Case No. 84081

Supreme Court of Nevada



Zane Michael Floyd,

Appellant,

vs.

The State of Nevada Department of Corrections, Charles Daniels, Director, Department of Corrections,

Appellee.

DEATH PENALTY CASE

Appeal from the Eighth Judicial District Court

# Appellant's Appendix
## Volume 1 of 4

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| | DOCUMENT | DATE | VOLUME | PAGE(S) |
|---|---|---|---|---|
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| 4. | David Ferrara, *Nevada prison officials unsure on execution method for Zane Floyd*, Las Vegas Review Journal, May 3, 2021 | 05/17/2021 | 1 | 234–238 |
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| 6. | *State v. Dozier*, Case No, 05215039, Clark County District Court, Transcript of Defendant's Motion for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner/Status Check: Protocols, Oct. 11, 2017 | 05/17/2021 | 2 | 257–277 |
| 7. | William Wan, *Execution drugs are scarce. Here's how one doctor decided to go with opioids*, The Washington Post, December 11, 2017 | 05/17/2021 | 2 | 278–281 |
| 8. | *State v. Dozier*, Case No, 05215039, Clark County District Court, Findings of Fact, Conclusions of Law, and Order Enjoining the Nevada Department of Corrections | 05/17/2021 | 2 | 282–299 |

| DOCUMENT | DATE | VOLUME | PAGE(S) |
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| Notice of Entry of Order granting Defendants' Motions to Dismiss | 01/07/2022 | 3–4 | 741–755 |
| Opposition to Defendant Azzam's Motion to Dismiss | 10/19/2021 | 3 | 689–696 |
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| DOCUMENT | DATE | VOLUME | PAGE(S) |
|---|---|---|---|
| RFB-CLB, (Dist. Nev.), ECF No. 113, June 28, 2021 | | | |
| Order Denying Plaintiff's Motion for Temporary Restraining Order with Notice and Preliminary Injunction | 06/17/2021 | 2 | 357–369 |
| Order Granting Defendants' Motions to Dismiss | 01/07/2022 | 3 | 729–740 |
| Plaintiff's Motion for Temporary Restraining Order With Notice and Preliminary Injunction | 04/16/2021 | 1 | 017–030 |
| Reply to Opposition to Motion for Temporary Restraining Order with Notice and Preliminary Injunction | 05/17/2021 | 1 | 070–086 |
| State of Nevada Ex Rel. Its Department of Corrections and Charles Daniels' Motion to Dismiss Under Nev. R. Civ. P. 12(B)(5) | 08/23/2021 | 2 | 370–380 |
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| Transcript of Proceedings Re: Plaintiff's Motion for Temporary Restraining Order and With Notice and Preliminary Injunction | 06/08/2021 | 2 | 312–356 |

## Certificate Of Electronic Service

I hereby certify that on May 18, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

v.

NEVADA DEPARTMENT OF CORRECTIONS;

CHARLES DANIELS, Director, Nevada Department of Corrections;

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

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

Defendants.

Case No.
Dept. No.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

(Exempt from Arbitration: Equitable and Declaratory Relief Requested)

**DEATH PENALTY CASE**

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

## I. INTRODUCTION

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

## II. PARTIES

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

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

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

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

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

## III. JURISDICTION

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

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

## IV. VENUE

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

## V. FACTS

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

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

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

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

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

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

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

## VI. CLAIMS FOR RELIEF

### Count I – Violation of Separation of Powers

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

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

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

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

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

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

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

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

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

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

determine Nevada's lethal injection protocol, but this time to the Director of the Department of Corrections.

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

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

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

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

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

15. All of the above inquiries go beyond fact-finding and to the core of policymaking and legislating, a task that the separation of powers specifically

forbids the Executive from performing. Nevada's democracy depends on Legislators legislating and the Executive governing. Thus, NRS 176.355's delegation of legislative power is not only a violation of Nevada's constitution, but also improper under our State's fundamental principles of governing.

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

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

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

i. **Success on the merits**

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

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

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

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

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

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

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

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

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

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

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

**ii. Irreparable harm**

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

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

**iii. No adequate remedy at law**

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

## Prayer for Relief

WHEREFORE, Mr. Floyd requests the following relief:

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

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

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

/ / /

/ / /

/ / /

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

DATED this 16th of April, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

*/s/ David Anthony*
DAVID ANTHONY
Assistant Federal Public Defender

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

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

**VERIFICATION**

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

DATED this 16th day of April, 2021.

*/s/ David Anthony*
DAVID ANTHONY
Assistant Federal Public Defender

**CERTIFICATE OF SERVICE**

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE M. FLOYD,

Plaintiff,

v.

NEVADA DEPARTMENT OF CORRECTIONS;

CHARLES DANIELS, Director, Nevada Department of Corrections;

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

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

Respondents.

Case No.
Dept. No.

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

Date of Hearing:
Time of Hearing:

(Exempt from Arbitration: Equitable and Declaratory Relief Requested)

**DEATH PENALTY CASE**

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

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

DATED this 16th day of April, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

*/s/ David Anthony*
DAVID ANTHONY
Assistant Federal Public Defender

*/s/ Brad D. Levenson*
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*/s/ Jocelyn S. Murphy*
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Assistant Federal Public Defender

## POINTS AND AUTHORITIES

## I. INTRODUCTION

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

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

## II. ARGUMENT

"NRS 33.010(1) authorizes an injunction when it appears from the complaint that the plaintiff is entitled to the relief requested and at least part of the relief consists of restraining the challenged act." *Univ. & Cmty. Coll. Sys. Of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). The standard a moving party must meet to obtain injunctive relief in the form of a temporary restraining order is the same as the standard for a preliminary injunction: "A preliminary injunction [or temporary restraining order] is available

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[1] David Ferrara, *DA to proceed with death penalty against gunman in 1999 store killings*, Las Vegas Rev. J. (Mar. 26, 2021), available at https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-gunman-in-1999-store-killings-2315637/.

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

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

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

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

To be a proper delegation of authority, the Legislature must make the "application or operation of a statute complete within itself dependent [only] upon

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[2]Article III § 1's full text provides: "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution."

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

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

> *1. The judgment of death must be inflicted by an injection of a lethal drug.*
>
> *2. The Director of the Department of Corrections shall*
>
> (a) Execute a sentence of death within the week, the first day being Monday and the last day being Sunday, that 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.
>
> *(b) Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.*
>
> (c) Be present at the execution
>
> (d) Notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.

> (e) 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.
>
> 3. The execution must take place at the state prison.
>
> 4. A person who has not been invited by the Director may not witness the execution.

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

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

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

##### a. Choosing, obtaining, and administering lethal drugs

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

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

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

Furthermore, while the statute states NDOC must consult with the Chief Medical Officer when choosing drugs, it does not require NDOC to follow or implement any protocol the Chief Medical Officer recommends, leaving room for arbitrary and capricious decision making by NDOC. If the Legislature was truly delegating fact-finding authority, then NDOC would be limited to only deciding which execution drug(s) would be used from an approved list and where to obtain the drug(s), both fact-specific circumstances that are dependent on changing

conditions. Instead, NDOC's power is limitless and NRS 176.355's operation is contingent on its decisions.

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

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

**c. Execution location**

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

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

**d. Humane executions**

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

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

Indeed, the absence of sufficient guidelines to NDOC has resulted in execution attempts that failed to comply with constitutional standards, such as when NDOC first attempted an execution using lethal gas without being provided appropriate guidance by the Legislature. Lacking guidance and left solely to their own devices NDOC engaged in arbitrary and capricious decision making (the exact conduct disallowed under proper delegations of authority) when it carried out the execution of Jon Gee by flooding Gee's cell with cyanide gas in the middle of the

night while he was sleeping. *See e.g.*, Rudolph Joseph Gerber & Jon M. Johnson, The Top Ten Death Penalty Myths: The Politics of Crime Control, 9–10 (2007). This method was not only unconstitutional, but also unsafe, and NDOC was ultimately unsuccessful in executing Gee.

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

Moreover, NDOC has even acknowledged its problematic execution protocols before the Legislature, admitting that it had conducted executions under questionable conditions at the Nevada State Prison. *See e.g.*, Ex. 1 at 125, Hearing Before the Senate Committee on Judiciary, 62nd Legis. (1983) (statement of John Slansky, Warden of Northern Nevada Correctional Center) (stating that "the gas chamber is over thirty years old, and it is unsafe" which requires "elaborate precautions" such as "antidotes for cyanide gas"); Ex. 2 at 1670 (Hearing Before the Assembly Committee on Judiciary, 62nd Legis. (1983) (statement of Vernon Housewright, Director of Prisons) (discussing NDOC's decision to utilize NSP's execution chamber for lethal gas executions, despite that it was not leak-proof and "posed a threat to other inmates in that wing").

Despite these unconstitutional occurrences, the Legislature still failed to provide suitable guidelines, which led to NDOC's continued unfettered use of its delegated authority. Notably, in 2018, NDOC again demonstrated its arbitrary decision making when it acquired an execution drug under false pretenses, ignoring the manufacturer's clear mandate that the drugs could not be used for lethal executions. *See* Richard A. Opel Jr., *Nevada Execution is Blocked After Drugmaker Sues*, N.Y. Times, (July 11, 2018), https://www.nytimes.com/2018/07/11/us/dozier-execution-fentanyl.html (describing the drug manufacturer's lawsuit against NDOC for its unapproved acquisition of Midazolam). To accomplish an execution, NDOC engaged in a subterfuge that violated the Controlled Substances Act, which is precisely why the Legislature, not the Executive, is tasked with creating standards for the Executive to follow when enforcing a punishment. NDOC was only permitted to engage in this unconstitutional behavior because the Legislature failed to provide sufficient guidelines. In fact, in the same case, NDOC was further criticized for its drug combination choice, which was deemed unconstitutional by a state court. *See* Ex. 3 (Eighth Judicial Court order finding NDOC's lethal injection protocol a violation of Petitioner's rights).[3]

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

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

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

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

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

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

## III. CONCLUSION

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

DATED this 16th day of April, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

*/s/ David Anthony*
DAVID ANTHONY
Assistant Federal Public Defender

*/s/ Brad D. Levenson*
BRAD D. LEVENSON
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*/s/ Jocelyn S. Murphy*
JOCELYN S. MURPHY
Assistant Federal Public Defender

**CERTIFICATE OF SERVICE**

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

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

EXH

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Attorneys for Plaintiff Zane M. Floyd

DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

v.

NEVADA DEPARTMENT OF CORRECTIONS;

CHARLES DANIELS, Director, Nevada Department of Corrections;

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

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

Respondents.

Case No.
Dept. No.

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

Date of Hearing:
Time of Hearing:

(Exempt from Arbitration: Equitable and Declaratory Relief Requested)

**DEATH PENALTY CASE**

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

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

DATED this 16th day of April, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

*/s/ David Anthony*
DAVID ANTHONY
Assistant Federal Public Defender

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

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

**CERTIFICATE OF SERVICE**

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

# EXHIBIT 1

# EXHIBIT 1

MINUTES OF THE NEVADA STATE LEGISLATURE

SIXTY-SECOND Session

Senate Committee on JUDICIARY

Date: February 10, 1983

Page: One (1)

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

COMMITTEE MEMBERS PRESENT:

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

STAFF MEMBERS PRESENT:

Marilyn Hofmann, Committee Secretary

SENATE BILL 109

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

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

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

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

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

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

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

# EXHIBIT 2

# EXHIBIT 2

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

MEMBERS ABSENT : None

GUESTS PRESENT : See guest list attached as EXHIBIT A.

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

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

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

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

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

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

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

# EXHIBIT 3

# EXHIBIT 3

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| SCOTT RAYMOND DOZIER,<br>Petitioner,<br>v.<br>STATE OF NEVADA,<br>Respondents. | Case No. 05C215039<br>Dept. No. IX<br><br>(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:

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ZANE MICHAEL FLOYD,

Plaintiff,

vs.

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

Defendants,

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

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

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

## I. INTRODUCTION

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

. . .

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

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

## II. BACKGROUND

### A. Floyd's complaint

#### 1. Floyd murdered four Nevadans in 1999

Lucy Tarantino, Thomas Darnell, Chuck Leos, and Dennis "Troy" Sargent were working at Albertsons on West Sahara Avenue on June 3, 1999.[2] Floyd murdered them with a 12-gauge shotgun. *Id*.

#### 2. Floyd's Separation of Powers claim

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

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[1] Br. 6:12-16.

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

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

Each of these claims is meritless, as explained below.

**B. Statutory background**

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

## III. LEGAL STANDARD

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

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## IV. ARGUMENT

### A. No likelihood of success on the merits

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

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

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

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

#### 2. NRS 176.355 is presumed valid, and it is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

In upholding a capital punishment statute that is almost identical to Nevada's,[3] the Tennessee Supreme Court explained:

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

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

. . .

. . .

. . .

[3] TENN. CODE ANN. § 40-23-114 (West 2020):

> (a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.
>
> . . .
>
> (c) The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.

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

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

## V. CONCLUSION

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

DATED this 30th day of April, 2021.

AARON D. FORD
Attorney General

By: /s/ *Steve Shevorski*
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
*Attorney for Defendant State of Nevada ex rel. Nevada Department of Corrections*

**CERTIFICATE OF SERVICE**

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

I certify that some of the participants in the case are not registered electronic filing system users. For those parties not registered, service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following unregistered participants:

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DISTRICT COURT
CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD,

Plaintiff,

v.

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

Defendants.

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

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

**(DEATH PENALTY CASE)**

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

## POINTS AND AUTHORITIES

### I. Introduction

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

### II. Argument

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

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

##### 1. Lawmaking is not a task for the Executive branch

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

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

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

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

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

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

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

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

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

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

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

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

**b. NRS 176.355 lacks critical terms**

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

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

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

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

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

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

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

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

While Floyd recognizes that the Nevada Supreme Court acknowledged former NRS 176.355's constitutionality in *Gee*, he contends that this holding was specific to the constitutional challenge brought in that particular case, and not, as Defendants propose, the court's "rejection" of every provision in Nevada's constitution as applied to NRS 176.355. Opp. at 1. Interpreting *Gee* in this manner is erroneous as it would bar all future constitutional challenges to the statute, including ones that have

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[3] Ex. 1 at 34-35 (Brief for Appellant at 34-35, *State v. Gee*, et al., 46 Nev. 418, 211 P. 676 (1923) (No. 2547)).

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

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

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

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

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

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

*See Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 302-09 (2018) (emphasis added). Likewise, Arizona's lethal injection statute also provides greater detail:

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

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

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

> corrections shall determine the substance or substances to be used and the procedures to be used in any execution."

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

> "A death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a *lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death*. The application of the drug or combination of drugs *shall be continued until the person is dead*."

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

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

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

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

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

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

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

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

[5] *Id.* at 962-80.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[13] Ex. 3 at 57.

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

## III. Conclusion

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

DATED this 17th day of May, 2021.

Respectfully submitted
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**CERTIFICATE OF SERVICE**

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

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*/s/ Sara Jelinek*
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DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| ZANE MICHAEL FLOYD,<br><br>Plaintiff,<br><br>v.<br><br>NEVADA DEPARTMENT OF CORRECTIONS; CHARLES DANIELS, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS; IHSAN AZZAM, CHIEF MEDICAL OFFICER OF THE STATE OF NEVADA; JOHN DOES 1-20, UNKNOWN EMPLOYEES OR AGENTS OF NEVADA DEPARTMENTS OF CORRECTIONS<br><br>Defendants. | Case No. A-21-833086-C<br>Dept. No. XIV<br><br>**EXHIBITS TO REPLY TO OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER WITH NOTICE AND PRELIMINARY INJUNCTION**<br><br>**(DEATH PENALTY CASE)**<br><br>**EXECUTION WARRANT SOUGHT BY THE STATE FOR THE WEEK OF JULY 26, 2021** |

| EXHIBIT | DOCUMENT |
|---|---|
| 1. | *State v. Gee, et al.*, Appellant's Opening Brief, Case No. 2547, Nevada Supreme Court, 1923 |
| 2. | Alexandra L. Klein, *Nondelegating Death*, 81 Ohio L. J. 924 (2020) |
| 3. | *Floyd v. Charles Daniels, et al.*, Case No. 3:21-cv-00176-RFB-CLB, Transcript of Evidentiary Hearing, (Testimony of Charles Daniels, (D. Nev.), May 6, 2021, (ECF No. 49) |
| 4. | David Ferrara, *Nevada prison officials unsure on execution method for Zane Floyd*, Las Vegas Review Journal, May 3, 2021 |
| 5. | Declaration of David B. Waisel, Oct. 4, 2017 |
| 6. | *State v. Dozier*, Case No, 05215039, Clark County District Court, Transcript of Defendant's Motion for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner/Status Check: Protocols, Oct. 11, 2017 |
| 7. | William Wan, *Execution drugs are scarce. Here's how one doctor decided to go with opioids*, The Washington Post, December 11, 2017 |
| 8. | *State v. Dozier*, Case No, 05215039, Clark County District Court, Findings of Fact, Conclusions of Law, and Order Enjoining the Nevada Department of Corrections from Using a Paralytic Drug in the Execution of Petitioner, Nov. 27, 2017 |
| 9. | Floyd v. Daniels, et al., Case No. 3:21-cv-00176-RFB-CLB, (D. Nev.) Motion to Withdraw as Attorney of Record for Dr. Ishan Azzam, May 4, 2021 (ECF No. 41) |

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DATED this 17th day of May, 2021

Respectfully submitted
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**CERTIFICATE OF SERVICE**

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

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# EXHIBIT 1

# EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

The State of Nevada, Plaintiff,
and Respondent
vs

Gee Jon and Hughie Sing, Defendants
and Appellants

## Appellant's Opening Brief

Statement of the case: The defendants, Gee Jon and Hughie Sing, were tried and convicted in the Seventh Judicial District Court of the State of Nevada, in and for the County of Mineral, upon an information charging the defendants with the crime of murder alleged to have been committed on or about the 27th day of August, 1921. The person alleged to have been killed was Tom Quong Kee, an old chimaman, residing at Mina in Mineral County, Nevada, in a place known as the "Chinese Laundry", situated in the chinese quarter of the town of Mina.

The testimony offered and received at the trial was entirely circumstantial in its nature with the exception of an alleged confession made by Hughie Sing, one of the defendants, wherein it was alleged that he had admitted his participation in the killing of Tom Quong Kee and designating his co-defendant, Gee Jon, also as a participant, and as the person who fired the fatal shots that resulted in the death of the deceased.

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

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

Before the trial of the above entitled cause commenced the defendants, Gee Jon and Hughie Sing, each for himself, demanded a separate trial and moved the Court to grant each of them a severance upon the ground that evidence would be offered on behalf of the State which might be held competent, relevant and material against one of the defendants, and that the same evidence was not competent, relevant or material or admissible at all against the other defendant, and particularly upon the ground that the State relied upon and would offer in evidence an alleged confession of the defendant, Hughie Sing which would not in any manner be binding upon, or admissible against his co-defendant, Gee Jon, all of which would be prejudicial to him and that each of the defendants would be prejudiced by testimony offered against the other which in no manner would be admissible against the other, and that the nature of such evidence would inevitably have its bearing upon the question of the guilt or innocence of the other defendant if the defendants should be tried jointly and the evidence offered, although admissible against one before the same jury that tried the other.

It was admitted by Counsel for the State that such evidence including the confession of Hughie Sing would be offered in evidence, but contending that instructions of the Court limiting such evidence to the particular defendant against whom it was admissible and excluding the same from the consideration of the jury as to the other defendant

would be sufficient to protect such other defendant against any injury therefrom because of the admission of such evidence in the presence of the jury and a consideration of the same by the jury as to the other defendant.

The Court denied defendants motion for a severance, to which the defendants duly excepted, and the denial of said application is the first error found by Appellants. As before stated, testimony of certain receipts and other documents found in the possession of Gee Jon, and not binding upon or competent against Hughie Sing was admitted in evidence for the purpose of showing motive, and here we might further state that while the same, if admissible at all, the same being found upon his person after the commission of the alleged offense, would only be admissible against the defendant, Gee Jon, and therefore inadmissible against his co-defendant and that the same should have been so limited by proper instruction, all of which was not done in this case. In any event, if the same had been limited by instruction to the defendant, Gee Jon, the same necessarily would have been prejudicial to the defendant, Hughie Sing, and no doubt considered by the jury without nicely gauging its probative value and applying it strictly to the defendant Gee Jon. On the other hand, the purported confession of Hughie Sing was admitted in evidence wherein he pointed the finger of accusation against his co-defendant Gee Jon, accusing him of actually firing the fatal shots that resulted in the death of the deceased. All of the things anticipated by the defendants motion for a severance, and which were admittedly within the expectation of

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

It also appeared from the undisputed testimony of the States witness, Deputy Sheriff Hammill, that the alleged confession of Hughie Sing was made under inducements and by promises that it would be better for him and demonstrating that any alleged statement of Hughie Sing comes clearly within the class of involuntary confessions, which are always held inadmissible and necessarily prejudicial. Error is assigned in overruling objections to the admission of the alleged confession of Hughie Sing, and also in the Court denying the defendants motion to strike such testimony after it appeared from the testimony of Witness Hammill that such confession was inadmissble.

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

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

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

of incompetent testimony upon the trial, and also moved in arrest of judgment because of the invalidity of the statutes of the State of Nevada imposing the death penalty upon the ground that the statute is indefinite and uncertain and that no valid judgment could be rendered thereon, and that the punishment prescribed by the statute was cruel and unusual in its nature and prohibited both by the State and Federal Constitution. The defendants motion for a new trial and in arrest of judgment was denied and exception thereto duly taken, and the case is brought here on appeal from the order denying defendants motion for a new trial and also from the judgment pronounced against the defendants by the Court imposing the death penalty, all of which has been assigned as error, prejudicial to the defendants and for which it is contended that the judgment and order denying defendants motion for a new trial should be reversed and a new trial granted.

First error assigned, denying the demand of the defendants for separate trials:

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

cause shown, the court shall otherwise direct," a separate trial could not be had as a matter of right merely by demanding the same. The section above quoted, however, makes it imperative upon good cause being shown, where two or more parties are jointly charged, for the Court to grant a severance. The only question therefore that is presented by the record in the case at bar is as to whether good cause was shown by the defendants, or either of them, for the granting of separate trials. If such good cause was shown, then the statute confers the right of separate trials upon the defendants. The only reason then that would justify the trial court in refusing to grant a separate trial upon the application of persons jointly charged with the commission of a crime would be either that the facts shown did not in fact constitute good cause as a matterof law, or that the cause shown or alleged to exist did not in fact exist.

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

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

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

to separate trials, but that notwithstanding the same the Court in its discretion might order the defendants notwithstanding the good cause shown tried jointly. This we contend is not the law. It was manifestly contemplated by the legislature that cases would arise where in the very nature of things the fair administration of justice would require the granting of separate trials to persons jointly charged with the commission of crime. If such had not been the contemplation of the legislature then it would have declared affirmatively that all persons jointly charged must be tried jointly. It was therefore provided in the furtherance of justice and so that the equilibrium of the scales of justice should not be disturbed that it was provided by the above section that for good cause shown the defendants jointly charged should be tried separately. It would be hard to imagine a condition as the same existed in this case which could be more imperative that the defendants be tried separately than which existed at the case at bar. The antagonistic positions occupied by the defendants, and the fact that one of them, Hughie Sing, had made a confession wherein it is alleged that he pointed the finger of accusation at his co-defendant while excusing himself by stating that he had no knowledge of the intention on the part of his co-defendant to kill the deceased, he directly accused his co-defendant, Gee Jon, with the firing of the shot that killed the deceased. This evidence was actually submitted to the jury and given to them for their consideration and while they were instructed that the same could only be considered as effecting the guilt or innocence of

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

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

governed by the same rules as obtain in determining the existence of any other fact. If the evidence is undisputed or if thefacts alleged are admitted and constitute good cause then the Court is bound to the same extent that he would be bound in determining any other question of fact; that is to say by that which is ultimately established by the evidence, and if the same is undisputed then the findings must be in accordance with the facts. It is only in the case of conflicting evidence or where two conclusions can reasonably be drawn from the same state of facts that the Court would not interfere with the findings of the trial Court. Then what is <u>good cause</u> for the granting of separate trials? If the appeal to reason and to the common experience of men to determine as to whether the facts hereinbefore set out constitute good cause, the answer must inevitably be in the affirmative. As to the law upon the subject we find that the particular circumstances of each case must control in determining the question as to whether in the furtherance of justice a severance should be granted. It is universally held that in the case of conflicting defenses where one defendant by admissions and confessions seeks to throw blame upon the other, and where such testimony is admissible against one and not against the other, then that in cases where the granting of the severance was within the discretion of the Court merely that a refusal to grant a severance under such circumstances amounts to an abuse of discretion and constitutes reversible error, it being held distinctly that such a state of facts as hereinbefore mentioned constitutes good cause and makes it imperative that

separate trials be granted.

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

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

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

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

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

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

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

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

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

The doctrine that a person shall not be required to accuse himself, or to be a witness against himself, is of ancient origin. It was crystallized into a maxim by the Common Law and was one of the provisions of the common law that was carried into this country at the time of the Declaration of Independence, and was afterwards amplified and embodied in the fundamental law of this country by the fifth amendment of the Constitution of the United States. The same principle was clearly established in this State in Article ONE, Section Eight, Constitution which declares "no person ** shall be compelled in any criminal case, to be a witness against himself". In the case at bar the testimony offered primarily as a foundation to the introduction of the confession of Hughie Sing was meager. The strongest statement of the facts as shown by the evidence was that Chief Kirkley had said to Hughie Sing that we want to talk to you and what you say may be used against you. It must be observed that all of the persons present upon this occasion, other than the defendant, Hughie Sing, were officers of the law and that no intimation by word or act was given to the defendant Hughie Sing to indicate that he was not obliged to answer questions propounded to him, and further that all statements made by the defendant Hughie Sing were made in response to a direct interrogatory propounded to him, and that the speaker spoke as one clothed with authority and while this Chinese boy of nineteen years of age was advised that what he said, according to the version of Chief

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

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

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

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

Fourth error assigned, relating to admission of diagram.

This assignment of error is predicated upon the admission in evidence of a photograph offered for the purpose of illustrating the condition of the door of the deceased's house and certain bullet marks upon the door wherein a pencil was placed in position to indicate the course that the bullet had taken through the door for the purpose of corroborating and identifying certain bullets found in the body of the deceased and in the floor of the cabin.

This testimony was offered in corroboration of the confession of Hughie Sing. Appellants are not contending that photographs are not admissible for the purpose of illustrating the surroundings as long as the same correctly portrays the real situation, but Appellants do contend that any addition to that which actually appeared and especially the placing of a pencil so as to indicate the range or course of a bullet in fact amounts to receiving evidence out of Court, the mere conclusion of the witness, and that the insertion of a pencil or any other instrument to emphasize the conclusions of the witness is rank error and prejudicial to the defendants. Appellants contention is best illustrated by the language of our own Court speaking through Mr. Justice Talbot in the case of the State vs Roberts, 27 Nevada 449, wherein that learned Justice speaking for the Court said: "of the four photographs offered on the trial, the one of the wound in the back after it had been opened by the knife of the surgeon was properly excluded by thecourt, because the bullet hole was no longer in the condition caused by the defendants."

The above testimony constituted a vital link in the chain of circumstances, and its admission necessarily of the most prejudicial character. Beyond the question of the change in the appearance of the bullet mark alleged to have been made by the defendants, it also injected into the case the mere conclusion of a witness, who at the time of the making of the illustration by the placing of the pencil was not under oath and not subject to cross-examination, and the admission of the same in our opinion violated every rule of evidence and deprived the defendants of a substantial right guaranteed by law and a part of due process of law. The same amounted to receiving evidence out of Court. It is clear, under the authorities, that while photographs are competent for the purpose of illustration when the same is shown to actually portray a real condition as made by the defendant; the same is never receivable after any change in the appearances for which the defendant is not responsible. Whenever the appearance is to any extent changed through agencies other than that of the defendants, then the photograph ceases to be an illustration of a condition made by the accused and is tinctured possibly with conclusions of others and it is sufficient that the same does not in fact portray the condition made by the defendants to illustrate which is the only purpose for which a photograph is admissible. As above stated, in State vs Roberts, supra, the opening of the wound by the surgeon's knife was alone sufficient to rob the photograph of its vitality as illustrative of the condition of the wound produced by the defendant. It therefore follows not only by authority but

upon sound reason that any addition or subtraction, or any change whatsoever in the condition as the appearances represented by the photograph takes it out of the rule of admissibility and renders the same clearly incompetent, and the admissibility of such evidence error. It would be just as competent after a body had been moved and appearances altered to receive in evidence a photograph as illustrative of the surroundings and situation of the defendant and the deceased at the time of the homicide. Any change in the condition the appearances of which are sought to be illustrated by photographs clearly renders the same inadmissible.

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

It was prejudicial error to admit State's Exhibit No. 10, an Automatic Colt's Pistol, in evidence. The sole foundation for the admission of the same, and its identification rested upon the alleged confession of Hughie Sing, which has heretofore been fully presented to the Court. This evidence being incompetent, the entire identification and foundation for admitting this exhibit in evidence resting upon incompetent evidence leaves the same devoid of authenticity, and inadmissible for any purpose. Without this confession there is nothing in the record to connect the defendants or either of them with this exhibit. The admission of the same was therefore error and manifestly prejudicial.

It is also,urged that the trial court committed error prejudicial to the defendants in permitting the Witness Hammill to testify concerning Exhibit No. 11, which was a Colt's Revolver, alleged to have been found the day following the homicide in the automobile of the witness Pappas, in which defendants had made the trip to Mina, and also in admitting this exhibit in evidence. There is a complete hiatus in the chain of testimony attempting to connect this weapon with the defendants. The same was found in the automobile sometime after the defendants had left the automobile and after the same had been in the exclusive possession and control of others, and was for a period unattended by any one, so that ample opportunity existed for some agency other than the defendants to have placed this gun in the automobile. The necessary foundation and connection between the defendants and this gun was notpresent in the evidence. This error is fundamental and necessarily highly prejudicial to the defendants. The error is so palpable that the citation of authorities is unnecessary.

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

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

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

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

The admission of this evidence over defendants objection was highly prejudicial to the defendants. First, there was no proper foundation laid for their introduction in evidence, or any connection whatsoever shown between these exhibits and the killing of the deceased. The same was manifestly offered for the purpose of proving motive and there was not a scintilla of testimony in the record to show the object or purpose of the alleged Hop Sing Tong or that the same had any more connection with the killing of the deceased than the Seventh Book of Moses. The object or purpose of such an organization, or that the defendants were in fact members thereof was not at all proven and any assumed connection between the testimony contained in the exhibits and the killing of the deceased was nothing more than speculative, and to draw a conclusion or in order that the same might raise a presumption against the defendants would amount merely to basing one presumption upon another. In the first place, it would be necessary without proof to presume that some connection did exist and secondly after so presuming it would be necessary to also infer some evidence by reason of the same proving motive and establishing a connection with the crime. This cannot be done. The testimony was not only not admissible against Gee Jon, the defendant in whose possession the exhibits were found, but as to the defendant Hughie Sing who was not shown to have had any possession of the exhibits or even to have known of them, there is no theory whatever that

would justify the admission of such evidence against the defendant Hughie Sing. Under the rule as announced at the beginning of the trial and at the time separate trials were denied the defendants because evidence that might be admissible against one but not the other would be offered it was then stated that such evidence would be admitted only as to the defendant against whom it was admissible and the jury instructed to disregard such evidence as to the other. As to the exhibits hereinbefore referred to no restriction was placed by the Court in admitting them for the purposes for which they might be considered, or as to which defendant they might be considered. We find as to the above exhibits that Hughie Sing is bound by evidence and the same admitted against him without the slightest connection either actually or by any fair inference. It is clear that this testimony could not under any circumstances be legally received against Hughie Sing - that he was not shown to have had either possession or any knowledge of them.

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

fered by the prosecution. In this connection we call attention to the statement made by Mr. Green, Counsel for the State in his closing argument to the jury. This emphasizes the use to which this testimony was put after the same had been admitted for the consideration of the jury.

In this connection, we also call attention to Assignment No. 17 wherein error is assigned to the remarks of the District Attorney with reference to tong wars. These remarks made in the closing argument were not based upon any legitimate inference deducible from the evidence in the case. The very nature of the remarks tended to inflame the minds of the jury against the accused men and to invite particularly the attention of the jury contained in exhibits admitted in evidence, and which as we have before pointed out were clearly inadmissible. In this case where the issue was life or death and where the fixing of the punishment rested entirely in the discretion of the jury the slightest prejudice arising from any error of a substantial nature was likely to turn the scale against the defendants. This must have been one of the causes that contributed to the jury fixing the death penalty and exercising its discretion against the defendants and especially when one of them was a mere boy in years and experience. We insist that in imposing the extreme penalty and cutting away the pound of flesh the most exact nicety must be observed and that the slightest error may have been the procuring cause of the rendition of the verdict with the death penalty. We insist that the most stupendous error was thus committed and that the same should without question be sufficient to call for a reversal.

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

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

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

question of fact. State vs Pappas 39 Nevada 40
Here the Court held that the inference from the use of a deadly weapon was an inference of fact and not of law and that instruction telling the jury that the law presumed the intent from the use of a deadly weapon was erroneous.

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

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

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

agencies, and then its mission is complete and its conclusions irrevocable."

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

"In view of the fact that the court instructed the jury 'the jury must receive as law what is laid down as such by the court' the natural presumption becomes conclusive that the jury did consider the erroneous instruction."

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

We respectfully submit that the above instruction as given by the Court did not correctly state the law, was well calculated to mislead the jury and prejudicial to the defendant.

Fourteenth assignment of error relating to the giving of Instruction No. Thirteen as follows:

"The Court instructs the jury that the rule of law which throws around the defendants the presumption of innocence and requires the State to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty, from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime."

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

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

Our own statute, Section 7163, Revised Laws, 1912, is as follows: "A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted."

The law as written in this State fortunately does not confine the right to the presumption of innocence to a favored class who are innocent per se but the right is accorded to all persons accused of crime and continues to exist throughout the entire trial and until such time as the guilt of the accused is proved beyond a reasonable doubt. As we have before observed, it is one of the elements in the nature of evidence in the defendant's favor, which in the very nature of things becomes an integral part of that presented to the jury for their consideration in determining whether or not the defendants are in fact guilty. If innocent and the innocent the only ones entitled to the benefit of the presumption why mention it at all, for if innocent and the innocence of the defendant once established then such defendant would not need the protection of such a presumption. We again assert that the true doctrine is that this presumption of innocence attaches to all persons accused of crime and continues to exist until swept away by

evidence establishing the guilt of the defendant beyond a reasonable doubt, and in determining whether the evidence does in fact remove all reasonable doubt and establish the guilt of the defendant to the satisfaction of the jury, the presumption of innocence is a tangible element to be considered just like any other fact in the case and to limit the application of the doctrine to the protection merely of the innocent would be to destroy the probative value of the rule as it exists and rob it of all its vitality intended for the protection of human kind, and while we still may boast of this humane doctrine as one of the maxims of our law, if the above given instruction is held to be the law, then only the form remains of what was once an impregnable protection while we have destroyed the substance. We also complain that the above instruction assumes the guilt of the accused, invades the province of the jury, and amounts to an assumption upon the part of the court that the defendants are guilty of the crime without qualification or making the rule depend upon whether the jury <u>believes</u> the defendants to be guilty, or giving them the right to determine for themselves the question of the guilt or innocence of the accused. In the case of the State vs Duffy, 6 Nevada 139, and State vs Burrelli, 27 Nevada 55, the same question was passed upon by this Court and distinctly held that an instruction assuming a fact to exist which was controverted amounted to an invasion of the province of the jury and a violation of Article VI of the Constitution of Nevada which prohibits the Court from charging the jury upon questions of fact. In the case of the State vs Duffy, Supra, the ob-

jectionable expression contained in the instruction and for which the case was reversed was "the guilt of the defendant rests upon circumstantial evidence". It was there held that this amounted to an assumption on the part of the Court that the defendant was guilty and must have been so understood by the jury. In the case at bar the statement 'that the rule of law which throws around the defendants the presumption of innocence, etc' is not a general abstract statement, stating a more abstract proposition, but by the instruction it is applied to the defendants, meaning Gee Jon and Hughie Sing, and in connection with the reference distinctly pointing out the defendants the court used the expression 'is not intended to shield those who are actually guilty from just and merited punishment'. This amounts to an unqualified assumption on the part of the court that the defendants Hughie Sing and Gee Jon are guilty and that the presumption of innocence is not for their benefit. The instruction practically nullifies the statutory declaration of the time honored maxim that persons accused of crime are presumed to be innocent until their guilt is proven beyond a reasonable doubt. The prejudice necessarily flowing from the giving of this instruction is manifest and constitutes reversible error.

Sixteenth assignment of error relating to the giving of instruction Number twenty-six, in part as follows:

"If you believe, from the evidence, beyond a reasonable doubt, the defendants ********** went to the place where Tom Quong Kee, deceased, resided, with the wilful and deliberate and premeditated purpose of taking his life, and that said defendants, with such intent, shot and killed the deceased, then and in that event, the defendants are guilty of murder in the first degree."

The above instruction assumes to give the jury the sum total of all the elements of the crime of murder and all that was necessary to justify convicting the defendants for that offense.

The instruction is fundamentally incorrect. It does not require proof that the killing was unlawful, neither does it require a felonious homicide, nor

that the killing was done with malice aforethought. This element and each of them are essential elements of the crime of murder. Murder cannot exist without first an unlawful and felonious killing; second, there must be malice aforethought coupled with wilfulness, deliberation and premeditation.

By the above instruction the jury is authorized to convict the defendants of murder of the first degree without proof of an unlawful killing with malice aforethought. These essential elements of the crime are entirely omitted from the instruction. A defendant may act wilfully, with premeditation and deliberation and yet not be guilty of murder. The killing in self-defense may contain all of these elements. State vs Vaughan, 22 Nevada, 299. The Court there said, speaking through Chief Justice Bigelow:

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

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

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

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

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

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

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

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

Twentieth assignment of error relating to the overruling of defendants motion in arrest of judgment:

This motion raises the contention that the infliction of the death penalty by the administration of lethal gas as provided by our statute amounts to the infliction of cruel and unusual punishment, prohibited by the Constitution of the United States and the Constitution of the State of Nevada, and that the section of the statute prescribing the punishment is indefinite and uncertain as to the formula to be employed so that if the judgment of the Court be definite and certain as to the manner of inflicting the punishment, then a judicial officer would necessarily be clothed with legislative power, it being necessary for the court to interpolate into the judgment that which is not provided by law and the judge would become a law-maker as well as a judicial officer; and again, if the judge pronounced his judgment in accordance with the law without adding to the same his version of what he might think the law ought to be, then the Warden of the State Prison, a non-judicial officer, would not only be clothed with executive authority, but also would become a law-maker, as well as an interpreter of the law for it would be necessary for the

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

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

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

void. The section of the Statute in question does not definitely provide anything as to mode, means or the exact kind of lethal gas which is to be used. As we have before said the term lethal gas covers a broad range, the term meaning simply "deadly gas" which embraces within the term and meaning not only the kind that would produce sleep and unconsciousness, but also the kind that disfigures the body and inflicts the most horrible and painful injuries upon the person to whom it might be administered. So far as we are aware the various modes of execution whether the same be the axe, gallows, electric chair, or the method of shooting - in each case the mode and manner of the execution is not only definitely ascertained and known, but is also specifically directed not only in the law but also in the judgment, and the warrant of execution. There is a definite method provided in executions by electricity which prescribes the manner of execution and precludes the possibility of a protracted torture in cases of executions by electricity. And the same is also true of every other method of execution employed by civilized people.

The most that can be said of lethal gas is whatever formula it may be applied is that it is merely experimental, some of the properties of which is as yet unknown and still others known to be the most horrible of all substances that might be administered. It has been decided by this Court in the case of the Meleod vs Miller and Lux that this Court will without proof take notice of scientific facts and matters of scientific research, as all such matters are presumably within the knowledge of the Court.

We therefore respectfully submit that the act under which the death penalty was pronounced in this case is unconstitutional and void, not only as violative of the Constitutional provisions prohibiting cruel and unusual punishment, but that the same is also void for uncertainty and that the judgment pronounced in pursuance thereto is also void, and that it was therefore error for the trial Court to deny the defendants motion in arrest of judgment, and that the same calls for a reversal.

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

Respectfully submitted:

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# EXHIBIT 2

# EXHIBIT 2

# Nondelegating Death

ALEXANDRA L. KLEIN*

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

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

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

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* Visiting Assistant Professor of Law, Washington and Lee University School of Law. I am grateful for the thoughtful and valuable feedback I received at the 2019 University of Richmond School of Law Junior Faculty Forum and the American Constitution Society's 2020 Constitutional Law Scholars Forum, as well as the support of the Frances Lewis Law Center at Washington and Lee University School of Law. Thanks to Rachel Barkow, Eric Berger, David Bruck, Michal Buchhandler-Raphael, Michael P. Collins, Jr., Deborah Denno, Brandon Hasbrouck, Arnold Janicker, Corinna Lain, Paul J. Larkin, Jr., Timothy MacDonnell, Robert Montville, Michael Morley, Alison Ramsey-Henry, Franklin Runge, Chris Seaman, Jonathan Shapiro, Meghan Shapiro, Joan Shaughnessy, and Karen Woody. Special thanks to Natalie Gordon, Joanna Thomas, Senuri Rauf, and Jac Andrade for their exceptional research assistance.

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

TABLE OF CONTENTS



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

## I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

and procedures, most notably the chemicals to be used, for a state execution."[8] This violated the state's nondelegation doctrine and rendered Arkansas's method of execution statute[9] facially unconstitutional.[10]

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

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

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[8] *Id.* at 854.

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

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

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

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

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

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

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

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

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

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

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

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

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[18] 139 S. Ct. 2116 (2019).

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

[20] *Id.* (Alito, J., concurring).

[21] *See infra* Part V.A.

[22] *See infra* Part II.B.

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

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

[25] *See infra* note 273 and accompanying text.

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

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

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

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

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

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

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

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

## II. METHODS OF EXECUTION

Deciding how an inmate dies and who kills[29] them is a thorny and long-standing issue in capital punishment. A hallmark of the American system of capital punishment is willingness within the executive branch to pass the duty of killing, and the details of that action, to another person or institution.[30] Legislative delegation to agencies, discussed *infra*, is properly characterized as one component of the broader system of responsibility-shifting in capital punishment.[31]

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

### A. *Historic Delegation and Responsibility for Killing*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[41] BANNER, *supra* note 36, at 38.

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

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

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

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

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

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

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

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

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

[49] BANNER, *supra* note 36, at 173.

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

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

[52] *Id.* at 176.

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

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

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

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[53] *Id.* at 174.

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

[55] *Id.*

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

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

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

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

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

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

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

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

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

## B. *Minimizing Accountability for Killing*

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

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

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

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

[64] *Id.*

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

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

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

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

execution team members[69] or suppliers,[70] and may exempt execution procedures from state freedom of information laws.[71] Execution protocols track statutory secrecy and establish procedures to hide the execution team's identities.[72] Concealing executioners' and suppliers' identities shields them from possible negative consequences in their communities.[73] It also serves symbolic functions. It is not the individual executioner who kills, but the embodiment of the state.[74]

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

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

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

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

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

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

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

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

The lethal injection machine Fred Leuchter[78] developed exemplified this principle.[79] In *The Execution Protocol*, Stephen Trombley explains, "The basic design requirement . . . is that it should kill quickly and efficiently, and in a way that causes the least pain and distress to the condemned person, the executioners, and the witnesses."[80] The machine used two modules, one to deliver the drugs

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

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

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

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

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

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

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

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

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

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

[82] TROMBLEY, *supra* note 78, at 79.

[83] *Id.*

[84] *Id.*

[85] BRANDON, *supra* note 37, at 235.

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

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

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

[89] *Id.* at 88–89.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[101] *See id.*

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

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

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

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

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

[107] Ohio's protocols refer to the executioner as a "Drug Administrator." *See* OHIO PROTOCOL, *supra* note 72, at 16–17.

[108] *Id.* at 16, 18.

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

[110] Dubber, *supra* note 14, at 562.

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

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

## III. THE NONDELEGATION DOCTRINE

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

### A. *State Nondelegation Doctrines*

The last time the Supreme Court found a legislative delegation impermissible under the nondelegation doctrine was in 1935.[117] Since that time,

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

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

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

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

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

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

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

the Supreme Court has consistently permitted Congress to make substantial delegations of powers to agencies and executive officials provided that Congress supplied an "intelligible principle" to guide the legislature's discretion.[118] For that reason, many scholars concluded that the nondelegation doctrine was mostly, if not completely dead.[119] Others have suggested that courts could resurrect the nondelegation doctrine, even if in a slightly different form than it took in 1935.[120] Still other scholarship points to interpretive canons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[131] *See id.* at 19.

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

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

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

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

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

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

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

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

[136] *Askew*, 372 So. 2d at 924.

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

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

[139] Brown, *supra* note 115, at 1527.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## B. *Recent Developments in the Federal Nondelegation Doctrine*

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

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

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

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

[150] *Id.* at 269–70.

[151] Rossi, *supra* note 118, at 1198.

[152] *See infra* Part IV.B.

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

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

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

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

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

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

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

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

Justice Gorsuch reframed the intelligible principle inquiry against these principles:

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[157] *Gundy*, 139 S. Ct. at 2129–30.

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

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

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

[161] *Id.* at 2141.

[162] *Id.* at 2136–39.

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

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

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

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

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

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

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

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

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[167] *Gundy*, 139 S. Ct. at 2141.

[168] *Id.* at 2145.

[169] *See id.* at 2131.

[170] *See id.* at 2134.

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

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

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

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

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

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

## IV. NONDELEGATION CHALLENGES TO METHOD OF EXECUTION STATUTES

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

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

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

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

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

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

[180] ALA. CODE § 15-18-82.1(a)–(b).

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

[182] CAL. PENAL CODE § 3604(a).

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

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

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

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

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

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

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

[187] *See* ALA. CODE § 15-18-82.1(a).

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

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

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

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

[192] *See supra* note 183 and accompanying text.

[193] UTAH CODE ANN. § 77-18-5.5(3).

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

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

that drugs should "quickly and painlessly cause death,"[196] or "cause death in a swift and humane manner."[197]

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

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

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

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

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

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

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

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

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

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

202 *Hobbs*, 412 S.W.3d at at 847.

203 *Id.* at 847–50.

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

205 *Id.* § 5–4–617(a)(2).

206 *Hobbs*, 412 S.W.3d at 849.

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

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

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

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

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

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

[211] *Hobbs*, 412 S.W.3d at 852.

[212] *Id.*

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

[214] *Hobbs,* 412 S.W.3d at 854.

[215] *Id.* at 854.

[216] *Id.*

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

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

After *Jones*, the Arkansas Legislature amended the AMEA in 2013, adopting a single-drug barbiturate protocol that also required ADC to administer a benzodiazepine[222] to the inmate before initiating the execution.[223] Inmates again brought nondelegation claims, including allegations that the amended AMEA did not constrain ADC's discretion in drug administration, selection, and training members of the execution team.[224] When that case, *Hobbs v.*

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[217] *Id.*

[218] *Id.*

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

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

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

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

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

[224] *McGehee*, 458 S.W.3d at 710.

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

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

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

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[225] 458 S.W.3d 707 (Ark. 2015).

[226] *Id.* at 718.

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

[228] *Id.* at 717.

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

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

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

[232] *Id.* at 54–55.

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

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

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

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

## B. *Nondelegation Challenges to Method of Execution Statutes*

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

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

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

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

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[237] *Ex parte* Granviel, 561 S.W.2d 503, 507 (Tex. Crim. App. 1978) (en banc).
[238] H.B. No. 945, 65th Gen. Assemb., Reg. Sess. § 1 (Tex. 1977).
[239] *Granviel*, 561 S.W.2d at 514.
[240] *Id.*
[241] *Id.* at 515.
[242] *Id.*
[243] *See id.* at 514
[244] *Id.* at 515; *id.* at 507–08 (quoting the complete affidavit); *see also* BANNER, *supra* note 36, at 297.
[245] *Granviel*, 561 S.W.2d at 508.
[246] *Id.* at 515.
[247] Zink v. Lombardi, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at *6 (W.D. Mo. Nov. 16, 2012); Sims v. Kernan, 241 Cal. Rptr. 3d 300, 308–09 (Cal. Ct. App. 2018); Sims v. State, 754 So. 2d 657, 668–69 (Fla. 2000) (per curiam); State v. Osborn, 631 P.2d 187, 201 (Idaho 1981); State v. Ellis, 799 N.W.2d 267, 289, 289 nn.51–52 (Neb. 2011).

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

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

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

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[248] *Osborn*, 631 P.2d at 201.

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

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

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

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

[253] *Id.*

[254] *See id.* at 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[264] *Ellis*, 799 N.W.2d at 289.

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

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

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

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

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

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

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

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

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

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

[273] *Brown*, 237 P.3d at 270.

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

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

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

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[274] *Id.*

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

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

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

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

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

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

[281] *Id.* at 1058.

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

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

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

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[282] *Id.*

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

[284] *Id.* at 1058.

[285] *Id.*

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

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

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

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

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

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

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

## V. NONDELEGATING DEATH

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

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

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

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

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

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

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

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

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

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

### A. *Why Nondelegation?*

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

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

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

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

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

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

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

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

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

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

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

[305] *Id.* at 1012–17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[317] *See* ZIMRING & HAWKINS, *supra* note 275, at 100 (discussing state legislatures' freedom to pass "symbolic legislation" and evade responsibility).

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

[319] *See* ZIMRING & HAWKINS, *supra* note 275, at 100; Cass, *supra* note 120, at 154 (discussing political benefits to legislators).

[320] Denno, *When Legislatures Delegate Death*, *supra* note 14, at 65.

[321] *See* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 87–88 (discussing Florida's shift to lethal injection); *id.* at 118–20 (discussing the optics of lethal injection); Deborah W. Denno, *The Lethal Injection Quandary*, *supra* note 27, at 116 (2007); Denno, *When Legislatures Delegate Death*, *supra* note 14, at 125; *see also* Interim Report No. 14 at 4, In the Matter of the Multicounty Grand Jury, State of Okla., Nos. SCAD-2014-70, GJ-2014-1 (May 19, 2016), https://files.deathpenaltyinfo.org/legacy/files/pdf/MCGJ-Interim-Report-5-19-16.pdf [https://perma.cc/7G2Q-HKN7] [hereinafter Interim Multicounty Grand Jury Report] (explaining that the Department of Corrections revised its execution protocols after "complications" arising from Clayton Lockett's execution).

[322] *See* Berger, *Individual Rights*, *supra* note 267, at 2065–66 (explaining the importance of transparency in judicial review of administrative decision-making); Hessick & Hessick, *supra* note 172, at 34–36 (discussing how delegation exacerbates the "fiction" of "notice to the public of their legal obligations").

[323] THE DEATH PENALTY IN AMERICA 14 (Hugo Adam Bedau, 3d ed. 1982).

[324] *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1145–48 (2019) (Sotomayor J., dissenting).

surrounding execution protocols and changes to protocols (due in no small part to agency discretion) leave inmates often unable to challenge protocols or decisions about executions until close in time to executions.[325] *Cook* illustrates this point: the Arizona Department of Corrections' discretion to make last-minute revisions to execution protocols threatened "to 'usurp the powers,' of the Judiciary" by undermining its ability to engage in judicial review.[326] Part of the challenges of rapid judicial review may stem from courts' unwillingness to stay executions, but altering protocols immediately before execution or during litigation unquestionably impacts judicial review, particularly when agencies are not constrained by procedural or fact-finding requirements.

Excessive delegation and limited accountability and transparency undermine the perception of the legitimacy of the death penalty. Delegation "is closely connected both with the rule of law concept and the theory of representative government."[327] Requiring legislation to have defining standards "serves the function of ensuring that fundamental policy decisions will be made, not by some appointed bureaucrats, but by the elected representatives of the people."[328] Ronald Cass emphasizes that the question of legitimacy "goes beyond Locke's declaration that the people have not consented to a grant of legislative power to others."[329] Instead, Cass contends that legitimacy is linked to concerns about accountability: legislators benefit from granting power to others, and that self-interest undermines legitimacy.[330] Legislative enactments, as opposed to agency determinations, may better reflect democratic, as opposed to purely majoritarian, decision-making.[331]

To be sure, courts have emphasized that the Executive is directly accountable to the people, and so that branch can reasonably make policy determinations to "resolve the competing interests which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[332] But majoritarian reasoning ignores the plight of politically unpopular groups.[333] Delegating to administrative agencies the task of crafting execution protocols

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[325] *See id.* at 1147–48 (Sotomayor, J., dissenting); *see also generally* KONRAD, *supra* note 24.

[326] Cook v. State, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012); *see also supra* notes 277–84 and accompanying text (discussing *Cook*).

[327] Schwartz, *supra* note 120, at 445; Sunstein, *Nondelegation Canons*, *supra* note 121, at 320.

[328] Schwartz, *supra* note 120, at 445.

[329] Cass, *supra* note 120, at 153 (citing JOHN LOCKE, *Second Treatise of Government* § 141, *in* TWO TREATISES OF GOVERNMENT 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)); *see* Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

[330] *See* Cass, *supra* note 120, at 153–55.

[331] *See* SCHOENBROD, *supra* note 118, at 110; Berger, *In Search of a Theory of Deference*, *supra* note 14, at 43; Schwartz, *supra* note 120, at 445.

[332] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

[333] *See* SCHOENBROD, *supra* note 118, at 110–12.

without legislative oversight or supervision undermines the legitimacy of the punishment because secrecy and unconstrained discretion blur the lines between legislative and executive power and eliminate checks on the exercise of power.[334] These harms stretch beyond the potential for cruelty and suffering in administration of the death penalty—they also threaten the democratic process.

Although judicial enforcement via the nondelegation doctrine may magnify the role of the judiciary, that branch has taken on an outsized role in part because of legislative delegation and secrecy. The next part evaluates key aspects of judicial inquiry into agency discretion to demonstrate why a more robust nondelegation inquiry into legislative delegation in method of execution statutes is necessary.

### B. *Agency Expertise and Limits on Discretion*

Judicial review in nondelegation cases reveals unwarranted reliance on agency expertise and willingness to gloss over existing separation of powers principles. Courts tend to place too much reliance on the legislative decision to adopt the death penalty, as well as a general choice of a method of execution.[335] In *Sims v. Kernan*, the California Court of Appeals relied substantially on legislative enactments unrelated to carrying out the death penalty to conclude there was a sufficient policy.[336] The court described agency protocols as "subsidiary decisions" to the choice to impose the death penalty and the method, rejecting litigants' arguments that legislative policy should at a minimum include decisions about "pain, speed, reliability, and transparency."[337] California's separation of powers jurisprudence dictated that the legislative body's representative nature required it to settle contested policy matters and crucial issues when it had the "time, information, and competence" to do so.[338] The court did not disagree that the legislature could make those evaluations, but concluded that lethal injection drug shortages justified institutional flexibility, and the Department of Corrections would be in the "best position" to adjust protocols in response to "lessons learned" from botched executions nationally.[339]

This sort of reasoning misses the mark. The legislative decision to authorize capital punishment is a separate policy judgment from how a sentence shall be carried out, and both are legislative decisions. The death penalty, capital trial procedure, or the location of death row do not set out factual inquiries for agencies developing execution protocols to resolve or criteria to evaluate against

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[334] *See* Barkow, *Separation of Powers*, *supra* note 137, at 1023–24.

[335] *See* Denno, *When Legislatures Delegate Death*, *supra* note 14, at 70–71.

[336] Sims v. Kernan, 241 Cal. Rptr. 3d 300, 303, 306 (Cal. Ct. App. 2018); *see supra* notes 257–58 and accompanying text.

[337] *Kernan*, 241 Cal. Rptr. 3d at 306.

[338] Clean Air Constituency v. Cal. State Air Res. Bd., 523 P.2d 617, 627 (Cal. 1974).

[339] *Kernan*, 241 Cal. Rptr. 3d at 307.

facts the agency must consider.[340] Capital trial procedures do not resolve procedural concerns about how execution protocols are developed.[341] Generalized legislative statements about the goals of capital punishment do not provide clear standards.[342] These are inadequate substitutes for legislative specificity, factual inquiry, and administrative procedures and guidance.[343]

Merely selecting a generic method of execution like lethal injection or lethal gas may not offer sufficient guidance to an agency that develops protocols. "Substance or substances in a lethal quantity sufficient to cause death"[344] or "lethal gas" encompass a range of gases and drugs that have varying effects on the human body ranging from swift, slow, possibly painless, or excruciating deaths.[345] These methods carry substantial room for discretion and significant potential for arbitrary action if agencies lack policy guidance or criteria from the legislature. Generally worded statutes make it difficult to evaluate whether the agency has complied with the legislature's directive because it may not be clear what the directive is other than ensuring that the condemned inmate dies.

A weaker approach to nondelegation preserves agency flexibility to respond to developing situations. The Oklahoma legislators who drafted the first lethal injection statute kept "the statutory language vague in order to accommodate the development of new and better drug technologies in the future."[346] The legislators did not include any oversight or specifications and the result was to "delegate 'to Oklahoma prison officials all critical decisions regarding the implementation of lethal injection.'"[347] But building this discretion into the system incentivizes agencies to imitate without engaging in fact-finding or assessments of whether another state's protocols are actually effective. When Oklahoma sought more recently to revise its protocols following Clayton Lockett's botched execution in 2014, the director of the Department of Corrections "asked administration members to obtain public[ly] available execution policies from other states, including Arizona, Florida, and Texas, identify these states' policies, and merge their best and most efficient practices into the Department's new Execution Protocol."[348]

Agency competence is a distinct but interrelated issue from nondelegation because courts substantially rely on agencies' presumed expertise and position

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[340] *See* Gundy v. United States, 139 S. Ct 2116, 2141 (2019) (Gorsuch, J., dissenting).

[341] *See id.* at 2132; *see also* Hobbs v. Jones, 412 S.W.3d 844, 854 (Ark. 2012). *But see Kernan*, 241 Cal. Rptr. 3d at 307; Brown v. Vail, 237 P.3d 263, 270 (Wash. 2010) (en banc).

[342] *See* Araiza, *supra* note 117, at 236 ("If one accepts such statements as furnishing principles governing every delegation of power the statute accomplishes, then either nearly every statute necessarily satisfies this supposedly-strengthened non-delegation review or we are thrown back into the subjective 'how intelligible does the principle have to be?' inquiry.").

[343] *Cf. Kernan*, 241 Cal. Rptr. 3d at 307; *Brown*, 237 P.3d at 269 (en banc).

[344] *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 43.14(a) (West 2019).

[345] *E.g.*, CAL. PENAL CODE § 3604(a) (West 2020).

[346] SARAT, GRUESOME SPECTACLES, *supra* note 38, at 117.

[347] *Id.*

[348] Interim Multicounty Grand Jury Report, *supra* note 321, at 5.

in upholding broad legislative delegations.[349] This inquiry misses a key step in the analysis—whether the agency actually has the expertise. Denno has demonstrated that the officials who develop execution protocols frequently lack technical or medical expertise.[350] This may be due to concerns over the ethics of medical involvement in executions.[351] Execution methods are not subjected to medical or scientific study before their implementation and may be held to lower standards than those used in animal euthanasia.[352] The prevalence of botched executions lends substantial support to the argument that there are deficiencies in agencies' procedures. Austin Sarat estimates that 7.12% of lethal-injection executions have been botched, lending substantial support to critiques of execution procedures.[353] This may be, as Denno has explained, "partly attributable to the dearth of written procedures provided to the executioners concerning how to perform an execution."[354] Other factors in botched executions may include inadequate training in administering drugs or inserting IVs, particularly for individuals who are in poor health, are obese, or have a history of drug abuse,[355] as well as flaws in the drugs used.[356]

Agencies' attempts to shift responsibility through the "discrete task" approach discussed *supra*, may also lend itself to errors.[357] Oklahoma's

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[349] *See supra* notes 262–67 and accompanying text.

[350] Denno, *Lethal Injection Chaos Post*-Baze, *supra* note 27, at 1335; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 112, 112 n.345; *see* Denno, *The Lethal Injection Quandary*, *supra* note 27, at 116.

[351] *See* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 119–20; Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 48 (2009); Denno, *The Lethal Injection Quandary*, *supra* note 27, at 113–14; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 90–91, 91 nn.174–75, 112–14, 112–14 nn.349–53.

[352] Denno, *When Legislatures Delegate Death*, *supra* note 14, at 86; *see also* Brief of Sixteen Professors of Pharmacology as Amici Curiae in Support of Neither Party, Glossip v. Gross, 135 S. Ct. 2726 (2015) (No. 14-7955) (discussing the use of midazolam as an anesthetic in executions).

[353] SARAT, GRUESOME SPECTACLES, *supra* note 38, at 177 (Appendix A). Between 1980 and 2010, states botched 17.33% of electrocutions. *Id.*

[354] Denno, *When Legislatures Delegate Death*, *supra* note 14, at 111–12.

[355] *See* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 136; Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida [https://perma.cc/6BNA-S4TT]; Bernard E. Harcourt, *The Barbarism of Alabama's Botched Executions*, N.Y. REV. BOOKS (Mar. 13, 2018), https://www.nybooks.com/daily/2018/03/13/the-barbarism-of-alabamas-botched-execution/ [https://perma.cc/YTA6-9LB8]; Lynn Waddell & Abby Goodnough, *Florida Executioner Says Procedures Were Followed*, N.Y. TIMES (Feb. 20, 2007), https://www.nytimes.com/2007/02/20/us/20death.html [https://perma.cc/7KV6-DAVE] (discussing testimony from Florida's execution team in the botched execution of Angel Diaz); s*ee also* Morales v. Tilton, 465 F. Supp. 2d 972, 979–80 (N.D. Cal. 2006).

[356] *See* Jon Yorke, *Comity, Finality, and Oklahoma's Lethal Injection Protocol*, 69 OKLA. L. REV. 545, 578–86 (2017); Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 926–29 (2008).

[357] *See supra* notes 91–106 and accompanying text.

revisions to its execution protocols did not prevent errors in Charles Warner's execution or Richard Glossip's scheduled execution.[358] The Interim Grand Jury Report presents a disturbing picture of inattention to detail. The Warner execution team overlooked that they were using the wrong drug—potassium acetate, instead of potassium chloride.[359] None could explain how it happened other than that they assumed someone else had approved it, or that they "dropped the ball."[360]

*Baze*'s prospective approval of lethal injection protocols only encourages this majoritarian approach in death, delegation, and deference.[361] *Baze* warned against interfering with state legislatures' roles in determining execution procedures, particularly because states act "with an earnest desire to provide for a progressively more humane manner of death."[362] The difficulty with this assertion is that agencies do far more than legislatures—without oversight. *Baze*'s approach conflates agencies and legislatures, giving one the deference due to the other.[363] Berger asserts that the "lack of legislative input casts serious doubts on the [*Baze*] plurality's insistence that rigorous judicial inquiry 'would substantially intrude on the role of state legislatures in implementing their execution procedures.'"[364] States may serve as laboratories of experimentation, but the freedom to experiment cannot justify weakening important structural protections built into state and federal constitutions.

Changes to execution protocols only highlight agencies' inexpertise and the breadth of agency discretion. Oklahoma's brief experimentation with nitrogen hypoxia as a method of execution that began in 2015 illustrates this problem.[365] Oklahoma's legislators relied on a fourteen-page report created over "three hours one evening"[366] by three professors who are not medical doctors.[367] Oklahoma's legislators also watched YouTube videos of teenagers inhaling

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[358] *See* Interim Multicounty Grand Jury Report, *supra* note 321, at 1–2.

[359] *Id.*

[360] *Id.* at 36–37. For further discussion of Oklahoma's execution errors, see Robin C. Konrad, *Lethal Injection: A Horrendous Brutality*, 73 WASH. & LEE L. REV. 1127, 1137–40 (2016).

[361] SARAT, GRUESOME SPECTACLES, *supra* note 38, at 121.

[362] Baze v. Rees, 553 U.S. 35, 51 (2008).

[363] Berger, *Individual Rights*, *supra* note 267, at 2039–40.

[364] Berger, *In Search of a Theory of Deference*, *supra* note 14, at 60.

[365] OKLA. STAT. ANN. tit. 22, § 1014(B) (West 2020); Lauren Gill, *Using Nitrogen Gas for Executions Is Untested and Poorly Understood. Three States Plan To Do It Anyway*, APPEAL (Oct. 25, 2019), https://theappeal.org/using-nitrogen-gas-for-executions-is-untested-and-poorly-understood-three-states-plan-to-do-it-anyway/ [https://perma.cc/TY5V-KDKM].

[366] Michael P. Copeland, Thom Parr, & Christine Pappas, Nitrogen Induced Hypoxia as a Form of Capital Punishment (unpublished manuscript) (on file with the *Ohio State Law Journal*); Eli Hager, *Why Oklahoma Plans to Execute People With Nitrogen*, MARSHALL PROJECT (Mar. 15, 2018), https://www.themarshallproject.org/2018/03/15/why-oklahoma-plans-to-execute-people-with-nitrogen [https://perma.cc/PM8G-GYPD].

[367] Scott Christianson, *How Oklahoma Came to Embrace the Gas Chamber*, NEW YORKER (June 24, 2015), https://www.newyorker.com/news/news-desk/how-oklahoma-came-to-embrace-the-gas-chamber [https://perma.cc/3RVL-VCAD]; Hager, *supra* note 366.

helium.[368] The bill only authorized nitrogen hypoxia as a method of execution in the event that lethal injection drugs were not available.[369] There were no details or guidance for the agency.[370] The legislature did not designate who would determine that lethal injection is "otherwise unavailable," or criteria for making the determination.[371] In 2018, Oklahoma's Attorney General determined that, due to a severe shortage of execution drugs, Oklahoma would switch to nitrogen hypoxia as its method of execution.[372] After delays in creating the protocol and obtaining necessary equipment,[373] the Attorney General announced in early 2020 that the state had "found a reliable supply of drugs to resume executions by lethal injection[]" and the Department of Corrections would "continue[] to work on a protocol that will allow the state to proceed by execution through nitrogen hypoxia where appropriate."[374]

Executive agencies and officials may not comply even when legislatures provide more specific instructions.[375] Montana's execution protocol has been struck down *twice* for violating the Montana Constitution's separation of powers provision because the protocol was inconsistent with the state's method of execution statute.[376] Montana's decision to identify the classes of execution drugs made it possible for a court to evaluate the extent to which the agency complied with the will of the legislature, even if the agency had discretion in dosage calculation or other procedures that might need to be modified based on the specific facts and conditions of particular executions.[377] While this is a separate administrative law inquiry, it is relevant to a court's decision to defer to agency expertise.

Inadequate criteria or fact-finding obligations incentivize agencies to take shortcuts. Agencies' tendency to copycat other jurisdictions' protocols and statutes concerning the death penalty, coupled with *Baze*'s prospective

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[368] Hager, *supra* note 366.

[369] H.B. 1879, 55th Leg., Reg. Sess. (Okla. 2015).

[370] *See id.*

[371] *See* OKLA. STAT. ANN. tit. 22 § 1014(B) (West 2020).

[372] Hager, *supra* note 366.

[373] *See* Nolan Clay, *Executions by Gas Stalled Indefinitely While State Seeks Willing Seller of Device*, OKLAHOMAN (Jan. 27, 2019), https://oklahoman.com/article/5621219/executions-by-gas-stalled-indefinitely-while-state-seeks-willing-seller-of-device [https://perma.cc/ NSC3-XYQQ].

[374] *State Officials Announce Plans to Resume Execution by Lethal Injection*, OKLA. ATT'Y GEN. (Feb. 13, 2020) (on file with the *Ohio State Law Journal*).

[375] *See* Denno, *When Legislatures Delegate Death*, *supra* note 14, at 88, 102 n.261; *see also* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 90–91.

[376] *See* Order on Cross-Motions for Summary Judgment at 22, Smith v. State, No. BDV-2008-303 (Mont. 1st Jud. Dist. Sept. 6, 2012) [hereinafter Smith Order]; *Montana Judge Puts Executions on Hold*, DEATH PENALTY INFO. CTR. (Oct. 7, 2015), https://deathpenaltyinfo.org/news/montana-judge-puts-executions-on-hold [https://perma.cc/2BTP-MMFC].

[377] *See* Smith Order, *supra* note 376, at 21. While this example relates to administrative norms, it illustrates the importance of careful judicial scrutiny on separation of powers questions.

approvals, allows courts to rely on the similarity to other jurisdictions' protocols, rather than the individual agency's research, fact-finding, or procedure. It also undermines claims that agencies have real expertise and demonstrates that the protocols lack what Berger describes as a "democratic pedigree"—the "political authority and epistemic authority underlying the policy."[378] Such protocols deserve far less deference than courts accord them.[379]

Reliance on procedural controls is also misplaced. Agencies' ability to alter execution protocols depends on the extent to which agencies are bound by state procedural rules. Agencies do not usually have to comply with state APA rules to create execution protocols.[380] Barkow has observed that, absent oversight or internal controls on matters of charging and plea bargaining, "the potential for arbitrary enforcement is high."[381] Scholars have contended that delegation in criminal law contexts should be treated differently because such delegations are "inconsistent with foundational criminal law doctrine, . . . present greater threats to the principles underlying the nondelegation doctrine, and . . . are not supported by the ordinary arguments in favor of delegation."[382] The same arguments apply in execution protocols. Absent any restraints, there is a risk of arbitrariness in selecting drugs or substances to cause death, and the consequences can be horrifying.[383] Unlimited agency discretion in the death penalty context allows agencies to wield both legislative power and executive power. Internal measures are necessary to protect individual rights when an agency can use the powers of multiple branches.[384] Courts addressing nondelegation challenges are too willing to ignore the absence of internal procedural checks as a constraint on agency discretion even when state nondelegation doctrines expressly rely on such checks.[385]

Vague legislation and a lack of administrative procedure leave courts doing precisely what the *Baze* plurality forecasted: "transform[ing] courts into boards of inquiry charged with determining 'best practices' for executions, with each

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[378] Berger, *In Search of a Theory of Deference*, *supra* note 14, at 39.

[379] *See* Baze v. Rees, 553 U.S. 35, 74–75 (2008) (Stevens, J. concurring); Berger, *Individual Rights*, *supra* note 267, at 2058 ("Administrative law norms teach that agencies deserve less respect when they are unaccountable, unknowable, and procedurally erratic. Given that such agencies would not receive deference in the administrative law context, they should not be afforded blanket deference in constitutional individual rights cases.").

[380] *See supra* notes 269–72 and accompanying text*; see also* Berger, *Individual Rights*, *supra* note 267, at 2081–82 (discussing problems of deference and delegation when legislatures "deliberately insulate[]" agencies from "political pressure" and "administrative law more generally").

[381] Barkow, *Separation of Powers*, *supra* note 137, at 1026–27.

[382] Hessick & Hessick, *supra* note 172, at 6.

[383] *See* Berger, *In Search of a Theory of Deference*, *supra* note 14, at 17–18, 60–61; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 66, 66 n.21, 99.

[384] *See* Brown, *supra* note 115, at 1555; Barkow, *Separation of Powers*, *supra* note 137, at 1023–24. *See generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

[385] *See supra* notes 271–73 and accompanying text.

ruling supplanted by another round of litigation touting a new and improved methodology."[386] Despite criticisms that judicial enforcement of delegation could overexpand the role of the judiciary,[387] the judiciary has already taken on an outsized role. A stricter approach arguably better serves separation of powers principles by forcing the legislative branch to become more accountable. To be sure, legislators are not rendered experts by virtue of elected office. Oklahoma's nitrogen hypoxia experiment aptly illustrates this point.[388] But legislators should impose more substantial guidelines, criteria, and procedural controls on agencies than "sufficient to cause death." And courts can—and should—comply with their constitutional obligation to enforce separation of powers norms.

### C. *Why Death is Nondelegable*

As long as states and the federal government intend to continue using the death penalty, they must grapple with decision-making in executions. Who makes decisions, and how they are made, are fundamental concepts underlying our constitutional system.[389] Rebecca Brown argues that separation of powers principles under the nondelegation doctrine implicate individual liberties, because "procedural requirements and separated powers are simply different limitations on the exercise of government power, sharing a common goal: to restrict arbitrary government action that is likely to harm the rights of individuals."[390] Unconstrained agency delegation to create execution protocols threatens prisoners' rights by increasing the risk that capital punishment will be inexpertly administered and cause severe pain and suffering. Weakening the separation of powers poses a threat to core democratic systems.

Nondelegation may seem especially counterintuitive because discretion and delegation are essential to continuing state-authorized killing.[391] Indeed, courts seem to favor delegation as a matter of legislative convenience, potentially for countermajoritarian concerns.[392] Berger has highlighted this issue as a false application of countermajoritarian concerns about unelected judges making

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[386] Baze v. Rees, 553 U.S. 35, 51 (2008); *In re* Ohio Execution Protocol, 860 F.3d 881, 886 (6th Cir. 2017) (en banc).

[387] *See* Sunstein, *Nondelegation Canons*, *supra* note 121, at 321.

[388] *See supra* notes 367–75 and accompanying text.

[389] *See* McNabb v. United States, 318 U.S. 332, 347 (1943).

[390] Brown, *supra* note 115, at 1555–56.

[391] Cook v. State, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012) ("It is both reasonable and . . . acceptable for the Legislature to delegate the details . . . to an agency that is 'better equipped to undertake the task' of ensuring that it is implemented as uniformly and humanely as possible.") (quoting Griffith Energy, LLC v. Ariz. Dep't of Revenue, 108 P.3d 282, 287 (Ariz. Ct. App. 2005)); *Ex parte* Granviel, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978) (en banc) ("[T]he Legislature has . . . delegated to the said Director power to determine details so as to carry out the legislative purpose which the Legislature cannot practically or efficiently perform itself.").

[392] *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–56 (2002).

decisions about "policy decisions made by government officials who answer to the people."[393] When decisions are made by unelected and unsupervised agencies, "judicial deference to them rests on shakier grounds."[394] Similarly, the countermajoritarian difficulty is not as pronounced when judicial decision-making is aimed at preserving individual rights for disadvantaged groups.[395]

Death penalty exceptionalism fits within theories of nondelegation that support heightened inquiry in criminal law contexts. The degree of discretion that is acceptable should vary with the scope of the power that the legislature accords an agency, as well as the executive agency or officer tasked with carrying out the directives.[396] The power to kill is an extraordinary one with potential for incurable harm.[397] Cass Sunstein has observed that "nondelegation canons" constrain Congress from delegating certain tasks to agencies, particularly when individual rights are implicated.[398] A more robust nondelegation inquiry is appropriate in evaluating method of execution statutes because of the impact on individual rights and the potential for mischief in undermining separation of powers in the state's decision to kill.

In applying this analysis, courts should recognize that a method of execution is a separate policy determination from the decision to use capital punishment and should not import legislative enactments regarding the latter to conclude that agencies have sufficient guidance to carry out the former. Blurring those lines fails to hold legislators to their constitutional responsibility to define crimes and fix punishments.[399] Courts should also examine whether statutes assign responsibility for fact-finding in nondelegation inquiries.[400] Few method of execution statutes contain requirements for agency fact-finding about speed, pain, and drug effectiveness for lethal injection or other methods of

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[393] Berger, *Individual Rights*, *supra* note 267, at 2059–60.

[394] *Id.* at 2060; *see also* Berger, *In Search of a Theory of Deference*, *supra* note 14, at 42 ("When courts strike down an agency policy adopted in secret with no legislative guidance or oversight, the countermajoritarian concern sharply decreases.").

[395] *See* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1147–48 (2014).

[396] *See* Whitman v. Am. Trucking Assn's, 531 U.S. 457, 475 (2001); *see also* Loving v. United States, 517 U.S. 748, 772–73 (1996); Coglianese, *supra* note 120, at 1872–73.

[397] Interim Multicounty Grand Jury Report, *supra* note 321, at 74 (depriving Charles Frederick Warner of his right to contest the method of execution in accordance with Oklahoma regulations); LAIN, LETHAL INJECTION, *supra* note 4 (manuscript at 43–44); Konrad, *Lethal Injection*, *supra* note 360, at 1133–37; *see also* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 177–210 (identifying botched executions).

[398] *See* Sunstein, *Nondelegation Canons*, *supra* note 121, at 331–32.

[399] *See Ex Parte* United States, 242 U.S. 27, 42 (1916); *see also* Weems v. United States, 217 U.S. 349, 378–79 (1910); Malloroy v. State, 435 P.2d 254, 255 (Idaho 1967).

[400] *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (criticizing the notion that fact-finding functions are sufficient to satisfy the "intelligible principle" requirement, and emphasizing that Congress still must make the policy underlying such fact-finding).

execution.[401] Requiring express directives from legislatures on this issue[402] fits within the contours of Justice Gorsuch's heightened intelligible principle inquiry in *Gundy*.[403] It also requires legislators to "make the policy judgments" about Eighth Amendment punishment by setting out terms of those inquiries.[404]

Aspects of execution protocols may require some agency flexibility, including sourcing drugs and chemicals for executions, the need to identify alternative substances, dosage calculation, or other on-the-spot decisions. But the absence of facts for executives to consider and "criteria against which to measure them"[405] has proved problematic. A lack of legislative guidance arguably contributed to agencies' behavior in illegally importing drugs for executions.[406] Despite federal and state laws addressing who may obtain and store controlled substances, agencies still obtain drugs without compliance, explaining sourcing, or how they spend state dollars.[407] States may prefer a non-specific method of execution statute to permit flexibility in the face of drug

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[401] *See* Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae in Support of Petitioners at 22–24, Baze v. Rees, 553 U.S. 35 (2008) (No. 07-5439) (summarizing the historically "unstudied way" lethal injection statutes have been adopted, as derived from Oklahoma's "purposefully vague" 1977 law); *see also supra* notes 176–96 and accompanying text (discussing states' method of execution statutes).

[402] Denno has proposed that states conduct "in-depth study of the proper implementation of lethal injection." This study would assist in fact-finding issues for states in developing procedures that presumably reduce pain or error, as well as identifying and responding to botched executions. Denno, *Lethal Injection Quandary*, *supra* note 321, at 118–21.

[403] *See Gundy*, 139 S. Ct. at 2141.

[404] *Id.*

[405] *Id.*

[406] *See* KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 24, 32; LAIN, LETHAL INJECTION, *supra* note 4, at 14–22; *Federal Authorities Seize Execution Drugs Imported for Arizona and Texas*, CBS NEWS (Oct. 23, 2015), https://www.cbsnews.com/news/federal-authorities-seize-execution-drugs-imported-for-arizona-and-texas/ [https://perma.cc/47R9-PYWA]; Madlin Mekelburg, *FDA Blocks Texas Import of Execution Drug*, TEX. TRIB. (Apr. 19, 2016), https://www.texastribune.org/2016/04/19/fda-blocks-texas-import-execution-drug/ [https://perma.cc/ECL3-F5LB]. *See also generally* Cook v. FDA, 733 F.3d 1, 12 (D.C. Cir. 2013). The DOJ recently issued an opinion concluding that the FDA lacks jurisdiction in this arena. *See* Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions, 43 Op. O.L.C. 1, 1 (2019), https://www.justice.gov/olc/opinion/file/1162686/download [https://perma.cc/DQN3-CE64].

[407] *See* Interim Multicounty Grand Jury Report, *supra* note 321, at 18, 21 ("[T]he Department never obtained [Oklahoma Bureau of Narcotics and Dangerous Drugs] or DEA registration allowing it to possess and/or store execution-related drugs . . . . OBNDD's Deputy General Counsel testified he has no idea how the Department properly obtained the execution drugs . . . ."); LAIN, LETHAL Injection, *supra* note 4, at 41–45; *Nebraska Supreme Court Orders Release of Lethal-Injection Drug Records*, DEATH PENALTY INFO. CTR. (May 20, 2020), https://deathpenaltyinfo.org/news/nebraska-supreme-court-orders-release-of-lethal-injection-drug-records?utm_source=WeeklyUpdate&utm_campaign=073ea20f52-weekly_update_2017_w41_COPY_01&utm_medium=email&utm_term=0_37cc7e4461-073ea20f52-711075509 [https://perma.cc/G7PN-4NPN]; *see also* Denno, *America's Experiment with Execution Methods, supra* note 68, at 717.

shortages. The need for flexibility alone, however, cannot justify unlimited discretion without fact-finding obligations or a set of criteria and obligations for agencies to consider before changing drugs or procedures. Legislatures are quite capable of writing statutes that give agencies the ability to choose between alternatives contingent on fact-finding or provide standards for agencies to use when making decisions.

Take Tennessee. While its default method of execution is lethal injection, it permits electrocution if "[t]he commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department."[408] This provision might not be a model of legislative clarity, but it does set a condition (certification) and imply a requirement of fact-finding (unavailability) before permitting the commissioner to switch methods. A court reviewing such a decision would have some facts and criteria to evaluate.[409] Arkansas also has offered some helpful specificity. The amended AMEA requires ADC to use FDA-approved drugs obtained from either an FDA-approved facility or nationally accredited compounding pharmacy.[410] Again, this sets measurable criteria for courts, even if there are problems with drug sourcing and pharmacies.[411]

Methods of execution statutes that require lethal injection be "swift and humane"[412] arguably offer a more identifiable policy to agencies tasked with creating protocols. This standard, however, is not sufficient by itself because it fails to address important concerns about agency expertise, personnel training, and qualifications. Nor does it prevent agencies from shifting protocols without fact-finding or measurable criteria. Giving agencies broad discretion to change execution methods without factual findings or justification for those changes creates a high risk of arbitrary action that may be difficult for courts to review, especially when inmates' challenges to execution protocols require swift judicial decision-making.[413]

An absence of procedure presents a threat to judicial review and should carry greater weight in nondelegation cases because it interferes with the balance of powers.[414] State nondelegation doctrines' reliance on procedural

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[408] TENN. CODE CRIM. PROC. ANN. § 40-23-114(e)(2) (West 2020).

[409] *Cf. Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

[410] ARK. CODE ANN. § 5-4-617(d) (West 2020).

[411] *See* LAIN, LETHAL INJECTION, *supra* note 4, at 29–41 (discussing compounding pharmacies).

[412] KAN. STAT. ANN. § 22-4001(a) (West 2020). Kansas also requires certification that the substances must comply with these criteria and any proposed changes require the same certification. *Id.* § 22-4001(c).

[413] *See* Cook v. State, 281 P.3d 1053, 1056–57 (Ariz. Ct. App. 2012).

[414] *See Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) ("Such an 'evasive standard' could threaten the separation of powers if it . . . allowed the agency to make the 'important policy choices' that belong to Congress while frustrating 'meaningful judicial review.'" (quoting Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 676, 685–6 (1980) (Rehnquist, J., concurring))); *Cook*, 281 P.3d at 1058 ("If the Department were to

protections in decision-making is sensible, because compliance with state procedural requirements preserves accountability by requiring agencies to engage with legislatively established processes in reaching decisions.[415] When agencies are free to alter their own protocols for any reason at all, including notice obligations to inmates about execution methods, it threatens to interfere with the judicial branch's responsibilities.[416] Courts' reluctance to hold agencies accountable for interference with judicial review abdicates the court's essential role in preserving the separation of powers as much as a legislative decision that hands over core lawmaking power.[417]

The lack of transparency from agencies receiving these delegations should also weigh against deferring to agency judgments.[418] Although the legislature has enacted these statutory provisions, indicating a policy preference for secrecy, such secrecy is concerning, especially when there are few (or no) procedural controls on agencies.[419] Secrecy should be a component of nondelegation inquiries because in the capital punishment context, secrecy corrodes accountability and creates a risk that agencies will improperly wield broad powers, especially because they lack constraints on their discretion.

Courts also err by treating constitutional prohibitions on cruel and unusual punishment as limitations on agency discretion that preserve broad delegations.[420] First, these prohibitions address different interests. Rachel

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continue [revising execution protocol] in such a way as to unreasonably limit . . . the courts from exercising meaningful judicial review of its actions, then . . . we might be presented with a separation of powers violation."); *see also* Brown v. Vail, 237 P.3d 263, 269–70 (Wash. 2010) (en banc).

[415] *See supra* Part II.A. (discussing states' nondelegation doctrines).

[416] *See Cook,* 281 P.3d at 1056–58; *see also supra* notes 277–84 and accompanying text.

[417] *See Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (explaining that leaving executive agencies "free to make all the important policy decisions" makes it difficult for courts to assess whether the agency had exceeded its authority); *see also* Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."). *But cf. Cook*, 281 P.3d at 1058 ("This practice [late changes to execution protocol] therefore threatens to 'usurp the powers,' of the Judiciary . . . . Nevertheless, because Arizona courts have been able to provide review—albeit rushed—of the Department's changes to its protocol, . . . we hold that the Department has not yet violated the Arizona Constitution's separation of powers doctrine.").

[418] *See* Berger, *Individual Rights*, *supra* note 267, at 2066; *see also supra* notes 67–72 and accompanying text (discussing secrecy in executions).

[419] Phillips v. DeWine, 841 F.3d 405, 421 (6th Cir. 2016) (Stranch, J., dissenting) ("HB 663 [protecting confidentiality for parties to executions] will obstruct scrutiny of Ohio's execution protocol. . . . [J]ust four years ago . . . we found it necessary 'to monitor every execution on an ad hoc basis' because Ohio could not be 'trusted to fulfill its . . . duty. . . . '") (quoting *In re* Ohio Execution Protocol Litig., 671 F.3d 601, 602 (6th Cir. 2012)); *see also supra* note 269 and accompanying text.

[420] *See Cook*, 281 P.3d at 1056 (reasoning that the Constitution "implicitly guides and limits" agency decision making by forbidding any "serious pain and suffering," which would fall under the Eighth Amendment's prohibition of "cruel and unusual punishment").

Barkow points out that the Bill of Rights "police[s] government abuse of power to an extent, [but does] . . . not guard against the same structural abuses as the separation of powers."[421] To be sure, there is a relationship between an Eighth Amendment claim and a nondelegation claim in the death penalty because arbitrary agency action, insufficient guidance, or expertise can trigger errors in executions that may cause severe pain and suffering.[422] Separation of powers implicates process concerns and prevents the aggrandizement of power.[423] The Eighth Amendment prohibits the infliction of cruel and unusual punishments and accordingly does not check the potential for mischief inherent in allowing an agency to wield executive and legislative powers.[424]

Second, constitutional principles cannot curb agency discretion. Cary Coglianese has evaluated the importance of limits on discretion through the intelligible principle analysis: "A statute will be constitutional as long as an executive officer's discretion is not unbounded in the same way that Congress's is."[425] As the Supreme Court pointed out in *Whitman v. American Trucking Associations, Inc.*, agencies cannot restrict overly broad delegations of legislative power by picking their own limiting constructions of statutory authority.[426] Courts should not rely on agencies to limit themselves, particularly because agencies cannot construe statutes unconstitutionally so they must already comply with constitutional restrictions on pain and suffering in executions.[427] The intelligible principle requirement and parallel state law doctrines dictate that the *legislature* must set the policy in the legislation it enacts.[428]

In light of the stakes inherent in carrying out death sentences and the horrifying consequences of broad agency discretion and responsibility-shifting mechanisms in capital punishment, legislators should have a greater obligation to define the punishment for a capital sentence. Courts should play their part by protecting separation of powers and administrative law norms to inject greater accountability in a system that, thus far, demands very little.

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[421] Barkow, *Separation of Powers*, *supra* note 137, at 1032.

[422] *See, e.g.*, State v. Deputy, 644 A.2d 411, 420 (Del. Super. Ct. 1994), *aff'd*, 648 A.2d 423 (Del. 1994); *see also* Hessick & Hessick, *supra* note 172, at 25–26 (discussing the relationship between individual liberties and separation of powers).

[423] Barkow*, Separation of Powers*, *supra* note 137, at 1032–33.

[424] U.S. CONST. amend. VIII; *see* Barkow, *Separation of Powers*, *supra* note 137, at 1032–33.

[425] Coglianese, *supra* note 120, at 1861.

[426] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).

[427] *See* Sunstein, *Nondelegation Canons*, *supra* note 121, at 331.

[428] *Whitman*, 531 U.S. at 472 ("[W]e repeatedly have said that when Congress confers decision-making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.") (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (emphasis and alterations in original)); *see also supra* Part II.A.

## VI. CONCLUSION

An argument that principles of nondelegation are viable in evaluating the death penalty may sound like grasping at straws to oppose the death penalty. Why bother asking legislatures to be more specific in considering how prisoners should be executed? Do arguments about how these decisions are made, who makes the decisions, policy, and procedure really just paper over other glaring defects in the death penalty?[429] Some may contend that these challenges are attempts to evade a lawfully-imposed sentence by complaining about technical and procedural trivialities.

The separation of powers and compliance with procedure are integral constitutional principles that matter a great deal in a democratic society and are core values in the American system of government.[430] As Justice Frankfurter explained, "The history of liberty has largely been the history of observance of procedural safeguards."[431] The history of the imposition of the death penalty appears to be one of largely unconstrained delegation by virtually every entity or individual involved in capital punishment.

In making decisions about death, it is tempting to try to find someone else to carry the burden or to be accountable. In *Caldwell v. Mississippi*,[432] the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[433] Nor should it be constitutionally permissible to allow legislatures to shirk their constitutional obligation to set punishments, especially in capital sentencing. The choice to enact the death penalty is a separate policy choice than how the state chooses to kill. Legislatures should not be able to shift the responsibility for determining how the state kills in the name of the people

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[429] *See generally* BESSLER, KISS OF DEATH, *supra* note 77; GARRETT, END OF ITS ROPE, *supra* note 3; David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004); William J. Bowers, Thomas W. Brewer, & Charles S. Lanier, *The Capital Jury Experiment of the Supreme Court*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 199 (Charles S. Lanier et al. eds., 2009); Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825 (2015); J. Michael Martinez, *"Freakishly Imposed" or "Fundamentally Fair"? Legal Arguments Against the Death Penalty*, *in* THE LEVIATHAN'S CHOICE: CAPITAL PUNISHMENT IN THE TWENTY-FIRST CENTURY 227 (J. Michael Martinez, William D. Richardson & D. Brandon Hornsby eds., 2002).

[430] Mistretta v. United States, 488 U.S. 361, 381 (1989) ("[T]he greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."); Cass, *supra* note 120, at 152–53; Madison, *supra* note 113, at 250–51.

[431] McNabb v. United States, 318 U.S. 332, 347 (1943).

[432] 472 U.S. 320 (1985).

[433] *Id.* at 328–29.

to agencies, particularly because they systematically remove procedural constraints associated with accountability and transparency. Passing difficult policy decisions to agencies that lack oversight or transparency undermines core democratic values.

Responsibility for death cannot, and should not, be delegated away. Respect for "one of the most vital of the procedural protections of individual liberty found in our Constitution" demands more.[434]

[434] Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).

# EXHIBIT 3

# EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | |
|---|---|
| ZANE M. FLOYD,<br><br>Plaintiff,<br><br>vs.<br><br>CHARLES DANIELS, Director, Nevada Department of Corrections; HAROLD WICKHAM, NDOC Deputy Director of Operations; WILLIAM GITTERE, Warden, Ely State Prison; WILLIAM REUBART, Associate Warden at Ely State Prison; DAVID DRUMMOND, Associate Warden at Ely State Prison; IHSAN AZZAM, Chief Medical Officer of the State of Nevada; DR. MICHAEL MINEV, NDOC Director of Medical Care, DR. DAVID GREEN, NDOC Director of Mental Health,<br><br>Defendants. | Case No. 3:21-cv-00176-RFB-CLB<br><br>Las Vegas, Nevada<br>Thursday, May 6, 2021<br>10:35 a.m.<br><br>EVIDENTIARY HEARING |

***C E R T I F I E D  C O P Y***

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE RICHARD F. BOULWARE, II,
UNITED STATES DISTRICT JUDGE

APPEARANCES: See next page

COURT REPORTER: Patricia L. Ganci, RMR, CRR
United States District Court
333 Las Vegas Boulevard South, Room 1334
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Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

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INDEX OF EXAMINATIONS

than -- is there anything different than what we've discussed here?

MR. GILMER: I think it -- it talks about how broad the deliberative process privilege is pertaining to issues and documents, especially. But that was because that case was specific to a document-seeking issue. I think it also would apply to testimony outside that confines, and that anything and everything predecisional is covered even -- and it talks at great length about facts and how they can be intertwined. So that is what I thought it was important to bring it to the Court's attention.

THE COURT: Okay. Thank you, Mr. Gilmer. I appreciate that.

All right. Director Daniels, if you wouldn't mind stepping forward, please.

I'm sorry, right up here, Director Daniels.

Watch your step there.

COURTROOM ADMINISTRATOR: Please raise your right hand.

CHARLES DANIELS, having duly been sworn, was examined and testified as follows:

COURTROOM ADMINISTRATOR: Thank you.

THE COURT: You can go ahead and take your seat. And if you could state your full name for the record. And since you're in front of the Plexiglas, Director Daniels, you can take your mask down.

THE WITNESS: Thank you, Your Honor.

Good morning. My name is Charles Daniels. I'm sorry, did you ask the spelling?

Yes. Charles, C-H-A-R-L-E-S. Last name Daniels, D-A-N-I-E-L-S.

EXAMINATION OF CHARLES DANIELS

BY THE COURT:

*Q.* Okay. So, Director Daniels, let's -- let's just start off with the most basic question. Why isn't the protocol finalized?

***A.*** Sir, the -- Your Honor, the protocol has not been finalized for several reasons. There's a requirement that I seek counsel with primarily the Chief Medical Officer of the state. I'm still in the process of looking at various drugs to be used. I believe that I don't have a greater responsibility than to ensure that I do this right, and I need to consult with as many individuals as possible to ensure that I'm doing this right.

There are also costs, heavy significant costs, associated with putting on one of these executions. So --

*Q.* Can you tell me a little bit about that. Because I'm not aware of that. Can you tell me, when you say that, what type of costs?

***A.*** Yes.

*Q.* You mean in terms of the protocol, can you explain that a little bit?

***A.*** Well, yes, because for anything that we decide we want to

do, whether it's regarding security, gathering intelligence, providing the appropriate staff that would have to come in and/or experts and/or contractors from other areas, we will have to have them come out. We're going to have to provide lodging. All the minutia that no one would think about that --

*Q.* Right.

***A.*** -- we have to plan for. I have to have redundancy built in to any issues that I may have.

I also have to work in coordination with other state law enforcement authorities, medical authorities, examiners.

We have to coordinate and move all of those people around. But, more importantly, I have to ensure I have enough staff to deal with any, and I mean any, contingency. There's no do-over button in -- in executions.

*Q.* Right.

***A.*** So I have to ensure that I have all of that. I have to bring people up. We have to run through our protocols step-by-step ensuring that we stay within the confines of what we've actually drafted.

*Q.* Okay.

***A.*** And if we identify any particular issues, then we need to mitigate that right there. And if we can't overcome it, then we need to make everyone else aware that there has been a change.

I have to ensure that the condemned individual is maintained in a safe place, that he has access to his attorneys,

and that for the most part we will ensure that he gets what he has coming to him as it relates to whatever the constitutional needs are and/or what the expectations are of the people of the State to include the judiciary as well as our -- the executive branch of our Government and so on.

But all of this requires a lot of moving pieces as it relates to especially the security apparatus, bringing people out, ensuring that they know step-by-step what they need to do.

There's also, of course, I have to ensure that my equipment works, that I have everything that I need, that we're able to test it ensure that it works.

That -- I also have to ensure that the drugs that are available. I have to -- that I have available or we think we have available are things we have in stock that would also expire depending on how long things go along.

So I have -- there's a lot of moving parts. And not to mention, of course, just the court proceedings and the attorneys and all of those people that are involved.

Coroners, EMTs, the clergy, all of those people that are involved. It's serious.

I would think that the expectation would be of Mr. Floyd and his -- and his representatives that I do everything possible to ensure that if we actually go through that it's done right in accordance with provisions that are outlined in the Eighth Amendment of the U.S. Constitution.

Cruel and unusual punishment, I take that very seriously. It's personal for me. But I understand my obligations and my duties towards the people of the state as well as all of the other inmates as well as Mr. Floyd.

*Q.* Okay.

So you've outlined a fair number of considerations that you have to factor in to your decision, including the -- again, the time and the experts and redundancy.

Let me ask you this question. When do you expect that your protocol will be finalized?

***A.*** Sir, I do not know when it will be finalized, because as long as I have an opportunity to conduct my due diligence, consult with more individuals, consult more sources -- and also I have to take into consideration as soon as the potential drugs are identified, there may be a huge push to have that via court order in some court we can't use that or there's some claim saying that that's no longer available to you.

*Q.* Right.

***A.*** And so I have to take into consideration that I can do most of my planning in advance, but it would be incumbent upon me to ensure that I have the best information available, I think, which is in everyone's best interests. I still have to consult with the -- with the Chief Medical Officer of the state. And until I do that, because it's a requirement, then I really have to know where -- where I am at with that individual as well

because I can't proceed without that consultation.

*Q.* Well, do you think it will take three months?

***A.*** Your Honor, I don't know.

*Q.* Well, you have to give me some date. I mean, it's not going to take five years, right?

***A.*** Sir, it would not. Your Honor, it would not.

*Q.* Okay. So give me what you think would be the outside limit of the decision.

I also have to make important decisions here, Director Daniels, and as it relates to how the Court has to rule, right.

And so you need to at least tell me -- given what you've said, it's clear that you've thought about this process and are still thinking about it and are potentially still gathering information, but it seems to me that the NDOC has to have some timeline, in part because of the timing of when these drugs might be available, as to when it's going to make a decision.

So what would be the outer boundaries of that decision?

***A.*** Your Honor, very good question. So here's what my response would be. After I am able to consult with the Chief Medical Officer and then look at all of our security apparatuses and so, I would say 90 to 120 days --

*Q.* Okay.

***A.*** -- would be sufficient.

*Q.* Well, and, again, I appreciate that you have a lot of things

that you've said, and there may be many things, Director Daniels, that we won't even take into consideration. So some of the things that you had mentioned just about the redundancy and, obviously, if someone were to get sick, for example, whoever the medical officer is who I presume would be monitoring this, if something were to happen that you have to find someone else, they have to go through the whole procedure again, potentially testing. And so I appreciate that in terms of the timing.

So one other --

**A.** Your Honor, may I ask you a question, sir?

Q. Yes, go ahead. But I didn't have anything else. I was just saying I have an understanding, given what you said, of how much goes into this decision. And it's certainly not the Court's intent in asking the question, Director Daniels, I want to be clear, of sort of deciding one way or another when or how you should do it. I just -- in terms of making the decision in this case, I also need to know what would be appropriate and fair in terms of the timing for you and also for Mr. Floyd's counsel in terms of preparation. That's why I'm asking you -- that's why I asked you that question.

I'm sorry. If there's something else you wanted to add, you can.

**A.** Yes, Your Honor. And I just want to be clear. You asked me to opine, which I did. I'm seeking to ensure that you get the information you need.

But I want to also just point out that there are some statutory limits as to what I must do once the actual signed warrant and order for the death to proceed. I will honor that unless --

*Q.* I appreciate that.

***A.*** -- otherwise stayed.

*Q.* Right.

***A.*** So I didn't want to give the impression that I'm controlling the timeline. I am obligated by statute to stay within the appropriate timeline.

*Q.* No, I -- I did not interpret your comments, Director Daniels, to somehow suggest that you wouldn't abide by a legitimate Court order from this Court or from State Court. I did not in any way take that from your testimony, because I don't think that's what you were suggesting.

I think what I understood was you are opining just about your process of deliberation, as you've said how seriously you take it, all the different factors that have to be considered, and the point at which, you know, if given an opportunity to weigh in on that process, how much would be potentially the outer limits of that decision. So I appreciate that.

Let me see if I have any more questions, and then I'll turn this over to counsel.

(Pause.)

BY THE COURT:

*Q.* One question I had, which is also helpful is, Director Daniels, do you have any information about how long it takes to acquire information about the drugs?

So, in other words, I would imagine as part of your process you want to acquire information about a particular drug in terms of how it has been used, what it's approved for, what may be its side effects or interaction effects.

Do you have any information about how long it takes just to get the information? Not the drug itself. I'm not asking you about how long once you make a request to obtain it, but just to get the information. Because one of the issues in this case, of course, Director Daniels, is how quickly could potentially Mr. Floyd's counsel get access to some of this information.

Do you have anything that you could share about how long it takes to get this information about the potential drugs? Without identifying a specific drug.

***A.*** Your Honor, thank you for your question.

I am clearly not a pharmacist, but we have a Director of Pharmacy Services and that's the individual that would order all of our drugs, but also would be the one to do some basic research from a professional standpoint.

Now, it's also my understanding that research is available on most drugs, but to the depth in which you get into

questionable or nonprescription types of usage, what its -- you know, its intended use, I think there's probably a better person to respond to that question.

*Q.* Okay.

***A.*** From the laymen's term, we can -- we can Google it.

*Q.* Right.

***A.*** But that would not be enough for me, and I would share with my Director of Pharmacy, "I need more than the Google version." I need to be able to discuss and understand the efficacy and all of those things that go around the utilization of the compounds that make the drugs.

I am not qualified to do that, but I would seek counsel to better understand it.

*Q.* Right. So you would -- you would ask other people to provide you with as much information as possible that's not so scientific such that you can't, sort of, obviously process that, but that gives you the full range of information that would allow you to be able to make an informed decision?

***A.*** Your Honor, yes. I would seek additional consultation with professionals in that field to better understand.

THE COURT: Okay. All right.

Thank you, Director Daniels. I don't know that I have more questions at this time.

Mr. Gilmer, is there something else that you wanted to be able to ask Director Daniels?

And then, Mr. Anthony, I'll turn to you.

MR. GILMER: Thank you, Your Honor. There's just a couple of points I would like to clarify with regard to the timeline. Would you like me to do it from here or from the podium?

THE COURT: Oh, no. Do it from there, please.

DIRECT EXAMINATION OF CHARLES DANIELS

BY MR. GILMER:

*Q.* Director Daniels, I think you tried to clarify your question with regard to the 90 to 100 days to finalize a protocol, but then also indicated that you would abide by any warrants or orders requiring you to move forward.

So if the execution warrant was issued by a Court the week of June 7th, as has been suggested has been thought, do you -- would you still think that you would need 90 to 100 days to finish or would you be able to complete the process in order to be able to comply with that Court order?

***A.*** In the event a warrant were to actually come out giving a date, I would comply.

At some point in time I could continue to review information, but at the end of the day it's a requirement, it's a duty of mine as Director of the Nevada Department of Corrections, to execute the wishes of the judiciary and the will of the people.

THE COURT: Let me ask you this question about that.

If you are ordered, for example, to perform an execution in four days, right, and you didn't feel you could adequately do that and safely do that, would you not have an obligation to inform the Court that it couldn't be done consistent with your constitutional obligation at the NDOC not to perform an execution without violation of the Eighth Amendment?

THE WITNESS: I would certainly consult my -- my legal counsel on that matter and bring up my objections and/or concerns. And while I certainly cannot speak for any other entity, I can tell you a violation of the Eighth Amendment is something that would be taken with great caution and care. And that would -- in my opinion, I would do the right thing.

THE COURT: Well, and I'm not asking for your legal opinion.

THE WITNESS: Yes.

THE COURT: Because I think Mr. Gilmer would and has adequately, as always, represented the legal positions of the NDOC. But I'm just responding to your question -- excuse me. I'm responding to your answer in response to Mr. Gilmer's questions about the performance of an execution if you are ordered June 7th, because it seems to me that there might be a point at which you were ordered to perform an execution, given what you said, that you simply couldn't perform and not violate the Eighth Amendment. And the question would come up, what would you do in that circumstance, if you know.

And it sounds like what you said, just to confirm, that you'd have to speak with your attorneys before you decided how to proceed. Is that right?

THE WITNESS: That would be my response.

THE COURT: Okay. That makes sense.

Mr. Gilmer, go ahead. I'm sorry.

MR. GILMER: Thank you, Your Honor.

And, also, I know that was a hypothetical, but under Nevada law that could never happen within four days. So ...

THE COURT: Well, no, I understand that. I mean, partly what the purpose really was with me to help me understand Director Daniels' response to your question. It was not to sort of lay out the fact that that would happen.

Yes, I think that I would be -- well, I don't think that it could happen in Nevada law and I don't think that any Court would order that either.

MR. GILMER: Understood.

THE COURT: But that was the purpose of that question.

Go ahead, Mr. Gilmer.

MR. GILMER: Thank you. I believe I only have one more question, Director Daniels, and it's always, you know, a very bad thing for a lawyer to say one more question because it's generally not true. But I believe I only have one more question.

BY MR. GILMER:

Q. And that is you mentioned that you have to consult with the Chief Medical Officer before making any final decisions.

You're not suggesting that you have not already met with Dr. Azzam, correct?

You have already met with him. Is that correct?

**A.** Correct. I have already met with Dr. Azzam.

Q. Okay. Thank you. I just wanted to make sure that was clear for the record.

MR. GILMER: I have nothing else at this time, Your Honor.

THE COURT: Okay.

Mr. Anthony?

MR. ANTHONY: Mr. Levenson will be handling the examination of the witness, Your Honor.

THE COURT: Okay. So what I would like for you to do is switch positions just because we have the Plexiglas there, preferably.

All right. Go ahead, Mr. Levenson.

MR. LEVENSON: Thank you.

CROSS-EXAMINATION OF CHARLES DANIELS

BY MR. LEVENSON:

Q. Good morning, Director Daniels.

**A.** Good morning.

Q. So to clarify, you -- I believe you originally said you had not met with the CMO. Is that incorrect? You have met with

your CMO?

**A.** I said I would -- I believe my testimony was that I would need or be required to meet with the CMO. We have already had one meeting.

*Q.* And when -- I'm sorry.

When was that meeting? What was the date of that meeting?

**A.** I do not recall the date.

THE COURT: Do you know how many months ago it was or weeks ago?

THE WITNESS: It was weeks ago.

THE COURT: Weeks ago.

And one question I had, Director Daniels, is, when were you first informed as to the fact that the State would be seeking a warrant of execution on June 7th? I'm not asking who informed you, but when do you recall you were first told that information?

THE WITNESS: Your Honor, I cannot recall the date. It wasn't very long ago. I do believe it was in April.

THE COURT: In April?

THE WITNESS: In April.

THE COURT: So, again, as it relates to how long you have been involved in this process of your deliberation, given that timing, it sounds as if you have been involved in this deliberative process for around 30 days or so?

THE WITNESS: Thank you for the question, Your Honor.

I'm not sure of the day and I don't want to give testimony that someone could impeach, but it's -- I believe it was back in April.

THE COURT: So you don't think -- for example, it wasn't January or February?

THE WITNESS: No.

THE COURT: That you recall.

THE WITNESS: Your Honor, I do not recall that.

THE COURT: So you recall it being some time in April, maybe late March.

THE WITNESS: Potentially, yes.

THE COURT: Okay. I'm just -- I'm just trying to get a rough estimate as to the timing of that as to when you were first, sort of, informed of when you would have to start this process. Because I would imagine, Director Daniels, that once you get that information, as you've indicated, there is a lot of work that has to be done to finalize the protocol. So the moment you hear that you start working, correct, when you hear that information?

THE WITNESS: Yes, Your Honor. I -- I will share with you, as I found out, of course, I obviously researched what was done during the last protocol. And in addition to that, then I went to the location, the site, where we would carry that out, met with the warden, and we went through the protocols there

step-by-step.

I was very deliberative in terms of what I wanted to see and I wanted to see what we had. And, of course, we're now in the process of changing the protocols to meet the new threads, ideas, and so on.

So we've made some changes and they're still working on putting that together. But a lot of this, of course, will still have to be completed at a little later date when we have more additional information. Because a lot will change based on who we communicate with, how long we, for instance, would have a contract to get various people here, would those people still be available, and so on. So there's a few things that are still in the works.

THE COURT: Well, and in terms of the information you don't have, are you still waiting for or seeking any information about drugs that may be used?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. Thank you.

Go ahead, Mr. Levenson.

BY MR. LEVENSON:

*Q.* Do you expect to meet again with Dr. Azzam?

***A.*** My response is that I do expect to meet with him in the future or as additional pharmaceuticals become available that I want to consult with him about. So each time there's a new pharmaceutical that we haven't previously discussed, I would

then seek consultation with Dr. Azzam.

*Q.* So have any meanings been currently arranged?

***A.*** Not future meetings.

*Q.* You mentioned that you went to the site where the execution was going to take place. The Clark County District Attorney's Office notices that site as Nevada State Prison.

Are you in disagreement with that?

THE COURT: I'm sorry. When you say "Nevada State Prison?"

MR. LEVENSON: I'm saying Nevada State Prison, Your Honor. That's the warrant, the current warrant. That's the execution, Nevada State Prison in Carson City.

THE COURT: Okay. I wasn't sure if, Mr. Levenson, you are identifying a specific facility. If you are, then it would be helpful to say that, or if you were trying to point out that the language wasn't specific. I wasn't sure the nature of your question.

So if you're asking about a specific location, that's fine. It would be helpful, I think for the witness, but also for me to know what you're actually asking.

MR. LEVENSON: Correct.

BY MR. LEVENSON:

*Q.* So it's identified as the Nevada State Prison in Carson City.

Do you agree that's where the execution would take

place?

**A.** The execution, as I know it to be, would be at Ely State Prison.

*Q.* You spoke about the protocol, the prior protocol. That would be in the Scott Dozier case. Was that right?

**A.** Yes.

*Q.* Are you aware of the findings by Judge Togliatti in 2017 about the use of a paralytic drug in the execution protocol?

MR. GILMER: Your Honor, I object to that. It calls for a legal conclusion. It's also addressing a factual finding that was vacated by the Nevada Supreme Court.

THE COURT: Well, I mean, are you objecting to him -- objecting to him indicating whether or not he was aware of it? They haven't asked the follow-up question yet, Mr. Gilmer.

MR. GILMER: Understood.

THE COURT: I think you're anticipating the next question.

MR. GILMER: I'll table the objection to the next question, Your Honor.

THE COURT: I'll be shocked if Director Daniels had not been informed at least of the decision. I think you're waiting for the next question.

But you can go ahead and answer that question. Were you aware of that decision by Judge Togliatti, Director Daniels?

THE WITNESS: Your Honor, yes, I was aware of it.

THE COURT: Okay.

BY MR. LEVENSON:

*Q.* Director Daniels, I want to go back to a question that the Judge asked you. You mentioned that the costs involved were something that you would -- would take additional time for you to -- to release a final protocol.

You mentioned staffing. Wouldn't staffing be the same no matter what the protocol is?

***A.*** No, that would not be the same.

*Q.* Could you explain that?

What would be different with -- with the particular drugs you used and your staffing?

MR. GILMER: Your Honor, I'm going to object to that as I think that would delve into deliberative process and also safety and security issues.

MR. LEVENSON: Your Honor, he --

THE COURT: So, hold on.

So, Mr. Gilmer, let me ask you this question. Could Director Daniels respond to how many, without naming who the people would be in terms of their title, positions might be affected by the different types of drugs?

Because I think part of the question relates to just how many people are involved in this process. I wouldn't necessarily ask Director Daniels to identify anyone by title because I think there could be legitimate security or other

issues related to that. But what about just how many people would be affected by a potential difference in the drug?

MR. GILMER: Perhaps, that could be answered, Your Honor. The concern I have is that he said it depends on what his final decision is, because he said it depends on what the drugs are. So that seems to me as if it would dive into deliberative processes into the final decision. So that's the concern. I think if it's as extremely narrow as you indicated, perhaps that's something Director Daniels may answer.

THE COURT: Why don't we try this. Director Daniels, how many positions do you think are implicated by choices of drugs? So choosing one drug versus another, without identifying which positions that are involved in the execution would be implicated, how many positions would be implicated by a choice in drugs, as far as you understand it?

THE WITNESS: Your Honor, I can't answer that as narrowly as possible because I would have to utilize a lot of staff and they would have to come from many places. But it would also, unfortunately, have me disclose sources, methods, numbers, security apparatus, and the specialized people that I need to ensure the security.

Your Honor, I'm very hesitant to talk about those issues publicly.

THE COURT: So -- so then how about this. In terms of your -- what you were referencing, it seems like what you were

saying is that you didn't want to assume that for the variety of drugs that may be under consideration or could be under consideration that the same personnel would be used for all. Is that fair?

THE WITNESS: That would be a fair question -- a fair assumption.

THE COURT: Okay.

THE WITNESS: Yes.

THE COURT: Mr. Gilmer, does that work? Because I think that was the nature of what -- what Mr. Levenson was trying to get at, which is that Director Daniels is basically saying there are many moving parts and staff are affected by that and staff potentially could be affected, without naming who they are and without naming the drugs, could be affected by the choice of drugs. Is that correct, Dr. Daniels -- I mean, Director Daniels.

THE WITNESS: Your Honor, yes.

THE COURT: Okay. Move on from there, Mr. Levenson.

BY MR. LEVENSON:

*Q.* You mentioned another component, an EMT. Does the changing of the -- does the finalization of the protocol determine how many EMTs you would need?

***A.*** Yes, it could.

*Q.* How?

MR. GILMER: Your Honor, that clearly would go into the

deliberative process and determinations.

THE COURT: Okay. And I would direct you not to answer at this time, Director Daniels.

BY MR. LEVENSON:

*Q.* Director Daniels, you mentioned a coroner, and I'm presuming -- let me ask the question. Would the protocol dictate how many coroners you had at the scene?

(Pause.)

THE WITNESS: Your Honor, I would really not like to answer any questions regarding my processes and procedures, how many, who many. That's an issue for us. We have to -- for instance, I'll explain.

There's confidentialities built into the processes. We have redundancy built in. We may cancel one of two or cancel two of three at the last moment. And I don't want to be pigeonholed into saying, well, this is all you have, then later on who is it.

I need to have control over the mechanisms to --

THE COURT: I appreciate that, Director Daniels.

THE WITNESS: -- perform my judicial responsibilities.

THE COURT: I appreciate that. So you don't have to answer further.

So, Mr. Levenson, what I would ask you to do is -- because I do think there are legitimate security issues regarding individuals who may be identified by profession within

the State, and we should avoid those types of questions.

I haven't ruled on that. And so I don't want to get into that, but I think that's part of the Director's hesitancy, which I think is a legitimate concern at this point in time.

So why don't we move on.

MR. LEVENSON: Certainly, Your Honor.

BY MR. LEVENSON:

*Q.* In your meeting with Dr. Azzam, Director Daniels, did you offer him multiple choices for a drug protocol?

MR. GILMER: Objection, Your Honor. That calls for questions regarding predecisional and deliberative process.

MR. LEVENSON: Can I respond, Your Honor?

THE COURT: Sure.

MR. LEVENSON: We think it has independent relevance separate and apart from the deliberative process. This goes to when the protocol is going to be finalized. We are alleging bad faith on the part of NDOC and its release of the drug protocol, so this goes to intent.

If Dr. Azzam was only offered one drug protocol, then the protocol was pretty much finalized at that point. That's why we have this question.

THE COURT: Well, the protocol hasn't been finalized yet and so I think part of the issue is -- you're right, Mr. Levenson, it could potentially go to that after the protocol has in fact been finalized.

So part of the issue with respect to your bad faith arguments, which I can appreciate, is that they are premature, some of them, at this point in time because we don't know what the final protocol is. I'm not saying you shouldn't ask those questions, Mr. Levenson, because I think they could potentially be relevant for the Court's consideration. But for now I am going to sustain the objection and allow for the privilege to be asserted for that question.

MR. LEVENSON: Okay.

BY MR. LEVENSON:

*Q.* Director Daniels, what actions have you taken with respect to finalizing the execution protocol since your meeting with Dr. Azzam?

MR. GILMER: Objection, Your Honor. I believe that also calls for a deliberative process privilege and also could delve into safety and security concerns as well as Director Daniels has previously testified.

THE COURT: Sustained. I'll allow for the privilege to be asserted conditionally at this time.

BY MR. LEVENSON:

*Q.* Director Daniels, in your declaration filed with this Court on April 30th, that's ECF Number 22-10, at paragraphs 9 through 11 you state that NDOC did not have midazolam in its possession. Is that correct?

***A.*** That is correct.

Q. Now, when you say it is not available for NDOC, what do you mean by that?

**A.** In consultation with my pharmacy chief indicated that that drug was no longer available to the -- to NDOC. That was a decision made well before I arrived, and I did not get into the details as to why.

Q. So you're not sure why it is unavailable to NDOC. Is that what I understand?

**A.** My understanding is that I'm not 100 percent sure as to why, which is why I will not testify as to why. All I know is I've been told that that -- that medication is not available to us.

THE COURT: I'm sorry. When you say "it's not available," it obviously is available in terms of being available for purchase. You're not saying that it's not available generally for purchase.

THE WITNESS: To NDOC.

THE COURT: And are you saying that because that's an NDOC policy or are you saying that because there's some other reason why you all cannot obtain it? And it's important because there -- it's one thing if NDOC has made a determination to do that, potentially. But it's another thing if, essentially, the company or someone else decided not to provide it.

Can you explain why it's not available?

THE WITNESS: Your Honor, I arrived -- my first day of work was December 3rd of '19. There were a lot of things that I

just didn't know because I wasn't a part of the organization or understand all the history.

Once I engaged in learning more about this process here in this state, I started asking about, well, individual items that were based on the last one.

THE COURT: Right.

THE WITNESS: And it was told to me -- the chief pharmacist explained to me -- I'm sorry. She's actually the Pharmacy Director -- indicated to me that that is no longer available to us. I did not get into the reasons why.

THE COURT: Okay. Okay.

THE WITNESS: It wasn't relevant to me. I wanted to know what we did have available --

THE COURT: Got it.

THE WITNESS: -- as opposed to what we did not.

THE COURT: Okay. Thank you, Director Daniels.

Go ahead, Mr. Levenson.

BY MR. LEVENSON:

*Q.* With regard to your obtaining midazolam, in your declaration at paragraph 10 you state that it cannot be purchased or, quote, otherwise obtained.

What does "otherwise obtained" mean in --

THE COURT: I think, Mr. Levenson, he's already gone over this. Let's move on from this question, please.

BY MR. LEVENSON:

Q. Are you able to receive drugs from other Department of Corrections?

MR. GILMER: Your Honor, I object. I think that seeks a legal conclusion.

THE COURT: Okay. I'm going to sustain that, but, Mr. Levenson, perhaps you could be more specific about what the nature is of what you're asking. I'm not sure I understand myself either, if you're talking about particular agencies, or it would be helpful to give some more detail.

BY MR. LEVENSON:

Q. Could you -- could you receive the drugs from, let's say, the Arizona Department of Corrections as opposed to going through a pharmacy?

**A.** Thank you.

MR. GILMER: Again, I just would like to object to that question because I think it calls for a legal conclusion as to where he can purchase drugs from other states. There's --

THE COURT: So, Mr. Gilmer, maybe I'm not understanding your -- your objection. What I understood the question to be is not asking Director Daniels for a legal conclusion, but whether or not he understood even as part of this process whether or not there would be access to -- without him deciding whether or not he's chosen to pursue it or not, whether or not there would be access to drugs from other corrections facilities outside of the State of Nevada. That limited question. And I think that that

would avoid the legal conclusion that you are objecting to.

So could you answer that -- that question, Director Daniels? Are you aware of whether or not you could obtain any drugs for the protocol from other state Departments of Corrections outside of Nevada?

THE WITNESS: Your Honor, I do not know. I have not directed my pharmacy chief to attempt to do so nor do I know if that's a common practice or if she has or has not. I don't know.

THE COURT: Okay. Thank you, Director Daniels.

BY MR. LEVENSON:

*Q.* Director Daniels, what other drugs are not available to NDOC usage for this execution?

MR. GILMER: Objection, Your Honor. That calls for the deliberative process privilege. And I believe that asking those questions would delve into his thoughts and opinions with regard to potential protocols.

MR. LEVENSON: May I respond, Your Honor?

THE COURT: Yes.

MR. LEVENSON: The director and his counsel put this issue -- they waived this issue because they put in their declaration and their pleadings that midazolam was not available. So that would infer that they have waived the issue as far as what is not available.

What we understand is that they're worried about drug

companies finding out that their drugs will be used. We're talking about drugs that will not be used. So it doesn't seem to have the same public concern nor, as I said, they have put this -- this in issue.

MR. GILMER: Brief response, Your Honor?

THE COURT: We don't -- I don't need the brief response because what I'm going to do is I'm going to reserve on this issue. As indicated, I'm going to have Director Daniels and Dr. Azzam come back on Monday. I'm going to look at these privilege issues that are being raised today.

So there will be an opportunity, Mr. Levenson, potentially for the Court to revisit this later. I think -- I do think with respect to midazolam it's different because that was specifically identified in the affidavit. And so that's different than other hypothetical drugs that NDOC may or may not have access to.

I'm not saying I wouldn't direct an answer, but let's move on from there. I'm going to reserve ruling on that.

So, Director, you do not have to answer that question.

Go ahead, Mr. Levenson.

BY MR. LEVENSON:

*Q.* And, Director, you said that you needed approximately 90 to 100 days to -- to finalize a protocol.

Have you voiced any concerns to anyone that you could potentially have to formulate and carry out an execution within

the next four weeks?

MR. GILMER: Objection, Your Honor, as I believe that mischaracterized the evidence in part or his testimony in part with regard to the 90 and 120-day timeline.

THE COURT: Is that the only portion you're objecting to?

MR. GILMER: What was the second part of the question?

THE COURT: Because I -- I thought -- I want to -- the question was -- and we can take out the 90 and 120 days -- have you voiced any concerns to any State officials or other public officials about the ability of the NDOC to effectively and safely carry out an execution within 30 days.

MR. GILMER: Your Honor, I object to that question to the extent that that could also delve into the deliberative process as well as potential attorney/client issues depending on how that answer was asked.

THE COURT: So that's why I asked you about your objection earlier, Mr. Gilmer, because I would have anticipated that you would have reasserted it. That's why I just rephrased it. I didn't expect that he would answer because I expect that you would in fact object. But I wanted just to restate it clearly, as I understood it, for the record.

I'm going to allow for that objection to be asserted at this time and again sustain it conditionally.

MR. LEVENSON: Can I have a moment, Your Honor?

THE COURT: Sure. Take your time.

(Plaintiff's counsel conferring.)

MR. LEVENSON: Let me try again, Your Honor.

BY MR. LEVENSON:

*Q.* Director Daniels, do you have any concerns about having to effectuate an execution within -- possibly within four weeks?

***A.*** I do not have any concerns. In reference to the previous question, I was opining based on a very deliberate question that I responded to.

However, I am clearly aware of my duties as the Director of the Nevada Department of Corrections. And if given an executed warrant and order, I will execute my duties. I -- there's always an opportunity to know more and learn more, but at some point in time you still have to execute your duties. And that's how I see this process.

THE COURT: But, again, Director, you wouldn't understand the duty to perform an execution that you couldn't legally perform. And what I mean by that is, for example, if you actually didn't have the drugs that you thought were appropriate for the execution, let's say there was an incident where they were destroyed inadvertently, you're not saying you would nonetheless go through with an execution even though you don't think you could safely perform it, correct?

THE WITNESS: Your Honor, I would clearly alert those in my chain of command as well as my legal counsel as to the

fact that I don't have the appropriate tools to complete these tasks. And that would be part of my duty to obviously stay within the scope of cruel and unusual punishment that's listed in the Eighth Amendment.

THE COURT: No. Okay. I just wanted to receive that clarification. It sounded as if you were saying you would do it regardless, but I didn't understand that to be your testimony. And I think what you're saying is that if you didn't think that you had the material, you're saying that you would alert the appropriate individuals or speak with Mr. Gilmer about what the options would be. Is that right?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay.

BY MR. LEVENSON:

*Q.* Director Daniels, how do you reconcile your testimony that you -- that it would be good to have a longer period of time to effectuate an execution with the fact that you would -- might have to prepare and complete an execution with four weeks? How do you reconcile those two pieces of testimony?

MR. GILMER: Objection, asked and answered. Just answered that in the last question.

THE COURT: Overruled. I think it's slightly different.

You can answer that question?

THE WITNESS: Would you repeat the question, sir?

BY MR. LEVENSON:

*Q.* Certainly.

How do you reconcile your previous testimony that a longer period of time to effectuate an execution would be good with the fact that you are talking about having to go through an execution in four weeks?

***A.*** Once again, the issue was I was asked to opine on time. And in most circumstances, if most of us are put in a situation in which we have more time to deliberate, more time to discuss, we would take advantage of that. However, that does not mean that I would not be prepared to take the information I had available to me as long as it was consistent with what the State law requires, our statute, as well as the Constitution.

I guess the analogy would be you could never make the -- perfect the enemy of the good. I would always opt for more and always opt for better. However, given the circumstances and the statute, I would go with the best information I had available. And if I did not believe that I could move forward in a way that would be consistent with the Constitution, the State Constitution, then I would apprise the appropriate individuals.

So I don't see a conflict in my testimony. I was just asked to opine. I opined, but I'm prepared to do my job.

THE COURT: But let me ask you this question, I think this may help to clarify this. It sounds to me as if what

you're saying is if you were given more time you would take more time because of the seriousness of this process and all the factors you'd have to consider, right?

THE WITNESS: Your Honor, exactly. I think the people of the state deserve the fact that the Director of the Department of Corrections sees this as a very, very serious issue. There is no greater responsibility than if you are going to be tasked with, as a part of your duties, to take a life that you do the best you can, learn as much as you can, and keep growing and learning as often, but sooner or later the day will come.

THE COURT: Well, let me ask you this question. If you had the ability to decide the date and the date was 30 days from now versus 90 days from now, which date would you choose?

THE WITNESS: Your Honor, last time I opined, that's how we got here.

THE COURT: Well, but, Director, I want you to be direct and honest with us.

THE WITNESS: I --

THE COURT: And I think you opined because what you're saying is it's a deliberative process and you want to be deliberative.

I appreciate that this question may be uncomfortable, but the fact is we're looking at, as you said, very serious issues here. There is a potential for this execution to proceed

possibly in 30 days, and I have to consider that.

And what you seem to have said to me is, "There are a lot of factors to consider. I don't necessarily have all of the information, even about the drugs." If you were given the choice, wouldn't you choose 90 days over 30 days?

THE WITNESS: If given the choice --

THE COURT: Yes.

THE WITNESS: -- I would go with the longer date.

However, the statutory limits are already set --

THE COURT: And I understand that.

THE WITNESS: -- I would obviously operate within the scope of the statute.

THE COURT: Director Daniels, I'm not asking you, right, whether or not you think, because I think you've said this, you could still -- you think you could still potentially perform NDOC an execution within 30 days. And you have said that if you didn't think you could do that, you would -- you would inform authorities. So I don't think that you're somehow suggesting with your answer that you wouldn't perform the duties. I know that's a concern of yours, but that's not what I take from it.

But you've acquired a great deal of information. It's helpful for me in terms of understanding this process and understanding what I have to consider for me to have that information as well. So I appreciate your candor. Thank you.

Mr. Levenson?

BY MR. LEVENSON:

*Q.* Director Daniels, I want to understand something you testified to previously. You talked about the timing of the release of the protocol somehow being based on companies seeing the drugs that were going to be used.

Can you explain that?

(Pause.)

MR. GILMER: Your Honor, I think there's an objection to that question because I don't remember that testimony, but I'm not sure exactly what the objection is.

If Mr. Daniels knows what he's asked -- I guess maybe it's vague. I'm not sure that question is answerable.

But obviously if Director Daniels can --

THE COURT: I think what Mr. Levenson is asking is if Director Daniels could be more detailed about your, sort of, reference to the possibility that you have to factor in a manufacturer coming in and saying, "We don't want to have our drugs used," and there might be litigation around that, and that creates something for you to consider in terms of finalizing the protocol. I think you said something like that in terms of your prior testimony.

Would that be fair that you have to at least consider that possibility in terms of what may be available to you in terms of the execution protocol?

THE WITNESS: I will respond based on what I believe to be the question. And at the end of the day, we know that as much research as I could possibly do, I will take that time to research and then consult with the Chief Medical Officer.

However, early disclosure of that information could provide some with an opportunity to create legal roadblocks for whatever reason. I -- I'm not in the head of any of these companies.

THE COURT: Right.

THE WITNESS: But I do understand that as I'm working the information that I received then deciding what information I want to present to the Chief Medical Officer.

I also have to take into consideration that there may be some legal challenges that will be generated through many groups. It can be anti-death penalty groups or so on. But I am cognizant of that.

But the primary issue is always the due diligence of me understanding the drugs and what the compounds and having professionals explain to me what this does, what the dosage would be, all of those -- those individual issues that I'm not qualified to make.

So I'm taking in the totality of the act -- of the execution process and our protocols, as well as our ability to secure the tools that we need to effectuate the will of the people.

THE COURT: Does a consideration of a possible litigation by a manufacturer factor into your timing of the finalization of the protocol?

THE WITNESS: (Pause.)

Your Honor, will you rephrase your question, please?

THE COURT: Sure. Does the consideration -- does a consideration of the possibility of litigation by a manufacturer to prevent use of a drug factor into your determination about the timing of the finalization of the protocol?

MR. GILMER: Your Honor, I'm always loath to object to a Judge's question.

THE COURT: No --

MR. GILMER: That gets into deliberative process.

THE COURT: That's fine. Again, part of it is, Mr. Gilmer, is I want -- I have to also know which questions you think would be covered. So I know, Mr. Gilmer, that you're respectful of the Court, but you will always object if you think it's appropriate. And I think you will continue to do so.

I'm going to sustain that objection to my own question, conditionally, with the understanding that I'll have to go back and look at that.

So -- but I do want to -- I do want to make sure, Mr. Gilmer, again, even if I ask a question, you're well aware of the fact that you can object and assert the privilege.

We have to figure out on a question-by-question basis

what the nature of the privilege is that's being asserted so I can rule on that later.

So, I appreciate that. And, again, I have no doubt that you'll continue to object as you see appropriate regardless of who asks the questions.

Mr. Levenson, please go ahead.

MR. LEVENSON: Just a moment, Your Honor.

(Plaintiff's counsel conferring.)

BY MR. LEVENSON:

*Q.* Director Daniels, do you have any plans to consult with any other individuals --

MR. GILMER: Objection.

BY MR. LEVENSON:

*Q.* -- as you formulate the protocol?

MR. GILMER: Objection, Your Honor, that goes into his deliberative process as to who he may seek opinions from.

THE COURT: Sustained.

(Plaintiff's counsel conferring.)

MR. LEVENSON: Your Honor, can I just revisit that for a moment? I believe that Director Daniels actually said in his testimony that he might be consulting with other people and I wanted to explore that. So I think he put the -- put it in issue.

THE COURT: I'll go back and take a look at the transcript. I think to the extent that Director Daniels

identified any individual process, you could potentially ask about that, but I think that the privilege would extend to him providing a sort of fulsome and detailed overall description of his deliberations and process, which is what I think the question invites.

And as I understand it, Mr. Gilmer, that's your objection to it. Is that correct?

MR. GILMER: Yes, Your Honor.

THE COURT: All right. So for now I'll continue to sustain that objection.

MR. LEVENSON: I don't think we have any other questions at the moment, Your Honor.

THE COURT: All right.

Mr. Gilmer, do you have any additional questions?

MR. GILMER: Your Honor, I have questions, but since you said Director Daniels will be back on Monday, I'll just reserve and ask those -- all those questions at that time.

THE COURT: Okay. Well, any questions you think will be helpful as it relates to deciding the privilege issue, Mr. Gilmer?

MR. GILMER: No, Your Honor. I do not.

THE COURT: All right.

Mr. Pomerantz, Ms. Ahmed, do you have any questions that you would like to ask of Director Daniels? Certainly you are free to do so as well.

MR. POMERANTZ: May I have a moment, Your Honor?

THE COURT: Sure. Take your time.

(Defense counsel conferring.)

MS. AHMED: Your Honor, thank you for asking. We don't have any questions for the witness.

THE COURT: Well, and I'll allow you an opportunity on Monday when we come back to be able to ask questions. Again, I know that you all are fairly new on this case and so you may need some time to be able to delve deeper. So I'll allow you to be able to reserve on that issue as relates to questions for Director Daniels.

MS. AHMED: Thank you, Your Honor.

THE COURT: All right. So for now, thank you, Director Daniels, for your testimony. I appreciate it.

I, unfortunately, am going to require that you come back on Monday and I appreciate again your time for that, but as I'm sure you understand, this is a very significant case and issue that we have to resolve. And so we're going to set a time and date. But you're excused for now, sir.

THE WITNESS: Yes, Your Honor. Thank you very much.

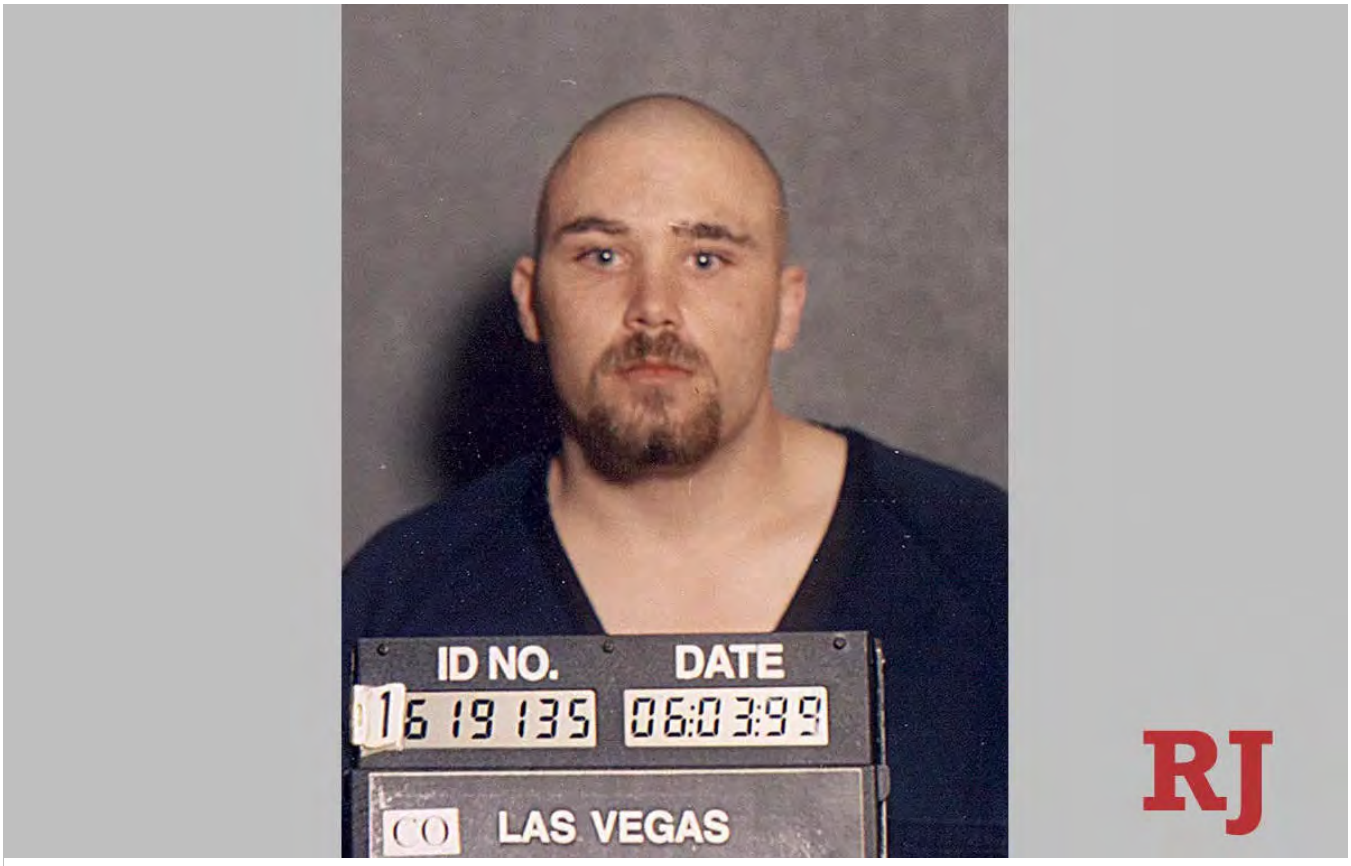
THE COURT: Thank you.

All right. Let's think a little bit then about next steps here. Mr. Gilmer, I want to start with you. As you are aware, in civil cases oftentimes when a privilege is asserted, a privilege log needs to be created so the Court can figure out

# EXHIBIT 4

# EXHIBIT 4

# Nevada prison officials unsure on execution method for Zane Floyd




Zane Floyd police mug shot following his 1999 shooting spree (Metropolitan Police Department)

By David Ferrara Las Vegas Review-Journal

May 3, 2021 - 5:48 pm



Nevada prison officials have yet to establish how they plan to kill condemned prisoner Zane Floyd, nearly a month before prosecutors want his execution to take place.

"I will prepare a final execution protocol, which will include the drug or combination of drugs to be used, once I have made the final conclusion that the (choice) of drug or drugs, and the manner in which to inject the drug or drugs, will result in a death that does not violate the Constitution," prison

director Charles Daniels said in court papers. "I am still in the process of finalizing the protocol that would be used for Mr. Floyd."

On Monday, U.S. District Judge Richard Boulware ordered Daniels and the state's chief medical officer, Ihsan Azzam, to testify later this week about what drugs are available for the state's lethal injection cocktail.

Federal public defenders representing Floyd, now 45, who was convicted of killing four and gravely wounding another inside a Las Vegas grocery store almost 22 years ago, argued that not telling Floyd how he would die amounts to cruel and unusual punishment, a violation of his constitutional rights.

## 'Playing three-card monte'

"I believe the state and the Department of Corrections know more about the drugs than they're telling us," one of Floyd's lawyers, David Anthony, told Boulware during Monday's hearing. "We've been playing three-card monte with the state in our phone calls. Is this the drug? No. Is this the drug? No. Is this the drug? Well, we can't say."

But Chief Deputy Attorney General Randall Gilmer argued that the prison system should not have to reveal its hand until a death warrant is signed.

Clark County District Attorney Steve Wolfson has asked a state court judge to sign the warrant next week, seeking Floyd's execution for the week of June 7.

"NDOC is awaiting the issuance of a valid execution warrant and order," Gilmer wrote in court briefs. "Once the execution protocol is finalized, NDOC is committed — save for necessary safety and security considerations — to providing that execution protocol to Floyd and the public."

The litigation comes as the Nevada Senate considers a bill that would abolish the death penalty.

No one from the district attorney's office was present at Monday's hearing, and Wolfson did not respond to phone and text messages seeking comment.

A jury sentenced Floyd to die for the 1999 killings inside a grocery store on West Sahara Avenue. He was dressed in military fatigues and armed with a 12-gauge shotgun hidden under a robe when he shot everyone he encountered.

Four employees — Lucy Tarantino, 60, Thomas Darnell, 40, Chuck Leos, 40, and Dennis "Troy" Sargent, 31 — died. Zachar Emenegger, 21, was shot twice and survived after playing dead in the produce section.

## Stay of execution

At Monday's hearing, Boulware stopped short of ordering a stay of execution for Floyd.

"Why shouldn't I stay this execution right now?" the judge asked. "It would save time, because you know we're going to litigate the protocol at some point. The defendant needs to have time. The court needs to have time. So why wouldn't I grant it, temporarily at least, until the protocol is finalized?"

Gilmer argued that it would be premature for the federal court to interfere with Floyd's case before an execution warrant is signed. He also wrote in a brief that Floyd has not shown that a stay would be necessary, depending on the method of execution.

Nevada's lethal injection protocol faced drawn-out legal scrutiny after another death row inmate, Scott Dozier, asked to be executed. He killed himself behind bars more than two years ago.

At least two of the drugs planned for Dozier are no longer available for Nevada's prison system.

Floyd's lawyers said last month that he preferred a firing squad over lethal injection. In order to challenge an execution, the U.S. Supreme Court requires an inmate to provide an alternative means of death.

"Floyd concedes he must establish that the harm he seeks to prevent is both likely and irreparable," Gilmer wrote. "However, he cannot show either. This is because, while NDOC certainly admits that death is irreparable, the harm Floyd must show here is something other than death, as he concedes, as he must, that the execution can proceed under his desired protocols."

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# EXHIBIT 5

# EXHIBIT 5

I, DAVID B. WAISEL, declare as follows:

1. I am a practicing anesthesiologist at Boston Children's Hospital and an Associate Professor of Anaesthesia, Harvard Medical School. I have been practicing clinical anesthesiology, primarily pediatric anesthesiology, for approximately 24 years.

2. I have been asked by the attorneys who represent Scott Dozier to provide an expert medical and scientific opinion about whether there is a substantial risk of harm that the Nevada Department of Corrections' proposed use of a three-drug protocol utilizing diazepam, fentanyl, and cisatracurium will cause Mr. Dozier severe pain or conscious suffering during his execution.

3. Terminology

a. "Awareness" is being cognizant of an experience while it is happening.

b. "Recall" is consciously remembering that experience later.

c. "Amnesia" is not consciously remembering that experience later.

d. A "paralytic agent" (like cisatracurium) prevents movement of skeletal muscle such as breathing, moving one's hands, blinking etc, which prevents the person receiving the paralytic from indicating distress. Paralytics "hide" the individual's experience.

e. "Blood oxygen level" is, simply, the amount of blood in the arterial blood system. It is typically 95-100 mmHg.

4. It is my understanding that the State of Nevada intends to execute Mr. Dozier by injections of 15 mg of diazepam, followed by 500 mcg of fentanyl, and, if he is still breathing, an additional 500 mcg of fentanyl will be administered, followed by 25 mg cisatracurium.

5. The protocol is unclear in ways that pose significant risk of unnecessary pain and suffering to Mr. Dozier. In EM-110, page 5 of 6, sections B.4.c and B.4.d both describe the initial diazepam and the following fentanyl to be administered. In B.4.e and B.4.e.1, the protocol describes monitoring for breathing and the additional 500 mcg of fentanyl that will be given. The protocol assumes this dose will stop Mr. Dozier's breathing, stating "The contents of the syringe [#1-3, 500 mcg of fentanyl] will then be slowly administered over one minute until the spontaneous breathing of the condemned inmate stops." The protocol does not call for an assessment of breathing over a period of time (such as described in B.4.e), and it does not instruct the executioners to give any additional diazepam or fentanyl. In fact, the protocol directs the executioners to give the paralytic agent, cisatracurium. B.4.f states "A Drug Administrator will then insert the needle of the forth [sic] syringe of lethal drug set number one (marked #1-4-cisatracurium, 25 mg) into the injection port." Following the protocol will result in cisatracurium being given after the second 500 mcg dose of fentanyl but before anything else, such as the dosages available in Set-2, which is conceptually opposite of the intent of B.4.e, which is to wait until breathing has stopped before administering cisatracurium. There are problems with these assumptions of the timing on assessing breathing and that not breathing is the same as not being aware (as described in paragraphs 16-20 below). According to

the protocol, the Set-2 is to be used if the inmate remains conscious or shows signs of life after the injection of the first set (Set-1) of lethal drugs, which means after the paralytic cisatracurium has already been administered. Assuming the cisatracurium reaches the blood stream, Mr. Dozier will be paralyzed and thus unable to indicate awareness – i.e., will not be observed as remaining conscious or showing signs of life to trigger the administration of Set-2. This means that Set-2 is only relevant if the Set-1 drugs do not reach the blood stream; Set-2, by the protocol, is not available even if an assessment were made (which, again, is not called for in the protocol) after the second 500 mcg of fentanyl that Mr. Dozier needed more diazepam and fentanyl.

6. This protocol is a sea change from every other protocol of which I am aware. The drug that kills Mr. Dozier is the paralytic cisatracurium. Other protocols have employed one of two mechanisms to cause death. The first protocol, the more traditional one, has been to give (1) an anesthetic agent, (2) a paralytic agent, and (3) the killing drug potassium chloride, which stops the heart very quickly. The second, which has become more common due to legitimate, increasing concerns about awareness with the paralytic, uses medications that either stop the patient from breathing or cause cardiovascular collapse but do not paralyze the muscles. This was initially known as the "single drug" technique, which used sodium thiopental or pentobarbital, in which the mechanism of death was either stopping breathing or cardiovascular collapse. It then became a 2-drug technique using benzodiazepines and opioids, and the presumed mechanism of death is the stopping

of breathing through anesthesia. But in these techniques, paralytics are not given, so the inmate cannot be aware while paralyzed.

7. In the current protocol, however, the killing agent is the paralytic of cisatracurium, which kills by preventing your ability to breathe, not through drugs that anesthetize (thereby ensuring an unconscious person during the process), but through drugs that paralyze muscles. This means that Mr. Dozier has a substantial risk of being paralyzed and awake as he dies of suffocation. The horror of being awake and unable to move is beyond description. But try to imagine, if you can, that you are awake yet unable to breathe, open your eyes, or move your hands. You are lying in complete isolation, unable to communicate the intense distress you are feeling. By way of one example, one patient aware and paralyzed reported that she "desperately wanted to scream or even move a finger to signal to the doctors that she was awake." The article concerning this example points out that it was not the surgery that was bothering her, it was being awake and unable to move. Landau E., Awake during surgery: 'I'm in Hell'. CNN May 17, 2010. http://www.cnn.com/2010/HEALTH/05/17/general.anesthesia/index.html ).

8. Nevada's current protocol is practically designed to ensure substantial harm of 1) air hunger following the injections of diazepam and fentanyl and 2) awareness while being paralyzed after the cisatracurium injection.

9. Diazepam is an older benzodiazepine rarely used for sedation or anesthesia. Miller's Anesthesia, the most prominent anesthesia textbook in the United States, instructs that 15 mg for a 93 kg person is well under the dose needed for induction of anesthesia – loss of consciousness. Reves J.G., Intravenous

Anesthetics, In: Miller R.D., Miller's Anesthesia. Philadelphia, PA: Elsevier; 2010 p. 738-740.

10. The amnestic effect of diazepam is irrelevant in the execution context. Just because a person does not remember suffering upon waking up does not mean the person did not experience the agony and suffering as it happened.

11. The risk of air hunger is substantial after administration of the diazepam and fentanyl. The Ohio execution of Dennis McGuire (see, e.g., D:\z Personal\z Leg Rsrch Hab Corpus\z LI\OH EmailsRevealWorriesProblmtcExcutn.mht) demonstrates the problem. Mr. McGuire received 10 mg of midazolam and 40 mg of hydromorphone. Mr. McGuire experienced obstruction of his airway (the soft tissues in the mouth blocked his ability to breathe, such as what occurs in obstructive sleep apnea, where people who are asleep stop breathing because of the soft tissue obstruction). The normal response to experience this obstruction is to sit up, relieving the obstruction. But because Mr. McGuire could not sit up, he could not relieve the obstruction despite his repeated attempts observed as bucking or fighting the straps holding him down[1], meaning that he suffocated to death, akin to the experience of water boarding. This process, and his fighting the air hunger, has been reported to have occurred for 15-20 minutes. The sedation midazolam and hydromorphone given in the McGuire case

[1] Mr. McGuire's son, who attended the execution, described it thusly: "I watched his stomach heave, I watched him trying to sit up against the straps on the gurney, I watched him repeatedly clench his fist[.] [It] appeared to me he was fighting for his life while suffocating." D:\z Personal\z Leg Rsrch Hab Corpus\z LI\OH EmailsRevealWorriesProblmtcExcutn.mht

does not supply suppression of the relevant clinical responses to noxious stimuli; one can be sedated but still consciously experiencing one's surroundings, including painful and horrific stimuli such as air hunger, even if the sedated person appears to the lay person as being unaware of the surroundings.

12. Air hunger is being unable to satisfy the physiologic and psychologic urge to breathe. Patients describe it as similar to the sensation of suffocation. Simple examples are the feelings you get when the air is knocked out of you, or when at the swimming pool a "friend" pushes and holds your head down underwater. While these experiences can be scary, and the sensation of breathing is met with palpable relief, you nonetheless essentially know or believe you will be able to breathe again. This knowledge ameliorates the experience of air hunger. This knowledge is not present when a person is being executed.

13. For Mr. Dozier, the experience of air hunger, if the diazepam and fentanyl sedate him enough to put him in that situation, is likely, because of the smaller doses that are being used under Nevada's protocol. The highest dose of fentanyl, 1000 mcg, is roughly equal to 15-20 mg of hydromorphone, which is half of what Mr. McGuire received during his botched execution. See Equivalent opioid calculator; see clincalc.com/opioids/. Benzodiazepine conversions are more problematic, particularly between intravenous benzodiazepines. But 10 mg of midazolam is much stronger than 15 mg diazepam, which is a much weaker drug.

14. More severe sensations of air hunger are described in patients who do not know if they will be able to breathe again. This brings about feelings such as that described by the following patient who experienced being paralyzed yet aware:

"I have never been so panicked, scared and horrified in my life. I was suffocating. I would have done anything even to take a small breath. I was scratching, clawing and flailing about. When the medication finally worked [to allow her to breathe], I never felt so relieved."

15. In general, the sensation of air hunger becomes intense with a relatively small rise of carbon dioxide ($CO_2$). We normally breathe out $CO_2$, the waste from our body. Not being able to do so creates panic. Brain imaging data suggest that increases in $CO_2$ and associated feelings of air hunger cause widespread increases in brain activity, including brain regions associated with stress and anxiety (amygdala, prefrontal cortex) and pain (periacqueductal gray). Liotti M., Brain responses associated with consciousness of breathlessness (air hunger), PNAS 2001;98:2035-40.; O'Mara S., Torturing the brain: On the folk psychology and folk neurobiology motivating 'enhanced and coercive interrogation techniques, Trends in Cognitive Science. 2009: 13 (12):497-540.

16. The high-dose fentanyl used in Nevada's new protocol is reminiscent of the quickly discredited high dose fentanyl technique proposed for heart surgery in 1978. As more experience was gained with this technique, concerns about awareness grew. The following examples explicate this problem. Note that these references are older, because this technique was discredited 30-35 years ago, although I do include a major textbook's note to show that the modern consensus is the same: *Fentanyl does not produce unconsciousness.* Fukuda K., Opioids, In: Miller R.D., Miller's Anesthesia, Philadelphia, PA: Elsevier; 2010; 777. Note that medicine also works by

case reports - physicians reporting events. Case reports are often the tip of the iceberg in terms of frequency of events.

a. In 1980, it was reported that a woman having redo heart surgery was responding to verbal commands until receiving 1600 mcg (24 mcg/kg) of fentanyl. Prior to incision, she received 4250 mcg (64 mg/kg) of fentanyl. The patient recalled the conversations between the surgeon and anesthesiologist during the opening of the chest. Mummaneni N., Awareness and recall under high-dose fentanyl-oxygen anesthesia, Anesth Analg. 1980:59:948-9.

b. In 1981, it was reported that a woman having open heart surgery reported intraoperative awareness. She received before surgery 10 mg of morphine sulfate and 0.4 mg scopolamine. Scopolamine is an anticholinergic drug that provides amnesia. It is often used in emergency cases when the patient does not have sufficient blood pressure to tolerate a proper anesthetic. She received a total of approximately 5040 mcg (reported as 90 mcg/kg) prior to surgical incision. She reported statements made by medical personnel prior to cutting the chest bone, an early part of the procedure. Hilgenberg J.C., Intraoperative awareness during high-dose fentanyl-oxygen anesthesia, Anesthesiology, 1981:54:341-3.

c. In 1983, a man having open heart surgery had intraoperative awareness and distress after 8000 mcg (96 mcg/kg) of fentanyl,

23 mg (0.28 mgkg) of diazepam, 0.4 mg scopolamine and 10 mg of morphine-, and scopolamine. 6. Again, it is worth noting that scopolamine and diazepam in combination was supposed to be a potent combination. Frumin M.J., Herekar V.R., Jarvik M.E., Amnestic actions of diazepam and scopolamine in man, Anesthesiology 1976;45:406-12. That the patient had awareness with diazepam and scopolamine (a stronger combination than diazepam alone) indicates the foolishness in relying on diazepam as a drug to block awareness. The patient reported hearing voices discussing an operating room event (his rising blood pressure) and his attempts to communicate that he was awake.

d. These events prompted KC Wong in 1983 to declare in an editorial that fentanyl does not prevent awareness. Wong K.C., Narcotics are not expected to produce unconsciousness and amnesia, Anesth Analg 1983;62:625-26.

e. In 1988, there were further investigations into the effects of high-dose fentanyl in patients having open heart surgery. In an extraordinary study, 10 patients received an intramuscular injection of 0.15 mg/kg of morphine and 0.3-0.4 scopolamine, and 60 minutes later received a total of 100 mcg/kg of fentanyl over 15 minutes. During this time, patients had headphones stating verbal messages at 25 mcg/kg, 50 mcg/kg, 75 mcg/kg and 100 mcg/kg of fentanyl. The left arm was isolated from the muscle

relaxant, allowing for patient response at these levels. This table from the paper indicates that at 25 mcg/kg of fentanyl, 80% (8/10) of patients were responsive, and at 100 mcg/kg, 60% (6/10) of patients were responsive to the verbal suggestions on the headphones. In addition, and most importantly, while the patients were sufficiently awake to respond to commands, none of them remembered it, indicating that the rates of being aware but not recalling being aware under high-dose fentanyl is significantly higher than the rate of reported awareness after high-dose fentanyl. Watanabe A., Wakefullness during the induction with high-dose fentanyl and oxygen anesthesia, J Anesth 2: 165-169, 1988.

**Table 2. Results**

| Patient No | Dosage of fentanyl (μg/kg) 25 | 50 | 75 | 100 | Complications |
|---|---|---|---|---|---|
| 1 | + | + | + | + | |
| 2 | + | + | + | + | |
| 3 | + | + | + | + | Rigidity Tachycardia |
| 4 | + | + | + | + | Rigidity |
| 5 | + | + | + | + | Tachycardia |
| 6 | − | − | − | − | |
| 7 | + | + | − | − | |
| 8 | − | − | − | − | Tachycardia |
| 9 | + | + | − | − | |
| 10 | + | + | + | + | Rigidity Tachycardia |

+ = response to verbal commands, − = no response to verbal commands

f. Lack of breathing does not mean there is an absence of patient awareness. Doses as low as 7-8 mcg/kg produce chest wall rigidity (impairing the ability to move the chest to breathe), but produces neither unconsciousness nor the stopping of breathing. Streisand J.B., Fentanyl-induced rigidity and unconsciousness in human volunteers, Anesthesiology 1993;78:629. The lack of chest wall movement in breathing can dupe an inexpert observer to assume the patient is not breathing.

g. Brief Summary of Fentanyl and Diazepam

   i. Fentanyl "is not associated with loss of consciousness" and does not block awareness in tested doses. Fukuda K., Opioids, In: Miller R.D., Miller's Anesthesia. Philadelphia, PA: Elsevier; 2010; 777.

   ii. The doses discussed here, in which there was patient awareness, are far greater than the doses proposed for Mr. Dozier. At the maximum, assuming only Set-1 were used as described in Section 5[2], Mr. Dozier would receive 1000 mcg, which is roughly 10.8 mcg/kg, and which is about 11% of the 100 mcg/kg dose.

[2] To the best of my professional interpretation, Set-2 (and the additional 500-1000 mcg of fentanyl) would only be used if Set-1 was not injected intravenously, because of, say, a disconnected or infiltrated intravenous line. As explained above, that is because if Set-1 was injected into a working intravenous line, the cisatracurium will paralyze Mr. Dozier, making him unable to show signs of distress.