DISTRICT COURT

CLARK COUNTY, NEVADA

SCOTT RAYMOND DOZIER, Petitioner, v. STATE OF NEVADA, Respondents.	Case No. 05C215039 Dept. No. IX (Death Penalty Habeas Corpus Case)

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

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

BACKGROUND

1. Petitioner Scott Raymond Dozier is an inmate on death row in the custody of the Nevada Department of Corrections ("NDOC"). In October of 2016, by letter to this Court, Petitioner expressed his desire to waive or discontinue his legal proceedings so that his sentence of execution could be carried out. Various proceedings transpired in which Petitioner was made to appear and present his wishes before this Court and eventually subject himself to a competency examination by a court-appointed mental health expert. In a July 2017 lengthy and thorough report, Michael S. Krelstein, M.D., determined that Petitioner was competent to waive his post-conviction and appellate proceedings. Premised on this determination, at another hearing in July 2017, Dozier and the Clark County District Attorney's Office agreed to stay Dozier's habeas corpus action provided NDOC had the ability to conduct the execution. This Court later signed an execution warrant presented by the Clark County District Attorney's Office, scheduling Petitioner's execution by lethal injection to take place the week of October 16, 2017.

2. Thereafter, on August 15, 2017, Petitioner filed Motions for Determination Whether Scott Dozier's Execution Will Proceed in a Lawful Manner and for Leave to Conduct Discovery. At that time, Petitioner's motions were based on constitutional concerns regarding NDOC's unknown execution protocol for carrying out his scheduled execution. On the same date, the Clark County District

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

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

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

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

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

6. At the Court's request, NDOC submitted a Declaration by John M. DiMuro, D.O., the former Chief Medical Officer of the State of Nevada,[1] dated October 20, 2017. NDOC also submitted revised protocol provisions, also dated October 20, 2017, within the Execution Manual (EM) for Sections 103 and 110. The October 20, 2017 revisions addressed titration and entailed significant increases in the dosage of the three drugs to be used under the protocol. NDOC's revised protocol retained all three of the drugs as set forth in its earlier version of the protocol, and

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[1] Nevada law requires the Director for the Department of Corrections to consult with the State's Chief Medical Officer ("CMO") regarding the selection of the drug or combination of drugs to be used for executions. NRS 176.355. In addition, provisions of NDOC's execution protocol require the CMO be consulted regarding the drugs' dosages to ensure they cause death, and further require that the CMO, or his designee, direct the preparation of the execution drugs. EM 100.02, 103.01 and 103.03.

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

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

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

8. At a follow-up hearing conducted on November 6, 2017, this Court accepted into evidence, this time over NDOC's objection, a second Declaration of Dr. Waisel signed that same date.[2] On November 8, 2017, NDOC submitted further revisions to EM 103 and 110. On November 9, 2017, NDOC filed a signed and adopted execution manual.

FINDINGS OF FACT

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

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[2] *See* Petitioner's November 6, 2017 Supplemental Errata, Ex. 38.

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

A. Known and Available Alternative

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

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

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

B. Substantial Risk of Harm

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

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

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

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

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

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

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

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

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

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[3] *See also* November 3, 2017 Hearing, State's Exs. 10 and 11.

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

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

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

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

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

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

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

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

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

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

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

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[4] October 20, 2017 Declaration of John M DiMuro, D.O., p. 3.

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

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

CONCLUSIONS OF LAW

30. For the above stated reasons, and based on the evidence presented, this Court finds that NDOC's proposed use of a paralytic agent in the execution of Petitioner Scott Dozier presents an unconstitutional "substantial risk of serious harm," and an "objectively intolerable risk of harm" in violation of the Eighth Amendment to the United States Constitution and Article 1, Section 6 of the Nevada Constitution. *Baze*, 553 U.S. at 50. This Court further finds that Petitioner has identified an alternative method of execution that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 52. Thus, this Court hereby enjoins NDOC from use of a paralytic agent in carrying out the planned execution of Scott Raymond Dozier.

31. The action taken by this Court in response to Petitioner's filings regarding the lawfulness of his planned execution rests upon the Court's inherent authority to inquire into the lawfulness of its own order, here the Court's signing and entry of a warrant of execution for Petitioner Scott Dozier. *See Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007); *cf.* NRS 1.210(3). In particular, this Court has the "inherent power to prevent injustice," *Halverson*, 123 Nev. at 261-62, 163 P.3d at 440, and to tailor the scope of its orders to avoid constitutional concerns. *See, e.g., Jordan v. State ex rel. Dep't of Motor Vehicles and Public Safety*, 121 Nev. 44, 60, 110 P.3d 30, 42 (2005) (orders regarding vexatious litigants must be narrowly tailored to avoid violation of constitutional right of access to the courts). Counsel for the NDOC has noted on the record that the Court

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

ORDER

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

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

DATED this 21st day of November, 2017

JENNIFER P. TOGLIATTI
DISTRICT JUDGE

[5] *See* Petitioner's 9-25-17 Reply at 10.

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

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

Diane Sanzo

DIANE SANZO, Judicial Assistant