

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CLAYTON LOCKETT, The Estate of by
and through its personal representative
GARY LOCKETT,

Plaintiff/Appellant,

v.

MARY FALLIN, Governor in her
individual capacity, *et al.*,

Defendants/Appellees.

Case No: 15-6134

**APPELLEES MOTION TO MAINTAIN DISTRICT COURT DOCUMENTS
UNDER SEAL AND TO PROHIBIT PARTIES FROM
REFERRING TO EXECUTION TEAM MEMBERS BY NAME**

State Appellees, by and through their attorneys, respectfully submit their Motion to maintain District Court documents 1, 2, and 5-2 under seal, and to prohibit parties from referring to execution team members by name throughout this appeal.

In support of this motion, Appellees state the following:

1. The State of Oklahoma has passed a statute to protect the identities of individuals who participate in execution proceedings in the State of Oklahoma.

OKLA. STAT. tit. 22, § 1015(B).

2. On April 29, 2014, the State of Oklahoma executed Clayton Lockett.

[Doc. 49] at 1.

3. On October 13, 2014, Appellant filed suit against several individuals, alleging, among other things, Eighth Amendment violations by individuals that took part in the execution proceedings. [Doc. 1] at 1.

4. Appellant's Complaint specifically named a doctor which Appellant alleged took part in executing Offender Lockett. *Id.*

5. The State, through the Attorney General of the State of Oklahoma, filed a special appearance and motion to strike the Complaint on October 21, 2015, due to the blatant exposure of an individual that Appellant alleges took part in the execution. [Doc. 5].

6. The District Court acted swiftly, sealing the docket entries that mentioned the individual by name, and ordering that future filings should have a caption that did not mention the individual by name. [Doc. 7] at 1.

7. The District Court later deferred ruling on the motion to strike, and instead ordered the Appellant to file an amended complaint with the name of the individual redacted, instead requiring Appellant to refer to the individual as "Doctor John Doe." [Doc. 17] at 1-2, 2 n.1. The Court also ordered that documents 1, 2, and 5-2 remain sealed. [Doc. 17] at 2.

8. The District Court granted the State's subsequent Motion to Dismiss, and noted the decision to seal those documents and require that the parties refer to

the individual as Dr. Doe. [Doc. 49] at 2 n.1. The Court ordered that the practice continue. *Id.*

9. Appellant has appealed the District Court's dismissal of Appellant's claims. [Doc. 50].

INTRODUCTION

This case arises from the execution of Clayton Lockett, which occurred in April of 2014. A few months later his Estate filed this suit, and willfully exposed to the public an individual purported to be part of the execution team. Specifically, Appellant's original Complaint purported to name an individual, a doctor, that Appellant claims is a member of the execution team. While Appellant refrained from directly defying the District Court's orders in court filings, Appellant's attorney has failed to show similar restraint in other areas, and has continued to name the individual in statements to the media. It is clear that Appellant is not interested in justice, but to harass an individual that he suspects is a member of the Lockett execution team. This Court should not allow Appellant to further harass this individual through filings in this Court.

I. TITLE 22, SECTION 1015(B) OF THE OKLAHOMA STATUTES RECOGNIZES AND PROTECTS THE CONFIDENTIALITY OF INDIVIDUALS AND ENTITIES INVOLVED IN THE EXECUTION PROCESS.

OKLA. STAT. tit. 22, § 1015(B) states that “[t]he identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.” The State has gone to great lengths to follow this statute and protect the identities of those entities and individuals from disclosure. Appellant’s or Appellant’s Counsel’s identification of this individual, regardless of whether that individual actually has or will serve on the execution team, was an intentional violation of the confidentiality provisions of OKLA. STAT. tit. 22, § 1015(B), and was designed strictly to harass and oppress persons believed to be involved in the execution process in Oklahoma.

The District Court found that this case is completely without merit. However, it does not appear that prevailing on the merits is the primary goal of Appellant or Appellant’s counsel. Appellant’s counsel has shown blatant disregard for the confidentiality concerns of the State by intentionally disclosing information about an individual that Appellant claims was involved in the execution process and maligning the Court for its decisions. The State of Oklahoma has determined that the participation in executions should be confidential, and that individuals

participating in those events must be shielded from the harassment, threats, and annoyance that are often the unfortunate consequences of aiding the State in executing its criminal sentences. Appellant and Appellant's counsel ignored this vital interest through the Complaint. This is especially troubling considering that Offender Lockett previously unsuccessfully challenged the validity of the confidentiality statute. The Oklahoma Supreme Court explicitly upheld the statute in *Lockett v. Evans*, 330 P.3d 488, 491 (Okla. 2014). The Oklahoma Court of Criminal Appeals likewise expressed their opinion that the claims were specious. *Lockett v. State*, 329 P.3d 755, 757 n.8 (Okla. Crim. App. 2014). In response to these resounding losses, Mr. Lockett's Estate and its attorney decided that since Mr. Lockett could not achieve his goals through the legal process, the Estate and its attorneys could ignore the law. Although the District Court shut the door on those machinations, the State is concerned that Appellant will attempt to use this Court as another soapbox to reveal confidential information to harass and annoy the individual. Appellees therefore request that this Court maintain the seal of documents 1, 2, and 5-2, and require that parties only refer to alleged execution team members by pseudonyms such as "Dr. Doe."

II. FEDERAL COURTS HAVE RECOGNIZED THE VALUE OF CONFIDENTIALITY STATUTES AND THE INTERESTS THEY PROTECT.

The validity of confidentiality statutes regarding executions has been addressed and affirmed by the Eighth and Fifth Circuits. The Ninth Circuit expressed concern over a statute and stayed an execution, but was promptly reversed by the United States Supreme Court.

In the case of *In re Lombardi*, the Eighth Circuit addressed Missouri's confidentiality statute. 741 F.3d 888, 894 (8th Cir. 2014). In that case, the federal district court ordered the state to disclose the identities of the prescribing physician, the pharmacist that compounded the lethal injection drugs, and the laboratory that tested the efficacy of the drugs. *Id.* at 893. The state moved for a writ of mandamus to prohibit the district court from enforcing those discovery orders. *Id.*

The Eighth Circuit discussed the confidentiality statute, and ruled that the district court had clearly abused its discretion in ordering the discovery. *Id.* at 896. The Circuit Court stated that it need not reach the significant and complex issues of privilege, because it was “*clear and indisputable* that the discovery ordered by the district court is not relevant to any claim that should survive a motion to dismiss.” *Id.* at 895 (emphasis added). The Circuit Court chided the district court for its order directing discovery of sensitive information, “the disclosure of which [the Director]

avers would prevent the State from acquiring lethal chemicals necessary to carry out the death penalty.” *Id.* at 896.

The Fifth Circuit has likewise addressed and upheld Texas’ confidentiality provisions in *Sells v. Livingston*, 750 F.3d 478, 480-81 (5th Cir. 2014). In that case, the federal district court decided that the state was required to provide certain information regarding the source of the drugs, based on an earlier Fifth Circuit case. *Id.* at 481. The Fifth Circuit rejected that decision, and held the earlier case did not create some baseline disclosure guidance. *Id.* Instead, the Fifth Circuit held that there was no liberty interest in the information, and therefore the claims surrounding information about the drugs were not cognizable. *Id.*¹

The State has an important and compelling interest in maintaining the confidentiality of the identities of execution team members. Therefore, this Court should order that documents 1, 2, and 5-2 remain sealed, and prohibit Appellant from referring to alleged execution team members by name.

¹ Only the Ninth Circuit has questioned the efficacy and validity of confidentiality statutes. In *Wood v. Ryan*, the plaintiff argued that Arizona’s confidentiality law violated his First Amendment rights. 759 F.3d 1076, 1078 (9th Cir. 2014). The Ninth Circuit declined to decide the issue, but did stay the execution, citing “serious questions” as to the merits of the plaintiff’s claims. *Id.* at 1088. Three days later, the United States Supreme Court vacated the stay, and reversed the Ninth Circuit’s ruling. *Ryan v. Wood*, ___S.Ct.____, 2014 WL 3600362 at *1 (July 22, 2014).

CONCLUSION

Whether the identified individual actually participated in executions is immaterial. Either way, that individual will be subjected to harassment, threats, and annoyance. Appellant and his counsel have continuously vocalized disagreement and even contempt for Oklahoma's confidentiality statute. In an abundance of caution, and to avoid further exposure, Appellees request that this Court order documents 1, 2, and 5-2 to remain sealed on appeal, and that the parties not refer to purported execution team members by name.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Tenth Circuit Court of Appeals' General Order on Electronic Submission of Documents (March 18, 2009), I hereby certify that:

1. There are no required privacy redactions (Fed. R. App. P. 25(a)(5)) to be made to the attached ECF pleading; and
2. This ECF submission is an exact copy of the additional hard copies of Appellee's Response Brief; and
3. This ECF submission was scanned for viruses with Sophos Endpoint Security and Control, version 9.7, a commercial virus scanning program that is updated hourly, and, according to the program is free of viruses.

CERTIFICATE OF SERVICE

I certify that on this 17th day of July 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing; and a copy to be served via the ECF System to:

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