IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(1) THE ESTATE OF CLAYTON LOCKETT, by and through its personal representative GARY LOCKETT, Plaintiff, v. (1) GOVERNOR MARY FALLIN, in her individual capacity; (2) ROBERT C. PATTON, in his individual capacity; (3) ANITA K. TRAMMELL, in her individual capacity; *et al.*, Defendants.	**Case No: 15-6134**

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

Plaintiff, the Estate of Clayton Lockett, by and through counsel David A. Lane, Kathryn Stimson and Mark Henricksen hereby files the following Response:

I. BACKGROUND

After the tortured execution of Clayton Lockett occurred in April of 2014, undersigned counsel was contacted by Appellant/Plaintiff to file a § 1983 lawsuit. During the course of the investigation, counsel learned the name of the doctor who botched the execution and he was named in the Complaint filed below. To date, that doctor has never publicly denied that he was the doctor who killed Clayton Lockett. Indeed, the identity of the doctor has been published worldwide. All

anyone need do to find his identity is to Google "Lockett execution doctor" and his name appears repeatedly.

Appellant argues that the local Oklahoma statute does not apply beyond limiting discovery during a judicial process; it is an unconstitutional prior restraint on undersigned counsel's free speech; and results in a denial of access to the courts.[1] Naming the doctor who violated the Constitution of the United States in a civil rights complaint brought in federal court is not designed to "harass" or "oppress" anyone; it is simply designed to hail into the dock a civil rights violating doctor who tortured and killed a human being in violation of the Constitution and is in compliance with the mandate of F.R.Civ.P. 10. Quite plainly, under the First Amendment to the United States Constitution, the State of Oklahoma has no ability or authority to gag anyone from publicly naming the execution team members nor prevent a court document from being so filed.

II. ARGUMENT

A. The Oklahoma Secrecy Statute does not apply in context of court filings.

OKLA. STAT. title. 22, § 1015(B) states in relevant part that "The identity of all persons who participate in or administer the execution process and persons

[1] Appellees have continued to mount the *ad hominum* attacks they began in the court below where they claimed that undersigned counsel's naming of the doctor "was an intentional violation of the confidentiality provisions of [the statute] and was designed strictly to harass and oppress persons believed to be involved in the execution process in Oklahoma." In this Court, they continue by writing that counsel "is not interested in justice, but to harass an individual that he suspects is a member of the Lockett execution team." (Mot. P. 3). They go on to allege that naming the doctor "was designed strictly to harass and oppress [him]." (Mot. P. 4). They express concern that counsel "will attempt to use this Court as another soapbox...to harass and annoy the [doctor]." (Mot. P. 5). It is undersigned counsel's belief that such *ad hominum* attacks on the integrity of opposing counsel are generally unprofessional and seldom advance the cause of justice in an adversarial system.

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."

Taken at face value, the State's argument could be extended logically so that any leaks to the media regarding the name of the doctor should be suppressed by court order as violative of the confidentiality provision of the statute. The State has alleged correctly that undersigned counsel has released the doctor's name to multiple media sources, yet the State has done nothing to restrain counsel from further publication. This is a tacit admission that the State recognizes that it has no right to suppress free speech under these circumstances.

The very terms of the statute indicate that the confidentiality clause is linked conjunctively to the discovery clause. Statutory construction principles applied to this language means that "[The names of the execution team]...shall be confidential *and* shall not be subject to discovery..." The two clauses must be taken together. Confidentiality is only maintained vis-a-vis the discovery process by the plain terms of the statute. There is nothing in the statute mandating that the names of the execution team members cannot be published in a publicly filed pleading in the United States district courts or the United States Courts of Appeal or in any media outlet anywhere. It simply means that Oklahoma is not required under *state* law to divulge the names of execution team members in discovery.

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must

> ordinarily be regarded as conclusive.

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Because the confidentiality clause is joined by the word "and" with the discovery clause, ordinary principles of statutory construction require that this Court read the statute simply as a limitation on discovery and not on any public disclosure through means other than discovery.

> We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word "and" was used otherwise than in its ordinary sense; and to construe the clause as though it said, "to the payment of charges and expenses, *or either of them*," as petitioner seems to contend, would be to add a material element to the requirement, and thereby to create, not to expound, a provision of law.

Crooks v. Harrelson, 282 U.S. 55, 58 (1930); *United States v. O'Driscoll*, 761 F.2d 589, 597-98 (10th Cir. 1985) (conjunctive terms indicate that all requirements must be satisfied), *cert. denied, O'Driscoll v. United States*, 475 U.S. 1020 (1986); Norman J. Singer, Statutes and Statutory Construction, Vol. 1A. § 21.14 (same); *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D.N.M. 1996).

Another basic rule of statutory construction is that wherever possible, statutes must be interpreted in accordance with constitutional principles. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 108 (1946). Statutes must be interpreted, if possible, to make them consistent with the Constitution. *St. Louis v. Wynne*, 224 U.S. 354, 358 (1912). "For it is a settled rule "that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution,...[internal citations omitted]." *Presser v. Ill.*, 116 U.S. 252, 263

(1886). To interpret the statute as the State has done would result in a constitutionally intolerable holding by this Court. The State is seeking a prior restraint on free speech involving a matter of public concern. It would require that Appellant be restrained by this Court from naming in publicly filed pleadings a constitutional violator who allegedly engaged in human rights violations and tortured Clayton Lockett to death.

Given the rules of statutory construction, a plain reading of the statute in question simply means that the State of Oklahoma shall maintain confidentiality in the identities of the execution team members by not divulging same in discovery. Oklahoma however, is not divulging the name of the execution team doctor; undersigned counsel is divulging that name. Oklahoma never gave up the name in any discovery proceeding thus the statute has been complied with. Clearly, to interpret the statute the way Appellees interpret it is to order a prior restraint on undersigned counsel from naming a constitutional violator in a federal lawsuit. This would not be consistent with the Constitution, thus that cannot be the intent of the legislature.

B. The Confidentiality Statute as interpreted by Oklahoma is an Unconstitutional Prior Restraint of Free Speech.

Freedom of expression upon matters of public concern is secured by the First Amendment. *Bartnicki v. Vopper*, 532 U.S. 514, 534-35 (2001) (citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964)). Any system of prior restraints of expression bears a heavy presumption against its constitutional

validity. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (citing *Carroll* v. *Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Id.* In *Keefe*, the court held that no prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971).

The Defendants in this case were all voluteers for the execution team. No one forced any of them to kill Mr. Lockett and if they now find themselves on the receiving end of a civil rights lawsuit, that consequence is one of the downsides of the mission they signed up for when they undertook their tasks. They appeared without masks in the execution chamber and subjected themselves to identification by anyone who happened to view their faces and recognized them. While acting under color of State law they also subjected themselves to the jurisdiction of this Court if they violated the Constitution of the United States, which they did.

Who these people are and what they did are clearly matters of great public concern. Whether they were trained or qualified to attempt to kill Clayton Lockett forms part of the subject matter of this litigation. "The right of privacy does not prohibit any publication of matter which is of public or general interest." *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (citation omitted). One of the costs associated with participation in public affairs is an attendant loss of privacy. *Id.* If a

newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103-04 (1979). If the information is lawfully obtained, the state may not punish its publication except when necessary to further a substantial interest. *Id.*

The Court has interpreted First Amendment guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary - orders that impose a "previous" or "prior" restraint on speech. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976). Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. *Id.* A prior restraint has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. *Id.* The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. *Id.* (*citing Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 492-493 (1975); *Craig v. Harney*, 331 U.S. 367, 374 (1947)). The protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct. *Id.*

Naming purported constitutional violators employed by the State of Oklahoma to kill prisoners is "…speech critical of the exercise of the State's power [which] lies at the very center of the First Amendment. [The State] seeks to punish the dissemination of information relating to alleged governmental misconduct, which only last Term we described as "speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth* v. *Smith*, 494 U.S. 624, 632 (1990).

The Supreme Court has been particularly attuned to encroachments upon free speech relating to the operating of the criminal justice system. This is because the judicial system "play[s] a vital part in a democratic state, and the public has a legitimate interest in their operations. See, *e. g., Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838-839 (1978). "It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575 (1980). Public vigilance serves us well, for "the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 270-271 (1948)." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034-35 (1991).

Even when national security is invoked by the government in support of

censorship, the Court has unambiguously held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963); see also *Near* v. *Minnesota*, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971)." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). While the national security context is where prior restraints stand their best chance of being upheld, even under those situations the Courts are not deferential simply because the magic words "national security" have been invoked by the government. As Justice Douglas said in his concurring opinion in the Pentagon Papers case:

> Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-270.

Id. at 723-24 (Douglas, J., concurring).

Under strict scrutiny review, the Government must demonstrate that the nondisclosure requirement is "narrowly tailored to promote a compelling Government interest," *Playboy Entertainment*, 529 U.S. at 813, and that there are no "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve," *Reno v. ACLU*, 521 U.S. 844, 874 (1997)." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 878 (2d Cir. 2008).

C. No Court Has Addressed The Constitutionality of Secrecy Laws After A Cognizable Injury Has Occurred.

Contrary to the erroneous assertions of the State, *no court anywhere* has addressed the constitutionality of secrecy laws except in context of death row inmates seeking to identify the drugs to be used in killing them, as well as the makers of those drugs and the identities of the members of the execution teams who will participate in their future executions. Courts have uniformly held that condemned prisoners certainly have a right to know what drugs will be used to kill them, but beyond that any information identifying the execution team or the maker of the drugs has been deemed irrelevant to any claim they may raise regarding a prospective Eighth Amendment violation. Courts have repeatedly held that the condemned inmates lack standing to obtain this information as no actual harm has befallen them and any future harm would be purely speculative thus the identities of the execution team or drug manufacturers has been deemed irrelevant. *See In re Lombardi,* 741 F.3d 888, 897 (8th Cir. 2014).

The State attempts to convince this Court that the Oklahoma secrecy statute was upheld in two cases filed by Clayton Lockett prior to his execution. This is simply untrue and absolutely misleading. The Court in *Lockett v. Evans,* 330 P.3d 488, 491 (Okla. 2014) never addressed the constitutionality of the secrecy statute. The case merely says that the court below went too far in declaring the statute unconstitutional as all Mr. Lockett needed to know in order to vindicate his rights under the Constitution was what drugs he was going to be killed with and that

information was provided to him. The Court never addressed the constitutionality of the confidentiality statute. Similarly, the State is incorrect in attempting to lead this Court to believe that the issue was decided in *Lockett v. State*, 329 P.3d 755 (Okla. Crim. App. 2014). There, the Court again simply noted that Mr. Lockett had access to information regarding the drugs the State would attempt to kill him with, therefore the other information sought regarding the identities of the drug manufacturers or execution team members was unnecessary to achieve adequate access to the courts. Contrary to the false assertion by the State, neither court addressed the constitutionality of the secrecy statute.

To uphold the secrecy statute would be to violate the First Amendment's guaranty of the right to petition the government for redress of grievances and would immunize wrong doing State actors from any federal consequences for their unlawful conduct.

D. Prior Decisions Of This Court Should Preclude The Defendants From Proceeding Anonymously.

Hiding the identities of the alleged wrongdoing State actors is not grounded in the law and would violate public policy.

In limited circumstances, courts have permitted a *plaintiff* to use an alias when significant privacy interests or threats of physical harm attend the revelation of a litigant's name. Anonymity has not been permitted to protect economic or professional concerns or when there is the threat of criminal or civil prosecution. *M.M. v. Zavaras,* 139 F.3d 798, 801 (10th Cir. 1998). Indeed, the policy

embodied in Fed.R.Civ.P. 10(a) requires the names of all parties to appear in the complaint. That is because lawsuits "are public events." *Id.* At 803. Anonymity should be permitted only in "exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." *Id.* In the American civil justice system there is "the presumption of openness." *Id.* This Court went on to note that the cases permitting anonymity have almost always involved abortion, birth control, and welfare prosecutions involving abandoned or illegitimate children. Anonymity is only permitted when an extremely important privacy interest can be established. Ultimately this decision is left to the sound discretion of the court. Professional embarrassment or consequences do not warrant anonymity. *Coe v. U.S. Dist. Court for Dist. of Colorado*, *supra*, 676 F.2d 411 (10th Cir. 1982).

The Second Circuit has enumerated some of the considerations for this Court when deciding whether anonymity should be permitted. In *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189-190. (2d Cir. 2008) the court balanced the plaintiff's interest in anonymity against both the public interest in disclosure and any prejudice to the other party. *Id.* at 189. The court identified ten factors to consider when determining whether a plaintiff can proceed anonymously including: 1) whether the litigation involves highly sensitive matters; 2) whether physical retaliation or psychological harm may befall a party; 3) whether the injury will likely occur regardless of anonymity; 4) whether a party is particularly

vulnerable; 5) whether a governmental party seeks anonymity; 6) prejudice accruing to the non-moving party; 7) whether the party has already been disclosed; 8) whether the public interest mandates disclosure; 9) Whether purely legal issues make the public interest in disclosure weak; 10) alternative methods of protecting identity.

In *Roe v. Catholic Health Initiatives* Colo.,2012 U.S. Dist. LEXIS 713(D. Colo. Jan. 4, 2012) the court stated that in matters of anonymity, this Court has historically taken its lead from the Eleventh Circuit, which lists three factors to be considered by this Court. They include: 1) "matters of a highly sensitive and personal nature"; 2) cases involving a "real danger of physical harm"; and 3) instances "where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." *Id.* The court also must "weigh the public interest in determining whether some form of anonymity is warranted." *Quoting Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000).

Regardless of the balancing test this Court employs, the public interest component of the equation is such that any other concerns pale in comparison. The only truly countervailing relevant consideration before this Court is the "real danger of physical harm" consideration. Any argument of physical harm made by the Defendants however, will be exposed as exaggerated, overblown and speculative. Indeed, Anita Trammel is named as a defendant and she has stated publically that she presides over all executions in the State of Oklahoma. She has never indicated that she has ever been threatened with any harm whatsoever. It is

a false argument to argue that exposing the other John Doe defendants is likely to result in any physical harm to them.

The doctor has already been publicly disclosed. There is no allegation he has been the subject of any threats. His identity was not discovered during the course of any "civil or criminal litigation" in violation of any statute, whether constitutional or otherwise. The State has proffered no facts indicating any physical harm has befallen or will befall the doctor. His name has been internationally published as the doctor who botched the execution. That fact coupled with other information known to undersigned counsel that the named doctor was in fact the correct party, gives counsel a good faith basis for naming the doctor in the complaint and counsel is confident he has named the correct party. The Executive Director of the Department of Corrections and the Assistant Warden have both been named in the complaint. Both had extensive hands-on involvement in the execution yet there is no effort being made to protect their anonymity.

The public has a compelling right to know the names, backgrounds and qualifications of all of the defendants in this action. The actions of the Defendants in this case led to an international outcry, unprecedented in the history of this country. The public has an absolute right to examine the training, experience and qualifications of the individuals employed by the State to kill Clayton Lockett. If the State is hiring unqualified people for this critically important job, the public

has a right to know that and demand changes in the procedures involved with hiring and training people on the execution team.

E. The Secrecy Statute is Unconstitutional Under the First Amendment as its Application Would Deny Plaintiff the Right To Petition The Government For Redress of Grievances.

In *California Motor Transport Co* . v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court recognized the right of access to the courts is a critical component of the First Amendment right to petition the Government for redress of grievances. *See also Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 741 (1983) ("[Going] to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important…"

Federal courts have repeatedly struck down state efforts to immunize their wrongdoers from being held accountable under § 1983. To prevail on an "access to the courts" constitutional challenge, a litigant must demonstrate "actual injury - that is 'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'" *Lewis v. Casey*, 518 U.S. 343, 348 (1996). Here, the actual injury has already occurred – Clayton Lockett was brutally killed by the defendants in violation of the Eighth Amendment to the Constitution. It is now time for the wrongdoers to be held accountable for their actions as set forth in the Complaint. Absent knowledge of the names of the John Doe defendants, the state has effectively immunized these defendants and evaded the jurisdiction of this Court. "It is the role of courts to

provide relief to claimants…who have suffered…actual harm." *Lewis*, 518 U.S. at 349. *Lewis* echoed the prior holding in *Bounds v. Smith* 430 U.S. 817 (1977) in which the Court acknowledged the fundamental right of access to the courts. The Court has routinely struck down state-created obstacles imposed upon indigent prisoners which served to bar them from the courthouse doors. The Court has prohibited state prison officials from actively interfering with inmates' attempts to prepare legal documents, *e. g., Johnson* v. *Avery*, 393 U.S. 483, 484, 489-490 (1969), or file them, *e. g., Ex parte Hull*, 312 U.S. 546, 547-549 (1941), and by requiring state courts to waive filing fees, *e. g., Burns* v. *Ohio*, 360 U.S. 252, 258 (1959), or transcript fees, *e. g., Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956), for indigent inmates. *Bounds* focused on the same entitlement of access to the courts. *See Lewis* 518 U.S. at 350; (*See also Whitington v. Ortiz*, 307 F. App'x 179, 187 (10th Cir. 2009) (inmates are entitled to tools to vindicate their constitutional right to access the courts for the purpose of pursuing post-conviction and habeas relief claims, and, to a more limited extent, civil rights claims)).

State efforts to immunize their employees from § 1983 liability have been resoundingly and consistently struck down by the United States Supreme Court. "[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors. Section 1983 accomplishes this goal by creating a form of liability that, by its very nature, runs only against a specific class of defendants: government bodies and their officials. Wisconsin's notice-of-claim statute undermines this "uniquely federal remedy,"

Felder v. Casey, 487 U.S. 131, 141-42 (1988). The Court went on to hold that enforcement of the state statute in § 1983 actions "so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest." *Id.* at 151.

The secrecy statute in Oklahoma is yet another effort by the State to thwart the reach of § 1983 and to erect a state barrier to the vindication of federal rights. Just as every other state-erected barrier to the vindication of federal civil rights in federal court has fallen, so too must the State secrecy law.

F. Cases specifically addressing confidentiality statutes and whether there is a First Amendment right of access to information about execution teams and protocol.

1. *Wood v. Ryan*

Last year in *Wood v. Ryan*, 759 F.3d 1076 (9th Cir. 2014) *vacated Ryan v. Wood*, 135 S.Ct. 21 (2014), the Ninth Circuit considered whether the First Amendment right to view executions (*California First Amendment Coalition*) supported the conclusion that there is a First Amendment right of access to information concerning the methods of execution.[2] The court in *Wood v. Ryan* did not ultimately decide whether Wood had a First Amendment right to the information he sought, concluded that Wood had raised "serious questions as to the merits of his First Amendment claim." *Id.* at 1088.

The Ninth Circuit first recognized that while *Richmond Newspapers* dealt

[2] Wood's underlying § 1983 suit alleged that the Department of Corrections had violated his (1) First Amendment right to petition the government for redress of grievances; (2) his First Amendment right to access information about the manner in which Arizona implements the death penalty; and (3) that Arizona's death penalty protocol violated the FDCA in violation of Art. VI.

with access to a court proceeding, Ninth Circuit case law has also recognized a First Amendment right of access to "documents related to those proceedings." *Wood*, 759 F.3d at 1081. The court concluded that a right of access to a proceeding entails a right of access to documents that are "intrinsically associated" with that proceeding. *Id.*

The court discussed how information pertaining to the execution equipment, procedure, and personnel were historically public information.[3] The Cour discussed the fact that given the flux in lethal injection protocol nationally and "the factual backdrop of the past six months in particular," more information about the drugs used in lethal injections could help the public make "better informed decisions" about lethal injections in this country. *Id.* at 1085 ("several flawed executions this year, including two in Oklahoma, […] have sparked public curiosity and debate over the types – and quality – of drugs that should be used in lethal injections.").

Without addressing the merits of the Ninth Circuit's analysis, the Supreme Court in *Ryan v. Wood*, 14A82, 2014 WL 3600362 (U.S. July 22, 2014) in a one paragraph opinion, held that the district court judge in Wood's case "did not abuse his discretion in denying Wood's motion for a preliminary injunction."

2. *Owens v. Hill*

Last year in *Owens v. Hill*, 295 Ga. 302, 758 S.E.2d 794 (2014), the

[3] Public accounts supplied information about the types of ropes used for Arizona hangings and the manufacturers who provided them. Arizona newspapers reported openly on gas chambers, describing their size, cost, and makeup, and explained that Eaton Metal Products Co., which supplied gas chambers to states, had a "patent on the death machine."

Georgia Supreme Court ultimately upheld the constitutionality of Georgia's analog to Okla. §1015. The opinion was hinged on the *Richmond Newspapers* analysis for determining whether a First Amendment right of access exists for execution information. *Id.* at 317. The Court summarily rejected any First Amendment right of access arguments. The Court hedged its opinion by acknowledging that there could be "serious questions about the constitutionality of the confidentiality statute," in a case where the plaintiff came closer to presenting a "colorable [Eighth Amendment] claim under *Baze v. Rees*, 533 U.S. 35 (2008)." *Id.* at 308. The court was not explicit about what exact Constitutional protection would be violated if a plaintiff demonstrated a more substantial Eighth Amendment claim, but the fact that they left the door open is valuable and suggests that a court might find a confidentiality statute to be unconstitutional if there is an Eighth Amendment smoking gun and the statute is preventing litigation. As is true of every prior case, the question before the Georgia Supreme Court did not involve a situation like that confronting this Court where a cognizable Constitutional tort has already occurred.

V. Conclusion

For all of the foregoing reasons this Court should deny the State's Motion.

Respectfully submitted this 14th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that on this 14th day of August, 2015, a true and correct copy of the foregoing **RESPONSE TO APPELLEES' MOTION TO MAINTAIN DISTRICT COURT DOCUMENTS UNDER SEAL AND TO PROHIBIT PARTIES FROM REFERRING TO EXECUTION TEAM MEMBERS BY NAME** has been served via ECF/E-Mail on:

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Malwarebytes Anti- Malware for Windows, Version 1.75.0.1300, database version v2013.07.02.08 updated February 24, 2013, and according to the program are free of viruses.

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