

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

Christopher S. McDaniel,)	
)	
Plaintiff,)	
)	
v.)	No. 2:16-CV-4243
)	
George Lombardi, in his official capacity as)	
Director of the Missouri Department of)	
Corrections,)	
)	
Defendant.)	

COMPLAINT

Plaintiff, Christopher S. McDaniel, alleges as follows:

INTRODUCTION

1. As a death penalty reporter for BuzzFeed News and as a former reporter for St. Louis Public Radio, Christopher S. McDaniel engages in extensive investigative reporting. His reporting has uncovered evidence suggesting that Missouri officials violate state and federal law, as well as engage in other questionable practices, in their efforts to sustain the death penalty in Missouri.

2. To ensure that executions are carried out in a constitutional manner, McDaniel applied in January 2014 to witness a Missouri execution. He completed the Missouri Department of Correction’s State Witness Application form, but he never received a response, constructively denying him the opportunity to be a witness.

3. Pursuant to Missouri statute, the Director of the Department of Corrections invites “at least eight reputable citizens, to be selected by him ... to be present at the execution ... to witness the execution[.]” Mo. Rev. Stat. § 546.740.¹
4. The Department of Corrections maintains no policy governing how the Director decides whether to grant or deny requests to witness an execution by members of the public or media, leaving the decision of who is a reputable citizen and who among those qualified should be selected to the discretion of the Director.
5. On their face and as applied, the Department of Corrections policies and customs regarding the selection of execution witnesses violate the Due Process Clause of the Fourteenth Amendment in that the opportunity to witness an execution and report on what was witnessed requires permission that is given or withheld without any specific standards, other than age, creating an impermissible risk of the suppression of ideas or viewpoint discrimination.

PARTIES

6. Plaintiff, Christopher S. McDaniel, is a United States citizen.
7. Defendant, George Lombardi, is the Director of the Missouri Department of Corrections. He is sued in his official capacity only.

JURISDICTION AND VENUE

8. Plaintiff brings this claim pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

¹ The literal language of statute requires that the Attorney General arrange for execution witnesses. Despite this language, however, the statute is understood and applied to make this duty incumbent upon the Director of the Department of Corrections.

9. This Court has jurisdiction under 28 U.S.C. § 1331 over Plaintiff's claim because it arises under the Constitution of the United States.
10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1) & (2) because Defendant is located in Cole County, Missouri, and his actions giving rise to the claim in this suit occurred in Cole County.
11. Venue is proper in the Central Division pursuant to Local Rule 3.1(a)(2).

FACTS

12. Plaintiff is a death penalty reporter for BuzzFeed News.
13. Plaintiff was formerly a reporter for St. Louis Public Radio.
14. In the course of his work for both BuzzFeed News and St. Louis Public Radio, Plaintiff has investigated and reported on Missouri's actions related to its execution of inmates.
15. Plaintiff's reporting has, at times, shone an unfavorable light on the actions of Missouri officials. For example,
 - a. A December 13, 2013 story revealed Missouri's execution drug supplier was not licensed to sell in Missouri, which, under normal circumstances, could be a felony. This revelation led to a state hearing into the matter, as well as a lawsuit against the pharmacy. After the suit, the pharmacy agreed to no longer sell execution drugs to Missouri;
 - b. A September 2, 2014 story exposed that Missouri had been injecting inmates with high levels of a sedative before execution witnesses were ushered into the room. This story led to legal challenges, which in turn caused the Department of Corrections to change its policy to make the sedative optional going forward. Some judges went on record finding the revelation "alarming,"

noting that the policy change prompted by the story “appears to be an acknowledgment that mandated injection of dangerous levels of midazolam shortly before the execution likely violates the inmate’s constitutional rights.”;

- c. A January 28, 2016 story showed that high-ranking Department of Corrections officials have handed out more than \$250,000 in cash stuffed in envelopes to pharmacists and members of the execution team, likely in violation of federal tax law; and
 - d. An April 21, 2016 story reported that Missouri’s former execution drug supplier admitted to committing hundreds of pharmaceutical violations, its license was placed on probation, and it later sold off its assets.
16. To ensure that executions are carried out in a constitutional manner, Plaintiff applied in January 2014 to witness a Missouri execution.
 17. Pursuant to Missouri statute, the Director of the Department of Corrections invites “at least eight reputable citizens, to be selected by him ... to be present at the execution ... to witness the execution[.]” Mo. Rev. Stat. § 546.740.
 18. By Department of Corrections policy and custom, the approval or disapproval of requests to witness an execution is in the unfettered discretion of the Director.
 19. Plaintiff completed the Missouri Department of Corrections’ State Witness Application form. A copy of his application, with his social security number redacted, is attached hereto and incorporated herein by reference.
 20. The Department’s application requires each prospective witness to state, among other things, whether they are or ever have been a member of a group or organization opposed to, or in support of, the death penalty.

21. Plaintiff never received a response to his application, constructively denying him the opportunity to be a witness to any of the seventeen executions that Missouri has carried out since his application was submitted.
22. In order to further understand Defendant's practices regarding the selection of execution witnesses, a public records request was made in May 2014, seeking copies of records from a one-year period related to applications to be an execution witness and the Department's handling of those applications.
23. The Department refused to provide the records as required by Missouri law, which necessitated litigation to compel the Department to comply with state law.
24. The Department was found to have violated Missouri's Sunshine Law. The Department did not appeal the determination that it had violated the law; however, it has appealed the determination that its violation of the law was knowing.
25. Once the records were made available to the public, Plaintiff learned that every applicant who, like Plaintiff, expressed a desire to ensure that execution were carried out properly and constitutionally was denied the opportunity to witness an execution.
26. The Department's policies and customs grant Defendant unfettered discretion to determine who is, or is not, permitted to witness an execution.
27. The Department's policies and customs provide the opportunity for discrimination based on viewpoint or retaliation for First Amendment protected activity, including expressive activity, press activity, or membership in a church or other organization that is opposed to the death penalty.
28. Plaintiff desires to witness an execution in Missouri.

29. At all times relevant, Plaintiff has not been under the age of twenty-one years and has been qualified to be an execution witness.
30. At all times relevant, Plaintiff is not clergy or religious leader.
31. At all times relevant, Plaintiff is not a relative or friend to any death row inmate.
32. As relevant to the actions described in this Complaint, Defendant acts and acted under color of law.

COUNT I

42 U.S.C. § 1983 – Due Process

33. Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.
34. Defendant's policies and customs related to the selection of execution witnesses allow Defendant to allow, or not allow, an application to witness an execution in such a way that they permit unbridled discretion to deny an adult citizen the benefit of serving as an execution witness based on the individual's viewpoint, expressive or press activity, or membership in a church or other organization.
35. There is no process or procedure by which Plaintiff might witness an execution other than through the policies and procedures established by the Department.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Court:

- a. Upon motion, grant a preliminary injunction preventing Defendant from inviting any individual, other than the Attorney General, to serve as execution witness until such time Defendant has established a policy for selection of execution witnesses that this Court determines accords with the Due Process Clause of the Fourteenth Amendment;

- b. Grant a permanent injunction preventing Defendant from selecting execution witness under a procedure that does not provide due process;
- c. Award Plaintiff's costs and attorneys' fees pursuant to 42 U.S.C. § 1988; and
- d. Allow such other and further relief as this Court finds just.

Respectfully submitted,

/s/ Anthony E. Rothert
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Attorneys for Plaintiff



STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
STATE WITNESS APPLICATION

INSTRUCTIONS: A. Please Print
B. Complete entire questionnaire, attach additional sheets if necessary.
C. Return completed application to: Office of Director, P. O. Box 235, Jefferson City Mo. 65102

NAME <i>Christopher McDowell</i>	DOB <i>9/5/1989</i>	SOCIAL SECURITY NUMBER	CITIZEN OF US? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	GENDER <input checked="" type="checkbox"/> M <input type="checkbox"/> F
HOME ADDRESS (STREET) <i>6109 Washington Blvd Hazel</i>	CITY <i>St. Louis</i>	STATE <i>MO</i>	ZIP CODE <i>63112</i>	HOME PHONE NUMBER <i>(502) 424-7562</i>
PLACE OF EMPLOYMENT <i>St. Louis Public Radio</i>	TYPE OF BUSINESS <i>Media</i>			
STREET <i>3651 Olive Street</i>	CITY <i>St. Louis</i>	STATE <i>MO</i>	ZIP CODE <i>63108</i>	BUSINESS PHONE NUMBER <i>(314) 516-6157</i>

CRIMINAL HISTORY: A criminal record in itself does not necessarily make you ineligible, however false information can be grounds for ineligibility.

- A. Have you ever been arrested, issued a summons, charged or convicted of any felony offense(s)? Yes No
- B. Have you ever been arrested, issued a summons, charged or convicted of any misdemeanor offense(s)? Yes No
- C. Have you ever been arrested, charged or convicted of any crime related to alcohol or drugs? Yes No
- D. Are you in any way related to someone under supervision of the Department of Corrections (inmate, probationer, parolee, etc.)? Yes No
- E. Are there current charges pending against you for any criminal offense(s)? Yes No

If you answer "Yes" to any of the above, provide information in the space provided. (Use the back side if necessary.)

MONTH/YEAR	OFFENSE(S) / ACTION TAKEN	ARREST AGENCY	STATE	CITY/ZIP

Have you ever been incarcerated in a correctional facility? Yes No If "Yes" please provide the following:

FACILITY	CITY/STATE	HOW LONG?

RELEASE DATE	STATUS	OFFENSE

Within the last 2 years have you visited, corresponded with anyone who is currently under the supervision of the Missouri Department of Corrections (inmate, parolee, probationer, etc.)? Yes No If "Yes" please list name, DOC number and facility name.

Are you related to anyone by blood or marriage who is currently employed in state service? Yes No If "Yes" provide: name, relationship and agency.

Brother-in-law, trooper with Kentucky State Police, Joseph Brown

Explain why you are requesting to be a witness to an execution in the State of Missouri.

To ensure that this solemn task is carried out constitutionally.

Are you, or have you ever been, a member of any group or organization opposed to, or in support of, the death penalty? Yes No If Yes, please list the name of the organization(s).

I hereby certify that this application contains no willful misrepresentation or falsification and that the information given by me is true and complete to the best of my knowledge and belief.

I also authorize any inquiries made in connection with information provided on this questionnaire. This includes employment verification and criminal history checks.

SIGNATURE <i>Chris McDowell</i>	DATE <i>1/2/2014</i>
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JS 44 (Rev 09/10)

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

CIVIL COVER SHEET

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

The completed cover sheet must be saved as a pdf document and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s):**First Listed Plaintiff:**

Christopher S. McDaniel ;

County of Residence: Outside This District**Defendant(s):****First Listed Defendant:**

Director of Missouri Department of Corrections George Lombardi ;

County of Residence: Cole County

County Where Claim For Relief Arose: Cole County

Plaintiff's Attorney(s):

Anthony E Rothert (Christopher McDaniel)
american civil liberties union of missouri foundation
454 WHITTIER
ST. LOUIS, Missouri 63108
Phone: 314-669-3420
Fax:
Email: arothert@aclu-mo.org

Defendant's Attorney(s):

Basis of Jurisdiction: 3. Federal Question (U.S. not a party)

Citizenship of Principal Parties (Diversity Cases Only)**Plaintiff:** N/A**Defendant:** N/A

Origin: 1. Original Proceeding

Nature of Suit: 440 All Other Civil Rights

Cause of Action: 42 USC 1983 - due process challenge to policy for selection of execution witnesses

Requested in Complaint**Class Action:** Not filed as a Class Action**Monetary Demand (in Thousands):****Jury Demand:** Yes**Related Cases:** Is NOT a refiling of a previously dismissed action

Signature: /s/ anthony e. rothert

Date: 8/31/2016

If any of this information is incorrect, please close this window and go back to the Civil Cover Sheet Input form to make the correction and generate the updated JS44. Once corrected, print this form, sign and date it, and submit it with your new civil action.