

**\*\*\*EXECUTIONS SCHEDULED FOR APRIL 20, 24, AND 27, 2017\*\*\***

IN THE ARKANSAS SUPREME COURT

STATE OF ARKANSAS, et al.

APPELLANTS

v.

No. CV 17-\_\_\_\_\_

MCKESSON MEDICAL-SURGICAL, INC.

APPELLEE

**EMERGENCY MOTION FOR IMMEDIATE STAY**

The State of Arkansas, the Arkansas Department of Correction (ADC), Asa Hutchinson, in his official capacity as Governor of Arkansas, and Wendy Kelley, in her official capacity as ADC Director, file this emergency motion for an immediate stay of the circuit court's injunction and, in support, state:

1. The State requires *extremely* expedited handling of this matter because the injunction entered below bars both the early-afternoon mixing and evening use of a lethal-injection drug for tonight's scheduled execution. The State's motion concerns an injunction entered by the circuit court at the request of Appellee McKesson Medical-Surgical, Inc. on April 20, 2017 (today). The same injunction was entered by the same circuit court on Friday, April 17, and was overturned by this Court on a writ of certiorari three days ago. *State v. Griffen*, Ark. Sup. Ct. No. CV-17-299 (Formal Order, Apr. 17, 2017).

## Background and Procedural History

2. After this Court overturned the first injunction, McKesson nonsuited its complaint. McKesson's proffered reason for nonsuiting was because a federal court had issued a stay of the Arkansas executions at that time. But by the time nonsuit was granted, the Eighth Circuit had overturned the stay. So minutes after an order dismissing the first case was entered on April 18, McKesson re-filed a substantively identical complaint and motion for temporary injunctive relief. McKesson insists that it is *not* attempting to stay executions in Arkansas. But that is precisely the intended and actual effect of the injunction. When McKesson believed all executions were stayed, it dropped its complaint. When the stays lifted, McKesson suddenly had an interest in suing ADC again.

3. McKesson contended that the ADC misled McKesson by purchasing vecuronium bromide from McKesson without affirmatively alerting McKesson that the ADC intended to use the vecuronium bromide to carry out executions in Arkansas—a disclosure that is not required under any statute or common-law theory. McKesson acknowledges as it must that the ADC's purchase and use of vecuronium bromide for lethal injection is expressly authorized under the Arkansas method-of-execution act, Ark. Code Ann. § 5-4-617(c). McKesson also contends that *after the completion of its sale of vecuronium bromide to the ADC*, McKesson asked the ADC to return the drug, and the ADC declined.

4. Three hours after McKesson (a Virginia company with its principal place of business in Virginia) lodged its complaint and other papers in this case, the State filed a motion to change venue under Act 967 of 2017. The Act provides that if no plaintiff in an action “is a resident of Arkansas” then “[a] defendant in a civil action under § 16-60-104(3) may obtain an order for change of venue by motion requesting a transfer to . . . any county in the State of Arkansas.” Act 967, § 2(e)(1). Venue transfer is mandatory under Act 967. *See id.* at § (e)(2) (“The venue of the civil action ***shall be changed*** upon a showing that the proposed transferee county is a proper venue as set forth in this subsection.”) (Emphasis added). The circuit court refused to rule on the transfer request. Instead, it improperly held the transfer request in abeyance and, over the State’s objection, held a hearing on McKesson’s request for an injunction. The circuit court’s injunction should be stayed for the simple reason that the circuit court ignored the mandatory provisions of Act 967 despite proper application for a venue transfer.

5. The State filed a comprehensive motion to dismiss explaining that McKesson’s complaint fails for at least three reasons: (1) the injunctive relief McKesson sought (and obtained) amounts to a stay of executions but the circuit court lacks jurisdiction to grant a stay of executions as a matter of settled Arkansas law; (2) the complaint is barred by sovereign immunity because McKesson seeks to control the actions of the State and no exception to sovereign immunity applies;

and (3) the complaint fails to state a viable cause of action as a matter of law. The State also filed a response to McKesson's preliminary injunction motion, explaining that McKesson was unlikely to succeed on the merits of its complaint and that McKesson could not establish irreparable harm.

6. At the end of the April 19 hearing and after the close of business, the circuit court announced from the bench her intention to grant an injunction prohibiting the ADC from using or disposing of the vecuronium bromide that the ADC purchased from McKesson in 2016. The circuit court's *Order Granting Plaintiff's Motion for Preliminary Injunction* was entered on April 20 at 11:33 a.m. The State immediately brought its appeal and filed this emergency motion seeking an immediate stay.

### **Argument**

7. To warrant the injunction awarded by the circuit court, McKesson was required to demonstrate (1) a likelihood of success on the merits, and (2) that irreparable harm would result in the absence of an injunction. *See Manila Sch. Dist. No. 15 v. Wagner*, 356 Ark. 149, 153, 148 S.W.3d 244 (2004). McKesson failed to demonstrate or even adequately plead either required element—the complaint was doomed on the merits from the start as a matter of law, and McKesson completely failed to meet its burden of establishing irreparable harm.

8. The standard of review for a temporary restraining order or a preliminary injunction is abuse of discretion—regarding both likelihood of success and irreparable harm. *AJ & K Operating Co., Inc. v. Smith*, 355 Ark. 510, 518, 140 S.W.3d 475 (2004). “Any suggestion in our caselaw that a conclusion by the circuit court that irreparable harm and likelihood of success on the merits are factual determinations, subject to a clearly erroneous standard, is incorrect.” *Id.*

9. This Court exercises superintending control over all the courts of Arkansas. Ark. Const. amend. 80, § 4. Superintending jurisdiction is an extraordinary power hampered by no specific rules or means. *Foster v. Hill*, 372 Ark. 263, 268, 275 S.W.3d 151 (2008). The Court may “invent, frame, and formulate new and additional means, writs, and processes[,]” and the Court is bound only by the exigencies that call for the exercise of superintending control. *Id.* If the Court believes that a supervisory writ or a writ of certiorari or prohibition is appropriate in this case, the State hereby requests such a writ.

10. Rule 8 of the Arkansas Rules of Appellate Procedure—Civil grants this Court the discretion to stay a lower-court order pending appeal. *See Smith v. Pavan*, 2015 Ark. 474, at 3 (per curiam). The State meets the standard for a stay articulated in *Pavan*. This Court’s consideration of a request for a stay includes preservation of the status quo ante, if possible, and the prejudicial effect of the passage of time necessary to consider the appeal. *Id.* The Court is also guided by

four factors in deciding whether to grant a stay: (1) the appellant's likelihood of success on the merits; (2) the likelihood of irreparable harm to the appellant absent a stay; (3) whether the grant of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.*

11. The circuit court's injunction is in reality a stay of the executions scheduled for April 20 (today), April 24, and April 27. As repeatedly explained by the ADC in various legal proceedings surrounding the scheduled executions, including affidavits and testimony submitted in this case, the ADC has no additional vecuronium bromide beyond what it purchased from McKesson, and the ADC has no other source from which to purchase vecuronium bromide. Vecuronium bromide is a required drug under Arkansas's lethal-execution protocol established in Ark. Code Ann. § 5-4-617(c). If the ADC cannot use the vecuronium bromide that it purchased from McKesson (and that McKesson willingly sold to the ADC), then the executions cannot go forward. The circuit court's order prohibits the ADC from using that vecuronium bromide and therefore operates as a stay of executions as long as it remains in effect.

12. This Court has plainly held, in another case where the same circuit court attempted to stay executions and this Court issued a supervisory writ to block the order—that “the circuit court acted in excess of its jurisdiction in staying the executions.” *Kelley v. Griffen et al.*, Ark. Sup. Court No. CV-15-829 (Oct. 20,

2015) (per curiam). *See also Singleton v. Norris*, 332 Ark. 196, 964 S.W.2d 366 (1988) (circuit court does not have jurisdiction to issue stay of jurisdiction); Ark. Code Ann. § 16-90-506(c) (only officers who have power to stay executions are the Governor, the ADC Director, and the Clerk of the Supreme Court).

13. The State respectfully submits that this Court has already demonstrated that the circuit court is not permitted to grant the injunction requested by McKesson. On Monday, this Court granted a writ of certiorari overturning Judge Griffen's temporary restraining order granted to McKesson in McKesson's original case. *See State et al. v. Griffen et al.*, Ark. Sup. Ct. No. CV-17-299 (Formal Order, Apr. 17, 2017). The Court should likewise grant a stay of the circuit court's injunction pending the State's appeal here.

14. In any event, McKesson could not possibly prevail on the merits below, and cannot prevail before this Court, because McKesson's complaint is barred by sovereign immunity as a matter of law. *See Ark. Const. art. 5, § 20; Ark. Tech. Univ. v. Link*, 341 Ark. 495, 502, 17 S.W.3d 809 (2000); *Fireman's Ins. Co. v. Ark. State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771 (1990). McKesson sought to compel the ADC to return the vecuronium bromide to McKesson, or to prevent the ADC from using the drug in executions. McKesson plainly sought and obtained an order from the circuit court that will operate to control the action of the State. The complaint is therefore barred by sovereign

immunity and the circuit court should not have granted an injunction. *See Ark. Dept. of Env't'l Quality v. Al-Madhoun*, 374 Ark. 28, 30, 32-34, 285 S.W.3d 654 (2008) (noting that “[s]overeign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings . . . [and] the court should determine if a judgment for the plaintiff will operate to control the action of the State[;]” overturning circuit court ruling that sovereign immunity only applied to requests for monetary relief and reaffirming that request for injunctive relief that seeks to control the actions of the State is barred by sovereign immunity; “[t]hese requests for injunctive relief . . . clearly seek to control the actions of the ADEQ.”). The circuit court’s injunction should be stayed pending appeal for this reason alone.

15. The limited exceptions to sovereign immunity do not apply. The exception for illegal or unconstitutional acts does not apply because McKesson does not and cannot seriously contend that the ADC acted unconstitutionally or even in violation of any statute. *See Cammack v. Chalmers*, 284 Ark. 161, 162-63, 680 S.W.2d 689 (1984). Only McKesson’s “taking without just compensation” claim might possibly assert a constitutional violation, but that claim failed from the outset because it is undisputed that the ADC paid McKesson for the vecuronium bromide. And no court has ever held that an injunction is a proper remedy for an unconstitutional taking—just compensation is always the remedy.

The second exception occurs where an agency or official acts *ultra vires*—meaning “without authority”—or acts arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *See Ark. State Game and Fish Comm’n*, 256 Ark. 930, 930-32, 512 S.W.2d 540 (1974). This exception is for acts of state officials or agencies that unreasonably or malevolently ***exceed the authority and discretion*** they have been given. *See Gray v. Ouachita Creek Watershed District*, 234 Ark. 181, 183-84, 351 S.W.2d 142 (1961). But McKesson’s complaint did not and could not allege this. The ADC is specifically authorized to purchase and use vecuronium bromide in executions. The ADC does not act arbitrarily, capriciously, in bad faith, or wantonly when doing so—as a matter of law. The complaint was and is barred by sovereign immunity and should have been dismissed.

16. McKesson appears to argue, and the circuit court concluded, that the *ultra vires* exception applies because the ADC acted in “bad faith” and thus outside its capacity as a representative of the state. To support this argument, McKesson contends only that ADC Deputy Director Rory Griffin did not *affirmatively* disclose to the McKesson salesperson who sold the drug to the ADC that the drug was for use in executions. McKesson does not contend that Mr. Griffin told McKesson that the drug was for some other use. The ADC strongly disputes the factual contention that Mr. Griffin did not affirmatively disclose that the drug was to be used in an execution. But even assuming *arguendo* that McKesson is correct,

Arkansas law expressly authorizes the ADC to purchase lethal-injection drugs and does not in any way require the ADC to affirmatively tell the supplying entity how the drugs are to be used. Indeed, in the context of the ongoing campaign by death-penalty opponents—highlighted by this Court in *Kelley v. Johnson*, 2016 Ark. 268, at 16-20, 496 S.W.3d 346, and the United States Supreme Court in *Glossip v. Gross*, 135 S. Ct. 2726, 2733-34 (2015), it is incredible to suggest that the statute *sub silentio* required as a legal obligation that the ADC affirmatively announce to a supplier that it was purchasing drugs for lethal injection. In short, McKesson does not plead and cannot show that ADC was acted *ultra vires* or in bad faith beyond the power conferred to it by statute.

17. McKesson was also unlikely to succeed on the merits below, and the State *is* likely to succeed on the merits of its appeal, because McKesson's complaint failed to state any viable claim against the ADC. The bottom line to all the claims is that McKesson willingly sold a drug to the ADC and then experienced seller's remorse. McKesson asked the ADC to return the drug *after the transaction* but the ADC declined. No valid legal theory supports McKesson's argument that a person who purchases a product must use that product in a certain way *as dictated by the seller after the completion of the transaction*, or must return the product *on demand by the seller after the completion of the transaction*. McKesson's contentions about violations of medical and drug statutes and

regulations are immaterial because McKesson is not the enforcement authority for any such statute or regulation and cannot bring a private cause of action against the ADC for such enforcement. *See, e.g., Cent. Okla. Pipeline, Inc. v. Hawk Field Services, LLC*, 2012 Ark. 157, at 19, 400 S.W.3d 701. The ADC has full legal authority to obtain and use the vecuronium bromide that it purchased from McKesson for executions under Arkansas law. In fact, the ADC is *required* by law to use vecuronium bromide for executions under the three-drug protocol outlined in Ark. Code Ann. § 5-4-617(c). Arkansas law forecloses all of McKesson’s legal theories because it expressly authorizes the ADC to purchase vecuronium bromide and use it in executions, and it does *not* require the ADC to make any disclosure or representation to the sellers and suppliers of execution drugs.

18. The most glaring reason (of the many reasons) that McKesson should not have received an injunction is that McKesson completely failed to demonstrate irreparable harm below—both in its pleadings and at the hearing. McKesson identified two distinct harms that it claims it will suffer in the absence of an injunction: (1) loss of property because the ADC will use the vecuronium bromide for executions and then the vecuronium bromide cannot be returned to McKesson; and (2) reputational injury as a result of McKesson’s (manifestly disclaimed) “association” with the State’s executions. McKesson’s asserted loss of its drug is not irreparable harm for at least two reasons. *First*, McKesson has already been

paid for the drug by the ADC. The fact that McKesson unilaterally decided to refund the ADC's payment is of no moment. *Second*, the loss of a product can be remedied with monetary damages. *See AJ & K Operating Co.*, 355 Ark. at 520 (“In order for there to be irreparable harm sufficient to support a temporary restraining order, the harm must be such that it cannot be adequately addressed by money damages or in a court of law”).

19. McKesson's contentions about the vast reputational injury that it will allegedly suffer if Arkansas uses its drug in executions are beyond speculative; they are entirely incredible and implausible. McKesson cannot support a claim of irreparable harm. *First*, McKesson has not and cannot identify any upstream manufacturer or downstream supplier or customer that has stopped—or has threatened to stop—working with McKesson if its drug is used in the executions. *Second*, McKesson has repeatedly—in public statements and in this litigation—contended that the ADC only obtained its drug through guile. Between those contentions and the fact that McKesson is affirmatively fighting Arkansas's attempts to move forward with executions, there is absolutely no chance that McKesson's reputation would be injured if the executions proceed. *Third*, McKesson's identity as a supplier of execution drugs is expressly confidential under Arkansas law. Ark. Code Ann. § 5-4-617(i)(2)(B). The affidavits of ADC Director Wendy Kelley and ADC Deputy Director Rory Griffen (and testimony

from this case and many others) confirm that the ADC is very protective of the confidentiality of its sellers and suppliers of execution drugs, and has never publicly disclosed the identities of *any* seller or supplier of execution drugs since the passage of the confidentiality provisions of Section 5-4-617. It was McKesson itself that decided to publicly announce on April 13 that the ADC will be using a drug purchased from McKesson. *See* Complaint Exhibits C, D, & E.

20. McKesson decided to sue and make clear to the entire world that McKesson is not in any way, shape, or form, a willing participant in Arkansas's executions. The only reason that McKesson has appeared in the media in recent days is because of McKesson's complaint and McKesson's own outreach on this issue. *See* Complaint Exhibits C, D & E. McKesson should not be permitted to fabricate a reputational injury based entirely and exclusively on McKesson's own public statements, and simultaneously ignore the fact that its statements make clear to the world that it is not associated with Arkansas's executions and indeed that it is affirmatively against the use of its drugs in such executions.

21. The evidence presented at the hearing below, or more accurately, the *absence* of any evidence from McKesson at the hearing below, confirmed that McKesson has no concrete irreparable harm. McKesson offered no evidence whatsoever that anyone has "associated" McKesson with Arkansas's executions. McKesson's own witness confirmed that not *one* manufacturer or supplier or

customer has terminated its business relationship with McKesson, threatened to do so, or taken *any* step that adversely impacts *any* of McKesson’s business relationships as a result of the fact that McKesson sold vecuronium bromide to the ADC and the ADC will use the drug in executions. Not even the manufacturer of the vecuronium bromide that McKesson sold to the ADC (and who McKesson says has a contract with McKesson that restricts such sales) has taken any adverse action against McKesson. Instead of showing concrete, immediate harm, McKesson simply offered into evidence that one officer of McKesson has “concerns” about the possible future reputational risk. McKesson’s rank speculation about reputational harm that will befall McKesson if the executions are carried out is simply that and nothing more—rank speculation. It does not satisfy the concrete irreparable harm required for a preliminary injunction.

22. On the other hand, the circuit court’s injunction imposes certain—not just likely—irreparable harm on the State of Arkansas and its citizens. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). The circuit court’s injunction makes it impossible—given the lack of available drugs—to carry out any lawful executions.

23. The balance of equities tips strongly in favor of the State. McKesson has no irreparable harm. But the State, its citizens, and the victims' families in the criminal cases scheduled for executions will suffer significant injury if the executions are stayed. The public interest likewise weighs heavily in favor of the State because the State has a significant interest in seeing justice done and carrying out lawful death sentences—for the victims, the victims' families, and the public.

24. A final factor that the Court should consider is the fact that McKesson sold the vecuronium bromide to the ADC in the summer of 2016 and then after the ADC declined to return the drug, McKesson rested on its laurels until filing its first complaint late in the day on Friday, April 14, 2017—with executions scheduled for Monday, April 17, 2017. “One of the cardinal principles of equity, often applied by the courts, is that equity will lend its aid only to those who are vigilant in asserting their rights.” *Hamilton v. Smith*, 212 Ark. 893, 898, 208 S.W.2d 425 (1948). McKesson has been dilatory, not diligent. And a quick review of the record in this case and McKesson's first case shows that McKesson is using this litigation in an attempt to block executions, not to remedy some wrong related to the ADC's purchase of McKesson's drug or to prevent reputational harm. The Court should not indulge McKesson's gamesmanship.

WHEREFORE, the Defendants-Appellants pray that their Emergency Motion for Immediate Stay is granted, that the Court stay the circuit court's order pending the appeal, and for all other just and appropriate relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Colin R. Jorgensen, do hereby certify that on this 20th day of April, 2017, I filed the foregoing document with the Clerk of the Supreme Court, and I served a copy on the following via email:

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