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

REPLY BRIEF OF APPELLANTS

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ARGUMENT[1]

While Respondents argue narrowly about the definition of each word in §546.720.2, a broader context is needed before addressing those arguments.

These are among the numerous attempts by death row inmates to thwart implementation of the death penalty by revealing identities of individuals who supply the drugs used in executions.[2] Even though the death penalty is both constitutional and a legal in Missouri, death row inmates and their allies try to obstruct the implementation of executions by disclosing pharmacists who supply the drugs because larger pharmaceutical distributors will no longer provide lethal chemicals for use in executions.

These efforts by death row inmates in Missouri have been consistently rejected in federal court appellate courts. In fact, every federal district court order that Respondents cite was reversed on

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[1] Respondents filed three separate briefs, but their arguments are similar and will be addressed in one brief.

[2] Plaintiff Bray sought records on behalf death row inmates. LF 16. The same inmates, represented by counsel for Bray, sought the identity of the suppliers in the *Zink* litigation.

appeal. Guardian Brief at 26-27. The Eighth Circuit, en banc, in *In re Lombardi*, 741 F.3d 888, 890 (8th Cir. 2014), granted a writ of mandamus that prohibited the disclosure of pharmacist identities, overruling a federal district court judge's order. In *Zink v. Lombardi,* the United States Court of Appeals for the Eight Circuit Court again denied efforts to reveal the supplier at issue here because doing so "would serve as a back-door means to frustrate the State's ability to carry out executions by lethal injection." *Zink v. Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015). And even more recently, Mississippi inmates who sought the identity of M7 were denied by the Eighth Circuit. *See In re: Missouri Department of Corrections*, No. 16-3072 (8th Cir. 2016) (published October 13, 2016).

It is against all reason that inmates who are challenging the constitutionality of their execution are consistently denied access to supplier identities, yet, as Respondents would argue, any person should be able to know the same identities simply by sending a Sunshine request to the Department. Revealing the suppliers here would allow Respondents to "achieve indirectly a *de facto* injunction against a lawful method of execution." *Zink* 783 F.3d at 1106. But the law does not allow public disclosure of this information because identities of execution team member are protected under § 546.720.2.

I. The legislative history supports the confidentiality of suppliers on the execution team.

Respondents argue that the legislative history of § 546.720.2 proves that the legislature did not intend to protect a pharmacist on the execution team who supplies lethal chemicals. It does not. In Respondents' view, the law was enacted in response to a St. Louis Post-Dispatch article that revealed the identity of a doctor on the execution team. *See* Guardian Brief at 4-5.[3] Therefore the law's purpose is to "provide protection to the members of the execution team and their families from retaliation and ridicule." Bray Brief at 25. But that same purpose is also met by protecting a pharmacist who supplies the lethal chemicals. A pharmacist who provides the lethal chemicals used in executions would be subject to the same retaliation as a doctor who oversees the execution.[4] This has already occurred in Texas. In 2013,

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[3] In a blatant violation of § 546.720.2, Respondents needlessly restate the full name of a former execution team member in their brief. *See also* Bray Brief at 24.

[4] Respondents misrepresent M6 and M7 as "pharmaceutical companies" or "manufacturers." Bray Brief 25, Guardian Brief at 25. M6 and M7 are

the identity of a pharmacist supplying lethal chemicals for Texas executions was revealed to the public. He was subjected to "hate mail and messages as well as getting dragged into the state's lawsuits with prisoners and possible future lawsuits."[5] This is precisely the type of scenario that § 546.720.2 was designed to prohibit.

Additionally, the sections close to § 546.720.2 show the legislature was intending to give the Department the ability to carry out executions. "Statutory provisions relating to the same subject matter are considered *in pari materia*." *Preston v. State*, 33 S.W.3d 574, 579 (Mo. App. W.D. 2000) (citation omitted). "[Courts] are required to interpret and apply statutory provisions with reference to each other to determine legislative intent." *Id.*

Reading the sections close to 546.720 as whole, the intent of the legislature is to effectuate the death penalty. Section 546.710 provides that when the Missouri Supreme Court issues an execution warrant for the prisoner, it "shall be obeyed by the director [of the department]

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licensed pharmacists, but knowing the pharmacy where they work could identify them. *See* § 546.720.2, Tr. 88, 129.

[5] https://www.texastribune.org/2013/10/07/tdcj-refuses-return-execution-drugs-pharmacist/ (last visited November 15, 2016).

accordingly." Section 546.720.1 provides the method of executions, either by lethal gas or lethal chemicals." Section 546.730 states that "the judgment of death must be executed within a correctional center of the department of corrections." All of these surrounding sections are about carrying out the execution. The confidentiality of the execution team members also ensures that the executions are carried out. However, Respondents' narrow reading of § 546.720.2 to allow disclosure of pharmacists on the execution team would create "a *de facto* injunction against a lawful method of execution" by cutting off the supply of lethal chemicals. *See Zink* 783 F.3d at 1106. This reading cannot be the intent of the legislature when reading the sections together.

II. Section 546.720.2 gives the director of the Department discretion to select an execution team.

In their brief, Respondents are feign shock about the Department's statement that § 546.720.2 places "no limits" on what professions can be selected to the execution team. Guardian Brief at 31. But § 546.720.2 does not limit the execution team to just doctors, nurses, pharmacists, or any other profession. Nor does that statute limit execution team membership to individuals who are "in the room" during the execution. Even the trial court below did not believe that

there was an "in the execution room" requirement to be on the execution team. The trial court specifically found that the identity of M5, who writes the prescription for pentobarbital (and is not in the room during executions), is protected by § 546.720.2. A21, 39, 44. That finding is not being appealed by Respondents. M6 and M7's involvement in supplying the lethal chemicals is just as critical, if not more so, than M5's role in writing the prescription.

The only limiting factor here, as stated in the Department's brief, is that an individual must "provide direct support" for the administration of the chemicals. Department Brief at 21. A pharmacist, who creates, compounds, or otherwise provides the lethal chemicals, is providing direct support for the administration of those the lethal chemicals. The lethal chemicals cause death. There can be no "administration of the lethal chemicals" without the lethal chemicals. Whether the pharmacist is in the room or miles away, his or her role in the execution is no different.

Respondents argue that allowing a pharmacist on the team would allow the absurd result of a delivery driver or a manufacturer of light bulbs to be on the execution team. Reporters Brief at 15. It does not. Those are examples of indirect support for the administration of the chemicals. Fundamentally, an execution by lethal injection is two

parts: lethal chemicals and individuals to administer the chemicals. By providing the lethal chemicals to the individuals that administer them, the pharmacist is providing "direct support for the administration of the lethal chemicals." § 546.720.2. The light bulb makers and delivery drivers, at best, indirectly support this process and therefore cannot be on the execution team under § 546.720.2. Respondents' insistence of how tenuous the pharmacists' connection is to the execution process is belied by the vigor with which they pursue their identities.

III. Previous definitions of the execution team do not limit future definitions of execution team members in the protocol.

Respondents argue that because a supplier of lethal chemicals was not on previous execution protocols, the Department cannot unilaterally change the definition of the execution team. Guardian Brief 8. But § 546.720.2 does not provide such a limitation. In fact, § 546.720.2 specifically delegates to the Department's director the authority to unilaterally change the definition of the execution team: "The identities of the members of the execution team, as defined in the execution protocol, shall be kept confidential." § 546.720.2 (Emphasis added). The Department's protocol is exempt from rule making procedures. *See Middleton v. Missouri Department of Corrections,* 278 S.W.3d 193 (Mo. 2009).

The legislature could have limited team membership to only doctors, or only individuals within 10 feet of the execution room, or some other arbitrary distance, but it did not. The legislature gave flexibility to the director in drafting the definition in the Department's protocol because the director has the specialized expertise in carrying out executions and may have to change the definition as circumstances change.

Prior to 2013, the Department and other states could acquire lethal chemicals through pharmaceutical distributors. Tr. 15-16. The Department director was not required to define the execution team to include those suppliers under § 546.720.2. There was no need for secrecy because these were larger companies where no individual could be targeted for assisting in executions. After outside pressures have cut off that supply, the Department was forced to turn to individuals to provide the drugs, who would only do so if assured confidentiality. Tr. 17, 26, LF 100. The director of the Department properly utilized his discretion authorized by § 546.720.2 to define the execution team to include these individuals. LF 20.

IV. The trial court's findings of alternatives methods of acquiring lethal drugs are mistaken and irrelevant.

The trial court found that the State of Missouri could explore establishing its own laboratory to produce the chemicals. Guardian Brief at 14, A28. This evidence was taken from a reporter who heard a speech by the Attorney General to lawyers in St. Louis, who then made opinions based on what he heard the Attorney General say. LF 292-300. Foundational and hearsay issues aside, it is likely that many individuals have strong opinions on the death penalty, but the Missouri Attorney General has no statutory role in procuring lethal chemicals; only the Department does. Creating a state-run laboratory to make lethal chemicals would require an appropriation by the legislature. It is possible that the legislature *could* appropriate funds for just about anything, but such speculation is pointless.

The reality is that there is no such state-run laboratory. Effective lethal chemicals are now only available through individual suppliers that require secrecy. If it were so easy to acquire pentobarbital or an effective substitute, as Respondents suggest, then the death row inmates of Mississippi would not have sued the Department in an effort

to reveal its source of pentobarbital. *See In re: Missouri Department of Corrections*, No. 16-3072 (8th Cir. 2016).[6]

V. Case law did not limit the execution team definition.

Respondents assert that other cases make it clear that § 546.720.2 does not allow pharmacists on the execution team. Guardian Brief 26. As noted above, every federal case cited by Respondents has been overruled by appellate courts, and therefore has no precedential value. And *Middelton v. Department of Corrections* was not about which individuals are on the execution team, but was about whether the execution protocol was subject to rulemaking procedures of the Missouri Administrative Procedure Act. *See Middleton,* 278 S.W.3d at 193 (Mo. 2009). The *Middleton* Court held that the execution protocol was exempt from those procedures and rulemaking under §536.010(6)(k) and was not addressing the director's discretion to define the execution team. *See id.* at 198.

[6] Likewise, the Respondents used an affidavit of a licensed pharmacist purporting to show how readily available pentobarbital is. LF 121-122. Not surprisingly, the affidavit did not state that pentobarbital would be readily available for use in executions by a state.

The only Missouri state court to address whether pharmacists can be included in the definition of the execution team is the Circuit Court of Cole County. There, the same judge addressed the issue three times, and three times the judge came up with a different interpretation.

In June of 2014, the trial court addressed the definition of the execution team in the protocol and found that "the definition, at first glance, would preclude the disclosure (of M6 and M7) requested by the Plaintiff…." LF 181. In July of 2015, the trial court addressed the same issue in its summary judgment order and found that §546.720.2 only applies to individuals who are "present in the execution chamber" and are "involved at the time of the execution." LF 308, 620. But in its final judgment, the trial court changed positions again, finding that the physician who writes the prescription, M5, "while not present during the execution, does provide direct support for the administration of the chemicals." LF 415, 167.

If the same judge has three different interpretations of the same statute, it is impossible that the Department's director could have "actual knowledge that [his] conduct violated" § 546.720.2 when he changed the definition of the execution team. *See Strake v. Robinwood W. Cmty. Improvement Dist.,* 473 S.W.3d 642, 645 (Mo. 2015). As

discussed above, the definition of the execution team is both reasonable and comports with the purpose and history of the § 546.720.2.

VI. Other arguments

A. No omissions in the privilege logs

The trial court stayed compliance with the judgment and ordered the Department to list the records they withheld on the privilege log. The Department did so. LF 140-143. Bray and the Guardian sought inclusions of additional records, and the Department included them while objecting to their relevance. LF 153-159, 410-412. There was a hearing on the completeness of the logs, where the attorney that made them testified and answered questions for nearly 4 hours, and Guardian and Bray had no further objections to the logs. Tr. 1-137. The logs were again amended a final time to include a few documents related to the Reporters Committee requests that were overlooked. Tr. 120, 136-137. LF 160-163.

But here on appeal, for the first time since the "Notice of Deficiencies," Respondents again argue that there are omissions in the privilege logs. Guardian Brief 16-18. But there are no omissions in the logs. The perceived omissions are only based on declaration of Respondents. The fact that Respondents might believe or wish other records exist, does not mean they do, nor is the Department required to

create a record.[7] "The Sunshine Act does not empower individuals or the courts to order a governmental agency to create records." *Am. Family Mut. Ins. Co. v. Missouri Dep't of Ins.*, 169 S.W.3d 905, 914 (Mo. App. W.D. 2005).

B. Judgment to matters outside of the pleadings is void

Without any supporting authority, Respondent Guardian argues that the Department waived any argument to withhold records identifying the qualifications of the nurse and anesthesiologist, and those records must be produced. Guardian Brief at 37. But Respondent Guardian did not seek production of these records in its pleadings; they only sought records identifying the supplier. LF 207-228. The Department listed these records in a privilege log addendum at the Guardian's request, but objected to those records as being "outside of Plaintiffs' petition." LF 410-412. "The purpose of a pleading is to limit and define the issues to be tried in a case and [to] put the adversary on notice thereof." *Smith v. City of St. Louis*, 395 S.W.3d 20,

[7] At the time of the request, the Department did not possess records "reflecting policy statements, regulation, or memoranda regarding the use of lethal injection drugs" other than the current execution protocol that was produced. Guardian Brief 37.

24 (Mo. 2013) (citation omitted). "To the extent that [a] judgment goes beyond the pleadings, it is void." *Id.* Respondent Guardian did not seek these records in their petition, therefore the portion of the judgment that ordered their production "is void." *Id.* Because the Department objected to them, those records were not "tried by implied consent." *Id.*

C. No public domain exception

At hearing, Briesacher testified that he withhold some complete pages produced in the *Zink* litigation because he learned that even in redacted form, the format or other details on a page could be used to identify the supplier of lethal chemicals on the execution team.[8] Tr. 32. *See* § 546.720.2. While Respondents openly doubt these conclusions, their own websites have claimed they found the source "by piecing together documents from dozens of public records requests..."[9]

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[8] This feat was noted by the Eighth Circuit: "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).

[9] See http://news.stlpublicradio.org/post/investigation-missouris-execution-drug-source-raises-legal-ethical-questions last visited on November 21, 2016.

Respondents argue that the Department's failure to seal these records that were on filed in a U.S. district court, is evidence of a purposeful violation. Guardian Brief at 43. But the Department has no duty to seal records that are not in their possession, nor would a failure to do so be evidence of a purposeful violation of the Sunshine Law. On the contrary, sealing the records would have likely tipped off death penalty opponents which "portion of a record that could identify" the execution team member. § 546.720.2. Plaintiffs in that lawsuit would have already had a copy of the discovery documents, so sealing the records on file with the court would not have prevented disclosure. Further, a governmental body does not have a duty under the Sunshine Law to redact or seal records that are not in its possession. Rather, a governmental body only has a duty to withhold records in its possession that "are protected from disclosure by law." § 610.021(14). *See Douglas, Haun & Heidemann, P.C., v. Missouri Department of Social Services,* WD79391, at 5-6. (decided October 4, 2016) (DSS' filing of TEFRA liens in county recorder offices is allowed under § 208.155, but such filing in did not make records open to law firm under § 610.021(14)).

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 November 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 3,323 words in total.

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