

Case No. 84081

Supreme Court of Nevada

Electronically Filed  
May 18 2022 11:14 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Zane Michael Floyd,

Appellant,

vs.

DEATH PENALTY CASE

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

Appellee.

Appeal from the Eighth Judicial District Court

**Appellant's Appendix  
Volume 2 of 4**

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DOCUMENT	DATE	VOLUME	PAGE(S)
Complaint for Declaratory and Injunctive Relief	04/16/2021	1	001–016
Defendant Ihsan Azzam, M.D.’s Joinder to State of Nevada Ex Rel. Its Department of Corrections and Charles Daniels’ Motion to Dismiss Under Nev. R. Civ. P. 12(B)(5)	10/07/2021	2	388–390
Defendant Ihsan Azzam, M.D.’s Motion to Dismiss under Nev. R. Civ. P. 12(B)(5)	10/07/2021	2	381–387
Exhibits in Support of Opposition to Defendant Azzam’s Motion to Dismiss	10/19/2021	3	697–699
1. Declaration of John M. DiMuro, M.D., dated Oct. 20, 2017	10/19/2021	3	700–705
2. E-mails between James Dzurenda, Director, Nevada Department of Correction and Dr. Ihsan Azzam, Chief Medical Officer, Nevada Department of Correction, for the period July 6, 2018 – July 10, 2018 (Bates numbers NDOC-DPP-0009 – 0022)	10/19/2021	3	706–720
Exhibits in Support of Opposition to NDOC Defendant’s Motion to Dismiss	10/07/2021	2	406–408
Exhibits in Support of Plaintiff’s Motion for Temporary Restraining	04/16/2021	1	031–033

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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	04/16/2021	1	034–037
2. Hearing Before the Assembly Committee on Judiciary, 62nd Legis. (1983) (statement of Vernon Housewright, Director of Prisons), dated May 2, 1983	04/16/2021	1	038–039
3. Dozier v. State of Nevada, Case No. 05C215039, District Court of Clark County, Nevada, dated Nov. 27, 2017	04/16/2021	1	040–057
Exhibits to Reply to Opposition to Motion for Temporary Re Restraining Order with Notice and Preliminary Injunction	05/17/2021	1	087–090
1. <i>State v. Gee, et al.</i> , Appellant’s Opening Brief, Case No. 2547, Nevada Supreme Court, 1923	05/17/2021	1	091–128
2. Alexandra L. Klein, <i>Nondelegating Death</i> , 81 Ohio L. J. 924 (2020)	05/17/2021	1	129–188
3. <i>Floyd v. Charles Daniels, et al.</i> , Case No. 3:21-cv-00176-	05/17/2021	1	189–233

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	RFB-CLB, Transcript of Evidentiary Hearing, (Testimony of Charles Daniels, (D. Nev.), May 6, 2021, (ECF No. 49)			
4.	David Ferrara, <i>Nevada prison officials unsure on execution method for Zane Floyd</i> , Las Vegas Review Journal, May 3, 2021	05/17/2021	1	234–238
5.	Declaration of David B. Waisel, Oct. 4, 2017	05/17/2021	1–2	239–256
6.	<i>State v. Dozier</i> , Case No, 05215039, Clark County District Court, Transcript of Defendant’s Motion for Determination Whether Scott Dozier’s Execution Will Proceed in a Lawful Manner/Status Check: Protocols, Oct. 11, 2017	05/17/2021	2	257–277
7.	William Wan, <i>Execution drugs are scarce. Here’s how one doctor decided to go with opioids</i> , The Washington Post, December 11, 2017	05/17/2021	2	278–281
8.	<i>State v. Dozier</i> , Case No, 05215039, Clark County District Court, Findings of Fact, Conclusions of Law, and Order Enjoining the Nevada Department of Corrections	05/17/2021	2	282–299

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from Using a Paralytic Drug in the Execution of Petitioner, Nov. 27, 2017			
9. <i>Floyd v. Daniels, et al.</i> , 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)	05/17/2021	2	300–311
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Opposition to NDOC Defendant’s Motion to Dismiss	10/07/2021	2	391–405
1. Reporter’s Transcript of Proceedings, <i>Floyd v. Daniels, et al.</i> , Case No. 3:21-cv-00176- RFB-CLB, (Dist. Nev), ECF No. 49, May 6, 2021	10/07/2021	2–3	409–518
2. Reporter’s Transcript of Proceedings, <i>Floyd v. Daniels, et al.</i> , Case No. 3:21-cv-00176-	10/07/2021	3	519–688

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RFB-CLB, (Dist. Nev.), ECF No. 113, June 28, 2021			
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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
State of Nevada Ex Rel. its Department of Corrections and Charles Daniels' Reply Supporting Their Motion to Dismiss Under Nev. R. Civ. P. 12(B)(5)	10/28/2021	3	721–728
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:

Steven G. Shevorski  
Chief Litigation Counsel  
sshevorski@ag.nv.gov

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

- iii. Although the 6/10 patients who were aware after receiving 100 mcg/kg of fentanyl did not remember being aware, that is irrelevant to the condemned inmate. What is relevant is the experience in the moment.
- iv. Because these patients did not remember their demonstrated awareness, it is presumed that many other patients experienced awareness without recall, likely putting the risk to Mr. Dozier closer to Watanabe's results.

17. Nevada's execution protocol does not provide for an adequate assessment of consciousness. If Mr. Dozier stops breathing during the 90 seconds after the fentanyl is given, the cisatracurium may then be given. But given how opioids such as fentanyl can slow respiratory rates, or even pause breathing for a period, it does not mean that Mr. Dozier is unaware. This is in addition to the risk of chest wall rigidity.

18. Even if Mr. Dozier stops breathing, that does not indicate lack of awareness. The drive to breathe is due to carbon dioxide in the blood. Opioids, like fentanyl, require higher carbon dioxide levels to initiate breathing and attenuate increases in breathing than if you did not receive fentanyl. After receiving opioids, the normal increased breathing response to increased carbon dioxide occurs later (at a high carbon dioxide level) and more slowly. In other words, if you have received fentanyl, you need a higher carbon dioxide level to breathe, and even then, when you



start breathing from the elevated carbon dioxide level, you will not breathe as much as if you had not received opioids.

19. Even if Mr. Dozier were to stop breathing, he would have awareness and brain function for some time afterward. The brain has developed to ensure brain function is not immediately lost when oxygen delivery to the brain is impaired. It has both stores of oxygen and glucose and, under normal circumstances, luxury perfusion. Luxury perfusion is the idea that the brain receives more blood than is absolutely necessary; it is a built-in margin for error. A typical 45 year-old non-smoker's blood oxygen concentration is 95-99. Healthy volunteers at arterial oxygen levels of 28 mmHg<sup>3</sup> are reported to have had no mental distress and maintained consciousness. Pagani M., Effects of acute hypobaric hypoxia on regional cerebral blood flow distribution: a single photon emission computed tomography study in humans, Acta Physiol Scand 2000; 168:377-383. Studies have also shown consciousness at blood oxygen levels at less than 25 mmHg. Lindholm P., Alveolar gas composition before and after maximal breath-holds in competitive divers, Undersea Hyperb Med 2006; 33: 463-467.

20. Given the extent of oxygen available in a healthy person, it is reasonable to assume that after receiving fentanyl a person could be aware for 3-5 minutes *after* the person stops breathing. Thus, even if Mr. Dozier stops breathing,

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<sup>3</sup> "mmHg" means millimeters of mercury, and it is technically a measure of pressure; in this case, it is used more casually to indicate "how much oxygen is in the blood".

he could be well aware after the cisatracurium is given, leading to the purgatory of awareness while paralyzed.

21. Information in Nevada's execution protocol regarding experience and training standards for executioners in general and the quality of the specific executioners is missing. There needs to be a better sense of their experience and training in general and in particular, such as the frequency with which they insert intravenous catheters, their ability to assess adequate intravenous line flow, and their ability to assess respiratory function and rate. Experienced clinicians are not always good at assessing respirations, particularly slow and shallow respirations, by looking at the patient. There is no information about experience and training in assessing consciousness under high-dose fentanyl.

22. I have been asked to discuss other ways of monitoring consciousness. In hospital settings, there are various brain-function or neural monitors which are used to assess anesthetic depth. One such monitor, more commonly used in surgical operations at high risk for awareness, is the FDA-approved bispectral index (BIS) monitor. Trained and appropriately knowledgeable anesthesiologists use the BIS monitor to reduce the likelihood of patient awareness during an operation. The BIS monitor processes a single frontal lobe electroencephalographic signal to calculate a dimensionless number that provides a measure of the patient's level of consciousness. BIS values range from 100 to 0, reflecting the awake state and absence of brain activity. While a host of variables may affect the significance of the values produced by the BIS monitor, scores between 40 and 60 indicate adequate

general anesthesia for surgery. Avidan M.S., Anesthesia Awareness and the Bispectral Index, New Engl J Med 2008; 358:1097-1108.

23. The protocol does not supply information regarding team training and rehearsals on set up, preparing drugs, preparing intravenous lines, responses to unexpected events, contingency plans and so forth. Team training over time is essential for a smooth running procedure. How many rehearsals are necessary is a function of progress during rehearsals. Based on clinical experiences, it is my opinion that 3 rehearsals over a 2 month period prior to the scheduled execution would be the bare minimum required. Of course, this also requires a rehearsal protocol that includes practice responding to a list of unexpected events.

24. In the end, there is a substantial risk that Mr. Dozier will experience hellish airway obstruction and hunger after the diazepam and fentanyl over a long period of time, and that he will be aware after he is paralyzed by the administration of the cisatracurium, and will thus suffer substantial harm from being awake while paralyzed while being put to death, because of 1) the use of a discredited technique which is known to fail to prevent awareness; 2) the use of an older drug that has not been used to induce unconsciousness for decades, and, to my knowledge, has not been used in lethal injections, with unclear dosing when far better drugs can be used to decrease the risk; 3) the going forward with unclear credentials of the executioners in all areas, particularly in assessing unconsciousness produced by the drugs in this protocol, and without indication that proper training and rehearsals have taken place; and 4) the use of a paralytic agent which will hide issues of

movement related to awareness, preventing proper actions to ensure a humane execution.

25. I have been asked to opine about whether a readily available alternative to Nevada's execution protocol could be used to minimize the substantial risk of harm that its present protocol causes. As explained above, I do not believe the proposed drugs can eliminate the substantial risk that Mr. Dozier will be aware during his execution, particularly at the low dosages provided in the protocol. In light of the expert literature discussed above, I do not believe that any amount of fentanyl will be sufficient to guarantee that Mr. Dozier will be unaware during his execution.

26. I am board certified with the American Board of Anesthesiology ("ABA"). The ABA is the preeminent organization for anesthesiologists whose mission is to advance the highest standards of practice in anesthesiology. For this reason, the ABA proscribes the participation of its members in lethal injections. (American Board of Anesthesiology, Commentary (May 2014) (available at <http://www.theaba.org/PDFs/BOI/CapitalPunishmentCommentary>.) (incorporating American Medical Association Code of Medical Ethics, Opinion E-2.06 – Capital Punishment (June 2000)). The penalty for violating the ABA's rules is permanent loss of membership in the organization. I interpret the ABA's rules as preventing me from advocating an alternative form of execution. I do not believe that I can take any position that a reasonable person could interpret as advocating for a particular method of execution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on this 4th day of October 2017, at Boston, Massachusetts.

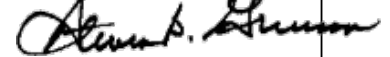


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David B. Waisel

# EXHIBIT 6

# EXHIBIT 6



1 RTRAN

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4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 SCOTT RAYMOND DOZIER aka CHAD )  
11 WYATT, )

12 Defendant, )  
13 )

CASE NO. 05C215039

DEPT. IX

14 BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE

15 WEDNESDAY, OCTOBER 11, 2017

16 **RECORDER'S TRANSCRIPT RE:**

17 **DEFENDANT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY/DEFENDANT'S**  
18 **MOTION FOR DETERMINATION WHETHER SCOTT DOZIER'S EXECUTION WILL**  
19 **PROCEED IN A LAWFUL MANNER/STATUS CHECK: PROTOCOLS**

20 APPEARANCES:

21 For the State:

JONATHAN VANBOSKERCK, ESQ.  
Deputy District Attorney

22 ANN McDERMOTT, ESQ.  
JORDAN SMITH, ESQ.  
Attorney General's Office - NDOC

23 For the Defendant:

24 DAVID ANTHONY, ESQ.  
LORI TEICHER, ESQ.  
Assistant Federal Public Defenders

25 RECORDED BY: YVETTE SISON, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, October 11, 2017 at 12:33 p.m.

2  
3 THE COURT: All right, this is Dozier versus State of Nevada, C215039.  
4 Counsel can you state your appearances for the record please.

5 MR. SMITH: Jordan Smith on behalf of the Nevada Department of  
6 Corrections.

7 MS. McDERMOTT: Ann McDermott on behalf of the Nevada Department of  
8 Corrections.

9 MR. VANBOSKERCK: Jonathan VanBoskerck, Clark County DA's Office.

10 MR. ANTHONY: David Anthony from the Federal Public Defender's Office for  
11 Mr. Dozier who's in custody. Thomas Ericsson won't be present at this hearing  
12 today.

13 MS. TEICHER: Lori Teicher from the Federal Public Defender's Office on  
14 behalf of Mr. Dozier as well.

15 THE COURT: Okay, I have gotten my weekly – I received my weekly letter  
16 from Mr. Dozier; this one briefer than ever. I've spoken to my lawyers. I haven't  
17 changed my position. Have a great afternoon. Somehow, freakishly, I did open it at  
18 noon. It was a little unusual – this afternoon. So – anyway, it was very brief, like  
19 three sentences. You should've been copied on it. It literally said; I've spoken to my  
20 lawyers. They continue to communicate with me, something to that effect, and I  
21 haven't changed my mind.

22 So, my staff has been under instructions to serve you with those as  
23 they come in. Anything on that?

24 MR. ANTHONY: Not from us, Your Honor.

25 THE COURT: Okay.



1 MR. SMITH: No, Your Honor. I do have one quick question though. There  
2 was some email correspondence about the letters and whether they are going to be  
3 publicly filed or not.

4 THE COURT: Yes. Well, here's the thing, most inmate correspondence, as  
5 you can imagine, with the hundreds of cases that we have, is served on the – I  
6 served on the parties but not filed in the public record. Its left-side filed, and the  
7 reason for that is, because pro pers are not allowed to file their own filings, number  
8 one. They need to go through their attorney. And so we do make a record of it, but  
9 we don't file it in the formal public filing because it's not a recognized pleading of the  
10 Court. It hasn't been filed with leave or permission of the Court, and so that's how  
11 we document it.

12 MR. SMITH: That was my question, was left-side filed. So that makes sense.  
13 Okay. Thank you.

14 THE COURT: Yes. They're left-side filed, and they're served upon the  
15 parties. So, if this were just any run-of-the-mill case, and he were sending me  
16 letters; why won't you let me out of jail? Why hasn't my case been dismissed?  
17 You're the Queen of the Sumerians, which is my favorite, left-side filed, and served  
18 on the parties.

19 Okay, so as far as the public dissemination, the Defense objected,  
20 based upon concerns of attorney-client privileged information that might be in those  
21 letters, although the latest letter is: I've talked to my lawyers. I haven't changed my  
22 mind. Have a great afternoon. There's nothing privileged about that. If there's  
23 some desire to see his handwriting by anyone who makes a request, if I thought it  
24 was not concerning related to the Defense concerns of privilege information, then I  
25 would put you on notice that I'm going to give a copy, but I'll put you on notice first.

1 I understand your concerns, but so far Mr. Dozier does nothing but  
2 exactly what I told him to, which is to tell me he's been talking to his lawyers, and  
3 whether or not he's changed his mind. Okay, so – I'm sorry, did you say you had  
4 anything else?

5 MR. SMITH: That was it, Your Honor.

6 THE COURT: Okay. So, the Court is in receipt of the most recent filing on  
7 behalf of Mr. Dozier. I assume you have a copy of it?

8 MR. SMITH: We do.

9 THE COURT: Okay; and that was filed on September 25<sup>th</sup>, and to my  
10 knowledge, you didn't file anything in response, correct?

11 MR. SMITH: That's correct, just the reply brief, that's correct.

12 THE COURT: Okay. So, where do you want to start?

13 MR. SMITH: Also, the reply brief was filed on the 25<sup>th</sup>, and there was an  
14 errata filed – was disclosed to us I believe on October 4<sup>th</sup>, and then formally filed  
15 under sealed I think with the Court on October 10<sup>th</sup> that contains Mr. Dozier's  
16 expert's affidavit.

17 You'll notice in the expert affidavit, toward the end the expert  
18 specifically refuses to provide an alternative method of execution. He claims that  
19 he's ethically barred from doing so.

20 You also note he doesn't specifically say – he criticizes the amount of  
21 dosages that the State is using for the various drugs, but doesn't say; I need you to  
22 be at X amount for this drug, X amount for this drug. So there are no minimum  
23 dosages or really any other specific modifications suggested. So, it's the State's  
24 position and NDOC's position that there is no – there has been no available known,  
25 feasible, readily implemented alternative suggested by the Defense.

1           With that said, we have gone over the reply brief and the expert affidavit  
2 with the State's Chief Medical Officer to determine what, if any, clarifications or  
3 modifications the State needs to make in response to that, and there are a few  
4 areas that we acknowledge we need to clarify, things that we always intended to do  
5 that we thought were implied that any anesthesiologist would know were inherent,  
6 because anesthesiology is more art than science. So there are a couple areas that  
7 we agree that we need to clarify including increasing the loading dosages for the  
8 drugs, the starting dosages; and clarifying that those amounts were never meant to  
9 be a cap. It was always the intent to what they call titrate to effect; meaning you  
10 start with these loading dosages. You see how well the inmate responds to those  
11 drugs through consciousness assessments; again which was always intended to be  
12 done, but given what the expert's affidavit said, you could see where perhaps that  
13 wasn't spelled out clearly enough.

14           So, you do a loading dose, you do a consciousness assessment to see  
15 how well the inmate responds. The inmate responds that he's still consciousness –  
16 conscious, you would then titrate to effect, meaning you gradually increase the  
17 dosages until you no longer have the responses, before moving onto the second  
18 drug, for example; then you repeat the process there, where you go up to a loading  
19 dose. You see – you do another consciousness assessment, this time the Fentanyl,  
20 I believe, it's tactile stimulus meaning more than verbal, some sort of pinch I  
21 imagine, I believe is the process there, but again that will be provided in an updated  
22 protocol soon.

23           Then, assuming that, after you've reached the loading dose or you  
24 titrated to effect as necessary, and you don't have a consciousness response, then  
25 you would move on to the third drug. That's always how the process was meant to

1 be implemented. We can see from the expert's report how somebody could read it  
2 that way; NDOC has agreed to provide those updates again, sort of under – within  
3 the context of their expert, refusing to provide specific dosages that we need to hit or  
4 otherwise, offering a specific alternative.

5 It's our hope to be able to provide those updates and those revisions  
6 based upon those updates to the Court and opposing counsel under seal next week.

7 THE COURT: So how does that affect the expert's view that there could be  
8 90 seconds of the time period for which the Defendant is not breathing, when he  
9 could resume breathing, and this proposition that this piece of equipment would  
10 assist any team, for lack of a better term, in determining whether in fact he is  
11 conscious or not, breathing or not; what about that piece of equipment? Did your –

12 MR. SMITH: Right. So, as far as the breathing piece goes, we acknowledge  
13 that breathing alone is not, by itself – again I don't – this is my layman's term, based  
14 upon my understanding, having gone over with the Chief Medical Officer here, so I  
15 think I'm using the correct terminology, but don't hold me to this necessarily, but we  
16 agree breathing alone does not sufficiently count for consciousness or not. So  
17 breathing will be a piece but along with this tactile verbal stimulus, these  
18 consciousness assessments, that will be done I believe by medical personnel.

19 So, I think it fixes the breathing piece about whether breathing alone  
20 should be the only assessment; as there will be a consciousness assessment,  
21 meaning verbal stimulus, tactile stimulus, and then maybe even like a harder tactile  
22 stimulus perhaps.

23 THE COURT: So, if you can answer, did your Chief Medical Officer address  
24 this piece of equipment itself or just –

25 MR. SMITH: Yes, we have concerns with this piece of equipment. This piece

1 of equipment, it's my understanding, is unreliable. I believe it was even discussed in  
2 Baze v. Glossip as well that it's – that while – while some people may use it in the  
3 medical context, it's not necessarily to be used in this particular context that we're  
4 discussing here today, but also these particular drugs, it's not designed for these  
5 particular drugs, and so it's unreliable to that extent; and the consciousness  
6 assessment, it will be a better indicator – the physical consciousness assessment  
7 will be a better indicator than using this piece of machine.

8               So, we did discuss the piece of machinery, the BIS machine, with the  
9 Chief Medical Officer, and it's our position that – that alone – that by itself will not be  
10 reliable and should not be used.

11           THE COURT: By itself?

12           MR. SMITH: Well, at all; at all.

13           THE COURT: I see. And you're suggesting to me that that – I can't  
14 remember which – I have the cite here. The case specifically addresses that piece  
15 of equipment?

16           MR. SMITH: That's my memory, Your Honor. I believe its Baze or Glossip  
17 that does – I could be – it's Baze, so it's Baze.

18           THE COURT: Baze.

19           MR. SMITH: I will confirm that. I know there is a Federal Court that does,  
20 and I believe maybe even another State Court that talks about the machine as well.  
21 We dug into this once it was suggested; and in Baze at – pages 50 to 60 it's  
22 discussed. If I'm incorrect on that, I will get the cite to everybody, including the  
23 Court this afternoon, if I'm incorrect; but that case I believe does discuss the BIS  
24 machine.

25           THE COURT: And so you referenced being able to clarify the protocol by

1 when?

2 MR. SMITH: Next week. We're aiming at Wednesday, Your Honor, and then  
3 we would submit that to Your Honor under seal and as well to opposing counsel at  
4 the same time.

5 THE COURT: And there would – would there be any reason why we would  
6 have to adjust the protective order?

7 MR. SMITH: I think – it would be covered by the protective order; perhaps,  
8 we could have some type of agreement in writing that would still be covered by the  
9 protective order. I mean, it's just an update of – it would be an update of the current  
10 protocol that everyone's been disclosed.

11 MR. ANTHONY: I mean from our perspective, we already made our  
12 arguments before the protective order was entered. Obviously, we've signed the  
13 protective order at this point.

14 I probably, in the interest of expediting the matter given the dire, you  
15 know, situation that is about a month out, I think that we could continue to be subject  
16 to the protective order based on whatever amendments they supply to us.

17 MR. SMITH: Another avenue could be, Your Honor, the protective order  
18 allows parties to designate things highly confidential. We could just designate it  
19 highly confidential on a protective order that might be another way to avoid having a  
20 separate agreement.

21 THE COURT: And so is it your – is it your plan to address in specific detail as  
22 the original protocol that I read when you amended to include the same kind of  
23 information as is already included in there as far as timing, and all the things that  
24 we've discussed here today in that protocol?

25 MR. SMITH: Yes, Your Honor, it's my understanding we would do the exact

1 same thing; clarify – increase and clarify these loading dosages are just that.  
2 They're not caps, with some description of how the dosage – the timing – the time  
3 period over which the doses would be administered, then when the consciousness  
4 assessment would be conducted and how that will be conducted and determine  
5 whether titrating, I believe is the phrase, titrating will be necessary or not before then  
6 moving onto the Fentanyl. Same thing, increase the loading dosages with an  
7 explanation of; this is the period of time over which it will be administered, then a  
8 consciousness assessment there to determine, you know, to ensure that Mr. Dozier  
9 is unconscious and insensate and won't experience any air hunger, etc., before  
10 moving onto the third drug. So yes, the same level of detail will be provided.

11 THE COURT: Look, I understand it's been the State's position that until this,  
12 you know, alternative is proffered that nothing is appropriate for inquiry, but I've said  
13 before, and I'll say it again, that the Court has the inherent authority to consider  
14 certain things in the enforcement of its order, and so, you know, one of the things  
15 that I'm struggling with, is the use of the paralytic; the purpose of it, the necessity of  
16 it, other than to mask suffering. So I'm sure there's some reason, otherwise, your  
17 medical officer wouldn't have it as part of the protocol. So what is it, because I have  
18 the inherent authority to ask, and if you don't agree, then you should go to the  
19 Nevada Supreme Court.

20 MR. SMITH: I agree that Your Honor has the inherent authority within the  
21 construct of the Supreme Court – Nevada Supreme Court precedent, etc., so let me  
22 see if I can address the use of the paralytic. In other protocols that have been the  
23 traditional, I'll call it the traditional protocol, with the potassium chloride going last,  
24 the paralytic is usually gone second. So, in all of these cases, they have approved  
25 the use of a paralytic, and the same argument has been made in those cases, that

1 all the paralytic does is mask pain, especially when it's being administered second,  
2 with the potassium chloride being administered third. I think its Glossip and Baze  
3 both say that potassium chloride administered by itself would be cruel and usual.  
4 Justice Sotomayor in her concurrences, I think it's authored most recently in her  
5 denial from cert [phonetics], said that potassium chloride is being somewhat like lit  
6 on – being set on fire or something to that extent.

7 But, Glossip and Baze say that if you're sufficiently unconscious from  
8 the first two drugs and insensate to pain, unconscious, that then potassium chloride,  
9 even though by itself would be unconstitutional because you can't experience it, and  
10 you're unconscious, the use of potassium chloride is constitutional.

11 Think of this execution protocol in a similar manner. Again I'm using  
12 terms loosely here; but from the first two drugs, Mr. Dozier will be unconscious,  
13 insensate to pain, will not experience air hunger, will not experience any panic, or  
14 anything of that nature. And so, instead of the potassium chloride, we're using the  
15 Cisatracurium. The breathing will be slowed with the Fentanyl, in combination with  
16 the Diazepam, the breathing will be slowed but Fentanyl is, my understand and  
17 again I'm not a doctor, my understanding is Fentanyl is fast-acting; and because  
18 there's no continuous flow, meaning just pumping him continuously with Fentanyl,  
19 his breathing will get to zero, then the paralytic will be administered to then as he  
20 gets lower in breath, and unable to breathe, the Cisatracurium will then prevent him  
21 from just expanding his diaphragm at that point.

22 So, you know, think of Cisatracurium not exactly in the same way, but  
23 loosely as an analogy to the potassium chloride in the – in the normal execution  
24 protocol that's been used – that had been approved.

25 THE COURT: So I don't think it's too much to ask for the State to provide a



1 medical officer's affidavit telling me that. I appreciate that you're representing that  
2 to me, but how about someone who's in charge of, you know, being the medical  
3 officer for the State who is a, I presume board certified anesthesiologist, to actually  
4 attest to those things, so I have that in the record, as opposed to – I'm not  
5 questioning what you say, but I would like to have that in the record as the stated  
6 purpose –

7 MR. SMITH: Okay.

8 THE COURT: -- of such a thing. So that it can be commented on, you know,  
9 I think we're gonna need to have a status check on this to get that – I mean you said  
10 by Wednesday you could file it?

11 MR. SMITH: We're aiming at Wednesday, yes Your Honor; end of the week,  
12 at the latest, we're aiming at Wednesday of next week. Would you like the affidavit  
13 from the Chief of –

14 THE COURT: Can you aim at Tuesday at 5 o'clock? So you could come  
15 here Wednesday and say it's on file and – I assume you'd have to have your expert  
16 to – I don't need the whole parties here just to do a scheduling –

17 MR. SMITH: I don't know about a fully revised protocol, Your Honor. I'm – I  
18 don't want to rush that. If you're looking for an affidavit, for example, explaining that;  
19 I'm sure I can get that to you by Tuesday absolutely. As far as a fully revised  
20 protocol, Wednesday was my understanding, was pretty fast given the –

21 THE COURT: Okay. If you could – if you could Tuesday by 5 o'clock, I just  
22 would like the affidavit of the stated purpose of the paralytic. I mean I understand  
23 that's your – you know, you didn't come up with that on your own, but if I could have  
24 that so that, you know I mean, much, much, much of the Defendant's challenge to  
25 this or questioning of this is related to the use of that, the purpose of it, the benefits if

1 any, and their concerns; and I think it's just important to have something from the  
2 Chief Medical Officer that addresses the stated and intended purpose of the drug.

3 MR. SMITH: I understand that. It's also – and this will be in an affidavit as  
4 well, but it's also my understanding that removing the paralytic could actually end up  
5 – and the opinion of the Chief Medical Officer end up being less humane than taking  
6 it out. That'll be in the affidavit as well, but I think that's important to mention.

7 And we'd also probably be filing – to the extent as discussed, details of  
8 the protocol itself, we probably be filing that affidavit under seal as well or at least  
9 redacted in the areas we feel need to be redacted.

10 THE COURT: Is there anything related to the Defense's concerns about the  
11 team's assessment ability, you know – I mean I think they aptly point out that most  
12 of the folks that do this kind of work that are going to be there, EMT's and doctors  
13 aren't in the business of securing the death or ensuring the death – the easy and  
14 painless death of a human being, that's not what they do usually. So there's the  
15 specific concerns that are raised in that brief is – and I don't recall, because I read it  
16 and I, you know, was comforted in knowing that it was a very thorough step-by-step  
17 contingency type plan regardless of whether the drugs and the titration and all that  
18 was appropriate or the amounts; the actual plan. But I am – I mean that raises a  
19 concern that you did or didn't discuss with your Chief Medical Officer?

20 MR. SMITH: We did discuss training. I mean, the people – the team that is  
21 involved has been training and doing rehearsals. I know that for a fact. And, as  
22 disclosed to opposing counsel and the Court as well, I mean there are people with  
23 medical training who are going to be participating in this. Beyond that and beyond  
24 saying, and this is my memory from the affidavit, beyond saying that you should  
25 have at least two run throughs over two months or something like that. I don't really

1 know the specifics that the expert offers on what additional needs to be done or  
2 what he wishes to see.

3 THE COURT: Well, I was getting into that discussion of that window of time  
4 where the Defendant could stop breathing but then start breathing again and with  
5 whatever –

6 MR. SMITH: Okay

7 THE COURT: -- titration or paralytic and when it is and how much it is might  
8 not be discerned by your average EMT. Hey, he stopped breathing for 90 seconds.  
9 He stopped breathing for two minutes.

10 MR. SMITH: I understand, Your Honor –

11 THE COURT: That part of it –

12 MR. SMITH: -- Your Honor –

13 THE COURT: -- it was a very specific kind of hypothetical.

14 MR. SMITH: There is an attending physician who will be present, and so  
15 again I don't know this level of detail, but it will be I imagine in the revised version,  
16 there will be EMT's present and an attending physician. So I understand your point,  
17 maybe your average EMT won't know what they're looking for, but there will be an  
18 attending physician there who's either directing or doing the assessments  
19 themselves. Again, I don't know the details of that, but there is an attending who will  
20 be there.

21 THE COURT: And will this attending have the benefit of all the – when we're  
22 – let's just say hypothetically which I – clearly we're not there, but hypothetically, all  
23 of the specific concerns that have been raised by this defense expert involve a very  
24 heightened examination of the Defendant while this is going on for all of these  
25 factors that this expert raises, will that attending physician be educated on – I mean

1 I – you know, just because you’re a physician, doesn't mean that you’re prepared  
2 and trained and done two run throughs on an execution, are aware of all the  
3 possible concerns that, you know, every doctor looking at this case might have  
4 associated with the breathing – the stopping of the breathing, starting again, being  
5 paralyzed, being conscious, and suffering through suffocation.

6 MR. SMITH: I understand Your Honor’s concerns. It’s my – the attending  
7 physician has experience in surgery and dealing with anesthesia. So, this isn’t – I  
8 don't mean to be flippant, but this isn’t you know some sort of just general practice  
9 person, this is somebody who has experience with surgery and dealing with patients  
10 under anesthesia.

11 THE COURT: Currently? Like a current surgeon?

12 MR. SMITH: Yes.

13 THE COURT: So someone who currently performs anesthesia for surgeries  
14 on a regular basis?

15 MR. SMITH: That’s my understanding, yes; and I wouldn't want to get too –  
16 again for identity purposes and confidentiality I wouldn’t want to –

17 THE COURT: No, no of course. But could you include – could your Chief  
18 Medical Officer include the plans of the background – I don't need details – I don't  
19 need to know where they graduated. I’m just saying someone who currently  
20 conducts anesthesia for general surgery – whatever they’re doing currently would be  
21 helpful.

22 MR. SMITH: Okay.

23 THE COURT: Okay. And so you could have that by Tuesday?

24 MR. SMITH: I will endeavor to have it to you by Tuesday.

25 THE COURT: I realize you don't have a –

1 MR. SMITH: I don't know the schedule, but I will –

2 THE COURT: Sure.

3 MR. SMITH: -- I will do my best.

4 THE COURT: If there was a problem with the Chief Medical Officer's  
5 schedule, you could just notify opposing counsel and I that you need two business  
6 days – whatever you need.

7 MR. SMITH: Sure. And, Your Honor, I'm personally out tomorrow and Friday  
8 that's why we are having the hearing today, but our team –

9 THE COURT: We could do Wednesday. I'll set a status check later in the  
10 week just to see if you filed what you said you were going to file.

11 MR. SMITH: Okay.

12 THE COURT: Just because we're getting close, and then you know, we have  
13 Nevada Day and we have --

14 MR. SMITH: Understood.

15 THE COURT: Okay. So – so why don't we say Wednesday for the Chief  
16 Medical Officer's Affidavit to address the list of things that I asked about today, and  
17 then you said you believed you could have your –

18 MR. SMITH: Hopefully this –

19 THE COURT: -- protocol produced to the Defense – it doesn't need to be  
20 produced to – I would prefer it be produced to them –

21 MR. SMITH: Okay.

22 THE COURT: -- before me. As long as I have it the day before the hearing, I'll  
23 drop everything and read it the day before the hearing.

24 MR. SMITH: Okay.

25 THE COURT: They, however, have someone they're consulting with that

1 would need it sooner. So, they're the first party in interest to get it and then you can  
2 send it to me, thereafter. What do you think would be a reasonable time for that?  
3 Did you say the end of the week next week?

4 MR. SMITH: Well, we'll still aim at Wednesday. End of the week is a back  
5 stop.

6 THE COURT: Okay. So do you think – when are you gone? You're gone the  
7 13<sup>th</sup> and the 16<sup>th</sup>?

8 MR. SMITH: Yes, tomorrow and Friday, and the weekend.

9 THE COURT: Would it be – do you think that you could come in on October  
10 20<sup>th</sup> in the late morning and just update me on what was filed and whether you've  
11 had an opportunity to get it to your expert and –

12 MR. ANTHONY: Your Honor, assuming that – I believe that the date that the  
13 Court was contemplating is Wednesday, the 18<sup>th</sup>, I think that that would be sufficient.  
14 Our expert is on the East Coast, but I believe we can get a hold of him if we're  
15 talking about – if they submit it by the 18<sup>th</sup>, I think we would be able to consult with  
16 him and get his feedback, so we could talk to the Court on the 20<sup>th</sup>. So I think that  
17 that would work.

18 MR. SMITH: The 20<sup>th</sup> will work.

19 THE COURT: Okay.

20 MR. ANTHONY: And Your Honor, just to clarify, that would assume that we  
21 get both things right?

22 THE COURT: Right.

23 MR. ANTHONY: That we get the execution protocol, the amended one, and  
24 secondly that we get the Chief Medical Officer's affidavit.

25 THE COURT: Right. I mean, I think on the 20<sup>th</sup>, if they weren't able to get the

1 protocol, then we discuss, you know, they are either handing it to you in open court  
2 or they're saying; we're really, you know, ran into some delays. We need X amount  
3 of time, and we can figure it out on the 20<sup>th</sup>.

4 MR. SMITH: That works, Your Honor.

5 THE COURT: I just – I'm trying to keep – I'm just trying to manage it.

6 MR. SMITH: I understand.

7 THE COURT: Okay. So, that'll be the plan, and the Nevada Attorney  
8 General's Office will prepare the Chief Medical Officer's response to some of these  
9 things that -- in an affidavit form, that the Court has raised and that was specifically  
10 questioned in the Defense filing, and the amended protocol on October 20<sup>th</sup> at  
11 11:30. I'm trying to make sure you're not sitting here for things you don't need to be  
12 sitting here for.

13 MR. ANTHONY: Thank you, Your Honor.

14 THE COURT: Is there anything else? And we're all agreeing that this would  
15 be designated – this protocol would be designated highly confidential? I assume  
16 you're not going to produce an entirely new protocol but just the sections that are  
17 relevant, you're just going to – you're going to produce amended sections that are  
18 relevant. I mean we have – there's a lot there that are not part of the Court's  
19 concern.

20 MR. SMITH: Correct.

21 THE COURT: Okay. So, are you going to designate it highly confidential?  
22 Because we're really talking about the drugs, the titrating, the amounts, the –

23 MR. SMITH: Yes.

24 THE COURT: You're okay with that?

25 MR. ANTHONY: Under the circumstances, we're fine with that. You know,

1 we obviously want to move things forward because of where we're at.

2 THE COURT: Okay. So –

3 MR. ANTHONY: The only thing that I would add, Your Honor, is just that the  
4 one other topic that was going to be for discussion today was whether or not Dr.  
5 Waisel's declaration should be made public. I know that was something that the  
6 Court mentioned at our last hearing, and so I just want to throw that out there as  
7 well. I don't know if there was gonna be a ruling as to whether that should remain  
8 confidential or whether it can be publicly filed. Other than that I don't have any  
9 questions.

10 MR. SMITH: I believe Your Honor gave me a homework assignment for today  
11 to review the affidavit and look at sections that we would like to have redacted, if  
12 necessary. I have a handful of those, a couple of those –

13 THE COURT: Do you have them highlighted or do you have some –

14 MR. SMITH: I do.

15 THE COURT: Did you show them to counsel yet?

16 MR. SMITH: No, not –

17 THE COURT: -- do you have two copies by any chance?

18 MR. SMITH: -- I do not. I just have the one I've written all over.

19 THE COURT: Is the highlight something that would copy if I make a copy?

20 MR. SMITH: The words – but I've also highlighted a couple other things as  
21 well.

22 THE COURT: Could we do this, could you – could you give a highlighted  
23 copy to both myself and the Defense before the 20<sup>th</sup> at 11:30 so that maybe by –  
24 whenever you give me your doctors – your Chief Medical Officer's affidavit?

25 MR. SMITH: Yes, Your Honor.



1 THE COURT: That way – and if you could just literally use a highlighter –

2 MR. SMITH: Yes.

3 THE COURT: -- so I can quickly reference it. I would appreciate it. You have  
4 a lot of materials. I try to refresh myself every time you come in here, and it's – also  
5 I don't have a medical degree. Clearly, I need one for this proceeding. Anything  
6 else? So you could get that to them and to me, then I could be prepared to address  
7 it on the 20<sup>th</sup> at 11:30.

8 MR. SMITH: Yes, that works for us, Your Honor.

9 MR. ANTHONY: That works for us as well, Your Honor.

10 THE COURT: Okay. Also, whatever your – if you could do the same with the  
11 affidavit – provide a – I mean I know it's subject to the protective order, but at some  
12 point – I mean, we're discussing these things in open court, dosing's and titration; I  
13 mean it's not a big secret, that part of it. It's not a security risk. It's not anything that  
14 can't be public that I can think of but there might be other things. So, anything else?

15 MR. ANTHONY: Not from us, Your Honor.

16 MR. SMITH: Not from us, Your Honor.

17 THE COURT: Okay, then I'll see you Friday, October 20<sup>th</sup> at 11:30. Okay,  
18 Thank you.

19 MR. SMITH: Thank you, Your Honor.

20 MR. ANTHONY: Thank you, Your Honor.

21 MS. TEICHER: Thank you, Your Honor.

22 [Proceedings concluded at 1:04 p.m.]

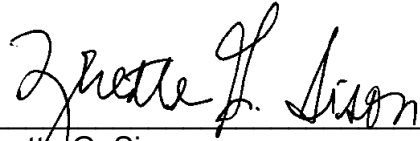
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

A handwritten signature in black ink, reading "Yvette G. Sison". The signature is written in a cursive, flowing style. The first name "Yvette" is written with a large, looped "Y". The middle initial "G." is written in a smaller, simpler script. The last name "Sison" is written with a large, looped "S". The signature is positioned above a horizontal line.

Yvette G. Sison  
Court Recorder/Transcriber

# EXHIBIT 7

# EXHIBIT 7

Post Nation

# Execution drugs are scarce. Here's how one doctor decided to go with opioids.

By William Wan December 11

The doctor who devised the nation's first execution method using fentanyl did so in a matter of minutes.

"I honestly could have done it in one minute. It was a very simple, straightforward process," said John DiMuro, who was Nevada's chief medical officer when he developed the experimental protocol with the powerful opioid. The state planned to use it last month on death row inmate Scott Dozier, but a judge put the execution on hold just days before its scheduled date. DiMuro resigned from his post in October.

In an interview, DiMuro said he looked at the few drugs available to the prison system and quickly settled on a three-drug combination. He included fentanyl and based its use in the protocol on a procedure often used to anesthetize patients for open-heart surgery.

His protocol is under attack from lawyers representing Dozier as well as others. Fentanyl is part of a wave of new drugs and options being explored by some states because of their problems obtaining the products they long have used. Critics have decried the efforts as risky human experimentation.

Some have also questioned why DiMuro, a board-certified anesthesiologist, helped create the protocol. Many doctors view any involvement in executions as a violation of their Hippocratic oath to do no harm. Many medical boards ban members from participating or assisting.

But DiMuro invokes duty and more, noting that he was required by Nevada statute to collaborate with prison officials to help them come up with a viable lethal injection protocol once they could no longer obtain the drugs traditionally used.

“I was just following the law. I owed it to the citizens of Nevada to follow the statute, and I did everything that was required of me,” he said.

DiMuro said his choice of fentanyl should remain separate from the nation’s opioid crisis, which has thrust the drug into the headlines as thousands of Americans continue to die of overdoses.

“People are trying to make that leap that we did it because of the opioid crisis, but it had nothing to do with it,” he said. “Fentanyl is one of the most commonly used opioids. It’s in every operating room, and it’s safe and effective in the right hands.”

The protocol that DiMuro designed calls for inmates to first receive diazepam, a sedative better known as Valium. They would then receive fentanyl to cause them to lose consciousness. Large doses of both would cause a person to stop breathing, according to three other anesthesiologists interviewed.

Yet the new method also involves injecting inmates with a third drug, cisatracurium, to paralyze the muscles — a step some medical experts believe creates unnecessary risk of suffering. If the inmate wakes up after receiving the third drug, he could die fully conscious but unable to move or signal his distress, critics say.

The judge who postponed Dozier’s execution cited concerns about the cisatracurium. The case is awaiting review by Nevada’s Supreme Court.

DiMuro defends his inclusion of cisatracurium. The first two drugs don’t guarantee the person would stop breathing and could take longer to take effect, he said. “The third drug helps to hasten and ensure death. Instead of taking a long time, death would come in five to 15 minutes. Without the paralytic, it would be less humane.”

His decision to resign as Nevada’s medical officer was related to neither the execution nor any threat to his board certification, he said. He had served in the post about 15 months after many years in private practice and saw it as a way to perform public service. “I wanted to see if I could give something back and help,” he said.

He said he has no opinion on the death penalty and feels confident he did his best in designing the new execution protocol.

“The one thing I was able to do,” he said, “was to make sure this was done in the most humane way possible.”


*Mark Berman contributed to this report.*

**Read more:**

[Lethal injection delayed after execution team couldn't find convicted killer's vein](#)

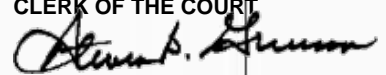
[Judge refuses to halt Va. execution over concerns about lethal-injection drugs](#)

 **4 Comments**

William Wan is a national correspondent for The Washington Post, covering science and news. He previously served as the paper's religion reporter, foreign policy correspondent and for three years as the Post's China correspondent in Beijing.  Follow @thewanreport

# EXHIBIT 8

# EXHIBIT 8



DISTRICT COURT

CLARK COUNTY, NEVADA

SCOTT RAYMOND DOZIER,

Petitioner,

v.

STATE OF NEVADA,

Respondents.

Case No. 05C215039

Dept. No. IX

(Death Penalty Habeas Corpus Case)

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

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



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

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

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

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

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

6         6. At the Court's request, NDOC submitted a Declaration by John M.  
7 DiMuro, D.O., the former Chief Medical Officer of the State of Nevada,<sup>1</sup> dated  
8 October 20, 2017. NDOC also submitted revised protocol provisions, also dated  
9 October 20, 2017, within the Execution Manual (EM) for Sections 103 and 110. The  
10 October 20, 2017 revisions addressed titration and entailed significant increases in  
11 the dosage of the three drugs to be used under the protocol. NDOC's revised protocol  
12 retained all three of the drugs as set forth in its earlier version of the protocol, and  
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14         <sup>1</sup> Nevada law requires the Director for the Department of Corrections to  
15 consult with the State's Chief Medical Officer ("CMO") regarding the selection of the  
16 drug or combination of drugs to be used for executions. NRS 176.355. In addition,  
17 provisions of NDOC's execution protocol require the CMO be consulted regarding  
the drugs' dosages to ensure they cause death, and further require that the CMO, or  
his designee, direct the preparation of the execution drugs. EM 100.02, 103.01 and  
103.03.

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

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

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

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

#### 18 FINDINGS OF FACT

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

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

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

10           A. Known and Available Alternative

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



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

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

18 B. Substantial Risk of Harm

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

23

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

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

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

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

---

22 <sup>4</sup> October 20, 2017 Declaration of John M DiMuro, D.O., p. 3.

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

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



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

3 ORDER

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

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

12 DATED this 27<sup>th</sup> day of November, 2017

13  
14   
15 JENNIFER P. TOGLIATTI  
16 DISTRICT JUDGE  
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22 <sup>5</sup> See Petitioner's 9-25-17 Reply at 10.  
23

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

3 Ann M. McDermott  
Jordan T. Smith, Esq.  
4 Thomas A. Ericsson, Esq.  
Lori C. Teicher, Esq.  
David Anthony, Esq.  
Jonathan E. Vanboskerck, Esq.

5   
6 DIANE SANZO, Judicial Assistant



# EXHIBIT 9

# EXHIBIT 9

AARON D. FORD  
Attorney General  
JULIE A. SLABAUGH (Bar No. 5783)  
Chief Deputy Attorney General  
State of Nevada  
Office of the Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
Telephone: (775) 684-1131  
Fax: (775) 684-1145  
JSlabaugh@ag.nv.gov

*Attorneys for Defendant  
Ihsan Azzam, Chief Medical Officer  
of the State of Nevada.*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ZANE M. FLOYD,

Plaintiff,

vs.

CHARLES DANIELS, *et al.*,

Defendants.

Case No. 3:21-cv-00176-RFB-CLB

**MOTION TO WITHDRAW AS  
ATTORNEY OF RECORD FOR  
DR. ISHAN AZZAM**

COMES NOW, Attorney General Aaron D. Ford, and Chief Deputy Attorney General, Julie A. Slabaugh, of the State of Nevada, Office of the Attorney General, pursuant to the Nevada Rules of Professional Conduct (“NRPC”) 1.7, 1.11 and 1.16, and Local Rule (“LR”) IA 10-6 and hereby move to withdraw as attorneys for Defendant Dr. Ishan Azzam. This motion is based upon the Memorandum of Points and Authorities, Declarations of Julie A. Slabaugh and Leslie M. Nino Piro, attached hereto as Exhibits “A” and “B”, and such argument and evidence as may be presented at the hearing on this motion, should that occur.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. STATEMENT OF FACTS**

On April 16, 2021, Plaintiff Zane M. Floyd filed his Motion for Temporary Restraining Order with Notice and Preliminary Injunction (ECF No. 5 & 6) and his Motion for Disclosure of Method of Execution (ECF No. 7). On April 21, 2021, Floyd filed his Motion for Stay of Execution. (ECF No. 10). On April 30, 2021, Dr. Azzam filed his Opposition to Floyd's Motion for Temporary Restraining Order with Notice and Preliminary Injunction and joined in the Nevada Department of Corrections (NDOC) Defendants oppositions to all of Floyd's pending motions. (ECF Nos. 26, 27 28 and 29).

On May 3, 2021, this Court held a hearing on all of Floyd's pending motions and following argument set an evidentiary hearing for May 6, 2021 to hear testimony from NDOC Director Daniels and Dr. Azzam regarding, among other things, what drugs are being considered for the execution protocol by Director Daniels, what drugs are available, what drugs are not available and when the execution protocol will be finalized.

Following the hearing on May 3, 2021, counsel for Julie A. Slabaugh and Leslie Nino Piro, General Counsel to the Office of the Attorney General (AGO) had a conversation with Dr. Azzam. (Exhibits A & B). In the course of that conversation it became clear that there was an actual conflict between Dr. Azzam and the NDOC Defendants in this case. (Exhibits A & B). Based on that conflict, Ms. Nino Piro informed Dr. Azzam that CDAG Slabaugh needed to withdraw and the AGO would retain outside counsel to continue his representation in this case. On May 4, 2021, Ms. Nino Piro secured outside counsel to continue Dr. Azzam's representation in this case. (Exhibit B). Ms. Nino Piro is currently expediting a written agreement to formally retain outside counsel. Outside counsel has informed Ms. Nino

1 Piro that a substitution of counsel will be filed as quickly as possible once  
2 the agreement is signed. However, even if outside counsel files the  
3 substitution by tomorrow, May 5, 2021, it is unlikely that outside counsel  
4 will be able to fully and adequately represent Dr. Azzam at the evidentiary  
5 hearing scheduled on Thursday, May 6, 2021. (Exhibit B).

## 6 II. ARGUMENT

7 LR IA 10-6 states in pertinent part:

8 (b) No attorney may withdraw after appearing in a  
9 case except by leave of Court after notice has been  
10 served on the affected client and opposing counsel.

11 (e) Except for good cause shown, no withdrawal or  
12 substitution shall be approved if delay of discovery,  
13 the trial or any hearing in the case would result.  
14 Where delay would result, the papers seeking leave of  
15 Court for the withdrawal or substitution must request  
specific relief from the scheduled trial or hearing. If a  
trial setting has been made, an additional copy of the  
moving papers shall be provided to the Clerk for  
immediate delivery to the assigned district judge,  
bankruptcy judge or magistrate judge.

16 NRPC 1.16(a)(1) states that a lawyer shall not represent a client or shall withdraw  
17 from representation of a client if “the representation will result in violation of the Rules of  
18 Professional Conduct or other law”. NRPC 1.7 states that a lawyer shall not represent a  
19 client if the representation involves a concurrent conflict of interest. *See also* LR IA 10-7  
20 (stating that attorneys must follow rules of professional conduct as adopted by the  
21 Supreme Court of Nevada).

22 In this case, the AGO must be allowed to withdraw as attorney of record because a  
23 conflict of interest has been identified between Dr. Azzam and the NDOC Defendants.  
24 (Exhibits A & B). Until such time as new counsel enters an appearance the AGO requests  
25 that the hearing, at least as it pertains to Dr. Azzam’s testimony, scheduled for May 6,  
26 2021 be continued so that Dr. Azzam may be fully and adequately represented during the  
27 proceeding by conflict free counsel. The AGO also requests that the due date for an  
28 answer or other responsive pleading be continued from May 7, 2021 until such time as the

1 Plaintiff Zane Floyd has filed his amended complaint in this matter or until outside  
2 counsel has had adequate time to prepare a responsive pleading. *See* ECF No. 33, p. 3, ll.  
3 7-11.

4 III. CONCLUSION

5 Based on the foregoing, it is respectfully requested that this Court enter an order  
6 approving the AGO's withdrawal as attorney for Defendant Dr. Ishan Azzam.

7 DATED this 4<sup>th</sup> day of May, 2021.

8 AARON D. FORD  
9 Attorney General

10 By:

  
11 JULIE SLABAUGH (Bar No. 5783)  
12 Chief Deputy Attorney General  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 4<sup>th</sup> day of May, 2021, I served a true and correct copy of the foregoing "Motion to Withdraw as Attorney of Record for Dr. Ishan Azzam", by U.S. District Court CM/ECF electronic filing to:

Rene L. Valladares  
Federal Public Defender

David Anthony  
Assistant Federal Public Defender

Brad D. Levenson  
Assistant Federal Public Defender

Timothy R. Payne  
Assistant Federal Public Defender

D. Randall Gilmer  
Chief Deputy Attorney General

And via e-mail and U.S. Postal Service to:

Ihsan Azzam, Ph.D., M.D.  
Chief Medical Officer  
4150 Technology Way  
Carson City, NV 89706  
iazzam@health.nv.gov



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# EXHIBIT A

# EXHIBIT A

**DECLARATION OF JULIE A. SLABAUGH**

I, Julie A. Slabaugh, herein declare under penalty of perjury that:

1. I am over the age of 18. That the statements contained herein, except where otherwise indicated to be upon information and belief, are based on my personal knowledge, are true, accurate and correct, are made under penalty of perjury, and that if I am called to testify regarding the matters herein, I would testify consistently therewith.

2. I am currently employed by the Nevada Attorney General's Office (AGO) as the Chief Deputy Attorney General in the Health and Human Services Division.

3. I am currently counsel of record for Dr. Ishan Azzam, Chief Medical Officer of the State of Nevada in the case of *Zane M. Floyd v. Charles Daniels et al*, Case No. 3:21-cv-00176-RFB-CLB (case).

4. On May 3, 2021, following the hearing held in this case I had a conversation with Dr. Azzam. Leslie M. Nino Piro, General Counsel for the AGO was also present for the conversation. In the course of that conversation it became clear that there was an actual conflict between Dr. Azzam and the "NDOC Defendants" (Charles Daniels, Harold Wickham, William Gittere, William Reubart, David Drummond, Dr. Michael Minev, Dr. David Green, and Linda Fox) in this case.

5. Based on that conflict, Ms. Nino Piro informed Dr. Azzam that CDAG Slabaugh needs to withdraw and that she would retain outside counsel to continue his representation in this case.

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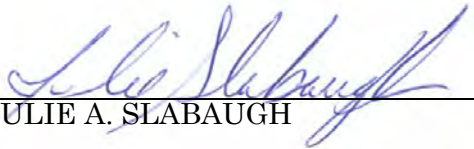


1 FURTHER DECLARANT, JULIE A. SLABAUGH, SAYETH NAUGHT.

2 Pursuant to 28 U.S.C. § 1746, Declarant, Julie A. Slabaugh herein  
3 certifies, under penalty of perjury, that the foregoing is true and correct.

4 Executed On: May 4, 2021.

5 By:

6   
JULIE A. SLABAUGH

# EXHIBIT B

# EXHIBIT B

**DECLARATION OF LESLIE M. NINO PIRO**

I, Leslie M. Nino Piro, herein declares under penalty of perjury that:

1. I am over the age of 18. That the statements contained herein, except where otherwise indicated to be upon information and belief, are based on my personal knowledge, are true, accurate and correct, are made under penalty of perjury, and that if I am called to testify regarding the matters herein, I would testify consistently therewith.

2. I am currently employed by the Nevada Attorney General Office (AGO) as General Counsel.

3. Julie A. Slabaugh, Chief Deputy Attorney General (CDAG) in the AGO's Health and Human Services Division, is currently counsel of record for Dr. Ishan Azzam, Chief Medical Officer of the State of Nevada, in the case of *Zane M. Floyd v. Charles Daniels et al.*, Case No. 3:21-cv-00176-RFB-CLB (case).

4. On May 3, 2021, following the hearing in this case, I had a conversation with Dr. Azzam. CDAG Slabaugh was also present for this conversation. In the course of that conversation, it became clear that an actual conflict exists between Dr. Azzam and the "NDOC Defendants" (Charles Daniels, Harold Wickham, William Gittere, William Reubart, David Drummond, Dr. Michael Minev, Dr. David Green, and Linda Fox) in this case.

5. Based on that conflict, I informed Dr. Azzam that CDAG Slabaugh needs to withdraw and I would retain outside counsel to continue his representation in this case.

6. This afternoon, May 4, 2021, I secured outside counsel to continue Dr. Azzam's representation in this case. I am currently expediting a written agreement to formally retain outside counsel.

1           7. Outside counsel has informed me that a substitution of counsel  
2 will be filed as quickly as possible once the agreement is signed. However,  
3 even if outside counsel files the substitution by tomorrow, May 5, 2021, I do  
4 not believe outside counsel will be able to fully and adequately represent  
5 Dr. Azzam at the evidentiary hearing scheduled on Thursday, May 6, 2021.

6           8. I believe a continuance of the May 6, 2021 evidentiary hearing is  
7 necessary to ensure that Dr. Azzam is fully and adequately represented by  
8 conflict-free counsel.

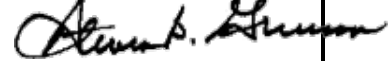
9           9. Based on the actual conflict, the AGO will be unable to file an  
10 answer or other responsive pleading by the May 7, 2021 deadline, and I ask  
11 that the deadline be extended until such time as Plaintiff Zane Floyd has  
12 filed his amended complaint in this matter. ECF No. 33 at 3:7-11.

13 FURTHER DECLARANT, LESLIE M. NINO PIRO, SAYETH NAUGHT.

14 Pursuant to 28 U.S.C. § 1746, Declarant, Leslie M. Nino Piro herein  
15 certifies, under penalty of perjury, that the foregoing is true and correct.

16 Executed On: May 4, 2021.

17  
18 By:   
19 LESLIE M. NINO PIRO  
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TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

ZANE FLOYD,

Plaintiff,

vs.

NEVADA DEPARTMENT OF  
CORRECTIONS,

Defendant.

AND RELATED PARTIES

CASE NO. A-21-833086-C  
DEPT NO. XIV

**TRANSCRIPT OF  
PROCEEDINGS**

BEFORE THE HONORABLE ADRIANA ESCOBAR, DISTRICT COURT JUDGE

TUESDAY, JUNE 8, 2021

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

APPEARANCES:

FOR THE PLAINTIFF:

DAVID S. ANTHONY, ESQ.  
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FOR NV DEPT. OF CORRECTIONS:

STEVEN G. SHEVORSKI, ESQ.  
D. RANDALL GILMER, ESQ.

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TRANSCRIBED BY: JD REPORTING, INC.

1       **LAS VEGAS, CLARK COUNTY, NEVADA, JUNE 8, 2021, 11:20 A.M.**

2                               **\* \* \* \* \***

3               THE COURT: Okay. Page 7 is Zane Floyd versus Nevada  
4 Department of Corrections.

5               Let's start with plaintiffs, please. On behalf of  
6 plaintiff, your appearances for the record.

7               MR. ANTHONY: Good morning, Your Honor. David  
8 Anthony from the Federal Public Defender's office for Zane  
9 Floyd. I also have my cocounsel Brad Levenson.

10              And we also have Mr. Floyd, who is in the custody of  
11 the Nevada Department of Corrections; and we'll waive his  
12 appearance for the purposes of this hearing today.

13              THE COURT: Okay. Very good. Thank you.

14              And on behalf of the Department of Corrections?

15              MR. SHEVORSKI: Good morning, Your Honor. Steve  
16 Shevorski, Chief Litigation Counsel of the State of Nevada, on  
17 behalf of the Nevada Department of Corrections.

18              THE COURT: Okay. And then is there anyone here that  
19 is representing Charles Daniels or Ihsan Azzam.

20              MR. SHEVORSKI: Can you hear me, Your Honor? Steve  
21 Shevorski for the record.

22              THE COURT: Yes.

23              MR. SHEVORSKI: It's my understanding in this  
24 particular action that Director Daniels has not been served,  
25 and so we have not had an opportunity to represent him;

1 obviously, we would.

2 Dr. Azzam has separate counsel through the  
3 Sklar Williams firm. But I don't believe Dr. Azzam has been  
4 served either.

5 Mr. Gilmer is on the line, who is the chief for the  
6 Nevada Department of Corrections in the Attorney General's  
7 office, and can speak to that further.

8 But that is my knowledge of that situation, Your  
9 Honor.

10 THE COURT: All right. I'm sorry. Did you say  
11 Mr. Gilmore?

12 MR. SHEVORSKI: Mr. Gilmer, spelled G-i-l-m-e-r.  
13 Now, he speaks with a Michigan accent, but you can still  
14 understand him.

15 THE COURT: I can understand it. Thank you.

16 Mr. Gilmer, good morning.

17 MR. GILMER: Good morning, Your Honor. Randall  
18 Gilmer for the record.

19 I believe what Mr. Shevorski stated is the correct  
20 position. I am unaware of Dr. Azzam, who we do not represent,  
21 as Mr. Shevorski indicating, being served.

22 And I am also unaware of Mr. Daniels being served  
23 specifically with regard to this particular claim and case.

24 THE COURT: Okay. Very good. Thank you.

25 All right. This is -- we're going to start. Let's

1 see. This is Plaintiff's Motion for Temporary Restraining  
2 Order with Notice and Preliminary Injunction.

3 I'd like Mr. Zane's counsel to begin, and I'd like  
4 you to speak, I mean, not at turtle speed, that slow, but not  
5 so fast that I can't take notes. So please -- please go ahead.

6 MR. ANTHONY: Thank you, Your Honor.

7 THE COURT: I've reviewed your pleadings thoroughly,  
8 but I would still like to have a thorough record on this case.

9 MR. ANTHONY: Thank you, Your Honor.

10 Mr. Floyd has filed a motion requesting a temporary  
11 restraining order and a preliminary injunction against the  
12 Nevada Department of Corrections. Mr. Floyd argues that the  
13 statutory provision NRS 176.355 constitutes an unlawful  
14 delegation of authority from the legislative branch to the  
15 executive in violation of Article III, Section 1, of the Nevada  
16 Constitution.

17 We are asking the Court to hold that the statutory  
18 provision is unconstitutional; and

19 We are asking the Court to enjoin the Department of  
20 Corrections from carrying out Mr. Floyd's execution until the  
21 legislature has amended the statute to provide suitable  
22 standards and guidelines to the Department of Corrections.

23 As I stated, Your Honor, the statutory provision in  
24 question is NRS 176.355.

25 The State's opposition to our motion does not address



1 the issue of irreparable prejudice or the public interest;  
2 therefore, the only issue before the Court today is the factor  
3 regarding the reasonable likelihood of success.

4 The controlling authority is acknowledged in both of  
5 the parties' briefs. The case is the *Luckman* (phonetic) case.  
6 The *Luckman* case talks about the need to have suitable  
7 standards that are established by the legislature for the  
8 agency's exercise of its power.

9 So maybe to start with we could engage in a thought  
10 experiment.

11 According to the State's position, the only thing  
12 that would be unlawful would be if a method of execution was  
13 not specified in a state statute. The problem with that is  
14 that we could, for example, have a state statute that listed  
15 all known available methods of execution. It could list lethal  
16 injection, electrocution, hanging, or firing squad. And it  
17 appears from the State's position that the former statute would  
18 be unconstitutional, but the latter would not.

19 It is our contention that merely stating the means of  
20 execution is not providing sufficient and suitable standards,  
21 as required by the *Luckman* case, to delegate the authority to  
22 effectuate an execution to the Department of Corrections.

23 The particular concerns which we have identified for  
24 the Court include critical questions, such as the drug or  
25 combination of drugs that the Department of Corrections intends

1 to use in the execution. And similarly even the State  
2 acknowledges that the term lethal injection itself can be an  
3 ambiguous term. The term lethal injection does not necessarily  
4 specify whether the injection is intravenous, intramuscular or  
5 subcutaneous, which are all possibilities under the way that  
6 the statute is worded.

7 I believe, Your Honor, that the two cases that the  
8 parties discuss provide a very helpful point of departure with  
9 respect to this issue. In the *Pine* (phonetic) case, which is  
10 cited by both parties, the question that was being interpreted  
11 was whether there was an unlawful delegation of authority to  
12 the executive under Chapter 453 of the Nevada Revised Statutes,  
13 which govern the licensing of those who qualify as engineers.

14 One of the things that's interesting about the *Pine*  
15 case is that the statutory scheme in question involved a total  
16 of what I have counted as 82 statutory provisions talking about  
17 the licensing and the discipline of engineers.

18 Similarly, in the *Luckman* case, the Nevada Supreme  
19 Court was addressing Chapter 453 of the NRS, which deals with  
20 the Uniform Controlled Substances Act. In *Luckman* and in  
21 Chapter 453, the Nevada Supreme Court was addressing a  
22 statutory scheme that consisted of 173 different statutory  
23 provisions.

24 I would like to contrast those circumstances with  
25 those that exist here where we have one statutory provision

1 that does nothing more than specify a means of execution.

2 Your Honor, we contend that this is a matter of first  
3 impression for the Court. The parties have acknowledged that  
4 the Nevada Supreme Court has addressed a similar issue, albeit  
5 one that was addressed under the Eighth Amendment and under  
6 Article I, Section 6, of the Nevada Constitution, which is  
7 Nevada's counterpart to the Eighth Amendment.

8 In the *Gee* (phonetic) case, cited by both parties,  
9 and also in the *McConnell* case, the Nevada Supreme Court held  
10 that it did not violate the Eighth Amendment to have an absence  
11 of standards regarding the lethal injection procedure. Our  
12 contention is that the *Gee* case and the *McConnell* case are not  
13 controlling on the question that the Court must decide today,  
14 which is whether the delegation of authority violates the state  
15 constitutional provision regarding the separation of powers.

16 There's a good reason for the difference. It is hard  
17 to conclude simply based on the absence of standards that an  
18 execution will necessarily be cruel and unusual, in violation  
19 of the Constitution. That is not the question that the Court  
20 must decide today.

21 The parties both discuss the *Hobbs* case, which is on  
22 point with the argument that Mr. Floyd is making to the Court  
23 today. The State's position is that *Hobbs* is an outlier, and I  
24 would respectfully submit to the Court that that is misleading  
25 in certain respects.

1 First of all, there are six states that designate a  
2 particular drug or drugs to be used in a lethal injection  
3 protocol. Furthermore, five additional states that have the  
4 death penalty have, including Nevada, have not yet weighed in  
5 on this issue. So I believe it is a stretch to say that the  
6 *Hobbs* case is an outlier when it comes to what can and should  
7 be done with respect to giving the executive branch sufficient  
8 guidance and standards regarding an execution procedure.

9 One of the assumptions that is made by the Department  
10 of Corrections is there is an assumption of expertise to the  
11 Department of Corrections. Interestingly enough, there is no  
12 factual support made in favor of that assertion.

13 The director of the Department of Corrections  
14 actually testified in federal court at a hearing on May 6th  
15 of this year, and that is in the exhibits before the Court in  
16 the reply to our motion. In his testimony the director  
17 acknowledged that he was not qualified to opine about the  
18 efficacy of the use of certain drugs in a lethal injection  
19 protocol.

20 He testified that if he had questions about that he  
21 would ask NDOC's pharmacist for more guidance. The problem  
22 there is is that even a pharmacist doesn't necessarily possess  
23 a medical expertise that one would expect to be able to  
24 determine the propriety of a lethal injection protocol. The  
25 closest that you could get would be an anesthesiologist, but

1 there is no suggestion in the record that any such consultation  
2 or anything like that has occurred.

3 Furthermore, the State also argues that the executive  
4 branch is in a unique position based upon their ability to  
5 assess manufacturers and supply chains. Again, our position is  
6 that if the legislature weighs in on this issue they can assure  
7 that the particular types of drugs that are suitable for lethal  
8 injection are used and produced for executions in the state of  
9 Nevada.

10 What the problem is is that when the Department of  
11 Corrections goes about obtaining lethal injection drugs the way  
12 they are doing, they do it by subterfuge, and they don't do it  
13 because the drugs in question are medically appropriate. That  
14 is a misnomer. That is not the basis for the drugs that they  
15 obtain or acquire.

16 Even more problematic is that all of these decisions,  
17 all of these critical decisions about life and death are made  
18 in secret. Generally, when decisions are made in secret, they  
19 are poor decisions. That is exactly what is playing out right  
20 now, Your Honor.

21 Right now Mr. Floyd faces an imminent execution date  
22 for the week of July 26th of this year. As we sit here right  
23 now, the Nevada Department of Corrections has not disclosed a  
24 finalized execution protocol to either Mr. Floyd or to the  
25 public, which they said that they would do.

1           This is the same way that things played out in 2017,  
2 the last time the Department of Corrections was faced with an  
3 execution. In that circumstance, we had provided materials to  
4 the court showing that the defense experts that were hired on  
5 behalf of the inmate were necessary to help the Department of  
6 Corrections know what the dosages of the drug should be. And,  
7 in fact, the Department of Corrections adopted the dosages that  
8 were suggested by the condemned inmate's expert witnesses.

9           In fact, even after those modifications occurred, the  
10 protocol was found by the state court to violate the  
11 Eighth Amendment and Article I, Section 6, based upon the  
12 substantial risk that the Department of Corrections protocol  
13 would cause cruel pain and suffering in violation of the  
14 Eighth Amendment.

15           The director, when he testified on May 6, testified  
16 that he had utmost confidence in the 2017 protocol. The  
17 problem is not only did a state court judge find the protocol  
18 unconstitutional, we have a very strong indication that the  
19 chief medical officer who is supposed to consult with the  
20 director has stated that he has a conflict of interest with the  
21 prison. We believe it is likely that the evidence will show  
22 that there is a disagreement between the director and the chief  
23 medical officer regarding the drugs to be used.

24           The problem with the system we have, Your Honor, is  
25 it leads to experimental protocols that have never been used

1 before throughout the nation on any condemned inmate. That is  
2 precisely, Your Honor, why we believe that legislative action  
3 on this point is critical.

4 In the legislature, the legislators can have medical  
5 experts testify. All of the decisions that are made by the  
6 legislature are done in a transparent manner. Anyone can go to  
7 the minutes of the proceedings and see who testified, what  
8 their conclusions were, what their expertise was to opine  
9 regarding critical issues, such as the decision of the State to  
10 take the life of another person.

11 As Justice Scalia said in the *Morrison* case, "We are  
12 a government of laws, not of men." And the one thing that  
13 should trouble us all is that the decision that's being made in  
14 this case to execute Mr. Floyd appears that it will be made by  
15 one man, one person, and there is no transparency to that  
16 process.

17 For all of those reasons, Your Honor, we argue that  
18 the Court should grant Mr. Floyd's motion for temporary  
19 restraining order and preliminary injunction and enjoin the  
20 Department of Corrections from effectuating Mr. Floyd's  
21 execution until the legislature has had an opportunity to amend  
22 the statute to provide suitable, adequate guidance to the  
23 director, as required in *Luckman* and the cases cited therein.

24 That's all I have to argue, Your Honor. If the Court  
25 has any questions, I would be happy to answer them.

1 THE COURT: I do not. I do not have any questions at  
2 this time, Counsel.

3 So I'd like to hear from Mr. Shevorski, please.

4 MR. SHEVORSKI: Thank you, Your Honor. Can you hear  
5 me okay?

6 THE COURT: Yes. But I want you to speak slower as  
7 well, please.

8 MR. SHEVORSKI: I will endeavor to do my best, Your  
9 Honor.

10 Counsel for Mr. Floyd mentioned the late Justice  
11 Antonin Scalia. As you probably remember, Your Honor, I'm a  
12 fan of Scalia as well, and I know Your Honor has probably read  
13 the book *A Matter of Interpretation* wherein Justice Scalia  
14 excoriates persons who look over the heads of the crowd to find  
15 their friends. That is not a proper judicial endeavor, but  
16 that is precisely what is going on here.

17 This argument that a lethal injection statute is  
18 subject to a separation of powers challenge has been tried time  
19 and again in the various states. The sole instance where the  
20 argument was successful was in the *Hobbs* case in Arkansas; and  
21 my friends from the other side, very good lawyers, cannot cite  
22 you another.

23 And the reason, I think is telling, is that the  
24 separation of powers doctrine does not require what my friends  
25 are telling you. The separation of powers doctrine deals with



1 a structural problem. It asks a simple question: Is one of  
2 the three branches of government exercising a power that  
3 belongs to another? I submit to you, Your Honor, that the  
4 answer is plainly no in this instance.

5 My friend from the other side started off with a  
6 thought experiment, and he listed a hypothetical statute, one  
7 that there is no resemblance to 176.355, Subpart 1, which is  
8 really the subpart that they have a problem with.

9 And in that hypothetical statute, opposing counsel  
10 mentioned a variety of specific methods of execution that the  
11 legislature has specified and said in that instance --

12 THE COURT: Counsel, will you please start your last  
13 thought again.

14 MR. SHEVORSKI: Yes.

15 THE COURT: I want to make sure that I am following  
16 you.

17 And I also -- I need to plug my computer in (video  
18 interference).

19 MR. SHEVORSKI: Certainly, Your Honor.

20 THE COURT: Just give me a moment.

21 (Pause in the proceedings.)

22 THE COURT: Go on, Counsel.

23 MR. SHEVORSKI: Are you ready? Okay. Thank you,  
24 Your Honor.

25 My friend from the other side listed a series of

1 execution methods. Now, I think I would agree with him if the  
2 Nevada Department of Corrections in that hypothetical scenario  
3 had then gone on to add other methods of execution and said  
4 thank you, Legislature, for those ideas, but we have got some  
5 of our own; we are going to make law and say that there shall  
6 be four more choice methods of execution, and we will choose  
7 which ones to implement. Because that is precisely where the  
8 Nevada Supreme Court said that the Board of Parole  
9 Commissioners went wrong in *McNeill versus State*, at 132 Nevada  
10 551. And if you -- the pinpoint cite, Your Honor, the  
11 discussion takes place at --

12 THE COURT: I have read the case, Counsel.

13 MR. SHEVORSKI: Thank you, Your Honor.

14 THE COURT: I have it here in front of me.

15 MR. SHEVORSKI: And in that discussion, the Nevada  
16 Supreme Court faulted the Board of Parole Commissioners for  
17 adding conditions to the parole, and then it was used by the  
18 executive to attempt to prosecute the defendant for a new  
19 crime, one that the legislature did not specify. In that  
20 instance, in *McNeill*, the Court found that the Board of Parole  
21 Commissioners made a law. It said it wrote what the law should  
22 be in their view. That is not what has occurred here.

23 The legislature in 176 has said that there will be  
24 capital punishment. It will be by a lethal injection. It will  
25 be by a drug or combination of drugs. It will be performed by

1 the director of the Department of Corrections. He shall  
2 consult with the chief medical officer.

3 Now, let me tell you why that does not violate the  
4 separation of powers doctrine: Because *Luckman* tells the Court  
5 that it is entirely appropriate for the legislature to delegate  
6 fact finding and the state of affairs in which their policy  
7 enunciated in the statute is carried out. The legislature --  
8 the separation of powers doctrine does not require the  
9 legislature a priori to try to determine as a matter of fact  
10 what drugs will be available when a particular execution date  
11 is set. It does not specify, it does not -- the separation of  
12 powers doctrine does not require the Department of  
13 Corrections -- or rather the legislature is not required under  
14 separation of powers doctrine, excuse me, Your Honor, to  
15 specify safety standards under which the execution is to be  
16 performed, no more than it -- separation of powers doctrine  
17 requires the micromanagement of methods of confinement.

18 And the reason, Your Honor, is that we presume that  
19 the Department of Corrections is going to do so, is going to  
20 use that delegation constitutionally, consistent with the  
21 Eighth Amendment, consistent with the Eighth Amendment. That  
22 is the law.

23 And similar, this Court is to presume that this  
24 statue, 176.355 is constitutional, and it is by allowing the  
25 Department of Corrections to find the facts as to what drugs

1 are available, to find the facts what drugs will be lethal at  
2 the time the execution date is set. The legislature has acted  
3 entirely consistently with *Luckman*.

4 And I want to talk about *McConnell* for a second  
5 because it is true --

6 THE COURT: Excuse me. Wait. Before you move  
7 forward, just give me one moment, please.

8 MR. SHEVORSKI: Yes, Your Honor.

9 THE COURT: All right. Go ahead.

10 MR. SHEVORSKI: Thank you, Your Honor. Just a brief  
11 moment on *McConnell*. For the record, at 120 Nevada 1043 is  
12 the -- our local Nevada reporter cite.

13 THE COURT: I have it.

14 MR. SHEVORSKI: The court wrote --

15 Thank you, Your Honor.

16 *McConnell* cites no authority from this or any other  
17 jurisdiction that deems lethal injection unconstitutional as a  
18 matter of law because of the absence of detailed codified  
19 guidelines for the procedure. And then it goes on to cite one  
20 law review article from Ohio in Footnote 7, which is when  
21 legislatures delegate death.

22 Now, I agree with my friend from the other side that  
23 conversation takes place in the context of the  
24 Eighth Amendment, but the Supreme Court's words are telling.  
25 The Supreme Court is looking to see if there is any authority

1 to show that the absence of codified guidelines for the  
2 procedure is unconstitutional. The answer at that time was no.  
3 The answer now is there is one case, *Hobbs*.

4 To rule in this case that 176.355 violates the  
5 separation of powers doctrine would be very similar to ruling  
6 that way in -- at the time of *McConnell*, and the Court should  
7 not go out on that island alone. No authority in Nevada and  
8 anywhere else, other than the *Hobbs* case in Arkansas, comes out  
9 the way that my friends from the other side want you to do so  
10 today.

11 176.355 is entirely consistent with separation of  
12 powers doctrine. The Department of Corrections is not making  
13 law. There are sufficient guidelines in the legislature  
14 statute.

15 My friends finished talking about that critical  
16 decisions are made in secret, and if they -- if this was done  
17 at the legislature, there could be live testimony; there could  
18 be medical experts presented. I think I agree with him;  
19 however, that has nothing to do with the separation of powers  
20 doctrine. It may be that those policy arguments, that expert  
21 testimony could lead to a better statute and one that they  
22 enjoy. Or perhaps what they want most of all is through that  
23 policy discussion that the death penalty will be abrogated.

24 That precise argument occurred during this session.  
25 It didn't -- the statute did not pass.

1           Now, we make these arguments. This is an incredibly  
2 important issue, and we debate in the public square the  
3 constitutionality of the death penalty and have vigorous  
4 disagreements with our friends, but none of that helps you  
5 decide the question here today. *McConnell* does. *McNeill* does.  
6 The weight of authority from the several states all point you  
7 to the conclusion that the plaintiff does not have a likelihood  
8 of success on the merits, and this Court should deny the  
9 plaintiff's motion.

10           Thank you, Your Honor.

11           THE COURT: Thank you, Counsel.

12           Mr. Anthony.

13           MR. ANTHONY: Yes, Your Honor.

14           THE COURT: Yes.

15           MR. ANTHONY: Thank you. I think that the one thing  
16 that I can see from the argument today that I believe is  
17 helpful for the Court is that I think it crystallizes the  
18 position between the parties.

19           We all agree that *Luckman* requires that there be  
20 suitable standards to guide the discretion of an executive  
21 agency. So really the question the Court will ask today is, is  
22 designating a means of execution all by itself, with nothing  
23 more, the existence of a suitable standard to guide agency  
24 discretion? It is our position that the answer to the question  
25 is no, that *Luckman* requires more, that the cases *Luckman* and

1 also the *Pine* case deal with comprehensive statutory schemes  
2 that bear no resemblance to the statute that the Court is  
3 reviewing today.

4           According to the State, the only thing that would  
5 violate the separation of powers is if an executive agency goes  
6 rogue all on its own and does something entirely different, but  
7 that's not really the question of whether there are suitable  
8 standards to guide the agency's decision.

9           The State talks about the consultation with the chief  
10 medical officer. But as the Court can see from the exhibits to  
11 the reply, there is a strong indication in this case that the  
12 consultation regarding the drugs that will be disclosed by the  
13 Department of Corrections eventually are ones where  
14 consultation appears not to have occurred.

15           As the Court can see from the exhibits before it, it  
16 appears, as we've stated previously, that there is a conflict  
17 between the chief medical officer and the director on this very  
18 point. That reiterates in our mind, Your Honor, the problem,  
19 the fundamental problem that exists when decisions are made in  
20 secret.

21           And the parties agree that the way that these types  
22 of weighty decisions should be made are based on a robust  
23 policy debate that occurs in the legislature where the peoples'  
24 representatives are allowed to hear evidence and to take  
25 testimony.

1           And there is also no debate between the parties today  
2 that the current director, Director Daniels, is in any way  
3 qualified to make these decisions. That is precisely why when  
4 *Luckman* says suitable standards, it requires more, Your Honor,  
5 than simply stating the method of execution with nothing else.

6           Thank you, Your Honor.

7           And if the Court has any questions, I will endeavor  
8 to answer them.

9           THE COURT: Okay. Thank you.

10          I do have a couple of questions for Mr. Shevorski.

11          Mr. Shevorski, with respect to the -- in *Pine*,  
12 concerning the comprehensive statutory schemes, how do you  
13 address that with respect to the Nevada Legislature and  
14 actually this statute, this specific statute?

15          MR. SHEVORSKI: Thank you, Your Honor. I think that  
16 that is an example. What *Pine* is doing there is saying, yes,  
17 in that instance there was a comprehensive scheme, but that has  
18 little to do with whether or not a different statute would meet  
19 the -- would pass muster under the separation of powers  
20 doctrine.

21          The separation of powers doctrine is a floor. It is  
22 not specifying -- so it's specifying the minimum standard to  
23 determine whether or not a branch of government is doing  
24 something that properly belongs to another branch.

25          Now, it's always true that the legislature can



1 give -- require and give more detailed standards. They can --  
2 it could micromanage the Nevada Department of Corrections and  
3 specify the type of drug, where it should be gotten, where it  
4 should -- what the dosage is, who should administer it, what  
5 time of day it should be. But that tells you nothing about  
6 whether or not a different statute, such as we have here, would  
7 pass muster under the separation of powers doctrine.

8 I think this one -- this one clearly does. It has  
9 suitable standards, and they have announced the policy. The  
10 policy is that the execution shall be take -- take place by  
11 injection. It shall be by lethal drug. It specifies the  
12 identity. Separation of powers doctrine requires no more.

13 THE COURT: Okay. And then I had another question  
14 for you:

15 What thoughts does the State have with respect to  
16 Mr. Anthony's comments that the chief medical officer may have  
17 some sort of a conflict with what's happening at this time?

18 MR. SHEVORSKI: Sure. To answer your question, Your  
19 Honor, I would say first that it doesn't matter for this  
20 analysis, and I don't mean that in a flippant way. Because  
21 what's going on here is this case is being brought as a facial  
22 challenge. It's not an as-applied challenge.

23 My friends from the other side are asking you to  
24 declare 176.355 unconstitutional on its face because it  
25 violates the separation of powers doctrine, not that a

1 particular input in the statute (indiscernible) have a conflict  
2 of interest.

3 But, secondly, all the statute -- the statute  
4 requires a consultation with the chief medical officer. So  
5 even if this was a different kind of challenge, I'm not sure  
6 what that would be under the Nevada Constitution to say that  
7 the execution can't go forward because the chief medical  
8 officer may have a conflict. It requires a consult. And so I  
9 think we'd be talking about a different case there. I think  
10 we'd be talking about a statutory claim, and my friends would  
11 have to show you that there was intended to be a private right  
12 of action.

13 But my friends from the other side haven't told you  
14 that the consultation hasn't occurred. I'm sure that will be  
15 fleshed out in their 1983 claim before the Honorable  
16 Judge Boulware in federal court.

17 But I don't think it matters legally for the type of  
18 challenge that they're bringing here, which is a facial  
19 challenge, Your Honor.

20 THE COURT: Okay. This is obviously a very important  
21 case, but I am -- and I know that we're going over a few  
22 minutes into the lunch hour. But I am going to take a  
23 15-minute break, recess, and then I'm going to come back, and I  
24 will have a decision for you. Maybe 10 minutes. Okay.

25 MR. SHEVORSKI: Thank you, Your Honor.

1 THE MARSHAL: Court is now in recess.

2 THE COURT: Thank you.

3 MR. ANTHONY: Yes, Your Honor.

4 (Proceedings recessed at 12:03 p.m., until 12:26 p.m.)

5 THE COURT: Okay. I just want everyone to know that  
6 before I move forward that I have given this very serious  
7 consideration and that I -- you know, understanding what's in  
8 the -- you know, that Mr. Floyd's life is in the, you know, in  
9 balance. I am very concerned about that, but I'm going to move  
10 forward and give you my analysis.

11 All right. Very basically, this case, the essence of  
12 this case is that a TRO or preliminary injunction be granted.  
13 And the first issue or the first finding when a Court is going  
14 to address a TRO or preliminary injunction is the likelihood of  
15 success on the merits.

16 Essentially, the issue in this case is whether  
17 NRS 176.355 violates the Nevada and United Supreme Court, the  
18 constitutional requirement that the separation of powers in  
19 this case, that the separation of powers between the executive,  
20 the legislative and judicial branches must always be  
21 maintained. In this case we are dealing with the legislative  
22 and the executive branch.

23 I am going to read the statute, which we've all  
24 reviewed quite a few times; you perhaps more than me, but I  
25 have reviewed it quite a few times. So,

1           NRS 176.35, Execution of death penalty:  
2           Method; time and place; witnesses.

3           1, The judgment of death must be  
4           inflicted by an injection of a lethal drug.

5           2, The Director of the Department of  
6           Corrections shall:

7           (a) Execute a sentence of death within  
8           the week, the first date being a Monday, and  
9           the last day being Sunday, that the judgment  
10          is to be executed as designated by the  
11          District Court. The Director may execute the  
12          judgment at any time during the week if a stay  
13          of execution is not entered by a court of  
14          appropriate jurisdiction.

15          (b) Select a drug or combinations of  
16          drug -- drugs to be used for the execution  
17          after consulting with the chief medical  
18          examiner.

19          (c) Be present at the execution.

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

25          (e) Invite a competent physician, the

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

11 3, The execution must take place at the  
12 state prison.

13 4, A person who has not been invited by  
14 the Director may not witness the execution.

15 And we also have here NRS 33.010(1). Subsection (1)  
16 authorizes an injunction when it appears from the complaint  
17 that the plaintiff is entitled to the relief requested and at  
18 least part of the relief consists of restraining the challenged  
19 act.

20 And then Article III, Section 1, the Nevada  
21 Constitution's full text provides,

22 The powers of the government of the State  
23 of Nevada shall be divided into three separate  
24 departments -- the Legislative, the Executive  
25 and Judicial -- and no persons charged with

1           the exercise of powers properly belonging to  
2           one of those departments shall exercise any  
3           functions, appertaining to either of the  
4           others, except in the cases expressly directed  
5           or permitted in this Constitution.

6           I just wanted to make sure that I started, you know,  
7           and took a look at how everything -- so this is the statute  
8           that is provided by the legislative branch. The statute, in  
9           this Court's view -- I've read it over and over -- is not  
10          ambiguous, and it -- it is not ambiguous. This is pretty  
11          straightforward. Could it be more -- include more? Perhaps.  
12          But it looks like this statute is complete.

13          And now let's go to -- I don't see a lot of ambiguity  
14          in the statute. I think it's pretty clear. So the question  
15          now is, has the executive -- has the legislative branch  
16          delegated executive functions to the -- excuse me, has the  
17          legislative branch delegated executive functions -- its  
18          functions, the legislative functions, to the executive branch,  
19          in this case comprising of the director of the Department of  
20          Corrections?

21          So I have looked through the cases that you've cited,  
22          and I've read everything that you've -- all of the pleadings  
23          that were filed, and I'd like to move as organized as I can.

24          So the first prong is whether there is a, as I  
25          indicated before, a likelihood of success on the merits. So

1 here, the Department of --

2 Let's see. Just give me one moment.

3 In the statute, the executive branch delegates to the  
4 director of the Department of Corrections that it shall execute  
5 a sentence of death. And then it talks about, first, Number 1,  
6 before that, must be inflicted by injection of a lethal drug  
7 and after consulting with -- essentially to be used -- after  
8 consulting with the chief medical officer.

9 Here, the executive branch -- or forgive me, the  
10 legislative branch is not -- well, let's go through this.  
11 Okay.

12 The director of Department of Corrections is taxed --  
13 is taxed with carrying out the execution of death. And it's  
14 very -- it's very clear, in this Court's view, what needs to be  
15 done. For instance, let's talk about *McNeill*. In *McNeill*, I  
16 think *McNeill* is distinguishable because the Department of  
17 Parole in that case added -- added requirements that were  
18 not -- were not required when -- during the sentencing. Okay.  
19 They added more restrictions, and the Court decided that that  
20 amounted to new law, which obviously is not something that can  
21 occur.

22 Here, the legislature is not allowing the Department  
23 of Corrections to define a new crime or punishment. It's  
24 simply authorizing how to enforce the death penalty because the  
25 Department's -- the Department of Corrections apparently is

1 better situated to do this. So I find *McNeill* to be  
2 distinguishable, and I believe that the legislature is not  
3 allowing the executive branch to define new punishments, change  
4 it to a different type of death, for instance.

5 It's very clear that it has to be by an injection of  
6 a lethal drug. It's not saying that it can be done by anything  
7 else, like a firing squad. Even though the statute is not, in  
8 this Court's view, is not -- and it's very clear -- I still  
9 took a look at the legislative history, and they found this to  
10 be a much more humane exercise when moving forward and  
11 executing the death penalty than the gas chamber.

12 All right. Then we go to *Luckman*. In *Luckman*, it  
13 discusses essentially how the executive branch is able to  
14 determine and have authority to describe what drugs are -- I  
15 may be saying this wrong. I'm not quoting it -- but which  
16 drugs were in which category and the -- with respect to the  
17 controlled substances.

18 And I think that that's analogous here in that they  
19 may have given more specific direction, but it still gave the  
20 executive branch the ability to determine and have the  
21 authority to describe with respect to the pharmaceutical issues  
22 and decide which drugs -- which drugs would be in which area or  
23 which -- just give me one moment, please -- what category the  
24 drugs would be in. All right. So and the legislature  
25 delegated that authority to, because just as in this case, that



1 authority is delegated to the director of the Department of  
2 Corrections, as indicated in NRS 176.355.

3 Here, in this case, even more so, they are carrying  
4 out the -- that director is vested with the requirement, that  
5 shall execute the sentence of death and so forth. And before  
6 that it's very clear that the judgment of death must be  
7 inflicted by an injection of a lethal drug.

8 In this Court's view, here, the delegation of  
9 authority to the Department of Corrections is constitutional,  
10 and this is not violating the -- it is not violating Article I  
11 of the -- Article III, Section 1, of the -- concerning the  
12 powers of government of the State of Nevada and the division of  
13 the three separate departments. I don't believe that this  
14 statute violates this.

15 The Nevada Legislature was clear with respect to the  
16 crimes that are -- that result in the death penalty and has  
17 delegated the authority to the Department of Corrections, which  
18 is tasked with following through on the execution of the death  
19 penalty. And this is similar to some of the other statutes as  
20 well. They're not delegating the legislative function.

21 I'm just going to discuss the Eighth Amendment  
22 because it's brought -- I don't believe that this is -- this is  
23 a facial challenge to NRS 176.355. I've read somewhere  
24 throughout my readings, I don't even remember if -- which party  
25 discussed it or perhaps both, but I believe that the

1 Eighth Amendment, the statute is presumed to be constitutional,  
2 and it must not cause an Eighth Amendment -- it must not or  
3 shall not violate the Eighth Amendment, you know, the issues  
4 with cruel and unusual punishment. I don't believe that that  
5 needs to be included in the statute for it to be  
6 constitutional, in NRS 176.355. Again, a statute is presumed  
7 to be constitutional.

8           So let's move onto this now: Article III, Section 1.  
9 This is not an unconstitutional delegation of authority under  
10 Article III, Section 1, because -- just because the director of  
11 the Department of Corrections determines what type of drugs are  
12 required.

13           Just one moment.

14           The legislature has not delegated -- again, I just  
15 want -- I think this is really important -- what crime is  
16 punishable -- or, excuse me just one moment. I can barely  
17 read my own writing. Hold on.

18           So because the --

19           Because the legislature has not delegated -- I  
20 believe I mentioned this above -- what crimes are punishable by  
21 the injection of a lethal drug, it simply delegates the means  
22 by which to do it, the executive branch carries this out. So I  
23 think that, you know, the compartments are there. The  
24 legislature has written a statute that is not ambiguous. It's  
25 straightforward, and I've discussed the cases with you.

1           And then I have something else that actually -- and  
2 I've also read the case from -- I believe it's the one from  
3 Arkansas. I have that in front of me as well. Yes, that case  
4 is very specific, and I read all of the requirements there or  
5 the, you know, what they discussed, but I don't believe that  
6 not having that in NRS 176.355, to that detail, makes it  
7 unconstitutional with respect to delegating the legislative  
8 function.

9           I don't believe that the executive branch is making  
10 law or doing anything that it cannot do, and it does not  
11 violate Article III, Section 1, of the Nevada Constitution.

12           I also have some examples. Actually, I reviewed the  
13 reply to opposition to motion for temporary restraining order  
14 with notice and preliminary injunction. And on page 10, there  
15 are some cases that are cited, and it looks --

16           Hold on. Are these cases still -- just give me one  
17 moment.

18           It states here on line 10 that there are -- so let's  
19 start:

20                   Defendants argue that NRS 176.355  
21                   (indiscernible) proper delegation because some  
22                   of Nevada's sister states have found their  
23                   lethal injection statutes constitutional.  
24                   This argument is only unpersuasive, well, and  
25                   misleading -- but also misleading --

1 Hold on.

2 And essentially it says,

3 Moreover, while some of Nevada's sister  
4 states view their lethal injection protocol  
5 delegation as constitutional, that  
6 constitutionality depends fully upon the use  
7 of a more detailed statutory language.

8 And it says that NRS 176.355 is lacking. Other  
9 lethal -- on page -- on line 10,

10 Other state lethal injection statutes are  
11 more detailed than Nevada's and leave less  
12 discretion for an administrative agency to  
13 make policy decision. For example, the  
14 California statute provides, The death penalty  
15 shall be inflicted by an intravenous injection  
16 of a substance or substances in a lethal  
17 quantity sufficient to cause death by  
18 standards established under the direction of  
19 the Department of Corrections and  
20 rehabilitation.

21 And we have Arizona's:

22 Penalty of death shall be inflicted by  
23 intravenous injection of a substance or  
24 substances in a lethal quantity sufficient to  
25 cause death under the supervision of the state

1 Department of Corrections.

2 Our statute is very similar to the Arizona one and  
3 not dissimilar from the California one.

4 Okay. And then we have the Idaho statute that says,

5 The punishment of death must be inflicted  
6 by the intravenous injections of a substance  
7 or substances in a lethal quantity sufficient  
8 to cause death until the defendant is dead.  
9 The Director of the Department of Corrections  
10 shall determine the substance or substances to  
11 be used and the procedures to be used in any  
12 execution.

13 In this Court's view, this is very similar to ours,  
14 to NRS 176.355.

15 Further, we have Ohio:

16 A death sentence shall be executed by  
17 causing the application to the person upon  
18 whom the sentence was imposed of a lethal  
19 injection of a drug or combination of drugs of  
20 sufficient dosage to quickly and painlessly  
21 cause death. The application of the drug or  
22 combination of drugs shall be continued until  
23 the person is dead.

24 So even though some of these -- one is, I believe,  
25 almost the exact language, and the others are very similar.

1 And these are sisters statutes that, unlike counsel for  
2 Mr. Zane, I believe they're similar to our statute, and they  
3 are constitutional as well. So and there is no issue with the  
4 separation of powers.

5 So because I do not find that there is -- this Court  
6 does not find that there is a likelihood of success on the  
7 merits, because this Court does not find that NRS 176.355 is  
8 unconstitutional and that it does not inappropriately  
9 delegate -- the legislature does not illegally or against the  
10 Constitution delegate or allow the executive branch to make new  
11 law or to do anything but to follow through on the very clear  
12 statute, I am going to deny it.

13 This Court denies the TRO and preliminary injunction.

14 And I am not going to go into further analysis  
15 because, really, this is critical, and this is sufficient.

16 So I would like Mr. -- just a moment -- Mr. Shevorski  
17 to please prepare a very detailed order. Please make sure that  
18 Mr. Anthony and Mr. Levenson and -- are able -- and Mr. Gilmer,  
19 although, you know, as a courtesy, you know, apparently they  
20 have not been served, but please make sure that it's very  
21 detailed with all of the law and this Court's analysis.

22 I'd like you to send that, after they take a look at  
23 it as to form and content, I would like you to please send that  
24 to Department 14. And I'd like it in two formats, PDF format  
25 and Word. Okay. So that --

1 MR. SHEVORSKI: Yes, Your Honor.

2 THE COURT: All right. And I think I have -- I hope  
3 I have been organized enough in my thoughts. I think that's  
4 very important. But I think -- well, anyway.

5 It's not an easy decision to make for me, but it is  
6 with respect to the law. Okay. It brings me no joy knowing,  
7 you know, necessarily what the result could be. And I know you  
8 can appeal this and everything else, and I understand that.  
9 But I believe that this is the correct interpretation of the  
10 law that's been -- and the pleadings that have been presented  
11 to this Court on this issue.

12 So, Counsel, all of you, I hope you have a good day  
13 and that you have a good summer with your families.

14 MR. ANTHONY: Thank you, Your Honor.

15 MR. SHEVORSKI: Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. ANTHONY: Could I add one thing, Your Honor?  
18 Just because we are working under an execution timeline, I  
19 didn't -- I know that the Court is having the State prepare and  
20 draft the order. I don't know if it would be possible for the  
21 Court to state a time frame for us to get those findings of  
22 fact and conclusions of law just so we can consider further  
23 appellate review.

24 THE COURT: Certainly. I think that's absolutely  
25 reasonable.

1 Mr. Shevorski, how much time do you need?

2 I understand Mr. Anthony's request, and I think it's  
3 correct.

4 Mr. Shevorski?

5 MR. SHEVORSKI: Yes. May I be heard, Your Honor?

6 THE COURT: Yes, of course. That's why I'm calling  
7 on you.

8 MR. SHEVORSKI: Thank you, Your Honor. Now, up to  
9 48 hours is the deadline, and I'll endeavor to do it quicker.

10 THE COURT: Yes. But it must be very thorough.

11 MR. SHEVORSKI: It will be.

12 THE COURT: Okay. Very good.

13 MR. SHEVORSKI: Yeah, it will be.

14 THE COURT: Okay. So, Mr. Anthony, does that --

15 So when you say 48 hours from -- do you mean from  
16 today, Mr. Shevorski?

17 I honestly don't remember how much time you need to  
18 turn around. Usually it is 10 days, but, obviously, we're not  
19 going with that because this is critical for Mr. Anthony's  
20 client to be able to appeal if, you know, should they wish.

21 MR. SHEVORSKI: Let's do -- how about the CO be  
22 Thursday? If that's okay with Mr. Anthony.

23 MR. ANTHONY: That would be fine on our end.

24 The other thing that is related to this, Your Honor,  
25 is an order for the preparation of the transcript. I don't



1 know how the Court's department handles that, but we would like  
2 to make a request for the transcript as well. I know under  
3 Rule 250 we are able to get a daily transcript. I know that  
4 this is not a criminal court. So I think that's also a related  
5 issue, and we'll follow whatever directives the Court would  
6 give us to help us expedite the preparation of the transcript.

7 THE COURT: Right. Okay. So I have Ms. Ray.

8 THE COURT RECORDER: Yes.

9 THE COURT: Ms. Ray, are you there?

10 Ms. Ray is our court recorder.

11 THE COURT RECORDER: Yes.

12 THE COURT: And, Ms. Ray, understanding the issues in  
13 this case and, you know, the time is critical, how soon can you  
14 have that transcript? I think this would be a priority over  
15 the other transcripts that, in my view, that are -- that you  
16 may be working on.

17 THE COURT RECORDER: The soonest we can do it is a  
18 24-hour turnaround, and I can send them the request form that  
19 they need to fill out, and then we can get working on it.

20 THE COURT: All right. Well, will you please do that  
21 immediately.

22 THE COURT RECORDER: Absolutely.

23 THE COURT: And will you send that also to  
24 Mr. Shevorski, to all counsels.

25 THE COURT RECORDER: Okay. I will. Yes.

1 THE COURT: All right. And Mr. Anthony or -- and  
2 Mr. Shevorski, Ms. Ray's name is Stacey Ray.

3 And, Stacey, I would like you to be available. I  
4 know that no one has gone to lunch yet, and I apologize, but be  
5 available to speak to Mr. Anthony and/or Mr. Levenson and also  
6 to Mr. Shevorski so that everybody is on the same page. All  
7 right?

8 THE COURT RECORDER: Okay.

9 THE COURT: All right.

10 MR. ANTHONY: Thank you, Your Honor.

11 THE COURT: Okay. Thank you. Have a great day,  
12 Counsel.

13 MR. SHEVORSKI: Thank you, Your Honor.

14 THE COURT: Okay. Thank you.

15 (Proceedings concluded 12:56 p.m.)

16 -oOo-

17 ATTEST: I do hereby certify that I have truly and correctly  
18 transcribed the audio/video proceedings in the above-entitled  
19 case.

20   
21

22 Dana L. Williams  
23 Transcriber  
24  
25

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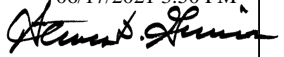
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20/15 22/25 23/2 35/14 35/15 36/8 38/10 38/11 38/13 38/14</p> <p><b>that</b> [260]</p> <p><b>that's</b> [11] 6/14 11/13 11/24 19/7 28/18 35/3 35/10 35/24 36/6 36/22 37/4</p> <p><b>their</b> [9] 9/4 11/8 11/8 12/15 14/22 15/6 22/15 31/22 32/4</p> <p><b>them</b> [3] 11/25 20/8 37/18</p> <p><b>then</b> [12] 2/18 14/3 14/17 16/19 21/13 22/23 25/20 27/5 28/12 31/1 33/4 37/19</p> <p><b>there</b> [35] 2/18 6/11 8/1 8/10 8/11 8/22 9/1 10/22 11/15 13/7 14/5 14/23 16/25 17/3 17/13 17/17 17/17 18/19 19/7 19/11 19/16 20/1 20/16 20/17 22/9 22/11 26/24 30/23 31/4 31/14 31/18 34/3 34/5 34/6 37/9</p> <p><b>There's</b> [1] 7/16</p> <p><b>therefore</b> [1] 5/2</p> <p><b>therein</b> [1] 11/23</p> <p><b>these</b> [8] 9/16 9/17 18/1 19/21 20/3 31/16 33/24 34/1</p> <p><b>they</b> [24] 9/6 9/12 9/12 9/12 9/14 9/18 9/25 9/25 13/8 17/16 17/21 17/22 21/1 21/9 27/19 28/9 28/18 29/3 31/5 34/2 34/19 34/22 36/20 37/19</p> <p><b>they're</b> [3] 22/18 29/20 34/2</p> <p><b>thing</b> [6] 5/11 11/12 18/15 19/4 35/17 36/24</p> <p><b>things</b> [2] 6/14 10/1</p> <p><b>think</b> [22] 12/23 14/1 17/18 18/15 18/17 20/15 21/8 22/9 22/9 22/17 26/14 27/16 28/18 30/15 30/23 35/2 35/3 35/4 35/24 36/2 37/4 37/14</p> <p><b>this</b> [87]</p> <p><b>thorough</b> [2] 4/8 36/10</p> <p><b>thoroughly</b> [1] 4/7</p> <p><b>those</b> [10] 6/13 6/24 6/25 10/9 11/17 14/4 17/20 25/7 26/2 35/21</p> <p><b>though</b> [2] 28/7 33/24</p>
<p><b>S</b></p> <p><b>safety</b> [1] 15/15</p> <p><b>said</b> [7] 9/25 11/11 13/11 14/3 14/8 14/21 14/23</p> <p><b>same</b> [2] 10/1 38/6</p> <p><b>say</b> [6] 3/10 8/5 14/5 21/19 22/6 36/15</p> <p><b>saying</b> [3] 20/16 28/6 28/15</p> <p><b>says</b> [4] 20/4 32/2 32/8 33/4</p> <p><b>Scalia</b> [4] 11/11 12/11 12/12 12/13</p> <p><b>scenario</b> [1] 14/2</p> <p><b>scheduled</b> [1] 24/23</p> <p><b>scheme</b> [3] 6/15 6/22 20/17</p> <p><b>schemes</b> [2] 19/1 20/12</p> <p><b>second</b> [1] 16/4</p> <p><b>secondly</b> [1] 22/3</p> <p><b>secret</b> [4] 9/18 9/18 17/16 19/20</p> <p><b>Section</b> [8] 4/15 7/6 10/11 25/20 29/11 30/8 30/10 31/11</p> <p><b>Section 1</b> [6] 4/15 25/20 29/11 30/8 30/10 31/11</p> <p><b>Section 6</b> [2] 7/6 10/11</p> <p><b>see</b> [8] 4/1 11/7 16/25 18/16 19/10 19/15 26/13 27/2</p> <p><b>Select</b> [1] 24/15</p> <p><b>send</b> [4] 34/22 34/23 37/18 37/23</p>	<p><b>show</b> [3] 10/21 17/1 22/11</p> <p><b>showing</b> [1] 10/4</p> <p><b>side</b> [7] 12/21 13/5 13/25 16/22 17/9 21/23 22/13</p> <p><b>similar</b> [8] 7/4 15/23 17/5 29/19 33/2 33/13 33/25 34/2</p> <p><b>similarly</b> [2] 6/1 6/18</p> <p><b>similarly even</b> [1] 6/1</p> <p><b>simple</b> [1] 13/1</p> <p><b>simply</b> [4] 7/17 20/5 27/24 30/21</p> <p><b>sister</b> [2] 31/22 32/3</p> <p><b>sisters</b> [1] 34/1</p> <p><b>sit</b> [1] 9/22</p> <p><b>situated</b> [1] 28/1</p> <p><b>situation</b> [1] 3/8</p> <p><b>six</b> [2] 8/1 25/2</p> <p><b>Sklar</b> [1] 3/3</p> <p><b>Sklar Williams</b> [1] 3/3</p> <p><b>slow</b> [1] 4/4</p> <p><b>slower</b> [1] 12/6</p> <p><b>so</b> [38] 2/25 4/5 4/5 5/9 8/5 12/3 15/19 17/9 18/21 20/22 22/4 22/8 23/25 26/7 26/14 26/21 26/24 26/25 28/1 28/24 29/3 29/5 30/8 30/18 30/22 31/18 33/24 34/3 34/5 34/16 34/25 35/12 35/22 36/14 36/15 37/4 37/7 38/6</p> <p><b>sole</b> [1] 12/19</p> <p><b>some</b> [8] 14/4 21/17 29/19 31/12 31/15</p>	<p><b>show</b> [3] 10/21 17/1 22/11</p> <p><b>showing</b> [1] 10/4</p> <p><b>side</b> [7] 12/21 13/5 13/25 16/22 17/9 21/23 22/13</p> <p><b>similar</b> [8] 7/4 15/23 17/5 29/19 33/2 33/13 33/25 34/2</p> <p><b>similarly</b> [2] 6/1 6/18</p> <p><b>similarly even</b> [1] 6/1</p> <p><b>simple</b> [1] 13/1</p> <p><b>simply</b> [4] 7/17 20/5 27/24 30/21</p> <p><b>sister</b> [2] 31/22 32/3</p> <p><b>sisters</b> [1] 34/1</p> <p><b>sit</b> [1] 9/22</p> <p><b>situated</b> [1] 28/1</p> <p><b>situation</b> [1] 3/8</p> <p><b>six</b> [2] 8/1 25/2</p> <p><b>Sklar</b> [1] 3/3</p> <p><b>Sklar Williams</b> [1] 3/3</p> <p><b>slow</b> [1] 4/4</p> <p><b>slower</b> [1] 12/6</p> <p><b>so</b> [38] 2/25 4/5 4/5 5/9 8/5 12/3 15/19 17/9 18/21 20/22 22/4 22/8 23/25 26/7 26/14 26/21 26/24 26/25 28/1 28/24 29/3 29/5 30/8 30/18 30/22 31/18 33/24 34/3 34/5 34/16 34/25 35/12 35/22 36/14 36/15 37/4 37/7 38/6</p> <p><b>sole</b> [1] 12/19</p> <p><b>some</b> [8] 14/4 21/17 29/19 31/12 31/15</p>	<p><b>show</b> [3] 10/21 17/1 22/11</p> <p><b>showing</b> [1] 10/4</p> <p><b>side</b> [7] 12/21 13/5 13/25 16/22 17/9 21/23 22/13</p> <p><b>similar</b> [8] 7/4 15/23 17/5 29/19 33/2 33/13 33/25 34/2</p> <p><b>similarly</b> [2] 6/1 6/18</p> <p><b>similarly even</b> [1] 6/1</p> <p><b>simple</b> [1] 13/1</p> <p><b>simply</b> [4] 7/17 20/5 27/24 30/21</p> <p><b>sister</b> [2] 31/22 32/3</p> <p><b>sisters</b> [1] 34/1</p> <p><b>sit</b> [1] 9/22</p> <p><b>situated</b> [1] 28/1</p> <p><b>situation</b> [1] 3/8</p> <p><b>six</b> [2] 8/1 25/2</p> <p><b>Sklar</b> [1] 3/3</p> <p><b>Sklar Williams</b> [1] 3/3</p> <p><b>slow</b> [1] 4/4</p> <p><b>slower</b> [1] 12/6</p> <p><b>so</b> [38] 2/25 4/5 4/5 5/9 8/5 12/3 15/19 17/9 18/21 20/22 22/4 22/8 23/25 26/7 26/14 26/21 26/24 26/25 28/1 28/24 29/3 29/5 30/8 30/18 30/22 31/18 33/24 34/3 34/5 34/16 34/25 35/12 35/22 36/14 36/15 37/4 37/7 38/6</p> <p><b>sole</b> [1] 12/19</p> <p><b>some</b> [8] 14/4 21/17 29/19 31/12 31/15</p>	<p><b>show</b> [3] 10/21 17/1 22/11</p> <p><b>showing</b> [1] 10/4</p> <p><b>side</b> [7] 12/21 13/5 13/25 16/22 17/9 21/23 22/13</p> <p><b>similar</b> [8] 7/4 15/23 17/5 29/19 33/2 33/13 33/25 34/2</p> <p><b>similarly</b> [2] 6/1 6/18</p> <p><b>similarly even</b> [1] 6/1</p> <p><b>simple</b> [1] 13/1</p> <p><b>simply</b> [4] 7/17 20/5 27/24 30/21</p> <p><b>sister</b> [2] 31/22 32/3</p> <p><b>sisters</b> [1] 34/1</p> <p><b>sit</b> [1] 9/22</p> <p><b>situated</b> [1] 28/1</p> <p><b>situation</b> [1] 3/8</p> <p><b>six</b> [2] 8/1 25/2</p> <p><b>Sklar</b> [1] 3/3</p> <p><b>Sklar Williams</b> [1] 3/3</p> <p><b>slow</b> [1] 4/4</p> <p><b>slower</b> [1] 12/6</p> <p><b>so</b> [38] 2/25 4/5 4/5 5/9 8/5 12/3 15/19 17/9 18/21 20/22 22/4 22/8 23/25 26/7 26/14 26/21 26/24 26/25 28/1 28/24 29/3 29/5 30/8 30/18 30/22 31/18 33/24 34/3 34/5 34/16 34/25 35/12 35/22 36/14 36/15 37/4 37/7 38/6</p> <p><b>sole</b> [1] 12/19</p> <p><b>some</b> [8] 14/4 21/17 29/19 31/12 31/15</p>



<p><b>T</b></p> <p><b>thought</b> [3] 5/9 13/6 13/13</p> <p><b>thoughts</b> [2] 21/15 35/3</p> <p><b>three</b> [3] 13/2 25/23 29/13</p> <p><b>through</b> [6] 3/2 17/22 26/21 27/10 29/18 34/11</p> <p><b>throughout</b> [2] 11/1 29/24</p> <p><b>Thursday</b> [1] 36/22</p> <p><b>time</b> [15] 10/2 12/2 12/18 16/2 17/2 17/6 21/5 21/17 24/2 24/12 24/23 35/21 36/1 36/17 37/13</p> <p><b>timeline</b> [1] 35/18</p> <p><b>times</b> [2] 23/24 23/25</p> <p><b>today</b> [12] 2/12 5/2 7/13 7/20 7/23 17/10 18/5 18/16 18/21 19/3 20/1 36/16</p> <p><b>told</b> [1] 22/13</p> <p><b>took</b> [2] 26/7 28/9</p> <p><b>total</b> [1] 6/15</p> <p><b>TRAN</b> [1] 1/1</p> <p><b>transcribed</b> [2] 1/25 38/18</p> <p><b>Transcriber</b> [1] 38/22</p> <p><b>transcript</b> [6] 1/8 36/25 37/2 37/3 37/6 37/14</p> <p><b>transcripts</b> [1] 37/15</p> <p><b>transparency</b> [1] 11/15</p> <p><b>transparent</b> [1] 11/6</p> <p><b>tried</b> [1] 12/18</p> <p><b>TRO</b> [3] 23/12 23/14 34/13</p> <p><b>trouble</b> [1] 11/13</p> <p><b>true</b> [2] 16/5 20/25</p> <p><b>truly</b> [1] 38/17</p> <p><b>try</b> [1] 15/9</p> <p><b>TUESDAY</b> [1] 1/12</p> <p><b>turn</b> [1] 36/18</p> <p><b>turnaround</b> [1] 37/18</p> <p><b>turtle</b> [1] 4/4</p> <p><b>two</b> [2] 6/7 34/24</p> <p><b>type</b> [4] 21/3 22/17 28/4 30/11</p> <p><b>types</b> [2] 9/7 19/21</p>	<p><b>United</b> [1] 23/17</p> <p><b>unlawful</b> [3] 4/13 5/12 6/11</p> <p><b>unlike</b> [1] 34/1</p> <p><b>unpersuasive</b> [1] 31/24</p> <p><b>until</b> [5] 4/20 11/21 23/4 33/8 33/22</p> <p><b>unusual</b> [2] 7/18 30/4</p> <p><b>up</b> [1] 36/8</p> <p><b>upon</b> [4] 9/4 10/11 32/6 33/17</p> <p><b>us</b> [4] 11/13 35/21 37/6 37/6</p> <p><b>use</b> [4] 6/1 8/18 15/20 32/6</p> <p><b>used</b> [9] 8/2 9/8 10/23 10/25 14/17 24/16 27/7 33/11 33/11</p> <p><b>Usually</b> [1] 36/18</p> <p><b>utmost</b> [1] 10/16</p>	<p><b>we're</b> [3] 3/25 22/21 36/18</p> <p><b>we've</b> [2] 19/16 23/23</p> <p><b>week</b> [3] 9/22 24/8 24/12</p> <p><b>weighed</b> [1] 8/4</p> <p><b>weighs</b> [1] 9/6</p> <p><b>weight</b> [1] 18/6</p> <p><b>weighty</b> [1] 19/22</p> <p><b>well</b> [10] 12/7 12/12 27/10 29/20 31/3 31/24 34/3 35/4 37/2 37/20</p> <p><b>went</b> [1] 14/9</p> <p><b>were</b> [8] 10/4 10/5 10/8 11/8 26/23 27/17 27/18 28/16</p> <p><b>what</b> [29] 3/19 6/16 8/6 9/10 9/19 10/6 11/7 11/8 12/16 12/24 14/21 14/22 15/10 15/25 16/1 17/22 20/16 21/4 21/4 21/15 22/6 27/14 28/14 28/23 30/11 30/15 30/20 31/5 35/7</p> <p><b>what's</b> [3] 21/17 21/21 23/7</p> <p><b>whatever</b> [1] 37/5</p> <p><b>when</b> [13] 8/6 9/10 9/18 10/15 15/10 16/20 19/19 20/3 23/13 25/16 27/18 28/10 36/15</p> <p><b>where</b> [7] 6/25 12/19 14/7 19/13 19/23 21/3 21/3</p> <p><b>wherein</b> [1] 12/13</p> <p><b>whether</b> [9] 6/4 6/11 7/14 19/7 20/18 20/23 21/6 23/16 26/24</p> <p><b>which</b> [26] 5/23 6/5 6/9 6/13 6/19 7/6 7/14 7/21 9/25 13/7 14/7 15/6 15/15 16/20 22/18 23/23 27/20 28/15 28/16 28/22 28/22 28/22 28/23 29/17 29/24 30/22</p> <p><b>while</b> [1] 32/3</p> <p><b>who</b> [12] 2/10 3/5 3/20 6/13 10/19 11/7 12/14 21/4 24/21 25/5 25/9 25/13</p> <p><b>whom</b> [1] 33/18</p> <p><b>why</b> [4] 11/2 15/3 20/3 36/6</p> <p><b>will</b> [23] 7/18 10/21 11/14 12/8 13/12 14/6 14/23 14/24 14/24 14/25 15/10 16/1 17/23 18/21 19/12 20/7 22/14 22/24 36/11 36/13 37/20 37/23 37/25</p> <p><b>Williams</b> [2] 3/3 38/22</p> <p><b>wish</b> [1] 36/20</p> <p><b>within</b> [1] 24/7</p> <p><b>witness</b> [1] 25/14</p> <p><b>witnesses</b> [2] 10/8 24/2</p> <p><b>Word</b> [1] 34/25</p> <p><b>worded</b> [1] 6/6</p>	<p><b>words</b> [1] 16/24</p> <p><b>working</b> [3] 35/18 37/16 37/19</p> <p><b>would</b> [33] 3/1 4/8 5/12 5/12 5/17 5/18 6/24 7/24 8/21 8/23 8/25 9/25 10/13 11/25 14/1 17/5 19/4 20/18 20/19 21/6 21/19 22/6 22/10 28/22 28/24 34/16 34/23 35/20 36/23 37/1 37/5 37/14 38/3</p> <p><b>writing</b> [1] 30/17</p> <p><b>written</b> [1] 30/24</p> <p><b>wrong</b> [2] 14/9 28/15</p> <p><b>wrote</b> [2] 14/21 16/14</p>
<p><b>U</b></p> <p><b>unaware</b> [2] 3/20 3/22</p> <p><b>unconstitutional</b> [9] 4/18 5/18 10/18 16/17 17/2 21/24 30/9 31/7 34/8</p> <p><b>under</b> [14] 6/5 6/12 7/5 7/5 15/13 15/15 20/19 21/7 22/6 30/9 32/18 32/25 35/18 37/2</p> <p><b>understand</b> [4] 3/14 3/15 35/8 36/2</p> <p><b>understanding</b> [3] 2/23 23/7 37/12</p> <p><b>Uniform</b> [1] 6/20</p> <p><b>unique</b> [1] 9/4</p>	<p><b>V</b></p> <p><b>variety</b> [1] 13/10</p> <p><b>various</b> [1] 12/19</p> <p><b>VEGAS</b> [1] 2/1</p> <p><b>versus</b> [2] 2/3 14/9</p> <p><b>very</b> [26] 2/13 3/24 6/8 10/18 12/21 17/5 19/17 22/20 23/6 23/9 23/11 27/14 27/14 28/5 28/8 29/6 31/4 33/2 33/13 33/25 34/11 34/17 34/20 35/4 36/10 36/12</p> <p><b>vested</b> [1] 29/4</p> <p><b>victim</b> [2] 24/21 25/9</p> <p><b>video</b> [2] 13/17 38/18</p> <p><b>view</b> [8] 14/22 26/9 27/14 28/8 29/8 32/4 33/13 37/15</p> <p><b>vigorous</b> [1] 18/3</p> <p><b>violate</b> [6] 7/10 10/10 15/3 19/5 30/3 31/11</p> <p><b>violates</b> [5] 7/14 17/4 21/25 23/17 29/14</p> <p><b>violating</b> [2] 29/10 29/10</p> <p><b>violation</b> [3] 4/15 7/18 10/13</p>	<p><b>W</b></p> <p><b>Wait</b> [1] 16/6</p> <p><b>waive</b> [1] 2/11</p> <p><b>want</b> [7] 12/6 13/15 16/4 17/9 17/22 23/5 30/15</p> <p><b>wanted</b> [1] 26/6</p> <p><b>was</b> [21] 5/12 6/10 6/11 6/11 6/19 6/21 7/5 8/17 10/2 10/10 11/8 12/20 12/20 14/17 17/2 17/16 20/17 22/5 22/11 29/15 33/18</p> <p><b>way</b> [8] 6/5 9/11 10/1 17/6 17/9 19/21 20/2 21/20</p> <p><b>we</b> [39]</p> <p><b>we'd</b> [2] 22/9 22/10</p> <p><b>we'll</b> [2] 2/11 37/5</p>	<p><b>X</b></p> <p><b>XIV</b> [1] 1/6</p> <p><b>Y</b></p> <p><b>Yeah</b> [1] 36/13</p> <p><b>year</b> [2] 8/15 9/22</p> <p><b>years</b> [1] 25/3</p> <p><b>yes</b> [16] 2/22 12/6 13/14 16/8 18/13 18/14 20/16 23/3 31/3 35/1 36/5 36/6 36/10 37/8 37/11 37/25</p> <p><b>yet</b> [2] 8/4 38/4</p> <p><b>you</b> [85]</p> <p><b>you've</b> [2] 26/21 26/22</p> <p><b>your</b> [53]</p>
			<p><b>Z</b></p> <p><b>ZANE</b> [4] 1/4 2/3 2/8 34/2</p> <p><b>Zane's</b> [1] 4/3</p>

  
CLERK OF THE COURT

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The Nevada Department of Corrections*

**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

Date of Hearing: June 8, 2021  
Time of Hearing: 10:00 a.m.

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

Plaintiff, Zane Michael Floyd (**Floyd**), through counsel of record, moved for a temporary restraining order and preliminary injunction under NRCP 65 and NRS 33.010. The State of Nevada ex rel. The Nevada Department of Corrections (**NDOC**), through counsel, opposed. Floyd replied. The Court held a hearing on June 8, 2021 at 10:00 a.m. Steve Shevorski of Nevada's Attorney General Office appeared for NDOC. Assistant Federal Public Defender David Anthony and Assistant Federal Public Defender Brad D. Levenson appeared for Floyd. The Court, having reviewed Floyd's motion and reply,

NDOC's opposition and listening to oral argument, DENIES Floyd's motion for temporary restraining order and preliminary injunction:

**I. Background**

1. Floyd is a death row inmate.

2. A Nevada jury sentenced him to death for shooting and killing Lucy Tarantino, Thomas Darnell, Chuck Leos, and Dennis "Troy" Sargent with a 12-gauge shotgun at a grocery store.

3. The Clark County District Attorney's Office (**DA**) sought a second supplemental order and warrant of execution for Floyd. The Honorable Judge Michael Villani granted the DA's motion for the second supplemental order of execution (**order of execution**). The second supplemental warrant of execution has not yet issued.

4. The order of execution sets Floyd's execution for the week of July 26, 2021.

5. The Nevada Legislature created NDOC. NRS 209.101(1).

6. NDOC's Director, *inter alia*, administers NDOC under the direction of Board of State Prison Commissioners. NRS 209.131(1).

7. Charles Daniels (**Daniels**) is NDOC's current Director.<sup>1</sup>

8. The office of Chief Medical Officer is an appointed position within Nevada's Division of Public and Behavioral Health of the Department of Health and Human Services. NRS 439.085(1).

9. Dr. Ishan Azzam (**Dr. Azzam**) is Nevada's current Chief Medical Officer.<sup>2</sup>

10. Floyd filed a complaint against NDOC, Daniels, and Dr. Azzam.

11. Floyd seeks declaratory relief and an order declaring that NRS 176.355 violates Article III §1 of Nevada's Constitution under the Separation of Powers doctrine.

12. Floyd further seeks a temporary restraining order and preliminary injunction prohibiting NDOC, Daniels, and Dr. Azzam from carrying out any lethal injection protocol

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<sup>1</sup> Daniels has not been served with a copy of the summons and complaint in this action, and so, has not yet been made a party to this action.

<sup>2</sup> Dr. Azzam has not been served with a copy of the summons and complaint in this action, and so, has not yet been made a party to this action.

1 against him until Nevada's Legislature amends NRS 176.355 to provide suitable and  
2 sufficient standards to execute Floyd in a constitutional manner.

3 13. After reviewing Floyd's complaint, Floyd's motion for temporary restraining  
4 order/preliminary injunction, NDOC's opposition, Floyd's reply, and hearing oral argument  
5 from the parties, and being fully apprised of this matter, the Court makes the following  
6 conclusions of law.

7 **II. Conclusions of law**

8 14. This Court is permitted to issue injunction relief pursuant to NRS 33.010,  
9 which provides:

10 An injunction may be granted in the following cases:

11 1. When it shall appear by the complaint that the plaintiff is  
12 entitled to the relief demanded, and such relief or any part  
thereof consists in restraining the commission or continuance of  
the act complained of, either for a limited period or perpetually.

13 2. When it shall appear by the complaint or affidavit that the  
14 commission or continuance of some act, during the litigation,  
would produce great or irreparable injury to the plaintiff.

15 3. When it shall appear, during the litigation, that the  
16 defendant is doing or threatens, or is about to do, or is procuring  
or suffering to be done, some act in violation of the plaintiff's  
rights respecting the subject of the action, and tending to render  
the judgment ineffectual.

17  
18 NRS 33.010.

19 15. To obtain a preliminary injunction, Floyd must show (1) a likelihood of success  
20 on the merits, and (2) a reasonable probability if the regulation went into force, they would  
21 necessarily suffer irreparable harm for which compensatory relief is not adequate. *Finkel*  
22 *v. Cashman Profl, Inc.*, 128 Nev. 68, 72, 270 P.3d 1259, 1262 (2012). While Floyd need not  
23 "establish certain victory on the merits, [he] must make prima facie showing through  
24 substantial evidence that [he is] entitled to the preliminary relief requested." *Shores v.*  
25 *Glob. Experience Specialists, Inc.*, 134 Nev. 503, 507, 422 P.3d 1238, 1242 (2018). The Court  
26 should also weigh the relative hardships of the parties and the public interest. *Univ. &*  
27 *Cnty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).  
28 . . .

1           16.     Under NRS Chapter 30, courts “have power to declare rights, status and other  
2 legal relations whether or not further relief is or could be claimed. No action or proceeding  
3 shall be open to objection on the ground that a declaratory judgment or decree is prayed  
4 for.” NRS 30.030. Any person “whose rights, status or other legal relations are affected by  
5 statute . . . may have determined any question or validity arising under the . . . statute . . .  
6 and obtain a declaration of rights, status or other legal relations thereunder.” Additionally,  
7 pursuant to NRS 233B.110, a party may seek a declaratory judgment regarding “[t]he  
8 validity or applicability of any regulation” and “the court shall declare the regulation  
9 invalid if it finds that it violates constitutional or statutory provisions or exceeds the  
10 statutory authority of the agency.”

11           17.     The statute at issue is NRS 176.355, which provides in full:

12                 1. The judgment of death must be inflicted by an injection of a  
13                 lethal drug.

14                 2. The Director of the Department of Corrections shall:

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

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

22                     (c) Be present at the execution.

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

26                     (e) Invite a competent physician, the county coroner, a  
27                     psychiatrist and not less than six reputable citizens over the age  
28                     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.

NRS 176.355.

          18.     Floyd in this action asserts that NRS 176.355 on its face violates the  
Separation of Powers doctrine enshrined in Article 3, §1 of Nevada’s Constitution.

...

1           19.     Article 3 of Nevada’s Constitution is entitled “Distribution of Powers.” NEV.  
2 CONST. art. 3.

3           20.     Relevant to Floyd’s challenge, Section 1 of Article 3 provides: “The powers of  
4 the Government of the State of Nevada shall be divided into three separate departments, -  
5 the Legislative, - the Executive and Judicial; and no persons charged with exercise of  
6 powers properly belonging to one of these departments shall exercise any functions,  
7 appertaining to either of the others, except in the cases expressly directed or permitted in  
8 this constitution.” NEV. CONST. art. 3, §1.

9           21.     The powers of the Legislative, Executive, and Judicial branches are described  
10 as follows by Nevada precedent:

11                   [L]egislative power is the power of law-making representative  
12                   bodies to frame and enact laws, and to amend and repeal them. .  
13                   . . .

14                   The executive power extends to the carrying out and enforcing  
15                   the laws enacted by the legislature. . . .

16                   ‘Judicial Power’ . . . is the *authority* to hear and determine  
17                   justiciable controversies. Judicial power includes the  
18                   authority to enforce any valid judgment, decree, or order.

19           *Del Papa v. Steffen*, 112 Nev. 369, 377, 915 P.2d 245, 250-51 (1996) (quoting *Galloway v.*  
20 *Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)).

21           22.     Defining criminal conduct and setting corresponding punishments is a  
22 legislative function. *Sheriff, Douglas Cty. v. LaMotte*, 100 Nev. 270, 272, 680 P.2d 333, 334  
23 (1984).

24           23.     The executive power carries out and enforces the laws that the Legislature  
25 enacts. *Del Papa*, 112 Nev. at 377, 915 P.2d at 250.

26           24.     Nevada’s jurisprudence makes clear that the Executive branch’s use of  
27 discretion to implement a law does not violate Article 3, Section 1 of Nevada’s Constitution.  
28 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 Cty. 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).

25. 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. Cty. of Clark*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

26. 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).

27. “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).

**A. Floyd has not met his burden to demonstrate a reasonable likelihood of success on the merits**

28. The Court holds that Floyd has not met his burden to demonstrate a reasonable likelihood on the merits that NRS 176.355 violates the Separation of Powers doctrine by unlawfully delegating legislative power to NDOC, an executive agency.

29. Floyd brings a facial challenge to the constitutionality of NRS 176.355. Compl. at ¶¶ 1-15. Floyd raises no question before this Court 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.

30. 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)).

...

1           31. “[W]hen the language of a statute is plain and unambiguous, a court should  
2 give that language its ordinary meaning and not go beyond it.” *Employers Ins. Co. of Nev.*  
3 *v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001).

4           32. Floyd contends that the Legislature unlawfully delegated its law-making  
5 function to NDOC in several ways by enacting NRS 176.355. First, he alleges the  
6 Legislature did not specify the execution drug or combinations of drugs to be used. Compl.  
7 at ¶ 11. Second, he contends that the Legislature did not require that the lethal drug(s)  
8 selected be humane or that the execution be implemented humanely. *Id.* at ¶ 12. Third,  
9 he claims the Legislature failed to specify the manner of injection, *i.e.*, NRS 176.355 is  
10 ambiguous as to whether the drug must be taken orally, intramuscularly, subcutaneously,  
11 or intravenously. *Id.* at ¶ 13. Finally, he contends that the Legislature failed to provide  
12 standards to guide NDOC in carrying out its purpose in effecting NRS 176.355, meaning  
13 NDOC is not expressly required to administer drugs until an inmate is dead or even acquire  
14 drugs that are sufficient to cause death. *Id.* at ¶ 14.

15           33. The Court does not agree with Floyd that NRS 176.355 is constitutionally  
16 infirm based on Floyd’s arguments.

17           34. Because Floyd brings a facial challenge, the Court starts with the language of  
18 the statute, NRS 176.355.

19           35. The Court does not agree with Floyd that the statute’s language is in any way  
20 ambiguous, let alone constitutionally suspect because the statute does not have the  
21 specificity that Floyd contends is required.

22           36. As an initial matter, the Court agrees with NDOC that the instant case is  
23 distinguishable from *McNeill v. State*, 132 Nev. 551, 375 P.3d 1022 (2016), where the  
24 Nevada Supreme Court found that the State Board of Parole Commissioners impermissibly  
25 made law by adding conditions of parole beyond those specifically listed by the Legislature.

26           37. Floyd contends that the statute improperly invites NDOC to exercise a law-  
27 making function because allegedly the Legislature did not specify that NDOC must acquire  
28 drugs sufficient to cause death or whether the drugs must be taken orally, intramuscularly,



1 subcutaneously, or intravenously. The Court does not agree. The Court views the words  
2 “lethal” and “injection” in NRS 176.355 as straightforward and unambiguous.

3 38. The word “lethal” has an ordinary meaning of “[d]eadly; fatal.” Lethal,  
4 BLACK’S LAW DICTIONARY (10th ed. 2014).

5 39. The word “injection” is also not ambiguous. As the Ohio Court of Appeals  
6 noted, “‘injection’ is defined as the ‘[i]ntroduction of a medicinal substance or nutrient  
7 material into the subcutaneous cellular tissue (subcutaneous or hypodermic), the muscular  
8 tissue (intramuscular), a vein (intravenous) . . . or other canals or cavities of the body.’”  
9 *O’Neal v. State*, 146 N.E.3d 605, 617 (Ohio Ct. App.), *appeal allowed*, 154 N.E.3d 98 (Ohio  
10 2020) (quoting STEDMAN’S MEDICAL DICTIONARY 635 (3d unabr. Laws.’ Ed. 1972)).

11 40. In rejecting Floyd’s argument, the Court is keeping faith with the Nevada  
12 Supreme Court’s analysis in *Luqman*. That the Legislature used ordinary terms like  
13 “lethal” and “injection” does not make NRS 176.355 constitutionally vulnerable to Floyd’s  
14 argument. *See Luqman*, 101 Nev. at 154, 697 P.2d at 110 (upholding delegation to  
15 administrative agency despite use of general terms like “medical propriety” and “potential  
16 for abuse” because they were sufficient to guide the agency’s fact-finding).

17 41. As to Floyd’s specific challenges, the Court does not agree with Floyd that the  
18 Legislature improperly delegated the law-making function by not specifying the drug or  
19 combination of drugs to be used in an execution by lethal injection. Consistent with  
20 Separation of Powers principles, the Legislature may delegate the power to determine the  
21 facts or state of things upon which the law makes its own operations depend. *State ex rel.*  
22 *Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature  
23 did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function  
24 to NDOC’s Director.

25 42.

26 43. Floyd cites to *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968),  
27 to argue that NRS 176.355 is unconstitutional because it lacks a sufficient comprehensive  
28 statutory scheme to guide NDOC and the Director’s discretion. But Floyd never grapples

1 with the distinction between making law and properly conferred discretion in carrying out  
2 the Legislature's policy:

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

8 *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*, 143  
9 U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). As the Nevada Supreme Court noted by citing  
10 to Justice Brandeis' opinion in *Douglas v. Noble*, 261 U.S. 165 (1923), that the Legislature  
11 may itself provide a specificity of facts upon which curtails the Executive branch's  
12 discretion in carrying out the Legislature's policy, there is nothing in Separation of Powers  
13 jurisprudence that requires the Legislature to do so. *Pine*, 84 Nev. at 511, 445 P.2d at 944-  
14 45 (citing *Douglas*, supra).

15 44. NRS 176.355 is also not infirm because it does not include specific language  
16 requiring a humane execution or that the drug(s) selected be humane. The Legislature and  
17 administrative agencies alike must follow the state and federal constitution. *See Gibson v.*  
18 *Mason*, 5 Nev. 283, 292 (1869) (explaining that the Legislature's power is limited only by  
19 "the Federal Constitution[] and . . . the fundamental law of the State"). The Court declines  
20 to accept Floyd's invitation to strike down NRS 176.355 by assuming that the Director and  
21 NDOC may act unconstitutionally without a specific statutory language commanding them  
22 to obey the Nevada and United States Constitutions.

23 45. The Court is not persuaded to follow the Arkansas Supreme Court's opinion  
24 in *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012). *Hobbs* is an outlier.

25 46. The courts to address this question, which have capital punishment statutes  
26 that are similar to Nevada's, have overwhelmingly found their state legislature can  
27 constitutionally delegate implementation of execution statutes to corrections officials. *See,*  
28 *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); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018);  
*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). *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)).

47. Finally, the Court notes the Nevada Supreme Court considered and rejected near identical arguments in the Eighth Amendment context. *McConnell v. State*, 120 Nev. 1043, 1056-57, 102 P.3d 606, 616 (2004); *State v. Gee*, 46 Nev. 418, 436-48, 211 P. 676, 681-82 (1923);

48. In upholding former NRS 176.355, the Nevada Supreme Court noted the current statute 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). Yet the Nevada Supreme Court “[could not] see that any useful purpose would be served by requiring greater detail.” *Id.* The Court affirmed that the reasoning in *Gee* 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).

...  
...  
...

**B. Because Floyd has no likelihood of success on the merits, the other factors need not be addressed**

49. Having found that Floyd does not have a likelihood of success on the merits, the Court's preliminary injunction inquiry is over and Floyd's request for extraordinary relief must be denied. *Boulder Oaks Comm. Assoc. v. B&J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 n.6 (2009).

### III. Order

Based upon the Background and Conclusions of Law above:

IT IS HEREBY ORDERED that Floyd's motion for temporary restraining order and preliminary injunction is DENIED.

DATED this 01 day of January, 2021.

**Dated this 17th day of June, 2021**

  
DISTRICT COURT JUDGE

Submitted by:

AARON D. FORD  
Attorney General

**36A 824 8598 A29D**  
**Adriana Escobar**  
**District Court Judge**

By: /s/ Steve Shevorski  
Steve Shevorski  
Chief Litigation Counsel  
*Attorneys for Defendants*

Approved as to form and content.

RENE L. VALLADARES  
Federal Public Defender

By: /s/ David Anthony  
David Anthony  
Assistant Federal Public Defender  
Brad D. Levenson  
Assistant Federal Public Defender  
Jocelyn S. Murphy  
Assistant Federal Public Defender  
*Attorneys for Plaintiff Zane M. Floyd*

**Traci A. Plotnick**

---

**Subject:** FW: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

---

**From:** David Anthony <David\_Anthony@fd.org>

**Sent:** Wednesday, June 16, 2021 4:02 PM

**To:** Steven G. Shevorski <SShevorski@ag.nv.gov>; Brad Levenson <Brad\_Levenson@fd.org>; Crane Pomerantz <CPomerantz@sklar-law.com>; nahmed@sklar-law.com

**Subject:** RE: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

Steve:

Please feel free to add my signature as to form and content so the proposed order can be sent over to DC 14. Thanks.

David

---

**From:** Steven G. Shevorski <[SShevorski@ag.nv.gov](mailto:SShevorski@ag.nv.gov)>

**Sent:** Wednesday, June 16, 2021 1:33 PM

**To:** David Anthony <[David\\_Anthony@fd.org](mailto:David_Anthony@fd.org)>; Brad Levenson <[Brad\\_Levenson@fd.org](mailto:Brad_Levenson@fd.org)>; Crane Pomerantz <[CPomerantz@sklar-law.com](mailto:CPomerantz@sklar-law.com)>; [nahmed@sklar-law.com](mailto:nahmed@sklar-law.com)

**Subject:** RE: Floyd v NV Dept. of Corrections A-21-833086-C - Clean Version of Draft Order for Review Prior to Submission to Court

David,

Please let us know if we may add your signature as to form and content. We will then email it over to the DC14 inbox for the Court's review along with a PDF copy.

Best,

Steve

Steve Shevorski  
Chief Litigation Counsel  
Office of the Attorney General  
555 E. Washington Ave., Suite 3900  
Las Vegas, NV 89101  
702-486-3783

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Zane Floyd, Plaintiff(s)

CASE NO: A-21-833086-C

7 vs.

DEPT. NO. Department 14

8 Nevada Department of  
9 Corrections, Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order Denying was served via the court's electronic eFile system to all  
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/17/2021

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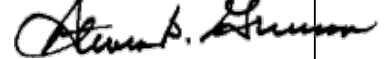
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*Attorneys for Defendants  
Nevada Department of Corrections  
and Charles Daniels*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ZANE MICHAEL FLOYD,  
  
Plaintiff,  
  
vs.

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

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

**HEARING REQUESTED**

**STATE OF NEVADA EX REL. ITS DEPARTMENT OF CORRECTIONS AND  
CHARLES DANIELS' MOTION TO DISMISS UNDER NEV. R. CIV. P. 12(B)(5)**

Defendants Nevada Department of Corrections and Charles Daniels (collectively,  
**NDOC**, unless noted otherwise), by and through counsel, move to dismiss under NEV. R.  
Civ. P. 12(b)(5) Plaintiff Zane Floyd's complaint for declaratory and injunctive relief.

**I. Introduction**

The Court should dismiss Floyd's complaint. The issue of whether a state statute  
violates the Separations of Powers is a question of law. *State v. Dist. Ct.*, 134 Nev. 783,  
786, 432 P.3d 154, 158 (2018). Quadruple murderer Floyd contends that NRS 176.355 is  
constitutionally infirm under the non-delegation doctrine. He is wrong. Floyd re-writes

1 Nevada’s Separation of Powers jurisprudence, ignores NRS 176.355’s plain meaning, and  
2 severs Nevada from the family of other states that have rejected similar arguments.

## 3 **II. Background**

### 4 **A. Floyd murdered four Nevadans in 1999**

5 Lucy Tarantino, Thomas Darnell, Chuck Leos, and Dennis “Troy” Sargent were  
6 working at Albertsons on West Sahara Avenue on June 3, 1999.<sup>1</sup> Floyd murdered them  
7 with a 12-gauge shotgun. *Id.*

### 8 **B. Floyd’s Separation of Powers claim**

9 Floyd is now a death row inmate. *Id.* at ¶ 2. The court denied Floyd’s petition for  
10 habeas relief, and Floyd exhausted his appeals in November 2020. *Id.* at ¶ 12. Now that  
11 the State has sought a warrant of execution, Floyd asks this Court to declare Nevada’s  
12 execution statute unconstitutional on its face. *Id.* at ¶¶ 13-14, p. 12.

13 The new action names NDOC, Director Daniels, and Dr. Azzam as Defendants. *Id.*  
14 at ¶ 3-5. Floyd alleges that NRS 176.355 violates Article III, Sec. 1 of Nevada’s  
15 Constitution. *Id.* at ¶¶ 1 and 4.

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

### 22 **C. Statutory background**

23 NDOC was created pursuant to NRS 209.101. Director Daniels is NDOC’s Chief  
24 Administrative and Fiscal Officer based on his “training, experience, and aptitude in the  
25

---

26 <sup>1</sup> See Compl., at ¶ 2 (citing *DA to proceed with death penalty against gunman in 1999*  
27 *store killings*, Las Vegas Rev. J., <https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-gunman-in-1999-store-killings-2315637/>.) This article  
28 is incorporated by reference into the complaint. *United States v. Ritchie*, 342 F.3d 903, 908  
(9th Cir. 2003) (citing *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002)).



1 field of corrections.” NRS 209.121. As Director, Daniels must “enforc[e] all laws governing  
2 the administration of [NDOC] and the custody, care, and training of offenders.” NRS  
3 209.131. Moreover, in cases where a death sentence has been pronounced, it shall be by  
4 lethal injection, and the Director shall “[s]elect the drug or combination of drugs to be used  
5 for the execution after consulting with the Chief Medical Officer.” NRS 176.355. Dr. Azzam  
6 is the Chief Medical Officer of the State of Nevada. NRS 439.085.

### 7 **III. Legal standards**

8 To survive a motion to dismiss, the complaint must set out “sufficient facts to  
9 establish all necessary elements” of each claim. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d  
10 672, 674 (1984). When considering a motion under NEV. R. CIV. P. 12(b)(5), the court must  
11 accept all factual allegations as true and draw every fair inference in favor of the non-  
12 moving party. *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

### 13 **IV. Legal argument**

#### 14 **A. NRS 176.355’s constitutionality is a pure question of law**

15 Floyd brings a facial challenge to the constitutionality of NRS 176.355. Compl. at  
16 ¶¶ 1-15. Floyd raises no question as to the constitutionality of Nevada’s mode of execution  
17 statute as applied to him, but rather asks this Court to declare NRS 176.355  
18 unconstitutional in all its applications. *Id.* at p. 12.

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

24 Because there are no factual issues to develop, the Court can resolve the question of  
25 NRS 176.355’s constitutionality at this time. *See Schwartz*, 132 Nev. at 742, 382 P.3d at  
26 894 (noting that the district court resolved the merits of appellants’ facial challenges on a  
27 motion to dismiss).

28 . . .

1           **B.     NRS 176.355 is presumed valid, and it is**

2           Statutes are presumed to be valid, and the challenger bears the burden of showing  
3 that a statute is unconstitutional. *Hard v. Depaoli*, 56 Nev. 19, 41 P.2d 1054, 1056 (1935).  
4 To meet that burden, the challenger must make a clear showing of invalidity. *Silvar v.*  
5 *Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).  
6 Courts “must interpret a statute in a reasonable manner, that is, [t]he words of the statute  
7 should be construed in light of the policy and spirit of the law, and the interpretation made  
8 should avoid absurd results.” *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502,  
9 509, 217 P.3d 546, 551 (2009) (quoting *Desert Valley Water Co. v. State, Eng’r*, 104 Nev.  
10 718, 720, 766 P.2d 886, 886-87 (1988)).

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

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

22           Floyd contends that by failing to specify the drug, the manner of delivery of the drug,  
23 or that the method be humane, the Legislature failed to provide sufficient guideposts.  
24 Compl. at ¶¶ 11-14. But Nevada’s jurisprudence makes clear that the Executive’s use of  
25 discretion to implement the law does not offend Separation of Powers principles. The  
26 legislature’s delegation to an administrative agency is constitutional “so long as suitable  
27 standards are established by the legislature for the agency’s use of its power.” *Sheriff,*  
28 *Clark Cty. v. Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). Suitable standards

1 include delegating “authority or discretion, to be exercised under and in pursuance of the  
2 law.” *State v. Shaughnessy*, 47 Nev. 129, 217 P. 581, 583 (1923).

3 In carrying out Floyd’s sentence pursuant to NRS 176.355 the Executive Branch is  
4 not making law but enforcing it. The Supreme Court explained the distinction between  
5 implementing law and making it:

6 [T]he true distinction . . . is between the delegation of power to  
7 make the law, which necessarily involves a discretion as to what  
8 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.

9 *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968) (quoting *Field v. Clark*, 143  
10 U.S. 649, 693-94, 12 S. Ct. 495, 505 (1892)). NDOC under NRS 176.355 is implementing  
11 the policy of death penalty by lethal injection devised by the Legislature.

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

## 19 **2. Floyd ignores the key words’ ordinary meanings**

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

26 While Floyd alleges that the word “lethal” does not provide sufficient guidance,  
27 Compl. at ¶ 14, “lethal” is neither a term of art nor ambiguous. It is defined as “[d]eadly;  
28 fatal.” *Lethal*, BLACK’S LAW DICTIONARY (10th ed. 2014). It is clear, therefore, that the

1 legislature wants NDOC to administer drugs, by injection, that cause death. Thus, the  
2 ordinary meaning of lethal and the Eighth Amendment to the U.S. Constitution constrain  
3 the Director's choice of drug protocol.

4 Nor is "injection" vague or ambiguous. As an Ohio Court of Appeals noted, "'injection'  
5 is defined as the '[i]ntroduction of a medicinal substance or nutrient material into the  
6 subcutaneous cellular tissue (subcutaneous or hypodermic), the muscular tissue  
7 (intramuscular), a vein (intravenous) . . . or other canals or cavities of the body.'" *O'Neal*  
8 *v. State*, 146 N.E.3d 605, 617 (Ohio Ct. App.), *appeal allowed*, 154 N.E.3d 98 (Ohio 2020)  
9 (quoting STEDMAN'S MEDICAL DICTIONARY 635 (3d unabridged. Laws. Ed. 1972)).

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

19 NRS 176.355 affords NDOC no more discretion than its prior version, requiring the  
20 use of lethal gas for executions, which "infring[ed] no provision of the Constitution." *State*  
21 *v. Gee*, 46 Nev. 418, 211 P. 676, 682 (1923). The prior version identified that "judgment of  
22 death shall be inflicted by the administration of lethal gas, and that a suitable and efficient  
23 inclosure and proper means for the administration of such gas for the purpose shall be  
24 provided." *Id.* Nowhere did the statute identify the type or quantity of gas to be used, that  
25 the gas must be administered humanely, or that the gas must be sufficient to cause death  
26 and administered until death occurs. Yet the Nevada Supreme Court "[could not] see that  
27 any useful purpose would be served by requiring greater detail." *Id.* The Court affirmed  
28 that *Gee's* reasoning applies equally to Nevada's lethal injection statute. *See McConnell v.*

1 *State*, 120 Nev. 1043, 1056, 102 P.3d 606, 616 (2004) (applying the reasoning in *Gee* to reject  
2 a facial challenge to NRS 176.355 based on a lack of detailed codified guidelines for the  
3 lethal injection procedure).

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

17 In sum, Director Daniels must determine what combination of drugs will result in  
18 death and the best way to introduce those substances into the body. These are fact-  
19 intensive questions best answered by corrections and medical professionals, who have  
20 relevant experience and the ability to update protocols in response to new medical  
21 information.

22 **3. Separation of Powers does not require continual updating to**  
23 **the Legislature’s delegation**

24 Floyd’s contortion of the separation of powers doctrine would force the legislature to  
25 amend NRS 176.355 in response to every change in drug manufacturing, the supply chain,  
26 and standards for medical procedures. While the legislature may choose to do this, it is not  
27 required to do so. Rather, the legislature may determine that this approach is not only  
28 inefficient, but dangerous. Accordingly, courts have held that, in deciding whether a

1 delegation exceeds constitutional limits, the court should consider whether the agency “has  
2 personnel better qualified to make [the delegated] determinations,” *Sims v. State*, 754  
3 So.2d 657, 670 (Fla. 2000), and if “it would be impracticable for the Legislature to supply  
4 the details” itself. *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012).

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

#### 18               **4. Out of state authority reinforces NRS 176.355’s validity**

19       Other state courts’ decisions considering execution protocol delegation-of-authority  
20 arguments support the constitutionality of NRS 176.355. Nevada has long looked to its  
21 sister states when considering whether delegations of authority violate the state’s own  
22 separation of powers doctrine. *See State v. Shaughnessy*, 47 Nev. 129, 217 P. 581, 584  
23 (1923) (Citing case law from Alabama, Arizona, Florida, Massachusetts, and Pennsylvania  
24 as further support for the constitutionality of the legislature’s delegation).

25       The courts to address this question have overwhelmingly found their state  
26 legislature can constitutionally delegate implementation of execution statutes to  
27 corrections officials. *See, e.g., O’Neal v. State*, 146 N.E.3d 605, 620 (Ohio Ct. App.), *appeal*  
28 *allowed on other grounds*, 154 N.E.3d 98 (Ohio 2020) (holding the legislature can delegate

1 implementation of the statute requiring death by lethal injection to the Department of  
2 Rehabilitation and Correction given their experience in conducting executions of  
3 condemned inmates); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018) (“The  
4 Legislature has made the ‘momentous decision’ to establish the death penalty and has  
5 decided the methods by which it will be carried out. The Legislature could properly delegate  
6 to the Department responsibility to establish procedures for implementing it.”); *Zink v.*  
7 *Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at \*7-8 (W.D. Mo. Nov. 16, 2012);  
8 *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); *State v. Ellis*, 799 N.W.2d 267, 289  
9 (Neb. 2011); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc); *Sims v. State*, 754  
10 So. 2d 657, 670 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *Ex parte*  
11 *Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). *But see Hobbs v. Jones*, 412 S.W.3d  
12 844 (Ark. 2012).

13 In upholding a capital punishment statute that is almost identical to Nevada’s,<sup>2</sup> the  
14 Tennessee Supreme Court explained:

15 [T]he legislature has determined a conviction of first degree  
16 murder accompanied by aggravating circumstances is  
17 punishable by death and that the method of execution shall be  
18 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.

19 *State v. Hawkins*, 519 S.W.3d 1 (Tenn. 2017) (quoting *State v. Hawkins*, No. W2012-  
20 00412CCA–R3–DD, 2015 WL 5169157 at \*28 (Tenn. Crim. App. 2015)). The Nevada  
21 Legislature has similarly exercised its power to determine the method for carrying out  
22 executions and left the technical details surrounding implementation to the executive  
23 . . .

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24  
25 <sup>2</sup> TENN. CODE ANN. § 40-23-114 (West 2020):

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

27 . . .  
28 (c) The department of correction is authorized to promulgate  
necessary rules and regulations to facilitate the implementation  
of this section.

1 officials tasked with enforcing the law. This delegation does not violate the Nevada  
2 Constitution.

3 **V. Conclusion**

4 Floyd's constitutional challenge fails as a matter of law and should be dismissed  
5 pursuant to NEV. R. CIV. P. 12(b)(5).

6 DATED this 23rd day of August, 2021.

7 AARON D. FORD  
8 Attorney General

9 By: /s/ Steve Shevorski  
10 Steve Shevorski (Bar No. 8256)  
11 Chief Litigation Counsel  
12 *Attorneys for Defendants*  
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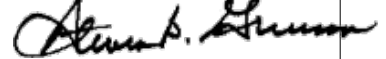


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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 23rd day of August, 2021, and e-served the same on all parties listed on the Court’s Master Service List.

/s/ Traci Plotnick  
Traci Plotnick, an employee of the  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ZANE M. 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

**DEFENDANT IHSAN AZZAM,  
M.D.'s MOTION TO DISMISS  
UNDER NEV. R. CIV. P. 12(B)(5)**

**(Hearing Requested)**

Defendant IHSAN AZZAM, M.D., by and through undersigned counsel, respectfully  
moves to dismiss under NEV. R. CIV. P. 12(b)(5) Plaintiff Zane Floyd's complaint for declaratory  
and injunctive relief.

. . .

1                   **I.       Introduction**

2                   On April 16, 2021, Zane Floyd, a death row inmate of the Nevada Department of  
3                   Corrections (NDOC), filed a Complaint for Declaratory and Injunctive Relief. Floyd alleges that  
4                   NRS 176.355 violates Article III, Sec. 1 of Nevada’s Constitution. Complaint, ¶¶ 1 and 4. The  
5                   action names NDOC, NDOC Director Daniels, and Dr. Azzam, the State’s Chief Medical Officer  
6                   (CMO). *Id.* at ¶¶3-5. As to Floyd’s argument and claims regarding the legality of the NRS  
7                   176.355, Dr. Azzam has separately moved to join in the NDOC defendants’ Motion to Dismiss,  
8                   filed on August 23, 2021. Dr. Azzam incorporates by reference the NDOC Motion to Dismiss  
9                   herein, as well.

10                  Additionally, Dr. Azzam seeks dismissal from Floyd’s suit because Floyd misstates the  
11                  law with respect to Dr. Azzam’s participation in the planning and effectuation of an execution, if  
12                  any. The plain language of the statute demonstrates that Dr. Azzam has a statutorily-limited role  
13                  in the preparation or implementation of the lethal injection protocol. As such, the Complaint  
14                  presents no legally cognizable claim against Dr. Azzam.

15                   **II.       Legal Standard**

16                  On a motion to dismiss, the court must construe the pleading liberally and draw every fair  
17                  inference in favor of the non-moving party. *Vacation Village, Inc. v. Hitachi Am., Ltd.*, 110 Nev.  
18                  481, 484 (1994) (citation and internal quotation marks omitted). “The test for determining whether  
19                  the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations  
20                  give fair notice of the nature and basis of a *legally sufficient claim* and the relief requested.” *Id.*  
21                  (citations omitted) (emphasis added).

22                  Although “all factual allegations of the complaint must be accepted as true” *Squires v.*  
23                  *Sierra Nev. Educ. Found., Inc.*, 107 Nev. 902, 905 (Nev. 1991), “conclusory allegations are not  
24                  considered as expressly pleaded facts or factual inferences.” *In re Amerco Derivative Litigation*,  
25                  127 Nev. 196, 232 (2011). The court need not accept as true conclusory or mere legal conclusions  
26                  made in the complaint. *See Pesci v. IRS*, 67 F. Supp. 2d 1189, 1191 (D. Nev. 1999).

27                  . . .  
28

1                   **III.     Legal Argument**

2                   As referenced above, Floyd’s Complaint seeks a ruling that NRS 176.355 is  
3                   unconstitutional and an injunction preventing the defendants from preparing and implementing a  
4                   lethal injection protocol pursuant to NRS 176.355. *Id.* at ¶ 1 (“... Mr. Floyd requests this Court  
5                   declare NRS 176.355 an unlawful delegation of power to the Executive branch and issue an  
6                   injunction against Defendants, forbidding use of any lethal injection protocol against Mr. Floyd.”)  
7                   The Complaint, however, fails to present a legally sufficient claim or any relief to be granted with  
8                   respect to Dr. Azzam.

9                   The Complaint, including the Claims and Prayer for Relief, focus almost exclusively upon  
10                  NDOC Director Daniels and NDOC, generally. The Complaint acknowledges that Dr. Azzam is  
11                  the state’s Chief Medical Officer. Complaint, ¶ 5. However, it neglects to clarify that Dr. Azzam  
12                  is neither employed by NDOC nor a subordinate to Director Daniels. Rather, Dr. Azzam is  
13                  employed by the Nevada Department of Health and Human Services (DHHS), Division of Public  
14                  and Behavioral Health, and serves at the pleasure of the Director of DHHS. NRS 439 .085; NRS  
15                  439 .005(3).

16                  Floyd’s position with respect to Dr. Azzam relies upon conclusory allegations about Dr.  
17                  Azzam’s role in the selection of drugs to be used in the execution and the preparation and  
18                  effectuation of the execution protocol, gleaned entirely from Floyd’s misreading of NRS 176.355.  
19                  These allegations are found in three objectively incorrect interpretations of the statute stated in  
20                  the Complaint as follows:

- 21
- 22                  • Dr. Azzam “will participate in planning and effectuating Mr. Floyd’s upcoming  
23                  execution[.]” Complaint, ¶ 1.
  - 24                  • Dr. Azzam “has the responsibility of providing consultation to the NDOC Director  
25                  regarding the selection of the drug or combination of drugs to be used in lethal  
26                  injection executions.” *Id.* at ¶ 5.
  - 27                  • “Nevada’s Director of the Department of Corrections, Charles Daniels, along with  
28                  Nevada’s Chief Medical Officer, Dr. Ihsan Azzam, will decide the entirety of the  
                    lethal injection protocol used to execute Mr. Floyd[.]” *Id.* at ¶ 16.

1 To the contrary of these statements, and as is clear from the statute itself, Dr. Azzam’s role in any  
2 execution is particularly narrow and exceptionally limited. NRS 176.355 provides specific actions  
3 that the Director of the Department of Corrections “shall” follow. NRS 176.355(2). The statute  
4 also provides for the method of execution (lethal injection), the place where the execution shall  
5 occur (state prison), and who may witness the execution. NRS 176.355(1),(3), (4). Plain review  
6 of the statute demonstrates that the statute neither authorizes nor allows the Chief Medical Officer  
7 to select the drugs to be used in the execution, nor does it provide for the Chief Medical Officer to  
8 plan or effectuate the execution.

9 The sole reference to the Chief Medical Officer in the statute is found in the context of  
10 duties directly conferred upon the Director, alone. The choice of drugs to be used in the execution  
11 is delegated exclusively to Director Daniels. See NRS 176.355(2)(b) (providing that the Director  
12 shall “select the drug or combination of drugs to be used for the execution . . .”) It imposes upon  
13 Director Daniels the obligation to “consult” with the Chief Medical Office, but imposes no  
14 corresponding obligation on the part of the Chief Medical Officer. *Id.* Implicit in the notion of a  
15 “consult” is that the Chief Medical Officer is free to give his opinion to the Director, but he lacks  
16 the ability to implement his own choices.<sup>1</sup> See <https://www.dictionary.com/browse/consult>  
17 (definition of consult is “to seek advice or information from; ask guidance from”). The statute  
18 imposes no direction on the substance of the consult or its duration, and does not require, or even  
19 recommend, that Director Daniels incorporate Dr. Azzam’s advice into the execution protocol that  
20

---

21  
22 <sup>1</sup> Consider the following. Assume, hypothetically, that the Chief Medical Officer supported  
23 imposition of the death penalty in this case and recommended to the Director that the execution  
24 should be carried out by a three drug protocol using fentanyl, ketamine, and sodium acetate.  
25 Assume, further, that the Director disagreed, and insisted on a one drug protocol using a  
26 barbiturate, which she includes in the final draft of the Execution Protocol. What recourse would  
27 the Chief Medical Officer have regarding her disagreement with the Director? The answer, fairly  
28 clearly, is none. Such is the case with Dr. Azzam; whether he agrees with the execution protocol  
or not, the final choices have been made by Director Daniels. Dr. Azzam lacks the authority to  
overrule or otherwise change Director Daniels’ decisions. That being the case, *Dr. Azzam* cannot  
be held responsible for choices made in the execution protocol or for the alternatives that have  
been bypassed.

1 he develops.<sup>2</sup> Despite the Complaint’s allegations, Plaintiff fully understands the limits of Dr.  
2 Azzam’s “consultation” and participation under NRS 176.355. *See* Plaintiff’s Opposition to  
3 NDOC’s Motion to Dismiss, p. 11 (noting “the Legislature does not require the Director to  
4 specifically give weight to or follow any advice given by the CMO” and that the statute “fails to  
5 provide suitable standards regarding a ‘consult,’ such as: (1) the means of communication (in  
6 person or video-conferencing media, written via email or letter); (2) the duration of  
7 communications; and (3) the weight that the Director is to afford the opinion and advice of the  
8 CMO.”).

9  
10 The Complaint, itself, also acknowledges that Director Daniels is “ultimately responsible  
11 for deciding the entirety of Nevada’s lethal injection protocol, after consulting with Dr. Ahsam  
12 [sic].” Complaint, Count I, ¶ 11. The Complaint, however, cites no statutes or regulations  
13 requiring the Chief Medical Officer to plan, decide the entirety of, or effectuate the execution  
14 protocol in support of the factual allegations against Dr. Azzam. Complaint at ¶¶ 1, 5, and 16. This  
15 is because no statutory or regulatory authority exists conferring such duties or powers upon the  
16 Chief Medical Officer. *See. e.g.,* NRS 439.110 (describing the duties of the Chief Medical  
17 Officer).

18 In sum, the Complaint relies upon a faulty reading of NRS 176.355 in asserting conclusory  
19 allegations against Dr. Azzam. Even if the relief Plaintiff seeks – a declaration that NRS 176.355  
20 is unconstitutional and an injunction against NDOC and Director Daniels from preparing or  
21 implementing the execution protocol – could be granted, it would have no bearing upon Dr.  
22 Azzam.<sup>3</sup> Accordingly, Dr. Azzam respectfully requests that the Court dismiss the Complaint with  
23 respect to him for failure to state a claim upon which relief can be granted pursuant to Nev. R. Civ.

24  
25 <sup>2</sup> Common sense dictates that the statute was written to ensure that Director Daniels, who  
26 is acting in his sole discretion, has information from disparate sources available to him when  
making this weighty decision.

27 <sup>3</sup> Dr. Azzam asserts that such relief, however, cannot be granted, and the Complaint should  
28 be dismissed with prejudice as requested in NDOC’s Motion to Dismiss, in which Dr. Azzam joins  
in full.

1 P. 12(b)(5). *See Stubbs v. Strickland*, 129 Nev. 146, 151 (2013) (affirming dismissal of Complaint  
2 pursuant to Rule 12(b)(5) by “constru[ing] a plain and unambiguous statute according to its  
3 ordinary meaning.”)

4 **IV. Conclusion**

5 WHEREFORE, Dr. Azzam respectfully requests that the Court dismiss the Complaint with  
6 prejudice as to Dr. Azzam for the reasons stated herein, and for the reasons provided in the NDOC  
7 Defendants’ Motion to Dismiss in which Dr. Azzam has moved for joinder by separate motion.  
8

9 Dated this 7th day of October, 2021.

Respectfully submitted,

11 By /s/ Nadia Ahmed  
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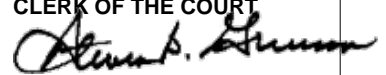
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of SKLAR WILLIAMS PLLC, and that on this 7th day of October, 2021, I caused a true and correct copy of foregoing **DEFENDANT IHSAN AZZAM, M.D.’s MOTION TO DISMISS UNDER NEV. R. CIV. P. 12(B)(5)** to be filed with the Clerk of the Court by using the electronic filing system, and e-served the same on all parties listed on the Court’s Master Service List.

/s/ Terri Scott

An employee of SKLAR WILLIAMS PLLC





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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ZANE M. 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

**DEFENDANT IHSAN AZZAM,  
M.D.'s JOINDER TO STATE OF  
NEVADA EX REL. ITS  
DEPARTMENT OF  
CORRECTIONS AND CHARLES  
DANIELS' MOTION TO DISMISS  
UNDER NEV. R. CIV. P. 12(B)(5)**

COMES NOW, Defendant IHSAN AZZAM, M.D., by and through undersigned counsel,  
respectfully joins in, adopts, and incorporates by reference, as though fully set forth herein, State

. . .

. . .

1 of Nevada ex Rel Its Department of Corrections and Charles Daniels' Motion to Dismiss Under  
2 Nev. R. Civ. P. 12(b)(5), filed on August 23, 2021.

3 Dated this 7th day of October, 2021.

4 Respectfully submitted,

5  
6 By /s/ Nadia Ahmed  
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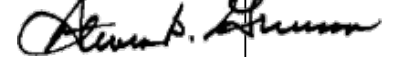
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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of SKLAR WILLIAMS PLLC, and that on this 7th day of October, 2021, I caused a true and correct copy of foregoing **DEFENDANT IHSAN AZZAM, M.D.’s JOINDER TO STATE OF NEVADA EX REL. ITS DEPARTMENT OF CORRECTIONS AND CHARLES DANIELS’ MOTION TO DISMISS UNDER NEV. R. CIV. P. 12(B)(5)** to be filed with the Clerk of the Court by using the electronic filing system, and e-served the same on all parties listed on the Court’s Master Service List.

/s/ Terri Scott

An employee of SKLAR WILLIAMS PLLC



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12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

14 Zane Michael Floyd,  
15 Plaintiff,  
16 v.

17 Nevada Department Of Corrections;

18 Charles Daniels, Director, Nevada  
Department of Corrections;

19 Ihsan Azzam, Chief Medical Officer of the  
20 State of Nevada;

21 John Does, 1-20, unknown employees or  
agents of Nevada Department of  
22 Corrections,

23 Defendants.

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

**Opposition to NDOC Defendant's  
Motion to Dismiss**

**DEATH PENALTY CASE.**

1 Plaintiff Zane Michael Floyd, by and through his counsel, opposes the State's  
2 August 23, 2021, Motion to Dismiss. This opposition is made and based on the  
3 following points and authorities and the entire file herein.

4 DATED this 7th day of October 2021.

5 Respectfully submitted  
6 RENE L. VALLADARES  
Federal Public Defender

7 /s/ David Anthony  
8 David Anthony  
Assistant Federal Public Defender

9 /s/ Brad D. Levenson  
10 Brad D. Levenson  
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11 /s/ Jocelyn S. Murphy  
12 Jocelyn S. Murphy  
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1 **Points and Authorities**

2 **I. Introduction**

3 On April 16, 2021, Plaintiff Zane Floyd filed a Complaint for Declaratory and  
4 Injunctive Relief, in conjunction with a Motion for Temporary Restraining Order  
5 with Notice and Preliminary Injunction. The State filed its response on May 3,  
6 2021. Plaintiff Floyd replied on May 17, 2021. This Court held a hearing on June 8,  
7 2021, and issued its Order denying Floyd’s request for a temporary restraining  
8 order and preliminary injunction on June 17, 2021.<sup>1</sup> On August 23, 2021, the State  
9 filed a Motion to Dismiss. Floyd now responds.

10 **II. Argument**

11 The State argues that Floyd fails to state a claim upon which relief can be  
12 granted. Specifically, the State contends that Nev. Rev. Stat. § 176.355 is  
13 constitutional, therefore Floyd is not entitled to injunctive relief. *See* MTD at 3–4.  
14 The State further argues that the issues raised by Floyd present pure questions of  
15 law that can be resolved now, by this Court, on the merits. *Id.* Finally, the State  
16 asserts that there are no factual issues to develop which would prevent this Court

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19 <sup>1</sup> Although this Court’s June 17, 2021 order denied Floyd’s request for a  
20 temporary restraining order and preliminary injunction, this Court may still grant  
21 declaratory or injunctive relief during this litigation pursuant to NRS 33.010(2), as  
22 “[a]n injunction may be granted . . . When it shall appear by the complaint or  
23 affidavit that the commission or continuance of some act, during the litigation,  
would produce great or irreparable injury to the plaintiff.” Here, there can be no  
question that denying Floyd’s complaint for injunctive relief would produce  
irreparable injury to him as the State is attempting to take his life, an act that  
cannot be undone.

1 from considering its Motion. *Id.* As explained below, each of these assertions are  
2 incorrect.

3 To survive a defendant's motion to dismiss, a plaintiff's complaint need *only*  
4 set forth sufficient facts to demonstrate the necessary elements of a claim for relief  
5 so that the defending party has adequate notice of the nature of the claim and relief  
6 sought. *W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223  
7 (1992) (emphasis added); *see also* Nev. R. Civ. P. 8 ("A plaintiff's complaint must  
8 contain . . . a short and plain statement of the claim showing that the pleader is  
9 entitled to relief"). A complaint may be dismissed "only if it appears beyond a doubt  
10 that the plaintiff could prove no set of facts, which, if true, would entitle him or her  
11 to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d  
12 670, 672 (2008). "In ruling on the motion to dismiss," the Court is "obligated to  
13 accept as true the allegations in [a plaintiff's] complaint, to accord him favor in the  
14 inferences to be drawn therefrom, and to resolve all doubts in his favor." *Chapman*  
15 *v. City of Reno*, 85 Nev. 365, 368, 455 P.2d 618, 619 (1969).

16 This Court should deny Defendant's Motion because Floyd's Complaint sets  
17 forth sufficient facts to state a cause of action for which relief can be granted. The  
18 parties agree that Nevada's Separation of Powers doctrine prevents the Executive  
19 from exercising legislative duties. MTD at 4. The parties also agree that for any  
20 delegated duty the Legislature must set forth suitable and sufficient standards that  
21 leave the Executive with only fact-finding authority. *Id.* at 4, 7. Even further, the  
22 parties agree that the Legislature has delegated its authority to NDOC, an  
23

1 executive agency. *Id.* While the parties disagree as to whether the delegation is  
2 constitutional (with sufficient standards and only fact-finding discretion afforded),  
3 this does not negate Floyd’s initial showing of sufficient facts to establish “a claim  
4 upon which relief can be granted” in violation of Nevada’s Separation of Powers  
5 doctrine. Nev. R. Civ. P. 12(b)(5). Moreover, contrary to the State’s assertions, there  
6 are many factual issues that still need to be developed. For example, the record  
7 must be developed concerning the scope of authority delegated to Director Daniels  
8 to determine Nevada’s execution protocol and whether the process of establishing  
9 that protocol only includes fact finding discretion.

10 **A. Floyd’s Complaint sets forth sufficient facts that would**  
11 **entitle him to relief and prevail on the State’s motion to**  
**dismiss.**

12 A plain reading of Nev. Rev. Stat. § 176.355 outlines that one non-medically  
13 trained individual, Director Daniels, has unilateral, unchecked authority to develop  
14 the method, including the drug(s) to be used, their dosages, and the order in which  
15 they are to be administered, to take the life of an individual, with limited required  
16 consultation with the state’s Chief Medical Officer (CMO). Nev. Rev. Stat. § 175.355  
17 is silent concerning the timing of when the final protocol must be published to  
18 Plaintiff Floyd.

19 **1. Director Daniels must make decisions which exceed**  
**the limited scope of permissible delegation.**

20 In arguing that Nev. Rev. Stat. § 176.355 is constitutional, the State argues  
21 that NDOC and Director Daniels are enforcing, rather than making, law. *See* MTD  
22 at 5. The State further argues that Director Daniels is NDOC’s Chief  
23 Administrative and Fiscal Officer based on his “training, experience, and aptitude



1 in the field of corrections.” *See* MTD at 2–3; Nev. Rev. Stat. § 209.121. According to  
2 the State, this is because Director Daniels must “enforc[e] all laws governing the  
3 administration of [NDOC] and the custody, care, and training of offenders.” *See*  
4 MTD at 3. Floyd argued in his Complaint that Director Daniels, who has no medical  
5 training or medical degree, is granted unfettered authority to determine the  
6 entirety of the lethal injection protocol to be used in his execution. *See* Compl. at 4.  
7 This issue presents many genuine issues of material fact that the Court must  
8 resolve. Accordingly, the State’s Motion to Dismiss must be denied.

9 **2. Director Daniels is not qualified to make the**  
10 **decisions required by Nev. Rev. Stat. § 176.355.**

11 As an initial matter, the State has offered no information concerning NDOC  
12 or Director Daniels’ qualifications to select a lethal injection protocol. The State also  
13 does not suggest that Director Daniels has any medical training or medical degree.  
14 He is not able to identify different classes of medications and is not able to assess  
15 how different classes of drugs, or specific drugs interact when combined or used  
16 together. *See* Ex. 1 at 48. Director Daniels even testified that he needed other  
17 individuals to provide this information to him. *See id.* at 42; Ex. 2 at 83–84. The  
18 State argues that a plain reading of the statute makes the Director’s obligations  
19 clear. *See* MTD at 3, 5–6. However, there is no mandate within the plain text of the  
20 statute concerning the depth of consultations with medical personnel or the weight  
21 to which a director must give these consultations. Nor does there exist a directive to  
22 consider the steps of the protocol with this level of detail. The very act of consulting,  
23 weighing, and rendering a decision concerning which drugs should be used and how

1 the drugs should be injected into the condemned person necessarily is more activity  
2 than merely making a determination of a fact to carry out what the Legislature has  
3 directed. This is an exercise in law making.

4 Accordingly, it is not unreasonable, especially considering NDOC's past  
5 questionable conduct, to believe that the Director would not fully consider, or would  
6 go against, the advice of the CMO, leading to the distinct potential for an execution  
7 protocol that violates the Eighth Amendment's prohibition on cruel and unusual  
8 punishment. This possibility means that the legislature has failed to outline  
9 sufficient guidelines for the decision-making process. Accordingly, the legislature  
10 has improperly delegated its lawmaking authority. As Plaintiff Floyd outlined this  
11 in his complaint, he has pled sufficient facts to overcome the State's Motion to  
12 Dismiss.

13 **3. Nev. Rev. Stat. § 176.355 impermissibly requires the**  
14 **Director to do more than enforce the law.**

15 Moreover, the State argues that Director Daniels is charged with carrying out  
16 and enforcing the laws enacted by the legislature, namely, the enforcement of the  
17 penalty set by the Nevada Legislature for criminal conduct while executive power  
18 extends to "carrying out and enforcing the laws enacted by the legislature." *Del*  
19 *Papa v. Steffen*, 112 Nev. 369, 377, 915 P.2d 245, 250 (1996) (quoting *Galloway v.*  
20 *Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)). *See* MTD at 4. The legislative  
21 powers may not be delegated to another branch of government. *Sheriff, Clark Cty. v.*  
22 *Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985). Although the legislature may  
23 not delegate its power to legislate, it may delegate the power to determine the facts

1 or state of things upon which the law makes its own operations depend. *Id.* While  
2 the State is correct in its recitation that “suitable standards” are required to guide  
3 the agency with respect to the purpose of the law, sufficient legislative standards  
4 are required in order to assure that the agency will neither act capriciously nor  
5 arbitrarily. *Id.* (emphasis added). Notably, the agency is only authorized to  
6 determine the facts which will make the statute effective. *Id.*

7 Here, Nev. Rev. Stat. § 176.355(2)(b) requires that the Director “select the  
8 drug or combination of drugs to be used for the execution after consulting with the  
9 Chief Medical Officer.” In requiring Director Daniels to make such decisions, the  
10 Legislature is impermissibly delegating its law-making authority to Director  
11 Daniels. The decisions Daniels is required to make concerning the drug protocol are  
12 beyond the scope of his credentials, education, training, and well beyond a mere  
13 “determination of fact.”

14 **4. The language of Nev. Rev. Stat. § 176.355 is not plain**  
15 **and is insufficient to guide agency fact-finding.**

16 The State argues that Floyd “ignores key words’ ordinary meanings.” MTD at  
17 5. The State then argues that the terms “lethal” and “injection” have clear meaning.  
18 MTD at 5–6. The State’s own response opens the door to the very inquiry that Floyd  
19 requests: how should the injection be administered? The State argues that  
20 “injection” is not “vague or ambiguous,” defined as “the [i]ntroduction of a medicinal  
21 substance or nutrient material into the subcutaneous cellular tissue (subcutaneous  
22 or hypodermic), the muscular tissue (intramuscular), a vein (intravenous) . . . or  
23 other canals or cavities of the body.” MTD at 6. With multiple means of introducing

1 a substance into the human body that fit the State's own accepted definition, the  
2 State concedes that there is room for further development on this point. Further, as  
3 demonstrated in Floyd's Complaint and above, other words in Nev. Rev. Stat.  
4 §176.355 are not plain and are open to multiple interpretations. Accordingly, where  
5 such genuine issue of material fact exists, the State's Motion to Dismiss necessarily  
6 fails.

7 **5. The State's reliance on prior case law concerning the**  
8 **Eighth Amendment issues raised by Nev. Rev. Stat. §**  
**176.355 is misplaced.**

9 As previously argued in the Complaint, *State v. Gee*, 46 Nev. 418, 211 P.  
10 676 (1923), and *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), do not  
11 affect Plaintiff Floyd's nondelegation claims because these cases presented  
12 challenges to Nevada's death penalty statute under an Eighth Amendment  
13 analysis, rather than the instant separation of powers argument. Reply at 7–9. The  
14 instant Complaint must stand because Floyd has presented genuine issues of  
15 material fact concerning the improper delegation of legislative authority in the  
16 development of the execution protocol under Nev. Rev. Stat. § 176.355. Because the  
17 record must be further developed concerning these issues, the State's Motion to  
18 Dismiss must be denied.

19 **B. The Legislature fails to provide suitable and sufficient**  
20 **guidance to NDOC or the NDOC Director to guide decision-**  
**making. Accordingly, the record must be developed.**

21 **1. Drug Protocol**

22 The State argues that there has been no improper delegation of legislative  
23 authority because Director Daniels is required to implement the death penalty by

1 means of lethal injection alone. *See* MTD at 5. While the statute does narrow the  
2 means of execution, it fails to prescribe the method by which this penalty should be  
3 carried out. Nev. Rev. Stat. § 176.355 is notably silent concerning:

- 4 - The class(es) of drug(s) to be used in executions;
- 5 - The dosage and sequencing of the drug(s);
- 6 - The quantity and quality of the drug(s);
- 7 - The number of drugs to be used (e.g. single drug protocol vs. multiple drug  
8 protocol, two drug protocol vs. three drug protocol, etc.);
- 9 - The method for administering each of the drugs and, assuming the only  
10 method to be intravenous administration, how and where the intravenous  
11 ports are to be established;
- 12 - From where and whom the prison is to procure the drug(s) to be used in the  
13 lethal injection;
- 14 - The training, qualifications, and experience required of those who are  
15 appointed to gain intravenous access and administer the lethal injection  
16 drug(s);
- 17 - How those responsible for gaining intravenous access and administering the  
18 lethal injection drug(s) are to be trained to operate under the protocol, and how  
19 many trainings are required in order to obtain proficiency and to guarantee a  
20 constitutionally acceptable execution;
- 21 - How much notice the condemned will receive once drug(s) are identified; and
- 22 - The suitability and sufficiency of the execution location.

1        Each of these considerations require a level of knowledge that Director Daniels  
2 certainly and admittedly does not have. *See* Ex. 1 at 42–47. The exercise of  
3 discretion necessarily requires competence and consideration in carrying out the  
4 decision-making authority. *See* DISCRETION, Black's Law Dictionary (11th ed.  
5 2019). Director Daniels, with no medical expertise or training, is not equipped to  
6 consider such questions which go beyond mere determinations of fact. All of these  
7 facts have been duly presented in Floyd's Complaint, thus establishing both a  
8 ground for relief and genuine issues of material fact that must be further explored  
9 by this Court. Further factual development on the record will establish the  
10 improper legislative delegation and highlight the gap between what the Director of  
11 the Nevada Department of Corrections is required to do statutorily and his actual  
12 qualifications.

## 13                    **2.        Consultation with Chief Medical Officer**

14        The State ignores the genuine questions of material fact that have been  
15 properly pled by Floyd concerning Director Daniels's statutorily required  
16 consultations with the Chief Medical Officer ("CMO"). These questions must be  
17 further developed on the record. Although Nev. Rev. Stat. § 176.355 requires that  
18 the Director consult with the CMO, the Legislature does not require the Director to  
19 specifically give weight to or follow any advice given by the CMO. The statute also  
20 fails to provide suitable standards regarding a "consult," such as: (1) the means of  
21 communication (in person or video-conferencing media, written via email or letter);  
22 (2) the duration of communications; and (3) the weight that the Director is to afford  
23 the opinion and advice of the CMO.

1           The State argues that it is enough that the statute requires the Director to  
2 consult with the CMO. *See* MTD at 5–6. Under this standard, however, an  
3 individual without any medical expertise, training, or background can choose to  
4 override or ignore the opinion of the CMO without oversight. Such practice risks  
5 significant harm to Floyd and others in his position. This practice of little to no  
6 consultation between the Director and CMO will surely create a substantial risk  
7 that Plaintiff Floyd and similarly situated individuals will suffer inhumane  
8 treatment. The State ignores that such a scenario would render the consultation  
9 requirement meaningless.

10           The statute further provides no guidance to a Director who would seek to  
11 abdicate responsibility and place all weight on the shoulders of the CMO. The  
12 consultation requirement would also be rendered meaningless if the Director elected  
13 to merely rubber-stamp without review any determinations made by the CMO. As  
14 the specific requirements for consultation between the Director and the CMO have  
15 not been outlined in the statute, the Legislature has not provided suitable  
16 standards to the Department of Corrections. Accordingly, Nev. Rev. Stat. § 176.355  
17 is an improper delegation of legislative authority.

18           The only way to properly prevent a substantial risk of inhumane treatment to  
19 Plaintiff Floyd and similarly situated persons and to ensure that the legislature has  
20 not improperly delegated its authority is to permit the development of the record  
21 concerning the nature of the Director’s consultations with the CMO and examine  
22 how the Director’s discretion is actually exercised. As these facts were pled in  
23

1 Plaintiff Floyd's complaint, and as a genuine issue of material fact does exist here,  
2 this Court cannot and should not grant the State's motion to dismiss.

3 **3. Public Policy demands a democratic process.**

4 Democracy requires that the Legislature, not the Executive, make law. Even  
5 if the Legislature delegates this authority the Executive's discretion is limited and  
6 must be guided by the Legislature's standards. A plain reading of Nev. Rev. Stat.  
7 §176.355 shows that the Director of NDOC is the sole individual charged with  
8 developing and carrying out the execution protocol. The Legislature has improperly  
9 delegated its lawmaking powers to the executive branch by permitting Director  
10 Daniels, untrained in medicine, to unilaterally determine the execution protocol  
11 without any regard to the weight of the opinion provided by the CMO and without  
12 public comment. Public policy demands that the protocol be developed by the proper  
13 lawmaking body—the legislature—where statutes endure a period of investigation  
14 and public comment to ensure that the interests of Nevada and affected individuals  
15 are duly considered.

16 ///

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18 ///



1 **III. Conclusion**

2 As Floyd has properly pled genuine issues of material fact for which relief can  
3 be granted, the State's Motion to Dismiss must be denied. The record must be  
4 further developed concerning both Directors Daniels's qualifications and how the  
5 execution protocol was developed. Floyd requests that such factual development be  
6 allowed to occur and that this Court enjoin the Nevada Department of Corrections  
7 from implementing his execution under an unconstitutional statute.

8 DATED this 7th day of October 2021.

9 Respectfully submitted  
10 RENE L. VALLADARES  
Federal Public Defender

11 /s/ David Anthony  
David Anthony  
12 Assistant Federal Public Defender

13 /s/ Brad D. Levenson  
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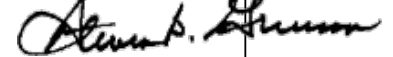
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**CERTIFICATE OF SERVICE**

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 7th day of October, 2021, a true and correct copy of the foregoing **Opposition to NDOC Defendant’s to Motion to Dismiss**, 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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9 Attorneys for Plaintiff Zane M. Floyd

10  
11 DISTRICT COURT  
CLARK COUNTY, NEVADA

12 Zane Michael Floyd,  
13 Plaintiff,

14 v.

15 Nevada Department of Corrections;

16 Charles Daniels, Director, Nevada  
Department of Corrections;

17 Ihsan Azzam, Chief Medical Officer of the  
State of Nevada;

18 John Does, 1-20, unknown employees or  
19 agents of Nevada Department of  
20 Corrections,

21 Defendants.  
22  
23

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

**Exhibits in Support of Opposition  
to NDOC Defendant's Motion to  
Dismiss**

**DEATH PENALTY CASE.**

Exhibit	Document
1.	Reporter's Transcript of Proceedings, <i>Floyd v. Daniels, et al.</i> , Case No. 3:21-cv-00176-RFB-CLB, (U.S.D.C. Nev), ECF No. 49, May 6, 2021
2.	Reporter's Transcript of Proceedings, <i>Floyd v. Daniels, et al.</i> , Case No. 3:21-cv-00176-RFB-CLB, (U.S.D.C. Nev.), ECF No. 113, June 28, 2021

DATED this 7th day of October 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

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**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

3:21-cv-00176-RFB-CLB

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ZANE M. FLOYD, )  
 ) Case No. 3:21-cv-00176-RFB-CLB  
Plaintiff, )  
 ) Las Vegas, Nevada  
vs. ) Thursday, May 6, 2021  
 ) 10:35 a.m.  
CHARLES DANIELS, Director, )  
Nevada Department of ) EVIDENTIARY HEARING  
Corrections; HAROLD )  
WICKHAM, NDOC Deputy )  
Director of Operations;  
WILLIAM GITTERE, Warden,  
Ely State Prison; WILLIAM  
REUBART, Associate Warden  
at Ely State Prison; DAVID  
DRUMMOND, Associate Warden  
at Ely State Prison; IHSAN  
AZZAM, Chief Medical  
Officer of the State of  
Nevada; DR. MICHAEL MINEV,  
NDOC Director of Medical  
Care, DR. DAVID GREEN, NDOC  
Director of Mental Health,  
  
Defendants.

C E R T I F I E D C O P Y

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE RICHARD F. BOULWARE, II,  
UNITED STATES DISTRICT JUDGE

APPEARANCES: See next page

COURT REPORTER: Patricia L. Ganci, RMR, CRR  
United States District Court  
333 Las Vegas Boulevard South, Room 1334  
Las Vegas, Nevada 89101

Proceedings reported by machine shorthand, transcript produced  
by computer-aided transcription.

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1 LAS VEGAS, NEVADA; THURSDAY, MAY 6, 2021; 10:35 A.M.

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3 P R O C E E D I N G S

4 COURTROOM ADMINISTRATOR: Now calling Zane Floyd versus  
5 Charles Daniels, et al., Case Number 3:21-cv-00176-RFB-CLB.

6 This is the time for the evidentiary motion hearing.  
7 Starting with counsel for defendants, please note your  
8 appearance for the record.

9 MR. GILMER: Good morning, Your Honor. Randall Gilmer  
10 on behalf of defendants. I'm representing all of the NDOC  
11 defendants and behind me is Dr. Azzam's counsel.

12 THE COURT: So what I would -- so what we could do --  
13 actually, Mr. Pomerantz and Ms. Ahmed, if you all want to come  
14 to counsel table. Just, again, if you are going to speak, we'll  
15 ask you to come forward here in front of where we have the  
16 Plexiglas here. But you all can come to the counsel table here  
17 as long as you keep your masks on.

18 MR. POMERANTZ: Yes, sir.

19 (Court conferring with courtroom administrator.)

20 MS. AHMED: For the record, Your Honor, good morning.  
21 Nadia Ahmed and Crane Pomerantz on behalf of Dr. Azzam.

22 MR. ANTHONY: Good morning, Your Honor.

23 David Anthony from the Federal Public Defender's Office  
24 appearing on behalf of Zane Floyd.

25 MR. LEVENSON: And Brad Levenson on behalf of Zane

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1 Floyd, who is appearing by video at Ely State Prison this  
2 morning.

3 THE COURT: Okay. So what our policy will be here is  
4 if you are speaking and you're behind the Plexiglas, then you  
5 can pull your masks down so we can get the proper record. And  
6 then you just have to put it back up when you are not speaking.

7 For counsel for Dr. Azzam, you can come up to the  
8 podium and pull your masks down. We have Plexiglas here in  
9 front of the Court, so that way you can address the Court as  
10 necessary.

11 So, Mr. Pomerantz and Ms. Ahmed, I wanted to actually  
12 start with you all in terms of the timing and the preparation.  
13 I'm not sure which of you would like to come up to the podium.

14 So, Ms. Ahmed, I notice you filed and the Court granted  
15 a motion for you to substitute in. The question is, are you  
16 fully prepared for the hearing today or were you going to be  
17 requesting additional time?

18 MS. AHMED: Your Honor, we were as prepared as possible  
19 in the event that the Court was to go forward.

20 We, obviously have, you know, had a relationship with  
21 Dr. Azzam for probably less than 24 hours. So in the grand  
22 scheme of things, certainly, you know, more time is always  
23 better, but recognizing that the Court may move forward with the  
24 hearing, we are prepared.

25 THE COURT: Well, part of the issue is the Court has to

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1 make determinations about the deliberative process privilege.

2 Dr. Azzam, potentially, would be related to that  
3 determination because if Dr. Azzam, as is required by the  
4 statute, made certain types of recommendations or had some  
5 advice that was provided, that potentially could be covered by  
6 this privilege.

7 I don't know if you and Mr. Pomerantz have had  
8 sufficient time to see what types of documents would be covered  
9 for you all to be able to make the arguments about that  
10 privilege. That's my concern. I want to be able to make  
11 rulings about what should and shouldn't be covered by the  
12 privilege, but I also want to know what you understand exists in  
13 terms of the universe of information.

14 Are you in a position to be able to advise the Court  
15 about that?

16 MS. AHMED: Frankly, Your Honor, speaking to documents,  
17 no, we have not had an opportunity to review other than the  
18 pleadings, which we've made a diligent effort to review  
19 everything that's attached to those, but we're, frankly, still  
20 going through those. But otherwise, we do not, document-wise,  
21 know what the privilege would extend to.

22 In terms of the actual argument relating to the  
23 deliberative process privilege, we would defer to Mr. Gilmer  
24 because -- frankly, because it's something that we think is more  
25 within his purview to argue to the Court, recognizing that

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1 Dr. Azzam has joined in that motion, but we would defer to them  
2 in terms of the argument to the Court on that matter.

3 THE COURT: Okay.

4 And I say that because we're supposed to go forward  
5 with our hearing today, but there was at least a request  
6 initially for us to give some time for Dr. Azzam's new counsel,  
7 yourself and Mr. Pomerantz, to be able to prepare him  
8 potentially for testimony. And so why don't we go forward,  
9 then, with the argument about the deliberative process  
10 privilege, and then I may come back to you.

11 MS. AHMED: Thank you, Your Honor.

12 THE COURT: Because I'm still contemplating the issue  
13 of whether or not we continue this, particularly with respect to  
14 Dr. Azzam, potentially until Monday just to give you all an  
15 opportunity, but I want -- I want to hear more about the  
16 privilege. So thank you, Ms. Ahmed.

17 MS. AHMED: Thank you, Your Honor.

18 THE COURT: Mr. Gilmer?

19 MR. GILMER: Good morning, Your Honor.

20 THE COURT: Good morning.

21 So I've had an opportunity to be able to look at a  
22 little bit about -- at your arguments about the privilege, and I  
23 wanted just to ask you a few questions about this.

24 First, can you tell me what documents exist or the  
25 nature of the documents exist that you think would be covered?

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1 Because we have testimony, but there's also going to be  
2 documents. And I say that because I'm probably going to order  
3 documents to be produced and it's helpful to know in the context  
4 of also testimony what you think exists and what would be  
5 covered by the privilege versus what wouldn't be. The privilege  
6 doesn't cover factual information.

7 And in this case and, again, looking at the privilege  
8 in my research, this is a Federal question case and so,  
9 obviously, Federal Common Law controls. And there is a  
10 deliberative process privilege under Federal Common Law as well,  
11 but there are certain qualifications. It's a qualified  
12 privilege.

13 So can you tell me a little bit about what you would be  
14 asserting would be covered by the privilege, what types of  
15 documents, what types of testimony so I can have a better  
16 understanding of its reach.

17 MR. GILMER: Certainly, Your Honor. Randall Gilmer,  
18 for the record. And I will answer that question.

19 But let me put at the beginning, I do not know if the  
20 documents that I necessarily am going to say that I believe  
21 would be covered by the privilege exist, but obviously I want to  
22 explain to you which documents I believe would be covered to the  
23 extent any such documents do exist. So I just want to make sure  
24 the record is clear on that point.

25 I believe that any documents that would be

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1 correspondence or --

2 THE COURT: So why don't we do this, Mr. Gilmer.  
3 Actually before we do this, what may be helpful is let's take a  
4 moment. You have Director Daniels here. You have Dr. Azzam  
5 here. They should be aware of what documents actually exist  
6 with respect to -- and here's the specific information that I  
7 think is relevant: Does the NDOC actually have information  
8 about drugs, specifically, in terms of their usage, their side  
9 effects, how they're to be used, information from the  
10 manufacturer of those drugs?

11 Does the NDOC have factual information about the  
12 availability of those drugs, how long they would be available,  
13 how long their potential shelf-life is as it relates to those  
14 drugs?

15 Does the NDOC have any information about the process by  
16 which they would have to acquire those drugs if they don't have  
17 them?

18 Does the NDOC have any of its own reports, particularly  
19 from someone like Dr. Azzam or from internal doctors, like the  
20 NDOC's own Director of Medicine, assessing the possible choices  
21 of drugs? Because, again, that would seem to me to fall more  
22 directly into the deliberative process.

23 So can you and Mr. Pomerantz and Ms. Ahmed meet right  
24 now? Because I don't want to have to come back. You all would  
25 know whether or not these types of documents exist. I'm not

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1 asking for you, Mr. Gilmer or Ms. Ahmed, for you all to tell me  
2 the number. But whether or not the NDOC or the State has  
3 received actual information about certain types of drugs, their  
4 availability, their uses or side effects or the recommended FDA  
5 uses, any of that information which is, from the Court's  
6 perspective, purely factual information, and then whether or not  
7 there have been any recommendations that have been created or  
8 advisory opinions or any discussions about agency decisions.

9           You don't have to tell me, again, how many of those  
10 documents exist, but I would like to be able to separate out  
11 agency recommendation or deliberative-type documents from  
12 documents which are factual as it relates to these drugs to the  
13 extent that you can do that, so that we don't have to go back  
14 and forth and Mr. Gilmer doesn't have to make representations  
15 about hypothetical documents that don't exist.

16           You all are here. If you want to sort of meet and  
17 confer, and I'll ask you, basically, just to step out so you can  
18 do that safely and confidentially, if you would like, into the  
19 hallway and give you like 10 minutes to do that. That way we  
20 could figure out exactly what's -- what's available. Because  
21 what I'm -- intend to do potentially is order the production of  
22 that information that wouldn't be covered by the privilege to --  
23 to the plaintiff and that could be part of this proceeding, but  
24 I want to be able to know what exists. And I can't really rule  
25 on things hypothetically without having some sense of what

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1 exists.

2           So, I'm going to give you all five to 10 minutes. You  
3 all let us know when you are done. But if you all would step  
4 out and sort of confer about that, that would be helpful. I'm  
5 going to stay on the bench while that happens.

6           And if you want to bring in plaintiff's counsel, you  
7 can after that. But what I'm going to ask you when you get back  
8 is to be able to give me information about those particular  
9 types of categories of documents. Okay.

10           MR. GILMER: Thank you, Your Honor.

11           THE COURT: All right. Thank you.

12           We'll be adjourned for that period of time. Thank you.

13           (Recess taken at 10:45 a.m.)

14           (Resumed at 10:50 a.m.)

15           THE COURT: Let's go back on the record, then.

16           So what can you tell me about what you've learned,  
17 Mr. Gilmer?

18           MR. GILMER: Yes. Randall Gilmer for the record.  
19 Thank you, Your Honor.

20           After our meet-and-confer with Dr. Azzam's counsel, it  
21 is both of our understandings that there has been no document  
22 exchanges between Dr. Azzam and Director Daniels or any -- or  
23 anyone at NDOC pertaining to the current deliberative nature as  
24 to the protocol that is currently, you know, under deliberation  
25 and process.



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1           NDOC certainly probably does have some of the documents  
2 you reference pertaining to certain drugs. And I understand  
3 that Your Honor indicated that you believe some of those issues  
4 might be factual. However, I would -- it would be our -- the  
5 State's position that those facts would still lead to the  
6 deliberative process and opinions and advisory opinions that are  
7 being discussed. To the extent that they obtained factual  
8 information about a drug that's being under consideration, but  
9 has not been decided on as being used, obviously, providing that  
10 factual information would delve into the deliberative process  
11 about potential drugs that are being used.

12           So we would still maintain that any such documents that  
13 would be in the possession of NDOC solely in that respect would  
14 still be covered by the privilege.

15           THE COURT: So what I understand you to be saying is  
16 you -- you believe that there are documents which contain  
17 information about drugs in terms of their availability, other  
18 sort of medical information about them, but you think that those  
19 documents are covered by the deliberative process privilege  
20 because they could be used in the deliberation?

21           MR. GILMER: I believe that they're covered by the  
22 deliberative process privilege, Your Honor. Because to the  
23 extent that those drugs have not been chosen to be part of the  
24 final cocktail, releasing those documents, to the extent they  
25 exist, would then put the public on record and notice as to what

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1 drugs were being considered for the final potential protocol.  
2 So, therefore, it would be delving into the deliberative nature  
3 and process with regard.

4 We would certainly have no problem providing any such  
5 documents to the drugs once the final protocol is completed and  
6 finalized. Certainly any documents at that point in time  
7 pertaining to those drugs would be discoverable with regard to  
8 those particular drugs. We still have the manufacturer issue  
9 that we've also briefed and would argue that there should be  
10 some sort of protective order pertaining to that, but --

11 THE COURT: So, Mr. Gilmer, let me ask this question  
12 about this issue with the privilege. In looking at the FTC  
13 case, which I'm referencing -- and I'll give you the cite for  
14 that case, which is 742 F.2d 1156, FTC versus Warner  
15 Communications, Incorporated.

16 The Ninth Circuit clearly says that this privilege can  
17 be qualified. One is -- and I want you to address this -- if  
18 the opposing party's interests outweighs the Government  
19 interest, why wouldn't, in this case, Mr. Floyd's interests  
20 outweigh the Government's interest? What reason could the  
21 Government have that would outweigh his interests in the drugs  
22 that are going to be used to execute him?

23 MR. GILMER: Randall Gilmer, for the record.

24 I do not believe -- if I understood your question  
25 correctly, Your Honor. I do not believe that Mr. Floyd's

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1 interests with regard to the drugs that are used to execute him  
2 are any less important than what the Government's choice is.  
3 However --

4 THE COURT: Well, here's what I mean by that. One of  
5 the issues the Court has to consider in this case is to what  
6 extent there may be methods of execution that do or don't  
7 violate the Eighth Amendment with respect to suffering and  
8 cruelty. And the Court actually has to evaluate -- and that's  
9 the other question I was going to ask you -- whether or not the  
10 NDOC chose drugs that it was aware had certain risks over other  
11 drugs. That's actually part of the process.

12 So the other part of this is if you look at the  
13 FTC case, it involves cases where the deliberation itself is not  
14 at issue. The deliberation here is exactly at issue, right.

15 So the question is: Why would the NDOC want to protect  
16 the fact that it had considered other drugs and disregarded  
17 them? Why would there be an interest in not simply sharing all  
18 of that information as it relates to what was chosen? And why  
19 wouldn't that be at issue here where Mr. Floyd has a  
20 constitutional right to know to what extent there are drugs that  
21 are available, even to the NDOC, that may pose less of a risk as  
22 it relates to the protocol, but were not chosen? That's  
23 actually an issue, Mr. Gilmer, that the Court has to look at.

24 So that's a two-part question. One is in this case why  
25 would the privilege apply if the actual deliberation and what's

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1 available is itself something that the Court has to consider  
2 and -- and decide. And, two, as it relates to Mr. Floyd's  
3 interests, right, this is a man who is going to be executed by  
4 the State. What could possibly be the State's interests that  
5 would override that interest with respect to not disclosing the  
6 nature of the drugs under consideration? So those are the two  
7 questions.

8 MR. GILMER: Certainly, Your Honor. Randall Gilmer,  
9 again, for the record.

10 Before I get to those two questions, I think it's  
11 important to also point out that this isn't about Mr. Floyd  
12 specific. This is about a deliberative process privilege that  
13 the State controls with regard to the importance of all  
14 deliberations that they do. So it is -- has far-reaching  
15 decisions based -- other than just in this particular context of  
16 this case. So I think that is why it's crucially important that  
17 this process be -- be protected and ruled on by the Court.  
18 Because while this is a very -- obviously a very serious issue,  
19 this protection is important with regard to numerous aspects of  
20 State Government and it's crucially important that it be  
21 protected.

22 THE COURT: So let me ask something -- just address  
23 that briefly, Mr. Gilmer. I am not saying that the deliberative  
24 process privilege doesn't apply to State decisions. I'm not  
25 saying in cases like this one it's not a Federal Common Law

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1 privilege that could not be asserted.

2 I'm saying in considering the particular factors that I  
3 must consider under FTC and other cases that allow for the Court  
4 to make determinations about when it should and shouldn't apply,  
5 in this case and in this case specifically why should or  
6 shouldn't it apply. So I want to be clear. I am not saying  
7 that the NDOC's determinations generally are not covered by the  
8 deliberative process privilege. I'm not saying that at all.

9 To the extent that there may have been some suggestion  
10 from my questions that I was going to rule in that way, that's  
11 not true. Based upon my review of the law, the deliberative  
12 process privilege would in fact be available to a State agency,  
13 potentially, in a case that involved Federal questions under  
14 Federal Common Law.

15 So I'm just focussed on how that privilege may or may  
16 not apply in this case, but am not in any way reaching a larger  
17 decision about whether or not the State can or cannot assert it.

18 MR. GILMER: Understood, Your Honor. Randall Gilmer.

19 With regard to the two specific questions, which I  
20 think I recall, I believe that to -- I think they can both be  
21 answered in the same way. It's putting the cart before the  
22 horse.

23 Certainly Mr. Floyd has a right to challenge the  
24 protocol if he puts forward a known and available alternative  
25 that is better, once he knows what our execution protocol is.

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1 That is his burden to show at that point in time that there's a  
2 known and readily-available alternative after the final protocol  
3 has been decided; not before that.

4           So once the -- its final executive -- once the final  
5 execution protocol is decided and those drugs have been chosen,  
6 at that point in time Mr. Floyd certainly may have an interest  
7 to determine what other drugs were known and readily available  
8 to NDOC that they didn't consider, to the extent that they fall  
9 into the alternative known and alternative protocol that they  
10 set forth in their complaint or whatever amended complaint that  
11 they're going to file, Your Honor.

12           So I think, again, it is certainly possible once the  
13 execution protocol is done that some of that information  
14 pertaining to what drugs are or are not available to NDOC and  
15 what was or was not considered, to the extent they're specific  
16 to the alternative and known available proposition that they put  
17 forward, I think would possibly be discoverable. I think that  
18 that's a different point, however, than what -- beforehand.

19           And with regard to the second point of your question is  
20 why would NDOC want to protect those drugs prior to the  
21 decisional process being completed, I think is, again, two-fold.  
22 It's important to be able to have frank conversations and throw  
23 out all potential drug possibilities even if it's farfetched or  
24 silly or, you know, doesn't make sense to people in the general  
25 public. It's important that they be able to have those frank

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1 and candid conversations.

2           However, if those drugs get out as even possibly being  
3 considered in a conversation in the public domain, then, as we  
4 know from Alvogen, from the Alvogen lawsuit and many other  
5 lawsuits throughout this country, that becomes the story and  
6 that becomes the issue. And those drugs become unavailable for  
7 other legitimate things, which is why --

8           THE COURT: Let me ask you a question, though,  
9 Mr. Gilmer. Why is that my concern in this case? If a  
10 manufacturer decides that it wants to come in and prevent use of  
11 its drugs, why is it not entitled to do that? What does that  
12 have to do with the questions here as it relates to what I have  
13 to decide?

14           I could -- because I can see where the NDOC or State  
15 agency would say, "The moment we potentially identify these  
16 drugs" -- as happened in the previous protocol in this state,  
17 the manufacturer came in and said, "We don't want to be  
18 associated with that." Why does the NDOC have the right then  
19 based upon that to conceal that information?

20           MR. GILMER: Again, Your Honor, the point would be I  
21 think that predecisional, the fact that we discussed a drug  
22 maybe that might be used is not something that should -- should  
23 have to cause a rush to the courthouse steps by every  
24 manufacturer out there because a drug might have been mentioned  
25 in some conversation, as opposed to what the actual drugs are

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1 and the actual drugs that are in the protocol.

2 We can -- we can -- we can fight that argument when it  
3 comes about once the execution protocol's final, but there's no  
4 reason to have -- have those fights about how a hypothetical  
5 drug that was -- was rejected and wasn't used.

6 THE COURT: So, first, I want to make sure I understand  
7 your point. Part of what I understand you to be saying is that  
8 if we release the list of all possible drugs, it could lead to a  
9 flood of litigation from these manufacturers who are  
10 preemptively seeking to prevent the use of their drug. Is that  
11 what I understand you to be saying?

12 MR. GILMER: That's certainly part of the argument,  
13 yes.

14 THE COURT: Okay. I mean, I'm just talking about you  
15 saying what could flow from this in terms of litigation. But go  
16 ahead. I want to make sure I hear the rest of that as well. Go  
17 ahead, Mr. Gilmer.

18 MR. GILMER: Well, no, so -- no, I do think that's an  
19 important point, but again -- but I think the main point is all  
20 of those drugs are being discussed in a predecisional context.  
21 So, again, it's not a case or controversy. It only becomes ripe  
22 or real for any of these drugs or anybody, including Mr. Floyd,  
23 once they're in the protocol.

24 And, again, like I said, once the protocol's finalized,  
25 once the drugs are picked, then at that point in time it's a



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1 different ball game. And I certainly understand the need for  
2 Mr. Floyd to look into known and readily-available alternatives,  
3 to the extent that they plead those in their amended complaint,  
4 and why we didn't consider those or why they couldn't be  
5 considered. At that point we're still narrowing specific to  
6 what he actually proposes in an amended complaint.

7 And I say "amended complaint" because the parties have  
8 all agreed that an amended complaint is going to have to be  
9 filed based upon the clear acknowledgment that midazolam is not  
10 going to be used.

11 So, at that point I -- and I don't want to speak for  
12 Mr. Floyd as to whether or not they would change what their  
13 proposed alternatives are from the current complaint.

14 So I -- I think that that puts it in a very different  
15 situation. I think it changes -- it flips the burden on its  
16 head. Because that's Mr. Floyd's burden, once he sees what  
17 we've decided to come forward with a known and readily-available  
18 alternative, not to pick the entire universe of drugs and  
19 handpick which ones he might want to use.

20 THE COURT: So one question I have for you, and I  
21 appreciate your arguments, Mr. Gilmer, is that would all, I  
22 think, be more persuasive if the DA's Office were not seeking to  
23 try to execute Mr. Floyd on June 7th.

24 And as you said last time, right, the NDOC has no role  
25 in deciding that date. But all of the arguments you're raising

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1 to me, including the assertion of privilege, only further  
2 support a stay of the execution in this case to allow for this  
3 to happen.

4 I don't necessarily disagree with you that it would  
5 make sense to allow the NDOC additional time. But the elephant  
6 in the room is that the DA's now in State Court right now  
7 seeking to get a June 7th execution date. And you're saying we  
8 need more time to make sure that there's proper deliberation.  
9 They should be allowed time once that decision's reached to be  
10 able to investigate that. You're not denying that. And I think  
11 that's true. And I appreciate the fact that you're saying that.

12 But this all can't get done by June 7th, that's for  
13 sure. And I certainly can't consider all of that information by  
14 June 7th.

15 So the question is: Are you going to take any  
16 position, then, on the motion to stay the execution, given the  
17 arguments that you are raising today as it relates to the  
18 privilege and -- and the process that you think the Court should  
19 allow to unfold?

20 MR. GILMER: Thank you, Your Honor. Randall Gilmer for  
21 the record.

22 I believe the State's position is clear with regard to  
23 the motion to stay the execution from our response and  
24 opposition. There's no execution order issued yet. And as we  
25 discussed on Monday and, I mean, I can go over that again, but I

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1 think there are very significant rules of comity here. We're  
2 dealing with a criminal proceeding. There's nothing for this  
3 Court to stay at this point in time.

4 THE COURT: No, no. Here's what I'm contemplating.  
5 NDOC could not perform an execution until there's sufficient  
6 time for the protocol to be investigated. That, from my  
7 standpoint now, is at least 60 to 90 days, if not more, based  
8 upon what you're saying to me.

9 Based upon the fact that this has been known, the NDOC  
10 has still not finalized its protocol -- and we'll hear from  
11 Director Daniels as to why that may be the case. Why would  
12 you -- on behalf of the NDOC defendants, that is. I understand  
13 the DA may have a different position. Why would you take a  
14 position one way or another about the Court making sure that  
15 Mr. Floyd had time to do that?

16 I mean, one of the NDOC's also obligations is in the  
17 context of individuals who are incarcerated with the NDOC to  
18 make sure they're able to exercise their constitutional rights.  
19 That is also a duty that the NDOC has.

20 Why would there be any reason not to allow Mr. Floyd  
21 that opportunity, given the amount of time that you're asking  
22 the NDOC to be able to have to finalize the protocol?

23 MR. GILMER: Thank you, Your Honor. Randall Gilmer,  
24 again, for the record.

25 I would again just reiterate I think our -- our

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1 opposition to the motion for stay very plainly sets forth the  
2 State's position with regard to that.

3 I would also note that, again, depending on what the  
4 final execution protocol is, there may not actually be a case or  
5 controversy for this Court to consider.

6 And with regard to the Court's statement that it might  
7 take 60 to 90 days to look into that protocol, as we've  
8 mentioned in our TRO response as well as our motion to stay  
9 response, there are numerous cases where the Court said, "You  
10 don't need that much time. There's nothing in this protocol,"  
11 and reversed stays that were issued on a much shorter time frame  
12 than that.

13 So, again, until we know what the execution protocol is  
14 and we see an amended complaint from plaintiff with regard to  
15 that, I don't think -- I think the issue is premature for this  
16 Court to decide.

17 THE COURT: But one of the things I have to decide,  
18 Mr. Gilmer, as relates to the privilege is how an opposing party  
19 can access the information in the time that they may need it.  
20 If you're taking the position that you don't think that there  
21 should be a stay, how can you then also take the position that  
22 they shouldn't be entitled to the information as soon as  
23 possible so that they can deal with any potential execution date  
24 that emerges, right? Because it seems like you're saying to the  
25 Court, "Let's wait. Let us decide. But if there's an execution

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1 date, we should go forward because there may not be an issue."

2 But one of the considerations I have to look at under  
3 the FTC case is to what extent the information is available.

4 It's clearly not available to them, I don't think there's any  
5 dispute about that. And so if you're not going to say, which I  
6 can appreciate, "We're -- we're not going to oppose the motion  
7 to stay, we're not going to take a position on it," why wouldn't  
8 that impact the analysis with respect to the deliberative  
9 process privilege because it requires me to look at the extent  
10 to which the information would be available?

11 MR. GILMER: Randall Gilmer, for the record, Your  
12 Honor. Thank you for the question.

13 I do not believe that it is relevant to that question  
14 because, again -- and making a circular argument to a certain  
15 extent -- it's their burden to come up with a known and  
16 alternative availability after they know what the final protocol  
17 is.

18 NDOC has been very clear that as soon as that final  
19 protocol is completed, we will provide it to them immediately,  
20 whether they file another complaint or not. And so certainly at  
21 that point in time they can gauge what they may need to -- to  
22 challenge that protocol. And at that point in time the Court  
23 and the parties can both look to see if when -- based upon the  
24 time that the execution protocol is finalized and assuming that  
25 the State Court issues an execution warrant without any stays or

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1 without any preliminary injunctions -- because those are  
2 floating around in State Court as well. At that point in time  
3 we'll have the date certain as to when the protocol was  
4 finalized, we'll have a date certain when the execution is, and  
5 the Court and the parties at that point in time will both be  
6 able to know if that's sufficient time or if more time needs to  
7 be done.

8 THE COURT: Okay.

9 MR. GILMER: But until that's done, there's no way for  
10 the Court, the plaintiff, or us to know how much time may or may  
11 not be needed. And, again, it's so -- it's premature under --  
12 as we indicated in our TRO, because there's really no case or  
13 controversy here until the amended complaint is filed and until  
14 there's actually a finalized protocol.

15 THE COURT: Okay. Thank you, Mr. Gilmer.

16 Ms. Ahmed, I don't know if you have anything else.  
17 Before I turn to plaintiff's counsel to respond as relates to  
18 the privilege, I don't know if you or Mr. Pomerantz have  
19 anything else to add as it relates to Dr. Azzam and the  
20 assertion of the privilege.

21 MR. POMERANTZ: Your Honor, Crane Pomerantz for  
22 Dr. Azzam.

23 With regard to the narrow issue of whether there are  
24 documents, I think that the representation of Mr. Gilmer is  
25 accurate. At this juncture we're not aware of documents

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1 relating to Mr. Floyd's case. We are not making any  
2 representations as to any previous cases.

3 I would note that if there are communications, e-mails,  
4 documents relating to previous cases, that's probably something  
5 the Federal Public Defender has access to. I, as I sit here, am  
6 not aware of any pre-2021 documents.

7 THE COURT: So one of the things, Mr. Pomerantz and  
8 Ms. Ahmed, I would actually direct you all to find out would be  
9 to what extent the State Medical Director has documents about  
10 the prior execution protocol. There was significant litigation  
11 about that. That information could potentially be relevant for  
12 this case. I know you all are literally less than 24 hours on  
13 this case, but I would direct you all to find that out.

14 I am going to bring us back at some point, obviously,  
15 to further explore this issue of what needs to be disclosed  
16 based upon the privilege, but I know you all aren't in the  
17 position to even talk about a privilege log or what would be  
18 relevant, Mr. Pomerantz and Ms. Ahmed, at this point in time.  
19 But I would direct you to -- to try to figure out from -- in  
20 speaking with your client what would be within that universe.

21 I'm not saying that I would order it disclosed, but I  
22 don't want us to be in a situation, Mr. Pomerantz and Ms. Ahmed,  
23 where we're trying to figure out what exists and then whether or  
24 not it would be covered by a privilege.

25 MR. POMERANTZ: Your Honor has made himself clear. We

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1 will engage in that inquiry. Just so I am clear, are you  
2 referring just to the Dozier matter or are you referring to any  
3 previous case in which there may have been a consultation or  
4 documents might exist?

5 THE COURT: It would be any -- and that's a good  
6 question, Mr. Pomerantz. I would limit -- limit your inquiry to  
7 going back to the Dozier protocol. That was the one where there  
8 was litigation in terms of what documents existed and what  
9 position or what opinions or other documents were created by the  
10 State Medical Officer.

11 As you all know, the statute requires your client to  
12 weigh in specifically as it relates to this execution. And so,  
13 I would direct you just going back to the Dozier protocol from  
14 2018, I believe.

15 MR. POMERANTZ: Understood, Your Honor. Thank you.

16 THE COURT: Thank you.

17 All right. Mr. Anthony? You can remain seated. I'll  
18 hear from you in response.

19 MR. ANTHONY: Thank you, Your Honor. David Anthony.

20 The first thing that I would observe based upon the  
21 argument so far is that if you accept the State's position here,  
22 I think the inescapable conclusion is that a stay is required.

23 The reason that's true is because one of the issues  
24 that I think we have to grapple with and one of the issues that  
25 we're going to explore is to what extent this is a unilateral



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1 decision by NDOC that may or may not have real justification for  
2 it.

3 In the last argument when I was before Your Honor on  
4 Monday, the concern that we had was that there were suggestions  
5 in the pleadings that what we're really waiting for is simply  
6 the formality of an execution warrant to be signed. If that is  
7 the only thing that we're waiting for, I think that is a factor  
8 that the Court could consider with respect to whether this is a  
9 delay that is sought in good faith or whether it is something  
10 that is just being used arbitrarily.

11 You know, so -- and one other thing I would reference,  
12 Your Honor, is that when we had this argument in front of the  
13 panel of the Ninth Circuit, the State was specifically asked  
14 whether they would be waiting for an execution warrant before a  
15 finalizing the protocol. Judge Berzon expressed concern that if  
16 we were to wait until that time that would be us effectively  
17 litigating with a gun to our heads. That would be meaning that  
18 we wouldn't have time to make a reliable decision on this issue.

19 If you look at the scheduling order -- not necessarily  
20 our -- what we proposed, Your Honor. But if you look at the  
21 scheduling order that was agreed to, even the scheduling order  
22 that the State has agreed to is a scheduling order that puts us  
23 out about 60 to 90 days, as Your Honor has already talked about.

24 So even what they say is necessary to be done here  
25 would have to lead to the conclusion that a stay would be

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1 required.

2 THE COURT: So, Mr. Anthony, why don't you lay out your  
3 perspective as to what is necessary in terms of preparation and  
4 why that amount of time would be appropriate in the context of a  
5 stay.

6 MR. ANTHONY: Well, thank you, Your Honor.

7 The proposal that we made to the Court in the  
8 scheduling order was based on what is typically needed to  
9 litigate a method of execution case.

10 One of the things that makes this circumstance  
11 different than the average case is that usually in method of  
12 execution litigation the protocol is known beforehand, usually  
13 that's the starting point. The starting point is this is a  
14 protocol that is known beforehand.

15 Many of the cases that the State cites about notice of  
16 a protocol, cases that might go a different direction, are  
17 because it's based on a protocol that has been known and  
18 consistently used for a period of time. If that was the  
19 situation that we faced today, we might have a different  
20 question about what is needed and what -- what type of a  
21 schedule is needed.

22 The reason that we proposed the time frame that we did  
23 is because we're still sitting here, we're four weeks out from a  
24 potential execution, and we don't even know the most basic of  
25 information. And so, I guess, what I would say, Your Honor, is

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1 that if the typical case, let's say, has a discovery period that  
2 lasts for 90 to 120 days based on a known protocol, what would  
3 be required to reliably litigate a case where the drug or drugs  
4 are completely unknown and they're still unknown and we're --  
5 you know, we're now four weeks out to an execution.

6 So to answer the Court's question, I think that even --  
7 I think that this Court could order a stay based simply upon the  
8 scheduling order that the State has already agreed to that is  
9 necessary and it begins when the protocol is disclosed.

10 THE COURT: Well -- well, let me ask you this question,  
11 Mr. Anthony, because I don't know I can stay an execution that  
12 has not been ordered.

13 I think what the Court could potentially do is order  
14 injunctive relief that would prevent the carrying out of any  
15 warrant of execution without a certain amount of time that  
16 allowed for certain litigation, right. Because right now there  
17 is actually no scheduled execution, correct?

18 MR. ANTHONY: That's correct, Your Honor.

19 THE COURT: So if there's relief that you are seeking,  
20 would not the relief be that the NDOC would be enjoined from  
21 performing any execution until after this litigation had  
22 concluded with respect to the issues that have been raised?

23 MR. ANTHONY: Yes, Your Honor. I believe that that  
24 would be the appropriate way to handle and to craft an order to  
25 respond to the unique situation presented here.

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1 THE COURT: Okay.

2 Mr. Gilmer, let me ask you this question. I would  
3 still like to hear from Director Daniels about why we don't have  
4 a protocol. Do you think that that testimony would implicate  
5 the deliberative process privilege or not? Because if -- again,  
6 if -- if you feel he can't share it, I'll have to go back and  
7 look at the arguments again today, but it seems to me that also  
8 would be something I would have to consider in the context of a  
9 stay.

10 So can you tell me do you believe that the questions  
11 that the Court has about why there's been no finalization of the  
12 protocol are questions that are not covered by the deliberative  
13 process privilege?

14 MR. GILMER: Randall Gilmer, for the record, Your  
15 Honor. Thank you for the question.

16 I'm hesitating because something a lawyer should never  
17 say in court is "I don't know." But I think as I'm -- as I'm  
18 contemplating the answer, I believe that most, if not all, of  
19 that answer -- I mean, I guess it would depend on what Director  
20 Daniels testified to. I could make a proffer, but I'm concerned  
21 that the Court would think that I might be coaching him for an  
22 answer.

23 THE COURT: No.

24 MR. GILMER: So that's my concern.

25 THE COURT: Well, the issue is, I guess, Mr. Gilmer,

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1 when we were here previously, you had seemed to suggest that  
2 there were legitimate reasons that you think could be made  
3 public that would provide some context for what you thought  
4 might be misinterpretations of the fact that the protocol was  
5 not finalized. On behalf of your client I think you were saying  
6 that there shouldn't be a rush to judgment about a lack of  
7 preparation or a lack of deliberation because there may be other  
8 legitimate reasons why the protocol hasn't been finalized. And  
9 I take you at your word for that. But you had suggested that  
10 Director Daniels would be able to explain that to me and be able  
11 to explain that at a -- at a hearing which is why I set this  
12 hearing. But, again, that was before you asserted the  
13 deliberative process privilege. I appreciate that.

14 But now that you're asserting that, can Director  
15 Daniels tell me why this has not been finalized without you sort  
16 of interjecting every third question, "That's covered by the  
17 deliberative process privilege"?

18 MR. GILMER: Yes. Thank you, Your Honor. Randall  
19 Gilmer for the record.

20 I believe that there would be several such objections  
21 and so I believe that it would be important for him not to  
22 testify at this point in time, other than to perhaps confirm  
23 that he has not made any decision.

24 I mean, that I think would be the only thing that would  
25 not be subject to the deliberative process privilege at this

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1 point in time.

2 THE COURT: I -- well, we could talk about the timing  
3 of the decision. That -- I mean, that seems to me that wouldn't  
4 be the subject of the deliberative process. But just knowing  
5 when there would actually be a decision, that seems to me  
6 something that could be discussed. Because, again, I'm trying  
7 to deal with all of the moving parts here as it relates to the  
8 requests from the parties.

9 So ...

10 MR. ANTHONY: Your Honor, may -- may I give a just a  
11 brief response?

12 My understanding, when we had our meet-and-confer, was  
13 that questions about the finalization of the protocol were not  
14 questions that would implicate the deliberative process. If you  
15 look at the State's pleading, I think what they argue at most is  
16 that the questions could be asked the right way, but they could  
17 also be asked in an objectionable way.

18 And so my understanding and, again, I just want the  
19 record to be clear is that if we're talking about when the  
20 protocol will be finalized, I didn't take that from our  
21 meet-and-confer that that was an objectionable point.

22 THE COURT: Well, why don't we do this. Let's have  
23 Director Daniels start testifying, and then we'll see how far we  
24 get.

25 What I will tell you is I'm going to set this for a

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1 continuation of this hearing because I want to hear from  
2 Dr. Azzam, but he has new counsel, for Monday. By that time, I  
3 would expect that there will be further disclosure of the  
4 relevant documents that exist. If there's a privilege log,  
5 Mr. Gilmer, Ms. Ahmed, Mr. Pomerantz, that that would have been  
6 created and provided to counsel by Monday.

7 Now, what I will let you know is I will consider the  
8 testimony today. If I decide to potentially issue some type of  
9 stay, obviously that could impact the scheduling in this case  
10 and there may be further litigation or appeal on that with  
11 respect to the parties. And so that's something I haven't yet  
12 decided, obviously, but that would impact that.

13 But I do expect for us to come back on Monday. And I  
14 would expect, Ms. Ahmed, Mr. Pomerantz, that your client would  
15 be prepared to testify at that time, and that all the parties  
16 would be aware of the documents that actually exist, that a  
17 privilege log would have been created that would address all of  
18 the communications that would be covered by that privilege.

19 And, again, I'm not saying that I'm going to grant the  
20 assertion of the privilege, but in order for me to be able to  
21 even figure out what would be covered, I need to know what  
22 exists. So I'm just saying that to you so that you all  
23 understand what's going to be happening because I would expect  
24 Director Daniels -- and we appreciate your time -- will have to  
25 probably testify both today and on Monday, depending on the

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1 Court's determination of the privilege. But let's see what we  
2 can find out today and where the privilege is asserted.

3 So, Director Daniels, why don't we have you come up and  
4 take the stand at this time.

5 MR. ANTHONY: Your Honor, one maybe housekeeping matter  
6 before we begin.

7 THE COURT: Yes.

8 MR. ANTHONY: Could we have five minutes just to look  
9 at our questioning outline to make it conform to what the  
10 Court's parameters were that were just set? Would that be okay?

11 THE COURT: That's fine. If you want to do that and if  
12 you want to -- all want to take your time to do that, that's  
13 fine with the Court. We'll take a five-minute recess.

14 MR. GILMER: Thank you, Your Honor. And, Your Honor, I  
15 probably have another brief moment about the protective order  
16 that I think is important before we get into Director Daniels'  
17 testimony, but we can do that after --

18 THE COURT: No, why don't we do it now because they're  
19 going to want to ask certain questions and I want to make sure  
20 that if there's an issue we address it now, Mr. Gilmer.

21 MR. GILMER: Certainly, Your Honor.

22 Well, I just want to make sure the Court is aware and I  
23 want to make sure I'm understanding the Court's -- understanding  
24 that the Court can obviously change their mind at any particular  
25 time, whether or not you plan on issuing a ruling pertaining to



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1 the deliberative process privilege today or if you're holding  
2 off on that.

3           And the reason why I ask, Your Honor, is we would  
4 intend to file an emergency -- we would ask for a certificate of  
5 appealability and an emergency -- and a stay and file an  
6 emergency motion with the Ninth Circuit on that particular  
7 issue. So that's why I'm asking for that so that the Court is  
8 aware why we're asking that. Should that go against the State,  
9 we are prepared to move in that direction and, obviously, that  
10 could be important for scheduling moving forward.

11           THE COURT: Certainly. But -- so part of the issue is,  
12 Mr. Gilmer, as you know, privileges can't be asserted in blanket  
13 fashion. I need to see how you're going to assert it.

14           For now, I'm not going to direct Director Daniels to  
15 respond to questions that are covered by the privilege, but I  
16 want to see what questions you think are covered by the  
17 privilege and what information you think can or cannot be  
18 shared.

19           And so it's difficult for me to rule on the privilege  
20 until I see how you're asserting it and what you think is  
21 covered by it.

22           The Court also is going to direct that a privilege log  
23 be created and that the documents be submitted to the Court in  
24 camera for review before I rule. There may be reasons that the  
25 Court would understand better when reviewing such documents, and

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1 it's typical fashion for these types of privilege determinations  
2 the Courts review these things in camera.

3 But, again, we can talk about that process later,  
4 Mr. Gilmer. That's in part -- certainly, I think it would be  
5 appropriate for either side if they want to appeal the Court's  
6 discussion, but I need to have a full record. And I want to  
7 make sure the record is full. And so we're going to go through  
8 that process today and we'll talk about that.

9 But for now, Mr. Gilmer, to answer your question, I'm  
10 not going to direct that Director Daniels answer questions where  
11 the privilege is asserted for today. I want to hear when and  
12 how you think it should be asserted, and that will help me  
13 figure out what the contours are of the privilege or not in this  
14 case.

15 MR. GILMER: Thank you, Your Honor.

16 THE COURT: Sure.

17 MR. GILMER: Appreciate that clarification.

18 THE COURT: No, not at all. We'll take a five-minute  
19 recess. Thank you.

20 (Recess taken at 11:25 a.m.)

21 (Resumed at 11:35 a.m.)

22 THE COURT: Okay. Mr. Anthony, you said you had an  
23 issue?

24 MR. ANTHONY: Yes, Your Honor.

25 Before we begin the examination, we would like to

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1 invoke the rule of exclusion under Rule 615 to exclude  
2 witnesses.

3 THE COURT: And who would that be?

4 MR. ANTHONY: That would be Dr. Azzam, Your Honor.

5 THE COURT: Okay.

6 Mr. Pomerantz, Ms. Ahmed, again you may not be in a  
7 position to -- to be able to respond. Certainly, I would let  
8 counsel, because counsel's permitted to stay, stay. But is  
9 there any reason why Dr. Azzam couldn't be excluded at this  
10 time?

11 MR. POMERANTZ: Your Honor, two points. Dr. Azzam, as  
12 it currently stands, is a party to this matter. However the  
13 Court rules is fine, but I would suggest that given the scope of  
14 the inquiry that the Court has indicated it's going to follow  
15 right now, which is timing of the protocol, that wouldn't appear  
16 to implicate any conversations or any communications with  
17 Dr. Azzam.

18 So the exclusion would seem to be on some level  
19 unnecessary. If there is questions about communications with  
20 Dr. Azzam and counsel for Mr. Floyd is concerned about that, you  
21 know, we understand that.

22 THE COURT: Well, I think those would be the questions  
23 exactly that Mr. Gilmer would stand up and say are covered by  
24 the deliberative process privilege and would have the most  
25 argument to say. So for now I agree. I don't think it -- the

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1 privilege -- I mean, the exclusion should apply in this case. I  
2 don't think given the nature of the testimony that Dr. Azzam's  
3 potential testimony would be impacted by that. I anticipate  
4 fairly circumspect testimony at this time.

5 So -- and he's a party, so I'm going to allow him to  
6 stay.

7 Anything else?

8 Mr. Gilmer?

9 MR. GILMER: Thank you, Your Honor.

10 Just one brief housekeeping matter. And if the Court  
11 would prefer a notice of supplemental authority, we will  
12 certainly provide that. But in my haste to get the motion for  
13 protective order to the Court, I neglected to inform the Court  
14 of a very recent Supreme Court case directly on point. So, as  
15 an Officer of the Court, I thought it was important that I point  
16 that out to the Court.

17 THE COURT: Okay.

18 MR. GILMER: The case is United States Fish and  
19 Wildlife Services versus Sierra Club. The cite is 592 U.S. And  
20 it was decided in March, on March 4th of this year, Your Honor.  
21 And as I said, if the Court would like a notice of supplement,  
22 we will certainly provide that. But I wanted to make sure you  
23 are aware of that because --

24 THE COURT: And, I'm sorry, what is -- what do you  
25 think it says that supports your position? That's different

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1 than -- is there anything different than what we've discussed  
2 here?

3 MR. GILMER: I think it -- it talks about how broad the  
4 deliberative process privilege is pertaining to issues and  
5 documents, especially. But that was because that case was  
6 specific to a document-seeking issue. I think it also would  
7 apply to testimony outside that confines, and that anything and  
8 everything predecisional is covered even -- and it talks at  
9 great length about facts and how they can be intertwined. So  
10 that is what I thought it was important to bring it to the  
11 Court's attention.

12 THE COURT: Okay. Thank you, Mr. Gilmer. I appreciate  
13 that.

14 All right. Director Daniels, if you wouldn't mind  
15 stepping forward, please.

16 I'm sorry, right up here, Director Daniels.

17 Watch your step there.

18 COURTROOM ADMINISTRATOR: Please raise your right hand.

19 CHARLES DANIELS, having duly been sworn, was examined  
20 and testified as follows:

21 COURTROOM ADMINISTRATOR: Thank you.

22 THE COURT: You can go ahead and take your seat. And  
23 if you could state your full name for the record. And since  
24 you're in front of the Plexiglas, Director Daniels, you can take  
25 your mask down.

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1 THE WITNESS: Thank you, Your Honor.

2 Good morning. My name is Charles Daniels. I'm sorry,  
3 did you ask the spelling?

4 Yes. Charles, C-H-A-R-L-E-S. Last name Daniels,  
5 D-A-N-I-E-L-S.

6 EXAMINATION OF CHARLES DANIELS

7 BY THE COURT:

8 Q. Okay. So, Director Daniels, let's -- let's just start off  
9 with the most basic question. Why isn't the protocol finalized?

10 A. Sir, the -- Your Honor, the protocol has not been finalized  
11 for several reasons. There's a requirement that I seek counsel  
12 with primarily the Chief Medical Officer of the state. I'm  
13 still in the process of looking at various drugs to be used. I  
14 believe that I don't have a greater responsibility than to  
15 ensure that I do this right, and I need to consult with as many  
16 individuals as possible to ensure that I'm doing this right.

17 There are also costs, heavy significant costs,  
18 associated with putting on one of these executions. So --

19 Q. Can you tell me a little bit about that. Because I'm not  
20 aware of that. Can you tell me, when you say that, what type of  
21 costs?

22 A. Yes.

23 Q. You mean in terms of the protocol, can you explain that a  
24 little bit?

25 A. Well, yes, because for anything that we decide we want to

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1 do, whether it's regarding security, gathering intelligence,  
2 providing the appropriate staff that would have to come in  
3 and/or experts and/or contractors from other areas, we will have  
4 to have them come out. We're going to have to provide lodging.  
5 All the minutia that no one would think about that --

6 Q. Right.

7 A. -- we have to plan for. I have to have redundancy built in  
8 to any issues that I may have.

9 I also have to work in coordination with other state  
10 law enforcement authorities, medical authorities, examiners.

11 We have to coordinate and move all of those people  
12 around. But, more importantly, I have to ensure I have enough  
13 staff to deal with any, and I mean any, contingency. There's no  
14 do-over button in -- in executions.

15 Q. Right.

16 A. So I have to ensure that I have all of that. I have to  
17 bring people up. We have to run through our protocols  
18 step-by-step ensuring that we stay within the confines of what  
19 we've actually drafted.

20 Q. Okay.

21 A. And if we identify any particular issues, then we need to  
22 mitigate that right there. And if we can't overcome it, then we  
23 need to make everyone else aware that there has been a change.

24 I have to ensure that the condemned individual is  
25 maintained in a safe place, that he has access to his attorneys,

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1 and that for the most part we will ensure that he gets what he  
2 has coming to him as it relates to whatever the constitutional  
3 needs are and/or what the expectations are of the people of the  
4 State to include the judiciary as well as our -- the executive  
5 branch of our Government and so on.

6 But all of this requires a lot of moving pieces as it  
7 relates to especially the security apparatus, bringing people  
8 out, ensuring that they know step-by-step what they need to do.

9 There's also, of course, I have to ensure that my  
10 equipment works, that I have everything that I need, that we're  
11 able to test it ensure that it works.

12 That -- I also have to ensure that the drugs that are  
13 available. I have to -- that I have available or we think we  
14 have available are things we have in stock that would also  
15 expire depending on how long things go along.

16 So I have -- there's a lot of moving parts. And not to  
17 mention, of course, just the court proceedings and the attorneys  
18 and all of those people that are involved.

19 Coroners, EMTs, the clergy, all of those people that  
20 are involved. It's serious.

21 I would think that the expectation would be of  
22 Mr. Floyd and his -- and his representatives that I do  
23 everything possible to ensure that if we actually go through  
24 that it's done right in accordance with provisions that are  
25 outlined in the Eighth Amendment of the U.S. Constitution.



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1 Cruel and unusual punishment, I take that very seriously. It's  
2 personal for me. But I understand my obligations and my duties  
3 towards the people of the state as well as all of the other  
4 inmates as well as Mr. Floyd.

5 Q. Okay.

6 So you've outlined a fair number of considerations that  
7 you have to factor in to your decision, including the -- again,  
8 the time and the experts and redundancy.

9 Let me ask you this question. When do you expect that  
10 your protocol will be finalized?

11 **A.** Sir, I do not know when it will be finalized, because as  
12 long as I have an opportunity to conduct my due diligence,  
13 consult with more individuals, consult more sources -- and also  
14 I have to take into consideration as soon as the potential drugs  
15 are identified, there may be a huge push to have that via court  
16 order in some court we can't use that or there's some claim  
17 saying that that's no longer available to you.

18 Q. Right.

19 **A.** And so I have to take into consideration that I can do most  
20 of my planning in advance, but it would be incumbent upon me to  
21 ensure that I have the best information available, I think,  
22 which is in everyone's best interests. I still have to consult  
23 with the -- with the Chief Medical Officer of the state. And  
24 until I do that, because it's a requirement, then I really have  
25 to know where -- where I am at with that individual as well

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1 because I can't proceed without that consultation.

2 Q. Well, do you think it will take three months?

3 A. Your Honor, I don't know.

4 Q. Well, you have to give me some date. I mean, it's not going  
5 to take five years, right?

6 A. Sir, it would not. Your Honor, it would not.

7 Q. Okay. So give me what you think would be the outside limit  
8 of the decision.

9 I also have to make important decisions here, Director  
10 Daniels, and as it relates to how the Court has to rule, right.

11 And so you need to at least tell me -- given what  
12 you've said, it's clear that you've thought about this process  
13 and are still thinking about it and are potentially still  
14 gathering information, but it seems to me that the NDOC has to  
15 have some timeline, in part because of the timing of when these  
16 drugs might be available, as to when it's going to make a  
17 decision.

18 So what would be the outer boundaries of that decision?

19 A. Your Honor, very good question. So here's what my response  
20 would be. After I am able to consult with the Chief Medical  
21 Officer and then look at all of our security apparatuses and so,  
22 I would say 90 to 120 days --

23 Q. Okay.

24 A. -- would be sufficient.

25 Q. Well, and, again, I appreciate that you have a lot of things

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1 that you've said, and there may be many things, Director  
2 Daniels, that we won't even take into consideration. So some of  
3 the things that you had mentioned just about the redundancy and,  
4 obviously, if someone were to get sick, for example, whoever the  
5 medical officer is who I presume would be monitoring this, if  
6 something were to happen that you have to find someone else,  
7 they have to go through the whole procedure again, potentially  
8 testing. And so I appreciate that in terms of the timing.

9 So one other --

10 **A.** Your Honor, may I ask you a question, sir?

11 **Q.** Yes, go ahead. But I didn't have anything else. I was just  
12 saying I have an understanding, given what you said, of how much  
13 goes into this decision. And it's certainly not the Court's  
14 intent in asking the question, Director Daniels, I want to be  
15 clear, of sort of deciding one way or another when or how you  
16 should do it. I just -- in terms of making the decision in this  
17 case, I also need to know what would be appropriate and fair in  
18 terms of the timing for you and also for Mr. Floyd's counsel in  
19 terms of preparation. That's why I'm asking you -- that's why I  
20 asked you that question.

21 I'm sorry. If there's something else you wanted to  
22 add, you can.

23 **A.** Yes, Your Honor. And I just want to be clear. You asked me  
24 to opine, which I did. I'm seeking to ensure that you get the  
25 information you need.

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1 But I want to also just point out that there are some  
2 statutory limits as to what I must do once the actual signed  
3 warrant and order for the death to proceed. I will honor that  
4 unless --

5 Q. I appreciate that.

6 A. -- otherwise stayed.

7 Q. Right.

8 A. So I didn't want to give the impression that I'm controlling  
9 the timeline. I am obligated by statute to stay within the  
10 appropriate timeline.

11 Q. No, I -- I did not interpret your comments, Director  
12 Daniels, to somehow suggest that you wouldn't abide by a  
13 legitimate Court order from this Court or from State Court. I  
14 did not in any way take that from your testimony, because I  
15 don't think that's what you were suggesting.

16 I think what I understood was you are opining just  
17 about your process of deliberation, as you've said how seriously  
18 you take it, all the different factors that have to be  
19 considered, and the point at which, you know, if given an  
20 opportunity to weigh in on that process, how much would be  
21 potentially the outer limits of that decision. So I appreciate  
22 that.

23 Let me see if I have any more questions, and then I'll  
24 turn this over to counsel.

25 (Pause.)

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1 BY THE COURT:

2 Q. One question I had, which is also helpful is, Director  
3 Daniels, do you have any information about how long it takes to  
4 acquire information about the drugs?

5 So, in other words, I would imagine as part of your  
6 process you want to acquire information about a particular drug  
7 in terms of how it has been used, what it's approved for, what  
8 may be its side effects or interaction effects.

9 Do you have any information about how long it takes  
10 just to get the information? Not the drug itself. I'm not  
11 asking you about how long once you make a request to obtain it,  
12 but just to get the information. Because one of the issues in  
13 this case, of course, Director Daniels, is how quickly could  
14 potentially Mr. Floyd's counsel get access to some of this  
15 information.

16 Do you have anything that you could share about how  
17 long it takes to get this information about the potential drugs?  
18 Without identifying a specific drug.

19 **A.** Your Honor, thank you for your question.

20 I am clearly not a pharmacist, but we have a Director  
21 of Pharmacy Services and that's the individual that would order  
22 all of our drugs, but also would be the one to do some basic  
23 research from a professional standpoint.

24 Now, it's also my understanding that research is  
25 available on most drugs, but to the depth in which you get into

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1 questionable or nonprescription types of usage, what its -- you  
2 know, its intended use, I think there's probably a better person  
3 to respond to that question.

4 Q. Okay.

5 A. From the laymen's term, we can -- we can Google it.

6 Q. Right.

7 A. But that would not be enough for me, and I would share with  
8 my Director of Pharmacy, "I need more than the Google version."  
9 I need to be able to discuss and understand the efficacy and all  
10 of those things that go around the utilization of the compounds  
11 that make the drugs.

12 I am not qualified to do that, but I would seek counsel  
13 to better understand it.

14 Q. Right. So you would -- you would ask other people to  
15 provide you with as much information as possible that's not so  
16 scientific such that you can't, sort of, obviously process that,  
17 but that gives you the full range of information that would  
18 allow you to be able to make an informed decision?

19 A. Your Honor, yes. I would seek additional consultation with  
20 professionals in that field to better understand.

21 THE COURT: Okay. All right.

22 Thank you, Director Daniels. I don't know that I have  
23 more questions at this time.

24 Mr. Gilmer, is there something else that you wanted to  
25 be able to ask Director Daniels?

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1 And then, Mr. Anthony, I'll turn to you.

2 MR. GILMER: Thank you, Your Honor. There's just a  
3 couple of points I would like to clarify with regard to the  
4 timeline. Would you like me to do it from here or from the  
5 podium?

6 THE COURT: Oh, no. Do it from there, please.

7 DIRECT EXAMINATION OF CHARLES DANIELS

8 BY MR. GILMER:

9 Q. Director Daniels, I think you tried to clarify your question  
10 with regard to the 90 to 100 days to finalize a protocol, but  
11 then also indicated that you would abide by any warrants or  
12 orders requiring you to move forward.

13 So if the execution warrant was issued by a Court the  
14 week of June 7th, as has been suggested has been thought, do  
15 you -- would you still think that you would need 90 to 100 days  
16 to finish or would you be able to complete the process in order  
17 to be able to comply with that Court order?

18 A. In the event a warrant were to actually come out giving a  
19 date, I would comply.

20 At some point in time I could continue to review  
21 information, but at the end of the day it's a requirement, it's  
22 a duty of mine as Director of the Nevada Department of  
23 Corrections, to execute the wishes of the judiciary and the will  
24 of the people.

25 THE COURT: Let me ask you this question about that.

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1 If you are ordered, for example, to perform an execution in four  
2 days, right, and you didn't feel you could adequately do that  
3 and safely do that, would you not have an obligation to inform  
4 the Court that it couldn't be done consistent with your  
5 constitutional obligation at the NDOC not to perform an  
6 execution without violation of the Eighth Amendment?

7 THE WITNESS: I would certainly consult my -- my legal  
8 counsel on that matter and bring up my objections and/or  
9 concerns. And while I certainly cannot speak for any other  
10 entity, I can tell you a violation of the Eighth Amendment is  
11 something that would be taken with great caution and care. And  
12 that would -- in my opinion, I would do the right thing.

13 THE COURT: Well, and I'm not asking for your legal  
14 opinion.

15 THE WITNESS: Yes.

16 THE COURT: Because I think Mr. Gilmer would and has  
17 adequately, as always, represented the legal positions of the  
18 NDOC. But I'm just responding to your question -- excuse me.  
19 I'm responding to your answer in response to Mr. Gilmer's  
20 questions about the performance of an execution if you are  
21 ordered June 7th, because it seems to me that there might be a  
22 point at which you were ordered to perform an execution, given  
23 what you said, that you simply couldn't perform and not violate  
24 the Eighth Amendment. And the question would come up, what  
25 would you do in that circumstance, if you know.



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1           And it sounds like what you said, just to confirm, that  
2     you'd have to speak with your attorneys before you decided how  
3     to proceed. Is that right?

4           THE WITNESS: That would be my response.

5           THE COURT: Okay. That makes sense.

6           Mr. Gilmer, go ahead. I'm sorry.

7           MR. GILMER: Thank you, Your Honor.

8           And, also, I know that was a hypothetical, but under  
9     Nevada law that could never happen within four days. So ...

10          THE COURT: Well, no, I understand that. I mean,  
11     partly what the purpose really was with me to help me understand  
12     Director Daniels' response to your question. It was not to sort  
13     of lay out the fact that that would happen.

14          Yes, I think that I would be -- well, I don't think  
15     that it could happen in Nevada law and I don't think that any  
16     Court would order that either.

17          MR. GILMER: Understood.

18          THE COURT: But that was the purpose of that question.  
19     Go ahead, Mr. Gilmer.

20          MR. GILMER: Thank you. I believe I only have one more  
21     question, Director Daniels, and it's always, you know, a very  
22     bad thing for a lawyer to say one more question because it's  
23     generally not true. But I believe I only have one more  
24     question.

25     BY MR. GILMER:

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1 Q. And that is you mentioned that you have to consult with the  
2 Chief Medical Officer before making any final decisions.

3 You're not suggesting that you have not already met  
4 with Dr. Azzam, correct?

5 You have already met with him. Is that correct?

6 **A.** Correct. I have already met with Dr. Azzam.

7 Q. Okay. Thank you. I just wanted to make sure that was clear  
8 for the record.

9 MR. GILMER: I have nothing else at this time, Your  
10 Honor.

11 THE COURT: Okay.

12 Mr. Anthony?

13 MR. ANTHONY: Mr. Levenson will be handling the  
14 examination of the witness, Your Honor.

15 THE COURT: Okay. So what I would like for you to do  
16 is switch positions just because we have the Plexiglas there,  
17 preferably.

18 All right. Go ahead, Mr. Levenson.

19 MR. LEVENSON: Thank you.

20 CROSS-EXAMINATION OF CHARLES DANIELS

21 BY MR. LEVENSON:

22 Q. Good morning, Director Daniels.

23 **A.** Good morning.

24 Q. So to clarify, you -- I believe you originally said you had  
25 not met with the CMO. Is that incorrect? You have met with

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1 your CMO?

2 **A.** I said I would -- I believe my testimony was that I would  
3 need or be required to meet with the CMO. We have already had  
4 one meeting.

5 **Q.** And when -- I'm sorry.

6 When was that meeting? What was the date of that  
7 meeting?

8 **A.** I do not recall the date.

9 THE COURT: Do you know how many months ago it was or  
10 weeks ago?

11 THE WITNESS: It was weeks ago.

12 THE COURT: Weeks ago.

13 And one question I had, Director Daniels, is, when were  
14 you first informed as to the fact that the State would be  
15 seeking a warrant of execution on June 7th? I'm not asking who  
16 informed you, but when do you recall you were first told that  
17 information?

18 THE WITNESS: Your Honor, I cannot recall the date. It  
19 wasn't very long ago. I do believe it was in April.

20 THE COURT: In April?

21 THE WITNESS: In April.

22 THE COURT: So, again, as it relates to how long you  
23 have been involved in this process of your deliberation, given  
24 that timing, it sounds as if you have been involved in this  
25 deliberative process for around 30 days or so?

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1 THE WITNESS: Thank you for the question, Your Honor.

2 I'm not sure of the day and I don't want to give  
3 testimony that someone could impeach, but it's -- I believe it  
4 was back in April.

5 THE COURT: So you don't think -- for example, it  
6 wasn't January or February?

7 THE WITNESS: No.

8 THE COURT: That you recall.

9 THE WITNESS: Your Honor, I do not recall that.

10 THE COURT: So you recall it being some time in April,  
11 maybe late March.

12 THE WITNESS: Potentially, yes.

13 THE COURT: Okay. I'm just -- I'm just trying to get a  
14 rough estimate as to the timing of that as to when you were  
15 first, sort of, informed of when you would have to start this  
16 process. Because I would imagine, Director Daniels, that once  
17 you get that information, as you've indicated, there is a lot of  
18 work that has to be done to finalize the protocol. So the  
19 moment you hear that you start working, correct, when you hear  
20 that information?

21 THE WITNESS: Yes, Your Honor. I -- I will share with  
22 you, as I found out, of course, I obviously researched what was  
23 done during the last protocol. And in addition to that, then I  
24 went to the location, the site, where we would carry that out,  
25 met with the warden, and we went through the protocols there

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1 step-by-step.

2 I was very deliberative in terms of what I wanted to  
3 see and I wanted to see what we had. And, of course, we're now  
4 in the process of changing the protocols to meet the new  
5 threads, ideas, and so on.

6 So we've made some changes and they're still working on  
7 putting that together. But a lot of this, of course, will still  
8 have to be completed at a little later date when we have more  
9 additional information. Because a lot will change based on who  
10 we communicate with, how long we, for instance, would have a  
11 contract to get various people here, would those people still be  
12 available, and so on. So there's a few things that are still in  
13 the works.

14 THE COURT: Well, and in terms of the information you  
15 don't have, are you still waiting for or seeking any information  
16 about drugs that may be used?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: Okay. Thank you.

19 Go ahead, Mr. Levenson.

20 BY MR. LEVENSON:

21 Q. Do you expect to meet again with Dr. Azzam?

22 A. My response is that I do expect to meet with him in the  
23 future or as additional pharmaceuticals become available that I  
24 want to consult with him about. So each time there's a new  
25 pharmaceutical that we haven't previously discussed, I would

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1 then seek consultation with Dr. Azzam.

2 Q. So have any meanings been currently arranged?

3 A. Not future meetings.

4 Q. You mentioned that you went to the site where the execution  
5 was going to take place. The Clark County District Attorney's  
6 Office notices that site as Nevada State Prison.

7 Are you in disagreement with that?

8 THE COURT: I'm sorry. When you say "Nevada State  
9 Prison?"

10 MR. LEVENSON: I'm saying Nevada State Prison, Your  
11 Honor. That's the warrant, the current warrant. That's the  
12 execution, Nevada State Prison in Carson City.

13 THE COURT: Okay. I wasn't sure if, Mr. Levenson, you  
14 are identifying a specific facility. If you are, then it would  
15 be helpful to say that, or if you were trying to point out that  
16 the language wasn't specific. I wasn't sure the nature of your  
17 question.

18 So if you're asking about a specific location, that's  
19 fine. It would be helpful, I think for the witness, but also  
20 for me to know what you're actually asking.

21 MR. LEVENSON: Correct.

22 BY MR. LEVENSON:

23 Q. So it's identified as the Nevada State Prison in Carson  
24 City.

25 Do you agree that's where the execution would take

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1 place?

2 **A.** The execution, as I know it to be, would be at Ely State  
3 Prison.

4 **Q.** You spoke about the protocol, the prior protocol. That  
5 would be in the Scott Dozier case. Was that right?

6 **A.** Yes.

7 **Q.** Are you aware of the findings by Judge Togliatti in 2017  
8 about the use of a paralytic drug in the execution protocol?

9 MR. GILMER: Your Honor, I object to that. It calls  
10 for a legal conclusion. It's also addressing a factual finding  
11 that was vacated by the Nevada Supreme Court.

12 THE COURT: Well, I mean, are you objecting to him --  
13 objecting to him indicating whether or not he was aware of it?  
14 They haven't asked the follow-up question yet, Mr. Gilmer.

15 MR. GILMER: Understood.

16 THE COURT: I think you're anticipating the next  
17 question.

18 MR. GILMER: I'll table the objection to the next  
19 question, Your Honor.

20 THE COURT: I'll be shocked if Director Daniels had not  
21 been informed at least of the decision. I think you're waiting  
22 for the next question.

23 But you can go ahead and answer that question. Were  
24 you aware of that decision by Judge Togliatti, Director Daniels?

25 THE WITNESS: Your Honor, yes, I was aware of it.

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1 THE COURT: Okay.

2 BY MR. LEVENSON:

3 Q. Director Daniels, I want to go back to a question that the  
4 Judge asked you. You mentioned that the costs involved were  
5 something that you would -- would take additional time for you  
6 to -- to release a final protocol.

7 You mentioned staffing. Wouldn't staffing be the same  
8 no matter what the protocol is?

9 A. No, that would not be the same.

10 Q. Could you explain that?

11 What would be different with -- with the particular  
12 drugs you used and your staffing?

13 MR. GILMER: Your Honor, I'm going to object to that as  
14 I think that would delve into deliberative process and also  
15 safety and security issues.

16 MR. LEVENSON: Your Honor, he --

17 THE COURT: So, hold on.

18 So, Mr. Gilmer, let me ask you this question. Could  
19 Director Daniels respond to how many, without naming who the  
20 people would be in terms of their title, positions might be  
21 affected by the different types of drugs?

22 Because I think part of the question relates to just  
23 how many people are involved in this process. I wouldn't  
24 necessarily ask Director Daniels to identify anyone by title  
25 because I think there could be legitimate security or other



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1 issues related to that. But what about just how many people  
2 would be affected by a potential difference in the drug?

3 MR. GILMER: Perhaps, that could be answered, Your  
4 Honor. The concern I have is that he said it depends on what  
5 his final decision is, because he said it depends on what the  
6 drugs are. So that seems to me as if it would dive into  
7 deliberative processes into the final decision. So that's the  
8 concern. I think if it's as extremely narrow as you indicated,  
9 perhaps that's something Director Daniels may answer.

10 THE COURT: Why don't we try this. Director Daniels,  
11 how many positions do you think are implicated by choices of  
12 drugs? So choosing one drug versus another, without identifying  
13 which positions that are involved in the execution would be  
14 implicated, how many positions would be implicated by a choice  
15 in drugs, as far as you understand it?

16 THE WITNESS: Your Honor, I can't answer that as  
17 narrowly as possible because I would have to utilize a lot of  
18 staff and they would have to come from many places. But it  
19 would also, unfortunately, have me disclose sources, methods,  
20 numbers, security apparatus, and the specialized people that I  
21 need to ensure the security.

22 Your Honor, I'm very hesitant to talk about those  
23 issues publicly.

24 THE COURT: So -- so then how about this. In terms of  
25 your -- what you were referencing, it seems like what you were

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1 saying is that you didn't want to assume that for the variety of  
2 drugs that may be under consideration or could be under  
3 consideration that the same personnel would be used for all. Is  
4 that fair?

5 THE WITNESS: That would be a fair question -- a fair  
6 assumption.

7 THE COURT: Okay.

8 THE WITNESS: Yes.

9 THE COURT: Mr. Gilmer, does that work? Because I  
10 think that was the nature of what -- what Mr. Levenson was  
11 trying to get at, which is that Director Daniels is basically  
12 saying there are many moving parts and staff are affected by  
13 that and staff potentially could be affected, without naming who  
14 they are and without naming the drugs, could be affected by the  
15 choice of drugs. Is that correct, Dr. Daniels -- I mean,  
16 Director Daniels.

17 THE WITNESS: Your Honor, yes.

18 THE COURT: Okay. Move on from there, Mr. Levenson.

19 BY MR. LEVENSON:

20 Q. You mentioned another component, an EMT. Does the changing  
21 of the -- does the finalization of the protocol determine how  
22 many EMTs you would need?

23 A. Yes, it could.

24 Q. How?

25 MR. GILMER: Your Honor, that clearly would go into the

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1 deliberative process and determinations.

2 THE COURT: Okay. And I would direct you not to answer  
3 at this time, Director Daniels.

4 BY MR. LEVENSON:

5 Q. Director Daniels, you mentioned a coroner, and I'm  
6 presuming -- let me ask the question. Would the protocol  
7 dictate how many coroners you had at the scene?

8 (Pause.)

9 THE WITNESS: Your Honor, I would really not like to  
10 answer any questions regarding my processes and procedures, how  
11 many, who many. That's an issue for us. We have to -- for  
12 instance, I'll explain.

13 There's confidentiality built into the processes. We  
14 have redundancy built in. We may cancel one of two or cancel  
15 two of three at the last moment. And I don't want to be  
16 pigeonholed into saying, well, this is all you have, then later  
17 on who is it.

18 I need to have control over the mechanisms to --

19 THE COURT: I appreciate that, Director Daniels.

20 THE WITNESS: -- perform my judicial responsibilities.

21 THE COURT: I appreciate that. So you don't have to  
22 answer further.

23 So, Mr. Levenson, what I would ask you to do is --  
24 because I do think there are legitimate security issues  
25 regarding individuals who may be identified by profession within

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1 the State, and we should avoid those types of questions.

2 I haven't ruled on that. And so I don't want to get  
3 into that, but I think that's part of the Director's hesitancy,  
4 which I think is a legitimate concern at this point in time.

5 So why don't we move on.

6 MR. LEVENSON: Certainly, Your Honor.

7 BY MR. LEVENSON:

8 Q. In your meeting with Dr. Azzam, Director Daniels, did you  
9 offer him multiple choices for a drug protocol?

10 MR. GILMER: Objection, Your Honor. That calls for  
11 questions regarding predecisional and deliberative process.

12 MR. LEVENSON: Can I respond, Your Honor?

13 THE COURT: Sure.

14 MR. LEVENSON: We think it has independent relevance  
15 separate and apart from the deliberative process. This goes to  
16 when the protocol is going to be finalized. We are alleging bad  
17 faith on the part of NDOC and its release of the drug protocol,  
18 so this goes to intent.

19 If Dr. Azzam was only offered one drug protocol, then  
20 the protocol was pretty much finalized at that point. That's  
21 why we have this question.

22 THE COURT: Well, the protocol hasn't been finalized  
23 yet and so I think part of the issue is -- you're right,  
24 Mr. Levenson, it could potentially go to that after the protocol  
25 has in fact been finalized.

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1           So part of the issue with respect to your bad faith  
2 arguments, which I can appreciate, is that they are premature,  
3 some of them, at this point in time because we don't know what  
4 the final protocol is. I'm not saying you shouldn't ask those  
5 questions, Mr. Levenson, because I think they could potentially  
6 be relevant for the Court's consideration. But for now I am  
7 going to sustain the objection and allow for the privilege to be  
8 asserted for that question.

9           MR. LEVENSON: Okay.

10 BY MR. LEVENSON:

11 Q. Director Daniels, what actions have you taken with respect  
12 to finalizing the execution protocol since your meeting with  
13 Dr. Azzam?

14           MR. GILMER: Objection, Your Honor. I believe that  
15 also calls for a deliberative process privilege and also could  
16 delve into safety and security concerns as well as Director  
17 Daniels has previously testified.

18           THE COURT: Sustained. I'll allow for the privilege to  
19 be asserted conditionally at this time.

20 BY MR. LEVENSON:

21 Q. Director Daniels, in your declaration filed with this Court  
22 on April 30th, that's ECF Number 22-10, at paragraphs 9 through  
23 11 you state that NDOC did not have midazolam in its possession.  
24 Is that correct?

25 **A.** That is correct.

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1 Q. Now, when you say it is not available for NDOC, what do you  
2 mean by that?

3 A. In consultation with my pharmacy chief indicated that that  
4 drug was no longer available to the -- to NDOC. That was a  
5 decision made well before I arrived, and I did not get into the  
6 details as to why.

7 Q. So you're not sure why it is unavailable to NDOC. Is that  
8 what I understand?

9 A. My understanding is that I'm not 100 percent sure as to why,  
10 which is why I will not testify as to why. All I know is I've  
11 been told that that -- that medication is not available to us.

12 THE COURT: I'm sorry. When you say "it's not  
13 available," it obviously is available in terms of being  
14 available for purchase. You're not saying that it's not  
15 available generally for purchase.

16 THE WITNESS: To NDOC.

17 THE COURT: And are you saying that because that's an  
18 NDOC policy or are you saying that because there's some other  
19 reason why you all cannot obtain it? And it's important because  
20 there -- it's one thing if NDOC has made a determination to do  
21 that, potentially. But it's another thing if, essentially, the  
22 company or someone else decided not to provide it.

23 Can you explain why it's not available?

24 THE WITNESS: Your Honor, I arrived -- my first day of  
25 work was December 3rd of '19. There were a lot of things that I

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1 just didn't know because I wasn't a part of the organization or  
2 understand all the history.

3           Once I engaged in learning more about this process here  
4 in this state, I started asking about, well, individual items  
5 that were based on the last one.

6           THE COURT: Right.

7           THE WITNESS: And it was told to me -- the chief  
8 pharmacist explained to me -- I'm sorry. She's actually the  
9 Pharmacy Director -- indicated to me that that is no longer  
10 available to us. I did not get into the reasons why.

11           THE COURT: Okay. Okay.

12           THE WITNESS: It wasn't relevant to me. I wanted to  
13 know what we did have available --

14           THE COURT: Got it.

15           THE WITNESS: -- as opposed to what we did not.

16           THE COURT: Okay. Thank you, Director Daniels.

17           Go ahead, Mr. Levenson.

18 BY MR. LEVENSON:

19 Q. With regard to your obtaining midazolam, in your declaration  
20 at paragraph 10 you state that it cannot be purchased or, quote,  
21 otherwise obtained.

22           What does "otherwise obtained" mean in --

23           THE COURT: I think, Mr. Levenson, he's already gone  
24 over this. Let's move on from this question, please.

25 BY MR. LEVENSON:

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1 Q. Are you able to receive drugs from other Department of  
2 Corrections?

3 MR. GILMER: Your Honor, I object. I think that seeks  
4 a legal conclusion.

5 THE COURT: Okay. I'm going to sustain that, but,  
6 Mr. Levenson, perhaps you could be more specific about what the  
7 nature is of what you're asking. I'm not sure I understand  
8 myself either, if you're talking about particular agencies, or  
9 it would be helpful to give some more detail.

10 BY MR. LEVENSON:

11 Q. Could you -- could you receive the drugs from, let's say,  
12 the Arizona Department of Corrections as opposed to going  
13 through a pharmacy?

14 A. Thank you.

15 MR. GILMER: Again, I just would like to object to that  
16 question because I think it calls for a legal conclusion as to  
17 where he can purchase drugs from other states. There's --

18 THE COURT: So, Mr. Gilmer, maybe I'm not understanding  
19 your -- your objection. What I understood the question to be is  
20 not asking Director Daniels for a legal conclusion, but whether  
21 or not he understood even as part of this process whether or not  
22 there would be access to -- without him deciding whether or not  
23 he's chosen to pursue it or not, whether or not there would be  
24 access to drugs from other corrections facilities outside of the  
25 State of Nevada. That limited question. And I think that that



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1 would avoid the legal conclusion that you are objecting to.

2 So could you answer that -- that question, Director  
3 Daniels? Are you aware of whether or not you could obtain any  
4 drugs for the protocol from other state Departments of  
5 Corrections outside of Nevada?

6 THE WITNESS: Your Honor, I do not know. I have not  
7 directed my pharmacy chief to attempt to do so nor do I know if  
8 that's a common practice or if she has or has not. I don't  
9 know.

10 THE COURT: Okay. Thank you, Director Daniels.

11 BY MR. LEVENSON:

12 Q. Director Daniels, what other drugs are not available to NDOC  
13 usage for this execution?

14 MR. GILMER: Objection, Your Honor. That calls for the  
15 deliberative process privilege. And I believe that asking those  
16 questions would delve into his thoughts and opinions with regard  
17 to potential protocols.

18 MR. LEVENSON: May I respond, Your Honor?

19 THE COURT: Yes.

20 MR. LEVENSON: The director and his counsel put this  
21 issue -- they waived this issue because they put in their  
22 declaration and their pleadings that midazolam was not  
23 available. So that would infer that they have waived the issue  
24 as far as what is not available.

25 What we understand is that they're worried about drug

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1 companies finding out that their drugs will be used. We're  
2 talking about drugs that will not be used. So it doesn't seem  
3 to have the same public concern nor, as I said, they have put  
4 this -- this in issue.

5 MR. GILMER: Brief response, Your Honor?

6 THE COURT: We don't -- I don't need the brief response  
7 because what I'm going to do is I'm going to reserve on this  
8 issue. As indicated, I'm going to have Director Daniels and  
9 Dr. Azzam come back on Monday. I'm going to look at these  
10 privilege issues that are being raised today.

11 So there will be an opportunity, Mr. Levenson,  
12 potentially for the Court to revisit this later. I think -- I  
13 do think with respect to midazolam it's different because that  
14 was specifically identified in the affidavit. And so that's  
15 different than other hypothetical drugs that NDOC may or may not  
16 have access to.

17 I'm not saying I wouldn't direct an answer, but let's  
18 move on from there. I'm going to reserve ruling on that.

19 So, Director, you do not have to answer that question.

20 Go ahead, Mr. Levenson.

21 BY MR. LEVENSON:

22 Q. And, Director, you said that you needed approximately 90 to  
23 100 days to -- to finalize a protocol.

24 Have you voiced any concerns to anyone that you could  
25 potentially have to formulate and carry out an execution within

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1 the next four weeks?

2 MR. GILMER: Objection, Your Honor, as I believe that  
3 mischaracterized the evidence in part or his testimony in part  
4 with regard to the 90 and 120-day timeline.

5 THE COURT: Is that the only portion you're objecting  
6 to?

7 MR. GILMER: What was the second part of the question?

8 THE COURT: Because I -- I thought -- I want to -- the  
9 question was -- and we can take out the 90 and 120 days -- have  
10 you voiced any concerns to any State officials or other public  
11 officials about the ability of the NDOC to effectively and  
12 safely carry out an execution within 30 days.

13 MR. GILMER: Your Honor, I object to that question to  
14 the extent that that could also delve into the deliberative  
15 process as well as potential attorney/client issues depending on  
16 how that answer was asked.

17 THE COURT: So that's why I asked you about your  
18 objection earlier, Mr. Gilmer, because I would have anticipated  
19 that you would have reasserted it. That's why I just rephrased  
20 it. I didn't expect that he would answer because I expect that  
21 you would in fact object. But I wanted just to restate it  
22 clearly, as I understood it, for the record.

23 I'm going to allow for that objection to be asserted at  
24 this time and again sustain it conditionally.

25 MR. LEVENSON: Can I have a moment, Your Honor?

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1 THE COURT: Sure. Take your time.

2 (Plaintiff's counsel conferring.)

3 MR. LEVENSON: Let me try again, Your Honor.

4 BY MR. LEVENSON:

5 Q. Director Daniels, do you have any concerns about having to  
6 effectuate an execution within -- possibly within four weeks?

7 A. I do not have any concerns. In reference to the previous  
8 question, I was opining based on a very deliberate question that  
9 I responded to.

10 However, I am clearly aware of my duties as the  
11 Director of the Nevada Department of Corrections. And if given  
12 an executed warrant and order, I will execute my duties. I --  
13 there's always an opportunity to know more and learn more, but  
14 at some point in time you still have to execute your duties.  
15 And that's how I see this process.

16 THE COURT: But, again, Director, you wouldn't  
17 understand the duty to perform an execution that you couldn't  
18 legally perform. And what I mean by that is, for example, if  
19 you actually didn't have the drugs that you thought were  
20 appropriate for the execution, let's say there was an incident  
21 where they were destroyed inadvertently, you're not saying you  
22 would nonetheless go through with an execution even though you  
23 don't think you could safely perform it, correct?

24 THE WITNESS: Your Honor, I would clearly alert those  
25 in my chain of command as well as my legal counsel as to the

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1 fact that I don't have the appropriate tools to complete these  
2 tasks. And that would be part of my duty to obviously stay  
3 within the scope of cruel and unusual punishment that's listed  
4 in the Eighth Amendment.

5 THE COURT: No. Okay. I just wanted to receive that  
6 clarification. It sounded as if you were saying you would do it  
7 regardless, but I didn't understand that to be your testimony.  
8 And I think what you're saying is that if you didn't think that  
9 you had the material, you're saying that you would alert the  
10 appropriate individuals or speak with Mr. Gilmer about what the  
11 options would be. Is that right?

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: Okay.

14 BY MR. LEVENSON:

15 Q. Director Daniels, how do you reconcile your testimony that  
16 you -- that it would be good to have a longer period of time to  
17 effectuate an execution with the fact that you would -- might  
18 have to prepare and complete an execution with four weeks? How  
19 do you reconcile those two pieces of testimony?

20 MR. GILMER: Objection, asked and answered. Just  
21 answered that in the last question.

22 THE COURT: Overruled. I think it's slightly  
23 different.

24 You can answer that question?

25 THE WITNESS: Would you repeat the question, sir?

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1 BY MR. LEVENSON:

2 Q. Certainly.

3 How do you reconcile your previous testimony that a  
4 longer period of time to effectuate an execution would be good  
5 with the fact that you are talking about having to go through an  
6 execution in four weeks?

7 A. Once again, the issue was I was asked to opine on time. And  
8 in most circumstances, if most of us are put in a situation in  
9 which we have more time to deliberate, more time to discuss, we  
10 would take advantage of that. However, that does not mean that  
11 I would not be prepared to take the information I had available  
12 to me as long as it was consistent with what the State law  
13 requires, our statute, as well as the Constitution.

14 I guess the analogy would be you could never make the  
15 -- perfect the enemy of the good. I would always opt for more  
16 and always opt for better. However, given the circumstances and  
17 the statute, I would go with the best information I had  
18 available. And if I did not believe that I could move forward  
19 in a way that would be consistent with the Constitution, the  
20 State Constitution, then I would apprise the appropriate  
21 individuals.

22 So I don't see a conflict in my testimony. I was just  
23 asked to opine. I opined, but I'm prepared to do my job.

24 THE COURT: But let me ask you this question, I think  
25 this may help to clarify this. It sounds to me as if what

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1 you're saying is if you were given more time you would take more  
2 time because of the seriousness of this process and all the  
3 factors you'd have to consider, right?

4 THE WITNESS: Your Honor, exactly. I think the people  
5 of the state deserve the fact that the Director of the  
6 Department of Corrections sees this as a very, very serious  
7 issue. There is no greater responsibility than if you are going  
8 to be tasked with, as a part of your duties, to take a life that  
9 you do the best you can, learn as much as you can, and keep  
10 growing and learning as often, but sooner or later the day will  
11 come.

12 THE COURT: Well, let me ask you this question. If you  
13 had the ability to decide the date and the date was 30 days from  
14 now versus 90 days from now, which date would you choose?

15 THE WITNESS: Your Honor, last time I opined, that's  
16 how we got here.

17 THE COURT: Well, but, Director, I want you to be  
18 direct and honest with us.

19 THE WITNESS: I --

20 THE COURT: And I think you opined because what you're  
21 saying is it's a deliberative process and you want to be  
22 deliberative.

23 I appreciate that this question may be uncomfortable,  
24 but the fact is we're looking at, as you said, very serious  
25 issues here. There is a potential for this execution to proceed

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1 possibly in 30 days, and I have to consider that.

2 And what you seem to have said to me is, "There are a  
3 lot of factors to consider. I don't necessarily have all of the  
4 information, even about the drugs." If you were given the  
5 choice, wouldn't you choose 90 days over 30 days?

6 THE WITNESS: If given the choice --

7 THE COURT: Yes.

8 THE WITNESS: -- I would go with the longer date.

9 However, the statutory limits are already set --

10 THE COURT: And I understand that.

11 THE WITNESS: -- I would obviously operate within the  
12 scope of the statute.

13 THE COURT: Director Daniels, I'm not asking you,  
14 right, whether or not you think, because I think you've said  
15 this, you could still -- you think you could still potentially  
16 perform NDOC an execution within 30 days. And you have said  
17 that if you didn't think you could do that, you would -- you  
18 would inform authorities. So I don't think that you're somehow  
19 suggesting with your answer that you wouldn't perform the  
20 duties. I know that's a concern of yours, but that's not what I  
21 take from it.

22 But you've acquired a great deal of information. It's  
23 helpful for me in terms of understanding this process and  
24 understanding what I have to consider for me to have that  
25 information as well. So I appreciate your candor. Thank you.



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1 Mr. Levenson?

2 BY MR. LEVENSON:

3 Q. Director Daniels, I want to understand something you  
4 testified to previously. You talked about the timing of the  
5 release of the protocol somehow being based on companies seeing  
6 the drugs that were going to be used.

7 Can you explain that?

8 (Pause.)

9 MR. GILMER: Your Honor, I think there's an objection  
10 to that question because I don't remember that testimony, but  
11 I'm not sure exactly what the objection is.

12 If Mr. Daniels knows what he's asked -- I guess maybe  
13 it's vague. I'm not sure that question is answerable.

14 But obviously if Director Daniels can --

15 THE COURT: I think what Mr. Levenson is asking is if  
16 Director Daniels could be more detailed about your, sort of,  
17 reference to the possibility that you have to factor in a  
18 manufacturer coming in and saying, "We don't want to have our  
19 drugs used," and there might be litigation around that, and that  
20 creates something for you to consider in terms of finalizing the  
21 protocol. I think you said something like that in terms of your  
22 prior testimony.

23 Would that be fair that you have to at least consider  
24 that possibility in terms of what may be available to you in  
25 terms of the execution protocol?

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1 THE WITNESS: I will respond based on what I believe to  
2 be the question. And at the end of the day, we know that as  
3 much research as I could possibly do, I will take that time to  
4 research and then consult with the Chief Medical Officer.

5 However, early disclosure of that information could  
6 provide some with an opportunity to create legal roadblocks for  
7 whatever reason. I -- I'm not in the head of any of these  
8 companies.

9 THE COURT: Right.

10 THE WITNESS: But I do understand that as I'm working  
11 the information that I received then deciding what information I  
12 want to present to the Chief Medical Officer.

13 I also have to take into consideration that there may  
14 be some legal challenges that will be generated through many  
15 groups. It can be anti-death penalty groups or so on. But I am  
16 cognizant of that.

17 But the primary issue is always the due diligence of me  
18 understanding the drugs and what the compounds and having  
19 professionals explain to me what this does, what the dosage  
20 would be, all of those -- those individual issues that I'm not  
21 qualified to make.

22 So I'm taking in the totality of the act -- of the  
23 execution process and our protocols, as well as our ability to  
24 secure the tools that we need to effectuate the will of the  
25 people.

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1 THE COURT: Does a consideration of a possible  
2 litigation by a manufacturer factor into your timing of the  
3 finalization of the protocol?

4 THE WITNESS: (Pause.)

5 Your Honor, will you rephrase your question, please?

6 THE COURT: Sure. Does the consideration -- does a  
7 consideration of the possibility of litigation by a manufacturer  
8 to prevent use of a drug factor into your determination about  
9 the timing of the finalization of the protocol?

10 MR. GILMER: Your Honor, I'm always loath to object to  
11 a Judge's question.

12 THE COURT: No --

13 MR. GILMER: That gets into deliberative process.

14 THE COURT: That's fine. Again, part of it is,  
15 Mr. Gilmer, is I want -- I have to also know which questions you  
16 think would be covered. So I know, Mr. Gilmer, that you're  
17 respectful of the Court, but you will always object if you think  
18 it's appropriate. And I think you will continue to do so.

19 I'm going to sustain that objection to my own question,  
20 conditionally, with the understanding that I'll have to go back  
21 and look at that.

22 So -- but I do want to -- I do want to make sure,  
23 Mr. Gilmer, again, even if I ask a question, you're well aware  
24 of the fact that you can object and assert the privilege.

25 We have to figure out on a question-by-question basis

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1 what the nature of the privilege is that's being asserted so I  
2 can rule on that later.

3 So, I appreciate that. And, again, I have no doubt  
4 that you'll continue to object as you see appropriate regardless  
5 of who asks the questions.

6 Mr. Levenson, please go ahead.

7 MR. LEVENSON: Just a moment, Your Honor.

8 (Plaintiff's counsel conferring.)

9 BY MR. LEVENSON:

10 Q. Director Daniels, do you have any plans to consult with any  
11 other individuals --

12 MR. GILMER: Objection.

13 BY MR. LEVENSON:

14 Q. -- as you formulate the protocol?

15 MR. GILMER: Objection, Your Honor, that goes into his  
16 deliberative process as to who he may seek opinions from.

17 THE COURT: Sustained.

18 (Plaintiff's counsel conferring.)

19 MR. LEVENSON: Your Honor, can I just revisit that for  
20 a moment? I believe that Director Daniels actually said in his  
21 testimony that he might be consulting with other people and I  
22 wanted to explore that. So I think he put the -- put it in  
23 issue.

24 THE COURT: I'll go back and take a look at the  
25 transcript. I think to the extent that Director Daniels

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1 identified any individual process, you could potentially ask  
2 about that, but I think that the privilege would extend to him  
3 providing a sort of fulsome and detailed overall description of  
4 his deliberations and process, which is what I think the  
5 question invites.

6 And as I understand it, Mr. Gilmer, that's your  
7 objection to it. Is that correct?

8 MR. GILMER: Yes, Your Honor.

9 THE COURT: All right. So for now I'll continue to  
10 sustain that objection.

11 MR. LEVENSON: I don't think we have any other  
12 questions at the moment, Your Honor.

13 THE COURT: All right.

14 Mr. Gilmer, do you have any additional questions?

15 MR. GILMER: Your Honor, I have questions, but since  
16 you said Director Daniels will be back on Monday, I'll just  
17 reserve and ask those -- all those questions at that time.

18 THE COURT: Okay. Well, any questions you think will  
19 be helpful as it relates to deciding the privilege issue,  
20 Mr. Gilmer?

21 MR. GILMER: No, Your Honor. I do not.

22 THE COURT: All right.

23 Mr. Pomerantz, Ms. Ahmed, do you have any questions  
24 that you would like to ask of Director Daniels? Certainly you  
25 are free to do so as well.

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1 MR. POMERANTZ: May I have a moment, Your Honor?

2 THE COURT: Sure. Take your time.

3 (Defense counsel conferring.)

4 MS. AHMED: Your Honor, thank you for asking. We don't  
5 have any questions for the witness.

6 THE COURT: Well, and I'll allow you an opportunity on  
7 Monday when we come back to be able to ask questions. Again, I  
8 know that you all are fairly new on this case and so you may  
9 need some time to be able to delve deeper. So I'll allow you to  
10 be able to reserve on that issue as relates to questions for  
11 Director Daniels.

12 MS. AHMED: Thank you, Your Honor.

13 THE COURT: All right. So for now, thank you, Director  
14 Daniels, for your testimony. I appreciate it.

15 I, unfortunately, am going to require that you come  
16 back on Monday and I appreciate again your time for that, but as  
17 I'm sure you understand, this is a very significant case and  
18 issue that we have to resolve. And so we're going to set a time  
19 and date. But you're excused for now, sir.

20 THE WITNESS: Yes, Your Honor. Thank you very much.

21 THE COURT: Thank you.

22 All right. Let's think a little bit then about next  
23 steps here. Mr. Gilmer, I want to start with you. As you are  
24 aware, in civil cases oftentimes when a privilege is asserted, a  
25 privilege log needs to be created so the Court can figure out

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1 what's covered by the privilege or not.

2           You probably don't know how many documents are there.  
3 And so I don't know that you're going to be able to tell me  
4 exactly how long it will take to create the log, but certainly  
5 for me to decide the privilege as it relates to documents, which  
6 I'm sure are going to be requested and in fact they're part of  
7 litigation, I need to see the privilege log. That would also  
8 help me to decide the testimony.

9           So, can you give me any indication at this point at  
10 least, Mr. Gilmer, how long it would take to create such a  
11 privilege log?

12           MR. GILMER: Thank you, Your Honor.

13           I had a brief discussion with Director Daniels during  
14 the break as to the -- the potential volume of documents. If  
15 our initial thought is correct and, obviously, we need to go  
16 back and speak to the chief pharmacist as they would know more  
17 about this particular issue, we believe that it would be a very  
18 short privilege log. And I would be able to have something for  
19 the Court certainly by Monday and possibly even by tomorrow, but  
20 certainly by Monday morning.

21           THE COURT: Okay. Because it seems to me that there  
22 are different categories of documents that would potentially  
23 fall into the privilege or be covered by the privilege and some  
24 that wouldn't. It certainly seems to me that there may be  
25 communications back and forth between Dr. Azzam and the NDOC

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1 which would potentially be covered by the privilege.

2 MR. GILMER: On that point, Your Honor, may I clarify?

3 Are you referring to this particular protocol or at any  
4 point in time with regard to Dr. Azzam?

5 THE COURT: Well, I asked Ms. Ahmed and Mr. Pomerantz  
6 to go back to the Dozier protocol. So I assume that they're  
7 looking at those, not just what were documents created by  
8 Dr. Azzam or his office, but what were the communications which  
9 would also be covered and are typically covered by a privilege  
10 log, but they would still need to be identified.

11 MR. GILMER: Understood, Your Honor. So I'll use that  
12 same time frame then. I just wanted to make sure that we were  
13 working with the same time frame.

14 THE COURT: So even though I may identify a document as  
15 being, counsel, as covered by the privilege, I still would want  
16 it as it should be in the privilege log just so that I am aware  
17 of the universe of documents. Because it seems to me there are  
18 going to be a few different categories. There's going to be  
19 correspondence between various NDOC officials or Dr. Azzam's  
20 office and the NDOC. There's going to be information that is  
21 communicated from the Director of Pharmacy within the NDOC to  
22 Director Daniels. Those would be communications which would be  
23 essentially -- I think would be covered, but should be  
24 identified.

25 But there's also going to be, which I think are the



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1 closer call questions, information -- let's say research that  
2 may be attached to communications or part of what has been  
3 gathered which may not be covered, but would still nonetheless  
4 be identified. And I say that, Mr. Gilmer, Ms. Ahmed, because I  
5 think there's a distinction between information that may be in  
6 the possession of the NDOC without identifying its source versus  
7 saying Dr. Azzam attached this to an e-mail saying, "I think  
8 this is what would be a preferred drug." I don't think that  
9 that would necessarily be discoverable, but I do think the fact  
10 that the NDOC had information about a particular drug without  
11 identifying its source may not be covered by the privilege. I'm  
12 not deciding that now. But I'm saying that because I think it's  
13 going to be important to distinguish the nature of the  
14 attachments in this type of a case to correspondence because I'm  
15 still going to have to figure out what information NDOC had or  
16 has as it relates to drugs in particular.

17 Now, because some of this information may come directly  
18 from manufacturers or from other sources, I don't know. I  
19 haven't seen the documents. I'm just saying it will be helpful  
20 for me in making this determination to be able to separate out  
21 that type of information. Because if you simply just say  
22 correspondence between Dr. Azzam and Director Daniels about an  
23 execution protocol, that's not enough for me to decide. So I  
24 will need to know if there are attachments and if the  
25 attachments can convey or include any type of medical

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1 information.

2 Mr. Pomerantz, you're looking like you have a question  
3 so --

4 MR. POMERANTZ: I am, Your Honor. Thank you.

5 I have a question from a -- sort of a pragmatic or sort  
6 of a realistic point of view with regard to the privilege log.  
7 Your Honor's been clear you want a privilege log from us. I  
8 believe we've represented to you that there are no documents  
9 relating to Mr. Floyd's case.

10 THE COURT: Right.

11 MR. POMERANTZ: We are happy to undertake that with  
12 regard to the Dozier case.

13 With regard to the very first category of documents,  
14 communications, potential communications -- I don't know what's  
15 out there. Potential communications between NDOC and Dr. Azzam,  
16 it appears on some level if NDOC is creating a privilege log and  
17 we're creating a privilege log, there's a duplication of  
18 efforts. We're going to capture the same documents.

19 So from a pragmatic standpoint, I guess my question is:  
20 Can we focus on these other categories with Dr. Azzam? Whether  
21 he reached out to somebody, reached out to a drug company,  
22 reached out to a physician, reached out to somebody else, that  
23 we would or the State has asserted as part of this deliberative  
24 process; or do you want us to go through the process of pulling  
25 those communications even if there's a duplication of efforts?

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1 THE COURT: So the difficulty I have here with your  
2 question, Mr. Pomerantz, is I'm not aware of these e-mail  
3 systems between the agencies and how they -- how duplicative  
4 they actually are. So, for example, different agencies may have  
5 different retention methods, may have different ways of storing  
6 information, such that I'm not certain that it would be  
7 duplicative because they may not be in NDOC's possession or they  
8 may be separately stored.

9 So, what I will say is to the extent that you all  
10 believe that there's duplication and that that can be clearly  
11 identified, you can indicate that to plaintiff's counsel and we  
12 can revisit it as necessary. So I wouldn't want you to do  
13 anything that's duplicative. However, without knowing how these  
14 systems -- if they're separate systems, if they're retained in  
15 the same way, it's hard for me to answer that, other than to say  
16 generally, Mr. Pomerantz, Ms. Ahmed, I wouldn't want you to --  
17 to engage in what is clearly duplicative work.

18 It does seem to me, for example, one, that NDOC will  
19 have and should have a lot of this information itself. I'm just  
20 not sure how, sort of, the State Medical -- the State Medical  
21 Officer's office is separated from that. But to the extent  
22 there's duplication, Mr. Pomerantz, I'm not going to require you  
23 both to be double-checking each other's privilege logs. But I  
24 do think at least an initial inquiry about what's covered in  
25 both, sort of, storage -- electronic storage facilities would be

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1 appropriate just to determine whether or not in fact there's  
2 duplication.

3 If you identify there to be duplicative entries,  
4 there's no need for you all to keep doing that.

5 MR. POMERANTZ: Your Honor's made himself clear. Thank  
6 you.

7 THE COURT: All right.

8 MR. GILMER: Your Honor, I'm a little slower than  
9 Mr. Pomerantz. I still have a couple of questions. I  
10 apologize.

11 THE COURT: Not at all.

12 MR. GILMER: And I don't want to change my timeline,  
13 but I want to make sure that I am understanding what exactly the  
14 Court would -- would like pertaining to Dozier. Because I was  
15 somewhat familiar with that case, and there are tens of  
16 thousands of pages with regard to the Dozier lawsuit.

17 So I would -- I would still maintain, number one, that  
18 anything regarding the Scott Dozier lawsuit, that was a  
19 different protocol and a different issue, so it clearly is not  
20 relevant now. But I would suggest to the Court that if to the  
21 extent there is anything relevant that the Court would consider  
22 with regard to the deliberative process, it would only be  
23 communications or documents that Director Daniels may have  
24 reviewed as part of looking into changing the protocol and not  
25 the entirety of the entire universe.

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1 I just want to make sure that that would be consistent  
2 with the Court's finding at this time? Because, obviously, that  
3 will change significantly the amount of work that goes into the  
4 issue.

5 THE COURT: So let me clarify this, Mr. Gilmer. I'm  
6 not requiring Dozier pleadings to be part of the privilege log.  
7 However, I just don't have the expertise to know, for example,  
8 Mr. Gilmer, whether or not a drug that was obtained three years  
9 ago is still available for use. I don't know enough to be able  
10 to say that if NDOC had these drugs in 2018 they could still use  
11 them now.

12 So I'm not in a position to be able to say it's not  
13 relevant because potentially there could be drugs that would  
14 have that long of a shelf-life. I don't know, right.

15 So what I will say is this. I am not interested in and  
16 I don't think it would be relevant information about any of the  
17 pleadings, correspondence about the pleadings, correspondence  
18 about strategy. You don't even need to put that in the  
19 privilege log.

20 What I'm concerned with is if there was information  
21 provided about drugs specifically, you should include that.  
22 Now, you could still make an argument as to its relevance as to  
23 why it shouldn't be disclosed, but I can't sit here right now,  
24 Mr. Gilmer, and say that it's not relevant because I don't know  
25 enough about these drugs to be able to rule out one way or

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1 another whether or not that information is relevant.

2           What I will say is for now you can include that in the  
3 privilege log and you can make an argument to me about why it  
4 shouldn't be disclosed, but it should still be identified but  
5 just as it relates to specifically those -- that information.

6           Now, I do think Dr. Azzam's recommendations about the  
7 protocol to the NDOC should be part of the privilege log. I  
8 doubt that at this point I'm in a position to order they be  
9 disclosed because I think that they could potentially clearly be  
10 covered by the deliberative process privilege, at least at this  
11 time without further analysis by the Court. So those would be  
12 documents that should be clearly identified so that the Court  
13 can at some point potentially consider them.

14           Because what I would anticipate is we may have to go at  
15 some point document-by-document, which happens, as you know, in  
16 this kind of case where you all will make an argument to me, I  
17 decide whether or not I even need to look at it, sometimes I  
18 wouldn't, and we'd have to go through that.

19           So I expect we're all going to end up doing a little  
20 bit of work, but I think the documents as it relates to the  
21 drugs, their accessibility, their effects or side effects or  
22 interactions, I don't know -- I'm not in a position to know,  
23 Mr. Gilmer -- whether or not that's thousands of pages. It  
24 seems to me a lot of the Dozier discovery would have been about  
25 the back and forth and communications. But, again, I don't

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1 know.

2           So if -- if it turns out when you review and in your  
3 conversations with Ms. Ahmed, Mr. Pomerantz, that there are more  
4 pages, that's fine. I will -- I will try to be reasonable about  
5 that time, but I'm not in a position to know now.

6           MR. GILMER: Understood, Your Honor. Thank you so much  
7 for the clarification.

8           THE COURT: Okay.

9           Mr. Anthony, is there something you wanted to add?

10          MR. ANTHONY: Just a couple points, Your Honor. I just  
11 wanted to start by clarifying one point. The State says that  
12 there are different issues in Dozier, but we have reason to  
13 believe that there are very similar, common issues in Dozier.

14          We believe that it is very possible that the Department  
15 of Corrections had a drug that was available to them, ketamine,  
16 and we believe that that may be a drug that is under  
17 consideration for this protocol right now. So just to make the  
18 link that we're talking about, because we're talking about  
19 pleadings, we're talking about a universe of 10,000 documents.  
20 I think, at least from our perspective, what we're concerned  
21 about is evaluations and analysis of a drug that was in their  
22 possession at the time of the Dozier execution that they chose  
23 not to go forward with and what went into that process and --

24          THE COURT: Mr. Anthony, but why would that be relevant  
25 when we have a different director making a different decision at

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1 a different point in time? Why is that relevant to my  
2 determination now? It would be one thing if Director Daniels  
3 made that decision. Then we could ask why you chose for one  
4 execution to follow one protocol and for a different execution  
5 to follow a different protocol when you had the same  
6 information. That seems to me it would be relevant. But why is  
7 this information relevant for this case?

8 Other than the fact they may possess information about  
9 the drug, but then it's only relevant if Director Daniels knows  
10 about it. Because part of what's going to happen is when we  
11 come back is we're going to have that discussion about what  
12 Director Daniels may or may not have been made aware of and that  
13 will impact its relevance, right.

14 So I'm not sure, Mr. Anthony, that that would be  
15 relevant at this point in time without there being some  
16 demonstration that Director Daniels and NDOC were currently made  
17 aware of this possibility for this particular potential  
18 execution.

19 MR. ANTHONY: If I could respond, Your Honor?

20 The commonality that I see is we have the same Chief  
21 Medical Officer. And in one circumstance he makes a  
22 recommendation against the use of a ketamine drug and that  
23 recommendation is followed.

24 And then we have this circumstance we're talking about  
25 today where the same drug is, potentially, part of the mix and



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1 the recommendation is against the use of ketamine, and in this  
2 circumstance that recommendation is overruled. The relevance is  
3 it's the same Chief Medical Officer who has the expertise to  
4 consult on this matter. And that's the commonality that we see  
5 between the Dozier case and the issues we're litigating here is  
6 to the extent that those drug -- you know, the conversations  
7 about the drug or drugs are the very same drugs, but they're  
8 making a different decision here than they did previously.

9 I understand that the directors are different now and  
10 previously, but we have the same Chief Medical Officer, the same  
11 medical official consulting with those directors. And so I just  
12 wanted to clarify what I believe is a very clear link between  
13 the Dozier litigation and the litigation here.

14 MR. GILMER: And, Your Honor --

15 THE COURT: Hold on a second, Mr. Gilmer -- Mr. Gilmer.

16 Mr. Anthony, to the extent that it wasn't clear and to  
17 the extent I wasn't clear with Ms. Ahmed and Mr. Pomerantz, I do  
18 want them to actually identify that -- those recommendations to  
19 NDOC in their privilege log. And if I -- if I misspoke about  
20 that, let me just be clear. I did want that to be a part of the  
21 privilege log.

22 If I didn't say that, Ms. Ahmed or Mr. Pomerantz,  
23 clearly, I did want that to be a part of the privilege log that  
24 you all are putting together.

25 MR. POMERANTZ: We understood that to be included, Your