

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joseph Rudolph Wood III, et)	
al.,)	
)	No. CV 14-1447-PHX-NVW
Plaintiffs,)	
vs.)	
)	Phoenix, Arizona
Charles L. Ryan, et al.,)	July 9, 2014
)	10:07 a.m.
)	
Defendants.)	

BEFORE: **THE HONORABLE NEIL V. WAKE, JUDGE**

(Motion for Preliminary Injunction)

Official Court Reporter:
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P R O C E E D I N G S

THE COURTROOM DEPUTY: This is Civil Case 2014-1447, Joseph Wood, III, et al., versus Charles L. Ryan, et al. This is the time set for oral argument.

Counsel, please announce for the record.

10:07:04

MS. KONRAD: Robin Konrad and Dale Baich on behalf of Joseph Wood who is appearing by video.

MR. ZICK: Good morning, Your Honor. Jeff Zick, Jeff Sparks, Matt Binford, and Lacey Gard from the Arizona Attorney General's Office on behalf of defendants.

10:07:21

THE COURT: Good morning, counsel. And good morning, Mr. Wood.

And also listening is Margaret Epler, who is a staff attorney with the Court of Appeals.

I will hear what either of you want to say. I have some questions as well. Ms. Konrad, it's your motion so you can go first.

10:07:35

MS. KONRAD: Thank you, Judge Wake.

Mr. Wood has made a simple request: He asked for public governmental information related to the drugs that will be used in his scheduled execution. Defendants have refused to provide that information, and their actions have violated Mr. Wood's First Amendment rights.

10:08:03

Mr. Wood seeks a preliminary injunction preventing defendants from carrying out his execution unless and until

10:08:19

1 they provide the public information that he has requested. Mr.
2 Wood can show a likelihood of success on Claim 2 from his
3 complaint.

4 THE COURT: I want to be clear that the motion for
5 preliminary injunction is grounded solely on the First 10:08:35
6 Amendment argument and none of the others. There's one line in
7 your brief where you reference due process, but there's nothing
8 elaborated in any claim for due process.

9 So my understanding is the sole basis for the relief
10 sought here is the First Amendment theory under Count 2, 10:08:55
11 correct?

12 MS. KONRAD: That is correct, Judge Wake.

13 Under Ninth Circuit precedent, there is a First
14 Amendment right of access to the execution process and the
15 information and documents related to that process. *California* 10:09:07
16 *First Amendment Coalition* determined that an execution is a
17 public governmental proceeding for which citizens have a First
18 Amendment right of access.

19 The circuit has also recognized that --

20 THE COURT: Well, that's once the prisoner enters the 10:09:24
21 execution chamber, right?

22 MS. KONRAD: The specifics in that case were related
23 to the execution itself. However, by finding that the
24 execution process is -- has been historically open to the
25 public, the case stands for the proposition that the execution 10:09:42

1 process is an open, public governmental proceeding.

2 THE COURT: Actually, none of the things you request
3 here have historically been supplied to the public, have they?
4 I mean, there's three things: One, sources and manufacturers,
5 national drug codes and lot numbers of the drugs intended to be 10:10:02
6 used; number two is medical professional and controlled
7 substances qualifications and certifications of the personnel;
8 and number three, the manner in which the defendants develop
9 their lethal injection drug protocol. I'm really not quite
10 sure what that means. But none of those are historically open 10:10:19
11 to the public, have they been?

12 MS. KONRAD: Some of that information has been
13 provided to the public, not under the confidentiality statute.
14 The defendants have provided that information in *West versus*
15 *Brewer*, the case that was before Your Honor. And -- but what 10:10:36
16 is important and what this Court needs to understand is that
17 there is a First Amendment right to the execution process, that
18 that is the *First Amendment Coalition* case held that there is a
19 First Amendment right of access to the execution process.

20 The second part of that deals with documents and 10:10:58
21 information related to the execution process, which is what we
22 are asking for. And --

23 THE COURT: Neither the Ninth Circuit authority nor
24 any other circuit authority supports that, does it? There's no
25 case that says that -- now, let me interrupt myself. There's a 10:11:14

1 lot of discussion here at an extremely high level of
2 abstraction. I'm talking about these three categories of
3 documents that you are seeking. And there's no appellate
4 authority that gives the First Amendment right to any of those,
5 have there?

10:11:35

6 MS. KONRAD: There has not been an appellate court who
7 has had the opportunity to reach this issue. This issue is
8 before this Court. However, there is Ninth Circuit precedent
9 to support the notion that the First Amendment right of access,
10 once the courts have recognized a First Amendment right of
11 access to a governmental proceeding, which it has here
12 regarding an execution, then that extends to records and
13 documents in governmental proceedings.

10:11:51

14 THE COURT: What's the authority for extending that to
15 the records and the specific things you are requesting? I
16 guess you have already answered my question. There is no
17 authority.

10:12:09

18 MS. KONRAD: There has not been authority on these
19 specific documents. However, the Ninth Circuit in a recent
20 decision from this year in *Courthouse News Service versus*
21 *Planet*, that's 750 F.3d at 776, there, the Court has recognized
22 that the Supreme Court has repeatedly held access to public
23 proceedings and records is an indispensable part of the
24 predicate to free expression about workings of the government
25 and also recognized that the Federal Courts of Appeals have

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10:12:46

1 widely agreed that access to documents and records extends to
2 civil cases. The Supreme Court --

3 THE COURT: Here's my problem.

4 MS. KONRAD: Uh-huh.

5 THE COURT: This is on an extremely high level of
6 generality, but cases are decided on facts.

7 MS. KONRAD: Correct.

8 THE COURT: I want to discuss what you are asking for
9 here and how you get to that. And I don't see anything that
10 supports any of that. You have that recent decision from Judge
11 Silver, but that's the only thing I can see that really
12 supports you on that. And all the others appear to be dead
13 against you.

14 MS. KONRAD: I'm sorry. Could you repeat that last
15 part, Judge?

16 THE COURT: All the other authority appears to be dead
17 against these contentions.

18 MS. KONRAD: The authorities that the State has cited
19 in their response, as we discuss in our reply, they are
20 generally discussing the proposition that non-public
21 information is not available when they are talking specifically
22 about First Amendment cases. And they also cite cases that
23 aren't even dealing with First Amendment principles.

24 Here, as *California First Amendment Coalition* takes us
25 through the First Amendment analysis and explains what is

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10:13:39

10:13:53

10:14:13

1 necessary, and they, that court, held that the First
2 Amendment -- there's a First Amendment right of access to the
3 execution process.

4 And what, Judge Wake, I'm -- I think you are correct.
5 I agree with you that there has not been a court, an appellate 10:14:30
6 court, who has actually decided the facts of this case, that
7 these are new facts which happen all the time. But the
8 principles of the First Amendment and the First Amendment law
9 support Mr. Wood as a public citizen to seek this information
10 under the First Amendment. 10:14:51

11 The -- in order to have access to the information, in
12 order to have -- this is an open public governmental
13 proceeding, executions have been. *First Amendment Coalition*
14 went through the history and has held it's been a historically
15 open public governmental proceeding. 10:15:13

16 So what we're asking for is not information that is
17 private information. We're not asking for information that
18 would be identifying persons involved.

19 THE COURT: In terms of open proceedings, if anybody,
20 and people now can, watch these executions through the public, 10:15:29
21 the public can indirectly through the press and others, you
22 don't see any of this stuff when you watch the execution. All
23 this is background events, information. None of this has
24 anything to do with the actual observance of the execution
25 process, does it? 10:15:52

1 MS. KONRAD: That is accurate. However, just as the
2 Supreme Court has said that the public has an access -- a right
3 of access to criminal trials, they also have access to the
4 information surrounding those trials. So it's not just simply
5 coming to the governmental process and viewing the governmental 10:16:10
6 process. Where the governmental process has been found to be a
7 historically open proceeding, which it has under *First*
8 *Amendment Coalition*, then what attaches to that right is also
9 information that is related to that governmental proceeding.
10 And here, we -- if there is a First Amendment right, which 10:16:32
11 there is, then the defendants need to demonstrate that there is
12 some reason, they have not provided any reason much less
13 meeting the standard under the First Amendment, to withhold
14 this information.

15 THE COURT: Why do you need to know the identity of 10:16:52
16 the manufacturer? So that the manufacturer can be subjected to
17 public pressure to stop supplying these drugs as all others
18 have who have been publicly known to supply this stuff? Is
19 that why you need the identity of the manufacturer? What do
20 you need it for? 10:17:10

21 MS. KONRAD: Well, first of all, a public citizen
22 doesn't need to tell why he would like information that's
23 available to him under the First Amendment. There's no
24 requirement that they explain why they need the information.
25 However -- 10:17:25

1 THE COURT: Let's be clear then. You want all this.
2 There's no reason for it, but it's your right. And that's what
3 you are asking in your injunction. There's no reason, no need
4 for it, but you have a right for it. If that's your
5 preliminary injunction, you are really swimming up the
6 waterfall.

10:17:36

7 MS. KONRAD: The reason for the information is the
8 basis for the First Amendment to allow public debate over
9 things. The information is valuable to the public. If Mr.
10 Wood has access to --

10:17:54

11 THE COURT: Well, other than knowing that particular
12 people are supplying drugs for this purpose, for the collateral
13 consequence, what is the reason for knowing the identity, what
14 is your reason for knowing the identity of the manufacturer?
15 You say sources. I assume that means the same thing. Lot
16 numbers, how could you have lot numbers without identifying
17 manufacturer? I mean, can you -- does the -- I'm not sure I
18 know exactly what that means, but it sounds to me like if you
19 identify lot numbers that's telling you the manufacturer. Is
20 that right?

10:18:09

10:18:27

21 MS. KONRAD: Correct.

22 THE COURT: And national drug codes, help me out with
23 that.

24 MS. KONRAD: The national drug code is a specific code
25 that is given to drugs, I believe, when they are FDA

10:18:34

1 registered.

2 THE COURT: What does -- I mean, that I'm not familiar
3 with. So tell me what that is and what is the usefulness of
4 you knowing that.

5 MS. KONRAD: This information is to be used for public 10:18:50
6 debate and further discussion about the death penalty.

7 THE COURT: You know, I'm not finding that high level
8 of abstraction to be useful. I'm asking you for something that
9 -- what use is going to be made of that public debate other
10 than to expose the manufacturer to public pressure because they 10:19:07
11 are manufacturing and supplying this?

12 MS. KONRAD: Well, on the other hand, Judge Wake, it
13 could let the public know this manufacturer has supplied it and
14 perhaps people who are pro-death penalty will choose to buy
15 stock in that corporation, will come out publicly to speak out 10:19:23
16 for, in favor, of that. It's not a one-sided debate. This
17 information is -- our government is based on the idea of free
18 flow and of information. And --

19 THE COURT: I do appreciate your candor in
20 acknowledging what I suspected here, which is the reason this 10:19:41
21 is being sought is to dry up the source of these drugs by
22 bringing consumer or public pressure against people. So I do
23 appreciate your candor acknowledging that. So that comes
24 back -- this is actually quite similar to the statutory
25 prohibition of releasing the identity of people involved in the 10:20:01

1 execution. You want to get the identity of the supplier so
2 that pressure can be brought on them so that they will stop
3 supplying this. I suspected that. I appreciate your candor in
4 acknowledging it. Go ahead.

5 MS. KONRAD: Judge Wake, I think you may have 10:20:19
6 misunderstood me, because I didn't agree that the reason, the
7 sole purpose is to put pressure on these companies. Part of it
8 is to discuss the companies, perhaps looking into the
9 companies, what are their manufacturing process. The public
10 has a right to know this information and have a discussion. 10:20:35

11 As I mentioned, it could also be people supporting the
12 companies, people wanting to come out and say that these
13 companies are doing a good service, are providing drugs that
14 are necessary.

15 THE COURT: This is the exact same true of the 10:20:49
16 identity of the people involved in the execution process. If
17 we know who they are, their friends may have occasion to
18 dialogue with them about it. We can check further into
19 whatever we want. We can appeal to their own sense of whether
20 it's policy or law or morals. It seems your argument applies 10:21:05
21 equally to the identity of the people involved in the process.

22 MS. KONRAD: I would disagree. In First -- *California*
23 *First Amendment Coalition*, I believe, supports this that there
24 is a compelling, legitimate, penological interest in protecting
25 the safety of the people who participate in the executions 10:21:27

1 protecting their identities. It's part of security purposes.
2 There's reasons tied to the prison.

3 Here, these are outside companies. They have nothing
4 to do with the prison itself. For example, in the past, the
5 defendants have provided information regarding suppliers of the 10:21:49
6 catheters that are used in the execution, of the restraint
7 belts. They have not contained that information. They have
8 not claimed that that information is confidential. And so this
9 here, drug manufacturers, people who are supplying things that
10 are to be used in an execution have not been kept confidential 10:22:12
11 historically.

12 THE COURT: Go ahead.

13 Well, I do have a question for you. And it has to do
14 with laches and bringing this motion. The letter from counsel
15 for the Department, on April 22, says, in part, the Department, 10:22:48
16 quote, "will use midazolam and hydromorphone in a two-drug
17 protocol," close quote. And then it says, "In the event ADC is
18 able to procure pentobarbital, ADC will provide notice of its
19 intent to use that drug in accordance with the Department Order
20 710," et cetera. 10:23:16

21 But the letter of May 6th says the Department, quote,
22 "will use midazolam" -- I'm not sure I'm pronouncing it
23 right -- "midazolam and hydromorphone in a two-drug protocol in
24 the event that a warrant of execution is issued." It says
25 nothing about doing anything else. 10:23:42

1 And then the letter of June 6 really talks about other
2 matters, tells what they are going to -- what they supplied or
3 will not supply. And from May 6th until July 2nd, which is the
4 day you filed this motion, was what, about seven weeks? 56
5 days. Execution is set for July the 23rd. And let's see.
6 When was that writ issued setting that date?

10:24:22

7 MS. KONRAD: When was the warrant issued?

8 THE COURT: Yes. Right.

9 MS. KONRAD: I'm not sure off the top of my head.
10 Perhaps the defendants know off the top of their head.

10:24:42

11 THE COURT: Mr. Zick, do you know off the top of your
12 head?

13 MR. ZICK: I don't know.

14 THE COURT: I'm trying to figure out how long there
15 was notice of this execution date in relation to --

10:24:50

16 MS. KONRAD: I believe it was May 29th. It was the
17 last week of May.

18 THE COURT: So that's about 55 days. 55 days from the
19 issuance of the warrant of execution to the date of the
20 execution. And you had known for three weeks before the
21 warrant was issued of the State's position and yet you took, of
22 those 55 days, you took 33 of those 55 days to file your
23 motion, leaving three weeks for the other side to respond to
24 your motion, for this Court to study the matter, rule on it,
25 and leave time for the Court of Appeals to consider what will

10:25:40

10:26:15

1 likely be appellate review of whatever decision this Court
2 makes.

3 Why is that not laches? That is unreasonable delay in
4 seeking the relief to the prejudice to the process, to the
5 courts, and to the other side in responding. Why do you get 33
6 days and gave them four days -- three days. I have got two
7 days. Court of Appeals will -- I'm moving this as fast as I
8 can so that the Court of Appeals will have the most time
9 possible to deal with any appeal. Why is that not unreasonable
10 delay that bars preliminary injunctive relief?

10:26:33

10:26:55

11 MS. KONRAD: Let me explain to you why, Judge Wake.
12 In that letter that you quoted from May 6th that you said that
13 the Department of Corrections said they will use midazolam and
14 hydromorphone. What's important to note on that letter is the
15 very last sentence, the last two sentences: "ADC will continue
16 to look for a source of pentobarbital indefinitely. If
17 successful, you will be notified in accordance with the
18 protocol." So the protocol that they are referencing in this
19 section, Attachment D, Subsection 2, indicates that the
20 prisoner gets notice 20 days before the execution.

10:27:13

10:27:31

21 So while that letter did indicate that they were
22 intending to use, there was still a possibility under the
23 protocol that they have developed and that they have -- the
24 defendants have said they follow, that the execution manner
25 could change at any time, the drugs.

10:27:55

1 And so what Mr. Wood did, through counsel, was
2 continue to ask questions to Defendant Ryan about the execution
3 process, to learn this information as he is entitled to under
4 his First Amendment rights.

5 When Director Ryan sent the letter on June 6th and
6 attached some information which you noted was not entirely
7 relevant here, at that point, then plaintiffs worked on their
8 lawsuit and brought it as quickly as possible. And then Mr.
9 Wood brought this motion for a preliminary injunction only
10 three days after receiving notice that, in fact, under --
11 notice pursuant to the protocol, how he would be executed.

12 THE COURT: Well, let's break it down into the three
13 parts again. Two of those parts didn't seem to be affected by
14 that at all, that is, the demand for the medical, professional,
15 and controlled substance qualifications and certifications of
16 the personnel and the manner in which the defendants developed
17 the lethal injection drug protocol. They did give answers and
18 it's pretty clear that's what they are giving you and nothing
19 more. How is that affected by this caveat that they may be
20 looking for other drugs and will give 20 days notice if they do
21 intend to use another drug? How are those two categories --
22 how are you justified in delaying -- in seeking an injunction
23 for those two categories?

24 MS. KONRAD: Those categories can't be separated. I
25 mean, as you are aware, we, on behalf of our clients, take time

1 to make sure that what we're coming to this Court and
2 presenting is what we feel a meritorious claim. And so to
3 bring part of a claim and then two or three weeks later bring
4 the other part, it just didn't seem to make sense as far as
5 judicial economy, as far as the timing, having multiple pieces
6 of litigation happening at the same time.

10:29:56

7 And so what has happened in the past during the last
8 two most recent executions, was we came into this Court. The
9 information we were seeking was turned over pursuant to the
10 Court order, and so we believe that there was a legitimate
11 reason in the request, and we had to ask for this information
12 related to the --

10:30:18

13 THE COURT: It's very different information.

14 MS. KONRAD: Some of it is additional information. I
15 will agree with you on that, Judge Wake.

10:30:30

16 THE COURT: I'm not endorsing the reasoning in any
17 other court's order, but as a practical matter, what you are
18 seeking in other matters is different, arguably a lot more
19 significant, than what you are seeking in this injunction. So
20 the fact that you may have persuaded another judge to order
21 them to produce certain information in no way suggests that you
22 are going to get that for any information you ask for in the
23 future if it's different information.

10:30:47

24 Tell me why that's -- well, I'm really speaking out
25 loud.

10:31:03

1 MS. KONRAD: It's our position that Judge Silver's
2 order was correct in her analysis of the First Amendment that
3 Mr. Wood, as a individualized citizen, has a public interest
4 right in this information to the historically open governmental
5 proceeding of executions. And that is the basis, again, why
6 we're here, why we're seeking that information.

10:31:21

7 THE COURT: All right.

8 MS. KONRAD: If you have no other questions.

9 THE COURT: That's fine. We'll hear from the other
10 side.

10:31:37

11 MR. BINFORD: Good morning, Your Honor.

12 Preliminary injunction --

13 THE COURT: State your name, please.

14 MR. BINFORD: I'm Matthew Binford. I'm from the
15 Attorney General's Office and I'm representing the defendants.

10:31:58

16 A preliminary injunction is a drastic measure, and the
17 plaintiffs have a high burden to meet. In this case, they have
18 to show that they have a First Amendment right to obtain
19 information within the government's control. They are unable
20 to meet that burden because there is no First Amendment right
21 to information within the government's control. The First
22 Amendment does not confer upon them a right to force the
23 government to turn over information.

10:32:13

24 Two recent cases, *Owens* and *Wellons*, addressed a
25 prisoner's claim under the First Amendment to access

10:32:27

1 information similar to what's requested here. In *Owens*, the
2 Georgia Supreme Court case, the Supreme Court there found that
3 there is no First Amendment right to that information.
4 Similarly, in *Wellons*, the 11th Circuit found that there's no
5 right to that information under the First Amendment.

10:32:45

6 Other cases from across the country have addressed
7 similar issues under a due process claim. And we understand
8 it's clear that they are not raising this as a due process
9 claim.

10 THE COURT: I want to be clear about that. That is
11 not presented. It is not before me. I will do nothing with
12 that and it cannot possibly be error for me to not to think
13 about grounded on that because the other side has made no such
14 contention and it's not before me.

10:32:56

15 MR. BINFORD: So if we focus on the First Amendment,
16 Judge, we agree that prisoners don't lose First Amendment
17 rights when they enter the prison doors. Prisoners enjoy
18 rights similar to the free citizens to the media. But the
19 bottom line is there is no First Amendment right to government
20 to turn over information no matter what your status in society
21 is. The media doesn't have a First Amendment right to force
22 the government to turn over information. Your average free
23 citizen doesn't have the right to force the government to turn
24 over information. So Mr. Wood does not have that right,
25 either.

10:33:14

10:33:30

10:33:42

1 The Supreme Court has said there's no constitutional
2 right to have access to particular government information.
3 They said that in *Houchins*. Neither the First Amendment nor
4 the Fourteenth Amendment mandates the right of access to
5 government information or sources of information within the
6 government's control. 10:33:54

7 If you look to the text of the First Amendment it
8 restricts Congress from doing something. It says, "Congress
9 shall make no law abridging the freedom of speech." It doesn't
10 say that Congress shall turn over papers within their 10:34:06
11 possession, and it doesn't say that people shall have the right
12 to obtain documents within the government's possession.

13 As the Third Circuit has said, "it requires some
14 straining of the text to construe the Amendment's explicit
15 preclusion of government interference as conferring upon each 10:34:21
16 citizen a presumptive right of access to any government-held
17 information which may interest him or her."

18 The plaintiffs rely on the *California First Amendment*
19 *Coalition* case. In that case, the Ninth Circuit held that the
20 public enjoys a limited qualified right to view an execution 10:34:37
21 from the moment the condemned prisoner walks into the execution
22 chamber. That's all that case held. The Ninth Circuit had a
23 chance to expand upon that case in the recent *Otter* case
24 regarding the Idaho Department of Corrections and access to
25 observe executions there. They didn't expand. They said, "As 10:34:54

1 we held before, there is a right to witness an execution,
2 qualified right, from the moment the prisoner enters."

3 That case talked about witnessing a proceeding. It
4 didn't talk about accessing government information. And it's a
5 large leap to say that just because you have a right to witness 10:35:09
6 a proceeding you all of a sudden have right to information that
7 may or may not concern that proceeding.

8 Wood has failed to cite to any binding precedent that
9 stands for the proposition that the public enjoys a First
10 Amendment right to obtain government information. And to the 10:35:24
11 contrary, the U.S. Supreme Court has said otherwise. In the
12 cases we have cited in our briefing, *Houchins*, *McBurney*
13 *Virginia State Board of Pharmacy*, *Zemel v. Rusk*, and *LAPD*
14 *versus United Reporting* all say there is no First Amendment
15 right to obtain government documents. 10:35:43

16 THE COURT: Those two are on an extremely high level
17 of generality, however, they favor you. But with respect to
18 this focused inquiry about matters directly relating to
19 executions, those are the cases that would be more helpful to
20 the Court. 10:36:01

21 MR. BINFORD: Well, in the *California First Amendment*
22 *Coalition* case, they conducted an analysis under *Press*
23 *Enterprise II*. But the *Press-Enterprise* test only applies to
24 government proceedings. It doesn't apply to documents within
25 the government's control. And they are not seeking access to 10:36:15

1 any government proceeding here. They are seeking access to
2 documents that the Department of Corrections, or information
3 that the Department of Corrections has. And they are seeking
4 to force the Department to turn over that information.

5 If -- even if a *Press-Enterprise II* analysis was 10:36:29
6 conducted, this Court would look at whether the place and
7 process has historically been open to the press and general
8 public. Well, there is no place and process because these are
9 documents. It's information within Corrections' control. But
10 if you look to see whether these documents have historically 10:36:44
11 been available to the public, they have not. Corrections has
12 never issued a press release saying that this is the source of
13 the drugs we intend to use. They have never had a press
14 conference saying these are the qualifications of the medical
15 team members and this is how we decided to come up with these 10:36:58
16 two chemicals to use in this execution.

17 The only time that information has even been turned
18 over to anyone outside of Corrections is when there's lawsuits
19 going on, when there's ongoing litigation. Last time it was in
20 response, over objection, to Judge Silver's order. In *West* it 10:37:14
21 was part of the discovery process. But this information hasn't
22 been historically given out to the public. It hasn't even
23 historically been given to the plaintiffs in this case or to
24 the Federal Public Defender's Office who has represented the
25 plaintiffs in many of these cases. 10:37:30

1 In regards to the second -- I mean, if you -- they
2 can't meet the first prong, but even if you got to the second
3 prong, whether public access plays a significant positive role
4 in the functioning of this particular process, again, we're not
5 talking about a process. We're talking about documents, 10:37:47
6 information the government has. But the source of the drugs
7 really plays no positive role in the functioning of executions.
8 The debate -- ADC has been very forthcoming in the past about
9 the drugs that will be used. They have been proactive. They
10 sent that letter out on April 22nd and said, look, these are 10:38:03
11 the two drugs we're going to use. We may find pentobarbital
12 but right now these are the two drugs we are going to use.

13 THE COURT: Let's talk about that for a minute. It
14 gets to the laches argument which you have made and I have
15 asked about. 10:38:19

16 So until the May 28 letter, whatever, the Department
17 is explicitly saying this is how we're going to do it and this
18 is the drugs we're going to use unless we do it some other way.
19 Isn't that the message you gave them right until May 28th?

20 MR. BINFORD: Yes. That's what it says in the 10:38:44
21 letters.

22 THE COURT: So how can it be laches for them to want a
23 real case or controversy before they come to court for relief?

24 MR. BINFORD: I think -- well, their claim is that a
25 First Amendment right attaches to this information no matter 10:38:59

1 what chemicals or drugs are used.

2 THE COURT: That's the merits of the claim. I'm
3 talking about laches now, whether they waited an unreasonable
4 and prejudicially long time before coming to court.

5 MR. BINFORD: I guess I wasn't making it clear, but no 10:39:16
6 matter what drug we use, whether it was pentobarbital or
7 midazolam and hydromorphone, they would have been able to raise
8 these claims. They could have amended a complaint if they
9 filed a complaint and we changed it to pentobarbital or the
10 drugs suddenly became available. They could have amended their 10:39:32
11 complaint. They could have amended any motion for injunctive
12 relief.

13 THE COURT: Well, the second and third categories
14 perhaps, but the sources, manufacturers, national drug codes
15 and lot numbers, you can't give them that until you know what 10:39:46
16 drugs you are going to use. And you are explicitly telling
17 them, you are keeping it open as to what drugs you are going to
18 use. And they didn't know until May 28. I mean -- I said May.
19 I said May. June 28.

20 MR. BINFORD: But nothing stopped them from asking on 10:40:05
21 April 22nd about the NDC numbers or lot numbers from the
22 hydromorphone and midazolam.

23 THE COURT: But you refused that. You made clear you
24 weren't going to give them that.

25 MR. BINFORD: And we -- I'm sorry, Judge. 10:40:18

1 THE COURT: So the issue isn't whether it was clear
2 whether you weren't going to give them these drugs, the issue
3 is what drugs you were going to use and whether there's a case
4 or controversy for them to come to court saying, we have a
5 constitutional right to have this information. We don't know
6 if they are going to actually use this stuff. Some day they
7 will tell us. But we want you to adjudicate now that if they
8 end up using these drugs we have a right. That doesn't sound
9 like a case or controversy the way we usually think of it
10 because your client wouldn't make up its mind.

10:40:31

10:40:46

11 MR. BINFORD: Well, if the law is as they say it is
12 and they have a First Amendment right to this information
13 then --

14 THE COURT: But we don't adjudicate hypothetical
15 questions. We don't give advisory opinions. We don't tell
16 people, if you do this, that will be okay. You don't have to
17 tell me whether they are going to do that. We don't do that in
18 federal court. That's contrary to Article III. By the way,
19 you can get that in state court sometimes, but you can't get it
20 here, not supposed to be able to get it here.

10:40:58

10:41:13

21 So I am exploring whether the argument, whether they
22 had a justiciable case or controversy that would occasion them
23 coming to court before you told them on June 28 that, yes, we,
24 like we said before, we are going to use the two-drug protocol
25 and there's no further word about -- well, actually the 20 days

10:41:36

1 would have expired on July 3rd anyway if you have to give 20
2 days notice of a different drug.

3 MR. BINFORD: And the other letters, they were
4 courtesy notices from the director. The June 28th letter was a
5 letter that was issued in accordance with DO 710 with the
6 protocol, and it was a formal letter that was sent to them on
7 that date.

10:41:53

8 But, Judge, the -- their delay in bringing this
9 lawsuit is just one factor in the consideration for granting
10 the motion for injunctive relief.

10:42:08

11 THE COURT: Actually, laches is an independent
12 standalone basis to deny it, even if they otherwise would have
13 had a meritorious case.

14 So all right. Go ahead.

15 MR. BINFORD: Well, if you did get to the merits and
16 you did get to whether they have a likelihood of succeeding on
17 the merits or whether specifically Plaintiff Wood has a
18 likelihood of success, they just have no chance of success. If
19 this Court were to view the First Amendment as the plaintiffs
20 view it, there would be no need for a Freedom of Information
21 Act or a public records law. If the government was required to
22 turn over information because they had a First Amendment right
23 to it, there's just no need for a FOIA or for Arizona's public
24 record law. The Supreme Court has said in no uncertain terms
25 that there's no constitutional right have to access from

10:42:30

10:42:48

10:43:06

1 particular government information or to require openness from
2 the bureaucracy. Wood's claim fails because he's alleging the
3 violation of a right that simply does not exist.

4 Attending a government proceeding and obtaining
5 documents from the government are two different things. And 10:43:21
6 since there's no First Amendment right to obtain the
7 information that he's requested from the defendants, his motion
8 for the preliminary injunction should be denied.

9 THE COURT: Now, in your brief, you argue that the
10 *Schad* case decided by Judge Silver is analytically erroneous 10:43:36
11 and the Court should not follow it. But do you have any
12 fact-based distinctions on that case, assuming it is not
13 analytically wrong at a high level of generality. Do you have
14 factual differences that would lead to a different result? I'm
15 not saying I agree with that decision. I just want to explore 10:43:56
16 whether there are differences that would matter.

17 MR. BINFORD: In that case, the pleadings filed by the
18 plaintiffs and -- the manufacturer was different. The source
19 was different. In that case, they knew who the source was.
20 They, after we disclosed the information, pursuant to the 10:44:13
21 judge's order, they issued a follow-up pleading asking for
22 clarification because they thought our information was wrong or
23 because they knew a certain thing about Lundbeck, the
24 manufacturer in that case. In this case, the source is
25 different. The chemicals are different. So that's one factual 10:44:30

1 distinction.

2 And if you give me a moment, I can ask my co-counsel.

3 THE COURT: Yeah. Go ahead.

4 (Discussion off the record.)

5 MR. BINFORD: Another thing that Mr. Zick reminded me 10:45:09
6 of is that in *Schad*, the plaintiffs' claim that the drugs were
7 near their expiration date, they knew a lot more about the
8 stock of drugs that Corrections had. They claimed that they
9 were near the expiration date. And, in fact, those proceedings
10 occurred in October of last year, and the expiration date as we 10:45:27
11 disclosed pursuant to the judge's order was November. So we
12 were nearing the execution date in that case.

13 Additionally, the company that provided the drugs or
14 the manufacturer of the drugs in that case had issued a public
15 statement. They had publicly acknowledged that they had 10:45:47
16 provided these drugs in the past and they were no longer doing
17 it in the future. We don't have that in this case. The
18 manufacturer of the drugs that Corrections has now hasn't been
19 made public. It shouldn't be made public, and --

20 THE COURT: Well, again, what did the Court order 10:46:00
21 produce in that case, and how was it different from what is
22 being sought in this case, different in a way that would
23 matter? Maybe there's no difference. So just tell me that and
24 we'll move on.

25 MR. BINFORD: Well, I can tell you the four things 10:46:17

1 that the judge ordered in that case were the manufacturer, the
2 national drug code numbers, the lot numbers, and the expiration
3 date.

4 THE COURT: Same thing sought here.

5 MR. BINFORD: Other than the qualifications of the 10:46:29
6 medical personnel and the, I guess, the thought process that
7 went into or the process that went into developing the new
8 protocol.

9 THE COURT: I have another question that's been on my
10 mind for a couple years, since the last time I was here on 10:46:44
11 these execution, drug execution cases. And the broader
12 question is do I have a case or controversy? I suppose if we
13 look at this in time, obviously the plaintiffs have a case or
14 controversy because he has an execution date set. So it's
15 extremely concrete for him. But up until May 28th, there is no 10:47:12
16 decision. There was a hypothetical contingent decision we'll
17 do it this way unless we get the drugs to do it that way. And
18 I have already articulated some of my concern about whether
19 that would have even supported a lawsuit at a time when the
20 Department wasn't making a decision. 10:47:36

21 This is actually very concrete with me, because I have
22 had two previous cases, all brought by the prisoners and in all
23 of them the Department of Corrections came into court and
24 avowed to me what they were going to do, that their plan or
25 their protocol was constitutional, that's really what they are 10:48:02

1 going to do, and therefore, I should adjudicate that that was
2 constitutional. And I concluded, obviously, in each of those
3 instances that there was a case or controversy and I rendered
4 my best judgment.

5 Well, it turns out the defendant got up to the Court 10:48:20
6 of Appeals and changed things, sometimes under pressure from
7 the judges in oral argument. So it turned out that I probably
8 didn't have cases or controversy in those cases. I was simply
9 giving advisory opinions to give the defendants leverage to
10 negotiate with the Court of Appeals. They didn't stand by the 10:48:39
11 rulings that I gave.

12 So I don't take it personally, but I'm not in the
13 business of giving advisory opinions. So I think when we were
14 last here in the previous case, I didn't mention that, but it
15 certainly raises a question in my mind from experiences as to 10:48:57
16 whether I can rely on the Department's avowals this is what
17 they are going to do and therefore it is appropriate for the
18 Court to adjudicate the legality of that that hasn't stood up.

19 I'm not sure how that cuts here, because the
20 plaintiffs have the most concrete case or controversy 10:49:20
21 imaginable in that their execution has been ordered and will
22 happen unless something stops it. I wonder if I should just
23 simply enter an injunction stopping the Department from
24 executing this defendant until they can come to the Court and
25 persuade me, contrary to prior experience, that they are 10:49:41

1 actually going to do what they are asking me to adjudicate the
2 constitutionality of. To do -- it's a strange turnaround of
3 case or controversy because the Court doesn't grant relief
4 without a case or controversy. But the difficulty I have had
5 has been with the Department of Corrections. And I certainly 10:50:01
6 can't allow a plaintiff to be executed because the Department
7 won't make up its mind what it's going to do and therefore
8 present a true case or controversy for the Court to adjudicate.
9 I am sort of going -- you weren't here at that time, so this is
10 history for you. Mr. Zick was. He remembers all of it. 10:50:19

11 So I look at this case, and it does appear clear that
12 the State is not going to use pentobarbital because they have
13 come within the 20 days that they acknowledge they have to give
14 notice if they are going to do that. Before they didn't even
15 do that. So maybe what the Department says they are going to 10:50:49
16 do is sufficiently concrete here that I can adjudicate the
17 merits, contrary to my experience with the Department in prior
18 cases.

19 So this is a very strange situation, because it turns
20 everything on its head. It would mean giving the plaintiff an 10:51:15
21 injunction precisely because there is not a case or controversy
22 as to what the State's going to do and protecting their right,
23 at least to have some minimal -- actually, minimal notice, you
24 know, when I had -- last had you all in here, which was the
25 follow-up on -- what was the last case? The names run together 10:51:41

1 in my mind.

2 MR. ZICK: Towery.

3 THE COURT: Towery. Yes. I think I made the comment
4 that it looked to me from this experience of multiple cases
5 that both sides were taking unreasonable positions that the 10:51:57
6 plaintiffs were demanding as a matter of constitutional
7 principle that every possible contingency that might happen be
8 scripted out ahead of time and in writing subject to
9 constitutional scrutiny. And I felt that couldn't be right,
10 because there are things that happen in the process of an 10:52:26
11 execution that the people on the spot, the administering
12 personnel, ultimately the director, have to make decisions as
13 things go, like the collapse of the vein, what to do next. You
14 can think it ahead of time and whatnot.

15 And the director was taking the position of here's 10:52:47
16 what we're going to do unless we do something different and
17 that that's constitutional because they have the right to
18 change their mind. And I raised the question of whether there
19 are some things that are sufficiently grave, sufficiently close
20 to serious risk of cruel and unusual punishment substantial and 10:53:10
21 avoidable pain, that it could make it necessary and appropriate
22 to know ahead of time whether it was going to be pursued or not
23 and that a line needed to be drawn. I threw that on the table.
24 I have never made a ruling to that effect. I threw that out
25 for discussion, and I haven't seen you for the last two years. 10:53:34

1 So I'm not sure how that cuts here. Maybe if the
2 director, on these issues, has made a clear decision as to what
3 he's not going to do, information he's not going to give, and
4 this time -- well, I believed it every time before, too. It
5 turned out to be wrong. This time I have to believe it too, to
6 give an adjudication.

10:54:02

7 So I have been musing about this, Mr. Binford, not
8 sure which direction it cuts. It does seem to me that if the
9 director will not make a decision and have it truly believable,
10 that is, to persuade me, then the other side has a pretty good
11 case to stop the execution until the director and the
12 Department does that. But on the other hand, maybe they have
13 done that here. Maybe I have that here in a very focused way,
14 not just a request for Judge Wake's best opinion from which
15 they could then negotiate in oral argument with the Court of
16 Appeals as to what they are really going to do.

10:54:33

10:54:59

17 So poor Mr. Binford. You weren't here. You can't
18 respond to that. So I articulate this because this has been on
19 my mind for over two years now. And I have to decide how
20 things apply in this case here.

10:55:21

21 MR. BINFORD: Thank you, Judge.

22 THE COURT: You can sit down. Thank you.

23 All right. Ms. Konrad, I will hear your reply.

24 MS. KONRAD: Just a few quick points, Judge Wake.

25 I just want to be clear we are not seeking the

10:55:38

1 information today to dry up the drug source. Mr. Wood, along
2 with any other citizen, has a right to that information and I
3 want the record to be clear on that.

4 The defendants mentioned cases out of the Georgia and
5 the Eleventh Circuit. Those cases aren't controlling, and the 10:56:01
6 Eleventh Circuit decision in *Wellons* has no analysis. So this
7 Court should apply its own circuit precedent.

8 And we mentioned the order in *Schad*. I want to make
9 clear there was a due process claim in *Schad* that's not present
10 here. But what is relevant from Judge Silver's order is the 10:56:26
11 analysis of First Amendment law based on this circuit and the
12 Supreme Court precedent that this Court should follow.

13 The defendants also mention *Houchins*. That is a
14 different case. It was regarding non-public information and it
15 was also before the watershed case of *Richmond News* which held 10:56:47
16 that there's a First Amendment right of public access to
17 criminal proceedings because those are governmental proceedings
18 to be open to the public.

19 Defendants also mention the *Otter* decision that was
20 out of the Ninth Circuit and how the Ninth Circuit had the 10:57:09
21 opportunity but did not to expand on *California First Amendment*
22 *Coalition*. That is incorrect because that was -- the issue
23 presented in *Otter* was the exact same issue that was presented
24 in *First Amendment Coalition, California First Amendment*
25 *Coalition*. 10:57:27

1 Finally, I just want to make sure the record is clear,
2 this case or controversy became clear on June 28th when
3 Defendant Ryan sent the letter.

4 THE COURT: As of that date, and as of now, though, is
5 it a real case or controversy? Is the Department's plan and
6 intention real and concrete enough that I can proceed to
7 determine the constitutionality of it?

10:57:46

8 MS. KONRAD: It's Mr. Wood's position that he has been
9 denied his First Amendment rights because the defendants
10 continually fail to turn over information that he's requested
11 in which he has a First Amendment right to that information,
12 open public execution proceedings and the documents that attach
13 to that. The defendants have argued that the documents aren't
14 included in the public right to First Amendment right to public
15 access, and as we noted, there's a recent decision that
16 outlines in *Courthouse News* of the Ninth Circuit why documents
17 are also included when a First Amendment right has been
18 recognized to a historically open public procedure.

10:58:06

10:58:30

19 So if you have no further questions I just
20 respectfully request that you grant the preliminary injunction
21 we're requesting. Thank you so much.

10:58:51

22 THE COURT: All right. So the execution is set for
23 July 23rd. Today is the 11th (sic). It is my intention to
24 have a ruling by Friday. I can't absolutely guarantee
25 anything, but that's my intention. And that would leave 12

10:59:15

1 calendar days for the counsel and the Court of Appeals to deal
2 with this, which is an extremely short period of time. But on
3 the other hand, that's the best I can do in terms of the timing
4 that was presented to me that's beyond my control.

5 All right. Thank you, counsel. The motion is taken
6 under advisement.

10:59:52

7 (Proceeding concluded at 10:59 a.m.)
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C E R T I F I C A T E

I, LAURIE A. ADAMS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 9th day of July, 2014.

s/Laurie A. Adams

Laurie A. Adams, RMR, CRR