**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ZANE MICHAEL FLOYD,

Appellant,

vs.

Cardinal Health, a private corporation; the STATE OF NEVADA DEPARTMENT OF CORRECTIONS; and JAMES DZURENDA, Director,

Respondents.

Supreme Court No. 85826

District Court No.: CV-21-01021



# NDOC RESPONDENTS' ANSWERING BRIEF

Respectfully submitted by:
AARON D. FORD
Attorney General
D. RANDALL GILMER (Nevada Bar No. 14001)
Chief Deputy Attorney General
CHRIS DAVIS (Nevada Bar No. 6616)
Senior Deputy Attorney General
Office of the Attorney General, State of Nevada
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-9252 (phone)
(702) 486-3773 (fax)
cwdavis@ag.nv.gov
*Attorneys for Respondents*
*State of Nevada Department of Corrections*
*and James Dzurenda*

## I. DISCLOSURE STATEMENT

The undersigned counsel of record certifies that Respondents State of Nevada Department of Corrections and James Dzurenda are not persons or entities described in NRAP 26.1(a) that must be disclosed.

## II. TABLE OF CONTENTS

## III. TABLE OF AUTHORITIES

### CASES

**STATUTES**



**RULES**

**TREATISES**

## IV. STATEMENT OF THE ISSUES

**A.** Whether Floyd has standing to assert claims on behalf of Defendant Cardinal Health against the NDOC Defendants.

**B.** Whether Floyd may raise claims for the first time on appeal that he expressly disclaimed before the district court, or failed to raise at all.

**C.** Whether the district court properly granted NDOC Defendants' motion for judgment on the pleadings when Floyd's complaint fails to allege facts supporting any claim for relief against NDOC Defendants.

## V. STATEMENT OF CASE

On November 9, 2021, Plaintiff-Appellant Zane Floyd filed a civil complaint against the State of Nevada, ex rel. Nevada Department of Corrections, Director Charles Daniels (collectively, NDOC) alleging a single claim for false pretenses. *See* 1-ROA-19, Complaint at 10:11-20. Floyd supports this claim with allegations that NDOC defrauded Cardinal by concealing letters from Manufacturers indicated that they did not want their products used in lethal injections and failing to disclose to Cardinal NDOC's intent to use such products for lethal injection. *See* 1-ROA-19, Complaint at 10:14-15.

NDOC filed a motion for judgment on the pleadings (1-ROA-174-88), which the district court initially denied, after applying an

erroneous standard for a motion for judgment on the pleadings (2-ROA-287-89). After NDOC moved for reconsideration (2-ROA-320-27), the district court granted NDOC's motion (2-ROA-347-52). After the district court entered judgment in favor of NDOC, Floyd filed his notice of appeal (2-ROA-347-52).

## VI. STATEMENT OF FACTS

"Early in the morning on June 3, 1999, Zane Michael Floyd held a woman against her will at his apartment in Las Vegas and sexually assaulted her." *Floyd v. State*, 118 Nev. 156, 161, 42 P.3d 249, 253 (2002),[1] *cert. denied, Floyd v. Nevada*, 537 U.S. 1196 (2003). "He then took his shotgun, walked to a nearby Albertson's supermarket, and shot five employees, killing four of them." *Id.* "The jury found Floyd guilty of four counts of first-degree murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, one count of burglary while in possession of a firearm, one count of first-degree kidnapping with use of a deadly weapon, and four counts of sexual assault with use of a deadly weapon." *Id.* at 162, 42 P.3d at 254. "For each murder, the jury imposed a death sentence, finding that the aggravating circumstances outweighed any mitigating circumstances."

---

[1] *Floyd* was abrogated on grounds unrelated to issues in this motion by *Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008).

*Id.* at 163, 42 P.3d at 254. "For the other seven offenses, the district court imposed the maximum terms in prison, to be served consecutively." *Id.* Floyd's conviction and sentence was upheld by Nevada Supreme Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court. *See Floyd*, 118 Nev. at 163-77, 42 P.3d at 254-63, *cert. denied*, 537 U.S. at 1196; *Floyd v. Filson*, 949 F.3d 1128, 1137-53 (9th Cir. 2020), *cert. denied. Floyd v. Gittere*, 141 S. Ct. 660 (2020).

On November 9, 2021, Floyd filed a civil complaint against the State of Nevada, ex rel. Nevada Department of Corrections, Director Charles Daniels (collectively, "NDOC"), unrelated to Floyd's lawful conviction and sentence for his crimes of murder, sexual assault, and other related crimes. *See* 1-ROA-11, Complaint at 2:18-21. The complaint also alleges claims against Alvogen, Inc., Sandoz, Inc., Hikma Pharmaceutical USA, Inc., three pharmaceutical manufacturers (collectively, "Manufacturers"),[2] and Cardinal Health (Cardinal), a pharmaceutical distributor. *See* 1-ROA-11-13, Complaint at 2:4-17, 3:5-6, 3:27 – 4:2. Floyd's only claim against NDOC is for false pretenses. Floyd alleges that NDOC defrauded Cardinal by concealing letters from

[2] On March 7, 2022, Floyd acknowledged his claims against the Manufacturers were defective by voluntarily dismissing those claims. 1-ROA-160-61.

Manufacturers indicating that the Manufacturers did not want their products used in lethal injections and failing to disclose to Cardinal NDOC's intent to use such products for lethal injection. *See* 1-ROA-19, Complaint at 10:14-15.

As Floyd's allegations do not support any claim for relief, much less a claim by him, the district court properly granted NDOC's motion for judgment on the pleadings.

## VII. SUMMARY OF ARGUMENT

Upon reconsideration, the district court properly granted NDOC's motion for judgment on the pleadings. Floyd's lack of standing is beyond debate. While Floyd's complaint entirely rests on allegations of fraudulent concealment, Floyd does not allege that NDOC concealed anything from Floyd. Instead, the object of his litigation is that NDOC fraudulently concealed information from Co-Defendant Cardinal Health, Inc. (Cardinal), a pharmaceutical distributor, from whom NDOC purchased pharmaceuticals to be used in Floyd's execution. NDOC could not and did not conceal any information that it had a duty to disclose to Cardinal. Even assuming it did, for purposes of NDOC's motion, Floyd lacks any injury which may be traceable to the fraudulent concealment allegedly directed to Cardinal. Instead, any injury faced by Floyd is the direct result of the four murders Floyd committed, for

which he has been justly sentenced. Accordingly, Floyd lacks standing to assert any claim on behalf of Cardinal.

Moreover, before the district court, Floyd insisted that his sole claim against NDOC was for false pretenses. This Court, however, has never recognized such a claim. In Nevada, false pretenses is a crime, not a tort. The legislature never indicated that Nevada's false pretenses criminal statute should modify the common law of fraud to create a new tort. Such statutory torts may be only created by the legislature, not the courts. As false pretenses is not a tort, Floyd's attempt to assert such a claim should be rejected.

Even if a claim of false pretenses was a recognized tort in Nevada, Floyd does not allege facts in his complaint required to support the elements for that claim. In fact, three of the four elements lack any factual support at all, as Floyd does not point to any facts in his complaint which would support those elements. Floyd's abbreviated allegation of a false representation to Cardinal fails to meet even a relaxed standard of alleging fraud with particularity, much less the more demanding standard of pleading the "time" and "place" of the misrepresentation, "the identity of the parties involved" and "the nature of the fraud." *See Rocker v. KPMG LLP*, 122 Nev. 1185, 1192, 148 P.3d 703, 708 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 181 P.3d 670 (2008).

Despite his assurance to the district court that he was only asserting a false pretenses claim, Floyd now claims that he also asserts fraudulent concealment and aiding and abetting claims. Floyd, however, cannot raise claims, for the first time on appeal, which he denounced before the district court or failed to mention at all.

Nevertheless, Floyd's fraudulent concealment claim has no merit. Floyd's unsupportable allegation that NDOC concealed any Manufacturers' disapproval of use of their pharmaceuticals for legal capital punishment is belied by Floyd's own complaint.

In his complaint, Floyd contradicts his conclusory allegations of concealment and proclaims that the Manufacturers directly informed Cardinal and the public at large for years about their disapproval of lawful capital punishment, despite the people's and victims' "important interest in the timely enforcement of [that] sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019). That disclosure establishes NDOC could not have concealed Manufacturers' disapproval even if they so desired. Moreover, Floyd failed to allege any facts showing the NDOC had a duty to disclose such information, intended to defraud Cardinal, that Cardinal would have acted differently, or that Cardinal suffered any damages as a result, all of which are necessary to state a claim of fraudulent concealment. Because Floyd has no such facts,

Floyd's fraud claim cannot be established, especially when such facts must be alleged with particularity, as mandated by Nev. R. Civ. P. 9(b).

Floyd's aiding and abetting claim fares no better. Cardinal owed no duty to Floyd because it had no relationship with Floyd, and therefore NDOC could not have aided Cardinal in breaching a duty. In fact, Floyd does not allege that NDOC aided Cardinal in any way, but instead alleges that NDOC acted contrary to Cardinal's interests. More importantly, Floyd does not allege that he was harmed at all as a result of Cardinal's actions, which is essential to state an aiding and abetting claim.

Accordingly, Floyd lacks standing, and his complaint has no merit whatsoever. This Court should therefore affirm the district court's order granting NDOC's motion for judgment on the pleadings, and dismiss Floyd's complaint with prejudice.

## VIII. ARGUMENT

### A. Standard of Review

This Court "review[s] a district court's decision to reconsider a previously decided motion for an abuse of discretion" E*state of Curtis v. Socaoco*, 136 Nev. 806, 472 P.3d 683, 2020 WL 5837916, at *1 (Sep. 30, 2020). In *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1998), this Court held that a "district court may reconsider a previously decided issue if . . . the decision is clearly erroneous." A motion for

reconsideration should be granted when the district court "clearly erred when [the court] denied [defendant's] motion to dismiss or for summary judgment." *Estate of Curtis*, 2020 WL 5837916, at *1.

In *Matter of Guardianship of Jones*, 531 P.3d 1236, 1248 (Nev. 2023), this Court held that the "district court's decision may be affirmed on any ground supported by the record, even if not relied upon by the district court." "Thus, the decision may be affirmed if the district court reached the correct result, even if for the wrong reason." *Id.*

In *Sadler v. PacifiCare of Nev.*, 130 Nev. 990, 993, 340 P.3d 1264, 1266 (2014), this Court held that "an order granting a motion for judgment on the pleadings presents a question of law" and is reviewed "*de novo.*" Pursuant to Nev. R. Civ. P. 12(c), "[a]fter the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." In *Peck v. Zipf*, 133 Nev. 890, 892, 407 P.3d 775, 778 (2017), this Court explained that when ruling on a motion for judgment on the pleadings, a court "accepts the factual allegations in the complaint as true and draws all inferences in favor of the nonmoving party." Accordingly, a "judgment on the pleadings is reviewed in the same manner as a dismissal under NRCP 12(b)(5)." *Id.; see also* S*adler*, 130 Nev. at 993–94, 340 P.3d at 1266 (holding that as "with a dismissal for failure to state a claim," when ruling on "a judgment on the pleadings," the court merely "accept[s] the factual

allegations in the complaint as true and draw all inferences in favor of the nonmoving party," and therefore "all material allegations of fact are admitted" for purposes of the motion); Nev. R. Civ. P. 12(h)(2) (providing that the "[f]ailure to state a claim upon which relief can be granted . . .may be raised . . . by a motion under Rule 12(c)").

In *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973), this Court held that, to avoid dismissal, the "complaint must . . . allege facts sufficient to establish all necessary elements of the claim for relief." "[B]are allegation is not enough," but plaintiff's "complaint must set forth sufficient facts to establish all necessary elements of a claim for relief." *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 873-75, 8 P.3d 837, 839-40 (2000). When ruling on a motion to dismiss, the court "must look at the substance of the claims, not just the labels used in the . . . complaint." *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. Cty. of Clark*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004). When the complaint fails to state facts which are "legally sufficient to constitute the elements of the claim asserted," the complaint should be dismissed. *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 829, 221 P.3d 1276, 1280 (2009).

### B. Floyd Has Not and Cannot Establish Standing

Floyd concedes that standing is essential to maintain his claim of false pretenses. *See* Opening Brief at 19; 1-ROA-218, Op. at 11:21 –

12:9; *see also Shoen v. SAC Holding Corp*., 122 Nev. 621, 634, 137 P.3d 1171, 1180 (2006) (holding a plaintiff's lack of standing "justifies dismissal of the complaint for failure to state a claim"), *abrogated on other grounds by Chur v. Eighth Judicial Dist. Court in & for County of Clark*, 136 Nev. 68, 71-75, 458 P.3d 336, 339-42 (2020). Floyed argues that the district court erred in dismissing his complaint for lack of standing with prejudice because standing implicates the court's subject matter jurisdiction. *See* Opening Brief at 18-20. Floyd, however, fails to cite any authority that would establish standing under the facts of his complaint. This defect alone warrants affirming dismissal of Floyd's complaint. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (refusing to consider arguments when Appellant "neglected his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns"). Floyd therefore concedes that he fails to allege any facts in his complaint which would supply the required standing.

First, Floyd is wrong that standing implicates a Nevada court's subject matter jurisdiction. Standing is a limitation to the federal court's subject matter jurisdiction under the United States Constitution's "Article III's case-or-controversy requirement." *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004) (distinguishing between Article III standing as a "constitutional limitation[] on federal-court

jurisdiction" and "third party standing" which is a "prudential limitation[]" because a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Article III, however, does not apply to Nevada courts, and therefore standing under Nevada law implicates only "prudential" and "justiciability" concerns. *National Association of Mut. Ins. Companies v. Dep't of Bus. & Indus., Div. of Ins.*, 139 Nev. Adv. Op. 3, 524 P.3d 470, 476 (2023). For that reason in *Shoen*, this Court held a plaintiff's lack of standing "justifies dismissal of the complaint for failure to state a claim," instead of dismissal for lack of subject matter jurisdiction. 122 Nev. at 634, 137 P.3d at 1180. Accordingly, the district court could properly dismiss Floyd's complaint for lack of standing with prejudice because standing does not implicate a Nevada court's subject matter jurisdiction.[3] *City of Henderson v.*

[3] It is true that in an unpublished decision this Court ruled that "the action should have been dismissed without prejudice" when "dismissal was for lack of standing." *Smaellie v. City of Mesquite*, 133 Nev. 1075, 393 P.3d 660, 2017 WL 1397400, at *1 (2017). This Court, however, relied on federal cases involving Article III where "standing is a jurisdictional mandate," but inadvertently overlooked established precedent that Article III standing does not apply to Nevada courts. Nevertheless, even under federal law, a complaint may be dismissed with prejudice for a lack of standing when a plaintiff cannot pursue his claims in another court. *See B. & V. Distrib. Co., Inc. v. Dottore Companies, LLC*, 278 Fed. Appx. 480, 488, 2008 WL 2080304, at *6 n.7 (6th Cir. 2008).

*Kilgore*, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006) (holding that the "district court is not divested of subject matter jurisdiction" when "justiciability . . . is at play").

More importantly, Floyd has not and cannot establish standing. In *Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 730, 291 P.3d 128, 133, (2012), this Court, citing Nev. R. Civ. P. 17(a), held that "[u]nder Nevada law, an action must be commenced by the real party in interest—one who possesses the right to enforce the claim and has a significant interest in the litigation." "Due to this limitation, a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court" seeking to enforce those rights. *Id*. Thus, to have standing, a "party must show a personal injury and not merely a general interest that is common to all members of the public." *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016).

Here, Floyd is not attempting to assert any personal injury, but instead attempts to assert the injury of Cardinal, who has never claimed injury. Floyd does not claim that NDOC made any misrepresentation or concealed any information that NDOC has a duty to disclose to Floyd. Floyd also does not allege that NDOC intended to induce Floyd to rely on such nonexistent misrepresentations or omissions, or that Floyd actually relied on anything which caused Floyd

harm. Any harm suffered by Floyd is the direct result of the four brutal murders he committed, for which he was lawfully convicted and sentenced to death, and not even relevant to the unsupportable claim Floyd alleges against NDOC in his complaint. Accordingly, Floyd is not the real party in interest and lacks standing to assert a claim of false pretenses against NDOC. *See Catherine Hosp. of Garden City v. Rodriguez,* 971 P.2d 754, 757 (Kan. App. 1998) (holding that plaintiff "had no standing to bring an action for fraud and misrepresentation" because Plaintiff was not "personally been misled," and did not "personally rel[y] on the untrue statement"); *Ex parte DaimlerChrysler Corp.*, 952 So. 2d 1082, 1090–91 (Ala. 2006) (relying on Restatement (Second) of Torts § 533 to reverse denial of motion to dismiss based on standing when plaintiff failed to allege that defendant "contemplated that the third party would be induced to act by the [defendant's alleged] misstatements made to someone else" and therefore failed to allege that plaintiff "relied on any alleged misrepresentation made by" defendant).

In *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), the United States Supreme Court held when "the suit is one challenging the legality of government action, . . . establish[ing] standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue." Here, Floyd is not the object of his action against

NDOC. Instead, the object of his action is to enforce an alleged agreement between Manufactures and Cardinal, Manufacturers' pharmaceutical distributor, purportedly preventing Cardinal from selling pharmaceuticals to NDOC for use in lethal injections. *See* Opening Brief at 40-45; 1-ROA-209, Op. at 2:13-17. The only wrongdoing Floyd alleges against NDOC is that it supposedly concealed from or misrepresented to Cardinal that the pharmaceuticals would be used for lethal injections, which allegedly prevented Manufacturers from enforcing their agreements with Cardinal. *See* Opening Brief at 40-45; 1-ROA-209, Op. at 2:17-19. Again, while NDOC did not mislead or conceal the reason for the purchase, none of these allegations have anything to do with Floyd's rights. Instead, the object of Floyd's litigation is an improper attempt to enforce the rights of the Manufacturers or Cardinal. *See Beazer Homes,* 128 Nev. at 730, 291 P.3d at 133 (holding that a party "has standing to assert only its own rights and cannot raise the claims of a third party not before the court").

Expanding upon the requirement that the "plaintiff [be] the 'object' of the challenged government action," in *California v. Texas*, 141 S. Ct. 2104, 2113-15 (2021), the United States Supreme Court explained that plaintiffs lacked standing when they failed to show "that the injury they will suffer or have suffered is 'fairly traceable' to the 'allegedly unlawful conduct' of which they complain." *See also Elley v. Stephens*,

104 Nev. 413, 416, 760 P.2d 768, 770 (1988) (holding that "a requirement of standing [under Nevada law] is that the litigant personally suffer injury that can be fairly traced" to the allegedly wrongful conduct). Here, Floyd's asserted injury is that the "specific drugs defendants purchased through false pretenses [could be] used in a manner that would result in a botched execution." Opening Brief at 35, 45; 1-ROA-219, Op. at 12:11-13. Floyd, however, does not allege any facts to support the claim that his execution would be "botched," much less that the botching of the execution could be traced to NDOC's alleged concealment or misrepresentation of the purpose for purchasing pharmaceutical from Cardinal. *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 45 (1976) (holding that "standing" requires an "injury that fairly can be traced to the challenged action of the defendant" and cannot be established when [s]peculative inferences are necessary to connect [plaintiffs'] injury to the challenged actions of [defendants]"). NDOC's (non-existent but) alleged fraud in precuring pharmaceuticals has no bearing on whether those pharmaceuticals could effectively be used in an execution.

Essentially, Floyd wrongly claims that any tangential injury he speculates could happen to him as a result of the alleged fraudulent activity committed on Cardinal by NDOC, gives him standing. This is untrue. Floyd himself has failed to cite any authority which would

support such a claim, or even that a fraud on one party could support a claim standing for another party. To the contrary, in *Warren v. Manufacturers Nat. Bank of Detroit*, 759 F.2d 542, 544-55 (6th Cir. 1985), the Sixth Circuit held that an employee lacked standing to assert "alleged acts of fraud . . . directed to [the employer] as a corporate entity,' even though the employee "claim[ed] injury by reason of his loss of employment" when the employer "was forced into bankruptcy" due to the employer's "reliance on [the] fraudulent representations." The court determined that the employee lacked "standing" because "[a]ny injury [the employee] suffered as a result of this fraud, here his lost employment, was merely incidental to the [employer's] injury." *Id*. at 545. The court reasoned that in "an action based on fraud one of the crucial elements is reliance" and the '[e]mployees of a defrauded corporation have no cause of action for fraud [because] they have not relied on the misrepresentation." *Id*. at 545 n.2.

Similarly, Floyd alleges acts of fraud directed to Cardinal, not Floyd. Even if Floyd could assert a claim of injury, which he cannot because his execution has been lawfully ordered, that injury would be merely incidental to any injury that may befall Cardinal as a result of Manufacturers' alleged displeasure because their products were being used in a lawful execution.

Again, Floyd does not claim that NDOC made any misrepresentation or concealed any information that NDOC has a duty to disclose to Floyd. Floyd also does not allege that NDOC intended to induce Floyd to rely on such nonexistent misrepresentations or omissions, or that Floyd actually relied on anything which caused Floyd harm, which is necessary to support a claim of standing. Floyd's complaint is simply a desperate attempt to distract this Court and the public from his own heinous crimes and improperly delay the justifiably imposed consequence of capital punishment. The Court should clear away the smoke and see this complaint for what it is – a frivolous action brought without any standing by a murderer lawfully convicted and sentenced to death by a jury of his peers. Accordingly, Floyd lacks standing to assert claims against NDOC. This Court should therefore affirm the district court's order granting NDOC's motion for judgment on the pleadings.

### C. Floyd's Fraudulent Concealment Claim Cannot Be Sustained

Floyd wrongly argues that he states a fraudulent concealment claim (Opening Brief at 43), despite previously insisting that his complaint does not assert such a claim. When opposing NDOC's motion for judgment on the pleadings, Floyd affirmed that he did "not raise a fraudulent concealment claim." 1-ROA-213, 215, Op. at 6:24-26, 8:24-28.

As Floyd expressly acknowledged before the district court that he was not asserting a fraudulent concealment claim, that claim cannot be considered on appeal. *See Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (holding "[p]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below"); *Bishop v. State*, 95 Nev. 511, 517, 597 P.2d 273, 276 (1979) (holding that a pro se party is bound by his "Pro per election" as to how to present his case); *see also Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) (holding that court should "resolv[e] that which the [pro se] litigant himself has shown to be his real concern" because to do otherwise the district court assumes the "improper role of an advocate seeking out the strongest arguments and most successful strategies for a party").

Even if Floyd had not abandoned any pretense to a fraudulent concealment claim, he has not and cannot state such a claim with the required particularity. Pursuant to Nev. R. Civ. P. 9(b), Floyd "must state with particularity the circumstances constituting fraud or mistake." In *Rocker*, this Court held that to "plead with particularity, plaintiffs must include in their complaint averments to the time, the place, the identity of the parties involved, and the nature of the fraud." 122 Nev. at 1192, 148 P.3d at 708. The court reasoned that when plaintiff "does not inform [defendant] of any specific dates or time

frames, or specify where . . . statements . . . were concealed or misleading . . . practices were used," then "the most [defendant] could aver is that it has not done anything wrong" and therefore plaintiffs "complaint does not meet the NRCP 9(b) particularity requirements." *Id.* at 1192, 148 P.3d at 708.

In passing, Floyd implies that he is subject to a relaxed pleading standard. *See* Opening Brief at 44; 1-ROA-217, Op. at 10:8-18. Before Floyd may rely on the relaxed pleading standard, however, he must satisfy three requirements: (1) the "complaint must adduce specific facts supporting a strong inference of fraud;" (2) the complaint "must aver that this relaxed standard is appropriate;" and (3) the complaint [must show] that he cannot plead with more particularity because the required information is in the defendant's possession." *Rocker*, 122 Nev. at 1194-95, 148 P.3d at 709 ; *see also In re CityCenter Const.*, 127 Nev. 1144, 373 P.3d 925, 2011 WL 5579034, at *2 (2011) (same).

Floyd does not even attempt to argue that his complaint meets any of these requirements. Floyd therefore is not entitled to the relaxed standard. Floyd's complaint also does not "adduce specific facts supporting a strong inference of fraud." In *Davenport v. Homecomings Fin., LLC*, 130 Nev. 1169, 2014 WL 1318964, at *4 (Mar. 31, 2014), this Court declared that in the "absence of any allegations that [Defendant] made representations to [Plaintiff] or any allegations that would

establish a confidential relationship between [Plaintiff] and [Defendant], we cannot conclude that the facts alleged raised a strong inference of fraud" of any kind. The Court reasoned that absent a misrepresentation or a "fiduciary or confidential relationship" required to impose a "duty to disclose," then "the relaxed standard of pleading set forth in *Rocker* did not apply to these claims." *Id*. at *3 - *4. The Court noted that the "court has never recognized the existence of a special or fiduciary relationship arising solely from a routine, arm's-length relationship." *Id.* at *3.

Just as with standing, Floyd cannot show a strong inference of fraud when Floyd has suffered no injury that is "fairly traceable" to the alleged improper conduct. Floyd does not allege that NDOC made false representation to Floyd or that NDOC concealed anything from Floyd that NDOC had a duty to disclose to Floyd. Floyd has no facts supporting a strong inference of fraud because the alleged fraud was supposedly directed at Cardinal, and not Floyd. In this case, not only do Floyd's allegations against NDOC fail to satisfy the heightened pleading requirement for fraud, his allegations fail to meet the most relaxed pleading standard.

In *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998), abrogated on other grounds by *GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001), this Court held that to establish

"fraudulent concealment, a plaintiff must . . . satisfies five elements: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages." *See also Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1154 (9th Cir. 2005) (relying on *Dow Chemical* for the elements of fraudulent concealment under Nevada law).

Floyd cannot establish any of these elements, much less with the particularity required by Rule 9(b). First, Floyd does not allege that NDOC concealed anything from Floyd necessary for Floyd to have standing to state a claim for fraudulent concealment. Instead, Floyd purports to allege that NDOC concealed the Manufacturers' letters, indicating that they did not want their products used in lethal injections, from Cardinal. 1-ROA-19, Complaint at 10:15-18. Even if this allegation could be used as support for the first element, this conclusory allegation is contradicted by the facts actually stated in

Floyd's own complaint. Floyd asserts that between 2013 and 2018, the Pharmaceutical Manufactures directly informed Cardinal, by way of agreements, that Manufacturers' pharmaceuticals were not to be sold "for purposes of an execution." 1-ROA-12, Complaint at 3:5-12. Indeed, Floyd alleges that "for over 25 years," "Manufacturers have emphatically proclaimed and represented, both privately and publicly, that [Manufacturers] are entirely opposed to the use of their 'life saving and life-enhancing' medication for use in capital punishment." 1-ROA-12, Complaint at 3:15-17. In light of such alleged public proclamations and private agreements with Cardinal, NDOC could not possibly have concealed from Cardinal the Manufacturers' purported disapproval of the use of their pharmaceuticals for use in capital punishment. *See Land Baron Inv. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 519 (2015) (holding that fraudulent concealment claim could not be established when plaintiff "knew of or could have discovered" the alleged undisclosed facts).

The second element fares far worse. Floyd does not allege any facts which would impose a duty upon NDOC to disclose Manufacturers' letters to anyone, much less to Floyd, who was lawfully convicted of murder, legally sentenced to death, and without any standing in this case. In *Mackintosh v. California Fed. Sav. & Loan Ass'n*, 113 Nev. 393, 401, 935 P.2d 1154, 1159 (1997), this Court held that a duty to

disclose is imposed only when a "special relationship" is established such as when a contract causes a "reasonable person to place more confidence and reliance" on the opposing party than that which is found in "ordinary" contracts. *See also In re Ridley*, 453 B.R. 58, 73 (Bankr. E.D.N.Y. 2011) (holding that plaintiff did not establish "the unusual circumstances that give rise to a special relationship and duty to disclose . . . such as the dual relationship of lender and seller that was present in *Mackintosh*"); *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 883–84 (9th Cir. 2007) (holding plaintiffs could not establish a "'special relationships' giving rise to a duty to disclose," under Nevada Law, by "a standard friendly but arms-length business relationship").

Here, Floyd does not allege any special relationship with anyone which would give rise to a duty to disclose. At best, Floyd alleges a standard arms-length business relationship between NDOC and Cardinal, which ***fails*** as a matter of law to create the required special relationship. *See Giles*, 494 F.3d at 883–84. Moreover, as Floyd admits that Cardinal, along with the public at large, was fully aware of the Manufacturers' purported disapproval, no special relationship could have been created. Without a special relationship, NDOC had no duty to disclose, and Floyd's claim of fraudulent concealment fails.

Third, Floyd alleges no facts establishing that NDOC had any intent to defraud. Floyd does not even allege an intent to defraud as a

legal conclusion. In *Jordan v. State ex rel. Dept. of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 75 & n.86, 110 P.3d 30, 51 & n.86 (2005), abrogated on other grounds by *Buzz Stew*, 124 Nev. 224, 181 P.3d 670, this Court held that "no underlying cause of action for fraud exists" when facts showing an intent to defraud are not "specifically alleged." Again, NDOC could not have had an intent to conceal Manufacturers' purported disapproval when that disapproval was known by Cardinal and the public at large.

Fourth, Floyd cannot establish the Cardinal was unaware of the fact and would have acted differently if they had known of the Manufacturers disapproval. As extensively set forth, Floyd alleges that Cardinal was fully aware of Manufacturers' disapproval and therefore certainly would not have acted differently. Floyd has no basis for interfering with the purchase of pharmaceuticals necessary for his lawful execution based on his conviction and sentence for four murders upheld by this Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court. *See Brochu v. Foote Enterprises, Inc.*, 128 Nev. 884, 381 P.3d 596, 2012 WL 5991571, at *5 (2012) (holding that misrepresentation claim could not be established when the decision to enter into a transaction "did not arise from any reasonable reliance" on defendant's representations or omission); *Lubbe v. Barba*, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975) (citing Prosser, Law of Torts,

714 (4th ed. 1971) to hold that the false representation or concealment "must have played a material and substantial part in leading the plaintiff to adopt his particular course").

Finally, Floyd alleges no damages suffered by him or Cardinal. Floyd cannot claim any damage as a result of the alleged concealment because he was convicted of four brutal murders and his sentence and conviction has been repeatedly upheld and will be lawfully imposed. *See Nelson v. Campbell*, 541 U.S. 637, 646 (2004) (indicating that an inmate does not suffer damages based on imposition of a death sentence unless the inmate successfully "challenge[s] . . . his conviction or sentence"); *Bucklew*, 139 S. Ct. at 1133 (explaining that both "the State and the victims of crime have an important interest in the timely enforcement of a sentence" of capital punishment). Floyd also does not allege that Cardinal was harmed in any way, nor could he, because Floyd admits that Cardinal was fully aware of Manufacturers disapproval, and therefore no concealment was possible, much less harm from concealment. Floyd does not allege that after being fully informed of the Manufacturers disapproval, that Cardinal made any attempt to limit NDOC's use of the pharmaceuticals purchased by NDOC. Floyd therefore cannot establish damages. *Foster v. Dingwall*, 126 Nev. 56, 71, 227 P.3d 1042, 1052, (2010) (holding that to establish "tortious misrepresentation," plaintiffs cannot " merely assert the fact

that they were damaged," but must establish facts showing "the amount of damages sought" that were "attributed to the tortious misrepresentation"); *Childs v. Selznick,* 281 P.3d 1161, 2009 WL 3189335, at *2 (Nev. Sept. 28, 2009) (holding "conclusory claim that [plaintiff] suffered damages as a result of [defendant's] conduct, without "any specific evidence of those damages" could not establish plaintiff's fraudulent misrepresentation claim); *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 426 (2007) (holding that Plaintiff failed to establish claim for fraudulent misrepresentation or omission when plaintiff "failed to establish that any omitted disclosure caused him to suffer damages").

As Floyd has not and cannot allege facts necessary to support any element of his claim of fraudulent concealment, and has in fact affirmed that his complaint alleges no such claim, this Court should affirm the district court's grant of NDOC's motion for judgment on the pleadings. Accordingly, Floyd has not and cannot state a claim for fraudulent concealment.

### D. Floyd's False Pretenses Claim Cannot Be Sustained Because Nevada Has Never Recognized the Tort of False Pretenses

Floyd misrepresents that this Court, in *Bright v. Sheriff, Washoe Cnty*, 90 Nev. 168, 170, 521 P.2d 371, 372 (1974), recognized a claim for false pretenses. Opening Brief at 42. *Bright* did no such thing. *Bright* is a criminal case setting forth the elements for the crime of false

pretenses under NRS 205.380. 90 Nev. at 170, 521 P.2d at 372. Floyd therefore fails to analyze under Nevada law whether a criminal statute could create a new tort of false pretenses.

In *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040, (2015), this Court "presume[d] that a statute does not modify common law unless such intent is explicitly stated." In *Cunningham v. Washoe Cty.*, 66 Nev. 60, 65, 203 P.2d 611, 613 (1949), this Court held that where the modification of the common law is "not authorized by the express terms of the statute under which the justification is made," only "the plainest and most necessary implication in the statute itself" may modify the common law. In *Badillo v. Am. Brands, Inc.*, 117 Nev. 34, 42, 16 P.3d 435, 440 (2001), the Court warned that "[a]ltering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function."

Using the same reasoning employed by this Court, the Wyoming Supreme Court rejected a claim that a criminal statute created a new tort. *See Sorensen v. State Farm Auto. Ins. Co.*, 234 P.3d 1233, 1236-39 (Wyo. 2010). The court reasoned that when "the legislature has intended a statute to create a new tort duty, it either has plainly stated that a violation gives rise to an action for damages, . . . or has employed language leaving no room for doubt that the provision modifies the

common law and imposes a duty not previously recognized." *Id*. at 1239.

Nothing in NRS 205.380 indicates that the Legislature intended to modify the common law and create a new tort of false pretenses. While the statue set out the crime and the punishment, it only provides for restitution when the defendant is convicted of the crime. *See* NRS 205.380(2). The statute does not provide a private right of action to recover for false pretenses.[4] Courts interpreting similar statutes criminalizing false pretenses have concluded that such statutes do not create a new tort. *See In re Cook*, Case No. 15-81220, 2017 WL 532286, at *5 & n.7 (Bankr. M.D.N.C. Feb. 9, 2017) (rejecting "an independent tort for 'false pretenses'" under North Carolina law because the "crime of false pretenses is set out in Section 14–100 in the North Carolina General Statutes, but the statute does not create civil liability"); *In re Bennett*, 517 B.R. 95, 105 n.7 (Bankr. M.D. Tenn. 2014) (explaining that the "criminal elements of false pretense contained portions of the

[4] For example, the legislature in NRS 205.522 provides a civil action for victims of crimes described in NRS 205.473 to 205.513, but not for victims of the crime of false pretenses found in NRS 205.380. Clearly, the legislature knows how to create a civil right of action for victims of crimes, but chose not to do so for victims under NRS 205.380.

elements of fraud, but there is no separate civil cause of action for 'false pretenses' under Tennessee law").

Accordingly, the Nevada Legislature did not create a new tort of false pretenses when enacting NRS 205.380. This Court should therefore affirm the district court's grant NDOC's motion for judgment on the pleading because Floyd maintained below that he was only asserting a claim for false pretenses that does not exist.

Even if a claim of false pretenses was a recognized tort in Nevada, Floyd tacitly concedes he failed to state such a claim. In *Bright*, the Court set forth the elements of the crime of false pretenses as: "(1) intent to defraud; (2) a false representation; (3) reliance on that representation; and (4) that the victim be defrauded." 90 Nev. at 170, 521 P.2d at 372. *Bright* never held these criminal elements created a civil tort. Nonetheless, putting aside this legal requirement, Floyd does not even attempt argue that his complaint sets forth facts establishing the first element of intent to defraud, the third element of "reliance on a false representation," or the fourth element that the "victim be defrauded."[5] *See* Op. at 5:25 – 11:11. Instead, Floyd's complaint only

[5] Floyd attempts to insert facts from NDOC's answer, from court transcripts, and from other sources. When ruling on NDOC's motion for judgment on the pleadings, however, the Court should only consider the facts as they are pled in the complaint. *See Peck*, 133 Nev. at 892, 407 P.3d at 778 (explaining that when ruling on a judgment on the

focuses on the alleged false representation aspect. *See* 1-ROA-19, Complaint at 10:12-18.

In *Hale v. Burkhardt*, 104 Nev. 632, 641, 764 P.2d 866, 871 (1988), this Court held that when the complaint merely alleged a fraudulent misrepresentation, the Court "decline[d] to read into this statement the missing factual allegations necessary to plead the commission of [the] predicate crime" of false pretenses. Similarly, this Court should decline to read facts into Floyd's complaint which would establish the missing three elements of his claim for false pretenses. This is especially true when Floyd cannot even allege any such facts, lacks standing to bring such a claim, and no such tort claim exists.

### 1. No Intent to Defraud Has or Can Be Alleged By Floyd

Floyd has not and cannot allege facts establishing that NDOC had any intent to defraud. An "intent to defraud" must be "specifically alleged," and Floyd does not even allege an intent to defraud as a legal conclusion. *See Jordan*, 121 Nev. at 75 & n.86, 110 P.3d at 51 & n.86. As set previously set forth NDOC could not have had an intent to conceal Manufacturers' purported disapproval when that disapproval

---

pleadings, a court "accepts the factual allegations in the complaint as true and draws all inferences in favor of the nonmoving party" and therefore a "judgment on the pleadings is reviewed in the same manner as a dismissal under NRCP 12(b)(5)).

was known by Cardinal and the public at large. *See* 1-ROA-12, Complaint at 3:15-17.

**2. Floyd Has Not and Cannot Establish Reliance**

Similarly, Floyd has not alleged facts showing reliance. Floyd could not have relied on any misrepresentation or omission because he simply had no power to interfere in the transaction between Cardinal and NDOC. *See Lubbe*, 91 Nev. at 600, 540 P.2d at 118 (holding that to establish "reliance," the false representation or concealment "must have played a material and substantial part in leading the plaintiff to adopt his particular course"). Floyd cannot establish the Cardinal would have acted differently if it had known of the pharmaceutical manufacturers disapproval because Floyd affirms that Cardinal was fully aware of Manufacturers disapproval. In fact, Floyd does not allege that Cardinal would have refrained from selling pharmaceuticals to NDOC had Cardinal been fully informed that those pharmaceuticals would be used in lethal injections. *See* 1-ROA-19, Complaint at 10:11-20; *see also Brochu*, 2012 WL 5991571, at *5 (holding that fraud claim could not be established when the decision to enter into a transaction "did not arise from any reasonable reliance" on defendant's representations or omission). Finally, as the plaintiff, Floyd has not and cannot argue that had he known NDOC would have obtained pharmaceuticals from Cardinal Health to carry out his jury-imposed death sentence, he would

have adopted a different course of action when he decided to murder four individuals.

### 3. Floyd Has Not and Cannot Identify a Victim Defrauded

In addition, Floyd does not even attempt to identify the victim defrauded. Floyd cannot be the victim defrauded because he was not deprived of "valuable thing." *See* NRS 205.380(1). Cardinal cannot be deemed a victim defrauded because NDOC provided Cardinal the compensation Cardinal requested for the pharmaceuticals purchased by NDOC. *See* 1-ROA-22-29, Complaint, Exhibit 1.

### 4. Floyd's False Representation Allegation is Insufficient

The only element Floyd attempts to allege is a false representation, but he again fails to allege sufficient facts showing that NDOC made any false representation to anyone. The entire facts supporting Floyd's false representation can be found in one short paragraph in Floyd's complaint:

> 53. Defendant NDOC intentionally defrauded the contractor CARDINAL by concealing letters from ALVOGEN, SANDOZ, and HIKMA that their Products were not to be used in lethal injections and/or failing to disclose NDOC's intent to use such products, but instead, and the false representation that NDOC has legitimate medical rationales.

1-ROA-19, Complaint at 10:15-18. Floyd does not argue that this brief allegation pleads the "time" and "place" of the misrepresentation, "the identity of the parties involved" or "the nature of the fraud," all of which are necessary to plead fraud with particularity as required by Nev. R. Civ. P. 9(b). Accordingly, Floyd has not alleged the facts necessary to meet any of the elements of his unrecognized false pretenses claim. This Court should therefore affirm the district court's order granting NDOC's motion for judgment on the pleadings.

### E. Floyd's Aiding and Abetting Claim Cannot Be Sustained Because Floyd Has Not Pled Such a Claim and Did Not Raise the Issue Below

Floyd, for the first time, argues that he alleged a claim of aiding and abetting Cardinal in breaching its duty to Floyd. Even construed liberally, Floyd's complaint contains no such claim. Instead of aiding Cardinal, Floyd's complaint alleges, albeit wrongly, that NDOC was perpetrating a fraud on Cardinal. 1-ROA-16, 19, Complaint at 7:22-23, 10:15-16. NDOC could hardly "substantially assist[] or encourage" Cardinal "in breaching" some imagined "duty" to Floyd, as required by *Dow Chemical,* 114 Nev. at 1490, 970 P.2d at 112, while at the same time defrauding Cardinal by purportedly concealing information from Cardinal. 1-ROA-19, Complaint at 10:15-16.

Moreover, Floyd never argued below that his complaint alleged an aiding and abetting claim, but instead insisted that the only claim

alleged in his complaint was a false pretenses claim. 1-ROA-213, 215, Op. at 6:24-26, 8:24-28. This Court should not consider an aiding and abetting claim that has been raised for the first time on appeal and was not raised below. *See Laird v. State Pub. Emp. Ret. Bd.*, 98 Nev. 42, 46, 639 P.2d 1171, 1173 (1982) (refusing to consider "a new claim for relief" because this Court "shall not entertain issues raised for the first time on appeal"); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that a "point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal"). To allow Floyd to argue that the district court erred by not recognizing such a claim would have required the district court to improperly act as an advocate for Floyd by combing through Floyds' complaint and manufacturing a claim on behalf of Floyd out of the myriad of available claims.

For example, in *Beaudett*, the Fourth Circuit held that courts should "resolv[e] that which the [pro se] litigant himself has shown to be his real concern" because to do otherwise the district court assumes the "improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." 775 F.2d at 1278. Because Floyd failed to assert below that his complaint alleged an aiding and abetting claim, he is foreclosed from arguing on appeal that the district court erred by not acting as Floyd's advocating in manufacturing that

claim on his behalf. *See Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993) (explaining that "[w]hile the courts liberally construe pro se pleadings as a matter of course, . . . judges are not also required to construct a party's legal arguments for him").

Even if Floyd had properly raised an aiding and abetting claim below, the claim has no merit. To establish aiding and abetting, Floyd must allege facts showing: (1) that Cardinal "breach[ed] a duty" to Floyd that caused injury to Floyd; (2) that NDOC "was aware of its role in promoting" the breach "at the time [NDOC] provided assistance" to Cardinal, and (3) that NDOC "knowingly and substantially assisted" Cardinal in committing the breach. *Dow Chemical*, 114 Nev. at 1490, 970 P.2d at 112. Floyd has not and cannot allege facts establishing any of these elements.

First, as Cardinal owes no duty to Floyd, and therefore could not breach a duty owed to Floyd. *See Fultz v. Union-Commerce Associates,* 683 N.W.2d 587, 592 (Mich. 2004) (hold that "no tort action based on a contract will lie" when the defendant owed "no independent duty" to the plaintiff that "is separate and distinct from the defendant's contractual obligations"); *Hines v. I.L.C. of Topeka & Lawrence, L.L.C.,* Case No. 88,284, 2002 WL 35658037, at *2 (Kan. Ct. App. Aug. 30, 2002) (holding that contracting party owed no duty to third party when there was "no

language in the [contract] which could be construed as attempting to impose a direct benefit on any third party").

Second, as already set forth, Floyd has not been harmed by any action taken by Cardinal or NDOC. Any harm to be suffered by Floyd is the direct result of the four brutal murders he committed, for which he was lawfully convicted and sentenced to death. *See Nelson*, 541 U.S. at 646 (indicating that an inmate does not suffer damages based on imposition of a death sentence unless the inmate successfully "challenge[s] . . . his conviction or sentence"); *Bucklew*, 139 S. Ct. at 1133 (explaining that both "the State and the victims of crime have an important interest in the timely enforcement of a sentence" of capital punishment). While Floyd speculates that his execution may be botched in the future, Floyd fails to explain the basis for this speculation, and certainly does not allege he has already been harmed, or that Cardinal's actions had any bearing on how Floyd is to be executed. *See Dow Chemical*, 114 Nev. at 1492, 970 P.2d at 113–14 (requiring "physical harm resulting from [the] failure to exercise reasonable care" to establish liability under Restatement (Second) of Torts § 324A).

Finally, Floyd does not allege that NDOC assisted Cardinal in any way, much less that NDOC was aware of such assistance. As already explained, Floyd does not allege that NDOC was assisting Cardinal, but

defrauding Cardinal. *See* 1-ROA-16, 19, Complaint at 7:22-23, 10:15-16. Floyd therefore has not alleged facts showing the "substantially assistance" required to establish an adding and abetting claim. *Dow Chemical*, 114 Nev. at 1490, 970 P.2d at 112.

As Floyd failed to raise this newly minted aiding and abetting claim before the district court, and does not allege facts necessary to support such a claim in his complaint, this Court should reject that claim on appeal.

## IX. CONCLUSION

For the reasons set forth above, Floyd lacks standing, and his complaint has no merit whatsoever. This Court should therefore affirm the district court's order granting NDOC's motion for judgment on the pleadings and dismiss Floyd's complaint with prejudice.

Respectfully submitted August 23, 2023.

AARON D. FORD
Attorney General

By: */s/ Chris Davis*
Chris Davis (Bar No. 6616)
Senior Deputy Attorney General
*Attorneys for the Respondent NDOC*

## X. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, font size 14-point, Century Schoolbook.

I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8203 words.

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 Nev. R. App. P. 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: August 10, 2023.

AARON D. FORD
Attorney General

By: */s/ Chris Davis*
Chris Davis (Bar No. 6616)
Senior Deputy Attorney General
*Attorneys for the Respondent NDOC*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **NDOC RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court, by using the efiling system on August 22, 2023.

Participants in the case who are registered users will be served by the Nevada Supreme Court efiling system.

Marian L. Massey, Esq
TALG, NV, Ltd.
5852 S. Durango Drive, Suite 105
Las Vegas, Nevada 89113
mmassey@talglaw.com
*Attorneys for Appellant Zane M. Floyd*

Steve Morris
Rosa Solis-Rainey
Morris Law Group
801 South Rancho Drive, Ste. B4
Las Vegas, NV 89106
sm@morrislawgroup.com
rsr®morrislawgroup.com
*Attorneys for Respondent*
*Cardinal Health, Inc*

/s/ *Chris Davis*
An employee of the office
of the Nevada Attorney General