IN THE SUPREME COURT OF THE STATE OF NEVADA

Robert Ybarra, Jr.,

Appellant,

vs.

Terry Royal, Warden,

Respondent.

DOCKET NO.: 89824

RESPONDENT'S APPENDIX
VOLUME ONE

DOCUMENT	DATE	VOLUME	PAGES
Order Regarding NDOC's Failure to Comply with Warrant of Execution	04/23/2025	1	RA 001 – 002
Non-Party James E. Dzurenda, Director of the Nevada Department of Corrections' Response to Order Regarding NDOC'S Failure to Comply with Warrant of Execution	05/19/2025	1	RA 003 – 033

CERTIFICATE OF SERVICE

I certify that on the 30th of July, 2025 indicated below, I served a copy of this filing upon all parties by electronic service.

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DATED this 30th of July, 2025.

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SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

Case No. CR-0001511

Dept. No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

*****

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROBERT YBARRA, JR.,

Respondent.

_____/

ORDER REGARDING NDOC'S FAILURE TO COMPLY WITH WARRANT OF EXECUTION

On March 25, 2025, the court filed a "Second Supplemental Warrant of Execution" in the above-entitled matter. The warrant directed the Director of the Nevada Department of Corrections (NDOC) to cause the judgment of death to be imposed on Defendant during the week beginning April 13, 2025.[1]

On April 2, 2025, a "Notice Update Pertaining to Joint Status Report" was filed by Randolph M. Fiedler, Esq., counsel for Defendant, and Melissa A. Brown, Esq., White Pine County District Attorney. The notice indicated that counsel had been advised by Chief Deputy Attorney General Gerald D. Randall Gilmer that the Department of Corrections "will

1 A corrected warrant was issued on March 26, 2025, setting the week beginning April 14, 2025, as the date for the execution.

SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

not be able to proceed with an execution the week of April 14, 2025, . . ." At a hearing held on January 3, 2025, Mr. Gilmer advised the court why the Department of Corrections would be unable to proceed with an execution set for the week of January 6, 2025. On April 14, 2025, the Nevada Supreme Court granted a motion to stay the execution. The court ordered expediated briefing in the habeas case on appeal in that court.

Since the execution was stayed, the Director is not facing contempt proceedings for failing to comply. However, due to the gravity of this matter and the fact that the Director has had over 90 days to prepare for an execution, the court finds it is appropriate to get details regarding NDOC's efforts to perform an execution. Thus, the court will allow the Director an opportunity to explain why NDOC is unable to proceed with an execution.

The response shall be filed on or before May 19, 2025, and shall provide the following:

1. Reasons why NDOC cannot comply with the warrant of execution.

    a) For each reason stated, specific details as to what efforts have been made since January 3, 2025.

    b) For each reason stated, specific details as to what action is planned (with time frames) to address each issue.

    c) Any other information the Director finds would be useful to the court.

Good cause appearing,

IT IS SO ORDERED.

DATED this 23 day of April, 2025.

COPY

FILED
2025 MAY 19 P 12:33
WHITE PINE COUNTY CLERK
BY: _____ DEPUTY

CASE NO. CR-0001511

DEPT. NO. 1

Affirmation pursuant to NRS 239B.030
The undersigned does hereby affirm that this document does not contain the social security number of any person

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

The State of Nevada,

Plaintiff,

vs.

Robert Ybarra, Jr., et al.,

Defendants.

NON-PARTY JAMES E. DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS' RESPONSE TO ORDER REGARDING NDOC'S FAILURE TO COMPLY WITH WARRANT OF EXECUTION

Non-party, James E. Dzurenda, in his official capacity as Director of the Nevada Department of Corrections, by and through counsel, Nevada Attorney General, Aaron D. Ford, Chief Deputy Solicitor General Jeffrey M. Conner, and Chief Deputy Attorney General D. Randall Gilmer, hereby provides this response to this Court's *Order Regarding NDOC's Failure to Comply With Warrant of Execution* issued on April 23, 2025 (Order).

In that Order, this Court noted that it would "allow the Director an opportunity to explain why NDOC [was] unable to proceed with an execution" "the week of April 14, 2025." Order at 2:10-12 and 2:1. Specifically, the Order asked the Director to provide this Court with the "[r]easons why NDOC cannot comply with the warrant of execution," and requesting "specific details as to what efforts have been made since January 3, 2025" as well as "specific details as to what action is planned (with time frames) to address each issue," while also allowing the Director to provide "[a]ny other information the Director finds would be useful to the court." *Id.* at 2:15-19.

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CASE NO. CR-0001511

DEPT. NO. 1

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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The State of Nevada,

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NON-PARTY JAMES E. DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS' RESPONSE TO ORDER REGARDING NDOC'S FAILURE TO COMPLY WITH WARRANT OF EXECUTION

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In that Order, this Court noted that it would "allow the Director an opportunity to explain why NDOC [was] unable to proceed with an execution" "the week of April 14, 2025." Order at 2:10-12 and 2:1. Specifically, the Order asked the Director to provide this Court with the "[r]easons why NDOC cannot comply with the warrant of execution," and requesting "specific details as to what efforts have been made since January 3, 2025" as well as "specific details as to what action is planned (with time frames) to address each issue," while also allowing the Director to provide "[a]ny other information the Director finds would be useful to the court." *Id.* at 2:15-19.

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The Director appreciates this Court's request. The Director is grateful this Court has permitted the Director an opportunity to provide additional information the Director believes "would be useful to the court." This aspect of the Order is of particular importance. The Director appreciates and understands this Court's desire to ensure that NDOC is taking steps to meet its constitutional obligations to ensure that an order of execution, when issued, is carried out, and the more general desire for this Court to ensure enforcement of its orders. However, disclosure of the specific information that is not already in the public domain, including information already provided to this Court, other courts within this state, and the United States District Court for the District of Nevada, would result in the public dissemination of information that is protected from disclosure under multiple privileges, including without limitation the deliberative process privilege, sometimes also referred to as executive privilege.

As such, in response to this Court's invitation to provide this Court with "[a]ny other information the Director finds would be useful to the court," the Director informs this Court that he is exercising the privilege accorded him by the law to maintain confidentiality of the information sought in (1)(a) and (1)(b) of this Order unless that information is already in the public domain.

1. NDOC Does not Currently Have The Necessary Unexpired Drugs

As this Court was informed in January, and as more fully explained in documents filed in *Floyd v. Daniels*, Case No. 3:21-cv-00176-RFB-CLB, which remains pending, some of the necessary medications that are currently set forth in the execution protocol as the "drug or combination of drugs" that will be used to carry out an execution, are expired. Specifically, the alfentanil in the NDOC's possession expired on February 29, 2024, and NDOC has been unable to procure any additional alfentanil or fentanyl (which can be used in its place). Joint Status Report, ECF No. 340 at 2:10-11, attached hereto as **Exhibit A**. The Joint Status Report goes on to state, "NDOC continues to pursue the purchase of drugs for the current protocol." **Exhibit A** at 2:15-16.

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Prior to filing the Joint Status Report, NDOC had made known, through its previous Director, that it "continues to seek purchase of [the necessary medications] through NDOC's ordinary practice of purchasing drugs, which is to purchase them from Cardinal Health." NDOC Defendants' Supplemental Briefing As To Why This Case is Not Moot, ECF No. 326 at 2:21-26, attached hereto as **Exhibit B**. NDOC was able to purchase additional amounts of two of the drugs in the protocol, namely ketamine and potassium chloride as noted in the Joint Status Report. However, because the alfentanil previously purchased has expired, NDOC continues to seek the purchase of alfentanil or fentanyl through Cardinal Health. Therefore, should NDOC choose to proceed under the current protocol, the execution will not be able to proceed until alfentanil or fentanyl are "available for purchase from Cardinal Health or other legal channels." **Exhibit B** at 2:21-26.

The Director confirms that efforts to purchase the necessary medications will continue. However, except as previously referenced herein and in the documents provided at Exhibits A and B (or other documents that may appear on the court docket in publicly accessible form), the Director respectfully declines to provide the "specific details as to what efforts have been made" in attempting to procure those medications. Disclosure of such information would result in the Director waiving several privileges, including the deliberative-process privilege.

2. NDOC Does Not Have All Necessary Members of the Execution Team

NDOC also informed this Court in January that it still had not identified all necessary individuals to perform crucial tasks necessary to carry out an execution under the current execution protocol. The minutes of the January 3, 2025 hearing confirm that NDOC's counsel informed this Court on the record that "NDOC [was] unable to proceed with the execution . . . due to the lack of appropriate medical personnel," and "that NDOC will continue to try to locate medical personnel with the Eighth Judicial District Court's Stay is in place." 1/3/25 Hrg Minutes at 1 (1:41:23pm).

The same is true today. In addition, although the Eighth Judicial District Court's stay is no longer operative, as this Court is aware, "on April 14, 2025, the Nevada Supreme

Court granted a motion to stay the execution." Order at 2:4-5. But just as in January, NDOC continues to try to locate qualified medical personnel. The Director continues to exercise his discretion, duties, and responsibilities by diligently and deliberately trying to locate and identify these individuals. However, the Director respectfully declines to provide more specific details as to these steps, to maintain confidentiality and protect the Director's deliberative-process privilege, which is specifically designed to ensure the Director can engage in these activities free of outside interference or influence. The Director also notes that should the identity of individuals being considered be divulged, it will make the final selection and procurement of those individuals exponentially more difficult due to safety and security concerns associated with participation in executions. Maintaining confidentiality of this information is essential to maintaining institutional security.

3. NDOC Is Performing Necessary Training

The Director also informs this Court that NDOC is conducting necessary operational training. The Director is withholding disclosure of specific information relating to the training regimen to maintain confidentiality and protect the Director's deliberative-process privilege and to maintain institutional security. Maintaining confidentiality of information involving training all corrections personnel involved in carrying out an execution on matters of safety and security, including training pertaining to the security team and ancillary teams necessary to ensure the safety and security of the execution process and all individuals involved in the execution, or who may be attending the execution, is essential to institutional security.

4. The Director Invokes The Deliberative-Process Privilege

The Director and NDOC appreciate and understand this Court's desire for more specific information regarding the above. But protecting the confidentiality of information requested by this Court helps ensure the Director's ability to continue working on necessary preparation without fear of outside interference or influence. For that reason, the Director declines to provide additional information under the deliberative-process privilege. The Director, as the administrative head of a state agency, NDOC, must have

the ability to engage in confidential discussions without subjecting those discussions to public disclosure. Similarly, the Director must be able to confidentially deliberate and consider processes and procedures pertaining to his crucial duties and responsibilities, particularly those involving execution procedures and practices. The deliberative process privilege recognizes this important governmental function.

This privilege is recognized under both state and federal law.

In *DR Partners v. Bd. Of Co. Com'rs of Clark Co.*,[1] the Nevada Supreme Court acknowledged that "[t]he deliberative process of 'executive' privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch of government."[2] The Court went on to make clear that, in addition to protecting internal memoranda and documents, the privilege is designed to "permit[] 'agency decision-makers to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure.'"[3] And while the privilege does not protect purely factual matters, factual matters are also privileged when those facts are "inextricably intertwined with the policy-making process."[4]

Similarly, in *United States Fish and Wildlife Service v. Sierra Club, Inc.*,[5] the United States Supreme Court confirmed that "the deliberative process privilege . . . is a form of executive privilege" and it "rooted in 'the obvious realization that officials will not communicate candidly among themselves if each remand is a potential item of discovery

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[1] 116 Nev. 616, 6 P.3d 464 (Nev. 2000).

[2] *Id.* at 622.

[3] *Id.* at 623 (citing *Paisely v. C.I.A.*, 712 F.2d 686, 697 (D.C. Cir. 1983), vacated in part 724 F.2d 201 (D.C. Cir. 1984)).

[4] *Id.* (internal quotation marks and citations omitted).

[5] 592 U.S. 261, 141 S. Ct. 777, 209 L. Ed.2d 78 (2021).

and front page news.'"[6] As a result, the privilege is designed to "encourage candor, which improves agency decisionmaking."[7] To be protected under the deliberative process privilege, the sought information must be both (1) "predecisional," meaning it was "generated before the adoption of an agency's policy or decision," and (2) "deliberative in nature, containing opinions, recommendations, or advice about agency policies."[8] "Purely factual material that does not reflect deliberative processes is not protected."[9] However, in the second part of this analysis, courts must consider whether the sought "factual material is so interwoven with the deliberative material that it is not severable."[10]

The fact that these predecisional considerations are made in the context of ensuring that the NDOC carries out a capital punishment in compliance with the Constitution of the United States and the Nevada Constitution. To this end, in *United States v. Fernandez*, the Ninth Circuit held that the deliberative process privilege protected a predecisional death penalty evaluation form and prosecution memorandum. There, the defendant filed a discovery motion seeking "all information that may tend to mitigate the sentence in this case," so he could make an "informed, accurate and meaningful presentation to the government."[11] The government argued, among other things, that the deliberative-process privilege protected the documents.[12] The district court granted the motion, ordering prosecutors "to provide all capital-eligible defendants with its completed death penalty

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[6] *Id.* at 267 (citing *Dep't of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L.Ed.2d 87 (2001).

[7] *Id.*

[8] *Warner Commc'ns*, 742 F.2d at 1161 (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

[9] *Id.* (citing *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

[10] *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000) (citing *Binion v. Dep't of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983)).

[11] *Fernandez*, 231 F.3d at 1243.

[12] *Id.*

evaluation form and prosecution memorandum."[13] The government filed a " 'Notice of Non-Compliance with Court's Order and Suggested Procedure,' in which the government respectfully but firmly informed the district court that it would not comply with its order."[14]

The Ninth Circuit reversed, finding that the death penalty evaluation form and the prosecution memorandum were both "predecisional" and "deliberative."[15] The documents were predecisional since they were submitted "*before* the Attorney General ma[de] the final decision whether to seek the death penalty," and deliberative because they contained "opinions, recommendations, or advice about agency policies."[16] Because the documents "play[ed] an integral role in the government's deliberative and policy-making processes," the deliberative process privilege shielded them from disclosure.[17]

Nevada has also recognized "that executive privilege may prohibit forced disclosure of information about the charging process," and this decision was made in the context of a death-penalty case as well.[18]

Similarly, here, any thoughts, considerations "opinions, recommendations or advice" the Director has that could be provided to this Court in response to the information sought at page 2 of the Order necessarily involves information about the Director's predecisional, deliberative thoughts and considerations as to procuring medications and individuals necessary to carry out the execution protocol. Therefore, those thoughts, opinions, knowledge and discussions play "an integral role in" the Director's deliberative and policy-making decisions as the sole decisionmaker regarding these crucial decisions.

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[13] *Id.* at 1244.

[14] *Id.*

[15] *Id.* at 1246.

[16] *Id.* (citations omitted).

[17] *Id.* at 1247.

[18] *Thomas v. State*, 122 Nev. 1361, 1374, 148 P.3d 727 (Nev. 2006) (citing *Labastida v. State*, 112 Nev. 1502, 1506 n.3, 931 P.2d 1334, 1337 n. 3 (Nev. 1996), *modified and superseded on other grounds on rehearing*, 115 Nev. 298, 986 P.2d 443 (1999).

The fact this Court's Order does not specifically request documents is of no consequence. In *Ames Construction v. Clark County*,[19] the court concluded that the deliberative-process privilege applies prospectively to witness testimony and granted a protective order barring a county commissioner's deposition. There, Ames asserted that the deliberative process only applied to instances where a party seeks disclosure of *documents* from a government body but does not apply when a party seeks to take the *deposition* of a government official to ask him or her questions about factual matters or documents already disclosed. The court rejected this narrow interpretation of the privilege, agreeing with the defendants that the goal of the privilege "is to encourage candid discussions of ideas and to improve the government decision-making process."[20] *Ames* further held that the defendants satisfied their burden of establishing that the privilege shielded the commissioner's deposition testimony.[21]

And while this Court is not asking for specific testimony, the Order does seek information that would require the Director to share information that has been, and is being, gleaned in "candid discussions" regarding the means and methods of ensuring that an execution can be carried out in a constitutional manner. *See* Order at 2:15-18 (asking for specific details and times frames).

The deliberative process privilege shields all materials and information the Director has obtained through communications with individuals, as well as information the Director has, and is, contemplating as he makes the crucial decisions regarding obtaining and using necessary medication and personnel. As those decisions have not yet been made, the substantive information in the Director's knowledge has been provided and learned by him for the express purpose of making a final decision. As such, the information this Court seeks, except as otherwise known in the public domain, qualifies as "predecisional."

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[19] No. 2:18-cv-00299-JCM-EJY, 2020 WL 1674327 (D. Nev. Apr. 6, 2020).

[20] *Id.* at *3 (collecting cases).

[21] *Id.* at *4.

The information is also "deliberative" because, whether statutorily required under NRS 176.355(2)(b), or as part of Director Dzurenda's due diligence in seeking information and opinions from other sources, he has sought that information for purposes of seeking advice to aid in his procurement of drugs to be used in the execution protocol, as well as in engaging in deliberative, predecisional consideration of matters regarding personnel needed to carry out the execution in a legal, humane, and constitutional manner. Should the Director be forced to provide that information at this time, he would not be able to "communicate candidly" with others, as that information may become front page news.[22] In short, providing this information in an open forum will "hinder [the] frank and independent discussion[s] regarding contemplated policies and decisions" the Director must make.[23]

5. Conclusion

The Director is diligently proceeding with all necessary steps so as to be able to complete his duties and responsibilities associated with the solemn task of enforcing an execution warrant when and if another one is issued. However, as noted above, as of the week of April 14, 2025, NDOC was not in possession of unexpired medications needed to proceed with the execution under the current protocol. In addition, as this Court was informed in January, and as reiterated in this filing, NDOC also did not have all necessary medical personnel in place as of the week of April 14, 2025.

The Director is committed to continuing to diligently seek the necessary medications and personnel, but as of the date of this filing, the Director cannot provide this Court with any specific timelines as to when those items will be available. As previously stated, however, the Director and NDOC are committed to making such information known (subject to protections regarding identities of individuals as well as manufacturers, distributers, or other identifying information regarding the source of the medications) as

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[22] *See Klamath*, 532 U.S. at 8–9.

[23] *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (citing *Warner Commc'ns*, 742 F.2d at 1161).

soon as the individuals are identified and confirmed for participation in the execution, and once all medications necessary to complete the execution under the protocol are obtained and within the possession of NDOC.

Respectfully submitted on this 19th day of May, 2025 by:

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Attorney General

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INDEX OF EXHIBITS

EXHIBIT A – ***Floyd v. Daniels*, Case No. 3:21-cv-00176-RFB-CLB, Joint Status Report, ECF No. 340**

EXHIBIT B – ***Floyd v. Daniels*, Case No. 3:21-cv-00176-RFB-CLB, NDOC Defendants' Supplemental Briefing As To Why This Case is Not Moot, ECF No. 326**

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on May 19, 2025, I caused to be deposited for mailing, a true and correct copy of the foregoing **NON-PARTY JAMES E. DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS' RESPONSE TO ORDER REGARDING NDOC'S FAILURE TO COMPLY WITH WARRANT OF EXECUTION,** to the following:

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White Pine County District Attorney
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/s/ Diane Resch
Diane Resch, an employee of the
Office of the Nevada Attorney General

EXHIBIT A

Floyd v. Daniels
Case No. 3:21-cv-00176-RFB-CLB
Joint Status Report, ECF No. 340

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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Assistant Federal Public Defender

Aaron Ford
Nevada Attorney General

/s/D. Randall Gilmer
D. Randall Gilmer
Chief Deputy Attorney General

EXHIBIT B

Floyd v. Daniels
Case No. 3:21-cv-00176-RFB-CLB
NDOC Defendants' Supplemental Briefing as to Why This Case is Not Moot, ECF No. 326

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' 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

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[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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