

Case No. 84081

Supreme Court of Nevada

Electronically Filed
May 18 2022 11:15 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 3 of 4**

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2. Alexandra L. Klein, <i>Nondelegating Death</i> , 81 Ohio L. J. 924 (2020)	05/17/2021	1	129–188
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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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Certificate Of Electronic Service

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

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/s/ Sara Jelinek
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1 Honor.

2 THE COURT: Okay.

3 So, again, you are still going to have to make a
4 relevance argument, Mr. Anthony, but that's part of it.

5 I mean, what I was trying to eliminate from
6 consideration, even for the Court, would be all of the back and
7 forth about the strategy, legal strategy, and other things in
8 the Dozier case.

9 But this is just to create logs about what the Court
10 would consider. And it's not to say that I'm going to order the
11 documents be disclosed, but I at least have to know what's
12 there.

13 So, Mr. Gilmer, was there something that you wanted to
14 add?

15 MR. GILMER: Yes, Your Honor. I mean, I guess
16 Mr. Anthony went into argument there, but I think he made a lot
17 of hypothetical statements and that's a position that there is
18 not any evidence to support. And so I just thought it was very
19 important for the record that I believe Mr. Anthony made certain
20 hypothetical statements pertaining to what may or may not have
21 been discussed before by Dr. Azzam and what may or may not be
22 discussing now.

23 And it would also clearly be covered by deliberative
24 process to the extent it's being discussed now. So I thought it
25 was very important to place that on the record, Your Honor.

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1 THE COURT: Okay.

2 MR. POMERANTZ: And, Your Honor, just for purposes of
3 the record, I'm sorry. We were not confirming or denying any
4 conversations. We were agreeing to look for documents as
5 directed by the Court.

6 THE COURT: And that's what I understood as well,
7 Mr. Pomerantz and Ms. Ahmed.

8 Again, I appreciate you all are all experienced lawyers
9 and I think you're reading too much into each other's
10 statements, and your clients aren't saying anything. But I
11 appreciate that. I also appreciate you're creating your record
12 in this case.

13 And my goal is for us to be able to have enough
14 information and for me to be able to have enough information so
15 we can reach a decision as it relates to disclosure in this
16 case.

17 Now, one of the things I do think would be important,
18 Mr. Gilmer and Ms. Ahmed and Mr. Pomerantz, is when you have an
19 opportunity to go back -- and today's Thursday. We're talking
20 about potentially coming back on Monday -- to look at what's
21 available, it may at that point be impractical to have Dr. Azzam
22 and Director Daniels come back on Monday because we may need to
23 go through some of the documents so that everyone can have them
24 and prepare their respective examinations or prepare their
25 clients for potential examination.

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1 So I think what would be helpful for the Court,
2 Mr. Gilmer, Ms. Ahmed, Mr. Pomerantz, is to know, "Okay. We
3 went back to our office and, wow, there was a lot of documents;"
4 or the process to figure this out we had to go back through
5 State archives. You know, the person who does the archives is
6 gone for the weekend. You know, I mean, there are any number of
7 reasons why this process may not be able to be completed in the
8 time we set for Monday.

9 So what -- and I'm just saying it out loud given what
10 you all have said. It may make the most sense for us rather
11 than unnecessarily scheduling Dr. Azzam and Director Daniels --
12 and Director Daniels to come back, but for us to at least have
13 a -- have a status conference set to discuss the disclosure of
14 documents and then we can make a determination about testimony
15 then. Because, again, you all don't really know anything yet
16 about what exists and you're not in a position to be able to
17 advise your client.

18 And, Mr. Gilmer, it sounds like you don't have that
19 information either.

20 And then of course plaintiff's counsel still has to
21 wait for me to look at it after you all have actually identified
22 it to figure out what needs to be disclosed and not disclosed.
23 That seems to me to be a process that most likely cannot be
24 completed for testimony for Monday.

25 So, I mean, I'll hear you all on that, but that seems

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1 to me that we should still set some type of discovery conference
2 so we could go through this after you all have had an
3 opportunity to look at it. But I don't know that testimony on
4 Monday seems practical.

5 Mr. Pomerantz? Ms. Ahmed?

6 MR. POMERANTZ: Your Honor, we -- we would agree. We
7 will undertake a diligent search. We obviously don't know the
8 volume of the documents right now. If it takes us this weekend
9 to prepare a privilege log, Your Honor's made himself clear, you
10 will have a privilege log on Monday. But in terms of being able
11 for Your Honor to review that privilege log, make the
12 determination over what's privileged or what's not, give
13 Mr. Floyd's counsel -- if Your Honor determines there are
14 documents that are not privileged, give Mr. Floyd's counsel an
15 opportunity to review and/or use those documents in an
16 examination, it seems impractical to think that an examination
17 could take place on Monday.

18 THE COURT: Okay. I appreciate that.

19 Mr. Gilmer, do you agree?

20 MR. GILMER: I do agree, Your Honor. I do.

21 And at the risk of the Court shutting me down, I would
22 also say that, you know, while obviously it sounds like the
23 Court needs this information in order to determine the scope of
24 the deliberative process privilege, you know, it would be the
25 State's position that that privilege -- that that can be decided

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1 upon without seeing these documents. But certainly I understand
2 the Court's ruling with regard to that issue.

3 But it seems as if for the efficiency of justice and
4 judicial economy, I just wanted to point that out that it is
5 still the State's position that this -- this review of these
6 documents is not necessary to make the decision with regard to
7 the deliberative process privilege.

8 THE COURT: And I appreciate that, Mr. Gilmer. And, in
9 fact, I think you would probably be in a better position to make
10 that argument to me after you've looked at more of these
11 documents and you can say, "There are 500 documents that are
12 basically back and forth between people about someone's schedule
13 and who can appear on a particular date." Okay. Right.
14 That -- so I'm not saying I wouldn't consider that, but I do
15 think that there are the potential for there to be relevant
16 documents and for the fact that I have to make this
17 determination, Mr. Gilmer, about whether or not facts that are
18 in the possession of an entity are so interwoven that they are
19 part of the privilege. That, as you know, is part of this
20 inquiry. That, I think, requires this -- in this case, in
21 addition, obviously, to the very serious interests that
22 plaintiff has, obviously, in this -- in these documents, and
23 that's another consideration.

24 So I think what would be helpful as we set a date for
25 Monday, Mr. Gilmer, would be for you to be in a position to help

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1 me understand why certain factual information, in particular
2 about drugs and their accessibility, somehow should not be
3 disclosed. Because it seems to me that information in
4 particular, which is factual without disclosing its source,
5 would be the type of information that, one, there would be an
6 argument for in terms of Mr. Floyd's interests overriding the
7 privilege, but also the possibility that it's purely factual and
8 not covered by that.

9 So the more information, Mr. Gilmer, you can give me
10 about that and how it's interwoven or not, the better I can make
11 that decision. But as you know, in response to your statement,
12 I actually have to look at to what extent those facts are
13 interwoven into the process, and I don't have enough information
14 to make that determination.

15 MR. GILMER: I understand, Your Honor. And, I guess,
16 in response to that I would just say -- and I'm just going to
17 use aspirin. This is -- I'm just using it as an example.
18 Please -- please nobody say that aspirin has anything to do with
19 our protocol, but just for sake of my purpose here.

20 If I say that aspirin is under consideration for
21 something, and so there's factual information about aspirin, but
22 that aspirin hasn't been chosen to go into the protocol, the
23 very fact that I give you the factual information about aspirin
24 would delve into the deliberative process that aspirin might be
25 being considered. Even if the -- the fact sheet about aspirin

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1 has nothing to do with anything else, the very fact that I give
2 a fact sheet that has aspirin on it would be something that
3 would delve into the deliberative process with regard to drugs
4 that have been considered.

5 THE COURT: Well, one of the things I'm also looking
6 at, Mr. Gilmer, in response to your hypothetical, which is that
7 there may be information that NDOC has as it relates to these
8 drugs and how they should be used that's not available to the
9 general public.

10 Now, there's a separate inquiry that I would have to do
11 about Mr. Floyd's interest in obtaining that particular type of
12 information. Aspirin's slightly different, but I think it may
13 be useful in the context of understanding that there are some
14 drugs where there's a great deal of public information about.
15 But there may be other drugs under consideration, Mr. Gilmer,
16 that there's not public information about. That's actually
17 important for me to figure out in terms of Mr. Floyd's interest
18 in disclosure.

19 If there are, for example, drugs under consideration
20 that may have a great deal of information about them, I think at
21 least an argument could be made, and I'm not saying that I would
22 be persuaded, but an argument can be made that Mr. Floyd's
23 interest isn't greater than the State's as it relates to
24 potential limited disclosure.

25 So --

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1 MR. GILMER: Right.

2 THE COURT: -- again, I'm not saying, Mr. Gilmer, that
3 there wouldn't be a basis for that. But part of it is I have no
4 information at all. I have no information about how long these
5 drugs have a shelf-life, when are they accessible, what are the
6 potential effects or not. I mean, so the Court is completely in
7 the dark as it relates to this information having to make a
8 decision about the ultimate sanction that a State can impose on
9 an individual.

10 So in the same way that Director Daniels wanted to have
11 this information and has actually had it, will probably have it
12 more than the Court potentially would have it, that's what I'm
13 asking for. And I'm not saying you're objecting to that, but I
14 wanted to give you a sense of as you look at this and are
15 preparing the arguments regarding the privilege for you and for
16 plaintiff's counsel to understand that that's an inquiry that I
17 have to look at, at what -- to what extent is this factual
18 information covered.

19 Now, the other question I want us to move onto -- and
20 this is going to be a significant issue, which is I want to
21 understand, Mr. Gilmer, why or why not -- or why not the State
22 has any interest one way or another as it relates to disclosure
23 of a manufacturer's name in this case.

24 And I say that, Mr. Gilmer, because the issue for me is
25 if a manufacturer wants to come in and bring litigation, it

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1 seems like it's entitled to do that. Why would the State be
2 entitled to, essentially, take into consideration litigation, to
3 the extent that it is, in terms of shielding that information
4 from the public, given the fact that we also have very clear
5 principles about public disclosure in Federal cases. I want us
6 to think about that while we're thinking about this other issue.

7 It's not clear to me why I should seal that
8 information. I'm not inclined to actually protect the names of
9 manufacturers. I -- I don't really understand that. But I want
10 to give you an opportunity, Mr. Gilmer, to explain that -- and
11 Director Daniels made some reference to it -- as you're going
12 through this information.

13 And we should look at a timeline for that briefing
14 because I really don't understand why any of the doctrines that
15 allow for sealing of information would apply to that type of
16 information in terms of the NDOC asserting it.

17 As you've indicated, the NDOC takes no position one way
18 or another about these executions. They're carrying out a
19 lawful order. And the fact of the matter is that may be
20 inconvenient for the lawful order, but the manufacturers have an
21 opportunity if they want to be able to come in and bring
22 lawsuit, as what happened previously.

23 So you don't have to respond to that now, but I wanted
24 to give you some sense of the concern the Court had about
25 sealing that information. I'm not really sure why that

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1 information should be sealed.

2 MR. GILMER: I appreciate that, Your Honor. And I
3 will -- if I have 20 seconds, I'll give you a brief response now
4 just so you can --

5 THE COURT: Sure.

6 MR. GILMER: -- think on it before we come back. And
7 I've addressed it in part in our -- in our pleadings so far that
8 have been filed in the TRO as well as the stay. And I think the
9 Wellons case, which is an Eleventh Circuit case, clearly points
10 out that there's not a need for the names of manufacturers in
11 the public domain. I think we discussed it as well in our
12 protective order as to what the concerns are there.

13 And the other issue is once these drugs become aware
14 and a manufacturer doesn't -- doesn't make it available to NDOC,
15 as Director Daniels discussed, that means it's not available for
16 NDOC for any purpose, not just execution, for legitimate medical
17 purposes as well, for things to treat illnesses and diseases as
18 mentioned.

19 So that is why I believe it is extremely important,
20 especially in the context here, especially pre -- predecisional
21 before the protocol is out and we know what the drugs are, that
22 there's no reason to have those names come out.

23 With regard to Mr. Floyd, if there's -- if there's
24 issues pertaining to how they're -- or how they have to be
25 stored or those types of things, certainly I think as we

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1 referenced in our brief, we mentioned that. To the extent that
2 Mr. Floyd needs that information in order to properly put his
3 defense forward, I think that that's a different issue. I mean,
4 I still think there's some strong arguments based upon Wellons
5 that it doesn't have to be disclosed, but I think that's a
6 different issue for a different day.

7 I think definitely predecisional we're where -- where
8 we're at. But I appreciate the opportunity to speak now and
9 also speak later. As the Judge indicated, you may wish to want
10 to know more later.

11 THE COURT: Well, again, I want to -- because this is a
12 case that involves many different parts, I wanted to at least
13 alert you all that is a possibility because I think that's an
14 issue that we need to address. Now, I don't think we need to
15 address that necessarily before dealing with the issue of the
16 protocol and its finalization and a potential stay in this case
17 and the privilege log, because I think the privilege log will
18 bring into focus the particular issues that you're discussing,
19 Mr. Gilmer.

20 So why don't we -- I'm going to look at my calendar,
21 too, because I want to figure out what our schedule will look
22 like going forward, because I would like to set a status
23 conference to go through the log and the arguments there for
24 Monday.

25 MR. GILMER: I turned my phone on, Your Honor.

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1 THE COURT: Yes, everyone who has a smart phone --
2 phones that are smarter than us.

3 (Pause.)

4 MR. ANTHONY: Your Honor?

5 THE COURT: Yes.

6 MR. ANTHONY: David Anthony here.

7 One issue that I wanted to cover with the Court before
8 I forgot, I understand from the Court that we're going to be
9 rescheduling the witnesses that were for Monday. One thing I
10 wanted to bring up is that there were a lot of references in the
11 testimony about the Chief Pharmacist, Linda Fox, and that
12 revolved around what was available or not available. She also
13 appears to be the custodian of records from some of these
14 documents that have been discussed.

15 What I was going to ask the Court is when we do
16 reconvene for the next part of the hearing with these witnesses,
17 I was hoping that Linda Fox could also be present to answer
18 questions regarding availability of drugs because she was a
19 person suggested by Director Daniels as the person who would
20 have the most knowledge regarding the accessibility of the
21 drugs.

22 THE COURT: I appreciate your question, Mr. Anthony.

23 What we're going to do on Monday is go through the
24 privilege log and I want to talk about the universe of
25 documents. That will allow us to set both a discovery schedule

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1 in this case and a hearing schedule. And then the parties can
2 make their respective arguments about what should and shouldn't
3 be disclosed, assert whatever privileges they think are
4 appropriate. But we are not -- I'm not going to decide that
5 today, Mr. Anthony, but I appreciate that.

6 So why don't we -- I have on my -- let's say Monday,
7 the 10th, at 10 o'clock.

8 I am not going to require that Director Daniels or
9 Dr. Azzam be present, but they're certainly welcome to attend.

10 What I anticipate and hope that we will be able to do
11 is that the parties will have been able to have produced the
12 privilege log, that is the defendants, by the close -- well,
13 let's just say ...

14 Why don't we do this. We'll set it for the afternoon
15 and then ...

16 (Court conferring with Court staff.)

17 THE COURT: So let's set this for Monday, the 10th at
18 11:00.

19 MR. GILMER: 11:00 a.m., Your Honor?

20 THE COURT: Yes.

21 Now, the other part of what will be helpful, Mr. Gilmer
22 and Ms. Ahmed and Mr. Pomerantz, is if there are documents that
23 are covered by the privilege, and we're going to discuss it, it
24 would be helpful if you all bring with you some flash drive or
25 digital media in which you could show me examples of what you're

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1 talking about so we don't have to order separate in camera work.

2 So, for example, Mr. Gilmer, if you want to make an
3 argument to me about this is the type of document that exists
4 over and over again, here's how things are interwoven, I'm going
5 to need to see some example of that. And if you have it here,
6 we can do it in camera without having then to set a separate
7 date.

8 Normally, I would potentially have separate dates, but
9 again this case has a very specific timeline for obvious
10 reasons. So I would ask that counsel be available -- not to
11 have all the documents, but to have at least some documents that
12 would provide different categories of examples on the privilege
13 log. I mean, if you have them all, it would be preferable.

14 But again, given what I expect the arguments will be,
15 it would be helpful for me, Mr. Gilmer, Ms. Ahmed, and
16 Mr. Pomerantz, for me to know what the nature of these documents
17 are.

18 For example, Mr. Gilmer, if you're going to tell me
19 about what type of information NDOC receives about a drug and
20 its accessibility, I don't know what that looks like at all. I
21 don't even know how that's communicated. Is that communicated
22 through a letter? Is that communicated through some sort of
23 manufacturer's generated invoice? I have no idea. But given
24 what you're saying about the interwoven nature of the facts, I
25 will need to see that.

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1 So what that means is that the privilege log would be
2 produced before -- let's just say they'd have to get it by at
3 least Sunday night, Sunday, the 9th, by 5:00. But hopefully,
4 again, this shouldn't take again that long.

5 What I will tell you -- I'm sorry. Let me go back.
6 The privilege log should be produced by -- by May 9th by 5:00
7 p.m. We will meet on May 10th by 11:00.

8 What I will tell you, also, is if you all think,
9 Mr. Gilmer, Ms. Ahmed, Mr. Pomerantz, you need more time,
10 that's -- I will consider that, obviously. And so you should
11 let me know as soon as possible, hopefully by tomorrow
12 afternoon, so I can make a ruling about whether or not the
13 schedule needs to be changed in this case.

14 MR. GILMER: And if that's necessary to do, how would
15 you like us to communicate that to the Court?

16 THE COURT: Just -- just you -- it can be communicated
17 with just a letter that's filed -- publicly filed in the docket
18 just requesting additional time with the schedule.

19 I'd ask for you all to confer because you -- I would
20 imagine you all are going to be working together so that you're
21 not duplicating your work, as Mr. Pomerantz suggested, asking
22 for time and also speaking with plaintiff's counsel about that.
23 If you can agree upon a schedule, that's fine. If you can't,
24 then the Court will decide.

25 Obviously, I'm also going to take into consideration,

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1 as we are having this discussion, whether or not the Court's
2 going to grant some type of injunctive relief as it relates to
3 the execution or discovery schedule. All of these things
4 obviously work together.

5 But I don't want us to rush the privilege log and have
6 to go back and forth. So I will give defense counsel an
7 opportunity to be able to look at it and make a determination
8 about whether or not it's feasible to be able to do this by
9 Monday.

10 Okay?

11 All right.

12 MR. ANTHONY: Your Honor?

13 THE COURT: Yes.

14 MR. ANTHONY: Sorry, just one -- one comment.

15 Again, in a normal case I certainly have no problem
16 extending professional courtesy to the opposing counsel
17 regarding whether more time is needed. And the Court did touch
18 on this, but I just kind of wanted to reiterate that, you know,
19 we're looking at the possibility of an execution warrant being
20 issued one week from tomorrow. And so, the reason I wanted to
21 bring that up again is I want to make sure that I am not remiss
22 in making a request for a temporary restraining order. It seems
23 as if the process that we have put in place is a good process --

24 THE COURT: I don't mean to interrupt you, Mr. Anthony.
25 I'm going to decide that issue before the weekend.

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1 MR. ANTHONY: Thank you, Your Honor.

2 THE COURT: So I don't want -- that way I'm not going
3 to order something and have you all have to work over the
4 weekend if I'm going to issue some sort of injunctive relief,
5 because then Mr. Gilmer, potentially, or defense counsel may
6 have some other work that they may want to do. So I'm going to
7 decide that probably by close of business Friday, if I'm going
8 to issue that order. Now, I may wait, but I'm going to look at
9 it and see.

10 And so I just have to figure out what the parties may
11 be requesting. I do want to see what may be the nature of the
12 information. So I may not issue the order until Monday,
13 depending. But I am going to look at that for Friday. I expect
14 I will decide this issue by -- by tomorrow.

15 MR. ANTHONY: Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. GILMER: And, Your Honor, with regard to the
18 privilege log, would you like that filed publicly or under seal?
19 Obviously --

20 THE COURT: Under seal. Under seal, obviously. The
21 log should be filed under seal.

22 MR. GILMER: I assumed that was the case, but I always
23 want to confirm it, Your Honor. Thank you.

24 THE COURT: Uh-hmm.

25 Any other -- any other requests at this time?

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1 Ms. Ahmed? Mr. Pomerantz?

2 MS. AHMED: Nothing, Your Honor. Thank you.

3 THE COURT: All right. Mr. Gilmer?

4 MR. GILMER: May 10th at 11:00 a.m., correct?

5 THE COURT: Yes.

6 MR. ANTHONY: Nothing from plaintiff, Your Honor.

7 THE COURT: All right. Thank you all for your time.

8 We will be adjourned. Thank you. I'm going to stay on the
9 bench for a few moments.

10 (Whereupon the proceedings concluded at 1:10 p.m.)

11

12 --oOo--

13 COURT REPORTER'S CERTIFICATE

14

15 I, PATRICIA L. GANCI, Official Court Reporter, United
16 States District Court, District of Nevada, Las Vegas, Nevada,
17 certify that the foregoing is a correct transcript from the
18 record of proceedings in the above-entitled matter.

19

20 Date: May 6, 2021.

21

/s/ Patricia L. Ganci

22

Patricia L. Ganci, RMR, CRR

23

CCR #937

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EXHIBIT 2

EXHIBIT 2

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ZANE M. FLOYD,)	
)	Case No. 3:21-cv-00176-RFB-CLB
Plaintiff,)	
)	Las Vegas, Nevada
vs.)	Monday, June 28, 2021
)	1:12 p.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.

PATRICIA L. GANCI, RMR, CRR

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1 LAS VEGAS, NEVADA; MONDAY, JUNE 28, 2021; 1:12 P.M.

2 --oOo--

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

4 COURTROOM ADMINISTRATOR: Now calling Zane M. Floyd
5 versus Charles Daniels, et al., Case Number
6 2:21-cv-00176-RFB-CLB. This is the time for the evidentiary
7 hearing.

8 Starting with counsel for plaintiffs, please note your
9 appearance for the record.

10 MR. ANTHONY: Thank you. David Anthony from the
11 Federal Public Defender's Office for Plaintiff Zane Floyd. Also
12 with me is Brad Levenson, also with Zane Floyd. And Mr. Floyd
13 is appearing by video link from the Nevada Department of
14 Corrections.

15 THE COURT: Good afternoon.

16 MR. GILMER: Good afternoon, Court. My name is Randall
17 Gilmer. I'm here on behalf of the Department of Correction
18 Defendants listed in this case. With me at counsel table is the
19 named defendant, Director Charles Daniels.

20 THE COURT: Good afternoon.

21 MR. POMERANTZ: Good afternoon, Your Honor. Crane
22 Pomerantz and Nadia Ahmed on behalf of Defendant Dr. Ihsan
23 Azzam. Dr. Azzam is present in the courtroom.

24 THE COURT: Good afternoon.

25 So we're going to go through a few things today. I

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1 will let the parties know I anticipate the proceedings today
2 will be much shorter than I initially believed because of the
3 filing by the defendants. My questions for Dr. Daniels -- for
4 Director Daniels will be somewhat limited, and then we'll have
5 some discussion or argument.

6 So what I would like to do is -- today is first hear
7 from Director Daniels. I'm going to ask him some questions
8 regarding the protocol, and then I'm going to ask Dr. Azzam's
9 counsel as relates to what's been produced by or created by
10 Dr. Azzam. And we can discuss whether or not he needs to take
11 the stand in relation to what he's actually provided in terms of
12 his medical opinion.

13 Then we'll address any arguments regarding the
14 supplements to the motions to stay and any discovery issues.
15 And then we will discuss any miscellaneous issues that may arise
16 in the context of this case.

17 Any reason why we can't proceed in that fashion,
18 Mr. Anthony?

19 MR. ANTHONY: No, Your Honor.

20 THE COURT: Okay. Mr. Gilmer?

21 MR. GILMER: Thank you, Your Honor. Randall Gilmer.

22 The only question I would have for the Court is not
23 knowing what the questions are that the Court intends to ask,
24 and we still do not have a ruling with regard to the
25 deliberative process. Is that something that I should continue

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1 to object to --

2 THE COURT: So --

3 MR. GILMER: -- or are you going to address that issue
4 beforehand?

5 THE COURT: Well, let's address that. First, you'll
6 hear the questions when I ask them, but, secondly, let me say
7 this. Deliberative process privilege is qualified. It's
8 qualified based upon the Court finding, first, that there is no
9 other basis by which the plaintiff can or opposing party can
10 obtain the information, first. Secondly, the Court also finds
11 it would be appropriate in the context of the public policy
12 behind that. Third, there's a question of waiver.

13 I think there's a real issue of waiver in this case.
14 Director Daniels has actually testified about what he has
15 considered and what his views are. He's offered a declaration
16 that actually talks about what's important to him. He's been
17 very candid with the Court about why and how he makes decisions
18 as it relates to the information he's received. And, in fact,
19 Mr. Gilmer, your submission contains a great deal of information
20 about what was considered in this context. I think that was
21 actually what Director Daniels said he was going to do and what
22 you said that the NDOC was going to do as it relates to
23 information that it had in its possession in terms of the
24 choices.

25 I'm not really sure what the privilege would cover,

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1 quite honestly, at this point, Mr. Gilmer, because between your
2 response or your client's response and Director Daniels'
3 testimony, he's essentially discussed what he has considered and
4 reviewed, including talking about why certain drugs were not
5 included in the protocol because he wanted to go through a
6 particular process through Cardinal of obtaining medications.
7 I'm not really sure, Mr. Gilmer, what's left.

8 Now, it seems to me the only thing that might be left
9 would be potentially if Director Daniels had sent correspondence
10 or something to one of his experts saying, "I don't really know
11 anything about this particular area," which would be reasonable.
12 "Can you tell me? And here are the questions I have about
13 that." That might be covered by the privilege. But as it
14 relates to information that he has received and considered, much
15 of that has already been disclosed, Mr. Gilmer.

16 So I'm not really sure exactly what you'd be asserting
17 the privilege with respect to because he's testified. You
18 provided material. He's provided a declaration. So I'm not
19 even really sure what would be covered.

20 MR. GILMER: Okay. Just brief response if I could,
21 Your Honor. And I'm treading lightly because I'm -- because you
22 mentioned the words "waiver" there, so I want to be careful as
23 to how I frame my words here.

24 We did provide numerous information in the response.
25 And I think anything in the response is obviously fair game.

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1 With regard to the experts that are -- that were referenced in
2 the response, those -- without delving into process, those
3 experts may or may not have been retained for purposes of the
4 litigation and may have been people that provided opinions in
5 order to defend the protocol for purposes of this lawsuit and
6 not necessarily experts that Director Daniels obtained
7 information from in processing and making his deliberative
8 process.

9 So in that respect I do think there could be a slight
10 difference between the materials that we provided to the Court
11 and people that Director Daniels may have discussed information
12 with that have not been disclosed.

13 THE COURT: What I meant by that is his declaration,
14 Mr. Gilmer, and Ms. Fox's declaration reference some of the
15 discussion, at least generally, about how they arrived at the
16 choice. That they were limiting their choice based upon certain
17 avenues by which they could acquire the drugs. That's clearly
18 within the process of deliberation. And when he testified, he
19 talked about the different considerations that he would have to
20 review.

21 So what I meant is in that context those are areas
22 where I think that he's discussed this issue. And so to the
23 extent that there would be a privilege, it seems to me it might
24 cover areas where he's asked questions to help him educate
25 himself about this. I'm not intending to ask him questions

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1 necessarily about that, but it seems to me that there are other
2 issues.

3 But I'm also just -- I'm not going to in any way sort
4 of hide the ball. I'm going to ask Director Daniels specific
5 questions which is: Why are there eight versions of the
6 protocol rather than one? Why did he make that choice? Is
7 he -- is there any intention to -- and here's what I mean by
8 that. If you look at the protocol, there are substitutions for
9 different drugs. There's a four-drug protocol and a three-drug
10 protocol.

11 MR. GILMER: Understood.

12 THE COURT: And then at Step One there are two
13 different drugs. They're not the same drug. Fentanyl and
14 alfentanil are not the same. At Step Four there are also two
15 different drugs, right, potassium chloride and potassium
16 "asedit" (verbatim). I'm not sure if I'm pronouncing that
17 correctly. I want to understand, because it will be important
18 in terms of preparation for Mr. Floyd, is there a rank order
19 preference for those variations, right. Is there a rank order
20 or not?

21 Some of those drugs are actually from what I see from
22 Dr. -- from Ms. Fox's declaration not available currently. Is
23 there any intention to purchase them in the intervening period?
24 Is it still the intention of the NDOC Defendants to wait until
25 seven days before the execution to actually pick from one of the

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1 eight variations of the protocol?

2 Those are all, I think, relevant and important
3 considerations for the Court as it relates to the motion to
4 stay. It's not my intention to sort of ask Director Daniels
5 about his understanding of drugs that, quite honestly, I would
6 not expect him to have an expertise about, but he was the one
7 who finalized or made the final choices about the protocol. I'm
8 going to ask him about that specifically, Mr. Gilmer. That
9 seems to me to be actually appropriate and fair and not part of
10 the deliberative process.

11 I'm not asking him necessarily everything that he had
12 to go through, but I am going to ask him -- he made a final
13 choice about what the protocol should be. I don't think that
14 the process would cover his explanation of why he chose that
15 particular protocol because he's actually discussed already in
16 testimony and declarations what went into the choice.

17 So those are the questions that I intend to ask him and
18 I think they're directly relevant in this case. So to the
19 extent I'm talking about waiver, really it's to -- it's as it
20 relates to issues, Mr. Gilmer, that have already been discussed.
21 It's not to say that somehow he has impliedly waived other
22 areas.

23 As you can see, the questions that I'm focussed on are
24 directly related to what is in the protocol, what he's talked
25 about, what's in his declaration, what's in Ms. Fox's

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1 declaration. That's what I'm focussed on for today.

2 MR. GILMER: Thank you, Your Honor.

3 I appreciate that clarification, and I think you and I
4 are in agreement that all of those issues are fair game.

5 Obviously I'll have my ears peaked just to make sure as the
6 question is actually asked, but thank you for the
7 understanding -- for the clarification.

8 THE COURT: Okay. No, absolutely.

9 And I'm not, again, finding a general waiver,
10 Mr. Gilmer, just so we are clear. But as to those areas that I
11 just mentioned that have been discussed, I think that there has
12 been an acknowledgment that the NDOC Defendants and specifically
13 Director Daniels has and is willing to discuss and, in fact, I
14 think had taken the position he thought it was important to
15 publicly go through that. So that's why I'm focussed on that
16 particular area.

17 This is -- and the parties will be able to follow-up
18 with areas of questions that I have identified, but this is not
19 intended to be a free-range exercise as it relates to
20 questioning, just so you all know, and particularly for
21 plaintiff -- Mr. Floyd's counsel.

22 There's a great deal of information that has come
23 forward obviously in terms of the filing of the NDOC Defendants
24 as it relates to the drugs that are going to be used and expert
25 testimony. I don't intend, Mr. Anthony and Mr. Levenson, to get

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1 into that, except to the extent that that may implicate the
2 choice of the drug protocol and the versions of it. So, I think
3 we should begin with that because then that will move this
4 directly into the stay.

5 But again, Ms. Ahmed, Mr. Pomerantz, not to leave you
6 out, what I intend to ask and we can go through that right now
7 is did Dr. Azzam actually provide a written report or
8 recommendation assessing the drug protocol as it has been
9 finalized.

10 Now, you don't have to tell me what is in that yet, but
11 it's important for me to know whether or not, in fact, there was
12 a written report or whether or not there was a communication or
13 conversation between Dr. Azzam and Director Daniels because the
14 steps the Court would take to address them is different. And
15 potentially the privileges or rights that either party would
16 have would also be different.

17 So if you all want to take a moment and speak to
18 Mr. Gilmer, you can, but right now the first basic question is:
19 Did Dr. Azzam produce a report consistent with his duties of
20 advising the director about the finalized execution protocol?

21 MR. POMERANTZ: Your Honor, Crane Pomerantz on behalf
22 of Dr. Azzam.

23 (Court reporter requests counsel get before a
24 microphone.)

25 MR. POMERANTZ: No problem.

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1 Just for purposes of the record I want to be careful.
2 I don't know if there was a finding by the Court that there was
3 any waiver by Dr. Azzam. Our position is that there has not
4 been, but we want to answer the Court's question directly. And
5 the direct answer to that question is there was a consultation
6 as required by Nevada statute. There was no written report
7 prepared by Dr. Azzam.

8 THE COURT: Okay. That's fine. And I appreciate that,
9 Mr. Pomerantz, because I haven't made the specific finding about
10 that because the issue would have been the nature of what was
11 actually the opinion. Because if there was a written report
12 that contained certain medical information, for example, or
13 studies, as you know, the privilege doesn't necessarily cover
14 information. It covers recommendations.

15 And so that's why it was important for me to know
16 whether or not there would be a written document in which there
17 might be portions that would not be covered by the deliberative
18 process privilege. It would appear in this case that that isn't
19 what transpired, that there was a consultation, and that would
20 then lead potentially to the Court having to evaluate whether or
21 not Dr. Azzam would testify today.

22 And I'm going to just consult with plaintiff's counsel
23 about that, but the focus of my inquiry today will really be
24 with Director Daniels and the protocol. I just had that one
25 question for you and Ms. Ahmed and your client. So we will

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1 address that at the end, but at this point in time I don't have
2 any further questions for Dr. Azzam and I don't anticipate
3 requiring him based upon what you have just said to testify
4 today because I don't think it would be appropriate, today, to
5 go through medical testimony regarding the efficacy or not of
6 the particular drug protocols. So for today that's all that I
7 need from Dr. Azzam.

8 Okay. All right. Mr. Anthony and Mr. Levenson, any
9 reason why we can't proceed with Director Daniels' testimony?

10 MR. ANTHONY: No, Your Honor.

11 THE COURT: All right. Director Daniels, if you would
12 please.

13 And just so the parties again are aware, the Court will
14 allow you and it's helpful to pull your masks down while you're
15 speaking into the microphone, and then you just have to pull it
16 back up. That facilitates the record in this case.

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

18 Your Honor, I just wanted to let you know that Director
19 Daniels took with him to the stand copies of his declarations
20 because plaintiff's counsel indicated that they may have
21 questions pertaining to those. So I just wanted the Court to be
22 aware as to what he had up there when he went to the stand with
23 them.

24 THE COURT: Thank you, Mr. Gilmer.

25 All right, Director Daniels. You need to, I'm sorry,

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1 stand and raise your right hand.

2 CHARLES ALVIN DANIELS, having duly been sworn, was
3 examined and testified as follows:

4 COURTROOM ADMINISTRATOR: Thank you.

5 THE COURT: So you can take your seat, Director
6 Daniels. You can take your mask down for the purpose of just
7 your testimony. And if you could state your full name for the
8 record, please.

9 THE WITNESS: Charles Alvin Daniels.

10 THE COURT: Okay. And remember, Director Daniels, the
11 microphone is that little bar that's in front of you. So you
12 don't have to get closer necessarily, unless Ms. Ganci tells you
13 otherwise.

14 EXAMINATION OF CHARLES ALVIN DANIELS

15 BY THE COURT:

16 Q. So, Director Daniels, I'm going to start by asking you just
17 a few questions.

18 In this case, Director Daniels, you made the decisions
19 about finalizing the protocol, right?

20 **A.** Yes, Your Honor.

21 Q. Okay. So, and you heard me ask Mr. Gilmer this question,
22 but my question to you is: By my count, there are eight
23 different versions of the drug protocol because there are
24 substitutions for drugs at Steps One and Two and there's
25 substitutions for drugs at Step Four -- or Step One, I should

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1 say, and substitutions for drugs at Step Four.

2 What I would like to understand is why you didn't
3 choose just one drug protocol.

4 **A.** Yes, sir. There were several reasons. Primarily I needed
5 to ensure that I had alternatives because there are expiration
6 dates that may come into play depending on the actual date.
7 And, therefore, I did not want to not include a particular drug
8 that we would run out of that we had previously purchased. So I
9 sought to have an alternative for two of those drugs, and so
10 that's why we have the different versions.

11 **Q.** So you're -- you're saying so the primary reason essentially
12 for the substitution of the drugs at Step One and Drug Four is
13 the possibility that the drugs that you had purchased might
14 expire and be unavailable, and it was your understanding that
15 these other drugs could substitute for those drugs at those
16 various steps in the protocol.

17 **A.** Yes, Your Honor. Now, I did not purchase those -- the ones
18 that we had on hand. Those were purchased prior to my arrival.
19 I started on December 3rd, 2019. So they had previously been
20 purchased.

21 However, once we were looking at the drugs that could
22 potentially be used, I was apprised that there may be a
23 situation in which some of these, if there were many delays,
24 could expire. Therefore, I had directed my Director of Pharmacy
25 to look at other alternatives if they had not already been

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1 previously addressed, and then we would ensure that we wrote a
2 protocol that would take all of that into consideration.

3 Q. Okay.

4 And let me ask you this other question. Is there a
5 rank order of preference of the different versions of the drug
6 protocol?

7 Do you understand my question?

8 **A.** Yes, Your Honor. There -- all of the versions are
9 appropriate and acceptable, but I think that I have first, if
10 you were to look at the very first one, which is fentanyl, I
11 could utilize fentanyl. And the alternative would be
12 alfentanil, but in terms of preference, I would like to use what
13 I have on hand. But, nonetheless, they are both -- and I've
14 been advised that they're both suitable, and the alfentanil is a
15 suitable replacement for the fentanyl.

16 Q. So let me ask you this question just because I want to be
17 clear about this. If everything is available, all the drugs are
18 available that are listed in the protocol, first, would it be
19 your preference to use a four-drug protocol or a three-drug
20 protocol?

21 **A.** It would be my preference to utilize a four-drug protocol.

22 Q. Okay. And of the four-drug protocol variations, which are
23 where there's four steps, at Step One, would it be your
24 preference to use fentanyl or alfentanil?

25 **A.** It would be my preference to use fentanyl.

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1 Q. Okay. And at Step Four would it be your preference to use
2 potassium chloride or potassium "asedit" (phonetic), if I'm
3 saying that right?

4 MR. GILMER: Acetate, Your Honor.

5 THE COURT: Acetate. Thank you. I knew there was a
6 way I was saying it wrong.

7 BY THE COURT:

8 Q. Potassium acetate.

9 A. Your Honor, it would be my position that we could move
10 forward with the potassium chloride.

11 Q. Okay. That would be your -- if both were available --

12 A. Yes.

13 Q. -- that would be your preference. Okay.

14 Before I move onto any other -- let me ask one other
15 question. In the drug protocol it indicates that it would be
16 the NDOC's position that the final date for the notification of
17 what would be the final protocol to be used of these versions
18 would be seven days before the actual execution. Is it still
19 your view that that's when you would disclose that?

20 A. Your Honor, if you don't mind, I would like to explain.

21 Q. Sure, that's exactly what I -- why I asked you to come up.
22 Go ahead, Director Daniels.

23 A. Yes, Your Honor.

24 We have all of the drugs available, but, once again,
25 based on anything that could happen in the future and a change

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1 in dates, regardless of items expiring or not, I still wanted to
2 give everyone, the courts, the plaintiffs, I wanted to give them
3 a date in which you can definitively say this is it.

4 Q. Okay.

5 **A.** And I -- seven days -- based on my experience, seven days is
6 enough if you wanted to pursue anything through the legal and/or
7 grievance process, that would still be available for the
8 defendant -- I'm sorry. Yes. Well, I'm the defendant. I'm
9 sorry. That would be available for Mr. Floyd. And, therefore,
10 I had to come up with a date in which this is a -- this is it.
11 This is where we are. This is the final decision. At this
12 particular time I would certainly know the expiration dates, how
13 close we are, and if I had to make a modification and if there
14 was something else that I -- that was unforeseen, then I would
15 obviously consult with my -- my legal counsel. But,
16 nonetheless, I think it's the right thing to do.

17 Q. Okay. I appreciate your explanation, Director Daniels.
18 Thank you.

19 One additional question, which is: At this point in
20 time do you have any reason to believe that the execution
21 protocol would be changed in any way?

22 **A.** Your Honor, at this time barring something unforeseen, I do
23 not believe that the protocols would be changed at this point.

24 Q. Well, and it seems to me based upon what you've said is that
25 the reason why you chose a protocol with alternatives was

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1 specifically to avoid having to modify it at a later date. You
2 wanted to make sure that the parties were aware of all of the
3 different possibilities, and that's why the protocol has these
4 different potential substitutes. Is that -- is that fair?

5 **A.** Yes, Your Honor. I do have the statutory authority as well
6 as responsibility and duty to move forward with a
7 judicially-presented warrant and order. And I need to be
8 prepared, and I needed to have some alternatives. So that's why
9 I made the decision that I did.

10 Q. Okay.

11 THE COURT: I don't have any additional questions in
12 this area.

13 Mr. Gilmer, I'll start with you. Do you have any
14 questions you'd like to follow-up on based upon the Court's
15 questions?

16 MR. GILMER: (Pause.) I probably have some questions,
17 Your Honor, but if I could defer to after plaintiffs go, it
18 probably would be quicker --

19 THE COURT: Okay.

20 MR. GILMER: -- for me to get all my questions in at
21 once.

22 THE COURT: Well, we can go back and forth as lawyers
23 like to do.

24 MR. GILMER: Okay.

25 THE COURT: Mr. Anthony.

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1 MR. ANTHONY: Your Honor, Mr. Levenson will be doing
2 the questioning. Could we have five minutes of time so we could
3 organize our questions consistent with the Court's preference?
4 Because the Court mentioned that this wouldn't be a
5 wide-ranging, a free-ranging question.

6 But one point of clarification I had for the Court, one
7 of the areas that we intended to question about was how long
8 Director Daniels has had knowledge of this ketamine protocol.
9 We thought that that was important to know because of the
10 equities involved in granting a stay motion. And so I wanted
11 the Court's direction about whether we would be allowed to ask
12 questions about how long this protocol has been known, how long
13 the -- he has known about the draft of the protocol, et cetera.

14 THE COURT: Well, I think in context of the equities,
15 Mr. Anthony, I think the drafting isn't really the issue. The
16 issue to me would be how long it took for Director Daniels to be
17 able to consider all of the information and make a final
18 determination.

19 He's actually talked about that. He talked about that
20 at the first time he testified. He talked about the fact that
21 he thought 90 to 120 days was a fair amount of time necessary to
22 review the material.

23 So I don't think, quite honestly, the equities turn on
24 drafts. They turn on his ability to be able to review and make
25 an informed decision regarding the protocol once he was aware of

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1 the need to develop one. And I believe he's already provided
2 testimony about that at the last hearing. So I'm not sure how
3 that question really speaks to the equities.

4 I understand why the equities are important, of course,
5 Mr. Anthony, but it seems to me that the process in terms of the
6 director and NDOC Defendants' consideration of the protocol
7 started before the protocol was drafted. So I'm not sure why
8 the drafts are important. Perhaps, you could tell me that.

9 MR. ANTHONY: Your Honor, in light of the Linda Fox
10 declaration that we received at 10:30 at night on Thursday, it
11 appears that Ms. Fox has confirmed something we suspected for a
12 long time, which was that this was a protocol that was put
13 together by former NDOC Director James Dzurenda possibly as
14 early as 2018.

15 And so what we wanted to ask about was the knowledge of
16 the protocol since it looks like it was formed back in 2018,
17 potentially 2019. And the only reason we wanted to ask those
18 questions, Your Honor, is because we've been told for the last
19 couple months that the NDOC couldn't disclose any information,
20 including the basics like the drugs that were under
21 consideration. And the reason we would ask those questions,
22 Your Honor, is because it appears to us that with asking
23 questions we could establish that this protocol was actually set
24 in place over two years ago.

25 And for that reason --

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1 THE COURT: Well, but it was under a different
2 director. Director Daniels has a separate obligation to
3 consider the information. And so let me just be clear. I don't
4 think that in terms of the timing of the protocol that the fact
5 that there may have been a draft done previously or that, in
6 fact, there were drugs that were ordered previously, which
7 Ms. Fox clearly indicates, means that Director Daniels
8 necessarily relied upon that one way or the other.

9 It seems to me that the question as it relates to the
10 equities is about the amount of time necessary to be able to
11 investigate the efficacy to the extent that they were to be used
12 for this procedure of the drugs under consideration. And as far
13 as I'm concerned, that starts with Director Daniels being
14 informed of his obligation to finalize a protocol.

15 So, I think Ms. Fox lays out fairly clearly that drugs
16 were purchased previously in the context of this -- of this
17 case. And I think that there are different questions related to
18 the equities that I'm going to ask the parties regarding that at
19 a later time, but I don't think that Director Daniels needs to
20 be asked that because it's clear from Ms. Fox's declaration that
21 Director Dzurenda ordered her to obtain other potential drugs
22 that ultimately were not used or needed. I don't think Director
23 Daniels is the appropriate person to ask that question.

24 Now, at the end of this if you think that we should
25 call Ms. Fox, then we can have that conversation, but I don't

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1 think it would be appropriate to ask him those questions.

2 MR. ANTHONY: Just for clarification, Your Honor, would
3 we be able to ask questions of Director Daniels' knowledge from
4 when he became the director starting from 20 -- December of
5 2019? Because I just want to make sure that we get the time
6 frames for our questions correctly. Would -- would we have the
7 Court's leave to be able to ask questions starting from when
8 Director Daniels became the director?

9 THE COURT: I'm sorry. What questions specifically,
10 Mr. Anthony? Maybe that will help me.

11 MR. ANTHONY: Discussions that he may have had with
12 either former Director Dzurenda or with Linda Fox when he
13 transitioned and became the director about his knowledge of a
14 ketamine protocol and about his knowledge of the -- that those
15 drugs were in the possession of the department and what
16 knowledge he gained during the course of his work when it came
17 to prior versions of this protocol. Because it appears that all
18 of these drugs for this protocol, as we've been talking about,
19 have been purchased in 2018. They've been purchased in 2019.
20 Director Daniels becomes the director.

21 So what we wanted to ask is how long has he had
22 knowledge about these particular drugs.

23 THE COURT: Okay. And that -- okay. That's different.

24 MR. ANTHONY: Oh.

25 THE COURT: If you wanted to ask, for example, not

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1 about drafts, but about when he became aware of NDOC being in
2 possession of drugs, that's different. Asking about drafts to
3 me is not relevant, but if you want to ask him whether or not he
4 was aware or when he became aware of the fact that certain drugs
5 were in NDOC's possession, I think that that's appropriate.

6 MR. ANTHONY: Thank you, Your Honor. That's helpful.

7 THE COURT: But I also think, honestly, Ms. Fox lays
8 out fairly clearly what was purchased approximately when. And I
9 also think, as I still think, Mr. Anthony, that the issue of the
10 equities really turns on when Director Daniels had to formally
11 make a decision about the protocol.

12 His awareness or not of drugs to me is a potential
13 consideration for the Court, but as he's noted, the real issue
14 is the -- then the execution date, the expiration date of the
15 drugs themselves, which become an issue only when there is an
16 actual deadline that must be kept. So I'm saying that because I
17 would encourage you to focus on that because the mere fact that
18 the NDOC may have possessed these drugs to me is not necessarily
19 a strong factor one way or another as it relates to the
20 equities.

21 But you can ask that particular question. Anything
22 else?

23 MR. ANTHONY: Not ...

24 (Plaintiff's counsel conferring.)

25 MR. ANTHONY: Just if we could have five minutes, Your

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1 Honor, just to conform our questions to the Court's guidance.

2 THE COURT: Okay. And, again, I really want this to be
3 fairly limited. As you can see, my questions were very specific
4 and limited because I think those are the issues that Director
5 Daniels can speak about because that's what he has direct
6 personal knowledge of. Other areas I think would be covered by
7 a medical expert.

8 So if you want to take a few moments, that's fine. You
9 can do that. I give you five minutes based upon the Court's
10 questions.

11 Director Daniels, if you want to stay seated there, you
12 can -- you can do that, or if you want to step down, you can.
13 But we can be in sort of a recess in open court for five
14 minutes. If you'd like to step down, you can, Director Daniels.
15 It's up to you.

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: Sure.

18 (Recess taken at 1:45 p.m.)

19 (Resumed at 1:54 p.m.)

20 THE COURT: Go back on the record here.

21 All right. Mr. Levenson.

22 MR. LEVENSON: Thank you.

23 EXAMINATION OF CHARLES ALVIN DANIELS

24 BY MR. LEVENSON:

25 Q. Good afternoon, Director Daniels.

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1 **A.** Good afternoon.

2 **Q.** Did you ever discuss execution protocols with former
3 Director Dzurenda?

4 **MR. GILMER:** Objection, Your Honor. I think that calls
5 into a specific question with regard to deliberative process
6 privilege.

7 **THE COURT:** Okay. Mr. Levenson, I actually went over
8 this. So I want -- I'm going to limit you to exactly the area
9 of the questions that I asked -- that I told you that you would
10 be entitled to. So I'm going to sustain the objection.

11 All right. So let's move on from questions about his
12 prior discussions with Director Dzurenda or -- regarding the
13 prior protocol.

14 (Plaintiff's counsel conferring.)

15 **BY MR. LEVENSON:**

16 **Q.** Director Daniels, when did you first become aware that NDOC
17 had ketamine -- had a supply of ketamine to use?

18 **A.** I believe I was generally made aware of the drugs for the
19 execution protocol in roughly the last week of March or the
20 first week of April, somewhere near Easter. In which I started
21 to ask questions regarding the execution protocols I needed to
22 get in to learn what we had available and where -- where we
23 could go from there.

24 **Q.** And who did you ask that question of?

25 **MR. GILMER:** Objection, Your Honor. I think that calls

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1 into deliberative process to ask a specific question and
2 identity as to an individual. He indicated that he asked
3 questions and found out information.

4 MR. LEVENSON: If I may, Your Honor.

5 THE COURT: Well, yes, but first I actually think
6 Ms. Fox has actually already talked a little bit about this.
7 So, Mr. Levenson, I'm not really sure what you're asking because
8 I think it's fairly clear, and Director Daniels has said so and
9 Ms. Fox's declaration established she was the one who was in
10 charge of that. That's with whom he spoke, and she actually
11 says that in her declaration. So I'm not sure why we need to go
12 through this.

13 MR. LEVENSON: Well, the Government did designate
14 Mr. Daniels as the person most knowledgeable. And some of these
15 questions are meant to flesh out the fact that he is not the
16 person most knowledgeable in light of -- instead of Ms. Fox and
17 that there is a need to have her testify.

18 THE COURT: Okay. Well, why -- I think it's clear that
19 he doesn't know about certain aspects of certain information. I
20 don't know that he was, quote/unquote, designated as the person
21 most knowledgeable. I wasn't --

22 MR. LEVENSON: Well, he was --

23 THE COURT: Let me just finish.

24 MR. LEVENSON: Okay.

25 THE COURT: -- for the hearing today. Now, there may

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1 be other questions. But for today let's focus on the areas that
2 I've asked questions of that I think also should be focussed on
3 here.

4 So I will ask you to move on from there.

5 MR. LEVENSON: Okay.

6 MR. GILMER: Your Honor, may I have a brief response on
7 that one?

8 We did inform plaintiff's counsel on Friday, per the
9 Court's order, that Director Daniels would be prepared to
10 testify regarding the two specific issues that the Court asked
11 for in the minute order when they asked for a substitution,
12 which was supply and ordering of the drugs. And that was what
13 the Court's order was limited to, which is why Director Daniels
14 was an appropriate individual to bring today.

15 THE COURT: Okay. Well, and I also think Ms. Fox's
16 declaration further supplements that record. So let's move on
17 from there, Mr. Levenson.

18 BY MR. LEVENSON:

19 Q. Director Daniels, did you discuss with Ms. Fox an execution
20 protocol using ketamine?

21 MR. GILMER: I'm going to object to that question, Your
22 Honor, in the sense that ... to the extent he's asking a
23 yes-or-no, I think that's probably appropriate. But if he's
24 trying to delve into specifics as to what they discussed, I
25 think that delves into the deliberative process procedure.

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1 THE COURT: Okay, Mr. Levenson. It's obvious he talked
2 with Ms. Fox about a protocol involving ketamine because that's
3 the one that was ultimately arrived at and she's the one who
4 told him about it. So I'm not really sure, Mr. Levenson, why
5 you're asking that question because I can tell you that the
6 Court finds that that's clearly established. And Director
7 Daniels is not denying that and Ms. Fox's declaration
8 establishes that. So let's move on.

9 MR. LEVENSON: A moment, Your Honor.

10 THE COURT: Sure.

11 (Plaintiff's counsel conferring.)

12 BY MR. LEVENSON:

13 Q. Director Daniels, when did you first decide on the dosages
14 for the protocol?

15 A. (Pause.) I decided on them as I identified the final
16 protocol and I sent it in. That's when I literally established
17 it. After I consulted with the individuals I consult with,
18 members of my team, and I made the appropriate consultations
19 with those I'm required to make consultations with, I made the
20 decision.

21 THE COURT: So basically you're saying that, I would
22 imagine, that within a day or two of finalizing the protocol is
23 when you made that decision about the dosages?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Okay.

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1 (Plaintiff's counsel conferring.)

2 BY MR. LEVENSON:

3 Q. Who did you consult with in coming up with the dosages?

4 MR. GILMER: Your Honor, I object to that with regard
5 to deliberative process privilege to the extent that they're
6 asking for specific individual names.

7 THE COURT: Well, let me ask you a question about that,
8 Mr. Gilmer. It seems to me that as it relates to information
9 that he received, he can talk about that and the sources of
10 that. What the recommendations were and opinions were is
11 different.

12 So I think it matters when he received information, and
13 maybe you could tell me why you're concerned about the experts.
14 If there's a separate issue which you've previously identified
15 as relates to security and other issues, that's one thing, and
16 that's a separate argument which I would consider separately.

17 But it seems to me that at some point Director Daniels
18 obviously received expert advice about the effects of these
19 drugs. It also seems to me that that information is not subject
20 to the deliberative process privilege in terms of the factual
21 aspect of it. And it also seems to me that plaintiff's counsel
22 needs to know that so they can specifically identify their
23 requests for the information. They're entitled to the factual
24 portion of the information, but they won't know what to ask if
25 they don't know how to ask it.

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1 So if you wanted to provide that, that's fine, but you
2 understand the process -- privilege covers the process, but it
3 doesn't cover the information. And so he clearly would have
4 received the information. So the question is how do you want to
5 address that, Mr. Gilmer. Because he doesn't get to cover the
6 information itself, but he does get to cover the recommendations
7 potentially.

8 MR. GILMER: So there's a couple points -- couple ways
9 I'd like to respond to your -- your clarification question, Your
10 Honor. And first would be, obviously to the extent we've
11 identified experts as part of this litigation and we have
12 affidavits attached to the response, that's fair game. And as I
13 already indicated, and I think this is a fair question for
14 plaintiff's counsel to ask, whether or not those plaintiffs or
15 those experts were involved in the deliberative process to
16 create the protocol, again, to the extent that they're
17 identified, I think that's fair game.

18 Some of those experts, I will tell you without
19 divulging which ones, were specifically retained for purposes of
20 this litigation and to testify in support of the protocol and,
21 therefore, were not part of that process at all. And, again,
22 I'm not going to divulge who these were and who they were not.

23 THE COURT: Well, I actually think some of them say
24 that in their declarations.

25 MR. GILMER: Sure. Certainly. And so obviously to the

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1 extent that they -- they have said that, then it's known.

2 So, with regard to the second part of the question with
3 regard to the names of individuals Director Daniels has spoken
4 to, as we've already discussed before, acknowledging them as
5 known numerous times, I guess there's a two-fold answer. I
6 don't believe it's necessarily important who he spoke to while
7 he was forming the deliberative process to come up with the
8 final protocol because the final protocol has to be -- has to
9 stand on its merit as drafted and based upon the experts we have
10 that we retained to testify about that protocol. And who he may
11 have spoken to to reach those decisions is part of that
12 deliberative process that got him there.

13 I also believe that those --

14 THE COURT: Let me stop you there, Mr. Gilmer. I first
15 had asked just about the information itself. There's two
16 separate issues here. One is the identity. The other is the
17 actual information. I don't believe the information is
18 protected.

19 So what you need to help me understand is: Was this
20 information provided in a report? Was it --

21 MR. GILMER: Yes.

22 THE COURT: -- orally? Because that would potentially
23 impact it.

24 So let's say, for example, Ms. Fox, who seems to me
25 would have clearly been involved at some point in this process,

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1 provided a report about what would be the potential effects
2 based upon studies of these different drugs.

3 Her final recommendation potentially would be covered
4 by the privilege, but her summary of what the studies show would
5 not be. And so I can't make those types of determinations,
6 Mr. Gilmer, unless I have more information about the nature of
7 the information.

8 So I'm asking you because the privilege doesn't cover
9 everything, and in this case I'm not even saying it's going to
10 cover even what you say it is. But without knowing the nature
11 of that information, I can't even apply it properly.

12 MR. GILMER: And that question can certainly be asked,
13 but the question that was asked, if I heard it correctly, by
14 Mr. Levenson was who did he speak to, which I think is a very
15 different question than what type of information was he provided
16 or who gave him information.

17 Back to the second point on the identity, other than
18 those that have come forward as experts in this case that we
19 intend to rely upon for purposes of evidentiary hearings, if the
20 Court thinks they're necessary after reading our responses,
21 which we obviously respectfully don't think any further hearings
22 are necessary to that point, but obviously those are fair game.
23 Those experts are the ones that the State will set upon to
24 defend the execution protocol as done.

25 Director Daniels has spoken to or likely has spoken

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1 to -- and maybe this question needs to be asked, but, again, I'm
2 always hesitant to give these answers because I don't want to be
3 accused of trying to coach my witness, Your Honor. But
4 obviously as we've talked about just in general parameters in
5 regard to the deliberative process in general and also the
6 execution procedures in general, people need to be able to get
7 frank advice and opinions from numerous people without --
8 without fear that those identities are necessarily named.

9 So I would object to the extent that he's asking
10 questions about specific people he spoke to other than those
11 that have been identified and waived because those people may
12 have been spoken to in confidence by Director Daniels in order
13 to obtain information, just like numerous governmental officials
14 speak to people in confidence without ever divulging who those
15 individuals are. That is part and parcel -- part of the
16 deliberative process privilege, who you get information from.

17 THE COURT: Well, let's do it this way because I still
18 need to -- and I appreciate it. I still need to figure out
19 how -- what the nature of the information is. So let me ask you
20 this first question, Director Daniels.

21 Did anyone with whom you consulted provide you with a
22 written assessment as it relates to the effects of these various
23 drugs in the drug protocol?

24 THE WITNESS: No, Your Honor.

25 THE COURT: Okay. So all the information you received

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1 was either by someone talking to you in some fashion or another.

2 Is that correct?

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: So there is no correspondence, no e-mail,
5 or anything that contains an actual assessment of the drugs in
6 the protocol. Is that correct?

7 THE WITNESS: That would be correct, Your Honor.

8 THE COURT: Okay.

9 So, Mr. Levenson, based upon that, if you wanted to ask
10 some questions, you can. And, again, this is not to say that
11 there couldn't be some follow-up after this as it relates to
12 information to be requested, but I needed to know and I need to
13 know what the universe is of the documents, or not, or the
14 nature of the information. It's not to say that you can't
15 request that Director Daniels divulge that information and
16 recommendations because, as I've said, I haven't made a final
17 ruling as to the privilege, but I need to know what the universe
18 of information is before I can figure out whether or not the
19 privilege should apply based upon the policy -- policy
20 considerations and requirements of the privilege.

21 So with that, Mr. Levenson, if you want to proceed with
22 additional questions, you may.

23 BY MR. LEVENSON:

24 Q. Director Daniels, with respect to the dosages, did you
25 consult with Dr. Yun?

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1 **A.** (Pause.) I did not consult with Dr. Yun.

2 **Q.** Did someone else consult with Dr. Yun regarding the dosages?

3 **MR. GILMER:** Objection, Your Honor, to the extent that
4 that might be trying to delve into attorney/client privilege.

5 **THE COURT:** Well, the dosages, Mr. Gilmer, had to come
6 from somewhere. They didn't come from Director Daniels himself.
7 So the question is where did they come from. Now, they had to
8 have been arrived at or provided by an expert because Director
9 Daniels didn't decide that.

10 So we can talk about the identities, but let me ask
11 this question. Were the dosages -- the dosages that are in the
12 protocol suggested to you by an expert?

13 **THE WITNESS:** Your Honor, they were -- in my
14 communication with the experts, I asked the question regarding
15 the dosages.

16 **THE COURT:** Okay.

17 **THE WITNESS:** And it was either affirmed or not
18 affirmed that those would be sufficient and/or adequate.

19 **THE COURT:** Got it.

20 So you made those -- the decision about the dosages
21 based upon information you received from experts regarding those
22 particular drugs?

23 **THE WITNESS:** Yes, Your Honor.

24 **THE COURT:** Okay.

25 **MR. GILMER:** And I think the record's clear, Your

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1 Honor. I think he's not necessarily implying that those experts
2 are the ones that are listed in the --

3 THE COURT: No, look, and I think, again, the issue
4 really is going to be what information Director Daniels had.
5 We'll get to the issue of who told him what later and whether or
6 not that's the subject of litigation or not. But I wanted to at
7 least lay out what the universe is. Go ahead.

8 MR. GILMER: I'm just making sure the record was clear
9 for later.

10 THE COURT: Okay.

11 MR. GILMER: So there wouldn't be any misunderstanding.

12 THE COURT: Uh-hmm.

13 Go ahead, Mr. Levenson.

14 BY MR. LEVENSON:

15 Q. Director Daniels, you just said that you supplied some
16 information or questions about dosages to experts. Where did
17 that information come from, your questions? Did anyone help you
18 formulate the questions about the dosages to the experts?

19 A. (Pause.) I am not a physician or a pharmacist, and I relied
20 on individuals who would have an expertise in that field to
21 guide me in asking the appropriate questions.

22 THE COURT: So what you're saying is in addition to
23 getting confirmation of the dosages, the suggested dosages which
24 you came up with to get confirmation also was based upon your
25 consultation with experts.

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1 THE WITNESS: I had those -- I had that information
2 confirmed.

3 THE COURT: Right.

4 THE WITNESS: Yes.

5 THE COURT: Okay. Okay.

6 BY MR. LEVENSON:

7 Q. Director Daniels, did you discuss the dosages with
8 Dr. Buffington?

9 A. (Pause.) I did discuss many things with Dr. Buffington to
10 include dosages.

11 Q. And did Dr. Buffington give you a report or a draft other
12 than the declaration that we have seen?

13 A. I have not received a report nor am I aware one was drafted.

14 Q. Same question with regard to Dr. Petersohn. Did you discuss
15 the dosages for the protocol with Dr. Petersohn?

16 A. I did not.

17 Q. Do you know if anyone else did?

18 A. I am not aware of the context of a conversation others may
19 have had.

20 Q. When did you first decide on the sequences of the drugs?

21 A. (Pause.) After consultation with the individuals I'm
22 supposed to consult with and then after I had the protocol and
23 validated the efficacy of the drugs and so on, I made that
24 decision right before we released the protocol, the final
25 protocol.

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1 THE COURT: So are you saying that you made the
2 decision as relates to the sequence and the dosages at
3 approximately the same time, which would have been one to two
4 days before the protocol was finalized?

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: Okay.

7 BY MR. LEVENSON:

8 Q. Did anyone that you consulted with regarding the sequence of
9 drugs give you a written assessment or report or an e-mail,
10 anything written?

11 A. I am not aware of an e-mail or a report regarding the
12 conversation and/or what we discussed.

13 Q. Did you discuss the sequences of the drugs with Dr. Yun?

14 A. I did not discuss the sequencing with Dr. Yun.

15 Q. Do you know if anyone else did on your team?

16 A. I am not aware of the context in which a member of my team
17 communicated with the doctor.

18 Q. Did you discuss the sequences of the drugs with
19 Dr. Buffington?

20 A. I do not recall having that specific conversation regarding
21 the sequence.

22 Q. Did you discuss the sequences of the drugs with
23 Dr. Petersohn?

24 A. I did not.

25 Q. Do you know if anyone else did?

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1 **A.** I am not aware if anyone else did.

2 **Q.** Do you know if NDOC keeps records regarding the expiration
3 of drugs in the execution protocol?

4 **A.** I am not aware of the intricate nature of how we maintain
5 and monitor our drugs, but as it relates to the protocol drugs,
6 I was apprised of the fact there may be an expiration date
7 specific to those drugs that may be near and that an alternative
8 would probably be appropriate.

9 **Q.** With regard to any of the drugs in the current protocol, do
10 you know if any of them have a rapidly-approaching expiration
11 date?

12 **A.** I am aware that some are nearing an expiration date. In
13 terms of "rapidly," I don't know if I can quantify that, but
14 there are some of the -- the drugs that are nearing -- there are
15 portions of some of the drugs that are nearing an expiration
16 date. But several of the drugs have different expiration dates
17 because they were purchased at different times.

18 THE COURT: Are any of the drugs set to expire before
19 the current execution date of July 26th?

20 THE WITNESS: Yes.

21 THE COURT: Which ones?

22 THE WITNESS: Well, Your Honor, I don't want to give
23 specifics because then I would --

24 THE COURT: But you have to give specifics.

25 THE WITNESS: I could be wrong.

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1 THE COURT: Oh, no. You have to give specifics as to
2 what you understand.

3 THE WITNESS: Yes.

4 THE COURT: I'm not saying, Mr. -- Director Daniels,
5 that if for some reason you're incorrect that -- that I would
6 find that you somehow misrepresented. But as you understand it
7 as you sit here today, which drugs do you understand will expire
8 before July 26th?

9 THE WITNESS: It is my understanding that some of the
10 fentanyl as well as some of the ketamine may expire.

11 THE COURT: Okay.

12 THE WITNESS: As a matter of fact, let me backtrack on
13 that ketamine. It is some of the potassium, I believe, chloride
14 that may also. But, Your Honor, please, I do not know the
15 answer.

16 THE COURT: I understand, Director Daniels, you're
17 qualifying it.

18 THE WITNESS: Yes.

19 THE COURT: So I understand that you are saying that
20 this is based upon your estimation, but obviously Ms. Fox would
21 be the one who most likely would understand that. And I
22 appreciate your indication that you can't be certain, but it's
23 still helpful for the record so -- for you to be able to offer
24 your best testimony which is what I believe that we've heard.
25 So thank you for that, and I appreciate the qualification.

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1 MR. GILMER: And, Your Honor, I have -- I can make a
2 proffer to that later during argument if it would be helpful to
3 the Court.

4 THE COURT: It would be helpful. Obviously part of the
5 issue in this case, Mr. Gilmer, I have to consider is what the
6 final protocol may or may not be, what are the considerations of
7 that as it relates to the motion to stay. And so that's why I
8 think these questions are appropriate because I do believe
9 Mr. Floyd and his counsel are entitled to understand whether or
10 not there's some version of the protocol that really are not in
11 play for different reasons. So that's why I think these
12 questions are appropriate at this point in time.

13 So, again, thank you for that clarification to the
14 extent that you could offer it, Director Daniels.

15 Mr. Levenson, go ahead.

16 BY MR. LEVENSON:

17 Q. Director Daniels, are you aware that the last remaining
18 batch of potassium chloride is expiring in July of this year?

19 A. I am aware that several of the drugs have an expiration date
20 that is in the near future, and I believe that was my testimony.

21 Q. So you don't have the specific knowledge that potassium
22 chloride, the only batch that you have left, is expiring next
23 month.

24 A. Once again, I don't know the actual date. I've been
25 consistent in that response, but that is certainly one of the

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1 drugs in which we have an alternative. We have the potassium
2 chloride to which you speak, and then we as a secondary have
3 potassium acetate. And that was one of the reasons that we had
4 multiple versions of drugs for this exact reason.

5 Q. Would that be a better question to ask of Pharmacist Fox?
6 Would she know that about the potassium chloride, specifically?

7 A. While I can't speak for my Director of Pharmacy, I believe
8 that she is more than qualified to respond to your question.

9 THE COURT: That would, as you understand it, Director
10 Daniels, fall within the purview of her duties as Director of --
11 of Pharmacology for NDOC, correct?

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: Okay.

14 Anything else, Mr. Levenson?

15 BY MR. LEVENSON:

16 Q. Director Daniels, did you offer Dr. Azzam multiple choices
17 for the drug protocol?

18 MR. GILMER: Objection, Your Honor. That goes into the
19 deliberative process as to what specifically he asked Dr. Azzam
20 with regard -- he's made the decision as to what was given and
21 he consulted. And that's all that needs -- anything else delves
22 into the deliberative process and what they discussed.

23 THE COURT: Mr. Levenson.

24 MR. LEVENSON: I think it goes -- what Mr. Anthony was
25 arguing, which this goes to when the protocol was finalized.

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1 We're alleging, again, bad faith on the part of the Department
2 of Corrections in their release of the drug protocol. And if
3 Dr. Azzam was only offered one choice of protocols, then NDOC
4 knew that protocol at the meeting. And that meeting took place,
5 as we understand it, in late March or April of -- of this year
6 pursuant to Director Daniels' last testimony.

7 THE COURT: If you want to ask when he had his final
8 consultation with Dr. Azzam, you can do that.

9 BY MR. LEVENSON:

10 Q. Director Daniels, when was your final consultation with
11 Dr. Azzam?

12 A. I do not recall the exact date I had my consultation with
13 Dr. Azzam.

14 THE COURT: Approximately, how far before you finalized
15 the protocol? Was it one week? Two weeks? A month?

16 THE WITNESS: At the risk of being wrong, I believe I
17 had that consultation roughly the last week of May or first week
18 of June.

19 THE COURT: Okay. Thank you.

20 BY MR. LEVENSON:

21 Q. So, Director Daniels, in your testimony in April you said
22 that you had met with Dr. Azzam in late March or early April.
23 Is it our understanding, then, that you had a second meeting
24 with Dr. Azzam?

25 A. It is accurate that I consulted with Dr. Azzam on two

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1 occasions.

2 Q. And your testimony is the first -- the second one was in
3 late May or early June.

4 **A.** To the best of my recollection, yes.

5 Q. Director Daniels, why did you wait until March 31st, 2021,
6 to begin purchasing execution drugs?

7 MR. GILMER: Objection, Your Honor, to the extent that
8 that delves into deliberative process as to when he may or may
9 not have purchased a particular drug.

10 It speaks for itself that there was a purchase made at
11 that time. I don't think why he decided to purchase it at any
12 particular time would do anything more than to delve into his
13 deliberative process and thinking.

14 THE COURT: Well, we know, I believe, from the record
15 when the drugs were ordered, unless I'm missing something. Has
16 that information been provided?

17 MR. GILMER: It has been.

18 THE COURT: Okay. So let's move on from there,
19 Mr. Levenson.

20 BY MR. LEVENSON:

21 Q. From your June declaration have you attempted to order
22 sodium thiopental?

23 MR. GILMER: I just would like to object to the form of
24 that question. The declaration speaks for itself as to what it
25 says.

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1 THE COURT: Well, and I also think, Mr. Levenson,
2 again, Director Daniels has been fairly clear about the fact
3 that he -- again, I mean, he doesn't order it. He has asked or
4 directed Ms. Fox to order it.

5 I guess I'm not sure I'm also understanding your
6 question. Are you asking whether or not he has directed that
7 additional drugs be purchased that are not in the protocol?

8 MR. LEVENSON: Well, I guess I should be more specific.

9 THE COURT: Because there's specific conversations
10 about -- about different drugs and what's available or not
11 available, which I think it's fair then for you to be able to
12 ask a question about it. It's just not clear to me what the
13 nature of your question actually is.

14 Ms. Fox goes through and so does Director Daniels about
15 what drugs were available or not available. And, in fact,
16 Mr. Gilmer's response talks about certain drugs not being
17 available. If you wanted to seek clarification about that
18 aspect of what was disclosed, you certainly can do that.

19 But I'm not really sure of the relevance of that,
20 Mr. Levenson. So, perhaps, you could rephrase the question, and
21 then before Director Daniels answers, we can -- we can look at
22 that.

23 MR. LEVENSON: Let me pose another question.

24 BY MR. LEVENSON:

25 Q. You stated in your June 2021 declaration that with regard

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1 to -- I'm going to switch to pentobarbital -- it could not be
2 purchased through NDOC through, and you say, "ordinary
3 transactions." Can you define what an ordinary transaction
4 means?

5 **A.** Yes, an ordinary transaction is similar to how we would
6 routinely purchase any of our pharmaceuticals.

7 It's important for us to have a standardized process
8 and that we follow the process. We use an online pharmacy, not
9 exclusive to maybe some -- some items, but regularly speaking,
10 we utilize an online pharmacy that we have a contract with.

11 THE COURT: Bless you.

12 THE WITNESS: And all of our processing -- well, the
13 vast majority of our processing is done through that portal
14 because we're transparent. This is the way the process works,
15 and if there are -- the public as well as everyone else has the
16 right basically to see this information. And we -- it's public.
17 There it is. This is where we purchase. This is who we
18 purchase through. This is our contractual obligation.

19 And I think that transparency is important. I'm not
20 here to tell you that wasn't the case prior to my arrival, but I
21 can speak for me that we have a standardized methodology of
22 procuring our pharmaceuticals is important and it's also very
23 cost effective or much more cost effective than trying to
24 piecemeal it any other way.

25 BY MR. LEVENSON:

PATRICIA L. GANCI, RMR, CRR

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1 Q. Is that the way you can procure lethal injection drugs,
2 through the Cardinal Health portal?

3 **A.** I am not aware of other ways to do such as that question
4 would be more appropriate for my pharmacy director as I am not
5 knowledgeable as to their normal -- to processes outside of the
6 bare minimum of the normal way they procure their
7 pharmaceuticals.

8 Q. Are you able --

9 THE COURT: Hold on a second.

10 MR. LEVENSON: Sorry.

11 THE COURT: It was my understanding based upon your
12 declaration and your testimony today, Director Daniels, that
13 based upon your own policy under your administration it was not
14 and is not your intent to purchase drugs for the execution
15 protocol outside of the process that you've established through
16 your online pharmacy, Cardinal. Is that correct?

17 THE WITNESS: It is -- Your Honor, it is my position
18 that we order drugs the way we always order any other thing
19 else. Now, of course there could be a potential for specialized
20 drugs --

21 THE COURT: Right.

22 THE WITNESS: -- someone with a rare disease or what
23 have you. But, typically speaking, we have a routine processes.
24 And I do not want there to be deviation unless of course it's
25 medically necessary -- necessitated. At which point in time my

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1 Director of Pharmacy has the authority to purchase drugs. I
2 mean, she's the expert.

3 THE COURT: And in this case related to the drug
4 protocol, you directed her to purchase them through the
5 ordinary --

6 THE DEFENDANT: Yes.

7 THE COURT: -- process of Cardinal. Is that correct?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: All right.

10 BY MR. LEVENSON:

11 Q. Director Daniels, you just mentioned specialized drugs. Are
12 you able to compound drugs or can you find a place to compound
13 drugs?

14 MR. GILMER: Objection, Your Honor. I'm just -- I
15 guess it goes outside the scope of the -- of the questions the
16 Court said they wanted to address today. And I'm not -- and
17 that's not something --

18 THE COURT: Sustained. I also think that's a more
19 appropriate question for Ms. Fox, honestly. I think that's not
20 within Director Daniels' knowledge or expertise, and that's
21 clear. He's been very clear about that.

22 BY MR. LEVENSON:

23 Q. Director Daniels, would you prefer to use pentobarbital over
24 the other drugs you currently have in your protocol if you were
25 able to get it?

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1 **A.** I have nothing -- I have no preference to use any other drug
2 than what has been approved and I've established to put into my
3 protocols.

4 **Q.** Have you ordered any drugs since June 2nd, which was the
5 last invoice we received?

6 **A.** I don't understand the scope of your question. Do you
7 mean --

8 **THE COURT:** As far as you're aware, has there been any
9 drugs that are identified in the protocol that have been ordered
10 since June 2nd?

11 **THE WITNESS:** I don't recall, but when they make their
12 purchases and how -- that's not routinely something that comes
13 to me. So I think that question would be more appropriate for
14 my pharmacy director, Ms. Fox.

15 **BY MR. LEVENSON:**

16 **Q.** What, if anything, did you do between June 2nd and June 9th
17 with respect to finalizing the execution protocol?

18 **MR. GILMER:** Objection, Your Honor, to the extent that
19 that calls into the deliberative process privilege.

20 **THE COURT:** Sustained.

21 **BY MR. LEVENSON:**

22 **Q.** Do you intend to make further purchases of execution drugs
23 from Cardinal Health between now and July 26, 2021?

24 **MR. GILMER:** Objection, Your Honor. It calls for an
25 incomplete hypothetical, and also relevance with regard to the

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1 scope of the Court's questions.

2 THE COURT: Actually, I don't believe that is the case,
3 Mr. Gilmer. I'm not sure whether or not Director Daniels again
4 is the appropriate person to ask because it's not clear to me
5 that he's aware of which drugs would need to be ordered or not.

6 Let me ask this question, Director Daniels. Have you
7 given Ms. Fox any direction as to whether or not she should
8 purchase, if they become available, any additional supplies of
9 any of the drugs in the execution protocol?

10 THE WITNESS: Your Honor, we have not had that
11 discussion.

12 THE COURT: Okay.

13 MR. LEVENSON: Just a moment, Your Honor.

14 (Plaintiff's counsel conferring.)

15 MR. LEVENSON: Nothing further, Your Honor.

16 THE COURT: Mr. Gilmer.

17 MR. GILMER: I have very brief questions, Your Honor.

18 THE COURT: Okay.

19 MR. GILMER: Thank you.

20 EXAMINATION OF CHARLES ALVIN DANIELS

21 BY MR. GILMER:

22 Q. Director Daniels, in response to the Court's question
23 earlier, the Court asked you a question pertaining -- I believe
24 it was the Court. It may have been Mr. Levenson. I guess
25 that's the problem with me deferring, but I still want to be

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1 able to do them all in one shot -- asked if you had a preference
2 between using the fentanyl versus the alfentanil or the
3 potassium chloride versus the potassium acetate. Do you recall
4 that question being asked by the Court?

5 **A.** Yes, I do.

6 **Q.** And you gave the Court an answer as to the preference would
7 be the fentanyl or the potassium chloride, if I recall your
8 answer correctly. The record will reflect. Was there a reason
9 why those were your preferences as opposed to the ones that are
10 listed as alternatives?

11 **A.** Yes.

12 **Q.** And what is that reason?

13 **A.** Yes. The expiration date, that's why I decided. Both
14 drugs, whether it be fentanyl or alfentanil, based on my
15 understanding would both be very similar in their efficacy. So
16 that was why. We already had obviously the fentanyl in our
17 inventory. It's getting old, and we can either use it or we
18 could -- it will expire and we'll have to destroy it. So that
19 was the factor, nothing more.

20 MR. GILMER: Thank you. I have no further questions
21 for Director Daniels at this time, Your Honor.

22 THE COURT: Mr. Levenson.

23 MR. LEVENSON: No follow-up.

24 THE COURT: Mr. --

25 MR. GILMER: Your Honor?

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1 THE COURT: -- Pomerantz and Ms. Ahmed, do you have any
2 questions that you would like to ask?

3 MR. POMERANTZ: No, sir. Thank you.

4 MR. GILMER: Your Honor, I do have one point of
5 clarification because you did say you were going to take
6 argument pertaining to the stay. I have some other questions
7 for Director Daniels that could have to do with other issues
8 pertaining to the stay, such as irreparable harm to NDOC and so
9 on and so forth, but those were not questions that the Court
10 delved into. So I didn't know if that was something you would
11 like me to ask now or not.

12 THE COURT: Well, I guess it depends upon what the
13 issue -- the questions are. And so, perhaps, you could --

14 MR. GILMER: Certainly.

15 THE COURT: -- be more specific, Mr. Gilmer.

16 MR. GILMER: Certainly, Your Honor. So one of the --
17 one of the balancing tests, as you know, under the Winter
18 factors is the balance of equities and irreparable --
19 irreparable harm for others. One of the areas I would like --
20 that might be important to the Court in determining that
21 question is types of costs and operations and so on and so forth
22 with regard to what NDOC has to do to put forward an execution
23 and what steps may or may not have already started based upon an
24 execution date of the week of July 26th, how much of that would
25 be -- have to be redundant and have to be done again if a stay

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1 was issued. Those types of questions would be questions that I
2 think might be helpful to the Court if the Court is interested
3 in that.

4 But, again, I didn't want to ask it in this context
5 because the Court's initial questions were very limited. But
6 those would be the areas of questions and inquiry.

7 THE COURT: If you'd like, if you think that's part of
8 the record that would be appropriate, you can ask those
9 questions.

10 MR. GILMER: Okay. Thank you, Your Honor.

11 BY MR. GILMER:

12 Q. Director Daniels, with regard to moving into the -- or
13 completing an execution, we've talked a lot about the drugs and
14 the procurement of the drugs and the drugs that would be used to
15 carry that out. What other moving parts do you have to do as an
16 entity, the Department of Corrections, to ensure that an
17 execution can be carried out effectively and efficiently?

18 A. One of our primary costs of course is ensuring we have the
19 appropriate staff available, the appropriate trained staff
20 available. We have to bring staff from other locations to their
21 location to Ely State Prison. We have to train them. They're
22 in a new environment. We're not only dealing with security
23 within the interior of the prison, we're also dealing with the
24 exterior.

25 We are also having to deal with coordination with state

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1 and local and county law enforcement officials. We have to
2 bring all of them in, and we all have a role in preparing for
3 this event. If you could imagine, it would be like an inaugural
4 event. There's a lot of moving pieces no one ever sees, but we
5 have to be prepared.

6 And so then in addition to that, all of the contractual
7 issues that if we sign a contract, we want to move forward. The
8 individuals that we deal with, you know, they're not on
9 retainer. They -- they need to know when we're going to move
10 forward with the process, and we have to bring them in. We have
11 to give them training. People that were previously available
12 can no longer avail themselves because maybe they have an
13 individual in their family that's being married, they go on
14 vacation, they get ill. So we have all of these moving parts.

15 And we want to ensure that we're also available to the
16 courts, and we still have to deal with grievances and such that
17 could potentially delay what we're doing. And there is a cost
18 factor to it, and the cost factor is significant the more we
19 move the date back.

20 Q. And is --

21 THE COURT: Okay. Well, hold on just a moment,
22 Mr. Gilmer.

23 Have you finalized any contracts for any of the experts
24 in terms of the date at this point in time?

25 You just mentioned that there are contracts that have

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1 to be signed.

2 THE WITNESS: Yes, Your Honor. I don't know if they've
3 been signed. I do -- I am aware that some have been prepared.

4 THE COURT: Right.

5 THE WITNESS: And there's been communication with some
6 of the subcontractors, which I really don't want to go into for
7 safety and security reasons.

8 THE COURT: Well, I appreciate that.

9 THE WITNESS: So I know that we've moved forward --
10 we've communicated with various individuals. With that, we've
11 also had to build in, I believe I testified to this before,
12 redundancy. If this doesn't work or this person becomes
13 unavailable, then who can come because we can't stop the -- the
14 processes if the person that we had initially contracted out
15 with can't show or we continue to delay the process.

16 So there are many issues that are impacted by the
17 contractual basis as well as just the ordinary cost that --

18 THE COURT: What I'm trying to figure out, Director
19 Daniels, is how much of that has actually been at this point
20 finalized. It sounds to me as if at this point you have
21 indicated to experts the possible date, but that that date may
22 not be set. And you've started conversations about security
23 issues, but that -- all of those moving parts have not been
24 finalized yet in anticipation of the possibility that this could
25 be moved. Is that correct?

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1 THE WITNESS: My response is I don't deal with the
2 procurement piece, but I've had discussions about the
3 procurement piece. And the idea is that we've got to get this
4 done. Let's make sure that we validate/verify who can come.
5 But -- and I am need -- I need to be apprised of are we good, do
6 we have someone available, do we have redundancy. And so as we
7 get closer, that would be a little bit more appropriate.

8 THE COURT: So what you're saying to me is that if I
9 were to issue a stay, and I'm not saying that I would, the
10 sooner I did that the better in terms of cost because it's more
11 expensive the closer we are to the execution date.

12 THE WITNESS: What I'm saying is I don't know what's
13 been signed so far.

14 THE COURT: No. Okay, but that's not my question.

15 THE WITNESS: Yes.

16 THE COURT: Is it more expensive if a stay is issued
17 closer to the execution date?

18 THE WITNESS: (Pause.) I would say in general, yes.

19 THE COURT: Okay. And in this case, as I understand
20 it, you haven't yet, as far as you're aware because you said you
21 aren't in procurement, signed any final contracts as it relates
22 to the execution date with experts. Is that right?

23 THE WITNESS: I am not aware of the actual signing of
24 the documents. I am aware that my people have had contact with
25 the individuals, but those would be my procurement people who --

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1 THE COURT: Right.

2 THE WITNESS: -- communicate. And I'm aware that this
3 has been moved well down the road. It's beyond discussion, but
4 whether or not they've actually signed as of today, I don't know
5 and I don't want to give bad information to the Court.

6 THE COURT: No, and I understand that.

7 As far as you know, is there any physical reason why,
8 for example, the execution date could not be moved three or four
9 months?

10 And what I mean by that is, has there been equipment
11 moved to a particular location as far as you know or something
12 about what has happened so far that would be so substantial that
13 you couldn't perform the execution if the date were moved, say,
14 three to four months?

15 THE WITNESS: To my knowledge, the primary cost we've
16 incurred is having individuals from some of our other facilities
17 already go up and do some training with their staff, our
18 specialized individuals. They've gone up and they've met with
19 the individuals up north. I don't want to get into the
20 particulars --

21 THE COURT: I'm not saying that --

22 THE WITNESS: -- there are many individuals up there.
23 This is the footprint. This is your responsibility. This is
24 how this works. So some of that has already taken place, but
25 once again we're going to continuously --

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1 THE COURT: Right.

2 THE WITNESS: -- do that. We're going to continue to
3 train and bring people up so that if the event is to occur and
4 there's nothing else stopping it, we can do it and we can do it
5 safely and expertly as one should expect from a corrections
6 agency.

7 THE COURT: But that training would be used whether or
8 not the execution took place in July or maybe three or four
9 months later; it's the same training, isn't it?

10 THE WITNESS: The training would be the same, but the
11 personnel may change obviously because of shift changes,
12 individuals retire, individuals get on our specialized -- for
13 instance, our -- our CERT teams, things of that nature. You'll
14 have that normal changeover. People retire. You would have
15 that, but the training would stay the same because we do have an
16 established protocol and we're just working to be more
17 efficient.

18 The only thing that -- well, not the only thing, but
19 there would be some organizations who may not be able to make
20 some of the training because of their staffing shortages,
21 whether it be state police, whether it be county sheriffs, or
22 someone else. So there would be some moving parts. We would
23 manage it. But in terms of the cost, right now I'm telling you
24 the primary issue is transporting people up, having them stay
25 overnight in hotels, and so on.

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1 But as we get a little bit closer, then we may have
2 some contractual issues.

3 THE COURT: All right. Perfect. Thank you, Director
4 Daniels.

5 Go ahead, Mr. Gilmer.

6 BY MR. GILMER:

7 Q. But regardless of the contractual issues, Your Honor --

8 MR. GILMER: And thank you, Your Honor, for your
9 questions.

10 BY MR. GILMER:

11 Q. Putting aside the contractual issues for a second because,
12 as you said, you're not sure of the process of where those
13 stand. The other parts and the other discussions, you talked
14 about moving parts with training and so on and so forth, those
15 are costs that have already been expended by the Department of
16 Corrections. Is that correct?

17 A. Some have been expended, and we can certainly ensure there
18 will be additional costs I presume. And then if we push it back
19 further, there will be additional costs, yes.

20 Q. And the Court asked this question and it was an important
21 one about whether or not that training can be reused. Is it
22 your understanding based upon the protocol even if that training
23 has occurred, it's very possible that the training might have to
24 occur again based upon certain procedures set forth in the
25 protocol?

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1 MR. LEVENSON: Objection. Leading, Your Honor.

2 THE COURT: That's all right. I'll allow it.

3 THE WITNESS: Yes. What I'm saying is is that even if
4 we train now, it's not a one-time deal. We have to continuously
5 change. We have to ensure that we have the right personnel at
6 the right time. We still have staff, for instance, that have to
7 take vacations. We still have staff that are in all sorts of
8 predicaments in their personal lives. And we need to ensure
9 that we can get the right people at the right time with the
10 right training.

11 In many respects if I'm pulling in staff from my
12 southern facilities or my northwest facilities, which I will
13 have to do, they may not always be the same individuals.

14 THE COURT: As far as I understand it, Director
15 Daniels, though, from what your testimony was, there hasn't been
16 any on-site training where there have been staff who have
17 actually been transported at this point in time. Is that
18 correct? As far as you know.

19 THE WITNESS: As far as I know. We did have training
20 scheduled probable -- I'm thinking roughly two weeks ago, but I
21 was on the road. So I'm not here to tell you -- I mean, I was
22 everywhere. I'm not 100 percent sure if they actually went.

23 THE COURT: Right.

24 THE WITNESS: So I don't want to give you -- say an
25 affirmative yes or no. But, clearly, we are planning for it.

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1 And we've had our special operations people communicate, get
2 their teams together. I just can't say for sure whether they've
3 gone or not, but ...

4 THE COURT: No, that makes sense. I appreciate that.
5 Thank you.

6 Go ahead, Mr. Gilmer.

7 MR. GILMER: Thank you, Your Honor.

8 BY MR. GILMER:

9 Q. And I know you were not present as director of NDOC during
10 the Scott Dozier execution, but have you had an opportunity to
11 determine how much costs were expended with regard to training
12 and so on and so forth pertaining to the Scott Dozier execution?

13 A. Yes. Upon my review, I believe it was roughly \$180,000, and
14 I am pretty sure in saying that that was probably low.

15 Q. Yes.

16 A. And then there would have been -- if the -- if Mr. Dozier
17 had not killed himself, there would have been additional costs,
18 if we had actually brought everyone up on the day that it had
19 been scheduled. So that -- that \$180,000 price tag is most
20 assuredly low, and I can't imagine it being in that realm in the
21 future.

22 Q. So you believe it would be more than that this time.

23 A. I believe it will be substantially more.

24 Q. And do you believe if the Court were to stay the execution
25 that's currently set -- that we anticipate will be scheduled for

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1 July 26 if the execution warrant is issued by the Court, that
2 that sum of money, over \$180,000, would also be even more so
3 because of a stay being entered by the Court?

4 **A.** Yes.

5 THE COURT: Why?

6 THE WITNESS: Simply because ...

7 THE COURT: If all of this training has to occur
8 anyway, if no one's been transferred up there anyway, and they
9 -- why would there be an additional cost?

10 THE WITNESS: I'll give you an example. So let's say
11 between now and July 26, we may run our teams up there three
12 times. And we're pulling teams from all of these other
13 facilities, meaning we're --

14 THE COURT: Okay. Let me give you -- let me help you
15 with this. If I issued the stay today --

16 THE WITNESS: Yes.

17 THE COURT: -- why would there be an additional cost?

18 THE WITNESS: Because I would still continue to train,
19 not necessarily as close an interval, but we still have to
20 continue to run people up there.

21 THE COURT: No, I understand that. Why would that stay
22 add to the cost versus what you would to pay anyway? That's
23 what I'm trying to understand, Director Daniels, which is not --
24 some of this \$180,000 you would have had to expend anyway,
25 right. The training for the staff, the preparation, the

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1 rehearsals, that's all -- those are all costs that NDOC has to
2 go through regardless of the day, correct?

3 THE WITNESS: We would have to go through that
4 training, but I can't attest to what Director Dzurenda had his
5 people do then. But this is one of my specialties, and I know
6 that my protocols are different than what he had and mine
7 require more staff, so --

8 THE COURT: But, again, let me try to be specific. I
9 understand what would be required based upon your protocol. The
10 question is you said that you thought it would cost more if I
11 issued a stay today. And I want to know exactly which costs
12 specifically you believe would be additional apart from what you
13 already have to expend for the protocol.

14 THE WITNESS: Yes. So if the date were moved back, so
15 let's say right now we have three operations and, you know, to
16 go up and train and to work with all of the other agencies. So
17 not only -- I still need to get those folks up there and get
18 them in tune to what's going on. I would literally never have
19 the same individuals, not completely. So we still have to
20 continue with moving that forward.

21 And then -- so the date goes further out. So instead
22 of maybe having three, we would have five. Let's just say we
23 were to use 30 -- 30 days. We would increase the interval, but
24 then in addition to that the one cost that the former director
25 did not incur was actually having people go up two -- two --

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1 one, two, three days prior to actually set up because it's
2 happening.

3 THE COURT: Right. But, Director Daniels, you said
4 that you -- but no one's already gone up there yet. You told me
5 that as far as you know no staff have gone up there. No actual
6 meetings have taken place. None of that has happened. So I'm
7 trying to understand how it is that you know that the costs
8 would be more if none of that's actually happened yet.

9 THE WITNESS: Well, for me it's -- it's -- it's fairly
10 easy to see that if we were still going to have to bring
11 individuals up to train --

12 THE COURT: Right.

13 THE WITNESS: -- they're getting used to a new
14 protocol --

15 THE COURT: Right.

16 THE WITNESS: -- as opposed to maybe what Director
17 Dzurenda had. I believe my intervals of training would be -- I
18 would have additional training and more specialized training
19 than what he would have. However, we still need to bring
20 individuals up to understand where they're working. Many of our
21 staff have never been in that facility. We still have to go
22 through -- through that entire processes.

23 And then as we -- for instance, if we -- right now we
24 haven't incurred a lot, but if we get close to the execution
25 date, the issue would be then we would already have people

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1 traveling and getting --

2 THE COURT: And I understand that part of it.

3 THE WITNESS: Yes.

4 THE COURT: I guess really it's just about today. I'm
5 not saying and I think you've been fairly clear, Director
6 Daniels, that if the Court were to issue a stay, let's say, a
7 week even before the execution date, there could be substantial
8 and significant costs based upon what you've described.

9 THE WITNESS: Yes.

10 THE COURT: But if I were to issue a stay today, it's
11 not clear to me that there would be any additional costs because
12 the actual costs associated with the finality of the date have
13 not been incurred yet as it relates to the major costs you
14 talked about, which is the transfer of the personnel and some of
15 the, sort of, on-site rehearsals. As far as I understand, that
16 hasn't happened yet.

17 And so what I'm trying to understand is why there would
18 be any additional costs, substantial costs at all, if the Court
19 were to issue a stay today. Because I do understand your
20 reasoning as it relates to week before, but why if I were to
21 issue a stay today would there be additional cost?

22 MR. LEVENSON: Your Honor, I'm sorry. It looks like
23 Mr. Floyd is holding something that was -- he wasn't holding
24 before. We just want to make sure he can hear.

25 Okay.

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1 THE COURT: Let the record reflect -- oh, yes. He just
2 said thumbs up in the image which suggests to me that he can
3 hear. So I appreciate that. Okay.

4 Go ahead, Mr. -- Director Daniels.

5 THE WITNESS: All right.

6 If we were planning a military operation, let's just
7 say we had to prepare and we had 90 days to prepare. So there
8 would be training in advance, but if that -- that act -- that
9 actual date were pushed back even 30 days or 60 days, well,
10 there would just be more intervals in training for
11 effectiveness, efficiency, more individuals, people who had not
12 been there. You would have more of that and more specialized
13 training.

14 In addition to that, then, we would also have to work
15 with the local law enforcement. Who do they have available?
16 Who was available last time? Who's been trained? Do they know
17 how to set up in our command center? Can we communicate? All
18 of those things that you need to do every time you change
19 personnel. Because if you're changing the launch date, then
20 you -- then you would have to actually plan it all out, but you
21 don't stop your current training.

22 I could extend the intervals if I -- if I knew what the
23 actual date would be moving out or whether it would be a 30 or
24 60 day. I don't know or pretend to know how you would actually
25 move forward with the stay if you were inclined to do so.

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1 But we can't stop our readiness and say, "Well, let's
2 just wait and not do anything until then," because if it comes
3 on short notice, then we're not properly prepared.

4 THE COURT: Well, let me ask you this question related
5 to costs. Isn't a lot of the cost also driven primarily by what
6 drugs would be available which you won't know until a week
7 before the execution?

8 THE WITNESS: From my understanding we've purchased the
9 drugs that we have on hand and have indicated that we're going
10 to use. So we have the drugs on hand.

11 THE COURT: Okay. Well, maybe I misunderstood your
12 testimony because I thought that you had testified earlier that
13 there might be some drugs that might expire before the current
14 execution date of July 26th. And --

15 THE WITNESS: Yes, some may, which is why we have the
16 redundancy built in with the alternative drugs. So, for
17 instance, with the fentanyl and then the al -- alfentanil,
18 that's why we have that. Because if fentanyl were to expire,
19 even though we didn't buy everything in one batch, but if some
20 of it were to expire, we can use the alternative. And because
21 that's why we have it.

22 THE COURT: Right. And so if I'm understanding what
23 you're saying is a lot of the costs then is associated with
24 personnel issues and expert issues in terms of travel and
25 training for the date. Is that right?

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1 THE WITNESS: Yes.

2 THE COURT: Okay. All right. Now I think I understand
3 that now. Okay. Thank you.

4 Go ahead, Mr. Gilmer.

5 MR. GILMER: Thank you, Your Honor. And, Your Honor,
6 to the extent the Court is interested in that as well, there's
7 some information probably in the confidential portion of the
8 execution protocol that might help the Court understand the
9 reason why that is important based upon timelines and when
10 things have to be done as well.

11 THE COURT: Okay.

12 MR. GILMER: So ...

13 MR. LEVENSON: And we'd like that as well, Your Honor.

14 THE COURT: You don't have it?

15 MR. LEVENSON: We do not.

16 THE COURT: Okay. All right. Well, we'll -- when we
17 get to that portion of it, we can talk about what's available
18 and what's not available.

19 MR. GILMER: Yeah, your previous order, Your Honor, was
20 to provide it to the Court, but not to provide it to plaintiff's
21 counsel as of yet.

22 THE COURT: Okay. Again, I just wanted to make sure we
23 have on the record what has and hasn't been provided. But go
24 ahead, Mr. Gilmer.

25 MR. GILMER: Thank you.

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1 BY MR. GILMER:

2 Q. So I think we've -- I think we've spoke a lot about
3 training, but just to sum up. Some training has occurred.
4 Additional training will happen. Is that correct?

5 A. Yes, we've had training with the staff that are currently at
6 that facility. That I know because I've been a part of some of
7 that. But in addition to the other teams, for instance, some of
8 the teams have had training at our headquarters in the southern
9 region with our specialized training. But the on-site training
10 up at Ely State Prison, I'm not sure if they actually took their
11 teams up yet for the first time. But I am aware that we brought
12 people in from around the state to our southern facility to
13 discuss how we're going to disseminate our -- our personnel.

14 Q. And do you believe that training would have to be repeated
15 if the training -- if it doesn't occur in July 26th?

16 A. Yes.

17 Q. So that would be additional costs expended even if the stay
18 was entered today.

19 A. Yes.

20 (Pause.)

21 MR. GILMER: I have no further questions at this time,
22 Your Honor. Thank you.

23 THE COURT: Thank you, Mr. Gilmer.

24 Mr. Levenson.

25 MR. LEVENSON: Thank you.

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1 EXAMINATION OF CHARLES ALVIN DANIELS

2 BY MR. LEVENSON:

3 Q. If we could start with training, you said some costs have
4 been expended so far in training. Which costs specific --
5 specifically have been expended in training so far?

6 A. Some of the costs that have been expended is individuals
7 traveling from one location to another to be assembled as a
8 team. Additional equipment that some of our individuals will
9 wear that we previously don't have or we needed to get
10 additional equipment. I don't want to get into my deficiencies
11 in the agency, but we had to buy additional less lethal to be
12 able to deal with it. And I really am -- I don't want to delve
13 into the sources, methods, techniques, and tactics because
14 that's different. That's a total different ball game. And I
15 don't want to publicly disclose that. And I think after the
16 Court sees some of the information that Counsel Gilmer was
17 speaking to, I think that would come to light very quickly, some
18 of that additional information.

19 THE COURT: Oh, I've seen it. It's in the redacted
20 version of the execution protocol. So I'm aware of that. So --

21 THE WITNESS: Yes, Your Honor. So I'm very concerned
22 about getting into anything other than we have incurred
23 additional costs, and most of it has been either equipment
24 and/or bringing people together to do training. Some of it up
25 at Ely which even the local warden and/or the other wardens may

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1 have done and the deputy director of operations may have ordered
2 that I wouldn't necessarily be privy to all of the details.

3 But we certainly have to bring people together to say,
4 "Hey, we now have a protocol. This is the game plan. This is
5 what we're going to do."

6 So there's a lot of moving parts, and we're not the
7 only agency involved. Every single time we talk about training,
8 we're also talking about bringing in the sheriff's, state
9 police, and so on because they have to work in conjunction with
10 us.

11 BY MR. LEVENSON:

12 Q. Have the drug administrators begun their training?

13 A. I don't know.

14 Q. Who would know?

15 A. (Pause.) I believe the warden at that facility would know.

16 Q. And you said that you weren't there two weeks ago when a
17 training was scheduled. Who would know if that training took
18 place?

19 A. The warden of that facility and the deputy director of
20 operations.

21 Q. And who is that?

22 A. The deputy director of operations is Brian Williams --

23 MR. GILMER: Can we -- oh, I'm sorry.

24 BY MR. LEVENSON:

25 Q. Because you have a new protocol, wouldn't more training be

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1 beneficial to run a smoother execution rather than less time?

2 **A.** Additional training and effective additional training would
3 be more beneficial, not just the sake of training.

4 **Q.** In your training have you conducted any run-throughs?

5 **A.** I've been a part of a run-through, if we're talking about
6 the same thing, where we look at the -- where we looked at the
7 old protocols. I wanted to be apprised of it. We ran through
8 it step by step. And then I took that information, and -- and I
9 used that as a starting point to delve into some of the further
10 changes.

11 **Q.** Have you done any run-throughs with the new protocol?

12 **A.** I have not done any training with the new protocols.

13 **Q.** And when do you expect that to start?

14 **MR. GILMER:** Objection, Your Honor. I think that that
15 could get into safety and security concerns to raise that --

16 **THE COURT:** Well, he's not identifying which aspects of
17 the training and he's gone through the timing of it. So I think
18 it's a fair question without identifying which parts of that
19 specific training. He can talk about it generally.

20 **THE WITNESS:** I'm positive within the next two weeks,
21 probably the week, but I have a lot of moving parts as well. I
22 have to attend court on a regular basis. I have a lot of things
23 I do. And some of them they want to deal with me.

24 However, my -- my specialty teams and my wardens that
25 are going to be responsible have already started their training.

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1 BY MR. LEVENSON:

2 Q. How many run-throughs are you anticipating, run-throughs of
3 the protocol?

4 A. I don't know the answer to that. A lot of it will be based
5 on our ability to get enough people at the right place at the
6 right time. And -- and then also our comfort level that that
7 warden may have with the ability to do the job and do it well
8 taking into considerations not only the inside, but also the
9 outside of the facility.

10 Q. So Warden Gittere may be a better person to ask that
11 question of?

12 A. Warden Gittere would be better to ask that question in terms
13 of the operational phase and what's going on on his property,
14 but we have other individuals. For instance, he has a boss,
15 which is the deputy director of operations, who would delve more
16 into getting the other individuals up there and the training,
17 whether the training be done at our headquarters or at a
18 training center or somewhere else.

19 So he -- he can't -- and meaning Warden Gittere can't
20 independently order individuals from other institutions, but
21 Director -- Deputy Director Williams can. And of course I
22 retain that ability as well.

23 Q. Turning to contracts. Who would know about which contracts
24 have been entered into since you don't seem to have that
25 information?

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1 **A.** I could reach out or my deputy director of -- we have an
2 acting -- of services would be the individual that is in charge
3 of procurement. And that individual and some of the folks in
4 procurement would be better know -- who would better know than I
5 would know where we are today.

6 **Q.** And who is that person?

7 **A.** Well, my acting deputy director of services is James Jones.

8 **Q.** Do you know if you've entered into any contracts regarding
9 specifically the execution protocol with EMTs? I remember you
10 mentioned EMTs in your last testimony.

11 **A.** In my last testimony I mentioned that there's several
12 individuals that we would have to, and I -- and those
13 individuals are named by position, but whether or not we have
14 those locked in right now, I don't know. Once again, that's a
15 procurement issue.

16 **Q.** What about an attending physician? Have you contracted with
17 an attending physician?

18 **A.** Once again, to any questions regarding contracting, I
19 don't -- I'm never there. I don't know, but I do have
20 individuals on my team that are responsible for it.

21 **Q.** Have you invited an attending physician yet?

22 **A.** I would not be the individual inviting the attending
23 physician -- physician.

24 **Q.** Who would?

25 **A.** I would, once again, have to reach out and communicate with

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1 my deputy director of services, who I'm sure will have to
2 concert -- contact others to make that work. I'm just not a
3 part of that process. I'm advised of that process.

4 Q. In your declaration you talked about making sure that the
5 execution protocol was done in a constitutional way. How do
6 costs factor into your determination that this is a
7 constitutional execution?

8 A. Well, costs are important. It's the taxpayers' money.
9 However, I will not -- I -- I have to be responsible for the
10 taxpayers' dollars, and I'm expected to be efficient yet
11 effective with understanding how that works. Nonetheless, I'm
12 going to move forward with what I'm required to move forward
13 with and executions are a part of my statutory responsibilities,
14 but it is always my goal --

15 THE COURT: Do you have a position one way or another
16 about the actual date itself, Director? Does it matter to you,
17 to NDOC? Other than preparation --

18 THE WITNESS: Well --

19 THE COURT: -- do you take a position about whether the
20 date should be July 26th versus September 26th?

21 THE WITNESS: My response is I want to be efficient as
22 well as effective and execute the will of the people.

23 THE COURT: But I'm asking you a specific question.

24 THE WITNESS: But --

25 THE COURT: Do you have a position about the date,

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1 whether it's July 26th or September 26th, for example? Those
2 are just two dates that I'm giving.

3 THE WITNESS: I will -- I will give an answer, but
4 I'm -- I would like to preface that first.

5 THE COURT: Okay. Go ahead.

6 THE WITNESS: All right. So the preface is this.
7 While we're talking nice and neatly about what's going on with
8 Mr. Floyd and the case and all of those things, I also have to
9 deal with the -- the issues of the community at Ely and all of
10 the other individuals on death row, and all the things that
11 happen that most people would never know about their units and
12 how these -- it's almost continuous. It's never going to stop.

13 Having said that, I take that into consideration, but
14 personally I don't have an issue on the date. My job is to be
15 prepared for whatever that date is. And so I prepare for each
16 event as if, all right, so we have a date, as far as I know.
17 Unless that's changed, we're going to prepare as if we're going
18 to have to follow through with the execution, and we will be
19 prepared.

20 THE COURT: So you're not taking on behalf of NDOC any
21 position about a particular date being a date that NDOC prefers.

22 THE WITNESS: I -- I have a preference to have it
23 sooner rather than later, but --

24 THE COURT: Why?

25 THE WITNESS: Well, we're preparing. We're ready --

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1 we're --

2 THE COURT: But let me ask you this question.

3 THE WITNESS: But --

4 THE COURT: Let me ask you this question.

5 THE WITNESS: Yes.

6 THE COURT: You received approximately three months to
7 be able to study this.

8 THE WITNESS: Yes.

9 THE COURT: Why shouldn't Mr. Floyd receive that same
10 time? Why would your preference be that he not be given that
11 amount of time?

12 THE WITNESS: Your Honor, I don't want to delve into
13 the --

14 THE COURT: Well, no, but you said you had a
15 preference, sooner rather than later.

16 THE WITNESS: I understand.

17 THE COURT: So -- based upon preparation. My question
18 to you is you obviously have taken a position, it seems, as to
19 the date. Is it just based upon preparation? Because you have
20 had three months to prepare.

21 THE WITNESS: I am making my position based on the fact
22 that this has a long-term effect. It's costly. The preparation
23 phase we can't seem to get out of. So I would like to move
24 forward with it.

25 But I just want to ensure I'm being very clear on this.

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1 The actual date is up to the Courts and --

2 THE COURT: Well, I understand that. What I'm trying
3 to understand is you went through the process of investigating
4 these drugs. So that process is important to me to understand
5 how long it takes to understand their effects, right? It took
6 you approximately, it seems to me, three months at least to be
7 able to fully go through this process.

8 Is there any reason you have to believe that Mr. Floyd
9 would be able to do that faster, based upon your experience?

10 THE WITNESS: (Pause.)

11 MR. GILMER: Your Honor, I'm going to object to that
12 question.

13 THE COURT: And that's fine, but I'm going to direct
14 that he answer that question. I'm not asking him to give a
15 personal opinion. He's gone through this process. He
16 understands what it took. I'm asking him if he has any reason
17 to believe, based upon what he went through, that Mr. Floyd
18 would be able to do it sooner.

19 MR. GILMER: Can I provide my reason for the objection
20 before the answer?

21 THE COURT: Sure.

22 MR. GILMER: Thank you, Your Honor.

23 I object to that question because I believe it is
24 seeking facts not known to Director Daniels because Director
25 Daniels does not know all of the resources available to the

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1 Federal Public Defender's Office and to Mr. Floyd. So you're
2 asking him to base it on a hypothetical based upon one
3 individual and not the entire Office of the Federal Public
4 Defender, who knows much about these cases. And I think it is
5 an inappropriate question to ask him with regard to what his
6 counsel and -- and expertise and abilities that the FPD's office
7 who deals with these cases throughout the country all the time
8 is aware of.

9 THE COURT: I appreciate that, and so perhaps I can
10 clarify this. Because, certainly, I'm not asking him about
11 Mr. Floyd specifically. Director Daniels has indicated that he
12 has some specialty as relates to this. He is a career
13 corrections administrator. He went through what he has
14 described as a very deliberate process, which I appreciate him
15 being candid about this. So he's aware of the information as it
16 relates to that.

17 Right. And his process is important in terms of
18 understanding how long it takes to be able to fully appreciate
19 the impact of these drugs. Right. Certainly, NDOC has
20 substantial resources and certainly more resources than the
21 Federal Public Defender's Office, but I'm not asking him to
22 opine about Mr. Floyd specifically.

23 But I want to understand, Mr. Gilmer, based upon his
24 experience having gone through this how long he thinks it would
25 take. Because he took approximately three months. I want to

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1 see whether or not there's any reason to believe that he would
2 think that Mr. Floyd and his counsel could go through that
3 process in less time based upon his experience. Again, that's
4 all I'm asking.

5 THE WITNESS: I will respond to your question, but give
6 me a moment to gather my thoughts.

7 THE COURT: Sure. Take your time.

8 (Pause.)

9 THE WITNESS: I don't want --

10 THE COURT: And I want to be clear, Director. I'm not
11 asking you to take a position in this litigation, but you went
12 through a process of looking at all of this material --

13 THE WITNESS: Right.

14 THE COURT: -- and information. It's a unique process.
15 There are a lot of drugs that are involved in this process.

16 THE WITNESS: Yes.

17 THE COURT: And based upon that, that's why I'm asking
18 you this question, not your personal opinion, not how you feel
19 about the date or the death penalty. This is -- that is not the
20 purpose of my question.

21 But having gone through essentially a process where you
22 had to review all of this related information, particularly
23 information about the drugs and their sequence, your process in
24 terms of the timing it took is actually relevant I think in
25 terms of me trying to figure out how much time Mr. Floyd and his

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1 experts should potentially receive or not. That's why I'm
2 asking you this question.

3 THE WITNESS: Thank you for your question, Your Honor.

4 My response is, Mr. Floyd for the duration has had a
5 team, starting -- I don't know when it started; well before I
6 got here. But he has a team. They've communicated. I'm making
7 that assumption. I never sat in on any of the meetings, but we
8 do on occasion. We're notified that there's been a motion,
9 there's been this, there's been that. I don't know how long and
10 how many appeals that Mr. Floyd has gone through.

11 THE COURT: I'm focussed on just the drug protocol.
12 I'm not focussed -- this is not a question about the validity or
13 not of the conviction. This is not a question about the
14 validity or not of the punishment. This is a question about
15 acquiring the information related to the drug protocol which is
16 what you specifically did.

17 THE WITNESS: Yes.

18 THE COURT: That's what I'm asking you about.

19 THE WITNESS: Yes.

20 THE COURT: Right, because you did not arrive at
21 dosages and sequences for at least a few months based upon what
22 appeared to be a thorough process.

23 My question is, would there be any reason that you
24 would have to believe that the process would be less for
25 Mr. Floyd and his experts in terms of time?

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1 THE WITNESS: My response is it is my belief that
2 Mr. Floyd and his team certainly may avail themselves to all the
3 legal positions and -- and processes to work through this
4 situation. I don't know what all of those processes are. They
5 need to deliberate. They need to learn --

6 THE COURT: Yes, but that's not what I'm asking you.

7 Do you have any reason to believe that they could do it
8 in less time than you?

9 THE WITNESS: I don't know how long it would take them
10 to do it. I have no idea.

11 THE COURT: So in your view, with someone who hasn't
12 had the experience, you thought that you took the appropriate
13 amount of time to assess these drugs and how they should be
14 administered, correct?

15 THE WITNESS: I did.

16 THE COURT: And you felt that you needed that much time
17 to be able to effectively assess and decide the protocol, right?

18 THE WITNESS: I believe that I needed time to ensure I
19 did my due diligence and was prepared to move forward with the
20 will of the people. In terms of how long they may take to delve
21 into the case more and do their research, it's very specific to
22 the drugs to be utilized in the protocol. I take no position on
23 that.

24 THE COURT: Okay. And, again, part of it is, Mr. --
25 Director Daniels, I haven't gone through this process except as

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1 a presiding judge. Yet, I have to decide potentially, and it's
2 an important decision for me, how much time is appropriate for
3 Mr. Floyd and his counsel to have to investigate the protocol
4 that you finalized. And so that's why I'm asking you this
5 question.

6 And I appreciate your answer as it relates to the time
7 that you took. So I don't have any, sort of, follow-up to that.
8 Thank you for that, Director Daniels.

9 Is there anything else, Mr. Levenson?

10 MR. LEVENSON: Just two quick followups from -- just
11 two quick followups, Your Honor.

12 BY MR. LEVENSON:

13 Q. You mentioned that there have been some run-throughs at Ely
14 already.

15 Had you identified any flaws in your system and did you
16 do anything to document those flaws?

17 MR. GILMER: Objection, Your Honor. I think that could
18 go into security and safety concerns to talk about flaws. I
19 think he can ask whether or not the protocol went fine, if
20 there's concerns, but I think if you're asking about a specific
21 flaw, that's an issue.

22 THE COURT: Let's think -- let's do this. Is there
23 anything that you believe has -- that was an issue that is not
24 addressed in the current protocol?

25 THE WITNESS: I believe we've looked at all

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1 contingencies, and I'm very pleased with the protocol that we
2 have in place now.

3 BY MR. LEVENSON:

4 Q. You mentioned a couple minutes ago some grievances. I
5 wasn't clear on what those grievances were that you had to deal
6 with.

7 THE COURT: I'm not sure -- I think the director had
8 made a comment about, sort of, dealing with other condemned
9 inmates and the impact of this case on his overall
10 administration of a system that has other condemned inmates.
11 I'm not sure if that's what you're asking.

12 I understood his comments to be in the context of
13 administration of a -- of a system that has other condemned
14 inmates, unless I'm missing something.

15 (Plaintiff's counsel conferring.)

16 MR. LEVENSON: I'm sorry, Your Honor. I had heard him
17 mention grievances earlier on in that statement. Maybe we can
18 ask that question later once we have the transcript.

19 THE COURT: Yes, I'm not sure what the -- what
20 grievances you're referencing or what would be the relevance of
21 that.

22 MR. LEVENSON: He mentioned having to deal with
23 grievances. I wasn't sure what the relevance was, and that's
24 why I was asking the question, what he was referring to.

25 THE COURT: I think his general statement had to deal

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1 with the fact that there are other individuals who are facing
2 the death penalty who were in the custody of NDOC and a
3 consideration of how this case might impact that generally as
4 relates to policy.

5 (Plaintiff's counsel conferring.)

6 MR. LEVENSON: So just to make sure that I didn't ask
7 the question too broadly, when I was speaking about the flaws
8 and the process, I wasn't speaking about security. I was
9 speaking just about the execution protocol.

10 BY MR. LEVENSON:

11 Q. So with that narrow confine, did you identify anything in
12 the execution protocol that you are going to change based on
13 your run-throughs?

14 A. I would have to delve into some of the things we do that
15 I -- I am not comfortable with stating publicly.

16 THE COURT: Well, the question is, does the protocol
17 have to be changed to address any issues that you have
18 encountered?

19 THE WITNESS: The protocols that we have in place right
20 now are our protocols.

21 THE COURT: Are appropriate for --

22 THE WITNESS: Yes.

23 THE COURT: -- as far as you understand it for the
24 issues --

25 THE WITNESS: Yes.

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1 THE COURT: -- that may arise in the potential
2 execution in this case.

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: All right.

5 MR. LEVENSON: No more questions, Your Honor.

6 THE COURT: All right.

7 Mr. Gilmer?

8 MR. GILMER: I have nothing further, Your Honor.

9 THE COURT: Okay.

10 Director Daniels, I appreciate your time. You are
11 excused for now. Thank you.

12 THE WITNESS: Thank you, Your Honor. Appreciate it.

13 THE COURT: All right. Now, we're going to turn to
14 some argument, but why don't we take a little bit of a break.
15 And people can gather their thoughts, and then we can discuss
16 the motion to stay.

17 I would like Director Daniels and Dr. Azzam to remain
18 during the entire proceeding just in the off-chance that
19 something comes up, but I don't anticipate that they will need
20 to be called further. So we'll be in recess, let's say, for
21 about 10, 15 minutes.

22 (Recess taken at 3:15 p.m.)

23 (Resumed at 3:35 p.m.)

24 THE COURT: Please be seated.

25 All right. We are back on the record here to go over

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1 arguments regarding the motion to stay.

2 So, Mr. Anthony, are you going to be arguing this?

3 MR. ANTHONY: Yes, Your Honor.

4 THE COURT: All right. Why don't you go ahead and
5 proceed.

6 MR. ANTHONY: Your Honor, the parties apparently agree
7 that a stay or an injunction is an equitable remedy. It
8 requires the Court to balance the equitable considerations that
9 exist on both sides.

10 It's our position --

11 THE COURT: I'm sorry. I -- the parties agree that a
12 stay should be imposed?

13 MR. ANTHONY: No. What the party --

14 THE COURT: Because I would be -- I wanted to clarify
15 because I haven't heard Mr. Gilmer say that.

16 MR. ANTHONY: What the parties I believe agree to is
17 that a stay or injunctions are equitable.

18 THE COURT: Oh. Okay. All right.

19 MR. GILMER: I confirm with that. That's what I
20 thought he said, Your Honor.

21 THE COURT: Okay.

22 MR. GILMER: If he didn't, I object.

23 THE COURT: Okay. Yes, that's -- I wanted to make
24 sure. All right.

25 MR. ANTHONY: So what the Court needs to do today is to

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1 balance the relative equities between the parties. And that's
2 something that the NDOC agrees we should look into, and they've
3 actually given us an invitation in their pleadings to assess the
4 equities in this situation.

5 As the Court knows, the Nevada Department of
6 Corrections has had between two and a half to three months to
7 formulate this protocol. It is our position that we should have
8 the same amount of time to litigate the protocol that they had
9 to create it.

10 Equities are relevant both to the issue of the stay,
11 and it's also relevant to the issue of judicial estoppel. And I
12 think that's also important to mention as well.

13 The Department of Corrections has been using privilege
14 objections to time its disclosures of very basic information
15 regarding the drugs they intend to use in their protocol. They
16 initially raised a claim of privilege and said that we couldn't
17 know basic information from the drug invoices that they put on a
18 privilege log. Those were purchases that were made at the end
19 of March and at the beginning of April.

20 They claimed that that information was subject to the
21 deliberative process privilege. The day after they disclosed
22 the protocol, they disclosed those invoices to us without any
23 claim of privilege. We suspected from the very beginning that
24 they were going to time the release of the protocol to an order
25 of execution from the State Court. And you know what? That's

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1 exactly what happened. It happened the very same day. The very
2 same day that Judge Villani issued an order of execution, that
3 was the day that we got disclosure of the execution protocol.

4 What the Court heard from the testimony from Director
5 Daniels today is that the most important information regarding
6 things like the dosage and the sequencing of the drugs -- that
7 those decisions were made one to two days before they released
8 the protocol on June 9th. That means that they have had
9 approximately two and a half to three months simply to formulate
10 and to work out what they needed for the protocol.

11 The other thing I would mention with respect to the
12 equities is that the Court ordered NDOC to provide weekly
13 privilege logs to us, but in the privilege log that they
14 provided on May 28th, they said they had nothing to provide to
15 us. In fact, they did have stuff to provide to us. They had
16 made additional drug purchases on May 26th. Those were not in
17 the privilege log.

18 So we didn't get timely disclosure of the March
19 purchases, the April purchases, or the May purchases. Those
20 were very critical pieces of information. If we would have had
21 that information, we would have been able to -- we would have
22 been able to investigate our case and we would have been able to
23 move in a much more expeditious manner, but we were not able to
24 because NDOC originally claimed that that information was
25 privileged and couldn't be disclosed at all. And it was only

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1 after the execution protocol was approved that they gave
2 those -- that information up without any assertion of privilege.

3 Their post hoc actions tend to repel the assertion they
4 made beforehand that the invoices were privileged. And I've
5 never heard a tenable argument from NDOC that there was a
6 legitimate claim of deliberative process privilege to prevent
7 disclosure of the drug invoices nor has any argument been made.

8 Similarly, NDOC has selectively disclosed Dr. Azzam's
9 ultimate opinion regarding the midazolam protocol in 2018 that
10 was provided to us on a production log. However, they have
11 selectively chosen not to provide us with Dr. Azzam's ultimate
12 opinion on this protocol.

13 It is our position that privileges have to be made
14 consistently. Privileges cannot be used to garble the truth.
15 Once a party opens the door by -- by providing Dr. Azzam's
16 opinion of the midazolam protocol, I believe that the Court
17 should order disclosure of Dr. Azzam's ultimate opinion as to
18 the ketamine protocol that they've ultimately released to us.

19 Similarly, from the testimony of Director Daniels on
20 May 6th, he asserted that he hadn't made the fundamental
21 decisions regarding the drug or combination of drugs to be used
22 in the execution protocol. From the examination of Director
23 Daniels today, what we know is that as far as we know from the
24 time that we've had there has been additional purchases of drugs
25 that they found were accessible or not accessible. The Court

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1 heard testimony about whether fentanyl or alfentanil would be
2 available or whether potassium chloride or potassium acetate
3 would be available. And the Court also heard that Director
4 Daniels consulted with the expert, Dr. Buffington, and that was
5 what accounted for the delay.

6 So our position is pretty simple. We believe that we
7 should have just as much time to investigate and litigate the
8 protocol as the Department of Corrections had to create it.
9 And, frankly, the other thing that the Court should look at is
10 there is a night and day difference between the pleadings that
11 NDOC filed last week and the pleadings that they filed months
12 ago.

13 When they were filing pleadings months ago, they said
14 this was too early. They said it wasn't ripe. They said
15 decisions still had to be made. They said that they were in a
16 pre-deliberative state. And the moment that order of execution
17 was signed by the State Court judge, everything turned on a
18 dime.

19 Now they're arguing to the Court that we have to go
20 forward no matter what and we can't stop this no matter what.
21 And we shouldn't be accorded the very same amount of time that
22 NDOC had to craft their protocol.

23 The Court asked good questions today about what would
24 be the difference in the costs. And I think that the upshot of
25 that questioning is that if the Court were to issue a stay now,

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1 then it could be an issue of saving costs because then the
2 parties, and the NDOC, could plan their affairs around a new
3 execution date that would come after the expiration of any
4 injunction order that would be issued by this Court.

5 So for those reasons, we believe that the equities, the
6 considerations that the Court needs to make, all militate in
7 favor of simply giving Mr. Floyd and his counsel the very same
8 amount of time that NDOC took to create the protocol that's
9 being litigated today.

10 Thank you, Your Honor.

11 THE COURT: And as I understand it, Mr. Anthony, this
12 is actually an argument based upon the due process claim and not
13 the Eighth Amendment claim, correct?

14 MR. ANTHONY: Yes, Your Honor. There's an element of
15 it that is based upon a procedural due process argument that is
16 very unique to this case.

17 THE COURT: Okay. Thank you, Mr. Anthony.

18 Mr. Gilmer.

19 MR. GILMER: Good afternoon, Your Honor. Randall
20 Gilmer on behalf of the Department of Corrections Defendants.

21 And I'm not really sure where to begin after hearing
22 Mr. Anthony's --

23 THE COURT: Let me ask you this question.

24 MR. GILMER: -- large work of fiction.

25 THE COURT: Let me ask you this question, Mr. Gilmer.

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1 If due process means anything, it involves fundamental fairness.
2 That's the purpose of the due process clause.

3 I asked the question of Director Daniels. I wanted to
4 hear from him what his experience was. He indicated that
5 they -- he needed three months to be able to investigate just
6 again the drugs and the sequence and the dosages.

7 Why wouldn't fundamental fairness require that
8 Mr. Floyd and his counsel have the same amount of time?

9 MR. GILMER: Thank you, Your Honor.

10 THE COURT: And why does your client take a position on
11 that?

12 MR. GILMER: Your Honor, well, I think part of your
13 question is rehashing questions that I think I've answered to
14 this Court numerous times before, and my answer's going to be
15 the same. My client has a duty to fulfill the laws of the land
16 and the laws of the State of Nevada. And as of right now there
17 is an execution order, but not warrant that says that the
18 execution shall take place on July 26th. My client has a duty
19 and obligation to fulfill that execution order assuming the
20 execution warrant is entered. My client has made that
21 abundantly clear.

22 The training component of that is important to consider
23 because, yes, certainly -- and I think Director Daniels
24 testified to this, but certainly training -- certain training
25 and having additional training may be helpful in the long run to

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1 have additional timing. However, you can also get stale if you
2 have training and then have to have it six months later if you
3 don't have it again. So those are cost factors that are very
4 important.

5 You made the comment that the Department of Corrections
6 may have more resources than the Federal Public Defender. That
7 may or may not be true. You guys are much more familiar with
8 the FPD's office than I am, but I'm very familiar with the
9 Nevada budget and how much resources the Department of
10 Corrections has. So if it's worse than ours, I feel sorry for
11 the FPD, but it's -- it's not fair to say that the Department of
12 Corrections has this wealth of money.

13 THE COURT: I'm not saying that, Mr. Gilmer.

14 MR. GILMER: Understood.

15 THE COURT: Let's be clear. Director Daniels had
16 estimated the costs of \$180,000 and some other costs associated
17 with that. There are various experts who are retained in this
18 case. So, clearly, there's some resources that were available
19 to the NDOC as it related to its investigations of the drugs.

20 And, again, this -- my question is based in part,
21 Mr. Gilmer, on the fact that it appears that the NDOC did take
22 its duty under the Nevada statutes very seriously in terms of
23 the time that it took to investigate the protocol. It's not --
24 I'm not in any way saying at this point that I make a finding of
25 bad faith. I am not making that finding, right, as it relates

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1 to the conduct.

2 But you had raised actually in your questioning a
3 question of equity. And equity is something that I have to --
4 as you know, have to consider. And, again, this is not about --
5 as I've said, I'm not dealing with the issue of challenging the
6 conviction or the punishment. I'm dealing just with the
7 experience of gathering information about the drugs. And I
8 don't know that I've heard anything from you or from Director
9 Daniels that would suggest that it would take less time than the
10 three months or that you actually have a reason to object to at
11 least receiving that period of time.

12 Now, I know you've taken the position that the NDOC has
13 an obligation to follow the law. I don't disagree with that
14 either. They would have the same obligation if I were to stay
15 the case. So I'm not saying that the NDOC shouldn't have
16 prepared for an execution on July 26th. What I am saying is
17 that it doesn't seem to me that based upon the NDOC's obligation
18 or the director's obligation that there would be any, as far as
19 I can see, reason that the in this case plaintiffs should get
20 less time. And that's, I mean -- and it may be, Mr. Gilmer,
21 you've given the best answer, which I can appreciate, but I have
22 to look at that because, again, under due process it's about
23 fundamental fairness.

24 And you may not have more information than that, but I
25 did feel an obligation and do feel an obligation just to make

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1 sure if there's something in the record that I had missed. And
2 my question to Director Daniels really was related to things
3 like, Mr. Gilmer, just so the record is clear, if there was some
4 regulatory approval that had to be obtained in order to get
5 information about a drug, that would -- that no longer was
6 required, for example, that would be relevant in terms of the
7 issue of the experience of obtaining information. The Court was
8 not aware of whether or not, for example, in the consideration
9 of side effects or other effects that there had to be certain
10 Government approvals that would be required in order to be able
11 to proceed.

12 So, that's -- that's why I asked you those questions.
13 So, again, I know you may have given your best answer, but I
14 wanted just to be clear about what it is specifically I'm
15 asking. If you don't have more information, that's fine. If
16 you want to rest on the arguments you've made, that's fine. But
17 I just wanted to be clear about that.

18 MR. GILMER: Well, thank you, Your Honor. And I think
19 some of that information will come forward in my outline I have
20 for the argument as well. So if the Court is comfortable with
21 my answer for right now, I will proceed with my argument and
22 then we can come back to that?

23 THE COURT: Okay.

24 MR. GILMER: So I think before I get into the prepared
25 argument that I have, while it's fresh in my head, I would like

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1 to respond to what Mr. Anthony stated just now. And I stand by
2 the line I said that when we talked over each other, Mr. Anthony
3 I think has made a lot of fictional statements in that
4 statement.

5 He first off talks about when talking about equities --
6 and, yes, I did offer for the Court to look at that because they
7 brought it up first. And I said that we stand by our position
8 that we have been fair, open, and honest and stuck to certain
9 governmental privileges.

10 And this Court may recall with regard -- when we had
11 the first argument on deliberative process and the factual
12 information, I provided the Court with an argument at that point
13 in time as to why the drugs that are under consideration are an
14 important part of the deliberative process piece. And I
15 mentioned to the Court at that point in time that once those
16 drugs were determined, then the factual components of those
17 drugs would be fair game. I've made that statement consistently
18 since the very beginning of this case.

19 We finalized the protocol. And, also, prior to the
20 protocol being finalized, I believe we were here on June 3rd,
21 the Court asked us to meet and confer as to what documents we
22 would provide that were in the privilege log without having to
23 have further argument on that. We did that in good faith.

24 And Mr. Anthony -- and based upon that meet and confer,
25 I provided documents that were factual in nature pertaining to

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1 the drugs. And instead of that good faith, Mr. Anthony is
2 trying to say that I was shielding it under privilege.

3 I met and conferred with Mr. Anthony and Mr. Levenson
4 as this Court requested so that we would take that off the
5 table. And now they're trying to turn that on its head by
6 saying, "Well, we gave them those documents and didn't assert
7 any of privilege in them."

8 Our position with regard to the privilege in those
9 invoices were consistent throughout this case. And we provided
10 them to plaintiff's counsel upon the meet and confer at the
11 request of this Court.

12 Also on June 3rd, which was six days prior to the
13 protocol, I informed -- we had a meet and confer in this very
14 courtroom before we left where I told Mr. Anthony and
15 Mr. Levenson what drugs were going to be used. So they knew on
16 June 3rd the drugs that were going to be used. And I believe
17 even though Director Daniels didn't recall the exact timeline
18 with regard to that, I am quite certain that I shared with him
19 the sequencing of those drugs in that meeting, even though we
20 did not have the -- the dosaging done.

21 And I'll note that the transcript -- if you read the
22 transcript for June 3rd, Mr. Anthony even said to the Court on
23 the record at that time that he realized we may not have all of
24 the sequencing finalized, but if he could get the names of the
25 drugs. We provided the names of the drugs before we even left

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1 the courthouse.

2 THE COURT: So, Mr. Gilmer, let me sort of help you a
3 little bit in terms of your argument. At this point I don't
4 find a basis for making a finding that there's been bad faith on
5 the part of the defendants.

6 My view of the record suggests that the defendants
7 raised a deliberative process privilege and -- as to the
8 discussions that the privilege was available. But that leads,
9 though, Mr. Gilmer to a separate question because I don't want
10 you necessarily to focus on the issue of bad faith because I
11 don't find that there's a basis for it in this record at this
12 point. But that doesn't change potentially the issue of whether
13 or not this information could have been disclosed pursuant to a
14 confidentiality order and whether or not that disclosure delayed
15 the plaintiff's ability to be able to investigate the protocol,
16 specifically dosages and sequence.

17 As the experts have indicated in your submission, the
18 dosage and sequence actually matter quite a bit as it relates to
19 the drugs. Now, this was information that was not shared, but
20 potentially could have been shared. And, again, it's not clear
21 to me based upon Director Daniels' testimony that necessarily
22 the sequence was arrived at until a week before.

23 But for my consideration the question is why would this
24 not have been able to be shared with -- with the plaintiff
25 previously, because I have to factor that in in terms of the

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1 equities. And this is not to say that I necessarily am finding
2 that the assertion of the privilege in and of itself was
3 inappropriate or wrong. It is to say that I have to evaluate
4 whether or not the assertion of the privilege delayed the
5 plaintiff's ability to be able to adequately investigate the
6 drugs.

7 MR. GILMER: Couple points on that, Your Honor. First
8 off, I think Director Daniels' testimony said that that dosage,
9 again sequencing, wasn't done until very soon before it was
10 done.

11 THE COURT: Right.

12 MR. GILMER: So in answer to your question, there
13 wouldn't -- and taking Director Daniels' testimony at its face
14 value, there wouldn't have been anything to disclose previously.

15 THE COURT: Okay.

16 MR. GILMER: Also, I cannot recall the precise date
17 when the protective order was entered in this case, but I
18 believe it was very -- it was not at the near beginning of this
19 process because there was some give and take with regard to that
20 PD's office pertaining to that particular order as well. So
21 there was some delay there.

22 And I think this is important because you asked this
23 question as well. On April 30th we had our first hearing in
24 this case. It was a Friday. We had it by video. And we had
25 that in preparation of the hearing that you wanted to have on

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1 the Monday. And at that hearing -- or at that -- at that
2 particular hearing we discussed discovery, and I made it clear
3 to this Court on April 30th that we would be fine with many
4 portions of discovery happening right now. And the Court said
5 that you didn't believe there was any reason why it should wait.

6 As I sit here today on June 25th, I have received no
7 discovery requests or -- from the FPD's office, none. So if
8 we're going to talk about delays and equities, I think that's
9 important. Because we had that conversation on the very first
10 hearing, but, yet, I never received any discovery responses or
11 requests for production of documents from the FPD's office for
12 us to even consider whether or not that information could have
13 been provided in some sort of confidential nature, especially
14 when we didn't have a protective order in place.

15 To follow-up on that, at a hearing on April 10th I
16 believe -- or May 10th, I believe it was, you indicated that you
17 informed the FPD's office about the concerns regarding Rule 45
18 subpoenas and the timing and how long it takes to get those
19 done, and it might take additional courts to get those done.
20 But yet -- and -- and that there was no reason we shouldn't
21 start that. That was May 10th, more than six weeks ago. Six
22 weeks ago you told them that they should start doing that.

23 And you said: "To the extent you need leave of this
24 Court to do it, please by all means do it." And they still,
25 unless they've failed to serve me with it, have not done that

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1 either.

2 So if we want to talk about delays, I think those are
3 two very important delays to also consider and discuss in the
4 context of this case. Whereas, we have been very open that as
5 soon as the -- the protocol was done and completed, we would
6 provide it. And nothing in the testimony that has -- that this
7 Court has heard today has changed that fact. So I think if
8 we're talking about what is in the party's situations to do, I
9 think those are very important portions when we're talking about
10 equity and fairness in this case. Because these are things that
11 could have been discussed for eight weeks and haven't been
12 because they didn't serve me anything.

13 Now, with regard to the actual merits of this case,
14 Your Honor, and the motion for stay and the likelihood --

15 THE COURT: I'm focussed on, let me just be clear
16 Mr. Gilmer, the due process aspect of their motion, right, which
17 is about notice and opportunity to be able to investigate this.

18 They have an opportunity to be able to have notice as
19 it relates to the protocol and then to investigate it, right.
20 Their supple -- your supplement focussed on the Eighth Amendment
21 aspect to that, but I don't understand that to necessarily be
22 the focus of their request for the stay in this case, in part,
23 because their argument is that they haven't had sufficient time
24 to be able to rebut the very substantive evidence that you've
25 put forward.

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1 So if you want to focus on the issue -- that particular
2 factor, let's look at that. That's what I'm focussed on. I
3 don't think at this point the record necessarily would -- and I
4 have to look at this again -- would reflect the Court issuing
5 this on a finding that the plaintiff has made a showing by -- by
6 a likelihood of success on the merits as it relates to the
7 Eighth Amendment claim. But there is still an issue of a stay
8 regarding due process and the opportunity to be -- to receive
9 the appropriate notice.

10 MR. GILMER: Well, thank you, Your Honor. On that
11 point -- and I heard you ask them that question today. And it
12 sounds like there being yet another chance to save themselves
13 from their own failures in this case. Because I'm looking at
14 the motion that they filed, the original motion that was filed
15 on April 16th, and nothing in here asks for relief under the due
16 process component. The entire motion discusses the Eighth
17 Amendment. That is what we argued in response.

18 And in addition in their supplement, as the Court just
19 indicated, they talked about the Eighth Amendment. That is what
20 we argued in response. That is what the entire briefing of this
21 case so far has been focussed upon.

22 So I believe that it puts me and my client in a very
23 unfair situation to now have to try to address why under Winter
24 and various other factors we should now change gears when they
25 didn't even brief it themselves to try to get a stay under the

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1 Fourteenth Amendment.

2 THE COURT: Well, I actually thought, Mr. Gilmer, and
3 I've actually been fairly clear myself about the fact that I
4 understood that they would be asking for time to have adequate
5 notice to investigate. I actually thought that that was a
6 discussion that we had had, which is partly why I had asked
7 Director Daniels those questions at the original hearing.

8 So I don't know that I find that somehow you -- you all
9 are unaware of the Court's concern about their need to have time
10 to investigate the drugs. I actually think that I have focussed
11 on that; not -- not so much on the actual drugs themselves
12 because they weren't known.

13 And so I think I've been very clear, Mr. Gilmer, about
14 the fact that, to me, that was the issue, that they should have
15 the opportunity and adequate time to be able to address that.

16 If you're arguing to me that the Court shouldn't
17 consider that because they haven't adequately raised it, I will
18 go back and look at the record of that. But I know, Mr. Gilmer,
19 that I have been very clear for -- for weeks and months that
20 that was what I was focussed on for this proceeding.

21 MR. GILMER: Yes, Your Honor, you have been very clear.
22 However, I don't believe the -- I don't believe the motions --
23 and, yes, to be fair, it says the Eighth Amendment and
24 Fourteenth Amendment because obviously the Eighth Amendment
25 applies through the Fourteenth Amendment to the states.

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1 But there's no discussions in any of their pleadings
2 about fundamental fairness or due process. All of the cases
3 they rely upon to provide to this Court talk about the context
4 of an Eighth Amendment challenge and what needs to be shown with
5 regard to a balance of the equities with regard to that.

6 So, yes, I appreciate and understand the Court has been
7 very clear on that, but if the -- if plaintiff themselves has
8 not asked and the Court hasn't provided and asked for specific
9 supplemental pleadings on that point, and I ultimately respond
10 to what they have provided -- which their supplement this last
11 time around, despite the Court's clearness, as you said, early
12 on about being concerned about the due process and fairness
13 under the due process clause, they had an opportunity to
14 supplement their stay. And what did their supplement focus on?
15 The Eighth Amendment. It didn't address any of the concerns
16 that the Court had pertaining to the Fourteenth Amendment.

17 So then I have to respond to what is presented to me by
18 the FPD's office and by Mr. Floyd. And what they've presented
19 to me in their supplement was an Eighth Amendment -- reasons why
20 a stay should be issued under the Eighth Amendment. And they
21 also threw in the All Writs Act and judicial estoppel, and I
22 have those in my notes to discuss as well. They didn't discuss
23 equal protection. They didn't discuss due process.

24 Now, are they going to be able to point one sentence in
25 passing and say maybe it was in there? I'll concede maybe

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1 there's one sentence. I don't remember it, but they might find
2 it. The point is --

3 THE COURT: Well, let me ask --

4 MR. GILMER: -- there's no case law or support --

5 THE COURT: Hold on.

6 MR. GILMER: -- raised in their arguments or briefing
7 for it.

8 THE COURT: Well, let me ask this question, Mr. Gilmer,
9 because it seems to me what you're saying to me is that to the
10 extent that I'm going to rely upon that to issue a stay, you
11 would like to have a further opportunity to address or submit
12 something. Is that what you're saying to me?

13 MR. GILMER: Yes, Your Honor. And I would -- I'd also
14 ask that I am asked to address and -- address it in the context
15 of an actual argument brought forth by plaintiffs in writing and
16 that I don't have to try to guess in some atmosphere or universe
17 as to what those -- what they might actually be arguing with
18 regard to that.

19 THE COURT: Okay. I understand that. So why don't we
20 then -- and I'll let them formulate a response. Why don't we
21 talk about this in the context of the issue of estoppel,
22 Mr. Gilmer. And I think I've heard you on estoppel, and I think
23 what I understand your position to be was that in terms of the
24 assertion of the privilege, the privilege assertion itself
25 didn't create an unfair litigation advantage because, in fact,

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1 the finalization of the drugs and the dosages and the sequence
2 wasn't made until a few days before the protocol was finalized.
3 And so estoppel shouldn't apply because it didn't engender any
4 true litigation advantage because that was not information that
5 was within the possession of the defendants earlier.

6 Is that a fair assessment of what you're arguing,
7 Mr. Gilmer?

8 MR. GILMER: That is part of the argument, Your Honor.
9 I believe there's a secondary part to that argument --

10 THE COURT: Okay.

11 MR. GILMER: -- as well, if I can add that as well. I
12 think as we've said this all along, and I think I hit this more
13 in the response that was filed last Thursday evening, that we
14 have been consistent in our pleadings throughout this case.
15 Yes, our first pleading, as Mr. Anthony said, did focus a lot on
16 the premature nature of this situation because it was premature.

17 However, it is not fair to say that the pleadings are
18 totally different or that we totally changed gears and
19 mid-stride. Because we also in our pleading, and I have pages,
20 I have it right here in front of me, specifically made clear the
21 fact that they have also not shown any of the four Winter
22 factors even if this Court were to forgive their lack of
23 standing at that point in time.

24 So we have been very consistent that regardless of when
25 they brought it and what they knew that they haven't been able

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1 to meet their standards. And on that point I think it's
2 important, and I know the Court said that you're more focussed
3 on the due process argument that the Court's been concerned
4 about, but that they've never briefed, at least not in any
5 consistent basis, and that is on the likelihood of the merits.
6 What did we get in their supplement instead of focusing on what
7 the Court wanted? They focussed again on the Eighth Amendment
8 and doubled-down on the fact that they had no evidence on that.

9 They said -- they still didn't say they had any
10 evidence. They said they needed more time and made conclusory
11 statements about what these drugs may or may not do.

12 I then provided my response, and then in their reply
13 brief they still said they needed more time. They said, "Oh, we
14 have some experts. We're not going to tell you who," which is
15 funny when we talk about telling us what? Because they said
16 they have experts and that in the brief amount of time the
17 experts have been able to find serious problems. But they
18 didn't provide a declaration from any expert that said they need
19 more time. They didn't provide any affidavit from an expert
20 that said they need more time. They didn't even provide the
21 names of the experts that said they need more time.

22 So, again, as we're talking about fundamental fairness
23 and -- and trying -- and to use the word that plaintiff's
24 counsel used in this case very early on, three-card Monte, where
25 was their obligation to not tell us who their experts were in

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1 their response? Where was their obligation to not tell us who
2 their experts were in a reply? Which I would still argue and
3 maintain would be too late as this Court is very well-known and
4 very well versed and it comes up in our cases all the time, if
5 you have an argument, you raise it in the motion. You don't
6 wait until the reply brief to bring it up.

7 They've done nothing. They have provided zero stitch
8 of even WebMD to their position as to why this protocol is bad
9 and why this protocol would cause unconstitutional pain and
10 suffering, nothing.

11 THE COURT: So let me ask you this question as it
12 relates to just the issue of estoppel, Mr. Gilmer. The Court
13 has not ordered the disclosure of the drafts of the protocol,
14 although I would be shocked if there were not drafts that
15 existed. Those drafts potentially could have provided
16 information as it relates to the sequence to the plaintiff.
17 Assertion of the privilege protected the consideration of the
18 various protocols under consideration. I did not order that
19 they be disclosed.

20 My question to you is what would be your argument in
21 response to the application of estoppel in terms of fairness
22 because I did not order that those drafts be disclosed to allow
23 for the director to go through a process. That -- that it's not
24 about punishing -- I want to be clear that in this case to the
25 extent that I considered estoppel, Mr. Gilmer, it wouldn't be

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1 about punishing the NDOC or the director for not providing it,
2 but it would be about the issue of, sort of, a litigation
3 advantage which is one of the factors. That it did create a
4 litigation advantage.

5 Now, there might have been a reason for that, and I'm
6 not saying that there couldn't have been a good faith reason for
7 that. But it doesn't change the potential consideration.
8 Estoppel again is an equitable doctrine that I have to look at
9 as to whether or not there's still a litigation advantage that
10 should be addressed by the Court in terms of equal time. Can
11 you address that particular issue?

12 MR. GILMER: I can, Your Honor. Thank you for that
13 opportunity.

14 So there's a couple of different reasons why I believe
15 that that is not a consideration for the Court to consider here.
16 Number one, first and foremost, and it goes part and parcel to
17 what I just said, they've said in their reply brief that they
18 allegedly have experts. But, yet, they still haven't told us
19 who they are. So to the extent that the expert would have come
20 to this Court and said, "Hey, look, they told us these drugs and
21 sequence, but I didn't know about it until this date and I need
22 this amount of time to say why it's wrong," then that might be
23 something that could be entertained.

24 They don't get to sit and rest on their laurels. Maybe
25 they have an expert. Maybe they don't. I have no idea because

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1 they haven't told us. But I've told the Court that we have
2 three, and I've provided very significant and at this point
3 undisputed medical record and evidence from two practicing
4 anesthesiologists and a pharmacologist that says why -- not only
5 will these drugs end in the end result that unfortunately Mr. --
6 the jury gave Mr. Floyd, but will also do it in a very painless
7 manner. That is undisputed. There is nothing before this Court
8 and they don't even have a proffer from an expert saying if they
9 had more time we could give you information. That's one reason
10 why the judicial estoppel argument shouldn't work.

11 Secondly, Your Honor, with regard to the exact -- they
12 actually do have, as they cited it in their complaint, even
13 though they didn't incorporate it by reference in their motion
14 for stay or their supplement like you had suggested that they
15 could, but we took that giving them all fair opportunity and
16 knowing that it was part of the Court record, the experts that
17 we retained for purposes of this litigation addressed numerous
18 components of what the experts that they set forth said about
19 the old protocol under Mr. Dozier.

20 Now, again, I understand -- and as we said and I said
21 all along, there are -- those statements in many ways mean
22 nothing because it's a totally different protocol. But they
23 clearly had relationships with experts dating back from three
24 years ago. Mr. Anthony stood before this Court, I can't
25 remember the exact date, but the -- I know there's an ECF that I

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1 believe is 45 or 44 where he provided this Court with an invoice
2 pertaining to ketamine that he said they have reason to believe
3 that this was considered at some point in time.

4 THE COURT: And, Mr. Gilmer, let --

5 MR. GILMER: Again, he knew that it would --

6 THE COURT: Mr. Gilmer, hold on. Hold on. I forgot to
7 ask this question. We're going to just detour slightly.

8 The Court has been made aware of this letter from the
9 manufacturer of ketamine about its objection. I want to hear
10 about whether or not you have any reason to believe that that
11 would in any way be something that I should consider or somehow
12 would be involved in this process. I made a -- I made a note to
13 myself to ask about it. We got into the argument --

14 MR. GILMER: Certainly.

15 THE COURT: -- but we're at the motion to stay stage.
16 So if you have some reason to believe based upon litigation or
17 if you want to proffer or if Director Daniels, if you want to
18 consult with him, want to let me know. I meant to actually ask
19 him. But is there any reason why based upon what was I think a
20 cease and desist letter that was sent to the NDOC making certain
21 allegations -- again, those are not before me. That's not an
22 issue before me. But is there any reason why the Court should
23 consider anything as it relates to that separate issue that
24 potentially is tangentially related?

25 MR. GILMER: No, Your Honor. And we can provide a

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1 proffer, although I think the invoices that are in the public
2 domain already have indicated this. And I believe the Review
3 Journal may have already talked about this.

4 We have ketamine. First off, we don't believe the
5 cease and desist letter has any legal merit. I believe this --
6 my response in part actually, which was filed before the cease
7 and desist letter came forward, shows that this was purchased in
8 the ordinary, transparent, and very open process, but I'll leave
9 those for a different day in a different courtroom, as you said.

10 But we have ketamine from different sources, not just
11 that manufacturer. So even assuming that manufacturer were to
12 somehow win, it would not prevent us from moving forward --

13 THE COURT: So you have no --

14 MR. GILMER: -- because we have sufficient supplies of
15 ketamine from other sources.

16 THE COURT: Okay. So you have no basis to believe that
17 even should that litigation proceed and the manufacturer be
18 successful that that would impact any considerations for this
19 Court at this time?

20 MR. GILMER: That is correct, Your Honor.

21 THE COURT: All right.

22 MR. GILMER: We have other sources of the ketamine, and
23 we are provided to go forward. And based upon Director Daniels'
24 earlier testimony about using expiration dates first and older
25 drugs first, kind of like the first in/first out principle,

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1 those -- those -- those purchases of ketamine were purchased
2 prior to the ketamine that's at issue by that manufacturer's
3 drug -- letter which, again, I maintain has no legal merit. But
4 we look forward to that fight wherever they decide to file a
5 lawsuit, should they do.

6 THE COURT: I appreciate that, again, only because
7 ketamine is actually in both the four-drug and three-drug
8 protocol. So if there's going to be an issue about it being
9 removed --

10 MR. GILMER: Yes.

11 THE COURT: -- I just wanted to make sure the record
12 was clear as to whether or not it would or would not be. So
13 thank you for that. And I'll let the plaintiff's counsel
14 respond if they want to, but I wanted just to make sure that I
15 had asked about that.

16 But go ahead with your argument, Mr. Gilmer.

17 MR. GILMER: Thank you.

18 So back to the ketamine point. Mr. Anthony was aware,
19 according to his own pleadings, whether they thought we would
20 use it or not use it, that it has been something, in their own
21 words, had been considered. So, clearly, Mr. Floyd and his
22 counsel were aware that that's something that in their due
23 diligence, to use -- to use the Court's word, they should have
24 been ready for. They should have been asking experts about it,
25 and they've had experts. They wanted to rely on expert's

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1 opinions from the Dozier protocol. So it makes sense that they
2 would ask about -- that they had the opportunity to do that
3 with -- for that one as well.

4 I would also point out he mentioned -- and I think this
5 was in their pleading. I couldn't follow the footnote
6 completely, but they said something along the lines of: "We had
7 to file our pleading because we didn't know midazolam wasn't
8 going to be used and we didn't think they would move forward
9 without the drugs," suggesting that they didn't know that we
10 weren't going to use midazolam until we filed ECF Number 22,
11 which was our response to the stay or injunction. ECF Number 23
12 is the same response. I can't remember which one was specific
13 to which particular entity.

14 They have known since at least October of 2019 that
15 midazolam -- midazolam was unavailable to NDOC and that we had
16 no protocol, and we talked about that in our response initially
17 as well. And they know that because it was in the opinion from
18 his very habeas case before the Ninth Circuit. And the Ninth
19 Circuit said that there is no protocol and that there had been
20 records before this Court that midazolam was unavailable.

21 So it's also disingenuous for Mr. Floyd or the FPD's
22 office to ever think that midazolam was going to be involved in
23 this particular protocol and that they shouldn't have possibly
24 considered other protocols.

25 They are also aware, and as we mentioned this in our --

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1 in our response to -- mentioned it in their -- in I think the
2 first response and in addition to their last -- in response to
3 their supplement, that since the filing of their previous
4 affidavits by the -- by the experts that they've hired with
5 regard to Dozier where they discussed cisatracurium and the
6 dangers of it and fentanyl and the dangers of it. So those are
7 two things that they already were on record of having dangers,
8 but, yet, they didn't bother to check back with those experts or
9 at least tell us that those experts can opine that despite the
10 change from 1,000 milligrams of fentanyl to 5,000 -- the maximum
11 of 5,000, 2,500, or the use of alfentanil -- that, again, I
12 understand and appreciate that they are not going to have time
13 for a full expert report. I didn't have time for a full expert
14 report.

15 But to come before this Court and say they have
16 experts, but we're not going to tell you who they are and they
17 tell us they need more time is not appropriate as we're talking
18 about judicial estoppel and fairness of litigation, Your Honor.

19 THE COURT: Okay.

20 MR. GILMER: And on that same point, I would last --

21 THE COURT: Well, it's a different -- I want to be
22 clear, it's a different analysis as well, Mr. Gilmer, which is
23 judicial estoppel is I think a different analysis because it's
24 based upon an argument that there's been a litigation advantage.
25 And I think you respond to that. I think the due process clause

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1 doesn't necessarily turn on litigation advantage. It turns on
2 fairness as it relates to the amount of time, which is -- again,
3 I'm going to ask them about the argument they put forward and
4 why there would be a basis for that. But I do think there's
5 different analyses for those --

6 MR. GILMER: Yeah.

7 THE COURT: -- just so the record is clear. I think
8 that your arguments you've just made really focus on the issue
9 of estoppel. What I am going to do is I'm going to ask them to
10 identify specifically their due process argument. I'll look at
11 it in the record as well. And then I'm going to come back to
12 you as it relates to any issue regarding, sort of, a submission
13 or prejudice.

14 Because it's not clear to me, Mr. Gilmer, this is the
15 last question I want to ask you, that you haven't actually
16 responded repeatedly to the argument about time and preparation.
17 And, in fact, both you and Director Daniels I think have been
18 very clear about how much time at least the NDOC Defendants took
19 without talking about how much time they thought Mr. Floyd and
20 his counsel and experts should take. But you've been very clear
21 about your responses to what you thought was appropriate.

22 It's not clear to me, Mr. Gilmer, that there would be
23 any prejudice to you or I should say to your clients as it
24 relates to the Court's consideration of a due process argument
25 because it does seem to me that it's implied in the record, but

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1 I'm going to check that.

2 What would be the disadvantage somehow of the Court
3 considering that without a submission? Let me know what you
4 believe would be a disadvantage. Is it simply just the
5 inability to be able to discuss the relevant case law on just
6 the issue of due process and how it applies to the facts of this
7 case? Because that would help me also to understand, if I'm
8 going to allow for a submission, how long it would take or what
9 would be from your perspective any prejudice to your clients
10 from not having what you believe to be a clear assertion of the
11 argument.

12 MR. GILMER: Thank you, Your Honor.

13 I think there's a couple different arguments.
14 Obviously I would like to think that briefing that attorneys do
15 makes -- is important for Courts to consider. Otherwise, please
16 stop having me do briefs, and we'll just come in and do
17 everything by oral argument.

18 So I obviously think to the extent that the Court has
19 specific questions -- and, again, as the Court has repeatedly
20 indicated, fundamental fairness in this case. And -- but it's
21 also in the context of a very fast-moving case where we have a
22 complaint that we know is going to have to be amended and stays
23 that were -- a motion for stay and a motion for injunction that
24 they weren't properly -- they weren't briefed in any substantive
25 way by F -- by plaintiff's counsel, and especially -- as I think

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1 we just had the concession from the Court, especially when it
2 comes back to the supplement. So I do think it's very important
3 that we have that opportunity to brief that.

4 I also think that there is actual prejudice to the
5 client as well, Your Honor, because when we're talking about
6 fundamental fairness and here we are -- and I understand that
7 maybe -- maybe the Court could look at this either way, but
8 Director Daniels did say that this -- the longer this execution
9 process goes on, the longer NDOC has to deal with obviously the
10 very important nature of this and the impact that has on
11 operations, normal operations, costs, so on, and so forth.

12 So the fact that -- and I'm going to use this word.
13 The fact that they might be bailed out by the fact that they
14 can't prove their Eighth Amendment stay and injunction, which is
15 what this Court asked for, by some fundamental fairness that up
16 to this point hasn't been briefed is not appropriate and has
17 also allowed them to see how we would respond to such things and
18 has put my client in a -- in a situation of undue prejudice.

19 THE COURT: Okay. And let me distinguish between two
20 things.

21 You're not saying it's undue prejudice in the context
22 of arguments that you would have raised that you haven't raised.
23 You're really talking about the equities of the application of
24 that particular standard in the context of costs and not knowing
25 about that. I'm trying to understand, Mr. Gilmer, what the

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1 prejudice is because you've --

2 MR. GILMER: Sure.

3 THE COURT: -- you've talked about costs. That's an
4 equity for the Court to consider in terms of the application.
5 But prejudice that I'm asking about really relates to, "We could
6 have made this argument, but we haven't. We could have obtained
7 this evidence, but we didn't." I haven't heard you say that.
8 Because it seems to me that you have been quite, I think,
9 fulsome in your arguments as it relates to notice and due
10 process.

11 So I'm trying to make sure I understand, Mr. Gilmer, if
12 there is a due process argument that you believe that you could
13 have raised and that you can't now raise or you're prejudiced
14 from raising, please let me know because it doesn't seem to me
15 that there is one. And that's different from the equity
16 consideration.

17 MR. GILMER: Certainly.

18 I don't believe that we have been prejudiced from
19 raising such issues. However, the -- but I do -- I do believe
20 it's difficult to parse what the Court's asking us to parse.
21 Certainly, the Court can provide us time to argue and brief a
22 particular issue, and I believe that we can do that.

23 That -- that is not -- and if I implied otherwise, that
24 was not the case. However, that time to brief it does cause
25 un -- a fundamental unfairness to my client because to the

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1 extent the Court is going to give yet more time, give them a
2 third bite at the apple, so to speak, to try to prove to this
3 Court why a stay should be granted, then -- and July 26th is --
4 is around the corner, that that definitely puts our client in a
5 situation when it comes to the equity component of that argument
6 at this point in time.

7 Which I would say at this point in time they should be
8 judicially estopped from raising based upon what they put
9 forward in their briefings, what they put forward in their
10 original motion, especially what they put forward to this Court
11 in the supplement and despite what you said -- what the honor --
12 what you pointed out has been a very strong consideration for
13 the Court since the beginning.

14 I was aware of that. I've tried to address it, but at
15 the same time I have to respond to arguments that they put
16 forth. And so the Court can have lots of concerns about what
17 may or may not be fair, but if plaintiff doesn't raise them
18 themselves, I can't -- I cannot respond to them. And it is
19 unfair and untenable that my client could be prejudiced by that,
20 by a stay being granted so they get yet another time to try to
21 fix their pleadings, their faulty pleadings. They have no
22 experts, nothing. Not -- like I said before, but bears
23 repeating, not even a citation to WebMD that fentanyl or
24 ketamine or any of these drugs would be difficult -- would cause
25 pain or concern.

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1 And I think if that's the case, we'd better let a lot
2 of anesthesiologists around the country doing operations today
3 (verbatim) that we have concerns about the medications that are
4 being used in life-saving medications -- or life-saving
5 surgeries throughout the country on a daily basis to ensure that
6 people don't feel pain or agony during those procedures.

7 So I'll leave it at that, Your Honor.

8 THE COURT: Thank you, Mr. Gilmer.

9 Mr. Anthony or Mr. Levenson, I want you first to
10 address the issue of the due process argument and how it's
11 presented in the pleadings. I'm going to go back and look at
12 that to make a determination about whether or not it has been
13 presented. I mean, again, I have to look at the pleadings, and
14 there have been various pleadings that have been filed in this
15 case. But why don't you first start with that, Mr. Anthony, and
16 then we'll proceed from there.

17 MR. ANTHONY: Count Three in the original complaint
18 that we filed on April 16th of 2021, Count Three asserts that
19 there is a violation of Mr. Floyd's procedural due process
20 rights under the Fourteenth Amendment based on the fact that the
21 State has not disclosed sufficient information or details
22 regarding the development and the drafting of the execution
23 protocol or the procedures that will be utilized in carrying out
24 Floyd's execution. This has prevented Floyd from determining
25 all aspects of the execution protocol that violate provisions of

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1 Federal law or cruel and unusual punishment, prevents him from
2 consulting medical experts concerning those aspects, and from
3 determining and seeking the remedy in the ways that the
4 execution protocol will present an unavoidable risk of
5 unconstitutional pain and suffering.

6 So that was Count Three that we filed on April 16th of
7 2021. And I recall in the Court's screening order the Court
8 found that that claim could go forward. The Court cited to
9 Judge Berzon's concurring opinion in First Amendment Coalition
10 v. Ryan. I know that that case should sound familiar because
11 we -- the parties briefed that issue extensively. And the State
12 attempted to distinguish Ryan. They talked about what the
13 problems were in Arizona with respect to the notice that Arizona
14 wasn't giving to the Department of Corrections.

15 And, similarly, I recall that Mr. Floyd had the
16 opportunity and we did take that opportunity to talk about what
17 were the comparisons and the contrasts between what was going on
18 in Arizona that caused Judge Berzon to be concerned in that --
19 in that case versus what types of procedural due process issues
20 we have in this case.

21 And the upshot of that discussion was that, whereas,
22 Arizona had its own problems with disclosure, the problems that
23 we had here was that we suspected that they were going to
24 disclose a novel protocol using drugs that have never been used
25 before in an execution and that we needed appropriate time to be

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1 able to litigate a novel protocol.

2 So when you look at our -- starting with our complaint,
3 when you look at the arguments that we raised in the stay, we
4 raised arguments about fundamental fairness, being able to
5 ascertain what they were going to do as far as a novel protocol,
6 that it does implicate issues of fundamental fairness, and the
7 State has had more than adequate notice of those arguments. We
8 have briefed the First Amendment Coalition v. Ryan case
9 extensively, and we've talked about the comparisons and the
10 contrasts.

11 And just to very briefly talk about how they apply
12 here, they apply here because ketamine has never been used in an
13 execution before. Fentanyl has never been litigated before.
14 That was only used once in Nebraska, but that was a volunteer.
15 So this Court is deciding not just one, but multiple drugs that
16 are being used for the first time.

17 The Court's going to have to make a decision about
18 potassium acetate. That drug was used by accident in Oklahoma.
19 And they were so concerned later that they stopped the execution
20 of Richard Glossip and they didn't restart executions for
21 several years.

22 So there are --

23 THE COURT: So, Mr. Anthony, let's talk then a little
24 bit about the issue of time. Let's assume for the moment I find
25 that -- that you have adequately raised the due process claim.

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1 Mr. Gilmer has raised an argument as it relates to the time that
2 would be necessary for you to gather information as -- as
3 relates to a -- the protocol. And in this case, you know, as
4 I've indicated, there are actually eight protocols because there
5 are eight different versions of the protocol.

6 Now, I'm not commenting on whether or not at this point
7 that's appropriate, but it does raise an issue for the Court to
8 consider in the context of preparation fairness to plaintiff and
9 his counsel regarding prep -- investigation of the drugs. So
10 talk to me on just the issue of time.

11 MR. ANTHONY: Is the Court's question about time needed
12 in the future or about time that has transpired in the past?

13 THE COURT: There are two questions. Thank you for
14 that.

15 One is what is the basis in the record from your
16 perspective beyond the time that the NDOC has taken that would
17 support additional time for Mr. Floyd to be able to research and
18 investigate these drugs. Two, what specific amount of time are
19 you actually requesting and why?

20 MR. ANTHONY: One of the most important factors that
21 courts of appeal look at on issues such as this when they talk
22 about how much time is needed, the first thing they look at is
23 to what extent is there a track record with respect to a
24 particular execution protocol. If we were in Texas and we were
25 litigating the pentobarbital single-drug injection procedure,

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1 there would be an argument that the Fifth Circuit would be
2 amenable to that you don't need much time. You already know
3 about it. It's already been used on X number of inmates who
4 have been previously executed.

5 So I think to answer the Court's question, one of the
6 things that dictates the amount of time needed is is this
7 something that has a track record that people know about or is
8 this something that is brand new and different. And there is a
9 lot that is brand new and different about this protocol. And
10 that is why we believe that more time should be given to
11 litigate that protocol than we would get in the average case.

12 When we first proffered scheduling orders to the Court,
13 we showed that in the average case -- whether it's a new or not
14 a new protocol, we showed the Court what other Courts had given
15 as far as scheduling orders.

16 Now, when you look at a couple things that are
17 important, first of all, is if you look at our first scheduling
18 order that we agreed to with the Attorney General's Office and
19 if you look at what we're proposing to the Court in our most
20 recent submission, our most recent submission is actually I
21 believe at least 60 days shorter than the minimum that the
22 Attorney General's Office agreed to as far as what would be
23 necessary to litigate this case.

24 And so -- and in addition to that, Your Honor, in our
25 most recent submission we explained to the Court everything that

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1 we would do in each period of time that we had. Obviously there
2 is a lot to do in here. And we've talked about what we would
3 intend to do in the first 30 days, moving onto the 30 to 60
4 days, and then finally what we could accomplish in 90 days.

5 And, again, we believe that that is a fair scheduling
6 order. It actually means that we're doing this in a compressed
7 time frame that is twice to three times faster than would be
8 done in the average method of execution challenge.

9 And so, again, we believe all of these things are
10 necessary to do this in a reliable fashion, but I believe that
11 the most recent schedule that we've proffered to the Court is
12 very fair and it sets forth everything that we need to do. And
13 I believe that has us scheduling our hearing, I wanted to say,
14 for October -- I think it's October 4th would be the date of the
15 start of the evidentiary hearing in this case.

16 So if you look at that time frame, that has us
17 completing -- we're going to have the amended complaint due this
18 week. We're going to have the discovery done, I would say -- I
19 think it is -- the time period that we have is 60 days. We
20 have --

21 THE COURT: And by the way, just so the record is
22 clear, I'm granting the motion. I didn't think there was any
23 opposition to the motion to extend the time --

24 MR. GILMER: Oh, no, we stipulated to that, Your Honor.

25 THE COURT: That's what I thought.

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1 MR. GILMER: You're talking about the motion to amend
2 the complaint?

3 THE COURT: Yes.

4 MR. GILMER: I'm just making sure that the record is
5 clear that's what I'm talking about.

6 THE COURT: Yes. No, you're not agreeing to anything
7 else. Right. There's been no objection to that, as far as I
8 can see. Is that correct, Mr. Gilmer?

9 MR. GILMER: That is correct. We -- we reached out.
10 He asked. We said, "Absolutely no problem."

11 THE COURT: Is that correct, Ms. Ahmed?

12 MS. AHMED: Yes, Your Honor.

13 THE COURT: All right. I just wanted to -- as a matter
14 of housekeeping. Go ahead.

15 So as I understand it, Mr. Anthony, just so the record
16 is clear, you're asking for -- approximately from the current
17 execution date you would be asking until at least -- for the
18 purpose of investigation until the week of -- well, to do the
19 evidentiary hearing you would be asking for October 4th, which
20 would mean that the Court would have to set, if I were to agree
21 to this stay in terms of what you're asking for, approximately
22 three months for the stay from the current execution date,
23 approximately. Is that correct?

24 MR. ANTHONY: Yes, Your Honor.

25 THE COURT: All right. Again, I'm not saying that I'm

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1 granting that. I just want to make sure that the record is
2 clear about what it is you're asking for.

3 Go ahead, Mr. Anthony, if there's anything else you
4 wanted to add.

5 MR. ANTHONY: Sorry. Let me get back to my notes here,
6 Your Honor. Just give me -- Court's indulgence for just a
7 moment.

8 THE COURT: Sure.

9 (Plaintiff's counsel conferring.)

10 MR. ANTHONY: Your Honor, I wanted to respond to one
11 issue that was brought up by the Attorney General's Office, and
12 that is what we have done with the time that's gone by in the
13 past. And our position is that when you're going to seek
14 discovery, when you're going to serve requests for production,
15 what's the very first thing that we would want to know? What
16 are the drugs in the execution protocol? What are the dosages
17 of the drugs in the execution protocol? What's the sequence of
18 the drugs used in the execution protocol? If we can't learn
19 that -- the very basic information, knowing additional things
20 isn't necessarily helpful because that is the foundation for all
21 knowledge and all discovery.

22 And so we can't be put in a position of saying we
23 needed to have requests for production issued before a
24 particular date when we can't have those very, very simple
25 questions answered. Secondly, one thing that we've been very

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1 clear about when we talk about alternatives is we have an
2 ethical duty to Mr. Floyd. And the only way that we can
3 knowingly and intelligently talk with him about things like
4 execution alternatives is to know what the protocol is. Before
5 we know what the protocol is, we can't advise him about what we
6 think is better.

7 And so if the Court is looking at our conduct in the
8 past, it's simply impossible for us to know what to ask for or
9 to know what a better alternative is before we know what is
10 presented. And so that's the reason why, you know, we haven't
11 been able to serve requests for production back in April. We
12 don't have very basic information. That's the foundation for
13 any request for production. That's the foundation for any
14 information to provide about an alternative. It's unethical for
15 us to pursue an alternative before knowing what's in -- what's
16 been offered. Because Mr. Floyd, as we've been very clear about
17 from the very beginning, does not want to be executed. Our goal
18 is to advise him knowingly and intelligently about what he can
19 expect with the State's protocol and what we believe can be a
20 better alternative and then to allow him to make a choice in
21 that regard. And it's only because we weren't given that basic
22 information that we weren't in a position to go forward
23 previously.

24 And so that's what I have as far as answering the
25 Court's questions about what has happened before now.

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1 THE COURT: Okay.

2 MR. GILMER: Your Honor, may I have a brief response?

3 THE COURT: Hold on just a moment.

4 Let me just -- again, Mr. Pomerantz, Ms. Ahmed, you all
5 have spent a lot of time in this court, but you don't
6 necessarily have to comment and far be it from me to invite
7 lawyers to speak if they don't want to actually be heard.
8 However, Mr. Pomerantz and Ms. Ahmed, in your filings you have
9 essentially taken the position -- you had previously joined in
10 certain respects with the NDOC Defendants, but do you have a
11 position at this point in time on behalf of Dr. Azzam as it
12 relates to the stay or the date --

13 MR. POMERANTZ: No.

14 THE COURT: -- of execution?

15 MR. POMERANTZ: No.

16 THE COURT: Appropriately concise and to the point,
17 Mr. Pomerantz. I appreciate that.

18 And let me just take this one point. Ms. McLetchie,
19 you've come forward and I appreciate you being here. One of the
20 questions I wanted you to think about while I'm finishing this
21 argument is there's a great deal of information that's now been
22 disclosed. And you still have I think these pending motions.
23 It's not clear to me, I will tell you this, other than
24 identifiers as it relates to individuals who are associated with
25 the protocol that there's anything that's left that has actually

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1 not been disclosed either through the response from the NDOC
2 Defendants or by previous disclosures.

3 I'm not clear that your requests at this point create
4 any issues of disputed fact between the parties or dispute
5 between the parties if, as you've previously indicated, you're
6 not looking for identifiers. So what I would ask you to do is
7 just consider whether or not you're going to be asking for
8 additional information because I will tell you, based upon my
9 review of the record and your -- and in preparation for hearing
10 your argument today, I don't know that there's not a great deal
11 that hasn't already been disclosed such that it would really be
12 the identifiers as it relates to information or security
13 protocols that have been at this point withheld and not covered.
14 Everything else was more or less disclosed in the NDOC
15 Defendants' most recent submission.

16 MS. MCLETTCHIE: That is correct. If the Court -- if
17 the Court is referring to the identifiers for the lower-level
18 staff that were originally listed -- that were listed in
19 connection with some of the documents on the privilege log that
20 was publicly filed and then the further information that the
21 Court found on the record at the last hearing should be sealed
22 from the execution protocol for security reasons, it's my
23 understanding that nothing has been filed or provided to the
24 Court that -- that is under seal. So at this time we're not
25 seeking further information.

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1 Also, I drafted a footnote to this in our -- in our
2 notice. It wasn't a motion because I don't think there was
3 anything to seek, but in our notice we did advise the Court that
4 Mr. Gilmer did provide us with copies of the drug invoices. And
5 so those have been provided to the Las Vegas Review Journal.

6 THE COURT: Well, is there any reason why then,
7 Ms. McLetchie, because then I could potentially excuse you, that
8 I wouldn't deny your motions without prejudice to there being
9 some further disclosure that's under seal and confidential for
10 which you could pursue disclosure?

11 MS. MCLETCHIE: I think that would be fine, Your Honor.
12 The only thing I will note is that I do think that we do have --
13 the Court -- the Court and I have one remaining disagreement
14 which is just the extent to which prior notice is required
15 before either closing a court hearing or sealing documents.
16 It's my view that the public shouldn't be in a position of
17 litigating in the dark or, frankly, even attending every single
18 hearing. And that rather than Mr. Gilmer asking the Court at
19 the hearing, "Hey, can I file this under seal," it's my view
20 that he should be seeking by motion to seal records, and then
21 the Court is then -- then the Review Journal or any other member
22 of the public is able to address any arguments in favor or
23 against sealing. And the same goes with court hearings as well,
24 Your Honor.

25 THE COURT: And, Ms. McLetchie, we don't necessarily

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1 have a disagreement. I agree that in most cases that would be
2 appropriate and that is the practice. I do find that this is a
3 special and unique case, and that it has been a fast-moving case
4 as it relates to the issues. And it's for that reason and that
5 reason alone that the Court permitted this type of a sealing
6 procedure, which the Court has the discretion to do and because
7 I find there to be security issues.

8 I do not disagree that as a general matter and general
9 principle that prior notice is appropriate and should be the
10 normal procedure. However, I do find that in this case that
11 there were very specific reasons which I had previously
12 identified as to why that did not occur and didn't need to
13 occur.

14 So I'm not disagreeing with you that that -- that that
15 is the general principle that applies, but in this case I did
16 find that there was good cause for it not to occur. And I just
17 wanted to be clear that I think your point was well taken except
18 I did find in this case that there were particular circumstances
19 that supported the Court making its finding and that the local
20 rule -- local rules allowed for that discretionary decision in
21 these specific circumstances.

22 So with that, unless there's another record you'd like
23 to make, Ms. McLetchie, I'm going to excuse you, unless you want
24 to -- you can remain, but I don't find that we need to consider
25 the motions further on behalf of your client.

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1 MS. MCLETTCHIE: I agree, and I thank the Court for your
2 time.

3 THE COURT: Okay.

4 MR. GILMER: I would just like to say that I think
5 occasionally the Court actually sua sponte said, "File things
6 under seal" and I didn't ask for it, but other than that, I
7 agree with everything else.

8 THE COURT: Well, I don't want to go back and forth on
9 that particular issue, but I do believe, as I've said
10 previously, there was a basis for the sealing in each and every
11 case. I also believe that much of the information that
12 potentially may have initially been protected by the initial
13 sealing has subsequently been disclosed. And so that the only
14 thing that's remaining is information that should remain sealed
15 for the reasons I previously identified.

16 So I won't necessarily dispute that -- Mr. Gilmer, that
17 you at the last minute asked for information. I'm not
18 suggesting that, and that there were times the Court I think
19 anticipated that you would request it and did that just to avoid
20 the bureaucracy of separate motions being filed.

21 So with that, thank you, Ms. McLetchie, for your time.
22 I appreciate it, but I wanted just to excuse you. As you were
23 sitting there, I didn't want you to have to wait.

24 MS. MCLETTCHIE: I appreciate it. Thank you, Your
25 Honor.

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1 THE COURT: Of course.

2 Mr. Gilmer, you wanted to be able to respond briefly.
3 And let me just say this to you, Mr. Gilmer. And, again, while
4 we're having this discussion, I went back and looked at the
5 motion for temporary restraining order and the preliminary
6 injunction motion. They do appear to explicitly reference the
7 Eighth Amendment and Fourteenth Amendment and do appear to
8 reference explicitly notice. And certainly the Court has
9 previously indicated that.

10 And in looking at the briefings, there is -- there is
11 some discussion of that. And I'm saying that to you because I'm
12 not sure that there's any need for further briefing on this
13 particular issue before the Court makes a potential decision on
14 the motion to stay. But I wanted just to give you the benefit
15 of that consideration.

16 MR. GILMER: Yes. Well, I was going to address part of
17 that, Your Honor, in my follow-up comments. So I appreciate the
18 Court -- the Court looking at that.

19 Mr. Anthony noted that there was a Count Three for
20 Fourteenth Amendment. I've not -- at no point in my argument
21 did I say that it wasn't raised in the complaint, but as the
22 Court's aware, there's a difference between filing something in
23 a complaint and filing something in a stay.

24 And, yes, you indicated that they do mention the
25 Fourteenth Amendment in the context of their preliminary

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1 injunction motion and -- but as we indicated, the supplement
2 didn't focus on any of that. And I would also remind the Court
3 that, yes, it was mentioned. It's, as the Court pointed out,
4 the Eighth Amendment and Fourteenth Amendment. But I think if
5 you read the full context of the motion, the entire context of
6 the motion is dealing with a method of execution challenge under
7 the Eighth Amendment and whether or not there is dangers of the
8 drugs and so on and so forth. They do not talk about -- they do
9 not brief and discuss in any great length fundamental fairness
10 under the due process.

11 And of course the Fourteenth Amendment would be
12 mentioned in that context because the Fourteenth Amendment is
13 what makes the Eighth Amendment incorporated to the states. So
14 I don't believe that that necessarily changes the position that
15 I said with regard to what the full nature and substance of the
16 actual motion for stay and the challenge that was brought there
17 was, despite the fact that the Fourteenth is obviously
18 referenced because we are a state entity and that's how the
19 Eighth Amendment applies to it.

20 The entire briefing dealt with Eighth Amendment issues
21 and the -- in the general Eighth Amendment context. And he is
22 right and -- and Mr. Anthony did say something that was accurate
23 about First Amendment/Ryan. We do discuss that and we discussed
24 that also in the supplement. And we filed a four -- three-page
25 supplement of 350 letters consistent with Ninth Circuit rules

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1 and precedent. I think theirs with about seven pages of
2 argument in response, but be that as it may, in that brief we
3 point out that there are not inherent due process issues and we
4 cite those to the cases that are referenced in the Pizzuto case.
5 So to the extent that it has been raised, I don't think that
6 there's been any specific finding that that would clearly weigh
7 in the equities of their favor. And, therefore, I think that
8 would be why additional briefing might be needed.

9 Two other quick points --

10 THE COURT: So, I'm sorry, therefore you think that
11 additional briefing would be required why, Mr. Gilmer? Because
12 I agree with you because I looked at this issue obviously as we
13 were going through this litigation. The nature of the due
14 process claim in this case is actually somewhat amorphous. It
15 would appear that there's no First Amendment claim that either
16 members of the public or media or even the condemned can bring.
17 That's different, however, than a fundamental procedural or
18 substantive due process argument about the disclosure of the
19 information and the protocol.

20 As far as I can see, that's an issue that has been
21 potentially considered, but there is not a clear Supreme Court
22 decision that says that a condemned person has this exact due
23 process right and what the contours of it are.

24 Nonetheless, I will tell you that based upon my review
25 of the pleadings I understand that to be an argument that the

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1 plaintiff has raised. If you think you need one final shot at
2 this, I don't know that it would take long because, quite
3 honestly, Mr. Gilmer, there's not much law, as you have said. I
4 don't know that it would take more than two or three pages, but
5 the reality of it is the Supreme Court and the Ninth Circuit
6 have not clearly defined what the contours of this due process
7 right are. There have been what appear to be references to the
8 applicability, which there would have to be, of the due process
9 clause and notice in this context, but the Supreme Court has not
10 squarely decided the issue. So this Court would be for the
11 first time addressing that, but I do think that the issue, so
12 you understand, is squarely before me.

13 So I'm going to issue a decision that addresses that.
14 And I will also just tell you, since I want to be clear, I do
15 think that there is a due process claim that exists in the
16 context of a condemned person having notice of the information
17 in an execution protocol and having sufficient time to be able
18 to investigate the drug protocol to be able to make a
19 determination about whether or not there would be an Eighth
20 Amendment violation.

21 So I want to be clear so you have an opportunity,
22 Mr. Gilmer, if you want to submit something that you think
23 legally would address that, you can, in the context of this
24 case, but it's my intention to issue my order with respect to
25 the stay by no later than Wednesday morning. And I would --

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1 would have issued it potentially by tomorrow, but I want to go
2 through some of the information you've raised and I wanted to
3 give you as always, Mr. Gilmer, an opportunity to file something
4 additionally. You always take yourself up on that, even though
5 I may give you more work to do --

6 MR. GILMER: Well, I can't on that timeline, Your
7 Honor. As I indicated in the beginning, I will be unavailable
8 to do anything tomorrow. So I won't be able to have anything to
9 you by Wednesday morning if we decided to do that.

10 THE COURT: Well, but the question, Mr. Gilmer, is
11 this. You've obviously looked at the law. I've looked at the
12 law. There's no -- right, it would be one thing if there were a
13 series of cases that we were going to discuss back and forth.
14 And the reason why I asked you initially about the fundamental
15 fairness issue, which is that's really the principle that
16 applies. There's no specific Supreme Court case that says this
17 is what the due process claim would be.

18 But to me it's an inescapable conclusion of the due
19 process clause that it would have to apply in the context of one
20 of the most dramatic exercises of governmental authority, which
21 would be the putting of someone to death, that I don't believe
22 that -- that the due process clause would not apply in that
23 circumstance. And I don't know that you are saying that it
24 wouldn't either. I think that we might be -- we might be
25 disputing the contours of that.

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1 So to that end, Mr. Gilmer, what would be the need for
2 additional briefing? Because you have clearly looked at this
3 issue, and you understand it, as I do, that there's no clear
4 case law on this. And you've cited I think to the cases that
5 talk about the due process clause generally, but there's nothing
6 more than that.

7 So why would you need additional time?

8 MR. GILMER: Well, you know what, Your Honor, and now
9 that I've listened to you, a very wise counsel, much smarter
10 than me as the Judge, I think you're right. There is no
11 briefing. But I also think if you listen to your answer -- your
12 questions that you just said, it's exactly why a stay shouldn't
13 be issued.

14 You indicated there's no clear ruling from the Supreme
15 Court. It's nebulous at best. There might -- there could be,
16 but we don't know what the contours are. All of that goes
17 against -- against providing a stay or an injunction because
18 none of that talks about the likelihood of success of the merits
19 let alone anything else. And I think you actually used the word
20 "clear indication" from -- from the Supreme Court. And that
21 goes exactly to our position that they have to put forth a clear
22 showing.

23 And with regard to the substantive due process and
24 specific, as there is plenty of case law that says this, you
25 only look at substantive due process when and if there is not an

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1 amendment that fits specifically. And in this case there's an
2 amendment that fits specifically. That is the Eighth Amendment.
3 That is where method of execution challenges are brought forth
4 all the time.

5 So there's no reason, if you -- if you want to look at
6 substantive due process, that that would apply because we have
7 an Eighth Amendment, and that's where these issues are supposed
8 to be addressed. And in that context -- and I think you can
9 follow it to why it would also apply as to why a stay wouldn't
10 be necessary in the context of the Fourteenth Amendment since
11 they can't show a likelihood of the merits of success since
12 there is no case. And as the Court said, you would be opining
13 as to what the law is and you very well may be correct in that,
14 but that doesn't show a likelihood of success on the merits to
15 get the stay. And so there's a different issue there.

16 And I would point out the Towery case, which is one of
17 the cases that plaintiff has mentioned numerous times. In that
18 case, Your Honor, the -- the State of Arizona informed the Ninth
19 Circuit after they filed their appeal, and I can't -- I cannot
20 recall if they filed or plaintiff filed, but after the appeal
21 was filed that the protocol had been changed yet again. It was
22 mere hours before they had oral argument. It was 48 hours
23 before the execution proceeded.

24 And the Court, yes -- Mr. Anthony points this out in
25 the briefing very well. They were very frustrated with the

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1 State of Arizona, and we have pointed out why what we have here
2 is very different. But despite that frustration, the Court
3 still said there was no stay authorized under law.

4 THE COURT: Okay, Mr. Gilmer. We're talking about a
5 protocol that has eight different versions, right?

6 MR. GILMER: I think we're --

7 THE COURT: And so this is not the substitute of a drug
8 that was known. Because that was the other issue in that case,
9 which was what was the drug substituted. I'm not talking about
10 that. I'm talking about if it's your position that you believe
11 that the due process clause doesn't require some opportunity for
12 a condemned person to be able to investigate whether or not the
13 drugs that are part of the protocol would, in fact, violate the
14 Eighth Amendment.

15 Is it your position that there is no such claim or is
16 it your position that to the extent that such a claim exists,
17 right, it shouldn't -- there is not a likelihood of success on
18 the merits here or a serious question going to the merits?
19 Those are two separate positions.

20 MR. GILMER: I think that -- I think that they are two
21 separate positions, but not inconsistent with one another.

22 THE COURT: Okay.

23 MR. GILMER: And I think to the extent that Count Three
24 doesn't apply in the complaint -- and, again, they haven't -- I
25 haven't seen their amended complaint. So obviously I haven't

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1 had any answer or motion to dismiss on anything. But to the
2 extent that that is brought forth, I do think it is important to
3 point out that I would -- I would maintain and argue that it
4 most likely fits under the Eighth Amendment and wouldn't be a
5 stand-alone claim. However, as the Court has indicated, there's
6 very little case law on this issue. There is no clear -- clear
7 showing as to what needs to be shown or what would happen.

8 So even if this Court were to conclude that that case
9 could proceed as a -- as a court count of action, there is no
10 legal reason or equitable reason to provide a stay or an
11 injunction while the Court considers that issue.

12 And I would also like -- and I know the Court has said
13 there's eight different protocols, and I appreciate the Court's
14 position on that. I would like to push back on that a little
15 bit. The protocol's very clear that there are -- it's a
16 four-drug protocol or a three-drug protocol, and it has two
17 substitutions based upon evidence that our experts have put
18 forth will act in the same fashion. And that is a good segue
19 for me to respond to the last few things that I wanted to
20 respond to with regard to Mr. Anthony's argument.

21 Nebraska used fentanyl. Nebraska used cisatracurium.
22 We've addressed that more. I don't need to say that. Yes, they
23 are correct that he was a volunteer. And I think maybe I
24 misunderstood what Mr. Anthony said, fentanyl's never been
25 litigated. It has been litigated. It was litigated here. It

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1 was litigated in Dozier. And we could have -- and that was --
2 there was never any discussion that fentanyl could not be used
3 in an execution protocol in Scott Dozier. It was cisatracurium
4 that was stopped. It was blocked by the State Court judge
5 initially and then later midazolam. There was never a finding
6 that fentanyl was inappropriate to use. So I think that that's
7 a little disingenuous by Mr. Anthony to state.

8 And, yes, while the inmate in Nebraska was a volunteer,
9 there's no -- and I don't think I'm speaking out of turn here
10 that if there had been problems with that execution or it had
11 been, to use the term that is used often when referring to these
12 things, botched, there would have been media coverage about it.
13 There would be something to know about it. There would be
14 something out there that they -- that Mr. Floyd could have
15 provided to this Court in their -- in their motion for stay or
16 in their supplemental motion to stay to say why this is a
17 problem. Instead, they just say it's a volunteer and hasn't
18 been litigated.

19 I think that speaks volumes as to the extent as to the
20 efficacy of the drugs used there. And, yes, it didn't include
21 ketamine. That is fair. But, again, I think our -- our experts
22 indicate why ketamine is an appropriate drug to use in place of
23 diazepam.

24 Lastly, because Mr. Anthony also again pointed out
25 something about discovery and why he didn't need to provide any

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1 and said that he would be waiting because that would be the
2 first thing he wanted. This is an exact quote from the April
3 30th transcript, Your Honor. And obviously you can go back. I
4 won't -- I won't -- I won't quote back what the Court said. But
5 you were discussing the fact that there's probably other
6 discovery issues other than the protocol such as training, such
7 as mechanisms, such as depositions, such as other things that
8 they may want.

9 And Mr. Anthony's response to the Court: "There's no
10 reason why we couldn't start discovery now. We agree. It would
11 be a good idea." That didn't say anything about it would be
12 futile. It said -- and I'm -- it said that there's no reason
13 why we shouldn't do it. So I think he's again trying to hide
14 the ball and go back on that.

15 So, again, I -- I know the Court's appreciation and
16 understands about the eight protocols. I believe that the --
17 that the execution protocol is clear that there are two
18 protocols. It's either a four-drug protocol or a three-drug
19 protocol. And two of those drugs each have a substitution that
20 could be used.

21 And Director Daniels provided an answer today that he
22 would -- all things being equal, and the Courts don't say
23 otherwise, he would move forward with the four-drug protocol
24 which would -- with fentanyl first and the potassium chloride.
25 And he said he would make those determinations based upon

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1 expiration dates.

2 So I don't think the universe of what the protocol is
3 going to be is -- is concerned. Also, on the potassium
4 acetate --

5 THE COURT: And, Mr. Gilmer, I'm not disagreeing with
6 that. Really the issue here is just about the timing. And the
7 question is why wouldn't the equities favor additional time.
8 What could possibly be the equity that -- of the NDOC Defendants
9 that would outweigh Mr. Floyd's? And I think you've done the
10 best you can as relates to the costs. If there's something
11 else, that's fine. I appreciate that, but --

12 MR. GILMER: Sure.

13 THE COURT: -- as you know, that's -- that's one of the
14 big issues here. This is one of those -- those cases,
15 Mr. Gilmer, where the equity factor is a substantial one. As
16 you know, often in cases that factor isn't necessarily
17 potentially as significant.

18 And so I don't know that you have anything else you
19 wanted to add, but I just wanted, again, to give you an
20 opportunity if you wanted to respond further, you can. If you
21 don't, you don't have to.

22 MR. GILMER: Equities might take a bigger role, Your
23 Honor, in this particular case, but it can't be the only thing
24 the Court can rely on. And Nooner, another case that plaintiff
25 suggests, which is out of the Eighth Circuit, but they have it

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1 in their pleadings, and I think the Ninth Circuit case law is
2 clear on this, says so even if you want to drop the likelihood
3 of merits of success to what Nooner said, which isn't the
4 standard in Ninth Circuit. But in Nooner they said even in
5 execution protocol challenges where equities are there, quote,
6 you have to show a significant possibility of success on the
7 merits.

8 And when they've given this Court zero medical evidence
9 and even a proffer with regard to it, there is no way they can
10 meet even that relaxed standard let alone the standard that's
11 binding based upon Winter.

12 So, yes, equities might -- even if this Court were to
13 disagree with us and find that the equities weigh in favor of
14 Mr. Floyd, that does nothing with regard to the likelihood of
15 success on the merit. It does nothing with regard to the
16 irreparable harm merit, and it does nothing with regard to
17 public policy where the citizens and the residents of the State
18 of Nevada have been waiting for 20 years for justice to be
19 carried out.

20 THE COURT: So why would three months make a difference
21 in that context, Mr. Gilmer? I mean, look, I -- again, this is
22 not about the context of -- it's years you're talking about.
23 You're talking about potentially three to four months, which is
24 essentially what they've asked for.

25 Why in -- from the standpoint of public policy would

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1 there not be an equally important public policy consideration
2 that an execution not occur in a situation in which a condemned
3 person hasn't had a fair opportunity to be able to look at the
4 drugs?

5 MR. GILMER: So, Your Honor, I say this and I tread
6 lightly in saying this because I know before that you said that
7 this isn't -- this isn't necessarily the Court's concern, and I
8 appreciate and understood why you said that in that context.
9 And I think you'll know what I'm talking to when I continue, but
10 because you mentioned the cease and desist letter that occurred,
11 a three-month stay entered by this Court doesn't mean that
12 nothing else is going to happen. And I realize that you might
13 just want to say back to me what you said before, that's not a
14 concern to this Court.

15 But if you're weighing the public interest and what
16 happens, and to the extent that we've already had one cease and
17 desist letter out there that we're going to have to get involved
18 with in litigation, there is a public need for this. It can't
19 just be said three months more after 20 years isn't going to
20 make a difference, because you don't know what 's going to
21 happen in those three months. You don't know what might happen
22 to the drugs that are in the possession of NDOC. You know, I
23 mean -- there's plenty of things that could happen between now
24 and three months from now as to why just saying a three-month
25 delay isn't going to -- it tips in his favor, especially when

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1 they have shown zero medical evidence of any concerns regarding
2 the current protocol.

3 And I know I've repeated myself numerous times. I
4 don't know if the media will report it or not, but I think it
5 bears repeating again. This record is devoid of any medical
6 support for their position that Mr. Floyd is going to have any
7 unconstitutional pain or suffering. And it is time for them --
8 it way past time for them to be given another chance when they
9 filed something in April.

10 Thank you, Your Honor.

11 THE COURT: Okay.

12 Well, again, just so the record is clear, Mr. Gilmer, I
13 understand their argument to be that they should have the
14 opportunity to be able to obtain that evidence and that your
15 client has been able to obtain that evidence for that period of
16 time. And so when I consider the context of their claim, it's
17 not that they've had the same amount of time.

18 So, I want to be clear about the fact that what I am
19 considering really is a claim based upon the ability to acquire
20 information regarding the drugs and the dosages and the
21 sequences that were disclosed in the protocol. That is -- would
22 be the sole basis for this.

23 So, Mr. Anthony, I don't know if you have anything else
24 you want to add to that. I think you have already made the
25 argument, but if you want to address the last point that

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1 Mr. Gilmer made which relates to the issue of expert testimony.
2 Because the NDOC Defendants did provide several experts who
3 opined about all of the different drug protocols and their views
4 about the fact that they didn't believe that any of these
5 protocols would result in an unconstitutional execution.

6 Go ahead, Mr. Anthony.

7 MR. ANTHONY: Just very briefly, Your Honor.

8 I think that the first thing that bears noting I think
9 once again for the record is just that we've had eight days from
10 the time of the disclosure of the execution protocol to the date
11 that we had to file our last pleading. We had eight days to
12 respond to a new, novel, experimental execution protocol. On
13 the other hand, they have had substantially longer than eight
14 days. In fact, what the Court heard today and what I asked
15 Mr. Gilmer to bring to this hearing was when did they first
16 contact their experts. According to the testimony of Director
17 Daniels, they've had their experts, at least Dr. Buffington for,
18 what, you know, almost 30 days at this point. So they --

19 MR. GILMER: Yeah, that's a mischaracterization --

20 THE COURT: Hold on. Hold on, Mr. Gilmer.

21 MR. GILMER: That's -- that is a mischaracterization --

22 THE COURT: Mr. Gilmer.

23 MR. GILMER: -- of the testimony, Judge.

24 THE COURT: Mr. Gilmer.

25 Please, I will give you a chance as I always do.

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1 Please do not interrupt. I will come back to you and so you can
2 respond.

3 Mr. Anthony.

4 MR. ANTHONY: Our understanding from Director Daniels'
5 testimony was that he consulted with Dr. Buffington or -- I
6 don't know at what time period. It was shortly before he made
7 the decisions -- he made the fundamental decisions about
8 dosages. And I don't know about sequencing because I don't
9 remember the sequencing, but it was as to the issue of dosages.

10 So our position is they've been able to get a jump on
11 this. They've been able to -- they've had this time. They've
12 had time since the end of March to work on this. So they've
13 been able to line up experts. They've been able to do things.
14 We haven't been afforded the same amount of time.

15 Now, we look forward to proffering reports from our
16 experts. We even have it built into the scheduling order. Our
17 scheduling order has a short form for disclosing experts and
18 their Rule 26 reports. So we are completely ready, willing, and
19 able to do that. And we have suggested that on an expedited
20 schedule and we are in the process of doing that. It's just
21 that we've only had eight days from the time that they disclosed
22 the execution protocol to the date that we had to file our
23 supplemental motion to stay the execution.

24 So that is a very compressed time frame. And, yes, we
25 are consulting with experts. And, yes, we are going to have

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1 expert reports. That's where the information that we had came
2 from, but nonetheless we've only had eight days. They have had
3 a lot more than eight days. That's the difference when it comes
4 to the equities between the parties.

5 So that's my response, unless the Court has additional
6 questions.

7 THE COURT: I don't.

8 So, Mr. Gilmer, now if you would like to respond.

9 MR. GILMER: Thank you, Your Honor. And I apologize to
10 the Court and to plaintiff's counsel. You know that that is out
11 of character for me. I apologize.

12 THE COURT: That's all right.

13 MR. GILMER: I believe Mr. or Director Daniels
14 testified that he spoke to one individual prior to finalizing
15 the protocol. He never put a timeline with regard to that. And
16 he made it clear that he never spoke to either Dr. Petersohn or
17 Dr. Yun. So I believe that was why that was a
18 misrepresentation.

19 THE COURT: I thought he was talking about Dr., I think
20 his name is, Buffington.

21 MR. GILMER: He did -- well, he clarified that after
22 the fact, but I thought he said experts and so I apologize. So
23 he did clarify that. But, again, even with Mr. Buffington he
24 said plenty is sufficient amount of time or 30 days, and there
25 was no timeline ever put forth with regard to when Mr. Daniels

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1 would have spoken to him.

2 Also, that is the second or third time I have heard
3 Mr. Anthony say they only had eight days. And not to beat a
4 dead horse, we told them on June 3rd what the drugs were. So
5 certainly he may not have known the sequencing or dosaging on
6 that time. Again, as I indicated, I believe I told him the
7 sequencing, but that is substantially different than eight days.
8 June 3rd is another week on top of that to at least know the
9 drugs that they could have set forth to their experts.

10 And, again, as I've indicated to this Court, I
11 appreciate and understand that maybe they would need more time
12 or everybody would want more time. Everybody always wants more
13 time to get stuff done. But even then, even just now when
14 Mr. Anthony talks about this, he still hasn't disclosed the
15 names of experts. I guess we take him at his word that he has
16 them. We don't know who they are. They didn't have a proffer
17 or a declaration from any experts saying how much time they need
18 or why they weren't able to provide anything to the Court in the
19 short time that they had. I think that that's important if
20 Mr. Anthony says he needs more time. If the -- if he can't tell
21 the Court that the experts say they were prejudiced by it, it
22 doesn't suggest that it's a problem.

23 I understand it's a tight time frame. We've all been
24 working under very tight time frames in this case.

25 THE COURT: I guess, Mr. Gilmer -- I guess I'm trying

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1 to make sure I'm understanding what your argument is. Your
2 argument is that they would essentially have to affirm on the
3 record as officers of the court that it would take them
4 additional time to be able to retain experts to respond? I just
5 want to make sure I'm understanding what you're saying because I
6 could ask him that question.

7 I understood the representations previously based upon
8 the discovery schedule that what they were saying was they would
9 need the time to both consult with retained experts that they
10 could comment on the process. So I guess I'm trying to
11 understand. Is it your position that essentially they should be
12 required to have some expert at least say, "I need more time"?

13 MR. GILMER: I believe that my position is they've
14 already had that -- they already were required to do that, Your
15 Honor. In their reply brief they didn't -- they said they
16 needed more time, but they explicitly stated in their reply
17 brief that in the short time they've had to consult with their
18 experts. That suggests they have experts. But, yet, they
19 didn't provide this Court with any declaration from experts that
20 says why they need more time, why they couldn't get it done in
21 the time that they had, who the experts are.

22 So, again, when we're talking about equities and what
23 is out there and what is not out there, that is a glaring
24 omission on behalf of plaintiff's counsel.

25 And, yes, I mean, I don't care if the Court asks the

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1 question or not. I'll be happy to hear their answer. I think
2 it's -- I think it's too little too late. They had an
3 opportunity to tell us who the experts were. They had an
4 opportunity to at least opine as to who their experts may be or
5 provide a proffer in their -- in their initial supplement. They
6 certainly had time to provide the names and what the experts --
7 why the experts couldn't get an answer to them done in time at
8 the time of the reply brief. There was nothing provided by an
9 expert at that point in time.

10 So, yes, certainly we can take them at their word as
11 officers of the court and we can ask them now, but it's too
12 little too late. The time was then. It's not now.

13 THE COURT: So let me ask you this question,
14 Mr. Gilmer, because at this point I'm going to go back and look
15 at the record, but I don't know that there's a reason to delay
16 issuing the order one way or another as soon as possible. Is
17 there any reason why if I were to order a stay in this case that
18 I need to do that in open court or -- because I'm going to go
19 back and look at some questions and issues that are here.

20 I don't know that it would take me that long, but I
21 could do that potentially today or tomorrow -- actually, you're
22 not -- you're not potentially available tomorrow. But is there
23 any reason why we need to do this -- we would need to do it in
24 open court?

25 I would fully anticipate that at least the NDOC

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1 Defendants to the extent that I issued a stay would appeal that
2 decision. I don't know that there's anything we would have to
3 work out, but to the extent that there's something if I were to
4 issue a stay that we would need to address, just let me know
5 what that would be.

6 I will tell you it would be my intention if I issued a
7 stay to nonetheless set an evidentiary hearing on a date within
8 the current execution date time frame; in the situation in which
9 if I ordered a stay that it would be overturned that there would
10 still be an evidentiary hearing in the case.

11 So that would be one thing that the -- I had thought
12 about as it related to any order that I drafted and finalized.
13 Is there anything else, Mr. Gilmer -- and then I'll come back to
14 you, Mr. Anthony or Mr. Levenson, and then Mr. Pomerantz and
15 Ms. Ahmed. Anything else that I would need to consider in any
16 order that I issued?

17 MR. GILMER: Other than my wonderful briefing, no.
18 But, no, in seriousness, Your Honor, and I apologize for making
19 light of the situation, but I do not believe it needs to be
20 taken in open court. I believe obviously any appeal we would
21 make would have to have a written order associated with it. So
22 obviously I think that would be the Court's preference as to
23 whether or not you issue it in open court.

24 I do think there's a slight difference with regard to
25 stay and injunctions as we've discussed before as to which one

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1 would be appropriate here because we still don't have the
2 execution warrant. We only have the order. And so to the
3 extent there's a stay and to the extent that -- and to the
4 extent -- and to the extent your order were to touch upon any of
5 the deliberative process privileges, although I don't think it's
6 going to from what the Court indicated, I still think that there
7 should be a certificate of appealability listed in the document.

8 THE COURT: Just to address that particular issue.

9 MR. GILMER: Well, also with regard to the stay
10 because, I mean, if an injunction is automatically
11 interlocutorily appealable --

12 THE COURT: Yes.

13 MR. GILMER: -- stays most likely are as well, but it
14 gets a lot more nuanced. And so I think it would be a lot
15 cleaner if it just had a certificate of appealability to the
16 extent it's a stay as opposed to an injunction.

17 THE COURT: Well, there's no actual -- I mean, again,
18 I'll go back and look at the way the state law works. There's
19 no actual warrant of execution.

20 MR. GILMER: That is correct.

21 THE COURT: So the question is whether or not there is
22 a stay that needs to be issued because there obviously has been
23 a week set, but the warrant itself hasn't been issued. I have
24 to go back and look at what Courts do in that case. I'm not
25 sure.

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1 Certainly to the extent the Court issued an order that
2 would both be a stay and potentially an injunction which would
3 prevent the NDOC from going forward with any execution prior to
4 a particular date, if that would be the order. But is there
5 anything else I would need to address, Mr. Gilmer?

6 MR. GILMER: I believe that's it, Your Honor. I
7 believe injunction as opposed to a stay and certificate of
8 appealability if you go with a stay. Other than that, that
9 covers it all. Thank you.

10 THE COURT: Okay.

11 Mr. Anthony?

12 MR. ANTHONY: Nothing from us, Your Honor.

13 THE COURT: Ms. Ahmed or Mr. Pomerantz?

14 MS. AHMED: Nothing from us, Your Honor.

15 THE COURT: Okay. Hold on just a moment.

16 (Court conferring with law clerk.)

17 THE COURT: We're going to take a five-minute recess.
18 Then I'll come back and I'll tell you exactly how I'm going to
19 rule on the stay and the scheduling for the order. We'll be
20 adjourned.

21 (Recess taken at 5:13 p.m.)

22 (Resumed at 5:20 p.m.)

23 THE COURT: Please be seated.

24 All right. So I'm going to issue a written order to
25 this effect, but the Court is going to grant the motion for an

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1 order of a stay of the execution of Zane Floyd in this case. I
2 do find that fundamental fairness and the due process clause, if
3 they are to mean anything, should in this case allow for a
4 person who has been condemned to death to have adequate time to
5 be able to investigate whether or not the drugs that are going
6 to be used to bring about his execution will be done so in a
7 constitutional manner.

8 The Court finds that the NDOC Defendants have had at
9 least three months to be able to investigate the drugs, their
10 dosages, and their sequence to make sure from the Director
11 Daniels' perspective that the drug protocol can be -- can be
12 administered in a constitutional manner.

13 The Court finds that fundamental fairness and the due
14 process clause means that Mr. Floyd and his counsel should be
15 afforded at least the same amount of time; that the defendants
16 have identified no reason why he should not be afforded this
17 amount of time in this case. The Court finds that in this case
18 this is an untested drug protocol, that there are at least eight
19 versions of the drug protocol in this case, all of these
20 versions have not been previously litigated.

21 The Court finds that the NDOC went through a thorough
22 investigation, at least based upon what's been presented to me,
23 of the drugs, and that that same ability to be able to engage in
24 a thorough investigation of the drugs should be afforded
25 Mr. Floyd and his counsel.

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1 The Court finds that the disclosure of the sequence and
2 the dosages was not made until just, as indicated, eight days
3 prior to the plaintiff's submission and that, therefore,
4 Mr. Floyd and his counsel did not and have not had sufficient
5 time to be able to adequately investigate the medical
6 significance of the dosages and the sequence of the eight
7 different protocols that have been put forward.

8 The Court will order, and this will be specific in my
9 written order, an injunction that would prevent the NDOC from
10 going forward with the execution of Mr. Floyd prior to the week
11 of October 18th.

12 The Court finds that Mr. Floyd and his counsel need
13 that time to be able to adequately investigate the drugs, and
14 that this Court also needs sufficient time to be able to
15 consider the evidence as it relates to the execution protocol.
16 The Court anticipates that there would be at least a three- to
17 four-day hearing with competing experts the week of October 4th
18 as has been put forward by plaintiff's counsel.

19 The Court, of course, is aware of the fact that the
20 NDOC Defendants may or Dr. Azzam may appeal this Court's
21 determination and will set an appropriate evidentiary hearing
22 date within the potential time frame for an evidentiary hearing
23 to proceed.

24 However, the Court will go through those details in its
25 written order as identified by the Court and the parties. At

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1 this point the Court is ordering injunctive relief. And,
2 Mr. Gilmer, I'll address the issue of whether or not it
3 constitutes a stay specifically in the context of the written
4 order, but at this time the Court would identify it as
5 injunctive relief at this point and possibly a stay in this
6 case.

7 The Court will issue its written order and anticipates
8 it by no later than Wednesday morning or potentially by tomorrow
9 night, but that's based upon other matters that the Court has
10 before it.

11 And I wanted to be clear that the Court's order is not
12 meant in any way to suggest or -- any finding as it relates to
13 the constitutionality of Mr. Floyd's conviction or the actual
14 imposition of capital punishment in this case. The Court's
15 order is based upon due process and fundamental fairness and the
16 Court's finding that even for an individual who has been
17 condemned to execution by the State that fundamental due process
18 and fairness require that he have an adequate amount of time to
19 be able to investigate the method by which the State intends to
20 take his life, and that in this case Mr. Floyd has not been
21 afforded that opportunity.

22 I am not making a finding that the NDOC Defendants in
23 any way or Dr. Azzam intentionally or in bad faith deprived
24 Mr. Floyd of the opportunity to be able to investigate these
25 drugs.

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1 The Court finds that and takes Director Daniels as his
2 word that he did not finalize the protocol until days before it
3 was publicly issued, which only further supports the Court's
4 determination that this process takes time for an individual or
5 group of individuals to be able to adequately understand and
6 assimilate the relevant information for this, the most serious
7 and ultimate punishment that the State can impose.

8 So the Court will issue a written ruling outlining that
9 and will address the issue, Mr. Gilmer, of certificate of
10 appealability, but the Court certainly finds that there would be
11 a basis for an appeal in this case in terms of the fact that
12 that would be available to the NDOC Defendants should they avail
13 themselves of it or Dr. Azzam. I'm not taking a position one
14 way or another about whether or not they should.

15 The Court does note that it finds that the balance of
16 the equities in this case strongly tilt in favor of Mr. Floyd.
17 That it has been 20 years since the punishment was imposed and
18 that three additional months to allow for him and his counsel to
19 be able to adequately investigate these drugs is not outweighed
20 by the public's interest in the enforcement of the penalty. At
21 this point in time there would, of course, be irreparable harm
22 to Mr. Floyd in this case as his life would be taken.

23 So that factor obviously weighs clearly, unmistakably,
24 undisputably in Mr. Floyd's favor as to the equities in this
25 case.

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1 The Court does not find that any additional or any
2 costs associated with moving the date would be costs that would
3 need to be additionally incurred that the NDOC would not have to
4 already incur in terms of preparation, that there are no
5 substantial identifiable additional costs with the moving of the
6 date as the Court finds that any costs that have been incurred
7 would have needed to be incurred in any event and will need to
8 be incurred for the execution protocol -- execution protocol to
9 be implemented.

10 Hold on.

11 (Court conferring with law clerk.)

12 THE COURT: Mr. Anthony, is there any further
13 clarification that the plaintiff would seek as relates to the
14 written order? Obviously, as I've indicated, I'm going to
15 finalize the order, but I wanted to give you all the basis for
16 the order now.

17 (Plaintiff's counsel conferring.)

18 MR. ANTHONY: Your Honor, just for clarification, and
19 this might be addressed in the order, the Court is still setting
20 aside that time the week prior to July 26th for a potential
21 evidentiary hearing if a stay should be vacated?

22 THE COURT: The order will include a date to that
23 effect, yes. I just need to check my calendar for that.

24 MR. ANTHONY: That's all for the plaintiff.

25 THE COURT: Mr. Gilmer?

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1 MR. GILMER: That was the only -- that was going to be
2 my only question as well, Your Honor, because you mentioned
3 October 4th and also July, but I'm sure that will be well
4 understood in the order, the written order, so ...

5 THE COURT: So, I think that, again, these things move
6 quickly, but I would anticipate that the hearing, to the extent
7 it took place, would occur July 19th. If the Court's order
8 would -- would be reversed or overturned in some fashion, it
9 seems to me that it would occur before that week, and then there
10 would be potentially an opportunity to address evidentiary
11 matters at that time. I'm not saying that, in fact, they would
12 be addressed. It would depend upon the nature of any subsequent
13 appellate order.

14 But it does seem to me that we should all be prepared
15 to have a hearing that week in the event that the Circuit Court
16 or the Supreme Court disagrees with this Court's order of a stay
17 of execution.

18 Any questions about that? Mr. Anthony?

19 MR. ANTHONY: Your Honor, just one other thing. If
20 we're making an alternate contingency plan, I would just like
21 the record to show we had a request for a site inspection that I
22 don't think is opposed. So if we were to find ourselves in a --
23 a different type of a time frame with a July 26 date, I just
24 wanted to reiterate that our scheduling order requested a site
25 inspection with the Court and with our experts. And we

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1 anticipate that that would occur the week prior to the 19th,
2 just for the record.

3 THE COURT: Well, so the record is clear, this is a
4 very specific order. There's no reason why discovery cannot
5 proceed, that I'm aware of, in this case as it relates to those
6 types of issues. I would anticipate that the NDOC would
7 potentially continue to prepare possibly for various
8 contingencies, as Director Daniels has said.

9 So I don't see why there wouldn't be the opportunity
10 for that process as relates to discovery and disclosure and
11 meeting and conferring to continue. Mr. Gilmer, is there any
12 reason why it would not?

13 MR. GILMER: We have no objection with regard to
14 providing the site inspection as always. As we've said from day
15 one, they should have started discovery back in April, Your
16 Honor. We stand by that and we're willing to proceed on that
17 front. And we will continue to proceed moving forward expending
18 additional state taxpayer money.

19 THE COURT: Okay.

20 Mr. Pomerantz? Ms. Ahmed?

21 MR. POMERANTZ: Nothing further, Your Honor. Thank
22 you.

23 THE COURT: All right. Hold on.

24 (Court conferring with courtroom administrator.)

25 THE COURT: All right. I appreciate everyone's time

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1 today. I know we've been at this for some time, but we will be
2 adjourned. I'm going to stay on the bench for a few moments.

3 (Whereupon the proceedings concluded at 5:35 p.m.)

4 --oOo--

5 COURT REPORTER'S CERTIFICATE

6
7 I, PATRICIA L. GANCI, Official Court Reporter, United
8 States District Court, District of Nevada, Las Vegas, Nevada,
9 certify that the foregoing is a correct transcript from the
10 record of proceedings in the above-entitled matter.

11
12 Date: June 29, 2021.

13 /s/ **Patricia L. Ganci**
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15 CCR #937
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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
State of Nevada;
20 John Does 1-20, unknown employees or
21 agents of Nevada Department of
22 Corrections,
23 Defendants.

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

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

DEATH PENALTY CASE.

1 Plaintiff Zane Michael Floyd, by and through his counsel, opposes Dr.
2 Azzam's October 7, 2021, Motion to Dismiss. This opposition is made and based on
3 the following points and authorities and the entire file herein.

4 DATED this 19th day of October 2021.

5 Respectfully submitted
6 Rene L. Valladares
7 Federal Public Defender

8 /s/ David Anthony
9 David Anthony
10 Assistant Federal Public Defender

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

14 /s/ Jocelyn S. Murphy
15 Jocelyn S. Murphy
16 Assistant Federal Public Defender

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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 Nevada Department of Corrections
6 (NDOC) filed its response on May 3, 2021. Floyd replied on May 17, 2021. This
7 Court held a hearing on June 8, 2021, and issued its Order denying Floyd’s request
8 for a temporary restraining order and preliminary injunction on June 17, 2021.¹ On
9 August 23, 2021, NDOC filed a Motion to Dismiss. Floyd responded on October 7,
10 2021. That same day, Defendant Azzam filed a joinder to NDOC’s motion to
11 dismiss, and his own motion to dismiss for failure to state a claim. Specifically,
12 Defendant Azzam argues that because he is not employed by NDOC and he has no
13 statutory responsibility for the development of the lethal injection protocol Floyd
14 has no claim against him. This argument is meritless and for the reasons
15 demonstrated below this Court should deny Defendant Azzam’s motion to dismiss.

16
17
18 _____
19 ¹ 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
21 subsequently grant declaratory or injunctive relief during this litigation pursuant to
22 NRS 33.010(2) as “[a]n injunction may be granted . . . When it shall appear by the
23 complaint or 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 **II. Argument**

2 Like Defendant NDOC, Defendant Azzam argues that Floyd fails to state a
3 claim upon which relief can be granted. Defendant Azzam contends that Nev. Rev.
4 Stat. § 176.355 is constitutional, therefore Floyd is not entitled to injunctive relief.
5 See MTD at 3-4. Further, Defendant Azzam asserts that he has no obligations
6 pursuant to Nev. Rev. Stat. § 176.355. Each of these assertions are incorrect. What's
7 more, the inter-defendant arguments concerning the extent each individual—NDOC
8 Director Daniels and Chief Medical Officer Azzam—volley responsibility for the
9 lethal injection protocol at issue further supports Floyd's claim Nev. Rev. Stat. §
10 176.355 is an improper delegation of legislative authority because the statute does
11 not contain the required suitable sufficient standards to guide the agency's fact-
12 finding. Floyd also incorporates by reference the arguments raised in his October 7,
13 2021 Opposition to NDOC's Motion to Dismiss.

14 To survive a motion to dismiss, a plaintiff's complaint need *only* set forth
15 sufficient facts to demonstrate the necessary elements of a claim for relief so that
16 the defending party has adequate notice of the nature of the claim and relief sought.
17 *W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); see
18 also Nev. R. Civ. P. 8 (“A plaintiff's complaint must contain . . . a short and plain
19 statement of the claim showing that the pleader is entitled to relief.”). A complaint
20 may be dismissed “only if it appears beyond a doubt that the plaintiff could prove no
21 set of facts, which, if true, would entitle him or her to relief.” *Buzz Stew, LLC v. City*
22 *of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). In considering a
23 motion to dismiss, the Court is “obligated to accept as true the allegations in [a

1 plaintiff's] complaint, to accord him favor in the inferences to be drawn therefrom,
2 and to resolve all doubts in his favor." *Chapman v. City of Reno*, 85 Nev. 365, 368,
3 455 P.2d 618, 619 (1969).

4 This Court should deny Azzam's motion because Floyd's Complaint sets forth
5 sufficient facts to state a cause of action for which relief can be granted. The parties
6 agree that Nev. Rev. Stat. § 176.355 requires that the Chief Medical Officer (CMO)
7 contribute to the execution protocol by consultation with the Director. Azzam MTD
8 at 2. Azzam points to the fact that Nev. Rev. Stat. § 176.355 does not statutorily
9 require further participation from the CMO. Azzam MTD at 4-5. Floyd agrees, and
10 argues that this is a significant part of the problem with Nev. Rev. Stat. § 176.355.

11 The fact that Azzam is employed by the Nevada Department of Health and
12 Human Services is of no moment. *See* Azzam MTD at 3. As Azzam states, Nev. Rev.
13 Stat. § 176.355 "imposes upon Director Daniels the obligation to 'consult' with the
14 Chief Medical Officer, but imposes no corresponding obligation on the part of the
15 Chief Medical Officer." Azzam MTD at 4. However, Nev. Rev. Stat. § 176.355
16 requires Azzam's participation in some capacity. The statute requires that the
17 Director of NDOC consult with the CMO, not any other state employed medical
18 professional.

19 Further, Azzam argues "the statute imposes no direction on the substance of
20 the consult or its duration, and does not require, or even recommend, that Director
21 Daniels incorporate Dr. Azzam's advice into the execution protocol." Azzam MTD at
22 3. This is precisely where Nev. Rev. Stat. § 176.355 fails constitutionally. The
23

1 statute allows an individual with no medical training whatsoever to be responsible
2 for selecting, ordering, dosing, sequencing, and establishing a protocol designed to
3 end a person’s life without adhering to any medical guidance. Azzam aptly points
4 out that there have been no established standards to guide NDOC. As written, Nev.
5 Rev. Stat. § 176.355 necessarily risks the adoption and implementation of a protocol
6 that will cause needless pain and suffering to Floyd and similarly situated
7 condemned inmates, running counter to the Eighth Amendment. As Floyd outlined
8 this in his complaint, he has pled sufficient facts to overcome Azzam’s motion.

9 Contrary to Azzam’s assertion that he plays a “statutorily-limited role in the
10 preparation and implementation of the lethal injection protocol,”² this has
11 historically not been true. NDOC and the CMO have previously interpreted the
12 consultation requirements of Nev. Rev. Stat. § 176.355 to include development of
13 the lethal injection protocol by the CMO. The 2017 protocol that was the subject of
14 litigation in the Scott Dozier case was developed solely by the previous CMO, John
15 DiMuro. Ex. 1. The Director of NDOC expressly sought and obtained Azzam’s
16 approval, in his capacity as CMO, of the drugs and dosages as being “appropriate
17 and effective” for the 2018 protocol (that substituted midazolam for diazepam as the
18 first drug to be administered). Ex. 2.

19 The questions raised in Azzam’s own motion concerning the extent to which
20 the Director must consult with the CMO; the extent to which the CMO may give
21 opinions and be involved in the selection of the drugs to be used during the
22

23 ² Azzam MTD at 2.

1 execution protocol, the order of the drugs, and the dosing and sequencing of the
2 drugs; and ultimately the extent to which the CMO is actually involved in the
3 development of the protocol that NDOC seeks to use to take a life, and other
4 questions, are the very ones to which Floyd seeks answers. Floyd raised these issues
5 in his complaint. These are the questions that require this Court to further develop
6 the record. Accordingly, Azzam's Motion to Dismiss must fail.

7 **III. Conclusion**

8 As Floyd has properly pled genuine issues of material fact for which relief can
9 be granted, Azzam's Motion to Dismiss must be denied. The record must be further
10 developed concerning how the execution protocol was developed and Azzam's
11 involvement and role in the development of the protocol. Floyd requests that such
12 factual development be allowed to occur and that this Court enjoin NDOC from
13 implementing his execution under an unconstitutional statute.

14 DATED this 19th day of October 2021.

15 Respectfully submitted
16 Rene L. Valladares
17 Federal Public Defender

18 /s/ David Anthony
19 David Anthony
20 Assistant Federal Public Defender

21 /s/ Brad D. Levenson
22 Brad D. Levenson
23 Assistant Federal Public Defender

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

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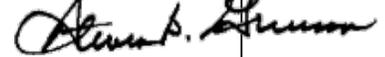
Certificate of Service

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 19th day of October, 2021, a true and correct copy of the foregoing **Opposition to Defendant Azzam’s 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:

Crane Pomerantz, Esq.
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/s/ Sara Jelinek
An Employee of the Federal Public Defenders
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10 (702) 388-6577
(702) 388-5819 (Fax)
11 Attorneys for Plaintiff Zane M. Floyd

12
13 DISTRICT COURT
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
State of Nevada;
20 John Does 1-20, unknown employees or
21 agents of Nevada Department of
22 Corrections,
23 Defendants.

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

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

DEATH PENALTY CASE.

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Exhibit	Document
1.	Declaration of John M. DiMuro, M.D., dated Oct. 20, 2017
2.	E-mails between James Dzurenda, Director, Nevada Department of Correction and Dr. Ihsam Azzam, Chief Medical Officer, Nevada Department of Correction, for the period July 6, 2018 – July 10, 2018 (Bates numbers NDOC-DPP-0009 – 0022)

DATED this 19th 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

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

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4 foregoing **Exhibits in Support of Opposition to Defendant Azzam’s Motion to**
5 **Dismiss**, was filed electronically with the Eighth Judicial District Court. Electronic
6 service of the foregoing document shall be made in accordance with the master
7 service list as follows:

8 Crane Pomerantz, Esq.
9 Nadia Ahmed, Esq.
10 SKLAR WILLIAMS PLLC
11 cpomerantz@sklar-law.com
12 nahmed@sklar-law.com

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

16 */s/ Sara Jelinek*
17 _____
18 An Employee of the Federal Public Defenders
19 Office
20
21
22
23

EXHIBIT 1

EXHIBIT 1

DECLARATION OF JOHN M. DIMURO, M.D.

I, John M. DiMuro, declare as follows:

1. Qualifications

I am the current Chief Medical Officer for the State of Nevada and maintain a part-time pain medicine medical practice in Reno, Nevada. I am dual board certified in anesthesiology and pain medicine. I obtained my undergraduate degree, B.A. Biology, from Kean University, in Union, New Jersey. I received my medical doctorate degree from the Philadelphia College of Osteopathic Medicine in Philadelphia, Pennsylvania. I completed my medical internship at the Tampa Bay Heart Institute in Tampa, Florida. I then completed all three years of anesthesiology training at Georgetown University in Washington, DC, and immediately entered and completed my pain medicine fellowship training in New York City at Memorial Sloan Kettering Cancer Center, New York Presbyterian Hospital of Columbia and Cornell Universities, and the Hospital for Special Surgery. I maintained a full time anesthesiology and pain medicine practice primarily in pain medicine, for approximately eleven years prior to my government appointment. I have served as the State of Nevada's Chief Medical Officer since my appointment to the position on July 1, 2016. I am licensed to practice medicine in Nevada. A true and correct copy of my curriculum vitae is attached as Exhibit A.

2. Purpose

- a. I have been informed that the Eighth Judicial District Court in the matter of *Dozier v. State of Nevada*, Case No. 05C215039 requests an expert medical and scientific opinion regarding the lethal injection protocol adopted by the Nevada Department of Corrections which I am required by statute to consult on. (NRS 176.355 (2)(b)).
- b. I have reviewed and am familiar with the declaration of Petitioner, Scott Dozier's, medical expert's affidavit.

3. Terminology

- a. "Milligram", abbreviated "mg", is a unit of mass or weight equal to one thousandth of a gram, and equivalent to 0.0154 grain.
- b. "Milliliter", abbreviated "ml", is a unit of capacity equal to one thousandth of a liter, and equivalent to 0.033815 fluid ounce, or 0.061025 cubic inch.
- c. "Cubic Centimeter", abbreviated "cc", is a unit of volume equal to one thousandth (10^{-3}) of a liter or to one milliliter. One milliliter (ml) is equal to one cubic centimeter (cc).
- d. "Diazepam" is the generic name for Valium®.
- e. "Cis-atracurium" is the generic name of Nimbex®.
- f. "Kilogram" is a unit of mass equal to 1000 grams and is equivalent to 2.204 pounds.
- g. "NDOC" is the Nevada Department of Corrections
- h. "Bolus" is an intravenous injection of a single dose of a drug over a short period of time
- i. "Analgesia" is the relief of pain.
- j. "Anesthesia" is general or local insensibility, as to pain and other sensation, induced by certain interventions or drugs to permit the performance of surgery or other painful procedures

Declaration of John M. DiMuro, M.D.

Page 1 of 5

AA701

- k. "Intubating dose" is the amount of drug used to provide relaxation of the vocal cords to safely allow passage of an endotracheal tube.

4. NDOC protocol

The humane, well-controlled, lethal injection protocol provided for in the Nevada Department of Corrections execution manual and for which we have extensively consulted includes the use of three drugs; the anti-anxiety drug diazepam, the opioid analgesic fentanyl, and the muscle relaxant ("paralytic") cis-atracurium. I have extensively reviewed the proposed dosing and administration of these drugs for humane lethal injection for execution. I have been apprised that the condemned inmate weighs approximately 100 kilograms and is currently not being prescribed any anti-anxiety or opioid medications while incarcerated.

It is my medical opinion as an anesthesiologist and pain medicine physician that the loading dose of 50mg of diazepam delivered intravenously with the possibility of administering an additional 50mg of diazepam will, within a reasonable degree of medical probability, render the inmate unresponsive to verbal stimuli.

Once it has been demonstrated that the inmate is unable to provide an interpretable physical response to verbal commands, fentanyl will be administered intravenously. The NDOC protocol calls for an initial intravenous bolus administration of five thousand (5,000mcg) micrograms of fentanyl to provide analgesia. This initial dose of 5,000 mcg of fentanyl combined with the previous dose of 50-100mg of diazepam will serve, to a reasonable degree of medical probability, to induce unconsciousness in the inmate. The protocol calls for an additional dosing of two-thousand five hundred (2,500mcg) micrograms should the patient respond to tactile stimuli in the form of a "medical-grade pinch" ninety seconds after the conclusion of the initial bolus administration. I am confident within a reasonable degree of medical probability that either the initial administration of fentanyl combined with the total dosing of diazepam or the initial administration combined with the subsequent bolus dose of fentanyl combined with the total dosing of diazepam will provide sufficient analgesia and unconsciousness. I am confident within a reasonable degree of medical probability that he will not experience 'air hunger', pain, panic or awareness.

When the inmate is incapable of responding to painful tactile stimuli, the intravenous administration of the muscle relaxant ("paralytic") cis-atracurium will commence. The initial dose of 100mg (five times the calculated intubating dose) will be administered. While this dose will provide profound skeletal muscle relaxation and render the inmate unable to initiate breath, an additional 100mg dose will be administered 5 minutes after the conclusion of the initial dose. This supplemental dose will increase the duration of action of the muscle relaxant and provide for cardiac arrest.

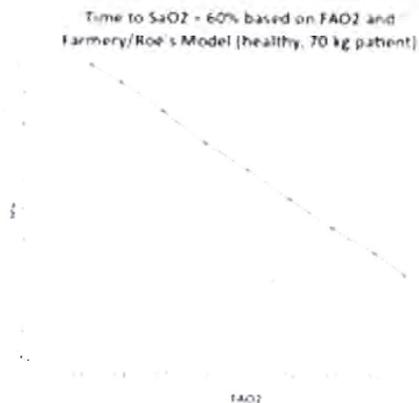
5. Pharmaceutical Function of the lethal injection drug protocol

The purpose of administering *diazepam* is to decrease anxiety. Diazepam is one of many drugs in the drug class name Benzodiazepines. As a class, Benzodiazepines interact with a specific neurotransmitter which results in anti-anxiety, sleep-inducing and muscle relaxation effects.

The purpose of administering the potent opioid *fentanyl* is two-fold. First, it serves as an analgesic. Fentanyl is considered fifty times more potent than heroin and the doses proposed by NDOC will, to a reasonable degree of medical probability, ensure adequate analgesia for the administration of cis-atracurium. Secondly, this 'high-dose' dosing of fentanyl, when combined with the high dose of the previously administered diazepam, will induce a loss of consciousness. The NDOC protocol calls for a re-dosing of fentanyl should the inmate respond to tactile stimulus – previously termed a “medical grade pinch.” This will optimize the ability to induce unconsciousness. Fentanyl is ubiquitous in modern medicine. If you have had any type of surgery involving an anesthesia provider, you would likely have been administered fentanyl. It is highly reliable, well-tolerated and fast-acting. This drug’s potency and lethality is demonstrated on a daily basis when used as an illicit drug.

The purpose of administering the muscle relaxant (aka “paralytic”) *cis-atracurium* is to expedite cardiac arrest. Since neither diazepam nor fentanyl directly inhibits the diaphragm muscle from working, the inmate could attempt to move the muscle to initiate a breath. The *cis-atracurium* will directly inhibit the use of this muscle and expedite the process to cardiac arrest. In my medical opinion, it would be less humane to omit the administration of the paralytic which would only serve to prolong the time to cardiac arrest.

The following graphic and tabular analysis published by Farmers and Roe in 1996 demonstrates that the inmate, breathing only standard room air (FAO2 = 0.13 {last row on table}), will desaturate his blood oxygen concentration to 60% (normal 93-100%) in approximately 2.8 minutes leading to cardiac arrhythmia. If we extrapolate this line, cardiac arrest will inevitably occur shortly thereafter.



47 Time to SaO₂ = 60% based on FAO₂ and Farmery/Roe's Model (healthy, 70 kg patient)

0.87	9.90 mins
0.8	9.32 mins
0.7	8.38 mins
0.6	7.30 mins
0.5	6.37 mins
0.4	5.40 mins
0.3	4.40 mins
0.2	3.55 mins
0.13 ^(room air)	2.80 mins

Verbal and tactile stimulus are standard methods of assessing unconsciousness. Bispectral (aka "Bis") monitoring is a type of intraoperative anesthetic monitor used to assist the anesthesia provider when attempting to ascertain a plane or depth of anesthesia. This type of monitoring is unreliable as the numerical value demonstrated to the anesthesia provider intraoperatively relies upon a unique mathematical calculation and cannot account for the administration of several anesthetic agents. It is *not* used routinely in the operating room theater.

6. NDOC dosages

The drug dosage of each drug in the NDOC protocol are more than appropriate for this approximately 100-kg inmate. Diazepam is commonly given in the peri-operative period at a dose of 5-10mg intravenously to exert an effect. This drug is frequently administered for patients with anxiety, restlessness and pain.

Fentanyl is not only given to induce anesthesia in the operating theater, but is usually the first pain-reliever given in the post-operative period. The usual dose for pain relief is 1mcg/kg or about 50-100mcg. The NDOC protocol calls for a dose of 50mcg/kg given as a bolus to be followed, if needed, by an additional 25-50mcg/kg. To a reasonable degree of medical probability, this is more than enough drug to obtain unconsciousness.

Declaration of John M. DiMuro, M.D.

Page 4 of 5

Each muscle relaxant (aka "paralytic") has a unique pharmacological profile. The package insert for cis-atracurium or Nimbex® recommends a 0.2mg/kg dosing regimen. For this 100-kg inmate, the usual intubating dose would be approximately 20mg. The NDOC protocol calls for five times this dose with a more than adequate 100mg dose. The NDOC protocol also calls for an additional dose after five minutes to obtain a maximal duration of action of the drug. As stated earlier, this will expedite the process to cardiac arrest.

7. Role of the medical personnel and staff

In modern medicine, the non-physician clinician plays a major role in healthcare delivery. Paramedics, physician-assistants, nurse practitioners, and other trained personnel provide quality care on a daily basis in hospitals, private offices and out in the field. In my opinion, within a reasonable degree of medical probability, the staff on site, under the supervision of the designated attending physician, will be more than capable of determining both a response to verbal and tactile stimuli while also assisting with the administration of the designated pharmaceutical regimen.

8. Summary

I have extensively reviewed and consulted on the proposed NDOC protocol as required by state law. In my opinion, the lethal injection protocol, when executed in the detailed manner in which it was written, will provide a humane, well-controlled procedure to lethally inject a condemned inmate to obtain the required result.

9. Declaration

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on the 20th day of October 2017.

/s/ John M. DiMuro, M.D.

John M. DiMuro

EXHIBIT 2

EXHIBIT 2

From: [REDACTED]
To: James Dzurenda, Kathryn E. Reynolds
CC: LAnderson [REDACTED] Richard Whitley
Subject: Re: Text message
Date: 06-Jul-2018 12:40
Attachments: Mime.822 [Save] [Open]
Creation Date: 06-Jul-2018 12:40
Store Date: 07-Jul-2018 03:57
Status: forwarded,opened,read
Box Type: received
Folder: James Dzurenda Home > Mailbox
Message Id: 5B3F6358.DOC_Domain.CGTH Postoffice.200.2000032.1.1ED6F.1

The Director of the Department of Corrections has consulted with me on the selection of the combination of drugs to be used in the execution scheduled for July 11, 2018. Under my official duties as Chief Medical Officer, I find the selection and dosage of Midazolam, Fentanyl and Cisatracurium to be appropriate and effective.

Ihsan Azzam, PhD, MD

----- Original message -----

From: James Dzurenda <[REDACTED]>
Date: 7/6/18 11:43 AM (GMT-08:00)
To: "Kathryn E. Reynolds" <[REDACTED]>, Ihsan Azzam <[REDACTED]>
Cc: LAnderson [REDACTED] Richard Whitley <[REDACTED]>
Subject: Re: Text message

Please add " I find the selection and dosages..." If you concur

James E Dzurenda, Director
Nevada Department of Corrections
3955 W. Russell Road
Las Vegas, NV 89118
(702) 486-9910
Fax (702) 486-9961

This message, including any attachments, is the property of the Nevada Department of Corrections and is solely for the use of the individual or entity intended to receive it. It may contain confidential and proprietary information and any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient(s) or if you have received this message in error, please contact the sender by reply email and permanently delete it.

>>> On 7/6/2018 at 11:38 AM, in message

<135282B78E4D1C448C984FC88737FA978AE05971@CCEXCH02.STATE.NV.US>, Ihsan Azzam

<[REDACTED]> wrote:

The Director of the Department of Corrections has consulted with me on the selection of the combination of drugs to be used in the execution scheduled for July 11, 2018. Under my official duties as Chief Medical Officer, I find the selection of Midazolam, Fentanyl and Cisatracurium to be appropriate and effective.

Ihsan Azzam, PhD, MD

----- Original message -----

From: James Dzurenda [REDACTED] v>

Date: 7/6/18 10:16 AM (GMT-08:00)

To: Ihsan Azzam [REDACTED] >

Subject: Text message

Good morning Dr. Azzam, I just wanted you to be aware the I text you a message that I was relaying from Katie Reynolds who is on vacation. Can you forward something in writing that you have reviewed the choice of medication that was selected to be utilized in the execution and determined it to be appropriate and effective?

James E Dzurenda, Director
Nevada Department of Corrections
3955 W. Russell Road
Las Vegas, NV 89118
(702) 486-9910
Fax (702) 486-9961

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AA708

From: [REDACTED]
To: James Dzurenda, Kathryn E. Reynolds
CC: Linda C. Anderson, Richard Whitley
Subject: Re: Text message
Date: 06-Jul-2018 11:38
Attachments: Mime.822 [Save] [Open]
Creation Date: 06-Jul-2018 11:38
Store Date: 07-Jul-2018 03:56
Status: opened,read,replied
Box Type: received
Folder: James Dzurenda Home > Mailbox
Message Id: 5B3F54D2.DOC_Domain.CGTH Postoffice.200.20000C0.1.BE35.1

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Ihsan Azzam, PhD, MD

----- Original message -----

From: James Dzurenda <[REDACTED]>
Date: 7/6/18 10:16 AM (GMT-08:00)
To: Ihsan Azzam <[REDACTED]>
Subject: Text message

Good morning Dr. Azzam, I just wanted you to be aware the I text you a message that I was relaying from Katie Reynolds who is on vacation. Can you forward something in writing that you have reviewed the choice of medication that was selected to be utilized in the execution and determined it to be appropriate and effective?

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From: [REDACTED]
To: Ihsan Azzam, Katie Reynolds
CC: [REDACTED] Richard Whitley
Subject: Re: Text message
Date: 06-Jul-2018 11:43
Attachments: TEXT.htm [Save] [Open]
Creation Date: 06-Jul-2018 11:43
Store Date: 07-Jul-2018 03:56
Status: accepted,opened,read
Box Type: sent
Folder: James Dzurenda Home > Sent Items
Message Id: 5B3F55E8.DOC_Domain.CGTH Postoffice.200.20000E9.1.44A29.1

Please add " I find the selection and dosages..." If you concur

James E Dzurenda, Director
Nevada Department of Corrections
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Las Vegas, NV 89118
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<135282B78E4D1C448C984FC88737FA978AE05971@CCEXCH02.STATE.NV.US>, Ihsan Azzam
<[REDACTED]> wrote:

The Director of the Department of Corrections has consulted with me on the selection of the combination of drugs to be used in the execution scheduled for July 11, 2018. Under my official duties as Chief Medical Officer, I find the selection of Midazolam, Fentanyl and Cisatracurium to be appropriate and effective.

Ihsan Azzam, PhD, MD

----- Original message -----

From: James Dzurenda <[REDACTED]>
Date: 7/6/18 10:16 AM (GMT-08:00)
To: Ihsan Azzam <[REDACTED]>
Subject: Text message

Good morning Dr. Azzam, I just wanted you to be aware the I text you a message that I was relaying from Katie Reynolds who is on vacation. Can you forward something in writing that you have reviewed the choice of medication that was

selected to be utilized in the execution and determined it to be appropriate and effective?

James E Dzurenda, Director
Nevada Department of Corrections
3955 W. Russell Road
Las Vegas, NV 89118
(702) 486-9910
Fax (702) 486-9961

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Please add " I find the selection and dosages..." If you concur

James E Dzurenda, Director
Nevada Department of Corrections
3955 W. Russell Road
Las Vegas, NV 89118
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>>> On 7/6/2018 at 11:38 AM, in message <135282B78E4D1C448C984FC88737FA978AE05971@ [REDACTED]>, Ihsan Azzam < [REDACTED]> wrote:
The Director of the Department of Corrections has consulted with me on the selection of the combination of drugs to be used in the execution scheduled for July 11, 2018. Under my official duties as Chief Medical Officer, I find the selection of Midazolam, Fentanyl and Cisatracurium to be appropriate and effective.

Ihsan Azzam, PhD, MD

----- Original message -----

From: James Dzurenda < [REDACTED]>
Date: 7/6/18 10:16 AM (GMT-08:00)
To: Ihsan Azzam < [REDACTED]>
Subject: Text message

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From: [REDACTED]
To: Ihsan Azzam
Subject: Text message
Date: 06-Jul-2018 10:16
Attachments: TEXT.htm [\[Save\]](#) [\[Open\]](#)
Creation Date: 06-Jul-2018 10:16
Store Date: 07-Jul-2018 03:49
Status: accepted,forwarded,opened,read
Box Type: sent
Folder: James Dzurenda Home > Sent Items
Message Id: 5B3F4186.DOC_Domain.CGTH Postoffice.200.20000E9.1.449A9.1

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From: James Dzurenda
To: [REDACTED]
Date: 7/6/2018 12:41 PM
Subject: Fwd: Re: Text message

>>> On 7/6/2018 at 12:40 PM, in message Ihsan Azzam [REDACTED] wrote:

The Director of the Department of Corrections has consulted with me on the selection of the combination of drugs to be used in the execution scheduled for July 11, 2018. Under my official duties as Chief Medical Officer, I find the selection and dosage of Midazolam, Fentanyl and Cisatracurium to be appropriate and effective.

Ihsan Azzam, PhD, MD

----- Original message -----

From: James Dzurenda [REDACTED] >
Date: 7/6/18 11:43 AM (GMT-08:00)
To: "Kathryn E. Reynolds" [REDACTED] >, Ihsan Azzam [REDACTED]
Cc: LAnderson [REDACTED] Richard Whitley [REDACTED]
Subject: Re: Text message

Please add " I find the selection and dosages..." If you concur

James E Dzurenda, Director

>>> On 7/6/2018 at 11:38 AM, in message, Ihsan Azzam [REDACTED] > wrote:
The Director of the Department of Corrections has consulted with me on the selection of the combination of drugs to be used in the execution scheduled for July 11, 2018. Under my official duties as Chief Medical Officer, I find the selection of Midazolam, Fentanyl and Cisatracurium to be appropriate and effective.

Ihsan Azzam, PhD, MD

----- Original message -----

From: James Dzurenda [REDACTED] >
Date: 7/6/18 10:16 AM (GMT-08:00)
To: Ihsan Azzam [REDACTED] >
Subject: Text message

Good morning Dr. Azzam, I just wanted you to be aware the I text you a message that I was relaying from Katie Reynolds who is on vacation. Can you forward something in writing that you have reviewed the choice of medication that was selected to be utilized in the execution and determined it to be appropriate and effective?

James E Dzurenda, Director

From: bsantina [REDACTED]
To: [REDACTED], James Dzurenda, Harold Wickham
Subject: Fwd: RGJ: Formal request for Alvogen letter
Date: 10-Jul-2018 14:35
Attachments: TEXT.htm [Save] [Open]
Alvogen lawsuit A-18-777312-B.pdf [Save] [Open]
NDOC formal request for Alvogen letter.docx [Save] [Open]
Brooke Santina.vcf [Save] [Open]
NDOC formal request for Alvogen letter.pdf [Save] [Open]
IMAGE.png [Save] [Open]
Creation Date: 10-Jul-2018 14:35
Store Date: 10-Jul-2018 17:33
Status: accepted,opened,read
Box Type: sent
Folder: Brooke Keast Home > Sent Items
Message Id: 5B44C44F.DOC_Domain.Stewart Postoffice.200.2000012.1.A399C.1

Do you know of any letter? I don't expect we would make it available to the media right now, but I'm unaware if there was even a letter sent to us...

[REDACTED]

Brooke Santina
Public Information Officer
Nevada Department of Corrections
office [REDACTED]
cell [REDACTED]

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and Twitter https://twitter.com/NV_Corrections?cn=Zm9sbG93ZXI%3D&refsrc=email

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From: "Corona, Marcella" [REDACTED]
To: "bsantina@[REDACTED]"
Date: 7/10/2018 2:29 PM
Subject: RGJ: Formal request for Alvogen letter
Hi Brooke,

NDOC-DPP-0018

AA716

Thanks for talking with me. As I said earlier, I wanted to send a formal request asking for a copy of a letter that Alvogen claims it sent to the Nevada Department of Corrections in April. Apparently, the drug company asked that its drug, midazolam, not be used in executions.

I attached my request to this email. I also attached a copy of the complaint from the lawsuit Alvogen filed against NDOC (in case you need it).

If possible, could you please send me a comment or statement from NDOC in response to this lawsuit? I'm interested in learning how this lawsuit could potentially affect Scott Dozier's execution, which has been scheduled for 8 p.m. tomorrow at Ely State Prison.

Please give me a call if you have questions or concerns.

Thank you,

Marcella Corona
Breaking news reporter
PART OF THE USA TODAY NETWORK

[REDACTED]
[REDACTED]
[REDACTED]

rgj.com

Do you know of any letter? I don't expect we would make it available to the media right now, but I'm unaware if there was even a letter sent to us...

[REDACTED]

Brooke Santina
Public Information Officer
Nevada Department of Corrections
office [REDACTED]
cell [REDACTED]

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and Twitter https://twitter.com/NV_Corrections?cn=Zm9sbG93ZXI%3D&refsrc=email

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From: "Corona, Marcella" <[REDACTED]>
To: "bsantina" <[REDACTED]>
Date: 7/10/2018 2:29 PM
Subject: RGJ: Formal request for Alvogen letter
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Please give me a call if you have questions or concerns.

Thank you,

Marcella Corona
Breaking news reporter

PART OF THE USA TODAY NETWORK

Mobile: [REDACTED]

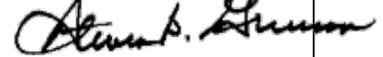


rgj.com

Full Name: Brooke Santana
Last Name: Santana
First Name: Brooke
Job Title: Public Info. Officer II

Business: 775-887-3309
Other: 775-887-3309
Primary Phone: 775-887-3309

Email: bsantina[REDACTED]
Email Display As: Brooke Santana [REDACTED]



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Chief Litigation Counsel
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Las Vegas, Nevada 89101
5 (702) 486-3420 (phone)
(702) 486-3773 (fax)
6 sshevorski@ag.nv.gov

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

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 ZANE MICHAEL FLOYD,
12 Plaintiff,
13 vs.

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

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

17 Defendants.
18

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

22 Defendants Nevada Department of Corrections and Charles Daniels (collectively,
23 **NDOC Defendants**, unless noted otherwise), by and through counsel, file their reply
supporting their motion to dismiss.

24 **I. Introduction**

25 This Court should dismiss Plaintiff's complaint. Death by lethal injection is the
26 legislature's punishment for Plaintiff's crimes. In carrying out the punishment imposed by
27 a jury of Plaintiff's peers, the NDOC Defendants are keeping faith with the executive's duty
28 to "faithfully execute[]" the law. NEV. CONST. art. 5, §7.

1 Plaintiff cannot avoid dismissal by contending that his complaint pleads facts
2 meeting the elements of a separation of powers claim. Br. 4:16-5:9. Plaintiff is wrong
3 because (i) a separation of powers claim presents a pure issue of law¹ and (ii) he has only
4 alleged legal conclusions regarding the level of delegation to the executive over executions
5 in NRS 176.355. Compl. at ¶1, 7, and 11-15. Precedent also confirms that it is appropriate
6 to resolve a facial constitutional challenge to a statute on a motion to dismiss. *Schwartz v.*
7 *Lopez*, 132 Nev. 732, 744, 382 P.3d 886, 895 (2016).

8 The NDOC Defendants under NRS 176.355 implement the legislature’s policy of the
9 death penalty by lethal injection. To stave off dismissal, Plaintiff makes a list of topics that
10 he believes should be specified in NRS 176.355. Br. 10:4-22. Tellingly, Plaintiff cites no
11 authority supporting its argument that the Nevada constitution requires that level of
12 micro-management. In allowing the NDOC Defendants the discretion of how the sentence
13 of lethal injection is implemented, the legislature is in no way delegated law-making power.
14 *Pine v. Leavitt*, 84 Nev. 507, 510-11, 445 P.2d 942, 944 (1968). The NDOC Defendants
15 determine what combination of drugs will result in death, the personnel and qualifications
16 of its staff, and the safest, humane way to implement the jury’s sentence through lethal
17 injection. These are fact-intensive questions, and by answering them, the NDOC
18 Defendants are paying due fealty to a core executive function, carrying out a sentence.

19 That a party cannot resist dismissal by amending their complaint through their
20 opposition is plain, indeed, “axiomatic.” *Calvillo v. Experian Info. Sols., Inc.*, 2:19-cv-00277-
21 RFB-NJK, 2020 WL 1549574, *4 (D. Nev. April 1, 2020) (citing *Schneider v. Cal. Dep’t of*
22 *Corrs.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998)). But that is what Plaintiff attempts by
23 raising the specter of an unpled Eighth Amendment claim. Br. 7:4-12. Plaintiff challenges
24 Director Daniels’ credentials, improperly cites transcripts in the proceeding before Judge
25 Boulware, and questions the level of consultation with the Chief Medical Officer. Br. 6:10-
26 7:12, 11:1-12, and 14-23. These new arguments have no nexus to this case’s sole issue,
27 . . .

28 ¹ *State v. Dist. Ct.*, 134 Nev. 783, 786, 432 P.3d 154, 158 (2018).

1 which is whether the legislature improperly delegated law-making power to the NDOC
2 Defendants under NRS 176.355. The answer to that question is, no.

3 **II. Legal Argument**

4 **A. No precedent requires this Court to accept Plaintiff's legal 5 conclusions regarding the constitutionality of NRS 176.355**

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

12 Plaintiff contends that so long as he pleads facts to raise a separation of powers claim
13 this Court is required to deny the NDOC Defendants' motion to dismiss. Br. 4:3-4. That
14 argument is a non-starter. Plaintiff cannot simply plead the elements of a claim to avoid
15 dismissal if the determinative question of law compels a different result. *See e.g. Saticoy*
16 *Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. 28, 34 388 P.3d
17 970, 975 (2017) (dismissing senior mortgagee's claim that the Legislature's altering of lien
18 priority was a taking without just compensation).

19 Plaintiff also argues that “the record must be developed concerning the scope of
20 authority delegated” to NDOC to carry Plaintiff's sentence. Br. 5:6-9. Plaintiff cites no
21 authority supporting his argument. *Id.* There is none. Interpreting the breadth of
22 authority from a statute's language is question of law for a court. *See In re Nev. State Eng'r*
23 *Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449, 453 (2012); *Sims v. Dist. Ct.*, 125 Nev.
24 126, 129-30, 206 P.3d 980, 982 (2009).

25 Likewise, the doctrine of the separation of powers involves a pure legal question
26 regarding the constitutionality of a statute. *State v. Second Jud. Dist. Ct.*, 134 Nev. 783,
27 786, 432 P.3d 154, 158 (2018). A cursory review of the complaint reveals he is raising a
28 pure legal challenge to NRS 176.355 by alleging “it violates Article III §1 by delegating

1 unfettered discretion to the NDOC to determine Nevada’s lethal injection protocol.” Compl.
2 ¶7. No precedent holds that a court is required to accept Plaintiff’s legal conclusions
3 regarding the constitutionality of a statute. *Flamingo Paradise Gaming, LLC v. Chanos*,
4 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). Resolving the core legal question against
5 Plaintiff requires nothing more than a straightforward review of the statute’s language.

6 **B. NRS 176.355 contains suitable standards to guide NDOC’s discretion**

7 *Pine* holds the test for determining whether a statute violates separation of powers
8 principles is whether the legislature gave the executive “discretion was to what [the law]
9 shall be.” *Pine*, 84 Nev. 510-11, 445 P.2d 944 (quoting *Field v. Clark*, 143 U.S. 649, 693
10 (1892)). This Court had little difficulty in denying Plaintiff’s motion for preliminary
11 injunction in holding that NRS 176.355 did not violate this principle and that Plaintiff has
12 not met his heavy burden to show NRS 176.355 is unconstitutional. *See Silvar v. Eighth*
13 *Jud. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (applying the presumption that
14 a statute is constitutional to an ordinance).

15 Plaintiff’s main gripe with NRS 176.355 is an alleged lack of specificity regarding
16 the qualifications of the person administering the drugs, selecting the drugs, the classes
17 and doses of the drugs to be administered, and how much notice, if any, should be given to
18 condemned of the execution protocol. Br. 10:4-22. Plaintiff’s laundry list is no serious
19 challenge to the statute’s constitutionality. That NRS 176.355 gives the executive branch
20 discretion of how to implement its provisions merely means this Court should be deferring
21 to the NDOC Defendants’ interpretation of their statutory duties so long as that
22 interpretation is within the statute’s language. *Wynn Las Vegas, LLC v. Baldonado*, 129
23 Nev. 734, 738, 311 P.3d 1179, 1182 (2013).

24 Analyzing Plaintiff’s laundry list reveals that Plaintiff is complaining about common
25 administrative functions. For example, *Pine* holds that determining the qualifications of a
26 position and selecting personnel is a core administrative function. *Pine*, 84 Nev. at 512,
27 445 P.2d at 945. Likewise, determining the dosage, the classes of drugs to be used, the
28 method of administering the drugs, where to locate them and from whom is classic fact-

1 finding to implement the legislature’s policy of lethal injection. It is perfectly permissible
2 for the legislature to delegate fact-finding, “which the law makes its own operations
3 depend.” *McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016) (quoting *Sheriff*
4 *v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985)). That is just what the legislature
5 did by enacting NRS 176.355.

6 Finding what drugs are available, whether they are humane, whether they are lethal
7 and in what doses, and determining the safest, most humane way to inject them is
8 indistinguishable from the type of discretion afforded the Pharmacy Board in *Luqman*. In
9 *Luqman*, the Court approved the delegation of authority to determine which drugs should
10 be classified in the appropriate schedules under the Uniform Controlled Substances Act.
11 *Luqman*, 101 Nev. at 154, 697 P.2d at 110-11. That the legislature did not list the drugs
12 and specify their scheduling did not make the Uniform Controlled Substances Act
13 constitutionally infirm.

14 There is even less reason to take issue with NRS 176.355’s delegation to NDOC than
15 the delegation upheld in *Luqman*. NDOC’s discretion, in addition to be guided by the
16 general statutory guideline in NRS 176.355, is cabined by the Eighth Amendment. The
17 Eighth Amendment’s prohibition on cruel and unusual punishment is implied in the
18 statute and constrains the Director. *See Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App.
19 2012); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App. 2018); *State v. Deputy*, 644 A.2d
20 411, 420 (Del. Super. Ct.), *aff’d*, 648 A.2d 423 (Del. 1994); *State v. Osborn*, 631 P.2d 187,
21 201 (Idaho 1981). Indeed, Plaintiff has availed himself of such an Eighth Amendment
22 challenge in his concurrent federal case.

23 Law-making means creating a new crime or devising an additional punishment.
24 *Sheriff, Douglas Cty. v. LaMotte*, 100 Nev. 270, 272, 680 P.2d 333, 334 (1984). That is not
25 what NRS 176.355 permits NDOC to do. To be sure, the legislature could have micro-
26 managed NDOC as Plaintiff suggests. Nothing in our separation of powers jurisprudence
27 requires it to do so.

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C. Plaintiff cannot resist dismissal by hinting at an Eighth Amendment claim he has not pled and that is foreclosed by *Gee* and *McConnell*

State v. Gee, 46 Nev. 418, 211 P. 676, 682 (1923) upheld a prior execution statute involving lethal gas. Though the statute contained none of the detail Plaintiff believes is constitutionally necessary, the Nevada Supreme Court “[could not] see that any useful purpose would be served by requiring greater detail.” *Id.* The Court affirmed that *Gee*’s reasoning applies equally to Nevada’s lethal injection statute. *See McConnell v. State*, 120 Nev. 1043, 1056, 102 P.3d 606, 616 (2004).

Undeterred, Plaintiff makes the following speculative argument:

[It] is not unreasonable, especially considering NDOC’s past questionable conduct, to believe that the Director would not fully consider, or would go against, the advice of the COMO, leading to the distinct potential for an execution protocol that violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

Br. 7:4-8. Plaintiff goes on to write that he has raised genuine issues of material fact regarding Director Daniels’ statutory duty to consult with the Chief Medical Officer. Br. 11:14-15. Plaintiff argues the absence of “oversight” regarding this consult “create[s] a substantial risk that Plaintiff Floyd and similarly situated individuals will suffer inhumane treatment.” Br. 12:5-8.

Plaintiff’s argument lacks merit for several reasons. First, Plaintiff has not pled an Eighth Amendment claim (in this case) and he cannot allege one through his opposition brief. Second, even if he had, such a claim would be futile under *Gee* and *McConnell*. Third, Plaintiff later in his brief expressly abandons any theory based on the Eighth Amendment. Br. 9:9-18. Plaintiff cannot use an invalid, unpled theory under the Eight Amendment to shore up his separation of powers claim.

...
...
...

1 **V. Conclusion**

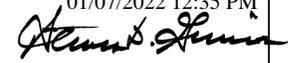
2 For these reasons, this Court should grant the NDOC Defendants' motion to dismiss
3 Plaintiff's complaint.

4 DATED this 28th day of October, 2021.

5 AARON D. FORD
6 Attorney General

7 By: /s/ Steve Shevorski
8 Steve Shevorski (Bar No. 8256)
9 Chief Litigation Counsel
10 *Attorneys for Defendants*
11 *Nevada Department of Corrections and*
12 *Charles Daniels*

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Electronically Filed
01/07/2022 12:35 PM

CLERK OF THE COURT

1 **ORDG**
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2 Attorney General
Steve Shevorsi (Bar No. 8256)
3 Chief Litigation Counsel
State of Nevada
4 Office of the Attorney General
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6 (702) 486-3773 (fax)
sshevorsi@ag.nv.gov

7 *Attorneys for the State of Nevada ex rel.*
8 *The Nevada Department of Corrections*

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 ZANE MICHAEL FLOYD,
12 Plaintiff,

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

13 vs.

Date of Hearing: December 9, 2021
Time of Hearing: 9:30 a.m.

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

18 Defendants.
19

20 **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS**

21 The State of Nevada ex rel its Nevada Department of Corrections (**NDOC**), Director
22 Charles Daniels (**Daniels**), and Chief Medical Officer Ihsan Azzam (**Dr. Azzam**), moved to
23 dismiss Plaintiff's, Zane Floyd (**Floyd**), complaint under NRCP 12(b)(5). The Court held a
24 hearing on December 9, 2021 at 9:30 a.m. Steve Shevorsi appeared for NDOC and
25 Director Daniels. Nadia Ahmed appeared for Dr. Ihsan Azzam. Brad Levenson and Jocelyn
26 Murphy appeared on Plaintiff's behalf. The Court, having reviewed the respective motions
27 to dismiss of NDOC and Daniels and Dr. Azzam, Floyd's opposition, and the respective
28 . . .

Order Granting Defendants' Motions to Dismiss, Case No. A-21-833086-C

1 replies and listening to oral argument, GRANTS NDOC and Daniels’ and Dr. Azzam’s
2 respective motions to dismiss:

3 **I. Plaintiffs’ allegations**

4 1. Floyd is a death row inmate. Compl. ¶2

5 2. A Nevada jury sentenced him to death for shooting and killing Lucy
6 Tarantino, Thomas Darnell, Chuck Leos, and Dennis “Troy” Sargent with a 12-gauge
7 shotgun at a grocery store. *Id.* (citing [https://www.reviewjournal.com/crime/courts/da-to-](https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-in-1999-store-killings-2315637/)
8 [proceed-with-death-penalty-against-in-1999-store-killings-2315637/](https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-in-1999-store-killings-2315637/)).

9 3. Floyd challenges Nevada’s lethal injection statute, NRS 176.355, as
10 unconstitutional under the non-delegation doctrine. *Id.* at ¶¶1, and 15-16.

11 4. Daniels is NDOC’s current Director.

12 5. Dr. Azzam is Nevada’s current Chief Medical Officer.

13 6. The Nevada Legislature created NDOC. NRS 209.101(1).

14 7. Floyd seeks declaratory relief and an order against NDOC, Daniels, and Dr.
15 Azzam declaring that NRS 176.355 violates Article III §1 of Nevada’s Constitution under
16 the Separation of Powers doctrine.

17 **II. Statutory background**

18 8. Daniels, *inter alia*, administers NDOC under the direction of Board of State
19 Prison Commissioners. NRS 209.131(1).

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21 Division of Public and Behavioral Health of the Department of Health and Human
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1 10. The statute at issue is NRS 176.355, which provides in full:

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

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

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

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

12 (c) Be present at the execution.

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

16 (e) Invite a competent physician, the county coroner, a
17 psychiatrist and not less than six reputable citizens over the age
18 of 21 years to be present at the execution. The Director shall
19 determine the maximum number of persons who may be present
20 for the execution. The Director shall give preference to those
21 eligible members or representatives of the immediate family of
22 the victim who requested, pursuant to NRS 176.357, to attend
23 the execution.

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

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

27 NRS 176.355.

28 **III. Conclusions of law**

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

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

11 14. The powers of the Legislative, Executive, and Judicial branches are described
12 as follows by Nevada precedent:

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

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

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

18. 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).

19. 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).

. . .

1 20. “An example of a pure legal question might be a challenge to the facial validity
2 of a statute.” *Beavers v. State, Dep’t. of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 438
3 n.1, 851 P.2d 432, 434 n.1 (1993); *accord Schwartz v. Lopez*, 132 Nev. 732, 744, 382 P.3d
4 886, 895 (2016).

5 21. Interpreting the breadth of authority from a statute’s language is question of
6 law for a court. *In re Nev. State Eng’r Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449,
7 453 (2012).

8 22. The doctrine of the separation of powers involves a pure legal question
9 regarding the constitutionality of a statute. *State v. Second Jud. Dist. Ct.*, 134 Nev. 783,
10 786, 432 P.3d 154, 158 (2018).

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

15 24. NRS 176.355 is constitutional.

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

18 26. The Court views the words “lethal” and “injection” in NRS 176.355 as
19 straightforward and unambiguous.

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

22 28. The word “injection” is also not ambiguous. As the Ohio Court of Appeals
23 noted, “‘injection’ is defined as the ‘[i]ntroduction of a medicinal substance or nutrient
24 material into the subcutaneous cellular tissue (subcutaneous or hypodermic), the muscular
25 tissue (intramuscular), a vein (intravenous) . . . or other canals or cavities of the body.’”
26 *O’Neal v. State*, 146 N.E.3d 605, 617 (Ohio Ct. App.), *appeal allowed*, 154 N.E.3d 98 (Ohio
27 2020) (quoting STEDMAN’S MEDICAL DICTIONARY 635 (3d unabr. Laws.’ Ed. 1972)).

28 . . .

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

7 30. The Legislature did not delegate its law-making function by not specifying the
8 drug or combination of drugs to be used in an execution by lethal injection. Consistent with
9 Separation of Powers principles, the Legislature may delegate the power to determine the
10 facts or state of things upon which the law makes its own operations depend. *State ex rel.*
11 *Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature
12 did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function
13 to NDOC’s Director.

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

22 32. The Court also takes note of persuasive authority that has rejected arguments
23 similar to Floyd’s. The courts to address this question, which have capital punishment
24 statutes that are similar to Nevada’s, have overwhelmingly found their state legislature
25 can constitutionally delegate implementation of execution statutes to corrections officials.
26 *See, e.g., O’Neal v. State*, 146 N.E.3d 605, 620 (Ohio Ct. App.), *appeal allowed on other*
27 *grounds*, 154 N.E.3d 98 (Ohio 2020); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App.
28 2018); *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7-8 (W.D. Mo.

1 Nov. 16, 2012); *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); *State v. Ellis*, 799
2 N.W.2d 267, 289 (Neb. 2011); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc);
3 *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho
4 1981); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). *State v. Hawkins*,
5 519 S.W.3d 1 (Tenn. 2017) (quoting *State v. Hawkins*, No. W2012-00412CCA-R3-DD, 2015
6 WL 5169157 at *28 (Tenn. Crim. App. 2015)).

7 33. The Court notes the Nevada Supreme Court considered and rejected near
8 identical arguments in the Eighth Amendment context. *McConnell v. State*, 120 Nev. 1043,
9 1056-57, 102 P.3d 606, 616 (2004); *State v. Gee*, 46 Nev. 418, 436-48, 211 P. 676, 681-82
10 (1923);

11 34. In upholding former NRS 176.355, the Nevada Supreme Court noted the
12 current statute affords NDOC no more discretion than its prior version, requiring the use
13 of lethal gas for executions, which “infring[ed] no provision of the Constitution.” *Gee*, 46
14 Nev. 418, 211 P. 676, 682 (1923). Yet the Nevada Supreme Court “[could not] see that any
15 useful purpose would be served by requiring greater detail.” *Id.* The Court affirmed that
16 the reasoning in *Gee* applies equally to Nevada’s lethal injection statute. *See McConnell*,
17 120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge
18 to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection
19 procedure).

20 **III. Order**

21 Based upon the Background and Conclusions of Law above:

22 **IT IS HEREBY ORDERED** that NDOC and Daniel’s motion to dismiss pursuant
23 to NRCP 12(b)(5) is GRANTED.

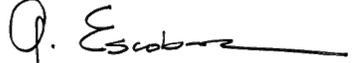
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IT IS FURTHER ORDERED that Dr. Azzam’s motion to dismiss pursuant to NRCP 12(b)(5) is also **GRANTED**.

DATED this 7th day of January, 2022.

Dated this 7th day of January, 2022



DISTRICT COURT JUDGE

**D3B 3B2 274C D5F1
Adriana Escobar
District Court Judge**

Submitted by:
AARON D. FORD
Attorney General

By: /s/ Steve Shevorski
Steve Shevorski
Chief Litigation Counsel
Attorneys for Defendants
State of Nevada ex rel. its
Department of Corrections and
Director Charles Daniels

From: Ahmed, Nadia <nahmed@clarkhill.com>
Sent: Wednesday, December 22, 2021 1:20 PM
To: Steven G. Shevorski <SShevorski@ag.nv.gov>
Subject: Re: Floyd - Checking in on Draft Order Granting Motions to Dismiss

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Okay fair enough. I'm fine with your order as is and don't have any edits. Sorry to hold it up and thank you!

Sent from my iPhone

Nadia Ahmed

Senior Counsel

Clark Hill LLP

3800 Howard Hughes Parkway, Las Vegas, NV 89169

(170) 269-7754(office) | (702) 862-8400(fax)

nahmed@clarkhill.com | www.clarkhill.com

From: David Anthony <David_Anthony@fd.org>
Sent: Thursday, December 30, 2021 9:15 AM
To: Steven G. Shevorski <SShevorski@ag.nv.gov>; Brad Levenson <Brad_Levenson@fd.org>
Cc: Ahmed, Nadia <nahmed@clarkhill.com>
Subject: RE: Floyd - Draft Order Granting MTD

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Steve:

It looks like there is a misspelling on page two line 6 should be "gauge". Other than that, we don't have an objection to the form or content of the order. Please feel free to submit the order to the court. Thanks.

David

From: Steven G. Shevorski <SShevorski@ag.nv.gov>
Sent: Monday, December 27, 2021 9:04 AM
To: Brad Levenson <Brad_Levenson@fd.org>; David Anthony <David_Anthony@fd.org>
Cc: Ahmed, Nadia <nahmed@clarkhill.com>
Subject: Floyd - Draft Order Granting MTD

Matter: Floyd
Case # A-21-833086-C

Brad and David,

I hope you were able to have a happy holiday. Attached is the draft order granting the motions to dismiss. Nadia has indicated her approval as to form and content.

Best regards,

Steve

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

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Zane Floyd, Plaintiff(s)

CASE NO: A-21-833086-C

vs.

DEPT. NO. Department 14

Nevada Department of
Corrections, Defendant(s)

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 1/7/2022

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| Bradley Levenson | ecf_nvchu@fd.org |
| David Anthony | david_anthony@fd.org |
| Crane Pomerantz | cpomerantz@sklar-law.com |
| Nadia Ahmed | nahmed@sklar-law.com |
| Akke Levin | alevin@ag.nv.gov |
| Sabrena Clinton | sclinton@ag.nv.gov |

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Kiel Ireland

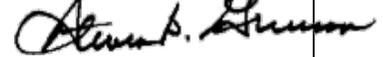
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2 Steve Shevorski (Bar No. 8256)
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3 Office of the Attorney General
555 E. Washington Ave, Suite 3900
4 Las Vegas, NV 89101
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sshevorski@ag.nv.gov

6 *Attorneys for Defendants*
7 *Nevada Department of Corrections*
8 *and Charles Daniels*

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 ZANE MICHAEL FLOYD,
12 Plaintiff,

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

13 vs.

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

18 Defendants.

19 **NOTICE OF ENTRY OF ORDER**

20 PLEASE TAKE NOTICE that an Order Granting Defendants' Motions to Dismiss
21 was entered on the 7th day of January, 2022, a copy of which is attached hereto as Exhibit
22 "A".

23 DATED this 7th day of January, 2022.

24 AARON D. FORD
Attorney General

25 By: /s/ Steve Shevorski
26 Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
27 *Attorneys for Defendants*
Nevada Department of Corrections
28 *and Charles Daniels*

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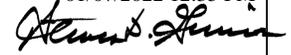
CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 7th day of January, 2022, 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
Office of the Attorney General

EXHIBIT A

EXHIBIT A


CLERK OF THE COURT

1 **ORDG**
AARON D. FORD
2 Attorney General
Steve Shevorsi (Bar No. 8256)
3 Chief Litigation Counsel
State of Nevada
4 Office of the Attorney General
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5 Las Vegas, NV 89101
(702) 486-3420 (phone)
6 (702) 486-3773 (fax)
sshevorsi@ag.nv.gov

7 *Attorneys for the State of Nevada ex rel.*
8 *The Nevada Department of Corrections*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 ZANE MICHAEL FLOYD,

12 Plaintiff,

13 vs.

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employees or agents of Nevada Department of
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18 Defendants.

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

Date of Hearing: December 9, 2021
Time of Hearing: 9:30 a.m.

19
20 **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS**

21 The State of Nevada ex rel its Nevada Department of Corrections (**NDOC**), Director
22 Charles Daniels (**Daniels**), and Chief Medical Officer Ihsan Azzam (**Dr. Azzam**), moved to
23 dismiss Plaintiff's, Zane Floyd (**Floyd**), complaint under NRCP 12(b)(5). The Court held a
24 hearing on December 9, 2021 at 9:30 a.m. Steve Shevorsi appeared for NDOC and
25 Director Daniels. Nadia Ahmed appeared for Dr. Ihsan Azzam. Brad Levenson and Jocelyn
26 Murphy appeared on Plaintiff's behalf. The Court, having reviewed the respective motions
27 to dismiss of NDOC and Daniels and Dr. Azzam, Floyd's opposition, and the respective
28 . . .

Order Granting Defendants' Motions to Dismiss, Case No. A-21-833086-C

1 replies and listening to oral argument, GRANTS NDOC and Daniels’ and Dr. Azzam’s
2 respective motions to dismiss:

3 **I. Plaintiffs’ allegations**

4 1. Floyd is a death row inmate. Compl. ¶2

5 2. A Nevada jury sentenced him to death for shooting and killing Lucy
6 Tarantino, Thomas Darnell, Chuck Leos, and Dennis “Troy” Sargent with a 12-gauge
7 shotgun at a grocery store. *Id.* (citing [https://www.reviewjournal.com/crime/courts/da-to-](https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-in-1999-store-killings-2315637/)
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4 CONST. art. 3.

5 13. Relevant to Floyd’s challenge, Section 1 of Article 3 provides: “The powers of
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16. The executive power carries out and enforces the laws that the Legislature enacts. *Del Papa*, 112 Nev. at 377, 915 P.2d at 250.

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

18. 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).

19. 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).

. . .

1 20. “An example of a pure legal question might be a challenge to the facial validity
2 of a statute.” *Beavers v. State, Dep’t. of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 438
3 n.1, 851 P.2d 432, 434 n.1 (1993); *accord Schwartz v. Lopez*, 132 Nev. 732, 744, 382 P.3d
4 886, 895 (2016).

5 21. Interpreting the breadth of authority from a statute’s language is question of
6 law for a court. *In re Nev. State Eng’r Ruling No. 5823*, 128 Nev. 232, 238, 277 P.3d 449,
7 453 (2012).

8 22. The doctrine of the separation of powers involves a pure legal question
9 regarding the constitutionality of a statute. *State v. Second Jud. Dist. Ct.*, 134 Nev. 783,
10 786, 432 P.3d 154, 158 (2018).

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

15 24. NRS 176.355 is constitutional.

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

18 26. The Court views the words “lethal” and “injection” in NRS 176.355 as
19 straightforward and unambiguous.

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

22 28. The word “injection” is also not ambiguous. As the Ohio Court of Appeals
23 noted, “‘injection’ is defined as the ‘[i]ntroduction of a medicinal substance or nutrient
24 material into the subcutaneous cellular tissue (subcutaneous or hypodermic), the muscular
25 tissue (intramuscular), a vein (intravenous) . . . or other canals or cavities of the body.’”
26 *O’Neal v. State*, 146 N.E.3d 605, 617 (Ohio Ct. App.), *appeal allowed*, 154 N.E.3d 98 (Ohio
27 2020) (quoting STEDMAN’S MEDICAL DICTIONARY 635 (3d unabr. Laws.’ Ed. 1972)).

28 . . .

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

7 30. The Legislature did not delegate its law-making function by not specifying the
8 drug or combination of drugs to be used in an execution by lethal injection. Consistent with
9 Separation of Powers principles, the Legislature may delegate the power to determine the
10 facts or state of things upon which the law makes its own operations depend. *State ex rel.*
11 *Ginocchio v. Shaughnessy*, 47 Nev. 129, 217 P. 581 (1923). That is just what the Legislature
12 did in enacting NRS 176.355. The Legislature properly delegated this fact-finding function
13 to NDOC’s Director.

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

22 32. The Court also takes note of persuasive authority that has rejected arguments
23 similar to Floyd’s. The courts to address this question, which have capital punishment
24 statutes that are similar to Nevada’s, have overwhelmingly found their state legislature
25 can constitutionally delegate implementation of execution statutes to corrections officials.
26 *See, e.g., O’Neal v. State*, 146 N.E.3d 605, 620 (Ohio Ct. App.), *appeal allowed on other*
27 *grounds*, 154 N.E.3d 98 (Ohio 2020); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308 (Ct. App.
28 2018); *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7-8 (W.D. Mo.

1 Nov. 16, 2012); *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012); *State v. Ellis*, 799
2 N.W.2d 267, 289 (Neb. 2011); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc);
3 *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho
4 1981); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). *State v. Hawkins*,
5 519 S.W.3d 1 (Tenn. 2017) (quoting *State v. Hawkins*, No. W2012-00412CCA-R3-DD, 2015
6 WL 5169157 at *28 (Tenn. Crim. App. 2015)).

7 33. The Court notes the Nevada Supreme Court considered and rejected near
8 identical arguments in the Eighth Amendment context. *McConnell v. State*, 120 Nev. 1043,
9 1056-57, 102 P.3d 606, 616 (2004); *State v. Gee*, 46 Nev. 418, 436-48, 211 P. 676, 681-82
10 (1923);

11 34. In upholding former NRS 176.355, the Nevada Supreme Court noted the
12 current statute affords NDOC no more discretion than its prior version, requiring the use
13 of lethal gas for executions, which “infring[ed] no provision of the Constitution.” *Gee*, 46
14 Nev. 418, 211 P. 676, 682 (1923). Yet the Nevada Supreme Court “[could not] see that any
15 useful purpose would be served by requiring greater detail.” *Id.* The Court affirmed that
16 the reasoning in *Gee* applies equally to Nevada’s lethal injection statute. *See McConnell*,
17 120 Nev. at 1056, 102 P.3d at 616 (applying the reasoning in *Gee* to reject a facial challenge
18 to NRS 176.355 based on a lack of detailed codified guidelines for the lethal injection
19 procedure).

20 **III. Order**

21 Based upon the Background and Conclusions of Law above:

22 **IT IS HEREBY ORDERED** that NDOC and Daniel’s motion to dismiss pursuant
23 to NRCP 12(b)(5) is GRANTED.

24
25
26 ...
27 ...
28 ...