

July 4, 2018

***Via Email Only***

The Honorable Judge James E. Wilson  
First Judicial District Court  
Department II  
885 E. Musser St  
Carson City, NV 89701  
775-887-2296  
SGreenburg@carson.org  
districtcourtclerk@Carson.org



Nevada

601 S. RANCHO DRIVE  
SUITE B11  
LAS VEGAS, NV 89106  
P/702.366.1536  
F/702.366.1331  
ACLUNV@ACLUNV.ORG

1325 AIRMOTIVE WAY  
SUITE 202  
RENO, NV 89502  
P/775.786.1033  
F/775.786.0805

[WWW.ACLUNV.ORG](http://WWW.ACLUNV.ORG)

Re: Factual Update in Emergency Writ Petition, *ACLU of Nevada Foundation v. Nevada Department of Corrections et al.* **Case No. 18OC001631B**

Dear Judge Wilson,

Please allow this letter to serve as a factual update to Petitioner, ACLU of Nevada Foundation's (ACLUNV), Emergency Writ Petition Emergency Petition For Writ Of Mandamus To Compel The Nevada Department Of Corrections To Produce Public Records Relating To Its Lethal Injection Procedures And Scott Dozier's July 11, 2018 Execution.

On July 3, 2018 the ACLUNV, in keeping with its efforts to inform the public of NDOC's lack of transparency, sent out a press release explaining that it was filing suit against NDOC to obtain vital records relating to NDOC's lethal injection drugs and execution procedures. On the morning of July 3, 2018, the ACLUNV also e-mailed a copy of the Writ Petition and exhibits to the Nevada Department of Corrections' (NDOC) assigned attorney general, Ann McDermott, and copied its director, James Dzurenda.

Hours after the ACLUNV's press release and e-mail, NDOC finally released a heavily redacted protocol and a press release naming the drugs it plans to use in Mr. Dozier's July 11, 2018 execution. This very limited production in response to the ACLUNV's public records request is still woefully insufficient. And as outlined below, this raises additional concerns about NDOC's failure to comply with its obligations under the Nevada Public Records Act.

**First**, NDOC released only one of the multitude of documents requested by the ACLUNV. Again, the ACLUNV also requested, yet still has not received,

- Records pertaining to NDOC's acquisition or attempted acquisition of lethal injection drugs since November 9, 2017 from suppliers, distributors,



Nevada

601 S. RANCHO DRIVE  
SUITE B11  
LAS VEGAS, NV 89106  
P/702.366.1536  
F/702.366.1331  
ACLUNV@ACLUNV.ORG

1325 AIRMOTIVE WAY  
SUITE 202  
RENO, NV 89502  
P/775.786.1033  
F/775.786.0805

[WWW.ACLUNV.ORG](http://WWW.ACLUNV.ORG)

manufacturers, or other state's department of corrections, including correspondence, memos, e-mails, notes and voice messages;

- Records pertaining to the any lethal injection drugs actually obtained since November 9, 2017, including records indications (1) the current amount of the drug in NDOC's control, (2) the date of purchase or acquisition and the purchase or acquisition orders (3) licensing information; (4) batch numbers; and (5) expiration dates.
- Records of communications among NDOC's medical staff relating to lethal injection drugs
- Records documenting the maintenance and inspection of the Ely State Prison pharmacy; and
- Records from the Federal Drug Enforcement Agency that demonstrate authorization to handle controlled substances at Ely State Prison

**Second**, the execution protocol NDOC finally produced **after** NDOC knew the ACLUNV took legal action, was heavily redacted, yet NDOC failed to give any citations to the specific statute or other legal authority that would make those parts of the execution manual confidential as required under 239.0107(1)(d)(2).

**Third**, this protocol reveals that NDOC added a controversial drug, Midazolam (a sedative), to its already constitutionally questionable protocol. NDOC now plans to use Midazolam (a sedative), Fentanyl (an opioid), and Cisastracurium (a paralytic). They appear to have substituted Midazolam for the expired Diazepam – despite NDOC's initial representations to the press that they were going to use the same three drugs as previously planned for the November 2017 execution.

**Midazolam is a dangerous drug with a history of being used in botched executions.**<sup>1</sup> In fact, after a horrifically botched execution using Midazolam in 2014,

---

<sup>1</sup> Even a short overview of recent executions using midazolam is disturbing: In Alabama in 2016, the inmate took over 30 minutes to die and “heaved and coughed through about 13 minutes,” and “clenched his fists and raised his head during the early part of the procedure.” Nashrulla, C. McDaniel, & C. Geidner, *Alabama Executes Inmate After Split Supreme Court Allows It To Proceed*, BuzzFeed NEWS, (Dec. 8, 2016) <https://tinyurl.com/yctnk4s>. In Ohio in 2014, the execution took over 30 minutes to die and the inmate “heaved and coughed through about 13 minutes,” and “clenched his fists and raised his head during the early part of the procedure.” Erica Goode, *After a Prolonged Execution in Ohio, Questions over “Cruel and Unusual,”* N.Y. TIMES, Jan. 17, 2014, <https://tinyurl.com/ydgqt79f>. In Arizona in 2014, the inmate “gasp[ed] and snort[ed]” for almost two hours before he finally died. Mark Berman, *Arizona execution lasts nearly two hours; lawyer says Joseph Wood was ‘gasp[ing] and struggl[ing] to breathe’* WASH. POST, July 23, 2014, <http://wapo.st/2nsiJrk>.

Arizona has agreed to never again use Midazolam in an execution.<sup>2</sup> Moreover, at least one manufacturer of Midazolam, Pfizer, refuses to sell it for the purposes of the execution.<sup>3</sup>

The use of this problematic drug makes it even more important that NDOC comply with its statutory obligations and produce the information requested by the ACLUNV.

**Fourth**, the execution protocol was signed by the Director of the Department of Corrections on June 11, 2018 - making it readily available when the ACLUNV submitted its records request on June 15, 2018. Yet NDOC failed to produce it until the ACLUNV took legal action. And, although NDOC has redacted some parts of the execution manual, there are some parts that are completely un-redacted and could have, and should have been produced by NDOC.

Sincerely,



Amy M. Rose  
Attorney for Petitioner, ACLU of Nevada Foundation

CC: Ann McDermott, Assistant Attorney General and Counsel for NDOC



601 S. RANCHO DRIVE  
SUITE B11  
LAS VEGAS, NV 89106  
P/702.366.1536  
F/702.366.1331  
ACLUNV@ACLUNV.ORG

1325 AIRMOTIVE WAY  
SUITE 202  
RENO, NV 89502  
P/775.786.1033  
F/775.786.0805

[WWW.ACLUNV.ORG](http://WWW.ACLUNV.ORG)

---

<sup>2</sup> Jon Herskovitz, *Arizona Agrees To Drop Use Of Contested Sedative In Executions*, REUTERS (Dec. 20, 2016), <https://www.reuters.com/article/us-arizona-executions/arizona-agrees-to-drop-use-of-contested-sedative-in-executions-idUSKBN1492BJ>

<sup>3</sup> *Id.*