UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 15-6134

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

**MEMORANDUM OF AMICI CURIAE
DOCTORS FOR THE
ETHICAL PRACTICE OF MEDICINE
IN OPPOSITION TO
APPELLEES' MOTION TO MAINTAIN DISTRICT COURT
DOCUMENTS UNDER SEAL AND TO PROHIBIT PARTIES
FROM REFERRING TO EXECUTION TEAM MEMBERS
BY NAME**

August 20, 2015

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BRIEF OF *AMICI CURIAE*
DOCTORS FOR THE ETHICAL PRACTICE OF MEDICINE

I. INTEREST OF *AMICI*

Amici Curiae are a number of concerned doctors,[1] each of whom has a long-standing interest in ensuring ethical practices in medicine, and in maintaining the professional framework necessary to support those practices. Medical ethics extend to doctors participating in executions. *Amici* respectfully submit that a ruling that the identities of such doctors cannot be disclosed could preclude accountability for misconduct and prevent the profession from carrying out the crucial function of overseeing the conduct of its members. *Amici* believe that they have particular expertise on these issues that will assist the Court in ruling on Appellees' motion.

II. THE FACTS RELEVANT TO *AMICI'S* INTEREST

Clayton Lockett's execution was overseen and facilitated by a medical doctor. Amended Compl. at ¶¶ 2, 7-8, 18-19 [Doc. 18]. This doctor failed repeatedly to locate a vein for the intravenous injection of the toxins the state intended to use to kill Mr. Lockett. He then improperly placed the IV into Mr. Lockett's femoral vein, nicked the vein, and caused the drugs to pump directly into his muscle, where they were not absorbed. [2] The doctor failed to recognize the error because he obscured Mr. Lockett's groin with a cloth for privacy reasons, and then failed to properly monitor the IV placement and function. Mr. Lockett experienced excruciating pain, which was visible and audible to witnesses, for 43 minutes prior to his ultimate death.

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[1] *Amici* are listed at Appendix A.

[2] Kimberly Querry & Meg Alexander, *Bombshell: Executed Oklahoma inmate's attorneys release shocking findings from autopsy*, KFOR-TV, June 13, 2014, http://kfor.com/2014/06/13/bombshell-executed-oklahoma-inmates-attorneys-release-shocking-findings-from-autopsy/.

In his original complaint, Appellant named the doctor who carried out Lockett's execution. The doctor's name had already been made public, and neither Appellees nor the State of Oklahoma has asserted that Appellant learned the doctor's name through any judicial disclosure. The State of Oklahoma, through its Attorney General, moved to strike the complaint on the grounds that it contained the identity of the doctor, herein referred to as Dr. Doe. The State of Oklahoma's motion relied on OKLA. STAT. tit. 22, § 1015(B), which provides in relevant part:

> The 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 District Court ordered the sealing of the complaint without explanation or citation to the legal basis for its decision, and ordered that future filings omit the doctor's name. *Amici* respectfully submit that this statute is inapplicable here, since Dr. Doe's identity is already in the public domain. But *Amici* also ask this Court to carefully consider the implications of a broad interpretation of the statute in these particular circumstances, because that would threaten a core interest of the *Amici*, the medical profession, and the public, namely the regulation of the profession of medicine and the accountability of doctors for professional errors.

As Appellees appear to acknowledge, nothing in OKLA. STAT. tit. 22, § 1015(B) imposes a duty of non-disclosure on Appellant, the medical profession, the press, or any other member of the public. The statute precludes the use of judicial processes to obtain the name of a doctor who participates in an execution. While the statute explicitly states that the names of individuals participating in the execution team "shall be confidential," no Oklahoma court has held that the name of a publicly

known member of an execution team may not appear in pleadings on account of this statute, nor have the courts determined the appropriate protocol once a name is already in the public domain. In the Supreme Court of Oklahoma's only examination of OKLA. STAT. tit. 22, § 1015(B), the court considered only whether the statute limited the taking of discovery relating to the drugs used in executions. The court held that it did not. *Lockett v. Evans*, 2014 OK 34, 330 P.3d 488, 491 (Okla. 2014).

The question presented on this motion is whether a litigant must refrain from using a publicly available name. The mere fact that the district court decided that certain documents should be filed under seal is insufficient to overcome the presumption of public access. *JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs of Cnty. of Montrose, Colo.*, 754 F.3d 824, 827 (10th Cir. 2014). "By definition, information that is readily available cannot be sealable." *Chadam v. Palo Alto Unified Sch. Dist.*, No. C 13-4129 CW, 2014 WL 325323, at *5 (N.D. Cal. Jan. 29, 2014). In general, courts decline to entertain a dispute "where the award of any requested relief would be moot." *McAlpine v. Thompson*, 187 F.3d 1213, 1216 (10th Cir. 1999).

Amici respectfully submit that common sense should be applied here, and urge the Court to refrain from issuing a blanket ruling precluding the use or disclosure of the name of a physician who has assisted in an execution. Aside from the futility of granting Appellees' requested relief in this instance, a broad proscription on the disclosure of the names of executioner physicians facilitates conduct that is unethical and negligent, and would interfere with the ethical obligations of other physicians.

III. THE PUBLIC AND THE MEDICAL PROFESSION HAVE AN IMPORTANT INTEREST IN KNOWING AND DISCLOSING THE IDENTITIES OF DOCTORS WHO PARTICIPATE IN EXECUTIONS

Professional associations and their members have responsibilities to speak out to protect the public or to prevent the profession from falling into disrepute. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (recognizing special interest of state bar associations to regulate attorney members in order to protect consumers and the integrity of the profession). It is vital to the medical profession that it be able to identify and address instances of alleged malpractice and other unethical conduct by individual doctors. State licensure boards aim to ensure that the doctors under their purview deliver the highest quality of care to patients in that state. The Oklahoma State Board of Medical Licensure and Supervision's (the "Board") stated purpose is:

> To promote the Health, Safety and Well-being of the citizens (patients) of Oklahoma by requiring a high level of qualifications, standards and continuing education for licenses regulated by Oklahoma Medical Board. To protect the on-going Health Safety and Well-being of the citizens (patients) of Oklahoma by investigating complaints, conducting public hearings, effectuating and monitoring disciplinary actions against any of the licensed professionals, while providing the licensee with proper due process and all rights afforded under the law. To provide any member of society upon request, a copy of the specific public records and information on any of the licensed professionals.

http://www.okmedicalboard.org/#about (last visited Aug. 14, 2015). It carries out this purpose through the application of the standards established for the practice of medicine, codified at OKLA. STAT. tit. 59, § 480 *et. seq*.

Dr. Doe's treatment of Appellant qualifies as the practice of medicine, even though his actions were intended to end Appellant's life. "Any offer or attempt to prescribe, order, give, or administer any drug" qualifies as the practice of medicine and thus falls under the purview of the Board. OKLA. STAT. tit. 59, § 492(C)(2). Dr. Doe administered, or attempted to administer, a lethal dose of drugs to appellant. His

actions are therefore reviewable by the Board, and by law, he may be subject to disciplinary action. *Id.* § 509.1.

Any investigation by the Board will seek to determine whether a licensed practitioner has breached applicable standards of care and/or professional obligations. The Board may discipline a doctor for various forms of "unprofessional conduct," including:

> (15) Gross or repeated negligence in the practice of medicine and surgery.

OKLA. ADMIN. CODE tit. 435, § 10-7-4(6),(15) and (24)

> 16. Prescribing, dispensing or administering of controlled substances or narcotic drugs in excess of the amount considered good medical practice, or prescribing, dispensing or administering controlled substances or narcotic drugs without medical need in accordance with published standards[.]

OKLA. STAT. tit. 59, § 509. Doctors must report, and the Board must investigate, complaints of physician conduct that deviates from these standards. OKLA. ADMIN. CODE tit. 435, § 10-7-4 ¶ 43 and 3-3-1.

While physician participation in executions is ethically controversial, those who elect to participate still must act in accordance with established standards of care. Indeed, it may reasonably be inferred that the state's decision to involve a physician in an execution is at least in large part so that the physician's skills will *reduce* the risk of unnecessary pain or error in the administration of the lethal pharmaceutical cocktail. The Oklahoma Department of Corrections has detailed guidelines about the identification of an appropriate site for insertion of the IV and due diligence related thereto, and requires that a physician "monitor the condemned offender's level of

consciousness . . . to ensure that the condemned is sufficiently unconscious" prior to the administration of the lethal drugs.[3]

Nothing in any Oklahoma statute or guideline suggests that the legislature intended to shield negligent medical practitioners performing executions from accountability for their deviations from ordinary standards of care. The law places limits only on initiating an administrative proceeding and taking "any action to revoke, suspend, or deny a license . . . *for the reason* that the person participated in any manner in the execution of a judgment of death." OKLA. STAT. tit. 59, § 4001 (emphasis added). The statute leaves it to the Board to institute proceedings for *other* reasons, such as the doctor's gross negligence. And § 4001 is silent as to whether the Board may impose any of the other disciplinary actions within its purview, such as censure, reprimand, or issuing a letter of concern to the doctor, on account of participation in an execution. *See id.* §§ 509.1 and 4001.

Oklahoma's standards for the practice of medicine plainly contemplate, and in fact require, that a doctor's breach of professionalism and any resulting discipline be made public: "Reports of all disciplinary action provided for in this section will be available to the public upon request." *Id.* § 509.1(D). Professional medical associations have an interest in alerting fellow practitioners, and their patients, that a doctor has violated statutory standards of professionalism, and in imposing penalties to deter future negligence. Here, Dr. Doe's apparent incompetence in the placement of

[3] Okla. State Penitentiary Field Memorandum No. OSP-040301-01, at 16, http://www.tulsaworld.com/procedures-for-the-execution-of-offenders-sentenced-to-death/pdf_d8c4a6b8-d0b1-11e3-9b2c-001a4bcf6878.html; Execution Procedures, OP-040301, *Execution of Offenders Sentenced to Death*, at 26-27, http://www.ok.gov/doc/documents/op040301.pdf.

the IV and his failure to monitor that IV after it had been inserted led to Mr. Lockett's protracted and painful death. Publicly available information suggests that Dr. Doe practices medicine in an area where he is presumably required to perform, on a regular basis, the very skill – placement and monitoring of an IV – that he apparently performed so poorly in this execution. Appellant's allegations and media reports of Mr. Lockett's execution justify – at a minimum – an investigation by the Board and a public hearing to determine whether his care was competent.[4] Moreover, because the administrative code specifically directs the Board to consider "repeated" acts of negligence, it is important that each instance of potential negligence be reportable. And in keeping with the purpose of the Board, and the mandates of § 509.1, the Board's findings should be made available to the public that the Board seeks to protect.[5]

Thus, the medical profession and patients have a compelling interest in the names of doctors performing executions being ascertainable. Basic competence and prioritization of patient care above all else are essential to any patient's selection of a physician; denying the public information about his actions during Mr. Lockett's execution precludes their evaluation of the quality of Dr. Doe's care.

a. THE MEDICAL PROFESSION MUST BE ABLE TO ADDRESS ETHICAL VIOLATIONS CONCERNING EXECUTIONS

Every doctor is bound by the Hippocratic Oath, which provides, in relevant part:

> I will use treatment to help the sick according to my ability and judgment, but I will never use it to injure or wrong them. I will not give

[4] *See* hearings announced at http://www.okmedicalboard.org/agendas_minutes.
[5] *See* results of disciplinary hearings published at *id*.

> poison to anyone though asked to do so, nor will I suggest such a plan.... Into whatsoever houses I enter, I will do so to help the sick, keeping myself free from all intentional wrong-doing and harm…[6]

Participation in an execution is widely viewed as harm, and an egregious violation of the Hippocratic Oath, throughout the medical profession.[7] There is no ambiguity in their positions; the American Medical Association has flatly declared that "[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."[8]

Despite this uniform view of medical ethics, states carrying out executions nevertheless enlist the assistance of physicians, notwithstanding those physicians' ethical obligations to act to benefit, and not harm, their patients. This "corrupts the medical profession" and "'medicalizes' executions, meaning that its veneer of medical respectability allows the imagery of healing to be used to justify killing."[9] But the medical profession continues to insist on full compliance with the fundamentals of medical ethics even within the framework of executions. Although states have created, over the strong objections of the medical community, limited "safe harbor" laws for

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[6] W.H.S. Jones, *The Doctor's Oath*, 11–12 (1924), available at http://www1.umn.edu/phrm/oaths/oath1.html. There are a number of versions of the Hippocratic Oath, which has been modernized and retranslated numerous times. All of them provide that a doctor must act for the benefit, and not to the detriment, of a patient.

[7] Tara Culp-Ressler, *One Sentence That Could Help End The Death Penalty In America*, Think Progress, Apr. 10, 2014, http://thinkprogress.org/health /2014/04/10/3423908/lethal-injection-pharmacists/; Bruce Patsner MD, *Baze v. Rees, Execution by Lethal Injection, and the Role of the Medical Profession*, at 3, 4, https://www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20lethal%20injection.pdf.

[8] *Code of Medical Ethics*, Opinion 2.06 – Capital Punishment (as revised and adopted June 1998), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/ opinion 206.page?.[8]

[9] Jonathan I. Groner M.D., *The Hippocratic Paradox: The Role Of The Medical Profession In Capital Punishment In The United States*, 35 FORD. URB. L.J. 883, 907 (2008).

physicians participating in executions, the states should not be permitted to completely insulate doctors from accountability for their actions.

If physicians continue to participate in executions notwithstanding this conflict, there must be oversight by the profession of their actions by their respective state boards. Oversight is only possible if the identity of such doctors can be known.

b. MEDICAL PROFESSIONALS ARE REQUIRED TO IDENTIFY AND REPORT EXAMPLES OF MALPRACTICE AND ETHICAL VIOLATIONS

Like lawyers, medical professionals are obligated to report ethical breaches by other doctors. The American Medical Association's *Principles of Medical Ethics* provides that "[a] physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence."[10] If a doctor learns that a colleague has engaged in the unethical and/or incompetent practice of medicine, he is ethically obliged to bring that conduct to the attention of the medical authorities. Failure to make such a report is, in itself, considered unprofessional conduct, which may be subject to disciplinary action. OKLA. ADMIN. CODE tit. 435, § 10-7-4, ¶ 43.

The functioning of this peer-reporting system requires that the identity of doctors involved in medical procedures be known or knowable. The only way to hold negligent doctors accountable for their actions – whatever the circumstances – is to make their identities known. The interpretation of OKLA. STAT. tit. 22, § 1015(B)

[10] Available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?; *see also* AMA Ethics Opinion 9.031 - *Reporting Impaired, Incompetent, or Unethical Colleagues* (2004), http://www.ama-assn.org/ama/pub/physician-resources/ medical-ethics/code-medical-ethics/opinion9031.page (based on 1992 report).

urged by Appellees risks selective abandonment of medical ethics standards and reporting requirements, and it does so with respect to a group that is already particularly vulnerable to doctor negligence and ethical violations. Prisons commonly employ doctors with a history of malpractice, leading to numerous inmate deaths.[11]

CONCLUSION

Wherefore, *Amici* respectfully request that this Court deny Appellees' motion to avoid creating dangerous precedent that would allow doctors involved in executions to act without accountability. Even if this Court were inclined to rule on the proper interpretation of OKLA. STAT. tit. 22, § 1015, this case presents particularly poor circumstances for such a ruling. Dr. Doe's identity cannot be kept "confidential" because it is already public.

August 20, 2015

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[11] Editorial, *Florida prisons are in a state of perpetual crisis*, Florida Times-Union, Mar. 30, 2015, http://jacksonville.com/opinion/ editorials/2015-03-30/story/Florida-prisons-are-state-perpetual-crisis; Danny Robbins, *Ga. Prison Doctor under Review following Critical Reports*, Atlantic Journal Constitution, July 24, 2015, at http://www.correctionsone.com /correctional-healthcare/articles/8688804-Ga-prison-doctor-under-review-following-critical-reports/.

CERTIFICATE OF COMPLIANCE

Undersigned counsel for *Amici curiae* hereby certifies, as required by the Rules of Appellate Procedure, as follows:

(A) no party's counsel authored the brief in whole or in part;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person – other than the *Amici curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief;

(D) that the brief is 10 pages long and contains 2,751 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(E) this brief is completed in 13-point font and has been prepared in a proportionally spaced typeface using Times New Roman font.

So certified this 20th day of August, 2015.

s/ A. Katherine Toomey
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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2015, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

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APPENDIX A

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1. Dr. Lucas Restrepo (Clinical Assistant Professor of Neurology at the University of California);

2. Dr. Steven Miles (Professor of Medicine and Bioethics at the University of Minnesota Medical School in Minneapolis);

3. Dr. Robert L. Cohen (Clinical Assistant Professor of Medicine, NYU; Member, New York City Board of Correction);

4. Dr. John P. May (Regional Medical Director of Florida Region for Wexford Heath Sources, and Consultant on Correctional Healthcare to the US Department of Justice, Civil Rights Division);

5. Dr. Marc Stern (Affiliate Assistant Professor, Health Services at the University of Washington, formerly the Health Services Director for the Washington State Department of Corrections);

6. Dr. Scott Allen (Professor of Medicine, Associate Dean of Academic Affairs, University of California Riverside School of Medicine);

7. Dr. Josiah D. Rich (Professor of Medicine and Epidemiology, Brown University and Director of the Center for Prisoner Health and Human Rights);

8. Dr. Robert Greifinger (Professor (Adjunct) of Health and Criminal Justice and Distinguished Research Fellow at John Jay College of Criminal Justice in New York City and correctional health care policy and quality management consultant);

9. Dr. Coleman Pratt (Chief Medical Officer, Health Center in Florida, former Medical Director for Prison Health Services);

10. Dr. David Nicholl (Consultant Neurologist at Sandwell and West Birmingham Hospital, UK); and

11. Dr. John Henning Schumann (Gussman Family Associate Professor of Medicine, University of Oklahoma-Tulsa).