IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

ZANE M. FLOYD,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL P. VILLANI, DISTRICT JUDGE,

Respondent.

STATE OF NEVADA

Real Party in Interest.

Supreme Court No.

District Court Case Nos.
99C159897
Habeas Court Case No.
A-21-832952-W

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

VOLUME 1 OF 2

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Respectfully submitted,

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

CERTIFICATE OF SERVICE

In accordance with NRAP Rule 25(c)(1)(C) the undersigned hereby certifies that on this 16th day of July, 2021, I personally served a true and correct copy of the foregoing APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION by email to:

Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

Further Service on the following party was made via UPS on July 16th, 2021:

Hon. Michael Villani
District Judge
Department XVII
Regional Justice Center
200 Lewis Ave
Las Vegas, NV 89155

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

EXECUTION OF ALLEN MILSTEAD AT DAYTON, NEVADA TERRITORY.

Sacramento Daily Union, Volume 24, Number 3685, 13 January 1863 — EXECUTION OF ALLEN MILSTEAD AT DAYTON, NEVADA TERRITORY [ARTICLE]

[CORRESPONDENCE OF THE UNION.]

VIRGINIA CITY, January 10, 1863.

Going to the Execution.

Knowing that you are always anxious to procure such items of news as might prove interesting to your readers, I thought I would send you a full description of the execution of Allen Milstead, which took place in Dayton, on Friday, January 9th.

The papers of this city had a brief sketch of the execution published this morning, but as none of them have given it anything like a full account, I am induced to send the UNION the present sketch. I also send you the only verbatim report of Milstead's speech, which he delivered after the rope had been placed around his neck, and when he was on the trap and about to be launched into eternity.

On Friday morning we started from Virginia at seven A. M., and arrived at Silver City in time to escort the Silver City Guard, a well drilled company, which is commanded by Captain E. B. Zabriskie, and which had been ordered out to be present at the execution. When we arrived at Dayton we found the citizens of that town delighted to see so many visiters, for never did they have the pleasure of seeing so many persons in their city before. The company marched down to the jail, when a guard was thrown around that institution for the purpose of keeping order.

Milstead's Actions When in Jail.

From the time that Milstead was condemned to be executed until the night before his execution he seemed to be of the opinion that he could make his escape, and during all this time would talk but little, and that always in the style of bravado; but when he was alone he would sing, dance, swear and use such language as was not fit to be heard. The night before his execution he gave up all hopes of getting out, and he commenced to curse the Judge, the District Attorney and mankind in general. He would not talk on religion to any one, although the Rev. Mr. Brown called on him—but up to a short time before he was executed would only insult this gentleman; but at the eleventh hour he told Sheriff Moore that he might send in that d—d old son of a b—h (meaning Rev. Mr. Brown), who did call to see him, and remained with him until he was taken out of jail.

Preliminary Arrangements.

Milstead wore a white shirt, drab pants, a pair of slippers, a felt hat and a blue overcoat, which was thrown over his shoulders.

Precisely at half-past twelve a single horse and wagon arrived with Milstead's coffin, which was of common pine, and painted red. At this time a terrible rush was made by the crowd toward the jail, but the company which was stationed as a guard kept them back, and those who rushed up expecting to see the prisoner had to wait for some little time, we suppose in great suspense.

At quarter to one o'clock the prisoner, in company with the Sheriff and one of his deputies, Shaw, came out of the jail, and right at the head of the stairway was the wagon on which was placed the coffin, which the prisoner was to ride on over to the place of execution. We watched the prisoner's countenance to see if he would change in any way when he saw his coffin, but he never moved a nerve no more than any man in that vast crowd, which at this time had assembled around the jail. He walked up the stairs alone, and though handcuffed he never quivered or flinched, but made an effort to get into the wagon, but stepped back and asked the Sheriff if he could not be permitted to walk over, which request was granted.

The Procession.

Ten minutes to one the procession started from the jail to the scaffold, which was distant about three-eighths of a mile, two Deputy Sheriffs taking the front of the procession, then the wagon, the prisoner with Sheriff Moore on his right, and Deputy Sheriff Shaw on his left, followed by Brigadier General Ford and several other gentlemen, who were in the center of the military company, which marched with open ranks, all surrounded by an excited crowd, whose curiosity seemed heightened to the highest imaginable pitch.

Scene on the Scaffold.

The scaffold was erected at the mouth of Gold Canon, and surrounded by hills on both sides. During the march there was nothing worthy of any special notice, more than the prisoner who smiled several times when going along, and walked as steady as any man in the procession. When we arrived at the scaffold the prisoner went upon it first, without any assistance, but we could notice that his countenance betokened a degree of sorrow which seemed to trouble him for a few moments, but afterwards he collected himself and then sat down. He cast his eyes around and through the crowd, and then asked the Sheriff if he could remain with the ministers for one hour, as he believed they might do him some good, and this request being granted, Rev. Mr. Brown and Rev. Mr. Lane went up, and he commenced to talk with Rev. Mr. Brown, and seemed to talk very earnestly, but at times he would look around quite excited, and seemed to be trying to see some one in the crowd, which he succeeded at last in doing. A man by the name of Wilson, who walks on crutches, was seated in a wagon close by. Milstead sent after him, and being a respectable looking man all seemed anxious to see how he would act. When Wilson got up, the prisoner came over and met him, took hold of him by both hands and seemed quite delighted to meet him. He then took him aside and remained in conversation with him for some time. He then got a pencil and a piece of paper, knelt down on the scaffold and wrote something which turned out to be his mother's address in Missouri, with a request that he (Wilson) should write to her about his death.

Several times he told Sheriff Shaw that he did not care for dying, if it was not on account of disgracing his friends, who, we understand, are very respectable people. During the time that he was on his knees writing, his friend wept very bitterly, and seemed three times more affected than did Milstead. After he shook hands with Wilson and bade him good-by, he for the first time wept for a moment, then cheered up again, and commenced to talk with Rev. Mr. Lane.

STATUTES

OF THE

STATE OF NEVADA

PASSED AT THE

TWENTIETH SESSION OF THE LEGISLATURE

1901

COMMENCED ON MONDAY, THE TWENTY-FIRST DAY OF JANUARY, AND ENDED ON SATURDAY, THE SIXTEENTH DAY OF MARCH

CARSON CITY, NEVADA
STATE PRINTING OFFICE, : : : : ANDREW MAUTE, SUPERINTENDENT
1901

procurement of more than one license for the same sheep, in the State of Nevada during the same year.

CHAP. LII.—*An Act amendatory of and supplementary to an Act entitled "An Act to regulate proceedings in criminal cases in the courts of justice in the Territory of Nevada."*

[Approved March 13, 1901.]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four hundred and fifty-four of said Act is hereby amended so as to read as follows:

Judgment of death.

Section four hundred and fifty-four. When judgment of death is rendered, a warrant, signed by the Judge and attested by the Clerk, under the seal of the Court, must be drawn and delivered to the Sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than sixty days nor more than ninety days from the time of the judgment, and must direct the Sheriff to deliver the defendant within seven days, or as soon thereafter as travel will permit, to the Warden of the State Prison of this State, for execution, such Prison to be designated in the warrant.

Warden of State Prison to execute death sentence.

SEC. 2. Section four hundred and fifty-seven of said Act is hereby amended so as to read as follows:

Governor and Warden only to suspend execution, except in appeal cases.

Section four hundred and fifty-seven. No Judge, Court or officer, other than the Governor, can suspend the execution of a judgment of death, except the Warden of the State Prison to whom he is delivered for execution, as provided in the eight succeeding sections, unless an appeal is taken. When an appeal is taken from a judgment of death, the appellate court, and any Judge thereof in vacation, may suspend the execution until the appeal is heard and determined.

SEC. 3. Section four hundred and fifty-eight of said Act is hereby amended so as to read as follows:

If defendant is insane.

Section four hundred and fifty-eight. If, after judgment of death, there is good reason to suppose that the defendant has become insane, the Warden of the State Prison to whom he is delivered for execution, with the concurrence of the Judge of the District Court of the county in which such Prison is situated, may summon from the list of jurors selected by the County Commissioners for the year, a jury of twelve persons, to inquire into the supposed insanity, and must give immediate notice thereof to the District Attorney of said county.

Warden may impanel jury to determine insanity of defendant.

SEC. 4. Section four hundred and sixty of said Act is hereby amended so as to read as follows:

Certificate of inquisition.

Section four hundred and sixty. A certificate of the inquisition must be signed by the jurors and the Warden, and

filed with the Clerk of the District Court of the county in which such Prison is situated.

SEC. 5. Section four hundred and sixty-one of said Act is hereby amended so as to read as follows:

When defendant is found insane or sane.

Section four hundred and sixty-one. If it is found by the inquisition that the defendant is sane, the Warden must execute the judgment; but if it is found that he is insane, the Warden must suspend the execution of the judgment until he receives a warrant from the Governor, or from the Judge of the District Court of the county in which such State Prison is situated, directing the execution of the judgment.

SEC. 6. Section four hundred and sixty-two of said Act is hereby amended so as to read as follows:

If insane.

Section four hundred and sixty-two. If the inquisition finds that the defendant is insane, the Warden must immediately transmit it to the Governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

SEC. 7. Section four hundred and sixty-three of the said Act is hereby amended so as to read as follows:

If defendant is a female and pregnant Warden to summon a jury of three physicians.

Section four hundred and sixty-three. If there is good reason to suppose that a female against whom a judgment of death is rendered is pregnant, the Warden of the State Prison to whom she is delivered for execution, with the concurrence of the District Court of the county in which such State Prison is situated, may summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the District Attorney of such county, and the provisions of sections four hundred and fifty-nine and four hundred and sixty apply to the proceedings upon the inquisition.

Notice to be given.

SEC. 8. Section four hundred and sixty-four of said Act is hereby amended so as to read as follows:

If defendant is pregnant, execution suspended.

Section four hundred and sixty-four. If it is found by the inquisition that the female is not pregnant, the Warden must execute the judgment; if it is found that she is pregnant, the Warden must suspend the execution of the judgment, and transmit the inquisition to the Governor.

SEC. 9. Section four hundred and sixty-six of said Act is hereby amended so as to read as follows:

If judgment of death has not been executed.

Section four hundred and sixty-six. If for any reason a judgment of death has not been executed, and it remains in force, the Court in which the conviction is had, on the application of the District Attorney of the county in which the conviction is had, must order the defendant to be brought before it; or, if he be at large, a warrant for his apprehension may be issued.

SEC. 10. Section four hundred and sixty-seven of said Act is hereby amended so as to read as follows:

Relating to execution of judgment.

Section four hundred and sixty-seven. Upon the defendant being brought into court, it must inquire into the facts, and if no legal reasons exist against the execution of the

judgment, must make an order that the Warden of the State Prison, to whom the Sheriff is directed to deliver the defendant, shall execute the judgment at a specified time.

SEC. 11. Section four hundred and sixty-eight of said Act is hereby amended so as to read as follows:

Death penalty to be by hanging, within inclosed limits of State Prison.

Suitable inclosure to be provided by Prison Commissioners.

Warden to be present and to select twelve reputable citizens.

Section four hundred and sixty-eight. The punishment of death shall be inflicted by hanging the defendant by the neck until he be dead, within the inclosed limits of the State Prison, and a suitable and efficient inclosure shall be provided by the Board of Prison Commissioners for the purpose. The Warden of the Prison where the execution is to take place must be present at the execution, and must invite the presence of a physician, the Attorney-General of the State, and at least twelve reputable citizens to be selected by him; and he shall, if requested by the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may deem proper to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

Warden to make return to the Court.

SEC. 12. After the execution, the Warden must make a return upon the death warrant to the Court by which the judgment was rendered, showing the time, place, mode and manner in which it was executed.

SEC. 13. This Act shall take effect January 1, 1903.

CHAP. LIII.—*An Act to prohibit the sale of ardent spirits to the Indians.*

[Approved March 14, 1901.]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Felony to sell, barter or give liquor to Indians.

SECTION 1. Any person who shall, after the passage of this Act, sell, barter, give, or in any manner dispose of any spirituous or malt liquors, wine or cider, of any description whatever, to any Indian within this State, shall be deemed guilty of a felony, and upon conviction thereof, shall be fined in any sum not less than one hundred dollars, or be imprisoned in the State Prison for a period of not more than three years, nor less than one year.

Fines paid into School Fund.

Reward to informer.

SEC. 2. All fines imposed and collected under the provisions of this Act shall be paid into the School Fund, and the Court before whom the conviction is had is hereby authorized and empowered to tax as part of the costs, the sum of one hundred dollars against the defendant, which last sum shall go to any person giving information leading to the arrest of the defendant; and in the event of the failure or

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 5526

JACK RAINSBERGER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

APR 11 1968

C. N. DAVIDSON
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER STAYING EXECUTION OF SENTENCE OF DEATH

On April 9, 1968, the district court of the Eighth Judicial District acting pursuant to the provisions of NRS 176.506 issued a warrant of execution directed to the Warden of the State Prison of the State of Nevada ordering the execution of Jack Rainsberger by the administration of lethal gas within the limits of the State Prison located at Carson City, Ormsby County, State of Nevada, on the 2nd day of May, 1968, from which said warrant of execution Jack Rainsberger has regularly filed a notice of appeal to this court and has delivered to the Clerk of this court a certified copy of the notice of appeal.

Pursuant to statute it is ordered that the execution of the judgment of death be, and the same hereby is, stayed pending determination of the said appeal.

DATED: April 11, 1968.

THOMPSON, C.J.

BADT, J.

5576

STATE OF NEVADA
COUNTY OF ORMSBY

FILED
APR 13 1968
C. R. Watson

Nevada Sheriff's Return

(For Use of Sheriff of Ormsby County)

I hereby certify and return that I received the within Stay of Execution

on the 12th day of April, 19 68, and personally served the same upon

Warden Carl Hocker

the within named defendant, on the 12th day of April, 19 68,

by delivering to the said defendant, personally, in Ormsby County, State of Nevada, a

copy of the Stay of Execution

Sheriff of Ormsby County, Nevada

By Don Rasner

Date: April 17, 19 68

THE CONDITION OF THE STATE PRISON

Bulletin No. 79-2

LEGISLATIVE COMMISSION

OF THE

LEGISLATIVE COUNSEL BUREAU

STATE OF NEVADA

August 1978

I. INTRODUCTION AND BACKGROUND

Legislative concern about the adequacy of the Nevada state prison can be traced back over several legislative sessions. Recently, this concern has manifested itself in the appropriation of funds to build new and remodel existing prison facilities, the passage of several legislative measures to streamline and improve prison administration and accounting procedures and appropriations to expand prison staffing and upgrade the salaries of certain prison staff.

The interim study of the condition of the state prison, mandated by A.C.R. 1 of the 1977 legislative session, was an outgrowth of concern about escapes, assaults on prisoners and staff and other recent events at the prison which raised many questions about the department's operations. Of particular concern to the 59th session of the legislature was the adequacy of the department to: (1) Protect society through proper security and control of prisoners, (2) Ensure the safety of inmates and staff, and (3) Provide for the well-being and rehabilitation of the inmates.

In line with the mandate in A.C.R. 1 to study the condition of the state prison, the subcommittee decided to evaluate the entire operation and administration of the department of prisons. The subcommittee believed, however, that other aspects of the criminal justice system, such as sentencing and paroling practices which may affect the operation of the prison through fluctuation in inmate population, were beyond the scope of its charge.

The subcommittee's study included: (1) A review of a substantial number of publications and articles dealing with prison administration, operation and reform, (2) Communication with numerous state, federal and private organizations engaged in, or familiar with, the study of correctional system reform, (3) The review of national and state standards and draft model legislation pertaining to the status of prisoners and the operation of adult correctional institutions, (4) Private interviews and correspondence with prison administrators, staff and inmates, and (5) Unannounced visits and formal tours of prison facilities.

Subcommittee meetings were held in Carson City (on August 13, 1977; December 22 and 23, 1977; and March 31 and April 1, 1978), and in Las Vegas (on October 21 and 22, 1977). On December 22, 1977, the subcommittee devoted 12 hours to

taking testimony from inmates housed at the maximum, medium, and women's institutions.

The subcommittee had formal tours of the northern Nevada prison facilities on August 12, 1977, and of the Southern Nevada correctional center on October 21, 1977. A subcommittee of the subcommittee conducted an unannounced tour of prison facilities on December 20 and 21, 1977. Staff made numerous informal and unannounced visits to the prison facilities during the course of the study.

The subcommittee put several formal questions to the department. These questions and the department's responses are attached to this report as Appendix A and B, respectively. The department's responses include a description of its operations.

As of this writing, the subcommittee notes the current constitutional questions raised by a rash of suits against many states' prisons. Aspects of the operations of prisons in Alabama, Arkansas, Florida, Louisiana, Mississippi, New Mexico, Wyoming, and Rhode Island have been declared unconstitutional (9).* Prison facilities have come under court order in many states.

In Nevada, a class action civil suit is now pending in the United States District Court for the District of Nevada which attacks a wide range of both the department's operations and its treatment of inmates.** The resolution of this suit could have far reaching procedural and fiscal impacts on the operation of Nevada's prison system. Regardless of the outcome of the suit, the subcommittee believes that the adoption of the subcommittee's recommendations will act to dissuade future judicial intervention into the administration of Nevada's prison system.

The subcommittee notes that volumes of national and state standards and model legislation, relating to the treatment of offenders and the operation of adult correctional institutions, have been written in recent years. Certain of the subcommittee's recommendations make reference to these standards.

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* These and other numbers in parentheses at the end of sentences refer to items in the footnote section at the end of the narrative of the report.

** See Maginnis v. Wolff, File No. 77-022, BRT, U. S. Dist. Court - Nevada, November 25, 1977.

In the interest of space, however, the report does not provide reference to or summarize many of the standards reviewed in the study or in the preparation of this report. Copies of relevant standards are available for any member's review in the legislative counsel bureau. Certain of the relevant standards and model legislation are: The American Bar Association's Tentative Draft Standards Relating To The Legal Status Of Prisoners, the "Setting For Corrections" portion of the proposed Nevada Criminal Justice Standards and Goals, the American Correctional Association's Manual Of Standards For Adult Correctional Institutions, the National Conference Of Commissioners On Uniform State Laws Draft Uniform Corrections Act, and the "Corrections" standards proposed by The National Advisory Commission on Criminal Justice Standards and Goals (19, 20, 22, 26, 27).

The Nevada Department of prisons is headed by the board of state prison commissioners (created by article 5, section 21 of the Nevada constitution), composed of the governor, who is president of the board, the attorney general and the secretary of state. The board has full control of all grounds, buildings, labor and property of the department. The department is administered by a director, who is the chief administrative and fiscal officer.

Each of the department's institutions are headed by a superintendent, in classified service, who is responsible to the director for the administration of his institution, including the execution of all policies and the enforcement of all regulations of the department pertaining to the custody, care and training of offenders under his jurisdiction. The law provides for a deputy director; however, no person occupied this position as of the writing of this report. Much of the law pertaining to the operation of Nevada's prisons is found in chapter 209 of the Nevada Revised Statutes.

The department states its mission is:

> To provide supervision of persons entrusted to our care, and to meet their basic human needs, and to provide meaningful programs that will instill values essential in the development of positive change in attitude and behavior.

The department of prisons operates four institutions, three in northern and one in southern Nevada. Northern Nevada institutions include: The Nevada state prison and the women's correctional center located near Stewart, Nevada. The department's southern Nevada institution, the Southern Nevada correctional

center, is located at Jean, Nevada. The department also operates a 50-man honor camp on the grounds of the Northern Nevada correctional center.

At the time this report was written, renovation was planned for the 117-year old Nevada state prison. The first 250 bed construction phase of the Southern Nevada correctional center and the 50-bed honor camp were being completed. Also, the addition of a 90-bed dormitory at the Northern Nevada correctional center and a 54-bed living unit at the women's correctional center were in the initial stages of planning and construction. Also planned is construction of 100 additional inmate housing spaces and certain educational and vocational program areas for the Southern Nevada correctional center.

According to the department of prisons it will have housing capabilities for 1,384 inmates after all of its ongoing or planned construction is completed, now estimated for the summer of 1980. This housing capability is broken down as follows: 340 inmates at the Nevada state prison, 540 at the Northern Nevada correctional center, 350 inmates at the Southern Nevada correctional center, 104 inmates at the women's correctional center, and 50 inmates at the honor camp. The department of prisons has indicated that, if current inmate population growth trends continue, it may submit plans for further expansion to the 1979 legislature. As of the end of February, 1978, there were 1,169 inmates, including 63 women, incarcerated in the department's institutions.

It should be noted at this point that the subcommittee was concerned about the construction and program plans for the Southern Nevada correctional center. The center was designed, according to the department and the architect who designed it, for youthful, first-time, minimum and medium security offenders who are willing to participate in educational and program activities. Although cognizant of this admirable objective, the subcommittee was concerned that potential increases in the department's inmate population could result in unsuitable high risk or aggressive inmates being sent to the Southern Nevada correction center. This, the subcommittee believes, could result in both security problems and high repair costs for the campus style facility whose amenities include high use of glass, exposed wood beams and carpeting.

II. FINDINGS AND RECOMMENDATIONS

The subcommittee found that there are, indeed, many problems pertaining to the conditions at the Nevada department of prisons. These problems were clearly identified to the subcommittee by testimony, through visits to the department of prison's institutions, by information gathered by the sub-

THE PENITENTIARIES IN ARIZONA, NEVADA, NEW MEXICO AND UTAH FROM 1900 TO 1980

Judith R. Johnson

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On the appointed day, Mrs. Dugan ate a last meal of steak and lamb chops, and then was escorted to the scaffold, where the rope was placed around her neck. While a total of seventy-five persons, including seven women and forty newspaper reporters watched, the trap door was sprung and Eva Dugan became the first woman executed in Arizona.[26]

Her death attracted national attention, in part because of her sex, but mostly because of the grisly circumstances of the hanging during which the head was completely torn from the body. Almost immediately after the execution, protest groups organized a campaign to stop hangings and to bring about prison reform in Arizona.[27]

Opposition to hanging also took shape in Nevada in the 1920s. Like Arizona and New Mexico, the Silver State originally assigned the responsibility for carrying out the death sentence in the county where the crime was committed. By 1911, however, the Nevada legislature revised the law to allow a choice of a hanging or a firing squad at the state prison. When the first murderer sentenced under the new law chose the latter, guards at the prison in Carson City objected to the assignment. To comply with the law but at the same time appease the guards, Warden George W. Cowing ordered an unusual device made by an eastern foundry. Soon earning the name "the shooting gallery," the steel contraption, placed in a small, separate room with narrow windows, held three rifles with strings attached to the triggers. Because only two of the rifles held bullets, none of the officers ordered to pull the strings knew which ones had fired the deadly shots.[28]

When used for the first time in May 1913, the "shooting gallery" performed as advertised. Yet resistance to the firing squad and hanging as brutal and inhumane forms of capital punishment gained momentum in the state. As a result, Nevada did not enforce the death penalty again until 1924 when it became the only state in the Union to use lethal gas.

When first applied in February 1924, only one company in the West manufactured the gas. Because common carriers refused to transport the chemical,

Nevada warden Matt Penrose arranged for drivers--at twenty-five dollars a day--to bring the containers by automobile to the prison. Understandably wishing to avoid any mishaps or accidents, the drivers made no stops along the way.

Although the preparation proved expensive, observers at the first execution, including a physician witness, judged that death by gas seemed preferable to hanging or the firing squad. By 1929, Nevada erected with convict labor a new building to house the gas chamber. The new structure was built with stone and concrete; its walls were two feet thick. Opposite two cells on one side stood the gas chamber, a room eight feet long and only six feet six inches high. The plain, prison-made chair was the only furniture. Under the chair, which had straps for securing the condemned, was a twenty-four-inch high space to hold the jar of sulfuric acid and water into which the cyanide capsules were dropped. Besides windows, there were two small holes in the walls of the chamber. Through one of these a cord passed that when pulled from the outside, permitted the capsule to drop and activate the chemical process. The other hole contained the tubing of a stethoscope used by a doctor to record the last breaths and heart beats of the condemned. By 1930, Nevada had executed three men in this fashion, and had attracted considerable negative attention in the press. Still, Warden Penrose, who refused to be swayed by the public outcry, claimed that gas was a means of execution more efficient, quicker, and thus less brutal than any other. Eventually, Colorado and Arizona adopted this method.[29]

Despite the controversy over the death penalty during these years, other problems and issues surfaced in the penitentiaries of the Far Southwest. As usual, overcrowding and inmate unemployment remained foremost in the daily struggles of the wardens. In the early 1920s, this situation demanded the attention of Utah warden James Devine, who was the first to advocate the removal of the penitentiary at the Sugarhouse location to a new site. Besides overcrowding, the warden claimed that residents who lived near the prison wanted the removal of the facility.[30]

By 1926, the prison held 203 inmates. That year, Governor George H. Dern appointed Richard E. Davis, an experienced penologist from New York and an active

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

Case No. C159897
Dept. No. V
Docket H

JUDGMENT OF CONVICTION

WHEREAS, on the 6th day of July, 1999, Defendant, ZANE MICHAEL FLOYD, entered a plea of Not Guilty to the crimes of BURGLARY WHILE IN POSSESSION OF A FIREARM; MURDER WITH USE OF A DEADLY WEAPON; ATTEMPT MURDER WITH USE OF A DEADLY WEAPON; SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON AND FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON, NRS 205.060, 193.165; 200.010, 200.030, 193.165;200.010, 200.030, 193.165, 193.330; 200.310, 200.320, 193.165; 200.364; 200.366 and 193.165; and

WHEREAS, the Defendant ZANE MICHAEL FLOYD, was tried before a Jury and the Defendant was found guilty of the crime of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM; COUNT II, III, IV, V - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON; COUNT VI - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON; CT VII - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON; and CT VIII, IX, X and XI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, in

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violation of NRS 205.060, 193.165; 200.010, 200.030, 193.165;200.010, 200.030, 193.165, 193.330; 200.310, 200.320, 193.165; 200.364; 200.366 and 193.165, and the Jury verdict was returned on or about the 19th day of July, 2000. Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found that there were Three (3) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person;

2. The murder was committed upon one or more persons at random and without apparent motive; and

3. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

That on or about the 21st day of July, 2000, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNTS II, III, IV and V - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 31st day of August, 2000, the Defendant being present in court with his counsel, CURTIS BROWN and DOUGLAS HEDGER, Deputy Public Defenders, and STEWART L. BELL, District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant as follows:

As to COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM - A maximum term of One Hundred Eighty (180) months with the minimum parole eligibility of Seventy-Two (72) months in the Nevada Department of Prisons and ordered to submit to testing to determine genetic markers. It is further recommended that the defendant be held responsible

for restitution totaling $1,638.48;

As to COUNTS II, III, IV, V - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON - Set by jury verdict as Death by Lethal Injection as to each count separately. It is further recommended that the Defendant also be held responsible for restitution totaling $15,051.00 as to Count II; $39,478.29 restitution as to Count III; $43,660.14 restitution as to Count IV; and $19,695.10 restitution as to Count V, and ordered to submit to testing to determine genetic markers;

As to Count VI - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON - A maximum term of Two-Hundred Forty (240) months in the Nevada Department of Prisons with the minimum parole eligibility of Ninety-Six (96) months, plus an equal and consecutive sentence of Two-Hundred Forty (240) months with the minimum parole eligibility of Ninety-Six (96) months for the Use of a Deadly Weapon and ordered to submit to testing to determine genetic markers. It is further recommended that Count VI be served consecutive to Count I and that the defendant be held responsible for restitution totaling $64,264.87.

As to COUNT VII - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON - LIFE in the Nevada Department of Prisons with the minimum parole eligibility of Sixty (60) months plus an equal and consecutive sentence of LIFE with the minimum parole eligibility of Sixty (60) months for the Use of a Deadly Weapon. It is further recommended that Count VII be served consecutive to Count VI.

As to COUNTS VIII, IX, X and XI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON - As to each count separately, the Defendant is sentenced to LIFE in the Nevada Department of Prisons with minimum parole eligibility of One Hundred Twenty (120) months plus an equal and consecutive sentence of LIFE with minimum parole eligibility of One Hundred Twenty (120) months for Use of a Deadly Weapon. The Defendant shall submit to testing to determine genetic markers and shall submit to a term of LIFETIME supervision to commence upon completion of any term of incarceration or parole. It is further recommended that the defendant be held responsible for restitution totaling $210.00 as to Count VIII and Count VIII be served consecutive to Count VII; Count IX be served consecutive to Count VIII; Count X be

served consecutive to Count IX; and Count XI be served consecutive to Count X.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 5 day of September, 2000, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#C159897X/msf
LVMPD EV#9906030340
1° MURDER W/WPN - F

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

Case No. C159897
Dept. No. V
Docket H

WARRANT OF EXECUTION

A JUDGMENT OF DEATH was entered on the 21st day of July, 2000, against the above named Defendant ZANE MICHAEL FLOYD as a result of his having been found guilty of Counts II, III, IV and V - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, by a duly and legally impaneled Jury of twelve persons. The Jury, with the HONORABLE JUDGE JEFFREY SOBEL presiding, after determining Defendant's guilt to the crime of COUNTS II, III, IV and V - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, in violation of NRS 200.010, 200.030, 193.165, returned said guilty verdict on or about the 19th day of July, 2000. The Jury then proceeded to hear evidence and deliberated on the punishment to be imposed as provided by NRS 175.552 and 175.554. Thereafter, the trial jury returned with the sentence that the Defendant should be punished by Death, and found that there were Three (3) aggravating circumstances connected with the commission of said crime, to-wit:

1. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally

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be hazardous to the lives of more than one person;

2. The murder was committed upon one or more persons at random and without apparent motive; and

3. The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

That on or about the 21st day of July, 2000, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, said verdict having been returned in the County of Clark, State of Nevada. The Court at this time, having determined that no legal reason exists against the execution of the Judgment.

IT IS HEREBY ORDERED that the County Clerk of the County of Clark, State of Nevada, shall forthwith, execute, in triplicate, under the Seal of the Court, certified copies of the Warrant of Execution, the Judgment of Conviction, and of the entry thereof in the Minutes of the Court. The original of the triplicate copies of the Judgment of Conviction, Warrant of Execution, and entry thereof in the Minutes of the Court, shall be filed in the Office of the County Clerk, and two of the triplicate copies shall be immediately delivered by the Clerk to the Sheriff of Clark County, State of Nevada.

IT IS FURTHER ORDERED that one of the triplicate copies be delivered by the Sheriff to the Director of the Department of Prisons or to such person as the Director shall designate. The Sheriff is hereby directed to take charge of the said Defendant, ZANE MICHAEL FLOYD, and transport and deliver the prisoner, forthwith, to the Director of the Department of Prisons at the Nevada State Prison located at or near Carson City, State of Nevada, and said prisoner, ZANE MICHAEL FLOYD, is to be surrendered to the custody of the said Director of the Department of Prisons or to such authorized person so designated by the Director of the Department of Prisons, for the imprisonment and execution of the said Defendant, ZANE MICHAEL FLOYD, in accordance with the provisions of this Warrant of Execution.

IT IS FURTHER ORDERED that in connection with the above facts and pursuant to the provisions of NRS 176.345, 176.355 and 176.357, the Director of the Department of Prisons,

or such person as shall by him be designated, shall carry out said Judgment and Sentence by executing the said ZANE MICHAEL FLOYD, by the administration to him, said Defendant, ZANE MICHAEL FLOYD, an injection of a lethal drug, the drug or combination of drugs to be used for the execution to be selected by the Director of the Department of Prisons after consulting with the State Health Officer. Said execution to be within the limits of the State Prison, located at or near Carson City, State of Nevada, during the week commencing on the 13th day of November, 2000, in the presence of the Director of the Department of Prisons, and 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, and invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The director shall determine the maximum number of persons who may be present for the execution. The director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution.. The execution must take place at the state prison and a person who has not been invited by the director may not witness the execution.

DATED this 5 day of ~~August~~ Sept, 2000.

DISTRICT JUDGE

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LAS VEGAS SUN

Corrections Department might lease out Jean prison

By Cy Ryan

Friday, March 13, 2009 | 5:45 p.m.

CARSON CITY – The state Corrections Department will open bids April 6 to see how much money the state could make by leasing out the Southern Nevada Correctional Center in Jean.

The state has been talking with the federal Immigration, Customs and Enforcement Agency about entering into a lease for the prison, and Alaska is interested in the prison too because it is looking for a place to send some of its inmates.

Cornell Companies of Houston, Texas, and GEO Group Inc., of Boca Raton, Fla., went so far as to tour the 600-bed prison, Corrections Director Howard Skolnik told a legislative committee Friday.

Cornell has a contract signed in May 2007 with Arizona to house 2,000 inmates at a prison in Hinton, Okla. GEO Group operates 59,000 detention beds in North America.

Assemblywoman Kathy McClain, D-Las Vegas, said she is "not thrilled" about the prospect of another state or the federal government sending its "worst of the worst" to the prison.

Skolnik told the committee there must be oversight of these operations.

Sen. Bob Coffin, D-Las Vegas, suggested looking into taking the 230 federal inmates from Guantanamo Bay in Cuba. Most, if not all, of those prisoners are alleged terrorists or enemies of the United States. But Coffin said, "I would not be afraid of them."

Skolnik was reluctant to take them. "We would have to get $100 per prisoner per bed" each day. And he didn't want to mix these types of prisoners with other inmates.

Coffin persisted and said, "Why overlook the possibility?"

The Southern Nevada Correctional opened in January 1978. It was closed in September 2000 for renovation when High Desert State Prison was opened. It was reopened but was closed last July. Prison officials say Southern Desert Correctional Center was the first major state prison in Clark County.

Gov. Jim Gibbons' budget also calls for closure of the Nevada State Prison in Carson City and the Tonopah Conservation Camp.

All photos in article courtesy of The Nevada Historical Society.

CAPITAL PUNISHMENT NEVADA STYLE

Since 1860, one woman and 74 men have been executed for committing murder in Nevada. The first legal executions were carried out by hanging, in the county where the murder occurred. After 1903, 10 murderers were sent to the gallows at the state prison in Carson City. The method of execution has evolved as the legislature sought more humane ways to put murderers to death. On rare occasions, when more than one killer was found guilty, they were both executed at the same time.

BY PATTY CAFFERATA, ESQ.

The first gas chamber at the Nevada State Prison in Carson City.

...da State Prison and its officers, circa 1880.

ONLY WOMAN EXECUTED IN NEVADA

At 10:47 a.m. on June 20, 1890, the trap doors dropped. Elizabeth died minutes before Josiah, becoming the only woman executed in Nevada history.

The only woman executed in Nevada, convicted murderer Elizabeth Potts died with her husband and partner in crime.

The husband and wife team of Josiah (age 44) and Elizabeth (age 40) Potts was hanged for the murder of Miles Faucett in Carlin, Elko County. In a carefully calculated plan, Elizabeth, who was already married to Josiah, married Faucett in California in March 1887. When her first marriage was discovered, Elizabeth fled back to Josiah. Obsessed, Faucett followed her and lived in the Potts' barn for a few months.

Sometime after January 1, 1888, after signing all his property over to the Josiah, Faucett mysteriously disappeared. In September, the Potts sold their house and moved to Wyoming.

When the new owners found human bones in the cellar, the Elko County sheriff charged the Potts with Faucett's murder. Josiah's story was that, once confronted about his alleged attempt to molest the Potts' daughter, Faucett killed himself. Alone, Josiah dragged the body to the cellar, set it on fire and later cut the body up.

The jury did not buy the story and the couple was sentenced to hang. Troubled by imposing a death sentence on a woman, District Court Judge Rensselaer Biglow unsuccessfully argued on appeal that both sentences should be commuted because she was the guiltier of the two.

Witnesses watched as the murderers walked up the 13 steps to the gallows platform in the Elko County jail yard. The couple sat quietly while the guards bound their hands with leather straps. Their shoes were removed, ropes slipped around their necks and black hoods placed over their heads.

LARGEST NUMBER OF MURDERERS EXECUTED TOGETHER

Four train robbers were hanged at the state penitentiary for the murder of Jack Welsh on a freight train moving through Humboldt County. The murderers included ex-cons and repeat offenders T. F. Gorman and John Sevener, 20-year-old Albert Lindeman, aka Frank William, and 17-year-old Fred Roberts.

They took $1.25 from Welsh and then tried to push him off the train. Clinging to the side ladder, Welsh pled for his life. Sevener beat Welch with a revolver, kicked him in the face and stomped on his hands. When Roberts riddled Welsh with bullets, Welsh fell off the train. Incredibly, the next morning, Welsh was discovered alongside the tracks and taken to the Winnemucca hospital, where he lived long enough to describe the crime and to identify his assailants.

Sevener, Gorman and Roberts were tried twice before they were convicted and sentenced to death. Lindeman was tried separately and convicted. Ironically, before the trial, a lynch mob gathered outside the jail planning to string Lindeman up. The sheriff spirited him to the state prison for safekeeping. Lindeman als

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CAPITAL PUNISHMENT NEVADA STYLE

continued from page 7

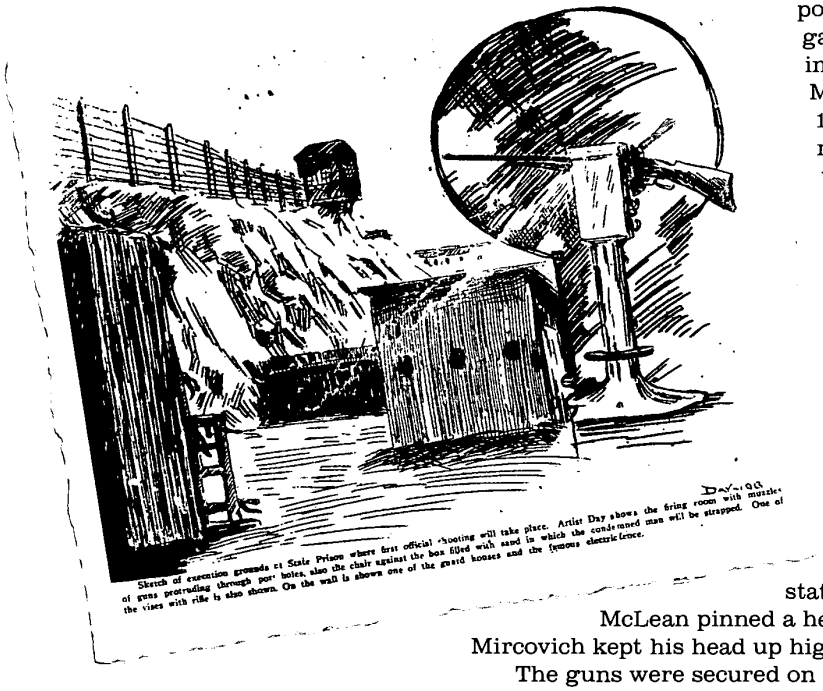
received a death sentence and the four were hanged in the second execution at the state prison on November 17, 1905. (The first inmate hanged at the prison was John Hancock on September 5, 1905.)

ONLY MURDERER EXECUTED BY THE FIRING SQUAD

After January 1, 1912, the legislature allowed the condemned to choose between the gallows or firing squad. Two murderers selected death by shooting, but only one was executed; the other's sentence was commuted.

On May 14, 1913, Serbian Andrija Mircovich was executed for the stabbing death of John Gregovich at the Tonopah & Goldfield Railway depot. Mircovich believed that Gregovich cheated him when handling the distribution of Andrija's cousin Chris Mircovich's estate. A recent arrival to the country, 33-year-old Andrija spoke little English and had little understanding of the probate system in Nevada.

Mircovich preferred the firing squad to the noose, claiming it would be quicker. Warden George Cowing tried to talk Mircovich out of the firing squad but failed. This prompted Cowing to order a 1,000-pound execution machine or "shooting gallery of steel." The equipment included a steel cage with three Maxim silencers and three Model 1899 .30-.30 Savage rifles. After the machine arrived at the prison, Cowing wanted nothing more to do with the execution and resigned. Denver Dickerson, a former Lieutenant Governor and warden, was appointed warden.



Sketch of execution grounds at State Prison where first official shooting will take place. Artist Day shows the firing room with muzzles of guns protruding through port holes, also the chair against the box filled with sand in which the condemned man will be strapped. One of the vises with rifle is also shown. On the wall is shown one of the guard houses and the famous electric fence.

Sketch of the "shooting gallery of steel," an automated firing squad machine used only once.

The three guards, selected by drawing names out of a hat, entered the firing chamber and then 12 witnesses were admitted to a roped-off area in the yard.

At about 11:30 a.m., guards marched Mircovich to the yard, where he was strapped to the chair bolted to a platform. He refused a black cap or blindfold, stating he wanted to see. Prison Doctor McLean pinned a heart-shaped target on his chest. Mircovich kept his head up high as instructed.

The guns were secured on stationary stands inside the firing chamber shed. Two rifles were loaded with soft-nosed ball cartridges and one gun was loaded with a blank. All the distances had been carefully measured and tested for accuracy. Each guard checked the aim on the rifle to be sighted on the defendant's heart.

The command to fire was given and the bullets met their mark. Doctor McLean declared the death instantaneous. The autopsy showed the two balls within 2/3 inches of each other in Mircovich's heart.

The design of the shooting cage prevented the witnesses from knowing who fired the fatal shots and the guards from seeing Mircovich die. The cage was never used again. Mircovich was the last murderer to be executed at the prison – until the gas chamber was installed.

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CAPITAL PUNISHMENT NEVADA STYLE

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ONLY DUAL HANGING AT THE STATE PRISON

Shoshone "Indian Johnny" (last name never recorded) and Joe Ibapah, a member of the Goshute tribe, were executed together at the prison for the murder of Fred Foreman in Montello, Elko County in December 1905. After drinking Jamaican Ginger (a patent medicine containing 70-80 percent alcohol) all day, the pair saw a light in a railroad tie house near the railroad tracks.

They discovered Fred Foreman, a white man, sleeping in there and demanded he buy them some more liquor. He said he could not because he had only one leg and walked with a crutch. Ibapah testified that Johnny gave him a knife and said, "I'll hold his hands and you cut his throat." Ibapah said he killed Foreman by cutting his throat from ear to ear. After the brutal killing, they jabbed out Forman's left eye and broke his right arm, then rolled his body into the fire and piled ties on top of him. At trial, Antelope Jack, Chief of the Goshute tribe, testified that Ibapah was a good boy, until his father gave him liquor when he was 12, and added that Ibapah killed his father because he had cut and hurt his mother many times.

Sentenced to death, they went to the gallows at the state prison around noon on December 3, 1906.

Nevada's first gas chamber.

FIRST EXECUTION IN A GAS CHAMBER IN THE COUNTRY

In March 1921, the Nevada Legislature sought again to provide a more humane method of execution, garnering national attention when it became the first state to use poisonous gas to execute a murderer. Three men were set for execution on February 8, 1924. Gee Jon was executed, but the other defendants' sentences were commuted.

Warden Denver Dickerson also presided over this first execution in the gas chamber. Twenty-nine-year-old Gee

Jon, a member of the famous Hop Sing Tong in San Francisco, was convicted of killing Tom Quong Kee in his Mina cabin in a "tong" war. Allegedly, Kee was a member of a rival tong. Hughie Sing and Jon hired Reno cabby George Pappas to drive them to Mina. The men sent Pappas to buy some beer while they walked to Kee's cabin and murdered him. At trial, Sing testified they went to Mina to kill Kee and Jon fired the two shots that killed him.

Using prison labor, the state constructed a squat, stone building lined with steel in the center of the yard. Observers watched through a window, standing behind a black line painted on the floor of the yard. Jon's thighs were strapped to the plain, unpainted pine chair with his arms linked to the thigh straps. Hydrocyanic (HCN) gas, smelling like almonds, was sprayed into the 10-by-12-foot room; Jon's movements ceased within six minutes.

Although Hughie Sing was also sentenced to die in the gas chamber for Kee's murder, his sentence was commuted.

In the 1930s, the state built a new "gas house." The chamber was described as having white walls and large windows for observation like a finely built surgery suite – almost cheery.

ONLY DUAL EXECUTION IN THE GAS CHAMBER

On July 15, 1954, the only dual execution in the gas chamber took place.

Ex-cons Frank Pedrini (age 47) and Leroy Linden (age 35) murdered Clarence Dodd. He picked them up hitchhiking in Winnemuca on Highway 40 (now Interstate 80). A carpenter, Dodd was returning home to California after visiting his mother. They forced Dodd off the highway near Mustang, holding him at gunpoint on the Truckee riverbank.

Linden's story was that he went to buy beer in the Mustang Station and came back to find Pedrini and Dodd on the ground. They told Dodd they were going to tie him up, leave him and drive his car to Reno. Linden claimed he walked away from them to watch the highway. Pedrini asked Dodd if he had any rope, and Dodd apparently said, "Yes, in the trunk." Dodd retrieved a length of binder twine. Linden claimed he heard

continued on page 12

PRO BONO HONOR ROLL

The State Bar of Nevada Board of Governors and the Access to Justice Commission extend a special thanks to the following attorneys who generously accepted cases in March 2010 through the Legal Aid Center of Southern Nevada, Washoe Legal Services, Nevada Legal Services and Volunteer Attorneys for Rural Nevadans.

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BOLD honors multiple cases accepted and/or sessions conducted within the month.

CAPITAL PUNISHMENT NEVADA STYLE

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a shot and ran to where the men were. Pedrini said he did it because Dodd had seen his tattoo on his hand and would be able to identify him.

Pedrini's story differed from Linden's. He claimed they both tugged on the 30-inch piece of binder twine to strangle Dodd. Then, they covered the body with rocks. Hunters found Dodd's garroted body in December.

In January 1954, Linden confessed, implicating Pedrini. The killers had extensive criminal records and allegedly met as cellmates in the Folsom State Prison in California. While Pedrini does not fit the description of a serial killer, he had served time for two previous murders.

Washoe County District Attorney Jack Streeter and his deputy Dyer Jensen prosecuted the murderers, while Bruce Thompson and Leslie Gray defended them at trial. The jury found the men guilty and sentenced them to death.

Pedrini got his last wish: he wanted to die with Linden and insisted they be executed together. They entered the gas chamber two minutes apart and were strapped in the metal chairs at 6:05 a.m. After the door was closed, the HCN gas was released at 6:10 a.m. Linden's heart stopped by 6:18 a.m. Pedrini's heart stopped by 6:19 a.m. ■

CONCLUSION

In Nevada's first 43 years (1860 to 1903), 30 executions were carried out by hanging. Then, the state executed one murderer using a firing squad. From 1924 through 1979, 32 men died from inhaling the lethal gas in the gas chamber.

Since 1985, lethal injection has been used to carry out a death sentence. Three drugs are administered, first to sedate, then to paralyze the muscles and cease breathing and finally potassium chloride to cause a deadly heart attack. From 1985 to 2006, 12 murderers have been put to death by injection, all but one "voluntarily," meaning they dropped their appeals and did not oppose their executions.

Of the 80 men currently on death row, Edward Wilson has been there the longest, since 1979. He was sentenced for killing Reno Police Officer Jimmy Hoff.

In the last 107 years (1903-2010), 45 murderers have been executed in Nevada. Since 1860, the total number of executions in Nevada is 75.

PATTY CAFFERATA is the former district attorney of Lincoln, Lander and Esmeralda counties. She wishes to thank the Nevada State Prison official who answered numerous questions on the statistics regarding capital punishment and Nevada Archivist II Chris Driggs for finding prison records and related documents.

Commission are not sufficient, as the Commission becomes a self-sufficient entity.

BUSINESS AND INDUSTRY

B&I - Athletic Commission — Budget Page B & I-190 (Volume II)
Budget Account 101-3952

Section 22 provides that if A.B. 469 does not become effective, any reference to the Office of Finance in the Office of Governor, created by this bill, shall be deemed to refer to the Budget Division of the Department of Administration.

ASSEMBLY BILL 469 (1st Reprint): Creating the Office of Finance in the Office of the Governor. (BDR 18-1180)

Section 23 provides that the provision for the DMV commissions in section 20, and this section, become effective upon passage and approval and all other sections would become effective on July 1, 2015.

Senator Goicoechea:
Are there only two entities, Carson City and Storey County, which utilize the State Office of the Public Defender?

Mr. Krmpotic:
That is correct. During the Legislative Session, a subsequent hearing was held on the Office of the Public Defender; Eureka and White Pine Counties withdrew their requests for those services.

Fiscal staff will now present BDR S-1289, the Capital Improvement Program (CIP) bill.

BILL DRAFT REQUEST S-1289: Authorizes and provides funding for certain projects of capital improvement. (Later introduced as Assembly Bill 491.)

Brody Leiser (Program Analyst):
The money committees closed the CIP budgets on May 20. The Program included 69 projects at a total cost of $215.3 million. It included 9 construction

projects, 45 maintenance projects, 3 planning projects and 12 statewide programs projects.

The BDR implements the 2015 CIP. I will briefly explain the sections of the BDR. A number of the projects have multiple funding sources, and as such, will be listed in multiple sections of the bill.

Section 1 of BDR S-1289 makes an appropriation of $6.4 million from the General Fund to support a portion of the funding in the 2015 CIP for the projects listed in that section.

Section 2 limits the authority for expenditure through June 30, 2019, and establishes a reversion of any remaining funds for the projects identified in section 1. Similar language is included in the BDR following each section that appropriates or authorizes funding.

Section 3 appropriates $5.2 million from the Highway Fund to support a portion of the 2015 CIP for six DMV and DPS facility projects as identified.

Section 5 restricts the transfer of funds from the Highway Fund for projects identified in section 3, until contract payments are required.

Section 6 authorizes $98.5 million in general obligation bonds for projects as identified.

Section 8 authorizes $23 million in general obligation bonds for CIP project No.15-C04 to construct the new DMV service office at the East Sahara Avenue complex in Las Vegas.

Project No. 15-C04 — Replace DMV (East Sahara Complex)

This section also establishes the required annual debt service payment on the bonds for this project from the Highway Fund and the Motor Vehicle Pollution Control Account. The Highway Fund will be responsible for 87.5 percent and the Pollution Control Account will be responsible for 12.5 percent of the annual debt service required.

MOTOR VEHICLES

DMV - Motor Vehicle Pollution Control — Budget Page DMV-62 (Volume III)
Budget Account 101-4722

Section 10 of BDR S-1289 specifies the State Board of Finance will issue general obligation bonds for the 2015 CIP when it is deemed appropriate. Subsection 2 and subsection 3 allow the State Controller to advance General Fund and Highway Fund money if bonds have not yet been sold to finance the projects approved for the 2015 CIP. If General Fund or Highway Fund monies are advanced, the amounts must be immediately repaid upon the sale of the bonds.

Section 11 reallocates $530,842 from a 2005 CIP project to fund a portion of CIP Project No. 15-P02, to plan the Nevada National Guard Readiness Center in North Las Vegas.

Project No. 15-P02 — Advance Planning Nevada National Guard Readiness Center

Section 13 transfers $47,132 from the 2007 CIP projects identified in subsection 1 to support the costs for the 2015 CIP projects identified in subsections 2 and 3.

Section 15 of BDR S-1289 transfers $138,681 from the 2009 CIP projects identified in subsection 1 to support costs for the 2015 CIP projects identified in subsections 2, 3 and 4.

Section 17 reallocates $240,000 of General Fund appropriations from CIP Project No. 09-C05, the Medical Education Learning Lab Building at the University of Nevada, Health Science System, to fund a portion of CIP Project No. 15-M42, a deferred maintenance project for NSHE.

Project No. 15-M42 — Deferred Maintenance (HECC/SHECC)

Section 19 transfers $3.3 million from the 2011 CIP projects listed in subsection 1 to support costs for the 2015 CIP projects identified in subsections 2 through 9.

Section 21 transfers $1.3 million from the 2013 CIP projects identified in subsection 1 to support costs for the 2015 CIP projects identified in subsections 2 and 3.

Section 23 authorizes $71.8 million from funding sources other than the General Fund or the Highway Fund for projects identified in this section. That includes $43.6 million in federal funds and $24.4 million in university or donor funds to support CIP Project No. 15-C78, the Hotel College Academic Building at the University of Nevada, Las Vegas (UNLV). An allocation of $3.8 million is also made from agency funds.

Project No. 15-C78 — Hotel College Academic Building (UNLV).

Section 23, subsection 2 requires the SPWD not to execute a contract for construction of a project approved in the 2015 CIP that includes federally authorized receipts, until the SPWD has determined that the federal funding authorized is available for expenditure.

Section 24 of BDR S-1289 requires the SPWD to use only qualified personnel to execute the 2015 CIP.

Section 25 requires State and local government entities to cooperate with the SPWD in carrying out the provisions of the CIP.

Section 26 approves $1 million for the cultural affairs bond program.

Section 27 approves $3 million for the Question 1, also known as the Q1 bond program.

Section 28 approves $1.5 million for the Lake Tahoe environmental protection bond program.

Section 29 approves $1 million for the water infrastructure bond program.

Section 30 approves ad valorem taxes for the Q1 bond program and for general obligation debt service. The general obligation debt service will receive 15.45 cents on every $100 of assessed valuation to support bonds sold for the 2015 CIP. The Q1 program bonds will be supported by 1.55 cents for every

$100 of assessed valuation. The overall rate of 17 cents per $100 of assessed valuation remains the same as approved for the current biennium.

Section 31 requires that the State Treasurer will estimate sufficient funding and determine whether that amount exists in the Consolidated Bond Interest and Redemption Fund to pay the principal and interest on past CIP issuances as well as on current issuances. If sufficient funding does not exist in the Fund, the Treasurer can request the State Controller to reserve money in the General Fund to pay those debts.

Treasurer - Bond Interest & Redemption — Budget Page ELECTED-185
(Volume I)
Budget Account 395-1082

Section 32 authorizes the State Board of Finance to pay expenses related to the issuance of general obligation bonds.

Section 33 authorizes money to pay for bonds in the Consolidated Bond Interest and Redemption Fund. The amount for FY 2016 is $145.9 million and it is $147.1 million in FY 2017.

Section 34 authorizes the SPWD and the NSHE, with the approval of IFC, to transfer money from one project within the same agency to another.

Section 35 approves $5 million from the Special Capital Construction Fund for Higher Education for allocation to the NSHE deferred maintenance CIP Project No. 15-M42.

Sections 37 and 38 extend the reversion dates for three prior year CIP projects. Two project extensions are from the 2009 CIP in section 37 and one project extension from the 2011 CIP in section 38.

Section 39 refers to the new Office of Finance established in A.B. 469, consistent with the language in the Authorization Act as identified earlier by Ms. Hoppe.

Sections 1 and 26 of this Act become effective on July 1 and the remaining sections of the Act become effective upon passage and approval.

Senator Roberson:
Seeing no questions or further public comment before the Committee, we are adjourned at 7:45 p.m.

RESPECTFULLY SUBMITTED:

_____
Cynthia Clampitt,
Committee Secretary

APPROVED BY:

_____
Senator Michael Roberson, Vice Chair

DATE:_____

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	2		Agenda
	B	3		Attendance Roster
S.B. 416	C	14	Senator Joseph (Joe) P. Hardy, M.D.	Amendment No. 936
S.B. 416	D	2	Senator Joseph (Joe) P. Hardy, M.D.	MGS Taxable Values FY 15-16 Property Tax Benefits of Amended S.B. 416
S.B. 371	E	8	Mark Krmpotic	Proposed Amendment 7750
S.B. 111	F	7	Mark Krmpotic	Proposed Amendment 7712

Section 21 was new language that provided that the Division Administrator of the Nevada Athletic Commission could apply to the General Fund for a temporary advance.

Section 22 indicated that if Assembly Bill (A.B.) 469 did not become effective, any reference in this act to the Office of Finance in the Office of the Governor would instead refer to the Budget Division of the Department of Administration.

Ms. Hoppe pointed out that section 23 stated that this section and section 20 of this act would become effective upon passage and approval. All other sections would become effective on July 1, 2015.

There being no comments or questions, Chair Anderson requested a motion for introduction of BDR S-1291.

> ASSEMBLYWOMAN CARLTON MOVED FOR COMMITTEE INTRODUCTION OF BDR S-1291.
>
> ASSEMBLYWOMAN DICKMAN SECONDED THE MOTION.
>
> THE MOTION PASSED. (Assemblywoman Kirkpatrick was not present for the vote.)

Cindy Jones, Assembly Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, advised the Committee that the next bill draft request was the Capital Improvement Program bill.

BDR S-1289 — Authorizes and provides funding for certain projects of capital improvement. (Later introduced as Assembly Bill 491.)

Brody Leiser, Program Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, provided an overview of bill draft request (BDR) S-1289. The finance committees closed the 2015 Capital Improvement Program (CIP) on May 20, 2015. The program included 69 projects at a cost of $215 million. The projects consisted of 9 construction projects, 45 maintenance projects, 3 planning projects, and 12 statewide program projects. The 2015 CIP was to be adopted through BDR S-1289. Mr. Leiser noted that many projects had multiple funding sources and would be listed in multiple sections of the bill.

Mr. Leiser described the following sections of BDR S-1289:

- Section 1 appropriated $6,403,083 of State General Funds to support a portion of the total funding in the 2015 CIP for projects identified under this section.

- Section 2 of BDR S-1289 limited the authority for expenditures through June 30, 2019, and established a reversion of any remaining funds from the projects identified in section 1. Similar language was included throughout the BDR following each section that appropriated or authorized funding. Mr. Leiser advised that he would not repeat this description for those sections.

- Section 3 appropriated $5,162,832 of State Highway Funds to support a portion of the funding of the 2015 CIP for six Department of Motor Vehicle (DMV) and Department of Public Safety (DPS) facility projects identified in this section.

- Section 5 restricted the transfer of funds from the Highway Fund for projects identified in section 3 until contract payments were required.

- Section 6 authorized $98,500,000 in general obligation bonds for projects identified in this section.

- Section 8 authorized $22,950,650 in general obligation bonds for CIP Project 15-C04 for construction of the new DMV service office at the East Sahara Complex in Las Vegas. This section also established the required annual debt service payment on the bonds for this project from the Highway Fund and the Pollution Control Account. The Highway Fund was responsible for 87.5 percent and the Pollution Control Account was responsible for 12.5 percent of the annual debt service required by this section.

- Section 10 specified that the State Board of Finance would issue general obligation bonds for the 2015 CIP when it was deemed appropriate. Subsections 2 and 3 allowed the State Controller to advance General Fund and Highway Fund money if bonds had not yet been sold to finance the projects approved in the 2015 CIP. If General Funds or Highway Funds were advanced, the amounts must be immediately repaid to the General Fund or Highway Fund upon sale of the bonds.

- Section 11 reallocated $530,842 from the 2005 CIP to fund a portion of CIP Project 15-P02, the Las Vegas Readiness Center for Nevada National Guard advanced planning.

- Section 13 transferred $47,132 from the 2007 CIP projects identified in subsection 1 to support costs for the 2015 CIP projects identified in subsections 2 and 3.

- Section 15 transferred $138,681 from the 2009 CIP projects identified in subsection 1 to support the costs for the 2015 CIP projects identified in subsections 2 through 4.

- Section 17 addressed the reallocation of $240,000 in General Funds from CIP Project 09-C05, Medical Education Learning Lab Building, University of Nevada Health Sciences System, to fund a portion of Project 15-M42, a deferred maintenance project for the Nevada System of Higher Education (NSHE).

- Section 19 transferred $3,288,241 from the 2011 CIP projects identified in subsection 1 to support the costs for the 2015 CIP projects identified in subsections 2 through 9.

- Section 21 transferred $1,315,000 from the 2013 CIP projects identified in subsection 1 to support costs for the 2015 CIP projects identified in subsections 2 and 3.

- Section 23 of the BDR authorized approximately $71.8 million from funding sources other than the General Fund or the Highway Fund for projects identified in this section. This included roughly $43.6 million in federal funds; $24,395,417 in donor funds to support Project 15-C78, the construction of the new Hotel College Academic Building at University of Nevada, Las Vegas (UNLV); and about $3.8 million in agency funds. Subsection 2 required the State Public Works Division of the Department of Administration to not execute a contract for construction of a project approved in the 2015 CIP that included federally authorized receipts until the Public Works Division had determined that federal funding authorized was available for expenditure.

- Section 24 required that the State Public Works Division use only qualified personnel to execute the 2015 CIP.

- Section 25 required state and local government entities to cooperate with the State Public Works Division when carrying out the provisions of the CIP.

- Section 26 approved $1 million for a cultural affairs bond program.

- Section 27 approved $3 million in general obligation bonds for the purpose described in subsection 1 of section 2, subsection 2 of section 2, and subsection 7 of section 2.

- Section 28 approved $1.5 million of bond funding for the Lake Tahoe Environmental Improvement Program, and section 29 approved $1 million in bonds to provide grants for water conservation and capital improvements to certain water systems.

- Section 30 approved ad valorem taxes for the Question 1 (Q1) Bond Program and for general obligation debt service. For the state general obligation debt, 15.45 cents on every $100 of assessed valuation of taxable property would be used to support the bonds sold for the CIP. For the Q1 Program, 1.55 cents for every $100 of assessed valuation of taxable property would be used to support the bonds sold for the Q1 Program. The overall rate of 17 cents per $100 of assessed valuation of taxable property remained the same as approved for the 2013-2015 biennium.

- Section 31 required the State Treasurer to estimate sufficient funding and determine whether that amount existed in the Consolidated Bond Interest and Redemption Fund to pay the principal and interest on CIP issuances. If there was not enough money in the Consolidated Bond Interest and Redemption Fund, the Treasurer could request that the State Controller reserve money in the State General Fund to pay those debts.

- Section 32 authorized the State Board of Finance to pay expenses related to the issuances of general obligation bonds.

- Section 33 authorized money to pay for bonds in the Consolidated Bond Interest and Redemption Account in the amount of $145,911,940 in fiscal year (FY) 2016 and $147,090,897 in FY 2017.

- Section 34 authorized the State Public Works Division of the Department of Administration and the Nevada System of Higher Education to transfer money within the same agency from one project to another, with the approval of the Interim Finance Committee (IFC).

- Section 35 approved $5 million from the Special Capital Construction Fund for Nevada System of Higher Education, CIP Project 15-M42 Deferred Maintenance.

- Sections 37 and 38 extended the reversion dates for three prior-year CIP projects. This included two project extensions from the 2009 CIP (section 37) and one project extension from the 2011 CIP (section 38).

In conclusion, Mr. Leiser noted that sections 1 and 26 would become effective on July 1, 2015, with the remainder of the act becoming effective on passage and approval.

There being no comments or questions, Chair Anderson requested a motion to introduce BDR S-1289.

> ASSEMBLYMAN KIRNER MOVED FOR COMMITTEE INTRODUCTION OF BDR S-1289.
>
> ASSEMBLYMAN ARMSTRONG SECONDED THE MOTION.
>
> THE MOTION PASSED. (Assemblywoman Kirkpatrick was not present for the vote.)

Assemblywoman Carlton thanked the Fiscal Analysis Division staff for their hard work and dedication.

Chair Anderson opened the hearing for public comment.

Kevin Ranft, representing Local 4041, American Federation of State, County and Municipal Employees (AFSCME), testified that AFSCME was appreciative of the Committee's approval of the cost-of-living allowance (COLA) for the state employees. He believed the state employees deserved the pay increase, but he asked for assurance that there was revenue behind the increase.

the Authorizations Act, authorized expenditures by agencies of the state government for the 2015-2017 biennium. Assembly Bill 490 related to state financial administration; authorized expenditures by various officers, departments, boards, agencies, commissions, and institutions of the state government for the 2015-2017 biennium; authorized the collection of certain amounts from the counties for the use of the services of the State Public Defender; required repayment of certain advances to state agencies; and provided other matters properly relating thereto. The Authorizations Act provided both revenue and expenditure authority for agencies that were not funded by the State General Fund to receive the revenues to support the budgets and expend funds in alignment with the budgets approved by the Assembly and Senate finance committees.

Ms. Jones explained that the Committee had previously discussed the back language regarding the various constraints and flexibilities in the management of the budgets for the 2015-2017 biennium. Each section of the bill was described by Fiscal Analysis Division staff to the Committee at the previous hearing.

Hearing no response to his request for testimony in support of, in opposition to, or neutral on the bill, Chair Anderson closed the hearing on A.B. 490 and opened the hearing on Assembly Bill 491.

Assembly Bill 491: Authorizes and provides funding for certain projects of capital improvement. (BDR S-1289)

Cindy Jones, Assembly Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, advised that Assembly Bill (A.B.) 491 was discussed in bill draft request (BDR) form by the Committee on May 29, 2015. Assembly Bill 491 authorized and provided funding for certain projects of capital improvement. The bill appropriated $6,403,083 of State General Funds to the State Public Works Division, Department of Administration, to fund certain projects in the Capital Improvement Program (CIP) for the 2015-2017 biennium, as delineated in the bill and approved by the Assembly and Senate finance committees during the full closings of various accounts. Fiscal Analysis Division staff had explained each section of the bill to the Committee at the previous hearing.

Hearing no response to his request for testimony in support of, in opposition to, or neutral on the bill, Chair Anderson closed the hearing on A.B. 491 and opened the hearing on Assembly Bill 255.

the Authorizations Act that was heard by the Committee on May 30, 2015. The bill was one of the five major budget bills required to complete the state's budget. The act related to state financial administration and authorized expenditures by various officers, departments, boards, agencies, commissions, and institutions of state government for the 2015-2017 biennium, authorized the collection of certain amounts from counties for the use of services of the State Public Defender, and required the repayment of certain advances to state agencies.

Ms. Jones stated that A.B. 490 included the amounts approved by the Assembly Committee on Ways and Means and the Senate Committee on Finance that were not State General Fund revenue. The supporting back language included funds that might be transferred, which was standard language within the Authorizations Act; the effective date for the act was July 1, 2015.

> ASSEMBLYWOMAN CARLTON MOVED TO DO PASS ASSEMBLY BILL 490.
>
> ASSEMBLYMAN HICKEY SECONDED THE MOTION.
>
> THE MOTION PASSED. (Assemblymen Edwards and Titus were not present for the vote.)

Assembly Bill 491: Authorizes and provides funding for certain projects of capital improvement. (BDR S-1289)

Cindy Jones, Assembly Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, stated that Assembly Bill (A.B.) 491 was the Capital Improvement Program (CIP) that was heard by the Committee on May 30, 2015. Ms. Jones said A.B. 491 funded capital improvement projects by authorizing certain expenditures by the State Public Works Division, Department of Administration; levying a property tax in support of the Consolidated Bond Interest and Redemption Fund; and making appropriations as required.

Ms. Jones indicated that the bill contained the CIP projects that were approved for the 2015-2017 biennium. There was certain language throughout A.B. 491 that was associated with the administration of the CIP projects. The bill included new projects, maintenance projects, and statewide maintenance initiatives as approved by the Assembly Committee on Ways and Means and the Senate Committee on Finance.

ASSEMBLYMAN KIRNER MOVED TO DO PASS ASSEMBLY BILL 491.

ASSEMBLYWOMAN KIRKPATRICK SECONDED THE MOTION.

THE MOTION PASSED. (Assemblymen Benitez-Thompson, Edwards, and Titus were not present for the vote.)

Assembly Bill 476 (1st Reprint): Revises provisions relating to unarmed combat. (BDR 41-1172)

Cindy Jones, Assembly Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, stated that Assembly Bill (A.B.) 476 (1st Reprint) revised provisions related to unarmed combat. The bill contained the funding mechanism for the Nevada Athletic Commission and was heard by the Committee on May 23, 2015; however, subsequent to that hearing, an additional amendment was requested.

Ms. Jones said proposed Amendment No. 7811 (Exhibit D) had been agreed to by all parties. The amendment facilitated the increase of fees related to unarmed combat from 6 percent to 8 percent, with 2 percent going to support the Nevada Athletic Commission, making it a fee-funded agency rather than a State General Fund-supported agency, as approved by the Assembly Committee on Ways and Means and the Senate Committee on Finance in the budget closing for the Nevada Athletic Commission.

Ms. Jones indicated that the Committee should rescind the action of May 23, 2015, and revote on A.B. 476 (R1).

ASSEMBLYWOMAN KIRKPATRICK MOVED TO RESCIND THE ACTION OF MAY 23, 2015, TO AMEND AND DO PASS ASSEMBLY BILL 476 (1ST REPRINT) AS AMENDED.

ASSEMBLYMAN KIRNER SECONDED THE MOTION.

THE MOTION PASSED. (Assemblyman Edwards was not present for the vote.)

Bruce Breslow, Director, Department of Business and Industry, explained that A.B. 476 (R1) was the same bill the Committee voted on at its May 23, 2015, hearing. The proposed amendments at that hearing included language that was requested by the Attorney General regarding the policy to help with drug testing and suspensions. The second amendment was proposed by

MOT
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #0010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

Case No. 99C159897
Dept No. XVII

MOTION AND NOTICE OF MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

DATE OF HEARING:
TIME OF HEARING:

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and moves this Honorable Court, pursuant to NRS 176.495 and NRS 176.505, to make and enter a Second Supplemental Order of Execution and to issue a Second Supplemental Warrant of Execution inasmuch as the Defendant Floyd's initial Judgment of Conviction was affirmed by the 9th Circuit Court of Appeals, so that his death sentence may be carried out. See Exhibit 1. Subsequently, Defendant Floyd's Petition for a Writ of Certiorari to the United States Supreme Court was denied on November 2, 2020.

WHEREAS, a Mandate has been issued from the Ninth Circuit Court of Appeals showing the affirmation of the aforementioned habeas corpus dismissal and the said Judgment having been filed with the United States District Court Clerk on or about the 5th day of November, 2020, See Exhibit 2. Additionally, an Order on Mandate was filed in the United States District Court District of Nevada on or about November 6, 2020. See Exhibit 3. Based on the Mandate, there is no longer any legal reason or good cause why the judgment of death should not be executed.

This Motion is based upon the entire record of these proceedings, the Points and Authorities attached hereto, and argument of counsel to be made at the time of the hearing on this Motion.

NOTICE OF HEARING

TO: ZANE MICHAEL FLOYD, Defendant; and

TO: BRAD LEVENSON and DAVID ANTHONY, Attorney for the Defendant

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION on for setting before the above entitled Court, in Department XVII thereof, on _____, the ___ day of April, 2021, at the hour of 9:00 o'clock a.m., or as soon thereafter as counsel may be heard.

DATED this _____ day of April, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

POINTS AND AUTHORITIES

This motion is being filed pursuant to NRS 176.495 and NRS 176.505 seeking this Court's issuance of a Second Supplemental Order of Execution and a Second Supplemental Warrant of Execution regarding the upheld murder convictions of the defendant, Zane Michael Floyd. The defendant has now exhausted his appellate and post-conviction remedies. The Nevada Supreme Court has upheld the lawfulness of his convictions. Moreover, the Ninth Circuit United States Court of Appeals has also affirmed his convictions. The United States Supreme Court has declined to grant certiorari to any petitions that defendant has filed seeking its intervention. As such, the defendant has exhausted his legal remedies and a supplemental order of execution pursuant to NRS 176.505 shall be issued. Following the issuance of the order of execution, a new warrant of execution pursuant to NRS 176.495 must also issue.

In their entirety, the relevant statutes for the purpose of this request are listed below.

NRS 176.495. New warrant generally.

> "1. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had must, upon the application of the attorney general or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the director of the department of prisons.
>
> 2. The warrant must state the conviction and judgment and appoint a week, the first day being Monday and the last day being Sunday, within which the judgment is to be executed. The first day of that week must be not less than 15 days nor more than 30 days after the date of the warrant. The director shall execute a sentence of death within the week the judgment is to be executed, as designated by the district court. The director may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.
>
> 3. Where sentence was imposed by a district court composed of three judges, the district judge before whom the confession or plea was made, or his successor in office, shall designate the week of execution, the first day being Monday and the last day being Sunday, and sign the warrant."

NRS 176.505. Order following appeal.

> "1. When a remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal has been taken, the court in which the conviction was

> obtained shall inquire into the facts, and, if no legal reasons exist prohibiting the execution of the judgment, shall make and enter an order requiring the director of the department of prisons to execute the judgment at a specified time. The presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, is not required.
>
> 2. When an opinion, order dismissing appeal or other order upholding a sentence of death is issued by the supreme court pursuant to chapter 34 or 177 of NRS, the court in which the sentence of death was obtained shall inquire into the facts and, if no legal reason exists prohibiting the execution of the judgment, shall make and enter an order requiring the director of the department of prisons to execute the judgment during a specified week. The presence of the defendant in the court when the order of execution is made and entered, or the warrant is issued, is not required.
>
> 3. Notwithstanding the entry of a stay of issuance of a remittitur in the supreme court following denial of appellate relief in a proceeding brought pursuant to chapter 34 or 177 of NRS, the court in which the conviction was obtained shall, upon application of the attorney general or the district attorney of the county in which the conviction was obtained, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the director of the department of prisons.

Accordingly, the State is requesting that this Court review and sign the proposed Second Order of Execution pursuant to NRS 176.505. Based upon the extensive procedural history of this case, both in State and Federal court, the Defendant has exhausted his legal remedies thereby leaving no valid legal reasons against the issuance of an order to carry out the jury's sentence of a judgment of death. Pursuant NRS 176.505(2), requiring the district court to set the judgment for a specified week, the week of June 7, 2021 is being proposed as a date for the Director of the Department of Corrections to execute the judgment.

Once the Second Supplemental Order of Execution is signed, the State would propose a future court date for the signing and filing of the Second Supplemental Warrant of Execution, pursuant to NRS 176.495. Due the timing required by statute, that the judgment be carried out no less than 15 days but no more than 30 days following the issuance of the warrant of execution, the State would request that this Court issues the Second Supplemental Warrant of Execution on or about May 21, 2021.

/ / /

/ / /

DATED this 14th day of April, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing MOTION FOR THE COURT TO ISSUE A SECOND SUPPLEMENTAL ORDER OF EXECUTION AND A SECOND SUPPLEMENTAL WARRANT OF EXECUTION, Points and Authorities, and Notice of Motion was made this 14th day of April, 2021, by facsimile transmission to:

BRAD LEVENSON
Email: brad_levenson@fd.org
DAVID ANTHONY
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Ecf_nvchu@fd.org

BY */s/ E.Davis*
Employee for the District Attorney's Office

AC/ed

WARR
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

Case No. 99C159897
Dept No. XVII

SECOND SUPPLEMENTAL WARRANT OF EXECUTION

TO: THE SHERIFF OF CLARK COUNTY, NEVADA, and
THE DIRECTOR OF THE DEPARTMENT OF PRISONS,
OF THE STATE OF NEVADA:

WHEREAS, on the 19th day of July, 2000, ZANE MICHAEL FLOYD was found guilty of Counts II, III, IV & V, Murder of the First Degree With Use of a Deadly Weapon, along with six (7) other Counts, by a duly and legally impaneled jury of twelve persons; and

WHEREAS, on the 21st day of July, 2000, that same jury returned a verdict of death against ZANE MICHAEL FLOYD; and

WHEREAS, on the 11th day of September, 2000, filed an appeal with the Supreme Court of the State of Nevada; and

WHEREAS, on the 13th day of March, 2002, the Supreme Court of the State of Nevada

affirmed ZANE MICHAEL FLOYD'S convictions for all counts as well as the Jury's imposition of the death penalty; and

WHEREAS, on the 24th of February, 2003, the United States Supreme Court denied ZANE MICHAEL FLOYD's Petition for a Writ of Certiorari; and

WHEREAS, on the 26th day of March, 2003, the Supreme Court of the State of Nevada filed a Remittitur with the Clerk of this Court showing the denial of rehearing; and

WHEREAS, on the 19th day of June, 2003, ZANE MICHAEL FLOYD filed a Petition for a Writ of Habeas Corpus (Post-Conviction) and on the 6th day of October, 2003, a Supplemental Petition for a Writ of Habeas Corpus (Post-Conviction) was filed on behalf of ZANE MICHAEL FLOYD; and

WHEREAS, on the 4th day of February, 2005, the District Court issued a Findings of Fact, Conclusions of Law, and Order denying ZANE MICHAEL FLOYD's Petition for a Writ of Habeas Corpus (Post-Conviction);

WHEREAS, on the 9th day of March, 2005, ZANE MICHAEL FLOYD filed a Notice of Appeal to the Supreme Court of the State of Nevada; and

WHEREAS, on the 16th of February, 2006, the Supreme Court of the State of Nevada denied ZANE MICHAEL FLOYD's appeal from the denial of his Petition for a Writ of Habeas Corpus (Post-Conviction);

WHEREAS, on the 17th day of March, 2006, the Supreme Court of the State of Nevada filed a Remittitur with the Clerk of this Court; and

WHEREAS, on the 14th of April, 2006, MICHAEL ZANE FLOYD filed a Petition for Writ of Habeas Corpus in United States District Court;

WHEREAS, on the 8th June, 2007, MICHAEL ZANE FLOYD filed his second Petition for a Writ of Habeas Corpus (Post-Conviction) in the State of Nevada District Court;

WHEREAS, on the 2nd day of April, 2008, the District Court issued a Findings of Fact, Conclusions of Law, and Order denying ZANE MICHAEL FLOYD's Second Petition for a Writ of Habeas Corpus; and

WHEREAS, on the 7th day of April, 2008, ZANE MICHAEL FLOYD filed a Notice

of Appeal from the denial of his Second Petition for a Writ of Habeas Corpus (Post-Conviction); and

WHEREAS, on the 18th day of February, 2011, the Supreme Court of the State of Nevada affirmed the District Court's denial of ZANE MICHAEL FLOYD's Second Petition for a Writ of Habeas Corpus (Post-Conviction); and

WHEREAS, on the 22nd of September, 2014, the United States District Court denied ZANE MICHAEL FLOYD's Petition for Writ of Habeas Corpus (Post-Conviction); and

WHEREAS, on the 22nd of October, 2014, a Notice of Appeal was filed to the US Court of Appeals, Ninth Circuit; and

WHEREAS, on the 11th day of October, 2019, The United States Court of Appeals for the Ninth Circuit issued an Order affirming the United States District Court's denial of ZANE MICHAEL FLOYD's Petition for a Writ of Habeas Corpus; and

WHEREAS, on November 2, 2020, the United States Supreme Court denied a Petition for a Writ of Certiorari; and

WHEREAS, on November 5, 2020, Mandate was filed giving the judgment of the United States Court of Appeals for the Ninth Circuit full effect.

WHEREAS, the Court, in which the conviction was had and pursuant to NRS 176.505, has inquired into the facts and determined that no legal reasons exist against the execution of the judgment of death, and has entered a SECOND supplemental order to execute the judgment and sentence of death,

NOW THEREFORE, it is hereby

ORDERED that the County Clerk of the County of Clark, State of Nevada, shall forthwith, execute, in triplicate, under the Seal of the Court, certified copies of the SECOND Supplemental Warrant of Execution, the Judgment of Conviction, and of the entry thereof in the Minutes of the Court. The original of the triplicate copies of the Judgment of Conviction, SECOND Supplemental Warrant of Execution, and entry thereof in the Minutes of the Court, shall be filed in the Office of the County Clerk, and two of the triplicate copies shall be immediately delivered by the Clerk to the Sheriff of Clark County, State of Nevada.

IT IS FURTHER ORDERED that one of the triplicate copies be delivered by the Sheriff to the Director of the Department of Prisons or to such person as the Director shall designate. The Sheriff is hereby directed to take charge of the said Defendant, ZANE MICHAEL FLOYD, and transport and safely deliver the prisoner, forthwith, to the Director of the Department of Prisons at the Nevada State Prison located at or near Carson City, State of Nevada, and said prisoner, ZANE MICHAEL FLOYD, is to be surrendered to the custody of the said Director of the Department of Prisons or to such authorized person so designated by the Director of the Department of Prisons, for the imprisonment and execution of the said Defendant, ZANE MICHAEL FLOYD, in accordance with the provisions of this SECOND Supplemental Warrant of Execution.

IT IS FURTHER ORDERED that in connection with the above facts and pursuant to the provisions of NRS 176.345, 176.355 and 176.357, the Director of the Department of Prisons, or such person as shall by him be designated, shall carry out said Judgment and Sentence by executing the said ZANE MICHAEL FLOYD, by the administration to him, said Defendant, ZANE MICHAEL FLOYD, an injection of a lethal drug, the drug or combination of drugs to be used for the execution to be selected by the Director of the Department of Prisons after consulting with the State Health Officer. Said execution to be within the limits of the State Prison, located at or near Carson City, State of Nevada, during the week commencing on the 7th day of June, 2021, in the presence of the Director of the Department of Prisons, and 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, and invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The director shall determine the maximum number of persons who may be present for the execution. The director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution. The execution must take place at the state prison and a person who has not been invited by the director may not witness the execution.

ORDERED that said Defendant shall be safely kept and imprisoned by said Director until the Defendant is put to death by the injection of a lethal drug, or combination of drugs, and these presents shall be your authority so to do.

HEREIN FAIL NOT.

WITNESS, the HONORABLE MICHAEL VILLANI, this _____ day of April, 2021.

_____
DISTRICT JUDGE

WITNESS my hand and seal
this _____day of April, 2021.
Clerk Name, Clerk
BY _____

ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

Case No. 99C159897
Dept No. XVII

SECOND SUPPLEMENTAL ORDER OF EXECUTION

A JUDGMENT OF DEATH having been entered on the 21st day of July, 2000, against the above named Defendant, ZANE MICHAEL FLOYD, as a result of his having been found guilty of Counts II, III, IV and V Murder of the First Degree with Use of a Deadly Weapon, by a duly and legally impaneled Jury of twelve persons; and

WHEREAS, this Court has made inquiry into the facts and found no legal reasons against the execution of the Judgment of Death.

IT IS ORDERED that the Director of the Department of Prisons shall execute the Judgment of Death, during the week commencing on the 7th day of June, 2021.

DATED this _____ day of April, 2021.

DISTRICT JUDGE

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO. 99C159897

DEPT. NO. XVII

THE STATE OF NEVADA

To the Sheriff of Clark County, and the Warden or Officers in charge of the State Prison of the State of Nevada,

GREETINGS:

WHEREAS, ZANE MICHAEL FLOYD

Having entered a plea of Not Guilty to the crime of Counts II, III, IV, and V Murder With Use of a Deadly Weapon, and the Defendant having been found guilty by the Jury of the crimes of Counts II, III, IV, and V Murder of the First Degree With Use of a Deadly Weapon, and judgment having been pronounced against him that be punished by the imposition of the Death Penalty by the administration of an injection of a lethal drug or combination of drugs.
All of which appears of record in the Office of the Clerk of said Court and a certified copy of the Judgment being attached hereto and made a part hereof.

Now this is to command you, the said Sheriff, to safely deliver the said ZANE MICHAEL FLOYD, into the custody of the said Warden or his duly authorized representative, when requested to do so,

and this is to command you, the said Warden, or your duly authorized deputy, to receive from the said Sheriff, the said ZANE MICHAEL FLOYD, to be sentenced as aforesaid, and that the said be put to death by an injection of a lethal drug or combination of drugs.

And these presents shall be your authority to do so. HEREIN FAIL NOT.

WITNESS, Honorable MICHAEL P. VILLANI, Judge of the said District Court at the Courthouse, in the County of Clark, this_____day of April, 2021.

Witness my hand and the Seal of said Court, the day and year last above written.

_____ Clerk

EXHIBIT 1

EXHIBIT 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZANE FLOYD, *Petitioner-Appellant*, v. TIMOTHY FILSON; ADAM PAUL LAXALT, Attorney General, *Respondents-Appellees.*	No. 14-99012 D.C. No. 2:06-cv-00471-PMP-CWH ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted January 31, 2019
San Francisco, California

Filed October 11, 2019
Amended February 3, 2020

Before: Marsha S. Berzon, John B. Owens, and Michelle T. Friedland, Circuit Judges.

Order;
Opinion by Judge Friedland

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Zane Floyd's habeas corpus petition challenging his Nevada conviction and death sentence for four counts of first-degree murder.

As to Floyd's ineffective-assistance-of-trial-counsel claims raised for the first time in his second state petition, which the Nevada Supreme Court denied as untimely and successive, the panel held that because the claims would fail on the merits, it did not need to resolve whether section 34.726 of the Nevada Revised Statutes is adequate to bar federal review, or whether Floyd can overcome his procedural default. The panel held that Floyd's remaining ineffective-assistance-of-counsel claim that was raised and adjudicated in state court fails under AEDPA's deferential standards.

Regarding Floyd's claim that his constitutional rights were violated when the State's expert made reference during his testimony to test results that he had obtained from Floyd's expert, the panel held that the Nevada Supreme Court's conclusion on direct appeal that no constitutional error occurred was not contrary to or an unreasonable application of controlling Supreme Court case law.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Regarding Floyd's claim that the trial court violated his constitutional rights by failing to grant a change of venue, the panel held that the district court did not err when it reasoned that AEDPA limited its review to those materials before the state courts that had rejected the venue claim.

Regarding Floyd's claim that the trial court violated his constitutional rights by permitting the mother of a victim to testify extensively during the penalty phase about her son's difficult life and previous experiences with violent crime, the panel held that the Nevada Supreme Court's conclusion that the admission of the testimony did not unduly prejudice Floyd was not contrary to or an objectively unreasonable application of clearly established federal law.

Reviewing under AEDPA, the panel held that the Nevada Supreme Court's determination that the prosecutor's improper statement that Floyd had committed "the worst massacre in the history of Las Vegas" was harmless was neither contrary to nor an unreasonable application of *Darden v. Wainwright*, 477 U.S. 168 (1986). Reviewing de novo, the panel held that several of the prosecutor's other statements—suggesting that other decisionmakers might ultimately decide whether Floyd received the death penalty, and implying that the jury could sentence Floyd to death to send a message to the community—were improper but did not so affect the fundamental fairness of the proceedings as to violate the Eighth Amendment or result in the denial of due process.

The panel declined to expand the certificate of appealability to include claims challenging Nevada's lethal injection protocol and courtroom security measures that caused certain jurors to see Floyd in prison garb and restraints.

COUNSEL

Brad D. Levenson (argued) and David Anthony, Assistant Federal Public Defenders; Rene Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Jeffrey M. Conner (argued), Deputy Assistant Attorney General; Heidi Parry Stern, Chief Deputy Attorney General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Las Vegas, Nevada; for Respondents-Appellees.

H. Louis Sirkin, Santen & Hughes, Cincinnati, Ohio, for Amicus Curiae National Association for Public Defense.

Thomas C. Sand and Nicholas H. Pyle, Miller Nash Graham & Dunn LLP, Portland, Oregon, for Amicus Curiae The National Organization on Fetal Alcohol Syndrome.

Elizabeth Ballart and William Leiner, Disability Rights California, Oakland, California, for Amici Curiae Disability Law Center of Alaska, Disability Rights California, National Disability Rights Network, and Nevada Disability Advocacy & Law Center.

John L. Krieger, Dickinson Wright PLLC, Las Vegas, Nevada; Justin J. Bustos, Dickinson Wright PLLC, Reno, Nevada; for Amici Curiae Canadian Criminal Justice Professors, Litigators, and Expert Witnesses.

Lisa Rasmussen, Law Office of Lisa Rasmussen, Las Vegas, Nevada, for Amici Curiae The Directors of the Three Research Centers of Birmingham City University's School of Law.

ORDER

The opinion filed on October 11, 2019, reported at 940 F.3d 1082, is amended as follows.

On page 12 of the slip opinion, following <whether Floyd can overcome his procedural default and obtain federal review of the merits of his ineffective assistance claims.>, insert the footnote <The arguments in Floyd's opening and reply briefs regarding section 34.726 of the Nevada Revised Statutes address the same ineffective assistance of counsel claims as do his *Martinez* arguments. In Floyd's petition for rehearing, he argues that we should reach other constitutional claims that were also procedurally defaulted by section 34.726. Floyd forfeited any such argument by failing to present it in his opening brief. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).>.

On page 14 of the slip opinion, replace <Floyd's counsel emphasized Floyd's developmental problems and mental illness> with <Floyd's counsel emphasized Floyd's developmental problems and emotional instability>.

On page 15 of the slip opinion, replace <Floyd's other mental illnesses> with <Floyd's other developmental problems>, and delete <on his mental state>.

On page 16 of the slip opinion, replace <the jury already had evidence before it that Floyd suffered from some mental illness and that his illness might have been related to his mother's alcohol use during pregnancy> with <the jury already had evidence before it that Floyd suffered from some developmental problems and that his issues might have been related to his mother's alcohol use during pregnancy>.

On page 17 of the slip opinion, replace <mental illness> with <developmental problems>.

On page 26 of the slip opinion, in the current footnote 5, replace <*Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001)> with <*Arpin*, 261 F.3d at 919>.

With these amendments, the panel has unanimously voted to deny Appellant's petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is accordingly **DENIED.** No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

FRIEDLAND, Circuit Judge:

In 1999, Petitioner-Appellant Zane Michael Floyd shot and killed four people at a Las Vegas supermarket. A Nevada jury found Floyd guilty of four counts of first-degree murder, as well as several related offenses, and sentenced him to death. After the Nevada Supreme Court upheld his conviction and sentence on direct appeal and denied a petition for postconviction relief, Floyd sought a writ of habeas corpus in the United States District Court for the District of Nevada. Following a stay during which Floyd filed an unsuccessful second petition for postconviction relief in state court, the district court denied the federal habeas petition but issued a certificate of appealability as to various claims now before us. We affirm the district court's

decision and deny Floyd's motion to expand the certificate of appealability.

I.

A.

Before dawn one morning in June 1999, Floyd called an escort service and asked the operator to send a female escort to his parents' home in Las Vegas, where he had been living since his discharge from the U.S. Marine Corps the previous year. When a young woman sent by the service arrived, Floyd threatened her with a shotgun and forced her to engage in vaginal and anal intercourse, digital penetration, and oral sex. At one point he removed a shell from his shotgun and showed it to her, telling her that her name was on it. He later put on a Marine Corps camouflage uniform and told her that he planned to kill the first nineteen people he saw that morning. Commenting that he would have already shot her had he had a smaller gun on him, he told the woman she had one minute to run before he would shoot her. She escaped.

Floyd then walked about fifteen minutes to an Albertsons supermarket near his home. When he arrived at 5:15 am, he immediately began firing on store employees. He shot and killed four Albertsons employees and wounded another. The store's security cameras captured these events.

When Floyd exited the store, local police were waiting outside. Officers arrested him, and he quickly admitted to shooting the people in the Albertsons. Prosecutors charged Floyd with offenses that included multiple counts of first-degree murder and indicated that they would seek the death penalty.

B.

Numerous psychiatric experts examined Floyd and explored his background. On the day of his arrest, Floyd's public defenders retained Dr. Jakob Camp, a forensic psychiatrist who examined Floyd for three hours. Dr. Camp concluded that Floyd did not suffer from a mental illness that would impair his ability to stand trial, noted that Floyd's experiences during and after his time in the Marines might have had a bearing on his actions that day, and suggested that counsel obtain Floyd's adolescent health records to learn more about an attention deficit/hyperactivity disorder ("ADHD") diagnosis for which Floyd had been previously treated with the drug Ritalin. Floyd's counsel eventually obtained records from two doctors who had treated Floyd's mental health issues as an adolescent that confirmed this type of diagnosis. Those doctors had diagnosed Floyd with attention deficit disorder ("ADD"), although they had also determined that Floyd did not have any significant cognitive deficits.

Shortly before trial, defense counsel also retained clinical neuropsychologist Dr. David L. Schmidt to conduct a full examination of Floyd. Dr. Schmidt concluded that Floyd suffered from ADHD and polysubstance abuse, but that he showed "[n]o clear evidence of chronic neuropsychological dysfunction." He also diagnosed Floyd with a personality disorder that included "[p]aranoid, [s]chizoid, and [a]ntisocial [f]eatures."

Discouraged by Dr. Schmidt's findings, which they worried would make Floyd unsympathetic to a jury, counsel turned to clinical neuropsychologist Dr. Thomas Kinsora. After reviewing Dr. Schmidt's report and a report from Floyd's childhood doctor, Dr. Kinsora was highly critical of Dr. Schmidt's work, questioning the validity of the tests that

Dr. Schmidt had conducted. Dr. Kinsora advised Floyd's counsel that it was "not clear whether or not a more comprehensive assessment would have revealed ongoing deficits or not," but that he "wouldn't be surprised to find some continued evidence of neurological problems" in light of the findings of one of the doctors who had examined Floyd as an adolescent. The defense subsequently un-endorsed Dr. Schmidt as an expert, but not before the state trial court ordered it to provide the prosecution a copy of Dr. Schmidt's report along with the associated raw testing data.

Defense counsel also retained Dr. Frank E. Paul, a clinical psychologist and retired Navy officer, who investigated and described in detail Floyd's background and life history. Floyd's mother told Dr. Paul that she had used drugs and alcohol heavily earlier in her life, including when she was pregnant with her first child, but that she "stopped drinking and all drug use when she found herself pregnant with [Floyd] . . . but continued to smoke tobacco." Dr. Paul also learned of an incident in which Floyd, at the age of eight, was accused of anally penetrating a three-year-old boy. Dr. Paul further learned that Floyd began using drugs and alcohol extensively in high school. Dr. Paul described Floyd's Marine Corps deployment to the U.S. base at Guantanamo Bay, Cuba as difficult, explaining that Floyd struggled with the stress and monotony of the deployment and drank extremely heavily during that period. Defense counsel originally named Dr. Paul as an expert but did not call him at trial and never disclosed Dr. Paul's report to the prosecution.

At the guilt phase of Floyd's trial, the jury convicted him of four counts of first-degree murder with use of a deadly weapon, one count of attempted murder with use of a deadly

weapon, one count of burglary while in possession of a firearm, one count of first-degree kidnapping with use of a deadly weapon, and four counts of sexual assault with use of a deadly weapon.

During the penalty phase of Floyd's trial, the State argued that three statutory aggravating factors justified application of the death penalty: killing more than one person, killing people at random and without apparent motive, and knowingly creating a risk of death to more than one person. In arguing that mitigating circumstances weighed against imposition of the death penalty, the defense called (among other witnesses) two experts hired by defense counsel: Dr. Edward Dougherty, a psychologist specializing in learning disabilities and education; and Jorge Abreu, a consultant with an organization specializing in mitigation defense.

Dr. Dougherty diagnosed Floyd with ADHD and a mixed personality disorder with borderline paranoid and depressive features. He also discussed the "prenatal stage" of Floyd's development, and commented that his mother "drank alcohol, and she used drugs during her pregnancy," including "during the first trimester." In rebuttal, the prosecution called Dr. Louis Mortillaro, a psychologist with a clinical neuropsychology certificate, who had briefly examined Floyd and reached conclusions similar to Dr. Schmidt's based on Dr. Schmidt's testing. Abreu painted a detailed picture of Floyd's life, drawing on many of the same facts that Dr. Paul's report had mentioned. He particularly noted Floyd's mother's heavy drinking, including during her pregnancies.

During closing arguments, defense counsel urged the jury to refrain from finding that a death sentence was warranted. The mitigating factors defense counsel relied on

in closing included Floyd's difficult childhood, his alcohol and substance abuse, his stressful military service, his ADD/ADHD, and his mother's substance abuse while she was pregnant with him.

After three days of deliberation, the jury sentenced Floyd to death. It found that all three statutory aggravating factors were present and that they outweighed Floyd's mitigating evidence.

C.

New counsel represented Floyd on his direct appeal, which the Nevada Supreme Court denied. *Floyd v. State*, 42 P.3d 249 (Nev. 2002) (per curiam). The U.S. Supreme Court then denied certiorari. *Floyd v. Nevada*, 537 U.S. 1196 (2003). Floyd filed a state petition for a writ of habeas corpus a little over a year later. The state trial court denied the petition on the merits, and the Nevada Supreme Court affirmed. *Floyd v. State*, No. 44868, 2006 Nev. LEXIS 851 (Nev. Feb. 16, 2006).

Floyd then filed a pro se habeas petition in the U.S. District Court for the District of Nevada. *See* 28 U.S.C. § 2254(a). The federal public defender was appointed as counsel and filed an amended petition with new allegations, including alleged ineffective assistance by Floyd's trial counsel. The district court agreed with the State that Floyd had not exhausted these new claims in state court and stayed the federal proceedings so he could do so.

Floyd filed a second state habeas petition that included the new claims of ineffective assistance of trial counsel. The state trial court denied this petition on the merits and as untimely filed. The Nevada Supreme Court affirmed, holding that Floyd's second petition was untimely and

successive. *Floyd v. State*, No. 51409, 2010 WL 4675234 (Nev. Nov. 17, 2010).

The federal district court then lifted the stay and reopened Floyd's habeas proceedings. It ultimately granted in part the State's motion to dismiss, concluding that Floyd's new claims that the Nevada Supreme Court had denied as untimely—including his new ineffective assistance of trial counsel claims—were procedurally defaulted, and that Floyd had not shown cause and prejudice for failing to raise his ineffective assistance of trial counsel claims in his first petition. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The district court went on to deny Floyd's remaining claims on the merits, but it issued a certificate of appealability as to several issues, including whether Floyd could show cause and prejudice for the default of his ineffective assistance of trial counsel claims.

Floyd appealed, pressing each of the certified issues and also arguing that we should expand the certificate of appealability to encompass two more. We evaluate each of his arguments in turn.

II.

We review a district court's denial of habeas corpus de novo. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to Floyd's habeas petition. Under AEDPA, we may grant Floyd relief only if the Nevada Supreme Court's rejection of his claims "(1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts." *Davis v. Ayala*, 135 S. Ct. 2187,

2198 (2015). "[C]learly established federal law" in this context refers to law "as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). "Although an appellate panel may . . . look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent," that precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam).

III.

Floyd asserts numerous claims of ineffective assistance of trial counsel. He raised most of these claims for the first time in his second state petition, prompting the Nevada Supreme Court to deny them as untimely and successive. *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010). The Nevada Supreme Court held that the ineffective assistance of counsel claims raised for the first time in Floyd's second state habeas petition were procedurally barred under section 34.726 of the Nevada Revised Statutes, which states that absent "good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year" after conviction or remittitur of any denied appeal "taken from the judgment." Nev. Rev. Stat. § 34.726(1).

Unless a petitioner can show "cause and prejudice," federal courts in habeas actions will not consider claims decided in state court on a state law ground that is independent of any federal question and adequate to support the state court's judgment. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Floyd and the State disagree about whether section 34.726, as applied in his case, is adequate to bar

federal review.[1] Floyd contends that when he filed his second state habeas petition in 2007, Nevada did not clearly and consistently apply section 34.726 to bar successive petitions alleging ineffective assistance of counsel in capital cases. He further argues that, even if the state law is adequate, he can establish cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), based on ineffective assistance of initial state habeas counsel in failing to raise claims of ineffective assistance of trial counsel.

Given that Floyd's underlying ineffective assistance of trial counsel claims lack merit, we need not resolve whether the state law is adequate or, if it is, whether Floyd can overcome his procedural default and obtain federal review of the merits of his ineffective assistance claims.[2] *See Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002). Even if we held in Floyd's favor on either of those questions and thus reached the merits of Floyd's ineffective assistance

[1] The Nevada Supreme Court also held that Floyd's new claims were barred by section 34.810 of the Nevada Revised Statutes, which requires dismissal of claims that could have been raised in an earlier proceeding. Nev. Rev. Stat. § 34.810(1)(b)(3). On appeal, the State does not contest the district court's determination that this application of section 34.810 was inadequate, and so it does not bar federal review, because the rule was not consistently applied at the time of Floyd's purported default.

[2] The arguments in Floyd's opening and reply briefs regarding section 34.726 of the Nevada Revised Statutes address the same ineffective assistance of counsel claims as do his *Martinez* arguments. In Floyd's petition for rehearing, he argues that we should reach other constitutional claims that were also procedurally defaulted by section 34.726. Floyd forfeited any such argument by failing to present it in his opening brief. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

of trial counsel claims, we would affirm the district court's denial of relief.[3]

A.

To succeed on an ineffective assistance of counsel claim, Floyd must show that his counsel's performance "fell below an objective standard of reasonableness," and that, if so, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). With respect to the prejudice requirement, the Supreme Court has cautioned that "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). To determine the risk of such prejudice at the penalty phase of a capital trial, we consider whether it is reasonably probable that the jury otherwise "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" in light of "the totality of the evidence" against the petitioner. *Strickland*, 466 U.S. at 695.

B.

Floyd's primary ineffective assistance of trial counsel claim is that his trial counsel failed to investigate and present mitigation evidence showing that Floyd suffers from fetal alcohol spectrum disorder ("FASD") as a result of his mother's alcohol consumption while he was in utero. In

[3] Nor is a remand to the district court for further evidentiary development appropriate because only "a habeas petitioner who asserts a *colorable* claim to relief . . . is entitled to an evidentiary hearing." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994) (emphasis added).

support of this claim, Floyd offers a report from FASD expert Dr. Natalie Novick Brown. After reviewing the trial court record and other experts' examinations of Floyd, Dr. Brown concluded that Floyd suffered from FASD and that the disorder could explain his actions on the day of the shooting. Floyd argues it is reasonably probable that had jurors been presented with evidence of FASD and its effects, they would have spared him a death sentence. Floyd acknowledges that trial counsel consulted seven experts, none of whom diagnosed Floyd with FASD, but he contends that those experts were inadequately prepared and lacked the expertise to present proper mitigating evidence regarding FASD.

We need not resolve whether Floyd's counsel's performance was deficient in failing to present expert testimony that Floyd suffers from FASD. Even assuming it was, there is no reasonable probability that, had the jury heard from an FASD expert, it would have concluded that mitigating factors outweighed aggravating factors such that Floyd did not deserve a death sentence.

The State presented an extremely weighty set of aggravating factors at sentencing. First, the State charged that Floyd "created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person." Nev. Rev. Stat. § 200.033(3). Second, it alleged that Floyd killed more than one person (indeed, four) during the course of the offense that led to his conviction. *See id.* § 200.033(12). Third, it alleged that the killings were at random and without apparent motive, because Floyd "just went to a place where he knew 18 people would be and shot everybody he could see." *See id.* § 200.033(9). The jury

unanimously found that all three aggravating circumstances existed with regard to all four victims.

In response, Floyd's counsel emphasized Floyd's developmental problems and emotional instability, issues exacerbated by his early life experiences and military service. Counsel's mitigation arguments included multiple references to Floyd's mother's drinking while Floyd was in utero—a point that both mitigation consultant Abreu and Dr. Dougherty emphasized as well. Counsel and Dr. Dougherty both explicitly opined that Floyd's mother's substance abuse might be to blame for Floyd's mental condition. All in all, Floyd's counsel argued that Floyd acted "under the influence of extreme mental or emotional disturbance," and that he "suffer[ed] from the effects, early effects of his mother's drinking, her ingested alcohol, drugs early on in her pregnancy."

Consistent with these defense arguments, the mitigation instructions submitted to the jury included that Floyd's "[m]other use[d] alcohol and drugs during early pregnancy," that Floyd had been born prematurely, that the murders were committed while Floyd was under the influence of "[e]xtreme [m]ental or [e]motional [d]isturbance," and that Floyd had been "[i]nsufficiently [t]reated for ADHD [and] other [e]motional-[b]ehavioral [p]roblems including [d]epression." Maternal alcohol and drug use was the first mitigating factor on the list.

Given the defense's focus on Floyd's mother's drinking during pregnancy and its effects, testimony by an FASD expert would likely not have changed any juror's balancing of mitigating versus aggravating circumstances. For Floyd to have been prejudiced by the lack of testimony by an FASD expert, at least one juror would have had to have considered a formal FASD diagnosis more severe and

debilitating than ADD/ADHD and Floyd's other developmental problems, which the defense had suggested included effects of his mother's drinking and drug use during pregnancy, but without using FASD terminology. In other words, at least one juror would have had to view a formal FASD diagnosis as a weightier mitigating factor than those presented. And that juror would have had to have placed so much additional weight on the FASD defense as to cause the mitigating circumstances to outweigh the State's significant aggravating evidence, even though they did not on the record before the jury. Both the limited additional contribution of the FASD mitigating factor as compared with the mitigation evidence presented and the especially shocking nature of Floyd's crime, during which he killed multiple unarmed people at close range, without provocation, and in their workplace, makes that switch in outcome unlikely. Given that the jury already had evidence before it that Floyd suffered from some developmental problems and that his issues might have been related to his mother's alcohol use during pregnancy, and given the extreme aggravating circumstances, it seems very unlikely—and so not reasonably probable—that any juror would have had these reactions.

This conclusion comports with our previous holdings that a capital petitioner is not necessarily prejudiced when counsel fails to introduce evidence that differs somewhat in degree, but not type, from that presented in mitigation. In *Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009), for instance, we held that a capital petitioner was not prejudiced by his attorney's failure to introduce medical evidence that he suffered from neurological damage. *Id.* at 870. We reasoned that because counsel presented evidence that the petitioner might have had brain damage from persistent drug and alcohol abuse, along with evidence of childhood events that

could have led to brain damage, medical evidence of neurological damage would have been different only in degree. *Id.* at 871. Floyd's FASD argument resembles that of the petitioner in *Bible*—the jury heard the evidence that would have supported the FASD diagnosis as well as the implication that the evidence explained Floyd's behavior. And like the petitioner in *Bible*, who "murdered a nine-year-old child in an especially cruel manner," Floyd "has a significant amount of aggravating circumstances that he would need to overcome," *id.* at 872, making it unlikely that the jury would have imposed a different sentence based on mitigating evidence that differed only in degree from that which Floyd presented at trial.

Floyd urges us to follow the Fourth Circuit's decision in *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), *petition for cert. docketed*, No. 18-1495 (May 31, 2019), in which that court affirmed a district court's conclusion that a capital petitioner's counsel had performed constitutionally deficiently in failing to present evidence of fetal alcohol syndrome in mitigation, and that the petitioner was prejudiced by this failure. *Id.* at 319. In some cases, FASD evidence might be sufficiently "different from . . . other evidence of mental illness and behavioral issues" to raise a reasonable probability that a juror would not have imposed the death penalty had it been presented. *Id.* at 318. But much distinguishes Floyd's case from that of the petitioner in *Williams*. Floyd's lawyers and experts explicitly argued that his mother's alcohol use while she was pregnant led to his developmental problems in some form and therefore helped explain his actions, whereas trial counsel in *Williams* investigated the petitioner's mother's drinking "as evidence of [the petitioner's] difficult childhood, not of [fetal alcohol-related disorders]" and never offered evidence to the jury that the drinking could have caused Williams's cognitive

issues. *Id.* at 309. The State submitted against Floyd three aggravating factors, all involving a multiple-victim shooting, whereas in *Williams* "the State only presented one aggravating factor: that the [single] murder occurred in the commission of a kidnapping." *Id.* at 318. The jury that imposed the death sentence on Floyd did not report difficulty reaching a verdict, whereas in *Williams* "the jury sent a note to the trial court stating it was deadlocked nine to three in favor of death." *Id.* at 308. In short, the petitioner in *Williams* was prejudiced because his lawyers presented a much weaker-than-available mitigation argument that was insufficient to overcome an also weak aggravating argument that clearly troubled some jurors.[4] That was not the situation here. We also note that our conclusion is consistent with the Fifth Circuit's in *Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1793 (2018), in which that court rejected an ineffective assistance of counsel claim relating to the failure to present mitigating evidence of an FASD diagnosis because the evidence would have been outweighed by what the court viewed as very substantial aggravating evidence. *Id.* at 549–51.

Floyd further argues that counsel provided deficient performance in the penalty phase by failing to call Dr. Paul, the consulting military and mental health expert, to testify about Floyd's military service, early life, and other matters. We are skeptical that declining to call this expert was constitutionally deficient. *See Hinton v. Alabama*, 571 U.S.

[4] Floyd's postconviction investigator interviewed one juror who stated that evidence of a "serious mental illness" would have "weighed heavily" in her sentencing-phase deliberations. It does not follow that this juror would have deemed FASD a sufficiently severe condition to mitigate Floyd's offenses, especially because she appears to have considered insufficient the existing evidence of potential ties between maternal alcohol use and Floyd's state of mind.

263, 275 (2014) ("The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.'" (alterations in original) (quoting *Strickland*, 466 U.S. at 690)). Even assuming that counsel's choice in this regard was deficient, it did not prejudice Floyd. Like Floyd's FASD evidence, Dr. Paul's testimony would have been largely cumulative of the evidence of Floyd's substance abuse and mental health struggles actually presented at trial, and the testimony therefore would have done little to offset the weighty aggravating evidence against Floyd.

C.

Floyd argues that his trial counsel's conduct during jury selection amounted to ineffective assistance of counsel. We disagree. Much of his argument supposes that various decisions by the trial court prejudiced him during jury selection, that those decisions were erroneous, and that his counsel was ineffective in failing to object to or otherwise remedy these errors. But most of the trial court decisions he challenges were not errors at all, and with respect to any that may have been errors, we conclude that his counsel acted within the bounds of professional competence in responding to the court's decisions.

For example, Floyd contends that his counsel erred in failing to successfully object to the trial court's dismissal of two prospective jurors. Floyd first argues that the trial court improperly or pretextually removed one venireperson from the venire for cause. Even assuming that the trial court erred in doing so, this does not show that Floyd's counsel was ineffective. On the contrary, Floyd's counsel attempted to rehabilitate the prospective jurors who had expressed hesitation about the death penalty, including the juror in

question, and to allay the court's concerns. After the juror stated that she had scruples about the death penalty, counsel elicited a response from her that she "would have to follow the law." But she then admitted that she would "invariably in all cases give a sentence less than death," and the trial court dismissed her for cause.

Floyd next argues that the court improperly dismissed a second venireperson for improper concerns about language ability. After it came to light that this prospective juror was not a native English speaker, defense counsel questioned him about his degree from an English-speaking university. Nonetheless, the court concluded that the juror's English fluency was insufficient, stating that it could "not take a chance where the stakes [were] so high to both sides."

That the trial court dismissed these two potential jurors does not mean that counsel's attempts to rehabilitate them were deficient and that competent counsel would have sufficiently rehabilitated the two to keep them on the jury, especially because the court appears to have had legitimate concerns about both.

Floyd similarly argues that because the trial court refused to excuse allegedly biased venirepersons for cause, counsel wasted peremptory challenges on striking those individuals from the jury pool. It appears, however, that the trial court made no error by refusing to dismiss the prospective jurors in question. One of them, for instance, retracted her statement that she could not consider a sentence of life with parole after the trial court clarified that she was only required to "at least consider" it. And again, even if the trial court erred, Floyd's counsel's reaction was within the realm of permissible strategic choices: counsel chose between the two (admittedly unattractive) options of spending a peremptory challenge or taking the risk of seating a juror that counsel

had concluded would be unfavorable to Floyd. In other words, Floyd's counsel was not ineffective for attempting to make the best of the trial court's alleged errors.

Finally, Floyd contends in general terms that the voir dire format, in which the prosecution questioned all prospective jurors before the defense was permitted to question any, was prejudicial or caused his counsel to be ineffective. We struggle to discern precisely Floyd's theory of deficient performance or of prejudice. Even assuming that the trial court's format was prejudicial, counsel did object to it by moving for "attorney conducted, sequestered individual *voir dire*." Trial counsel's attempt to challenge the trial court's procedures shows diligence, not ineffectiveness.

Moreover, Floyd's lawyers had the opportunity to individually question numerous prospective jurors, eliciting information about their views on topics including the death penalty, psychology, alcoholism, and how they would behave in a jury room. Counsel's decision not to further question each venireperson about his or her exposure to media coverage of the shooting and ability to consider mitigating evidence was not deficient. The questionnaires that every prospective juror completed asked about these issues, and the trial court asked all prospective jurors if "there [is] anybody among you who feels unable to set aside what they've read, seen, or heard" about the case. Floyd's counsel were entitled to rely on those responses, and their mere failure to inquire further does not render their performance deficient. *See Fields v. Woodford*, 309 F.3d 1095, 1108 (9th Cir. 2002) ("[W]e cannot say that failure to inquire beyond the court's voir dire was outside the range of reasonable strategic choice or that it would have affected the outcome."); *Wilson v. Henry*, 185 F.3d 986, 991 (9th Cir. 1999) (rejecting argument "that trial counsel rendered

ineffective assistance by failing to focus on his client's criminal history during voir dire to discover potential juror prejudice and determine whether jurors could follow limiting instructions on such a history").

D.

Floyd's counsel was not ineffective in cross-examining the State's penalty-phase psychological expert witness, Dr. Mortillaro. Dr. Mortillaro reviewed the guilt-phase record materials and other psychological experts' reports and data, including Dr. Schmidt's unfavorable test results that the defense provided the prosecution in discovery before it un-endorsed Dr. Schmidt. Dr. Mortillaro also interviewed Floyd himself. Based on these materials, Dr. Mortillaro opined that—contrary to defense expert Dr. Dougherty's testimony—Floyd had not suffered brain damage, was of average IQ, did not suffer delusions, could tell right from wrong, and was not mentally ill.

On cross-examination, defense counsel elicited testimony from Dr. Mortillaro that he had only interviewed Floyd for about ninety minutes and that he had only received Dr. Dougherty's report the day before. Counsel also attempted to undermine Dr. Mortillaro's reliance on Floyd's scores from tests administered by Dr. Schmidt as the basis for Dr. Mortillaro's conclusion, arguing that the results should have been thrown out entirely. Counsel succeeded in getting Dr. Mortillaro to admit that any individual psychologist has significant discretion in deciding whether the test score was valid enough to allow reliance on the raw data. Counsel then pointed out that Dr. Dougherty had looked at the same data and diagnosed Floyd with dissociative personality disorder rather than borderline personality disorder, and he elicited an admission from

Dr. Mortillaro that individuals with borderline personality disorder may show dissociative symptoms.

Finally, counsel attempted to undermine Dr. Mortillaro's minimization of Floyd's ADD/ADHD. Counsel presented Dr. Mortillaro with his own prior testimony from another matter in which Dr. Mortillaro had stated "that 70 percent of those with attention deficit [disorder] still have it as an adult." Dr. Mortillaro also conceded that even if a patient were to "outgrow" ADD or ADHD, the fallout from the childhood disorder "would stay with them."

Floyd generally faults counsel for choosing to rely on cross-examination of Dr. Mortillaro rather than calling Floyd's other consulting expert, Dr. Kinsora, to rebut Dr. Mortillaro's testimony. The caselaw does not support Floyd's argument. In prior cases in which we and other circuits have recognized constitutionally deficient cross-examination, there were glaring failures to ask even basic questions, not—as here—a strategic choice between one means of undermining the witness and another. *See, e.g.*, *Reynoso v. Giurbino*, 462 F.3d 1099, 1112–13 (9th Cir. 2006) (counsel ineffective for failing to ask *any* questions about a $25,000 reward that might have motivated key witnesses' testimony against the defendant); *Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006) (ineffective assistance where counsel did not cross-examine key prosecution witness at all because he felt unprepared to do so, even though he "had plenty of ammunition with which to impeach [the witness's] testimony").

Floyd does not contend that counsel failed altogether to cross-examine Dr. Mortillaro about key issues, but rather that he failed to do so in a manner that Floyd now believes would have been more effective. But Floyd's counsel did attempt to impeach Dr. Mortillaro's testimony, including

with information counsel obtained from experts he had hired. This was not constitutionally deficient performance.

E.

Floyd argues that his trial counsel was ineffective for failing to object to various jury instructions. Many of the arguments against the instructions Floyd now challenges would not have been legally supported or would have been foreclosed by then-governing law, so counsel was not ineffective for failing to raise them.

First, we disagree with Floyd that the jury should have been instructed at the penalty phase that it could impose a death sentence only if it found that aggravating factors outweighed mitigating factors beyond a reasonable doubt. Floyd contends that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required that the jury instructions include such a statement about burden of proof. The Court in *Apprendi* held that, subject to an exception for prior convictions, "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490 (emphasis added). Floyd characterizes the balance of aggravating and mitigating circumstances as a "fact" governed by this rule.

The federal courts of appeals that have considered this argument have uniformly rejected it, holding that a jury's balancing inquiry in a capital case is a subjective and moral one, not a factual one. *See United States v. Gabrion*, 719 F.3d 511, 532–33 (6th Cir. 2013) (en banc); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013); *United States v. Barrett*, 496 F.3d 1079, 1107–08 (10th Cir. 2007); *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31–32 (1st Cir.

2007); *United States v. Purkey*, 428 F.3d 738, 749–50 (8th Cir. 2005).[5] Floyd's proposed instruction thus hardly flowed naturally from *Apprendi*, which did not involve a capital case and was decided just months before Floyd's trial began. Floyd's counsel was not deficient for failing to make an argument that was untested, an extension of newly minted law, and (judging from the weight of subsequent authority) likely to fail. *See Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

Second, Floyd's counsel was not ineffective for failing to challenge on constitutional grounds the penalty-phase jury instructions for the aggravating circumstance that "[t]he murder was committed upon one or more persons at random and without apparent motive." At the time of Floyd's trial, the Nevada Supreme Court had already rejected an identical constitutional challenge to this aggravating factor. *See Geary v. State*, 930 P.2d 719, 727 (Nev. 1996). Counsel was not ineffective for failing to raise this argument.

[5] We have never directly ruled on this question—nor do we today—but we have at least twice expressed our skepticism of Floyd's view. *See Ybarra v. Filson*, 869 F.3d 1016, 1030–31 (9th Cir. 2017); *United States v. Mitchell*, 502 F.3d 931, 993–94 (9th Cir. 2007). Floyd also argues that counsel should have requested a reasonable doubt instruction based on the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which applied the principle from *Apprendi* to hold that every sentence-enhancing fact, "no matter how the State labels it," must be found beyond reasonable doubt. *Id.* at 602. *Ring* was decided two years after Floyd's trial. In addition, *Ybarra* and *Mitchell*, as well as other circuits' decisions rejecting that argument, post-date *Ring* and thus defeat this version of Floyd's claim as well.

Third, no *Strickland* violation occurred when Floyd's counsel declined to challenge a guilt-phase jury instruction that premeditation, an element of first-degree murder, "may be as instantaneous as successive thoughts of the mind." Even assuming that this instruction was improper and that counsel's decision not to challenge it was unreasonable, no prejudice resulted from use of the instruction. The jury had before it significant evidence that Floyd's premeditation occurred in more than an instant. Among other things, he told his sexual assault victim that he planned to kill the first nineteen people he saw, then walked for fifteen minutes carrying the shotgun that he used to perpetrate the murders. Even if counsel had succeeded in striking the "instantaneous premeditation" instruction, there is no reasonable probability that the jury would have found a lack of premeditation as a result. *See Strickland*, 466 U.S. at 694.

F.

Floyd's remaining claim of ineffective assistance—that his trial counsel should have objected to Nevada's use of the "great risk of death" aggravating circumstance—was raised and adjudicated in state court, so we review it under AEDPA's deferential standards. The claim fails under those standards.

Floyd contends that his trial counsel should have objected to this aggravating circumstance as duplicative of another aggravating circumstance—the "multiple murders" factor—that the State charged. *See* Nev. Rev. Stat. § 200.033(3). Initial post-conviction counsel presented a nearly identical argument[6] to the Nevada Supreme Court,

[6] To the extent Floyd is now making a new argument that this aggravating circumstance was impermissibly vague, we hold that

which rejected it on the merits. The Nevada Supreme Court held that the two aggravators were based on different facts and served different state interests. It reasoned that "[o]ne is directed against indiscriminately dangerous conduct by a murderer, regardless of whether it causes more than one death; the other is directed against murderers who kill more than one victim, regardless of whether their conduct was indiscriminate or precise." *Floyd v. State*, No. 44868, 2006 Nev. LEXIS 851 (Nev. Feb. 16, 2006). Floyd argues in a conclusory fashion that this decision was "arbitrary and capricious" such that it was contrary to or an unreasonable application of clearly established federal law, but he cites no controlling Supreme Court precedent relevant to this argument. His briefing focuses entirely on the legislative history of Nevada's aggravating factors and what he contends are two conflicting strains of doctrine in that state's jurisprudence on the "great risk of death factor." These state law issues are not grounds for federal habeas relief, and we are aware of no clearly established federal law that the Nevada Supreme Court's determination might have contravened. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (holding that "clearly established Federal law" refers only to U.S. Supreme Court decisions at time of alleged violation).

argument lacks merit. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam). To the extent that Floyd is making a new argument in his reply brief that substantial evidence did not support this jury instruction, we hold that Floyd forfeited any such argument by failing to articulate it in his opening brief. *See Arpin*, 261 F.3d at 919.

IV.

Floyd argues that his constitutional rights were violated when the State's expert, Dr. Mortillaro, made reference during his testimony to test results that he had obtained from Floyd's expert, Dr. Schmidt. The Nevada Supreme Court's conclusion on direct appeal that no constitutional error occurred, *Floyd v. State*, 42 P.3d 249, 258–59 (Nev. 2002) (per curiam), was not contrary to or an unreasonable application of controlling Supreme Court caselaw.

Floyd argues at length that the Nevada Supreme Court wrongly determined that Dr. Schmidt's report was not privileged work product.[7] Although the Nevada Supreme

[7] Floyd argues that his counsel were ordered to turn over Dr. Schmidt's report "before defense counsel had even seen the report of their expert." That assertion is misleading. The court ordered the defense to provide a copy of Dr. Schmidt's report "before the close of business on June 15, 2000." Dr. Schmidt's report is dated June 13, 2000. In his declaration, Floyd's counsel describes a phone call with Dr. Schmidt on June 14 where Dr. Schmidt informed counsel that he was "unable to find any neurological basis for Mr. Floyd's actions." "Upon talking with Dr. Schmidt," counsel "became skeptical about the quality of his testing and decided to hire Dr. Kinsora" to review Dr. Schmidt's testing and analysis. So Floyd's counsel knew basically what would be in Dr. Schmidt's report before they turned it over, whether or not they had seen the actual report. Counsel had the opportunity to withdraw Dr. Schmidt as an expert before turning over his report, as they previously had done with Dr. Paul, but failed to do so. And Floyd's counsel admits that there was "no strategic reason to turn over a report that [they] were not sure about using." In light of this timeline, Floyd's argument that the prosecution's use of Dr. Schmidt's data violated the work-product privilege might be more accurately framed as a result of a poor strategic choice on defense counsel's part not to withdraw Dr. Schmidt as an expert, which could in turn be grounds for an ineffective assistance of counsel claim. *See McClure v. Thompson*, 323 F.3d 1233, 1242–43 (9th Cir. 2003). But no such claim is before us.

Court drew on federal authority in reaching that conclusion, Floyd "simply challenges the correctness of the state evidentiary rulings," and "he has alleged no deprivation of federal rights" that could entitle him to relief. *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). He similarly argues that the Nevada Supreme Court misapplied its own precedent, but a state court's misreading of *state* law is not a ground for federal habeas relief.

Ake v. Oklahoma, 470 U.S. 68 (1985), does not support Floyd's challenge to the use of Schmidt's report either. The Supreme Court in *Ake* held that "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase" of a capital case. *Id.* at 84. Floyd received ample psychiatric evaluations and assistance prior to sentencing, so *Ake* has little bearing here.

Floyd further contends that our extension of *Ake* in *Smith v. McCormick*, 914 F.2d 1153, 1158–59 (9th Cir. 1990), should have compelled the Nevada Supreme Court to reach a different result. In *Smith*, we held that a capital defendant's due process rights[8] were violated when, instead of permitting an independent psychiatric evaluation, the trial court ordered a psychiatrist to examine the defendant and

[8] Floyd asserted in passing in his opening brief before this court that the disclosure and use of Dr. Schmidt's report violated his Fifth Amendment rights against self-incrimination but provided no developed argument supporting that assertion. We therefore express no view on that issue. *See e.g.*, *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." (internal citations omitted)).

report directly to the court at a resentencing hearing. *Id.* at 1159–60. We reasoned that the petitioner's "counsel was entitled to a confidential assessment of such an evaluation, and the strategic opportunity to pursue other, more favorable, arguments for mitigation." *Id.* at 1160.

Floyd appears to argue that because, under *Smith*, a defendant is entitled to a confidential assessment of the state-provided psychiatric assessment and the chance to pursue other strategies, he was entitled to claw back a document that was disclosed in connection with designating an expert to testify after he reversed course and removed the expert from his witness list. The holding in *Smith* did not encompass what Floyd seeks here, so the Nevada Supreme Court did not act contrary to our precedent. And, in any event, Floyd's proposed rule is not clearly established by any Supreme Court decision. *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam).

Indeed, the Supreme Court has held that mandatory disclosure schemes are permissible in criminal trials as long as they do not structurally disadvantage the defendant. *See Wardius v. Oregon*, 412 U.S. 470, 472 (1973) ("We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules *unless reciprocal discovery rights are given to criminal defendants*." (emphasis added)). Nevada provides for reciprocal discovery, as it did at the time of Floyd's trial, so *Wardius* was not contravened here. *See* Nev. Rev. Stat. § 174.234 (1999).

V.

Floyd next contends that the trial court violated his constitutional rights by failing to grant a change of venue.[9] He argues that the district court erred when it rejected this claim in part on the ground that, of the 115 news articles Floyd submitted with his federal habeas petition to attempt to show that the jury was exposed to prejudicial pretrial publicity about his case, only three were in the record before the state courts. Relying on *Cullen v. Pinholster*, 563 U.S. 170 (2011), the district court reasoned that AEDPA limited its review to those materials before the state courts that had rejected Floyd's venue claim. *See id.* at 185 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.").

The district court did not err. Floyd argues that, under *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), the district court misapplied *Pinholster* to bar consideration of his 112 new articles. Floyd's reliance on *Dickens* is misplaced. In *Dickens*, we held that AEDPA (as interpreted in *Pinholster*) did not bar a federal court from considering new evidence introduced to support a *Martinez* motion alleging ineffective assistance of trial and postconviction counsel as cause and prejudice for a procedural default. *Dickens*, 740 F.3d at 1319–20. Here, by contrast, Floyd faults the district court for failing to consider new evidence

[9] In Floyd's opening brief, he asserts in a section heading that the district court also erred by failing to consider his claim that the trial court violated his rights by refusing to sever the sexual assault charges against him from the murder charges. But he does not actually argue this point or explain the alleged error, so we consider any such argument forfeited. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

in the context of a change of venue claim decided on its merits in the state court and so reviewed under AEDPA deference. Floyd's theory about how the Nevada Supreme Court erred has nothing to do with trial counsel's performance and therefore does not implicate the *Dickens* rule.

Because Floyd makes no argument beyond the district court's refusal to consider these documents—which we conclude was not error—we need not consider whether the Nevada Supreme Court's denial of Floyd's venue claim was contrary to or unreasonably applied clearly established federal law.

VI.

Floyd argues, as he did on direct appeal, that the trial court violated his constitutional rights by permitting the mother of victim Thomas Darnell to testify extensively during the penalty phase about her son's difficult life and previous experiences with violent crime. The Nevada Supreme Court held that parts of Nall's testimony "exceeded the scope of appropriate victim impact testimony" and should not have been admitted under state evidentiary law, but that their admission did not unduly prejudice Floyd such that it rendered the proceeding fundamentally unfair. *Floyd v. State*, 42 P.3d 249, 262 (Nev. 2002) (per curiam). The Nevada Supreme Court's rejection of this claim was not contrary to or an objectively unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d).

The prosecution called Mona Nall, Darnell's mother, to offer victim impact testimony during the penalty phase of trial. Nall told the jury how Darnell had thrived in the face of serious learning and developmental disabilities, going on to form close relationships with his family and members of

the community. She testified that "the hurt has gone so deep" for those affected by his death. Nall also recounted an incident years earlier in which Darnell and his family had been kidnapped by two men who held the family hostage and sexually assaulted Nall's daughter. Defense counsel objected twice to this testimony and the trial court admonished the prosecution to "get to th[e] point."

The Nevada Supreme Court did not unreasonably apply the relevant clearly established federal law in rejecting Floyd's claim that this testimony violated his due process rights. In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held that in a penalty-phase capital trial, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Id.* at 827. The Court added that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–83 (1986)).

Like the Nevada Supreme Court, we are troubled by the admission of some of Nall's testimony. That court determined that although *Payne* did not necessarily bar Nall's testimony about the hostage-taking and kidnapping incident, those parts of her testimony should not have been admitted under state evidentiary law because of its limited relevance and high risk of prejudice. We are additionally concerned about the propriety of Nall's testimony about Darnell's early life and developmental difficulties because of its limited relevance to Floyd's impact on the victims (or on people close to and surviving them) and its potential risk of prejudice. Eliciting extensive testimony about a horrible

crime that had nothing to do with the defendant risks inappropriately affecting jurors who might feel that the victim's family should be vindicated for all of its tragedies, not just for the one caused by Floyd.

Nevertheless, it was not unreasonable for the Nevada Supreme Court to conclude that the admission of Nall's testimony did not render Floyd's trial fundamentally unfair. Given the strength of the prosecution's aggravating case against Floyd, it seems unlikely that the jury was substantially swayed by the irrelevant parts of Nall's testimony. The same characteristics that made Nall's testimony so objectionable—that it had nothing to do with Floyd's crimes or, at times, with Floyd's victims—could have diminished the testimony's effect on the jury.

The prosecutor indirectly referenced the irrelevant portions of Nall's testimony in closing argument when he commented on "the tremendous tragedies . . . that Mona has suffered and had suffered with her son over the years, so many tragedies, so many hardships." But this comment lacked detail and was in the context of a long description of the victim impact of Floyd's crime, so the prosecution does not appear to have relied extensively on the improper testimony. In the face of the robust aggravating evidence that the State presented, the Nevada Supreme Court did not unreasonably apply clearly established Supreme Court law by holding that Floyd was not prejudiced by Nall's statement or by the prosecutor's references to it, so there was no due process violation. *See Payne*, 501 U.S. at 825. For the same reasons, any error in permitting Nall's testimony about Darnell's early life was harmless as there is no evidence that the testimony had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v.*

Abrahamson, 507 U.S. 619, 638 (1993) (quotation marks omitted).

VII.

Floyd challenges numerous statements made by the prosecution as misconduct amounting to constitutional error.[10] We agree that a subset of these statements was improper, but we hold that the impropriety is not a ground for habeas relief under the relevant standards of review.

The due process clause provides the constitutional framework against which we evaluate Floyd's claims of prosecutorial misconduct. "The relevant question" under clearly established law "is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see also Parker v. Matthews*, 567 U.S. 37, 45 (2012) (per curiam) (holding that *Darden* provides relevant clearly established law on habeas review of claims that statements by prosecutors amounted to prosecutorial misconduct). In making that determination, courts look to various

> *Darden* factors—i.e., the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and

[10] The district court determined that Floyd had exhausted all of these claims, and the State does not challenge that ruling.

> whether defense counsel had an adequate opportunity to rebut the comment.

Hein v. Sullivan, 601 F.3d 897, 914 (9th Cir. 2010). As the Supreme Court emphasized in *Darden*, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned," 477 U.S. at 181 (citation omitted), because the effect on the trial as a whole needs to be evaluated in context. *See United States v. Young*, 470 U.S. 1, 17–20 (1985) (prosecutor's exhortation that the jury "do its job" and statements of personal belief were improper, but they did not have prejudicial effect on the trial as a whole in light of the comments' context and overwhelming evidence of guilt).

A.

In his direct appeal and first habeas petition, Floyd presented several claims that the prosecutor's statements amounted to misconduct; we review those adjudicated claims under AEDPA. We agree with the Nevada Supreme Court that the prosecutor's contention that Floyd had committed "the worst massacre in the history of Las Vegas" was improper. *Floyd v. State*, 42 P.3d 249, 260–61 (Nev. 2002) (per curiam). That court's further determination that the comment was harmless, *id.* at 261, was not unreasonable. Although the Nevada Supreme Court cited the state's codified harmless error doctrine, *see* Nev. Rev. Stat. § 178.598, and not *Darden*, its reasoning can also be understood as concluding that Floyd had not shown that the misconduct "so infected the trial with unfairness" as to work a denial of his due process rights. *Darden*, 477 U.S. at 181 (quotation marks omitted).

This conclusion was not objectively unreasonable under the *Darden* factors. Although the "worst massacre"

comment came late in the trial and was not invited by the defense, the weight of the evidence against Floyd and the fact that the comment was not egregiously inflammatory make the Nevada Supreme Court's determination reasonable. In *Darden*, for instance, the prosecutor made a series of comments far more inflammatory than this one.[11] The Supreme Court nonetheless held that those comments did not render the petitioner's trial fundamentally unfair in light of the defense's response and the strong evidence against the petitioner. *Id.* at 180–83. And although the trial court here did not specifically direct jurors to ignore the prosecutor's "worst massacre" comments, it did instruct them that "arguments and opinions of counsel are not evidence." The Nevada Supreme Court's determination was therefore neither contrary to nor an unreasonable application of *Darden*.

B.

Floyd raised additional claims in his second state habeas petition that statements by the prosecutor amounted to misconduct. The Nevada Supreme Court held that those claims were procedurally barred, *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010), but because

[11] *Darden* enumerated a few of the prosecutor's statements: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." "I wish [the victim] had had a shotgun in his hand when he walked in the back door and blown [the petitioner's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." "I wish someone had walked in the back door and blown his head off at that point." "He fired in the boy's back, number five, saving one [round]. Didn't get a chance to use it. I wish he had used it on himself." "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." 477 U.S. at 180 n.12.

the State has forfeited any objection to the district court's decision to review them on the merits nonetheless, we consider them de novo.

Most of these claims are meritless, but we note two troubling arguments made by the prosecution. We find improper one set of statements characterizing the jury's role in imposing the death penalty. At the penalty phase, the prosecution told the jury that "you're not killing him," that "[y]ou are part of a shared process," and that "even after you render your verdict, there's a process that continues." These comments suggested that other decisionmakers might ultimately decide whether Floyd received the death penalty. They therefore present concerns under *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985), which held that the Eighth Amendment makes it "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."

Nevertheless, these comments did not "so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." *Id.* at 340. The statements did not quite as clearly suggest to the jury that Floyd would not be executed as did the offending remark in *Caldwell*. *See id.* at 325–26 ("[Y]our decision is not the final decision"; "[T]he decision you render is automatically reviewable by the Supreme Court."). Defense counsel emphasized the jury's responsibility during his closing argument, telling the jurors, "[w]e sit before you and we ask whether or not you're going to kill somebody." Moreover, the jury instructions clearly stated that the jurors "must assume that the sentence will be carried out." This sufficiently avoided any "*uncorrected* suggestion that the responsibility for any

ultimate determination of death will rest with others," so as to not require reversal. *Id.* at 333 (emphasis added).

The prosecution also argued during the penalty phase that the death penalty "sends a message to others in our community, not just that there is a punishment for a certain crime, but that there is justice." This statement inappropriately implies that the jury could sentence Floyd to death to send a message, rather than making "an *individualized* determination." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). The harm of this statement was mitigated in part by jury instructions that emphasized the jury's responsibility to weigh the specific aggravating and mitigating circumstances of the case. Both the defense and the prosecution also repeatedly emphasized and relied on the specific details of the crime at hand, encouraging the jury to make a determination based on the individual facts of the case. Finally, we agree with the district court's holding that, in context, these comments did not "incite the passions of the jurors" and "did not include any overt instruction to the jury to impose the death penalty . . . to send a message to the community." In light of the other arguments made at trial, and the strong evidence against Floyd, the improper argument by the prosecution did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (quotation marks omitted).

VIII.

Floyd advances on appeal two claims outside the certificate of appealability issued by the district court. These uncertified claims challenge Nevada's lethal injection protocol and courtroom security measures that caused certain jurors to see Floyd in prison garb and restraints. We

construe this portion of his briefing as a motion to expand the certificate of appealability. 9th Cir. R. 22-1(e).

A petitioner meets his burden for a certificate of appealability if he can make "a 'substantial showing of the denial of a constitutional right,' accomplished by 'demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Turner v. McEwen*, 819 F.3d 1171, 1178 n.2 (9th Cir. 2016) (first quoting 28 U.S.C. § 2253(c)(2); and then quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). Floyd makes no such showing here, and we therefore deny his motion to expand the certificate of appealability.

First, Floyd's uncertified challenge to Nevada's lethal injection protocol—a three-drug sequence of the anesthetic midazolam, the opioid fentanyl, and the paralytic cisactracurium—is not yet ripe. In 2018, the manufacturer of Nevada's supply of midazolam brought an action to enjoin its product's use in executions. The manufacturer won, obtaining a preliminary injunction, *Alvogen v. Nevada*, No. A-18-777312-B (Nev. Dist. Ct. Sept. 28, 2018), which is currently on appeal to the Nevada Supreme Court. *See State v. Alvogen, Inc.*, Nos. 77100, 77365 (Nev. 2019). As a result, for all practical purposes, Nevada presently has no execution protocol that it could apply to Floyd. A method-of-execution challenge is not ripe when the respondent state has no protocol that can be implemented at the time of the challenge. *See Payton v. Cullen*, 658 F.3d 890, 893 (9th Cir. 2011) (claim unripe because no protocol in place following state court invalidation of existing protocol). We cannot determine what drugs Nevada might attempt to use to execute Floyd, and we cannot adjudicate the

constitutionality of an unknown protocol. Floyd's claim is therefore unripe for federal review because "the injury is speculative and may never occur." *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) (citation omitted).

Second, Floyd's uncertified and procedurally defaulted argument that his trial counsel was ineffective for failing to challenge various courtroom security measures fails. In Floyd's second state habeas petition and instant federal petition, he contended that his trial counsel failed to object to the trial court's forcing him to appear at voir dire in a prison uniform and restraints. The Nevada Supreme Court dismissed this claim as untimely and successive because it was first raised in Floyd's second state petition, *Floyd v. State*, No. 51409, 2010 WL 4675234, at *1 (Nev. Nov. 17, 2010), and the district court dismissed it as procedurally defaulted. As with Floyd's other defaulted ineffective assistance of counsel claims, because of the underlying claim's weakness, we need not resolve whether the state law under which it was deemed defaulted is adequate or whether Floyd may show cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012).

In light of the overwhelming evidence of Floyd's guilt and the weight of the aggravating factors against him, any reasonable jurist would agree that the courtroom security measures had no substantial effect on the jury's verdicts. *See Walker v. Martel*, 709 F.3d 925, 930–31 (9th Cir. 2013) (reversing the grant of habeas relief on a shackling-related ineffective assistance claim because the prejudicial effect of shackles was "trivial" compared to aggravating evidence against defendant who killed multiple victims during armed robberies); *Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) (holding that when evidence against the

defendant is overwhelming, prejudice from shackling is mitigated). Even if trial counsel should have objected to the restraints, Floyd was not prejudiced by that failure. *See Harrington v. Richter*, 562 U.S. 86, 111 (2011) (explaining that *Strickland*'s prejudice prong "asks whether it is reasonably likely the result would have been different." (quotation marks and citation omitted)).

We therefore deny the motion to expand the certificate of appealability as to both uncertified claims.

IX.

For the foregoing reasons, we **AFFIRM** the district court's denial of habeas relief.

EXHIBIT 2

EXHIBIT 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZANE FLOYD,

Petitioner - Appellant,

v.

TIMOTHY FILSON, Warden and ADAM PAUL LAXALT, Attorney General,

Respondents - Appellees.

No. 14-99012

D.C. No. 2:06-cv-00471-PMP-CWH
U.S. District Court for Nevada, Las Vegas

MANDATE

The judgment of this Court, entered October 11, 2019, and amended February 3, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

EXHIBIT 3

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE FLOYD

Petitioner-Appellant,

vs.

TIMOTHY FILSON, Warden and ADAM PAUL LAXALT, Attorney General,

Respondents-Appellees.

District No. 2:06-cv-00471-RFB-CWH

U.S.C.A. No. 14-99012

ORDER ON MANDATE

The above-entitled cause having been before the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals having on 10/11/2019 , issued its judgment AFFIRMING the judgment of the District Court, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS ORDERED that the mandate be spread upon the records of this Court.

Dated this 6th day of November, 2020.

Richard F. Boulware, II
United States District Judge

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

v.

ZANE M. FLOYD,

Defendant

Case No. 99C159897
Dept. No. 17

OPPOSITION TO MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

Date of Hearing: May 14, 2021
Time of Hearing: 8:30 a.m.

(DEATH PENALTY CASE)

EXECUTION WARRANT SOUGHT FOR THE WEEK OF JUNE 7, 2021

POINTS AND AUTHORITIES

I. Introduction

On April 14, 2021, the State filed a motion with this Court seeking a second supplemental order of execution and a second supplemental warrant of execution. The State's proposed warrant seeks Mr. Floyd's execution at the Nevada State Prison, which was closed and decommissioned in 2012. The State requests that this Court sign the order of execution and schedule a hearing for the purpose of signing the warrant. Mr. Floyd opposes the State's motion.

II. Argument

Mr. Floyd objects to this Court taking any action in this matter until he receives notice and an opportunity to be heard, including, but not limited to, signing an order of execution. As explained below, legal reasons exist prohibiting the execution of judgment. NRS 176.505(1). First, this matter must be transferred to Department 5 as the state statutory scheme requires the case and the pending state petition to be heard there. Second, the Clark County District Attorney's Office (CCDA) must be disqualified from this case and another entity must be substituted to represent the State. Third, Mr. Floyd is entitled to litigate his pending state habeas petition before a warrant for his execution can be entered.[1] Finally, due to logistical considerations involved with effectuating a two week to one month warrant and the safety issues presented by the ongoing COVID-19 pandemic, this

[1] As further discussed below, one of the claims raised in the state petition is the denial of Mr. Floyd's right to seek clemency, a constitutional right in Nevada. The State is seeking Mr. Floyd's execution the week of June 7th, however, the Pardons Board does not meet again until June 22, 2021.

Court should order a representative of the attorney general's office to be present to make representations regarding the Nevada Department of Correction's (NDOC) ability to conduct a humane execution while protecting the safety of the visitors and prison personnel at the execution.

A. The motions to transfer the case and disqualify the CCDA must be litigated before the Court considers the State's motion.

Before the State's motion can be considered, the case must be before a court with jurisdiction to hear it. As explained in his motion to transfer the case, this Court is neither the court of conviction nor the court where the sentence of death was obtained. NRS 176.495; 176.505(1)–(3). Moreover, the state habeas petition filed by Mr. Floyd has subsequently been improperly transferred to this Court in violation of NRS 34.730(3)(b), which requires assignment to "the original judge or court." As explained in Mr. Floyd's motion, Department 5 is the court where the trial, sentencing, and all prior post-conviction proceedings occurred.[2] There is still no valid transfer order in existence documenting how or when this case was transferred to this Court. For the reasons stated in Mr. Floyd's motion, this case must first be transferred back to Department 5 before any other action is taken in this case or on the state habeas petition.

Moreover, before the State's motion can be considered it must be brought by the appropriate representative for the State. As explained in Mr. Floyd's motion to disqualify the CCDA, the people's representatives in the Legislature are currently

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[2] Alternatively, to the extent the case management orders of the Eighth Judicial District Court control, this matter should be heard in Department 1.

deciding whether to abolish capital punishment, which would moot this case. But every time the Legislature acts, whether it be the initial reading of the bill or the ultimate vote by the Assembly to pass it, the Clark County District Attorney, who has testified against the legislation, acts against Mr. Floyd. Even more problematic, two senate-prosecutors employed with the CCDA who will potentially decide the fate of the legislation would have to act against the wishes of their boss to allow the legislation to be considered by the Senate, which is a direct violation of the separation of powers provision in the state constitution. Article III, § 1. This patent violation of the state constitution requires the disqualification of the CCDA and the appointment of another entity to represent the State's interests.

Mr. Floyd requests that he be permitted to litigate these issues before this Court considers the State's motion. Under EDCR 1.60(h), Mr. Floyd has the right to seek review of any decision by this Court regarding the appropriate department in which this matter should be heard. Mr. Floyd also has the remedy of mandamus and prohibition available in which to seek review with the Nevada Supreme Court of any decision regarding his motions to transfer the case and to disqualify the CCDA. Mr. Floyd requests that this Court defer consideration of the State's motion until it is before a court with jurisdiction to consider it and filed by the appropriate representative from the State.

B. Mr. Floyd's pending state petition requires this Court defer consideration of the State's motion.

This Court should not consider the State's motion until Mr. Floyd has had the opportunity to litigate his pending state habeas petition. NRS 176.486. Staying consideration of the State's motion is required because it is "necessary for a proper consideration of the claims for relief." NRS 176.487. Mr. Floyd's petition "presents substantial grounds upon which relief may be granted and valid justification for the claims not having been presented in a prior proceeding." NRS 176.487(4). It "asserts claims based upon specific facts or law which, if true, would entitle the petitioner to relief." NRS 176.487(5). The petition raises arguments demonstrating that the claims are not procedurally barred. NRS 176.487(3). And the "court cannot decide legal claims which are properly raised or expeditiously hold an evidentiary hearing on factual claims which are properly raised before the execution of sentence." NRS 176.487(6). Therefore, the relevant statutory factors applicable here all militate in favor of deferring consideration of the State's motion.

Specifically, Mr. Floyd's petition argues he is categorically exempt from the death penalty due to Fetal Alcohol Spectrum Disorder (FASD), which is equivalent to Intellectual Disability (ID), a categorical exemption to the death penalty. Pet. at 23–37. Mr. Floyd's claim has not been previously raised, and it is not procedurally barred because of previously unavailable scientific evidence, showing that adaptive functioning deficits from FASD are just as severe as those occurring with individuals who have ID. Pet. at 20-21. Similarly, the medical evidence showing the limited brain development of twenty-three-year-olds, specifically those with FASD

like Mr. Floyd, was not previously available in prior proceedings. Evolving standards of decency which guide the Court's application of Article 1, § 6 of the Nevada Constitution and the Eighth Amendment require consideration of Mr. Floyd's claim due to its factual and legal unavailability during prior state proceedings. *Hathaway v. State*, 119 Nev. 248, 252, 119 P.3d 503, 506 (2003). Moreover, as an argument regarding actual innocence of the death penalty the Nevada Supreme Court recognizes that Mr. Floyd can overcome any procedural bars to consideration of the issue. *Cf. Ybarra v. State*, 127 Nev. 47, 50, 247 P.3d 269, 271 (2011) (reversing district court's finding of procedural default of intellectual disability claim and remanding for consideration of merits of claim).

Moreover, Mr. Floyd's petition argues his constitutional rights have been violated by the State's intention to execute him before he has had an opportunity to seek clemency with the Pardons Board. Pet. at 38–45. Mr. Floyd's claim was not previously ripe for review due to pending legal challenges to his convictions and sentences, *cf. Clark v. Robinson*, 113 Nev. 949, 952, 944 P.2d 788, 790 (1997) (statute of limitations does not begin until claim is ripe), and, after the conclusion of that litigation, the COVID-19 pandemic has prevented undersigned counsel from investigating and proffering the facts necessary to support Mr. Floyd's clemency petition. Pet. at 38–42; *see* Section II(C)(2), below. Now, the claim is undoubtedly ripe as the State seeks a warrant for Mr. Floyd's execution before the next scheduled meeting by the Pardons Board. The factual and legal unavailability of the

claim during prior proceedings allows Mr. Floyd to overcome any procedural bars to the consideration of his claim. *Hathaway*, 119 Nev. at 252, 71 P.3d at 506.

This Court should not consider the State's motion until the court in Department 5 has had an opportunity to consider Mr. Floyd's petition. The petition complies with NRS 34.810(4)(a) and (b), as Mr. Floyd has pleaded good cause and prejudice to overcome any state procedural bars to the consideration of his claims. Pet. at 20–21. The State has not filed an answer to the petition, NRS 34.760, and there has been no judicial determination with respect to the petition under NRS 34.770(1). In fact, the proceedings on Mr. Floyd's petition have not been scheduled until June 25, two weeks after his execution. In such circumstances, this Court must defer consideration of the State's motion until Mr. Floyd has received an opportunity to litigate his petition before a district court with jurisdiction to hear it and the Nevada Supreme Court.

C. This Court should not sign a warrant of execution until the Nevada Attorney General's Office appears before the Court to make necessary representations regarding NDOC's position in this matter.

Because of the speed with which CCDA has sought this execution warrant, many questions remain open. NDOC, not CCDA, has the answers to these questions, and this Court should require NDOC's representatives to appear and provide answers.

1. NDOC should represent whether it is prepared to conduct an execution.

This Court should require a member of the Nevada Attorney General's Office to appear in court to provide assurances that NDOC is prepared to conduct an

execution. The CCDA normally does not contact anyone from the attorney general's office or NDOC before seeking an execution warrant, and there is no indication the office has done so here. For example, the last time the CCDA sought an execution warrant they acknowledged the office had not been in communication with the Director of NDOC about the prison's ability to carry out an execution.[3] The CCDA did not know whether NDOC had a current execution protocol or the drugs to carry out an execution.[4] Ultimately, the execution date needed to be rescheduled even though the CCDA initially proffered an execution warrant for sixty to ninety days.[5] Here, the State has proffered an execution warrant for only two weeks to one month until the execution, but again these basic questions remain unanswered. If the execution date needed to be modified last time to give NDOC more time to prepare, then it is unlikely to be prepared here given the short time frame involved.

In addition, there is no evidence that NDOC has a current execution protocol or the drugs to perform an execution. When the last execution warrant was sought by the CCDA in 2017, the Director informed the media that NDOC could perform an execution.[6] However, the publicly available information now suggests that NDOC does not have lethal injection drugs. Specifically, media reports indicate the

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[3] Ex. 1 at 11 (*State v. Dozier*, Case No. 05C215039, Transcript of Proceedings at 11 (July 27, 2017)).

[4] *Id.*

[5] Ex. 2 at 9 (*State v. Dozier*, Case No. 05C215039, Transcript of Proceedings at 9 (August 17, 2017) (signing second warrant based upon "the State's position as to what the prison could do within the statutory timeframe")).

[6] Ex. 1 at 11.

only drug in the possession of NDOC is fentanyl.[7] The last word from the Attorney General to the media was that NDOC could not perform an execution because it did not have all the necessary execution drugs.[8] In prior litigation, NDOC distanced itself from the suggestion that it would proceed with an execution using high doses of fentanyl.[9] And since the last execution warrant sought by the CCDA, it was revealed that NDOC resorted to subterfuge to illegally obtain execution drugs.[10] That conduct by NDOC also violates federal law under 21 U.S.C. § 822(a)(2). NDOC's pharmacist has made false statements to the Drug Enforcement Administration to obtain execution drugs.[11] There is no indication that the Director has consulted with the Chief Medical Officer regarding the drug or combination of drugs to be used in the execution as required by NRS 176.355(2)(b). There is no indication that NDOC has a current signed and adopted execution protocol.

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[7] Ex. 3 (Sam Metz, *Death penalty debate reemerges in Nevada after past stalls*, AP News, Mar. 24, 2021).

[8] Ex. 4 Cy Ryan, *State official Nevada execution chamber unusable*, Las Vegas Sun, March 8, 2011.

[9] *See Nevada Dep't of Corr. v. Eighth Judicial District Court (Dozier)*, Case No. 74679, Nevada Supreme Court, Emergency Petition for Writ of Mandamus or Prohibition Under NRAP 21(a)(6) and NRAP 27(e) at 16 n.7 (filed) ("NDOC's protocol does not use the so-called 'high dose Fentanyl" technique because "high dose Fentanyl" refers to anesthesia using only Fentanyl while NDOC's protocol also uses Diazepam.").

[10] Ex. 5 (*Dozier v. State of Nevada*, Case No. 05C215039, 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, filed Nov. 27, 2017).

[11] The DEA 222 forms NDOC's pharmacist fills out to obtain controlled substances require a statement regarding the purpose for the drugs, and it is incorrect for the forms to say that the drugs will be used at a hospital.

Moreover, there is no evidence that NDOC has done the preparation and training of execution staff necessary to perform an execution. NDOC has not performed an execution since 2006, and the execution protocol used in that execution was the same one used by all the states in conducting lethal injection executions. NDOC has never conducted an execution using the novel execution protocol it disclosed in 2018, and neither has any other state. There is no indication that NDOC has done any recent training or test runs on the 2018 protocol or on a new undisclosed execution protocol. There is no indication that the Director could comply with the warrant and state law by inviting an attending physician, psychiatrist, and a coroner to be present at the execution. NRS 176.355(2)(e). And as explained below, there is no indication that NDOC could perform the execution at the decommissioned Nevada State Prison. *See* Section II(C)(3), below. For all of these reasons, this Court should hear from NDOC's legal representative before signing an execution warrant, as it is doubtful that all of these matters could be sorted out in two to four weeks. The rush to execution sought by the State is both impractical and carries a substantial and unjustified risk of causing a botched and torturous execution.

2. NDOC should represent whether it is safe to conduct an execution in light of the COVID-19 pandemic.

This Court should stay its decision to sign an execution warrant until NDOC informs the Court that it is safe to conduct an execution and that procedures are in place to ensure the safety of visitors and prison personnel in the institution. NDOC has prevented all in person visitation at its facilities since March 16, 2020, due to

the COVID-19 pandemic.[12] At the present time, NDOC still does not permit in person legal visitation. Inmates in prison facilities, including Mr. Floyd, have not been fully vaccinated against COVID-19. COVID-19 is currently running rampant throughout NDOC facilities, causing numerous inmate deaths.[13] The most recent information provided to the media from the Governor states that less than ten percent of NDOC inmates have been vaccinated, which means that NDOC may still be unable to open for visitation.[14] At least one court has declined to issue an execution warrant precisely because of the inability of counsel to have visitation with the condemned inmate due to COVID-19 restrictions.[15] And courts have required safety measures to be put in place before permitting executions to occur.[16]

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[12] Ex. 6 (Memorandum from Charles Daniels, Director, State of Nevada Department of Corrections to All Employees, re: Director's Update in Response to Covid-19, dated Mar. 16, 2020).

[13] Ex. 7 (Katelyn Newberg, *55 prisoners who contracted COVID died. Activists say it was preventable*, Las Vegas Review Journal (April 9, 2021), available at https://www.reviewjournal.com/local/local-nevada/55-prisoners-who-contracted-covid-died-activists-say-it-was-preventable-2323306/).

[14] Ex. 8 (Michael Lyle, *Sisolak questions prison officials on 'extremely low' inmate vaccinations*, Nevada Current (April 21, 2021), available at https://www.nevadacurrent.com/2021/04/21/sisolak-questions-prison-officials-on-extremely-low-inmate-vaccinations/)).

[15] Ex. 9 (*Texas v. Hernandez*, Case No. 20060D05825, Order Denying State's Motion Requesting Execution Date (filed March 15, 2021) (declining to sign execution warrant because counsel was unable to meet with client at prison to pursue clemency and because of risks to counsel and prison personnel from COVID infection)).

[16] Ex. 10 (*Smith, et al. v. William P. Barr, et al.*, Case No. 2:20-cv-00630-JMS-DLP, U.S.D.C. SD Ind. (Terre Haute Division), Order Granting Preliminary Injunction, dated Jan. 7, 2021).

The majority of jurisdictions in the country have stayed execution warrants due to the COVID-19 pandemic.[17] The few that did not have experienced COVID-19 infections for legal counsel, members of the media, condemned inmates, and prison

[17] Ex. 16(a – j); *see, e.g.*, *In re Hummel*, No. WR-81,578-02, 2020 WL 1268970, at *1 (Tex. Crim. App. Mar. 16, 2020) (*sua sponte* granting stay of execution "in light of the current health crisis and the enormous resources needed to address that emergency"); *In re Beatty*, No. WR- 59,939-04, 2020 WL 1329145, at *1 (Tex. Crim. App. Mar. 19, 2020) (same); *In re Hernandez*, No. WR-81,577-02, 2020 WL 1645052, at *1 (Tex. Crim. App. Apr. 1, 2020) (granting stay of execution in recognition that the execution "should be stayed at the present time"); *Fourth Texas Execution Delayed in Midst of Virus Outbreak*, Associated Press (April 6, 2020) https://apnews.com/article/e2021b26e914e2edc8df25b609dc77c7 (court granted District Attorney's motion to reschedule the April 29, 2020 execution of Billy Wardlow because of the Governor's statewide disaster declaration related to COVID-19); *In re Busby*, No. WR-70,747- 03, 2020 WL 2029306, at *1 (Tex. Crim. App. Apr. 27, 2020) (granting stay of execution in recognition that execution "should be stayed at the present time"); *Texas v. Carlos Trevino*, No. 1997-CR-1717D (Bexar Co. Dist. Ct. Apr. 15, 2020) (order granting unopposed motion to withdraw original execution date of June 3, 2020 and resetting execution date to September 30, 2020 "due to restrictions and concerns caused by the COVID-19/Coronavirus pandemic") https://files.deathpenaltyinfo.org/documents/Trevino-Carlos-TX-Bexar- Cty-Order-Rescheduling-Execution-2020-04-15.pdf; *Texas v. Carlos Trevino*, No. 1997-CR-1717D (Bexar Co. Dist. Ct. Sep. 15, 2020) (order withdrawing death warrant setting execution for September 30, 2020 because of "the current COVID-19 conditions in Texas," and scheduling a hearing for March 5, 2021 to set a new execution date) https://files.deathpenaltyinfo.org/documents/Trevino-TX-290-DC-Order-Withdrawing-Execution-Date-2020-09-15.pdf; Adam Tamburin and Mariah Timms, *Harold Nichols; Governor Delays August Execution Over Coronavirus Concerns*, Tennessean (July 17, 2020)*;* https://www.tennessean.com/story/news/crime/2020/07/17/harold-wayne-nichols-execution-august-tennessee-bill-lee-covid-19/5461947002/; *Gov. Lee Grants Temporary Reprieve for Pervis Payne*, Office of the Governor (Nov. 6, 2020) https://www.tn.gov/governor/news/2020/11/6/gov--lee-grants-temporary-reprieve-for-pervis-payne.html (granting "temporary reprieve from execution until April 9, 2021, due to challenges and disruptions caused by the COVID-19 pandemic"); *Tennessee v. Oscar Franklin Smith*, No 89-F-1773 (Tenn. Apr. 17, 2020) (June 4, 2020 execution rescheduled "due to the COVID-19 pandemic"); *Tennessee v. Oscar Franklin Smith*, No 98-F-1773 (Tenn. Jan. 5, 2021) (Feb. 4, 2021 execution stayed pending further order "because of the multiple issues caused by the continuing COVID-19 pandemic"); *Tennessee v. Byron Lewis Black*, No 88-S-1479 (Tenn. Dec. 03, 2020) (order resetting October 8, 2020 execution date until April 8, 2021 "because of the multiple issues caused by the continuing COVID-19 pandemic").

staff.[18] Prisons are "super spreader" environments for COVID-19 because of the small spaces, absence of adequate ventilation, and inability to engage in social distancing.[19] There is no indication that visitors and correctional personnel will be able to engage in social distancing in the spaces provided by the prison for viewing and conducting the execution. The Chief Medical Officer (CMO) has experience in epidemiology and he should be able to opine regarding the safety risks posed by conducting an execution at the present time.[20] This Court should require a representative for the attorney general to appear to relate the CMOs position with respect to conducting an execution before considering the State's motion.

Similarly, the COVID-19 pandemic has prevented Mr. Floyd's legal team from conducting the field investigation and prison contact with the client necessary to support his application for clemency to the Pardons Board. As explained in Claim Two of Mr. Floyd's petition, even though some work has been completed for the clemency petition, the legal team still intends to interview and memorialize the statements of approximately fifteen witnesses spread across five states.[21] In person visitation with Mr. Floyd is necessary for his legal counsel and a mental health

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[18] Ex. 11 (Michael Tarm, et al., *AP Analysis: Federal executions likely a COVID superspreader*, Associated Press (February 5, 2021), available at https://apnews.com/article/public-health-prisons-health-coronavirus-pandemic-executions-956da680790108d8b7e2d8f1567f3803).

[19] *Id.*

[20] Ex. 12 (Associated Press, *Nevada's chief medical officer not licensed to practice medicine in the U.S.*, Washington Times (September 11, 2018) available at https://www.washingtontimes.com/news/2018/sep/11/ihsan-azzam-nevada-chief-medical-officer-not-licen/).

[21] Ex. 3 at 5 to State Petition (Declaration of Herbert Duzant, at 5, dated April 9, 2021)).

expert to conduct an evaluation. And the Director is independently obligated under the statutory scheme to determine whether a physician should evaluate Mr. Floyd to assess his sanity for execution. NRS 176.425(1). The suggestion that the prison environment is too dangerous for Mr. Floyd to meet with his own counsel or a mental health expert is entirely inconsistent with the State's suggestion that dozens of individuals outside the prison should congregate with prison personnel in a small space to witness and conduct an execution. This Court should not consider the State's motion until Mr. Floyd has been able to prepare and present his clemency petition before the Pardons Board or before the prison opens for visitation.

3. NDOC should represent whether it can conduct the execution at the Nevada State Prison.

The parties apparently agree that state law requires Mr. Floyd's execution to occur at the Nevada State Prison. Mot. at 4 (warrant noting "the State Prison" is the Nevada State Prison located near Carson City, Nevada). This is so because NRS 176.355(3) states the execution "*must* take place at *the* state prison." (Emphasis added). The use of the definite article and the singular phrasing requires the statute be interpreted as requiring that executions occur at the Nevada State Prison. Moreover, NSP was the only "state prison" in existence at the time of the statute's enactment.

As a factual matter, the execution chamber at the Nevada State Prison is completely unsuitable to perform an execution. NSP was decommissioned and shut down permanently in 2012. According to the Director of Public Works, Gus Nunez, the "execution chamber at the ancient Nevada State Prison . . . is unusable and

[Nevada] could not carry out a death penalty" there.[22] Nunez concludes that it is "[n]ot feasible" to "[r]emodel NSP's existing execution chamber to comply with code and courts."[23] Similarly, Jeff Mohlenkamp, the Director of the Department of Administration, notes there "are significant concerns that the current facility would not pass any court challenges."[24] News reports cited "[e]xperts [who] have said that under new court rulings [it is] impossible to conduct future executions at the death chamber at NSP.[25] The structural inadequacy of the execution chamber at NSP is corroborated by NDOC's modified occupancy and life safety plans for NSP. The plans note an individual must climb three flights of stairs to get to the execution chamber, there are no accommodations for the disabled, and the facility has no available restrooms, heating or cooling systems, and a non-operational fire alarm system.[26] A representative for NDOC must therefore appear before the Court to state whether the Director is prepared to conduct Mr. Floyd's execution at NSP.

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[22] Ex. 4 (Cy Ryan, State Official: Nevada execution chamber unusable, Las Vegas Sun (March 8, 2011), available at http://www.lasvegassun.com/news/2011/mar/08/public-works-official-states-execution-chamber-unu/).

[23] Ex. 13 at 5 (E-mail from Gus Nunez to Jeff Mohlenkamp, Re: Execution Chamber, dated Feb. 14, 2013).

[24] Ex. 13 at 2 Mr. Mohlenkamp and Mr. Nunez have both stated that the execution chamber at NSP fails to comply with the Americans with Disabilities Act. *Id.*

[25] Ex. 14 (Proposal would move execution chamber to Ely, available at https://www.nevadaappeal.com/news/2012/sep/07/proposal-would-move-execution-chamber-to-ely/).

[26] Ex. 15 at 5-6 (Letter from Susan K. Stewart, Deputy Attorney General, Construction Law Counsel to Michael Pescetta, Assistant Federal Public Defender, Re: Public Records Request, dated Nov. 14, 2013).

III. Conclusion

For the foregoing reasons, Mr. Floyd requests that this Court defer consideration of the State's motion until this matter is assigned to the correct court, litigated by the appropriate representative for the State, and Mr. Floyd has had the opportunity to litigate his pending state petition.

DATED this 21st 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

CERTIFICATE OF SERVICE

In accordance with EDCR 8.04(c) the undersigned hereby certifies that on this 21st day of April, 2021, a true and correct copy of the foregoing **OPPOSITION TO MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION**, 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:

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

EXHS

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Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

v.

ZANE M. FLOYD,

Defendant.

Case No. 99C159897
Dept. No. 17

EXHIBITS TO OPPOSITION TO MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION

Date of Hearing: May 14, 2021
Time of Hearing: 8:30 a.m.

(DEATH PENALTY CASE)

EXECUTION WARRANT SOUGHT FOR THE WEEK OF JUNE 7, 2021

Exhibit No.	Document
1	*State v. Dozier*, Case No. 05215039, Transcript of Proceedings, dated July 27, 2017.
2	*State v. Dozier*, Case No. 05215039, Transcript of Proceedings, dated Aug. 17, 2017.
3	Sam Metz, *Death penalty debate reemerges in Nevada after past stalls,* AP News, Mar. 24, 2021.
4	Cy Ryan, *State official Nevada execution chamber unusable*, Las Vegas Sun, March 8, 2011.
5	*Dozier v. State of Nevada*, Case No. 05C215039, 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, filed Nov. 27, 2017
6	Memorandum from Charles Daniels, Director, State of Nevada Department of Corrections to All Employees, re: Director's Update in Response to Covid-19, dated Mar. 16, 2020.
7	Katelyn Newberg, *55 prisoners who contracted COVID died. Activists say it was preventable*, Las Vegas Review-Journal, dated Apr. 9, 2021.
8	Michael Lyle, *Sisolak questions prison officials on 'extremely low' inmate vaccinations*, Nevada Current, Apr. 21, 2021.
9	*State of Texas v. Hernandez*, Cause No. 20060D05825, 346th District Court of El Paso County, Texas, Order Denying State's Motion Requesting Execution Date, Mar. 15, 2021.
10	*Smith, et al. v. William P. Barr, et al.*, Case No. 2:20-cv-00630-JMS-DLP, U.S.D.C. SD Ind. (Terre Haute Division), Order Granting Preliminary Injunction, dated Jan. 7, 2021.
11	Michael Tarm, Michael Balsamo and Michael R. Sisak, *AP analysis: Federal executions likely a COVID superspreader*, AP News, dated Feb. 5, 2021.
12	*Nevada's chief medical officer not licensed to practice medicine in U.S.*, Associated Press, dated Sept. 11, 2018.
13	Letter from Katie S. Armstrong, Deputy Attorney General, to Michael Pescetta, Assistant Federal Public Defender, Re: Public Records Request, dated Dec. 17, 2013.
14	Geof Dornan*, Proposal Would Move Execution Chamber to Ely*, Nevada Appeal, Sept. 7, 2012.

15	Letter from Susan K. Stewart, Deputy Attorney General, Construction Law Counsel to Michael Pescetta, Assistant Federal Public Defender, Re: Public Records Request, dated Nov. 14, 2013.
16a	*In Re John William Hummel, Relator,* Case No. WR-81,578-02, Texas Court of Criminal Appeals, Order on Motion for Leave to File application for Writ of Mandamus, dated Mar. 16,2020
16b	*In re Tracy Beatty*, Case No. WR59,939-04, Texas Court of Criminal Appeals, Order on Motion to Stay the Execution, dated Mar 19, 2020.
16c	In Re Fabian Hernandez, Case No. WR-81,577-02, Texas Court of Criminal Appeals, Order on Motion to Stay the Execution, dated Apr. 1, 2020.
16d	*Tennessee v. Smith*, Case No. M2016-01869-SC-Rll-PD, Supreme Court of Tennessee, Order (granting motion resetting execution), dated Apr. 17, 2020.
16e	*In Re Edward Lee Busby, Jr.,* Case No. WR-70,747-03, Texas Court of Criminal Appeals, Order on Motion to Stay the Execution, dated Apr. 27, 2020.
16f	*Tennessee v. Nichols*, Case No. E1998-00562-SC-R11-PD, Supreme Court of Tennessee, Notice and Executive Reprieve, dated July 17, 2020.
16g	*Texas v. Trevino,* Cause No. 1997CR1717D, 29th Judicial District Court, Bexar County, Texas, Order Withdrawing Execution Date, Sept. 15, 2020.
16h	*Tennessee v. Payne,* Case No. M1988-00096-SC-DPE-DD, Supreme Court of Tennessee, Notice and Executive Reprieve, dated Nov. 6, 2020.
16i	*Tennessee v. Black*, Case No. M2000-00641-SC-DPE-CD, Supreme Court of Tennessee, Order (staying execution), dated Dec. 3, 2020.
16j	*Tennessee v. Smith*, Case No. M2016-01869-SC-R11-PD, Supreme Court of Tennessee, Order (staying execution), dated Jan 5, 2021.

/ / /

/ / /

DATED this 21st 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

CERTIFICATE OF SERVICE

In accordance with EDCR 8.04(c) the undersigned hereby certifies that on this 21st day of April, 2021, a true and correct copy of the foregoing **EXHIBITS TO OPPOSITION TO MOTION FOR THE COURT TO ISSUE SECOND SUPPLEMENTAL ORDER OF EXECUTION AND SECOND SUPPLEMENTAL WARRANT OF EXECUTION**, 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:

Alexander Chen
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

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

EXHIBIT 1

EXHIBIT 1

Electronically Filed
8/15/2017 3:59 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. SCOTT RAYMOND DOZIER aka CHAD WYATT, Defendant.	CASE NO. 05C215039 DEPT. IX

BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE

THURSDAY, JULY 27, 2017

ROUGH DRAFT TRANSCRIPT
TRANSCRIPT OF PROCEEDINGS
STATUS CHECK: SETTING OF EVALUATION

APPEARANCES:

For the State: GIANCARLO PESCI, ESQ.
Deputy District Attorney

For the Defendant: TOM ERICSSON, ESQ.

RECORDED BY: YVETTE SISON, COURT RECORDER

Las Vegas, Nevada, Thursday, July 27, 2017 at 9:34 a.m.

THE COURT: This is C215039, status check – so Mr. Dozier, the last time we were in court, the report of the doctor had been provided. I told the parties because there was medical and psychological information in those – in that report, that I needed a protective order to be filed because technically it didn't – it wasn't a competency evaluation under competency statutes per se. It was a competency evaluation that I ordered sua sponte, meaning on my own motion, right?

THE DEFENDANT: [unintelligible].

THE COURT: Okay and so instructed the District Attorney to prepare a protective order so that it would be maintained in the files of the attorneys and no distributed or copied by them and given to a third party or unsealed without court permission and a court order, really. So do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: Any questions about that?

THE DEFENDANT: Not about that, Your Honor. Thank you.

THE COURT: Okay. So then, I told the parties that I would give them a copy of the Krelstein – Dr. Krelstein's 13-page evaluation and cover sheet, once I had that order. So I sign the order, and then they were provided, and please confirm that you got a copy of the –

MR. PESCI: Mr. Vanboskerck from our office in Appeals received it. I have not. He's looked at it.

MR. ERICSSON: Your Honor, I did receive a copy of it.

THE COURT: Okay. So, I told Mr. Ericsson to – and I wasn't sure if he would have the time or ability to be able to get it to you and have you review it before you

got here today. Have you reviewed it?

THE DEFENDANT: He did, and I have Your Honor.

THE COURT: Okay. And then I told the District Attorney to prepare a warrant of execution in the event that you were to come here and advise me that you still wish to pursue imposition of the death sentence and waive your rights to post conviction with the caveat that the parties have stipulated that, meaning you and the District Attorney, have stipulated or agreed that in the event the sentence couldn't be carried out, you know, and in very lay terms, if you're going to be there anyway and you're not going to be able to pursue what you have represented to me you want to pursue, then you would go ahead and continue with your post-conviction.

THE DEFENDANT: Right. I incur no procedural santions – [unintelligible]

THE COURT: Right. And that was the gist of the agreement –

THE DEFENDANT: Yes, Your Honor.

THE COURT: Your position is, well I might as well if I can't pursue imposition of the death sentence. Is that an accurate assessment of what's happened?

THE DEFENDANT: Yes, Your Honor. That is.

THE COURT: And is that your understanding?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And do you have any questions about that?

THE DEFENDANT: Not about that, Your Honor.

THE COURT: Okay. What – obviously the way you're answering that, you do have questions about something so –

THE DEFENDANT: I don't know yet, but it seems – I just don't – I have my –

THE COURT: You don't know yet. All right. So, you understand where we're at up until now?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have been repeatedly since – one moment please – October – was it October of 2016 when you first asked me –

THE DEFENDANT: It was October 31st, the day I wrote the letter Your Honor.

THE COURT: Okay. So you've been asking me repeatedly in writing and in person to waive your right to pursue habeas litigation, waive all post-conviction and appellate remedies and submit to your sentence of death?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: And so basically, you've been asking me since October 31, 2016 to be executed?

THE DEFENDANT: I have, Your Honor.

THE COURT: Has anything changed?

THE DEFENDANT: No, Your Honor.

THE COURT: There's nothing about – remind me where you're housed right now?

THE DEFENDANT: High Desert State Prison, Your Honor.

THE COURT: And there's – there's nothing about the time that you've spent in a different facility, and an opportunity to have thought about this that changes your view?

THE DEFENDANT: It has just re-edified it, Your Honor.

THE COURT: Now I told the District Attorney to prepare a first supplemental warrant of exe – well I didn't call it a first supplemental, they did; but technically, it's a first supplemental order – warrant of execution, and they have proposed two documents to me. One is a first supplemental warrant of execution. Mr. Ericsson, do you have a copy of this?

MR. ERICSSON: Yes, Your Honor.

THE COURT: And have you shown it to Mr. Dozier?

MR. ERICSSON: Yes, Your Honor.

THE COURT: Have you read this?

THE DEFENDANT: I had looked at it, and gave it just a brief examination. I didn't [unintelligible] it.

THE COURT: Okay can you do me a favor? I really need you to study it –

THE DEFENDANT: Okay, sure.

THE COURT: -- so can you – it's up to you –

THE DEFENDANT: Yes.

THE COURT: -- you want time to study it or you want to do it this morning and I will trail it. I really need you to read it word for word, and I'm going to ask you questions.

THE DEFENDANT: Can you give me 10 minutes, Your Honor?

THE COURT: I can give you – you've been here how many times?

THE DEFENDANT: More times than I'd like.

THE COURT: Since 2007, how many times have you been in my department?

THE DEFENDANT: Since 2007, 17 to 28 something like that; I don't know.

THE COURT: Okay. Do you have any doubt –

THE DEFENDANT: Not counting –

THE COURT: -- you're going to have 10 minutes?

THE DEFENDANT: Well not counting the court dates with the trial right, because if we have those, then we're like at 50 something.

THE COURT: Yeah, so you know you have a lot more than 10 minutes.

THE DEFENDANT: Well I mean – I – if you just give me a little bit of time, I can review it quite quickly, and we can attend to it, Your Honor, is all I'm saying. We don't need to put it –

THE COURT: Well –

THE DEFENDANT: -- over to another day or something like that.

THE COURT: -- I'm not going to continue it to another day, but I'm not going to rush through it. So – you know, take your time. Do you have a – can you give him the other copy please?

MR. ERICSSON: Yes, Your Honor, I'll go talk to him.

THE COURT: And there's a first supplemental order with language that I don't recall from the first order – line 19, herein fail not, which is interesting to me, and I'm not sure what the genesis of that is, but I'm going to let him look at it, and then I'll trail it.

MR. PESCI: This is the stock language, Your Honor.

THE COURT: Is it?

MR. PESCI: Yes.

THE COURT: Does that come from –

MR. PESCI: I'm not sure, but we do have – and I want to make sure that you have that one. I shared this with Defense Counsel. He had some concerns about how we worded the stipulation that you said earlier –

THE COURT: Yes.

MR. PESCI: -- which is that if we are not able to go forth with the execution, he would be in no worse position as far as his appellate rights; so we tweaked a little bit, and I believe you have that, but I just wanted –

THE COURT: Can you both check and –

MR. PESCI: I don't know what you have in front of you. Could we approach?

THE COURT: Here, come and look and see what you –

[Bench Conference]

MR. PESCI: On page 2, Your Honor, the first supplemental, the bottom of the page, Defense Counsel requested of me that we add some language to – if I'm misspeaking, please tell me, to further clarify and make it exceptionally clear that the State's position is if we are not able to carry out the execution, he had not waived his appellate rights, and he can continue to pursue those rights. We're not going to say; hey waive them, we can't do it, so sad, you're done. No, he has that opportunity and that's why that language was changed at the request of counsel.

THE COURT: Okay. So I'm going to – in my hand is the first supplemental, and – first supplemental warrant and the first supplemental order, and I'm going to ask Mr. Dozier some questions about it, so I want him to be very careful and read it. So just give me a few minutes.

MR. ERICSSON: Your Honor, if I can just bring up one more issue – consideration while I'm speaking with him on the details of that, this morning – I've been contacted a number of times by attorneys from the Federal Public Defender's Office. David Anthony is here this morning. He has spoken with Mr. Dozier. They have reached an agreement that the – with Your Honor's allowing them to, that the Federal Public Defender's Office would associate in on this care for the limited purpose of filing something to require the State to verify sooner than one week prior to the execution, what drugs are going to be used for the execution.

Mr. Dozier has indicated he is willing to have their office do that with the understanding that they are not seeking in any way to delay the execution, they are simply trying to verify what drugs are going to be used to make sure that they are

effective drugs and there's not gonna be a potential issue with the actual execution when it is carried out. I wanted to bring that to your attention. Mr. Dozier has indicated he does not want to delay the signing of the warrant, but he does want to authorize them to litigate that issue, and it may simply be an order from you to the District Attorney's Office that they provide verification what drugs they are planning to use, because we do not have that information at this point, and I don't think that the government has been told what drugs they plan to use.

MR. PESCI: Judge, my first response is I don't know how the Federal Public Defender gets appointed there, but we'll set that aside; but I don't know what drugs are going to be used. The Statute does not require the explanation of what drugs. In fact, it says drug or drugs that will be used, and so there's no legal right to a knowledge of what they're going to be pursuant to the statute.

I can tell you right now, I have no personal knowledge of what those drugs are, and I think that pursuant to the statutes, it's the Director of the Department of Corrections who is in charge of that responsibility. So, I just don't know how we get the Federal PD into the situation, even if they are to be appointed. I don't know if there's a right to know that, and I don't know how –

THE COURT: Well, why would I appoint them?

MR. PESCI: -- it won't be a delay.

THE COURT: They're asking to associate in or make a motion or – that's one thing, but how am I appointing them. I mean that's kind of a term of art. Is there some authority I'm missing – I mean that – if they move to, you know, associate with you, I don't know that I have any grounds not to allow such a thing. It may be a distinction without a difference.

MR. ERICSSON: Right and – we can file something, having them associate

for that purpose.

THE COURT: Okay. So, that's my first question is that's more of a procedural issue, but I don't think it's one that's a significant one. I would just ask that somehow that be affected, like a motion, an order shortening time, something where – because I don't think there's grounds for me to appoint them, because I've appointed you, but I certainly am not going to preclude them from coming into the case. If he's agreed, then it's just a procedural matter that I would just ask be handled a different way than an appointment. Does that make sense?

MR. ERICSSON: Yes, Your Honor.

THE COURT: Okay. So that's the first issue. So, the next issue Mr. Dozier – I -- first of all let me ask you this. The date in the supplemental warrant – I mean I rather you – I'd rather just do this all at once at the end after you've read it.

THE DEFENDANT: Okay.

THE COURT: I'll address the drug issue. I'll address the warrant. I'll address the order. I'll address the date; and then I'll hear from you and then we'll go from there okay?

THE DEFENDANT: Yes ma'am.

THE COURT: Okay, thanks.

[Case trailed at 9:47 a.m.]

[Case recalled at 10:10 a.m.]

THE COURT: All right, recalling Scott Dozier's matter. Now, Mr. Dozier did you have an opportunity to carefully read the first supplemental warrant of execution?

THE DEFENDANT: I have, Your Honor.

THE COURT: And did you have an opportunity to carefully read the first

supplemental order of execution?

THE DEFENDANT: I have, Your Honor.

THE COURT: And what is your position on these documents as far as your review?

THE DEFENDANT: I have no issue with them, and I have no further questions, Your Honor.

THE COURT: And you understand that – one of the problems I'm having with hearing that – okay if the statute requires?

MR. PESCI: Yes, Your Honor.

THE COURT: And the District Attorney's position, and that would be NRS 176.345 requires that the warrant appoint a week, the first day being Monday and the last day being Sunday within which the judgment is to be executed, which must not be less than 60 days, no more than 90 days from the time of the judgment.

If I were to sign it today, hypothetically, the District Attorney's Office, I assume with consultation – in consultation with the prison or did you just put a date in that was within that time range? How did that work?

MR. PESCI: Not in consultation, it was just within that time range, Your Honor.

THE COURT: Okay. I'm sorry, one second please -- has included a date on page 4 of the warrant that says; said execution to be within the limits of the State prison located at or near Ely, State of Nevada, during the week commencing the 16th day of October, 2017; and that is –

MR. ERICSSON: About 70 days, Your Honor.

THE COURT: -- about; and so if – if the motion is filed to address NRS 176.355, which is the statute that indicates the Director of the Department of

Corrections shall at subsection 2b, select the drug or combinations of drugs to be used for the execution after consulting with the Chief Medical Officer.

So, the question becomes, has anyone from either side inquired of the Director of the Department of Corrections when and if – or when and how that determination would be made. I mean I know how, after consulting with the Chief Medical Officer, but when? Does anybody even have an idea?

MR. PESCI: As I understand it, Your Honor, until and unless there is a warrant in place, that mechanism does not start to move forward. And as I understand it, there's been representations I believe in, by the Director on – as recently as a few weeks ago on Nevada public radio, indicating that if a warrant was signed, they would be able to get the drugs and go forward.

So, I have not personally spoken to the Director, so I can't answer that question personally, and I apologize, but as information has been relayed to me through Steve Wolfson, my boss, the information he has is that the department says that if there's a warrant, they can get it. But I can't tell you which drug or drugs, I don't know the answer to that.

THE COURT: You have no additional information?

MR. ERICSSON: Your Honor, the only think I can add is three weeks ago I heard an interview with the Director of Prisons on KNPR, which he was asked about access to drugs, and he indicated that there are other states who have drugs expiring within a 90-day window and that he would, if directed to, be able to access drugs, is how I interpreted what he said on the public radio station.

My guess is that if this is signed, Mr. Pesci and I should be able to call up and say; there is now a warrant in place provided to us in writing – it's my understanding the DA has been requesting in writing more information on this, and

they've said until we have a warrant, we're not in position to give that to you, but if we – looks like we're close to that point if that happens and then if they, for whatever reason, are not providing that information, then I think filing motions and requiring them to provide that in advance – as you know, there is great concern about drugs not working properly. There's been a lot of problems in other states recently where executions have really been botched, and having adequate notice of what drugs they're planning to use I think is very important to make sure that we don't have a situation that has happened in other states.

THE COURT: So Mr. Dozier, I appreciate that it's the – you know, the State is representing that the Department of Corrections has said; if we get the warrant, then we'll worry about it, words to that effect, I mean I'm paraphrasing –

THE DEFENDANT: Right, Your Honor.

THE COURT: -- and is there – but that doesn't necessarily preclude the opportunity to endeavor – to discover the defense, what's going to be used. That doesn't mean that it couldn't be found out necessarily, I'm not sure. It's all, you know, being presented from the District Attorney's inquiry. I'm not challenging his representations as an Officer of the Court, but you know, we'll cross that bridge when we come to it. Maybe there would be more information available if it were pursued by the Defense, and then if you – you and your attorneys in consultation decide; wow, that wasn't the cocktail I had envisioned or I'm concerned about the efficacy or I'm concerned about the painfulness or the protractedness of the – you know, whatever it is that there's a concern about, you're doing it after a date has already been set – after – I mean I'm hearing, you know, you don't want time to pursue that –

THE DEFENDANT: I don't want time, Your Honor.

THE COURT: -- before I sign this?

THE DEFENDANT: I don't, Your Honor.

THE COURT: Are you sure?

THE DEFENDANT: I am sure, Your Honor. My outlook on this is that personally I'm not that concerned with it. I think once they get started they're going to get it done one way or another; and ideally it may not be terrible and painful, but if it is, I'm kind of committed at that point. However, I recognized that in an ideal situation, I would like to know the answer to those things, and as such that was why I was willing to work with the ACLU and not try to bar them from making statements or efforts on my account whatsoever.

THE COURT: The ACLU or the Federal Public Defender?

THE DEFENDANT: Oh I –

THE COURT: They're not the same.

THE DEFENDANT: You're right, Your Honor. My apologies. I misspoke. I made an agreement with the Federal Public Defender also on behalf of the ACLU. So that was my misspoke, and I apologize Your Honor.

MR. ERICSSON: And Your Honor, I need to speak to him about that because I don't believe the ACLU –

THE COURT: Could you speak to him about that.

THE DEFENDANT: I agree – I just – my misstatement –

THE COURT: That's fine.

THE DEFENDANT: -- I introduced them both. I just misspoke [unintelligible] –

THE COURT: I assume you've talked to numerous people about the situation.

THE DEFENDANT: I have talked to a whole bunch of people about the situation, Your Honor.

THE COURT: And my guess is there's quite a few that would like you to reconsider your position.

THE DEFENDANT: Correct.

THE COURT: And this issue that's been raised about the drugs, you understand that it could be pursued and maybe we could get an answer, I'm not sure, but we haven't even attempted to really – you know, we'll cross that bridge when we come to it. It was an informal inquiry it sounds like or maybe a letter, maybe not. I've never seen a letter; and you don't want to pursue that in advance?

THE DEFENDANT: It's been a long time, Your Honor. I'm ready to go.

THE COURT: So there's nothing that's occurred in the last year including discussions about the drugs, the efficacy of the drugs, whether they have the drugs, whether the drugs used in other states have had problematic, perhaps painful or protracted executions; that has not dissuaded you from asking me to sign this warrant and this order?

THE DEFENDANT: It has not. [unintelligible] all those people ended up dead and that's my goal, Your Honor.

MR. ERICSSON: And, Your Honor, I would just ask one further clarification that you ask of him and that – obviously, I have been doing everything I can to convince Mr. Dozier to follow through with the appellate process, and I think that there are issues that are in his favor in that process. He has obviously instructed me multiple times that he wants to go forward with this, but I – he's doing it against my counsel and my direction, and I just want that verification that he understands that it is against his attorney's strong recommendation that he go forward with the appellate process.

THE DEFENDANT: I understand. I mean, yes I recognize and state that I

knowingly am going against his what he feels are in my best interest, and his advice – his and a number of others who I've known considerably a longer time; not to discredit the relationship between Mr. Ericsson and I, that's not the case at all, it's just there's other attorneys who I've had a much more extensive history with that have worked even harder than Mr. Ericsson has, trying to dissuade me from this course of action. I'm set – there will be no dissuading me from this course of action.

THE COURT: So – if I sign this, then the attorneys that want to associate in with you understand the significance of associating in quickly and filing whatever it is they want to file on his behalf that he's agreed to, related to discovery of the drugs?

MR. ERICSSON: Yes, Your Honor, and they are in court this morning.

THE COURT: And just so that I'm clear, I think I asked Mr. Dozier, you have reviewed the first supplemental warrant of execution. The District Attorney made the changes that you requested related to the reservation of rights in the event that the execution is actually impossible the week of October 16th because the drugs are not available or the prison is unable to impose that sentence. What about the rest of the language?

MR. ERICSSON: Your Honor, I would submit it as to the rest of the language. I have no objection.

THE COURT: So you have no reason to challenge any of the dates or any of the information, and any of the language of the order?

MR. ERICSSON: No, Your Honor.

MR. PESCI: As far as Mr. Dozier, we need to make a record that he's reviewed the rest of it as well.

THE COURT: You read the entire document, correct?

THE DEFENDANT: I have, yes Your Honor, I did.

THE COURT: And you understand what this document says?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: You understand that it sets a date the week of October 16, 2017 for your execution?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you have any questions about it?

THE DEFENDANT: Not about that, Your Honor.

THE COURT: Are you sure this is what you wish me to do?

THE DEFENDANT: I am. Yes, 100% sure, Your Honor.

THE COURT: Okay, the record should reflect I've signed a first supplemental warrant of execution setting the execution date, as required by statute, the week of October 16, 2017, and the first supplemental order of execution. Can I see counsel at the bench?

[Bench Conference]

THE COURT: Okay, so I mentioned up at the bench to the attorneys, and I'll make a record of it now. There's a requirement that there be a triplicate by the Clerk of the Court, and the Clerk of the Court has to be involved in the filing of this, and so I have signed them. I am going to deliver them to the Clerk of the Court. They will be filed and subject to a certified copy, I anticipate no later than tomorrow. Do you have any questions?

THE DEFENDANT: One question and then another unrelated question. First related question would be; do you anticipate there are amicus briefs or other third party interest filed in the attempts of preventing this, that I would have to be in court during those days?

THE COURT: Well, probably.

THE DEFENDANT: Okay.

THE COURT: It's hard to talk about your life without you –

THE DEFENDANT: Okay.

THE COURT: -- or your death.

THE DEFENDANT: Okay. The issue that provides is that they –

THE COURT: I mean, I'm not making light of it.

THE DEFENDANT: -- no I understand –

THE COURT: I can't anticipate what's gonna happen, but I can't – I can't presume – I know – believe me, you and I have known each other since 2007, and you are a man of singular purpose, and I am – I understand where – what your position is right now, but I can't presume that every time; you know, I can't.

THE DEFENDANT: I understand.

THE COURT: It wouldn't be proper or appropriate or ethical.

THE DEFENDANT: I guess the question then is that do we – do we address that with central transportation and – because the problem – my concern is that they are hot and heavy to get me out of High Desert State Prison, they ship me up to Ely. All of a sudden they're like whoa amicus brief, Dozier's gotta be back here, they turn around and ship me back down, and then I do a yoyo back and forth for the next 60 days, missing these last opportunities for visitation with my family, constantly on transport, etcetera. I don't – that is my overlying – what would be brought into a bad situation.

THE COURT: Here's my question – I would prefer, not that he gets to choose, but it makes sense that if the Federal Public Defender is going to associate in, and I'm gonna have a motion, you know, just on what we've talked about that I'm aware of, amicus briefs set aside for just what we already know is coming, does it

make sense to have him go back to Ely right now, or can he stay down here until they associate in, and I get some kind of motion that they're moving with singular purpose to file?

MR. PESCI: Judge as far as sense goes, it makes sense to keep him here, but I don't have control over the Department of Corrections.

THE COURT: Right, I understand.

MR. PESCI: I'm sure if the representatives are here and they could take whatever you say and take that into consideration.

THE COURT: Can you – because I'm going to –

MR. PESCI: I think they might be –

THE COURT: -- set a status check already in this case.

THE DEFENDANT: Your Honor, I believe if you set a status check they'll keep me – they'll keep transportation frozen for me.

THE COURT: Yeah, because I need to have you here a week from now so that I can see if – can they associate in that fast? Can you ask the front row if they could associate in or get an order shortening time to me or get something to me?

MR. ERICSSON: Your Honor, we've discussed that already. They indicated to me they're going to have to me today an association, and the way we plan to do it is just a notice of association, and we weren't gonna do it with an order, just notice that they're associating in.

THE COURT: All right. So here's what I'm doing. I'm setting a status check one week from today on association of the Federal Public Defender. I'm setting a status check one week from today on warrant of execution. I'm setting a status check one week from today on order on warrant of execution because I anticipate there's going to be some drug motion filed.

I would put in the minutes that the Court's preference would be that he remain at High Desert until I have concluded the litigation of the matter, which allows me to set it -- you know, it takes too long to get him from up there anyway. It would be my preference as well. I know I can't control the prison on where they house someone, but if you could put in the minutes and maybe get those minutes to someone. Do you think you could do that?

MR. PESCI: I believe Mr. Pesci, Your Honor, that if – so long as I have court dates pending, that they will not transport me.

THE COURT: Okay.

MR. PESCI: My understanding, talking to the transport people here, is that if I have pending court dates, transportation for me is frozen.

THE COURT: Okay. Well, you have pending court dates.

THE DEFENDANT: Do you -- I'm sorry Mr. Pesci –

MR. PESCI: Go ahead sir.

THE DEFENDANT: Do you need to see me next week for the – for them signing in?

THE COURT: Yes. Sorry. One other thing, you said; I have an unrelated thing, and I have a related thing – what's your unrelated thing? Transport?

THE DEFENDANT: Can you please fix that picture. It's driving me crazy.

THE COURT: What picture? What picture?

THE DEFENDANT: The one on the all that's hanging sideways. Do you not notice that?

MR. PESCI: Judge, for the record, I will endeavor with the people that we normally do transport orders to see if they'll – I'll tell them your wishes, that he stays; but I don't know what they'll do, but I'll pass that along.

MR. ERICSSON: Your Honor, where this is a capital case, I believe that transcripts should – I don't know if that only applies during trial, but we would request a transcript of today's proceedings.

THE COURT: Sure. Could you get me an order please?

MR. ERICSSON: Yes.

THE COURT: Okay. So, I have a status check. You have to come, fix the picture, anything else?

MR. PESCI: What was the date?

THE DEFENDANT: That's it for right now, Your Honor, thank you very much.

THE CLERK: August 3rd at 9 a.m.

MR. PESCI: August 3rd.

[Proceedings concluded at 10:31 a.m.]

ATTEST: Pursuant to Ryle 3C (d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.

Yvette G. Sison
Court Recorder/Transcriber

EXHIBIT 2

EXHIBIT 2

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8/30/2017 3:56 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. SCOTT RAYMOND DOZIER aka CHAD WYATT, Defendant,	CASE NO. 05C215039 DEPT. IX

BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE

THURSDAY, AUGUST 17, 2017

RECORDER'S TRANSCRIPT RE:

STATUS CHECK: WARRANT OF EXECUTION/ASSOCIATION OF FEDERAL PUBLIC DEFENDER

APPEARANCES:

For the State:	JONATHAN VANBOSKERCK, ESQ. GIANCARLO PESCI, ESQ. Deputy District Attorneys
For the Defendant:	THOMAS ERICSSON, ESQ.
Also Present:	DAVID ANTHONY, ESQ. LORI TEICHER, ESQ. Assistant Federal Public Defenders

RECORDED BY: YVETTE SISON, COURT RECORDER

Case Number: 05C215039

Las Vegas, Nevada, August 17, 2017 at 10:13 a.m.

THE COURT: State of Nevada versus Scott Dozier, C215039. The record should reflect the presence of the Defendant in custody. This is a status check. Counsel can you state your appearances for the record?

MR. VANBOSKERCK: Jonathan Vanboskerck for the State.

MR. PESCI: Giancarlo Pesci also for the State.

MR. ERICSSON: Tom Ericsson on behalf of Mr. Dozier.

MR. ANTHONY: David Anthony from the Federal Public Defender's Office on behalf of Mr. Dozier.

THE COURT: Okay, so Mr. Dozier wrote the Court a letter. It said that he cc'd both sides. I assume you have a copy of that.

MR. VANBOSKERCK: The State does not have a copy, Your Honor.

THE COURT: Can you approach? It's not about anything substantive.

MR. ERICSSON: We've seen it, Your Honor.

MR. VANBOSKERCK: May I show Mr. Pesci?

THE COURT: It's not necessarily – Mr. Dozier is assuring the Court that he's taking these proceedings seriously. Would that be an accurate summary?

THE DEFENDANT: I would concur with that, Your Honor. Yes, Your Honor.

THE COURT: Notwithstanding his concern about the photograph, he wanted to reassure me that he still gets how incredibly important this is, and that a courtroom is an important place where people go to have their, you know, stressful matters decided, words to that effect; agreed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So, that's all he was saying. So moving on to – there were two

motions filed by the – Defense Counsel that I was provided a courtesy copy of yesterday. The – there was also an order to, you know, an order shortening time or some document without an order with it, like a motion to shorten time or something to that effect without an – an order shortening time order with it, so that I could set the motion earlier than it's already set. When my staff inquired of counsel, somebody at your office said it's just to put the Court on notice that this motion is coming and to set a briefing schedule or something to that effect, but I mean I can't do an OST without an order on an OST. It was just a – a straight file, you know, it was just a motion with no actual setting order. Does that make sense?

MR. ANTHONY: I understand, Your Honor. The other purpose was to give notice to the Attorney General's Office so they could be aware as well because one of the issues that arises is that the District Attorney has taken the position that they're not going to be defending the State with respect to the motions that have been filed. So, the purpose for filing the motion was to make sure the Attorney General's Office was aware that this was going to be handled today as far as setting a scheduling order for the briefing schedule.

MR. VANBOSKERCK: And Judge, we did file oppositions. I don't know if your department got a courtesy copy or should have, but we did file oppositions that essentially set out why this belongs to the AG to respond to and also sort of arguing that you shouldn't address it, and that there's not – it's not the appropriate time for discovery.

THE COURT: Okay. Well first, it's not on calendar today. So, the whole – you know, it's kind of hard to set a briefing schedule with someone who's not present. And so, I appreciate – it's not our responsibility to oppose it, but we oppose it and don't hear it argument; but I'm still going to require the Attorney General to

appear. So could someone contact her and find out A, did she get it; B, when could she be here; C, is somebody else in the office going to appear and not her. I mean I don't know that – how do you know she's – because she's the Department of Corrections assigned deputy or what?

MR. ANTHONY: My understanding is that she was brought to the attention of Mr. Ericsson as the representative for the Department of Corrections, and there was an email exchange between Mr. Ericsson and Ms. McDermott, and so it was our understanding that she would be the representative for the Attorney General's Office appearing before the Court.

MR. VANBOSKERCK: Additionally Judge, I will reach out to her. I didn't do it yesterday because I was trying to get something into you since they only filed it yesterday morning.

THE COURT: Okay. So, so my first question is, were you given a date by the Clerk's Office that you could serve on the AG. And if you're asking me to accelerate the date, then I need an order setting it that you can serve her with. That's how we, you know, get her here; not just mailing her a copy of something. It has to be on calendar, we give her notice. I mean I can't really give her a hard time for not being here today when it's not on calendar, and she wasn't noticed of any date per se.

[Colloquy - The Court]

THE COURT: Except for August 29th. Is there any reason why I need to move it up for a briefing schedule, and if so where's that proposed order?

MR. ANTHONY: Your Honor, I –

THE COURT: Is someone gonna give me one?

MR. ANTHONY: -- Your Honor, I can prepare a proposed order for the Court and have it to the Court within the hour.

THE COURT: Okay so if you could – I would like to set a hearing scheduling your two motions shortening the time to set a briefing schedule on your two motions for August 24th at 9 a.m., you could serve her with that. I assume State you served her with your –

MR. VANBOSKERCK: We served her with our –

THE COURT: -- it's her job to oppose –

MR. VANBOSKERCK: -- yes.

THE COURT: -- but we oppose and you shouldn't address this?

MR. VANBOSKERCK: Yes.

THE COURT: Okay. And what else do we need to do?

MR. VANBOSKERCK: Judge you would also –

THE COURT: Have you seen these motions?

THE DEFENDANT: Not yet, Your Honor. She was going to discuss --

THE COURT: Because one of the things that we're going to talk about is he indicated to me kind of a limited engagement, for lack of a better term, that I will be interested to see if some of what you're requesting is consistent with that.

MR. ANTHONY: Absolutely, Your Honor. And again, I think that our goals are similar here that are – what we seek is transparency; and that's the concern that we have is that starting at the hearing on July 27th, we know that the Court had questions about what drugs were gonna be used, do they have the drugs, questions like that and in talking with Mr. Dozier, that's also a concern. We just want to have transparency so the Court knows that the order it's going to be signing is enforceable and that it can be done in a lawful manner, and that's the purpose for the motions.

THE COURT: Okay. While – I – I have my law clerk running back there to

get the motion that I'm referring to so that I can maybe read into the record some of the language that I'm talking about. When is it that you would be serving him with this motion, the Defendant?

MR. ANTHONY: Your Honor, our intention was to give Mr. Dozier a copy at the conclusion of this hearing, so that he can take it back with him to review.

THE COURT: Okay, so for example on page 13, on the motion for determination whether Scott Dozier's execution will proceed in a lawful manner and notice of motion, subsection C on page 13; NDOC's most current, unsigned, not adopted execution protocol presents an unjustified risk that the execution will cause cruel pain and suffering, and so you know, these are things that he needs to be familiar with.

MR. ANTHONY: Absolutely, Your Honor.

THE COURT: Because –

MR. ANTHONY: And again the purpose behind saying that, Your Honor, is that as far as we are aware, there is no current signed adopted protocol.

THE COURT: I understand the purpose. I just don't know that your objection about there not being a signed protocol is what he wanted pursued. That's up to him. That's not my decision and I will consider all the arguments that are put before me, and I'll make the tough call. I'm just saying that if there's an unsigned protocol, and discovery isn't satisfactory to the Defense in that regard, then the next step would be them asking me to declare it cruel and unusual, and not impose it or vacate my order, and I'm just making sure that he reads it before I spend, you know, a significant amount of time and he seems – if he seems surprised by what's going on. So you need to read it.

THE DEFENDANT: I understand, Your Honor.

THE COURT: Okay.

THE DEFENDANT: Just to be abundantly clear, these items we've discussed, I have discussed with them. Granted I have not looked at this motion, but I am familiar with what the – the gist of it is. I feel that theoretically if the State is killing someone, that those things probably should be available to the public, and if I don't know those – I got into this recognizing I very well may not know those, and so not knowing those is not going to deter me from my course of action. So –

THE COURT: Well that's inconsis – that's what I'm saying. I'm – I – let's say hypothetically, I allow discovery on some of these things or all of these things or part of these things, or half of these things. I don't know because I haven't heard everything I need to. And it turns out that there – that some of the concerns that they have are true. Then what is the remedy or the next step, and I'm – you know, that is an issue between you and your attorneys as far as what you said to me repeatedly in open court on a regular basis ever since this started versus what they're going to be asking for here –

THE DEFENDANT: Right.

THE COURT: -- on your behalf. We don't have to address it today because you haven't read it. I haven't heard from the AG. There's a lot of unfinished business with it. I just think it's really important that you read it.

THE DEFENDANT: I got ya, Your Honor.

THE COURT: And it's – you know, it's a light read.

THE DEFENDANT: Yeah I know Your Honor, [unintelligible] small motion [unintelligible].

THE COURT: So, you'll have that to him when?

MS. TEICHER. Your Honor, I have the motions. I do not have all the exhibits

that are the bulk of what you have there, but I have all of the motions and the oppositions to give to him right now to take back with him.

THE COURT: Okay, so when will he have everything?

MS. TECHIER: We can mail that to him today.

THE COURT: Okay. So – could you get started on the motions and oppositions by next week, and then hopefully you will have received everything else, even if you haven't read it all by next week.

THE DEFENDANT: I can read it all in a night, Your Honor, even if it is that big one. I pretty much take my time with that and get it done. Is there something you need me here for the 24th because I thought we were under the understanding that – please – you know, correct if I'm wrong –

THE COURT: Can you get me another copy of this?

MR. ANTHONY: Absolutely, which document Your Honor?

THE COURT: I want another copy of the motion for determination whether Scott Dozier's execution will proceed in a lawful manner and notice of motion. Is there any reason, with no paperclips or anything else that the Defendant can't have this?

THE CORRECTIONS OFFICER: No that's fine, Your Honor.

THE COURT: You've been served.

THE DEFENDANT: All right. Oh man.

MR. ANTHONY: Your Honor, may I approach?

THE COURT: Yes. So I'll just need one with all the exhibits. So instead of mailing it to him, you can drop it off to my department. Easier?

MR. ANTHONY: Absolutely, Your Honor.

THE COURT: Okay. All right. So August 24th – now there was the issue of

the order which – timing of which was important to at least the Defendant if in fact his wishes are going to be carried out as he's requested so far, and the State's position as to what the prison could do within the statutory timeframe. So – I think – I anticipated what I was going to do is sign an order with a different date today with the understanding that if something from these motions changes anything or the Defendant changes any position, then what would be left to do would be enter a stay of the amended order.

MR. VANBOSKERCK: And Judge we do have the updated order and warrant, if I may approach.

THE COURT: Did you look at it?

MR. ANTHONY: Yes, Your Honor.

THE COURT: Does it comply with the statutory timeframe?

MR. ERICSSON: Yes, Your Honor, it does.

THE COURT: Okay. Can I – can you approach with it?

MR. VANBOSKERCK: And Judge additionally did you want Mr. Dozier to have a copy of their motion for discovery as well so that he can review that?

THE COURT: She's giving it to him right?

MS. TEICHER: Yes, Your Honor, I'm taking the staples off.

MR. VANBOSKERCK: Okay. I just heard you say the first one and not the second one.

THE COURT: Well no, what I was told was it didn't have the exhibits, and the discovery motion had all the exhibits. I don't know that the other motion had as much to go with it.

Okay. So Mr. Dozier, I have here a second supplemental warrant of execution. It does in fact order that the execution within the limits of the state prison

located at or near Ely, State of Nevada, during the week commencing the 13th day of November, 2017. And you're already familiar with the language of an order like this because I've signed one previously at your request, correct?

THE DEFENDANT: That is absolutely correct, Your Honor. Looks exactly the same except for the dates, Your Honor.

THE COURT: All right. And so, it's your desire again for me to sign this second supplemental warrant of execution?

THE DEFENDANT: It is, Your Honor.

THE COURT: Setting your execution for the week of the 13th day of November, 2017?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And then there's the supplemental order, which basically you've seen before in a previous format that was similar to this with a different date, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. So I've signed both the second supplemental order of execution, and a second supplemental warrant of execution. I believe my clerk takes this to the – my court clerk takes this to the Clerk of the Court if I'm not mistaken. You know, I'm not signing these every day, so I'm making sure procedurally I've got that handled.

You're on for next Thursday at 9 o'clock. As a courtesy, you are going to call the AG and advise that she's going to be receiving a notice setting these two motions.

The attorneys for the Defendant are going to prepare an order setting the motion for discovery and the motion for determination whether Scott Dozier's

execution will proceed in a lawful manner. For briefing – you're going to actually place them on calendar for a briefing schedule in the order setting it for the 27th – I mean, I'm sorry the 24th at 9 o'clock. I'll sign that, and you will serve it on her, which would give her notice to appear.

MR. VANBOSKERCK: The 21st vacated?

THE COURT: The 21st is vacated.

THE DEFENDANT: What about the 29th? Is that also vacated?

THE COURT: That's vacated.

THE DEFENDANT: Thank you.

MR. ERICSSON: Your Honor, we were just discussing scheduling. Mr. Pesci and I we are currently in a capital murder trial in Department 20. That is going to be going all of next week including on the 24th. I think that I –

THE COURT: What if I set it at 8:30? I'll set this. Is he starting trial before 8:30 in the morning?

MR. ERICSSON: That is the time that he's been – we're scheduled to start Tuesday and Wednesday at 8:30 –

THE COURT: And Thursday?

MR. PESCI: There's a truncated schedule that day, Your Honor, because the Defense was only available on that particular day.

THE COURT: So you're saying you're starting early on Thursday in front of Judge Johnson on a murder case?

MR. PESCI: That's my understanding, to try to accommodate Defense Counsel's expert that's only available on that particular day, the 24th.

THE COURT: Okay. So I'm sorry – so move this up, but we're not available any other day. I had it on the 29th right? And so –

MR. ERICSSON: Your Honor, we're trying to coordinate. I'm – you say you're not available on the 29th? Because that's when I think it's currently set for.

THE COURT: It's going to be set for the 29th, but I presumed because I had a notice of motion, which I interpreted as an order shortening time to move it up to the extent I could to set a briefing schedule because this is going to take time, is the representation of the little two-page document that I got yesterday, with no actual setting order. It just was a notice, and so I interpreted, let's move this up. That's how I interpreted it.

MR. ERICSSON: And Your Honor, I think maybe I was mis – I was thinking you wanted the hearing on the motions on the 24th. You're just wanting to have – setting the briefing schedule on that date?

THE COURT: Yeah.

MR. VANBOSKERCK: It's just to set the briefing schedule.

THE COURT: I just want to have the AG here, and she – she can, you know, tell me she doesn't want to respond I guess, and then when I direct her to, she can tell me how long she needs. That was the idea.

MR. ERICSSON: Okay. And that would be fine. I don't even think I need to be here for that.

MR. VANBOSKERCK: Myself and Mr. Anthony could be here.

MR. ANTHONY: I think that would be just fine, Your Honor.

THE COURT: Okay. So you understand the drill. I know you don't want to come.

THE DEFENDANT: That would be fine. It's just setting a briefing schedule right? I mean, I don't need to be here for that.

THE COURT: Okay. Your appearance is waived on the 24th, one time.

THE DEFENDANT: Thank you.

THE COURT: You know, it's not a lot to ask. You want to pursue this – you know, just be able to look me in the eye and say I'm still pursuing this.

THE DEFENDANT: I know – Mr. Van –

MR. VANBOSKERCK: Well Judge, did you want him here to address your questions?

THE COURT: It's a thing. We talked about this already.

THE DEFENDANT: I know. I [indiscernible] Mr. VanBoskerck [indiscernible] I didn't mean to interrupt you.

MR. VANBOSKERCK: And I apologize for interrupting. You had said you wanted him to read it and address whether he felt it was inconsistent with the pleadings.

THE COURT: Well that was part of it.

MR. VANBOSKERCK: Do you want him here for that date, because that might be a reason for him to be here.

THE COURT: I think that – let me put it to you this way. He has no trouble communicating his thoughts or feelings to me in writing, and he is free to do so between now and then if he'd like to. All of his letters make it to my department. So, I'm going to waive your appearance that one day.

THE DEFENDANT: Okay. Thank you. Your Honor?

THE COURT: Yes.

THE DEFENDANT: Well – ummm – my – this is not – whatever happens with this, it's not going to change anything. I went into this, Your Honor, recognizing I would know those things. And they tell me; listen, there's a good chance it's going to be a real miserable experience for you for those two hours before you actually

expire. I'm still going to do this if it's up to me. I recognize it's really your call, Your Honor, but I'm not gonna waiver on this, Your Honor.

THE COURT: Okay. Well that's why --

THE DEFENDANT: So – just – any of these 12 hours in this rig right here compiled are as bad in actuality.

THE COURT: I understand. I'm waiving your appearance, but I do want you to read what they've argued on your behalf.

THE DEFENDANT: I well recognize that, Your Honor, and I have no complaints about that.

THE COURT: Okay. So I'll waive your appearance on the 29th – 24th, excuse me. The 21st – I'm sorry, the 21st and the 29th is vacated. The only matter – the only date right now is the 24th for the AG to come in, take a position one way or another, be noticed in writing by the Defense and by a courtesy phone call from the District Attorney. Anything else?

MS. TEICHER: For the record, Your Honor, we're [indiscernible] Mr. Dozier, I am giving him copies of the motion for leave to conduct discovery as well as the State's opposition to the motion to leave to conduct discovery. Any exhibits that are referenced in that are the ones that Your Honor presented to Mr. Dozier, and I'm also giving him a copy of the State's filed opposition to the motion for leave for determination.

THE COURT: Okay, and so you're going to provide me another courtesy copy with all the exhibits?

MS. TEICHER: Yes.

MR. ANTHONY: Yes, Your Honor, today.

THE COURT: Okay. Thank you. Okay, that's it.

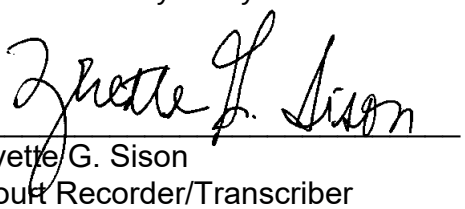
MR. VANBOSKERCK: Thank you, Your Honor.

MR. ERICSSON: Thank you, Your Honor.

THE COURT: Thank you.

[Proceeding concluded at 10:35 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Yvette G. Sison
Court Recorder/Transcriber

EXHIBIT 3

EXHIBIT 3

RELATED TOPICS

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Death penalty debate reemerges in Nevada after past stalls

By SAM METZ March 24, 2021

CARSON CITY, Nev. (AP) — A Nevada legislative committee introduced a proposal Wednesday to end the death penalty with nearly identical language to a 2019 bill that stalled and never received hearings in the state Senate or Assembly.

Lawmakers who oppose the death penalty say they're confident that 2021 is the year they will finally carry the effort across the finish line.

They have campaigned to end the death penalty in the past two legislative sessions, only to see their efforts thwarted before reaching the floor for a vote.

Assemblyman Steve Yeager, a longtime anti-death penalty advocate, hopes recent litigation that forced Nevada to return drugs that are part of its lethal injection combination — along with pushes to end the death penalty in other

That's the plan at the moment. Of course, it's subject to everything else going on in the building," the Las Vegas Democrat said, referring to the way the pandemic has slowed the pace of legislative activity.

The Assembly Judiciary Committee's bill would remove provisions of state law that allow people found guilty of first-degree murder to be sentenced to death.

Although about 80 inmates remained on its death row as of 2020, Nevada has not executed anyone since 2006. The state has faced difficulties procuring lethal injection drugs. Last year, a state court ordered the Department of Corrections to return drugs used as part of Nevada's lethal injection combination. The department has a batch of fentanyl that expires on June 30, but does not posses the other two drugs called for in its execution protocol.

Death penalty opponents hope the growth of the criminal justice reform movement and renewed attention on the death penalty will generate enough political will to enact a ban. In the final months of President Donald Trump's tenure, the U.S. Justice Department resumed executions after a 17-year federal hiatus. The 13 executions carried out drew newfound attention to the death penalty, said state Sen. James Ohrenschall, D-Las Vegas, who is sponsoring a similar bill in the Senate.

"I think a lot of people were shocked. The fact that there'd been this moratorium for so long, and then all of a sudden, it's the opposite," brought momentum to push to end the death penalty, he said.

2021, according to the Death Penalty Information Center.

Gov. Ralph Northam on Wednesday signed a bill abolishing the death penalty in Virginia, and the Wyoming Legislature voted down a proposal last week.

Democrats control both chambers in the Nevada Statehouse, but many have hesitated to take a stance on the death penalty. In the historically law-and-order state, memories of the 2017 Route 91 mass shooting are still fresh.

Both state Senate Majority Leader Nicole Cannizzaro, D-Las Vegas, and Gov. Steve Sisolak have recently sidestepped questions about their stances on the issue.

"There are a lot of differing opinions on that. Personally, it's something that I'm open to to hearing and having a discussion," Cannizzaro said.

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Sam Metz is a corps member for the Associated Press/Report for America Statehouse News Initiative. Report for America is a nonprofit national service program that places journalists in local newsrooms to report on undercovered issues.

Man accused of strangling "I-5...

SACRAMENTO, Calif. (AP) — The...

Remains in Missouri...

LIBERTY, Mo. (AP) — Decomposed ...

April 6, 2021

EXHIBIT 4

EXHIBIT 4

LAS VEGAS SUN

State official: Nevada execution chamber unusable

Prison Board told state could not carry out a death penalty at aging facility

By Cy Ryan

Tuesday, March 8, 2011 | 4:34 p.m.

CARSON CITY – The execution chamber at the ancient Nevada State Prison in Carson City is unusable and the state could not carry out a death penalty.

Gus Nunez, manager of the state Public Works Board, Tuesday listed numerous violations at the prison including the death chamber which is not ADA accessible.

He told the state Prison Board that an elevator would have to be installed on the outside to carry the public up to see the execution and there were code violations. And the stairs and hand rails leading up to the execution chamber violated the ADA code.

The last execution was in 2006 and Greg Cox, interim director of the state Department of Corrections, said the state could not put an inmate to death because it doesn't have the drug to do the job and a judge would probably stop the execution because of the code violations.

There are no executions presently scheduled.

It would cost thousands of dollars to correct the deficiencies associated with upgrading the death chamber.

Curtis Brown, a 14-year correctional officer, disputed the testimony of Nunez and said "Executions could be carried out without a problem.

Rebecca Gasca of the ACLU recommended the state impose a moratorium on the death penalty. She said a study should be done on the implications of capital punishment.

A bill is sitting on the desk of the governor of Illinois to abolish the death penalty, she said.

Gov. Brian Sandoval has recommended in his budget to the Legislature to close the prison at a savings of $16 million in the next two years. The inmates would be transferred to High Desert prison in Southern Nevada where there are two vacant dormitories with 600 beds.

The board, with Sandoval as its chairman, did not take a position on closure of the prison. Secretary of State Ross Miller said that should be left up to the Legislature and the governor. Attorney General Catherine Cortez Masto, the third board member, was absent from the meeting.

Cox said he has urged the Legislature to make a quick decision on the closure of the prison. It costs the state $700,000 for every month there is a delay. He said he would probably have to lay off 30-40 correctional officers instead of the initial estimate of 130 losing their jobs.

The correctional officers could be transferred to other prisons.

The board imposed a hiring freeze on the prison to allow flexibility of Cox to move correctional officers around when jobs become vacant.

Cox is proposing a phased-down closure with it being fully shut down on Oct. 31 which is Nevada Day.

EXHIBIT 5

EXHIBIT 5

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:

BACKGROUND

1. Petitioner Scott Raymond Dozier is an inmate on death row in the custody of the Nevada Department of Corrections ("NDOC"). In October of 2016, by letter to this Court, Petitioner expressed his desire to waive or discontinue his legal proceedings so that his sentence of execution could be carried out. Various proceedings transpired in which Petitioner was made to appear and present his wishes before this Court and eventually subject himself to a competency examination by a court-appointed mental health expert. In a July 2017 lengthy and thorough report, Michael S. Krelstein, M.D., determined that Petitioner was competent to waive his post-conviction and appellate proceedings. Premised on this determination, at another hearing in July 2017, Dozier and the Clark County District Attorney's Office agreed to stay Dozier's habeas corpus action provided NDOC had the ability to conduct the execution. This Court later signed an execution warrant presented by the Clark County District Attorney's Office, scheduling Petitioner's execution by lethal injection to take place the week of October 16, 2017.

2. Thereafter, on August 15, 2017, Petitioner filed Motions for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner and for Leave to Conduct Discovery. At that time, Petitioner's motions were based on constitutional concerns regarding NDOC's unknown execution protocol for carrying out his scheduled execution. On the same date, the Clark County District

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

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

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

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

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

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

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[1] Nevada law requires the Director for the Department of Corrections to consult with the State's Chief Medical Officer ("CMO") regarding the selection of the drug or combination of drugs to be used for executions. NRS 176.355. In addition, 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.

Dr. DiMuro resigned as the State's Chief Medical Officer effective October 30, 2017. At the close of a status hearing conducted on October 31, 2017, during which this Court scheduled the November 3, 2017 evidentiary hearing, NDOC announced Dr. DiMuro's resignation and submitted a Declaration signed by Dr. DiMuro in which he stated that his resignation was "completely unrelated to the scheduled 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.

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

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

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

FINDINGS OF FACT

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

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[2] *See* Petitioner's November 6, 2017 Supplemental Errata, Ex. 38.

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

A. Known and Available Alternative

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

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

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

B. Substantial Risk of Harm

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[4] October 20, 2017 Declaration of John M DiMuro, D.O., p. 3.

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

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

CONCLUSIONS OF LAW

30. For the above stated reasons, and based on the evidence presented, this Court finds that NDOC's proposed use of a paralytic agent in the execution of Petitioner Scott Dozier presents an unconstitutional "substantial risk of serious harm," and an "objectively intolerable risk of harm" in violation of the Eighth Amendment to the United States Constitution and Article 1, Section 6 of the Nevada Constitution. *Baze*, 553 U.S. at 50. This Court further finds that Petitioner has identified an alternative method of execution that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 52. Thus, this Court hereby enjoins NDOC from use of a paralytic agent in carrying out the planned execution of Scott Raymond Dozier.

31. The action taken by this Court in response to Petitioner's filings regarding the lawfulness of his planned execution rests upon the Court's inherent authority to inquire into the lawfulness of its own order, here the Court's signing and entry of a warrant of execution for Petitioner Scott Dozier. *See Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007); *cf.* NRS 1.210(3). In particular, this Court has the "inherent power to prevent injustice," *Halverson*, 123 Nev. at 261-62, 163 P.3d at 440, and to tailor the scope of its orders to avoid constitutional concerns. *See, e.g., Jordan v. State ex rel. Dep't of Motor Vehicles and Public Safety*, 121 Nev. 44, 60, 110 P.3d 30, 42 (2005) (orders regarding vexatious litigants must be narrowly tailored to avoid violation of constitutional right of access to the courts). Counsel for the NDOC has noted on the record that the Court

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

ORDER

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

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

DATED this 27th day of November, 2017

JENNIFER P. TOGLIATTI
DISTRICT JUDGE

[5] *See* Petitioner's 9-25-17 Reply at 10.

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

Ann M. McDermott
Jordan T. Smith, Esq.
Thomas A. Ericsson, Esq.
Lori C. Teicher, Esq.
David Anthony, Esq.
Jonathan E. Vanboskerck, Esq.

Diane Sanzo

DIANE SANZO, Judicial Assistant

EXHIBIT 6

EXHIBIT 6

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 977-5500

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
(702) 486-9906

Steve Sisolak
Governor

Charles Daniels
Director

State of Nevada
Department of Corrections

March 16, 2020

TO: All Employees

FROM: Charles Daniels, Director

SUBJECT: **DIRECTOR'S UPDATE IN RESPONSE TO COVID-19**

Consistent with national and state health and human services protocols, protecting your health and safety is my top priority. With the issuance of the Governor's emergency declaration we are armed with additional tools and the flexibility to respond to and ultimately contain COVID-19.

With the activation of the State Emergency Operations Center and our Nevada Health Response team, a one stop COVID-19 information website was created to avail you of rapidly developing data, guidance and news impacting you, your family, co-workers and the community. You can access the website here: https://nvhealthresponse.nv.gov/. NDOC has been actively participating in the fight against COVID-19 and exploring ways to mitigate the impact to our State and its citizens.

Here are the current measures we have already implemented with public, staff and inmate safety in mind:

- Suspended all inmate visitation;
- Legal visitation modified to video only;
- Town Hall meetings conducted and scheduled with staff and inmates at every institution;
- Suspended volunteers and external service provider entry into our facilities;
- Commenced symptom detection protocols to include visual observation of influenza-like symptoms and assessment of body temperature of all individuals entering our facilities. For anyone with a temperature greater than 100.3, will be denied entry and instructed to see a community health care provider immediately;
- Suspended all inmate access to the community;
- Activated an Emergency Operation Center at each facility. The hours of operation are 5 a.m. – 12 a.m. daily, until further notice.

I extend my thoughts and prayers to the victims, families, and friends who have been impacted by COVID-19. This has been a challenging time for all of us, and I just want you to know how much I appreciate your patience, resolve and your selfless determination to protect the public and one another.

There is no one-size-fits-all approach to how we address this issue, and this is a rapidly developing situation that we will continue to monitor. All options are on the table to ensure the safety of you and your families.

Please remember to monitor and educate those with an underlying serious or long-term medical condition. Please take additional actions to reduce their risk of getting sick with this virus.

I strongly urge you to:

- Conduct an inventory check of personal items recommended to aid in the fight against COVID-19. Gather extra supplies such as soap, tissue, alcohol-based hand sanitizer and basic pantry staples.

- Make a list of emergency contacts to have on hand—family, friends, neighbors, carpool drivers, health care providers, teachers, employers, local public health department and community resources to include relevant websites.

Perform normal everyday precautions to try to avoid getting sick and avoid people who are sick and wash your hands often.

I have formed a team led by Dr. Minev, NDOC's Medical Director. This group has been directed to provide me with ongoing assessment results and recommendations specific to keeping our staff safe.

Should you have any additional questions or concerns, please work through your immediate chain of command.

Thank you

EXHIBIT 7

EXHIBIT 7

55 prisoners who contracted COVID died. Activists say it was preventable.

As the virus spread in Nevada prisons, activists called for state intervention. None came.

Jump to the start of the story.

John Oliver Snow

78, died on 2/27/2021. He was imprisoned at High Desert State Prison.

Alfred Catalani

68, died on 2/3/2021. He was imprisoned at Lovelock Correctional Center.

Bernardo Vega

80, died on 1/22/2021 He was imprisoned at Northern Nevada Correctional Center.

Eddie Wallis

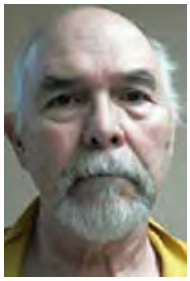
72, died on 1/19/2021. He was imprisoned at Northern Nevada Correctional Center.

Nathaniel Burkett

74, died on 1/19/2021. He was imprisoned at Northern Nevada Correctional Center.

Rickey Egberto

65, died on 1/19/2021. He was imprisoned at Northern Nevada Correctional Center.



Edward Lizares

74, died on 1/13/2021. He was imprisoned at Northern Nevada Correctional

Johnny Luckett

54, died on 1/12/2021 He was imprisoned at Northern Nevada Correctional

William Bell

74, died on 1/12/2021. He was imprisoned at Northern Nevada Correctional Center.

Michael League

74, died on 1/12/2021. He was imprisoned at Lovelock Correctional Center.

Alex Felix

53, died on 1/8/2021. He was imprisoned at Lovelock Correctional Center.

Rojillio Cruz

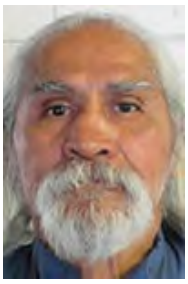
48, died on 1/6/2021. He was imprisoned at High Desert State Prison.

Center.

Center.

Jason Ward

77, died on 1/5/2021. He was imprisoned at Northern Nevada Correctional Center.



Louis Pacheco

75, died on 1/5/2021. He was imprisoned at Northern Nevada Correctional Center.

Phillip Bradley

63, died on 1/5/2021. He was imprisoned at Lovelock Correctional Center.

David Keeney

72, died on 1/3/2021. He was imprisoned at Northern Nevada Correctional Center.

Chaunchey Lloyd

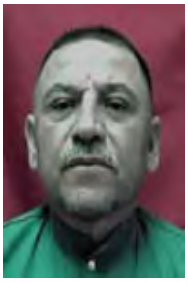
89, died on 1/3/2021. He was imprisoned at Northern Nevada Correctional Center.

William Drewry

62, died on 1/2/2021. He was imprisoned at Lovelock Correctional Center.

Howard White

76, died on 12/31/2020. He was imprisoned at Northern Nevada Correctional Center.



Paulo Preciado

62, died on 12/31/2020. He was imprisoned at Lovelock Correctional Center.

George White

69, died on 12/30/2020. He was imprisoned at Lovelock Correctional Center.

Paul Bouteiller

73, died on 12/29/2020. He was imprisoned at Lovelock Correctional Center.

Robert Bowman

70, died on 12/27/2020.He was imprisoned at Northern Nevada Correctional Center.

Samuel Pow Shing Kung

66, died on 12/26/2020. He was imprisoned at Southern Desert Correctional Center.

Clark Morse

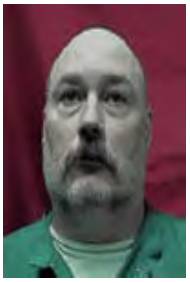
77, ied on 12/25/2020. He was imprisoned at Northern Nevada Correctional Center.

Kenneth Foose

82, died on 12/25/2020. He was imprisoned at Northern Nevada Correctional Center.

Raymundo Olvera

58, died on 12/24/2020. He was imprisoned at Lovelock Correctional Center.

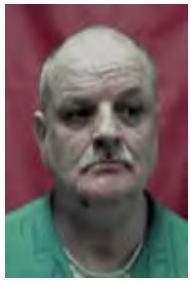


Ronald Altringer

50, died on 12/23/2020. He was imprisoned at Northern Nevada Correctional Center.

Henry Evans

65, died on 12/23/2020. He was imprisoned at Northern Nevada Correctional Center.



David Foust

62, died on 12/22/2020. He was imprisoned at Northern Nevada Correctional Center.

Francisco Lara

69, died on 12/22/2020. He was imprisoned at Lovelock Correctional Center.

Kenneth Friedman

63, died on 12/17/2020. He as imprisoned at High Desert State Prison.

Robert Yowell

66, died on 12/16/2020. He was imprisoned at Northern Nevada Correctional Center.

Michael Donovan

62, died on 12/13/2020. He was imprisoned at Northern Nevada Correctional Center.

Paul Harlow

79, died on 12/8/2020. He was imprisoned at Northern Nevada Correctional Center.

Lawrence Pepito

71, died on 12/7/2020. He was imprisoned at Northern Nevada Correctional Center.

Johnny Joe Nunley

56, died on 12/3/2020. He was imprisoned at High Desert State Prison.

Jeremy Vondale Heathmon

37, died on 11/27/2020. He was imprisoned at High Desert State Prison.

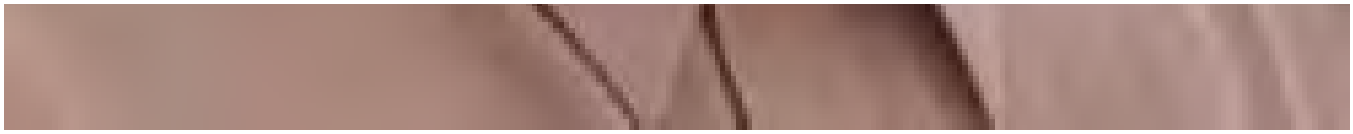
Daniel Fuentez

61, died on 11/27/2020. He was imprisoned at Northern Nevada Correctional Center.

By **Katelyn Newberg** Las Vegas Review-Journal

April 9, 2021 - 6:15 am

When writing his last letter to his mother, Johnny Nunley was terrified that he would die from the virus devastating his body.



Johnny Nunley, 56, was one of 55 Nevada prisoners who have died of the coronavirus, according to Clark County coroner records and data from the Department of Corrections. Nunley was serving a sentence of six to 15 years for burglary charges when he died on Dec. 3, 2020, at High Desert State Prison. (Lisa Nunley-Macon)

"He said: 'Right now I'm not feeling normal— I have no energy, my eyes hurt, I can't taste my food and everything smells the same; it stinks,'" said Donna Davis, reading from the letter.

Nunley's fears came true. The 56-year-old died of COVID-19 on Dec. 3 at High Desert State Prison, when his family said he was close to being released on parole for burglary charges.

Clark County coroner records identified Nunley as one of 55 Nevada prisoners who died after testing positive for COVID-19, according to March 29 data provided by the Department of Corrections.

Davis said that before her son died, he complained of feeling sicker and sicker to her over the phone. She said he should have received better medical treatment.

"It's like they took the position that he was just an inmate, what difference does it make?" Davis said.

Activists 'stonewalled'

The Department of Corrections declined to identify the 55 prisoners who records show died after testing positive for the virus.

But using records from Nevada coroner's offices and sheriff's departments, the Review-Journal identified 39. All were men.

Those not identified either were considered pending cases, because an agency had not yet independently confirmed and cataloged their cause and

manner of death. Or their cases fell under the jurisdiction of the Pershing County Sheriff's Office, which did not respond to requests for comment. Lovelock Correctional Center is located in Pershing County.

Nevada prisoners die after contracting coronavirus

Since the start of the pandemic, among all state prisons, the Northern Nevada Correctional Center in Carson City has seen the most prisoners die after testing positive — 30, according to Department of Corrections data.

The Nevada Sentencing Commission has twice declined to recommend that Gov. Steve Sisolak depopulate the prison population to minimize spread. Last May, the Nevada Supreme Court also denied a petition to release vulnerable and elderly prisoners because of the virus.

State data as of Wednesday shows 4,500 coronavirus cases among state prisoners since the start of the pandemic and 980 cases among prison employees.

The youngest prisoner confirmed to have died of COVID-19 was Jeremy Heathmon, 37, who records show was serving two to six years for burglary charges. He died at High Desert State Prison on Nov. 27 amid a reported surge in state prison cases.

At the time, activists implored the state to intervene. But no action came.

Sarah Hawkins, a Clark County public defender and president of Nevada Attorney's for Criminal Justice, said the prison system has "stonewalled" those seeking answers throughout the pandemic. She said activists suspect that more than 55 prisoners have died of the virus.

"What we have been hearing from NDOC does not match what we're hearing from folks who are actually in custody," Hawkins said.

WHAT WE HAVE BEEN HEARING FROM NDOC DOES NOT MATCH WHAT WE'RE HEARING FROM FOLKS WHO ARE ACTUALLY IN CUSTODY.

SARAH HAWKINS, A CLARK COUNTY PUBLIC DEFENDER AND PRESIDENT OF NEVADA ATTORNEY'S FOR CRIMINAL JUSTICE

The prison system has confirmed that 46 of the 55 prisoners reflected in its data died from COVID-19; state law requires an autopsy to confirm the cause of all prisoner deaths. COVID-19 data from the Department of Health and Human Services shows 53 prisoner deaths. A spokeswoman said the agency was reviewing the prison system's other two reported cases.

Hawkins said deaths related to the virus were preventable, and that prison outbreaks are "a result of the Nevada Department of Corrections' failure to act."

"We are incredibly disheartened, and we feel really helpless because we can't get the information we need to challenge that," she said.

In an emailed statement, the Department of Corrections cited the "confidentiality of medical information" when refusing to identify which inmates died of the virus.

"While we all strive to protect the health of offenders and staff, cases have been identified in NDOC facilities and, unfortunately, we have lost both offenders and staff to this virus," the department said in the statement. "Our hearts go out to the families and loved ones of all those who have died from COVID-19."

Three department employees have died of COVID-19, according to state data.

'He only had a few months left'

As cases began to rise, Jamee Fitch could tell that her father was nervous.

"He knew once it got to where it started taking off, that people would start dying," Fitch said. "Those were his words to me."

Following a stroke several years ago, Robert Bowman was housed in a medical unit at the Northern Nevada Correctional Centerwith other men at high risk of contracting COVID-19.

They talked through letters and weekly phone calls, a relationship that took nearly 10 years to repair. Alcoholism had haunted Bowman throughout his life, Fitch said. It's why he was again in prison on a DUI charge.

His sentence was set to expire in 2023, but he was due to be released on parole as early as 2021. Then came Christmas time.

THE WARDEN COULDN'T EVEN TELL ME HOW LONG HE WAS SICK FOR, OR HOW LONG HE WAS IN THE HOSPITAL

JAMEE FITCH

Fitch hadn't heard from her father in weeks. The Christmas card he faithfully sent each year never came. Finally, she got a call from the prison, and she immediately knew something was wrong.

"The warden couldn't even tell me how long he was sick for, or how long he was in the hospital," Fitch told the Review-Journal.

Bowman died Dec. 27 at the Carson Tahoe Regional Medical Center, according to the Carson City Sheriff's Office. He was 70.

Fitch said her father and prisoners like him were sandwiched together, never given a "fighting chance" against COVID-19.

She teared up, thinking about how close she was to seeing him again. He was supposed to meet his great-granddaughter upon release, who is now 4; he didn't want her first memory of him to be from behind bars. She will now have to meet him through a letter he left her and the cowboy mementos from his rodeo days that Fitch holds on to.

"That was her only living great-grandparent," she said. "And now that chance is gone, and he only had a few months left."

Like Bowman, Nunley also was close to being released on parole. He had been searching for a place to stay in Clark County when he died of the virus

— the same day his mother received his last letter, his sister Lisa Nunley-Macon said.

Nunley-Macon said she partly blames a "lack of care" from the prison system for her brother's death. The former football player, who was serving a six-to-15-year sentence for stealing items from a Las Vegas grocery store, was a "clean freak," she said, and likely would have taken stringent precautions given the freedom to do so.

"I don't believe he would have died if he wasn't in prison," she said.

Contact Katelyn Newberg at knewberg@reviewjournal.com or 702-383-0240. Follow @k_newberg on Twitter.

EXHIBIT 8

EXHIBIT 8

COVID-19 | JUSTICE

Sisolak questions prison officials on ‘extremely low’ inmate vaccinations

By **Michael Lyle** - April 21, 2021

LATEST STORIES

Sisolak questions prison officials on ‘extremely low’ inmate vaccinations

April 21, 2021

Drought, demands on groundwater making water law even more contentious

April 20, 2021

Interstate water wars are heating up along with the climate

Commentary April 20, 2021

UNDERCURRENT | Nevada’s Best Blog

“The Department of Corrections has simply failed,” said a civil liberties advocate. (NDOC social media photo)

Less than 10 percent of nearly 11,000 inmates in the Nevada Department of Corrections are fully vaccinated, officials told Gov. Steve Sisolak Tuesday at the Board of Prison Commissioners meeting.

The low vaccination numbers come despite the department indicating in a March 4 press release, when it began vaccinating eligible inmates, that 46 percent of inmates statewide had signed up to receive the Covid-19 vaccine.

Sisolak was concerned by the “extremely low” numbers presented to the board and questioned staff about efforts to get inmates and staff vaccinated.

“The vaccination program for both the staff and the inmates is a priority for me and this board,” Sisolak told NDOC director Charles Daniels. “I want to make sure you reach out to everyone, make them aware of what is available.”

Daniels didn’t elaborate on why they haven’t been vaccinating more inmates and staff despite eligibility, but implied they

In exchange with Lee, Haaland noncommittal on BLM HQ

- Jacob Fischler

Clark County approves plan to emerge from COVID restrictions

- Dana Gentry

Attorneys general warn against sale of fake COVID vaccine cards

- Jeniffer Solis

The PAC, not the song

- Hugh Jackson

Metro investigator contradicts officer, police report at Gomez fact-finding

- Dana Gentry

“started seeing a lot of hesitation” after federal officials urged a pause of administering the Johnson & Johnson vaccine a week before Tuesday’s commission meeting. The system was relying heavily on the J&J vaccine.

“We are working on our best to increase interest and compliance among our staff and our offenders,” added Michael Minev, the medical director for the department. “We actually had a very robust vaccinated effort at Florence McClure Women’s Correctional Center but that data has not been compiled.”

As of last week, 565 inmates have received the first dose of the Moderna vaccine and 277 have received both doses of Moderna. Another 688 have received the J&J single dose. There are currently 10,796 people incarcerated in the Nevada prison system.

Families of those incarcerated pushed back against corrections officials, saying their loved ones have requested the vaccine but still haven’t received anything.

“My husband qualified for the vaccination last week. However, the only thing you’re giving out is Johnson & Johnson and they pulled it,” said Patricia Adkinson during public comment.

Nick Shepack, a policy fellow with the ACLU of Nevada, called the numbers “abysmal.”

“The Department of Corrections has simply failed,” he said. “This is another failure on part of the new NDOC leadership. It speaks to the same issues that led to the outbreaks where they were unable to get people PPE and they were unable to get people enough food. Now, they aren’t able to get people the vaccine.”

Since the Johnson & Johnson vaccine was pulled, Daniels said

they are “now looking at what we can do to get the other (vaccines) into rotation.”

“Everyone will have available to them a vaccine other than the Johnson product if they so desire to get one,” he said.

The Nevada Department of Corrections began vaccinating staff in December.

Minev said 33 percent of all staff are fully vaccinated, with 831 having received both doses of the Moderna and another 39 staff members getting the J&J vaccine. Another 1,230, or 48 percent of the staff, have received the first dose of Moderna.

Sisolak said the low vaccination numbers could scrap plans to allow visitations again on May 1, which have been halted for more than 13 months.

“It was my desire, and I expressed to Director Daniels, I would like to open up visitation for our offenders but I can’t do that when it’s only 5 percent who have been fully vaccinated and only 11 percent have gotten the first dose,” Sisolak said.

Some families speaking during public comment said they have received conflicting information about the resumption of visits.

“Literally there has not been a word until a few days ago and that has turned into a rumor and gossip mill about what is true, what facility heard what and who heard what,” said Jodi Hocking, the founder of the prison advocacy group Return Strong. “If the department would actually communicate in a way that let people have open access to information that isn’t a security risk without everything being secretive it would be much better.”

A member of Return Strong said she reached out to the family services coordinator an hour before the Board of Prison

Commissioners meeting and was told “there were no plans for the start of visitation.”

Daniels said NDOC is providing inmates information about visitations and “putting information out to the general public on our social media sites.”

As Daniels was saying that , none of the department’s social media accounts provided any such information, but by early Tuesday evening there was an NDOC Facebook post announcing visitation would resume May 1.

The Nevada Department of Corrections has been often and repeatedly criticized during the last year for a lack of transparency by civil rights groups, criminal reform activists, private attorneys and elected officials.

As if to underscore the criticisms, Tuesday’s meeting, which was supposed to be streamed for the public, wasn’t. An NDOC official told commissioners, which includes Sisolak, Attorney General Aaron Ford and Secretary of State Barbara Cegavske, that the video was down.

Shepack said the ACLU is looking into whether this violated Nevada’s open meeting law, noting that since people could call in for public comment he couldn’t say definitively.

“There are some meetings held during Covid that were call-in only and had no video, but those (conditions were) clearly stated when the meetings were posted,” he said. “We believe that since it was posted that it would be televised on YouTube it very well may be (in violation). It’s problematic even if it’s not. It barred a lot of people from participation. Nobody can go back and watch it.”

It’s not the first time a Board of Prison Commissioners meeting has been scrutinized for sidelining the public.

“The last Board of Prison Commissioners’ meeting, they tried to set a deadline that was six days before for a written comment,” he added. “It was on Martin Luther King Day. The deadline was at noon, on a holiday, six days before a meeting. It feels intentional that they don’t want the families to show up and call out the director.”

In addition to updates around vaccinations, Minev also told the board 70 people have been “medically evaluated for compassionate release,” a substantial increase from previous years.

When asked about the 298 program, which outlines compassionate release, NDOC officials told Nevada Current that in 2020 “only three applied, but two of the offenders did not have physician’s letters.”

Hocking previously said those numbers don’t paint an accurate picture adding that people “don’t apply because the process is so difficult and most of (the inmates) don’t even know that they can apply.”

Minev told the board of the 70 people that have been medically evaluated for compassionate release statewide:

- 22 inmates from Northern Nevada Correctional Center
- 17 inmates from High Desert State Prison
- Seven inmates from Florence McClure Women’s Correctional Center
- 14 inmates from Southern Desert Correctional Center
- One inmate from Warm Springs Correctional Center
- One inmates from Wells Conservation Camp
- Eight from Lovelock Correctional Center

He added that as of Monday, “17 of these 70 offenders for compassionate release cleared initial medical screening.

"Of these 17 offenders, nine are being reviewed for compassionate release," he added. "One offender at Florence McClure Women's Correctional Center has been accepted and approved by director Daniels pending the 45-day notification to the County Commission."

Commissioners were supposed to discuss an administrative regulation on inmate deductions, but took no action. Inmate deductions have been discussed several times at prior board meetings after NDOC began seizing up to 80 percent of funds in inmate accounts last September.

Money, usually deposited by families and friends, is used to buy necessities such as food and soap or pay for medical needs. Despite the board rescinding the regulation in January, many families called in to say the practice is ongoing.

Hocking said they submitted 59 letters for written public comment, but none of the letters have been made available on the Board or Prison Commissioners' website where other meeting agenda items are available.

Since Senate Bill 22, which is currently being heard in the legislative session, would regulate inmate deductions, Ford suggested they table discussions until the next board meeting.

Michael Lyle

Michael Lyle (MJ to some) has been a journalist in Las Vegas for eight years. He started his career at *View Neighborhood News*, the community edition of the *Las Vegas Review-Journal*. During his seven years with the *R-J*, he won several first place awards from the Nevada Press Association and was named its 2011 Journalist of Merit. He left the paper in 2017 and spent a year as a freelance journalist accumulating bylines anywhere from *The Washington Post* to *Desert Companion*. While he covers a range of topics from homelessness to the criminal justice system, he gravitates toward stories about race relations

and LGBTQ issues. Born and mostly raised in Las Vegas, Lyle graduated from UNLV with a degree in Journalism and Media Studies. He is currently working on his master's in Communications through an online program at Syracuse University. In his spare time, Lyle cooks through Ina Garten recipes in hopes of one day becoming the successor to the Barefoot Contessa throne. When he isn't cooking (or eating), he also enjoys reading, running and re-watching episodes of "Parks and Recreation." He is also in the process of learning kickboxing.

DAILY CURRENT NEWSLETTER
CONTACT
DONATE
HOUSING
HEALTH CARE
COVID-19

EXHIBIT 9

EXHIBIT 9

IN THE 346TH DISTRICT COURT

OF EL PASO COUNTY, TEXAS

STATE OF TEXAS	§	
	§	
v.	§	**CAUSE NO 20060D05825**
	§	
FABIAN HERNANDEZ	§	

ORDER DENYING STATE'S MOTION REQUESTING EXECUTION DATE

On this date, this Court, came to consider the State's Third Motion Requesting Execution Date for Defendant Fabian Hernandez. After considering the State's Motion and the Defendant's response brief, the court hereby DENIES the State's motion without prejudice, for the reasons set forth below:

1. On April 23, 2020 the execution date was stayed by the Court of Criminal Appeals due to the COVID-19 pandemic.

2. Defendant intends to seek clemency.

3. Due to the COVID-19 pandemic, counsel was unable to meet with Mr. Hernandez because all visitation in the Texas Department of Criminal Justice (TDCJ) was suspended.

4. Due to the COVID-19 pandemic traveling to meet with Mr. Hernandez posed a significant health risk to not only counsel but anyone else that wished to travel to TDCJ.

5. According to the TDCJ website, that suspension has now been lifted starting today, March 15, 2021 and visitation has now resumed but in a limited capacity.

6. Even though TDCJ resumed visitation in a limited capacity today, there is still an unnecessary risk not only to TDCJ personnel, but to the victim's family as well as the defendant's family who will be present during the execution process.

THEREFORE, this matter will be set for a status hearing in June 2021. The specific date and time will be provided under a separate order.

SIGNED this the 15th day of March, 2021.

JUDGE PATRICIA C. BACA

EXHIBIT 10

EXHIBIT 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

PATRICK R. SMITH, BRANDON S. HOLM, Plaintiffs, v. WILLIAM P. BARR, MICHAEL CARVAJAL, T.J. WATSON, Defendants.	)	No. 2:20-cv-00630-JMS-DLP

Order Granting Preliminary Injunction

The Court concluded in an order issued on this date that plaintiffs Patrick R. Smith and Brandon S. Holm have demonstrated that they are entitled to a preliminary injunction. The defendants are enjoined from carrying out any future executions in the next 60 days without implementing the following policies:

1. The defendants will enforce mask requirements for all staff participants in the executions.

2. The defendants will maintain contact logs for all FCC Terre Haute staff members involved in any execution who have close contact—within 6 feet for a total of 15 minutes over the course of a 24-hour period—with any other person during execution preparation, during an execution, or during the post-execution process.

3. For 14 days following any such close contact, the defendants will require the impacted FCC Terre Haute staff member to produce a negative COVID-19 result using one of the complex's rapid testing machines each day before beginning ordinary duties that involve interaction with FCC inmates.

4. The defendants will ensure that thorough contract tracing is conducted for any such FCC staff member who tests positive for COVID-19 during this 14-day period.

IT IS SO ORDERED.

January 7, 2021

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

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EXHIBIT 11

EXHIBIT 11

AP analysis: Federal executions likely a COVID superspreader

By MICHAEL TARM, MICHAEL BALSAMO and MICHAEL R. SISAK February 5, 2021

WASHINGTON (AP) — As the Trump administration was nearing the end of an unprecedented string of executions, 70% of death row inmates were sick with COVID-19. Guards were ill. Traveling prisons staff on the execution team had the virus. So did media witnesses, who may have unknowingly infected others when they returned home because they were never told about the spreading cases.

Records obtained by The Associated Press show employees at the Indiana prison complex where the 13 executions were carried out over six months had contact with inmates and other people infected with the coronavirus, but were able to refuse testing and declined to participate in contact tracing efforts and were still permitted to return to their work assignments.

Other staff members, including those brought in to help with executions, also spread tips to their colleagues about how they could avoid quarantines and skirt public health guidance from the federal government and Indiana health officials.

The executions at the end of Donald Trump's presidency, completed in a short window over a few weeks, likely acted as a superspreader event, according to the records reviewed by AP. It was something health experts warned could happen when the Justice Department insisted on resuming executions during a pandemic.

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It's impossible to know precisely who introduced the infections and how they started to spread, in part because prisons officials didn't consistently do contact tracing and haven't been fully transparent about the number of cases. But medical experts say it's likely the executioners and support staff, many of whom traveled from prisons in other states with their own virus outbreaks, triggered or contributed both in the Terre Haute penitentiary and beyond the prison walls.

Of the 47 people on death row, 33 tested positive between Dec. 16 and Dec. 20, becoming infected soon after the executions of Alfred Bourgeois on Dec. 11 and Brandon Bernard on Dec. 10, according to Colorado-based attorney Madeline Cohen, who compiled the names of those who tested positive by reaching out to other federal death row lawyers. Other lawyers, as well as activists in contact with death row inmates, also told AP they were told a large numbers of death row inmates tested positive in mid-December.

In addition, at least a dozen other people, including execution team members, media witnesses and a spiritual adviser, tested positive within the incubation period of the virus, meeting the criteria of a superspreader event, in which one or more individuals trigger an outbreak that spreads to many others outside their circle of acquaintances. The tally could be far higher, but without contact tracing it's impossible to be sure.

Active inmate cases at the Indiana penitentiary also spiked from just three on Nov. 19 — the

day Orlando Cordia Hall was put to death — to 406 on Dec. 29, which was 18 days after Bourgeois' execution, according to Bureau of Prisons data. The data includes the inmates at the high-security penitentiary, though the Bureau of Prisons has never said whether it included death row inmates in that count.

In all, 726 of the approximately 1,200 inmates at the United States Penitentiary at Terre Haute have tested positive for COVID-19 since the start of the pandemic, according to Bureau of Prisons data. Of them, 692 have recovered.

———

Advocates and lawyers for the inmates, a Zen Buddhist priest who was a spiritual adviser for one prisoner, and even the families of some of the victims fought to delay the executions until after the pandemic. Their requests were rebuffed repeatedly and their litigation failed. And some got sick.

Witnesses, who were required to wear masks, watched from behind glass in small rooms where it often wasn't possible to stand six feet apart. They were taken to and from the death-chamber building in vans, where proper social distancing often wasn't possible. Passengers frequently had to wait in the vans for an hour or more, with windows rolled up and little ventilation, before being permitted to enter the execution-chamber building. And in at least one case, the witnesses were locked inside the execution chamber for more than four hours with little ventilation and no social distancing.

Prison staff told their colleagues they should first get on planes, go back to their homes and then they could take a test, according to two people familiar with the matter. If they were positive, they said, they could just quarantine and wouldn't be stuck in Terre Haute for two weeks, said the people, who could not publicly discuss the private conversations and spoke to AP on condition of anonymity.

Following Hall's execution in November, only six members of the execution team opted to get coronavirus tests before they left Terre Haute, the Justice Department said in a court filing. The agency said they all tested negative. But days later, eight members of the team tested positive for the virus. Five of the staff members who had tested positive were brought back to Terre Haute for more executions a few weeks later.

Yusuf Ahmed Nur, the spiritual adviser for Hall, stood just feet away inside the execution chamber when Hall was executed on Nov. 19. He tested positive for the virus days later.

Writing about the experience, Nur said he knew he would be putting himself at risk, but that

Hall had asked him to be at his side when he was put to death. He, and Hall's family, felt obliged to be there.

"I could not say no to a man who would soon be killed," Nur wrote. "That I contracted COVID-19 in the process was collateral damage" of executions during a pandemic.

Later, two journalists tested positive for the virus after witnessing other executions in January, then had contact with activists and their own loved ones, who later tested positive as well. Despite being informed of the diagnoses, the Bureau of Prisons knowingly withheld the information from other media witnesses and decided not to initiate any contact tracing efforts.

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By mid-December, prison officials said that both Corey Johnson and Dustin Higgs were sick. They were the last two prisoners to be executed, just days before President Joe Biden took office.

Death row was put on lockdown after their results, inmates told Ashley Kincaid Eve, a lawyer and anti-death penalty activist. But even though they had also tested positive, she said Higgs and Johnson were still moved around the prison — potentially infecting guards accompanying them — so they could use phones and email to speak with their lawyers and families as their execution dates approached. Eve said prisons officials may have worried a court would delay the executions on constitutional ground if that access was denied.

In response to questions from the AP, the Bureau of Prisons said staff members who don't experience symptoms "are clear to work" and that they have their temperatures taken and are asked about symptoms before reporting for duty. (The AP has previously reported that staff members at other prisons were cleared with normal temperatures even when thermometers showed hypothermic readings.)

The agency said it also conducts contact training in accordance with federal guidance and that "if staff are circumventing this guidance, we are not aware."

Officials said staff members were required to participate in contact tracing "if they met the criteria for it" and agency officials couldn't compel employees to be tested.

"We cannot force staff members to take tests, nor does the CDC recommend testing of asymptomatic individuals," an agency spokesperson said, referring to the Centers for Disease Control and Prevention.

The union for Terre Haute employees declined to comment, saying it did not want to "get into

the public fray of this whole issue."

Elsewhere, union officials have long complained about the spread of the coronavirus through the federal prison system, as well as a lack of personal protective equipment and room to isolate infected inmates. Some of those issues have been alleviated, but containing the virus continues to be a concern at many facilities.

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No more executions have yet been scheduled under Biden. The Bureau of Prisons has repeatedly refused to say how many other people have tested positive for the coronavirus after the last several executions. And the agency would not answer questions about the specific reasoning for withholding the information from the public, instead directing the AP to file a public records request.

The Bureau of Prisons said it also "took extensive efforts to mitigate the transmission" of the virus, including limiting the number of media witnesses and adding an extra van for the witnesses to space them out.

It has argued witnesses were informed social distancing may not be possible in the execution chamber and that witnesses and others were required to wear masks and were offered additional protective equipment, like gowns and face shields. The agency also refused to answer questions about whether Director Michael Carvajal or any other senior leaders raised concerns about executing 13 people during a worldwide pandemic that has killed more than 450,000 in the U.S.

Still, it appears their own protocols weren't followed. After a federal judge ordered the Bureau of Prisons to ensure masks were worn during executions in January, the executioner and U.S. marshal in the death chamber removed their masks during one of the executions, appearing to violate the judge's order. The agency argued they needed to do so to communicate clearly and that they only removed their masks for a short time and disputes that it violated the order.

———

In a Nov. 24 court filing on the spread of COVID at Terre Haute, Joe Goldenson, a public health expert on the spread of disease behind bars, said hundreds of staff participated in one way or another at each execution, including around 40 people on execution teams and those on 50-person specialized security teams who traveled from other prisons nationwide. He said he had warned earlier that executions were likely to become a superspreader.

Medical and public health experts repeatedly called on the Justice Department to delay

executions, arguing the setup at prisons made them especially vulnerable to outbreaks, including because social distancing was impossible and health care substandard.

“These are the type of high-risk superspreader events that the (American Medical Association) and (the Centers for Disease Control and Prevention) have been warning against throughout the pandemic,” James L. Madara, the executive vice president of the AMA, wrote to the Department of Justice on Jan. 11, just before the last three federal executions were carried out.

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Tarm reported from Chicago and Sisak reported from New York.

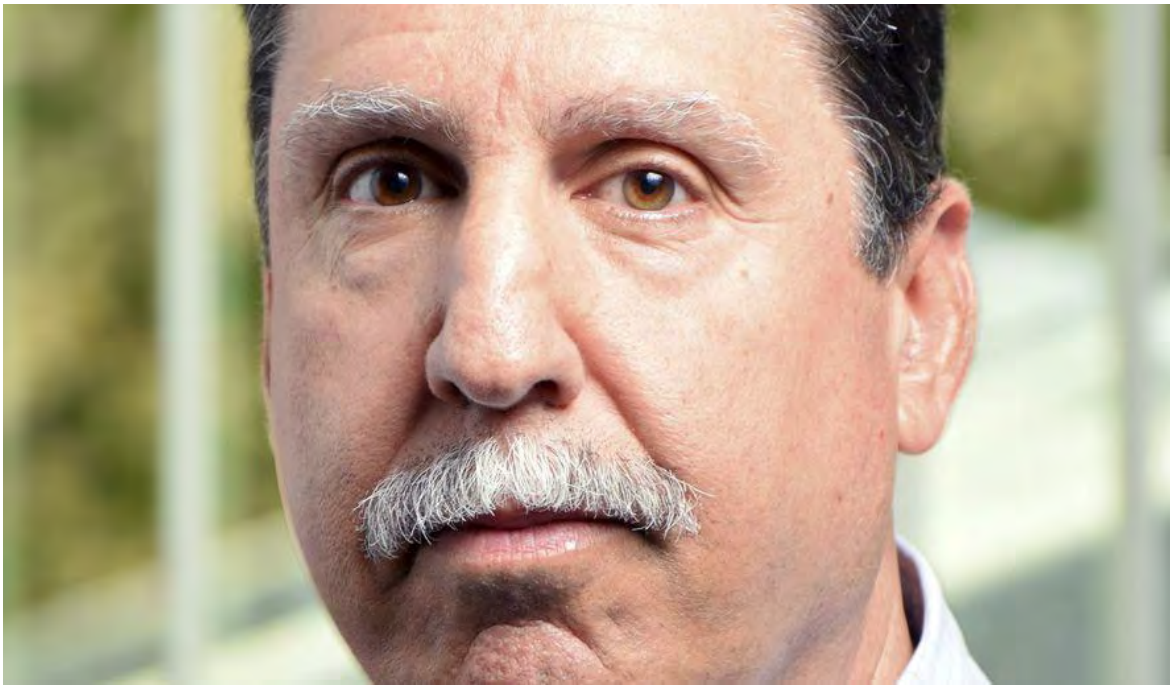
———————

On Twitter, follow Michael Tarm at twitter.com/mtarm, Michael Balsamo at www.twitter.com/MikeBalsamo1 and Michael Sisak at twitter.com/mikesisak.

EXHIBIT 12

EXHIBIT 12

Nevada's chief medical officer not licensed to practice medicine in U.S.



This undated photo provided by the Nevada Division of Public Behavioral Health shows Dr. Ihsan Azzam, whose appointment as Nevada Chief Medical Officer was announced Thursday, May 17, 2018. Azzam served as state medical epidemiologist since 1995. State Division of ... more >

By - *Associated Press - Tuesday, September 11, 2018*

Nevada’s top doctor isn’t licensed to practice medicine in the United States.

Ihsan Azzam testified in Las Vegas on Tuesday that he has a master’s degree and worked for several years in environmental public health and epidemiology before being named chief state medical officer last May.

Azzam says he practiced for several years as an obstetrics and gynecology physician in Africa before moving to the United States in the 1990s.

TOP STORIES

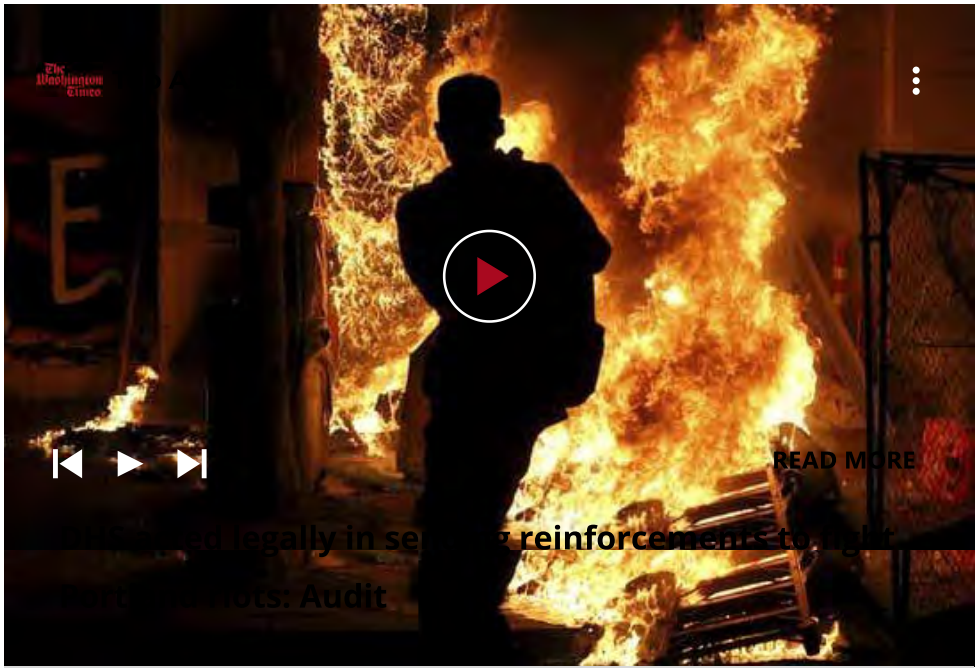
Richard Dawkins loses 'Humanist of the Year' award after comparing trans people to Rachel Dolezal

Waters dings GOP after censure vote fails: 'Republicans love to use me as a target'

Harris vows transformative social agenda, higher spending and tax hikes

That qualifies Azzam for the job under Nevada state law.

Azzam testified that while he has no background in anesthesia or pain management, he says the doses of three drugs proposed for an inmate's lethal injection would be enough to kill a mammoth.



Three drug manufacturers are trying to convince a judge that Nevada improperly obtained their products for an execution, which is not an approved use.

EXHIBIT 13

EXHIBIT 13

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

December 17, 2013

Law Offices of the Federal Public Defender
Michael Pescetta, Assistant Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, NV 89101

Re: Public Records Request

Dear Mr. Pescetta:

Please find enclosed the documents the Nevada Department of Administration had that are responsive to your public records request regarding the execution chamber and the Nevada State Prison. The email address for the Director of the Nevada Department of Corrections has been redacted as it is not public and not relevant to the request.

If you have any questions, please contact me at (775) 684-1224.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: Katie S. Armstrong
KATIE S. ARMSTRONG
Deputy Attorney General

KSA/lsd
Enclosures
cc Jeff Mohlenkamp, Dept. of Administration
Jennifer Burry, Dept. of Administration

Telephone 775-684-1100 • Fax 775-684-1108 • www.ag.state.nv.us • E-mail aginfo@ag.nv.gov

Jeff Mohlenkamp

From: Jeff Mohlenkamp
Sent: Thursday, September 13, 2012 9:23 AM
To: Gerald Gardner
Subject: RE: CIP Projects

Gerald,

I will try and get a good feel for what is going on in some of the smaller budgets to see if there are matters of interest and let you know.

As far as the hotel college, let me know if the Governor wants to have a discussion with Gus Nunez and me. We could get overall estimates of cost, time frame and potential resources that UNLV can bring to the table. The concern is really not getting the design work done. Money is already available for that. The key is where we come up with construction costs in the next biennium – there are always options if this is a high priority.

The next two weeks – Fridays are my only available day. I would be happy to have meetings on those days to let you know how things are going. Let me know and I will have my assistant get it set up.

My thoughts are the general flow for this first phase of the budget will be as follows:

September 17th to 28th – full review of key budget initiatives (budget hearings)
October 1st through 10th – make major decisions regarding what comes out of agency request and what goes in (meetings set up with the Governor on Oct 2nd and 10th (the key in my opinion is to be careful about what we include so we do not have to take away in Gov Rec – also when do we put forward Governor's key initiatives – I recommend Gov Rec as it remains confidential until the State of the State – January

October 15th – Agency request is finalized and transmitted to LCB – it also becomes a public document

I have time between now and 11am, this afternoon after 4:30p or tomorrow if you want to sit down and discuss the general flow.

Jeff Mohlenkamp, Director
Department of Administration
(775) 684-0222

From: Gerald Gardner
Sent: Thursday, September 13, 2012 8:41 AM
To: Jeff Mohlenkamp
Subject: RE: CIP Projects

Hi Jeff,
I'm meeting with the Governor this afternoon on these and will let you know. I know that the Hotel College is a priority.

Thanks for having the budget hearings schedule sent over. Any recommendations on which of these are a must-attend? (I was planning to attend Ed on Monday, DPS on Thursday, NDOT, NSHE, HHS next week at a minimum).

Do you still want to have a regular meeting while the hearings are going on? I know you're going to be running all day. Let me know and I'll keep some time open Monday or Tuesday afternoon for you. Otherwise we can just touch base on the fly.

Thanks,
Gerald

From: Jeff Mohlenkamp
Sent: Wednesday, September 12, 2012 8:26 AM
To: Gerald Gardner
Subject: CIP Projects

Gerald,

The Public Works Board meets on September 18th to finalize recommendations to the Governor of priority CIP projects. While it is ultimately the Governor's decision which projects are funded and which are not, traditionally Governor's have followed the recommendations pretty closely with a few modifications.

Most of the projects being given high consideration are larger maintenance projects that are necessary to keep state building functional. There are a few, however, that do not fall into that definition. I would like some thoughts on whether these items are priority for the Governor in order to keep the SPWB recommendations closely aligned with the final funding recommendations.

The following projects are under consideration:

1. Statewide energy program – this would be a new program to set funds aside to work on energy savings projects that have functional payback of less than 8 years. Examples would be use of high efficiency lighting, additional solar projects, replacement of older less efficient systems. The request is for approximately $2 million. Ideally, the funds would be used to secure federal grants and to leverage NV Energy funds that might be available.
2. Movement of Execution Chamber from NSP- this modifies Ely State Prison to create an execution chamber. Due to the closure of NSP and the lack of ADA compliance of the existing chamber, the NDOC is recommending replacement. There are significant concerns that the current facility would not pass any court challenges. Further, while the only execution facility remains at NSP, it is difficult to find other uses for the facility. This is estimated at less than $1 million. My guess is that we will have some cost creep here and end up somewhat higher but even at $1.5 million, this cost is very low.
3. Movement of License Plate factory from NSP – in order to use this facility for other purposes, the factory needs to be relocated. The concept is to move it to a location adjacent to NNCC in Carson. This is highway funded at a cost of $4.4 million.
4. Sahara DMV replacement – this provides for the replacement of the DMV located on Sahara. The current facility is very old and has several issues. This is also highway funded at a cost of over $23 million. Alternatively, we could complete the design work this biennium and construct next biennium if funding is available. Due to the potential low fund balance in the highway fund, I am concerned about this project.
5. UNLV Hotel College – I need to know how high a priority this is to get done. It is likely that over the next biennium we will need to come up with $10's of millions of state funds to get this constructed.
6. Any other new projects desired by the Governor- I am unsure if there are other priority projects. If so, we need to keep in mind that we have approximately $70 million of significant maintenance projects that we need to fund. Therefore, additional projects may require the reduction of other enhancements under consideration.

Let me know if you would like to meet to discuss this prior to September 18th. It is not critical that we have decisions but just helps to have the Governor's ultimate projects more closely aligned with the SPWB recommendations.

Jeff Mohlenkamp, Director
Department of Administration
(775) 684-0222

Jeff Mohlenkamp

From: [redacted]
Sent: Friday, February 08, 2013 1:12 PM
To: Jeff Mohlenkamp
Subject: Re: Execution Chamber

We are on top of this.

James "Greg" Cox, Director
Nevada Dept. of Corrections
3955 W. Russell Rd.
Las Vegas, NV 89118
702-486-9910

>>> On 2/8/2013 at 8:03 AM, in message <3F92C954C366E943A9103E5E587217613E4529B3048MX1.STATE.NV.US>, Jeff Mohlenkamp <jmohlenkamp@admin.nv.gov> wrote:

I am hearing from the Governor's office that there may be a push to not let this move to Ely. Please prepare a summary of any alternatives that were considered or could be considered and the pros and cons related to them.

In this pros and cons, we should include relative costs of keeping NSP ready for use, potential legal challenges regarding its use, etc.

If there are other considerations, we should identify the costs associated with them.

Do not put a lot of time and effort into this yet as I am not sure how valid the concerns are – I am just looking to be generally prepared to highlight the costs and challenges associated with other options that were considered.

Jeff Mohlenkamp, Director
Department of Administration
(775) 684-0222

Jeff Mohlenkamp

From: Gus Nunez
Sent: Thursday, February 14, 2013 3:54 PM
To: Jeff Mohlenkamp; [redacted]
Cc: Gerald Gardner; Mike Torvinen
Subject: RE: Execution Chamber
Attachments: 13-CIP - Execution Chamber - Summary of Alternatives.xlsx

Jeff – Attached is a rough estimate of various alternatives for the new execution chamber with Pros and cons. The first one is the project that is included in the current Gov. Rec. CIP. The other are possible alternatives. We've taken a shot at the pros and cons but those should come from DOC. Let us know if you need any of these proposals/alternatives further detailed.

Gustavo Nunez, PE
Administrator
State Public Works Division
775.684.4100 (O)
775.720.5242 (C)
My new e-mail address is gnunez@admin.nv.gov

From: Jeff Mohlenkamp
Sent: Friday, February 08, 2013 8:03 AM
To: Greg Cox; [redacted]; Gus Nunez
Cc: Gerald Gardner
Subject: Execution Chamber

I am hearing from the Governor's office that there may be a push to not let this move to Ely. Please prepare a summary of any alternatives that were considered or could be considered and the pros and cons related to them.

In this pros and cons, we should include relative costs of keeping NSP ready for use, potential legal challenges regarding its use, etc.

If there are other considerations, we should identify the costs associated with them.

Do not put a lot of time and effort into this yet as I am not sure how valid the concerns are – I am just looking to be generally prepared to highlight the costs and challenges associated with other options that were considered.

Jeff Mohlenkamp, Director
Department of Administration
(775) 684-0222

13-CIP - Execution Chamber - Summary of Alternatives

Location	Project Cost	Pro	Con
1. Remodel ESP existing Court Room (13-C2) into execution chamber (1,900 SF) (2013 CIP 13-C02)	$692,289	Places execution chamber at current death row location, basic layout similar to California's where victim's family is separated	Doubles as a court room Remote location, travel to Ely for families and witness's
2. Construct new execution chamber at ESP (4,382 sf)	$3,255,300	Places execution chamber at current death row location, design has been modeled after execution facility built in California.	Remote location, travel to Ely for families and witness's
3. Construct new execution chamber at Prison 8 site (4,382 sf)	$9,100,000	Places execution chamber in Las Vegas area	Very expensive to build a stand alone building that is not near utilities, plus constructing a new road building pad , lighting security fencing.
4. Remodel NSP's existing execution chamber to comply with code and courts	Not Feasible (See # 5)	Keeps execution chamber in Carson City	Current location on the third floor does not have enough square footage and current area layout to comply with the courts and current layout that was constructed in California
5. Remodel NSP's mattress factory to an execution chamber to comply with code and courts (2,400 sf)	$2,126,000	Keeps execution chamber in Carson City	Very expensive to bring up to current building codes. Must reactivate telephone & data sytem, ugrade utilities new bathrooms, security upgrades. Expensive to provide staff to watch one inmate during time period prior to execution.

State Public Works Board — Project Cost Estimate

Project No:	3036					Funding Summary	
Description:	Remodel Administration Building to Accommodate Executions					State:	892,289
	Design and construct 1,900 square of tenant improvements for an execution chamber in the Ely State Prison Administration building					Agency:	
						Federal:	
Department:	NDOC	Division:	NDOC	Dept. Rank:	1	Other:	
Agency:	NDOC	Project Mgr:	RMO			Total:	892,289

Project Group:	Armory, Military or Prisons	Building Area:	1,900	gsf
Project Type:	Remodel	Months To Construction:	24	
Project Site:	Remote	Annual Inflation Rate:	3.00%	
Location:	Ely	Total Inflation:	6.09%	

	2012	2014
Professional Services		
A/E Design & Supervision	84,010	87,963
Surveys	0	0
Soils Analysis	0	0
Materials Testing Services	0	0
Structural Plan Check	1,426	1,469
Mechanical Plan Check	1,277	1,316
Electrical Plan Check	766	789
Civil Plan Check	0	0
ADA Plan Check	1,277	1,316
Fire Marshal Plan Check	1,407	2,175
Code Compliance Plan Check	0	0
Constructability Plan Check	0	0
CMAR Pre-Construction Service	0	0
Project Mgmt & Inspection	60,061	60,061
3rd Party Commissioning	10,000	10,615
FF&E Design Fee	20,000	21,235
Other	0	
Sub Total	**180,224**	**186,842**
Building Costs		
Construction	425,600	451,519
Construction Contingency	63,840	67,728
Green Building Equivalence	0	0
Utility/Off-Site Costs	0	0
Utility Connection Fees	0	0
Data/Telecom Wiring	950	1,008
Furnishings and Equipment	0	0
Roof Maint. Agreement	0	0
Local Government Requirements	0	0
Hazardous Material Abatement	0	0
Other	0	0
Sub Total	**490,390**	**520,256**
Miscellaneous		
Advertising	772	820
Printing	3,860	4,096
Bond Sale Costs	164	174
Agency Moving Costs	0	0
Land Purchase	0	0
Purchasing Assessment	0	0
Sub Total	**4,796**	**5,092**
Total Project Cost	**655,410**	**692,289**

REMARKS

All line item costs are estimated with the best information available in 2012. It is expected that the actual costs incurred in the 2013 to 2015 time frame will be somewhat different than the 2012 estimate. Thus, during project implementation, funds must be shifted from one category to another within the project budget by the SPWB staff. However, the total project budget cannot be exceeded unless additional funds are provided.

Construction Cost Detail:

Construction:		
1. Remodel (1,900sf @ $140/sf)		266,000
	Total	266,000
2. Remote Site Allowance (20%)		53,200
3. Secure Facility Allowance (20%)		53,200
4. Occupied Facility Allowance (20%)		53,200
	Total	425,600

Proj. No.: 3036 Remodel Administration Building to Accommodate Executions

Agency: NDOC

Location: Ely

Detail Description:

The scope of this project is to design and construct tenant improvements in the current Ely State Prison Administration Building to accommodate an execution chamber. Tenant improvements will include remodeling of approximately 1,900 square feet of Ely State Prison Administration Building's Visitation and Court Room areas.

Project Justification:

The current Execution facility is located at the now closed Nevada State Prison.
The relocation of the Execution facility to an active prison and is adjacent to Death Row at the Ely State Prison is critical to the operation of the correctional system.

Background Information:

Tenant improvements are to be based on the proposed Prison 8 model and the San Quentin, California model and include an architectural program and construction documents acceptable to the 8th District Court. State Public Works Division has developed a conceptual design and cost estimate for the facility remodel to accommodate the execution chamber.

Budget Account No. 1030
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NEVADA 89701-4717

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MICHAEL PESCETTA
ASSISTANT FEDERAL PUBLIC DEFENDER
411 EAST BONNEVILLE AVE STE 250
LAS VEGAS NV 89101

89101$6632 C075

EXHIBIT 14

EXHIBIT 14

Proposal would move execution chamber to Ely

ncs-import

Friday, September 7, 2012 (/news/2012/sep/07/proposal-would-move-execution-chamber-to-ely/)

Public Works Manager Gus Nunez on Thursday recommended a capital improvement projects budget that includes building a new execution chamber at the Ely State Prison.

The historic execution chamber is the former gas chamber at the now-closed Nevada State Prison in Carson City. Experts have said under new court rulings it may well be impossible to conduct future executions in Carson and, at present, there are more than 100 inmates on death row in Nevada.

Director of Administration Jeff Mohlenkamp said one major security advantage of building a new chamber in Ely is that those inmates are all housed there, since it's Nevada's maximum security institution. In the past, inmates had to be transported from Ely to Carson City when an execution order was issued.

According to the proposed project list, constructing an execution chamber in the Ely prison administration building would cost $692,289. That is far less than the $5.3 million estimate to build a new execution building in Southern Nevada.

Mohlenkamp, formerly the chief fiscal officer for the Department of Corrections, said the getting a new chamber - for less than $1 million that meets court-imposed standards - would be a bargain if the state was instructed by the courts to execute one of the death row inmates.

Prison spokesman Brian Connett said the plans for the execution chamber are based on the California design that has already been accepted by the 9th Circuit Court. Connett said the center will take up about 1,900 square feet of the existing administration building. He is hoping the upgrade is included in the 2014 budget.

The new execution chamber was part of a $127 million package of projects recommended by Nunez for the coming biennium. Of that total, just $79.8 million is state general fund money. Most of the rest, more than $30 million, is highway fund money.

Mohlenkamp said he doesn't yet know exactly how much money will be available for the list of projects but will have to develop an estimate by Oct. 1.

He said his office is trying to get creative because there really isn't any capacity for new bonding of projects for at least the next few years.

Nunez told the board whatever of money available will be used first on life safety and legal issues such as disability access, security issues, HVAC and electrical work and projects to prevent deterioration of state facilities.

He said one example is replacing the access bridge at the Caliente Youth Center - one of Nevada's juvenile offender institutions. He said that bridge is the only access and that, "during flooding in the past they've had to evacuate the kids by helicopter."

The life safety list, including just more than $3 million in ADA projects, totals $11.4 million.

Most of the $10.2 million in security projects goes to the prison system. That list does include renovation of the control room at Lakes Crossing, the high security facility for mentally ill and dangerous offenders.

"These projects we feel will help keep facilities functioning in a safe environment for state employees," he said.

One project that, again, is expected to be postponed is the new hotel college building at UNLV. College officials have that as one of their top priorities because they are concerned Harrah's Corp. may back out of its promise to fund half the estimated $50 million cost of the college but Nunez said there just isn't the money at this point.

HVAC and electrical work is projected to consume about $25 million of the total available and preventative maintenance some $17 million.

The Public Works Board took no action on the recommendations presented Thursday. They meet again Sept. 18 to try finalize the list.