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15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 Edward Harold Schad, Jr., and Robert
18 Glen Jones, Jr.,
19 Plaintiffs,

20 v.

21 Janice K. Brewer, Governor of
22 Arizona; Charles L. Ryan, Director,
23 Arizona Department of Corrections;
24 Ron Credio, Warden, Arizona
25 Department of Corrections-Eyman;
26 Lance Hetmer, Warden, Arizona
27 Department of Corrections-Florence,
28 Defendants.

Case No.2:13-cv-02001-ROS

Reply to Response in Opposition to
Plaintiff's Motion for Temporary
Restraining Order or Preliminary
Injunction

**Executions Scheduled October 9,
2013, and October 23, 2013**

Plaintiffs Edward Harold Schad and Robert Glen Jones hereby reply to the
response filed by Defendants

1 **I. Plaintiffs were timely in filing**

2 Defendants claim that Plaintiffs were not diligent in filing this action. (ECF
3 17 at 2.) Plaintiffs were diligent. Delays by governmental officials in responding
4 to requests for information made by Plaintiffs is one reason why this action was
5 filed when it was.

6 Litigation is always the last resort. Plaintiffs acted reasonably and in good
7 faith. They should not be penalized for not running to Court to file a lawsuit at the
8 moment a government official says no.

9 As detailed in the Complaint, (ECF 1 at ¶¶ 24-29 & Exhibits A-D),
10 Plaintiffs, through counsel, requested specific information regarding the
11 drugs that would be used to execute them. In addition to those efforts,
12 counsel requested records from the Arizona Department of Administration
13 (“ADOA”). (Letter from Dale A. Baich to Alan Ecker, July 3, 2013, attached at
14 Exhibit M.) When the agency did not respond, counsel followed up. (Email
15 from Dale A. Baich to Alan Ecker, August 2, 2013, attached at Exhibit N.)
16 When the follow-up was ignored, counsel emailed the Director of ADOA.
17 (Email from Dale A. Baich to Brian McNeal, August 28, 2013, attached at
18 Exhibit O.) ADOA responded on September 4, 2013. (email from Alan Ecker
19 to Dale A. Baich, September 4, 2013, attached at Ex. P.) Plaintiffs presently
20 have another outstanding request to ADOA, (Letter from Dale A. Baich to Alan
21 Ecker, October 2, 2013, attached at Ex. Q), and the agency has not responded.

22 Counsel for Plaintiffs had discussions with staff at the American Civil
23 Liberties Union of Arizona (“ACLU”) and learned that the ACLU was requesting
24 information concerning the drugs to be used in upcoming executions. The ACLU
25 shared the information it obtained with Plaintiffs. (ECF 1 at ¶¶ 80-90 & Exhibit
26 E; ECF 11 at 6-7 & Exhibits K-L.) Interestingly, the ACLU was provided with
27 more information than Plaintiffs were provided when they made their
28 request.

1 In addition, after the denial by ADC to Plaintiffs' requests and the ACLU
2 request, counsel for Plaintiff had a discussion with the attorney general's
3 office in a continuing effort to resolve this matter short of litigation. That
4 discussion was not fruitful.

5 Finally, the Arizona lethal injection protocol requires that the Director give
6 notice to the prisoner of the drug that will be used to carry out the execution.
7 (ADC Dep't Order 710, Attach. D, at ¶ C.1.) Plaintiffs reasonably declined to
8 engage in litigation until after ADC's self-imposed deadline, given that Director
9 Ryan had the ability until that point to make changes to the information that he
10 had given to Plaintiffs' counsel.

11 For these reasons, Plaintiffs were diligent in bringing this action.

12 **II. Defendants Misconstrue Plaintiffs' Due Process Argument and**
13 **Improperly Rely upon This Court's Decision in *West v. Brewer* in**
14 **Attempt to Foreclose This Claim**

15 Defendants are wrong in their assertion that Plaintiffs have asserted that
16 Defendants' actions "den[y] them the opportunity to litigate their Eighth
17 Amendment claim." (ECF No. 17 at 10.) Plaintiffs have argued that they cannot
18 even *assess* whether they have a valid Eighth Amendment claim because the
19 Defendants have, in violation of Plaintiffs' First Amendment rights, improperly
20 withheld information. *See* ECF No. 1 at 15, ¶¶ 137-138 (complaint stating that
21 "Defendants' failure to provide Plaintiff with the requested information regarding
22 his scheduled execution and the drug it intends to use has created a virtually
23 insurmountable barrier to the filing and prosecution of a colorable Eighth
24 Amendment claim" and that "Defendants have actively *prevented Plaintiff from*
25 *making a valid assessment* of whether he will be executed in a manner that will
26 violated his Eighth Amendment rights") (emphasis added); *see also* ECF No. 11
27 at 13 (motion for preliminary injunction stating, "By deliberately concealing
28 information *that is not confidential* from Plaintiffs, Defendants have actively

1 prevented Plaintiffs from making a valid assessment of whether they will be
2 executed in a manner that will violate their Eighth Amendment rights”).

3 Perhaps because Defendants have misconstrued Plaintiffs’ argument, they
4 rely upon the Court’s memorandum opinion in *West v. Brewer*, No. 11-cv-1409,
5 2011 WL 6724628 (D. Ariz. Dec. 21, 2011), to explain why Plaintiffs have not
6 demonstrated a likelihood of success on the merits for Claim Two. (ECF No. 17
7 at 10.) *West* is inapposite for two reasons. First, in *West*, the plaintiffs in that case
8 received the exact type of information that is now being withheld from the instant
9 Plaintiffs. Thus, in *West* there was no challenge related to obtaining information
10 about the execution drugs, as that was provided without being subject to the
11 protective order.

12 Second, in *West*, the plaintiffs argued that “[t]he current system functions to
13 allow ADC to shield itself with a facially constitutional written protocol while in
14 practice disregarding the very procedural safeguards that render this protocol
15 constitutional.” *West v. Brewer*, No. 11-cv-1409, Short Trial Br. on All Contested
16 Issues of Law, ECF No. 71 at 3 (D. Ariz. Nov. 10, 2011). The crux of the
17 argument was the defendants repeatedly claimed they would follow the written
18 protocol, but they did not. *Id.* In denying the claim, the Court determined that
19 Plaintiffs had not demonstrated an actual injury—that is, the Court found they
20 “made no attempt to demonstrate how the protocol deviations interfered with their
21 ability to challenge implementation of the protocol as constitutionally
22 objectionable.” *West*, 2011 WL 6724628 at *21. The finding by the Court that
23 the actions in that litigation did not demonstrate actual injury is not relevant to the
24 issue here. Plaintiffs are not challenging Defendants’ lethal-injection protocol.
25 They are challenging Defendants’ withholding of information to which Plaintiffs,
26 as individual citizens, are entitled under the First Amendment. The actual injury
27 is the denial of their First Amendment right to access information related to the
28 execution process and the inability to review information to assess whether there

1 exists a viable Eighth Amendment claim. Defendants’ reliance on the decisions of
2 other jurisdictions not bound by Ninth Circuit law, and that did not involve the
3 First Amendment, is irrelevant.

4 Plaintiffs’ request before this Court is for a temporary restraining
5 order or a preliminary injunction directing Defendants to provide non-confidential
6 information that is part of the State “implement[s] the most serious punishment a
7 state can exact from a criminal defendant—the penalty of death.” *Cal. First*
8 *Amendment Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002). They have
9 asked not for a stay of execution *per se*, but for access to information to which
10 they are entitled under the First and Fourteenth Amendments. They have actively
11 sought this information, are entitled to it, and have not been dilatory.

12 **III. Under the First Amendment, Plaintiffs are entitled to non-confidential**
13 **information that explains how Defendants will carry out the penalty of death.**

14 The Ninth Circuit has “determin[ed] that the public has a First Amendment
15 right of access to governmental proceedings in general and executions in
16 California in particular” *Cal. First Amendment Coal. v. Woodford*, 299 F.3d
17 at 875. Although the issue before the court was the First Amendment right of the
18 public to view the full execution process, the analysis by which the court
19 determined that the public had such a right is directly relevant here, because the
20 information Defendants are withholding is relevant to an understanding of the
21 State’s actions in the taking of life. Information about the executioner’s tool
22 (here, the drug) is relevant to an understanding of executions in general, but it is
23 even more relevant in the specific circumstances here, given Defendants’
24 difficulty in obtaining legitimate drugs in the past, and given their current
25 unwillingness to reveal basic information such as lot numbers and expiration
26 dates.

27 Moreover, Arizona’s confidentiality statute is not determinative of the First
28 Amendment. The Constitution is the supreme law of the land and, as noted by the

1 Ninth Circuit, “state statutes are never determinative of Constitutional
2 limitations.” *Stuart v. Craven*, 456 F.2d 913, 914 n.3 (9th Cir. 1972); U.S. Const.
3 art. VI.¹

4 Finally, Defendants’ assertion that it is ironic that lethal injection was
5 designed to be more humane, *citing Baze v. Rees*, 553 U.S. 35, 42, n.1 (2008), but
6 instead has involved “time-consuming litigation[,]” (Resp. Mot. for TRO, ECF 17
7 at 9) improperly conflates two issues: 1) the relationship of the intention of the
8 first states to choose lethal injection as an execution method, and the results of the
9 practical application of Arizona in using the method that other states adopted; and
10 2) the relationship of litigation vindicating individual constitutional rights to the
11 marketplace. First, even if lethal injection was intended to be more humane, the
12 fact remains that the actual *practices* in Arizona have raised constitutional
13 concerns, which have led to the necessary litigation to vindicate constitutional
14 rights. Second, the litigation that Plaintiffs (and previous Arizona death-row
15 prisoners) have pursued based on Defendants’ actions and practices in the
16 execution context is not relevant to what occurs in the marketplace. In other
17 words, if drug manufacturers become aware of the use of their products owing to
18 new reports of government activity, and those companies then choose to withdraw
19 those products from the marketplace, that decision is unrelated to the actions of
20 individual plaintiffs seeking to ensure vindicate their constitutional rights (such as
21 the First Amendment, as here).

22 **IV. Plaintiffs Attestation**

23 Plaintiffs attach the Declaration of Dale A. Baich, Exhibit R, attesting to the
24 facts alleged in the matter before the Court.

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28 ¹ Notwithstanding the fact that Plaintiffs’ First Amendment rights override
Arizona’s confidentiality statute, Plaintiffs assert that Defendants have improperly
interpreted the statute itself.

1 Respectfully submitted this 3rd day of October 2013.

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Kelley Henry
Federal Public Defender

Denise Young

s/ Kelley Henry
Counsel for Schad

Jon M. Sands
Federal Public Defender
Dale A. Baich
Robin C. Konrad
Assistant Federal Public Defenders

s/ Dale A. Baich
Counsel for Jones

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Certificate of Service

I hereby certify that on October 4, 2013 , I electronically filed the foregoing Reply to Response in Opposition to Plaintiff’s Motion for Temporary Restraining Order or Preliminary Injunction, with the Clerk’s Office by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Chelsea L. Hanson
Legal Assistant
Capital Habeas Unit

Exhibit M

Office of the
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

Jon M. Sands
Federal Public Defender

direct line: 602-382-2816
email: dale_baich@fd.org

July 3, 2013

Alan Ecker
Arizona Department of Administration
100 N. 15th Ave., Suite 401
Phoenix, Arizona 85007

Dear Mr. Ecker:

This is a public records request made pursuant to Arizona Revised Statutes section 39-121.01(D), asking that your office provide any and all records that fall within the time period of February 1, 2011, to date, relating to the information identified below. The term "record" is meant to convey the broadest possible meaning, including but not limited to: correspondence, communications, logs, reports, and forms, maintained in whatever form, including but not limited to written or electronic format.

I. Documents submitted to your office by the Arizona Department of Corrections (ADC) relating to certain procurement activities or contracts.

ADC Department Order 302.01 (attached) requires that ADC's Chief Procurement Officer maintain reports of the following procurement activities: Sole Source Procurement; Competition Impractical; Emergency Procurement; Brand Name Determination; and Determination to Utilize Requests for Proposal, and to furnish a report to the State Procurement Office¹ disclosing the number of each of the requests and disposition of each of these delegations. See highlights in Attachment.

We therefore request all records that have been submitted by ADC's Chief Procurement Officer, as well as those generated by your office in response or relation to these aforementioned reports.

To the extent that ADC's reports only contain numerical data and do not specify the products at issue, please provide us with all reports covering this time period, as well as any supporting or otherwise related records that ADC submitted or your office produced in relation to these reports.

¹ Department Order 302.01 section 1.2.2 requires that the ADC Chief Procurement Officer submit the reports to the "State Purchasing Office." Our public records request is directed to the properly constituted division of the Arizona Department of Administration, whether that division is listed as the State Purchasing Office, State Procurement Office, or some other name.

Alan Ecker
Page 2

However, if ADC's reports are not simply numerical, but instead provide details regarding the designations of specific items, we request copies of reports only relating to the acquisition of the following pharmaceutical supplies, whether they are identified by the names listed below or by any other name:

- Sodium Thiopental (also known as Thiopental Sodium, Sodium Pentothal, and Pentothal)
- Pentobarbital (also known as Pentobarbital Sodium and Nembutal)
- Phenobarbital (also known as Phenobarbital Sodium)
- Propofol (also known as Diprivan)

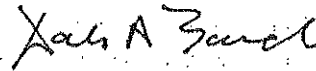
II. Documents relating to pay warrants pertaining to certain pharmaceutical products.

Please provide all documents relating to pay warrants between your office and any foreign or domestic vendors concerning the same pharmaceuticals as identified above in section I. This request includes but is not limited to, contracts, communications, telephone logs, and any records relating to purchases or attempted purchases pertaining to these pay warrants, maintained in whatever form, including but not limited to written or electronic format.

These requests are ongoing. As you receive information relevant to these requests, please provide it to me immediately.

Pursuant to Arizona Revised Statutes section 39-121.01(D)(1), I ask that you promptly furnish me copies of these documents. I will pay any copying fees incurred for these documents. If you will be unable to provide copies of these documents by Wednesday, July 17, 2013, I ask that you notify me immediately; in that case, I or my agent will come to your office to view the documents on your premises. See Ariz. Rev. Stat. § 39-1201.01(D)(1).

Sincerely,



Dale A. Baich, Supervisor
Capital Habeas Unit

DAB/clh

Exhibit N

public records request

Dale Baich to: alan.ecker
Cc: Chelsea Hanson

08/02/2013 04:00 PM

Alan,

I sent a public records request to you on July 2, 2013 (attached) and I have not received a response.
Please advise me of the status of the request.

Best regards,

dale

Dale A. Baich
Office of The Federal Public Defender
for the District of Arizona
Capital Habeas Unit
602-382-2816 office
602-625-2111 mobile
602-320-4991 mobile



2013.07.03 AZ DOA Ecker request.pdf



2013.07.03 AZ DOA Attachment.pdf

Exhibit O



Fw: Request for follow-up on public-records request

Kim Stout to: Chelsea Hanson

09/10/2013 08:19 AM

History: This message has been replied to.

From: Dale Baich/AZF/09/FDO
To: Brian.Mcneil@azdoa.gov,
Date: 08/28/2013 04:49 PM
Subject: Request for follow-up on public-records request

Hi Brian,

I'm emailing you about a public-records request, a copy of which is attached, that I sent to the Alan Ecker at the DoA on July 3. I'm hoping that you might be able to help me determine the status of the request, because we have not yet received a response from Mr. Ecker, despite several attempts to reach him.

My first follow-up contact was via email, which I sent on August 2. Subsequently, one of my staff, Kim Stout, left two voicemails with Mr. Ecker. She made the first call on August 20 at 1015. Ms. Stout identified herself as a member of our office, explained that she was calling on my behalf, and asked for an update on my records request. Then, because she had not heard from him, she called again today, August 28 at 0930, and left another voicemail. We still have not heard from him.

I have worked with Mr. Ecker in the past and have found him responsive and helpful. Perhaps Mr. Ecker is out of the office, or perhaps he is no longer the appropriate contact for public-records requests. Whatever the reason, I'm hoping that you might be able to assist me in getting a response.

dale

Dale A. Baich
Office of The Federal Public Defender
for the District of Arizona
Capital Habeas Unit
602-382-2816 office
602-625-2111 mobile
602-320-4991 mobile



2013.07.03 AZ DOA Attachment.pdf



2013.07.03 AZ DOA Ecker request.pdf

Exhibit P

Fw: public records request
Dale Baich to: Kim Stout

09/04/2013 04:28 PM

----- Forwarded by Dale Baich/AZF/09/FDO on 09/04/2013 04:28 PM -----

From: Alan Ecker <Alan.Ecker@azdoa.gov>
To: Dale Baich <Dale_Baich@fd.org>
Date: 09/04/2013 04:08 PM
Subject: RE: public records request

Dale,

This email is in response to your records request dated July 2, 2013.

Regarding item I, the State Procurement Office does possess the quarterly reports that you reference. However, none of those reports contain any information pertaining to the pharmaceuticals you listed in your four bullet points. In fact, none of the reports reference any pharmaceuticals.

Regarding item II, the General Accounting Office does not have any information pertaining to the pharmaceuticals identified in section I. The AFIS accounting system does not contain information at that level of detail.

While ADOA does not have any of the information pursuant to your request, please be advised that there is a provision of law, A.R.S. 13-757 (C) concerning the disclosure of certain information related to your request that prohibits disclosure of information within the scope of that provision.

Thanks,

Alan Ecker

-----Original Message-----

From: Dale Baich [mailto:Dale_Baich@fd.org]
Sent: Friday, August 02, 2013 4:01 PM
To: Alan Ecker
Cc: Chelsea Hanson
Subject: public records request

Alan,

I sent a public records request to you on July 2, 2013 (attached) and I have not received a response. Please advise me of the status of the request.
Best regards,

dale

Dale A. Baich
Office of The Federal Public Defender
for the District of Arizona

Capital Habeas Unit
602-382-2816 office
602-625-2111 mobile
602-320-4991 mobile

(See attached file: 2013.07.03 AZ DOA Ecker request.pdf) (See attached file:

2013.07.03 AZ DOA Attachment.pdf)

Exhibit Q

Office of the
FEDERAL PUBLIC DEFENDER
for the District of Arizona
Capital Habeas Unit

Jon M. Sands
Federal Public Defender

direct line: 602-382-2816
email: dale_baich@fd.org

October 2, 2013

Hand-Delivered

Alan Ecker
Arizona Department of Administration
100 N. 15th Ave., Suite 401
Phoenix, Arizona 85007

Dear Mr. Ecker:

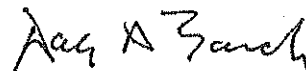
This is a public-records request made pursuant to Arizona Revised Statutes section 39-121.01(D), asking that your office provide any and all records that fall within the time period of January 1, 2011 through December 1, 2011, relating to and including any pay warrants or vouchers, supporting documents (correspondence, communications, logs, reports, and forms, maintained in whatever form, including but not limited to written or electronic format), and were paid on behalf of the Arizona Department of Corrections for the following domestic vendors:

- Cardinal Health
- Morris Dickson
- Physician's Sales & Service
- Amerisource Bergen

These requests are ongoing. As you receive information relevant to these requests, please provide it to me immediately.

Pursuant to Arizona Revised Statutes section 39-121.01(D)(1), I ask that you promptly furnish me copies of these documents. I will pay any copying fees incurred for these documents. If you will be unable to provide copies of these documents by 12:00 p.m. on October 4, 2013, I ask that you notify me immediately; in that case, I or my agent will come to your office to view the documents on your premises. *See* Ariz. Rev. Stat. § 39-1201.01(D)(1).

Sincerely,



Dale A. Baich, Supervisor
Capital Habeas Unit

DAB/clh

Exhibit R

1 Declaration of Dale A. Baich

2 I Dale A. Baich, hereby declare the following to be true to the best of my
3 knowledge and belief.

- 4 1. On July 19, 2013, I requested information from the Arizona Department
5 of Corrections (“ADC”) about the drugs ADC intended to use in
6 Plaintiffs’ executions. Specifically, I asked for information about the
7 drugs’ manufacturer and source; the drugs’ lot numbers and expiration
8 dates; whether the drugs are from a domestic or foreign source; and
9 whether the drugs have federal Food and Drug Administration (FDA)
10 approval. *See* Exhibit A to Complaint.
- 11 2. In that same letter, I asked ADC Director Charles Ryan to provide
12 documentation indicating that the persons tasked with executing Plaintiffs
13 had authority to handle substances that are classified as controlled
14 substances under the federal Controlled Substances Act. *See* Exhibit A to
15 Complaint.
- 16 3. On July 30, 2013, Director Ryan responded by asserting that ADC
17 “intends to use unexpired, domestically obtained Pentobarbital for these
18 executions.” *See* Exhibit B to Complaint.
- 19 4. On August 6, 2013, I sent Director Ryan a follow-up letter, asking for the
20 answers to my previous questions, and asking if ADC intended to use
21 Nembutal®, which is the brand name for FDA-approved pentobarbital.
22 *See* Exhibit C to Complaint.
- 23 5. On August 16, 2013, Director Ryan responded, asserting that information
24 about the name of the manufacturer and the source of the drug “is
25 confidential and is not subject to disclosure under A.R.S. § 13-757(C).”
26 *See* Exhibit D to Complaint.
- 27 6. To date, the State has refused to provide Plaintiffs with the information I
28 requested regarding the pentobarbital it intends to use in their executions.

- 1 7. I had discussions with staff at the American Civil Liberties Union of
2 Arizona (“ACLU”) and learned that the ACLU was requesting
3 information concerning the drugs to be used in upcoming executions. The
4 ACLU shared the information it obtained with me. *See* Exhibit E to
5 Complaint; Exhibits K & L to Application for Preliminary Injunction. The
6 ACLU was provided with more information than Plaintiffs were provided
7 when they made their request.
- 8 8. Beginning in July, 2013, through October 2, 2013, I made requests to the
9 Arizona Department of Administration for information. *See*, Exhibits M –
10 Q to Reply to Response to Application for Preliminary Injunction. I have
11 not received records from the agency.
- 12 9. After the denial by ADC to Plaintiffs’ requests and the ACLU request, I
13 had a discussion with the attorney general’s office in a continuing effort to
14 resolve this matter short of litigation. That discussion was not fruitful.
- 15 10. Finally, the Arizona lethal injection protocol requires that the Director
16 give notice to the prisoner of the drug that will be used to carry out the
17 execution. While Mr. Schad has been provided notice, as of this filing,
18 Mr. Jones has not been similarly advised.

19 I declare under penalty of perjury and the laws of the United States that the
20 foregoing is true and correct to the best of my information and belief.

21 Dated this 4th day of October, 2013, in Phoenix, Arizona.

22 

23

Dale A. Baich