

*** Execution Scheduled for April 27, 2017 ***

Case No. _____

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

KENNETH WILLIAMS,
PLAINTIFF,

v.

WENDY KELLEY, in her official capacity as Director,
Arkansas Department of Correction, and
ARKANSAS DEPARTMENT OF CORRECTION,
DEFENDANTS.

**COMPLAINT FOR DECLARATORY
AND EQUITABLE RELIEF**

I. Introduction

1. Plaintiff Kenneth Williams files this action for declaratory relief to prevent unconstitutional pain and suffering that he will endure in his execution, which is currently scheduled for April 27, 2017. Mr. Williams has unique medical conditions – sickle cell trait, Lupus, and organic brain damage – that are very likely to cause complications, and resultant severe pain and suffering, if the State proceeds with his execution as planned.

2. The executions performed on April 24, 2017, provided new and compelling evidence that Arkansas's lethal injection protocol will not work as intended against persons who have medical conditions like Mr. Williams's. In

Monday's execution of Marcel Williams, for example, the State was unable to determine whether he was unconscious; his body movements – including grimacing, arching his back, and moving his eyes, coughing, and turning his head – continued well after the consciousness check and apparently until the paralytic was administered; and steps set forth in the protocol were not followed. As a result, he was tortured to death, as Plaintiff can prove at a hearing, but his excruciating pain and suffering were masked from witnesses by operation of the paralytic drug. Absent court intervention, Plaintiff Kenneth Williams will likewise be tortured to death and endure severe pain and suffering due to his unique medical conditions and as a result of the State's failure to humanely apply its execution protocol.

3. Plaintiff has previously been a party to group litigation raising facial challenges to the Arkansas lethal injection protocol. This Complaint, by contrast, raises as-applied challenges unique to Plaintiff in light of his personal medical conditions and in light of the disturbing events at this week's executions.

II. Procedural History

4. Mr. Williams was among a group of prisoners who challenged the Arkansas lethal injection statute and protocol in a Complaint filed in Case No. 60CV-15-1400 on April 6, 2015, the same day that Act 1096 became law.

5. On April 10, 2015, the Arkansas Department of Correction ("ADC") noticed the removal of the action to federal court. On April 18, 2015, the prisoners

voluntarily dismissed the federal case without prejudice in order to return their causes of action to state court. That same day, the prisoners filed an amended complaint in case 60CV-15-1400. The amended complaint omitted any claims under the federal Constitution.

6. On May 19, 2015, the ADC filed a motion to dismiss, which raised a formalistic challenge to this Court's jurisdiction. The prisoners then filed a new action (case no. 60CV-15-2921) on June 29, 2015, to remedy the alleged jurisdictional defect. On July 13, 2015, the ADC moved to dismiss the new action.

7. On July 17, 2015, based on the parties' stipulation, this Court dismissed without prejudice case number 60CV-15-1400 in deference to case number 60CV-15-2921.

8. On August 6, 2015, the State adopted a new lethal-injection protocol using midazolam. On September 28, 2015, the prisoners filed an amended complaint in 60CV-15-2921.

9. After this Court denied ADC's motions to dismiss and for summary judgment, ADC appealed solely on sovereign-immunity grounds. In *Johnson v. Kelley*, 496 S.W.3d 346 (Ark. 2016), the Arkansas Supreme Court adopted the standard of *Glossip v. Gross*, 135 S. Ct. 2726 (2015), for claims under the Arkansas Cruelty Clause, reversed this Court, and dismissed the complaint. The court deemed inadequate the plaintiffs' pleading of alternative methods of

execution, finding that the “circuit court erred in concluding that the Prisoners pled sufficient facts as to the proposed alternative drugs,” and also rejecting their proposal of a firing squad because “[e]xecution by firing squad is not identified in the statute as an approved means of carrying out a sentence of death.” *Johnson*, 496 S.W.3d at 359-60. On February 21, 2017, the United States Supreme Court denied certiorari, and the Court denied rehearing on April 24, 2017. *Johnson v. Kelley*, 137 S. Ct. 1067 (2017).

10. On February 27, 2017, Governor Hutchinson issued eight execution warrants for four double executions to occur from April 17 to 27, 2017, including for Plaintiff’s execution on the latter date. On March 27, 2017, nine prisoners, including Plaintiff, filed a complaint in the United States District Court for the Eastern District of Arkansas in which they alleged that the State’s midazolam protocol facially violates the Eighth Amendment, both on its own and in combination with the compressed execution schedule.

11. The federal court conducted an evidentiary hearing from April 10 to April 13 and granted a preliminary injunction against ADC, prohibiting it from proceeding with the executions. *McGehee v. Hutchinson*, No. 4:17-CV-179, 2017 WL 1399554, *49 (E.D. Ark. April 15, 2017). The court found a significant likelihood that, because of its medical and pharmacological properties, the use of midazolam in the prisoners’ executions would cause severe pain and suffering, and

that there are alternative, reasonably available methods of execution that would not cause such pain and suffering. *Id.* at *27-42.

12. The Eighth Circuit reversed. *McGehee v. Hutchinson*, No. 17-1804, -- F.3d ---, 2017 WL 1404693 (8th Cir. 2017). The majority characterized the evidence about midazolam as “equivocal”; found that prisoners had shown no likelihood that the alternative methods of execution they identified were available; and ruled that prisoners unnecessarily delayed bringing suit because they had initially pursued their rights in Arkansas court. *Id.* at *2-3. The United States Supreme Court denied certiorari. *McGehee v. Hutchinson*, No. 16-8770, 2017 WL 1414915 (2017).

III. Summary of Causes of Action

13. In summary form, Plaintiff’s causes of action are as follows:

a. Claim 1: In violation of the Due Process Clause of the Arkansas Constitution, the lethal injection protocol that ADC will knowingly employ on Mr. Williams entails objectively unreasonable risks of substantial and unnecessary pain and suffering, unbearable anxiety, and a lingering death due to Mr. Williams’s unique medical conditions and the State’s failure to follow its own rules and procedures.

b. Claim 2: In violation of Art. 2, § 9, of the Arkansas Constitution, which protects Mr. Williams against cruel or unusual punishment, the

ADC's chosen lethal injection protocol will subject Mr. Williams to severe, unnecessary pain and suffering due to Mr. Williams's unique medical conditions and the State's failure to follow its own rules and procedures.

IV. Parties

14. Plaintiff Kenneth Williams is an Arkansas prisoner under a sentence of death and under warrant to be executed on April 27, 2017 at 7:00 p.m.

15. Defendant Wendy Kelley is the Director of the ADC. Defendant Kelley oversees the ADC and all of its employees and agents. She is personally responsible for procuring drugs for use in lethal injection and for performing or delegating other crucial steps in the lethal injection process.

16. Defendant Arkansas Department of Correction ("ADC") is an agency of the executive branch of the State of Arkansas. The ADC is responsible for incarcerating Mr. Williams and other prisoners, for carrying out death sentences, and for procuring and using lethal injection drugs.

V. Jurisdiction and Venue

17. This Court has jurisdiction over the subject matter of this action pursuant to Arkansas Constitutional Amendment 80, the declaratory judgment statute, Ark. Code Ann. § 16-111-101 et seq., and Ark. Code Ann. § 17-87-105. This Court has personal jurisdiction over the Defendants under Ark. Code Ann. § 16-4-101(B).

18. Venue in this Court is authorized by Ark. Code Ann. § 16-60-103(3), which allows suits against state agencies and state officers to be brought in Pulaski County.

VI. Statement of Facts

A. Arkansas's lethal injection protocol

19. Act 1096, Arkansas's lethal injection law, gives the ADC unfettered discretion to choose between a one-drug barbiturate execution protocol and a three-drug execution protocol that omits the use of any barbiturate. Ark. Code Ann. § 5-4-617(c). In 2015, Mr. Williams learned, through counsel, that the State intended to execute him using the three-drug protocol, specifically “[m]idazolam, followed by vecuronium bromide, followed by potassium chloride.” *Id.*

20. On August 6, 2015, ADC adopted a new execution protocol providing, in pertinent part:

- a. That condemned inmates will first be injected with 500 mg of midazolam.
- b. That, after at least five minutes, a member of the execution team “will confirm the inmate is unconscious,” using unspecified techniques.
- c. That the inmate will next be injected with 100 mg of vecuronium bromide.

d. That the inmate will then be injected with 240 mEq. of potassium chloride.

B. Arkansas's application of its lethal injection protocol

21. ADC has employed this protocol in three executions: the execution of Ledell Lee on April 20, 2017, and the executions of Jack Jones and Marcel Williams on April 24, 2017.

22. In the execution of Mr. Jones, after the injection of midazolam, witnesses reported that Mr. Jones was still moving his lips, and that the executioners were putting a tongue depressor in his mouth for a few minutes. Andrew Demillo and Kelly Kissel, *Arkansas Conducts Nation's First Double Execution Since 2000*, Assoc. Press, Apr. 25, 2017 (Ex. 1). An ADC spokesperson claimed that Mr. Jones's movements were the result of him speaking with and apologizing to Director Kelley. *Id.* Witnesses disputed that version of events. Eric Besson, Lisa Hammersly and John Moritz, *2 killers executed hours apart*, Arkansas Online, Apr. 25, 2017 (Ex. 2) ("He did not appear to be talking").

23. The execution of Marcel Williams was even more troubling. When checking his consciousness, the executioner stated, "I'm not sure." *Id.* Well after the consciousness check and continuously until the other, undisputedly painful drugs were apparently administered, he was grimacing, *id.*, arching his

back, and sucking for air. Jacob Rosenberg, *Arkansas executions: 'I was watching him breathe heavily and arch his back,'* The Guardian, Apr. 25, 2017 (Ex. 3).

24. Another witness provided this minute-by-minute account:

10:16 . . . The medication is started.

10:17 Marcel's eyes close . He is breathing very hard. His chest visibly rises up and down in hard , almost jerky motions.

10:18 Hard breathing continues; Marcel turns his head slightly .

10:19 After only two minutes, designee begins checking Marcel's neck, touches his arm and hand. Not clear if this is part of the consciousness check.

10:20 Hard breathing continues. Designee touches Marcel's right fingers; I hear loud talking coming from outside .

10:21 Marcel's head moves; hard breathing continues; Designee places pulse ox[imeter] on Marcel's right middle finger.

10:22 Designee touches Marcel's eyelashes and speaks into his ear (not loudly enough to be heard in witness room where I was standing); Marcel's head turns; hard breathing continues; Designee touches Marcel's hand and removes pulse ox[imeter] (it is never replaced)

10:23 Marcel's breathing visibly slows; I no longer see the sheet moving.

10:24 Designee checks Marcel's right wrist

10:25 Marcel coughs

10:26 Designee again brushes Marcel's eyelashes and touches his hand and arm

10:27 Designee just keeps looking at Marcel; his face appears to show concern

10:28 Marcel's right eye (I cannot see his left) opens slightly; I can see movement of his eyeball

10:29 I continue to see eye movement

10:30 Designee continues to just look at Marcel at this point

10:31 Designee brushes Marcel's eyelashes; the right eye is still open; Designee takes out a stethoscope and puts it on Marcel's neck and chest; appears to listen for breathing.

10:32 Designee says I think we need to call the coroner (this was actually audible even without the audio being on); Coroner comes in and uses his stethoscope to briefly check Marcel

10:33 Time of death is announced; Wendy Kelley reads proclamation.

Declaration of Jamie Giani, ¶ 3, Apr. 25, 2017 (Ex. 4).

25. The accounts of these witnesses demonstrate that ADC, in applying the lethal injection protocol, does not follow its own procedures, for example, by lacking the medical skill to determine whether, and in fact failing to ensure that,

the prisoner is unconscious before proceeding with administration of the second and third drugs. The accounts further demonstrate that, at least for persons with certain unique medical conditions and as applied by ADC, midazolam does not induce general anesthesia or analgesia. *See* Declaration of Joel Zivot, M.D., ¶¶ 11-15, Apr. 25, 2017 (Ex. 5).

C. Plaintiff's medical conditions

26. Plaintiff Kenneth Williams is an African-American man who has recently been diagnosed with sickle cell trait, erythrocytosis, and brain dysfunction with a history of brain injury. He was also diagnosed with Lupus in 2013. *Id.* ¶ 16.

27. Sickle cell trait is a blood condition that in this country is found primarily among African-Americans. Sickle cell trait is inherited genetically. *Id.* ¶ 17.

28. Sickle cell disease is a lifelong medical condition that causes significant pain and serious health problems. The disease causes a chronic shortage of functioning red blood cells, which are required to deliver oxygen throughout the body. The damaged cells can also cause blood clotting and associated problems such as stroke. Red blood cells that contain the abnormal hemoglobin protein characteristic of sickle cell disease will alter shape from a normal spherical flattened appearance to a crescent or sickled shape. This occurs whenever the red

blood cells afflicted with the abnormal hemoglobin molecule are exposed to low oxygen. *Id.* ¶ 18.

29. Persons with sickle cell trait, as opposed to full-blown sickle cell disease, are not usually symptomatic, and they typically can lead normal lives. However, persons with sickle cell trait, like Mr. Williams, can develop “sickle crises,” in which the symptoms of sickle cell disease manifest under conditions where their bodies – and their red blood cells in particular – are placed under significant strain. When a tourniquet is applied to the arm or leg of a person with sickle-prone cells, the resulting fall in oxygen to the limb in question can initiate a cascade of sickling cells. Sickled cells are ineffective oxygen carriers and the sickled red cell clump is associated with progressive organ failure as a consequence of obstruction of the veins. Impaired blood flow will necessarily result in inadequacy of circulation and uneven distribution of the chemicals set for execution. *Id.* ¶ 19.

30. Arkansas’s lethal injection protocol, when administered to Plaintiff, is likely to provoke a “sickle crisis.” The administration of midazolam will at first cause a fall in blood oxygen and cause red cell sickling. Once paralysis is achieved by injection vecuronium bromide, the further inexorable fall in blood oxygen will only serve to further lead to a severely painful sickle crisis. *Id.* ¶ 20.

31. Mr. Williams's brain damage and Lupus diagnosis will also likely cause significant pain and suffering during administration of the lethal injection drugs. Brain injury and Lupus are independently associated with significantly increased risk of seizure and associated complications, and there is a substantial likelihood that the injection of midazolam will provoke such a response in Mr. Williams. *Id.* ¶ 21.

32. Alone and in combination, each of Plaintiff's medical conditions will complicate the State's "one size fits all" execution procedure and lead to severe pain and suffering for him. After the State injects Mr. Williams with vecuronium bromide, however, most or all of the manifestations of his extreme pain and suffering will not be discernible to witnesses. Vecuronium bromide is a paralytic that will prevent movement of all major muscle groups in his body and prevent him from breathing, but it will not reduce his pain or affect his consciousness in any way. *Id.* ¶ 22.

D. Alternative, significantly less painful methods of execution are available.

33. Nitrogen hypoxia is an available and far less painful execution method in which the prisoner is deprived of oxygen. Unlike asphyxia, hypoxia allows the prisoner to exhale carbon dioxide, thus preventing any feeling of air hunger or panic. Oklahoma and Louisiana have both studied nitrogen hypoxia and have concluded it is a painless method of execution. *See* Exs. 6 & 7.

Moreover, the supplies needed for this method are widely available and not difficult to obtain. *See id.* Oklahoma has in fact adopted nitrogen hypoxia as an execution method. 22 Okla. Stat. § 1014(B). Arkansas could do the same and thereby avoid causing needless pain and suffering to Plaintiff.

34. Alternatively, the State's use of vecuronium bromide will add an unnecessary quantum of suffering to Plaintiff's execution and should therefore be eliminated from the protocol. The drug will cause air hunger and severe trauma. In addition, the vecuronium bromide will paralyze Plaintiff and thereby mask his significant pain and suffering, thus preventing the State from responding appropriately and humanely. The State has no need to inflict those torments to achieve Plaintiff's death. *See* Ex. 5, ¶ 22. While this alternative would still cause severe pain—because of the effects of midazolam discussed above—it would nevertheless reduce Plaintiff's suffering significantly.

VII. Claims for Relief

Claim 1: As Applied Violation of the Arkansas Due Process Clause

35. All of the allegations set forth elsewhere in this Complaint are incorporated by this reference as if fully set forth herein.

36. The fundamental fairness guaranteed by the state Due Process Clause prohibits ADC from purposely or knowingly employing execution procedures on Plaintiff that entail objectively unreasonable risks of substantial and unnecessary

pain and suffering; unbearable anxiety; and/or a lingering death. Plaintiff's unique medical conditions and the State's failure to properly and effectively employ its lethal injection protocol in recent, comparable executions provide ample notice to the State that its execution protocol would cause Plaintiff severe and unnecessary pain and suffering.

37. The Arkansas lethal injection protocol, as applied against Plaintiff, will thus violate the Due Process Clause of Art. 2, § 8 of the Arkansas Constitution.

Claim 2: As Applied Violation of Art. 2, § 9, of the Arkansas Constitution

38. All of the allegations set forth elsewhere in this Complaint are incorporated by this reference as if fully set forth herein.

39. Article 2, section 9, of the Arkansas Constitution protects Plaintiff against cruel or unusual punishment. The ADC's chosen lethal injection protocol will subject Plaintiff to severe, unnecessary pain and suffering due to his unique medical conditions and the State's failure to follow its own rules and procedures.

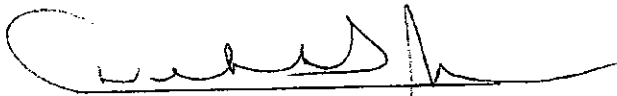
VIII. Prayer for Relief

WHEREFORE, Plaintiff prays for the following relief:

That this Court order discovery and an evidentiary hearing on Plaintiff's claims for relief;

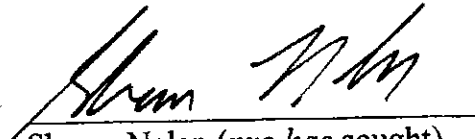
That this Court grant equitable and declaratory relief, inter alia, by declaring that the ADC lethal injection protocol as applied against Plaintiff is unconstitutional; and

That this Court grant such other relief as is necessary and appropriate.



Deborah Anne Czuba
Arkansas Bar # 2008271
Supervising Attorney
Capital Habeas Unit
Federal Defender Services of Idaho
702 W. Idaho St.
Boise, Idaho 83702
(208) 331-5530
Deborah_A_Czuba@fd.org

Attorney for Kenneth Williams



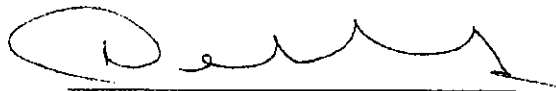
Shawn Nolan (*pro hac* sought)
PA Bar #56535
James Moreno (*pro hac* sought)
PA Bar # 86838
Capital Habeas Unit
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut St., Suite 545-W
Philadelphia, PA 19106
(215) 928-0520
Shawn_Nolan@fd.org
James_Moreno@fd.org

Attorneys for Kenneth Williams

April 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2017, I served a copy of this Complaint and Appendix on counsel for the State by causing it to be hand-delivered to Attorney General Leslie Rutledge at 323 Center Street, Suite 200, Little Rock, AR 72201, and by sending it by email to oag@ArkansasAG.gov.

A handwritten signature in black ink, appearing to read 'Deborah Anne Czuba', written over a horizontal line.

Deborah Anne Czuba