

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

No. WD79893

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

Plaintiffs-Respondents

v.

GEORGE LOMBARDI, ET AL,

Defendants-Appellants.

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

**BRIEF OF RESPONDENTS
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
CHRISTOPHER MCDANIEL, and
AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION**

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PRELIMINARY STATEMENT

This case concerns whether the Department of Corrections (“DOC” or the “Department”) failed to comply with Missouri’s Sunshine Law by withholding government records on a matter of substantial public concern: namely, records concerning the entities that supply and test lethal drugs used by the State in carrying out executions. As the Circuit Court below correctly held, the DOC knowingly violated the Sunshine Law by asserting that Section 546.720.2, RSMo,¹ affords it near-unlimited power to define the composition of the “execution team” and thereby cloak the suppliers of lethal injection drugs in secrecy, notwithstanding the statute’s clear limiting language.

Only natural persons may be members of the execution team, as that term is defined in Section 546.720.2, RSMo. And there are two—and only—two categories of natural persons who may lawfully be added to the execution team: those 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. Unlike the medical personnel who are physically present for an execution, and directly support the executioners, neither the pharmacies and laboratories that create and test execution drugs, nor their employees, provide “direct support” within the meaning of Section 546.720.2. The DOC’s efforts to expand the execution team beyond

¹ All statutory references are to Missouri Revised Statutes 2000, as updated, unless otherwise noted.

the bounds of its statutory authority in order to shield its procurement of lethal injection drugs from public scrutiny is not only unlawful, but directly contrary to this State's longstanding commitment to an open government.

Accordingly, for the reasons set forth herein, Respondents respectfully urge this Court to affirm the decision of the Circuit Court.

RESPONDENTS' ADDITIONAL STATEMENT OF FACTS

The Expansion of DOC's Execution Protocol

In October 2013, the DOC revised its protocol used in carrying out executions. LF 20-21. Its revised protocol stated, *inter alia*, that

[t]he 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.

LF 20. On October 22, 2013 the DOC issued a press release that stated, in part, that it had "added a compounding pharmacy to its execution team. The compounding pharmacy will be responsible for providing pentobarbital for executions carried out under the new protocol." LF 596 & 615.

Respondents' Sunshine Law Requests

Between December, 2013, and February, 2014, Respondents the Reporters Committee for Freedom of the Press (“Reporters Committee”), Christopher McDaniel (“McDaniel”), and the American Civil Liberties Union of Missouri Foundation (“ACLU”) submitted a series of Sunshine Law requests to the DOC for records concerning, *inter alia*, the pharmacies and laboratories that produce and test drugs used in lethal injections. LF 615-17. The Reporters Committee’s request specifically asked for copies of “records identifying the pharmacy (or pharmacies) producing drugs to be used in lethal injections in Missouri, and records identifying the laboratory (or laboratories) testing drugs to be used in lethal injections in Missouri.” LF 616. The requests of the ACLU and McDaniel requested a variety of specific records concerning drugs, licensing, communications, and purchasing and payment records related to executions. LF 615-17. The DOC provided some records in response to Respondents’ requests and denied access to others, primarily relying on Section 546.720.2. *Id.*

Decisions of the Circuit Court

On July 15, 2015, the Circuit Court found that summary judgment should be entered in favor of Respondents because the DOC “failed, at least in part, to comply with the Sunshine Law.” LF 622. It also found that summary judgment should be entered in favor of the plaintiffs in the *Bray* and *Guardian News* cases. *See* LF 123, 301. In making its finding in this case, the Circuit Court held that “neither laboratories nor pharmacies, nor the employees that work for those entities, ‘*administer* lethal gas or chemicals’ or ‘*provide direct support for the administration* of lethal gas or chemicals[,]’ LF 620

(emphasis in original). The Circuit Court found further that Defendant's violation of the Sunshine Law was knowingly done. LF 622. However, because the Circuit Court determined that a question of fact remained as to "whether or not a particular person meets the statutory definition of an execution team member and therefore whether such a person could be identified by disclosure of a record[,]" it did not enter final judgment and set the case for trial on that unresolved questions of fact. LF 622.

A trial was held on September 17, 2015. Tr. at 1. At trial, the Circuit Court noted that it chose to defer final judgment in order to resolve the remaining factual issue regarding "exactly who meets the statutory definition of an execution team" member. Tr. at 8. After hearing testimony from Defendant and receiving evidence from all parties in the three cases consolidated for trial, the Circuit Court entered final judgment in all three cases on March 21 and 25, 2016. LF 164-68, 413-21, 624-26. The Circuit Court incorporated its findings of fact and conclusions of law from the July 15, 2015 orders in its final judgment . *See* LF 164, 413, 624.

In this case, the Circuit Court specifically noted that documents identified as DOC 003 and DOC 004, which had been identified as "privileged" by Defendant, were open records that had to be disclosed. LF 625. DOC 003 is a pharmacy license that the DOC suggests could identify M6, a pharmaceutical provider of pentobarbital. LF 140, 160. DOC 004 is a laboratory accreditation that the DOC suggests could identify M6. LF 140,

160.² After hearing evidence, the Circuit Court reaffirmed that “DOC 003 and DOC 004 are public records, that no statutory exemption cited by Defendant applies to these specific public records sought by Plaintiffs, and that Defendant’s withholding of such records violates the Sunshine Law.” LF 625. “In reaching this conclusion,” the Circuit Court “reviewed the logs as well as the evidence adduced at the September 17, 2015 hearing,” and found that while M6 is a person, he “does not provide direct support for the administration of lethal chemicals nor is present in the execution chamber.” LF 625.

In addition to the findings regarding the records being open and subject to disclosure, the Circuit Court further held that: “[u]pon consideration of this evidence, including the evidence at the September 17 hearing, and the parties’ arguments, the Court reaffirms its holding that Defendant’s violation of the Sunshine Law was knowingly done.” LF 625-26. The Circuit Court then found the costs and attorneys’ fees submitted by Plaintiffs to be reasonable and ordered Defendant to pay them pursuant to § 610.027. LF 626. The DOC’s appeal to this Court followed.

² The DOC’s Amended Privilege Log also identifies DOC 006-008 and DOC 040 as being responsive to Respondents’ requests. LF 162-63.

- I. The Circuit Court correctly found that the Department violated the Sunshine Law because Section 546.720.2 does not authorize the Department to close public records for the reason that they might identify a pharmacist or laboratory (Response to Appellant’s Point I).**

Standard of Review

“[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Questions of law are reviewed *de novo*, *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012), but “deference is given to the fact-finder” with respect to contested questions of fact, *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010).

Argument

As this Court has stated, the Sunshine Law, §§ 610.010, *et seq.*, “embodies Missouri’s commitment to open government and is to be construed liberally in favor of open government.” *N. Kansas City Hosp. Bd. of Trustees v. St. Luke’s Northland Hosp.*, 984 S.W.2d 113, 119 (Mo. App. W.D. 1998) (citation omitted). Accordingly, “[e]xcept as otherwise provided by law,” all public records of government bodies must be open to the public, and all exceptions are strictly construed to promote the State’s commitment to openness. § 610.011.

At issue in this appeal is the scope and application of Section 546.720.2, which DOC has cited to withhold records responsive to Respondents' Sunshine Law requests. It 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.

§ 546.720.2. As set forth in more detail below, the Circuit Court correctly held that this statute neither permits the DOC to add whatever or whomever it wishes to the execution team, nor withhold records responsive to Respondents' Sunshine Law requests.

A. Section 546.720 does not afford the DOC unfettered discretion to add whatever and whomever it wishes to the execution team.

The DOC boldly claims on appeal—contrary to the plain language of the Section 546.720.2, the decision of the Circuit Court, and common sense—that there are “no limits” on the types of persons its director may appoint to the execution team. Br. of Appellants at 21. A careful review of the statutory provision, however, as was undertaken by the Circuit Court, refutes any argument that the DOC has unfettered power to appoint whomever or whatever it wants to the execution team. As Judge Beetem held, the “statute’s mandatory language indicates the intent of the General Assembly to require that the execution team be limited[,]” LF 619-20, to two—and only two—categories of natural persons: (1) persons who administer lethal gas or chemicals, and (2) persons who provide direct support for the administration of lethal gas or chemicals. § 546.720.2.

“The goal of statutory analysis is to “ascertain the intent of the legislature, as expressed in the words of the statute.” *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 909 (Mo. banc 2006). Accordingly, “each word, clause, sentence and section of a statute should be given meaning[,]” *Missouri Prop. & Cas. Ins. Guar. Ass’n v. Pott Indus.*, 971 S.W.2d 302, 305 (Mo. banc 1998), and “[a]bsent statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary[,]” *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999).

The intent of the General Assembly to limit the scope of the execution team to certain categories of natural persons is evident by its choice of the words “shall consist”

before describing the two types of persons that may be added. The use of the word “shall” in the statute is a command by the legislature that defines precisely what the DOC is to do. *See Shall*, Merriam Webster, *archived at* perma.cc/ET6K-SY83 (defining “shall”, in part, as “used to express a command or exhortation”); *see also Bauer v. Transitional Sch. Dist. of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. 2003) (“Generally, the word “shall” connotes a mandatory duty.”). This is the same manner in which “shall” is used in Section 546.720.1, which states that “[t]he manner of inflicting the punishment of death *shall* be by the administration of lethal gas or by means of the administration of lethal injection.” § 546.720.1 (emphasis added). Just as those two methods of execution are the *only* acceptable methods, “shall” in Section 546.720.2 operates to define the *only* permissible conduct of the DOC with regard to appointing persons to the execution team.

In addition, the use of the word “consist,” meaning “to be composed or made up” of, *Consist*, Merriam-Webster, *archived at* perma.cc/S5KW-Z3EJ, defines the exact boundaries of what is to be. *Cf., e.g.,* M.O. Const. art I, § 16 (“That a grand jury shall *consist* of twelve citizens”); *see also Booth v. Greene*, 75 S.W.3d 864, 869, fn.3 (Mo. App. W.D. 2002) (“The term ‘consist’ is defined as ‘to be made up or composed.’ The American Heritage College Dictionary 297 (3d ed.1993). Under the usage note for the word ‘include,’ the dictionary provides, ‘When one wants to make clear that the listing is exhaustive ... the use of comprise or consist will avoid ambiguity.’ *Id.* at 687.”). In using these words, the intent of the General Assembly to limit the power of the DOC when defining the execution team is clear. It did not say that the director “may decide” who can be added, or that the execution team may “include” certain people. *Cf., e.g.,* §

23.195.1 (“Indebtedness compiled in the register *shall include* but not be limited to that incurred by the third state building fund, the higher education loan authority . . . and any metro transportation districts.” (emphasis added)). It said exactly what it meant: that the execution team “shall consist” of two and only two types of individuals: “those ‘persons who administer lethal gas or chemicals’ and those ‘persons who provide direct support for the administration of lethal gas or chemicals.’” LF 619 (citation omitted). The statute does not, as Appellants erroneously claim, place “no limits” on the “types of individuals can be selected to the execution team.” Br. of Appellants at 21.

The DOC ignores the clear limiting language set forth in Section 546.720.2, focusing instead on other parts of the Code of Criminal Procedure that have no bearing whatsoever on the issue presented by this case. *See* Br. of Appellants at 23-24 (discussing Sections 546.720.3 and 546.720.4). Section 546.720.3, for example, creates a cause of action for the disclosure of the identity of a member of the execution team. But the question presented in this case is *who* is lawfully a member of the execution team. The DOC’s argument puts the cart before the horse—it cannot justify an unlawful expansion of its statutory authority by pointing to provisions that only apply when its power is properly exercised. Much as it might desire to the contrary, Section 546.720.2 simply “does not . . . empower the DOC to define the execution team as it wishes, without limitation.” LF 620.

B. The Circuit Court correctly held that pharmacies, laboratories, and their employees do not provide “direct support” for the administration of lethal chemicals.

The DOC has made no argument that the persons and/or entities identified in the public records that it has withheld “*administer* lethal gas or chemicals[,]” § 546.720.2 (emphasis added), and rests entirely on its assertion that they “provide direct support for the administration of lethal chemicals[,]” Br. of Appellants at 25-26. However, as the Circuit Court correctly determined, neither the pharmacies and laboratories that produce and test drugs used in executions, nor their employees, provide *direct* support for the *administration* of execution drugs, unlike medical personnel who are physically present at the execution. *See* LF 619-21; 625.

As a preliminary matter, Appellant’s brief misstates the nature of Respondents’ Sunshine Law requests. The Department asserts that “Respondents submitted numerous requests to the Department that aimed to reveal the identities of M6 and M7.” Br. of Appellants at 22. Yet, as the record shows, Respondents’ requests in this case primarily sought records concerning *pharmacies* and *laboratories* used to create and test lethal execution drugs for use by the Department. *See, e.g.*, LF 451 (the Reporters Committee’s request asked for “records identifying the pharmacy (or pharmacies) producing drugs to be used in lethal injections in Missouri, and records identifying the laboratory (or laboratories) testing drugs to be used in lethal injections in Missouri.”); LF 615-17 (ACLU’s and McDaniel’s requests). The DOC makes no argument that laboratories or pharmacies are “persons” that can be added to the execution team, notwithstanding its

prior press release announcing that it had done so. LF 615 (Circuit Court’s finding that the DOC issued a press release announcing it had “added a compounding pharmacy to its execution team.”). Nor could it; as the Circuit Court correctly held, the word “persons” in Section 546.720.2 refers only to “natural persons”. LF 620. And the DOC’s witness conceded at trial that neither the laboratory that tests execution drugs nor the pharmacy that compounds them is a member of the execution team. Tr. 39:23-40:1(laboratory); *id.* at 89:13-16 (pharmacy). Accordingly, as “[l]aboratories and pharmacies are not ‘persons’ within the meaning of Section 546.720.2[,]” LF 619, the DOC cannot withhold information about them in response to Plaintiffs’ Sunshine Law requests.

The DOC attempts to evade this limitation by arguing that that Section 546.720.2 permits it to withhold records about the pharmacies or laboratories used to create or test execution drugs because releasing them might reveal the identities of employees of those entities, who it broadly claims *are* members of the execution team. *See* Br. of Appellants at 4; Tr. 88-90. That argument, too, was correctly rejected by the Circuit Court, which held that “neither laboratories nor pharmacies, *nor the employees that work for those entities . . . ‘provide direct support for the administration of lethal gas or chemicals.’*” LF at 620 (citing § 546.720.2) (emphasis in original in part, added in part).

As noted above, the primary goal of statutory interpretation is to determine the intent of the legislature, which is determined in the first instance by examining the plain language of the law, giving words their ordinary meaning. *See United Pharmacal Co.*, 208 S.W.3d at 909; *Missouri Prop.*, 971 S.W.2d at 305; *Am. Healthcare Mgmt.*, 984 S.W.2d at 498. The plain language of Section 546.720.2 limits the members of the

execution team to natural persons who provide not only support, but *direct* support for the *administration* of lethal drugs. “Direct,” used as an adjective, is defined in part as “marked by absence of an intervening agency, instrumentality, or influence[.]” *Direct*, Merriam-Webster, *archived at* perma.cc/XW4Q-R4LC; *see also* *Am. Nat. Life Ins. Co. of Texas v. Dir. of Revenue*, 269 S.W.3d 19, 21 (Mo. banc 2008) (“‘Direct’ is defined in *Black’s Law Dictionary* as ‘[i]mmediate; proximate; ... operating by an immediate connection or relation, instead of operating through a medium.’”). And “administer” is defined, in part, as “to mete out: dispense[.]” *Administer*, Merriam Webster, *archived at* perma.cc/8GUB-YX2Z. Therefore, in order to provide “direct” support for the “administration” of lethal drugs, there must be no intervening persons, or attenuation whatsoever, between the human beings dispensing the execution drugs and the human beings providing support to them.

The Circuit Court correctly noted that the statute’s reference to “medical personnel” clearly illustrates who the General Assembly considered to be an individual providing “direct support for the administration of” execution drugs. LF 620; § 546.720.2. As the DOC’s own execution protocol lays out, “medical personnel” perform tasks such as loading drugs into syringes, and inserting the primary and secondary IV lines into the inmate’s body. LF 20. These persons provide “direct support” for the administration of lethal drugs because they are present in the execution chamber and there are no intervening persons or entities between them and those who administer the drugs. *See* § 546.720.2. Unlike those individuals—who are properly members of the execution team—employees of pharmacies and laboratories that supply or test execution

drugs are not even present in the execution chamber. *See* LF 626 (finding M6 is not present in the execution chamber); LF 414 (finding that M6 and M7 are not present during the execution). Under no logical reading of the statute do the “employees that work for [pharmacies and laboratories]” provide “direct support” for the “administration” of the drugs. LF 414, 620. Thus, as the Circuit Court held, they are not members of the execution team and records concerning them cannot be kept from the public. *See* LF 620; § 546.720.2.

The interpretation of “direct” urged by the DOC was rightly rejected by the Circuit Court below as leading to “unreasonable results.” LF 622 (citing *Murray v. Mo. Highway & Transp. Comm’n*, 37 S.W.3d 228, 223 (Mo. banc 2001) (stating that statutes should be interpreted to “avoid unreasonable or absurd results”). The DOC argues that a “logical,” “causal,” or “consequential relationship” to the administration of lethal drugs is sufficient to add a person to the execution team. Br. of Appellants at 26. That betrays the plain meaning of “direct,” and makes no sense in its application. For example, execution protocol also requires saline solution to be injected into the condemned person before the execution drugs. LF 20. Certainly the saline solution has a “logical” connection to those drugs, yet, as the DOC’s witness admitted, they do not keep secret the provider of the saline solution. Tr. 134-35. The DOC’s interpretation would also permit the Director of the DOC to add *himself* to the execution team, as the revised execution protocol states that the lethal chemicals are injected “[u]pon order of the department director[.]” LF 21. Of course the Director’s identity is not secret, nor could it be—it is in the very caption of these consolidated cases. There are other types of

“causal” or “logical” relationships that produce equally absurd results—consider a delivery driver who transports the execution drugs to the DOC, or the employees of the companies that manufacture the light bulbs in the execution chamber that must be “maintained at a sufficient level to permit proper administration of the chemicals[.]” LF 21. It is patently unreasonable to assume the General Assembly intended to authorize the DOC to add all of those people to the execution team by enacting Section 546.720.2. They provide tangentially related services, not “direct support” for the administration of execution drugs. The Department’s argument should, therefore, be rejected. *See Murray*, 37 S.W.3d at 223.

C. The narrow scope of Section 546.720.2’s secrecy provision is consistent with the history of executions in the United States.

Information about the instrumentalities of execution and those who manufactured them has historically been publicly available in the United States. *See, e.g., Wood v. Ryan*, 759 F.3d 1076, 1083 (9th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 21 (2014) (noting “public accounts in some states supplied information about both the types of ropes used in hangings and the manufacturers who provided them.”); Chris Woodyard, *Enough Rope: the Hangman’s Rope in the Press*, Haunted Ohio (Jan. 19, 2013), *archived at* perma.cc/H8TE-27G8. For example, in 1897 the *Cincinnati Enquirer* noted that

The ropes with which Jackson and Walling are to be hung have been completed and delivered over to Sheriff Plummer. Each rope is 23 feet in length, and they were made to order in about a week’s time from the giving of the order. They were made

by Frank Vonderheide., [sic] the Main Street cordage dealer, and most of the work was done by Mr. Vonderheide himself. They are made of what is known as silver finish flax sewing twine, there being four strands of 110 threads each, or 440 threads in all.

Woodyard, *Enough Rope: the Hangman's Rope in the Press*, *supra*.

As the methods of execution evolved, so too did the public's knowledge about the manufacturers of the associated instrumentalities. The United States Court of Appeals for the Ninth Circuit noted in *Wood*, for example, that “[n]ewspapers reported openly on gas chambers, describing their size, cost, and makeup, and explained that Eaton Metal Products Co., which delivered gas chambers to states like Arizona, had a ‘patent on the death machine.’” 759 F.3d at 1083. Properly interpreted, Missouri’s execution secrecy statute is consistent with these historical practices, shielding *only* the identities of the executioners themselves and those who provide them direct support—not the companies who produce the instrumentalities of execution or their employees. *See* § 546.720.2; LF 620 (Circuit Court noting that “consistent with the traditional, historical purpose of such statutes to protect the personal privacy of those individuals tasked with carrying out executions, the Court construes ‘persons’ in § 546.720 to mean natural persons.”). The DOC’s interpretation of the statute would represent a radical departure from historical practices, and it provides no reason to believe the legislature had any such intention.

D. The DOC's speculative policy arguments have no bearing on its obligations to comply with the Sunshine Law.

Throughout its brief, the DOC advances the speculative argument that the entities and/or persons that now provide it with lethal execution drugs might not want their identities revealed because public disclosure could lead to a loss of business revenue. *See* Br. of Appellants at 23. In addition to being pure conjecture, the DOC's purported policy argument is wholly irrelevant. There may be any number of private parties that enter into contracts with the State and would prefer that their identities be kept confidential, but that preference cannot and does not override the openness mandated by the Sunshine Law. Individuals and entities that enter into agreements with the State should reasonably expect that their identities and the nature of their dealings with the government will be subject to public oversight. As this Court has previously stated:

Entering into a contract with a public governmental entity is simply not a personal matter. No private individual or entity entering into a contract with a public governmental entity can have a reasonable expectation of privacy with regard to such a contract except to the extent those contracts, or portions thereof, fall within an exception set forth in § 610.021. *Contracts entered into by governmental entities are precisely the type of records the Sunshine Law seeks to provide to the public.* 'The clear purpose of the Sunshine Law is to open official conduct to the scrutiny of the electorate.' *Hyde v. City*

of Columbia, 637 S.W.2d 251, 262 (Mo. App. W.D. 1982). To prevent the disclosure of contracts that public governmental bodies enter into with private entities or individuals would significantly inhibit this purpose.

North Kansas City Hosp. Bd. of Trustees, 984 S.W.2d at 121-22 (emphasis added).

In enacting the Sunshine Law, the legislature determined that the public policy of the State is that public records shall be open unless there is a specific statute that permits them to be closed. If the DOC believes that it is preferable to keep information about the suppliers and testers of execution drugs from the public, it should direct those arguments to the General Assembly, which could amend the law. “[C]ourts cannot rewrite the statutes the legislature in its wisdom has enacted no matter how much such rewriting is desired by a particular group.” *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 483 (Mo. App. W.D. 2015) (citation omitted). This Court “cannot usurp the function of the General Assembly, or by construction, rewrite its acts.” *Id.* (quoting *Marshall v. Marshall Farms, Inc.*, 332 S.W.3d 121, 128 (Mo. App. S.D. 2010)). Rather, this Court’s “role is limited to interpreting and applying the statute as it currently exists [because] ‘[t]o substitute for the concept of the general assembly our view of what might be the more salutary public policy would be for us to legislate rather than to adjudge.’” *Id.* (quoting *Lemasters v. Willman*, 281 S.W.2d 580, 590 (Mo. App. 1955)). The preferences of individuals contracting with the DOC simply cannot override that entity’s legal obligations to the public as established by the General Assembly.

E. The DOC's erroneous interpretation of Section 546.720.2 is not entitled to deference.

As it did below, the DOC makes the erroneous argument that its interpretation of Section 546.720.2 is entitled to deference under the standards governing judicial review of formal agency rulemakings and determinations. *See* Br. of Appellants at 26-27 (citing *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 592 (Mo. banc 2013); *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm.*, 362 S.W.3d 415 (Mo. banc 2012); and *Morton v. Missouri Air Conservation Com'n*, 944 S.W.2d 231 (Mo. App. S.D. 1997)). The DOC's invocation of that standard in this case—which involves no such formal agency action—is misplaced.

The Missouri Supreme Court has expressly determined that the DOC's execution protocol, which interprets Section 546.720.2, is not a rule subject to the requirements or standards of the Missouri Administrative Procedure Act ("MAPA"). *Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 197 (Mo. banc 2009). The cases cited by the DOC, all of which involved evaluations of or challenges to formal agency determinations and rulemaking, are thus inapposite. *See Farrow*, 407 S.W.3d at 592; *Mercy Hospitals*, 362 S.W.3d at 417; *Morton*, 944 S.W.2d at 234.

The DOC cannot have its cake and eat it too: either a modification of the execution protocol is a rulemaking subject to notice and comment (granting the agency deference in its interpretation), or it is not (in which case no deference is due and *Middleton* was incorrectly decided in the DOC's favor). That question having already

been determined by the Missouri Supreme Court, the DOC's argument here is foreclosed.³

Even assuming, *arguendo*, that the DOC's modification of its execution protocol was somehow a formal agency rulemaking—which it was not—it would still be “inappropriate” for this Court to defer to the DOC's interpretation of Section 546.720.2 because that interpretation “expands, narrows, or is inconsistent with the plain and ordinary meaning of the words of the statute.” *Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 87 (Mo. App. W.D. 2011). As set forth above, the DOC's expansion of the execution protocol is patently inconsistent with the plain and ordinary language of Section 546.720.2, and accordingly is owed no deference by the judiciary. *See id.*

II. The Department knowingly violated the Sunshine Law (Response to Appellant's Point II).

Standard of Review

Sunshine Law cases can involve questions of law, fact, or both. “What constitutes a knowing or purposeful violation of the Sunshine Law is a question of law.” *Laut v. City of Arnold*, 491 S.W.3d 191, 193 (Mo. banc 2016). Questions of law are reviewed *de novo*. *White v. Dir. of Revenue*, 321 S.W.3d 298, 307 (Mo. banc 2010). “An issue of statutory interpretation is a question of law, not fact.” *Laut*, 491 S.W.3d at 196 (quoting

³ The DOC does not argue, nor could it, that it modified the Execution Protocol in 2013 pursuant to the MAPA.

Treasurer of State–Custodian of Second Injury Fund v. Witte, 414 S.W.3d 455, 460 (Mo. banc 2013)). By contrast, “[w]hether the conduct of [a governmental body] brings it within the scope of the statutory definitions of knowing or purposeful conduct is a question of fact.” *Id.* at 196.

A knowing violation of the Sunshine Law must be proven by a preponderance of the evidence. § 610.027.3. “A knowing violation requires proof that the public governmental body had ‘actual knowledge that [its] conduct violated a statutory provision.’” *Strake v. Robinwood W. Cmty. Improvement Dist.*, 473 S.W.3d 642, 645 (Mo. banc 2015) (quoting *White v. City of Ladue*, 422 S.W.3d 439, 452 (Mo. App. E.D. 2013)); *see also Laut*, 491 S.W.3d at 198 (citing *Strake*, 473 S.W.3d at 645). This “requires that the governmental body knowingly violated the Sunshine Law, not merely that it knowingly failed to produce the document[.]” *Laut*, 491 S.W.3d at 199.⁴

Here, the Circuit Court entered judgment after receiving evidence and testimony, and accordingly this Court is obligated to “view the evidence in the light most favorable

⁴ While the *Laut* decision was handed down after the trial court ruled in this case, that case cited to and relied on *Strake*, which had been decided long before this case came to a close. Moreover, Defendant’s Motion to Amend Judgment Pursuant to Rule 78.04 was pending when *Laut* was decided and a copy of the *Laut* opinion was filed with the Circuit Court. *See* LF 8. Therefore, there is nothing in the record to suggest that the Circuit Court did not consider *Laut*, or that it failed to apply the correct legal standard.

to the circuit court’s judgment and defer to the circuit court’s credibility determinations.” *Laut*, 491 S.W.3d at 197 (quoting *Ivie*, 439 S.W.3d at 200).

“Appellate courts defer to the trial court on factual issues ‘because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.’” *White*, 321 S.W.3d at 308–09 (quoting *Essex Contracting, Inc. v. Jefferson Cty.*, 277 S.W.3d 647, 652 (Mo. banc 2009)). “The appellate court’s role is not to re-evaluate testimony through its own perspective.” *Id.* at 309. Indeed, “no contrary evidence need be considered on a substantial-evidence challenge . . . [and] [c]ircuit courts are free to believe any, all, or none of the evidence presented at trial.” *Laut*, 491 S.W.3d at 197 (quoting *Ivie*, 439 S.W.3d at 200). Moreover, “[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.” Rule 73.01(c).

With regard to the legal standard applied by the Circuit Court in this case, it is important to note that, “trial judges are presumed to know the law and to apply it in making their decisions.” *State v. Amick*, 462 S.W.3d 413, 415 (Mo. banc 2015). And, an appellate court “must presume that the trial court properly considered the relevant portions of the Sunshine Law in rendering its decision as long as that presumption is not rebutted by the record.” *Am. Family Mut. Ins. Co. v. Mo. Dep’t of Ins.*, 169 S.W.3d 905,

913–14 (Mo. App. W.D. 2005). Nothing in the record rebuts the presumption that the Circuit Court understood and properly applied the law.⁵

Argument

Here, in addition to reviewing the uncontroverted material facts submitted by the parties with their motions for summary judgment, the Circuit Court had the opportunity to observe the Department’s witness as he provided an explanation for the Department’s violation of the Sunshine Law. An in-person evaluation of the sincerity of that testimony caused the Circuit Court to reaffirm that the DOC’s violation was knowingly done. *See* LF 625-26. The Department argued that two statutes—§§ 217.075 and 546.720.2—were the basis for its refusal to disclose the requested records that would reveal the pharmacies that provided execution drugs to the state. LF 598-601. Because the three cases here were consolidated into a single trial, and the same statutes were relied upon by the Department in each case, it is relevant to view the Circuit Court’s findings from all three cases as they relate to the Defendant’s knowing violation.

In both *Bray v. Lombardi, et al.* and *Reporters Committee for Freedom of the Press, et al. v. Missouri Department of Corrections*, the Circuit Court found that the Sunshine Law was knowingly violated because the plain language of Section 546.720.2 does not authorize the Defendants to close the records requested. LF 138-39; 622-23. In *Bray*, the Circuit Court further stated in its order that the current interpretation of

⁵ *See supra* note 2.

546.720.2 to include the suppliers of lethal drugs as a member of the execution team was “rendered even more questionable by its novelty.” LF 130-31. The Circuit Court went on to note that, before 2013, as the Department conceded at trial, “they regularly supplied the public and press with information about suppliers of chemicals.” LF 131 (noting that the issue of confidentiality for suppliers is for the legislature to address, and “it cannot be solved by reinterpreting a clearly worded statute”). In addition, in its order in *Bray*, the Circuit Court stated that “defendants also knowingly violated the Sunshine Law when they made a frivolous claim that the request sought documents that fell within Mo. Rev. Stat. § 217.075[,]” and “when they failed to produce available responsive documents even in redacted form.” LF 139.

In *Guardian News and Media, LLC, et al. v. Missouri Department of Corrections*, the Circuit Court found that “DOC knowingly violated the Sunshine Law by,” among other things, “citing irrelevant exceptions to the Sunshine Law.” LF 419. It found further that the “DOC also knowingly violated the Sunshine Law by refusing to disclose records that would reveal the suppliers of legal injection drugs, because its refusal was based on an interpretation of Missouri Revised Statutes section 546.720 that was clearly contrary to law.” LF 309-10, 419. The Circuit Court specifically found that § “546.720 does not create a Sunshine Law exemption for records that identify or that might identify the entities that supply the execution drugs.” LF 420. “DOC 002-DOC 004 and DOC 009-DOC 034 are therefore public records and must be produced to Plaintiffs without redactions other than the identity of M5.” LF 420.

The Department asserts, for the first time in this appeal, that it was impossible for it to “know”—as the term is defined under the Sunshine Law—that its interpretation of Section 546.720.2 was incorrect in light of the Circuit Court’s June 6, 2014 decision in *Winfield v. Lombardi*, Case No. 14AC-CC00263. LF 180-82. There, in denying a motion for preliminary injunction in a case also dealing with a Sunshine Law request seeking records disclosing the supplier of execution drugs, the court noted that the execution protocol allows the Director the discretion to define the execution team and he has done so rather broadly. LF 181. However, the court also noted that while the Director’s definition, “at first glance, would preclude the disclosure requested by the Plaintiff, ... this order is *not to be construed as a finding to that effect.*” LF 181. And, in finding that the likelihood of success was “not high,” the court noted that it was referring to the “likelihood of success on the merits for *all claims.*” LF 181.⁶ Notably, here, the Department’s witness did not make any reference to the denial of preliminary injunction in *Winfield* as something that was relied on for the DOC’s interpretation of Section 546.720.2. The Department’s witness had ample opportunity to explain to the Circuit Court why Appellant believed the exemption applied to the records at issue here, and

⁶ The petition at issue in *Winfield* raised claims alleging invalid exemptions related to “execution team” exemptions, “offender records” exemptions, “legal action” and “privileged communications” exemptions, a catch-all exemption, and the “state secret doctrine.” See *Winfield v. Lombardi*, Petition, Case No. 14AC-CC00263.

never mentioned reliance on this previous decision issued by this same trial court. Thus, arguing now that it was relied on is not persuasive nor is it supported by the evidence.

The Department also argues that an Eighth Circuit case supports their argument that the violation could not have been knowingly done. There, the Department attempted to avoid disclosure of the supplier of execution drugs in the context of civil discovery by arguing that such information was confidential and privileged information under Section 546.720.2 and common law. *In re Lombardi*, 741 F.3d 888, 894 (8th Cir. 2014).

However, as the Department concedes, in that case, while the court did not require disclosure it found that, although “[t]he privilege issues are significant and complex, ... *we express no view on them*, because it is clear and indisputable that the discovery ordered by the district court is not relevant to any claim that should survive a motion to dismiss[.]” *Id.* at 895 (emphasis added). Thus, any reliance on this case, and any reliance on what the Department took away from a phone conference in that case, is misplaced given the court’s ruling. *See* Tr. 32.

Here, the Circuit Court did not find that the Department was “merely incorrect,” as the Department seems to suggest on appeal. What the Circuit Court found was that the plain language of the statute does not allow for closure of the records, the Department’s interpretation was clearly contrary to law, and the exemptions cited were frivolous and irrelevant. With regard to its reliance on § 546.720.2, it is important to note the Department’s testimony acknowledging that, before the most recent execution protocol was drafted, the pharmaceutical supplier of chemicals was *never* included as a member of the execution team. Tr. 21, 70-74, 129-30. And, at the time the previous protocols were

drafted, the person preparing them was aware of § 546.720.2, a statute that has not been amended since 2007, and believed that his protocol that did not include individuals who supplied the chemicals was consistent with the statute's requirements. Tr. 71-72; *see* § 546.720.

Notably, while the statute clearly states that only those who administer lethal chemicals or provide direct support for their administration can be part of the execution team, § 546.720.2, the Department conceded that it did not include the supplier of the chemicals until after it purportedly learned that the drugs could not be obtained unless the suppliers were guaranteed confidentiality. Tr. 19-21. Moreover, while the protocol was amended to include suppliers of pentobarbital, it was not amended to include the producer of saline, also a chemical used in executions. Tr. 134-36. And, in addition to responding to what it characterized as the demand of its suppliers, the Department testified further that it believes the State should withhold information under the Sunshine Law based upon the potential professional consequences that the identified individuals could face, and that the Department took that into consideration. Tr. 106 (indicating that, for example, if an anesthesiologist were identified, he would lose his certification and ability to practice medicine because the American Medical Association, the American Association for Anesthesiologists, and the American Association of Pharmacists do not support their members participating in executions). Particularly given the Department's admitted reinterpretation of the law to suit its current needs, the Circuit Court properly

concluded that the Department knew it was violating the Sunshine Law when it refused to produce documents that could reveal the chemical suppliers.⁷

Finally, the Department's contention that affirming the Circuit Court's finding that it knowingly violated the Sunshine Law would put other governmental bodies in a precarious position is entirely baseless. Each Sunshine Law case is based upon unique facts and circumstances. This is why hearing evidence often assists a trial court, as it did here, in making a determination as to whether a violation was knowing or purposeful based upon the particular facts of that case. Here, after hearing testimony from the Department's witness, the Circuit Court reaffirmed its previous determination that the violations were knowing, and in the case of *Guardian News*, also purposeful. This Court must defer to the factual and credibility findings of the Circuit Court.

Conclusion

To prevail here, the Department must show that “there is *no evidence* in the record” demonstrating that Plaintiffs proved a knowing violation by a preponderance of the evidence. *Laut*, 491 S.W.3d at 197 (emphasis added) (quoting *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014)). The record does not support such a conclusion.

⁷ The Department also testified that it was withholding records for purposes of “institutional security,” § 217.075, citing the same concerns surrounding confidentiality of the suppliers and their inability to carry out executions if the suppliers were revealed. Tr. 53-54, 68.69.

Respectfully submitted,
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Certification of Service and of Compliance with Rule 84.06(B) and (C)

The undersigned hereby certifies that on October 21, 2016, the foregoing brief was filed electronically and served automatically on the counsel for Respondent.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 7,470 words.

The undersigned finally certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

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