

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PHILIP EIL,)	
)	
)	
Plaintiff,)	
)	
v.)	Case No. 15-cv-99-M-LDA
)	
U.S. DRUG ENFORCEMENT ADMINISTRATION)	
)	
Defendant.)	
_____)	

AFFIDAVIT OF PHILIP EIL

Philip Eil, on oath, deposes and says:

1. The facts set forth in this affidavit are true to my knowledge and are based on my personal knowledge and review of publically available information, including news articles and press releases.

2. I submit this Affidavit in support of my Motion for Summary Judgment in this matter.

3. In May 2007, a grand jury for the United States District Court for the Southern District of Ohio returned a 22-count indictment charging Paul Volkman (“Volkman”) with the following: conspiring to unlawfully distribute a controlled substance in violation of 21 U.S.C. §841(a), maintaining drug-involved premises in violation of 21 U.S.C. §856(a)(1), the unlawful distribution of a controlled substance leading to death in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. §§ 924(c)(1) and (2). A true and accurate copy of the indictment is attached hereto as Exhibit A.

4. On May 23, 2007, the U.S. Drug Enforcement Administration (“DEA”) issued a press release, stating that Volkman and his co-defendants “handed out more than 1,500,000 pain pills between October 2001 and February 2006,” made \$3,087,500 from this scheme, allegedly caused “the deaths of at least 14 people,” and that “[t]his indictment serves as a warning to all medical professionals that if you illegally prescribe medication for personal gain you will be prosecuted to the fullest extent of the law.” A true and accurate copy of the press release is attached hereto as Exhibit B.

5. I was a freelance professional journalist in 2009, when I learned about this indictment. Volkman had gone to college and medical school with my father in the 1960s and

1970s, and I became intrigued by his story, which I believed was nationally and historically significant. The question that sparked my interest was, in essence, “How did this man with an MD/PhD from the University of Chicago turn into, according to the government’s allegations, a prodigious drug dealer and medical mass-murderer?” I immediately began conducting research for a book about Volkman and his case. Shortly thereafter, in September 2009, I enrolled in a graduate nonfiction writing program at the Columbia University School of the Arts, where I chose the Volkman story as my thesis project. I graduated from that Columbia program with a Master of Fine Arts (M.F.A.) degree in May of 2011.

6. In December 2009, I conducted my first interviews of Volkman. And, to date, I have conducted more than 100 interviews, across 19 states, for the project. (This book is by far the most labor-intensive, expensive, and time-consuming project I have taken on during my seven-year journalism career.) The subjects of these interviews include doctors, lawyers, nurses, law enforcement officials, politicians, friends and family of Dr. Volkman, former patients of Dr. Volkman, and numerous people in the Southern Ohio county where his crimes took place.

7. In 2010, seven months before the Volkman trial, a DEA agent approached me after I had conducted an interview of a former patient of Volkman. He asked me whether I was aware of the potential harm of speaking with potential witnesses and he mentioned the possibility I could be charged with witness tampering.

8. In or around the same time, that former patient of Volkman reached out to me and informed me that a DEA agent had instructed her to not speak with me. A copy of this individual’s correspondence to me is attached hereto as Exhibit C.

9. Volkman’s trial began on March 1, 2011. The start of the trial was covered by the Associated Press. And, the following month, the New York Times mentioned the trial in a front-page article titled, “Ohio County Losing Its Young to Painkillers’ Grip.” A true and accurate copy of this article is attached hereto as Exhibit D.

10. I traveled to Ohio to attend and observe Volkman’s trial.

11. During the course of the eight-week trial, the government presented 70 witnesses and more than 220 exhibits into evidence. A jury found Volkman guilty on all but two counts in May 2011.

12. Neither the Exhibit List, nor the PACER docket shows that any of the exhibits were ordered to be filed under seal.

13. On March 7, 2011, the fourth day of the Volkman trial, I was served with a subpoena ordering that I appear to testify at Volkman’s trial the following morning. A true and accurate copy of the subpoena is attached hereto as Exhibit E.

14. On March 7, 2011, U.S. Attorney Timothy Oakley alerted the Court about my presence in the courtroom, informed the Court that I had been subpoenaed and asked that I be required to leave. At this point, I exited the courtroom. A true and accurate copy of excerpts from the Transcript of Proceedings, March 7, 2011 in Volkman’s trial is attached hereto as Exhibit F.

15. Later that afternoon, the Court and counsel for the government and Volkman engaged in an on-the-record conversation out of the presence of the jury. Judge Sandra Beckwith asked Attorney Oakley about the “drift of the government’s subpoena since [Eil] doesn’t appear to have any firsthand knowledge of the case.” Attorney Oakley responded that he did not “know if that’s the case or not. We know that Mr. Eil has been talking to witnesses in the Portsmouth area. We would have only known about those people from the witness list or from Dr. Volkman. We believe he’s been in communication with Dr. Volkman over the time of this.” See Exhibit F, p. 6.

16. That same day, the Court asked if the government had the resources to ascertain whether I was a student at Columbia working towards a degree. She specifically asked, “[w]hat are the chances, say between now and noon tomorrow, someone in some other FBI or DEA office might be persuaded to go by Columbia University and see if Mr. Eil is registered and, if so, in what course, et cetera? And if not, that would be very important to know as well.” See Exhibit F, p. 13.

17. Prior to my being served with a subpoena, neither Attorney Oakley, nor anyone from the government, asked me if I had firsthand knowledge of activities at Volkman’s clinics. Had anyone asked me, I would have explained that I learned of the case more than 18 months after Volkman’s indictment and therefore did not have any such firsthand knowledge.

18. I was never called to testify in the Volkman trial.

19. I did not have the resources to mount a First Amendment case to regain my place in the courtroom, so I was not able observe any of the trial after March 7, 2011.

20. In May 2011, a jury found Volkman guilty on all but two counts.

21. The DEA issued a press release on May 10, 2011, noting that “Volkman was one of the nation’s largest physician dispensers of oxycodone in 2003 and 2005. Evidence presented during the trial showed that Volkman prescribed and dispensed millions of dosages of various drugs including diazepam, hydrocodone, oxycodone, alprazolam, and carisoprodol.” A true and accurate copy of this press release is attached hereto as Exhibit G. The New York Times covered the verdict, in an article titled, “Ohio: Doctor Found Guilty on Drug Counts.” The ABC affiliate in Chicago (where Volkman lived) also covered the verdict. In that article, “Doc From Chicago Convicted of Running Giant ‘Pill Mill,’” Volkman was dubbed the “pill mill killer.” True and accurate copies of these articles are attached hereto as Exhibit H.

22. In February 2012, Volkman was sentenced to four consecutive life terms in prison.

23. On February 14, 2012, the DEA issued another press release regarding his sentencing. In this press release, the DEA stated that Volkman was the “Largest Physician Dispenser of Oxycodone in the U.S. from 2003 to 2005” and that “[t]he life sentence should serve as a warning to all medical professionals that if you prescribe medication for personal gain... you will be investigated and prosecuted to the full extent of the law.” A true and accurate copy of this press release is attached hereto as Exhibit I.

24. In 2012, the DEA's website featured Volkman's sentencing as one of its "Top Stories" of the year. A true and accurate copy of this page is attached hereto as Exhibit J.

25. In June 2012, the DEA presented a slideshow to the Arizona Pharmacists Association. The slideshow discussed Volkman's case. Upon information and belief, a true and accurate copy of the slideshow is attached hereto as Exhibit K. This slideshow is freely available to the public and was accessed via Google search.

26. Upon information and belief, in November 2012, the DEA presented a slideshow to the National Conference on Pharmaceuticals and Chemical Diversion, in Cincinnati. The 89-page slideshow, titled "Pill Mills & Pain Clinics: The United States v. Volkman," focused solely on Volkman's case. Upon information and belief, a true and accurate copy of the slideshow is attached hereto as Exhibit L. This slideshow is freely available to the public and was accessed via Google search.

27. In October 2015, the DEA presented to the National Association of State Chief Administrators, wherein it discussed Volkman's case. Upon information and belief, a true and accurate copy of the slideshow is attached hereto as Exhibit M. This slideshow is freely available to the public and was accessed via Google search.

28. On or about January 11, 2012, eight months after the Volkman trial, I contacted Assistant U.S. Attorney Oakley to request access to the evidence admitted during the trial. That same day, Attorney Oakley responded that he would not share the exhibits with me and that I should file a FOIA request with the United States Department of Justice ("DOJ"). A true and accurate copy of this correspondence is attached hereto as Exhibit N.

29. On February 1, 2012, I sent the FOIA Request to the Executive Office of U.S. Attorneys ("EOUSA"), a sub-agency of the DOJ, requesting "all materials listed in the Exhibit List filed by the government on August 18, 2011 (Doc. #375)" submitted in the case of U.S.A. v. Volkman, and attached a complete list of exhibits to this letter. A true and accurate copy of this letter and the accompanying Exhibit list are attached hereto as Exhibit O. I also sought "the opportunity to inspect physical items, such as prescription bottles, and receive copies of all other materials (papers, photographs, DVDs, etc.) that can be re-produced."

30. On February 28, 2012, the EOUSA acknowledged receipt of the FOIA Request and assigned it tracking number "12-485." This was 1,476 days ago.

31. On March 20, 2012, I sent a letter to U.S. District Court Judge Sandra Beckwith, the judge who presided over Volkman's trial, to see if I could obtain access to the trial exhibits. A true and accurate copy of this correspondence is attached hereto as Exhibit P.

32. On or about April 3, 2012, Judge Beckwith responded to me, stating, in part, that the FOIA Request was the appropriate vehicle for me to obtain access to these records. She also informed me that the entire trial record, including exhibits, had been transferred to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). A true and accurate copy of this letter is attached hereto as Exhibit Q.

33. On or about April 11, 2012, I sent a letter to the clerk of the Sixth Circuit U.S. Court of Appeals to see if I could obtain access to the trial exhibits. A true and accurate copy of this correspondence is attached hereto as Exhibit R.

34. On or about April 17, 2012, Janice Yates, Chief Deputy Clerk of the Sixth Circuit, sent me a letter stating that a response to my request would be made after the DOJ conducted its review of the materials. A true and accurate copy of this correspondence is attached hereto as Exhibit S.

35. To date, I have received no such response.

36. On or about November 29, 2012, nine months after acknowledging my FOIA request, the EOUSA sent me a letter stating that my request was being transferred to the DEA, which would respond to me directly. EOUSA processed no pages in response to my request and assessed me a "review fee" of \$154. A true and accurate copy of this correspondence is attached hereto as Exhibit T.

37. Upon information and belief, on or about December 19, 2012, the DEA received the transfer of the FOIA Request from the EOUSA.

38. On or about February 19, 2013, in response to Volkman's appeal of his conviction (and unrelated to my FOIA request), the government uploaded 16 complete or partial trial exhibits (60 pages) to PACER which have either been lightly redacted, such that the redactions are effectively meaningless, or wholly unredacted. These exhibits include death certificates, toxicology reports, medical files, and prescription slips. True and accurate copies these documents are attached hereto as Exhibit U.

39. Between May 7, 2013 and March 12, 2015 (a span of one year, ten months, and five days) the DEA sent me ten partial releases in response to my February 2012 FOIA request. Some of these pages are attached hereto as Exhibit V. In one case, six months and twenty one days passed between subsequent partial-fulfillment packages. In another instance, six months and nine days passed between subsequent partial-fulfillment packages. The DEA stated that it was collectively withholding information pursuant to 5 U.S.C. §§ 552(b)(6), (b)(7)(C), (D), (E) and (F). Upon information and belief, the DEA withheld 14,000 pages (or 87.4 percent) of the 16,012 pages it reviewed. Further, hundreds of the pages the DEA produced to me were significantly redacted, making them effectively no more than blank pages.

40. On November 22, 2014, I wrote to U.S. Senator Sheldon Whitehouse to inform him of the DEA's delay in responding to the FOIA request and to seek his assistance. At that time, more than 22 months had passed since the DEA had received my transferred request, and, according to the cover letters on its partial fulfillment packages, the agency had processed roughly 23 percent of my request.

41. On November 25, 2014, I wrote to U.S. Congressman David Cicilline to inform him of the DEA's delay in responding to the FOIA Request and to seek his assistance.

42. On December 9, 2014, I wrote to U.S. Senator Jack Reed to inform him of the DEA's delay in responding to the FOIA Request and to seek his assistance.

43. On December 9, 2014, I filed a formal complaint with the Office of Government Information Services (OGIS, the “FOIA Ombudsman”) at the National Archives and Records Administration to seek the office’s assistance. A true and accurate copy of this correspondence is attached hereto as Exhibit W.

44. On March 18, 2015, with the assistance of the ACLU of Rhode Island and pro bono counsel, I filed this lawsuit.

45. After I commenced this lawsuit, the DOJ provided documents, in two installments, in July and August of 2015, in response to the FOIA Request. The DOJ redacted the following:

- Identifying information of third parties, including names, social security numbers, addresses, telephone numbers, dates of birth or death, medical and tax record numbers, insurance information, employment information and other particularly unique and sensitive personal and medical information, pursuant to §552(b)(6) and (b)(7)(C)
- Identifying information of criminal investigators, pursuant to §552(b)(6), (b)(7)(C) and (b)(7)(f); and
- DEA numbers, pursuant to §552(b)(7)(e).

46. The DOJ withheld in their entirety

- Medical records of an individual named in the transcript of the Volkman trial, pursuant to §552(b)(6) and (b)(7)(C), including this individual’s medical records and a video recording of a medical visit;
- Detailed autopsy and toxicology reports, reports of post-mortem exams and photographs of deceased patients, pursuant to §552(b)(6) and (b)(7)(C); and
- Tax records of an individual, pursuant to §552(b)(7)(C).

47. The DOJ produced a total of 3,813 pages to me in July and August of 2015 and, upon information and belief, withheld 10,943 pages in their entirety. Attached hereto as Exhibit X are true and accurate copies of some of the pages which were released by the DOJ, which show that in some instances, the majority – or all – of the substantive material was redacted. In my opinion, the DOJ’s July/August 2015 releases offered only a marginal improvement from the DEA’s prior near-total rejection of my FOIA request. Even after that release was completed, the vast majority of the evidence shown during the Volkman trial remained effectively (due to expansive redactions) or literally (due to withholding) sealed off to the general public.

48. Attached hereto as Exhibit Y are true and accurate copies of a sampling of documents that were (1) uploaded to PACER by the Ohio U.S. Attorney’s office in 2013 and (2) redacted when produced to me by the DOJ in 2015, in response to this lawsuit. Clearly, different

privacy standards were applied by the government to the documents. It is also noteworthy that the DOJ's July/August 2015 standards and the DEA's 2013-2015 standards do not exactly match. To date, in my pursuit of this evidence, I have encountered three different standards of withholding and redacting from the government.

49. To date, more than four years and ten months after the Volkman trial ended, I have received only a small portion of the evidence shown to the jury. By many measures, the U.S. prescription drug abuse and overdose crisis has worsened since Volkman's trial. As a result, this evidence remains critically relevant to public discussion of a problem the White House has called an "epidemic." Few examples speak to this relevance like the New York Times' "Room for Debate" online forum titled, "Prosecuting Doctors in Prescription Drug Overdose Deaths[.]" from last month. The forum features op-eds from three experts: a former DEA official, the executive director of Physicians for Responsible Opioid Prescribing and a law and health care professor. The discussion centers around the explosion of drug overdoses around the country, "fueled in part by addiction to prescription painkillers." The Volkman case was also recently explicitly referenced in the Guardian ("America's poorest white town: abandoned by coal, swallowed by drugs," 11/12/15) and in former L.A. Times reporter Sam Quinones's acclaimed 2015 book, *Dreamland: The True Tale of America's Opiate Epidemic*. A true and accurate copy of this forum is attached hereto as Exhibit Z.

50. In 2009, when I learned of Volkman's indictment, I set out to tell the story of a highly-educated man – my father's former classmate – who became one of the most notorious prescription drug dealers in U.S. history. As we approach the five-year anniversary of the verdict in that case, on May 10, 2016, I am astonished that the vast majority of evidence from his trial remains sealed off to that case's plaintiff: the American public.

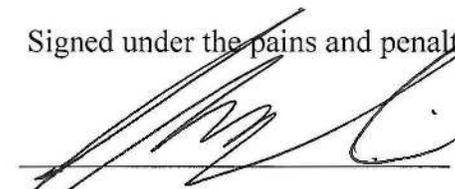
51. My difficulty accessing evidence from the Volkman trial presents a stark contrast the accessibility of trial evidence in other federal court districts. Since 2006, the United States District Court for the Eastern District of Virginia has hosted a website offering, "link[s] to all 1,202 exhibits admitted into evidence during the trial of U.S. v. [9/11 co-conspirator Zacarias] Moussaoui, with the exception of seven that are classified or otherwise remain under seal," according to the homepage. These exhibits – which include emails, photographs, credit card receipts, maps of the World Trade Center, video of the 9/11 attacks, and recordings of 911 dispatchers – are accessible to anyone, anywhere in the world, at any time of day, in a matter of seconds. A true and accurate copy of this webpage is attached hereto as Exhibit AA.

52. Over time, my quest for access to this evidence has become a story in its own right. My FOIA experiences have been covered by the document-based news site MuckRock ("Phil Eil's FOIA Nightmare," 12/12/14), the National Security Archive at George Washington University's "UNREDACTED" blog ("DEA Races to the Bottom of the FOIA Barrel...", 11/5/15), Esquire.com ("Why is the DEA Not Cooperating With this FOIA Request?," 12/2/15), and the Providence Journal ("ACLU Takes Drug Enforcement Administration to Court," 12/28/15), among other outlets. I have personally written about the case for Salon.com ("The Shocking News About Government Secrecy That Should Have Every American Worried," 6/2/15), the New England First Amendment Coalition ("We Are the Transparency Police," 11/9/15), Northeastern University journalism professor Dan Kennedy's "Media Nation" blog ("A

Journalist Fights the Power for Public Information,” 11/30/15), and VICE.com (“How the Feds Blocked Me From Covering a Pill Mill Trial,” 2/24/16).

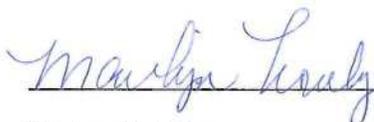
53. In January 2016, my FOIA story was highlighted, along with numerous others, in the U.S. House of Representatives Committee on Oversight and Government Reform report, “FOIA Is Broken.” In fact, I was the sole journalist quoted in the report’s executive summary. That quote - “I often describe the handling of my FOIA request as the single most disillusioning experience of my life” - comes from a May 2015 letter I wrote to the Committee in response to its call for feedback about the FOIA system. A true and accurate copy of this report is attached hereto as Exhibit BB.

Signed under the pains and penalties of perjury,


Philip Eil

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

Subscribed and sworn to before me this 14th day of March, 2016.


Notary Public

My commission expires: 4/2/2017

MARILYN LOVELY
Notary Public of Rhode Island
My Commission Expires: 4/2/2017