

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ZANE M. FLOYD,

Petitioner,

v.

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

Respondent.

STATE OF NEVADA

Real Party in Interest.

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**PETITION FOR WRIT  
OF MANDAMUS AND  
PROHIBITION**

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## NRAP 26.1 DISCLOSURE

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

1. The Clark County Public Defender's office represented Mr. Floyd in his pretrial, trial, and direct appeal proceedings.
2. David M. Schieck represented Mr. Floyd during his initial state post-conviction proceedings.
3. The Federal Public Defender, District of Nevada, has represented Mr. Floyd for all subsequent proceedings, including the proceedings below.

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## **I. JURISDICTIONAL AND ROUTING STATEMENT**

This is a death penalty case. As such, the Supreme Court retains jurisdiction under NRAP 17(a).

## **II. RELIEF SOUGHT**

Floyd requests this Court issue a writ of mandamus ordering the Eighth Judicial District Court to vacate its order of execution because, as a matter of law, executions must take place at the Nevada State Prison (NSP). *See* NRS 176.355(3). However, the State has made it clear it intends to execute Floyd at the Ely State Prison (ESP).

Additionally, Floyd requests this Court prohibit the district court from entering a Warrant of Execution that designates ESP as the location for his execution, or, if the Warrant has already issued by the time this Court rules, that the district court be directed to vacate the Warrant of Execution to the extent it designates ESP as the location for the execution. Although a stay of execution is currently in place, it is temporary, and could be lifted anytime at the district court's discretion. Finally, Floyd asks this Court to hold that NRS 176.355 requires executions to occur at the NSP as a matter of law; resolution of this

question of law is needed to provide the district court with necessary “guidance on this issue.” *Hawkins v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 900, 904-05 407 P.3d 766, 771 (2017) (issuing writ of mandamus directing district court to vacate order and reconsider ruling in light of this Court’s “guidance”).

### **III. ISSUES PRESENTED**

Whether the meaning of “the state prison,” as used by the Legislature when enacting NRS 176.355(3), requires executions to take place at the Nevada state prison.

### **IV. NEVADA STATUTORY PROVISION**

The title of NRS 176.355 is: Execution of the death penalty: Method, time and place; witnesses. NRS 176.355 provides:

1. The judgment of death must be inflicted by an injection of a lethal drug.
2. The Director of the Department of Corrections shall:
  - (a) Execute a sentence of death within the week, the first day being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.

(b) Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.

(c) Be present at the execution.

(d) Notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.

(e) Invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The Director shall determine the maximum number of persons who may be present for the execution. The Director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution.

3. The execution *must take place at the state prison*.

4. A person who has not been invited by the Director may not witness the execution.

(emphasis added).

## V. STATEMENT OF THE FACTS

### 1. Relevant Procedural history

In 2000, after entering a judgment of conviction, the Eighth Judicial District Court<sup>1</sup> sentenced Floyd to die “in the Nevada State Prison located at or near Carson City, State of Nevada.”<sup>2</sup> Similarly, Floyd’s first warrant of execution, sought by the Clark County District Attorney’s Office, ordered that pursuant to NRS 176.355 Floyd’s execution was to be held “within the limits of the State Prison, located at or near Carson City, State of Nevada.”<sup>3</sup> Despite seven other Nevada prisons existing at the time, it was clear, in both instances, that the state prison referenced in NRS 176.355 was the Nevada State Prison.<sup>4</sup>

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<sup>1</sup> This pleading refers to the “district court” as the Honorable Michael P. Villani, the judge in Department 17. However, the judgment of conviction in question was entered by the Honorable Jeffrey D. Sobel in Department 5.

<sup>2</sup> 1PA017-020.

<sup>3</sup> 1PA021-023.

<sup>4</sup> *See* Nevada Department of Corrections, [http://doc.nv.gov/Facilities/NNCC\\_Facility/](http://doc.nv.gov/Facilities/NNCC_Facility/) (last visited June 28, 2021) (noting Ely State Prison, Florence McClure Women’s Correctional Center, High Desert State Prison, Lovelock Correctional Center, Northern Nevada Correctional Center, Southern Desert Correctional Center, and Warm Springs Correctional Center as operating prior to Floyd’s September 5, 2000 judgment of conviction).

Ultimately, the State did not effectuate the first execution warrant, as Floyd began his appeals process, contesting his conviction, and death sentence, through direct appeal and postconviction petitions before the Nevada courts, and then through habeas proceedings in both state and federal courts. At the end of 2020, the United States Supreme Court denied Floyd's Petition for Writ of Certiorari in his initial federal habeas proceedings. This ended all then-pending litigation in Floyd's case, and the next step towards Floyd's execution was for the State to again seek an order and warrant of execution.

On April 14, 2021, the Clark County District Attorney (CCDA) filed a motion with the district court seeking a second supplemental order of execution and second supplemental warrant of execution.<sup>5</sup> The State's proposed warrant sought Floyd's execution at NSP, during the week of June 7, 2021.<sup>6</sup> Floyd filed his opposition on April 21, 2021,

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<sup>5</sup> 1PA047-108.

<sup>6</sup> *Id.*

contesting the warrant, but stipulating to the State's contention that state law required Floyd's execution to occur at the NSP.<sup>7</sup>

On May 10, 2021, the State filed an addendum to its motion, changing the execution date, and changing the execution location to ESP, contending that its previous requests for the execution to take place at NSP were the result of "typographical error."<sup>8</sup>

The next day Floyd filed his motion to strike, or alternatively stay the second supplemental order of execution and second supplemental warrant of execution, on the basis that the CCDA's proposed execution warrant was in violation of NRS 176.355(3) by seeking Floyd's execution at a location other than NSP.<sup>9</sup>

On June 4, 2021, the district court heard argument on Floyd's motion, and later denied the motion from the bench at the conclusion of the hearing.<sup>10</sup> The district court issued its formal written order of

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<sup>7</sup> 1PA109-125.

<sup>8</sup> 2PA289-294.

<sup>9</sup> 2PA295-308.

<sup>10</sup> 2PA373.

denial, on June 7, 2021.<sup>11</sup> In denying the motion, the district court explained that under its interpretation of NRS 176.355 executions could take place at any state prison because NSP was the only state prison in existence at the time of NRS 176.355's enactment in 1967, and state prison is written in the statute using lower case letters.<sup>12</sup> The district court further opined that interpreting the statute any other way would lead to an absurd result.<sup>13</sup> The district court subsequently granted a stay of execution for Floyd pending resolution of his petition for writ of mandamus and prohibition in case number 83108.

This petition for writ of mandamus and prohibition follows. If this Court does not give consideration to Floyd's writ, the State will execute him illegally in a place prohibited by NRS 176.355.

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<sup>11</sup> 2PA390-393 The district court's order stated findings would be prepared. *Id.* However, it does not appear that any further findings will be made.

<sup>12</sup> 2PA372-73.

<sup>13</sup> 2PA373.

## 2. Nevada State Prison and NRS 176.355

Before obtaining statehood in 1864, Nevada had already established its state prison.<sup>14</sup> Upon settling in a location just outside of Carson City, Nevada's forefathers immediately created a Board of Prison Commissioners, and leased (later purchasing) 20 acres of land in Ormsby County to be used as a state prison.<sup>15</sup> NSP operated for two years before Nevada officially became a state.<sup>16</sup> While NSP continued to be Nevada's main location for executing criminal punishments, executions did not take place at the prison and were handled in the county of conviction.<sup>17</sup> Indeed, inmates sentenced to death were executed off-site, by hanging, at public events "in the county where the murder occurred."<sup>18</sup>

Public executions remained the status quo until 1901 when the Legislature changed Nevada law, requiring all executions after 1903 to

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<sup>14</sup> 2PA394-404.4

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See* 1PA025-031.

<sup>18</sup> *Id.*; *see also* 1PA013-016 (stating that "responsibility for carrying out the death sentence" belonged to "the county where the crime was committed."); 1PA001.

take place at the NSP. And all death sentenced inmates were required to be turned over to the Warden of the state prison by statute.<sup>19</sup>

This change was significant for two reasons. First, it signified the Legislature's conscious decision to move away from the mob spectacle characterizing public executions towards a more sanitized process—within the walls of the state prison.<sup>20</sup> And second, it evidenced the Legislature's intent for all executions to occur at NSP, the state prison. Thereafter, this Court also interpreted state law as requiring executions to take place just outside Carson City, at NSP.<sup>21</sup>

Nevada's statutory execution location requirement remained until 1967, when Assembly Bill (A.B.) 81 was introduced in the Legislature.<sup>22</sup> A.B. 81's overall purpose was to comprehensively codify Nevada's criminal code.<sup>23</sup> Regarding the death penalty, the Act moved the

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<sup>19</sup> 1PA002-005.

<sup>20</sup> 1PA025-031.

<sup>21</sup> *See Kramer v. State*, 60 Nev. 262, 262, 108 P.2d 304, 304 (1940) (this Court taking judicial notice that the state prison, NSP, was not technically located within Carson City's limits).

<sup>22</sup> *See* A.B. 81 1967 Leg., 54th Sess. (Nev. 1967).

<sup>23</sup> *Id.*

execution location requirement to NRS 176.355, and amended the prior statute's text from stating that the condemned was to be delivered "to the Warden of the State Prison of This State, for execution, such Prison to be designated in the warrant" to mandating that "[t]he execution *shall take place within the limits of the state prison.*"<sup>24</sup> (emphasis added). These changes reaffirmed the Legislature's intent that all executions must take place at NSP by further narrowing its language so that there was no ambiguity in the Legislature's intent to exclude other state prisons. Indeed, although other prisons were in existence (namely, Warm Springs Correctional Center and Northern Nevada Correctional Center), during NRS 176.355's enactment, NSP remained the state prison and statutory location for all executions in Nevada.<sup>25</sup> Even after 1967, additional state prisons were built and everyone still referred to NSP as the state prison.

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<sup>24</sup> *Id.*

<sup>25</sup> *See* 2PA405 (Citing 1964 as Northern Nevada Correctional Center's opening year); 2PA407-408 (noting that Warm Springs Correctional Center was located in Carson City, Nevada and "authorized by and constructed through appropriations from the 1961 legislative session.").

Since codified, NRS 176.355 has been amended five times, specifically in 1977, 1983, 1989, 1995, and 2001. In 1977, the legislature amended NRS 176.355 to establish the Department of Prisons.<sup>26</sup> In 1983, the statute was amended to change the method of execution from lethal gas to lethal injection.<sup>27</sup> Later, in 1989, NRS 176.355 was amended to clarify the time for which the penalty of death must be executed.<sup>28</sup> In 1995, the Legislature sought to modify the rights of relatives of victims to attend executions.<sup>29</sup> Finally, in 2001, the Legislature changed the Department of Prisons to the Department of Corrections and established a formal system for offender management.<sup>30</sup>

In addition, while many of the amendments were not relevant to the location of executions, the 1983 amendment modified the text of that section of the statute. After 1983, NRS 176.355 required that “[t]he

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<sup>26</sup> S.B. 116, 1977 Leg., 59th Sess. (Nev. 1977).

<sup>27</sup> S.B. 109, 1983 Leg., 62nd Sess. (Nev. 1983).

<sup>28</sup> A.B. 555, 1989 65th Sess. (Nev. 1989).

<sup>29</sup> A.B. 469, 1995 Legis. 68th Sess. (Nev. 1995).

<sup>30</sup> S.B. 193, 2001 Legis. 71st Sess. (Nev. 2001).

execution *must take place at the state prison.*” See (S.B. 109, 1983 Leg., 62nd Sess. (Nev. 1983)) (emphasis added). This change further clarified the precise location where an execution “must” take place on NSP’s premises, to wit, *at* NSP, not *within the limits* of NSP, or to the Warden of NSP.<sup>31</sup> See 2PA313-316 (statement of John Slansky, Warden of Northern Nevada Correctional Center)] (opining a specific “meaning behind the words, ‘within the state prison’” and subsequently changing the statute’s text).

Notably, with each amendment NRS 176.355’s language became more specific as to the precise location where executions occurred. And, when discussing the death penalty under NRS 176.355, legislators only referenced NSP.<sup>32</sup>

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<sup>31</sup> During this time, two additional state prisons were operating, Southern Nevada Correctional Center and Southern Desert Correctional Center. 1PA024; 2PA406.

<sup>32</sup> See *e.g.*, 2PA313-316 (statement of John Slansky, Warden of Northern Nevada Correctional Center); 2PA318-323 (statement of Vernon Housewright, Director of Prisons); 3PA615; *see also* 2PA325 (Legislative Commission of the Legislative Counsel Bureau State of Nevada, Report to the Legislative Commission of its Subcommittee for Study of the Condition of the State Prison, 60th Sess., at 1-3 (Aug. 1978)).

In 2012, NSP shut down.<sup>33</sup> In 2015, through A.B. 491, the Legislature approved funding for a new execution chamber at ESP (also known as Capital Improvement Project (CIP) 15-C03).<sup>34</sup> However, no one mentioned NRS 176.355 during the discussion of the legislation.<sup>35</sup>

## VI. ARGUMENT

### 1. Standard of Review

Questions of statutory interpretation, including those brought in writ petitions, are reviewed by this Court de novo. *Matter of William S.*, 122 Nev. 432, 437, 132 P.3d 1015, 1018 (2006).

This Court has original jurisdiction to issue writs of mandamus and prohibition. Nev. Const. art. 6, § 4. Writs of mandamus and prohibition are necessary if a petitioner does not have a “plain, speedy and adequate remedy in the ordinary course of law.” *Cote v. Eighth Judicial Dist. Ct.*, 124 Nev. 36, 39 175 P.3d 906, 908 (2008) (quoting NRS 34.170 and NRS 34.330). The writ of mandamus compels the performance of an act the law requires, NRS 34.160, and the writ of

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<sup>33</sup> See 2PA394-404.

<sup>34</sup> See A.B. 491, 2015 78th Sess. (Nev. 2015).

<sup>35</sup> See 1PA032-046.

prohibition is available when a court acts in excess of its jurisdiction, NRS 34.320.

Writs of mandamus are available to correct the district court's arbitrary or capricious exercise of discretion. *State v. Zogheib*, 130 Nev. 158, 161, 321 P.3d 882, 884 (2014). A discretionary ruling that is “contrary to the evidence or established rules of law” or is influenced by prejudice or preference rather than reason constitutes an arbitrary or capricious exercise of discretion. *Id.* The writ is also available to remedy a manifest abuse of discretion. *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (manifest abuse of discretion is a “clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule”).

Consideration of this writ is proper, as there is no other remedy at law for hearing Floyd's claim.<sup>36</sup>

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<sup>36</sup> *See* 2PA345-63 (arguing that Floyd's claim is not cognizable for relief in district court in a post-conviction petition).

**2. NRS 176.355's plain and specific language requires executions to take place at NSP**

Because NRS 176.355(3) is unambiguous, legislative intent may be derived from the plain words of the statute, which clearly limits executions to NSP.

The purpose of statutory interpretation “is to give effect to the Legislature’s intent.” *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). Thus, when interpreting a statute this Court begins with the statute’s plain words and avoids any interpretation which “renders language meaningless or superfluous.” *Id.*; *State v. Tatalovich*, 129 Nev. 588, 589-90, 309 P.3d 43, 44 (2013). However, “[t]his duty does not include expanding upon or modifying the statutory language because such acts are the Legislature’s function.” *Williams v. United Parcel Servs.* 129 Nev. 386, 391-92, 302 P.3d 1144, 1147 (2013).

Only if a statute is ambiguous is this Court permitted to go beyond its plain meaning to determine legislative intent. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). “A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.” *D.R. Horton, Inc. v. Eighth Judicial*

*Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). Nonetheless, “when a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction.”

*Edgington v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003); *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

NRS 176.355 comprises the details governing executions in Nevada. In codifying NRS 176.355, the Legislature provided clear instructions for how the death penalty is to be carried out in Nevada:

**Execution of death penalty; Method; time and place; witnesses.**

1. The judgment of death must be inflicted by an injection of a lethal drug.

2. The Director of the Department of Corrections shall:

(a) Execute a sentence of death within the week, the first day being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.

(b) Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.

(c) Be present at the execution.

(d) Notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.

(e) Invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The Director shall determine the maximum number of persons who may be present for the execution. The Director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution.

3. The execution must take place at the state prison.

4. A person who has not been invited by the Director may not witness the execution.

And, pursuant to that statutory provision, all executions “*must* take place at *the* state prison.” (emphasis added). This language is specific, and the definite article “the,” clearly identifies the state prison—NSP, as a requirement, as the reference is to the state prison singular.

**a. Use of the definite article**

When enacting NRS 176.355, and through its almost half a dozen amendments, the Legislature made an explicit decision to use “the,”

instead of “a,” or foregoing the use of a definite article altogether. The choice was purposeful. By using “the,” a limiting word, the Legislature evidenced its intent to restrain executions to a singular location—NSP. *See Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (use of the definite article in the Constitution’s conferral of appointment authority on “the Courts of Law” obviously narrows the class of eligible ‘Courts of Law’ to those courts of law envisioned by the Constitution”); *Pineda v. Bank of America, N.A.*, 241 P.3d 870, 875 (Cal. 2010) (“Use of the indefinite articles “a” or “an” signals a general reference, while use of the definite article ‘the’ (or ‘these’ in the instance of plural nouns) refers to a specific person, place, or thing.”); *Poole v. Nevada Auto Dealership Invest., LLC*, 135 Nev. 280, 291 n.5, 449 P.3d 479, 488 n.5 (Nev. App. 2019) (distinguishing between indefinite article (“a”) in NRS 598.0923(2) with definite article (“the”)).

NRS 176.355 clearly states that executions must take place at “the” state prison, not “a” or “any” state prison. *See Pineda v. Bank of America, N.A.*, 241 P.3d 870, 875 (Cal. 2010) (“Use of the indefinite articles “a” or “an” signals a general reference, while use of the definite

article ‘the’ (or ‘these’ in the instance of plural nouns) refers to a specific person, place, or thing.”). If the Legislature intended executions to occur at any state prison it would have specified such in the text of the statute, instead of using a definite article. *Compare* NRS 176.355, *with* Tex. Code Crim. Proc. Art. 43.19 (stating executions “shall take place at a location designated by the Texas Department of Criminal Justice”), *and* Ga. Code § 17-10-44 (providing that “[t]he Department of Corrections shall provide a place for the execution of the death sentence”). Indeed, the Legislature’s choice to use “the” to specifically designate the NSP becomes even clearer when considering that other state prisons were in existence at the time of NRS 176.355’s enactment and subsequent amendments.<sup>37</sup> *See* section III below.

The district court treated the use of the definite article as insignificant, and instead interpreted NRS 176.355 as encompassing all

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<sup>37</sup> In the proceedings below, counsel for Floyd misspoke by agreeing with the district court’s assertion that there was only one state prison at the time NRS 176 was enacted. As described above, this was incorrect, and Floyd now corrects that assertion in this writ. *See* NRPC 3.3(a)(1) (“A lawyer shall not knowingly . . . Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”).

Nevada prisons, partly because the letters “s” and “p” in state prison are written in lowercase. The district court’s reasoning is flawed for several reasons. First, reading the statute in this manner is prohibited as it would render “the” unnecessary and superfluous. *See S. Nevada Homebuilders Ass’n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990)) (internal quotation marks omitted) (when interpreting a statute courts should consider “provisions as a whole so as to read them in a way that would not render words or phrase superfluous or make a provision nugatory.”). And, “[l]ike all the other words in a statute, the articles count.” *People v. Hayden*, 127 N.E.3d 823, 842 (Ill. 2018). Second, nothing mandates that the words be capitalized in order to memorialize intent. In fact, the Legislature, and others have referred to NSP in other contexts without capitalizing the “s” or “p,” and there was never any confusion what state prison was being referenced.<sup>38</sup> This follows even more so when, like NRS 176.355, a

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<sup>38</sup> *See* 1PA008-011 (discussing NSP without capitalizing “state” or “prison.”); *see also* 1PA025-031 (referring to NSP as the “state prison,” without capitalization).

statute refers to a specific person, place, or thing, but doesn't use its proper noun.

Third, a subsequent lowercase noun does not defeat the particularizing effect of a definite article. In *Hayden*, the court analyzed whether a statute which used the term “the victim” included any victim or a specific person. 127 N.E.3d at 842-43. The court concluded that by using “the,” a definite article, before a noun, the Legislature limited the scope of the term to specifically named victims in a prosecution case and not any victim. *Id.* This holding impliedly acknowledged that a lowercase noun does not negate the effects of a definite article. *Id.* Similarly here, interpreting “the state prison” as including “a,” “all” or even “any” prison in Nevada “would require a decontextualization in defiance of the definite article.” *Id.*; see also *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo.1969) (en banc) (concluding that although Legislature

used the term “the tax levy” in ordinance, the definite article was intended to implicate a specific property tax mill levy).<sup>39</sup>

Rules of statutory interpretation demand that the Legislature’s explicit word choice not be treated as “random or devoid of meaning.” *See Williams v. State Dep’t of Corr.*, 133 Nev. 594, 598-99, 402 P.3d 1260, 1264 (2017) (quoting *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)) (internal citations omitted). Moreover, this Court has specifically recognized that “[the Legislature’s] explicit decision to use one word over another in drafting a statute is material. It is a decision that is imbued with legal significance and should not be presumed to be

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<sup>39</sup> This concept is also illustrated by reading other states’ execution statutes. *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* 170 (2012) (“a material variation in terms suggests a variation in meaning.”). For example, Indiana mandates that “execution[s] must take place inside the walls of *the state prison*.” *See* Ind. Code § 35-38-6-5 (emphasis added). The term “state prison” is not capitalized, yet all executions occur at the Indiana State Prison even though there are over 15 state prisons in that state. Likewise, Florida provides that “[t]he sheriff shall deliver a person sentenced to death to *the state prison* to await the death warrant.” Fl. Stat. 922.111. Although “state prison” is in lowercase letters, executions only occur at Florida State Prison (in a state with over 40 institutions). Thus, the Legislature’s decision to not capitalize the term “state prison” should not undermine the Legislature’s intent in using the definite article.

random or devoid of meaning. *Id.* NRS 176.355 uses specific language (the) to designate a particular prison (NSP), as opposed to inclusive terms (a, any, or), which would indicate no preference or designated prison. *Pineda*, 241 P.3d at 875.

In reaching the opposite conclusion, the district court also relied on an incorrect fact, namely that NSP was the only prison in existence when NRS 176.355 was created, and as a result the Legislature had no choice but to put “the,” because it was the only state prison. This is factually untrue and the fact that there were other state prisons at the time provides support for Floyd’s argument. In 1967, two other state prisons operated in Nevada. Accordingly, the Legislature had to choose between one prison, two prisons, or all three prisons as potential execution locations. By using “the state prison” in the statute, the Legislature evidenced its choice of one state prison, NSP. Construing NRS 176.355 in any other manner would eliminate the legal significance of the Legislature’s intentional act. *Williams*, 133 Nev. at 598-99.

For these reasons, NRS 176.355 plainly requires executions to take place at NSP. The district court’s conclusion that “the” includes “any” and “all” state prisons merely because state prison is lowercase is an arbitrary and capricious exercise of discretion. Further, the district court manifestly abused its discretion because it incorrectly interpreted and applied principles of statutory construction when it denied Floyd’s motion to strike and/or stay the execution.

**3. Looking to other factors also demonstrates legislative intent that executions must take place at NSP**

Even if this Court finds it appropriate to go beyond NRS 176.355’s plain language, legislative history, historical considerations, public policy, and principles of statutory construction still evidence the Legislature’s intent to require executions to take place at NSP.

When interpreting an ambiguous statute, this Court assesses legislative history, reason, and public policy to determine legislative intent. *Lucero*, 127 Nev. at 95-96, 249 P.3d at 1228; *see also* Scalia & Garner, at 299 (concluding that legitimate rules of statutory construction can resolve textual ambiguities). Moreover, “[l]aws

imposing criminal sanctions require strict construction in favor of the citizen and against the government.” *Sparkman v. State*, 95 Nev. 76, 82, 90 P.2d 151, 156 (1979) (Citing *United States v. Brown*, 333 U.S. 18 (1947); *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (quoting *Anderson v. State*, 95 Nev. 625, 629, 600 P.2d 241, 243 (1979) (concluding that ambiguous “[c]riminal statutes must be strictly construed and resolved in favor of the defendant.”)).

**a. Legislative history further supports Floyd’s construction**

NRS 176.355’s legislative history refutes any argument that the Legislature sought to make the statute applicable to any state prison. Since enactment, it has been understood that the “state prison” referenced in NRS 176.355 is NSP. In addition, NRS 176.355 has been brought before the Legislature for amendments several times, none of which were to change the execution location, but rather to further

narrow and specify NSP as the proper location, as this fact was clear to all.<sup>40</sup>

For example, in several committee meetings NSP was the only prison referenced when discussing the location of an execution under the statute. *See e.g.*, 2PA313-316 (statement of John Slansky, former Warden of Northern Nevada Correctional Center describing the inept execution conditions at NSP); 2PA321-22 (statement of Vernon Housewright, former Director of Prisons, discussing changes to Nevada’s method of execution due to the insufficiency of NSP’s execution chamber); 2PA325 (Memorandum Exhibit submitted for Hearing before Assembly Committee on Judiciary, 68th Sess. Legis. 1977-78 (1995)) (referencing NSP as the location where executions occur).

And, in 1978, the Legislature requested the legislative commission to draft a report on the condition of the state prison.<sup>41</sup> The report

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<sup>40</sup> This Court continued to refer to NSP as the “State Prison” in orders staying executions after the enactment of NRS 176.355(3). 1PA006-007.

<sup>41</sup> *See* 1PA008-012.

detailed conditions at NSP, the only prison the Legislature and the commission understood to be Nevada's state prison. Indeed, during legislative sessions no one debated which state prison was "the" state prison because everyone knew NSP was Nevada's official state prison. *Id.* In reaching its contrary conclusion, the district court ignored NRS 176.355's legislative history. However, as evidenced above, statutory text and history alike foreclose the district court's contrary interpretation.

For its part, in the proceedings below, the State contended that NRS 176.355's legislative history should be ignored, as only A.B. 491's history in 2015 is relevant to determine legislative intent in 1967 and 1983 for NRS 176.355. This reasoning is flawed and goes against this Court's statutory construction jurisprudence. The Legislature's subsequent apportionment of funds for the construction of an execution chamber at ESP in 2015 provides no insight regarding its intent in 1967, 1977, 1983, 1989, 1995, or 2001. <sup>42</sup>What the Legislature intended

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<sup>42</sup> Appropriation of funds does not change Nevada law. A bill appropriating funds starts in a different committee than a bill changing

in 2015 doesn't matter as legislative actions that occur nearly 50 years later cannot be attributed or transferred to past legislative enactments. "[T]he words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the statute must be construed as it was intended to be understood when it was passed." *See Orr Ditch & Water Co. v. Just. Ct. of Reno twp., Washoe Cty.*, 64 Nev. 138, 171, 178 P.2d 558, 574 (1947).

Moreover, it does not follow that state prisons which were not in existence, or even a forethought in 1967, could have been envisioned in the statute's intent. When the Legislature approved the funding requested in A.B. 491 no one discussed NSP or NRS 176.355, or proffered any changes to the statute. While this was likely an oversight by the Legislature, an oversight cannot undo a codified statute.<sup>43</sup> If statutes must be construed in the state of mind of the Legislature at the

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criminal laws. So, the Legislature's 2015 apportionment of funds for the construction of the ESP execution chamber is unrelated to NRS 176.355. This disconnect is for legislators to work out, not this Court.

<sup>43</sup> The Legislature is not the only entity that has not updated its provisions regarding NSP. Under NRAP 8(f), if there is a stay of execution entered by this Court "the clerk shall deliver copies thereof to the Governor of Nevada and to the warden of the Nevada State Prison."

time of passage, then despite its decommissioned condition, NSP is the state prison in Nevada, and resultantly the only prison where executions can occur.

**b. NSP is Nevada's state prison**

Nevada's history further informs the question of whether "the state prison," is NSP. NSP has always been an integral part of Nevada's history. Its existence predates Nevada's statehood. It was Nevada's first prison. It was constructed just outside Carson City, the state's capital. And, it remained the state's only prison for decades. NSP was a massive institution, that housed hundreds of inmates, employed hundreds of Nevadans, and continued its operation, without pause, until closing its doors in 2012. NSP's impact as Nevada's state prison can still be seen today as the institution holds itself out as a landmark and operates as a museum of Nevada's history, even holding special events each year for Nevada day.<sup>44</sup> Thus, NSP's moniker of being Nevada's state prison is not by coincidence, but by design, as it was a central component in forging Nevada's identity.

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<sup>44</sup> 2PA394-404.

When the Legislature moved executions from public events to private occurrences it deliberately chose NSP as the execution location. When the Legislature passed NRS 176.355, it again reaffirmed that executions were required to take place at NSP. Executions were carried out at NSP for over a hundred years in all manners and by all methods: hanging, firing squad, gas chamber, and lethal injection. At no point did any question whether “the state prison” was NSP because it was a known fact.

While other prisons did come into being, none were considered *the* state prison, as NSP undoubtedly kept that title. Despite Nevada establishing seven other state prisons, each and every execution that has ever taken place has occurred at NSP. That is because there has never been any confusion as to what the Legislature meant by “the state prison.” The mere fact that the Legislature overlooked NRS 176.355(3) when approving funding for the new death chamber at ESP does not change this fact. The district court’s order is erroneous as it fails to acknowledge NSP’s historical circumstances and how it impacts the Legislature’s intent.

**c. Legislators amend laws, not courts**

In denying Floyd’s motion, the district court also based its denial on avoiding absurd results. *See Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) (holding that statutes should be construed so as to “avoid absurd results.”). The district court did not further explain why Floyd’s interpretation was in any way absurd. In fact, there is nothing absurd about specifying one place where executions must occur. However, absurdity will result if this Court allows the district court’s interpretation of NRS 176.355 to stand as it would allow the transference of intent from the 2015 Legislature to the 1967 Legislature.

Here, under Floyd’s interpretation of the statute the result is not absurd; rather, the result is that the statute needs to be amended. Far from being absurd, statutory amendments are required all the time and indeed, as noted above, the very statute in question has been amended five times over the years since its enactment.

If the Legislature wants to change NRS 176.355(3) after constructing a new execution chamber, then the responsibility lies with

the Legislature to amend the statute to evidence its intent. Its failure to do so is an oversight only it can fix as “[i]t is the prerogative of the Legislature, not the Supreme Court, to change or rewrite a statute.” *Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012); *see also* Nev. Const. Art. 3 § 1 (stating that the executive, legislative, and judicial branches of government are forbidden from encroaching on the powers of one another); *Ex parte Smith*, 33 Nev. 466, 111 P. 930, 936 (1910) (“It is the Legislature, not the court, which is to define a crime and ordain its punishment.”).

Likely, this case presents the first challenge to this issue as Floyd’s execution will be the first to occur at a place other than the state prison. Because this issue was not ripe until now, it is imperative that this Court take this opportunity to interpret NRS 176.355(3). This result is straightforward and logical, whereas, interpreting NRS 176.355 as the district court did would result in absurdity, as it would inappropriately require this Court to step into the shoes of the Legislature and make law.

## VII. CONCLUSION

The district court's conclusion that the term "the state prison," as used in NRS 176.355(3), encompassed any state prison was an arbitrary and capricious exercise of discretion because it relied on untrue facts and ignored relevant canons of statutory construction. Moreover, the district court manifestly abused its discretion because it incorrectly interpreted and applied NRS 176.355(3) when it denied Floyd's motion to strike and/or stay the execution. Based on the foregoing, Floyd respectfully requests that this Court issue a writ of mandamus, ordering the Eighth Judicial District court to vacate its order of execution because, as a matter of law, executions must take place at the NSP.

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Floyd further requests that this Court prohibit the district court from entering a Warrant of Execution that designates ESP, or, if the Warrant has already issued, that it order the Eighth Judicial District court to vacate the warrant to the extent it designates ESP as the location of the execution.

DATED this 16th day of July, 2021.

Respectfully submitted,

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*/s/ David Anthony*

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*/s/ Jocelyn S. Murphy*

JOCELYN S. MURPHY  
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**VERIFICATION PURSUANT TO NRAP 21(A)(5)**

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

Executed on July 16, 2021.

*/s/ Jocelyn S. Murphy*  
JOCELYN S. MURPHY  
Assistant Federal Public Defender

## CERTIFICATE OF COMPLIANCE

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

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

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

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

Proportionately spaced. Has a typeface of 14 points or more and contains 6,046 words: or

Monospaced. Has 10.5 or few

Does not exceed pages.

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

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

Respectfully submitted,

*/s/Jocelyn S. Murphy*  
JOCELYN S. MURPHY  
Assistant Federal Public Defender

## CERTIFICATE OF SERVICE

In accordance with NRAP Rule 25(c)(1)(C) the undersigned hereby certifies that on this 16th day of July, 2021, I personally served a true and correct copy of the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION by email to:

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

Further Service on the following party was made via UPS on July 16, 2021:

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

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

## NOTICE OF FILING

In accordance with NRAP 21(a)(1), the undersigned hereby certifies that on this 16th day of July, 2021, I personally served a true and correct copy of the foregoing PETITION FOR WRIT OF MANDAMUS AND PROHIBITION, by email to:

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An Employee of the  
Federal Public Defender, District of Nevada