

**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**

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

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 Intervenor Guardian US, The Philadelphia Inquirer, the Pittsburgh Post-Gazette and the Philadelphia City Paper, as well as the public, are unable to review those documents because they are filed under seal. Intervenor seeks 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 supplier chosen by the DOC, movants 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. Intervenor 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. In support of their Motion, Intervenor aver:

1. As detailed in the declarations attached to their Motion to Intervene, Intervenor are news organizations that serve millions of readers in Pennsylvania and beyond.

2. The lethal injection protocol announced by Pennsylvania’s DOC calls for the administration of three drugs, beginning with pentobarbital as an anesthetic, following by pancuronium bromide and potassium chloride. (Doc. No. 206 at 2-7.)

3. Pentobarbital is also known by the brand name Nembutal.

4. The manufacturer of Nembutal has prohibited its sale in the United States for use in executions.

5. For that reason, when the DOC wished to obtain drugs for use in an execution scheduled for November 2012, the DOC contracted with one or more compounding pharmacies to manufacture all of the drugs needed for the execution on special order.

6. By Orders dated November 1, 2012, and November 2, 2012, this Court directed the DOC to provide Plaintiffs in this action with the name and other identifying information about the compounding pharmacies chosen by the DOC. The Court's Order of November 1, 2012, required Plaintiffs to keep the identifying information for the DOC's chosen suppliers confidential.

7. In compliance with that Order, Plaintiffs 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.

8. On November 5, 2012, the Court held a hearing on the Plaintiffs' Motion to Stay Execution, 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 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.)

9. 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.

10. On November 18, 2013, Plaintiffs herein moved for permission to take additional discovery and supplement the summary judgment record regarding the 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," with an exhibit titled Motion to Supplement, 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.)

11. Plaintiffs' motion and supporting exhibits (Doc. No 226) and brief in support of the motion, also with exhibits (Doc. No. 228),¹ concern and presumably identify the DOC's chosen suppliers of execution drugs, as well as other entities

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".

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.)

12. Those documents are part of the Court record on Defendants' Motion for Summary Judgment, but are not available to Intervenors and the public.

13. The public and the press have a presumptive right of access to documents filed with the Court for consideration in connection with the merits of the claims before the Court. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.* 998 F.2d 157, 165 (3d Cir. 1993) (“[W]e hold there is a presumptive right to public access to all material filed in connection with nondiscovery pretrial motions, whether these motions are case dispositive or not, but no such right as to discovery motions and their supporting documents”).

14. The exhibits submitted by Plaintiffs in connection with their Motion to Stay and the briefs and exhibits submitted by Plaintiffs in opposition to the Defendants' Motion for Summary Judgment are central to the Court's consideration of Plaintiffs' constitutional claims and are, therefore, judicial documents presumed to be open to the public and the media.

15. These documents are of acute interest to the public and the media in light of the intense public scrutiny that has developed in the last year around the sourcing of drugs used for lethal injection executions. *See* Declaration of Katharine Viner.

16. The Defendants bear the burden of justifying the sealing of court documents that contain the identity of the DOC's chosen supplier(s).

17. Those documents can only remain sealed if Defendants demonstrate that the denial of access serves an important or "overwhelming" governmental interest and that there is no less restrictive way to accomplish that interest. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).

18. The DOC's interest is not sufficiently significant or well-defined to justify barring public access to court documents that identify the DOC's chosen supplier(s) of execution drugs.

19. The DOC has chosen the three drugs it prefers to use for lethal injection – that protocol is contrary to Pennsylvania's lethal injection statute. 61 Pa. C.S. § 4304(a)(1). Two of those drugs are commercially available, yet the DOC has chosen to have all three specially manufactured by one or more compounding pharmacies.

20. The DOC contends that it may lose its chosen suppliers of execution drugs if the identity of that supplier becomes known. If that is true, the DOC has

other options for carrying out executions by lethal injection. It could choose other drugs, or other suppliers. Protecting the DOC's preferred procedures is not the same as protecting the DOC's interest in carrying out the sentence imposed on Mr. Michael.

21. On the other side of the scale is the intense public interest in the information, sought here by Intervenors, about the origins of the drugs the DOC intends to use to execute Mr. Michael and others thereafter.

22. There is growing public concern about the manner in which lethal injection executions are carried out. That concern has grown exponentially during the last year, following reports of problematic executions in Florida, Ohio, Oklahoma and Arizona.

23. One point of public interest surrounding these executions is the type and source of the drugs used in lethal injection procedures. There have been numerous reports and investigations of states allegedly using unlawful supply chains to obtain these drugs. *See, e.g.,* Chris McDaniel and Véronique Lacapra, *Missouri's Execution Drug Source Raises Legal, Ethical Questions*, St. Louis Public Radio, Dec. 31, 2013, *available at* <http://news.stlpublicradio.org/post/investigation-missouris-execution-drug-source-raises-legal-ethical-questions>.

24. Where a state uses a compounding pharmacy to manufacture the

drugs, there is also concern about where the pharmacy obtains the Active Pharmaceutical Ingredients, or API, it requires to make up the substance, as the sale of the API is also controlled by federal law.

25. If Mr. Hubert is executed on September 22, 2014, or soon thereafter, it will be Pennsylvania's first execution since Gary Heidnik was put to death in 1999, and the first execution in Pennsylvania since the development of the controversy over the use of lethal injection as a means of execution and the decrease in the availability of pentobarbital for that purpose. That alone makes this execution and the facts surrounding it of particular interest to Intervenors and the public.

26. 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 sources of those drugs adduced at the hearing held before this Court on November 5, 2012.

27. The questions raised in this case and in states around the country about the identity, competency and legality of the drug suppliers and the effectiveness, currentness and legality of the drugs themselves raise considerable and justifiable concern about the DOC's choice in 2012 of suppliers. The question whether the DOC continues to use the same suppliers after these revelations is an important one as it speaks to the issue of whether such a supremely significant

procedure as an execution of a human being is being properly managed and conducted.

28. 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.

29. 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.

30. It is anticipated that the compounders and other entities involved in the supply of execution drugs for the DOC in 2014 will be the subject of additional motions and briefing by Mr. Michael, in keeping with past arguments made by Mr. Michael. Mr. Michael's attorneys have requested exactly that information from the DOC. (Doc. No. 250 at 3.)

31. 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.)

32. 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 the United States Constitution are being followed in the process of obtaining the drugs that the state will use to punish crime.

33. Intervenors have not previously sought this information because there was no reason to report on Pennsylvania's execution procedures until there was a strong possibility that an execution would, in fact, occur here. In addition, as noted, the question of the origin of execution drugs has become of far greater interest to the public in the last few months.

34. 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. *See In re: Richard Poplawski v. Pennsylvania Department of Corrections*, No. AP 2014-0207, slip op. (Pa. Off. Open Records March 12, 2014 (attached hereto)).

THEREFORE, 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 or identify of those drugs, and directing that future filings disclosing information about the supply chain for the drugs not be filed under seal. In support of this Motion, Intervenors rely upon their declarations and their supporting memorandum of law.

Respectfully submitted,

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Attorneys for Intervenors.

Dated: September 11, 2014

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that on September 10, 2014, undersigned counsel for Intervenors sought concurrence in this motion from each party, as required by L.R.7.1, by emailing all counsel of record at 1:00 PM. Counsel for the Class, as well as Counsel for class members Hubert Michael and Terry Williams, responded that they take no position on Intervenors' Motion to Unseal. Counsel for Defendants did not respond to the email, nor to telephone messages left for Ms. Lawson and Ms. Zapp later in the afternoon.

/s/ Mary Catherine Roper
Mary Catherine Roper

CERTIFICATE OF SERVICE

I, Mary Catherine Roper, hereby certify that on this 11th day of September, 2014, I electronically filed the foregoing Motion and supporting Memorandum with the Court's ECF system, and that all counsel in the case are ECF users.

/s/ Mary Catherine Roper
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