

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARNELL BUCHANAN,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Electronically Filed
Sep 23 2021 10:52 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 82869

**MOTION TO STRIKE APPELLANT’S OPENING BRIEF OR, IN THE
ALTERNATIVE, FOR AN ENLARGEMENT OF TIME**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, KAREN MISHLER, and files this Motion to Strike Appellant’s Opening Brief or, in the Alternative, For an Enlargement of Time. This motion is based on the following memorandum, declaration of counsel and all papers and pleadings on file herein.

Dated this 23rd day of September, 2021.

Respectfully submitted,

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

BY /s/ Karen Mishler
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney

ARGUMENT

Appellant has filed an Opening Brief, but has not filed or served an appendix supporting the assertions in the brief. This Court should strike Appellant's Opening Brief or, in the alternative, extend the State's time to respond until at least 30 days after Appellant files a conforming appendix.

Rule 28(e)(1) of the Nevada Rules of Appellate Procedure (NRAP) requires that "[e]very assertion in the briefs regarding matters in the record shall be supported by a reference to the page and volume number ... of the appendix where the matter relied on is to be found." Compliance with this mandatory requirement is not optional. Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004) (counsel's citation to habeas corpus petition in support of claims of error in capital murder trial did not comply with appellate rule requiring that every assertion in brief be supported by reference to specific part of transcript where matter relied upon was to be found); Barry v. Lindner, 119 Nev. 661, 671, 81 P.3d 537, 543-44 (2003) (opening and reply briefs failed to comply with NRAP 28(e)); State v. Haberstroh, 119 Nev. 173, 186, 69 P.3d 676, 685 (2003) (citation to habeas petition does not comply with NRAP 28(e)); Rodriguez v. State, 117 Nev. 800, 811-12, 32 P.3d 773, 780-81 (2001) (no prejudicial error because capital murder defendant's brief failed to offer "cogent argument supported by legal authority and references to relevant parts of the record").

NRAP 30 dictates the form in which an appendix shall be submitted to this court. The burden to make a proper appellate record rests on appellant. Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980). NRAP 31(d)(1) states that “[i]f an appellant fails to file an opening brief or appendix within the time provided by this Rule, or within the time extended, a respondent may move for dismissal of the appeal or the court may dismiss the appeal on its own motion.”

Further, NRAP 31(a)(1)(B) states that “[t]he respondent shall serve and file the answering brief within 30 days after the appellant’s brief is served.” NRAP 31(b)(3) permits a party to move for an extension of time under certain circumstances.

Appellant’s Opening Brief was filed on September 21, 2021. As of September 23, 2021, Appellant has not served an appendix on the State, nor has Appellant filed an appendix with this Court. The Opening Brief contains no citations to an appendix or to any type of record, despite containing multiple assertions as to what occurred in the district court. These assertions are not supported by a page in the appendix where the matter relied on is found, as required under NRAP 28(e)(1).

The State hereby moves to strike the opening brief. If this Court is not inclined to strike the opening brief, the State respectfully requests that this Court extend the time in which the State has to file its responding brief to a period no earlier than 30 days from when an appendix which conforms with this Court’s rules is filed and

served. Because the State does not know when or if such an appendix will be filed, suggesting a more precise date is not possible.

Dated this 23rd day of September, 2021.

Respectfully submitted,

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

BY */s/ Karen Mishler*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 23, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

DAVID R. FISCHER, ESQ.
Counsel for Appellant

KAREN MISHLER
Chief Deputy District Attorney

BY /s/ E. Davis

Employee,
Clark County District Attorney's Office

KM//ed