IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83436

ZANE MICHAEL FLOYD

Appellant,

v.

WILLIAM GITTERE, Warden, and AARON FORD, Nevada Attorney General,

Respondents.

Appeal From Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Michael Villani,

APPELLANT'S OPENING BRIEF

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ZANE MICHAEL FLOYD,

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WILLIAM GITTERE, Warden, and AARON FORD, Nevada Attorney General,

Respondents.

NRAP 26.1 DISCLOSURE

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

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

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

/s/ David Anthony
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I. JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying Petitioner Zane Floyd's Petition for Writ of Habeas Corpus (Post-Conviction) in a capital case. The district court entered its Findings of Fact and Conclusions of Law on August 16, 2021. 14PA3484-90 Notice of the entry of order was entered on August 18, 2021. 14PA3484. Mr. Floyd filed a timely Notice of Appeal on August 30, 2021. 14PA3493-94. This Court has appellate jurisdiction over this appeal pursuant to NRS 177.015(1)(b), 177. 015(3), 34.575(1), and 34.830.

II. ROUTING STATEMENT

This case is retained by the Supreme Court because it is a capital case. Nev. R. App. P. 17(a)(1).

III. STATEMENT OF THE ISSUES

1. Department 5 was the court of conviction, the court where the death sentence was obtained, and the court that heard all prior post-conviction matters as required by Chapters 34 of the Nevada Revised Statutes. Did the district court err in denying Mr. Floyd's motion to transfer the habeas case to Department 5 as required by NRS 34.730(3)?

2. Did the district court err in denying Mr. Floyd's claim that the denial of the opportunity to seek clemency with the Pardons Board before his upcoming execution violates his right to due process; and further, are the Board's rules a violation of a death row inmate's due process rights?

3. Did the district court err in denying Mr. Floyd's claim that he is categorically ineligible for the death penalty due to his Fetal Alcohol Spectrum Disorder ("FASD"), which is morally equivalent to Intellectual Disability in terms of its severity?

4. Did the district court err in denying Mr. Floyd's claim that state law prohibits his execution at the Ely State Prison when NRS 176.355(3) requires the execution to take place at the Nevada State Prison?

5. Did the district court err in denying Mr. Floyd's claim that intervening law allows him to receive consideration of his claim that his death sentence is invalid due to improper penalty-phase verdict forms?

IV. STANDARD OF REVIEW

The district court's legal conclusions are reviewed de novo. *Wells Fargo, N.A., v. Radeki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018). This Court will defer to the district court's factual findings unless clearly erroneous or unsupported by substantial evidence. *Rippo v State*, 134 Nev. 411, 416 423 P.3d 1084, 1093, *amended on denial of reh'g*, 432 P.3d 167 (2018). However, in the instant case, no factual development was permitted and there is therefore nothing to which to defer. Questions of statutory interpretation are reviewed by this Court de novo. *Matter of William S.*, 122 Nev. 432, 437, 132 P.3d 1015, 1018 (2006). A question of law pertaining to the constitutionality of a statute or administrative regulation is reviewed de novo. *Silvar v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

V. STATEMENT OF THE CASE

This is an appeal from the order of the district court denying Mr. Floyd's post-conviction petition for writ of habeas corpus, Eighth Judicial District Court Case No. A-21-832952-W. 14PA3484–92. On August 16, 2021, Department 17 issued its Findings of Fact and

Conclusions of Law denying Mr. Floyd habeas relief on all claims. *Id.* The written notice of entry of order was served on August 18, 2021. *Id.*

Mr. Floyd filed a petition for writ of habeas corpus (post-conviction) on April 15, 2021, in which he raised two constitutional claims challenging the validity of his death sentence. 6PA1367–1413. He then filed an amended petition on May 11, 2021, raising an additional two claims for relief challenging his death sentence. 10–11PA2474–2530. On June 3, 2021, he filed a second amended petition, raising an additional claim challenging his death sentence. 12PA2766–2822. The State filed a Response to Petitioner's Third Petition for Writ of Habeas Corpus (Post-Conviction) on June 4, 2021. 12PA2960–78. Mr. Floyd filed a Reply on June 18, 2021. 13PA3048–91.

Oral arguments were heard on July 9, 2021. 13PA3149–62. On August 16, 2021, Department 17 entered its Findings of Fact and Conclusions of law denying the petition without an evidentiary hearing. 14PA3484–90. On August 18, 2021, the written Notice of Entry was served. 14PA3484.

This appeal follows.

VI. STATEMENT OF THE FACTS

Factual development in the matter below was not permitted. The district court was therefore required to accept the factual assertions contained in the petition as true unless belied by the record. *Mann v. State*, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002).

Mr. Floyd was convicted of four counts of first-degree murder and other offenses and sentenced to death in 2000.[1] 12PA2768. Department 5 was the court of conviction, where the death sentence was obtained, and also the court that heard the two subsequent post-conviction matters that followed. 1PA0003.

A. Relevant facts concerning improper transfer of the post-conviction petition (Issue VIII(A) below)

Mr. Floyd has maintained a continuous objection that the transfer of his habeas matter from Department 5 to Department 17 was improper and requires reversal with instructions to transfer the case to Department 5 for de novo consideration of the petition.

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[1] The facts of the offenses are set forth in this Court's order affirming the judgment on direct appeal. *Floyd v. State*, 118 Nev. 156, 42 P.3d 249 (2002).

Mr. Floyd filed numerous objections regarding the improper transfer of this habeas matter, and his criminal case, to the district court in Department 17, versus Department 5, which was the original court for the trial and all prior habeas proceedings. Mr. Floyd filed the original Motion to Transfer Case Under EDCR 1.60(H) on April 14, 2021, in the criminal and habeas matters. 1PA0001–09. The State filed a Response to Defendant's Motion to Transfer Case Under EDCR 1.60(H), in opposition, on April 26, 2021. 7PA1503–10PA2270. Mr. Floyd filed a Reply to the State's Response to Motion to Transfer Case Under EDCR 1.60(H) on April 29, 2021. 10PA2300–06.

Mr. Floyd also filed the instant Petition for Writ of Habeas Corus (Post-Conviction) on April 15, 2021. 6PA1367–1413. The next day, the habeas matter was also reassigned to Department 17 ostensibly because the criminal case was assigned to that department. 7PA1501–02. On May 14, 2021, oral argument was heard concerning the Motion to Transfer, including the transfer of the habeas proceedings. 11PA2654–80. On that day, the Motion to Transfer was denied. 11PA2662. The Decision and Order Denying Defendant's Motion to Transfer Case Under EDCR 1.60(H) was filed on June 4, 2021. 13PA3005–07.

Following this, Mr. Floyd filed an Objection to Order Denying Motion to Transfer Case Under EDCR 1.60(H) on June 9, 2021, with Department 10. 13PA3008–16. The State filed a response in opposition to this objection on June 17, 2021. 13PA3041–47. Argument on the objection was heard on June 18, 2021. On June 21, 2021, Department 10 issued an Order Denying Defendant's Objection to Order Denying Defendant's Motion to Transfer Case Under EDCR 1.60(H). 13PA3109–10. This Order did not address the habeas petition or Mr. Floyd's arguments regarding improper transfer of the habeas petition. *Id.*

Following the Order issued out of Department 10, on June 22, 2021, Mr. Floyd filed an Objection to Order Denying Motion to Transfer Case under EDCR 1.60(H) with Department 7. 13PA3111–21. On June 28, 2021, the district court issued a minute order declining to hear the matter due to multiple conflicts. 13PA3148.[2] Separate from this appeal, Mr. Floyd filed a Petition for Writ of Mandamus and Prohibition with this Court on the issue of the improper transfer of both the criminal and habeas matters. *See* Case No. 83167.

[2] The minute order also noted that the presiding criminal judge had already determined the matter. 13PA3148.

On September 7, 2021, this underlying case was transferred from Department 17 to Department 6.[3] 14PA3496.

B. Relevant facts regarding the recent change in the location of the execution from Nevada State Prison to Ely State Prison (Issue VIII(D) below)

Mr. Floyd did not have a notice of the intent to execute him at Ely State Prison until May 10, 2021, as the State's warrant originally sought to execute him at Nevada State Prison. 10PA2310–11. Originally the warrant submitted by the State complied with the specifics of NRS 176.355(3) and listed Nevada State Prison as the location of the execution.[4] 10PA2413–16; 10PA2310. It was not until the May 10, 2021 filing that the State changed the location of the execution to designate Ely State Prison as the location of the execution. Additional facts are stated below in the argument sections of Mr. Floyd's claims.[5]

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[3] This transfer date is noted on the docket history on the e-filing system for the Eighth Judicial District Court. The new Department is clearly noted in the caption of the Civil Order to Statistically Close Case dated December 8, 2021, that was filed in the habeas matter after the Findings of Fact and Conclusions of Law were issued.

[4] It stated "Said execution to be within the limits of the State Prison, located at or near Carson City, State of Nevada…"10PA2416.

[5] Separate from this appeal, Mr. Floyd filed a Petition for Writ of Mandamus and Prohibition with this Court on the issue of the prohibition

VII. SUMMARY OF ARGUMENT

Department 17 did not have jurisdiction to hear Mr. Floyd's habeas petition. Considering the plain language of NRS 34.730(3), the district courts in Departments 10 and 17 erred when holding the transfer of Mr. Floyd's habeas petition was proper. As such, any decision from Department 17 regarding the habeas petition is void and must be deemed a nullity. Reversal is required with instructions to transfer the case to Department 5 to consider the petition de novo.

Beyond this error, the district court committed reversible errors in denying Mr. Floyd's petition. Mr. Floyd's claims challenging his death sentence are based on new factual and legal circumstances that did not previously exist during prior proceedings and which are now ripe due to the fact that the State seeks an order and warrant for his execution.

The district court erred when it found there are no state and federal due process rights to seek access to the clemency process for a death row inmate who is also exhausting judicial remedies.

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of an execution taking place anywhere other than Nevada State Prison. *See* Case No. 83225.

Constitutional protections apply when a death row inmate seeks meaningful access to be heard in the clemency process, as a constitutionally protected life interest is at stake. Further, Nevada's clemency rules violate Mr. Floyd's right to due process, as the provisions are inconsistent with respect to whether and what judicial remedies must be exhausted before an inmate is permitted to seek commutation of his sentence. And the provisions provide no notice as to whether the Board considered the application or whether consideration was denied on procedural grounds. These provisions deprive death row inmates access to the clemency process. The relevant provisions are also unclear in their requirements and inconsistent between themselves, creating vagueness issues rendering the provisions invalid.

The district court erred when it found that *Atkins v. Virginia*, 536 U.S. 304 (2002), was not applicable in this matter due to a "bright-line" test on IQ. Mr. Floyd is exempt from the death penalty under the rationale of *Atkins* due to his Fetal Alcohol Spectrum Disorder ("FASD") being morally and functionally equivalent to intellectual disability in terms of adaptive functioning deficits. Mr. Floyd is also ineligible for the

death penalty under *Roper v. Simmons*, 543 U.S. 551 (2005), due to his functional mental age at the time of the crimes.

Additionally, the district court erred when it found that Mr. Floyd can be executed at Ely State Prison consistent with NRS 176.355(3). The plain reading of the statute would not lead to an absurd result, as the statute must simply be amended by the Legislature—not the courts—to specify a different location other than the Nevada State Prison.

Lastly, the district court erred when it decided that Mr. Floyd was not entitled to relief based on improper verdict forms given this Court's recent decision in *Petrocelli v. State*, No. 79069, 486 P.3d 1290, 2021 WL 2073794 (May 21, 2021) (unpublished disposition), when the district court decided this Court's decision does not apply in this case.[6]

[6] *Petrocelli* is cited as persuasive authority, *see* NRAP 36(c)(3).

VIII. ARGUMENT

A. The district court erred in its denial of Mr. Floyd's motion to transfer the habeas petition to Department 5 for consideration.

The case transfer from Department 5 to Department 17 was improper, and thus the district court did not have jurisdiction to hear this matter. The district court erred in denying Mr. Floyd's motions to transfer the case and his subsequent objection to the denial of the motion to transfer the case back to Department 5 for consideration of the state habeas petitions. The Nevada Revised Statutes are clear as to the specific court which has jurisdiction to hear a post-conviction habeas petition. The statutes refer to the original judge or court as the one to which the post-conviction matter is properly assigned. Thus, the only court that can hear the habeas matter is Department 5.

1. The district court in Department 17 did not have subject matter jurisdiction over Mr. Floyd's post-conviction habeas petition.

Transfer of this matter to the district court in Department 17 was improper, and the lower court did not have jurisdiction to adjudicate the habeas petition. This renders any decision it issued a nullity. NRS 34.730(3) governs where the petition must be assigned and 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*.

(Emphasis added).

Below, the habeas petition was transferred to Department 17 based on the fact that Department 17 had the criminal case.[7] 7PA1501–02. The Notice of Department Reassignment cites to NRS 34.730 as the basis of the reassignment. *Id.*

However, NRS 34.730(3)(b) is clear that the assignment must be made to the "original judge or court" whenever possible. Department 5 was the court of conviction, the court where the death sentence was obtained, and the court that heard the two subsequent post-conviction matters in Mr. Floyd's case. Department 5 still exists and is the original

[7] Mr. Floyd also maintains that the transfer of his criminal matter was improper under NRS 176 and this Court's instructions on remand in *Rainsberger v. State*, 81 Nev. 22, 22, 449 P.2d 254, 254 (1969).

court.[8] The decisions below clearly ran afoul of NRS 34.730(3)(b). The transfer of the habeas petition to Department 17 was improper, and therefore that court did not have jurisdiction.

2. The proceedings in Department 17, and the orders issued by the district court, are null due to the absence of jurisdiction.

Because the transfer of Mr. Floyd's habeas petition was improper, Department 17 did not have subject matter jurisdiction to decide the case. An order issued by the wrong court is a quintessential example of a void order. As such, any order regarding the habeas petition out of Department 17 is void as it was issued by the wrong court. *Cf. Hasting v. Burning Moscow Co.,* 2 Nev. 93, 96 (1866) (stating court of criminal jurisdiction could not render civil judgment). The lack of jurisdiction nullifies all the rulings of the district court below. *E.g., Application of Alexander*, 80 Nev. 354, 358-59, 393 P.2d 615, 617 (1964). Thus, this Court must conclude that any decision issued by Department 17 in the

[8] Since the filing of the appeal, both cases have now been transferred to Department 6 as of September 7, 2021. 14PA3496. This is still not the proper court for the habeas petition to be heard.

habeas case is invalid and remand the case with instructions for the proper department to adjudicate the petition.

B. The denial of an opportunity for Mr. Floyd to seek clemency with the Pardons Board before his execution violates his right to due process, and further Nevada's clemency regulations violate his due process rights.

The regulations of the Pardons Board are unclear and inconsistent as applied to death row inmates, as the provisions requiring the exhaustion of "judicial remedies" and the procedures allowing the Governor to override the vote of a member of the Board to hear an application leave petitioners unclear regarding what is required to access the clemency process. The State's intention to execute Mr. Floyd before he has had a meaningful opportunity to seek clemency violates state and federal constitutional rights to due process and equal protection. As constitutional protections apply to death row inmates seeking meaningful access to the clemency process, if Mr. Floyd is executed prior to having a meaningful opportunity to be heard by the Board it would amount to a violation of state and federal constitutional guarantees of due process, equal protection, and freedom from cruel

and/or unusual punishment.[9] U.S. Const. amend. V, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21; 5 § 13, 14.

To be clear, Mr. Floyd does not argue he is entitled to a certain outcome from the Board, but simply that due to his compelling life interest he is entitled access to the Board in a meaningful capacity regardless of the final answer to his application under the state and federal constitutional guarantees cited above.[10]

The district court partly based its decision denying relief on Mr. Floyd's claim on this Court's decision in *Goldsworthy v. Hannif*, 86 Nev. 252, 256, 468 P.2d 250, 353 (1970). 14PA3489. Specifically, the district

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[9] The Nevada Constitution offers the citizens of this state broader protection against cruel or unusual punishments given the clear language differences between Nev. Const. art 1, § 6, "cruel *or* unusual," versus the language in U.S. Const. amend. VIII, "cruel *and* unusual." (emphasis added).

[10] While NAC 213.019 purports to deprive individual litigants of a private right of action that provision is not controlling here as: (1) it states that it does not create an "interest in liberty," but does not address a life interest, (2) NRS 233B.040 is clear the Nevada Administrative Code has the force of law and as the Legislature has clearly created provisions for commutation of a death sentence NAC 213.019 cannot be used to excuse arbitrary denial of access when it concerns a right protected by due process, and (3) Mr. Floyd does not argue he has the right to commutation, merely the right to meaningful access to the clemency process.

court held that Mr. Floyd did not have a constitutional right to clemency. *Id.* However, the decision in *Goldsworthy* actually supports Mr. Floyd's position. There is a difference in that the interest at stake in *Goldsworthy* was the defendant's liberty, while here it is Mr. Floyd's very life in peril. Both interests, however, deal with an issue of access to the procedures of the Pardons/Parole Board. In fact, in *Goldsworthy* this Court ordered the State Board of Parole Commissioners to consider the application for parole. *See Goldsworthy*, 86 Nev. at 257, 468 P.2d at 354.

In *Goldsworthy*, the petitioner petitioned for a writ of mandate directing the Department of Parole and Probation to allow him to not only file an application, but to require the State Board of Parole Commissioners to consider his application for parole. *See id.* After the case was final, the relevant provisions governing the timing of parole applications were changed. *See id.* at 254, 468 P.2d at 352. When Mr. Goldsworthy attempted to apply for parole, the Board of Parole Commissioners refused to allow him to apply under the new provisions. *Id.* Mr. Goldsworthy argued that "whether he is granted parole or not, he is legally entitled to make application under the statute in effect

prior to July 1, 1967." *Id.* at 255, 468 P.2d at 352. This Court ultimately issued a Writ of Mandate commanding the respondents in that matter to "permit petitioner to file and directing respondents to consider his request for parole." *Id.* at 257, 468 P.2d at 354.

Similar to the ex post facto issue in *Goldsworthy*, the relevant Nevada Administrative Code ("NAC") requirements discussed below were also passed after Mr. Floyd was sentenced. The relevant changes to NAC 213 (NAC 213.055, NAC 213.107, and NAC 213.120) occurred in 2010, about a decade after Mr. Floyd was sentenced. Notably, these modifications occurred after Mr. Thomas Nevius was granted clemency by the Pardons Board in 2002.[11] Mr. Nevius is the last death row inmate to have applied for, and been granted, clemency in Nevada.

Further in *Severance v. Armstrong*, 97 Nev. 95, 96, 624 P.2d 1004, 1005 (1981), this Court stated, in regard to an application for parole, "[s]uch a right, once granted by the legislature, is a constitutionally

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[11] There have been no others capital petitioners who have applied for clemency before the Pardons Board since that time. *See American Bar Association, Nevada,* (September 26, 2019), https://www.capitalclemency.org/state-clemency-information/nevada/.

protected interest which may not be unfairly denied." In a death penalty case, an application for commutation is analogous to an application for parole. And similarly to how NRS chapter 213 creates a process by which an individual can apply for parole, NRS 213 also contains various provisions providing for commutation of a death sentence. These provisions clearly evidence an intent by the Legislature to provide a process to seek commutation of sentences by death row inmates. However, as it currently stands NAC 213 and the Board rules contain various provisions that make access to the Pardons Board impossible for death row inmates.

Moreover, Mr. Floyd's case is also distinct from *Niergarth v. State,* 105 Nev. 26, 28, 768 P.2d 882, 883 (1989), the decision cited by the district court. 14PA3489. The issue here is a life interest, and not just a liberty interest as what was at issue in *Niergarth. See id.* In *Niergarth*, the appellant argued for a particular outcome and demanded release—in fact, he had already had a hearing before the Parole Board and had been denied: "[i]ndeed, appellant has already had a hearing before the Parole Board on his combined sentences." *Niergarth*, 105 Nev. at 29, 768 P.2d at 884.

A life interest is provided more constitutional protections than a mere liberty interest. *Woodard,* 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).[12] Here, Mr. Floyd has a life interest at stake and has not been heard by the Board, nor has he received any short of acknowledgement or indication from the Board with respect to his application.

Mr. Floyd has a compelling due process claim in relation to access to the Pardons Board prior to an execution. As noted by the United States Supreme Court, "some minimal procedural safeguards apply to clemency proceedings." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). As it stands, the current Board provisions for death row inmates in Nevada are a violation of their constitutional rights and are more akin to the issues of accessibility in *Goldsworthy* than the issues of outcome as in *Niergarth*.

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[12] Justice O'Connor's concurrence in the plurality decision has been treated by courts as binding precedent. *See, e.g., Hall v. Barr*, No. 17-cv-2587-TSC, 2020 WL 6743080, at *3, 9 (D.C. Cir. Nov. 16, 2020) (citing *Woodward*, 523 U.S. at 289 and referring to Justice O'Connor's concurrence as "controlling Supreme Court precedent"); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (recognizing that Justice O'Connor's concurrence "set binding precedent").

1. The lack of access and vagueness created by clemency provisions in NAC 213 render Nevada's clemency process a violation of a death row inmate's due process rights.

Considered singly or cumulatively, the following provisions of the NAC violate Mr. Floyd's right to have meaningful access to the Pardons Board to seek commutation of his death sentence:

NAC 213.055(2) states:

> Except as otherwise provided in subsection 4, a member of the Board may select an application for clemency for the consideration of the Board at a meeting notwithstanding the procedures and criteria established by the Secretary pursuant to subsection 1, any regulation of the Board or the recommendation or absence of a recommendation from the Director of the Department or the Chief Parole and Probation Officer. A member of the Board who wishes to select an application for the consideration of the Board must inform the Secretary of the selection not less than 50 days before the date of the meeting at which the Board will consider the application, unless the member demonstrates good cause for a shorter period of time.

NAC 213.055(4) states: "Before a meeting of the Board, the Governor may remove from consideration any application for clemency that has been selected for the consideration of the Board."

NAC 213.107 states: "Except as otherwise provided in subsection 2 of NAC 213.055, the Board will not consider an application for clemency if other forms of judicial or administrative relief are reasonably available to the applicant."

NAC 213.120, entitled "Death Penalty," states:

> 1. Except as otherwise provided in subsection 2 of NAC 213.055, the Board will not consider an application for a pardon or the commutation of a punishment submitted by a person sentenced to the death penalty unless the person has exhausted all available judicial appeals.
>
> 2. If a death penalty is being considered, the presence of the Governor is required and any judgment must be made by a majority of the members of the Board.

Under NRS 233B.040, these provisions of the Nevada Administrative Code are given the same weight as law:

> 1. To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. If adopted and filed in accordance with the provisions of this chapter, the following regulations have the force of law and must be enforced by all peace officers:
>
> (a) The Nevada Administrative Code . . . .

When determining whether a statute is vague and violates due process, generally a two-factor test under the void-for-vagueness doctrine is used. Vagueness exists if a statute or rule: "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, here by encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Silvar v. Eighth Judicial Dist. Court ex rel. County of Clark*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Here, as stated above, the relevant provisions of the NAC have the "force of law" as any other statute. As such, they are analyzed under the same two-factor test for being unconstitutionally vague.

a. Nevada's clemency provisions are unconstitutionally vague.

The provisions in NAC 213.120 and NAC 213.055 are vague and create an unconstitutional violation of due process in regard to access to the clemency process in Nevada for death row inmates. It is not clear what "judicial appeals" the requirements are referencing as a precondition to seeking clemency. There is also no notice of any kind to the applicant within the provisions to inform a death row inmate if a

Board member pulled their application, but the governor overrode that decision. The two-factor test from *Silvar* renders these statutes vague because these provisions (1) fail to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited in terms of judicial appeals and/or other forms of relief; and (2) lack notice to the applicant regarding whether the application was not considered based on these requirements. Consequently, these provisions fail to prevent the arbitrary and discriminatory obstruction of clemency access for death row inmates in Nevada. *See Silvar*, 122 Nev. 289, 129 P.3d 682.

There is also inconsistent language between provisions. NAC 213.107 states that an application for clemency will not be considered if "judicial or administrative relief are reasonably available." However, it is unclear what "reasonably available" means. Then, NAC 213.120 uses mandatory language regarding available judicial appeals: "the person has exhausted *all available* judicial appeals." (emphasis added). These provisions are clearly inconsistent with each other.

Moreover, the criteria on the Board's website does nothing to assist an ordinarily intelligent person in determining what is needed in

regard to judicial remedies in order to pursue clemency, nor does the criteria provide any guidance on how to interpret the provisions contained in NAC 213. The limitation contained in NAC 213.120 is reiterated in the Criteria for the Evaluation of Inmate Applications for Clemency, found on the Board of Pardons website. Similar inconsistent language between the NAC provisions is seen in the Criteria. Under the subsection entitled "Pending Criminal Charges, Investigations or Appeals," it states: "(2) Cases that are under appeal in Nevada or Federal Court will generally not be considered," and also that "(3) Judicial remedies must be exhausted prior to being eligible for clemency review." Criteria for Evaluation of Inmate Applications for Clemency, State of Nevada Board of Pardons, https://bit.ly/32YMB5q (last visited Dec. 7, 2021).

Additionally, the requirements in NAC 213.120 ignore that an individual on death row is usually litigating up until the last moment leading to their execution. It is unlikely that a death row inmate, such as Mr. Floyd, would not have an appeal or other court proceeding left, such as litigation with respect to an execution warrant, until they are strapped to the gurney for execution. It is unclear how this provision

defines "judicial appeals," or where exactly in the process a death row inmate should be. Once again, the rules found on the Board's website are inconsistent and provide no clarification. While there is permissive language such as "*generally* not be considered" there is also mandatory language in another provision stating, "remedies *must* be exhausted." (emphasis added).

While NAC 213.055 may appear to provide a safety valve by allowing the rules and the requirements in NAC 213.120 to be suspended, the provision only makes the problem of arbitrariness worse. NAC 213.055 suggests that any Board member, so long as the governor does not object, can override the rules set forth in the NAC and the Board's individual rules. However, this provision only makes the due process issues surrounding the clemency process in the Nevada more unclear, leading to further problems.

Although NAC 213.120 includes mandatory language regarding when the Board will not consider an application, NAC 213.055 appears permissive in that a member of the Board can select a clemency application while ignoring the strict limitations in other provisions. However, there is no language on how and if an individual will get

notice if this authority was used by any of the Board members and if the governor removed their application from consideration. Obviously, if the Governor removes the application from consideration, it is in itself a denial of the request for clemency—however there is no actual notice requirement for this sort of denial. This lack of notice leaves a death row inmate who seeks commutation of his sentence without any answer or direction on if they received any consideration by the Board.

NAC 213.120 and NAC 213.055 provide no meaningful way for a death row inmate to be heard during the clemency process, and at the time of this writing, Mr. Floyd has never heard back from any Board member in any capacity, despite submitting an application and video in support of the application four times. He does not know whether his application is not being considered due to pending litigation in state and federal court, and he does not know whether his application has been the subject of a procedural rejection.

Mr. Floyd fully completed the required forms and created a clemency video as part of his application. 13PA3181–14PA3483. In these materials, especially through the video, he showed the effect Fetal Alcohol Spectrum Disorder ("FASD") has had on him throughout his

life, including at the time of the offense. *Id.* He also showed how his tumultuous and abusive childhood impacted him. *Id.* The application and video discussed that his mother drank while pregnant, and that Mr. Floyd showed physiological features consistent with FASD. He has been formally diagnosed with FASD in connection with post-conviction proceedings, but that evidence was not considered by the jury that sentenced him. Mr. Floyd's friends and family articulated the difference in Mr. Floyd's personality after his time in the military being stationed at Guantanamo Bay. *Id.* All of this compelling mitigation evidence never previously considered has been submitted in connection with Mr. Floyd's application for commutation of his sentence. *See also* Section C, below (discussing Mr. Floyd's FASD).

As Mr. Floyd has never heard from back from the Board in regard to his applications (submitted three times in 2021 to meet the various Board deadlines—the latest on November 29 for the March 2022 agenda), it can only be assumed that the existence of pending litigation and lack of exhausted judicial remedies is the reason access to the process is being denied to him. If Mr. Floyd was a death row inmate in many other jurisdictions other than Nevada, he would not be facing this

lack of access, lack of clarity, and lack of ability to be heard in a meaningful capacity.

b. NAC 213.120 is an outlier when compared to federal capital clemency regulations and other states' clemency regulations.

The problems created by NAC 213.120 are even more apparent when compared to other clemency rules and provisions around the country. While some other jurisdictions place a requirement of what legal remedies must be exhausted prior to applying for clemency, they are explicit as to what those remedies are. The Pardons Board's regulations are an outlier which is a strong indication that they are unconstitutional in violation of equal protection principles and the protection against cruel and unusual punishments.

First, when reviewing the federal clemency provisions, the language is clear there are requirements about what methods of legal relief must be exhausted: "[n]o petition for reprieve or commutation of a death sentence should be filed before proceedings on the petitioner's direct appeal of judgment of conviction and first petition under 28 U.S.C. 2255 have terminated." 28 CFR § 1.10(b). In contrast, the

Nevada statutes do not define exactly what must be concluded with respect to judicial remedies prior to seeking clemency.

Similarly, when looking to other states it is also clear that Nevada's procedures regarding access are overly strict and unclear. For example, Louisiana clearly defines where in the litigation process capital cases must be in order to apply for clemency. On the Louisiana website for Application for Commutation of Sentence, the requirement for Capital Cases states "[a]ny offender sentenced to death may submit an application within one year from the date of the direct appeal denial." *Application for Commutation of Sentence*, https:// doc.louisiana.gov/imprisoned-person-programs-resources/pardons-parole/application-for-commutation-of-sentence/ (last visited Dec. 7, 2021).

Likewise, in Arkansas, an application for clemency in capital cases must be filed no later than 40 days before an execution. Ark. Code Ann. 16-93-201(a)(1). However, every capital clemency application gets a hearing—"a hearing is required for death sentence cases," and "[a]t least 30 days prior to the execution date, the Board, with a quorum of members present, must conduct a hearing with the inmate…" *Arkansas*

Parole Board Policy Manual (Secretary of State Rule Number 158), at 25, 26, (Revised and Adopted Nov. 23, 2015) https://doc.arkansas.gov/wp-content/uploads/2020/09/ABP_Manual_rev112315.pdf.

Even Texas provides death row inmates seeking clemency a meaningful opportunity to be heard. In Texas, an interview with a Board member is mandatory if requested by the applicant: "Upon receipt of a request for an interview, the Presiding Officer (Chair) shall designate at least one member of the Board to conduct the requested interview." 37 Tex. Admin. Code § 143.43(e). Texas allows a way for death row inmates to have an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Oklahoma is another state that clearly allows death row inmates to litigate matters in court and still pursue clemency in a meaningful way. Most notably is the recent case of Julius Jones in Oklahoma. Mr. Jones has not only been involved in highly publicized litigation regarding his case and potential execution over the past year, but he has also gone before the Oklahoma Clemency board twice. Mr. Jones first went in front of the board on September 13, 2021, and for a second

time on November 1, 2021. Jessica Schulberg, *Julius Jones is Still at Risk of Execution Despite a Parole Board Twice Suggesting He May Be Innocent*, (Nov. 11, 2021), https://www.huffpost.com/entry/julius-jones-execution-parole-board-innocent_n_618c0d62e4b030921924f1c5. Both times the Oklahoma Pardon and Parole Board recommended to commute his sentence. *Id.* On November 18, 2021, Oklahoma Gov. Kevin Stitt commuted Mr. Jones' sentence to life without eligibility for parole hours before his planned execution. *Governor Stitt Commutes Julius Jones' Sentence to Life Without Possibility of Parole*, (November 18, 2021), https://oklahoma.gov/governor/newsroom/newsroom/2021/november/governor-stitt-commutes-julius-jones--sentence-to-life-without-p.html.

Had Mr. Jones been a death row inmate in Nevada, he would have been unable to both pursue clemency and litigate issues surrounding his potential execution and legal case in court. Nevada death row inmates deserve this minimum amount of due process that is afforded by other states and the federal government.

2. Due process principles apply to clemency proceedings for death row inmates and their life interest.

Due process applies to clemency applications and proceedings for death row inmates in their ability to access the clemency process. "[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. at 333 (internal quotation marks omitted). *Mathews* identifies three factors courts should consider in evaluating the requirements of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Here, Mr. Floyd's private interest is his own life. The risk of erroneous deprivation is great, as the deprivation of his life through a state-sanctioned execution is irrevocable. The Legislature and the Nevada Constitution have already established clear provisions for a

procedure for clemency for a death row inmate, and thereby created a clear compelling interest in fair access to the clemency process. *See* NRS 213.030, NRS 213.080, NRS 213.085, NRS 213.1099, Nev. Const. Art. 5, Sec. 14. And further, the United States Supreme Court has recognized that "process is not an end in itself," and "its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

While clemency decisions themselves are not usually a question for the courts, as noted in *Woodard*, "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner *any access to its clemency process*." *Woodard*, 523 U.S. at 289 (emphasis added). Here, Mr. Floyd is being denied access to the clemency process in violation of his due process rights. These concerns implicate not just Mr. Floyd's procedural due process rights but also his substantive due process rights as the substantive unfairness resulting from the Board's failure to consider his application in the face of the regulations discussed above are

disproportionate to their stated purpose as applied to death row inmates facing imminent execution.

a. By seeking to execute him prior to the opportunity to be heard by the Board, the State violates Mr. Floyd's due process rights.

The State violates Mr. Floyd's due process rights by seeking to execute him before he can appear before the Board. "If the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated." *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (citing Young v. Hayes, 218 F.3d 850, 853 (8th Cir. 2000)).

As noted earlier, Nevada has created a clemency process, with the Legislature passing numerous statutes regarding death row clemency specifically. As this Court stated in *Goldsworthy*: "[I]f the legislature undertakes to enact laws granting parole when it need not constitutionally have done so, we think those rights granted as acts of clemency or grace must be administered with accordance with concepts of due process…" *Goldsworthy*, 86 Nev. at 256, 468 P.2d at 353. As such the State is prohibited from interfering with Mr. Floyd's access to Nevada's clemency process. Until Mr. Floyd is able to meaningfully

access the clemency process, the State moving forward with an execution would constitute a due process violation.

b. The clemency rules in NAC 213 and promulgated by the Board impact whether a death row inmate can make a free and deliberate waiver of their appeals.

The requirements contained in NAC 213.120 also create issues for inmates seeking to forego available judicial remedies in order to seek clemency. To waive the right to proceed, the defendant must be able to make a knowing, intelligent, and voluntary waiver. The waiver must be a "product of a free and deliberate choice rather than coercion or improper inducement" under the totality of the circumstances. *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007).

Without a clear guide as to what actual judicial remedies must be exhausted, in order for a death row inmate to seek clemency, NAC 213.120 places death row inmates—like Mr. Floyd—into a position where the language of the requirements state they must give up their appeals to access the clemency process. If a death row inmate must give up their appeals in order to pursue clemency, then this waiver is not the product of free and deliberate choice.

c. Nevada's clemency rules are used against death row inmates in habeas litigation.

In the proceedings below, the State used the Pardons Board's rules as a sword to argue that Mr. Floyd forfeited his right to seek commutation of his sentence by availing himself of available judicial remedies. Specifically, the State argued that "[a]fter the jury returned a verdict of death against Petitioner back in 2000, he was obviously aware of the potential to be executed. Petitioner had the potential to seek clemency since 2000—he did not have to wait till the State filed the Warrant of Execution to pursue clemency." 12PA2973. And also: "[b]y waiting twenty-one years to apply for clemency, Petitioner cannot establish good cause to explain why this claim was untimely and just raised for the first time in his third Petition." 12PA2974.

However, under the current scheme, Mr. Floyd has not had "twenty-one" years to pursue clemency as the State argued but has actually had zero years as litigation has been ongoing. The State's position highlights the vagueness problems with Nevada's clemency framework, which should not be used as a sword against Mr. Floyd.

d. Effectively, Nevada has no clemency process for death row inmates.

The current regulations and rules establishing Nevada's clemency process for death row inmates are unconstitutional, and effectively create a system where Nevada has "arbitrarily denied a prisoner any access to its clemency process." *Woodard*, 523 U.S. at 289. This Court must therefore vacate Mr. Floyd's death sentence, or, in the alternative, stay his execution and order the Pardons Board to consider his application notwithstanding the rules governing exhaustion of judicial remedies. NRS 176.415(1).

C. Mr. Floyd's Fetal Alcohol Spectrum Disorder ("FASD") is equivalent to an intellectual disability, making him categorically ineligible for the death penalty under *Atkins*.

Mr. Floyd argued in the instant petition that he is categorically ineligibile for the death penalty because his Fetal Alcohol Spectrum Disorder ("FASD") is morally equivalent to intellectual disability in its severity. Given this, Mr. Floyd's death sentence is invalid under both state and federal constitutional guarantees of due process, equal protection, reliable sentence, and the freedom from cruel and/or

unusual punishments.[13] U.S. Const. amends V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21. The district court rejected Mr. Floyd's claim on the rationale that "*Atkins* sets forth a bright-line test on IQ."[14] 14PA3489. The district court did not otherwise determine whether Mr. Floyd's adaptive functioning deficits as a result of FASD were sufficiently severe to warrant a categorical exclusion from the death penalty.

The district court's decision rejecting Mr. Floyd's claim constitutes a fundamentally incorrect understanding of the holding in *Atkins*, 536

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[13] It is again important to note that this Court has recognized it has the ability to provide greater constitutional protections under the Nevada constitution than under the federal constitution. *See, e.g., State v. Kincade*, 129 Nev. 953, 317 P.3d 206 (2013). Given the language of Nev. Const. art 1, § 6—prohibiting "cruel or unusual" punishment—the Nevada Constitution does in fact provide broader protection against cruel or unusual punishment versus the language in U.S. Const. amend. VIII prohibiting "cruel and unusual" punishment.

[14] It should also be noted that in the State's Response to Petitioner's Third Petition for Writ of Habeas Corpus (Post-Conviction), the State never argued that *Atkins* did not apply to Mr. Floyd or that FASD does not meet the standards to be deemed an intellectual disability equivalent, but that Mr. Floyd's claim was procedurally barred. 12PA2971–73.

U.S. 304, and the inferences that should be drawn from the case to apply in circumstances such as the instant one.

The Court in *Atkins* concluded that for a state to execute an individual with an intellectual disability would amount to cruel and unusual punishment under the Eighth Amendment—"we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.'" *Atkins*, 536 U.S. 304, at 321 (2002) (quoting *Ford*, 477 U.S. at 405). And that "[b]ecause of their impairments . . .by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. The *Atkins* Court also noted that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317.

Similarly, in *Hall v. Florida*, the Supreme Court struck down a Florida law that defined intellectual disability in terms of a rigid IQ test

score. "This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Hall v. Fla.*, 572 U.S. 701, 704 (2014). The Supreme Court in *Hall* also noted that "[i]ntellectual disability is a condition, not a number," and that it is "not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. *Id.* at 723; *see* DSM–5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score.").

Thus, the district court is simply incorrect—*Atkins* did not set-forth a "bright-line rule" regarding IQ for ineligibility. The only bright line rule that came out of *Atkins* is that individuals with intellectual disabilities are ineligible for the death penalty. Given the case law that comes after *Atkins*, it is clear this holding set a floor and not a ceiling with respect to IQ.

It is clear the district court's reasoning for denying Mr. Floyd relief due to his FASD, which is the functional equivalent of intellectual disability, was based on a "bright-line" rule that does not exist. And if it

did, it would be clearly unconstitutional. As such, the district court's decision to deny Mr. Floyd relief was contrary to *Atkins* and its progeny.

As will be explained below, Mr. Floyd proffered new scientific evidence and demonstrated that he has a condition equal to an intellectual disability in terms of moral culpability, making him categorically ineligible for the death penalty under *Atkins*.

1. Mr. Floyd suffers from ND-PAE/FASD.

Mr. Floyd has been diagnosed with FASD—a "brain-based, congenial, lifelong, impactful disorder" that affects his adaptive functioning and is analogous to "Intellectual Disability (ID) Equivalence." 12PA2852–53 at ¶9, 12PA2880–81 at ¶32; 14PA3338–39 at ¶9, 14PA3366–67 at ¶32. Mr. Floyd meets the current diagnosis for "Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure ("ND-PAE") under the DSM-5 as analyzed below. 12PA2869–70 at ¶24; 14PA3355–56 at ¶24. The diagnostic criteria requires: "evidence of prenatal alcohol exposure, at least one impairment in neurocognitive function…at least one impairment in self-regulation…and at least two domains of adaptive behavior, with onset in the development period." 12PA2869 at ¶24; 14PA3355 at ¶24. Mr.

Floyd's actual "functioning and life history well exceed DSM-5 diagnostic criteria for ND-PAE, the current diagnoses under DSM-5 for the CNS impairment or 'mental impairment'" in FASD. 12PA2870 at ¶24; 14PA3356 at ¶24.

First, Mr. Floyd's mother had a well-documented history of drinking while pregnant with Mr. Floyd. 12PA2869 at ¶24; 14PA3355 at ¶24. His mother, Valerie Floyd testified at trial "that at the time she became pregnant with her son she was a 'hippie' who abused alcohol and used illegal street drugs." 12PA2832–33 at ¶19; 14PA3398–99 at ¶19. She further testified that she became pregnant with Mr. Floyd during a "period of heavy drinking." *Id.* Social worker Jorge Abreu previously testified that Valerie Floyd informed him that she was "drinking alcohol and using drugs including LSD and cocaine 'throughout the pregnancy in both cases.'" 12PA2833 at ¶19; 14PA3399 at ¶19.[15] Mr. Floyd's biological father, Jay Cobis, attested that during the early months of her second pregnancy (with Mr. Floyd) "Valerie

[15] Valerie Floyd had an infant prior to Mr. Floyd who died from SIDS. SIDS is associated with prenatal alcohol exposure. 12PA2833 at ¶19; 14PA3399 at ¶19.

continued drinking, smoking cigarettes and marijuana, and abusing cocaine and possibly other drugs" and that "[m]utal friends reported…Valerie continued abusing drugs and other substances throughout her pregnancy with Zane." 14PA3330. In her declaration, Rosalie Ann Cobis[16] stated that: "If Valerie continued to live as she had in Kodaik then there probably is no doubt that Zane was damaged in many ways. He never had a chance to be normal." 14PA3332.

Second, Mr. Floyd's cognitive testing at various times (1989, 2000, and 2006) shows that he suffers from neurocognitive impairments in four areas: sub-test discrepancies in intellectual testing, complex visuospatial memory deficits, academic learning disabilities, and deficits in visuospatial construction. 12PA2863–65 at ¶19, 12PA2869–70 at ¶24;14PA3349–51 at ¶19, 14PA3355–56 at ¶24. Only one area is needed for a diagnosis. In her evaluation of previous scores, Dr. Natalie Brown noted that Mr. Floyd's full-scale IQ scores have varied widely between tests, and that "[b]ecause of the significant discrepancies in

[16] Rosalie Ann Cobis is the sister of James Cobis and is Mr. Floyd's biological aunt. She resided with her brother and Valerie Floyd during Mr. Floyd's conception.

sub-test scores, Mr. Floyd's full-scale IQ scores are not reliable representations of his intellectual functioning." 12PA2865 at ¶19; 14PA3351 at ¶19. In her report, Dr. Brown also stated that "the widespread deficits seen in Mr. Floyd's cognitive profile have a *profound* effect on his adaptive behavior." 12PA2866 at ¶21; 14PA3352 at ¶21 (emphasis added). Cognitive disabilities have also been present throughout Mr. Floyd's life. At one point in his childhood, school officials recommended that Mr. Floyd be placed in special education classes. However, his adoptive father, Michael Floyd, reported that he told school officials that "he wouldn't allow him to be in a class with 'retards.'" 12PA2841 at ¶39; 14PA3407 at ¶39.

Third, Mr. Floyd has impairments in three areas of self-regulation: attention, impulse control, and problem solving. 12PA2869–70 at ¶24; 14PA3355–56 at ¶24. Only one is needed. These issues are seen throughout Mr. Floyd's life. An elementary school teacher noted that "he did not use his time wisely or practice self-control," and he was expelled from fifth grade for being "out of control." 12PA2836 at ¶27; 14PA3402 at ¶27.

Fourth, Mr. Floyd has adaptive impairments in four areas: communication, daily living skills, socialization, and motor coordination. 12PA2860–63 at ¶18; 12PA2869–70 at ¶24; 14PA3346-49 at ¶18; 14PA3355–56 at ¶24. Only two are needed. Dr. Brown interviewed individuals[17] who have known Mr. Floyd throughout his life and administered the Vineland-3 to them.[18] 12PA2860–63 at ¶18; 14PA3346–49 at ¶18. The results showed that during childhood, "compared to other 12-and 16-year-olds, Mr. Floyd's adaptive functioning was severely impaired." 12PA2861–62 at ¶18(b); 14PA3347–48 at ¶18(b). The Vineland-3 results "also show Mr. Floyd's adaptive functioning decreased significantly over time, showing that as adaptive responsibilities and expectations became more complex with advancing age, his adaptive capacity diminished considerably in relation to age peers." 12PA2862 at ¶18(b); 14PA3348 at ¶18(b).

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[17] Dr. Brown interviewed Carolyn Smith, a family friend and social worker; Jay Hall, a long term friend; and Mike Hall, the father of Jay Hall who has known Mr. Floyd for years. 12PA2860–63 at ¶18(a); 14PA3346–49 at ¶18(a).

[18] "The Vineland-3 is a widely-used measure in mental health that assesses an evaluee's adaptive behavior via ratings from individuals who know him/her well." 12PA2861–62 at ¶18(b); 14PA3347–48 at ¶18(b).

Lastly, Mr. Floyd has been impacted by FASD his entire life. Not only was he born underweight, but he experienced several issues during the developmental period. Mr. Floyd was born six weeks premature. 12PA2833 at ¶20; 14PA3399 at ¶20. Throughout his childhood various delays and struggles were identified. For example, Valerie Floyd testified that Mr. Floyd "developed slowly as an infant and could not draw circles in school." 12PA2834 at ¶23; 14PA3400 at ¶23. One of his kindergarten reports noted "'We have been very concerned about Zane's physical coordination and development. It is not what it should be by this time." 12PA2834–35 at ¶24; 14PA3400–01 at ¶24. A child psychologist who saw Mr. Floyd when he was thirteen years old testified that while Mr. Floyd was being treated for ADHD at the time, "there were additional issues that required more extensive analysis…such as an 'information processing learning disability' and the potential for a 'permanent emotional problem.'" 12PA2835 at ¶25; 14PA3401 at ¶25. The tumultuous childhood Mr. Floyd experienced only exacerbated the complications created by FASD: "[t]he kind of adversity he experienced in childhood has been found in the research to

cause brain damage in and of itself. So this is additive and cumulative insult on the brain damage he was born with." 14PA3479 at 5:52-6:07.

Thus, Mr. Floyd clearly established that he suffers from FASD.

2. FASD is morally equivalent to an intellectual disability.

Intellectual Disability (ID) equivalence "refers to accommodations that are made by legal and other governmental entities…to people who—because of brain impairment—function as if they have an ID but fail to qualify for the ID label…because their IQ scores are a few points too high." Stephen Greenspan, Natalie Novick Brown, & William Edwards*, FASD and the Concept of "Intellectual Disability Equivalence," in Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives*, International Library of Ethics, Law, and the New Medicine 241 9M. Nelson & M. Trusslers eds., 2016. According to experts, FASD is "a logical candidate" for ID equivalence for several reasons. *Id.*

First, the DSM-5 classifies both FASD and ID as neurodevelopmental disorders. 12PA2870–71 at ¶26; 14PA3356-57 at ¶26. The difference is that ID can be diagnosed by a single provider and

somewhat minimal testing, whereas a FASD diagnosis requires a team of multiple professionals—including neurologists, medical doctors, and an adaptive functioning specialist. 12PA2877at ¶31(b); 14PA3363 at ¶31(b). FASD is much more difficult to diagnose early and put in place appropriate interventions. 12PA2876 at ¶30(c); 14PA3362 at ¶30(c). This often leads to a greater risk of negative development trajectory than even those with ID. *Id.*

Second, both FASD and ID are caused by permanent structural brain damage. 12PA2877 at ¶31(a); 14PA3363 at ¶31(a). In an individual with FASD, "[t]he toxic effects of prenatal alcohol exposure appear to be widespread throughout the entire brain, causing subtle but potent irregularities in brain structure that compromise brain function and directly impact cognition and behavior." 12PA2856; 14PA3342.

Third, both ID and FASD impact cognitive functioning. However, while in many cases IQ "distinguishes between ID and FASD," the "executive and everyday adaptive functioning in both conditions tends to be identical." 12PA2877at ¶31(c); 14PA3363 at ¶31(c). And "[e]xecutive functioning also is similar in FASD and ID…[e]xecutive functioning tends to be universally impaired in FASD as well as ID…"

12PA2877–78 at ¶31(c); 14PA3363–64 at ¶31(c). As discussed by Dr. Brown in Mr. Floyd's Clemency Video: "[t]here is no difference now in terms of intellectual function between ID and FASD because they are both defined as executive functioning." 14PA3482 at 3:32–3:43. It is important to note that "[f]ull-scale IQ also has become less important in ID according to the DSM-5 as 'intellectual' deficiency now is defined as a broad array of mixed impairments that mostly involve executive dysfunction…" 12PA2877 at ¶31(c); 14PA3363 at ¶31(c).

Fourth, both ID and FASD require adaptive impairment in the DSM-5. 12PA2878 at ¶31(d); 14PA3364 at ¶31(d). However, at least one deficient adaptive domain is required in ID and at least two deficient adaptive domains in FASD—"typically making people with ID and FASD indistinguishable from each other in terms of everyday behavior." *Id.* It is also important to note that the deficiencies in FASD tend to worsen with age. *Id.* These symptoms "become more complex and debilitating, leading to greater adaptive severity in adulthood." 12PA2880 at ¶31(g); 14PA3366 at ¶31(g). The mortality rate for males with FASD is also significantly higher than those with ID and the general population. 12PA2880 at ¶31(i); 14PA3366 at ¶31(i). The life

expectancy for males in the general population is 76 years, 74 years in individuals with ID, and less than half of that at only 34 years in FASD. *Id.*

Because FASD is the functional equivalent of ID, this Court should hold that Mr. Floyd is categorically exempt from the death penalty.

3. Neither retribution nor deterrence can be used as justification for the death penalty due to Mr. Floyd's FASD.

In *Atkins*, part of the consideration for excluding those with intellectual disabilities from being death penalty eligible was due to considerations of retribution and deterrence. Used as justification for the death penalty, the *Atkins* Court found the two are not furthered when an individual's culpability is impaired. *See Atkins*, 536 U.S. at 319. While *Atkins* relied on the medical community's definition of intellectual disability at the time of *Atkins*, recent advancements in medical science have shown that FASD should also result in a categorical exemption from the death penalty.

As analyzed above, FASD is an intellectual disability equivalent, impacting Mr. Floyd since birth as a brain-based condition limiting his

intellectual and adaptive functioning. The mental culpability of individuals with FASD is impacted the same way the mental culpability of individuals with ID is. *Atkins* made it clear that the two primary social purposes of the death penalty, retribution, and deterrence of capital crimes, are not justified when the perpetrator lacks moral culpability due to an intellectual disability. *Id.* Unless the imposition of the death penalty on an intellectually disabled person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

The same is true for an individual with FASD.

With regard to retribution, the *Atkins* Court stated: "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.* at 319. And: "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* Here, Mr. Floyd's

culpability is impacted by FASD, a degenerative brain disorder which causes cognitive and adaptive functioning defects.

Deterrence in capital sentencing deals with the notion that severe punishment will prevent others from committing the same crimes. *Id.* at 320. For individuals with intellectual disability, there is a "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," just as there is in individuals with FASD. *Id.* It is because of this diminished capacity that these individuals are less likely to "process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* FASD impacts the cognitive ability of individuals who suffer from it in a similar manner: "[t]he toxic effects of prenatal alcohol exposure appear to be widespread throughout the entire brain, causing subtle but potent irregularities in brain structure that *compromise brain functions and directly impact cognition and behavior*." 12PA2856; 14PA3342 (emphasis added).

Here, similarly to how executing an individual with an intellectual disability will not "measurably further the goal of deterrence," neither will executing an individual such as Mr. Floyd who has FASD. Neither

the goals of retribution nor deterrence would be furthered or justified by the execution of Mr. Floyd.

4. Mr. Floyd is also categorically exempt from the death penalty under *Roper*.

In *Roper v Simmons*, 543 U.S. 551 (2005), the Supreme Court held that offenders who committed their crimes under the age of eighteen were ineligible for the death penalty. This was based on three general differences between juveniles and adults, which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569. These factors are: the lack of maturity and underdeveloped sense of responsibility, that juveniles are more vulnerable and/or susceptible to outside pressures and negative influences, and lastly that the character of a juvenile is not as fully formed as that of an adult. *See id.* at 569–70. The Court noted that due to these facts "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 553.

While Mr. Floyd was chronologically 23 when he committed the offense for which he was sentenced, *Roper* and the rationale behind it can, and must, be extended to him. While *Roper* created a cut-off of

eighteen, it also recognized "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* at 574. Even prior to *Roper*, the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1983), noted that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings,* 455 U.S. at 115.

Here, Mr. Floyd suffers from FASD. FASD is a condition that has plagued him his entire life, and impacted his brain development and his cognitive, adaptive, and social abilities. As previously discussed, individuals born with FASD have widespread brain damage. In addition, individuals with FASD also "exhibit abnormal and delayed brain maturation across developmental years." 12PA2884 at ¶38; 14PA3370 at ¶38. Studies have shown that individuals impacted by prenatal alcohol exposure (PAE), experience "significant maturational alterations and delays in the prefrontal cortex and its microstructure in children, adolescents and adults…compared to normally-developing age-peers." *Id.*

Even a "normally developing" adolescent brain does not have mature executive control capacity until at least the age of 25. 12PA2886

at ¶41; 14PA3372 at ¶41. Brain development in an individual with FASD lags many years behind the rates seen in "normally developing" age peers. *Id.* Given this, it is very likely that Mr. Floyd's brain was not fully developed when he was 23 due to his ND-PAE/FASD. The same factors that exclude individuals under the chronological age of 18 from exposure to the death penalty are present here. Due to his FASD Mr. Floyd lacked the maturity and culpability of a neurotypical 23-year-old, was more vulnerable to outside influence, had less control over his surroundings, and had personality traits that were more transitory. As such, Mr. Floyd is categorically exempt from the death penalty under *Roper*. To allow him to remain on death row and his execution to move forward in any capacity would constitute cruel or unusual punishment under the Eighth Amendment, and thus his death sentence must be vacated and permanently set aside.

5. Mr. Floyd is categorically exempt from the death penalty under *Atkins* and *Roper* and executing him would amount to cruel and unusual punishment.

Mr. Floyd is categorically exempt from the death penalty under *Atkins* due to his FASD, and further he must be found categorically exempt from the death penalty under the rationale in *Roper* due to his

mental age at the time the crime was committed. The district court clearly erred in finding a ceiling "bright-line" rule in *Atkins*. Further, to apply any sort of bright-line rule to the principles of the Eighth Amendment would be at odds with the very core of those principles—which are based on evolving, not rigid, standards of decency. *See Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). As noted in *Trop v. Dulles*, "[T]he Amendment must draw its meaning from the evolving standards of decency to mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86,100 (1958). Given the evolving standards of our society, and the growing factual and scientific information that has been discovered regarding FASD, it is clear that Mr. Floyd's FASD diagnosis is equivalent to an intellectual disability due to it being a brain-based condition that created severe limitations and constraints on his cognitive and adaptive skills from infancy. It diminishes his culpability in the same way that intellectual disability does under *Atkins*, thus making him categorically exempt from the death penalty. His execution would result in cruel and unusual punishment, and his death sentence must therefore be permanently set aside.

D. Pursuant to NRS 176.355(3), state law prohibits an execution from taking place anywhere other than Nevada State Prison.

Under NRS 176.355, executions in Nevada can only take place at Nevada State Prison. NRS 176.355(3) states: "The execution must take place at the state prison." To allow otherwise would violate state and federal constitutional guarantees of due process, equal protection, and freedom from cruel and/or unusual punishment as it would be a clear violation of state law. U.S. Const. amend. V, VIII, XIV; Nev. Const. Art. I §§ 6, 8(2), Art. IV, § 21.

The district court held that "[s]ince Ely State Prison is a lawful Nevada prison, Petitioner is not entitled to relief." 14PA3490. This is clearly erroneous as the language in NRS 176.355 is clear that the location of an execution is not merely "a" state prison, but "the" state prison. "[W]hen a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). This Court has held that statutes are to be interpreted in a way to give meaning to all their words. No words are to be 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 phrases superfluous or make a provision nugatory"). Thus, the word "the" must be given meaning.

Moreover, the Legislature was purposeful in using the definite article, "the," to denote the specific location of an execution. *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.") The use of a definite article cannot be ignored. *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."). And, "[l]ike all the other words in statute, the articles count." *People v. Hayden*, 127 N.E. 3d 823, 842 (Ill. 2018).

Other jurisdictions have dealt with these same issues of statutory construction and come to the same conclusion—definite articles matter.

In *Hayden* the court examined if a statute dealing with the term "the victim" included any victim or a specific individual. 127 N.E.3d at 842–43. In that case, the court concluded that the definite article before a noun limited the scope of the term to specifically named victims in a prosecution case and not just any victim. *Id.* In *Brooks v. Zabka*, 450 P.2d 653, 655 (Co.1969) (en banc), the court concluded that the term "the tax levy" in an ordinance was intended to implicate a specific property tax mill levy. Definite articles matter.

Here, the district court's interpretation clearly made the word "the" superfluous, which contravenes the clear language of the statute. NRS 175.355 prescribes the manner in which executions in Nevada must be carried out, and NRS 175.355(3) is clear that "[t]he execution *must* take place at *the* state prison." (emphasis added). The language is not permissive and places a strict mandate on the location of executions in the state. The clear use of a definite article in this context makes the language of the statute clear, as such review of legislative intent is not necessary. However, if the Court determines such a review is needed, it also supports Mr. Floyd's position.

When amended in 1983, NRS 176.355(3) modified the text to read "[t]he execution must take place at the state prison." Prior to that, NRS 176.355(2) required that '[t]he execution shall take place within the limits of the state prison." In 1967 when originally drafted there were actually three prisons in Nevada—Warm Springs Correctional Center ("WSCC"), Nevada Northern Corrections Center ("NNCC"), and the Nevada State Prison.[19] 13PA3085. Given the fact there were multiple prisons in the state, the 1983 legislature could have simply used "a" or "any" state prison when referring to the location of an execution but chose to be precise with the location and used "the" as a definite article to refer to something specific—the Nevada State Prison. Additionally, Nevada State Prison has been referred to as "the state prison" or as "Nevada state prison," without capitalization, in other contexts outside

[19] Warm Springs Correctional Center was constructed in 1961, and was known as Nevada Women's Correctional Center until September 1997. *See State of Nevada: Department of Corrections, Warm Springs Correctional Center*, https://doc.nv.gov/Facilities/WSCC_Facility/. Northern Nevada Correctional Center opened in 1964. State of Nevada: Department of Correctional, *Northern Nevada Correctional Center*, https://doc.nv.gov/Facilities/WSCC_Facility/.

NRS 176.355(3). 13PA3093–3108. Thus, the plain reading of the statute and the statute's legislative history both support Mr. Floyd's reading.

Below, the State argued that since the Nevada Legislature approved $860,000 to be spent on a new execution chamber at Ely State Prison in 2015, the Legislature did not intend for executions to take place only at the Nevada State Prison. 12PA2974–75. However, the Legislature in 2015 did not amend NRS 176.355. Nor can the approved funding be used to override the intent of the Legislature at the time NRS 176.355 was enacted in 1967 or modified in 1983. The district court cannot amend the statute in place of the Legislature. It is a court's duty "to interpret the statute's language; this 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); *see also Williams v. State Dep't of Corr.*, 133 Nev. 594, 598–99, 402 P.3d 1260, 1264 (2017) ("[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 random or

devoid of meaning." (internal citations omitted)) (quoting *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003).

The district court erred in finding that an execution can take place at Ely State Prison, as the language in NRS 176.355(3) is clear it must take place at "*the* state prison." (emphasis added). There is no ambiguity. If there is an issue, then it is on the Legislature to amend the statute, not the courts. Allowing each branch of government to fulfill its constitutional role is not an absurd result.

E. Mr. Floyd's death sentence is invalid due to improper penalty phase verdict forms.

Mr. Floyd's death sentence is invalid under state and federal constitutional guarantees of due process, equal protection, a reliable sentence, and a fair and impartial jury, because the verdict forms provided to the jury for penalty deliberations were prejudicially misleading. U.S. Const. amend. V, VI, VIII, XIV; Nev. Const. Art. I, § 1, 5, 6, 8; Art. 4, § 21. The general verdict forms and instructions used in Mr. Floyd's case incorrectly required mitigating circumstances to outweigh aggravating circumstances in order to impose a life sentence. The jury was prevented from considering life sentencing options as the

forms stated the jury's ability to consider a life sentence was dependent on weighing aggravating and mitigation circumstances.

In order to impose a death sentence a jury must find "at least one aggravating circumstance and further find that there are no mitigating circumstance sufficient to outweigh the aggravating circumstances or circumstances found." NRS 175.554(3); *see also* NRS 200.030(4). When a jury returns a death sentence the written verdict must designate the aggravating circumstances found and also "state there are no mitigating circumstances sufficient to outweigh the aggravating circumstances or circumstances found." NRS 175.554(4). These requirements do not exist for consideration of a sentence less than death.

In Mr. Floyd's case, the jury was provided two forms for deliberation: a general verdict form and a special verdict form. The general verdict form was used to determine the ultimate penalty and the special verdict form included a list of aggravating factors. Both forms were used. The general verdict form included the following section:

> [H]aving found that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances impose a sentence of,
> _____ A definite term of 100 years imprisonment, with eligibility for parole beginning when a minimum of 40 years has served,
> _____ Life in Nevada State Prison with the possibility of parole, with eligibility for parole beginning when a minimum of 40 years has been served.
> _____ Life in Nevada State Prison without the possibility of parole.
> _____ Death.

12PA2940–44.

Under these instructions, the weighing of aggravating and mitigating factors is connected to a life sentencing option, thus that verdict form is erroneous. This constitutes a misstatement of law because that finding isn't necessary to impose a life sentence. This is a clear error, that affected Mr. Floyd's "substantial rights, by causing actual prejudice or miscarriage of justice" just as it did in *Petrocelli*, No. 790, 2021 WL 2073794 (May 21, 2021) (unpublished disposition).[20] *Valedez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (internal citations omitted). These forms and jury instructions meant

[20] This case is cited as persuasive authority, *see* NRAP 36(c)(3).

the difference between life and death for Mr. Floyd, and yet conflated death eligibility and the consideration of the life sentencing options.

Given the above, the verdict forms used in Mr. Floyd's trial constitutes a plain error which warrants reversal, and this Court must similarly reverse on plain error grounds just as it did in *Petrocelli*. *See Petrocelli*, No. 79069, 486 P.3d 1290, 2021 WL 2073794 (May 21, 2021) (unpublished disposition). The district court erred when it concluded otherwise. Mr. Floyd is entitled to a new penalty hearing, and requests that this Court reverse the district court's order and grant relief on this claim.

IX. CONCLUSION

Mr. Floyd maintains his continuing objection that the transfer of his case to Department 17 was improper, and that the district court did not have jurisdiction to hear this matter. Mr. Floyd requests that this Court reverse and remand to the district court with instructions to: (1) transfer Mr. Floyd's habeas petitions to Department 5 for consideration, (2) declare the proceedings in Department 17 a nullity, and (3) prevent the district court in Department 17 from acting in the habeas case, and

(4) grant any other relief this Court deems appropriate to effectuate its decision.

If for some reason this Court finds that the district court did have jurisdiction, then Mr. Floyd respectfully requests this Court reverse the order of the district court and vacate his death sentences based on the errors he has described above. In the alternative, Mr. Floyd requests this Court remand this case with instructions that the district court grant an evidentiary hearing to demonstrate good cause and prejudice and the merit of his claims.

Finally, Mr. Floyd requests that this Court order the Pardons Board to place his application for commutation of his death sentence on the next scheduled meeting agenda and stay his execution until his application is considered under NRS 176.415(1).

DATED this 28th day of December 2021.

Respectfully submitted,

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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:

[X] 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:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 12,989 words: or

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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/ David Anthony
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 28, 2021. Electronic Service of the foregoing Petitioner's Opening Brief shall be made in accordance with the Master Service List as follows:

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District of Nevada