

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.

Electronically Filed
Jul 07 2021 02:12 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court Case Nos.
99C159897
Habeas Court Case No.
A-21-832952-W

**APPENDIX TO
PETITION FOR WRIT
OF MANDAMUS AND
PROHIBITION**

Volume 11 of 11

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<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Amended Opposition to Motion for Execution Warrant	04/26/2021	7	1614-1632
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Court Minutes	05/14/2021	11	2519-2520
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Court Minutes stating Chief Judge has recused herself	06/28/2021	11	2659
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Decision and Order Denying Defendant's Motion to Transfer Case Under EDCR 1.60(H)	06/04/2021	11	2548-2550
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Exhibits in Support of Amended Opposition to Motion for Execution Warrant	04/26/2021	7-8	1633-1641

<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Exhibits in Support of Defendant's Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H) (Dept. VII)	06/24/2021	11	2633-2658
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Exhibits in Support of Motion to Transfer Case Under EDCR 1.60(H)	04/14/2021	1-6	0015-1371
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Exhibits in Support of Reply to Response to Transfer Case Under EDCR 1.60(H)	04/29/2021	10-11	2417-2505
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Exhibits to Objection to Order Denying Transfer (Dept. X)	06/09/2021	11	2587-2609
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Exhibits to Opposition to Motion for Execution Warrant	04/21/2021	6-7	1451-1613

<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Motion and Notice of Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution	04/14/2021	6	1372-1433
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Motion to Transfer Case Under EDCR 1.60(H)	04/14/2021	1	0006-0014
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H) (Dept. VII)	06/22/2021	11	2622-2632
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Objection to Order Denying Transfer (Dept. X)	06/09/2021	11	2577-2586
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Opposition to Motion for Execution Warrant	04/21/2021	6	1434-1450

<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Order Denying Defendant's Objection to Order Denying Defendant's Motion to Transfer Case Under EDCR 1.60(H)	06/21/2021	11	2620-2621
<i>Rainsberger v. Nevada</i> , Case No. 5576, Nevada Supreme Court, Appeal from Warrant of Execution and Opinion	01/10/1969	1	0003-0005
<i>Rainsberger v. Nevada</i> , Case No. 5576, Nevada Supreme Court, Order Staying Execution of Sentence of Death	04/11/1968	1	0001-0002
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Recorder's Transcript of Hearing	05/14/2021	11	2521-2547
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Recorder's Transcript of Hearing	06/04/2021	11	2551-2576
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Reply to Response to Motion to Transfer Case Under EDCR 1.60(H)	04/29/2021	10	2410-2416

<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, Second Supplemental Order of Execution	06/09/2021	11	2610-2612
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, State's Reply to Defendant's Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution	05/05/2021	11	2506-2518
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, State's Response to Defendant's Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H)	06/17/2021	11	2613-2619
<i>Floyd v. Gittere, et al.</i> , Case No. 99C159897, Clark County District Court, State's Response to Motion to Transfer	04/26/2021	7-10	1642-2409

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 APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION by email to:

Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

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

GROUND 1
(continued)

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Amendment Right to _____, based on these facts:

REQUIRES "BREAKING AND ENTERING" OR SIMILAR UNLAWFUL ACTIVITY.

ALTHOUGH THE NEVADA LEGISLATURE HAS MOVED AWAY FROM THE COMMON LAW DEFINITION OF BURGLARY IF HAS NOT REPEALED IT THEREFORE THE FOLLOWING HOLDS TRUE, "COMMON LAW SHALL BE THE RULE OF DECISION IN ALL COURTS AND SHALL REMAIN IN FULL FORCE UNTIL REPEALED" COMMON LAW STATES, AND THE NEVADA SUPREME COURT HAS DETERMINED THAT, "THE LEGISLATURE HAS NOT ELIMINATED THE COMMON LAW NOTION THAT A PERSON WITH ABSOLUTE UNCONDITIONAL RIGHT TO ENTER A STRUCTURE CANNOT BURGLARIZE THAT STRUCTURE," REGARDLESS OF INTENT

SINCE I WAS A REGISTERED HOTEL GUEST AND MAINTAINED A PLAYERS CLUB CARD AND A HOTEL KEY THAT ALLOWED ME TO COME IN AND OUT OF MY HOTEL ROOM AS WELL AS ACCESS TO OTHER AMMENITIES THROUGH OUT THE CASINO. I HAD ABSOLUTE AND UNCONDITIONAL RIGHT TO BE IN THE CASINO, INCLUDING BUT NOT LIMITED TO THE CASHIER GAGE, THEREFORE BURGLARY WAS NOT COMMITTED.

THERE ARE NO SAFEGUARDS AGAINST ARBITRARY

GROUND 1
(continued)

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Amendment Right to _____, based on these facts:

OR DISCRIMINATORY APPLICATION OF NRS 205.060 WHICH
IS BY DEFINITION CONTRADICTORY AND DISCRIMINATORY;
I.E. IF YOU ENTER A COMMERCIAL BURGLARY WITH OR
WITHOUT INTENT WITH NO PRIOR FELONIES ITS NOT
BURGLARY. WITH PRIOR FELONIES REGARDLESS OF
HOW MANY OR WHEN THEY OCCURED - YESTERDAY OR
50 YEARS AGO IT'S BURGLARY. IN ADDITION NRS 205.060
BURGLARY STATUE INCLUDE CRIMES WITH DIFFERENT
PENALTIES HAD THEY NOT OCCURED IN ONE OF THE
MANY AND VARIOUS ENTITIES INCLUDED IN THE
DEFINITION OF A BURGLARY I.E. ANY HOUSE, ROOM,
APARTMENT, SHOP, WAREHOUSE, STORE, MILL, BARN,
STABLE, OUTHOUSE OR OTHER BUILDING TENT, VESSEL,
VEHICLE, VEHICLE TRAILER, SEMI-TRAILER OR HOUSE
TRAILER, AIR PLANE, GLIDERS, BOAT OR RAILROAD
CAR. IS THERE ANYWHERE YOU CAN COMMIT A CRIME
THAT IS NOT CONSIDERED A BURGLARY AND YOU DONT
EVEN HAVE TO "BREAK AND ENTER," JUST ENTER!

FOR EXAMPLE, AS STATED IN MY CHARGE OF
COUNT 1 BURGLARY- "OBTAINING MONEY UNDER FALSE
PRETENSE NRS 205.380; WHICH IS ^{ALSO A} CLASS B FELONY
LIKE BURGLARY, IS PUNISHABLE IN STATE PRISON FOR

GROUND 1
(continued)

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Amendment Right to _____, based on these facts:

A MINIMUM TERM OF NOT LESS THAN 1 YEAR AND A MAXIMUM TERM OF NOT MORE THAN 6 YEARS V.S. BURGLARY WHICH IS PUNISHABLE BY A MINIMUM TERM OF NOT LESS THAN 1 YEAR AND A MAXIMUM TERM OF NOT MORE THAN 10 YEARS. BY LAW MINIMUM TERM CANNOT EXCEED MORE THAN 40% OF MAXIMUM SENTENCE. THEREFORE THE MAXIMUM MINIMUM YOU CAN SERVE IS 2 1/3 YEARS FOR "OBTAINING MONEY UNDER FALSE PRETENSE" V.S. 4 YEARS FOR BURGLARY.

GRAND OR PETIT LARCENY CAN BE EITHER A CATEGORY C OR B FELONY (BURGLARY IS A CATEGORY B) DEPENDING ON THE VALUE OF THE PROPERTY. BATTERY CAN RANGE FROM A MISDEMEANOR, A C FELONY TO A B FELONY WITH TERMS RANGING FROM 6 MONTHS, 1-6 YEARS, 1-10 YEARS, 1-15 YEARS DEPENDING ON THE SITUATION. THEN OF COURSE THERE'S THEFT, FORGERY AND ASSAULT.

THE MERRIAM-WEBSTER DICTIONARY FOR BURGLARY STATES "FORCIBLE ENTRY INTO A BUILDING, ESPECIALLY AT NIGHT WITH THE INTENT TO COMMIT A CRIME (AS THEFT) BREAKING AND ENTERING OR SIMILAR ACTIVITY. I DOUBT YOU COULD FIND A DEFINITION OF BURGLARY ANYWHERE THAT IS MISSING THE MOST PRIMARY ELEMENT

GROUND 1
(continued)

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Amendment Right to _____, based on these facts:

CONSIDERED IN A GENERIC OR COMMON LAW; BREAKING AND
ENTERING, EXCEPT IN THE NEVADA NRS 205.060 STATUE
DEFINITION.

ANY CONVICTION UNDER BURGLARY STATUE NRS 205.060
IS NEVER FOR COMMON LAW WHICH IS THE LAW OF THE
LAND UNDER THE US CONSTITUTION, THEREFORE I AM
REQUESTING THE DISMISSAL OF THE BURGLARY CHARGE
IN THIS CASE.

DECLARATION UNDER PENALTY OF PERJURY

I, the undersigned, understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury.

I declare, under the penalty of perjury under the laws of the United States of America, that the above and/or foregoing information is accurate, correct and true to the best of my knowledge executed within the terms of NRS 171.102 and NRS 208.165. See 28 U.S.C. 1746 and 18 U.S.C. 1621.

Dated this 28 day of JUNE, 20 18


Signature

1188566
NDOC#

PHALA MUM
Print Name

NRS 171.102 (2) Declaration made subject to penalty of perjury.

NRS 208.165 A prisoner may execute any instrument by signing his name immediately following a declaration "under penalty of perjury" with the same legal effect as if he had acknowledged it or sworn to its truth before a person authorized to administer oaths. As used in this section, "prisoner" means a person confined in any jail or prison, or any facility for the detention of juvenile offenders, in this state.

NRS 208.165 Execution of instrument by prisoner. A prisoner may execute any instrument by signing his or her name immediately following a declaration "under penalty of perjury" with the same legal effect as if he or she had acknowledged it or sworn to its truth before a person authorized to administer oaths. As used in this section, "prisoner" means a person confined in any jail or prison, or any facility for the detention of juvenile offenders, in this state.

(Added to NRS by 1985, 1643)



1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 KRISTA D. BARRIE
6 Chief Deputy District Attorney
7 Nevada Bar #010310
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Respondent
12
13
14

DISTRICT COURT
CLARK COUNTY, NEVADA

15 PHALA MUM, # 7028218

16 Petitioner,

17 -vs-

18 THE STATE OF NEVADA

19 Respondent.

CASE NO: A-18-777795-W

DEPT NO: IX

20 **MOTION TO TRANSFER PETITION TO CRIMINAL CASE**

21 DATE OF HEARING: October 2, 2018
22 TIME OF HEARING: 9:00 AM

23 Comes now, the State of Nevada, by Steven B. Wolfson, Clark County District
24 Attorney, through Krista D. Barrie, Chief Deputy District Attorney, and hereby submits this
25 Motion to Transfer Petition to Criminal Case.

26 This motion is made and based upon all the papers and pleadings on file herein, the
27 attached points and authorities in support hereof, and oral argument at the time of hearing, if
28 deemed necessary by this Honorable Court.

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YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned counsel will bring the above and foregoing state's MOTION TO TRANSFER PETITION TO CRIMINAL CASE on for hearing in Dept. 9 of the above-captioned court on the 2nd day of October, 2018, at the hour of 9:00 AM, or as soon thereafter as counsel may be heard.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: Melicia L. for
KRISTA D. BARRIE
Chief Deputy District Attorney
Nevada Bar #010310

On November 22, 2016, the State charged Phala Mum (hereinafter "Defendant") by way of Information with the following: BURGLARY (Category B Felony - NRS 205.060 - NOC 50424). On November 28, 2016, Defendant pleaded guilty to one count of Burglary as stated in the Information. As part of the negotiations, the State retained the right to argue at sentencing, the State did not oppose concurrent treatment between Defendant's instant case and Case No. 16F12374B, and the State agreed not to oppose dismissal of Case Numbers 16F00467X and 16F08655X. The offer was also contingent upon Defendant's co-defendant accepting the negotiations.

On March 9, 2017, Defendant was sentenced to a suspended sentence of a minimum of nineteen (19) months to a maximum sentence of forty-eight (48) months and placed on probation for an indeterminate period not to exceed five years. Defendant's Judgment of Conviction was filed on March 29, 2017.

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1 On January 18, 2018, after Defendant had been revoked from probation in her other
2 case, (Case No. C313606), Defendant stipulated to violating her probation in this case. The
3 Court ordered Defendant's probation revoked Nunc Pro Tunc to November 1, 2017, and
4 Defendant's original sentence of a minimum of nineteen (19) months and a maximum of forty
5 eight (48) months in the Nevada Department of Corrections concurrent with case C313606,
6 was imposed. Defendant received 165 days credit for time served. On January 24, 2018,
7 Defendant's Amended Judgment of Conviction was filed to reflect the revocation of probation.

8 Defendant filed the instant Petition for Writ of Habeas Corpus on July 31, 2018.

9 **ARGUMENT**

10 On July 18, 2018, Petitioner filed a habeas petition which the clerk of the court docketed
11 with a new civil case number A-18-777795-W and the petition has been set for hearing on
12 October 2, 2018. The habeas petition plainly challenges the judgment of conviction in criminal
13 case C-16-319460-2. However, the clerk of the court assigned the petition a new civil case
14 number.

15 Filing a habeas petition challenging a judgment of conviction under a civil case number
16 is contrary to existing law:

17 If a petition challenges the validity of a conviction or sentence, it must be . . .
18 [f]iled with the record of the original proceeding to which it relates.

19 NRS 34.730(3).

20 //

21 //

22 //

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28 //

1 No hearing upon the petition may be set until this filing requirement is met. NRS
2 34.730(4). This is so because reference to the docket in the criminal case is essential for
3 determining the timeliness and successiveness of the petition. Application of such procedural
4 bars is mandatory. State v. Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). The
5 district attorney, as the prosecuting agency, is the appropriate respondent to answer a petition
6 only where it requests relief from a judgment of conviction obtained by the district attorney.
7 NRS 34.745(1). Otherwise, if the habeas petition is for some other purpose, it may be filed as
8 a separate civil action and the Attorney General or other appropriate custodian of the
9 petitioner's person would be the appropriate respondent. NRS 34.400; 34.745(2).

10 The Nevada Supreme Court has explained and endorsed this distinction:

11 Different statutory procedures apply to petitions that challenge the validity of
12 the judgment of conviction and sentence and petitions that challenge the
13 computation of time served. NRS 34.738(1) provides that a petition that
14 challenges the validity of the judgment of conviction and sentence "must be filed
15 with the clerk of the district court for the county in which the conviction
16 occurred." Under NRS 34.730(3), a petition that challenges the validity of the
17 judgment of conviction or sentence must also be filed with the record of the
18 original proceeding to which it relates and be assigned to the original judge or
19 court, whenever possible. In contrast, any other petition, including a petition that
20 challenges the computation of time served, must be filed as a separate action
21 "with the clerk of the district court for the county in which the petitioner is
22 incarcerated."

23 Griffin v. State, 122 Nev. 737, 741, 137 P.3d 1165, 1167 (2006). While habeas itself may be
24 a civil remedy at common law, when used as a post-conviction remedy to challenge a criminal
25 judgment of conviction the procedural vehicle is a special statutory remedy and can be
26 characterized as neither civil nor criminal for all purposes. Mazzan v. State, 109 Nev. 1067,
27 1069–70, 863 P.2d 1035, 1036 (1993). For this reason, the legislature has directed that a quasi-
28 civil, quasi-criminal petition for post-conviction relief challenging a judgment of conviction
be filed with the criminal case instead of as a separate civil action.

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1 **CONCLUSION**

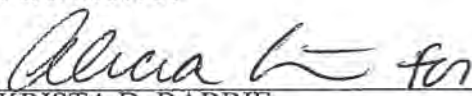
2 WHEREFORE, the State respectfully requests the instant petition be transferred to criminal
3 case C-16-319460-2.

4 DATED this 10th day of September, 2018.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY


10 KRISTA D. BARRIE
11 Chief Deputy District Attorney
12 Nevada Bar #010310

13 **CERTIFICATE OF MAILING**

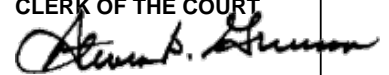
14 I hereby certify that service of the above and foregoing was made this 10th day of
15 September, 2018, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

16 PHALA MUM, BAC#1188566
17 Florence McClure Women's Correctional Center
18 4370 Smiley Road
19 Las Vegas, NV 89115

20 BY:


21 Secretary for the District Attorney's Office

22
23
24
25
26
27
28 16F12374B; KDB/jc/L4



1 RTRAN

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 PHALA MUM,

10 Defendant.

} CASE NO. A-18-777803-W

} DEPT. VII

11
12
13 BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE
14 TUESDAY, OCTOBER 2, 2018

15 **RECORDER'S TRANSCRIPT OF**
16 **STATE'S MOTION TO TRANSFER PETITION**
17 **TO THE CRIMINAL CASE**

18 APPEARANCES:

19 For the Plaintiff:

STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

20
21
22 For the Defendant:

No Appearances

23
24
25 RECORDED BY: RENEE VINCENT, COURT RECORDER

1 Tuesday, October 2, 2018 - Las Vegas, Nevada

2 [Proceedings begin at 9:13 a.m.]

3
4 THE COURT: State versus Kopp, A777795. All right. This is for a motion
5 to transfer the criminal case. So I'm having these motions transferred to me since
6 this is an administrative decision of the Court. It's not a decision for individual
7 judges to make how we handle our case filings. So I'll be handling all of these
8 motions that are filed by the District Attorney's Office.

9 I did have one concern because I think the State's failure to cite the
10 entire statute comes close to a Rule 11 violation. The beginning part of the statute
11 says, "That the petition shall be filed in an original action," and then it gives
12 subparts about how that's supposed to happen.

13 So it's supposed to be assigned to the original judge whenever that's
14 possible and a copy of the criminal file is supposed to be filed with the case. The
15 State conveniently neglected the part that says "it shall be filed an original petition,"
16 which is concerning to me.

17 MR. OWENS: Well, Judge, I would just comment, the statute actually
18 begins with the language, "Accept as otherwise provided herein," or words to that
19 effect. There's an exception only be filed as a civil action except as --

20 THE COURT: Right. Except that --

21 MR. OWENS: The language I gave is the exception.

22 THE COURT: Mr. Owens, so generally when a case is filed, it is randomly
23 assigned to a judge, so that does not happen in this circumstance. It's filed as an
24 original petition, original case, but it is assigned to the judge who heard the criminal
25 case. That's not normal. That is an exception to our normal filing process. It is

1 also not normal that we put the entire record from another case into a case. So
2 those are the exceptions. That's how I read the statute.

3 I also really don't understand what right -- what business it is of the
4 District Attorney's Office to tell the Court how to manage its case files. I really
5 don't. I don't know what possible prejudice there is to the State that we choose to
6 assign this a civil case number so that we can manage and track our cases. I don't
7 tell you what experts to hire in a case or how to run your cases.

8 MR. OWENS: Well, it's not the D.A.'s Office. It's the legislature --

9 THE COURT: So --

10 MR. OWENS: -- that said it's supposed to be done a certain way, and --

11 THE COURT: Well, I believe we are --

12 MR. OWENS: I understand Your Honor reads the statute differently, and,
13 respectfully, we disagree with that and --

14 THE COURT: And I believe we are doing it the way the legislature has
15 said. I think we've been out of compliance with the statute, frankly. So I'm going to
16 deny Mum and for the same reasons Kopp. Thank you.

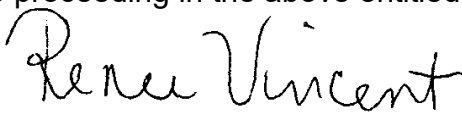
17 MR. OWENS: Okay. Thank you, Judge.

18 THE COURT: The Court will prepare the order on both.

19 MR. OWENS: Thanks.

20 [Proceeding concluded at 9:15 a.m.]

21
22 ATTEST: I do hereby certify that I have truly and correctly transcribed the
23 audio-visual recording of the proceeding in the above entitled case to the
24 best of my ability.

25 

Renee Vincent, Court Recorder/Transcriber

Writ of Habeas Corpus

COURT MINUTES

October 04, 2018

A-18-777795-W Phala Mum, Plaintiff(s)
vs.
Nevada State of, Defendant(s)

October 04, 2018 09:00 AM Petition for Writ of Habeas Corpus
HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 10C
COURT CLERK: Trujillo, Athena
RECORDER: Sison, Yvette G.
REPORTER:
PARTIES PRESENT:
William J. Merback Attorney for Defendant

JOURNAL ENTRIES

Defendant not present.

COURT noted the Defendant was not transported because it does not entertain oral arguments on these matters and ORDERED, Defendant s presence WAIVED. COURT further noted it has reviewed the petition and the State's response and FINDS the petition to be time barred. COURT ORDERED, Petition DENIED; State to prepare the order.

NDC

CLERK'S NOTE: A copy of this minute order has been mailed to:

Phala Mum, BAC #1188566
FMWCC
4370 Smiley Road
Las Vegas, NV 89115

REGISTER OF ACTIONS

[CASE NO. A-18-777795-W](#)

Phala Mum, Plaintiff(s) vs. Nevada State of, Defendant(s)

§
§
§
§
§
§

Case Type: **Writ of Habeas Corpus**

Date Filed: **07/18/2018**

Location: **Department 9**

Cross-Reference Case Number: **A777795**

RELATED CASE INFORMATION

Related Cases

C-16-319460-2 (Writ Related Case)

PARTY INFORMATION

Defendant Nevada State of

Lead Attorneys
William J. Merback
Retained
 7024554251(W)

Plaintiff Mum, Phala

Pro Se

EVENTS & ORDERS OF THE COURT

OTHER EVENTS AND HEARINGS

07/17/2018 [Application to Proceed in Forma Pauperis](#)

07/18/2018 [Petition for Writ of Habeas Corpus](#)

07/18/2018 [Motion to Withdraw As Counsel](#)

07/18/2018 [Motion for Appointment of Attorney](#)

07/18/2018 [Affidavit](#)

07/31/2018 [Order for Petition for Writ of Habeas Corpus](#)

08/06/2018 [Order to Proceed In Forma Pauperis](#)

09/10/2018 [Response](#)

State's Response to Defendant's Petition for Writ of Habeas Corpus and Motion to Appoint Counsel

09/10/2018 [Motion](#)

Motion to Transfer Petition to Criminal Case

10/02/2018 **Motion** (9:00 AM) (Judicial Officer Bell, Linda Marie)

State's Motion to Transfer Petition to Criminal Case

10/02/2018 Reset by Court to 10/02/2018

Result: Denied

10/04/2018 [Petition for Writ of Habeas Corpus](#) (9:00 AM) (Judicial Officer Togliatti, Jennifer)

[Parties Present](#)

[Minutes](#)

10/02/2018 Reset by Court to 10/04/2018

Result: Denied

10/09/2018 [Order to Statistically Close Case](#)

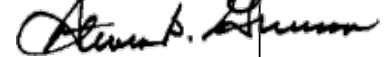
Civil Order to Statistically Close Case

10/15/2018 [Reporters Transcript](#)

Court Reporters transcript of Proceedings (Civil) - 10-2-2018

FINANCIAL INFORMATION

	Plaintiff Mum, Phala		
	Total Financial Assessment		1.00
	Total Payments and Credits		1.00
	Balance Due as of 10/18/2018		0.00
10/02/2018	Transaction Assessment		1.00
10/02/2018	Payment (Window)	Receipt # 2018-65621-CCCLK	Kim Blandino (1.00)



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 DESHON HEREFORD,
9 Plaintiff,

CASE#: A-18-777787-W
DEPT. XXIII

10 vs.

11 BRIAN WILLIAMS WARDEN,
12 Defendant.

13
14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT
JUDGE

15 TUESDAY, AUGUST 21, 2018

16 **RECORDER'S TRANSCRIPT OF HEARING:**
17 **STATE'S NOTICE OF MOTION AND MOTION TO TRANSFER**
18 **PETITION TO CRIMINAL CASE**

19
20 APPEARANCES:

21 For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

22
23 For the Defendant: PRO SE

24
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, August 21, 2018

2

3 [Hearing began at 9:42 a.m.]

4 THE COURT: Hi. So I just -- we just had the luck of having
5 received an email from Judge Bell. That would've been yesterday or last
6 week. I didn't read my email. It says post --

7 THE CLERK: Yesterday.

8 THE COURT: -- what? Oh, yesterday. Okay.

9 "Post-conviction petitions are now receiving a civil case number.
10 The petition should be assigned to the department that has the
11 underlying criminal case and set on criminal calendar days. The entire
12 criminal file should be copied and included as an event in the post-
13 conviction case." So it's going to be a civil case number. We're going to
14 put it into our criminal. We have to copy everything and put into criminal.

15 MR. OWENS: Yeah, I've heard through the grapevine that
16 there has been such a policy. We weren't privy to it.

17 THE COURT: Okay.

18 MR. OWENS: We just started getting petitions in with A
19 numbers and it's causing a great deal of havoc in our office, in my unit in
20 particular, and the defense bar. And so, yeah, we're challenging the
21 policy. I think it's contrary to the plain language of the statute. We
22 weren't consulted in it. I've got some big concerns I'm not sure were
23 even considered or thought through. Maybe they were. I just don't
24 know cause I haven't seen a memo on it.

25 THE COURT: I read you exactly what Judge Bell emailed us,

1 and I'm kind of a foot soldier in this matter. I think she's meeting with
2 Mr. Lalli today. I don't know if this is one of the matters they're
3 discussing.

4 MR. OWENS: And I don't -- yeah.

5 THE COURT: It could be.

6 MR. OWENS: Yes, she met with Mr. Lalli last week and I
7 wasn't there. I'm going to be there today. That's at 10:30. It would be
8 wonderful.

9 THE COURT: Then that would be the meeting she's
10 referencing.

11 MR. OWENS: Yeah. It would be wonderful if we could
12 resolve this administratively. So maybe you want to set this over. If we
13 can't, if our concerns aren't addressed or we don't have a solution --

14 THE COURT: You want me to continue this out for like a
15 month to figure out the A or C number?

16 MR. OWENS: No, preferably a week cause I mean --

17 THE COURT: That's fine.

18 MR. OWENS: -- with each passing day, there's -- I'm of the
19 opinion there's damage being done that's not going to be able to be sent
20 back and with each passing day, with each petition being filed as an A
21 number, we're never going to get it back in the C cases and we'll have
22 gaps in the Odyssey program. And so I rather -- if we can't -- maybe
23 Judge Bell thought all this through and she's got answers to my
24 questions. If not, I'd like to at least preserve the ability to take it up on a
25 writ and get the Supreme Court to weigh in cause it affects appeals. All

1 the appeals we do are going to be changed. Supreme Court, I don't
2 know that they were consulted and so I may need to get it up there
3 pretty quickly cause the problem is just growing each day.

4 THE COURT: I tend to agree with everything that you say, so
5 can we do '09 -- September 11th?

6 MR. OWENS: Yes.

7 THE COURT: Okay. And if there's an emergency that comes
8 up, call us and we'll figure something out. We'll get you on calendar.
9 That happens to be the next time I'm available.

10 MR. OWENS: Okay. That'll work.

11 THE CLERK: September 11th at 9:30.

12 THE COURT: So we'll just continue it to the same thing, the
13 State's notice of motion and motion to transfer the -- moved to that same
14 date.

15 MR. OWENS: You know, now that I think about it, the petition
16 is to be heard.

17 [Court and Court Clerk confer]

18 THE COURT: What we're saying -- see this is concerning too
19 because it's concerning that everything actually gets from the civil filing
20 to the criminal, but I'm sure Judge Bell's contemplated this.

21 MR. OWENS: The petition is to be heard on -- not 'till
22 September 24th, so we are preparing a response and we'll have it filed
23 by -- before then. But, yeah, September 11th will work.

24 THE COURT: Yeah, yeah. I don't -- yeah, you still have to do
25 your responses. It's just --

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MR. OWENS: Yes.

THE COURT: -- more of a clerical. I see where you're going,
so hopefully you guys and Judge Bell can figure it out.

MR. OWENS: Okay.

THE COURT: All right. So I'll see you back on that date,
okay?

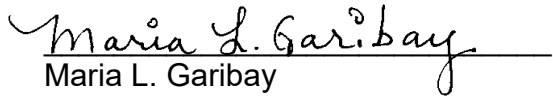
MR. OWENS: Thank you very much.

THE COURT: Thank you. Have a good meeting.

[Hearing concluded at 9:46 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video proceedings in the above-entitled case to the best of my ability.


Maria L. Garibay
Court Recorder/Transcriber

A-18-778736-P In the Matter of the Petition of
Robert Morrie Hayes

September 05, 2018 09:00 AM State's Notice of Motion and Motion to Transfer Petition to
Criminal Case

HEARD BY: Wiese, Jerry A. COURTROOM: RJC Courtroom 14A

COURT CLERK: Medina, Vanessa

RECORDER:

REPORTER: Farkas, Kimberly


PARTIES PRESENT:

JOURNAL ENTRIES

Steven Owens, Esq., on behalf of the State, present.

Colloquy regarding policy of Petition for Writ of Habeas Corpus in civil matters. COURT ORDERED, Motion GRANTED; Writ Petition TRANSFERRED to the criminal case (C297840). Mr. Owens advised he was working on a response and would file it in the criminal matter.

CLERK'S NOTE: Subsequent to Court, Evidentiary Hearing (Petition for Writ of Habeas Corpus) set for September 20, 2018 at 8:30 AM in case C297840. //09/12/18 vm



1 **RTRAN**

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5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7
8 **RAFAEL REID, and**
9 **GARY SILVA**

10 **Plaintiffs,**

11 **vs.**

12 **BRIAN WILLIAMS, and**
13 **STATE OF NEVADA**

14 **Defendants.**

CASE#: A-18-778249-W,
A-18-778464-W

DEPT. XII

15 **BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE**
16 **THURSDAY, SEPTEMBER 6, 2018**

17 ***RECORDER'S TRANSCRIPT OF HEARING: STATE'S NOTICE OF***
18 ***MOTION AND MOTION TO TRANSFER PETITION TO CRIMINAL***
19 ***CASE AND PETITION FOR WRIT OF HABEAS CORPUS***

20 **APPEARANCES:**

21 **For the Plaintiffs:**
22 **Rafael Reid**

23 **Gary Silva**

JEREMY BARON, ESQ.
Assistant Federal Public Defender
KELSEY L. BERNSTEIN, ESQ.

24 **For the Defendants:**

STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

25 **RECORDED BY: KRISTINE SANTI, COURT RECORDER**

1 Las Vegas, Nevada, Thursday, September 6, 2018

2

3 [Hearing began at 8:58 a.m.]

4 THE COURT: Good morning.

5 MR. OWENS: Good morning, Judge. I've got the two -- only
6 two civil case numbers that appear on the criminal docket.

7 Rafael Reid, on page 11, and I don't know if you want to call at
8 the same time, but Gary Silva on page 12 is the same a motion, same
9 issues.

10 THE COURT: Sure. State versus Rafael Reid's petition and
11 Silva's petition, cases 778249 and 778464.

12 MR. BARON: Good morning, Your Honor, my name is
13 Jeremy Baron; I'm from the Federal Public Defender's Office. I
14 represent Mr. Reid in his Federal case, and I filed this State petition on
15 his behalf. I don't intend to represent him in the State proceedings, but I
16 thought I would make myself available to answer any questions the
17 Court has about why we filed it the way we filed it.

18 THE COURT: And it sounds like you don't have any -- you
19 aren't taking any position. You just don't want him to waive any issues
20 with timeliness.

21 MR. BARON: That's right, Your Honor.

22 THE COURT: I don't really understand what this is all about.
23 I mean, I don't know is the State looking -- I kind of agree with you. Not
24 kind of, I do agree with you.

25 MR. OWENS: Well, everyone I talk to agrees with me that --

1 except for Judge Bell. And my understanding is this is her policy, to
2 create new civil actions. And I don't see how you can do that from this
3 reading of the statute. It said when the habeas is used as a procedure
4 to challenge a Judgment of Criminal Conviction it's to be file with the
5 criminal case.

6 And that hasn't been done. I've been looking up in Odyssey
7 and under the A number, the criminal case does not appear there. This
8 is going to create huge problems when there's an appeal from one of
9 these civil habeas petitions, and there's no criminal case that can be
10 made part of the record to go up with it. And we're going to be different
11 on appeal than every other jurisdiction here in Nevada when they go up
12 on appeal.

13 Our appendices even if you were to get the criminal case in
14 there; you've got the A case with the petition, you've got the criminal
15 case and then you may have other petitions for the application of
16 procedural bars. It's all got to go up and it's all going to have different
17 case numbers. And right now the rules don't even allow for the criminal
18 case to go up.

19 THE COURT: Only.

20 MR. OWENS: I foresee all kinds of problems and so --

21 THE COURT: But the criminal case would have to go up. I
22 mean, my concern is being able to judge whether the petitions can even
23 procedural go forward.

24 MR. OWENS: Right. So I'm filing these motions. The parties
25 in the other case I don't think that attorney is here. Kelsey Bernstein

1 filed a notice of non-opposition in the --

2 THE COURT: Sure.

3 MR. OWENS: -- in Silva case.

4 THE COURT: I think he agrees with you.

5 MR. OWENS: The parties are in agreement, but it's really the
6 Court that is, you know, wants this apparently a new procedure. And I
7 just don't have the record of what -- I mean, I've spoken to Judge Bell,
8 but I don't have a record here. And I think if we elect to take one of
9 these cases up the Supreme Court's going to want to know what the
10 Court's position is and for me to be able to go up with what record we
11 have. But it flies in face of the statute and so far Judge Bell has not
12 been able to satisfy to my concerns about meeting the statute. And I'm
13 concerned about all the damage being done. This -- implications for
14 habeas petitions everyday are being filed as separate civil actions.

15 I don't even know how you go back and fix that and refile
16 those back in the criminal cases. We're going to have a gap here
17 forever after the record in the criminal case will be incomplete, and
18 they're going to have to hunt down during this timeframe that this
19 procedure was in effect. You're going to have to go hunt down the
20 corresponding A numbers wherever they're at, and add those in
21 somehow to the procedural history or we're going to have gaps in
22 Odyssey.

23 THE COURT: If I grant your motion you can't take it
24 anywhere, because you would have -- so I guess I'm asking what is it
25 you're looking to do, because if you're looking to take it up you probably

1 want me to deny your motion.

2 MR. OWENS: Well, I've been trying to work with Judge Bell
3 administratively and I'm going to go back to my supervisor and
4 encourage him to allow me to go forward with the writ. So I would need
5 a case where that -- my motion is denied.

6 Judge Weiss yesterday granted my motion.

7 THE COURT: Well I'm inclined to grant it. I think you're right.

8 MR. OWENS: Well, do what you want to do. That was
9 certainly -- my motion is that's where it belongs. That may get you in
10 trouble with Judge Bell, and that's why I put on the record in each case
11 that I don't have any record of it. But that's my understanding is that
12 Judge Bell has directed or has given some policy or something directed
13 the District Court Judges or the Clerk's Office at least to file these as
14 separate civil actions.

15 So, I hate to put you in that position, but, yeah, I need a
16 decision on the motion and we may very well take one or more of these
17 cases up. That -- I haven't decided for sure, but that's where we're at.

18 THE COURT: Okay. Now I'm concerned. I mean, I would
19 like my habeas stuff to all be in order, so I can look at the criminal case.
20 I can make a determination about timeliness. And there's no -- you have
21 to have the criminal case.

22 MR. OWENS: Right.

23 THE COURT: No matter what, because even this -- if there's
24 substantive issues you -- it's a review of the criminal record.

25 MR. OWENS: And, you know, I'm kind of making Judge Bell's

1 argument here, but in conversations with her her intent was to take the
2 entirety of the criminal case, which I reminded her it might be tens of
3 thousands of pages in some of these big cases, and put all that as an
4 event. Scan it in somehow and create it as a link in the A case as an
5 event like you do with a criminal bind over --

6 THE COURT: Sure.

7 MR. OWENS: -- for the Justice Court documents. They
8 would do that in a civil case and you'd have it all -- it'd be useless
9 because it's strung together with no index, no pagination. It's just all
10 documents dumped into one event, which would link back to the criminal
11 case. And yes, so in theory then all those documents could be part of
12 an appeal from habeas. That's her solution. That has not happened
13 yet, and we've got habeas petitions right now pending that might be
14 denied and they don't have the criminal record that has been filed with
15 the habeas petition.

16 So, that's her solution. I hope I haven't misrepresented her
17 position, but that just hasn't occurred yet. And it's been what a month
18 this policy has been in place.

19 THE COURT: I'm inclined to grant the motions. Did you want
20 to say anything further?

21 MR. BARON: No, Your Honor. I don't take a position on the
22 motion. Again, I've just made myself available in case the Court had any
23 questions about why we filed Mr. Reid's petition the way we did.

24 THE COURT: Well, yeah it sounds like you were unable to.

25 MR. BARON: That's right. We attempted to file in the criminal

1 case originally. That filing was rejected by the Clerk's Office. I spoke to
2 the Clerk's Office they directed me to file it as a new civil case, that's
3 what I did, and it was accepted for filing.

4 THE COURT: I hope the master calendar will let you file this
5 stuff in the criminal now.

6 MR. OWENS: Well, if you're granting my motions we are
7 drafting responses and we will file those in the criminal case.

8 THE COURT: Okay. Good luck.

9 MR. OWENS: And I will look for a Judge to rule against me I
10 guess.

11 THE COURT: Well that's why --

12 MR. OWENS: If I can get one of these in front of Judge Bell --

13 THE COURT: -- I gave you an opportunity. Yeah, I gave you
14 an opportunity.

15 MR. OWENS: Yup. All right.

16 THE COURT: Thank you.

17 MR. OWENS: Thanks, Judge.

18 MR. BARON: Your Honor, I believe this is case is on calendar
19 for September 11th, does the Court intend to keep that date?

20 THE COURT: Yes. Is that okay?

21 MR. BARON: Well does the Court want me to keep coming
22 back? Because again, I don't represent him here I just want to make
23 myself available.

24 THE COURT: No, no, I appreciate you appearing. But no, I
25 don't think you have to keep coming back.

1 MR. BARON: Thank you.

2 THE COURT: Thank you.

3 MR. OWENS: Thanks, Judge.

4 [Hearing concluded at 9:06 a.m.]

5 [Hearing recalled at 10:44 a.m.]

6 THE COURT: I called it a long time ago. State versus Gary
7 Silva. The motion was granted.

8 MS. BERNSTEIN: And that's fine.

9 THE COURT: Okay.

10 MS. BERNSTEIN: is also -- I mean, I filed a non-opposition
11 so I fully expected it to be granted. There was just a couple of questions
12 on moving forward with the policy that now all writs are civil instead of
13 criminal. In moving into the criminal case obviously is fine. The one
14 concern that I have is service when we initiate a civil case they don't let
15 you E-serve. So I -- assuming, I just kind of wanted Court clarification
16 that filing the motion that they acknowledge service even though I wasn't
17 able to personally serve them in the way that you would a civil
18 complaint.

19 THE COURT: Oh, you mean the State is actually accepting
20 service of the writ?

21 MS. BERNSTEIN: Yes.

22 THE COURT: Well they appeared today so yeah.

23 MS. BERNSTEIN: And that's why I just needed to make sure
24 that the was on the record. And then I also wanted to request a motion -
25 - or an order to transport for the future court dates.

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THE COURT: Uh --

MS. BERNSTEIN: For the argument on his writ.

THE COURT: I don't think your client needs to be here for the argument on the writ. If I grant an evidentiary hearing I will grant an order to transport.

MS. BERNSTEIN: Okay.

THE COURT: Okay.

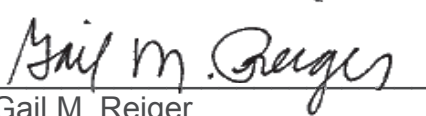
MS. BERNSTEIN: Thank you.

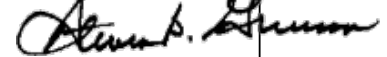
THE COURT: Thank you.

* * * * *

[Hearing concluded at 10:45 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.


Gail M. Reiger
Court Recorder/Transcriber



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 DESHON HEREFORD,
9 Plaintiff,

CASE#: A-18-777787-W
DEPT. XXIII

10 vs.

11 BRIAN WILLIAMS WARDEN,
12 Defendant.

13
14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT
JUDGE

15 TUESDAY, SEPTEMBER 11, 2018

16 **RECORDER'S TRANSCRIPT OF HEARING:**
17 **STATE'S NOTICE OF MOTION AND MOTION TO TRANSFER**
18 **PETITION TO CRIMINAL CASE**

19
20 APPEARANCES:

21 For the State: JONATHAN VANBOSKERCK, ESQ.
22 Chief Deputy District Attorney

23 For the Defendant: PRO SE

24
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, September 11, 2018

2

3 [Hearing began at 9:32 a.m.]

4 THE MARSHALL: A-18-777787 Hereford vs. Williams.

5 THE COURT: Okay. This is a -- it's one of the post-conviction
6 petition writ of habeas corpus, which is a criminal matter. Hi, good
7 morning.

8 MR. VANBOSKERCK: Good morning, Your Honor. Jonathan
9 Vanboskerck for the State. Mr. Owens was here with you last time.

10 THE COURT: Yep.

11 MR. VANBOSKERCK: I'm covering for him. In the interim, I
12 know you're aware there was a meeting with the chief judge where they
13 tried to work it out. My understanding is they have not, and we're hoping
14 for a ruling on the motion from you today.

15 THE COURT: Okay. So just going back to the email that was
16 sent -- and I think that I went over it with Mr. Owens last time. Let's see.

17 MR. VANBOSKERCK: That's what he told me.

18 THE COURT: This was supposed to be set on criminal
19 calendar every day we have to put the entire criminal file, copy it and put
20 it as an event in post-conviction case. So, Kathy, how did you do this
21 last time? Did we give them a date? I don't remember giving Mr.
22 Owens a date last time.

23 MR. VANBOSKERCK: There's a date for the petition of
24 September 24th, that's already in Odyssey.

25 THE COURT: And that's in the criminal case? No. Is it a

1 criminal case or civil case, because I'm not up on Odyssey right now?

2 THE CLERK: Let me see if it's one or the other.

3 MR. VANBOSKERCK: My recollection is I think it was filed in
4 the A number --

5 THE CLERK: It's in civil.

6 MR. VANBOSKERCK: -- but I could be wrong, Judge.

7 THE COURT: Then we need to put it into a C number, the
8 hearing date.

9 THE CLERK: Yeah, so they're going to have to create a
10 criminal case number.

11 MR. VANBOSKERCK: Well, there is a new A number that
12 was filed. And again, we're asking that it be filed in the actual criminal
13 case number, the original criminal case number.

14 THE CLERK: Oh, here's the criminal. Let me just double
15 check that real quick.

16 THE CLERK: That seems like consistent with what they're
17 wanting.

18 MR. VANBOSKERCK: My understanding is that the chief
19 judge wants it filed as a new separate A-case number. But again, we're
20 asking that it go back.

21 THE COURT: And then it goes into the C number and we
22 hear it on the criminal days.

23 MR. VANBOSKERCK: We're asking that the A number be
24 disposed of completely and be refiled in total in the C number.

25 THE COURT: You know what, I have not had that much --

1 that discussion with Judge Bell, as far as what she wants us to do with
2 the A number. The other one with Mr. Owens, we did copy it and put it
3 into the C number, and we'll reset the hearing date C date. But unless
4 I've missed it, I haven't received anything or heard about what we're
5 going to do with the A number.

6 MR. VANBOSKERCK: Yeah. And I know from the meeting
7 there's still a disagreement over that. She's still --

8 THE COURT: Yeah. So at this point, the A number will just
9 be there until -- I mean, obviously for us it's going to be more of a pain
10 cause we're going to have to go back and clean it up once a decision is
11 made how to handle all of these. But we need to get him a C number.
12 Can we just notify them? We probably want to follow up with Judge Bell.
13 And then, can we just notify them of the date? It clearly says we have to
14 reset it in the criminal case.

15 THE CLERK: Right.

16 THE COURT: On criminal days.

17 THE CLERK: Right.

18 THE COURT: And it's going to be further out at the end of
19 September.

20 THE CLERK: Right. Because master calendar will have to
21 get it assigned a new criminal case number and transfer the petition.

22 THE JUDICIAL EXECUTIVE ASSISTANT: They want it in the
23 original C number.

24 THE CLERK: In the original one?

25 THE COURT: Yeah. Can you do that now, or do we need to

1 just let them know you need to --

2 THE CLERK: I can do it now, since I have that criminal --

3 THE COURT: The original C number?

4 THE CLERK: Uh-huh.

5 THE COURT: Okay. And then that September date, do we
6 need to -- we probably need to move it out. Have you all even started
7 your return?

8 MR. VANBOSKERCK: I believe our response has been filed
9 already. It's pro per. So I believe our response has been filed.

10 THE COURT: Can you double check in the C case, please?

11 THE CLERK: It's not going to be in the C yet.

12 THE COURT: Did they file a return?

13 MR. VANBOSKERCK: I thought I saw it there yesterday when
14 I looked it up.

15 THE CLERK: Was it in the C case or the A case?

16 MR. VANBOSKERCK: I don't remember. Yesterday I looked
17 up both numbers.

18 THE CLERK: Most likely it's in the A case, but let me double
19 check here.

20 MR. VANBOSKERCK: My vague -- if I had to bet, I'd say it's
21 the A number, but I can't represent for certain.

22 THE COURT: You're probably right.

23 THE CLERK: Response, it was filed August 23rd.

24 THE COURT: Okay. So we can keep that hearing date. Let's
25 just make sure to give him a C number. So the only thing we need to

1 do, is we're going to need to --

2 Is he in prison?

3 MR. VANBOSKERCK: Yes.

4 THE COURT: Okay. So we need to reset the date on a
5 criminal day and we're going to need to arrange for the transport of the
6 Defendant, or we just --

7 MR. VANBOSKERCK: Actually, we're not asking for that
8 because --

9 THE COURT: Is this one of those where we did on the papers
10 and pleadings?

11 MR. VANBOSKERCK: Yes.

12 THE COURT: You know, you're right. We don't have to
13 transport him.

14 MR. BANBOSKERCK: If Your Honor's inclined to rule on the
15 papers, we wouldn't ask for transport.

16 THE COURT: That's what I always do. And then I just set it,
17 bring them in for the claims that need to be further developed.

18 THE CLERK: September 24th is our criminal day and it's
19 already set.

20 THE COURT: Okay. Well, then we're good.

21 THE CLERK: It's under the A number, which I'll get that
22 changed.

23 THE COURT: Okay. So we'll see you on the 24th.

24 MR. VANBOSKERCK: Just for Mr. Owens', cause I know he
25 wants a ruling from the Court on the motion, is the motion to transfer to

1 the criminal case granted?

2 THE COURT: It's granted to the extent that it will be heard on
3 the criminal calendar. And everything, all the filings in the A case will be
4 copied into the C case; however, the Court's not ruling at this time on his
5 request to dismiss the A case until I receive a, what Linda Bell, Judge
6 Bell wants to do.

7 MR. VANBOSKERCK: Are we going to have a status check
8 on whether -- on the final ruling on that part of it, cause I know that's
9 very important to Mr. Owens?

10 THE COURT: We can. I mean, we could put that out, you
11 know, 30-45 days, cause I don't know that -- I talked to her about it
12 briefly maybe two weeks ago, but I haven't talked to her since she's had
13 the meeting with Mr. Owens. So I don't know. Yeah, we can to keep
14 our feet to the fire. We're going to have to. It's going to be more of a
15 mess for us, because we have to make sure we don't just have an open
16 case with no activity in it. But that's fine.

17 MR. VANBOSKERCK: Yeah. I apologize. I just know he
18 wants a clear ruling.

19 THE COURT: Well, that's the ruling you're going to get, but I
20 can give you a status check date for dismissal of the A case number.

21 MR. VANBOSKERCK: Please.

22 THE COURT: If you'd like that.

23 THE CLERK: All right. So a few weeks after the hearing?

24 THE COURT: Yeah.

25 THE CLERK: Okay.

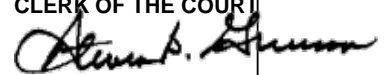
1 THE COURT: Hopefully she'll decide what she wants to do.
2 THE CLERK: October 8th at 9:30.
3 THE COURT: Okay. And again, that's a status check on
4 dismissal on the A case number. So we have a date on calendar.
5 Thank you.
6 MR. VANBOSKERCK: And just for staffing purposes, is that
7 on a civil calendar or criminal calendar?
8 THE COURT: Civil.
9 MR. VANBOSKERCK: Thank you. I appreciate that.
10 THE CLERK: Oh, and that would be the 9th. I'm sorry, I said
11 the 8th.
12 THE COURT: Okay. Sorry. It's civil. It would be on civil.
13 THE CLERK: Yeah. So that would be October 9th at 9:30.
14 MR. VANBOSKERCK: Thank you very much. I appreciate it.
15 THE COURT: Thank you. Have a good day. Bye, bye.

16
17 [Hearing concluded at 9:38 a.m.]

18 * * * * *

19 **ATTEST:** I do hereby certify that I have truly and correctly transcribed the
20 audio/video proceedings in the above-entitled case to the best of my ability.

21 
22 Maria L. Garibay
23 Court Recorder/Transcriber
24
25



1 RTRAN

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4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 DESHON HEREFORD,
9 Plaintiff,

CASE#: A-18-777787-W
DEPT. XXIII

10 vs.

11 BRIAN WILLIAMS WARDEN,
12 Defendant.

13
14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT
JUDGE

15 TUESDAY, OCTOBER 9, 2018

16 **RECORDER'S TRANSCRIPT OF HEARING:**
17 **STATUS CHECK: DISMISSAL OF A777787**

18
19 APPEARANCES:

20 For the State: NO APPEARANCES

21
22 For the Defendant: PRO SE

23
24
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, October 9, 2018

2
3 [Hearing began at 11:00 a.m.]

4 THE COURT RECORDER: No one checked in.

5 THE COURT: [Indiscernible] motion to transfer petition to the
6 criminal case. Oh, this is one of those petitions for habeas. Listen,
7 [indiscernible] granted.

8 Well, Kathy is gone. Are you doing [indiscernible] for
9 her or is Kathy going to do it? This is -- did you read the new order the
10 judge -- petitions for habeas post-conviction filed in a civil case, but
11 they're to be heard in the criminal case on the criminal calendar and
12 they're all the documents are put in the corresponding criminal case.

13 THE CLERK: I wasn't aware of that but I can find out.

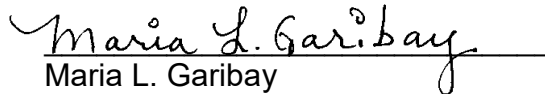
14 THE COURT: I'll make a note for Kathy. Let me make a note
15 for Kathy real quick, okay. So you can just put that on Kathy's desk.
16 [Court addresses the Law Clerk]

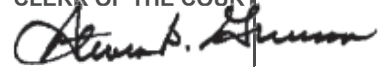
17 All right, so that will be granted.

18 [Hearing concluded at 11:02 a.m.]

19 * * * * *

20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio/video proceedings in the above-entitled case to the best of my ability.

22 
23 Maria L. Garibay
24 Court Recorder/Transcriber
25



1 **DECL**
2 RENE L. VALLADARES
3 Federal Public Defender
4 Nevada State Bar No. 11479
5 JEREMY C. BARON
6 Assistant Federal Public Defender
7 Nevada State Bar No. 14143C
8 411 E. Bonneville Ave. Suite 250
9 Las Vegas, Nevada 89101
10 (702) 388-6577
11 (702) 388-6419 (fax)
12 jeremy_baron@fd.org

13 On behalf of pro se petitioner Rafael Reid
14 Special appearance only

15 Rafael Reid, NDOC No. 1004447
16 High Desert State Prison
17 P.O. Box 650
18 Indian Springs, Nevada 89070
19 Pro se

20 EIGHTH JUDICIAL DISTRICT COURT
21 IN AND FOR THE COUNTY OF CLARK

22 RAFAEL REID,
23
24 Petitioner,
25
26 v.
27 BRIAN E. WILLIAMS and the
ATTORNEY GENERAL for the STATE of
NEVADA,
Respondents.

Case No. A-18-778249-W
Dept. No. XII

Date of Hearing: 9/6/2018
Time of Hearing: 8:30 a.m.

(Not a Death Penalty Case)

DECLARATION REGARDING THE STATE'S MOTION TO TRANSFER

Undersigned counsel respectfully submits this declaration regarding the
State's August 1, 2018, motion to transfer.

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1 5. When I originally attempted to file Mr. Reid's petition (and the other
2 documents) in the criminal case, the clerk's office rejected the filing. After I received
3 notice, I called the clerk's office to inquire. I spoke to an employee who explained the
4 clerk's office has recently adopted a new protocol for filing post-conviction habeas
5 petitions in this Court: it now requires new petitions to be filed as new civil actions.
6 Once the clerk's office opens the new civil case, I was told, the clerk's office would
7 copy the record from the existing criminal case into the new civil case and would
8 assign the new civil case to the same department as the existing criminal case, as an
9 associated case.

10 6. Based on the employee's instructions, I attempted to refile the petition
11 and its associated documents as a new civil case. The clerk's office accepted the
12 petition and the associated documents for filing and opened the instant case.

13 7. If the Court grants the State's motion to transfer, I respectfully suggest
14 the Court do so in a way that is without prejudice to the substantive or procedural
15 issues involved in Mr. Reid's petition.

16
17 I declare under penalty of perjury the following information is true and correct
18 to the best of my knowledge and recollection. I am executing this declaration on
19 August 14, 2018, in Las Vegas, Clark County, Nevada.

20
21 

22 JEREMY C. BARON
23 Assistant Federal Public Defender
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I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

Rafael Reid
No. 1004447
High Desert State Prison
PO Box 650
Indian Springs, NV 89070

4



1 NOT
2 NEVADA APPEAL GROUP, LLC
3 Kelsey Bernstein, Esq.
4 Nevada Bar No. 13825
5 726 S. Casino Center Blvd., Ste. 211
6 Las Vegas, Nevada 89101
7 Telephone: (702) 598-1299
8 Kbernstein.esq@gmail.com
9 Attorney for Petitioner
10 Gary Silva

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

9 Gary Silva,
10 Petitioner-Defendant,

) Case No.: A-18-778464-W
) Dept. No: XII
)

11 vs.

) **NOTICE OF NON-OPPOSITION TO**
) **STATE'S MOTION TO TRANSFER**
) **PETITION TO CRIMINAL CASE AND**
) **REQUEST FOR CLARIFICATION**
)

12 The State of Nevada,
13 Respondent-Plaintiff.
14

15
16 COMES NOW, Petitioner Gary Silva, by and through his attorney of record, KELSEY
17 BERNSTEIN, ESQ. of the firm Nevada Appeal Group, LLC, hereby submits this Defendant's
18 Notice of Non-Opposition to State's Motion to Transfer Petition to Criminal Case and
19 Request for Clarification.
20

21 ///

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23 ///

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28
Non-Opposition and Request for Clarification - 1

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On or about July 25, 2018, Petitioner's Counsel attempted to file the Petition for Writ
3 of Habeas Corpus in the regular criminal proceedings pursuant to ordinary custom and
4 practice in this jurisdiction. However, Petitioner's filing was rejected by the District Court
5 Clerk's Office because of a newly implemented policy that now requires *all* Habeas
6 Petitions to be filed as an original civil proceeding (see **Exhibit 1**, attached hereto). After
7 telephonically speaking with the Clerk's Office at length, Counsel was obligated to file the
8 Petition as an original proceeding in order to ensure a timely filing.
9

10
11 The new procedure is understandably creating significant confusion among post-
12 conviction criminal practitioners, and additionally raises significant procedural questions
13 with regards to service and appellate procedure, such as substantive appealability and
14 appeal filing fees.
15

16 Petitioner's Counsel agrees with the State that the instant Petition should remain
17 under the criminal proceedings, and requests clarification from this Court as to how to
18 proceed forward.
19

20 DATED this 16 day of August, 2018.
21

22 By:
23 NEVADA APPEAL GROUP, LLC
24

25 By: /s/ Kelsey Bernstein
26 Kelsey Bernstein, Esq.
27 Nevada Bar No. 13825
28 600 S. Eighth Street
Las Vegas, Nevada 89101

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Clark County District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155
motions@clarkcountynyda.com
pdmotions@clarkcountynyda.com

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EXHIBIT 1

**Filing Returned for Envelope Number: 2903971 in Case: C-13-289799-1,
State of NevadavsGary Silva for filing Petition for Writ of Habeas Corpus -
PWHC (CRM)**

efilingmail@tylerhost.net <efilingmail@tylerhost.net>
To: kbernstein.esq@gmail.com

Thu, Jul 26, 2018 at 7:12 AM

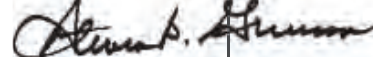
**Filing Returned**

Envelope Number: 2903971
Case Number: C-13-289799-1
Case Style: State of NevadavsGary Silva

The filing below has been reviewed and has been returned for further action. **Please refile with the corrections outlined below.** Please, contact the appropriate court help center for further information.

Return Reason(s) from Clerk's Office	
Court	Eighth Judicial District Court
Returned Reason	Rejected
Returned Comments	Pursuant to NRS 34.730 - 3(a), please resubmit this Petition for Writ of Habeas Corpus (Post-Conviction), as a new action.

Document Details	
Case Number	C-13-289799-1
Case Style	State of NevadavsGary Silva
Date/Time Submitted	7/25/2018 5:17 PM PST
Filing Type	Petition for Writ of Habeas Corpus - PWHC (CRM)
Filing Description	Petition for Writ of Habeas Corpus (Post-Conviction)
Activity Requested	EFileAndServe
Filed By	Kelsey Bernstein
Filing Attorney	Kelsey Bernstein



JOIN

RESCH LAW, PLLC d/b/a Conviction Solutions

By: Jamie J. Resch

Nevada Bar Number 7154

2620 Regatta Dr., Suite 102

Las Vegas, Nevada, 89128

Telephone (702) 483-7360

Facsimile (800) 481-7113

Jresch@convictionsolutions.com

Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

PAULETTE W. PERRY,

Petitioner,

vs.

DWIGHT NEVEN, WARDEN, THE STATE OF
NEVADA,

Respondents.

Case No.: A-18-779106-W

Dept. No: X

**JOINDER TO STATE'S MOTION TO
TRANSFER PETITION TO CRIMINAL CASE**

Date of Hearing: October 8, 2018

Time of Hearing: 10:30 a.m.

COMES NOW, Petitioner, Paulette Perry, by and through her attorney, Jamie J. Resch, Esq., and hereby files this joinder to the State's motion to transfer petition to criminal case. This joinder is based on the pleadings and papers herein, any attached exhibits, and any argument as may be presented to the Court at the time of hearing.

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the foregoing Joinder to State's Motion to Transfer
Petition to Criminal Case was made this 25th day of September, 2018, by Electronic Filing
Service to:

Clark County District Attorney's Office
Motions@clarkcountyda.com
PDmotions@clarkcountyda.com



An Employee of Conviction Solutions

I.

POINTS AND AUTHORITIES

As part of the pleadings in this matter, the State has filed a motion to transfer this
petition to the criminal case to which it pertains. The Court likely already is aware: This matter
bears a separate civil case number which was assigned by the Clerk's office at the time of filing.
However, the petition, as the State points out, challenges the conviction and sentence in
C177174-1.

Ms. Perry joins in the State's motion and believes this matter should have been assigned
the same case number as the criminal proceeding. A careful reading of the complete statute
reveals that filing in the criminal case would be proper in this matter.

NRS 34.730(3) states:

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.

The State's arguments are adopted here.¹ As the State argues, filing "with the record" of the criminal proceeding ensures that the Court has access to the critical documents to determine whether or not Petitioner's important constitutional rights have been violated with respect to her criminal conviction.

But there is more at work here. In addition to the State's arguments, it should be noted that questions of statutory interpretation start with an attempt to give effect to the Legislature's intent based on the plain language of the statute. Williams v. State Dept. of Corr., 133 Nev. Adv. Rep. 75, 402 P.3d 1260 (2017). Effort must be made to avoid rendering any part of a statute meaningless. Id.

Here, NRS 34.730(3) clearly cannot require that every post-conviction petition be filed by the clerk as a new and separate action because subsections (a) and (b) plainly describe what should happen when a petition challenges a conviction and sentence in a criminal case. The use of the word "except" as the very first word of the statute suggests, by its plain language, there is

¹ To the extent the State argues no hearing can be had on the petition until this motion is resolved, Perry does not agree. The motion is filed under NRS 34.730, but any prerequisites to the court hearing the merits of the petition arise only under NRS 34.740 to NRS 34.770. See NRS 34.730(4).

1 an "exception" to the stated rule that petitions must be assigned a new case number and filed as
2 a new action. That exception is when the petition challenges the conviction or sentence in a
3 criminal case.
4

5 The State's further arguments about the need for the criminal record to be reviewed are
6 well-taken. This Court is required as part of its statutory obligations to review the petition and
7 determine if a response is required or if the petition is plainly meritless. NRS 34.745(4)
8 (Requiring court to review petition, exhibits, and "record of the court" in performing this
9 analysis). The easiest and clearest way to meet this requirement would be for the petition to be
10 heard in the criminal case that is already on file, which contains all of these required records.
11

12 District Court judges have "coextensive" authority, and one judge should not exercise
13 authority over another's execution of "judicial functions" absent emergency circumstances.
14 Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007). No emergency circumstance exists
15 here. As such, interpretation of Nevada's post-conviction statutes and of how they apply to this
16 matter should be performed by the district court judge assigned to the case. NRS 34.730(3)(b).
17

18 None of this is intended to put form over substance. Whether the case has a civil or
19 criminal case number is not the main issue. Rather, the focus is on the largely criminal nature of
20 the proceedings at hand and the concomitant rights of due process and fundamental fairness
21 that accompany post-conviction proceedings which challenge a criminal conviction.
22

23 Pennsylvania v. Finley, 481 U.S. 551 (1987). Potential deficiencies if the matter is treated as a
24 separately filed civil matter under state law include: (1) The State's noted lack of an available
25 record upon which to determine the matter, (2) a lack of readily available transcription services,
26 (3) the potential lack of security to ensure the Petitioner's in-person presence on a noncriminal
27
28

1 calendar day, and (4) ensuring ready access to criminal appellate procedures, as the Nevada
2 Supreme Court treats post-conviction appeals as criminal appeals. To be fair, many of these
3 concerns may not be present in the instant case, where the case already appears to be heard as
4 part of this Court's criminal calendar despite the civil case number. However, the lack of any link
5 to the available criminal record, and concerns about potential appellate procedures, could be
6 best addressed by granting the motion and more formally hearing this petition as part of the
7 Court's criminal case.
8

9
10 **II.**

11 **CONCLUSION**

12 For the reasons stated herein, the Court should grant the State's motion to transfer
13 petition to criminal case.
14

15 DATED this 25th day of September, 2018.
16

17 Submitted By:

18 RESCH LAW, PLLC d/b/a Conviction Solutions
19

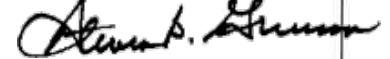
20 By: 

21 JAMIE J. RESCH

22 Attorney for Petitioner
23
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TABLE OF HABEAS CASES FILED AS SEPARATE CIVIL ACTIONS

BANDA, RICHARD	18A781327-W / 17C322402-1
BROWN, TRACEY	18A779238-W / 11C276549-1
BOWLES, DEMANS	18A779747-W / 15C309391-1
CARR, JABRON	18A778244-W / 14C301532-1
COMBS, MATTHEW	18A780467-W / 16C315408-1
COOK, BRIAN CLAY	18A780893-W / 11C274059-1
COSTANTINO, DEREK ANTHONY	18A780842-W / 94C120552
DEVOSE, CHRISTOPHER	18A781814-W / 15C303641-1
DUDA, CHET	18A777800-W / 13C286668-1
DUMAS, SABRINA aka DUMAS, ZOLLIE	18A778136-W / 88C084703
DURAN, VICKIE	18A780934-W / 09C260879
EAGLES, BRIAN	18A778556-W / 16C312386-1
GALLIMORT, JOSE	18A778229-W / 97C147074
GARCIA, CARLOS HUMBERTO	18A780825-W / 12C281252-1
HAYES, ROBERT	18A778736-P / 14C297840-1
HEREFORD, DESHON	18A777787-W / 08C240464
JACKSON, MARLAND	18A778170-W / 16C313223-1
JACKSON, RICHARD	18A778465-W / 17C326173-1
JORDAN, STEPHON	18A781150-W / 15C309412-1
KIE, DONALD JR.	18A778622W / 16C312386-2
KOPP, DENNIS J.	18A777803-W / 16C318968-1
MACK, DARREN	18A779044-W / 07C237716
MARENCO, CHARLES	18A778945-W / 17C320573-1
MILLER, TRE RONDELL	18A778548-W / 16C319814-1
MONROE, DAIMON	18A780877-W / 07C237052
MUM, PHALA	18A777795-W / 16C319460-2
MUNGAI, JAMES	18A778484-W / 15C306725-1
PAMPLIN, JOHN DAVID	18A779247-W / 02C184760
PEREZ, JONATHAN	18A778248-W / 14C298503-1
PERRY, PAULETTE W.	18A779106-W / 01-C177174-1
PINEDA – LAURENCIO, YIORKIS	18A781338-W / 08C247198
PINEDA – LAURENCIO, YIORKIS	18A781336-W / 08C248583
PORRETTI, WAYNE	18A777788 / 12C279827-1
REID, RAFAEL	18A778249-W / 13C291082-1
RENCER, EDDIE JR.	18A780636-W / 06C225668
SILVA, GARY	18A778464-W / 13C289799-1
STEWART, TERRANCE	18A779385-W / 16C313046-1
TAYLOR, GERALD	18A780465-W / 14C297487-3
VASALLO – ALVAREZ, JOSE	18A778389-W / 14C303155-1
WASHINGTON, LEON JR.	18A778460-W / 16C315818-1
WASHINGTON, SAAIM	18A780117-W / 13C287139-1
WESLEY, PERRY	18A778725-W / 16C314681-1



1 **ROPP**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ALEXANDER CHEN
6 Chief Deputy District Attorney
7 Nevada Bar #010539
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 ZANE MICHAEL FLOYD,
13 #1619135

14 Defendant.

CASE NO: 99C159897

DEPT NO: XVII

15 **STATE'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR THE**
16 **COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND**
17 **SECOND SUPPLEMENTAL WARRANT OF EXECUTION**

18 DATE OF HEARING: MAY 14, 2021
19 TIME OF HEARING: 8:30AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby
22 submits the attached Points and Authorities in Reply to Defendant's Opposition to Motion for
23 the Court to Issue Second Supplemental Order of Execution and Second Supplemental
24 Warrant of Execution.

25 This reply is made and based upon all the papers and pleadings on file herein, the
26 attached points and authorities in support hereof, and oral argument at the time of hearing, if
27 deemed necessary by this Honorable Court.

28 //

H:\P DRIVE DOCS\FLOYD, ZANE, 99C159897, ST'S

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POINTS AND AUTHORITIES
ARGUMENT

**THIS COURT CAN ISSUE THE ORDER OF EXECUTION WHILE DEFENDANT'S
TWO MOTIONS AND THIRD POST-CONVICTION PETITION ARE STILL
PENDING AND WITHOUT ASSURANCES FROM NDOC**

Defendant requests this Court to defer from issuing the Order of Execution or signing the Warrant of Execution until Defendant has the opportunity to fully litigate his pending motions and third post-conviction Petition. Opposition, at 2. However, this Court may issue the Order of Execution while Defendant's pleadings are still pending without signing the Warrant of Execution.

NRS 175.505(1) provides that when a defendant has exhausted his legal remedies, "if no legal reasons exist prohibiting the execution of the judgment, [the judge] shall make and enter an order requiring the Director of the Department of Corrections to execute the judgment at a specified time." As the State noted in its Motion, Defendant has exhausted all his post-conviction and appellate remedies under NRS 176.505. The Nevada Supreme Court and the United States Court of Appeals for the Ninth Circuit have affirmed the lawfulness of Defendant's convictions. The United States Supreme Court has declined to grant certiorari and there is nothing left for Defendant to appeal. Thus, Defendant has exhausted all other legal remedies.

Defendant has now filed two motions and a third post-conviction Petition attempting to delay this Court from issuing the Order of Execution. Defendant argues that both his Motion to Transfer Case Under EDCR 1.60(H) and Motion to Disqualify the Clark County District Attorney's Office must be fully litigated before this Court can sign the Warrant of Execution. Opposition, at 3-4. Defendant's two motions are simply without merit because this case is properly assigned to this Department under the Homicide Team as a death penalty case and Defendant provides no reason why this Court should disqualify the District Attorney's Office. Regardless, Defendant's two Motions will be litigated and heard by this Court on May 14, 2021, at the same time as the instant Motion Seeking an Order and Execution of Warrant.

1 Therefore, Defendant's two motions will be fully litigated before this Court even has to issue
2 the Order of Execution.

3 Defendant also argues that this Court should not consider the State's Motion until
4 Defendant is able to litigate his third post-conviction Petition and it is heard by the Nevada
5 Supreme Court. Opposition, at 5-7. NRS 176.487 clearly states that a stay based upon the filing
6 of a postconviction petition should only occur when the writ is "proper." The statute then
7 delineates criteria for the court to consider. NRS 176.487 reads:

8 In making this determination, the court shall consider whether:

9
10 1. The petition is the first effort by the petitioner to raise constitutional
11 claims for relief after a direct appeal from a conviction and the petition raises
12 claims other than those which could have been raised at trial or on direct
13 appeal.

14 2. The petition is timely filed and jurisdictionally appropriate and does
15 not set forth conclusory claims only.

16 3. If the petition is not the first petition for postconviction relief, it
17 raises constitutional claims which are not procedurally barred by laches, the
18 law of the case, the doctrines of abuse of the writ or successive petition or any
19 other procedural default.

20 4. If the petition is a second or successive petition, it presents
21 substantial grounds upon which relief might be granted and valid justification
22 for the claims not having been presented in a prior proceeding.

23 5. The petition asserts claims based upon specified facts or law which,
24 if true, would entitle the petitioner to relief.

25 6. The court cannot decide legal claims which are properly raised or
26 expeditiously hold an evidentiary hearing on factual claims which are
27 properly raised before the execution of sentence.

28 Defendant's third Petition "argues he is categorically exempt from the death penalty
due to Fetal Alcohol Spectrum Disorder (FASD)." Opposition, at 5. However, the issue of
Defendant's Fetal Alcohol Spectrum Disorder has already been litigated and determined by
the district court and again by the Nevada Supreme Court. See Findings of Fact, Conclusions
of Law and Order, April 2, 2008; see also Order of Affirmance, Case No. 51409, November
17, 2010. Petitioner's third Petition is time-barred, successive, and a further attempt to delay
his execution. Thus, this Court need not wait for his procedurally barred third Petition to be

1 heard by this Court and the Nevada Supreme Court before issuing the Order of Execution. To
2 delay the issuance of the Order of Execution merely based on a third time-barred and
3 successive Petition would essentially give defendants the ability to delay their executions in
4 perpetuity.

5 Lastly, Defendant claims that this Court should not issue the Order or sign the Warrant
6 of Execution until the Nevada Attorney General's Office or representatives from the Nevada
7 Department of Corrections ("NDOC") can appear and "provide assurances" they are prepared
8 to conduct the execution. Opposition, at 7-15. Specifically, Defendant requests for the
9 Attorney General's Office and NDOC to provide assurances that: (1) they are prepared to
10 conduct an execution, (2) whether it is safe to conduct an execution during the COVID-19
11 pandemic, and (3) they are prepared to conduct the execution at the Nevada State Prison. Id.

12 While Defendant cites to numerous news articles related to the death penalty and
13 previous death penalty cases from Nevada, Defendant fails to cite to any lawful authority that
14 the Attorney General's Office or NDOC must provide assurances it is able to carry out the
15 execution *before* issuing the Order or signing the Warrant. Neither NRS 176.495 nor 176.505
16 require that NDOC "provide assurances" it is actually able to carry out the execution before
17 this Court can issue the Order. Instead, NRS 176.355(2) gives the Director of the Department
18 of Corrections the power to determine the logistics of the execution once there is an Order
19 from the district court. Defendant cites to no statute that requires the NDOC to issue assurances
20 of the manner and method or place of execution *before* this Court can issue the Order of
21 Execution.

22 Defendant claims that NDOC should provide these assurances because of "the speed
23 with which the CCDA has sought this execution warrant," and that "the rush to execution
24 sought by the State" may lead to a "botched and tortuous execution." Opposition, at 7, 10. It
25 is unclear how the State is "rushing" this execution, when Defendant previously asserted that
26 the State strategically waited to file the Warrant of Execution until it was "politically helpful
27 timing." Motion to Disqualify Clark County District Attorney's Office, April 14, 2021, at 8-
28 9. Defendant cannot have it both ways—where he argues the State is both rushing this

1 execution and that the State strategically waited to file the Motion until it was “politically
2 helpful timing.” The State simply cannot be both “rushing” an execution and delaying it.

3 Moreover, Defendant is concerned because he has not been fully vaccinated against
4 COVID-19 and needs to be able to visit with his legal team to prepare his application for
5 clemency to the Pardons Board. Opposition, at 11-13. Defendant’s legal team has clearly been
6 able to defend his execution up until this point by filing two motions along with two replies,
7 his third Petition, and the instant Opposition all within the last few weeks and during the
8 COVID-19 pandemic. It is unclear to the State why NDOC must assure their COVID-19
9 protocols before this Court can issue the Order so Defendant can meet with his legal team to
10 apply for clemency—especially when his legal team has already been able to accomplish so
11 much on his behalf up until this point without any NDOC assurances.

12 Obviously, based on the nature of the COVID-19 pandemic, there is nothing in the
13 statute that mandates NDOC provide assurances of its COVID protocol for carrying out the
14 execution. Like the manner, method, and place of execution assurances Defendant requests,
15 this does not need to be addressed *before* this Court can issue the Order of Execution.
16 Defendant does not have a legal right to apply for clemency to the Pardons Board before this
17 Court can issue the Order of Execution. And even if Defendant applies for clemency to the
18 Pardons Board, his chances of clemency are relatively low based on the nature and severity of
19 the crime or factors involved. See Criteria for Evaluation of Inmate Applications for Clemency
20 (attached as “Exhibit 1”). Thus, it is unclear why NDOC must provide assurances for its
21 COVID-19 protocol before this Court can issue the Order.

22 Defendant’s instant Opposition highlights his many attempts to delay this execution.
23 Defendant claims this Court must wait to issue the Order until his meritless Motions and
24 procedurally barred third Petition can be heard. But Defendant has exhausted all his post-
25 conviction and appellate remedies under NRS 176.505, and there is no reason this Court should
26 not issue the Order based on his pending pleadings. Moreover, NRS 176.505 does not require
27 the Attorney General’s Office or NDOC to “provide assurances” regarding the execution itself
28

1 before this Court can issue the Order. Defendant has exhausted all legal remedies, and thus,
2 this Court should issue the Order of Execution.

3 **CONCLUSION**

4 Obviously, Defendant is attempting to litigate multiple issues, in multiple courts in an
5 attempt to thwart his execution. However nothing cited by Defendant is a reason not to
6 complete the first and initial step of signing an Order of Execution. As such, the State
7 respectfully requests that the Court follows the statute and issues the Order.

8 DATED this 5th day of May, 2021.

9 Respectfully submitted,

10 STEVEN B. WOLFSON
11 Clark County District Attorney
12 Nevada Bar #001565

13 BY /s/ Alexander Chen
14 ALEXANDER CHEN
15 Chief Deputy District Attorney
16 Nevada Bar #010539
17 Office of the Clark County District Attorney
18 Regional Justice Center
19 200 Lewis Avenue
20 Post Office Box 552212
21 Las Vegas, Nevada 89155
22 (702) 671-2500
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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing State's Reply to Defendant's Opposition to Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution, was made this 5th day of May, 2021, by electronic transmission to:

BRAD LEVENSON
Email: brad_levenson@fd.org
DAVID ANTHONY
Email: david_anthony@fd.org
Ecf_nvchu@fd.org

BY /s/ E. Davis
Employee for the District Attorney's Office

AC//ed

EXHIBIT 1

EXHIBIT 1

ADDRESS ALL COMMUNICATIONS TO:

PARDONS BOARD
1677 OLD HOT SPRINGS ROAD
SUITE A
CARSON CITY, NEVADA 89706
TELEPHONE (775) 687-5049
FAX (775) 687-6736

DENISE DAVIS, EXECUTIVE SECRETARY

STATE OF NEVADA



BOARD OF PARDONS

BOARD OF PARDONS
STEVE SISOLAK
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LIDIA S. STIGLICH
JUSTICE, MEMBER
ELISSA F. CADISH
JUSTICE, MEMBER
ABBI SILVER
JUSTICE, MEMBER

Criteria for the Evaluation of Inmate Applications for Clemency

Disqualifying Institutional Conduct:

- 1) Having been housed in disciplinary segregation for any period of time within the past 36 months.
- 2) Any guilty finding of a major disciplinary infraction within the past 24 months or a pending major disciplinary.
- 3) Three or more minor/general disciplinary infractions within the past 18 months.

Disqualifying Parole Status:

- 1) Inmates who are eligible for release on parole to the community within 6 months.
- 2) Inmates who are serving a period of parole revocation or a single sentence imposed while on parole.
- 3) Inmates who have been denied release on parole to the community on the current sentence.

Pending Criminal Charges, Investigations or Appeals:

- 1) Inmates with unresolved criminal charges will not be considered.
- 2) Cases that are under appeal in Nevada or Federal Court will generally not be considered.
- 3) Judicial remedies must be exhausted prior to being eligible for clemency review.
- 4) Inmates who are currently under investigation by the NDOC Inspector General or Attorney General's office will not be considered.

Time and Sentence Disqualifications:

- 1) An inmate with a sentence that is projected to discharge to the community within 12 months will not generally be considered.
- 2) Inmates who have served a prior prison sentence for a felony conviction and whose current maximum sentence or combined consecutive maximum sentences are 20 years or less will not be considered.
- 3) Applications from inmates sentenced to death or life without the possibility of parole for an offense committed between November 2, 1982 and July 1, 1995 will not be considered for a commutation of sentence that allows parole eligibility until 20 calendar years have passed.
- 4) Applications from inmates sentenced to death or life without the possibility of parole for an offense committed after July 1, 1995 will not be considered for a commutation of sentence that allows for parole.

Exceptions:

Extraordinary circumstances or case factors may exist that mitigate disqualifying criteria. Circumstances may include an act of heroism or a catastrophic event. Mitigating case factors may include the age of the offender at the time the offense was committed in conjunction with little or no prior criminal history.

In order to consider applicants who claim exemptions because of extraordinary circumstances, the applicant must clearly demonstrate why such consideration should be given. Since most inmate families endure hardships while a person is incarcerated, family hardship is not considered an extraordinary circumstance.

Further consideration for offenses not categorized as the most serious:

Each application will be considered on its own merit. Inmates meeting the published minimum criteria will be subject to further review and may also be disqualified for one or more of the following reasons:

- 1) The nature and severity of the crime or factors involved.
- 2) Prior criminal history.
- 3) Overall institutional adjustment.
- 4) The result of institutional evaluations (psychological reports, sexual psych panel reports and/or parole or other risk assessments).

Qualifying Criteria:

In order to be considered, an inmate must meet the published minimum criteria and demonstrate by clear and convincing evidence at least one of the following:

The applicant has within his or her capacity, made exceptional strides in self-development and self-improvement. The inmate has made responsible use of available rehabilitative programs to address treatment needs;

The applicant is suffering from a critical illness or has a severe and chronic disability, which would be mitigated by release from prison;

The applicant's further incarceration would constitute gross unfairness because of basic inequities involved, including:

- The severity of the sentence received in relation to the sentences received by co-defendants or in relation to other offenders serving sentences for crimes with similar characteristics;
- The extent of the applicant's participation in the offense;
- A history of abuse suffered by the applicant at the hands of the victim that significantly contributed to or brought about the offense.

Evaluation of certain cases meeting the minimum criteria:

The following is provided to assist in evaluating applications on inmates who are serving sentences for the most serious of crimes. Cases which have more mitigating case factors will be given more weight toward consideration than those with aggravating influences. **The mitigating factors listed in this document are not intended to lessen or diminish the gravity of the offense.**

Murder convictions:

Aggravating influences include:

A substantial degree of premeditation to commit the murder.

- Any evidence of torture or sexual connotations.
- The method in which the person was murdered required concentrated effort (ie, strangulation, stabbing or beating to death as opposed to a single gunshot).
- Mutilation of the victim's body.
- Luring the victim or murder by execution.
- Hiding the body.
- Child or disabled victim.
- Prior history of violence or institutional violence.

Criteria for Inmate Clemency Applications

Page 4

Mitigating influences include:

- Having been a co-offender during the murder and not having been the person who actually inflicted the wound(s).
- The murder occurred incidentally during the commission of another crime with little or no premeditation to kill.
- The murder occurred while the offender was in a heightened emotional state, or was influenced by abuse inflicted by the victim.
- The offender was young when the murder was committed.

Sex offenses:

Aggravating influences:

- The offender has prior arrests or convictions for sex related offenses.
- The victim was tied up or forcibly taken to another location.
- The victim was a child, elderly, or physically or mentally disabled.
- There were multiple victims.
- The duration of the offense lasted more than three hours or was repeated multiple times.
- The offense was planned or premeditated.
- The use of weapons or objects.
- The offender forcibly assaulted the victim, or threatened the use of force or other violence to coerce compliance.

Mitigating influences:

- The offense occurred with an adult victim, was situational, not premeditated and occurred only one time and the offender has no prior instances of sexual deviance or violence.
- The activity appeared to be consensual in nature and the offender has no prior arrests or convictions that are sexual or violent in nature (ie, lewdness with a minor and the minor is sexually active and the offender is not significantly older than the victim or the offender operates in a diminished capacity).

Criteria for Inmate Clemency Applications

Page 5

Inquiries and Correspondence:

The Executive Secretary and staff for the Pardons Board can be reached at (775) 687-5049.

Correspondence should be addressed to:

Executive Secretary of the Pardons Board

Attention: Denise Davis

1677 Old Hot Springs Road, Suite A

Carson City, NV 89706

Felony/Gross Misdemeanor

COURT MINUTES

May 14, 2021

99C159897 The State of Nevada vs Zane M Floyd

May 14, 2021 08:30 AM All Pending Motions

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Albrecht, Samantha

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

Alexander G. Chen	Attorney for Plaintiff
Bradley D. Levenson	Attorney for Defendant
Brianna Vega Stutz	Attorney for Plaintiff
David S. Anthony	Attorney for Defendant
State of Nevada	Plaintiff

JOURNAL ENTRIES

STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION...MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)...DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION...DEFENDANT'S MOTION TO DISQUALIFY THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE

Defendant not present, presence waived.

Mr. Anthony argued, as to the Motion to Transfer Case, that certain issues were not in dispute and the statutes passed by the legislature control. Mr. Anthony stated the case was heard in Department 5 and requested a hearing to determine why the case was transferred, or in the alternative to transfer the case to Department 1. Court noted Department 5's cases were transferred to Department 17 on 12/28/2008, according to a printout from Odyssey. Mr. Chen stated the defense was so strict regarding the language of the statute, noted this case was 20 years old and all death penalty cases were randomly assigned to the four homicide tracks. Court FINDS the case was transferred in 2008, he is the successor Judge, and the creation of the homicide team allows him to hear this case, therefore COURT ORDERED, Motion to Transfer Case DENIED.

Court confirmed the argument on the Motion to Disqualify would be related to separation of powers. Argument by Mr. Levenson regarding identifiable impropriety and the likelihood of public suspicion. Mr. Levenson reviewed the procedural history of the case and read various media articles in Court. Court inquired regarding the status of the two Senators and Mr. Levenson stated they can not be on leave as it is not permitted by the Attorney General's Opinion 357. Mr. Chen argued the Court's ruling should not be based on social media and noted the Senators were not compensated by the District Attorney's Office while performing their duties. Mr. Chen stated the Attorney General and the District Attorney are the only ones that can request a Warrant of Execution. Upon Court's inquiry, Mr. Chen advised their position

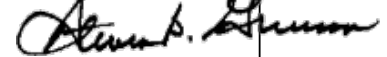
was that the two Senators were employees of the office but not the public officers. Mr. Levenson argued the person appointed would be acting on behalf of the District Attorney's Office. Court stated it would consider the arguments presented and therefore, COURT ORDERED, matter UNDER ADVISEMENT with a decision to be issued before 5:00 pm today.

Court noted parties agreed to continue the other two Motions. Colloquy regarding scheduling conflicts. Mr. Levenson advised they would be going back to Federal Court next week and requested 30 day status checks. COURT FURTHER ORDERED, State's Motion for the Court to Issue Second Supplemental Order of Execution and Defendant's Motion to Strike CONTINUED.

NDC

6/4/2021 8:30 AM STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

6/4/2021 8:30 AM DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,
9 Plaintiff,

CASE#: 99C159897
A21-832852-W

10 vs.

DEPT. XVII

11 ZANE M. FLOYD,
12 Defendant.

13
14 BEFORE THE HONORABLE JACOB VILLANI, DISTRICT COURT JUDGE
15 FRIDAY, MAY 14, 2021

16 RECORDER'S TRANSCRIPT OF HEARING:
17 **ALL PENDING MOTIONS**

18 APPEARANCES:

19 For the State:

ALEXANDER G. CHEN, ESQ.
Chief Deputy District Attorney
BRIANNA STUTZ, ESQ.
Deputy District Attorney

22 For the Defendant:

BRADLEY D. LEVENSON, ESQ.
DAVID S. ANTHONY, ESQ.
Assistant Federal Public Defenders

23
24
25 RECORDED BY: CYNTHIA GEORGILLAS, COURT RECORDER

1 Las Vegas, Nevada, Friday, May 14, 2021

2
3 [Case called at 8:28 a.m.]

4 THE COURT: The Zane Floyd matter. Appearances for the
5 record please.

6 MR. CHEN: Alex Chen and Brianna Stutz on behalf of the
7 State.

8 MR. LEVENSON: Good morning, Your Honor, Brad
9 Levenson and David Anthony from the Federal Public Defender's Office
10 on behalf of Zane Floyd. Mr. Floyd has waived his appearance today.
11 And we do not believe he's appearing by video either.

12 THE COURT: All right. Thank you.

13 All right. We have some matters in court on calendar today.
14 The first one we should deal with is the motion to transfer the case
15 because that's -- we can't go any further depending on how that turns
16 out. So go ahead counsel.

17 MR. ANTHONY: Thank you, Your Honor. So after reviewing
18 our pleading and the pleading of the State, it appears that there are
19 certain issues that are really not in dispute today. And to start out with, I
20 think that we can all agree that what is most controlling here are the
21 statutes passed by the legislature. The statutes passed by the
22 legislature control over any inconsistent court rules. And so what I'd like
23 to do is I'd like to start by talking about the applicable statutes that we've
24 cited in our motion that we believe dictate the outcome of the transfer
25 motion. And that is the NRS 176.495 and 176.505.

1 Both of those statutes refer to quote: the court in which the
2 conviction was had. And 505 refers to the court in which the death
3 sentence was obtained. And those are the courts that are referenced in
4 those statutory provisions. We believe that applying those statutes has
5 to result in the conclusion that this case has to be heard in Department
6 V. Department V was the department that heard the trial. It was the one
7 that imposed the sentence of death. All of the prior post-conviction
8 proceedings also occurred in Department V.

9 Which also raises another statutory provision that is relevant
10 here and that is NRS 34.730. When the habeas rules or the statute talks
11 about the assignment of post-conviction matters, it states under section
12 (3)(b) that the case needs to be assigned to the initial judge or court.
13 We believe that interpreting that language has to result in the conclusion
14 that we're talking about the particular department that heard the case.

15 And so as far as the statutory scheme itself, we believe it's
16 very clear on this issue and that it makes sense the reason that the
17 legislature would have the statute worded that way. Because they want
18 to make sure that the court that initially heard the case and that has the
19 case file is the same court that is seeing the case throughout.

20 And in my own experience litigating capital habeas matters,
21 that is the way that it seems to work, which is that if a new capital
22 habeas petition is filed I haven't had any case that's been randomly
23 assigned to a murder court judge. Instead it's in the department that it
24 was in for the prior proceedings, for the trial, for the sentence, for the
25 prior post-conviction matter.

1 And so I think just right off to start with, what we would say is
2 that the statutes controlled here. The State doesn't have a contrary
3 position to argue on this point. And if we can resolve it on the statutory
4 grounds, I don't think we even need to get to the next level which is to
5 talk about the relevant court rules and the issue about -- you know, the
6 fact that -- you know, as we sit here right now we don't have any
7 information as to why the case migrated to Department XVII. Usually
8 there is a clerk's order, like there is in the state habeas case, that notes
9 when a case is being transferred from one place to another. And that's
10 not something that we have here either.

11 So to the extent that the Court doesn't believe that this issue
12 can be resolved based on the statute, what we would ask for as an
13 alternative is we would ask for a hearing to determine the whats and the
14 whys about why the case was transferred to Department XVII and
15 whether that was an appropriate transfer. And we believe based on the
16 statutory scheme primarily, but also based on the statewide rules of
17 criminal procedure first of all, and secondly the Chief Judge's order last
18 December assigning criminal cases from Department V to Department I
19 that we believe for that reason that if the Court isn't inclined to accept
20 the argument about Department V, then it appears that Department I
21 would be the alternative place if we're going based on the Court rules as
22 opposed to what we believe is clearly required by the statute.

23 THE COURT: Is your argument that this matter should just
24 stay with the department. It's not so much to stay with the judge.
25 Because we know that the judge who handled this matter back in the

1 day is no longer on the bench so that Judge can't hear the case. And if
2 the department now is 100% civil, do you want a civil judge hearing this
3 case? And as you know we have some judges in history of our court
4 system that handle construction defect. Would you want a construction
5 defect judge handling this matter?

6 MR. ANTHONY: Well to answer the Court's question I think
7 that the statutory scheme is pretty clear on this point. And it -- if you
8 look -- again we're talking about 34.730, it says to the original judge or
9 court.

10 And the other thing that was interesting, Your Honor, when I
11 was researching the legislative history on this, is that I looked back in
12 time when we had a three judge panel statute. And the time we had a
13 three judge panel statute under NRS 176.505, they had a provision that
14 said that if the execution warrant was going to be signed, it had to be
15 signed by the judge who took the plea or his successor. And so when
16 we have a three judge panel statute, it was even more clear that what
17 we were talking about is the judge or his successor.

18 So in answer to the Court's question, absolutely, it's our
19 contention that this is talking about the department that heard the case.
20 And we believe that is required and it's elucidated by NRS 34.730. And
21 also I believe it's elucidated by the legislative history. Because when we
22 have a three judge panel system that's exactly the way the statute was
23 worded. It said the judge who took the plea or his successor, and that to
24 me, that means that we're talking about the department.

25 THE COURT: The -- neither party cited this. We did our

1 research and I'm not sure what -- one moment please.

2 [Colloquy between the Court and staff]

3 THE COURT: There's a -- we were able to pull up and I don't
4 know the official name for it, but it appears to be history sheet through
5 Odyssey. And this case all of Department V's cases were transferred to
6 this department December 28th, 2008. And if this is accurate, am I not
7 the successor Judge for this particular matter?

8 MR. ANTHONY: Well, first of all, Your Honor, what I would
9 say is that I'm at a little bit of a loss. When I looked at Odyssey I didn't
10 see any notation of any transfer motion. So I haven't seen what the
11 Court's looking at --

12 THE COURT: We're going run two -- we're going two run
13 copies for both sides.

14 MR. ANTHONY: Okay, yeah, I would appreciate taking a look
15 at that. But I guess what I would say, again coming back, Your Honor,
16 to the more fundamental point. If the statutory scheme controls, then the
17 statutory scheme controls over any court rules that are inconsistent with
18 the statutory scheme. And that's our position.

19 Normally, Your Honor, this isn't an issue that arises. Because
20 as we know most cases are processed, they might have a post-
21 conviction action and then, you know, the case is concluded. Capital
22 cases are unique, because we find ourselves at the end of the line. And
23 as the Court said, and again I'm going to assume that, you know, the
24 notation that the Court mentioned was accurate in every way, that there
25 may be things that happen subsequently by court rule that might move a

1 case around. But it's our contention that it's the statutory scheme that
2 controls here.

3 And the case that we cited is very clear on that proposition.
4 And I don't think that the State really has even a contrary position about
5 what controls. And we all know that that statutes control to the extent
6 there's any inconsistency.

7 THE COURT: All right. Thank you, counsel.

8 [Noise coming from Bluejeans videoconference]

9 THE COURT: If anyone is on Bluejeans please mute your
10 phone or computer. We have another hearing going on. Thank you.
11 State.

12 MR. CHEN: Thank you, Judge. So the statute does control,
13 but our position is essentially that the statute -- that defense is making
14 an argument that almost defies logic by going so strict about the words
15 in the statute that this case could never receive an order or warrant of
16 execution.

17 And what I mean by that is this case is 20 years in the making.
18 How many, as you mentioned, Your Honor, earlier, how many judges
19 are on the bench for that long or even longer based upon that length of
20 what the post-conviction proceeding. Here what we have is that all the
21 cases that were death penalty were randomly assigned to one of these
22 four homicide tracks.

23 And what I can say about the statutory construction that Mr.
24 Anthony's referencing is that he even said that when the three judge
25 panel was in place the statute said his successor. So are we to assume

1 that now that for history we've had female judges, we have a majority of
2 female judges here in the Eighth Judicial District Court, that no female
3 judge could potentially ever hear this case simply because the statute at
4 one point said his. I think the spirit of that statute is that the case is
5 supposed to go strictly to the department to which it's assigned. If
6 Department V cases in fact were transferred here, then we believe that
7 this is the appropriate department. That's all I have.

8 THE COURT: All right. I'll give counsel each an opportunity
9 to review the document and see if you just want to add anything. I know
10 I'm just handing it to you right now.

11 [Pause]

12 THE COURT: Anything to add?

13 MR. ANTHONY: Your Honor, I would just say obviously from
14 what the Court notice shows, it shows that the case was transferred from
15 Judge Glass. That was Department V. So that is consistent with our
16 position. Of course, I haven't actually seen this page before, but I have
17 no reason to doubt that it's authentic and I don't have any dispute about
18 whatever this is what in fact it purports to be. So I don't have any debate
19 about that.

20 The only thing I would say, Your Honor, just very briefly. In
21 response to the State's argument, statutes in the olden days used to use
22 the word he. And even though they use the word he they also apply to
23 female judges, you know. So I don't think that the argument about his
24 successor necessarily meant that in 2001, a woman couldn't sit on a
25 three judge panel.

1 THE COURT: I'm not buying that argument so --

2 MR. ANTHONY: Oh, okay.

3 THE COURT: That's fine.

4 MR. ANTHONY: All right.

5 THE COURT: I didn't really mean to cut you off, but you didn't
6 need to go any further because I'm not buying the argument that it's he
7 so we can't have a female judge hear this case. So --

8 MR. ANTHONY: Understood, Your Honor.

9 THE COURT: -- anything else regarding this sheet or
10 anything else regarding your argument?

11 MR. ANTHONY: Nothing else on the sheet, Your Honor,
12 relevant to our argument.

13 THE COURT: And how about from the State?

14 MR. CHEN: No, Your Honor.

15 THE COURT: All right. Under the statute it says successor
16 judge by court. By 2008, I was, since all the cases were transferred out
17 of that department, I am the successor judge on this particular case.
18 Also I find that the creation of the homicide team allows me to hear this
19 matter. And so I am going to deny the motion.

20 The next motion is to disqualify the DA's Office. And I just
21 want to make sure, counsel, I don't know Mr. Anthony, Mr. Levenson,
22 who is going to handle this. I do have a question for each side. Defense
23 is not arguing a conflict of interest or arguing to separation of powers.
24 Because I think the State, in their opposition, addressed the separation
25 of powers, but then the also talked about a conflict of interest. So I just

1 want to make sure we're strictly separation of powers argument. Is that
2 correct?

3 MR. LEVENSON: That's correct, separation of powers.

4 THE COURT: Okay.

5 MR. LEVENSON: And, Your Honor, may I approach the
6 lectern?

7 THE COURT: Sure.

8 MR. LEVENSON: Thank you, Your Honor. So we're asking
9 the Court this morning to disqualify the Clark County District Attorney's
10 Office from continuing to represent the State in prosecuting Mr. Floyd's
11 case. And we're asking this Court, pursuant to NRS 252.100, to appoint
12 another person to perform the duties of the District Attorney.

13 This Court has broad discretion in determining who appears
14 before it. And this Court has an affirmative responsibility for controlling
15 the conduct of the attorneys practicing before the Court. So we think
16 this Court should disqualify the District Attorney, because there is and
17 this is the standard and I believe we agree with the State on this. There
18 is at least reasonable possibility that some specifically identifiable
19 impropriety did occur and the likelihood of public suspicion outweighs
20 keeping the District Attorney on this case.

21 So with respect to the first part, the identifiable impropriety, DA
22 Wolfson expressed opposition to A.B. 395 and the two Senate
23 Prosecutors Cannizzaro and Scheible ensured the bill did not get out of
24 the judiciary committee or even heard for a vote, and that of course
25 happened yesterday. With respect to the second part of the test, which

1 is a likelihood of public suspicion, the media has highlighted the
2 impropriety of the senate prosecutors and the public suspicion about this
3 can only grow from there.

4 So I'd like to just briefly go over the fact, which I think are
5 important for this Court to look at. Mr. Floyd was -- his sur petition to the
6 US Supreme Court was denied on November 2nd, 2020. At that point he
7 was out of legal options and a District Attorney at any point could have
8 issued a warrant, an execution warrant.

9 Five months later, almost five months later on March 24th,
10 Assembly Bill 395 which is the bill proposing to abolish the death penalty
11 was read for the first time in the judiciary committee. Two days later, the
12 Review Journal issued an article stating that the DA's Office would seek
13 a warrant against Mr. Floyd.

14 And this is what DA Wolfson said to the newspaper: I think
15 the timing is good. Our legislative leaders should recognize that there
16 are some people who commit such heinous acts, whether it be the
17 particular type of murder or the number of people killed, that this
18 community has long felt should receive the death penalty. I'm not
19 purposefully moving forward with Floyd's case because of the
20 legislature, but because they're occurring at the same time, I want our
21 law makers to have their eye wide open because this is a landmark
22 case.

23 About a month later on April 13th, A.B. 395 was approved on
24 the assembly floor. And the very next day, April 14th, the DA's Office
25 sought a warrant for Mr. Floyd's execution. DA Wolfson has a

1 supervisory role over the two senate prosecutors. He made his
2 preference known to the media regarding the abolition bill. And he
3 appears to abuse his power in his office to highlight a case and tell the
4 legislative leaders how they should vote on the pending legislation.

5 The political implications of the DA's statements have been
6 picked up by the press. And I believe that I gave to the Court a list of
7 seven articles which we intend to file electronically later today.

8 On March 30th, 2021, the Review Journal printed an article
9 that said the DA to Proceed with Death Penalty Against Gunman in 1999
10 Store Killings. That article pointed out that DA Wolfson supported the
11 death penalty and that two prosecutors serving the Nevada Legislature,
12 including senate majority leader Cannizzaro were going to decide the
13 fate of the bill.

14 April 18th, 2021, the Nevada Independent issued an article
15 called Criminal Justice Reform Shouldn't Depend on a Deputy District
16 Attorney. And that article pointed out that Cannizzaro's day job as a
17 Deputy DA and that her boss DA Wolfson had recently testified in
18 support of a -- against A.B. 395.

19 On April 19th, 2021, the Review Journal issue -- published an
20 upend entitled Trending Death, which pointed out the barrier to the
21 passes of the abolition bill was through the senate judiciary committee
22 that had two senate prosecutors on the panel.

23 May 7th, 2021, the Nevada Appeal published an article called
24 Nevada Prosecutors Are Standing in the Way of Abolishing the Death
25 Penalty. Again it pointed out that a pair of senators who are also

1 prosecutors could derail the abolition effort.

2 May 12th, 2021 Nevada Appeal published another article
3 Prosecutor Senators Pressed to Quit Dragging on Death Penalty
4 Abolition Bill. And again this article pointed out that key senators are
5 also Clark County Prosecutors.

6 So yesterday, the abolition bill died without a hearing, without
7 Cannizzaro or Schieble even bringing it to the floor. And in article
8 published by the Review Journal yesterday called Death Penalty Ban
9 Fails in the Legislature, it talks about after the bill cleared the Assembly
10 by a wide margin the legislation stalled in a Senate Judiciary Committee.
11 The committee included, and this is a quote: Two democrats, majority
12 leader Nichole Cannizzaro and fellow Las Vegas Senator Melanie
13 Schieble, both of whom are prosecutors in a Clark County DA's Office
14 where DA Steve Wolfson has been outspoken in his support for keeping
15 the death penalty.

16 Also yesterday the Huffington Post issued an article called
17 Nevada Democrats Squander Opportunity to End the Death Penalty.
18 And this article points out again you have the Senate Judiciary Chair
19 Melanie Schieble and the Senate Majority Leader Nichole Cannizzaro
20 both work as prosecutors for the Clark County DA's Office when the -- is
21 out of session. And their boss DA Wolfson has testified against A.B.
22 395. So Schieble who had -- also the article talks about how Schieble
23 had previously stated her support for ending the death penalty, did not
24 hold a hearing. And Cannizzaro never committed to holding a floor vote.

25 It is clear from what happened yesterday that the senate

1 prosecutors were involved in derailing the bill. Cannizzaro's statement
2 makes clear that with weeks left in the session she decided there was no
3 path forward. She as a senate majority leader had the ability to get rid of
4 all deadlines on bills. And this bill could have circulated for another two
5 and a half weeks. But she decided at that point there was no consensus
6 on the bill. Questionable who she was discussing this with, but it was
7 her decision and her decision alone that killed the bill. It's important to
8 note why the Assembly passed this with a clear majority this bill
9 languished for exactly one month without a vote. And again that was
10 because of the two senate prosecutors.

11 And while the DA's statements and Cannizzaro's statements
12 yesterday certainly raise questions about how closely they were working
13 together, the answers actually matter less than what members of the
14 public might ask. Disqualification standards does not ask whether public
15 suspicion is confirmed but whether there is a reasonable likelihood of
16 suspicion.

17 And there is no overwhelming interest in keeping the District
18 Attorney on this case. This case has not been in state court in over 10
19 years. None of the prosecutors are left on this case. And whoever has
20 this case would have to get up to speed with a lengthy record.

21 On the other hand, Your Honor, there is a strong interest in
22 disqualifying the DA's Office from this case. The citizens of this state, as
23 well as Mr. Floyd, deserve the assurance that this lawyers representing
24 the state who are seeking Mr. Floyd's execution, the harshest penalty
25 that there is in law, are doing so fairly and not to further an agenda to

1 manipulate the other branches of government.

2 Does this Court have any questions?

3 THE COURT: I do. I didn't see in either briefing the specific
4 status of the two senators. Are they on leave of absence right now? Are
5 -- do they resign and then come back to the office at the end of the
6 legislative session? Are they getting a pay check from the DA's Office or
7 a paycheck from the Legislative Bureau? I don't have that information.
8 Do you have that information, counsel?

9 MR. LEVENSON: So this is the answer I have for you. It
10 doesn't matter because AG Opinion 357, which is a December 22nd,
11 1954 opinion, the AG stated that a leave of absence of state employees
12 for purposes of serving as elected members of the legislature is not
13 sanctioned by section 1, article 3. So they can't be on leave. If they're
14 not on leave, then they're getting paid by both. And if they are on leave,
15 it's not permitted by the Attorney General's Opinion. So we'd say the
16 answer doesn't matter whether they're on leave or not. They would not
17 be permitted to be on leave and then be rehired.

18 THE COURT: So any actions they've taken since they've
19 become state senators are a nullity?

20 MR. LEVENSON: No, absolutely not. And we're not asking
21 this Court at all to get into the process of what composes the legislature.
22 This is a very finite and simple issue, whether the DA's Office should still
23 be prosecuting this case. Whatever happens in the legislature, we're not
24 asking you to get involved in. We're asking you to control the people
25 that are in front of you practicing. And in this case the DA's Office

1 should not be prosecuting Mr. Floyd's case.

2 It's a very simple question, unlike the other cases, the other
3 separation of powers case. I know there was one before you before that
4 asked for the striking of the death penalty. Other ones asked for a
5 reversing of the conviction. This is a very finite point we're asking, which
6 is who is prosecuting this case.

7 THE COURT: So by having these two state senators, they've
8 disqualified the entire office, is -- the DA's Office?

9 MR. LEVENSON: They have. Because of the -- again we
10 don't need to know what was in their head. We just need to know what
11 the public suspicion would bear out. And based on the seven articles,
12 and there are more, but just based on the seven articles, people have
13 picked up -- and social media as well, and I believe we have a footnote
14 in our brief about the social media. It is clear that people have realized
15 that the two people that stood in the way of the abolition bill are deputy
16 district attorneys and their boss has publicly come out against A.B. 395.
17 And yesterday it bore out.

18 THE COURT: Is it the Court's position to get into the
19 legislative thought process of the two senators?

20 MR. LEVENSON: Absolutely not, Your Honor. Again we
21 don't need to do that.

22 THE COURT: Okay.

23 MR. LEVENSON: We don't need to know what's in the brain
24 of the legislatures -- legislators. We just need to know what the public
25 suspicion is. And again we point to the press as bearing that out.

1 THE COURT: All right. Thank you.

2 State.

3 MR. CHEN: Thank you, Your Honor. This Court's ruling
4 shouldn't be based on media articles. It shouldn't be based on Twitter
5 feeds. It shouldn't be based on that type of public perception.

6 What we have here is they're essentially just trying to say that
7 the DA's Office is cloaked in this impropriety simply because two of the
8 deputies happen to also serve in our office. And as the Court's question
9 earlier, I know for a fact that they are not compensated by the office
10 while they're serving their duties. It changes a lot of things for them by
11 taking time off and serving in the legislature instead of working in the
12 Clark County District Attorney's Office. So our position is those are two
13 separate entities. However, there's just nothing that Mr. Levenson has
14 pointed out that puts this DA's Office in a light that is either contrary to
15 law or contrary to what the office is trying to do right now in Mr. Floyd's
16 execution.

17 There is a statute that calls for the order and the warrant of
18 execution. And by statute we are fulfilling that statute. DA Wolfson has
19 made opinions regarding the death penalty as well as A.B. 395, but
20 there's nothing that prohibits him from doing that. And in fact, a lot of
21 individuals running for office probably have an opinion on something like
22 this. It would not automatically mean that they can't fulfill their duties
23 whether from the bench or from the District Attorney's Office, because
24 these are statutorily granted.

25 Now I would also say that when I was reading the reply for

1 instance in this case that was filed by the Mr. Levenson and Mr.
2 Anthony, it basically had some really stinging things to say about the
3 State's opposition. And I was thinking for a moment that wow, this is so
4 stinging that maybe I'm wrong. Maybe I'm doing something wrong, but
5 then I looked to the end of their conclusion and it basically says,
6 pursuant to NRS 252.100, it says the Court should appoint some other
7 person to perform the duties of the District Attorney.

8 Now if you read that statute in conjunction with NRS 176.495,
9 the only two individuals or offices that can even seek a warrant of
10 execution are the Attorney Generals or the District Attorney's Office that
11 prosecuted the case, which would be the Clark County District Attorney's
12 Office. Even under what they're proposing it would essentially mean if
13 this Court were to all of the sudden appoint a third entity as the
14 prosecutor in this case, a warrant of execution could never be fulfilled.
15 And to me it seems like their motivations to get the Clark County District
16 Attorney's Officer off of this case are clear when they're calling for the
17 Court to appoint a third party prosecutor.

18 I would also just point out that in terms of the public and
19 perception that Mr. Levenson was talking about, the Governor of this
20 state also issued a statement after A.B. 395 failed. And he had
21 indicated that he wanted -- his preference would have been that the
22 legislation modified some things regarding the death penalty bill, but he
23 didn't want something and wouldn't sign something that called for its
24 outright abolition. And that's what A.B. 395 did. So to only blame two
25 senators who are a part of the larger senate, I think is a disingenuous

1 argument.

2 But at the end of everything, Your Honor, the State is merely
3 fulfilling its duty. Mr. Floyd has been convicted and now we're seeking
4 to fulfill the next steps. And so there really is no reason for this office to
5 be removed from the case.

6 THE COURT: Do the two Deputy DA/Senators hold a public
7 office? Because that's under the case law that you've cited as far as
8 only if the person holds a public office. And your argument is only the
9 DA, Mr. Wolfson versus the two senators and Deputy DAs.

10 MR. CHEN: Our position is that they are employees of the
11 office. But they are not the public officers when they serve as Deputy
12 District Attorneys.

13 THE COURT: Does the statute say public officers or public
14 office?

15 MR. CHEN: I believe it's officers, Judge.

16 THE COURT: And are they public officers by being Deputy
17 District Attorneys under the Executive Branch?

18 MR. CHEN: I don't believe that they are. I think Mr. Wolfson
19 is the one who holds the office. He's the one who sets the policies for
20 the office. And that's really what the executive function is, they're setting
21 the policies. So it's our position that they would not qualify.

22 THE COURT: All right. Thank you.
23 Counsel.

24 MR. LEVENSON: Thank you, Your Honor. In answer to your
25 question, the statute doesn't talk about public officer or offices, it talks

1 about their functions. And so we think that they would qualify as the
2 prosecutor -- senate prosecutors.

3 Just three quick points, if this Court were to appoint under the
4 statute, that person appointed or persons would be acting on behalf of
5 the District Attorney's Office. So I disagree with Mr. Chen that a warrant
6 couldn't be issued. They would be acting as the District Attorney's
7 Office.

8 [Noise coming from Bluejeans videoconference]

9 THE COURT: I think that's through the jail system so it's --

10 MR. LEVENSON: Yeah.

11 THE COURT: -- we can't do anything about that.

12 MR. LEVENSON: Can I have just a moment, Your Honor?

13 THE COURT: Sure.

14 MR. LEVENSON: It's problem not reading my own
15 handwriting. There were amendments that were brought forward to the
16 senate prosecutors, today is Friday, on Wednesday evening as far as
17 we understand it. And those amendments would have done what the
18 Governor had requested. So again, the death of A.B. 395 was at the
19 hands of the senate prosecutors.

20 And again we don't have to know what's in their brains. We
21 don't have to scoop them out and examine them. What we have to look
22 at is the likelihood of public suspicion.

23 And Mr. Chen says don't look at the media reports. But that's
24 how we look at what the public is doing. You look at a poll; you look at
25 the media reports. You see what the media is reporting. You look at the

1 comments underneath. So I think it's a valid use to look at what the
2 media was able to point out was the problem. And that problem again
3 as I said bore out yesterday afternoon.

4 Unless the Court has any other questions.

5 THE COURT: Counsel, statute questions, 252.070 is that
6 correct.

7 MR. LEVENSON: Right.

8 MR. CHEN: 100, I believe is the one they cite, 252.100.

9 THE COURT: 100, let me pull it up again.

10 MR. LEVENSON: I'm sorry. So I quoted the article 3, section
11 1. I didn't realize you were looking at the statute.

12 THE COURT: State, you said 100 -- .100?

13 MR. CHEN: Yes, that's what's cited.

14 THE COURT: I'm going to ask both sides a question under
15 252.070, sub section 1. It says the appointment of a Deputy District
16 Attorney, that's what we have here, must not be construed to confer
17 upon that deputy policy making authority for the office of the District
18 Attorney or the county in which the Deputy District Attorney is employed.
19 So under that statute it says that the appointment of a Deputy DA does
20 not confer that deputy policy making authority. Does that have any
21 impact on your argument? And that's a question for both sides.

22 MR. CHEN: Your Honor, I --

23 THE COURT: Do you want to look at it real --

24 MR. LEVENSON: Thank you, Your Honor.

25 THE COURT: 070, you can take it.

1 MR. LEVENSON: Thank you. From our point of view, Your
2 Honor, it doesn't change anything. You still have DA Wolfson making a
3 public statement. He is the public figure. And there's still the suspicion
4 that pressure is being borne upon the prosecutors.

5 And one other point, Your Honor, as far as I understand it, the
6 only person who can decide not to pay someone in his office is DA
7 Wolfson. It's his determination whether to put someone on leave and
8 when to bring them back. And I still believe that the 1952 AG Code --
9 AG opinion says he cannot do that. But he is giving them the
10 opportunity to serve in the legislature and then come back.

11 So again public suspicion you would wonder if they didn't do
12 what they were supposed to do, would they be invited back in the same
13 positions. So again, we have to look at the likelihood of public suspicion.
14 And I think that has been fairly met here.

15 THE COURT: All right. Thank you.

16 State, your analysis of 252.070, subsection (1).

17 MR. CHEN: Yes, thank you, Your Honor. We did include that
18 in our response. We do believe that again there is a difference between
19 the senators who serve in our office from the elected District Attorney
20 that's created through NRS 252.

21 We also pointed to a case for instance, *Price v. Goldman*.
22 That was one where they said not any deputy can accept -- can approve
23 a wire intercept. And they made it very specific that there's a difference
24 between the person and the powers that the District Attorney can have
25 versus just the mere deputy.

1 And piggybacking off of NRS 252.070, you have 252.100 that
2 is cited by defense and the one that call for us to be removed and
3 someone else to be appointed. And Mr. Levenson had just said that
4 some other person would be standing in for the DA's Office. But as they
5 had just said a moment ago, when they were arguing about what
6 department this should be in, they said the statutes are most controlling.
7 But the statute on issuing a warrant, NRS 190 -- 176.495 doesn't say a
8 substitute. So in the case of where the case should be heard, it does
9 say the subsequent department. But when you're talking about who can
10 obtain an actual warrant of execution, there's only two parties referenced
11 by the statute. And if the statute was most controlling then that means it
12 has to be the Attorney General's Office or the District Attorney's Office.
13 So there's just no basis for the removal of our office, Your Honor.

14 THE COURT: All right. Thank you. This is the defense
15 motion. You have the very last word.

16 MR. LEVENSON: Again, Your Honor, I think it's really
17 important that we don't get lost in the weeds here. We don't need to
18 know specifically what Cannizzaro and Schieble were thinking. We have
19 the DA's point of view about abolishing 395. And the standard is
20 likelihood of public suspicion. So I think again we have fairly met that
21 burden.

22 THE COURT: On this particular matter I did want to hear from
23 both parties and I appreciate your presentation today. I'm going to
24 consider further your arguments this morning and I will endeavor to have
25 a decision out before 5 o'clock today. I have a calendar starting

1 basically now and I have an evidentiary hearing this afternoon, but in
2 between my various hearings I'm going to look at these matters again.
3 And again my goal is to have a decision out by 5 this afternoon. Thank
4 you, counsel.

5 Now it's my understanding is that there's another motion
6 pending and the parties had agreed to -- or two other motions. Parties
7 had agreed to continue those motions to another date. Have the parties
8 discussed a convenient time for that?

9 MR. CHEN: So, Your Honor, we have spoke --

10 THE COURT: Whether it's in this department. I've already
11 ruled it's going to be in this department, but I don't know if the parties
12 have discussed a convenient time for each side.

13 MR. CHEN: So this one we had a little bit of a different
14 opinion. We'll leave it to the Court's discretion. Our position would be
15 there are other hearings that are going on both here and in Federal
16 Court. They have other actions here in State Court that are outside of
17 your department. And then they also have federal actions as well. So
18 my preference was going to be to continue if for two weeks. I believe
19 they wanted 30-day status checks. So I know it's not a grave difference
20 between the two weeks and the 30 days.

21 But our -- the State's position would essentially be that the
22 proposed order that we have right now and we're asking the Court to
23 sign an order for the week of July 26th. Based upon that, I would rather
24 have shorter status checks to make sure that we can fulfill all necessary
25 obligations prior to that date. So our preference would be for two weeks.

1 But I do believe they're seeking for a longer day if we're going to hear
2 those motions.

3 MR. LEVENSON: And, Your Honor, --

4 THE COURT: Let me hear from defense.

5 MR. LEVENSON: -- we're certainly in agreement that we're
6 ask -- we're not asking the Court to sign any order today. We're asking
7 to come back. We have been in Federal Court. We're going to be back
8 in Federal Court next week. Based on what we have heard from the
9 Judge, we believe that there will be -- there could be a stay for 90 or 120
10 days depending on how things start to play out, until execution protocol
11 is actually given over by Nevada Department of Corrections. So at this
12 point we think two weeks is too soon and we would ask for 30-day status
13 checks to keep the case moving.

14 THE COURT: And do you have a specific date in Federal
15 Court right now?

16 MR. LEVENSON: We return --

17 THE COURT: I know you're going today or soon.

18 MR. LEVENSON: We return on Thursday, this Thursday.

19 THE COURT: Okay. And is the Judge -- the Federal Court
20 Judge -- what specific issue is the Judge dealing with on Thursday?

21 MR. LEVENSON: I think we're --

22 MR. ANTHONY: Your Honor, the issue that's going to be
23 dealt with is the issue of document disclosure from the Nevada
24 Department of Corrections. We're going to be reviewing a privilege log
25 that was put together by the Department of Corrections. And secondly,

1 we're going to be proffering to the Court what the plaintiff expects with
2 respect to the discovery period that we're asking for. So we're going to
3 be talking about who we're going to depose. What type of Rule 35
4 subpoenas we're going to be issuing to other jurisdictions. There's
5 going to be a site inspection. Those are things we're going to be
6 discussing next Thursday.

7 THE COURT: All right. What I'm going to do is I'll set this --
8 the matter for argument three weeks from today. The reason why I'm
9 splitting the baby here so to speak is that every two week is a homicide
10 calendar and this will probably be lengthy argument and this way I'll
11 have the whole morning I can dedicate to this matter. All right. So we'll
12 go out three weeks at 8:30 on the following day.

13 THE CLERK: Okay. So it'll be June 4th.

14 MR. CHEN: Your Honor, can we anticipate that actually that
15 will be at the end of the calendar because of the lengthy argument?

16 THE COURT: No, I won't have a calendar.

17 MR. CHEN: Oh, I see.

18 THE COURT: That's what I'm saying for this --

19 MR. CHEN: Okay.

20 THE COURT: - because every two weeks I have the homicide
21 calendar, so that's why I'm passing it three weeks so I won't have a
22 homicide calendar.

23 MR. CHEN: Understood. Thank you.

24 THE COURT: All right. Thank you.

25 MR. LEVENSON: Thank you, Your Honor.

1 MR. ANTHONY: Your Honor, --

2 THE COURT: Yeah.

3 MR. ANTHONY: -- sorry, just one more thing. I understand
4 the Court made a ruling on the transfer motion. I know -- I was
5 wondering what the process was going to be for preparing the order.
6 The reason that I ask that, Your Honor, is that under EDCR 1.60(h) I
7 need to file an objection within 5 days with the presiding criminal judge.
8 I believe that may be Judge Jones now.

9 THE COURT: Yeah.

10 MR. ANTHONY: I know that Your Honor used to be the
11 presiding criminal judge. So I don't know if there -- I was going to ask
12 about any logistics about -- I don't know if the Court had any ideas about
13 a timeframe for an order. And the only reason I ask is just so I can meet
14 whatever deadline I need to meet for raising the objection with Judge
15 Jones.

16 THE COURT: I'll provide that information in my minute order
17 this afternoon.

18 MR. ANTHONY: Thank you, Your Honor.

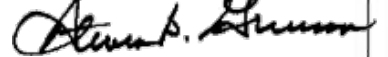
19 THE COURT: Okay. All right. Thank you.

20 [Hearing concluded at 9:10 a.m.]

21 *****

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the
23 audio/video proceedings in the above-entitled case to the best of my ability.

24 
25 Jessica Kirkpatrick
Court Recorder/Transcriber



1 **ORDR**

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4 THE STATE OF NEVADA,

5 Plaintiff,

6 -vs-

7 ZANE MICHAEL FLOYD,

8 Defendant.

CASE NO: 99C159897

DEPT NO: XVII

9
10 **DECISION AND ORDER DENYING DEFENDANTS MOTION TO TRANSFER**
11 **CASE UNDER EDCR 1.60(H)**

12 DATE OF HEARING: MAY 14, 2021
13 TIME OF HEARING: 8:30 AM

14 THIS MOTION having come on for hearing before the Honorable MICHAEL
15 VILLANI, District Judge, on the 14th day of May 2021, with the Defendant not being
16 present. The Court having considered the matter, including briefs, transcripts, arguments of
17 counsel, and documents on file herein, now therefore, the Court makes the Decision on
18 Defendant's Motion to Transfer Case Under EDCR 1.60(H).

19 On December 28, 2008, all Department XVII's civil and criminal caseloads were
20 transferred to Department III, and all of Department V's civil and criminal caseloads were
21 transferred to Department XVII. The transfer of cases from Department V to Department
22 XVII included the instant case. As of December 31, 2020, Department V only hears civil
23 matters. See Administrative Order 20-25. Moreover, since 2008, while this matter was still
24 pending before the Nevada Supreme Court, neither party objected to the transfer of the
25 instant case to Department XVII. Additionally, since late 2008, the original Judge.

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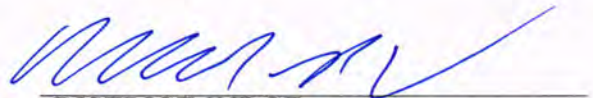
1 EDCR 1.60(a) grants the authority of the Chief Judge to “assign and re-assign all
2 cases pending in District Court. Furthered, pursuant to EDCR 1.30(b)(5), the Chief Judge
3 has the authority to determine the regular and special assignments of District Court Judges.
4

5 On July 1, 2017, the Eighth Judicial District created the Homicide Team. See
6 Administrative Order 17-05. The Order provided that four departments would exclusively
7 hear homicide cases to increase case management efficiency. In 2018, Department XVII
8 was assigned to the Homicide Team. Additionally, Department XVII was assigned the
9 present matter in 2008 and in 2018 assigned to hear all homicide matters.
10

11 Therefore, THIS COURT FINDS that Department XVII is the proper
12 Department to preside over the instant case.

13 **ORDER**

14 THEREFORE, IT IS HEREBY ORDERED that Defendant’s Motion to Transfer Case
15 Under EDCR 1.60(H) is hereby denied.
16

17 

18 DISTRICT JUDGE

19 MICHAEL P. VILLANI
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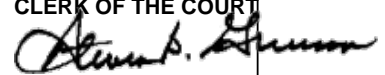
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 4th day of June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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BY /s/ Samantha Albrecht
Samantha Albrecht
Court Clerk for Judge Villani



1 RTRAN

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 ZANE M. FLOYD,

9 Defendant.

CASE#: 99C159897

CASE#: A-21-832952-W

DEPT. XVII

10
11 BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE
12 FRIDAY, JUNE 4, 2021

13 **RECORDER'S TRANSCRIPT OF HEARING:**
14 **STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO**
15 **ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND**
16 **SECOND SUPPLEMENTAL WARRANT OF EXECUTION.**
17 **DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION**
18 **TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION**
19 **AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION.**

20 APPEARANCES:

21 For the State:

ALEXANDER G. CHEN, ESQ.

Chief Deputy District Attorney

BRIANNA STUTZ, ESQ.

Deputy District Attorney

22 For the Defendant:

BRAD D. LEVENSON, ESQ.

DAVID ANTHONY, ESQ.

Assistant Federal Public Defenders

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25 RECORDED BY: KRISTINE SANTI, COURT RECORDER

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Las Vegas, Nevada, Friday, June 4, 2021

[Hearing commenced at 8:35 a.m.]

THE COURT: Good morning, everyone.

MR. CHEN: Good morning.

THE COURT: We have two motions on calendar this morning. I think the first one we should handle is the motion to strike -- everyone have a seat -- and that was filed by counsel for Mr. Floyd.

MR. ANTHONY: Judge, we also -- if the Court would entertain it, both Mr. Chen and I are ready to argue the motion for reconsideration of the disqualification motion. If you would entertain that, we're ready to go on that as well.

THE COURT: I haven't reviewed that because it's set for next week, I believe.

MR. ANTHONY: Next Friday; correct.

THE COURT: Yeah, I just --

MR. ANTHONY: Okay.

THE COURT: -- haven't looked at it. I mean, I know it exists, I have not reviewed it.

So I think the motion to strike should be argued first.

MR. LEVENSON: Your Honor, may I approach the lectern.

THE COURT: Absolutely.

MR. LEVENSON: So Mr. Floyd's motion to strike the State's order and warrant of execution is predicated on Nevada Statute 176.355, the title of the statute is called Method, Time, and Place. This was a

1 statute that was passed in 1967. There is no dispute that at the time that
2 the statute was passed that when the legislature said “the state prison”
3 what they were referring to was the Nevada State Prison. It was the only
4 state prison in existence at the time.

5 If we look at the rules of statutory construction that apply here
6 we have a couple things to look at, first of all the statute uses the word
7 “the” and “the” is a definite article. As a rule of statutory construction the
8 word “the” refers to a specific reference. It doesn’t say “a state prison”
9 and it doesn’t say “any state prison.” This is a rule of statutory
10 construction; it has been followed by appellate courts in Nevada.

11 The plain language also says state prison singular, which
12 means we’re talking about one place. The State’s proffered execution
13 warrant that they initially proffered to the Court similarly acknowledged
14 that when they used the word “the state prison” what they were referring
15 to is the Nevada State prison.

16 There’s also a preexisting historical understanding. We cited
17 to Your Honor the *Kramer* case, the *Kramer* case was from the 1940s
18 and it was based on a predecessor statute where the Nevada Supreme
19 Court recognized that the word “the state prison” was a reference to the
20 Nevada State Prison located just outside of Carson City, Nevada.

21 The legislature also has a long history of requiring that
22 executions take place at the Nevada State Prison. My understanding,
23 from looking at the historical society regarding the Nevada State Prison,
24 is that the legislature first passed the statute in 1901 requiring that after
25 1903 all executions had to take place at the Nevada State Prison. Before

1 that executions took place at the county seat where the defendant was
2 convicted. So there is legislative intent starting in 1901 and it carries
3 forward all the way until 1967 when the legislature passed the current
4 version of NRS 176.355.

5 The State's arguments are few in their opposition to our
6 motion. The first thing the State correctly acknowledges is that there was
7 only one state prison in existence when the statute was enacted. The
8 next argument that the State raises is what I would characterize as a
9 strawman. The State argues that the statute doesn't say there is only
10 one state prison. Well, of course not. It just talks about "the state
11 prison."

12 The State also argues -- and I think this is the point where we
13 have the most tension between the parties -- is the State argues correctly
14 that the legislature apportioned money to fund the execution chamber in
15 Ely, Nevada, at Ely State Prison.

16 So the argument the Court needs to sort out is -- and for the
17 purposes of this argument, we will assume that the legislature had an
18 oversight. I don't think any of us would debate that when the legislature
19 apportioned the money for Ely State Prison that they -- at that time
20 wanted executions to take place at the Ely State Prison. For purposes of
21 argument, I'm willing to acknowledge that.

22 The question the Court has to answer is, can you take the
23 intent of the legislature in 2015 and can you transfer it and import it to the
24 intent of the legislature in 1967? The answer to that question has to be
25 no. There is controlling authority cited in Mr. Floyd's reply brief citing to

1 the *Orr Ditch* case that talks about when you assess legislative intent you
2 do so at the time the statute was enacted. You don't look at subsequent
3 events, like the funding of the Ely State Prison, and say we can transfer
4 the intent of the legislature in 2015 and say that that's what the
5 legislature was assuming in 1967.

6 Again, we're willing to acknowledge that the legislature made
7 an oversight here. But the way the democratic process works is that if a
8 statute needs to be amended, it needs to be amended by the legislature.
9 The one thing that we know for certain is that courts do not amend
10 statutes. So where as Your Honor could probably look at the totality of
11 these circumstances and say, well, they apportioned the money for the
12 Ely State Prison, that can't suffice to say that the statute meant
13 something that it absolutely did not mean to the legislature when they
14 passed the statute in 1967.

15 Now, the State still has the warrant that they've proffered to the
16 Court, it's still the one for Mr. Floyd's execution at the Nevada State
17 Prison, they acknowledged in an addendum that they recently filed that
18 that was a mistake. So at this point Your Honor doesn't have a corrected
19 warrant, I don't know if the State's intention is to ask the Court at some
20 point to interlineate to correct the typographical error, but the bottom line
21 is, from Mr. Floyd's perspective, we do not want to delay, we do not want
22 to hold back an argument that we know is going to be a real imminent
23 argument at the point that the State asked this Court to interlineate, to
24 correct the location from the Nevada State Prison to the Ely State Prison.

25 It's our argument that the language of the statute is plain, the

1 intent of the legislature is plain, and that authority from the Nevada
2 Supreme Court does not allow this Court to transfer the intent of the
3 legislature from 2015 into the intent of the legislature in 1967.

4 For those reasons we would ask that the Court grant our
5 motion to strike the State's supplemental warrant to the extent that it's
6 going to be corrected to say that the execution should occur at Ely State
7 Prison.

8 THE COURT: When the Nevada State Prison in Carson City
9 was closed, would that in effect abolish the death penalty, pending
10 amending the statute?

11 MR. LEVENSON: I believe as a practical matter, Your Honor, I
12 believe it would, unless the Department of Corrections announce that
13 they were prepared to have the execution go forward at the place
14 designated under state law, which is the Nevada State Prison. So if it is
15 the warrant that's before the Court, without being corrected or
16 interlineated, it would not be inconsistent with Nevada state law for the
17 execution to proceed at that location. But until that statute is amended by
18 the legislature, effectively that would mean that an execution could not
19 take place at the Ely State Prison.

20 THE COURT: 176.355(3), as you had mentioned, says must
21 take place at the state prison. Isn't Ely State Prison the state prison?

22 MR. LEVENSON: Well, Ely State Prison is a state prison, High
23 Desert State Prison is a state prison, Lovelock is a state prison. So no
24 argument that it is not a state prison. What I can say for certain is that it
25 is not the state prison that was the intent of the legislature when they

1 passed the statute in 1967.

2 THE COURT: Well, we only had one state prison back --

3 MR. LEVENSON: That's correct, Your Honor.

4 THE COURT: -- when the statute was created.

5 MR. LEVENSON: That's correct.

6 THE COURT: Okay. Thank you.

7 Mr. Chen.

8 MR. CHEN: Thank you, Your Honor.

9 I don't have much to add, other than, based on the Court's
10 questions, we would agree with the point that, in essence, if you
11 believe --

12 THE COURT: I wasn't necessarily agreeing or disagreeing. I
13 just wanted to pose that question -- I'm going to pose it to you as well -- is
14 that the statute says the state prison, at the time it was Carson City.

15 MR. CHEN: And I misspoke in saying that. But just in terms of
16 that philosophy, and that line of questioning, Your Honor, what we would
17 say is effectively if this Court were to rule that it has to take at the state
18 prison, then I would point out that the state prison isn't in a -- now that's --
19 I can't think of the word right now -- but it's lower case state prison. So
20 it's just at the state prison, which to us specifies that it has to take place
21 at a Nevada state prison, such as Ely.

22 But what I was also going to say was that you look at the plain
23 language of a statute, but then, in addition, if you're going to do statutory
24 interpretation, the case law is clear it can't lead to an absurd result.
25 Clearly, if this Court were to find that the state prison is only one place

1 that's now closed, and was open at the time, it would lead to an absurd
2 result, because although Nevada has passed the death penalty, has the
3 death penalty, has not abolished the death penalty. By this Court ruling
4 that the statute applies only to the one place that used to be near Carson
5 City, it would lead to an absurd result. And that's -- cases like *Sheriff*
6 *versus Burcham*, 124 Nevada 1247.

7 So our position would be that certainly when this statute was
8 created the legislature intended for a death penalty to take place at a
9 prison, at the time there was only one prison. So, for instance, there
10 were no public shows of exhibition, shows of power, executing people in
11 public as it happened centuries ago, this was going to take place at a
12 Nevada sanctioned location, which would be the prison, Your Honor.

13 So to that I think this -- it's clear. And then you look at what's
14 happened subsequently, I think Mr. Anthony referenced, that the
15 legislature, again, when addressing the death penalty, has addressed
16 funding Ely State Prison where executions could take place. I think it is
17 clear that the legislature intends for it to happen at a Nevada state prison,
18 such as Ely State Prison.

19 THE COURT: All right. Thank you.

20 Yes, Counsel.

21 MR. LEVENSON: Your Honor, may I briefly reply.

22 THE COURT: Absolutely.

23 MR. LEVENSON: First of all, I think I might need to correct
24 what I said. I wanted to make sure I answered the Court's question
25 correctly, when the Court asked, would this mean that the death penalty

1 was abolished, the answer is clearly no, there was not an intent to
2 abolish the death penalty. What I would say is that this is something that
3 the legislature could easily fix, if they wanted to. That's the way the
4 democratic process should work and that there could be a special
5 session. The legislature could do whatever they feel is appropriate. But
6 the important thing is that the people's representatives need to be able to
7 amend statutes if they don't conform to our current understanding.

8 Secondly, and finally, what I would say is that there's no
9 debate that Ely State Prison is a state prison. And the term keeps being
10 used of "a state prison." But what we're talking about is we're talking
11 about the plain language and we're talking about a definite article and
12 we're talking about a singular location.

13 Thank you, Your Honor.

14 THE COURT: In the statute -- and I had thought about this
15 prior to today's argument -- the state prison is in lower case and I don't
16 know if that has any impact on your position. Again, at the time there
17 was only one state prison, so they said the state prison. Should my
18 interpretation be that that's all that existed at the time, the intent was to
19 send it to a state prison, the state prison, because there was only one. I
20 mean, they wouldn't say anything else because there was only one.

21 And so am I to interpret that that language means -- it can only
22 be held at Carson City?

23 MR. LEVENSON: Well, just to be clear, I believe the Nevada
24 State Prison is actually not literally in Carson City. I believe it's just
25 outside by one mile, so just to be clear about the record.

1 But to answer the Court's question, given the legislative
2 history, and given the plain language of the statute, particularly when
3 they use the word "the", the definite article, and they use a singular for
4 state prison, that is a specific reference. And so the preexisting
5 understanding that the legislature had, and that the Nevada Supreme
6 Court had, interpreting those statutes should be what controls here and it
7 controls their legislative intent.

8 THE COURT: All right. Thank you.

9 I think first and foremost any legislative interpretation by any
10 Court is to make sure that -- or to interpret a statute, one, by its plain
11 meaning, but also so that we have an absurd result. At the time of this
12 statute there was only one prison. Could the legislature back, when that
13 statute was enacted, said the state prison or any other prisons that may
14 be created in the future in any other county, perhaps. But I don't know if
15 they would have done it at the time. I think the proper statutory
16 construction would be not to lead to an absurd result, and Ely is a state
17 prison, and I think the intent was to have it at a state prison and no other
18 facility, Ely is a state prison. So I'm going to deny the motion to strike.

19 Now, we have the second motion filed in this matter by the
20 State, motion issue second supplemental order of execution and second
21 supplemental warrant of execution.

22 So let me hear from the State first.

23 MR. CHEN: And for the purpose of today, Your Honor, I
24 actually only want to address the order and the reason being the warrant
25 wouldn't actually be signed anytime soon, from my proposed date of

1 July 26th, we couldn't actually seek it until 15 to 30 days prior anyway.

2 So what I'm asking the Court to do is to consider signing the
3 order of execution. Now, NRS 176.505 actually doesn't indicate that the
4 State is the one who's to request this. We're certainly to request the
5 warrant of execution. But the order of execution simply says that it's
6 supposed to happen when the remitter comes and when they've
7 exhausted all their legal appeals.

8 Now, this Court, it came down in November where the
9 Supreme Court of the United States had rejected the final petition of writ
10 of habeas corpus, that was done in federal court. So this Court might not
11 have known. So, basically, when the State was made aware we started
12 gathering the information. We did file to make the request. But formally I
13 don't necessarily think it's even on the District Attorney's Office to make
14 the request for the order, I think that that's just something that legally,
15 and as the statute says, it shall be done.

16 So it would be our position that he's exhausted his appeals,
17 that a warrant should be -- or I'm sorry -- an order should be issued.

18 Now, I understand that currently there are multiple lawsuits that
19 are occurring, both federal court, there's petitions here, I understand that
20 there's -- I believe they've also filed another state action in state court.
21 So I understand that legal processes will take place and are going to
22 happen. However, even if this Court were to file an order of execution for
23 that week of July 26, it doesn't mean that, A, this court couldn't stay it if it
24 felt the need to stay it at any point in time. Additionally, the federal court
25 may very well step in and order a stay.

1 But even until that order is even signed I don't think that there's
2 anything for any party to stay, because otherwise there's really no
3 pending actions. If anything gets stayed, it would mean that we're
4 staying the petition for writ of habeas corpus, we're staying all the things
5 that actually need to be litigated in this case.

6 So in getting the order my hope is to let the legal processes
7 play out. If for any reason this Court is not comfortable filing a warrant of
8 execution at a later date, by all means I'm sure the Court will let us know
9 that there are reasons that it's not comfortable signing it. But at this
10 stage I think the statute mandates that it be done, and I think that it would
11 be appropriate for the Court to issue the order at this time.

12 THE COURT: All right. Thank you.

13 Counsel.

14 MR. LEVENSON: Your Honor, the parties agree on the
15 relevant statute and the legal standard that applies. Under NRS 176.505,
16 the question that this Court is required to ask is whether legal reasons
17 exist that prevent the execution of judgment. The State acknowledges
18 that there are several pending actions, there's a pending petition for writ
19 of habeas corpus, there's a declaratory judgment action in
20 Department 14, there are several pending actions, and there's also
21 Mr. Floyd's opportunity to seek further review, either from the Nevada
22 Supreme Court, or to seek review of the Court's order on the transfer
23 motion.

24 So when -- so in response to the State's argument that you
25 could just issue the order and then stay it later if you thought so, our

1 position is that is plainly contrary to the statute. Under 505 the Court
2 must ask whether legal reasons exist that prohibit the execution of
3 judgment.

4 The other thing that I would just mention, as a practical matter,
5 is that that puts a lot of stress on the Department of Corrections. If the
6 Court goes forward and signs an order of execution, and then later has to
7 modify the date, the warden and his staff put forth supposedly a lot of
8 effort to prepare for executions. It's very expensive. They have to do
9 training. They have to do run-throughs. So I would say that we shouldn't
10 play any games where we start off with an arbitrary date and then later
11 find that we're not actually giving the Department of Corrections the time
12 that they need. And I think that's an important thing to keep in mind
13 because it's not just us here in court, it's also another process that exists
14 outside of this court.

15 The other thing I would say to Your Honor is is that we
16 currently have status checks set for every three weeks. So it's not like
17 this is a case that's going to slip through the cracks, the Court's kept us
18 on a tight schedule. We're obtaining rulings on our motions. We also
19 have a pending state petition where the Court is going to rule. And so it's
20 our position that given all of these protective measures, and given what
21 the statute requires, which is that there be legal cause for -- or a finding
22 of no legal cause, we believe that the Court is simply not in a position to
23 make that finding as we sit here today.

24 The one thing that I believe is very clear is that due to the
25 outstanding litigation that we have, I don't think that there's any

1 reasonable possibility that we would be concluded by the week of
2 July 26. We have -- in front of Your Honor, we have an argument
3 scheduled for July 2nd, that argument will be an argument regarding the
4 state petition that's pending before Your Honor in the habeas case.

5 If there is an evidentiary hearing that the Court chooses to
6 order, we're not going to be able to proceed with the execution. Even if
7 there is not, the Court would need to produce its findings of fact and
8 conclusions of law. Those would need to be done with a notice of entry
9 of order. That's a lot of things to get done if we're hearing argument on
10 July 2nd. That's a very tight timeframe. I don't think, particularly given
11 this procedural posture, that this Court can make the conclusions the
12 statute requires that there are not legal reasons that exist.

13 And, finally, I think the other important point is is that that
14 doesn't include appellate review, that doesn't include what the Nevada
15 Supreme Court would have to do to look at these issues, like the motions
16 and also the petition.

17 So I don't think that there's any doubt that that process of
18 appellate review could not occur by July 26.

19 And one of the things I would add is is that the issues that
20 we've brought to the Court are issues of first impression. The issue
21 about the state prison, the issue about the disqualification of the
22 prosecutor's office, the issue about -- well, actually, I need to back up on
23 the transfer motion, but those are novel issues that need to be decided
24 by an appellate court as well, and that cannot be done by our current
25 deadline of July 26.

1 It's our position that we would not be able to obtain meaningful
2 appellate review if this Court went forward on the arbitrary schedule that
3 the State is proposing.

4 The other thing that we need to do, and I imagine that we might
5 get to this today, Your Honor, is we still need to set responsive dates for
6 the two motions for leave to file an amended petition and a second
7 amended petition. And I'm hoping that we'll be able to do that today, but
8 even if we do that today, that also would trigger another briefing
9 schedule. And obviously our hope would be that we can resolve all those
10 matters by July 2nd. But if we still have real concerns that we're not going
11 to be concluded with all the litigation in time for the Court to prepare
12 findings to determine whether an evidentiary hearing is warranted and to
13 have appellate review.

14 So in the State's reply they assert that the motions have been
15 fully litigated but we know that's not true. Right now we have the ability
16 under the local rules to file objections to the Court's ruling on the transfer
17 motion. As the Court may be aware, we're currently waiting on a written
18 order from the Court so we can be able to go to the next step. And so I
19 know that -- I've been in touch with the Court's law clerk about that but I
20 think it's very important that we're able to get an order on the transfer
21 motion.

22 One thing that I would also say to Your Honor, and I don't -- I
23 know that it is prohibited to file a renewed motion under the local rules,
24 but as I was preparing for this hearing, Your Honor, I discovered what I
25 believed to be controlling authority in this jurisdiction as to the transfer

1 motion. I was able to locate a Nevada Supreme Court case from 1969
2 called *Rainsberger v State*, which actually says that successor in office
3 means a particular department.

4 And so I don't want to reargue the motion, but I would like to
5 make a request for Your Honor that I be allowed to at least have a limited
6 opportunity for leave to argue for reconsideration and to direct the Court's
7 attention to the *Rainsberger* case and it's from 1969. And the issue there
8 was whether the warrant had the issue from a particular department and
9 the Nevada Supreme Court held that it did and it had to be the one that
10 was the court of conviction.

11 I have a copy of the *Rainsberger* case that I can provide to
12 Your Honor, if necessary. Also I have a copy for the State.

13 But I'm not going to reargue the motion. I would just like the
14 Court to consider the *Rainsberger* case when it issues its written order on
15 the transfer motion.

16 Would the Court prefer that I approach the Court with the case
17 or should I --

18 THE COURT: I'll take the copy of the case, provide the State a
19 copy of that particular Nevada Supreme Court Case.

20 MR. CHEN: Thank you.

21 THE COURT: Thank you.

22 MR. LEVENSON: And I can answer any questions that the
23 Court has about *Rainsberger*, it's a very brief opinion, it's about three
24 sentences long.

25 THE COURT: Oh, -- yeah, let me just look at it now if it's only

1 three sentences long.

2 Is that it?

3 MR. LEVENSON: What I did, Your Honor, is I also included
4 information from the district court case file to show that it was a
5 department specific ruling.

6 [Pause in proceedings]

7 THE COURT: Go ahead, Counsel.

8 MR. LEVENSON: Thank you, Your Honor.

9 I'd like to move on briefly. I believe that the relevant statute
10 that the Court will need to apply with respect to the State petition is
11 NRS 176.487. Those are the issues that the Court needs to consider
12 when determining whether a stay of execution should exist.

13 As the Court may recall from our petition we plead excuses to
14 overcome procedural default affirmatively in the introduction to our
15 petition. At this point in time I understand that the State will be
16 responding to our petition.

17 But as the Court sits here right now, the Court cannot conclude
18 in the present procedural posture that the claims that we've raised are
19 necessarily procedurally defaulted. In fact, there are many of them that
20 were not ripe before the State proceeded to seek an execution warrant.
21 So we have good reasons to bring these claims in a petition now and
22 these are claims that have not been previously considered by any district
23 court or any state court.

24 And it's our position that before these issues are fully briefed,
25 and before the procedural arguments have been briefed, then the

1 considerations that exist in 176.487 all militate in favor of this Court
2 staying any decision to sign an execution order until the State and the
3 Court had at least had an opportunity to see what the procedural
4 arguments are. Because we have affirmatively alleged that we can
5 overcome the procedural bars that would normally apply to a successive
6 State petition.

7 Furthermore, Your Honor, another consideration that we raised
8 in our opposition briefing is that Mr. Floyd still intends to seek
9 commutation of his death sentence with the Pardons Board. Mr. Floyd
10 has submitted a timely application for commutation of his death sentence
11 by the May 30th deadline; that would allow Mr. Floyd to be placed on the
12 Pardons Board September 21st, 2021, meeting agenda. And we would
13 submit that until we've had an opportunity to have the Pardons Board at
14 least consider the application and to put on -- put it on their calendar, that
15 this Court shouldn't sign the execution order today. The Court should
16 see whether or not Mr. Floyd is going to be able to be put on the
17 calendar. We have no reason to believe that the Pardons Board would
18 prejudge this case without giving Mr. Floyd an opportunity to present his
19 request for clemency to the Pardons Board. So we would argue that that
20 is another reason that the Court should and must consider, and a reason
21 why the Court should not sign the State's execution order.

22 Finally, Your Honor, there's also a declaratory judgment action
23 that's pending in Department 14. It argues that NDOC has received an
24 unlawful delegation of authority from the legislative branch regarding the
25 execution protocol without sufficient guidelines. Department 14 will need

1 to have adequate time to consider that argument. The current argument
2 is scheduled for June 8th in front of Department 14. But if the Court were
3 to sign the execution order now, it could jeopardize the ability for
4 Mr. Floyd to seek meaningful review in Department 14, and also to seek
5 any appellate review that might be available to him.

6 Finally, Your Honor, as far as the argument about
7 representations regarding the Nevada Attorney General's Office, our
8 position is that if the Court is going to accommodate the Department of
9 Corrections, which I think that we agreed last time that we would do, that
10 we should actually hear from them before we set an arbitrary execution
11 date. That is an issue that occurred in the Dozier matter back in 2017.
12 There was an execution date set, the Department of Corrections was not
13 prepared to go, and we had to come back to court to get another
14 supplemental warrant of execution to accommodate the Department of
15 Corrections. So I believe that the Court should be considering those
16 factors as well.

17 And I believe that there's also considerations of judicial
18 economy that warrant resolving these matters first before moving onto an
19 execution order.

20 Finally, the last thing that I would say is that there's also the
21 concern that the Department of Corrections legitimately has for the
22 spread of COVID-19 in the prison system and that's something that the
23 Department hasn't been asked to talk about or to opine about. But
24 nonetheless that presents a serious risk for people who come in outside
25 of the prison. Right now the prison requires negative COVID test for

1 people before they're even allowed into the prison.

2 I would submit, Your Honor, that if we're talking about
3 spectators, if we're talking about media, if we're talking about the victims'
4 family, or if we're talking about the defendant's family, that's a lot of
5 people to put together in one place at one time. And empirically, from the
6 few executions that did occur in 2020, those turned out to be super
7 spreader events for COVID-19, it ended up getting correctional officers
8 sick, witnesses sick, media individuals sick.

9 And so I think that for all of those reasons I believe that there is
10 no rush for the Court to sign an order of execution specifying July 26 as
11 the date for an execution.

12 And the last argument I would make, Your Honor, is that even
13 if the Court was inclined to sign the order of execution, the Court could
14 interlineate the date out because there's no reason to have a particular
15 date in an order of execution. Even if the Court was going to sign the
16 order of execution, it doesn't need to have a particular date specified.
17 That's what's done in the warrant. And the State has already talked with
18 the Court about its intentions with respect to the warrant. So we believe
19 that there's not a reason for the date to be specified in the order.

20 Thank you, Your Honor.

21 THE COURT: All right. Thank you.

22 Let me hear from the State.

23 MR. CHEN: Thank you, Your Honor.

24 Our reading of 176.505 is that it does say that it must be a
25 judgment at a specified time, that's the specific language, then the

1 warrant has to coordinate with the order itself.

2 In terms of the appellate review that Mr. Anthony is speaking of
3 though, I mean, at some point this has to be final. And they have every
4 right to litigate, and I understand that they're challenging every decision
5 that this Court has made. I'm sure that in federal court, if things don't go
6 the way that they're hoping, they'll challenge those decisions as well. But
7 at some point the State's position is there needs to be some finality.

8 And just as an example, Mr. Anthony, who's a fine attorney, he
9 handled Mr. Floyd's post-conviction petition back in 2005, I believe. He
10 filed it. He raised a number of claims and then now in 2021 he's still the
11 attorney raising additional claims. If at some point the Court doesn't just
12 have the order in place, the litigation theoretically could last forever.

13 Even if a Court were to stay this matter, they have to only stay
14 it a reasonable time to accomplish what it is that needs to be
15 accomplished. If the Court never sets a date in certain, then there really
16 is no goal, and theoretically this litigation will just continue for years and
17 years and years without any order, without any warrant even being
18 possible. Because I do believe that they will never find a good time to do
19 this. I don't believe that at any point Defendant Floyd or his counsel will
20 think that, yes, we agree that the protocol is so great or that the
21 procedures are so great or everything is inline, that we agree that this is
22 an execution that should take place.

23 So because of that I think that we just need to push everything
24 forward and let the legal processes play out in the way that they do. And
25 if someone stays it pursuant to statute, that happens. But at this point I

1 think it is appropriate for an order.

2 THE COURT: All right. Thank you.

3 Counsel, you had mentioned that July 26 is too early, again,
4 we still need the warrant of execution, I mean, that has to be filed and
5 various appeal issues are going to be ongoing. You had mentioned that
6 if this Court issues a particular decision today, that -- and we have some
7 other motions pending in petition -- that it gives you limited time to take,
8 whatever decision I make, whatever decision -- I think you said
9 Department 14 -- and I know there's a federal action pending as well.
10 And you said that July 26 is not enough time either to get a stay from the
11 higher court or request a stay from the trial court, whether District Court
12 14, 17, Supreme Court. If I set a date of execution in August, wouldn't
13 that solve the issue of the -- how fast you have to get all the paperwork
14 completed to pursue your appellate rights -- or your client's appellate
15 rights? I'm just concerned about just not having a date. Because as we
16 know, without a deadline nothing happens, I mean, that's just the reality
17 of it, nothing happens without a deadline.

18 MR. LEVENSON: Well, the short answer, Your Honor, is that I
19 think an August date would still be problematic from the perspective of
20 appellate review; that would require the Nevada Supreme Court to act on
21 multiple matters in a very short amount of time. So I'm concerned about
22 that.

23 If we are taking the timeframe based on what was happening in
24 federal court, that would still put us at a timeframe around September at
25 the very minimum, from, you know, what's been going on in federal court.

1 One thing I want to clarify is is that when the State mentions
2 the execution protocol, there still is no execution protocol. And that was
3 the reason we were setting status checks in the first place. I think that
4 the Court would be in a position at our next status check to make a much
5 more reasonable determination regarding what seems reasonable to the
6 Department of Corrections and to the Court and to the State and to
7 Mr. Floyd once we have more information about the protocol. But to just
8 say right now that August would be good enough, I don't think that we
9 can conclude that as we sit here today.

10 THE COURT: What date do you want, besides no date?

11 MR. LEVENSON: Well, Your Honor, I think what we would be
12 appropriate is to have the date be set from the Nevada Supreme Court's
13 disposition of -- a final disposition of these matters. I believe what the
14 statute say is that if there was an order of affirmance, and if any petitions
15 for writ of mandamus were denied, the State statutory scheme says that
16 that's the point at which an execution order and warrant could be signed
17 and could be effectuated, is once those appellate remedies are
18 exhausted there's -- the State statute is actually paired up to the date of
19 an order of affirmance from the Nevada Supreme Court.

20 So I would say that's the date that we're looking at, would be
21 the date on which the Nevada Supreme Court issues an order of
22 affirmance or also denying any petitions for writ of mandamus.

23 THE COURT: All right. Thank you.

24 Anything further by the State?

25 MR. CHEN: No, thank you, Your Honor.

1 THE COURT: All right. I'm going to issue a written decision on
2 or before Monday of next week on this particular motion.

3 And there was one other matter, I think, that we could take
4 care of.

5 [Colloquy between the Court and the Law Clerk]

6 THE COURT: Apparently in the A case there's a motion for
7 appointment of counsel, and that's -- I'm not sure when that is set for.

8 MR. ANTHONY: It's not -- I don't believe it's set yet, Your
9 Honor.

10 THE COURT: Apparently I'm being told it's set on the 25th.

11 MR. ANTHONY: Okay.

12 THE COURT: And, obviously, I'm assuming there's no
13 objection, I mean, I -- definitely I will appoint your office as counsel. So
14 that motion is granted today. No oppositions been filed.

15 MR. ANTHONY: Your Honor, we do have one more matter,
16 we had filed a petition and an amended petition and a second amended
17 petition. I know Mr. Chen is answering today on the first two, the petition
18 and the amended petition; that still leaves the second amended petition,
19 which adds one more claim based on some new law that came out,
20 *Petrocelli*. And so right now the briefing schedule is we have two weeks
21 to reply and then the argument is July 2nd. It would be wonderful if we
22 could argue all three petitions; that would be one more claim by -- on that
23 July 2nd deadline. And I don't know how that briefing schedule would
24 look, but it's only one more claim.

25 THE COURT: Any objection by the State?

1 MR. CHEN: No, Your Honor. If they file something timely,
2 then we'll do our best to file something by the date that the Court is going
3 to hear the petition. So we'll get everything done at once.

4 THE COURT: Is July 2nd a homicide day or is it non-homicide?

5 THE CLERK: Non-homicide.

6 THE COURT: July 2nd is fine.

7 MR. CHEN: Okay.

8 THE COURT: Okay? The parties agree on that.

9 MR. ANTHONY: Oh, and, Your Honor, I'm sorry, we have an
10 order of transcript request, proposed order, that we'd like to file with the
11 Court.

12 THE COURT: You have to file it electronically, but -- and I'll
13 sign off on that, if it's submitted through electronic means. You can get it
14 to -- as soon as you get back to your office, file it. Before I leave today,
15 I'll sign it electronically.

16 MR. ANTHONY: And then we also wanted to request that
17 this -- these hearings be -- be pursued under Rule 250 where we have
18 daily transcript request since we're going to have a lot of hearings and it's
19 a -- it is a death penalty case, and an important one with an execution
20 date, that we have that request before the Court.

21 THE COURT: That's fine. I'll order daily transcripts for any of
22 the hearings.

23 MR. ANTHONY: Thank you.

24 MR. CHEN: Thank you.

25 THE COURT: Okay. All right. Thank you, Counsel. Have a

1 good weekend.

2 MR. CHEN: You as well.

3 MR. ANTHONY: Thank you, Your Honor.

4

5 [Hearing concluded at 9:16 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

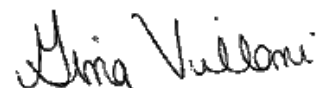
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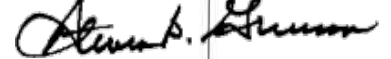
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Gina Villani
Court Recorder/Transcriber
District Court Dept. IX



OBJ
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Attorneys for Defendant/Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff.

v.

ZANE M. FLOYD,
Defendant.

ZANE M. FLOYD,
Petitioner.

v.

WILLIAM GITTERE, ET AL.,
Respondents.

Case No.
Related Case Nos. 99C159897
A-21-832952-W

Dept. No. X

**OBJECTION TO ORDER DENYING
MOTION TO TRANSFER CASE
UNDER EDCR 1.60(H)**

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

**EXECUTION SCHEDULED FOR THE
WEEK OF JULY 26, 2021**

1 **NOTICE OF HEARING ON OBJECTION TO ORDER DENYING MOTION TO**
2 **TRANSFER CASE UNDER EDCR 1.60(H)**

3 PLEASE TAKE NOTICE that the above entitled Objection to Order Denying
4 Motion to Transfer Case Under EDCR 1.60(H) will come on for hearing before this
5 Court in Department No. ____ on the ____ day of _____, 2021, at ____am/pm
6 located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada
7 89101.

8 DATED this ____ day of June, 2021.

9 Respectfully submitted
10 RENE L. VALLADARES
11 Federal Public Defender

12 /s/ David Anthonv
13 DAVID ANTHONY
14 Assistant Federal Public Defender

15 /s/ Brad D. Levenson
16 BRAD D. LEVENSON
17 Assistant Federal Public Defender
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POINTS AND AUTHORITIES

I. Introduction

Defendant 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 and the court that heard the two subsequent post-conviction matters in Floyd's case.

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.

On April 14, 2021, Floyd filed a motion to transfer the case from Department 17 back to Department 5 under EDCR 1.60(h). Floyd's motion was based in 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. 5/14/21 TT at 9. 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, 2008.²

¹ This pleading refers to the "district court" as the Honorable Michael P. Villani, the judge in Department 17.

² Ex. 1 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021). The document the court disclosed in open court was not filed in, and is not reflected in, the docket of this case in Odyssey. Ex. 5 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Internal Court Document, Undated).

1 At a subsequent hearing on June 4, 2021, counsel for Floyd directed the
2 district court's attention to the case of *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d
3 254, 254 (1969), and asked the court to reconsider its decision as *Rainsberger* was
4 controlling authority dictating a decision in Floyd's favor on the transfer motion.
5 6/4/21 TT at 15-17. Later in the afternoon of June 4, 2021, the district court issued
6 its written order denying Floyd's motion to transfer the case. Ex. 2. The *Rainsberger*
7 case was not addressed by the district court.

8 Under EDCR 1.60(h), Floyd hereby files this objection to the district court's
9 order denying his motion to transfer the case.³ This objection is timely filed. *See id.*
10 (referencing time for filing objections under EDCR 2.34(f)); EDCR 2.34(f) (requiring
11 written objections to be served in five days from service of order).

12 II. Relevant Statutory Provisions

13 Chapters 34 and 176 of the Nevada Revised Statutes dictate that only the
14 judicial department that entered the conviction has jurisdiction to issue an
15 execution warrant. The relevant statutory provisions are the following:

16 NRS 176.495(1) provides:

17 If for any reason a judgment of death has not been
18 executed, and remains in force, *the court in which the*
19 *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,

20 ³ EDCR 1.60(h) states: "Any objection to the ruling must be heard by the
21 presiding judge of the division from which the case was reassigned in the same
22 manner as objections to a discovery recommendation under Rule 2.34(f)." This
23 objection has been 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.").

1 signed by the judge and attested by the clerk under the
2 seal of the court, and delivered to the Director of the
Department of Corrections.

3 (Emphasis added).

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

6 Where sentence was imposed by a district court
7 composed of three judges, *the district judge before whom*
8 *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.

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

10 NRS 176.505(1, 2) provides:

11 When remittitur showing the affirmation of a
12 judgment of death has been filed with the clerk of the
13 court from which the appeal has been taken, *the court in*
14 *which the conviction was obtained* shall inquire into the
15 facts, and, if not 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.

16 When an opinion, order dismissing appeal or other
17 order upholding a sentence of death is issued by the
18 appellate court of competent jurisdiction pursuant to
19 chapter 34 or 177 of NRS, *the court in which the sentence*
20 *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.

21 (Emphasis added).

1 Finally, NRS 34.730(3) provides:

2 Except as otherwise provided in this subsection, the
3 clerk of the district court shall file a petition as a new
4 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:

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

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

(Emphasis added).

9 III. Argument

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

20 The State did not respond to Floyd's statutory arguments in its response to
21 Floyd's motion to transfer the case. The district court's order also completely fails to
22 cite or address any of the statutory provisions cited in Floyd's motion. Instead, the
23 district court's order is based upon Administrative Orders and rules of the Eighth

1 Judicial District Court. However, the statutes passed by the Legislature are
2 controlling over any court rules or administrative orders to the extent any
3 inconsistency exists. *Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 85, 140
4 P.2d 953, 956 (1943). Therefore, the administrative orders and court rules cited by
5 the district court do not dictate the resolution of Floyd's motion.⁴

6 The Nevada Supreme Court addressed the very issue presented here in
7 Floyd's favor in *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969). In
8 *Rainsberger*, the defendant pleaded guilty before Judge John C. Mowbray to a
9 capital offense and was sentenced to death by a three-judge panel. *Rainsberger v.*
10 *State*, 81 Nev. 92, 399 P.2d 129 (1965). At the time, Judge Mowbray was the judge
11 in Department 3 of the Eighth Judicial District Court. Ex. 3 at 266 (Political
12 History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016). Judge
13 Mowbray resigned on October 1, 1967. *Id.* An execution warrant was subsequently
14 issued for Mr. Rainsberger's execution by the Honorable Howard W. Babcock, from
15 Department 6. *Id.*

16 On appeal, the defendant argued the execution warrant was invalid under
17 NRS 176.495. Specifically, the defendant "contends that the warrant of execution
18 rendered on April 9, 1968, directing death by the administration of lethal gas on
19 May 2, 1968 is invalid because the judge who signed the warrant was not the
20

21 ⁴ Moreover, the district court's reliance on its status as a "murder judge" is
22 not relevant when the alleged transfer occurred several years before the murder
23 court was even created by the Chief Judge in 2017. Ex. 2 at 1-2 (*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).

1 successor in office of the judge who heard the plea of guilty as required by NRS
2 176.495(3).” *Rainsberger*, 85 Nev. at 22, 449 P.2d at 254. The Nevada Supreme
3 Court found the question whether the warrant was valid was moot. *Id.* However,
4 the court remanded the case for a new warrant with instructions: “The new warrant
5 should be drawn and signed by the judge of *Department Three* of the Eighth
6 Judicial District Court in accordance with NRS 176.495(3).” *Id.* (emphasis added).

7 The Nevada Supreme Court’s instructions on remand in *Rainsberger* dictate
8 that the district court erred in holding that it had jurisdiction to issue an execution
9 warrant for Floyd. To the extent the district court addressed Floyd’s statutory
10 arguments at all, the court erred in holding it was the successor in office to the
11 court in Department 5. This interpretation of successor in office is overly broad and
12 not supported by the precise statutory language in NRS 176.495 and 176.505.
13 Moreover, the Nevada Supreme Court has recognized the term “successor in office”
14 refers specifically to the judge that took the place of the position of the prior judge,
15 not just any subsequent judge on the Nevada Supreme Court. *Calloway v. Reno*, 116
16 Nev. 250, 253 n.1, 993 P.2d 1259, 1261 n.1 (2000) (“Justice Maupin is successor in
17 office to former Chief Judge Steffen, and Justice Agosti is successor in office to
18 former Chief Justice Springer.”). This Court must accordingly hold that the district
19 court erred in failing to grant Floyd’s motion to transfer the case.

20 Moreover, the district court failed to address Floyd’s arguments with respect
21 to the improper transfer of his petitions under NRS 34.730(3)(b). Floyd objected to
22 the transfer of his state petition, which was transferred to Department 17 because
23

1 the court had the criminal case. Ex. 4 (*State of Nevada v. Zane Floyd*, Case No.
2 99C159897, Clark County District Court, Notice of Department Reassignment,
3 Apr. 16, 2021). NRS 34.730(3)(b) requires assignment of a state petition to “the
4 original judge or court.” The district court’s interpretation of the statute reads the
5 term “original” out of the statute. As explained above, the district court never
6 addressed these statutory arguments, but this Court must do so and hold that the
7 state petition was improperly transferred to Department 17.

8 **IV. Conclusion**

9 For the foregoing reasons, Floyd respectfully requests that this Court sustain
10 his objection and transfer the criminal case and the state petitions to Department 5
11 under EDCR 1.60(h).

12 DATED this 9th day of June, 2021.

13 Respectfully submitted
14 RENE L. VALLADARES
Federal Public Defender

15 /s/ David Anthony
16 DAVID ANTHONY
Assistant Federal Public Defender

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

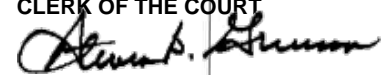
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of June, 2021, a true and correct copy of the foregoing OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H), was filed manually with the Eighth Judicial District Court Clerk. Electronic service of the foregoing document shall be made to opposing counsel by prior agreement via email listed as follows:

Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com


An Employee of the Federal Public Defenders
Office, District of Nevada



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DISTRICT COURT
CLARK COUNTY, NEVADA

12 STATE OF NEVADA,
13 Plaintiff.

14 v.

15 ZANE M. FLOYD,
16 Defendant.

17 ZANE M. FLOYD,
18 Petitioner.

19 v.

20 WILLIAM GITTERE, ET AL.,
21 Respondents.
22
23

Case No.
Related Case Nos. 99C159897
A-21-832952-W
Dept. No. X

**EXHIBITS TO OBJECTION TO
ORDER DENYING MOTION TO
TRANSFER CASE UNDER EDCR
1.60(H)**

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

**EXECUTION SCHEDULED FOR THE
WEEK OF JULY 26, 2021**

EXHIBIT NO.	DOCUMENT
1.	<i>State of Nevada v. Zane Floyd</i> , Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021.
2.	<i>State of Nevada v. Zane Floyd</i> , Case No. 99C159897, Clark County District Court, Decision and Order Denying Defendant's Motion to Transfer Case, June 4, 2021.
3.	Political History of Nevada, Chapter 6, The Nevada Judiciary (12 th ed. 2016).
4.	<i>State of Nevada v. Zane Floyd</i> , Case No. 99C159897, Clark County District Court, Notice of Department Reassignment, Apr. 16, 2021.
5.	<i>State of Nevada v. Zane Floyd</i> , Case No. 99C159897, Clark County District Court, Internal Court Document, Undated.

DATED this 9th day of June, 2021.

Respectfully submitted
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Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of June, 2021, a true and correct copy of the foregoing EXHIBITS TO OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H), was filed manually with the Eighth Judicial District Court Clerk. Electronic service of the foregoing document shall be made to opposing counsel by prior agreement via email listed as follows:

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An Employee of the Federal Public Defenders
Office, District of Nevada

EXHIBIT 1

EXHIBIT 1

99C159897

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

May 14, 2021

99C159897

The State of Nevada vs Zane M Floyd

May 14, 2021

3:00 AM

Minute Order

HEARD BY: Villani, Michael

COURTROOM: Chambers

COURT CLERK: Samantha Albrecht

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- On October 11, 2019, the 9th Circuit of Appeals denied Defendant s Petition for Writ of Habeas corpus. On November 2, 2020, the United State Supreme Court denied certiorari. On April 14, 2021, Defendant filed his Motion to Disqualify Clark County District Attorney s Office. Said motion is based up the argument that two Deputy District Attorneys are presently working as State Senators. It is argued that such a situation violates the separation of powers doctrine and, therefore, the entire Clark County District Attorney s office should be disqualified from representing the State of Nevada in the present case. Nev. Const. Art 3, 1 provides the following:

The powers of the Government of the State of Nevada shall be divided into three separate departments, the legislature, the executive and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in cases expressly directed or permitted in this constitution.

The Defense does not dispute that the Senators in question are on leave of absence from the District Attorney s office while the legislature is in session. NRS 252.070(1) provides:

All district Attorneys may appoint deputies, who are authorized to transact official business relating to those duties of the office set forth in NRS 252.080 and 252.090 to the same extent as their principals and perform such duties as the as the district attorney may from time to time direct. The

PRINT DATE: 05/14/2021

Page 1 of 2

Minutes Date: May 14, 2021

PA2591

99C159897

appointment of a deputy district attorney must not be construed to confer upon that deputy policy making authority for the office of the district attorney or the county by which the deputy district attorney is employed.


Senators Cannizzaro and Scheible are on leave of absence from the District attorney s office and, therefore are not performing executive branch functions under their current status as legislators, they are being compensated by the legislative branch of government opposed to the executive branch, and while serving in the legislature they are not under the control of the elected District Attorney. As such, the Court finds that under the present scenario there is not a separation of powers violation.

The Court will prepare a formal order in a pleading format consistent with the above on May 18, 2021.

CLERK'S NOTE: A copy of this Minute Order was provided by e-mail to: David Anthony, David_Anthony@fd.org; Brad Levenson, Brad_Levenson@fd.org; Alexander Chen, alexander.chen@clarkcountyda.com; and Brianna Stutz, brianna.stutz@clarkcountyda.com.
5/14/2021 sa

EXHIBIT 2

EXHIBIT 2



1 **ORDR**

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4 THE STATE OF NEVADA,

5 Plaintiff,

6 -vs-

7 ZANE MICHAEL FLOYD,

8 Defendant.

CASE NO: 99C159897

DEPT NO: XVII

9
10 **DECISION AND ORDER DENYING DEFENDANTS MOTION TO TRANSFER**
11 **CASE UNDER EDCR 1.60(H)**

12 DATE OF HEARING: MAY 14, 2021
13 TIME OF HEARING: 8:30 AM

14 THIS MOTION having come on for hearing before the Honorable MICHAEL
15 VILLANI, District Judge, on the 14th day of May 2021, with the Defendant not being
16 present. The Court having considered the matter, including briefs, transcripts, arguments of
17 counsel, and documents on file herein, now therefore, the Court makes the Decision on
18 Defendant's Motion to Transfer Case Under EDCR 1.60(H).

19 On December 28, 2008, all Department XVII's civil and criminal caseloads were
20 transferred to Department III, and all of Department V's civil and criminal caseloads were
21 transferred to Department XVII. The transfer of cases from Department V to Department
22 XVII included the instant case. As of December 31, 2020, Department V only hears civil
23 matters. *See* Administrative Order 20-25. Moreover, since 2008, while this matter was still
24 pending before the Nevada Supreme Court, neither party objected to the transfer of the
25 instant case to Department XVII. Additionally, since late 2008, the original Judge.

26 ///

27 ///

28 ///

1 EDCR 1.60(a) grants the authority of the Chief Judge to "assign and re-assign all
2 cases pending in District Court. Furthered, pursuant to EDCR 1.30(b)(5), the Chief Judge
3 has the authority to determine the regular and special assignments of District Court Judges.
4

5 On July 1, 2017, the Eighth Judicial District created the Homicide Team. See
6 Administrative Order 17-05. The Order provided that four departments would exclusively
7 hear homicide cases to increase case management efficiency. In 2018, Department XVII
8 was assigned to the Homicide Team. Additionally, Department XVII was assigned the
9 present matter in 2008 and in 2018 assigned to hear all homicide matters.
10

11 Therefore, THIS COURT FINDS that Department XVII is the proper
12 Department to preside over the instant case.

13 **ORDER**

14 THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Transfer Case
15 Under EDCR 1.60(H) is hereby denied.
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17 

18 DISTRICT JUDGE

19 MICHAEL P. VILLANI
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 4th day of June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID ANTHONY
BRAD D. LEVENSON
411 E. BONNEVILLE, STE. 250
LAS VEGAS, NV 89101

BY /s/ Samantha Albrecht
Samantha Albrecht
Court Clerk for Judge Villani

EXHIBIT 3

EXHIBIT 3

POLITICAL HISTORY OF NEVADA

(TWELFTH EDITION)



Issued by
BARBARA K. CEGAVSKE
Nevada Secretary of State

Produced jointly with the Research Division
of the Legislative Counsel Bureau

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Political History of Nevada



Chapter 6

The Nevada Judiciary

<i>District—Counties</i>	<i>Name</i>	<i>Year</i>
No. 2—Washoe (Dept. 4)	Craven, Thomas O.	1967-1971
No. 2—Washoe (Dept. 5)	Gezelin, Emile (Appointed July 1, 1967; elected 1968.)	1967-1971
No. 3—Eureka and Lander	Sexton, John F.	1967-1971
No. 4—Elko	Wright, George F.	1967-1971
No. 5—Mineral, Esmeralda, and Nye	Breen, Peter (Died November 24, 1967.)	1967
	Mann, Kenneth (Appointed January 2, 1968, to election following.)	1968-1969
	Mann, Kenneth (Elected to unexpired term.)	1969-1971
No. 6—Pershing and Humboldt	Leighton, Donald M. (Died, June 19, 1967.)	1967
	Young, Llewellyn A. (Appointed August 15, 1967, to election following.)	1967-1969
	Young, Llewellyn A. (Elected to unexpired term.)	1969-1971
No. 7—White Pine and Lincoln	Wilkes, Roscoe	1967-1971
No. 8—Clark (Dept. 1)	Sundean, Clarence	1967-1971
No. 8—Clark (Dept. 2)	Compton, William P.	1967-1971
No. 8—Clark (Dept. 3)	Mowbray, John C. (Resigned October 1, 1967.)	1967
	Wartman, Alvin Nicholls (Appointed October 1, 1967; resigned October 14, 1969.)	1967-1969
	Wines, Taylor (Appointed October 14, 1969; resigned January 15, 1970.)	1969-1970
	Morse, William (Appointed January 18, 1970, to unexpired term.)	1970-1971
No. 8—Clark (Dept. 4)	O'Donnell, Thomas J.	1967-1971
No. 8—Clark (Dept. 5)	Mendoza, John F.	1967-1971
No. 8—Clark (Dept. 6)	Babcock, Howard W. (Appointed July 1, 1967; elected 1968.)	1967-1971

Statutes of Nevada 1971, Chapter 521, p. 1087, created the same eight judicial districts. District No. 1 had two judges, District No. 2 had six judges, District No. 8 had nine judges, and the rest had one each. On and after July 1, 1972, District No. 8 had 10 judges.

EXHIBIT 4

EXHIBIT 4



DISTRICT COURT
CLARK COUNTY, NEVADA

Zane Floyd, Plaintiff(s)

vs.

William Gittere, Defendant(s)

Case No.: A-21-832952-W

Related

99C159897

Department 17

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Michael Villani.

☒ This reassignment is due to: Per NRS 34.730, case assigned to same judge as the criminal case.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion to Disqualify Attorney, on 06/25/2021, at 8:30 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Patricia Azucena-Preza

Patricia Azucena-Preza

Deputy Clerk of the Court

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CERTIFICATE OF SERVICE

I hereby certify that this 16th day of April, 2021

- ☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-21-832952-W.
David_Anthony@fd.org
Brad_Levenson@fd.org
AHerr@ag.nv.gov
rgarate@ag.nv.gov
motions@clarkcountynvda.com

/s/ Patricia Azucena-Preza

Patricia Azucena-Preza
Deputy Clerk of the Court

EXHIBIT 5

EXHIBIT 5

99C159897

Summary

Detail

Parties

Charges

Events

Service

Hearings

Conditions

Notes

Disposition

Time Stds

Save

Exit

The State of Nevada vs Zane M Floyd

Type Felony/Gross Misdemeanor

Inactive

Date	Type and Comment	Previous	Next
04/15/2021	Clerk's Notice of Hearing Notice of Hearing		
04/15/2021	Motion for Order Motion and Notice of Motion for the Court to Issue Second Supplemental Order of Execut		
04/14/2021	Notice Notice of Waiver		
04/14/2021	Motion to Disqualify Attorney Motion to Disqualify the Clark County District Attorney's Office		
04/14/2021	Exhibits Exhibits in Support of Motion to Transfer		
04/14/2021	Motion Motion to Transfer Case Under EDCR 1.60(H)		
09/09/2013	Appendix Two - Full Text of Cases Submitted in Memorandum of Law in Support of Motion for Summary Jud		
09/09/2013	Appendix One - Complete Trial Record from Voir Dire to Death Penalty Sentencing Hearing		
03/26/2013	Archive SEALED Folder C		
03/22/2013	Archive SEALED Folder B		
03/22/2013	Archive SEALED Folder A		
03/22/2013	Archive SEALED Folder E		
03/22/2013	Archive SEALED folder F		
03/22/2013	Archive SEALED Folder D		
07/01/2011	USJR Reporting Statistical Closure USJR Case Status correction		
02/18/2011	Appeal to Supreme Court Flag Removed		
02/18/2011	NV Supreme Court Clerks Certificate/Judgment - Affirmed Rehearing Denied.		
01/19/2011	Left Side Filing Supreme Court Order Denying Rehearing		
11/17/2010	Left Side Filing Supreme Court Order		
12/28/2008	Case Reassignment Reassign Case From Judge Glass To Judge Villani		

1 **ORDR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ALEXANDER CHEN
6 Chief Deputy District Attorney
7 Nevada Bar #010539
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)
10)
11 Plaintiff,)

11 -vs-)

12 ZANE MICHAEL FLOYD,)
13 #1619135)
14 Defendant.)

Case No. 99C159897
Dept No. XVII

16 SECOND SUPPLEMENTAL ORDER OF EXECUTION

17 A JUDGMENT OF DEATH having been entered on the 21st day of July, 2000, against
18 the above named Defendant, ZANE MICHAEL FLOYD, as a result of his having been found
19 guilty of Counts II, III, IV and V Murder of the First Degree with Use of a Deadly Weapon,
20 by a duly and legally impaneled Jury of twelve persons; and

21 WHEREAS, this Court has made inquiry into the facts and found no legal reasons
22 against the execution of the Judgment of Death.

23 IT IS ORDERED that the Director of the Department of Prisons shall execute the
24 Judgment of Death, during the week commencing on the 26th day of July, 2021.

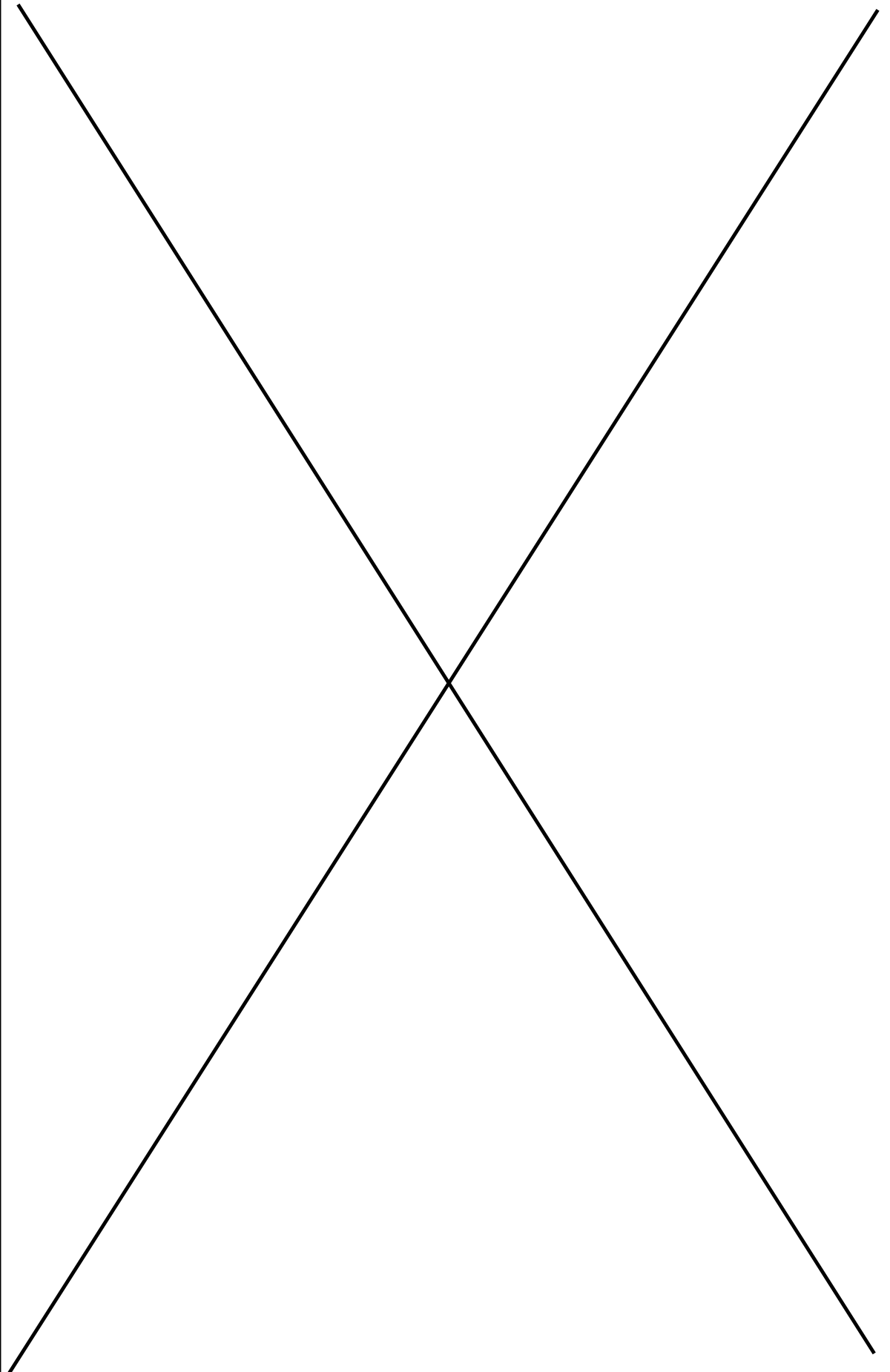
25 DATED this ____ day of June, 2021.

Dated this 9th day of June, 2021



27 DISTRICT JUDGE
28 E9A D68 5073 EAE2
Michael Villani
District Court Judge

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1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 The State of Nevada vs Zane M
Floyd

CASE NO: 99C159897

7 DEPT. NO. Department 17

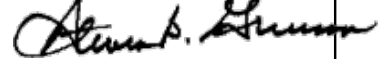
8
9 **AUTOMATED CERTIFICATE OF SERVICE**

10 This automated certificate of service was generated by the Eighth Judicial District
11 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

12 Service Date: 6/9/2021

13 ECF Notifications CHU	ecf_nvchu@fd.org
14 Amanda White	awhite@ag.nv.gov
15 Heather Procter	hprocter@ag.nv.gov
16 Randall Gilmer	drgilmer@ag.nv.gov
17 Frank Toddre	ftoddre@ag.nv.gov
18 Steven Wolfson	motions@clarkcountyda.com
19 Eileen Davis	Eileen.davis@clarkcountyda.com
20 Sara Jelinek	Sara_Jelinek@fd.org
21 Heather Ungermann	ungermannh@clarkcountycourts.us
22 Brad Levenson	brad_levenson@fd.org
23 David Anthony	david_anthony@fd.org

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1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 ALEXANDER CHEN
6 Chief Deputy District Attorney
7 Nevada Bar #010539
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 ZANE MICHAEL FLOYD,
13 #1619135

14 Defendant.

CASE NO: 99C159897

DEPT NO: XVII

15 **STATE'S RESPONSE TO DEFENDANT'S OBJECTION TO ORDER DENYING**
16 **MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)**

17 DATE OF HEARING: MAY 14, 2021
18 TIME OF HEARING: 8:30AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Response to Defendant's Objection to Order
22 Denying Motion to Transfer Case Under EDCR 1.60 (H).

23 This response is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 //

27 //

28 //

H:\P DRIVE DOCS\FLOYD, ZANE, 99C159897, ST'S RESP. TO DEFT'S OBJECTION TO TRANSFER.DOCX

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On June 8, 1999, the State charged ZANE MICHAEL FLOYD (hereinafter
4 “Defendant”) by way of Criminal Complaint with four counts of Murder with Use of a Deadly
5 Weapon, three counts of Attempt Murder with Use of a Deadly Weapon, five counts of Sexual
6 Assault with Use of a Deadly Weapon, one count of Burglary While in Possession of a Firearm,
7 and one count of First Degree Kidnapping with Use of a Deadly Weapon. The State also filed
8 a Notice of Reservation to Seek the Death Penalty. On June 25, 1999, the State filed an
9 Amended Criminal Complaint adding an additional charge of Attempt Murder with Use of a
10 Deadly Weapon.

11 On June 28, 1999, the State charged Defendant by way of Information, and two
12 amendments thereafter, as follows: Count 1 – Burglary While in Possession of a Firearm
13 (Felony – NRS 205.060); Count 2 – Murder with Use of a Deadly Weapon (Open Murder)
14 (Felony – NRS 200.010, 200.030, 193.165); Count 3 – Murder with Use of a Deadly Weapon
15 (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 4 – Murder with Use of a
16 Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); Count 5 – Murder
17 with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165);
18 Count 6 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030,
19 193.165, 193.330); Count 7 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS
20 200.010, 200.030, 193.165, 193.330); Count 8 – First Degree Kidnapping with Use of a Deadly
21 Weapon (Felony – NRS 200.310, 200.320, 193.165); Count 9 – Sexual Assault with Use of a
22 Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 10 – Sexual Assault with
23 Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); Count 11 – Sexual
24 Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165); and Count
25 12 – Sexual Assault with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165).
26 On July 6, 1999, the State filed a Notice of Intent to Seek the Death Penalty.

27 Defendant’s jury trial commenced on July 11, 2000. On July 19, 2000, the jury returned
28 a verdict finding Defendant guilty on all counts. At the penalty hearing, the State introduced

1 three aggravating circumstances in support of a death sentence. On July 21, 2000, the same
2 jury returned a verdict of death against Defendant.

3 On August 11, 2000, Defendant filed a Motion for New Trial. The State filed its
4 Opposition on August 17, 2000. On August 21, 2000, the district court denied the Motion for
5 New Trial. The Order was filed on August 24, 2000.

6 On August 31, 2000, the district court adjudicated Defendant guilty, and sentenced him
7 to death for Counts 2, 3, 4, and 5. The Judgment of Conviction and the Order of Execution
8 were filed on September 5, 2000.

9 On September 11, 2000, Defendant filed a direct appeal with the Nevada Supreme
10 Court. The Nevada Supreme Court affirmed Defendant's conviction on March 13, 2002. The
11 Court denied Defendant's subsequent Motion for Rehearing on May 7, 2002. Appellate
12 counsel then filed a Petition for Writ of Certiorari to the United States Supreme Court, which
13 was denied on February 24, 2003. Remittitur issued on March 26, 2003.

14 On June 19, 2003, Defendant filed his first Petition for Writ of Habeas Corpus (Post-
15 Conviction). The State filed its Response on July 24, 2003. Defendant then filed a
16 Supplemental Petition through counsel, David Schieck, Esq., on October 6, 2004. The State
17 filed its Supplemental Opposition on December 7, 2004. On January 18, 2005, the district
18 court denied Defendant's Petition. The Findings of Fact, Conclusions of Law and Order was
19 filed on February 4, 2005.

20 Defendant filed a Notice of Appeal on March 9, 2005, appealing the denial of his post-
21 conviction Petition. On February 16, 2006, the Nevada Supreme Court affirmed the denial of
22 Defendant's Petition for Writ of Habeas Corpus. Remittitur issued on April 14, 2006.

23 On April 14, 2006, Defendant filed a Petition for Writ of Habeas Corpus in the United
24 States District Court and requested stay and abeyance. Stay and abeyance was granted on April
25 25, 2007, for exhaustion of state court remedies.

26 Defendant then filed his second successive Petition for Writ of Habeas Corpus (Post-
27 Conviction) on June 8, 2007. The State filed its Opposition on August 18, 2007. Defendant
28 filed his Reply on August 28, 2007. Following argument by both parties on December 13,

1 2007, the district court ordered an evidentiary hearing. Following the hearing on February 22,
2 2008, where Defendant's former counsel, David Schieck, Esq. testified, the district court
3 denied Defendant's second Petition. The Findings of Fact, Conclusions of Law and Order was
4 filed on April 2, 2008.

5 On April 7, 2008, Defendant filed a Notice of Appeal from the denial of his second
6 Petition for Writ of Habeas Corpus (Post-Conviction). On November 17, 2010, the Nevada
7 Supreme Court affirmed the district court's denial of the second Petition. Remittitur issued
8 February 18, 2011. The Nevada Supreme Court also denied Defendant's request for Rehearing.

9 On September 22, 2014, the United States District Court denied Defendant's Petition
10 for Writ of Habeas Corpus (Post-Conviction). Defendant filed a Notice of Appeal to the United
11 States Court of Appeals for the Ninth Circuit on October 22, 2014. On October 11, 2019, the
12 United States Court of Appeals for the Ninth Circuit issued an Order affirming the United
13 States District Court's denial of Defendant's Petition for Writ of Habeas Corpus.

14 On November 2, 2020, the United States Supreme Court denied Defendant's Petition
15 for Writ of Certiorari. On November 5, 2020, Mandate was filed giving the judgment of the
16 United States Court of Appeals for the Ninth Circuit full effect.

17 On April 14, 2021, the State filed a Motion Seeking an Order and Execution of Warrant.
18 The same day, Defendant filed the instant Motion to Transfer Case Under EDCR 1.60(H)
19 (hereinafter "Motion"), and Motion to Disqualify the Clark County District Attorney's Office.

20 On May 14, 2021, the parties argued the motions regarding the transfer of this case as
21 well as the disqualification of the Clark County District Attorney's Office. The District Court
22 denied both motions in orders that were filed on June 4, 2021. On June 9, 2021, Defendant
23 filed an objection to the order that denied his motion to transfer. The State now responds.

24 **ARGUMENT**

25 The State stands by its prior response that it filed on April 26, 2021. However, this is
26 meant to serve as a supplement based upon Defendant's current objection.

27 When a literal and plain meaning leads to an unreasonable or absurd result, the court
28 may consider other sources for the statute's meaning. State v. Friend, 118 Nev. 115 (2002).

1 NRS 176.495 is the statute that governs the issuance of a new warrant of execution. The plain
2 language of the statute indicates that the “court in which the conviction was had “must draw
3 up a warrant “signed by the judge.” Similarly, NRS 176.505, which contains the requirements
4 for an order of execution, also calls for the “court in which the conviction was obtained” to
5 issue the order.

6 It is undisputed that the Defendant was convicted in District Court Department 5.
7 However, cases that were in Department 5 have been re-assigned over the years. As indicated
8 in Department XVII’s Order, on December 28, 2008, Department V’s civil and criminal
9 caseloads were transferred to Department XVII. Thus, even though the number of the
10 department is different, the court in which the conviction was obtained is now titled as
11 Department XVII.

12 Defendant cites Rainsberger v. State as his support for transferring the case to
13 Department V. 85 Nev. 22 (1969). However Rainsberger dealt with a provision of NRS
14 176.495 that no longer exists. At the time Rainsberger was decided, the court was reading a
15 1967 version of NRS 176.495(3) which allowed for a three judge panel to impose the death
16 penalty, and it was up to the district court that took the plea or his “successor in office” to issue
17 the warrant of execution. This provision was eliminated by the Legislature in 2003. *See* AB
18 13, page 2084. Thus, Rainsberger can be distinguished for this case.

19 However, Department XVII is in fact the successor department that has been tasked
20 with Defendant’s case. The case was properly re-assigned by the Chief Judge of the Eighth
21 Judicial District Court pursuant to Rule 1.60 of the Eighth Judicial District Court rules.
22 Although Defendant argues that the rules and administrative orders should not matter, those
23 rules have been adopted and approved by the Nevada Supreme Court. The Legislature has
24 given the Supreme Court the ability to make these rules pursuant to NRS 2.120.

25 Based on Defendant’s request, he is not only asking that the order and warrants of
26 execution be signed by Department V, but he also adds that his third petition for writ of habeas
27 corpus (post-conviction) should also be handled by Department V. As noted in the State’s
28 original reply, Department V is a civil department not handling criminal cases. NRS

1 34.730(3)(b) says that it is only “whenever possible” that the original judge or court hears the
2 petition. However, it is not possible based upon the assignment of cases and the types of courts
3 that now make up the district court. Thus, Department XVII, which has taken the cases from
4 Department V, should also hear the petition for writ of habeas corpus.

5 **CONCLUSION**

6 The district court did not err in refusing to transfer the case. As such, the State requests
7 that this court deny Defendant’s objection.

8 DATED this 17th day of June, 2021.

9 Respectfully submitted,

10 STEVEN B. WOLFSON
11 Clark County District Attorney
12 Nevada Bar #001565

13 BY /s/ Alexander Chen
14 ALEXANDER CHEN
15 Chief Deputy District Attorney
16 Nevada Bar #010539
17 Office of the Clark County District Attorney
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19 200 Lewis Avenue
20 Post Office Box 552212
21 Las Vegas, Nevada 89155
22 (702) 671-2750
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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing State’s Response to Defendant’s
Objection to Order Denying Motion to Transfer Case Under EDCR 1.60 (H), was made this
17th day of June, 2021, by electronic transmission to:

BRAD LEVENSON
Email: brad_levenson@fd.org
DAVID ANTHONY
Email: david_anthony@fd.org
Ecf_nvchu@fd.org

BY /s/ E. Davis
Employee for the District Attorney's Office

AC//ed

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

CASE NO: 99-C-159897-1

DEPT NO: X

**ORDER DENYING DEFENDANT'S OBJECTION TO ORDER DENYING
DEFENDANT'S MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)**

DATE OF HEARING: JUNE 18, 2021
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 18 day of June, 2021, the Defendant not being present, but Defendant represented by DAVID ANTHONY and BRAD LEVENSON of the Federal Public Defender's Office, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and having reviewed the pleadings on file herein:

THIS COURT FINDS that this case was part of a random re-assignment of cases from Department V to Department XVII. The Nevada Supreme Court has upheld the Eighth Judicial District Court's re-assignment of cases. Therefore, Department XVII is the proper court that can issue the order and warrant of execution.

Dated this 21st day of June, 2021

IT IS HEREBY ORDERED that the Defendant's motion shall be denied.

DATED this _____ day of June, 2021.


DISTRICT JUDGE

C59 03A 31F4 CC4E

Tierra Jones

District Court Judge

I:\APPELLATE\WPDOCS\ATTORNEY FILES\ALEX'S DOCUMENTS\ORDER DENYING OBJECTION TO MOTION TO

TRANSFER.DOCX

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 The State of Nevada vs Zane M
Floyd

CASE NO: 99C159897

7 DEPT. NO. Department 17

8
9 **AUTOMATED CERTIFICATE OF SERVICE**

10 This automated certificate of service was generated by the Eighth Judicial District
11 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

12 Service Date: 6/21/2021

13 ECF Notifications CHU	ecf_nvchu@fd.org
14 Amanda White	awhite@ag.nv.gov
15 Heather Procter	hprocter@ag.nv.gov
16 Randall Gilmer	drgilmer@ag.nv.gov
17 Frank Toddre	ftoddre@ag.nv.gov
18 Steven Wolfson	motions@clarkcountyda.com
19 Eileen Davis	Eileen.davis@clarkcountyda.com
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23 David Anthony	david_anthony@fd.org

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OBJ

RENE L. VALLADARES

Federal Public Defender

Nevada Bar No. 11479

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Attorneys for Defendant/Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff.

v.

ZANE M. FLOYD,

Defendant.

ZANE M. FLOYD,

Petitioner.

v.

WILLIAM GITTERE, ET AL.,

Respondents.

Case Nos. 99C159897

A-21-832952-W

Dept. No. VII

**OBJECTION TO ORDER DENYING
MOTION TO TRANSFER CASE
UNDER EDCR 1.60(H)**

Date of Hearing:

Time of Hearing:

(DEATH PENALTY CASE)

**EXECUTION SCHEDULED FOR THE
WEEK OF JULY 26, 2021**

**HEARING TO BE SCHEDULED IN
DEPARTMENT VII**

1 **NOTICE OF HEARING ON OBJECTION TO ORDER DENYING MOTION**
2 **TO TRANSFER CASE UNDER EDCR 1.60(H)**

3 PLEASE TAKE NOTICE that the above entitled Objection to Order Denying
4 Motion to Transfer Case Under EDCR 1.60(H) will come on for hearing before this
5 Court in Department No. ____ on the ____ day of _____, 2021, at _____am/pm
6 located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada
7 89101.

8 DATED this ____ day of June, 2021.

9 Respectfully submitted
10 RENE L. VALLADARES
11 Federal Public Defender

12 /s/ David Anthony
13 DAVID ANTHONY
14 Assistant Federal Public Defender

15 /s/ Brad D. Levenson
16 BRAD D. LEVENSON
17 Assistant Federal Public Defender
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1 **POINTS AND AUTHORITIES**

2 **I. Introduction**

3 Defendant/Petitioner Zane Floyd was convicted of four counts of first-degree
4 murder and other offenses and sentenced to death. Department 5 was the court of
5 conviction and the court that heard the two subsequent post-conviction matters in
6 Floyd's case.

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

13 On April 14, 2021, Floyd filed a motion to transfer the case from Department
14 17 back to Department 5 under EDCR 1.60(h). Floyd's motion was based in part
15 upon NRS 176.495(1), 176.505(1, 2), and 34.730(3)(b). Argument was held on the
16 motion on May 14, 2021, and the district court denied the motion from the bench.
17 5/14/21 TT at 9. During the proceedings, the district court provided to counsel what

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22 ¹ This pleading refers to the "district court" as the Honorable Michael P.
23 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).

1 appeared to be an internal court document stating the case was transferred from
2 Department 5 to Department 17 on December 28, 2008.²

3 At a subsequent hearing on June 4, 2021, counsel for Floyd directed the
4 district court's attention to the case of *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d
5 254, 254 (1969), and asked the court to reconsider its decision as *Rainsberger* was
6 controlling authority dictating a decision in Floyd's favor on the transfer motion.
7 6/4/21 TT at 15-17. Later in the afternoon of June 4, 2021, the district court issued
8 its written order denying Floyd's motion to transfer the case. Ex. 2. The *Rainsberger*
9 case was not addressed by the district court.

10 Floyd filed a timely objection with the district court in Department 10 as
11 required under EDCR 1.60(h).³ Argument was heard on the objection on June 18,
12 2021. On June 21, 2021, the court issued its written order denying Floyd's objection.
13 Department 10's denial of the objection was substantially the same as the order
14 denying the initial motion. Ex. 6. Specifically, the court held Floyd's case was
15 properly transferred to Department 17 under the rules of the Eighth Judicial
16

17 ² Ex. 1 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County
18 District Court, Court Minutes, May 14, 2021). The document the court disclosed in
19 open court was not filed in, and is not reflected in, the docket of this case in
Odyssey. Ex. 5 (*State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County
District Court, Internal Court Document, Undated).

20 ³ EDCR 1.60(h) states: "Any objection to the ruling must be heard by the
21 presiding judge of the division from which the case was reassigned in the same
22 manner as objections to a discovery recommendation under Rule 2.34(f)." Floyd's
23 initial 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.").

1 District Court and that the “Nevada Supreme Court has upheld the Eight Judicial
2 District Court’s re-assignment of cases.” *Id.*

3 Under EDCR 1.60(h), Floyd hereby files this objection to the district courts’
4 orders denying his motion to transfer the case and denial of the initial objection to
5 the denial of his motion to transfer the case. This objection is timely filed. *See id.*
6 (referencing time for filing objections under EDCR 2.34(f)); EDCR 2.34(f) (requiring
7 written objections to be served in five days from service of order).

8 II. Relevant Statutory Provisions

9 Chapters 34 and 176 of the Nevada Revised Statutes dictate that only the
10 judicial department that entered the conviction has jurisdiction to issue an
11 execution warrant. The relevant statutory provisions are the following:

12 NRS 176.495(1) provides:

13 If for any reason a judgment of death has not been
14 executed, and remains in force, *the court in which the*
15 *conviction was had* must, upon application of the Attorney
16 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.

17 (Emphasis added).

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

20 Where sentence was imposed by a district court
21 composed of three judges, *the district judge before whom*
22 *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.

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

1 NRS 176.505(1, 2) provides:

2 When remittitur showing the affirmation of a
3 judgment of death has been filed with the clerk of the
4 court from which the appeal has been taken, *the court in*
5 *which the conviction was obtained* shall inquire into the
6 facts, and, if not legal reasons exist prohibiting the
7 execution of the judgment, shall make and enter an order
8 requiring the Director of the Department of Corrections to
9 execute the judgment at a specified time. The presence of
10 the defendant in the court at the time the order of
11 execution is made and entered, or the warrant is issued,
12 is not required.

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

(Emphasis added).

13 Finally, NRS 34.730(3) provides:

14 Except as otherwise provided in this subsection, the
15 clerk of the district court shall file a petition as a new
16 action separate and distinct from any original proceeding
17 in which a conviction has been had. If a petition
18 challenges the validity of a conviction or sentence, it must
19 be:

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

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

20 (Emphasis added).

1 **III. Argument**

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

13 The State did not respond to Floyd’s statutory arguments in its initial
14 response to Floyd’s motion to transfer the case.⁴ The district courts’ orders also fail
15 to cite or address any of the statutory provisions cited in Floyd’s motion. Instead,
16 the district courts’ orders are based upon Administrative Orders and rules of the
17 Eighth Judicial District Court. However, the statutes passed by the Legislature are
18 controlling over any court rules or administrative orders to the extent any
19 inconsistency exists. *Lauer v. Eighth Judicial District Court*, 62 Nev. 78, 85, 140

20
21 ⁴ In its response to the objection filed in Department 10, the State argued for
22 the first time that Floyd’s interpretation of legislative intent would lead to absurd
23 results (but it never identified why the result was in any way absurd), Resp. at 4; 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.*

1 P.2d 953, 956 (1943). Therefore, the administrative orders and court rules cited by
2 the district courts do not dictate the resolution of Floyd's motion.⁵

3 The Nevada Supreme Court addressed the very issue presented here in
4 Floyd's favor in *Rainsberger v. State*, 85 Nev. 22, 22, 449 P.2d 254, 254 (1969). In
5 *Rainsberger*, the defendant pleaded guilty before the Honorable John C. Mowbray
6 to a capital offense and was sentenced to death by a three-judge panel. *Rainsberger*
7 *v. State*, 81 Nev. 92, 399 P.2d 129 (1965). At the time, Judge Mowbray was the
8 judge in Department 3 of the Eighth Judicial District Court. Ex. 3 at 266 (Political
9 History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016). Judge
10 Mowbray resigned on October 1, 1967. *Id.* An execution warrant was subsequently
11 issued for Mr. Rainsberger's execution by the Honorable Howard W. Babcock, from
12 Department 6. *Id.*

13 On appeal, the defendant argued the execution warrant was invalid under
14 NRS 176.495. Specifically, the defendant "contends that the warrant of execution
15 rendered on April 9, 1968, directing death by the administration of lethal gas on
16 May 2, 1968 is invalid because the judge who signed the warrant was not the
17 successor in office of the judge who heard the plea of guilty as required by NRS
18 176.495(3)." *Rainsberger*, 85 Nev. at 22, 449 P.2d at 254. The Nevada Supreme
19 Court found the question whether the warrant was valid was moot. *Id.* However,

21 ⁵ Moreover, the district court's reliance on its status as a "murder judge" is
22 not relevant when the alleged transfer occurred several years before the murder
23 court was even created by the Chief Judge in 2017. Ex. 2 at 1-2 (*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).

1 the court remanded the case for a new warrant with instructions: “The new warrant
2 should be drawn and signed by the judge of *Department Three* of the Eighth
3 Judicial District Court in accordance with NRS 176.495(3).” *Id.* (emphasis added).

4 The Nevada Supreme Court’s instructions on remand in *Rainsberger* dictate

5 that the district courts erred in holding that the court in Department 17 had
6 jurisdiction to issue an execution order and warrant for Floyd. To the extent the
7 district courts addressed Floyd’s statutory arguments at all, the courts erred in
8 holding the court in Department 17 was the successor in office to the court in
9 Department 5. This interpretation of successor in office is overly broad and not
10 supported by the precise statutory language in NRS 176.495 and 176.505.

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

19 Moreover, the district courts both failed to address Floyd’s arguments with
20 respect to the improper transfer of his state habeas petitions under NRS
21 34.730(3)(b). Floyd objected to the transfer of his state petition, which was
22 transferred to Department 17 because the court had the criminal case. Ex. 4 (*State*
23

1 *of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Notice
2 of Department Reassignment, Apr. 16, 2021). NRS 34.730(3)(b) requires assignment
3 of a state petition to “the original judge or court.” The district courts’ interpretation
4 of the statute reads the term “original” out of the statute. As explained above, the
5 district courts never addressed these statutory arguments, but this Court must do
6 so and hold that the state petition was improperly transferred to Department 17.

7 **IV. Conclusion**

8 For the foregoing reasons, Floyd respectfully requests that this Court sustain
9 his objection and transfer the criminal case and the state petitions to Department 5
10 under EDCR 1.60(h).

11 DATED this 22nd day of June, 2021.

12 Respectfully submitted
13 RENE L. VALLADARES
Federal Public Defender

14 /s/ David Anthony
15 DAVID ANTHONY
Assistant Federal Public Defender

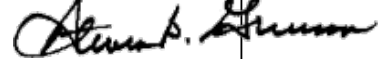
16 /s/ Brad D. Levenson
17 BRAD D. LEVENSON
Assistant Federal Public Defender

1 **CERTIFICATE OF SERVICE**

2 In accordance with EDCR 8.04 (c), the undersigned hereby certifies that on
3 this 22nd day of June, 2021, a true and correct copy of the foregoing OBJECTION
4 TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H),
5 was filed electronically with the Eighth Judicial District Court Clerk. Electronic
6 service of the foregoing document shall be made to opposing counsel listed as
7 follows:

8 Alexander Chen
9 Chief Deputy District Attorney
10 motions@clarkcountyda.com
11 Eileen.davis@clarkcountyda.com

12 /s/ Sara Jelinek
13 An Employee of the Federal Public Defenders
14 Office, District of Nevada
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1 EXH
2 RENE L. VALLADARES
3 Federal Public Defender
4 Nevada Bar No. 11479
5 DAVID ANTHONY
6 Assistant Federal Public Defender
7 Nevada Bar No. 7978
8 David_Anthony@fd.org
9 BRAD D. LEVENSON
10 Assistant Federal Public Defender
11 Nevada Bar No. 13804C
12 Brad_Levenson@fd.org
13 411 E. Bonneville, Ste. 250
14 Las Vegas, Nevada 89101
15 (702) 388-6577
16 (702) 388-5819 (Fax)

17 Attorneys for Defendant/Petitioner Zane M. Floyd

18 DISTRICT COURT
19 CLARK COUNTY, NEVADA

20 STATE OF NEVADA,
21 Plaintiff,

22 v.

23 ZANE M. FLOYD,
Defendant.

ZANE M. FLOYD,
Petitioner,

v.

WILLIAM GITTERE, ET AL.,
Respondents.

Case No. 99C159897
A-21-832952-W

Dept. No. VII

**EXHIBITS TO OBJECTION TO
ORDER DENYING MOTION TO
TRANSFER CASE UNDER EDCR
1.60(H)**

Date of Hearing:
Time of Hearing:

(DEATH PENALTY CASE)

**EXECUTION SCHEDULED FOR THE
WEEK OF JULY 26, 2021**

**HEARING TO BE SCHEDULED IN
DEPARTMENT VII**

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EXHIBIT NO.

DOCUMENT

1. *State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Court Minutes, May 14, 2021
2. *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
3. Political History of Nevada, Chapter 6, The Nevada Judiciary (12th ed. 2016).
4. *State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Notice of Department Reassignment, Apr. 16, 2021.
5. *State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Internal Court Document, Undated.
6. *State of Nevada v. Zane Floyd*, Case No. 99C159897, Clark County District Court, Order Denying Defendant's Objection to Order Denying Defendant's Motion to Transfer Case Under EDCR 1.60 (H), June 21, 2021

DATED this 22nd day of June, 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

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CERTIFICATE OF SERVICE

In accordance with the EDCR 8.04 (c), the undersigned hereby certifies that on this 22nd day of June, 2021, a true and correct copy of the foregoing EXHIBITS TO OBJECTION TO ORDER DENYING MOTION TO TRANSFER CASE UNDER EDCR 1.60(H), was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

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

EXHIBIT 1

EXHIBIT 1

Felony/Gross Misdemeanor

COURT MINUTES

May 14, 2021

99C159897 The State of Nevada vs Zane M Floyd

May 14, 2021 08:30 AM All Pending Motions

HEARD BY: Villani, Michael COURTROOM: RJC Courtroom 11A

COURT CLERK: Albrecht, Samantha

RECORDER: Georgilas, Cynthia

REPORTER:

PARTIES PRESENT:

Alexander G. Chen	Attorney for Plaintiff
Bradley D. Levenson	Attorney for Defendant
Brianna Vega Stutz	Attorney for Plaintiff
David S. Anthony	Attorney for Defendant
State of Nevada	Plaintiff

JOURNAL ENTRIES

STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION...MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)...DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION...DEFENDANT'S MOTION TO DISQUALIFY THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE

Defendant not present, presence waived.

Mr. Anthony argued, as to the Motion to Transfer Case, that certain issues were not in dispute and the statutes passed by the legislature control. Mr. Anthony stated the case was heard in Department 5 and requested a hearing to determine why the case was transferred, or in the alternative to transfer the case to Department 1. Court noted Department 5's cases were transferred to Department 17 on 12/28/2008, according to a printout from Odyssey. Mr. Chen stated the defense was so strict regarding the language of the statute, noted this case was 20 years old and all death penalty cases were randomly assigned to the four homicide tracks. Court FINDS the case was transferred in 2008, he is the successor Judge, and the creation of the homicide team allows him to hear this case, therefore COURT ORDERED, Motion to Transfer Case DENIED.

Court confirmed the argument on the Motion to Disqualify would be related to separation of powers. Argument by Mr. Levenson regarding identifiable impropriety and the likelihood of public suspicion. Mr. Levenson reviewed the procedural history of the case and read various media articles in Court. Court inquired regarding the status of the two Senators and Mr. Levenson stated they can not be on leave as it is not permitted by the Attorney General's Opinion 357. Mr. Chen argued the Court's ruling should not be based on social media and noted the Senators were not compensated by the District Attorney's Office while performing their duties. Mr. Chen stated the Attorney General and the District Attorney are the only ones that can request a Warrant of Execution. Upon Court's inquiry, Mr. Chen advised their position

was that the two Senators were employees of the office but not the public officers. Mr. Levenson argued the person appointed would be acting on behalf of the District Attorney's Office. Court stated it would consider the arguments presented and therefore, COURT ORDERED, matter UNDER ADVISEMENT with a decision to be issued before 5:00 pm today.

Court noted parties agreed to continue the other two Motions. Colloquy regarding scheduling conflicts. Mr. Levenson advised they would be going back to Federal Court next week and requested 30 day status checks. COURT FURTHER ORDERED, State's Motion for the Court to Issue Second Supplemental Order of Execution and Defendant's Motion to Strike CONTINUED.


NDC

6/4/2021 8:30 AM STATE'S MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

6/4/2021 8:30 AM DEFENDANT'S MOTION TO STRIKE, OR ALTERNATIVELY, MOTION TO STAY THE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

EXHIBIT 2

EXHIBIT 2



1 **ORDR**

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4 THE STATE OF NEVADA,

5 Plaintiff,

6 -vs-

7 ZANE MICHAEL FLOYD,

8 Defendant.

CASE NO: 99C159897

DEPT NO: XVII

9
10 **DECISION AND ORDER DENYING DEFENDANTS MOTION TO TRANSFER**
11 **CASE UNDER EDCR 1.60(H)**

12 DATE OF HEARING: MAY 14, 2021
13 TIME OF HEARING: 8:30 AM

14 THIS MOTION having come on for hearing before the Honorable MICHAEL
15 VILLANI, District Judge, on the 14th day of May 2021, with the Defendant not being
16 present. The Court having considered the matter, including briefs, transcripts, arguments of
17 counsel, and documents on file herein, now therefore, the Court makes the Decision on
18 Defendant's Motion to Transfer Case Under EDCR 1.60(H).

19 On December 28, 2008, all Department XVII's civil and criminal caseloads were
20 transferred to Department III, and all of Department V's civil and criminal caseloads were
21 transferred to Department XVII. The transfer of cases from Department V to Department
22 XVII included the instant case. As of December 31, 2020, Department V only hears civil
23 matters. *See* Administrative Order 20-25. Moreover, since 2008, while this matter was still
24 pending before the Nevada Supreme Court, neither party objected to the transfer of the
25 instant case to Department XVII. Additionally, since late 2008, the original Judge.

26 ///

27 ///

28 ///

1 EDCR 1.60(a) grants the authority of the Chief Judge to "assign and re-assign all
2 cases pending in District Court. Furthered, pursuant to EDCR 1.30(b)(5), the Chief Judge
3 has the authority to determine the regular and special assignments of District Court Judges.

4
5 On July 1, 2017, the Eighth Judicial District created the Homicide Team. See
6 Administrative Order 17-05. The Order provided that four departments would exclusively
7 hear homicide cases to increase case management efficiency. In 2018, Department XVII
8 was assigned to the Homicide Team. Additionally, Department XVII was assigned the
9 present matter in 2008 and in 2018 assigned to hear all homicide matters.

10
11 Therefore, THIS COURT FINDS that Department XVII is the proper
12 Department to preside over the instant case.

13 **ORDER**

14 THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Transfer Case
15 Under EDCR 1.60(H) is hereby denied.

16
17 
18 _____
DISTRICT JUDGE

19 MICHAEL P. VILLANI
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 4th day of June, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID ANTHONY
BRAD D. LEVENSON
411 E. BONNEVILLE, STE. 250
LAS VEGAS, NV 89101

BY /s/ Samantha Albrecht
Samantha Albrecht
Court Clerk for Judge Villani

EXHIBIT 3

EXHIBIT 3

POLITICAL HISTORY OF NEVADA

(TWELFTH EDITION)



Issued by
BARBARA K. CEGAVSKE
Nevada Secretary of State

Produced jointly with the Research Division
of the Legislative Counsel Bureau

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Political History of Nevada



Chapter 6

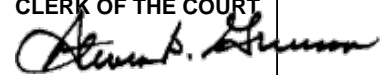
The Nevada Judiciary

<i>District—Counties</i>	<i>Name</i>	<i>Year</i>
No. 2—Washoe (Dept. 4)	Craven, Thomas O.	1967-1971
No. 2—Washoe (Dept. 5)	Gezelin, Emile (Appointed July 1, 1967; elected 1968.)	1967-1971
No. 3—Eureka and Lander	Sexton, John F.	1967-1971
No. 4—Elko	Wright, George F.	1967-1971
No. 5—Mineral, Esmeralda, and Nye	Breen, Peter (Died November 24, 1967.)	1967
	Mann, Kenneth (Appointed January 2, 1968, to election following.)	1968-1969
	Mann, Kenneth (Elected to unexpired term.)	1969-1971
No. 6—Pershing and Humboldt	Leighton, Donald M. (Died, June 19, 1967.)	1967
	Young, Llewellyn A. (Appointed August 15, 1967, to election following.)	1967-1969
	Young, Llewellyn A. (Elected to unexpired term.)	1969-1971
No. 7—White Pine and Lincoln	Wilkes, Roscoe	1967-1971
No. 8—Clark (Dept. 1)	Sundean, Clarence	1967-1971
No. 8—Clark (Dept. 2)	Compton, William P.	1967-1971
No. 8—Clark (Dept. 3)	Mowbray, John C. (Resigned October 1, 1967.)	1967
	Wartman, Alvin Nicholls (Appointed October 1, 1967; resigned October 14, 1969.)	1967-1969
	Wines, Taylor (Appointed October 14, 1969; resigned January 15, 1970.)	1969-1970
	Morse, William (Appointed January 18, 1970, to unexpired term.)	1970-1971
No. 8—Clark (Dept. 4)	O'Donnell, Thomas J.	1967-1971
No. 8—Clark (Dept. 5)	Mendoza, John F.	1967-1971
No. 8—Clark (Dept. 6)	Babcock, Howard W. (Appointed July 1, 1967; elected 1968.)	1967-1971

Statutes of Nevada 1971, Chapter 521, p. 1087, created the same eight judicial districts. District No. 1 had two judges, District No. 2 had six judges, District No. 8 had nine judges, and the rest had one each. On and after July 1, 1972, District No. 8 had 10 judges.

EXHIBIT 4

EXHIBIT 4



DISTRICT COURT
CLARK COUNTY, NEVADA

Zane Floyd, Plaintiff(s)

vs.

William Gittere, Defendant(s)

Case No.: A-21-832952-W

Related

99C159897

Department 17

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Michael Villani.

☒ This reassignment is due to: Per NRS 34.730, case assigned to same judge as the criminal case.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion to Disqualify Attorney, on 06/25/2021, at 8:30 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Patricia Azucena-Preza

Patricia Azucena-Preza

Deputy Clerk of the Court

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that this 16th day of April, 2021

- 4 ☒ The foregoing Notice of Department Reassignment was electronically served to all
5 registered parties for case number A-21-832952-W.

6 David_Anthony@fd.org

7 Brad_Levenson@fd.org

8 AHerr@ag.nv.gov

9 rgarate@ag.nv.gov

10 motions@clarkcountyda.com

11 **/s/ Patricia Azucena-Preza**

12 Patricia Azucena-Preza

13 Deputy Clerk of the Court

EXHIBIT 5

EXHIBIT 5

99C159897

ESigs

Forms

Save

Exit

Summary

Detail

Parties

Charges

Events

Service

Hearings

Conditions

Notes

Disposition

Time Stds

The State of Nevada vs Zane M Floyd

Type Felony/Gross Misdemeanor

Inactive

Events

Previous

Next

Date	Type and Comment	
04/15/2021	Clerk's Notice of Hearing Notice of Hearing	
04/15/2021	Motion for Order Motion and Notice of Motion for the Court to Issue Second Supplemental Order of Execut	
04/14/2021	Notice Notice of Waiver	
04/14/2021	Motion to Disqualify Attorney Motion to Disqualify the Clark County District Attorney's Office	
04/14/2021	Exhibits Exhibits in Support of Motion to Transfer	
04/14/2021	Motion Motion to Transfer Case Under EDCR 1.60(H)	
09/09/2013	Appendix Two - Full Text of Cases Submitted in Memorandum of Law in Support of Motion for Summary Juc	
09/09/2013	Appendix One - Complete Trial Record from Voir Dire to Death Penalty Sentencing Hearing	
03/26/2013	Archive SEALED Folder C	
03/22/2013	Archive SEALED Folder B	
03/22/2013	Archive SEALED Folder A	
03/22/2013	Archive SEALED Folder E	
03/22/2013	Archive SEALED folder F	
03/22/2013	Archive SEALED Folder D	
07/01/2011	USJR Reporting Statistical Closure USJR Case Status correction	
02/18/2011	Appeal to Supreme Court Flag Removed	
02/18/2011	NV Supreme Court Clerks Certificate/Judgment - Affirmed Rehearing Denied.	
01/19/2011	Left Side Filing Supreme Court Order Denying Rehearing	
11/17/2010	Left Side Filing Supreme Court Order	
12/28/2008	Case Reassignment Reassign Case From Judge Glass To Judge Vilani	

EXHIBIT 6

EXHIBIT 6

Heather L. Smith
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

CASE NO: 99-C-159897-1

DEPT NO: X

**ORDER DENYING DEFENDANT'S OBJECTION TO ORDER DENYING
DEFENDANT'S MOTION TO TRANSFER CASE UNDER EDCR 1.60 (H)**

DATE OF HEARING: JUNE 18, 2021
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 18 day of June, 2021, the Defendant not being present, but Defendant represented by DAVID ANTHONY and BRAD LEVENSON of the Federal Public Defender's Office, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and having reviewed the pleadings on file herein:

THIS COURT FINDS that this case was part of a random re-assignment of cases from Department V to Department XVII. The Nevada Supreme Court has upheld the Eighth Judicial District Court's re-assignment of cases. Therefore, Department XVII is the proper court that can issue the order and warrant of execution.

Dated this 21st day of June, 2021

IT IS HEREBY ORDERED that the Defendant's motion shall be denied.

DATED this _____ day of June, 2021.

Tierra Jones
DISTRICT JUDGE

C59 03A 31F4 CC4E

Tierra Jones

District Court Judge

I:\APPELLATE\WPDOCS\ATTORNEY FILES\ALEX'S DOCUMENTS\ORDER DENYING OBJECTION TO MOTION TO

TRANSFER.DOCX

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 The State of Nevada vs Zane M
Floyd

CASE NO: 99C159897

7 DEPT. NO. Department 17

8
9 **AUTOMATED CERTIFICATE OF SERVICE**

10 This automated certificate of service was generated by the Eighth Judicial District
11 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

12 Service Date: 6/21/2021

13 ECF Notifications CHU	ecf_nvchu@fd.org
14 Amanda White	awhite@ag.nv.gov
15 Heather Procter	hprocter@ag.nv.gov
16 Randall Gilmer	drgilmer@ag.nv.gov
17 Frank Toddre	ftoddre@ag.nv.gov
18 Steven Wolfson	motions@clarkcountyda.com
19 Eileen Davis	Eileen.davis@clarkcountyda.com
20 Sara Jelinek	Sara_Jelinek@fd.org
21 Heather Ungermann	ungermannh@clarkcountycourts.us
22 Brad Levenson	brad_levenson@fd.org
23 David Anthony	david_anthony@fd.org

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99C159897

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 28, 2021

99C159897

The State of Nevada vs Zane M Floyd

June 28, 2021

3:00 AM

Minute Order

HEARD BY: Bell, Linda Marie

COURTROOM: No Location

COURT CLERK: Yolanda Orpineda

JOURNAL ENTRIES

- Mr. Floyd has filed an Objection to Judge Jones' Order Denying Motion to Transfer Case Under EDCR 1.60(H). The Chief Judge has multiple conflicts in this matter pursuant to Nevada Revised Code of Judicial Conduct Rules 2.11(A)(1) and 2.11(A)(2)(b). As a result, the Chief Judge declines to hear this matter which was already determined by the presiding criminal Judge.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. // yo 06/28/21

PRINT DATE: 06/28/2021

Page 1 of 1

Minutes Date: June 28, 2021