

Electronically Filed
Jul 09 2021 03:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

1 **NOAS**

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19 (702) 388-6577

20 (702) 388-5819 (Fax)

21 Attorneys for Plaintiff Zane M. Floyd

22
23
DISTRICT COURT
CLARK COUNTY, NEVADA

14 ZANE MICHAEL FLOYD,

15 Plaintiff,

16 v.

17 NEVADA DEPARTMENT OF
18 CORRECTIONS; CHARLES DANIELS,
19 DIRECTOR, NEVADA DEPARTMENT
20 OF CORRECTIONS; IHSAN AZZAM,
21 CHIEF MEDICAL OFFICER OF THE
22 STATE OF NEVADA; JOHN DOES 1-20,
23 UNKNOWN EMPLOYEES OR AGENTS
OF NEVADA DEPARTMENTS OF
CORRECTIONS

Defendants.

Case No. A-21-833086-C

Dept. No. XIV

NOTICE OF APPEAL

(DEATH PENALTY CASE)

1 Notice is hereby given that Plaintiff appeals to the Nevada Supreme Court
2 from the June 17, 2021, Order Denying Plaintiff's Motion for Temporary
3 Restraining Order with Notice and Preliminary Injunction, as well as all orders,
4 rulings, or decisions related thereto that are made appealable thereby.

5 Written notice of entry of the order was filed on June 17, 2021.

6 DATED this 2nd day of July, 2021.

7 Respectfully submitted
8 RENE L. VALLADARES
Federal Public Defender

9 /s/ David Anthony
10 DAVID ANTHONY
Assistant Federal Public Defender

11 /s/ Brad D. Levenson
12 BRAD D. LEVENSON
Assistant Federal Public Defender

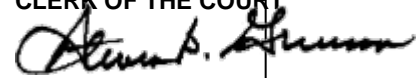
13 /s/ Jocelyn S. Murphy
14 JOCEYLYN S. MURPHY
Assistant Federal Public Defender

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Steven G. Shevorski
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An Employee of the Federal Public Defenders
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20 (702) 388-5819 (Fax)

21 Attorneys for Plaintiff Zane M. Floyd

22
23
DISTRICT COURT
CLARK COUNTY, NEVADA

14 ZANE MICHAEL FLOYD,
15 Plaintiff,
16 v.

Case No. A-21-833086-C

Dept. No. XIV

17 NEVADA DEPARTMENT OF
18 CORRECTIONS; CHARLES DANIELS,
19 DIRECTOR, NEVADA DEPARTMENT
20 OF CORRECTIONS; IHSAN AZZAM,
21 CHIEF MEDICAL OFFICER OF THE
22 STATE OF NEVADA; JOHN DOES 1-20,
23 UNKNOWN EMPLOYEES OR AGENTS
OF NEVADA DEPARTMENTS OF
CORRECTIONS

Defendants.

CASE APPEAL STATEMENT

(DEATH PENALTY CASE)

1 **CASE APPEAL STATEMENT**

2 1. Name of petitioner filing this case appeal statement: Zane Michael
3 Floyd.

4 2. Identify the judge issuing the decision, judgment, or order appealed
5 from: The Honorable Adriana Escobar of the Eighth Judicial District Court.

6 3. Identify each appellant and the name and address of counsel for each
7 appellant:

8 Appellant:

9 Zane Michael Floyd

10 Counsel for Appellant:

11 Rene L. Valladares
12 David Anthony
13 Brad D. Levenson
14 Jocelyn S. Murphy
15 Office of the Federal Public Defender
16 411 E. Bonneville, Ste. 250
17 Las Vegas, Nevada 89101

18 4. Identify each respondent and the name and address of counsel for each
19 respondent:

20 Defendants:

21 Nevada Department of Corrections
22 Charles Daniels, Director, Nevada Department of Corrections
23 Ihsan Azzam, Chief Medical Officer of the State of Nevada
John Does 1-20, unknown employees or agents of Nevada Department
of Corrections

Counsel for NDOC Defendants:

Aaron D. Ford
Attorney General
Steve Shevorski
Chief Litigation Counsel
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101

Counsel for Ishan Azzam

Crane Pomerantz, Esq.
Nadia Ahmed, Esq.
SKLAR WILLIAMS PLLC
cpomerantz@sklar-law.com
nahmed@sklar-law.com

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42: Not applicable.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court: Appellant was represented by appointed counsel, the Office of the Federal Public Defender in the district court.

7. Indicate whether appellant was represented by appointed or retained counsel on appeal: Appellant is represented by appointed counsel, the Office of the Federal Public Defender on appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: Appellant was granted a fee waiver as listed on the Eighth Judicial Court Case Docket on April 16, 2021. Mr. Floyd has been represented by appointed counsel for

1 all of the proceedings in his criminal case, Case No. 99C159897. Mr. Floyd was
2 granted leave to proceed in forma pauperis and the Federal Public Defender was
3 appointed to represent him on April 17, 2006, in *Floyd v. Baker*, Case No. 2:06-cv-
4 00471-RFB-DJA, Docket No. 6. The Federal Public Defender has represented Mr.
5 Floyd in all subsequent state and federal proceedings.

6 9. Indicate the date the proceeding commenced in the district court: on
7 April 16, 2021.

8 10. Provide a brief description of the nature of the action and result in the
9 district court, including the type of judgment or order being appealed and the relief
10 granted by the district court: On March 26, 2021, Clark County District Attorney,
11 Steve Wolfson, announced that the CCDA would be seeking a warrant of execution
12 against appellant Zane Michael Floyd. On April 16, 2021, Mr. Floyd filed a
13 Complaint for Declaratory and Injunctive Relief, and a Plaintiff's Motion for
14 Temporary Restraining Order with Notice and Preliminary Injunction. On April 30,
15 2021, NDOC Defendants filed their Opposition to Motion for Temporary
16 Restraining Order with Notice and Preliminary Injunction. Mr. Floyd filed his
17 Reply to Opposition to Motion for Temporary Restraining Order with Notice and
18 Preliminary Injunction on May 17, 2021. At a hearing on June 8, 2021, the court
19 denied Mr. Floyd's Motion for Temporary Restraining Order with Notice and
20 Preliminary Injunction. On June 17, 2021, the court filed an Order Denying
21 Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary
22 Injunction.

1 11. Indicate whether the case has previously been the subject of an appeal
2 to or original writ proceeding in the Supreme Court or Court of Appeals, and if so,
3 the caption and docket number of the prior proceeding: This case has not been the
4 subject of appeal in the Supreme Court or Court of Appeals.

5 12. Indicate whether this appeal involves child custody or visitation: This
6 appeal does not involve child custody or visitation.

7 13. If this is a civil case, indicate whether this appeal involves the
8 possibility of settlement: This appeal does not involve the possibility of settlement.

9 DATED this 2nd day of July, 2021.

10 Respectfully submitted
11 RENE L. VALLADARES
12 Federal Public Defender

13 /s/ David Anthony
14 DAVID ANTHONY
15 Assistant Federal Public Defender

16 /s/ Brad D. Levenson
17 BRAD D. LEVENSON
18 Assistant Federal Public Defender

19 /s/ Jocelyn S. Murphy
20 JOCEYLYN S. MURPHY
21 Assistant Federal Public Defender
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Steven G. Shevorski
Chief Litigation Counsel
sshevorski@ag.nv.gov

/s/ Sara Jelinek
An Employee of the Federal Public Defenders
Office, District of Nevada

CASE SUMMARY**CASE NO. A-21-833086-C****Zane Floyd, Plaintiff(s)****vs.****Nevada Department of Corrections, Defendant(s)**§
§
§
§
§Location: **Department 14**Judicial Officer: **Escobar, Adriana**Filed on: **04/16/2021**Cross-Reference Case **A833086**

Number:

CASE INFORMATIONCase Type: **Other Civil Matters**Case
Status: **04/16/2021 Open****DATE****CASE ASSIGNMENT****Current Case Assignment**

Case Number	A-21-833086-C
Court	Department 14
Date Assigned	04/16/2021
Judicial Officer	Escobar, Adriana

PARTY INFORMATION**Plaintiff****Floyd, Zane M***Lead Attorneys***Valladares, Rene L.***Retained*

702-388-6577(W)

Defendant**Azzam, Ihsan****Daniels, Charles****Nevada Department of Corrections****Shevorski, Steven G.***Retained*

702-634-5000(W)

DATE**EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**

04/16/2021

**Complaint**

Filed By: Plaintiff Floyd, Zane M

Complaint for Declaratory and Injunctive Relief

04/16/2021

**Motion for Temporary Restraining Order**

Filed By: Plaintiff Floyd, Zane M

Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction

04/16/2021

**Exhibits**

Filed By: Plaintiff Floyd, Zane M

EXHIBITS IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION

04/19/2021

**Clerk's Notice of Hearing***Notice of Hearing*

04/30/2021

**Opposition**

Filed By: Defendant Nevada Department of Corrections


CASE SUMMARY

CASE NO. A-21-833086-C

Nevada Department of Corrections's Opposition to Motion for Temporary Restraining Order with Notice and Preliminary Injunction

- | | |
|------------|--|
| 05/07/2021 |  Stipulation and Order
Filed by: Plaintiff Floyd, Zane M
<i>Stipulation and Order</i> |
| 05/17/2021 |  Reply to Opposition
Filed by: Plaintiff Floyd, Zane M
<i>Reply to Opposition to Motion for Temporary Restraining Order with Notice of Preliminary Injunction</i> |
| 05/17/2021 |  Exhibits
Filed By: Plaintiff Floyd, Zane M
<i>Exhibits in Support of Reply to Opposition to Motion for Temporary Restraining Order with Notice of Preliminary Injunction</i> |
| 06/10/2021 |  Recorders Transcript of Hearing
Party: Defendant Nevada Department of Corrections
<i>Recorder's Transcript of Hearing Re: Plaintiff's Motion for Temporary Restraining Order With Notice and Preliminary Injunction heard 6-8-21</i> |
| 06/17/2021 |  Order Denying
Filed By: Defendant Nevada Department of Corrections
<i>Order Denying Plaintiff's Motion for Temprrary Restraining Order with Notice and Preliminary Injunction</i> |
| 06/17/2021 |  Notice of Entry of Order
Filed By: Defendant Nevada Department of Corrections
<i>Notice of Entry of Order</i> |
| 07/02/2021 |  Notice of Appeal
Filed By: Plaintiff Floyd, Zane M
<i>Notice of Appeal</i> |
| 07/02/2021 |  Case Appeal Statement
Filed By: Plaintiff Floyd, Zane M
<i>Case Appeal Statement</i> |

HEARINGS

- | | |
|------------|--|
| 06/08/2021 |  Motion for Temporary Restraining Order (10:00 AM) (Judicial Officer: Escobar, Adriana)
<i>Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction Denied;</i>
Journal Entry Details:
<i>All appearances made via the BlueJeans Videoconferencing Application. Mr. Gilmer, Chief for Nevada Department of Corrections also present. Mr. Anthony stated Mr. Floyd waved his appearance for the purposes of this hearing. Upon inquiry of Court if anyone was appearing on behalf of Mr. Daniels, Mr. Shevorski stated Mr. Daniels has not been served or they would represent him. Mr. Shevorski further stated Mr. Azzam has separate counsel however, he has not been served in this matter either. Mr. Gilmer confirmed that neither Mr. Daniels or Mr. Azzam have been served. Arguments by Mr. Anthony and Mr. Shevorski regarding the merits of and opposition to the motion. Court stated its findings and ORDERED, Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction DENIED. Mr. Shevorski to prepare a detailed order and provide it to opposing counsel for review. Colloquy regarding time needed to prepare the order and the time to needed to prepare a transcript of the hearing. Court's Recorder stated the transcript could be expedited and prepared within twenty-four hours. Court directed counsel to have the order prepared by June 10, 2021.;</i> |
|------------|--|

CASE SUMMARY

CASE NO. A-21-833086-C

FINANCIAL INFORMATION

DATE

Plaintiff Floyd, Zane M
 Total Charges
 Total Payments and Credits
Balance Due as of 7/7/2021

294.00
 294.00
0.00

DISTRICT COURT CIVIL COVER SHEET

_____ **Clark** _____ County, Nevada
 Case No. _____
 (Assigned by Clerk's Office)

CASE NO: A-21-833086-C
Department 14

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): <div style="text-align: center;">Zane Floyd, #66514</div> <div style="text-align: center;">Ely State Prison</div> <div style="text-align: center;">P.O. Box 1989</div> <div style="text-align: center;">Ely, NV 89301</div>	Defendant(s) (name/address/phone): <div style="text-align: center;">Nevada Department of Corrections, et al.,</div> <div style="text-align: center;">5500 Snyder Ave. Bld 17</div> <div style="text-align: center;">P.O. Box 7011</div> <div style="text-align: center;">Carson City, NV 89702</div>
Attorney (name/address/phone): <div style="text-align: center;">Brad D. Levenson</div> <div style="text-align: center;">Federal Public Defenders Office</div> <div style="text-align: center;">411 E. Bonneville Ave., Suite 250</div> <div style="text-align: center;">Las Vegas, NV 89101</div>	Attorney (name/address/phone): <div style="text-align: center;">Aaron D. Ford</div> <div style="text-align: center;">Office of the Attorney General</div> <div style="text-align: center;">100 N. Carson</div> <div style="text-align: center;">Carson City, NV 89702</div>

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input checked="" type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

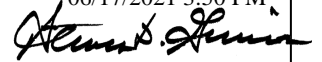
04/16/2021

Date

/s/ Brad D. Levenson

Signature of initiating party or representative

See other side for family-related case filings.


CLERK OF THE COURT

ORDD
AARON D. FORD
Attorney General
Steve Shevorski (Bar No. 8256)
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*Attorneys for the State of Nevada ex rel.
The Nevada Department of Corrections*

DISTRICT COURT

CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

vs.

NEVADA DEPARTMENT OF
CORRECTIONS; CHARLES DANIELS;
Director, Nevada Department of Corrections;
IHSAN AZZAM, Chief Medical Officer of the
State of Nevada; JOHN DOES 1-20, unknown
employees or agents of Nevada Department of
Corrections,

Defendants.

Case No. A-21-833086-C
Dept. No. XIV

Date of Hearing: June 8, 2021
Time of Hearing: 10:00 a.m.

**ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING
ORDER WITH NOTICE AND PRELIMINARY INJUNCTION**

Plaintiff, Zane Michael Floyd (**Floyd**), through counsel of record, moved for a temporary restraining order and preliminary injunction under NRCP 65 and NRS 33.010. The State of Nevada ex rel. The Nevada Department of Corrections (**NDOC**), through counsel, opposed. Floyd replied. The Court held a hearing on June 8, 2021 at 10:00 a.m. Steve Shevorski of Nevada's Attorney General Office appeared for NDOC. Assistant Federal Public Defender David Anthony and Assistant Federal Public Defender Brad D. Levenson appeared for Floyd. The Court, having reviewed Floyd's motion and reply,

1 NDOC's opposition and listening to oral argument, DENIES Floyd's motion for temporary
2 restraining order and preliminary injunction:

3 **I. Background**

4 1. Floyd is a death row inmate.

5 2. A Nevada jury sentenced him to death for shooting and killing Lucy
6 Tarantino, Thomas Darnell, Chuck Leos, and Dennis "Troy" Sargent with a 12-gauge
7 shotgun at a grocery store.

8 3. The Clark County District Attorney's Office (**DA**) sought a second
9 supplemental order and warrant of execution for Floyd. The Honorable Judge Michael
10 Villani granted the DA's motion for the second supplemental order of execution (**order of**
11 **execution**). The second supplemental warrant of execution has not yet issued.

12 4. The order of execution sets Floyd's execution for the week of July 26, 2021.

13 5. The Nevada Legislature created NDOC. NRS 209.101(1).

14 6. NDOC's Director, *inter alia*, administers NDOC under the direction of Board
15 of State Prison Commissioners. NRS 209.131(1).

16 7. Charles Daniels (**Daniels**) is NDOC's current Director.¹

17 8. The office of Chief Medical Officer is an appointed position within Nevada's
18 Division of Public and Behavioral Health of the Department of Health and Human
19 Services. NRS 439.085(1).

20 9. Dr. Ishan Azzam (**Dr. Azzam**) is Nevada's current Chief Medical Officer.²

21 10. Floyd filed a complaint against NDOC, Daniels, and Dr. Azzam.

22 11. Floyd seeks declaratory relief and an order declaring that NRS 176.355
23 violates Article III §1 of Nevada's Constitution under the Separation of Powers doctrine.

24 12. Floyd further seeks a temporary restraining order and preliminary injunction
25 prohibiting NDOC, Daniels, and Dr. Azzam from carrying out any lethal injection protocol

26
27 ¹ Daniels has not been served with a copy of the summons and complaint in this action,
and so, has not yet been made a party to this action.

28 ² Dr. Azzam has not been served with a copy of the summons and complaint in this
action, and so, has not yet been made a party to this action.

1 against him until Nevada’s Legislature amends NRS 176.355 to provide suitable and
2 sufficient standards to execute Floyd in a constitutional manner.

3 13. After reviewing Floyd’s complaint, Floyd’s motion for temporary restraining
4 order/preliminary injunction, NDOC’s opposition, Floyd’s reply, and hearing oral argument
5 from the parties, and being fully apprised of this matter, the Court makes the following
6 conclusions of law.

7 **II. Conclusions of law**

8 14. This Court is permitted to issue injunction relief pursuant to NRS 33.010,
9 which provides:

10 An injunction may be granted in the following cases:

11 1. When it shall appear by the complaint that the plaintiff is
12 entitled to the relief demanded, and such relief or any part
thereof consists in restraining the commission or continuance of
the act complained of, either for a limited period or perpetually.

13 2. When it shall appear by the complaint or affidavit that the
14 commission or continuance of some act, during the litigation,
would produce great or irreparable injury to the plaintiff.

15 3. When it shall appear, during the litigation, that the
16 defendant is doing or threatens, or is about to do, or is procuring
or suffering to be done, some act in violation of the plaintiff’s
rights respecting the subject of the action, and tending to render
the judgment ineffectual.

17
18 NRS 33.010.

19 15. To obtain a preliminary injunction, Floyd must show (1) a likelihood of success
20 on the merits, and (2) a reasonable probability if the regulation went into force, they would
21 necessarily suffer irreparable harm for which compensatory relief is not adequate. *Finkel*
22 *v. Cashman Profl, Inc.*, 128 Nev. 68, 72,270 P.3d 1259, 1262 (2012). While Floyd need not
23 “establish certain victory on the merits, [he] must make prima facie showing through
24 substantial evidence that [he is] entitled to the preliminary relief requested.” *Shores v.*
25 *Glob. Experience Specialists, Inc.*, 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). The Court
26 should also weigh the relative hardships of the parties and the public interest. *Univ. &*
27 *Cmty. Coll. Sys. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

28 . . .

1 16. Under NRS Chapter 30, courts “have power to declare rights, status and other
2 legal relations whether or not further relief is or could be claimed. No action or proceeding
3 shall be open to objection on the ground that a declaratory judgment or decree is prayed
4 for.” NRS 30.030. Any person “whose rights, status or other legal relations are affected by
5 statute . . . may have determined any question or validity arising under the . . . statute . . .
6 and obtain a declaration of rights, status or other legal relations thereunder.” Additionally,
7 pursuant to NRS 233B.110, a party may seek a declaratory judgment regarding “[t]he
8 validity or applicability of any regulation” and “the court shall declare the regulation
9 invalid if it finds that it violates constitutional or statutory provisions or exceeds the
10 statutory authority of the agency.”

11 17. The statute at issue is NRS 176.355, which provides in full:

12 1. The judgment of death must be inflicted by an injection of a
13 lethal drug.

14 2. The Director of the Department of Corrections shall:

15 (a) Execute a sentence of death within the week, the first day
16 being Monday and the last day being Sunday, that the judgment
17 is to be executed, as designated by the district court. The Director
18 may execute the judgment at any time during that week if a stay
19 of execution is not entered by a court of appropriate jurisdiction.

20 (b) Select the drug or combination of drugs to be used for the
21 execution after consulting with the Chief Medical Officer.

22 (c) Be present at the execution.

23 (d) Notify those members of the immediate family of the victim
24 who have, pursuant to NRS 176.357, requested to be informed of
25 the time, date and place scheduled for the execution.

26 (e) Invite a competent physician, the county coroner, a
27 psychiatrist and not less than six reputable citizens over the age
28 of 21 years to be present at the execution. The Director shall
 determine the maximum number of persons who may be present
 for the execution. The Director shall give preference to those
 eligible members or representatives of the immediate family of
 the victim who requested, pursuant to NRS 176.357, to attend
 the execution.

 3. The execution must take place at the state prison.

 4. A person who has not been invited by the Director may not
 witness the execution.

NRS 176.355.

 18. Floyd in this action asserts that NRS 176.355 on its face violates the
Separation of Powers doctrine enshrined in Article 3, §1 of Nevada’s Constitution.

. . .

1 19. Article 3 of Nevada’s Constitution is entitled “Distribution of Powers.” NEV.
2 CONST. art. 3.

3 20. Relevant to Floyd’s challenge, Section 1 of Article 3 provides: “The powers of
4 the Government of the State of Nevada shall be divided into three separate departments, -
5 the Legislative, - the Executive and Judicial; and no persons charged with exercise of
6 powers properly belonging to one of these departments shall exercise any functions,
7 appertaining to either of the others, except in the cases expressly directed or permitted in
8 this constitution.” NEV. CONST. art. 3, §1.

9 21. The powers of the Legislative, Executive, and Judicial branches are described
10 as follows by Nevada precedent:

11 [L]egislative power is the power of law-making representative
12 bodies to frame and enact laws, and to amend and repeal them. .
 . . .

13 The executive power extends to the carrying out and enforcing
14 the laws enacted by the legislature. . . .

15 ‘Judicial Power’ . . . is the *authority* to hear and determine
16 justiciable controversies. Judicial power includes the
 authority to enforce any valid judgment, decree, or order.

17 *Del Papa v. Steffen*, 112 Nev. 369, 377, 915 P.2d 245, 250-51 (1996) (quoting *Galloway v.*
18 *Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)).

19 22. Defining criminal conduct and setting corresponding punishments is a
20 legislative function. *Sheriff, Douglas Cty. v. LaMotte*, 100 Nev. 270, 272, 680 P.2d 333, 334
21 (1984).

22 23. The executive power carries out and enforces the laws that the Legislature
23 enacts. *Del Papa*, 112 Nev. at 377, 915 P.2d at 250.

24 24. Nevada’s jurisprudence makes clear that the Executive branch’s use of
25 discretion to implement a law does not violate Article 3, Section 1 of Nevada’s Constitution.
26 The Legislature’s delegation to an administrative agency is constitutional “so long as
27 suitable standards are established by the legislature for the agency’s use of its power.”
28 *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). Suitable

standards include delegating “authority or discretion, to be exercised under and in pursuance of the law.” *State v. Shaughnessy*, 47 Nev. 129, 217 P. 581, 583 (1923).

25. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. *Hard v. Depaoli*, 56 Nev. 19, 41 P.2d 1054, 1056 (1935). To meet that burden, the challenger must make a clear showing of invalidity. *Silvar v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

26. Statutory and constitutional interpretation are questions of law. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 644, 173 P.3d 734, 738 (2007).

27. “An example of a pure legal question might be a challenge to the facial validity of a statute.” *Beavers v. State, Dep’t. of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 438 n.1, 851 P.2d 432, 434 n.1 (1993); accord *Schwartz v. Lopez*, 132 Nev. 732, 744, 382 P.3d 886, 895 (2016).

A. Floyd has not met his burden to demonstrate a reasonable likelihood of success on the merits

28. The Court holds that Floyd has not met his burden to demonstrate a reasonable likelihood on the merits that NRS 176.355 violates the Separation of Powers doctrine by unlawfully delegating legislative power to NDOC, an executive agency.

29. Floyd brings a facial challenge to the constitutionality of NRS 176.355. Compl. at ¶¶ 1-15. Floyd raises no question before this Court as to the constitutionality of Nevada’s mode of execution statute as applied to him, but rather asks this Court to declare NRS 176.355 unconstitutional in all its applications. *Id.* at p. 12.

30. Courts “must interpret a statute in a reasonable manner, that is, [t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.” *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (quoting *Desert Valley Water Co. v. State, Eng’r*, 104 Nev. 718, 720, 766 P.2d 886, 886-87 (1988)).

...

1 31. “[W]hen the language of a statute is plain and unambiguous, a court should
2 give that language its ordinary meaning and not go beyond it.” *Employers Ins. Co. of Nev.*
3 *v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001).

4 32. Floyd contends that the Legislature unlawfully delegated its law-making
5 function to NDOC in several ways by enacting NRS 176.355. First, he alleges the
6 Legislature did not specify the execution drug or combinations of drugs to be used. Compl.
7 at ¶ 11. Second, he contends that the Legislature did not require that the lethal drug(s)
8 selected be humane or that the execution be implemented humanely. *Id.* at ¶ 12. Third,
9 he claims the Legislature failed to specify the manner of injection, *i.e.*, NRS 176.355 is
10 ambiguous as to whether the drug must be taken orally, intramuscularly, subcutaneously,
11 or intravenously. *Id.* at ¶ 13. Finally, he contends that the Legislature failed to provide
12 standards to guide NDOC in carrying out its purpose in effecting NRS 176.355, meaning
13 NDOC is not expressly required to administer drugs until an inmate is dead or even acquire
14 drugs that are sufficient to cause death. *Id.* at ¶ 14.

15 33. The Court does not agree with Floyd that NRS 176.355 is constitutionally
16 infirm based on Floyd’s arguments.

17 34. Because Floyd brings a facial challenge, the Court starts with the language of
18 the statute, NRS 176.355.

19 35. The Court does not agree with Floyd that the statute’s language is in any way
20 ambiguous, let alone constitutionally suspect because the statute does not have the
21 specificity that Floyd contends is required.

22 36. As an initial matter, the Court agrees with NDOC that the instant case is
23 distinguishable from *McNeill v. State*, 132 Nev. 551, 375 P.3d 1022 (2016), where the
24 Nevada Supreme Court found that the State Board of Parole Commissioners impermissibly
25 made law by adding conditions of parole beyond those specifically listed by the Legislature.

26 37. Floyd contends that the statute improperly invites NDOC to exercise a law-
27 making function because allegedly the Legislature did not specify that NDOC must acquire
28 drugs sufficient to cause death or whether the drugs must be taken orally, intramuscularly,

1 subcutaneously, or intravenously. The Court does not agree. The Court views the words
2 “lethal” and “injection” in NRS 176.355 as straightforward and unambiguous.

3 38. The word “lethal” has an ordinary meaning of “[d]eadly; fatal.” Lethal,
4 BLACK’S LAW DICTIONARY (10th ed. 2014).

5 39. The word “injection” is also not ambiguous. As the Ohio Court of Appeals
6 noted, “‘injection’ is defined as the ‘[i]ntroduction of a medicinal substance or nutrient
7 material into the subcutaneous cellular tissue (subcutaneous or hypodermic), the muscular
8 tissue (intramuscular), a vein (intravenous) . . . or other canals or cavities of the body.’”
9 *O’Neal v. State*, 146 N.E.3d 605, 617 (Ohio Ct. App.), *appeal allowed*, 154 N.E.3d 98 (Ohio
10 2020) (quoting STEDMAN’S MEDICAL DICTIONARY 635 (3d unabr. Laws.’ Ed. 1972)).

11 40. In rejecting Floyd’s argument, the Court is keeping faith with the Nevada
12 Supreme Court’s analysis in *Luqman*. That the Legislature used ordinary terms like
13 “lethal” and “injection” does not make NRS 176.355 constitutionally vulnerable to Floyd’s
14 argument. *See Luqman*, 101 Nev. at 154, 697 P.2d at 110 (upholding delegation to
15 administrative agency despite use of general terms like “medical propriety” and “potential
16 for abuse” because they were sufficient to guide the agency’s fact-finding).

17 41. As to Floyd’s specific challenges, the Court does not agree with Floyd that the
18 Legislature improperly delegated the law-making function by not specifying the drug or
19 combination of drugs to be used in an execution by lethal injection. Consistent with
20 Separation of Powers principles, the Legislature may delegate the power to determine the
21 facts or state of things upon which the law makes its own operations depend. *State ex rel.*
22 *Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature
23 did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function
24 to NDOC’s Director.

25 42.

26 43. Floyd cites to *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968),
27 to argue that NRS 176.355 is unconstitutional because it lacks a sufficient comprehensive
28 statutory scheme to guide NDOC and the Director’s discretion. But Floyd never grapples

1 with the distinction between making law and properly conferred discretion in carrying out
2 the Legislature's policy:

3 [T]he true distinction . . . is between the delegation of power to
4 make the law, which necessarily involves a discretion as to what
5 it shall be, and conferring authority or discretion as to its
6 execution, to be exercised [sic] in pursuance of the law. The first
7 cannot be done; to the latter no valid objection can be made.

8 *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*, 143
9 U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). As the Nevada Supreme Court noted by citing
10 to Justice Brandeis' opinion in *Douglas v. Noble*, 261 U.S. 165 (1923), that the Legislature
11 may itself provide a specificity of facts upon which curtails the Executive branch's
12 discretion in carrying out the Legislature's policy, there is nothing in Separation of Powers
jurisprudence that requires the Legislature to do so. *Pine*, 84 Nev. at 511, 445 P.2d at 944-
45 (citing *Douglas*, supra).

13 44. NRS 176.355 is also not infirm because it does not include specific language
14 requiring a humane execution or that the drug(s) selected be humane. The Legislature and
15 administrative agencies alike must follow the state and federal constitution. *See Gibson v.*
16 *Mason*, 5 Nev. 283, 292 (1869) (explaining that the Legislature's power is limited only by
17 "the Federal Constitution[] and . . . the fundamental law of the State"). The Court declines
18 to accept Floyd's invitation to strike down NRS 176.355 by assuming that the Director and
19 NDOC may act unconstitutionally without a specific statutory language commanding them
20 to obey the Nevada and United States Constitutions.

21 45. The Court is not persuaded to follow the Arkansas Supreme Court's opinion
22 in *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012). *Hobbs* is an outlier.

23 46. The courts to address this question, which have capital punishment statutes
24 that are similar to Nevada's, have overwhelmingly found their state legislature can
25 constitutionally delegate implementation of execution statutes to corrections officials. *See,*
26 *e.g., O'Neal v. State*, 146 N.E.3d 605, 620 (Ohio Ct. App.), *appeal allowed on other grounds*,
27 154 N.E.3d 98 (Ohio 2020); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018);
28 *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7-8 (W.D. Mo. Nov. 16,

2012); *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). *State v. Hawkins*, 519 S.W.3d 1 (Tenn. 2017) (quoting *State v. Hawkins*, No. W2012-00412CCA–R3–DD, 2015 WL 5169157 at *28 (Tenn. Crim. App. 2015)).

47. Finally, the Court notes the Nevada Supreme Court considered and rejected near identical arguments in the Eighth Amendment context. *McConnell v. State*, 120 Nev. 1043, 1056-57, 102 P.3d 606, 616 (2004); *State v. Gee*, 46 Nev. 418, 436-48, 211 P. 676, 681-82 (1923);

48. In upholding former NRS 176.355, the Nevada Supreme Court noted the current statute affords NDOC no more discretion than its prior version, requiring the use of lethal gas for executions, which “infring[ed] no provision of the Constitution.” *Gee*, 46 Nev. 418, 211 P. 676, 682 (1923). Yet the Nevada Supreme Court “[could not] see that any useful purpose would be served by requiring greater detail.” *Id.* The Court affirmed that the reasoning in *Gee* applies equally to Nevada’s lethal injection statute. *See McConnell*, 120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection procedure).

...

...

...

Traci A. Plotnick

Subject: FW: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

From: David Anthony <David_Anthony@fd.org>

Sent: Wednesday, June 16, 2021 4:02 PM

To: Steven G. Shevorski <SShevorski@ag.nv.gov>; Brad Levenson <Brad_Levenson@fd.org>; Crane Pomerantz <CPomerantz@sklar-law.com>; nahmed@sklar-law.com

Subject: RE: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

Steve:

Please feel free to add my signature as to form and content so the proposed order can be sent over to DC 14. Thanks.

David

From: Steven G. Shevorski <SShevorski@ag.nv.gov>

Sent: Wednesday, June 16, 2021 1:33 PM

To: David Anthony <David_Anthony@fd.org>; Brad Levenson <Brad_Levenson@fd.org>; Crane Pomerantz <CPomerantz@sklar-law.com>; nahmed@sklar-law.com

Subject: RE: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

David,

Please let us know if we may add your signature as to form and content. We will then email it over to the DC14 inbox for the Court's review along with a PDF copy.

Best,

Steve

Steve Shevorski
Chief Litigation Counsel
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
702-486-3783

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Zane Floyd, Plaintiff(s)

CASE NO: A-21-833086-C

7 vs.

DEPT. NO. Department 14

8 Nevada Department of
9 Corrections, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Denying was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/17/2021

15 Traci Plotnick

tplotnick@ag.nv.gov

16 Steven Shevorski

sshevorski@ag.nv.gov

17 Mary Pizzariello

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18 Akke Levin

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20 Kiel Ireland

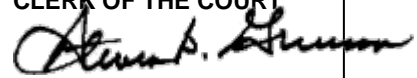
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*Attorneys for the State of Nevada ex rel.
The Nevada Department of Corrections*

DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

vs.

NEVADA DEPARTMENT OF
CORRECTIONS; CHARLES DANIELS;
Director, Nevada Department of Corrections;
IHSAN AZZAM, Chief Medical Officer of the
State of Nevada; JOHN DOES 1-20, unknown
employees or agents of Nevada Department of
Corrections,

Defendants.

Case No. A-21-833086-C
Dept. No. XIV

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction was entered on the 17th day of June, 2021, a copy of which is attached hereto as Exhibit "A"

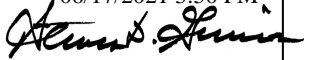
DATED this 17th day of June, 2021.

AARON D. FORD
Attorney General

By: /s/ Steve Shevorski
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel

EXHIBIT A

EXHIBIT A


CLERK OF THE COURT

ORDD
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*Attorneys for the State of Nevada ex rel.
The Nevada Department of Corrections*

DISTRICT COURT

CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

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NEVADA DEPARTMENT OF
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Corrections,

Defendants.

Case No. A-21-833086-C
Dept. No. XIV

Date of Hearing: June 8, 2021
Time of Hearing: 10:00 a.m.

**ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING
ORDER WITH NOTICE AND PRELIMINARY INJUNCTION**

Plaintiff, Zane Michael Floyd (**Floyd**), through counsel of record, moved for a temporary restraining order and preliminary injunction under NRCP 65 and NRS 33.010. The State of Nevada ex rel. The Nevada Department of Corrections (**NDOC**), through counsel, opposed. Floyd replied. The Court held a hearing on June 8, 2021 at 10:00 a.m. Steve Shevorski of Nevada's Attorney General Office appeared for NDOC. Assistant Federal Public Defender David Anthony and Assistant Federal Public Defender Brad D. Levenson appeared for Floyd. The Court, having reviewed Floyd's motion and reply,

1 NDOC's opposition and listening to oral argument, DENIES Floyd's motion for temporary
2 restraining order and preliminary injunction:

3 **I. Background**

4 1. Floyd is a death row inmate.

5 2. A Nevada jury sentenced him to death for shooting and killing Lucy
6 Tarantino, Thomas Darnell, Chuck Leos, and Dennis "Troy" Sargent with a 12-gauge
7 shotgun at a grocery store.

8 3. The Clark County District Attorney's Office (**DA**) sought a second
9 supplemental order and warrant of execution for Floyd. The Honorable Judge Michael
10 Villani granted the DA's motion for the second supplemental order of execution (**order of**
11 **execution**). The second supplemental warrant of execution has not yet issued.

12 4. The order of execution sets Floyd's execution for the week of July 26, 2021.

13 5. The Nevada Legislature created NDOC. NRS 209.101(1).

14 6. NDOC's Director, *inter alia*, administers NDOC under the direction of Board
15 of State Prison Commissioners. NRS 209.131(1).

16 7. Charles Daniels (**Daniels**) is NDOC's current Director.¹

17 8. The office of Chief Medical Officer is an appointed position within Nevada's
18 Division of Public and Behavioral Health of the Department of Health and Human
19 Services. NRS 439.085(1).

20 9. Dr. Ishan Azzam (**Dr. Azzam**) is Nevada's current Chief Medical Officer.²

21 10. Floyd filed a complaint against NDOC, Daniels, and Dr. Azzam.

22 11. Floyd seeks declaratory relief and an order declaring that NRS 176.355
23 violates Article III §1 of Nevada's Constitution under the Separation of Powers doctrine.

24 12. Floyd further seeks a temporary restraining order and preliminary injunction
25 prohibiting NDOC, Daniels, and Dr. Azzam from carrying out any lethal injection protocol

26
27 ¹ Daniels has not been served with a copy of the summons and complaint in this action,
and so, has not yet been made a party to this action.

28 ² Dr. Azzam has not been served with a copy of the summons and complaint in this
action, and so, has not yet been made a party to this action.

1 against him until Nevada’s Legislature amends NRS 176.355 to provide suitable and
2 sufficient standards to execute Floyd in a constitutional manner.

3 13. After reviewing Floyd’s complaint, Floyd’s motion for temporary restraining
4 order/preliminary injunction, NDOC’s opposition, Floyd’s reply, and hearing oral argument
5 from the parties, and being fully apprised of this matter, the Court makes the following
6 conclusions of law.

7 **II. Conclusions of law**

8 14. This Court is permitted to issue injunction relief pursuant to NRS 33.010,
9 which provides:

10 An injunction may be granted in the following cases:

11 1. When it shall appear by the complaint that the plaintiff is
12 entitled to the relief demanded, and such relief or any part
thereof consists in restraining the commission or continuance of
the act complained of, either for a limited period or perpetually.

13 2. When it shall appear by the complaint or affidavit that the
14 commission or continuance of some act, during the litigation,
would produce great or irreparable injury to the plaintiff.

15 3. When it shall appear, during the litigation, that the
16 defendant is doing or threatens, or is about to do, or is procuring
or suffering to be done, some act in violation of the plaintiff’s
rights respecting the subject of the action, and tending to render
the judgment ineffectual.

17
18 NRS 33.010.

19 15. To obtain a preliminary injunction, Floyd must show (1) a likelihood of success
20 on the merits, and (2) a reasonable probability if the regulation went into force, they would
21 necessarily suffer irreparable harm for which compensatory relief is not adequate. *Finkel*
22 *v. Cashman Profl, Inc.*, 128 Nev. 68, 72,270 P.3d 1259, 1262 (2012). While Floyd need not
23 “establish certain victory on the merits, [he] must make prima facie showing through
24 substantial evidence that [he is] entitled to the preliminary relief requested.” *Shores v.*
25 *Glob. Experience Specialists, Inc.*, 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). The Court
26 should also weigh the relative hardships of the parties and the public interest. *Univ. &*
27 *Cmt’y. Coll. Sys. v. Nevadans for Sound Gov’t*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

28 . . .

1 16. Under NRS Chapter 30, courts “have power to declare rights, status and other
2 legal relations whether or not further relief is or could be claimed. No action or proceeding
3 shall be open to objection on the ground that a declaratory judgment or decree is prayed
4 for.” NRS 30.030. Any person “whose rights, status or other legal relations are affected by
5 statute . . . may have determined any question or validity arising under the . . . statute . . .
6 and obtain a declaration of rights, status or other legal relations thereunder.” Additionally,
7 pursuant to NRS 233B.110, a party may seek a declaratory judgment regarding “[t]he
8 validity or applicability of any regulation” and “the court shall declare the regulation
9 invalid if it finds that it violates constitutional or statutory provisions or exceeds the
10 statutory authority of the agency.”

11 17. The statute at issue is NRS 176.355, which provides in full:

12 1. The judgment of death must be inflicted by an injection of a
13 lethal drug.

14 2. The Director of the Department of Corrections shall:

15 (a) Execute a sentence of death within the week, the first day
16 being Monday and the last day being Sunday, that the judgment
17 is to be executed, as designated by the district court. The Director
18 may execute the judgment at any time during that week if a stay
19 of execution is not entered by a court of appropriate jurisdiction.

20 (b) Select the drug or combination of drugs to be used for the
21 execution after consulting with the Chief Medical Officer.

22 (c) Be present at the execution.

23 (d) Notify those members of the immediate family of the victim
24 who have, pursuant to NRS 176.357, requested to be informed of
25 the time, date and place scheduled for the execution.

26 (e) Invite a competent physician, the county coroner, a
27 psychiatrist and not less than six reputable citizens over the age
28 of 21 years to be present at the execution. The Director shall
 determine the maximum number of persons who may be present
 for the execution. The Director shall give preference to those
 eligible members or representatives of the immediate family of
 the victim who requested, pursuant to NRS 176.357, to attend
 the execution.

 3. The execution must take place at the state prison.

 4. A person who has not been invited by the Director may not
 witness the execution.

NRS 176.355.

 18. Floyd in this action asserts that NRS 176.355 on its face violates the
Separation of Powers doctrine enshrined in Article 3, §1 of Nevada’s Constitution.

. . .

1 19. Article 3 of Nevada’s Constitution is entitled “Distribution of Powers.” NEV.
2 CONST. art. 3.

3 20. Relevant to Floyd’s challenge, Section 1 of Article 3 provides: “The powers of
4 the Government of the State of Nevada shall be divided into three separate departments, -
5 the Legislative, - the Executive and Judicial; and no persons charged with exercise of
6 powers properly belonging to one of these departments shall exercise any functions,
7 appertaining to either of the others, except in the cases expressly directed or permitted in
8 this constitution.” NEV. CONST. art. 3, §1.

9 21. The powers of the Legislative, Executive, and Judicial branches are described
10 as follows by Nevada precedent:

11 [L]egislative power is the power of law-making representative
12 bodies to frame and enact laws, and to amend and repeal them. .
 . . .

13 The executive power extends to the carrying out and enforcing
14 the laws enacted by the legislature. . . .

15 ‘Judicial Power’ . . . is the *authority* to hear and determine
16 justiciable controversies. Judicial power includes the
 authority to enforce any valid judgment, decree, or order.

17 *Del Papa v. Steffen*, 112 Nev. 369, 377, 915 P.2d 245, 250-51 (1996) (quoting *Galloway v.*
18 *Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)).

19 22. Defining criminal conduct and setting corresponding punishments is a
20 legislative function. *Sheriff, Douglas Cty. v. LaMotte*, 100 Nev. 270, 272, 680 P.2d 333, 334
21 (1984).

22 23. The executive power carries out and enforces the laws that the Legislature
23 enacts. *Del Papa*, 112 Nev. at 377, 915 P.2d at 250.

24 24. Nevada’s jurisprudence makes clear that the Executive branch’s use of
25 discretion to implement a law does not violate Article 3, Section 1 of Nevada’s Constitution.
26 The Legislature’s delegation to an administrative agency is constitutional “so long as
27 suitable standards are established by the legislature for the agency’s use of its power.”
28 *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). Suitable

standards include delegating “authority or discretion, to be exercised under and in pursuance of the law.” *State v. Shaughnessy*, 47 Nev. 129, 217 P. 581, 583 (1923).

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28. The Court holds that Floyd has not met his burden to demonstrate a reasonable likelihood on the merits that NRS 176.355 violates the Separation of Powers doctrine by unlawfully delegating legislative power to NDOC, an executive agency.

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21 specificity that Floyd contends is required.

22 36. As an initial matter, the Court agrees with NDOC that the instant case is
23 distinguishable from *McNeill v. State*, 132 Nev. 551, 375 P.3d 1022 (2016), where the
24 Nevada Supreme Court found that the State Board of Parole Commissioners impermissibly
25 made law by adding conditions of parole beyond those specifically listed by the Legislature.

26 37. Floyd contends that the statute improperly invites NDOC to exercise a law-
27 making function because allegedly the Legislature did not specify that NDOC must acquire
28 drugs sufficient to cause death or whether the drugs must be taken orally, intramuscularly,

1 subcutaneously, or intravenously. The Court does not agree. The Court views the words
2 “lethal” and “injection” in NRS 176.355 as straightforward and unambiguous.

3 38. The word “lethal” has an ordinary meaning of “[d]eadly; fatal.” Lethal,
4 BLACK’S LAW DICTIONARY (10th ed. 2014).

5 39. The word “injection” is also not ambiguous. As the Ohio Court of Appeals
6 noted, “‘injection’ is defined as the ‘[i]ntroduction of a medicinal substance or nutrient
7 material into the subcutaneous cellular tissue (subcutaneous or hypodermic), the muscular
8 tissue (intramuscular), a vein (intravenous) . . . or other canals or cavities of the body.’”
9 *O’Neal v. State*, 146 N.E.3d 605, 617 (Ohio Ct. App.), *appeal allowed*, 154 N.E.3d 98 (Ohio
10 2020) (quoting STEDMAN’S MEDICAL DICTIONARY 635 (3d unabr. Laws.’ Ed. 1972)).

11 40. In rejecting Floyd’s argument, the Court is keeping faith with the Nevada
12 Supreme Court’s analysis in *Luqman*. That the Legislature used ordinary terms like
13 “lethal” and “injection” does not make NRS 176.355 constitutionally vulnerable to Floyd’s
14 argument. *See Luqman*, 101 Nev. at 154, 697 P.2d at 110 (upholding delegation to
15 administrative agency despite use of general terms like “medical propriety” and “potential
16 for abuse” because they were sufficient to guide the agency’s fact-finding).

17 41. As to Floyd’s specific challenges, the Court does not agree with Floyd that the
18 Legislature improperly delegated the law-making function by not specifying the drug or
19 combination of drugs to be used in an execution by lethal injection. Consistent with
20 Separation of Powers principles, the Legislature may delegate the power to determine the
21 facts or state of things upon which the law makes its own operations depend. *State ex rel.*
22 *Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature
23 did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function
24 to NDOC’s Director.

25 42.

26 43. Floyd cites to *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968),
27 to argue that NRS 176.355 is unconstitutional because it lacks a sufficient comprehensive
28 statutory scheme to guide NDOC and the Director’s discretion. But Floyd never grapples

1 with the distinction between making law and properly conferred discretion in carrying out
2 the Legislature's policy:

3 [T]he true distinction . . . is between the delegation of power to
4 make the law, which necessarily involves a discretion as to what
5 it shall be, and conferring authority or discretion as to its
6 execution, to be exercised [sic] in pursuance of the law. The first
7 cannot be done; to the latter no valid objection can be made.

8 *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*, 143
9 U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). As the Nevada Supreme Court noted by citing
10 to Justice Brandeis' opinion in *Douglas v. Noble*, 261 U.S. 165 (1923), that the Legislature
11 may itself provide a specificity of facts upon which curtails the Executive branch's
12 discretion in carrying out the Legislature's policy, there is nothing in Separation of Powers
13 jurisprudence that requires the Legislature to do so. *Pine*, 84 Nev. at 511, 445 P.2d at 944-
14 45 (citing *Douglas*, supra).

15 44. NRS 176.355 is also not infirm because it does not include specific language
16 requiring a humane execution or that the drug(s) selected be humane. The Legislature and
17 administrative agencies alike must follow the state and federal constitution. *See Gibson v.*
18 *Mason*, 5 Nev. 283, 292 (1869) (explaining that the Legislature's power is limited only by
19 "the Federal Constitution[] and . . . the fundamental law of the State"). The Court declines
20 to accept Floyd's invitation to strike down NRS 176.355 by assuming that the Director and
21 NDOC may act unconstitutionally without a specific statutory language commanding them
22 to obey the Nevada and United States Constitutions.

23 45. The Court is not persuaded to follow the Arkansas Supreme Court's opinion
24 in *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012). *Hobbs* is an outlier.

25 46. The courts to address this question, which have capital punishment statutes
26 that are similar to Nevada's, have overwhelmingly found their state legislature can
27 constitutionally delegate implementation of execution statutes to corrections officials. *See,*
28 *e.g., O'Neal v. State*, 146 N.E.3d 605, 620 (Ohio Ct. App.), *appeal allowed on other grounds*,
154 N.E.3d 98 (Ohio 2020); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018);
Zink v. Lombardi, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7-8 (W.D. Mo. Nov. 16,

2012); *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). *State v. Hawkins*, 519 S.W.3d 1 (Tenn. 2017) (quoting *State v. Hawkins*, No. W2012-00412CCA-R3-DD, 2015 WL 5169157 at *28 (Tenn. Crim. App. 2015)).

47. Finally, the Court notes the Nevada Supreme Court considered and rejected near identical arguments in the Eighth Amendment context. *McConnell v. State*, 120 Nev. 1043, 1056-57, 102 P.3d 606, 616 (2004); *State v. Gee*, 46 Nev. 418, 436-48, 211 P. 676, 681-82 (1923);

48. In upholding former NRS 176.355, the Nevada Supreme Court noted the current statute affords NDOC no more discretion than its prior version, requiring the use of lethal gas for executions, which “infring[ed] no provision of the Constitution.” *Gee*, 46 Nev. 418, 211 P. 676, 682 (1923). Yet the Nevada Supreme Court “[could not] see that any useful purpose would be served by requiring greater detail.” *Id.* The Court affirmed that the reasoning in *Gee* applies equally to Nevada’s lethal injection statute. *See McConnell*, 120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection procedure).

...

...

...

49. Having found that Floyd does not have a likelihood of success on the merits, the Court's preliminary injunction inquiry is over and Floyd's request for extraordinary relief must be denied. *Boulder Oaks Comm. Assoc. v. B&J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 n.6 (2009).

Based upon the Background and Conclusions of Law above:

DATED this 9th day of September, 2021.


DISTRICT COURT JUDGE

36A 824 8598 A29D
Adriana Escobar
District Court Judge

By: /s/ *David Anthony*
 David Anthony
 Assistant Federal Public Defender
 Brad D. Levenson
 Assistant Federal Public Defender
 Jocelyn S. Murphy
 Assistant Federal Public Defender
Attorneys for Plaintiff Zane M. Floyd

Traci A. Plotnick

Subject: FW: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

From: David Anthony <David_Anthony@fd.org>

Sent: Wednesday, June 16, 2021 4:02 PM

To: Steven G. Shevorski <SShevorski@ag.nv.gov>; Brad Levenson <Brad_Levenson@fd.org>; Crane Pomerantz <CPomerantz@sklar-law.com>; nahmed@sklar-law.com

Subject: RE: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

Steve:

Please feel free to add my signature as to form and content so the proposed order can be sent over to DC 14. Thanks.

David

From: Steven G. Shevorski <SShevorski@ag.nv.gov>

Sent: Wednesday, June 16, 2021 1:33 PM

To: David Anthony <David_Anthony@fd.org>; Brad Levenson <Brad_Levenson@fd.org>; Crane Pomerantz <CPomerantz@sklar-law.com>; nahmed@sklar-law.com

Subject: RE: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

David,

Please let us know if we may add your signature as to form and content. We will then email it over to the DC14 inbox for the Court's review along with a PDF copy.

Best,

Steve

Steve Shevorski
Chief Litigation Counsel
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
702-486-3783

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Zane Floyd, Plaintiff(s)

CASE NO: A-21-833086-C

7 vs.

DEPT. NO. Department 14

8 Nevada Department of
9 Corrections, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Denying was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/17/2021

15 Traci Plotnick

tplotnick@ag.nv.gov

16 Steven Shevorski

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17 Mary Pizzariello

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18 Akke Levin

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20 Kiel Ireland

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21 Eddie Rueda

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22 Bradley Levenson

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Matters

COURT MINUTES

June 08, 2021

A-21-833086-C Zane Floyd, Plaintiff(s)
vs.
Nevada Department of Corrections, Defendant(s)

**June 08, 2021 10:00 AM Motion for Temporary
Restraining Order**

HEARD BY: Escobar, Adriana **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Nicole McDevitt

RECORDER: Stacey Ray

REPORTER:

PARTIES

PRESENT: Anthony, David S. Attorney
Levenson, Bradley D. Attorney
Shevorski, Steven G. Attorney

JOURNAL ENTRIES

- All appearances made via the BlueJeans Videoconferencing Application.

Mr. Gilmer, Chief for Nevada Department of Corrections also present.

Mr. Anthony stated Mr. Floyd waved his appearance for the purposes of this hearing. Upon inquiry of Court if anyone was appearing on behalf of Mr. Daniels, Mr. Shevorski stated Mr. Daniels has not been served or they would represent him. Mr. Shevorski further stated Mr. Azzam has separate counsel however, he has not been served in this matter either. Mr. Gilmer confirmed that neither Mr. Daniels or Mr. Azzam have been served. Arguments by Mr. Anthony and Mr. Shevorski regarding the merits of and opposition to the motion. Court stated its findings and ORDERED, Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction DENIED. Mr. Shevorski to prepare a detailed order and provide it to opposing counsel for review. Colloquy regarding time needed to prepare the order and the time to needed to prepare a transcript of the hearing. Court's Recorder stated the transcript could be expedited and prepared within twenty-four

hours. Court directed counsel to have the order prepared by June 10, 2021.

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL (DEATH PENALTY CASE); CASE APPEAL STATEMENT (DEATH PENALTY CASE); DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION; NOTICE OF ENTRY OF ORDER; DISTRICT COURT MINUTES

ZANE MICHAEL FLOYD,

Plaintiff(s),

vs.

NEVADA DEPARTMENT OF
CORRECTIONS; CHARLES DANIELS,
Director, Nevada Department of Corrections;
IHSAN AZZAM, Chief Medical Officer of the
State of Nevada.,

Defendant(s),

Case No: A-21-833086-C

Dept No: XIV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 7 day of July 2021.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk

