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Eleven Years of Lethal Injection Challenges in Arkansas

Julie Vandiver

In 2015, the Supreme Court decided *Glossip v. Gross*, which upheld the denial of a challenge to the lethal injection protocol in Oklahoma.¹ Justice Breyer dissented, writing that he believed the death penalty was unconstitutional because, among other reasons, it had become “unusual.”² He pointed out that Arkansas, along with 10 other states, had not conducted an execution in more than 8 years.³ This Article provides a look into how Arkansas made it onto this list. The drought was not from a lack of effort by the state. In the ten years preceding *Glossip*, twenty-one execution dates were set and all were stayed.⁴ Nineteen of those were stayed because of lethal injection litigation. As this Article will recount, the decade-long hiatus was the result of dogged litigation on behalf of death-sentenced prisoners,⁵ repeated amendment of the state’s lethal injection law, and missteps by state officials.

· Credit for the tremendous efforts described in this article goes to the following attorneys: Josh Lee, Scott W. Braden, Julie Brain, Jeff Rosenzweig, Jennifer Molayem, John C. Williams, Joe Luby, Jennifer Merrigan, Joe Perkovich, Deborah Sallings, Meredith Boylan, and George Kostolampros.

1. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

2. *Id.* at 2772-73 (Breyer, J., dissenting).

3. *Id.* at 2773.

4. *See* Table 1.

5. *See* Claudia Lauer, *Arkansas Court Upholds Execution Protocol, Drug Secrecy Law*, ASSOCIATED PRESS (June 23, 2016), <http://www.bigstory.ap.org/article/5bcb872f1a154d078bf05d7e429339cb/arkansas-court-gives-ok-execute-inmates-upholds-secrecy> [https://perma.cc/6NUK-9AU8].

I. A VERY BRIEF MODERN HISTORY OF THE DEATH PENALTY IN ARKANSAS

In 1970, Governor Winthrop Rockefeller commuted the sentences of all death row inmates in the state.⁶ In 1983, the General Assembly adopted lethal injection as its method of execution.⁷ The new statute called for a “continuous, intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant’s death is pronounced according to accepted standards of medical practice.”⁸

The 1990 execution of John Swindler was the first execution⁹ in Arkansas following the Rockefeller commutations, *Furman v. Georgia*, and *Gregg v. Georgia*.¹⁰ Twenty-six executions followed.¹¹ Arkansas, like most other death-penalty states at that time, used a three-drug lethal injection protocol.¹² Sodium thiopental was administered first to render the prisoner unconscious and insensate to the effects of the second and third drugs.¹³ The second drug was pancuronium bromide, a muscle

6. ARK. CODE ANN. § 5-4-617(a)(1) (2016); *see also* Ray Long & Steve Mills, *Ryan to Review Death Row Cases*, CHI. TRIB. (Mar. 3, 2002), http://www.articles.chicagotribune.com/2002-03-03/news/0203030434_1_blanket-commutation-irreversible-judgment-death-row [<https://perma.cc/EY3Z-GUBD>].

7. Lauren E. Murphy, Comment, *Third Time’s a Charm: Whether Hobbs v. Jones Inspired a Durable Change to Arkansas’s Method of Execution Act*, 66 ARK. L. REV. 813, 816 (2013).

8. 41 ARK. CODE ANN. § 1352 (Supp. 1983).

9. *See Executions*, ARK. DEP’T CORRECTION, <http://www.adc.arkansas.gov/executions> [<https://perma.cc/Z5QA-LMDY>]. Swindler was executed by electric chair. *Prison History and Events*, ARK. DEP’T CORRECTION, <http://www.adc.arkansas.gov/prison-history-and-events-page-2> [<https://perma.cc/Y8PZ-PJXQ>].

10. Swindler was the first execution in Arkansas since 1964. *See Executions*, *supra* note 9. The Rockefeller commutations occurred in 1970. *See Long & Mills*, *supra* note 6. *Furman v. Georgia* was decided in 1972. *See USA: Deadly Formula: An International Perspective on the 40th Anniversary of Furman v. Georgia*, AMNESTY INT’L (June 28, 2012), <http://www.amnesty.org/en/documents/amr51/050/2012/en> [<https://perma.cc/K4GU-NGUF>].

11. *See Executions*, *supra* note 9.

12. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 146 tbl. 11 (2002).

13. *Id.* at 97-98.

relaxant.¹⁴ The drug paralyzed all voluntary movements of the body, including those necessary to breathe.¹⁵ The final drug, potassium chloride, stopped the heart.¹⁶

On November 28, 2005, Eric Randall Nance was executed by the State of Arkansas.¹⁷ On April 20, 2017, Ledell Lee became the first inmate executed in Arkansas since Eric Nance.¹⁸ Three executions followed in short order: Jack Jones, Marcel Williams, and Kenneth Williams.¹⁹ By this author's count, between the Nance execution in 2005, and before the setting of eight execution dates in 2017, there were at least nine lawsuits filed challenging either the state's method of execution law, its lethal injection protocol, or its control of information regarding lethal injection.²⁰ This Article does not provide an exhaustive catalog of those suits. Instead, the following is a discussion of the key lethal injection fights between 2005 and 2016 in Arkansas.

A. Terrick Nooner §1983 Action

The first iteration of the lethal injection litigation was brought against the Arkansas Department of Correction (ADC) six months after the Nance execution by Terrick Nooner as a section 1983 challenge.²¹ The case was before Judge Susan Webber Wright, U.S. District Court judge for the Eastern

14. *Id.* at 98.

15. *Id.*

16. *Id.*

17. LOUISE J. PALMER, JR., *ENCYCLOPEDIA OF CAPITAL PUNISHMENT IN THE UNITED STATES* 35 (2008).

18. Laura Santhanam, *Does the Death Penalty Bring Closure to a Victim's Family?*, PBS NEWSHOUR (Apr. 25, 2017, 3:02 PM), <http://www.pbs.org/newshour/updates/death-penalty-bring-closure-victims-family/> [<https://perma.cc/95PC-2UW9>].

19. This Article was prepared for a symposium in October 2016 before Governor Hutchinson took the unprecedented step of setting eight execution dates in an eleven-day period beginning April 17, 2017. Four of the eight men received stays of execution. Those stays were unrelated to lethal injection. There was a flurry of lethal injection litigation attendant to the eight execution dates which is not discussed in this article.

20. *See* Table 2.

21. *See* Complaint for Plaintiff at 2, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. May 1, 2006) (Doc. 1).

District of Arkansas.²² At the time of filing, Nooner did not have an execution date scheduled. Similar lawsuits had been brought throughout the country.²³

Nooner's complaint, which raised due process and cruelty claims under the federal constitution, drew heavily on past executions in Arkansas.²⁴ He complained that if the first drug was not correctly administered, he would suffer when dosed with the two remaining drugs.²⁵ The pancuronium bromide would make it impossible to breathe and death may come by suffocation.²⁶ The potassium chloride would burn when injected.²⁷ For proof, Nooner pointed to four executions he said were botched.²⁸ Ronald Gene Simmons, whose execution took seventeen minutes, began coughing three minutes into his execution and turned blue.²⁹ Fifty of the sixty-nine minutes of Rickey Ray Rector's execution were behind closed curtains where the execution team had to cut into Rector's arm to reach a vein.³⁰ Five minutes after the lethal chemicals began to flow, Rector's lips moved.³¹ Steven Douglas Hill had a seizure-like episode during his execution.³² Christina Riggs, who had to place her own IV catheters into her wrists, was vocalizing when she should have been unconscious.³³

Two intervenors, Don Davis and Jack Jones, joined the suit.³⁴ Davis, facing an execution date of July 5, 2006, was

22. See *Nooner v. Norris*, No. 5:06-cv-00110-SWW, 2008 WL 3211290, at *1 (E.D. Ark. Aug. 5, 2008).

23. See Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1301 (2007) (describing an "explosion" of lethal injection litigation).

24. See Complaint for Plaintiff at 2, 4-7, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. May 1, 2006) (Doc. 1).

25. *Id.* at 14-19.

26. *Id.* at 15-16.

27. *Id.* at 16.

28. *Id.* at 18.

29. See Complaint for Plaintiff at 5, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. May 1, 2006) (Doc. 1).

30. *Id.* at 5.

31. *Id.* at 6.

32. *Id.*

33. *Nooner v. Norris*, No. 5:06-cv-00110-SWW, 2008 WL 3211290, at *12 (E.D. Ark. Aug. 5, 2008).

34. *Nooner v. Norris*, 594 F.3d 592, 596 (8th Cir. 2010).

granted a preliminary injunction by Judge Wright.³⁵ The court reasoned that Davis faced irreparable harm in the form of an intensely painful execution and if his allegations turned out to be baseless, the state was free to execute him at a later date “without the specter that the ADC’s protocol carries an unreasonable risk of inflicting unnecessary pain.”³⁶ The court rejected the State’s position that Davis waited too long to file suit finding that he moved to intervene before his execution date was set and soon after he had completed his substantive challenges to his conviction.³⁷ Judge Wright held that Davis raised serious questions warranting “deliberate investigation” and an expedited evidentiary hearing was warranted.³⁸ The Eighth Circuit Court of Appeals declined to hear the case before the execution warrant expired.³⁹ The Supreme Court declined to vacate the district court’s stay.⁴⁰ After the date passed, the propriety of the preliminary injunction proceeded as an ordinary appeal.⁴¹

The case laid largely dormant in the district court while the stay pending appeal proceeded in the circuit court. Just over a year after Don Davis’s would-be execution date, the Eighth Circuit reversed the grant of the preliminary injunction and vacated the stay of execution.⁴² The Court held it was an abuse of discretion to grant an injunction, when Davis could have challenged the lethal injection method after completion of direct review (in 1994) without threat of execution.⁴³ The appearance of dilatoriness was exacerbated by the complaint’s reliance on facts of prior executions.⁴⁴ The executions cited by the plaintiffs

35. *Id.*

36. Order Granting Motion for Preliminary Injunction at 5, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. June 26, 2006) (Doc. 29).

37. *Id.* at 5-6.

38. *Id.* at 6-7.

39. Order Vacating Motion to Stay, *Nooner v. Norris*, 491 F.3d 804 (8th Cir. 2007) (No. 06-2748).

40. *Norris v. Davis*, 548 U.S. 927 (2006).

41. Order Filed to Proceed with Appeal, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. July 26, 2006).

42. *Nooner v. Norris*, 491 F.3d 804, 806 (8th Cir. 2007).

43. *Id.* at 809-10.

44. *Id.*

as botched occurred between 1990 and 2000.⁴⁵ At oral argument, the panel zeroed in on another delay, noting that the lawsuit stalled during appeal.⁴⁶ As a result, the litigation that followed in the *Nooner* case, and all others, was marked by a hyper-sensitivity to diligent action.

Two days after the circuit court issued its opinion and vacated Davis's stay of execution, the plaintiffs moved for expedited discovery.⁴⁷ Within a week of the Eighth Circuit's opinion the State of Arkansas rewrote its lethal injection protocol.⁴⁸ Fresh protocol in hand, the Attorney General asked that Terrick Nooner's execution be set.⁴⁹ Governor Mike Beebe complied and set Nooner's execution for September 18, 2007.⁵⁰ Jack Jones soon received an execution date of October 16, 2007.⁵¹

Two days after the Eighth Circuit's decision, another petitioner, Frank Williams, filed his own suit in federal court advancing the same claims as Nooner and Davis.⁵² Since his suit raised the same issues, why not just intervene like Davis and Jones? This was the question raised by the State as they sought to consolidate the Williams case with the Nooner/Davis/Jones case.⁵³ This highlights an important strategic consideration for death sentenced prisoners. At the time Williams filed suit, he was still litigating the merits of his sentence and conviction.⁵⁴ Williams had more time to conduct discovery and develop

45. *Id.* at 810.

46. Transcript of Oral Argument at 9, *Nooner v. Norris*, 491 F.3d 804 (8th Cir. 2007) (No. 06-2748).

47. Order Denying Motion for Expedited Discovery and Granting Motion for Consolidation at 1-2, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Aug. 9, 2007).

48. *Id.* at 2.

49. Order Denying Motion for Preliminary Injunction or Stay of Execution at 1-2, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Sept. 11, 2007).

50. *Id.* at 2.

51. *Id.*

52. Complaint at 2-3, *Williams v. Norris*, No. 5:07-cv-00173-SWW (E.D. Ark. July 11, 2007) (Doc. 1).

53. Order Denying Motion for Expedited Discovery and Granting Motion for Consolidation at 7-8, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Aug. 9, 2007) (Doc. 19).

54. *Id.* at 8.

evidence to strengthen his claims.⁵⁵ He opposed consolidation arguing his entire suit would be compressed into a decision on whether Nooner (who had an imminent execution) could show a likelihood of success on the merits.⁵⁶ With more time, Williams could have discovery, investigation, expert consultation and even a trial on the merits.⁵⁷ Indeed, this was the Eighth Circuit's point in *Nooner*.⁵⁸ With lead time, a substantive case regarding lethal injection can be decided without the entry of a preliminary injunction.

Over his objection, Williams's suit was combined with the original *Nooner* case and Nooner and Jones filed motions for preliminary injunction.⁵⁹ Judge Wright denied stays for both men ruling that it was unlikely either could show a substantial risk of constitutionally significant pain.⁶⁰ The district court followed the Eighth Circuit's ruling in *Taylor v. Crawford*⁶¹ to find that if the written protocol had no inherent risk of pain, then the simple risk that the protocol would not go as written was "insignificant in [the] constitutional analysis."⁶² The court also found since Nooner's primary complaint was with the serial administration of the three drugs, his challenge could have been brought much earlier.⁶³

If lethal injection had been Nooner's only legal vehicle, he would likely have been executed in 2007. Nooner was spared because of two stays of execution unrelated to lethal injection.

55. Response in Opposition to Consolidation at 3, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Aug. 3, 2007) (Doc. 84).

56. *Id.* at 3.

57. *Id.*

58. *Nooner v. Norris*, 491 F.3d 804, 809-10 (8th Cir. 2007).

59. Order at 1, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Aug. 9, 2007) (Doc. 19); Motion for Preliminary Injunction or Stay of Execution at 1, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Aug. 8, 2007) (Doc. 87); Motion for Preliminary Injunction or Stay of Execution at 1, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Sept. 4, 2007) (Doc. 92).

60. Order at 23, *Nooner v. Norris*, No. 5:06-cv-00110-SWW (E.D. Ark. Sept. 11, 2007) (Doc. 93).

61. 455 F.3d 1095 (8th Cir. 2006).

62. *Id.* at 13 (quoting *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007)).

63. *Id.* at 17.

He received a stay from the district court on a *Ford* claim⁶⁴ and one from the Eighth Circuit on a second or successive habeas petition asserting actual innocence.⁶⁵

Jack Jones still faced an October 16, 2007, execution date.⁶⁶ On September 25, 2007, the United States Supreme Court granted certiorari in *Baze v. Rees*.⁶⁷ Both Jones and Davis were granted stays of execution based on the grant in *Baze*.⁶⁸ With Nooner, Jones, and Davis not facing imminent execution, and the constitutionality of a thiopental three drug protocol before the United States Supreme Court, the district court stayed the entire case pending the resolution of *Baze*.⁶⁹

Baze was decided on April 16, 2008, in favor of the State of Kentucky.⁷⁰ Arkansas adopted a new protocol (AD 08-28) in an effort to fall in line with the High Court's ruling in *Baze*.⁷¹ Judge Wright granted summary judgment to the defendants.⁷² The stays were dissolved.⁷³ The Eighth Circuit found the new protocol was "designed 'to avoid the needless infliction of pain, not to cause it'" and it was "substantially similar to—and perhaps even more thorough than—the Kentucky protocol upheld by the Supreme Court in *Baze*."⁷⁴ The decision solidified Arkansas's commitment to the three-drug protocol and led corrections officials to take questionable steps to obtain drugs to carry it out.

64. Order 1 at, Nooner v. Norris, No. 5:96-cv-00495 (E.D. Ark. Sept. 10, 2007) (Doc. 121).

65. Judgment at 1, Nooner v. Norris, No. 07-3074 (8th Cir. Sept. 14, 2007).

66. Motion for Stay of Execution at 1, Nooner v. Norris, No. 07-3165 (8th Cir. Sept. 30, 2007).

67. *Baze v. Rees*, 128 S. Ct. 34 (2007).

68. Motion for Stay of Execution at 1, Nooner v. Norris, No. 07-3165 (8th Cir. Sept. 30, 2007); Order 1 at 1, Jones v. Norris, No. 07-3165 (8th Cir. Oct. 11, 2007); Order at 1, Nooner v. Norris, No. 5:06-cv-00110-SWW (E.D. Ark. Oct. 30, 2007).

69. Nooner v. Norris, No. 5:06-cv-00110-SWW, 2007 WL 3232083, at *1-2 (E.D. Ark. Nov. 9, 2007).

70. *Baze v. Rees*, 553 U.S. 35, 41, 47 (2008).

71. Nooner v. Norris, No. 5:06-cv-00110-SWW, 2008 WL 3211290, at *15 (E.D. Ark. Aug. 5, 2008).

72. *Id.*

73. Nooner v. Norris, No. 5:06-cv-00110-SWW, 2007 WL 3232083, at *1-2 (E.D. Ark. Oct. 30, 2007).

74. Nooner v. Norris, 594 F.3d 592, 608 (8th Cir. 2011).

B. Frank Williams Administrative Procedures Act Suit

Within five days of the State's adoption of the new protocol, Frank Williams Jr. filed suit in Pulaski County Circuit Court alleging AD-0828 violated the State Administrative Procedures Act because it was a rule subject to public notice and comment before adoption.⁷⁵ The suit also challenged the Department's authority to use a three-drug protocol because the statute called for the combination of a barbiturate and paralytic.⁷⁶ The challenge was assigned to Judge Tim Fox.⁷⁷ This was this first foray into Arkansas state court for lethal injection litigation.⁷⁸ At the time, conventional wisdom was that the state courts were unlikely to be a friendly forum for death-sentenced prisoners.⁷⁹ As this article bears out, that did not prove to be the case. The best proof for that is the Attorney General of Arkansas's removal in 2015 of a lethal injection challenge from her own state courts into federal district court.⁸⁰

The defendants moved to dismiss Williams' APA suit asserting sovereign immunity from suit and arguing that *Baze* approved their protocol.⁸¹ The State contended that the protocol was an internal policy directing ADC personnel and thus was not subject to the APA's rule-making procedures.⁸²

The suit moved quickly. Less than four months after filing and twelve days before Frank Williams's September 9, 2008, execution date, Judge Fox granted partial summary judgment for Williams.⁸³ Rather than grant Williams a stay of execution, the

75. Ark. Dep't. of Corr. v. Williams, 2009 Ark. 523, at *2, 357 S.W.3d 867, 868-69; ARK. CODE ANN. § 25-15-201 et seq.

76. Williams, 2009 Ark. at *2, 357 S.W.3d at 868, n.1.

77. *Id.* at *1, 357 S.W.3d at 867.

78. DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/news/past/33/2008> [<https://perma.cc/7XSV-CSJN>].

79. U.S. Dep't of Justice, BUREAU OF JUSTICE STAT. (2007), <https://www.bjs.gov/content/pub/html/cp/2007/cp07st.pdf> [<https://perma.cc/PDP9-E2U>].

80. Amended Complaint for Declaratory and Injunctive Relief at 2, Williams v. Kelley, No. 60-cv-15-1400 (Pulaski Cty. Ct. Sept. 28, 2015).

81. Ark. Dep't. of Corr. v. Williams, 2009 Ark. 523, at *2-3, 357 S.W.3d 867, 868-69.

82. *Id.* at *3, 357 S.W.3d at 869.

83. Order Concerning Defendant's Motion for Summary Judgment, Williams v. Ark. Dep't. of Corr., No. CV 2008-4891 (Pulaski Cty. Cir. Ct. Aug. 28, 2008).

judge issued a permanent injunction against the use of the lethal injection protocol.⁸⁴ His order prevented the use of the protocol against *any* prisoner, not just Williams.⁸⁵

Having lost in the circuit court on whether the APA applied to the protocol, the ADC could have just complied with the dictates of the Administrative Procedures Act. That law requires an agency to provide notice of the adoption of a rule and give the public thirty days in which to comment on the rule.⁸⁶ Instead, the defendants appealed.⁸⁷ However, before the Arkansas Supreme Court decided the appeal, the defendants found a third way to address the ruling.⁸⁸ The ADC lobbied the General Assembly to change the law.⁸⁹

In April, the legislature passed Act 1296 of 2009.⁹⁰ It exempted the Method of Execution Act from the APA and the Freedom of Information Act (FOIA).⁹¹ It also gave total discretion to the director to set policies and procedures for executions.⁹² Strikingly, the new law vested the director with discretion to choose one or more chemicals of any kind and in any amount for the execution procedure.⁹³

On October 29, 2009, the Arkansas Supreme Court ruled Act 1296 mooted the appeal.⁹⁴ The court found that although the act applied to Williams, it was not a sentencing statute and thus was not impermissibly “retroactive” nor *ex post facto*.⁹⁵

84. *Williams*, 2009 Ark. at *9, 357 S.W.3d at 872.

85. *Id.* at *3, 357 S.W.3d at 869.

86. ARK. CODE ANN. 25-15-204 (2014).

87. *Williams*, 2009 Ark. at *3, 357 S.W.3d at 869.

88. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 7, *Williams v. Norris*, No. 5:09-cv-394 (E.D. Ark. Dec. 28, 2009).

89. *Id.*

90. ARK. CODE ANN. § 5-4-617 (repealed 2013).

91. ARK. CODE ANN. § 5-4-617 (repealed 2013).

92. ARK. CODE ANN. § 5-4-617 (repealed 2013).

93. ARK. CODE ANN. § 5-4-617 (repealed 2013).

94. Ark. Dep’t. of Corr. v. *Williams*, 2009 Ark. 523, at *2, 357 S.W.3d 867, 869.

95. *Id.* at *9, 357 S.W.3d at 872.

C. Marcel Williams Federal Suit

A new suit was filed in federal court before the Arkansas Supreme Court lifted Judge Fox's permanent injunction.⁹⁶ The plaintiff was Marcel Williams and the case was heard by district court Judge J. Leon Holmes.⁹⁷ The suit complained that the new law violated the *ex post facto* cause,⁹⁸ the due process clause of the Fourteenth Amendment, and the separation of powers provision of the Arkansas State Constitution.⁹⁹ It contended that the new law removed the anesthesia requirement and hid the procedure from public scrutiny.¹⁰⁰ According to the suit, this was a violation of the *ex post facto* clause which prohibited a post-judgment increase of punishment.¹⁰¹ Williams claimed the new secrecy impeded his right to access the courts and to make Eighth Amendment challenges.¹⁰² The director's wide discretion to name execution procedures, the suit alleged, was an unconstitutional surrender of legislative power to the executive branch.¹⁰³

Jack Jones and Don Davis, facing March and April execution dates respectively, moved to intervene in Williams' federal challenge.¹⁰⁴ On March 2, 2010, the district court granted the state's motion to dismiss.¹⁰⁵ The court denied the substantive claims largely on the grounds that although the law

96. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Williams v. Norris, No. 5:09-cv-394 (E.D. Ark. Dec. 28, 2009).

97. Williams v. Hobbs, No. 5:09CV00394, 2010 WL 749563, at *1 (E.D. Ark. Mar. 2, 2010).

98. U.S. CONST. art. I, § 10.

99. ARK. CONST. art. 4, § 1-2; Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 1, Williams v. Norris, No. 5:09-cv-394 (E.D. Ark. Dec. 28, 2009).

100. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 1, Williams v. Norris, No. 5:09-cv-394 (E.D. Ark. Dec. 28, 2009).

101. *Id.* at 19-20.

102. *Id.* at 18-19.

103. *Id.* at 16-18.

104. Motion to Intervene by Jack Harold Jones, Jr., Williams v. Hobbs, No. 5:09-cv-394 (E.D. Ark. Feb. 3, 2010); Motion of Don W. Davis to Intervene and Brief in Support, Williams v. Hobbs, No. 5:09-cv-394 (E.D. Ark. Feb. 24, 2010).

105. Williams v. Hobbs, No. 5:09CV00394, 2010 WL 749563, at *1 (E.D. Ark. Mar. 2, 2010).

had changed, the protocol had not.¹⁰⁶ The law may allow the director to skip anesthesia, but the protocol in place still used it.¹⁰⁷ Any concern about future changes was too speculative to make out a claim.¹⁰⁸ The court declined to exercise supplemental jurisdiction over the state law separation of powers claim.¹⁰⁹ The district court denied the intervention motions of Jack Jones and Don Davis.¹¹⁰

The Eighth Circuit upheld the dismissal.¹¹¹ The panel rejected the ex post facto claim finding the prisoners failed to show “more than a ‘speculative and attenuated risk’” of an increase in punishment.¹¹² Though finding it a closer call, the court rejected the claim that the secrecy surrounding execution procedures increased mental anxiety.¹¹³ In doing so, the panel credited the guarantee the Assistant Attorney General made at oral argument that he would “call the prisoner’s counsel personally to inform them of a change in the protocol.”¹¹⁴ The court found the law did not impede access to the courts because prisoners have brought Eighth Amendment claims without a lethal injection protocol.¹¹⁵

D. Jack Jones Federal Suit

After being shut out of Marcel Williams’ federal suit, and with his execution only eight days away, Jack Jones filed his own complaint in federal district court.¹¹⁶ The complaint brought the identical federal claims (omitting the state separation of powers claim) that were brought by Williams and dismissed for failure to state a claim.¹¹⁷ Jones simultaneously

106. *Id.* at *3-4.

107. *Id.* at *4.

108. *Id.*

109. *Id.*

110. *Hobbs*, 2010 WL 749563, at *4.

111. *Williams v. Hobbs*, 658 F.3d 842, 845 (8th Cir. 2011).

112. *Id.* at 848-51.

113. *Id.* at 850-51.

114. *Id.* at 850.

115. *Id.* at 852.

116. *Jones v. Hobbs*, 745 F. Supp. 2d 886, 887-88 (E.D. Ark. 2010).

117. *Id.* at 888; *Williams v. Hobbs*, 658 F.3d 842, 845 (8th Cir. 2011).

requested a stay of execution or a preliminary injunction.¹¹⁸ The case landed in front of Judge Holmes who, having just dismissed the same claims for failure to state a claim, granted a stay of execution.¹¹⁹ The court reasoned that Jones met the standard set forth in *Dataphase Sys., Inc. v. CL Sys.*¹²⁰ Holmes held that one such factor under *Dataphase*—likelihood of success on the merits—only required the movant to “raise[] serious questions that call for deliberate investigation.”¹²¹

On March 12, 2010, four days prior to the Jones date, the State moved the Eighth Circuit to vacate the stay.¹²² The defendants argued that the district court “flatly rejected identical allegations” but “[n]evertheless . . . granted Jones’ motion to stay his execution.”¹²³ The panel assigned to the matter declined to rule on the stay prior to the execution date.¹²⁴ The court denied an en banc petition to dissolve the stay over the dissent of three judges.¹²⁵ Judge Gruender would have vacated the stay because he was “convinced that the district court abused its discretion” because “Jones ha[d] virtually no chance of prevailing on the merits.”¹²⁶

Judge Holmes also allowed the interventions of Don Davis and Stacey Johnson.¹²⁷ He reached the merits of the suit and

118. Motion for Stay of Execution and/or Preliminary Injunction at 1, *Jones v. Hobbs*, No. 5:10-cv-00065-JLH (E.D. Ark. Mar. 8, 2010).

119. 640 F.2d 109, 113 (8th Cir. 1981); *Jones v. Hobbs*, 696 F. Supp. 2d 1018, 1019 (E.D. Ark. 2010).

120. *Id.* at 1020-21 (“The factors to consider when deciding whether to grant or deny motions for preliminary injunctions include ‘(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on others parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.’”) (quoting *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

121. *Jones*, 696 F. Supp. 2d at 1021.

122. Defendant’s Motion to Vacate Stay of Execution at 1-2, *Jones v. Hobbs*, No.10-1570 (8th Cir. Mar. 12, 2010).

123. *Id.* at 1.

124. Order at 4, *Jones v. Hobbs*, No. 10-1570 (8th Cir. Mar. 16, 2010) (Gruender, J., dissenting).

125. *Id.* at 1.

126. *Id.* at 2-4.

127. Order, *Jones v. Hobbs*, No. 5:10-cv-00065-JLH (E.D. Ark. Mar. 22, 2010); Order, *Jones v. Hobbs*, No. 5:10-cv-00065-JLH (E.D. Ark. Mar. 17, 2010).

dismissed the claims “for the same reasons as in *Williams*.”¹²⁸ Stays were also granted to Davis and Johnson because “the issues raised are serious, and the plaintiffs are entitled to appeal the dismissal of their complaint.”¹²⁹

The stays did not survive appellate review.¹³⁰ On April 9, 2010, the Friday before Davis’ Monday-scheduled execution, the Eighth Circuit vacated the Davis and Johnson stays.¹³¹ The panel held the district court applied the wrong standard by finding “‘serious questions’ requiring ‘deliberate investigation’” was sufficient to warrant a stay.¹³² Instead, the Court held a plaintiff was required to show “a significant possibility of success on the merits.”¹³³ The day before, the Eighth Circuit in a brief order also dissolved the Jones stay.¹³⁴

The merits appeal for this case was consolidated with the Marcel Williams Federal Suit.¹³⁵

E. Jack Jones State Nondelegation Suit

The same day Jack Jones filed his copycat federal suit, he also filed suit in Pulaski County Circuit Court raising the state-law-based separation of powers claim.¹³⁶ He noted although his execution was imminent, he was not to blame for the last minute nature of his suit.¹³⁷ He argued the new method of execution act “ha[d] been law for less than a year” and it was only deemed applicable to him on December 10, 2009 (the day of the Frank Williams Jr. opinion).¹³⁸ Jones argued he diligently sought to intervene in the federal challenge (a mere eighteen days after the Frank Williams decision) but that the district court ruled on

128. Jones v. Hobbs, No. 5:10-cv-00065-JLH, 2010 WL 14177976, at *1 (E.D. Ark. Apr. 5, 2010).

129. *Id.* at *4.

130. Jones v. Hobbs, 604 F.3d 580, 581 (8th Cir. 2010).

131. *Id.*

132. *Id.* at 581.

133. *Id.* (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)).

134. Order, Jones v. Hobbs, No. 10-1570 (8th Cir. Apr. 8, 2010).

135. Order, Jones v. Hobbs, No. 10-2899 (8th Cir. Aug. 31, 2010).

136. Complaint for Declaratory and Injunctive Relief at 1, Jones v. Hobbs, No. CV 2010-1118 (Pulaski Cty. Cir. Ct. Mar. 8, 2010).

137. *Id.* at 3.

138. *Id.* at 1-2.

March 2, 2010, that it would not exercise supplemental jurisdiction over the state law claim or allow him to intervene.¹³⁹ With his complaint, he filed a motion for injunctive relief or a stay of execution.¹⁴⁰ The case was assigned to Judge Fox.¹⁴¹ Don Davis, facing imminent execution, sought to intervene.¹⁴²

Both Davis and Jones moved the Arkansas Supreme Court to stay their executions on account of the nondelegation suit.¹⁴³ Initially, both motions were denied as moot because the men had stays from federal courts.¹⁴⁴ Once those stays were vacated, the Arkansas Supreme Court entered stays without comment.¹⁴⁵ Justice Brown explained at least his reasons for the stay.¹⁴⁶ He wrote that the stay was necessary for the separation of powers claim to be litigated in the circuit court.¹⁴⁷

The Plaintiffs piled on the Jones suit.¹⁴⁸ Alvin Jackson, Kenneth Williams, Stacey Johnson, Bruce Ward, Marcel Williams, Jason McGehee and Frank Williams intervened.¹⁴⁹

139. *Id.* at 2.

140. Complaint for Declaratory and Injunctive Relief at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Pulaski Cty. Cir. Ct. Mar. 8, 2010); Motion for Injunctive Relief Operating as a Stay of Execution, *Jones v. Hobbs*, No. CV 2010-1118 (Mar. 8, 2010).

141. *Hobbs v. Jones*, 2012 Ark. 293, at *1, 412 S.W.3d 844, 844.

142. Motion of Don Davis to Intervene, *Jones v. Hobbs*, No. CV 2010-1118 (Mar. 16, 2010).

143. Formal Order at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Mar. 17, 2010); *Davis v. Ark. Dep't of Corrections*, 2010 Ark. 167, at *1, 2010 WL 1404437, at *1.

144. *Jones v. Hobbs*, No. 5:10-cv-00065-JLH, 2010 WL 1417976, at *1 (E.D. Ark. Apr. 5, 2010); Formal Order, *Jones v. Hobbs*, No. CV 2010-1118 at *1 (Mar. 17, 2010); *Davis v. Ark. Dep't of Correction*, 2010 Ark. 167 (2010).

145. Formal Order, *Jones v. Hobbs*, No. CV 2010-1118 (May 17, 2010).

146. *Davis v. Hobbs*, 2010 Ark. 168, at *1-2, 2010 WL 1474559, at *1-2.

147. *Id.* at *1, 2010 WL 1474559, at *1. Justice Brown explained that the case satisfied “each of this court’s announced criteria for imposing a stay of execution: (1) a constitutional issue of first impression is pending; (2) the issue is one of public significance; (3) the issue of a state stay only became ripe after the Eighth Circuit decision; (4) whether the new execution protocol violates the Arkansas Constitution is for Arkansas courts and not federal courts to decide; and (5) the separation-of-powers issue under the Arkansas Constitution cannot be decided before the execution which, again, is scheduled for today.” *Id.* at *1-2, 2010 WL 1474559, at *1-2 (citing *Singleton v. Norris*, 332 Ark. 196, 964 S.W.2d 366 (1998)).

148. Order, *Jones v. Hobbs*, No. 2010-1118 (July 19, 2010).

149. Motion to Intervene at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Apr. 8, 2010); Motion to Intervene at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Apr. 7, 2010); Motion to Intervene at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Apr. 6, 2010); Motion to Intervene at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Apr. 2, 2010); Motion to Intervene at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Mar. 23, 2010).

Some intervenors added claims that the Method of Execution Act (MEA) violated the Nurse Practice Act, the Federal Food, Drug, and Cosmetic Act, and the Federal Controlled Substances Act.

On July 29, 2010, an amended complaint alleged the nationwide shortage of lethal injection drugs made the increased discretion of the director more dangerous because the director was more likely to choose a novel, painful drug.¹⁵⁰ The plaintiffs requested discovery of documents related to the procurement of lethal injection drugs and noticed the deposition of Director Ray Hobbs.¹⁵¹

The day before the circuit court held a hearing on November 29, 2010, the United Kingdom imposed an export ban on sodium thiopental.¹⁵² At the hearing, the court denied the motion to dismiss regarding the separation of powers claim and dismissed the claims arising under the Federal Food Drug and Cosmetic Act, the Federal Controlled Substances Act, and the state Nurse Practice Act.¹⁵³

As 2010 ended, the defendants had still not responded to the Plaintiffs' requests for discovery.¹⁵⁴ Through an open records request, the American Civil Liberties Union received a slew of emails from California Department of Corrections officials regarding their search for lethal injection drugs.¹⁵⁵ The emails included an exchange between an Arizona Department of Corrections official and a California Department of Corrections official stating that Arizona had "followed the lead of Arkansas

150. Amended Complaint for Declaratory and Injunctive Relief at 11-12, *Jones v. Hobbs*, No. CV 2010-1118 (July 29, 2010).

151. Motion to Compel at 1, 6, *Jones v. Hobbs*, No. CV 2010-1118 (Feb. 2, 2011).

152. Nathan Koppel & Jeanne Whalen, *U.K. Limits Execution Drug's Export*, WALL ST. J. (Nov. 29, 2010), <https://www.wsj.com/articles/SB10001424052748703309804575645090755512932> [<https://perma.cc/R2S7-CQ5Q>].

153. Order Granting in Part and Denying in Part the Defendant's Motion to Dismiss, Denying the Defendant's Motion for Protective Order, and Denying the Plaintiffs' Motion for Sanctions at 1-2, *Jones v. Hobbs*, No. CV 2010-1118 (Dec. 16, 2010).

154. Plaintiffs' Supplemental Complaint at 7-8, *Jones v. Hobbs*, No. CV 2010-1118 (Jan. 24, 2011).

155. *Documents from the CDCR*, ACLU N. CAL. (Apr. 7, 2011), <https://www.aclunc.org/blog/documents-cdcr> [<http://perma.cc/4SF6-WY2C>].

and purchased the drugs we need from a company in London.”¹⁵⁶ The email revealed that Arkansas was having difficulties getting its drugs through customs.¹⁵⁷ Other litigants, seeking to discover the source of the Arizona drugs, sent a FOIA request to the Federal Food and Drug Administration.¹⁵⁸ Documents revealed in that release showed the London drug-supplier was Dream Pharma.¹⁵⁹

The plaintiffs filed a supplemental complaint alleging that the Department of Corrections intended to execute them with drugs “obtained from an overseas driving school.”¹⁶⁰ The complaint alleged that Dream Pharma was “a ramshackle, one-man operation run from the back of a driving school, Elgone Driving Academy.”¹⁶¹ According to the complaint, the company’s website advertised “‘unlicensed’ drugs, ‘orphan drugs,’ ‘medicinal products that has [sic] been discounted [sic] from UK market,’ and ‘products that are licensed in other parts of the world.’”¹⁶² The supplemental complaint raised three claims: (1) that the use of non-FDA approved chemicals created a substantial risk of serious harm; (2) that the suppression of information regarding the lethal injection chemicals was interfering with the plaintiff’s access to the court; and (3) that the use of the driving school chemicals in executions showed a deliberate indifference to unnecessary pain and suffering.¹⁶³ The

156. Email from Charles Flagan, Deputy Director, Ariz. Dep’t of Corrections, to John McAuliffe, Correctional Counselor, Cal. Dep’t of Corrections (Sept. 28, 2010) (on file with author).

157. *Id.*

158. Complaint for Injunctive Relief under the Freedom of Information Act, 5 U.S.C. § 552 at 1, *ACLU of N. Cal v. FDA*, No. 3:11-cv-03949-SC (N.D. Cal. Aug. 11, 2011).

159. E-mail from Charles Flanagan, *supra* note 156; Owen Bowcott, *London Firm Supplied Drugs for US Executions*, *GUARDIAN* (Jan. 6, 2011), <https://www.theguardian.com/world/2011/ja/06/london-firm-supplied-drugs-us-executions> [<https://perma.cc/AD4B-E6T3>].

160. Plaintiffs’ Supplemental Complaint at 1, *Jones v. Hobbs*, No. CV 2010-1118 (Pulaski Cty. Cir. Ct. Jan. 24, 2011).

161. *Id.* at 2.

162. *Id.* at 3.

163. *Id.* at 2, 7, 9.

complaint included two photos of the Elgone Driving Academy, a rundown storefront.¹⁶⁴

In depositions of top corrections officials, it was revealed that the ADC gave lethal injection chemicals to Oklahoma, Mississippi, and Tennessee.¹⁶⁵ According to the testimony, Arkansas had received lethal injection drugs from Tennessee.¹⁶⁶ Documents disclosed revealed that the Dream Pharma drugs had been detained by the FDA at customs.¹⁶⁷

In response to the revelations in discovery, the plaintiffs moved the Pulaski County Circuit Court to order the discovery of information pursuant to a subpoena issued to Dream Pharma under the Hague Convention.¹⁶⁸ In addition to correspondence with the Department of Corrections, the plaintiffs sought to discover information regarding Dream Pharma's compliance with regulations relating to drug storage and shipment and records showing manufacture and expiration dates of lethal injection drugs.¹⁶⁹

On April 2, 2011, the Arkansas Democrat-Gazette reported that the Drug Enforcement Agency had seized lethal injection drugs from Georgia, Kentucky, and Tennessee.¹⁷⁰ The article quoted ADC spokeswoman Dina Tyler as saying, "We haven't heard from [the DEA]. We're not expecting to hear from them."¹⁷¹ Also making the news were the revelations in depositions that Arkansas and other states were swapping lethal

164. *Id.* at 13. To see a different photo of the same building, see Andrew Hosken, *Lethal Injection Drug Sold from UK Driving School*, BBC NEWS (Jan. 6, 2011), <http://tinyurl.com/2dpc83w> [<https://perma.cc/783V-3JBT>] (noting the photo with caption "[t]he humble location of Dream Pharma, which doubles as a driving school.").

165. John Schwartz, *Seeking Execution Drug, States Cut Legal Corners*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/2011/04/14/us/14lethal.html> [<https://perma.cc/VX6W-MKY2>].

166. *Id.*

167. Motion for Discovery under the Hague Convention at 2, Jones v. Hobbs, No. CV 2010-1118 (Mar. 8, 2011).

168. Motion for Discover under the Hague Convention at 1, 3, Jones v. Hobbs, No. CV-2010-1118 (Pulaski Cty. Cir. Ct. Mar. 8, 2011).

169. *Id.* at 4-5.

170. Roger Alford & Kristin M. Hall, *DEA Takes Execution Drug from 2 States*, ARK. ONLINE (Apr. 2, 2011), <http://m.arkansasonline.com/news/2011/apr/02/dea-takes-execution-drug-2-states-20110402/> [<https://perma.cc/3SBC-SFK3>].

171. *Id.*

injection chemicals.¹⁷² The New York Times reported that “[r]ecently released documents emerging from lawsuits in many states reveal the intense communication among prison systems to help one another obtain sodium thiopental, and what amounts to a legally questionable swap club among prisons to ensure that each has the drug when it is needed for an execution.”¹⁷³ On April 15, 2011, Britain blocked the export of three additional lethal-injection drugs (pentobarbital, pancuronium bromide and potassium chloride) to the United States and urged a Europe-wide ban on sales of the drugs to the United States.¹⁷⁴

Amidst the national press, Governor Beebe set execution dates: Marcel Williams for July 12, 2011, Jason McGehee for July 26, 2011, and Bruce Ward for August 16, 2011.¹⁷⁵ The men moved the Arkansas Supreme Court for stays of execution arguing that they were identically situated to Jack Jones, Don Davis, and Stacey Johnson who all had stays due to the pending nondelegation suit.¹⁷⁶ The Arkansas Supreme Court granted the stays without comment other than to ask the Circuit Court for a status report.¹⁷⁷

172. Schwartz, *supra* note 165.

173. *Id.*

174. Associated Press, *U.K. to End Export of Execution Drugs*, ARK. ONLINE (Apr. 15, 2011), <http://www.arkansasonline.com/news/2011/apr/15/uk-end-export-execution-drugs-20110415/> [<https://perma.cc/NRK5-9KDN>].

175. Andy Davis, *Execution Dates Announced for Two Death-Row Inmates*, ARK. ONLINE (Apr. 26, 2011), <http://www.arkansasonline.com/news/2011/apr/26/execution-dates-announced-two-death-row-i-20110426/> [<https://perma.cc/R2JQ-NBMU>]; *Stays of Executions 2011*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/stays-execution-2011> [<https://perma.cc/U9NG-5BCG>].

176. Petition for Stay of Execution, *McGehee v. Hobbs*, No. 11-577 (Jun. 8, 2011).

177. *McGehee v. Hobbs*, 2011 Ark. 285, at *1, 383 S.W.3d 823, 823-24. Judge Fox’s status report to the Arkansas Supreme Court gives a snapshot of the incredible effort undertaken by both sides to litigate the case. Judge Fox reported:

The Complaint in *Jones v. Hobbs, et al*, Case No. 60CV10-1118 was filed on March 8, 2010. At that time there was only one named plaintiff, Jack Harold Jones. Since the filing of the original Complaint there have been over 110 pleadings filed and approximately 17 Orders entered. The pleading file at this time consists of seven separate volumes with each volume containing hundreds of pages of pleadings . . . The case continued its progression at the trial court level. The constitutional issues expanded exponentially as discovery was conducted and the number of plaintiffs increased as well . . . There have been substantial discovery disputes between the parties resulting in an unusually large number of motions to compel . . . On January 24, 2011

Scott Braden, an attorney for the plaintiffs wrote a letter to United States Attorney General Eric Holder complaining that the interstate “swap club” violated federal law.¹⁷⁸ Braden noted that because Tennessee’s supply of sodium thiopental had recently been seized by the DEA, the Attorney General should investigate the transfer of the same drug to Arkansas.¹⁷⁹ About a month later, the DEA wrote Braden acknowledging his letter had been referred to the agency and declined to confirm or deny an investigation.¹⁸⁰

The Arkansas Department of Corrections surrendered its supply of sodium thiopental to the DEA and moved for summary judgment on the claims in the Supplemental Complaint which related to the “driving-school” sodium thiopental.¹⁸¹

At hearing on cross-motions for summary judgment, Judge Fox ruled that the Method of Execution Act statute delegated too much authority to the Director of the ADC.¹⁸² In an attempt to cure the deficiency, Fox struck the portion of the statute which read “any other chemical or chemicals, including but not limited to.”¹⁸³ The relevant part of the statute then read:

(a)(1) The sentence of death is to be carried out by intravenous lethal injection of one (1) or more chemicals, as determined in kind and amount in the discretion of the Director of the Department of Correction.

the plaintiffs filed a Supplemental Complaint which as of this date remains the operative claim for relief. As of the filing of such pleading there were nine plaintiffs, represented to be all persons under final sentence of death in Arkansas.

Status Report, *McGehee v. Hobbs*, No. 11-577 (July 28, 2011).

178. Letter from Scott W. Braden to Eric H. Holder Jr., Attorney General (May 2, 2011) (on file with author).

179. *Id.*

180. Letter from Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control to Scott W. Braden (June 7, 2011) (on file with author).

181. Defendant’s Motion for Summary Judgment at 2-3, *Jones v. Hobbs*, No. CV 2010-1118 (Pulaski Cty. Cir. Ct. July 21, 2011).

182. Final Order, *Jones v. Hobbs*, No. CV 2010-1118 at 2-3 (Pulaski Cty. Cir. Ct. Aug. 29, 2011).

183. *Id.*

(2) The chemical or chemicals injected may include one (1) or more of the following substances:

(A) One (1) or more ultra-short-acting barbiturates;

(B) One (1) or more chemical paralytic agents;

(C) Potassium chloride; or

(D) Any other chemical or chemicals, including but not limited to saline solution.¹⁸⁴

Judge Fox found the claims regarding the driving school drugs moot but enjoined the State of Arkansas “from using any sodium thiopental obtained in violation of any state or federal law.”¹⁸⁵

The defendants appealed both the severance of the statute and the injunction against illegal acquisition of sodium thiopental.¹⁸⁶ The State argued that it needed the flexibility afforded by the law to respond to shortages of lethal injection chemicals.¹⁸⁷ The State addressed the irony of appealing an injunction which prevented them from breaking the law.¹⁸⁸ The brief argued that the State did not intend to break the law but wanted the injunction lifted because “if it is left in place, inmates who have been on death row for years or even decades will attempt to further delay implementation of their capital sentences by filing groundless, last-minute motions asking the Circuit Court to delay executions by finding the ADC in

184. ARK. CODE ANN. § 5-4-617(a)(2)(D), *invalidated* by *Hobbs v. Jones*, 2012 Ark. 293, at *1, 412 S.W.3d 844, 847; The current version of this statute is ARK. CODE ANN. § 5-4-617(c)-(d) (2016).

185. Final Order, *Jones v. Hobbs*, No. CV-2010-1118 at 3.

186. *Hobbs*, 2012 Ark. 293, at *1, *6-7, *19, 412 S.W.3d at 847, 850, 856. Shortly after the case was appealed, one of the Plaintiffs, Frank Williams, won substantive relief in the Arkansas Supreme Court. *Williams v. State*, 2011 Ark. 534, at *1, 2011 WL 6275536, at *1, *overruled* by *Nooner v. State*, 2014 Ark. 296, at *14, 438 S.W.3d 233, 242. The court recalled the mandate of his direct appeal finding a never-before discovered verdict-form deficiency. *Williams*, 2011 Ark. at *1, *3-4, 2011 WL 6275536, at *1-2. At his resentencing, a jury sentenced him to life without parole. Associated Press, *Jury Gives Former Death-Row Inmate Life Sentence*, ARK. ONLINE (July 17, 2014), <http://www.arkansasonline.com/news/2014/jul/17/jury-gives-former-death-row-inmate-life-sentence/> [https://perma.cc/7PYR-JDNN].

187. *Hobbs*, 2012 Ark. 293, at *13-15, 412 S.W.3d at 854-55.

188. *Id.* at *19-20, 412 S.W.3d at 856-57.

contempt on the theory that the ADC violated this injunction.”¹⁸⁹ The prisoners cross-appealed arguing that the striking of the statutory language did not cure the excess delegation.¹⁹⁰

The Arkansas Supreme Court struck down the MEA finding it “plainly gives absolute and exclusive discretion to the ADC to determine what chemicals are to be used.”¹⁹¹ The court rejected the argument that it needed to follow other state supreme courts on the interpretation of Arkansas’s separation of powers clause.¹⁹² The court found the lower court’s revision of the statute to be insufficient to solve the excess delegation.¹⁹³ The court declined to tell the General Assembly how to fix the constitutional defect.¹⁹⁴ The court also reversed the issuance of the injunction.¹⁹⁵ Justice Baker dissented arguing that Texas, Delaware, Idaho, and Florida had all rejected similar separation of powers challenges.¹⁹⁶

F. 2013 Law Change

The Arkansas Supreme Court’s decision left the state without a way to execute prisoners. The state had to wait for the General Assembly to come back into session in January of 2013 to rewrite the law. On January 16, 2013, in advance of the legislative session, Governor Mike Beebe publicly announced his lack of support for the death penalty and said he would sign a bill abolishing the death penalty.¹⁹⁷ But abolition was not on the minds of the legislators, and the General Assembly instead

189. Appellant’s Brief at Arg. 21, *Hobbs v. Jones*, No. 11-1128 (Ark. Dec. 22, 2011).

190. *Hobbs v. Jones*, 2012 Ark. 293, at *1, *7, 412 S.W.3d 844, 847, 850.

191. *Id.* at *1-2, *14, 412 S.W.3d at 847, 854.

192. *Id.* at *15, 412 S.W.3d at 854. “Despite the fact that other states may analyze similar statutes differently according to their respective constitutions, we are bound only by our own constitution and our own precedent.” *Id.*

193. *Id.* at *16, 412 S.W.3d at 855.

194. *Hobbs*, 2012 Ark. at *15, 412 S.W.3d at 854-55. “Further, we note specifically that nothing in this opinion shall be construed as implying what modifications to the statute would pass constitutional muster.” *Id.*

195. *Id.* at 857.

196. *Id.* at 857-59 (Baker, J., dissenting) (joined by Special Justice Byron Freeland).

197. Gavin Lesnick, *Beebe: Would Sign Death Penalty Repeal*, ARK. DEMOCRAT-GAZETTE (Jan. 16, 2013), <http://www.arkansasonline.com/news/2013/jan/16/beebe-would-sign-death-penalty-repeal/> [https://perma.cc/FU4L-KL2J].

enacted Act 139 which amended Arkansas Code Annotated 5-4-617 in response to the *Hobbs v. Jones* opinion.¹⁹⁸ Governor Beebe signed the measure into law.¹⁹⁹

The Act specified the lethal class of drug as a barbiturate and required the injection of a benzodiazepine prior to injection of the lethal chemical.²⁰⁰ The new Act included legislative findings that the law was necessary to comply with the constitutional prohibition on cruel and unusual punishment and that the law “satisfies the separation-of-powers doctrine.”²⁰¹ The Act exempted information about the acquisition of lethal injection drugs from the FOIA allowing only the release of “the type and concentration of the drugs and substances.”²⁰²

G. State FOIA Suit

Less than two months after Act 139 was signed into law, several prisoners sued Shea Wilson, Communications Administrator of the ADC, under the Freedom of Information Act in Pulaski County Circuit Court.²⁰³ The prisoners requested documents related to the implementation of the death penalty and the acquisition of drugs.²⁰⁴ Citing the new law, no information was released.²⁰⁵ The Petition sought a declaratory judgment that records containing “information about the origin, history, and quality of lethal injection drugs, including all correspondence with and documents obtained from

198. See *Hobbs v. McGehee*, 2015 Ark. 116, at *10-11, 458 S.W.3d 707, 714 (quoting text of Act 139).

199. *Id.*; *How a Bill Becomes a Law*, ARK. HOUSE OF REP., <http://www.arkansashouse.org/kids-in-the-house/how-a-bill-becomes-a-law> [https://perma.cc/3TT5-FKL7].

200. S. 237, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), <http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act139.pdf> [https://perma.cc/LR5U-Z6ZW] (An Act Regarding the Administration of a Lethal Injection at the Department of Correction).

201. *Id.*

202. *Id.*

203. Petition for an Order Compelling Release of Public Records under the Freedom of Information Act and Complaint for Declaratory Judgment, *Johnson v. Wilson*, No. 60-CV-13-1204 at 1 (Pulaski Cty. Cir. Ct. Mar. 18, 2013).

204. *Id.* at 1, 11.

205. *Id.* at 3, 5.

manufacturers and suppliers of lethal injection chemicals, must be disclosed.”²⁰⁶

The defendants moved to dismiss the lawsuit arguing that the requested documents were exempt from the FOIA under Act 139 which protects documents related to the “implementation” of lethal injection.²⁰⁷ After a hearing and in camera review of responsive documents, the circuit court denied the prisoners request for release of documents.²⁰⁸ The court did not rule on the prisoner’s claim for declaratory judgment or the Defendant’s motion to dismiss the case.²⁰⁹ Pursuant to the settlement agreement, discussed *infra*, the petitioners moved to dismiss the case.²¹⁰

H. 2013 Protocol Change

On April 11, 2013, the ADC adopted a new lethal injection protocol which called for the prisoners to be injected with Lorazepam (a benzodiazepine) and Phenobarbital (a barbiturate).²¹¹ According to the Associated Press, the Arkansas Department of Corrections spent \$20,000 to secure the lethal injection drugs necessary for the protocol.²¹²

I. McGehee Suit

The choice of Phenobarbital, a slow-acting barbiturate which had never before been used in an execution, generated an almost immediate legal challenge.²¹³ Jason McGehee and eight other plaintiffs filed suit in state court.²¹⁴ The prisoners

206. *Id.* at 1.

207. Respondent’s Motion to Dismiss at 1, Johnson v. Wilson, No. 60-CV-13-1204 (Pulaski Cty. Cir. Ct. Mar. 22, 2013).

208. Order, Johnson v. Wilson, No. 60-CV-13-1204 (Pulaski Cty. Cir. Ct. Mar. 25, 2013).

209. *Id.*

210. Motion to Dismiss Appeal at 1, Johnson v. Wilson, No. 60-CV-13-1204 (Pulaski Cty. Cir. Ct. June 20, 2013).

211. Hobbs v. McGehee, 2015 Ark. 116, at *2-3, 458 S.W.3d 707, 709-10.

212. Jeannie Nuss, *Arkansas Has Enough Drugs to Carry Out Executions*, ASSOCIATED PRESS (Apr. 17, 2013).

213. *Hobbs*, 2015 Ark. at *3, 458 S.W.3d at 710.

214. *Id.* at *1, 458 S.W.3d at 707.

contended that the new protocol was more likely to result in serious brain damage than death.²¹⁵ Animal studies suggested that the dosage in the protocol was insufficient to kill them.²¹⁶ They complained that if the drug did kill them, it would be excruciatingly slow.²¹⁷ If manufacturer instructions were followed it would take at least sixty minutes to inject the first dose.²¹⁸ The plaintiffs complained that the protocol violated the statute in place at the time they were sentenced (because it used a slow-acting barbiturate rather than an ultra-short acting barbiturate) and it violated the current statute (because it would not kill the prisoners).²¹⁹ The plaintiffs complained that the use of near-death or slow death from phenobarbital violated the ex post facto clause and the Eighth Amendment.²²⁰ The prisoners asserted the statute was preempted by federal statutory law which required a prescription for the transfer of controlled substances.²²¹ Finally, the prisoners contended that the new statute did not cure the separation of powers infirmity in that it gave the director too much discretion in the selection and training of the execution team and selecting the lethal chemicals.²²² The case was heard by Judge Wendell Griffen.²²³

With the suit pending, Attorney General Dustin McDaniel asked Governor Beebe to set execution dates for seven inmates.²²⁴ The ADC announced it was abandoning its phenobarbital protocol.²²⁵ With the drug choice in flux, attorneys for the plaintiffs and the defendants entered into a

215. *Id.* at *2-3, 458 S.W.3d at 709-10.

216. *Id.* at *3, 458 S.W.3d at 710.

217. *Id.*

218. *Hobbs*, 2015 Ark. at *3, 458 S.W.3d at 710.

219. *Id.* at *2-3, 458 S.W.3d at 710.

220. *Id.*

221. *Id.* at *3, 458 S.W.3d at 710.

222. *Id.* at *2-3, 458 S.W.3d at 709-10.

223. Acknowledgement of Oral Argument, *McGehee v. Hobbs*, No. 60-CV-13-1794 (Pulaski Cty. Cir. Ct. Feb. 21, 2014).

224. Sean Beherec, *Set Deaths for Seven Governor Is Asked*, ARK. DEMOCRAT-GAZETTE, May 4, 2013, at 1B.

225. According to ADC Spokeswoman, Shea Wilson, the supplier of the phenobarbital agreed to accept a return of the drug and would issue a refund. Sean Beherec, *Beebe: Lethal Injections on Hold*, ARK. DEMOCRAT-GAZETTE, Jun. 19, 2013, at 1A.

partial settlement agreement.²²⁶ They agreed the retreat from Phenobarbital mooted some of the claims but that the challenges to the statute were live.²²⁷ Among other things, the parties agreed that after the ADC obtained new lethal injection drugs it would “notify the plaintiffs’ counsel that it has obtained the drugs and [would] specify which drugs ha[d] been obtained and [would] disclose packing slips, package inserts, and box labels received from the supplier.”²²⁸

The suit proceeded on the facial challenges to the statute: (1) whether the prisoners should be executed under the 1983 statute, which was in place when they were sentenced; and (2) whether the new law gave the Director too much discretion to choose between a large class of disparate drugs and by not specifying training and selection requirements for the execution team.²²⁹ The defendants asserted the affirmative defenses of sovereign immunity and qualified immunity.²³⁰

Governor Mike Beebe announced that he would not set execution dates until the ADC adopted a new protocol.²³¹ An article reporting the announcement tallied that Beebe had set twelve execution dates for eight inmates since July of 2007, none of which had been carried out.²³² Shortly after, Attorney General McDaniel addressed a meeting of the Sheriff’s Association and stated that he believed the death penalty was “completely broken.”²³³ He expressed frustration with the serial lawsuits stating, “I truly believe we could make the statute describing the Department of Correction’s powers in these areas

226. Agreement, *McGehee v. Hobbs*, No. 60CV-13-1794 (Pulaski Cty. Cir. Ct. June 14, 2013).

227. Amended Complaint for All Plaintiffs at 1-2, *McGehee v. Hobbs*, No. (Pulaski Cty. Cir. Ct. Feb. 21, 2014).

228. Complaint for Declaratory and Injunctive Relief at 15, *Johnson v. Kelley*, 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Jun. 29, 2015).

229. *Hobbs v. McGehee*, 2015 Ark. 115, at *4, 458 S.W.3d 707, 710.

230. Defendant’s Answer to Plaintiffs’ Amended Complaint at 9, *McGehee v. Hobbs*, No. 60-CV-13-1794 (Pulaski Cty. Cir. Ct., July 3, 2013).

231. Sean Beherec, *Beebe: Lethal Injections on Hold*, ARK. DEMOCRAT-GAZETTE, June 19, 2013, at 1A.

232. *Id.* at 3A.

233. Dustin McDaniel, Ark. Att’y Gen., Address to Ark. Sheriffs Ass’n at 2-3 (July 10, 2013), <http://posting.arktimes.com/images/blogimages/2013/07/10/1373479045-dustin.pdf>[<https://perma.cc/4PA6-EAHB>].

as long and detailed as ‘War and Peace’ and we would still be sued.”²³⁴ At a General Assembly judiciary committee on the death penalty Attorney General McDaniel testified the State had few options to resume executions.²³⁵

With only facial challenges alive, the McGehee suit was resolved on dueling motions for summary judgment.²³⁶ Judge Griffen ruled that the new act violated the separation of powers doctrine because “barbiturate” gave the director the choice between ultra-short-acting barbiturates which would cause unconsciousness in less than a minute and long-acting barbiturates like phenobarbital that would take as long as an hour to kick in.²³⁷ Judge Griffen also faulted the statute for failing to give guidance regarding the training of the execution team.²³⁸ He sided with the defendants on the retroactivity claim and ruled that the statute did not offend anti-retroactivity principles because it was not a sentencing statute.²³⁹

Each party appealed to the Arkansas Supreme Court.²⁴⁰ In a 4-3 opinion the court reversed the separation of powers ruling and affirmed the retroactivity ruling.²⁴¹ The opinion was penned by Justice Baker, the author of the dissenting opinion in *Hobbs v. Jones*.²⁴² The Court held that by identifying the class of drugs (barbiturate) and stating that it had to be administered in an amount sufficient to cause death, the legislature had given sufficient guidance to the executive branch.²⁴³ The court also

234. *Id.* at 12-13.

235. Cathy Frye, *Drug Dilemma Spurs Debate: Still Execute? Legislators Hear Doubts Cast on Costs, Penalty’s Support*, ARK. DEMOCRAT-GAZETTE, July 25, 2013, at 1B. While the appeal of the *McGehee* case was pending in the Arkansas Supreme Court, the senate judiciary committee voted out of committee a bill to abolish the death penalty in Arkansas. See *Arkansas Legislature: Senate Committee Advances Bill to End Death Penalty*, TIMES RECORD (Feb. 26, 2015), <http://www.swtimes.com/legislature/arkansas-legislature-senate-committee-advances-bill-end-death-penalty> [https://perma.cc/CU28-DQHA].

236. *Hobbs v. McGehee*, 2015 Ark. 1166, at *1, 458 S.W.3d 707, 707.

237. Memorandum Opinion and Order at 13, 16, *McGehee v. Hobbs*, No. 60-CV-13-1794 (Pulaski Cty. Cir. Ct. Feb. 21, 2014).

238. *Id.*

239. *Id.* at 7.

240. *Hobbs v. McGehee*, 2015 Ark. 116, at *6-7, 458 S.W.3d 707, 712.

241. *Id.* at *19, 458 S.W.3d at 719.

242. *Id.* at *1, 458 S.W.3d at 709.

243. *Id.* at *16, 458 S.W.3d at 717.

credited the statement in the legislative findings that it was meant to comply with the prohibition on cruel and unusual punishment as providing additional guidance to the Director.²⁴⁴ The court found the constitution did not require the legislature to guide the Director on the training of the execution team.²⁴⁵

Justice Wynne, joined by Chief Justice Hannah and Justice Danielson, dissented in part.²⁴⁶ Wynne, who was not on the court for *Jones*, argued that the new law failed to fix the separation of powers problem identified in 2012.²⁴⁷ He reasoned that the class of barbiturates ranged too broadly to sufficiently guide the ADC.²⁴⁸ He offered that *Jones* explicitly rejected the argument, now embraced by the majority, that the law's preamble invocation of the Eighth Amendment was sufficient policy guidance.²⁴⁹ He suggested that a policy statement such as that used by other states "quickly and painlessly cause death" (Ohio) or "cause death in a swift and humane manner" (Kansas) would provide the necessary guidance to the Director.²⁵⁰

J. 2015 Law Change

Before the Arkansas Supreme Court could even issue its mandate reversing Judge Griffen and upholding the constitutionality of Act 139, the General Assembly, again, rewrote the Method of Execution law.²⁵¹ On April 4, 2015, newly-elected Republican Governor Asa Hutchinson signed into law Act 1096.²⁵² The justification for law change was the

244. *Id.* n. 6.

245. *Hobbs*, 2015 Ark. at *19, 458 S.W.3d at 719.

246. *Id.* (Wynne, J., concurring in part, dissenting in part).

247. *Id.* at *22, 458 S.W.3d at 720-21 (Wynne, J., concurring in part, dissenting in part).

248. *Id.* at *23, 458 S.W.3d at 721 (Wynne, J., concurring in part, dissenting in part).

249. *Id.* at *23, 458 S.W.3d at 721 (Wynne, J., concurring in part, dissenting in part).

250. *Hobbs*, 2015 Ark. at *24, 458 S.W.3d at 721-22 (Wynne, J., concurring in part, dissenting in part).

251. See H.B. 1751, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

252. See Andrew DeMillo, *Arkansas Governor Signs Lethal Injection Measure; Suit Filed*, ASSOCIATED PRESS (Apr. 6, 2015), <http://www.washingtontimes.com/news/2015/apr/6/arkansas-governor-signs-lethal-injection-measure-s/> [<https://perma.cc/4MWX-KUJR>].

unavailability of pentobarbital, the drug used by the majority of states using a one-drug barbiturate protocol.²⁵³

The new law preserved the option for a one-drug barbiturate protocol and added the option of a three drug protocol, like that previously in place, but using midazolam instead of sodium thiopental.²⁵⁴ While the law restricted the choice of drugs, it allowed the use of compounded chemicals.²⁵⁵ It also took new measures to shield the drug acquisition process from public view.²⁵⁶ It required the Director seek a protective order before revealing information about drug providers in litigation.²⁵⁷ The law allowed for the disclosure of drug package inserts, labels, test results, and the lethal injection protocol so long as they were redacted to shield the identity of “the compounding pharmacy, testing laboratory, seller, or supplier”²⁵⁸

K. Williams/Johnson State Suit

The same day the Governor signed Act 1096 into law, seven death-sentenced prisoners filed suit in state court with Marcel Williams as the lead plaintiff.²⁵⁹ The suit levied eight claims.²⁶⁰ The suit raised several claims related to the new secrecy provisions, principally that the provision violated the contracts clause by abrogating the 2013 settlement agreement from the FOIA suit which would have required disclosure of drug information when new drugs were acquired for lethal injection.²⁶¹ The suit also brought substantive claims under the Eighth Amendment, the ex post facto clause, and their Arkansas corollaries, claiming that the use of compounded drugs created a

253. H.B. 1751; *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> [<https://perma.cc/9GYG-DA9Q>].

254. See H.B. 1751.

255. H.B. 1751.

256. H.B. 1751.

257. H.B. 1751.

258. H.B. 1751.

259. Complaint for Declaratory and Injunctive Relief at 1, *Williams v. Kelley*, No. 60-CV-15-1400 (Pulaski Cty. Cir. Ct. Apr. 6, 2015).

260. *Id.* at 2-7.

261. *Id.* at 17-18.

risk of pain and midazolam was insufficient to render the condemned unconscious.²⁶² The case was again assigned to Judge Griffen.²⁶³

Noting that the plaintiffs' claims arose under the constitution and laws of the United States, the Arkansas Attorney General removed the complaint to federal district court citing 28 U.S.C. § 1441(a).²⁶⁴ The notice asserted that the district court had "supplemental jurisdiction over the state-law claims."²⁶⁵ The prisoners voluntarily dismissed their complaint in federal court and filed an amended complaint in state court removing all references to federal constitutional law and raising only state law grounds for relief.²⁶⁶ The Defendants moved to dismiss the amended complaint arguing that the court lacked subject matter jurisdiction because the matter was removed to federal court and had not been remanded.²⁶⁷ In order to cure the asserted jurisdictional problem, the prisoners filed a new complaint, under a new case number, with Stacey Johnson as the lead plaintiff.²⁶⁸ Again, the complaint asserted only state law claims.²⁶⁹ The case stayed before Judge Griffen.²⁷⁰

While litigation was proceeding, the ADC acquired lethal injection drugs at the cost of \$24,226.40 and adopted a protocol using a three-drug midazolam protocol.²⁷¹ The prisoners were provided with redacted drug package inserts and labels for the drug.²⁷² No package slips were provided.²⁷³ Shortly after,

262. *Id.* at 23-25.

263. Cover Sheet, *Williams v. Kelley*, No. 60-CV-15-1400 (Pulaski Cty. Cir. Ct. Apr. 6, 2015).

264. Notice of Removal at 1, *Williams v. Kelley*, 4:15-cv-206-JM (E.D. Ark. Apr. 10, 2015).

265. *Id.* at 2.

266. Amended Complaint for Declaratory and Injunctive Relief, *Williams v. Kelley*, No. 60-CV-15-1400 (Pulaski Cty. Cir. Ct. Apr. 18, 2015); Notice of Voluntary Dismissal Without Prejudice, *Williams v. Kelley*, 4:15-cv-206 (E.D. Ark. Apr. 18, 2015).

267. Motion to Dismiss Plaintiffs' Second Amended Complaint at 3, *Williams v. Kelley*, No. 60-CV-15-1400 (Pulaski Cty. Cir. Ct. Apr. 18, 2015).

268. Complaint for Declaratory and Injunctive Relief at 1, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. June 29, 2015).

269. *Id.* at 4-10.

270. Formal Order, *Kelley v. Johnson*, No. 60-CV-15-2921 (Ark. Dec. 10, 2015).

271. Jeannie Roberts, *Rutledge Requests 8 Execution Dates Be Set – Appeals Up, She Says: State Has Drugs*, ARK. DEMOCRAT-GAZETTE, Sept. 2, 2015, at 1.

272. *Kelley v. Johnson*, 2016 Ark. 268, at *5, 496 S.W.3d 346, 352.

Governor Asa Hutchinson set double-header execution dates for October 21, 2015 (Ward and Davis); November 3, 2015 (Johnson and Nooner); December 14, 2015 (Marcel Williams and Jones); January 14, 2016 (McGehee and Kenneth Williams).²⁷⁴ The State moved to dismiss the *Johnson* lawsuit again asserting immunity from suit.²⁷⁵ It also alleged that any contract with the prisoners expired when the McGehee suit concluded.²⁷⁶ Secrecy was necessary, according to the state, because access to information about drug suppliers was the cause of nationwide drug shortages.²⁷⁷ After the acquisition of the lethal injection drugs, the prisoners amended their complaint to add a claim under the public expenditures clause of the Arkansas Constitution which required disclosure of recipients of public funds.²⁷⁸ With execution dates looming, the plaintiffs filed an emergency motion for summary judgment or for a preliminary injunction.²⁷⁹ On October 9, 2015, with the executions of Bruce Ward and Don Davis two weeks away, Judge Griffen denied the defendant's motion to dismiss the case with the exception of the separation of powers claim which he dismissed.²⁸⁰ He set a hearing on the claims for March 2016, and entered a temporary restraining order and stay of execution of all plaintiffs pending the hearing.²⁸¹ The court also ordered the defendants to identify (or object to the disclosure of) the

273. *Id.* at *5, 496 S.W.3d at 352.

274. Jeannie Roberts, *Nine Inmates on Death Row Cite Pain Risk—New Filing in Lawsuit Claims Latest Drug Strategy a Gamble*, ARK. DEMOCRAT-GAZETTE, Sept. 30, 2015, at 7.

275. Defendants' Motion to Dismiss Plaintiffs' Complaint at 1, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. July 13, 2015).

276. *Id.*

277. Brief in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint at 26, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. July 13, 2015).

278. Amended Complaint for Declaratory and Injunctive Relief at 4, 12, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Sept. 28, 2015).

279. Emergency Motion for Summary Judgment or, Alternatively, for a Preliminary Injunction, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Sept. 30, 2015).

280. Memorandum Order Denying Motion to Dismiss Amended Complaint at 5, 11, 14, 16, 18, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 9, 2015).

281. Temporary Restraining Order, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 9, 2015); Scheduling Order at 1, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 12, 2015).

supplier of the lethal injection drugs and provide unredacted drug information to the Plaintiffs.²⁸²

The defendants appealed the temporary restraining order to the Arkansas Supreme Court.²⁸³ They argued that one of the drugs used in the protocol would expire in June 2016, and so the prisoners had an incentive to delay the legal proceedings.²⁸⁴ In response, the plaintiffs asked the court to issue its own stays of execution.²⁸⁵ The plaintiffs pleaded their extreme diligence in challenging the new law—relating that they filed suit on the very day it was signed into law.²⁸⁶

One day before the Ward and Davis execution dates, the Arkansas Supreme Court granted the emergency petition and issued a writ of mandamus on the grounds that by statute only the Governor, the Director of the Department of Correction, or the Clerk of the Supreme Court have the right to stay an execution.²⁸⁷ The court rejected as “semantics” the prisoners’ argument that the circuit court had entered an injunction rather than a stay of execution.²⁸⁸ Yet, the Court issued its own stays under *Singleton v. Norris* finding that “[t]he prisoners filed their complaint immediately after Act 1096 was enacted, the complaint contains bona fide constitutional claims, and the first executions are set for October 21, 2015.”²⁸⁹

Back in the circuit court, the plaintiffs pressed for discovery while the defendants sought a protective order.²⁹⁰ The

282. Scheduling Order at 1, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 12, 2015).

283. Defendants’ Notice of Appeal, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 13, 2015).

284. Order Denying Defendants’ Motion to Dissolve Temporary Restraining Order at 1-2, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 13, 2015).

285. Formal Order, *Johnson v. Kelley*, No. CV-15-833 (Ark. Oct. 21, 2015).

286. Order Denying Defendants’ Motion to Dissolve Temporary Restraining Order at 2, *Kelley v. Johnson*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 13, 2015).

287. Formal Order, *Kelley v. Griffen*, CV-15-829 (Pulaski Cty. Cir. Ct. Oct. 20, 2015) (citing ARK. CODE ANN. § 16-90-506(c) and *Singleton v. Norris*, 332 Ark. 196 (1998)).

288. *Id.*

289. *Id.* at 4.

290. Notice of Filing Initial Discovery Requests, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 22, 2015); Defendants’ Motion for a Protected Order, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 21, 2015).

plaintiffs conceded that the court may first decide the merits of the claims regarding the secrecy provisions of the MEA before ruling on the protective order.²⁹¹ The defendants moved for summary judgment, attaching declarations from Wendy Kelley, Rory Griffin, and medical experts.²⁹² The Declaration of ADC Director Wendy Kelley stated that she had been unable to secure lethal injection drugs without the promise of confidentiality.²⁹³ Deputy Director Rory Griffin stated that he had contacted the suppliers of the alternative lethal injection drugs named by the prisoners in their complaint (the day before signing his affidavit) and they either refused or would not immediately agree to supply drugs for an execution.²⁹⁴

Judge Griffen resolved the matter on cross motions for summary judgment.²⁹⁵ As to the contracts claim, he ruled in favor of the plaintiffs.²⁹⁶ He rejected the ADC's argument that abrogation of the contract was necessary because drug suppliers would not provide lethal injection chemicals if their identity would become public.²⁹⁷ The court noted that the ADC sought a protective order on the grounds that the supplier of the lethal injection chemicals did so in contravention of a directive from the manufacturer that they not be used for capital punishment.²⁹⁸ The court reasoned that opposition to the death penalty, whether by the state or drug companies, does not justify abrogation of a valid contract to disclose drug information.²⁹⁹ The court held

291. Response to Defendants' Motion for a Protective Order at 2, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 26, 2015).

292. Brief in Support of Defendants' Response in Opposition to Plaintiffs' Emergency Motion for Partial Summary Judgment or, Alternatively, for a Preliminary Injunction and Defendants' Cross-Motion for Summary Judgment at 1, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 16, 2015).

293. Affidavit of Wendy Kelley at 5, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 16, 2015).

294. Affidavit of Rory Griffin at 1-5, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Oct. 16, 2015).

295. Memorandum Order Concerning Plaintiffs' Motion for Partial Summary Judgment, Defendants' Cross Motion for Summary Judgment, and Defendants' Motion for Protective Order at 31-32, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Dec. 3, 2015).

296. *Id.* at 8.

297. *Id.* at 6-7.

298. *Id.* at 7.

299. *Id.* at 8.

that because the secrecy portion of the law impaired the obligation of a contract it was void immediately.³⁰⁰ The court also granted summary judgment to the plaintiffs on the public expenditures claim holding that the Arkansas Constitution does not “authorize the legislature to decide to conceal when public money is spent, to whom it is paid, and the purposes for those expenditures.”³⁰¹

The court also found the law’s secrecy troublesome because of the “the ADC’s history of obtaining lethal injection drugs from a disreputable source, a wholesaler operating illegally from the back of a driving school.”³⁰² The court ruled that the record needed development on the question of whether the midazolam protocol carried a significant risk of pain.³⁰³

The court denied a protective order over drug supplier information and denied the defendants entreaty that if they must disclose to only do so to the plaintiffs’ attorneys—not to the prisoners themselves. The court roundly rejected that offer, calling the notion that attorneys could withhold such information from their clients “manifestly untenable.”³⁰⁴ The court rejected the idea that death row inmates should be treated differently than any other litigant.³⁰⁵

The defendants noticed appeal and sought an emergency motion staying all proceedings in the circuit court.³⁰⁶ The Arkansas Supreme Court granted a stay of the circuit court

300. Memorandum Order Concerning Plaintiffs’ Motion for Partial Summary Judgment, Defendants’ Cross Motion for Summary Judgment, and Defendants’ Motion for Protective Order at 4-5, 8, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Dec. 3, 2015).

301. *Id.* at 16-17.

302. *Id.* at 11.

303. *Id.* at 12.

304. *Id.* at 30.

305. Memorandum Order Concerning Plaintiffs’ Motion for Partial Summary Judgment, Defendants’ Cross Motion for Summary Judgment, and Defendants’ Motion for Protective Order at 31, *Johnson v. Kelley*, No. 60-CV-15-2921 (Pulaski Cty. Cir. Ct. Dec. 3, 2015).

306. Emergency Motion for Immediate Stay of All Proceedings in the Circuit Court Pending Appeal or, Alternatively, for a Temporary Stay, *Kelley v. Johnson*, No. CV-15-992 (Ark. Dec. 4, 2015).

proceedings pending appeal and thus no drug supplier information was disclosed.³⁰⁷

The Arkansas Supreme Court issued its opinion reversing Judge Griffen on June 23, 2016, seven days before the state's supply of vercuronium bromide was set to expire.³⁰⁸ The court, in a four to three decision, held the statute constitutional.³⁰⁹ With regard to the cruel or unusual punishment claim, the court held that the United States Supreme Court's rulings in *Baze* and *Glossip* controlled its interpretation of the state corollary to the Eighth Amendment.³¹⁰ In doing so, they rejected the prisoner's textual argument that "cruel or unusual punishment" was distinct from "cruel and unusual punishment."³¹¹ The court held that under Supreme Court precedent, a litigant must prove that a method of execution presents a "substantial risk of serious harm" and that there is a less risky "known and available alternative method[] of execution."³¹²

The court found that the prisoners failed to sufficiently plead an available alternative method of execution.³¹³ The prisoners pleaded five alternatives to the midazolam protocol: firing squad, massive dose of a fast-acting FDA-approved barbiturate, massive dose of anesthetic gas, massive dose of an injectable opioid, or a massive dose of a transdermal opioid patch.³¹⁴ The court held that in order for the prisoners to plead a feasible alternative, they must do more than show that a drug is commercially available but must demonstrate that "a department of correction, is able to obtain the drugs for the purpose of carrying out an execution."³¹⁵ With regard to the firing squad, the court held that the prisoners' allegations "that ADC has firearms, bullets, and personnel at its disposal to carry out an

307. Formal Order, *Kelley v. Johnson*, CV-15-992 (Ark. Dec. 4, 2015).

308. *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346.

309. Bruce Green, *Amicus Briefs*, *Johnson v. Kelley* (2016), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1014&context=stein_amicus [https://perma.cc/6XY9-CBZH].

310. *Kelley*, 2016 Ark. at 13-15, 496 S.W.3d at 356-57.

311. *Id.* at 15, 496 S.W.3d at 357.

312. *Id.* at 13-14, 496 S.W.3d at 356-57.

313. *Id.* at 16-21, 496 S.W.3d at 358-60.

314. *Id.* at 16, 496 S.W.3d at 357-58.

315. *Kelley*, 2016 Ark. at 19, 496 S.W.3d at 359.

execution” were “entirely conclusory in nature” and insufficient to satisfy the fact-pleading requirements of Arkansas state law.³¹⁶ The court also held that the firing squad was not “readily implemented” because Arkansas’s statute only provides for execution by lethal injection or electrocution (in the event lethal injection is found to be unconstitutional).³¹⁷

The court rejected each of the prisoners’ claims regarding the secrecy provisions of the statute.³¹⁸ The court held that the secrecy provisions did not violate the contracts clause of the state constitution because the settlement agreement only governed protocol adopted under the previous incarnation of the MEA and thus there was no existing contract to abrogate.³¹⁹ As to the publications clause, the court ruled that the General Assembly is allowed “to determine the time and means by which [the publication clause] is to be implemented.”³²⁰

Although Wendy Kelley had sworn by affidavit that she was unable to secure lethal injection drugs, within two weeks of the expiration of vecuronium bromide, the ADC was able to acquire a new source for the chemical.³²¹ The state had sufficient drugs to carry out executions and a statute which had been ruled constitutional by the state supreme court.³²² However, because the Arkansas Supreme Court tethered its decision on the state cruel or unusual punishment clause to the federal cruel and unusual punishment clause—the prisoners had an issue to appeal to the United States Supreme Court.³²³ The Arkansas Supreme Court stayed the issuance of its mandate and thus prevented the finality of its judgment—while the prisoners sought review in the nation’s highest court.³²⁴

316. *Id.*

317. *Id.* at 19-20, 496 S.W.3d at 359-60.

318. *Id.* at 27-29, 496 S.W.3d at 363-64.

319. *Id.* at 28-29, 496 S.W.3d at 364.

320. *Kelley*, 2016 Ark. at 32, 496 S.W.3d at 366.

321. John Lyon, *Arkansas Obtains New Supply of Execution Drug*, ARK. NEWS (July 12, 2016), <http://www.arkansasnews.com/news/arkansas/arkansas-obtains-new-supply-execution-drug>[<https://perma.cc/MB84-WC4K>].

322. *Id.*

323. *Kelley*, 2016 Ark. at 15, 496 S.W.3d at 357.

324. Motion to Clarify Duration of Stay of Mandate at 1-2, *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346, No. CV-15-992 (Ark. Sept. 23, 2016).

The prisoners filed a certiorari petition presenting three questions related to what a prisoner must plead under the Eighth Amendment in order to state a “known and available alternative” to the current method of execution.³²⁵ The prisoners asked the Supreme Court whether, as the Arkansas Supreme Court suggested, a method of execution must already be allowed by statute in order to qualify as a viable alternative.³²⁶ The prisoners also asked the High Court to decide what a prisoner must plead regarding the firing squad and commercially-available pharmaceuticals in order to establish they are available.³²⁷

On February 21, 2017, the Supreme Court denied certiorari over the dissents of Justices Sotomayor and Breyer.³²⁸ In a companion petition denied the same day,³²⁹

Justice Sotomayor reasoned that the lower-court decision permits a state to “bar a death-row inmate from vindicating a right guaranteed by the Eighth Amendment . . . [by] pass[ing] a statute declining to authorize any alternative method.” Sotomayor reached back to *Marbury v. Madison*³³⁰ and *Martin v. Hunter’s Lessee*³³¹ to argue that the lower court’s decision subverted foundational principles of supremacy and uniformity by allowing individual state courts to override the guarantee of the Eighth Amendment by declining to write alternative methods of execution into state laws.³³² Following the Supreme Court’s denial of certiorari, the Arkansas Supreme Court issued its mandate and dismissed the case below.³³³

325. Petition for Writ of Certiorari, *Johnson v. Kelley*, No. 16-6496 (U.S. Oct. 19, 2016).

326. *Id.* at i.

327. *Id.*

328. *Johnson v. Kelley*, 137 S. Ct. 1067 (2017).

329. *Arthur v. Dunn*, 137 S. Ct. 725, 729 (2017).

330. 1 Cranch 137, 177 (1803).

331. 1 Wheat. 304, 347-48 (1816).

332. *Dunn*, 137 S. Ct. at 730.

333. Formal Order, *Kelley v. Johnson*, CV-15-992 (Ark. Feb. 24, 2017).

II. CONCLUSION

In April 2017, the drought in executions ended in spectacular fashion. Certiorari was denied in the *Johnson* case just two months before the state's supply of Midazolam would expire on April 30, 2017. In an unprecedented move, Governor Asa Hutchinson set eight men to be executed in eleven days, two executions on four days between April 17, and April 28, 2017. A swift volley of litigation followed. A federal district court granted a preliminary injunction which would have stayed all eight executions.³³⁴ A state trial court granted a temporary restraining order which would have prevented the use of the second lethal injection drug and effectively stayed all executions.³³⁵ Both orders were overturned by higher courts.³³⁶ Four of the eight men, Ledell Lee, Jack Jones, Marcel Williams and Kenneth Williams, were executed. The remaining four were spared pursuant to stays of execution granted on challenges unrelated to lethal injection. The April executions sparked new concerns regarding the State's lethal injection procedures.³³⁷ As the last decade has borne out, litigation will continue to be an important tool to protect the vital rights of death-sentenced inmates and to spotlight the questionable actions of state officials.

334. *McGehee v. Hutchinson*, 2017 WL 1399554 (E.D. Ark. Apr. 15, 2017) (vacated by *McGehee v. Hutchinson*, 854 F.3d 488 (8th Cir. Apr. 17, 2017) (en banc)).

335. *McKesson Medical-Surgical v. Arkansas*, 60cv-17-1921 (Pulaski Cty. Ct. 2017).

336. *McGehee v. Hutchinson*, 854 F.3d 488 (8th Cir. Apr. 17, 2017) (en banc); *Arkansas v. Griffen*, CV-17-299 (Ark. Apr. 17, 2017).

337. Max Brantley, *Calls for Investigation Follow Execution of Kenneth Williams, Observed 'Lurching' and Moaning During Lethal Injections*, ARK. TIMES (Apr. 28, 2017), <https://www.arktimes.com/ArkansasBlog/archives/2017/04/28/calls-for-investigation-follow-execution-of-kenneth-williams-observed-lurching-and-moaning-during-lethal-injections> [https://perma.cc/N2EL-CNTY].

TABLE 1: EXECUTION DATES

Don Davis, July 5, 2006
Terrick Nooner, September 18, 2007
Jack Jones, October 16, 2007
Don Davis, November 8, 2007
Frank Williams, Jr., September 9, 2008
Jack Jones, March 16, 2010
Don Davis, April 12, 2010
Stacey Johnson, May 4, 2010
Jack Jones, May 24, 2010
Frank Williams, Jr., June 22, 2011
Marcel Williams, July 12, 2011
Jason McGehee, July 26, 2011
Bruce Ward, August 16, 2011
Bruce Ward, October 21, 2015
Don Davis, October 21, 2015
Stacey Johnson, November 3, 2015
Terrick Nooner, November 3, 2015
Marcel Williams, December 14, 2015
Jack Jones, December 14, 2015
Jason McGehee, January 14, 2015
Kenneth Williams, January 14, 2015

TABLE 2: LAWSUITS

Nooner v. Norris, 5:06-cv-110 (E.D. Ark. May 1, 2006).

Frank Williams v. Norris, 5:07-cv-173 (E.D. Ark. July 11, 2007).³³⁸

Frank Williams v. Arkansas Department of Correction, 2008-4891 (Pulaski Cty. Ct. May 6, 2008).

Marcel Williams v. Norris, 5:09-cv-394 (E.D. Ark. Dec. 28, 2009).

Jones v. Hobbs, 2010-1118 (Pulaski Cty. Cir. Ct. Mar. 8, 2010).

Jones v. Hobbs, 5:10-cv-65 (E.D. Ark. Mar. 8, 2010).

Johnson v. Wilson, 60-cv-13-1204 (Pulaski Cty. Ct. Mar. 18, 2013).

McGehee v. Hobbs, 60-cv-13-1794 (Pulaski Cty. Ct. Apr. 26, 2013).

Marcel Williams v. Kelley, 60-cv-15-1400 (Pulaski Cty. Ct. Apr. 6, 2015).

Johnson v. Kelley, 60-cv-15-2921 (Pulaski Cty. Ct. June 29, 2015).³³⁹

338. Consolidated with *Nooner v. Norris*.

339. This suit was really a continuation of the *Marcel Williams v. Hobbs* case filed with a new case number in response to a jurisdictional argument raised by the Defendant.