WD79893

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOAN BRAY,
GUARDIAN NEWS AND MEDIA LLC, ET AL,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL

Respondents.

v.

GEORGE LOMBARDI, ET AL

Appellants,

Appeal from the Circuit Court of Cole County,
The Honorable Jon Beetem, Circuit Judge

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from the Judgments entered on March 21 and 23 of 2016, by Judge Jon Beetem, in the Circuit Court of Cole County. The Department filed after trial motions on April 19, 2016. The Judgments became final on July 18, 2016 pursuant to Rule 81.05(a)(2)(A). The Judgments disposed of all claims at issue between the parties below, and thus are final appealable judgment pursuant to § 512.020(5)[1] and Rule 74.01 of the Missouri Rules of Civil Procedure. This appeal presents no questions reserved for the exclusive jurisdiction of the Missouri Supreme Court, and jurisdiction properly lies in this Court. *See* Mo. Const. Art. V; § 3, § 477.050.

[1] All statutory references are to the 2000 Revised Statutes of Missouri, as amended, unless otherwise noted.

STATEMENT OF FACTS

The Missouri Department of Corrections is mandated by § 546.720 to carry out the punishment of death in Missouri by means of lethal gas or lethal injection. In 2007, the Missouri General Assembly amended §546.720 to include 4 sub-sections to protect the identities of individuals involved in execution process. Section 546.720.2 requires the director of the Department to select an execution team to carry out the sentence and that "the members of the execution team, as defined in the execution protocol, shall be kept confidential." Additionally, "any portion of a record that *could identify* a person as being a current or former member of the execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity." (emphasis added) § 546.720.2. Section 546.720.3 creates a civil cause of action for execution team members against any person that knowingly discloses their identities. Section 546.720.4 forbids a professional licensing board to take disciplinary action against person's license from "participation in a lawful execution."

When choosing the execution team, the Department director reviews the protocol to determine what positions are necessary. Tr. 13.[2] If the only

[2] "Tr." Refers to the Trial Transcript. "LF" refers to the Legal File. "A" refers to the Appendix.

way to fill the position is to have an individual's identity be confidential, the director names those individuals to the execution team under the condition that they meet the definition of execution team in the protocol. *Id.*

In addition to defining the execution team members, the execution protocol lists the drugs used to carry out the execution. As availability of drugs change, so has the execution protocol. Prior to 2013, the Department had a three-drug execution protocol, with the primary execution drug being sodium thiopental. Tr. 15, 132-133. The Department purchased the drugs through a corporate distributor that was known to the public and did not request confidentiality. Tr. 16. However, the Department was no longer able to acquire sodium thiopental when the manufacturer ceased supplying it to the United States because of its use in executions. Tr. 15.

In August of 2013, the Department released a new execution protocol listing propofol as the lethal drug. LF 252-254. The Department received propofol from two publically known drug suppliers. Tr. 14, 63. At the request of the manufacturer of propofol, and ultimately at the direction of the Governor's office, the Department returned its supply to those suppliers. Tr. 15. The suppliers of propofol would no longer provide drugs to the Department that would be used in executions. *Id.*

With the manufacturers of sodium thiopental and propofol unwilling to provide the drugs to the Department, the Department searched for an

alternative execution drug. Tr. 16. The Department chose pentobarbital because it had been used by many other states with a high degree of success. Tr. 17. After contacting medical and pharmaceutical distributors, none were willing to provide pentobarbital to the Department for use in executions. *Id.* The Department then expanded its search to local, individualized pharmacists that may be associated with small compounding pharmacies. Tr. 17. However, the only individuals that will provide the lethal chemicals require the assurance of confidentiality. Tr. 26, LF 100. Because of the small nature of these pharmacies, knowing the name of the pharmacy would reveal the identity of the pharmacist on the execution team. LF 100. Like the other members of the execution team, the pharmacists' primary concern with participation in executions was confidentiality of their identity. Tr. 20.

On October 18, 2013, the Department revised its execution protocol to include pentobarbital as the execution drug. LF 20-21. Because the individual pharmacists who would supply pentobarbital required confidentiality, the director defined the execution team to include "individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure." Tr. 26, LF 20. This clarification of the execution team definition fit within the discretion given to the director in § 546.720.2 and was consistent with previous definitions in the protocol that included pharmacists and someone who prepares the chemicals.

Tr. 26-28, LF 80, 252-257. The pharmacists the director has selected since the October 2013 protocol are referred to as M6 and M7 in litigation to retain their confidentiality. Trial Exhibit 3. The physician who writes the prescription for the drug is M5. *Id.*

Records Requests

The Department's deputy general counsel, Matt Briesacher, acted as custodian of records for records requests relating to executions and execution-related issues. Tr. 10. In addition to being one of the four Department employees who knows the identities of all execution team members, Briesacher handled these requests because of the litigation and questions of law surrounding executions. *Id.*

Bray request

On November 5, 2013, Joan Bray, on behalf of 23 death row inmates ("Bray"), sought records from the Department "indicating the DOC's current inventory" of pentobarbital as well as records "indicating the source" of pentobarbital. LF 16 (emphasis added). On November 6, 2013, Briesacher responded to the request estimating it "will take approximately three weeks" to respond. LF 18. Tr. 45.

On November 18, 2013, Briesacher produced responsive records. LF 19. Because Bray's record request sought records "indicating the current inventory" of pentobarbital, Briesacher only provided records in existence on

the date of the request. Tr. 46. Briesacher redacted the information that could reveal identities of the execution team members who supplied pentobarbital pursuant to § 546.720. LF 19. Briesacher also cited § 217.075, which allows closure of offender records that "relate to institutional security." *Id.* Briesacher explained that some records in an offender file that identify execution team members, if released, could interfere with the Department's ability to operate internally on the night of the execution. Tr. 53. To Briesacher, the institutional security portion of § 217.075 relates to the Department's ability to carry out executions. Tr. 52-53, 69.

On January 31, 2014, Bray filed suit seeking to reveal the source of the supplier of pentobarbital. LF 10-15.

The Guardian requests

In April and May of 2014, Guardian News & Media LLC, the Associated Press, the Kansas City Star, the Springfield News-Leader, and the St. Louis Post-Dispatch, submitted several records requests to the Department seeking access to records relating to the Department's use of lethal injection drugs to execute Missouri inmates (collectively, the "Guardian requests"). LF 249. Primarily, the requests sought records in the Department's possession "sufficient to disclose the name, chemical composition, concentration and source" of the drugs used in the October 2013 execution protocol. LF 261. Within 3 business days of receiving each

request, Briesacher responded with an estimated time it would take to produce the records. LF 249-250, ¶¶ 10, 13, 15.

Briesacher responded to the requests and provided a copy of the execution protocol, but did not "release records that could be used to identify a member of the execution team as defined in the October 18, 2013 protocol." LF 250. As he did in response with the Bray requests, Briesacher cited §§546.720, 217.075, and 610.021(1) and (14) as the bases for withholding records that could identify the individuals providing pentobarbital. LF 211, ¶ 18.

On May 15, 2014, the Guardian and co-plaintiffs filed suit in order to access records that could reveal the identities of individuals that provide pentobarbital to the Department for use in executions. LF 208, ¶ 6.

Reporters Committee requests

From December 2013 to February 2014, the Reporters Committee for Freedom of the Press, the American Civil Liberties Union of Missouri, and Christopher McDaniel (collectively, the "Reporters Committee"), submitted numerous records requests to the Department regarding the Department's source of pentobarbital used in executions. LF 450-453, ¶¶ 15, 17, 19, 21, 23, 24. Briesacher responded to the requests and provided responsive records. LF 496-556, 565-575, 584-594. Like the responses to the Bray and Guardian requests, Briesacher withheld or redacted records that could be used to

identify the individuals who supply the execution drugs to the Department pursuant to §§ 546.720.2, 217.075 and 610.021(1) and (14). ¶¶ 6, 8, 10, 12, 15.

On May 15, 2014, the Reporters Committee and co-plaintiffs filed suit to access records that could reveal the identities of individuals that provide pentobarbital to the Department for use in executions. LF 448-456.

Trial Court Proceedings

Because all three lawsuits sought to reveal the identity of the individuals that provides pentobarbital to the Department under the current execution protocol, the trial court heard all cases on a shared record. All parties filed cross motions for summary judgment on the legal issue of whether §§ 217.075, 546.720, and the Department's execution protocol protects the release of records that could identify the individuals who supply pentobarbital.

Summary Judgment Motions

On July 15, 2015, the trial court entered partial summary judgment in favor of all Plaintiffs "on the issue of [the Department's] compliance with the Sunshine Law" but deferred "entry of judgment pending a resolution of the remaining issues in this case." A-1, 23, 46. In sum, the trial court found that the statutes cited by the Department do not protect from disclosure any records relating to the source of the execution drugs.

The trial court made a number of other findings of violations of the Sunshine law. The trial court found that the Department had a duty to produce records that were in existence at the time the Department produced records, but were not in existence when the request for records was made, even though the request sought documents relating to the "current inventory" of drugs. A15-16, LF 16. The trial court also found that the Department violated the Sunshine Law when it listed the statutory exemptions on the same day it produced records. A26-27. According to the trial court, the Department had to list the exemptions within 3 days of receiving the request. A35, ¶ 57.

Based only on the summary judgment motions, the trial court concluded that the Department "knowingly failed, at least in part, to comply with the Sunshine Law" in all three cases. A17, 35, 56. The trial court found the Department knowingly violated the law because the plain language of the statutes did not authorize closure of the records. A16-17, A56-57. According to the trial court, the Department also knowingly violated the Sunshine Law when it "made a frivolous claim that the request sought documents that fell within §217.075." A17.

July 29, 2015 conference call

On July 29, 2015, the trial court held a case review by conference call where attorneys for the Department and Plaintiffs were present.[3] LF 6, 203, 444. Plaintiffs sought immediate disclosure of the records, but the Department sought a stay of disclosure until appellate review was concluded. The trial court stated it would grant a stay, but ordered the Department to produce a privilege log in 30 days describing the records withheld. A hearing date was set for September 17, 2015, so that the Plaintiffs could raise any objections to the Department's log and the trial court could resolve the remaining issues in the case. See A1, 23, 46.

Privilege Logs

In compliance with the trial court's orders, the Department produced its privilege log on August 28, 2015. LF 140-143. The log described each document withheld and attributed the document to a specific records request. *Id.*

Plaintiffs Bray and Guardian each filed objections with the trial court on the sufficiency of the Department's privilege log. LF 144-152, 315-322.

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[3] There was neither a transcript nor a written order from the phone conference; the parties and trial court acknowledge the stay and privilege log in the record. *See* LF 148; Tr. 56, 58; and A40.

Bray wanted the privilege log to include records that were not in existence at the time of her November 5, 2013, request that sought records relating to the "current inventory" of pentobarbital.[4] LF 148-150, 16. The Guardian, despite not raising this issue in its petition, objected that the log did not include records relating to the qualifications of the nurse (M2) and the doctor (M3) on the execution team. LF 318. Prior to the September 17, 2015 hearing, the Department filed addendums to the privilege log that included the records Bray and the Guardian identified in their objections. LF 153-163, 410-412. The Department also provided an explanation why these records were not initially included, and objected to expanding the case to matters outside of the Guardian's petition. *Id.*

September 17, 2015 Hearing

At the September 17, 2015 hearing, the Department voluntarily provided deputy counsel Matt Briesacher to testify on the contents of the privilege log and to explain his responses to the records requests.

In regards to Bray's objections to the privilege log, Briesacher explained that because the Department generates numerous records every

[4] Bray sought inclusion of records Bray's counsel received in discovery in *Zink v. Lombardi,* 2-12-CV-4209BP, (W.D. Mo. 2014) on January 9, 2014. LF 92 ¶ 4.

day, "it would be entirely impossible" to produce records that are created up until the date of production, rather than when the request is received. Tr. 46-48. This is because:

> By the time that I contacted all the locations of those records, got those records, reviewed them, there would be dozens of additional records that I would have to request again, review again and submit again. It would be a never ending cycle.

Tr. 47.

Counsel for the Guardian questioned Briesacher on why he withheld entire documents from production, even though redacted versions were previously filed in federal court as part of the *Zink* litigation. Tr. 82. Briesacher had participated in a conference call during the *Zink* litigation where he learned from those plaintiffs that just the form of a record, even when redacted, could be used to identify the supplier of lethal chemicals on the execution team.[5] Tr. 32. Briesacher tested these assertions on the record to verify it could be done. Tr. 93. According to Briesacher, both the form and the content of a particular document could be used to identify the team

[5] Section 546.720.2 states "any portion of a record that *could identify* a person as being a current or former member of the execution team shall be privileged…" (emphasis added).

members. Tr. 85-86. After learning this, Briesacher felt he could no longer provide certain records without revealing execution team identities. Tr. 33. Regardless if a record was currently in the "public domain" as an exhibit in federal court, Briesacher explained, § 546.720 still required the record to be withheld if it could identify an execution team member. Tr. 97.

During questioning by counsel for the Reporter's Committee, Briesacher stated that he forgot that the February 20, 2014, request was part of the lawsuit when he was making the privilege log. Tr. 120. The trial court asked that Briesacher annotate the log to include the February 20, 2014 request and that it be filed within 5 days Tr. 136-137. The Department complied with the court's direction and filed an amended log on September 22, 2015.[6] LF 160-163.

March 21, 2016 Final Judgments

On March 21, 2016, the trial court entered its judgment in all three cases. The judgments incorporated the July 15, 2015, orders finding that records containing the identities of M6 and M7 are not protected by any

[6] The amended privilege log attributes documents DOC 006-008 and 040 to the Reporters Committee 2/20/15 request. The date is in error, the request was on February 20, 2014.

exemption.[7] A18, 37, 58. In contrast to the July 15 order, the judgments specifically found that M5, the doctor who writes prescriptions for the pentobarbital, while not present during executions, does provide direct support for the administration of the lethal chemicals and is therefore properly on the execution team under § 546.720.2. A21, 39, 44. The trial court awarded $134,790.99 in costs and attorney fees but stayed the Department's obligation to comply with the judgment "until exhaustion of all appeals." A22, 45, 60.

The trial court also found additional violations of the Sunshine law in the judgments. In the Bray case, the Department knowingly violated the Sunshine law because Briesacher "apparently failed to review fully the court's order of July 15 before providing the initial privilege log, and omitted from the log documents that this Court's order of July 15 specified as responsive to Ms. Bray's request." A22. In the Guardian case, the trial court found that "by refusing to disclose these documents already in the public domain, the [Department] purposely violated the Sunshine Law." A43.

On April 19, 2016, the Department filed post-trial motions to amend the judgments arguing that the trial court applied the wrong legal standard

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[7] The Bray decision was initially was titled "Order," but was amended to be denoted a judgment on March 25, 2016.

for knowing and purposeful violations under § 610.027.3-4. LF 169, 422, 627. On July 18, 2016, motions were denied pursuant to Rule 81.05(a)(2)(A).

On July 21, 2016, the Department filed its notice of appeal in all cases. On July 26, 2016, this Court granted the Department's motion to consolidate the Guardian and Reporters Committee appeals (WD 79894 and WD 79895) with the Bray appeal.

POINTS RELIED ON

I. The trial court erred in ordering the disclosure of records that could identify M6 and M7, the pharmacists on the execution team who provide the lethal chemicals to the Department for executions, because those records are protected from disclosure by law in that § 546.720.2 specifically protects from disclosure any portion of a record that could identify a person as being a current or former member of an execution team, as defined in the Department's execution protocol.

Section 546.720, RSMo

Section 610.021(14), RSMo

Zink v. Lombardi, 783 F.3d 1089 (8th Cir. 2015)

II. The trial court erred in awarding attorney fees because the record did not show that the Department knowingly or purposely violated the Sunshine Law, in that when the Department cited §§ 546.720 and 217.075 as a basis for withholding records, Department officials could not know that these provisions did not authorize the closure of records, and Department officials' interpretation of these laws was reasonable.

Laut v. City of Arnold, 2016 WL 3563987 (Mo. banc 2016)

Section 610.027.3-4, RSMo

Section 546.720, RSMo

III. **The trial court erred in finding the Department violated the Sunshine Law when Briesacher produced records in existence at the time of Bray's records request, but not records that were created after Bray's records request, because Briesacher was not obligated to produce records not yet in existence at the time of the request in that Bray's request only sought records relating to the "current inventory" of pentobarbital, and the Sunshine Law does not require an agency to supplement records created after a records request was made.**

Section 610.023.2-3, RSMo

IV. **The trial court erred in finding the Department violated the Sunshine Law, purposely or otherwise, by not producing records in "the public domain" that were previously filed in federal court because records in the Department's possession are closed under § 546.720.2 if any portion of the record could be used to identify members of the execution team in that there is no "public domain" rule in the Sunshine Law that opens records that are otherwise privileged when copies of those**

records are found elsewhere.

Section 546.720.2, RSMo

Section 610.021(14), RSMo

ARGUMENT

I. The trial court erred in ordering the disclosure of records that could identify M6 and M7, the pharmacists on the execution team who provide the lethal chemicals to the Department for executions, because those records are protected from disclosure by law in that § 546.720.2 specifically protects from disclosure any portion of a record that could identify a person as being a current or former member of an execution team, as defined in the Department's execution protocol.

Standard of Review

"This Court applies *de novo* review to questions of law decided in court-tried cases." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. 2012).

Analysis

While Plaintiffs brought their case through records requests under the Sunshine Law in chapter 610, this Court need only look at § 546.720 because § 610.021(14) allows closure of "records which are protected from disclosure by law," and § 546.720 provides such protection for the records Plaintiffs requested.

In § 546.720.2, the Missouri General Assembly provided the strongest possible protections of records that could identify execution team members. Section 546.720.2 states:

> The director of the department of corrections shall select an execution team which shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals. The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law. The section of an execution protocol that directly relates to the administration of lethal gas or lethal chemicals is an open record, the remainder of any execution protocol of the department of corrections is a closed record.

(Emphasis added) In addition to mandating confidentiality of these records, the legislature delegated authority to the Department and its director discretion to "select the execution team" and that "the identities of members

of the execution team" are to be "defined in the execution protocol." § 546.720.2.

Section 546.720.2 gives no limits to the director on what professions or types of individuals can be selected to the execution team. The legislature only provided that execution team "shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals." § 546.720.2.

Following the directives in § 546.720.2 and in order to implement the punishment of death under § 546.720, the director issued the execution protocol on October 18, 2013, and defined the members of the execution team:

> The execution team consists of department employees and contracted medical personnel including a physician, nurse, and pharmacist. The execution team also consists of anyone selected by the department director who provides direct support for the administration of lethal chemicals, including individuals who prescribe, compound, prepare, or otherwise supply the chemicals for use in the lethal injection procedure.

A63. Under this protocol, the Department has named to the execution team pharmacists (M6 and M7) who supply the chemicals for use in the lethal injection procedure. Exhibit 3.

Respondents submitted numerous records requests to the Department that aimed to reveal the identities of M6 and M7. LF 16, 261, 450-453. The Department withheld these records because M6 and M7 are "members of the execution team, as defined in the department's execution protocol," therefore records that identify them "are confidential." § 546.720.2. Additionally, "any portion of the record that could identify" M6 or M7 "shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure." *See Id.*

The trial court ordered disclosure of the records because it found that a pharmacist who supplies the lethal chemicals to the execution team does not "provide direct support for the administration of lethal gas or lethal chemicals" and therefore cannot be placed on the execution team under § 546.720.2. A12, 30, 39, 53. This interpretation of law is in error because it ignores the language of the statute, the intent of the legislature in crafting protections for team members, and the deference afforded to the Department when it interprets laws that specifically grant authority to the director.

A. The language in Chapter 546 supports the inclusion of M6 and M7 to the execution team.

The intent of the legislature in § 546.720.2 and related sections supports the Department's authority to add suppliers of lethal chemicals to the execution team. "The primary rule of statutory construction is to

ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857-58 (Mo. 2001). "Statutory provisions relating to the same subject matter are considered *in pari materia,* and are to be interpreted together. *Lagares v. Camdenton R-III Sch. Dist.,* 68 S.W.3d 518, 525 (Mo. App. W.D 2001).

In chapter 546, it is apparent that the legislature intended to protect the identities of those essential to the execution process so that lawful executions could be carried out. The death penalty has many vocal opponents who may seek to harass or harm individuals that participate in state sponsored executions. If these individuals are exposed to harassment and financial loss, then the Department may not be able fulfill its statutory mandate in carrying out executions. *See* §§ 546.710, 546.720.1.[8]

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[8] When the Missouri Supreme Court issues an execution warrant, it "shall be obeyed" by the director of the Department. *See* §546.710. A United States District Court recently denied a request to unseal records identifying M2 and M3 finding "the Court must be wary of unsealing information that will lead to harassment of private individuals for the purpose of thwarting the State's administration of the death penalty." *Ringo v. Lombardi*, case no. 09-4095-CV-C-BP (W.D. Mo. Jan. 6, 2016) (appeal docketed). LF 192-193.

The legislature anticipated the professional and monetary harm an execution team member could incur if an identity is revealed. Section 546.720.3 states:

> A person whose identity is disclosed in violation of this section shall:
>
> (1) Have a civil cause of action against a person who violates this section
>
> (2) Be entitled to recover from any such person
>
> (3) Actual damages;
>
> (4) Punitive damages on a showing of a willful violation of this section.

Section 546.720.4 explicitly forbids any licensing board from taking disciplinary action against a person's license "because of his or her participation in a lawful execution." This protection has proven to be necessary as plaintiffs in *Zink v. Lombardi* have openly asserted that "protecting the identity of the State's health care professionals on (the execution team) unreasonably restricts their associations and colleagues from de-certifying or otherwise censuring them or boycotting them." *Zink v. Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015).

If the identities of M6 and M7 were released, they would likely face harassment by those who seek to end or thwart executions by means outside of the legislature. *See* LF 191-192. The United States

Court of Appeals for the Eighth Circuit warned of the "[t]he real potential that unwarranted discovery (revealing the identity of suppliers of lethal chemicals) would serve as a back-door means to frustrate the State's ability to carry out executions by lethal injection." *Zink,* at 1106 (8th Cir. 2015).

If their confidentiality is lost, these execution team members would no longer participate in executions.[9] Tr. 53, LF 100. The court in *Zink* noted that "after the State's former [pentobarbital] supplier was identified…the supplier discontinued providing drugs to the State." *Zink*, at 1106. The legislature also anticipated that licensed professionals, such as M6 and M7, would be punished by their licensing boards and offered protections in §546.720.4. *See* LF 140, DOC 003, 009.

B. M6 and M7 provide direct support for the administration of lethal chemicals under §546.720.2.

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[9] M7 has recently intervened in a pending federal court case where Mississippi inmates sought disclosure of M7's identity. *See In re: Missouri Department of Corrections, M7*, case no. 16-3072 (8th Cir. 2016). M7 asserted that if M7's identity is released, M7 will "no longer supply lethal chemicals at all." (*See* Exhibit A of M7's Petition for Rehearing at p. 13).

A pharmacist that supplies the lethal chemicals provides "direct support for the administration" of those chemicals under § 546.720.2 and therefore can be a member of the execution team.

"Absent a definition in the statute, the plain and ordinary meaning is derived from the dictionary." *Circuit City Stores, Inc. v. Dir. of Revenue*, 438 S.W.3d 397, 400 (Mo. 2014). Here, there is no definition in § 546.720.2 for "direct." The term "direct" in this context is defined as "characterized by or giving evidence of a close, logical, causal or consequential relationship." WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY(1993). The lethal chemicals that a pharmacist provides have a "logical, causal or consequential relationship" to the administration of those chemicals. There can be no "administration of the chemicals" without first having chemicals to administer.

C. Deference is given to the Department's definition of the execution team in the execution protocol.

Any ambiguity raised by whether a pharmacist who provides the lethal chemicals provides "direct support for the administration of the lethal chemicals," should be resolved in favor of the Department's official interpretation of § 546.720.2 found in the execution protocol. "The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Farrow v. Saint Francis Med.*

Ctr., 407 S.W.3d 579, 592 (Mo. 2013) citing *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm.,* 362 S.W.3d 415, 417 (Mo. 2012). "If the agency's interpretation of a statute is reasonable and consistent with the language of the statute, it is entitled to considerable deference. *Morton v. Missouri Air Conservation Com'n,* 944 S.W.2d 231, 236 - 237 (Mo.App. S.D. 1997) (citations omitted).

Here, section 546.720.2 directs the Department's director to select an execution team and delegates to the Department the authority to define the execution team in the protocol. The Department's interpretation of that statute to include individual pharmacists to supply execution drugs necessary to carry out executions when the drugs were unavailable from public sources is "reasonable and consistent with the language" of § 546.720.2 and "is entitled to considerable deference." *See Morton,* 944 S.W.2d at, 236 - 237. Therefore, the trial court erred in ordering the disclosure of records that could identify execution team members M6 and M7 because they are protected by § 546.720.2 and Department's the execution protocol.

II. The trial court erred in awarding attorney fees because the record did not show that the Department knowingly or purposely violated the Sunshine Law, in that when the Department cited §§ 546.720 and 217.075 as a basis for withholding records, Department officials could not know that these provisions did not authorize the closure of records, and Department officials' interpretation of these laws was reasonable.

Standard of Review

Interpreting a statute and determining whether it applies to a given set of facts are questions of law that this Court reviews *de novo*. *Sherf v. Koster*, 371 S.W.3d 903, 907 (Mo. App. W.D. 2012). The meaning of the term "knowing" as set out in section 610.027 "is a question of statutory interpretation and, so, is a question of law for this Court." *Laut v. City of Arnold,* 2016 WL 3563987, at *4 (Mo. June 28, 2016). "The portions of the Sunshine Law that allow for imposition of a civil penalty and an award of attorney fees and costs are penal in nature and *must be strictly construed*." *Id.* (emphasis added).

Argument

The fee provisions in the Sunshine Law "are intended to punish the wrongdoer and deter others." *Spradlin, v. City of Fulton,* 982 S.W.2d 255, 261 (Mo. 1998). To be awarded fees, plaintiff bears the burden to prove that the Department "knowingly or purposely violated the Sunshine Law when it refused to produce the requested records." *Strake v. Robinwood W. Cmty. Improvement Dist.,* 473 S.W.3d 642, 645 (Mo. 2015).

The Missouri Supreme Court recently addressed the definition of a "knowing" violation that is a prerequisite for attorney fees and penalties under the Sunshine Law:

> Section 610.027.3 states that a penalty shall be imposed and attorney's fees and costs may be assessed only: Upon a finding by a preponderance of the evidence that a public governmental body or a member of a public governmental body has *knowingly violated section 610.010 to 610.026*

Laut v. City of Arnold, 2016 WL 3563987, at 6 (Mo. June 28, 2016) (emphasis by the Court). "That is, section 610.027.3 does not impose strict liability." *Id.* "Rather, it requires that the governmental body knowingly violated the Sunshine Law, not merely that it knowingly failed to produce the document, for the trial court to impose a civil penalty or assess costs and attorney's fees." *Id.* "The court, therefore, must find that the defendant knew it was

violating these provisions of the Sunshine Law for the statute to authorize a fine or penalty." *Id.* (emphasis added). In other words, "[a] knowing violation requires proof that the public governmental body had actual knowledge that [its] conduct violated a statutory provision." *Strake,* 473 S.W.3d at 645. (emphasis added).

Referring to the Department's citation of §§ 546.720 and 217.075, the trial court found the Department knowingly violated the law because the plain language of the statutes did not authorize closure of the records. A16-17, 56-57. The trial court repeated this finding in different ways:

- The Department "knowingly violated the Sunshine Law when they made a frivolous claim that the requests sought documents that within the Mo. Rev. Stat § 217.075." A17.
- The Department knowingly violated the Sunshine Law" by "citing irrelevant exceptions to the Sunshine Law." A43

Before §610.027.3-4 could authorize an award of attorney fees and penalties against the Department for citing §§ 546.720 and 217.075, the trial had to "find that [the Department] knew" that these statutes did not protect records that could identify the pharmacists on the execution team. *Laut,* 2016 WL 3563987, at 6. Or, that the Department actually knew that § 546.720 did not authorize the placement of pharmacists on the execution team. The trial court did not make such a finding. Rather, the trial court

determined that the statutory exemptions the Department cited were incorrect.

As explained in Point I, § 546.720.2 authorizes the Department to issue an execution protocol that includes pharmacists who supply the lethal chemicals. But even if the Department's interpretation were incorrect, it would be impossible for the Department to actually know that § 546.720 did not apply in light of the same trial court's decision in *Winfield v. Lombardi,* case no.14AC-CC00263 (June 6, 2014). There, the trial court also addressed whether § 546.720.2 authorizes the director to appoint a pharmacist to the exaction team and denied plaintiff's preliminary injunction because "the likelihood of success on the merits" of claims that the Department's director lacked such authority were "not high." LF 180. It is implausible that the Department could *actually know* that its interpretation § 546.720 was wrong when the same trial court previously determined that the Department was likely to succeed on the same interpretation in 2014.

The issue of suppliers being named to the execution team has also been litigated extensively in federal court. The Eight Circuit, en banc, in *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014) declined to state it is in excess of the director's authority to name suppliers of lethal chemicals to the execution team under § 546.720, noting "[t]he privilege issues are significant and complex, but we express no view on them…." *In re Lombardi*, at 895

(Dismissing death row inmates' discovery request for the identities of pharmacists on the execution team as "not relevant to any claim" in their petition).

Because the trial court changed its mind and later found that the Department was incorrect on a "significant and complex" issue cannot mean the Department knowingly violated the Sunshine Law. No Missouri appellate case has found a "knowing" violation simply because an interpretation of law by a governmental body was later found to be incorrect. On the contrary, this Court has held that merely being incorrect does not rise to knowingly violating the law. In *R.L. Polk & Co. v. Missouri Dep't of Revenue*, 309 S.W.3d 881 (Mo. App. W.D. 2010), this Court upheld the finding of the trial court that although the Department of Revenue incorrectly interpreted a statute calculating costs for record production, thus violating the Sunshine Law, it "had not purposefully or knowingly violated the Sunshine Law." *R.L. Polk* at 886. The Department of Revenue's "incorrect" interpretation of the law was not "the type of conduct that constituted a purposeful or knowing violation." *Id.*

A. Citing 217.075 is not a knowing violation of the Sunshine Law.

The trial court's finding that even referencing §217.075 (in addition to § 546.720) is a "frivolous claim" and therefore a knowing violation, is also not supported by the law. Section 610.023.4 only requires a custodian of records

to "cite the specific provision of law under which access is denied." Section 217.075.1(3) states that offender records "relating to institutional security" are not public records. Briesacher testified that he relied on § 217.075, in addition to § 546.720.2, because some records in an offender file that identify execution team members, if released, could interfere with the Department's ability to operate internally on the night of the execution. Tr. 53. There is nothing frivolous about the Department's concern for institutional security on the night of the execution, nor is citing a relevant statutory provision evidence that "the governmental body knowingly violated the Sunshine Law." See *Laut,* 2016 WL 3563987, at 6.

If merely citing an incorrect statute in a response letter under § 610.023.4 can in itself be a knowing violation of the law, governmental bodies would be put in a precarious position. Unlike the Department, many governmental bodies do not have attorneys to review responses to Sunshine requests. The award of penalties and fees would depend on whether a layperson is correct in every legal conclusion made in response to a Sunshine request, regardless of the layperson's actual knowledge. However, even if there were a mistake in citing § 217.075 in a response letter, fees are inappropriate because § 610.027.3 "does not impose strict liability." *Laut,* 2016 WL 3563987, at 6.

III. The trial court erred in finding the Department violated the Sunshine Law when Briesacher produced records in existence at the time of Bray's records request, but not records that were created after Bray's records request, because Briesacher was not obligated to produce records not yet in existence at the time of the request in that Bray's request only sought records relating to the "current inventory" of pentobarbital, and the Sunshine Law does not require an agency to supplement records created after a records request was made.

Standard of Review

Interpreting a statute and determining whether it applies to a given set of facts are questions of law which this court reviews *de novo*. *Sherf v. Koster*, 371 S.W.3d 903, 907 (Mo. App. W.D. 2012).

Analysis

The trial court found that the Department had a duty to produce records that were created after Bray's records request was received. A15-16. According to the trial court, the Department had a duty to produce records that came into existence up until the time Department responded to the Sunshine request. A15. Further, it was a knowing violation to not include these later records in the Department's privilege log. A21-22. This holding

expands the duties of governmental bodies beyond the requirements of the Sunshine Law and ignores the language of Bray's request that sought records relating to the "current inventory" of pentobarbital.

The facts are not in dispute. On November 5, 2013, Bray sought records from the Department "indicating the DOC's current inventory" of pentobarbital. LF 16 (emphasis added). On November 6, 2013, Briesacher responded to the request estimating it "will take approximately three weeks" to respond. LF 18. Tr. 45. On November 18, 2013, Briesacher produced responsive records. LF 19. Because Bray's record request sought records regarding the "current inventory" of pentobarbital (emphasis added), Briesacher only provided records in existence on the date of the request. Tr. 46.

In Bray's motion for summary judgment, she alleged that 34 pages of documents Bray's counsel obtained on January 9, 2014, in the *Zink* litigation were responsive to the November 5, 2013 records request. LF 36-37. The records Bray identified were created *after* Briesacher received the request, in the range of November 7-14, 2013. LF 126-127. The trial court found that these records should have been produced. A15-16.

The Sunshine Law discusses that a request for public records "shall be acted upon" and that records shall be made "available for inspection and copying." *See* § 610.023.2-3. Briesacher acted upon the Bray's request by

providing copies of records relating to the "current inventory" of pentobarbital. LF 16. Briesacher satisfied the requirements of § 610.023.2-3 by acting on the request as written and making records available.

Even if the request itself did not relate to the "current inventory," there is no obligation under the Sunshine Law to for Briesacher to provide records that were not existence on the date the request was received. And unlike discovery obligations, where a party is required to supplement responses under Mo. Rule 56.01(e), there is no such requirement in the Sunshine Law. There is no need for such a requirement because the Sunshine Law places no limit on the number of records requests a person can make. *See* § 610.023.

"It would be entirely impossible" for a governmental body like the Department to be required produce records that were created between the time a request was received and when records are sent out. Tr. 47. The Department has approximately 30,000 offenders, and every day they are generating additional records. Tr. 47. Briesacher explained how unworkable this trial court's new requirement would be:

> By the time that I contacted all the locations of those records, got those records, reviewed them, there would be dozens of additional records that I would have to request again, review again and submit again. It would be a never ending cycle. I think even

> this, Ms. Bray's request shows how quickly and volatile certain areas that are of frequency in our Sunshine requests. In a matter of a couple days we went from no documents to 30 or 40. In a day or two after that, we may have had another 40 documents that would have required me to review those documents, determine whether they were opened or closed records, redact those records, and produce them. It would just be impossible.

Tr. 47-48.

Briesacher's testimony shows what a burden the trial court's re-interpretation of the Sunshine law would place on governmental bodies. However, there is no requirement in the Sunshine law to produce records that come into existence after the records request was received. If they wish, requestors can simply re-submit a request to see if any new documents have been created since the last request. Tr. 48. Therefore, the trial court erred in finding that records dated after Bray's request should have been produced.[10]

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[10] The trial court found a knowing violation because Briesacher "apparently failed to review fully the court's order" when he omitted documents created after Bray's request. A21-22. However, § 610.027.3 only provides penalties if an agency knowingly violated the Sunshine Law, not for perceived mistakes of litigants that are corrected upon request. LF 153-163.

IV. The trial court erred in finding the Department violated the Sunshine Law, purposely or otherwise, by not producing records in "the public domain" that were previously filed in federal court because records in the Department's possession are closed under § 546.720.2 if any portion of the record could be used to identify members of the execution team in that there is no "public domain" rule in the Sunshine Law that opens records that are otherwise privileged when copies of those records are found elsewhere.

Standard of Review

"Interpreting a statute and determining whether it applies to a given set of facts are questions of law which this court reviews *de novo*." *Sherf v. Koster*, 371 S.W.3d 903, 907 (Mo. Ct. App. 2012) (citation omitted). "We must give effect to the language of a statute as written and will not add words or requirements by implication where the statute is not ambiguous." *Id.*

Analysis

The trial court found that the Department purposely violated the Sunshine Law by refusing to disclose documents already in the public domain. LF 43. There is no dispute that Briesacher did not produce records previously filed in federal court because he knew they could be used to

identify members of the execution under § 546.720.2. *See* Tr. 80, LF 337.[11] However, there is no rule or statute that voids confidentiality protections of records in the possession of a governmental body if copies of those records are available in the public domain.

For example, §610.035 prohibits a governmental entity from publicly disclosing Social Security numbers. If a hacker gets ahold of Social Security numbers and releases them into the public domain on a webpage, the governmental body is not then relieved of its obligation to keep the same Social Security numbers confidential.

Similarly, § 546.720.2 protects records that identify execution team members. It states in relevant part:

> Notwithstanding any provision of law to the contrary, <u>any portion of a record that could identify</u> a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity.

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[11] At the hearing, the Guardian introduced Exhibits 8-11, which are included in the legal file as Exhibits B-E to the Guardian's "Notice of Deficiencies." LF 337-408.

(Emphasis added). These protections are not erased if one later learns that a record that could identify an execution team member was previously filed in federal court, or was otherwise made available outside the agency.

There should be no dispute that the records Briesacher withheld are protected under § 546.720.2. The parties stipulated that Briesacher "refused to release records that could be used to identify members of the execution team." LF 249-250 ¶¶ 11, 15. "Stipulations are controlling and conclusive, and courts are bound to enforce them." *Zipper v. Health Midwest*, 978 S.W.2d 398, 410 (Mo. App. W.D. 1998) (citation omitted). Briesacher's experience with these records in previous litigation further demonstrates that these records, even redacted in redacted form, could be used to identify members of the execution.

After records were produced in discovery, Briesacher participated in a conference call during the *Zink* litigation where he learned that just the form of certain records, even when redacted, could be used to identify the supplier of lethal chemicals on the execution team. Tr. 32. Briesacher tested these assertions on the record to verify it could be done. Tr. 93. According to Briesacher, both the form and the content of a particular document could be used to identify the execution team members. Tr. 85-86. After learning this, Briesacher concluded he could no longer provide certain records without revealing execution team identities. Tr. 33. Additionally, § 546.720.3 would

open up Briesacher to civil liability if he disclosed these records that he now knew could be used to identify a team member. Tr. 50.

The United States Court of Appeals, for the 8th Circuit agreed with Briesacher's testimony about the use of records to identify team members. "In this very case…the State's former drug supplier was identified through information in the public domain… ." *Zink v. Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015). "The supplier then elected to discontinue providing drugs to the State rather than endure the expense and burdens of litigation." *Id.*

Briesacher was merely applying the law as it was written. He withheld records he knew "could be used to identify" current or former members of the execution team. § 546.720.2. Because there is no public domain exception to the Sunshine Law, the Department did not violate the law by withholding these records, purposely or otherwise.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's judgments and grant other relief that proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that on the 21st day of September 2016, the foregoing Appellants Brief was filed electronically via Missouri Case.net and served to:

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I further certify that the foregoing Appellants Brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 8,784 words in total.

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