

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE M. FLOYD,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK; AND
THE HONORABLE MICHAEL P. VILLANI,
DISTRICT JUDGE,

Respondent.

STATE OF NEVADA

Real Party in Interest.

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Supreme Court Case No. 2021-0158 p.m.
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District Court Case Nos.
99C159897
Habeas Court Case No.
A-21-832952-W

**PETITION FOR WRIT
OF MANDAMUS AND
PROHIBITION**

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HONORABLE MICHAEL P. VILLANI, DISTRICT JUDGE,

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Real Party in Interest.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. The Clark County Public Defender's office represented Mr. Floyd in his pretrial, trial, and direct appeal proceedings.
2. David M. Schieck represented Mr. Floyd during his initial state post-conviction proceedings.

3. The Federal Public Defender, District of Nevada, has represented Mr. Floyd for all subsequent proceedings, including the proceedings below.

/s/ David Anthony

DAVID ANTHONY

Attorney of record for Zane M. Floyd

/s/ Brad D. Levenson

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TABLE OF CONTENTS

I.	NRAP 17 ROUTING STATEMENT	1
II.	RELIEF SOUGHT.....	1
III.	STATEMENT OF THE ISSUES.....	1
IV.	APPLICABLE STATUTORY PROVISIONS	2
V.	STATEMENT OF THE FACTS	4
VI.	SUMMARY OF ARGUMENT.....	8
VII.	REASONS WHY THE WRIT SHOULD ISSUE.....	11
	A. An extraordinary writ is necessary to seek this Court’s review of the district courts’ denials of Floyd’s transfer motion and objection to the denial of the motion	11
	B. Only the district court in Department 5 has jurisdiction to issue an order and warrant of execution and to hear Floyd’s state habeas petitions.....	12
	C. The proceedings in Department 17, including the issuance of an order of execution, are rendered a nullity due to the absence of jurisdiction.	17
VIII.	CONCLUSION.....	18
	VERIFICATION PURSUANT TO NRAP 21(A)(5).....	20
	CERTIFICATE OF COMPLIANCE.....	21
	CERTIFICATE OF SERVICE.....	23
	NOTICE OF FILING	24

TABLE OF AUTHORITIES

State Cases	Page(s)
<i>Application of Alexander</i> , 80 Nev. 354, 393 P.2d 615 (1964)	18
<i>Calloway v. Reno</i> , 116 Nev. 250, 993 P.2d 1259 (2000)	16
<i>Hasting v. Burning Moscow Co.</i> , 2 Nev. 93 (1866)	17
<i>Lauer v. Eighth Judicial District Court</i> , 62 Nev. 78, 140 P.2d 953 (1943)	10, 13
<i>Margold v. Eighth Judicial District Court</i> , 109 Nev. 804, 858 P.2d 33 (1993)	11
<i>Rainsberger v. State</i> , 85 Nev. 22, 449 P.2d 254 (1969)	<i>passim</i>
<i>Rawson v. Ninth Judicial District Court</i> , 133 Nev. 309, 396 P.3d 842 (2017)	17
 State Statutes	
NRS 34.160	11
NRS 34.320	11
NRS 34.730	<i>passim</i>
NRS 174.105	17
NRS 176.495	<i>passim</i>
NRS 176.505	3, 15
 Constitutional Provisions	
Nev. Const. art. 6, § 4	10

I. NRAP 17 ROUTING STATEMENT

This matter is retained by the Supreme Court under NRAP 17(a) because this is a death penalty case.

II. RELIEF SOUGHT

Floyd asks this Court to order the Eighth Judicial District Court to transfer his criminal and habeas cases from Department 17 to Department 5, vacate the Order of Execution entered by Department 17, and to declare the prior proceedings in Department 17 a nullity. Floyd also asks for an order prohibiting Department 17 of the Eighth Judicial District Court from entering a Warrant of Execution, and to vacate the Warrant if issued, refraining from entering any further orders in Department 17, and preventing any further action in Floyd's case until his criminal and habeas cases are transferred to Department 5.

III. STATEMENT OF THE ISSUES

Whether the district court erred in holding Floyd's criminal and habeas cases were properly transferred to Department 17 when Department 5 was the court of conviction, the court where the death sentence was obtained, and the original court that imposed the

judgment of conviction, and heard all prior post-conviction matters as required by Chapters 34 and 176 of the Nevada Revised Statutes.

IV. APPLICABLE STATUTORY PROVISIONS

Chapter 176 of the Nevada Revised Statutes dictates that only the judicial department that entered the judgment of conviction has jurisdiction to issue an order and warrant of execution. Chapter 34 requires the original judicial department that imposed the judgment to hear a post-conviction matter whenever possible. The relevant statutory provisions are the following:

NRS 176.495(1) provides:

If for any reason a judgment of death has not been executed, and remains in force, *the court in which the conviction was had* must, upon application of the Attorney General or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the Director of the Department of Corrections.

(Emphasis added).

Subsection 3 of former NRS 176.495 is also relevant to the issue of legislative intent and that subsection provided:

Where sentence was imposed by a district court composed of three judges, *the district judge*

before whom the confession or plea was made, or his successor in office, shall designate the week of execution, the first day being Monday and the last day being Sunday, and sign the warrant.

(Emphasis added) (repealed June 9, 2003, Laws 2003, chapter 366, § 4).

NRS 176.505(1, 2) provides:

When remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal has been taken, *the court in which the conviction was obtained* shall inquire into the facts, and, if no legal reasons exist prohibiting the execution of the judgment, shall make and enter an order requiring the Director of the Department of Corrections to execute the judgment at a specified time. The presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, is not required.

When an opinion, order dismissing appeal or other order upholding a sentence of death is issued by the appellate court of competent jurisdiction pursuant to chapter 34 or 177 of NRS, *the court in which the sentence of death was obtained* shall inquire into the facts and, if no legal reason exists prohibiting the execution of the judgment, shall make and enter an order requiring the Director of the Department of Corrections to execute the judgment during a specified week. The presence of the defendant in the court when the order of execution is made and entered, or the warrant is issued, is not required.

(Emphasis added).

Finally, NRS 34.730(3) provides:

Except as otherwise provided in this subsection, the clerk of the district court shall file

a petition as a new action separate and distinct from any original proceeding in which a conviction has been had. If a petition challenges the validity of a conviction or sentence, it must be:

(a) Filed with the record of the original proceeding to which it relates; and

(b) Whenever possible, assigned to *the original judge or court*.

(Emphasis added).

V. STATEMENT OF THE FACTS

Defendant/Petitioner Zane Floyd was convicted of four counts of first-degree murder and other offenses and sentenced to death.

Department 5 was the court of conviction, the court where the death sentence was obtained, and the court that heard the two subsequent post-conviction matters in Floyd's case. However, the instant Order of Execution was signed by the district court in Department 17.

11PA2610. The district courts in Departments 17 and 10 who heard Floyd's motion and objection to the denial of the transfer motion have ruled a Warrant of Execution may be issued by the court in Department 17, which could be entered as soon as July 9, 2021. Floyd accordingly faces imminent execution the week of July 26, 2021, pursuant to an

Order of Execution that was entered by a district court lacking jurisdiction to do so, and the court apparently also intends to sign a Warrant of Execution as soon as July 9, 2021. If this Court does not consider Floyd's writ, the State will execute him pursuant to an illegal order and warrant.

On April 14, 2021, the State filed a motion for the district court¹ to issue a second supplemental order and warrant of execution. The State's motion was filed in Department 17, which was the department designated in the Odyssey electronic filing system to hear the case. However, the docket did not reflect the existence of any order transferring the case to Department 17 from Department 5, the date of such transfer, or the reason for it.

¹ This pleading refers to the "district court" as the Honorable Michael P. Villani, the judge in Department 17. Reference to the district courts plural refers to Judge Villani and the Honorable Tierra D. Jones, the judge in Department 10 who heard Floyd's initial objection under EDCR 1.60(h).

On April 14, 2021, Floyd filed a motion to transfer the case from Department 17 back to Department 5 under EDCR 1.60(h).² Floyd's motion was based in pertinent part upon NRS 176.495(1), 176.505(1, 2), and 34.730(3)(b). Argument was held on the motion on May 14, 2021, and the district court denied the motion from the bench. 11PA2529. During the proceedings, the district court provided to counsel what appeared to be an internal court document stating the case was transferred from Department 5 to Department 17 on December 28, 2008.³ The document the court disclosed in open court was not filed in, and is not reflected in, the docket of this case in Odyssey.⁴

At a subsequent hearing on June 4, 2021, counsel for Floyd directed the district court's attention to *Rainsberger v. State*, 85 Nev.

² Floyd also opposed the State's motion seeking a Second Supplemental Order and Warrant of Execution on the grounds that the district court did not have jurisdiction to issue an execution order and warrant. 7PA1614.

³ 11PA2519-20 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021).

⁴ 11PA2655 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Internal Court Document, Undated).

22, 22, 449 P.2d 254, 254 (1969), and asked the court to reconsider its decision as *Rainsberger* was controlling authority dictating a decision in Floyd's favor on the transfer motion. 11PA2565-57. Later in the afternoon of June 4, 2021, the district court issued its written order denying Floyd's motion to transfer the case. 11PA548. The *Rainsberger* case was not addressed by the district court.

Floyd filed a timely objection with the district court in Department 10 as required under EDCR 1.60(h).⁵ Argument was heard on the objection on June 18, 2021. On June 21, 2021, the court issued its written order denying Floyd's objection. Department 10's denial of the objection was substantially the same as the order denying the initial motion. 11PA2657. Specifically, the court held Floyd's case was

⁵ EDCR 1.60(h) states: "Any objection to the ruling must be heard by the presiding judge of the division from which the case was reassigned in the same manner as objections to a discovery recommendation under Rule 2.34(f)." Floyd's objection was filed with the presiding judge of the civil division and the criminal division as Floyd is litigating this motion in the criminal case (Case No. 99C159897) and the civil one (Case No. A-21-832952-W) EDCR 1.60(a) ("the civil presiding judge shall have the authority to assign or reassign civil cases pending in the civil/criminal division; and the criminal presiding judge shall have the authority to assign or reassign criminal cases pending in the civil/criminal division.").

properly transferred to Department 17 under the rules of the Eighth Judicial District Court and that the “Nevada Supreme Court has upheld the Eight Judicial District Court’s re-assignment of cases.” *Id.*

Floyd subsequently filed an objection with the Chief Judge of the Eighth Judicial District Court on June 22, 2021, as required by EDCR 1.60(h). On June 28, 2021, the Chief Judge issued a minute order recusing her from consideration of Floyd’s objection under the Nevada Revised Code of Judicial Conduct. 11PA2659. The order recognized Floyd had exhausted all available remedies under EDCR 1.60(h) when Floyd’s objection was heard by the court in Department 10, and such decision “is final and nonappealable.”

This petition for writ of mandamus and prohibition follows.

VI. SUMMARY OF ARGUMENT

When Chapter 176 of the Nevada Revised Statutes was passed in 1967 the Legislature made reference to a specific court within the county where the defendant was convicted as the one with jurisdiction to enter an order and warrant of execution. This Court acknowledged in

Rainsberger v. State, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969), that the reference to a specific court in Chapter 176 meant the judge or successor in office located in the same judicial department as the one that entered the judgment of conviction.

The decisions of the district courts in Departments 10 and 17 do not specifically address either the statutory language or this Court's decision in *Rainsberger*. For its part, the State acknowledged *Rainsberger* controls, but argued below that Floyd's case is distinguishable because it came about as the result of a jury verdict under subsection 1 of NRS 176.495, as opposed to the three judge panel procedure contained in former subsection 3 of 176.495.⁶

Similarly, the decisions of the district courts in Department 10 and 17 do not specifically address NRS 34.730(3)(b). Again, the State acknowledged below that the reference to the "original judge or court"

⁶ The State's attempt to distinguish legislative intent based on whether a jury verdict was entered or whether the sentencing verdict came about as the result of a three-judge panel (either by a guilty plea or hung jury on penalty) lacks any sound basis and is unsupported by any authority.

that heard the case as the one that must hear a post-conviction petition is department specific.⁷

The district court decisions below both hold that if a valid court rule providing for the transfer of a case after entry of the judgment of conviction exists then any district court located in the county in which the defendant is convicted to which the case is transferred is the successor in office to the judge that entered the judgment of conviction. However, as explained below, the district court's decisions both read the precise statutory language used by the Legislature out of the statutes and fail to acknowledge this Court's controlling decision in *Rainsberger*. And the statutes passed by the Legislature control over any court rules to the extent an inconsistency exists. *See, e.g., Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 85, 140 P.2d 953, 956 (1943).

Floyd accordingly seeks consideration through an extraordinary writ to ensure that only a court with jurisdiction hears the State and Floyd's motions in the criminal case and the habeas petitions.

⁷ The State argued below that because Department 5 was designated as an all civil department that it was not "possible" for Department 5 to hear the criminal and post-conviction matters.

VII. REASONS WHY THE WRIT SHOULD ISSUE

A. An extraordinary writ is necessary to seek this Court's review of the district courts' denials of Floyd's transfer motion and objection to the denial of the motion

This Court has original jurisdiction to issue writs of mandamus and prohibition. Nev. Const. art. 6, § 4. An extraordinary writ is the appropriate remedy to compel a district court to transfer a case that has been improperly transferred and to stop a court from acting in a case that has been improperly transferred. *E.g., Margold v. Eighth Judicial District Court (State)*, 109 Nev. 804, 805-06, 858 P.2d 33, 34-35 (1993). The writ of mandamus compels the performance of an act the law requires, NRS 34.160, and the writ of prohibition is available when a court acts without jurisdiction NRS 34.320. Writs of mandamus and prohibition are necessary here as Floyd does not have an adequate remedy at law to seek review from this Court of the decisions of (1) the Presiding Judge of the Criminal Division denying Floyd's objection to the order denying his motion to transfer his case and (2) the district court in Department 17 from denying Floyd's motion to transfer the case to Department 5. *See* EDCR 1.60(h).

B. Only the district court in Department 5 has jurisdiction to issue an order and warrant of execution and to hear Floyd's state habeas petitions

The district courts erred in denying Floyd's motions to transfer the case and objection to the denial of the motion to transfer the case back to Department 5 for issuance of an order and warrant of execution as well as for consideration of Floyd's state habeas petitions. The Nevada Revised Statutes refer to a specific court as the only one with jurisdiction to enter an execution order and warrant of execution. The statutes refer to the court in which the conviction was had, the court in which the death sentence was obtained, the court before whom the confession or plea was made, and the court's successor in office. Similarly, the statutes refer to the original judge or court as the one to whom a post-conviction matter is assigned. In each instance, the only court that can hear the criminal and habeas matters is Department 5, not Department 17.

The State did not respond to Floyd's statutory arguments in its initial response to Floyd's motion to transfer the case.⁸ The district courts' orders also fail to cite or address any of the statutory provisions cited in Floyd's motion. Instead, the district courts' orders are based upon Administrative Orders and rules of the Eighth Judicial District Court.⁹ However, the statutes passed by the Legislature are controlling over any court rules or administrative orders to the extent any inconsistency exists. *Lauer*, 62 Nev. at 85, 140 P.2d at 956. Therefore,

⁸ In its response to the objection filed in Department 10, the State argued for the first time that Floyd's interpretation of legislative intent would lead to absurd results (but it never identified why the result was in any way absurd), 11PA2616; the State acknowledged *Rainsberger* was controlling but purported to distinguish the case because subsection 3 of NRS 176.495 was repealed, *id.*; and it argued that the court in Department 17 was the successor in office to Department 5 because the case was appropriately transferred by court rule. *Id.*

⁹ Court rules governing the assignment and re-assignment of pending cases generally do not conflict with the statutory scheme. For example, the newly-adopted Nevada Rules of Criminal Procedure require the random assignment of criminal cases unless the defendant is the subject of another pending or reopened action or the case is assigned as ordered by the chief judge consistent with a plan of court-wide case management. N.R.Cr.P. 2(1)(A, B). The statutory scheme merely requires the judicial department that entered the judgment of conviction to be the one to enter an order and warrant of execution.

the administrative orders and court rules cited by the district courts do not dictate the resolution of Floyd’s motion and objection.¹⁰

This Court addressed the very issue presented here in Floyd’s favor in *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969). In *Rainsberger*, the defendant pleaded guilty before the Honorable John C. Mowbray to a capital offense and was sentenced to death by a three-judge panel. *Rainsberger v. State*, 81 Nev. 92, 399 P.2d 129 (1965). At the time, Judge Mowbray was the judge in Department 3 of the Eighth Judicial District Court.¹¹ Judge Mowbray resigned on October 1, 1967. *Id.* An execution warrant was subsequently issued for Mr. Rainsberger’s execution by the Honorable Howard W. Babcock, from Department 6. *Id.*

On appeal, the defendant argued the execution warrant was invalid under NRS 176.495. Specifically, the defendant “contend[ed]

¹⁰ Moreover, the district court’s reliance on its status as a “murder judge” is not relevant when the alleged transfer occurred several years before the murder court was even created by the Chief Judge in 2017. 11PA2640-41 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Decision and Order Denying Defendants Motion to Transfer Case Under EDCR 1.60(H), June 4, 2021).

¹¹ 11PA2650 (Political History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016).

that the warrant of execution rendered on April 9, 1968, directing death by the administration of lethal gas on May 2, 1968 [wa]s invalid because the judge who signed the warrant was not the successor in office of the judge who heard the plea of guilty as required by NRS 176.495(3).” *Rainsberger*, 85 Nev. at 22, 449 P.2d at 254. This Court found that the question whether the warrant was valid was moot. *Id.* However, the court remanded the case for a new warrant with instructions: “The new warrant should be drawn and signed by the judge of *Department Three* of the Eighth Judicial District Court in accordance with NRS 176.495(3).” *Id.* (emphasis added).

This Court’s instructions on remand in *Rainsberger* dictate that the district courts erred in holding that the court in Department 17 had jurisdiction to issue an execution order and warrant for Floyd. To the extent the district courts addressed Floyd’s statutory arguments at all, the courts erred in holding the court in Department 17 was the successor in office to the court in Department 5. This interpretation of successor in office is overly broad and contrary to the precise statutory language in NRS 176.495 and 176.505. Moreover, this Court has

recognized the term “successor in office” refers specifically to the judge that took the place of the position of the prior judge, not just any subsequent judge on the Court. *Calloway v. Reno*, 116 Nev. 250, 253 n.1, 993 P.2d 1259, 1261 n.1 (2000) (“Justice Maupin is successor in office to former Chief Judge Steffen, and Justice Agosti is successor in office to former Chief Justice Springer.”). This Court must accordingly hold that the district courts erred in failing to grant Floyd’s motion to transfer the case and his objection to the denial of the motion.

In addition, the district courts both failed to address Floyd’s arguments with respect to the improper transfer of his state habeas petitions under NRS 34.730(3)(b). Floyd objected to the transfer of his state petition, which was transferred to Department 17 because the court had the criminal case.¹² NRS 34.730(3)(b) requires assignment of a state petition to “the original judge or court.” The district courts’ interpretation of the statute reads the term “original” out of the statute. As explained above, the district courts never addressed these statutory

¹² 11PA2652 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Notice of Department Reassignment, Apr. 16, 2021).

arguments. This Court must do so, however, and hold that the state petition was improperly transferred to Department 17.

C. The proceedings in Department 17, including the issuance of an order of execution, are rendered a nullity due to the absence of jurisdiction.

This Court has jurisdiction to grant an extraordinary writ that attacks a void order issued by a district court lacking jurisdiction when there is otherwise no adequate remedy at law by appeal. *Rawson v. Ninth Judicial District Court*, 133 Nev. 309, 316-17, 396 P.3d 842, 847-48 (2017). This Court must pick up where *Rainsberger* left off and conclude that the order of execution and all of the other actions taken by the court in Department 17 are void due to the lack of jurisdiction of the district court. An order issued by the wrong court is the quintessential example of a void order. *Cf. Hasting v. Burning Moscow Co.*, 2 Nev. 93, 96 (1866) (stating court of criminal jurisdiction could not render civil judgment).

The existence of subject matter jurisdiction with the district court is an *a priori* consideration that must be resolved before the district court can take any action in the criminal or habeas cases. And

jurisdiction must be inquired into by the district court *sua sponte*. NRS 174.105(3). The impact of the lack of jurisdiction nullifies all of the rulings the district court has rendered in the criminal and habeas cases. *E.g., Application of Alexander*, 80 Nev. 354, 358-59, 393 P.2d 615, 617 (1964). Moreover, the absence of jurisdiction necessarily renders any execution order and warrant issued by the court in Department 17 invalid. *See id.* Therefore, this Court must conclude the order of execution pertaining to Zane Floyd is invalid as well as all of the rulings of the district court in the criminal and habeas cases.

VIII. CONCLUSION

For the foregoing reasons, Floyd requests that this Court order the State to respond to this petition under NRAP 21(b)(1) and grant his petition.¹³

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¹³ Floyd will file a motion requesting a stay of the district court proceedings under NRAP 8(a)(1)(A) once he first seeks relief in the district court which he will do contemporaneously with the filing of the instant petition.

Floyd requests that this Court issue a writ of mandamus and prohibition directing the district court to (1) transfer Floyd's criminal case and habeas petitions to Department 5 for consideration; (2) vacate the order of execution entered by Department 17; (3) declare the proceedings in Department 17 a nullity; (4) prevent the district court in Department 17 from issuing a Warrant of Execution, or, if the Warrant has issued, directing the district court to vacate the Warrant; (5) prevent the district court in Department 17 from acting in the criminal case and the habeas case; and (6) for any other relief this Court deems appropriate to effectuate its decision.

DATED this 7th day of July, 2021.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony

DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson

BRAD D. LEVENSON
Assistant Federal Public Defender

VERIFICATION PURSUANT TO NRAP 21(A)(5)

Pursuant to NRAP 21(a)(5), and under the penalty of perjury, the undersigned declares the following: that he is an Assistant Federal Public Defender acting for Zane Michael Floyd, petitioner in the above captioned petition; that he has read the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION and knows the contents thereof and that the same is true and correct to his own knowledge, except as to those matters set forth on information and belief, and as to those matters he believes to be true.

Executed on July 7, 2021.

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

☐ This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c) it is either:

☒ Proportionately spaced. Has a typeface of 14 points or more and contains 3,825 words: or

☐ Monospaced. Has 10.5 or few

☐ Does not exceed pages.

3. Finally. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that

this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with NRAP Rule 25(c)(1)(C) the undersigned hereby certifies that on this 7th day of July, 2021, I personally served a true and correct copy of the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION by email to:

Alexander Chen
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Further Service on the following party was made via UPS on July 7th, 2021:

Hon. Michael Villani
District Judge
Department XVII
Regional Justice Center
200 Lewis Ave
Las Vegas, NV 89155

/s/ Sara Jelinek
An Employee of the
Federal Public Defender, District of Nevada

NOTICE OF FILING

In accordance with NRAP 21(a)(1), the undersigned hereby certifies that on this 7th day of July, 2021, I personally served a true and correct copy of the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION, by email to:

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/s/ Sara Jelinek
An Employee of the
Federal Public Defender, District of Nevada