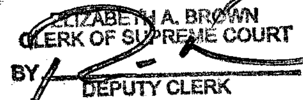
IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA DEPARTMENT OF CORRECTIONS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JENNIFER TOGLIATTI, DISTRICT JUDGE,
Respondents,
and

SCOTT RAYMOND DOZIER,
Real Party in Interest

Supreme Court No. 74679

District Court Case No. 05C215039



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(CAPITAL CASE)

THE STATE OF NEVADA, THROUGH THE CLARK COUNTY DISTRICT ATTORNEY,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT JUDGE,
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and
SCOTT RAYMOND DOZIER,
Real Party in Interest.

Supreme Court No. 74722

***AMICUS* BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF REAL PARTY IN INTEREST**

18-05221

<u>*AMICUS* BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF REAL PARTY IN INTEREST</u>

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF *AMICI*

The ACLU is a nationwide nonpartisan organization of over one million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal constitutions, within which the ACLU's Capital Punishment Project focuses on upholding those rights in the context of death-penalty litigation, systemic reform, and public education and advocacy.

The American Civil Liberties Union of Nevada (ACLUNV) is an affiliate of the American Civil Liberties Union. The ACLUNV's mission is to protect and defend the civil rights and civil liberties granted to Nevadans by both the Nevada and United States Constitutions. The ACLUNV's work encompasses protecting the constitutional rights of those subject to a sentence of death.

The Nevada Department of Corrections informed *amici* it takes no position on the filing of this brief. The Clark County District Attorney's office does not consent to the filing of *amici's* brief. Thus, *amici* filed a motion seeking leave of the court to file this brief per NRAP 29 (a).

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici has no parent corporations and no publicly held company owns 10% or more of its stock.

The following law firms have appeared and/or are expected to appear in this court:

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I. STATEMENT OF FACTS, PROCEDURE, AND INTRODUCTION

Death-row prisoner Scott Dozier faces the threat of execution at the hands of the Nevada Department of Corrections ("NDOC") by a combination of drugs never used in any execution in the United States or anywhere. The proposed protocol includes two drugs never before used in any execution – Fentanyl, a narcotic, and Cisatracurium, a paralytic, originally proposed as the final, death-causing agent. The District Court's Order enjoined NDOC's use of paralytics in its execution of Mr. Dozier. As the Real Party in Interest, Dozier opposes the requested writs of mandamus and prohibition, which would effectively reverse the District Court's order.

In its Order, the District Court found that:

> NDOC's proposed use of a paralytic agent in the execution of Petitioner Scott Dozier presents an unconstitutional "substantial risk of serious harm" and an "objectively intolerable risk of harm" in violation of the Eighth Amendment to the United States Constitution *and* Article 1, Section 6 of the Nevada Constitution.

"Findings of Fact, Conclusions of Law, and Order Enjoining the Nevada Department of Corrections From Using a Paralytic Drug in the Execution of Petitioner," 15, 4 PA 910-926 (emphasis added). The Court stated that it had the authority to make this determination based "upon the Court's inherent authority to inquire into the lawfulness of its own order, here the District Court's signing and

entry of a warrant of execution for Petitioner Scott Dozier." *Id.*

In response to the District Court's Order, the Petitioners in this case, NDOC, moved for a stay of Scott Dozier's execution. *See* Order Staying Execution of Scott Dozier Pending Further Order of the Nevada Supreme Court, 2. The Clark County District Attorney's Office ("CCDA") opposed this request for a stay. *Id.* The District Court issued an Order staying the execution on November 14, 2017, until further order of this Court. *Id.* at 4.

The Clark County District Attorney argues that the district court judge acted beyond her authority in enjoining the use of the paralytic. CCDA Writ at 2. NDOC argues that the district court judge erroneously interpreted the rulings in *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), in making its ruling. NDOC Writ at 2-3.

With these facts as background, *amici* join Real Party in Interest, Scott Dozier, in showing that, in addition to protection the Eighth Amendment affords him against the cruel and unusual punishment NDOC proposes,[1] the Nevada Constitution's parallel provision provides this Court with an alternative route to the same ruling because the proposed protocol, at a minimum, should be found to be

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[1] *Amici* agree with Dozier's Eighth Amendment arguments, but do not repeat them here, in order to focus on the broader protections of the Nevada Constitution.

cruel *or* unusual and therefore impermissible. Nev. Const. art. 1, § 6. This Court therefore should deny Petitioner's requested relief.

This brief addresses four points basic to the conclusion that the Nevada Constitution bars the proposed execution by this unprecedented drug protocol, even if somehow it were permitted by the Eighth Amendment. First, this Court has already observed that the Nevada Constitution can provide greater protection than the U.S. Constitution, and in fact has applied such protections in various circumstances. Second, state courts have been particularly conscientious in applying the greater protections of their state constitutions in death penalty cases. Third, the only plausible reading of the disjunctive text barring "cruel or unusual punishment" found in article 1, section 6 of the Nevada Constitution is that it bars punishment that would be either cruel or unusual, meaning the protection is broader than the Eighth Amendment. Fourth, the history of the Nevada Constitution, modeled on the California Constitution with the same language, only supports this conclusion. The brief concludes by illustrating how the broader protections of Nevada's Constitution apply to the unprecedented and cruel lethal-injection protocol proposed here.

II. ARGUMENT

A. The Nevada Constitution Often Provides Broader Protections Against Government Intrusion Against the Individual than the Federal Constitution.

Just as federal courts speak with final authority on issues of federal law, state courts ultimately decide all issues of state law. This basic principle of course applies to state constitutions in general, and this Court's interpretation of the Nevada Constitution in particular. As the Court has explained, "states may expand the individual rights of their citizens under state law beyond those provided under the Federal Constitution[,]" *State v. Bayard*, 119 Nev. 241, 246 (2003), and this Court's interpretations of Nevada constitutional provisions are in no way bound by federal court decisions interpreting the federal constitution. But "expansion" might not be the right term. While the Nevada Constitution was adopted after the U.S. Constitution, state constitutions were the *original* source of protection of individual rights later found in the U.S. Constitution, so that "prior to the adoption of the federal Constitution each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions." William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977); *see also State v. Short*, 851 N.W.2d 474, 481-83 (Iowa 2014) (discussing this history in detail).

Here, in Nevada, this Court has exercised its authority to independently interpret this state's constitution repeatedly. In *Bayard*, the Court declined on state-law grounds to apply the controversial Fourth Amendment precedent set out by a divided U.S. Supreme Court in *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (5-4 decision). *Bayard,* 119 Nev. at 247. Under *Atwater*'s interpretation of the Fourth Amendment, a police officer may arrest a person suspected of a mere traffic offense if the officer has probable cause that the suspect has committed the offense. Applying the protections of article 1, section 18 of the Nevada Constitution, and citing in part the rationale of the dissent in *Atwater*, this Court disagreed. *Bayard*, 119 Nev. at 245-47. The Court held that a reasonableness test applies, which requires, "probable cause that a traffic offense has been committed and circumstances that require immediate arrest." *Id.* at 247. The Nevada Constitution thus provides greater protection from this particular government intrusion.

Another example: in *State v. Kincade*, this Court interpreted Nevada Revised Statute § 179.045(5), which requires that a warrant include either a statement of probable cause or an attached affidavit establishing probable cause. 317 P.3d 206 (2013) (reaffirming *State v. Allen*, 119 Nev. 166, 168, (2003)). The Court found that the justice of peace had issued a warrant, but it was served without including either the statement of probable cause or the attached affidavit. *Kincade*, 317 P.3d

at 207. The Court therefore ruled the warrant invalid and the evidence obtained as a result suppressed. *Id.* at 209. The Court rejected the State's invitation to follow *United States v. Grubbs*, in which the U.S. Supreme Court found the Fourth Amendment to "only require that a warrant state with particularity the place to be searched and items subject to seizure," and did not require any explanation of the probable cause to search. *Kincade*, 317 P.3d at 208, quoting *Grubbs,* 547 U.S. 90, 97 (2006).

In doing so, the Court recognized that "states are permitted to provide broader protections and rights than provided by the U.S. Constitution." *Kincade,* 317 P.3d at 208. It found that because the legislature had established the warrant requirements at issue, suppression was appropriate, and *Grubbs* did not control. *Id.* at 209. Nevada's statute thus provides greater protection, in this regard, than the Fourth Amendment.

This Court has also applied the greater protections of the Nevada Constitution to correct the failure of state prosecutors to play by the rules. *See Thomas v. Eighth Judicial District Court in and for County of Clark*, 402 P.3d 619, 626 (Nev. 2017) (holding that the double-jeopardy "protections of Article 1, Section 8 of the Nevada Constitution also attach to those instances when a prosecutor intentionally proceeds in a course of egregious and improper conduct that causes prejudice to the defendant which cannot be cured by means short of a

mistrial" and thus declining to follow, on state law grounds, *Oregon v. Kennedy*, 456 U.S. 667, 672, (1982)); *Roberts v. State*, 110 Nev. 1121, 1132 (1994) (invoking article 1, section 8 of the Nevada Constitution to "conclude that the proper standard for analyzing whether a *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] violation has occurred after a specific request is whether there exists a reasonable possibility that the claimed evidence would have affected the judgment of the trier of fact, and thus the outcome of the trial" and declining to follow, on these state-law grounds, *United States v. Bagley*, 473 U.S. 667, 674 (1985)).

The restrictions on governmental takings provide yet another example. In *McCarran Int'l Airport v. Sisolak*, the Court considered the implications of aircrafts flying at certain altitudes over landowners' properties while taking off or landing at public airports. 122 Nev. 645, 675 (2006). As the Court explained, when "it comes to interpreting a state constitution, we have recognized that 'states may expand the individual rights of their citizens under state law beyond those provided by the Federal Constitution.'" *Id.* at 669. (citation omitted). In this instance, the Court relied in part on textual differences between the two. It noted the inalienable right of "Acquiring, Possessing and Protecting property" under article 1, section 1 of the Nevada Constitution of which, "[t]here is no corollary provision in the United States Constitution." *Sisolak*, 122 Nev. at 670. The Court also cited article 1, section 8, subdivision 6, which states: "Private property shall not be taken for

public use without just compensation have been *first made*." (emphasis added). This differs from the Fifth Amendment to the United States Constitution which states, "nor shall private property be taken for public use, without just compensation." The Court explained that "the drafters of our Constitution imposed a requirement that just compensation be secured prior to a taking, and our State enjoys a rich history of protecting private property owners against government takings." *Sisolak*, 122 Nev. at 670. Here, again, the Court found the protections of the Nevada Constitution more expansive than its federal counterpart.

As shown below, see Point IV, *infra*, with respect to the Eighth Amendment and its corollary provision in the Nevada Constitution, there are important, controlling textual differences as well. Before turning to those differences, it is important to understand that, regardless of textual differences, numerous sister states have found greater protections in their state constitutions that restrain the government's ability to execute a person in their state. While the governmental takings, searches, seizures, and prosecutorial misconduct at issue in the above cases are significant and require careful policing by the state courts, including this Court, in no context is the need for restraining government action more crucial than when the State seeks to take a human life as criminal punishment.

B. State Courts Have a Long History of Applying State Constitutional Provisions in a More Protective Manner than the Federal Constitution when Restricting the Government's Ability to Execute.

The "penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Given this stark reality, state courts have taken very seriously their obligations to independently construe state constitutional protections against government overreach in executions. This judicial vigilance is practiced both when state and federal constitutional provisions are identical, when they are different, and in contexts varying from eligibility for execution, fair process in capital sentencing, competence for execution, and method of execution. Although in some instances state constitutions have been relied upon to invalidate capital punishment altogether,[2] the vast majority of examples come from states that continue to allow executions but restrict the

[2] *See, e.g.*, *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (finding "that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution"), *superseded by* Cal. Const., art. I, § 27; *State v. Santiago*, 122 A.3d 1, 73 (Conn. 2015) ("We therefore conclude that, following the enactment of P.A. 12–5, capital punishment also violates article first, §§ 8 and 9, of the Connecticut constitution because it no longer serves any legitimate penological purpose."); *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (finding "the death penalty is unconstitutionally cruel under art. 26 of the Declaration of Rights").

government from acting in cruel, unfair, and unusual ways even if not barred by the Eighth Amendment.

As most pertinent here, when states have proposed to carry out executions in ways that would violate state constitutional bans on cruel and unusual punishment, state high courts have not hesitated to apply their state constitutions to bar such executions. *See e.g. State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008)(finding that "death by electrocution as provided in § 29–2532 violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9," despite previous assertions by the United State Supreme Court noting that death by electrocution can be carried out constitutionally); *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001)("[W]e hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment in Art. I, Sec. I, Par. XVII of the Georgia Constitution.")

Relatedly, state courts have employed state constitutional provisions to protect the rights of incompetent prisoners whom the state sought to forcibly medicate to restore their competence for execution. *See, e.g., State v. Perry*, 610 So.2d 746, 762 (La. 1992) (finding that Louisiana's prohibition on cruel or unusual punishment "affords no less, and in some respects more, protection than that available to individuals under the Cruel and Unusual Punishments Clause of the

Eighth Amendment."); *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993) ("We hold that the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution.").

The procedure used to decide whether a criminal defendant must live or die has also been subject to the scrutiny of state courts applying state constitutional provisions. In *People v. Ramos*, 689 P.2d 430, 444 (Cal. 1984), the California Supreme Court rejected the rationale of the U.S. Supreme Court in *California v. Ramos*, 463 U.S. 992 (1983). The California court held that a sentencing-phase jury instruction that commutation is available for life imprisonment without parole – without mentioning commutation's equal availability for a death sentence – "violates the due process clause of the California Constitution both because it is misleading and because it invites the jury to consider speculative and impermissible factors in reaching its decision[.]" 689 P.2d at 444; *see also People v. Superior Court (Engert)*, 647 P.2d 76, 81 (Cal. 1982) (holding "heinous, atrocious & cruel" death-eligibility factor unconstitutionally vague under the state due process clause); *Hurst v. State*, 202 So.3d 40, 57 (Fla. 2016) (finding "the Florida Constitution and the rights afforded to persons within this State, may require more protection be afforded criminal defendants than that mandated by the federal Constitution" and therefore requiring, under Florida constitutional jury right, unanimous jury verdict for a death sentence).

In Colorado, whose constitutional cruel and unusual punishment ban exactly mirrors the language of the Eighth Amendment, the state supreme court held that the Colorado Constitution disallows execution when the jury determines that aggravating and mitigating factors are equally balanced. *People v. Young*, 814 P.2d 834 (1991), *statutorily abrogated on other grounds as noted in People v. Vance*, 933 P.2d 576 (Colo. 1997). As that court explained, "[t]he existence of federal constitutional provisions essentially the same as those to be found in our state constitution does not abrogate our responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question." *Id.*

State courts in Tennessee and Georgia applied their state constitutional protections to bar executing inmates with intellectual disabilities before the Supreme Court came to this same conclusion. *See Van Tran v. State*, 66 S.W.3d 790, 804 (Tenn. 2001) (holding after extensive analysis that executing individuals with intellectual disabilities is "grossly disproportionate" under article I, § 16 of the Tennessee Constitution); *Fleming v. Zant*, 386 S.E.2d 339, 343 (Ga. 1989)(concluding that executing intellectually disabled "offenders violates the Georgia constitutional guarantee against cruel and unusual punishment.")(*superseded by* statute on other grounds, O.C.G.A. § 17-7-131(c)(3), (j)); *see also State v. Roberts*, 14 P.3d 713, 733 (Wash. 2000) ("We, therefore, hold

that major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder. . . This is especially true in light of our repeated recognition that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment.").

The CCDA and NDOC argue that the Eighth Amendment – and in particular the U.S. Supreme Court's precedents interpreting it – would allow Mr. Dozier's execution by the unprecedented and cruel lethal-injection protocol proposed here. Although *amici* fully agree with Mr. Dozier's showing that this is incorrect, the alternative basis for this Court to reach the same conclusion is through application of Nevada's more robust constitutional protections against government action in execution. As shown below, the textual difference between the Nevada Constitution and the Eighth Amendment can lead to no other conclusion that the Nevada Constitution is more protective.

C. The Nevada Constitution's use of "Cruel *or* Unusual Punishment" Provides Greater Protection than the Eighth Amendment.

Article 1, section 6 of the Nevada Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor shall cruel *or* unusual punishments be inflicted, nor shall witnesses be unreasonable detained." (emphasis added). The Eighth Amendment of the United States Constitution states:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted." (emphasis added). As discussed more fully below, the Nevada Constitution was drafted decades after the framers enacted the Bill of Rights in 1791, but did not incorporate the same language. The Nevada Constitution drafters' use of the disjunctive "or" in "cruel *or* unusual punishments" rather than the conjunctive "and" used in the federal constitution expresses a clear intent to more broadly curtail the actions of this state when it imposes punishment. Unlike the Eighth Amendment, which bars only punishment that is cruel *and* unusual, the Nevada Constitution prohibits punishment that is either cruel *or* unusual.

The basic principles of constitutional construction overwhelmingly support this conclusion. Courts are to give each term of the Constitution (or a statute) its plain meaning and so as to render each term employed meaningful:

> When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. 'Under established principles of statutory construction, when a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given.' However, when more than one interpretation of a statute can reasonably be drawn from its language, the statute is ambiguous and the plain meaning rule has no application. Additionally, courts must construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.

Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n, 117 Nev. 835, 840–41 (2001) (internal citation omitted). The rule applies equally with respect to interpretation of the Constitution. "The language of a constitutional provision is applied in accordance with its plain meaning, unless the language is ambiguous." *Halverson v. Sec'y of State*, 124 Nev. 484, 488 (2008).

The constitutional drafters selection of the word "or" in article 1, section 6, is significant. "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)(citing to *FCC v. Pacifica Foundation,* 438 U.S. 726, 739–40 (1978)). The United States Supreme Court's decision in *United States v. Woods* further elucidates the point that although terms connected by "or", "can sometimes introduce an appositive—a word or phrase that is synonymous with what precedes it ("Vienna or Wien," "Batman or the Caped Crusader")—its ordinary use is almost always disjunctive, that is, the words it connects are to be 'given separate meanings.'"134 S. Ct. 557, 567 (2013) (quoting *Reiter at* 339)

Here, a simple look at the dictionary definitions of "cruel," and "unusual" demonstrates each word must be "given separate meanings." *Id.* Cruel is defined as "1: disposed to inflict pain or suffering: devoid of humane feelings"; "2a: causing or conducive to injury, grief or pain," or "2b: unrelieved by leniency."

Merriam-Webster's Collegiate Dictionary 301 (11th ed. 2005) But unusual simply means, "Not usual: uncommon, rare." *Merriam-Webster's Collegiate Dictionary* 1375. "Cruel" and "Unusual" simply cannot be construed as synonymous.

Using these constitutional and statutory construction rules, every word of the phrase "cruel or unusual" must be given its plain meaning. It follows therefore that the terms "cruel" and "unusual," when separated by the word "or," are meant to include two separate and distinct terms, so that Nevada's prohibition on "cruel or unusual" reaches punishments that are either cruel *or* unusual. Not only is this the plain reading of article 1, section 6, but it must be read in this manner to avoid an absurd result. This reading of Nevada's Constitution falls directly in line with numerous other cases in Nevada. Time after time, Nevada courts have given the term "or" its plain meaning, and therefore upheld its disjunctive purpose. As this Court has explained:

> Conceding that the word 'or' may be used, interpreted, or construed in a conjunctive rather than a disjunctive sense to prevent an absurd or unreasonable result, or where the context requires such construction, or such construction is necessitated by some impelling reason in the context, there is no reason here for interpreting it other than in its ordinary and elementary sense and giving it its disjunctive meaning.

Fredricks v. City of Las Vegas, 76 Nev. 418, 421 (1960); *see also Anderson v. State*, 109 Nev. 1129, 1134 (1993) ("A careful review of NRS 484.3795(1) reveals that the legislature used the disjunctive 'or,' and not the conjunctive 'and,' when it defined 'under the influence,' thereby requiring one or the other, but not

necessarily both."); *Rogers v. State*, 105 Nev. 230, 232–33 (1989) ("Moreover, use of the disjunctive "or" between the term "drive" and the term "be in actual physical control" suggests that the two terms have different meanings."); *Jensen v. Sheriff, White Pine Cty.*, 89 Nev. 123, 125 (1973) ("The statute spells out the several specific acts in the disjunctive, and any one of them is sufficient to taint the act with criminality."); *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 841 (2001) ("The word 'or' is typically used to connect phrases or clauses representing alternatives. The fact that the two phrases in Nevada Revised Statute § 608.110(1) describing permissible deductions are separated by a comma and the word 'or' indicates that the phrase 'other deductions authorized by written order of an employee' in Nevada Revised Statute § 608.110(1) is in the alternative to, and is not conditioned by, the preceding clause."); *Scott v. Justice's Court of Tahoe* Twp., 84 Nev. 9, 11–12 (1968) ("The statute separates the words 'go' and 'remain upon' with the disjunctive conjunction 'or.' A fair construction of the statute is that either act may be punishable..."); *State v. Catanio*, 120 Nev. 1030, 1033–34 (2004) ("By using the disjunctive 'or,' the statute clearly indicates that 'upon' and 'with' have different meanings. An act committed 'with' the minor's body indicates that the minor's body is the object of attention, and that language does not require a physical touching by the accused.").

Other state court decisions interpreting similarly-worded state constitutional provisions banning cruel or unusual punishment are in accord. In *People v. Anderson* the California Supreme Court gave meaning to the term "or" in article I, section 6 of the California Constitution, by holding that punishments that are either cruel or unusual are prohibited:

> Before undertaking to examine the constitutionality of capital punishment in light of contemporary standards, it is instructive to note that article I, section 6, of the California Constitution, unlike the Eighth Amendment to the United States Constitution, prohibits the infliction of cruel or unusual punishments. Thus, the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become an unusual punishment.

493 P.2d 880, 882 (1972)(*superseded by* Cal. Const., art. I, §27). The court also addressed the historical context and found that the framers intended for "or" to have its plain and ordinary meaning:

> We may not presume, as respondent would have us do, that the framers of the California Constitution chose the disjunctive form "haphazardly," nor may we assume that they intended that it be accorded any but its ordinary meaning.

Id. at 886.

Although the voters of California would subsequently amend the words of the California State Constitution by referendum, Cal. Const., art. I, § 27, rendering *Anderson*'s analysis inapplicable going forward in that state, the correct textual analysis remains a model for this Court. And it is a model from a state with deep

ties to Nevada. *See* Point (D), *infra*. Other sister-state courts, and judges, interpreting either identical or similar language in their constitution have reached the same conclusion. *See People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (holding that the textual difference between Michigan's bar on "cruel or unusual" punishment and the federal prohibition on "cruel and unusual" punishment provided a "compelling reason" to interpret the state prohibition more broadly); *Dodd v. State*, 879 P.2d 822, 829 (Okla. Crim. App. 1994) (Chapel, J., concurring in part and dissenting in part) (citing the example of Michigan, and arguing that the "cruel *or* unusual punishments clause of the Oklahoma Constitution must also be construed to" provide greater protection than the Eighth Amendment); *Hopkinson v. State*, 632 P.2d 79, 204 (Wyo. 1981) (Rose, C.J., concurring and dissenting) (following *Anderson*'s reading of cruel *or* unusual in death penalty case).

Similarly, in *Tillman v. State*, 591 So. 2d 167, 169 n.2 (Fla. 1991), the Florida Supreme Court noted that the "Florida Constitution prohibits 'cruel or unusual punishment.' The use of the word 'or' indicates that alternatives were intended." *Id.* (internal citations omitted). Although the provision of the Florida Constitution at issue was amended in 1998 to conform with the Eighth Amendment's bar against cruel and unusual punishment, again the textual analysis of the "or" provision remains valid. As the commentary to Florida's 1998 constitutional amendment clarified:

> The prohibition against cruel *or* unusual punishment is changed to a prohibition against cruel *and* unusual punishment. This change conforms the prohibition with the parallel statement in the federal constitution. It also raises the bar on the part of a defendant by requiring proof of both prohibitions rather than one or the other. Decisions construing the prohibition against cruel or unusual punishment must be made in conformity with decisions of the United States Supreme Court on the parallel language...

Fla. Const. art. I, § 17, commentary to 1998 Amendment. Nevada has not adopted such limiting language as is found in this Florida amendment. Petitioners' citation to Florida caselaw as a supportive reason to deny broader protection under the Nevada Constitution is therefore misplaced. NDOC Writ at 33, n. 11.[3]

Finally, decades before the U.S. Supreme Court held the Eighth Amendment applied to restrict cruel and unusual punishment by state actors,[4] a federal court in

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[3] This Court should also reject the State's misplaced reliance on Arkansas caselaw, which has held that Arkansas' "cruel or unusual" constitutional provision does not provide greater protection and therefore upheld Eighth Amendment standards pronounced by the U.S. Supreme Court. *See Kelley v. Johnson*, 496 S.W.3d 346, 357 (Ark. 2016) is also misplaced. NDOC Writ at 33, n. 11. The Arkansas court stated that it was "not convinced that the slight variation in phraseology between the two constitutions denotes a substantive or conceptual difference in the two provisions that would compel us to disregard any part of the test governing a challenge to a method of execution." As shown in this brief, but perhaps not true in Arkansas (and certainly not addressed in *Kelley*), the consistent judicial interpretation and application of the word "or" as a disjunctive in Nevada calls for a different result here. Moreover, whatever the case may be in Arkansas, this Court has repeatedly interpreted the Nevada Constitution as providing greater protections than the federal constitution when appropriate. This Court should follow the majority interpretation of "cruel or unusual" punishment provisions as significant persuasive authority, rather than the isolated decision of the Arkansas court.

[4] *See Robinson v. California*, 370 U.S. 660 (1962).

the District of Nevada, presiding over a prisoner lawsuit, read article 1, section 6 of the Nevada Constitution to bar punishment that is either cruel *or* unusual. *See Mickle v. Henricks,* 262 F. 687 (1918). The prisoner, convicted of rape, challenged a sentencing provision requiring him to undergo forced sterilization. *Id.* at 687. He argued that the procedure violated the prohibition on cruel or unusual punishment under Nevada's Constitution. *Id.* . The court found that "[u]nder this provision, if the punishment is either cruel or unusual, it is prohibited." *Id.* The court then banned the punishment as being unusual. *Id.* at 687-88. *See also id.* at 689 ("It is to be noted that the Nevada Constitution forbids punishments either 'cruel or unusual.' The terms are used disjunctively, and if accorded their usual significance it is evident the purpose was to forbid newly devised as well as cruel punishments.")

This Court has briefly considered and rejected an argument that the Nevada Constitution's broader protection means that the death penalty cannot be carried out at all in this state. The Court held simply that it would not "reconsider [prior] precedent upholding the constitutionality of the death penalty. *Gallego v. State*, 117 Nev. 348, 370 (2001), abrogated on other grounds by *Nunnery v. State*, 127 Nev. 799 (2011)).[5] As shown above, however, *see* Point B, *supra*, even courts that

[5] As Mr. Dozier correctly points out, the other decisions in which this Court has touched on the issue, relied upon by the State, never included any determination whether Nevada's protection is broader than the Eighth Amendment because those (continued...)

allow the death penalty, including in some very active death-penalty states, have found particular execution and sentencing practices to violate state constitutional provisions. This Court should do so too. The only plausible meaning of article 1, section 6 is that it provides greater protection than the Eighth Amendment by barring punishment that is either cruel or unusual. And the proposed execution of Mr. Dozier, at a minimum, meets at least one of those two criteria. *See also* Point E, *infra*.

D. Historical Analysis Only Supports the Broader, More Protective, Reading.

Even though the reading of this constitutional provision is unambiguous, we can look to the history for further insight. In 1863, Nevada's first Constitutional Convention was held in Carson City after an election in which 80% of voters approved of statehood. REPORTS OF THE 1863 CONSTITUTIONAL CONVENTION OF THE TERRITORY OF NEVADA AS WRITTEN FOR THE *TERRITORIAL ENTERPRISE* BY ANDREW J. MARSH SAMUEL L. CLEMENS AND FOR THE *VIRGINIA DAILY UNION* BY AMOS BOWMAN ix (William C. Miller & Eleanore Bushnell, eds., 1972). Although this convention was not successful in enacting a state constitution, the proposed constitution of 1863 served as the model for the Constitution later adopted in 1864, making its history relevant.

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cases did not "construe the language of the state constitutional provision." Answer to Writ. at 104.

In creating the first draft of the Bill of Rights in 1863, the Nevada constitutional delegates used the California Constitution as their starting point. On the second day of the convention it was adopted that, "the Constitution of California, as amended, be adopted as a basis for consideration, so far as it may be deemed applicable to the wants of this State." *Id.* at 16; s*ee also id.* at 32 ("The balance of the report is substantially a copy of the California Bill of Rights."). Further, 29 of the 39 members of the convention had come to Nevada from California. *Id.* at 472. When it came time to adopt section 6, regarding cruel or unusual punishment, there was no discussion and contemporary reports simply state that the section was "read and adopted." *Id.* at 37.

The Nevada delegates met again in 1864 to draft a new constitution, and adopted the language of 1863 as their starting point. *See* Andrew Marsh, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 24 (1866). The operative language of section 6 was initially drafted as: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel *nor* unusual punishment be inflicted, nor shall witnesses be unreasonably detained." *Id.* at 24. It is unclear why the disjunctive word changed from "or" in 1863 to "nor" in the 1864 iteration or if it was simply a transcription error. Either way, this further evidences the intent from the drafters to use a *disjunctive* phrase in abolishing both cruel punishment and unusual

punishments. When section 6 came up for debate at the 1864 constitutional convention, the only amendment was to change it back from "nor" to "or", which was "agreed to by unanimous consent." *Id.* at 782.

At no point then did the framers of the Nevada constitution even attempt to include "and" in its prohibition on cruel or unusual punishment. The Eighth Amendment to the United States Constitution had existed for 73 years at this point, but the framers never contemplated the use of the same language. The use of the California Bill of Rights as the model for Nevada's Declaration of Rights is further instructive, as the disjunctive term "or" in the parallel California provision was later given its plain meaning. *See Anderson*, 493 P.2d at 882.

And California's Constitution was Nevada's model. This is clear from the constitutional debates in both the 1863 and 1864 conventions. Constitutional delegate Mr. Delong explained:

> I know that this Territory is peopled almost exclusively by Californians-by men that have lived and acquired property there for years past-who have lived under and are acquainted with the Constitution of that State as it has been construed from time to time by the Supreme Court of that State. They have come into this Territory and found that here the leading paramount interests of our Territory are similar to those which they left behind them in the State of California. This important fact renders the Constitutional and laws of the California particularly applicable to us...

Marsh, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS at 14. Every shred of history connected to article 1, section 6 thus supports the conclusion that the

framers of the Nevada Constitution looked past the Eighth Amendment's narrower protection to the model of California. The framers thereby established a provision more restrictive against government action when meting out criminal punishment.

E. Application of Nevada's Broader Protection Precludes the Proposed Punishment Which Must be Regarded as Either Cruel or Unusual.

As Mr. Dozier has established in his brief, the State's true intention with this lethal-injection protocol is the one it disclosed at the outset – to suffocate Mr. Dozier by paralyzing his diaphragm muscles, thereby killing him. And, although the State has now proposed that the purpose of the paralytic agent in its protocol is to preserve to dignity of the execution, NDOC Writ at 43-44, the evidence is uncontroverted that the effect of the paralytic is to risk needless and torturous death by suffocation.

It is undisputed that the proposed protocol for executing Scott Dozier is the first of its kind in the nation and in the world. Therefore, even if the protocol were not cruel, this Court may rely on the Nevada Constitution to rule the punishment unusual and prohibited by article 1, section 6 of the Nevada Constitution. *Mickle,* 262 F. at 689 ("The terms are used disjunctively, and if accorded their usual significance it is evident the purpose was to forbid *newly devised* as well as cruel punishments.") (emphasis added). One reason the proposed punishment is so unusual is that the U.S. Supreme Court has strongly cautioned against it. *Baze*, 553

U.S. at 53 (noting that the use of paralytic to cause conscious suffocation would violate the Eighth Amendment).

But the proposed punishment is indeed cruel. This Court could therefore also disallow the proposed execution on that basis alone. As Mr. Dozier has established in his answering papers, suffocating a prisoner to death is not only cruel, but torture. It is a worse death than would suffer any animal when euthanized in this or any other state. *See, e.g.*, Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 Ford. Urb. L. J. 817, 834–35 (2008).[6]

Nevada's broader protections also preclude forcing a death row inmate to

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[6] The State improperly relies on the 1923 case of *State v. Gee Jon*, 211 P. 676, 682 (Nev. 1923), for the proposition that "a method of execution only violates the Nevada Constitution if it is deliberately designed to inflict pain." NDOC Writ at 33, n. 11. In *Gee Jon* this Court held that despite the fact that "suffering and torture may be inflicted by [lethal gas] is no argument against it. We must presume that the officials entrusted with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they *may not do so* is no argument against the law." *Id.* (emphasis added). Modern precedent, however, teaches that the federal constitution, which provides a floor of protection for Mr. Dozier, does not permit punishments that give rise to a "substantial risk" of severe pain or torture, such that the courts may simply sit back and wait to see what happens with the State's planned execution regime. *See Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (quoting *Baze v. Rees*, 553 U.S. 35 (2008)) This is true regardless of the executioner's intentions. As shown in this brief, the Nevada Constitution provides greater protection, and the standards of decency which it incorporates take society to a point well beyond *Gee Jon*. In any case, as Mr. Dozier has shown, the intent of the paralytic as the death-causing agent means that the proposed protocol would even be impermissible under the anachronistic *Gee Jon* standard.

proffer an alternative method to bring about their death. The State has placed in contention whether Mr. Dozier has proposed an adequate alternative to NDOC's proposed lethal-injection protocol. NDOC Writ at 8-12, 37. This argument is based on federal Eighth Amendment jurisprudence that a death-row inmate must propose an alternative to the State's cruel proposal for executing them. This Court, however, should dispense with this requirement entirely based on the strong protections found in the Nevada Constitution.[7]

Just as this Court in *Bayard* looked to the U.S. Supreme Court's dissent in *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (5-4 decision) to craft the state constitutional rule, 119 Nev. at 245-47, the Court here should look to the dissent in the controversial Supreme Court case that first required the prisoner to propose the alternative execution method. As Justice Sotomayor stated in her dissent, joined by three other justices, in *Glossip v. Gross*, 135 S.Ct. 2726, 2792 (2015), the majority's "conclusion that petitioners' challenge also fails because they identified no available alternative means by which the State may kill them is legally indefensible." *Id.* at 2792 (Sotomayor, J, dissenting). The dissenting justices supported this thesis with a powerful argument that showed the "absurd consequences" of the requirement. *Id.* at 2795. As they explained, "under the

[7] *Amici* take no position regarding whether Mr. Dozier has, in fact, proposed an adequate alternative, and argue only against the imposition of the requirement in the first place.

Court's new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake[.]" *Id.* That is so "because petitioners failed to prove the availability of sodium thiopental or pentobarbital," allowing the State to "execute them using whatever means it designated." *Id.*

To the extent the State's argument that Mr. Dozier has not proposed an adequate alternative gives this Court any pause, the Nevada Constitution does not require prisoners to offer such alternatives, and this Court should so hold.

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Although the proposed protocol is troubling on so many fronts that the lesser protections of the Eighth Amendment equally disallow it, this Court should take this opportunity to return to the original protector of rights of the individual against an overreaching state. It should apply the Nevada Constitution to bar the proposed cruel and unusual punishment of Scott Dozier.

III. CONCLUSION

For the foregoing reasons, *amici* respectfully request this court deny Respondents' writ petitions and find in favor of Real Party in Interest, Scott Dozier.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,904 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: January 25, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Brief on January 25, 2018. I have also mailed this Amicus Brief by USPS, postage prepaid, for delivery within three calendar days to the following people:

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