IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84081

Zane Michael Floyd

Appellant,

v.

The State of Nevada Department of Corrections, Charles Daniels, Director, Department of Corrections for the State of Nevada,

Respondents.

Appeal from Eighth Judicial District Court
Clark County, Nevada
The Honorable Adriana Escobar

Appellant's Reply to State's Answering Brief

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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 in all subsequent proceedings, including the proceedings below.

/s/ David Anthony
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I. Introduction

Zane Floyd filed his Opening Brief ("OB") with this Court on May 18, 2022, and the Nevada Department of Corrections (hereinafter "the State") filed its Answering Brief ("RAB") on June 17, 2022. Floyd now files his reply.

In his opening brief, Floyd argued that the minority position articulated by the Arkansas Supreme Court in *Hobbes v. Jones*, 412 S.W.3d 844 (Ark. 2012), is the one that is consistent with this Court's precedents as it is the only approach that provides sufficient and suitable standards. OB at 23–28. He further argued that the gravity of the decision to have capital punishment requires more of the Legislature than merely stating a means of execution and leaving the rest up to the NDOC Director. *Id.*; *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2608—09 (2022) (acknowledging presumption that Congress leaves for itself the ability to make major decisions of public importance). Other than stating a means of execution, the State does not argue that anything else in NRS 176.355 provides meaningful criteria to restrain the Director's power.

The parties agree that "the line between the legislative role of writing the law and the executive role of carrying out the law is sometimes imprecise." RAB at 3 (acknowledging "that lack of precision has led to the development of the nondelegation doctrine"). But after making this concession, the State argues the Legislature need do nothing more than state a means of execution to fulfill its constitutional role and that everything else can be done by the Director. RAB at 4.[1] However, if this were true, then the Legislature could also pass a statute providing for every known means of execution and leave it up to the Director to pick one. Alternatively, the State argues that the Legislature need do nothing more than state a public policy in favor of capital punishment and the rest of the gaps can be filled in by the Director. RAB at 3. But under this approach, the Legislature would not have to state a means of execution at all. The State's arguments may have an intuitive appeal, but they do not grapple with the imprecision

[1] The State does not defend the district court's approach of limiting the relevant inquiry to whether the statute violates the void for vagueness doctrine. 3AA748.

that it acknowledges exists in the nondelegation context that requires an inquiry into the suitability and sufficiency of the standards promulgated by the Legislature.

Only once a statute is shown to have: (1) suitable and sufficient guidelines, (2) that limit the delegated agency's power to only fact-finding authority, and (3) prevent arbitrary and capricious behavior, is the nondelegation doctrine undisturbed. NRS 176.355 satisfies none of these requirements. NRS 176.355 violates the nondelegation doctrine because it lacks any criteria to sufficiently and suitably guide the NDOC Director's exercise of authority. The lack of guidelines allows the Director to have unfettered discretion to make law and exercise his authority in an arbitrary and capricious manner: he may supply all the details of NRS 176.355 that were not but should have been provided by the Legislature.

Yet, the State contends this is inaccurate. The State maintains that the NDOC Director is doing nothing more than "fine-tuning" details as "NRS 176.355, as written, provides sufficient and suitable standards on carrying out a capital sentence and . . . the Legislature

can provide more detail in NRS 176.355 if it wants to, but . . . the Nevada Constitution does not demand that it do so." RAB at 10. But the State fails to point to any discernable criteria, as presented in NRS 176.355, that sufficiently and suitably guides the Director's use of power. And, as will be further demonstrated below, because the State supports its argument by relying on inapplicable or distinguishable precedent, the Eighth Amendment, and statements inconsistent with their own concessions, its arguments fail.

II. Argument

A. The standard of review is *de novo*.

Citing *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1280, 1382 (1987), the State argues that in reviewing whether NRS 176.355 is a proper delegation this Court "is confined to the district court's final written order when granting the motion to dismiss." RAB at 7. However, this argument is incorrect. *Rust* is inapplicable here as it concerns the standard for reviewing a premature notice of appeal. *Id.*[2]

[2] Floyd notes that his Notice of Appeal was timely filed on January 10, 2022, following the district court's January 7, 2022, order granting Respondent's Motion to Dismiss.

Instead, *Buzz Stew, LLC v. City of N. Las Vegas*, 14 Nev. 224, 228, 181 P.3d 670, 672 (2008), and *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011), inform this Court's standard of review. Both recognize this Court reviews orders granting a motion to dismiss and the constitutionality of a statute de novo. Because Floyd appeals from a district court order granting a motion to dismiss and asks this Court to determine NRS 176.355's constitutionality under the separation of powers doctrine, a de novo standard of review applies. Accordingly, this Court's review is not limited solely to the district court's order.[3]

B. Although the district court cited *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 697 P.2d 107 (1985) it misapplied the legal standard set forth there.

The State asserts "Floyd's claim that the district court failed to apply *Luqman* is belied by the record" because the district court "cited and expressly" applied *Luqman* in its order. RAB at 7. But the State's argument mischaracterizes Floyd's contentions and, as a result, fails to respond to them. Floyd did not argue that the district court failed to cite

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[3] Despite contending that this Court's review of Floyd's claims is limited to the district court's order, the State's brief recognizes that this Court's review is de novo. *See* RAB at 6.

or apply *Luqman*; instead, Floyd contended that the district court's application of *Luqman* was improper. *See* OB at 13–16. Simply because the district court cited *Luqman* and stated it was applying the precedent does not mean it was correctly applied. The district court misapplied *Luqman* by concluding that NRS 176.355 was a proper delegation because the statute was "not ambiguous." *See* OB at 13–16. Determining that NRS 176.355 was constitutional on the grounds that it was "not ambiguous" is erroneous as the critical inquiry under *Luqman* is whether the statute provides suitable and sufficient standards.

C. NRS 176.355 violates the nondelegation doctrine.

The State contends Floyd failed to prove NRS 176.355 violates the nondelegation doctrine for several reasons. First, the State argues this Court's precedent demonstrates that NRS 176.355's guidelines are suitable and sufficient such that they do not give the NDOC Director lawmaking authority. RAB at 8–9. Second, the State argues that any deficiency in NRS 176.355(2)(b)'s consultation requirement does not violate the doctrine because it also does not result in the director

exercising lawmaking authority. RAB at 10. The State next argues that the NDOC Director's absence of any relevant expertise is an inappropriate factor to consider in a nondelegation analysis. RAB at 15–17. Finally, the State contends that even if NRS 176.355 does violate the doctrine due to unsuitable and insufficient guidelines, the statute is nonetheless still constitutional as the Eighth Amendment ensures that NDOC's Director will not carry out his delegated authority in an arbitrary or capricious manner. RAB at 11–13. For the reasons detailed below, each of the State's arguments fail.

a. NRS 176.355 does not have suitable or sufficient guidelines as it provides no criteria to guide the NDOC Director's authority.

The State argues when "measured against this Court's nondelegation cases" Floyd cannot "articulate how NRS 176.355 results in the Department crossing the line into lawmaking." RAB at 8–9. The State contends *Luqman*, *Smith v. Bd. of Wildlife Comm'rs*, 461 P.3d 164, 2020 WL 1972791 (Nev. 2020), and *McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016), all demonstrate that if the NDOC Director is not "defining a new crime or new punishment," the

Executive is not making law and thus more detailed criteria are not needed. RAB at 9–10. The State also contends that Floyd waived part of his argument because it was mentioned in the summary of his brief and not further developed in the body. RAB at 11.

1. Under this Court's precedent, actual criteria are needed for NRS 176.355 to have suitable and sufficient guidelines.

The parties agree that *Luqman*, *McNeill*, and *Smith* are controlling here, but disagree regarding the proper interpretation of these cases. What the State refuses to acknowledge, but each case has in common, is that the statutes found constitutional under the nondelegation doctrine all had some criteria accompanying the delegation of authority. But here, no criteria guides NRS 176.355's delegation.

For example, in *Luqman*, through NRS Chapter 402, the Legislature delegated exclusive authority to the Pharmacy Board "to classify drugs into various schedules according to the drug's propensity for harm and abuse." 101 Nev. at 152–53, 697 P.2d at 109–10. Besides this guideline, the Legislature also provided "general and specific

guidelines listing various factors which are to be taken into account by the pharmacy board when scheduling drugs as well as delineating the requirements by which a drug is classified in an appropriate schedule." *Id.* at 153, 697 P.2d at 110. These standards provided the Board with sufficient criteria, making it a constitutional delegation. *Id.* at 154, 697 P.2d at 110–11.

The delegation of authority in *Smith* occurred under similar circumstances. In *Smith*, NRS 503.570 delegated authority to the Board of Wildlife Commissioners to establish trapping regulations. 2020 WL 1972791, at *1. Along with the Act, the Legislature also provided specific criteria to guide the Board's use of authority. *Id.* at *2. Specifically, the Legislature required the Board to: (1) "adopt regulations setting forth the frequency at which a person who traps wild mammals must visit a trap," (2) "promulgate regulations that require '[a] person to visit [his or her] trap . . . at least once each 96 hours," and (3) "consider requiring a trap . . . placed in close proximity to a populated or heavily used area by persons to be visited more frequently." *Id.* And if the Board chose not to implement the third

guideline, then it was required to submit factual findings explaining its decision not to do so. *Id.* Because the Legislature had accompanied NRS 503.270 with criteria, this Court held that suitable and sufficient standards guided the Board and thus the statute did not violate the nondelegation doctrine. *Id.*

Moreover, *McNeill* further demonstrates that criteria are needed for a constitutional delegation. In *McNeill*, this Court concluded that NRS 213.1243 did not permit the Board of Parole Commissioners to impose more lifetime supervision conditions than were particularized in the statute. 132 Nev. at 555, 375 P.3d at 1025. But even if it did, "that delegation of power would fail because the Legislature has not provided guidelines informing the Board *how, when, or under what circumstances*, it may create additional conditions." *Id.* at 557, 375 P.3d at 1026 (emphasis added). In other words, because there was no accompanying criteria the delegation of authority was unconstitutional.

Unlike *Luqman* and *Smith*, NRS 176.355 has no criteria in the statute guiding the NDOC Director's use of authority. Instead, NRS 176.355 has only two provisions: (1) the execution must be by lethal

injection, and (2) the Director must consult the Chief Medical Officer (CMO) before selecting the execution drugs to be used. However, because the second provision does not provide any meaningful criteria with respect to the Director's exercise of authority, NRS 176.355 fails to provide adequate criteria to guide the exercise of that power. *See* Section C.2, below. Because NRS 176.355 is missing criteria detailing "how, when, and under what circumstances," the execution protocol is created, *see McNeill*, at 557, 375 P.3d at 1026, the outcome here should follow this Court's guidance in *McNeill* and the delegation must fail. As demonstrated by this Court's precedent, a single provision, without more, is inadequate and does not satisfy the suitable and sufficient standards requirement. To have suitable and sufficient standards, a delegation of authority must include criteria to guide the agency's use of authority.

2. Floyd did not waive his argument.

In his opening brief, Floyd sought to differentiate between what the decisional rule would be if this Court adopted the minority position versus the majority position on the nondelegation issue. OB at 23–28.

He argued that only the minority position gives substance to the suitable and sufficient standards rule this Court followed in *Luqman*. *Id*.

The State argues that Floyd "waived" this argument because he mentioned this issue in his summary of the argument but did not repeat it in the argument section of his brief. RAB at 11. The State cites *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 130 P.3d 1280 (2006), but that case does not support its argument. In *Edwards*, the plaintiff challenged several statutory provisions in the district court but did not raise those issues in his opening brief. *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. In such circumstances, this Court held the plaintiff had waived his right to challenge the statutory provisions. *Id*.

Floyd's case does not present a situation where he raised claims for relief in the district court that he did not raise before this Court. Instead, his argument considered what the rule of decision would be depending upon which approach this Court followed. As to this issue, at some points the State argues that the Legislature need do nothing more than state a means of execution. RAB at 4. At other points, the State

argues the Legislature need only define a "relevant public policy," RAB at 8, and that everything else is "fine-tuning" that may be performed by the Director. *Id*.

The fundamental problem with the majority position and with the State's argument is that a statute that does nothing more than state a means of execution does not provide suitable and sufficient standards. If the State's argument is correct then the Legislature could also list every means of execution in a statute and it would also be constitutional, or, alternatively, the Legislature could pass a statute that states public policy is to provide for the death penalty as a punishment and to leave the means of execution entirely up to the Director. The State refrains from arguing such a statute would be constitutional, but it does not dispute that the rule it urges the Court to adopt would permit such a statute.

The State cannot avoid consideration of the consequences of the rule it urges the Court to adopt by arguing that Floyd has "waived" the ability to engage in such a discussion. To the contrary, it is entirely proper for this Court to consider whether the decisional rule it adopts

actually provides sufficient and suitable standards to guide the Director's discretion.

b. Without suitable and sufficient guidelines NRS 176.355 allows the NDOC Director to make law and exercise authority in an arbitrary and capricious manner.

Outside of this Court's precedent, the State further contends that Floyd's claims fail as "NRS 176.355 does not leave the Director to arbitrarily define how to carry out a death sentence under Nevada law," but rather "leaves fine-tuning the details of carrying out an execution to the Department." RAB at 4, 10. In support of this argument, the State points to NRS 176.355(2)(b)'s consultation requirement and argues that "Floyd fails to explain how the lack of more detailed direction regarding the Director's consultation with the CMO somehow transforms the nature of the Director's role under NRS 176.355 into lawmaking." RAB at 10. The State avers that even if the consultation requirement is illusory and lacks genuineness, "[t]he Director's decisions in establishing an execution manual remain an exercise in fact-finding or resolving conditions necessary to carrying out the legislature's directives." RAB at 10. This argument is incorrect.

In delegating authority to the Director, the Legislature recognized the Director needed to create a protocol accounting for relevant understandings of the science from the medical community. It can be for no other reason that the Legislature explicitly required the Director to consult with the CMO about the drug or drugs that will be used in the execution before it occurs. But NRS 176.355(2)(b)'s plain language shows that the statute provides no suitable or sufficient standards to ensure that the CMO actually renders advice that is followed by the Director. Without an identical statutory requirement on the CMO to participate or other requirement that the NDOC Director consult with a medical doctor in the CMO's absence, NRS 176.355(2)(b) is optional. An optional standard is insufficient as it gives the NDOC Director unfettered discretion to act in an arbitrary or capricious manner.

Moreover, NRS 176.355(2)(b) does not define what a "consult" is or require the Director to give any weight or consideration to the CMO's opinion. Allowing the Director the ability to resolve questions regarding lethal drugs, sequencing, and dosages, with no mandatory criteria, bestows him with the power to decide the method and manner of

execution. Deciding the method and manner of execution goes beyond fact-finding authority and violates the nondelegation doctrine.

c. NRS 176.355's violation of the nondelegation doctrine cannot be cured by the Eighth Amendment.

The State argues the Eighth Amendment can fill in the criteria that are missing from the statute. RAB at 5, 11–13. Specifically, the State contends that *State v. Gee*, 46 Nev. 418, 211 P. 676 (1923), allows this Court to conclude that the Legislature does not have to include suitable and sufficient standards in statutes if the standard is purportedly incorporated through a separate constitutional protection. Thus, according to the State, NRS 176.355 does not violate the nondelegation doctrine because nearly identical claims in the Eighth Amendment context were already rejected. RAB at 11–12. Each of the State's contentions are flawed.

While "the Legislature is free to presume that the Department will abide by relevant constitutional mandates when carrying out the directives the Legislature sets forth by statute," this presumption does not control the nondelegation doctrine analysis as it does not alleviate

the Legislature's obligation to set forth suitable and sufficient guidelines for every delegation of authority. *See Luqman*, 101 Nev. at 151, 697 P.2d at 108–09; *Smith*, 461 P.3d at 164, 2020 WL 1972791 at *2; *McNeill*, 132 Nev. at 556, 375 P.3d at 1025. Furthermore, the State cites no precedent supporting its argument that if a statute is constitutional under the Eighth Amendment, then it also can not violate the nondelegation doctrine.

In *Gee*, this Court concluded that NRS 176.355's language was not "indefinite and uncertain" such that it necessarily violated a defendant's constitutional rights against cruel and/or unusual punishments. *Id.* at 418, 211 P. at 682. The State now asks this Court to transpose *Gee's* holding as precedent here because the issues are "similar." But the legal conclusions reached in *Gee* are not transferable here. Contrary to what the State suggests, whether NRS 176.355 infringes on a defendant's Eighth Amendment rights is a wholly different inquiry than whether NRS 176.355 violates the nondelegation doctrine. Each constitutional provision has its own test to determine whether a constitutional provision was violated, and *Gee* was specific to

the Eighth Amendment. This is clear as the opinion did not analyze whether NRS 176.355 included suitable and sufficient guidelines and whether the Executive exercised more than fact finding authority.[4] Interpreting *Gee* in any other manner is erroneous as it would bar all future constitutional challenges to the statute, including ones never raised before this Court, like Floyd's separation of powers challenge. *See Ex Parte Tartar*, 339 P.2d 553, 557 (Cal. 1959) ("Cases are not authority for propositions not considered.").

Notably, the Jon Gee execution is illustrative of why specifying a means of execution alone is neither suitable nor sufficient. In the 1920s, NRS 176.355 specified executions should be effectuated by the administration of lethal gas. *Gee*, 46 Nev. at 418, 211 P. at 681–82. However, the Legislature failed to specify anything other than the means of execution in the statute. *Id.* Lacking guidance from the Legislature and left solely to their own devices, NDOC had unfettered discretion to create Nevada's execution protocol. This led to arbitrary

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[4] Floyd included the briefing of the appellant in *Gee* to show the nondelegation issue was not before the Court in that case. 1AA91—128.

and capricious decision making. NDOC chose the most dangerous and unsafe form of gas, cyanide, and then it carried out the execution by flooding Gee's cell with the cyanide in the middle of the night while he was sleeping, risking harm to employees and other inmates.[5] The first execution attempt was unsuccessful.[6] After that failure, NDOC then moved the execution to the prison's butcher shop, temporarily converting it to a "gas chamber," despite the obvious potential contamination issues that would arise from conducting an execution outside of an airtight chamber and in a location where animals are butchered.[7] The catastrophic outcome in *Gee* demonstrates that NRS 176.355 has not sufficiently guided NDOC in carrying out its use of legislative authority then or now.

Turning to the State's second argument, it is also incorrect to conclude that the Legislature may omit explicitly listing suitable and

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[5] *See* Rudolph Joseph Gerber & Jon M. Johnson, The Top Ten Death Penalty Myths: The Politics of Crime Control, 9–10 (2007).

[6] *Id*.

[7] *See* Trina N. Seitz, A History of Execution Methods in the United States, in 362–63 Handbook of Death and Dying (1st ed. 2003).

sufficient standards to guide an agency's use of authority if a constitutional provision conceivably relates to the subject matter. Nowhere in this Court's separation of powers precedent is this argument supported. If the State's argument had currency, then one would expect to see standards regarding procedural and substantive due process doing heavy lifting in this Court's precedents as surely state agencies are expected to accord due process to those affected by their decisions.

In fact, *Luqman*, *Smith*, and *McNeill* stand for the opposite conclusion. Even if the Legislature presumes NDOC will follow the Eighth Amendment in creating Nevada's execution protocol, *contra Baze v. Rees*, 553 U.S. 35, 55–56 (2008) (noting execution protocol must have safe harbor provisions before presumption exists that execution will be performed in a constitutional manner), this Court has determined that, to be a constitutional delegation of authority, NRS 176.355 must have express criteria to guide the agency. *See Luqman*, 101 Nev. at 151, 697 P.2d at 108–09; *Smith*, 461 P.3d at 164, 2020 WL 1972791 at *2; *McNeill*, 132 Nev. at 556, 375 P.3d at 1025. In the same

way, an absence of suitable and sufficient standards cannot be cured by the Eighth Amendment. *See* RAB at 5 (arguing that any nondelegation violation in NRS 176.355 can be remedied by the Eighth Amendment). Accordingly, neither *Gee* nor the Eighth Amendment control this Court's nondelegation inquiry.

d. This Court has authority to consider public policy in determining whether the Legislature's delegation has exceeded constitutional limits.

Finally, citing *Schwartz v. Lopez*, 132 Nev. 732, 738 P.3d 886, 891 (2016), the State argues this Court has no authority to consider the NDOC Director's absence of expertise when determining whether NRS 176.355 violates the nondelegation doctrine. RAB at 15–16; *but see West Virginia*, 142 S. Ct. at 2612—13. (acknowledging agency expertise is relevant in nondelegation cases). However, as the State has conceded before, and Floyd agrees, inherent in the nondelegation inquiry is whether the delegated agency has the requisite skills, knowledge, and expertise to carry out the delegated task. *See* 1AA65–66 (acknowledging that "in deciding whether a delegation exceeds constitutional limits" courts can consider "whether the agency official is better qualified to

make the determination." (internal quotation marks omitted)). And this inquiry is logical. If the Legislature delegates authority, it must at least be to an agency better equipped to establish an execution protocol. Thus, the State's conclusion this Court cannot consider the NDOC Director's lack of expertise is erroneous.

Moreover, the decision in *Schwartz* is inapplicable and can be distinguished here. In *Schwartz*, this Court analyzed whether the Education Savings Account Program, passed by the Legislature, violated several provisions of Nevada's Constitution. *Id*. at 738, 382 P.3d at 891. In concluding that it did not, this Court recognized that its decision could not be based upon whether it was generally good "public policy" to pass the statute, only whether it violated constitutional provisions. *Id*. But a different methodology is used in a nondelegation analysis. To determine whether a statute violates the nondelegation doctrine courts *must* consider if the agency has any expertise because the issue lies within the statute's public policy of delegating a legislative task to another branch. If the Legislature enacts a public policy which delegates authority to an agency without suitable and

sufficient standards or to an agency not better equipped to make the determination, then reviewing courts may consider this when determining if a nondelegation violation has occurred.

Accordingly, this Court should consider the public policy underlying NRS 176.355's delegation of authority to the NDOC Director and whether it violates the nondelegation doctrine because the agency lacks suitable and sufficient standards to guide the exercise of authority and is not better qualified than the Legislature to create an execution protocol. *See* OB at 22–23, 29–31.

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III. Conclusion

For the foregoing reasons, Floyd requests this Court reverse the district court's order dismissing his complaint for declaratory and injunctive relief and remand the case with instructions to enjoin NDOC from carrying out his execution until the Legislature amends NRS 176.355 in a manner that is consistent with state constitutional standards.

DATED this 18th day of July, 2022.

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:

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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
David Anthony
Assistant Federal Public Defender

Certificate of Electronic Service

I hereby certify that this document was filed electronically with the Nevada Supreme Court on July 18th, 2022. Electronic Service of the foregoing **Appellant's Reply to State's Answering Brief** shall be made in accordance with the Master Service List as follows:

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