

Cite as 2010 Ark. 168  
**SUPREME COURT OF ARKANSAS**  
No. CV-10-351

DON WILLIAM DAVIS

PETITIONER

V.

RAY HOBBS, DIRECTOR, ARKANSAS  
DEPARTMENT OF CORRECTION

RESPONDENT

Opinion Delivered April 12, 2010

PETITION FOR STAY OF EXECUTION

CONCURRING OPINION.

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ROBERT L. BROWN, Associate Justice

I would stay the execution of Don W. Davis that is scheduled for today, for the following reasons. The stay will allow the pending claim in Pulaski County Circuit Court that the new Method of Execution Act (Act 1296 of 2009) violates the separation-of-powers clause of the Arkansas Constitution to be resolved.<sup>1</sup> The Eighth Circuit Court of Appeals lifted the stay of Davis's execution on April 9, 2010, by a vote of two to one. That decision does not decide the state issue.

This case satisfies each of this court's announced criteria for imposing a stay of execution: (1) a constitutional issue of first impression is pending; (2) the issue is one of public significance; (3) the issue of a state stay only became ripe after the Eighth Circuit decision; (4) whether the new execution protocol violates the Arkansas Constitution is for

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<sup>1</sup>The claim is that the General Assembly, by Act 1296, gave the Director of the Department of Correction unfettered discretion to formulate the process and chemicals for a state execution which can be altered at any time. This, according to the argument, is an unconstitutional delegation of power by the General Assembly.

Arkansas courts and not federal courts to decide; and (5) the separation-of-powers issue under the Arkansas Constitution cannot be decided before the execution which, again, is scheduled for today. See *Singleton v. Norris*, 332 Ark. 196, 964 S.W.2d 366 (1998) (per curiam).

The State argues that prison officials will execute Davis using the protocol that was approved by the federal courts under the old version of the method-of-execution statute. See *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010). Under Act 1296, however, the argument made by Davis is that the Director of the Department of Correction can change the execution protocol at any time, including at the last minute. The pending constitutional question is whether the General Assembly has breached the separation-of-powers provision of the Arkansas Constitution by this grant of power to the Department Director.

At this writing, it is unknown whether the separation-of-powers argument made by the death row inmates will prevail in state court so as to render Act 1296 unconstitutional. Accordingly, I would stay the execution of Don W. Davis in order for that determination to be made.