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

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| **ZANE M. FLOYD**,<br><br>*Appellant*,<br>vs.<br><br>**CARDINAL HEALTH, INC., ET AL.**,<br><br>*Respondents*. | No.: **85826** | Electronically Filed<br>Feb 20 2024 04:16 PM<br>Elizabeth A. Brown<br>Clerk of Supreme Court |

# APPELLANT'S MOTION FOR LEAVE TO FILE REQUEST TO TAKE JUDICIAL NOTICE


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*Counsel for Appellant Zane M. Floyd*

Appellant Zane M. Floyd ("Appellant"), by and through his *pro bono* appellate counsel of record, Marian L. Massey, hereby submits this Motion for Leave to File Request to Take Judicial Notice (the "Motion"). This Motion is based upon the following Points and Authorities, the exhibit attached hereto, the briefs filed in this matter, and the oral argument conducted on February 6, 2024.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Relevant Factual Background and Procedural Posture.

On February 6, 2024, oral argument was held before the en banc Supreme Court, and in this matter was submitted for a decision. During oral argument, counsel for Respondent Cardinal Health, Inc. ("Cardinal Health") argued that Appellant's appeal was moot because:

> [T]here is no basis to suggest that the medicines at issue could or would be used any longer. As I believe NDOC will concede, all but one of the medicines at issue have expired, with the other one expiring this month, and the State's current policy is only to use nonexpired medicines in lethal injection, thus there's no live controversy to be resolved.[1]

[1] Andrew Kaplan, Prior Oral Argument Recordings, 85826 Floyd vs. Cardinal Health, February 6, 2024, timestamp of the recording between 13:30–50 (last visited February 18, 2024), https://nvcourts.gov/supreme/arguments/recordings/85826_floyd_vs._cardinal_health.

On February 16, 2024, Mr. Floyd's counsel at the Federal Public Defender's office and counsel for Respondent Nevada Department of Corrections ("NDOC") submitted a status report to the federal judge presiding over Appellant's 42 U.S.C. § 1983 lawsuit, which states in pertinent part:

> The Nevada Department of Corrections ("NDOC") currently possesses alfentanil which will expire on February 29, 2024. ***NDOC recently purchased ketamine and potassium chloride on or about February 12, 2024, and purchased additional potassium chloride on or about February 15, 2024***. The medications listed above are the only ones purchased by NDOC for the present execution protocol that have not expired. NDOC continues to pursue the purchase of drugs for the current protocol.

*See* Status Report, attached hereto as **Exhibit A** (emphasis added).

As set forth in further detail below, Appellant respectfully seeks leave of the Court to file the instant motion requesting this Court to take judicial notice of the status report filed in Mr. Floyd's case proceeding before Judge Richard F. Boulware II of the United States District Court for the District of Nevada (the "Status Report"). The Status Report is attached hereto as **Exhibit A**.

## II. Legal Argument.

### A. *Appellant Requests Leave to File this Motion.*

Nevada Rule of Appellate Procedure 27 allows a party to move this Honorable Court for specific relief. *See* NEV. R. APP. PRO. ("NRAP") 27(a)(1)–(2). The Nevada Rules of Appellate Procedure are silent with respect to whether a party may make a motion after briefing has been completed, and oral argument has been conducted.[2]

Accordingly, out of an abundance of caution, Appellant respectfully requests leave of this Court to file the instant Motion requesting for the Court to take judicial notice of proceedings another one of Mr. Floyd's cases wherein Respondent Nevada Department of Corrections ("NDOC") notified a federal court of its recent purchase of Ketamine and Potassium Chloride from Cardinal Health.

[2] See NRAP 27 (addressing motions to appellate courts); NRAP 28(c) ("Unless the court permits, no further *briefs* may be filed") (emphasis added); NRAP 31(e) (permitting submission of supplemental authorities 'after the party's brief has been filed, but before a decision" under limited circumstances).

### B. *Judicial Notice Should Be Taken of the Recent Proceedings in Mr. Floyd's Federal Court Case.*

On appeal, this Court "can only consider those matters that are contained in the record made by the court below," and generally will not consider "statements made by counsel portraying what purportedly occurred below." *Mack v. Est. of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (citations omitted); *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal"). However, this Court may take judicial notice of facts that are "[c]apable of accurate and ready determination . . . [and] not subject to reasonable dispute." *Id.* (citing NRS 47.130(2)(b)); *Whitehead v. Nevada Comm'n on Jud. Discipline*, 110 Nev. 380, 419 n.35, 873 P.2d 946, 970 n.35 (1994).

Although courts generally may not take judicial notice of "records in another and different case," this Court has recognized an exception to the rule allowing courts to take judicial notice of records in another case under limited circumstances. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing *Giannopulos v. Chachas*, 50 Nev. 269, 257 P. 618 (1927). To establish good cause to invoke the exception to the general rule, a party must establish: (1) "a valid reason presented itself," and (2)

the relationship between the cases is "close and serious." *Mack*, 125 Nev. at 91–92, 206 P.3d at 106 (taking judicial notice of criminal proceedings in another case because the deceased wife "stood to gain financially from the [husband] killer because of the close relationship between the murder trial and the benefits to which the deceased's estate is entitled"); *Occhiuto*, 97 Nev. at 145, 625 P.2d at 569 (holding that the close relationship between the case and a previous divorce proceeding justified the district court taking judicial notice of the prior proceeding).[3]

Here, good cause exists to allow the Court to take judicial notice of the Status Report based upon the closeness of the parties involved in the two proceedings, the representations of counsel during oral argument, and the similar pattern of behavior. *See Brigade Leveraged Cap. Structures*, 130 Nev. 1158 (unpublished disposition); *see also* **Exhibit A**. Mr. Floyd's claims challenging the method of execution arising under 42

[3] *See also Brigade Leveraged Cap. Structures, Fund, Ltd. v. Union Lab. Life Ins. Co.*, 130 Nev. 1158 (2014) (unpublished disposition) (taking judicial notice of order granting summary judgment in another case because "the order is a matter of public record and is a reliable source," and the facts in the order "because the cases are connected—they concern the same parties involved in a similar pattern of behavior"); *Gray v. State*, 137 Nev. 911 n.2, 498 P.3d 280 n.2 (Nev. App. 2021) (unpublished disposition) (taking judicial notice of proceedings in district court case that was "directly related" to the appeal).

U.S.C. § 1983 are closely related to the civil claims at issue in his pending appeal because both cases involve similar parties (Appellant and NDOC), the method of procurement of drugs for use in his execution is at issue in both cases, and the expiration of the drugs has the ability to render the claims in both cases moot. Further, although Cardinal Health's counsel made representations that the issues before the Court were moot because NDOC no longer had possession of drugs for use in Mr. Floyd's execution, less than a week later NDOC purchased Ketamine and Potassium Chloride from Cardinal Health's website for use in Appellant's execution. Finally, given the status of Appellant's pending appeal, he is unable to modify his requested relief before the district court to incorporate new or additional facts. *See generally* NRAP 12(A)(a) (stating district court "lacks authority" to grant motion for relief while appeal is docketed and pending).

Accordingly, to the extent the Court is inclined to consider the representations of counsel during oral argument, Appellant respectfully submits good cause exists to allow the Court to take judicial notice of the Status Report.

## III. Conclusion.

Based upon the foregoing, Appellant submits that good cause exists to allow for the Court to take judicial notice of the Status Report filed in Mr. Floyd's other litigation, and respectfully requests that the Court grant this Motion in its entirety.

DATED this 20th day of February, 2024.

BY: */s/ Marian L. Massey, Esq.*

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## CERTIFICATE OF SERVICE

This is to certify that on February 20, 2024, a true and correct copy of the foregoing **APPELLANT'S MOTION FOR LEAVE TO FILE REQUEST TO TAKE JUDICIAL NOTICE** was served on the following by United States Mail, first class, and by the Nevada Supreme Court Electronic Filing System:

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BY: */s/ Kavita Narh*
An employee of TALG, NV, Ltd.

# EXHIBIT A

# EXHIBIT A

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Zane M. Floyd,

Plaintiff,

v.

James Dzurenda[1], *et al.*,

Defendants.

Case No. 3:21-cv-00176-RFB-CLB

**Joint Status Report**

DEATH PENALTY CASE

[1] Pursuant to Fed. R. Civ. P. 25(d), a party's successor in office is automatically substituted as a party.

On February 6, 2024, this Court issued a minute order requiring the parties to file a joint status report in this matter before February 20, 2024. ECF No. 339. Plaintiff Zane Michael Floyd and Defendants James Dzurenda, *et al.*, through counsel, hereby submit the following report:

Mr. Floyd currently has two appeals pending before the Nevada Supreme Court. The first is an appeal from the district court's denial of habeas corpus relief in *Floyd v. Gittere*, Case No. 83436. The second is an appeal from the district court's denial of declaratory and injunctive relief in *Floyd v. Cardinal Health Inc., et al*, Case No. 85826. Oral argument in the latter appeal occurred on February 6, 2024.

The Nevada Department of Corrections ("NDOC") currently possesses alfentanil which will expire on February 29, 2024. NDOC recently purchased ketamine and potassium chloride on or about February 12, 2024, and purchased additional potassium chloride on or about February 15, 2024. The medications listed above are the only ones purchased by NDOC for the present execution protocol that have not expired. NDOC continues to pursue the purchase of drugs for the current protocol.

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DATED this 16th day of February,2024

Rene L. Valladares
Federal Public Defender

*/s/David Anthony*
David Anthony
Assistant Federal Public Defender

*/s/Brad Levenson*
Brad Levenson
Assistant Federal Public Defender

*/s/Ellese Henderson*
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*/s/D. Randall Gilmer*
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