

**THIS IS A CAPITAL CASE. EXECUTION SCHEDULED FOR TODAY.**

**CV-17-346**

IN TH

COURT

**FILED**

APR 27 2017

STACEY PECTOL  
CLERK

KENNETH D. WILLIAMS

Movant/Appellant

v.

STATE OF ARKANSAS,

Respondent/Appellee

---

**EMERGENCY MOTION FOR STAY OF EXECUTION  
TO PRESERVE THIS COURT'S JURISDICTION**

---

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](mailto:Deborah_A_Czuba@fd.org)  
*Counsel of Record*

Shawn Nolan (*pro hac* sought)  
Pennsylvania Bar # 56535  
James Moreno (*pro hac* sought)  
PA Bar. # 86838  
Federal Community Defender Office  
601 Walnut St., Suite 545-W  
Philadelphia, PA 19106  
(215) 928-0520  
[Shawn\\_Nolan@fd.org](mailto:Shawn_Nolan@fd.org)  
[James\\_Moreno@fd.org](mailto:James_Moreno@fd.org)

*Attorneys for Kenneth Williams*

Dated: April 27, 2017

Pursuant to Ark. Code Ann. § 16-90-506(a) and *Singleton v. Norris*, 964 S.W.2d 366 (Ark. 1998), Kenneth Williams, by and through undersigned counsel, respectfully moves this Court to stay his scheduled execution. Because of medical conditions beyond his control and in light of documented problems that arose during the executions on Monday, April 24, 2017, Mr. Williams is very likely to suffer severe pain and suffering from the administration of the state's lethal injection protocol. Mr. Williams has therefore filed a complaint for declaratory and equitable relief in the Circuit Court of Pulaski County on the ground that the State's execution protocol, as applied against Mr. Williams, will violate the Arkansas Constitution's ban on cruel or unusual punishments and its Due Process Clause. *See* Appendix A. Mr. Williams's claims pose significant constitutional questions regarding whether the State may execute a death-sentenced prisoner who makes a convincing showing that he will suffer an intolerable risk of serious pain and suffering on account of pre-existing medical conditions. A stay is necessary to allow these important claims to be heard before his sentence is carried out.

### **PROCEDURAL HISTORY**

Kenneth Dewayne Williams was charged with the October 3, 1999 capital murder of Cecil Boren in the course of a felony and other crimes.

Mr. Williams was among a group of prisoners who raised facial challenges to 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 the latest lethal injection statute became law.

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 and instead raised only facial challenges based on state law.

On May 19, 2015, the ADC filed a motion to dismiss, which raised a formalistic challenge to the circuit 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.

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.

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 case 60CV-15-2921.

After the circuit court denied ADC’s motions to dismiss and for summary

judgment, ADC appealed on sovereign-immunity grounds. In *Johnson v. Kelley*, 496 S.W.3d 346 (Ark. 2016), this Court adopted the standard of *Glossip v. Gross*, 135 S. Ct. 2726 (2015), for facial challenges 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), *rehearing denied*, --- S. Ct. ---, 2017 WL 1427633.

On February 27, 2017, Governor Hutchinson issued eight execution warrants for four double executions to occur from April 17 to 27, 2017, including Movant Kenneth Williams's execution on April 27, 2017. On March 27, 2017, those prisoners 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 violated the Eighth Amendment, both on its own and in combination with the compressed execution schedule.

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. 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.

The Eighth Circuit reversed. *McGehee v. Hutchinson*, No. 17-1804, --- F.3d ---, 2017 WL 1404693 (8th Cir. Apr. 17, 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).

On April 26, 2017, Movant Kenneth Williams filed a complaint for declaratory and equitable relief in the Circuit Court of Pulaski County on the grounds that the State's execution protocol, as applied against Mr. Williams, will violate the Arkansas Constitution's ban on cruel or unusual punishments and its Due Process Clause. *See* Appendix A. In order to permit the parties and Circuit

Court to litigate the issues below, Mr. Williams now asks this Court to stay his execution.

## **ARGUMENT**

### **I. Mr. Williams Suffers from Medical Conditions that Put Him at a Serious Risk of Harm from the Execution Protocol, and this Week's Executions Demonstrate That the State Does Not Apply the Protocol Properly or Effectively to Manage Such Risks**

#### **A. Mr. Williams's Medical Conditions**

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. Appendix A, Complaint Ex. 5, ¶ 16.

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.

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 pathognomonic for sickle cell disease will alter shape from a normal spherical bi-concave 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.

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. *Id.* ¶ 19.

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.

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.

Alone and in combination, each of Mr. Williams'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.

**B. This Week's Executions**

ADC has employed its current execution 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.

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.* But others disputed that version of events. Eric Besson, Lisa

Hammersly and John Moritz, *2 killers executed hours apart*, Arkansas Online, Apr. 25, 2017 (Appendix A, Complaint Ex. 2) (“He did not appear to be talking”).

The execution of Marcel Williams was even more troubling. When attempting to assess his consciousness, the executioner stated, “I’m not sure.” *Id.* Well after the consciousness check and 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 (Appendix A, Complaint Ex. 3).

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 (Appendix A, Complaint Ex. 4).

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 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* Appendix A, Complaint Ex. 5, ¶¶ 11-15.

### **C. Plaintiff presents cognizable claims for relief**

It is well-established that as-applied constitutional challenges raise cognizable claims separate and apart from facial constitutional challenges, including in the lethal injection context. *See Bucklew v. Lombardi*, 783 F.3d 1120, 1129 (8th Cir. 2015) (en banc) (reversing lower court's denial of as-applied lethal

injection challenge based on the prisoner's unique medical conditions). As applied claims require different legal analysis than facial challenges, and consider additional factual circumstances. *See Siebert v. Allen*, 506 F.3d 1047, 1049-50 (11th Cir. 2007) (granting stay on as-applied challenge to lethal injection protocol but denying stay on facial challenge).

In as-applied lethal injection challenges, it remains unsettled whether, and under what circumstances, a prisoner must demonstrate the availability of alternative methods of execution. *See Bucklew*, 783 F.3d at 1129 (Bye, J., concurring) (“It is my position a death row inmate alleging an Eighth Amendment as-applied challenge need not plead a readily available alternative method of execution. A state cannot be excused from taking into account a particular inmate’s existing physical disability or health condition when assessing the propriety of its execution method.”). In an abundance of caution, Mr. Williams has pled and proffered evidence in support of alternative methods in his as-applied complaint. *See* Appendix A, Complaint at 14-15.

## **II. A Stay of Execution Is Warranted in These Circumstances**

A stay of execution is warranted here because Mr. Williams presents extraordinary circumstances under the framework of *Singleton*.

First, Mr. Williams’s constitutional claims alleging that the State will imminently impose on him an objectively intolerable risk of pain involve “*bona*

*fide* constitutional claim[s]” of “public significance.” *Singleton*, 964 S.W.2d at 369. Specifically, the complaint raises fact-intensive questions regarding the effects that the lethal injection procedure will have on Mr. Williams in light of his unique medical conditions. Moreover, the witness accounts of ADC’s failure to follow its protocol in the executions this week plainly involve questions of public significance. Mr. Williams’s complaint also raises important questions of law including whether, under the Arkansas Constitution, as-applied challenges to a method of execution must plead alternative methods of execution and, if so, under what standard such alternatives should be considered.

Second, Mr. Williams’s claim only recently became “ripe for decision.” *Singleton*, 964 S.W.2d at 368. The medical conditions upon which the complaint is based were only diagnosed in the last month. *See* Appendix A, Complaint Ex. 5. Only in the past week has it become clear that ADC fails to apply its execution protocol in a manner that could ameliorate the risk of severe pain for prisoners with unique medical conditions. *See supra*. Moreover, the prisoners’ joint facial challenge to the execution protocol only became final this week, on April 24, 2017, when the United States Supreme Court denied rehearing on certiorari. *Johnson v. Kelley*, --- S. Ct. ---, 2017 WL 1427633 (2017). The instant challenge is timely filed.

Finally, given the imminent nature of Mr. Williams’s scheduled execution

on April 27, 2017, “the likelihood of a decision by the Circuit Court and a meaningful appeal to this court occurring before execution appear to be exceedingly remote.” *Singleton*, 964 S.W.2d at 368. Accordingly, in order to ensure review of these important questions, the Court should grant a stay.

## CONCLUSION

This Court should “grant the stay of execution for the limited purpose of resolving this singular issue of public importance.” *Singleton*, 964 S.W.2d at 369.

WHEREFORE, Mr. Williams respectfully requests that the Court stay his scheduled execution pending the full and fair litigation of his lawsuit concerning the constitutionality of the state’s method of execution in light of his pre-existing medical conditions.

Respectfully submitted:

/s/ Deborah Anne Czuba  
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  
*Counsel of Record*

/s/ Shawn Nolan  
Shawn Nolan (*pro hac* sought)  
PA Bar # 56535  
James Moreno (*pro hac* sought)  
PA Bar # 86838  
Capital Habeas Unit  
Federal Community Defender Office  
Eastern District of Pennsylvania  
Curtis Center, Suite 545W  
601 Walnut Street  
Philadelphia, PA 19106  
(215) 928-0520  
Shawn\_Nolan@fd.org  
James\_Moreno@fd.org

*Attorneys for Appellant*

Dated: April 27, 2017

## **CERTIFICATE OF SERVICE**

I hereby certify that, on April 27, 2017, I served this Motion, including the appendix thereto, on counsel for the State by email service on the Attorney General at [oag@ArkansasAG.gov](mailto:oag@ArkansasAG.gov).

/s/ Deborah Anne Czuba  
Deborah Anne Czuba