

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.: 76485

District Court Case No. A-18-777312-B

Electronically Filed  
Jul 27 2018 03:25 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

MOTION TO EXPEDITE DECISION BY OCTOBER 19, 2018

ADAM PAUL LAXALT

*Attorney General*

ANN M. McDERMOTT (Bar No. 8180)

*Bureau Chief*

JORDAN T. SMITH (Bar No. 12097)

*Deputy Solicitor General*

OFFICE OF THE ATTORNEY GENERAL

555 East Washington Avenue, Suite 3900

Las Vegas, NV 89101

(702) 486-3894

[jsmith@ag.nv.gov](mailto:jsmith@ag.nv.gov)

For the second time in less than a year, a department in the Eighth Judicial District Court has entered an order that delayed a lawful capital sentence. And for the second time in less than a year, there is a serious risk that one or more drugs in the State's lethal injection protocol will expire before this Court has the opportunity to issue a decision. If a ruling comes too late, the State may lose its ability to carry out Scott Raymond Dozier's capital sentence—as happened when drugs expired during the prior related writ proceeding. Any drug expiration will hand death penalty opponents, and Alvogen, Inc., a win by default. A drug expiration may also force the State to find a substitute drug yet again, and this seemingly endless capital litigation process will start anew with another trudge to this Court. Even a ruling that comes after some (but not all) drugs expire will have an accordion effect that will deplete the State's supply and impair the State's ability to complete other capital sentences following Dozier. The more drugs that expire as a result of the District Court's restraining order, the less (or no) drugs that are available to vindicate other capital jury verdicts.

Much like the State's Diazepam supply in the previous Dozier writ, a 200 milligram batch of Cisatracurium expires November 30, 2018. The current lethal injection protocol calls for 200 milligrams of Cisatracurium for each execution. Therefore, if the Court does not issue a ruling in time to use this November batch, the State will lose its ability to carry out an execution. This will impact pending capital sentences and cause irreparable damage to the State's sovereign interests. *See New Motor Vehicle Bd. of Ca. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in

chambers) (holding that a State suffers irreparable injury any time a court enjoins it from effectuating statutes enacted by Representatives of the People).

Under 176.495(2), a supplemental warrant of execution must “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.”

Since November 30<sup>th</sup> is a Friday, a supplemental warrant cannot appoint the week of November 26, 2018 as there will not be a full week to complete the execution before the November batch expires. The next available full week begins Monday, November 12, 2018 and ends Sunday, November 18, 2018. To properly notice the week of November 12, 2018, based on the minimum 15-day deadline in NRS 176.495, the District Court (Judge Togliatti) will have to issue a supplemental warrant on or before Friday, October 26, 2018. Accordingly, to prevent a pyrrhic resolution in the State’s favor, the Court needs to issue a decision at least one week before October 26<sup>th</sup>—Friday, October 19, 2018. However, cutting it too close to October 19<sup>th</sup> opens the door for another last minute lawsuit to stir enough confusion and delay that the drugs still expire.

This Court has already “recognize[d] the importance of this matter, both to Dozier and to the citizens of the State of Nevada, [and] the fact that this case has serious implications ....” *NDOC v. Eighth Jud. Dist. Ct.*, 417 P.3d 1117, 2018 WL 2272873, at \*3 (Nev. 2018) (unpublished disposition). Thus, this is one of the rare instances when the

Court should issue a summary disposition with a reasoned opinion to follow. The Court has followed this process in other time sensitive matters.

For example, in *In re Candelaria*, 126 Nev. 408, 245 P.3d 518 (2010), the Court issued an order granting a motion to expedite briefing and required the appellant to file the opening brief two days later, the answering brief five days later, and the reply brief two days after that. (Case No. 55715, doc. 10-08312). Four days after briefing was complete, the Court issued an order setting oral argument with two days' notice. (*Id.* at docs. 10-09579; 10-09657). The parties argued the case on April 15, 2010 and the Court issued a disposition on the same day. (*Id.* at doc. 10-09868). The disposition stated “[a]s this matter warranted our expedited consideration and decision, we enter this order for the purposes of providing the parties immediate resolution. A detailed disposition in this matter will be forthcoming.” (*Id.*).

The Court has followed a similar practice in other matters more recently. *See The Las Vegas Review Journal v. Eighth Jud. Dist. Ct.*, Case No. 75073 (2018) (directing answer to writ petition in 24 hours and issuing published decision granting the writ 15 days after the Court docketed the matter); *see also Wynn v. Eighth Jud. Dist. Ct.*, Case No. 74184 (2017) (directing answer one day after petition docketed, requiring party to file answer within 5 days, requesting a reply 3 days thereafter, and holding argument 3 months later); *Wynn v. Eighth Jud. Dist. Ct.*, Case No. 74063 (2017) (requesting answer within a month of docketing, requiring answer within 7 days, requesting a reply 3 days thereafter, and deciding matter within 3 months).

Unlike the previous Dozier writ proceeding, this matter does not involve “multiple, complex issues” of constitutional law. *Cf. NDOC v. Eighth Jud. Dist. Ct. (Dozier)*, Case No. 74679 (Mar. 27, 2018) (Order Denying Emergency Motion to Expedite). On the contrary, this matter presents straightforward legal questions about the District Court’s authority to stay an execution and the (non)existence of a drug manufacturer’s causes of action to interfere with a capital sentence. The sovereign and victim interests at stake warrant expedited treatment. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) (accepting “the State’s legitimate interest in carrying out a sentence of death in a timely manner.”); *Ledford v. Comm’r, Georgia Dep’t of Corr.*, 856 F.3d 1312, 1319 (11th Cir. 2017) (“Victims of crime also have an important interest in the timely enforcement of a sentence.”).

For these reasons, Petitioners respectfully request that the Court expedite its decision in this matter and issue a disposition on or before October 19, 2018. *See* NRAP 2 (“On the court’s own or a party’s motion, the court may ... expedite its decision”).

Dated: July 27, 2018.

/s/ Jordan T. Smith  
Ann M. McDermott (Bar No. 8180)  
*Bureau Chief*  
Jordan T. Smith (Bar No. 12097)  
*Deputy Solicitor General*  
OFFICE OF THE ATTORNEY GENERAL  
555 East Washington Avenue, Suite 3900  
Las Vegas, NV 89101  
[jsmith@ag.nv.gov](mailto:jsmith@ag.nv.gov)  
*Counsel for Petitioners*

## VERIFICATION

I, Jordan T. Smith, declare as follows:

1. I am currently employed in the Office of the Attorney General as the Deputy Solicitor General. I am counsel for Petitioners named herein.

2. I verify that I have read the foregoing Motion to Expedite Decision by October 19, 2018 and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury of the laws of Nevada that the foregoing is true and correct.

Executed on this 27<sup>th</sup> day of July 2018 in Las Vegas, Nevada.

/s/ Jordan T. Smith  
Jordan T. Smith (Bar No. 12097)  
*Deputy Solicitor General*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 27(d) and the typeface and type-style requirements of NRAP 27(d)(1)(E) because this Motion has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 double-spaced Garamond font. This filing also complies with NRAP 32.

I further certify that I have read this Motion and that it complies with the page or type-volume limitations of NRAP 27(d)(2) and NRAP 32 because, it is proportionately spaced, and does not exceed 10 pages.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Motion complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion regarding matters in the record to be supported by appropriate references to the record on appeal. 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: July 27, 2018.

/s/ Jordan T. Smith  
Jordan T. Smith (Bar No. 12097)  
*Deputy Solicitor General*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MOTION TO EXPEDITE DECISION BY OCTOBER 19, 2018** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on July 27, 2018.

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:

James J. Pisanelli, Esq.  
Todd Bice, Esq.  
Debra Spinelli, Esq.  
PISANELLI BICE, PLLC  
400 South 7th Street, Suite 300  
Las Vegas, NV 89101

Angela Walker  
LATHAM & WATKINS, LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004-1304

Kenneth Schuler  
Michael Faris  
Alex Grabowski  
LATHAM & WATKINS, LLP  
330 North Wabash Avenue  
Suite 2800  
Chicago, IL 60611

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