IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83181

Zane Michael Floyd

Appellant,

Electronically Filed Nov 05 2021 02:23 p.m. Elizabeth A. Brown Clerk of Supreme Court

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,

Respondent.

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

APPELLANT'S APPENDIX VOLUME 2 OF 2

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DOCUMENT	DATE	VOLUME	PAGE(S)
Complaint for Declaratory and Injunctive Relief	04/16/2021	1	001–016
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Notice of Entry of Order and Order Denying Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction	06/17/2021	2	358–373
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 5th day of November, 2021. Electronic Service of the foregoing APPELLANT'S APPENDIX shall be made in accordance with the master service list as follows:

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/s/ Sara Jelinek

An Employee of the Federal Public Defender, District of Nevada

EXHIBIT 5

EXHIBIT 5

I, DAVID B. WAISEL, declare as follows:

1. I am a practicing anesthesiologist at Boston Children's Hospital and an Associate Professor of Anaesthesia, Harvard Medical School. I have been practicing clinical anesthesiology, primarily pediatric anesthesiology, for approximately 24 years.

2. I have been asked by the attorneys who represent Scott Dozier to provide an expert medical and scientific opinion about whether there is a substantial risk of harm that the Nevada Department of Corrections' proposed use of a threedrug protocol utilizing diazepam, fentanyl, and cisatracurium will cause Mr. Dozier severe pain or conscious suffering during his execution.

- 3. Terminology
 - a. "Awareness" is being cognizant of an experience while it is happening.
 - b. "Recall" is consciously remembering that experience later.
 - c. "Amnesia" is not consciously remembering that experience later.
 - d. A "paralytic agent" (like cisatracurium) prevents movement of skeletal muscle such as breathing, moving one's hands, blinking etc, which prevents the person receiving the paralytic from indicating distress. Paralytics "hide" the individual's experience.
 - e. "Blood oxygen level" is, simply, the amount of blood in the arterial blood system. It is typically 95-100 mmHg.

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4. It is my understanding that the State of Nevada intends to execute Mr. Dozier by injections of 15 mg of diazepam, followed by 500 mcg of fentanyl, and, if he is still breathing, an additional 500 mcg of fentanyl will be administered, followed by 25 mg cisatracurium.

5. The protocol is unclear in ways that pose significant risk of unnecessary pain and suffering to Mr. Dozier. In EM-110, page 5 of 6, sections B.4.c and B.4.d both describe the initial diazepam and the following fentanyl to be administered. In B.4.e and B.4.e.1, the protocol describes monitoring for breathing and the additional 500 mcg of fentanyl that will be given. The protocol assumes this dose will stop Mr. Dozier's breathing, stating "The contents of the syringe [#1-3, 500 mcg of fentanyl] will then be slowly administered over one minute until the spontaneous breathing of the condemned inmate stops." The protocol does not call for an assessment of breathing over a period of time (such as described in B.4.e), and it does not instruct the executioners to give any additional diazepam or fentanyl. In fact, the protocol directs the executioners to give the paralytic agent, cisatracurium. B.4.f states "A Drug Administrator will then insert the needle of the forth [sic] syringe of lethal drug set number one (marked #1-4-cisatracurium, 25 mg) into the injection port." Following the protocol will result in cisatracurium being given after the second 500 mcg dose of fentanyl but before anything else, such as the dosages available in Set-2, which is conceptually opposite of the intent of B.4.e, which is to wait until breathing has stopped before administering cisatracurium. There are problems with these assumptions of the timing on assessing breathing and that not breathing is the same as not being aware (as described in paragraphs 16-20 below). According to

the protocol, the Set-2 is to be used if the inmate remains conscious or shows signs of life after the injection of the first set (Set-1) of lethal drugs, which means after the paralytic cisatracurium has already been administered. Assuming the cisatracurium reaches the blood stream, Mr. Dozier will be paralyzed and thus unable to indicate awareness – i.e., will not be observed as remaining conscious or showing signs of life to trigger the administration of Set-2. This means that Set-2 is only relevant if the Set-1 drugs do not reach the blood stream; Set-2, by the protocol, is not available even if an assessment were made (which, again, is not called for in the protocol) after the second 500 mcg of fentanyl that Mr. Dozier needed more diazepam and fentanyl.

6. This protocol is a sea change from every other protocol of which I am aware. The drug that kills Mr. Dozier is the paralytic cisatracurium. Other protocols have employed one of two mechanisms to cause death. The first protocol, the more traditional one, has been to give (1) an anesthetic agent, (2) a paralytic agent, and (3) the killing drug potassium chloride, which stops the heart very quickly. The second, which has become more common due to legitimate, increasing concerns about awareness with the paralytic, uses medications that either stop the patient from breathing or cause cardiovascular collapse but do not paralyze the muscles. This was initially known as the "single drug" technique, which used sodium thiopental or pentobarbital, in which the mechanism of death was either stopping breathing or cardiovascular collapse. It then became a 2-drug technique using benzodiazepines and opioids, and the presumed mechanism of death is the stopping of breathing through anesthesia. But in these techniques, paralytics are not given, so the inmate cannot be aware while paralyzed.

7. In the current protocol, however, the killing agent is the paralytic of cisatracurium, which kills by preventing your ability to breathe, not through drugs that anesthetize (thereby ensuring an unconscious person during the process), but through drugs that paralyze muscles. This means that Mr. Dozier has a substantial risk of being paralyzed and awake as he dies of suffocation. The horror of being awake and unable to move is beyond description. But try to imagine, if you can, that you are awake yet unable to breathe, open your eyes, or move your hands. You are lying in complete isolation, unable to communicate the intense distress you are feeling. By way of one example, one patient aware and paralyzed reported that she "desperately wanted to scream or even move a finger to signal to the doctors that she was awake." The article concerning this example points out that it was not the surgery that was bothering her, it was being awake and unable to move. Landau E., surgery: 'I'm Awake during in Hell'. CNN<u>May 17,</u> 2010. http://www.cnn.com/2010/HEALTH/05/17/general.anesthesia/index.html).

8. Nevada's current protocol is practically designed to ensure substantial harm of 1) air hunger following the injections of diazepam and fentanyl and 2) awareness while being paralyzed after the cisatracurium injection.

9. Diazepam is an older benzodiazepine rarely used for sedation or anesthesia. <u>Miller's Anesthesia</u>, the most prominent anesthesia textbook in the United States, instructs that 15 mg for a 93 kg person is well under the dose needed for induction of anesthesia – loss of consciousness. Reves J.G., <u>Intravenous</u> <u>Anesthetics</u>, In: Miller R.D., Miller's Anesthesia. Philadelphia, PA: Elsevier; 2010 p. 738-740.

10. The amnestic effect of diazepam is irrelevant in the execution context. Just because a person does not remember suffering upon waking up does not mean the person did not experience the agony and suffering as it happened.

11. The risk of air hunger is substantial after administration of the diazepam and fentanyl. The Ohio execution of Dennis McGuire (see, e.g., $D:\z$ Personal\z Rsrch Hab LI\OH Leg Corpus\z EmailsRevealWorriesProblmtcExcutn.mht) demonstrates the problem. Mr. McGuire received 10 mg of midazolam and 40 mg of hydromorphone. Mr. McGuire experienced obstruction of his airway (the soft tissues in the mouth blocked his ability to breathe, such as what occurs in obstructive sleep apnea, where people who are asleep stop breathing because of the soft tissue obstruction). The normal response to experience this obstruction is to sit up, relieving the obstruction. But because Mr. McGuire could not sit up, he could not relieve the obstruction despite his repeated attempts observed as bucking or fighting the straps holding him down¹, meaning that he suffocated to death, akin to the experience of water boarding. This process, and his fighting the air hunger, has been reported to have occurred for 15-20 minutes. The sedation midazolam and hydromorphone given in the McGuire case

¹ Mr. McGuire's son, who attended the execution, described it thusly: "I watched his stomach heave, I watched him trying to sit up against the straps on the gurney, I watched him repeatedly clench his fist[.] [It] appeared to me he was fighting for his life while suffocating." D:\z Personal\z Leg Rsrch Hab Corpus\z LI\OH EmailsRevealWorriesProblmtcExcutn.mht

does not supply suppression of the relevant clinical responses to noxious stimuli; one can be sedated but still consciously experiencing one's surroundings, including painful and horrific stimuli such as air hunger, even if the sedated person appears to the lay person as being unaware of the surroundings.

12. Air hunger is being unable to satisfy the physiologic and psychologic urge to breathe. Patients describe it as similar to the sensation of suffocation. Simple examples are the feelings you get when the air is knocked out of you, or when at the swimming pool a "friend" pushes and holds your head down underwater. While these experiences can be scary, and the sensation of breathing is met with palpable relief, you nonetheless essentially know or believe you will be able to breathe again. This knowledge ameliorates the experience of air hunger. This knowledge is not present when a person is being executed.

13. For Mr. Dozier, the experience of air hunger, if the diazepam and fentanyl sedate him enough to put him in that situation, is likely, because of the smaller doses that are being used under Nevada's protocol. The highest dose of fentanyl, 1000 mcg, is roughly equal to 15-20 mg of hydromorphone, which is half of what Mr. McGuire received during his botched execution. <u>See</u> Equivalent opioid calculator; <u>see</u> clincalc.com/opioids/. Benzodiazepine conversions are more problematic, particularly between intravenous benzodiazepines. But 10 mg of midazolam is much stronger than 15 mg diazepam, which is a much weaker drug.

14. More severe sensations of air hunger are described in patients who do not know if they will be able to breathe again. This brings about feelings such as that described by the following patient who experienced being paralyzed yet aware: "I have never been so panicked, scared and horrified in my life. I was suffocating. I would have done anything even to take a small breath. I was scratching, clawing and flailing about. When the medication finally worked [to allow her to breathe], I never felt so relieved."

15. In general, the sensation of air hunger becomes intense with a relatively small rise of carbon dioxide (CO₂). We normally breathe out CO₂, the waste from our body. Not being able to do so creates panic. Brain imaging data suggest that increases in CO₂ and associated feelings of air hunger cause widespread increases in brain activity, including brain regions associated with stress and anxiety (amygdala, prefrontal cortex) and pain (periacqueductal gray). Liotti M., Brain responses associated with consciousness of breathlessness (air hunger), PNAS 2001;98:2035-40.; O'Mara S., Torturing the brain: On the folk psychology and folk neurobiology motivating 'enhanced and coercive interrogation techniques, Trends in Cognitive Science. 2009: 13 (12):497-540.

16. The high-dose fentanyl used in Nevada's new protocol is reminiscent of the quickly discredited high dose fentanyl technique proposed for heart surgery in 1978. As more experience was gained with this technique, concerns about awareness grew. The following examples explicate this problem. Note that these references are older, because this technique was discredited 30-35 years ago, although I do include a major textbook's note to show that the modern consensus is the same: *Fentanyl does not produce unconsciousness*. Fukuda K., <u>Opioids</u>, In: Miller R.D., Miller's Anesthesia, Philadelphia, PA: Elsevier; 2010; 777. Note that medicine also works by

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case reports - physicians reporting events. Case reports are often the tip of the iceberg in terms of frequency of events.

- a. In 1980, it was reported that a woman having redo heart surgery was responding to verbal commands until receiving 1600 mcg (24 mcg/kg) of fentanyl. Prior to incision, she received 4250 mcg (64 mg/kg) of fentanyl. The patient recalled the conversations between the surgeon and anesthesiologist during the opening of the chest. Mummaneni N., <u>Awareness and recall under high-dose fentanyl-oxygen anesthesia</u>, Anesth Analg. 1980:59:948-9.
- b. In 1981, it was reported that a woman having open heart surgery reported intraoperative awareness. She received before surgery 10 mg of morphine sulfate and 0.4 mg scopolamine. Scopolamine is an anticholinergic drug that provides amnesia. It is often used in emergency cases when the patient does not have sufficient blood pressure to tolerate a proper anesthetic. She received a total of approximately 5040 mcg (reported as 90 mcg/kg) prior to surgical incision. She reported statements made by medical personnel prior to cutting the chest bone, an early part of the procedure. Hilgenberg J.C., <u>Intraoperative awareness during high-dose fentanyl-oxygen anesthesia</u>, Anesthesiology, 1981:54:341-3.
- c. In 1983, a man having open heart surgery had intraoperative awareness and distress after 8000 mcg (96 mcg/kg) of fentanyl,

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23 mg (0.28 mgkg) of diazepam, 0.4 mg scopolamine and 10 mg of morphine-, and scopolamine. 6. Again, it is worth noting that scopolamine and diazepam in combination was supposed to be a potent combination. Frumin M.J., Herekar V.R., Jarvik M.E., <u>Amnestic actions of diazepam and scopolamine in man</u>, Anesthesiology 1976;45:406-12. That the patient had awareness with diazepam and scopolamine (a stronger combination than diazepam alone) indicates the foolishness in relying on diazepam as a drug to block awareness. The patient reported hearing voices discussing an operating room event (his rising blood pressure) and his attempts to communicate that he was awake.

- d. These events prompted KC Wong in 1983 to declare in an editorial that fentanyl does not prevent awareness. Wong K.C., <u>Narcotics are not expected to produce unconsciousness and</u> <u>amnesia</u>, Anesth Analg 1983;62:625-26.
- e. In 1988, there were further investigations into the effects of high-dose fentanyl in patients having open heart surgery. In an extraordinary study, 10 patients received an intramuscular injection of 0.15 mg/kg of morphine and 0.3-0.4 scopolamine, and 60 minutes later received a total of 100 mcg/kg of fentanyl over 15 minutes. During this time, patients had headphones stating verbal messages at 25 mcg/kg, 50 mcg/kg, 75 mcg/kg and 100 mcg/kg of fentanyl. The left arm was isolated from the muscle

relaxant, allowing for patient response at these levels. This table from the paper indicates that at 25 mcg/kg of fentanyl, 80% (8/10) of patients were responsive, and at 100 mcg/kg, 60% (6/10) of patients were responsive to the verbal suggestions on the headphones. In addition, and most importantly, while the patients were sufficiently awake to respond to commands, none of them remembered it, indicating that the rates of being aware but not recalling being aware under high-dose fentanyl is significantly higher than the rate of reported awareness after high-dose fentanyl. Watanabe A., <u>Wakefullness during the</u> induction with high-dose fentanyl and oxygen anesthesia, J Anesth 2: 165-169, 1988.

Patient No	Dosa 25	ige of fen 50	tanyl (µg 75	g/kg) 100	Complications
1	+	+	+	+	
2	+	+	+	+	
3	+	+	+	+	Rigidity Tachycardia
4	+	+	+	+	Rigidity
5	÷	+	+	+	Tachycardia
6	-	-	_	-	
7	+	+	-	-	
8	-	-	-	-	Tachycardia
9	+	+	-	-	
10	÷	+	+	+	Rigidity Tachycardia

Table	2.	Results
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+ = response to verbal commands, - = no response to verbal commands

- f. Lack of breathing does not mean there is an absence of patient awareness. Doses as low as 7-8 mcg/kg produce chest wall rigidity (impairing the ability to move the chest to breathe), but produces neither unconsciousness nor the stopping of breathing. Streisand J.B., <u>Fentanyl-induced rigidity and unconsciousness</u> in human volunteers, Anesthesiology 1993;78:629. The lack of chest wall movement in breathing can dupe an inexpert observer to assume the patient is not breathing.
- g. Brief Summary of Fentanyl and Diazepam
 - Fentanyl "is not associated with loss of consciousness" and does not block awareness in tested doses. Fukuda K., <u>Opioids</u>, In: Miller R.D., Miller's Anesthesia. Philadelphia, PA: Elsevier; 2010; 777.
 - ii. The doses discussed here, in which there was patient awareness, are far greater than the doses proposed for Mr.
 Dozier. At the maximum, assuming only Set-1 were used as described in Section 5², Mr. Dozier would receive 1000 mcg, which is roughly 10.8 mcg/kg, and which is about 11% of the 100 mcg/kg dose.

² To the best of my professional interpretation, Set-2 (and the additional 500-1000 mcg of fentanyl) would only be used if Set-1 was not injected intravenously, because of, say, a disconnected or infiltrated intravenous line. As explained above, that is because if Set-1 was injected into a working intravenous line, the cisatracurium will paralyze Mr. Dozier, making him unable to show signs of distress.

- iii. Although the 6/10 patients who were aware after receiving 100 mcg/kg of fentanyl did not remember being aware, that is irrelevant to the condemned inmate. What is relevant is the experience in the moment.
- iv. Because these patients did not remember their demonstrated awareness, it is presumed that many other patients experienced awareness without recall, likely putting the risk to Mr. Dozier closer to Watanabe's results.

17. Nevada's execution protocol does not provide for an adequate assessment of consciousness. If Mr. Dozier stops breathing during the 90 seconds after the fentanyl is given, the cisatracurium may then be given. But given how opioids such as fentanyl can slow respiratory rates, or even pause breathing for a period, it does not mean that Mr. Dozier is unaware. This is in addition to the risk of chest wall rigidity.

18. Even if Mr. Dozier stops breathing, that does not indicate lack of awareness. The drive to breathe is due to carbon dioxide in the blood. Opioids, like fentanyl, require higher carbon dioxide levels to initiate breathing and attenuate increases in breathing than if you did not receive fentanyl. After receiving opioids, the normal increased breathing response to increased carbon dioxide occurs later (at a high carbon dioxide level) and more slowly. In other words, if you have received fentanyl, you need a higher carbon dioxide level to breathe, and even then, when you start breathing from the elevated carbon dioxide level, you will not breathe as much as if you had not received opioids.

19. Even if Mr. Dozier were to stop breathing, he would have awareness and brain function for some time afterward. The brain has developed to ensure brain function is not immediately lost when oxygen delivery to the brain is impaired. It has both stores of oxygen and glucose and, under normal circumstances, luxury perfusion. Luxury perfusion is the idea that the brain receives more blood than is absolutely necessary; it is a built-in margin for error. A typical 45 year-old nonsmoker's blood oxygen concentration is 95-99. Healthy volunteers at arterial oxygen levels of 28 mmHg³ are reported to have had no mental distress and maintained consciousness. Pagani M., <u>Effects of acute hypobaric hypoxia on regional cerebral blood flow distribution: a single photon emission computed tomography study in humans</u>, Acta Physiol Scand 2000; 168:377-383. Studies have also shown consciousness at blood oxygen levels at less than 25 mmHg. Lindholm P., <u>Alveolar gas composition before and after maximal breath-holds in competitive divers</u>, Undersea Hyperb Med 2006; 33: 463-467.

20. Given the extent of oxygen available in a healthy person, it is reasonable to assume that after receiving fentanyl a person could be aware for 3-5 minutes *after* the person stops breathing. Thus, even if Mr. Dozier stops breathing,

³ "mmHg" means millimeters of mercury, and it is technically a measure of pressure; in this case, it is used more casually to indicate "how much oxygen is in the blood".

he could be well aware after the cisatracurium is given, leading to the purgatory of awareness while paralyzed.

21. Information in Nevada's execution protocol regarding experience and training standards for executioners in general and the quality of the specific executioners is missing. There needs to be a better sense of their experience and training in general and in particular, such as the frequency with which they insert intravenous catheters, their ability to assess adequate intravenous line flow, and their ability to assess respiratory function and rate. Experienced clinicians are not always good at assessing respirations, particularly slow and shallow respirations, by looking at the patient. There is no information about experience and training in assessing consciousness under high-dose fentanyl.

22. I have been asked to discuss other ways of monitoring consciousness. In hospital settings, there are various brain-function or neural monitors which are used to assess anesthetic depth. One such monitor, more commonly used in surgical operations at high risk for awareness, is the FDA-approved bispectral index (BIS) monitor. Trained and appropriately knowledgeable anesthesiologists use the BIS monitor to reduce the likelihood of patient awareness during an operation. The BIS monitor processes a single frontal lobe electroencephalographic signal to calculate a dimensionless number that provides a measure of the patient's level of consciousness. BIS values range from 100 to 0, reflecting the awake state and absence of brain activity. While a host of variables may affect the significance of the values produced by the BIS monitor, scores between 40 and 60 indicate adequate

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general anesthesia for surgery. Avidan M.S., <u>Anesthesia Awareness and the</u> <u>Bispectral Index</u>, New Engl J Med 2008; 358:1097-1108.

23. The protocol does not supply information regarding team training and rehearsals on set up, preparing drugs, preparing intravenous lines, responses to unexpected events, contingency plans and so forth. Team training over time is essential for a smooth running procedure. How many rehearsals are necessary is a function of progress during rehearsals. Based on clinical experiences, it is my opinion that 3 rehearsals over a 2 month period prior to the scheduled execution would be the bare minimum required. Of course, this also requires a rehearsal protocol that includes practice responding to a list of unexpected events.

24. In the end, there is a substantial risk that Mr. Dozier will experience hellish airway obstruction and hunger after the diazepam and fentanyl over a long period of time, and that he will be aware after he is paralyzed by the administration of the cisatracurium, and will thus suffer substantial harm from being awake while paralyzed while being put to death, because of 1) the use of a discredited technique which is known to fail to prevent awareness; 2) the use of an older drug that has not been used to induce unconsciousness for decades, and, to my knowledge, has not been used in lethal injections, with unclear dosing when far better drugs can be used to decrease the risk; 3) the going forward with unclear credentials of the executioners in all areas, particularly in assessing unconsciousness produced by the drugs in this protocol, and without indication that proper training and rehearsals have taken place; and 4) the use of a paralytic agent which will hide issues of movement related to awareness, preventing proper actions to ensure a humane execution.

25. I have been asked to opine about whether a readily available alternative to Nevada's execution protocol could be used to minimize the substantial risk of harm that its present protocol causes. As explained above, I do not believe the proposed drugs can eliminate the substantial risk that Mr. Dozier will be aware during his execution, particularly at the low dosages provided in the protocol. In light of the expert literature discussed above, I do not believe that any amount of fentanyl will be sufficient to guarantee that Mr. Dozier will be unaware during his execution.

26. I am board certified with the American Board of Anesthesiology ("ABA"). The ABA is the preeminent organization for anesthesiologists whose mission is to advance the highest standards of practice in anesthesiology. For this reason, the ABA proscribes the participation of its members in lethal injections. (American Board of Anesthesiology, Commentary (May 2014) (available at http://www.theaba.org/PDFs/BOI/CapitalPunishmentCommentary.) (incorporating American Medical Association Code of Medical Ethics, Opinion $E \cdot 2.06$ – Capital Punishment (June 2000)). The penalty for violating the ABA's rules is permanent loss of membership in the organization. I interpret the ABA's rules as preventing me from advocating an alternative form of execution. I do not believe that I can take any position that a reasonable person could interpret as advocating for a particular method of execution.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on this 4th day of October 2017, at Boston, Massachusetts.

J.L.L

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David B. Waisel

EXHIBIT 6

EXHIBIT 6

1	RTRAN	Electronically Filed 10/18/2017 12:52 PM Steven D. Grierson CLERK OF THE COURT			
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5 6	DISTRICT COURT CLARK COUNTY, NEVADA				
7) STATE OF NEVADA,)				
8	Plaintiff,	CASE NO. 05C215039			
9	VS.	DEPT. IX			
10	((SCOTT RAYMOND DOZIER aka CHAD)				
11	WYATT,)				
12	Defendant,				
13	/)				
14	BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE				
15	WEDNESDAY, OCTOBER 11, 2017				
16 17	RECORDER'S TRANSCRIPT RE: DEFENDANT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY/DEFENDANT'S MOTION FOR DETERMINATION WHETHER SCOTT DOZIER'S EXECUTION WILL PROCEED IN A LAWFUL MANNER/STATUS CHECK: PROTOCOLS				
18	APPEARANCES:				
19	For the State:	JONATHAN VANBOSKERCK, ESQ.			
20		Deputy District Attorney			
21		ANN McDERMOTT, ESQ. JORDAN SMITH, ESQ.			
22		Attorney General's Office - NDOC			
23	For the Defendant:	DAVID ANTHONY, ESQ. LORI TEICHER, ESQ.			
24		Assistant Federal Public Defenders			
25	RECORDED BY: YVETTE SISON, COURT RECORDER				
	-	1-			
	Case Number: 05C215039				

1 Las Vegas, Nevada, Wednesday, October 11, 2017 at 12:33 p.m. 2 3 THE COURT: All right, this is Dozier versus State of Nevada, C215039. 4 Counsel can you state your appearances for the record please. 5 MR. SMITH: Jordan Smith on behalf of the Nevada Department of 6 Corrections. 7 MS. McDERMOTT: Ann McDermott on behalf of the Nevada Department of 8 Corrections. 9 MR. VANBOSKERCK: Jonathan VanBoskerck, Clark County DA's Office. 10 MR. ANTHONY: David Anthony from the Federal Public Defender's Office for 11 Mr. Dozier who's in custody. Thomas Ericsson won't be present at this hearing 12 today. 13 MS. TEICHER: Lori Teicher from the Federal Public Defender's Office on behalf of Mr. Dozier as well. 14 15 THE COURT: Okay, I have gotten my weekly – I received my weekly letter 16 from Mr. Dozier; this one briefer than ever. I've spoken to my lawyers. I haven't 17 changed my position. Have a great afternoon. Somehow, freakishly, I did open it at 18 noon. It was a little unusual – this afternoon. So – anyway, it was very brief, like 19 three sentences. You should've been copied on it. It literally said; I've spoken to my 20 lawyers. They continue to communicate with me, something to that effect, and I 21 haven't changed my mind. 22 So, my staff has been under instructions to serve you with those as 23 they come in. Anything on that? 24 MR. ANTHONY: Not from us, Your Honor. 25 THE COURT: Okay. -2MR. SMITH: No, Your Honor. I do have one quick question though. There
 was some email correspondence about the letters and whether they are going to be
 publicly filed or not.

4 THE COURT: Yes. Well, here's the thing, most inmate correspondence, as 5 you can imagine, with the hundreds of cases that we have, is served on the -16 served on the parties but not filed in the public record. Its left-side filed, and the 7 reason for that is, because pro pers are not allowed to file their own filings, number 8 one. They need to go through their attorney. And so we do make a record of it, but 9 we don't file it in the formal public filing because it's not a recognized pleading of the 10 Court. It hasn't been filed with leave or permission of the Court, and so that's how 11 we document it.

¹² MR. SMITH: That was my question, was left-side filed. So that makes sense.
 ¹³ Okay. Thank you.

THE COURT: Yes. They're left-side filed, and they're served upon the
 parties. So, if this were just any run-of-the-mill case, and he were sending me
 letters; why won't you let me out of jail? Why hasn't my case been dismissed?
 You're the Queen of the Sumerians, which is my favorite, left-side filed, and served
 on the parties.

Okay, so as far as the public dissemination, the Defense objected,
 based upon concerns of attorney-client privileged information that might be in those
 letters, although the latest letter is: I've talked to my lawyers. I haven't changed my
 mind. Have a great afternoon. There's nothing privileged about that. If there's
 some desire to see his handwriting by anyone who makes a request, if I thought it
 was not concerning related to the Defense concerns of privilege information, then I
 would put you on notice that I'm going to give a copy, but I'll put you on notice first.

1 I understand your concerns, but so far Mr. Dozier does nothing but 2 exactly what I told him to, which is to tell me he's been talking to his lawyers, and 3 whether or not he's changed his mind. Okay, so - I'm sorry, did you say you had 4 anything else? 5 MR. SMITH: That was it, Your Honor. 6 THE COURT: Okay. So, the Court is in receipt of the most recent filing on 7 behalf of Mr. Dozier. I assume you have a copy of it? 8 MR. SMITH: We do. THE COURT: Okay; and that was filed on September 25th, and to my 9 10 knowledge, you didn't file anything in response, correct? 11 MR. SMITH: That's correct, just the reply brief, that's correct. 12 THE COURT: Okay. So, where do you want to start? MR. SMITH: Also, the reply brief was filed on the 25th, and there was an 13 errata filed – was disclosed to us I believe on October 4th, and then formally filed 14 under sealed I think with the Court on October 10th that contains Mr. Dozier's 15 16 expert's affidavit. 17 You'll notice in the expert affidavit, toward the end the expert 18 specifically refuses to provide an alternative method of execution. He claims that 19 he's ethically barred from doing so. 20 You also note he doesn't specifically say – he criticizes the amount of 21 dosages that the State is using for the various drugs, but doesn't say; I need you to 22 be at X amount for this drug, X amount for this drug. So there are no minimum 23 dosages or really any other specific modifications suggested. So, it's the State's 24 position and NDOC's position that there is no – there has been no available known, 25 feasible, readily implemented alternative suggested by the Defense.

1 With that said, we have gone over the reply brief and the expert affidavit 2 with the State's Chief Medical Officer to determine what, if any, clarifications or 3 modifications the State needs to make in response to that, and there are a few 4 areas that we acknowledge we need to clarify, things that we always intended to do 5 that we thought were implied that any anesthesiologist would know were inherent, 6 because anesthesiology is more art than science. So there are a couple areas that 7 we agree that we need to clarify including increasing the loading dosages for the 8 drugs, the starting dosages; and clarifying that those amounts were never meant to 9 be a cap. It was always the intent to what they call titrate to effect; meaning you 10 start with these loading dosages. You see how well the inmate responds to those 11 drugs through consciousness assessments; again which was always intended to be 12 done, but given what the expert's affidavit said, you could see where perhaps that 13 wasn't spelled out clearly enough.

14 So, you do a loading dose, you do a consciousness assessment to see 15 how well the inmate responds. The inmate responds that he's still consciousness -16 conscious, you would then titrate to effect, meaning you gradually increase the 17 dosages until you no longer have the responses, before moving onto the second 18 drug, for example; then you repeat the process there, where you go up to a loading 19 dose. You see – you do another consciousness assessment, this time the Fentanyl, 20 I believe, it's tactile stimulus meaning more than verbal, some sort of pinch I 21 imagine, I believe is the process there, but again that will be provided in an updated 22 protocol soon.

Then, assuming that, after you've reached the loading dose or you
 titrated to effect as necessary, and you don't have a consciousness response, then
 you would move on to the third drug. That's always how the process was meant to

1 be implemented. We can see from the expert's report how somebody could read it 2 that way; NDOC has agreed to provide those updates again, sort of under – within 3 the context of their expert, refusing to provide specific dosages that we need to hit or 4 otherwise, offering a specific alternative.

5

It's our hope to be able to provide those updates and those revisions 6 based upon those updates to the Court and opposing counsel under seal next week.

7 THE COURT: So how does that affect the expert's view that there could be 8 90 seconds of the time period for which the Defendant is not breathing, when he 9 could resume breathing, and this proposition that this piece of equipment would 10 assist any team, for lack of a better term, in determining whether in fact he is 11 conscious or not, breathing or not; what about that piece of equipment? Did your -

12 MR. SMITH: Right. So, as far as the breathing piece goes, we acknowledge 13 that breathing alone is not, by itself – again I don't – this is my layman's term, based 14 upon my understanding, having gone over with the Chief Medical Officer here, so I 15 think I'm using the correct terminology, but don't hold me to this necessarily, but we 16 agree breathing alone does not sufficiently count for consciousness or not. So 17 breathing will be a piece but along with this tactile verbal stimulus, these 18 consciousness assessments, that will be done I believe by medical personnel.

19 So, I think it fixes the breathing piece about whether breathing alone 20 should be the only assessment; as there will be a consciousness assessment, 21 meaning verbal stimulus, tactile stimulus, and then maybe even like a harder tactile 22 stimulus perhaps.

23

THE COURT: So, if you can answer, did your Chief Medical Officer address 24 this piece of equipment itself or just -

25

MR. SMITH: Yes, we have concerns with this piece of equipment. This piece

-6-

1 of equipment, it's my understanding, is unreliable. I believe it was even discussed in 2 Baze v. Glossip as well that it's - that while - while some people may use it in the 3 medical context, it's not necessarily to be used in this particular context that we're 4 discussing here today, but also these particular drugs, it's not designed for these 5 particular drugs, and so it's unreliable to that extent; and the consciousness 6 assessment, it will be a better indicator – the physical consciousness assessment 7 will be a better indicator than using this piece of machine. 8 So, we did discuss the piece of machinery, the BIS machine, with the 9 Chief Medical Officer, and it's our position that – that alone – that by itself will not be

¹⁰ || reliable and should not be used.

11

12

THE COURT: By itself?

MR. SMITH: Well, at all; at all.

THE COURT: I see. And you're suggesting to me that that – I can't
 remember which – I have the cite here. The case specifically addresses that piece
 of equipment?

¹⁶ MR. SMITH: That's my memory, Your Honor. I believe its <u>Baze</u> or <u>Glossip</u>
 ¹⁷ I that does – I could be – it's <u>Baze</u>, so it's <u>Baze</u>.

18

THE COURT: <u>Baze</u>.

MR. SMITH: I will confirm that. I know there is a Federal Court that does,
and I believe maybe even another State Court that talks about the machine as well.
We dug into this once it was suggested; and in <u>Baze</u> at – pages 50 to 60 it's
discussed. If I'm incorrect on that, I will get the cite to everybody, including the
Court this afternoon, if I'm incorrect; but that case I believe does discuss the BIS
machine.

25

THE COURT: And so you referenced being able to clarify the protocol by

¹ when?

MR. SMITH: Next week. We're aiming at Wednesday, Your Honor, and then
we would submit that to Your Honor under seal and as well to opposing counsel at
the same time.

THE COURT: And there would – would there be any reason why we would
have to adjust the protective order?

⁷ MR. SMITH: I think – it would be covered by the protective order; perhaps,
 ⁸ we could have some type of agreement in writing that would still be covered by the
 ⁹ protective order. I mean, it's just an update of – it would be an update of the current
 ¹⁰ protocol that everyone's been disclosed.

MR. ANTHONY: I mean from our perspective, we already made our
 arguments before the protective order was entered. Obviously, we've signed the
 protective order at this point.

I probably, in the interest of expediting the matter given the dire, you
 know, situation that is about a month out, I think that we could continue to be subject
 to the protective order based on whatever amendments they supply to us.

MR. SMITH: Another avenue could be, Your Honor, the protective order
 allows parties to designate things highly confidential. We could just designate it
 highly confidential on a protective order that might be another way to avoid having a
 separate agreement.

THE COURT: And so is it your – is it your plan to address in specific detail as the original protocol that I read when you amended to include the same kind of information as is already included in there as far as timing, and all the things that we've discussed here today in that protocol?

25

MR. SMITH: Yes, Your Honor, it's my understanding we would do the exact

-8-

1 same thing; clarify – increase and clarity these loading dosages are just that. 2 They're not caps, with some description of how the dosage – the timing – the time 3 period over which the doses would be administered, then when the consciousness 4 assessment would be conducted and how that will be conducted and determine 5 whether titrating, I believe is the phrase, titrating will be necessary or not before then 6 moving onto the Fentanyl. Same thing, increase the loading dosages with an 7 explanation of; this is the period of time over which it will be administered, then a 8 consciousness assessment there to determine, you know, to ensure that Mr. Dozier 9 is unconscious and insensate and won't experience any air hunger, etc., before 10 moving onto the third drug. So yes, the same level of detail will be provided.

11 THE COURT: Look, I understand it's been the State's position that until this, 12 you know, alternative is proffered that nothing is appropriate for inquiry, but I've said 13 before, and I'll say it again, that the Court has the inherent authority to consider 14 certain things in the enforcement of its order, and so, you know, one of the things 15 that I'm struggling with, is the use of the paralytic; the purpose of it, the necessity of 16 it, other than to mask suffering. So I'm sure there's some reason, otherwise, your 17 medical officer wouldn't have it as part of the protocol. So what is it, because I have 18 the inherent authority to ask, and if you don't agree, then you should go to the 19 Nevada Supreme Court.

MR. SMITH: I agree that Your Honor has the inherent authority within the
 construct of the Supreme Court – Nevada Supreme Court precedent, etc., so let me
 see if I can address the use of the paralytic. In other protocols that have been the
 traditional, I'll call it the traditional protocol, with the potassium chloride going last,
 the paralytic is usually gone second. So, in all of these cases, they have approved
 the use of a paralytic, and the same argument has been made in those cases, that

-9-

all the paralytic does is mask pain, especially when it's being administered second,
with the potassium chloride being administered third. I think its <u>Glossip</u> and <u>Baze</u>
both say that potassium chloride administered by itself would be cruel and usual.
Justice Sotomayor in her concurrences, I think it's authored most recently in her
denial from cert [phonetics], said that potassium chloride is being somewhat like lit
on – being set on fire or something to that extent.

But, <u>Glossip</u> and <u>Baze</u> say that if you're sufficiently unconscious from
 the first two drugs and insensate to pain, unconscious, that then potassium chloride,
 even though by itself would be unconstitutional because you can't experience it, and
 you're unconscious, the use of potassium chloride is constitutional.

11 Think of this execution protocol in a similar manner. Again I'm using 12 terms loosely here; but from the first two drugs, Mr. Dozier will be unconscious, 13 insensate to pain, will not experience air hunger, will not experience any panic, or 14 anything of that nature. And so, instead of the potassium chloride, we're using the 15 Cisatracurium. The breathing will be slowed with the Fentanyl, in combination with 16 the Diazepam, the breathing will be slowed but Fentanyl is, my understand and 17 again I'm not a doctor, my understanding is Fentanyl is fast-acting; and because 18 there's no continuous flow, meaning just pumping him continuously with Fentanyl, 19 his breathing will get to zero, then the paralytic will be administered to then as he 20 gets lower in breath, and unable to breathe, the Cisatracurium will then prevent him 21 from just expanding his diaphragm at that point.

22

So, you know, think of Cisatracurium not exactly in the same way, but
 loosely as an analogy to the potassium chloride in the – in the normal execution
 protocol that's been used – that had been approved.

25

THE COURT: So I don't think it's too much to ask for the State to provide a

-10-

medical officer's affidavit telling me that. I appreciate that you're representing that
to me, but how about someone who's in charge of, you know, being the medical
officer for the State who is a, I presume board certified anesthesiologist, to actually
attest to those things, so I have that in the record, as opposed to – I'm not
questioning what you say, but I would like to have that in the record as the stated
purpose –

7

MR. SMITH: Okay.

THE COURT: -- of such a thing. So that it can be commented on, you know,
 I think we're gonna need to have a status check on this to get that – I mean you said
 by Wednesday you could file it?

MR. SMITH: We're aiming at Wednesday, yes Your Honor; end of the week,
 at the latest, we're aiming at Wednesday of next week. Would you like the affidavit
 from the Chief of –

THE COURT: Can you aim at Tuesday at 5 o'clock? So you could come
 here Wednesday and say it's on file and – I assume you'd have to have your expert
 to – I don't need the whole parties here just to do a scheduling –

¹⁷ MR. SMITH: I don't know about a fully revised protocol, Your Honor. I'm – I
 ¹⁸ don't want to rush that. If you're looking for an affidavit, for example, explaining that;
 ¹⁹ I'm sure I can get that to you by Tuesday absolutely. As far as a fully revised
 ²⁰ protocol, Wednesday was my understanding, was pretty fast given the –

THE COURT: Okay. If you could – if you could Tuesday by 5 o'clock, I just
 would like the affidavit of the stated purpose of the paralytic. I mean I understand
 that's your – you know, you didn't come up with that on your own, but if I could have
 that so that, you know I mean, much, much, much of the Defendant's challenge to
 this or questioning of this is related to the use of that, the purpose of it, the benefits if

any, and their concerns; and I think it's just important to have something from the
Chief Medical Officer that addresses the stated and intended purpose of the drug.

MR. SMITH: I understand that. It's also – and this will be in an affidavit as
well, but it's also my understanding that removing the paralytic could actually end up
– and the opinion of the Chief Medical Officer end up being less humane than taking
it out. That'll be in the affidavit as well, but I think that's important to mention.

And we'd also probably be filing – to the extent as discussed, details of
 the protocol itself, we probably be filing that affidavit under seal as well or at least
 redacted in the areas we feel need to be redacted.

10 THE COURT: Is there anything related to the Defense's concerns about the 11 team's assessment ability, you know – I mean I think they aptly point out that most 12 of the folks that do this kind of work that are going to be there, EMT's and doctors 13 aren't in the business of securing the death or ensuring the death - the easy and 14 painless death of a human being, that's not what they do usually. So there's the 15 specific concerns that are raised in that brief is - and I don't recall, because I read it 16 and I, you know, was comforted in knowing that it was a very thorough step-by-step 17 contingency type plan regardless of whether the drugs and the titration and all that 18 was appropriate or the amounts; the actual plan. But I am - I mean that raises a 19 concern that you did or didn't discuss with your Chief Medical Officer?

MR. SMITH: We did discuss training. I mean, the people – the team that is
 involved has been training and doing rehearsals. I know that for a fact. And, as
 disclosed to opposing counsel and the Court as well, I mean there are people with
 medical training who are going to be participating in this. Beyond that and beyond
 saying, and this is my memory from the affidavit, beyond saying that you should
 have at least two run throughs over two months or something like that. I don't really

1 know the specifics that the expert offers on what additional needs to be done or
2 what he wishes to see.

THE COURT: Well, I was getting into that discussion of that window of time
 where the Defendant could stop breathing but then start breathing again and with
 whatever –

6

10

13

MR. SMITH: Okay

THE COURT: -- titration or paralytic and when it is and how much it is might
not be discerned by your average EMT. Hey, he stopped breathing for 90 seconds.
He stopped breathing for two minutes.

MR. SMITH: I understand, Your Honor –

- 11 THE COURT: That part of it –
- 12 MR. SMITH: -- Your Honor --
 - THE COURT: -- it was a very specific kind of hypothetical.

MR. SMITH: There is an attending physician who will be present, and so
again I don't know this level of detail, but it will be I imagine in the revised version,
there will be EMT's present and an attending physician. So I understand your point,
maybe your average EMT won't know what they're looking for, but there will be an
attending physician there who's either directing or doing the assessments
themselves. Again, I don't know the details of that, but there is an attending who will
be there.

THE COURT: And will this attending have the benefit of all the – when we're
 - let's just say hypothetically which I – clearly we're not there, but hypothetically, all
 of the specific concerns that have been raised by this defense expert involve a very
 heightened examination of the Defendant while this is going on for all of these
 factors that this expert raises, will that attending physician be educated on – I mean

I – you know, just because you're a physician, doesn't mean that you're prepared
and trained and done two run throughs on an execution, are aware of all the
possible concerns that, you know, every doctor looking at this case might have
associated with the breathing – the stopping of the breathing, starting again, being
paralyzed, being conscious, and suffering through suffocation.

MR. SMITH: I understand Your Honor's concerns. It's my – the attending
 physician has experience in surgery and dealing with anesthesia. So, this isn't – I
 don't mean to be flippant, but this isn't you know some sort of just general practice
 person, this is somebody who has experience with surgery and dealing with patients
 under anesthesia.

11

12

THE COURT: Currently? Like a current surgeon?

MR. SMITH: Yes.

THE COURT: So someone who currently performs anesthesia for surgeries
 on a regular basis?

¹⁵ MR. SMITH: That's my understanding, yes; and I wouldn't want to get too –
 ¹⁶ again for identity purposes and confidentiality I wouldn't want to –

THE COURT: No, no of course. But could you include – could your Chief
 Medical Officer include the plans of the background – I don't need details – I don't
 need to know where they graduated. I'm just saying someone who currently
 conducts anesthesia for general surgery – whatever they're doing currently would be
 helpful.

²² MR. SMITH: Okay.

²³ THE COURT: Okay. And so you could have that by Tuesday?

²⁴ MR. SMITH: I will endeavor to have it to you by Tuesday.

²⁵ THE COURT: I realize you don't have a –

-14-

1	MR. SMITH: I don't know the schedule, but I will –
2	THE COURT: Sure.
3	MR. SMITH: I will do my best.
4	THE COURT: If there was a problem with the Chief Medical Officer's
5	schedule, you could just notify opposing counsel and I that you need two business
6	days – whatever you need.
7	MR. SMITH: Sure. And, Your Honor, I'm personally out tomorrow and Friday
8	that's why we are having the hearing today, but our team –
9	THE COURT: We could do Wednesday. I'll set a status check later in the
10	week just to see if you filed what you said you were going to file.
11	MR. SMITH: Okay.
12	THE COURT: Just because we're getting close, and then you know, we have
13	Nevada Day and we have
14	MR. SMITH: Understood.
15	THE COURT: Okay. So – so why don't we say Wednesday for the Chief
16	Medical Officer's Affidavit to address the list of things that I asked about today, and
17	then you said you believed you could have your –
18	MR. SMITH: Hopefully this –
19	THE COURT: protocol produced to the Defense – it doesn't need to be
20	produced to – I would prefer it be produced to them –
21	MR. SMITH: Okay.
22	THE COURT: before me. As long as I have it the day before the hearing, I'll
23	drop everything and read it the day before the hearing.
24	MR. SMITH: Okay.
25	THE COURT: They, however, have someone they're consulting with that
	-15-

would need it sooner. So, they're the first party in interest to get it and then you can
send it to me, thereafter. What do you think would be a reasonable time for that?
Did you say the end of the week next week?

4 MR. SMITH: Well, we'll still aim at Wednesday. End of the week is a back
 5 stop.

THE COURT: Okay. So do you think – when are you gone? You're gone the
 13th and the 16th?

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MR. SMITH: Yes, tomorrow and Friday, and the weekend.

⁹ THE COURT: Would it be – do you think that you could come in on October
 ¹⁰ 20th in the late morning and just update me on what was filed and whether you've
 ¹¹ had an opportunity to get it to your expert and –

MR. ANTHONY: Your Honor, assuming that – I believe that the date that the
 Court was contemplating is Wednesday, the 18th, I think that that would be sufficient.
 Our expert is on the East Coast, but I believe we can get a hold of him if we're
 talking about – if they submit it by the 18th, I think we would be able to consult with
 him and get his feedback, so we could talk to the Court on the 20th. So I think that
 that would work.

18

MR. SMITH: The 20th will work.

¹⁹ THE COURT: Okay.

²⁰ MR. ANTHONY: And Your Honor, just to clarify, that would assume that we
 ²¹ get both things right?

22

THE COURT: Right.

²³ MR. ANTHONY: That we get the execution protocol, the amended one, and
 ²⁴ secondly that we get the Chief Medical Officer's affidavit.

25

THE COURT: Right. I mean, I think on the 20th, if they weren't able to get the

-16-

protocol, then we discuss, you know, they are either handing it to you in open court
 or they're saying; we're really, you know, ran into some delays. We need X amount
 of time, and we can figure it out on the 20th.

4

5

MR. SMITH: That works, Your Honor.

THE COURT: I just – I'm trying to keep – I'm just trying to manage it.

⁶ MR. SMITH: I understand.

THE COURT: Okay. So, that'll be the plan, and the Nevada Attorney
 General's Office will prepare the Chief Medical Officer's response to some of these
 things that -- in an affidavit form, that the Court has raised and that was specifically
 questioned in the Defense filing, and the amended protocol on October 20th at
 11:30. I'm trying to make sure you're not sitting here for things you don't need to be
 sitting here for.

13

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MR. ANTHONY: Thank you, Your Honor.

THE COURT: Is there anything else? And we're all agreeing that this would
 be designated – this protocol would be designated highly confidential? I assume
 you're not going to produce an entirely new protocol but just the sections that are
 relevant, you're just going to – you're going to produce amended sections that are
 relevant. I mean we have – there's a lot there that are not part of the Court's
 concern.

MR. SMITH: Correct.

THE COURT: Okay. So, are you going to designate it highly confidential?
 Because we're really talking about the drugs, the titrating, the amounts, the –

MR. SMITH: Yes.

²⁴ THE COURT: You're okay with that?

MR. ANTHONY: Under the circumstances, we're fine with that. You know,

we obviously want to move things forward because of where we're at.

2

THE COURT: Okay. So -

MR. ANTHONY: The only thing that I would add, Your Honor, is just that the
one other topic that was going to be for discussion today was whether or not Dr.
Waisel's declaration should be made public. I know that was something that the
Court mentioned at our last hearing, and so I just want to throw that out there as
well. I don't know if there was gonna be a ruling as to whether that should remain
confidential or whether it can be publicly filed. Other than that I don't have any
questions.

MR. SMITH: I believe Your Honor gave me a homework assignment for today
 to review the affidavit and look at sections that we would like to have redacted, if
 necessary. I have a handful of those, a couple of those –

¹³ THE COURT: Do you have them highlighted or do you have some –

¹⁴ MR. SMITH: I do.

¹⁵ THE COURT: Did you show them to counsel yet?

¹⁶ MR. SMITH: No, not –

¹⁷ THE COURT: -- do you have two copies by any chance?

¹⁸ MR. SMITH: -- I do not. I just have the one I've written all over.

¹⁹ THE COURT: Is the highlight something that would copy if I make a copy?

²⁰ MR. SMITH: The words – but I've also highlighted a couple other things as
 ²¹ well.

THE COURT: Could we do this, could you – could you give a highlighted
 copy to both myself and the Defense before the 20th at 11:30 so that maybe by –
 whenever you give me your doctors – your Chief Medical Officer's affidavit?
 MR. SMITH: Yes, Your Honor.

1	THE COURT: That way – and if you could just literally use a highlighter –	
2	MR. SMITH: Yes.	
3	THE COURT: so I can quickly reference it. I would appreciate it. You have	
4	a lot of materials. I try to refresh myself every time you come in here, and it's – also	
5	I don't have a medical degree. Clearly, I need one for this proceeding. Anything	
6	else? So you could get that to them and to me, then I could be prepared to address	
7	it on the 20 th at 11:30.	
8	MR. SMITH: Yes, that works for us, Your Honor.	
9	MR. ANTHONY: That works for us as well, Your Honor.	
10	THE COURT: Okay. Also, whatever your – if you could do the same with the	
11	affidavit – provide a – I mean I know it's subject to the protective order, but at some	
12	point – I mean, we're discussing these things in open court, dosing's and titration; I	
13	mean it's not a big secret, that part of it. It's not a security risk. It's not anything that	
14	can't be public that I can think of but there might be other things. So, anything else?	
15	MR. ANTHONY: Not from us, Your Honor.	
16	MR. SMITH: Not from us, Your Honor.	
17	THE COURT: Okay, then I'll see you Friday, October 20 th at 11:30. Okay,	
18	Thank you.	
19	MR. SMITH: Thank you, Your Honor.	
20	MR. ANTHONY: Thank you, Your Honor.	
21	MS. TEICHER: Thank you, Your Honor.	
22	[Proceedings concluded at 1:04 p.m.]	
23		
24		
25		
	-19-	
		1

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability. hette Yvette/G. Sison Coult Recorder/Transcriber -20-

EXHIBIT 7

EXHIBIT 7

The Washington Post

Post Nation

Execution drugs are scarce. Here's how one doctor decided to go with opioids.

By William Wan December 11

The doctor who devised the nation's first execution method using fentanyl did so in a matter of minutes.

"I honestly could have done it in one minute. It was a very simple, straightforward process," said John DiMuro, who was Nevada's chief medical officer when he developed the experimental protocol with the powerful opioid. The state planned to use it last month on death row inmate Scott Dozier, but a judge put the execution on hold just days before its scheduled date. DiMuro resigned from his post in October.

In an interview, DiMuro said he looked at the few drugs available to the prison system and quickly settled on a three-drug combination. He included fentanyl and based its use in the protocol on a procedure often used to anesthetize patients for open-heart surgery.

His protocol is under attack from lawyers representing Dozier as well as others. Fentanyl is part of a wave of new drugs and options being explored by some states because of their problems obtaining the products they long have used. Critics have decried the efforts as risky human experimentation.

Some have also questioned why DiMuro, a board-certified anesthesiologist, helped create the protocol. Many doctors view any involvement in executions as a violation of their Hippocratic oath to do no harm. Many medical boards ban members from participating or assisting.

But DiMuro invokes duty and more, noting that he was required by Nevada statute to collaborate with prison officials to help them come up with a viable lethal injection protocol once they could no longer obtain the drugs traditionally used.

"I was just following the law. I owed it to the citizens of Nevada to follow the statute, and I did everything that was required of me," he said.

DiMuro said his choice of fentanyl should remain separate from the nation's opioid crisis, which has thrust the drug into the headlines as thousands of Americans continue to die of overdoses.

"People are trying to make that leap that we did it because of the opioid crisis, but it had nothing to do with it," he said. "Fentanyl is one of the most commonly used opioids. It's in every operating room, and it's safe and effective in the right hands."

The protocol that DiMuro designed calls for inmates to first receive diazepam, a sedative better known as Valium. They would then receive fentanyl to cause them to lose consciousness. Large doses of both would cause a person to stop breathing, according to three other anesthesiologists interviewed.

Yet the new method also involves injecting inmates with a third drug, cisatracurium, to paralyze the muscles - a step some medical experts believe creates unnecessary risk of suffering. If the inmate wakes up after receiving the third drug, he could die fully conscious but unable to move or signal his distress, critics say.

The judge who postponed Dozier's execution cited concerns about the cisatracurium. The case is awaiting review by Nevada's Supreme Court.

DiMuro defends his inclusion of cisatracurium. The first two drugs don't guarantee the person would stop breathing and could take longer to take effect, he said. "The third drug helps to hasten and ensure death. Instead of taking a long time, death would come in five to 15 minutes. Without the paralytic, it would be less humane."

His decision to resign as Nevada's medical officer was related to neither the execution nor any threat to his board certification, he said. He had served in the post about 15 months after many years in private practice and saw it as a way to perform public service. "I wanted to see if I could give something back and help," he said.

He said he has no opinion on the death penalty and feels confident he did his best in designing the new execution protocol.

"The one thing I was able to do," he said, "was to make sure this was done in the most humane way possible."

Mark Berman contributed to this report.

Read more:

Lethal injection delayed after execution team couldn't find convicted killer's vein

Judge refuses to halt Va. execution over concerns about lethal-injection drugs

Q 4 Comments

William Wan is a national correspondent for The Washington Post, covering science and news. He previously served as the paper's religion reporter, foreign policy correspondent and for three years as the Post's China correspondent in Beijing. **Y** Follow @thewanreport

EXHIBIT 8

EXHIBIT 8

Electronically Filed 11/27/2017 4:02 PM Steven D. Grierson CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

SCOTT RAYMOND DOZIER,

Petitioner,

v.

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STATE OF NEVADA,

Respondents.

Case No. 05C215039 Dept. No. IX

(Death Penalty Habeas Corpus Case)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ENJOINING THE NEVADA DEPARTMENT OF CORRECTIONS FROM USING A PARALYTIC DRUG IN THE EXECUTION OF PETITIONER

12 Upon Petitioner's Motions for Determination Whether Scott Dozier's 13 Execution Will Proceed in a Lawful Manner and for Leave to Conduct Discovery, 14 and this matter having come before the Court for multiple hearings, including an 15 evidentiary hearing conducted on November 3, 2017, and the Court having heard 16 expert testimony and oral argument presented by respective counsel for both 17 parties, and having reviewed and considered the parties' pleadings and supporting 18 exhibits admitted into the record, and with good cause appearing therefor, this 19 Court issues the following findings of fact, conclusions of law, and order:

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BACKGROUND

2 1. Petitioner Scott Raymond Dozier is an inmate on death row in the custody of the Nevada Department of Corrections ("NDOC"). In October of 2016, by 3 letter to this Court, Petitioner expressed his desire to waive or discontinue his legal 4 proceedings so that his sentence of execution could be carried out. Various 5 6 proceedings transpired in which Petitioner was made to appear and present his 7 wishes before this Court and eventually subject himself to a competency 8 examination by a court-appointed mental health expert. In a July 2017 lengthy and 9 thorough report, Michael S. Krelstein, M.D., determined that Petitioner was 10 competent to waive his post-conviction and appellate proceedings. Premised on this 11 determination, at another hearing in July 2017, Dozier and the Clark County 12 District Attorney's Office agreed to stay Dozier's habeas corpus action provided 13 NDOC had the ability to conduct the execution. This Court later signed an execution warrant presented by the Clark County District Attorney's Office, 14 scheduling Petitioner's execution by lethal injection to take place the week of 15 16 October 16, 2017.

Thereafter, on August 15, 2017, Petitioner filed Motions for
 Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner
 and for Leave to Conduct Discovery. At that time, Petitioner's motions were based
 on constitutional concerns regarding NDOC's unknown execution protocol for
 carrying out his scheduled execution. On the same date, the Clark County District

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Attorney's Office filed oppositions to Petitioner's motions arguing, in part, that the motions were improperly served upon it.

3 3. On August 17, 2017, at the request of the Clark County District
4 Attorney's Office, Mr. Dozier's execution was rescheduled for the week of November
5 13, 2017.

On August 23, 2017, NDOC filed a Notice in Advance of Status Check 6 4. to set a briefing schedule on Petitioner's motions. Attached to NDOC's Notice was 7 8 Exhibit A disclosing the lethal injection drugs (Diazepam, Fentanyl and Cisatracurium) that NDOC intended to use for the execution of Mr. Dozier. On 9 September 5, 2017, NDOC disclosed an execution manual dated the same day 10 ("September 5th manual"). On September 6, 2017, NDOC filed an Opposition to 11 Petitioner's motions. On September 7, 2017, Petitioner filed Objections to NDOC's 12 13 disclosure of the protocol under seal.

14 5. In response to NDOC's Opposition, and upon consultation regarding the execution protocol with a retained expert in anesthesiology, Petitioner filed a 15 Reply on September 25, 2017, followed by a Declaration from its expert in 16 anesthesiology, David B. Waisel, M.D., dated October 4, 2017. Dr. Waisel asserted 17 18 in his Declaration that he interpreted the American Board of Anesthesiology's rules "as preventing [him] from advocating an alternative form of execution." He did not 19believe that he could "take any position that a reasonable person could interpret as 20 advocating for a particular method of execution." Accordingly, in his Reply, 21 Petitioner proffered, as a known and available alternative execution procedure 22

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pursuant to federal constitutional precedent in *Baze v. Rees*, 553 U.S. 35, 61 (2008) and *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015), that NDOC utilize a two-drug version of the protocol, via administration of the drugs Diazepam and Fentanyl, as already provided for in NDOC's draft protocol but in higher doses, and eliminate the use of the third paralytic drug (Cisatracurium).

6 6. At the Court's request, NDOC submitted a Declaration by John M. 7 DiMuro, D.O., the former Chief Medical Officer of the State of Nevada,¹ dated 8 October 20, 2017. NDOC also submitted revised protocol provisions, also dated 9 October 20, 2017, within the Execution Manual (EM) for Sections 103 and 110. The 10 October 20, 2017 revisions addressed titration and entailed significant increases in 11 the dosage of the three drugs to be used under the protocol. NDOC's revised protocol 12 retained all three of the drugs as set forth in its earlier version of the protocol, and

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Dr. DiMuro resigned as the State's Chief Medical Officer effective October 30, 2017. At the close of a status hearing conducted on October 31, 2017, during which 18 this Court scheduled the November 3, 2017 evidentiary hearing, NDOC announced Dr. DiMuro's resignation and submitted a Declaration signed by Dr. DiMuro in 19 which he stated that his resignation was "completely unrelated to the scheduled execution of Scott Dozier" and that he stood by his opinions contained in his earlier Declaration of October 20, 2017. See NDOC's Notice of Supplemental Declaration of 20 John M. DiMuro, D.O., on November 1, 2017, Ex. A. At a post-evidentiary hearing on November 6, 2017, NDOC announced that Dr. DiMuro had been replaced by a 21 new acting CMO, Leon Ravin, M.D., whose background is in psychiatry. NDOC also announced that Dr. John Scott, M.D. would serve as Dr. Ravin's designee for 22 purposes of Dozier's execution. The manual requires that the CMO or his designee oversee the preparation of the lethal injections drugs.

¹⁴ ¹ Nevada law requires the Director for the Department of Corrections to consult with the State's Chief Medical Officer ("CMO") regarding the selection of the drug or combination of drugs to be used for executions. NRS 176.355. In addition, provisions of NDOC's execution protocol require the CMO be consulted regarding the drugs' dosages to ensure they cause death, and further require that the CMO, or his designee, direct the preparation of the execution drugs. EM 100.02, 103.01 and 103.03.

1 thus issues surrounding the use of the paralytic drug became the primary focal point of the litigation. $\mathbf{2}$

3 7. This Court then scheduled an evidentiary hearing on November 3. 4 2017, for purposes of receiving expert testimony. NDOC continually objected to the 5 appropriateness and necessity of this hearing because, in its view, Dozier had not properly plead or presented a "known and available" alternative method of 6 7 execution as required by Baze and Glossip. At the evidentiary hearing, Petitioner's 8 expert Anesthesiologist, Dr. Waisel, testified about his concerns regarding NDOC's 9 revised protocol and in particular regarding NDOC's proposed use of a paralytic in 10 the execution. NDOC cross-examined Dr. Waisel. This Court, over Petitioner's 11 hearsay objection, admitted as evidence the October 20, 2017, Declaration of Dr. 12 DiMuro, that was requested earlier by this Court.

13 8. At a follow-up hearing conducted on November 6, 2017, this Court 14 accepted into evidence, this time over NDOC's objection, a second Declaration of Dr. 15 Waisel signed that same date.² On November 8, 2017, NDOC submitted further revisions to EM 103 and 110. On November 9, 2017, NDOC filed a signed and 16 17 adopted execution manual.

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FINDINGS OF FACT

19 9. The fundamental question presented to this Court for resolution, once NDOC submitted its three-drug execution protocol on September 5, 2017, followed by two subsequent revisions to EM 103 and 110 of the protocol on October 20, 2017,

² See Petitioner's November 6, 2017 Supplemental Errata, Ex. 38.

1 and November 8, 2017, concerns NDOC's use of a paralytic agent as the third and 2 lethal drug in its lethal injection protocol. Specifically, the issue is whether NDOC's 3 proposed use of the paralytic drug (Cisatracurium) presents a violation of 4 Petitioner's constitutional rights under either Article 1, Section 6 of the Nevada 5 Constitution and/or the Eighth Amendment to the United States Constitution. The 6 Court finds that NDOC's proposed use of the paralytic drug in the execution of 7 Petitioner Scott Dozier presents a substantial risk of harm to Petitioner in violation of his state and federal constitutional rights, based upon the untested protocol of 8 9 NDOC, and the limited medical evidence presented by NDOC.

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A. Known and Available Alternative

11 10. NDOC opposes Petitioner's position regarding elimination of the 12 paralytic agent on essentially two grounds. First, NDOC argues that Petitioner 13 failed, in accordance with the requirements of Baze and Glossip, to plead or show a known and available alternative method of execution. Yet Petitioner, through his 14 defense team, and specifically in his Reply, did provide a known and available 15 alternative. To the extent NDOC's position is that the defense's expert 16 anesthesiologist did not himself offer the alternative, the Court finds NDOC's 17 18 argument unpersuasive. The argument is based on a technicality, a fine line without a distinction, as Petitioner's expert was ethically obligated to couch his 19 20 testimony in a particular way while not offering the best way to kill someone based on his anesthesiology experience. Based upon the totality of the testimony of the 21 22 expert and his declarations, the Court finds NDOC's position that the Petitioner did

not pose a known and available method to be an oversimplification. This Court can
 properly consider Dr. Waisel's testimony in conjunction with the proffered
 alternative by the defense.

The United States Supreme Court requires that the proffered 4 11. 5 alternative be known, feasible, and readily implementable. Baze, 553 U.S. at 52. 6 The Petitioner's proposed alternative here is feasible according to the testimony of 7 Dr. Waisel. The alternative is available according to NDOC's representations that 8 they have access to 15,000 micrograms of Fentanyl and also have sufficient 9 amounts of Diazepam. In addition, NDOC's argument that the alternative proffered 10 is not "known" is of no help to NDOC because the alternative is actually contained 11 within the State's protocol. Additionally, the extent to which the alternative is 12 unknown is equally attributable to the State's own protocol. Nothing is "known" 13 about NDOC's untested protocol in this particular case. However, the only cross-14 examined testimony of any medical expert here is that the protocol proposed by Petitioner will in fact kill Petitioner without risk of suffering air hunger or 15 awareness of suffocation. The Court therefore finds that the Petitioner has met his 16 burden of proffering a known and available alternative method of execution. 17

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B. Substantial Risk of Harm

19 12. In opposing Petitioner's request to remove the paralytic drug, NDOC
20 argues he cannot establish that its use of the paralytic is unconstitutional under the
21 standard announced by the Supreme Court in *Baze* and *Glossip*. Under those
22 decisions, Petitioner must show that, absent removal of the paralytic agent, he is

being subjected to a "substantial risk of serious harm." *Glossip*, 135 S Ct. at 2737; *Baze*, 553 U.S. at 50. NDOC relies on the *Baze* decision, in which the Supreme Court determined the use of a paralytic agent in a three drug protocol was not unconstitutional on the basis that the *Baze* petitioners were unable to demonstrate use of the paralytic presented the requisite risk of harm. This Court has reviewed *Baze* in detail and is fully aware that the decision makes it very difficult to mount a lethal injection challenge based upon the language of the case.

8 13. This Court recognizes and appreciates that an inmate sentenced to 9 death is not entitled to a perfect execution. *See Baze*, 553 U.S. at 48 ("the 10 Constitution does not demand the avoidance of all risk of pain in carrying out 11 executions."). In addition, there will always be some risk of movement – twitching 12 or fist clenching – by the condemned inmate. That is to be expected.

13 14. This Court finds, however, that the circumstances presented in this
14 instance are distinguishable from the circumstances presented in *Baze*, for
15 numerous reasons.

16 15. First, the protocol proposed by NDOC, unlike Kentucky's protocol in 17 *Baze*, is untested. Kentucky was using a well-established three-drug protocol 18 (consisting of sodium thiopental, pancuronium bromide and potassium chloride), 19 that had a history of use in Kentucky and in many executions by many other death 20 penalty states. Further, the Supreme Court observed in *Baze* that of the thirty-six 21 death penalty states at that time, thirty of the states were using the same protocol 22 with the exact same drugs. *Baze*, 553 U.S. at 44. Here, there is no such similarity

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among the states: the protocol proposed by NDOC has never been used in any state in the United States and has never previously been reviewed by any court.

3 16. Second, the Supreme Court in Baze referenced a number of studies and 4 periodicals supporting the use of the three drug protocol utilized by Kentucky. See. 5 e.g., Baze, 553 U.S. at 107-111 (concurring opinion of Breyer, J.). These included 6 studies regarding the adequacy of the first drug anesthetic (Sodium Thiopental), 7 and the potential for awareness of the inmate during the lethal injection process. Id. 8 It is notable that Justice Brever concluded that it could not be found, either in the 9 record or in readily available literature, that there were grounds to believe that 10 Kentucky's lethal injection method created a significant risk of unnecessary 11 suffering. Here, however, there are no such studies because the Court is examining 12 a protocol that has no similarity and has never been used in any state.

13 17. Unlike in *Baze*, here the only studies presented and that this Court 14 can rely upon are those presented by Petitioner's expert Anesthesiologist, Dr. 15 Waisel, showing that when Fentanyl is administered, awareness can occur even 16 with high doses. *See* November 3, 2017 hearing, Petitioner's Exs. H, I and J.³ This 17 presents a serious concern. Dr. Waisel's testimony was clear that the condemned 18 inmate could be not breathing yet still be aware, and that the inmate could be 19 unable to respond to stimuli yet still be aware. *See infra* Paragraphs 19-23.

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18. Unlike the record in *Baze*, here all that has been presented to the Court in terms of live testimony is the testimony of Petitioner's expert. This Court

³ See also November 3, 2017 Hearing, State's Exs. 10 and 11.

finds Dr. Waisel to be a very credible witness. Dr. Waisel testified regarding the risk presented by the proposed use of the Cisatracurium, specifically concerning the risk of the inmate suffering "air hunger," and the risk of being aware yet paralyzed and suffocating to death. The Court did not hear any other significant concern except for "air hunger" or awareness during the administration of Cisatracurium. For example, the Court heard no evidence about pain in the extremities or anything else.

8 19. Dr. Waisel testified that his concern about the risk of air hunger and 9 awareness is premised upon an error in the administration of the protocol. If the 10 protocol is followed as written, and Mr. Dozier receives the maximum dosages of 11 Diazepam and Fentanyl as described in the protocol, Dr. Waisel stated there is no 12 risk of air hunger or awareness. Dr. Waisel acknowledged that as long as the 13 protocol is followed correctly, there is not a substantial risk of pain from the 14 Cisatracurium.

20. Further, Dr. Waisel stated that, *if* the first two drugs are delivered successfully as written in the protocol, removing the Cisatracurium is not a slight or marginally better alternative method of execution. Dr. Waisel also testified that the Cisatracurium provides no additional benefit. Dr. Waisel testified that Cisatracurium increases the risk of inhumane treatment rather than decreases the risk. He stated that in medicine, a doctor would never take a risk that does not provide a benefit.

21. Dr. Waisel testified that it is extremely unlikely to the point of medical certainty that there would be a substantial risk of pain or suffering if Mr. Dozier was executed using 100 mg of Diazepam and 7500 mcg of Fentanyl (without the Cisatracurium).

22. 5 Additionally, Dr. Waisel testified that it is unlikely that Mr. Dozier will experience air hunger or panic after the initial loading doses of diazepam and 6 7 fentanyl, if the drugs are actually successfully delivered. Just on the loading doses 8 themselves, if the protocol is carried out as written and intended, Dr. Waisel 9 testified there was no need to worry about awareness, air hunger, or pain. Dr. 10 Waisel's opinion here was predicated upon the assumption that the drugs were fully 11 and successfully delivered and an experienced person correctly made the 12 assessments of lack of response to both verbal and tactile stimuli. Dr. Waisel testified that even a surgeon who had been to medical school would not necessarily 13 be able to reliably assess awareness. He testified that there was no objectively 14 ascertainable definition of a medical grade pinch, which is the critical time period 15 where the execution team decides to administer the Cisatracurium. 16

Dr. Waisel testified that there was always more of a potential risk if
only the initial loading doses were administered versus the maximum doses of 100
mg of Diazepam and 7,500 mcg of Fentanyl.

20 24. Dr. Waisel also testified that use of the two drugs, Diazepam and
21 Fentanyl, would work, would not be painful, and would cause Mr. Dozier's death.
22 His testimony is unrebutted.

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25. Mr. Dozier's execution will be the first execution in Nevada in eleven years in a new and unused execution chamber. Thus, beyond other concerns about NDOC's untested protocol, it is unknown how the delivery or administration of the drugs will go, i.e., whether it will proceed smoothly, given the absence of any recent experience in carrying out lethal injection executions by the prison staff and other participants involved. This adds to the risks presented.

7 26. While this Court admitted the Declaration of Dr. DiMuro, despite the 8 fact that NDOC did not present his live testimony, the Declaration presents little to 9 counter the opinions of Petitioner's expert. There is little contained in the 10 Declaration in the way of debate or anticipatory rebuttal of the testimony provided by Dr. Waisel. While the Court does have Dr. DiMuro's Declaration, provided at the 11 12 Court's request, that is all that the Court has from the State. The Court has 13 NDOC's stated purpose of the paralytic, but has very little if anything to contravene 14 the testimony of Petitioner's expert except for written materials presented by the State relating to packaging inserts for Diazepam and Fentanyl and some additional 15 16 study information. This is in stark contrast to the State of Kentucky and the Baze 17 case where the Court was confronted with a known protocol with numerous 18 supporting studies.

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27. Here, the specific rationale offered by Dr. DiMuro to justify use of the Cisatracurium · that the inmate could attempt to move the diaphragm muscle to

1	initiate a breath 4 \cdot constitutes a "masking" event. In accordance with the testimony
2	of Petitioner's expert, this rationale serves as a reason why the Cisatracurium
3	should not be used. It is widely recognized that a major complaint regarding use of a
4	paralytic agent in an execution is that the paralytic serves to "mask" any signs of
5	distress, pain or suffering being experienced by the condemned inmate. This
6	concern was mentioned multiple times by the various justices in the Baze opinions.
7	See Baze, 553 U.S. at 57 (Roberts, C.J., announcing judgment of the Court, joined
8	by Kennedy, J., and Alito, J.) (Petitioner's contend Kentucky should omit the
9	pancuronium bromide "because it serves no therapeutic purpose while suppressing
10	muscle movements that could reveal an inadequate administration of the first
11	drug"), id. at 71 (Stevens, J., concurring in the judgment) ("Because it masks any
12	outward sign of distress, pancuronium bromide creates a risk that the inmate will
13	suffer excruciating pain before death occurs"), id. at 111 (Thomas, J., joined by
14	Scalia, J., concurring in the judgment) ("Petitioners argued that Kentucky
15	should eliminate the use of a paralytic agent, such as pancuronium bromide, which
16	could, by preventing any outcry, mask suffering an inmate might be experiencing
17	because of inadequate administration of the anesthetic"), and <i>id.</i> at 122 (Ginsburg,
18	J., joined by Souter, J., dissenting) ("Kentucky's use of pancuronium bromide to
19	paralyze the inmate means he will not be able to scream after the second drug is
20	injected, no matter how much pain he is experiencing.").

⁴ October 20, 2017 Declaration of John M DiMuro, D.O., p. 3.

28. While the Supreme Court in *Baze* observed that use of the paralytic serves the purpose of preserving the dignity of the execution, there has been nothing submitted to this Court indicating its use is to serve that purpose here. No medical evidence has been presented that the Cisatracurium is necessary to preserve the dignity of the proceeding or that the request to take out the paralytic is, in the words of Justice Thomas, being offered by the defense to disgrace the death penalty. *Id.* at 107. This Court simply has not heard any argument or seen any evidence of that being the purpose of the paralytic in this protocol.

29. Finally, Petitioner additionally raised arguments pursuant to the Glossip and Baze decisions regarding the adequacy of the qualifications and training of prison officials and staff to reliably carry out an execution. This Court finds that NDOC has done a reasonable and appropriate job in having enough personnel under the new protocol to carry out Petitioner's execution. The Court does not find that there is any evidence of improperly trained staff based upon the signed protocol. Other than those specifically addressed in this Order, this Court does not find persuasive Petitioner's numerous other alleged failures in the protocol or staffing. NDOC has put together a comprehensive execution protocol in this regard. This finding is provided some support by the opinion of Petitioner's expert, whose testimony the Court has already found to be very credible, that the execution protocol will work without use of a paralytic.

CONCLUSIONS OF LAW

2 30. For the above stated reasons, and based on the evidence presented, 3 this Court finds that NDOC's proposed use of a paralytic agent in the execution of 4 Petitioner Scott Dozier presents an unconstitutional "substantial risk of serious 5 harm," and an "objectively intolerable risk of harm" in violation of the Eighth 6 Amendment to the United States Constitution and Article 1, Section 6 of the 7 Nevada Constitution. Baze, 553 U.S. at 50. This Court further finds that Petitioner 8 has identified an alternative method of execution that is "feasible, readily 9 implemented, and in fact significantly reduce[s] a substantial risk of severe pain." 10 Id. at 52. Thus, this Court hereby enjoins NDOC from use of a paralytic agent in 11 carrying out the planned execution of Scott Raymond Dozier.

12 31. The action taken by this Court in response to Petitioner's filings 13 regarding the lawfulness of his planned execution rests upon the Court's inherent 14 authority to inquire into the lawfulness of its own order, here the Court's signing 15 and entry of a warrant of execution for Petitioner Scott Dozier. See Halverson v. 16 Hardcastle, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007); cf. NRS 1.210(3). In 17 particular, this Court has the "inherent power to prevent injustice," Halverson, 123 18 Nev. at 261-62, 163 P.3d at 440, and to tailor the scope of its orders to avoid 19 constitutional concerns. See, e.g., Jordan v. State ex rel. Dep't of Motor Vehicles and 20 Public Safety, 121 Nev. 44, 60, 110 P.3d 30, 42 (2005) (orders regarding vexatious litigants must be narrowly tailored to avoid violation of constitutional right of 21 access to the courts). Counsel for the NDOC has noted on the record that the Court 22

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1	has the inherent authority to review the execution procedure, but has maintained it
2	must do so within the parameters of case law as established in <i>Baze</i> and <i>Glossip</i> .
3	ORDER
4	IT IS HEREBY ORDERED that Petitioner's August 15, 2017 Motion for
5	Determination of the Lawfulness of Scott Dozier's Execution, and his corresponding
6	request ⁵ to eliminate use of a paralytic drug and to restrict NDOC's execution
7	protocol to the first two drugs (Diazepam and Fentanyl) in NDOC's November 7,
8	2017, execution manual, is HEREBY GRANTED, and NDOC IS ENJOINED from
9	use of a paralytic agent in carrying out the execution of Scott Raymond Dozier.
10	IT IS FURTHER ORDERED that Petitioner's Motion for Leave to Conduct
11	Discovery is otherwise DENIED as MOOT.
12	DATED this <u>27</u> ^E day of November, 2017
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14	JENNIFER P. TOGLATTI
15	DISTRICT JUDGE
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22 23	⁵ See Petitioner's 9-25-17 Reply at 10.
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1	I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth
2	Judicial District Court EFP system to:
3	Ann M. McDermott Jordan T. Smith, Esq.
	Thomas A. Ericsson, Esq. Lori C. Teicher, Esq.
4	David Anthony, Esq. Jonathan E. Vanboskerck, Esq.
5	Torane Sanzo
6	DIANE SANZO, Judicial Assistant
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EXHIBIT 9

EXHIBIT 9

	Case 3:21-cv-00176-RFB-CLB Docum	ent 41 Filed 05/04/21 Page 1 of 5	
1 2 3 4 5 6 7 8 9	AARON D. FORD Attorney General JULIE A. SLABAUGH (Bar No. 5783) Chief Deputy Attorney General State of Nevada Office of the Attorney General 100 North Carson Street Carson City, Nevada 89701-4717 Telephone: (775) 684-1131 Fax: (775) 684-1145 JSlabaugh@ag.nv.gov Attorneys for Defendant Ihsan Azzam, Chief Medical Officer of the State of Nevada.		
10	UNITED STAT	ES DISTRICT COURT	
11	DISTRIC	CT OF NEVADA	
12	ZANE M. FLOYD,	Case No. 3:21-cv-00176-RFB-CLB	
13	Plaintiff,	MOTION TO WITHDRAW AS	
14	vs.	ATTORNEY OF RECORD FOR DR. ISHAN AZZAM	
15	CHARLES DANIELS, et al.,		
16	Defendants.		
17		cal Aaron D. Ford, and Chief Deputy	
18		h, of the State of Nevada, Office of the	
19		Nevada Rules of Professional Conduct	
20	("NRPC") 1.7, 1.11 and 1.16, and Local Rule ("LR") IA 10-6 and hereby move		
21	to withdraw as attorneys for Defendant Dr. Ishan Azzam. This motion is		
22	based upon the Memorandum of Points and Authorities, Declarations of		
23	Julie A. Slabaugh and Leslie M. Nino Piro, attached hereto as Exhibits "A"		
24	and "B", and such argument and evidence as may be presented at the		
25	hearing on this motion, should that occur.		
26	/////		
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MEMORANDUM OF POINTS AND AUTHORITIES

2 II. STATEMENT OF FACTS

On April 16, 2021, Plaintiff Zane M. Floyd filed his Motion for 3 Temporary Restraining Order with Notice and Preliminary Injunction (ECF 4 No. 5 & 6) and his Motion for Disclosure of Method of Execution (ECF No. $\mathbf{5}$ 7). On April 21, 2021, Floyd filed his Motion for Stay of Execution. (ECF 6 No. 10). On April 30, 2021, Dr. Azzam filed his Opposition to Floyd's 7 8 Motion for Temporary Restraining Order with Notice and Preliminary Injunction and joined in the Nevada Department of Corrections (NDOC) 9 Defendants oppositions to all of Floyd's pending motions. (ECF Nos. 26, 27 10 28 and 29). 11

12 On May 3, 2021, this Court held a hearing on all of Floyd's pending 13 motions and following argument set an evidentiary hearing for May 6, 2021 14 to hear testimony from NDOC Director Daniels and Dr. Azzam regarding, 15 among other things, what drugs are being considered for the execution 16 protocol by Director Daniels, what drugs are available, what drugs are not 17 available and when the execution protocol will be finalized.

Following the hearing on May 3, 2021, counsel for Julie A. Slabaugh 18 and Leslie Nino Piro, General Counsel to the Office of the Attorney General 19(AGO) had a conversation with Dr. Azzam. (Exhibits A & B). In the course 20of that conversation it became clear that there was an actual conflict 21between Dr. Azzam and the NDOC Defendants in this case. (Exhibits A & 22B). Based on that conflict, Ms. Nino Piro informed Dr. Azzam that CDAG 23Slabaugh needed to withdraw and the AGO would retain outside counsel to 24continue his representation in this case. On May 4, 2021, Ms. Nino Piro 25secured outside counsel to continue Dr. Azzam's representation in this case. 26(Exhibit B). Ms. Nino Piro is currently expediting a written agreement to 27formally retain outside counsel. Outside counsel has informed Ms. Nino 28

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Piro that a substitution of counsel will be filed as quickly as possible once
 the agreement is signed. However, even if outside counsel files the
 substitution by tomorrow, May 5, 2021, it is unlikely that outside counsel
 will be able to fully and adequately represent Dr. Azzam at the evidentiary
 hearing scheduled on Thursday, May 6, 2021. (Exhibit B).

6 III. ARGUMENT

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LR IA 10-6 states in pertinent part:

(b) No attorney may withdraw after appearing in a case except by leave of Court after notice has been served on the affected client and opposing counsel.

(e) Except for good cause shown, no withdrawal or substitution shall be approved if delay of discovery, the trial or any hearing in the case would result. Where delay would result, the papers seeking leave of Court for the withdrawal or substitution must request specific relief from the scheduled trial or hearing. If a trial setting has been made, an additional copy of the moving papers shall be provided to the Clerk for immediate delivery to the assigned district judge, bankruptcy judge or magistrate judge.

NRPC 1.16(a)(1) states that a lawyer shall not represent a client or shall withdraw
from representation of a client if "the representation will result in violation of the Rules of
Professional Conduct or other law". NRPC 1.7 states that a lawyer shall not represent a
client if the representation involves a concurrent conflict of interest. *See also* LR IA 10-7
(stating that attorneys must follow rules of professional conduct as adopted by the
Supreme Court of Nevada).

In this case, the AGO must be allowed to withdraw as attorney of record because a
conflict of interest has been identified between Dr. Azzam and the NDOC Defendants.
(Exhibits A & B). Until such time as new counsel enters an appearance the AGO requests
that the hearing, at least as it pertains to Dr. Azzam's testimony, scheduled for May 6,
2021 be continued so that Dr. Azzam may be fully and adequately represented during the
proceeding by conflict free counsel. The AGO also requests that the due date for an
answer or other responsive pleading be continued from May 7, 2021 until such time as the

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1	Plaintiff Zane Floyd has filed his amended complaint in this matter or until outside		
2	counsel has had adequate time to prepare a responsive pleading. <i>See</i> ECF No. 33, p. 3, ll.		
3	7-11.		
4	III. CONCLUSION		
5	Based on the foregoing, it is respectfully requested that this Court enter an order		
6	approving the AGO's withdrawal as attorney for Defendant Dr. Ishan Azzam.		
7	DATED this 4 th day of May, 2021.		
8	AARON D. FORD Attorney General		
9	By:lebuug		
10	JULIE SLABAUGH (Bar No. 5783) Chief Deputy Attorney General		
11	Chief Deputy Attorney General		
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1	CERTIFICATE OF SERVICE
2	I certify that I am an employee of the Office of the Attorney General,
3	State of Nevada, and that on this 4 th day of May, 2021, I served a true and
4	correct copy of the foregoing "Motion to Withdraw as Attorney of Record for
5	Dr. Ishan Azzam", by U.S. District Court CM/ECF electronic filing to:
6	Rene L. Valladares
7	Federal Public Defender
8	David Anthony Assistant Federal Public Defender
9	Brad D. Levenson Assistant Federal Public Defender
10	Timothy R. Payne
11	Assistant Federal Public Defender
12	D. Randall Gilmer Chief Deputy Attorney General
13	And via e-mail and U.S. Postal Service to:
14	
15	Ihsan Azzam, Ph.D., M.D. Chief Medical Officer
16	4150 Technology Way Carson City, NV 89706
17	iazzam@health.nv.gov
18	(101
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EXHIBIT A

EXHIBIT A

AA307

DECLARATION OF JULIE A. SLABAUGH

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I, Julie A. Slabaugh, herein declare under penalty of perjury that:
1. I am over the age of 18. That the statements contained herein,
except where otherwise indicated to be upon information and belief, are
based on my personal knowledge, are true, accurate and correct, are made
under penalty of perjury, and that if I am called to testify regarding the
matters herein, I would testify consistently therewith.

8 2. I am currently employed by the Nevada Attorney General's Office
9 (AGO) as the Chief Deputy Attorney General in the Health and Human
10 Services Division.

I am currently counsel of record for Dr. Ishan Azzam, Chief
 Medical Officer of the State of Nevada in the case of Zane M. Floyd v.
 Charles Daniels et al, Case No. 3:21-cv-00176-RFB-CLB (case).

4. On May 3, 2021, following the hearing held in this case I had a
conversation with Dr. Azzam. Leslie M. Nino Piro, General Counsel for the
AGO was also present for the conversation. In the course of that
conversation it became clear that there was an actual conflict between Dr.
Azzam and the "NDOC Defendants" (Charles Daniels, Harold Wickham,
William Gittere, William Reubart, David Drummond, Dr. Michael Minev,
Dr. David Green, and Linda Fox) in this case.

5. Based on that conflict, Ms. Nino Piro informed Dr. Azzam that
CDAG Slabaugh needs to withdraw and that she would retain outside
counsel to continue his representation in this case.

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- 25 //////
- 26 //////
- 27 //////
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I FURTHER DECLARANT, JULIE A. SLABAUGH, SAYETH NAUGHT.
2 Pursuant to 28 U.S.C. § 1746, Declarant, Julie A. Slabaugh herein
3 certifies, under penalty of perjury, that the foregoing is true and correct.
4 Executed On: May 4, 2021.

JULIE A. SLABAUGH By:

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EXHIBIT B

EXHIBIT B

AA310

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DECLARATION OF LESLIE M. NINO PIRO

I, Leslie M. Nino Piro, herein declares under penalty of perjury that:
I am over the age of 18. That the statements contained herein,
except where otherwise indicated to be upon information and belief, are
based on my personal knowledge, are true, accurate and correct, are made
under penalty of perjury, and that if I am called to testify regarding the
matters herein, I would testify consistently therewith.

8 2. I am currently employed by the Nevada Attorney General Office
9 (AGO) as General Counsel.

Julie A. Slabaugh, Chief Deputy Attorney General (CDAG)
 in the AGO's Health and Human Services Division, is currently counsel of
 record for Dr. Ishan Azzam, Chief Medical Officer of the State of Nevada, in
 the case of Zane M. Floyd v. Charles Daniels et al., Case No. 3:21-cv-00176 RFB-CLB (case).

4. On May 3, 2021, following the hearing in this case, I had a
 conversation with Dr. Azzam. CDAG Slabaugh was also present for this
 conversation. In the course of that conversation, it became clear that an
 actual conflict exists between Dr. Azzam and the "NDOC Defendants"
 (Charles Daniels, Harold Wickham, William Gittere, William Reubart,
 David Drummond, Dr. Michael Minev, Dr. David Green, and Linda Fox) in
 this case.

5. Based on that conflict, I informed Dr. Azzam that CDAG
Slabaugh needs to withdraw and I would retain outside counsel to continue
his representation in this case.

6. This afternoon, May 4, 2021, I secured outside counsel to
continue Dr. Azzam's representation in this case. I am currently expediting
a written agreement to formally retain outside counsel.

7. Outside counsel has informed me that a substitution of counsel 1 $\mathbf{2}$ will be filed as quickly as possible once the agreement is signed. However, even if outside counsel files the substitution by tomorrow, May 5, 2021, I do 3 not believe outside counsel will be able to fully and adequately represent 4 Dr. Azzam at the evidentiary hearing scheduled on Thursday, May 6, 2021. $\mathbf{5}$

8. I believe a continuance of the May 6, 2021 evidentiary hearing is 6 necessary to ensure that Dr. Azzam is fully and adequately represented by 7 conflict-free counsel. 8

9. Based on the actual conflict, the AGO will be unable to file an 9 answer or other responsive pleading by the May 7, 2021 deadline, and I ask 10 that the deadline be extended until such time as Plaintiff Zane Floyd has 11 filed his amended complaint in this matter. ECF No. 33 at 3:7-11. 12FURTHER DECLARANT, LESLIE M. NINO PIRO, SAYETH NAUGHT. 13

Pursuant to 28 U.S.C. § 1746, Declarant, Leslie M. Nino Piro herein 14 certifies, under penalty of perjury, that the foregoing is true and correct. 15Executed On: May 4, 2021. 16

By:

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Electronically Filed 6/10/2021 8:56 AM Steven D. Grierson CLERK OF THE COURT TRAN DISTRICT COURT CLARK COUNTY, NEVADA * * * * * ZANE FLOYD, CASE NO. A-21-833086-C Plaintiff, DEPT NO. XIV vs. NEVADA DEPARTMENT OF CORRECTIONS, TRANSCRIPT OF PROCEEDINGS Defendant. AND RELATED PARTIES BEFORE THE HONORABLE ADRIANA ESCOBAR, DISTRICT COURT JUDGE TUESDAY, JUNE 8, 2021 RE: PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION **APPEARANCES:** FOR THE PLAINTIFF: DAVID S. ANTHONY, ESQ. BRADLEY D. LEVENSON, ESQ. FOR NV DEPT. OF CORRECTIONS: STEVEN G. SHEVORSKI, ESQ. D. RANDALL GILMER, ESQ. RECORDED BY: STACEY RAY, COURT RECORDER TRANSCRIBED BY: JD REPORTING, INC.

A-21-833086-C | Floyd v. NV DoC | 2021-06-08 LAS VEGAS, CLARK COUNTY, NEVADA, JUNE 8, 2021, 11:20 A.M. 1 2 3 Okay. Page 7 is Zane Floyd versus Nevada THE COURT: 4 Department of Corrections. 5 Let's start with plaintiffs, please. On behalf of 6 plaintiff, your appearances for the record. 7 MR. ANTHONY: Good morning, Your Honor. David 8 Anthony from the Federal Public Defender's office for Zane 9 Flovd. I also have my cocounsel Brad Levenson. 10 And we also have Mr. Floyd, who is in the custody of 11 the Nevada Department of Corrections; and we'll waive his 12 appearance for the purposes of this hearing today. 13 THE COURT: Okay. Very good. Thank you. 14 And on behalf of the Department of Corrections? 15 MR. SHEVORSKI: Good morning, Your Honor. Steve Shevorski, Chief Litigation Counsel of the State of Nevada, on 16 17 behalf of the Nevada Department of Corrections. 18 THE COURT: Okay. And then is there anyone here that 19 is representing Charles Daniels or Ihsan Azzam. 20 MR. SHEVORSKI: Can you hear me, Your Honor? Steve 21 Shevorski for the record. 22 THE COURT: Yes. 23 MR. SHEVORSKI: It's my understanding in this 24 particular action that Director Daniels has not been served, 25 and so we have not had an opportunity to represent him; JD Reporting, Inc.

obviously, we would. 1 2 Dr. Azzam has separate counsel through the 3 Sklar Williams firm. But I don't believe Dr. Azzam has been 4 served either. 5 Mr. Gilmer is on the line, who is the chief for the 6 Nevada Department of Corrections in the Attorney General's 7 office, and can speak to that further. 8 But that is my knowledge of that situation, Your 9 Honor. 10 THE COURT: All right. I'm sorry. Did you say 11 Mr. Gilmore? MR. SHEVORSKI: Mr. Gilmer, spelled G-i-l-m-e-r. 12 13 Now, he speaks with a Michigan accent, but you can still 14 understand him. 15 THE COURT: I can understand it. Thank you. Mr. Gilmer, good morning. 16 17 MR. GILMER: Good morning, Your Honor. Randall 18 Gilmer for the record. 19 I believe what Mr. Shevorski stated is the correct 20 position. I am unaware of Dr. Azzam, who we do not represent, 21 as Mr. Shevorski indicating, being served. 22 And I am also unaware of Mr. Daniels being served 23 specifically with regard to this particular claim and case. 24 THE COURT: Okay. Very good. Thank you. 25 All right. This is -- we're going to start. Let's

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This is Plaintiff's Motion for Temporary Restraining 1 see. 2 Order with Notice and Preliminary Injunction.

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I'd like Mr. Zane's counsel to begin, and I'd like you to speak, I mean, not at turtle speed, that slow, but not so fast that I can't take notes. So please -- please go ahead. MR. ANTHONY: Thank you, Your Honor.

THE COURT: I've reviewed your pleadings thoroughly, but I would still like to have a thorough record on this case. 8 9

MR. ANTHONY: Thank you, Your Honor.

10 Mr. Floyd has filed a motion requesting a temporary 11 restraining order and a preliminary injunction against the 12 Nevada Department of Corrections. Mr. Floyd argues that the 13 statutory provision NRS 176.355 constitutes an unlawful 14 delegation of authority from the legislative branch to the 15 executive in violation of Article III, Section 1, of the Nevada 16 Constitution.

17 We are asking the Court to hold that the statutory 18 provision is unconstitutional; and

19 We are asking the Court to enjoin the Department of 20 Corrections from carrying out Mr. Floyd's execution until the 21 legislature has amended the statute to provide suitable 22 standards and guidelines to the Department of Corrections.

23 As I stated, Your Honor, the statutory provision in 24 question is NRS 176.355.

The State's opposition to our motion does not address

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the issue of irreparable prejudice or the public interest;
 therefore, the only issue before the Court today is the factor
 regarding the reasonable likelihood of success.

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The controlling authority is acknowledged in both of the parties' briefs. The case is the *Luckman* (phonetic) case. The *Luckman* case talks about the need to have suitable standards that are established by the legislature for the agency's exercise of its power.

9 So maybe to start with we could engage in a thought 10 experiment.

11 According to the State's position, the only thing 12 that would be unlawful would be if a method of execution was 13 not specified in a state statute. The problem with that is 14 that we could, for example, have a state statute that listed 15 all known available methods of execution. It could list lethal 16 injection, electrocution, hanging, or firing squad. And it 17 appears from the State's position that the former statute would 18 be unconstitutional, but the latter would not.

19 It is our contention that merely stating the means of 20 execution is not providing sufficient and suitable standards, 21 as required by the *Luckman* case, to delegate the authority to 22 effectuate an execution to the Department of Corrections.

The particular concerns which we have identified for the Court include critical questions, such as the drug or combination of drugs that the Department of Corrections intends

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to use in the execution. And similarly even the State
acknowledges that the term lethal injection itself can be an
ambiguous term. The term lethal injection does not necessarily
specify whether the injection is intravenous, intramuscular or
subcutaneous, which are all possibilities under the way that
the statute is worded.

I believe, Your Honor, that the two cases that the parties discuss provide a very helpful point of departure with respect to this issue. In the *Pine* (phonetic) case, which is cited by both parties, the question that was being interpreted was whether there was an unlawful delegation of authority to the executive under Chapter 453 of the Nevada Revised Statutes, which govern the licensing of those who qualify as engineers.

One of the things that's interesting about the *Pine* case is that the statutory scheme in question involved a total of what I have counted as 82 statutory provisions talking about the licensing and the discipline of engineers.

Similarly, in the *Luckman* case, the Nevada Supreme Court was addressing Chapter 453 of the NRS, which deals with the Uniform Controlled Substances Act. In *Luckman* and in Chapter 453, the Nevada Supreme Court was addressing a statutory scheme that consisted of 173 different statutory provisions.

I would like to contrast those circumstances with those that exist here where we have one statutory provision

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that does nothing more than specify a means of execution.

Your Honor, we contend that this is a matter of first 3 impression for the Court. The parties have acknowledged that the Nevada Supreme Court has addressed a similar issue, albeit one that was addressed under the Eighth Amendment and under Article I, Section 6, of the Nevada Constitution, which is Nevada's counterpart to the Eighth Amendment.

8 In the Gee (phonetic) case, cited by both parties, 9 and also in the McConnell case, the Nevada Supreme Court held 10 that it did not violate the Eighth Amendment to have an absence 11 of standards regarding the lethal injection procedure. Our 12 contention is that the Gee case and the McConnell case are not 13 controlling on the question that the Court must decide today, which is whether the delegation of authority violates the state 14 15 constitutional provision regarding the separation of powers.

16 There's a good reason for the difference. It is hard 17 to conclude simply based on the absence of standards that an 18 execution will necessarily be cruel and unusual, in violation 19 of the Constitution. That is not the question that the Court 20 must decide today.

21 The parties both discuss the *Hobbs* case, which is on 22 point with the argument that Mr. Floyd is making to the Court 23 The State's position is that Hobbs is an outlier, and I today. 24 would respectfully submit to the Court that that is misleading 25 in certain respects.

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First of all, there are six states that designate a particular drug or drugs to be used in a lethal injection protocol. Furthermore, five additional states that have the death penalty have, including Nevada, have not yet weighed in on this issue. So I believe it is a stretch to say that the Hobbs case is an outlier when it comes to what can and should be done with respect to giving the executive branch sufficient guidance and standards regarding an execution procedure.

9 One of the assumptions that is made by the Department 10 of Corrections is there is an assumption of expertise to the 11 Department of Corrections. Interestingly enough, there is no 12 factual support made in favor of that assertion.

13 The director of the Department of Corrections 14 actually testified in federal court at a hearing on May 6th 15 of this year, and that is in the exhibits before the Court in 16 the reply to our motion. In his testimony the director 17 acknowledged that he was not qualified to opine about the 18 efficacy of the use of certain drugs in a lethal injection protocol.

He testified that if he had questions about that he 21 would ask NDOC's pharmacist for more guidance. The problem 22 there is is that even a pharmacist doesn't necessarily possess a medical expertise that one would expect to be able to determine the propriety of a lethal injection protocol. The closest that you could get would be an anesthesiologist, but 25

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there is no suggestion in the record that any such consultation
 or anything like that has occurred.

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Furthermore, the State also argues that the executive branch is in a unique position based upon their ability to assess manufacturers and supply chains. Again, our position is that if the legislature weighs in on this issue they can assure that the particular types of drugs that are suitable for lethal injection are used and produced for executions in the state of Nevada.

What the problem is is that when the Department of Corrections goes about obtaining lethal injection drugs the way they are doing, they do it by subterfuge, and they don't do it because the drugs in question are medically appropriate. That is a misnomer. That is not the basis for the drugs that they obtain or acquire.

Even more problematic is that all of these decisions, all of these critical decisions about life and death are made in secret. Generally, when decisions are made in secret, they are poor decisions. That is exactly what is playing out right now, Your Honor.

Right now Mr. Floyd faces an imminent execution date for the week of July 26th of this year. As we sit here right now, the Nevada Department of Corrections has not disclosed a finalized execution protocol to either Mr. Floyd or to the public, which they said that they would do.

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This is the same way that things played out in 2017, the last time the Department of Corrections was faced with an execution. In that circumstance, we had provided materials to the court showing that the defense experts that were hired on behalf of the inmate were necessary to help the Department of Corrections know what the dosages of the drug should be. And, in fact, the Department of Corrections adopted the dosages that were suggested by the condemned inmate's expert witnesses.

9 In fact, even after those modifications occurred, the 10 protocol was found by the state court to violate the 11 Eighth Amendment and Article I, Section 6, based upon the 12 substantial risk that the Department of Corrections protocol 13 would cause cruel pain and suffering in violation of the 14 Eighth Amendment.

15 The director, when he testified on May 6, testified 16 that he had utmost confidence in the 2017 protocol. The 17 problem is not only did a state court judge find the protocol 18 unconstitutional, we have a very strong indication that the 19 chief medical officer who is supposed to consult with the director has stated that he has a conflict of interest with the 20 21 prison. We believe it is likely that the evidence will show 22 that there is a disagreement between the director and the chief 23 medical officer regarding the drugs to be used.

The problem with the system we have, Your Honor, is it leads to experimental protocols that have never been used

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before throughout the nation on any condemned inmate. That is 1 2 precisely, Your Honor, why we believe that legislative action 3 on this point is critical.

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In the legislature, the legislators can have medical experts testify. All of the decisions that are made by the legislature are done in a transparent manner. Anyone can go to the minutes of the proceedings and see who testified, what their conclusions were, what their expertise was to opine 9 regarding critical issues, such as the decision of the State to 10 take the life of another person.

11 As Justice Scalia said in the Morrison case, "We are 12 a government of laws, not of men." And the one thing that 13 should trouble us all is that the decision that's being made in 14 this case to execute Mr. Floyd appears that it will be made by 15 one man, one person, and there is no transparency to that 16 process.

17 For all of those reasons, Your Honor, we argue that 18 the Court should grant Mr. Floyd's motion for temporary 19 restraining order and preliminary injunction and enjoin the 20 Department of Corrections from effectuating Mr. Floyd's 21 execution until the legislature has had an opportunity to amend 22 the statute to provide suitable, adequate guidance to the 23 director, as required in Luckman and the cases cited therein.

24 That's all I have to argue, Your Honor. If the Court 25 has any questions, I would be happy to answer them.

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1 THE COURT: I do not. I do not have any questions at 2 this time, Counsel.

So I'd like to hear from Mr. Shevorski, please.

4 MR. SHEVORSKI: Thank you, Your Honor. Can you hear 5 me okay?

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6 THE COURT: Yes. But I want you to speak slower as 7 well, please.

8 MR. SHEVORSKI: I will endeavor to do my best, Your 9 Honor.

Counsel for Mr. Floyd mentioned the late Justice Antonin Scalia. As you probably remember, Your Honor, I'm a fan of Scalia as well, and I know Your Honor has probably read the book *A Matter of Interpretation* wherein Justice Scalia excoriates persons who look over the heads of the crowd to find their friends. That is not a proper judicial endeavor, but that is precisely what is going on here.

This argument that a lethal injection statute is subject to a separation of powers challenge has been tried time and again in the various states. The sole instance where the argument was successful was in the *Hobbs* case in Arkansas; and my friends from the other side, very good lawyers, cannot cite you another.

And the reason, I think is telling, is that the separation of powers doctrine does not require what my friends are telling you. The separation of powers doctrine deals with

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a structural problem. It asks a simple question: Is one of 1 2 the three branches of government exercising a power that 3 belongs to another? I submit to you, Your Honor, that the 4 answer is plainly no in this instance. 5 My friend from the other side started off with a 6 thought experiment, and he listed a hypothetical statute, one 7 that there is no resemblance to 176.355, Subpart 1, which is 8 really the subpart that they have a problem with. 9 And in that hypothetical statute, opposing counsel 10 mentioned a variety of specific methods of execution that the 11 legislature has specified and said in that instance --12 THE COURT: Counsel, will you please start your last 13 thought again. 14 MR. SHEVORSKI: Yes. 15 THE COURT: I want to make sure that I am following 16 you. 17 And I also -- I need to plug my computer in (video 18 interference). 19 MR. SHEVORSKI: Certainly, Your Honor. 20 THE COURT: Just give me a moment. (Pause in the proceedings.) 21 22 THE COURT: Go on, Counsel. 23 MR. SHEVORSKI: Are you ready? Okay. Thank you, 24 Your Honor. 25 My friend from the other side listed a series of JD Reporting, Inc.

execution methods. Now, I think I would agree with him if the 1 2 Nevada Department of Corrections in that hypothetical scenario 3 had then gone on to add other methods of execution and said 4 thank you, Legislature, for those ideas, but we have got some 5 of our own; we are going to make law and say that there shall 6 be four more choice methods of execution, and we will choose 7 which ones to implement. Because that is precisely where the 8 Nevada Supreme Court said that the Board of Parole 9 Commissioners went wrong in McNeill versus State, at 132 Nevada 10 551. And if you -- the pinpoint cite, Your Honor, the 11 discussion takes place at --

> THE COURT: I have read the case, Counsel. MR. SHEVORSKI: Thank you, Your Honor. THE COURT: I have it here in front of me.

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15 MR. SHEVORSKI: And in that discussion, the Nevada 16 Supreme Court faulted the Board of Parole Commissioners for 17 adding conditions to the parole, and then it was used by the 18 executive to attempt to prosecute the defendant for a new 19 crime, one that the legislature did not specify. In that 20 instance, in McNeill, the Court found that the Board of Parole 21 Commissioners made a law. It said it wrote what the law should 22 be in their view. That is not what has occurred here.

The legislature in 176 has said that there will be capital punishment. It will be by a lethal injection. It will be by a drug or combination of drugs. It will be performed by

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the director of the Department of Corrections. He shall
 consult with the chief medical officer.

3 Now, let me tell you why that does not violate the 4 separation of powers doctrine: Because Luckman tells the Court 5 that it is entirely appropriate for the legislature to delegate 6 fact finding and the state of affairs in which their policy enunciated in the statute is carried out. The legislature --7 8 the separation of powers doctrine does not require the 9 legislature a priori to try to determine as a matter of fact 10 what drugs will be available when a particular execution date 11 is set. It does not specify, it does not -- the separation of powers doctrine does not require the Department of 12 13 Corrections -- or rather the legislature is not required under 14 separation of powers doctrine, excuse me, Your Honor, to 15 specify safety standards under which the execution is to be 16 performed, no more than it -- separation of powers doctrine 17 requires the micromanagement of methods of confinement.

And the reason, Your Honor, is that we presume that the Department of Corrections is going to do so, is going to use that delegation constitutionally, consistent with the Eighth Amendment, consistent with the Eighth Amendment. That is the law.

And similar, this Court is to presume that this statue, 176.355 is constitutional, and it is by allowing the Department of Corrections to find the facts as to what drugs

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A-21-833086-C | Floyd v. NV DoC | 2021-06-08 are available, to find the facts what drugs will be lethal at 1 2 the time the execution date is set. The legislature has acted 3 entirely consistently with Luckman. 4 And I want to talk about McConnell for a second 5 because it is true --6 THE COURT: Excuse me. Wait. Before you move 7 forward, just give me one moment, please. 8 MR. SHEVORSKI: Yes, Your Honor. 9 THE COURT: All right. Go ahead. Thank you, Your Honor. Just a brief 10 MR. SHEVORSKI: 11 moment on McConnell. For the record, at 120 Nevada 1043 is 12 the -- our local Nevada reporter cite. 13 THE COURT: I have it. 14 MR. SHEVORSKI: The court wrote --15 Thank you, Your Honor. McConnell cites no authority from this or any other 16 17 jurisdiction that deems lethal injection unconstitutional as a 18 matter of law because of the absence of detailed codified 19 quidelines for the procedure. And then it goes on to cite one 20 law review article from Ohio in Footnote 7, which is when 21 legislatures delegate death. 22 Now, I agree with my friend from the other side that 23 conversation takes place in the context of the 24 Eighth Amendment, but the Supreme Court's words are telling. 25 The Supreme Court is looking to see if there is any authority

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to show that the absence of codified guidelines for the
 procedure is unconstitutional. The answer at that time was no.
 The answer now is there is one case, *Hobbs*.

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To rule in this case that 176.355 violates the separation of powers doctrine would be very similar to ruling that way in -- at the time of *McConnell*, and the Court should not go out on that island alone. No authority in Nevada and anywhere else, other than the *Hobbs* case in Arkansas, comes out the way that my friends from the other side want you to do so today.

11 176.355 is entirely consistent with separation of
12 powers doctrine. The Department of Corrections is not making
13 law. There are sufficient guidelines in the legislature
14 statute.

15 My friends finished talking about that critical 16 decisions are made in secret, and if they -- if this was done 17 at the legislature, there could be live testimony; there could 18 be medical experts presented. I think I agree with him; 19 however, that has nothing to do with the separation of powers 20 doctrine. It may be that those policy arguments, that expert 21 testimony could lead to a better statute and one that they 22 enjoy. Or perhaps what they want most of all is through that 23 policy discussion that the death penalty will be abrogated.

24 That precise argument occurred during this session.
25 It didn't -- the statute did not pass.

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1	Now, we make these arguments. This is an incredibly
2	important issue, and we debate in the public square the
3	constitutionality of the death penalty and have vigorous
4	disagreements with our friends, but none of that helps you
5	decide the question here today. McConnell does. McNeill does.
6	The weight of authority from the several states all point you
7	to the conclusion that the plaintiff does not have a likelihood
8	of success on the merits, and this Court should deny the
9	plaintiff's motion.
10	Thank you, Your Honor.
11	THE COURT: Thank you, Counsel.
12	Mr. Anthony.
13	MR. ANTHONY: Yes, Your Honor.
14	THE COURT: Yes.
15	MR. ANTHONY: Thank you. I think that the one thing
16	that I can see from the argument today that I believe is
17	helpful for the Court is that I think it crystallizes the
18	position between the parties.
19	We all agree that <i>Luckman</i> requires that there be
20	suitable standards to guide the discretion of an executive
21	agency. So really the question the Court will ask today is, is
22	designating a means of execution all by itself, with nothing
23	more, the existence of a suitable standard to guide agency
24	discretion? It is our position that the answer to the question
25	is no, that Luckman requires more, that the cases Luckman and

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also the *Pine* case deal with comprehensive statutory schemes
 that bear no resemblance to the statute that the Court is
 reviewing today.

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According to the State, the only thing that would violate the separation of powers is if an executive agency goes rogue all on its own and does something entirely different, but that's not really the question of whether there are suitable standards to guide the agency's decision.

9 The State talks about the consultation with the chief 10 medical officer. But as the Court can see from the exhibits to 11 the reply, there is a strong indication in this case that the 12 consultation regarding the drugs that will be disclosed by the 13 Department of Corrections eventually are ones where 14 consultation appears not to have occurred.

As the Court can see from the exhibits before it, it appears, as we've stated previously, that there is a conflict between the chief medical officer and the director on this very point. That reiterates in our mind, Your Honor, the problem, the fundamental problem that exists when decisions are made in secret.

And the parties agree that the way that these types of weighty decisions should be made are based on a robust policy debate that occurs in the legislature where the peoples' representatives are allowed to hear evidence and to take testimony.

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1	And there is also no debate between the parties today
2	that the current director, Director Daniels, is in any way
3	qualified to make these decisions. That is precisely why when
4	Luckman says suitable standards, it requires more, Your Honor,
5	than simply stating the method of execution with nothing else.
6	Thank you, Your Honor.
7	And if the Court has any questions, I will endeavor
8	to answer them.
9	THE COURT: Okay. Thank you.
10	I do have a couple of questions for Mr. Shevorski.
11	Mr. Shevorski, with respect to the in Pine,
12	concerning the comprehensive statutory schemes, how do you
13	address that with respect to the Nevada Legislature and
14	actually this statute, this specific statute?
15	MR. SHEVORSKI: Thank you, Your Honor. I think that
16	that is an example. What <i>Pine</i> is doing there is saying, yes,
17	in that instance there was a comprehensive scheme, but that has
18	little to do with whether or not a different statute would meet
19	the would pass muster under the separation of powers
20	doctrine.
21	The separation of powers doctrine is a floor. It is
22	not specifying so it's specifying the minimum standard to
23	determine whether or not a branch of government is doing
24	something that properly belongs to another branch.
25	Now, it's always true that the legislature can

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give -- require and give more detailed standards. They can -it could micromanage the Nevada Department of Corrections and specify the type of drug, where it should be gotten, where it should -- what the dosage is, who should administer it, what time of day it should be. But that tells you nothing about whether or not a different statute, such as we have here, would pass muster under the separation of powers doctrine.

8 I think this one -- this one clearly does. It has 9 suitable standards, and they have announced the policy. The 10 policy is that the execution shall be take -- take place by 11 injection. It shall be by lethal drug. It specifies the 12 identity. Separation of powers doctrine requires no more.

13 THE COURT: Okay. And then I had another question14 for you:

15 What thoughts does the State have with respect to 16 Mr. Anthony's comments that the chief medical officer may have 17 some sort of a conflict with what's happening at this time?

MR. SHEVORSKI: Sure. To answer your question, Your Honor, I would say first that it doesn't matter for this analysis, and I don't mean that in a flippant way. Because what's going on here is this case is being brought as a facial challenge. It's not an as-applied challenge.

23 My friends from the other side are asking you to 24 declare 176.355 unconstitutional on its face because it 25 violates the separation of powers doctrine, not that a

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particular input in the statute (indiscernible) have a conflict
 of interest.

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But, secondly, all the statute -- the statute requires a consultation with the chief medical officer. So even if this was a different kind of challenge, I'm not sure what that would be under the Nevada Constitution to say that the execution can't go forward because the chief medical officer may have a conflict. It requires a consult. And so I think we'd be talking about a different case there. I think we'd be talking about a statutory claim, and my friends would have to show you that there was intended to be a private right of action.

But my friends from the other side haven't told you that the consultation hasn't occurred. I'm sure that will be fleshed out in their 1983 claim before the Honorable Judge Boulware in federal court.

But I don't think it matters legally for the type of challenge that they're bringing here, which is a facial challenge, Your Honor.

THE COURT: Okay. This is obviously a very important case, but I am -- and I know that we're going over a few minutes into the lunch hour. But I am going to take a 15-minute break, recess, and then I'm going to come back, and I will have a decision for you. Maybe 10 minutes. Okay.

MR. SHEVORSKI: Thank you, Your Honor.

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THE MARSHAL: Court is now in recess.

THE COURT: Thank you.

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MR. ANTHONY: Yes, Your Honor.

(Proceedings recessed at 12:03 p.m., until 12:26 p.m.)

THE COURT: Okay. I just want everyone to know that before I move forward that I have given this very serious consideration and that I -- you know, understanding what's in the -- you know, that Mr. Floyd's life is in the, you know, in balance. I am very concerned about that, but I'm going to move 10 forward and give you my analysis.

11 All right. Very basically, this case, the essence of 12 this case is that a TRO or preliminary injunction be granted. 13 And the first issue or the first finding when a Court is going 14 to address a TRO or preliminary injunction is the likelihood of 15 success on the merits.

16 Essentially, the issue in this case is whether 17 NRS 176.355 violates the Nevada and United Supreme Court, the 18 constitutional requirement that the separation of powers in 19 this case, that the separation of powers between the executive, 20 the legislative and judicial branches must always be 21 maintained. In this case we are dealing with the legislative 22 and the executive branch.

23 I am going to read the statute, which we've all 24 reviewed quite a few times; you perhaps more than me, but I 25 have reviewed it quite a few times. So,

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NRS 176.35, Execution of death penalty: Method; time and place; witnesses.

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

2, The Director of the Department of Corrections shall:

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

(b) Select a drug or combinations of drug -- drugs to be used for the execution after consulting with the chief medical examiner.

(c) Be present at the execution.

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

(e) Invite a competent physician, the

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county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to present -- 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 attended the execution.

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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.

And we also have here NRS 33.010(1). Subsection (1) authorizes an injunction when it appears from the complaint that the plaintiff is entitled to the relief requested and at least part of the relief consists of restraining the challenged act.

20 And then Article III, Section 1, the Nevada 21 Constitution's full text provides,

> The powers of the government of the State of Nevada shall be divided into three separate departments -- the Legislative, the Executive and Judicial -- and no persons charged with

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the exercise of powers properly belonging to one of those departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this Constitution.

I just wanted to make sure that I started, you know, and took a look at how everything -- so this is the statute that is provided by the legislative branch. The statute, in this Court's view -- I've read it over and over -- is not ambiguous, and it -- it is not ambiguous. This is pretty straightforward. Could it be more -- include more? Perhaps. But it looks like this statute is complete.

13 And now let's go to -- I don't see a lot of ambiguity 14 in the statute. I think it's pretty clear. So the question 15 now is, has the executive -- has the legislative branch delegated executive functions to the -- excuse me, has the 16 17 legislative branch delegated executive functions -- its 18 functions, the legislative functions, to the executive branch, 19 in this case comprising of the director of the Department of Corrections? 20

21 So I have looked through the cases that you've cited, 22 and I've read everything that you've -- all of the pleadings 23 that were filed, and I'd like to move as organized as I can.

24 So the first prong is whether there is a, as I 25 indicated before, a likelihood of success on the merits. So

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1 here, the Department of --

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Let's see. Just give me one moment.

In the statute, the executive branch delegates to the director of the Department of Corrections that it shall execute a sentence of death. And then it talks about, first, Number 1, before that, must be inflicted by injection of a lethal drug and after consulting with -- essentially to be used -- after consulting with the chief medical officer.

9 Here, the executive branch -- or forgive me, the
10 legislative branch is not -- well, let's go through this.
11 Okay.

12 The director of Department of Corrections is taxed --13 is taxed with carrying out the execution of death. And it's 14 very -- it's very clear, in this Court's view, what needs to be 15 done. For instance, let's talk about McNeill. In McNeill, I 16 think McNeill is distinguishable because the Department of 17 Parole in that case added -- added requirements that were 18 not -- were not required when -- during the sentencing. Okay. 19 They added more restrictions, and the Court decided that that 20 amounted to new law, which obviously is not something that can 21 occur.

Here, the legislature is not allowing the Department of Corrections to define a new crime or punishment. It's simply authorizing how to enforce the death penalty because the Department's -- the Department of Corrections apparently is

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better situated to do this. So I find McNeill to be distinguishable, and I believe that the legislature is not 3 allowing the executive branch to define new punishments, change it to a different type of death, for instance.

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It's very clear that it has to be by an injection of a lethal drug. It's not saying that it can be done by anything else, like a firing squad. Even though the statute is not, in this Court's view, is not -- and it's very clear -- I still took a look at the legislative history, and they found this to be a much more humane exercise when moving forward and executing the death penalty than the gas chamber.

12 All right. Then we go to Luckman. In Luckman, it 13 discusses essentially how the executive branch is able to 14 determine and have authority to describe what drugs are -- I 15 may be saying this wrong. I'm not quoting it -- but which 16 drugs were in which category and the -- with respect to the 17 controlled substances.

18 And I think that that's analogous here in that they 19 may have given more specific direction, but it still gave the 20 executive branch the ability to determine and have the 21 authority to describe with respect to the pharmaceutical issues 22 and decide which drugs -- which drugs would be in which area or 23 which -- just give me one moment, please -- what category the 24 drugs would be in. All right. So and the legislature 25 delegated that authority to, because just as in this case, that

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authority is delegated to the director of the Department of
 Corrections, as indicated in NRS 176.355.

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Here, in this case, even more so, they are carrying out the -- that director is vested with the requirement, that shall execute the sentence of death and so forth. And before that it's very clear that the judgment of death must be inflicted by an injection of a lethal drug.

8 In this Court's view, here, the delegation of 9 authority to the Department of Corrections is constitutional, 10 and this is not violating the -- it is not violating Article I 11 of the -- Article III, Section 1, of the -- concerning the 12 powers of government of the State of Nevada and the division of 13 the three separate departments. I don't believe that this 14 statute violates this.

The Nevada Legislature was clear with respect to the crimes that are -- that result in the death penalty and has delegated the authority to the Department of Corrections, which is tasked with following through on the execution of the death penalty. And this is similar to some of the other statutes as well. They're not delegating the legislative function.

I'm just going to discuss the Eighth Amendment because it's brought -- I don't believe that this is -- this is a facial challenge to NRS 176.355. I've read somewhere throughout my readings, I don't even remember if -- which party discussed it or perhaps both, but I believe that the

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Eighth Amendment, the statute is presumed to be constitutional, and it must not cause an Eighth Amendment -- it must not or shall not violate the Eighth Amendment, you know, the issues with cruel and unusual punishment. I don't believe that that needs to be included in the statute for it to be constitutional, in NRS 176.355. Again, a statute is presumed to be constitutional.

8 So let's move onto this now: Article III, Section 1. 9 This is not an unconstitutional delegation of authority under 10 Article III, Section 1, because -- just because the director of 11 the Department of Corrections determines what type of drugs are 12 required.

13

Just one moment.

The legislature has not delegated -- again, I just want -- I think this is really important -- what crime is punishable -- or, excuse me just one moment. I can barely read my own writing. Hold on.

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So because the --

19 Because the legislature has not delegated -- I 20 believe I mentioned this above -- what crimes are punishable by 21 the injection of a lethal drug, it simply delegates the means 22 by which to do it, the executive branch carries this out. So I 23 think that, you know, the compartments are there. The 24 legislature has written a statute that is not ambiguous. It's 25 straightforward, and I've discussed the cases with you.

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And then I have something else that actually -- and 1 2 I've also read the case from -- I believe it's the one from 3 I have that in front of me as well. Yes, that case Arkansas. 4 is very specific, and I read all of the requirements there or 5 the, you know, what they discussed, but I don't believe that 6 not having that in NRS 176.355, to that detail, makes it 7 unconstitutional with respect to delegating the legislative function. 8 9 I don't believe that the executive branch is making 10 law or doing anything that it cannot do, and it does not 11 violate Article III, Section 1, of the Nevada Constitution. 12 I also have some examples. Actually, I reviewed the reply to opposition to motion for temporary restraining order 13 14 with notice and preliminary injunction. And on page 10, there 15 are some cases that are cited, and it looks --Hold on. Are these cases still -- just give me one 16 17 moment. 18 It states here on line 10 that there are -- so let's 19 start: 20 Defendants argue that NRS 176.355 21 (indiscernible) proper delegation because some 22 of Nevada's sister states have found their 23 lethal injection statutes constitutional. 24 This argument is only unpersuasive, well, and 25 misleading -- but also misleading --

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Hold on.

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And essentially it says,

Moreover, while some of Nevada's sister states view their lethal injection protocol delegation as constitutional, that constitutionality depends fully upon the use of a more detailed statutory language. And it says that NRS 176.355 is lacking. Other lethal -- on page -- on line 10,

Other state lethal injection statutes are more detailed than Nevada's and leave less discretion for an administrative agency to make policy decision. For example, the California statute provides, The death penalty shall be inflicted by an intravenous injection 16 of a substance or substances in a lethal quantity sufficient to cause death by standards established under the direction of the Department of Corrections and rehabilitation.

And we have Arizona's:

Penalty of death shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death under the supervision of the state

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A-21-833086-C | Floyd v. NV DoC | 2021-06-08 Department of Corrections. 1 2 Our statute is very similar to the Arizona one and 3 not dissimilar from the California one. 4 Okay. And then we have the Idaho statute that says, 5 The punishment of death must be inflicted 6 by the intravenous injections of a substance 7 or substances in a lethal quantity sufficient to cause death until the defendant is dead. 8 9 The Director of the Department of Corrections 10 shall determine the substance or substances to 11 be used and the procedures to be used in any 12 execution. 13 In this Court's view, this is very similar to ours, 14 to NRS 176.355. 15 Further, we have Ohio: A death sentence shall be executed by 16 17 causing the application to the person upon 18 whom the sentence was imposed of a lethal 19 injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly 20 21 cause death. The application of the drug or 22 combination of drugs shall be continued until 23 the person is dead. 24 So even though some of these -- one is, I believe, 25 almost the exact language, and the others are very similar.

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A-21-833086-C | Floyd v. NV DoC | 2021-06-08

And these are sisters statutes that, unlike counsel for Mr. Zane, I believe they're similar to our statute, and they 3 are constitutional as well. So and there is no issue with the separation of powers.

5 So because I do not find that there is -- this Court 6 does not find that there is a likelihood of success on the 7 merits, because this Court does not find that NRS 176.355 is 8 unconstitutional and that it does not inappropriately delegate -- the legislature does not illegally or against the 9 10 Constitution delegate or allow the executive branch to make new 11 law or to do anything but to follow through on the very clear 12 statute, I am going to deny it.

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This Court denies the TRO and preliminary injunction. And I am not going to go into further analysis

15 because, really, this is critical, and this is sufficient.

16 So I would like Mr. -- just a moment -- Mr. Shevorski 17 to please prepare a very detailed order. Please make sure that 18 Mr. Anthony and Mr. Levenson and -- are able -- and Mr. Gilmer, 19 although, you know, as a courtesy, you know, apparently they 20 have not been served, but please make sure that it's very 21 detailed with all of the law and this Court's analysis.

22 I'd like you to send that, after they take a look at 23 it as to form and content, I would like you to please send that 24 to Department 14. And I'd like it in two formats, PDF format 25 and Word. Okay. So that --

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A-21-833086-C | Floyd v. NV DoC | 2021-06-08

MR. SHEVORSKI: Yes, Your Honor. 1 2 THE COURT: All right. And I think I have -- I hope 3 I have been organized enough in my thoughts. I think that's 4 very important. But I think -- well, anyway. 5 It's not an easy decision to make for me, but it is 6 with respect to the law. Okay. It brings me no joy knowing, 7 you know, necessarily what the result could be. And I know you 8 can appeal this and everything else, and I understand that. 9 But I believe that this is the correct interpretation of the 10 law that's been -- and the pleadings that have been presented 11 to this Court on this issue. 12 So, Counsel, all of you, I hope you have a good day 13 and that you have a good summer with your families. 14 MR. ANTHONY: Thank you, Your Honor. 15 MR. SHEVORSKI: Thank you, Your Honor. 16 THE COURT: Okay. 17 MR. ANTHONY: Could I add one thing, Your Honor? 18 Just because we are working under an execution timeline, I 19 didn't -- I know that the Court is having the State prepare and 20 draft the order. I don't know if it would be possible for the 21 Court to state a time frame for us to get those findings of 22 fact and conclusions of law just so we can consider further 23 appellate review. 24 THE COURT: Certainly. I think that's absolutely 25 reasonable.

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A-21-833086-C | Floyd v. NV DoC | 2021-06-08 Mr. Shevorski, how much time do you need? 1 2 I understand Mr. Anthony's request, and I think it's 3 correct. 4 Mr. Shevorski? 5 MR. SHEVORSKI: Yes. May I be heard, Your Honor? 6 THE COURT: Yes, of course. That's why I'm calling 7 on you. 8 Thank you, Your Honor. Now, up to MR. SHEVORSKI: 9 48 hours is the deadline, and I'll endeavor to do it quicker. 10 Yes. But it must be very thorough. THE COURT: 11 MR. SHEVORSKI: It will be. 12 THE COURT: Okay. Very good. 13 MR. SHEVORSKI: Yeah, it will be. 14 THE COURT: Okay. So, Mr. Anthony, does that --15 So when you say 48 hours from -- do you mean from 16 today, Mr. Shevorski? 17 I honestly don't remember how much time you need to 18 turn around. Usually it is 10 days, but, obviously, we're not 19 going with that because this is critical for Mr. Anthony's 20 client to be able to appeal if, you know, should they wish. 21 MR. SHEVORSKI: Let's do -- how about the CO be 22 Thursday? If that's okay with Mr. Anthony. 23 MR. ANTHONY: That would be fine on our end. 24 The other thing that is related to this, Your Honor, 25 is an order for the preparation of the transcript. I don't JD Reporting, Inc.

A-21-833086-C | Floyd v. NV DoC | 2021-06-08

know how the Court's department handles that, but we would like 1 2 to make a request for the transcript as well. I know under 3 Rule 250 we are able to get a daily transcript. I know that 4 this is not a criminal court. So I think that's also a related 5 issue, and we'll follow whatever directives the Court would 6 give us to help us expedite the preparation of the transcript. 7 THE COURT: Right. Okay. So I have Ms. Ray. 8 THE COURT RECORDER: Yes. 9 THE COURT: Ms. Ray, are you there? 10 Ms. Ray is our court recorder. 11 THE COURT RECORDER: Yes. 12 THE COURT: And, Ms. Ray, understanding the issues in 13 this case and, you know, the time is critical, how soon can you 14 have that transcript? I think this would be a priority over 15 the other transcripts that, in my view, that are -- that you may be working on. 16 17 THE COURT RECORDER: The soonest we can do it is a 18 24-hour turnaround, and I can send them the request form that 19 they need to fill out, and then we can get working on it. 20 THE COURT: All right. Well, will you please do that 21 immediately. 22 THE COURT RECORDER: Absolutely. 23 THE COURT: And will you send that also to 24 Mr. Shevorski, to all counsels. 25 THE COURT RECORDER: Okay. I will. Yes.

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1	THE COURT: All right. And Mr. Anthony or and
2	Mr. Shevorski, Ms. Ray's name is Stacey Ray.
3	And, Stacey, I would like you to be available. I
4	know that no one has gone to lunch yet, and I apologize, but be
5	available to speak to Mr. Anthony and/or Mr. Levenson and also
6	to Mr. Shevorski so that everybody is on the same page. All
7	right?
8	THE COURT RECORDER: Okay.
9	THE COURT: All right.
10	MR. ANTHONY: Thank you, Your Honor.
11	THE COURT: Okay. Thank you. Have a great day,
12	Counsel.
13	MR. SHEVORSKI: Thank you, Your Honor.
14	THE COURT: Okay. Thank you.
15	(Proceedings concluded 12:56 p.m.)
16	-000-
17	ATTEST: I do hereby certify that I have truly and correctly
18	transcribed the audio/video proceedings in the above-entitled
19	case.
20	Dana Philling
21	Jana P. Williams
22	Dana L. Williams Transcriber
23	ITANSCIDEI
24	
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1 2 3 4 5 6 7	AARON D. FORD Attorney General Steve Shevorski (Bar No. 8256) Chief Litigation Counsel State of Nevada Office of the Attorney General 555 E. Washington Ave, Suite 3900 Las Vegas, NV 89101 (702) 486-3420 (phone) (702) 486-3773 (fax) sshevorski@ag.nv.gov Attorneys for the State of Nevada ex rel. The Nevada Department of Corrections	Electronically Filed 6/17/2021 4:59 PM Steven D. Grierson CLERK OF THE COURT		
8	DISTRICT	COURT		
9	CLARK COUNT	Y, NEVADA		
10 11	ZANE MICHAEL FLOYD,	Case No. A-21-833086-C Dept. No. XIV		
12	Plaintiff,			
13	vs.			
	NEVADA DEPARTMENT OF CORRECTIONS; CHARLES DANIELS; Director, Nevada Department of Corrections;			
15	IHSAN AZZAM, Chief Medical Officer of the State of Nevada; JOHN DOES 1-20, unknown			
16	employees or agents of Nevada Department of Corrections,			
17 18	Defendants.			
18 19	NOTICE OF ENTRY OF ORDER			
$\frac{13}{20}$		Denying Plaintiff's Motion for Temporary		
20	Restraining Order with Notice and Preliminary			
22	June, 2021, a copy of which is attached hereto a			
23	DATED this 17th day of June, 2021.			
24	AARON	D. FORD		
25		y General		
26	By: <u>/s/ Steve Shevorski</u> Steve Shevorski (Bar No. 8256)			
27	Chie	f Litigation Counsel		
28				
	Page 1	of 2		
	Case Number: A-21-83	33086-C		

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 Brad D. Levenson, Assistant Federal Public Defender
10	Jocelyn S. Murphy, Assistant Federal Public Defender 411 E. Bonneville, Ste. 250
11	Las Vegas, Nevada 89101
12	Attorneys for Plaintiff
13	<u>/s/ Eddie A. Rueda</u> Eddie A. Rueda, an employee of the
14	Office of the Attorney General
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EXHIBIT A

EXHIBIT A

	ELECTRONICALLY 6/17/2021 3:51		
1	ORDD	CLERK OF THE COURT	
2	AARON D. FORD Attorney General		
3	Steve Shevorski (Bar No. 8256) Chief Litigation Counsel		
4	State of Nevada Office of the Attorney General		
5	555 E. Washington Ave, Suite 3900 Las Vegas, NV 89101		
6	(702) 486-3420 (phone) (702) 486-3773 (fax)		
7	sshevorski@ag.nv.gov		
8	Attorneys for the State of Nevada ex rel. The Nevada Department of Corrections		
9	DISTRICT	COURT	
10	CLARK COUNT	Y, NEVADA	
11	ZANE MICHAEL FLOYD,	Case No. A-21-833086-C	
12	Plaintiff,	Dept. No. XIV	
13	vs.	Data of Hooving Lung 8, 2021	
14	NEVADA DEPARTMENT OF CORRECTIONS; CHARLES DANIELS;	Date of Hearing: June 8, 2021 Time of Hearing: 10:00 a.m.	
15	Director, Nevada Department of Corrections;		
16	IHSAN AZZAM, Chief Medical Officer of the State of Nevada; JOHN DOES 1-20, unknown		
17	employees or agents of Nevada Department of Corrections,		
18	Defendants.		
19			
20	ORDER DENYING PLAINTIFF'S MOTIO ORDER WITH NOTICE AND PI		
21	ORDER WITH NOTICE AND FI	ALLIMINART INSUNCTION	
22	Plaintiff, Zane Michael Floyd (Floyd),	through counsel of record, moved for a	
23	temporary restraining order and preliminary injunction under NRCP 65 and NRS 33.010.		
24	The State of Nevada ex rel. The Nevada Dep	partment of Corrections (NDOC), through	
25	counsel, opposed. Floyd replied. The Court he	eld a hearing on June 8, 2021 at 10:00 a.m.	
26	Steve Shevorski of Nevada's Attorney Gener	al Office appeared for NDOC. Assistant	
27	Federal Public Defender David Anthony and A	Assistant Federal Public Defender Brad D.	
28	Levenson appeared for Floyd. The Court, h	aving reviewed Floyd's motion and reply,	

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

Background I.

4.

12.

4

3

- 1. Flovd is a death row inmate.

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

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

12

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).

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

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

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

20

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

Floyd further seeks a temporary restraining order and preliminary injunction

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

Floyd seeks declaratory relief and an order declaring that NRS 176.355 2211. violates Article III §1 of Nevada's Constitution under the Separation of Powers doctrine. 23

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prohibiting NDOC, Daniels, and Dr. Azzam from carrying out any lethal injection protocol

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

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

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

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

- 7 III. Conclusions of law
- 8

14. This Court is permitted to issue injunction relief pursuant to NRS 33.010.

9 which provides:

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An injunction may be granted in the following cases:

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

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.

18 NRS 33.010.

To obtain a preliminary injunction, Floyd must show (1) a likelihood of success 15.19 on the merits, and (2) a reasonable probability if the regulation went into force, they would 20necessarily suffer irreparable harm for which compensatory relief is not adequate. Finkel 21v. Cashman Prof'l, Inc., 128 Nev. 68, 72,270 P.3d 1259, 1262 (2012). While Floyd need not 22"establish certain victory on the merits, [he] must make prima facie showing through 23substantial evidence that [he is] entitled to the preliminary relief requested." Shores v. 24Glob. Experience Specialists, Inc., 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). The Court 25should also weigh the relative hardships of the parties and the public interest. Univ. & 26Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). 2728

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 lethal drug.
13	2. The Director of the Department of Corrections shall: (a) Execute a sentence of death within the week, the first day
14	being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director
15	may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.
16	(b) Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.
17	(c) Be present at the execution.(d) Notify those members of the immediate family of the victim
18	who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.
19	(e) Invite a competent physician, the county coroner, a
20	psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The Director shall
21	determine the maximum number of persons who may be present for the execution. The Director shall give preference to those
22	eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend
23	the execution. 3. The execution must take place at the state prison.
24	4. A person who has not been invited by the Director may not witness the execution.
25	NRS 176.355.
26	18. Floyd in this action asserts that NRS 176.355 on its face violates the
27	Separation of Powers doctrine enshrined in Article 3, §1 of Nevada's Constitution.
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	Page 4 of 11
	AA364

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 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 bodies to frame and enact laws, and to amend and repeal them.	
12		
13	The executive power extends to the carrying out and enforcing the laws enacted by the legislature	
14	'Judicial Power' is the <i>authority</i> to hear and determine	
15	justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree, or order.	
16		
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. <i>Sheriff, Douglas Cty. v. LaMotte</i> , 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).

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).

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

10 27. "An example of a pure legal question might be a challenge to the facial validity
11 of a statute." *Beavers v. State, Dep't. of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 438
12 n.1, 851 P.2d 432, 434 n.1 (1993); accord Schwartz v. Lopez, 132 Nev. 732, 744, 382 P.3d
13 886, 895 (2016).

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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)).

 $28 \parallel$

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

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

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

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

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

subcutaneously, or intravenously. The Court does not agree. The Court views the words
 "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).

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

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

1741. As to Floyd's specific challenges, the Court does not agree with Floyd that the Legislature improperly delegated the law-making function by not specifying the drug or 18 combination of drugs to be used in an execution by lethal injection. Consistent with 19Separation of Powers principles, the Legislature may delegate the power to determine the 20facts or state of things upon which the law makes its own operations depend. State ex rel. 2122Ginocchiov. Shaughnessy, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function 23to NDOC's Director. 24

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

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

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

Pine v. Leavitt, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*, 143
U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). As the Nevada Supreme Court noted by citing
to Justice Brandeis' opinion in *Douglas v. Noble*, 261 U.S. 165 (1923), that the Legislature
may itself provide a specificity of facts upon which curtails the Executive branch's
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 94445 (citing *Douglas*, supra).

1344. NRS 176.355 is also not infirm because it does not include specific language requiring a humane execution or that the drug(s) selected be humane. The Legislature and 14 administrative agencies alike must follow the state and federal constitution. See Gibson v. 15Mason, 5 Nev. 283, 292 (1869) (explaining that the Legislature's power is limited only by 1617"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 NDOC may act unconstitutionally without a specific statutory language commanding them 19 20to obey the Nevada and United States Constitutions.

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

46. The courts to address this question, which have capital punishment statutes
that are similar to Nevada's, have overwhelmingly found their state legislature can
constitutionally delegate implementation of execution statutes to corrections officials. See, *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, 68182 (1923);

11 48. In upholding former NRS 176.355, the Nevada Supreme Court noted the 12current statute affords NDOC no more discretion than its prior version, requiring the use 13of lethal gas for executions, which "infring[ed] no provision of the Constitution." Gee, 46 14 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 1516 the reasoning in Gee applies equally to Nevada's lethal injection statute. See McConnell, 17120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge 18 to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection 19procedure).

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12	B. Because Floyd has no l factors need not be add	likelihood of success on the merits, the other lressed
3	49. Having found that Floyd	does not have a likelihood of success on the merits,
4	the Court's preliminary injunction inq	uiry is over and Floyd's request for extraordinary
5	relief must be denied. Boulder Oaks Co	mm. Assoc. v. B& J Andrews Enters., LLC, 125 Nev.
6	397, 403, 215 P.3d 27, 31 n.6 (2009).	
7	III. Order	
8	Based upon the Background and	Conclusions of Law above:
9	IT IS HEREBY ORDERED that	Floyd's motion for temporary restraining order and
10	preliminary injunction is DENIED.	
11	DATED this day of	, 2021.
12		Dated this 17th day of June, 2021
13		DISTRICT COUPT HUDGE
14		DISTRICT COURT JUDGE
15	Submitted by:	36A 824 8598 A29D Adriana Escobar
16	AARON D. FORD Attorney General	District Court Judge
17		
18	By: <u>/s/ Steve Shevorski</u> Steve Shevorski	
19	Chief Litigation Counsel Attorneys for Defendants	
20		
21	Approved as to form and content.	
22	RENE L. VALLADARES Federal Public Defender	
23		
24	By: <u>/s/ David Anthony</u> David Anthony	
25	Assistant Federal Public Defender Brad D. Levenson	
26	Assistant Federal Public Defender Jocelyn S. Murphy	
27	Assistant Federal Public Defender Attorneys for Plaintiff Zane M. Floy	d
28		

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 <<u>SShevorski@ag.nv.gov</u>>
Sent: Wednesday, June 16, 2021 1:33 PM
To: David Anthony <<u>David Anthony@fd.org</u>>; Brad Levenson <<u>Brad Levenson@fd.org</u>>; Crane Pomerantz
<<u>CPomerantz@sklar-law.com</u>>; 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		STRICT COURT 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	recipients registered for e-Service on th	as served via the court's electronic eFile system to all the above entitled case as listed below:	
14	Service Date: 6/17/2021		
15	Traci Plotnick	tplotnick@ag.nv.gov	
16 17	Steven Shevorski	sshevorski@ag.nv.gov	
17	Mary Pizzariello	mpizzariello@ag.nv.gov	
19	Akke Levin	alevin@ag.nv.gov	
20	Sabrena Clinton	sclinton@ag.nv.gov	
21	Kiel Ireland	kireland@ag.nv.gov	
22	Eddie Rueda	erueda@ag.nv.gov	
23	Bradley Levenson	ecf_nvchu@fd.org	
24		_ C	
25			
26			
27			
28			

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	NOAS RENE L. VALLADARES Federal Public Defender Nevada Bar No. 11479 DAVID ANTHONY Assistant Federal Public Defender Nevada Bar No. 7978 David_Anthony@fd.org BRAD D. LEVENSON Assistant Federal Public Defender Nevada Bar No. 13804C Brad_Levenson@fd.org JOCELYN S. MURPHY Assistant Federal Public Defender Nevada Bar No. 15292 Jocelyn_Murphy@fd.org 411 E. Bonneville, Ste. 250 Las Vegas, Nevada 89101 (702) 388-6577 (702) 388-5819 (Fax) Attorneys for Plaintiff Zane M. Floyd DISTRICT CLARK COUNY 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	
	CHIEF MEDICAL OFFICER OF THE STATE OF NEVADA; JOHN DOES 1-20, UNKNOWN EMPLOYEES OR AGENTS OF NEVADA DEPARTMENTS OF	
21 22 23	CORRECTIONS Defendants.	
	Case Number: A	Docket 83181 Document 2021-19839 -21-833086-C

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	
	RENE L. VALLADARES	
8	Federal Public Defender	
9	/s/ David Anthony	
	DAVID ANTHONY	
10	Assistant Federal Public Defender	
11	/s/ Brad D. Levenson	
	BRAD D. LEVENSON	
12	Assistant Federal Public Defender	
13	/s/ Jocelyn S. Murphy	
	JOCEYLYN S. MURPHY	
14	Assistant Federal Public Defender	
15		
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1	AA375	

1	CERTIFICATE OF SERVICE
2	In accordance with EDCR 8.04(c), the undersigned hereby certifies that on
3	this 2nd day of July, 2021, a true and correct copy of the foregoing NOTICE OF
4	APPEAL, was filed electronically with the Eighth Judicial District Court. Electronic
5	service of the foregoing document shall be made in accordance with the master
6	service list as follows:
7 8	Steven G. Shevorski Chief Litigation Counsel sshevorski@ag.nv.gov
9	Crane Pomerantz, Esq.
10	Nadia Ahmed, Esq. SKLAR WILLIAMS PLLC
11	cpomerantz@sklar-law.com nahmed@sklar-law.com
12	
13	<u>/s/ Sara Jelinek</u> An Employee of the Federal Public Defenders Office District of Neuroda
14	Office, District of Nevada
15	
16	
17	
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	3

Electronically Filed 7/2/2021 12:42 PM Steven D. Grierson

uso

		CLERK OF THE COURT
1	ASTA	Atump. an
T	RENE L. VALLADARES	Contraction of the
2	Federal Public Defender	
4	Nevada Bar No. 11479	
3	DAVID ANTHONY	
0	Assistant Federal Public Defender	
4	Nevada Bar No. 7978	
1	David_Anthony@fd.org	
5	BRAD D. LEVENSON	
-	Assistant Federal Public Defender	
6	Nevada Bar No. 13804C	
	Brad_Levenson@fd.org	
7	JOCELYN S. MURPHY	
	Assistant Federal Public Defender	
8	Nevada Bar No. 15292	
	Jocelyn_Murphy@fd.org	
9	411 E. Bonneville, Ste. 250	
1.0	Las Vegas, Nevada 89101	
10	(702) 388-6577	
1 1	(702) 388-5819 (Fax)	
11	Attended to Distatic Trans M. Flored	
12	Attorneys for Plaintiff Zane M. Floyd	
14	DISTRICT	COURT
13	CLARK COUN	
10		II, NEVADA
14	ZANE MICHAEL FLOYD,	Case No. A-21-833086-C
	Plaintiff,	
15		Dept. No. XIV
	v.	
16		
	NEVADA DEPARTMENT OF	CASE APPEAL STATEMENT
17	CORRECTIONS; CHARLES DANIELS,	
	DIRECTOR, NEVADA DEPARTMENT	(DEATH PENALTY CASE)
18	OF CORRECTIONS; IHSAN AZZAM,	
10	CHIEF MEDICAL OFFICER OF THE	
19	STATE OF NEVADA; JOHN DOES 1-20,	
90	UNKNOWN EMPLOYEES OR AGENTS OF NEVADA DEPARTMENTS OF	
20	CORRECTIONS	
21		
<i>4</i> ⊥	Defendants.	
22		
23		
	Case Number: A	-21-833086-C

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 H	onorable 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		<u>Appellant</u> :
9		Zane Michael Floyd
10		Counsel for Appellant:
11		Rene L. Valladares David Anthony
12		Brad D. Levenson Jocelyn S. Murphy
13		Office of the Federal Public Defender 411 E. Bonneville, Ste. 250
14		Las Vegas, Nevada 89101
15	4.	Identify each respondent and the name and address of counsel for each
16	respondent:	
17		<u>Defendants</u> :
18		Nevada Department of Corrections Charles Daniels, Director, Nevada Department of Corrections
19		Ihsan Azzam, Chief Medical Officer of the State of Nevada John Does 1-20, unknown employees or agents of Nevada Department
20		of Corrections
21		
22		
23		
		2

1	Counsel for NDOC Defendants:
2	Aaron D. Ford
3	Attorney General Steve Shevorski
4	Chief Litigation Counsel Office of the Attorney General
5	555 E. Washington Ave., Ste. 3900 Las Vegas, Nevada 89101
6	Counsel for Ishan Azzam
7	Crane Pomerantz, Esq. Nadia Ahmed, Esq.
8	SKLAR WILLIAMS PLLC
9	cpomerantz@sklar-law.com nahmed@sklar-law.com
10	5. Indicate whether any attorney identified above in response to question
11	3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court
12	granted that attorney permission to appear under SCR 42: Not applicable.
13	6. Indicate whether appellant was represented by appointed or retained
14	counsel in the district court: Appellant was represented by appointed counsel, the
15	Office of the Federal Public Defender in the district court.
16	7. Indicate whether appellant was represented by appointed or retained
17	counsel on appeal: Appellant is represented by appointed counsel, the Office of the
18	Federal Public Defender on appeal.
19	8. Indicate whether appellant was granted leave to proceed in forma
20	pauperis, and the date of entry of the district court order granting such leave:
21	Appellant was granted a fee waiver as listed on the Eighth Judicial Court Case
22	Docket on April 16, 2021. Mr. Floyd has been represented by appointed counsel for
23	
	3

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

6
9. Indicate the date the proceeding commenced in the district court: on
7
7
7
7
7

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 12against 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, 152021, NDOC Defendants filed their Opposition to Motion for Temporary 16Restraining Order with Notice and Preliminary Injunction. Mr. Floyd filed his 17Reply 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 19denied Mr. Floyd's Motion for Temporary Restraining Order with Notice and 20Preliminary Injunction. On June 17, 2021, the court filed an Order Denying 21Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary 22Injunction.

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 Federal Public Defender
12	/s/ David Anthony
13	DAVID ANTHONY
	Assistant Federal Public Defender
14	/s/ Brad D. Levenson BRAD D. LEVENSON
15	Assistant Federal Public Defender
16	/s/ Jocelyn S. Murphy
17	JOCEYLYN S. MURPHY Assistant Federal Public Defender
18	
19	
20	
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	1

1	CERTIFICATE OF SERVICE
2	In accordance with EDCR 8.04(c), the undersigned hereby certifies that on
3	this 2nd day of July, 2021, a true and correct copy of the foregoing CASE APPEAL
4	STATEMENT, was filed electronically with the Eighth Judicial District Court.
5	Electronic service of the foregoing document shall be made in accordance with the
6	master service list as follows:
7	Steven G. Shevorski Chief Litigation Counsel
8	sshevorski@ag.nv.gov
9	Crane Pomerantz, Esq. Nadia Ahmed, Esq.
10	SKLAR WILLIAMS PLLC cpomerantz@sklar-law.com
11	nahmed@sklar-law.com
12	/s/ Sara Jelinek
13	An Employee of the Federal Public Defenders Office, District of Nevada
14	
15	
16	
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22	
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	6

Eighth Judicial District Court CASE SUMMARY CASE NO. A-21-833086-C

Zane Floyd, F vs. Nevada Depar		NO. A-21-8 § § § §	Location: Judicial Officer:	Department 14 Escobar, Adriana 04/16/2021 A833086
	CA	ase Informa	ΓΙΟΝ	
			Case Type:	Other Civil Matters
			Case Status:	04/16/2021 Open
DATE	С	ASE ASSIGNM	ENT	
	CourtDepartDate Assigned04/16/	833086-C tment 14 ⁄2021 ar, Adriana		
	РА	RTY INFORMA	TION	
Plaintiff	Floyd, Zane M			Lead Attorneys Valladares, Rene L. Retained 702-388-6577(W)
Defendant	Azzam, Ihsan			
	Daniels, Charles			
	Nevada Department of Corrections	i		Shevorski, Steven G. <i>Retained</i> 702-634-5000(W)
DATE	Events &	& ORDERS OF	THE COURT	INDEX
04/16/2021	EVENTS Complaint Filed By: Plaintiff Floyd, Zane M Complaint for Declaratory and Injunc	ctive Relief		
04/16/2021	Motion for Temporary Restraining O Filed By: Plaintiff Floyd, Zane M Plaintiff's Motion for Temporary Rest		with Notice and Preliminary	7 Injunction
04/16/2021	Exhibits Filed By: Plaintiff Floyd, Zane M EXHIBITS IN SUPPORT OF MOTION NOTICE AND PRELIMINARY INJUN		ORARY RESTRAINING ORI	DER WITH
04/19/2021	Clerk's Notice of Hearing Notice of Hearing			
04/30/2021	Dopposition Filed By: Defendant Nevada Departr	nent of Correc	tions	

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

	CASE SUMMARY
	Nevada Department of Corrections Sposition 15-83:30995 Femporary Restraining Order with Notice and Preliminary Injunction
05/07/2021	Stipulation and Order Filed by: Plaintiff Floyd, Zane M Stipulation and Order
05/17/2021	Reply to Opposition Filed by: Plaintiff Floyd, Zane M Reply to Opposition to Motion for Temporary Restraining Order with Notice of Preliminary Injunction
05/17/2021	Exhibits Filed By: Plaintiff Floyd, Zane M Exhibits in Support of Reply to Opposition to Motion for Temporary Restraining Order with Notice of Preliminary Injunction
06/10/2021	Recorders Transcript of Hearing Party: Defendant Nevada Department of Corrections Recorder's Transcript of Hearing Re: Plaintiff's Motion for Temporary Restraining Order With Notice and Preliminary Injunction heard 6-8-21
06/17/2021	Order Denying Filed By: Defendant Nevada Department of Corrections Order Denying Plaintiff's Motion for Temprary Restraining Order with Notice and Preliminary Injunction
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 Case Appeal Statement
	HEARINGS
06/08/2021	 Motion for Temporary Restraining Order (10:00 AM) (Judicial Officer: Escobar, Adriana) Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction Denied; Journal Entry Details: 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 reading the merge a transcript of
	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.;

EIGHTH JUDICIAL DISTRICT COURT 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**

AA385



DISTRICT COURT CIVIL COVER SHEET

Clark County, Nevada

	Case No.	County, I	CASE NO: A-21-8330
	(Assigned by Clerk		Departme
I. Party Information (provide both ho	me and mailing addresses if different		nt(s) (name/address/phone):
Plaintiff(s) (name/address/phone):			
Zane Floyd, #			Nevada Department of Corrections, et al,.
Ely State P			5500 Snyder Ave. Bld 17
P.O. Box 1			P.O. Box 7011
Ely, NV 89	301		Carson City, NV 89702
Attorney (name/address/phone):		Attorney	(name/address/phone):
Brad D. Lev			Aaron D. Ford
Federal Public Defe			Office of the Attorney General
411 E. Bonneville A			100 N. Carson
Las Vegas, N	√ 89101		Carson City, NV 89702
I. Nature of Controversy (please s	elect the one most applicable filing typ	pe below)	
Civil Case Filing Types			
Real Property			Torts
Landlord/Tenant	Negligence		Other Torts
Unlawful Detainer	Auto		Product Liability
Other Landlord/Tenant	Premises Liability		Intentional Misconduct
Title to Property	Other Negligence		Employment Tort
Judicial Foreclosure	Malpractice		Insurance Tort
Other Title to Property	Medical/Dental		Other Tort
Other Real Property	Legal		—
Condemnation/Eminent Domain	Accounting		
Other Real Property	Other Malpractice		
Probate	Construction Defect & Con	ntract	Judicial Review/Appeal
Probate (select case type and estate value)	Construction Defect		Judicial Review
Summary Administration	Chapter 40		Foreclosure Mediation Case
General Administration	Other Construction Defect		Petition to Seal Records
Special Administration	Contract Case		Mental Competency
Set Aside	Uniform Commercial Code		Nevada State Agency Appeal
Trust/Conservatorship	Building and Construction		Department of Motor Vehicle
Other Probate	Insurance Carrier		Worker's Compensation
Estate Value	Commercial Instrument		Other Nevada State Agency
Over \$200,000			Appeal Other
	Collection of Accounts		
Between \$100,000 and \$200,000	Employment Contract		Appeal from Lower Court
Under \$100,000 or Unknown	Other Contract		Other Judicial Review/Appeal
Under \$2,500			
	il Writ		Other Civil Filing
Civil Writ			Other Civil Filing
Writ of Habeas Corpus	Writ of Prohibition		Compromise of Minor's Claim
Writ of Mandamus	Other Civil Writ		Foreign Judgment
Writ of Quo Warrant			Other Civil Matters
Business C	ourt filings should be filed using th	he Business	Court civil coversheet.
04/16/2021			
			/s/ Brad D Levenson

Date

Brad D. Levenson

Signature of initiating party or representative

See other side for family-related case filings.

Form PA 201 Rev 3.1

		Electronically Filed 06/17/2021 3:50 PM
1	ORDD AARON D. FORD	CLERK OF THE COURT
2	Attorney General Steve Shevorski (Bar No. 8256)	
3	Chief Litigation Counsel State of Nevada	
4	Office of the Attorney General 555 E. Washington Ave, Suite 3900	
5	Las Vegas, NV 89101 (702) 486-3420 (phone) (702) 486-3773 (fax) sshevorski@ag.nv.gov	
7	Attorneys for the State of Nevada ex rel.	
8	The Nevada Department of Corrections	
9	DISTRICT	COURT
10	CLARK COUNT	Y, NEVADA
11	ZANE MICHAEL FLOYD,	Case No. A-21-833086-C Dept. No. XIV
12	Plaintiff,	
13	vs.	Date of Hearing: June 8, 2021
14	NEVADA DEPARTMENT OF CORRECTIONS; CHARLES DANIELS;	Time of Hearing: 10:00 a.m.
15	Director, Nevada Department of Corrections; IHSAN AZZAM, Chief Medical Officer of the	
16	State of Nevada; JOHN DOES 1-20, unknown employees or agents of Nevada Department of	
17	Corrections,	
18	Defendants.	
19		
20	ORDER DENYING PLAINTIFF'S MOTIO ORDER WITH NOTICE AND PI	
21		
22		through counsel of record, moved for a
23	temporary restraining order and preliminary injunction under NRCP 65 and NRS 33.010.	
24	The State of Nevada ex rel. The Nevada Department of Corrections (NDOC), through	
25	counsel, opposed. Floyd replied. The Court he	
26	Steve Shevorski of Nevada's Attorney Gener	
27	Federal Public Defender David Anthony and Assistant Federal Public Defender Brad D.	
28	Levenson appeared for Floyd. The Court, h	aving 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:

Background I.

4.

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- 1. Flovd is a death row inmate.

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

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

12

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).

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

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

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

20

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

Floyd further seeks a temporary restraining order and preliminary injunction

21

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

Floyd seeks declaratory relief and an order declaring that NRS 176.355 2211. violates Article III §1 of Nevada's Constitution under the Separation of Powers doctrine. 23

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prohibiting NDOC, Daniels, and Dr. Azzam from carrying out any lethal injection protocol

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

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

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

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

- **Conclusions of law** II. 7
- 8

This Court is permitted to issue injunction relief pursuant to NRS 33.010. 14.

which provides: 9

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An injunction may be granted in the following cases:

1. When it shall appear by the complaint that the plaintiff is 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. 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff. When it shall appear, during the litigation, that the 3. 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

NRS 33.010. 18

To obtain a preliminary injunction, Floyd must show (1) a likelihood of success 15.19 on the merits, and (2) a reasonable probability if the regulation went into force, they would 20necessarily suffer irreparable harm for which compensatory relief is not adequate. Finkel 21v. Cashman Prof'l, Inc., 128 Nev. 68, 72,270 P.3d 1259, 1262 (2012). While Floyd need not 22"establish certain victory on the merits, [he] must make prima facie showing through 23substantial evidence that [he is] entitled to the preliminary relief requested." Shores v. 24Glob. Experience Specialists, Inc., 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). The Court 25should also weigh the relative hardships of the parties and the public interest. Univ. & 26Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). 2728

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 lethal drug.
13	2. The Director of the Department of Corrections shall: (a) Execute a sentence of death within the week, the first day
14	being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director
15	may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.
16	(b) Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.
17	(c) Be present at the execution.(d) Notify those members of the immediate family of the victim
18	who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.
19	(e) Invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age
20	of 21 years to be present at the execution. The Director shall
21	determine the maximum number of persons who may be present for the execution. The Director shall give preference to those
22	eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend
23	the execution. 3. The execution must take place at the state prison.
24	4. A person who has not been invited by the Director may not witness the execution.
25	NRS 176.355.
26	18. Floyd in this action asserts that NRS 176.355 on its face violates the
27	Separation of Powers doctrine enshrined in Article 3, §1 of Nevada's Constitution.
28	
	Page 4 of 11
	AA390

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 bodies to frame and enact laws, and to amend and repeal them.
12	
13	The executive power extends to the carrying out and enforcing the laws enacted by the legislature
14	'Judicial Power' is the <i>authority</i> to hear and determine
15	justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree, or order.
16	
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. <i>Sheriff, Douglas Cty. v. LaMotte</i> , 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. <i>Del Papa</i> , 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).

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).

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

10 27. "An example of a pure legal question might be a challenge to the facial validity
11 of a statute." *Beavers v. State, Dep't. of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 438
12 n.1, 851 P.2d 432, 434 n.1 (1993); accord Schwartz v. Lopez, 132 Nev. 732, 744, 382 P.3d
13 886, 895 (2016).

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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)).

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. .

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

3

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

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

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

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

subcutaneously, or intravenously. The Court does not agree. The Court views the words
 "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).

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

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

1741. As to Floyd's specific challenges, the Court does not agree with Floyd that the Legislature improperly delegated the law-making function by not specifying the drug or 18 combination of drugs to be used in an execution by lethal injection. Consistent with 19Separation of Powers principles, the Legislature may delegate the power to determine the 20facts or state of things upon which the law makes its own operations depend. State ex rel. 2122Ginocchiov. Shaughnessy, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function 23to NDOC's Director. 24

42.

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

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

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

Pine v. Leavitt, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*, 143
U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). As the Nevada Supreme Court noted by citing
to Justice Brandeis' opinion in *Douglas v. Noble*, 261 U.S. 165 (1923), that the Legislature
may itself provide a specificity of facts upon which curtails the Executive branch's
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 94445 (citing *Douglas*, supra).

1344. NRS 176.355 is also not infirm because it does not include specific language requiring a humane execution or that the drug(s) selected be humane. The Legislature and 14 administrative agencies alike must follow the state and federal constitution. See Gibson v. 15Mason, 5 Nev. 283, 292 (1869) (explaining that the Legislature's power is limited only by 1617"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 NDOC may act unconstitutionally without a specific statutory language commanding them 19 20to obey the Nevada and United States Constitutions.

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

46. The courts to address this question, which have capital punishment statutes
that are similar to Nevada's, have overwhelmingly found their state legislature can
constitutionally delegate implementation of execution statutes to corrections officials. See, *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,

1 2012); Cook v. State, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); State v. Ellis, 799 N.W.2d $\mathbf{2}$ 267, 289 (Neb. 2011); Brown v. Vail, 237 P.3d 263, 269 (Wash. 2010) (en banc); Sims v. 3 State, 754 So. 2d 657, 670 (Fla. 2000); State v. Osborn, 631 P.2d 187, 201 (Idaho 1981); Ex 4 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 $\mathbf{5}$ 6 5169157 at *28 (Tenn. Crim. App. 2015)).

7 47. Finally, the Court notes the Nevada Supreme Court considered and rejected 8 near identical arguments in the Eighth Amendment context. McConnell v. State, 120 Nev. 9 1043, 1056-57, 102 P.3d 606, 616 (2004); State v. Gee, 46 Nev. 418, 436-48, 211 P. 676, 681-10 82 (1923);

11 48. In upholding former NRS 176.355, the Nevada Supreme Court noted the 12current statute affords NDOC no more discretion than its prior version, requiring the use 13of lethal gas for executions, which "infring[ed] no provision of the Constitution." Gee, 46 14 Nev. 418, 211 P. 676, 682 (1923). Yet the Nevada Supreme Court "[could not] see that any 15useful purpose would be served by requiring greater detail." Id. The Court affirmed that 16 the reasoning in Gee applies equally to Nevada's lethal injection statute. See McConnell, 17120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge 18 to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection 19procedure).

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12	B. Because Floyd has no factors need not be add	likelihood of success on the merits, the other lressed
3	49. Having found that Floyd	does not have a likelihood of success on the merits,
4	the Court's preliminary injunction inc	uiry is over and Floyd's request for extraordinary
5	relief must be denied. Boulder Oaks Co	mm. Assoc. v. B& J Andrews Enters., LLC, 125 Nev.
6	397, 403, 215 P.3d 27, 31 n.6 (2009).	
7	III. Order	
8	Based upon the Background and	Conclusions of Law above:
9	IT IS HEREBY ORDERED that	Floyd's motion for temporary restraining order and
10	preliminary injunction is DENIED.	
11	DATED this day of	, 2021.
12		Dated this 17th day of June, 2021
13		DISTRICT COURT JUDGE
14		DIGINICI COONI CODOL
15	Submitted by:	36A 824 8598 A29D Adriana Escobar
16	AARON D. FORD Attorney General	District Court Judge
17		
18	By: <u>/s/ Steve Shevorski</u> Steve Shevorski	-
19	Chief Litigation Counsel Attorneys for Defendants	
20		
21	Approved as to form and content.	
22	RENE L. VALLADARES Federal Public Defender	
23		
24	By: <u>/s/ David Anthony</u> David Anthony	
25	Assistant Federal Public Defender Brad D. Levenson	
26	Assistant Federal Public Defender Jocelyn S. Murphy Assistant Federal Public Defender	
27	Assistant Federal Public Defender Attorneys for Plaintiff Zane M. Floy	d
28		

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 <<u>SShevorski@ag.nv.gov</u>>
Sent: Wednesday, June 16, 2021 1:33 PM
To: David Anthony <<u>David Anthony@fd.org</u>>; Brad Levenson <<u>Brad Levenson@fd.org</u>>; Crane Pomerantz
<<u>CPomerantz@sklar-law.com</u>>; 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	CCERN	
2	CSERV	
3		STRICT COURT 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		rvice was generated by the Eighth Judicial District as served via the court's electronic eFile system to all
13	recipients registered for e-Service on th	
14	Service Date: 6/17/2021	
15	Traci Plotnick	tplotnick@ag.nv.gov
16	Steven Shevorski	sshevorski@ag.nv.gov
17 18	Mary Pizzariello	mpizzariello@ag.nv.gov
19	Akke Levin	alevin@ag.nv.gov
20	Sabrena Clinton	sclinton@ag.nv.gov
21	Kiel Ireland	kireland@ag.nv.gov
22	Eddie Rueda	erueda@ag.nv.gov
23	Bradley Levenson	ecf_nvchu@fd.org
24		
25		
26		
27		
28		

1 2 3 4 5 6 7	AARON D. FORD Attorney General Steve Shevorski (Bar No. 8256) Chief Litigation Counsel State of Nevada Office of the Attorney General 555 E. Washington Ave, Suite 3900 Las Vegas, NV 89101 (702) 486-3420 (phone) (702) 486-3773 (fax) sshevorski@ag.nv.gov Attorneys for the State of Nevada ex rel. The Nevada Department of Corrections	Electronically Filed 6/17/2021 4:59 PM Steven D. Grierson CLERK OF THE COURT
8	DISTRICT	COURT
9	CLARK COUNT	'Y, NEVADA
10	ZANE MICHAEL FLOYD,	Case No. A-21-833086-C
$\begin{array}{c c}11\\12\end{array}$	Plaintiff,	Dept. No. XIV
12 13	vs.	
	NEVADA DEPARTMENT OF CORRECTIONS; CHARLES DANIELS;	
15	Director, Nevada Department of Corrections; IHSAN AZZAM, Chief Medical Officer of the	
16	State of Nevada; JOHN DOES 1-20, unknown employees or agents of Nevada Department of Corrections,	
17	Defendants.	
18		
19	NOTICE OF ENTI	
20		Denying Plaintiff's Motion for Temporary
21	Restraining Order with Notice and Preliminary	
22	June, 2021, a copy of which is attached hereto as Exhibit "A"	
23	DATED this 17th day of June, 2021.	
24 25		D. FORD y General
$\frac{25}{26}$	By: <u>/s/</u>	Steve Shevorski
$\begin{array}{c} 20\\27\end{array}$		e Shevorski (Bar No. 8256) f Litigation Counsel
28		
20		
	Page 1	of 2
	Case Number: A-21-83	33086-C

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 Brad D. Levenson, Assistant Federal Public Defender		
10	Jocelyn S. Murphy, Assistant Federal Public Defender 411 E. Bonneville, Ste. 250 Las Vegas, Nevada 89101		
11			
12	Attorneys for Plaintiff		
13	<u>/s/ Eddie A. Rueda</u> Eddie A. Rueda, an employee of the		
14	Office of the Attorney General		
15			
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	Page 2 of 2		

EXHIBIT A

EXHIBIT A

	ELECTRONICALLY 6/17/2021 3:51						
1	ORDD	CLERK OF THE COURT					
2	AARON D. FORD Attorney General						
3	Steve Shevorski (Bar No. 8256) Chief Litigation Counsel						
4	State of Nevada Office of the Attorney General						
5	555 E. Washington Ave, Suite 3900 Las Vegas, NV 89101						
6	(702) 486-3420 (phone) (702) 486-3773 (fax)						
7	sshevorski@ag.nv.gov						
8	Attorneys for the State of Nevada ex rel. The Nevada Department of Corrections						
9	DISTRICT	COURT					
10	CLARK COUNTY, NEVADA						
11	ZANE MICHAEL FLOYD,	Case No. A-21-833086-C					
12	Plaintiff,	Dept. No. XIV					
13	vs.	Data of Hooving Lung 8, 2021					
14	NEVADA DEPARTMENT OF CORRECTIONS; CHARLES DANIELS;	Date of Hearing: June 8, 2021 Time of Hearing: 10:00 a.m.					
15	Director, Nevada Department of Corrections;						
16	IHSAN AZZAM, Chief Medical Officer of the State of Nevada; JOHN DOES 1-20, unknown						
17	employees or agents of Nevada Department of Corrections,						
18	Defendants.						
19							
20	ORDER DENYING PLAINTIFF'S MOTIO						
21	ORDER WITH NOTICE AND PRELIMINARY INJUNCTION						
22	Plaintiff, Zane Michael Floyd (Floyd), through counsel of record, moved for a						
23	temporary restraining order and preliminary injunction under NRCP 65 and NRS 33.010.						
24	The State of Nevada ex rel. The Nevada Department of Corrections (NDOC), through						
25	counsel, opposed. Floyd replied. The Court held a hearing on June 8, 2021 at 10:00 a.m.						
26	Steve Shevorski of Nevada's Attorney General Office appeared for NDOC. Assistant						
27	Federal Public Defender David Anthony and Assistant Federal Public Defender Brad D.						
28	Levenson appeared for Floyd. The Court, h	aving reviewed Floyd's motion and reply,					

Page **1** of **11**

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

Background I.

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- 1. Flovd is a death row inmate.

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

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

12

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).

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

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

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

20

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

Floyd further seeks a temporary restraining order and preliminary injunction

21

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

Floyd seeks declaratory relief and an order declaring that NRS 176.355 2211. violates Article III §1 of Nevada's Constitution under the Separation of Powers doctrine. 23

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prohibiting NDOC, Daniels, and Dr. Azzam from carrying out any lethal injection protocol

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

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

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

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

- 7 III. Conclusions of law
- 8

14. This Court is permitted to issue injunction relief pursuant to NRS 33.010.

9 which provides:

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An injunction may be granted in the following cases:

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

To obtain a preliminary injunction, Floyd must show (1) a likelihood of success 15.19 on the merits, and (2) a reasonable probability if the regulation went into force, they would 20necessarily suffer irreparable harm for which compensatory relief is not adequate. Finkel 21v. Cashman Prof'l, Inc., 128 Nev. 68, 72,270 P.3d 1259, 1262 (2012). While Floyd need not 22"establish certain victory on the merits, [he] must make prima facie showing through 23substantial evidence that [he is] entitled to the preliminary relief requested." Shores v. 24Glob. Experience Specialists, Inc., 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). The Court 25should also weigh the relative hardships of the parties and the public interest. Univ. & 26Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). 2728

1 2	16. Under NRS Chapter 30, courts "have power to declare rights, status and other 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.2. The Director of the Department of Corrections shall:(a) Execute a sentence of death within the week, the first day			
14	being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director			
15	may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.			
16	(b) Select the drug or combination of drugs to be used for the			
17	execution after consulting with the Chief Medical Officer. (c) Be present at the execution. (d) Notify these members of the immediate family of the vistim			
18	(d) Notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.			
19	(e) Invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age			
20	of 21 years to be present at the execution. The Director shall determine the maximum number of persons who may be present			
21	for the execution. The Director shall give preference to those eligible members or representatives of the immediate family of			
22	the victim who requested, pursuant to NRS 176.357, to attend the execution.			
23	3. The execution must take place at the state prison. 4. A person who has not been invited by the Director may not			
24	witness the execution.			
25	NRS 176.355.			
26	18. Floyd in this action asserts that NRS 176.355 on its face violates the			
27	Separation of Powers doctrine enshrined in Article 3, §1 of Nevada's Constitution.			
28				
	Page 4 of 11			
	AA406			

119. Article 3 of Nevada's Constitution is entitled "Distribution of Powers." NEV.2CONST. 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 bodies to frame and enact laws, and to amend and repeal them.		
12			
13	The executive power extends to the carrying out and enforcing the laws enacted by the legislature		
14	'Judicial Power' is the <i>authority</i> to hear and determine		
15	justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree, or order.		
16	authority to emore any varia juagment, accred, or or acr.		
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. <i>Del Papa</i> , 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).

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).

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

10 27. "An example of a pure legal question might be a challenge to the facial validity
11 of a statute." *Beavers v. State, Dep't. of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 438
12 n.1, 851 P.2d 432, 434 n.1 (1993); accord Schwartz v. Lopez, 132 Nev. 732, 744, 382 P.3d
13 886, 895 (2016).

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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)).

28

. .

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

3

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

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

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

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

subcutaneously, or intravenously. The Court does not agree. The Court views the words
 "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).

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

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

1741. As to Floyd's specific challenges, the Court does not agree with Floyd that the Legislature improperly delegated the law-making function by not specifying the drug or 18 combination of drugs to be used in an execution by lethal injection. Consistent with 19Separation of Powers principles, the Legislature may delegate the power to determine the 20facts or state of things upon which the law makes its own operations depend. State ex rel. 2122Ginocchiov. Shaughnessy, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function 23to NDOC's Director. 24

42.

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

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

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

Pine v. Leavitt, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*, 143
U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). As the Nevada Supreme Court noted by citing
to Justice Brandeis' opinion in *Douglas v. Noble*, 261 U.S. 165 (1923), that the Legislature
may itself provide a specificity of facts upon which curtails the Executive branch's
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 94445 (citing *Douglas*, supra).

1344. NRS 176.355 is also not infirm because it does not include specific language requiring a humane execution or that the drug(s) selected be humane. The Legislature and 14 administrative agencies alike must follow the state and federal constitution. See Gibson v. 15Mason, 5 Nev. 283, 292 (1869) (explaining that the Legislature's power is limited only by 1617"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 NDOC may act unconstitutionally without a specific statutory language commanding them 19 20to obey the Nevada and United States Constitutions.

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

46. The courts to address this question, which have capital punishment statutes
that are similar to Nevada's, have overwhelmingly found their state legislature can
constitutionally delegate implementation of execution statutes to corrections officials. See, *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,

1 2012); Cook v. State, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); State v. Ellis, 799 N.W.2d $\mathbf{2}$ 267, 289 (Neb. 2011); Brown v. Vail, 237 P.3d 263, 269 (Wash. 2010) (en banc); Sims v. 3 State, 754 So. 2d 657, 670 (Fla. 2000); State v. Osborn, 631 P.2d 187, 201 (Idaho 1981); Ex 4 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 $\mathbf{5}$ 6 5169157 at *28 (Tenn. Crim. App. 2015)).

7 47. Finally, the Court notes the Nevada Supreme Court considered and rejected 8 near identical arguments in the Eighth Amendment context. McConnell v. State, 120 Nev. 9 1043, 1056-57, 102 P.3d 606, 616 (2004); State v. Gee, 46 Nev. 418, 436-48, 211 P. 676, 681-10 82 (1923);

11 48. In upholding former NRS 176.355, the Nevada Supreme Court noted the 12current statute affords NDOC no more discretion than its prior version, requiring the use 13of lethal gas for executions, which "infring[ed] no provision of the Constitution." Gee, 46 14 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 1516 the reasoning in Gee applies equally to Nevada's lethal injection statute. See McConnell, 17120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge 18 to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection 19procedure).

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12		loyd has no likelihood of success on the merits, the other ed not be addressed				
3	49. Having four	49. Having found that Floyd does not have a likelihood of success on the merits,				
4	the Court's preliminary injunction inquiry is over and Floyd's request for extraordinary					
5	relief must be denied. <i>Boulder Oaks Comm. Assoc. v. B& J Andrews Enters., LLC</i> , 125 Nev.					
6	397, 403, 215 P.3d 27, 31 n.6 (2009).					
7	III. Order					
8	Based upon the B	Based upon the Background and Conclusions of Law above:				
9	IT IS HEREBY O	RDERED that Floyd's motion for temporary restraining order and				
10	preliminary injunction is					
11	DATED this	day of, 2021.				
12		Dated this 17th day of June, 2021				
13		C Cinobar HUDGE				
14		DISTRICT COURT JUDGE				
15	Submitted by:	36A 824 8598 A29D Adriana Escobar				
16	AARON D. FORD Attorney General	District Court Judge				
17						
18	By: <u>/s/ Steve Shevorski</u> Steve Shevorski					
19	Chief Litigation Cour Attorneys for Defende	usel unts				
20						
21	Approved as to form and	content.				
22	RENE L. VALLADARES					
23						
24	By: <u>/s/ David Anthony</u> David Anthony					
25	Assistant Federal Pu Brad D. Levenson					
26	Assistant Federal Pu Jocelyn S. Murphy_					
27	Assistant Federal Pu Attorneys for Plaintif					
28						

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 <<u>SShevorski@ag.nv.gov</u>>
Sent: Wednesday, June 16, 2021 1:33 PM
To: David Anthony <<u>David Anthony@fd.org</u>>; Brad Levenson <<u>Brad Levenson@fd.org</u>>; Crane Pomerantz
<<u>CPomerantz@sklar-law.com</u>>; 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	CCERN			
2	CSERV			
3	DISTRICT COURT CLARK COUNTY, NEVADA			
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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 17	Steven Shevorski	sshevorski@ag.nv.gov		
17	Mary Pizzariello	mpizzariello@ag.nv.gov		
19	Akke Levin	alevin@ag.nv.gov		
20	Sabrena Clinton	sclinton@ag.nv.gov		
21	Kiel Ireland	kireland@ag.nv.gov		
22	Eddie Rueda	erueda@ag.nv.gov		
23	Bradley Levenson	ecf_nvchu@fd.org		
24				
25				
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1	I			

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)			nt(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. Levenson, Bradley D. Shevorski, Steven G.	Attorney Attorney 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

PRINT DATE: 07/07/2021

Page 1 of 2 Minutes Date: June 08, 2021

A-21-833086-C

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

Certification of Copy

State of Nevada County of Clark

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),

SS:

Case No: A-21-833086-C

Dept No: XIV

vs.

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

Defendant(s),

now on file and of record in this office.

ALL CLEARE CONTRACTOR **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 anners