

**UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA**

FRANK ROBERT CHESTER, et al.,

Plaintiffs,

v.

JOHN E. WETZEL, et al.,

Defendants.

Civil Action

No. 1:08-cv-1261
(Judge Kane)

**Execution Scheduled for
September 22, 2014**

**MEMORANDUM OF LAW IN SUPPORT OF
INTERVENORS' EMERGENCY MOTION FOR ORDER TO UNSEAL
AND TO PROHIBIT FUTURE SEALING OF DOCUMENTS DISCLOSING
SUPPLIERS OF DRUGS TO BE USED FOR LETHAL INJECTION**

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INTRODUCTION

The Commonwealth of Pennsylvania has scheduled the execution of Hubert Michael, Jr. for September 22, 2014. Documents filed in this Court contain key information about the supply chain for the drugs that will be used to execute Mr. Michael, but Intervenors Guardian US, The Philadelphia Inquirer, the Pittsburgh Post-Gazette and the Philadelphia City Paper, as well as the public, are unable to get access to those documents because they are filed under seal.

Intervenors seek access to the sealed documents – and those filed in the future – so that they can learn and report about the sources chosen by the Pennsylvania Department of Corrections (“DOC”) to supply, test and otherwise provide the drugs that will be used to execute Mr. Michael. Given the string of problematic lethal injection executions around the country and the allegations already raised in this litigation concerning the reliability of the supply chain chosen by the DOC, Intervenors believe that the public interest in a full examination of the DOC’s planned execution procedures outweighs the DOC’s stated interest in maintaining the secrecy of its suppliers. Intervenors seek expedited consideration of their Motion so that they may learn and report about the DOC’s chosen suppliers in advance of Mr. Michael’s execution, which could occur as early as September 22, 2014.

PROCEDURAL HISTORY

This case is a civil rights action brought by a class of Pennsylvania inmates sentenced to execution, challenging the constitutionality of Pennsylvania's death penalty protocol. The history of the case is quite complex, but the history related to Intervenor's motion is more succinct.

On September 5, 2012, the Defendants served upon the Plaintiffs a second amended Department of Corrections Lethal Injection Protocol dated August 28, 2012, which by its terms "supersedes all prior versions" of the execution protocol to be used by the Commonwealth of Pennsylvania. One week later, on September 11, 2012, a death warrant issued for Hubert Michael, a member of the Plaintiff class in this case. Mr. Michael's execution was scheduled for November 8, 2012. Attorneys for Mr. Michael and for the Plaintiff Class filed a Motion for Stay of Execution and sought discovery and an evidentiary hearing, arguing that the protocol adopted by the DOC would result in pain and suffering to Mr. Michael and thereby violate the Eighth Amendment.

In connection with that motion, attorneys for Mr. Michael and the Class served discovery requests for information about the drugs the DOC planned to use for the execution, including the suppliers of those drugs. The Defendants resisted revealing the suppliers of the drugs, arguing that revealing the identity of the DOC's chosen suppliers could cause those suppliers to refuse to continue as a

source of execution drugs. (Doc. No. 153)

By Order dated November 1, 2012, this Court ordered Defendants to provide the requested information because the identity of the DOC's chosen suppliers and associated information concerning the production and testing of the drugs manufactured for use in Pennsylvania executions are highly relevant to Plaintiffs' claims in this litigation. (Doc. No. 156.)

The Order of November 1, 2012, dealt primarily with whether Defendants' objections could prevent disclosure of supplier information *to the Plaintiffs*, a question the Court analyzed under "the standards defined by the federal courts for the governmental privilege relating to state law enforcement records". In the same Order, the Court required that Plaintiffs not disclose the information related to the DOC's suppliers, but did not order the sealing of any documents filed with the Court:

Defendants rely largely upon a concern that this disclosure will have an adverse impact upon these third party vendors, and may therefore thwart government efforts to secure these products in the future to avoid this disclosure. These concerns, while substantial and sincere, do not in our view call for the wholesale denial of this information which may be relevant to a fully-informed consideration of the constitutionality of Pennsylvania's death penalty protocol. These concerns do, however, strongly caution against public dissemination of this information, and suggest that the information should be shared with counsel for the Plaintiffs subject to a strict confidentiality order prohibiting further disclosure of this information without the express approval of the Court.

(Doc. No. 156) (the “Confidentiality Order”). No member of the public or the media participated in the debate over the confidentiality of the identity of the DOC’s chosen suppliers, and no party represented the interests of the media or the public in fuller disclosure.

In compliance with the Confidentiality Order, Plaintiffs, with the concurrence of Defendants, have sought permission to file their motions, briefs and exhibits under seal whenever those documents contained the identity of the DOC’s suppliers or other entities involved in the supply chain.

On November 5, 2012, the Court held a hearing on the Plaintiffs’ Motion to Stay, in which Plaintiffs presented expert and other evidence in support of their argument that the DOC’s lethal injection protocol posed an unacceptable risk that they would be subjected to pain and suffering in violation of the Eighth Amendment. The Plaintiffs’ expert expressed his opinion that the manufacture of lethal injection drugs by the DOC’s chosen suppliers failed to comply with accepted medical standards in a number of ways. The Plaintiffs’ expert did not disclose the identity of the DOC’s chosen suppliers, but in his testimony he referenced and relied upon several exhibits that revealed the suppliers’ identities, specifically Plaintiffs’ Exhibits 49, 50 and 52. (Doc. No. 188 at 19, 30, 32-33.) The Court accepted the parties’ agreement that those exhibits would be admitted into evidence but would remain confidential. (Doc. No. 188 at 72:22 – 73:3)

Plaintiffs Exhibits 49, 50 and 52 from the November 5, 2012 hearing are therefore part of the record in this case but are not available to Intervenors and the public.

On November 18, 2013, Plaintiffs moved for permission to take additional discovery and supplement the summary judgment record with respect to a FDA investigation of the entity responsible for testing the compounded drugs the Commonwealth had intended to use to execute Mr. Michael. (Doc. No. 226-2.) The Plaintiffs' Motion is identified on the docket as "SEALED DOCUMENT", but is identified in the Court's Order of February 28, 2014, granting the Motion (Doc. No. 234), and in Plaintiffs' Memorandum In Opposition To Defendants' Motion To Strike (Doc. No. 245 at 7-8.)

Plaintiffs' motion and supporting exhibits (Doc. No 226) and brief in support with exhibits (Doc. No. 228)¹ concern and presumably identify the DOC's chosen suppliers of execution drugs, as well as other entities involved in the supply and testing chain for those drugs. Plaintiffs sought permission to file those documents under seal and the Defendants agreed. Plaintiffs' motion did not identify any reason the documents should be kept from public view. (Doc. No. 225.) The Court granted the motion without making specific findings regarding the need for secrecy. (Doc. No. 227.) Those documents are part of the Court

¹ Intervenors believe that Plaintiffs' brief is Docket No. 228 because that document was filed 14 days after Plaintiff's motion, which is the time allowed by local rule for the filing of a brief in support of a motion. Docket entry 228 is identified only as "DOCUMENTS SEALED".

record on Defendants' Motion for Summary Judgment, but are not available to Intervenors and the public.

On July 24, 2014, Governor Corbett signed a new execution warrant for Mr. Michael, and his execution was scheduled for September 22, 2014. That execution date was stayed by the Court of Appeals for the Third Circuit on August 15, 2014, when it granted Mr. Michael's Motion for Stay of Execution Pending Consideration of Petition for En Banc Rehearing. Should the Petition for Rehearing in the Third Circuit be denied, Mr. Michael likely once again will face a short timeframe leading to a scheduled execution. (Doc. No. 250.)

Plaintiffs have requested that Defendants supplement and update their discovery responses for:

information and documents regarding the content of the execution protocol; the composition of the lethal injection team and the training and qualifications of those individuals; **the manufacturers and/or compounders of lethal injection drugs available for use by the DOC; and lot numbers, quantities, testing results, reliability, expiration dates, suppliers and vendors, packaging and labels, receipts, and information regarding storage and disposal of lethal injection drugs purchased by the DOC for scheduled executions.**

Doc. No. 250 (emphasis supplied). Any future motions or related documents filed by Plaintiffs that identify manufacturers and other entities in the supply chain for the drugs purchased by the DOC for use in future executions will, presumably, be filed under seal in compliance with the Confidentiality Order.

STATEMENT OF FACTS

As detailed in Exhibits A through D to the Motion to Intervene, the Intervenors are each members of the media with long-standing histories of investigating and reporting to the public on issues of concern, including the use of lethal injection as a means of carrying out death sentences.

Guardian News & Media LLC (“Guardian US”) is a digital news service organized in New York, where it is based, as Guardian News and Media LLC. Declaration of Katherine Viner (Exh. A). Guardian US serves an extensive United States audience. The Inquirer is a prize-winning daily newspaper with its principal place of business in Philadelphia. Declaration of Gabriel Escobar (Exhibit B). Its core distribution area is an eight county area including Philadelphia and its surrounding counties in Pennsylvania and New Jersey. The Pittsburgh Post-Gazette is a major award-winning newspaper in Western Pennsylvania with more than 900,000 readers and a website, post-gazette.com, that averages 4.25 million unique users a month. Declaration of David Shribman (Exh. C). The Philadelphia City Paper is a prize-winning alternative weekly newspaper with more than 2,000 distribution locations throughout Philadelphia, its Pennsylvania suburbs and South Jersey. Declaration of Lillian Swanson (Exh. D).

Intervenors challenge the Confidentiality Order issued by this Court on November 1, 2012, directing that documents containing the identity and other

information about the DOC's supplier(s) of execution drugs be kept confidential, and subsequent orders of the Court directing the sealing of specific documents containing the same information. There has been an exponential growth in the public's concern about execution by lethal injection following reports of problematic executions in Florida, Ohio, Oklahoma and Arizona.

Pennsylvania has scheduled the execution of Hubert Michael, Jr. for September 22, 2014. If that execution is carried out, Mr. Michael will be the first person executed in Pennsylvania since 1999, and the first executed under the DOC's new execution protocol. Intervenors and the public have a particular interest in the facts surrounding the suppliers of the drugs that Pennsylvania has or will purchase for the purpose of executing Mr. Michael, in part because of the allegations and evidence regarding the sources of those drugs adduced at the hearing held before this Court on November 5, 2012.

At the November 5, 2012 hearing, an expert introduced by Mr. Michael's counsel identified several significant issues regarding the pentobarbital and other drugs obtained by the DOC for Mr. Michael's execution. The expert noted that the concentration of the pentobarbital appeared to be different from that normally found on the market, and different from the concentration called for by Pennsylvania's protocol. The expert also noted a lack of evidence of testing for sterility and biological contamination. And the expert noted that the vials supplied

by the compounding pharmacy were not labeled in accordance with the Pennsylvania protocol or standard medical practice. Exh. A at para. 13. Moreover, the public information relating to Plaintiffs' Motion to Supplement suggests additional concerns with the DOC's chosen supply chain for execution drugs. Exh. C at para. 7. These allegations raise considerable concern about the competency of the supplier and related entities chosen by the Department of Corrections in 2012. The question whether the Department of Corrections continues to use the same supplier after these revelations is an important one. Exh. A at para. 14.

Even aside from these concerns, however, Intervenors would wish to report and/or investigate the identity of the entities involved in supplying drugs to the DOC for use in executions. If Intervenors had access to the DOC's supplier information, they could uncover potential problems with the supply chain, or could confirm that the provenance of the drugs Pennsylvania intends to use to execute Mr. Michael is completely sound.² Either fact would be of intense interest to the

² Intervenors could examine the bona fides and track record of each supplier chosen by the Department of Corrections (past and present), including: whether there have been complaints lodged against it concerning either procurement of ingredients or the manufacture of drugs; whether it has supplied drugs for lethal injections in other states (including, of course, the recent executions in Florida, Ohio, Oklahoma and Arizona); where it will obtain the API for pentobarbital; what sort of testing it contracts for on the drugs it manufactures; and its relationship with those testing facilities. Exhibit A at para 16.

public in this time of heightened awareness and scrutiny of the lethal injection process.

As is detailed above, the identity of the 2012 supplier is revealed in certain filings made under seal in this Court. Intervenors anticipate that the DOC's 2014 supplier of execution drugs will be the subject of additional motions and briefing by Mr. Michael, in keeping with past arguments made by his attorneys. Indeed, Plaintiffs have requested updated information from the Department of Corrections for that purpose. (Doc. No 250 at 3.)

Intervenors cannot obtain the information they seek directly from the Pa DOC, as that agency has successfully contended that the identity of its drug suppliers is not available through the Pennsylvania Right to Know Law. Exh. B at para. 10. *See In re: Richard Poplawski v. Pennsylvania Department of Corrections*, No. AP 2014-0207, slip op. (Pa. Off. Open Records March 12, 2014) (attached as Exh. E to the Motion to Intervene).

STATEMENT OF QUESTIONS INVOLVED

Whether Defendants can overcome the “strong presumption” that the First Amendment entitles Intervenors and the public to see documents filed with the Court in this proceeding.

ARGUMENT

For the first time in this litigation, the Court is directly presented with a claim that the sealing of certain court exhibits and filings in connection with non-discovery motions violates the public’s presumptive right of access to those documents. The analysis is the same as it would have been if Intervenors had sought access when the documents in question were originally sealed. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994) (“The appropriate approach in considering motions to modify confidentiality orders is to use the same balancing test that is used in determining whether to grant such orders in the first instance . . .”).

The question presented is whether Defendants can meet their burden of overcoming Intervenors’ presumed right of access to documents filed in this Court. As with all protective orders, the burden is on the party seeking the protective order to show, with specificity, that disclosure would work a “clearly defined and serious injury to the party seeking closure.” *Pansy*, 23 F.3d at 786; *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). “Broad allegations of

harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

A. Intervenor’s Right Under The First Amendment to See Documents Filed in This Action

The Third Circuit has held that the “First Amendment [also] embraces a right of access to [civil] trials” and documents filed in civil cases. *Publicker Indus.*, 733 F.2d at 1070 (citation and internal quotations omitted). This right exists independently of the common law right of access. *Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 198 n.13 (3d Cir. 2001) (citing *Republic of Phillipines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991)).³ The general rationale behind this right is that “public access to civil trials . . . plays an important role in the participation and the free discussion of governmental affairs.” *Publicker Indus.*, 733 F.2d at 1070.

The First Amendment right of access can only be overcome by an exacting showing: “to limit the public’s access to civil trials [where First Amendment right to access applies,] there must be a showing that the denial serves an important

³ In addition, the existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute. *United States v. Criden, (Criden I)*, 648 F.2d 814, 819 (3d Cir.1981); *Publicker Indus.*, 733 F.2d at 1067 (“[A]ppellants PNI and Dow Jones possess a common law right of access to civil trials.”).

governmental interest and that there is no less restrictive way to serve that governmental interest.” *Publicker Indus.*, 733 F.2d at 1070.⁴ *See also id.*, 733 F.2d at 1071 (to overcome the First Amendment right of access, the record before the trial court must demonstrate “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest”) (internal quotations omitted). That “showing” requires ““specific, on the record findings” that indicate closure of the government proceedings is ‘essential’ to preserve higher values and is narrowly tailored to serve that interest.”

Philadelphia Inquirer, 906 F. Supp. 2d at 366 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).⁵ *See also Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) (Once a party “has

⁴ Where the courts have not yet recognized a First Amendment right of access to a particular government process, the Court must apply the two-pronged “experience and logic” test to determine whether there is any right of access. *See Philadelphia Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 366-68 (M.D. Pa. 2012). Because the right of access to court documents such as those sought by Intervenors is already established, that inquiry is unnecessary. *See Publicker Indus.*, 733 F.2d at 1070. As this Court determined in *Philadelphia Inquirer v. Wetzel*, allowing the press to examine “all phases of the execution contributes to the proper functioning of the execution process, in part because it allows the press to contribute to an informed discussion of the Commonwealth's lethal injection procedures.” 906 F. Supp. 2d at 371.

⁵ Procedurally, a trial court that limits the public’s right to access civil trial proceedings “must both articulate the countervailing interest it seeks to protect and make findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Publicker Indus.*, 733 F.2d at 1071 (internal quotations omitted).

moved to intervene to challenge the protective order, [its proponents] must make a ‘particularized showing of the need for continued secrecy’ if the documents are to remain under seal.”).

This an exacting and fact-specific inquiry, as this Court demonstrated in

Philadelphia Inquirer:

On review, the Court finds that protecting the lethal injection team constitutes a significant governmental interest. The Court does not find, however, that this interest outweighs Plaintiffs' First Amendment right of public access to the extent that a curtain must obscure the execution chamber whenever the lethal injection team is present. First, Defendants have not cited any incidents where prison officials were harmed after inmates were hanged or electrocuted in full view of press witnesses. Given that inmates have been executed in full view of witnesses for over one hundred years without incident, the Court is hard-pressed to conclude that Defendants' choice to obscure the chamber is proportionate to the perceived risk of harm. Second, Defendants have not articulated a reason why the lethal injection team cannot take affirmative steps beyond wearing surgical garb to conceal their identifying characteristics, nor do Defendants cite any instances where inmates became aware of the LIT members' identities and subsequently retaliated against them. Furthermore, Defendants provide no support for their argument that the DOC would be prevented from proceeding with the execution scheduled for November 8, 2012.

Philadelphia Inquirer, 906 F. Supp. 2d at 373.

B. Defendants Cannot Justify Keeping The Identities Of The DOC's Chosen Suppliers Of Execution Drugs From The Public

The Defendants' justification for shielding the identity of companies involved in provision of drugs for execution is that those companies do not want public scrutiny and may cease providing the drugs in order to avoid it. (Doc. No. 153.) The only way to protect the DOC's ability to carry out death sentences, they argue, is to protect the DOC's chosen suppliers from the discomfort of public scrutiny. There are several reasons why the Defendants' justification is insufficient to overcome Intervenors' and the public's right of access to documents filed in this litigation.

The first reason is that Defendants' argument far outstrips the facts. The DOC is not required by law to use the drugs identified in its protocol – indeed, its use of a three-drug protocol appears to be contrary to its statutory mandate. 61 Pa. C.S. § 4304(a)(1). Furthermore, only one of the drugs in the DOC's protocol poses any difficulty for the DOC – the other two drugs are readily available through normal commercial channels.

It may or may not be true that the DOC's chosen supplier of pentobarbital will refuse future business from the DOC if its identity is known. But even if that were the case, the DOC could find a different source of pentobarbital, or could change its protocol to use only drugs that are available through normal commercial channels. There have been twenty-eight executions in the United States in 2014,

all of them by lethal injection and more than half of them using pentobarbital. *See* Execution List 2014, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/execution-list-2014>.

The second reason that the Defendants' concerns do not overcome the First Amendment right of access to documents filed in this Court is that the claimed impact upon the DOC's ability to conduct executions is entirely within the DOC's power to mitigate, if it chooses to do so. The DOC has chosen this combination of drugs and this supplier of drugs. Protecting the DOC's ability to perform its statutory obligations is an important government interest, but protecting the DOC's administrative preferences is not.

The third reason that the Defendants' asserted interest cannot supplant the Intervenor's interest is that it is flatly inconsistent with our governmental values and our Constitution. The sole reason for Defendants' bid to keep the DOC's suppliers secret is that the public is more engaged than before in the moral and legal questions surrounding the death penalty broadly and the use of lethal injection specifically. Increased public scrutiny of critical government functions cannot be the justification for overriding the public's First Amendment right to scrutinize those government functions. The purpose of the First Amendment right of access is to *facilitate* public scrutiny of government, not to *frustrate* that scrutiny. The "First Amendment embraces a right of access to [civil] trials ... to

ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.” *Publiker Indus.*, 733 F.2d at 1070 (quoting *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 604-05 (1982)).

On the other hand, the public’s interest in scrutinizing and debating execution by lethal injection cannot be overstated. The taking of a human life is the most awesome and frightening power that we, the public, have given our government. That unparalleled grant of power brings with it a similarly unparalleled public interest in overseeing the use of that power. Neither the DOC’s administrative convenience nor the embarrassment of the commercial entities that contract with the DOC are “important” interests when measured on that scale.⁶

The information that Intervenors seek is not tangential or incidental to the public’s interest. The question before the public – whether capital punishment is consistent with our contemporary values and whether lethal injection is a humane way of effecting such punishment – turns, to no small degree, on the reliability and efficacy of the drugs used, and that question is inextricably bound up with the manner in which the drugs are manufactured and tested. The public also has a significant interest in knowing whether federal laws and the requirements set out in

⁶ This is “not the kind of confidential commercial information that courts have traditionally protected, *e.g.*, trade secrets.” *Publiker Indus.*, 733 F.2d at 1074 (citations omitted).

the United States Constitution are being followed in the process of obtaining the drugs that the state will use to punish crime. These important questions are raised by the identity of the DOC's chosen suppliers of execution drugs.

Intervenors and the public have a particular interest in all of the facts relating to the chain of supply for the drugs that the Pa. DOC has or will purchase for the purpose of executing Mr. Michael, in part because of the allegations and evidence regarding the source of those drugs adduced at the hearing held before this Court on November 5, 2012.

These allegations raise considerable concern about the competency of the supplier chosen by the Pa. DOC in 2012. The question whether the DOC continues to use the same supplier after these revelations is an important one as it speaks to the issue of whether such a supremely significant procedure as an execution is being properly managed and conducted.

Even aside from these concerns, however, normal journalistic practice and investigation concerning the planned execution would include a focus on the identity of the supplier and the provenance of the drugs.

Public scrutiny of these facts could uncover problems with the supply chain, or alternatively it could reveal the opposite: it could confirm that the source of the drugs the Pa. DOC intends to use to execute Mr. Michael is completely sound and the products they supply entirely up to standard. Either fact would be of intense

interest to the public in this time of heightened awareness and scrutiny of the lethal injection process.

The level of attention focused on the lethal injection procedure reflects the importance of this event – the state’s most extreme exercise of its power, the taking of a human life. As this Court has observed, “There are few issues of greater interest to the public than this one.” (Doc. No. 188 at 8.)

CONCLUSION

Intervenors respectfully request that the Court set an expedited schedule for briefing and, if necessary, an evidentiary hearing on the Emergency Motion to Unseal and thereafter enter an order unsealing documents previously filed in this Court that disclose the DOC’s chosen supplier(s) of lethal injection drugs, and directing that future filings disclosing information about the supply chain for the drugs not be filed under seal.

Respectfully submitted,

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Dated: September 11, 2014

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this brief complies with the length requirements of L.R. 7.8(b), in that it contains less than 5000 words, exclusive of tables and certifications. The body of this brief contains 4423 words.

/s/ Mary Catherine Roper
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