RECENT DEVELOPMENTS

Arkansas Supreme Court Upholds State's Death Penalty Three-Drug Protocol

Kelley v. Johnson, 2016 Ark. 268, 496 S.W.3d 346.

The Arkansas Supreme Court recently upheld Act 1096 of 2015, reversing Pulaski County Circuit Judge Wendell Griffen's decision declaring it unconstitutional. Nine inmates brought the initial suit against Wendy Kelley, Director of the Arkansas Department of Corrections (ADC), claiming Act 1096's nondisclosure elements violate due process, the First Amendment, and contractual disclosure obligations guaranteed under the Arkansas Constitution.

Act 1096 of 2015 (the Act) details the current method of executions in the state, amending "the previous method-of-executions statute." The original statute, Act 139, involved benzodiazepine to be followed by an unspecified barbiturate.[1] Six of the nine inmates involved in the current decision filed suit in 2013 claiming Act 139 violated the separation-of-powers doctrine in Arkansas by leaving the choice of barbiturate up to the ADC. The parties entered into a settlement agreement in early 2013. The inmates later brought an as-applied claim later that year, winning on the circuit level but meeting ultimate reversal by the Arkansas Supreme Court.[2] The court maintained that Act 139 provided reasonable guidelines for the ADC to use in determining which method to use.

The Act removes benzodiazepine by adding the option of "[m]idazolam, followed by vecuronium bromide, followed by potassium chloride."[3] It also provided that the ADC may only obtain the drugs from a manufacturer approved by the U.S. Food and Drug Administration (FDA), from an FDA-registered

1. ARK. CODE ANN. § 5-4-617(g) (Repl. 2013).
2. Hobbs v. McGhee, 2015 Ark. 116, 458 S.W.3d 707.
3. ARK. CODE ANN. § 5-4-617(c) (Supp. 2015).

facility, or from an accredited compounding pharmacy. The Act does not require this information be publically disclosed. In the original suit, Judge Griffen struck down the Act and issued a protective order requesting the ADC to turn over information about the manufacturers, suppliers and other details about the drugs.[4] The ADC applied for an immediate stay of the order, which the Arkansas Supreme Court granted.

In its appeal before the court, the ADC contended that the inmates failed to plead and prove a constitutional violation and, as a result, the state has sovereign immunity. The ADC also maintained that the inmates failed to plead and prove the feasibility and capability of alternative methods of execution being readily administered. In their brief, the nine inmates argued (1) the Arkansas Supreme Court lacks jurisdiction to hear the sovereign-immunity argument; (2) the method-of-execution violates the Eighth Amendment; and (3) the Act's secrecy provisions are not severable, thus making the entire Act unconstitutional. Specifically, they contended that their rights to due process were impeded, because not knowing the identity of the pharmaceutical supplier prevented them from litigating their claims that lethal injection is cruel and unusual punishment. They also discussed alternatives such as a firing squad, or a massive dose of an anesthetic gas or an injectable opioid.

Writing for the majority, Justice Courtney Goodson reviews how the inmates failed to prove that the three-drug protocol imposes cruel or unusual punishment. The import of the Supreme Court's decision in *Glossip v. Gross*[5] resonates strongly in the opinion, particularly in analyzing the inmate's burden of not only identifying a known and available alternative, but proving how it "significantly reduce[s] a substantial risk of severe pain." The majority holds that the circuit court clearly erred in finding that the inmates sufficiently pled as to the proposed alternative drugs and the firing squad, thus failing to satisfy the test for establishing a claim of cruel or unusual punishment. In reviewing the remaining arguments, the majority also dismisses the inmates' challenge to secrecy in the execution process. Relying on Eighth Circuit precedent in *Zink*

4. Johnson v. Kelley, No. 60CV-15-2921, 2015 WL 6085395 (Ark. Cir. Oct. 9, 2015).

5. Glossip v. Gross, 135 S. Ct. 2726 (2015).

v. *Lombardi*,[6] the court concluded that the lower court further "erred in ruling that public access to the identity of the supplier of the three drugs ADC has obtained would positively enhance the functioning of executions in Arkansas. As has been well documented, disclosing the information is actually detrimental to the process."[7]

Justices Josephine Hart and Paul Danielson dissented, while Justice Robin Wynne concurred in part and dissented in part. Hart noted Judge Griffen was right to require disclosure of the drug information. Justice Danielson said the Supreme Court lacks jurisdiction. In his dissent, Justice Wynne wrote that he believed the inmates proved their claim as to cruel and unusual punishment, further opining that the Constitution requires such information to be published under Article 19, Section 12.

On July 21, the Arkansas Supreme Court refused to rehear the case. A Petition for Certiorari was filed on October 19, 2016.

6. Zink v. Lombardi, 783 F.3d 1089, 1113 (8th Cir. 2015).
7. Kelley v. Johnson, 2016 Ark. 268, at 25, 496 S.W.3d 346, 362.

Eighth Circuit Rejects NLRB's Position and Joins Circuit Split, Finding Class and Collection Action Waivers Lawful Under NLRA

Cellular Sales of Missouri, LLC v. Nat'l Labor Relations Bd., 824 F.3d 772 (8th Cir. 2016).

This past June, the U.S. Court of Appeals for the Eighth Circuit joined a circuit split over whether employers' arbitration agreements illegally prevent employees from exercising their rights guaranteed under the National Labor Relations Act (NLRA). On the heels of a Seventh Circuit decision finding for the National Labor Relations Board (NLRB), the Eighth Circuit found that an arbitration agreement's broad language could reasonably be construed by an employee as prohibiting the filing of charges with the NLRB or otherwise engaging in certain protected concerted activities. However in doing so, the court refused to broadly enforce the NLRB's decision and joined two other circuits who have upheld the general use of similar class action waivers.[8]

The case arose after an employee with Cellular Sales of Missouri entered into an employment agreement that included an arbitration provision. In doing so, "he agreed to arbitrate individually '[a]ll claims, disputes, or controversies' related to his employment and to waive any class or collective proceeding."[9] Five months after his employment ended with the company, the employee filed a putative class-action lawsuit alleging violations of the Fair Labor Standards Act (FLSA). His employer moved to compel arbitration based off his signed employment agreement. The district court concluded the arbitration agreement was enforceable and later approved a settlement, dismissing the lawsuit with prejudice. However, this employee also filed an unfair labor practice charge with the NLRB claiming the class-action waiver component contained in

8. *See* Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013); D.R. Horton, Inc. v. NLRB. 737 F.3d 344 (5th Cir. 2013). While the Eleventh Circuit upheld a class action waiver, it did so without discussing the NLRA. Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326 (11th Cir. 2014).

9. Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 774 (8th Cir. 2016).

the arbitration provision violated his right to engage in protected concerted activity. Section 7 of the NLRA protects employees' actions in concerted activities "for the purpose of collective bargaining or other mutual aid or protection."[10] Closely related to Section 7 is Section 8(a)(1), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."[11]

The NLRB issued a complaint, evidencing its stern opposition to arbitration agreements. Beginning in 2012, the NLRB adopted the stance that employers' arbitration agreements illegally prevent employees from exercising their rights guaranteed by the NLRA. In *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012), a 3-2 majority of the NLRB decided that requiring employees to agree to a class and collective action waiver in an arbitration agreement violates the NLRA. The Fifth Circuit later reversed this decision.[12] While the NLRB reaffirmed its position from *D.R. Horton* in a later case,[13] the Fifth Circuit again rejected the NLRB's decision last year.[14]

In *Cellular Sales*, an administrative law judge (ALJ) ruled in favor of the NLRB. The NLRB then ordered the company to either rescind the arbitration agreement or revise it to clarify it. On appeal, Cellular Sales pointed to another Eighth Circuit decision, *Owen v. Bristol Care*,[15] holding that arbitration agreements containing class waivers are enforceable in claims brought under FLSA.[16] The NLRB insisted that the *Owen* decision be reconsidered, going as far as filing a motion for initial hearing *en banc*. The court denied this motion, upholding *Owen,* and concluding that Cellular Sales did not violate the NLRA by simply having a waiver in its arbitration provision. However, it specifically disagreed with Cellular Sales on one point: that the company's employers *could* reasonably understand the arbitration agreement to waive or impede their rights to file unfair labor practice charges. In other words, the provision was not sufficient to alert employees that they retained

10. 29 U.S.C.A. § 157 (2016).
11. 29 U.S.C. § 158(a)(1) (2016).
12. D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).
13. Murphy Oil USA, Inc., 361 N.L.R.B. 72 (Oct. 28, 2014).
14. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).
15. 702 F.3d 1050 (8th Cir. 2013).
16. *Id.* at 1053-55.

rights to file charges because the provision "would reasonably be read by . . . employees as substantially restricting, if not totally prohibiting, their access to the Board's processes."[17] Thus, Cellular Sales' mandatory arbitration agreement included language that was too broad.

As mentioned, other circuits have followed the Fifth Circuit's approach to the NLRA, with only the Seventh and Ninth Circuits departing this summer. In May, the Seventh Circuit held that Epic Systems Corporation's wage-and-hour class arbitration clause violated Sections 7 and 8 of the NLRA.[18] The court relied on the NLRB's reasoning from *D.R. Horton*, which rests on the notion that engaging in class, collective or representative proceedings is "concerted activity."[19] Interestingly, Rule 23 class actions were not in existence when Congress enacted the NLRA in 1935 and defined "concerted activity."[20] The Ninth Circuit more recently sided with the NLRB in August in a case against Ernst & Young where employees' signed mandatory "concerted action waivers," which forced plaintiffs to submit to *individual* arbitration alone and in "separate proceedings."[21] Ernst & Young filed a writ of certiorari in early September, joining similar moves by both the NLRB and Epic Systems (regarding the Fifth and Seventh Circuit decisions respectfully).[22]

Until this circuit split is addressed by the Supreme Court, it leaves uncertainty for Arkansas employers whose employment contracts contain class and collective action waivers. It also complicates the potential of a nationwide class action involving identical arbitration agreements with class action waivers. In the meantime, Arkansas employers should ensure that any arbitration agreements include language explaining that employees are free to bring charges related to their employment to the NLRB.

17. Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 778 (8th Cir. 2016).

18. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).

19. *Id.* at 1153.

20. *Id.* at 1154.

21. Morris et al. v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).

22. Morris et al. v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 276 (U.S. Sept. 8, 2016) (No. 16-300).

Supreme Court Revisits Canons of Statutory Construction to Interpret Federal Mandatory Minimum Sentencing Enhancement

Lockhart v. United States, 136 S. Ct. 958 (2016).

In its first case decided after Justice Antonin Scalia's death, the Supreme Court underscored that "a timeworn textual canon" still matters. In a 6-2 decision, the Court applied the rule of last antecedent in interpreting 18 U.S.C. § 2252(b)(2). At the heart of the case was a statutory enhancement providing, in relevant part:

> Whoever violates [the federal possession-of-child-pornography law] . . . shall be fined under this title or imprisoned not more than 10 years, or both, but . . . if such person has a prior conviction under this chapter, . . . or under the laws of any State relating to *aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward* [emphasis added], . . . such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

Courts split over whether the phrase "involving a minor or ward" modified *all* three items in the list of enumerated predicate state crimes, or just the last crime, abusive sexual conduct. The Second Circuit held the phrase applied to only the last one, while the Sixth, Eighth and Tenth Circuits applied the phrase to all three crimes.[23] In *United States v. Hunter,* the Eighth Circuit held that under § 2252(b)(2) the phrase modified all three prior crimes.[24]

Under this federal statute, defendants convicted of possessing child pornography would automatically trigger a 10-year mandatory minimum sentence if any of the defendant's prior state convictions related to "aggravated sexual abuse,

23. *See* United States v. Mateen, 739 F.3d 300, 304-05 (6th Cir. 2014); United States v. Hunter, 505 F.3d 829, 831 (8th Cir. 2007); United States v. McCutchen, 419 F.3d 1122, 1125 (10th Cir. 2005).

24. 505 F.3d 829, 830-31 (8th Cir. 2007).

sexual abuse, or abusive sexual conduct involving a minor or ward."[25] In Lockhart's case, his prior conviction was for sexual abuse of his adult girlfriend, rather than a "minor or ward."

Both sides pointed to Justice Scalia and Bryan Garner's 2012 treatise "*Reading Law: The Interpretation of Legal Text*"[26] in arguing which canon to employ. The federal government relied most heavily on the "rule of last antecedent." Under this rule, a "limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows."[27]

Lockhart argued the "series qualifier" canon should guide the Court to read that all three items as limited by "involving a minor or ward" because it "makes sense" with ordinary English usage. Additionally, the phrase in its entirety constitutes a "single, integrated list of closely related, parallel, and overlapping terms." He also asked the Court to apply the rule of lenity and consider substantial legislative history, involving a Department of Justice letter and Report from the Senate Judiciary Committee on the Child Pornography Prevention Act of 1996.[28]

The government refuted this interpretation noting how employing the series qualifier canon creates redundancy: "sexual abuse" and "abusive sexual conduct" are indistinguishable unless one of them is limited. This interpretation would violate the "surplusage canon," a point the majority took to heart in noting that Lockhart's reading of the statute involves "too much similarity."

The majority ultimately sides with the government. The opinion, authored by Justice Sonia Sotomayor, offers contemporary examples (including the "World Champion Kansas City Royals") to show that the modifier included at the end of a sentence only applies to the last item in the list. In addition to exploring the legislative history, the majority also notes that three chapters of the Federal Criminal Code were

25. 18 U.S.C. § 2252(b)(1) (2016).

26. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

27. Lockhart v. U.S., 136 S. Ct. 958, 962 (2016) (*quoting* Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

28. *See* S. REP. NO. 104-358, at 9 (1996); H.R. REP. NO. 105-557, at 26-34 (1998).

distinctly named to only have "minor or ward" in one of them.[29] It also shows a concern that applying the "minor or ward" qualifier to all the three crimes listed would render them largely redundant—noting that this modifier, "by contrast, preserves some distinction between the categories." According to the majority, "a sensible grammatical principle buttressed by the statute's text and structure" is enough to trump Lockhart's dependence on legislative history and the rule of lenity.

During oral arguments, the late Justice Scalia invoked the rule of lenity, which would offer the benefit of the doubt to a defendant if the law could plausibly be read two ways. His comments and previous opinions strongly hint that he would have likely joined the two-justice dissent in part. Justice Kagan, joined by Justice Breyer, relies on illustrative examples, the series qualifier rule, the rule of lenity, and legislative history. The dissent adamantly maintains the series qualifier rule is more consistent with an "ordinary understanding of how English works." In spite of § 2252(b)(2)'s "inartful drafting" (quoting the majority), this rule would allow the modifying phrase to qualify all three of the crimes. Kagan faults the majority for taking such a strict view instead, and points to five recent Supreme Court opinions that adhere to the series-qualifier rule.

Following this opinion, more defendants like Lockhart could receive an enhancement because a qualifying conviction under a state law relating to "sexual abuse" need not involve a minor. The Eighth Circuit has visited the *Lockhart* decision three times in recent months, invoking the enhancement under § 2252(b)(1) and (b)(2).[30] These cases should provide guidance to Arkansas courts applying the sentencing enhancement in the wake of *Lockhart*.

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29. "The first section in Chapter 109A is titled 'Aggravated sexual abuse.' 18 U.S.C. § 2241. The second is titled 'Sexual abuse.' § 2242. And the third is titled 'Sexual abuse of a minor or ward.' § 2243." *Lockhart*, 136 S. Ct. at 964.

30. United States v. Sumner, 816 F.3d 1040, 1044 (8th Cir. 2016); United States v. Knowles, 817 F.3d 1095, 1097 (8th Cir. 2016); United States. v. Krebs, 830 F.3d 800, 803 (8th Cir. 2016).