

No. 84081

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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ZANE MICHAEL FLOYD,

Appellant,

v.

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

Respondents.

On Appeal from the Eighth Judicial District Court
The Honorable Adriana Escobar
District Court Case No. A-21-833086-C

**RESPONDENTS NEVADA DEPARTMENT OF CORRECTIONS
AND DIRECTOR CHARLES DANIELS'
ANSWERING BRIEF**

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STATEMENT OF THE ISSUES

Did the district court correctly conclude that NRS 176.355 does not violate the separation of powers and provides sufficient and suitable standards for guiding the Director of the Nevada Department of Corrections in preparing an execution protocol?

STATEMENT OF THE CASE

A Clark County jury sentenced Plaintiff Zane Michael Floyd to death for killing four people with a shotgun in an Albertson's grocery store in 1999. *Floyd v. State*, 118 Nev. 156, 161-63, 42 P.3d 249, 253-54 (2002). After the completion of Floyd's federal habeas proceedings, the Clark County District Attorney began the process of obtaining an order of execution and warrant to carry out Floyd's capital sentences. 1-AA-002.

Thereafter, Floyd filed a complaint in the district court, asserting that NRS 176.355 violates the separation of powers under what is known as the non-delegation doctrine. 1-AA-001-016. Along with his complaint, which sought declaratory and injunctive relief, Floyd sought a temporary restraining order and a preliminary injunction. 1-AA-013, 017-030.

The district court denied Floyd's request for preliminary relief, and Floyd appealed that ruling. 2-AA-357-369. But this Court dismissed the appeal as moot because, while briefing was ongoing in that case, the district court granted a

motion dismiss the complaint filed by Defendants Nevada Department of Corrections and Director Charles Daniels (collectively “the Department”).¹ Order Dismissing Appeal, *Floyd v. Nevada Dep’t. of Corr.*, Case No. 83181 (April 21, 2022).

The district court entered findings of fact and conclusions of law, which expressly delineate the rolls of the different branches of government and expressly cite numerous Nevada Supreme Court cases applying the non-delegation doctrine and other relevant principles on statutory interpretation. 3-AA-731-733. And it drew from those cases fundamental principles that inform application of the non-delegation doctrine, among them (1) that “the Legislature may delegate the power to determine the facts or state of things upon which the law makes its own operations depend”; and (2) that the Legislature does not need to restate in a statute what is already proscribed by the state and federal constitutions. 3-AA-734.

And applying those principles to this case, the district court concluded that Floyd failed to carry his burden of establishing that NRS 176.355 is unconstitutional. 3-AA-734. The district court also cited (1) numerous cases from other jurisdictions around the country that have rejected arguments similar to

¹ The complaint also named Nevada Chief Medial Officer Dr. Ihsan Azzam as a defendant. And the district court granted a motion to dismiss the complaint as to Dr. Azzam. Although Floyd appealed the district court’s order dismissing the complaint against Dr. Azzam, Floyd has since stipulated to dismissing the appeal with respect to Dr. Azzam.

Floyd's, and (2) prior Nevada Supreme Court decisions rejecting challenges to NRS 176.355 in other related contexts. 3-AA-734-735.

This appeal follows.

SUMMARY OF THE ARGUMENT

Separation of powers is one of the most fundamental principles of our form of government. But as history has shown, the line between the legislative role of writing the law and the executive role of carrying out the law is sometimes imprecise. And that lack of precision has led to the development of the non-delegation doctrine.

The non-delegation doctrine recognizes that the Legislature is prohibited from transferring its power to enact law to another branch of government *State v. Shaughnessy*, 47 Nev. 129, ___, 217 P. 581, 583 (1923). This typically occurs when the Legislature fails to provide "suitable standards" to guide the Executive's exercise of authority to carry out public policy. *Sheriff v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). But after it has adequately defined a particular public policy, the Legislature may delegate to the Executive the authority to fill in the gaps necessary to carry out that policy. *Id.*

Does NRS 176.355 adequately define public policy on carrying out a death sentence in Nevada? That is the ultimate question in this case. Floyd posits that NRS 176.355 violates the principles of non-delegation by failing to provide a more

precise definition for the State's preferred method of execution. But Floyd fails to articulate how the absence of the higher level of precision he desires in NRS 176.355 actually offends the principles of separation of powers that inform application of the non-delegation doctrine.

The district court correctly concluded that Floyd failed to establish that NRS 176.355 is unconstitutional. The core purpose of non-delegation is to prevent arbitrary decision-making by the executive branch. *Luqman*, 101 Nev. at 154, 697 P.2d at 110. But NRS 176.355 does not leave the Director to arbitrarily define how to carry out a death sentence under Nevada law. Rather, as the district court correctly determined, NRS 176.355 unambiguously identifies lethal injection as Nevada's preferred method of execution and appropriately leaves fine-tuning the details of implementing an execution by lethal injection to the Department.

In his summary of the argument, Floyd also asserts that under the district court's standard, the Legislature did not even need to identify lethal injection as the method of execution. But whether the Legislature could have done less than it has done in NRS 176.355 is not before this Court for two reasons. First, Floyd did not brief this point in his argument, which means this Court need not address it. Additionally, what is before this Court is whether the Legislature fulfilled its duty to write the law in NRS 176.355 and constitutionally delegated putting that law into action to the Department. That is precisely what NRS 176.355 does. And for

that reason, the district court correctly granted the motion to dismiss and denied Floyd’s request for a permanent injunction.

Even so, if Floyd were correct that NRS 176.355 lacks sufficient detail to satisfy the non-delegation doctrine, the district court also correctly recognized that the federal and state constitutional prohibitions against cruel and unusual punishment appropriately curtail the director’s exercise of discretion in creating an execution protocol. The Legislature need not restate by statute what is already proscribed by the Constitution—here, the prohibition against cruel and unusual punishment. And with the prohibition against cruel and unusual punishment added to the analysis, the scale tips decisively in the Department’s favor.

A wealth of authority from around the country also favors the Department’s position. The single case Floyd cites in his favor is an outlier and is limited in application. And Floyd’s policy argument that the Department, through the Director, lacks the expertise necessary to implement an execution protocol presents a policy question that is appropriately reserved to the Legislature.

The district court correctly granted the motion to dismiss. This Court should affirm.

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. . .
. . .

ARGUMENT

I. Standard of Review

And order granting a motion to dismiss is reviewed *de novo*. *Moon v. McDonald, Carano & Wilson LLP*, 129 Nev. 547, 550, 306 P.3d 406, 408. And denial of injunctive relief is typically reviewed for an abuse of discretion, but this Court will review denial of an injunction *de novo* when the facts are not in dispute. *Commission on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009).

The constitutionality of a statute is a question of law reviewed *de novo*. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 644, 173 P.3d 734, 738 (2007). Application of the separation of powers is also a question of law that is reviewed *de novo*. *State v. Second Jud. Dist. Ct.*, 134 Nev. 783, 786, 432 P.3d 154, 158 (2018).

Statutes are presumed to be constitutional. *Hard v. Depaoli*, 56 Nev. 19, ___, 41 P.2d 1054, 1056 (1935) A person challenging the constitutionality of a statute bears the burden of making a clear showing of invalidity of the statute. *Silvar v. Eighth Jud. Dist. Ct. ex rel. Cty. Of Clark*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

II. Floyd fails to establish a violation of the separation of powers.

Floyd fails to show that the district court erred by denying his requests for declaratory and injunctive relief and granting the Departments' motion to dismiss.

The district court cited and applied the correct legal standards. And the district court correctly determined that Floyd failed to establish a violation of separation of powers under the non-delegation doctrine.

A. The district court cited and applied the correct legal standard.

Floyd charges the district court with failing to apply the standard this Court set forth in *Luqman*. OB at 13-16. But this Court's review is confined to the district court's final written order granting the motion to dismiss. *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1280, 1382 (1987). And Floyd's argument is irreconcilable with that order.

The district court cited and expressly applied *Luqman*, along with numerous other decisions from this Court that address application of the non-delegation doctrine. 3-AA-731-33. And through its application of this Court's case law, the district court expressly rejected Floyd's arguments that NRS 176.355 improperly delegates law-making authority to the Department. 3-AA-733-734.

Thus, Floyd's claim that the district court failed to apply *Luqman* is belied by the record. Rather, Floyd's argument boils down to him disagreeing with how the district court applied the non-delegation doctrine. And for the reasons explained below, Floyd fails to articulate how NRS 176.355 grants the Department the power to make law, rather than merely delegating the authority to address the

facts and conditions necessary to carrying out public policy the Legislature already established.

B. Floyd did not show a violation of separation of powers.

The district court correctly determined that Floyd failed to establish a violation of the separation of powers through the non-delegation doctrine. The Legislature adequately defined the relevant public policy and constitutionally delegated the fine-tuning of carrying out that policy to the Department.

1. Floyd fails to articulate how NRS 176.355 results in the Department making law rather than carrying out the law.

The non-delegation doctrine is an application of the principle of separation of powers. *Luqman*, 101 Nev. at 153, 697 P.2d at 110 (citing Nev. Const. art. 3, § 1). As the district court articulated in its order, the non-delegation doctrine draws a line between making the law and carrying out the law. 3-AA-732. Relevant here, is that the Legislature writes the law by defining the elements of crimes and establishing the punishments for criminal offenses, and the Executive enforces the law by investigating and prosecuting crimes and carrying out the relevant punishment. *Del Papa v. Steffen*, 112 Nev. 369, 377-78, 925 P.2d 245, 250-51 (1996); *Sheriff v. Lamotte*, 100 Nev. 270, 272, 680 P.2d 333, 334 (1984).

Floyd's complaint failed to articulate how NRS 176.355 results in the Department crossing the line into lawmaking. 3-AA-733-734. And his opening brief on appeal fares no better. Floyd insists that the allowing the Director to create

an execution protocol is an exercise in making law. But his position comes up short when it is measured against this Court's non-delegation cases, *Luqman* included.

First, Floyd challenges the statute because it is silent on a list of issues. OB at 19-20. But Floyd fails to explain how the Department is making law when it makes decisions about (1) “[t]he class(es) of drug(s) to be used in executions”; (2) the dosage and sequencing of the drugs; (3) the quantity and quality of the drugs; (4) the number of drugs to be used; (5) the preferred method for injecting those drugs; (6) where to obtain the drugs; (7) the qualifications and training for the execution team; (8) providing notice of the selected drugs to the prisoner; and (9) setting up the execution chamber.

None of those determinations involves the Department exercising a legislative function by defining a new crime or a new punishment, as would have been the case if the Legislature delegated the authority to set conditions of lifetime supervision to the State Board of Parole Commissioners in *McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016). And the determinations Floyd listed in his brief are no different than the Pharmacy Board considering the effects and properties of various drugs when categorizing them into schedules in *Luqman* or the Board of Wildlife Commissioners setting various standards for checking hunting traps that this Court recently addressed in *Smith v. Board of Wildlife Commissioners*, 461 P.3d 164, 2020 WL 1972791 (Nev. 2020). Each point Floyd

lists in his brief addresses a factual issue or a condition necessary to carrying out the Legislature's expressed desire that a death sentence be carried out by lethal injection.

Floyd also complains that NRS 176.355 does not provide any qualitative direction regarding the Director's required consultation with the Chief Medical Officer. OB at 20-22. But Floyd fails to explain how the lack of more detailed direction regarding the Director's consultation with the Chief Medical Officer somehow transforms the nature of the Director's role under NRS 176.355 into lawmaking. The Director's decisions in establishing an execution manual remain an exercise in fact-finding or resolving conditions necessary to carrying out the Legislature's directives, both of which are permissible under the non-delegation doctrine.

Thus, everything that Floyd insists is missing from NRS 176.355 involves decisions that the Legislature can constitutionally delegate to the Department. And the district court correctly concluded that NRS 176.355, as written, provides sufficient and suitable standards on carrying out a capital sentence and appropriately leaves fine-tuning the details of carrying out an execution to the Department. Certainly, the Legislature can provide more detail in NRS 176.355 if it wants to, but Article 3, Section 1 of the Nevada Constitution does not demand that it do so.

Finally, in his summary of the argument, without further development anywhere in the brief, Floyd asserts that the district court's standard in this case "would not necessarily even require a means of execution to be stated to constitute a constitutional delegation of authority." OB at 8-9. Because Floyd does not actually brief that argument, this Court need not address it. *See, e.g., Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Additionally, this Court need not decide how the district court's decision would apply to a hypothetical statute that is not at issue here. The question for this Court to decide is only whether NRS 176.355 is constitutional as written.

2. The district court correctly recognized that the constitutional prohibition of cruel and unusual punishment informs this Court's inquiry.

Even if Floyd were correct that language of NRS 176.355 alone lacks adequate guidance to constrain the Department's decision-making in establishing an execution protocol, Floyd's argument falls when the Eighth Amendment is added to the equation. The district court did not misapprehend Floyd's claim by relying on this Court's decisions addressing NRS 176.355 under the Eighth Amendment, as he suggests. OB at 16-17. Instead, the district court correctly acknowledged that the Legislature is not required to restate constitutional commands in a statute and recognized that the Nevada Supreme Court has rejected

nearly identical claims to Floyd's in the Eighth Amendment context. 3-AA-734-735.

The non-delegation doctrine's purpose is ensuring that the law adequately defines the parameters of executive authority for carrying out public policy. *Luqman*, 101 Nev. at 154, 697 P.2d at 110. Proper consideration of principles that control statutory construction, which aid this Court in giving meaning to statutory language, emphasize the importance of the federal and state prohibitions against cruel and unusual punishment in this context. It is fundamental that the Legislature is presumed to understand the current state of law. *Northern Nevada Ass'n of Injured Workers v. Nevada State Indus. Ins. System*, 107 Nev. 108, 112, 807 P.2d 728, 730 (1991). Inherent in that presumption is the Legislature's awareness of constitutional mandates. *See McNeill*, 132 Nev. at 556, 375 P.3d at 1025. And consistent with the presumption of regularity, the Legislature is free to presume that the Department will abide by relevant constitutional mandates when carrying out the directives the Legislature sets forth by statute. *State v. Gee*, 46 Nev. 418, ___, 211 P. 676, 682 (1923).

Thus, Floyd's argument that the non-delegation doctrine requires the Legislature to explicitly define all the details for establishing an execution protocol within NRS 176.355 makes no practical sense. This Court already rejected a similar claim raised under the Eighth Amendment nearly a century ago because the

Legislature does not need to restate in a statute what the federal and state constitutions already demand of the Department during an execution. *Id.* at ____, 211 P. at 681-82. And that point holds true regardless of whether this Court is applying the Eighth Amendment or principles of non-delegation doctrine that inform application of the separation of powers under Article 3, Section 1 of the Nevada Constitution.

3. An abundance of authority from other jurisdictions supports the district court’s order.

Floyd also turns to out-of-state authority for assistance. OB at 23-28. But Floyd is only able to cite a single case—*Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012)—that supports his position. OB at 24. Other than *Jones*, every other decision considering a challenge to lethal injection statutes based upon the non-delegation doctrine has denied relief.² And the Arkansas Supreme Court has revisited *Jones*, limiting its holding by rejecting a challenge asserting that the lethal injection statute in Arkansas continued to violate “separation-of-powers because it delegates

² 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)).

to the [Arkansas Department of Correction] the ‘absolute discretion’ to determine the type of barbiturate to use and sets no guidelines or standards concerning the competence of personnel who will carry out death sentences.” *Hobbs v. McGehee*, 458 S.W.3d 707, 709 (Ark. 2015).

Thus, *Jones* is an outlier in holding that a state constitutional provision on the separation of powers mandates the state legislature to provide specific guidance for selecting the drugs to be used in an execution. And the Arkansas Supreme Court has limited the scope of that decision by rejecting further non-delegation challenges to the statute.

Floyd also suggests this Court should consider that various other states have not addressed the issue because (1) the state’s legislature decided to provide “standards detailing the type, quantity, or quality of drugs required,” or (2) the issue has not been presented through a non-delegation challenge. OB at 26-27. But Floyd provides no explanation on how either of those points have any bearing here. That a state legislature decided to include additional detail in its relevant statutory framework says nothing of whether that state’s constitution demanded that level of detail. And that no prisoner has raised the issue in the other states Floyd identifies would seem to suggest that there is no basis to raise such a claim in those states. Thus, Floyd’s arguments about the states that have not addressed this issue are unavailing.

Finally, Floyd argues that in some states that have rejected non-delegation challenges, the relevant statutory framework provides more detail on the method of execution than NRS 176.355. OB at 24 n.6. But Floyd fails to show that the additional details in those statutes played a material role in the state court's decision. In other words, Floyd provides no explanation to show that those state courts would have reached a different outcome if they were analyzing a statute that is identical to NRS 176.355.

The wealth of authority on this issue from outside Nevada strongly supports the district court's determination that Floyd failed to carry his burden of establishing the unconstitutionality of NRS 176.355. This Court should affirm.

4. Floyd's policy argument about the director's qualifications to implement an execution protocol improperly asks this Court to resolve a policy question that belongs to the Legislature.

Floyd argues that his position best serves the democratic process. OB at 29-31. This is so, according to Floyd, because the basis for deferring to the Department on preparing an execution protocol is grounded upon a misperception about "institutional competency" and "agency expertise." OB at 29. But Floyd's argument fundamentally misses the point and demonstrates that pushing too hard in his desired direction threatens to upset the balance of power between the three branches of government under the Nevada Constitution in other ways.

The sole constitutional question for this Court to decide in this appeal is whether the Legislature has improperly delegated its law-making authority to the Department. It has not. For the reasons explained above, the Legislature has sufficiently defined public policy on the preferred method of execution in Nevada and has appropriately left fine-tuning the details of putting that policy into action in the hands of an executive agency.

Again, the Legislature could place tighter requirements on the Department in establishing a protocol if the Legislature wanted to do so. But for the reasons explained above, the Nevada Constitution does not demand that result. And once that threshold question on the constitutionality of a legislative delegation of authority is complete, remaining questions such as who has the relevant “training or expertise” for carrying out the Legislature’s directives are pure questions of policy that are the province of the Legislature alone. *Cf. Schwartz v. Lopez*, 132 Nev. 732, 738, 382 P.3d 886, 891 (2016) (recognizing that once the court determines that a statute is constitutional, considerations of the public policy set forth by statute are “left to the sound wisdom and discretion of our state Legislature”)

Floyd cites no authority establishing that the non-delegation doctrine gives this Court authority to second-guess the Legislature’s decision to make an otherwise constitutional delegation of authority to the Department. “When a statute

is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch.” *Beazer Homes Nevada, Inc. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 120 Nev. 575, 578, 97 P.3d 1132, 1134 (2004).

Because the Legislature can constitutionally delegate the authority for creating an execution protocol, and has done so here, questions of public policy pertaining to the wisdom of the Legislature’s decisions (1) to make that delegation of authority, and (2) to whom to delegate that authority are questions this Court is not positioned to resolve. Those issues are questions for the Legislature to decide through the democratic process that Floyd professes to protect. *Id.*

This Court should decline Floyd’s invitation to make policy decisions that are the Legislature’s to make.

* * *

CONCLUSION

This Court should affirm the district court's order dismissing Floyd's complaint.

DATED this 17th day of June 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of NRAP 32(a)(7)(B) because this brief contains 3,842 words, excluding the parts of the brief exempted by NRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of June 2022.

AARON D. FORD
Attorney General

By: /s/ Jeffrey M. Conner
Jeffrey M. Conner (Bar No. 11543)
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the Nevada Supreme Court by using the electronic filing system on June 17, 2022. Registered participants will be served electronically.

/s/ Esmeralda I. Velazquez
An Employee of the
State of Nevada
Office of the Attorney General