No. 14-16310

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD,

Plaintiff-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–14-1447

EXECUTION SCHEDULED FOR JULY 23, 2014 10:00 A.M. M.S.T.

DEFENDANTS-APPELLEES' RESPONSE TO MOTION TO SUPPLEMENT THE RECORD

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Much like the information Wood included in his Opening Brief (O.B. at 22–30, 38–40), he neglected to present the district court with the information he now seeks to add to the record. The new information Wood offers includes a state-law FOIA request by an Assistant Federal Public Defender on behalf of death row inmates seeking documents regarding lethal injection chemicals from the Arkansas Department of Corrections. (ER 189–90.) Arkansas responded by producing the state's lethal injection procedure (similar to Arizona's lethal injection protocol, ER 075–107) and three packing slips indicating that Arkansas received lethal injection chemicals from West-Ward Pharmaceuticals. (ER 192–203.)

The exhibits submitted for the first time here—almost a week after the judgment and notice of appeal were filed—are not part of the record. *See United States v. Canon*, 534 F.2d 139, 140 (9th Cir. 1976) (stating that affidavit filed 7 days after notice of appeal was filed and 14 days after judgment "was not before the District Court when it made its order and, therefore, is not a proper part of the record on appeal"). Furthermore, nothing in Federal Rule of Appellate Procedure 10(e), which governs correction or modification of the record, supports Wood's request. That rule states that a "misstatement" in the record may be corrected by stipulation of the parties, by the district court, or by this Court. Fed. R. App. P. 10(e)(2). Wood contends that the supplemental

information corrects Appellees' "misstatement of fact" that reported decisions in which death row inmates have brought legal actions seeking to obtain the source of lethal injection drugs demonstrate that such information has not "historically been open to the press and general public." *California First Amendment Coal. v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002) (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) ("*Press-Enter. II*")). (A.B. at 21–22.) There was no misstatement of fact—Appellees noted that in *Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011), Arkansas prisoners brought a civil rights action challenging the "secrecy encompassed" in that state's lethal injection protocol. (A.B. at 21.) Appellees argued that that case, along with others in which prisoners specifically sought the sources of lethal injection drugs, shows that the type of information Wood seeks has not historically been publically available. (*Id.* at 20–22.) *Williams* speaks for itself and Appellees' argument with respect to its implication is not a misstatement of fact. Accordingly, there is no "omission or misstatement" to be corrected. *See* Fed. R. App. P. 10(e)(2).

In any event, even if this Court in its discretion were to consider the supplemental information, it undermines, rather than supports, Wood's position. Arkansas revealed the drug source in response to a request under its state Freedom of Information statute. (ER at 187, 189.) As Wood states in his reply, such laws were "devised to provide access to governmental functions that were

not historically open proceedings." (R.B. at 7. Emphasis in original.) The fact that the Arkansas prisoners were forced to resort to a FOIA request to obtain the drug source thus demonstrates that such information is not "historically open," and therefore, not subject to a First Amendment right of access.

Similarly, if this Court were to apply the *Press-Enter. II* analysis, the newly supplemented information would cut against Wood's position.[1] Arkansas's one-time disclosure of a source of lethal injection drugs does not undermine Appellees' contention that such information has not been historically public. Not only does a solitary disclosure fail to demonstrate a historical tradition of openness, but Arkansas provided the source in response to a request under a state open records law, not any claim of a First Amendment right. (ER 187, 189.)

Perhaps more significantly, the context of Arkansas's disclosure of the drug source provides additional support for Appellees' contention that public access to the source of lethal injection drugs does not "play[] a significant role in the functioning of the particular process in question," *California First Amendment Coal.*, 299 F.3d at 875 (quoting *Press-Enter. II*, 478 U.S. at 8–9),

[1] Appellees' maintain, as presented in their Answering Brief, that because the information Wood seeks cannot fall within the First Amendment right of access to government proceedings, the *Press-Enter. II* test is inapplicable. (A.B. 14–18.)

but instead impedes capital punishment from functioning altogether. (A.B. at 24–27.) Wood's supplemental information, showing that on April 15, 2013, Arkansas disclosed the source of lethal injection drugs pursuant to a state open records request, tells only part of the story. A month after West-Ward Pharmaceuticals was disclosed as the source of Arkansas's lethal injection drugs, the company announced that it would no longer provide drugs to the Arkansas Department of Corrections because it did not want its products used in executions. *Dep't of Corr. to Rewrite Execution Protocol*, ARKANSAS NEWS (June 17, 2013, 6:32 PM), arkansasnews.com/sections/news/Arkansas/department-correction-rewrite-execution-protocol.html; John Lyon, *N.J. Drug Maker Closes Account with Ark. Dep't of Corr.*, SOUTHWEST TIMES RECORD (May 15, 2013, 5:58 PM), swtimes.com/sections/news/state-news/new-jersey-drug-maker-closes-account-arkansas-department-correction.html; Ed Pilkington, *British Drug Co. Acts to Stop its Products Being Used in US Executions*, THE GUARDIAN (May 15, 2013, 13:16 EST), www.theguardian.com/world/2013/may/15/death-penalty-drugs-us-uk/print.

Thus, the full context of the disclosure further demonstrates that when the sources of drugs become publically available, the states are impeded in their ability to carry out their mandated functions. (*See* Dist. Ct. Doc. 21, at 13–14; A.B. at 24–26.) Consequently, even if this Court permitted Wood to supplement

the record with the Arkansas information, it only undermines his contention that he has a First Amendment right to the information he seeks under the *Press-Enter. II* analysis.

CONCLUSION

Wood's motion to supplement the record should be denied. Should this Court in its discretion allow consideration of this information, Appellees contend that the supplemental material fails to support Wood's contention that there is a First Amendment right to the information he seeks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 16, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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