NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 108
COMMUTATION OR STAY OF EXECUTION

Effective Date: 06/11/2018

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

108.01 COMMUTATION OR STAY OF EXECUTION

A. [redacted] working with [redacted] will ensure that the following restricted access outside telephone lines [redacted] operate properly. [redacted] will ensure that there are [redacted] cell phones with classified phones numbers available for use should there be issues related to the land lines. These numbers will be confidentially provided only to those groups concerned [redacted] prior to a scheduled execution.

1. The Governor's direct line:
2. The Attorney General's direct line:
3. Federal Court Clerks direct line:
4. State Court Clerks direct line:
5. Judge Togliatti's direct line:

[redacted]

In addition to standard telephone lines and cell phones, a satellite phone will be available so that communications outside of the facility remains possible. This [redacted] will be provided [redacted]

B. In the event of a stay of execution, all preparations will cease and the Director will be immediately notified by the designated Warden.

C. It must be understood that after the infusion of the lethal drugs has begun the execution may still be stopped, but the inmate's respiratory and cardiovascular systems will be progressively more compromised.

1. If the execution is ordered to be stopped at any point after the infusion of the lethal drugs has begun, all reasonable attempts to save the inmate's life will be made by the Attending Physician and medical personnel present using equipment that will be made available for that possible contingency as noted in EM 104.01 – List of Needed Equipment, Materials and External/Internal Contacts.

2. If necessary, the inmate will be transported [redacted] for further stabilization and medical care.

D. If the condemned inmate has already been taken to the Execution Chamber room and a commutation or Stay of Execution order is received, the inmate shall be returned [redacted] All execution personnel shall remain on duty until released by the Associate Warden of Operations.

E. The Attorney General (or designee) shall be notified of the situation as soon as possible.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 109
EXECUTION PROCESS TIMELINE

Effective Date: 06/11/2018

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

109.01 OVERVIEW OF EXECUTION – 30 DAYS PRIOR

A. When an Order of Execution is received by the Department and the Director has set the date and time of the execution, if necessary, the condemned inmate will be transferred to ESP [redacted] prior to the scheduled execution. Upon arrival at the institution, the inmate will be photographed.

B. The Director of the Nevada Department of Corrections will appoint an Execution Review Committee (ERC) who will be responsible for the selection of Execution Assignment Positions. [redacted]

C. The designated Warden will ensure that written notification of the execution date and time has been made to the County Sheriff / County Corner via hand-delivered letters.

1. The letter to the County Sheriff's Department will ensure [redacted] the execution.

2. The letter to the County Coroner will ensure that the Coroner will be present at the execution and that they will be responsible for confirmation of the inmate's death and for pronouncing the time of death utilizing the atomic clock located in the Execution Chamber room.

D. There will be [redacted] teams: Execution Management, [redacted] Guest Witnesses, Medical Aid Station, and Debriefing. All participants not appointed by the Director, Deputy Director of Operations or ERC must be involved voluntarily and follow the guidelines for selections as outlined in the manual. A member of each team will be responsible for note taking. Timeline notations will occur [redacted]. All documents completed during any phase of the execution will be placed in an execution file to be forwarded to the Warden's Administrative Assistant' Office. Once all documents are collected they will be sent to the Deputy Director of Operations office for file retention. Teams will include the following:

1. Execution Management Team [redacted]
    a. One Warden
    b. Two Associate Wardens

[redacted]

5. Guest Witnesses Team (4 members)
    a. One Official Witnesses on-site representative [redacted]
    b. One Media Witnesses on-site representative – Public Information Officer
    c. One Victim Family on-site representative [redacted]
    d. One Inmate Family on-site representative (if inmate's family has been invited by the Director of NDOC) [redacted]

6. Medical Aid Station Team [redacted]

8. Debriefing Team [redacted]

E. The Deputy Director of Operations for the Nevada Department of Corrections will be responsible for the selection of the Warden, two Associate Warden's [redacted]

109.02 OVERVIEW OF EXECUTION – TWO WEEKS PRIOR

A. No later than two weeks prior to the scheduled execution the designated Deputy Director/designated Warden will meet with the condemned inmate to:

1. Conduct a detailed interview of inmate for preparation of the Death Certificate.
2. Attain inmate's final meal request from the standard NDOC Men's Menu.
3. Allow inmate to sign a DOC 3008 – Press Release form if he will be conducting interviews with the media.
4. Select personal spiritual advisor, if requested.
5. Select method of property disposition.

B. [redacted] will ensure the following Execution Area phones [redacted] operate so that internal and external phone calls may be placed and received. [redacted] will also ensure that the assigned cell phones operate correctly [redacted]

1. The Governor's line [redacted]
2. The Attorney General's line [redacted]
3. Federal Court Clerks line [redacted]
4. State Court Clerks line [redacted]
5. Judge Togliatti's direct line [redacted]

C. A completion of all maintenance inspections and repairs will be done [redacted] Maintenance inspections and repairs will also be completed [redacted] to include proper room temperature checks in all areas [redacted]

D. Arrangements will be made by the ASO II for [redacted] Sani-Huts to be delivered [redacted]

E. The Maintenance Supervisor will make arrangements for parking lot/facility entrance barricades to be delivered and set-up [redacted]

F. There will be a mandatory meeting regarding the execution operation plan status. [redacted]

109.03 OVERVIEW OF EXECUTION – ONE WEEK PRIOR

A. A notification of visiting programs and operational schedule changes that will affect facility operations on the day of the scheduled execution will be made via written memorandum. A memo will be sent to all units notifying all concerned that on the day of the event the institution will follow the [redacted] meal service schedule. The memorandum will be distributed to staff via Departmental Email. Inmates will be informed of these changes.

B. All staff involved in the execution process will meet [redacted] Detailed briefing on specific duties and responsibilities will be given followed by a full equipment check and event rehearsal. This equipment check includes testing [redacted] outside restricted access telephone lines and satellite phone.

C. ESP Food Service Manager/Culinary Sergeant will be notified in writing that they will be responsible for setting up beverages in the Gatehouse, Visiting Room and other designated areas as directed.

109.04 OVERVIEW OF EXECUTION – 48 HOURS PRIOR

A. If the condemned inmate has not already been moved to the Execution Holding Area [redacted] the following steps are to be taken. [redacted] prior to the scheduled execution, the assigned [redacted] Team [redacted] will report to the condemned man's living unit. One member [redacted] will be responsible for recording all movement by the condemned inmate using a hand-held camera.

1. They will take with them a complete set of new state-issue clothing consisting of a pair of jeans, short sleeved button-down shirt, socks, underwear and tennis shoes [redacted]

a. In the event of inclement weather a State-issued coat will be provided to the inmate [redacted].

2. They will enter the unit and proceed to the cell of the condemned inmate.

3. The condemned inmate will be positively identified [redacted]

4. The condemned inmate will be moved to a unit shower [redacted]

5. He will then put on the new set of State issued clothing consisting of a pair of jeans, short sleeved button-down shirt, socks, underwear and tennis shoes. No tee-shirt is to be issued or worn.

6. All of the condemned inmate's personal property will be loaded onto a cart. The condemned inmate and his property will then be escorted [redacted] The condemned inmate will be secured [redacted] His property will be thoroughly searched and inventoried in front of him [redacted] An inventory sheet will be completed and signed [redacted] and counter-signed by the condemned inmate.

7. The condemned inmate will not be allowed to bring with him any personal items.

8. Personal property will be handled in accordance with arrangements previously discussed with the condemned inmate and will follow departmental procedures.

9. The condemned inmate [redacted] will be placed in ankle and wrist restraints. If the Warden authorizes and the condemned inmate elects, the [redacted] Team will then take the condemned inmate to [redacted] yard time [redacted] and a shower.

[redacted] The [redacted] Team will take the condemned inmate to [redacted]

a. [redacted] yard first. He will be given [redacted] supervised yard time. [redacted] officers will maintain constant observation of the condemned inmate [redacted]

b. At the conclusion of yard time the condemned inmate will be restrained and moved to [redacted] a shower.

i. [redacted] will be supplied with shower shoes, soap, shampoo packet, comb, towel, toothpaste, toothbrush, cup, toilet paper. A new set of these items will be provided each time the condemned inmate is allowed to shower.

c. At the conclusion of his shower, the condemned inmate will be given another new set of clothing [redacted]. The

clothing will consist of a pair of jeans, short sleeved button-down shirt, socks, underwear and tennis shoes. No tee-shirt is to be issued or worn.

11. Following yard time and a shower the condemned inmate will be [redacted] escorted [redacted]. He will again be positively identified [redacted] and placed in the Execution Area Holding Cell.

    a. Direct visual observation of the condemned inmate will be maintained [redacted] At no time will the condemned inmate be out of visual observation [redacted]

B. Maintenance Department will ensure the institution's emergency generator and telephone battery back-up in the Execution Area are tested and functional. A check of room temperatures will be conducted in all locations of the Execution area. [redacted]

C. Necessary medical equipment will be laid out [redacted] The [redacted] Team [redacted] will participate and be responsible for checking the restraints that will be used during the execution. At this time all medical equipment to include the cardiac monitors will be checked for accountability and functionality.

D. [redacted] list will be generated and sent to necessary staff. Authorization for access to this area will be granted by the designated Warden or one of the designated Associate Wardens.

109.05 OVERVIEW OF THE DAY OF EXECUTION

A. [redacted] the condemned inmate will be served a standard NDOC Men's Menu breakfast tray and lunch sack.

    1. [redacted] Officers will report with the hand-held camera to the Culinary Department. [redacted] Officer will video the random selection of a breakfast styro and sack lunch for the condemned inmate. Delivery of these meals will be recorded from the time of their selection through to the time of delivery to the condemned inmate in the Execution Area Holding Cell.

B. [redacted] the [redacted] Team will offer the condemned inmate recreation yard time and a shower [redacted] Procedures as outlined in Sections 109.04A.10 and 109.04A.11 will be followed.

C. Once the condemned inmate has been returned to the Execution Area Holding Cell [redacted], he will be allowed to write letters, make phone calls and receive visits.

D. He will be asked if he desires a visit from his Spiritual Advisor or the Institutional Chaplain. The Institutional Chaplain will be assigned to the execution area the day of the execution.

1. The Spiritual Advisor and Chaplain are to remain in the [redacted] area in the time proceeding and following the execution. Should the inmate request a visit from either one, they will proceed to [redacted] where the inmate is located. A member of the [redacted] Team will remain in the room at all times.

2. Both the Spiritual Advisor and Chaplain may be present for the execution. [redacted]

E. [redacted] after being processed in and escorted [redacted] the condemned inmate family members may begin visiting with the condemned inmate.

F. [redacted] the Inmate Family members Escort Officer will escort the inmate's family [redacted]

G. [redacted] the [redacted] Team [redacted] will escort the Attending Physician to examine the condemned inmate. The Attending Physician will:

1. Assess the inmate's need for pre-execution sedatives. The doses will be orally administered with the first dose being offered to the condemned inmate at approximately four hours and the second oral dose being offered at approximately one hour prior to execution. This sedative pre-medication is not mandatory. Medical services personnel will administer the sedative pre-medication following NDOC policy and procedures. This sedative pre-medication is intended to provide a calming effect and shall not cause any lack of cognitive ability, incoherency or incompetence. The Attending Physician will determine the appropriate sedative and dosage.

2. Assess the condemned inmate's peripheral veins for IV placement. The veins of the lower arms are preferable, but the veins of the lower legs and neck should also be assessed. The Attending Physician will then advise the EMT performing the venipunctures.

H. [redacted] an [redacted] Officer will take the hand-held camera to the Culinary Department to video record the preparation and delivery of the condemned inmate's last meal exclusively by the Food Services Manager III and the Culinary Sergeant under camera. The menu for the last meal will match the inmate's previously selected menu choice from the standard NDOC Men's Menu. The preparation of the meal will be video recorded from the beginning of the meal preparation through to the delivery to the condemned inmate in the Execution Area Holding Cell.

I. [redacted] the condemned inmate will be offered the first prescribed pre-execution sedatives [redacted].

J. [redacted] the condemned inmate's last meal is to be served to him by the Food Services Manager and Culinary Sergeant under camera.

K. The condemned inmate may receive visits from his Spiritual Advisor/Chaplain, Attorney General (or designee), Director, Deputy Director, Warden or PIO following the completion of his last meal and until a time as determined by the designated Warden.

1. Any other visitors must be approved by the Director.

2. The [redacted] officers and the Official Execution Recorder will remain in the observation area from the start of the observation until they are relieved by the [redacted] Team [redacted]

L. The inmate will be allowed to send out letters and make final telephone calls to his immediate family and attorney-of-record. Additionally he will be able to send out letters to the media. Supplies for these letters will be provided [redacted].

M. [redacted] institutional count will be conducted. [redacted]

N. [redacted] conduct a telephone test on each of the [redacted] outside restricted access telephone lines and each of the [redacted] cell phones.

O. [redacted] the condemned inmate will be offered the second prescribed pre-execution sedative [redacted].

P. See *EM 110 Execution Procedure* for continued timeline.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 110
EXECUTION PROCEDURE

Effective Date: **06/11/2018**

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

110.01 FINAL PREPARATION OF COMDENMED INMATE

[redacted]

1. The Warden will ensure that the Execution Area Viewing Room blinds are closed and that the Viewing Room lights are at full illumination.

2. The [redacted] Team [redacted] will relieve the [redacted] Officers [redacted]

   b. [redacted] officers will then move [redacted] The [redacted] Team [redacted] will move [redacted] to assist [redacted] officers with any issues that may arise before, during or after the execution.

3. The condemned inmate is placed in [redacted] restraints [redacted]

B. [redacted] the [redacted] Team [redacted] will inform the Warden that the condemned inmate is ready to enter the Execution Area Chamber Room.

C. [redacted] with permission of the Warden, the inmate is escorted [redacted] to the Execution Chamber Room [redacted], placed on the table and secured using soft restraints. The restraints that were used during escort will then be removed. A head support will be placed under the inmate's head and the table will be placed at a reverse Trendelenburg position.The [redacted] Team [redacted] will ensure the inmate is properly secured to the table and announce 'inmate secured'.

D. [redacted] the [redacted] Officers will post themselves in the Execution Chamber Room while the [redacted] Team [redacted] escorts [redacted] the EMT's into the Execution Chamber Room to set the IV lines and cardiac monitor leads.

1. The EMT will perform a venipuncture of both arms or alternate sites derived from the advice of the Attending Physician such as (in the order of preference) the condemned inmate's ankle, lower leg or neck.

    a. Using the appropriate gauge needle/catheter set (18 or 20 depending upon the size and condition of the vein at the intended venipuncture site) the EMT will perform a venipuncture of the condemned inmate's right arm (or alternate site derived from the advice of the Attending Physician). The venipuncture site should be selected as distal on the extremity as possible which will also accommodate at least a 20 gauge needle/catheter set. Should that site prove unsuccessful, a site proximal on the arm can then be selected and a second venipuncture re-attempted. When the venipuncture of the right arm is successful, the EMT will withdraw and appropriately discard the needle, connect the catheter tubing to the IV line, remove the tourniquet on the condemned inmate's upper arm and then check the patency of the venipuncture.

        i. The EMT will open the IV line flow-valve and observe for a free flow of saline inside the IV drip chamber.

        ii. The EMT will also observe the IV site for any unwanted swelling, discoloration or fluid seeping at the venipuncture site. If any of these problems are observed, the EMT will discontinue the IV at that site. If no problems are observed, the catheter/IV line will be secured with sufficient tape and set the IV flow at a rate sufficient to keep the vein open.

    b. The process set forth above in Section 110.01(D)(1)(a) will be repeated for the contralateral side or at another location on the same side to establish another adequate intravenous line.

2. If the EMT is unable to find an adequate vein in an arm, the venipuncture will occur into a vein of an ankle, lower leg or neck as advised by the Attending Physician. Once established and secure, a normal saline solution will then be infused at a slow rate in order to keep the vein open.

3. Once both venipunctures are successfully completed, cardiac leads will be attached to the condemned inmate by the EMT. The EMT will check [redacted] to ensure that the cardiac monitor is functioning properly. The cardiac monitor will then be turned off until the end of the process; there will be no dynamic cardiopulmonary electronic monitoring of the condemned inmate during the process.

E. [redacted] once these tasks have been accomplished successfully, the [redacted] Team and the EMT [redacted] will then exit the Execution Area Chamber Room [redacted]. The only person remaining with the condemned inmate will be the Warden.

F. [redacted] the Warden will direct the [redacted] Team [redacted] posted in the Execution Area Viewing Rooms to dim the lights. The Warden will then open the Execution Area Viewing Room blinds and advise the condemned inmate that those witnessing the execution may now hear his last words. A digital audio recorder will also record them.

110.02 EXECUTION OF CONDEMNED INMATE

A. [redacted] the Director will positively contact the Attorney General/designee and the Governor/designee in person or on their direct lines [redacted] in order to confirm a possible stay of execution, order, pardon or commutation of sentence. If none exists, the Director will inform the Warden to proceed with the execution.

B. Prior to the execution, the Warden will receive practical training in:

1. Measuring and reporting the condemned inmate's level of consciousness.

2. Monitoring the IV sites for signs of compromise.

C. Prior to the administration of lethal drugs, an Attending Physician or properly trained and qualified medical professional will enter the Execution Chamber Room behind a screen in order to monitor the condemned inmate's level of consciousness during the procedure.

D. The Warden will instruct the Drug Administrators to begin injecting the lethal drugs into the condemned inmate as specified below.

1. It must be understood that after the infusion of the lethal drugs has begun the execution may still be stopped, but the inmate's respiratory and cardiovascular systems will be progressively more compromised.

   a. If the execution is ordered to be stopped at any point after the infusion of the lethal drugs has begun, all reasonable attempts to save the inmate's life will be made by the Attending Physician and medical personnel present using equipment that will be made available for that possible contingency as noted in EM 104.01 – List of Needed Equipment, Materials and External/Internal Contacts.

   b. If necessary, the inmate will be transported [redacted] to the nearest emergency room for further stabilization and medical care.

2. If at any point, the Attending Physician determines that the condemned inmate's responses to the lethal drugs deviates from as expected, the Drug Administrators, Warden and Director will pause the procedure, close the Viewing Room window blinds and consult with the Attending Physician. Following the consultation with the Attending Physician, the Director will then decide how to proceed from that point. If the execution is to continue, the Viewing Room blinds will be reopened before proceeding.

3. From Workroom #1, in the following order and manner, a Drug Administrator will administer the lethal drugs while the Attending Physician and other medical personnel,

assisted by the Warden in the Chamber Room, closely observes and measures the level of consciousness of the condemned inmate.

a. Throughout the procedure the Warden, Attending Physician, and other medical personnel will evaluate the patency of the IV sites by ensuring that the IV drip chambers show continuous steady drips and that the IV sites show no signs of compromise. If the patency of one of the IV's is believed to be compromised, the medical professionals will inform the Drug Administrators to use the other, patent IV site. If both IV's appear to be compromised, the Warden will then consult with the Attending Physician before allowing the EMT to proceed with steps to re-establish patent IV access.

b. After the contents of each syringe has been administered, the syringe will be removed from the injection port and the syringe/needle unit will be placed in a new, small sharps container labeled and provided for that purpose.

c. From Tray-1, a Drug Administrator will obtain Midazolam syringes #1-1 through #1-10 containing 500 milligrams of Midazolam. The contents of the syringes will then be administered consecutively at the rate of one minute each.

    i. Two minutes after injecting the last syringe of Midazolam, the Attending Physician or other medical personnel will attempt to elicit an interpretable physical response to a verbal stimulus (i.e. move fingers, thumbs up, open eyes) and to a painful stimulus in the form of a medical grade pinch. If the condemned inmate does not respond to both attempts, the Attending Physician or other medical personnel will inform the Drug Administrator. The Drug Administrator will then begin injection of Fentanyl.

    ii. If, after the injection of the last syringe of Midazolam, the inmate shows a response to either stimulus, the Drug Administrator shall not proceed. The Director will consult with the Attending Physician. The Director will then decide the next course of action, which may include:

        1. Waiting and observing for an additional short period of time
        2. Initiating another IV
        3. Administering additional Midazolam to titrate to effect.
        4. Halting the execution
        5. Begin with the injection of Fentanyl if the IV is patent.

    iii. If the Director chooses actions 1, 2, and/or 3 above, after their completion the Attending Physician or other medical personnel will attempt to elicit an interpretable physical response to a verbal stimulus (i.e. move fingers, thumbs up, open eyes) and to a painful stimulus in the form of a medical grade pinch. If the condemned inmate does not respond to both attempts, the Attending Physician or other medical personnel will inform the Drug Administrator. The Drug Administrator will then begin injection of Fentanyl.

d. From Tray-2, a Drug Administrator will obtain Fentanyl syringes #2-1 through #2-10 containing 5,000 micrograms of Fentanyl. The contents of all syringes will then be

administered within two minutes. The injection of Fentanyl will be titrated to its desired effect in the following manner:

i. 90 seconds after the initial injection of 5,000 micrograms of Fentanyl, the Attending Physician or other medical personnel will attempt to elicit a response to painful stimuli (in the form of a medical grade pinch) from the condemned inmate. If the condemned inmate does not respond to the painful stimulus, the injection of Fentanyl will stop and the injection of Cis-atracurium will begin.

ii. If, after the initial 5,000 micrograms of Fentanyl have been injected, it is determined by the Attending Physician or other medical personnel that the inmate responded to painful stimuli, the Drug Administrator will obtain a supplemental dose of 2,500 micrograms of Fentanyl from syringes #2-11 through #2-15 and administer their contents over an additional two minutes.

iii. 90 seconds after the injection of the supplemental 2,500 micrograms of Fentanyl, the Attending Physician or other medical personnel will reattempt to elicit responses to painful stimuli. If the condemned inmate does not respond to this attempt the injection of Fentanyl will stop and the injection of Cis-atracurium will begin.

iv. If, after the injection of the supplemental 2,500 micrograms of Fentanyl, the inmate shows a response to painful stimuli, the Drug Administrator shall not proceed. The Director will consult with the Attending Physician. The Director will then decide the next course of action, which may include:

    1. Waiting and observing for an additional short period of time
    2. Initiating another IV
    3. Administering additional Fentanyl to titrate to effect.
    4. Halting the execution

v. If the Director chooses actions 1, 2, and/or 3 above, after their completion the Attending Physician or other medical personnel will attempt to elicit an interpretable physical response to a painful stimulus in the form of a medical grade pinch. If the condemned inmate does not respond, the Attending Physician or other medical personnel will inform the Drug Administrator. The Drug Administrator will then begin injection of Cis-atracurium.

e. From Tray-3, a Drug Administrator will obtain Cis-atracurium syringes #3-1 through #3-5 containing 100 milligrams of Cis-atracurium. The contents of all syringes will then be administered over 60 seconds. The injection of Cis-atracurium will be titrated to its desired effect in the following manner:

i. After the initial 100 milligrams of Cis-atracurium have been injected and five minutes have elapsed, the Drug Administer will administer a supplemental dose of 100 milligrams from supplemental syringes #3-6 through #3-10. The contents of the supplemental dose will then be administered over an additional 60 seconds.

f. After the administration of the supplemental dose of Cis-atracurium has been administered, the Attending Physician or other medical personnel in Workroom #1 will then turn on the cardiac monitor. The Attending Physician or other medical personnel will observe it until all signs of electrical activity of the heart have ceased.

E. When the lethal drugs have been injected as outlined above, and all electrical activity of the condemned inmate's heart has ceased (as shown by the cardiac monitor), and confirmed by the Attending Physician, the Coroner will be escorted to the execution room to confirm the condemned inmate is deceased and pronounce the time of death. Times recorded for the execution process will be recorded from clocks located in the Execution Area Chamber Room.

F. Immediately following the Coroner's pronouncement of death the Warden will close the Execution Area Chamber Room blinds and direct the posted Observation Team members to fully illuminate their assigned Viewing Room lights.

G. The two Drug Administrators who inject the lethal drugs into the IV lines will document the amount of each lethal drug administered and confirm that it was administered on form DRC 2001.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 111
POST-EXECUTION PROCEDURE

Effective Date: 06/11/2018

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

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111.01 POST-EXECUTION PROCEDURE

A. Immediately following the announcement of the condemned inmate's official time of death, the Warden will close the Execution Area Viewing Room blinds and instruct [redacted] Officers posted in the Viewing Rooms to increase the Viewing Room lights to full illumination.

B. If present, Inmate Family members will be [redacted] escorted from their Viewing Room. [redacted] After the other groups have been escorted from their respective Viewing Rooms [redacted], Inmate Family members may elect to either be escorted out of the institution or to remain [redacted] until [redacted] Witnesses have departed.

C. Next, the Media Witnesses will be escorted by the Public Information Officer (PIO) and their Escort Officer from their Viewing Room, [redacted] out to their designated area [redacted] behind the barricades. A temporary structure suitable for a press briefing will be erected there. The PIO may elect to make an announcement at that time at that location.

D. Next, the Victim Family Witnesses will be escorted from their Viewing Room [redacted] Counseling services will be provided.

E. Next, the Official Witnesses will be escorted from their Viewing Room [redacted] Counseling services will be provided.

F. After all witness groups have left the Execution Area Viewing Rooms, the following procedures will be completed before the deceased inmate's body will be removed from the Execution Area Chamber Room [redacted]:

1. The Associate Warden of Operations will:

    a. Assist the County Coroner in completion of the Death Certificate. A copy will be made and will be placed in the execution file which will then be forwarded to the Warden's Administrative Assistant's office.

    b. Ensure that a Body Disposition document is completed in triplicate (original and two copies). The first copy will be signed by the mortuary vehicle driver and then retained in the execution file which will be forwarded to the Warden's Administrative Assistant's office. The original and the second copy will be provided to the mortuary driver.

    c. Ensure that a copy of the cardiac monitor's memory card or a recording from the cardiac monitor used to record the condemned inmate's heart activity to the time of death is to be placed in the execution file which will be forwarded to the Warden's Administrative Assistant's office for filing.

2. The White Pine County Coroner will:

    a. Collect items, including needles and tubing that were connected to the executed inmate.

    b. Take at least one photograph of the executed inmate's face for identification purposes.

3. The Drug Administrators will:

    a. Record the source and disposition of all solutions and syringes. Their records will indicate the amounts used and not used.

    b. The number of solutions that were used will be recorded by vial sequence number, lethal drug name and lethal drug volume.

4. A member of the State of Nevada Inspector General's office will:

    a. Collect all other execution related evidence that was not connected to the inmate's body, such as all used syringes and prepared syringes that were not used.

[redacted]

G. After the designated Associate Warden, Coroner, Drug Administrators and IG have completed their respective tasks related to processing the body and collecting evidence in the Execution Area Chamber Room, the [redacted] Team [redacted] will:

1. Assist the Coroner with placing the deceased inmate's body in a body bag with a sealed identity tag.

2. Supervise the escort of the deceased inmate's body from the Execution Area Chamber Room [redacted]

3. After confirming that the Body Disposition document is properly signed by the mortuary driver, assist with placing the deceased inmate's body in the mortuary vehicle.

4. Escort the mortuary vehicle [redacted].

5. Confirm the identity of the deceased inmate by the sealed tag [redacted].

6. Upon order of the designated Associate Warden, release the deceased inmate's body [redacted] for transport [redacted].

H. All staff involved in the execution event will meet [redacted] for a mandatory debriefing. These staff members will be offered the services of clergy and/or psychologists of the Debriefing Team.

1. Assigned staff working the execution will be released from duty by the Event Commander, Associate Warden of Programs or Associate Warden of Operations.

2. The Execution Management Team Sergeant will provide a list of names of debriefing team members to the Warden along with vehicle descriptions and license plates, if available.

3. The Execution Management Team Sergeant will ensure that all resource materials for the debriefing sessions will be available at the institution.

I. All documents, memorandums, telephone records, logs and audio/video recordings related to the execution will be placed in an execution file to be forwarded to the Warden's Administrative Assistant's office. Once all execution items are collected and reviewed they will be sent to the Deputy Director of Operation's office for file retention.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 112
EXECUTION PROCESS FORMS

Effective Date: 06/11/2018

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

112.01 EXECUTION PROCESS FORMS

[redacted]

D. Execution Telephone Log
E. Report and Schedule of Execution – Exhibit A
F. Body Identification Form

[redacted]

J. News Media Agreement
K. Consent to Search English/Spanish
L. Media Visit Information Sheet
M. Inmate Authorization for Photography, Recording for Publication

112.01D

NDOC EXECUTION TELEPHONE LOG

DATE	TIME	CALLER NAME	CALL ROUTED TO	COMMENTS

Employee Printed Name:_____ **Employee Signature:**_____

112.01E

NEVADA DEPARTMENT OF CORRECTIONS

Report and Schedule of Execution **EXHIBIT A**

Date _____

Report on the Legal Execution of: _____

Pursuant to the provisions of NRS 2000.030, 4(A) and NRS 176.345 and 176.355

As ordered on the ***(Date)*** day of ***(Month & Year)***

in the 7th Judicial District Court of the State of Nevada by the

Honorable ***(Judge's full name)*** , District Judge
At _____

On the _____ day of _____, 20XX

	Time Recorded
Inmate entered Execution Chamber	_____ AM/PM
Inmate strapped to table	_____ AM/PM
Door closed at	_____ AM/PM
Lethal doses of medication administered:	
Midazolam, Dosage: _____	_____ AM/PM
Fentanyl, Dosage: _____	_____ AM/PM
Fentanyl, Dosage: _____	_____ AM/PM
Cis-actracurium, Dosage: _____	_____ AM/PM
Inmate pronounced dead	_____ AM/PM
Body removed from Execution Chamber	_____ AM/PM

Submitted by: Reviewed by:

112.01E

Warden

County Corner

112.01 F

NEVADA DEPARTMENT OF CORRECTIONS
ELY STATE PRISON

Body Identification Form

This will certifiy that I have, on this date, at ***(Time)*** , received from Ely State Prison

the person of:

_____
Inmate's Name

_____
Inmate's Identification Number

DATED this _____ day of _____, 20XX

PRINTED NAME OF PERSON RECEIVING BODY

_____

SIGNATURE NAME OF PERSON RECEIVING BODY

_____

Title _____

Address _____

WITNESSED BY

(Print Name) _____
Signature _____

(Print Name) _____
Signature _____

(Print Name) _____
Signature _____

Distribution:
Warden Records Mortuary

112.01 J

Nevada Department of Corrections

News Media Agreement

I, _____, do hereby state that I am employed as a reporter or media representative for:

- print media such as a newspaper, magazine or periodical with local, national or international circulation.
- a television or radio news station which broadcasts locally, nationally or internationally.
- an internet blog, web-based media service or other bona fide news source.

My employer is: _____

My immediate supervisor is: _____

Who may be reached at (telephone):_____

- I have familiarized myself with NDOC Administrative Regulation 120 governing my conduct during interviews and visits within a prison. I agree to comply with the rules, both written and verbal, and direction given while inside the secured facility.

- I hereby waive my personal right to be free from search of my person or property so long as I remain within the boundaries of the grounds.

- I agree to provide no compensation, either direct or indirect, to the offender or his/her family for any interviews or correspondence. I further agree to respect the rights of privacy for all inmates and to obtain a release from any inmate before any photos or recordings are utilized or personal information derived from any interview or correspondence is used in any publication or broadcast.

- I recognize a visit to a facility presents certain hazards, and I agree to assume all ordinary and usual risks to my personal safety inherent in a visit to a facility of this type.

_____ _____

Media Signature Date

_____

Staff Signature

DOC 045 (11/16)

112.01K

NEVADA DEPARTMENT OF CORRECTIONS

CONSENT TO SEARCH

I, the undersigned, being free from coercion, duress, threats or force of any kind, do hereby freely and voluntarily consent to the search of my person, vehicle and other property which I have brought onto prison grounds. I agree that the search maybe conducted by duly authorized Correctional Officers of the Department of Corrections or by other law enforcement officers specifically authorized by the Warden. I understand that if I do not consent to the search of my person, vehicle or other property, I will be denied visitation on this date and may also be denied future visits pursuant to Administrative Regulation 719.

Inmate's Name_____ I.D. Number_____

Signed this _____ day of _____, 20_____, in the City of _____, State of Nevada.

_____
Signature

_____
Print Name

_____
Street Address

_____
City, State, Zip code

Witnesses:

_____

_____

112.01 K

DEPARTAMENTO DE CORRECCIONES DE NEVADA

CONSENTIMIENTO A REGISTRO PERSONAL

Yo, el abajo firmante, estando libre de coerción, de amenazas o presion, voluntariamente doy mi consentimiento a que registren mi persona, mi vehiculo o propiedad que e traido a los terrenos de esta prision. Estoy de acuerdo que sere registrado(a) por personal autorizado por el Departmento Correccional o otros especificamente autorizados por el director de esta prision. Entiendo que de no consentir a que me registren a mi, mi vehiculo o otra propiedad, se me negara la visita en esta fecha y tambien pueden negarme visitas en el futuro de acuerdo a la regulación administrativa 719.

Nombre del prisionero_____ Número de identificación _____

Firmado este _____ día de _____, 20_____, en la ciudad

de _____, Estado de Nevada.

_____
Nombre

_____
Firma

_____
Dirección de la calle

_____
Ciudad, estado, código postal

Testigos:

_____

_____

1/12.01 L

NEVADA DEPARTMENT OF CORRECTIONS

Procedures Governing Media at an Execution

WITNESS AT EXECUTION

There are six seats assigned for reporter witnesses in the execution chamber media witness room. To be as fair as possible, the occupants of the six seats will be chosen randomly and in accordance with the following guidelines:

A. Up to two print, radio or broadcast media representatives from the county of sentencing.

B. Up to two print, radio or broadcast media representatives from Nevada outside the county of sentencing.

C. One International Wire Service operating from and based in Nevada.

D. One media representative from Nevada, chosen dependent upon the circumstances of the particular execution.

Should we be unable to fill all six seats based on the above criteria, the NDOC PIO will consider the applicants and through lottery, will fill seats in a manner to represent varied counties throughout the State of Nevada.

The department cannot allow any witness to the execution, media or otherwise, to photograph, video or audio tape, or even sketch an image of the execution itself. No items other than a piece of identification will be allowed to come in with media representatives. No pens, paper or other items are allowed. Water will be provided and should any representative need writing materials, a small notepad and pen will be provided by the NDOCPIO.

For safety, security and privacy reasons, each media representative that is chosen to witness the execution must submit to a clothed pat searched and be scanned through a metal detector prior to entrance into the secured facility. The NDOC staff will make every effort to keep each member of the media safe, however, being inside of a prison introduces a level of risk and media representatives entering the prison must agree to acknowledge and accept that risk by signing the News Media Agreement. The agreement is attached for you to read and address any questions ahead of time.

Media witnesses to the execution will not be allowed to interview any other witnesses on prison grounds.

Any media representatives present in either the parking lot or inside as a witness should be familiar with NDOC Administrative Regulations 120 Media Access and 719 Inmate Visitation. Failure to adhere to the agency's policies and/or guidelines may result immediate removal from the facility or the grounds.

INMATE INTERVIEWS - 1 week prior to execution

Condemned inmates are allowed to be interviewed by media representatives. The inmate's attorney and the warden must authorize the interviews and they must take place within the last week prior to the execution. That said, we have already received too many requests to accommodate in one week and will have to limit the number of interviews to 4 in this case, which would take an estimated 6 hours of time to complete.

112.01L

NEVADA DEPARTMENT OF CORRECTIONS

Procedures Governing Media at an Execution

Any media wishing to be considered for an interview must let us know when submitting the pre-credentialing form. In this case, the 4 interviewees have already been chosen and approved by the inmate's attorney and the Warden. Three of those interviews already took place when there was a prior execution date set, and the fourth we have scheduled for the morning of Monday the week of the execution. Cameras or other equipment will be allowed into the institution as approved by the Warden.

Conservative dress is encouraged for all visitors. Clothing that is tight fitting, revealing, or made with see-through fabrics is not allowed. Please avoid jeans or blue clothing, no tobacco products or lighters allowed, no cell phones are allowed inside the institution.

Questions call Brooke Santina at 775-887-3309 or 775-350-0037.

112.01 L

NEVADA DEPARTMENT OF CORRECTIONS

Procedures Governing Media at an Execution

Media plays an important role keeping the public informed and their objective presence is vital to fair and thorough coverage of an execution. There are unique safety and security issues and other challenges presented at an execution due to the nature of the occurrence. Executions are not open to the public but witnesses are allowed under Nevada Revised Statutes 176.355 and the Department of Corrections (NDOC) Execution Protocol and Execution Directive 101 - Media Access.

July 11, 2017, at 8:00 PM, at Ely State Prison, Scott Raymond Dozier, 46, is scheduled to be put to death. His first-degree murder conviction was for the 2002 killing and dismemberment of Jeremiah Miller, 22. Miller's torso was found in a suitcase that had been dumped in a trash bin in Las Vegas, Nevada. The Eighth Judicial District Court ordered the execution.

There are two ways for media to be present at the execution.

- Staged in the parking lot
- As a witness inside the media room in the execution chamber.

ADVANCE CREDENTIALING

Either staged in the parking lot, or as a witness, all media representatives wishing to be onsite at Ely State Prison during the execution must be pre-credentialed and on the approved list at the gate. To be considered for either location, each media representative must complete and email a copy of the attached credentialing form to the NDOC PIO. It should be received no later than two weeks before scheduled execution, or by July 1st.

PARKING LOT STAGING - PRESS CONFERENCE

Media vehicles will be staged toward the back of the parking lot which will be assigned for media vehicles only and will be clearly marked. It is our intent to host a short press conference after the execution, weather permitting, near the parking lot staging area. No media or media vehicles will be allowed onsite prior to 5:00 PM on the day of the execution. Media must exit the parking lot no later than one hour after the post execution press conference is completed.

112.01 L

NEVADA DEPARTMENT OF CORRECTIONS

Procedures Governing Media at an Execution

Advance Credentialing Form

All media representatives must provide contact information to the Public Information Office at least two weeks prior to the date of the execution. Space is limited. Once capacity has been reached, no additional media representatives will be permitted to park onsite. Media will be allowed onsite not before 5:00 PM on July 11 and will have one hour after the close of the press conference to exit the premises.

PLEASE INDICATE YOUR PREFERENCES:

____ I'd like to be considered to INTERVIEW the inmate.

_____ I'd like to be considered to be a WITNESS to the execution.

_____ I'd like to park onsite and cover the press conference.

Number of vehicles you are arriving with: **# of Satelite Trucks_____** **# of Passenger vehicles_____**

Name of Media Outlet/ Organization_____

Primary Attendee Name_____

Email Address:_____

Primary Phone#.:_____Secondary#:._____

Type of Organization Represented:

_TV/Cable _ Radio _Newspaper

_ Website _Freelance _Magazine

_Other (indicate

Names of other group members:

_____

_____

_____

Please print legibly and Email or fax this document with a copy of each attendee's Press ID (if one is issued by your organization) to:

Brooke Santina * Bsantina@doc.nv.gov * (775) 350-3307 * Fax (775) 887-3253

112.01 m

Nevada Department of Corrections

Inmate Media Consent Form

I, _____ _____
(Print Inmate Name) (NDOC #)

- O consent to be interviewed and/or photographed
- O do not consent to be interviewed and/or photographed

by_____
Name of interviewer or photographer

of_____
Name of news outlet or organization

on_____
Date / Location

I hereby waive confidentiality and consent to be photographed, recorded electronically, and/or interviewed for media coverage, publicity, website, or other special production.

I understand that I do not have to participate in this project and I may choose to discontinue the interview at any time and by doing so, I would therefore withdraw this consent.

I understand that I will receive no pay, royalties, merit credits or other form of compensation for participating in this project. I am free and voluntarily signing this authorization to participate in this project.

I understand that the Nevada Department of Corrections has no control of the use of my statement(s) and/or photographs in publications or broadcasts prepared by other organizations. On behalf of myself and my heirs and assigns, I release the State of Nevada and the Department of Corrections from any and all claims that may otherwise accrue to me as a result of the publication or broadcast of my statement(s) or photograph(s) obtained during this media opportunity.

_____
Inmate's Signature Date

_____
Staff Signature Title Date

EXHIBIT 8

Capital Punishment

Physicians must not participate in a legally authorized execution.

Code of Medical Ethics Opinion 9.7.3

Debate over capital punishment has occurred for centuries and remains a volatile social, political, and legal issue. An individual's opinion on capital punishment is the personal moral decision of the individual. However, as a member of a profession dedicated to preserving life when there is hope of doing so, a physician must not participate in a legally authorized execution.

Physician participation in execution is de. ned as actions that fall into one or more of the following categories:

(a) Would directly cause the death of the condemned.

(b) Would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned.

(c) Could automatically cause an execution to be carried out on a condemned prisoner.

These include, but are not limited to:

(d) Determining a prisoner's competence to be executed. A physician's medical opinion should be merely one aspect of the information taken into account by a legal decision maker, such as a judge or hearing officer.

(e) Treating a condemned prisoner who has been declared incompetent to be executed for the purpose of restoring competence, unless a commutation order is issued before treatment begins. The task of re-evaluating the prisoner should be performed by an independent medical examiner.

(f) Prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure.

(g) Monitoring vital signs on site or remotely (including monitoring electrocardiograms).

(h) Attending or observing an execution as a physician.

(i) Rendering of technical advice regarding execution.

and, when the method of execution is lethal injection:

(j) Selecting injection sites.

(k) Starting intravenous lines as a port for a lethal injection device.

(l) Prescribing, preparing, administering, or supervising injection drugs or their doses or types.

(m) Inspecting, testing, or maintaining lethal injection devices.

(n) Consulting with or supervising lethal injection personnel.

The following actions do not constitute physician participation in execution:

(o) Testifying as to the prisoner's medical history and diagnoses or mental state as they relate to competence to stand trial, testifying as to relevant medical evidence during trial, testifying as to medical aspects of aggravating or mitigating circumstances during the penalty phase of a capital case, or testifying as to medical diagnoses as they relate to the legal assessment of competence for execution.

(p) Certifying death, provided that the condemned has been declared dead by another person.

(q) Witnessing an execution in a totally nonprofessional capacity.

(r) Witnessing an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a nonprofessional capacity.

(s) Relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution.

(t) Providing medical intervention to mitigate suffering when an incompetent prisoner is undergoing extreme suffering as a result of psychosis or any other illness.

No physician should be compelled to participate in the process of establishing a prisoner's competence or be involved with treatment of an incompetent, condemned prisoner if such activity is contrary to the physician's personal beliefs. Under those circumstances, physicians should be permitted to transfer care of the prisoner to another physician.

Organ donation by condemned prisoners is permissible only if:

(u) The decision to donate was made before the prisoner's conviction.

(v) The donated tissue is harvested after the prisoner has been pronounced dead and the body removed from the death chamber.

(w) Physicians do not provide advice on modifying the method of execution for any individual to facilitate donation.

AMA Principles of Medical Ethics: I

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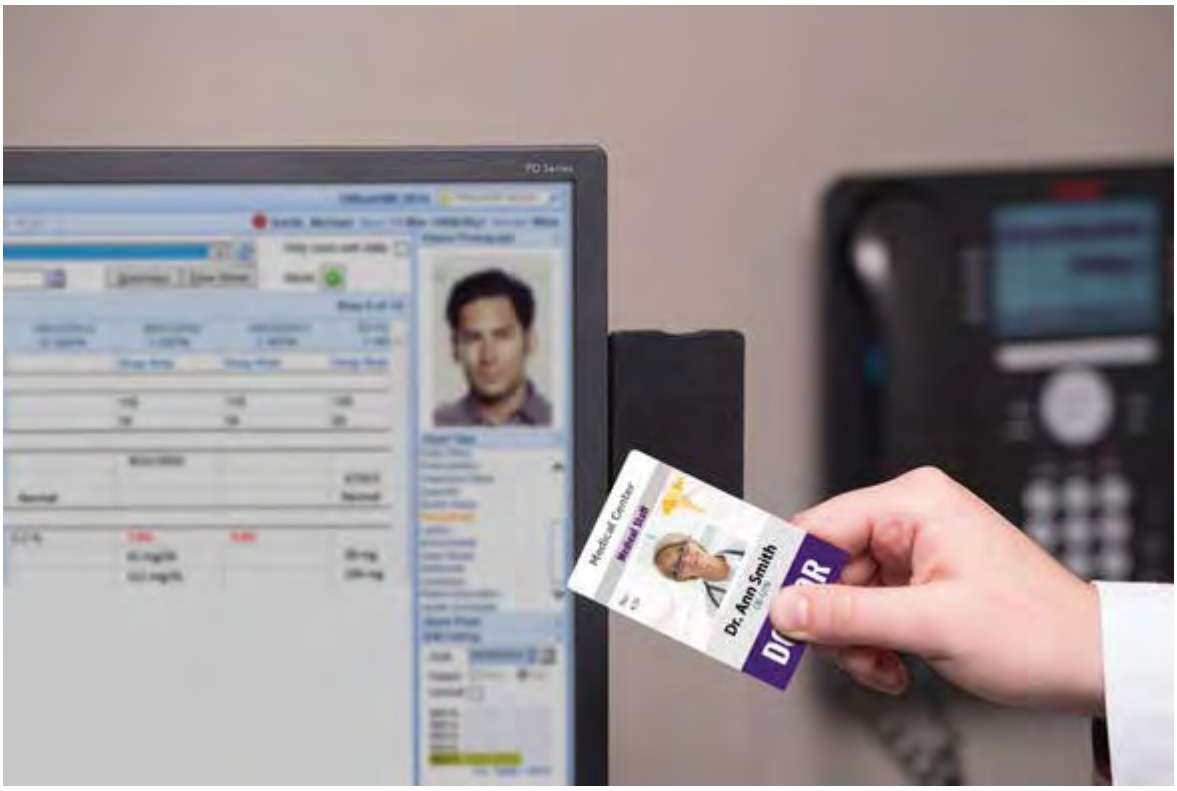

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EXHIBIT 9

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

MCKESSON MEDICAL-SURGICAL INC. **PLAINTIFF**

VS. **NO. 60CV-17-1960**

STATE OF ARKANSAS;
ARKANSAS DEPARTMENT OF CORRECTION;
ASA HUTCHINSON, Governor of the State of Arkansas, in his official capacity; and
WENDY KELLEY, Director of the Arkansas Department of Correction, in her official capacity **DEFENDANTS**

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

On the 19th day of April, 2017, this cause came on for hearing before the Court on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction. Plaintiff appeared through its counsel, Steven W. Quattlebaum and John E. Tull. Defendants appeared by and through their counsel, Solicitor General Lee Rudofsky and Senior Assistant Attorney General Colin Jorgensen.

Having reviewed Plaintiff's Complaint, Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction, and responsive pleadings of Defendants and all briefs, and having fully considered the evidence presented at the hearing and arguments of counsel, the Court hereby FINDS and ORDERS:

1. This Court denied Plaintiff's request for a temporary restraining order insofar as Plaintiff requested ex-parte relief. This Court instead scheduled a hearing on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction as there was sufficient time for Defendants to be heard on the Motion the following day.

2. Article 5, section 20 of the Arkansas Constitution provides that the State of Arkansas shall never be made a defendant in any of her courts. *Arkansas Dept. of Community Correction v. City of Pine Bluff*, 2013 Ark. 36, 425 S.W.3d 731. The doctrine of sovereign immunity has been extended to include state agencies. *Id.* In determining whether the doctrine of sovereign immunity applies, the court must decide whether a judgment for a plaintiff will operate to control the action of the State or subject it to liability. *Id.* If so, the suit is one against the State and is barred by the doctrine of sovereign immunity. *Id.*

3. However, there are several exceptions to the defense of sovereign immunity. One exception to the sovereign immunity defense is that a state agency acted outside of its authority, ultra vires, and in bad faith. *See Fitzgiven v. Dorey*, 2013 Ark. 346, 429 S.W.3d 234. A state agency may be enjoined if it can be shown that the agency's action is ultra vires or outside the authority of the agency. *Id.* A state agency may also be enjoined from acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *Id.*

4. The Court finds that the defense of sovereign immunity is inapplicable to the facts of this case as Plaintiff sufficiently pled and sufficiently proved at this hearing that Defendants' conduct was outside of their authority, ultra vires, and made in bad faith. This Court therefore has jurisdiction to hear and decide this matter.

5. To justify a grant of preliminary injunctive relief, a plaintiff must establish that irreparable harm will result in the absence of an injunction or restraining order and that the plaintiff has a likelihood of success on the merits. *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002). The test for determining the likelihood

of success on the merits is whether there is a reasonable probability of success in the litigation. *Id.*

6. The Court finds that Plaintiff has established a reasonable probability of success on its claims for:

(a.) Rescission Based on Misrepresentation of a Medical License and Rescission Based on Unilateral Mistake;

(b.) Replevin; and

(c.) Unjust Enrichment.

Thus, Plaintiff established a likelihood of success on the merits in this litigation.

7. The Court finds that in the absence of a preliminary injunction, Plaintiff will suffer irreparable harm which cannot be adequately compensated by money damages or redressed by a court of law.

8. Based upon these findings, the Court hereby restrains and enjoins Defendants from using or disposing of the vecuronium bromide they obtained from Plaintiff. This prohibition shall remain in effect until further order of the Court. At this time, the Court is not ordering Defendants to return the vecuronium bromide to Plaintiff as a final hearing has not been held.

9. The parties may contact the Court's Trial Court Administrator to schedule a hearing on Defendants' Motion to Dismiss and Defendants' Motion for Change of Venue, said hearing to occur on an agreed date and time that occurs after the deadline for all responses and replies have passed. No one has requested that response and reply times be shortened. Plaintiffs are entitled to formally respond to Defendants' Motion to Dismiss and Motion for Change of Venue. Any party may also request that a

final hearing be scheduled on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction.

FOR THE FOREGOING REASONS, Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction is hereby granted. Defendants are hereby restrained and enjoined from using or disposing of the vecuronium bromide they obtained from Plaintiff until further order of the Court.

IT IS SO ORDERED.

ALICE S. GRAY
CIRCUIT JUDGE

APR 20 2017
DATE

cc: Steven W. Quattlebaum
John E. Tull
Lee Rudofsky
Colin Jorgensen

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ALVOGEN INC. Plaintiff vs. STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS, et al. Defendants	CASE NO. A-18-777312-B DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EMERGENCY HEARING RE PLAINTIFF'S EX PARTE APPLICATION FOR TRO AND MOTION FOR PRELIMINARY INJUNCTION

WEDNESDAY, JULY 11, 2018

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFF:	TODD L. BICE, ESQ. JAMES J. PISANELLI, ESQ. KENNETH SCHULER, ESQ. MICHAEL FARRIS, ESQ.
FOR THE DEFENDANTS:	JORDAN SMITH, ESQ.
ALSO PRESENT:	J. COLBY WILLIAMS, ESQ. For Sandoz, Inc.

LAS VEGAS, NEVADA, WEDNESDAY, JULY 11, 2018, 8:55 A.M.

(Court was called to order)

THE COURT: Good morning. You can be seated.

Mr. Smith, can you hear me?

MR. SMITH: Yes, Your Honor, I can. Do you hear me?

THE COURT: I can. Mr. Smith, welcome back to Business Court. How many years has it been since you left Pisanelli Bice and were in Business Court last?

MR. SMITH: Too long. Probably about two and a half years, I think, Your Honor. Good to see you again.

THE COURT: Okay. Mr. Lalli, why are you here? This is Business Court, Mr. Lalli.

MR. LALLI: I have an interest in this proceeding.

THE COURT: Okay. I'm going to have those who are in Ely please identify themselves first, and then have those in the courtroom who are appearing identify themselves, please.

MR. SMITH: This is Jordan Smith, the Deputy Solicitor General, on behalf of the Nevada Department of Corrections. With me is Ann McDermott. Also in the conference room with me is Warden Baca, Deputy Director of Operations Harold Wickam, and Ely State Prison Warden Gittere.

THE COURT: Good morning, gentlemen.

And those in the courtroom?

MR. BICE: Good morning, Your Honor. Todd Bice on

behalf of the plaintiff, Alvogen. With me also, Your Honor, as I introduced on the phone yesterday, is Kenneth Schuler from Latham & Watkins.

MR. SCHULER: Good morning, Your Honor.

MR. BICE: And Mike Farris from Latham & Watkins, Your Honor.

MR. FARRIS: 'Morning, Your Honor.

THE COURT: 'Morning.

MR. PISANELLI: Good morning, Your Honor. James Pisanelli on behalf of Alvogen.

THE COURT: You weren't going to let your partner identify you?

MR. PISANELLI: He wasn't going to do it. I could see it coming. So I had to go ahead and jump in.

THE COURT: Okay. So, Mr. Schuler and Mr. Farris, you are appearing today on a temporary reprieve while you file your pro hac applications. Regardless of what happens in this hearing you're still going to have to file them.

MR. SCHULER: We appreciate the accommodation, Your Honor.

THE COURT: Well, Mr. Smith stipulated, so it was easy for us to accommodate you.

MR. SCHULER: Thank you.

MR. BICE: And we appreciate him doing that, Your Honor.

I'd also make just so -- and I'll -- he doesn't need an introduction, but Mr. Colby Williams is here this morning, Your Honor, on behalf of an additional party that I believe wants to be heard. But I'm going to leave that to you and Mr. Williams.

THE COURT: Mr. Williams.

MR. WILLIAMS: Good morning, Your Honor.

THE COURT: Good morning.

MR. WILLIAMS: We've got the gang back together here.

THE COURT: Feels like old times.

MR. WILLIAMS: Your Honor --

THE COURT: You've got to get near a mike, or Jill's going to scold you.

MR. WILLIAMS: That's why I'm coming up, Your Honor.

Very briefly, and I won't take the lead here, but we represent a company called Sandoz, Inc., S-A-N-D-O-Z, Inc. Sandoz, Inc., manufactures one of the other drugs that is to be used in the planned execution, Your Honor, and we likewise have an objection. I'll let the plaintiff make its argument first and add a very brief argument after that if the Court will allow it.

THE COURT: Can you give me the trade name of your client's drug?

MR. WILLIAMS: Yes, I can, Your Honor. It's

cisatracurium.

THE COURT: Okay. Thank you, Mr. Williams.

MR. WILLIAMS: Thank you very much.

MR. SMITH: Your Honor, if I may.

THE COURT: I have an additional media request from KTNV. Unless there's an objection, I'm going to go ahead and sign it. Hearing no objection, the request is granted.

So, Dennis, could you give that to whoever I give those to.

MR. SMITH: Your Honor, may I be heard on Mr. Williams's appearance quickly?

THE COURT: He hasn't actually appeared yet. He just said hi. So if he gets up to talk, I will let you be heard related to his issues. Okay?

MR. SMITH: Understood, Your Honor. Thank you.

THE COURT: I don't know if he will actually get up to be heard. Sometimes he's very quiet.

All right. Is there anything else before we start with the plaintiff's application for a TRO. I'm cross out the word "ex parte," because I don't do ex parte TROs. We had a conference call yesterday afternoon to set this hearing so anybody who was interested could be heard.

And now Mr. DiGiacomo is here. Good morning, Mr. DiGiacomo. Why are you in Business Court?

MR. DiGIACOMO: I hear that you might be hearing

something that is of interest.

THE COURT: Mr. Bice, it's you.

MR. BICE: Thank you, Your Honor.

Your Honor, we appreciate the Court hearing this matter. In d let me start off sort of even addressing your statement just a moment ago. Let me be clear about what this motion is not about. This motion is not about the merits of the death penalty or whether and when it is appropriate. Alvogen, Your Honor, is a business, and it takes no position as to the merits or propriety of the death penalty in any circumstances. We are here in Business Court because this is a business dispute.

What has happened here is Alvogen is a pharmaceutical company that develops and sells products that are designed to save and improve patients' lives. And as a pharmaceutical company it has the right to refuse to do business with anyone, including the government, when it is concerned and suspects that its products are going to be misused. And that's what this case is about, and that's why we are here in a Business Court setting. That is especially the case, Your Honor, when the planned use is fundamentally at odds with the company's purpose, the company's brand, and the company's business goodwill.

Now, there isn't any doubt, I would submit, Your Honor, about the -- you know, the immediacy of this situation

or for the risk of potential irreparable harm to Alvogen if its product is misused in this fashion. In fact, we've already attached to our pleading, so I don't want to belabor the point, there's already media coverage that has raise Alvogen's name in the context of what other media sources have referenced as botched executions relating to this drug. And this drug, Your Honor, I'm sure that over the course of the day I will mispronounce it, but I understand the proper pronunciation is midazolam. So if I mispronounce it, Your Honor, I apologize.

THE COURT: Your colleagues said you blew it already.

MR. BICE: I suspect that's the case.

So, Your Honor, what we are asking for today is a TRO to not halt the execution, Your Honor. The State is free to exercise its prerogative, but it isn't free to do that in the context of using a product that it is not authorized to use for this purpose and that it acquired, we maintain, through subterfuge. That's what this case is about. It is if the State has other means of carrying out its wishes, that is not an issue for Alvogen.

So what we're asking for in terms of the TRO, Your Honor, is a TRO that preserves the status quo, which precludes the use of Alvogen's product in this use.

So the question, as the Court knows, is simply

straightforward. It's reasonable probability of success, it's a threat of irreparable harm if the status quo isn't maintain until the Court can hold a preliminary injunction.

THE COURT: And are monetary damages a sufficient --

MR. BICE: And are monetary damages an adequate remedy. That's right. So, Your Honor, for purposes of the argument today I'm going to address a couple of points, and then I'm going to have Mr. Schuler address what I would consider to be -- what I'm characterizing as the property rights questions relative to Alvogen products and why those rights afford relief here. But I'm going to address, Your Honor, the fundamental point that we want to make about NRS 41.700. And before I turn to that, because we're here on a TRO and I'm sure that the State is going to raise this issue, the issue of timing, all right, why are we here now, okay. And I'll tell the Court why we are here now. The urgency that we are here now is purely the product of the defendants' own making. The defendants in this case have been obviously planning on carrying out this execution for some time now. And I understand that. But they also knew that they had acquired these drugs and they also acknowledged to Judge Wilson up in Carson City just last week that one of the reasons that they were trying to keep the identity of where they acquired the drugs, the manufacturers a secret is because the manufacturers might very well object. Well, with all due

respect, Your Honor, the State's concession that what it was doing was it was trying to keep that information hidden so that my clients wouldn't be able to exercise their First Amendment rights to come into court and seek relief is not appropriate. So the only reason that we are here now is because until Saturday -- well, until Friday, actually, is when Judge Wilson had ordered them to produce this information in response to demands from the ACLU and in fact lawsuit that the ACLU had filed we did not know that they had acquired this product in this fashion. In fact, we had reason to believe that they had not, because we had specifically sent multiple letters to both the governor, the Attorney General, as well as to the prison and the warden warning them that they were not permitted, directly or indirectly, to acquire our product for this purpose because it is not an FDA-approved purpose, and we object to their use of our product in that fashion, something that we have a right to do.

THE COURT: Can I stop you for a minute.

MR. BICE: Yes.

THE COURT: Mr. Smith, does your client concede they received those letters that according to the brief were sent in April?

MR. SMITH: I'm not sure if all those entities that Mr. Bice has listed had received those letters, but I am aware of some of them did receive those letters from Alvogen, the

April 20th letter, that's correct.

THE COURT: Thank you. So, Mr. Smith, I just wanted to make sure we were past that.

Okay, Mr. Bice. You may continue.

MR. BICE: Thank you, Your Honor. So what we know, Your Honor, is in April is when those letters were sent. And we now know based on the disclosures that were prompted by Judge Wilson's order on Friday is that they had in fact after receiving notice and after being told that they were not allowed to acquire this product from my client for this use they set about to do just that. And there's no evidence that they disclosed this to Cardinal. Instead of going to Alvogen directly, they went to Cardinal, an intermediary, and there's no basis for claiming that they disclosed that, there's no evidence that they disclosed that, and we had an understanding with Cardinal while we were finalizing the terms of our arrangement with Cardinal that they would not allow this product to be used for that purpose. And that's set forth in the declarations that we have submitted to the Court, Your Honor. And in fact we finalized and signed that agreement at the end of May. And again, Your Honor, per the terms of the invoices that we found out about on --

THE COURT: Hold on a second.

MR. BICE: Of course.

THE COURT: We can't exclude people from the

courtroom. We can just pull up another chair. We've got chairs that we can --

(Pause in the proceedings)

THE COURT: Sorry, Mr. Bice.

MR. BICE: Oh. It's all right, Your Honor.

THE COURT: Good morning, Ms. Weckerly.

MS. WECKERLY: Good morning.

THE COURT: Mr. Bice, you can continue. I've got the whole Homicide Team in here now.

MR. BICE: All right. Thank you, Your Honor. I appreciate that.

So what I was saying, Your Honor, was the State per the terms of the invoices that we found out about on Friday where they had acquired this product from Cardinal in violation of the explicit notices that they had received said that they were going to pay for this sometime in June, which is after the date in which we had even finalized the contract, the formal contract with Cardinal.

So our point here, Your Honor, that takes us then to NRS 41.700. I know in our brief we have laid out a number of claims and a number of causes of action. In some of those we are arguing that we have a private right of action under the statute. But the reason I'm going to focus on 41.700 for purposes of today, Your Honor, and the temporary restraining order is there's no question that we have a right of action

under 41.700, because it specifically provides that we have a claim for any knowing and unlawful use of a controlled substance. That's what has happened here. This drug is a controlled substance.

THE COURT: Well, not yet.

MR. BICE: What's that?

THE COURT: It hasn't been used yet.

MR. BICE: It has not been used yet, that is correct. And we are seeking to enjoin its use in this inappropriate fashion. And what our point here, Your Honor, is the State acquired this knowingly -- knowing that it was inappropriate. And that is the definition of subterfuge, Your Honor. They acquired it in a fashion and they had -- as we point out in our motion, Your Honor, they had notice that they weren't to acquire it for this purpose, that they could not do so, right. They also had it shipped to the central pharmacy in Las Vegas, rather than to the Ely State Prison, which is again highlighting the fact that they didn't want to attract attention about how they -- where they were planning on using this and what they were planning on using it for.

THE COURT: And, Mr. Bice, that's at Tab 3 of your application for the TRO?

MR. BICE: Yes, Your Honor.

THE COURT: All right. Thank you.

MR. BICE: And again, Your Honor, there's -- we have

substantial reason to believe, particularly for purposes of a temporary restraining order, Your Honor, that they did not disclose to Cardinal the terms of those letters that they had received and that they were not to be acquiring it for this purpose. And, as they acknowledged to Judge Wilson -- and it's in page 4 of his order, Your Honor. I don't know if you have his order, because I don't believe we provided it.

THE COURT: I don't have it yet.

MR. BICE: But I do have a copy of it for the Court. And Judge Wilson had acknowledged, Your Honor, he was having to decide this on a very quick basis because the ACLU had filed it shortly. So this is a copy of his order granting in part the emergency writ, Your Honor.

THE COURT: Thank you, Mr. Bice.

MR. BICE: Thank you. And on page 4 of his order, Your Honor, he --

THE COURT: I'm going to mark it as Court's Exhibit 1 for part of our record today.

MR. BICE: Thank you, Your Honor.

So on page 4 what he specifically noted, Your Honor, is that the State had noted that one of the reasons that they didn't want this information out about how they acquired the drugs was because the manufacturers and marketers of the drugs may very well object and protest this particular use. They knew full well. They had received our letters. And I notice

-- and to my knowledge -- and the Court will have to inquire of the State -- I don't believe that they disclosed to Judge Wilson that they had received those letters and that they had acquired the products despite those explicit warnings that they were not allowed to do so.

So our point here, Your Honor, is this is the very definition, we would submit, of a subterfuge. Which then takes us, Your Honor, to the terms of 453.331, Your Honor, which, as we maintain, is a predicate act that is a violation of the statute, which then gives rise to the claim under 41.700. And that is because 453.331 specifies, "It is unlawful to knowingly acquire a controlled substance by means of," and then it lists a number of things, misrepresentation, fraud, et cetera, or subterfuge, Your Honor. And then we provide you in our brief what the caselaw defines as a subterfuge, Your Honor, and what does the dictionary define as a subterfuge. And it's simple. Attempts to hide. There's no question here that the State was hiding. In fact, they essentially admitted it to Judge Wilson that they were hiding it.

Now, there is no legitimate basis -- I mean, the State, Your Honor, I would submit, needs to be held to a little bit higher standard than just ordinary citizens. But there is -- under no circumstances is the State -- is it appropriate to say -- to essentially say, well, we were hiding

on this because we didn't want people to be able to have the time to assert their First Amendment rights and petition the court for redress. And that's what we're here about now. So the timing issue, Your Honor, is purely of the State's making. The ACLU had asked for this information back in June, and the State refused to provide it, which ultimately then resulted in Judge Wilson's order coming out on Friday. And we learned about this because our client received a call I believe it was technically Saturday morning by the time they found out about it, early Saturday morning, that in fact Alvogen's product was being used in this inappropriate means. And then we, of course, worked diligently over Sunday and Monday to get our pleadings in order to file them yesterday. And we appreciate the Court hearing us.

So if the Court simply looks at 41.700, we have a cause of action for any misuse -- for any misuse of a controlled substance that causes us harm. The common law, as the Court knows, provides that even though the statute talks about damages, remedies are deemed to be cumulative unless the legislature expressly excludes them. There's nothing in the statute that precludes the common-law remedy of injunctive relief when in fact monetary damages, Your Honor, would not be adequate under the circumstances.

And just let me briefly touch on that, Your Honor. I don't believe that there's any monetary damage that would be

available here. We would have a difficult time calculating those damages, and we would have a difficult time which the Court would have in assessing what they would be in terms of monetary damage. What we are facing here is serious reputational harm to our business and our business goodwill, because this -- we are in the business -- Alvogen is in the business of making and selling life-preserving medications and drugs. That's its business. This use is completely incompatible with that business and is completely harmful to that business. And again, we're not here passing judgment on or asking the Court to address the merits of the death penalty. All we're talking about here is this particular drug has been used, and we lay it out in the complaint and I don't believe that it's even open to dispute, but it's been documented in numerous media accounts, this particular drug in its use in executions has resulted in some what the media has characterized as botched executions. An individual I believe it was in Oklahoma after administered this drug woke up halfway through the execution. In other circumstances in Arizona, Arizona I believe even stopped using it because it resulted in the inmate gasping for air and suffering during the process, and the execution lasted substantially longer, multiples of what it was supposed to last. And so this drug is not approved for this use. The FDA does not approve it for this use, and we do not sell it for this use, and we do not

allow it to be used for this use. And the State knew that when it decided to then go out and try and acquire it surreptitiously. Had it be forthright with his and had it ben forthright with Cardinal, we would not be here, because there would be no need. Because they would have never acquired it.

So that is -- that is why we here, that is why we are asking the Court for the relief in the form of a temporary restraining order. I understand what the arguments will be from the State. I recognize that, that Mr. Dozier has been on Death Row for a number of years, I believe more than a decade at this point, and that this process has gone on and this case has already been up to the Supreme Court once; but it hasn't been --

THE COURT: Well, that was on a different issue.

MR. BICE: Exactly. That was -- and I wanted to make that point crystal clear, because sometimes the public doesn't understand that.

THE COURT: That was on the cruel and unusual punishment issue.

MR. BICE: That is correct. That is not on this issue. So I recognize the State's interest here, Your Honor. But, again, had the State simply followed the instructions and not surreptitiously acquired this drug, we wouldn't even be here. Just like had the State disclosed back in June when they were first asked about this, had they disclosed it,

again, there would have been more than ample time for a full evidentiary hearing about how they acquired it. So now we're having to ask the Court -- and I recognize that it's at the eleventh hour --

THE COURT: Well, I got this case yesterday about 1:30.

MR. BICE: I understand that, Your Honor. And we'd worked diligently to get these pleadings in front of the Court.

THE COURT: So can I ask you a couple questions.

MR. BICE: Of course, Your Honor.

THE COURT: Other than the April letter, were there any efforts by your client to make known to the Nevada Department of Corrections your client's intent to preclude them from using the medication if it was obtained by them?

MR. BICE: Yes. It was actually noted on the Web page, Your Honor. It's -- the markings on the company's Web page specifically calls out that these drugs are not to be used for that purpose and that the company would object to any of their usages. And we did, as laid out in the declaration, Your Honor, and I think it's Mr. Harker's declaration, perhaps Ms. Sweet's, but I believe that it was we looked at the sales records and there was no indication that they had acquired any when we originally looked.

THE COURT: And that was the April time frame.

MR. BICE: Yes. That is correct, Your Honor. So the State has been on notice since then, they knew about it before they purchased the product, and, again, Your Honor, this is -- I don't believe, frankly, Your Honor, that the State could credibly -- and if they want to, then this just highlights the need for an evidentiary hearing in the form of a preliminary injunction, but I don't really think that the State can credibly claim to the Court that it was not intending to hide its acquisition. It didn't want it disclosed. That's why it objected to Judge Wilson. I mean, they had ample time to disclose this, and we could have had a full hearing well before today. But, again, the timing is purely of the State's making in this, Your Honor.

THE COURT: And your complaint or your application, I can't remember which, you make an allegation that information was provided to Cardinal about a different purpose for use of the medication. Can you tell me where that is in the evidence, because I couldn't find anything related to it.

MR. BICE: Your Honor, what we believe -- what we believe, and we are -- and we acknowledge to the Court we are having to proceed on -- quickly on this because of what we have found out, is when we -- as laid out in Mr. Harker's declaration, Your Honor, when we started marketing this product there were discussions with Cardinal about the fact that we did not want it used for this purpose. And we were in

-- and Mr. Harker, as he testifies, Your Honor, in his declaration, he understood that Cardinal was going to honor that. And we then formally were in negotiations to modify the terms to make it clear, and Cardinal then would sign it at the end of May, Your Honor, specifically acknowledging this is not an allowed use. So the reason that we say that, Your Honor, is that Cardinal knew this was our objection. And Cardinal, I believe, Your Honor, back in even November of -- I apologize, I don't remember, but there's a press statement that Cardinal issued that says it expressly honors the manufacturer's restrictions use and the FDA-approved usage.

So that's why we maintain, Your Honor, and we happily acknowledge on this record because we don't yet have discovery, that Cardinal would not -- had Cardinal been told the truth about this usage we do not believe Cardinal would have sold it to them.

THE COURT: Based upon your contractual requirements.

MR. BICE: Based upon our discussions with them, based upon the contract that we had with them, based upon our Web page disavowing this particular use, and, again, Your Honor, based on what we understood from actual discussions that Mr. Harker had with Cardinal. And again, the State had it shipped to its general pharmacy --

THE COURT: On Russell Road in Las Vegas.

MR. BICE: -- on Russell Road in Las Vegas, not to the Ely State Prison, where the execution chamber is at, giving all the appearances that this was being acquired for appropriate FDA-approved usage, not for a usage that is not approved and not for a usage that is specifically objected to. The State, Your Honor -- again, it's very simple. The State had the letter, it had notice. If the State would have disclosed its true purpose, the State knows full well it would have never acquired the drug and we wouldn't even be here.

THE COURT: I believe it's your complaint where you allege that Dr. Azzam signed something that was sent to Cardinal indicating the request for that. That's what I'm looking for.

MR. BICE: Okay. Your Honor, I'm actually going to -- I'm going to have Mr. Schuler address that --

THE COURT: Okay.

MR. BICE: -- as property rights claims, and actually I was going to turn it over to him shortly. So I will just do that now, Your Honor.

THE COURT: All right. I will wait. No. Finish up.

MR. BICE: And so what I want to be clear about, though, is for purposes of a temporary restraining order, Your Honor, we have shown that we have a claim. I believe the record establishes that we have a reasonable probability of

success on the merits. I don't believe -- if the Court has questions about our irreparable harm, I'm happy to address those; but I would submit that the type of reputational and goodwill harm that is being proposed here is very serious for a business, particularly a pharmaceutical company whose entire mission and business purpose is to create and market and sell products that are designed to enhance and prolong people's lives. And the use of those products to do the exact opposite and then to have media coverage and their name associated with this, particularly when this drug -- there is a risk of even what's being characterized as botched executions is highly harmful to any business.

With that, Your Honor, I'll turn it over to my colleague.

THE COURT: Thank you, Mr. Bice.

MR. BICE: Thank you.

MR. SCHULER: I want to again thank Mr. Smith for the accommodation.

Your Honor, if I could approach with --

THE COURT: Sure.

MR. SCHULER: -- the decision from the Arkansas court in the McKesson case.

THE COURT: I read it. It's attached to your brief.

MR. SCHULER: Thank you, Your Honor.

So with regard to the Court's question our argument

is that Dr. Azzam had tacitly represented by asking for it to be delivered to the central pharmacy location that it was for a legitimate purpose. That is not a claim focused on here, today, but that is an allegation in the complaint.

I want to focus on the property claim, the replevin claim. We think it is very straightforward in light of the closest authority that we're aware of, which is the McKesson case. The salient facts of those cases are virtually identical, which is notice to the State Department of Corrections that they could not legitimately acquire the product, a subsequent effort that was successful to acquire the product, a demand for return that was not honored, and continuing wrongful possession by the State Department of Corrections. So I --

THE COURT: You offered to give them back their money for anything they paid for the product.

MR. SCHULER: Yeah. And I think what's --

THE COURT: Which looks like it's about 50 bucks.

MR. SCHULER: That's correct, Your Honor. And what I think is salient about that is, A, the Department has not taken us up on our demand; but, B, we didn't say, go to Cardinal and get a refund. We said, it's our property, give it back to us, we will refund you so that you're made whole. And so vis-a-vis the State and my client, Alvogen, we indicated to them we have superior ownership rights when the

midazolam product is to be acquired by a prison system and specifically for purposes of an execution, which is a use that it's not permitted for.

So we think that's the closest authority. We expect the State to make an argument based on title, they got title through Cardinal. But, as we noted in our papers, Your Honor, that requires under the UCC that they be a good-faith purchaser for value. Our contention is they at best had voidable title, that Cardinal had voidable title to transfer it, and under the UCC you have to be a good-faith purchaser for value in order to get good title from somebody who has voidable title.

Now, the case we cited to the Court, was is the Tempurpedic case, is very similar again. If you have notice that somebody is restricting and not permitting the property to be used for this particular purpose, you're not a good-faith purchaser for value, because you're not exercising honesty in fact. That's the Tempurpedic that's cited in our papers. They also can't be a buyer in the ordinary course of business, because they were aware by virtue of our April 20th letters that we demanded that they return it, that they could not purchase it either directly or indirectly, and they were aware based on the Website indicating the same with regard to the midazolam product. That is Exhibit 5, Your Honor. I know there was a question about that. That's Exhibit 5 to our

papers. And it prominently says when you go to the Website, "Midazolam, this product contents box warnings, see full prescribing information for this product." Then says, "Alvogen endorses the use of its products in accordance with FDA-approved indications. To this end Alvogen has undertaken controls to avoid diversion of the product for use in execution protocols. In furtherance of this effort Alvogen does not accept direct orders from prison systems or Department of Correction. In addition, Alvogen is working to ensure that it's distributors and wholesalers do not resell either directly or indirectly this product to prison systems or Departments of Correction."

So we believe they can't qualify to obtain good title, and that's the straightforward replevin claim. I would analogize this, Your Honor, to a felon who was given notice by the State that they can't acquire a firearm legally. They get a letter, and then thereafter they go to a sporting goods store, and they're told they're a felon, they can get it. They go to four more, and finally the fifth store doesn't ask whether they're a convicted felon and they acquire the gun. Well, that's voidable title, because they're not a good-faith purchaser. They're on notice that they can't legally acquire a firearm. And the law is such that we don't need to wait until that firearm is used in the commission of a crime to institute forfeiture proceedings. The doctrine of replevin is

available to the manufacturer or to the sporting goods store to get that property back, which furthers the public policy of avoiding felons having firearms.

Now, I want to briefly mention, unless the Court has any questions on replevin, one of our other predicate act claims, which is under NRS 453.381. And for purposes of the hearing today we're only arguing this issue for purposes of establishing a predicate act of unlawful conduct for purposes of NRS 41.700.

Now, under 453.381(1) a physician may prescribe or administer controlled substances only for a legitimate medical purpose and in the ordinary course of his or her professional practice. Now, we're aware based on the execution protocol and the press release from the State that there will be someone who will be designated as the attending physician at the execution. Now, an attending physician as a matter of law is a physician who is in charge. They have responsibility for the patient, they have responsibility for the administration of any drugs to the patient. That's the -- some of the evidence we cited, Your Honor, was Center for Medicare and Medicaid Services Glossary that's attached, as well, I believe.

Now, the approved labelling for midazolam, which is the Harker declaration, paragraph 6, lists the approved FDA uses for midazolam. And none of them involves execution. And

the evidence indicates that using a drug like midazolam, which is a sedative that renders somebody unconscious, for such a purpose is not a legitimate use for a controlled substance. And that's the AMA Code of Medical Ethics opinion that we cited to the Court. So, again, a straightforward violation of NRS 453.381 that is imminent and we believe establishes a predicate -- another predicate act of unlawful conduct for purposes of the main claim, which is the 41.700 claim.

And unless the Court has any questions --

THE COURT: I don't.

MR. SCHULER: Appreciate the time.

THE COURT: Thank you.

Do you have any more on your side?

MR. BICE: No, Your Honor.

THE COURT: All right. Mr. Williams, you're going to come up, and then I think I'm going to get an objection, and I'm going to hear it before you start talking other than to say your name and who you represent again.

MR. WILLIAMS: Fair enough, Your Honor. Colby Williams on behalf of Sandoz, Inc.

THE COURT: Mr. Smith, do you have an objection to Mr. Williams speaking this morning?

MR. SMITH: Yes, Your Honor, I do. Last night I received an email from Mr. Williams at about 10 to 10:00. I didn't actually see the email till about 1:00 or 1:30 this

morning, but then no motion to intervene, no complaint filed, no separate application filed by Sandoz or Mr. Williams. So I object to him being in front of the Court this morning. I think it's procedurally improper. I understand we're working on a short time frame here, but that short time frame Mr. Bice referenced, to the extent it even applies to him, certainly doesn't apply to Mr. Williams and his client. Cisatracurium has been a part of the protocol for over a year. I think the first announcement of the use of that drug was August 2017 in a press release where cisatracurium was notified to the public as going to be used. The protocol itself was released in redacted form in September of 2017, which laid out cisatracurium. We had an evidentiary hearing in front of Judge Togliatti where cisatracurium was the central issue in that case. We've taken a trip up to the Nevada Supreme Court and back regarding cisatracurium, and during the entirety of that time, over almost a year now, cisatracurium -- Sandoz sat on its hands, didn't do anything, and didn't assert its rights. They would be joining a request for equitable relief. Equitable relief is subject to laches. And so to the extent Sandoz had any rights -- which I don't think Alvogen has any rights, I don't think Sandoz has any rights, but to the extent it ever had any it has slept on those, and at this late date laches applies. Federal Courts and State Courts apply laches even to condemned inmates themselves when they raise

constitutional claims too late on the eve of an execution. So a condemned inmate making cruel and unusual claims gets barred by laches if they've slept on it and it's a pure transparent attempt to delay an execution. So a condemned inmate who's actually going to be executed can't raise a constitutional claim, a stranger manufacturer who has had notice of this for more than a year certainly can't appear before Your Honor today.

THE COURT: Since those issues go to substantive issues, I'm going to let Mr. Williams speak. I do not know if he's going to ask me to intervene for purposes of this proceeding or not, but I let him speak.

Mr. Williams, you're up.

MR. WILLIAMS: Thank you, Your Honor. And sticking with my preferred practice of being brief, we're here for a limited purpose today. We are not a party in this case yet. But for purposes of today, Your Honor, I did -- when we were contacted by the client last night it advised me that it, too, had sent a letter to the governor's office, the AG, and to the Department of Corrections. When I got a copy of that letter I promptly forwarded it directly to Mr. Smith's email. The purpose for my appearance today, Your Honor, is to register our formal objection and to ask the Court to include that letter as an exhibit to this proceeding. I don't intend on making any further argument today, Your Honor, but I want our

formal objection noted for the record.

THE COURT: May I have a copy of the letter?

Mr. Smith, did you get a copy of the letter with the email from Mr. Williams last night?

MR. SMITH: I did, Your Honor. I will add the caveat, though, I don't recall off the top of my head, and obviously I haven't had a chance to inquire whether any of the entities Sandoz allegedly sent the letter to actually received that particular letter. I was able to do some quick checking with regard to Mr. Bice's client, not Mr. Williams's client.

THE COURT: Okay. Mr. Williams, are these two identical copies?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: I'm going to mark this as Court's Exhibit 2.

MR. WILLIAMS: That's all I have, Your Honor.

THE COURT: Thank you.

Mr. Smith, that means you're up.

MR. SMITH: Thank you, Your Honor. For the record again, Jordan Smith, Deputy Solicitor General, on behalf of the Nevada Department of Corrections.

And I understand Mr. Bice and Mr. Williams's desire to try and separate two issues here. They claim this case has nothing to do with the death penalty, but in the next breath they argue, but we don't want to be associated with it, and

the effect of this, let's not kid ourselves, will be to stop an execution that's happening in less than 12 hours. Vague claims of reputational harm will be aimed at stopping the State from carrying the most solemn of its duties in the justice system. And I'll detail all these issues, but I think it's important at the outset to realize this, that a stranger to the execution process with whom the Department of Corrections has no direct contact -- Department of Corrections didn't purchase the drug from the manufacturer, it purchased the drugs from a third-party intermediate, Cardinal Health. So what we're doing here is a --

THE COURT: Mr. Smith, let me ask a question, because I've got to stop you. This is one of the problems with video. You can't see I'm trying to get your attention.

For purposes of this litigation is the State waiving any cap on damages that are claimed by the plaintiffs?

MR. SMITH: No, Your Honor. We're not waiving --

THE COURT: Okay.

MR. SMITH: -- any aspect of sovereign -- well, let me say this. The State's not waiving any aspect of sovereign immunity, whether 41.031 or .032. So the State's not waiving sovereign immunity.

THE COURT: I'm just trying to make a record, because that is part of my issue related to whether monetary damages are sufficient. Given the State's caps on damages, it

creates certain issues for me in making that evaluation. So given your remarks, I had to make sure that you weren't waiving that. Thank you. You may continue.

MR. SMITH: Well, and, Your Honor, let me clarify. If that's going to be an issue of significance to you, I will concede I've not discussed the waiver of the cap on damages with my client before this hearing. I don't imagine that we would, but if that's going to be a dispositive [inaudible] with Your Honor, before I unequivocally say that we wouldn't waive that cap, I would like the opportunity to discuss that with my client, in all honesty.

THE COURT: All right. Thank you. Do you want to keep going with your argument? And then you can talk to them -- we'll take a short break after you argue to see if you need to say anything before I hear from the plaintiffs on rebuttal.

MR. SMITH: That would be great, Your Honor. I'd appreciate that. Thank you very much.

THE COURT: All right.

MR. SMITH: So what we're witnessing here today, Your Honor, is the newest, most novel attempt in the never-ending saga to frustrate a state's ability to carry out capital punishment through lethal injection. My colleagues on the other essentially concede that no state anywhere has ever entertained a suit by a manufacturer directly against the Department of Corrections to stop one of its drugs from being

used in an execution. Again, that's particularly odd where, again, here there's no direct connection. The State did not purchase its drugs directly from Alvogen and instead went through a third-party intermediary.

But an interesting fact that Mr. Bice glosses over, and I'll walk through this in a moment, is that when the Department of Corrections purchased the midazolam from Cardinal Health on May 9th and May 11th there was no enforceable contract precluding Cardinal Health from selling midazolam to the State. We'll see from the exhibits that agreement was entered into on May 28th. But regardless of whatever their understanding was between Alvogen and Cardinal Health, that had no binding effect whatsoever on the Nevada Department of Corrections or even Cardinal Health at that point. Cardinal Health, in the absence of any contractual agreement, was free to sell those drugs to the Nevada Department of Corrections, and Nevada Department of Corrections was free to purchase those drugs. So they want to characterize this and they want to conjure up between independent facts some grand scheme, some conspiracy, some subterfuge of the Nevada Department of Corrections snuck around some controls, dipped and dodged and did this in the dark of night in some smoke-filled room or something. The fact of the matter is at the time the Department of Corrections purchased these drugs there were zero controls on

Cardinal Health. Zero. Zero enforceable controls. And in fact any contract between Cardinal Health and Alvogen isn't enforceable against the Nevada Department of Corrections. If Alvogen has a beef, it's with Cardinal Health, not with the Nevada Department of Corrections. But I'll walk through that evidence with you.

But, again, make no mistake. Mr. Bice wants to say this isn't about stopping an execution, this is just about one drug. If the Court enters a preliminary injunction enjoining the use of midazolam, there will be no execution tonight absent some emergency motion by the Nevada Supreme Court. So they want to say this is just about a drug, but the effect of their injunction will be to stay an execution. And by statute District Courts only have the ability to enjoin or stay executions in six circumstances.

I'll direct the Court's attention to NRS 176.415. I'll give you a second to get there, if you'd like. But that statute says, "An execution of judgment of death must be stayed only in six circumstances, (1) by the State Board of Parole Commissioners; (2) by the governor if the governor grants a reprieve on the Constitution -- but as an aside, that reprieve is limited to 60 days, I believe, after a direct appeal -- (3) when a direct appeal from the judgment of conviction or sentence is taken to appellate court -- we're not dealing with a direct appeal here -- (4) if a District

Court in the county where the prison is located -- so that would be up here in Ely -- there's an investigation regarding sanity or pregnancy -- that doesn't apply -- (5) if the judge of a District Court when a motion is filed has to determine whether the inmate is intellectually disabled -- that doesn't apply -- and then (6) cites two statutes regarding genetic marker analysis and a habeas proceeding. So courts do not have the ability to enter an order that will have the effect of staying an execution aside from what's listed in 176.416. So this Court does not have statutory authority to enter any order that would stay an execution.

The Nevada Supreme Court was quite clear to Judge Togliatti the last time we were up there on the Dozier matter.

THE COURT: I read their opinion to Judge Togliatti, Mr. Smith.

MR. SMITH: That's right. That's right. And the Nevada Supreme Court was clear. District Courts' inherent authority in the context of an execution is severely restricted if there is any left. I think that opinion's quite clear for the fact that courts are limited in the execution context, whether it's under Chapter 34 or Chapter 176, to exercise an only statutory prerogative, not inherent authority. That's where things got sideways in Judge Togliatti's courtroom, was doing things under inherent authority. So under 176.415 those are the only instances a

court may enter an order that would have the effect of staying an execution, and a suit by a third-party manufacturer is not one of them.

And there's also another practical problem on that same front. This goes to balance of the hardships a little bit and public interest, but also goes to scope of this Court's equitable authority. The Nevada Department of Corrections is currently an active warrant and order of execution from Judge Togliatti. It his a legal obligation. It has been court ordered to carry out an execution this week. If Your Honor prevents the State from using midazolam, it will be stuck in a rock and a hard place. Your order will put the State in a Catch-22 where it can't use midazolam, but yet Judge Togliatti's order requires the State to go forward.

Remember, Mr. Dozier is a volunteer. He wants this to happen. And if the Department of Corrections can't carry out Judge Togliatti's order, presumably Mr. Dozier could bring a contempt motion. So the effect of this Court's order, if it issues one, would be to enjoin a lawful order from another District Court judge in the Eighth Judicial District Court. I think there are a host of problems with that, and I think that should act as a limit on this Court's equitable authority.

Our visiting counsel from out of state -- I can't remember his name, I apologize -- relies heavily on the Arkansas-McKesson case. And it's true. In the McKesson case

a third-party distributer did get an injunction from an Alabama District Court judge. Alvogen is one step removed from the third-party distributer in that case. The third-party distributer in McKesson actually had a contractual relationship with the state. That's why among other things it brought unjust enrichment claim. But my friend from out of state doesn't reference the fact that the Arkansas Supreme Court summarily reversed that preliminary injunction just eight days later. On April 28th, 2018 -- or 2017, I might have the years mixed up, there was an emergency motion to stay filed by the State of Arkansas, and the Arkansas Supreme Court summarily reversed that. I can send that order to the Court if it would like to see that.

They also don't tell you about the District Court in Arkansas that actually entered that order. Subsequent to its preliminary injunction the Arkansas Supreme Court removed that District Court judge from presiding over any death penalty cases because he was found to be -- have incurable bias against the death penalty. Of course, the judge then sued in Federal Court, and the Eighth Circuit on July 2nd actually said, no, the Arkansas Supreme Court was within its powers to say this judge can't hear this class of cases for bias. So that's the type of District Court judge that initially bought the type of claims that are being peddled to you today and was summarily reversed by the Arkansas Supreme Court in short

order.

Now I'll address the statutory claim they advance. And you'll notice they sort of abandon all the other claims under Chapter 453 today. They only point to one as a predicate for a claim under Chapter 41.700. And I think there's a reason for that abandonment, Your Honor. Under NRS Chapter 453.281(3) the State has statutory immunity from claims under this chapter. 453.281(3). It says, "No liability imposed by the provisions -- no liability imposed by the provisions of NRS 453.011 to 453.552 upon any authorized State officer engaged in the lawful performance of his or her duties." And that's exactly what we have here. Every member of the Nevada Department of Corrections during the actions alleged here were carrying out their lawful duties to carry out an execution under NRS 176.355. That statute requires the Department of Corrections and the Director to carry out lawful sentences of death. And that's exactly what's happening here.

So under 453.281 the State is immune from any claims underneath that chapter. And even with regards to 453.381, which is the only one they're talking about here today, they're asking this Court to find as a matter of first impression that there's a private right of action, a private right of action that would allow an injunction to be issued. No court has ever found that. The Nevada Supreme Court has never found that. The fact that that is an unanswered

question, counsels highly against the fact that they have a likelihood of success on the merits of that claim. So they resort then to the Bilbao versus Wynn case, saying, well, you know, based upon these factors you might find an implied right of action based upon legislative intent. I guess I'm a bit of a throwback, Your Honor. I think the best evidence of legislative intent is the words actually used and enacted by the legislature. I think that's probably the best evidence. I know it may be not in vogue these days, but I think that's probably the case. And there's nothing in Chapter 453 that creates a private right of action. When the legislature wants to create a private right of action it knows how to do so. You've seen it, I've seen it, it's in all sort of chapter across the NRS that when a private right of action is there the legislature says so. And there isn't one in this case.

They acknowledge that the statutes benefit the citizenry as a whole. There's nothing that indicates that manufacturers any unique standing. And then they admit candidly, which I can appreciate, that they're unaware of any legislative history to the contrary. In other words, the legislature didn't even talk about creating a private right of action under this statute.

What the legislature did do with regard to injunctions, though, I'll point the Court's attention to NRS 453.276. That provision limits who can seek an injunction

under this statute. That statute says, "Only the Board --" I believe that's the Pharmacy Board "-- and the Attorney General's Office may bring an action for an injunction which would be a violation of the provisions of this chapter, and that action must be brought in the name of the State." If you're looking for clues of legislative intent, the fact that the legislature specifically said only the AG's Office or only the Pharmacy Board can seek an injunction under the statute is a direct indicator that they're excluding third parties.

I won't try to butcher the Latin phrase, but when a statute says "includes a certain group," by definition it is excluding everybody else. And so the third-party manufacturers here aren't entitled to an injunction under NRS Chapter 453.

Other indicators, just so I have them on the record, NRS 453.271 indicates who enforces the chapter. If we're looking for intent underlying the statutory scheme, it is for the State to control controlled substances. Enforcement, distribution, control is for the State, not third parties.

An underlying conduct for the one statutory claim that you hold onto this morning, that's, again, 453.381, about whether a physician may prescribe or administer controlled substances, they don't tell the Court about the next chapter in the NRS, which is Chapter 454, NRS Chapter 454. And that's the specific chapter that deals with what medical personnel in

the Department of Corrections can or can't do with regard to medicines. And I'll point the Court's attention to NRS 454.221(2)(f). That provision in (1) says, "A person who furnishes any dangerous drug except on prescription of a practitioner is guilty of a Category B felony." So it deals with criminal punishments, just like Chapter 453 does.

But then if you look at section (2), it says, "The provisions of this section do not apply -- do not apply to the furnishing of any dangerous drug by," go down to section (f), "a pharmacy in a correctional institution through a person designated by the Director of the Department of Corrections to administer a lethal injection to a person who has been sentenced to death." Chapter 454, the chapter that's actually on point instead of the general Chapter 453 about doctors and medical personnel generally, allows the Director of the Department of Corrections to authorize a person to administer a dangerous drugs for purposes of a lethal injection. This statutory provision authorizes what will happen later this evening, Your Honor. The Director has condoned all -- has authorized all personnel, medical or otherwise, to carry out the lawful sentence of a jury and the lawful order of Judge Togliatti. Additional authority is found in 454.213. It says, "Except as otherwise provided, a drug or medicine referred to by definition may be possessed and administered by (k) any person designated by the head of a correctional

institution who in addition to the Director of the Department of Corrections, the warden of the institution," in this case Warden Gittere, who's with me here today, "has the authority to authorize people to administer drugs in the correctional setting."

Additionally, 454.215 says, "Authority to dispense a dangerous drug," and then there's registered nurses, pharmacy in a correctional institution, a practitioner authorized by the Board, et cetera. (7) a registered nurse employed at an institution of the Department of Corrections to an offender in the institution." So these statutes allow for the procurement of lethal injection drugs and the administration of lethal injection drugs. These are the specific statutes the Court should look at, not the general statute in 453. And these statutes authorize the lethal injection process.

So it's not the case that medical personnel are unlawfully obtaining, distributing, or using drugs. This process is controlled by law, and it's all authorized.

But even if you could get through all those hurdles and there's still some fraudulent misrepresentation, some grand plan on behalf of the Nevada Department of Corrections to get around nonexistent controls, what are the alleged misrepresentations? With regard to NDOC -- from NDOC to Alvogen there are absolutely none. None of the declarants highlight any misrepresentation or omission from the

Department of Corrections to Alvogen. At best they claim the Department should have told Cardinal Health something. But there is no direct connection, no misrepresentation, certainly not one pled with specificity as required in a fraud-based claim between the Nevada Department of Corrections and Alvogen. There's no direct relationship. Without a direct omission to Alvogen or misrepresentation, there's simply not even any standing. I think standing is a big problem here for Alvogen. But there hasn't even been a fraud or misrepresentation made to it.

At most we have the letter, the letter that Your Honor referenced, the April 20th letter. So what is the legal effect of that letter? Absolutely nothing. A stranger to the Department of Corrections wrote a letter to it, saying, we don't like our drugs being used -- I'm paraphrasing, obviously -- we don't like our drugs being used, so please don't try to get them. That letter didn't impose any legal obligation whatsoever on the Department of Corrections. They claim, well, you should have told Cardinal Health that you got this letter. Well, as Your Honor knows, fraud-based claims based upon omission, you can only instate one of those if you have a duty to otherwise disclose the information you are not disclosing. That's a lot of Nevada Supreme Court cases. The 1998 Dow Chemical case comes to mind. You only have a duty to disclose information -- to state an omission claim if it's

imposed by law. Well, where does that duty come from? Not the letter, not statute. They've not identified any source of a duty where the Department of Corrections had an obligation to tell Cardinal Health they had that.

Cardinal Health -- again, back to these checks. They're claiming Cardinal Health, well, we don't like the death penalty and so our third parties have all these controls in place to make sure. Cardinal Health had zero controls in place. They didn't ask why we were ordering it, they didn't do anything. And so let's talk about that. And I'll walk you through it.

In Exhibit 3, the invoices, you can see that the Nevada Department of Corrections ordered midazolam on May 9th and May 11th. I'll represent to the Court that from the May 9th order we received the drugs the very next day, on May 10th. And I'll represent to the Court from the order on the 11th we received the drugs on 5/14. There's some reference to an order on the 29th. I have not been able to track that down. I've not seen an invoice. I don't think an invoice for the 29th is actually in the exhibits for their motion. But I'll explain that away in any event. So the invoices in Exhibit 3 tell you we ordered the drugs May 9th and the 11th and got them shortly thereafter.

Now let's turn to Exhibit 1. That's the declaration of Mr. Harker. That's at paragraph 10 in particular. Mr.

Harker avers at paragraph 10, "Thereafter Alvogen and Cardinal amended their generic wholesale service agreement to include sales under Alvogen's controlled distribution program schedule." In other words, Cardinal Health wasn't bound by whatever that schedule was before the agreement on May 28th. So that agreement -- the restriction that Alvogen finally got around to imposing on Cardinal Health didn't occur until well after the Department of Corrections had ordered and actually received the drug. So whatever legal effect that -- the controls or this agreement has as between Cardinal Health and Alvogen wasn't even in effect at the time they got the drug.

So this whole action is -- and I think this is partially what this litigation is about. This whole action is just PR damage control. They told the world, we had all these checks in place and got pressured by death penalty advocates not to use their drugs in death penalty procedures, and they assured the world, oh, don't worry, don't worry, we won't. So they couldn't even have one contract with their distributer that said, hey, Distributer, don't sell this to the State. So without a contract Cardinal Health had no reason not to sell it to the State, had no reason to even ask the State why it was ordering it, and the State had no obligation to explain its purpose. And even afterwards, even with regard to the May 29th purchase, if it actually exists, that contract between Alvogen and Cardinal Health had zero binding effect on the

Nevada Department of Corrections. So there's no plan to get around controls, no subterfuge to dodge the long list of failsafes that allegedly were in place by Alvogen. They didn't exist, certainly not with regard to Cardinal Health and the Nevada Department of Corrections.

And let's talk about the other alleged subterfuges. One of them, much to my surprise, involved something I said to Judge Wilson last week during the ACLU's public records request. And, frankly, I'm a little disappointed in Mr. Bice the way he's sort of twisting what was said, or perhaps he doesn't have the transcript. I don't even have the order that he gave Your Honor, so I'm impressed with his ability to get something a party doesn't even have yet. But if you look at that transcript, the point that I was making citing Glossip versus Gross, Bays versus Rees, and other Federal Court cases was simply that under the Nevada Public Records Act there could be a basis for the Department of Corrections to claim confidentiality over certain documents and withhold them under the Nevada Public Records Act. That's what the scope of the discussion was, that's what the point of the hearing was about. And I argued that perhaps given the short notice -- I hadn't even reviewed the documents at that time, unlike Your Honor, Judge Wilson set a conference call not to set a hearing, but just to jump in the merits, much to my chagrin. So I was making statements at that hearing, saying, there

might be confidentiality because the only valid reason -- and the ACLU didn't deny this -- the only valid reason to get this information is to then pressure drug manufacturers. And I said, the State has an interest under the Bradshaw balancing test to withhold that information under the confidentiality provisions of the Nevada Public Records Act. The argument was, ooh, we're hiding this information so the manufacturer doesn't know. The manufacturer by all accounts, based upon the evidence submitted to you, didn't have any procedures in place to figure it out that the Nevada Department of Corrections had even ordered anything. The Department of Corrections had no reason to hide the sale from Cardinal Health, no reason to hide the sale from Alvogen. It had bought it open and honestly, logged on and ordered it. That's the extent of it. There was no hacking, no grand conspiracy. They logged on, ordered it, and it showed up the next day.

So to take my statements as saying we were trying to hide it from Alvogen or other manufacturers is certainly not the case. It's disappointing he'd make that argument and certainly try to put me in the middle of some fraud. It just doesn't exist. Perhaps we can track down the transcript. But that's the extent of the argument, because that was the issue there.

The next thing they said was, ooh, there's some grand conspiracy because we shipped it to the Las Vegas office

and not Ely. That's where the Department of Corrections' central pharmacy is. That's where most drugs go in the ordinary course. Drugs rarely, if ever, go to Ely. And I understand these are factual questions, and I'm certainly not trying to talk myself into an evidentiary hearing. But that is the fact of the matter, that most drugs ordered by the Department of Corrections go to the central Las Vegas office. That wasn't some, again, smoke screen to hide what was going on here. The fact of the matter, there didn't need to be a smoke screen, because Alvogen wasn't looking, Cardinal Health didn't have an obligation to look, and had no obligation to preclude the Department of Corrections from buying these drugs.

I'll address -- and those arguments, of course, go to the statutory claims under 453 and also the false pretenses claim.

I'll touch on conversion and replevin just quickly. There's simply no property interest here. You don't need to get into the UCC to realize that Cardinal Health had purchased the drugs from the manufacturer with the rights to resell them. Nevada Department of Corrections obtained title to the drugs from Cardinal Health. If anybody has a property interest -- that's disputable. Nobody does. But if somebody does, it's Cardinal Health, not the manufacturer here.

They're buyer in the ordinary course argument

doesn't hold any water. I submit that's why they buried in a footnote. The Department of Corrections was a buyer in due course from Cardinal Health. There's nothing untoward about it. There was no bad faith either by Cardinal Health or the Nevada Department of Corrections. They simply purchased it in the ordinary course, like it does with any other drugs, and those drugs were shipped to Las Vegas's central repository.

I'll touch briefly on sovereign immunity with the understanding Your Honor will let me have a quick break to discuss that one issue with my client. But the State is entitled to sovereign immunity under 41.031 and 41.032. The application for TRO doesn't discuss 41.032(1), which applies to an officer exercising due care in the execution of a statute or regulation. Here, as I've already stated, the Department of Corrections was exercising due care, carrying out its statutory mandate to carry out a lawful sentence of death under 176.355. So they're entitled to statutory immunity under subsection (1) of .032. They're also entitled to discretionary immunity under subsection (2) because of discretionary function. The Department of Corrections and its employees exercised discretion, judgment, and choice in how to obtain the drugs, where to obtain the drugs, who has access to them, and how they are administered during a lawful lethal injection. Those are all covered by discretionary immunity. Again, a third-party stranger, a manufacturer, cannot overcome

discretionary immunity on those issues, either.

Now I want to spend a few minutes talking about irreparable harm. Alvogen claims it's suffering irreparable harm from being associated with an execution. Well, a couple points. First, I think they've made quite clear, they point to their Website, they point to other published statements, and they point to this litigation, they want nothing to do with the execution. In fact, their claim in this case is that somehow Nevada Department of Corrections stole lethal injection drugs. That's the essence of their argument. So I don't think any reasonable observer who believes that thinks they are somehow acquiescing and wanting to be associated with an execution. And to the extent they have any injury it is self inflicted. Again, they didn't even have a contract in place with Cardinal Health at the time to prevent the sale of drugs. So any reputational harm associated with selling to state drugs that can be used in a lethal injection was caused by their own lax controls that they like to tout about. If there's any negative association between midazolam and executions, that ship sailed long ago. The first use of midazolam in an execution was in 2013 by the State of Florida. Since then it's been used in approximately 32 executions in six states. Midazolam for better or worse is synonymous with lethal injections. If Alvogen didn't like that, they shouldn't have started making a generic brand of it.

Midazolam has been used frequently -- as frequently as last April by Alabama, who even since Alvogen started making a generic brand in April of 2017, there's been four executions using midazolam. So to the extent there's any connotation or connection between midazolam and lethal injection, that's already in the public mind. And so just like any other business disparagement case where you're claiming harm to your reputation, you have to show how this particular execution, Nevada's execution, is going to cause you some different, unique, or greater reputational harm that you haven't already suffered by producing a drug that is used frequently in lethal injection protocols.

Business disparagement cases, harm to business reputation, those are compensable by monetary damages, but don't constitute irreparable harm basis. And I think also their reliance on -- and I understand Mr. Bice tries to undercut this by saying remedies are cumulative, but you can't be on one hand arguing under NRS 41.700 that monetary damages aren't going to be enough, give me monetary damages, I'm not actually arguing the statutory claims under 453. Those are just predicates for my monetary claim. It's difficult to say to a court that, oh, I've got irreparable injury, money's not going to be enough but yet pay me. And we're talking about whether there's going to be a waiver of a cap or not. It's difficult to make those arguments simultaneously.

And I think I disagree with Mr. Bice that he definitely has a claim under 41.700. I think if you look at that statute the purpose of that statute is for people who have been administered a drug, victims of drugs, drug overdoses, not manufacturers. I think if we look at the legislative history there no one was concerned about drug makers when they enacted that statute. They were worried about people who bought drugs from a drug dealer, overdosed, and having a monetary claim. That's what I think the legislative history bears out with regard to that statute. So I don't think a manufacturer is within the class of persons the legislature was concerned about when it enacted 41.700.

And again, without a predicate claim under 453, they don't even have a claim under Chapter 41. As I pointed out, there's no private right of action. Only the Attorney General can seek an injunction or the Pharmacy Board, and there's statutory immunity. So you have to get through those hurdles before you even talk about Chapter 41, and I don't think we get there.

And finally we'll talk about the balance of the hardships. And I think this tilts strongly in favor of the State. As I've already said, there's no greater obligation, more solemn obligation that a state has than carrying out a capital sentence. None. I think we can all agree there's no higher issue in the justice system than that. And here we are

talking about stopping that process based upon vague notions by a third-party manufacturer that didn't have anything said directly to it or admitted directly to it. I think that would be -- it's hard to overstate what we're dealing with here, and I don't think a third-party manufacturer can get that done and overturn that state's interest. The U.S. Supreme Court in Bays versus Rees and others state that, "The state has a legitimate interest in carrying a death sentence in a timely manner."

Mr. Dozier has been on Death Row for 10 years. He has willingly submitted to his sentence for almost a year now, I think actually over a year, almost two years. He's willingly submitted to the judgment a jury of his peers imposed upon him. So I understand it's a little bit odd for the Department of Corrections to be talking about Mr. Dozier's interests, but I think that's something this Court should consider. Mr. Dozier has said goodbye to his relatives, he has prepared himself for tonight. By all accounts he wants to go forward this evening, and that interest also will be overturned by a third-party manufacturer, again, based upon speculative claims of irreparable harm.

And just back on that, because I want to make sure I've made my record on that, they've said, we've received bad press reports. Bad press reports. That's what we're talking about here. Bad press reports. They haven't identified one

client, one customer who said, if you go forward with this we're cutting off our contract. They've not identified one person, one entity who said, I'm not going to do business with. They haven't identified one person. It's completely speculative. Customers -- we might lose customers. They don't like bad press, and they don't want bad press that understands the fact that they were too inept to get a contract with Cardinal Health to prevent what they're now trying to undo. That's the bad press they don't want.

Victims also have an interest in a timely enforcement of a capital sentence. State and Federal Courts acknowledge that. I'll point to one case, Ledford versus Georgia Department of Corrections, a 2017 decision by the Eleventh Circuit victims here. Jeremiah Miller's family have waited a long time for the justice system to carry out the verdict that has been imposed here. That is a strong interest, as well, in addition to the State's and the interests of the public in carrying out a lawful sentence.

Of course, anytime a state's ability to carry out its statutory duty is enjoined it suffers irreparable harm. The U.S. Supreme Court has said. For example, the new Motor Vehicle Board case versus Orrin Fox, 1997, by Chief Justice Rehnquist. So the interests we're talking about here do not get any higher, Your Honor. I can't think of a greater state interest, I can't think of a greater public interest. In

addition to the time and effort and expenditure of money at the taxpayers' expense that has gone into this, I don't need to tell Your Honor how much effort in the Eighth Judicial District Court alone it has spent in overtime, staff preparation to have staff available to deal with the execution coming tonight. And those expenses are not unique to the Eighth JD. They go all the way up the court system. The Nevada Supreme Court has personnel, time, and effort invested in this, the Federal Courts do, the Ninth Circuit, the District Court, and the U.S. Supreme Court are all standing by, Your Honor, waiting to hear what this Court does. Because everyone wants to know whether the execution, the State's highest obligation in the justice system, whether that's going to go forward or not. And we're here talking about that over -- about stopping that over ambiguous and speculative reputational harm. I think that the balance of the hardships, the public interest isn't even close in this case, Your Honor.

So unless you have any other questions, I ask that the motion be denied.

THE COURT: All right. Mr. Smith, how long a break do you need to consult with your client?

MR. SMITH: I'd ask for 10 minutes, Your Honor.

THE COURT: So we'll take a 15-minute recess break so you can also go to the restroom after your consultation. I don't know if you need to turn your line off or if you're

going to go out of the room, but do that so we can't hear you talking. Okay?

MR. SMITH: Very good, Your Honor. Thank you.

THE COURT: Jill's going to meet you on this end.

(Court recessed at 10:08 a.m., until 10:17 a.m.)

THE COURT: Mr. Bice, did you email that to him?

MR. BICE: Your Honor, we've been having trouble getting this to work, and I've now got it, so --

THE COURT: I understand the wi-fi in this particular courtroom sucks because the vault is above you.

MR. BICE: So I now have got it up, and I'm trying to get it out to him right now, Your Honor. My apologies.

THE COURT: It's okay. I'm going to ask him if he got it when he comes back in. So if you will please make sure somebody on your staff sends it if you can't.

MR. BICE: I sent it, but I'm not sure it's going to go through.

(Pause in the proceedings)

MR. SMITH: Your Honor --

THE COURT: Yes?

MR. SMITH: Would it be okay if I impose upon the Court for about another five to ten minutes? We're still tracking down the necessary decision makers.

THE COURT: Absolutely.

MR. SMITH: Okay. I apologize to everybody, and I

appreciate the courtesy.

THE COURT: Don't worry about it. The air conditioning is working down here, so it's okay.

MR. SMITH: Luckily, it is up in Ely, too. So thank you.

(Court recessed at 10:20 a.m., until 10:27 a.m.

THE COURT: So, Mr. Smith, I asked Mr. Bice to send Judge Wilson's order to you. He is not certain whether it was able to transmit, because, unfortunately, the courtroom that I am currently assigned to primarily use has a lot of problems. Did you get it?

MR. SMITH: I did, yes, from Emily, Ms. Buchwald.

THE COURT: So do you want a minute to look at that before we continue?

MR. SMITH: I'm ready to continue, Your Honor. I'll look at it during the rebuttal.

THE COURT: All right. Thank you, Mr. Smith.

MR. SMITH: So I've had a chance to confer with the client. And to extent the cap is waivable -- and I've got concerns about whether the cap is waivable. That's something I'm going to have to actually research. But to the extent it is waivable we are comfortable with waiving it.

I also want to address something that's kind of implicit in Your Honor's question. I mean, the purpose of the cap was to protect the State from large damages awards.

THE COURT: You can't use cell phones to record things unless you have a media request. I will excuse from the courtroom unless you put it away. That was to you in the back row, Miss.

UNIDENTIFIED SPEAKER: I was just trying to get reception.

THE COURT: That person was not trying to get reception. That person was trying to film.

Okay. You may continue, Mr. Smith.

MR. SMITH: Thank you, Your Honor. I thought for a moment I was in trouble.

So the purpose of the damages cap, Your Honor, is the shield the State from large damages awards. So it's meant as a shield for the State. And so it's sort of the implicit idea that it can somehow -- that the cap itself can then be used as a sword as a reason to grant an injunction because of irreparable harm. I'm not sure that the cap can then be turned around and used as a shield against the State. These are things I've got to look into. I guess that's a long way of saying that to the extent the cap is -- Your Honor finds the cap waivable, we do waive it. And, again, that would be assuming that the Court doesn't find that the State is entitled to immunity under 41.032(1) and .032(2).

THE COURT: So, Mr. Smith, if I can summarize, you're not sure the cap is waivable. But if I think the cap

is waivable, you're willing to waive it on behalf of the State of Nevada.

MR. SMITH: That's the long and short of it, Your Honor.

THE COURT: I'm not going to make the decision today whether it's waivable or not, because it hasn't been briefed.

MR. SMITH: Understood, Your Honor.

THE COURT: Okay. All right. Thank you.

Anything else that you wanted to add, Mr. Smith, before I go to Mr. Bice and his team?

MR. SMITH: Not unless Your Honor has any questions for me.

THE COURT: No, I don't. How did the video conference work from your perspective?

MR. SMITH: I think it worked well. Really worked well.

THE COURT: Okay. Thank you.

Mr. Bice, you're up.

MR. BICE: Thank you, Your Honor.

Your Honor, this is not -- let me just try and deal with these in order. This is not a motion governed by the statute about an injunction against an execution. We are not seeking to enjoin the execution, we're not seeking to enjoin the death penalty in any fashion. What we are, however, seeking to do is an injunction against misuse of our product

that the State did not legitimately acquire. And with all due respect to Mr. Smith's arguments, I think he has confirmed just why the State did try to hide its acquisition of this drug, why it didn't want it disclosed, why it never disclosed it. And contrary to his arguments, I think the evidence will support with appropriate discovery that as soon as the State received those notices from us they affirmatively went out and purchased this product because they feared they wouldn't be able to do so. If they weren't trying to hide as Mr. Smith says, then why didn't they tell Cardinal that they had received these letters? Why didn't they show anybody these letters? Why didn't they tell Judge Wilson they had received these letters? Why didn't they tell anybody they had received these letters? They didn't because they wanted to hide the fact of why they were purchasing the drug, pure and simple.

And the State of Nevada comes in to the Court and says, well, you know, we don't have any duty to disclose. Well, the minute someone comes in and tell you, we didn't have a duty to disclose, they have confirmed that they were trying to hide it. And that's exactly what the law defines as a subterfuge. Mr. Smith's argument essentially boils down to this, Your Honor, the State of Nevada is above the law, the ends justifies the means. According to him, the State's theory is because if they break into our warehouse and steal it we are somehow a stranger to this proceeding and therefore

we don't have any ability to protect our product or our reputation or what our product is used for. And on that, Your Honor, we submit he is just wrong on the law.

As we point out, we aren't running away from any of our claims, contrary to his suggestion. What we're pointing out, however, is under the statute and the provisions that we have been citing, Your Honor, it is unlawful, and under the State law anyone has a claim for any injury over the unlawful use of a controlled substance. That is right in the statute. The statute is not restricted as Mr. Jones -- or, I'm sorry, Mr. Smith would now like to rewrite it to say somehow, well, it's only for people that unlawfully use drugs and then overdose on them. Not so. What this statute actually provides, Your Honor, 41.700, it's any unlawful use of a controlled substance and someone who is harmed thereby. And the question then becomes is the State's use unlawful, did it acquire it unlawfully. Well, the State statute tells us that anyone who acquires a controlled substance by subterfuge has done so unlawfully.

Whether or not there is a private right of action under 453.331 is irrelevant to that analysis. Or whether or not the State is, quote, "liable for money damages" under that provision is irrelevant. The question is was it unlawful to acquire it in that fashion. And again, Your Honor, we're here on a temporary restraining order, and we're here on a

temporary restraining order precisely because the State attempted and desired to keep what it had done a secret. And only because Judge Wilson -- the irony here, Your Honor, is the ACLU asked for this information back in June, and the State told the ACLU, well, we can't get you that information for 60 days. Judge Wilson ordered it produced, and they produced it in a matter of -- I think it was a matter of hours after Judge Wilson ordered it produced. So this story from the State that they couldn't produce it wasn't accurate, they wanted to hide it. Otherwise, they would have just simply acknowledged to everyone, here's our letters, we've received this, but we don't believe that this is in any way binding on us. And had they been forthright with everyone, including us, we could have been here, we could have had a full evidentiary hearing long before today. But the State didn't want to do that. And I would submit that is evidence in the typical case of consciousness of wrongdoing. They didn't want to do that, so they kept it a secret as long as they could until Judge Wilson forced their hand. That right there, Your Honor, in terms of the balancing of hardships tips decidely in our favor.

Now, with all due respect to the State invoking the interest of victims and the like, again, we could have had an evidentiary hearing on this long before today, because the State had purchased this product, as they now admit, clear

back in May after they'd received notice. And I do believe, Your Honor, that discovery will show that they received that notice and that's why they went out and purchased it, is because they feared that they weren't going to be able to purchase it in the future, so they acted so that they could acquire it and then keep that acquisition concealed from us. Again, Your Honor, had the State simply forthrightly said what was going on, told everyone the actual facts and events, we would have had a preliminary injunction hearing, there would have been an evidentiary hearing, and all of this could have been resolved. So for the State to now invoke the fact that this is -- they've expended these resources and relying upon the interests of victims as somehow justifying saying that the balancing of hardship tips in their favor I think is just flat wrong. The State created this situation through it's lack of candor and cannot now enlist the interests of other people to somehow diminish their involvement in this.

So that met, Your Honor, turns us simply to -- another point he made is, you know, we don't -- he characterized these drugs as lethal injection drugs. They are absolutely not lethal injection drugs. And that's the point. This is a sedative that has an FDA approval for a specific purpose. And this is not one of those purposes. They just plan on misusing it, to our detriment.

That's why, Your Honor, we're here on a TRO. We

believe we have maintained, we have shown you that their acquisition of this drug was by subterfuge, they admit that they received the notice. Mr. Smith's silence about whether or not they disclosed that to Cardinal or to anyone else I think speaks volumes. It's a confession that they did not -- that they knew they had this information, they knew they were not to be acquiring it for this purpose, they kept it a secret so that they could acquire it, so that they could end-run our restrictions. That is the very definition of subterfuge. And I submit, Your Honor, that the Nevada Attorney General's Office would prosecute criminally any doctor or other private citizen that engaged in this very conduct of trying to acquire drugs that you know and you have been warned you are not to acquire for this purpose. The State would prosecute a private citizen on this. And, contrary to the State's belief, the State is just as much bound to the law as is a private citizen. And the State can no more violate the law than a private citizen can violate the law.

And now to argue that, well, this execution is planned for tonight and that there's a warrant by Judge Togliatti, as the Court well knows, Judge Togliatti is in this building after we have --

THE COURT: Well, not today. Not today.

MR. BICE: Not today. But after we have an actual evidentiary hearing, which we believe we are entitled to, if

the Court disagrees with us, Judge Togliatti can sign another warrant. It's not that difficult of a process. Again, the urgency here is of the State's own making. The State is not immune from this suit, because this is not a policy. They are not exercising judgment here. They acquired this product in an illegitimate means. Again, Your Honor, to accept his argument the Court would have to say that even if the State of Nevada broke into our warehouse, took vials of this drug, stealing it from us, that there's nothing that the Court could do about their use of it. Because this is being used in an execution, they claim that the Court has no authority now to enter any form of relief to my client. That is simply not the law and not the case.

Then we turn briefly, Your Honor, to their argument that there's not sufficient evidence at this point of irreparable harm. That again, Your Honor, is self serving by the State. Mr. Smith says, well, where's the evidence of clients not going to do business with you, where's any of that evidence. Mr. Smith's client kept this a secret from us until Saturday. We don't know why the -- it's like a defamation. You don't know why the phone doesn't ring. So to say that we need to rock-solid evidence in front of you of each somehow person that's not going to do business with us because of the State's antics is simply not a valid basis for denying us injunctive relief.

Your Honor, we actually pay our vendors, like Cardinal, additional money not to allow this product to be used for this purpose. We obviously recognize that it's very important to our reputation and to our business and to our business goodwill that we protect this product from being used for that purpose, because we actually expend money and resources to do it. The client is expending money and resources with lawyers to be here today to protect itself and protect its reputation. So it obviously has a very good reason for believing that the State's misuse of its product in this fashion will harm it, will harm it's reputation, and will harm its goodwill. And on a TRO to come in any say because -- the State to brag that, we've kept it a secret for so long, Your Honor, but they don't have the evidence in front of you today is simply disingenuous. The State is asking the Court to reward it for its subterfuge, to reward it for its concealment, and to reward it for its lack of candor.

And as Judge Wilson's order makes clear, they were -- they did not want this information out because they specifically feared that manufacturers who found out that they had acquired this drug through in appropriate means would object to that. What possible State interest is there, Your Honor, in the State concealing information so that citizens don't exercise their First Amendment right to seek redress in the courts? There is none. But the State is here bragging

that that's what it did. It's bragging about the fact that it sought to deprive my client of its First Amendment right to come into the courtroom and seek redress for this misuse. That right there, Your Honor, tells you where the equities tip in this case.

At the end of the day, Your Honor, this is reputational harm, it is a misuse of the product. My client is entitled to protect its interests, it's entitled to protect against this, and discovery and the evidence, Your Honor, we maintain is going to show that they got those letters and they went out and acquired this product because -- specifically because they wanted to get around any restrictions.

And to address his point that, well, the contract wasn't signed with Cardinal until the end of May, well, first of all let's be clear about something. That is something -- the contract simply memorializes what our prior understanding was with Cardinal and we were getting that into place. But that doesn't mean that we don't have rights against Cardinal and didn't have rights against Cardinal at that point in time just like we have them against the State now for circumventing those restrictions.

And, by the way, the State certainly has no standing to claim whether or not our arrangement and our understanding with Cardinal was enforceable at that time when they set out to circumvent it, Your Honor.

Now I'll turn it over to my colleague, Your Honor. But, again, we ask the Court very simply and straightforward. We are not seeking to enjoin any execution. The State is free to execute in accordance with the law any inmate that is subject to that penalty. But what the State is not free to do is to go around secretly, circumventing my client's rights, purchasing this drug, and then concealing it as long as they could so that they could violate my client's rights when they knew full well that they were not to acquire it for this end purpose. And I thank the Court for its time.

THE COURT: Thank you, Mr. Bice.

Before I hear from the rest of your team I have one more question for Mr. Smith. My Post-It note got buried.

Do you recall, Mr. Smith, if this particular drug was in the cocktail that was litigated before Judge Togliatti?

MR. SMITH: I can definitively say it was not, Your Honor. The cocktail that was litigated in front of Judge Togliatti involved diazepam. Given the timing of the Nevada Supreme Court oral argument following the evidentiary hearing, the diazepam expired, and that's why the Department of Corrections had to substitute midazolam.

THE COURT: Okay. Thank you.

Now the last argument. We are now on the "Our Mission" sign. Is that what you want to show me in Ely? I liked looking at Mr. Smith better. Thanks. All right.

MR. SCHULER: Thank you, Your Honor.

With regard to the McKesson case we're going to supplement the record with regard to the allegations that were made by the State that that judge was removed, et cetera, et cetera. That is true. However, what the State did not report is that McKesson went in and got a second TRO from a second Arkansas judge. That was not vacated by the state's Supreme Court. The case ended when the vecuronium bromide that was the subject of that lawsuit expired just like the diazepam that Mr. Smith just noted. So that case is good law, as is the Tempurpedic case. I'll get to that in a second.

Now, I wanted to address a couple of the statutory immunity sections that were addressed by Mr. Smith. One of them was 453.281(c)(3). Now, what that provides, Your Honor, is that there's immunity with regard to those sections of 453 for the lawful performance of a state official in their duties. But the very predicate for our arguments is that these are unlawful by virtue of the actions taken by the State and the other defendants.

The other thing I'll note is that it only applies to state, county, or municipal officers. What I addressed to you earlier today is the attending physician, who is not an officer of any municipality or state that I'm aware of.

The third thing I'll note is that, again, our argument is that the performance of -- even it did apply, it's

not lawful and therefore wouldn't apply.

He also cited a statute that indicates that a pharmacy in a prison system can have a dangerous drug. Well, again, the pharmacy is not the attending physician. And that's the claim that we addressed here this morning. In addition, it says "dangerous substance," it doesn't say "controlled substance." And as the Court is well aware, those are two different terms and the Court has an obligation to construe both statutes so that they're -- give meaning to both statutes. And there are different terms, and therefore I don't think that the statute that Mr. Smith cites has any applicability to the claim against John Doe I, who's the attending physician, who would not qualify for any of those [unintelligible].

Now, on the replevin case, even if McKesson, which we think is the most apt circumstances -- as I said, there was a second TRO, so I don't think the fact that the judge -- the first judge was removed has anything to do with the merits -- but the Tempurpedic case, which Counsel didn't address, likewise says -- he says, well, we got it from Cardinal. But we already addressed that argument. Tempurpedic was an action in replevin against a fifth-down-the-line purchaser. But the court found that because they had constructive notice that they couldn't acquire the product in the manner that they did, they could not acquire good title.

And let's recall how this all started. April 20th, 2018, my client unambiguously told the State, you may not -- we won't sell this drug to you directly and we have controls in place that we direct our intermediaries not to sell it to you, as well, and you may not use, we object to your using it for the purpose of execution. So they were aware. And if you have it, give it back to us and we, not Cardinal, will issue you a full refund. That is an indication of superior ownership rights of which they were on notice. And under the UCC they cannot acquire the title Mr. Smith indicates that they think they acquired. That's the Tempurpedic case.

Lastly, as my colleague indicated, the contract was effective May 28th. Mr. Smith I think acknowledges that once that was effective that he could not obtain good title. But remember, the payment -- which, remember contracts, you have to have consideration -- offer, acceptance, consideration to have a contract. The consideration was not to be paid until --

THE COURT: We know about contracts in Business Court, Counsel. You don't have to tell us.

MR. SCHULER: So in June the payments were to be made. That's after the May 28th restriction was put into place. So that -- we believe they were on notice of our superior ownership rights, they attempted to take title in violation of those rights, and under the doctrine of replevin

we should be able to get it back.

THE COURT: Thank you.

Is there anything else to be submitted? We're going to be in recess until 11:05. I have a conference call at 11:00 o'clock on another case, and I have to go finalize my notes before I tell you what my ruling is.

(Court recessed at 10:49 a.m., until 11:05 a.m.)

THE COURT: Back to Business Court.

Where's Jordan Smith? I need Ely State Prison.

Jordan, are you still there? Sorry for the delay, guys.

MR. SMITH: No problem, Your Honor. We're here.

THE COURT: First I want to compliment counsel on the arguments that you made. I know that this was set on very short notice, since I was reassigned the case yesterday afternoon.

First, the determination that I'm making today and the issues that have been presented to the Court are not an issue of a stay of an execution. The issue presented here is the plaintiff's right to decide not to do business with someone, including the government, especially if there's a fear of misuse of their product.

The plaintiff has a reasonable probability of success of establishing the State knew its intended use of midazolam was not one approved by the FDA.

Given the April letter, plaintiff has a reasonable probability of success in establishing the State was not a BFP.

NRS 41.700 does not preclude an action for damages by the plaintiff. The plaintiff has established a reasonable probability that it will suffer damages to its business reputation which will impact investor relations and customer relations.

The plaintiff has a reasonable probability of establishing claims under replevin and NRS 41.700.

It is unclear to the Court at this time whether the State would have immunity for any monetary damages for the claims being made by plaintiff in this case. If the State is permitted to use the midazolam manufactured by plaintiff, plaintiff has shown a reasonable probability it will suffer irreparable damages, including damages to its business reputation.

The State is therefore restrained and enjoined from using or disposing of the midazolam manufactured by plaintiff pending further order of this Court.

I am not making any order with relationship to the cisatracurium manufactured by Mr. Williams's client, Sandoz, Inc., because that product was part of the original cocktail that was dealt with by Judge Togliatti.

Mr. Smith, do you want me to require a bond?

MR. SMITH: Yes, Your Honor, we would. Given the expenses of training staff, preparation, overtime that's required to prepare for these things, if your injunction's overturned, all of that will have to be repeated at substantial expense, and so I would ask for a bond anywhere between $100,000 and $200,000, Your Honor.

THE COURT: Mr. Bice, do you want to speak to the bond?

MR. BICE: Yes, Your Honor. We would oppose on that amount, Your Honor. I'll explain why. We understand that there has to be a bond, but, as I indicated before and I don't believe it's seriously disputed, that the State has known about this and that the need for the urgency on this is because the State did not disclose and circumvented our restrictions. Had the State been candid with everyone and just admitted this is what it had done, we could have had a hearing, a full evidentiary hearing, there would be no need for a temporary restraining order. So that expense that is associated with is not a product of my client's actions, it's a product of the State's actions. I believe that a nominal bond not to exceed $5,000 would be the appropriate bond on a matter of this nature, Your Honor.

THE COURT: I'm going to set the bond in the amount of $10,000.

Mr. Smith, Mr. Bice, do you wish to do any discovery

prior to me setting a preliminary injunction hearing?

MR. BICE: Yes, Your Honor.

THE COURT: What discovery do you want to do?

MR. SMITH: Your Honor, may I be heard on that really quick, Your Honor? We would ask Your Honor to treat your TRO as a preliminary injunction. Given the urgency of this, we'd like to take an emergency appeal to the Nevada Supreme Court and try to get that done --

THE COURT: No, I'm not going to treat it as a preliminary injunction. There are different burdens on a TRO and a preliminary injunction, and typically on a preliminary injunction I hear actual testimony and evidence.

So do you want to do any discovery before I schedule the preliminary injunction hearing?

MR. BICE: And we do, Your Honor.

THE COURT: What discovery would you like to do, Mr. Bice?

MR. BICE: We would like to obtain documentation, Your Honor, including internal emails, text messages, and other forms of communication between anyone at the State that was involved in this decision, who received our correspondence, and then who made the activities surrounding the acquisition of the drugs from Cardinal. And then we would like the depositions of those people, Your Honor.

THE COURT: Mr. Smith, how long will it take you to

identify that information and produce it and make those witnesses available for deposition?

MR. SMITH: I don't have a time frame, Your Honor, especially given the circumstances and considering what from an appellate standpoint we might be doing before the warrant expires at the end of this week. It certainly can't be done this week. I've got to look and do some investigation on my own and see how many people we're talking about and what that might entail.

THE COURT: All right. In addition to what Mr. Bice has requested, which is essentially ESI related to the letters and the acquisition of the midazolam is there any discovery you would like to do, Mr. Smith, before I schedule the preliminary injunction hearing?

MR. SMITH: Yes, Your Honor. We'd like to conduct substantial discovery regarding Alvogen's reputation. They're claiming damage to reputation, so we're going to do significant discovery into what that reputation entails with various industry actors, with regard to their knowledge of their use of midazolam in other executions and in other industries, for example, palliative care or assisted suicide, things of that nature that their drugs are used in that may bear upon their reputation. So there's going to be significant discovery into their reputation that's going to need to be had.

THE COURT: So you want to do all that before I schedule a preliminary injunction hearing?

MR. SMITH: Yes, Your Honor, we would.

THE COURT: Okay. So it sounds to me like that's going to be about 120 days' worth of discovery between what the two of you want to do. Since this was a temporary restraining order that was issued with notice after the opportunity of both sides to be heard, I can extend the effectiveness of this TRO through the end of the preliminary injunction hearing. But that's going to be several months given the discovery that the two of you have advised me you want to do.

MR. SMITH: And again, Your Honor, I understand that. I would reiterate my request to treat this as a preliminary injunction so we can take an appeal. Given the gravity of the interests at stake here -- Your Honor didn't make a ruling on the balance of the State interests. Given what we're talking about, what we're dealing with here, we think an immediate appeal is appropriate in this case, Your Honor. So I would urge you to allow us to do that.

THE COURT: So, Mr. Smith, the reason I won't is because there is a different standard on a preliminary injunction than a TRO. Typically I hear evidence and witnesses at a preliminary injunction hearing. I'm happy to do that on a expedited basis. But the fact that you have both

asked for discovery and the discovery you've asked for is rather extensive, I can't schedule an immediate hearing because of the discovery you want to do. If you tell me you want to do some more limited discovery before I do the --

MR. SMITH: Well, Your Honor, I --

THE COURT: Wait. You've got to let me finish, Mr. Smith. I know because you're on video you can't see that I'm still talking.

MR. SMITH: I apologize.

THE COURT: But, you know, given the amount of discovery that you told me you want to do, I can't make you do it faster than 120 days unless you think there's some miracle that's going to occur identifying all those industry experts and getting depositions.

MR. SMITH: Your Honor, I understand. But I don't think it's accurate to blame this delay upon the State here. The State -- the delay for the preliminary injunction hearing isn't because of the discovery the State wants to seek, it's the nature of the claims that have been brought. So if the State doesn't do the adequate discovery to defend itself against reputational claims, then I don't see the scope of discovery being the State's fault in when the preliminary injunction gets set. It's the nature of the claims that plaintiff has brought.

THE COURT: I certainly understand that. And if we

were talking about advancing the trial to the date of the preliminary injunction hearing, I would absolutely agree with you. But I don't think it's appropriate under the circumstances here to advance the trial to the day of the preliminary injunction. So if you guys want to rethink and can give me a better timeline on what discovery you really want to do before a preliminary injunction hearing, I can schedule it as early as next week. I just need you to tell me how long it's going to take to do what you need to do before you're ready.

You want a minute to talk to your people? Your people want to talk to you.

So I'm going to step out of the room. Everybody talk among yourselves quietly.

Let me know when you've finished, Mr. Smith.

MR. SMITH: Well, Your Honor, just to be clear, I don't need to confer with anybody. I think the scope of discovery I've set is unavoidable. So if Mr. Bice needs to confer, I understand, but from our standpoint I don't think that there's any avoiding the discovery that needs to be done here given the nature of the claims.

THE COURT: Okay. Then I'm going to set a status check in 60 days to check on how you've done on your discovery. Since there is not going to at this point be an answer and I'm not scheduling a Rule 16, I'm going to let you

manage the limited discovery that has been identified for purposes of the preliminary injunction on your own.

If there is motion to dismiss practice that needs to occur on a parallel track, I will be happy to entertain that. If the State answers and there is a Rule 16 conference that is required, we will do that on a parallel track, as well.

MR. BICE: Your Honor, there's one additional -- I'd like to add on the --

THE COURT: Mr. Smith, did you have something else?

MR. SMITH: I'll wait for Mr. Bice. It's fine.

THE COURT: Okay. Mr. Bice.

MR. BICE: Yes. Your Honor, we would like discovery surrounding John Doe I, the attending physician, because that's also part of our claim. We don't know who that is. And then we would obviously want the ESI-related discovery concerning that individual, as well as a deposition.

THE COURT: Okay.

MR. BICE: Thank you.

MR. SMITH: We obviously will have discovery disputes on that, I'm sure.

There's a point I wanted to raise, Your Honor, just so I don't anybody unaware. I need to do some assessing based upon my notes of the Court's ruling. There may be an argument to be made. Just so everyone's aware that you know -- you're characterizing it as a TRO, but it does constitute a

preliminary injunction. And if that's the case, I think that order will be appealable. So that's just something we'll be looking into. I want to take the Court or the parties unaware on that front.

THE COURT: Mr. Smith, it won't bother me if you go to the Supreme Court on a writ. It doesn't bother me. I'm used to writs being taken. It's one of those things I've become used to as part of my Business Court practice. So please feel free to exercise any remedies that you think are appropriate.

I am handwriting in on the draft TRO that Mr. Bice provided that the TRO will remain in effect pending the preliminary injunction hearing completion, because that was not included in here. And since I am setting a status check in 60 days, rather than setting the hearing now given the discovery that has been requested by the parties, I cannot fill in the blanks that Mr. Bice had given me for the preliminary injunction.

All right. Anything else? Mr. Bice?

MR. BICE: So we just cross those out, Your Honor?

THE COURT: I am working on it, Mr. Bice.

MR. BICE: Understood.

THE COURT: Dulce, what's that date in 60 days?

THE CLERK: Will it be oral or chambers?

THE COURT: Oral.

THE CLERK: That'll be September 10th at 9:00 a.m.

THE COURT: And I would really like you guys to give me a status report on the discovery at that time so I can make a determination as to where to place you on my calendar.

MR. BICE: Understood, Your Honor.

THE COURT: Anything else, Mr. Smith?

MR. SMITH: No, Your Honor.

THE COURT: All right. Have a nice day. Thank you.

MR. BICE: Thank you, Your Honor.

THE PROCEEDINGS CONCLUDED AT 11:17 A.M.

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
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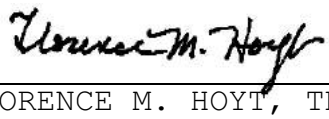

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7/12/18

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DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC., Plaintiff, v. STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTION; JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity; Defendants.	Case No.: A-18-777312-B Dept. No.: XI **NOTICE OF ENTRY OF TEMPORARY RESTRAINING ORDER** Date of Hearing: July 11, 2018 Time of Hearing: 9:00 a.m.

PLEASE TAKE NOTICE that a Temporary Restraining Order was entered in the above-captioned matter on July 11, 2018, a true and correct copy of which is attached hereto.

DATED this 11th day of July, 2018.

PISANELLI BICE PLLC

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 11th day of July, 2018, I caused to be served via the Court's e-filing/e-service system and by email a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF TEMPORARY RESTRAINING ORDER** to the following:

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC.,

Plaintiff,

v.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity;

IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity;

And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

Case No.: A-18-777312-B

Dept. No.: XXVII

~~[PROPOSED]~~ **TEMPORARY RESTRAINING ORDER**

Date of Hearing:

Time of Hearing:

This matter having come before the Court on Plaintiff's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction (the "Application") on July 10, 2018. James J. Pisanelli, Esq. and Todd L. Bice, Esq. of the law firm PISANELLI BICE PLLC and Kenneth Schuler, Esq. and Michael Faris, Esq. of the law firm LATHAM & WATKINS LLP (*pro hac vice forthcoming*), appeared on behalf of Alvogen, Inc. ("Alvogen").

Having considered the papers filed on behalf of Plaintiff, and good cause appearing therefore, THE COURT HEREBY FINDS THAT:

1. Alvogen has met its burden for a Temporary Restraining Order against the State of Nevada, Nevada Department of Corrections ("NDOC"), James Dzurenda ("Dzurenda"), Ihsan Azzam ("Azzam"), and John Doe (collectively the "Defendants").

2. Alvogen has met its burden under NRCP 65(b) for issuance of a Temporary Restraining Order against the Defendants pending a hearing on a preliminary injunction as the facts set forth in the Applications demonstrated that a Temporary Restraining Order is necessary to preserve the status quo and prevent irreparable harm that would occur if Defendants misuse Alvogen's product midazolam in the execution of Scott Raymond Dozier ("Dozier"), scheduled for July 11, 2018 at 8:00 p.m.

3. Alvogen will suffer irreparable harm to its reputation as a company that produces life-enhancing and life-saving drugs if Defendants are allowed to misuse its product midazolam.

THEREFORE, IT IS HEREBY ORDERED THAT:

A. Alvogen's Application for a Temporary Restraining Order is GRANTED.

B. The Court further orders that the Defendants are prohibited and enjoined from using Alvogen's product midazolam in capital punishment until further order of this Court.

C. The Court further orders that security is set at $ 10,000.

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D. The TRO will remain in effect pending the preliminary injunction hearing completion

E. A hearing on Alvogen's Motion for Preliminary Injunction is scheduled for the 10 day of Sept, 2018, at the hour of 9 o'clock a .m. in Department 4 of the Eighth Judicial District Court. Status check related to dates of discovery in preparation for the preliminary injunction hearing

IT IS SO ORDERED.

DATE: 11 July HOUR: 11:30am

DISTRICT COURT JUDGE

Respectfully submitted:

PISANELLI BICE PLLC

By: _____
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RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. SCOTT RAYMOND DOZIER, Defendant.	CASE NO.: 05C215039 DEPT. IX

BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE

WEDNESDAY, JULY 11, 2018

RECORDER'S ROUGH DRAFT TRANSCRIPT OF HEARING CONFERENCE CALL

APPEARANCES:

For the State:	JONATHAN VANBOSKERCK, ESQ. Chief Deputy District Attorney JORDAN T. SMITH, ESQ. Assistant Solicitor General - NV AG ANN M. McDERMOTT, ESQ. Bureau Chief - NV AG
For the Defendant:	THOMAS A. ERICSSON, ESQ. Oronoz & Ericsson DAVID ANTHONY, ESQ. Assistant Federal Public Defender

RECORDED BY: YVETTE SISON, COURT RECORDER

Las Vegas, NV, Wednesday, July 11, 2018

[Hearing commenced at 1:14 p.m.]

THE COURT: Hello. Good afternoon.

MR. SMITH: Hello.

THE COURT: Mr. Smith?

MR. SMITH: Yes. I'm here with Ann McDermott and with us is Thom Ericsson also. We're in a conference room at Ely State Prison.

THE COURT: Okay. Mr. Anthony is on the phone?

MR. ANTHONY: Yes, Your Honor.

THE COURT: Yes?

MR. ANTHONY: This is David Anthony. Yes, Your Honor.

THE COURT: Okay. Is there anyone else we should have here?

MR. SMITH: Jonathan Vanboskerck I believe was going to join us, Your Honor.

THE COURT: From Las Vegas or calling in?

MR. SMITH: Yes.

MS. McDERMOTT: Calling in.

THE COURT: Not Mr. Pesci from Ely State Prison?

MR. SMITH: I don't believe at all.

THE COURT: Okay.

[Pause in the proceedings]

MR. VANBOSKERCK: Hello.

THE COURT: Hello.

MR. VANBOSKERCK: Hello. Sorry. This is Jonathan Vanboskerck. Sorry to make everyone wait. I didn't see the email come through. I apologize.

THE COURT: Okay. So if everybody could again state in on the line.

MR. SMITH: This is Jordan Smith for the Nevada Department of Corrections.

MS. McDERMOTT: Ann McDermott, Nevada Department of Corrections.

MR. ERICSSON: Thom Ericsson here.

MR. ANTHONY: David Anthony from the Federal Public Defender's Office for Mr. Dozier.

MR. VANBOSKERCK: Jonathan Vanboskerck with the DA's office.

THE COURT: Okay. So this is Jennifer Togliatti. I asked my law clerk to send an email to attorneys for NDOC to advise me if after the ruling of Judge Gonzalez which was widely reported in the media change anything from my perspective as far as being, you know, on stand-by to let us know if it wasn't going forward; meaning us, being my department. And I was advised that the Department of Corrections requested this phone conference, so here it is.

MR. SMITH: Yes, Your Honor. This is Jordan Smith on behalf of Nevada Department of Corrections. So, Your Honor is correct that this morning Judge Gonzalez' temporary restraining order enjoining the corrections from using Midazolam in the lethal -- in lethal injections

on Dozier's execution [indiscernible] by further order of the Court. Because of that ruling, now NDOC is [indiscernible] two Court orders.

I have Your Honor's order of execution requiring that Department of Corrections to go forward with an execution some time during the week [indiscernible] while simultaneously having an order from Judge Gonzalez that precludes us from using Midazolam which is part of the -- the protocol and part of the three drugs that were going to be used.

Based upon the advice of medical folks here, they do not support going forward at this time with just Fentanyl and Cisatracurium. And so to avoid being in contempt of your order or for anything of that nature because we don't have the ability to carry out an execution this week, we ask that you lift or vacate your order of execution. We'll note that the execution warrant itself contemplates this. I mean, as I believe the agreement between the District Attorney's Office and Mr. Dozier was that he would suspend his habeas provided we have the -- that NDOC has the ability to carry it out.

NDOC no longer has the ability to carry it out and so I presume, I'll Mr. Ericsson speak to that, but I presume they want to reinstate habeas given the circumstances. But for NDOC's purposes, we would ask Your Honor to lift and vacate the order of execution requiring the execution to proceed this week.

THE COURT: So as opposed to -- I think we had talked about the language of the pre-prepared order was more of a stay language, if I recall correctly. I mean I have it here. Hold on one moment. And you're

asking for some different order, you mean phrased differently or would that suffice until further order of the Court?

MR. SMITH: I think perhaps temporarily that could suffice, Your Honor, I guess. That order was drafted by Mr. Vanboskerck sort of contemplating if Mr. Dozier would be the one changing his mind. I think at that time no one was really foreseeing this circumstance. I know I certainly wasn't. And so I think we would request -- I mean unless there's a logistical issue with Your Honor, we would request that the Court vacate the order -- vacate the order instead of just staying the order.

There's going to be significant proceedings going on in front of Judge Gonzalez and likely appeals after that. I don't think a stay personally in light of 176.415, I'm not sure a stay is the language that we would like to use in these circumstances. We would prefer vacating or lifting the order of execution.

THE COURT: Okay. So starting with Mr. Ericsson; any comments?

MR. ERICSSON: I have not spoken with Dozier yet about any of this. I arrived at the prison here approximately 30 minutes ago. I'm going to be seeing him here I would imagine in the next hour or so.

I am certainly not objecting to whatever language you grant that the Department of Corrections decides as far as the order at this point. I do agree that it should not be -- execution should not go forward under these circumstances.

THE COURT: So what's the DA's position on the order and

the language and the circumstances?

MR. VANBOSKERCK: Honestly what I'm trying to do right now is look up the -- the statute to see what language is used in the statute. My preference would be that we track, you know, if the statute says stay, you know, track the language of the statute that contemplates if the Court knows of a legal reason why the execution should not go forward that would be request.

THE COURT: Well, on page 3 of your proposed stay order, it says, lines 3 and 4, whereas petitioner has now expressed a clear and unambiguous statement that he desires to pursue habeas relief. And I think what Mr. Smith was alluding to earlier was that the agreement between the State and the Defendant was that he could pursue habeas relief in the event the State -- I mean, the Department of Corrections was unable to go forward.

So they now said they're unable to go forward and the terms of the stipulation are that he would be allowed to pursue habeas relief. And so perhaps the stay in light of the -- I mean that the entire hour and some odd long phone conversation we had last time was all about the stipulation between the parties and me just being me the enforcer of the stipulation.

Now -- now it appears that the stipulation cannot be affected and the terms of the stipulation was that if it couldn't be affected, he would then pursue habeas. He can always give that back up, you know, give that right back up and reenter the stipulation or adjust the stipulation or amend it or do whatever he wants to. My question would

be what is the problem with signing the stay for today, this minute, having it filed, and then entering an order vacating 'cause it's not going to happen by the end of the week according to the Department of Corrections.

MR. VANBOSKERCK: I have no objection to you staying the order in terms of whether Mr. Dozier wants to withdraw; that's more of a question for Mr. Ericsson.

THE COURT: Right. And he's not probably going to be able to do that, you know, immediately.

MR. VANBOSKERCK: Yeah.

THE COURT: And so my thought was enter a stay before 8 p.m. and then the order vacating the request could be addressed, you know, in writing that you can all look at in advance and have, you know, no rush between now and 5 p.m. or whatever to -- to approve language that you may or may not agree to.

MR. SMITH: Your Honor, this is -- this is Jordan Smith. Given the timing and logistical issues, I think that would be fine entering a stay for purposes of today and then addressing vacating or lifting later is fine. I guess my concern is, you know, all of the parties all agree and acknowledge that the stay you enter today would give NDOC out from under your order this week. I guess I don't want to be in a position whether there's an order in place that we didn't comply with or carry out execution this week. And so as long as everyone agrees to the effect of this that you're entering, we [indiscernible] --

THE COURT: [indiscernible]

MR. SMITH: Yes.

THE COURT: What I'm going to do -- I mean the last sentence of the order clearly stays the execution. I'll have it filed today by the Clerk of the Court and then you can certainly -- an order vacating and this -- you know, be heard on any language [indiscernible] if you have any and have a little time to think about it. But -- but I think it's -- you know, the reason we're at this point is because of the stipulation. And the stipulation was clear and repeatedly stated on the record a hundred thousand times that if the execution could not be effected, he would, you know, be entitled to pursue a habeas relief. If something changes because he then acquires a new ability to go forward, he can again seek to suspend that and pursue the execution.

I see zero downside of signing the -- the order of stay, letting you look over vacate order and if you all agree I sign off on it and then you're back to doing what you're doing in front of Judge Gonzalez [indiscernible] --

MR. VANBOSKERCK: Judge, Jonathan Vanboskerck for the DA's Office. Just one request; I have no objection to the procedure you're proposing. Just one request as to the order itself; on page 3, lines 3 and 4, it says, whereas Petitioner has now expressed a clear and unambiguous statement that he desires to pursue habeas relief instead of submitting to his sentence and; I don't see that's factually incorrect so you score that out.

THE COURT: Okay. So what I --

MR. VANBOSKERCK: 'Cause he's not asking.

THE COURT: -- is being proposed -- I'm sure -- what's being proposed is lines 3 and 4 of page 3 be redacted so that it simply reads, whereas on June 19th, 2018 this Court entered a third supplemental warrant of execution and a third supplemental order of execution and now therefore, it is hereby ordered pursuant to NRS 176.486, NRS 176.487 and NRS 176.488 that Petitioner's execution is stayed and Petitioner may pursue habeas relief. And take out "that".

If I sign this, then if there's anything else that you want to include -- you know, I just want to have something on file before 8 o'clock. And then you can look at whatever language you think appropriately addresses this circumstance and then order vacating the order what I'm thinking. Does anyone object to taking out lines 3 and 4 of page 3 and changing the word "so that" to "and" on line 6?

MR. SMITH: This is Jordan Smith, Your Honor. I have no objection to those changes. I guess my concern is I don't want it as though -- I don't want to seem as though that NDOC is requesting a quote on quote, stay of the execution. I mean our request is vacate and lift the order. You know, I think stay under some of the statute has some consequences and I don't it to be seen as [indiscernible] he is doing. But I understand given the exigency of the circumstances, this is -- this is the procedure that we are going with.

THE COURT: Well, if you -- I -- I would expect that the order vacating my previous order would address the circumstances more specifically in that, you know, the Department of Corrections in light of the Court order from Department 11 -- I mean basically her Court order

may be stipulation between the parties actually impossible for today. So I don't -- I'm sure if given a little quiet reflection, one of you can come up with some language that -- that kind of memorializes what happened today, not by Mr. Dozier or NDOC's preference, but just by the Court's ruling and then put that into the order vacating.

MR. SMITH: [indiscernible]

THE COURT: So I could -- let's see -- I mean it's clear he's not asking for the stay. You're not asking for the stay, but the stay is necessary based upon the terms of the stipulation. So I would think you could put that language that, you know, the factual recitation in the order vacating of why it is that this is being vacated.

MR. SMITH: This is Jordan Smith, Your Honor. I think you put it correctly that I think is -- so I think that that's right, so I will -- I will endeavor to do that in the proposed order around to the parties.

THE COURT: Okay. So as far as Mr. Ericsson, Mr. Anthony, Mr. Smith, Jonathan, you have no problem taking out 3 and 4, and "so that", and --

MR. ANTHONY: Your Honor --

THE COURT: [indiscernible]

MR. ANTHONY: -- Your Honor --

THE COURT: -- changing that to "and"?

MR. ANTHONY: -- Your Honor, this is David Anthony. No objection [indiscernible] to the proposal.

MR. ERICSSON: And this is Thom Ericsson, I agree. No objection to that change.

MR. VANBOSKERCK: No objection, Your Honor.

THE COURT: And, Thom, when are you talking to him?

MR. ERICSSON: Your Honor, I'm looking at the -- the officials here. They're giving me a thumbs up. So I think I'll be talking to him here pretty [indiscernible] --

THE COURT: Okay. So I'm going to have the redactions. I'm going to file the stay today. And who is going to undertake -- I hear Mr. Smith, say you're undertaking to -- to draft a proposed order vacating?

MR. SMITH: Yes, Your Honor. This is -- this is Jordan Smith. That's right. I'll draft that proposed order [indiscernible] the parties [indiscernible] likely tomorrow.

THE COURT: Okay. And does everybody -- is there a timeframe that you want to see this addressed by the Court?

MR. ANTHONY: It would be my hope, Your Honor, that we could file something at least by Friday before the weekend that addresses it; that would be my hope.

THE COURT: Okay. Well, if you could get any proposed -- I mean it would be great if you could see if you could read it first and then if you can't agree, provide the proposed order and the nature of the dispute to my law clerk so that I can look at it all. And then if I need to I could have a phone conference. I imagine since it's very straight forward you might be able to agree.

MR. VANBOSKERCK: [indiscernible]

THE COURT: You know, I'll err on the side of more

information rather than last if I was forced to choose, so keep that in mind and I'll be available if you can't agree.

MR. ERICSSON: Your Honor, I agree with that.

THE COURT: Okay. So I'm going to get the Clerk of the Court then to with redactions file this so something is on file before 8 o'clock tonight and then I will wait to get any other proposed order. And if all of you could just respond in writing to my law clerk, you know, yes, I agree or no, I don't or whatever it is I request a phone conference, whatever you -- whatever you want.

MR. ERICSSON: Yes, Your Honor.

THE COURT: Anything else I need to address?

MR. SMITH: Not from NDOC's perspective, Your Honor.

MR. ERICSSON: No. Thank you for the time today.

MR. VANBOSKERCK: Yes. Thank you.

THE COURT: Okay. Thank you very much.

MR. ANTHONY: Thank you, Your Honor.

MR. SMITH: Thank you.

[Hearing concluded at 1:33 p.m.]

* * * * * *

ATTEST: Pursuant to Rule 3C(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

Michelle Ramsey
Court Recorder/Transcriber

ORDR

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

SCOTT RAYMOND DOZIER, aka,
Chad Wyatt, #0927782

Defendant.

CASE NO: 05C215039

DEPT NO: IX

STAY OF EXECUTION

WHEREAS, on September 25, 2007, SCOTT RAYMOND DOZIER, aka, Chad Wyatt was found guilty of COUNT 1 – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON by a duly and legally impaneled jury of twelve persons; and

WHEREAS, on October 3, 2007, that same jury returned a verdict of death against SCOTT RAYMOND DOZIER, aka, Chad Wyatt as to COUNT 1 – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON; and

WHEREAS, on December 20, 2007, SCOTT RAYMOND DOZIER, aka, Chad Wyatt filed an appeal with the Supreme Court of the State of Nevada; and

WHEREAS, on January 20, 2012, the Nevada Supreme Court filed an ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING SCOTT RAYMOND DOZIER, aka, Chad Wyatt's conviction for MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, wherein the Supreme Court of the State of Nevada remanded the matter to the district court to strike the deadly weapon enhancement attendant to the murder

conviction, but affirmed the conviction of MURDER OF THE FIRST DEGREE as well as the Jury's imposition of the Death Penalty, with an Amended Judgment of Conviction being filed on June 4, 2012; and

WHEREAS, on June 4, 2012, the Court filed an Amended Judgment of Conviction striking the deadly weapon enhancement attendant to COUNT 1 – MURDER OF THE FIRST DEGREE; and

WHEREAS, on July 27, 2012, SCOTT RAYMOND DOZIER, aka, Chad Wyatt filed a Petition for Writ of Habeas Corpus (Post-Conviction); and

WHEREAS, on October 31, 2016, SCOTT RAYMOND DOZIER, aka, Chad Wyatt contacted this Court by letter and indicated a desire to cease habeas litigation, waive all post-conviction and appellate remedies and submit to his sentence of death. SCOTT RAYMOND DOZIER, aka, Chad Wyatt has consistently maintained this position; and

WHEREAS, out of an abundance of caution, this Court ordered a psychological evaluation of SCOTT RAYMOND DOZIER, aka, Chad Wyatt. Dr. Michael Krelstein authored a report dated July 9, 2017, that concluded that SCOTT RAYMOND DOZIER, aka, Chad Wyatt was competent to decide whether to cease habeas litigation, waive all post-conviction and appellate remedies and submit to his sentence of death; and

WHEREAS, the parties agreed to stay the Petition for Writ of Habeas Corpus filed on July 27, 2012, in order to facilitate imposition of sentence. The parties further agreed that should the STATE OF NEVADA not be able to carry out SCOTT RAYMOND DOZIER, aka, Chad Wyatt's execution that the stay be lifted and habeas litigation may proceed in the ordinary course, meaning that SCOTT RAYMOND DOZIER, aka, Chad Wyatt will be in the same procedural posture as he was before attempting to carry out the execution; and

WHEREAS, on November 27, 2017, this Court entered an order enjoining the use of a paralytic drug in Dozier's execution; and

WHEREAS, on June 1, 2018, this Court entered an order vacating the order enjoining the use of a paralytic drug in Dozier's execution; and

WHEREAS, on June 19, 2018, this Court entered a Third Supplemental Warrant of Execution and a Third Supplemental Order of Execution; and

~~WHEREAS, Petitioner has now expressed a clear and unambiguous statement that he desires to pursue habeas relief instead of submitting to his sentence; and~~

NOW THEREFORE, it is hereby ORDERED pursuant to NRS 176.486, NRS 176.487 and NRS 176.488 that Petitioner's execution is stayed ~~so that~~ and Petitioner may pursue habeas relief.

DATED this 11th day of July 2018.

JENNIFER TOGLIATTI
DISTRICT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
5TH DIVISION

MCKESSON MEDICAL-SURGICAL INC. **PLAINTIFF**

V. **Case No.** CV 17-1921

STATE OF ARKANSAS; ARKANSAS DEPARTMENT OF CORRECTION; ASA HUTCHINSON, Governor of the State of Arkansas, in his official capacity; and WENDY KELLEY, Director, Arkansas Department of Correction, in her official capacity. **DEFENDANTS**

TEMPORARY RESTRAINING ORDER

Before the Court is Plaintiff McKesson Medical-Surgical, Inc.'s ("McKesson's"), motion for a temporary restraining order or preliminary injunction against Defendant State of Arkansas, Arkansas Department of Corrections, Governor Asa Hutchinson, in his official capacity, and Director Wendy Kelly in her official capacity. The Court having considered the evidence submitted in support thereof, good cause appearing, and in accordance with Rule 65 of the Arkansas Rules of Civil Procedure and the common law, makes the following Order:

IT IS HEREBY ORDERED AND ADJUGED as follows:

(1) This Court has subject matter jurisdiction under Amendment 80 to the Arkansas Constitution and Ark. Code Ann. § 16-13-201.

(2) This Court has personal jurisdiction over the Defendants.

(3) Plaintiff has demonstrated a clear showing based on specific facts found in its Verified Complaint and attached exhibit, as well as in its motion and brief in support and

attached exhibits, that it has a likelihood of success on the merits of its claims in the Verified Complaint and that immediate and irreparable injury will be caused to Plaintiff if a temporary restraining order is not granted.

(4) Unless the Court takes immediate action, Plaintiff's property will be used by the Defendants and cannot be returned to Plaintiff. Plaintiff will suffer a series of irreparable harms including loss of property and forced participation in a procedure that is likely to cause reputational injury and related harms as set forth in greater detail in the pleadings.

(5) The forgoing harms cannot be remedied later. In contrast, any harm to the Defendants can be remedied through later acquisition of a replacement product.

(6) Weighing the equities and considering Plaintiff's likelihood of ultimate success, and the effect on Plaintiff if the Court takes no action, a temporary restraining order is in the public interest.

(7) Plaintiff has adequately demonstrated the necessity of proceeding without notice to Defendants of this *ex parte* application in order to preserve and protect the status quo.

(8) Based on the foregoing, the Court determines that no security is required at this time because Plaintiff has already refunded to Defendants the price of the property at issue.

(9) Therefore, this Court finds that Plaintiff has established good cause for the issuance of a Temporary Restraining Order issued *ex parte* as more particularly described herein.

IT IS THEREFORD ORDERED THAT:

1. Defendant having actual notice of this Order (by personal service, U.S. Mail, electronic mail, or otherwise) shall not use the vercuronium bromide obtained from Plaintiff until ordered otherwise by this Court. The Court shall address the final disposition of the property, including ownership of it, at a future hearing.

2. Should Defendant object to any part of this Order, or from it being entered as a Preliminary Injunction, then Defendant should appear on April 18th, 2017, at 9:00 a.m. in the Pulaski County Courthouse. Should Defendant desire an earlier hearing, then pursuant to Rule 65(b) of the Arkansas Rules of Civil Procedure, Defendant should make an application to this Court.

IT IS SO ORDRED THIS 14th day of April, 2017, at April 4:25 p.m. [time].

Wendell Griffen by:
Honorable _____
Circuit Court Judge, 5th Division, Pulaski County

Cathy Compton
3rd Division

FORMAL ORDER

STATE OF ARKANSAS,)

) **SCT.**

SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 17, 2017, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-17-299

STATE OF ARKANSAS, ARKANSAS DEPARTMENT OF CORRECTION, ASA HUTCHINSON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS; WENDY KELLEY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTION PETITIONERS

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION – 60CV-17-1921

HONORABLE WENDELL GRIFFEN, CIRCUIT JUDGE AND MCKESSON MEDICAL-SURGICAL, INC. RESPONDENTS

PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS, WRIT OF PROHIBITION, WRIT OF CERTIORARI, OR SUPERVISORY WRIT. PETITION FOR WRIT OF MANDAMUS AND PROHIBITION DENIED. PETITION FOR WRIT OF CERTIORARI GRANTED; TEMPORARY RESTRAINING ORDER VACATED. KEMP, C.J., AND HART, J., WOULD HAVE HELD RULING ON PETITION FOR WRIT OF CERTIORARI IN ABEYANCE PENDING DISPOSITION OF MCKESSON'S VOLUNTARY MOTION TO DISMISS. MOTION TO REMOVE JUDGE WENDELL GRIFFEN FROM CASE MOOT.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 17TH DAY OF APRIL, 2017.

Stacey Pectol

CLERK

BY:_____

DEPUTY CLERK

ORIGINAL TO CLERK

CC: LEE RUDOFSKY, SOLICITOR GENERAL, NICHOLAS BRONNI, DEPUTY SOLICITOR GENERAL, AND COLIN JORGENSEN, SENIOR ASSISTANT ATTORNEY GENERAL
STEVEN W. QUATTLEBAUM, JOHN E. TULL III, MICHAEL N. SHANNON, AND MICHAEL B. HEISTER
HON. WENDELL GRIFFEN, CIRCUIT JUDGE
GOVERNOR ASA HUTCHINSON
WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION
MARK CASHION, WARDEN, VARNER SUPERMAX UNIT
WILLIAM STRUAGHN, WARDEN, CUMMINS UNIT

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

MCKESSON MEDICAL-SURGICAL INC. **PLAINTIFF**

VS. **NO. 60CV-17-1960**

STATE OF ARKANSAS;
ARKANSAS DEPARTMENT OF CORRECTION;
ASA HUTCHINSON, Governor of the State of Arkansas, in his official capacity; and
WENDY KELLEY, Director of the Arkansas Department of Correction, in her official capacity **DEFENDANTS**

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

On the 19th day of April, 2017, this cause came on for hearing before the Court on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction. Plaintiff appeared through its counsel, Steven W. Quattlebaum and John E. Tull. Defendants appeared by and through their counsel, Solicitor General Lee Rudofsky and Senior Assistant Attorney General Colin Jorgensen.

Having reviewed Plaintiff's Complaint, Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction, and responsive pleadings of Defendants and all briefs, and having fully considered the evidence presented at the hearing and arguments of counsel, the Court hereby FINDS and ORDERS:

1. This Court denied Plaintiff's request for a temporary restraining order insofar as Plaintiff requested ex-parte relief. This Court instead scheduled a hearing on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction as there was sufficient time for Defendants to be heard on the Motion the following day.

2. Article 5, section 20 of the Arkansas Constitution provides that the State of Arkansas shall never be made a defendant in any of her courts. *Arkansas Dept. of Community Correction v. City of Pine Bluff*, 2013 Ark. 36, 425 S.W.3d 731. The doctrine of sovereign immunity has been extended to include state agencies. *Id.* In determining whether the doctrine of sovereign immunity applies, the court must decide whether a judgment for a plaintiff will operate to control the action of the State or subject it to liability. *Id.* If so, the suit is one against the State and is barred by the doctrine of sovereign immunity. *Id.*

3. However, there are several exceptions to the defense of sovereign immunity. One exception to the sovereign immunity defense is that a state agency acted outside of its authority, ultra vires, and in bad faith. *See Fitzgiven v. Dorey*, 2013 Ark. 346, 429 S.W.3d 234. A state agency may be enjoined if it can be shown that the agency's action is ultra vires or outside the authority of the agency. *Id.* A state agency may also be enjoined from acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *Id.*

4. The Court finds that the defense of sovereign immunity is inapplicable to the facts of this case as Plaintiff sufficiently pled and sufficiently proved at this hearing that Defendants' conduct was outside of their authority, ultra vires, and made in bad faith. This Court therefore has jurisdiction to hear and decide this matter.

5. To justify a grant of preliminary injunctive relief, a plaintiff must establish that irreparable harm will result in the absence of an injunction or restraining order and that the plaintiff has a likelihood of success on the merits. *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002). The test for determining the likelihood

of success on the merits is whether there is a reasonable probability of success in the litigation. *Id.*

6. The Court finds that Plaintiff has established a reasonable probability of success on its claims for:

(a.) Rescission Based on Misrepresentation of a Medical License and Rescission Based on Unilateral Mistake;

(b.) Replevin; and

(c.) Unjust Enrichment.

Thus, Plaintiff established a likelihood of success on the merits in this litigation.

7. The Court finds that in the absence of a preliminary injunction, Plaintiff will suffer irreparable harm which cannot be adequately compensated by money damages or redressed by a court of law.

8. Based upon these findings, the Court hereby restrains and enjoins Defendants from using or disposing of the vecuronium bromide they obtained from Plaintiff. This prohibition shall remain in effect until further order of the Court. At this time, the Court is not ordering Defendants to return the vecuronium bromide to Plaintiff as a final hearing has not been held.

9. The parties may contact the Court's Trial Court Administrator to schedule a hearing on Defendants' Motion to Dismiss and Defendants' Motion for Change of Venue, said hearing to occur on an agreed date and time that occurs after the deadline for all responses and replies have passed. No one has requested that response and reply times be shortened. Plaintiffs are entitled to formally respond to Defendants' Motion to Dismiss and Motion for Change of Venue. Any party may also request that a

final hearing be scheduled on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction.

FOR THE FOREGOING REASONS, Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction is hereby granted. Defendants are hereby restrained and enjoined from using or disposing of the vecuronium bromide they obtained from Plaintiff until further order of the Court.

IT IS SO ORDERED.

ALICE S. GRAY
CIRCUIT JUDGE

APR 20 2017

DATE

cc: Steven W. Quattlebaum
John E. Tull
Lee Rudofsky
Colin Jorgensen

Supreme Court CV-17-317

*****EXECUTIONS SCHEDULED FOR APRIL 20, 24, AND 27, 2017*****

IN THE ARKANSAS SUPREME COURT

STATE OF ARKANSAS, et al. APPELLANTS

v. No. CV 17-_____

MCKESSON MEDICAL-SURGICAL, INC. APPELLEE

EMERGENCY MOTION FOR IMMEDIATE STAY

The State of Arkansas, the Arkansas Department of Correction (ADC), Asa Hutchinson, in his official capacity as Governor of Arkansas, and Wendy Kelley, in her official capacity as ADC Director, file this emergency motion for an immediate stay of the circuit court's injunction and, in support, state:

1. The State requires *extremely* expedited handling of this matter because the injunction entered below bars both the early-afternoon mixing and evening use of a lethal-injection drug for tonight's scheduled execution. The State's motion concerns an injunction entered by the circuit court at the request of Appellee McKesson Medical-Surgical, Inc. on April 20, 2017 (today). The same injunction was entered by the same circuit court on Friday, April 17, and was overturned by this Court on a writ of certiorari three days ago. *State v. Griffen*, Ark. Sup. Ct. No. CV-17-299 (Formal Order, Apr. 17, 2017).

Background and Procedural History

2. After this Court overturned the first injunction, McKesson nonsuited its complaint. McKesson's proffered reason for nonsuiting was because a federal court had issued a stay of the Arkansas executions at that time. But by the time nonsuit was granted, the Eighth Circuit had overturned the stay. So minutes after an order dismissing the first case was entered on April 18, McKesson re-filed a substantively identical complaint and motion for temporary injunctive relief. McKesson insists that it is *not* attempting to stay executions in Arkansas. But that is precisely the intended and actual effect of the injunction. When McKesson believed all executions were stayed, it dropped its complaint. When the stays lifted, McKesson suddenly had an interest in suing ADC again.

3. McKesson contended that the ADC misled McKesson by purchasing vecuronium bromide from McKesson without affirmatively alerting McKesson that the ADC intended to use the vecuronium bromide to carry out executions in Arkansas—a disclosure that is not required under any statute or common-law theory. McKesson acknowledges as it must that the ADC's purchase and use of vecuronium bromide for lethal injection is expressly authorized under the Arkansas method-of-execution act, Ark. Code Ann. § 5-4-617(c). McKesson also contends that *after the completion of its sale of vecuronium bromide to the ADC*, McKesson asked the ADC to return the drug, and the ADC declined.

4. Three hours after McKesson (a Virginia company with its principal place of business in Virginia) lodged its complaint and other papers in this case, the State filed a motion to change venue under Act 967 of 2017. The Act provides that if no plaintiff in an action "is a resident of Arkansas" then "[a] defendant in a civil action under § 16-60-104(3) may obtain an order for change of venue by motion requesting a transfer to . . . any county in the State of Arkansas." Act 967, § 2(e)(1). Venue transfer is mandatory under Act 967. *See id.* at § (e)(2) ("The venue of the civil action ***shall be changed*** upon a showing that the proposed transferee county is a proper venue as set forth in this subsection.") (Emphasis added). The circuit court refused to rule on the transfer request. Instead, it improperly held the transfer request in abeyance and, over the State's objection, held a hearing on McKesson's request for an injunction. The circuit court's injunction should be stayed for the simple reason that the circuit court ignored the mandatory provisions of Act 967 despite proper application for a venue transfer.

5. The State filed a comprehensive motion to dismiss explaining that McKesson's complaint fails for at least three reasons: (1) the injunctive relief McKesson sought (and obtained) amounts to a stay of executions but the circuit court lacks jurisdiction to grant a stay of executions as a matter of settled Arkansas law; (2) the complaint is barred by sovereign immunity because McKesson seeks to control the actions of the State and no exception to sovereign immunity applies;

and (3) the complaint fails to state a viable cause of action as a matter of law. The State also filed a response to McKesson's preliminary injunction motion, explaining that McKesson was unlikely to succeed on the merits of its complaint and that McKesson could not establish irreparable harm.

6. At the end of the April 19 hearing and after the close of business, the circuit court announced from the bench her intention to grant an injunction prohibiting the ADC from using or disposing of the vecuronium bromide that the ADC purchased from McKesson in 2016. The circuit court's *Order Granting Plaintiff's Motion for Preliminary Injunction* was entered on April 20 at 11:33 a.m. The State immediately brought its appeal and filed this emergency motion seeking an immediate stay.

Argument

7. To warrant the injunction awarded by the circuit court, McKesson was required to demonstrate (1) a likelihood of success on the merits, and (2) that irreparable harm would result in the absence of an injunction. *See Manila Sch. Dist. No. 15 v. Wagner*, 356 Ark. 149, 153, 148 S.W.3d 244 (2004). McKesson failed to demonstrate or even adequately plead either required element—the complaint was doomed on the merits from the start as a matter of law, and McKesson completely failed to meet its burden of establishing irreparable harm.

8. The standard of review for a temporary restraining order or a preliminary injunction is abuse of discretion—regarding both likelihood of success and irreparable harm. *AJ & K Operating Co., Inc. v. Smith*, 355 Ark. 510, 518, 140 S.W.3d 475 (2004). "Any suggestion in our caselaw that a conclusion by the circuit court that irreparable harm and likelihood of success on the merits are factual determinations, subject to a clearly erroneous standard, is incorrect." *Id.*

9. This Court exercises superintending control over all the courts of Arkansas. Ark. Const. amend. 80, § 4. Superintending jurisdiction is an extraordinary power hampered by no specific rules or means. *Foster v. Hill*, 372 Ark. 263, 268, 275 S.W.3d 151 (2008). The Court may "invent, frame, and formulate new and additional means, writs, and processes[,]" and the Court is bound only by the exigencies that call for the exercise of superintending control. *Id.* If the Court believes that a supervisory writ or a writ of certiorari or prohibition is appropriate in this case, the State hereby requests such a writ.

10. Rule 8 of the Arkansas Rules of Appellate Procedure—Civil grants this Court the discretion to stay a lower-court order pending appeal. *See Smith v. Pavan*, 2015 Ark. 474, at 3 (per curiam). The State meets the standard for a stay articulated in *Pavan*. This Court's consideration of a request for a stay includes preservation of the status quo ante, if possible, and the prejudicial effect of the passage of time necessary to consider the appeal. *Id.* The Court is also guided by

four factors in deciding whether to grant a stay: (1) the appellant's likelihood of success on the merits; (2) the likelihood of irreparable harm to the appellant absent a stay; (3) whether the grant of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.*

11. The circuit court's injunction is in reality a stay of the executions scheduled for April 20 (today), April 24, and April 27. As repeatedly explained by the ADC in various legal proceedings surrounding the scheduled executions, including affidavits and testimony submitted in this case, the ADC has no additional vecuronium bromide beyond what it purchased from McKesson, and the ADC has no other source from which to purchase vecuronium bromide. Vecuronium bromide is a required drug under Arkansas's lethal-execution protocol established in Ark. Code Ann. § 5-4-617(c). If the ADC cannot use the vecuronium bromide that it purchased from McKesson (and that McKesson willingly sold to the ADC), then the executions cannot go forward. The circuit court's order prohibits the ADC from using that vecuronium bromide and therefore operates as a stay of executions as long as it remains in effect.

12. This Court has plainly held, in another case where the same circuit court attempted to stay executions and this Court issued a supervisory writ to block the order---that "the circuit court acted in excess of its jurisdiction in staying the executions." *Kelley v. Griffen et al.*, Ark. Sup. Court No. CV-15-829 (Oct. 20,

2015) (per curiam). *See also Singleton v. Norris*, 332 Ark. 196, 964 S.W.2d 366 (1988) (circuit court does not have jurisdiction to issue stay of jurisdiction); Ark. Code Ann. § 16-90-506(c) (only officers who have power to stay executions are the Governor, the ADC Director, and the Clerk of the Supreme Court).

13. The State respectfully submits that this Court has already demonstrated that the circuit court is not permitted to grant the injunction requested by McKesson. On Monday, this Court granted a writ of certiorari overturning Judge Griffen's temporary restraining order granted to McKesson in McKesson's original case. *See State et al. v. Griffen et al.*, Ark. Sup. Ct. No. CV-17-299 (Formal Order, Apr. 17, 2017). The Court should likewise grant a stay of the circuit court's injunction pending the State's appeal here.

14. In any event, McKesson could not possibly prevail on the merits below, and cannot prevail before this Court, because McKesson's complaint is barred by sovereign immunity as a matter of law. *See* Ark. Const. art. 5, § 20; *Ark. Tech. Univ. v. Link*, 341 Ark. 495, 502, 17 S.W.3d 809 (2000); *Fireman's Ins. Co. v. Ark. State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771 (1990). McKesson sought to compel the ADC to return the vecuronium bromide to McKesson, or to prevent the ADC from using the drug in executions. McKesson plainly sought and obtained an order from the circuit court that will operate to control the action of the State. The complaint is therefore barred by sovereign

immunity and the circuit court should not have granted an injunction. *See Ark. Dept. of Envt'l Quality v. Al-Madhoun*, 374 Ark. 28, 30, 32-34, 285 S.W.3d 654 (2008) (noting that "[s]overeign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings . . . [and] the court should determine if a judgment for the plaintiff will operate to control the action of the State[;]" overturning circuit court ruling that sovereign immunity only applied to requests for monetary relief and reaffirming that request for injunctive relief that seeks to control the actions of the State is barred by sovereign immunity; "[t]hese requests for injunctive relief . . . clearly seek to control the actions of the ADEQ."). The circuit court's injunction should be stayed pending appeal for this reason alone.

15. The limited exceptions to sovereign immunity do not apply. The exception for illegal or unconstitutional acts does not apply because McKesson does not and cannot seriously contend that the ADC acted unconstitutionally or even in violation of any statute. *See Cammack v. Chalmers*, 284 Ark. 161, 162-63, 680 S.W.2d 689 (1984). Only McKesson's "taking without just compensation" claim might possibly assert a constitutional violation, but that claim failed from the outset because it is undisputed that the ADC paid McKesson for the vecuronium bromide. And no court has ever held that an injunction is a proper remedy for an unconstitutional taking—just compensation is always the remedy.

The second exception occurs where an agency or official acts *ultra vires*—meaning "without authority"—or acts arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *See Ark. State Game and Fish Comm'n*, 256 Ark. 930, 930-32, 512 S.W.2d 540 (1974). This exception is for acts of state officials or agencies that unreasonably or malevolently ***exceed the authority and discretion*** they have been given. *See Gray v. Ouachita Creek Watershed District*, 234 Ark. 181, 183-84, 351 S.W.2d 142 (1961). But McKesson's complaint did not and could not allege this. The ADC is specifically authorized to purchase and use vecuronium bromide in executions. The ADC does not act arbitrarily, capriciously, in bad faith, or wantonly when doing so—as a matter of law. The complaint was and is barred by sovereign immunity and should have been dismissed.

16. McKesson appears to argue, and the circuit court concluded, that the *ultra vires* exception applies because the ADC acted in "bad faith" and thus outside its capacity as a representative of the state. To support this argument, McKesson contends only that ADC Deputy Director Rory Griffin did not *affirmatively* disclose to the McKesson salesperson who sold the drug to the ADC that the drug was for use in executions. McKesson does not contend that Mr. Griffin told McKesson that the drug was for some other use. The ADC strongly disputes the factual contention that Mr. Griffin did not affirmatively disclose that the drug was to be used in an execution. But even assuming *arguendo* that McKesson is correct,

Arkansas law expressly authorizes the ADC to purchase lethal-injection drugs and does not in any way require the ADC to affirmatively tell the supplying entity how the drugs are to be used. Indeed, in the context of the ongoing campaign by death–penalty opponents—highlighted by this Court in *Kelley v. Johnson*, 2016 Ark. 268, at 16-20, 496 S.W.3d 346, and the United States Supreme Court in *Glossip v. Gross*, 135 S. Ct. 2726, 2733-34 (2015), it is incredible to suggest that the statute *sub silentio* required as a legal obligation that the ADC affirmatively announce to a supplier that it was purchasing drugs for lethal injection. In short, McKesson does not plead and cannot show that ADC was acted *ultra vires* or in bad faith beyond the power conferred to it by statute.

17. McKesson was also unlikely to succeed on the merits below, and the State *is* likely to succeed on the merits of its appeal, because McKesson's complaint failed to state any viable claim against the ADC. The bottom line to all the claims is that McKesson willingly sold a drug to the ADC and then experienced seller's remorse. McKesson asked the ADC to return the drug *after the transaction* but the ADC declined. No valid legal theory supports McKesson's argument that a person who purchases a product must use that product in a certain way *as dictated by the seller after the completion of the transaction*, or must return the product *on demand by the seller after the completion of the transaction*. McKesson's contentions about violations of medical and drug statutes and

regulations are immaterial because McKesson is not the enforcement authority for any such statute or regulation and cannot bring a private cause of action against the ADC for such enforcement. *See, e.g., Cent. Okla. Pipeline, Inc. v. Hawk Field Services, LLC*, 2012 Ark. 157, at 19, 400 S.W.3d 701. The ADC has full legal authority to obtain and use the vecuronium bromide that it purchased from McKesson for executions under Arkansas law. In fact, the ADC is *required* by law to use vecuronium bromide for executions under the three-drug protocol outlined in Ark. Code Ann. § 5-4-617(c). Arkansas law forecloses all of McKesson's legal theories because it expressly authorizes the ADC to purchase vecuronium bromide and use it in executions, and it does *not* require the ADC to make any disclosure or representation to the sellers and suppliers of execution drugs.

18. The most glaring reason (of the many reasons) that McKesson should not have received an injunction is that McKesson completely failed to demonstrate irreparable harm below—both in its pleadings and at the hearing. McKesson identified two distinct harms that it claims it will suffer in the absence of an injunction: (1) loss of property because the ADC will use the vecuronium bromide for executions and then the vecuronium bromide cannot be returned to McKesson; and (2) reputational injury as a result of McKesson's (manifestly disclaimed) "association" with the State's executions. McKesson's asserted loss of its drug is not irreparable harm for at least two reasons. *First*, McKesson has already been

paid for the drug by the ADC. The fact that McKesson unilaterally decided to refund the ADC's payment is of no moment. *Second*, the loss of a product can be remedied with monetary damages. *See AJ & K Operating Co.*, 355 Ark. at 520 ("In order for there to be irreparable harm sufficient to support a temporary restraining order, the harm must be such that it cannot be adequately addressed by money damages or in a court of law").

19. McKesson's contentions about the vast reputational injury that it will allegedly suffer if Arkansas uses its drug in executions are beyond speculative; they are entirely incredible and implausible. McKesson cannot support a claim of irreparable harm. *First*, McKesson has not and cannot identify any upstream manufacturer or downstream supplier or customer that has stopped—or has threatened to stop—working with McKesson if its drug is used in the executions. *Second*, McKesson has repeatedly—in public statements and in this litigation—contended that the ADC only obtained its drug through guile. Between those contentions and the fact that McKesson is affirmatively fighting Arkansas's attempts to move forward with executions, there is absolutely no chance that McKesson's reputation would be injured if the executions proceed. *Third*, McKesson's identity as a supplier of execution drugs is expressly confidential under Arkansas law. Ark. Code Ann. § 5-4-617(i)(2)(B). The affidavits of ADC Director Wendy Kelley and ADC Deputy Director Rory Griffen (and testimony

from this case and many others) confirm that the ADC is very protective of the confidentiality of its sellers and suppliers of executions drugs, and has never publicly disclosed the identities of *any* seller or supplier of execution drugs since the passage of the confidentiality provisions of Section 5-4-617. It was McKesson itself that decided to publicly announce on April 13 that the ADC will be using a drug purchased from McKesson. *See* Complaint Exhibits C, D, & E.

20. McKesson decided to sue and make clear to the entire world that McKesson is not in any way, shape, or form, a willing participant in Arkansas's executions. The only reason that McKesson has appeared in the media in recent days is because of McKesson's complaint and McKesson's own outreach on this issue. *See* Complaint Exhibits C, D & E. McKesson should not be permitted to fabricate a reputational injury based entirely and exclusively on McKesson's own public statements, and simultaneously ignore the fact that its statements make clear to the world that it is not associated with Arkansas's executions and indeed that it is affirmatively against the use of its drugs in such executions.

21. The evidence presented at the hearing below, or more accurately, the *absence* of any evidence from McKesson at the hearing below, confirmed that McKesson has no concrete irreparable harm. McKesson offered no evidence whatsoever that anyone has "associated" McKesson with Arkansas's executions. McKesson's own witness confirmed that not *one* manufacturer or supplier or

customer has terminated its business relationship with McKesson, threatened to do so, or taken *any* step that adversely impacts *any* of McKesson's business relationships as a result of the fact that McKesson sold vecuronium bromide to the ADC and the ADC will use the drug in executions. Not even the manufacturer of the vecuronium bromide that McKesson sold to the ADC (and who McKesson says has a contract with McKesson that restricts such sales) has taken any adverse action against McKesson. Instead of showing concrete, immediate harm, McKesson simply offered into evidence that one officer of McKesson has "concerns" about the possible future reputational risk. McKesson's rank speculation about reputational harm that will befall McKesson if the executions are carried out is simply that and nothing more—rank speculation. It does not satisfy the concrete irreparable harm required for a preliminary injunction.

22. On the other hand, the circuit court's injunction imposes certain—not just likely—irreparable harm on the State of Arkansas and its citizens. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist , J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). The circuit court's injunction makes it impossible—given the lack of available drugs—to carry out any lawful executions.

23. The balance of equities tips strongly in favor of the State. McKesson has no irreparable harm. But the State, its citizens, and the victims' families in the criminal cases scheduled for executions will suffer significant injury if the executions are stayed. The public interest likewise weighs heavily in favor of the State because the State has a significant interest in seeing justice done and carrying out lawful death sentences—for the victims, the victims' families, and the public.

24. A final factor that the Court should consider is the fact that McKesson sold the vecuronium bromide to the ADC in the summer of 2016 and then after the ADC declined to return the drug, McKesson rested on its laurels until filing its first complaint late in the day on Friday, April 14, 2017—with executions scheduled for Monday, April 17, 2017. "One of the cardinal principles of equity, often applied by the courts, is that equity will lend its aid only to those who are vigilant in asserting their rights." *Hamilton v. Smith*, 212 Ark. 893, 898, 208 S.W.2d 425 (1948). McKesson has been dilatory, not diligent. And a quick review of the record in this case and McKesson's first case shows that McKesson is using this litigation in an attempt to block executions, not to remedy some wrong related to the ADC's purchase of McKesson's drug or to prevent reputational harm. The Court should not indulge McKesson's gamesmanship.

WHEREFORE, the Defendants-Appellants pray that their Emergency Motion for Immediate Stay is granted, that the Court stay the circuit court's order pending the appeal, and for all other just and appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, do hereby certify that on this 20th day of April, 2017, I filed the foregoing document with the Clerk of the Supreme Court, and I served a copy on the following via email:

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IN THE SUPREME COURT OF ARKANSAS

STATE OF ARKANSAS;
ARKANSAS DEPARTMENT OF CORRECTION;
ASA HUTCHINSON, in his official capacity as
Governor of Arkansas; and
WENDY KELLEY, in her official capacity as
Director of the Arkansas Department of Correction, PETITIONERS

v. No. CV 17-317

HON. ALICE GRAY and
MCKESSON MEDICAL-SURGICAL, INC. RESPONDENTS

MCKESSON MEDICAL-SURGICAL, INC.'S
RESPONSE TO EMERGENCY MOTION FOR IMMEDIATE STAY

McKesson Medical-Surgical, Inc. ("McKesson") states as follows for its response to Petitioners' Motion for Immediate Stay. Petitioners' motion to stay is nothing more than a disguised attempt to reverse the preliminary injunction ordered by the circuit court. The preliminary injunction should stand. McKesson refers this Court to the description of the record evidence adduced at the hearing on April 19, 2017, and set forth in its response to petitioners' petition for a writ filed earlier today.

ARGUMENT

Whether to grant a preliminary injunction pursuant to Rule 65 of the Arkansas Rules of Civil Procedure is committed to the sound discretion of the circuit court. *See Smith v. American Trucking Ass'n, Inc.*, 300 Ark. 594, 597, 781 S.W.2d 3, 5 (1989); *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 540, 42 S.W.3d 453, 456 (2001). The circuit court must consider two factors: (1) whether the moving party

has demonstrated a likelihood of success on the merits and (2) whether irreparable harm will result in the absence of an injunction or restraining order. *See Baptist Health v. Murphy*, 365 Ark. 115, 121, 226 S.W.3d 800, 806 (2006). The circuit court considered these two factors and carefully exercised its considerable discretion. Although petitioners present a litany of arguments, none has merit. The circuit court acted within its broad discretion, and this Court should deny the petition.

1. The Equities Do Not Justify Staying the Circuit Court's Preliminary Injunction.

The State attempts to argue the equities in its motion, but that is part of the *federal* standard for whether a preliminary injunction should be granted. It has no application here. *Blake*, 344 Ark. 536, 542 42 S.W.3d at 457. The State attempts to bootstrap its equity argument to whether the preliminary injunction should be stayed. But McKesson did not somehow slumber on its rights as the State suggests. It repeatedly attempted to get its Vecuronium back from ADC – the Vecuronium that ADC obtained through bad faith and ultra vires conduct. The State cannot invoke equity when the ADC has clearly failed to do equity itself. *Sample v. Sample*, 250 Ark. 731, 733, 466 S.W.2d 935, 936 (1971). McKesson, moreover, could not move for a preliminary injunction before it was identified as the supplier of Vecuronium to the ADC. Indeed, it is the public knowledge that lead to irreparable harm. McKesson only nonsuited the first action because the executions were not going to proceed, and McKesson would not have irreparable harm. The State's argument is

meritless. Finally, the State's motion is directed to the wrong court. A motion to stay pending appeal should be addressed to the trial court in the first instance. *McCluskey v. Kerlen*, 4 Ark. App. 334, 335, 631 S.W.2d 18, 19 (1982); *see also* Ark. R. Civ. P. 54(b)(2).

2. The Circuit Court Had Jurisdiction To Enter The Order.

Petitioners contend that the circuit court lacks jurisdiction because the circuit court cannot stay executions. The order at issue, however, is not a stay of execution. McKesson did not seek such an order, and the circuit court did not enter an order staying an execution. McKesson filed suit to prevent the drugs that it supplied, and that ADC obtained through misrepresentation and mistake, from being used by ADC. As a result, the circuit court's order precludes ADC only from using McKesson's specific product. The order does not enjoin ADC from using other drugs or means to conduct executions. Neither McKesson nor the relief it seeks is an obstacle to such action by ADC. *See, e.g.*, Ark. Code Ann. § 5-4-617(c)(1). That ADC may not have other drugs available for its intended purposes at this particular time, or have other means to effect executions on the schedule that has been set, does not somehow transform an order not to dispose of a particular product into a stay of executions.

The State relies on *Kelley v. Griffen* in support of its contention that the circuit court lacked authority to grant relief to McKesson. 2015 Ark. 375, 3, 472 S.W.3d

135, 137 (2015). But in *Kelley*, the circuit court expressly "stated in the order that it was staying the executions." *Id.* No such order has been requested or entered in this case. Similarly, Ark. Code Ann. § 16-90-506(c), which petitioners also cite, does not apply. McKesson did not ask the circuit court to "suspend[] the execution of a judgment of death." *Id.* McKesson asked for an order against the State's use of McKesson's property. Executions may proceed, just not with McKesson's Vecuronium. The circuit court had jurisdiction to enjoin preliminarily ADC's use of the Vecuronium that it had obtained from McKesson.

The Formal Order issued on April 17, 2017, by this Court in Case No. CV-17-299 does not indicate that the circuit court lacked jurisdiction. In that earlier case, the State's request for writs of mandamus and prohibition were denied. Prohibition will lie when the circuit court is wholly without jurisdiction, but this Court did not issue a writ of prohibition in the earlier case. *White v. Palo*, 2011 Ark. 126, 7, 380 S.W.3d 405, 409 (2011). This Court issued a writ of certiorari. The irregularity addressed by this Court in granting certiorari appears to have been directed to Judge Wendell Griffin's presiding over Case No. 60cv-17-1921. *See* Per Curiam, Case No. 17-155 (April 17, 2017). It does not appear to have been directed at a jurisdictional problem, and, as explained above, there was none. The circuit court had jurisdiction.

3. Sovereign Immunity Does Not Bar McKesson's Claims.

Petitioners also contend that they have sovereign immunity from suit. But McKesson is not seeking money damages – only relief that is purely injunctive. Indeed, McKesson's complaint is express that no money damages have been requested. And this Court has recognized exceptions to sovereign immunity that apply here. This Court has made clear that ultra vires, arbitrary, capricious, and bad-faith acts are not protected by sovereign immunity. *See Arkansas Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232, 7, 428 S.W.3d 415, 420 (2013); *Arkansas Dep't of Envtl. Quality v. Oil Producers of Arkansas*, 2009 Ark. 297, 11, 318 S.W.3d 570, 575–76 (2009). As detailed above, and in the briefing and record below, the State engaged in a course of bad-faith dealings with McKesson and must answer for them in the courts. When an exception to sovereign immunity applies, injunctive relief is the only remedy available. *Alpha Mktg.*, 2013 Ark. 232, 7, 428 S.W.3d at 420.

This Court's decision in *Cammack v. Chalmers*, 284 Ark. 161, 166, 680 S.W.2d 689, 691 (1984), is instructive. There, a donor had provided property to the Board of Trustees for the University of Arkansas for a "specific" and "clearly limited" purpose. *Id.* Because the Board of Trustees attempted to use the property in a manner inconsistent with the terms of the conveyance, the trial court had jurisdiction to enjoin the actions of the university trustees that were in bad faith or arbitrary. *Id.* Also, in *Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998), an attorney alleged that state employees engaged in conduct that they knew would

"embarrass[] him and damag[e] his professional reputation." Because the conduct of the state employees was "malicious," the plaintiff overcame sovereign immunity.

McKesson demonstrated during the hearing before the circuit court that the ADC's conduct in acquiring and retaining the Vecuronium was in bad faith and ultra vires. The admissions of the State's representatives demonstrate: the State's awareness that McKesson was prohibited from selling Vecuronium to the State for use in capital punishment; that ADC should have disclosed to McKesson the reason it was attempting to purchase Vecuronium; the State's understanding that ADC's conduct would cause serious harm to McKesson; and a strategic decision by the State to misrepresent or induce a mistake about the purpose of its purchase of the Vecuronium. Accordingly, the circuit court properly concluded that McKesson has a reasonable likelihood of success on the State's sovereign-immunity defense.

The State's suggestion that there is no private cause of action to enforce the various state laws regarding the state medical board, medical licenses, or drug wholesalers does not alter this sovereign-immunity analysis. The State's defense of sovereign immunity is defeated by the exception for ultra vires, arbitrary, capricious, and bad-faith conduct on the part of the State, regardless of whether some other, separate private action could be brought. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 320, 730 S.W.2d 474, 478 (1987). Here, in this action for return of the Vecuronium and for an order against the State's use of the same, the

State's actions were misleading and in bad-faith and thus are not shielded by sovereign immunity.

4. McKesson Demonstrated A Reasonable Probability Of Success On The Merits.

Petitioners' contention that there is not a likelihood of the complaint's succeeding is based on mischaracterization of the issues. Petitioners' argument that there is not a private cause of action to enforce the various state laws regarding the state medical board, medical licenses, or drug wholesalers misreads the complaint. The complaint does not seek to enforce those laws, but points to the State's bad-faith and misrepresentations, which include actions contrary to those state laws, as one of the reasons that the State's actions are not shielded here by sovereign immunity. And petitioners' argument that the courts must presume that a State agency follows all statutes and regulations is an argument that cannot support dismissal of a complaint that pleads to the contrary and whose allegations are supported by proof adduced at an evidentiary hearing. It is not even an argument that the State did not engage in bad faith, ultra vires actions. Surely it is not within the parameters of good-faith, authorized conduct to obtain a product from a supplier knowing that the supplier is barred from distributing the product for the use intended by the State while effecting a mistake on the part of the supplier about the intended use of the product.

Petitioners' argument that it has authority to use Vecuronium in its administration of capital punishment is not the point. The complaint seeks only the return of the Vecuronium that ADC misled McKesson into selling to the State and a prohibition against the State's use of the same; it does not seek any relief regarding use of any drugs obtained by the State elsewhere. McKesson has stated claims for rescission based on misrepresentation and mistake, replevin, and unjust enrichment, and the circuit court correctly found a reasonable probability of success on those claims. *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 542, 42 S.W.3d 453, 457–58 (2001).

(1) "Rescission involves an effort to abandon and recede from a contract which the parties did not intend to make." *Aetna Life Ins. Co. v. May*, 217 Ark. 215, 221, 229 S.W.2d 238, 241 (1950). As set forth above, McKesson has a likelihood of demonstrating that Vecuronium was obtained by ADC through misrepresentation and mistake. ADC has admitted that it knew that McKesson would not sell Vecuronium to ADC for the purpose of executions, so ADC intentionally deviated from normal procedures by communicating only by text message, tried to avoid shipment to a correctional facility, and leveraged its existing relationship with McKesson's sales representative and previous history of prescription drug purchases under the auspices of a medical license on file, and intentionally led McKesson to misunderstand ADC's intended use of the drug.

Under the State of Arkansas's regulations for physicians, a licensed physician "may not . . . [p]rescribe or administer dangerous or controlled drugs to a person for other than legitimate medical purposes." Arkansas State Medical Board Regulations, § 17-95-704. In order to place its purchase of Vecuronium, ADC relied upon the existing medical license issued to a doctor that was on file with McKesson and that had been repeatedly used to purchase medical supplies and to purchase injectable drugs for legitimate medical purposes. By intentionally failing to disclose the intended use of the Vecuronium, ADC led McKesson to believe that the Vecuronium would be used only for "legitimate medical purposes"; otherwise, a physician would not be able to prescribe or administer the Vecuronium. The administration of capital punishment is not a legitimate medical purpose, as defined in Arkansas law. *See* Ark. Code Ann. § 17-95-704(e)(3), (4)(A).

When a party seeks rescission based on mistake, there is no contract "between the parties on account of the fact that there had not been a meeting of the minds of the contracting parties." *Aetna Life Ins. Co. v. May*, 217 Ark. 215, 221, 229 S.W.2d 238, 241 (1950). Under an existing agreement, Vecuronium is one of the drugs McKesson is not permitted to sell to state correctional facilities that administer capital punishment. McKesson would not have entered an agreement to sell to ADC Vecuronium had McKesson known that it would not be used for a legitimate medical purpose, pursuant to the regulations of the Arkansas Medical Board that govern

physicians in the State of Arkansas. ADC knew that McKesson had made a mistake, induced by ADC's conduct, and sought to capitalize on it. McKesson has a likelihood of proving there was no meeting of the minds and succeeding on its rescission claim.

(2) Arkansas law "authorizes a party claiming a right of possession of property in the possession of another to apply . . . for issuance of an order of delivery of the property." *Drug Task Force for Thirteenth Judicial Dist. of State v. Hoffman*, 353 Ark. 182, 186-87, 114 S.W.3d 213, 215 (2003); *see also* Ark. Code § 18–60–804. McKesson's replevin claim constitutes exactly that. On or about July 11, 2016, McKesson shipped to ADC 10 boxes containing 10 vials of 20 mg/25 ml Vecuronium. McKesson received a declaration signed "[u]nder penalties of perjury" in which the signatory "declare[d] that [she] read the forgoing and that the facts stated herein are true" and affirmed that "in accordance with the state and federal law requirements and the manufacturer's requirements" ADC was "shipping the prescription Drug(s) and/or CCP back to McKesson." ADC acknowledged that the Vecuronium had been obtained inappropriately and had to be returned. On these facts, McKesson has a likelihood of success on the merits on its claim for replevin.

(3) "To find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore." *Campbell v. Asbury Auto., Inc.*, 2011 Ark. 157, 21, 381 S.W.3d 21, 36 (2011). Unjust

enrichment requires there to "be some operative act, intent, or situation to make the enrichment unjust and compensable." *Id.* ADC has admitted it knew it was not allowed to obtain Vecuronium from McKesson. It has admitted that it obtained Vecuronium from McKesson anyway. It has admitted that it knew that McKesson was making a mistake. It agreed to return the product but has admittedly refused to follow through. No private party could argue with any credibility that these facts would not establish a claim for unjust enrichment. It should be no different for ADC. McKesson has a substantial likelihood of succeeding on the merits of its unjust-enrichment claim.

5. McKesson Has Shown Irreparable Harm.

The harm McKesson will suffer in the absence of a preliminary injunction is irreparable and money damages will not suffice. *Potter v. City of Tontitown*, 371 Ark. 200, 214, 264 S.W.3d 473, 483 (2007). Without a preliminary injunction, McKesson's property will be used by ADC and cannot be returned to McKesson. McKesson will suffer grave irreparable harm for being associated with the executions of inmates using products that the manufacturer banned for such purpose. The association will impact McKesson's relationships with its contractual partners. Manufacturers that prohibit the sale of lethal pharmaceuticals to federal and state correctional facilities that administer capital punishment will likely be less likely to enter into business arrangements with McKesson if products McKesson distributed

are used in the administration of capital punishment. Arkansas has admitted that, by associating a distributor with ADC and the administration of capital punishment, "you are also possibly affecting their ability to carry out their business at all if they are unable to procure drugs from the FDA-approved manufacturers that these drugs came from."

McKesson has a significant commercial interest in ensuring that its contracts are implemented correctly and avoiding damage to its reputation and good will. Such harms cannot be adequately remedied later through a monetary judgment against ADC and Arkansas. *See Walker v. Selig*, 2015 WL 12683818, at *19 (E.D. Ark. Oct. 30, 2015); *Tempur-Pedic Int'l, Inc. v. Waste To Charity, Inc.*, 2007 WL 535041, at *10 (W.D. Ark. Feb. 16, 2007). Because the executions are scheduled to proceed immediately, with the concomitant use of products that ADC obtained from McKesson through material misrepresentations and mistake in violation of its supplier agreement, the threatened harms cannot be remedied later.

Petitioners' attempt to discount the harm to McKesson suggests that McKesson's own filing of a lawsuit disclosed the company's identity and thus undermines its claim for irreparable injury that would result if ADC is not enjoined from using the Vecuronium it obtained from McKesson. But, as petitioners recognize, McKesson attempted repeatedly, through private correspondence, to obtain the return of the Vecuronium from ADC. Indeed, McKesson obtained

agreement from ADC for it to return the drugs, but ADC did not follow through on that agreement. The record in this action reflects that the manufacturer of the Vecuronium initially identified McKesson as the supplier on April 13, 2017. *See* Exhibit 2. National publications, including *Bloomberg* and the *Washington Post*, then reported on McKesson's involvement. *See* Exhibit 6. It was not until that point that McKesson filed its initial lawsuit on April 14, 2017.

The initial public identification of McKesson as the supplier was through public statements by other entities, but that disclosure meant that McKesson's ability to protect against irreparable harm required further action. These circumstances certainly do not preclude McKesson from its right to obtain return of the Vecuronium that ADC misled it into selling.

6. Venue Is Proper In Pulaski County.

McKesson filed this action on April 18, 2017, seeking a temporary restraining order against ADC's use of the Vecuronium it had obtained from McKesson. The circuit court held a telephonic conference with the parties on April 18, 2017, during which counsel for the State agreed to participate in a hearing on April 19, 2017. Later that same day and after agreeing to participate in a hearing, the State filed a Motion for Change of Venue, asking the circuit court to transfer this action to the Circuit Court of Faulkner County. This matter, with notice to all parties and without objection, was set for hearing regarding McKesson's motion for a temporary

restraining order or preliminary injunction on April 19, 2017. The State waived any right to insist that this case be transferred without a decision on McKesson's motion for a temporary restraining order or preliminary injunction.

And there is no justification for a writ vacating the preliminary injunction and ordering transfer now. Petitioners contend that the circuit court was required to transfer this case to Faulkner County under a just-enacted law that appears designed specifically to permit the State to take cases out of Pulaski County and engage in forum-shopping for a State-preferred judge. Courts have a long and distinguished history of disapproval of judge-shopping. *Patterson v. Isom*, 338 Ark. 234, 240–41, 992 S.W.2d 792, 796 (1999). There is no dispute that McKesson properly brought this case in Pulaski County and that Pulaski County is a proper venue for this case. This Court should not permit the use of an extraordinary writ to compel transfer of a case from a proper venue on the whim of the State.

Moreover, McKesson has serious legal arguments against the transfer of this case that the circuit court indicated will be addressed following appropriate briefing and a hearing under the Arkansas Rules of Civil Procedure. The recently passed law upon which the State relies ostensibly permits transfer only when the plaintiff is not a "resident" of Arkansas. The law does not define the word *resident*. The State wishes to define the word *resident* as synonymous with *citizen* for purposes of assessing diversity of citizenship for removal to federal court, which is to say the

State argues that *residency* means where a corporation is incorporated and where a corporation has its principal place of business. But the law does not say "citizen"; the law says "resident." And the State presented no authority that the word *resident* in this new law means the same thing as *citizen* means in the context of federal diversity jurisdiction. There is no reason to believe that is what the General Assembly intended. Indeed, such an interpretation is contrary to the venue scheme in the Arkansas Code. *See* Ark. Code Ann. § 16-60-101(a)(3)(B).

McKesson presented an affidavit that it has a facility in Pulaski County and employees in Pulaski County and that it pays taxes here. That is enough to establish residency for purposes of this change-of-venue law. It is at least enough to warrant full adversarial briefing and argument on this issue in the circuit court and an order from the circuit court on the issue of change of venue, before this Court hands down a precedent about the meaning of a recently enacted law. An extraordinary writ is not appropriate as a means to displace a case from a proper venue to a new one in these circumstances.

CONCLUSION

The circuit court was well within its discretion to issue a preliminary injunction, and the petition for immediate stay – really a thinly veiled motion to overturn the preliminary injunction – should be denied.

Respectfully submitted,

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Attorneys for McKesson Medical-Surgical, Inc.

CERTIFICATE OF SERVICE

I do hereby certify that on this 20th day of April, 2017, I filed the foregoing document with the Clerk of the Supreme Court, and I served a copy on the following *via* electronic mail:

Lee P. Rudofsky (lee.rudofsky@arkansas.gov)
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323 Center Street, Suite 200
Little Rock, Arkansas 72201

/s/ Steven W. Quattlebaum
Steven W. Quattlebaum

FORMAL ORDER

STATE OF ARKANSAS,)

) SCT.

SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 20, 2017, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-17-317

STATE OF ARKANSAS

STATE OF ARKANSAS, ARKANSAS DEPARTMENT OF CORRECTION, ASA HUTCHINSON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS; WENDY KELLEY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTION PETITIONER

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, TWELFTH DIVISION – 60CV-17-1960

HON. ALICE GRAY, CIRCUIT JUDGE AND MCKESSON MEDICAL-SURGICAL, INC. RESPONDENTS

PETITIONER'S EMERGENCY PETITION FOR WRIT OF CERTIORARI. CLERK TO COMMENCE BRIEFING. PETITIONER'S EMERGENCY MOTION FOR IMMEDIATE STAY OF CIRCUIT COURT'S INJUNCTION IS GRANTED. MOTION OF FRESENIUS KABI USA, LLC, AND WEST-WARD PHARMACEUTICALS CORP. FOR LEAVE TO FILE AMICUS BRIEF IS DENIED.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 20TH DAY OF APRIL, 2017.

Stacey Pectol
CLERK

BY: _____
DEPUTY CLERK

ORIGINAL TO CLERK

CC: LEE RUDOFSKY, SOLICITOR GENERAL, NICHOLAS BRONNI, DEPUTY SOLICITOR GENERAL, AND COLIN JORGENSEN, SENIOR ASSISTANT ATTORNEY GENERAL
STEVEN W. QUATTLEBAUM, JOHN E. TULL III, MICHAEL N. SHANNON, AND MICHAEL B. HEISTER
HON. ALICE GRAY, CIRCUIT JUDGE
GOVERNOR ASA HUTCHINSON
WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION
MARK CASHION, WARDEN, VARNER SUPERMAX UNIT
WILLIAMS STRAUGHN, WARDEN, CUMMINS UNIT

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPENDIX TO PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION (VOLUMES 1 and 2)** with the Clerk of the Court for the Nevada Supreme Court by Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a courtesy copy was emailed to counsel for Respondents simultaneously with the filing of the foregoing.

A copy was also provided to the following:

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Hon. Elizabeth Gonzalez
Eighth Judicial District Court
Department 11

200 Lewis Avenue
Las Vegas, NV 89155

/s/ *Barbara Fell*
An employee of the
Office of the Attorney General

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier in his official capacity,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

and

ALVOGEN, INC.,

Real Party in Interest.

Supreme Court Case No.:
District Court No.: A-18-777312-B

APPENDIX TO PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

VOLUME 2 OF 2

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APPENDIX - TABLE OF CONTENTS

EXHIBIT 3

S (623) 478-8500

CARDINAL HEALTH
600 N 83RD AVE
TOLLESON, AZ 85353

PAGE 1 OF 1 ROUTE/STOP 307 / 010

DV

CardinalHealth

DEA RW-0263056 FED ID 68-0158739

CUST. NO.	DATE	ORIGINAL INVOICE
163264	5/14/18	3768806
REG NO.	**CUST. DEA NO.**	**ORDER NO.** / **CUSTOMER P.O. NUMBER**
CA00001	AS2995922	5864116
	ORDER DATE	**CONF. NO.**
	5/11/18	07062

BILL TO
NV DEPT OF CORRECTION CTR PHCY
CENTRAL PHCY
3955 W RUSSELL RD-CASA GRANDE
LAS VEGAS, NV 89118

SHIP TO
NV DEPT OF CORRECTION CTR PHCY
CENTRAL PHCY
3955 W RUSSELL RD-CASA GRANDE
LAS VEGAS, NV 89118

ITEM NUMBER	NDC/UPC	QTY ORDERED	QTY SHIPPED	OMIT	UM	DESCRIPTION	SIZE	FORM	CLASS	RETAIL PRICE		UNIT PRICE	EXTENSION	NOTE CODE
5392014	47781-0589-91 TOTE# 1	3	3		CT	MIDAZOLAM 5MG/ML 10X10ML C4	10	MD	4			17.18	51.54	CT
			3			PIECES SHIPPED						SUBTOT	51.54	
			3			TOTAL PIECES SHIPPED								
						---------- S U M M A R Y ----------								
						Total RX				51.54				
						NET AMOUNT				51.54				

INVOICE SHIP DATE: 5/13/2018

For SDS Visit: http://www.mycardinalsdspd.com

PLEASE REMIT YOUR PAYMENTS TO FOLLOWING ADDRESS:
CARDINAL HEALTH 110, LLC
C/O BANK OF AMERICA
PO BOX 56412
LOS ANGELES, CA 90074-6412

Note Codes:		
T	Taxable	CT Contract
GO	Contract Item Override	SN Special Net
SP	Special Pricing	OV Price Override
		CS Source Contract

Omit Codes:		
C Dropship	4 Not stocked	7 Drug Recall
2 DC Out	5 Mfr Disc	8 New item/stock unavail.
3 Mfr Out	6 DC Disc	9 Restricted item
		S Regulatory Review

List Chemical Designations
E - Ephedrine
P - Phenylpropanolamine
S - Pseudoephedrine
L - Other List Chemical

307 / 010

6/13/18
DUE DATE

51.54

Customer is a final dispenser purchasing for own use and will not redistribute prescription pharmaceuticals into the secondary market.

The prices shown on this invoice are net of discounts provided at the time of purchase. Some of the products listed on this invoice may be subject to additional discounts or rebates. Please refer to your contract or any specific additional discounts or rebates that may apply to these purchases. You may have an obligation pursuant to 42 USC §1320a-7b to report discounts and rebates to Medicare, Medicaid or other governmental health care programs.

Effective January 1, 2015, DSCSA Transaction Data for qualified prescription drugs can be accessed via your usual ordering platform, such as Order Express or Med eCommerce, or at cardinalhealth.com/trace.

APP00574

S (623) 478-8500

CARDINAL HEALTH
600 N 83RD AVE
TOLLESON, AZ 85353

PAGE 1 OF 1 ROUTE/STOP 307 / 010

DV

CardinalHealth

DEA RW-0263056 FED ID 68-0158739

CUST. NO.	DATE	ORIGINAL INVOICE	
163264	5/10/18	3762358	
REG NO.	CUST. DEA NO.	ORDER NO.	CUSTOMER P.O. NUMBER
CA00001	AS2995922	5858116	
	ORDER DATE	CONF. NO.	
	5/09/18	03654	

BILL TO
NV DEPT OF CORRECTION CTR PHCY
CENTRAL PHCY
3955 W RUSSELL RD-CASA GRANDE
LAS VEGAS, NV 89118

SHIP TO
NV DEPT OF CORRECTION CTR PHCY
CENTRAL PHCY
3955 W RUSSELL RD-CASA GRANDE
LAS VEGAS, NV 89118

ITEM NUMBER	NDC/UPC	QTY ORDERED	QTY SHIPPED	UNIT	UPN	DESCRIPTION	SIZE	FORM	CLASS	RETAIL PRICE			UNIT PRICE	EXTENSION	NOTE CODE
4259263	00054-0176-13	1	1	EA		BUPRENORPHINE 2MG 30 SL C3	30	TB	3R				20.92	20.92	CT
	TOTE# 1														
	see message(s): 121														
5392014	47781-0589-91	3	3	CT		MIDAZOLAM 5MG/ML 10X10ML C4	10	MD	4				17.18	51.54	CT
	TOTE# 1														
			4			PIECES SHIPPED							SUBTOT	72.46	
			4			TOTAL PIECES SHIPPED									
						---------- S U M M A R Y ----------									
						Total RX				72.46					
						NET AMOUNT				72.46					

INVOICE SHIP DATE: 5/09/2018

For SDS Visit: http://www.mycardinalsdspd.com

PLEASE REMIT YOUR PAYMENTS TO FOLLOWING ADDRESS:
CARDINAL HEALTH 110, LLC
C/O BANK OF AMERICA
PO BOX 56412
LOS ANGELES, CA 90074-6412

Messages

121 This product is required by the FDA to be dispensed with a medication guide. To obtain a medication guide for this product, please visit http://www.fda.gov/Drugs/DrugSafety/ucm085729.htm

Note Codes:		
T	Taxable	CT Contract
CO	Contract Item Override	SN Special Net
SP	Special Pricing	OV Price Override
		CS Source Contract

Omit Codes:		
C Dropship	4 Not stocked	7 Drug Recall
2 DC Out	5 Mfr Disc	8 New item:stock unavail
3 Mfr Out	6 DC Disc	9 Restricted Item
		S Regulatory Review

List Chemical Designations
E - Ephedrine
P - Phenylpropanolamine
S - Pseudoephedrine
L - Other List Chemical

307 / 010

6/09/18
DUE DATE

7246

Customer is a final dispenser purchasing for own use and will not redistribute prescription pharmaceuticals into the secondary market.

The prices shown on this invoice are net of discounts provided at the time of purchase. Some of the products listed on this invoice may be subject to additional discounts or rebates. Please refer to your contract for any specific additional discounts or rebates that may apply to these purchases. You may have an obligation pursuant to 42 USC §1320a-7b to report discounts and rebates to Medicare, Medicaid or other governmental health care programs.

Effective January 1, 2015, DSCSA Transaction Data for qualified prescription drugs can be accessed via your usual ordering platform, such as Order Express or Med eCommerce, or at cardinalhealth.com/trace.

NAPP02573

EXHIBIT 4

Nevada Department of Corrections

Public Information Office: 775-887-3309
PIO Brooke Keast Cell: 775-350-0037

NDOC Requests Stay of Execution

For Immediate Release
November 9, 2017

The execution of Raymond Scott Dozier, which was scheduled to take place Tuesday, November 14th at 8:00 PM at Ely State Prison has been stayed. The Nevada Department of Corrections requested to stay the execution following the Eighth Judicial District Court's refusal to allow the paralytic drug Cisatracurium to be used in the three drug lethal injection protocol prepared upon consultation with the state's Chief Medical Officer. The Nevada Department of Corrections stands by the integrity of the protocol and therefore requested a stay of execution, which the court granted. An expedited writ or prohibition or mandamus is expected to be filed with the Supreme Court.

EXHIBIT 5

Midazolam Injection, USP C-IV Single Dose Vial

This product contains boxed warnings. See full prescribing information for this product.

Alvogen endorses the use of its products in accordance with FDA-approved indications. To this end, Alvogen has undertaken controls to avoid diversion of this product for use in execution protocols. In furtherance of this effort, Alvogen does not accept direct orders from prison systems or departments of correction. In addition, Alvogen is working to ensure that its distributors and wholesalers do not resell, either directly or indirectly this product, to prison systems or departments of correction.

MIDAZOLAM INJECTION, USP C-IV SINGLE DOSE VIAL

	NDC#	STRENGTH	PKG SIZE	GCN	GCN SEQ#	
	47781-588-68	2 mg/2 mL (1 mg/mL)	25			PRESCRIBING INFO With Boxed Warnings

APP0257

EXHIBIT 6

Nevada Department of Corrections

Public Information Office: 775-887-3309
PIO Brooke Santina Cell: 775-350-0037

Update Regarding NDOC Process for Choosing Execution Drugs

For Immediate Release
July 6, 2018

The Nevada Department of Corrections (NDOC) is updating information in regards to the lethal injection protocol for the court-ordered execution of condemned murderer Raymond Scott Dozier.

According to NRS 176.355, the judgement of death must be inflicted by an injection of a lethal drug(s). When considering the drugs to be used for the ordered execution, NDOC Director James Dzurenda consulted with the-then State of Nevada Chief Medical Officer – at that time an anesthesiologist – who approved the drug protocol.

After the expiration of the drug Diazepam, it was necessary to change the lethal injection protocol. NDOC presented a revised execution protocol to the current Chief Medical Officer. The current State of Nevada Chief Medical Officer concurred that the drugs in the NDOC execution protocol (Midazolam, Fentanyl and Cisatracurium) are appropriate and effective for the use intended. As part of the execution protocol, an attending physician, who is a practicing physician in the State of Nevada, will attend the execution.

The Attorney General's office was consulted about the method of execution challenges, including by providing general advice about the proposed manual and drug protocol under legal precedent. The advice was premised on the medical recommendation of the State's Chief Medical Officer. The Nevada Department of Corrections relied on the legal advice from the Nevada Attorney General's Office.

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EXHIBIT 7

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL

Effective Date: 06/11/2018

NDOC EXECUTION MANUAL INDEX

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

Effective Date: 06/11/2018

EXECUTION DIRECTIVES & OPERATIONAL PROCEDURES	
EM 100	Nevada Legal Authority
EM 101	Media Access
EM 102	Witness Selection Criteria and Instructions
EM 103	Acquisition and Preparation of Drugs for Lethal Injection
EM 104	List of Needed Equipment, Materials and External/Internal Contacts
EM 105	Security Plan & Extra Duty Stations for the Execution of the Death Penalty
EM 106	Victim Family Witness Selection & Instructions
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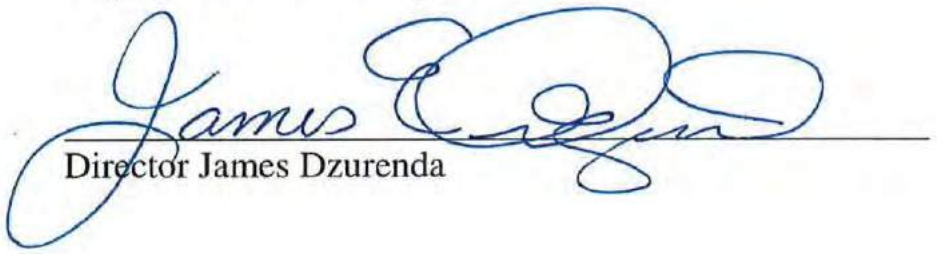
EM 108	Commutation or Stay of Execution
EM 109	Execution Process Timeline
EM 110	Execution Procedure
EM 111	Post-Execution Procedure
EM 112	Execution Process Forms  D. Execution Telephone Log E. Report and Schedule of Execution – Exhibit A F. Body Identification Form  J. News Media Agreement K. Consent to Search English/Spanish L. Media Visit Information Sheet M. Inmate Authorization for Photography, Recording for Publication

NDOC EXECUTION MANUAL

Effective Date: 06/11/2018

Signature Authority:



Director James Dzurenda

6/11/2018

Date

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 100
NEVADA LEGAL AUTHORITY

Effective Date: 06/11/2018

CONFIDENTIAL IN UN-REDACTED FORMAT: NO

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

The Attorney General's Office will be consulted to ensure that the legal authorities cited herein are up to date.

NEVADA REVISED STATUTES

100.01 PROCEEDINGS WHEN CONVICTION CARRIES DEATH PENALTY (NRS 176.345)

A. NRS 176.345 (Added to NRS by 1967, 1438; A 1977, 860; 1989, 390; 1999, 1048; 2001 Special Session, 218) states:

1. When a judgment of death has been pronounced, a certified copy of the judgment of conviction must be forthwith executed and attested in triplicate by the clerk under the seal of the court. There must be attached to the triplicate copies a warrant signed by the judge, attested by the clerk, under the seal of the court, which:

    a. Recites the fact of the conviction and judgment;

    b. Appoints a week, the first day being Monday and the last day being Sunday, within which the judgment is to be executed, which must not be less than 60 days nor more than 90 days from the time of judgment; and

    c. Directs the sheriff to deliver the prisoner to such authorized person as the Director of the Department of Corrections ("Director") designates to receive the prisoner, for execution. The prison must be designated in the warrant.

2. The original of the triplicate copies of the judgment of conviction and warrant must be filed in the office of the county clerk, and two of the triplicate copies must be immediately delivered by the clerk to the sheriff of the county. One of the triplicate copies must be delivered by the sheriff, with the prisoner, to such authorized person as the Director of the Department of Corrections designates, and is the warrant and authority of the Director for the imprisonment and execution of the prisoner, as therein provided and commanded. The Director shall return the certified copy of the judgment of

conviction to the county clerk of the county in which it was issued. The other triplicate copy is the warrant and authority of the sheriff to deliver the prisoner to the authorized person designated by the Director. The final triplicate copy must be returned to the county clerk by the sheriff with the sheriff's proceedings endorsed thereon.

100.02 EXECUTION OF DEATH PENALTY: METHOD; TIME AND PLACE; WITNESSES (NRS 176.355)

A. NRS 176.355 (Added to NRS by 1967, 1439; A 1977, 860; 1983, 1937; 1989, 390; 1995, 381; 2001 Special Session, 218), states:

1. The judgment of death must be inflicted by an injection of a lethal drug.

2. The Director of the Department of Corrections shall:

   a. Execute a sentence of death within the week, the first day being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.

   b. Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.

   c. Be present at the execution.

   d. Notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.

   e. Invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The Director shall determine the maximum number of persons who may be present for the execution. The Director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution.

3. The execution must take place at the state prison.

4. A person who has not been invited by the Director may not witness the execution.

100.03 REQUEST FOR NOTIFICATION OF EXECUTION OF DEATH PENALTY; REQUEST TO ATTEND (NRS 176.357)

A. NRS 176.357 (Added to NRS by 1995, 318) states:

1. If after a conviction for murder a judgment of death has been pronounced, each member of the immediate family of the victim who is 21 years of age or older may submit a written request to the Director to be informed of the time, date and place scheduled for

the execution of the sentence of death. The request for notification may be accompanied by a written request to attend or nominate a representative to attend the execution.

2. As used in this section, "immediate family" means persons who are related by blood, adoption or marriage, within the second degree of consanguinity or affinity.

100.04 DIRECTOR OF DEPARTMENT OF CORRECTIONS TO MAKE RETURN ON DEATH WARRANT (NRS 176.365)

A. NRS 176.365 (Added to NRS by 1967, 1439; A 1977, 860; 2001 Special Session, 219) states:

1. After the execution, the Director of the Department of Corrections must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, place, mode and manner in which it was executed.

100.05 WHEN EXECUTION OF DEATH PENALTY MAY BE STAYED (NRS 176.415)

A. NRS 176.415 (Added to NRS by 1967, 1440; A 1987, 1221; 2003, 768; 2007, 25; 2013, 686, 1756) states:

1. By the State Board of Pardons Commissioners as authorized in Section 14 of Article 5 of the Constitution of the State of Nevada;

2. By the Governor if the Governor grants a reprieve pursuant to Section 13 of Article 5 of the Constitution of the State of Nevada;

3. When a direct appeal from the judgment of conviction and sentence is taken to the Supreme Court;

4. By a judge of the district court of the county in which the state prison is situated, for the purpose of an investigation of sanity or pregnancy as provided in NRS 176.425 to 176.485, inclusive;

5. By a judge of the district court in which a motion is filed pursuant to subsection 5 of NRS 175.554, for the purpose of determining whether the defendant is mentally retarded; or

6. Pursuant to the provisions of NRS 176.0919 or 176.486 to 176.492, inclusive.

100.06 SANITY INVESTIGATION: FILING OF PETITION; STAY OF EXECUTION (NRS 176.425)

A. NRS 176.425 (Added to NRS by 1967, 1440; A 1977, 861; 1991, 1002; 2001 Special Session, 219) states:

1. If, after judgment of death, there is a good reason to believe that the defendant has become insane, the Director of the Department of Corrections to whom the convicted person has been delivered for execution may by a petition in writing, verified by a physician, petition a district judge of the district court of the county in which the state

prison is situated, alleging the present insanity of such person, whereupon such judge shall:

a. Fix a day for a hearing to determine whether the convicted person is insane;

b. Appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the convicted person; and

c. Give immediate notice of the hearing to the Attorney General and to the district attorney of the county in which the conviction was had.

2. If the judge determines that the hearing on and the determination of the sanity of the convicted person cannot be had before the date of the execution of such person, the judge may stay the execution of the judgment of death pending the determination of the sanity of the convicted person.

100.07 SANITY INVESTIGATION: CONDUCT OF HEARING (NRS 176.435)

A. NRS 176.435 (Added to NRS by 1967, 1440; A 1977, 861; 2001 Special Session, 219) states:

1. On the day fixed, the Director of the Department of Corrections shall bring the convicted person before the court, and the Attorney General or the Attorney General's deputy shall attend the hearing. The district attorney of the county in which the conviction was had, and an attorney for the convicted person, may attend the hearing.

2. The court shall receive the report of the examining physicians and may require the production of other evidence. The Attorney General or the Attorney General's deputy, the district attorney, and the attorney for the convicted person or such person if the convicted person is without counsel may introduce evidence and cross-examine any witness, including the examining physicians.

3. The court shall then make and enter its finding of sanity or insanity.

100.08 EXECUTION OF JUDGMENT WHEN DEFENDANT FOUND SANE (NRS 176.445)

A. NRS 176.445 (Added to NRS by 1967, 1441; A 1977, 861; 2001 Special Session, 219) states:

1. If it is found by the court that the convicted person is sane, the Director of the Department of Corrections must execute the judgment of death; but if the judgment has been stayed, as provided in NRS 176.425, the judge shall cause a certified copy of the order staying the execution of the judgment, together with a certified copy of the judge's finding that the convicted person is sane, to be immediately forwarded by the clerk of the court to the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county. Proceedings shall then be instituted in the last mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495.

100.09 SUSPENSION OF EXECUTION WHEN DEFENDANT FOUND INSANE; PROCEEDINGS ON RECOVERY OF SANITY (NRS 176.455)

A. NRS 176.455 (Added to NRS by 1967, 1441; A 1977, 861; 2001 Special Session, 219) states:

1. If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death until the convicted person becomes sane, and shall therein order the Director of the Department of Corrections to confine such person in a safe place of confinement until the convicted person's reason is restored.

2. The clerk of the court shall serve or cause to be served three certified copies of the order, one on the Director, one on the Governor, for the use of the State Board of Pardons Commissioners, and one on the clerk of the district court of the county in which the conviction was had.

3. If the convicted person thereafter becomes sane, notice of this fact shall be given by the Director to a judge of the court staying the execution of the judgment, and the judge, upon being satisfied that such person is then sane, shall enter an order vacating the order staying the execution of the judgment.

4. The clerk of the court shall immediately serve or cause to be served three certified copies of such vacating order as follows: one on the Director, one on the Governor, for the use of the State Board of Pardons Commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495.

100.10 INVESTIGATION OF PREGNANCY: PROCEDURE; HEARING (NRS 176.465)

A. NRS 176.465 (Added to NRS by 1967, 1441; A 1977, 862; 2001 Special Session, 220) states:

1. If there is good reason to believe that a female against whom a judgment of death has been rendered is pregnant, the Director of the Department of Corrections to whom she has been delivered for execution shall petition a judge of the district court of the county in which the state prison is situated, in writing, alleging such pregnancy, whereupon such judge shall summon a jury of three physicians to inquire into the alleged pregnancy and fix a day for the hearing thereon, and give immediate notice thereof to the Attorney General and to the district attorney of the county in which the conviction was had.

2. The provisions of NRS 176.425 and 176.435 apply to the proceedings upon the inquisition, except that three physicians shall be summoned. They shall certify in writing to the court their findings as to pregnancy.

100.11 PROCEEDINGS AFTER INVESTIGATION: EXECUTION OF JUDGMENT; SUSPENSION OF EXECUTION; ISSUANCE OF WARRANT ON TERMINATION OF PREGNANCY (NRS 176.475)

A. NRS 176.475 (Added to NRS by 1967, 1442; A 1977, 862; 2001 Special Session, 220) states:

1. If it is found by the court that the female is not pregnant, the Director of the Department of Corrections must execute the judgment of death; but if a stay of execution has been granted pursuant to NRS 176.425 the procedure provided in NRS 176.445 is applicable.

2. If the female is found to be pregnant, the judge shall enter an order staying the execution of the judgment of death, and shall therein order the Director to confine such female in a safe place of confinement commensurate with her condition until further order of the court.

3. When such female is no longer pregnant, notice of this fact shall be given by the Director to a judge of the court staying the execution of the judgment. Thereupon the judge, upon being satisfied that the pregnancy no longer exists, shall enter an order vacating the order staying the execution of the judgment and shall direct the clerk of such court to serve or cause to be served three certified copies of such order, one on the Director, one on the Governor for the use of the State Board of Pardons Commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last mentioned district court for the issuance of a new warrant of execution of the judgment in the manner provided in NRS 176.495.

100.12 ENTRY OF STAY OF EXECUTION AND NECESSARY ORDERS (NRS 176.488)

A. NRS 176.488 (Added to NRS by 1987, 1221; A 2001 Special Session, 221) states:

1. A stay of execution must be entered by the court in writing and copies sent as soon as practicable to the Director of the Department of Corrections, the warden of the institution in which the offender is imprisoned and the Office of the Attorney General in Carson City. The court shall also enter an order and take all necessary actions to expedite further proceeding before that court.

100.13 STAY OF EXECUTION FOLLOWING DENIAL OF APPEAL (NRS 176.491)

A. NRS 176.491 (Added to NRS by 1987, 1221; A 1989, 491) states:

1. Upon the denial of any appeal to the Supreme Court pursuant to chapter 34 or 177 of NRS, the Supreme Court shall dissolve any stay of execution previously entered. No stay of such execution may be entered or continued by the Supreme Court after the denial of an appeal pending the filing of a petition with a federal court or a petition for a writ of certiorari with the Supreme Court of the United States.

2. The entry of a stay of issuance of a remittitur in the Supreme Court does not prohibit the application of or the issuance of a warrant of execution by the district court in which the conviction was obtained.

3. To stay the execution of a sentence of death following the denial of any appeal to the Supreme Court pursuant to chapter 34 or 177 of NRS, a person under sentence of death must:

   a. Apply for and obtain a stay in the federal court in which the person applies for a writ of certiorari or habeas corpus; or

   b. Obtain a stay of execution pursuant to NRS 176.487.

100.14 NEW WARRANT GENERALLY (NRS 176.495)

A. NRS 176.495 (Added to NRS by 1967, 1442; A 1977, 863; 1989, 391; 2001 Special Session, 221; 2003, 2083) states:

1. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had must, upon the application of the Attorney General or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the Director of the Department of Corrections.

2. The warrant must state the conviction and judgment and appoint a week, the first day being Monday and the last day being Sunday, within which the judgment is to be executed. The first day of that week must be not less than 15 days nor more than 30 days after the date of the warrant. The Director shall execute a sentence of death within the week the judgment is to be executed, as designated by the district court. The Director may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.

100.15 ORDER FOLLOWING APPEAL (NRS 176.505)

A. NRS 176.505 (Added to NRS by 1967, 1442; A 1977, 863; 1989, 491; 2001 Special Session, 221) states:

1. When a remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal has been taken, the court in which the conviction was obtained shall inquire into the facts, and, if no legal reasons exist prohibiting the execution of the judgment, shall make and enter an order requiring the Director of the Department of Corrections to execute the judgment at a specified time. The presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, is not required.

2. When an opinion, order dismissing appeal or other order upholding a sentence of death is issued by the Supreme Court pursuant to chapter 34 or 177 of NRS, the court in which the sentence of death was obtained shall inquire into the facts and, if no legal reason exists prohibiting the execution of the judgment, shall make and enter an order requiring

the Director of the Department of Corrections to execute the judgment during a specified week. The presence of the defendant in the court when the order of execution is made and entered, or the warrant is issued, is not required.

3. Notwithstanding the entry of a stay of issuance of a remittitur in the Supreme Court following denial of appellate relief in a proceeding brought pursuant to chapter 34 or 177 of NRS, the court in which the conviction was obtained shall, upon application of the Attorney General or the district attorney of the county in which the conviction was obtained, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the Director of the Department of Corrections.

100.16 AUTHORITY TO POSSESS AND ADMINISTER DANGEROUS DRUG (NRS 454.213)

A. NRS 454.213*(1) (k)* states that "[a] drug or medicine referred to in NRS 454.181 to 454.371, inclusive, may be possessed and administered by:" "[a]ny person designated by the head of a correctional institution." *See* NRS 454.213 [Effective January 1, 2012] (Added to NRS by 1979, 1682; A 1981, 60, 746; 1983, 1221, 1515, 1937; 1987, 952, 1657, 2215; 1989, 749; 1991, 1956; 1993, 1216, 2839; 1995, 725, 1691; 1999, 2720; 2001, 2, 789, 792; 2003, 2296; 2005, 2476; 2007, 1866; 2009, 1534; 2011, 1341, 2609, 3080, effective January 1, 2012)

100.17 FURNISHING DANGEROUS DRUG WITHOUT PRESCRIPTION PROHIBITED; PENALTY; EXCEPTIONS (NRS 454.221)

A. NRS 454.221(2)(f) states that "[t]he provisions of this section do not apply to the furnishing of any dangerous drug by:" "[a] pharmacy in a correctional institution to a person designated by the Director of the Department of Corrections to administer a lethal injection to a person who has been sentenced to death." *See* NRS 454.221 (Added to NRS by 1973, 1197; A 1975, 354; 1977, 673, 938; 1979, 594, 1676; 1981, 747; 1983, 453, 1938; 1985, 887, 1701; 1987, 1658; 1989, 1126; 1991, 795; 1993, 451, 2841; 1995, 301, 1292, 1329; 2001, 791; 2001 Special Session, 242; 2007, 1868)

THE CONSTITUTION OF THE STATE OF NEVADA

100.18 REMISSION OF FINES AND FORFEITURE; COMMUTATIONS AND PARDONS; SUSPENSION OF SENTENCE; PROBATION

A. Section 14 of Article 5 of the Constitution of the State of Nevada (Amended in 1950 and 1982) states:

1. The governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may, upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments, except as provided in subsection 2, and grant pardons, after convictions, in all cases, except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons.

2. Except as may be provided by law, a sentence of death or a sentence of life imprisonment without possibility of parole may not be commuted to a sentence which would allow parole.

3. The legislature is authorized to pass laws conferring upon the district courts authority to suspend the execution of sentences, fix the conditions for, and to grant probation, and within the minimum and maximum periods authorized by law, fix the sentence to be served by the person convicted of crime in said courts.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 101
MEDIA ACCESS

Effective Date: **06/11/2018**

CONFIDENTIAL IN UN-REDACTED FORMAT: NO

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

The Public Information Officer (PIO) will be consulted to ensure that this manual is consistent with contemporary media procedures.

101.01 MEDIA REQUESTS FOR INTERVIEWS WITH CONDEMNED INMATE

A. Upon receiving notice that an execution has been scheduled, the Public Information Officer ("PIO") will determine whether the condemned inmate wants to receive requests from the media for interviews and if the condemned inmate's attorney will approve of media interviews.

B. If the condemned inmate is interested in receiving requests from the media for interviews and the condemned inmate's attorney approves of media interviews:

1. The condemned inmate must complete and sign an Inmate's Authorization for Photography, Recording or Publicity (DOC 3008) prior to the commencement of any media interview.

    a. A copy of the completed and signed Inmate's Authorization for Photography, Recording or Publicity (DOC 3008) will be placed in the condemned inmate's Institutional File.

2. The PIO may make direct contact with the condemned inmate when an interview is requested by a member of the media. This may be done without the required letters indicated within Section 120.07(3) of NDOC Administrative Regulation 120, entitled *News Media Contacts Press Releases*.

3. The media may conduct interviews with the condemned inmate one (1) week prior to the scheduled execution date. Interviews will take place in the Execution Holding Area designated for visits and interviews.

    a. The media may conduct interviews via telephone if the condemned inmate so desires.

b. The condemned inmate may terminate an interview at any time.

c. News media and media representative who wish to access NDOC institutions/facilities for purposes of interviewing the condemned inmate, must follow the procedures set forth herein and NDOC Administrative Regulation 120, entitled *News Media Contacts Press Releases* and all other applicable laws and NDOC regulations.

C. If the condemned inmate is not interested in receiving requests from the media for interviews and/or the condemned inmate's attorney does not approve of media interviews, the PIO will advise the media.

101.02 MEDIA ACCESS TO INSTITUTIONS/FACILITIES FOR PURPOSES OF INTERVIEWING A CONDEMNED INMATE

A. News media and other media representatives who wish to access a NDOC institution/facility for the purpose of interviewing a condemned inmate must submit a written request, on company letterhead, to the PIO that includes the following information:

1. Each person's full name, title and contact information;

2. The purpose of the interview including the name and NDOC ID# of the condemned inmate that the member(s) of their organization wishes to see;

3. The requested date, time and duration of the interview; and

4. If requesting to bring equipment, a list of proposed equipment including camera(s) and other recording device(s);

    a. News media or other media representatives who obtain prior authorization from the Warden to bring a camera or other recording device into the institution/facility must also complete and sign a Media Visit Information Sheet (DOC 046) prior to being allowed into the institution/facility.

B. The PIO will be responsible for reviewing written requests from news media and other media representatives for access to institutions/facilities for the purpose of interviewing a condemned inmate, and, if approved, facilitating, scheduling and coordinating such media interviews.

1. The PIO may request additional information and/or documentation from the news media/other media representative for the purpose of considering the written request for access to institutions/facilities for the purpose of interviewing a condemned inmate and/or facilitating, scheduling and coordinating such media interviews.

C. News media and other media representatives will only be granted access to the facility/institution subject to approval of time, manner and place restrictions relating to safety, security, discipline and the orderly operation of the prison, and consistent with preserving condemned inmate and staff rights to privacy.

1. News media and other media representatives will only be permitted to bring the pre-approved equipment which may include but is not limited to a camera or other recording device into the institution/facility. Prior authorization must be obtained from the Warden.

2. The safety, security and rights to privacy of NDOC employees, inmates, and approved visitors, and the safety, security and operations of the institution/facility are paramount.

3. The number of members of the news media and other media representatives and equipment (including cameras and recording devices) entering the institution/facility may be limited.

D. News media and other media representatives must provide positive identification. Foreign media, except for Canadians, must have an "I" Visa on their passport, prior to being allowed into the institution/facility.

E. News media and other media representatives must submit to a search of their person (i.e. clothed body search and metal detector inspection), vehicle or any other property, that they have brought onto NDOC property.

1. News media or other media representative will be required to complete and sign a Consent to Search (DOC 1615) prior to being allowed into the institution/facility.

F. News media and other media representatives must complete and sign a News Media Agreement (DOC 045) prior to being allowed into the institution/facility.

G. News media and other media representatives shall be escorted throughout the institution/facility by an Associate Warden to ensure compliance with NDOC regulations and for the security of the media team.

1. Interviews with a condemned inmate are subject to the visiting procedures and rules established by way of NDOC Administrative Regulation 719, Inmate Visitation, the AR 719 Visitation Manual, and the applicable institution/facility Operational Procedures.

    a. Failure to comply with all applicable rules and procedures may result in termination of the interview.

2. News media and other media representative interviews with a condemned inmate will take place in the Execution Holding Area designated for visits and interviews. The condemned inmate may be placed in restraints or the visit may be conducted in a non-contact visiting area.

3. Random access to the institution/facility not specific to the purpose of the visit (i.e. interviewing the condemned inmate) is prohibited.

4. In the event of an unusual occurrence or emergency, the interview with the condemned inmate will be suspended and the news media and other media representatives will be restricted to a designated area of the institution/facility.

101.03 MEDIA WITNESSES TO THE EXECUTION

A. The PIO is responsible for developing a list of potential media witnesses to the execution and submitting the list to the Director.

B. News media and other media representatives who wish to be considered as a potential media witness to the execution must submit a written request, on company letterhead, to the PIO within one (1) week of the execution warrant being issued that includes the pertinent information.

C. The Director, in his sole discretion, shall determine whether to approve a member of the news media or other media representative to be a witness to the execution.

   1. A person who has not been invited by the Director may not witness the execution.

   2. Courtroom artists will not be approved as media witnesses to the execution.

D. Media witnesses to the execution will not be permitted to take any cell phones, cameras, recording devices or any other personal items into the institution/facility where the execution will take place and/or any other pre-execution staging areas.

   1. Any attempt to bring cellphones and/or recording or photography equipment (i.e. cameras or recording devices) into the institution/facility where the execution will take place and/or any other pre-execution staging areas will result in immediate revocation of the Director's previously issued invitation to witness the execution.

E. Media witnesses to the execution are not allowed to interview any other witnesses to the execution on NDOC property/prison grounds.

F. All members of the news media and other media representatives who expect to gain access onto institutional grounds must be pre-approved by the PIO. All members of the news media and other media representatives will be restricted to the area in the parking lot designated for the media and marked "MEDIA ONLY". Only those members of the news media and other media representatives who have been expressly invited by the Director to witness the execution will be allowed access through the Gatehouse per these procedures.

G. Members of the news media and all other media representatives will be required to leave institutional grounds within one (1) hour of the Media Witnesses group returning to their designated area of the parking lot at the conclusion of the condemned inmate's execution.

101.04 MEDIA INQUIRIES ON THE DATE OF THE EXECUTION

A. NDOC's PIO will distribute the telephone number designated to receive calls concerning the execution, via press release, 24 hours prior to the time of the scheduled execution.

B. Media inquiries on the date of the execution should be made only to the telephone number designated to receive calls concerning the execution. Information released will be via press releases prepared by the PIO.

1. A NDOC Execution Telephone Log will be maintained by the assigned individual manning the telephone.

2. The completed telephone log will be will be turned into the Warden's office. All documents, memorandums, the telephone log and any other correspondence pertaining to the execution will be retained in a file drawer of the Warden's Administrative Assistant.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 102
WITNESS SELECTION CRITERIA AND INSTRUCTIONS

Effective Date: **06/11/2018**

CONFIDENTIAL IN UN-REDACTED FORMAT: NO

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

102.01 WITNESSES TO THE EXECUTION

A. The Director of the Department of Corrections ("Director") shall be present at the execution. NRS 176.355(2)(c).

B. The Director shall invite the following to be present at the execution (NRS 176.355(2)(e):

1. A competent Physician;

2. The County Coroner; (in White Pine County this person is the same as certain trained members of the White Pine County Sheriff's Department)

3. A psychiatrist;

4. Not less than six (6) reputable citizens over the age of 21 years.

In addition, the following may be invited to be present at the execution:

- The County Sheriff; (in White Pine County , certain members of the Sheriff's Department are trained as county coroner's)
- A local mortician;
- The spiritual advisor of the condemned inmate who is scheduled to be executed and/or the facility chaplain; and
- The District Attorney of the sentencing county.

C. Two weeks prior to the scheduled execution, the designated Warden will provide notification to the Department of Public Safety, Sheriff and Coroner in writing of the execution and request a police unit from both agencies to be on-site for the execution. A letter will be hand delivered to all three of those agencies by a NDOC staff member.

D. The Director, in his sole discretion, shall determine the maximum number of persons who may be present for the execution per NRS 176.355(2)(e). If all who are invited also elect to attend, there will be up to four specific groups of witnesses: Official witnesses, Victim witnesses, Media witnesses and Inmate Family members.

E. The Director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution. NRS 176.355(2)(c).

1. The Director shall notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution. NRS 176.355(2)(d).

F. A person who has not been invited by the Director may not witness the execution. NRS 176.355(4).

G. One week prior to scheduled execution date a confidential list of approved Official, Victim and Media Witnesses as well as Inmate Family members will be finalized and distributed to the Execution Management Team.

H. After the condemned inmate has been secured to the execution table and made ready for the final execution procedure, a person who has been invited by the Director as a witnesses will be permitted to view the execution.

102.02 WITNESSES PROCEDURE

A. A person who has been invited by the Director to witness the execution will be provided with individualized instructions two weeks prior to scheduled execution regarding the location and time that they will need to arrive prior to the execution to be checked-in and processed.

B. Witnesses to the execution must present proof of a valid current State or Federally issued photo identification (i.e. Driver's License, Passport, or Consular I.D.), and other vital information upon request, prior to being issued a Witness/Media Pass and being permitted to gain entry to the institution/facility where the execution will take place and/or any other pre-execution staging areas.

C. Witnesses to the execution must submit to a search of their person (i.e. clothed body search and metal detector inspection), vehicle or any other property, that they have brought onto NDOC property.

1. All witnesses and inmate family members will be required to complete and sign a Consent to Search (DOC 1615) prior to being allowed into the institution/facility.

D. No witness to the execution, including Media Witnesses, will be permitted to take any cameras, recording devices, cell phones, or personal items into the institution/facility where the execution will take place and/or any other pre-execution staging areas.

1. Any attempt to bring cellphones, recording or photography equipment (i.e. cameras or recording devices) into the institution/facility where the execution will take place and/or

any other pre-execution staging areas will result in immediate revocation of the Director's previously issued invitation to witness the execution.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 103
ACQUISITION AND PREPARATION OF DRUGS FOR LETHAL INJECTION

Effective Date: **06/11/2018**

CONFIDENTIAL IN UN-REDACTED FORMAT: NO

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

103.01 LETHAL INJECTION PROTOCOL

A. Lethal drugs are to be used in the execution. Although the combination of drugs and doses listed below are lethal for most individuals, individual differences do exist. It shall be the responsibility of the Director to consult with the Chief Medical Officer in order to ensure that the selected lethal drug or combination of drugs and their dosages to be used in the execution are sufficient to cause death. The Director shall then select the drug, combination of drugs and dosages to be used for the execution. This information will not be withheld from the inmate or the public.

1. The NDOC Public Information Officer (PIO) will prepare and produce a statement on behalf of the Nevada Department of Corrections.

B. The Director will provide the condemned inmate with written notice of the drug or combination of drugs that will be used for the execution after a final decision has been made and no less than seven (7) calendar days prior to the first day of the week (i.e. Monday), as designated by the district court, that the judgment of death is to be executed.

1. If at any time after written notice of the drug or combination of drugs to be used for the execution has been provided to the condemned inmate, the Director determines that it is necessary to change the Lethal Injection Protocol identified and provided in CEM 110.02, a written notice of the Director's determination, which identifies the necessary changes to the Lethal Injection Protocol and an explanation as to the basis for such changes, will be immediately provided to both the condemned inmate and the condemned inmate's counsel of record.

C. The drug amounts specified below are designed for the execution of persons weighing 500 pounds or less. The drug amounts will be reviewed and revised, as necessary, for a condemned inmate exceeding 500 pounds.

103.02 ACQUIRING LETHAL DRUGS AND EQUIPMENT

A. After the Director makes the final decision as to the drug or combination of drugs that will be used for the scheduled execution, the designated Deputy Director/designated Warden will be responsible for:

1. Confirming that the equipment and materials necessary to properly conduct the execution is on site, immediately available for use and functioning properly.

2. Ensuring all medical equipment, including a backup cardiac monitor is on site, immediately available for use and functioning properly.

3. Ensuring that the drugs identified are acquired, arrive at Ely State Prison (ESP) no later than the day of execution and are properly stored. The drugs shall be stored in a secured locked area that is temperature regulated and monitored to ensure compliance with manufacturer specifications, under the direct control of the designated Warden.

103.03 PREPARATION OF LETHAL DRUGS

A. At the appropriate time, approximately two hours prior to the scheduled execution, the designated Warden shall transfer custody of the drugs to two members of the Security Team who have been selected by the designated Deputy Director as the Drug Administrators. The Drug Administrators will be two individuals who, based upon their years of experience and proven performance within the corrections industry, are uniquely trusted to perform the sensitive and critical tasks of properly preparing the lethal drugs for the execution, and then injecting the lethal drugs into the condemned inmate per these instructions when so ordered.

B. The quantity of the lethal drugs may not be changed without prior approval of the Director.

C. It is the responsibility of the Drug Administrators to prepare the lethal drugs. An Attending Physician or other properly trained and qualified medical professional will observe the Drug Administrators as they prepare the lethal drugs.

1. Both Drug Administrators shall complete detailed written reports describing the preparation and labeling of the lethal drugs.

   a. The Drug Administrators shall be responsible for preparing and labeling the assigned syringes in a distinctive manner identifying the specific lethal drug contained in each syringe by (1) lethal drug name, (2) lethal drug amount and (3) assigned number. This information shall be preprinted on a label, with one label affixed to each syringe to ensure a label remains visible.

   b. The syringes for each lethal drug by name will then be placed in an individual tray marked for all the syringes of that lethal drug. The labels for each tray and each syringe it contains will be colored to match: red in color for Midazolam, white in color for Fentanyl and blue in color for Cis-atracurium.

   c. The drugs and their doses are to be prepared and labeled as follows:

i. Tray-1: Midazolam (labels to be red in color)

		DRUG	CONCENTRATION	SYRINGE	TOTAL
1.	#1-1	Midazolam	5mg/cc	10ml	50mg
2.	#1-2	Midazolam	5mg/cc	10ml	50mg
3.	#1-3	Midazolam	5mg/cc	10ml	50mg
4.	#1-4	Midazolam	5mg/cc	10ml	50mg
5.	#1-5	Midazolam	5mg/cc	10ml	50mg
6.	#1-6	Midazolam	5mg/cc	10ml	50mg
7.	#1-7	Midazolam	5mg/cc	10ml	50mg
8.	#1-8	Midazolam	5mg/cc	10ml	50mg
9.	#1-9	Midazolam	5mg/cc	10ml	50mg
10.	#1-10	Midazolam	5mg/cc	10ml	50mg

11. In the unlikely event that it is deemed necessary (see protocol in EM 110), additional syringes of Midazolam may be ordered by the Director, and then prepared and injected by the Drug Administrators. If ordered, additional syringes will be similarly labeled and numbered next in sequence, for example the next syringe would be numbered #1-11, then #1-12 and so on.

ii. Tray-2: Fentanyl (labels to be white in color)

		DRUG	CONCENTRATION	SYRINGE	TOTAL
1.	#2-1	Fentanyl	50mcg/cc	10ml	500mcg
2.	#2-2	Fentanyl	50mcg/cc	10ml	500mcg
3.	#2-3	Fentanyl	50mcg/cc	10ml	500mcg
4.	#2-4	Fentanyl	50mcg/cc	10ml	500mcg
5.	#2-5	Fentanyl	50mcg/cc	10ml	500mcg
6.	#2-6	Fentanyl	50mcg/cc	10ml	500mcg
7.	#2-7	Fentanyl	50mcg/cc	10ml	500mcg

8.	#2-8	Fentanyl	50mcg/cc	10ml	500mcg
9.	#2-9	Fentanyl	50mcg/cc	10ml	500mcg
10.	#2-10	Fentanyl	50mcg/cc	10ml	500mcg
11.	#2-11	Fentanyl	50mcg/cc	10ml	500mcg
12.	#2-12	Fentanyl	50mcg/cc	10ml	500mcg
13.	#2-13	Fentanyl	50mcg/cc	10ml	500mcg
14.	#2-14	Fentanyl	50mcg/cc	10ml	500mcg
15.	#2-15	Fentanyl	50mcg/cc	10ml	500mcg

16. In the unlikely event that it is deemed necessary (see protocol in EM 110), additional syringes of Fentanyl may be ordered by the Director, and then prepared and injected by the Drug Administrators. If ordered, additional syringes will be similarly labeled and numbered next in sequence, for example the next syringe would be numbered #2-16, then #2-17 and so on.

iii. Tray-3: Cis-atracurium (labels to be blue in color)

		DRUG	CONCENTRATION	SYRINGE	TOTAL
1.	#3-1	Cis-atracurium	2mg/1ml	10ml	20mg
2.	#3-2	Cis-atracurium	2mg/1ml	10ml	20mg
3.	#3-3	Cis-atracurium	2mg/1ml	10ml	20mg
4.	#3-4	Cis-atracurium	2mg/1ml	10ml	20mg
5.	#3-5	Cis-atracurium	2mg/1ml	10ml	20mg
6.	#3-6	Cis-atracurium	2mg/1ml	10ml	20mg
7.	#3-7	Cis-atracurium	2mg/1ml	10ml	20mg
8.	#3-8	Cis-atracurium	2mg/1ml	10ml	20mg
9.	#3-9	Cis-atracurium	2mg/1ml	10ml	20mg
10.	#3-10	Cis-atracurium	2mg/1ml	10ml	20mg

11. In the unlikely event that it is deemed necessary (see protocol in EM 110), additional syringes of Cis-atracurium may be ordered by the Director, and then prepared and injected by the Drug Administrators. If ordered, additional syringes will be similarly labeled and numbered next in

sequence, for example the next syringe would be numbered #3-11, then #3-12 and so on.

2. One Drug Administrator will prepare and label the lethal drug syringes. The second Drug Administrator will observe, verify the preparation, dosage and labeling of each syringe. The second Drug Administrator will then place the syringes in their correct trays for use.

3. The Drug Administrators shall prepare the designated lethal drugs and syringes so that the correct number of syringes are prepared and placed in each correctly labeled tray.

   a. To prepare each syringe for use, the Drug Administrator will draw the appropriate amount of supplied drug solution into each syringe so that the specified dose of each drug is made ready in each syringe.

      i. Midazolam will be used at a concentration of 5 milligrams per milliliter. For this drug, the specified doses to be prepared are 50 milligrams in 10 milliliter syringes. In order to achieve those doses, the Drug Administrator will draw ten (10) milliliters of the supplied solution into each 10 milliliter syringe labeled to contain Midazolam.

      ii. Fentanyl will be used at a concentration of 50 micrograms per milliliter. For this drug, the specified doses to be prepared are 500 micrograms in each 10 milliliter syringe. In order to achieve those doses, the Drug Administrator will draw ten (10) milliliters of the supplied solution into each 10 milliliter syringe labeled to contain Fentanyl.

      iii. Cis-actracurium will be used at a concentration of 2 milligrams per milliliter. For this drug, the specified doses to be prepared are 20 milligrams in each 10 milliliter syringe. In order to achieve those doses, the Drug Administrator will draw ten (10) milliliters of the supplied solution into each 10 milliliter syringe labeled to contain Cis-atracurium.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 104
LIST OF NEEDED EQUIPMENT, MATERIALS AND EXTERNAL/INTERNAL CONTACTS

Effective Date: **06/11/2018**

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

104.01 NEEDED MEDICAL EQUIPMENT AND MATERIALS

A. One gel pillow
B. Twelve Bio-bags
C. Twelve white hand towels
D. Hot packs – 6 x 9 instant style
E. One box underpads
F. Portable suction machine and canister
G. Suction tubing
H. Resuscitator with bag and mask
I. Oxygen tank
J. Oxygen masks
K. Curved Laryngoscope
L. Trach tubes
M. Heplocks
N. Pulse Oximetry cable extension
O. Pulse Oximetry clip
P. Rolling medical stool (for use during setting of IV's)
Q. Portable stretcher, equipped with securing straps, one blanket and one pillow
R. Wheelchair
S. Automated external defibrillator (AED)
T. One stop watch
U. One stethoscope
V. Surgical shears
W. One flashlight
X. Four medium straight hemostats
Y. Four tourniquets
Z. Adhesive tape, both narrow and wide
AA. One roll of gauze
BB. Several gauze pads
CC. Alcohol

DD. Sponges
EE. One tongue depressor
FF. Four 18-gauge intercath needles, 1 ¾ inches long
GG. Four 20-gauge intercath needles, 1 ¾ inches long
HH. Four standard fluid administration tubing sets with "Y" injection site 3 to 4 inches long
II. Four extension sets 48 inches by 24 feet
JJ. Four injection needles, 20 gauge, 2 inches
KK. Twenty-four 10cc syringes for injection
LL. Eight 20cc syringes for sterile saline for injection
MM. Forty 18 gauge 1 ½ inch needles
NN. Six vials of sterile saline for injection
OO. Number of required vials of lethal drugs for injection
PP. Pre-printed Lethal Drug syringe labels
QQ. Twelve small Sharps containers
RR. 20 vials of NARCAN
SS. 20 vials of ROMAZICON
TT. Two sterile cut-down trays
UU. Two Electrocardiogram machines and two sets of leads
VV. EKG patches
WW. Extra-long EKG cables
XX. Two Blood Spill kits
YY. Facemasks with eye shields
ZZ. Surgical caps
AAA. Shoe covers
BBB. Non-latex surgical gloves
CCC. Chlorascrub swabs

104.02 NEEDED NON-MEDICAL EQUIPMENT AND MATERIALS

A. Digital audio recorder
B. Tripod & camera
C. [redacted] hand-held video cameras with power supplies
[redacted]
F. [redacted] Cell phones
G. [redacted] Satellite phone
H. Bullhorns
I. Parking barricades and traffic cones
J. Reflective Safety vests
K. Traffic directing light wands
L. Clipboards: 6 – Legal sized
M. Radio Battery charging stations – Gatehouse and Tower 3
N. Evidence kit with placards
O. Hand-scanners
P. Cell-sense detector
Q. Cleaning supplies – as allowed for unit cell cleaning

104.03 EXTERNAL/INTERNAL CONTACTS

A. [redacted] prior to the execution, the designated NDOC staff member will establish a service contract with [redacted] local Emergency Medical Technicians (EMTs).

B. [redacted] prior to scheduled execution, telephone notifications will be placed to the Department of Public Safety, the County Sheriff's Office, the County Coroner's Office and the local Mortuary notifying them of the pending execution.

C. [redacted] prior to the scheduled execution date [redacted] the Warden will make arrangements for the necessary medical equipment and lethal drugs to be provided.

1. Arrangements will be made for the pre-medication of the condemned inmate should he request sedation on the day of the scheduled execution.

2. It will be the responsibility of the [redacted] Team, with assistance provided by medical personnel, to ensure the cardiac monitor is in good working order and that medical equipment as necessary will be laid [redacted]

D. [redacted] the designated NDOC staff member will confirm arrangements with the Emergency Medical Technicians (EMTs), Attending Physician, County Coroner, Mortuary representative, Psychiatrist, inmate's Spiritual Advisor and facility Chaplain.

E. [redacted] an on-site meeting will be held with the EMTs, the County Coroner and the Attending Physician. The meeting will outline the events of the pending execution. Additionally, the location and type of cardiac monitor system will be shown.

F. [redacted] prior to scheduled execution, arrangements will be made for the Attorney General (or designee) to attend the execution at Ely State Prison.

G. [redacted] confidential telephone lists of appropriate government officials will be established, so that they may be immediately contacted via a land-line phone or a back-up cell phone. Restricted access phone lines for both types of phones will be established for the Governor's Office, Attorney General's office, Federal Court clerks, State Court clerks and 8th Judicial District Court Clerk for Judge Togliatti. [redacted] These numbers will be confidentially provided only to those groups concerned [redacted]

H. The Execution Area and Execution Area Chamber Room will each have a restricted access list. Authorization for access to these areas will be established by the Warden.

1. After the condemned inmate is moved to the Execution Area Holding Cell, [redacted] will not be used by any unauthorized person.

104.03 PREPARATION OF EXECUTION AREA WORKROOMS

A. All medical equipment will be checked for readiness and operational functionality by the [redacted] Team with the assistance of a qualified contracted EMT.

1. These checks will be performed:

a. [redacted] between scheduled executions;
b. [redacted] to a scheduled execution (prior to the final rehearsal);
c. [redacted] prior to the day of the scheduled execution;
d. [redacted] prior to the scheduled execution

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 105
SECURITY PLAN AND EXTRA DUTY STATIONS FOR THE EXECUTION OF THE DEATH PENALTY

Effective Date: 06/11/2018

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

105.01 SECURITY PLAN

A. The following security plan has been designated to provide complete safety and security coverage at Ely State Prison. It is designed with the highest level of protection for staff, visitors and witnesses during an execution of the death penalty.

B. Prior to the scheduled date of execution:

1. In order to prepare to implement this plan [redacted] training will be conducted to include operational planning, staff selection, assignments and training so that all members of each execution team will completely understand what is expected of them on the day of execution.

2. 'State Property' or 'No Trespassing' signs will be maintained along the perimeter of prison property so that it is clearly marked for demonstrators or observers.

3. A Medical Aid Station will be established for this event. [redacted]

4. At the State Route 490 top-of-the-hill entrance to the prison the Maintenance Department will [redacted] that only authorized personnel and approved witnesses will be admitted into the parking lot at the designated time.

5. The designated Associate Warden or Event Commander will provide copies [redacted]

C. On the scheduled date of execution:

1. [redacted] on the scheduled date of execution, the Exterior Team will be posted and this security plan will be in effect.

2. [redacted] all ESP staff members arriving at the institution will be directed to [redacted] where they will park and secure their vehicles. Staff members will then [redacted] Staff members will [redacted] entrance to the institution. At times of inclement weather, [redacted] This [redacted] staff parking plan will continue until the execution is completed and the institution has been returned to normal operations by the designated Associate Warden.

3. [redacted]

4. The meal plan for all inmates except the condemned inmate on the scheduled date of execution will follow the [redacted] meal schedule – the normally planned hot breakfast menu meal will be served [redacted] the regularly planned hot dinner menu meal will be served [redacted] with a cold, regularly planned lunch menu meal [redacted]

5. [redacted] on the day of a scheduled execution, the Maintenance and External Security teams will [redacted] separate parking area in the main parking lot: Media, Official & Victim Witnesses, VIP and Inmate Family. In addition, the Maintenance and External Security teams [redacted] for the purpose of conducting periodic briefings.

6. [redacted]

7. Authorized Official witnesses, Victim Family witnesses and Inmate Family members will be issued [redacted] after they have been processed and cleared by Gatehouse Officers.

8. Media witnesses will be issued [redacted] after they have been processed and cleared by Gatehouse Officers.

9. Any person not on the [redacted] WILL NOT be allowed entry onto Ely State Prison property.

10. [redacted] inmate and/or institutional visits, unscheduled deliveries, inmate transports (unless medically or operationally necessary) and work completed by outside contractors/vendors WILL NOT be allowed.

11. Authorized Media representatives and witnesses may arrive at the facility 5:00 p.m. on the day of a scheduled execution.

12. Authorized Inmate Family members and inmate's Spiritual Advisor may arrive at the facility at 10:00 a.m. on the day of a scheduled execution.

13. Authorized State Personnel may arrive at the facility [redacted] on the day of a scheduled execution.

14. The authorized County Coroner, Attending Physician, EMTs and Psychiatrist may arrive at the facility [redacted] on the day of a scheduled execution.

15. The authorized Mortuary representative may arrive at the facility [redacted]

105.02 EXTRA DUTY STATIONS

[redacted] The [redacted] Team will consist of [redacted] This team will be assigned [redacted] of Ely State Prison. [redacted]

1. [redacted] will be posted [redacted] respond quickly to problems that develop during the event such as if a demonstrator enters State property and refuses to be removed. If vandalism occurs [redacted] as appropriate will be notified and assistance requested.

2. [redacted]

3. [redacted]

4. Traffic Control Point #1 (TCP-1): [redacted] Officers will be assigned to the State Route 490 top-of-the-hill parking lot entrance.

5. Traffic Control Point #2 (TCP-2): [redacted] Officers will be assigned to direct any turn-around traffic at the traffic circle if required. Additionally, this team is responsible for the Official witnesses, Victim Family witnesses, and if invited Inmate Family members parking areas.

6. [redacted] Officers will be assigned to Tower 3/Sally-port. [redacted]

7. Media Witnesses Parking: [redacted] Officers will be assigned [redacted] Each Media group will be allocated an area that is approximately 10' x 10' for staging their equipment and conducting their newsfeed.

8. ESP Staff Parking: [redacted] Officers will be assigned [redacted]

9. Gatehouse: [redacted] Officers will be assigned to check all ID's, complete clothed body searches and clear persons through the scanners prior to entry into the facility. One of the Gatehouse Officers must be a female.

10. Escort Officers: [redacted] Officers will be assigned to provide escort from the parking lot to the Gatehouse and then to the areas specifically designated for each Officer's group. [redacted] groups include: Official Witnesses, Media Witnesses, Victim Family Witnesses, and if invited by the Director of NDOC, Inmate Family members.

11. There will be [redacted] additional [redacted] assignments.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 106
VICTIM FAMILY WITNESS SELECTION & INSTRUCTIONS

Effective Date: 06/11/2018

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

106.01 VICTIM FAMILY WITNESSES

A. The Director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution. NRS 176.355(2)(c).

   1. [redacted] prior to the execution date, the NDOC Victims Services Officer will notify the victim's family.

B. On the day of execution [redacted] Victim Family witnesses may arrive at Ely State Prison (ESP). They will be directed to park [redacted] The Victim Family Escort Officer will escort them from the parking lot to the Gatehouse. The Victim Services Officer will meet them at the ESP Gatehouse.

C. Following the required security checks, the Victim Services Officer and the Victim Family Escort Officer will escort the Victim Family [redacted].

D. Following a briefing regarding the execution protocols, the Victim Family Escort Officer will be directed by the Associate Warden of Programs to escort the Victim Family witnesses [redacted]

E. At the conclusion of the execution the Victim Family witnesses will be escorted [redacted] the Victim Services Officer and Victim Family Escort Officer will escort the Victim Family witnesses back to their designated area of the parking lot.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS

NEVADA DEPARTMENT OF CORRECTIONS

EXECUTION MANUAL
EM 107
WITNESS GROUPS PROCEDURE

Effective Date: **06/11/2018**

CONFIDENTIAL IN UN-REDACTED FORMAT: YES

AUTHORITY AND RESPONSIBILITY

The Director and designated Deputy Director will ensure that this manual is accurately revised and published upon order of the Governor prior to a scheduled execution.

107.01 WITNESS PROCEDURE

A. Nevada law, NRS 176.355(2)(e), states there must be at least six witnesses to attend an execution. The Director shall determine the maximum number of persons who may be present for the execution. He must approve all witnesses and other persons to be present.

B. [redacted] authorized Media and the invited Media Witnesses may begin arriving at the institution. They will be directed to park [redacted] behind the barricades.

C. [redacted] the Inmate Family members may begin arriving at ESP. They will be directed to park in designated spaces [redacted] They will be escorted to the Gatehouse by the Inmate Family Escort Officer and Classification Caseworker III (CCS III). After being processed in by Gatehouse Officers they will receive a briefing by the CCS III and then be escorted [redacted] the Inmate Family members will be escorted to wait [redacted] while the condemned inmate completes his last meal.

D. [redacted] the Attorney General (or designee) will arrive at Ely State Prison to witness the execution process. This individual will park [redacted] and proceed into the institution to meet with the Designated Warden and Associate Warden(s).

1. This individual will be able to view the execution [redacted]

E. [redacted] Official witnesses and Victim Family witnesses will arrive at the institution. A Victim Services Officer will be at the Gatehouse to meet the Victim Family witnesses. Both groups will be directed to park [redacted] Both witness groups will have an Escort Officer to take them to the Gatehouse to be processed in and given an I.D. card.

F. [redacted] the Official and Victim Family witnesses will be escorted by the Associate Warden of Programs, Victim Services Officer and designated Escort Officers from the Gatehouse [redacted]

1. [redacted] the Associate Warden of Programs will brief the Official and Victim witnesses on the execution protocol.

G. [redacted] invited Media Witnesses will proceed to the Gatehouse to be processed in and given an I.D. card. All other Media representatives will be instructed to remain [redacted] the parking lot behind the "MEDIA PARKING" barricade.

H. If both Inmate Family members and Victim Family witnesses will be present to view the execution, then the Inmate Family members will use Execution Area Viewing Room [redacted] and the Victim Family witnesses will use Execution Area Viewing Room [redacted] with the Official witnesses. If only the Inmate Family members or the Victim Family witnesses attend then the attending group will use Execution Area Viewing Room [redacted] and the Official witnesses will use Execution Area Viewing Room [redacted]

I. [redacted] at the direction of the Associate Warden of Programs, the Victim Witnesses Escort Officer will escort the Victim Witnesses to their designated Execution Area Viewing Room. The witnesses will not be allowed to take any cameras, recording devices, or any personal items into the witness area.

J. [redacted] the Associate Warden of Programs will escort the Official Witnesses to Execution Area Viewing Room [redacted] The witnesses will not be allowed to take any cameras, recording devices, or any personal items into the witness area. The condemned inmate's spiritual advisor and Institutional Chaplain will be allowed to witness the execution [redacted]

K. [redacted] the CCS III and the Inmate Family members Escort Officer will escort the Inmate Family members [redacted] to the Execution Area Viewing Room [redacted] The witnesses will not be allowed to take any cameras, recording devices, or any personal items into the witness area.

L. [redacted] the Official witnesses, Victim Family witnesses and Inmate Family members should be seated. None of the personnel involved in the execution should be in sight. The Associate Warden of Operations will notify the Public Information Officer (PIO) in the Gatehouse when it is time to bring the Media Witnesses to Execution Area Viewing Room [redacted] The PIO and Media Witnesses Escort Officer will then escort the Media Witnesses directly to Execution Area Viewing Room [redacted]

1. In Execution Area Viewing Room [redacted], the Associate Warden of Operations will brief the Media witnesses on the execution protocol.

M. Immediately following the execution Inmate Family members will be escorted [redacted]

N. They may elect to either be escorted to the parking lot or to wait [redacted] In either event, they must depart the property [redacted]

O. After the Inmate Family members have been escorted from their viewing room, the Media witnesses will be escorted by the PIO and Media Witnesses Escort Officer from Execution Area Viewing [redacted] to their designated parking area. The media must depart the institution property within one hour of their return to their designated area of the parking lot.

P. The Victim Family witnesses will be escorted from their designated Execution Area Viewing Room [redacted] by the Victim Services Officer and Escort Officer.

Q. The Official witnesses will then be escorted [redacted] They will meet briefly with the Associate Warden of Programs who will offer them the opportunity to participate in a debriefing session. Official witnesses may then depart institutional grounds.

R. After all Media has departed the property the Inmate Family members, if still [redacted] will be escorted to the parking lot so they may depart institutional grounds. After all other witnesses have departed institutional grounds, Victim Family witnesses will depart institutional grounds.

NO ATTACHMENTS: SEE CEM 112 FOR ALL EXECUTION RELATED FORMS