

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD,

Appellant,

v.

THE STATE OF NEVADA
DEPARTMENT OF
CORRECTIONS, CHARLES
DANIELS, DIRECTOR,
DEPARTMENT OF
CORRECTIONS; AND ISHAN
AZZAM, CHIEF MEDICAL
OFFICER OF THE STATE OF
NEVADA,

Respondents.

Supreme Court No. 83181

District Court Case No. 99CI59897

Electronically Filed
Jul 30 2021 02:26 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**DOCKETING STATEMENT
CIVIL APPEALS**

(DEATH PENALTY CASE)

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department XIV
County Clark Judge The Honorable Adriana Escobar
District Ct. Case No. A-21-833086-C

2. Attorney filing this docketing statement:

Attorney David S. Anthony, Brad Levenson Telephone (702)388-6577
Firm Federal Public Defenders Office
Address: 411 East Bonnevill Avenue, Suite 250
Las Vegas, Nevada 89101

Client(s) Zane Michael Floyd

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

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Client(s) NDOC Defendants

Attorney Crane Pomerantz, Nadia Ahmed

Telephone (702) 360-6000

Firm Sklar Williams PLLC

Address: 410 South Rampart Boulevard, Suite 350

Las Vegas, Nevada 89145

Client(s) Ishan Azzam

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

☐ Judgment after bench

☐ Dismissal:

☐ trial Judgment after

☐ Lack of jurisdiction

☐ jury verdict Summary

☐ Failure to state a

☐ judgment Default

☐ claim Failure to

judgment

prosecute

☐ Grant/Denial of NRCP 60(b)
relief

☐ Other (specify): _____

☐ Divorce Decree:

X Grant/Denial of injunction

☐

☐

☐ Grant/Denial of declaratory
relief

Original
Modification

☐ Review of agency determination

Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

☐ Child

☐ Custody

Venue

☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Floyd v. State, Supreme Court of the State of Nevada, Case No. 36752, Opinion (42 P.3d 249 (March 13, 2002)) (per curiam)

Floyd v. State, Supreme Court of the State of Nevada, Case No. 44868, Order of Affirmance (178 P.3d 754 (Feb. 16, 2006))

Floyd v. State, Supreme Court of the State of Nevada, Case No. 51409, Order of Affirmance (367 P.3d 769 (Nov. 17, 2010))

Floyd v. The Eighth Judicial District Court, Supreme Court of the State of Nevada, Case No. 83108

Floyd v. The Eighth Judicial District Court, Supreme Court of the State of Nevada, Case No. 83167

Floyd v. The Eighth Judicial District Court, Supreme Court of the State of Nevada, Case No. 83225

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Judgment of Conviction (September 5, 2000)

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Findings of Fact Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (February 4, 2005)

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Findings of Fact Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (April 2, 2008)

Floyd v. Baker, United States District Court, Case No 2:06-cv-00471-RFB-CWH, Order (47 F.Supp.3d 1148 (Sep. 22, 2014))

Floyd v. Baker, United States Court of Appeals for the Ninth Circuit, Case No. 14-99012, Opinion (940 F.3d 1082 (Oct. 11, 2019) and amended 949 F.3d 1128 (Feb. 2, 2020))

Floyd v. Gittere, et al, United States District Court, Case No. 2:06-cv-00471-RFB-DJA

Floyd v. Daniels, et al, United States District Court, Case No. 3:21-cv-00176-RFB-CLB

Floyd v. Gittere, District Court, Clark County, Nevada, Case No. A-21-832952-W

8. Nature of the action. Briefly describe the nature of the action and the result below:

Petitioner/Appellant, Zane Michael Floyd, appeals from an Order of the Eighth Judicial District Court denying his motion for temporary restraining order with notice and preliminary injunction. Mr. Floyd filed a complaint in the district court on April 16, 2021, alleging the Legislature made an unlawful delegation of authority to the Director of the NDOC, the Chief Medical Officer, and subordinate NDOC employees who will conduct Mr. Floyd's execution, in violation of Article 3, Section 1 of the Nevada Constitution. Specifically, Mr. Floyd argued the Legislature's grant of authority under NRS 176.355 constituted an unlawful delegation of authority in violation of the state constitution's separation of powers clause. The NDOC Defendants filed an opposition to Mr. Floyd's request for TRO/preliminary injunction and Mr. Floyd filed a reply. The district court heard argument on Mr. Floyd's motion on June 8, 2021. The court denied the motion at the close of the hearing and entered its findings of fact, conclusions of law, and order on June 17, 2021.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the district court erred in denying Mr. Floyd's motion for TRO/preliminary injunction enjoining the Defendants from proceeding with his execution because NRS 176.355 constitutes an unlawful delegation of authority from the legislative branch to the executive branch in violation of Article 3, Section 1, of the Nevada Constitution.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ NA

☐

☐

If not, explain: Not applicable. The Nevada Department of Corrections, through the Nevada Attorney General's Office, is a party to this appeal.

12. Other issues. Does this appeal involve any of the

☐ following issues?

- An issue arising under the United States and/or Nevada – Constitutions – yes, this is an issue under the Nevada Constitution
- A substantial issue of first impression – yes, this is a substantial issue of first impression
- An issue of public policy – yes, this appeal presents an important issue of public policy

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17 and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Under NRAP 17(a)(1), this case is retained by the Supreme Court because it is a death penalty case.

14. Trial. If this action proceeded to trial, how many days did the trial last? _

N/A

Was it a bench or jury trial? _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from
June 17, 2021

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served
June 17, 2021

Service was by

electronic means.

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

N/A.

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP Date of filing _____
50(b)

☐ NRCP Date of filing _____

☐ NRCP Date of filing _____

☐ 52(b)

NRCP 59

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See Primo Builders v. Washington, 126 Nev., 245 P.3d 1190 (2010).

N/A

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed July 2, 2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal,

e.g., NRAP 4(a) or other. NRAP 4(a)(1) provides for 30 days to file a timely notice of appeal

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☐ NRAP 3A(b)(3) Yes

☐ 3A(b)(1) Other (specify)

☐ NRAP ☐ NRS 38.205

3A(b)(2) ☐ NRS 233B.150

☒ X NRAP NRS 703.376

(b) Explain how each authority provides a basis for appeal from the judgment or order: NRAP 3A(b)(3) provides for an appeal from the denial of a motion for preliminary injunction

List all parties involved in the action or consolidated actions in the district court:

- (a) Parties: Charles Daniels is the Director of the Nevada Department of Corrections; Ihsan Azzam is the Chief Medical Officer; John Does 1-20 are unknown employees or agents of NDOC who will be involved in the execution of appellant
- (b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other: all parties noted above are parties to this appeal. All parties have executed waiver of service of summons which have been filed in the district court contemporaneously with the instant docketing statement.

22. List all parties involved in the action or consolidated actions in the district court:

The State of Nevada Department of Corrections; Charles Daniels, Director, Department of Corrections; and Ihsan Azzam, Chief Medical Officer of the State of Nevada; John Does 1-20 are unknown employees or agents of NDOC who will be involved in the execution of appellant

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

NRS 33.010 (declaratory relief) and NRS 30.030 (injunctive relief)

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

- Yes

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Y

☐ **No**

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment? N/A

☐ Y

☐ N

26.If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

27.Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross- claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order.

VERIFICATION

I certify that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

DATED this 30th day of July, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
David Anthony

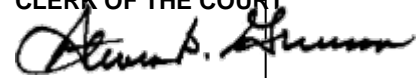
CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of July, 2021, electronic service of the foregoing DOCKETING STATEMENT CIVIL APPEAL, shall be made in accordance with the Master Service List as follows:

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

v.

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.
Dept. No.

**COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Exempt from Arbitration: Equitable
and Declaratory Relief Requested)

DEATH PENALTY CASE

**EXECUTION WARRANT SOUGHT
BY THE STATE FOR MR. FLOYD'S
EXECUTION THE WEEK OF JUNE
7, 2021**

I. INTRODUCTION

1. Plaintiff, Zane Floyd hereby moves this Court for equitable relief against the Nevada Department of Corrections (NDOC), Charles Daniels, Director of the NDOC, Ihsan Azzam, Nevada's Chief Medical Officer, and John Does 1-20, who will participate in planning and effectuating Mr. Floyd's upcoming execution. Mr. Floyd challenges as unconstitutional NRS 176.355 (Nevada's lethal injection statute), which delegates, without suitable standards, unfettered discretion to the NDOC to determine Nevada's lethal injection protocol. Under NRS 33.010 and 30.030, Mr. Floyd requests this Court declare NRS 176.355 an unlawful delegation of power to the Executive branch and issue an injunction against Defendants, forbidding use of any lethal injection protocol against Mr. Floyd. Mr. Floyd's claims for relief are as follows:

II. PARTIES

2. Plaintiff, Mr. Floyd is a state death row inmate in the custody of Defendants at Ely State Prison in Ely, Nevada. On March 26, 2021, Clark County District Attorney, Steve Wolfson, announced that the CCDA would be seeking a warrant of execution against Mr. Floyd. *See* David Ferrara, *DA to proceed with death penalty against gunman in 1999 store killings*, Las Vegas Rev. J. (Mar. 26, 2021), available at <https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-gunman-in-1999-store-killings-2315637/>. Mr. Floyd brings this Complaint seeking declaratory and injunctive remedies, to ensure he is not unlawfully executed under NRS 176.355's unconstitutional delegation of legislative authority to the NDOC.

1 3. Defendant NDOC is a Nevada state agency. Article V of Nevada's
2 Constitution establishes that NDOC is a part of Nevada's Executive branch.
3 Under NRS 176.355, NDOC has delegated authority to carry out the execution of
4 death sentenced inmates.

5 4. Defendant Charles Daniels is the current Director of the NDOC.
6 Defendant Daniels is responsible for managing the operations of Nevada's state
7 prison facilities and the custody of the inmates confined therein, including Ely State
8 Prison (ESP). Defendant Daniels is ultimately responsible for the overall operations
9 and policies of NDOC, including the conducting of executions at ESP pursuant to
10 appropriately authorized state court issued warrants of execution, and ensuring
11 that any such executions at ESP are carried out in conformity with the constitutions
12 of Nevada and the United States. Under NRS 176.355, Director Daniels is required
13 to select the drug or combination of drugs to be used in Mr. Floyd's execution. Mr.
14 Daniels and all other individuals identified as Defendants in this Complaint are
15 sued in their official capacities.

16 5. Defendant Dr. Ihsan Azzam is the Chief Medical Officer of the State of
17 Nevada. Dr. Azzam is responsible for enforcing all public health laws and
18 regulations in the State. He also has the responsibility of providing consultation to
19 the NDOC Director regarding the selection of the drug or combination of drugs to be
20 used in lethal injection executions.

1 6. Defendants John Does 1-20 are employees or agents of NDOC who
2 take part in carrying out the lethal injection protocol for Nevada executions,
3 whether through planning, preparation, or performing the execution.

4 **III. JURISDICTION**

5 7. This Court has jurisdiction over Plaintiff, Mr. Floyd, as at all relevant
6 times he has been a citizen of the State of Nevada. Jurisdiction is also conferred to
7 Defendants as all are either Nevada state agencies or actors.

8 8. Jurisdiction is further conferred by NRS 30.010 and NRS 33.030,
9 which authorizes this Court to decide actions for declaratory relief and grant
10 injunctions.

11 **IV. VENUE**

12 9. Venue is proper in the Eighth Judicial District Court for the State of
13 Nevada, County of Clark, pursuant to NRS 13.020 in that the Defendants are
14 Nevada State agencies, Nevada public officers, and “the cause, or some part thereof,
15 arose” in Clark County, Nevada.

16 **V. FACTS**

17 10. On September 5, 2000, in the state district court for the Eighth
18 Judicial District Court of Nevada, the Honorable Jeffrey D. Sobel entered a
19 judgment of conviction against Mr. Floyd sentencing him to death.

20 11. After, Mr. Floyd began an appeals process, contesting his conviction
21 and death sentence through direct appeal and postconviction petitions before the
22 Nevada courts and then through habeas proceedings in both federal and state
23 courts.

1 12. The litigation of Mr. Floyd’s first federal habeas proceeding ended in
2 November 2020, upon the United States Supreme Court’s denial of Mr. Floyd’s
3 petition for writ of certiorari.

4 13. On March 26, 2021, Clark County District Attorney, Steve Wolfson,
5 gave notice that the CCDA would be seeking a warrant of execution against Mr.
6 Floyd from the state district court for the Eighth Judicial District Court of Nevada.

7 14. On April 14, 2021, the State filed a Motion and Notice of Motion for the
8 Court to Issue Second Supplemental Order of Execution and Second Supplemental
9 Warrant of Execution.

10 15. While the Legislature is constitutionally charged with deciding the
11 lethal injection protocol for Mr. Floyd’s execution, it delegated this authority to the
12 NDOC through NRS 176.355 (Nevada’s lethal injection protocol statute), by tasking
13 the Director of the Department of Corrections with, among other things, “Select[ing]
14 the drug or combination of drugs to be used for the execution after consulting with
15 the Chief Medical Officer.”

16 16. Because NRS 176.355 delegates unfettered discretion, Nevada’s
17 Director of the Department of Corrections, Charles Daniels, along with Nevada’s
18 Chief Medical Officer, Dr. Ihsan Azzam, will decide the entirety of the lethal
19 injection protocol used to execute Mr. Floyd. John Doe NDOC employees will also
20 assist in carrying out the lethal injection execution established by Daniels and Dr.
21 Azzam.

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1 5. Accordingly, the Legislature may never delegate its lawmaking
2 authority.

3 6. However, under limited circumstances, the Legislature may delegate
4 fact-finding authority by establishing suitable and sufficient guidelines to aid the
5 delegated agency in carrying out the Legislature's policies. These guidelines must
6 make the statute complete within itself and leave the delegated agency with only
7 fact-finding authority.

8 7. NRS 176.355 violates Article III § 1 by delegating unfettered discretion
9 to the NDOC to determine Nevada's lethal injection protocol.

10 8. NRS 176.355 was codified in 1967 as Nevada's lethal injection statute.
11 It mandated that "the judgment of death shall be inflicted by the administration of
12 lethal gas, and that a suitable and efficient enclosure and proper means for the
13 administration of such gas for the purpose shall be provided by the board of prison
14 commissioners." This constituted a delegation to an Executive department, the
15 NDOC.

16 9. Later, in 1983, upon changing Nevada's method of execution to lethal
17 injection, NRS 176.355 was amended. The amendment altered NRS 176.355's
18 statutory language to provide: "(1) [t]he judgment of death must be inflicted by an
19 injection of a lethal drug. (2) The Director of the Department of Corrections shall . . .
20 Select the drug or combination of drugs to be used for the execution after consulting
21 with the Chief Medical Officer." The Legislature once again delegated authority to
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1 determine Nevada’s lethal injection protocol, but this time to the Director of the
2 Department of Corrections.

3 10. NRS 176.355 includes less guidance than its prior version and its
4 statutory language grants NDOC unrestricted authority, violating Article III § 1, in
5 the following ways:

6 11. First, the Legislature fails to include suitable and sufficient guidelines
7 to aid NDOC in carrying out the lethal injection protocol. Indeed, the sole guidance
8 NRS 176.355 provides is that Mr. Daniels is ultimately responsible for deciding the
9 entirety of the Nevada’s lethal injection protocol, after consulting with Dr. Ahsam.
10 NRS 176.355 only partially identifies the method of execution (lethal injection) and
11 doesn’t detail “how” and “under what circumstances” the lethal injection protocol
12 must be carried out. NRS 176.355 provides the NDOC with unfettered discretion to
13 choose between any type of drug(s) to be used during the execution and whether a
14 one or multi drug protocol is satisfactory. NRS 176.355 fails to provide any
15 guidelines or standards to aid NDOC in making either of these decisions.

16 12. Next, NRS 176.355 doesn’t require the lethal drug(s) selected to be
17 humane or that the execution be carried out humanely. NDOC is left with
18 unfettered discretion to decide whether to facilitate a humane lethal injection
19 protocol, a task that is beyond mere fact-finding. While a humane lethal injection
20 protocol may be assumed or implied, neither is the standard under the separation of
21 powers doctrine and neither is satisfactory for a constitutional delegation. NDOC is
22 left with unfettered discretion to decide whether to create and effectuate a humane
23 lethal injection protocol.

1 13. Additionally, NRS 176.355 states that death must be inflicted by an
2 injection of a lethal drug but does not specify the manner of injection. Thus, the
3 NDOC has unfettered discretion to decide whether an execution will be carried out
4 by an intravenous injection, requiring the use of a needle or through an oral
5 injection, consisting of injecting the lethal substance into a cocktail, that is then
6 drank during the execution. The Legislature fails to fully define its intended method
7 of execution and provide suitable and sufficient guidelines to aid the NDOC in
8 determining the proper manner of execution.

9 14. Finally, NRS 176.355 also fails to guide NDOC in carrying out the
10 Legislature's purpose in effecting the statute. Contextually, it is clear that NRS
11 176.355's main purpose is to execute a defendant. However, the statute doesn't
12 include standards to guide NDOC in carrying out this purpose. Instead, it leaves
13 those legislative decisions directly to NDOC. NRS 176.355 merely states that the
14 death punishment "must be inflicted by an injection of a lethal drug." Yet, its text
15 does not include express guidance requiring NDOC to administer lethal drugs until
16 an inmate is dead or even acquire drugs that are sufficient to cause death. These
17 tasks are not simple fact finding but go to the core of legislating by permitting
18 NDOC to: discontinue administering the lethal drug at its discretion, make
19 determinative decisions as to which drug(s) it believes are sufficient to cause death,
20 and arbitrarily acquire lethal drugs that are insufficient to cause death.

21 15. All of the above inquiries go beyond fact-finding and to the core of
22 policymaking and legislating, a task that the separation of powers specifically
23

1 forbids the Executive from performing. Nevada's democracy depends on Legislators
2 legislating and the Executive governing. Thus, NRS 176.355's delegation of
3 legislative power is not only a violation of Nevada's constitution, but also improper
4 under our State's fundamental principles of governing.

5 **B. An injunction prohibiting Defendants from using any lethal injection**
6 **protocol against Mr. Floyd is proper as he is likely to succeed on the**
7 **merits and Defendants conduct will cause irreparable harm for which**
8 **compensatory damages are inadequate**

9 16. Mr. Floyd realleges and incorporates herein by reference all of the
10 preceding paragraphs of this Complaint as if set forth in full below.

11 17. An injunction is appropriate when a moving party has a likelihood of
12 success on the merits and irreparable harm will result if the Defendant's conduct
13 continues. *Boulder Oaks Community Ass'n v. B & J Andrews Enterprises, LLC*, 125
14 Nev. 397, 403, 215 P.3d 31 (2009).

15 i. **Success on the merits**

16 18. Mr. Floyd is reasonably likely to succeed on the merits of his claim
17 because NRS 176.355 unequivocally violates Article III § 1 of Nevada's Constitution
18 by delegating legislative authority to the NDOC without suitable and sufficient
19 standards to guide NDOC in carrying out Nevada's lethal injection protocol.

20 19. NRS 176.355 provides a clear delegation of authority from the
21 Legislature, to the Executive, to determine Nevada's lethal injection protocol.

22 20. Article III § 1 of Nevada's constitution expressly prohibits the
23 Legislature's act.

1 21. The Legislature may only delegate authority when it: (1) establishes
2 suitable and sufficient standards within the statute to guide the delegated agency
3 in executing the Legislature’s policy; and (2) makes the statute complete within
4 itself such that only fact-finding authority is left.

5 22. Considering these factors, the Legislature’s delegation is
6 unconstitutional as it delegates unfettered discretion to the NDOC by:

7 (a) Failing to provide suitable and sufficient standards to guide
8 NDOC in executing NRS 176.355’s policy.

9 (b) Failing to make the statute complete within itself such that only
10 fact-finding authority is left.

11 (c) Failing to provide a meaningful definition of “lethal injection” and
12 thus giving NDOC authority to define terms.

13 (d) Providing NDOC with power beyond fact-finding authority by
14 granting the NDOC unfettered discretion to choose the quantity, quality, and type of
15 drug(s) to be used in Mr. Floyd’s execution.

16 (e) Providing NDOC with power beyond fact-finding authority by
17 permitting the NDOC with unfettered discretion to not acquire drugs that are
18 sufficient to cause death.

19 (f) Providing NDOC with power beyond fact-finding authority by
20 permitting the NDOC unfettered discretion to determine if its lethal injection
21 protocol will be carried out in a humane manner and determine what constitutes a
22 humane execution.

1 **ii. Irreparable harm**

2 23. If this Court does not intervene, Mr. Floyd will suffer irreparable
3 harm.

4 24. Defendants continued unlawful conduct will result in irreparable
5 harm. Defendants only purpose in carrying out NRS 176.355 is to execute Mr. Floyd
6 by lethal means. Mr. Floyd's death is a permanent harm and thus irreparable once
7 carried out by the NDOC; whereas, NDOC will only suffer delay, which is
8 inconsequential when compared to Mr. Floyd's execution. Any favorable outcome
9 following a trial will be useless for Mr. Floyd if his execution is not enjoined by this
10 Court.

11 **iii. No adequate remedy at law**

12 25. Because Defendants actions will result in Mr. Floyd's execution, any
13 amount of compensatory remedy is inadequate.

Prayer for Relief

WHEREFORE, Mr. Floyd requests the following relief:

1. That this Court assume jurisdiction of this case and set it for a hearing on the merits.

2. That this Court issue a declaratory judgment declaring NRS 176.355 a violation of Article III § 1, as an unlawful delegation of Legislative authority to the Executive, as alleged above.

3. That this Court issue a temporary restraining order or preliminary or permanent injunction commanding Defendants not to carry out any lethal injection protocol on Mr. Floyd until such time as the Legislature amends NRS 176.355 to set forth the State's lethal injection protocol and provide suitable and sufficient standards to guide Defendants in executing that protocol, so that Mr. Floyd may be executed in a constitutional manner.

///

///

///

1 4. Mr. Floyd also seeks any further relief the Court deems necessary,
2 just, and proper.

3 DATED this 16th of April, 2021.

4 Respectfully submitted
5 RENE L. VALLADARES
6 Federal Public Defender

7 /s/ David Anthony
8 DAVID ANTHONY
9 Assistant Federal Public Defender

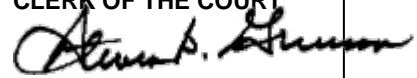
10 /s/ Brad D. Levenson
11 BRAD D. LEVENSON
12 Assistant Federal Public Defender

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

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I electronically filed the foregoing document with the Clerk of
3 the Court by using the electronic filing system on the 17th day of June, 2021.

4 I certify that some of the participants in the case are not registered electronic filing
5 system users. For those parties not registered, service was made by depositing a copy of
6 the above-referenced document for mailing in the United States Mail, first-class postage
7 prepaid, at Las Vegas, Nevada to the following unregistered participants:

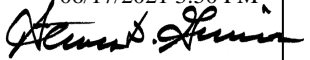
8 Rene L. Valladares, Federal Public Defender
9 David Anthony, Assistant Federal Public Defender
10 Brad D. Levenson, Assistant Federal Public Defender
11 Jocelyn S. Murphy, Assistant Federal Public Defender
12 411 E. Bonneville, Ste. 250
13 Las Vegas, Nevada 89101

14 *Attorneys for Plaintiff*

15 /s/ Eddie A. Rueda
16 Eddie A. Rueda, an employee of the
17 Office of the Attorney General
18
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EXHIBIT A

EXHIBIT A


CLERK OF THE COURT

ORDD
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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 *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).

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
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).

...

...

...

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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