

*****EXECUTIONS SCHEDULED APRIL 24 AND 27, 2017*****

No. 60CV-15-2921

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTEENTH DIVISION**

STACEY JOHNSON, JASON McGEHEE,
BRUCE WARD, TERRICK NOONER,
JACK JONES, MARCEL WILLIAMS,
KENNETH WILLIAMS, DON DAVIS, and
LEDELL LEE

PLAINTIFFS

v.

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

DEFENDANTS

MOTION FOR RULING

Plaintiffs in this action (“Prisoners”) respectfully request that the Court enter an immediate order on their Motion to Reconsider and their Response to Motion to Strike/Dismiss, both filed on April 3, 2017. Acknowledging that the Court was assigned to this case only on Monday afternoon, an immediate order is necessary to preserve the remaining Plaintiffs’ rights before their claims become moot.¹

The parties have recited the procedural history of this case at length in prior pleadings. That history need not be repeated here. The essential facts

¹ Defendants executed Ledell Lee last night. He is no longer party to the action. Plaintiffs Marcel Williams and Jack Jones are scheduled to be executed Monday, April 24. Plaintiff Kenneth Williams is scheduled to be executed Thursday, April 27.

are these: In *Johnson v. Kelley*, 2016 Ark. 268, 496 S.W.3d 346, the Supreme Court dismissed Plaintiffs' Amended Complaint for failure under Ark. R. Civ. P. 12(b)(6) to sufficiently plead an alternative execution method, as required by *Glossip v. Gross*, 135 S. Ct. 2726 (2015). Crucially, the Supreme Court has never said whether it dismissed the Amended Complaint with or without prejudice to file an amended complaint, which Plaintiffs did on February 24, 2017. Defendants have argued that the Supreme Court's unreasoned order on their motion for a clarification of an earlier stay, entered in No. CV-15-829 on March 2, 2017, is tantamount to a final order preventing repleading. But Defendants argued that Plaintiffs cannot replead in their motion for clarification, and the Supreme Court did not rule on that argument. The Court held only that the earlier stay does not protect Plaintiffs as this Court exercises its post-mandate jurisdiction over the case. Because *Johnson* was an interlocutory appeal on the basis of sovereign immunity, Plaintiffs were not permitted to appeal two claims the Court had already dismissed.

The usual course of proceedings when a complaint is dismissed for failure to plead adequately under Rule 12(b)(6)—even if the parties have asked for summary judgment—is to permit amendment. *Ratliff v. Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984). The Court should follow that procedure here. For the reasons previously stated in the Motion to Reconsider and the Response to

the Motion to Strike/Dismiss, the Court should rule that Plaintiffs are permitted to amend the complaint and should order final judgment on Plaintiffs' separation-of-powers and ex post facto claims under Ark. R. Civ. P. 54. Plaintiffs request immediate action on this request so that their executions do not moot their claims.

Dated: April 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Williams, hereby certify that I have served a copy of the foregoing on all counsel of record through the electronic filing system this 21st day of April, 2017.

/s/ John Williams
JOHN C. WILLIAMS