

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83181

Zane Michael Floyd

Appellant,

v.

The State of Nevada Department of Corrections, Charles Daniels,
Director, Department of Corrections; and Ishan Azzam, Chief Medical
Officer of The State of Nevada,

Respondent.

Appeal from Eighth Judicial District Court

Clark County, Nevada

The Honorable Adriana Escobar

**APPELLANT'S APPENDIX
VOLUME 1 OF 2**

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DOCUMENT	DATE	VOLUME	PAGE(S)
Complaint for Declaratory and Injunctive Relief	04/16/2021	1	001–016
Exhibits in Support of Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction	04/16/2021	1	031–057
Exhibits to Reply to Opposition to Motion for Temporary Re Restraining Order with Notice and Preliminary Injunction	05/17/2021	1–2	087–312
Nevada Department of Corrections Opposition to Motion for Temporary Restraining Order With Notice and Preliminary Injunction	04/30/2021	1	058–069
Notice of Appeal	07/02/2021	2	374–418
Notice of Entry of Order and Order Denying Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction	06/17/2021	2	358–373
Plaintiff's Motion for Temporary Restraining Order With Notice and Preliminary Injunction	04/16/2021	1	017–030
Reply to Opposition to Motion for Temporary Restraining Order with Notice and Preliminary Injunction	05/17/2021	1	070–086
Transcript of Proceedings	06/08/2021	2	313–357

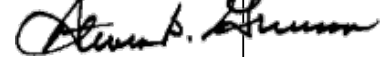
CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 5th day of November, 2021.

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

v.

NEVADA DEPARTMENT OF
CORRECTIONS;

CHARLES DANIELS, Director, Nevada
Department of Corrections;

IHSAN AZZAM, Chief Medical Officer of
the State of Nevada;

JOHN DOES 1-20, unknown employees or
agents of Nevada Department of
Corrections,

Defendants.

Case No.
Dept. No.

**COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Exempt from Arbitration: Equitable
and Declaratory Relief Requested)

DEATH PENALTY CASE

**EXECUTION WARRANT SOUGHT
BY THE STATE FOR MR. FLOYD'S
EXECUTION THE WEEK OF JUNE
7, 2021**

I. INTRODUCTION

1. Plaintiff, Zane Floyd hereby moves this Court for equitable relief against the Nevada Department of Corrections (NDOC), Charles Daniels, Director of the NDOC, Ihsan Azzam, Nevada's Chief Medical Officer, and John Does 1-20, who will participate in planning and effectuating Mr. Floyd's upcoming execution. Mr. Floyd challenges as unconstitutional NRS 176.355 (Nevada's lethal injection statute), which delegates, without suitable standards, unfettered discretion to the NDOC to determine Nevada's lethal injection protocol. Under NRS 33.010 and 30.030, Mr. Floyd requests this Court declare NRS 176.355 an unlawful delegation of power to the Executive branch and issue an injunction against Defendants, forbidding use of any lethal injection protocol against Mr. Floyd. Mr. Floyd's claims for relief are as follows:

II. PARTIES

2. Plaintiff, Mr. Floyd is a state death row inmate in the custody of Defendants at Ely State Prison in Ely, Nevada. On March 26, 2021, Clark County District Attorney, Steve Wolfson, announced that the CCDA would be seeking a warrant of execution against Mr. Floyd. *See David Ferrara, DA to proceed with death penalty against gunman in 1999 store killings*, Las Vegas Rev. J. (Mar. 26, 2021), available at <https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-gunman-in-1999-store-killings-2315637/>. Mr. Floyd brings this Complaint seeking declaratory and injunctive remedies, to ensure he is not unlawfully executed under NRS 176.355's unconstitutional delegation of legislative authority to the NDOC.

1 3. Defendant NDOC is a Nevada state agency. Article V of Nevada's
2 Constitution establishes that NDOC is a part of Nevada's Executive branch.
3 Under NRS 176.355, NDOC has delegated authority to carry out the execution of
4 death sentenced inmates.

5 4. Defendant Charles Daniels is the current Director of the NDOC.
6 Defendant Daniels is responsible for managing the operations of Nevada's state
7 prison facilities and the custody of the inmates confined therein, including Ely State
8 Prison (ESP). Defendant Daniels is ultimately responsible for the overall operations
9 and policies of NDOC, including the conducting of executions at ESP pursuant to
10 appropriately authorized state court issued warrants of execution, and ensuring
11 that any such executions at ESP are carried out in conformity with the constitutions
12 of Nevada and the United States. Under NRS 176.355, Director Daniels is required
13 to select the drug or combination of drugs to be used in Mr. Floyd's execution. Mr.
14 Daniels and all other individuals identified as Defendants in this Complaint are
15 sued in their official capacities.

16 5. Defendant Dr. Ihsan Azzam is the Chief Medical Officer of the State of
17 Nevada. Dr. Azzam is responsible for enforcing all public health laws and
18 regulations in the State. He also has the responsibility of providing consultation to
19 the NDOC Director regarding the selection of the drug or combination of drugs to be
20 used in lethal injection executions.

1 6. Defendants John Does 1-20 are employees or agents of NDOC who
2 take part in carrying out the lethal injection protocol for Nevada executions,
3 whether through planning, preparation, or performing the execution.

4 **III. JURISDICTION**

5 7. This Court has jurisdiction over Plaintiff, Mr. Floyd, as at all relevant
6 times he has been a citizen of the State of Nevada. Jurisdiction is also conferred to
7 Defendants as all are either Nevada state agencies or actors.

8 8. Jurisdiction is further conferred by NRS 30.010 and NRS 33.030,
9 which authorizes this Court to decide actions for declaratory relief and grant
10 injunctions.

11 **IV. VENUE**

12 9. Venue is proper in the Eighth Judicial District Court for the State of
13 Nevada, County of Clark, pursuant to NRS 13.020 in that the Defendants are
14 Nevada State agencies, Nevada public officers, and “the cause, or some part thereof,
15 arose” in Clark County, Nevada.

16 **V. FACTS**

17 10. On September 5, 2000, in the state district court for the Eighth
18 Judicial District Court of Nevada, the Honorable Jeffrey D. Sobel entered a
19 judgment of conviction against Mr. Floyd sentencing him to death.

20 11. After, Mr. Floyd began an appeals process, contesting his conviction
21 and death sentence through direct appeal and postconviction petitions before the
22 Nevada courts and then through habeas proceedings in both federal and state
23 courts.

1 12. The litigation of Mr. Floyd’s first federal habeas proceeding ended in
2 November 2020, upon the United States Supreme Court’s denial of Mr. Floyd’s
3 petition for writ of certiorari.

4 13. On March 26, 2021, Clark County District Attorney, Steve Wolfson,
5 gave notice that the CCDA would be seeking a warrant of execution against Mr.
6 Floyd from the state district court for the Eighth Judicial District Court of Nevada.

7 14. On April 14, 2021, the State filed a Motion and Notice of Motion for the
8 Court to Issue Second Supplemental Order of Execution and Second Supplemental
9 Warrant of Execution.

10 15. While the Legislature is constitutionally charged with deciding the
11 lethal injection protocol for Mr. Floyd’s execution, it delegated this authority to the
12 NDOC through NRS 176.355 (Nevada’s lethal injection protocol statute), by tasking
13 the Director of the Department of Corrections with, among other things, “Select[ing]
14 the drug or combination of drugs to be used for the execution after consulting with
15 the Chief Medical Officer.”

16 16. Because NRS 176.355 delegates unfettered discretion, Nevada’s
17 Director of the Department of Corrections, Charles Daniels, along with Nevada’s
18 Chief Medical Officer, Dr. Ihsan Azzam, will decide the entirety of the lethal
19 injection protocol used to execute Mr. Floyd. John Doe NDOC employees will also
20 assist in carrying out the lethal injection execution established by Daniels and Dr.
21 Azzam.

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VI. CLAIMS FOR RELIEF

Count I – Violation of Separation of Powers

1. NRS 176.355 violates the Nevada Constitution's separation of powers by delegating to the NDOC, an Executive department, authority to decide Nevada's lethal injection protocol without sufficient standards or guidelines to aid the agency in its exercise of legislative power. This violates Mr. Floyd's right to a constitutional execution and as a result, this Court should declare NRS 176.355 unconstitutional, an improper delegation of power, and issue an injunction prohibiting NDOC from carrying out any lethal injection execution against Mr. Floyd.

2. Mr. Floyd realleges and incorporates herein by reference all of the preceding paragraphs of this Complaint as if set forth in full below.

A. NRS 176.355 violates Article III § 1 of Nevada's Constitution as it is an unlawful delegation of authority from the Legislature to the Executive.

3. The separation of powers doctrine is incorporated in Nevada's constitution. It prevents one branch of government from impinging on the powers of another by restricting delegation of powers within the branches.

4. Specifically, Article III § 1 provides: "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution."

1 5. Accordingly, the Legislature may never delegate its lawmaking
2 authority.

3 6. However, under limited circumstances, the Legislature may delegate
4 fact-finding authority by establishing suitable and sufficient guidelines to aid the
5 delegated agency in carrying out the Legislature's policies. These guidelines must
6 make the statute complete within itself and leave the delegated agency with only
7 fact-finding authority.

8 7. NRS 176.355 violates Article III § 1 by delegating unfettered discretion
9 to the NDOC to determine Nevada's lethal injection protocol.

10 8. NRS 176.355 was codified in 1967 as Nevada's lethal injection statute.
11 It mandated that "the judgment of death shall be inflicted by the administration of
12 lethal gas, and that a suitable and efficient enclosure and proper means for the
13 administration of such gas for the purpose shall be provided by the board of prison
14 commissioners." This constituted a delegation to an Executive department, the
15 NDOC.

16 9. Later, in 1983, upon changing Nevada's method of execution to lethal
17 injection, NRS 176.355 was amended. The amendment altered NRS 176.355's
18 statutory language to provide: "(1) [t]he judgment of death must be inflicted by an
19 injection of a lethal drug. (2) The Director of the Department of Corrections shall . . .
20 Select the drug or combination of drugs to be used for the execution after consulting
21 with the Chief Medical Officer." The Legislature once again delegated authority to
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1 determine Nevada's lethal injection protocol, but this time to the Director of the
2 Department of Corrections.

3 10. NRS 176.355 includes less guidance than its prior version and its
4 statutory language grants NDOC unrestricted authority, violating Article III § 1, in
5 the following ways:

6 11. First, the Legislature fails to include suitable and sufficient guidelines
7 to aid NDOC in carrying out the lethal injection protocol. Indeed, the sole guidance
8 NRS 176.355 provides is that Mr. Daniels is ultimately responsible for deciding the
9 entirety of the Nevada's lethal injection protocol, after consulting with Dr. Ahsam.
10 NRS 176.355 only partially identifies the method of execution (lethal injection) and
11 doesn't detail "how" and "under what circumstances" the lethal injection protocol
12 must be carried out. NRS 176.355 provides the NDOC with unfettered discretion to
13 choose between any type of drug(s) to be used during the execution and whether a
14 one or multi drug protocol is satisfactory. NRS 176.355 fails to provide any
15 guidelines or standards to aid NDOC in making either of these decisions.

16 12. Next, NRS 176.355 doesn't require the lethal drug(s) selected to be
17 humane or that the execution be carried out humanely. NDOC is left with
18 unfettered discretion to decide whether to facilitate a humane lethal injection
19 protocol, a task that is beyond mere fact-finding. While a humane lethal injection
20 protocol may be assumed or implied, neither is the standard under the separation of
21 powers doctrine and neither is satisfactory for a constitutional delegation. NDOC is
22 left with unfettered discretion to decide whether to create and effectuate a humane
23 lethal injection protocol.

1 13. Additionally, NRS 176.355 states that death must be inflicted by an
2 injection of a lethal drug but does not specify the manner of injection. Thus, the
3 NDOC has unfettered discretion to decide whether an execution will be carried out
4 by an intravenous injection, requiring the use of a needle or through an oral
5 injection, consisting of injecting the lethal substance into a cocktail, that is then
6 drank during the execution. The Legislature fails to fully define its intended method
7 of execution and provide suitable and sufficient guidelines to aid the NDOC in
8 determining the proper manner of execution.

9 14. Finally, NRS 176.355 also fails to guide NDOC in carrying out the
10 Legislature's purpose in effecting the statute. Contextually, it is clear that NRS
11 176.355's main purpose is to execute a defendant. However, the statute doesn't
12 include standards to guide NDOC in carrying out this purpose. Instead, it leaves
13 those legislative decisions directly to NDOC. NRS 176.355 merely states that the
14 death punishment "must be inflicted by an injection of a lethal drug." Yet, its text
15 does not include express guidance requiring NDOC to administer lethal drugs until
16 an inmate is dead or even acquire drugs that are sufficient to cause death. These
17 tasks are not simple fact finding but go to the core of legislating by permitting
18 NDOC to: discontinue administering the lethal drug at its discretion, make
19 determinative decisions as to which drug(s) it believes are sufficient to cause death,
20 and arbitrarily acquire lethal drugs that are insufficient to cause death.

21 15. All of the above inquiries go beyond fact-finding and to the core of
22 policymaking and legislating, a task that the separation of powers specifically
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1 forbids the Executive from performing. Nevada's democracy depends on Legislators
2 legislating and the Executive governing. Thus, NRS 176.355's delegation of
3 legislative power is not only a violation of Nevada's constitution, but also improper
4 under our State's fundamental principles of governing.

5 **B. An injunction prohibiting Defendants from using any lethal injection**
6 **protocol against Mr. Floyd is proper as he is likely to succeed on the**
7 **merits and Defendants conduct will cause irreparable harm for which**
8 **compensatory damages are inadequate**

9 16. Mr. Floyd realleges and incorporates herein by reference all of the
10 preceding paragraphs of this Complaint as if set forth in full below.

11 17. An injunction is appropriate when a moving party has a likelihood of
12 success on the merits and irreparable harm will result if the Defendant's conduct
13 continues. *Boulder Oaks Community Ass'n v. B & J Andrews Enterprises, LLC*, 125
14 Nev. 397, 403, 215 P.3d 31 (2009).

15 i. **Success on the merits**

16 18. Mr. Floyd is reasonably likely to succeed on the merits of his claim
17 because NRS 176.355 unequivocally violates Article III § 1 of Nevada's Constitution
18 by delegating legislative authority to the NDOC without suitable and sufficient
19 standards to guide NDOC in carrying out Nevada's lethal injection protocol.

20 19. NRS 176.355 provides a clear delegation of authority from the
21 Legislature, to the Executive, to determine Nevada's lethal injection protocol.

22 20. Article III § 1 of Nevada's constitution expressly prohibits the
23 Legislature's act.

1 21. The Legislature may only delegate authority when it: (1) establishes
2 suitable and sufficient standards within the statute to guide the delegated agency
3 in executing the Legislature's policy; and (2) makes the statute complete within
4 itself such that only fact-finding authority is left.

5 22. Considering these factors, the Legislature's delegation is
6 unconstitutional as it delegates unfettered discretion to the NDOC by:

7 (a) Failing to provide suitable and sufficient standards to guide
8 NDOC in executing NRS 176.355's policy.

9 (b) Failing to make the statute complete within itself such that only
10 fact-finding authority is left.

11 (c) Failing to provide a meaningful definition of "lethal injection" and
12 thus giving NDOC authority to define terms.

13 (d) Providing NDOC with power beyond fact-finding authority by
14 granting the NDOC unfettered discretion to choose the quantity, quality, and type of
15 drug(s) to be used in Mr. Floyd's execution.

16 (e) Providing NDOC with power beyond fact-finding authority by
17 permitting the NDOC with unfettered discretion to not acquire drugs that are
18 sufficient to cause death.

19 (f) Providing NDOC with power beyond fact-finding authority by
20 permitting the NDOC unfettered discretion to determine if its lethal injection
21 protocol will be carried out in a humane manner and determine what constitutes a
22 humane execution.

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ii. Irreparable harm

23. If this Court does not intervene, Mr. Floyd will suffer irreparable harm.

24. Defendants continued unlawful conduct will result in irreparable harm. Defendants only purpose in carrying out NRS 176.355 is to execute Mr. Floyd by lethal means. Mr. Floyd’s death is a permanent harm and thus irreparable once carried out by the NDOC; whereas, NDOC will only suffer delay, which is inconsequential when compared to Mr. Floyd’s execution. Any favorable outcome following a trial will be useless for Mr. Floyd if his execution is not enjoined by this Court.

iii. No adequate remedy at law

25. Because Defendants actions will result in Mr. Floyd’s execution, any amount of compensatory remedy is inadequate.

Prayer for Relief

WHEREFORE, Mr. Floyd requests the following relief:

1. That this Court assume jurisdiction of this case and set it for a hearing on the merits.

2. That this Court issue a declaratory judgment declaring NRS 176.355 a violation of Article III § 1, as an unlawful delegation of Legislative authority to the Executive, as alleged above.

3. That this Court issue a temporary restraining order or preliminary or permanent injunction commanding Defendants not to carry out any lethal injection protocol on Mr. Floyd until such time as the Legislature amends NRS 176.355 to set forth the State's lethal injection protocol and provide suitable and sufficient standards to guide Defendants in executing that protocol, so that Mr. Floyd may be executed in a constitutional manner.

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1 4. Mr. Floyd also seeks any further relief the Court deems necessary,
2 just, and proper.

3 DATED this 16th of April, 2021.

4 Respectfully submitted
5 RENE L. VALLADARES
6 Federal Public Defender

7 /s/ David Anthony
8 DAVID ANTHONY
9 Assistant Federal Public Defender

10 /s/ Brad D. Levenson
11 BRAD D. LEVENSON
12 Assistant Federal Public Defender

13 /s/ Jocelyn S. Murphy
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15 Assistant Federal Public Defender

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VERIFICATION

Under penalty of perjury, the undersigned declares that she is counsel for the petitioner named in the foregoing complaint and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 16th day of April, 2021.

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

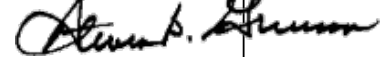
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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of April, 2021, a true and correct copy of the foregoing COMPLAINT, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be sent via email addressed as follows:

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE M. FLOYD,

Plaintiff,

v.

NEVADA DEPARTMENT OF
CORRECTIONS;

CHARLES DANIELS, Director, Nevada
Department of Corrections;

IHSAN AZZAM, Chief Medical Officer of
the State of Nevada;

JOHN DOES 1-20, unknown employees or
agents of Nevada Department of
Corrections,
Respondents.

Case No.
Dept. No.

**PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER
WITH NOTICE AND PRELIMINARY
INJUNCTION**

Date of Hearing:
Time of Hearing:

(Exempt from Arbitration: Equitable
and Declaratory Relief Requested)

DEATH PENALTY CASE

**EXECUTION WARRANT SOUGHT
FOR THE WEEK OF JUNE 7, 2021**

1 Plaintiff Zane Michael Floyd, by and through his counsel, moves this Court
2 for a temporary restraining order with notice, and preliminary injunction, against
3 the Defendants preventing them from executing him at Ely State Prison by lethal
4 injection until further order of the Court. This request for injunctive relief is
5 submitted pursuant to NRS 33.010, NRS 33.030, and this Court's inherent
6 authority.

7 DATED this 16th day of April, 2021.

8 Respectfully submitted
9 RENE L. VALLADARES
Federal Public Defender

10 /s/ David Anthony
11 DAVID ANTHONY
Assistant Federal Public Defender

12 /s/ Brad D. Levenson
13 BRAD D. LEVENSON
Assistant Federal Public Defender

14 /s/ Jocelyn S. Murphy
15 JOCELYN S. MURPHY
Assistant Federal Public Defender
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1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The State of Nevada intends to execute Plaintiff Zane Floyd during the week
4 of June 7, 2021, using a drug or combination of drugs chosen by Defendant Daniels.
5 NRS 176.355(2)(b). On March 26, 2021, Clark County District Attorney, Steve
6 Wolfson, announced that the CCDA would be seeking a warrant of execution
7 against Mr. Floyd.¹ On April 14, 2021, the State filed a Motion and Notice of Motion
8 for the Court to Issue Second Supplemental Order of Execution and Second
9 Supplemental Warrant of Execution.

10 Mr. Floyd accordingly moves this Court for a temporary restraining order
11 and/or injunctive relief, staying his execution and enjoining Defendants from
12 implementing any aspect of Nevada's execution protocol against him.

13 **II. ARGUMENT**

14 “NRS 33.010(1) authorizes an injunction when it appears from the complaint
15 that the plaintiff is entitled to the relief requested and at least part of the relief
16 consists of restraining the challenged act.” *Univ. & Cmty. Coll. Sys. Of Nevada v.*
17 *Nevadans for Sound Gov’t*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). The
18 standard a moving party must meet to obtain injunctive relief in the form of a
19 temporary restraining order is the same as the standard for a preliminary
20 injunction: “A preliminary injunction [or temporary restraining order] is available
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22 ¹ David Ferrara, *DA to proceed with death penalty against gunman in 1999*
23 *store killings*, Las Vegas Rev. J. (Mar. 26, 2021), available at
24 <https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-gunman-in-1999-store-killings-2315637/>.

1 when the moving party can demonstrate that the nonmoving party's conduct, if
2 allowed to continue, will cause irreparable harm for which compensatory relief is
3 inadequate and that the moving party has a reasonable likelihood of success on the
4 merits." *Boulder Oaks Community Ass'n v. B & J Andrews Enterprises, LLC*, 125
5 Nev. 397, 403, 215 P.3d 27, 31 (2009).

6 **A. Mr. Floyd can show he is likely to succeed on the merits.**

7 "A party seeking a preliminary injunction must show a likelihood of success
8 on the merits of their case." *Shores v. Global Experience Specialists, Inc.*, 134 Nev.
9 503, 505, 422 P.3d 1238, 1241 (2018).

10 Under Nevada's separation of powers doctrine, the executive, legislative, and
11 judicial branches of government are forbidden from encroaching on the powers of
12 one another, including the unlawful delegation of authority.² Nev. Const. Art. 3 § 1.
13 The Legislature may seek to delegate its lawmaking authority, but only under
14 limited circumstances and where "the power given is prescribed in terms
15 sufficiently definite to serve as a guide in exercising that power." *Banegas v. State*
16 *Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001).

17 To be a proper delegation of authority, the Legislature must make the
18 "application or operation of a statute complete within itself dependent [only] upon
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21 ²Article III § 1's full text provides: "[t]he powers of the Government of the
22 State of Nevada shall be divided into three separate departments, the Legislative,
23 the Executive and the Judicial; and no persons charged with the exercise of powers
24 properly belonging to one of these departments shall exercise any functions,
appertaining to either of the others, except in the cases expressly directed or
permitted in this constitution."

1 the existence of certain facts or conditions, the ascertainment of which is left to the
2 administrative agency.” *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153, 697 P.2d
3 107, 110 (1985). The Legislature must also create “suitable and sufficient standards
4 for the agency’s use of its power,” including sufficiently advising the delegated
5 department regarding the law’s purpose. *Id.* These standards are necessary as “the
6 agency is only authorized to determine the facts which will make the statute
7 effective,” (otherwise known as fact-finding authority), not legislate. *McNeill v.*
8 *State*, 132 Nev. 551, 556–57, 375 P.3d 1022, 1025–26 (2016). And sufficient
9 legislative standards are required as safeguards against capricious or arbitrary
10 behavior by the delegated branch. *Id.*

11 Upon enacting NRS 176.355, the Legislature delegated authority to NDOC,
12 an Executive department, to determine, develop, and carry out Nevada’s execution
13 protocol for death sentenced inmates. Specifically, NRS 176.355 provides that:

14 *1. The judgment of death must be inflicted by an injection*
15 *of a lethal drug.*

16 *2. The Director of the Department of Corrections shall*

17 (a) Execute a sentence of death within the week, the first
18 day being Monday and the last day being Sunday, that the
19 judgment is to be executed, as designated by the district
20 court. The director may execute the judgment at any time
21 during that week if a stay of execution is not entered by a
22 court of appropriate jurisdiction.

23 *(b) Select the drug or combination of drugs to be used for*
24 *the execution after consulting with the Chief Medical*
 Officer.

 (c) Be present at the execution

 (d) Notify those members of the immediate family of the
 victim who have, pursuant to NRS 176.357, requested to be
 informed of the time, date and place scheduled for the
 execution.

1 (e) Invite a competent physician, the county coroner, a
2 psychiatrist and not less than six reputable citizens over
3 the age of 21 years to be present at the execution. The
4 Director shall determine the maximum number of persons
5 who may be present for the execution. The Director shall
6 give preference to those eligible members or
7 representatives of the immediate family of the victim who
8 requested, pursuant to NRS 176.357, to attend the
9 execution.

3. The execution must take place at the state prison.

4. A person who has not been invited by the Director may
not witness the execution.

(emphasis added). This delegation was unlawful as it grants power to NDOC that
exceeds mere fact-finding authority and does not prescribe “suitable and sufficient”
standards to guide NDOC in its delegated authority.

**1. The Legislature has provided insufficient guidance to
NDOC.**

The Legislature in passing NRS 176.355 has failed to provide guidance on
several aspects of the execution scheme: (1) how NDOC should choose, obtain, and
administer lethal drugs; (2) quantity and quality standards for those lethal drugs;
and (3) executing condemned inmates in a humane and constitutional manner. *See,*
e.g., Hobbs v. Jones, 412 S.W.3d 844, 854-55 (Ark. 2012).

a. Choosing, obtaining, and administering lethal drugs

First, other than stating that the “judgment of death must be inflicted by an
injection of a lethal drug,” NRS 176.355 provides no “suitable and sufficient”
standards to guide NDOC in choosing, obtaining, or administering the lethal drugs.
NRS 176.355 fails to provide a list of drug(s) which would be “suitable and
sufficient” to carry out Nevada’s lethal injection protocol, indicate what type of
drug(s) are necessary to facilitate an execution (i.e., a barbiturate), or even define

1 “lethal injection.” Moreover, NDOC also has sole authority to determine how much
2 notice the condemned should receive once the drug(s) to be used are identified.
3 Because of these failures, NRS 176.355 does not leave NDOC with mere fact-finding
4 authority, but rather, gives NDOC unfettered discretion to create law by defining
5 terms, determining Nevada’s lethal injection protocol, and administering any
6 drug(s) it pleases, all without adequate guidance.

7 In addition, NRS 176.355 requires NDOC to carry out the execution by “an
8 injection of a lethal drug,” but the statute fails to define, in specific terms, the
9 manner of injection. There is more than one way to “inject” a drug. Drugs may be
10 injected intravenously (using a needle) or orally (injecting the drug into a solution
11 that can be consumed). As a result of the Legislature’s failure to provide “suitable
12 and sufficient” guidelines directing NDOC to either method, NDOC has the power
13 to define “injection” under NRS 176.355, and administer drug(s) in either manner,
14 exceeding its limited fact-finding authority.

15 Furthermore, while the statute states NDOC must consult with the Chief
16 Medical Officer when choosing drugs, it does not require NDOC to follow or
17 implement any protocol the Chief Medical Officer recommends, leaving room for
18 arbitrary and capricious decision making by NDOC. If the Legislature was truly
19 delegating fact-finding authority, then NDOC would be limited to only deciding
20 which execution drug(s) would be used from an approved list and where to obtain
21 the drug(s), both fact-specific circumstances that are dependent on changing
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1 conditions. Instead, NDOC's power is limitless and NRS 176.355's operation is
2 contingent on its decisions.

3 **b. Quantity and quality of lethal drugs**

4 Second, as discussed above, although choosing the drug(s) by itself exceeds
5 fact-finding authority, even if it didn't, the statute still fails to provide "suitable and
6 sufficient" standards because there are no criteria guiding NDOC in selecting the
7 quantity or quality of drugs. NRS 176.355 neglects to advise NDOC regarding the
8 suitability or efficiency of the drugs selected, such as: whether a one- or multi-drug
9 protocol is satisfactory, whether the drugs chosen should be certain to cause death,
10 or whether the drugs chosen must facilitate a humane execution. Each inquiry
11 requires more than mere fact-finding, exceeding NDOC's authority under the
12 Constitution.

13 **c. Execution location**

14 Third, even though NRS 176.355 states that the execution "must take place
15 at the state prison," the statute fails to provide any "suitable and sufficient"
16 standards regarding the safety, efficiency, and capabilities of the execution location.
17 Because the statute lacks "suitable and sufficient" standards, NDOC is tasked with
18 legislating and determining where the execution will take place at the state prison,
19 whether the location is safe, and whether the location is equipped to conduct an
20 execution by lethal injection. While one may assume that some of the above
21 discussed matters are implied in the statute, implication is insufficient to satisfy
22 constitutional requirements. *Banegas*, 117 Nev. at 227, 19 P.3d at 248–49. The
23 "suitable and sufficient" standards must clearly be established for the Legislature's
24

1 delegation to be deemed constitutional. *Luqman*, 101 Nev. at 153, 697 P.2d at 110.
2 Without them, NDOC may act arbitrarily and capriciously by carrying out the
3 execution in an inadequate enclosure or without sufficient means.

4 **d. Humane executions**

5 Fourth, the Legislature fails to include standards to guide NDOC in carrying
6 out NRS 176.355's purpose, which is to humanely execute the condemned. The
7 statute's text omits express language requiring NDOC to administer lethal drugs
8 until the condemned is deceased, or even acquire drugs that are sufficient to cause
9 death. Thus, NDOC is tasked with determining whether and how to apply these
10 constitutionally required standards to the statute. These tasks are not simple fact
11 finding, but go to the crux of legislating by permitting NDOC to discontinue
12 administering the lethal drug at its discretion, make determinative decisions as to
13 which drugs it believes are sufficient to cause death, and arbitrarily acquire lethal
14 drugs that are insufficient to cause death.

15 **2. The Legislature's insufficient guidance has resulted in**
16 **previous unconstitutional execution attempts.**

17 Indeed, the absence of sufficient guidelines to NDOC has resulted in
18 execution attempts that failed to comply with constitutional standards, such as
19 when NDOC first attempted an execution using lethal gas without being provided
20 appropriate guidance by the Legislature. Lacking guidance and left solely to their
21 own devices NDOC engaged in arbitrary and capricious decision making (the exact
22 conduct disallowed under proper delegations of authority) when it carried out the
23 execution of Jon Gee by flooding Gee's cell with cyanide gas in the middle of the
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1 night while he was sleeping. *See e.g.*, Rudolph Joseph Gerber & Jon M. Johnson,
2 The Top Ten Death Penalty Myths: The Politics of Crime Control, 9–10 (2007). This
3 method was not only unconstitutional, but also unsafe, and NDOC was ultimately
4 unsuccessful in executing Gee.

5 After that failure, NDOC then moved the execution to the prison’s butcher
6 shop, temporarily converting it to a “gas chamber,” despite the obvious potential
7 contamination issues that would arise from conducting an execution outside of an
8 airtight chamber and in a location where animals are butchered. *See Trina N. Seitz,*
9 *A History of Execution Methods in the United States*, in 362–63 *Handbook of Death*
10 *and Dying* (1st ed. 2003).

11 Moreover, NDOC has even acknowledged its problematic execution protocols
12 before the Legislature, admitting that it had conducted executions under
13 questionable conditions at the Nevada State Prison. *See e.g.*, Ex. 1 at 125, Hearing
14 Before the Senate Committee on Judiciary, 62nd Legis. (1983) (statement of John
15 Slansky, Warden of Northern Nevada Correctional Center) (stating that “the gas
16 chamber is over thirty years old, and it is unsafe” which requires “elaborate
17 precautions” such as “antidotes for cyanide gas”); Ex. 2 at 1670 (Hearing Before the
18 Assembly Committee on Judiciary, 62nd Legis. (1983) (statement of Vernon
19 Housewright, Director of Prisons) (discussing NDOC’s decision to utilize NSP’s
20 execution chamber for lethal gas executions, despite that it was not leak-proof and
21 “posed a threat to other inmates in that wing”).
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1 Despite these unconstitutional occurrences, the Legislature still failed to
2 provide suitable guidelines, which led to NDOC's continued unfettered use of its
3 delegated authority. Notably, in 2018, NDOC again demonstrated its arbitrary
4 decision making when it acquired an execution drug under false pretenses, ignoring
5 the manufacturer's clear mandate that the drugs could not be used for lethal
6 executions. *See* Richard A. Opel Jr., *Nevada Execution is Blocked After Drugmaker*
7 *Sues*, N.Y. Times, (July 11, 2018), [https://www.nytimes.com/2018/07/11/us/dozier-](https://www.nytimes.com/2018/07/11/us/dozier-execution-fentanyl.html)
8 [execution-fentanyl.html](https://www.nytimes.com/2018/07/11/us/dozier-execution-fentanyl.html) (describing the drug manufacturer's lawsuit against NDOC
9 for its unapproved acquisition of Midazolam). To accomplish an execution, NDOC
10 engaged in a subterfuge that violated the Controlled Substances Act, which is
11 precisely why the Legislature, not the Executive, is tasked with creating standards
12 for the Executive to follow when enforcing a punishment. NDOC was only permitted
13 to engage in this unconstitutional behavior because the Legislature failed to provide
14 sufficient guidelines. In fact, in the same case, NDOC was further criticized for its
15 drug combination choice, which was deemed unconstitutional by a state court. *See*
16 *Ex. 3* (Eighth Judicial Court order finding NDOC's lethal injection protocol a
17 violation of Petitioner's rights).³

18
19 Considering the above, Floyd is reasonably likely to succeed on the merits of
20 his claim.

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23 ³ *Reversed on procedural grounds, Nevada Dep't of Corr. v. Eighth Judicial*
24 *District Court (Dozier)*, 134 Nev. 1014, 417 P.3d 1117 (2018) (unpublished).

1 **B. Mr. Floyd will be irreparable harmed absent a preliminary**
2 **injunction or temporary restraining order.**

3 “Before a preliminary injunction will issue, the applicant must show . . .
4 irreparable harm.” *University & Cmty College System of Nevada v. Nevadans for*
5 *Sound Government*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). “Irreparable harm
6 is an injury for which compensatory damage is an inadequate remedy.” *Excellence*
7 *Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351, 353, P.3d 720, 723-24 (2015) (quoting
8 *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). “Torture and
9 death are also clearly irreparable harms.” *Villanueva-Bustillos v. Marin*, 370
10 F.Supp.3d 1083, 1090 (C.D. Cal. 2018).

11 Death is unlike any other harm that can be suffered. It is final, irreversible,
12 and indeed the ultimate injury. Mr. Floyd cannot be compensated adequately
13 through money damages if or when Defendants violate the state constitution by
14 executing him. Executing Mr. Floyd before he has a chance to be heard on the
15 merits of his claim constitutes irreparable harm for which there is no adequate
16 remedy. Any favorable outcome following a trial will be useless for Mr. Floyd if his
17 execution is not stayed and preliminarily enjoined. In comparison, the only harm
18 Defendants will suffer is delay in carrying out Mr. Floyd’s execution, a harm that is
19 not considered irreparable. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248,
20 253, 89 P.3d 36, 39 (2004) (citing *Hansen A/S v. Eighth Judicial Dist. Court*, 116
21 Nev. 650, 658, 6 P.3d 982, 986-87 (2000)).

22 For these reasons, irreparable harm warranting injunctive relief is
23 established.
24

1 **III. CONCLUSION**

2 For the foregoing reasons, and those stated in his Complaint, Mr. Floyd
3 requests that this Court grant a temporary restraining order and/or injunctive
4 relief, staying his execution and enjoining Defendants from attempting to
5 implement any aspect of Nevada's execution protocol against him.

6 DATED this 16th day of April, 2021.

7 Respectfully submitted
8 RENE L. VALLADARES
 Federal Public Defender

9 /s/ David Anthony
10 DAVID ANTHONY
 Assistant Federal Public Defender

11 /s/ Brad D. Levenson
12 BRAD D. LEVENSON
 Assistant Federal Public Defender

13 /s/ Jocelyn S. Murphy
14 JOCELYN S. MURPHY
15 Assistant Federal Public Defender

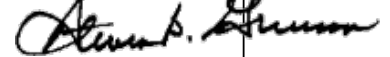
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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of April, 2021, a true and correct copy of the foregoing **MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION**, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be sent via email addressed as follows:

D. Randall Gilmer
Chief Deputy Attorney General
Office of the Nevada Attorney General
Public Safety Division
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Las Vegas, NV 89101
Phone: 702.486.3427
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/s/ Sara Jelinek
An Employee of the Federal Public Defenders
Office, District of Nevada



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Attorneys for Plaintiff Zane M. Floyd

DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

v.

NEVADA DEPARTMENT OF
CORRECTIONS;

CHARLES DANIELS, Director, Nevada
Department of Corrections;

IHSAN AZZAM, Chief Medical Officer of
the State of Nevada;

JOHN DOES 1-20, unknown employees or
agents of Nevada Department of
Corrections,

Respondents.

Case No.
Dept. No.

**EXHIBITS IN SUPPORT OF
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER WITH NOTICE AND
PRELIMINARY INJUNCTION**

Date of Hearing:
Time of Hearing:

(Exempt from Arbitration: Equitable
and Declaratory Relief Requested)

DEATH PENALTY CASE

**EXECUTION WARRANT SOUGHT
FOR THE WEEK OF JUNE 7, 2021**

EXHIBIT NO.	Document
Ex. 1	Hearing Before the Senate Committee on Judiciary, 62nd Legis. (1983) (statement of John Slansky, Warden of Northern Nevada Correctional Center), dated Feb. 10, 1983.
Ex. 2	Hearing Before the Assembly Committee on Judiciary, 62nd Legis. (1983) (statement of Vernon Housewright, Director of Prisons), dated May 2, 1983.
Ex. 3	<i>Dozier v. State of Nevada</i> , Case No. 05C215039, District Court of Clark County, Nevada, dated Nov. 27, 2017.

DATED this 16th day of April, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Jocelyn S. Murphy
JOCELYN S. MURPHY
Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of April, 2021, a true and correct copy of the foregoing EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be sent via email addressed as follows:

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/s/ Sara Jelinek
An Employee of the Federal Public
Defenders Office, District of Nevada

EXHIBIT 1

EXHIBIT 1

MINUTES OF THE NEVADA STATE LEGISLATURE

SIXTY-SECOND Session

Senate Committee on JUDICIARY

Date: February 10, 1983

Page: One (1)

The Senate Committee on Judiciary was called to order by Chairman, Senator Thomas R.C. Wilson, at 9:00 a.m., Thursday, February 10, 1983, in Room 213 of the Legislative Building, Carson City, Nevada. Exhibit A is a copy of the Agenda; Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Thomas R.C. Wilson, Chairman
Senator Helen A. Foley, Vice Chairman
Senator Sue Wagner
Senator William H. Hernstadt
Senator Thomas J. Hickey
Senator James H. Bilbray
Senator Bob Ryan

STAFF MEMBERS PRESENT:

Marilyn Hofmann, Committee Secretary

SENATE BILL 109

The first bill on the agenda was Senate Bill 109, an act relating to the execution of criminals; changing the method of inflicting the death penalty to lethal injection.

Senators Glaser and Ashworth were the first to testify. Senator Glaser stated that Senate Bill 109 is relatively simple, straightforward and self-explanatory. The method of capital punishment in the State of Nevada is the sole issue of this bill. Senator Glaser said that he feels that execution by lethal injection is a more sophisticated, humane method of capital punishment. He noted that several states have already adopted this method, i.e., Idaho, New Mexico, Texas and Oklahoma. The drug that is primarily used is sodium pentothal. He expressed that sodium pentothal injections are painless and clean. He also said that this type of method

would avoid some of the emotional trauma and publicity which usually accompanies other forms of execution. He said that sodium pentothal is used for putting animals away, and is considered the most humane method. The co-sponsor of the bill, Senator Ashworth, commented that the condition of the gas chamber at the maximum security prison is very old and there are indications that when used, a great deal of effort is necessary to seal the chamber. The use of lethal injection would eliminate that expense. In response to a question from Senator Wagner, Senator Ashworth stated that he did not believe that doctors would be involved in any way with the injection itself, but only as observers.

The next person to testify was John Slansky, Warden of the Northern Nevada Correctional Center. He is speaking on behalf of the Department of Prisons, and takes a position of advocacy on Senate Bill 109. His principal concern when proposing this bill, was the safety of the gas chamber at the Nevada State Prison. He said that the gas chamber is over thirty years old, and it is unsafe. He further stated that the primary concern at the time of the Jesse Bishop execution, was the safety of the staff, witnesses and the news media, and elaborate precautions were taken, including antidotes for cyanide gas. He said that execution by gas is an extremely complicated, dangerous and costly procedure; execution by lethal injection is none of those. Gas from a gas chamber must be vented into the open air, and is affected by weather conditions. He also said that during one test done in preparation for an execution, the windows in the witness room were blown out during pressurization. Senator Wagner asked the witness if his objectives in supporting this bill were different from the sponsors', since they are on record in support of the bill because it is more humane and will draw less attention, while the Department's is mainly safety and cost effectiveness. He said that he and the sponsors had not really discussed the question of humanity, but he emphasized that there is no conflict between the Department's position and the sponsors' position. He believes that the lethal injection method would remove some of the carnival atmosphere that surrounds an execution. He also said that it is difficult to discuss humanity when someone is being executed. Mr. Slansky was asked who would administer the injection. He stated that it would be a violation of oath for a doctor to do the injection, and therefore one member of the prison staff would administer the drug, and he does not know who that would be, and does not believe that

the person who administers the drug would like to have his identity known.

Senator Hernstad suggested that perhaps the use of carbon monoxide gas would be preferable to cyanide gas. Senator Bilbray stated that a less circus atmosphere could be accomplished by administering lethal injection in a nursing facility, or the condemned person's room with family present. The Chairman questioned the warden regarding the reasons behind the location of the execution and the number of persons to be present. Mr. Slansky indicated that the normal place for the execution would be the maximum security prison, and he did not know the meaning behind the words, "within the limits of the state prison." He was then questioned regarding the words, "No person who has not been invited by the director may witness the execution." The warden stated that he had no reason for that particular language, but he could see why he might want to have certain persons at the execution. This language was apparently patterned after the Texas law. The warden said that he believed that there should be more than six official witnesses [that he should be able to have other "observers".] The Committee consensus was that this language simply allowed the director to invite more than six witnesses, at his discretion. There was discussion regarding how many witnesses attended the Jesse Bishop execution, and an exact number could not be determined. The Chairman stated, for the record: "I take it it's not the method of administering the death penalty which makes the event a sensational one; I gather it's the nature of the event itself.... it is consistent to say whether or not it's sensational really does not turn on the method of execution..it turns on the fact of execution, by whatever the method." The warden agreed with the Chairman, and stated that execution would be sensational no matter what the method. Senator Wagner emphasized that the number of people who are allowed to attend is a part of the sensationalism, and that this Committee should have some concern as to how many witnesses are there and how they are chosen. The warden said that whenever there is an execution, the local and national media wish to be there. Senator Wagner suggested that perhaps methods other than lethal injection would point out the ugliness of execution to a greater extent, and the warden agreed. In response to a question posed by Senator Ryan, the warden stated that there are 18 persons now awaiting execution in Nevada.

The next person to testify was Senator Joe Neal, who spoke

EXHIBIT 2

EXHIBIT 2

MEMBERS PRESENT: Chairman Jan Stewart
Vice-Chairman Shelley Berkley
Mr. Mike Malone
Mrs. Jane Ham
Mr. Byron Bilyeu
Mr. Gene Collins
Mr. Robert Fay
Mr. David Humke
Mr. Leonard Nevin
Mr. James Stone
Mrs. Courtenay Swain

MEMBERS ABSENT : None

GUESTS PRESENT : See guest list attached as EXHIBIT A.

Chairman Stewart called the meeting to order at 8:20 a.m. The first bill considered by the Committee was SB 109.

SB 109: Changes method of inflicting death penalty.
(BDR 14-70)

Senator Norman Glaser Introduced Vern Housewright, Director of Prisons, and stated they were here to discuss Senate Bill 109, which changes the method of inflicting the death penalty.

He said he first became interested in this when a warden at one of the interim finance committee meetings indicated to us there were some problems over at the prison when they had an execution out there a year or so ago. The gas chamber is on the top story and they had considerable trouble to make it leak proof. The cyanide gas is very toxic and posed a threat to other inmates in that wing.

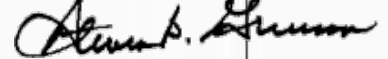
He remembers back to 1961 when he first served in the Assembly, they used to evacuate the Warden and the Warden's family from the house next door, which is outside of the grounds.

After the execution, it takes time to vent off the gases and they can only admit a little bit of it into the atmosphere at a time, so it takes several days to evacuate the room.

He became acquainted with this method of execution, the death by lethal injection, when he was down in Oklahoma several years ago. Oklahoma and Texas, Arkansas, Idaho and one other State have death by lethal injection.

EXHIBIT 3

EXHIBIT 3



DISTRICT COURT

CLARK COUNTY, NEVADA

SCOTT RAYMOND DOZIER,

Petitioner,

v.

STATE OF NEVADA,

Respondents.

Case No. 05C215039

Dept. No. IX

(Death Penalty Habeas Corpus Case)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ENJOINING THE
NEVADA DEPARTMENT OF CORRECTIONS FROM USING A PARALYTIC
DRUG IN THE EXECUTION OF PETITIONER

Upon Petitioner's Motions for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner and for Leave to Conduct Discovery, and this matter having come before the Court for multiple hearings, including an evidentiary hearing conducted on November 3, 2017, and the Court having heard expert testimony and oral argument presented by respective counsel for both parties, and having reviewed and considered the parties' pleadings and supporting exhibits admitted into the record, and with good cause appearing therefor, this Court issues the following findings of fact, conclusions of law, and order:

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1 Attorney's Office filed oppositions to Petitioner's motions arguing, in part, that the
2 motions were improperly served upon it.

3 3. On August 17, 2017, at the request of the Clark County District
4 Attorney's Office, Mr. Dozier's execution was rescheduled for the week of November
5 13, 2017.

6 4. On August 23, 2017, NDOC filed a Notice in Advance of Status Check
7 to set a briefing schedule on Petitioner's motions. Attached to NDOC's Notice was
8 Exhibit A disclosing the lethal injection drugs (Diazepam, Fentanyl and
9 Cisatracurium) that NDOC intended to use for the execution of Mr. Dozier. On
10 September 5, 2017, NDOC disclosed an execution manual dated the same day
11 ("September 5th manual"). On September 6, 2017, NDOC filed an Opposition to
12 Petitioner's motions. On September 7, 2017, Petitioner filed Objections to NDOC's
13 disclosure of the protocol under seal.

14 5. In response to NDOC's Opposition, and upon consultation regarding
15 the execution protocol with a retained expert in anesthesiology, Petitioner filed a
16 Reply on September 25, 2017, followed by a Declaration from its expert in
17 anesthesiology, David B. Waisel, M.D., dated October 4, 2017. Dr. Waisel asserted
18 in his Declaration that he interpreted the American Board of Anesthesiology's rules
19 "as preventing [him] from advocating an alternative form of execution." He did not
20 believe that he could "take any position that a reasonable person could interpret as
21 advocating for a particular method of execution." Accordingly, in his Reply,
22 Petitioner proffered, as a known and available alternative execution procedure
23

1 pursuant to federal constitutional precedent in *Baze v. Rees*, 553 U.S. 35, 61 (2008)
2 and *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015), that NDOC utilize a two-drug
3 version of the protocol, via administration of the drugs Diazepam and Fentanyl, as
4 already provided for in NDOC's draft protocol but in higher doses, and eliminate the
5 use of the third paralytic drug (Cisatracurium).

6 6. At the Court's request, NDOC submitted a Declaration by John M.
7 DiMuro, D.O., the former Chief Medical Officer of the State of Nevada,¹ dated
8 October 20, 2017. NDOC also submitted revised protocol provisions, also dated
9 October 20, 2017, within the Execution Manual (EM) for Sections 103 and 110. The
10 October 20, 2017 revisions addressed titration and entailed significant increases in
11 the dosage of the three drugs to be used under the protocol. NDOC's revised protocol
12 retained all three of the drugs as set forth in its earlier version of the protocol, and
13

14 ¹ Nevada law requires the Director for the Department of Corrections to
15 consult with the State's Chief Medical Officer ("CMO") regarding the selection of the
16 drug or combination of drugs to be used for executions. NRS 176.355. In addition,
17 provisions of NDOC's execution protocol require the CMO be consulted regarding
the drugs' dosages to ensure they cause death, and further require that the CMO, or
his designee, direct the preparation of the execution drugs. EM 100.02, 103.01 and
103.03.

18 Dr. DiMuro resigned as the State's Chief Medical Officer effective October 30,
19 2017. At the close of a status hearing conducted on October 31, 2017, during which
20 this Court scheduled the November 3, 2017 evidentiary hearing, NDOC announced
21 Dr. DiMuro's resignation and submitted a Declaration signed by Dr. DiMuro in
22 which he stated that his resignation was "completely unrelated to the scheduled
23 execution of Scott Dozier" and that he stood by his opinions contained in his earlier
Declaration of October 20, 2017. *See* NDOC's Notice of Supplemental Declaration of
John M. DiMuro, D.O., on November 1, 2017, Ex. A. At a post-evidentiary hearing
on November 6, 2017, NDOC announced that Dr. DiMuro had been replaced by a
new acting CMO, Leon Ravin, M.D., whose background is in psychiatry. NDOC also
announced that Dr. John Scott, M.D. would serve as Dr. Ravin's designee for
purposes of Dozier's execution. The manual requires that the CMO or his designee
oversee the preparation of the lethal injections drugs.

1 thus issues surrounding the use of the paralytic drug became the primary focal
2 point of the litigation.

3 7. This Court then scheduled an evidentiary hearing on November 3,
4 2017, for purposes of receiving expert testimony. NDOC continually objected to the
5 appropriateness and necessity of this hearing because, in its view, Dozier had not
6 properly plead or presented a “known and available” alternative method of
7 execution as required by *Baze* and *Glossip*. At the evidentiary hearing, Petitioner’s
8 expert Anesthesiologist, Dr. Waisel, testified about his concerns regarding NDOC’s
9 revised protocol and in particular regarding NDOC’s proposed use of a paralytic in
10 the execution. NDOC cross-examined Dr. Waisel. This Court, over Petitioner’s
11 hearsay objection, admitted as evidence the October 20, 2017, Declaration of Dr.
12 DiMuro, that was requested earlier by this Court.

13 8. At a follow-up hearing conducted on November 6, 2017, this Court
14 accepted into evidence, this time over NDOC’s objection, a second Declaration of Dr.
15 Waisel signed that same date.² On November 8, 2017, NDOC submitted further
16 revisions to EM 103 and 110. On November 9, 2017, NDOC filed a signed and
17 adopted execution manual.

18 FINDINGS OF FACT

19 9. The fundamental question presented to this Court for resolution, once
20 NDOC submitted its three-drug execution protocol on September 5, 2017, followed
21 by two subsequent revisions to EM 103 and 110 of the protocol on October 20, 2017,

22 ² See Petitioner’s November 6, 2017 Supplemental Errata, Ex. 38.
23

1 and November 8, 2017, concerns NDOC's use of a paralytic agent as the third and
2 lethal drug in its lethal injection protocol. Specifically, the issue is whether NDOC's
3 proposed use of the paralytic drug (Cisatracurium) presents a violation of
4 Petitioner's constitutional rights under either Article 1, Section 6 of the Nevada
5 Constitution and/or the Eighth Amendment to the United States Constitution. The
6 Court finds that NDOC's proposed use of the paralytic drug in the execution of
7 Petitioner Scott Dozier presents a substantial risk of harm to Petitioner in violation
8 of his state and federal constitutional rights, based upon the untested protocol of
9 NDOC, and the limited medical evidence presented by NDOC.

10 A. Known and Available Alternative

11 10. NDOC opposes Petitioner's position regarding elimination of the
12 paralytic agent on essentially two grounds. First, NDOC argues that Petitioner
13 failed, in accordance with the requirements of *Baze* and *Glossip*, to plead or show a
14 known and available alternative method of execution. Yet Petitioner, through his
15 defense team, and specifically in his Reply, did provide a known and available
16 alternative. To the extent NDOC's position is that the defense's expert
17 anesthesiologist did not himself offer the alternative, the Court finds NDOC's
18 argument unpersuasive. The argument is based on a technicality, a fine line
19 without a distinction, as Petitioner's expert was ethically obligated to couch his
20 testimony in a particular way while not offering the best way to kill someone based
21 on his anesthesiology experience. Based upon the totality of the testimony of the
22 expert and his declarations, the Court finds NDOC's position that the Petitioner did
23

1 not pose a known and available method to be an oversimplification. This Court can
2 properly consider Dr. Waisel's testimony in conjunction with the proffered
3 alternative by the defense.

4 11. The United States Supreme Court requires that the proffered
5 alternative be known, feasible, and readily implementable. *Baze*, 553 U.S. at 52.
6 The Petitioner's proposed alternative here is feasible according to the testimony of
7 Dr. Waisel. The alternative is available according to NDOC's representations that
8 they have access to 15,000 micrograms of Fentanyl and also have sufficient
9 amounts of Diazepam. In addition, NDOC's argument that the alternative proffered
10 is not "known" is of no help to NDOC because the alternative is actually contained
11 within the State's protocol. Additionally, the extent to which the alternative is
12 unknown is equally attributable to the State's own protocol. Nothing is "known"
13 about NDOC's untested protocol in this particular case. However, the only cross-
14 examined testimony of any medical expert here is that the protocol proposed by
15 Petitioner will in fact kill Petitioner without risk of suffering air hunger or
16 awareness of suffocation. The Court therefore finds that the Petitioner has met his
17 burden of proffering a known and available alternative method of execution.

18 B. Substantial Risk of Harm

19 12. In opposing Petitioner's request to remove the paralytic drug, NDOC
20 argues he cannot establish that its use of the paralytic is unconstitutional under the
21 standard announced by the Supreme Court in *Baze* and *Glossip*. Under those
22 decisions, Petitioner must show that, absent removal of the paralytic agent, he is
23

1 being subjected to a “substantial risk of serious harm.” *Glossip*, 135 S Ct. at 2737;
2 *Baze*, 553 U.S. at 50. NDOC relies on the *Baze* decision, in which the Supreme
3 Court determined the use of a paralytic agent in a three-drug protocol was not
4 unconstitutional on the basis that the *Baze* petitioners were unable to demonstrate
5 use of the paralytic presented the requisite risk of harm. This Court has reviewed
6 *Baze* in detail and is fully aware that the decision makes it very difficult to mount a
7 lethal injection challenge based upon the language of the case.

8 13. This Court recognizes and appreciates that an inmate sentenced to
9 death is not entitled to a perfect execution. *See Baze*, 553 U.S. at 48 (“the
10 Constitution does not demand the avoidance of all risk of pain in carrying out
11 executions.”). In addition, there will always be some risk of movement – twitching
12 or fist clenching – by the condemned inmate. That is to be expected.

13 14. This Court finds, however, that the circumstances presented in this
14 instance are distinguishable from the circumstances presented in *Baze*, for
15 numerous reasons.

16 15. First, the protocol proposed by NDOC, unlike Kentucky’s protocol in
17 *Baze*, is untested. Kentucky was using a well-established three-drug protocol
18 (consisting of sodium thiopental, pancuronium bromide and potassium chloride),
19 that had a history of use in Kentucky and in many executions by many other death
20 penalty states. Further, the Supreme Court observed in *Baze* that of the thirty-six
21 death penalty states at that time, thirty of the states were using the same protocol
22 with the exact same drugs. *Baze*, 553 U.S. at 44. Here, there is no such similarity
23

1 among the states: the protocol proposed by NDOC has never been used in any state
2 in the United States and has never previously been reviewed by any court.

3 16. Second, the Supreme Court in *Baze* referenced a number of studies and
4 periodicals supporting the use of the three-drug protocol utilized by Kentucky. *See*,
5 *e.g.*, *Baze*, 553 U.S. at 107-111 (concurring opinion of Breyer, J.). These included
6 studies regarding the adequacy of the first drug anesthetic (Sodium Thiopental),
7 and the potential for awareness of the inmate during the lethal injection process. *Id.*
8 It is notable that Justice Breyer concluded that it could not be found, either in the
9 record or in readily available literature, that there were grounds to believe that
10 Kentucky's lethal injection method created a significant risk of unnecessary
11 suffering. Here, however, there are no such studies because the Court is examining
12 a protocol that has no similarity and has never been used in any state.

13 17. Unlike in *Baze*, here the only studies presented and that this Court
14 can rely upon are those presented by Petitioner's expert Anesthesiologist, Dr.
15 Waisel, showing that when Fentanyl is administered, awareness can occur even
16 with high doses. *See* November 3, 2017 hearing, Petitioner's Exs. H, I and J.³ This
17 presents a serious concern. Dr. Waisel's testimony was clear that the condemned
18 inmate could be not breathing yet still be aware, and that the inmate could be
19 unable to respond to stimuli yet still be aware. *See infra* Paragraphs 19-23.

20 18. Unlike the record in *Baze*, here all that has been presented to the
21 Court in terms of live testimony is the testimony of Petitioner's expert. This Court

22 ³ *See also* November 3, 2017 Hearing, State's Exs. 10 and 11.
23

1 finds Dr. Waisel to be a very credible witness. Dr. Waisel testified regarding the
2 risk presented by the proposed use of the Cisatracurium, specifically concerning the
3 risk of the inmate suffering "air hunger," and the risk of being aware yet paralyzed
4 and suffocating to death. The Court did not hear any other significant concern
5 except for "air hunger" or awareness during the administration of Cisatracurium.
6 For example, the Court heard no evidence about pain in the extremities or anything
7 else.

8 19. Dr. Waisel testified that his concern about the risk of air hunger and
9 awareness is premised upon an error in the administration of the protocol. If the
10 protocol is followed as written, and Mr. Dozier receives the maximum dosages of
11 Diazepam and Fentanyl as described in the protocol, Dr. Waisel stated there is no
12 risk of air hunger or awareness. Dr. Waisel acknowledged that as long as the
13 protocol is followed correctly, there is not a substantial risk of pain from the
14 Cisatracurium.

15 20. Further, Dr. Waisel stated that, *if* the first two drugs are delivered
16 successfully as written in the protocol, removing the Cisatracurium is not a slight or
17 marginally better alternative method of execution. Dr. Waisel also testified that the
18 Cisatracurium provides no additional benefit. Dr. Waisel testified that
19 Cisatracurium increases the risk of inhumane treatment rather than decreases the
20 risk. He stated that in medicine, a doctor would never take a risk that does not
21 provide a benefit.

1 21. Dr. Waisel testified that it is extremely unlikely to the point of medical
2 certainty that there would be a substantial risk of pain or suffering if Mr. Dozier
3 was executed using 100 mg of Diazepam and 7500 mcg of Fentanyl (without the
4 Cisatracurium).

5 22. Additionally, Dr. Waisel testified that it is unlikely that Mr. Dozier
6 will experience air hunger or panic after the initial loading doses of diazepam and
7 fentanyl, if the drugs are actually successfully delivered. Just on the loading doses
8 themselves, if the protocol is carried out as written and intended, Dr. Waisel
9 testified there was no need to worry about awareness, air hunger, or pain. Dr.
10 Waisel's opinion here was predicated upon the assumption that the drugs were fully
11 and successfully delivered and an experienced person correctly made the
12 assessments of lack of response to both verbal and tactile stimuli. Dr. Waisel
13 testified that even a surgeon who had been to medical school would not necessarily
14 be able to reliably assess awareness. He testified that there was no objectively
15 ascertainable definition of a medical grade pinch, which is the critical time period
16 where the execution team decides to administer the Cisatracurium.

17 23. Dr. Waisel testified that there was always more of a potential risk if
18 only the initial loading doses were administered versus the maximum doses of 100
19 mg of Diazepam and 7,500 mcg of Fentanyl.

20 24. Dr. Waisel also testified that use of the two drugs, Diazepam and
21 Fentanyl, would work, would not be painful, and would cause Mr. Dozier's death.
22 His testimony is un rebutted.

1 25. Mr. Dozier's execution will be the first execution in Nevada in eleven
2 years in a new and unused execution chamber. Thus, beyond other concerns about
3 NDOC's untested protocol, it is unknown how the delivery or administration of the
4 drugs will go, i.e., whether it will proceed smoothly, given the absence of any recent
5 experience in carrying out lethal injection executions by the prison staff and other
6 participants involved. This adds to the risks presented.

7 26. While this Court admitted the Declaration of Dr. DiMuro, despite the
8 fact that NDOC did not present his live testimony, the Declaration presents little to
9 counter the opinions of Petitioner's expert. There is little contained in the
10 Declaration in the way of debate or anticipatory rebuttal of the testimony provided
11 by Dr. Waisel. While the Court does have Dr. DiMuro's Declaration, provided at the
12 Court's request, that is all that the Court has from the State. The Court has
13 NDOC's stated purpose of the paralytic, but has very little if anything to contravene
14 the testimony of Petitioner's expert except for written materials presented by the
15 State relating to packaging inserts for Diazepam and Fentanyl and some additional
16 study information. This is in stark contrast to the State of Kentucky and the *Baze*
17 case where the Court was confronted with a known protocol with numerous
18 supporting studies.

19 27. Here, the specific rationale offered by Dr. DiMuro to justify use of the
20 Cisatracurium - that the inmate could attempt to move the diaphragm muscle to
21
22
23

1 initiate a breath⁴ · constitutes a “masking” event. In accordance with the testimony
2 of Petitioner’s expert, this rationale serves as a reason why the Cisatracurium
3 should not be used. It is widely recognized that a major complaint regarding use of a
4 paralytic agent in an execution is that the paralytic serves to “mask” any signs of
5 distress, pain or suffering being experienced by the condemned inmate. This
6 concern was mentioned multiple times by the various justices in the *Baze* opinions.
7 *See Baze*, 553 U.S. at 57 (Roberts, C.J., announcing judgment of the Court, joined
8 by Kennedy, J., and Alito, J.) (Petitioner’s contend Kentucky should omit the
9 pancuronium bromide “because it serves no therapeutic purpose while suppressing
10 muscle movements that could reveal an inadequate administration of the first
11 drug”), *id.* at 71 (Stevens, J., concurring in the judgment) (“Because it *masks* any
12 outward sign of distress, pancuronium bromide creates a risk that the inmate will
13 suffer excruciating pain before death occurs”), *id.* at 111 (Thomas, J., joined by
14 Scalia, J., concurring in the judgment) (“Petitioners argued . . . that Kentucky
15 should eliminate the use of a paralytic agent, such as pancuronium bromide, which
16 could, by preventing any outcry, *mask* suffering an inmate might be experiencing
17 because of inadequate administration of the anesthetic”), and *id.* at 122 (Ginsburg,
18 J., joined by Souter, J., dissenting) (“Kentucky’s use of pancuronium bromide to
19 paralyze the inmate means he will not be able to scream after the second drug is
20 injected, no matter how much pain he is experiencing.”).

22 ⁴ October 20, 2017 Declaration of John M DiMuro, D.O., p. 3.
23

1 28. While the Supreme Court in *Baze* observed that use of the paralytic
2 serves the purpose of preserving the dignity of the execution, there has been
3 nothing submitted to this Court indicating its use is to serve that purpose here. No
4 medical evidence has been presented that the Cisatracurium is necessary to
5 preserve the dignity of the proceeding or that the request to take out the paralytic
6 is, in the words of Justice Thomas, being offered by the defense to disgrace the
7 death penalty. *Id.* at 107. This Court simply has not heard any argument or seen
8 any evidence of that being the purpose of the paralytic in this protocol.

9 29. Finally, Petitioner additionally raised arguments pursuant to the
10 *Glossip* and *Baze* decisions regarding the adequacy of the qualifications and
11 training of prison officials and staff to reliably carry out an execution. This Court
12 finds that NDOC has done a reasonable and appropriate job in having enough
13 personnel under the new protocol to carry out Petitioner's execution. The Court does
14 not find that there is any evidence of improperly trained staff based upon the signed
15 protocol. Other than those specifically addressed in this Order, this Court does not
16 find persuasive Petitioner's numerous other alleged failures in the protocol or
17 staffing. NDOC has put together a comprehensive execution protocol in this regard.
18 This finding is provided some support by the opinion of Petitioner's expert, whose
19 testimony the Court has already found to be very credible, that the execution
20 protocol will work without use of a paralytic.

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1 has the inherent authority to review the execution procedure, but has maintained it
2 must do so within the parameters of case law as established in *Baze* and *Glossip*.

3 ORDER

4 IT IS HEREBY ORDERED that Petitioner's August 15, 2017 Motion for
5 Determination of the Lawfulness of Scott Dozier's Execution, and his corresponding
6 request⁵ to eliminate use of a paralytic drug and to restrict NDOC's execution
7 protocol to the first two drugs (Diazepam and Fentanyl) in NDOC's November 7,
8 2017, execution manual, is HEREBY GRANTED, and NDOC IS ENJOINED from
9 use of a paralytic agent in carrying out the execution of Scott Raymond Dozier.

10 IT IS FURTHER ORDERED that Petitioner's Motion for Leave to Conduct
11 Discovery is otherwise DENIED as MOOT.

12 DATED this 27th day of November, 2017

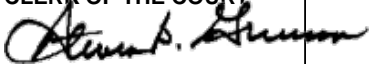
13
14 
15 JENNIFER P. TOGLIATTI
16 DISTRICT JUDGE
17
18
19
20
21

22 ⁵ See Petitioner's 9-25-17 Reply at 10.
23

1 I hereby certify that on the date filed, a copy of this
2 Order was electronically served through the Eighth
Judicial District Court EFP system to:

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4 Thomas A. Ericsson, Esq.
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5 
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

ZANE MICHAEL FLOYD,

Plaintiff,

vs.

Case No. A-21-833086-C
Dept. No. XIV

NEVADA DEPARTMENT OF
CORRECTIONS; CHARLES DANIELS,
Director, Nevada Department of Corrections;
IHSAN AZZAM, Chief Medical Officer of the
State of Nevada; JOHN DOES 1-20,
unknown employees or agents of Nevada
Department of Corrections,

Defendants,

**NEVADA DEPARTMENT OF
CORRECTION'S OPPOSITION TO
MOTION FOR TEMPORARY
RESTRAINING ORDER WITH NOTICE
AND PRELIMINARY INJUNCTION**

Defendant Nevada Department of Corrections, by and through counsel, opposes Plaintiff Zane Michael Floyd's motion for temporary restraining order with notice and preliminary injunction.

I. INTRODUCTION

The Court should deny Floyd's motion for extraordinary relief. Nothing in Floyd's motion demonstrates a likelihood of success on the merits. Floyd dodges Nevada precedent that has expressly rejected the precise arguments Floyd makes here in the Eighth Amendment context. *State v. Gee*, 46 Nev. 418, 436-48, 211 P. 676, 681-82 (1923); *McConnell v. State*, 120 Nev. 1043, 1056-57, 102 P.3d 606, 616 (2004).

...

1 Because Nevada precedent forecloses any argument under the Eighth Amendment,
2 Floyd resorts to the non-delegation doctrine. Tellingly, Floyd exclusively relies on *Hobbs*
3 *v. Jones*, 412 S.W.3d 844 (Ark. 2012),¹ but ignores that *Hobbs* is isolated from prevailing
4 authority rejecting similar arguments. *Sims v. Kernan*, 30 Cal.App.5th 105, 115 (Cal. Ct.
5 App. 2018) (collecting cases).

6 NRS 176.355 is presumed constitutional – and it is. The non-delegation doctrine
7 does not require micromanagement of core executive functions, such as carrying out
8 criminal sentences. The Legislature determined the penalty -- death. The Legislature
9 determined the means of carrying out the sentence -- lethal injection. The Legislature
10 wisely delegated the carrying out of Floyd’s sentence to the administrative agency with the
11 experience and specialized knowledge to implement its will. This Court should deny
12 Floyd’s motion for preliminary injunctive relief.

13 **II. BACKGROUND**

14 **A. Floyd’s complaint**

15 **1. Floyd murdered four Nevadans in 1999**

16 Lucy Tarantino, Thomas Darnell, Chuck Leos, and Dennis “Troy” Sargent were
17 working at Albertsons on West Sahara Avenue on June 3, 1999.² Floyd murdered them
18 with a 12-gauge shotgun. *Id.*

19 **2. Floyd’s Separation of Powers claim**

20 Floyd is now a death row inmate. *Id.* at ¶ 2. The court denied Floyd’s petition for
21 habeas relief, and Floyd exhausted his appeals in November 2020. *Id.* at ¶ 12. Now that
22 the State has sought a warrant of execution, Floyd asks this Court to declare Nevada’s
23 execution statute unconstitutional on its face. *Id.* at ¶¶ 13-14, p. 12. Floyd alleges that
24 NRS 176.355 violates Article III, Sec. 1 of Nevada’s Constitution. *Id.* at ¶¶ 1 and 4.

25 ¹ Br. 6:12-16.

26 ² See Compl., at ¶ 2 (citing *DA to proceed with death penalty against gunman in 1999*
27 *store killings*, Las Vegas Rev. J., <https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-gunman-in-1999-store-killings-2315637/>.) This article
28 is incorporated by reference into the complaint. *United States v. Ritchie*, 342 F.3d 903, 908
(9th Cir. 2003) (citing *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002)).

1 According to Floyd, NRS 176.355 is constitutionally infirm for several reasons. First,
2 he alleges it doesn't specify the drug to be used. *Id.* at ¶ 11. Second, he contends that it
3 does not say the execution must be implemented humanely. *Id.* at ¶ 12. Third, he claims
4 it does not say whether the drug must be taken orally or intravenously. *Id.* at ¶ 13. Fourth,
5 he proclaims that it does not say that NDOC has to acquire drugs that are sufficient to
6 cause death. *Id.* at ¶ 14.

7 Each of these claims is meritless, as explained below.

8 **B. Statutory background**

9 NDOC was created pursuant to NRS 209.101. Director Daniels is NDOC's Chief
10 Administrative and Fiscal Officer based on his "training, experience, and aptitude in the
11 field of corrections." NRS 209.121. As Director, Daniels must "enforc[e] all laws governing
12 the administration of [NDOC] and the custody, care, and training of offenders." NRS
13 209.131. Moreover, in cases where a death sentence has been pronounced, it shall be by
14 lethal injection, and the Director shall "[s]elect the drug or combination of drugs to be used
15 for the execution after consulting with the Chief Medical Officer." NRS 176.355.

16 **III. LEGAL STANDARD**

17 To obtain a preliminary injunction, Floyd had to show (1) a likelihood of success on
18 the merits and (2) a reasonable probability if the regulation went into force, they would
19 necessarily suffer irreparable harm for which compensatory relief is not adequate. *Finkel*
20 *v. Cashman Profl, Inc.*, 128 Nev. 68, 72,270 P.3d 1259, 1262 (2012). While Floyd need not
21 "establish certain victory on the merits, [he] must make prima facie showing through
22 substantial evidence that [he is] entitled to the preliminary relief requested." *Shores v.*
23 *Glob. Experience Specialists, Inc.*, 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). The Court
24 should also weigh the relative hardships of the parties and the public interest. *Univ. &*
25 *Cnty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

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1 **IV. ARGUMENT**

2 **A. No likelihood of success on the merits**

3 **1. NRS 176.355's constitutionality is a pure question of law.**

4 Floyd brings a facial challenge to the constitutionality of NRS 176.355. Compl. at
5 ¶¶ 1-15. Floyd raises no question as to the constitutionality of Nevada's mode of execution
6 statute as applied to him, but rather asks this Court to declare NRS 176.355
7 unconstitutional in all its applications. *Id.* at p. 12.

8 Statutory and constitutional interpretation are questions of law. *ASAP Storage, Inc.*
9 *v. City of Sparks*, 123 Nev. 639, 644, 173 P.3d 734, 738 (2007). "An example of a pure legal
10 question might be a challenge to the facial validity of a statute." *Beavers v. State, Dep't. of*
11 *Motor Vehicles & Pub. Safety*, 109 Nev. 435, 438 n.1, 851 P.2d 432, 434 n.1 (1993); accord
12 *Schwartz v. Lopez*, 132 Nev. 732, 744, 382 P.3d 886, 895 (2016).

13 Because there are no factual issues to develop, the Court can resolve the question of
14 NRS 176.355's constitutionality at this time. See *Schwartz*, 132 Nev. at 742, 382 P.3d at
15 894 (noting that the district court resolved the merits of appellants' facial challenges on a
16 motion to dismiss).

17 **2. NRS 176.355 is presumed valid, and it is.**

18 Statutes are presumed to be valid, and the challenger bears the burden of showing
19 that a statute is unconstitutional. *Hard v. Depaoli*, 56 Nev. 19, 41 P.2d 1054, 1056 (1935).
20 To meet that burden, the challenger must make a clear showing of invalidity. *Silvar v.*
21 *Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).
22 Courts "must interpret a statute in a reasonable manner, that is, '[t]he words of the statute
23 should be construed in light of the policy and spirit of the law, and the interpretation made
24 should avoid absurd results.'" *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502,
25 509, 217 P.3d 546, 551 (2009) (quoting *Desert Valley Water Co. v. State, Eng'r*, 104 Nev.
26 718, 720, 766 P.2d 886, 886-87 (1988)).

27 ...

28 ...

1 **i. Carrying out sentences is an Executive-Branch duty.**

2 NRS 176.355 does not violate Article III of the Nevada Constitution. Article 3,
3 Section 1 of the Nevada Constitution establishes three departments—the Legislative, the
4 Executive, and the Judicial—and mandates that “no persons charged with the exercise of
5 powers properly belonging to one of these departments shall exercise any functions,
6 appertaining to either of the others” NEV. CONST. art. III, § 1. Defining criminal
7 conduct and setting corresponding punishments is a legislative function, *Sheriff, Douglas*
8 *Cnty. v. LaMotte*, 100 Nev. 270, 272, 680 P.2d 333, 334 (1984), while executive power
9 extends to “carrying out and enforcing the laws enacted by the legislature.” *Del Papa v.*
10 *Steffen*, 112 Nev. 369, 377, 915 P.2d 245, 250 (1996) (quoting *Galloway v. Truesdell*, 83 Nev.
11 13, 19, 422 P.2d 237, 242 (1967)).

12 Floyd contends that by failing to specify the drug, the manner of delivery of the drug,
13 or that the method be humane, the Legislature failed to provide sufficient guideposts.
14 Compl. at ¶¶ 11-14. But Nevada’s jurisprudence makes clear that the Executive’s use of
15 discretion to implement the law does not offend Separation of Powers principles. The
16 legislature’s delegation to an administrative agency is constitutional “so long as suitable
17 standards are established by the legislature for the agency’s use of its power.” *Sheriff, Clark*
18 *Cnty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). Suitable standards
19 include delegating “authority or discretion, to be exercised under and in pursuance of the
20 law.” *State v. Shaughnessy*, 47 Nev. 129, 217 P. 581, 583 (1923).

21 Floyd’s argument misses the mark because nothing in NRS 176.355 permits the
22 Executive Branch to *make* law, as opposed to implementing the law. The Supreme Court
23 has explained the distinction between the two:

24 [T]he true distinction . . . is between the delegation of power to
25 make the law, which necessarily involves a discretion as to what
26 it shall be, and conferring authority or discretion as to its
27 execution, to be exercised [sic] in pursuance of the law. The first
28 cannot be done; to the latter no valid objection can be made.

27 . . .

28 . . .

1 *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*,
2 143 U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). In carrying out the execution of Floyd,
3 NDOC is implementing the policy of death penalty by lethal injection devised by the
4 Legislature.

5 The Legislature, not NDOC, by enacting NRS 176.355, mandated that the sole
6 method of execution will be lethal injection, departing from the state's prior use of lethal
7 gas. 1983 NEV. STAT. 1937. The discretion delegated to NDOC only extends to
8 implementing lethal injections as part of their duty to carry out and enforce state law.
9 Director Daniels has no discretion to carry out an execution by hanging, fire squad, lethal
10 gas, or any method other than lethal injection. By implementing the Legislature's will to
11 carry out executions by lethal injection, Director Daniels is carrying out a core function of
12 the Executive Branch.

13 **ii. Floyd ignores the key words' ordinary meanings.**

14 Floyd contends that the NRS 176.355 is constitutionally infirm because "it does not
15 specify the manner of injection." Compl. at ¶ 13. However, the ordinary meaning of "lethal"
16 and "injection" provide sufficient standards. *See Luqman*, 101 Nev. at 154, 697 P.2d at 110
17 (upholding delegation to administrative agency despite use of general terms like "medical
18 propriety" and "potential for abuse" because they were sufficient to guide the agency's fact-
19 finding).

20 While Floyd alleges that the word "lethal" does not provide sufficient guidance,
21 Compl. at ¶ 14, "lethal" is neither a term of art nor ambiguous. It is defined as "[d]eadly,
22 mortal, fatal." *Lethal*, *Black's Law Dictionary* at 903 (6th ed. 1990). It is clear, therefore,
23 that the legislature wants NDOC to administer drugs, by injection, that cause death. Thus,
24 the ordinary meaning of lethal and the Eighth Amendment to the U.S. Constitution
25 constrain the Director's choice of drug protocol. Nor is "injection" vague or ambiguous. As
26 the Ohio Court of Appeals noted, "'injection' is defined as the '[i]ntroduction of a medicinal
27 substance or nutrient material into the subcutaneous cellular tissue (subcutaneous or
28 hypodermic), the muscular tissue (intramuscular), a vein (intravenous) . . . or other canals

1 or cavities of the body.” *O’Neal v. State*, 146 N.E.3d 605, 617 (Ohio Ct. App.), *appeal*
2 *allowed*, 154 N.E.3d 98 (Ohio 2020) (quoting STEDMAN’S MEDICAL DICTIONARY 635 (3d
3 unabr. Laws.’ Ed. 1972)). Thus, “lethal injection” means to introduce a medicinal substance
4 or nutrient material into the subcutaneous cellular tissue, the muscular tissue, a vein , or
5 other canals or cavities of the body that is deadly (i.e, fatal). Director Daniels is prepared
6 to do exactly that.

7 Floyd also contends that there is nothing in NRS 176.355 mandating a humane
8 execution. Compl. at ¶ 12. Floyd’s argument ignores that statutes are presumed
9 constitutional. *Nevadans of Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006). The
10 legislature and administrative agencies alike must follow the state and federal
11 constitution. *See Gibson v. Mason*, 5 Nev. 283, 292 (1869) (explaining that the Legislature’s
12 power is limited only by “the Federal Constitution[] and . . . the fundamental law of the
13 State”). In fact, Floyd acknowledges that the Director is responsible for ensuring that
14 executions are “carried out in conformity with the constitutions of Nevada and the United
15 States.” Compl. at ¶ 4.

16 NRS 176.355 affords NDOC no more discretion than its prior version, requiring the
17 use of lethal gas for executions, which “infring[ed] no provision of the Constitution.” *Gee*,
18 46 Nev. 418, 211 P. 676, 682 (1923). The prior version identified that “judgment of death
19 shall be inflicted by the administration of lethal gas, and that a suitable and efficient
20 inclosure and proper means for the administration of such gas for the purpose shall be
21 provided.” *Id.* Nowhere did the statute identify the type or quantity of gas to be used, that
22 the gas must be administered humanely, or that the gas must be sufficient to cause death
23 and administered until death occurs. Yet the Nevada Supreme Court “[could not] see that
24 any useful purpose would be served by requiring greater detail.” *Id.* The Court affirmed
25 that *Gee*’s reasoning applies equally to Nevada’s lethal injection statute. *See McConnell*,
26 120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge
27 to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection
28 procedure).

1 Courts across the country have likewise disposed of similar arguments. The Eighth
2 Amendment prohibition on cruel and unusual punishment is implied in the statute and
3 constrains the Director. *See Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012) (“[T]he
4 United States Constitution also implicitly guides and limits the Department’s discretion.”);
5 *State v. Gee*, 46 Nev. 418, 211 P. 676, 682 (1923). No precedent requires including provisos
6 in statutes that they be enforced constitutionally in every piece of legislation. *See Sims v.*
7 *Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018) (explaining that “[t]he Legislature did
8 not need to provide more explicit standards and safeguards” because the 8th Amendment
9 offers “adequate guidance”); *State v. Deputy*, 644 A.2d 411, 420 (Del. Super. Ct.), *aff’d*, 648
10 A.2d 423 (Del. 1994) (“No requirement exists that the state statute itself must establish
11 detailed procedures for the administration of the death penalty.”); *State v. Osborn*, 631 P.2d
12 187, 201 (Idaho 1981) (“[W]e will not assume that the director of the department of
13 corrections will act in other than a reasonable manner.”).

14 In sum, Director Daniels must determine what combination of drugs will result in
15 death and the best way to introduce those substances into the body. These are fact-
16 intensive questions best answered by the administrative agency with relevant experience.

17 **iii. Separation of Powers does not require continual**
18 **updating to the Legislature’s delegation.**

19 Floyd’s contortion of the separation of powers doctrine would force the legislature to
20 amend NRS 176.355 in response to every change in drug manufacturing, the supply chain,
21 and standards for medical procedures. While the legislature may choose to do this, it is not
22 required to do so. Rather, the legislature may determine that this approach is not only
23 inefficient, but dangerous. Accordingly, in deciding whether a delegation exceeds
24 constitutional limits, other states consider “whether the agency official is better qualified
25 to make the determination” and if “requiring the legislature to detail the policy would be
26 impracticable.” *Zink v. Lombardi*, 2:12-CV-4209-NKL, 2012 WL 12828155, at *7 (W.D. Mo.
27 Nov. 16, 2012).

28 . . .

1 Floyd’s suggestion that the legislature needs to include information on “how NDOC
2 should choose, obtain, and administer lethal drugs” and the “quantity and quality
3 standards for those lethal drugs” is impractical and presumes the legislature’s desire to
4 make medical judgments. *See Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012) (“[I]t
5 would be impracticable for the Legislature to supply the details of the execution process
6 itself.”); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011) (“The tasks assigned to the director
7 are highly technical and require a course of continuous decision, making it appropriate to
8 delegate them.”); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (“[D]etermining the
9 methodology and the chemicals to be used are matters best left to the Department of
10 Corrections . . . because it has personnel better qualified to make such determinations.”).
11 The Legislature may choose to specify the dosage of drugs, which facilitate a constitutional
12 execution, but nothing in the Eighth Amendment or Separation of Powers jurisprudence
13 commands them to so. *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S. Ct. 2242, 2247 (2002).

14 **iv. Out of state authority reinforces NRS 176.355’s validity.**

15 Other state courts’ decisions considering execution protocol delegation-of-authority
16 arguments support the constitutionality of NRS 176.355. Nevada has long looked to its
17 sister states when considering whether delegations of authority violate the state’s own
18 separation of powers doctrine. *See State v. Shaughnessy*, 47 Nev. 129, 217 P. 581, 584
19 (1923) (Citing case law from Alabama, Arizona, Florida, Massachusetts, and Pennsylvania
20 as further support for the constitutionality of the legislature’s delegation).

21 The courts to address this question have overwhelmingly found their state
22 legislature can constitutionally delegate implementation of execution statutes to
23 corrections officials. *See, e.g., O’Neal v. State*, 146 N.E.3d 605, 620 (Ohio Ct. App.), *appeal*
24 *allowed on other grounds*, 154 N.E.3d 98 (Ohio 2020) (holding the legislature can delegate
25 implementation of the statute requiring death by lethal injection to the Department of
26 Rehabilitation and Correction given their experience in conducting executions of
27 condemned inmates); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018) (“The
28 Legislature has made the ‘momentous decision’ to establish the death penalty and has

1 decided the methods by which it will be carried out. The Legislature could properly delegate
2 to the Department responsibility to establish procedures for implementing it.”); *Zink v.*
3 *Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7-8 (W.D. Mo. Nov. 16, 2012);
4 *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); *State v. Ellis*, 799 N.W.2d 267, 289
5 (Neb. 2011); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc); *Sims v. State*, 754
6 So. 2d 657, 670 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *Ex parte*
7 *Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). *But see Hobbs v. Jones*, 412 S.W.3d
8 844 (Ark. 2012).

9 In upholding a capital punishment statute that is almost identical to Nevada’s,³ the
10 Tennessee Supreme Court explained:

11 [T]he legislature has determined a conviction of first degree
12 murder accompanied by aggravating circumstances is
13 punishable by death and that the method of execution shall be
14 lethal injection. Allowing the department of correction to
establish a protocol for the implementation of lethal injection
does not constitute an unconstitutional delegation of legislative
authority.

15 *State v. Hawkins*, 519 S.W.3d 1 (Tenn. 2017) (quoting *State v. Hawkins*, No. W2012-
16 00412CCA-R3-DD, 2015 WL 5169157 at *28 (Tenn. Crim. App. 2015)). The Nevada
17 Legislature has similarly exercised its power to determine the method for carrying out
18 executions and left the technical details surrounding implementation to the executive
19 officials tasked with enforcing the law. This delegation does not violate the Nevada
20 Constitution.

21 ...

22 ...

23 ...

24
25 ³ TENN. CODE ANN. § 40-23-114 (West 2020):

26 (a) For any person who commits an offense for which the person
is sentenced to the punishment of death, the method for carrying
out this sentence shall be by lethal injection.

27 ...

28 (c) The department of correction is authorized to promulgate
necessary rules and regulations to facilitate the implementation
of this section.

B. Because Floyd has no likelihood of success on the merits, none of the other factors are relevant

Floyd contends the irreparable harm factor favors injunctive relief. Br. 12. Floyd’s argument fails. Having demonstrated that Floyd does not have a likelihood of success on the merits, the inquiry is over. *Boulder Oaks Comm. Assoc. v. B& J Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 n.6 (2009).

V. CONCLUSION

This Court should deny Floyd's motion for temporary restraining and request for preliminary injunction.

DATED this 30th day of April, 2021.

AARON D. FORD
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Nevada Department of Corrections

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CERTIFICATE OF SERVICE

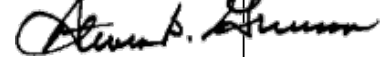
I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 30th day of April, 2021.

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

ZANE MICHAEL FLOYD,

Plaintiff,

v.

NEVADA DEPARTMENT OF
CORRECTIONS; CHARLES DANIELS,
DIRECTOR, NEVADA DEPARTMENT
OF CORRECTIONS; IHSAN AZZAM,
CHIEF MEDICAL OFFICER OF THE
STATE OF NEVADA; JOHN DOES 1-20,
UNKNOWN EMPLOYEES OR AGENTS
OF NEVADA DEPARTMENTS OF
CORRECTIONS

Defendants.

Case No. A-21-833086-C

Dept. No. XIV

**REPLY TO OPPOSITION TO
MOTION FOR TEMPORARY
RESTRAINING ORDER WITH
NOTICE AND PRELIMINARY
INJUNCTION**

(DEATH PENALTY CASE)

**EXECUTION WARRANT SOUGHT
BY THE STATE FOR THE WEEK OF
JULY 26, 2021**

1 **POINTS AND AUTHORITIES**

2 **I. Introduction**

3 On April 16, 2021, Zane M. Floyd moved this Court for a temporary
4 restraining order and preliminary injunction enjoining Defendants from carrying
5 out any aspect of Nevada's execution protocol against him as NRS 176.355 violates
6 Article III § 1 of the Nevada Constitution. NDOC filed its opposition to the Motion
7 and Complaint on April 30, 2021. Floyd hereby replies to NDOC's opposition.

8 **II. Argument**

9 The fact that NRS 176.355 is presumed constitutional does not mean that it
10 actually is. Nevada courts have never addressed whether NRS 176.355 violates the
11 separation of powers clause by improperly delegating authority, to the Executive, to
12 decide Nevada's lethal injection protocol without suitable and sufficient standards.
13 Since the issue is now properly before the Court NRS 176.355's constitutionality can
14 finally be examined.

15 **A. As long as NRS 176.355 fails to establish suitable and sufficient**
16 **standards to guide NDOC's exercise of delegated authority, Floyd has a**
likelihood of success on the merits of his nondelegation claim

17 **1. Lawmaking is not a task for the Executive branch**

18 Defendants have much to say about the two things the Legislature has
19 determined, and little to say about the numerous law-forming decisions NDOC has
20 the authority to make, has made, and the arbitrary and capricious nature of those
21 decisions. To put it in perspective, under NRS 176.355, the Legislature determines
22 that death is the punishment for certain crimes and lethal injection is *a part* of the
23 manner of execution. NDOC determines:

- 1 • The full manner of execution (i.e., intravenous, subcutaneous, or
- 2 intramuscular injection)
- 3 • Definition of lethal injection
- 4 • Method of execution (types of drug(s) to be used)
- 5 • How to choose, obtain, and administer drugs
- 6 • Quantity and quality of drugs
- 7 • Whether a one or multi drug protocol is satisfactory
- 8 • Whether the drugs chosen should be certain to cause death
- 9 • Whether the drugs chosen must facilitate a humane execution
- 10 • How much notice the condemned will receive once drug(s) are identified
- 11 • The suitability and sufficiency of the execution location

12 By delegating the above listed tasks, NDOC's discretion extends far beyond
13 merely "implementing" the lethal injection protocol. Opp. at 6. To implement is "to
14 put into effect according to or by means of a definite plan or procedure." *See*
15 *Implement*, <https://www.dictionary.com/browse/implement>, (last visited May 11,
16 2021). The Legislature has no definite plan or procedure in place for executions and
17 NDOC is tasked with determining what the entire lethal injection protocol
18 procedures "shall be." *See Pine v. Leavitt*, 84 Nev. 507, 511-12, 445 P.2d 942, 944
19 (1968) (concluding that "delegation of power to make the law . . . involves a
20 discretion as to what it shall be."). Without any guideposts from the legislature,
21 NRS 176.355 violates the separation of powers because it permits the executive
22 branch to make law.

23

1 Defendants contend that NRS 176.355 does not delegate lawmaking power
2 because “nothing” in the text “permits the Executive Branch to *make* law,” and
3 NDOC “has no discretion to carry out an execution by . . . any method other than
4 lethal injection.” Opp. at 5-6. This reasoning is unsound and misses the point. NRS
5 176.355 does not have to expressly grant NDOC lawmaking power within the
6 statute to implicate the nondelegation doctrine. NRS 176.355 is so sparse, and
7 devoid of guidance, that it resultantly delegates unfettered discretion to the
8 executive, and with that the ability to *make law*.

9 Moreover, Nevada’s separation of powers jurisprudence clearly demonstrates
10 NRS 176.355 is an unlawful delegation of authority. Not only do suitable standards
11 have to be established, but they have to be sufficient enough to leave the delegated
12 agency with only fact-finding authority. In *Luqman*, the Court held the Legislature
13 had made a proper delegation to the State Board of Pharmacy by allowing it to
14 categorize “drugs into various schedules according to the drug’s propensity for harm
15 and abuse.” *Sheriff, Clark Cty. v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 109-10
16 (1985). The Court reasoned that the Executive’s power didn’t constitute lawmaking
17 and was purely fact finding because the Legislature had both included general and
18 specific guidelines detailing numerous factors for the Board to consider while
19 scheduling drugs, and listed requirements for classifying drugs into certain
20 schedules. *Id.* at 154, 697 P.2d at 110-11. Similarly here, the Legislature has
21 delegated authority to the Executive to decide upon a lethal injection protocol.
22 However, unlike *Luqman*, in the case at hand the Legislature failed to provide *any*
23

1 guidelines or factors to aid NDOC in choosing, obtaining, or administering the
2 lethal drugs. That being the case, NRS 176.355 is distinguishable from *Luqman* and
3 should be found unconstitutional.

4 **a. NRS 176.355 fails to define terms**

5 There is no dispute that NRS 176.355 fails to specify the drug or combination
6 of drugs to be used in Nevada’s execution protocol. This alone is a sufficient basis
7 for finding that NRS 176.355 constitutes an unlawful delegation of authority. *E.g.*,
8 *Hobbs v. Jones*, 412 S.W.3d 844, 853-54 (Ark. 2012). As the court noted in *Hobbs*,
9 such statutory provisions “give[] absolute discretion to the ADC to determine the
10 chemicals that may be used.” *Id.* at 853. Unlike the situation in *Hobbs*, here NRS
11 176.355 fails to even include a list of potential drugs that the Director should
12 consider when creating a lethal injection protocol. Leaving such an important issue
13 to the sole discretion of the Director clearly constitutes an unlawful delegation of
14 authority.

15 Defendants maintain that the Legislature does not need to define terms, as
16 “lethal” and “injection” are ordinary and unambiguous. Opp. at 6. This is incorrect.
17 Even assuming “lethal” is unambiguous, “injection” is not because it is subject to
18 multiple interpretations.¹ *Young v. Nevada Gaming Control Board*, 136 Nev. Adv.
19 Op. 66, 473 P.3d 1034, 1036, (2020) (“A word is ambiguous if it is subject to more
20 than one reasonable interpretation.”) (quoting *Savage v. Pierson*, 123 Nev. 86, 89,

22 ¹ See Injection, <https://medical-dictionary.thefreedictionary.com>, (last visited
23 May 13, 2021) (defining intradermal injection, intramuscular injection, intrathecal
injection, intravenous injection, jet injection, and subcutaneous injection).

1 157 P.3d 697, 699) (internal quotations omitted). As Defendant’s note, an “injection”
2 has several meanings, an injection may be: “into the subcutaneous cellular tissue
3 (subcutaneous or hypodermic), the muscular tissue (intramuscular), a vein
4 (intravenous)” or any “other canals or cavities of the body.” Opp. at 6.

5 As evidenced above, NRS 176.355 fails to define lethal injection by omitting
6 the type of injection the Legislature intended (through the muscle, vein, or cells),
7 and the manner in which it expected the punishment to be implemented (by
8 consuming a solution that has been injected with lethal drugs or injected into
9 tissue). This failure has left the precise method of execution unclear and delegated
10 NDOC unfettered discretion to define terms and ultimately determine the manner
11 in which Floyd is killed. This is improper as both are tasks solely left to the
12 Legislature.

13 **b. NRS 176.355 lacks critical terms**

14 While statutes are presumed constitutional, Defendants ignore NDOC’s
15 repeated unlawful and inhumane actions carried out under NRS 176.355. It’s
16 simply untrue that suitable and sufficient standards are unnecessary to compel
17 NDOC to comply with Nevada law and carry out a humane execution because they
18 have failed to do so in the past. *See Hobbs v. Jones*, 412 S.W.3d 844, 854 (Ark. 2012)
19 (“[W]hen the General Assembly has provided [in]sufficient guidance . . . the doctrine
20 of separation of powers has been violated and other constitutional provisions cannot
21 provide a cure.”). To support this assertion, Defendants quote *State v. Gee*, 46 Nev.
22 418, 211 P. 676 (1923), wherein the Nevada Supreme Court stated it “[could not] see
23

1 that any useful purpose would be served by requiring greater detail,” under former
2 NRS 176.355. *See* Opp. at 7. However, this argument is misleading. *Gee* was limited
3 to addressing the defendant’s argument that greater detail was required under the
4 Eighth Amendment and its state counterpart, Article I, § 6. Moreover, the Court
5 analyzed the statute under its prior version, which included more detail than NRS
6 176.355’s current version.

7 Indeed, the failure to create objective standards that an execution must be
8 humane can lead to even greater unconstitutional results, as NDOC has the power
9 to adopt a “so long as they die” framework in choosing and administering drugs,
10 with no consideration of the pain and suffering of condemned inmates.² As a result,
11 several states have included a humanity provision in their statutes. *See* Ohio Rev.
12 Code Ann. § 2949.22(A) (2020); Kan Stat. Ann. § 22-4001(a) (2020); Miss. Code Ann
13 § 99-19-51(1).

14 **2. The Nevada Supreme Court has never addressed separation of**
15 **powers, and nondelegation, as applied to NRS 176.355**

16 Defendants argue that Floyd “dodges Nevada precedent” by failing to address
17 how *State v. Gee*, 46 Nev. 418, 211 P. 676 (1923), and *McConnell v. State*, 120 Nev.
18 1043, 102 P.3d 606 (2004), affect his nondelegation claim. Opp. at 1. The short
19 answer is, they do not. *Gee* and *McConnell* challenge Nevada’s execution statute
20 under the Eighth Amendment, which is an entirely different constitutional

21 ² *See So Long as They Die: Lethal Injections in the United States*, Human
22 Rights Watch, [https://www.hrw.org/report/2006/04/23/so-long-they-die/lethal-](https://www.hrw.org/report/2006/04/23/so-long-they-die/lethal-injections-united-states#)
23 [injections-united-states#](https://www.hrw.org/report/2006/04/23/so-long-they-die/lethal-injections-united-states#); *see also* Greg Botelho & Dana Ford, *Oklahoma stops*
execution after botching drug delivery, CNN,
<https://www.cnn.com/2014/04/29/us/oklahoma-botched-execution/index.html>.

1 provision than Floyd’s asserted violation. Thus, Defendant’s reliance on *Gee* and
2 *McConnell* is misplaced because neither case discusses whether NRS 176.355
3 violates Article III, § 1 of the Nevada constitution.

4 McConnell argued NRS 176.355 constituted cruel and unusual punishment
5 because the statute failed to include “detailed codified guidelines setting forth a
6 protocol for lethal injection,” and as a result would lead to botched executions. 120
7 Nev. 1043, 1055, 102 P.3d 606, 615-16 (2004). Similarly, Gee’s appellate briefing
8 never mentioned Article III, § 1 of Nevada’s constitution or nondelegation, but
9 instead argued former NRS 176.355 was so “indefinite and uncertain as to the
10 formula to be employed” that NDOC could choose a method that constitutes cruel
11 and unusual punishment and require intervention by other branches.³ Even
12 defendants do not dispute that these cases only examine NRS 176.355 “in the
13 Eighth Amendment context,” and hold that “[t]he Eighth Amendment prohibition
14 on cruel and unusual punishment is implied in the statute.” Opp. at 8.

15 While Floyd recognizes that the Nevada Supreme Court acknowledged former
16 NRS 176.355’s constitutionality in *Gee*, he contends that this holding was specific to
17 the constitutional challenge brought in that particular case, and not, as Defendants
18 propose, the court’s “rejection” of every provision in Nevada’s constitution as applied
19 to NRS 176.355. Opp. at 1. Interpreting *Gee* in this manner is erroneous as it would
20 bar all future constitutional challenges to the statute, including ones that have
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22 ³ Ex. 1 at 34-35 (Brief for Appellant at 34-35, *State v. Gee*, et al., 46 Nev. 418,
23 211 P. 676 (1923) (No. 2547)).

1 never been briefed, or raised before the court, like Floyd’s separation of powers
2 claim. *E.g.*, *Ex parte Tartar*, 339 P.2d 553, 557 (Cal. 1959) (“Cases are not authority
3 for propositions not considered.”). Because Floyd’s claim is distinguishable from *Gee*
4 and *McConnell*, Floyd presents an issue of first impression, and those decisions are
5 not controlling with respect to his separation of powers claim. *See* Opp. at 2.
6 (acknowledging that Nevada precedent only “forecloses any argument under the
7 Eighth Amendment”).

8 **3. Looking to other states raises even more questions regarding**
9 **NRS 176.355’s validity**

10 Next, Defendants argue that only “isolated” authority supports requiring the
11 Legislature to provide suitable and sufficient standards regarding lethal drugs.
12 Opp. at 2. However, *Hobbs v. Jones*, 412 S.W. 3d 844 (Ark. 2012), does not stand
13 alone. Several states have lethal injection statutes that include standards detailing
14 the type, quantity, and quality of drugs required. *See e.g.*, Ark. Code Ann. § 5-4-
15 617(c) (2020); Miss. Code Ann. § 99-19-51(1) (West 2020); Or. Rev. Stat. § 137.473(1)
16 (West 2020); Wyo. Stat. Ann. § 7-13-904(a) (West 2020); 61 Pa. C.S. Ann. §
17 4304(a)(1) (West 2010); Utah Code Ann. § 77-19-10(2) (West 2020). Moreover, many
18 states, including Nevada, have simply failed to address whether the Legislature’s
19 delegation to the Executive branch is unconstitutional. *See* NRS 176.355; Okla.
20 Stat. Tit. 22, § 1014; Ga. Code Ann. § 17-10-38; La. Rev. Stat. § 15:1569; *see also*
21 *State v. Kleypas*, 40 P.3d 139, 254-55 (Kan. 2001) (overruled on other grounds by
22 *State v. Wilson*, 431 P.3d 841 (Kan. 2018)) (addressing only whether Kansas’s lethal
23

1 injection protocol constitutes cruel and unusual punishment for failure to adopt
2 specific guidelines).

3 Defendants next argue that NRS 176.355 is a proper delegation because some
4 of Nevada's sister states have found their lethal injection statutes constitutional.
5 Opp. at 9-10. This argument is not only unpersuasive, but also misleading.
6 Defendants do not acknowledge that each state has its own constitutional
7 provisions. Moreover, while some of Nevada's sister states view their lethal
8 injection protocol delegations as constitutional, that constitutionality depends
9 wholly upon use of more detailed statutory language, which NRS 176.355 is lacking.
10 Other state lethal injection statutes are more detailed than Nevada's and leave less
11 discretion for an administrative agency to make policy decisions. For example,
12 California's statute provides that:

13 "[T]he death penalty shall be inflicted by . . . an *intravenous*
14 *injection of a substance or substances in a lethal quantity*
15 *sufficient to cause death*, by standards established under
the direction of the Department of Corrections and
Rehabilitation."

16 See *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 302-09 (2018) (emphasis added).

17 Likewise, Arizona's lethal injection statute also provides greater detail:

18 "Penalty of death shall be inflicted by an *intravenous*
19 *injection of a substance or substances in a lethal quantity*
sufficient to cause death, under the supervision of the
state department of corrections."

20 *Cook v. State*, 281 P.3d 1053, 1055-56 (Ariz. App. 2012) (emphasis added). As does
21 Idaho:

22 "The punishment of death must be inflicted by the
23 *intravenous injection of a substance or substances in a*
lethal quantity sufficient to cause death until the
defendant is dead. The director of the department of

1 corrections shall determine the substance or substances to
2 be used and the procedures to be used in any execution.”

3 Idaho Code § 19-2716 (emphasis added); *State v. Osborn*, 631 P.2d 187, 201
4 (Idaho 1981). And, Ohio:

5 “A death sentence shall be executed by causing the
6 application to the person, upon whom the sentence was
7 imposed, of a *lethal injection of a drug or combination of*
8 *drugs of sufficient dosage to quickly and painlessly cause*
9 *death*. The application of the drug or combination of drugs
10 *shall be continued until the person is dead.*”

11 (emphasis added) Ohio Rev. Code Ann. § 2949.22A (2020). Tellingly, looking to
12 other states evidences that Nevada’s statute fails to provide suitable and sufficient
13 guidelines and thus violates the separation of powers doctrine.

14 Defendants also contend that NRS 176.355 is a lawful delegation because
15 Tennessee has a similar statute, that it deemed constitutional. Opp. at 10.
16 Defendant’s assertion is misplaced. Comparing Nevada’s statute to other states is
17 simply the first step in the process. Whether NRS 176.355 is ultimately
18 unconstitutional also depends on the constraints of Nevada’s separation of powers
19 clause, which slightly differs from Tennessee’s. *See* Nev. Constitution article III, § 1;
20 Tenn. Const. article II §§ 1, 2.

21 While both provisions share similar language, Nevada’s constitution goes a
22 step further by including greater detail describing its intent to keep each
23 department’s use of power separate. Nevada’s provision vehemently declares that
the Executive, Judicial, and Legislative branches are all “divided” and operate
“separate” from one another, unlike Tennessee. Nev. Constitution article III § 1.
Nevada also qualifies its separation of powers clause by stating no department shall

1 exercise any “*functions*, appertaining to either of the others.” Nev. Const. art III, § 1
2 (emphasis added). This language is analogous to limiting delegations to only fact-
3 finding authority, and thus makes Nevada’s provision stricter and more limiting.

4 **4. Nevada’s execution protocol is nondelegable**

5 Finally, Defendants argue that NRS 176.355 does not violate separation of
6 powers because NDOC “is better qualified” to decide the lethal injection protocol.
7 Opp. at 8. And requiring the Legislature to provide suitable and sufficient
8 standards would be too “impracticable.” *Id.* The Defendants offer no factual support
9 for this naked and unsupported assertion.

10 Defendants presume expertise, however, it is a fallacy that NDOC has the
11 “experience and specialized knowledge” to decide a lethal injection protocol.⁴ Opp. at
12 2. Delegating the authority for conducting an execution is different than merely
13 implementing traditional criminal sentences.⁵ Determining the means by which a
14 person dies calls for more than custodial and rehabilitative care.⁶ It requires
15 scientific expertise, medical acumen concerning usage, side effects, and storage of
16 lethal drugs, and knowledge of the risk levels associated with choosing certain
17 drug(s).

19 ⁴ See Ex. 2 at 958 (Alexandra L. Klein, *Nondelegating Death*, 81 Ohio L. J.
20 924 (2020) (“Deference to presumed agency expertise in a separation of powers
analyses muddies the distinction between constitutionally permissible delegation
and administrative competence.”)).

21 ⁵ *Id.* at 962-80.

22 ⁶ NDOC’s mission is “to protect society by maintaining offenders in safe and
humane conditions while preparing them for successful reentry back into society.”
Nevada Department of Corrections,
23 http://doc.nv.gov/About/Mission_Statement/Home/ (last visited May 11, 2021).

1 NDOC Director Charles Daniels has never carried out an execution in
2 Nevada, lacks expertise in all areas relevant to deciding a lethal injection protocol,
3 and under NRS 176.355 is not required to follow the advice of Nevada's Chief
4 Medical Officer or any physician for that matter. When asked about the process of
5 obtaining lethal drugs, and acquiring information on potential drugs, Director
6 Daniels stated "I am not qualified" to discuss that and he acknowledged "there's
7 probably a better person to respond to that question."⁷

8 Indeed, less than a month before the Clark County District Attorney's
9 original proposed execution date (June 7, 2021), Director Daniels testified that
10 NDOC was "still in the process of finalizing the protocol that would be used for Mr.
11 Floyd" and had not "made the final conclusion that the (choice) of drug or drugs, and
12 the manner in which to inject the drug or drugs will result in a death that does not
13 violate the constitution."⁸ In fact, despite knowing of the impending proposed
14 execution date for over a month Director Daniels has only consulted with the Chief
15 Medical Officer once and does not have any future meetings scheduled. This clearly
16 evidences that NDOC is not more qualified than the Legislature. Most importantly,
17 when life is at stake, concerns of impracticability are in themselves impractical. If
18 Defendants are truly concerned about "the agency with the relevant experience" and
19
20

21 ⁷ See Ex. 3 at 47-48 (Transcript of Testimony of Charles Daniels, *Floyd v.*
22 *Charles Daniels, et al.*, Case No. 3:21-cv-00176-RFB-CLB, (D. Nev.), May 6, 2021).

23 ⁸ See Ex. 4. (David Ferrara, *Nevada prison officials unsure on execution*
method for Zane Floyd, Las Vegas Review Journal, May 3, 2021).

1 “specialized knowledge” deciding the protocol, then the Legislature should set the
2 standards. Opp. at 2, 8.

3 NDOC’s recent history with lethal injection protocols shows why such critical
4 decisions should be left to the people’s representatives in the Legislature. NDOC
5 has not conducted an execution since 2006. NDOC engages in extraordinary secrecy
6 with respect to its execution protocol, only disclosing it after issuance of an
7 execution warrant and under compulsion by the court. After disclosure of a novel
8 and experimental protocol in 2017, NDOC made major errors with respect to the
9 dosage of the drugs that it did not address until it was pointed out by an expert for
10 the condemned inmate.⁹ The architect of the protocol, former CMO John DiMuro,
11 bragged to the media that “I honestly could have done it in one minute.”¹⁰ And even
12 after making modifications, the execution protocol was not adopted by the Director
13 until the week before the execution and the protocol was ultimately found to violate
14 the Eighth Amendment and Article I, § 6 of the Nevada Constitution, by the only
15 court that reviewed it.¹¹

16 Here, Floyd faces an imminent execution in the face of extraordinary secrecy
17 by NDOC. It appears the execution protocol may yet again involve experimental
18

19 ⁹ Ex. 5 (report of David B. Waisel at 3-15, October 4, 2017); Ex. 6 (*State v.*
20 *Dozier*, Case No. 05C215039, Transcript of Proceedings, at 6 (October 11, 2017)
(concession by NDOC to modify dosage of execution drugs).

21 ¹⁰ Ex. 7 (William Wan, *Execution drugs are scarce. Here’s how one doctor*
22 *decided to go with opioids*, the Washington Post (December 11, 2017)).

23 ¹¹ Ex. 8 (*State v. Dozier*, Case No. 05C215039, Findings of Fact, Conclusions
of Law, and Order Enjoining the Nevada Department of Corrections from Using a
Paralytic Drug in the Execution of Petitioner at 2-18 (November 27, 2017), *reversed*
on procedural grounds, *NDOC v. Eighth Judicial District Court (Dozier)*, 134 Nev.
1014, 417 P.3d 1117 (2018) (unpublished)).

1 drugs never used before in any prior execution, which will likely again give rise to
2 major problems with respect to dosage and drug interactions. And the Director who
3 is making the critical decisions with respect to the protocol is in apparent
4 disagreement with the Chief Medical Officer,¹² the only medical official he is
5 statutorily required to consult, and he has expressed confidence in NDOC's prior
6 protocol even though he claims to know it was found to be unconstitutional.¹³

7 Unlike NDOC, the legislative process is a transparent and reliable one in
8 which the public can have confidence. For example, in Utah, when changing their
9 death penalty statute, the amendment was reviewed carefully by law enforcement
10 officials, senators, and representatives, who all testified in a public forum,
11 regarding their opinions, expertise, and suggestions. *Death penalty provisions on*
12 *H.B. 180 Before the S. Health and Human Services Comm.*, 2004 Leg., 55th Sess.
13 30:24-1:08 (Utah 2004). In contrast, NDOC's decision making process completely
14 lacks transparency.

15 The Legislature is not only the entity with the most resources and public
16 accountability; it is the entity that is critical in maintaining the transparency and
17 separation of powers that our democratic process demands. *See Morrison v. Olson*,
18 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (internal quotations omitted) ("It is
19 a proud boast of our democracy that we have a government of laws and not of
20

21 ¹² Ex. 9 (*Floyd v. Daniels*, Case No. 3:21-cv-00176-RFB-CLB, Motion to
22 Withdraw as Attorney for Record for Dr. Ishan Azzam at 2 (May 4, 2021) (noting
23 "an actual conflict between Dr. Azzam and the NDOC Defendants in this case")).

¹³ Ex. 3 at 57.

men.”); *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967) (“The division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people.”).

III. Conclusion

For the foregoing reasons, and those stated in his Complaint, and original Motion, Floyd requests this Court issue a temporary restraining order and/or preliminary injunction, staying his execution and enjoining Defendants from carrying out any aspect of Nevada’s execution protocol against him.

DATED this 17th day of May, 2021.

Respectfully submitted
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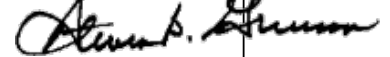
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CERTIFICATE OF SERVICE

In accordance with EDCR 8.04(c), the undersigned hereby certifies that on this 17th day of May, 2021, a true and correct copy of the foregoing REPLY TO OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION, was filed electronically with the Eighth Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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/s/ Sara Jelinek
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Attorneys for Plaintiff Zane M. Floyd

DISTRICT COURT
CLARK COUNTY, NEVADA

<p>ZANE MICHAEL FLOYD,</p> <p>Plaintiff,</p> <p>v.</p> <p>NEVADA DEPARTMENT OF CORRECTIONS; CHARLES DANIELS, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS; IHSAN AZZAM, CHIEF MEDICAL OFFICER OF THE STATE OF NEVADA; JOHN DOES 1- 20, UNKNOWN EMPLOYEES OR AGENTS OF NEVADA DEPARTMENTS OF CORRECTIONS</p> <p>Defendants.</p>	<p>Case No. A-21-833086-C Dept. No. XIV</p> <p>EXHIBITS TO REPLY TO OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION</p> <p>(DEATH PENALTY CASE)</p> <p>EXECUTION WARRANT SOUGHT BY THE STATE FOR THE WEEK OF JULY 26, 2021</p>
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EXHIBIT	DOCUMENT
1.	<i>State v. Gee, et al.</i> , Appellant's Opening Brief, Case No. 2547, Nevada Supreme Court, 1923
2.	Alexandra L. Klein, <i>Nondelegating Death</i> , 81 Ohio L. J. 924 (2020)
3.	<i>Floyd v. Charles Daniels, et al.</i> , Case No. 3:21-cv-00176-RFB-CLB, Transcript of Evidentiary Hearing, (Testimony of Charles Daniels, (D. Nev.), May 6, 2021, (ECF No. 49)
4.	David Ferrara, <i>Nevada prison officials unsure on execution method for Zane Floyd</i> , Las Vegas Review Journal, May 3, 2021
5.	Declaration of David B. Waisel, Oct. 4, 2017
6.	<i>State v. Dozier</i> , Case No, 05215039, Clark County District Court, Transcript of Defendant's Motion for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner/Status Check: Protocols, Oct. 11, 2017
7.	William Wan, <i>Execution drugs are scarce. Here's how one doctor decided to go with opioids</i> , The Washington Post, December 11, 2017
8.	<i>State v. Dozier</i> , Case No, 05215039, Clark County District Court, Findings of Fact, Conclusions of Law, and Order Enjoining the Nevada Department of Corrections from Using a Paralytic Drug in the Execution of Petitioner, Nov. 27, 2017
9.	Floyd v. Daniels, et al., Case No. 3:21-cv-00176-RFB-CLB, (D. Nev.) Motion to Withdraw as Attorney of Record for Dr. Ishan Azzam, May 4, 2021 (ECF No. 41)

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DATED this 17th day of May, 2021

Respectfully submitted
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DAVID ANTHONY
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EXHIBIT 1

EXHIBIT 1

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 The State of Nevada, Plaintiff,
4 and Respondent
5 vs

6 Gee Jon and Hughie Sing, Defendants
7 and Appellants

8
9 Appellant's Opening Brief

10 Statement of the case: The defendants, Gee Jon and
11 Hughie Sing, were tried and convicted in the Seventh Judi-
12 cial District Court of the State of Nevada, in and for
13 the County of Mineral, upon an information charging the
14 defendants with the crime of murder alleged to have been com-
15 mitted on or about the 27th day of August, 1921. The per-
16 son alleged to have been killed was Tom Quong Kee, an old
17 chinaman, residing at Mina in Mineral County, Nevada, in a
18 place known as the "Chinese Laundry", situated in the chinese
19 quarter of the town of Mina.

20 The testimony offered and received at the trial was en-
21 tirely circumstantial in its nature with the exception of
22 an alleged confession made by Hughie Sing, one of the defen-
23 dants, wherein it was alleged that he had admitted his par-
24 ticipation in the killing of Tom Quong Kee and designating
25 his co-defendant, Gee Jon, also as a participant, and as the
26 person who fired the fatal shots that resulted in the death
27 of the deceased.

28 The only proof of motive offered as a circumstance by
the State consisted of receipts found in the possession of

1 Gee Jon purporting to be receipts for dues paid to the Hop
2 Sing Tong.

3 Before the trial of the above entitled cause commenced
4 the defendants, Gee Jon and Hughie Sing, each for himself,
5 demanded a separate trial and moved the Court to grant each
6 of them a severance upon the ground that evidence would be
7 offered on behalf of the State which might be held competent,
8 relevant and material against one of the defendants, and that
9 the same evidence was not competent, relevant or material or
10 admissible at all against the other defendant, and particular-
11 ly upon the ground that the State relied upon and would of-
12 fer in evidence an alleged confession of the defendant, Hughie
13 Sing which would not in any manner be binding upon, or admis-
14 sible against his co-defendant, Gee Jon, all of which would
15 be prejudicial to him and that each of the defendants would
16 be prejudiced by testimony offered against the other which
17 in no manner would be admissible against the other, and that
18 the nature of such evidence would inevitably have its bear-
19 ing upon the question of the guilt or innocence of the other
20 defendant if the defendants should be tried jointly and the
21 evidence offered, although admissible against one before
22 the same jury that tried the other.

23 It was admitted by Counsel for the State that such evi-
24 dence including the confession of Hughie Sing would be of-
25 fered in evidence, but contending that instructions of the
26 Court limiting such evidence to the particular defendant
27 against whom it was admissible and excluding the same from
28 the consideration of the jury as to the other defendant

1 would be sufficient to protect such other defendant against
2 any injury therefrom because of the admission of such evi-
3 dence in the presence of the jury and a consideration of the
4 same by the jury as to the other defendant.

5 The Court denied defendants motion for a severance, to
6 which the defendants duly excepted, and the denial of said
7 application is the first error found by Appellants. As
8 before stated, testimony of certain receipts and other docu-
9 ments found in the possession of Gee Jon, and not binding
10 upon or competent against Hughie Sing was admitted in evidence
11 for the purpose of showing motive, and here we might further
12 state that while the same, if admissible at all, the same
13 being found upon his person after the commission of the al-
14 leged offense, would only be admissible against the defendant,
15 Gee Jon, and therefore inadmissible against his co-defendant
16 and that the same should have been so limited by proper in-
17 struction, all of which was not done in this case. In any
18 event, if the same had been limited by instruction to the
19 defendant, Gee Jon, the same necessarily would have been pre-
20 judicial to the defendant, Hughie Sing, and no doubt considered
21 by the jury without nicely gauging its probative value and
22 applying it strictly to the defendant Gee Jon. On the other
23 hand, the purported confession of Hughie Sing was admitted
24 in evidence wherein he pointed the finger of accusation aga-
25 inst his co-defendant Gee Jon, accusing him of actually fir-
26 ing the fatal shots that resulted in the death of the deceased.
27 All of the things anticipated by the defendants motion for a
28 severance, and which were admittedly within the expectation of

1 the State to offer upon the trial was in fact actually offered
2 upon the trial and admitted in evidence, emphasizing the
3 defendants contention that prejudice would inevitably result
4 from such a course and that a denial of separate trials
5 amounted to an abuse of discretion.

6 It also appeared from the undisputed testimony of the
7 States witness, Deputy Sheriff Hammill, that the alleged
8 confession of Hughie Sing was made under inducements and
9 by promises that it would be better for him and demonstrating
10 that any alleged statement of Hughie Sing comes clearly
11 within the class of involuntary confessions, which are al-
12 ways held inadmissible and necessarily prejudicial. Error
13 is assigned in overruling objections to the admission of
14 the alleged confession of Hughie Sing, and also in the Court
15 denying the defendants motion to strike such testimony af-
16 ter it appeared from the testimony of Witness Hammill that
17 such confession was inadmissible.

18 As we have before stated, aside from the alleged con-
19 fession of Hughie Sing, the case rested entirely upon cir-
20 cumstantial evidence, the circumstances showing the presence
21 of the defendants in Mina on the night of the homicide,
22 testimony as to footprints said to have been traced from
23 the dead man's house to an automobile, the tracks of which
24 were seen some twelve hundred feet from the house of the
25 deceased. Certain photographs showing the appearance of the
26 house and one of the outer doors bearing bullet marks were
27 also received in evidence over objection upon the ground
28 that a pencil had been placed in position to indicate the

1 course or direction taken by the bullet for the purpose of
2 establishing the identity of bullets found under the floor
3 of the house, and alleged to have been the ones fired into
4 the body of the deceased.

5 Exhibits consisting of two pistols were also admitted
6 in evidence over objection similar to the caliber of the
7 bullets found in the house of the deceased. One of the
8 guns, a six shooter, supposed to belong to Gee Jon, and cor-
9 responding in size and make to the bullets found in the
10 house near the body of the deceased was also admitted in evi-
11 dence over objection, the only identification of the same
12 consisted in evidence of a witness showing that the same
13 was found in a pocket of the automobile in which Gee Jon had
14 ridden the night before and after an appreciable interval
15 of time had elapsed and without any proof tending to show
16 that Gee Jon was the only person that could have placed the
17 gun in the pocket of the automobile, it appearing that other
18 persons had access to the automobile, and that the automo-
19 bile had stood for some time unattended on a street corner
20 and afterwards taken to the garage and was for a considerable
21 period of time in the custody of others before the gun was
22 found. The defendants were found guilty by the jury and
23 their punishment fixed at death. Thereafter and on the
24 25th day of January, 1922, the defendants and each of them
25 filed his motion for a new trial upon all the statutory
26 grounds, including errors of law occurring at the trial,
27 the denial of defendants application for separate trials,
28 erroneous instructions given by the Court, and the admission

1 of incompetent testimony upon the trial, and also moved
2 in arrest of judgment because of the invalidity of the stat-
3 utes of the State of Nevada imposing the death penalty upon
4 the ground that the statute is indefinite and uncertain and
5 that no valid judgment could be rendered thereon, and that
6 the punishment prescribed by the statute was cruel and unusual
7 in its nature and prohibited both by the State and Federal
8 Constitution. The defendants motion for a new trial and in
9 arrest of judgment was denied and exception thereto duly
10 taken, and the case is brought here on appeal from the order
11 denying defendants motion for a new trial and also from the
12 judgment pronounced against the defendants by the Court im-
13 posing the death penalty, all of which has been assigned as
14 error, prejudicial to the defendants and for which it is
15 contended that the judgment and order denying defendants mo-
16 tion for a new trial should be reversed and a new trial
17 granted,

18
19 First error assigned, denying the demand of the defen-
20 dants for separate trials:

21 It is appellants contention that error was committed by
22 the trial Court necessarily prejudicial to the defendants
23 in denying their several motions for separate trials. Prior
24 to the enactment of Section 317 of the Criminal Practice Act
25 of 1921, Session Laws, 1921, Page 165, a separate trial in
26 all felony cases was granted upon demand as a matter of right;
27 however, by the enactment of Section 317, as follows "When
28 two or more defendants shall be jointly charged with a crimi-
nal offense, they shall be tried jointly, unless, for good

1 cause shown, the court shall otherwise direct," a separate
2 trial could not be had as a matter of right merely by demand-
3 ing the same. The section above quoted, however, makes it
4 imperative upon good cause being shown, where two or more
5 parties are jointly charged, for the Court to grant a sever-
6 ance. The only question therefore that is presented by the
7 record in the case at bar is as to whether good cause was
8 shown by the defendants, or either of them, for the granting
9 of separate trials. If such good cause was shown, then the
10 statute confers the right of separate trials upon the defen-
11 dants. The only reason then that would justify the trial
12 court in refusing to grant a separate trial upon the applica-
13 tion of persons jointly charged with the commission of a crime
14 would be either that the facts shown did not in fact consti-
15 tute good cause as a matter of law, or that the cause shown
16 or alleged to exist did not in fact exist.

17 In the case at bar it was alleged in the demand of the
18 defendants and each of them that testimony of a confession
19 of one of the defendants not in the presence of the other
20 defendant and not admissible against him would be offered in
21 evidence, and that such confession charged the commission
22 of the alleged murder to his co-defendant. This state of
23 fact was not traversed by Counsel for the prosecution, but on
24 the contrary thereof it stood admittedly before the Trial
25 Court upon the hearing of the motion that such testimony
26 would be offered, and further that said testimony was admitt-
27 edly prejudicial to the other defendants for the reason that
28 Counsel for the Prosecution in opposing the granting of the

severance contended that it would be necessary for the Court in the event the defendants were tried jointly to instruct the jury that such confession admissible against one of the defendants and not admissible against the other should not be considered against the other, against whom it was not admissible, and contending that such an instruction would obviate the prejudice that might result therefrom. In respect to the above contention, the trial court said, inter alia, (See page 4, lines 5 to 21) "The motion made by Counsel for a severance is based primarily upon the ground that certain declarations, admissions or statements were made by one of the defendants which would not be admissible against his co-defendant. Counsel for the State admits this fact, and under the decision cited by counsel, it appears to the Court that the jury can be instructed as to the weight to be given to such evidence and can be limited to the particular defendant who made the statements, and believing that the jury, when so instructed, would follow the instructions of the Court and limit the statements to the defendant by whom they were made the Court feels that his co-defendant would be fully protected by such instructions. Under the circumstances the Court does not feel that it would be an abuse of its discretion to try the defendants jointly."

It will be observed from the foregoing that the position assumed by the Court below and Counsel for the State that the entire matter of granting separate trials to the defendants was a matter entirely in the discretion of the Court and that whatever cause, however good the same might seem, did not as a matter of right entitle the defendants

1 to separate trials, but that notwithstanding the same the
2 Court in its discretion might order the defendants not-
3 withstanding the good cause shown tried jointly. This we
4 contend is not the law. It was manifestly contemplated by
5 the legislature that cases would arise where in the very
6 nature of things the fair administration of justice would
7 require the granting of separate trials to persons jointly
8 charged with the commission of crime. If such had not been
9 the contemplation of the legislature then it would have
10 declared affirmatively that all persons jointly charged
11 must be tried jointly. It was therefore provided in the
12 furtherance of justice and so that the equilibrium of the
13 scales of justice should not be disturbed that it was pro-
14 vided by the above section that for good cause shown the
15 defendants jointly charged should be tried separately. It
16 would be hard to imagine a condition as the same existed in
17 this case which could be more imperative that the defendants
18 be tried separately than which existed at the case at bar.
19 The antagonistic positions occupied by the defendants, and
20 the fact that one of them, Hughie Sing, had made a confes-
21 sion wherein it is alleged that he pointed the finger of
22 accusation at his co-defendant while excusing himself by
23 stating that he had no knowledge of the intention on the
24 part of his co-defendant to kill the deceased, he directly
25 accused his co-defendant, Gee Jon, with the firing of the
26 shot that killed the deceased. This evidence was actually
27 submitted to the jury and given to them for their consid-
28 eration and while they were instructed that the same could
only be considered as effecting the guilt or innocence of

1 the defendant, Hughie Sing, the same nevertheless was fully
2 impressed upon the minds of the jury, for at the same time
3 the jury considered the question of the guilt or innocence
4 of Hughie Sing they also were considering the question of
5 the guilt or innocence of Oec Jon. And to say that they
6 could discard the testimony as to one and consider it as
7 to the other would be to ascribe to the jury, who are but
8 human beings, that divinity which according to our common
9 knowledge does not exist in man. The reasonable mind must
10 therefore conclude that good cause did in fact exist for
11 the granting of a severance and that fact once being estab-
12 lished and standing uncontroverted, then judicial discretion
13 ceased to exist and to step beyond the pale of the admitted
14 facts, and the failure to give consideration and effect to
15 that which is within the general and common knowledge of
16 all mankind amounts to nothing more than the exercise of
17 arbitrary power without being tempered by that which the law
18 discerns as fit and proper to be done in the particular case.
19 It amounts simply to the will of the judge, supplanting the
20 legal and rational conclusion that inevitably flows from
21 the undisputed facts as presented to the Court.

22 In this connection, we most emphatically contend that
23 the Statutes in respect to separate trials as hereinbefore
24 quoted does not vest a mere discretionary power in the
25 judge in the matter of granting separate trials. The exis-
26 tence of good cause is an issue of fact that is raised and
27 proven just like any other fact and in the determination of
28 the question as to whether good cause is in fact shown is

1 governed by the same rules as obtain in determining the ex-
2 istence of any other fact. If the evidence is undisputed
3 or if the facts alleged are admitted and constitute good
4 cause then the Court is bound to the same extent that he
5 would be bound in determining any other question of fact;
6 that is to say by that which is ultimately established by
7 the evidence, and if the same is undisputed then the find-
8 ings must be in accordance with the facts. It is only in
9 the case of conflicting evidence or where two conclusions
10 can reasonably be drawn from the same state of facts that
11 the Court would not interfere with the findings of the trial
12 Court. Then what is good cause for the granting of separate
13 trials? If the appeal to reason and to the common experi-
14 ence of men to determine as to whether the facts hereinbe-
15 fore set out constitute good cause, the answer must inevit-
16 ably be in the affirmative. As to the law upon the subject
17 we find that the particular circumstances of each case must
18 control in determining the question as to whether in the
19 furtherance of justice a severance should be granted. It
20 is universally held that in the case of conflicting defenses
21 where one defendant by admissions and confessions seeks to
22 throw blame upon the other, and where such testimony is ad-
23 missible against one and not against the other, then that
24 in cases where the granting of the severance was within the
25 discretion of the Court merely that a refusal to grant a
26 severance under such circumstances amounts to an abuse of
27 discretion and constitutes reversible error, it being held
28 distinctly that such a state of facts as hereinbefore men-
tioned constitutes good cause and makes it imperative that

1 separate trials be granted.

2 State vs Desroche, 17 Southern 209, (La)
3 State vs Birbiglia, 88 Southern 532 (La)

4 Upon this subject we can find no higher authority than
5 the expression of our own Court, which is binding upon
6 this Court. In the case of the State of Nevada vs McLane,
7 15 Nevada, page 345, where a similar statute was under con-
8 sideration, Mr. Justice Beatty in delivering the opinion
9 of the Court said:

10 "That the defendants in this case each relied for his
11 exculpation upon establishing the guilt of his co-defendant
12 is plainly apparent from the statement of facts above given,
13 and if either had moved for a separate trial at the proper
14 stage of proceedings, and upon a sufficient showing of
15 facts, we should have been strongly inclined to the opinion
16 that the denial of his application would have been error."

17 In an opinion dissenting upon other grounds in respect
18 to the above contention, Mr. Justice Hawley, whose opinions
19 have not only illuminated the judicial history of our own
20 State, but also that of the Nation, expressed his views as
21 follows:

22 "From the state of facts as elicited at the trial,
23 it clearly appears that the defendants were entitled to a
24 separate trial, if a sufficient showing had been made, and
25 a severance asked for at the proper time. It is, however,
26 well settled, that if a defendant fails to make a motion
27 or an objection, when required by the rules of practice, or
28 the principles of law, he can not thereafter take any advan-
tage of his own omission of duty in that respect. In my

1 opinion, the action of the court in refusing to grant the
2 defendant, McLane, a separate trial, is sustainable, upon
3 the ground that the motion was made too late. The motion
4 should have been made before the court commenced to impanel
5 the jury."

6 If further authority is necessary, we also cite the
7 opinion of our own court delivered by Mr. Justice Morcross
8 in the case of the State of Nevada vs Johnny, 29 Nevada,
9 page 203, wherein he cites approvingly the case of the State
10 vs McLane, supra. Here we wish to point out, first that
11 the Statute with reference to separate trials was identical
12 with the Section now in force in this State, except that
13 the demand for separate trials for good cause shown might
14 be made by the State as well as the Defendant, whereas under
15 our present Statute the separate trial may be granted for
16 good cause shown, eliminating merely "the State or the Defen-
17 dant". Second, in the case at bar, the cause relied upon
18 by the defendants for the granting of separate trials was
19 actually admitted; that is to say that the confession con-
20 sisting of the admissions of Hughie Sing, incriminating his
21 co-defendant, would actually be offered upon the trial; .
22 Third, in the case at bar, the demands for separate trials
23 were timely made before the selection of the jury to try
24 the case had commenced. This removes the case at bar from
25 any of the objections pointed out in the opinion of the
26 cases heretofore cited.

27 We therefore respectfully submit that the ruling of the
28 Court in denying defendants separate trials was erroneous,
and prejudicial to the defendants.

1 Second error assigned, admission of the confession
2 of Hughie Sing.

3 The doctrine that a person shall not be required to
4 accuse himself, or to be a witness against himself, is of
5 ancient origin. It was crystallized into a maxim by the
6 Common Law and was one of the provisions of the common law
7 that was carried into this country at the time of the Decla-
8 ration of Independence, and was afterwards amplified and
9 embodied in the fundamental law of this country by the fifth
10 amendment of the Constitution of the United States. The
11 same principle was clearly established in this State in Ar-
12 ticle ONE, Section Eight, Constitution which declares
13 "no person ** shall be compelled in any criminal case, to
14 be a witness against himself". In the case at bar the tes-
15 timony offered primarily as a foundation to the introduction
16 of the confession of Hughie Sing was meager. The strongest
17 statement of the facts as shown by the evidence was that
18 Chief Kirkley had said to Hughie Sing that we want to talk
19 to you and what you say may be used against you. It must
20 be observed that all of the persons present upon this occa-
21 sion, other than the defendant, Hughie Sing, were officers
22 of the law and that no intimation by word or act was given
23 to the defendant Hughie Sing to indicate that he was not
24 obliged to answer questions propounded to him, and further
25 that all statements made by the defendant Hughie Sing were
26 made in response to a direct interrogatory propounded to
27 him, and that the speaker spoke as one clothed with authority
28 and while this Chinese boy of nineteen years of age was ad-
 vised that what he said, according to the version of Chief

1 Kirkley, might be used against him, nevertheless the vital in-
2 formation that he was not required or compelled to speak was
3 not given him. Is this such a voluntary confession as to
4 render the same admissible at all? It has been repeatedly
5 held by this Court that before the introduction of a confes-
6 sion in evidence the foundation must be laid showing its
7 voluntary character. State vs Wilson, 39 Nev. 298, and
8 authorities there cited.

9 However, the infirmity of the Court's ruling does not
10 depend merely upon the lack of a proper foundation. The tes-
11 timony of the Witness Hammill, Deputy Sheriff of Mineral
12 County, Nevada, shows affirmatively that the Defendant Hughie
13 Sing was told by Hammill that it would be better for him
14 to tell the truth, in connection with leading questions as-
15 suming the participation of the defendant Hughie Sing in
16 the killing of the deceased. Aside from the positive state-
17 ment of the defendant Hughie Sing to the effect that they
18 had promised to turn him loose if he would make a statement
19 the testimony of Officer Hammill, who was in fact in charge
20 of the case, and more particularly interested, it appears
21 undisputed that he told Hughie Sing that it would be better
22 for him to tell the truth and that Chief of Police Kirkley
23 also made the same statement to Hughie Sing. This places
24 the case squarely within the rule as announced by this Court
25 in the case of the State of Nevada vs Dye, 133 Pacific 935;
26 State vs Urie, 129 Pacific 305; State vs Carrick 16 Nevada
27 129, and other authorities cited in the Dye case, supra.
28 For other authorities see the following:

1 Wilson vs U.S. 162 U.S. 613 - 40th Law Ed. 1090
2 Bram vs U. S. 168 U.S. 532, 545 - 42 Law Ed. 568
3 Harold vs Oklahoma 169 Fed. 47, 54, 94
4 State vs Johnson, 59 Ala. 37
5 16 California 409, Smith vs State
6 State vs Ah How, 34 Cal. 218
7 State vs Johnson, 41 Cal. 452
8 State vs Barrie, 49 Cal. 342
9 People vs Simon, 5 Fla. 285
10 State vs Austine, 51 Ill. 236
11 State vs Chambers 59 Iowa 179
12 State vs Garrard 50 Miss 147
13 State vs Brockman, 46 Mo. 566
14 State vs Warren, 29 Tex 369
15 State vs Walker, 24 Vt. 296
16 Daniels vs State 6 Am. State Reports 238
17 and citations thereunder
18 Citations under State vs Turner 136 Am. State
19 Reports 135

20 All that has been said applies equally to the testimony
21 of Officers Kirkley, Hammill and Dean. It is manifest that
22 the admission of the testimony of the Witness Hammill clear-
23 ly transgresses every rule of evidence applicable to the
24 admissibility of confessions, it being clear from affirma-
25 tive testimony, to which there is no contradiction that all
26 of the confession as detailed by the Witness Hammill was
27 given under circumstances rendering the same involuntary and
28 the testimony of the Witness Hammill, which was undisputed,
also places the testimony of Chief of Police Kirkley and
Officer Dean in the same category. The admission of the
confession, or several confessions detailed by the witnesses
above mentioned was manifestly erroneous and necessarily
prejudicial to the defendants and calls for a reversal of the
judgment and order denying the defendants motion for a new
trial.

1 Fourth error assigned, relating to admission of diagram.

2 This assignment of error is predicated upon the admis-
3 sion in evidence of a photograph offered for the purpose
4 of illustrating the condition of the door of the deceased's
5 house and certain bullet marks upon the door wherein a
6 pencil was placed in position to indicate the course that
7 the bullet had taken through the door for the purpose of
8 corroborating and identifying certain bullets found in the
9 body of the deceased and in the floor of the cabin.

10 This testimony was offered in corroboration of the con-
11 fession of Hughie Sing. Appellants are not contending that
12 photographs are not admissible for the purpose of illus-
13 trating the surroundings as long as the same correctly por-
14 trays the real situation, but Appellants do contend that
15 any addition to that which actually appeared and especially
16 the placing of a pencil so as to indicate the range or
17 course of a bullet in fact amounts to receiving evidence
18 out of Court, the mere conclusion of the witness, and that
19 the insertion of a pencil or any other instrument to empha-
20 size the conclusions of the witness is rank error and pre-
21 judicial to the defendants. Appellants contention is best
22 illustrated by the language of our own Court speaking
23 through Mr. Justice Talbot in the case of the State vs
24 Roberts, 27 Nevada 449, wherein that learned Justice speak-
25 ing for the Court said: "of the four photographs offered
26 on the trial, the one of the wound in the back after it
27 had been opened by the knife of the surgeon was properly
28 excluded by the court, because the bullet hole was no longer
 in the condition caused by the defendants."

1 The above testimony constituted a vital link in the
2 chain of circumstances, and its admission necessarily of
3 the most prejudicial character. Beyond the question of
4 the change in the appearance of the bullet mark alleged to
5 have been made by the defendants, it also injected into the
6 case the mere conclusion of a witness, who at the time of
7 the making of the illustration by the placing of the pencil
8 was not under oath and not subject to cross-examination, and
9 the admission of the same in our opinion violated every
10 rule of evidence and deprived the defendants of a substan-
11 tial right guaranteed by law and a part of due process of
12 law. The same amounted to receiving evidence out of Court.
13 It is clear, under the authorities, that while photographs
14 are competent for the purpose of illustration when the
15 same is shown to actually portray a real condition as made
16 by the defendant; the same is never receivable after any
17 change in the appearances for which the defendant is not
18 responsible. Whenever the appearance is to any extent
19 changed through agencies other than that of the defendants,
20 then the photograph ceases to be an illustration of a con-
21 dition made by the accused and is tinged possibly with
22 conclusions of others and it is sufficient that the same
23 does not in fact portray the condition made by the defendants
24 to illustrate which is the only purpose for which a photo-
25 graph is admissible. As above stated, in State vs Roberts,
26 supra, the opening of the wound by the surgeon's knife was
27 alone sufficient to rob the photograph of its vitality as
28 illustrative of the condition of the wound produced by the
defendant. It therefore follows not only by authority but

1 upon sound reason that any addition or subtraction, or any
2 change whatsoever in the condition as the appearances rep-
3 resented by the photograph takes it out of the rule of ad-
4 missibility and renders the same clearly incompetent, and
5 the admissibility of such evidence error. It would be just
6 as competent after a body had been moved and appearances
7 altered to receive in evidence a photograph as illustrative
8 of the surroundings and situation of the defendant and the
9 deceased at the time of the homicide. Any change in the
10 condition the appearances of which are sought to be illus-
11 trated by photographs clearly renders the same inadmissible.
12

13 Sixth assignment of error, relating to the admission
14 of State's Exhibit No. 10 in evidence.

15 It was prejudicial error to admit State's Exhibit No.
16 10, an Automatic Colt's Pistol, in evidence. The sole foun-
17 dation for the admission of the same, and its identification
18 rested upon the alleged confession of Hughie Sing, which has
19 heretofore been fully presented to the Court. This evidence
20 being incompetent, the entire identification and foundation
21 for admitting this exhibit in evidence resting upon incom-
22 petent evidence leaves the same devoid of authenticity, and
23 inadmissible for any purpose. Without this confession there
24 is nothing in the record to connect the defendants or either
25 of them with this exhibit. The admission of the same was
26 therefore error and manifestly prejudicial.
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1 It is also, urged that the trial court committed error
2 prejudicial to the defendants in permitting the Witness
3 Hammill to testify concerning Exhibit No. 11, which was
4 a Colt's Revolver, alleged to have been found the day follow-
5 ing the homicide in the automobile of the witness Pappas,
6 in which defendants had made the trip to Mina, and also in
7 admitting this exhibit in evidence. There is a complete
8 hiatus in the chain of testimony attempting to connect this
9 weapon with the defendants. The same was found in the auto-
10 mobile sometime after the defendants had left the automo-
11 bile and after the same had been in the exclusive posses-
12 sion and control of others, and was for a period unattended
13 by any one, so that ample opportunity existed for some
14 agency other than the defendants to have placed this gun
15 in the automobile. The necessary foundation and connection
16 between the defendants and this gun was not present in the
17 evidence. This error is fundamental and necessarily highly
18 prejudicial to the defendants. The error is so palpable
19 that the citation of authorities is unnecessary.

20 The observations hereinbefore made fully applies to
21 assignment No. 8, referring to the testimony of Witness
22 Balzar, relating to the same exhibit.

23 Assignment No. 10 is also fully covered by the
24 foregoing discussion as to Exhibit No. 11 and the testimony
25 of the Witness Hammill.

26 Assignment No. 11 relating to a motion to strike the
27 testimony of Kirkley, Hammill and Dean is based upon the
28 ground hereinbefore presented and does not require further
 discussion.

1 Twelfth assignment of error relating to the admission
2 of certain receipts found in the possession of Gee Jon.

3 The admission of this evidence over defendants objec-
4 tion was highly prejudicial to the defendants. First,
5 there was no proper foundation laid for their introduction
6 in evidence, or any connection whatsoever shown between
7 these exhibits and the killing of the deceased. The same
8 was manifestly offered for the purpose of proving motive
9 and there was not a scintilla of testimony in the record
10 to show the object or purpose of the alleged Hop Sing Tong
11 or that the same had any more connection with the killing
12 of the deceased than the Seventh Book of Moses. The object
13 or purpose of such an organization, or that the defendants
14 were in fact members thereof was not at all proven and any
15 assumed connection between the testimony contained in the
16 exhibits and the killing of the deceased was nothing more
17 than speculative, and to draw a conclusion or in order that
18 the same might raise a presumption against the defendants
19 would amount merely to basing one presumption upon another.
20 In the first place, it would be necessary without proof
21 to presume that some connection did exist and secondly
22 after so presuming it would be necessary to also infer
23 some evidence by reason of the same proving motive and es-
24 tablishing a connection with the crime. This cannot be
25 done. The testimony was not only not admissible against
26 Gee Jon, the defendant in whose possession the exhibits
27 were found, but as to the defendant Hughie Sing who was not
28 shown to have had any possession of the exhibits or even
 to have known of them, there is no theory whatever that

1 would justify the admission of such evidence against the
2 defendant Hughie Sing. Under the rule as announced at
3 the beginning of the trial and at the time separate trials
4 were denied the defendants because evidence that might be
5 admissible against one but not the other would be offered
6 it was then stated that such evidence would be admitted
7 only as to the defendant against whom it was admissible
8 and the jury instructed to disregard such evidence as to
9 the other. As to the exhibits heresinbefore referred to
10 no restriction was placed by the Court in admitting them
11 for the purposes for which they might be considered, or
12 as to which defendant they might be considered. We find
13 as to the above exhibits that Hughie Sing is bound by
14 evidence and the same admitted against him without the
15 slightest connection either actually or by any fair infer-
16 ence. It is clear that this testimony could not under
17 any circumstances be legally received against Hughie Sing -
18 that he was not shown to have had either possession or
19 any knowledge of them.

20 As to Gee Jon there was no testimony establishing any
21 legitimate connection and at most the introduction of such
22 evidence did nothing more than raise a suspicion which did
23 not amount to proof and supplied the failure of the State
24 in a case of circumstantial evidence to in any other way
25 establish motive. This was an important element in the
26 chain of circumstances and the admission of the exhibits
27 necessarily most prejudicial to the defendants and placed
28 them before the jury in the role of paid assassins, as this
was the inference sought to be drawn from the exhibits of-

1 ferred by the prosecution. In this connection we call at-
2 tention to the statement made by Mr. Green, Counsel for the
3 State in his closing argument to the jury. This emphasizes
4 the use to which this testimony was put after the same had
5 been admitted for the consideration of the jury.

6 In this connection, we also call attention to Assign-
7 ment No. 17 wherein error is assigned to the remarks of
8 the District Attorney with reference to tong wars. These
9 remarks made in the closing argument were not based upon
10 any legitimate inference deducible from the evidence in
11 the case. The very nature of the remarks tended to inflame
12 the minds of the jury against the accused men and to invite
13 particularly the attention of the jury contained in exhib-
14 its admitted in evidence, and which as we have before
15 pointed out were clearly inadmissible. In this case where
16 the issue was life or death and where the fixing of the
17 punishment rested entirely in the discretion of the jury
18 the slightest prejudice arising from any error of a sub-
19 stantial nature was likely to turn the scale against the
20 defendants. This must have been one of the causes that
21 contributed to the jury fixing the death penalty and exer-
22 cising its discretion against the defendants and especially
23 when one of them was a mere boy in years and experience.
24 We insist that in imposing the extreme penalty and cutting
25 away the pound of flesh the most exact nicety must be ob-
26 served and that the slightest error may have been the pro-
27 curing cause of the rendition of the verdict with the
28 death penalty. We insist that the most stupendous error
was thus committed and that the same should without question
be sufficient to call for a reversal.

1 Thirteenth assignment of error relating to the giving
2 of instruction No. eleven, in part as follows:

3 "There are certain kinds of murder which carry with
4 them evidence of premeditation and deliberation. These the
5 Legislature has enumerated in the Statute, and has taken
6 upon itself the responsibility of saying that they shall be
7 deemed and held to be murder of the first degree. These
8 cases are of two classes: First, where the killing is per-
9 petrated by means of poison, or lying-in-wait, or torture,
10 or any other kind of wilful, deliberate and premeditated
11 killing and here the means used is held to be evidence of
12 premeditation and deliberation."

13 This instruction we think clearly invades the province
14 of the jury and decides the question of the degree of the
15 alleged murder as a matter of law, removing from the jury
16 if the instruction is followed the right to determine the
17 same for itself. By the expression "here the means used
18 is held to be evidence of premeditation and deliberation"
19 this was an expression on the part of the Court as to the
20 ultimate conclusion to be drawn from facts proven and to
21 declare that the same existed as a matter of law instead of
22 instructing the jury that it was a question of fact for the
23 jury to determine. The expression used in the instruction
24 before quoted was equivalent to saying to the jury "in this
25 case the use of a pistol was evidence of deliberation and
26 premeditation" and this rule was declared as a matter of law
27 when in truth and in fact the same was a question of fact
28 to be arrived at by the jury from a consideration from all
 the facts and circumstances of the case and determined as a

1 question of fact. State vs Pappas 39 Nevada 40

2 Here the Court held that the inference from the use of a
3 deadly weapon was an inference of fact and not of law and that
4 instruction telling the jury that the law presumed the in-
5 tent from the use of a deadly weapon was erroneous.

6 The vice in the instruction above complained of is that
7 if as a matter of law fixes the degree of the crime and
8 for that reason was necessary prejudicial and as a matter
9 of law elevated the crime charged against the defendants to
10 that of a cruel and aggravated character worthy of extreme
11 punishment. It is clear that the language employed in the
12 instruction in the case at bar conveyed the meaning to the
13 jury as above interpreted and that the same was the construc-
14 tion likely to be placed upon this portion of the charge by
15 the jury, but in the event that other constructions may be
16 attempted to be placed upon the language, we nevertheless
17 insist that under the rule as laid down in State vs McGinnis
18 5 Nevada 337 in the language of Mr. Chief Justice Lewis:
19 "We are not fully satisfied that it misled the jury. Very
20 serious doubts may be entertained as to that. Still in a
21 criminal case, any ambiguity which may have a tendency to
22 mislead the jury should entitle the prisoner to a new trial."

23 The same expression was adopted in the case of the
24 State of Nevada vs Ferguson, 9 Nevada 114, wherein Mr. Justice
25 Hawley, speaking for the Court said:

26 "The law does not conclude the rights of individuals or
27 parties upon any such uncertain grounds. Its utmost effort
28 is accuracy, as far as it may be attained through fallible

1 agencies, and then its mission is complete and its accomplish-
2 ments irreversible."

3 The same doctrine was recognized and followed by
4 this Court in the case of the State of Nevada vs Scott,
5 142 Pacific 1056, wherein the Court said:

6 "In view of the fact that the court instructed the
7 jury 'the jury must receive as law what is laid down as
8 such by the court' the natural presumption becomes con-
9 clusive that the jury did consider the erroneous in-
10 struction."

11 Whether this instruction in its form as given either
12 misled the jury in arriving at the verdict, or confused
13 them as to what the law really was, is immaterial; but
14 either condition was prejudicial to the defendant in
15 this case."

16 We respectfully submit that the above instruction
17 as given by the Court did not correctly state the law,
18 was well calculated to mislead the jury and prejudicial
19 to the defendant.
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2 Fourteenth assignment of error relating to the giving
3 of Instruction No. Thirteen as follows:

4 "The Court instructs the jury that the rule of law
5 which throws around the defendants the presumption of inno-
6 cence and requires the State to establish, beyond a reason-
7 able doubt, every material fact averred in the indictment,
8 is not intended to shield those who are actually guilty, from
9 just and merited punishment, but is a humane provision of the
10 law which is intended for the protection of the innocent
11 and to guard, so far as human agencies can, against the con-
12 viction of those unjustly accused of crime."

13 The giving of the above instruction violated the funda-
14 mental rights of the defendants which so long existed at
15 the common law, and has been carried into our jurisprudence
16 either by the common law as transplanted in America, and
17 more frequently contained in Constitutional or Legislative
18 provisions firmly engrafting the same upon our system of
19 jurisprudence and making the same a part that due process of
20 law which is guaranteed to every person under the protection
21 of our laws. This is the presumption of innocence which
22 attends every accused person upon his trial and serves as
23 his sufficient protection until such time as his guilt is
24 satisfactorily proven beyond all reasonable doubt. It has
25 frequently been referred to as standing in the nature of
26 evidence in the defendant's favor and must in connection
27 with all the other evidence in the case be considered by
28 the jury in determining whether the guilt of the accused
has been proven beyond a reasonable doubt. This presumption

1 of innocence arrays itself, together with all of the other
2 evidence in the case, for the consideration of the jury and
3 enters in to the sum total from which the jury must reach a
4 conclusion and stands as one of the elements tending to
5 raise a reasonable doubt beyond which the State must make
6 out its case.

7 Our own statute, Section 7163, Revised Laws, 1912,
8 is as follows: "A defendant in a criminal action is pre-
9 sumed to be innocent until the contrary be proved; and in
10 case of a reasonable doubt whether his guilt be satisfac-
11 torily shown, he is entitled to be acquitted."

12 The law as written in this State fortunately does not
13 confine the right to the presumption of innocence to a
14 favored class who are innocent per se but the right is ac-
15 corded to all persons accused of crime and continues to ex-
16 ist throughout the entire trial and until such time as the
17 guilt of the accused is proved beyond a reasonable doubt.
18 As we have before observed, it is one of the elements in
19 the nature of evidence in the defendant's favor, which in
20 the very nature of things becomes an integral part of that
21 presented to the jury for their consideration in determining
22 whether or not the defendants are in fact guilty. If inno-
23 cent and the innocent the only ones entitled to the benefit
24 of the presumption why mention it at all, for if innocent
25 and the innocence of the defendant once established then
26 such defendant would not need the protection of such a pre-
27 sumption. We again assert that the true doctrine is that
28 this presumption of innocence attaches to all persons ac-
cused of crime and continues to exist until swept away by

1 evidence establishing the guilt of the defendant beyond a
2 reasonable doubt, and in determining whether the evidence
3 does in fact remove all reasonable doubt and establish the
4 guilt of the defendant to the satisfaction of the jury,
5 the presumption of innocence is a tangible element to be
6 considered just like any other fact in the case and to
7 limit the application of the doctrine to the protection
8 merely of the innocent would be to destroy the probative val-
9 ue of the rule as it exists and rob it of all its vitality
10 intended for the protection of human kind, and while we
11 still may boast of this humane doctrine as one of the maxims
12 of our law, if the above given instruction is held to be
13 the law, then only the form remains of what was once an
14 impregnable protection while we have destroyed the substance.
15 We also complain that the above instruction assumes the
16 guilt of the accused, invades the province of the jury, and
17 amounts to an assumption upon the part of the court that the
18 defendants are guilty of the crime without qualification or
19 making the rule depend upon whether the jury believes the
20 defendants to be guilty, or giving them the right to deter-
21 mine for themselves the question of the guilt or innocence
22 of the accused. In the case of the State vs Duffy, 6 Nevada
23 138, and State vs Burralli, 27 Nevada 55, the same question
24 was passed upon by this Court and distinctly held that an
25 instruction assuming a fact to exist which was controverted
26 amounted to an invasion of the province of the jury and a
27 violation of Article VI of the Constitution of Nevada which
28 prohibits the Court from charging the jury upon questions
of fact. In the case of the State vs Duffy, Supra, the ob-

1 objectionable expression contained in the instruction and for
2 which the case was reversed was "the guilt of the defendant
3 rests upon circumstantial evidence". It was there held that
4 this amounted to an assumption on the part of the Court that
5 the defendant was guilty and must have been so understood
6 by the jury. In the case at bar the statement 'that the
7 rule of law which throws around the defendants the presumption
8 of innocence, etc' is not a general abstract statement, stat-
9 ing a mere abstract proposition, but by the instruction it
10 is applied to the defendants, meaning Gee Jon and Hughie
11 Sing, and in connection with the reference distinctly pointing
12 out the defendants the court uses the expression 'is not
13 intended to shield those who are actually guilty from just
14 and merited punishment'. This amounts to an unqualified as-
15 sumption on the part of the court that the defendants Hughie
16 Sing and Gee Jon are guilty and that the presumption of inno-
17 cence is not for their benefit. The instruction practically
18 nullifies the statutory declaration of the time honored
19 maxim that persons accused of crime are presumed to be inno-
20 cent until their guilt is proven beyond a reasonable doubt.
21 The prejudice necessarily flowing from the giving of this
22 instruction is manifest and constitutes reversible error.

1 Sixteenth assignment of error relating to the giv-
2 ing of instruction Number twenty-six, in part as
3 follows:

4 "If you believe, from the evidence, beyond a reas-
5 onable doubt, the defendants ***** went to the
6 place where Tom Quang Kac, deceased, resided, with the
7 wilful and deliberate and premeditated purpose of tak-
8 ing his life, and that said defendants, with such in-
9 tent, shot and killed the deceased, then and in that
10 event, the defendants are guilty of murder in the first
11 degree."

12 The above instruction assumes to give the jury
13 the sum total of all the elements of the crime of
14 murder and all that was necessary to justify convict-
15 ing the defendants for that offense.

16 The instruction is fundamentally incorrect. It
17 does not require proof that the killing was unlawful,
18 neither does it require a felonious homicide, nor
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1 that the killing was done with malice aforethought. This
2 element and each of them are essential elements of the
3 crime of murder. Murder cannot exist without first an
4 unlawful and felonious killing; second, there must be mal-
5 ice aforethought coupled with wilfulness, deliberation and
6 premeditation.

7 By the above instruction the jury is authorized to
8 convict the defendants of murder of the first degree with-
9 out proof of an unlawful killing with malice aforethought.
10 These essential elements of the crime are entirely omitted
11 from the instruction. A defendant may act wilfully, with
12 premeditation and deliberation and yet not be guilty of
13 murder. The killing in self-defense may contain all of
14 these elements. State vs Vaughan, 22 Nevada, 299. The
15 Court there said, speaking through Chief Justice Bigelow:

16 "The fact that a killing was intentional does not
17 necessarily prove that it was done with malice; for an in-
18 tentional killing may be entirely justifiable, as where it
19 is done in necessary self-defense."

20 It will be observed that the instruction hereinbefore
21 complained of eliminates therefrom the word "unlawfully",
22 "feloniously" and also "malice aforethought" which are the
23 very essence of any form of murder. As was said by this
24 Court in its opinion above quoted "an intentional killing
25 may be in self-defense". The same can also be said of
26 deliberation and premeditation, for deliberation in its
27 legal acceptation means merely a cool state of the blood,
28 and premeditation means thought of beforehand, so that a
killing in self-defense or other justifiable homicide may

1 be intentional and with deliberation and premeditation.
2 Unless the same is unlawful, felonious and with malice
3 aforethought, it doesnot constitute the crime of murder.
4 In the first instance, an unlawful and felonious killing
5 must exist and the offense is elevated in degree as the
6 elements are superadded until it reaches the high grade
7 of the offense. If an unlawful and felonious killing
8 only is shown, then the offense is only manslaughter. If
9 there is superadded the elements of wilfulness, premeditation
10 tion and malice aforethought, then the offense might be
11 elevated to that of murder, but in no case can murder exist
12 without an unlawful killing with malice aforethought.

13 Notwithstanding what other instructions may have been
14 given upon this subject, this instruction attempting to
15 apply the law to the facts of the case is clearly an incorrect
16 statement of law, prejudicial to the defendants and
17 falling within the rule laid down by this Court in the case
18 of the State vs McCinnis, supra, State vs Ferguson, supra,
19 State vs Vaughan, supra and State vs Scott, supra, holding
20 that error is presumed and is not cured by the giving of a
21 correct instruction upon the same subject, it being presumed
22 that the jury followed the erroneous charge.

23 Assignment of error No. 17, relating to misconduct
24 of the District Attorney, is fully covered in this brief
25 in its discussion of the incompetent evidence admitted over
26 defendants objection. If this evidence was incompetent, then
27 references made to the same by the District Attorney and his
28 reference to long wars was not only highly improper, but of
vital prejudice to the accused and destroyed the possibility

1 of the defendants having that fair and impartial trial which
2 is guaranteed to them by law.

3 Eighteenth assignment of error relating to motion for
4 a new trial:

5 For all the reasons hereinbefore urged, it was error
6 for the trial court to deny the defendants motion for a
7 new trial.

8 Twentieth assignment of error relating to the over-
9 ruling of defendants motion in arrest of judgment:

10 This motion raises the contention that the infliction
11 of the death penalty by the administration of lethal gas
12 as provided by our statute amounts to the infliction of
13 cruel and unusual punishment, prohibited by the Constitution
14 of the United States and the Constitution of the State of
15 Nevada, and that the section of the statute prescribing the
16 punishment is indefinite and uncertain as to the formula
17 to be employed so that if the judgment of the Court be
18 definite and certain as to the manner of inflicting the
19 punishment, then a judicial officer would necessarily be
20 clothed with legislative power, it being necessary for the
21 court to interpolate into the judgment that which is not
22 provided by law and the judge would become a law-maker as
23 well as a judicial officer; and again, if the judge pro-
24 nounced his judgment in accordance with the law without ad-
25 ding to the same his version of what he might think the law
26 ought to be, then the Warden of the State Prison, a non-
27 judicial officer, would not only be clothed with executive
28 authority, but also would become a law-maker, as well as
an interpreter of the law for it would be necessary for the

1 Warden not only to determine the manner and mode of the
2 execution, but also determine the exact kind of lethal
3 gas to be used in the execution, which covers a wide range
4 of possibility. While he might act judiciously and select
5 the most efficacious method and kind of lethal gas that
6 would be the most painless and in accord with humanitarian
7 views, it is nevertheless possible that within the broad
8 scope covered by lethal gas he might select that which
9 would inflict the most excruciating torture and even might
10 prolong the agony of the condemned for days.

11 In order to render the act invalid as violative of
12 constitutional prohibitions, it is not necessary that the
13 act in terms actually provide affirmatively for the infliction
14 of cruel and unusual punishment. It is only necessary
15 that such consequences may result therefrom by the general
16 and broad scope of the act which leaves it at least possible
17 if executed by an arbitrary inhuman person that cruel and
18 unusual punishment might be inflicted under the act. If
19 such is possible then the act is just as vulnerable to
20 the objection here made as it would be had it expressly
21 provided that the things be done which fall within the
22 range of possibility. If cruel and unusual punishment could
23 be inflicted by reason of the act, then it is just as objectionable
24 as if it had actually in terms provided for the
25 infliction of punishment that would be cruel and unusual.

26 Every act of the legislature in order to be valid must
27 be definite and certain in its operation, otherwise it
28 would be void for uncertainty. Likewise, the judgment of a
Court must be definite and certain, otherwise it would be
open to the objection of uncertainty which would render it

1 void. The section of the Statute in question does not defi-
2 nitely provide anything as to mode, means or the exact kind
3 of lethal gas which is to be used. As we have before said
4 the term lethal gas covers a broad range, the term meaning
5 simply "deadly gas" which embraces within the term and
6 meaning not only the kind that would produce sleep and un-
7 consciousness, but also the kind that disfigures the body
8 and inflicts the most horrible and painful injuries upon
9 the person to whom it might be administered. So far as we
10 are aware the various modes of execution whether the same
11 be the axe, gallows, electric chair, or the method of shoot-
12 ing - in each case the mode and manner of the execution
13 is not only definitely ascertained and known, but is also
14 specifically directed not only in the law but also in the
15 judgment, and the warrant of execution. There is a defi-
16 nite method provided in executions by electricity which pre-
17 scribes the manner of execution and precludes the possibility
18 of a protracted torture in cases of executions by electricity.
19 And the same is also true of every other method of execution
20 employed by civilized people.

21 The most that can be said of lethal gas is whatever
22 formula it may be applied is that it is merely experimental,
23 some of the properties of which is as yet unknown and still
24 others known to be the most horrible of all substances that
25 might be administered. It has been decided by this Court
26 in the case of the McLeod vs Miller and Lux that this Court
27 will without proof take notice of scientific facts and mat-
28 ters of scientific research, as all such matters are presum-
ably within the knowledge of the Court.

1 We therefore respectfully submit that the act under
2 which the death penalty was pronounced in this case is un-
3 constitutional and void, not only as violative of the Con-
4 stitutional provisions prohibiting cruel and unusual pan-
5 ishment, but that the same is also void for uncertainty and
6 that the judgment pronounced in pursuance thereto is also
7 void, and that it was therefore error for the trial Court
8 to deny the defendants motion in arrest of judgment, and
9 that the same calls for a reversal.

10 Appellants specifically rely upon every assignment
11 of error herein made whether the same has been specifically
12 presented or not, and respectfully urge that for all of
13 the errors hereinbefore presented and assigned that the
14 judgment and order denying plaintiffs motion for a new trial
15 should be reversed.

16 Respectfully submitted:

17 *J. M. Frank*
18 *J. Rafferty*
19 *Thos. J. Latta*
20 Attorneys for Appellants.
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24
25
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27
28

EXHIBIT 2

EXHIBIT 2

Nondelegating Death

ALEXANDRA L. KLEIN*

Most states' method of execution statutes afford broad discretion to executive agencies to create execution protocols. Inmates have challenged this discretion, arguing that these statutes unconstitutionally delegate legislative power to executive agencies, violating the state's nondelegation and separation of powers doctrines. State courts routinely use the nondelegation doctrine, in contrast to the doctrine's historic disfavor in federal courts. Despite its uncertain status, the nondelegation doctrine is a useful analytical tool to examine decision-making in capital punishment.

This Article critically evaluates responsibility for administering capital punishment through the lens of nondelegation. It analyzes state court decisions upholding broad legislative delegations to agencies and identifies common themes in this jurisprudence. This Article positions legislative delegation in parallel with historic and modern execution practices that utilize responsibility-shifting mechanisms to minimize participant responsibility in carrying out capital sentences and argues that legislative delegation serves a similar function of minimizing accountability in state-authorized killing.

The nondelegation doctrine provides useful perspectives on capital punishment because the doctrine emphasizes accountability, transparency, and perceptions of legitimacy, core themes that permeate historic and modern death penalty practices. Creating execution protocols carries a high potential for arbitrary action due to limited procedural constraints, secrecy, and broad statutorily enacted discretion. The decision to authorize capital punishment is a separate policy decision than the decision of how that punishment is carried out. This Article frames a more robust nondelegation analysis for method of execution statutes and argues that legislators determined to utilize the

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penalty should carry greater accountability for investigating and selecting methods of execution and should not be allowed to delegate these decisions.

TABLE OF CONTENTS

I.	INTRODUCTION	924
II.	METHODS OF EXECUTION	929
	A. <i>Historic Delegation and Responsibility for Killing</i>	929
	B. <i>Minimizing Accountability for Killing</i>	933
III.	THE NONDELEGATION DOCTRINE	939
	A. <i>State Nondelegation Doctrines</i>	939
	B. <i>Recent Developments in the Federal Nondelegation Doctrine</i>	945
IV.	NONDELEGATION CHALLENGES TO METHOD OF EXECUTION	
	STATUTES	948
	A. <i>The Arkansas Method of Execution Act and Nondelegation</i>	951
	B. <i>Nondelegation Challenges to Method of Execution Statutes</i>	955
V.	NONDELEGATING DEATH	962
	A. <i>Why Nondelegation?</i>	963
	B. <i>Agency Expertise and Limits on Discretion</i>	968
	C. <i>Why Death is Nondelegable</i>	974
VI.	CONCLUSION	980

“If we feel the need to actually protect the moral misgivings of the people participating, then there is no greater evidence of what we are doing is wrong.”¹

I. INTRODUCTION

The Supreme Court has reshaped the American death penalty by imposing guiding principles that attempted to narrow legislators’ and jurors’ discretion in decisions about who should be sentenced to death and how those decisions are

¹ Brigid Delaney, *Bryan Stevenson: If It’s Not Right to Rape a Rapist, How Can It Be OK to Kill a Killer?*, GUARDIAN (Feb. 16, 2015), <https://www.theguardian.com/world/2015/feb/17/bryan-stevenson-if-its-not-right-to-a-rapist-how-can-it-be-ok-to-kill-a-killer> [https://perma.cc/J3MZ-5BAQ] (quote from an interview with Bryan Stevenson).

made.² Despite these efforts, the death penalty remains vulnerable to criticisms about arbitrariness, inadequate standards, and excessive discretion.³ Execution procedures are equally susceptible to these critiques.⁴

Most states' method of execution statutes grants broad discretion to executive agencies to create execution protocols, including selecting the drugs to be used in lethal injection.⁵ Death row inmates have unsuccessfully challenged these statutes as unconstitutional legislative delegations that violate state constitutions' separation of power doctrines,⁶ with one notable exception.

In *Hobbs v. Jones*,⁷ the Supreme Court of Arkansas held that the Arkansas General Assembly had "abdicated its responsibility" by giving the Arkansas Department of Corrections the "unfettered discretion to determine all protocols

² See, e.g., *Roberts v. Louisiana*, 428 U.S. 325, 334–36 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976); *Jurek v. Texas*, 428 U.S. 262, 271–72 (1976); *Proffitt v. Florida*, 428 U.S. 242, 251–53 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

³ See *Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) ("40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.") (footnotes omitted); BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 227 (2017).

⁴ See CORINNA BARRETT LAIN, *LETHAL INJECTION: WHY WE CAN'T GET IT RIGHT AND WHAT IT SAYS ABOUT US* 1–3 (forthcoming) (manuscript at 1–3) (on file with the *Ohio State Law Journal*) [hereinafter LAIN, *LETHAL INJECTION*].

⁵ See, e.g., N.C. DEP'T OF PUB. SAFETY, *EXECUTION PROCEDURE MANUAL FOR SINGLE DRUG PROTOCOL (PENTOBARBITOL)* 17 (Oct. 24, 2013), <https://files.nc.gov/ncdps/documents/files/Protocol.pdf> [<https://perma.cc/RW3H-7VCH>] [hereinafter NORTH CAROLINA PROTOCOL]; see also Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1407 (2014) [hereinafter Berger, *Lethal Injection*].

⁶ See, e.g., *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, *8 (W.D. Mo. Nov. 16, 2012); *Cook v. State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 309 (Cal. Ct. App. 2018); *State v. Deputy*, 644 A.2d 411, 420–21 (Del. Super. Ct. 1994), *aff'd*, 648 A.2d 423 (Del. 1994); *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011); *Ex parte Granviel*, 561 S.W. 2d 503, 515 (Tex. Crim. App. 1978) (en banc); *Brown v. Vail*, 237 P.3d 263, 270 (Wash. 2010) (en banc).

⁷ *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012).

and procedures, most notably the chemicals to be used, for a state execution.”⁸ This violated the state’s nondelegation doctrine and rendered Arkansas’s method of execution statute⁹ facially unconstitutional.¹⁰

Despite *Jones*’s outlier status,¹¹ the nondelegation doctrine is more relevant to death penalty administration than it seems at first glance. Justice Brennan’s dissent in *McGautha v. California*,¹² which contended that the failure to set standards in capital cases violated the due process clause, relied on, *inter alia*, nondelegation cases to support his argument for the need to eliminate “legislative abdication” that resulted in arbitrary determinations in capital sentencing.¹³ Numerous scholars have examined accountability, discretion, deference, and responsibility in the death penalty for a variety of actors.¹⁴ None, however, have meaningfully considered the application of the nondelegation doctrine to death penalty administration.

The nondelegation doctrine requires branches of government to comply with their constitutionally-prescribed spheres of authority by prohibiting the legislature from delegating pure legislative power to another branch.¹⁵ Although the nondelegation doctrine has not enjoyed robust treatment in federal courts,¹⁶ state courts retain and apply it. Recent events at the Supreme Court have also signaled the possibility of a revival of the federal nondelegation doctrine.¹⁷

⁸ *Id.* at 854.

⁹ ARK. CODE ANN. § 5-4-617 (West 2011), amended by 2013 Ark. Laws Acts 139, 89th Gen. Assemb., Gen. Sess. (Ark. 2013).

¹⁰ *Jones*, 412 S.W.3d at 847; see Lauren E. Murphy, Note, *Third Time’s a Charm: Whether Hobbs v. Jones Inspired a Durable Change to Arkansas’s Method of Execution Act*, 66 ARK. L. REV. 813, 814 (2013).

¹¹ See *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7 (W.D. Mo. Nov. 16, 2012) (discussing *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012)).

¹² *McGautha v. California*, 402 U.S. 183, 252 (1971), *reh’g granted, judgment vacated* by *Crampton v. Ohio*, 408 U.S. 941 (1972).

¹³ *Id.* at 251–53, 253 n.2 (Brennan, J., dissenting).

¹⁴ See, e.g., MATTHEW H. KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* 16–18 (2011); Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 17–18, 44–50, 61 (2010); Eric Berger, *The Executioners’ Dilemmas*, 49 U. RICH. L. REV. 731, 746, 750–52 (2015); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 68–69, 100 (2002); Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545, 546, 587 (1996); Joseph L. Hoffman, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1140 (1995); Michael J. Osofsky, Albert Bandura, & Philip G. Zimbardo, *The Role of Moral Disengagement in the Execution Process*, 29 L. & HUM. BEHAV. 371, 373, 385 (2005).

¹⁵ See *infra* Part II (discussing the nondelegation doctrine).

¹⁶ See *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (“Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capricious standards.”).

¹⁷ See *infra* notes 172–73 and accompanying text.

In *Gundy v. United States*,¹⁸ although a plurality of the Supreme Court upheld Congress's broad delegation of authority to the Attorney General to determine the applicability of registration requirements for certain sex offenders, three Justices dissented, contending that the nondelegation doctrine should apply.¹⁹ Justice Alito's concurrence in the judgment indicated his willingness to reconsider nondelegation.²⁰

The nondelegation doctrine implicates government accountability, transparency, and perceptions of legitimacy of legislative conduct.²¹ These issues carry great significance in capital punishment. Administrative structures in capital punishment obscure responsibility for, and decision-making in, state-authorized killing in many ways. Legislatures confer substantial discretion on executive agencies or prison officials to establish and implement execution protocols.²² Statutes and execution protocols conceal executioners' identities.²³ Information about execution drugs and processes is often exempted from states' freedom of information acts,²⁴ and corrections agencies usually do not have to comply with state administrative procedure acts when creating execution protocols.²⁵

The decline of capital punishment only increases the urgency of these concerns. As Brandon Garrett points out, only a handful of prosecutors in a few counties are responsible for the continued use of the penalty.²⁶ States have expanded their choices of methods of execution in response to botched executions and lethal injection drug shortages.²⁷ The decline of the death penalty, along with the challenges states face in conducting executions, increases the risk of arbitrariness.²⁸ How decisions about the death penalty are made, and who makes them, matter just as much as what those decisions are.

¹⁸ 139 S. Ct. 2116 (2019).

¹⁹ *Id.* at 2131 (Gorsuch, J., dissenting).

²⁰ *Id.* (Alito, J., concurring).

²¹ See *infra* Part V.A.

²² See *infra* Part II.B.

²³ See VA. CODE ANN. § 53.1-233 (West 2020); Sandra Davidson & Michael Barajas, *Masking the Executioner and the Source of Execution Drugs*, 59 ST. LOUIS U. L.J. 45 (2014); see also *infra* Part II.B.

²⁴ See ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 14–16 (Robert Dunham & Ngozi Ndulue eds.), <https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf> [<https://perma.cc/9TR3-JZAD>] [hereinafter KONRAD, BEHIND THE CURTAIN] (surveying state secrecy laws).

²⁵ See *infra* note 273 and accompanying text.

²⁶ GARRETT, END OF ITS ROPE, *supra* note 3, at 190–92 (“Even within the largest death penalty states, just a handful of counties produce the death sentences that result in executions.”).

²⁷ See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1361 (2014); see also Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 63 (2007).

²⁸ See *Glossip v. Gross*, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting).

This Article draws upon nondelegation and capital punishment scholarship to examine the nondelegation doctrine in state method of execution statutes and execution protocols. It critically evaluates state court decisions upholding broad legislative delegation to executive agencies to create execution protocols. It illustrates the relationship between these practices and historic and modern execution procedures that delegate responsibility within the executive branch for carrying out state-authorized killing. Legislative delegation is one of many methods to minimize responsibility for carrying out capital punishment.

Part II analyzes modern and historic methods of execution. Executions utilize intra-executive delegation or other methods of spreading responsibility among participants carrying out executions. How the state chooses to kill, and the way that burden is spread, illustrates why the nondelegation doctrine offers a unique perspective on the role of the death penalty in American society.

Part III outlines the nondelegation doctrine, with a primary focus on the way in which states have formulated their nondelegation doctrines. It also discusses the potential for a shift in the application of the doctrine in federal courts after the Supreme Court's decision in *Gundy*. The potential for increased scrutiny could serve to reframe the debate about delegation in method of execution statutes. Part IV examines litigation in which capital defendants challenged a state's method of execution statute on nondelegation grounds and explores the reasoning courts relied on to authorize broad delegations to agencies to create execution protocols with limited guidance. This Part illustrates common themes in nondelegation cases and judicial support of broad legislative delegation.

Part V contends that capital punishment schemes that rely on shifting responsibility and minimizing accountability undermine government accountability, transparency, and perceptions of legitimacy of the death penalty. The justifications for delegation are not met by the reality of capital punishment, particularly because judicial decision-making relies on unjustified assumptions of agency expertise. Inadequate procedural controls, secrecy, and minimal legislative guidance and oversight present a substantial risk of arbitrary action. It concludes by offering a stronger nondelegation analysis for method of execution statutes.

Like executioners, legislatures seek to shift the responsibility for state-authorized killing to other individuals or agencies. Spreading responsibility for killing absolves entities of the need to grapple with the true consequences of capital punishment. This Article contends that the decision to authorize capital punishment is a separate policy decision than the decision of how that punishment is carried out. In light of the stakes of carrying out capital punishment and the potential for extraordinary harm, legislators determined to utilize the penalty should carry greater accountability for investigating and selecting methods of execution and should not be allowed to delegate these decisions.

II. METHODS OF EXECUTION

Deciding how an inmate dies and who kills²⁹ them is a thorny and long-standing issue in capital punishment. A hallmark of the American system of capital punishment is willingness within the executive branch to pass the duty of killing, and the details of that action, to another person or institution.³⁰ Legislative delegation to agencies, discussed *infra*, is properly characterized as one component of the broader system of responsibility-shifting in capital punishment.³¹

Despite the difference between legislative and intra-executive delegation, recourse to responsibility-shifting mechanisms minimizes responsibility for the “machinery of death.”³² Parts A and B explore delegation in historic and modern execution protocols. In historic executions, executive agents responsible for the act of killing attempted, and often succeeded, in delegating killing to others.³³ Modern execution protocols demonstrate similar patterns through mechanical or structural methods of distancing involvement in killing or spreading responsibility through the execution team.³⁴ Each of these elements permits individuals and institutions to disclaim responsibility in killing.

A. *Historic Delegation and Responsibility for Killing*

Historic accounts of executions include startling and disturbing examples of delegation on the part of the executive official responsible for conducting executions. Timothy Kaufman-Osborn describes a practice in medieval England by which some convicts could receive commutations or pardons if they took a turn as an executioner.³⁵ This practice continued in colonial America; condemned prisoners could receive a reprieve in exchange for executing their

²⁹ I use the term “kill” deliberately in this Article. Regardless of one’s opinion about capital punishment, the death penalty is the state-sanctioned act of killing another human being. Using sanitized language will not change that fact and seems inappropriate when discussing responsibility for state-sanctioned killing. See, e.g., Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1622 (1986).

³⁰ See *infra* notes 41–50 and accompanying text.

³¹ See *infra* notes 316–18 and accompanying text.

³² *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“From this day forward, I shall no longer tinker with the machinery of death.”); *Rumbaugh v. McCotter*, 473 U.S. 919, 920–21 (1985) (Marshall, J., dissenting from denial of certiorari).

³³ See *infra* notes 50–52 and accompanying text.

³⁴ See *infra* notes 73–77 and accompanying text.

³⁵ TIMOTHY V. KAUFMAN-OSBORN, FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE 66 (2002).

fellow prisoners.³⁶ Sheriffs typically carried out executions,³⁷ although they “tended to delegate these responsibilities when they could.”³⁸ In addition to seeking prisoners to carry out executions, sheriffs would attempt to hire individuals to carry out executions.³⁹ Prisoners’ participation in executions did not, however, end when hanging did. One of the executioners at the botched execution of Willie Francis in 1946 was an inmate at the Louisiana State Penitentiary named Vincent Venezia.⁴⁰

This “democratized” early American death penalty moved the responsibility for carrying out executions “from a small set of specialists to a diffuse group of amateurs, where it would remain as long as executions were conducted by hanging.”⁴¹ The general public distaste for executioners may explain these delegation practices.⁴² The sheriff could fulfill his executive duties while passing off the unpleasant task to someone else.⁴³

³⁶See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 36 (2002) (“Maryland found it so difficult to appoint an executioner that the colony turned to a succession of criminals, each of whom was reprieved from a death sentence in exchange for agreeing to serve as hangman for a term of years or life.”); *id.* at 37 (describing specific cases in which prisoners facing death sentences hanged other prisoners); JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 262 (2012) [hereinafter BESSLER, *CRUEL & UNUSUAL*].

³⁷See BANNER, *supra* note 36, at 36; CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY* 25 (1999); see also KAUFMAN-OSBORN, *supra* note 35, at 65–66 (discussing the responsibilities of sheriffs in medieval England).

³⁸BANNER, *supra* note 36, at 36; see AUSTIN SARAT, KATHERINE BLUMSTEIN, AUBREY JONES, HEATHER RICHARD, & MADELINE SPRUNG-KEYSER, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY* 40 (2014) [hereinafter SARAT, *GRUESOME SPECTACLES*].

³⁹BANNER, *supra* note 36, at 36–37 (“[B]ills submitted by sheriffs for reimbursement often included entries for payments to several other people for actually carrying out the hanging.”).

⁴⁰See Deborah W. Denno, *When Willie Francis Died: The “Disturbing” Story Behind One of the Eighth Amendment’s Most Enduring Standards of Risk*, in *DEATH PENALTY STORIES* 17, 41–43 (John H. Blume & Jordan M. Steiker eds., 2009).

⁴¹BANNER, *supra* note 36, at 38.

⁴²See BANNER, *supra* note 36, at 36 (“In England and elsewhere in Europe, death sentences were carried out by professional executioners, specialists loathed by the public.”); CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 70 (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press 1995) (1764) (“What are everyone’s feelings about the death penalty? We can read them in the indignation and contempt everyone feels for the hangman, who is after all the innocent executor of the public will . . .”); BESSLER, *CRUEL & UNUSUAL*, *supra* note 36, at 262 (discussing public revulsion for executioners); Dubber, *supra* note 14, at 551 (describing public sentiment towards executioners).

⁴³See *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (discussing delegation as an abdication of responsibility while still receiving credit for having addressed a problem).

The inherent difficulties of hanging triggered other forms of intra-executive delegation. Hanging is often an ineffective and painful way to kill,⁴⁴ despite attempts to use scientific principles to assess the proper length of rope and drop.⁴⁵ A short drop chanced “painful death by slow suffocation.”⁴⁶ In some public hangings, if a prisoner did not die instantly after the drop, family or friends might pull on the hanging prisoner’s legs to ensure that death came more swiftly.⁴⁷ On the other hand, a longer drop or other miscalculation risked decapitation.⁴⁸ As Stuart Banner explains: “In the 1870s, in an effort to make a painless death more likely, local officials in several places that still used the old downward method of hanging began trying longer drops.”⁴⁹ Unfortunately, this led to near or complete decapitations, horrified observers, and sharp public criticism.⁵⁰

When conducting hangings, officials “sought methods of removing their own agency from the process of hanging.”⁵¹ State officials hired professionals to hang inmates.⁵² Alternatively, officials created automated gallows systems

⁴⁴ See *Campbell v. Wood*, 18 F.3d 662, 717 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting, Appendix A) (“The evidence presented on remand clearly showed that hanging creates a significant risk both of decapitation and of slow asphyxiation.”); BANNER, *supra* note 36, at 170–73 (discussing the problem of painless hanging and describing botched hangings); KAUFMAN-OSBORN, *supra* note 35, at 116–20; SARAT, GRUESOME SPECTACLES, *supra* note 38, at 34–35, 39–41 (discussing the complexity of execution by hanging); ELIZA STEELWATER, *THE HANGMAN’S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA’S STRUGGLE WITH THE DEATH PENALTY* 63 (2003) (describing the hanging of James McCaffry in 1851, who remained conscious and struggling for five minutes after the drop); Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 120 (1978); Anny Sauvageau, Romano LaHarpe, & Vernon J. Geberth, *Agonal Sequences in Eight Filmed Hangings: Analysis of Respiratory and Movement Responses to Asphyxia by Hanging*, 55 J. FORENSIC SCI. 1278, 1278 (2010); see also Matt Soniak, *Hanging Themselves Was the Only Way to See How Hanging Works*, MENTALFLOSS (Mar. 31, 2012), <http://mentalfloss.com/article/30340/he-wanted-better-understand-hanging-so-he-hanged-himself-12-times> [https://perma.cc/DW6A-TVY5] (discussing Nicolas Minovici, who researched hanging by hanging himself and volunteers in the late nineteenth and early twentieth centuries).

⁴⁵ See *Campbell*, 18 F.3d at 717 (Reinhardt, J., concurring and dissenting, Appendix A) (discussing drop tables for hangings); see also KAUFMAN-OSBORN, *supra* note 35, at 122.

⁴⁶ *Campbell*, 18 F.3d at 717 (Reinhardt, J., concurring and dissenting, Appendix A); BRANDON, *supra* note 37, at 35–36.

⁴⁷ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 32–33.

⁴⁸ *Campbell*, 18 F.3d at 718 (Reinhardt, J., concurring and dissenting, Appendix A) (“[E]very single expert who testified at the evidentiary hearing acknowledged at one point or another that some prisoners who are hanged in Washington may be decapitated.”).

⁴⁹ BANNER, *supra* note 36, at 173.

⁵⁰ See *id.* (describing the executions of Charles Jolly, Henry Hollenscheid, Samuel Frost, Patrick Hartnett, and James Stone); see also *Campbell*, 18 F.3d at 720 (Reinhardt, J., concurring and dissenting, Appendix A) (discussing the execution of Black Jack Ketchum in New Mexico).

⁵¹ BANNER, *supra* note 36, at 173–74.

⁵² *Id.* at 176.

that effectively “allowed condemned criminals to hang themselves.”⁵³ When the prisoner stepped onto the gallows platform, a mechanical reaction would trigger the hanging either by jerking the prisoner up into the air, or dropping the prisoner.⁵⁴ Francis Barker “invented, for his own 1905 execution, an electrical device that allowed him to release the trap door himself by pressing a button strapped to his thigh.”⁵⁵ Automated devices appeared in other execution methods. In 1912, Andrija Mircovich, sentenced to die in Nevada, selected the firing squad as his method of execution.⁵⁶ Confronted with the difficulty of finding anyone to perform the execution, Nevada “constructed a firing squad machine, mounting three rifles on a framework that fired the weapons” when strings were cut or pulled.⁵⁷ One of the rifles was loaded with a blank.⁵⁸

The movement towards technologically driven (and purportedly more humane) methods of killing like the electric chair, the gas chamber, or lethal injection arose in part from public perceptions of the cruelty of botched hangings.⁵⁹ Adopting more “humane”⁶⁰ methods of killing that interposed technology or physical distance between the executioner and the condemned could make the act more impersonal, reducing executioners’ emotional burdens.⁶¹

The gas chamber presented one opportunity to interpose technology or physical distance because the executioner did not come in contact with the condemned.⁶² In California, executioners mixed water and sulfuric acid in the

⁵³ *Id.* at 174.

⁵⁴ *Id.* (describing execution machines in Colorado, Connecticut, and Nebraska).

⁵⁵ *Id.*

⁵⁶ See Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah’s Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 400 (2002–03); Deborah W. Denno, *The Firing Squad as “A Known and Available Alternative Method of Execution”* Post-Glossip, 49 U. MICH. J.L. REFORM 749, 790 (2016) [hereinafter, Denno, *The Firing Squad*].

⁵⁷ Cutler, *supra* note 56, at 400; see also Denno, *The Firing Squad*, *supra* note 56, at 790.

⁵⁸ See Denno, *The Firing Squad*, *supra* note 56, at 790; see also Patty Cafferata, *Capital Punishment Nevada Style*, NEV. LAW., June 2010, at 3, 8.

⁵⁹ See BANNER, *supra* note 36, at 176–77 (citing newspaper reports from that era); BRANDON, *supra* note 37, at 25–46 (discussing the shift in public sentiment away from hangings).

⁶⁰ Cf. BANNER, *supra* note 36, at 200–01 (describing errors in lethal gas executions); SARAT, GRUESOME SPECTACLES, *supra* note 38, at 116 (“Five out of every one hundred executions by lethal gas had been botched.”).

⁶¹ See BANNER, *supra* note 36, at 204 (“Clinton Duffy, the warden at San Quentin during many of its gas chamber executions, surveyed the officers under his command and discovered that all of them preferred the gas chamber to the gallows. The men felt less ‘directly responsible for the death of the condemned,’ he explained.”).

⁶² See *id.* at 196–97 (describing gas chamber executions). Michel Foucault makes the same point about the guillotine: “Death was reduced to a visible, but instantaneous event. Contact between the law, or those who carry it out, and the body of the criminal, is reduced to a split second. There is no physical confrontation; the executioner need be no more than a

“Mixing Room,” and a pipe carried the solution to reservoirs under the chair where the condemned would be strapped in to die.⁶³ To kill the inmate, a member of the execution team pushed a lever that lowered a bundle of sodium cyanide crystals into the acid-water solution, producing hydrocyanic gas.⁶⁴

Technological developments also led to professional executioners; the complexity of the electric chair meant that killing was delegated to professionals, usually electricians.⁶⁵ As methods of execution evolved, execution protocols and internal processes continued to adopt methods of responsibility shifting. The next section explores more recent delegation and responsibility-shifting mechanisms.

B. *Minimizing Accountability for Killing*

Modern execution protocols permit, and even encourage, delegation. The official conducting or supervising executions selects the executioner, who may not even work for the department of corrections.⁶⁶ Florida’s executioner is not a prison employee, but “a private citizen who is paid \$150 per execution” and whose identity is kept secret.⁶⁷

Execution protocols and state laws conceal execution procedures and participants’ identities.⁶⁸ State laws prohibit disclosing the identities of

meticulous watchmaker.” MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 13 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) [hereinafter FOUCAULT, *DISCIPLINE AND PUNISH*].

⁶³ *Fiero v. Gomez*, 865 F. Supp. 1387, 1392 (N.D. Cal. 1994), *vacated*, *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

⁶⁴ *Id.*

⁶⁵ See BANNER, *supra* note 36, at 194–95; BRANDON, *supra* note 37, at 208–09, 220–21 (discussing professional executioners).

⁶⁶ See, e.g., FLA. STAT. ANN. § 922.10 (West 2020); UTAH CODE ANN. § 77-19-10(2)–(3) (West 2020) (allowing the executive director of corrections or a “designee” to select people to carry out lethal injection or “peace officers” to compose the firing squad); see also *supra* notes 28–37 and accompanying text (discussing historic internal executive delegation of killing).

⁶⁷ *Death Row*, FLA. DEP’T OF CORR., <http://www.dc.state.fl.us/ci/deathrow.html> [<https://perma.cc/J5MX-DGJ2>].

⁶⁸ See KONRAD, *BEHIND THE CURTAIN*, *supra* note 24, at 14–16; Berger, *Lethal Injection*, *supra* note 5, at 1388–92; Deborah W. Denno, *America’s Experiment with Execution Methods*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 707, 721–24 (James R. Acker, Robert M. Bohm, & Charles S. Lanier eds., 3d ed. 2014).

execution team members⁶⁹ or suppliers,⁷⁰ and may exempt execution procedures from state freedom of information laws.⁷¹ Execution protocols track statutory secrecy and establish procedures to hide the execution team's identities.⁷² Concealing executioners' and suppliers' identities shields them from possible negative consequences in their communities.⁷³ It also serves symbolic functions. It is not the individual executioner who kills, but the embodiment of the state.⁷⁴

Other procedures shield executioners from knowing whether they were responsible for killing. A repealed New Jersey statute required the lethal

⁶⁹ See, e.g., ARIZ. REV. STAT. ANN. § 13-757(C) (2020); VA. CODE ANN. § 53.1-233 (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(b) (West 2019); see also KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 14–16; ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 88 (2000) (describing the secrecy surrounding executioners' identities).

⁷⁰ See, e.g., GA. CODE ANN. § 42-5-36(d)(2) (2020); OKLA. STAT. ANN. tit. 22, § 1015(B) (West 2020); VA. CODE ANN. § 53.1-234 (West 2020); see also KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 14–16.

⁷¹ See, e.g., ARK. CODE ANN. § 5-4-617 (West 2020); see also KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 14–16; LAIN, LETHAL INJECTION, *supra* note 4 (manuscript at 42–45).

⁷² See, e.g., FLA. DEP'T OF CORR., EXECUTION BY ELECTROCUTION PROCEDURES 8–9 (Feb. 27, 2019), <http://www.dc.state.fl.us/ci/docs/Electrocution%20Certification%20Ltr%20and%20Procedure%202-27-19%20Final.pdf> [<https://perma.cc/DHD5-45BN>] (describing a separate, secured “executioner’s room”); NORTH CAROLINA PROTOCOL, *supra* note 5, at 16–17; OHIO DEP'T OF REHAB. & CORR., EXECUTION 18 (Oct. 7, 2016), <https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/OhioProtocol10.07.2016.pdf> [<https://perma.cc/RCX5-R69F>] [hereinafter OHIO PROTOCOL]; VA. DEP'T OF CORR., EXECUTION MANUAL 10 (Feb. 7, 2017), <https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/VirginiaProtocol02.07.2017.pdf> [<https://perma.cc/5G6J-4TU3>] [hereinafter VIRGINIA PROTOCOL]; see also Berger, *Lethal Injection Secrecy*, *supra* note 5, at 1388–91.

⁷³ See Motion for Leave to File and Brief for the States of Arizona et al. as Amici Curiae in Support of Applicants at 13, *Barr v. Roane*, No. 19A615 (Dec. 3, 2019) (“Without the assurance of confidentiality, ‘there is a significant risk that persons and entities necessary to the execution would become unwilling to participate.’”) (quoting *Owens v. Hill*, 758 S.E.2d 794, 805 (Ga. 2014)); *supra* note 42 (discussing the historic unpopularity of executioners). There is a difference between legislative accountability and identifying members of an execution team. Nonetheless, the secrecy surrounding execution teams' identities is one component of a multilayered and opaque system of extreme delegation and shifting responsibility. It should also be noted that there does not appear to have been any serious threats to execution teams or supplying pharmacies. See LAIN, LETHAL INJECTION, *supra* note 4 (manuscript at 45–49) (discussing the absence of threats).

⁷⁴ See FOUCAULT, DISCIPLINE & PUNISH, *supra* note 62, at 10 (“Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself.”); KAUFMAN-OSBORNE, *supra* note 35, at 200 (describing executions as “another means of validating the state’s monopoly over the means of legitimate violence”); Osofsky et al., *supra* note 14, at 385 (discussing execution participants’ tendency to rely on “the societal imperative to use the death penalty as the ultimate punishment for homicidal crimes”).

injection protocol to ensure that the identity of the person who actually carried out the sentence would be concealed even from the executioner themselves.⁷⁵ Utah's current statute requires "two or more persons . . . [to] administer a continuous intravenous injection," but only one of those injections contains the lethal substances.⁷⁶ These procedures may be intended to ameliorate executioners' stress or trauma potentially caused by participation in an execution.⁷⁷

The lethal injection machine Fred Leuchter⁷⁸ developed exemplified this principle.⁷⁹ In *The Execution Protocol*, Stephen Trombley explains, "The basic design requirement . . . is that it should kill quickly and efficiently, and in a way that causes the least pain and distress to the condemned person, the executioners, and the witnesses."⁸⁰ The machine used two modules, one to deliver the drugs

⁷⁵ N.J. STAT. ANN. § 2C:49-3 (West 2006), *repealed by* L. 2007, C. 204, § 7 (effective Dec. 18, 2007) ("[T]he procedures and equipment utilized in imposing the lethal substances shall be designed to insure that the identity of the person actually inflicting the lethal substance is unknown even to the person himself."). The New Jersey Legislature abolished the death penalty in 2007. *See New Jersey*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-jersey> [<https://perma.cc/U3ZF-XLX2>].

⁷⁶ UTAH CODE ANN. § 77-19-10 (West 2020).

⁷⁷ *See, e.g.*, JOHN D. BESSLER, *KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY* 115–16 (2003) [hereinafter BESSLER, *KISS OF DEATH*]; LIFTON & MITCHELL, *supra* note 69, at 89–90 (describing the impact on members of execution teams); Allen L. Ault, *The Hidden Victims of the Death Penalty: Correctional Staff*, WASH. POST (July 31, 2019), <https://www.washingtonpost.com/opinions/2019/07/31/hidden-victims-death-penalty-correctional-staff/> [<https://perma.cc/74YW-G48V>]; Jim Dwyer, *Jim Dwyer of Newsday, Long Island, NY*, NEWSDAY (Nov. 21, 1994), <https://www.pulitzer.org/winners/jim-dwyer> [<https://perma.cc/P5YY-93CH>] (click "Living with Those Deaths"); Jerry Givens, *I Was Virginia's Executioner from 1982 to 1999. Any Questions for Me?*, GUARDIAN (Nov. 21, 2013), <https://www.theguardian.com/commentisfree/2013/nov/21/death-penalty-former-executioner-jerry-givens> [<https://perma.cc/NZS6-WPE5>]; Robert T. Muller, *Prison Executioners Face Job-Related Trauma*, PSYCHOL. TODAY (Oct. 11, 2018), <https://www.psychologytoday.com/us/blog/talking-about-trauma/201810/prison-executioners-face-job-related-trauma> [<https://perma.cc/57K4-QT6Z>].

⁷⁸ Fred Leuchter, once nicknamed "Dr. Death," has been described as a "self-proclaimed execution expert and manufacturer of death machinery," despite lacking the qualifications to practice engineering. *See An 'Expert' on Executions Is Charged With Fraud*, N.Y. TIMES (Oct. 24, 1990), <https://www.nytimes.com/1990/10/24/us/an-expert-on-executions-is-charged-with-fraud.html> [<https://perma.cc/6H9E-TSRQ>]; *see also* STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY* 84–86 (1992). Jurisdictions have since stopped using the machine. *See* Malcolm Gay, *Uncomfortably Numb*, RIVERFRONT TIMES (Dec. 15, 2004), <https://www.riverfronttimes.com/stlouis/uncomfortably-numb/Content?oid=2482648> (on file with the *Ohio State Law Journal*).

⁷⁹ *See* KAUFMAN-OSBORN, *supra* note 35, at 181 ("The net result is a system that eliminates virtually all possibility of error while simultaneously perfecting the mechanisms that enable the dispersion and denial of responsibility for dealing death."); *see also* BANNER, *supra* note 36, at 299; Dubber, *supra* note 14, at 563–66.

⁸⁰ TROMBLEY, *supra* note 78, at 78–79.

and one to control the execution.⁸¹ The control module was in a different room than where the execution takes place, and required two members of the execution team to operate it.⁸² The module had “two complete sets of controls.”⁸³ “When it was time for the execution to commence, each of the executioners presses a button. A computer in the machine chooses which executioner has activated the sequence, and the choice is then automatically erased from the computer’s memory.”⁸⁴

This method has both historic roots and modern applications. West Virginia’s electric chair was operated by pressing three buttons, but two were “dummies,” and “no one could be certain which button sent the current to the chair.”⁸⁵ Japan currently uses comparable methods to conduct hangings; prison employees press buttons simultaneously, but “none is told which button is the ‘live one’ that will cause the prisoner’s fall.”⁸⁶

Firing squad procedures also inject some doubt into who kills. Utah’s firing-squad protocol requires a “five-person execution team,” with two alternates and a team leader.⁸⁷ Four .30-caliber rifles are loaded with two rounds each, and the fifth with blanks.⁸⁸ “Care shall be taken to preclude any knowledge by the members of the firing squad of who is issued the weapon with two blank cartridges.”⁸⁹ This is a consistent practice in firing squads.⁹⁰ It allows participants to reasonably claim they do not know if they killed the prisoner,

⁸¹ *Id.* at 79; Dubber, *supra* note 14, at 565–66.

⁸² TROMBLEY, *supra* note 78, at 79.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ BRANDON, *supra* note 37, at 235.

⁸⁶ Miwa Suzuki, *Cruel Yet Popular Punishment: Japan’s Death Penalty*, YAHOO NEWS (Sept. 7, 2018), <https://sg.news.yahoo.com/cruel-yet-popular-punishment-japans-death-penalty-044522392.html> [<https://perma.cc/7QVH-8C5C>].

⁸⁷ UTAH DEPARTMENT OF CORRECTIONS, TECHNICAL MANUAL 54, https://cdn.muckrock.com/foia_files/2017/03/22/3-13-17_MR34278_RES.pdf (on file with the *Ohio State Law Journal*) (revised June 10, 2010) [hereinafter UTAH PROTOCOL]; *see also* Denno, *The Firing Squad*, *supra* note 56, at 782–84 (describing Utah’s firing squad execution protocols).

⁸⁸ UTAH PROTOCOL, *supra* note 87, at 88.

⁸⁹ *Id.* at 88–89.

⁹⁰ The 1959 Procedure for Military Executions requires eight members of a firing squad, and the officer in charge of carrying out the execution is responsible for ensuring that “[A]t least one, but no more than three will be loaded with blank ammunition.” DEP’T OF THE ARMY, PROCEDURE FOR MILITARY EXECUTIONS, AR 633–15, at 4 (Apr. 7, 1959) (rescinded). The officer is required to place the rifles at random in a rack so that the firing squad will not know which one they have selected. *See id.* Mississippi and Oklahoma permit the use of firing squads in executions. *See Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution> [<https://perma.cc/KB3M-FZAM>]; *see also* BANNER, *supra* note 36, at 203 (discussing historic firing squad protocols in Utah and Nevada that offered executioners the opportunity to disclaim responsibility for killing); *supra* note 57 and accompanying text.

although the odds are not in their favor.⁹¹ Corrections officials conceal the firing squad's identities by placing the squad in a separate room from the prisoner they are about to kill.⁹²

Apart from mechanical interventions, execution protocols are “broken down into several small tasks, each assigned to a different person, to minimize the sense of responsibility felt by each participant.”⁹³ Lethal injection protocols illustrate these processes.⁹⁴ One individual orders the drugs.⁹⁵ Another designated individual or team prepares the syringes.⁹⁶ “Tie-down teams” or other correctional staff escort the condemned to the death chamber and strap him to the gurney.⁹⁷ Montana's protocols describe in detail which member of the tie-down team is responsible for each strap—different officers handle different straps, thus the condemned is tied down by a cohesive group, rather than an individual corrections officer.⁹⁸ Another individual or team places the IVs.⁹⁹ North Carolina's execution team prepares the condemned in a “Preparation Room” by restraining him on the gurney, attaching “cardiac

⁹¹ See LIFTON & MITCHELL, *supra* note 69, at 89 (“This is ‘for the conscience of the executioners, so no one knows for sure who fired the live round,’ a spokesman for the corrections department in Utah has explained.”).

⁹² See UTAH PROTOCOL, *supra* note 87, at 89; see also NORMAN MAILER, *THE EXECUTIONER'S SONG* 1011 (1979).

⁹³ BANNER, *supra* note 36, at 299; see Osofsky et al., *supra* note 14, at 386; see also LIFTON & MITCHELL, *supra* note 69, at 82 (“Individual responsibility also dissolves, as each member of the team is given only a limited task.”).

⁹⁴ See FLA. DEP'T OF CORR., *EXECUTION BY LETHAL INJECTION PROCEDURES 2–3* (Feb. 2019), <http://www.dc.state.fl.us/ci/docs/Lethal%20Injection%20Certification%20Ltr%20and%20Procedure%202-27-19%20Final%20.pdf> [<https://perma.cc/Q5X8-G6GW>] [hereinafter *FLORIDA LETHAL INJECTION PROTOCOL*] (describing the different tasks the “team warden” assigns to various team members, including: “achieving and monitoring peripheral venous access,” “achieving and monitoring central venous access,” “examining the inmate prior to execution,” and “attaching the leads to the heart monitors and observing the monitors”); see also LIFTON & MITCHELL, *supra* note 69, at 81–82, 103–04 (discussing the “task-oriented” nature of executions).

⁹⁵ See FLORIDA LETHAL INJECTION PROTOCOL, *supra* note 94, at 3; OHIO PROTOCOL, *supra* note 72, at 6.

⁹⁶ See FLORIDA LETHAL INJECTION PROTOCOL, *supra* note 94, at 9; MONT. DEP'T OF CORR., *MONTANA STATE PRISON EXECUTION TECHNICAL MANUAL* 24, 50–51 (Jan. 16, 2013) (on file with the *Ohio State Law Journal*) [hereinafter *MONTANA PROTOCOL*]; OHIO PROTOCOL, *supra* note 72, at 12–13; UTAH PROTOCOL, *supra* note 87, at 77 (“The IV team leader shall prepare each chemical in accordance with the manufacturer's instructions and draw them into the two (2) sets of syringes.”).

⁹⁷ See MONTANA PROTOCOL, *supra* note 96, at 26; NORTH CAROLINA PROTOCOL, *supra* note 5, at 15; OHIO PROTOCOL, *supra* note 72, at 15.

⁹⁸ MONTANA PROTOCOL, *supra* note 96, at 49.

⁹⁹ See MONTANA PROTOCOL, *supra* note 96, at 50–51; NORTH CAROLINA PROTOCOL, *supra* note 5, at 9 (EMT-Paramedic is “responsible for the insertion of the catheters, IV lines, and applying of the leads of the EKG”); OHIO PROTOCOL, *supra* note 72, at 15 (“The Medical Team shall establish one or two viable IV sites[.]”); UTAH PROTOCOL, *supra* note 87, at 52, 79–80 (IV Team).

monitoring electrodes,” inserting the IV, starting the saline solution, and covering the condemned with a sheet.¹⁰⁰ Different team members bring the condemned into the “Death Chamber,” while other team members finalize the rest of the preparations.¹⁰¹

The executioner administers the intravenous injections at the warden’s signal,¹⁰² often in a separate room than the death chamber.¹⁰³ Another member of the execution team performs consciousness checks after an anesthetic is administered.¹⁰⁴ If the condemned is unconscious, then the warden will signal the executioner who then administers the second and third drugs.¹⁰⁵ Different members of the team may be responsible for monitoring different equipment or the prisoner’s bodily functions.¹⁰⁶ Ohio has a “Command Center” keeping a record of the timeline of the prisoner’s death, and a “Drug Administrator”¹⁰⁷ announces “the start and finish times of each injection to the Command Center contact who shall then inform the Command Center for capture on the Execution Timeline.”¹⁰⁸

Compartmentalizing these actions into a series of mechanical, ritualized, and rehearsed steps separates obvious violence from killing.¹⁰⁹ As Markus Dubber explains, because even participants in a system of capital punishment “share the general inhibition against inflicting extreme violence on a particular person, they develop mechanisms to minimize their sense of responsibility for the infliction of the death penalty.”¹¹⁰ If participants are guaranteed anonymity and take small, discreet actions, they can more readily disavow any sense of

¹⁰⁰ NORTH CAROLINA PROTOCOL, *supra* note 5, at 15.

¹⁰¹ *See id.*

¹⁰² *See* MONTANA PROTOCOL, *supra* note 96, at 52; OHIO PROTOCOL, *supra* note 72, at 16–18.

¹⁰³ *See* *Baze v. Rees*, 553 U.S. 35, 45 (2008) (“The execution team administers the drugs remotely from the control room through five feet of IV tubing.”); VIRGINIA PROTOCOL, *supra* note 72, at 10.

¹⁰⁴ *See* MISSISSIPPI DEP’T OF CORRECTIONS, CAPITAL PUNISHMENT PROCEDURES 9 (Nov. 2017), https://files.deathpenaltyinfo.org/legacy/files/pdf/MississippiProtocol_11.15.2017.pdf [<https://perma.cc/H5FT-9GP4>] [hereinafter MISSISSIPPI PROCEDURES]; MONTANA PROTOCOL, *supra* note 96, at 52; VIRGINIA PROTOCOL, *supra* note 72, at 10.

¹⁰⁵ *See* MONTANA PROTOCOL, *supra* note 96, at 52. This is in a state that uses a three-drug protocol. *See id.* at 50–51. Some jurisdictions use single-drug execution protocols. *See State by State Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols> [<https://perma.cc/ULV9-9YBA>] (illustrating six states that have recently used single-drug executions protocol).

¹⁰⁶ *See* NORTH CAROLINA PROTOCOL, *supra* note 5, at 17–18; OHIO PROTOCOL, *supra* note 72, at 18.

¹⁰⁷ Ohio’s protocols refer to the executioner as a “Drug Administrator.” *See* OHIO PROTOCOL, *supra* note 72, at 16–17.

¹⁰⁸ *Id.* at 16, 18.

¹⁰⁹ *See supra* notes 82–83 and accompanying text.

¹¹⁰ Dubber, *supra* note 14, at 562.

personal responsibility for killing another human being.¹¹¹ External and retrospective sources of authority help maintain this façade: the state established the penalty, the jury sentenced him to death, the courts heard his appeals, and the warden gave the order.¹¹²

Redirecting decisions about killing shifts accountability between individuals and entities. These practices echo legislative delegation to executive agencies. Nondelegation fits into this framework because it recognizes the inherent harms in shifting responsibility for consequential decisions. The next Part of this article discusses the role of the nondelegation doctrine in state and federal courts before turning in Part IV to a detailed discussion of inmates' challenges to method of execution statutes.

III. THE NONDELEGATION DOCTRINE

The separation of powers is a core value in American governance. In *Federalist No. 47*, James Madison asserted that, to prevent tyranny, legislative, executive, and judicial powers must be divided, rather than accumulated by a branch, individual, or group.¹¹³ The nondelegation doctrine derives in part from this principle.¹¹⁴ Under the doctrine, a legislature may not delegate its “essential legislative functions” to other governmental bodies, such as administrative agencies.¹¹⁵ This Part begins with an examination of state nondelegation doctrines, followed by a discussion of *Gundy v. United States*,¹¹⁶ and the significance of the potential for a renewed federal nondelegation doctrine.

A. State Nondelegation Doctrines

The last time the Supreme Court found a legislative delegation impermissible under the nondelegation doctrine was in 1935.¹¹⁷ Since that time,

¹¹¹ See *supra* note 82 and accompanying text; see also Osofsky et al., *supra* note 14, at 386 (“After lethal activities become routinized into separate sub-functions, participants shift their attention from the morality of their activity to the operational details and efficiency of their specific job.”).

¹¹² See BRANDON, *supra* note 37, at 209; LIFTON & MITCHELL, *supra* note 69, at 79, 105; Dubber, *supra* note 14, at 573.

¹¹³ James Madison, *The Federalist No. 47*, in ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, *THE FEDERALIST PAPERS* 245, 245 (Ian Shapiro ed., Yale Univ. Press 2009); see also *Loving v. United States*, 517 U.S. 748, 756 (1996).

¹¹⁴ See *Mistretta v. United States*, 488 U.S. 361, 371 (1989); KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.6, at 1–2 (6th ed. supp. 2020).

¹¹⁵ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); see also *Loving*, 517 U.S. at 757; *Field v. Clark*, 143 U.S. 649, 692–94 (1892); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553–54 (1991).

¹¹⁶ *Gundy v. United States*, 139 S. Ct. 2116 (2019).

¹¹⁷ See *id.* at 2129; see also *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541–42 (“In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting

the Supreme Court has consistently permitted Congress to make substantial delegations of powers to agencies and executive officials provided that Congress supplied an “intelligible principle” to guide the legislature’s discretion.¹¹⁸ For that reason, many scholars concluded that the nondelegation doctrine was mostly, if not completely dead.¹¹⁹ Others have suggested that courts could resurrect the nondelegation doctrine, even if in a slightly different form than it took in 1935.¹²⁰ Still other scholarship points to interpretive canons

laws for the government of trade and industry throughout the country, is virtually unfettered.”); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (“Congress has declared no policy, has established no standard, has laid down no rule.”); HICKMAN & PIERCE, *supra* note 114, at 5–6; William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, in *SUPREME COURT REVIEW* 2018–2019, at 211, 216–17 (Steven D. Schwinn ed., 3d ed. 2019).

¹¹⁸ See *Gundy*, 139 S. Ct. at 2129 (listing cases in which the Supreme Court permitted “very broad delegations”); see also ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 153 (1987); HICKMAN & PIERCE, *supra* note 114, at 139, 143–46; DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 40 (1993). A few lower courts have found unconstitutional delegations. See *Am. Trucking Ass’n, Inc. v. U.S. EPA*, 175 F.3d 1027, 1037–38 (D.C. Cir. 1999); *South Dakota v. United States Dep’t of Interior*, 69 F.3d 878, 885 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); see also Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 *VAND. L. REV.* 1167, 1171 (1999) (asserting that the federal system “might be said to endorse a strong prodelegation separation of powers jurisprudence—one that generally favors delegation to administrative agencies, while precluding congressional delegation with strings attached”).

¹¹⁹ See, e.g., Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 *U. PA. L. REV.* 759, 839 (1997); Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 *VA. L. REV.* 765, 780 (2016); Richard D. Cudahy, *The Nondelegation Doctrine: Rumors of Its Resurrection Prove Unfounded*, 16 *ST. JOHN’S J. LEGAL COMMENT.* 1 (2002); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2364 (2001); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1241 (1994); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. CHI. L. REV.* 1721, 1723 (2002); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93, 145 (2005); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 *HARV. J. L. & PUB. POL’Y* 931, 974 (2014).

¹²⁰ See, e.g., SCHOENBROD, *supra* note 118, at 14; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 *U. CHI. L. REV.* 1297, 1328–29 (2003); Araiza, *supra* note 117, at 217; Peter H. Aranson, Ernest Gelhorn, & Glen O. Robinson, *A Theory of Delegation*, 68 *CORNELL L. REV.* 1, 63 (1982); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 *HARV. J. L. & PUB. POL’Y* 147, 198 (2017); Cary Coglianese, *Dimensions of Delegation*, 167 *U. PA. L. REV.* 1849, 1889 (2019); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 *NOTRE DAME L. REV.* 619, 645 (2017); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 *NW. U. L. REV.* 443, 459–60 (1977).

or reliance on other legal doctrines to apply nondelegation principles in federal cases.¹²¹

Unlike the uncertainty in the viability of the federal nondelegation doctrine, as Jim Rossi has explained, in state courts, “the nondelegation doctrine is alive and well”¹²² Conceptually, state nondelegation doctrines are fairly similar to the federal nondelegation doctrine in that they stem from constitutional separation of powers principles. State systems of government parallel the tripartite federal system.¹²³ Some state constitutions, like the U.S. Constitution, provide that each branch of government is vested with specific powers.¹²⁴ Others also have an express separation of powers clause and vesting clauses.¹²⁵ A handful of state constitutions, while preserving the division of powers, expressly permit delegation of “regulatory” authority in certain

¹²¹ HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 137–38 (2006) (asserting that courts have relied on the nondelegation doctrine “to justify narrowly construing a statute”); Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 174 (2019) (discussing *Gundy v. United States*); Lisa Schultz Bressman, Essay, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1409 (2000); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 699 (1997); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); Cass R. Sunstein, Foreword, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1197, 1203 (2018).

¹²² Rossi, *supra* note 118, at 1189. *But see* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 417 (2017) (observing that state courts are “surpris[ingly]” willing to defer to legislative delegation).

¹²³ See, e.g., *Brown v. Heymann*, 297 A.2d 572, 577 (N.J. 1972) (“There is no indication that our State Constitution was intended, with respect to the delegation of legislative power, to depart from the basic concept of distribution of the powers of government embodied in the Federal Constitution.”).

¹²⁴ See, e.g., ALASKA CONST. art. 2, § 1, art. 3, § 1, art. 4, § 1; DEL. CONST. art. 2, § 1, art. 3, § 1; art. 4, § 1; HAW. CONST. art. 3, § 1, art. 5, § 1, art. 6, § 1; KAN. CONST. art. 1, § 3, art. 2, § 1, art. 3, § 1; N.C. CONST. art. II, § 1, art. III, § 1, art. IV, § 4; N.H. CONST. pt. 2, art. 2, pts. 41–45, see pt. 2 art. 69; N.Y. CONST. art. 3, § 1, art. 4, § 1; OHIO CONST. art. II, § 1, art. III, § 5, art. IV, § 1; PA. CONST. ch. 2, § 2, ch. 2, § 3, ch. 2, § 4; S.D. CONST. art. 3, § 1, art. 4, § 1, art. 5, § 1; WASH. CONST. art. II, § 1, art. III, § 2, art. IV, § 1; WIS. CONST. art. IV, § 1, art. V, § 1, art. VII, § 2.

¹²⁵ See ALA. CONST. art. III, § 42; ARIZ. CONST. art. III; ARK. CONST. art. 4, §§ 1–2; CAL. CONST. art. III, § 3; COLO. CONST. art. III; FLA. CONST. art. II, § 3; GA. CONST. art. 1, § 2, ¶ 3; IDAHO CONST. art. II, § 1; ILL. CONST. art. 2, § 1; IND. CONST. art. 3, § 1; IOWA CONST. art. 3, § 1; KY. CONST. §§ 27–28; LA. CONST. art. 2, §§ 1–2; MASS. CONST. pt. 1, art. XXX; MD. CONST. art. 8; ME. CONST. art. 3, §§ 1–2; MICH. CONST. art. 3, § 2; MINN. CONST. art. 3, § 1; MISS. CONST. art. 1, §§ 1–2; MO. CONST. art. 2, § 1; MONT. CONST. art. IV, § 1; N.D. CONST. art. XI, § 26; NEB. CONST. art. II, § 1, cl. 1; NEV. CONST. art. 3, § 1, cl. 1; N.J. CONST. art. 3, § 1; N.M. CONST. art. 3, § 1; OKLA. CONST. art. 4, § 1; OR. CONST. art. III, § 1; R.I. CONST. art. V; S.C. CONST. art. I, § 26; S.D. CONST. art. II; TENN. CONST. art. 2, §§ 1–2; TEX. CONST. art. II, § 1; UTAH CONST. art. 5, § 1; VA. CONST. art. 3, § 1; VT. CONST. ch. II, §§ 2–5; W. VA. CONST. art. 5, § 1; WYO. CONST. art. 2, § 1.

circumstances.¹²⁶ There is, as Keith Whittington and Jason Iuliano have observed, significant textual support in state constitutions delineating the responsibilities of each branch and limiting legislative delegation.¹²⁷

Despite permitting substantial delegation, state courts do apply the doctrine.¹²⁸ This may be because state governmental structure, needs, and policies are sufficiently distinct from the sprawling federal system that a more robust nondelegation inquiry is viable.¹²⁹ Likewise, state systems may be “better equipped” to tackle excessive delegation.¹³⁰ Internal mechanisms within states may provide for comprehensive judicial review, increased legislative oversight, or administrative review processes.¹³¹ Similarly, state constitutions are more amenable to change than the federal constitution, potentially altering separation of powers analyses.¹³²

State nondelegation cases emphasize the importance of adhering to separation of powers principles in decision-making.¹³³ The federal nondelegation doctrine permits Congress to direct others to “fill up the details” in a statute provided Congress has “la[id] down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”¹³⁴ State nondelegation doctrines rely on similar analyses. In evaluating

¹²⁶ See CONN. CONST. art. 2, amended by Art. XVIII; NEV. CONST. art. 3, § 1, cl. 2; VA. CONST. art. 3, § 1; see also OR. CONST. art. III, § 2 (providing the legislature can establish an agency for budgetary control).

¹²⁷ Whittington & Iuliano, *The Myth of the Nondelegation Doctrine*, *supra* note 122, at 416.

¹²⁸ See 1 FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 17 (1965) (discussing state courts’ willingness to strike down statutes with excessively broad delegations); ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* 571–72 (2d ed. 1993); Rossi, *supra* note 118, at 1193; Whittington & Iuliano, *The Myth of the Nondelegation Doctrine*, *supra* note 122, at 417; see also *Brown v. Heymann*, 297 A.2d 572, 577 (N.J. 1972) (“[I]n our State the judiciary has accepted delegations of legislative power which probably exceed federal experience.”).

¹²⁹ See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 238–39 (2009) (“Each of the states has its own, virtually unique, arrangements concerning the distribution of powers among and within the branches.”); Rossi, *supra* note 118, at 1170 (“State courts sometimes reach different results than their federal counterparts in deciding issues of constitutional law because states are distinct institutions of governance, in terms of their sizes, decisionmaking structures, populations, and histories.”).

¹³⁰ See COOPER, *supra* note 128, at 17–18 (discussing the difference between federal and state courts in checking administrative agencies).

¹³¹ See *id.* at 19.

¹³² See WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS*, *supra* note 129, at 239–40; see also Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1670–71 (2014).

¹³³ See *Dep’t of Bus. Regulation v. Nat’l Manufactured Hous. Fed’n, Inc.* 370 So. 2d 1132, 1135 (Fla. 1979); *Askew v. Cross Key Waterways*, 372 So.2d 913, 924 (Fla. 1978).

¹³⁴ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (quoting *Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm’rs of Clinton Cty.*, 1 Ohio St. 77,

whether delegation is consonant with state separation of powers principles, state courts, while acknowledging pragmatic governance concerns, draw the line at allowing agencies to create policy.¹³⁵ “Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy.”¹³⁶

Separation of powers jurisprudence may be classified as either “formalist” or “functionalist.”¹³⁷ A formalist approach relies on “bright-line rules designed to keep each branch within its sphere of power.”¹³⁸ A functionalist approach centers on “whether an action of one branch interferes with one of the core functions of another.”¹³⁹ States, as in the federal system, use both formalist and functionalist approaches in separation of powers questions.¹⁴⁰ Rossi offers a helpful taxonomy of the various states’ separation of powers constitutional provisions and state approaches to nondelegation: “weak,” “strong,” and “moderate.”¹⁴¹

“Strong” jurisdictions evaluating nondelegation cases analyze the legislature’s freedom to set policy and delegate against whether the agency’s actions are consistent with the underlying statutory policies and commands.¹⁴²

88 (Ohio 1852)); *see also* *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

¹³⁵ *See* *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 626 (Cal. 1974) (“An unconstitutional delegation of power occurs when the Legislature confers upon an administrative agency the unrestricted authority to make fundamental policy determinations.”); *CEED v. Cal. Coastal Zone Conservation Comm’n*, 118 Cal. Rptr. 315, 329 (Cal. Dist. Ct. App. 1974) (“Consequently, where the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the doctrine.”); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 920 (Fla. 1978) (exploring the difference between setting policy and “fleshing out” an existing policy through regulation); *Chapel v. Commonwealth*, 89 S.E.2d 337, 342 (Va. 1955) (concluding that legislative failure to declare “specific policy” or “fix any standard to direct and guide” an agency in making rules was an “invalid” delegation of legislative power); *Thompson v. Smith*, 154 S.E. 579, 584 (Va. 1930) (“Government could not be efficiently carried on if something could not be left to the judgment and discretion of administrative officers to accomplish in detail what is authorized or required by law in general terms.”).

¹³⁶ *Askew*, 372 So. 2d at 924.

¹³⁷ *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006) [hereinafter *Barkow, Separation of Powers*]; Brown, *supra* note 115, at 1522–23.

¹³⁸ *Barkow, Separation of Powers*, *supra* note 137, at 997.

¹³⁹ Brown, *supra* note 115, at 1527.

¹⁴⁰ *See* WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS*, *supra* note 129, at 238.

¹⁴¹ *See* Rossi, *supra* note 118, at 1190–1201.

¹⁴² *See* *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 628 (Cal. 1974) (concluding that there was no separation of powers problem because the agency could exercise its discretion on “reasons relating to the three primary goals” of the legislation); *see*

Virginia, for example, has defined “[c]onstitutionally sufficient policies” in delegation cases as “those ‘where the terms or phrases employed have a well understood meaning, and prescribe sufficient standards to guide the administrator.’”¹⁴³ A key component of this analysis is the guidelines limiting agency discretion.¹⁴⁴ Provided legislatures have set policies and sufficient guidelines by which agencies exercise their discretion, the legislatures can delegate to agencies the “power to ascertain the facts and conditions to which the policy and principles apply.”¹⁴⁵

State courts prefer substantial guidelines from legislatures to facilitate judicial review of nondelegation challenges because courts are more readily able to assess whether the agency has complied with the will of the legislature.¹⁴⁶

“Weak” jurisdictions generally uphold broad delegations as long as adequate procedural safeguards are in place, and concentrate their analysis on administrative standards.¹⁴⁷ Courts may conclude that judicial review or compliance with the state’s Administrative Procedure Act (APA) are sufficient

also Rossi, *supra* note 118, at 1224 (“[S]tate courts adhering to a strong nondelegation doctrine trade off the potential efficiencies associated with delegation to guard against faction and ensure that the legislature, rather than agencies, makes key policy decisions.”).

¹⁴³ *Elizabeth River Crossings OpCo, LLC v. Weeks*, 749 S.E.2d 176, 192 (Va. 2013) (quoting *Bell v. Dorey Elec. Co.*, 448 S.E.2d 622, 624 (Va. 1994)).

¹⁴⁴ *See Clean Air Constituency*, 523 P.2d at 626–27 (“To avoid such delegation, the Legislature must provide an adequate yardstick for the guidance of the administrative body empowered to execute the law.”); *Cottrell v. City & Cty. of Denver*, 636 P.2d 703, 709–10 (Colo. 1981) (en banc); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011) (“[W]here the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.”); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc) (“The second requirement for proper legislative delegation is that adequate procedural safeguards be present for the promulgation of rules and to test their constitutionality once promulgated.”).

¹⁴⁵ *Thompson v. Smith*, 154 S.E. 579, 584 (Va. 1930) (quoting *Mutual Film Corp. v. Ohio Indus. Comm’n*, 236 U.S. 239, 245 (1915)); *see also* *Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 87 (Tex. 1940) (“The legislature may validly delegate the authority to find facts from the basis of which there is determined the applicability of the law; that is, an administrative body may be given the authority to ascertain conditions upon which an existing law may operate”); *Volkswagen of Am., Inc. v. Smit*, 689 S.E.2d 679, 687 (Va. 2010) (explaining that legislatures need not set out minutiae, but can delegate authority to create procedures for general standards).

¹⁴⁶ *See Askew v. Cross Key Waterways*, 372 So. 2d 913, 918–19 (Fla. 1978) (“When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.”); *see also* *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (comparing claimed authority of the Texas Secretary of State over state elections with what the Texas General Assembly had actually authorized).

¹⁴⁷ Rossi, *supra* note 118, at 1191–92.

to check administrative discretion.¹⁴⁸ For instance, in *Brown v. Vail*,¹⁴⁹ discussed in greater detail *infra*, the Washington Supreme Court identified compliance with Washington's APA with an agency appeals process or judicial review as a necessary limitation on administrative discretion when assessing agency rules that may subject a person to "criminal sanctions."¹⁵⁰

The final category in Rossi's taxonomy, "moderate," describes jurisdictions that "vary the degree of standards necessary depending on the subject matter of the statute or the scope of the statutory directive."¹⁵¹ This approach appears to be more consistent with that taken by courts in evaluating nondelegation challenges to capital punishment statutes. As discussed *infra*, courts rely substantially on the presumption of agency expertise and the impracticality of requiring legislatures to develop detailed protocols.¹⁵²

B. Recent Developments in the Federal Nondelegation Doctrine

Although the federal nondelegation doctrine is of limited utility in evaluating state constitutional law,¹⁵³ recent developments merit some discussion. The Supreme Court's current approach to legislative delegation tracks a functionalist approach, allowing Congress significant freedom in delegation, provided it has set out an intelligible principle.¹⁵⁴ Administrative agencies exercise substantial discretion in implementing and enforcing laws.¹⁵⁵

While the Supreme Court has eschewed the nondelegation doctrine since 1935, the nondelegation doctrine may be "slightly alive."¹⁵⁶ In *Gundy v. United*

¹⁴⁸ See COOPER, *supra* note 128, at 17 ("[S]tate courts have inclined to the view that combination of legislative, prosecutory, and adjudicatory functions in a single agency will be countenanced where a practical necessity therefor exists, but only so long as workable checks and balances . . . exist to guard against abuses of administrative discretion."). But see Rossi, *supra* note 118, at 1227 (observing that state judicial review of agency rulemaking is generally weaker than federal APA review).

¹⁴⁹ *Brown v. Vail*, 237 P.3d 263 (Wash. 2010) (en banc).

¹⁵⁰ *Id.* at 269–70.

¹⁵¹ Rossi, *supra* note 118, at 1198.

¹⁵² See *infra* Part IV.B.

¹⁵³ See Whittington & Iuliano, *supra* note 122, at 417.

¹⁵⁴ See *Brown*, *supra* note 115, at 1553–54.

¹⁵⁵ *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); see also *Field v. Clark*, 143 U.S. 649, 693–94 (1892).

The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 88–89 (Ohio 1852).

¹⁵⁶ See THE PRINCESS BRIDE (Act III Communications 1987) (Miracle Max: "Well, it just so happens that your friend here is only mostly dead. There's a big difference between mostly dead and all dead. . . . mostly dead is slightly alive").

States, the Court held that the federal Sex Offender Registration and Notification Act (SORNA) did not violate the nondelegation doctrine by granting the Attorney General discretion to apply SORNA's sex offender registration requirements to individuals convicted of sex offenses before SORNA was enacted.¹⁵⁷ Nonetheless, two separate opinions for four members of the Court signaled a potential shift in the Court's approach to nondelegation.¹⁵⁸ Justice Alito concurred only in the judgment, and expressed his willingness to reevaluate the nondelegation doctrine.¹⁵⁹ Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented on the ground that SORNA effectively permitted the Attorney General to write the law that would apply to individuals convicted before SORNA was enacted.¹⁶⁰

Justice Gorsuch asserted that the "intelligible principle misadventure"¹⁶¹ had obscured "guiding principles" the Court had previously set forth to channel courts' analyses of separation of powers cases.¹⁶² First, Congress may direct another branch of government to "fill up the details" provided that "Congress makes the policy decisions . . ."¹⁶³ This required Congress to identify "standards 'sufficiently definite and precise'" to permit Congress, the people, and the judicial branch to determine whether the branch authorized to "fill up the details" had complied with Congress's directives.¹⁶⁴ Second, Congress is permitted to make application of a rule contingent on specific fact-finding by the executive.¹⁶⁵ Third, in examining whether a statute impermissibly delegates legislative power, a court must consider whether there is an overlap between Congress's exclusive legislative authority and a power the Constitution has vested in another branch of government.¹⁶⁶

Justice Gorsuch reframed the intelligible principle inquiry against these principles:

¹⁵⁷ *Gundy*, 139 S. Ct. at 2129–30.

¹⁵⁸ See Bamzai, *supra* note 121, at 166.

¹⁵⁹ *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").

¹⁶⁰ *Id.* at 2131 (Gorsuch, J., dissenting).

¹⁶¹ *Id.* at 2141.

¹⁶² *Id.* at 2136–39.

¹⁶³ *Id.* at 2136 (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)).

¹⁶⁴ *Id.*; see also *Yakus v. United States*, 321 U.S. 414, 426 (1944); *In re Kollock*, 165 U.S. 526, 532 (1897); *Wayman v. Southard*, 23 U.S. 1, 31 (1825).

¹⁶⁵ *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing *Cargo of Brig Aurora v. United States*, 11 U.S. 382, 388 (1813), and *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883)). The absence of controlled (or indeed any) fact-finding was one of the factors that proved fatal to the relevant provision of the NIRA in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935) ("It does not require any finding by the President as a condition of his action.").

¹⁶⁶ See *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting); *Loving v. United States*, 517 U.S. 748, 772 (1996) (discussing an overlap between a delegation of authority to set aggravating factors in a capital trial for the military and the President's role as Commander in Chief); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.¹⁶⁷

He characterized the separation of powers doctrine as a “procedural guarantee that requires Congress to assemble a social consensus before choosing our nation’s course on policy questions”¹⁶⁸ Respecting these limitations protects individual rights,¹⁶⁹ and promotes legislative accountability.¹⁷⁰

In evaluating the distinctions between Justice Kagan’s majority opinion and Justice Gorsuch’s dissent, Aditya Bamzai asserts that this analysis measures the same factors in the Court’s traditional “intelligible principle” analysis; thus the “real difference” is the level of scrutiny the Court might apply to that analysis.¹⁷¹ Although there is similarity between the analyses, the potential for increased scrutiny is a significant development in reevaluating the doctrine.¹⁷²

Justice Kavanaugh did not participate in *Gundy*, and the Court recently denied *Gundy*’s petition for rehearing.¹⁷³ Even so, the Court can likely count five members who are willing to reconsider the scope of legislative delegation. In a statement regarding denial of certiorari in a case that raised the same issues as *Gundy*, Justice Kavanaugh signaled his willingness to reevaluate the scope of the nondelegation doctrine, particularly Congress’s authority to delegate “major policy questions” to agencies.¹⁷⁴ A significant alteration of the federal nondelegation doctrine, therefore, may be in the cards.¹⁷⁵

¹⁶⁷ *Gundy*, 139 S. Ct. at 2141.

¹⁶⁸ *Id.* at 2145.

¹⁶⁹ *See id.* at 2131.

¹⁷⁰ *See id.* at 2134.

¹⁷¹ Bamzai, *supra* note 121, at 185; *see also* Coglianese, *supra* note 120, at 1883 (asserting that Justice Gorsuch’s dissent does not offer more meaningful guidance than the intelligible principle test).

¹⁷² *See, e.g.,* Araiza, *supra* note 117, at 231–34; Coglianese, *supra* note 120, at 1883; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718, 817 (2019); Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism From the Founding to the Present*, 167 U. PA. L. REV. 1699, 1747 (2019); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 912 (2020); F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. (forthcoming 2020) (manuscript at 6) (on file with the *Ohio State Law Journal*).

¹⁷³ *Gundy v. United States*, 140 S.Ct. 579 (mem.) (2019).

¹⁷⁴ *Paul v. United States*, 718 Fed.App’x. 360 (6th Cir. 2017) (Statement of Kavanaugh, J., respecting the denial of certiorari), *cert denied*, 140 S. Ct. 342 (Nov. 25, 2019) (No. 17–8330).

¹⁷⁵ *See, e.g.,* Gary Lawson, “I’m Leavin’ It (All) Up To You”: *Gundy* and the (Sort-Of) Resurrection of the Subdelegation Doctrine, 2018 CATO SUP. CT. REV. 31, 33 (2018–19); *supra* note 161.

This development is significant insofar as it informs the application of state nondelegation doctrines and provides a possible way to reframe the debate over delegation in capital punishment.¹⁷⁶ Regardless of the strength or weakness of a state's approach to delegation, state courts generally reject inmates' claims that states' highly generalized method of execution statutes violate the nondelegation doctrine.

IV. NONDELEGATION CHALLENGES TO METHOD OF EXECUTION STATUTES

All twenty-eight states that retain the death penalty use lethal injection as their primary method of execution.¹⁷⁷ Although some states only use lethal injection,¹⁷⁸ others offer prisoners a choice between two or even three

¹⁷⁶ In *Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 935-37 (Wis. 2020), Justice Kelly's concurrence expressly discussed Justice Gorsuch's *Gundy* dissent in state separation of powers questions along with Wisconsin precedent. *Id.* (Kelly, J., concurring). *Gundy* could potentially support states' decisions to apply a more skeptical evaluation of state legislative delegation.

¹⁷⁷ See ALA. CODE § 15-18-82.1(a) (2020); ARIZ. REV. STAT. ANN. § 13-757(A) (2020); ARK. CODE ANN. § 5-4-617(a), (c) (2020); CAL. PENAL CODE § 3604(a) (West 2020); FLA. STAT. ANN. § 922.105(1) (West 2020); GA. CODE ANN. § 17-10-38(a) (West 2020); IDAHO CODE ANN. § 19-2716 (West 2020); IND. CODE ANN. § 35-38-6-1(a) (West 2020); KAN. STAT. ANN. § 22-4001(a) (West 2020); KY. REV. STAT. ANN. § 431.220(1)(a) (West 2020); LA. STAT. ANN. § 15:569(B) (2019); MISS. CODE ANN. § 99-19-51(1) (West 2020); MO. ANN. STAT. § 546.720(1) (West 2020); MONT. CODE ANN. § 46-19-103(3) (West 2019); NEB. REV. STAT. ANN. § 83-964 (West 2020); NEV. REV. STAT. ANN. § 176.355(1) (West 2020); N.C. GEN. STAT. ANN. § 15-188 (West 2020); OHIO REV. CODE ANN. § 2949.22(A) (West 2020); OKLA. STAT. ANN. tit. 22, § 1014(A) (West 2020); OR. REV. STAT. ANN. § 137.473(1) (West 2020); 61 PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1) (West 2010); S.D. CODIFIED LAWS § 23A-27A-32 (2020); TENN. CODE ANN. § 40-23-114(a) (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(a) (West 2019); UTAH CODE ANN. § 77-18-5.5(1)(a) (West 2020); VA. CODE ANN. § 53.1-234 (West 2020); WYO. STAT. ANN. § 7-13-904(a) (West 2020). Pennsylvania, California, and Oregon all have governor-imposed moratoriums. See Mark Berman, *Pennsylvania's Governor Suspends the Death Penalty*, WASH. POST (Feb. 13, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/02/13/pennsylvania-suspends-the-death-penalty/> [<https://perma.cc/BYW5-3MXN>]; J. Cooper, *Oregon's New Governor Plans to Continue Death Penalty Moratorium*, DEATH PENALTY INFO. CTR. (Feb. 23, 2015), <https://deathpenaltyinfo.org/news/oregons-new-governor-plans-to-continue-death-penalty-moratorium> [<https://perma.cc/T22A-KTH3>]; Innocence Staff, *California Governor Imposes Death Penalty Moratorium*, INNOCENCE PROJECT (Mar. 13, 2019), <https://www.innocenceproject.org/ca-gov-imposes-death-penalty-moratorium/> [<https://perma.cc/4L3Z-9MQX>].

¹⁷⁸ See GA. CODE ANN. § 17-10-38(a); IDAHO CODE ANN. § 19-2716; IND. CODE ANN. § 35-38-6-1(a); KAN. STAT. ANN. § 22-4001(a); MONT. CODE ANN. § 46-19-103(3); NEB. REV. STAT. ANN. § 83-964; NEV. REV. STAT. ANN. § 176.355(1); N.C. GEN. STAT. ANN. § 15-188; OHIO REV. CODE ANN. § 2949.22(A); OR. REV. STAT. ANN. § 137.473(1); PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1); S.D. CODIFIED LAWS § 23A-27A-32; TEX. CODE CRIM. PROC. ANN. art. 43.14(a).

methods.¹⁷⁹ Inmates in Alabama can choose between lethal injection, electrocution, or nitrogen hypoxia.¹⁸⁰ In Virginia and Florida, inmates may select electrocution or lethal injection; lethal injection is the default if a prisoner refuses to choose.¹⁸¹ California grants inmates a choice of lethal injection or gas.¹⁸² Some jurisdictions, like Tennessee and Arizona, only give inmates whose offenses were committed before a certain date a choice between two methods.¹⁸³ Some states have authorized alternative methods of execution in the event that lethal injection is unavailable due to drug shortages or court rulings.¹⁸⁴ Mississippi, Oklahoma, and Utah have authorized the firing squad as

¹⁷⁹ See, e.g., ALA. CODE § 15-18-82.1(a); ARIZ. REV. STAT. ANN. § 13-757(B); CAL. PENAL CODE § 3604(b); FLA. STAT. ANN. § 922.105(1); S.C. CODE ANN. § 24-3-530 (2020); VA. CODE ANN. § 53.1-234. Three states, Washington, New Hampshire, and Delaware all authorize hanging, but none of those jurisdictions retain the death penalty. See *Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016) (concluding that Delaware’s death penalty was unconstitutional because it permitted a judge to determine the facts necessary to impose a death sentence and did not require juror unanimity); *State v. Gregory*, 427 P.3d 621, 621–22 (Wash. 2018) (holding that Washington’s death penalty was unconstitutional under Washington’s Constitution because it was administered in an arbitrary and racially biased manner); Kate Taylor & Richard A. Oppel Jr., *New Hampshire, with a Death Row of 1, Ends Capital Punishment*, N.Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/us/death-penalty-new-hampshire.html> [<https://perma.cc/SYY2-ATDH>].

¹⁸⁰ ALA. CODE § 15-18-82.1(a)–(b).

¹⁸¹ FLA. STAT. ANN. § 922.105(1); VA. CODE ANN. § 53.1-234.

¹⁸² CAL. PENAL CODE § 3604(a).

¹⁸³ See ARIZ. REV. STAT. ANN. § 13-757(B) (2020) (“A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date.”); KY. REV. STAT. ANN. § 431.220(1)(a) (West 2020) (giving prisoners who were sentenced to death before March 31, 1998 a choice between lethal injection or electrocution); TENN. CODE ANN. § 40-23-114(b) (West 2020) (“Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.”). If an inmate refuses to choose, statutes identify a “default” method, which is usually lethal injection. See ARIZ. REV. STAT. ANN. § 13-757; TENN. CODE ANN. § 40-23-114; VA. CODE ANN. § 53.1-234.

¹⁸⁴ See ALA. CODE § 15-18-82.1(c); FLA. STAT. ANN. § 922.105(3); MISS. CODE ANN. § 99-19-51(1) (West 2020); OKLA. STAT. ANN. tit. 22 § 1014(C) (West 2020); S.C. CODE ANN. § 24-3-530; TENN. CODE ANN. § 40-23-114(d). States have complained about difficulties in sourcing lethal injection drugs due to anti-death penalty activists and pharmaceutical companies’ unwillingness to allow their products to be used in executions. See, e.g., Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 BROWN J. WORLD AFF. 27, 29–31, 33–35 (2014); Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER (May 21, 2016), <https://www.newyorker.com/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs> [<https://perma.cc/5R86-VZYK>]; Jolie McCullough, *How Many Doses of Lethal Injection Drugs Does Texas Have?*, TEX. TRIB., <https://apps.texastribune.org/execution-drugs/> [<https://perma.cc/NA2T-9FE9>] (last updated July 3, 2020).

a method of execution.¹⁸⁵ Some statutes have a “catch-all” clause permitting Departments of Corrections to choose *any* constitutional method if all the legislatively-authorized methods are found unconstitutional or are otherwise unavailable.¹⁸⁶

Most of these statutes do not contain substantial detail beyond the method of execution the legislature selected. Lethal injection statutes rely on general reference to “lethal injection,”¹⁸⁷ or “the administration of a lethal quantity of a drug or drugs”¹⁸⁸ “by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death.”¹⁸⁹ Legislatures usually leave it to the state’s department of corrections to develop protocols and make critical decisions.¹⁹⁰ A handful of jurisdictions have designated classes of drugs, or specific drugs, to be used in lethal injections, such as anesthetics, barbiturates, chemical paralytic agents, potassium chloride, or sodium thiopental.¹⁹¹ Statutes designating other methods of execution are similarly general, referring to “electrocution,”¹⁹² “firing squad,”¹⁹³ “lethal gas,”¹⁹⁴ or “hanging,” and granting the state’s department of corrections substantial decision-making authority.¹⁹⁵

Most method of execution statutes rarely address pain in the execution process. The few statutes that do refer to pain typically offer general statements

¹⁸⁵ See OKLA. STAT. ANN. tit. 22, § 1014(D) (providing that if lethal injection, nitrogen hypoxia, and electrocution are unconstitutional or “otherwise unavailable, then the sentence of death shall be carried out by firing squad”); MISS. CODE ANN. § 99-19-51(4) (alternative if lethal injection, nitrogen hypoxia, and electrocution are unconstitutional or unavailable); UTAH CODE ANN. § 77-18-5.5(3) (West 2012).

¹⁸⁶ See, e.g., ALA. CODE § 15-18-82.1(c); FLA. STAT. ANN. § 922.105(3); OHIO REV. CODE ANN. § 2949.22(C) (West 2020); TENN. CODE ANN. § 40-23-114(d).

¹⁸⁷ See ALA. CODE § 15-18-82.1(a).

¹⁸⁸ OKLA. STAT. ANN. tit. 22, § 1014(A).

¹⁸⁹ See ARIZ. REV. STAT. ANN. § 13-757(A) (2020); see also CAL. PENAL CODE § 3604(a) (West 2020); KAN. STAT. ANN. § 22-4001(a) (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(a) (West 2019).

¹⁹⁰ See KAN. STAT. ANN. § 22-4001(c); NEB. REV. STAT. § 83-964 (West 2020); NEV. REV. STAT. ANN. § 176.355 (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(a); VA. CODE ANN. § 53.1-234 (West 2020); see also Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL’Y REV. 259, 303 (2009) (discussing state statutes that direct substantial discretion to agencies).

¹⁹¹ ARK. CODE ANN. § 5-4-617(c) (2020); MISS. CODE ANN. § 99-19-51(1) (West 2020); OR. REV. STAT. § 137.473(1) (West 2020); PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1) (West 2010); UTAH CODE ANN. § 77-19-10(2) (West 2020); WYO. STAT. ANN. § 7-13-904(a) (West 2020); see also *infra* note 222 and accompanying text.

¹⁹² See *supra* note 183 and accompanying text.

¹⁹³ UTAH CODE ANN. § 77-18-5.5(3).

¹⁹⁴ See ARIZ. REV. STAT. ANN. § 13-757(B); CAL. PENAL CODE § 3604(a). Alabama, Oklahoma, and Mississippi specifically identify “nitrogen hypoxia” as the method of execution for gas. See ALA. CODE § 15-18-82.1(a) (2020); MISS. CODE ANN. § 99-19-51(2); OKLA. STAT. ANN. tit. 22, § 1014(B) (West 2020).

¹⁹⁵ See, e.g., MO. ANN. STAT. § 546.720 (West 2020); S.C. CODE ANN. § 24-3-530 (2020).

that drugs should “quickly and painlessly cause death,”¹⁹⁶ or “cause death in a swift and humane manner.”¹⁹⁷

Inmates’ nondelegation challenges to state method of execution statutes contend that the grant of broad discretion to the department of corrections to create execution protocols lacks a sufficient intelligible principle or policy determination and represents an unconstitutional delegation of pure legislative power.¹⁹⁸ Even states using “strong” nondelegation approaches, such as Florida and Texas,¹⁹⁹ have rejected these arguments.²⁰⁰ Arkansas is the sole jurisdiction to have concluded that its method of execution statute represented an unconstitutional delegation of legislative power.²⁰¹

This Part recounts previous nondelegation challenges to death penalty litigation. Part A centers on the litigation in Arkansas in *Jones* that found a separation of powers violation. Part B examines litigation in other jurisdictions that upheld broad delegation to correctional agencies to create protocols.

A. *The Arkansas Method of Execution Act and Nondelegation*

In 2010, a group of death row inmates in Arkansas challenged the constitutionality of the Arkansas Method of Execution Act (AMEA).²⁰² They asserted that the AMEA violated the Arkansas Constitution’s separation of powers doctrine because it unconstitutionally delegated the Arkansas Department of Correction (ADC) “unfettered discretion” to select lethal injection chemicals and other execution-related policies.²⁰³ The AMEA selected “intravenous lethal injection” of “one . . . or more chemicals, as determined in kind and amount in the discretion of the Director of the Department of Correction” as the state’s method of execution.²⁰⁴ It provided a list the director could choose from, including “ultra-short-acting barbiturates,” “chemical paralytic agents,” “[p]otassium chloride,” as well as “[a]ny other chemical or chemicals”²⁰⁵ The circuit court found the AMEA unconstitutional and struck the catch-all phrase.²⁰⁶

¹⁹⁶ OHIO REV. CODE ANN. §2949.22(A) (2020).

¹⁹⁷ See KAN. STAT. ANN. § 22-4001(a) (2020); see also MISS. CODE ANN. § 99-19-51(1).

¹⁹⁸ *Hobbs v. Jones*, 412 S.W.3d 844, 854 (Ark. 2012).

¹⁹⁹ See Rossi, *supra* note 118, at 1193–95.

²⁰⁰ See *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006), *abrogated on other grounds by* *Darling v. State*, 45 So.3d 444 (Fla. 2010); see also *Ex parte Granviel*, 561 S.W.3d 503, 514 (Tex. Crim. App. 1978) (en banc).

²⁰¹ See *Hobbs*, 412 S.W.3d at 854; see also *infra* Part III.A.

²⁰² *Hobbs*, 412 S.W.3d at 847.

²⁰³ *Id.* at 847–50.

²⁰⁴ ARK. CODE ANN. § 5–4–617(a)(1) (West 2011).

²⁰⁵ *Id.* § 5–4–617(a)(2).

²⁰⁶ *Hobbs*, 412 S.W.3d at 849.

The Arkansas Supreme Court affirmed and struck the entire statute as facially unconstitutional because it was not severable.²⁰⁷ Arkansas's legislature may delegate discretionary authority to other branches, such as the power to determine facts or to act in response to a contingency the statute identifies.²⁰⁸ Provided the law was "mandatory in all it requires and all it determines,"²⁰⁹ it did not violate separation of powers principles if the legislature designated certain state officials or agencies to put the law into operation.²¹⁰ The legislature had to enact "appropriate standards by which the administrative body is to exercise th[e delegated] power" before delegating discretionary power to an agency or official.²¹¹ But, the court cautioned, "[a] statute that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers."²¹²

The court concluded that the AMEA gave ADC the "absolute discretion" to determine the kind and amount of chemicals to be used for lethal injection, without offering any guidance in selecting the chemicals.²¹³ The AMEA did not create a mandatory directive—ADC could choose (or decline) to use any of the listed drugs.²¹⁴ While the legislature could give ADC the power to make factual determinations or decisions in contingencies, the AMEA "g[ave] the ADC the power to decide all the facts and all the contingencies with no reasonable guidance given absent the generally permissive use of one or more chemicals."²¹⁵ Coupled with ADC's unlimited discretion to set *all* policies and procedures to conduct executions, there was "no guidance and no general policy with regard to the procedures for the ADC to implement lethal injections."²¹⁶

²⁰⁷ *Id.* at 855. The circuit court apparently reasoned that the reference to "any other chemical or chemicals" would eliminate much of the uncertainty in the statute. *Id.* at 849. The Arkansas Supreme Court concluded that the language the circuit court struck did not have a "practical effect" on the statute because the remainder of the statute gave the ADC "absolute discretion." *Id.* at 855.

²⁰⁸ *Id.* at 851 (citing *State v. Davis*, 10 S.W.2d 513, 514 (Ark. 1928)).

²⁰⁹ *State v. Davis*, 10 S.W.2d 513, 514 (Ark. 1928).

²¹⁰ *Hobbs v. Jones*, 412 S.W.3d 844, 851 (Ark. 2012) (quoting *State v. Davis*, 10 S.W.2d 513, 514 (Ark. 1928)); *see also* *Ark. Sav. & Loans Ass'n Bd. v. West Helena Sav. & Loan Ass'n*, 538 S.W.2d 560, 564–67 (Ark. 1976)).

²¹¹ *Hobbs*, 412 S.W.3d at 852.

²¹² *Id.*

²¹³ *Id.* at 853–54 (noting that "may" is discretionary and observing that "the list of chemicals is not exhaustive and includes, as an option, broad language that 'any other chemical or chemicals' may be used" (quoting ARK. CODE ANN. § 5-4-617(a)(2)(D) (Supp. 2011))). Before the 2009 amendments, the AMEA provided that "[t]he punishment of death is to be administered by a continuous intravenous injection of a lethal quality of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice." ARK. CODE ANN. § 5-4-617 (repealed 2009).

²¹⁴ *Hobbs*, 412 S.W.3d at 854.

²¹⁵ *Id.* at 854.

²¹⁶ *Id.*

The court also declined to read the prohibitions on cruel and unusual punishment in the Arkansas and U.S. Constitutions as “reasonable guidance” for ADC.²¹⁷ The General Assembly’s failure to provide specific guidance in statutes violated the separation of powers “and other constitutional provisions cannot provide a cure.”²¹⁸

The *Jones* dissent grounded its objection in majoritarian perspectives: every other nondelegation case had reached the opposite conclusion, and many other states’ method of execution statutes gave departments of corrections even broader discretion to select lethal injection drugs and carry out executions.²¹⁹ Like other states, discussed *infra*, the dissent concluded it was sufficient for the AMEA to define the punishment and express the legislature’s intent to impose that punishment.²²⁰ Granting ADC the discretion to figure out the methodology and chemicals was appropriate because ADC was “better qualified” to make the decision and it was “impracticable” for the General Assembly to do it.²²¹

After *Jones*, the Arkansas Legislature amended the AMEA in 2013, adopting a single-drug barbiturate protocol that also required ADC to administer a benzodiazepine²²² to the inmate before initiating the execution.²²³ Inmates again brought nondelegation claims, including allegations that the amended AMEA did not constrain ADC’s discretion in drug administration, selection, and training members of the execution team.²²⁴ When that case, *Hobbs v.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See *id.* at 858–60 (Baker, J., dissenting). The dissent also relied on the Eighth Circuit’s conclusion in *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010), that Arkansas’s lethal-injection protocol did not violate the Eighth Amendment in part because it was consistent with the three-drug protocol that other states used. See *Hobbs*, 412 S.W.3d at 861 (Baker, J., dissenting); see also *Nooner*, 594 F.3d at 601, 608.

²²⁰ *Hobbs*, 412 S.W.3d at 861 (Baker, J., dissenting).

²²¹ *Id.* (“The execution of this law is precisely the type of delegation of ‘details with which it is impracticable for the legislature to deal directly.’”) (quoting *Leathers v. Gulf Rice Ark., Inc.*, 994 S.W.2d 481, 483 (Ark. 1999)).

²²² Benzodiazepines are a class of “[C]entral [N]ervous [S]ystem depressants that . . . [have] sedative, and muscle-relaxing properties.” *What Are Central Nervous System Depressants?*, ADDICTION CTR., <https://www.addictioncenter.com/drugs/drug-classifications/central-nervous-system-depressants/#:~:text=Sometimes%20called%20%E2%80%9Cbenzos%2C%E2%80%9D%20benzodiazepines,Valium%2C%20Xanax%2C%20and%20Ativan> [<https://perma.cc/MUQ5-424W>]. The ADC described benzodiazepines as “a class of drugs known for their anti-anxiety and anticonvulsant properties.” *Hobbs v. McGehee*, 458 S.W.3d 707, 716 n.5 (Ark. 2015).

²²³ See ARK. CODE ANN. § 5-4-617(b) (West 2013); S.B. 237, 89th Gen. Assemb., Reg. Sess. § 1 (Ark. 2013). The Arkansas General Assembly has amended the statute two more times since then. See S.B. 464, 92d Gen. Assemb., Reg. Sess. § 3 (Ark. 2019); H.B. 1751, 90th Gen. Assemb., Reg. Sess. §§ 1–2 (Ark. 2015). The amendments changed the type of drugs that could be used in an execution but require ADC to choose between a single-drug or three-drug protocol based on drug availability. ARK. CODE ANN. § 5-4-617(c).

²²⁴ *McGehee*, 458 S.W.3d at 710.

McGehee,²²⁵ reached the Arkansas Supreme Court, the court reversed course from *Jones*.²²⁶

Designating barbiturates as the lethal agent channeled ADC's discretion because the legislature could constitutionally grant an agency the power to select from "specific legislatively approved options."²²⁷ The legislature had crafted a more precise set of directives for executions and given ADC a targeted mandate to develop regulations surrounding capital punishment.²²⁸ The court relied on *Baze v. Rees*,²²⁹ to conclude that the amended AMEA did not need to set training and qualifications for execution teams.²³⁰ In *Baze*, inmates contended that inadequate facilities and training created a risk that execution teams would improperly administer thiopental, causing severe pain.²³¹ The Supreme Court relied on the trial court's factual findings that it was easy to follow directions to prepare the drug, and that the execution protocol set qualifications for executioners in concluding that Kentucky's protocol did not risk severe pain.²³² *McGehee*'s willingness to mix Eighth Amendment holdings with separation of powers analyses may be explained by the authoring justice, who had dissented in *Jones* in part because she thought constitutional principles prohibiting cruel and unusual punishments narrowed agency discretion.²³³

The transition from *Jones* to *McGehee* can be explained in part by the amendments to the AMEA, which addressed some of the court's criticisms in *Jones* by setting mandatory standards and more specific criteria for execution protocols.²³⁴ But the *McGehee* dissent contended that identifying classes of drugs alone did not provide reasonable guidelines because of variability in drug onset and length of effect.²³⁵ The *McGehee* majority, by contrast, was more willing to credit agency expertise and resume a majoritarian position in the context of the death penalty and nondelegation.²³⁶

²²⁵ 458 S.W.3d 707 (Ark. 2015).

²²⁶ *Id.* at 718.

²²⁷ *Id.* at 716–17 ("Here, the legislature has afforded reasonable guidelines by limiting the ADC's discretion to barbiturates, rather than permitting the ADC to consider any drug of any class.").

²²⁸ *Id.* at 717.

²²⁹ *Id.* at 718 (citing *Baze v. Rees*, 553 U.S. 35, 45 (2008)).

²³⁰ *McGehee*, 458 S.W.3d at 718 (citing *Hooker v. Parkin*, 357 S.W.2d 534, 538 (Ark. 1962)).

²³¹ *Baze v. Rees*, 553 U.S. 35, 54 (2008).

²³² *Id.* at 54–55.

²³³ See *Hobbs v. Jones*, 412 S.W.3d 844, 861 (Ark. 2012) (Baker, J., dissenting) ("[A]ppellants' discretion is not 'unfettered' because they are at all times bound by the constraints of our federal and state constitutions against cruel and unusual punishment.").

²³⁴ See *supra* note 223 (discussing amendments to the AMEA).

²³⁵ *McGehee*, 458 S.W.3d at 721 (Wynne, J., concurring in part and dissenting in part) ("Ultra-short-acting barbiturates can cause a person to lose consciousness within seconds, while a long-acting barbiturate may take considerably longer to take effect.").

²³⁶ See Berger, *In Search of a Theory of Deference*, *supra* note 14, at 17; Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 413–14 (2009).

B. *Nondelegation Challenges to Method of Execution Statutes*

Ex parte Granviel, decided in 1978, is the earliest case in which an inmate raised a nondelegation claim.²³⁷ Texas's lethal injection statute, enacted in 1977, called for execution by "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead," to be "determined and supervised by the Director of the Department of Corrections."²³⁸ *Granviel* asserted that this broad provision gave the director legislative authority in violation of the Texas Constitution.²³⁹

The Texas Court of Criminal Appeals acknowledged the legislature's responsibility to "declar[e] a policy and fix[] a primary standard" before giving the power to an agency to "establish rules, regulations, or minimum standards reasonably necessary to carry out the expressed purpose of the act."²⁴⁰ It concluded that, by choosing the death penalty, selecting a method and time of execution, and designating someone to set execution procedure, the legislature had sufficiently cabined the director's discretion.²⁴¹ The court afforded significant deference to the legislature's decision to delegate, and the director's presumed expertise in addressing details that the legislature could not "practically or efficiently" do itself.²⁴²

Granviel also connected the regularity of administrative procedures to the question of delegation.²⁴³ Although at that time lethal injection was a brand-new method of execution, the court relied on a vaguely worded affidavit from the director to conclude that his choice of drugs was "informed."²⁴⁴ The director's assertion that he had consulted with "people familiar with lethal substances"²⁴⁵ in making his decision showed his compliance with the "basic principle" of administrative law to "ascertain[] facts to support the final choice of the substance," despite an absence of any real detail on how he had made that choice.²⁴⁶

Granviel became the template for nondelegation claims that followed. Like the *Jones* dissent, courts relied on *Granviel* to conclude nondelegation was not viable.²⁴⁷ For example, in *State v. Osborn*, the Idaho Supreme Court observed,

²³⁷ *Ex parte Granviel*, 561 S.W.2d 503, 507 (Tex. Crim. App. 1978) (en banc).

²³⁸ H.B. No. 945, 65th Gen. Assemb., Reg. Sess. § 1 (Tex. 1977).

²³⁹ *Granviel*, 561 S.W.2d at 514.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 515.

²⁴² *Id.*

²⁴³ *See id.* at 514.

²⁴⁴ *Id.* at 515; *id.* at 507–08 (quoting the complete affidavit); *see also* BANNER, *supra* note 36, at 297.

²⁴⁵ *Granviel*, 561 S.W.2d at 508.

²⁴⁶ *Id.* at 515.

²⁴⁷ *Zink v. Lombardi*, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at *6 (W.D. Mo. Nov. 16, 2012); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308–09 (Cal. Ct. App. 2018); *Sims v. State*, 754 So. 2d 657, 668–69 (Fla. 2000) (per curiam); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *State v. Ellis*, 799 N.W.2d 267, 289, 289 nn.51–52 (Neb. 2011).

“This matter was disposed of in *Ex parte Granviel*,” quoted the opinion at length, and concluded it, too, would assume its director of corrections would behave reasonably without analyzing *Idaho*’s separation of powers doctrine.²⁴⁸

Other jurisdictions, including Florida, Nebraska, California, Arizona, and a federal district court in Missouri, have placed heavy reliance on other nondelegation decisions, although they typically offer more legal analysis than *Osborn*.²⁴⁹ This kind of approach is common in state constitutional law and death penalty jurisprudence. Courts rely on statistics on, *inter alia*, judicial decisions in capital sentencing to show “reliable objective evidence of contemporary values” to evaluate whether a punishment comports with “evolving standards of decency.”²⁵⁰ It can also be seen from courts’ reliance on the Supreme Court’s preemptive approval of the *Baze* three-drug protocol for other states’ execution protocols.²⁵¹ If enough states seem to have adopted a particular method, courts tend to accept it—and an accompanying broad delegation—more readily, without assessing particular agencies’ internal decision-making.²⁵² Eric Berger observes that the use of “state counting” in evaluating the permissibility of execution protocols in *Baze* is “exceedingly deferential” without considering whether “state practices should be probative.”²⁵³

When it comes to evaluating the constitutional scope of legislative delegation to agencies, courts, perhaps wary of imposing countermajoritarian decisions on legislative action, do not consider whether state legislatures’ broad delegations undermine important democratic values and instead rely on numbers.²⁵⁴ Rossi criticizes this approach because courts often fail to address distinctions between other jurisdictions’ governmental and constitutional structure and their own.²⁵⁵ Courts’ reliance on the *Granviel* line of precedent

²⁴⁸ *Osborn*, 631 P.2d at 201.

²⁴⁹ See, e.g., *Zink*, 2012 WL 12828155, at *6–8; *Ellis*, 799 N.W.2d at 289, 289 nn.51–52; *Cook v. State*, 281 P.3d 1053, 1056 n.4 (Ariz. Ct. App. 2012); *Kernan*, 241 Cal. Rptr. 3d at 308–09; *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Sims*, 754 So. 2d at 668–69 (per curiam).

²⁵⁰ *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002); see also *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008); *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977).

²⁵¹ *Baze v. Rees*, 553 U.S. 35, 61 (2008) (“A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.”); see also *Nooner v. Norris*, 594 F.3d 592, 597, 599, 601, 608 (8th Cir. 2010); Berger, *In Search of a Theory of Deference*, *supra* note 14, at 13 (discussing “preemptive deference”).

²⁵² See Berger, *In Search of a Theory of Deference*, *supra* note 14, at 17.

²⁵³ *Id.*

²⁵⁴ See *id.* at 14.

²⁵⁵ See Rossi, *supra* note 118, at 1233 (“In many state cases, separation of powers analysis becomes a counting game—a “me[[]]-tooism”—where a court simply cites the number of state opinions accepting a certain type of statute and the number rejecting it,

leads them to rapidly dismiss *Jones* without assessing if their separation of powers doctrines are more similar to Arkansas or to other states' doctrines.²⁵⁶

In determining whether legislatures have established sufficient policy, most courts conclude that legislatures have complied by adopting the penalty and picking a general method of execution, and occasionally, by identifying the agency or official to create the protocol or carry out the execution.²⁵⁷ One difficulty with this analysis is that courts sometimes conflate one policy decision (whether a particular crime merits the death penalty) with another (the method of execution).

Sims v. Kernan illustrates this problem. The California Court of Appeals suggested that the legislature had spent sufficient time on policy decisions to guide the corrections agency because it had addressed *other* aspects of the death penalty, such as capital trial procedure; the location of death row; allowing the inmate to choose between lethal gas and lethal injection; identifying witnesses; and voluntary physician attendance.²⁵⁸ *Sims* did not clarify how these decisions set standards an agency could use to evaluate whether it had complied with the legislative policy when it selected lethal drugs or gas for executions—or if these enactments could guide agency decision-making about pain.

To overcome this hurdle, courts have relied on state or federal constitutional requirements to constrain agency discretion.²⁵⁹ In *Cook v. State*, the Arizona

usually as support for siding with the majority of states having previously considered the issue.”) (footnote omitted); see also John P. Frank, Book Review, 63 TEX. L. REV. 1339, 1340 (1985) (reviewing *Developments in State Constitutional Law* (Bradley D. McGraw ed., 1985), and *State Supreme Courts: Policymakers in the Federal System* (Mary Cornelia Porter & G. Alan Tarr eds., 1982)).

²⁵⁶ See, e.g., *Zink v. Lombardi*, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at *7 (W.D. Mo. Nov. 16, 2012); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308–9 (Cal. Ct. App. 2018). Only *Zink* evaluated whether Missouri's separation of powers doctrine was consistent with Arkansas's to determine if *Jones* was persuasive. *Id.*

²⁵⁷ See *Zink*, 2012 WL 12828155, at *8 (concluding that Missouri's legislature had established a general policy by identifying the method for executions); *Cook v. State*, 281 P.3d 1053, 1055–56 (Ariz. Ct. App. 2012) (concluding that appointing the Department of Corrections to supervise executions and specifying the method was a sufficient standard to guide the Department); *Kernan*, 241 Cal. Rptr. 3d at 305–06 (identifying the legislative policy as using lethal gas or lethal injection to implement executions); *Diaz v. State*, 945 So. 2d 1136, 1145 (Fla. 2006) (per curiam) (relying on *Sims*); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam) (explaining that the statute “clearly defines the punishment to be imposed” and “makes clear that the legislative purpose is to impose death”); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011) (relying on other jurisdictions' analyses to conclude that the legislature declared a policy and set a “primary standard” by identifying the purpose of the statute, the punishment, and a general means); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc) (explaining that the legislature had sufficiently identified policy by identifying the method and place of execution and which officials set execution protocols and supervised executions).

²⁵⁸ *Kernan*, 241 Cal. Rptr. 3d at 307.

²⁵⁹ See *Cook*, 281 P.3d at 1056; *Kernan*, 241 Cal. Rptr. 3d at 305; see also *Ex parte Granviel*, 561 S.W.2d 503, 513 (Tex. Crim. App. 1978) (en banc) (presuming that the

Court of Appeals explained that the federal Constitution “implicitly guides and limits the Department’s discretion” because the Department’s protocols had to comply with a constitutional requirement that execution protocols avoid a substantial risk of serious harm, pain, and suffering.²⁶⁰ This conclusion is questionable. Legislative enactments may not violate constitutions and agencies are *already* required to comply with constitutional limitations on punishment in conducting executions.²⁶¹ Therefore a reliance on constitutional restrictions does not meaningfully limit the discretion legislators confer on agencies.²⁶²

In rejecting nondelegation arguments, courts also rely on the argument that agencies, not legislatures, are better equipped to develop execution protocols.²⁶³ Courts may emphasize the technical nature of execution protocols and the need for continuous decision-making.²⁶⁴ *Cook* asserted that it was “impracticable” for the legislature to create a protocol, pointing to Arizona’s execution protocols, which “span[] 35 pages” and set procedures for a thirty-five day period leading up to the execution and the execution that required coordination with multiple government agencies, law enforcement, and the media.²⁶⁵ These analyses assume that corrections agencies have the requisite expertise to make these determinations.²⁶⁶ Deference to presumed agency expertise in a separation of powers analysis muddies the distinction between constitutionally permissible delegation and administrative competence.²⁶⁷ This deference is also often misplaced. As discussed *infra*, agencies often develop protocols without medical expertise or rely on other states’ protocols without engaging in their own fact-finding.²⁶⁸

Director of the Department of Corrections will comply with constitutional requirements in selecting the drugs to be used in lethal injection).

²⁶⁰ *Cook*, 281 P.3d at 1056 (citing *Dickens v. Brewer*, 631 F.3d 1139, 1144 (9th Cir. 2011)).

²⁶¹ See *Baze v. Rees*, 553 U.S. 35, 38–39 (2008).

²⁶² See *infra* notes 393–426 and accompanying text.

²⁶³ See, e.g., *Zink v. Lombardi*, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at *8 (W.D. Mo. Nov. 16, 2012); *Kernan*, 241 Cal. Rptr. 3d at 307; *Granviel*, 561 S.W.2d at 515; *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011).

²⁶⁴ *Ellis*, 799 N.W.2d at 289.

²⁶⁵ *Cook*, 281 P.3d at 1056 (“It contains detailed instructions on the various chemicals to be used, how they should be administered by Department personnel, and how the execution will be supervised and regulated.”).

²⁶⁶ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 38; Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 969 (1999).

²⁶⁷ Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2057–58 (2011) (asserting that agencies should not receive deference in constitutional inquiries when they operate outside “[a]dministrative law norms”).

²⁶⁸ See *Baze v. Rees*, 553 U.S. 35, 75 (2008) (Stevens, J., concurring) (concluding that protocols are a product of “‘administrative convenience’ . . . rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion”); see also *infra* Part V.B.

Departments of corrections also receive a presumption that the discretion accompanying broad delegation will not lead to arbitrary decision-making.²⁶⁹ Courts' reliance on the existence of procedural safeguards to approve delegation is jarringly inconsistent with reality. Many jurisdictions exempt their execution protocols, or even their department of corrections, from state administrative procedure rules.²⁷⁰ This, as Berger points out, increases the risk that "the officials in charge of the procedure will throw something together haphazardly and without serious reflection on the constitutional issues."²⁷¹ Prisoners have argued that the absence of policy and lack of administrative procedure give agencies unconstitutionally broad discretion, to little avail.²⁷² The Washington Supreme Court acknowledged the importance of adequate procedural safeguards for constitutional legislative delegation in criminal contexts: promulgating rules pursuant to Washington's APA that include either an appeal process before the agency or judicial review, and the "procedural safeguards normally available to a criminal defendant remain."²⁷³

Despite the fact that Washington's Department of Corrections was exempt from the state APA, the court concluded that procedural safeguards for promulgating execution protocols were met because prisoners could seek

²⁶⁹ See *State v. Deputy*, 644 A.2d 411, 420 (Del. Super. Ct. 1994), *aff'd*, 648 A.2d 423 (Del. 1994) (presuming that the Department of Corrections will properly perform its duties); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981) ("[W]e will not assume that the director of the department of corrections will act in other than a reasonable manner."); *Ex Parte Granviel*, 561 S.W.2d 503, 513, 515 (Tex. Crim. App. 1978) (en banc) (rejecting the presumption that the Director of the Department of Corrections will act in an "arbitrary" manner).

²⁷⁰ See, e.g., CAL. PENAL CODE § 3604.1(a) (West 2020) ("The Administrative Procedure Act shall not apply to standards, procedures, or regulations promulgated pursuant to Section 3604."); N.C. GEN. STAT. ANN. § 150B-1(d)(6) (West 2020); VA. CODE ANN. § 2.2-4002(B)(9) (West 2020) (exempting agency action relating to "[i]nmates of prisons or other such facilities or parolees therefrom"); WASH. REV. CODE ANN. § 34.05.030(1)(c) (West 2020) (state APA does not apply to the department of corrections with respect to persons in the department's custody or subject to their jurisdictions); *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 142 (D.C. Cir. 2020) (Rao, J., concurring); *Hill v. Owens*, 738 S.E.2d 56, 59–60 (Ga. 2013); *Conner v. N.C. Council of State*, 716 S.E.2d 836, 845–46 (N.C. 2011) (holding that the Council of State's approval of North Carolina's lethal injection protocol is not subject to the APA); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311–12 (Tenn. 2005) (state corrections department does not have to adopt lethal injection protocol consistently with Tennessee APA); *Porter v. Commonwealth*, 661 S.E.2d 415, 432–33 (Va. 2008). Other courts have held that administrative procedures apply when promulgating execution protocols, but these are the exception, rather than the norm. See *Bowling v. Ky. Dep't of Corr.*, 301 S.W.3d 478, 488 (Ky. 2009); *Evans v. State*, 914 A.2d 25, 34 (Md. 2006).

²⁷¹ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 60.

²⁷² See *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Granviel*, 561 S.W.2d at 515; *Brown v. Vail*, 237 P.3d 263, 269–70 (Wash. 2010) (en banc); see also Coglianese, *supra* note 120, at 1868 (explaining that compliance with administrative procedure may be a component of nondelegation inquiries per *Schechter Poultry*).

²⁷³ *Brown*, 237 P.3d at 270.

judicial review through lawsuits challenging execution methods and because the prisoners had received constitutional process during their trial and death sentence.²⁷⁴ Procedural safeguards attached to criminal convictions bear limited relevance to procedural processes in creating execution policies. Reliance on judicial review is problematic because it reinforces legislative abdication.

Franklin Zimring and Gordon Hawkins have demonstrated that the availability of engaged judicial review in capital punishment post-*Gregg* allowed state legislatures to pass responsibility to the judiciary, and once the trend had shifted, “traditional mechanisms of restraint had been literally abandoned.”²⁷⁵ Courts retain some of the burden that legislators have handed over. In *Diaz v. State*, the Florida Supreme Court brushed aside criticisms that the Department of Corrections was exempt from Florida’s APA. “In light of the exigencies inherent in the execution process,” the court explained, judicial review was “preferable” to administrative review.²⁷⁶ In other words, the judiciary would limit the Department’s authority, therefore the discretion the legislature had granted was within constitutional bounds.²⁷⁷

But agencies’ wide discretion may interfere with judicial review. In addition to their unsuccessful nondelegation claim, Arizona prisoners argued in *Cook* that the unlimited authority of the Arizona Department of Corrections to set and revise execution protocols interfered with the judicial branch and violated the separation of powers doctrine.²⁷⁸ The Department repeatedly changed its execution protocols shortly before carrying out executions—in one case, *eighteen hours* before a scheduled execution.²⁷⁹ The Arizona Court of Appeals “agree[d]” that the Department’s recent habit of swapping protocols “at the last minute raise[d] constitutional concerns, as well as a separation of powers concern under the Arizona Constitution” by “threaten[ing] to prevent meaningful judicial review.”²⁸⁰ Shifting execution protocols left courts to address complex, fact-intensive constitutional questions in a short period of time, potentially obstructing judicial review and interfering with the duties of the judicial branch.²⁸¹

²⁷⁴ *Id.*

²⁷⁵ FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 100 (1986).

²⁷⁶ *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam).

²⁷⁷ See *id.* at 1143–44; see also Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1356–57 (2008).

²⁷⁸ *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012).

²⁷⁹ *Lopez v. Brewer*, 680 F.3d 1068, 1070–71 (9th Cir. 2012); *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012); *Cook*, 281 P.3d at 1056–57 (citing, *inter alia*, Order, *State v. Beaty*, No. CR-85-0211-AP/PC (Ariz. May 25, 2011)).

²⁸⁰ *Cook*, 281 P.3d at 1057 (footnote omitted). Last minute protocol changes “raised serious concerns under the Eighth Amendment’s prohibition of cruel and unusual punishment,” the Equal Protection Clause of the Fourteenth Amendment, as well as that Amendment’s “guarantee of an inmate’s right to in-person visits with counsel . . .” *Id.* at 1057 n.5.

²⁸¹ *Id.* at 1058.

The court ultimately concluded that, although the Department was on thin ice, it “ha[d] not yet violated the Arizona Constitution’s separation of powers doctrine” because courts could provide review (even if rushed).²⁸² The court also assumed the Department’s new protocol, which required seven days’ written notice to the inmate identifying which lethal injection drugs the Department would use in an execution, would solve the problem.²⁸³ Although seven days was “relatively short,” it improved upon the one or two days’ notice the Department had provided in the past.²⁸⁴ The protocol provided that the director of the Department could deviate from the protocols at his or her discretion at any time, likely prompting the court’s warning that if the Department continued its practices in a way that interfered with judicial review, the court might reconsider its holding.²⁸⁵

Courts also appear reluctant to address nondelegation challenges in part because of their novelty. In *Sims v. State*, the Florida Supreme Court rejected a nondelegation challenge to Florida’s lethal-injection statute in part because the previous version of the statute authorizing electrocution as the method of execution had not identified “the precise means, manner or amount of voltage to be applied.”²⁸⁶ Although there are instances in which electrocution statutes may permit delegation challenges,²⁸⁷ the court did not consider significant differences between the two methods of execution. The task of selecting drugs for executions, a quasi-medical procedure, carries significantly more discretion and involves different decision-making processes and factual inquiries than electrocution.

It is certainly possible that the subject matter tilts courts’ decisions—courts that tend to uphold death sentences may be more reticent to apply their states’ nondelegation doctrines or more willing to tolerate broad delegation.²⁸⁸ Florida and Texas, for example, are death penalty strongholds.²⁸⁹ Of course, so is

²⁸² *Id.*

²⁸³ *Id.* (explaining that new notice requirements, “if implemented by the Department, should help ensure meaningful judicial review . . .”).

²⁸⁴ *Id.* at 1058.

²⁸⁵ *Id.*

²⁸⁶ *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam).

²⁸⁷ See Denno, *When Legislatures Delegate Death*, *supra* note 14, at 88 (discussing rulings that Nebraska’s electrocution execution protocols appeared to violate state law).

²⁸⁸ See Dan Levine & Kristina Cooke, *In States with Elected High Court Judges, a Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015), <https://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/> [<https://perma.cc/3DEA-ABCS>].

²⁸⁹ See GARRETT, *END OF ITS ROPE*, *supra* note 3, at 138–39 (discussing geographic use of the death penalty); JON SORESENSEN & ROCKY LEANN PILGRIM, *LETHAL INJECTION: CAPITAL PUNISHMENT IN TEXAS DURING THE MODERN ERA* 16 (2006) (stating that Texas sentenced 925 people to death between 1973 and 2002); *id.* at 18–19 (discussing Texas’s capital punishment system).

Arkansas, rendering *Jones* a particularly intriguing deviation.²⁹⁰ *Jones* embraced a formalist perspective on separation of powers in holding that the legislature had to do more to curb agency discretion in creating execution protocols.²⁹¹ Formalism, or strong nondelegation approaches, evince majoritarian values, favoring legislative power by insisting that elected officials make difficult policy determinations.²⁹² Thus, requiring the Arkansas General Assembly to select the applicable classes of lethal injection drugs forced the legislature to engage more transparently with a fraught and controversial policy issue.²⁹³

Functionalist, weak, or moderate approaches are also majoritarian because a “deferential approach leaves the bulk of the responsibility for structural design to the elected departments of government.”²⁹⁴ Some scholars contend that agencies are accountable and transparent due to their processes,²⁹⁵ but the secrecy and absence of administrative constraints on corrections agencies undercuts those arguments in the capital-sentencing context. *Cook* illustrates this problem quite precisely: agency flexibility created a substantial risk of interference with the judiciary’s ability to carry out its duties.²⁹⁶

The separation of powers serves important functions in our system of government. Allowing agencies to take up the task of making important policy decisions without adequate legislative guidance, such as how the state will kill those it has deemed unworthy of living, destabilizes those values. The lack of legislative accountability and agency transparency undermines perceptions of legitimacy of the punishment. Relevant administrative law norms heighten the problem of broad delegation: agencies often lack expertise in crafting protocols, they rely on other jurisdictions, and are exempt from many procedural safeguards.

V. NONDELEGATING DEATH

As the previous parts of this Article have illustrated, delegating responsibility is a central part of the history of the American death penalty, current method of execution statutes, administrative protocols, and judicial

²⁹⁰ Between 1973 and 2002, Arkansas sentenced ninety-nine people to death. See SORENSON & PILGRIM, *supra* note 293, at 16; see also LIFTON & MITCHELL, *supra* note 69, at 100–01; SARAT, GRUESOME SPECTACLES, *supra* note 38, at 130–36.

²⁹¹ See *supra* Part IV.A; see also Brown, *supra* note 115, at 1523–25.

²⁹² Berger, *In Search of a Theory of Deference*, *supra* note 14, at 38; Brown, *supra* note 115, at 1526.

²⁹³ See Murphy, *supra* note 10, at 837–39.

²⁹⁴ Brown, *supra* note 115, at 1528–29.

²⁹⁵ See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1957 (2008); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1018 (2000); see also Berger, *In Search of a Theory of Deference*, *supra* note 14, at 43–44.

²⁹⁶ See *Cook v. State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012).

decision-making. Legislatures may initiate the process of broad delegation, but the system of capital punishment is sustainable in part because of continued delegation across juries, judges, departments of corrections, officials, executioners, and the public.²⁹⁷

This Part explores the flaws in legislative delegations as well as courts' analyses of the problem of delegating death. It contends that the nondelegation doctrine offers important considerations such as accountability, transparency, and legitimacy in governance to evaluate capital punishment. It evaluates common problems in judicial review of nondelegation questions in capital punishment, particularly deference to agency expertise. This Part concludes by arguing that legislatures should not be allowed to delegate this significant policy choice and frames out a more robust nondelegation analysis for evaluating method of execution statutes.

A. *Why Nondelegation?*

This Article does not propose that legislatures should write exhaustive execution protocols addressing every possible contingency.²⁹⁸ Some delegation is inevitable and necessary in modern governance.²⁹⁹ Harold Bruff observes that courts struggle with applying the nondelegation doctrine “because no one has successfully articulated neutral principles for deciding how specific a particular delegation should have to be.”³⁰⁰ But, as Justice Gorsuch pointed out in *Gundy*, the Supreme Court has not entirely “abandoned the business of policing improper legislative delegations[,]” but instead applied other doctrines to “rein

²⁹⁷ See BESSLER, *KISS OF DEATH*, *supra* note 77, at 119 (“Only because responsibility for executions is spread so diffusely among the various actors in the criminal justice system do judges and jurors feel permission to disavow responsibility for the sentences they impose.”); LIFTON & MITCHELL, *supra* note 69, at 81–83; Dubber, *supra* note 14, at 547 (discussing the “distribution of responsibility” that is “crucial to the American system of capital punishment”).

²⁹⁸ See BRUFF, *supra* note 121, at 140 (“The courts are properly reluctant to employ the doctrine vigorously, because it involves a constitutional decision that overrides a congressional judgment regarding the amount of discretion that should be accorded to the executive in a particular context.”).

²⁹⁹ See *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); see also BRUFF, *supra* note 121, at 140 (discussing the difficulties inherent in a “revived” and robust delegation doctrine); Madison, *supra* note 113, at 246 (discussing that the “legislative, executive, and judiciary departments are by no means totally separate and distinct from each other”); Araiza, *supra* note 117, at 236–37; Cass, *supra* note 120, at 155–58 (discussing delegations of authority in early America).

³⁰⁰ See BRUFF, *supra* note 121, at 140; see also *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) (“[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”); Cass, *supra* note 120, at 181 (“The harder question is the line-drawing question: how do courts distinguish impermissible delegations of legislative power from permitted assignments of legal authority?”); Sunstein, *Nondelegation Canons*, *supra* note 121, at 326–27.

in Congress's efforts to delegate legislative power"³⁰¹ Courts can, and do, keep the balance between legislative and executive power.³⁰² Unconstrained discretion upsets the balance, especially in criminal and capital punishment. Legislative accountability was a significant concern in *Furman* and the reshaping of the American death penalty.³⁰³ The breadth of agencies' discretion to create execution protocols without real legislative guidance is another aspect of the overarching problem of accountability and decision-making in capital punishment.

Rachel Barkow has argued for "criminal law exceptionalism" in separation of powers jurisprudence.³⁰⁴ Her work demonstrates the historical and constitutional underpinnings that support an argument for strict separation of powers in criminal law, including the division of functions in the criminal law among each branch.³⁰⁵ The Framers favored limiting power to prevent abuse of criminal process through the separation of powers.³⁰⁶ Death penalty exceptionalism exists in criminal and constitutional law because "death is a punishment different from all other sanctions in kind rather than degree."³⁰⁷ The state's authority to impose criminal penalties arises from the power the people invested in it. The state's authority to kill flows from the same source. Narrowing a jury's discretion is necessary to ensure that sentences are proportional to the offense.³⁰⁸ Constraining agency discretion ensures that the proper parties are making the right decisions with the right process.³⁰⁹ Without

³⁰¹ *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting); *see also supra* note 120 and accompanying text.

³⁰² *See Gundy*, 139 S. Ct. at 2135–38 (Gorsuch, J., dissenting).

³⁰³ *See Furman v. Georgia*, 408 U.S. 238, 255–57 (1972) (Douglas, J., concurring); *id.* at 309–10 (Potter, J., concurring); *id.* at 313–14 (White, J., concurring); *see also* *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) ("North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences."); BANNER, *supra* note 36, at 261–64 (discussing *Furman v. Georgia*). These schemes do not resolve the problem of extreme discretion—they merely shift it elsewhere. *See* BANNER, *supra* note 36, at 273 (discussing the NAACP Legal Defense Fund's briefs in *Gregg v. Georgia*); GARRETT, *END OF ITS ROPE*, *supra* note 3, at 137–40 (discussing geographic disparity in the death penalty due in part to prosecutorial discretion).

³⁰⁴ Barkow, *Separation of Powers*, *supra* note 137, at 1012.

³⁰⁵ *Id.* at 1012–17.

³⁰⁶ *Id.* at 1017; *see* Hessick & Hessick, *supra* note 172, at 25–26.

³⁰⁷ *Woodson*, 428 U.S. at 303–04; *see also Furman*, 408 U.S. at 286–89 (Brennan, J., concurring).

³⁰⁸ *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

³⁰⁹ *See* Sunstein, *Nondelegation Canons*, *supra* note 121, at 339 (explaining that the "link" between "individual rights and interests" and "institutional design" is preserved

proper constraints at the different points of the capital-punishment process, there is a risk of arbitrarily imposed death sentences,³¹⁰ or arbitrarily selected methods of execution.

Unconstrained agency discretion in the context of figuring out a method of execution implicates three primary problems associated with separation of powers: accountability, transparency, and the perception of legitimacy.³¹¹ Accountability addresses *who* is responsible for making decisions and who receives the credit (or blame).³¹² Transparency relates to preserving democratic values and inmates' access to judicial review. A lack of transparency and unlimited agency discretion in decisions about punishment and killing undermines the legitimacy of government action.³¹³

Accountability is a central value in the legitimacy of criminal punishment, sentencing practices, and the state's power to kill.³¹⁴ As David Schoenbrod points out, delegating allows legislators to claim the credit for purported benefits for a statute and evade blame for burdens or negative consequences.³¹⁵ By authorizing the death penalty, legislators can claim to be tough on crime and then blame the agency for flaws in administering penalty,³¹⁶ or leave the mess

through "a requirement that certain controversial or unusual actions will occur only with respect for the institutional safeguards introduced through the design of Congress").

³¹⁰ But see GARRETT, *END OF ITS ROPE*, *supra* note 3, at 138–54; Jordan M. Steiker, *The Role of Constitutional Facts and Social Science Research in Capital Litigation: Is "Proof" of Arbitrariness or Inaccuracy Relevant to the Constitutional Regulation of the American Death Penalty?*, in *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 23, 23–46 (Charles S. Lanier et al. eds., 2009).

³¹¹ See *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (explaining that changing regulations across administrations implicates fair notice and SORNA allowed Congress to "claim credit" for dealing with sex offenders while letting the Attorney General address a complicated problem); SCHOENBROD, *supra* note 118, at 14–19; Whittington & Iuliano, *The Myth of the Nondelegation Doctrine*, *supra* note 122, at 412.

³¹² See Hessick & Hessick, *supra* note 172, at 29–30; Sunstein, *Nondelegation Canons*, *supra* note 121, at 319–20.

³¹³ See Barkow, *Ascent of the Administrative State*, *supra* note 277, at 1336.

³¹⁴ See Andrea Roth, "Spit and Acquit": Prosecutors as Surveillance Entrepreneurs, 107 CALIF. L. REV. 405, 447 (2019) (discussing accountability and legitimacy). Roth emphasizes that accountability also reflects democratic values and community norms. "A practice is more likely to reflect community norms if the community has a chance to debate the practice and, if the practice does not meet its ostensible policy goals, to lobby to change or discontinue it." *Id.*

³¹⁵ SCHOENBROD, *supra* note 118, at 10.

³¹⁶ See *id.* at 14 ("Delegation thus allows members of Congress to function as ministers rather than legislators; they express popular aspirations and tend to their flocks rather than make hard choices."); see also Barkow, *Separation of Powers*, *supra* note 137, at 1030–31 (discussing why "the political system is biased in favor of more severe punishments"); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1155 (2008) (discussing the benefits legislators accrue by creating overbroad criminal statutes).

to courts to sort out.³¹⁷ Individuals convicted of capital offenses are a “politically unpopular minority,”³¹⁸ and legislators have little to lose and much to gain by supporting the death penalty, even if its use is infrequent, arbitrary, and riddled with error. Legislatures receive political capital for authorizing the death penalty and accordingly should be accountable for that decision and the inevitable consequences.³¹⁹ To the extent that legislators reevaluate the death penalty and alter a method of execution statute, they do so more frequently, as Deborah Denno argues, “to stay one step ahead of a looming constitutional challenge to that method because the acceptability of the death penalty process itself therefore becomes jeopardized.”³²⁰ Legislative enactments on capital punishment focus on continuing executions by preserving secrecy, accessing tools or drugs for executions, and avoiding litigation, rather than humanitarian and constitutional concerns.³²¹

Broad delegation interferes with transparency and access to justice.³²² Hugo Bedau observes that, due to the secrecy surrounding executions, “the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal.”³²³ Secrecy and unconstrained discretion contribute to delays in litigation and repeat litigation. Justice Sotomayor’s dissent in *Bucklew v. Precythe*,³²⁴ refuted the majority opinion’s complaints about litigation delays by pointedly observing that secrecy

³¹⁷ See ZIMRING & HAWKINS, *supra* note 275, at 100 (discussing state legislatures’ freedom to pass “symbolic legislation” and evade responsibility).

³¹⁸ *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (noting that sex offenders are a “politically unpopular minority” and Congress could evade the difficult question of what to do under SORNA by passing responsibility to the Attorney General); see also Barkow, *Separation of Powers*, *supra* note 137, at 1029–31; Berger, *In Search of a Theory of Deference*, *supra* note 14, at 61; Corinna Lain, *Deciding Death*, 57 DUKE L.J. 1, 4 (2007).

³¹⁹ See ZIMRING & HAWKINS, *supra* note 275, at 100; Cass, *supra* note 120, at 154 (discussing political benefits to legislators).

³²⁰ Denno, *When Legislatures Delegate Death*, *supra* note 14, at 65.

³²¹ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 87–88 (discussing Florida’s shift to lethal injection); *id.* at 118–20 (discussing the optics of lethal injection); Deborah W. Denno, *The Lethal Injection Quandary*, *supra* note 27, at 116 (2007); Denno, *When Legislatures Delegate Death*, *supra* note 14, at 125; see also Interim Report No. 14 at 4, In the Matter of the Multicounty Grand Jury, State of Okla., Nos. SCAD-2014-70, GJ-2014-1 (May 19, 2016), <https://files.deathpenaltyinfo.org/legacy/files/pdf/MCGJ-Interim-Report-5-19-16.pdf> [<https://perma.cc/7G2Q-HKN7>] [hereinafter Interim Multicounty Grand Jury Report] (explaining that the Department of Corrections revised its execution protocols after “complications” arising from Clayton Lockett’s execution).

³²² See Berger, *Individual Rights*, *supra* note 267, at 2065–66 (explaining the importance of transparency in judicial review of administrative decision-making); Hessick & Hessick, *supra* note 172, at 34–36 (discussing how delegation exacerbates the “fiction” of “notice to the public of their legal obligations”).

³²³ THE DEATH PENALTY IN AMERICA 14 (Hugo Adam Bedau, 3d ed. 1982).

³²⁴ See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1145–48 (2019) (Sotomayor J., dissenting).

surrounding execution protocols and changes to protocols (due in no small part to agency discretion) leave inmates often unable to challenge protocols or decisions about executions until close in time to executions.³²⁵ *Cook* illustrates this point: the Arizona Department of Corrections' discretion to make last-minute revisions to execution protocols threatened "to 'usurp the powers,' of the Judiciary" by undermining its ability to engage in judicial review.³²⁶ Part of the challenges of rapid judicial review may stem from courts' unwillingness to stay executions, but altering protocols immediately before execution or during litigation unquestionably impacts judicial review, particularly when agencies are not constrained by procedural or fact-finding requirements.

Excessive delegation and limited accountability and transparency undermine the perception of the legitimacy of the death penalty. Delegation "is closely connected both with the rule of law concept and the theory of representative government."³²⁷ Requiring legislation to have defining standards "serves the function of ensuring that fundamental policy decisions will be made, not by some appointed bureaucrats, but by the elected representatives of the people."³²⁸ Ronald Cass emphasizes that the question of legitimacy "goes beyond Locke's declaration that the people have not consented to a grant of legislative power to others."³²⁹ Instead, Cass contends that legitimacy is linked to concerns about accountability: legislators benefit from granting power to others, and that self-interest undermines legitimacy.³³⁰ Legislative enactments, as opposed to agency determinations, may better reflect democratic, as opposed to purely majoritarian, decision-making.³³¹

To be sure, courts have emphasized that the Executive is directly accountable to the people, and so that branch can reasonably make policy determinations to "resolve the competing interests which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."³³² But majoritarian reasoning ignores the plight of politically unpopular groups.³³³ Delegating to administrative agencies the task of crafting execution protocols

³²⁵ See *id.* at 1147–48 (Sotomayor, J., dissenting); see also generally KONRAD, *supra* note 24.

³²⁶ *Cook v. State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012); see also *supra* notes 277–84 and accompanying text (discussing *Cook*).

³²⁷ Schwartz, *supra* note 120, at 445; Sunstein, *Nondelegation Canons*, *supra* note 121, at 320.

³²⁸ Schwartz, *supra* note 120, at 445.

³²⁹ Cass, *supra* note 120, at 153 (citing JOHN LOCKE, *Second Treatise of Government* § 141, in *TWO TREATISES OF GOVERNMENT* 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)); see *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

³³⁰ See Cass, *supra* note 120, at 153–55.

³³¹ See SCHOENBROD, *supra* note 118, at 110; Berger, *In Search of a Theory of Deference*, *supra* note 14, at 43; Schwartz, *supra* note 120, at 445.

³³² *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

³³³ See SCHOENBROD, *supra* note 118, at 110–12.

without legislative oversight or supervision undermines the legitimacy of the punishment because secrecy and unconstrained discretion blur the lines between legislative and executive power and eliminate checks on the exercise of power.³³⁴ These harms stretch beyond the potential for cruelty and suffering in administration of the death penalty—they also threaten the democratic process.

Although judicial enforcement via the nondelegation doctrine may magnify the role of the judiciary, that branch has taken on an outsized role in part because of legislative delegation and secrecy. The next part evaluates key aspects of judicial inquiry into agency discretion to demonstrate why a more robust nondelegation inquiry into legislative delegation in method of execution statutes is necessary.

B. Agency Expertise and Limits on Discretion

Judicial review in nondelegation cases reveals unwarranted reliance on agency expertise and willingness to gloss over existing separation of powers principles. Courts tend to place too much reliance on the legislative decision to adopt the death penalty, as well as a general choice of a method of execution.³³⁵ In *Sims v. Kernan*, the California Court of Appeals relied substantially on legislative enactments unrelated to carrying out the death penalty to conclude there was a sufficient policy.³³⁶ The court described agency protocols as “subsidiary decisions” to the choice to impose the death penalty and the method, rejecting litigants’ arguments that legislative policy should at a minimum include decisions about “pain, speed, reliability, and transparency.”³³⁷ California’s separation of powers jurisprudence dictated that the legislative body’s representative nature required it to settle contested policy matters and crucial issues when it had the “time, information, and competence” to do so.³³⁸ The court did not disagree that the legislature could make those evaluations, but concluded that lethal injection drug shortages justified institutional flexibility, and the Department of Corrections would be in the “best position” to adjust protocols in response to “lessons learned” from botched executions nationally.³³⁹

This sort of reasoning misses the mark. The legislative decision to authorize capital punishment is a separate policy judgment from how a sentence shall be carried out, and both are legislative decisions. The death penalty, capital trial procedure, or the location of death row do not set out factual inquiries for agencies developing execution protocols to resolve or criteria to evaluate against

³³⁴ See Barkow, *Separation of Powers*, *supra* note 137, at 1023–24.

³³⁵ See Denno, *When Legislatures Delegate Death*, *supra* note 14, at 70–71.

³³⁶ *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 303, 306 (Cal. Ct. App. 2018); *see supra* notes 257–58 and accompanying text.

³³⁷ *Kernan*, 241 Cal. Rptr. 3d at 306.

³³⁸ *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 627 (Cal. 1974).

³³⁹ *Kernan*, 241 Cal. Rptr. 3d at 307.

facts the agency must consider.³⁴⁰ Capital trial procedures do not resolve procedural concerns about how execution protocols are developed.³⁴¹ Generalized legislative statements about the goals of capital punishment do not provide clear standards.³⁴² These are inadequate substitutes for legislative specificity, factual inquiry, and administrative procedures and guidance.³⁴³

Merely selecting a generic method of execution like lethal injection or lethal gas may not offer sufficient guidance to an agency that develops protocols. “Substance or substances in a lethal quantity sufficient to cause death”³⁴⁴ or “lethal gas” encompass a range of gases and drugs that have varying effects on the human body ranging from swift, slow, possibly painless, or excruciating deaths.³⁴⁵ These methods carry substantial room for discretion and significant potential for arbitrary action if agencies lack policy guidance or criteria from the legislature. Generally worded statutes make it difficult to evaluate whether the agency has complied with the legislature’s directive because it may not be clear what the directive is other than ensuring that the condemned inmate dies.

A weaker approach to nondelegation preserves agency flexibility to respond to developing situations. The Oklahoma legislators who drafted the first lethal injection statute kept “the statutory language vague in order to accommodate the development of new and better drug technologies in the future.”³⁴⁶ The legislators did not include any oversight or specifications and the result was to “delegate ‘to Oklahoma prison officials all critical decisions regarding the implementation of lethal injection.’”³⁴⁷ But building this discretion into the system incentivizes agencies to imitate without engaging in fact-finding or assessments of whether another state’s protocols are actually effective. When Oklahoma sought more recently to revise its protocols following Clayton Lockett’s botched execution in 2014, the director of the Department of Corrections “asked administration members to obtain public[ly] available execution policies from other states, including Arizona, Florida, and Texas, identify these states’ policies, and merge their best and most efficient practices into the Department’s new Execution Protocol.”³⁴⁸

Agency competence is a distinct but interrelated issue from nondelegation because courts substantially rely on agencies’ presumed expertise and position

³⁴⁰ See *Gundy v. United States*, 139 S. Ct 2116, 2141 (2019) (Gorsuch, J., dissenting).

³⁴¹ See *id.* at 2132; see also *Hobbs v. Jones*, 412 S.W.3d 844, 854 (Ark. 2012). But see *Kernan*, 241 Cal. Rptr. 3d at 307; *Brown v. Vail*, 237 P.3d 263, 270 (Wash. 2010) (en banc).

³⁴² See *Araiza*, *supra* note 117, at 236 (“If one accepts such statements as furnishing principles governing every delegation of power the statute accomplishes, then either nearly every statute necessarily satisfies this supposedly-strengthened non-delegation review or we are thrown back into the subjective ‘how intelligible does the principle have to be?’ inquiry.”).

³⁴³ Cf. *Kernan*, 241 Cal. Rptr. 3d at 307; *Brown*, 237 P.3d at 269 (en banc).

³⁴⁴ E.g., TEX. CODE CRIM. PROC. ANN. art. 43.14(a) (West 2019).

³⁴⁵ E.g., CAL. PENAL CODE § 3604(a) (West 2020).

³⁴⁶ SARAT, GRUESOME SPECTACLES, *supra* note 38, at 117.

³⁴⁷ *Id.*

³⁴⁸ Interim Multicounty Grand Jury Report, *supra* note 321, at 5.

in upholding broad legislative delegations.³⁴⁹ This inquiry misses a key step in the analysis—whether the agency actually has the expertise. Denno has demonstrated that the officials who develop execution protocols frequently lack technical or medical expertise.³⁵⁰ This may be due to concerns over the ethics of medical involvement in executions.³⁵¹ Execution methods are not subjected to medical or scientific study before their implementation and may be held to lower standards than those used in animal euthanasia.³⁵² The prevalence of botched executions lends substantial support to the argument that there are deficiencies in agencies' procedures. Austin Sarat estimates that 7.12% of lethal-injection executions have been botched, lending substantial support to critiques of execution procedures.³⁵³ This may be, as Denno has explained, "partly attributable to the dearth of written procedures provided to the executioners concerning how to perform an execution."³⁵⁴ Other factors in botched executions may include inadequate training in administering drugs or inserting IVs, particularly for individuals who are in poor health, are obese, or have a history of drug abuse,³⁵⁵ as well as flaws in the drugs used.³⁵⁶

Agencies' attempts to shift responsibility through the "discrete task" approach discussed *supra*, may also lend itself to errors.³⁵⁷ Oklahoma's

³⁴⁹ See *supra* notes 262–67 and accompanying text.

³⁵⁰ Denno, *Lethal Injection Chaos Post-Baze*, *supra* note 27, at 1335; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 112, 112 n.345; see Denno, *The Lethal Injection Quandary*, *supra* note 27, at 116.

³⁵¹ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 119–20; Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 48 (2009); Denno, *The Lethal Injection Quandary*, *supra* note 27, at 113–14; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 90–91, 91 nn.174–75, 112–14, 112–14 nn.349–53.

³⁵² Denno, *When Legislatures Delegate Death*, *supra* note 14, at 86; see also Brief of Sixteen Professors of Pharmacology as Amici Curiae in Support of Neither Party, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955) (discussing the use of midazolam as an anesthetic in executions).

³⁵³ SARAT, GRUESOME SPECTACLES, *supra* note 38, at 177 (Appendix A). Between 1980 and 2010, states botched 17.33% of electrocutions. *Id.*

³⁵⁴ Denno, *When Legislatures Delegate Death*, *supra* note 14, at 111–12.

³⁵⁵ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 136; Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), <https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida> [<https://perma.cc/6BNA-S4TT>]; Bernard E. Harcourt, *The Barbarism of Alabama's Botched Executions*, N.Y. REV. BOOKS (Mar. 13, 2018), <https://www.nybooks.com/daily/2018/03/13/the-barbarism-of-alabamas-botched-execution/> [<https://perma.cc/YTA6-9LB8>]; Lynn Waddell & Abby Goodnough, *Florida Executioner Says Procedures Were Followed*, N.Y. TIMES (Feb. 20, 2007), <https://www.nytimes.com/2007/02/20/us/20death.html> [<https://perma.cc/7KV6-DAVE>] (discussing testimony from Florida's execution team in the botched execution of Angel Diaz); see also *Morales v. Tilton*, 465 F. Supp. 2d 972, 979–80 (N.D. Cal. 2006).

³⁵⁶ See Jon Yorke, *Comity, Finality, and Oklahoma's Lethal Injection Protocol*, 69 OKLA. L. REV. 545, 578–86 (2017); Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 926–29 (2008).

³⁵⁷ See *supra* notes 91–106 and accompanying text.

revisions to its execution protocols did not prevent errors in Charles Warner's execution or Richard Glossip's scheduled execution.³⁵⁸ The Interim Grand Jury Report presents a disturbing picture of inattention to detail. The Warner execution team overlooked that they were using the wrong drug—potassium acetate, instead of potassium chloride.³⁵⁹ None could explain how it happened other than that they assumed someone else had approved it, or that they “dropped the ball.”³⁶⁰

Baze's prospective approval of lethal injection protocols only encourages this majoritarian approach in death, delegation, and deference.³⁶¹ *Baze* warned against interfering with state legislatures' roles in determining execution procedures, particularly because states act “with an earnest desire to provide for a progressively more humane manner of death.”³⁶² The difficulty with this assertion is that agencies do far more than legislatures—without oversight. *Baze*'s approach conflates agencies and legislatures, giving one the deference due to the other.³⁶³ Berger asserts that the “lack of legislative input casts serious doubts on the [*Baze*] plurality's insistence that rigorous judicial inquiry ‘would substantially intrude on the role of state legislatures in implementing their execution procedures.’”³⁶⁴ States may serve as laboratories of experimentation, but the freedom to experiment cannot justify weakening important structural protections built into state and federal constitutions.

Changes to execution protocols only highlight agencies' inexpertise and the breadth of agency discretion. Oklahoma's brief experimentation with nitrogen hypoxia as a method of execution that began in 2015 illustrates this problem.³⁶⁵ Oklahoma's legislators relied on a fourteen-page report created over “three hours one evening”³⁶⁶ by three professors who are not medical doctors.³⁶⁷ Oklahoma's legislators also watched YouTube videos of teenagers inhaling

³⁵⁸ See Interim Multicounty Grand Jury Report, *supra* note 321, at 1–2.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 36–37. For further discussion of Oklahoma's execution errors, see Robin C. Konrad, *Lethal Injection: A Horrendous Brutality*, 73 WASH. & LEE L. REV. 1127, 1137–40 (2016).

³⁶¹ SARAT, GRUESOME SPECTACLES, *supra* note 38, at 121.

³⁶² *Baze v. Rees*, 553 U.S. 35, 51 (2008).

³⁶³ Berger, *Individual Rights*, *supra* note 267, at 2039–40.

³⁶⁴ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 60.

³⁶⁵ OKLA. STAT. ANN. tit. 22, § 1014(B) (West 2020); Lauren Gill, *Using Nitrogen Gas for Executions Is Untested and Poorly Understood. Three States Plan To Do It Anyway*, APPEAL (Oct. 25, 2019), <https://theappeal.org/using-nitrogen-gas-for-executions-is-untested-and-poorly-understood-three-states-plan-to-do-it-anyway/> [<https://perma.cc/TY5V-KDKM>].

³⁶⁶ Michael P. Copeland, Thom Parr, & Christine Pappas, Nitrogen Induced Hypoxia as a Form of Capital Punishment (unpublished manuscript) (on file with the *Ohio State Law Journal*); Eli Hager, *Why Oklahoma Plans to Execute People With Nitrogen*, MARSHALL PROJECT (Mar. 15, 2018), <https://www.themarshallproject.org/2018/03/15/why-oklahoma-plans-to-execute-people-with-nitrogen> [<https://perma.cc/PM8G-GYPD>].

³⁶⁷ Scott Christianson, *How Oklahoma Came to Embrace the Gas Chamber*, NEW YORKER (June 24, 2015), <https://www.newyorker.com/news/news-desk/how-oklahoma-came-to-embrace-the-gas-chamber> [<https://perma.cc/3RVL-VCAD>]; Hager, *supra* note 366.

helium.³⁶⁸ The bill only authorized nitrogen hypoxia as a method of execution in the event that lethal injection drugs were not available.³⁶⁹ There were no details or guidance for the agency.³⁷⁰ The legislature did not designate who would determine that lethal injection is “otherwise unavailable,” or criteria for making the determination.³⁷¹ In 2018, Oklahoma’s Attorney General determined that, due to a severe shortage of execution drugs, Oklahoma would switch to nitrogen hypoxia as its method of execution.³⁷² After delays in creating the protocol and obtaining necessary equipment,³⁷³ the Attorney General announced in early 2020 that the state had “found a reliable supply of drugs to resume executions by lethal injection[]” and the Department of Corrections would “continue[] to work on a protocol that will allow the state to proceed by execution through nitrogen hypoxia where appropriate.”³⁷⁴

Executive agencies and officials may not comply even when legislatures provide more specific instructions.³⁷⁵ Montana’s execution protocol has been struck down *twice* for violating the Montana Constitution’s separation of powers provision because the protocol was inconsistent with the state’s method of execution statute.³⁷⁶ Montana’s decision to identify the classes of execution drugs made it possible for a court to evaluate the extent to which the agency complied with the will of the legislature, even if the agency had discretion in dosage calculation or other procedures that might need to be modified based on the specific facts and conditions of particular executions.³⁷⁷ While this is a separate administrative law inquiry, it is relevant to a court’s decision to defer to agency expertise.

Inadequate criteria or fact-finding obligations incentivize agencies to take shortcuts. Agencies’ tendency to copycat other jurisdictions’ protocols and statutes concerning the death penalty, coupled with *Baze*’s prospective

³⁶⁸ Hager, *supra* note 366.

³⁶⁹ H.B. 1879, 55th Leg., Reg. Sess. (Okla. 2015).

³⁷⁰ *See id.*

³⁷¹ *See* OKLA. STAT. ANN. tit. 22 § 1014(B) (West 2020).

³⁷² Hager, *supra* note 366.

³⁷³ *See* Nolan Clay, *Executions by Gas Stalled Indefinitely While State Seeks Willing Seller of Device*, OKLAHOMAN (Jan. 27, 2019), <https://oklahoman.com/article/5621219/executions-by-gas-stalled-indefinitely-while-state-seeks-willing-seller-of-device> [<https://perma.cc/NSC3-XYQQ>].

³⁷⁴ *State Officials Announce Plans to Resume Execution by Lethal Injection*, OKLA. ATT’Y GEN. (Feb. 13, 2020) (on file with the *Ohio State Law Journal*).

³⁷⁵ *See* Denno, *When Legislatures Delegate Death*, *supra* note 14, at 88, 102 n.261; *see also* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 90–91.

³⁷⁶ *See* Order on Cross-Motions for Summary Judgment at 22, *Smith v. State*, No. BDV-2008-303 (Mont. 1st Jud. Dist. Sept. 6, 2012) [hereinafter *Smith Order*]; *Montana Judge Puts Executions on Hold*, DEATH PENALTY INFO. CTR. (Oct. 7, 2015), <https://deathpenaltyinfo.org/news/montana-judge-puts-executions-on-hold> [<https://perma.cc/2BTP-MMFC>].

³⁷⁷ *See* *Smith Order*, *supra* note 376, at 21. While this example relates to administrative norms, it illustrates the importance of careful judicial scrutiny on separation of powers questions.

approvals, allows courts to rely on the similarity to other jurisdictions' protocols, rather than the individual agency's research, fact-finding, or procedure. It also undermines claims that agencies have real expertise and demonstrates that the protocols lack what Berger describes as a "democratic pedigree"—the "political authority and epistemic authority underlying the policy."³⁷⁸ Such protocols deserve far less deference than courts accord them.³⁷⁹

Reliance on procedural controls is also misplaced. Agencies' ability to alter execution protocols depends on the extent to which agencies are bound by state procedural rules. Agencies do not usually have to comply with state APA rules to create execution protocols.³⁸⁰ Barkow has observed that, absent oversight or internal controls on matters of charging and plea bargaining, "the potential for arbitrary enforcement is high."³⁸¹ Scholars have contended that delegation in criminal law contexts should be treated differently because such delegations are "inconsistent with foundational criminal law doctrine, . . . present greater threats to the principles underlying the nondelegation doctrine, and . . . are not supported by the ordinary arguments in favor of delegation."³⁸² The same arguments apply in execution protocols. Absent any restraints, there is a risk of arbitrariness in selecting drugs or substances to cause death, and the consequences can be horrifying.³⁸³ Unlimited agency discretion in the death penalty context allows agencies to wield both legislative power and executive power. Internal measures are necessary to protect individual rights when an agency can use the powers of multiple branches.³⁸⁴ Courts addressing nondelegation challenges are too willing to ignore the absence of internal procedural checks as a constraint on agency discretion even when state nondelegation doctrines expressly rely on such checks.³⁸⁵

Vague legislation and a lack of administrative procedure leave courts doing precisely what the *Baze* plurality forecasted: "transform[ing] courts into boards of inquiry charged with determining 'best practices' for executions, with each

³⁷⁸ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 39.

³⁷⁹ See *Baze v. Rees*, 553 U.S. 35, 74–75 (2008) (Stevens, J. concurring); Berger, *Individual Rights*, *supra* note 267, at 2058 ("Administrative law norms teach that agencies deserve less respect when they are unaccountable, unknowable, and procedurally erratic. Given that such agencies would not receive deference in the administrative law context, they should not be afforded blanket deference in constitutional individual rights cases.").

³⁸⁰ See *supra* notes 269–72 and accompanying text; see also Berger, *Individual Rights*, *supra* note 267, at 2081–82 (discussing problems of deference and delegation when legislatures "deliberately insulate[]" agencies from "political pressure" and "administrative law more generally").

³⁸¹ Barkow, *Separation of Powers*, *supra* note 137, at 1026–27.

³⁸² Hessick & Hessick, *supra* note 172, at 6.

³⁸³ See Berger, *In Search of a Theory of Deference*, *supra* note 14, at 17–18, 60–61; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 66, 66 n.21, 99.

³⁸⁴ See Brown, *supra* note 115, at 1555; Barkow, *Separation of Powers*, *supra* note 137, at 1023–24. See generally G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

³⁸⁵ See *supra* notes 271–73 and accompanying text.

ruling supplanted by another round of litigation touting a new and improved methodology.”³⁸⁶ Despite criticisms that judicial enforcement of delegation could overexpand the role of the judiciary,³⁸⁷ the judiciary has already taken on an outsized role. A stricter approach arguably better serves separation of powers principles by forcing the legislative branch to become more accountable. To be sure, legislators are not rendered experts by virtue of elected office. Oklahoma’s nitrogen hypoxia experiment aptly illustrates this point.³⁸⁸ But legislators should impose more substantial guidelines, criteria, and procedural controls on agencies than “sufficient to cause death.” And courts can—and should—comply with their constitutional obligation to enforce separation of powers norms.

C. *Why Death is Nondelegable*

As long as states and the federal government intend to continue using the death penalty, they must grapple with decision-making in executions. Who makes decisions, and how they are made, are fundamental concepts underlying our constitutional system.³⁸⁹ Rebecca Brown argues that separation of powers principles under the nondelegation doctrine implicate individual liberties, because “procedural requirements and separated powers are simply different limitations on the exercise of government power, sharing a common goal: to restrict arbitrary government action that is likely to harm the rights of individuals.”³⁹⁰ Unconstrained agency delegation to create execution protocols threatens prisoners’ rights by increasing the risk that capital punishment will be ineptly administered and cause severe pain and suffering. Weakening the separation of powers poses a threat to core democratic systems.

Nondelegation may seem especially counterintuitive because discretion and delegation are essential to continuing state-authorized killing.³⁹¹ Indeed, courts seem to favor delegation as a matter of legislative convenience, potentially for countermajoritarian concerns.³⁹² Berger has highlighted this issue as a false application of countermajoritarian concerns about unelected judges making

³⁸⁶ *Baze v. Rees*, 553 U.S. 35, 51 (2008); *In re Ohio Execution Protocol*, 860 F.3d 881, 886 (6th Cir. 2017) (en banc).

³⁸⁷ See Sunstein, *Nondelegation Canons*, *supra* note 121, at 321.

³⁸⁸ See *supra* notes 367–75 and accompanying text.

³⁸⁹ See *McNabb v. United States*, 318 U.S. 332, 347 (1943).

³⁹⁰ Brown, *supra* note 115, at 1555–56.

³⁹¹ *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012) (“It is both reasonable and . . . acceptable for the Legislature to delegate the details . . . to an agency that is ‘better equipped to undertake the task’ of ensuring that it is implemented as uniformly and humanely as possible.”) (quoting *Griffith Energy, LLC v. Ariz. Dep’t of Revenue*, 108 P.3d 282, 287 (Ariz. Ct. App. 2005)); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978) (en banc) (“[T]he Legislature has . . . delegated to the said Director power to determine details so as to carry out the legislative purpose which the Legislature cannot practically or efficiently perform itself.”).

³⁹² See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–56 (2002).

decisions about “policy decisions made by government officials who answer to the people.”³⁹³ When decisions are made by unelected and unsupervised agencies, “judicial deference to them rests on shakier grounds.”³⁹⁴ Similarly, the countermajoritarian difficulty is not as pronounced when judicial decision-making is aimed at preserving individual rights for disadvantaged groups.³⁹⁵

Death penalty exceptionalism fits within theories of nondelegation that support heightened inquiry in criminal law contexts. The degree of discretion that is acceptable should vary with the scope of the power that the legislature accords an agency, as well as the executive agency or officer tasked with carrying out the directives.³⁹⁶ The power to kill is an extraordinary one with potential for incurable harm.³⁹⁷ Cass Sunstein has observed that “nondelegation canons” constrain Congress from delegating certain tasks to agencies, particularly when individual rights are implicated.³⁹⁸ A more robust nondelegation inquiry is appropriate in evaluating method of execution statutes because of the impact on individual rights and the potential for mischief in undermining separation of powers in the state’s decision to kill.

In applying this analysis, courts should recognize that a method of execution is a separate policy determination from the decision to use capital punishment and should not import legislative enactments regarding the latter to conclude that agencies have sufficient guidance to carry out the former. Blurring those lines fails to hold legislators to their constitutional responsibility to define crimes and fix punishments.³⁹⁹ Courts should also examine whether statutes assign responsibility for fact-finding in nondelegation inquiries.⁴⁰⁰ Few method of execution statutes contain requirements for agency fact-finding about speed, pain, and drug effectiveness for lethal injection or other methods of

³⁹³ Berger, *Individual Rights*, *supra* note 267, at 2059–60.

³⁹⁴ *Id.* at 2060; *see also* Berger, *In Search of a Theory of Deference*, *supra* note 14, at 42 (“When courts strike down an agency policy adopted in secret with no legislative guidance or oversight, the countermajoritarian concern sharply decreases.”).

³⁹⁵ *See* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Countermajoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1147–48 (2014).

³⁹⁶ *See* *Whitman v. Am. Trucking Assn.’s*, 531 U.S. 457, 475 (2001); *see also* *Loving v. United States*, 517 U.S. 748, 772–73 (1996); *Coglianesi*, *supra* note 120, at 1872–73.

³⁹⁷ Interim Multicounty Grand Jury Report, *supra* note 321, at 74 (depriving Charles Frederick Warner of his right to contest the method of execution in accordance with Oklahoma regulations); LAIN, LETHAL INJECTION, *supra* note 4 (manuscript at 43–44); Konrad, *Lethal Injection*, *supra* note 360, at 1133–37; *see also* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 177–210 (identifying botched executions).

³⁹⁸ *See* Sunstein, *Nondelegation Canons*, *supra* note 121, at 331–32.

³⁹⁹ *See Ex Parte United States*, 242 U.S. 27, 42 (1916); *see also* *Weems v. United States*, 217 U.S. 349, 378–79 (1910); *Malloroy v. State*, 435 P.2d 254, 255 (Idaho 1967).

⁴⁰⁰ *See* *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (criticizing the notion that fact-finding functions are sufficient to satisfy the “intelligible principle” requirement, and emphasizing that Congress still must make the policy underlying such fact-finding).

execution.⁴⁰¹ Requiring express directives from legislatures on this issue⁴⁰² fits within the contours of Justice Gorsuch's heightened intelligible principle inquiry in *Gundy*.⁴⁰³ It also requires legislators to "make the policy judgments" about Eighth Amendment punishment by setting out terms of those inquiries.⁴⁰⁴

Aspects of execution protocols may require some agency flexibility, including sourcing drugs and chemicals for executions, the need to identify alternative substances, dosage calculation, or other on-the-spot decisions. But the absence of facts for executives to consider and "criteria against which to measure them"⁴⁰⁵ has proved problematic. A lack of legislative guidance arguably contributed to agencies' behavior in illegally importing drugs for executions.⁴⁰⁶ Despite federal and state laws addressing who may obtain and store controlled substances, agencies still obtain drugs without compliance, explaining sourcing, or how they spend state dollars.⁴⁰⁷ States may prefer a non-specific method of execution statute to permit flexibility in the face of drug

⁴⁰¹ See Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae in Support of Petitioners at 22–24, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439) (summarizing the historically "unstudied way" lethal injection statutes have been adopted, as derived from Oklahoma's "purposefully vague" 1977 law); see also *supra* notes 176–96 and accompanying text (discussing states' method of execution statutes).

⁴⁰² Denno has proposed that states conduct "in-depth study of the proper implementation of lethal injection." This study would assist in fact-finding issues for states in developing procedures that presumably reduce pain or error, as well as identifying and responding to botched executions. Denno, *Lethal Injection Quandary*, *supra* note 321, at 118–21.

⁴⁰³ See *Gundy*, 139 S. Ct. at 2141.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ See KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 24, 32; LAIN, LETHAL INJECTION, *supra* note 4, at 14–22; *Federal Authorities Seize Execution Drugs Imported for Arizona and Texas*, CBS NEWS (Oct. 23, 2015), <https://www.cbsnews.com/news/federal-authorities-seize-execution-drugs-imported-for-arizona-and-texas/> [<https://perma.cc/47R9-PYWA>]; Madlin Mekelburg, *FDA Blocks Texas Import of Execution Drug*, TEX. TRIB. (Apr. 19, 2016), <https://www.texastribune.org/2016/04/19/fda-blocks-texas-import-execution-drug/> [<https://perma.cc/ECL3-F5LB>]. See also generally *Cook v. FDA*, 733 F.3d 1, 12 (D.C. Cir. 2013). The DOJ recently issued an opinion concluding that the FDA lacks jurisdiction in this arena. See *Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions*, 43 Op. O.L.C. 1, 1 (2019), <https://www.justice.gov/olc/opinion/file/1162686/download> [<https://perma.cc/DQN3-CE64>].

⁴⁰⁷ See Interim Multicounty Grand Jury Report, *supra* note 321, at 18, 21 ("[T]he Department never obtained [Oklahoma Bureau of Narcotics and Dangerous Drugs] or DEA registration allowing it to possess and/or store execution-related drugs OBNDD's Deputy General Counsel testified he has no idea how the Department properly obtained the execution drugs"); LAIN, LETHAL INJECTION, *supra* note 4, at 41–45; *Nebraska Supreme Court Orders Release of Lethal-Injection Drug Records*, DEATH PENALTY INFO. CTR. (May 20, 2020), https://deathpenaltyinfo.org/news/nebraska-supreme-court-orders-release-of-lethal-injection-drug-records?utm_source=WeeklyUpdate&utm_campaign=073ea20f52-weekly_update_2017_w41_COPY_01&utm_medium=email&utm_term=0_37cc7e4461-073ea20f52-711075509 [<https://perma.cc/G7PN-4NPN>]; see also Denno, *America's Experiment with Execution Methods*, *supra* note 68, at 717.

shortages. The need for flexibility alone, however, cannot justify unlimited discretion without fact-finding obligations or a set of criteria and obligations for agencies to consider before changing drugs or procedures. Legislatures are quite capable of writing statutes that give agencies the ability to choose between alternatives contingent on fact-finding or provide standards for agencies to use when making decisions.

Take Tennessee. While its default method of execution is lethal injection, it permits electrocution if “[t]he commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.”⁴⁰⁸ This provision might not be a model of legislative clarity, but it does set a condition (certification) and imply a requirement of fact-finding (unavailability) before permitting the commissioner to switch methods. A court reviewing such a decision would have some facts and criteria to evaluate.⁴⁰⁹ Arkansas also has offered some helpful specificity. The amended AMEA requires ADC to use FDA-approved drugs obtained from either an FDA-approved facility or nationally accredited compounding pharmacy.⁴¹⁰ Again, this sets measurable criteria for courts, even if there are problems with drug sourcing and pharmacies.⁴¹¹

Methods of execution statutes that require lethal injection be “swift and humane”⁴¹² arguably offer a more identifiable policy to agencies tasked with creating protocols. This standard, however, is not sufficient by itself because it fails to address important concerns about agency expertise, personnel training, and qualifications. Nor does it prevent agencies from shifting protocols without fact-finding or measurable criteria. Giving agencies broad discretion to change execution methods without factual findings or justification for those changes creates a high risk of arbitrary action that may be difficult for courts to review, especially when inmates’ challenges to execution protocols require swift judicial decision-making.⁴¹³

An absence of procedure presents a threat to judicial review and should carry greater weight in nondelegation cases because it interferes with the balance of powers.⁴¹⁴ State nondelegation doctrines’ reliance on procedural

⁴⁰⁸ TENN. CODE CRIM. PROC. ANN. § 40-23-114(e)(2) (West 2020).

⁴⁰⁹ Cf. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

⁴¹⁰ ARK. CODE ANN. § 5-4-617(d) (West 2020).

⁴¹¹ See LAIN, LETHAL INJECTION, *supra* note 4, at 29–41 (discussing compounding pharmacies).

⁴¹² KAN. STAT. ANN. § 22-4001(a) (West 2020). Kansas also requires certification that the substances must comply with these criteria and any proposed changes require the same certification. *Id.* § 22-4001(c).

⁴¹³ See *Cook v. State*, 281 P.3d 1053, 1056–57 (Ariz. Ct. App. 2012).

⁴¹⁴ See *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (“Such an ‘evasive standard’ could threaten the separation of powers if it . . . allowed the agency to make the ‘important policy choices’ that belong to Congress while frustrating ‘meaningful judicial review.’” (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 676, 685–6 (1980) (Rehnquist, J., concurring))); *Cook*, 281 P.3d at 1058 (“If the Department were to

protections in decision-making is sensible, because compliance with state procedural requirements preserves accountability by requiring agencies to engage with legislatively established processes in reaching decisions.⁴¹⁵ When agencies are free to alter their own protocols for any reason at all, including notice obligations to inmates about execution methods, it threatens to interfere with the judicial branch's responsibilities.⁴¹⁶ Courts' reluctance to hold agencies accountable for interference with judicial review abdicates the court's essential role in preserving the separation of powers as much as a legislative decision that hands over core lawmaking power.⁴¹⁷

The lack of transparency from agencies receiving these delegations should also weigh against deferring to agency judgments.⁴¹⁸ Although the legislature has enacted these statutory provisions, indicating a policy preference for secrecy, such secrecy is concerning, especially when there are few (or no) procedural controls on agencies.⁴¹⁹ Secrecy should be a component of nondelegation inquiries because in the capital punishment context, secrecy corrodes accountability and creates a risk that agencies will improperly wield broad powers, especially because they lack constraints on their discretion.

Courts also err by treating constitutional prohibitions on cruel and unusual punishment as limitations on agency discretion that preserve broad delegations.⁴²⁰ First, these prohibitions address different interests. Rachel

continue [revising execution protocol] in such a way as to unreasonably limit . . . the courts from exercising meaningful judicial review of its actions, then . . . we might be presented with a separation of powers violation.”); *see also* *Brown v. Vail*, 237 P.3d 263, 269–70 (Wash. 2010) (en banc).

⁴¹⁵ *See supra* Part II.A. (discussing states' nondelegation doctrines).

⁴¹⁶ *See Cook*, 281 P.3d at 1056–58; *see also supra* notes 277–84 and accompanying text.

⁴¹⁷ *See Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (explaining that leaving executive agencies “free to make all the important policy decisions” makes it difficult for courts to assess whether the agency had exceeded its authority); *see also* *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (“Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.”). *But cf. Cook*, 281 P.3d at 1058 (“This practice [late changes to execution protocol] therefore threatens to ‘usurp the powers,’ of the Judiciary . . . Nevertheless, because Arizona courts have been able to provide review—albeit rushed—of the Department’s changes to its protocol, . . . we hold that the Department has not yet violated the Arizona Constitution’s separation of powers doctrine.”).

⁴¹⁸ *See Berger, Individual Rights, supra* note 267, at 2066; *see also supra* notes 67–72 and accompanying text (discussing secrecy in executions).

⁴¹⁹ *Phillips v. DeWine*, 841 F.3d 405, 421 (6th Cir. 2016) (Stranch, J., dissenting) (“HB 663 [protecting confidentiality for parties to executions] will obstruct scrutiny of Ohio’s execution protocol. . . . [J]ust four years ago . . . we found it necessary ‘to monitor every execution on an ad hoc basis’ because Ohio could not be ‘trusted to fulfill its . . . duty. . . .’”) (quoting *In re Ohio Execution Protocol Litig.*, 671 F.3d 601, 602 (6th Cir. 2012)); *see also supra* note 269 and accompanying text.

⁴²⁰ *See Cook*, 281 P.3d at 1056 (reasoning that the Constitution “implicitly guides and limits” agency decision making by forbidding any “serious pain and suffering,” which would fall under the Eighth Amendment’s prohibition of “cruel and unusual punishment”).

Barkow points out that the Bill of Rights “police[s] government abuse of power to an extent, [but does] . . . not guard against the same structural abuses as the separation of powers.”⁴²¹ To be sure, there is a relationship between an Eighth Amendment claim and a nondelegation claim in the death penalty because arbitrary agency action, insufficient guidance, or expertise can trigger errors in executions that may cause severe pain and suffering.⁴²² Separation of powers implicates process concerns and prevents the aggrandizement of power.⁴²³ The Eighth Amendment prohibits the infliction of cruel and unusual punishments and accordingly does not check the potential for mischief inherent in allowing an agency to wield executive and legislative powers.⁴²⁴

Second, constitutional principles cannot curb agency discretion. Cary Coglianese has evaluated the importance of limits on discretion through the intelligible principle analysis: “A statute will be constitutional as long as an executive officer’s discretion is not unbounded in the same way that Congress’s is.”⁴²⁵ As the Supreme Court pointed out in *Whitman v. American Trucking Associations, Inc.*, agencies cannot restrict overly broad delegations of legislative power by picking their own limiting constructions of statutory authority.⁴²⁶ Courts should not rely on agencies to limit themselves, particularly because agencies cannot construe statutes unconstitutionally so they must already comply with constitutional restrictions on pain and suffering in executions.⁴²⁷ The intelligible principle requirement and parallel state law doctrines dictate that the *legislature* must set the policy in the legislation it enacts.⁴²⁸

In light of the stakes inherent in carrying out death sentences and the horrifying consequences of broad agency discretion and responsibility-shifting mechanisms in capital punishment, legislators should have a greater obligation to define the punishment for a capital sentence. Courts should play their part by protecting separation of powers and administrative law norms to inject greater accountability in a system that, thus far, demands very little.

⁴²¹ Barkow, *Separation of Powers*, *supra* note 137, at 1032.

⁴²² See, e.g., *State v. Deputy*, 644 A.2d 411, 420 (Del. Super. Ct. 1994), *aff’d*, 648 A.2d 423 (Del. 1994); see also Hessick & Hessick, *supra* note 172, at 25–26 (discussing the relationship between individual liberties and separation of powers).

⁴²³ Barkow, *Separation of Powers*, *supra* note 137, at 1032–33.

⁴²⁴ U.S. CONST. amend. VIII; see Barkow, *Separation of Powers*, *supra* note 137, at 1032–33.

⁴²⁵ Coglianese, *supra* note 120, at 1861.

⁴²⁶ *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001).

⁴²⁷ See Sunstein, *Nondelegation Canons*, *supra* note 121, at 331.

⁴²⁸ *Whitman*, 531 U.S. at 472 (“[W]e repeatedly have said that when Congress confers decision-making authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis and alterations in original)); see also *supra* Part II.A.

VI. CONCLUSION

An argument that principles of nondelegation are viable in evaluating the death penalty may sound like grasping at straws to oppose the death penalty. Why bother asking legislatures to be more specific in considering how prisoners should be executed? Do arguments about how these decisions are made, who makes the decisions, policy, and procedure really just paper over other glaring defects in the death penalty?⁴²⁹ Some may contend that these challenges are attempts to evade a lawfully-imposed sentence by complaining about technical and procedural trivialities.

The separation of powers and compliance with procedure are integral constitutional principles that matter a great deal in a democratic society and are core values in the American system of government.⁴³⁰ As Justice Frankfurter explained, “The history of liberty has largely been the history of observance of procedural safeguards.”⁴³¹ The history of the imposition of the death penalty appears to be one of largely unconstrained delegation by virtually every entity or individual involved in capital punishment.

In making decisions about death, it is tempting to try to find someone else to carry the burden or to be accountable. In *Caldwell v. Mississippi*,⁴³² the Supreme Court held that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”⁴³³ Nor should it be constitutionally permissible to allow legislatures to shirk their constitutional obligation to set punishments, especially in capital sentencing. The choice to enact the death penalty is a separate policy choice than how the state chooses to kill. Legislatures should not be able to shift the responsibility for determining how the state kills in the name of the people

⁴²⁹ See generally BESSLER, KISS OF DEATH, *supra* note 77; GARRETT, END OF ITS ROPE, *supra* note 3; David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004); William J. Bowers, Thomas W. Brewer, & Charles S. Lanier, *The Capital Jury Experiment of the Supreme Court*, in THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 199 (Charles S. Lanier et al. eds., 2009); Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825 (2015); J. Michael Martinez, “Freakishly Imposed” or “Fundamentally Fair”? *Legal Arguments Against the Death Penalty*, in THE LEVIATHAN’S CHOICE: CAPITAL PUNISHMENT IN THE TWENTY-FIRST CENTURY 227 (J. Michael Martinez, William D. Richardson & D. Brandon Hornsby eds., 2002).

⁴³⁰ *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (“[T]he greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”); Cass, *supra* note 120, at 152–53; Madison, *supra* note 113, at 250–51.

⁴³¹ *McNabb v. United States*, 318 U.S. 332, 347 (1943).

⁴³² 472 U.S. 320 (1985).

⁴³³ *Id.* at 328–29.

to agencies, particularly because they systematically remove procedural constraints associated with accountability and transparency. Passing difficult policy decisions to agencies that lack oversight or transparency undermines core democratic values.

Responsibility for death cannot, and should not, be delegated away. Respect for “one of the most vital of the procedural protections of individual liberty found in our Constitution” demands more.⁴³⁴

⁴³⁴Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).

EXHIBIT 3

EXHIBIT 3

3:21-cv-00176-RFB-CLB

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE M. FLOYD,)
) Case No. 3:21-cv-00176-RFB-CLB
Plaintiff,)
) Las Vegas, Nevada
vs.) Thursday, May 6, 2021
) 10:35 a.m.
CHARLES DANIELS, Director,)
) EVIDENTIARY HEARING
Nevada Department of)
Corrections; HAROLD)
WICKHAM, NDOC Deputy)
Director of Operations;
WILLIAM GITTERE, Warden,
Ely State Prison; WILLIAM
REUBART, Associate Warden
at Ely State Prison; DAVID
DRUMMOND, Associate Warden
at Ely State Prison; IHSAN
AZZAM, Chief Medical
Officer of the State of
Nevada; DR. MICHAEL MINEV,
NDOC Director of Medical
Care, DR. DAVID GREEN, NDOC
Director of Mental Health,
Defendants.

C E R T I F I E D C O P Y

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE RICHARD F. BOULWARE, II,
UNITED STATES DISTRICT JUDGE

APPEARANCES: See next page

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Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

3:21-cv-00176-RFB-CLB

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16 INDEX OF EXAMINATIONS

17 TESTIMONY OF CHARLES DANIELS

18 Examination by the Court.....40
19 Direct Examination by Mr. Gilmer.....49
20 Cross-Examination by Mr. Levenson.....52

20

21

22

23

24

25

3:21-cv-00176-RFB-CLB

1 than -- is there anything different than what we've discussed
2 here?

3 MR. GILMER: I think it -- it talks about how broad the
4 deliberative process privilege is pertaining to issues and
5 documents, especially. But that was because that case was
6 specific to a document-seeking issue. I think it also would
7 apply to testimony outside that confines, and that anything and
8 everything predecisional is covered even -- and it talks at
9 great length about facts and how they can be intertwined. So
10 that is what I thought it was important to bring it to the
11 Court's attention.

12 THE COURT: Okay. Thank you, Mr. Gilmer. I appreciate
13 that.

14 All right. Director Daniels, if you wouldn't mind
15 stepping forward, please.

16 I'm sorry, right up here, Director Daniels.
17 Watch your step there.

18 COURTROOM ADMINISTRATOR: Please raise your right hand.

19 CHARLES DANIELS, having duly been sworn, was examined
20 and testified as follows:

21 COURTROOM ADMINISTRATOR: Thank you.

22 THE COURT: You can go ahead and take your seat. And
23 if you could state your full name for the record. And since
24 you're in front of the Plexiglas, Director Daniels, you can take
25 your mask down.

3:21-cv-00176-RFB-CLB

1 THE WITNESS: Thank you, Your Honor.

2 Good morning. My name is Charles Daniels. I'm sorry,
3 did you ask the spelling?

4 Yes. Charles, C-H-A-R-L-E-S. Last name Daniels,
5 D-A-N-I-E-L-S.

6 EXAMINATION OF CHARLES DANIELS

7 BY THE COURT:

8 Q. Okay. So, Director Daniels, let's -- let's just start off
9 with the most basic question. Why isn't the protocol finalized?

10 A. Sir, the -- Your Honor, the protocol has not been finalized
11 for several reasons. There's a requirement that I seek counsel
12 with primarily the Chief Medical Officer of the state. I'm
13 still in the process of looking at various drugs to be used. I
14 believe that I don't have a greater responsibility than to
15 ensure that I do this right, and I need to consult with as many
16 individuals as possible to ensure that I'm doing this right.

17 There are also costs, heavy significant costs,
18 associated with putting on one of these executions. So --

19 Q. Can you tell me a little bit about that. Because I'm not
20 aware of that. Can you tell me, when you say that, what type of
21 costs?

22 A. Yes.

23 Q. You mean in terms of the protocol, can you explain that a
24 little bit?

25 A. Well, yes, because for anything that we decide we want to

3:21-cv-00176-RFB-CLB

1 do, whether it's regarding security, gathering intelligence,
2 providing the appropriate staff that would have to come in
3 and/or experts and/or contractors from other areas, we will have
4 to have them come out. We're going to have to provide lodging.
5 All the minutia that no one would think about that --

6 Q. Right.

7 A. -- we have to plan for. I have to have redundancy built in
8 to any issues that I may have.

9 I also have to work in coordination with other state
10 law enforcement authorities, medical authorities, examiners.

11 We have to coordinate and move all of those people
12 around. But, more importantly, I have to ensure I have enough
13 staff to deal with any, and I mean any, contingency. There's no
14 do-over button in -- in executions.

15 Q. Right.

16 A. So I have to ensure that I have all of that. I have to
17 bring people up. We have to run through our protocols
18 step-by-step ensuring that we stay within the confines of what
19 we've actually drafted.

20 Q. Okay.

21 A. And if we identify any particular issues, then we need to
22 mitigate that right there. And if we can't overcome it, then we
23 need to make everyone else aware that there has been a change.

24 I have to ensure that the condemned individual is
25 maintained in a safe place, that he has access to his attorneys,

3:21-cv-00176-RFB-CLB

1 and that for the most part we will ensure that he gets what he
2 has coming to him as it relates to whatever the constitutional
3 needs are and/or what the expectations are of the people of the
4 State to include the judiciary as well as our -- the executive
5 branch of our Government and so on.

6 But all of this requires a lot of moving pieces as it
7 relates to especially the security apparatus, bringing people
8 out, ensuring that they know step-by-step what they need to do.

9 There's also, of course, I have to ensure that my
10 equipment works, that I have everything that I need, that we're
11 able to test it ensure that it works.

12 That -- I also have to ensure that the drugs that are
13 available. I have to -- that I have available or we think we
14 have available are things we have in stock that would also
15 expire depending on how long things go along.

16 So I have -- there's a lot of moving parts. And not to
17 mention, of course, just the court proceedings and the attorneys
18 and all of those people that are involved.

19 Coroners, EMTs, the clergy, all of those people that
20 are involved. It's serious.

21 I would think that the expectation would be of
22 Mr. Floyd and his -- and his representatives that I do
23 everything possible to ensure that if we actually go through
24 that it's done right in accordance with provisions that are
25 outlined in the Eighth Amendment of the U.S. Constitution.

3:21-cv-00176-RFB-CLB

1 Cruel and unusual punishment, I take that very seriously. It's
2 personal for me. But I understand my obligations and my duties
3 towards the people of the state as well as all of the other
4 inmates as well as Mr. Floyd.

5 Q. Okay.

6 So you've outlined a fair number of considerations that
7 you have to factor in to your decision, including the -- again,
8 the time and the experts and redundancy.

9 Let me ask you this question. When do you expect that
10 your protocol will be finalized?

11 A. Sir, I do not know when it will be finalized, because as
12 long as I have an opportunity to conduct my due diligence,
13 consult with more individuals, consult more sources -- and also
14 I have to take into consideration as soon as the potential drugs
15 are identified, there may be a huge push to have that via court
16 order in some court we can't use that or there's some claim
17 saying that that's no longer available to you.

18 Q. Right.

19 A. And so I have to take into consideration that I can do most
20 of my planning in advance, but it would be incumbent upon me to
21 ensure that I have the best information available, I think,
22 which is in everyone's best interests. I still have to consult
23 with the -- with the Chief Medical Officer of the state. And
24 until I do that, because it's a requirement, then I really have
25 to know where -- where I am at with that individual as well

3:21-cv-00176-RFB-CLB

1 because I can't proceed without that consultation.

2 Q. Well, do you think it will take three months?

3 A. Your Honor, I don't know.

4 Q. Well, you have to give me some date. I mean, it's not going
5 to take five years, right?

6 A. Sir, it would not. Your Honor, it would not.

7 Q. Okay. So give me what you think would be the outside limit
8 of the decision.

9 I also have to make important decisions here, Director
10 Daniels, and as it relates to how the Court has to rule, right.

11 And so you need to at least tell me -- given what
12 you've said, it's clear that you've thought about this process
13 and are still thinking about it and are potentially still
14 gathering information, but it seems to me that the NDOC has to
15 have some timeline, in part because of the timing of when these
16 drugs might be available, as to when it's going to make a
17 decision.

18 So what would be the outer boundaries of that decision?

19 A. Your Honor, very good question. So here's what my response
20 would be. After I am able to consult with the Chief Medical
21 Officer and then look at all of our security apparatuses and so,
22 I would say 90 to 120 days --

23 Q. Okay.

24 A. -- would be sufficient.

25 Q. Well, and, again, I appreciate that you have a lot of things

3:21-cv-00176-RFB-CLB

1 that you've said, and there may be many things, Director
2 Daniels, that we won't even take into consideration. So some of
3 the things that you had mentioned just about the redundancy and,
4 obviously, if someone were to get sick, for example, whoever the
5 medical officer is who I presume would be monitoring this, if
6 something were to happen that you have to find someone else,
7 they have to go through the whole procedure again, potentially
8 testing. And so I appreciate that in terms of the timing.

9 So one other --

10 **A.** Your Honor, may I ask you a question, sir?

11 **Q.** Yes, go ahead. But I didn't have anything else. I was just
12 saying I have an understanding, given what you said, of how much
13 goes into this decision. And it's certainly not the Court's
14 intent in asking the question, Director Daniels, I want to be
15 clear, of sort of deciding one way or another when or how you
16 should do it. I just -- in terms of making the decision in this
17 case, I also need to know what would be appropriate and fair in
18 terms of the timing for you and also for Mr. Floyd's counsel in
19 terms of preparation. That's why I'm asking you -- that's why I
20 asked you that question.

21 I'm sorry. If there's something else you wanted to
22 add, you can.

23 **A.** Yes, Your Honor. And I just want to be clear. You asked me
24 to opine, which I did. I'm seeking to ensure that you get the
25 information you need.

3:21-cv-00176-RFB-CLB

1 But I want to also just point out that there are some
2 statutory limits as to what I must do once the actual signed
3 warrant and order for the death to proceed. I will honor that
4 unless --

5 Q. I appreciate that.

6 A. -- otherwise stayed.

7 Q. Right.

8 A. So I didn't want to give the impression that I'm controlling
9 the timeline. I am obligated by statute to stay within the
10 appropriate timeline.

11 Q. No, I -- I did not interpret your comments, Director
12 Daniels, to somehow suggest that you wouldn't abide by a
13 legitimate Court order from this Court or from State Court. I
14 did not in any way take that from your testimony, because I
15 don't think that's what you were suggesting.

16 I think what I understood was you are opining just
17 about your process of deliberation, as you've said how seriously
18 you take it, all the different factors that have to be
19 considered, and the point at which, you know, if given an
20 opportunity to weigh in on that process, how much would be
21 potentially the outer limits of that decision. So I appreciate
22 that.

23 Let me see if I have any more questions, and then I'll
24 turn this over to counsel.

25 (Pause.)

3:21-cv-00176-RFB-CLB

1 BY THE COURT:

2 Q. One question I had, which is also helpful is, Director
3 Daniels, do you have any information about how long it takes to
4 acquire information about the drugs?

5 So, in other words, I would imagine as part of your
6 process you want to acquire information about a particular drug
7 in terms of how it has been used, what it's approved for, what
8 may be its side effects or interaction effects.

9 Do you have any information about how long it takes
10 just to get the information? Not the drug itself. I'm not
11 asking you about how long once you make a request to obtain it,
12 but just to get the information. Because one of the issues in
13 this case, of course, Director Daniels, is how quickly could
14 potentially Mr. Floyd's counsel get access to some of this
15 information.

16 Do you have anything that you could share about how
17 long it takes to get this information about the potential drugs?
18 Without identifying a specific drug.

19 **A.** Your Honor, thank you for your question.

20 I am clearly not a pharmacist, but we have a Director
21 of Pharmacy Services and that's the individual that would order
22 all of our drugs, but also would be the one to do some basic
23 research from a professional standpoint.

24 Now, it's also my understanding that research is
25 available on most drugs, but to the depth in which you get into

3:21-cv-00176-RFB-CLB

1 questionable or nonprescription types of usage, what its -- you
2 know, its intended use, I think there's probably a better person
3 to respond to that question.

4 Q. Okay.

5 A. From the laymen's term, we can -- we can Google it.

6 Q. Right.

7 A. But that would not be enough for me, and I would share with
8 my Director of Pharmacy, "I need more than the Google version."
9 I need to be able to discuss and understand the efficacy and all
10 of those things that go around the utilization of the compounds
11 that make the drugs.

12 I am not qualified to do that, but I would seek counsel
13 to better understand it.

14 Q. Right. So you would -- you would ask other people to
15 provide you with as much information as possible that's not so
16 scientific such that you can't, sort of, obviously process that,
17 but that gives you the full range of information that would
18 allow you to be able to make an informed decision?

19 A. Your Honor, yes. I would seek additional consultation with
20 professionals in that field to better understand.

21 THE COURT: Okay. All right.

22 Thank you, Director Daniels. I don't know that I have
23 more questions at this time.

24 Mr. Gilmer, is there something else that you wanted to
25 be able to ask Director Daniels?

3:21-cv-00176-RFB-CLB

1 And then, Mr. Anthony, I'll turn to you.

2 MR. GILMER: Thank you, Your Honor. There's just a
3 couple of points I would like to clarify with regard to the
4 timeline. Would you like me to do it from here or from the
5 podium?

6 THE COURT: Oh, no. Do it from there, please.

7 DIRECT EXAMINATION OF CHARLES DANIELS

8 BY MR. GILMER:

9 Q. Director Daniels, I think you tried to clarify your question
10 with regard to the 90 to 100 days to finalize a protocol, but
11 then also indicated that you would abide by any warrants or
12 orders requiring you to move forward.

13 So if the execution warrant was issued by a Court the
14 week of June 7th, as has been suggested has been thought, do
15 you -- would you still think that you would need 90 to 100 days
16 to finish or would you be able to complete the process in order
17 to be able to comply with that Court order?

18 A. In the event a warrant were to actually come out giving a
19 date, I would comply.

20 At some point in time I could continue to review
21 information, but at the end of the day it's a requirement, it's
22 a duty of mine as Director of the Nevada Department of
23 Corrections, to execute the wishes of the judiciary and the will
24 of the people.

25 THE COURT: Let me ask you this question about that.

3:21-cv-00176-RFB-CLB

1 If you are ordered, for example, to perform an execution in four
2 days, right, and you didn't feel you could adequately do that
3 and safely do that, would you not have an obligation to inform
4 the Court that it couldn't be done consistent with your
5 constitutional obligation at the NDOC not to perform an
6 execution without violation of the Eighth Amendment?

7 THE WITNESS: I would certainly consult my -- my legal
8 counsel on that matter and bring up my objections and/or
9 concerns. And while I certainly cannot speak for any other
10 entity, I can tell you a violation of the Eighth Amendment is
11 something that would be taken with great caution and care. And
12 that would -- in my opinion, I would do the right thing.

13 THE COURT: Well, and I'm not asking for your legal
14 opinion.

15 THE WITNESS: Yes.

16 THE COURT: Because I think Mr. Gilmer would and has
17 adequately, as always, represented the legal positions of the
18 NDOC. But I'm just responding to your question -- excuse me.
19 I'm responding to your answer in response to Mr. Gilmer's
20 questions about the performance of an execution if you are
21 ordered June 7th, because it seems to me that there might be a
22 point at which you were ordered to perform an execution, given
23 what you said, that you simply couldn't perform and not violate
24 the Eighth Amendment. And the question would come up, what
25 would you do in that circumstance, if you know.

3:21-cv-00176-RFB-CLB

1 And it sounds like what you said, just to confirm, that
2 you'd have to speak with your attorneys before you decided how
3 to proceed. Is that right?

4 THE WITNESS: That would be my response.

5 THE COURT: Okay. That makes sense.

6 Mr. Gilmer, go ahead. I'm sorry.

7 MR. GILMER: Thank you, Your Honor.

8 And, also, I know that was a hypothetical, but under
9 Nevada law that could never happen within four days. So ...

10 THE COURT: Well, no, I understand that. I mean,
11 partly what the purpose really was with me to help me understand
12 Director Daniels' response to your question. It was not to sort
13 of lay out the fact that that would happen.

14 Yes, I think that I would be -- well, I don't think
15 that it could happen in Nevada law and I don't think that any
16 Court would order that either.

17 MR. GILMER: Understood.

18 THE COURT: But that was the purpose of that question.
19 Go ahead, Mr. Gilmer.

20 MR. GILMER: Thank you. I believe I only have one more
21 question, Director Daniels, and it's always, you know, a very
22 bad thing for a lawyer to say one more question because it's
23 generally not true. But I believe I only have one more
24 question.

25 BY MR. GILMER:

3:21-cv-00176-RFB-CLB

1 Q. And that is you mentioned that you have to consult with the
2 Chief Medical Officer before making any final decisions.

3 You're not suggesting that you have not already met
4 with Dr. Azzam, correct?

5 You have already met with him. Is that correct?

6 A. Correct. I have already met with Dr. Azzam.

7 Q. Okay. Thank you. I just wanted to make sure that was clear
8 for the record.

9 MR. GILMER: I have nothing else at this time, Your
10 Honor.

11 THE COURT: Okay.

12 Mr. Anthony?

13 MR. ANTHONY: Mr. Levenson will be handling the
14 examination of the witness, Your Honor.

15 THE COURT: Okay. So what I would like for you to do
16 is switch positions just because we have the Plexiglas there,
17 preferably.

18 All right. Go ahead, Mr. Levenson.

19 MR. LEVENSON: Thank you.

20 CROSS-EXAMINATION OF CHARLES DANIELS

21 BY MR. LEVENSON:

22 Q. Good morning, Director Daniels.

23 A. Good morning.

24 Q. So to clarify, you -- I believe you originally said you had
25 not met with the CMO. Is that incorrect? You have met with

3:21-cv-00176-RFB-CLB

1 your CMO?

2 **A.** I said I would -- I believe my testimony was that I would
3 need or be required to meet with the CMO. We have already had
4 one meeting.

5 **Q.** And when -- I'm sorry.

6 When was that meeting? What was the date of that
7 meeting?

8 **A.** I do not recall the date.

9 THE COURT: Do you know how many months ago it was or
10 weeks ago?

11 THE WITNESS: It was weeks ago.

12 THE COURT: Weeks ago.

13 And one question I had, Director Daniels, is, when were
14 you first informed as to the fact that the State would be
15 seeking a warrant of execution on June 7th? I'm not asking who
16 informed you, but when do you recall you were first told that
17 information?

18 THE WITNESS: Your Honor, I cannot recall the date. It
19 wasn't very long ago. I do believe it was in April.

20 THE COURT: In April?

21 THE WITNESS: In April.

22 THE COURT: So, again, as it relates to how long you
23 have been involved in this process of your deliberation, given
24 that timing, it sounds as if you have been involved in this
25 deliberative process for around 30 days or so?

3:21-cv-00176-RFB-CLB

1 THE WITNESS: Thank you for the question, Your Honor.

2 I'm not sure of the day and I don't want to give
3 testimony that someone could impeach, but it's -- I believe it
4 was back in April.

5 THE COURT: So you don't think -- for example, it
6 wasn't January or February?

7 THE WITNESS: No.

8 THE COURT: That you recall.

9 THE WITNESS: Your Honor, I do not recall that.

10 THE COURT: So you recall it being some time in April,
11 maybe late March.

12 THE WITNESS: Potentially, yes.

13 THE COURT: Okay. I'm just -- I'm just trying to get a
14 rough estimate as to the timing of that as to when you were
15 first, sort of, informed of when you would have to start this
16 process. Because I would imagine, Director Daniels, that once
17 you get that information, as you've indicated, there is a lot of
18 work that has to be done to finalize the protocol. So the
19 moment you hear that you start working, correct, when you hear
20 that information?

21 THE WITNESS: Yes, Your Honor. I -- I will share with
22 you, as I found out, of course, I obviously researched what was
23 done during the last protocol. And in addition to that, then I
24 went to the location, the site, where we would carry that out,
25 met with the warden, and we went through the protocols there

3:21-cv-00176-RFB-CLB

1 step-by-step.

2 I was very deliberative in terms of what I wanted to
3 see and I wanted to see what we had. And, of course, we're now
4 in the process of changing the protocols to meet the new
5 threads, ideas, and so on.

6 So we've made some changes and they're still working on
7 putting that together. But a lot of this, of course, will still
8 have to be completed at a little later date when we have more
9 additional information. Because a lot will change based on who
10 we communicate with, how long we, for instance, would have a
11 contract to get various people here, would those people still be
12 available, and so on. So there's a few things that are still in
13 the works.

14 THE COURT: Well, and in terms of the information you
15 don't have, are you still waiting for or seeking any information
16 about drugs that may be used?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: Okay. Thank you.

19 Go ahead, Mr. Levenson.

20 BY MR. LEVENSON:

21 Q. Do you expect to meet again with Dr. Azzam?

22 A. My response is that I do expect to meet with him in the
23 future or as additional pharmaceuticals become available that I
24 want to consult with him about. So each time there's a new
25 pharmaceutical that we haven't previously discussed, I would

3:21-cv-00176-RFB-CLB

1 then seek consultation with Dr. Azzam.

2 Q. So have any meanings been currently arranged?

3 A. Not future meetings.

4 Q. You mentioned that you went to the site where the execution
5 was going to take place. The Clark County District Attorney's
6 Office notices that site as Nevada State Prison.

7 Are you in disagreement with that?

8 THE COURT: I'm sorry. When you say "Nevada State
9 Prison?"

10 MR. LEVENSON: I'm saying Nevada State Prison, Your
11 Honor. That's the warrant, the current warrant. That's the
12 execution, Nevada State Prison in Carson City.

13 THE COURT: Okay. I wasn't sure if, Mr. Levenson, you
14 are identifying a specific facility. If you are, then it would
15 be helpful to say that, or if you were trying to point out that
16 the language wasn't specific. I wasn't sure the nature of your
17 question.

18 So if you're asking about a specific location, that's
19 fine. It would be helpful, I think for the witness, but also
20 for me to know what you're actually asking.

21 MR. LEVENSON: Correct.

22 BY MR. LEVENSON:

23 Q. So it's identified as the Nevada State Prison in Carson
24 City.

25 Do you agree that's where the execution would take

3:21-cv-00176-RFB-CLB

1 place?

2 **A.** The execution, as I know it to be, would be at Ely State
3 Prison.

4 **Q.** You spoke about the protocol, the prior protocol. That
5 would be in the Scott Dozier case. Was that right?

6 **A.** Yes.

7 **Q.** Are you aware of the findings by Judge Togliatti in 2017
8 about the use of a paralytic drug in the execution protocol?

9 MR. GILMER: Your Honor, I object to that. It calls
10 for a legal conclusion. It's also addressing a factual finding
11 that was vacated by the Nevada Supreme Court.

12 THE COURT: Well, I mean, are you objecting to him --
13 objecting to him indicating whether or not he was aware of it?
14 They haven't asked the follow-up question yet, Mr. Gilmer.

15 MR. GILMER: Understood.

16 THE COURT: I think you're anticipating the next
17 question.

18 MR. GILMER: I'll table the objection to the next
19 question, Your Honor.

20 THE COURT: I'll be shocked if Director Daniels had not
21 been informed at least of the decision. I think you're waiting
22 for the next question.

23 But you can go ahead and answer that question. Were
24 you aware of that decision by Judge Togliatti, Director Daniels?

25 THE WITNESS: Your Honor, yes, I was aware of it.

3:21-cv-00176-RFB-CLB

1 THE COURT: Okay.

2 BY MR. LEVENSON:

3 Q. Director Daniels, I want to go back to a question that the
4 Judge asked you. You mentioned that the costs involved were
5 something that you would -- would take additional time for you
6 to -- to release a final protocol.

7 You mentioned staffing. Wouldn't staffing be the same
8 no matter what the protocol is?

9 A. No, that would not be the same.

10 Q. Could you explain that?

11 What would be different with -- with the particular
12 drugs you used and your staffing?

13 MR. GILMER: Your Honor, I'm going to object to that as
14 I think that would delve into deliberative process and also
15 safety and security issues.

16 MR. LEVENSON: Your Honor, he --

17 THE COURT: So, hold on.

18 So, Mr. Gilmer, let me ask you this question. Could
19 Director Daniels respond to how many, without naming who the
20 people would be in terms of their title, positions might be
21 affected by the different types of drugs?

22 Because I think part of the question relates to just
23 how many people are involved in this process. I wouldn't
24 necessarily ask Director Daniels to identify anyone by title
25 because I think there could be legitimate security or other

3:21-cv-00176-RFB-CLB

1 issues related to that. But what about just how many people
2 would be affected by a potential difference in the drug?

3 MR. GILMER: Perhaps, that could be answered, Your
4 Honor. The concern I have is that he said it depends on what
5 his final decision is, because he said it depends on what the
6 drugs are. So that seems to me as if it would dive into
7 deliberative processes into the final decision. So that's the
8 concern. I think if it's as extremely narrow as you indicated,
9 perhaps that's something Director Daniels may answer.

10 THE COURT: Why don't we try this. Director Daniels,
11 how many positions do you think are implicated by choices of
12 drugs? So choosing one drug versus another, without identifying
13 which positions that are involved in the execution would be
14 implicated, how many positions would be implicated by a choice
15 in drugs, as far as you understand it?

16 THE WITNESS: Your Honor, I can't answer that as
17 narrowly as possible because I would have to utilize a lot of
18 staff and they would have to come from many places. But it
19 would also, unfortunately, have me disclose sources, methods,
20 numbers, security apparatus, and the specialized people that I
21 need to ensure the security.

22 Your Honor, I'm very hesitant to talk about those
23 issues publicly.

24 THE COURT: So -- so then how about this. In terms of
25 your -- what you were referencing, it seems like what you were

3:21-cv-00176-RFB-CLB

1 saying is that you didn't want to assume that for the variety of
2 drugs that may be under consideration or could be under
3 consideration that the same personnel would be used for all. Is
4 that fair?

5 THE WITNESS: That would be a fair question -- a fair
6 assumption.

7 THE COURT: Okay.

8 THE WITNESS: Yes.

9 THE COURT: Mr. Gilmer, does that work? Because I
10 think that was the nature of what -- what Mr. Levenson was
11 trying to get at, which is that Director Daniels is basically
12 saying there are many moving parts and staff are affected by
13 that and staff potentially could be affected, without naming who
14 they are and without naming the drugs, could be affected by the
15 choice of drugs. Is that correct, Dr. Daniels -- I mean,
16 Director Daniels.

17 THE WITNESS: Your Honor, yes.

18 THE COURT: Okay. Move on from there, Mr. Levenson.

19 BY MR. LEVENSON:

20 Q. You mentioned another component, an EMT. Does the changing
21 of the -- does the finalization of the protocol determine how
22 many EMTs you would need?

23 A. Yes, it could.

24 Q. How?

25 MR. GILMER: Your Honor, that clearly would go into the

3:21-cv-00176-RFB-CLB

1 deliberative process and determinations.

2 THE COURT: Okay. And I would direct you not to answer
3 at this time, Director Daniels.

4 BY MR. LEVENSON:

5 Q. Director Daniels, you mentioned a coroner, and I'm
6 presuming -- let me ask the question. Would the protocol
7 dictate how many coroners you had at the scene?

8 (Pause.)

9 THE WITNESS: Your Honor, I would really not like to
10 answer any questions regarding my processes and procedures, how
11 many, who many. That's an issue for us. We have to -- for
12 instance, I'll explain.

13 There's confidentiality built into the processes. We
14 have redundancy built in. We may cancel one of two or cancel
15 two of three at the last moment. And I don't want to be
16 pigeonholed into saying, well, this is all you have, then later
17 on who is it.

18 I need to have control over the mechanisms to --

19 THE COURT: I appreciate that, Director Daniels.

20 THE WITNESS: -- perform my judicial responsibilities.

21 THE COURT: I appreciate that. So you don't have to
22 answer further.

23 So, Mr. Levenson, what I would ask you to do is --
24 because I do think there are legitimate security issues
25 regarding individuals who may be identified by profession within

3:21-cv-00176-RFB-CLB

1 the State, and we should avoid those types of questions.

2 I haven't ruled on that. And so I don't want to get
3 into that, but I think that's part of the Director's hesitancy,
4 which I think is a legitimate concern at this point in time.

5 So why don't we move on.

6 MR. LEVENSON: Certainly, Your Honor.

7 BY MR. LEVENSON:

8 Q. In your meeting with Dr. Azzam, Director Daniels, did you
9 offer him multiple choices for a drug protocol?

10 MR. GILMER: Objection, Your Honor. That calls for
11 questions regarding predecisional and deliberative process.

12 MR. LEVENSON: Can I respond, Your Honor?

13 THE COURT: Sure.

14 MR. LEVENSON: We think it has independent relevance
15 separate and apart from the deliberative process. This goes to
16 when the protocol is going to be finalized. We are alleging bad
17 faith on the part of NDOC and its release of the drug protocol,
18 so this goes to intent.

19 If Dr. Azzam was only offered one drug protocol, then
20 the protocol was pretty much finalized at that point. That's
21 why we have this question.

22 THE COURT: Well, the protocol hasn't been finalized
23 yet and so I think part of the issue is -- you're right,
24 Mr. Levenson, it could potentially go to that after the protocol
25 has in fact been finalized.

3:21-cv-00176-RFB-CLB

1 So part of the issue with respect to your bad faith
2 arguments, which I can appreciate, is that they are premature,
3 some of them, at this point in time because we don't know what
4 the final protocol is. I'm not saying you shouldn't ask those
5 questions, Mr. Levenson, because I think they could potentially
6 be relevant for the Court's consideration. But for now I am
7 going to sustain the objection and allow for the privilege to be
8 asserted for that question.

9 MR. LEVENSON: Okay.

10 BY MR. LEVENSON:

11 Q. Director Daniels, what actions have you taken with respect
12 to finalizing the execution protocol since your meeting with
13 Dr. Azzam?

14 MR. GILMER: Objection, Your Honor. I believe that
15 also calls for a deliberative process privilege and also could
16 delve into safety and security concerns as well as Director
17 Daniels has previously testified.

18 THE COURT: Sustained. I'll allow for the privilege to
19 be asserted conditionally at this time.

20 BY MR. LEVENSON:

21 Q. Director Daniels, in your declaration filed with this Court
22 on April 30th, that's ECF Number 22-10, at paragraphs 9 through
23 11 you state that NDOC did not have midazolam in its possession.
24 Is that correct?

25 A. That is correct.

3:21-cv-00176-RFB-CLB

1 Q. Now, when you say it is not available for NDOC, what do you
2 mean by that?

3 A. In consultation with my pharmacy chief indicated that that
4 drug was no longer available to the -- to NDOC. That was a
5 decision made well before I arrived, and I did not get into the
6 details as to why.

7 Q. So you're not sure why it is unavailable to NDOC. Is that
8 what I understand?

9 A. My understanding is that I'm not 100 percent sure as to why,
10 which is why I will not testify as to why. All I know is I've
11 been told that that -- that medication is not available to us.

12 THE COURT: I'm sorry. When you say "it's not
13 available," it obviously is available in terms of being
14 available for purchase. You're not saying that it's not
15 available generally for purchase.

16 THE WITNESS: To NDOC.

17 THE COURT: And are you saying that because that's an
18 NDOC policy or are you saying that because there's some other
19 reason why you all cannot obtain it? And it's important because
20 there -- it's one thing if NDOC has made a determination to do
21 that, potentially. But it's another thing if, essentially, the
22 company or someone else decided not to provide it.

23 Can you explain why it's not available?

24 THE WITNESS: Your Honor, I arrived -- my first day of
25 work was December 3rd of '19. There were a lot of things that I

3:21-cv-00176-RFB-CLB

1 just didn't know because I wasn't a part of the organization or
2 understand all the history.

3 Once I engaged in learning more about this process here
4 in this state, I started asking about, well, individual items
5 that were based on the last one.

6 THE COURT: Right.

7 THE WITNESS: And it was told to me -- the chief
8 pharmacist explained to me -- I'm sorry. She's actually the
9 Pharmacy Director -- indicated to me that that is no longer
10 available to us. I did not get into the reasons why.

11 THE COURT: Okay. Okay.

12 THE WITNESS: It wasn't relevant to me. I wanted to
13 know what we did have available --

14 THE COURT: Got it.

15 THE WITNESS: -- as opposed to what we did not.

16 THE COURT: Okay. Thank you, Director Daniels.

17 Go ahead, Mr. Levenson.

18 BY MR. LEVENSON:

19 Q. With regard to your obtaining midazolam, in your declaration
20 at paragraph 10 you state that it cannot be purchased or, quote,
21 otherwise obtained.

22 What does "otherwise obtained" mean in --

23 THE COURT: I think, Mr. Levenson, he's already gone
24 over this. Let's move on from this question, please.

25 BY MR. LEVENSON:

3:21-cv-00176-RFB-CLB

1 Q. Are you able to receive drugs from other Department of
2 Corrections?

3 MR. GILMER: Your Honor, I object. I think that seeks
4 a legal conclusion.

5 THE COURT: Okay. I'm going to sustain that, but,
6 Mr. Levenson, perhaps you could be more specific about what the
7 nature is of what you're asking. I'm not sure I understand
8 myself either, if you're talking about particular agencies, or
9 it would be helpful to give some more detail.

10 BY MR. LEVENSON:

11 Q. Could you -- could you receive the drugs from, let's say,
12 the Arizona Department of Corrections as opposed to going
13 through a pharmacy?

14 A. Thank you.

15 MR. GILMER: Again, I just would like to object to that
16 question because I think it calls for a legal conclusion as to
17 where he can purchase drugs from other states. There's --

18 THE COURT: So, Mr. Gilmer, maybe I'm not understanding
19 your -- your objection. What I understood the question to be is
20 not asking Director Daniels for a legal conclusion, but whether
21 or not he understood even as part of this process whether or not
22 there would be access to -- without him deciding whether or not
23 he's chosen to pursue it or not, whether or not there would be
24 access to drugs from other corrections facilities outside of the
25 State of Nevada. That limited question. And I think that that

3:21-cv-00176-RFB-CLB

1 would avoid the legal conclusion that you are objecting to.

2 So could you answer that -- that question, Director
3 Daniels? Are you aware of whether or not you could obtain any
4 drugs for the protocol from other state Departments of
5 Corrections outside of Nevada?

6 THE WITNESS: Your Honor, I do not know. I have not
7 directed my pharmacy chief to attempt to do so nor do I know if
8 that's a common practice or if she has or has not. I don't
9 know.

10 THE COURT: Okay. Thank you, Director Daniels.

11 BY MR. LEVENSON:

12 Q. Director Daniels, what other drugs are not available to NDOC
13 usage for this execution?

14 MR. GILMER: Objection, Your Honor. That calls for the
15 deliberative process privilege. And I believe that asking those
16 questions would delve into his thoughts and opinions with regard
17 to potential protocols.

18 MR. LEVENSON: May I respond, Your Honor?

19 THE COURT: Yes.

20 MR. LEVENSON: The director and his counsel put this
21 issue -- they waived this issue because they put in their
22 declaration and their pleadings that midazolam was not
23 available. So that would infer that they have waived the issue
24 as far as what is not available.

25 What we understand is that they're worried about drug

3:21-cv-00176-RFB-CLB

1 companies finding out that their drugs will be used. We're
2 talking about drugs that will not be used. So it doesn't seem
3 to have the same public concern nor, as I said, they have put
4 this -- this in issue.

5 MR. GILMER: Brief response, Your Honor?

6 THE COURT: We don't -- I don't need the brief response
7 because what I'm going to do is I'm going to reserve on this
8 issue. As indicated, I'm going to have Director Daniels and
9 Dr. Azzam come back on Monday. I'm going to look at these
10 privilege issues that are being raised today.

11 So there will be an opportunity, Mr. Levenson,
12 potentially for the Court to revisit this later. I think -- I
13 do think with respect to midazolam it's different because that
14 was specifically identified in the affidavit. And so that's
15 different than other hypothetical drugs that NDOC may or may not
16 have access to.

17 I'm not saying I wouldn't direct an answer, but let's
18 move on from there. I'm going to reserve ruling on that.

19 So, Director, you do not have to answer that question.

20 Go ahead, Mr. Levenson.

21 BY MR. LEVENSON:

22 Q. And, Director, you said that you needed approximately 90 to
23 100 days to -- to finalize a protocol.

24 Have you voiced any concerns to anyone that you could
25 potentially have to formulate and carry out an execution within

3:21-cv-00176-RFB-CLB

1 the next four weeks?

2 MR. GILMER: Objection, Your Honor, as I believe that
3 mischaracterized the evidence in part or his testimony in part
4 with regard to the 90 and 120-day timeline.

5 THE COURT: Is that the only portion you're objecting
6 to?

7 MR. GILMER: What was the second part of the question?

8 THE COURT: Because I -- I thought -- I want to -- the
9 question was -- and we can take out the 90 and 120 days -- have
10 you voiced any concerns to any State officials or other public
11 officials about the ability of the NDOC to effectively and
12 safely carry out an execution within 30 days.

13 MR. GILMER: Your Honor, I object to that question to
14 the extent that that could also delve into the deliberative
15 process as well as potential attorney/client issues depending on
16 how that answer was asked.

17 THE COURT: So that's why I asked you about your
18 objection earlier, Mr. Gilmer, because I would have anticipated
19 that you would have reasserted it. That's why I just rephrased
20 it. I didn't expect that he would answer because I expect that
21 you would in fact object. But I wanted just to restate it
22 clearly, as I understood it, for the record.

23 I'm going to allow for that objection to be asserted at
24 this time and again sustain it conditionally.

25 MR. LEVENSON: Can I have a moment, Your Honor?

3:21-cv-00176-RFB-CLB

1 THE COURT: Sure. Take your time.

2 (Plaintiff's counsel conferring.)

3 MR. LEVENSON: Let me try again, Your Honor.

4 BY MR. LEVENSON:

5 Q. Director Daniels, do you have any concerns about having to
6 effectuate an execution within -- possibly within four weeks?

7 A. I do not have any concerns. In reference to the previous
8 question, I was opining based on a very deliberate question that
9 I responded to.

10 However, I am clearly aware of my duties as the
11 Director of the Nevada Department of Corrections. And if given
12 an executed warrant and order, I will execute my duties. I --
13 there's always an opportunity to know more and learn more, but
14 at some point in time you still have to execute your duties.
15 And that's how I see this process.

16 THE COURT: But, again, Director, you wouldn't
17 understand the duty to perform an execution that you couldn't
18 legally perform. And what I mean by that is, for example, if
19 you actually didn't have the drugs that you thought were
20 appropriate for the execution, let's say there was an incident
21 where they were destroyed inadvertently, you're not saying you
22 would nonetheless go through with an execution even though you
23 don't think you could safely perform it, correct?

24 THE WITNESS: Your Honor, I would clearly alert those
25 in my chain of command as well as my legal counsel as to the

3:21-cv-00176-RFB-CLB

1 fact that I don't have the appropriate tools to complete these
2 tasks. And that would be part of my duty to obviously stay
3 within the scope of cruel and unusual punishment that's listed
4 in the Eighth Amendment.

5 THE COURT: No. Okay. I just wanted to receive that
6 clarification. It sounded as if you were saying you would do it
7 regardless, but I didn't understand that to be your testimony.
8 And I think what you're saying is that if you didn't think that
9 you had the material, you're saying that you would alert the
10 appropriate individuals or speak with Mr. Gilmer about what the
11 options would be. Is that right?

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: Okay.

14 BY MR. LEVENSON:

15 Q. Director Daniels, how do you reconcile your testimony that
16 you -- that it would be good to have a longer period of time to
17 effectuate an execution with the fact that you would -- might
18 have to prepare and complete an execution with four weeks? How
19 do you reconcile those two pieces of testimony?

20 MR. GILMER: Objection, asked and answered. Just
21 answered that in the last question.

22 THE COURT: Overruled. I think it's slightly
23 different.

24 You can answer that question?

25 THE WITNESS: Would you repeat the question, sir?

3:21-cv-00176-RFB-CLB

1 BY MR. LEVENSON:

2 Q. Certainly.

3 How do you reconcile your previous testimony that a
4 longer period of time to effectuate an execution would be good
5 with the fact that you are talking about having to go through an
6 execution in four weeks?

7 A. Once again, the issue was I was asked to opine on time. And
8 in most circumstances, if most of us are put in a situation in
9 which we have more time to deliberate, more time to discuss, we
10 would take advantage of that. However, that does not mean that
11 I would not be prepared to take the information I had available
12 to me as long as it was consistent with what the State law
13 requires, our statute, as well as the Constitution.

14 I guess the analogy would be you could never make the
15 -- perfect the enemy of the good. I would always opt for more
16 and always opt for better. However, given the circumstances and
17 the statute, I would go with the best information I had
18 available. And if I did not believe that I could move forward
19 in a way that would be consistent with the Constitution, the
20 State Constitution, then I would apprise the appropriate
21 individuals.

22 So I don't see a conflict in my testimony. I was just
23 asked to opine. I opined, but I'm prepared to do my job.

24 THE COURT: But let me ask you this question, I think
25 this may help to clarify this. It sounds to me as if what

3:21-cv-00176-RFB-CLB

1 you're saying is if you were given more time you would take more
2 time because of the seriousness of this process and all the
3 factors you'd have to consider, right?

4 THE WITNESS: Your Honor, exactly. I think the people
5 of the state deserve the fact that the Director of the
6 Department of Corrections sees this as a very, very serious
7 issue. There is no greater responsibility than if you are going
8 to be tasked with, as a part of your duties, to take a life that
9 you do the best you can, learn as much as you can, and keep
10 growing and learning as often, but sooner or later the day will
11 come.

12 THE COURT: Well, let me ask you this question. If you
13 had the ability to decide the date and the date was 30 days from
14 now versus 90 days from now, which date would you choose?

15 THE WITNESS: Your Honor, last time I opined, that's
16 how we got here.

17 THE COURT: Well, but, Director, I want you to be
18 direct and honest with us.

19 THE WITNESS: I --

20 THE COURT: And I think you opined because what you're
21 saying is it's a deliberative process and you want to be
22 deliberative.

23 I appreciate that this question may be uncomfortable,
24 but the fact is we're looking at, as you said, very serious
25 issues here. There is a potential for this execution to proceed

3:21-cv-00176-RFB-CLB

1 possibly in 30 days, and I have to consider that.

2 And what you seem to have said to me is, "There are a
3 lot of factors to consider. I don't necessarily have all of the
4 information, even about the drugs." If you were given the
5 choice, wouldn't you choose 90 days over 30 days?

6 THE WITNESS: If given the choice --

7 THE COURT: Yes.

8 THE WITNESS: -- I would go with the longer date.

9 However, the statutory limits are already set --

10 THE COURT: And I understand that.

11 THE WITNESS: -- I would obviously operate within the
12 scope of the statute.

13 THE COURT: Director Daniels, I'm not asking you,
14 right, whether or not you think, because I think you've said
15 this, you could still -- you think you could still potentially
16 perform NDOC an execution within 30 days. And you have said
17 that if you didn't think you could do that, you would -- you
18 would inform authorities. So I don't think that you're somehow
19 suggesting with your answer that you wouldn't perform the
20 duties. I know that's a concern of yours, but that's not what I
21 take from it.

22 But you've acquired a great deal of information. It's
23 helpful for me in terms of understanding this process and
24 understanding what I have to consider for me to have that
25 information as well. So I appreciate your candor. Thank you.

3:21-cv-00176-RFB-CLB

1 Mr. Levenson?

2 BY MR. LEVENSON:

3 Q. Director Daniels, I want to understand something you
4 testified to previously. You talked about the timing of the
5 release of the protocol somehow being based on companies seeing
6 the drugs that were going to be used.

7 Can you explain that?

8 (Pause.)

9 MR. GILMER: Your Honor, I think there's an objection
10 to that question because I don't remember that testimony, but
11 I'm not sure exactly what the objection is.

12 If Mr. Daniels knows what he's asked -- I guess maybe
13 it's vague. I'm not sure that question is answerable.

14 But obviously if Director Daniels can --

15 THE COURT: I think what Mr. Levenson is asking is if
16 Director Daniels could be more detailed about your, sort of,
17 reference to the possibility that you have to factor in a
18 manufacturer coming in and saying, "We don't want to have our
19 drugs used," and there might be litigation around that, and that
20 creates something for you to consider in terms of finalizing the
21 protocol. I think you said something like that in terms of your
22 prior testimony.

23 Would that be fair that you have to at least consider
24 that possibility in terms of what may be available to you in
25 terms of the execution protocol?

3:21-cv-00176-RFB-CLB

1 THE WITNESS: I will respond based on what I believe to
2 be the question. And at the end of the day, we know that as
3 much research as I could possibly do, I will take that time to
4 research and then consult with the Chief Medical Officer.

5 However, early disclosure of that information could
6 provide some with an opportunity to create legal roadblocks for
7 whatever reason. I -- I'm not in the head of any of these
8 companies.

9 THE COURT: Right.

10 THE WITNESS: But I do understand that as I'm working
11 the information that I received then deciding what information I
12 want to present to the Chief Medical Officer.

13 I also have to take into consideration that there may
14 be some legal challenges that will be generated through many
15 groups. It can be anti-death penalty groups or so on. But I am
16 cognizant of that.

17 But the primary issue is always the due diligence of me
18 understanding the drugs and what the compounds and having
19 professionals explain to me what this does, what the dosage
20 would be, all of those -- those individual issues that I'm not
21 qualified to make.

22 So I'm taking in the totality of the act -- of the
23 execution process and our protocols, as well as our ability to
24 secure the tools that we need to effectuate the will of the
25 people.

3:21-cv-00176-RFB-CLB

1 THE COURT: Does a consideration of a possible
2 litigation by a manufacturer factor into your timing of the
3 finalization of the protocol?

4 THE WITNESS: (Pause.)

5 Your Honor, will you rephrase your question, please?

6 THE COURT: Sure. Does the consideration -- does a
7 consideration of the possibility of litigation by a manufacturer
8 to prevent use of a drug factor into your determination about
9 the timing of the finalization of the protocol?

10 MR. GILMER: Your Honor, I'm always loath to object to
11 a Judge's question.

12 THE COURT: No --

13 MR. GILMER: That gets into deliberative process.

14 THE COURT: That's fine. Again, part of it is,
15 Mr. Gilmer, is I want -- I have to also know which questions you
16 think would be covered. So I know, Mr. Gilmer, that you're
17 respectful of the Court, but you will always object if you think
18 it's appropriate. And I think you will continue to do so.

19 I'm going to sustain that objection to my own question,
20 conditionally, with the understanding that I'll have to go back
21 and look at that.

22 So -- but I do want to -- I do want to make sure,
23 Mr. Gilmer, again, even if I ask a question, you're well aware
24 of the fact that you can object and assert the privilege.

25 We have to figure out on a question-by-question basis

3:21-cv-00176-RFB-CLB

1 what the nature of the privilege is that's being asserted so I
2 can rule on that later.

3 So, I appreciate that. And, again, I have no doubt
4 that you'll continue to object as you see appropriate regardless
5 of who asks the questions.

6 Mr. Levenson, please go ahead.

7 MR. LEVENSON: Just a moment, Your Honor.

8 (Plaintiff's counsel conferring.)

9 BY MR. LEVENSON:

10 Q. Director Daniels, do you have any plans to consult with any
11 other individuals --

12 MR. GILMER: Objection.

13 BY MR. LEVENSON:

14 Q. -- as you formulate the protocol?

15 MR. GILMER: Objection, Your Honor, that goes into his
16 deliberative process as to who he may seek opinions from.

17 THE COURT: Sustained.

18 (Plaintiff's counsel conferring.)

19 MR. LEVENSON: Your Honor, can I just revisit that for
20 a moment? I believe that Director Daniels actually said in his
21 testimony that he might be consulting with other people and I
22 wanted to explore that. So I think he put the -- put it in
23 issue.

24 THE COURT: I'll go back and take a look at the
25 transcript. I think to the extent that Director Daniels

3:21-cv-00176-RFB-CLB

1 identified any individual process, you could potentially ask
2 about that, but I think that the privilege would extend to him
3 providing a sort of fulsome and detailed overall description of
4 his deliberations and process, which is what I think the
5 question invites.

6 And as I understand it, Mr. Gilmer, that's your
7 objection to it. Is that correct?

8 MR. GILMER: Yes, Your Honor.

9 THE COURT: All right. So for now I'll continue to
10 sustain that objection.

11 MR. LEVENSON: I don't think we have any other
12 questions at the moment, Your Honor.

13 THE COURT: All right.

14 Mr. Gilmer, do you have any additional questions?

15 MR. GILMER: Your Honor, I have questions, but since
16 you said Director Daniels will be back on Monday, I'll just
17 reserve and ask those -- all those questions at that time.

18 THE COURT: Okay. Well, any questions you think will
19 be helpful as it relates to deciding the privilege issue,
20 Mr. Gilmer?

21 MR. GILMER: No, Your Honor. I do not.

22 THE COURT: All right.

23 Mr. Pomerantz, Ms. Ahmed, do you have any questions
24 that you would like to ask of Director Daniels? Certainly you
25 are free to do so as well.

3:21-cv-00176-RFB-CLB

1 MR. POMERANTZ: May I have a moment, Your Honor?

2 THE COURT: Sure. Take your time.

3 (Defense counsel conferring.)

4 MS. AHMED: Your Honor, thank you for asking. We don't
5 have any questions for the witness.

6 THE COURT: Well, and I'll allow you an opportunity on
7 Monday when we come back to be able to ask questions. Again, I
8 know that you all are fairly new on this case and so you may
9 need some time to be able to delve deeper. So I'll allow you to
10 be able to reserve on that issue as relates to questions for
11 Director Daniels.

12 MS. AHMED: Thank you, Your Honor.

13 THE COURT: All right. So for now, thank you, Director
14 Daniels, for your testimony. I appreciate it.

15 I, unfortunately, am going to require that you come
16 back on Monday and I appreciate again your time for that, but as
17 I'm sure you understand, this is a very significant case and
18 issue that we have to resolve. And so we're going to set a time
19 and date. But you're excused for now, sir.

20 THE WITNESS: Yes, Your Honor. Thank you very much.

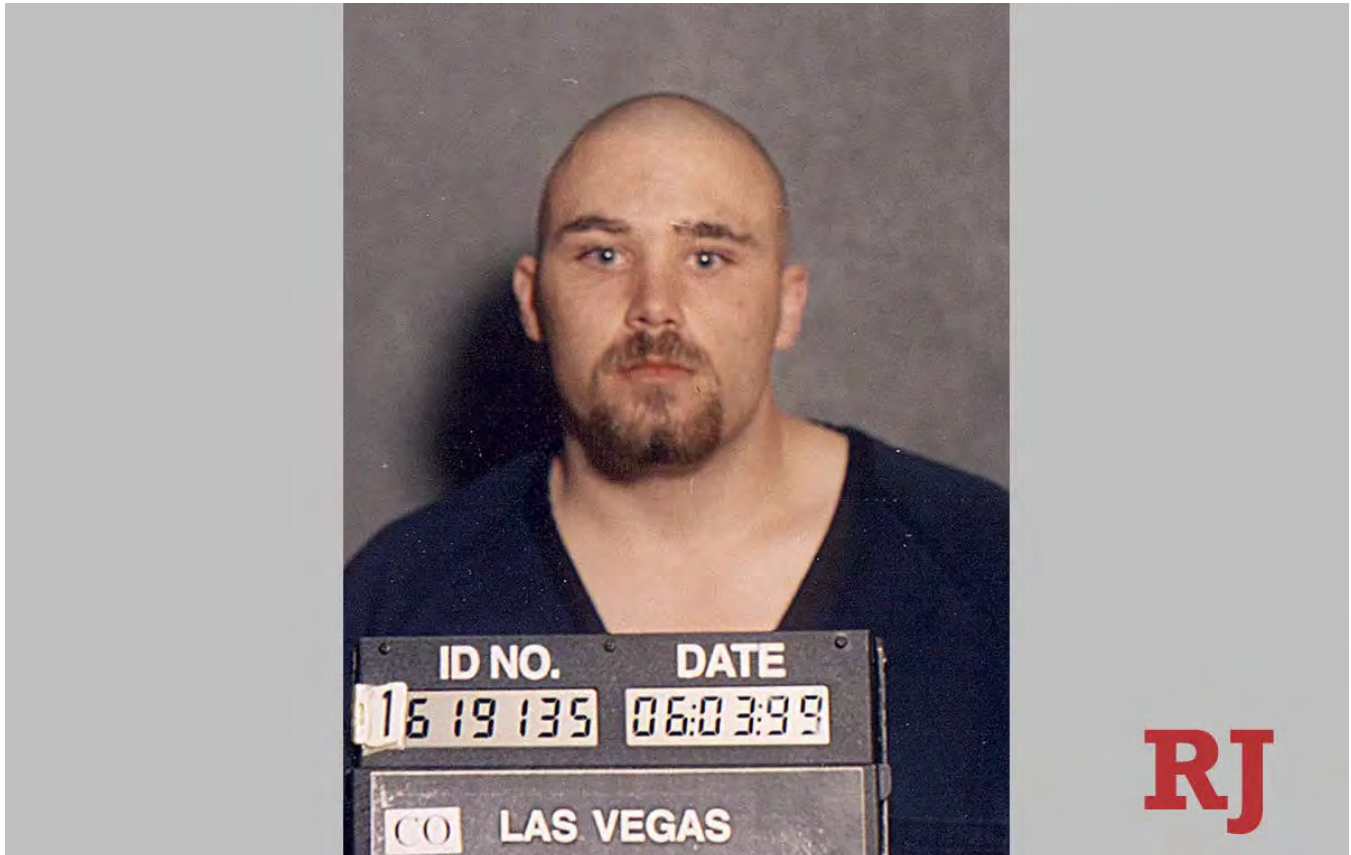
21 THE COURT: Thank you.

22 All right. Let's think a little bit then about next
23 steps here. Mr. Gilmer, I want to start with you. As you are
24 aware, in civil cases oftentimes when a privilege is asserted, a
25 privilege log needs to be created so the Court can figure out

EXHIBIT 4

EXHIBIT 4

Nevada prison officials unsure on execution method for Zane Floyd



Zane Floyd police mug shot following his 1999 shooting spree (Metropolitan Police Department)

By [David Ferrara](#) Las Vegas Review-Journal



May 3, 2021 - 5:48 pm

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Nevada prison officials have yet to establish how they plan to kill condemned prisoner Zane Floyd, nearly a month before prosecutors want his execution to take place.

“I will prepare a final execution protocol, which will include the drug or combination of drugs to be used, once I have made the final conclusion that the (choice) of drug or drugs, and the manner in which to inject the drug or drugs, will result in a death that does not violate the Constitution,” prison

director Charles Daniels said in court papers. “I am still in the process of finalizing the protocol that would be used for Mr. Floyd.”

On Monday, U.S. District Judge Richard Boulware ordered Daniels and the state’s chief medical officer, Ihsan Azzam, to testify later this week about what drugs are available for the state’s lethal injection cocktail.

Federal public defenders representing Floyd, now 45, who was convicted of killing four and gravely wounding another inside a Las Vegas grocery store almost 22 years ago, argued that not telling Floyd how he would die amounts to cruel and unusual punishment, a violation of his constitutional rights.

‘Playing three-card monte’

“I believe the state and the Department of Corrections know more about the drugs than they’re telling us,” one of Floyd’s lawyers, David Anthony, told Boulware during Monday’s hearing. “We’ve been playing three-card monte with the state in our phone calls. Is this the drug? No. Is this the drug? No. Is this the drug? Well, we can’t say.”

But Chief Deputy Attorney General Randall Gilmer argued that the prison system should not have to reveal its hand until a death warrant is signed.

Clark County District Attorney Steve Wolfson has [asked a state court judge](#) to sign the warrant next week, seeking Floyd’s execution for the week of June 7.

“NDOC is awaiting the issuance of a valid execution warrant and order,” Gilmer wrote in court briefs. “Once the execution protocol is finalized, NDOC is committed — save for necessary safety and security considerations — to providing that execution protocol to Floyd and the public.”

The litigation comes as the [Nevada Senate considers a bill](#) that would abolish the death penalty.

No one from the district attorney's office was present at Monday's hearing, and Wolfson did not respond to phone and text messages seeking comment.

A jury sentenced Floyd to die for the 1999 killings inside a grocery store on West Sahara Avenue. He was dressed in military fatigues and armed with a 12-gauge shotgun hidden under a robe when he shot everyone he encountered.

Four employees — Lucy Tarantino, 60, Thomas Darnell, 40, Chuck Leos, 40, and Dennis "Troy" Sargent, 31 — died. Zachar Emenegger, 21, was shot twice and survived after playing dead in the produce section.

Stay of execution

At Monday's hearing, Boulware stopped short of ordering a stay of execution for Floyd.

"Why shouldn't I stay this execution right now?" the judge asked. "It would save time, because you know we're going to litigate the protocol at some point. The defendant needs to have time. The court needs to have time. So why wouldn't I grant it, temporarily at least, until the protocol is finalized?"

Gilmer argued that it would be premature for the federal court to interfere with Floyd's case before an execution warrant is signed. He also wrote in a brief that Floyd has not shown that a stay would be necessary, depending on the method of execution.

Nevada's lethal injection protocol faced drawn-out legal scrutiny after another death row inmate, Scott Dozier, asked to be executed. He [killed himself behind bars](#) more than two years ago.

At least two of the drugs planned for Dozier are no longer available for Nevada's prison system.

Floyd's lawyers said last month that he [preferred a firing squad over lethal injection](#). In order to challenge an execution, the U.S. Supreme Court requires an inmate to provide an alternative means of death.

"Floyd concedes he must establish that the harm he seeks to prevent is both likely and irreparable," Gilmer wrote. "However, he cannot show either. This is because, while NDOC certainly admits that death is irreparable, the harm Floyd must show here is something other than death, as he concedes, as he must, that the execution can proceed under his desired protocols."

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