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,

Respondent,

And

ALVOGEN, INC.,

Real Party in Interest.

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CASE NO: 76485

D.C. NO: A-18-777312-B

AMICUS CURIAE BRIEF OF THE CLARK COUNTY DISTRICT ATTORNEY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS / PROHIBITION

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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, Respondent, And ALVOGEN, INC., Real Party in Interest.	CASE NO: 76485 D.C. NO: A-18-777312-B

AMICUS CURIAE BRIEF OF THE CLARK COUNTY DISTRICT ATTORNEY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS / PROHIBITION

COMES NOW, the State of Nevada, Amicus Curiae, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and submits this Amicus Curiae Brief of the Clark County District Attorney in Support of Petition for Writ of Mandamus / Prohibition. This Brief is based on the following memorandum and all papers and pleadings on file herein.

Dated this 26th day of July, 2018.

Respectfully submitted,

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BY */s/ Jonathan E. VanBoskerck*
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MEMORANDUM OF POINTS AND AUTHORITIES

NRAP 29(d)(3) STATEMENT OF AMICUS CURIAE

Amicus Curiae is the Clark County District Attorney (CCDA). The CCDA has an interest in preventing Alvogen from subverting the authority of Nevada lawmakers to set Nevada public policy and protecting the sentence imposed by the jury from improper collateral attack.

STATEMENT OF THE CASE

This Court recently summarized the procedural background of the underlying criminal case:

> Dozier was convicted of first-degree murder and was sentenced to death. This court affirmed his murder conviction and death sentence on appeal. Dozier v. State, Docket No. 50817 (Order Affirming in Part, Reversing in Part, and Remanding, January 20, 2012). Dozier then filed a timely postconviction petition for a writ of habeas corpus. Eventually, he decided to suspend the postconviction proceeding and have his duly-imposed death sentence carried out. After determining that Dozier was

competent to make this decision, the district court stayed the petition and signed a warrant of execution.

Despite the fact that Dozier had indicated that he did not want to pursue postconviction relief, the district court permitted attorneys from the Federal Public Defender (FPD) to associate with Dozier's state postconviction attorney. The FPD subsequently filed a "Motion for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner," and an accompanying motion requesting discovery regarding the drugs the State intended to use in Dozier's execution, in the postconviction case. The CCDA pointed out that Dozier had initiated the proceeding by filing a postconviction habeas petition, and issues relating to the execution protocol fell outside the scope of Nevada's postconviction statutes. See, NRS 34.724(1); McConnell v. State, 125 Nev. 243, 247, 212 P.3d 307, 310 (2009) (recognizing that a postconviction petition for a writ of habeas corpus "is available to address two types of claims: (1) requests for relief from a judgment of conviction or sentence in a criminal case and (2) challenges to the computation of time that the petitioner has served pursuant to a judgment of conviction." (internal alterations and quotation marks omitted)). The FPD argued that the district court had the inherent authority to ask questions about the execution protocol because it had signed the warrant of execution and was therefore vested with the responsibility of ensuring that Dozier's execution would proceed lawfully. The district court agreed with the FPD and directed NDOC, the entity responsible for establishing the execution protocol, NRS 176.355, to respond to the motion.

NDOC filed an opposition. Although NDOC recognized that the FPD's request was procedurally improper, it expressed willingness to ignore the procedural issues given that the date scheduled for Dozier's execution was approaching.[1] NDOC also disclosed an updated version of the execution protocol, which involved administering three drugs in succession: Diazepam, Fentanyl, and Cisatracurium. The FPD filed a reply. In it, the FPD argued that administering Cisatracurium would constitute cruel and unusual punishment in the event that the first two drugs failed because it would cause Dozier to suffocate to death while he was aware and conscious. After holding an "evidentiary hearing,"

[1] Notably, NDOC repeatedly indicated that it would only ignore these issues so long as the FPD complied with requirements set out in 42 U.S.C. § 1983 and Baze v. Rees, 553 U.S. 35 (2008), which the FPD declined to do.

> which involved taking testimony from only one witness, the district court entered an order enjoining use of Cisatracurium and directing Dozier's execution to proceed with the first two drugs.

Nevada Department of Corrections v. District Court (Dozier), Docket No. 74679 and 74722, Order Granting Petition in Docket No. 74722 and Denying Petition in Docket No. 74769, filed May 18, 2018, p. 2-4 (footnote in original).

The CCDA and the Nevada Department of Corrections (NDOC) challenged the District Court's injunction. Id. at 1-2. This Court granted writ relief and vacated the District Court's order. Id. at 2, 8.

Dozier's execution was scheduled for July 11, 2018. Appendix to Emergency Petition for Writ of Mandamus or Prohibition Under NRAP 21(a)(6) and NRAP 27(e) (PA) 74. On July 10, 2018, Real Party in Interest filed a Complaint for Emergency Injunctive Relief and Return of Illegally-Obtained Property. Id. at 73-153. The District Court held a hearing on July 11, 2018. Id. at 342-425. On the same day the District Court issued a Temporary Restraining Order that "prohibited and enjoined [NDOC] from using Alvogen's product midazolam in capital punishment until further order of this Court." Id. at 430.

STATEMENT OF FACTS

This Court summarized the facts supporting Dozier's conviction and death sentence on direct appeal:

> Dozier killed Jeremiah Miller at the La Concha Inn in Las Vegas, Clark County, Nevada. Dozier dismembered Miller's body, put his torso,

> which was cut into two pieces, into a suitcase, and dumped the suitcase into an apartment complex dumpster. Miller's head, lower arms, and lower legs were never recovered. Dozier took money from Miller that Miller had intended to use to purchase precursor chemicals for the production of methamphetamine.

Dozier v. State, Docket No. 50817 (Order Affirming in Part, Reversing in Part, and Remanding, January 20, 2012, p. 1).

ARGUMENT

Real Party in Interest cannot be allowed to abuse the civil litigation process to impose its political agenda upon Nevada. Alvogen's political position is insufficient to overcome Nevada decision to allow the death penalty and to statutorily limit the judicial ability to stay executions. The lower court acted outside its jurisdiction and/or exercised its authority in a manifestly abusive, arbitrary or capricious manner by issuing a stay despite the doctrine of sovereign immunity and the plain text of NRS 176.415.

I. STANDARD OF REVIEW

Standard for Prohibition

Nevada Revised Statute 34.320 states:

> The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person from exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

A writ of prohibition does not serve to correct errors; its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial but not ministerial power. Olsen Family Trust v. District Court, 110 Nev. 548, 551, 874 P.2d 778, 780 (1994); Low v. Crown Point Mining Co., 2 Nev. 75 (1866). However, "a writ of prohibition must issue when there is an act to be 'arrested' which is 'without or in excess of the jurisdiction' of the trial judge." Houston Gen. Ins. Co. v. District Court, 94 Nev. 247, 248, 78 P.2d 750, 751 (1978); Ham v. Eighth Judicial District Court, 93 Nev. 409, 412, 566 P.2d 420, 422 (1977); See also, Goicoechea v. District Court, 96 Nev. 287, 607 P.2d 1140 (1980); Cunningham v. District Court, 102 Nev. 551, 729 P.2d 1328 (1986).

The object of a writ of prohibition is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. Olsen Family Trust, 110 Nev. at 552, 874 P.2d at 781; Silver Peaks Mines v. Second Judicial District Court, 33 Nev. 97, 110 P. 503 (1910). Petitions for extraordinary writs are addressed to the sound discretion of the Court, and may only issue where there is no plain, speedy, and adequate remedy at law. NRS 34.330; Jeep Corp. v. Second Judicial Dist. Court, 98 Nev. 440, 442-443, 652 P.2d 1183, 1185 (1982).

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Standard for Mandamus

This Court may issue a writ of mandamus to enforce "the performance of an act which the law enjoins as a duty especially resulting from an office . . . or to compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled and from which he is unlawfully precluded by such inferior tribunal." NRS 34.160.

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). Thus a writ of mandamus will only issue to control a court's arbitrary or capricious exercise of its discretion." Id. *citing* Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-1016 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

II. EXTRAORDINARY RELIEF IS WARRANTED AS PETITIONER DOES NOT HAVE A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW

"[M]andamus and prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of this court." Hickey v. Eighth Jud. Dist. Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). However, extraordinary relief will not issue "where the petitioner has a plain, speedy

and adequate remedy, *such as an appeal*, in the ordinary course of law." Id. at 731, 782 P.2d at 1338 (emphasis added); Bradford v. Eighth Jud. Dist. Court, 129 Nev. ___, ___, 308 P.3d 122, 123 (2013). Further, even though an appeal may not be immediately available "because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." Pan v. Eighth Jud. Dist. Court, 120 Nev. 222, 225, 88 P.3d 840, 841 (2004); Bradford, 129 Nev. at ___, 308 P.3d at 123. Lastly, the petitioner carries "the burden of demonstrating that extraordinary relief is warranted." Pan, 120 Nev. at 228, 88 P.3d at 844; see also NRAP 21(a).

Petitioner does not have an adequate and speedy remedy at law. Dozier has twice been scheduled for execution and in both instances NDOC has been precluded from going forward at the last moment. Repeated collateral attacks on Dozier's death sentence not only frustrate the jury's sentence, it has the practical effect of making it impossible to execute Dozier because the drugs involved have expiration dates.

III. SOVEREIGN IMMUNITY REQUITED THE LOWER COURT TO PREVENT ALVOGEN FROM USURPING THE LEGISLATURE'S AUTHORITY TO SET PUBLIC POLICY

Sovereign immunity precludes Alvogen from dictating public policy by way of private lawsuit. As such, writ relief is warrant to correct Judge Gonzalez's failure to enforce NRS 41.032(2).

In the context of a capital case, this Court has refused to adopt a rule that "rewards and thus incentivizes less than forthright advocacy[.]" Righetti v. Eighth Judicial District Court, 133 Nev. __, __, 388 P.3d 643, 648 (2017). It is widely recognized that those who litigate for capital defendants engage in tactics designed to frustrate the imposition of sentence through never ending delay.[2] Rhines v. Weber, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 1535 (2005) ("In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."); In re Reno, 55 Cal.4th 428, 515, 283 P.3d 1181, 1246 (Cal. 2012) ("death row inmates have an incentive to delay assertion of habeas corpus claims"). The United States Supreme Court has noted that executions are frustrated by the political pressure placed on pharmaceutical companies "to refuse to supply the drugs used to carry out death sentences." Glossip v. Gross, __ U.S. __, __, 135 S.Ct. 2726, 2733 (2015). Indeed, in a case strikingly similar to this matter, litigation between Arkansas and a drug company over the acquisition of a drug for use in an execution resolved by way of a joint motion to

[2] This litigation has been tainted by such misconduct once already. At oral argument on the last writ, this Court questioned the FPD about the lack of authorization from Dozier to request a stay to file a 42 U.S.C. § 1983 action and how counsel was achieving the same goal despite the wishes of his client. Nevada Department of Corrections v. District Court (Dozier), Docket No. 74679 and 74722, May 8, 2018, Oral Argument, 59:18-57,1:04:05-35 (https://nvcourts.gov/Supreme/Arguments/Recordings/NEVADA_DEP_T_OF_CORR__VS__DIST__COURT_(DOZIER_(SCOTT))/).

dismiss because the drugs had expired. Arkansas v. McKesson Medical-Surgical, Inc., Arkansas Supreme Court Docket No. CV-17-317 (Joint Motion to Dismiss, filed March 19, 2018). Clearly, such an outcome in this matter would be seen as a victory by anti-capital punishment advocates such as Alvogen.

However, such a result is legally impermissible because the Legislature has specifically declined to include discretionary policy decisions within the State's waiver of sovereign immunity:

> [N]o action may be brought under NRS 41.031 … which is … [b]ased on the exercise or performance or the failure to perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

NRS 41.032(2).

This Court has recognized that the purpose of NRS 41.032(2) is "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Martinez v. Maruszczak, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (punctuation, citation and footnote omitted). In determining whether conduct is discretionary, and thus protected by sovereign immunity, this Court asks whether the governmental actions "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic or political policy." Id. at 446-47, 168 P.3d at 729. Ultimately, "if the injury-producing conduct is an integral part of

government policy-making or planning, if the imposition of liability might jeopardize the quality of the government process, or if the legislative or executive branch's power or responsibility would be usurped, immunity will likely attach[.]" Id. at 446, 168 P.3d 729. Importantly, ***the doctrine of sovereign immunity cannot be avoided through subterfuge***. State ex rel. Comm'r. of the DOT v. Thomas, 336 S.W.3d 588, 606 (Tenn. Crim. App. 2010).

Alvogen concedes that it "learned from … the Nevada branch of the American Civil Liberties Union that NDOC had acquired the midazolam it intends to use for Dozier's execution from Cardinal Health[.]" PA at 79.[3] Notably absent from Alvogen's pleading is any indication that suit will be brought against Cardinal Health. Alvogen admits that Cardinal Health sold the drug in question to NDOC. Id. at 79-80. Indeed, under Alvogen's view of the facts, Cardinal Health is the true villain. Alvogen maintains that it "understood from communication with Cardinal Health that it would not distribute the Alvogen Midazolam Product to corrections facilities for use in lethal injection protocols." Id. at 79. Yet, Alvogen appears to be doing nothing to recover from Cardinal Health for the reputational and goodwill

[3] The American Civil Liberties Union is a prominent anti-capital punishment legal organization. (https://www.aclu.org/other/case-against-death-penalty, ACLU, The Case Against the Death Penalty, last viewed July 16, 2018). Indeed, the litigation through which the American Civil Liberties Union of Nevada received the information regarding Cardinal Health's sale of the drug to NDOC was specifically related to Dozier's execution. PA 61-64.

harm it claims to have suffered from Cardinal Health's sale of Alvogen's product.

Alvogen is clearly abusing the civil litigation process in an attempt to control Nevada's capital punishment policy. Any reasonable corporation alleging it was harmed would seek recovery from all possible sources. Alvogen's decision to turn a blind eye to Cardinal Health's sale of Alvogen's drug to NDOC is inexplicable unless Alvogen's decision to sue NDOC is about an anti-death penalty agenda.

Regardless of Alvogen's position on the death penalty and its motives in suing NDOC, the people of Nevada, through the elected Legislative and Executive branches, believe that capital punishment is a legitimate response to certain criminal misconduct. NRS 200.030(4)(a). This decision by the political branches of government clearly satisfies the Martinez test in that it involves a high degree of individual choice and is clearly an expression of social policy.

Further, the Legislature invested the Director of the Department of Corrections with the discretion to "[s]elect the drug or combination of drugs to be used for the execution[.]" NRS 176.355(2)(b). This selection process clearly includes the acquisition of the necessary drugs because that process itself involves policy choices about how to get the medication. See, Ortega v. Reyna, 114 Nev. 55, 953 P.2d 18 (1998) (state trooper's decision to arrest and detain a motorist stopped for a traffic infraction who refused to sign the citation was a discretionary act immune from suit); Maturi v. Las Vegas Metro Police Dep't., 110 Nev. 307, 871

P.2d 932 (1994) (police officer's decision to handcuff a prisoner behind the back instead of in the front constituted a discretionary decision that invoked immunity); Neal-Lomax v. Las Vegas Metro Police Dep't., 574 F.Supp.2d 1170 (D. Nev. 2008) (police department entitled to summary judgment in an action alleging negligent supervision and training on Taser use); Kerrvile State Hospital v. Clark, 923 S.W.2d 582 (Tex. 1995) (hospital's use of oral medication rather than injectable did not come within waiver of sovereign immunity). Even if every allegation of fact made by Alvogen is correct, Nevada has not waived sovereign immunity as to these acts because the Legislature clearly intended this process to be an individualized and discretionary process controlled by the Director of the Department of Corrections. Even if NDOC used subterfuge to acquire Alvogen's product, such a discretionary judgment call would be a legitimate choice in light of decisions by Alvogen and other drug companies "to refuse to supply the drugs used to carry out death sentences." Glossip, __ U.S. at __, 135 S.Ct. at 2733. Regardless, this was an individualized and discretionary call reserved to the Director of the Department of Prisons, who was tasked with executing the political branches' social policy decision.

Application of sovereign immunity to correct the lower court's manifestly abusive, arbitrary and/or capricious exercise of discretion is particularly appropriate in the death penalty context. The United States Supreme Court has rightly pointed

out that death is different. Gregg, 428 U.S. at 188, 96 S.Ct. at 2932. This view flows not only from the enormity of an attempt by the State to end the life of a citizen, but also from the terrible harm inflicted upon the community and the victim's surviving loved ones. Such an emotionally charged issue invariably causes partisans on both sides of the debate to fight as hard as possible. In pursuing their crusade against capital punishment, it is very easy for anti-death penalty organizations and companies to view delay as a way to impose their beliefs upon Nevada without the inconvenience of an election. See, Glossip, __ U.S. at __, 135 S.Ct. at 2733; Rhines, 544 U.S. at 277-78, 125 S.Ct. at 1535; In re Reno, 55 Cal.4th at 515, 283 P.3d at 1246; Righetti, 133 Nev. at __, 388 P.3d at 648.

However, such skullduggery has real human costs that should not be ignored. Not only does it undermine our democracy by usurping the people's right to set public policy through their elected officials, but the judicial system of Nevada promised justice to Miller's loved ones and friends. The jury decided that the form of that justice would be Dozier's death. Dozier has made peace with the verdict. He has likely asked his mother and other loves ones to accept his decision. Each of these people, on the victim side and Dozier's side, are utterly mistreated by a process that legitimizes gamesmanship in the form of last minute delays that somehow always manage to prevent an execution from actually happening. Twice all of these people were forced to go through the emotional trauma and heartache of an imminent

execution and twice the system has allowed them to suffer for nothing. This Court has the authority and the obligation to do better by these people.

Writ relief is warranted in order to prevent Alvogen from effectively invalidating NRS 176.355(2)(b) and NRS 200.030(4)(a) through "less than forthright advocacy[.]" Righetti, 133 Nev. at __, 388 P.3d at 648. Nevada's political decision that capital punishment is a legitimate response to certain criminal misconduct and the choices made to execute that policy are protected from subversion through third party lawsuits by the doctrine of sovereign immunity. The lower court should have complied with Nevada law and rebuffed Alvogen's attempt to usurp the authority of Nevada's elected officials to set public policy. This is particularly so where Dozier has accepted the verdict of the jury and wants to die rather than spend the remainder of his days in prison.

IV. THE DISTRICT COURT LACKED JURISDICTION TO STAY DOZIER'S EXECUTION

The lower court lacked authority to enjoin Dozier's execution. The Legislature has carefully circumscribed the ability of the judiciary to stop an execution. The questionable claims raised by Real Party in Interest are clearly outside that limited scope. As such, the lower court acted without authority and writ relief is warranted.

The Legislature has carefully delineated under what circumstances an execution may be stayed and who has the authority to make such a determination:

The execution of a judgment of death must be stayed only:

> 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 appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution;
>
> 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 intellectually disabled; or
>
> 6. Pursuant to the provisions of NRS 176.0919 or 176.486 to 176.492, inclusive.

NRS 176.415.

This Court has repeatedly held that "*if the language of a statute is clear on its face, we will ascribe to the statute its plain meaning and not look beyond its language*." Koller v. State, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006) (footnote and internal quotation marks omitted, emphasis added); Accord, Potter v. Potter, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005) ("When the language of a statute is clear and unambiguous, its apparent intent must be given effect"); State Dept. of Human

Resources, Welfare Div. v. Estate of Ulmer, 120 Nev. 108, 113, 87 P.3d 1045, 1049 (2004) (It is well established that when the language of a statute is plain and unambiguous a court should give that language its ordinary meaning and not go beyond it); Beazer Homes Nevada, Inc. v. Eighth Judicial District Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (if the plain meaning of a statute is clear on its face the this court will not go beyond the language of the statute to determine its meaning); State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) (We must attribute the plain meaning to a statute that is not ambiguous); Diamond v. Swick, 117 Nev. 671, 675, 28 P.3d 1087, 1089 (2001) ("This court has consistently held that when there is no ambiguity in a statute, there is no opportunity for judicial construction, and the law must be followed unless it yields an absurd result. In construing a statute, this court must give effect to the literal meaning of the words."); City Council of City of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 893, 784 P.2d 974, 977 (1989) (When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it).

The plain text of NRS 716.415 is clear and the lower court should have complied with the law. Judge Gonzalez does not sit on the State Board of Pardons Commissioners and did not premise her decision upon Article 5, § 14 of the Nevada Constitution. Thus NRS 176.415(1) did not allow her to stay Dozier's execution. Similarly, Judge Gonzalez is not the Governor and as such could not exercise the

authority invested in him under NRS 176.415(2).

Sections 3-6 of NRS 176.415 vest jurisdiction to stay an execution in the judiciary. However, none of these specific circumstances are present in this matter. NRS 176.415(3) allows an appellate court to stay an execution in the context of a direct appeal from a judgment of conviction. The Eighth Judicial District Court is not an appellate court, Judge Gonzalez is not an appellate judge and the proceeding before her was not a direct appeal from Dozier's Judgment of Conviction.

NRS 176.415(4) does not apply because Judge Gonzalez is not "a judge of the district court of the county in which the state prison is situated" and the proceedings before her did not involve "an investigation of sanity or pregnancy[.]" Dozier is housed at Ely State Prison, which is located in White Pines County.[4] Judge Gonzalez did not make a factual finding that Dozier is pregnant and it has already been decided that Dozier is competent. PA at 430; Nevada Department of Corrections v. District Court (Dozier), Docket No. 74679 and 74722, Order Granting Petition in Docket No. 74722 and Denying Petition in Docket No. 74769, filed May 18, 2018, p. 2.

NRS 176.415(5) does not justify Judge Gonzalez's order since the proceeding below was not "for the purpose of determining whether the defendant is

[4] NDOC's web based inmate search system indicates that Dozier is housed at Ely State Prison. (http://167.154.2.76/inmatesearch/form.php, last viewed July 13, 2018). NDOC's website says that Ely State Prison is located in White Pines County. (http://doc.nv.gov/Facilities/ESP_Facility/, last viewed July 13, 2018).

intellectually disabled[.]" Regardless, it has already been demonstrated that Dozier is competent. Nevada Department of Corrections v. District Court (Dozier), Docket No. 74679 and 74722, Order Granting Petition in Docket No. 74722 and Denying Petition in Docket No. 74769, filed May 18, 2018, p. 2.

Finally, NRS 176.415(6) is also inapplicable. NRS 176.0919 allows an "[e]xecution to be stayed pending results of genetic marker analysis[.]" The proceeding below did not involve such a scientific procedure. NRS 176.415(6) also allows a stay pursuant to NRS 176.486 to NRS 176.492. An examination of those statutes does not change the situation since they relate to a capital defendant's decision to pursue habeas relief. NRS 176.486 allows a court to "stay the execution of a sentence of death when a postconviction petition for habeas corpus has been filed[.]" The proceeding below was not a habeas matter and Dozier has decided not to pursue such relief. PA at 430; Nevada Department of Corrections v. District Court (Dozier), Docket No. 74679 and 74722, Order Granting Petition in Docket No. 74722 and Denying Petition in Docket No. 74769, filed May 18, 2018, p. 2.

Other jurisdictions have rejected attempts to circumvent statutes similar to NRS 176.415. Commonwealth v. Michael, 618 Pa. 353, 56 A.3d 899 (2012) (Please and Commonwealth courts lacked jurisdiction to stay execution under 42 Pa.C.S.A. §9545(c)); Singleton v. Norris, 332 Ark. 196, 964 S.W.2d 366 (1998) (circuit court lacked jurisdiction to stay execution under Ark. Code Ann. § 16-90-506); Lockett

v. State, 2014 OK CR 3, 329 P.3d 755 (2014) (rejected request for a stay of execution because 22 O.S. 2011, §1001(C) limited the Court's authority to issue a stay).

The lower court did not deign to address the controlling authority of NRS 176.415. Instead, the order below nakedly relied upon nothing more than Rule 65(b) of the Nevada Rules of Civil Procedure (NCRP). However, the NRCP do not apply to capital punishment cases. NRCP 81(a) indicates that the civil procedure rules "do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute." The United States Supreme Court has made it clear that death is different. Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932 (1976). Accordingly, NRS 176.415 enunciates the special statutory proceedings in which a sentence of death may be stayed. The rules of civil procedure are inconsistent with those proceedings because the circumstances under which a death case may be stayed pursuant to NRS 176.415 are significantly more circumscribed than the stays allowed under NRCP 65(b). NRS 176.415 itself is within Title 14, which governs "Procedure in Criminal Cases." As such, there is no room for the rules of civil procedure to apply in a proceeding that stays a death sentence.

The rules of statutory construction clearly mandate such a conclusion. The more specific authority controls over the general proposition:

> "When two statutory provisions conflict, this court employs the rules of statutory construction and attempts to harmonize conflicting

> provisions so that the act as a whole is given effect," *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 508, 306 P.3d 369, 380 (2013) (internal citations omitted). "Under the general/specific canon, the more specific statute will take precedence and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict, but can exist in harmony," *Williams v. State, Dep't of Corr.*, 133 Nev. Adv. Rep. 75, 402 P.3d 1260, 1265 (internal citations and quotation marks omitted); *see also Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015) (providing that "[w]here a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls" (internal quotation marks omitted)).

N.J. v. State (In re N.J.), 134 Nev. Adv. Op. 48, p. 5-6, __ P.3d __ (2018). Accord, State v. Eighth Judicial District Court (Logan D.), 129 Nev. __, __, 306 P.3d 369, 381 (2013) ("when a [statutory] scheme contains a general prohibition contradicted by a specific provision, the specific provision is construed as an exception to the general one") (internal quotation marks and citation omitted).

In re N.J. is instructive. The question presented was whether NRS 48.045(2) was inapplicable in juvenile delinquency proceedings because it was inconsistent with NRS 62D.420(1)(a). NRS 48.045(2) mandates that "[a]lthough evidence of prior misconduct 'is not admissible to prove the character of a person,' it may be admitted 'for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" In re N.J., 134 Nev. Adv. Op. 48, p. 3 (quoting, NRS 48.045(2). On the other hand, NRS 62.420(1)(a) allows for admission of "all competent, material and relevant evidence

that may be helpful in determining the issues presented[.]" This Court applied the general / specific cannon of statutory construction to reject application of NRS 48.045(2) to juvenile delinquency proceedings "[b]ecause NRS 62D.420 is a statute focusing specifically on the admission of evidence in juvenile proceedings, it is the more specific statute, and it governs here." In re N.J., 134 Nev. Adv. Op. 48, p. 5-6. The same logic required Judge Gonzalez to reject NRCP 65(b) in favor of NRS 176.415.

In Logan D., a juvenile sex offender argued that he should not be subject to the registration and community notification requirements of NRS 179D.010-550 because NRS 169.025(2) "provides that NRS Title 14, which includes NRS Chapters 169 through 189, does not apply to juvenile delinquency proceedings." Logan D., 129 Nev. at __, 306 P.3d at 380. However, Legislative amendments to Chapter 179D required "that juveniles adjudicated of sex offenses submit to registration and community notification[.]" Id. This Court concluded that "[t]he rules of statutory construction dictate that the specific provisions of NRS Chapter179D be construed as exceptions to the general prohibition of NRA 169.025(2)." Logan D., 129 Nev. at __, 306 P.3d at 381. As such, Logan D. also supports rejection of NRCP 65(b).

Consistent with the rules of statutory construction, this Court should treat NRS 176.415 as a specific exception to the more general rule of NRCP 65(b). The civil rule is the wider gate and would allow for a stay if any set of facts show

"immediate and irreparable injury, loss or damage[.]" However, under NRS 176.415(1)-(6) a sentence of death may be stayed only in very specific situations. In each of these the availability of a stay is limited to clearly delineated factual and procedural circumstances. As such, the lower court's reliance upon NRCP 65(b) was a manifest abuse of discretion because the Court ignored the controlling and specific provisions of NRS 176.415.

The plain language of NRS 176.415 clearly delineates the circumstances under which a sentence of death can be stayed. None of them are relevant here. Judge Gonzalez acted beyond her jurisdiction or exercised her authority in a manifestly abusive or capricious manner in ignoring NRS 176.415. This analysis does not change based on the lower court's abusive and capricious application of NRCP 65(b) because that rule is inapplicable under the rules of statutory construction. As such, writ relief is warranted.

CONCLUSION

The current stay differs little from the previous injunction. Not very long ago this Court chided the Eighth Judicial District Court for ignoring McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009):

> When proper procedures are followed, the parties, the courts, and the public tend to understand the type of case being litigated, the overall framework that applies to it, and the relevant rules and tests that control the ultimate outcome. We regret that this did not happen here. Although we recognize the importance of this matter, both to Dozier and to the citizens of the State of Nevada, the fact that this case

> has serious implications was all the more reason to follow established rules and procedures rather than set them aside as inconvenient. We cannot endorse this process.

Nevada Department of Corrections v. District Court (Dozier), Docket No. 74679 and 74722, Order Granting Petition in Docket No. 74722 and Denying Petition in Docket No. 74769, filed May 18, 2018, p. 7-8. Really, the only thing that has changed is that the Eighth Judicial District Court has moved from ignoring this Court's precedent to disregarding the will of the Legislature. Neither of these are permissible in a democracy governed by the rule of law.

WHEREFORE, the State respectfully requests that extraordinary relief be GRANTED.

Dated this 26th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains no more than 5,722 words and is no more than one-half the maximum length authorized for a party's brief, NRAP 29(e).
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 26, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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