

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

EVIDENTIARY HEARING RE PRELIMINARY INJUNCTION - DAY 1

TUESDAY, SEPTEMBER 11, 2018

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

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 G. SCHULER, ESQ.

FOR THE DEFENDANTS:

JORDAN T. SMITH, ESQ.
DONALD R. GILMER, ESQ.
STEVE SCHEVORSKI, ESQ.
THERESA HAAR, ESQ.
Deputies Attorney General

FOR THE INTERVENORS:

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DAVID McELHINNEY, ESQ.
DANIEL R. POLSENBERG, ESQ.
J. COLBY WILLIAMS, ESQ.
PHILIP R. ERWIN, ESQ.

1 tasked with carrying out capital sentences?

2 A Yes, it is.

3 Q And who assigned that responsibility to the
4 Department of Corrections?

5 A The Legislature voted and developed an NRS, which
6 is one of our state statutes on executions. In the NRS it
7 identifies me as the Director of Corrections overseeing the
8 executions for the State of Nevada.

9 Q So does the Department of Corrections, does it
10 decide or does it have any say in whether the state has
11 capital punishment or the death penalty?

12 A No, it does not.

13 Q Who makes that determination?

14 A That's the Legislature.

15 Q Do you know how many people are currently housed on
16 death row?

17 A We have 87 today.

18 Q If you know, of the last number of executions that
19 the State has carried out, how many of them have been
20 volunteers?

21 A When I looked at the last 12 executions in the state
22 of Nevada, 11 of those were volunteers.

23 Q So for all you know, somebody could volunteer next
24 week, for all you know?

25 A You can have a large number volunteer at any time.

1 Q And so is that why it's important that the State
2 have on hand an inventory of lethal injection drugs in case it
3 needs it?

4 A Yes, it is.

5 Q Describe for me how the Department of Corrections
6 actually gets involved in carrying out an execution.

7 A Well, we get a court order from the court ordering
8 me to perform an execution on a specific individual. The
9 order is given to me and the day I receive it I have 60 to 90
10 days to comply. No less than 60. It has to be greater than
11 60 but no more than 90, so it has to be in-between a 60 and
12 90-day term.

13 Q And so that's if there's an initial warrant and
14 order issued?

15 A That is correct.

16 Q What if, for whatever reason, there has to be a
17 supplemental warrant issued, how much time does the Department
18 of Corrections have?

19 A You even have less time. The supplemental is 15
20 days. It has to be greater than 15 days but no more than 30
21 days and it has to -- the execution has to occur in-between
22 those time frames.

23 Q That's a pretty short turn around?

24 A Yes, it is.

25 Q Do you recall when the Department of Corrections

1 Q In your opinion, Mr. Dzurenda, if all three drugs
2 are enjoined, will the Nevada Department of Corrections be
3 able to carry out Mr. Dozier's execution through the method
4 that you have chosen in your discretion?

5 A No, I would not.

6 Q If all three drugs are enjoined or barred, does the
7 Nevada Department of Corrections, in your opinion, have the
8 present ability to carry out Mr. Dozier's execution?

9 A As of right now, no.

10 Q And even if the State -- if the State is unable to
11 use the batch of cisatracurium that expires on November 30th,
12 will the Department of Corrections have to use cisatracurium
13 that would have otherwise been available for another potential
14 execution?

15 A Yes.

16 MR. BICE: Objection. Foundation, Your Honor.

17 THE COURT: Overruled.

18 BY MR. SMITH:

19 Q And is that true even if the State can buy more
20 cisatracurium, in your opinion?

21 A Yes, it is.

22 Q Do you as the Director of the Department of
23 Corrections also have discretion to designate the person,
24 separate and apart from the warrant, but is it your
25 understanding under Nevada law that you have discretion to

INDEX

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
<u>PLAINTIFFS' WITNESSES</u>				
James Dzurenda	24/86/ 90/121	144	191/215/ 218/226	221
Ihsan Azzam	229/260	264		
Linda Fox	267	-	-	-

* * *

EXHIBITS ADMITTED 9/11/18

<u>DESCRIPTION</u>	<u>ADMITTED</u>
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PLAINTIFFS' EXHIBIT NO.

11	248
17	99
23	39
24	35
25	42
27	39
31	77
40	105
44	54
53	51
55	235
63	110
66	32
76	66
100	140
101	134
138	246
142	202

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DEFENDANTS' EXHIBIT NO.

V	187
W	184
X	148
Y	149
Z	150
AA	173
BB	176

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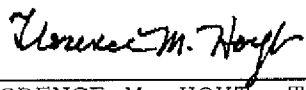
CERTIFICATION

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
Las Vegas, Nevada 89146

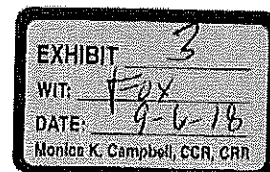


FLORENCE M. HOYT, TRANSCRIBER

9/12/18

DATE

Drug	Expiration Date	Manufacturer	Quantity	Purchase Date
Midazolam	6/30/2019	Alvogen	750 mg	5/29/2018
	1/30/2020	Alvogen	3000 mg	5/9/18 and 5/11/18
Fentanyl	7/30/2019	Hikma	2500 mcg	9/28/2017
	8/30/2018	Sandoz	300 mg	10/17/2017, 11/2/2017 and 12/14/2107?
Cisatracurium	11/30/2018	Sandoz	200 mg	10/17/2017, 11/2/2017 and 12/14/2107?



Fentanyl:

100mcg/2ml (#25 ampules)- Expiration-06/2021

250mcg/5ml(#50 ampules)- Expiration- 08/2021

250mcg/5ml (#20- ampules)- Expiration- 11/2021 & #081727A, Expiration-08/2021

100mcg/2ml (#25 vials)- Expiration- 07/2019

250mcg/5ml (#10 ampules)- Expiration- 02/01/2019

(5 more boxes at ESP total of 250ml, 50mcg/ml)

Midazolam:

50mg/10ml (#60 vials)- Expiration- 01/2020

(3 more boxes at ESP, total of 150ml, 5mg/ml)

Cisatracurium:

10mg/5ml (#20 vials)- Expiration- 08/2018

20mg/10ml (#10 vials)- Expiration- 07/2018

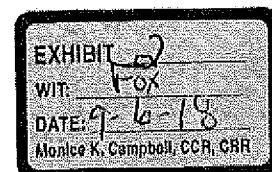
(3 more boxes at ESP total of 150ml, 2mg/ml)

(Brand-Nimbex)

200mg/20ml (10 vials)- Expiration 06/01/2019

10mg/5ml (10 vials)- Expiration 02/01/2019

20mg/10ml (20 vials)- Expiration 04/01/2019



ALVOGEN0001615

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.; HIKMA
PHARMACEUTICALS USA, INC.; AND
SANDOZ INC.,

Real Parties in Interest.

Supreme Court Case No.: 76485
District Court Case No. A-18-777312-B

Electronically Filed
Sep 18 2018 02:49 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**RESPONSE TO ALVOGEN'S EXPEDITED MOTION TO VACATE SEPTEMBER 21, 2018
ORAL ARGUMENT**

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Real Party in Interest, Alvogen, Inc., asserts that recent District Court proceedings have obviated the need for oral argument and an expedited decision. Not so. As this Court recognized in its August 16, 2018 Order Denying Stay and Scheduling Argument, “the object of the writ petition is twofold. The State argues that the TRO should be dissolved both because it amounts to an improper stay of execution in violation of NRS 176.415 and because no law allows drug manufacturers to retain rights over distributed products.” (Order, Aug. 16, 2018). These are purely legal issues that will be unaffected by the District Court’s forthcoming orders on the drug companies’ motions for preliminary injunction and the State’s motion to dismiss.¹

Even though the Court allowed discovery and the evidentiary hearing to proceed, the drug companies have been amassing “evidence” toward non-existent causes of action and requesting an injunction that NRS 176.415 prohibits. The drug companies do not have cognizable claims for relief and any ruling that has the substantive effect of staying an execution contravenes NRS 176.415 no matter its form—TRO or preliminary injunction. The drug companies should not be able to delay or avoid a ruling on these issues simply because they successfully hurried the District Court through an evidentiary hearing before this Court had the opportunity to hear oral argument and rule.

¹ At the close of evidence on Monday, September 17, 2018, the District Court expressed its intent to issue a ruling on the preliminary injunction later this week.

Moreover, the interplay between a TRO and NRS 176.415 is an important issue that is capable of repetition, yet evading review. This Court “may still consider [a] case as a matter of widespread importance capable of repetition, yet evading review” if “(1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.” *Bisch v. Las Vegas Metro Police Dep’t*, 129 Nev. 328, 334, 302 P.3d 1108, 1113 (2013). Those conditions are met here.

TROs typically have short fifteen-day time periods; NRCP 65(b), and preliminary injunctions will often overtake them before this Court can conduct its review, but according to NRS 176.415, district courts do not have authority to issue an execution-stopping TRO to begin with, and the State will incur undue delay if it must wait for a preliminary injunction to issue before it can dissolve the order under NRS 176.492. A district court’s power to halt an execution with a TRO is an important statewide issue that is likely to occur again but avoid review due to subsequent preliminary injunctions. Therefore, both objects of the State’s Petition remain ripe, but most particularly the threshold issue of whether the District Court had the authority to issue injunctive relief through a TRO.

There is still a need for an expedited decision. First, as previously explained,² a batch of the State's Cisatracurium expires on November 30, 2018, and, given the statutory deadlines to obtain a supplemental execution warrant, a decision must issue by October 19, 2018 so the State can use this batch. Alvogen claims that this date is irrelevant because the State possesses other Cisatracurium batches from other manufacturers and could possibly purchase additional amounts from other companies. Yet under Alvogen's theory of the case, a drug that is available for purchase isn't *really* available for purchase: somehow the State may not obtain title to the drugs even though the drugs are promptly delivered to the State by the distributor with whom the State directly dealt. Alvogen ignores that, if the District Court's ruling stands, these other manufacturers could prevent the State from using *their* Cisatracurium by filing another lawsuit claiming a dormant property interest in drugs sold through third-party intermediaries.

² (See Mot. Expedite Decision by October 19, 2018, filed July 27, 2018).

Additionally, if this Petition or a later appeal is heard in the ordinary course, the other Cisatracurium batches and batches of the other two drugs will likely expire.³ The next Cisatracurium batch (after November) expires on February 1, 2019 with others expiring on April 1, 2019 and June 1, 2019, respectively. (Ex. A).⁴ Contrary to the drug companies' arguments, the State possesses full title to the November 30 batch and the State should not be prevented from using it through the drug companies' stall tactics.⁵ As NDOC Director Dzurenda testified at the evidentiary hearing, if the State is unable to use the Cisatracurium batch that expires on November 30th, NDOC will have to use Cisatracurium that otherwise would have been available for another potential execution. (Ex. B at 153:10-15). This is the case even if the State can buy more Cisatracurium. (*Id.* at 153:19-21). Director Dzurenda explained that it is important that the State have on hand an inventory of lethal injection drugs in case the State needs it to complete sentences as appeals are exhausted or if other inmates waive appeals like Mr. Dozier. (*See id.* at 146:18-147:4). In Director Dzurenda's opinion, if all three drugs are enjoined, NDOC does not have the present ability to carry out Mr. Dozier's execution and NDOC will be unable to do so through the method Director Dzurenda has chosen. (*Id.* at 153:1-9); *see also* NRS 176.355(2)(b) (stating that the Director "[s]elect[s] the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.").

³ The State understands that approximately 78% of original proceedings are resolved within about a year. Similarly, 63% of civil appeals are resolved within about a year.

⁴ Fentanyl batches expire on February 1, 2019, in July 2019, and then again in 2021. (Ex. A). Likewise, Midazolam batches expire June 30, 2019 and in January 2020. (*Id.*). The District Court allowed

Second, the State and victims have an interest in timely carrying out capital sentences and the delay will compound if the appellate process must start over. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) (recognizing “the State’s legitimate interest in carrying out a sentence of death in a timely manner.”); *see also 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.”) (quotations omitted). Mr. Dozier’s execution has been thwarted twice now; restarting the appellate process does not serve judicial economy, the public, or the victims.

Dated: September 18, 2018.

/s/ Jordan T. Smith
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these documents and dates into evidence despite this Court’s September 10, 2018 Order Directing Answer and Imposing Stay in Case Number 76847 which prevented “disclosure, in any form, and discovery of the following three items...(2) drugs other than those *manufactured by real parties in interest and at issue in this case*[.]” (emphasis added).

⁵ Revealing the true motives behind this lawsuit, the drug companies have tried to call NDOC’s handling of the November batch into question—an area of inquiry wholly unrelated to the statutory and common law claims that they advance and more appropriately described as a method of execution challenge. (*See* Alvogen Ex. 1 at 86:15 (“They are all at Ely State Prison at this point.”)).

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response complies with the formatting requirements of NRAP 27(d) and the typeface and type-style requirements of NRAP 27(d)(1)(E) because this Response 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 Response 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: September 18, 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 **RESPONSE TO ALVOGEN'S EXPEDITED MOTION TO VACATE SEPTEMBER 21, 2018 ORAL ARGUMENT** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on September 18, 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 Real Parties in Interest simultaneously with the filing of the foregoing.

A copy was also provided to the following:

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