Case No. 83225

Supreme Court 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.

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

Petition for Rehearing

DEATH PENALTY CASE

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I. Introduction

Zane M. Floyd petitions this Court for rehearing, following this Court's order denying Floyd's Petition for a Writ of Mandamus.[1] Rehearing is required because this Court overlooked and misapprehended principles of statutory interpretation in purporting to apply a plain language standard but considering evidence outside of NRS 176.355's plain language. *See* NRAP 40(c)(2).

Rehearing is also required because this Court overlooked and misapprehended material questions of fact and law in this case demonstrating that the Legislature intentionally used similar and dissimilar language to distinguish penal institutions and as such did not intend "the state prison" to be a collective or general term. *See* NRAP 40(c)(2).

Finally, rehearing is necessary because this Court overlooked and misapprehended material questions of law in failing to interpret NRS 176.355 in a manner harmonious with other statutes.

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[1] *Floyd v. Eighth Judicial District Court*, Case No. 83225, Order Denying Petition (filed February 24, 2022) ("Slip. Op.").

II. Argument

A. This Court overlooked and misapprehended material questions of fact and law in applying its plain language interpretation of NRS 176.355.

Floyd argued that under either statutory interpretation—plain meaning or legislative history—NRS 176.355(3) requires executions to only occur at the Nevada State Prison. This Court rejected Floyd's argument "[b]ased on the plain language of that statute" and concluded that under NRS 176.355(3) executions can take place at "any one of the state prisons and not a specific prison as posited by Floyd." Slip. Op. at 2-3. But, in actuality, this Court's decision shows that it rejected Floyd's argument based on something entirely outside of NRS 176.355's plain language and therefore overlooked and misapprehended the Court's own rules of statutory interpretation.

While this Court's analysis began with plain meaning, and discussed capitalization and definite articles, this Court recognized that neither of these grammatical points standing alone or together were sufficiently clear to determine the meaning of "the state prison." *See* Slip. Op. at 2-3. In fact, as discussed below, this Court overlooked and

misapprehended both *Briggs & Stratton Power Prod. Grp., LLC v. Generac Power Sys., Inc.*, 796 N.W.2d 234, 238 (Wisc. Ct. App. 2011), and *Baez v. Disabled Am. Veterans Serv. Found.*, 119 F. Supp. 490, 491 (S.D.N.Y. 1954), which actually support rather than repel the argument that "the state prison" is unclear and meaning cannot be determined based on plain language alone.

After concluding that plain meaning could not be determined based on grammar or any other indications in NRS 176.355's plain language, this Court looked outside of the statute and turned to Nevada's history to provide "context" for meaning. Slip. Op. at 3. Specifically, this Court reviewed how many state prisons were in existence when NRS 176.355 was enacted. Slip. Op. at 3. Ultimately, this Court used that single piece of historical evidence to disagree with Floyd's interpretation, stating "given that there was more than one state prison when [NRS 176.355] was enacted . . . and that the statute does not say 'the Nevada State Prison,' context does not dictate a specific prison where executions must take place." Slip. Op. at 3.

Overlooking and misapprehending its own rules of statutory interpretation, this Court dispositively decided the merits of Floyd's claim by going beyond NRS 176.355's plain language. *See Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979) ("When the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it."); *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984) ("If a statute is clear on its face a court cannot go beyond the language of the statute in determining the Legislature's intent.").

Furthermore, this Court misapprehended *Wyers v. Am. Med. Response Nw., Inc.*, 377 P.3d 570, 578 (Or. 2016), which discusses viewing a definite article in context with other sentences in the statute and not the context of the historical circumstances in reference to the words used in the statute. Slip. Op. at 3.

Once this Court considered historical context, thereby recognizing that NRS 176.355 could not be decided based on plain meaning, this Court was required to examine the entire context under an ambiguous statutory interpretation analysis. *See Leven v. Frey*, 123 Nev. 399, 405,

168 P.3d 712, 716 (2007). Considering one historical fact does not adequately depict NRS 176.355's intended meaning. This Court's context analysis overlooked and misapprehended similar statutory provisions, legislative history evidencing the Legislature's intent to distinguish terms, and additional state history demonstrating that NRS 176.355's intent and purpose is not only to "establish a procedure for carrying out a death sentence," but also to designate one specific and consistent place where said death sentences may be carried out. Slip. Op. at 3.

1. This Court overlooked and misapprehended material questions of law in ignoring that an uncapitalized noun can still be a proper noun, especially when preceded by a definite article.

First, this Court concluded that the term "the state prison" is intended to encompass all prisons in Nevada because "state prison is not capitalized in NRS 176.355(3)." Slip. Op. at 2. As support, this Court relied on *Briggs & Stratton Power Prod. Grp., LLC v. Generac Power Sys., Inc.*, 796 N.W.2d 234, 238 (Wisc. Ct. App. 2011). But *Briggs* does not definitively support this conclusion. Indeed, as quoted by this Court, "a proper noun is a noun that designates a particular being or

thing, and is *usually* capitalized in English."[2] Slip. Op. at 2 (emphasis added). The Wisconsin Court of Appeals' use of the limiting word *usually* is of significance here. Usually means most often, it does not mean always, definitively, or conclusively. *See Usually, Merriam-Webster Online Dictionary* (2022). Thus, this Court overlooked and misapprehended the holding in *Briggs* by concluding that an uncapitalized noun is definitively "a non-specific, or common noun." Slip. Op. at 2. While the Legislature could have intended the uncapitalized noun in "the state prison" to be a common noun, under *Briggs* "the state prison" could also have been intended to be a proper noun. Accordingly, under the rule cited by this Court in *Briggs,* at best

[2] The same is also true in the reverse. *See, e.g.*, *Baez v. Disabled Am. Veterans Serv. Found.*, 119 F. Supp. 490, 491 (S.D.N.Y. 1954); *see also* Slip. Op. at 2. In *Baez*, the Plaintiff challenged the results of a word puzzle contest. The Plaintiff argued that contestants who submitted the word "Esth" were in violation of contest rules because proper names were prohibited from submission. *Id*. At the time, "Esth" was capitalized in the dictionary and defined as an Estonian person, which would have made it a proper noun. *Id*. Although the court recognized that "[p]roper nouns and proper adjectives are capitalized," it acknowledged that the word contest committee's decision to not treat "Esth" as a proper name, despite it being capitalized in the dictionary, was not invalid. *Id*. at 492.

the correct noun classification of "the state prison" based solely on capitalization is not dispositive.

Moreover, *Briggs* is distinguishable from the case at hand. In *Briggs*, the nouns at issue were already expressly defined in a contract as referencing specific things, unlike Nevada's statutory scheme which fails to expressly define "the state prison." Additionally, although *Briggs* recognizes that a proper noun is not always capitalized, the Wisconsin Court of Appeals did not discuss the implications of this specific limitation, especially when like here the uncapitalized noun is preceded by a definite article. *See id.* at 230; *see also, State v. Lykins*, 357 Or. 145, 159, 348 P.3d 231 (2015) ("As a grammatical matter, the definite article, 'the,' indicates something specific, either known to the reader or listener or uniquely specified.").

This omission represents the error in this Court's application of *Briggs* as this Court's precedent has previously affirmed "that the use of a definite article" does affect "the scope of the noun following it." Slip. Op. at 3 (citing *Poole v. Nev. Auto Dealership Inv., LLC*, 135 Nev. 280, 291 n.5, 449 P.3d 479, 488 n.5 (Ct. App. 2019). Nonetheless, despite the

distinguishable characteristics of *Briggs*, notably, this Court also overlooked the Wisconsin Court of Appeals' reliance on the impact of "qualifying phrases" that precede nouns. *Briggs*, 796 N.W.2d at 237, 239. Accordingly, based on the above, this Court misapprehended the general rule in *Briggs* and rules of statutory interpretation by conclusively declaring that an uncapitalized noun is always "a non-specific, or common noun." Slip. Op. at 2.

2. This Court overlooked material questions of law in deciding the merits of Floyd's claim based on evidence outside of NRS 176.355's plain language to determine the meaning of "the state prison."

Next, this Court acknowledged that "the use of a definite article (the) can limit the scope of the noun following it," but nonetheless dismissed Floyd's interpretation of NRS 176.355 by concluding that the term was not unclear upon reviewing the historical context in which the statute was passed. Slip. Op. at 3.

NRS 176.355 does not define the term "the state prison." However, this Court concluded that the meaning of the term could still be determined based on NRS 176.355's plain language. Slip. Op. at 3. But,

to reach its decision, this Court went outside NRS 176.355's plain words and considered contextual historical information. Slip. Op. at 3. As a result, this Court must reconsider its "plain meaning" interpretation of NRS 176.355 because it misapplied fundamental rules of statutory interpretation and failed to examine the entire context of the term "the state prison" in its analysis.

In applying its plain language analysis, this Court stated that the Legislature's use of a definite article (the), which has limiting power when it precedes a noun, required the Court to consult the context surrounding the term "the state prison" in order to determine its meaning. *See* Slip. Op. at 3. This Court then examined whether other prisons existed during NRS 176.355's enactment and used that evidence to dispositively conclude that because "there was more than one state prison when the statute was enacted . . . context does not dictate a specific state prison where executions must take place." *Id*. However, this reference to context is only permissible once a statute is first found to be ambiguous.

This Court's analysis overlooked and misapprehended *Wyers v. Am. Med. Response Nw., Inc.*, 377 P.3d 570, 578 (Or. 2016), the case cited to support review of contextual historical evidence. While *Wyers* does acknowledge that "the use of the definite article is not always, so to speak, definitive" and that "[i]ts use in context may reveal an intention to encompass less categorically specific referents," *Wyers* specifically defines "statutory context" as meaning the context of the words in the provision, not the historical conditions existing when the statute was passed as this Court misapprehended. *Id.* at 578-79.

Moreover, this Court's analysis also overlooked and failed to properly apply its own statutory interpretation jurisprudence which expressly disallows consulting anything outside of the statute under a plain language interpretation. *See Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979) ("When the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it."); *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984) ("If a statute is clear on its face a court

cannot go beyond the language of the statute in determining the Legislature's intent.").

This Court's jurisprudence explains that courts can consult evidence outside the statute's language only when that language is unclear. *State, Div. of Ins. v. State Farm Mut. Auto. Ins.* Co., 116 Nev. 290, 294, 995 P.2d 482, 485 (2000). Contextual evidence is considered to be outside of a statute's plain language. *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). As a result, this Court has held that determining "the meaning of the words used in a statute by 'examining the context'" of the statutory provision is only permitted when the provision at issue is ambiguous. *Id.*; *see also McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986). Thus, by relying on the fact that "there was more than one state prison when [NRS 176.355] was enacted" to reject Floyd's interpretation of NRS 176.355, this Court violated its own statutory interpretation principles and as a result overlooked and misapprehended its own controlling authority. Slip. Op. at 3.

3. If this Court needed to examine evidence outside of NRS 176.355's plain language to determine meaning, then NRS 176.355 is unclear, and the entire context should be examined when determining meaning.

By relying on extrinsic historical evidence to reach its decision, this Court recognized that the meaning of "the state prison" is actually unclear and ambiguous as it could not be determined by NRS 176.355's plain language alone and required review of contextual circumstances. Slip. Op. at 3. But even this Court's context analysis overlooked and misapprehended the law by limiting its examination to a single contextual fact rather than reviewing the entire context of the term "the state prison." Slip. Op. at 3. When this Court reviewed contextual evidence that was not a part of NRS 176.355's text it shifted the analysis from plain language to ambiguous and, as such, analogous statutory provisions, legislative history, and the entire state history of NRS 176.355 should have been examined as it encompasses the whole context. *Leven*, 123 Nev. at 405, 168 P.3d at 716; *State Farm*, 116 Nev. at 294, 995 P.2d at 485.

Beginning with the relevant analogous statutory provisions, this Court overlooked and misapprehended NRS 200.030(4)(b) and NRS 212.030 in failing to consider these provisions which use similar and dissimilar terms to NRS 176.355 and clearly evidence the Legislature's intent to distinguish "the state prison" from other institutions in Nevada. As noted by Floyd, when determining the meaning of "the state prison," other provisions in the NRS that use similar and dissimilar terms to refer to prisons in Nevada should have been examined by this Court to determine meaning. *See* Reply at 3-9, 11-13.

For example, both Floyd and the State referenced NRS 200.030(4)(b) as providing context for NRS 176.355's meaning because that provision, and most throughout the chapter, use the term "the state prison." *See* Ans. at 4; Reply at 10-18. The meaning of the terms is the same not only because the same term is used, but also because the subjects are related. This Court placed dispositive emphasis on whether the Legislature used the term "the state prison" prior to other prisons being built. Slip. Op. at 3. However, many of the provisions in NRS Chapter 200, including NRS 200.030(4)(b), which use "the state prison"

were enacted during a time when Nevada State Prison was the *only* state prison in existence. Thus, it follows that when the Legislature later enacted NRS 176.355 and referenced "the state prison" it was still referring to Nevada State Prison as "[i]t is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *City of Boulder City v. General Sales Drivers, delivery Drivers and Helpers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985). In view of the Legislature using the term "the state prison" when Nevada State Prison was the only prison in the state, context indicates executions were intended to take place at a specific state prison.

To further illustrate this point, Floyd also referenced NRS 212.030, which this Court overlooked in failing to examine NRS 212.030's dissimilar use of terms. *See* Reply at 3-9, 11-13. NRS 212.030 provides in pertinent part:

> When any prisoner escapes from *an institution or facility of the Department of Corrections*, the Director of the Department may issue a warrant for the recapture of the escaped prisoner.

(emphasis added). Instead of including "the state prison" the Legislature intentionally used "an institution or facility of the Department of Corrections." The dissimilar use of terms means that the Legislature intended to distinguish Nevada State Prison from other Nevada prisons. This intent becomes even clearer upon examining prior versions of NRS 212.030. Though NRS 212.030 was enacted in 1977, it was initially passed in the late 1800s and was a part of Nevada's early laws. *See* Exs. 1-6 to Request to Take Judicial Notice.[3] When the Legislature first passed the provision, and up until it was officially added to the current NRS, it stated:

> When any prisoner or prisoners escape from *the state prison of this state*, it shall be lawful for the warden of the state prison to issue a warrant for the recapture of said escaped prisoner.

See Exs. 1-6 to Request to Take Judicial Notice. (emphasis added).

The context of this amendment is imperative, and dispositive, and was overlooked by this Court. The Legislature's decision to change NRS

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[3] Floyd has filed a request for judicial notice contemporaneously with this petition for rehearing as this legislative history was only located manually at the Nevada Supreme Court's library. It has been included for the ease of the reader.

212.030's language from "the state prison" to "an institution or facility of the Department of Corrections" demonstrates a clear intent to distinguish terms. When Nevada State Prison was the only prison in Nevada from which a prisoner could escape, the Legislature used specific language to reference that institution. And when other prisons opened, and it intended warrants to be sought for escaped prisoners from any prison, it changed the terminology to incorporate more general language.[4] If "the state prison" was meant to encompass all prisons in Nevada there would not have been a need for the amendment. Further, if "the state prison" was intended to mean any "an institution or facility of the Department of Corrections" it would not continue to use both terms throughout Nevada's statutory scheme, or even use both terms within a single provision. *See* NRS 209.261 (When "a person is being held under sentence of imprisonment in the state prison, the Director

[4] Additionally, this interpretation is not unreasonable as NRS 212.030 merely outlines when a warrant can be issued, NRS 212.090 provides the penalty for an escaped prisoner and thus intentionally used general language to penalize a prisoner that escapes from any prison in Nevada. *See* NRS 212.090 ("A prisoner confined in a prison or being in the lawful custody of an officer or other person who escapes or attempts to escape from prison or custody . . . shall be punished.").

shall immediately provide for the transportation of the offender . . . to an appropriate institution or facility of the Department.").

For a century, Nevada State Prison was the only prison in Nevada. Serving as the heart of all penal operations in the State, many of Nevada's statutes were written to specifically reference this institution, such as NRS 212.030. Later, when other prisons opened, some statutes were amended to expressly recognize these facilities, like NRS 212.030.[5] Others, like NRS 176.355, were intentionally not enacted or amended to include general language because the Legislature intended the term "the state prison" to mean what it has always meant in prior statutes—Nevada State Prison. *See City of Boulder City*, 101 Nev. at 118-19, 694 P.2d at 500 ("It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject.").

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[5] Providing further context, NRS 212.030 was passed in 1977 along with the 1977 amendment of NRS 176.355. Both statutes were a part of the Legislature's attempt to overhaul most statutes referencing penal institutions upon the creation of the Department of Prisons. Pet. at 11; Reply at 5.

Next, this Court overlooked and misapprehended material questions of fact in failing to examine NRS 176.355's legislative history which provides context for the meaning of "the state prison." In his petition, Floyd argued that the Legislature's amendments to NRS 176.355 evidenced its intent to limit "the state prison" to Nevada State Prison. Pet. at 11-12; Reply at 4-5. Specifically, the Court overlooked the Legislature's 1983 amendment to NRS 176.355, which changed the statute's language from "within the limits of the state prison" to "must take place at the state prison." Pet. at 10-12; Reply at 4-5. If the Legislature intended "the state prison" to mean any prison in Nevada, it would have changed the term during this amendment as it had previously done with other statutes as discussed above. Additionally, Floyd argued that the committee hearing minutes further demonstrated the Legislature's meaning behind "the state prison." Pet. at 12, 26-27. When discussing NRS 176.355, and the location of an execution, state legislators only referenced Nevada State Prison. Pet. at 12, 26-27. However, this Court failed to examine any of this information in its review of the context surrounding the term "the state prison."

This point is also illustrated by examining Nevada's early history of establishing a procedure for carrying out a death sentence, which this Court overlooked and failed to consider in determining context for the meaning of "the state prison." In the late 1800s inmates sentenced to death were not executed at a specific place. Pet. at 8-10; 1PA025-031. During that time, Nevada's execution procedure permitted each county to carry out their own hangings, therefore allowing executions to occur at multiple places. Pet. at 8-10; 1PA025-031. As Floyd argued, the Legislature evidently did not like this procedure and instead wanted all executions to occur in one specific place. Pet. at 8-10. This resulted in the 1901 legislation that centralized executions and required them to all occur at the state prison, Nevada State Prison. Pet. at 8-10. Thus, even before NRS 176.355 was enacted, all executions occurred at Nevada State Prison. Pet. at 4-12; Reply at 1. And after NRS 176.355's enactment the Legislature still intended for Nevada State Prison to remain Nevada's execution location—and it has. Pet. at 8-12, 29-30; Reply at 1. Every single execution in Nevada has taken place at Nevada State Prison because everyone has understood "the state prison" to

mean Nevada State Prison. Pet. at 29-30. Indeed, this is why state district courts, the District Attorney's Office, and even this Court continued to reference Nevada State Prison as "the state prison," and thereby interpret NRS 176.355 as meaning Nevada State Prison. Pet. at 4, 9.

Viewing each of the above contextual considerations together, it is clear that the Legislature intended for "the state prison" to be a limited term specifically referring to Nevada State Prison, and this Court overlooked and misapprehended these facts in denying Floyd's Petition.

4. This Court overlooked and misapprehended material questions of law in ignoring that under its interpretation NRS 176.355 cannot be read harmoniously with other statutes.

This Court concluded that the term "the state prison" is "a common noun" and therefore "denotes any one of the state prisons and not a specific prison as posited by Floyd." Slip. Op. at 3. However, this Court's conclusion overlooks and fails to consider that in applying this interpretation NRS 176.355 cannot be read harmoniously with NRS 209.261, as that statute uses both "the state prison" and "an appropriate institution or facility of the Department" in a single

provision. Reply at 11; *see also Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. Of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This Court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."). Reading the statutory context of NRS 209.261, it is clear that the Legislature intended to distinguish prisons in the provision by using different terms. But this Court's decision in Floyd's case is inconsistent with this clear meaning and therefore NRS 176.355 and NRS 209.261 are unharmonious. Moreover, if, as this Court interprets, "the state prison" means any prison in Nevada, then the term "the state prison" in NRS 109.261 would also be rendered "mere surplusage." Reply at 11.

5. This Court overlooked and misapprehended material questions of law in limiting its purpose analysis to plain meaning and ignoring the Legislature's intent for NRS 176.355 to serve dual purposes

This Court held that "Floyd's interpretation is unreasonable because it would frustrate the purpose of NRS 176.355—to establish a procedure for carrying out a death sentence." Slip. Op. at 3. But, as this

Court noted, "it is the duty of this court to give effect to that . . . legislative purpose" only "[w]here legislative intent can be clearly discerned from the plain language of the statute." Slip. Op. at 3. As discussed in greater detail above, this Court could not determine the meaning of "the state prison" solely based on NRS 176.355's plain language. Thus, this Court overlooked and misapprehended NRS 176.355's legislative purpose by relying solely on plain language even though legislative intent could not be clearly discerned from the face of the statute. Accordingly, Nevada's statutory scheme, legislative history, and state history should have been reviewed by this Court to determine NRS 176.355's purpose.

Furthermore, as argued in Floyd's Petition and Reply, Floyd's interpretation of NRS 176.355 does not frustrate NRS 176.355's purpose and therefore is not unreasonable. Pet. at 31-32; Reply at 21-24. Floyd acknowledges that "the purpose of NRS 176.355 [is] to establish a procedure for carrying out a death sentence." Slip. Op. at 3. And this is evidenced through plain language and legislative history. However, this Court overlooked and ignored another purpose of NRS

176.355, which is also evidenced through plain language and legislative history, and that is to designate the *specific* place and the *specific* time of an execution. NRS 176.355 is intended to accomplish both purposes and neither can override the other, they are meant to work in tandem.

The place and time of an execution were not meant to be general designations. Indeed, this supplementary purpose is even written within the title of the statute. *See* NRS 176.355 ("*Execution of death penalty: Method; time and place; witnesses*."). The Legislature further demonstrated this purpose through NRS 176.355's 1983 amendment when it changed the place of executions language to be more specific about the proper place for an execution to occur. This Court overlooked and ignored this act by the Legislature which evidences that part of NRS 176.355's purpose is to establish a specific rather than general execution location.

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III. Conclusion

For the foregoing reasons, Floyd requests that this Court grant his Petition for Rehearing and prohibit the district court from entering a Warrant of Execution that designates any location other than the Nevada State Prison as the location for his execution.

Dated this 14th day of March, 2022.

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

/s/ Jocelyn S. Murphy
Jocelyn S. Murphy
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing 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:

It has been prepared in a proportionally spaced typeface using Microsoft Word processing program in 14-point font size and Century Schoolbook font;

I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 4,440 words.

/s/ David Anthony
David Anthony
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on March 14, 2022. 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 Defender,
District of Nevada