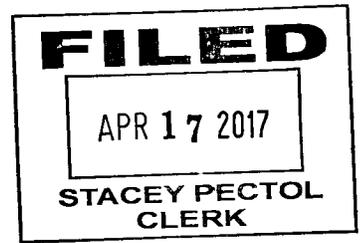


**\*\*\*EXECUTIONS SCHEDULED FOR APRIL 17, 20, 24, AND 27, 2017\*\*\***

IN THE ARKANSAS SUPREME COURT

STATE OF ARKANSAS;  
ARKANSAS DEPARTMENT OF CORRECTION;  
ASA HUTCHINSON, in his official capacity as  
Governor of Arkansas; and  
WENDY KELLEY, in her official capacity as  
Director of the Arkansas Department of Correction



PETITIONERS

v. No. CV 17-299

PULASKI COUNTY CIRCUIT COURT,  
FIFTH DIVISION, HON. WENDELL GRIFFEN

RESPONDENT

and

MCKESSON MEDICAL-SURGICAL, INC.

RESPONDENT

**EMERGENCY PETITION FOR WRIT OF MANDAMUS, WRIT OF PROHIBITION, WRIT OF CERTIORARI, OR SUPERVISORY WRIT**

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, state as follows for their Emergency Petition for Writ of Mandamus, Writ of Certiorari, or Supervisory Writ:

1. This Petition arises from a complaint and motion for a temporary restraining order brought by Respondent McKesson Medical-Surgical, Inc. on April 14, 2017. McKesson's complaint essentially alleges that McKesson made a mistake nine months ago when it sold the ADC a drug that could be used in lethal

injection under Arkansas law. McKesson asks that the ADC be enjoined from using the drug it purchased from McKesson in lethal-injection executions.

2. McKesson filed its complaint and exhibits at 3:58 p.m. on Friday. *See* Exhibits 1 & 1A-1E. McKesson filed a motion for an *ex parte* temporary restraining order at 4:22 p.m. (Exhibit 2) and a brief at 4:23 p.m. (Exhibit 3). At 4:37 p.m., Circuit Judge Wendell Griffen (through another judge) granted the TRO and enjoined the ADC from using the drug in scheduled executions. *See* Exhibit 4. As Judge Griffen well knows, this prevents the executions from going forward. Judge Griffen's TRO was emailed to Petitioners' counsel at 5:33 p.m., after the close of business for Easter weekend. *See* Exhibit 5.<sup>1</sup>

3. This Petition seeks two types of relief. *First*, Petitioners seek a supervisory writ under Supreme Court Rule 6-1 to vacate Judge Griffen's *ex parte*

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<sup>1</sup> Because Petitioners were not notified of the TRO until after close of business on Friday, Petitioners are obviously unable to obtain a partial record from the Pulaski County Circuit Clerk's before Monday, April 17. Petitioners will supplement with a certified partial record Monday morning if the Court desires, but Petitioners respectfully request that the Court take judicial notice of the filings in *McKesson v. State et al.*, Pulaski County Circuit Court No. 60CV-17-1921, and not require a certified record. Petitioners have provided as exhibits all documents that are part of the record.

TRO, which is for all intents and purposes a stay of the scheduled executions. Only this Court can stay an execution once the Governor issues a death warrant. Ark. Code Ann. 16-90-506(c); *see infra* ¶ 16.

4. *Second*, Petitioners respectfully ask the Court to remove Judge Griffen from this case. Judge Griffen cannot be considered remotely impartial on issues related to the death penalty. Judge Griffen has demonstrated that he is unlikely to refrain from actual bias regarding matters related to the death penalty, and at a minimum, he cannot avoid the appearance of unfairness and his impartiality might reasonably be questioned. *See* Arkansas Code of Judicial Conduct Rules 1.2, 2.2, 2.3(A), 2.10(A), 2.10(B), 2.11(A).

5. Judge Griffen's conduct on the afternoon of Friday, April 14 makes it crystal clear that he cannot be considered impartial in matters related to the death penalty. Around 2 p.m., Judge Griffen attended an anti-death penalty rally on the Capitol steps—a rally protesting the executions lawfully set for the next two weeks. *See* Exhibit 6A & 6B. At 4:25 p.m., Judge Griffen entered the *ex parte* TRO that prevents Arkansas from carrying out the same executions he was protesting earlier in the day. Exhibit 4. Within an hour of granting the TRO, Judge Griffen was photographed at a second anti-death penalty rally—this one at the Governor's Mansion, where Judge Griffen lay strapped down on a cot to

simulate the experience of a condemned prisoner on a gurney. *See* Exhibit 7.

Judge Griffen was protesting the very executions he had just enjoined.

6. Judge Griffen's appearance at the two rallies was not the only time this week that Judge Griffen publicly expressed his personal views about Arkansas's upcoming executions, in general, and about Arkansas's use of drugs in executions, specifically. On his personal blog, Judge Griffin wrote:

As faithful people across the world enter Holy Week and observe Holy Thursday, Good Friday, the beginning of Passover, Holy Saturday, and Resurrection Sunday/Easter, the State of Arkansas in the United States of America is determined to kill seven men over a ten-day period beginning April 17, the day after Resurrection Sunday/Easter. While the world meditates about divine love, forgiveness, justice, and hope, Arkansas officials plan to commit a series of homicides. Acting in the name of empire and operating under the authority of law, ***they plan to use medications designed for treating and healing disease to kill men*** who are defenseless because those men were convicted of killing other defenseless persons.

This week, religious people across the world are engaging in rituals and exercises that symbolize belief in divine love, mercy, freedom, forgiveness, hope, and peace. This week, religious people acting in the name of empire in Arkansas are also plotting to kill seven men. Like Lazarus, these condemned men are children of God. Like Lazarus, these men have deadly histories.

The moral and ethical dwarfism at work in the plot to kill Jesus and Lazarus is still with us. That moral and ethical dwarfism, coupled with the willingness to commit murderous acts in support of moral, social, commercial, and political empire, is a defining mark of every failing, and failed, empire.

Premeditated and deliberate killing of defenseless persons – including defenseless persons who have been convicted of murder – is not morally justifiable. ***Using medications designed for treating illness***

***and preserving life to engage in such premeditated and deliberate killing is not morally justifiable.***

Any morally unjustified and unjustifiable killing produces moral injury. Beginning a week from today, and three days after Good Friday – on Monday, April 17 – the political, religious, commercial, and social captains of empire in Arkansas will commence a series of morally unjustified and unjustifiable killings. Each death will be a new, and permanent, moral injury. These deaths will join the existing long list of atrocities, oppression, and other moral injuries associated with our state to cause people around the world to associate Arkansas with bigotry, hate, and other forms of injustice as long as human memory continues.

See Exhibit 8 (emphasis added).

7. Amendment 80 provides that this Court exercises superintending control over all the courts of Arkansas. Ark. Const. amend. 80, § 4. This Court has defined superintending jurisdiction as one of three types of jurisdiction held by the courts of last resort; the other types are appellate and original jurisdiction. *Foster v. Hill*, 372 Ark. 263, 275 S.W.3d 151 (2008). Superintending jurisdiction is an extraordinary power hampered by no specific rules or means. *Id.* By virtue of the jurisdiction, the court may “invent, frame, and formulate new and additional means, writs, and processes.” *Id.* In *Hill*, this Court exercised superintending jurisdiction and said that the Court is bound only by the exigencies that call for its exercise. *Id.* at 268, 275 S.W.3d at 155.

8. The purpose of a writ of mandamus is to enforce an established right or to enforce the performance of a duty. *Parker v. Crow*, 2010 Ark. 371, at 5-6,

368 S.W.3d 902. This Court has often held that mandamus is an appropriate remedy when a public officer is called upon to do a plain and specific duty, which is required by law and which requires no exercise of discretion or official judgment. *Id.* at 6.

9. A writ of prohibition is issued to prevent or prohibit the lower court from acting wholly without jurisdiction. *Parker v. Crow*, 2010 Ark. 371, at 6. The purpose of the writ of prohibition is to prevent a court from exercising a power not authorized by law when there is no adequate remedy. *Id.*

10. A writ of certiorari lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy; it is available to the appellate court in its exercise of superintending control over a lower court that is proceeding illegally where no other mode of review has been provided. *Parker v. Crow*, 2010 Ark. 371, at 6. A writ of certiorari requires a demonstration of a plain, manifest, clear, and gross abuse of discretion. *Id.* at 6-7. Certiorari lies when a judge has acted in excess of his or her authority. *Id.* at 7.

11. Rule 65 of the Arkansas Rules of Civil Procedure contemplates two types of injunctive relief: (1) temporary restraining orders, which are issued without notice to the adverse party and expire by operation of law within two weeks, and (2) preliminary injunctions, which are issued after notice and an adversarial presentation of the issues at a hearing. *See generally* Newbern &

Watkins, 2 Arkansas Practice Series: Civil Practice and Procedure § 35:2 (4th ed.); *see also IBAC Corp. v. Becker*, 371 Ark. 330, 335, 265 S.W.3d 755, 759 (2007). Rule 65 provides that a circuit court may issue a TRO without notice (as in this case) *only if*: “(A) specific facts in an affidavit or a verified complaint show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant’s party certifies in writing any efforts made to give notice and the reasons why it should not be required.” Ark. R. Civ. P. 65(b)(1).

12. McKesson fails both requirements for a TRO under Rule 65. *First*, McKesson’s complaint is “verified” by Steve Quattlebaum, a Little Rock attorney representing a Delaware corporation with its principle place of business in Virginia. Mr. Quattlebaum cannot possibly have personal knowledge of the conversations among other parties and various other factual allegations in the complaint. Moreover, Mr. Quattlebaum cannot act as both McKesson’s attorney (he has signed all the pleadings) and as its verifying affiant/witness for the TRO. *See, e.g.*, Arkansas Rules of Professional Conduct 3.7. In short, Mr. Quattlebaum’s signature is not a proper “affidavit or verified complaint” as required for an *ex parte* TRO under Ark. R. Civ. P. 65(b)(1)(A). Judge Griffen’s TRO should be vacated for this reason alone.

13. *Second*, McKesson has also failed to provide certification in writing that it attempted to give notice as required by Ark. R. Civ. P. 65(b)(1)(B). Counsel for McKesson emailed unfiled copies of its pleadings to Petitioners' counsel at 4:34 p.m. (*see* Exhibit 5), *after* Judge Griffen signed the TRO (through another judge) at 4:25 p.m. (*see* Exhibit 4). Counsel's email of unfiled copies of McKesson's pleadings *after* Judge Griffen already signed the TRO that was apparently prepared for his signature by McKesson's counsel does not satisfy the requirement of Rule 65(b)(1)(B) that "the movant's party certifies in writing any efforts made to give notice and the reasons why it should not be required." Judge Griffen's TRO should be vacated for this reason alone.

14. McKesson alleges that the ADC, a "longstanding McKesson customer" (Exhibit 1 ¶ 8), somehow "misled" McKesson by purchasing vecuronium bromide from McKesson through the ADC's medical director—as the ADC has always purchased drugs from McKesson through their "longstanding" supplier-customer relationship. McKesson alleges further that the ADC declined to alert McKesson that the ADC intended to use the vecuronium to carry out executions in Arkansas—a disclosure that is not required under any statute or common law theory—but a purpose for the ADC's use of vecuronium that is expressly authorized under the Arkansas method-of-execution act, Ark. Code Ann. § 5-4-617. McKesson alleges that *after its voluntary sale of vecuronium to the*

ADC, McKesson received an inquiry from the manufacturer about McKesson's sale of vecuronium to the ADC. Exhibit 1 ¶ 19. McKesson asked the ADC to return the drug (*id.* ¶ 20), and although an ADC official initially "indicated to McKesson that the Vecuronium had been set aside for return" (*id.* ¶ 21), the ADC Director ultimately declined to return the drug to McKesson. *Id.* ¶ 23. The ADC *did* offer to return the drug if McKesson would provide an alternative drug to be used in executions. *Id.*, ¶ 24.

15. Based on these factual allegations, McKesson requested and Judge Griffen granted an *ex parte* TRO in which Judge Griffen found that: McKesson "demonstrated a clear showing based on specific facts found in its Verified Complaint . . . that it has a likelihood of success on the merits of its claims in the Verified Complaint and that immediate and irreparable injury will be caused to [McKesson] if a temporary restraining order is not granted." Exhibit 4 p. 1-2. Judge Griffen further found that without a TRO, McKesson will suffer "a series of irreparable harms including loss of property and forced participation in a procedure that is likely to cause reputational injury and related harms[.]" *Id.*, p. 2. And Judge Griffen ordered that Petitioners "shall not use the vecuronium [sic] bromide obtained from [McKesson] until ordered otherwise by this Court." *Id.* Judge Griffen scheduled a hearing for Tuesday, April 18, after the first execution scheduled by the Governor for April 17.

16. Judge Griffen’s *ex parte* TRO is for all intents and purposes a stay of the executions scheduled for April 17, 20, 24, and 27. As repeatedly explained by both ADC Director Kelley and ADC Deputy Director Rory Griffin at the trial referenced in McKesson’s complaint (and in the transcripts attached under seal as Exhibits A and B to the complaint), the ADC has no additional vecuronium bromide beyond what it purchased from McKesson, the ADC has so far been unable to locate another source from which to purchase vecuronium bromide, and vecuronium bromide is a required drug under Arkansas’s lethal-execution protocol as set forth in Ark. Code Ann. § 5-4-617—if the ADC cannot use the vecuronium bromide for the scheduled executions, then the executions cannot go forward. Judge Griffen’s *ex parte* TRO is an undisguised stay of the upcoming executions.

17. But this Court has plainly held, in another case where Judge Griffen attempted to stay executions with a TRO—and another case where this Court issued a supervisory writ to block an unlawful TRO by Judge Griffen—that “the circuit court acted in excess of its jurisdiction in staying the executions” and therefore the Court “lift[ed] the stay of the executions entered by the circuit court.” *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) (a circuit court does not have jurisdiction to issue a stay of jurisdiction); Ark. Code Ann. § 16-90-506(c) (providing that the only officers who have the power to stay

executions are the Governor, the ADC Director, and the Clerk of the Supreme Court). Judge Griffen lacks jurisdiction to stay the executions. The Court should grant a supervisory writ and vacate Judge Griffen's *ex parte* TRO.

18. The Court need not consider whether McKesson is likely to succeed on the merits in order to grant a supervisory writ because McKesson and Judge Griffen have failed to comply with Rule 65 and Judge Griffen lacks jurisdiction to stay the scheduled executions, *supra*. But McKesson cannot demonstrate a likelihood of success on the merits in any event because the complaint is barred by sovereign immunity. *See* Ark. Const. art. 5, § 20 (“The State of Arkansas shall never be made defendant in any of her courts.”). As the sovereign-immunity rule has been commonly stated, “if a judgment for the plaintiff will operate to control the action of the State *or* subject it to liability, the suit is one against the State and is barred by the doctrine of sovereign immunity.” *Ark. Tech. Univ. v. Link*, 341 Ark. 495, 502, 17 S.W.3d 809 (2000) (emphasis added) (citing cases). “[W]here the pleadings show that the action is, in effect, one against the state, the trial court acquires no jurisdiction.” *Fireman’s Ins. Co. v. Ark. State Claims Comm’n*, 301 Ark. 451, 455, 784 S.W.2d 771 (1990). Although McKesson does not seek monetary damages, McKesson *does* seek to force the ADC to return the vecuronium bromide to McKesson. At bottom, McKesson plainly seeks a judgment that will “operate to control the action of the State.” The complaint is barred by sovereign

immunity, and Judge Griffen lacks jurisdiction. The Court should grant a supervisory writ and vacate Judge Griffen's TRO.

19. Even if Judge Griffen and McKesson had complied with Rule 65, and Judge Griffen had jurisdiction to issue a stay of executions, and the complaint was not barred by sovereign immunity, McKesson would remain unlikely to succeed on the merits because McKesson has failed to state a cause of action against Petitioners. McKesson attempts to assert numerous claims—rescission, replevin, unjust enrichment, and so on—but most if not all of the claims asserted by McKesson are *remedies*, not *causes of action*. In any event, the bottom line is that McKesson willingly sold a drug to the ADC and then experienced seller's remorse. McKesson asked ADC to return the drug *after the transaction* but the ADC declined. None of the claims asserted by McKesson, nor any statute or common-law theory, support McKesson's apparent belief that a person who purchases a product must use that product in a certain way *as dictated by the seller after the transaction* or must return the product *on demand by the seller*. McKesson is not the enforcement authority for the medical statutes it cites in its pleadings, or any statutes or regulations for that matter. And of course, the ADC has full legal authority to use the drug for executions under Arkansas law. McKesson has no contract with the ADC requiring the ADC to perform any acts specific to the purchase of this drug or any drug. The parties engaged in a mutual transaction

with no contractual obligations or other restrictions on future behavior—and that is all. McKesson’s complaint fails on the merits even if it is not barred by sovereign immunity. The Court should issue a supervisory writ and vacate Judge Griffen’s TRO.

20. McKesson also fails the irreparable harm prong of its demand for a TRO. McKesson identified two distinct harms that it claims it will suffer in the absence of a TRO: (1) loss of property because Petitioners 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 false) “association” with the upcoming executions. McKesson’s 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, especially since the ADC disclaims any right to the refund. *Second*, the loss of a product in the marketplace can be remedied with monetary damages. *See AJ&K Operating Co. v. Smith*, 355 Ark. 510, 520, 140 S.W.3d 475, 482 (2004) (“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”).

21. McKesson’s tireless platitudes about the vast reputational injury that it claims it will suffer by association with Arkansas’s executions are entirely

incredible and implausible. McKesson has never said or done anything to intentionally associate itself with executions. If McKesson had done a bit more legal research beyond searching for legal claims that don't exist under the facts of this case, McKesson would have discovered that its identity as a supplier of execution drugs (even if unwitting) is expressly confidential under Arkansas law. Petitioners are required to "keep confidential all information that may identify or lead to the identification of . . . the entities . . . who . . . test, sell, or supply the drug or drugs . . . for the execution process." Ark. Code Ann. § 5-4-617(i)(2)(B). Given Petitioners' duty to protect McKesson's confidentiality under the confidentiality provisions of the method-of-execution-act, it is simply untrue that McKesson would be publicly associated with Arkansas's executions if not for the fact that McKesson decided to publicly announce that the ADC will be using a drug purchased from McKesson by filing this lawsuit.

22. Even more importantly, despite the confidentiality provisions and the apparent fact that nobody has ever publicly associated McKesson with Arkansas's executions, 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 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 Exhibit 1C (Washington Post article noting McKesson's release of a statement*

Thursday night noting that it sold vecuronium bromide to the ADC). 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.

23. The complaint and the motion for a TRO in this case are so lacking in legal merit as to be worse than frivolous. This Court should put a stop to the games being played by a Judge who is obviously unable to preside over this case impartially and who is doing everything possible to insulate review of his stay of executions.

WHEREFORE, the Petitioners pray that their Emergency Petition for Writ of Mandamus, Writ of Prohibition, Writ of Certiorari, or Supervisory Writ is granted, that the Court vacate Judge Griffen's TRO and remove Judge Griffen from the case below, and for all other just and appropriate relief.

Respectfully submitted,

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Arkansas Attorney General

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**CERTIFICATE OF SERVICE**

I, Lee Rudofsky, Solicitor General, do hereby certify that on this 15th day of April, 2017, I filed the foregoing document with the Clerk of the Supreme Court by providing a copy via email to Clerk Stacey Pectol, and I served a copy on the following via email:

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