

FILED
SEP 30 2016
MICHAEL GANS
CLERK OF COURT

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 16-3072

In re: Missouri Department of Corrections, Petitioner

M7, Petitioner – Intervenor

Richard Jordan and Ricky Chase, Respondents.

On Petition for Writ of Mandamus to the United States District Court
for the Western District of Missouri – Jefferson City
(2:16-MC-09005)

**RESPONDENTS' MOTION FOR LEAVE
TO FILE TRANSCRIPT UNDER SEAL**

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Attorneys for Respondents

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EIGHTH CIRCUIT

RESPONDENTS' MOTION FOR LEAVE TO FILE TRANSCRIPT UNDER SEAL

Richard Jordan and Ricky Chase, Respondents in the above-captioned mandamus proceeding, move this Court for leave to file a portion of the transcript of the hearing before District Judge Bough under seal. The transcript, attached to the paper copy of this motion, is designated "Exhibit 4-B" in Respondents' pleadings in opposition to the petitions for mandamus and rehearing filed by the Missouri Department of Corrections ("MO-DOC") and M7. In support of this motion, Respondents represent the following to the Court:

1. On July 1, 2016, the United States District Court for the Western District of Missouri conducted a hearing on MO-DOC's motion to quash a subpoena duces tecum and notice of deposition served upon MO-DOC by Respondents.
2. A portion of the hearing was sealed with only MO-DOC and Respondents' attorneys present in the courtroom.
3. On September 20, 2016, the district court entered a Protective Order sealing the transcript of the *in camera* portion of the July 1 hearing. Doc. 38, *Missouri Department of Corrections v. Jordan et al.*, case no. 2:16-mc-09005.
4. Under the terms of the Protective Order, the transcript of the *in camera* portion of the transcript can only be filed in the Eighth Circuit Court of Appeals under seal.

5. In addition to the sealed transcript, Respondents submit a brief Argument Regarding Matters in Sealed Transcript, setting forth the relevance of the sealed transcript to the issues before this Court.

6. Respondents believe that this Motion may be made publically available on PACER. See Local Rule 25A(g).

WHEREFORE, PREMISES CONSIDERED, Respondents request that this Court grant leave to file the sealed portion of the July 1 transcript and the Argument Regarding Matters in Sealed Transcript under seal.

Respectfully submitted,

/s/ James W. Craig

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Motion on all parties by electronic mail. This pleading is not filed via the Electronic Case Filing system of the United States Court of Appeals for the Eighth Circuit.

This, the 30th day of September, 2016.

/s/ James W. Craig

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**RESPONDENTS' ARGUMENT
REGARDING MATTERS IN SEALED TRANSCRIPT**

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**RESPONDENTS' ARGUMENT
REGARDING MATTERS IN SEALED TRANSCRIPT**

On July 1, 2016, the United States District Court for the Western District of Missouri conducted a hearing on MO-DOC's motion to quash a subpoena duces tecum and notice of deposition served upon MO-DOC by Respondents. A portion of the hearing was sealed with only MO-DOC and Respondents' attorneys present in the courtroom. The sealed transcript is designated as "Exhibit 4-B" in the Respondents' oppositions to the motions filed by the Missouri Department of Corrections ("MO-DOC") and M7, MO-DOC's anonymous drug vendor.

During the in camera portion of the hearing, counsel for MO-DOC discussed matters set forth in the privilege log which had been submitted to the district court ex parte. Respondents' counsel did not have access to the ex parte privilege log.

MO-DOC's counsel focused the Court's attention on Request No. 2 of the subpoena duces tecum under consideration in the district court. That request seeks production of "All drug labels and package inserts for any drug purchased or obtained by the Department, from 2010 to the present, for use in lethal injection executions."¹ MO-DOC counsel stated:

I'm primarily focused on request number 2 for documents about pentobarbital . . . if identified whether or not there is a responsive document to that request, that answers the question of whether it is or is not manufactured or

¹ Exhibit 3 to Respondents' Opposition at 5.

compounded pentobarbital because manufactured pentobarbital has that information, and compounded pentobarbital does not have a package insert.

So by merely saying that there exists a document that proves it's manufactured or proves that it's compounded, that answers the question does Missouri use compounded or manufactured pentobarbital.²

Thereafter, the district court stated “there are three responses that list No. 2.”³
Counsel for MO-DOC agreed.⁴

Thus, there is evidence that at some point after 2010, MO-DOC purchased manufactured pentobarbital for use in lethal injection executions. All parties agree that pentobarbital can be purchased in one of two forms: either compounded by a licensed pharmacy from the active pharmaceutical ingredients for the chemical; or manufactured by a pharmaceutical company under FDA-approved and monitored practices. Akorn Pharmaceuticals is the sole licensed manufacturer of pentobarbital.⁵ Akorn has instituted a policy restricting the sale of Nembutal to corrections departments for use in executions.⁶

The sale of manufactured pentobarbital by M7 or another vendor to MO-DOC would violate the property and contractual rights of Akorn to determine how its

² Exhibit 4-B at 8-9.

³ Id. at 10.

⁴ Id.

⁵ See Exhibit D (May 13, 2016 article) to Exhibit 15 (Declaration of Comptroller DiNapoli) to Respondent's Opposition.

⁶ Exhibit B to Exhibit 15 to Respondents' Opposition.

product is used. For the reasons set forth in the Oppositions filed by Respondents in the public record, mandamus should be denied if this Court, or the district court, finds that MO-DOC and M7's attempt to safeguard the confidentiality of the identity of MO-DOC's lethal injection drug vendors would facilitate the violation of the rights of Akorn and its shareholders.

Respectfully submitted,

/s/James W. Craig

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This, the 30th day of September, 2016.

/s/ James W. Craig