IN THE SUPREME COURT OF NEVADA

ZANE M. FLOYD, *Appellant*, *vs.* CARDINAL HEALTH, INC., ET AL. *Respondents*.	)	CASE NO. 85826

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

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Cardinal Health, Inc. ("Cardinal Health") submits this Response to Appellant Zane M. Floyd's ("Appellant") Motion for Leave to File Request to Take Judicial Notice ("Motion") pursuant to NRAP 27(3)(A). The Court should deny Appellant's requested leave because the facts he seeks to judicially notice are not relevant or necessary to decide this appeal.

ARGUMENT

I. The case before this Court is moot because all medicines at issue in this litigation have expired or are about to expire.

Appellant's Motion fundamentally misunderstands why this case is moot. The only relief sought by Appellant **in this case** with respect to Cardinal Health is: (1) a declaratory order finding that Appellant is a third-party beneficiary to Cardinal Health's agreements with pharmaceutical manufacturers Alvogen, Inc., Sandoz, Inc., and Hikma Pharmaceuticals USA, Inc. (collectively, the "Pharmaceutical Manufacturers"), and with Defendant Nevada Department of Corrections ("NDOC"), and (2) an injunction directing Cardinal Health to demand the return of medicines that NDOC purchased for use in lethal injection, and which Appellant alleges Cardinal Health sold in violation of its agreements with the Pharmaceutical Manufacturers. R. at 19-20.

Appellant's requested relief here—return of the specific medicines allegedly purchased in violation of Cardinal Health's Controlled Distribution Agreements with the Pharmaceutical Manufacturers—is no longer justiciable **because the**

specific medicines Appellant seeks the return of have expired (except for one, which will expire on February 28, 2024). *See* Cardinal Health Answering Br. at 36-37. *See also Floyd v. Daniels*, No. 21-cv-00176, 2021 WL 2827291, at *7 (D. Nev. July 6, 2021); *Floyd v. Daniels*, No. 21-cv-00176, *Declaration of Linda Fox, Pharmacy Director of the Nevada Department of Corrections* and *Exhibit 1* thereto, ECF Nos. 116 and 118 (June 30, 2021), attached hereto as **Exhibit A**; *Floyd v. Daniels*, No. 21-cv-00176, *NDOC Defendants' Notice of Errata to Correct Expiration Date of Alfentanil Purchase Listed in Chart of Drugs*, ECF No. 316 (Mar. 10, 2022), attached hereto as **Exhibit B**. NDOC's current policy is that it will not use expired medicines in executions. *See Floyd v. Daniels*, No. 21-cv-00176, *NDOC Defendants' Supplemental Brief as to Why the Case Is Not Moot*, ECF No. 326 (May 16, 2022), at p. 10, attached hereto as **Exhibit C**. NDOC has not contradicted this position.

II. The "facts" Appellant seeks to judicially notice do not involve the medicines at issue and do not affect any mootness determination here.

Appellant requests that the Court take judicial notice of a status report filed in separate federal litigation, which states that "NDOC recently purchased ketamine and potassium chloride on or about February 12, 2024, and purchased additional potassium chloride on or about February 15, 2024." Mot. at 3. The joint report ***does not state*** from whom NDOC purchased these medicines or which entity

manufactured the medicines, or that these medicines were purchased in violation of any agreements at issue in this appeal. Rather, Appellant's Motion assumes without foundation that the medicines were purchased by NDOC from Cardinal Health. *See* Mot. at 4. However, there is no indication (nor could there be) that these medicines were purchased in violation of any Controlled Distribution Agreements at issue **in this case**. *See* R. at 13, 16 (alleging that the medicines at issue "were purchased by NDOC from [Cardinal Health between 2019 and 2021" and "[i]n 2017-2018[.]").

Appellant has not provided a reason why the statements made in this joint status report should or could impact this Court's determination of mootness. And to the extent that Appellant is implying that the joint report contradicts anything stated in oral argument, this is false.

Appellant misrepresents Cardinal Health's statements at oral argument: Cardinal Health did not state that "NDOC no longer had possession of medicines for use in Mr. Floyd's execution[.]" Mot. at 7. Nor could it: Cardinal Health does not know NDOC's current stock of medicines. Rather, Cardinal Health represented that none of the medicines **at issue in this case** that were **allegedly purchased from Cardinal Health in violation of its Controlled Distribution Agreements with the Pharmaceutical Manufacturers** could or would be used in Appellant's execution.[1]

[1] *See* Oral Argument Recording, *Floyd v. Cardinal Health* (Feb. 6, 2024), timestamp 13:30-50 (Feb. 6, 2024).

In sum, as Cardinal Health argued, all of the medicines at issue **in this case** have expired or are about to expire, such that the relief sought by Appellant is moot, regardless of any later purchases of medicines by NDOC. It would be inappropriate and unnecessary for the Court to grant Appellant leave to take judicial notice of an unrelated status update in separate litigation, because it would not affect the outcome of this appeal.

CONCLUSION

Appellant's Motion for Leave to File Request to Take Judicial Notice should be denied.

DATED this 26th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2024, I submitted the foregoing for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the all counsel of record including:

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EXHIBIT A

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE M. FLOYD,

Plaintiff,

v.

CHARLES DANIELS, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants.

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

DECLARATION OF LINDA FOX, PHARMACY DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS PURSUANT TO MINUTE ORDER DATED JUNE 30, 2021 (ECF No. 115)

I, Linda Fox, hereby declare based on personal knowledge and/or information and belief, that the following assertions are true.

1. I have been a registered pharmacist with the State of Nevada since 1990.

2. I have worked as a pharmacist for the Nevada Department of Corrections (NDOC) since 2004.

3. I currently am the Pharmacy Director for the NDOC, a position I have held since 2010. This position is also occasionally referred to Chief of Pharmacy or Pharmacy Director. I am responsible for the administrative and day-to-day functions of pharmaceutical services for the NDOC. This position requires me to do many things, including ensuring that medications are ordered, obtained, and properly stored and secured until they are utilized for their intended use.

4. I am providing this Declaration to the Court at the request of my counsel, as it is my understanding the Court has sought the following information pertaining to each of the drugs referenced in the Execution Manual:

a. "when the drug or drug batch was purchased,"

b. "[w]hen the drug or drug batch was received by the NDOC, and"

c. "the expiration date for the respective drug or drug batch expired."

5. In response to these three specific questions, there is some important information I need to share with the Court as to the processes and storage information to put the information into context.

6. First, for purpose the Court's question in ¶ 4(a), I am providing the information for the date of ordering the drugs, which to me as a layperson I consider purchasing, and based on the context of the Court's question, appears to be what the Court is requesting information on. I would have to defer to my counsel as to whether there is a distinction between ordering and purchasing.

7. Second, with regard to the Court's question in ¶ 4(b), I note that the general and standard practice is that NDOC receives a drug the next business day following the drug being ordered/purchased on the Cardinal website portal. This is generally noted by the "stamped received" marking on the invoice and also generally aligns with the date listed on the invoice immediately following the "Cust. No." box on the right-hand side of the invoice. The invoices also note the "order date" in the box entitled the same. As an example, I direct the Court to one of the invoices that will be referenced below and contained in "**Attachment 2"** to this Declaration, NDOC0001.

8. Third, with regard to the Court's question in ¶ 4(c), once the drugs are received, they are stored in the same location in the pharmacy, and it is not possible at that point to determine which "batch" the drug was part of, due the manner in which the medications are stored. I can certainly provide the expiration dates for each of the drugs as requested. I simply cannot provide to this Court what specific order unless the drug is the only supply of the drug in NDOC's possession, or the only supply of that drug from a particular manufacturer. This is because if the drug is from the same manufacturer, once ordered, received, and purchased, the drugs are stored in the same location without any readily available markings or posting suggesting which "batch" the drug was part of at the time of ordering.

9. With those three important caveats, I believe I can provide this Court with the information it seeks for "all drugs (including different batches of the same drug) listed in the Execution Protocol" as referenced in the Order and referenced in ¶¶ 4(a)-(c) above.

10. To that end, I direct the Court to the Chart incorporated into this declaration as "**Attachment 1**," which provides five categories: (1) drug name and quantity; (2) invoice bates number; (3) order/purchase date; (4) receive date; and (5) expiration date. The invoices referenced in category two of the chart are located in **"Attachment 2**." The "drug name" referenced in the chart is the generic name for the drug, e.g. fentanyl, alfentanil, ketamine, cisatracuriam, potassium chloride or potassium acetate, and not the specific brand name, which can be found on the invoices. The use of the word "I" in any footnotes in the Chart at Attachment 1 should be read as referring to me, Linda Fox. The Chart has been organized alphabetically and in order the drugs are injected pursuant to the Execution Protocol. They have also been organized in reverse chronological order from the date of order/purchase.

11. I do not believe there is any other "underlying documentation" pertinent to the Court's question, but in an abundance of caution I have also provided the "perpetual inventory logs," which I understand have previously been disseminated in response to a public records request. Those logs are located at **"Attachment 3**." NDOC Pharmacy maintains perpetual logs for controlled substances and therefore no such logs exist for any purchases of cisatracuriam, potassium chloride, or potassium acetate as those are not controlled substances. I have not yet completed the perpetual log for the alfentanil purchase of June 1, 2021 contained in the Chart. Therefore, there is no log to provide to the Court regarding that purchase. However, the information contained in the Chart pertaining to the June 1, 2021 purchase is accurate and correct. These logs are being provided to the Court as further support for the quantities, whereabouts, and expiration dates associated with the drugs set forth herein. Please note the logs also contain other drugs not listed in the Chart as the drugs were purchased prior to 2018. To ensure there is no confusion however, the Chart accurately reflects the current stock of drugs referenced in the Execution Manual.

12. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

EXECUTED this 30th day of June, 2021.

/s/ *Linda Fox**
Chief Linda Fox
Pharmacy Director,
Nevada Department of Corrections

* Pursuant to Temporary General Order 2020-05, entered by Chief Judge Du on March 30, 2020, https://www.nvd.uscourts.gov/wp-content/uploads/2020/03/GO-2020-05-re-COVID-19-Remote-Hearings.pdf, and as extended on March 29, 2021, https://www.nvd.uscourts.gov/wp-content/uploads/2021/03/Order-Extending-GO-2020-05.pdf, Chief Fox has authorized counsel to affix her electronic signature to this Declaration. Should counsel have misconstrued these Temporary Orders in any way, or if the Court wishes to have a hand-signed copy of this Declaration, one will be provided to the Court upon request.

ATTACHMENT 1 – CHART OF DRUGS

DRUG AND QUANTITY	INVOICE BATES NUMBER	ORDER/PURCHASE DATE	RECEIVED DATE	EXPIRATION DATE
Alfentanil – 80,000mcg	NDOC0004	June 1, 2021	June 2, 2021	May 31, 2022
Alfentanil – 25,000mcg	NDOC0001	May 25, 2021	May 26, 2021	May 31, 2022
Alfentanil – 80,000mcg	NDOC-DPP-0024/NDOC0021	March 31, 2021	April 1, 2021	Unknown/Not in Stock[1]
Fentanyl – 2,500mcg	NDOC0011	March 30, 2018	April 2, 2018	All stock expires by November 30, 2021[2]
Ketamine – 2,500mg	NDOC0003	May 25, 2021	May 26, 2021	November 30, 2021
Ketamine – 10,000mg	NDOC0008/NDOC-DPP-0030	July 3, 2019	July 5, 2019	February 28, 2022
Ketamine – 15,000mg	NDOC0007/NDOC-DPP-0029	July 2, 2019	July 3, 2019	February 28, 2022
Cisatracuriam – 400mg	NDOC0002	May 25, 2021	May 26, 2021	April 19, 2022
Cisatracuriam – 200mg	NDOC0009	May 2, 2018	May 3, 2018	June 1, 2019
Cisatracuriam – 200mg	NDOC0010	April 9, 2018	April 10, 2018	April 1, 2019
Cisatracuriam -- 100mg	NDOC0012	March 30, 2018	April 2, 2018	February 1, 2019
Potassium Acetate – 1000mEq	NDOC0002	May 25, 2021	May 26, 2021	May 31, 2023
Potassium Acetate – 2000mEq	NDOC0023	March 31, 2021	April 1, 2021	Unknown/Not in Stock[3]
Potassium Chloride – 1600mEq	NDOC0006/NDOC-DPP-0028	July 5, 2019	July 8, 2019	July 31,2021

[1] I was instructed to return this order by Director Daniels and therefore it is not in NDOC's possession, and I do not know the expiration date. The credit invoice indicates we received credit for this return on April 28, 2021. *See* NDOC-DPP-0025/NDOC0022.

[2] I have provided the Court with all purchases of fentanyl from 2018 forward as requested by this Court; however, NDOC has possession of unexpired fentanyl that predates the 2018 date the Court sought ordering date receive date information for. In total, NDOC has a total amount of 32,500 mcg of unexpired fentanyl on hand. The following quantities of expire on the following dates: 15,000mcg on June 30, 2021; 15,000mcg on August 31, 2021; and 2,500mcg on November 30, 2021.

[3] This drug was returned based on instructions from Director Daniels on or about April 8, 2021. *See* NDOC0005.

EXHIBIT B

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE M. FLOYD,

Plaintiff,

v.

CHARLES DANIELS, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants.

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

NDOC DEFENDANTS' NOTICE OF ERRATA TO CORRECT EXPIRATION DATE OF ALFENTANIL PURCHASE LISTED IN CHART OF DRUGS AT ECF No. 116-2 and ECF No. 118

Defendants Charles Daniels, Harold Wickham, William Gittere, William Reubart, David Drummond, Dr. Michael Minev, Dr. David Green, and Linda Fox (collectively, "NDOC Defendants"), by and through counsel, Aaron D. Ford, Attorney General for the State of Nevada, D. Randall Gilmer, Chief Deputy Attorney General, Douglas Rands, Senior Deputy Attorney General, and Ian Carr, Deputy Attorney General, hereby provide this Notice of Errata to correct an inadvertent oversight as to a pharmaceutical expiration date set forth in the Chart of Drugs originally submitted *in camera* and redacted at ECF

No. 116-2, subsequently filed by the Court in unredacted format as an attachment to the Court's Minute Order at ECF No. 118.

The fifth column of the second row of the Chart of Drugs, pertaining to "Alfentanil – 80,000 mcg" with an invoice serialized as bates number "NDOC0004" should reflect an expiration date of February 28, 2024 rather than May 31, 2022 as erroneously depicted in the original chart. A routine inspection of the physical packaging of the listed pharmaceutical by NDOC staff revealed the discrepancy. This same inspection of ketamine and the other drugs in the possession of the NDOC confirmed the expiration dates of the other drugs referenced in Chart of Drugs, and as noted in the Execution Manual, are correct. Accordingly, while NDOC has supplies of Alfentanil that last until 2024 as noted, it does not impact the ketamine expiration date of February 28, 2022, as consistently referenced throughout this litigation.

NDOC and the Office of the Attorney General apologize for this error.

Respectfully submitted on this 10th day of March, 2022, by:

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Attorney General

By: /s/ Ian Carr
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE M. FLOYD,

Plaintiff,

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CHARLES DANIELS, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants.

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

NDOC DEFENDANTS' SUPPLEMENTAL BRIEF AS TO WHY THIS CASE IS NOT MOOT

Defendants Charles Daniels, Harold Wickham, William Gittere, William Reubart, David Drummond, Dr. Michael Minev, Dr. David Green, and Linda Fox (collectively, "NDOC Defendants"), by and through counsel, Aaron D. Ford, Attorney General for the State of Nevada, D. Randall Gilmer, Chief Deputy Attorney General, hereby provide this *Supplemental Brief as to Why This Case is Not Moot* as Ordered by the Court on April 25, 2022 (ECF No. 324).

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I. INTRODUCTION

While the parties have respectfully but strenuously disagreed on most everything over this case throughout the past year, on this issue they show a united front: this case is not moot.[1] The parties also agree this case is ripe for a decision on the merits as it relates to the execution protocol (protocol) challenge[2] that was the subject of an evidentiary hearing that spanned eight days of testimony, along with a site inspection to Ely, Nevada.[3]

Here, the case is not moot for at least two distinct reasons.

First, the case is not moot because Floyd has (without merit) challenged not only the drugs contained in the protocol, but also the procedures NDOC plans to use to carry out the execution. Namely, Floyd challenges the amount of training the drug administrators, emergency medical technicians (EMTs), attending physician, warden, and Director have or will receive under the protocol. Floyd also challenges whether the protocol appropriately sets forth the education, identification, licensing, and credentials of the drug administrators, EMTs, and attending physician required in the protocol. Floyd also challenges NDOC's position that there is no constitutional requirement for Floyd or his counsel to know the identity of the drug administrators, EMTs, or attending physician. None of these issues are impacted by what drugs may or may not be available to NDOC. Therefore, each of these are live controversies that the Court can and should rule on forthwith given that the evidentiary hearing was completed in December 2021—two months before the expiration of the ketamine.

Second, although NDOC does not currently possess unexpired ketamine, as consistently stated during this litigation, NDOC is actively attempting to obtain ketamine. Currently, NDOC continues to seek purchase of ketamine through NDOC's ordinary practice for purchasing drugs, which is to purchase them from Cardinal Health. While NDOC does not know when ketamine may become available for purchase from Cardinal Health or other legal channels, given Floyd's age, it is extremely likely Floyd will live for

[1] ECF No. 324 at 5:22-6:20, 7:20-22, 10:20-11:3.
[2] ECF No. 324 at 7:20-22, 10:20-11:3.
[3] ECF Nos. 260, 263, 266, 282, 284, 285, 288, 289, 291, 292, 294.

decades before his natural death moots the jury verdict that sentences Floyd to death. Thus, although ketamine and the other drugs will always have expiration dates, it is reasonable to believe NDOC will be able to purchase and possess unexpired batches of the drugs required in time to proceed with Floyd's execution under NDOC's protocol.

Yet, as the past year has shown, when NDOC does obtain the required drugs in the future, those drugs will likely expire due to delays associated with litigation before this Court rules on the ultimate issue of the constitutionality of the use of those drugs. Thus, although the current stock of ketamine has expired, the dispute regarding its use in the three- or four-drug cocktail is not moot given that the controversy is capable of repetition yet evading review.

II. STATEMENT OF FACTS

Floyd brought this lawsuit over a year ago.[4] Two and a half months later, Floyd filed an amended complaint.[5] In the amended complaint, Floyd claims, among other things, various Eighth Amendment violations relating to the protocol finalized by Director Daniels. These allegations, in addition to challenging the use of ketamine and all the other drugs used in the protocol,[6] include: (1) lack of safeguards based on Floyd's (false) premise that the protocol does not adequately provide for training of the execution team members;[7] (2) lack of safeguards regarding the transportation and storage of each of the drugs named in the protocol;[8] (3) lack of adequate access to counsel;[9] (4) a challenge to the configuration of the execution chamber itself;[10] and (5) the lack of appropriate medical care (including the appropriateness of the attending physician credentials should life-saving measures be required).[11]

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[4] ECF No. 2.
[5] ECF No. 120.
[6] *Id*. at 33:5-37:7.
[7] *Id*. at 33:16-42:2.
[8] *Id* at 42:3-15.
[9] *Id*. at 43:16-44:9.
[10] *Id*. at 44:10-18.
[11] *Id*. at 52:15-54:18.

Each of these allegations were, in varying degrees, discussed and argued during the course of this case, the evidentiary hearing, or, alternatively, deal with facial challenges to the protocol. Indeed, the Court and parties travelled to Ely specifically to view the execution chamber, the equipment that will be used in the execution, and the placement of equipment and individuals involved in the execution within the chamber—none of which are impacted by the drugs that may ultimately be used in the execution. Floyd never abandoned and does not now abandon those ripe and live claims.

III. LEGAL STANDARD REGARDING MOOTNESS

A. Mootness Requires the Lack of Any Available Relief

The mootness doctrine is a flexible one, requiring courts to consider various circumstances surrounding the case.[12] A case is moot only when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[13] A case "'becomes moot only when it is *impossible* for a court to grant any effectual relief [] to the prevailing party.'"[14] The Supreme Court has noted that "so long as any single claim for relief remains viable, whether the claim was the primary or secondary relief originally sought," a case is not moot.[15] Or, as more recently specified, "[a]s 'long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.'"[16] Thus, a case should only be dismissed based on mootness when it is "'absolutely clear' that the litigation no longer has 'any need of the judicial protection it sought.'"[17]

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[12] *Wolfe v. City of Portland*, __ F. Supp.3d ___, 2021 WL 4713237, *6 (D. Or. 2021) (citing *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-92 (2000); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012)).

[13] *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013)); *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

[14] *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Service Employees*, 567 U.S. 298, 307, (2012)) (emphasis added); *Karuk*, 681 F.3d at 1017 ("a case is not moot if *any* effective relief may be granted").

[15] *Ramer v. Saxbe*, 522 F.2d 695, 704 (D.C. Cir. 1975) (citing *McCormack*, 395 U.S. at 496; *United States v. SCRAP*, 412 U.S. 669, 689 n. 14 (1973), *Lake Carriers' Assn. v. MacMullan*,406 U.S. 498, 506 (1968); *Bond v. Floyd*, 384 U.S. 116, 128 n.4 (1966)).

[16] *Chafin*, 568 U.S. at 172 (citing *Knox*, 567 U.S. at 307-08) (emphasis added).

[17] *Karuk*, 681 F.3d at 1017 (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)).

B. Mootness Exceptions That Keep This Case a Live Controversy

Even if this Court determines that this case is moot, there are several exceptions to the mootness doctrine that permit the Court to hear this case. One such exception that applies here is the "capable of repetition while evading review" exception.[18] This exception applies whenever "(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again."[19] As it relates to the first prong of this exception, courts must consider whether "the underlying action is almost certain to run its course before [the federal courts] can give the case full consideration."[20] "The second prong of the repetition/evasion exception requires some indication that the challenged conduct will be repeated."[21] The "some indication" aspect "requires a 'reasonable expectation that the same party will confront the same controversy again.'"[22]

IV. ANALYSIS

A. All Parties Agree This Case is Not Moot

As a preliminary matter, all parties agree that this case is not moot. This agreement between Floyd and NDOC Defendants means nothing in the context of standing, but it certainly bears weight in the context of mootness. Unlike standing, mootness is more flexible. In this regard, Chief Justice Rehnquist, in *Honig v. Doe*,[23] wrote separately to explain why he voted with the majority in finding that the case was not moot. In that concurrence, Chief Justice Rehnquist wrote that while courts often referred to mootness as part of Article III standing, such a reference is a legal misnomer as evidenced by the exceptions to the mootness doctrine. Instead, if courts lacked jurisdiction to hear moot cases, a party could not salvage jurisdiction by way of the "capable of repetition, yet evading

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[18] *Public Utilities Comm. of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1458 (1996).

[19] *Native Village of Nuiqsut v. Bur. of Land Mgmt.*, 9 F.4th 1201, 1209 (9th Cir. 2021) (citing *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002-03 (9th Cir. 2017)).

[20] *Wilson v. Holder*, 7 F. Supp.3d 1104, 1114 (D. Nev. 2014) (quoting *Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F. 3d 851, 855 (9th Cir. 1999)).

[21] *Id.* (quoting *Alaska*, 189 F.3d at 856).

[22] *Id.* (quoting *W. Coast Seafood Processors Ass'n v. Natural Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011)).

[23] 484 U.S. 305 (1988).

review" exception or any other exception.[24] Specifically, Chief Justice Rehnquist noted if

> [the] mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, [the Court] would have no more power to decide lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading review that we would to decide cases which are 'moot' but raises no such questions.[25]

Thus, mootness is not tied to standing; courts have the power to override issues of mootness when "there are strong reasons to override it."[26]

Here, as noted below, there is no need to override mootness because both parties agree the case is not moot. Nonetheless, to the extent this Court disagrees with the parties, given the flexible nature of mootness, the fact that: (1) all parties wish this Court to decide the case; (2) there is real relief that Floyd can obtain from this Court (even though NDOC disagrees that Floyd is entitled to that relief); and (3) a decision will provide an answer to crucial legal questions that will assist the bar, the judiciary, Floyd, other condemned inmates, and the State of Nevada, are all relevant facts for this Court to consider in determining whether to dismiss this case as moot over the objections of the parties.

B. Because Floyd Seeks Relief From Various Aspects of the Protocol, This Case Is Not Moot Due to The Expiration of Ketamine

This case is not moot.

Floyd brought claims challenging the constitutionality of the protocol that have nothing to do with the drugs in the protocol. Those claims include:

- lack of safeguards based on Floyd's (false) premise that the protocol does not adequately provide for training of the execution team members;[27]

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[24] *Id.* at 330-31 (Rehnquist, CJ, concurring).
[25] *Id.*
[26] *Id.*; *see also People Not Politicians Oregon v. Clarno*, 826 Fed. Appx. 581, 586 (Nelson, J., dissenting) (recognizing Chief Justice Rehnquist's observation that "[t]he doctrine of mootness is comprised of both constitutional and prudential considerations") (quoting *Honig*, 484 U.S. at 330-31).
[27] ECF No. 120 at 33:16-42:2.

- lack of safeguards regarding the transportation and storage of each drug named in the protocol;[28]
- lack of adequate access to counsel;[29]
- a challenge to the configuration of the execution chamber itself;[30] and
- the lack of appropriate medical care (including the appropriateness of the attending physician's credentials should the condemned inmate require life-saving measures).[31]

Based on each of these claims, it is not surprising that both Floyd and NDOC Defendants agree that this case is not moot.

The evidentiary hearing in this matter produced testimony and evidence that arguably applies to each of these challenges, with the possible exception of the access to counsel challenge—which this Court can decide based on the face of the protocol itself. To be sure, the issues regarding training, identity, credentials, licensing, equipment, placement of individuals in the chamber, use of a separate room to inject medications, monitoring of Floyd before and during the injection of the drugs, ability to provide resuscitation if necessary, and what, if any requirement to share the identity, credentials, and licensing information to Floyd, are all live controversies that are ripe for decision regardless of whether NDOC has any of the drugs contained in the protocol. Indeed, even if NDOC decided—either voluntarily or out of necessity—to make modifications to the drug cocktail, the parties have a concrete legal interest in this Court resolving those claims.

Of course, NDOC is confident that each of those procedures—just like the cocktail—are constitutional. But that confidence does not change the undeniable fact that Floyd continues to argue those claims or the fact that this Court has ample evidence and legal arguments to address each of those claims given the eight-day evidentiary hearing, more than a dozen other hearings and status conferences, countless briefing and filings, and the

[28] *Id* at 42:3-15.
[29] *Id*. at 43:16-44:9.
[30] *Id*. at 44:10-18.
[31] *Id*. at 52:15-54:18.

Ely site visit.

As the mootness doctrine is a flexible one requiring courts to consider various circumstances surrounding the case,[32] this case is not moot. Indeed, given the many constitutional violations Floyd alleges, there is no question Floyd and NDOC both have legally cognizable interests in the outcome of this case wholly separate from the issue of whether NDOC can obtain ketamine to move forward with its chosen cocktail.[33]

A review of the amended complaint, motions, documents, evidence, and testimony presented at the evidentiary hearing and throughout the past year establishes that it is not impossible for this Court to provide real and effective relief to either Floyd or NDOC.[34] Indeed, this case is not moot because instead of it being "absolutely clear" that there is not a need for the judicial protection[35] sought by Floyd—and judicial confirmation of constitutionality sought by NDOC–it is actually "absolutely clear" that a decision on the merits of this litigation is necessary to provide the judicial protection both parties seek and desire: Floyd's desire to avoid execution by what he perceives to be an unconstitutional protocol irrespective of the drug cocktail; and NDOC's desire for this Court to acknowledge and confirm the constitutional protocol established by NDOC.

In addition to the existence of real relief this Court can still provide to the parties,[36] and the concrete interest all parties have in the merits of this case, [37] this Court should also consider the "sunk costs to the judicial system"[38] that would result if this Court decides, *sua sponte*, that this case is moot. This case has been pending for over a year resulting in hearings spanning dozens of days, including an eight-day evidentiary hearing that involved an out-of-town site inspection. In addition to the multitude of hearings, the Court and the parties have filed 324 documents to date. This does not include the briefing, filings, and arguments made before the Ninth Circuit in relation to this case. As such, finding this case

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[32] *Wolfe*, 2021 WL 4713237 at, * 6.
[33] *Fikre*, 904 F.3d at 1037.
[34] *Chafin*, 568 U.S. at 172.
[35] *Karuk*, 681 F.3d at 1017.
[36] *Ramer*, 522 F.2d at 704.
[37] *Chafin*, 568 U.S. at 172.
[38] *Wolfe*, 2021 WL 4713237 at *6.

moot and "abandoned" at this late stage would "prove more wasteful than frugal," especially here where all "of the parties plainly [do not] lack a continuing interest."[39]

The Supreme Court has found that "so long as any single claim for relief remains viable, whether the claim was the primary or secondary relief originally sought," a case is not moot. Or, as more recently specified, "[a]s 'long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.'" Thus, this Court should only dismiss this case as moot if it is "'absolutely clear' that the litigation no longer has 'any need of the judicial protection it sought.'"

Accordingly, given the multiple avenues of relief sought by Floyd—all wholly independent and not contingent on the drug cocktail—and this Court's ability to provide real and concrete relief to Floyd or NDOC as it relates to those avenues, this case is not moot. Rather, it is ripe for a decision on the merits in all respects, including the drug cocktail itself.

C. Even Assuming the Expiration of Ketamine Rendered the Case Moot, the Case Must Still Be Decided as It is Capable of Repetition, Yet Evading Review

Assuming this Court disagrees with NDOC—and Floyd—and believes that this case is moot, the case is still ripe for a decision on the merits because, even assuming mootness, the capable of repetition yet evading review exception to the mootness doctrine applies. As noted above, for this exception to apply, two things must be present: "(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again."[40]

Both prongs exist here.

1. The Duration is Too Short

This case has been pending for over a year. During that time, three different drugs expired: fentanyl, potassium chloride, and most recently, ketamine. These drugs expired

[39] *Laidlaw*, 528 U.S. at 192.

[40] *Native Village of Nuiqsut v. Bur. of Land Mgmt.*, 9 F.4th 1201, 1209 (9th Cir. 2021) (citing *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002-03 (9th Cir. 2017)).

before this Court could make a decision—despite the rather expeditious treatment of discovery, briefings, arguments, and hearings. And the expiration of these drugs occurred even though the parties, the public, and the Court were aware of the expiration dates. Indeed, it was because of these expiration dates that NDOC continually pushed for an expeditious decision.

In addition to the factual reality established in this specific case, "[t]he Supreme Court has previously held that eighteen months was insufficient time to accommodate complete judicial review,"[41] and "the Ninth Circuit has held that the issuance of a two-year permit is sufficiently short in duration to evade review."[42] Similarly, under Nevada law, once the state court issues an execution warrant, NDOC must carry out the execution "not less than 15 days nor more than 30 days after the date of the warrant."[43] Likewise, given NDOC's policy that it will only use non-expired drugs as part of the approved lethal injection cocktail, the timeframe for carrying out an execution is also contingent on the expiration of the drugs purchased by NDOC. The expiration dates vary with each drug and each purchase. This was made clear by the Index of Drug expiration dates, which notes that while NDOC purchased alfentanil on two occasions less than a week apart, the expiration of the shipments varied from May 31, 2022, to February 28, 2024.[44]

Accordingly, the first prong of this exception is clearly met.

2. Repetition of the Events of This Case is Likely

As of today, Floyd sits on death row. This reality—baring extraordinary and unforeseen circumstances—will exist for the rest of Floyd's life, whether that death be by natural causes or because NDOC fulfills the jury verdict entered two decades ago. As demonstrated by this lawsuit and others filed in both state and federal court contemporaneously with this case, Floyd continues to fight his death sentences.

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[41] *Wilson*, 7 Supp.3d at 1114 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 775 (1978).
[42] *Id.* (citing *Alaska*, 189 F.3d at 855).
[43] NEV. REV. STAT. 176.495(2).
[44] ECF No. 118 at 2; ECF No. 316 at 2:3-12.

Likewise, until such time as Floyd dies or there is a change in Nevada law or his sentence, NDOC has a statutory duty to carry out his legally-imposed execution. NDOC will comply with that statutory duty in accordance with the protocol that Director Daniels dutifully researched, deliberated and finalized. And as noted at the hearing on April 25, 2022, Director Daniels instructed NDOC's chief pharmacist to continually attempt to purchase the medications set forth in the protocol.[45]

Given these undisputed facts, and Floyd's relatively young age and health, it is reasonable to conclude that both Floyd and NDOC "will confront the same controversy again" at some point in the future.[46] This is because it is reasonable to conclude that NDOC will eventually purchase ketamine as well as the other expired drugs. This could occur due to a change in wholesaler; a new pharmaceutical company decides to sell ketamine or the other drugs without blocking purchases by corrections facilities; the Nevada Legislature amends or modifies public records laws, which would permit NDOC to purchase the medication from compounding pharmacies or other sources without having to disclose their identity; or Cardinal Health itself decides to permit NDOC to purchase the medication. These are just a few examples of why there is a reasonable expectation that, at some point during Floyd's life, NDOC will be able to purchase ketamine and the other drugs in the cocktail that have or will eventually expire—and as indicated in this case, will expire before the Court can address the merits.

D. The Lack of a Current Execution Warrant Does Not Moot This Case

Finally, NDOC notes that in requesting briefing on this issue, this Court noted that in addition to NDOC's lack of possession of unexpired ketamine, the lack of a valid execution order and warrant to carry out Floyd's death sentence triggered the need to consider mootness.[47]

Regarding the execution warrant and order, NDOC reiterates that the Clark County District Attorney's Office (CCDA), not the State or NDOC, is responsible for obtaining an

[45] ECF No. 324 at 5:7-11, 9:15-10:3.
[46] *Wilson*, 7 F. Supp.3d at 1114.
[47] ECF No. 324 at 11:14.

execution warrant or order should the state court fail to *sua sponte* issue one under NRS Chapter 176. NDOC has no control over that decision.

Notwithstanding this legal reality, it is not reasonable to believe the CCDA will never seek an amended execution order and warrant. Indeed, it did so initially, leading to this underlying lawsuit. CCDA also continues to seek judicial relief by defending the various motions, appeals, and lawsuits Floyd brought in an attempt to stave off execution and preclude the issuance of the amended warrant and order. Further, this Court heard from the CCDA prosecutor, who repeatedly informed this Court that the CCDA will continue to seek an amended execution order and warrant, but that office decided to wait to request a new amended warrant and order until the Nevada Supreme Court concluded review of Floyd's state-based challenges.

Finally, while the CCDA has not yet obtained a new execution order and warrant, that decision is voluntary. The CCDA may seek an amended order and warrant at any time. And indeed, just as NDOC has a legal duty to carry out a death sentence once an execution order and warrant issues, the CCDA has a legal duty to seek such an order and warrant.

As such, the lack of a valid execution order or warrant does not moot this lawsuit. And, assuming it could be construed as being moot, the voluntary cessation doctrine requires this Court to procced to the merits of this case.[48] That doctrine provides that a legal challenge cannot be mooted as a result of the voluntary actions of one of the parties to the lawsuit. Here, the CCDA is not one of the parties, and moreover, the CCDA it will seek an execution and warrant at the conclusion of Floyd's state-based cases. Accordingly, this is not a case where CCDA's temporary decision to not obtain the warrant and order means the challenged conduct is not likely to recur.[49]

V. CONCLUSION

This case is not moot. This is true even though the ketamine expired and NDOC does not currently possess any unexpired ketamine. Floyd raised numerous other

[48] *Laidlaw*, 528 U.S. at 189; *see also* NDOC's Opening Brief on Appeal in this case, DktEntry: 16 at 7, 20, 22-24.

[49] *Id.*

challenges to the protocol, all of which are ripe for decision without reference to the drugs NDOC may have. Thus, there is real, concrete relief that this Court can provide to the parties in this case.

To the extent this Court disagrees and believes that the lack of ketamine moots this case, given the short shelf life of the drugs, the issues relating to the use of ketamine (or any other drug in the cocktail) are reasonably likely to occur again in the future. NDOC continues to attempt to fulfill its duties to purchase the drugs from Cardinal Health and will do so immediately upon their availability. Similarly, the CCDA can—and likely will—continue to abide by its duty to obtain an execution order and warrant. Thus, even if this Court concludes this case is moot—despite the agreement of the parties that a real case and controversy remains—at least two exceptions, the capable of repetition yet evading review, and the voluntary cessation doctrine, keep the controversy in this case alive.

Three hundred nine-six (396) days. That is how long the parties have sought an answer to Floyd's constitutional questions. During that time, three different drugs expired—fentanyl, ketamine, and potassium chloride. Of equal importance, Floyd's victims, the family members of his victims, and the residents of Nevada, have waited two decades for justice. Mootness does not prevent the Court from providing answers to the existing questions.

Respectfully submitted on this 16th day of May, 2022, by:

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