

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FRANK ROBERT CHESTER, et al.,

Plaintiffs,

v.

JOHN E. WETZEL, et al.,

Defendants.

Civil Action

No. 1:08-cv-1261

(Judge Kane)

**Execution Scheduled for  
September 22, 2014**

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**DECLARATION OF KATHARINE VINER IN SUPPORT OF  
INTERVENORS' EMERGENCY MOTION FOR ORDER TO UNSEAL  
AND TO PROHIBIT FUTURE SEALING OF DOCUMENTS DISCLOSING  
SUPPLIERS OF DRUGS TO BE USED FOR LETHAL INJECTION**

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KATHARINE VINER makes the following declaration:

1. This declaration is submitted in support of the motion of Intervenor Guardian News & Media LLC ("Guardian US") to unseal and to prohibit future sealing of documents disclosing suppliers of drugs to be used for lethal injection in Pennsylvania.

2. I am the Editor-in-Chief of Guardian US.

3. Guardian US is a digital news service organized in New York, where it is based, as Guardian News and Media LLC. Guardian US has a main office in New

York City, which employs 60 people. We have other offices in Los Angeles and Washington D.C., as well as reporters in Texas, Washington, and Florida.

Globally, the Guardian's website recently surpassed 100 million unique visitors per month. Within that readership, Guardian US has about 25 million unique visitors per month in the United States. This puts our online readership in America alongside that of traditional US newspapers such as the Los Angeles Times and Washington Post.

4. Guardian US was established in 2011 to cover US and international news for an American audience as the US online presence of the London-based newspaper, The Guardian. Guardian US has reported extensively on the death penalty in the United States, and particularly on the use of lethal injection as a means to effect executions.

5. Guardian US has noted – and responded to – an increase in public concern about the manner in which lethal injection executions are carried out. That concern has grown exponentially during the last year, following reports of problematic executions in Florida, Ohio, Oklahoma and Arizona. Guardian US has reported on these events and had a reporter present at the Oklahoma execution of Clayton Lockett.

6. One point of public interest surrounding these executions is the type and source of the drugs used in their lethal injection procedures. The lethal injection

protocol announced by Pennsylvania's Department of Corrections (the "Pa. DOC" or "DOC") calls for the administration of three drugs, beginning with pentobarbital as an anesthetic, following by pancuronium bromide and potassium chloride. (Doc. No. 206 at 2-7.)

7. As pentobarbital is not sold in the United States for the purpose of conducting executions, states including Pennsylvania that wish to use these drugs must either approach suppliers from outside the country or contract the services of a compounding pharmacy to manufacture the drugs on special order.

8. There have been numerous reports and investigations of states allegedly using unlawful supply chains to obtain these drugs. *See, e.g.,* Chris McDaniel and Véronique Lacapra, *Missouri's Execution Drug Source Raises Legal, Ethical Questions*, St. Lois Public Radio, Dec. 31. 2013, *available at* <http://news.stlpublicradio.org/post/investigation-missouris-execution-drug-source-raises-legal-ethical-questions>.

9. Where a state uses a compounding pharmacy to manufacture the drugs, there is also concern about where the pharmacy obtains the Active Pharmaceutical Ingredients, or API, it requires to make up the substance, as the sale of the API is also controlled by federal law.

10. Pennsylvania has scheduled the execution of Hubert Michael, Jr. for September 22, 2014. The Court of Appeals for the Third Circuit has stayed that

execution while it considers Mr. Michael's petition for rehearing, but Guardian US understands that the petition before the Third Circuit could be denied and the execution schedule restored at any time. (Doc. No. 250 at 3.)

11.If Mr. Hubert is executed on September 22, 2014 or soon thereafter, it will be Pennsylvania's first execution since Gary Heidnik was put to death in 1999, and the first execution in Pennsylvania since the development of the controversy over the use of lethal injection as a means of execution and the decrease in the availability of the drugs that the Pa. DOC would use for that purpose. That alone makes this execution and the facts surrounding it of particular interest to Guardian US and to its readers.

12.Guardian US and the public have a particular interest in the facts surrounding the supplier of the drugs that the Pa. DOC has or will purchase for the purpose of executing Mr. Michael, in part because of the allegations and evidence regarding the source of those drugs adduced at the hearing held before this Court on November 5, 2012. The occasion for that hearing was a motion to stay filed with respect to the last execution scheduled by the state of Pennsylvania, when it stated its intention to execute Mr. Michael on November 8, 2012.

13.At the November 5, 2012 hearing, an expert introduced by Mr. Michael's counsel identified several significant issues regarding the pentobarbital and other drugs obtained by the Pa. DOC for Mr. Michael's execution. The expert noted that

the concentration of the pentobarbital appeared to be different from that normally found on the market, and different from the concentration called for by the Pa. DOC's protocol. The expert also noted a lack of evidence of testing for sterility and biological contamination of the stock. And the expert noted that the vials supplied by the compounding pharmacy were not labeled in accordance with standard medical practice: specifically, the color coding on the labels was switched around, such that the first administered drug, pentobarbital, was not labelled in yellow according to recognized practice but in green, while the muscle relaxant pancuronium bromide was labelled in yellow when normal procedure has it marked in fluorescent red. (Doc. No. 188 at 30-31, 34, 35-39.)

14. These allegations raise considerable concern about the competency of the supplier chosen by the Pa. DOC in 2012. The question whether the DOC continues to use the same supplier after these revelations is an important one as it speaks to the issue of whether such a supremely significant procedure as an execution is being properly managed and conducted.

15. Even aside from these concerns, however, normal journalistic practice and investigation concerning the planned execution would focus on the identity of the supplier and the provenance of the drugs. That investigation could uncover problems with the supply chain, or alternatively it could reveal the opposite: it could confirm that the source of the drugs the Pa. DOC intends to use to execute

Mr. Michael is completely sound and the products they supply entirely up to standard. Either fact would be of intense interest to the public in this time of heightened awareness and scrutiny of the lethal injection process.

16. In its normal journalistic practice, Guardian US would examine the bona fides and track record of each supplier chosen by the Pa. DOC (past and present), including:

- whether there have been complaints lodged against it concerning either procurement of ingredients or the manufacture of drugs;
- whether it has supplied drugs for lethal injections in other states (including, of course, the recent executions in Florida, Ohio, Oklahoma and Arizona);
- where it has or will obtain the API for pentobarbital;
- what sort of testing it contracts for on the drugs it manufactures, specifically to test for the sterility, purity and concentration of the substances;
- its relationship with those testing facilities.

17. In conducting this investigation, Guardian US would consult publicly available sources and would endeavor to interview the supplier and others.

18. None of this investigation is possible unless Guardian US knows the identity of the supplier that the Pa. DOC used in 2012, as well as the identity of the

suppliers or suppliers that the Pa. DOC intends to use if it does carry out Mr. Michael's execution – or another execution – this year. The identity of the 2012 supplier is, we believe, revealed in certain filings made under seal in this Court, particularly the exhibits submitted by Plaintiffs in connection with the hearing on the November 5, 2012 Motion to Stay; and the Plaintiffs' Motion to Supplement and Develop the Record (Doc. No. 226-2) and supporting memorandum and exhibits filed in November and December, 2013, which concerned an FDA investigation related to one or more suppliers of lethal injection drugs for the Pa. DOC.

19. It is anticipated that the DOC's 2014 supplier of execution drugs will be the subject of additional motions and briefing by Mr. Michael, in keeping with past arguments made by Mr. Michael. Mr. Michael's attorneys have requested exactly that information from the DOC. (Doc. No. 250 at 3.)

20. The level of attention focused on the lethal injection procedure reflects the importance of this event – the state's most extreme exercise of its power, the taking of a human life. As this Court has observed, "There are few issues of greater interest to the public than this one." (Doc. No. 188 at 8.)

21. The information that Guardian US seeks is not tangential or incidental to the public's interest. The question before the public – whether capital punishment is consistent with our contemporary values and whether lethal injection is a humane

way of effecting such punishment – turns, to no small degree, on the reliability and efficacy of the drugs used, and that question is inextricably bound up with the manner in which the drugs are manufactured. The public also has a significant interest in knowing whether federal laws and the requirements set out in the United States Constitution are being followed in the process of obtaining the drugs that the state will use to punish crime.

22. Guardian has not previously sought this information because there was no reason to report on Pennsylvania’s execution procedures until there was a strong possibility that an execution would, in fact, occur here. In addition, as noted, the question of the origin of execution drugs has become of far greater interest to the public in the last nine months.

23. Guardian US cannot obtain the information it seeks directly from the Pa DOC, as that agency has successfully contended that the identity of its drug suppliers is not available through the Pennsylvania Right to Know Law. *See In re: Richard Poplawski v. Pennsylvania Department of Corrections*, No. AP 2014-0207, slip op. (Pa. Off. Open Records March 12, 2014 (attached hereto)).

I HEREBY AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING STATEMENTS ARE, TO THE BEST OF MY RECOLLECTION AND BELIEF, TRUE AND ACCURATE.

Katharine Viner



KATHARINE VINER

September 10, 2014.