No. 14-16310

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph Rudolph Wood III, Plaintiff-Appellant,

vs.

Charles L. Ryan, et al., Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:14-cv-01447-NVW-JFM

REPLY TO RESPONSE TO MOTION TO SUPPLEMENT THE RECORD

EXECUTION SCHEDULED: JULY 23, 2014 at 10:00AM MST (10:00 PDT)

JON M. SANDS
Federal Public Defender
District of Arizona
Dale A. Baich
Robin C. Konrad
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
dale_baich@fd.org
robin_konrad@fd.org

Attorneys for Plaintiff-Appellant Joseph R. Wood III

Reply to Response to Motion to Supplement the Record

Defendants-Appellees do not dispute Mr. Wood's statement and supporting case law that the Court has the inherent authority to supplement the record on appeal. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (citation omitted); *see also Rosales-Martinez v. Palmer*, __ F.3d __, No. 12-15077, 2014 WL 2462557 (9th Cir. June 3, 2014). Yet they ask the Court to deny Mr. Wood's motion because nothing in Rule 10(e) supports his request. That rule allows for modification where there is a difference regarding what the record truly discloses in district court, FRAP 10(e)(1), or where the record is incomplete by error or accident. FRAP 10(e)(2).[1] Mr. Wood, however, is not seeking to correct or modify the record. Mr. Wood seeks to correct the reliance upon the term "strong evidence" suggested by Defendants-Appellees for the first time on appeal in their Answering Brief. (Answering Br. at 21-22.) Therefore, for the reasons explained in his motion, this Court should exercise its equitable authority to allow information to rebut this argument.

As Mr. Wood explained in his motion, this request has been made only in response to Defendants-Appellees' have now asserted that "[t]he existence of the

[1] *See generally Dickerson v. State of Ala.*, 667 F.2d 1364, 1367 n.5 (11th Cir. 1982) (internal citations omitted) (noting that while Second Circuit Court of Appeals has based its authority to supplement the record on FRAP 10(e), "[o]ther circuits have relied primarily on the appellate court's inherent equitable powers to supplement the record as justice requires").

cases [including one from Arkansas] provides strong evidence that the type of information Wood seeks has been historically unavailable, *thus requiring inmates to bring legal challenges in an attempt to obtain it*." (Answering Br. at 21-22) (emphasis added). Defendants-Appellees assert that the case from Arkansas, *Williams v. Hobbs*, 658 F.3d 842, 845 (8th Cir. 2011), along with others, demonstrates that "the sources of lethal injection drugs have not historically been publically available." (Resp. to Mot. at 3.) But as Mr. Wood asserted in his Reply Brief, *Williams* does not support that proposition.

Williams involved a challenge to the state's Method of Execution Act, in which the prisoners argued that the Act violated the ex post facto clause because the Act created a risk of more painful execution; increased prisoners' mental anxiety; and made execution protocols less humane. *Id.* at 848. The prisoners also argued that the Act violated their due process rights because the secrecy of the law "denies them 'an opportunity to litigate' their nonfrivolous claim that the execution protocol violates the Eighth Amendment." *Id.* at 852. Their argument was *not* based on the fact that they did not know the source of the drugs, as Defendants-Appellees suggest. Rather, the argument was that "[b]ecause the Director can deviate from the established protocol at any moment, they contend that they will be unable to challenge the protocol in court." *Id.*

No First Amendment challenge was raised in *Williams*. In fact, none was necessary because the law at issue in Arkansas *allowed for disclosure* of the "choice of chemicals" to be used in executions. *Id.* at 850. Thus, contrary to Defendants-Appellees' assertion, Arkansas has not kept the source of the drug secret—as is demonstrated by the records that Mr. Wood submitted for consideration in this motion.

Further, despite Defendants-Appellees' arguments to the contrary, the fact that the Arkansas prisoners were able to make use of the state public-records act demonstrates only that they were able to access the information without resorting to a constitutional challenge. *Williams*, 658 F.3d at 851 ("The prisoners in this case have access to the current protocol, the ability to make a FOIA request, and assurances by the state's counsel that he will provide them with any new execution protocol upon request. Thus the information the prisoners require to ease their anxiety is discoverable. . . ."). That the state chooses to make a given process (here, obtaining information) straightforward and simple does not remove that process from other constitutional protections that it already has.

Here, the First Amendment right of access to historically open governmental proceedings and associated documents remains attached to those proceedings, whether or not the government makes access to those proceedings available through means other than constitutional challenges. To suggest otherwise would

lead to an absurd result: the government could provide straightforward and simple administrative access to a particular historically open proceeding, such that the need for a constitutional challenge to gain access did not arise. At some point, the government could arbitrarily deny access to the proceedings, thus leading to a right-of-access challenge.

If ADC's position is correct, the government could then claim that the existence of administrative access demonstrated lack of openness, and that therefore the proceedings have no First Amendment protections. But as Mr. Wood has explained (Reply Br. at 9-10), it is not the government's choice or actions that determines whether a proceeding has been historically open. Accordingly, it is of no consequence that the state public-records act provided access.

Moreover, a corporation's decision to discontinue dealing with a buyer is the corporation's right. *See, e.g.*, "Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever." *McElhenney Co. v. Western Auto Supply Co.* 269 F.2d 332, 337 (reviewing alleged violations of the Clayton Act). Such decisions are an expected and protected component of First Amendment activities.

In sum, Defendants-Appellees have misconstrued the import of the information with which Mr. Wood seeks to supplement the record. What is more,

Defendants-Appellees interpretations further support the importance of this Court exercising its power to consider that information.

If the record is expanded for this limited purpose, Defendants-Appellees will not be prejudiced. If, however, the record is not expanded, Mr. Wood will be prejudiced by the misstatement of fact in Defendants-Appellees Answering Brief. Finally, the circumstances of this case fall well within the circumstances in which a court may exercise its inherent authority to consider supplemental information.

Conclusion

For the reasons stated here and in his motion, Mr. Wood respectfully asks the Court to supplement the record with and consider the attached records in support of his appeal.

Respectfully submitted: July 16, 2014

Jon M. Sands
Federal Public Defender
District of Arizona

Dale A. Baich
Robin C. Konrad

s/Dale A. Baich
Attorneys for Plaintiff-Appellant

Certificate of Service

I certify that on July 16, 2014, I transmitted the foregoing Motion to Supplement the Record using the Appellate CM/ECF system for filing and transmittal of a Notice of Docket Activity to the following ECF registrants:

Clerk of Court
James R. Browning U.S. Courthouse
95 7th Street
San Francisco, California 94103

Jeffrey Zick
Assistant Attorney General
1275 West Washington Street
Phoenix, AZ 85007

s/Robin Stoltze
Legal Assistant
Capital Habeas Unit