

MINUTES**HOUSE AND SENATE INTERIM COMMITTEES ON JUDICIARY****July 24, 2013**

The House and Senate Interim Committees on Judiciary met at 10:00 a.m., Wednesday, July 24, 2013, in Room A-MAC, Little Rock, Arkansas.

Committee members present: Senators Jeremy Hutchinson, Chair; Jane English, Keith Ingram, Eddie Joe Williams, and Jon Woods; Representatives Marshall Wright, Chair; John Vines, Vice Chair; John Baine, Bob Ballinger, Charlene Fite, Jeremy Gillam, David Hillman (non-voting), Monte Hodges, David Kizzia, Patti Julian (non-voting), Stephen Magee, Mark McElroy, Micah Neal, Jim Nickels, Sue Scott, Matthew Shepherd, Mary Lou Slinkard, Nate Steel, Wes Wagner, and John Walker.

Other members in attendance: Senators Linda Chesterfield, Jonathan Dismang, Joyce Elliot, Stephanie Flowers, Missy Irvin, Johnny Key, David Sanders, and David Wyatt; Representatives Randy Alexander, John Burris, Kim Hammer, Karen Hopper, Sheilla Lampkin, Frederick Love, David Meeks, Betty Overbey, Tommy Thompson, David Whitaker, Butch Wilkins, and Henry "Hank" Wilkins, IV.

Senator Hutchinson called the meeting to order.

Discussion of the State's Current Parole System and Procedures (Exhibit B.2)

Dr. Mary Parker, Vice Chair, Board of Corrections (Board); and Sheila Sharp, Interim Director, Department of Community Correction (DCC), spoke on the changes implemented by the Board and DCC in response to the Darrell Dennis case. One change would require parole officers to hold a parolee who is waiting on a revocation hearing; the Board will not lift the hold until the hearing; and Act 3 (mental health holds) will be also be reviewed. In addition, the Board and DCC will continue to review and adjust other identifiable problems as appropriate. The following policy changes are now in effect:

- DCC will not release parole holds on individuals awaiting a revocation hearing pursuant to requests from jail personnel
- All requests for release of holds made by sheriffs of jail personnel must be in writing.
- Parolees charged with felonies; violent or sex related misdemeanors will be jailed and a revocation hearing will be sought.
- Parolees who have absconded two or more times will be jailed and a revocation hearing will be sought.
- DCC will prioritize and fast track the admission of higher risk offenders into the Technical Violator Program.
- DCC will attempt to find open jail space in other jurisdictions within the state when the holding jail must release an offender who has an existing parole hold.
- All requests for revocations and denials thereof will be fully documented in the offender's case file.
- If a probationer / parolee is on an ACT 3 hold their hold will not be released until their ACT 3 hearing, or the hold is lifted.

Dr. Parker said the Board believes that the public deserves to have confidence in its parole system and they intend to address any deficiencies that come to light in the ongoing efforts to improve this system.

Senator Hutchinson requested a case-by-case raw data report showing recidivism rates prior to Act 570 and post Act 570. Dr. Parker and Ms. Sharp said the data would be difficult to pull together and asked that they be allowed to prepare the report in steps. Senator Hutchinson replied that he wanted the report before the beginning of the 2014 Fiscal Session to determine if the legislature needs to tweak certain provisions of the act.

Senator Sanders spoke on the possibility of raising the threshold for felony theft from \$500 to \$1000 and said he is very concerned about the number of burglary and theft claims in Little Rock committed by career criminals. He also questioned why the "temporary" policy set by the Arkansas Parole Board (APB) in 2007 (allowing parolees to serve out parole terms after absconding) was continued without question. Dan Roberts, Deputy Director, Parole and Probation, DCC, stated he was never told the policy was temporary and that the policy will be officially reversed by APB at their next meeting.

Senator Williams requested DCC and the Board provide the committees with an extensive list of proposed policy/legislative changes that need to be addressed.

Senator Flowers said DCC has not implemented many of the provisions of Act 570 such as improving literacy skills, mental health services, and housing for parolees. She also questioned the risk and needs assessment process of prospective parolees. Ms. Sharp explained the parole process (Exhibit 2) and said DCC asked Area Managers to meet with community leaders to determine what services are available and to submit a plan for the remainder of the fiscal year. Senator Flowers asked the committees to take a closer look at the mandates of Act 570 in terms of DCC Best Practices.

Senator Sanders expressed concern that parole officers he spoke with were afraid to cooperate with investigations due to possible retaliation. Dr. Parker assured him that will not happen and the Board will reach out to any employee that brings forth information.

Mark Stodola, Mayor, City of Little Rock, asked legislators to focus on career criminals and technology issues relevant to Act 570. He said career burglar and thieves should be locked up--76% of burglars in Little Rock have criminal records and have been arrested multiple times. Mayor Stodola said with today's technology, career criminals/parolees could, and should be, monitored. The city of Little Rock appropriated \$3 million last year for reentry programs and is working with the Department of Correction to transition parolees back into society in order to reduce recidivism rates.

Ms. Sharp stated DCC has the ability to monitor 300 parolees, but currently monitors 142. She said the agency will utilize a portion of the \$3 million from the Best Practices fund to increase monitoring programs within the next month; DCC is currently evaluating outside companies to provide additional services. Ms. Sharp said they hope to have programs available in all areas soon. Senator Hutchinson asked Ms. Sharp to review the possibility of shifting funds from other areas to pay for additional monitoring programs, and if that is not feasible, to report back to the committees.

John Felts, Chairman, Arkansas Parole Board, said the parole board hears approximately 900 cases per month and works closely with DOC and DCC. Upon questioning by Senator Williams regarding the number of unserved warrants issued by APB, Mr. Felts stated the parole board issued 7,344 warrants for FY13:

- absconder - 4592
- technical - 495
- delinquent - 257
- active warrants as of June 30 - 2842; 2144 abscond warrants issued to DCC

Recessed for lunch at 12:15 p.m.

Reconvened at 1:30 p.m.

Discussion of the Arkansas Death Penalty and Execution Procedures

REMARKS - ATTORNEY GENERAL DUSTIN MCDANIEL

Thank you so much for inviting me. I'm here today with Senior Assistant Attorney General David Raupp and Assistant Attorney General David Curran.

As you know, I've been talking in recent weeks about the legal and practical issues surrounding the death penalty. I continue to support the death penalty. However, I think it's time for us to frankly discuss the system as it currently exists. I believe it is completely broken.

I applaud you, Mr. Chairman, for convening this meeting to discuss where we are and where we may be going. As I see it, our options are limited: We can continue throwing money into a broken system and dedicating resources to litigation. We can modify the system. Or we can abolish the death penalty all together. Statistics from my office indicate that a killer on death row has a near 50/50 chance of receiving some kind of substantive relief from the Arkansas Supreme Court, such as another hearing or even a new trial. No other prisoner in the Department of Correction has as many avenues of relief as death row inmates.

Arkansas currently has 37 murderers who await execution on death row. The average inmate on death row has been there for almost 15 years. Six of them have been there for more than 20 years. The AG's office has been working diligently to see that executions are carried out. Our last execution was on November 28, 2005. We currently have no executions scheduled. I sent letters to Gov. Beebe on February 20th of this year, requesting that he set execution dates for seven inmates. The Governor has not set those dates yet, and his office has said publicly the reason they have not been set is because it is not possible to conduct executions at this time. I'm sure that many of you, like me, ask the same question at this point. Why not? The focus of my testimony today will attempt to address that question.

We might begin with a very brief bit of background. Arkansas has had the death penalty since the 19th Century. By the mid twentieth century many questions were raised about whether sentences of death were being meted out fairly. In 1970, Governor Winthrop Rockefeller, a Republican, had his own doubts about the issue. So he commuted the sentences of all 15 prisoners then on death row. In 1972, in *Furman v. Georgia* the United States Supreme Court declared the death penalty unconstitutional across the entire country, based largely on the concern that judges and juries had too much unguided discretion about when to sentence a defendant to death. In 1976, the Supreme Court issued several further decisions clarifying the manner in which the death penalty could be constitutionally imposed. Executions across the country resumed in 1977.

Arkansas had been using the electric chair, but in 1983 the General Assembly followed several other states and adopted a statute authorizing execution by lethal injection. Capital sentences were carried out by lethal injection for more than 20 years without significant challenges to the lethal injection process.

In 2006, the U.S. Supreme Court case of *Hill v. McDonough* changed everything about death row litigation. The Court said death row inmates could file separate civil lawsuits challenging the means and methods to be used in their execution. This has led to an avalanche of civil lawsuits in state and federal courts around the country. It's important to know that civil litigation today stands as a much greater impediment to execution than the appeals process, even though the criminal appeals process is significant and lengthy. Thus, even after an inmate has been litigating his criminal appeals and post conviction challenges for up to 20 years, he may still file an entirely new round of civil litigation challenging the methods by which his sentence will be carried out.

In many states the implementation of the death penalty has ground to a halt due to these suits. Notably, in Arkansas, the Supreme Court has granted stays of execution to allow inmates to challenge the lethal injection process in civil suits even though every aspect of their conviction and sentences have already been upheld. As a result, no execution has been carried out in Arkansas since 2005. Since *Hill v. McDonough* was handed down in 2006, Arkansas inmates have filed numerous suits challenging various aspects of the lethal injection process. In one of those cases the inmates contended that ADC should have engaged in a rulemaking procedure under the Administrative Procedures Act when they specified the means for carrying out a sentence of death.

In order to cut short this argument as well as to address the shortage of drugs for lethal injection which ADC had already foreseen, the General Assembly amended the lethal injection statute in 2009. It was, of course, promptly challenged in court by several inmates. Even though Arkansas' statute was the same as those in several other states, our Supreme Court ruled that it violated the separation of powers doctrine by giving too much discretion to ADC.

In 2013, Representative Steel and Senator Hester introduced a new lethal injection statute which gave more specific guidance to ADC. It should be no surprise, though, that the new law, only enacted in March, is already being challenged in court. The suit alleges that the statute must specify the type of IV procedures used and the rate of flow from the syringe. I believe that if the Legislature were to amend the law today to give the inmates what they contend is required, they would file yet another suit tomorrow, challenging yet another aspect of the medical procedure. I truly believe we could make the statute describing the Department of Correction's powers in this area as long and detailed as "War and Peace" and we would still be sued.

In addition to the lengthy criminal appeals and never ending civil litigation, there is also a new, practical impediment: the drugs needed for lethal injection are simply not available for state purchase anymore. There are really only two drugs -- thiopental and pentobarbital -- that have been approved by both the medical community and the courts for the execution of a human being. These drugs are not available for purchase by state departments of corrections. Many of the manufacturers of these drugs are European. The death penalty has been abolished in most of Europe, and those manufacturers will not sell their drugs for this purpose.

Many of you have asked about Texas and have pointed out that Texas has executed by lethal injection as recently as July 18. Texas, as with some other states, have old supplies still available for use. Even their supplies are dwindling. We don't know specifically what Texas has or has not got on hand, but at least one recent public records search indicates they have enough for 23 more executions. However, even those 23 doses have an expiration date, and we don't know what those dates are. Universal lack of availability is why the old practice of sharing or buying drugs from other states no longer takes place. It's important for you to know that Texas isn't the only stat who planned ahead. We also did. Arkansas attempted to acquire an ample supply of lethal injection drugs for future use. However, the DEA in 2011 informed the state that they believed the drugs were improperly imported and threatened seizure of the drugs. Ultimately, the state turned the drugs over to the federal government, and no viable source for replacement has been found. The federal government is currently blocking the importation of any drug for use in lethal injection. Just yesterday, in *Cook v. FDA*, the U.S. Court of Appeals in Washington DC ruled that the FDA cannot allow lethal injection drugs to be imported from foreign manufacturers or pharmacies.

In addition to the drug shortage issue, the state must have someone qualified and willing to *administer* a lethal injection. Medical professionals have participated in the past so long as they could do so anonymously. Now, as an additional line of attack on the system, inmates have begun demanding the names and qualifications of those who set the IV lines and administer the drugs. It is much more difficult to find medical professionals willing to participate if they face lawsuits challenging their abilities, motives, qualifications and personal and professional backgrounds. Furthermore, some inmate lawsuits have contended that only a doctor can administer the lethal injection. Others insist a doctor must write a prescription for the drugs to be administered. Of course, these inmates know that the American Medical Association has taken the position that it is unethical for a physician to participate in the execution of an otherwise healthy human being. As states are beginning to realize, lethal injections are all but impossible to carry out as a result of the practical hurdles I have described, and I assure you that there are more that I have not mentioned for the sake of brevity.

Therefore, the discussion has evolved to include alternate methods of execution. Within the last three years, the state of Utah executed a man by firing squad. The attorney general of Missouri said earlier this month that Missouri might have no choice but to reopen their gas chamber if their efforts to carry out lethal injections continue to be halted by the courts. The Arkansas statute says that if the lethal injection method becomes unavailable or is invalidated, our fallback method of execution is the electric chair. (Ark Code. 5-4-617.) Of course we don't know for sure how the courts would view an execution by a firing squad or a gas chamber or electric chair, but I think I have a good guess. Although the specific factual issues in a challenge to execution by one of these alternative methods would be different, the legal issues regarding claims of cruelty and the possibility of undue pain or mistake would be exactly the same as the claims raised in the lethal injection suits.

I will do everything in my power until I leave office to address the death penalty's legal hurdles, but I cannot tell you how this chapter in our history will play out. I thank you for taking the time to discuss this important issue. As policy makers of the state and as my clients, I will be happy to take any questions. **End of Remarks**

Upon questioning by Senator Hutchinson regarding alternatives to lethal injection, General McDaniel stated he is unsure how the court would view an execution by other methods, but said he guesses the legal issues regarding claims of cruelty would be exactly the same as for lethal injection. He advised the committees to pressure the congressional delegation to change the law prohibiting the Federal Drug Administration from allowing states to import drugs used for lethal injection.

Ray Hobbs, Director, Arkansas Department of Correction, said he shares the sentiments of General McDaniel and stated the inability to carry out the death sentence is not exclusive to Arkansas. He said the state's supply of drugs used in lethal injection has expired. Within the next month, DOC staff will attend a national forum for states that have the death penalty to discuss how to move forward and carry out the death penalty as required by the recent court ruling.

Didi Sallings, Director, Arkansas Public Defender Commission, said the system is a nightmare for the families of both the victim and the defendant. A jury trial for a death penalty case will cost the commission \$80-\$150,000 (witnesses, trial prep, etc); a non death penalty capital case will cost \$20,000--this does not include lawyer's salaries, appeals, or post conviction trials. Ms. Sallings said she would strongly encourage the legislature not to go back to the electric chair as a means of execution—she cannot imagine a court saying it is constitutional and the state would be inviting additional litigation costs.

Senator Chesterfield requested a report indicating if the crime rate went up or down during the four years there was no capital punishment. Senator Hutchinson said he believes the Arkansas Sentencing Commission can provide that information.

Sam Kooistra, Executive Director, Arkansas Coalition to Abolish the Death Penalty, said it is clear the system is broken and needs to be fixed. As he sees it, there are three options for moving forward: keep lethal injection and hope you can make it work; switch methods for executions; or get rid of the death penalty. In his opinion, the only option is to repeal the death penalty. The death penalty costs more than any other sentence, including life in prison. Studies also show the death penalty does not deter crime. In 2009, a study at Duke University in North Carolina showed that if a state repealed capital punishment it would save \$11 million per year. Mr. Kooistra said the General Assembly cannot control these costs since most come from the federal appeals process. He asked the committees to think about repealing the death penalty the same as when making any other policy choice.

Herb Rule, Citizen, spoke in favor of replacing the death penalty. Mr. Rule stated that as legislator s in 1967, he and Cal Ledbetter introduced the first and only bill to repeal the death penalty and it died on the House floor with 19 votes. He said there has been a 75% decline in death penalty sentencing since 1990, with a 68% reversal rate on appeal. A poll conducted by Opinion Research Associates show 62% of Arkansans prefer life without parole with prisoner earnings (while in prison) going to the victim's family.

With no further business, the meeting adjourned at 3:30 p.m.