

**In the Supreme Court 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 Judge,

Respondents,

and

ALVOGEN, INC.; and HIKMA  
PHARMACEUTICALS USA INC.

Real Parties  
in Interest.

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Aug 13 2018 10:47 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**HIKMA'S OPPOSITION  
TO THE STATE'S  
MOTION TO STAY  
and  
JOINDER IN ALVOGEN'S  
OPPOSITION TO  
MOTION TO STAY**

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*Attorneys for Hikma Pharmaceuticals USA Inc.*

Hikma Pharmaceuticals USA Inc. (“Hikma”) joins in Alvogen, Inc.’s (“Alvogen”) opposition to the State’s motion for stay and adds its own following arguments.

**I. INSTEAD OF STAYING ALL PROCEEDINGS  
FOR AN INTERLOCUTORY PETITION, THIS COURT SHOULD ALLOW  
HIKMA TO DEVELOP A RECORD FOR APPELLATE REVIEW**

The State requests a stay of all proceedings in the district court while it challenges the district court’s interlocutory TRO. This approach will result in unnecessary delay and piecemeal litigation.

While Hikma has joined in and supplemented Alvogen’s motion for preliminary injunction, Hikma is not a party to the TRO; thus, the State is not restrained from using Hikma’s Fentanyl in the execution of Dozier. Because Judge Togliatti had already issued a stay of execution on July 11, 2018, Hikma did not seek its own TRO, but sought a preliminary injunction instead. If this Court stays the underlying proceedings, Hikma will be in a position where it cannot obtain any relief.

Just as bad, with a stay Hikma would be in untenable position of having its claims reviewed by this Court, on an interim basis, but without the opportunity to develop a sufficient record for such an appellate review. The State should not be allowed to stay the development of all

issues simply because it is challenging an interlocutory TRO. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 101, 407 P.3d 702, 708 (2017). So far, Hikma has only filed a complaint and moved for a preliminary injunction. The State is attempting to cut off Hikma's claims before they can be developed. Under these circumstances, this Court should avoid this type of "interference from the appellate court during the course of preliminary and trial proceedings." *See Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5, 106 P.3d 134, 136-37 (2005). Even if the Court hears this interlocutory petition, it should not stay the proceedings, which would prevent parties like Hikma from developing the issues. *See id.*; *Archon Corp.*, 407 P.3d at 708.

Normally, where a district court rejects a defendant's NRCP 12(b)(5) attack on the viability of a complaint, that determination is not appealable and usually is not properly the subject of a writ petition. Instead, the unsuccessful movant is required to participate in the discovery process. Participating in discovery will not defeat a party's ability later to challenge to the viability of a legal claim. That is true in this case.

## **II. THE STATE IS NOT ENTITLED TO A STAY UNDER THE NRAP 8(c) FACTORS**

This Court considers four factors in deciding whether to grant a stay: (1) whether the object of the writ petition will be defeated if the stay is denied, (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied, (3) whether the real party in interest will suffer irreparable or serious injury if the stay is granted, and (4) whether appellant/petitioner is likely to prevail on the merits in the writ petition. NRAP 8(c); *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Under these factors, the State is not entitled to stay the district court proceedings.

### **A. The Object of the Petition Will Not Be Defeated if the Stay is Denied**

A denial of the stay of proceedings would have no bearing on the Petition, whatsoever. This is not a case where allowing the district court proceedings to continue would destroy the underlying object of the appeal, as it would in an appeal seeking to enforce an arbitration provision. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 254, 89 P.3d 36, 37-38, 40 (2004) (“[A]llowing the district court proceedings to continue while its appeal is pending will render the arbitration clause

meaningless, and any victory on appeal will be hollow.”). The State contends the petition has two objects that will be defeated if district court proceedings are allowed to continue. Neither of these contentions justifies a stay.

***1. The State Claims A Purpose of this Writ is to Prevent Discovery and Disclosure***

The State asserts that the Petition’s purpose “is to establish that drug manufacturers do not possess a cause of action or property interest that entitles them to discovery in the first place.” Mot. 8. This characterization overreaches. While the Petition challenges whether manufacturers possess viable claims for relief, the Petition does not mention whether a drug manufacturer is entitled to obtain information from the State about its products. The Petition also does not contain a viable argument that the discovery process must be stalled pending a decision by this Court on whether a plaintiff’s claims are cognizable.

The State’s argument against disclosure and transparency is ironic considering that the State is subject to the Nevada Public Records Act, NRS Chapter 239. In fact, the State was even recently compelled by a district court to disclose the information stemming these legal pro-

ceedings.<sup>1</sup> The State should not be allowed to use the Petition as a springboard to prevent disclosure of information and discovery.

**2. *A Challenge to the District Court's Authority  
is Not Destroyed by Denying a Stay***

The State also claims that an object of the Petition is to establish that the district court lacked authority to enter an injunction “that has the effect of staying an execution.” Mot. 8. But the State fails to articulate how continued proceedings in the district court would defeat that alleged object. Interlocutory review does not automatically bring the underlying litigation to a halt, and allowing proceedings to go forward would expedite any ultimate decision. Because the district court’s grant of a preliminary injunction would not change the existing conditions under the TRO, the object of these proceedings remains unaffected.

**B. The State Will Not Suffer  
Irreparable Injury Absent a Stay**

**1. *Involvement in Litigation  
is Not Irreparable Harm***

The State complains that it will be irreparably injured if required to expend time and resources in the discovery process and the prelimi-

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<sup>1</sup> See *Am. Civil Liberties Union of Nev. Found. v. State*, Case No. 18 OC 00163 1B, Order (Nev. Dist. Ct. July 6, 2018).

nary injunction hearing pending this writ proceeding. Mot. 7-8. This Court has already rejected that argument, however, concluding that a party does not suffer irreparable or serious injury in being required “to participate ‘needlessly’ in the expense of lengthy and time-consuming discovery, trial preparation, and trial.” *Hansen*, 116 Nev. at 658, 6 P.3d at 986-87. In fact, this Court held that “litigation expenses, while potentially substantial, are neither irreparable nor serious.” *Id.* (citing other cases). This may be especially so, where the State is utilizing existing legal personnel.

**2.    *This Court Should Not Deny Discovery  
where this Litigation Arose  
from the State’s Withholding Information***

The impetus for this litigation was an order from the First Judicial District Court compelling the State to produce previously requested public records relating to the drugs that were to be used for Dozier’s execution. *See* Ex 1. According to the order, the State purposely withheld public records relating to those matters, in violation of the Nevada Public Records Act, so that drug manufacturers would not know whether their drugs were being used in the execution. *See* Ex. 1 at 3-4. Now, the State asks this Court for a stay of the underling proceedings to avoid

discovery, which would allow the State to continue its pattern of shielding its potentially illegal conduct and avoiding transparency and accountability.

Real Parties in Interest, and the citizens of Nevada, have a substantial interest in knowing how the State intends to carry out the process of killing a human being under a death warrant. The limited discovery that has been requested by Real Parties in Interest are essentially requests for public records that are open to public review. The purpose of allowing the release of public records is to ensure an accountable government. *See Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 215, 234 P.3d 922, 925 (2010). As a matter of public policy, the State should not be allowed to argue that a disclosure of public records would cause the State irreparable harm.

**C. Hikma Will Suffer Irreparable Harm  
if the Stay is Granted**

If this Court stays the underlying proceedings, Hikma will suffer irreparable or serious injury for two reasons. A stay of proceedings could prevent Hikma from obtaining its preliminary injunction, or even its own TRO, regarding its product. Then, if the State obtains midazolam from a manufacturer other than Alvogen, it could proceed with the



execution while still utilizing Hikma's Fentanyl. A stay of the underlying action could prevent Hikma from seeking immediate, emergency relief to avoid harm and maintain the status quo. Hikma would be irreparably injured as a result. And again, the State requests an advisory decision from this Court with no record before it. *See supra* § I.

**D. The State is Unlikely to Prevail  
on the Merits of its Petition**

With respect to the fourth factor, the State proposes a fluid approach: that it need not prove it will win, but only that the issue raised is important and its position is legitimate. Mot. 6-7. The State ignores that any fluidity depends upon the type of stay being requested and the circumstances of the case. There can be stays of injunctions, stays of enforcement of an order or judgment, or stays of proceedings. The State seems to argue it would be entitled to any type of stay if its legal position is non-frivolous.

But this is where all four factors intersect. The State would not be entitled to stay the TRO (and allow the execution to go forward with these drugs) because the harm would be irreparable and the object of the Petition would be defeated. Similarly, staying all district court proceedings causes harm to Real Parties in Interest and deprives this

Court of an adequate record. That cannot be justified simply on the basis that the State has a non-frivolous, albeit not necessarily prevailing, legal argument.

Even though the State relies on *Mikohn Gaming* to argue for a less stringent standard, that case actually supports Hikma's position on this stay. *See supra* § I. In *Mikohn Gaming*, this Court held that when an appeal "seek[s] to compel arbitration," and "the merits are unclear," a stay should generally enter, because the object of the appeal, *i.e.*, the benefits of arbitration, will be defeated if the district court proceeds. *Id.* Thus, *Mikohn Gaming* applies only where further district court proceedings will defeat the object of the writ petition or appeal under the first stay factor.

Similarly, while the State relies on *Hansen* to argue that the fourth factor requires only a "substantial" case, this Court had also required the movant to "show that the balance of equities weighs heavily in favor of granting the stay," the analysis under the second and third factors. *Hansen*, 116 Nev. at 659, 6 P.3d at 987. Simply put, even the State's fluid reading of the fourth stay factor is not enough to support a stay of proceedings.

The State's position takes us full circle. By conceding that the merits are not yet clear enough to support a likelihood-of-success showing, the State underscores the need for further proceedings below. There is no district court record on the merits of Hikma's claims, except for the complaint itself, which has never been considered by the district court or tested with discovery. Because the State declines to argue that it is likely to prevail on the merits of Hikma's claims, the Court should allow the parties to develop those claims and record by proceeding below.

### **III. CONCLUSION**

For the foregoing reasons, denial of the State's request to stay the district court proceedings is warranted.

Dated this 13th day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Josh M. Reid  
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### CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I submitted the foregoing “Hikma’s Opposition to the State’s Motion to and Joinder in Alvogen’s Opposition to Motion for Stay” for filing *via* the Court’s eFlex electronic filing system. Simultaneous electronic notification and/or email notification will be sent to the following:

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/s/ *Jessie M. Helm*

An Employee of Lewis Roca  
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**EXHIBIT 1**

**EXHIBIT 1**

REC'D & FILED

2018 JUL -6 PM 5:18

SUSAN MERRIWETHER  
CLERK

G. COOPER  
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

The AMERICAN CIVIL LIBERTIES UNION  
of NEVADA FOUNDATION, a non-profit  
organization,

CASE NO. 18 OC 00163 1B

DEPT. 2

Petitioner,

vs.

ORDER GRANTING IN-PART  
EMERGENCY PETITION ISSUING  
WRIT OF MANDAMUS

STATE OF NEVADA *ex rel*, The NEVADA  
DEPARTMENT of CORRECTIONS;  
JAMES DZURENDA, in his official  
capacity as DIRECTOR,

Defendant.

Before the Court is Petitioner, American Civil Liberties Union of Nevada Foundation's (ACLUNV), Emergency Petition for Writ Of Mandamus To Compel The Nevada Department Of Corrections To Produce Public Records Relating To Its Lethal Injection Procedures And Scott Dozier's July 11, 2018 Execution. The Petition was filed at 3:15 p.m. on July 3, 2018 less than four judicial days before the scheduled execution by lethal injection of Nevada inmate Scott Dozier.

The ACLUNV sent a communication to the Court that was not filed. The Court has not seen that communication or been told what it says.

The Court first saw the Petition the morning of July 5, 2018. The Court's July 5 morning calendar was full so the Court could only quickly review the Petition. The Court instructed staff to arrange a telephone conference with counsel for the ACLUNV and NDOC. NDOC had hardly any time to investigate or prepare a response to the Petition.

1 The Court had little time to review the Petition and prepare for the hearing. The Court  
2 decided to proceed with a telephonic hearing in spite of NDOC's and the Court's lack of  
3 time to prepare for the hearing because Dozier's execution date was only four judicial  
4 days away. The Court heard oral argument by ACLUNV and NDOC's respective counsel  
5 during a telephonic hearing at 2:00 p.m. on July 5. The Court received no evidence other  
6 than the affidavit of Amy M. Rose and the copies of documents attached to the Petition.  
7 Because NDOC had hardly any time to prepare the Court informed NDOC it was not  
8 waiving any objections or defenses it may have in this action. Some of the Court's  
9 questions and statements during oral argument were made because of a lack of time to  
10 prepare for the hearing. All of the reasons for the Court's decision are contained in this  
11 order and anything the Court asked or said during oral argument that are inconsistent  
12 did not play any part in the Court's decision.

13 It appears at least some of the rush to hearing could have been avoided had the  
14 ACLUNV filed the Petition earlier. It knew or should have known a new death warrant  
15 would be issued.

16 The Court instructed ACLUNV to prepare a draft order and NDOC to file any  
17 objections as to any variations between what the Court stated on the record as the order  
18 and ACLUNV's draft and the parties complied. The Court used ACLUNV's draft as a  
19 starting point and this order is the Court's product based upon that process and it differs  
20 somewhat from the oral order. The differences are intentional.

21 The Court has not made findings of fact because NDOC had no opportunity to  
22 rebut information provided by ACLUNV or affirmatively produce evidence of its own.

23 The Third Supplemental Warrant of Execution for Dozier's execution was filed on  
24 June 19, 2018. Mr. Scott Dozier was previously scheduled to be executed on November  
25 14, 2017, using a three (3) drug cocktail of diazepam (a sedative), fentanyl (a pain  
26 medication), and cisastracurium (a paralytic). Although Mr. Dozier volunteered for  
27 execution, he brought a motion to determine the lawfulness of the method of his  
28 execution and challenged the use of a paralytic as unconstitutional. The sentencing



1 District Court agreed with Mr. Dozier and found that the use of a paralytic carries a  
2 substantial and "objectively intolerable risk of harm" to Mr. Dozier and prohibited the  
3 NDOC from using a paralytic in Mr. Dozier's execution. NDOC objected to this  
4 prohibition and filed a writ of mandamus with the Nevada Supreme Court. On May 10,  
5 2018, the Nevada Supreme Court overturned the sentencing District Court's ruling on  
6 procedural grounds.

7 On June 15, 2018, after the Nevada Supreme Court's decision, the ACLUNV  
8 submitted a public records request (Ex. 1) to NDOC under NRS 239 et seq., requesting  
9 documents pertaining to NDOC's lethal injection drugs and procedures. On June 19,  
10 2018, a new warrant of execution (Ex. 2) was signed by the sentencing District Court,  
11 setting Mr. Dozier's execution for the week of July 9, 2018. On June 22, 2018, the  
12 ACLUNV wrote to NDOC (Ex. 3) following-up on its public records request, informing  
13 NDOC that in light of Mr. Dozier's upcoming execution, immediate completion of its  
14 records request was necessary. NDOC informed the ACLUNV later on June 22, 2018,  
15 (Ex. 4) that the request was being processed and that:

16 "This request is not readily available and requires not only a search of  
17 potentially responsive documents but also a review of potentially  
18 responsive documents for any confidential e.g. personal information.  
19 Given that the request requires extensive searches and consultation,  
20 [NDOC] anticipate[s] being able to respond to you within sixty (60) days."

21 In response, on June 25, 2018, the ACLUNV wrote to NDOC again (Ex. 5)  
22 explaining the importance of these requests in light of Mr. Dozier's upcoming execution.  
23 The ACLUNV prioritized and offered to narrow some requests in order to receive  
24 documents immediately. On June 28, 2018, the ACLUNV again wrote to NDOC (Ex 6)  
25 stating that as NDOC had not produced the documents requested the ACLUNV planned  
26 to take legal action. NDOC responded on July 2, 2018 (Ex. 7) stating that it had received  
27 the ACLUNV's June 25, 2018, request and again stated the request is not readily  
28 available and NDOC anticipated being able to respond to you within 60 days.

29 The ACLUNV initiated the instant Emergency Writ to obtain the requested  
30 documents from NDOC under the Nevada Public Records Act, NRS 239 et seq.

1 On the same day the ACLUNV's Petition was filed, NDOC released a redacted execution  
2 protocol and a press release naming the drugs it plans to use in Mr. Dozier's execution.  
3 The execution protocol was signed by James Dzurenda, the Director of the Department  
4 of Corrections on June 11, 2018.

5 At the July 5th hearing, Counsel for NDOC could not tell this Court what  
6 measures were taken to fulfill the ACLUNV's requests before both the June 22, and July  
7 2, form letters were sent to the ACLUNV saying that no records were readily available.  
8 When asked by this Court what steps had been taken to comply with the ACLUNV's  
9 June 15, 2018 records request, Counsel for NDOC represented that NDOC took steps to  
10 obtain and redact part of the executional manual but represented that he did not have  
11 knowledge of whether other steps were taken.

12 Counsel for NDOC stated that there are United States Supreme Court cases, such  
13 as *Glossip v. Gross*, which point out that anti-death penalty advocates use information  
14 about where a state obtains execution drugs, such as that requested by the ACLUNV, to  
15 persuade the manufacturer and others to cease selling that drug for execution purposes.  
16 Counsel for the ACLUNV represented that NDOC has previously publicly released an  
17 invoice for a drug to be used in an execution with no redactions for confidentiality.

#### 18 19 ANALYSIS

20 The purpose of Nevada's robust Public Records Act, "is to foster democratic  
21 principles by providing members of the public with access to inspect and copy public  
22 books and records to the extent permitted by law." NRS 239.001(1); see *PERS v. Reno*  
23 *Newspapers Inc.*, 129 Nev. 833, 836-837 (2013) ("The [Nevada Public Records] Act's  
24 purpose is to promote government transparency and accountability by facilitating public  
25 access to information regarding government activities.")

26 Courts "begin with the presumption that all government-generated records are  
27 open to disclosure." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 628 (2011).  
28 The provisions of the Act "must be construed liberally to carry out this important

1 purpose." NRS 239.001(2).

2 Except for the public records identified by statute to be confidential, "all public  
3 books and public records of a governmental entity must be open at all times. . ." NRS  
4 239.010(1).

5 Once a public records request is made, the governmental entity is required to  
6 respond "[n]ot later than the end of the fifth business day after the date on which the  
7 person who has legal custody or control of a public book or record of a governmental  
8 entity receives a written or oral request from a person to inspect, copy or receive a copy  
9 of the public book or record." NRS 239.0107(1).

10 The governmental entity is required to either allow inspection or copying, or  
11 provide a copy of the requested record. NRS 239.0107(1)(a).

12 If the governmental entity does not have legal custody or control of the public  
13 book or record, it must provide to the person, in writing: "(1) Notice of that fact; and (2)  
14 The name and address of the governmental entity that has legal custody or control of the  
15 public book or record, if known." NRS 239.0107(b)(1-2).

16 "If the governmental entity is unable to make the public book or record available  
17 by the end of the fifth business day after the date on which the person who has legal  
18 custody or control of the public book or record received the request," it must, provide in  
19 writing "(1) Notice of that fact; and (2) A date and time after which the public book or  
20 record will be available for the person to inspect or copy or after which a copy of the  
21 public book or record will be available to the person." NRS 239.0107(c).

22 "If a public book or record of a governmental entity is readily available for  
23 inspection or copying, the person who has legal custody or control of the public book or  
24 record shall allow a person who has submitted a request to inspect, copy or receive a  
25 copy of a public book or record." NRS 239.0107(2).

26 NDOC argued and the Court understands that Dozier is not a party to this action.  
27 The Court concludes the people of the State of Nevada have a substantial interest in how  
28 the State intends to carry out the process of killing a human being under a death

1 warrant. The Court concludes that whatever potential prejudice NDOC may suffer as a  
2 result of this order, whether this order is ultimately found to be right or wrong, the  
3 potential prejudice to the people of the State of Nevada from the process of killing  
4 Dozier not being transparent before the execution is far greater.

5 From the documents, representations, and argument presented to this Court,  
6 considering the nature of the records requested, and considering Mr. Dozier's July 11th  
7 execution, at least the following records requested by the ACLUNV should on their face  
8 be readily available and should be immediately produced in good faith by NDOC:

- 9 1. For the lethal injection drugs planned to be used in Mr. Dozier's July 11<sup>th</sup>,  
10 records reflecting the names and quantities of the drugs to be used;
- 11 2. For any lethal injections drugs obtained by Respondent since November 9,  
12 2017:
  - 13 a. Records indicating the current amount of any such drugs in NDOC's  
14 custody or control;
  - 15 b. The date of purchase or acquisition of those drugs; and
  - 16 c. Expiration dates.

17 "Lethal injection drugs" means any drug NDOC will or may inject into Dozier as  
18 any part of the process of executing him.

- 19 3. Records from the Drug Enforcement Agency that demonstrate  
20 authorization to handle controlled substances at Ely State Prison.

## 22 ORDER

23 IT IS ORDERED:

24 A Writ of Mandamus be issued directing and ordering Respondents, State of  
25 Nevada ex rel the Nevada Department of Corrections and James Dzurenda, in his official  
26 capacity as Director of the Nevada Department of Corrections, to produce to Petitioner,  
27 the ACLUNV, by July 9, 2018, the following records that are in its custody or control:

28 /////



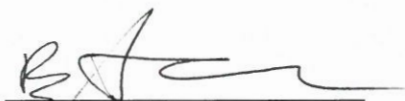
## CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on July 6, 2018, I served a copy of this document by placing a true copy in an envelope addressed to:

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the envelope sealed and then deposited in the Court's central mailing basket in the Court Clerk's Office for delivery to the United States Post Office at 1111 South Roop Street, Carson City, Nevada for mailing.

  
Baylie Hellman  
Law Clerk