

****EXECUTIONS SCHEDULED FOR APRIL 24 and 27, 2017****

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

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

Plaintiffs

v. No. 4:17-cv-00179-KGB

ASA HUTCHINSON, Governor of the State of Arkansas, and
WENDY KELLEY, Director, Arkansas Department of Correction,

Defendants

MOTION TO MODIFY JOINT PROPOSED EXECUTION VIEWING POLICY

Per the Court's order entered April 17, 2017 (ECF No. 63), Plaintiffs respectfully move to modify the Joint Proposed Execution Viewing Policy (ECF No. 62). Specifically, Plaintiffs request modification of Paragraph 7 of the agreement, which reads: "The curtains to the viewing room will be closed until all witnesses are present and the execution commences." ECF No. 62 at 2. Plaintiffs believe the "execution commences" when their clients are escorted into the execution chamber. Defendants interpret this term to mean that attorneys will not be allowed to view their client in the execution chamber until just before the drugs are about to flow. For the reasons stated below, Plaintiffs respectfully request that the Court require Defendant Kelley to allow them to view the entirety of the procedure, beginning at the time their client enters the execution chamber to be strapped to the gurney and to have the IV lines affixed.

Yesterday, the Court heard testimony in *Williams v. Kelley*, No. 17-103, concerning Marcel Williams's as-applied challenge to the lethal-injection protocol. Dr. Joel Zivot testified about the difficulty of obtaining IV access for Williams:

[W]hen individuals are obese, like Mr. Williams, it's generally difficult to find veins. I placed a tourniquet on Mr. Williams' arms just to see if I could see a vein, and I could not easily find one on either arm. His legs certainly are out of the question. And it then leaves the groin, which would also be exceedingly difficult in him, or the neck, which would also be very difficult.

Tr. at 19. Director Kelley was present for an assessment of Williams's arms last week. The examination found what Kelley termed "a good vein" in one arm, but the "other arm didn't appear to have a visibly good vein." Tr. at 77. Notably, at last week's hearing in this case, Director Kelley testified that "there is an extremely unlikely chance that we would proceed with one line. I mean, that's not the intention. The intention is to have two lines." Tr. 1175.

Similarly, the Court heard testimony about Jack Jones's various medical and mobility issues in *Jones v. Kelley*, No. 17-111. In particular, Jones's advanced neuropathy makes it appropriate that counsel observe the procedure.

The issues with Williams's intravenous access, as well as Jones's problems, illustrate the need for the attorneys to view the entirety of the procedure. Counsel must be aware of what is happening to their clients at this most critical time. If the ADC is unable to locate a vein in a reasonable amount of time, counsel will be obliged to take steps necessary to protect their client's rights. Plaintiffs asked for relief on this issue in their

complaint and preliminary-injunction brief. Compl. ¶¶180–82; PI Br. at 26–29. The Court’s preliminary-injunction order in this case did not mention this issue. Plaintiffs now ask that the Court require Kelley to permit attorneys to see the entirety of the execution process, beginning with the point at which Plaintiffs enter the execution chamber.

The Court has already determined that plaintiffs have a right to meaningful attorney presence and access to courts and that this right “extends through the duration of their executions.” ECF No. 54 at 92. The “duration of the execution” includes all points at which Plaintiffs are in the execution chamber. Insofar as Defendants argue otherwise, at least one Court has rejected the idea that the “execution commences” only when the drugs begin to flow.

Defendants argue that the public does not have a right to view the “initial execution procedures,” but rather only the execution itself, which defendants define as beginning when the lethal chemicals start to flow. This definition, however, is simply of defendants’ own making. The public and press historically have been allowed to watch the condemned inmate enter the execution place, be attached to the execution device and then die. . . . [H]istorical tradition strongly supports the public’s First Amendment right to view the condemned as the guards escort him into the chamber, strap him to the gurney and insert the intravenous lines.

Cf. Calif. First Am. Coalition v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002).

Of course, this jurisdiction has rejected *Woodford*’s holding that the public has the right to view portions of the execution before the drug flow. *Arkansas Times, Inc. v. Norris*, 2008 U.S. Dist. Lexis 3500 (Jan. 7, 2008). However, Plaintiffs are not asserting the

public's rights. They are asserting their own rights to have their attorney present for "the duration of their executions," as the Court has already held is proper.

Under the Court's previous analysis of this issue, *see* ECF No. 54 at 92–100, the Court must balance Plaintiffs' right to attorney and court access during the duration of the execution and Defendants' interest in keeping the curtain closed until drugs begin to flow. This requires the Court to balance factors stated in *Turner v. Safley*, 482 U.S. 78 (1984).

At the hearing, Kelley admitted that "the main reason for not being able to witness the IV setup is to protect the confidentiality" of a volunteer participant on the IV team. Tr. at 1174. Assuming this is a valid rationale, the other *Turner* factors favor access. Opening the curtain at the point of Plaintiffs' entry, while only the attorneys are in the viewing room, is the only way to effectuate Plaintiffs' right to counsel and to access the courts for the duration of the execution. The impact on prison resources will be minimal—access requires only that the attorneys be ushered into the viewing area before other witnesses and that the curtain be opened while the attorneys are present. Finally, access can be achieved at no cost to Kelley's interest in confidentiality of the execution team members. All persons who would view these portions of the execution are allowed access to highly confidential material (such as descriptive information about the IV team member's appearance) by the parties' protective order. ECF No. 18 ¶¶2.d, 3, 9. It should be assumed that the attorneys will follow the protective order.

CONCLUSION

Plaintiffs respectfully request that the Court modify the Joint Proposed Execution Viewing Policy to permit their attorneys to view the entirety of the execution procedure, beginning with Plaintiffs' entry into the execution chamber.

Respectfully submitted,

/s/ Jeff Rosenzweig
Jeff Rosenzweig, ABN 77115
jrosenzweig@att.net
300 Spring St., Ste. 310
Little Rock, AR 72201
(501) 372-5247

*Counsel for Stacey Johnson,
Jack Jones and Kenneth Williams*

/s/ John C. Williams
Scott Braden, ABN 2007123
John C. Williams, ABN 2013233
Federal Public Defender Office
scott_braden@fd.org
john_c_williams@fd.org
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114

*Counsel for Don Davis, Jason McGehee,
Terrick Nooner, Bruce Ward,
and Marcel Williams*

Certificate of Service

I hereby certify that on this 22nd day of April, 2017, the foregoing Motion to Modify Joint Proposed Execution Viewing Policy was filed using the Court's CM/ECF system, which shall make service on all parties.

/s/ John C. Williams_____

JOHN C. WILLIAMS