

REC'D & FILED

2018 JUL -6 PM 5:18

SUSAN MERRIWETHER  
CLERK

G. COOPER  
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

The AMERICAN CIVIL LIBERTIES UNION  
of NEVADA FOUNDATION, a non-profit  
organization,

CASE NO. 18 OC 00163 1B

DEPT. 2

Petitioner,

vs.

ORDER GRANTING IN-PART  
EMERGENCY PETITION ISSUING  
WRIT OF MANDAMUS

STATE OF NEVADA *ex rel*, The NEVADA  
DEPARTMENT of CORRECTIONS;  
JAMES DZURENDA, in his official  
capacity as DIRECTOR,

Defendant.

Before the Court is Petitioner, American Civil Liberties Union of Nevada Foundation's (ACLUNV), 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. The Petition was filed at 3:15 p.m. on July 3, 2018 less than four judicial days before the scheduled execution by lethal injection of Nevada inmate Scott Dozier.

The ACLUNV sent a communication to the Court that was not filed. The Court has not seen that communication or been told what it says.

The Court first saw the Petition the morning of July 5, 2018. The Court's July 5 morning calendar was full so the Court could only quickly review the Petition. The Court instructed staff to arrange a telephone conference with counsel for the ACLUNV and NDOC. NDOC had hardly any time to investigate or prepare a response to the Petition.

1 The Court had little time to review the Petition and prepare for the hearing. The Court  
2 decided to proceed with a telephonic hearing in spite of NDOC's and the Court's lack of  
3 time to prepare for the hearing because Dozier's execution date was only four judicial  
4 days away. The Court heard oral argument by ACLUNV and NDOC's respective counsel  
5 during a telephonic hearing at 2:00 p.m. on July 5. The Court received no evidence other  
6 than the affidavit of Amy M. Rose and the copies of documents attached to the Petition.  
7 Because NDOC had hardly any time to prepare the Court informed NDOC it was not  
8 waiving any objections or defenses it may have in this action. Some of the Court's  
9 questions and statements during oral argument were made because of a lack of time to  
10 prepare for the hearing. All of the reasons for the Court's decision are contained in this  
11 order and anything the Court asked or said during oral argument that are inconsistent  
12 did not play any part in the Court's decision.

13 It appears at least some of the rush to hearing could have been avoided had the  
14 ACLUNV filed the Petition earlier. It knew or should have known a new death warrant  
15 would be issued.

16 The Court instructed ACLUNV to prepare a draft order and NDOC to file any  
17 objections as to any variations between what the Court stated on the record as the order  
18 and ACLUNV's draft and the parties complied. The Court used ACLUNV's draft as a  
19 starting point and this order is the Court's product based upon that process and it differs  
20 somewhat from the oral order. The differences are intentional.

21 The Court has not made findings of fact because NDOC had no opportunity to  
22 rebut information provided by ACLUNV or affirmatively produce evidence of its own.

23 The Third Supplemental Warrant of Execution for Dozier's execution was filed on  
24 June 19, 2018. Mr. Scott Dozier was previously scheduled to be executed on November  
25 14, 2017, using a three (3) drug cocktail of diazepam (a sedative), fentanyl (a pain  
26 medication), and cisastracurium (a paralytic). Although Mr. Dozier volunteered for  
27 execution, he brought a motion to determine the lawfulness of the method of his  
28 execution and challenged the use of a paralytic as unconstitutional. The sentencing

1 District Court agreed with Mr. Dozier and found that the use of a paralytic carries a  
2 substantial and "objectively intolerable risk of harm" to Mr. Dozier and prohibited the  
3 NDOC from using a paralytic in Mr. Dozier's execution. NDOC objected to this  
4 prohibition and filed a writ of mandamus with the Nevada Supreme Court. On May 10,  
5 2018, the Nevada Supreme Court overturned the sentencing District Court's ruling on  
6 procedural grounds.

7 On June 15, 2018, after the Nevada Supreme Court's decision, the ACLUNV  
8 submitted a public records request (Ex. 1) to NDOC under NRS 239 et seq., requesting  
9 documents pertaining to NDOC's lethal injection drugs and procedures. On June 19,  
10 2018, a new warrant of execution (Ex. 2) was signed by the sentencing District Court,  
11 setting Mr. Dozier's execution for the week of July 9, 2018. On June 22, 2018, the  
12 ACLUNV wrote to NDOC (Ex. 3) following-up on its public records request, informing  
13 NDOC that in light of Mr. Dozier's upcoming execution, immediate completion of its  
14 records request was necessary. NDOC informed the ACLUNV later on June 22, 2018,  
15 (Ex. 4) that the request was being processed and that:

16 "This request is not readily available and requires not only a search of  
17 potentially responsive documents but also a review of potentially  
18 responsive documents for any confidential e.g. personal information.  
19 Given that the request requires extensive searches and consultation,  
20 [NDOC] anticipate[s] being able to respond to you within sixty (60) days."

21 In response, on June 25, 2018, the ACLUNV wrote to NDOC again (Ex. 5)  
22 explaining the importance of these requests in light of Mr. Dozier's upcoming execution.  
23 The ACLUNV prioritized and offered to narrow some requests in order to receive  
24 documents immediately. On June 28, 2018, the ACLUNV again wrote to NDOC (Ex 6)  
25 stating that as NDOC had not produced the documents requested the ACLUNV planned  
26 to take legal action. NDOC responded on July 2, 2018 (Ex. 7) stating that it had received  
27 the ACLUNV's June 25, 2018, request and again stated the request is not readily  
28 available and NDOC anticipated being able to respond to you within 60 days.

29 The ACLUNV initiated the instant Emergency Writ to obtain the requested  
30 documents from NDOC under the Nevada Public Records Act, NRS 239 et seq.

1 On the same day the ACLUNV's Petition was filed, NDOC released a redacted execution  
2 protocol and a press release naming the drugs it plans to use in Mr. Dozier's execution.  
3 The execution protocol was signed by James Dzurenda, the Director of the Department  
4 of Corrections on June 11, 2018.

5 At the July 5th hearing, Counsel for NDOC could not tell this Court what  
6 measures were taken to fulfill the ACLUNV's requests before both the June 22, and July  
7 2, form letters were sent to the ACLUNV saying that no records were readily available.  
8 When asked by this Court what steps had been taken to comply with the ACLUNV's  
9 June 15, 2018 records request, Counsel for NDOC represented that NDOC took steps to  
10 obtain and redact part of the executional manual but represented that he did not have  
11 knowledge of whether other steps were taken.

12 Counsel for NDOC stated that there are United States Supreme Court cases, such  
13 as *Glossip v. Gross*, which point out that anti-death penalty advocates use information  
14 about where a state obtains execution drugs, such as that requested by the ACLUNV, to  
15 persuade the manufacturer and others to cease selling that drug for execution purposes.  
16 Counsel for the ACLUNV represented that NDOC has previously publicly released an  
17 invoice for a drug to be used in an execution with no redactions for confidentiality.

#### 18 19 ANALYSIS

20 The purpose of Nevada's robust Public Records Act, "is to foster democratic  
21 principles by providing members of the public with access to inspect and copy public  
22 books and records to the extent permitted by law." NRS 239.001(1); see *PERS v. Reno*  
23 *Newspapers Inc.*, 129 Nev. 833, 836-837 (2013) ("The [Nevada Public Records] Act's  
24 purpose is to promote government transparency and accountability by facilitating public  
25 access to information regarding government activities.")

26 Courts "begin with the presumption that all government-generated records are  
27 open to disclosure." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 628 (2011).  
28 The provisions of the Act "must be construed liberally to carry out this important

1 purpose." NRS 239.001(2).

2 Except for the public records identified by statute to be confidential, "all public  
3 books and public records of a governmental entity must be open at all times. . ." NRS  
4 239.010(1).

5 Once a public records request is made, the governmental entity is required to  
6 respond "[n]ot later than the end of the fifth business day after the date on which the  
7 person who has legal custody or control of a public book or record of a governmental  
8 entity receives a written or oral request from a person to inspect, copy or receive a copy  
9 of the public book or record." NRS 239.0107(1).

10 The governmental entity is required to either allow inspection or copying, or  
11 provide a copy of the requested record. NRS 239.0107(1)(a).

12 If the governmental entity does not have legal custody or control of the public  
13 book or record, it must provide to the person, in writing: "(1) Notice of that fact; and (2)  
14 The name and address of the governmental entity that has legal custody or control of the  
15 public book or record, if known." NRS 239.0107(b)(1-2).

16 "If the governmental entity is unable to make the public book or record available  
17 by the end of the fifth business day after the date on which the person who has legal  
18 custody or control of the public book or record received the request," it must, provide in  
19 writing "(1) Notice of that fact; and (2) A date and time after which the public book or  
20 record will be available for the person to inspect or copy or after which a copy of the  
21 public book or record will be available to the person." NRS 239.0107(c).

22 "If a public book or record of a governmental entity is readily available for  
23 inspection or copying, the person who has legal custody or control of the public book or  
24 record shall allow a person who has submitted a request to inspect, copy or receive a  
25 copy of a public book or record." NRS 239.0107(2).

26 NDOC argued and the Court understands that Dozier is not a party to this action.  
27 The Court concludes the people of the State of Nevada have a substantial interest in how  
28 the State intends to carry out the process of killing a human being under a death

1 warrant. The Court concludes that whatever potential prejudice NDOC may suffer as a  
2 result of this order, whether this order is ultimately found to be right or wrong, the  
3 potential prejudice to the people of the State of Nevada from the process of killing  
4 Dozier not being transparent before the execution is far greater.

5 From the documents, representations, and argument presented to this Court,  
6 considering the nature of the records requested, and considering Mr. Dozier's July 11th  
7 execution, at least the following records requested by the ACLUNV should on their face  
8 be readily available and should be immediately produced in good faith by NDOC:

- 9 1. For the lethal injection drugs planned to be used in Mr. Dozier's July 11<sup>th</sup>,  
10 records reflecting the names and quantities of the drugs to be used;
- 11 2. For any lethal injections drugs obtained by Respondent since November 9,  
12 2017:
  - 13 a. Records indicating the current amount of any such drugs in NDOC's  
14 custody or control;
  - 15 b. The date of purchase or acquisition of those drugs; and
  - 16 c. Expiration dates.

17 "Lethal injection drugs" means any drug NDOC will or may inject into Dozier as  
18 any part of the process of executing him.

- 19 3. Records from the Drug Enforcement Agency that demonstrate  
20 authorization to handle controlled substances at Ely State Prison.

21  
22 ORDER

23 IT IS ORDERED:

24 A Writ of Mandamus be issued directing and ordering Respondents, State of  
25 Nevada ex rel the Nevada Department of Corrections and James Dzurenda, in his official  
26 capacity as Director of the Nevada Department of Corrections, to produce to Petitioner,  
27 the ACLUNV, by July 9, 2018, the following records that are in its custody or control:

28 /////

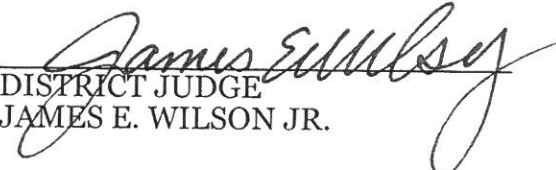
1. For the lethal injection drugs planned to be used in Mr. Dozier's July 11<sup>th</sup>, records reflecting the names and quantities of the drugs to be used;
2. For any lethal injections drugs obtained by Respondent since November 9, 2017:
  - a. Records indicating the current amount of any such drugs in NDOC's custody or control;
  - b. The date of purchase or acquisition of those drugs; and
  - c. Expiration dates.

"Lethal injection drugs" means any drug NDOC will or may inject into Dozier as any part of the process of executing him.

3. Records from the Drug Enforcement Agency that demonstrate authorization to handle controlled substances at Ely State Prison.

Respondent is not required to produce information declared by law to be confidential, however, as per NRS 239.0107(d), if there is a statutory or legal reason for withholding information for the purposes of confidentiality it must provide "a citation to specific statute or legal authority that makes the public book for record, or a part thereof, confidential."

ACLUNV may file a motion for attorney's fees and NDOC may file an opposition.  
July 6, 2018.

  
DISTRICT JUDGE  
JAMES E. WILSON JR.

\*The Court's law clerk is in a relationship with the stepson of one of Dozier's trial counsel. The Court received no information or input from the law clerk regarding this action.

## CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on July 6, 2018, I served a copy of this document by placing a true copy in an envelope addressed to:

Amy M. Rose  
601 S. Rancho Drive, Suite B11  
Las Vegas, NV 89106  
[rose@aclunv.org](mailto:rose@aclunv.org)

Jordan Smith  
555 E. Washington Ave., Suite 3900  
Las Vegas, NV 89101  
[jsmith@ag.nv.gov](mailto:jsmith@ag.nv.gov)

the envelope sealed and then deposited in the Court's central mailing basket in the Court Clerk's Office for delivery to the United States Post Office at 1111 South Roop Street, Carson City, Nevada for mailing.

  
Baylie Hellman  
Law Clerk