

IN THE SUPREME COURT OF ARKANSAS

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STATE OF ARKANSAS, *ex rel.*  
LESLIE RUTLEDGE, ATTORNEY GENERAL

STACEY PECTOR  
PETITIONER

v. Case No. CV-18-296

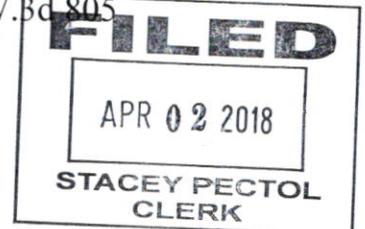
SCOTT ELLINGTON

RESPONDENT

EMERGENCY PETITION FOR WRIT OF MANDAMUS

Pursuant to Arkansas Supreme Court Rule 6-1(a)(1), the State of Arkansas hereby petitions for an emergency writ of mandamus ordering Scott Ellington, the Prosecuting Attorney for the Second Judicial District of Arkansas, to immediately nonsuit the claims that he purported to bring on the State's behalf in *State of Arkansas, ex rel. Scott Ellington, et al. v. Purdue Pharma, L.P., et al.*, Crittenden County Circuit Court, No. 18CV-18-268 ("Crittenden Litigation").

1. This case is about who represents the people and State of Arkansas. Our Constitution makes the Attorney General the State's "chief law officer" and entrusts her with responsibility for managing the State's civil legal affairs. *State ex rel. Williams v. Karston*, 208 Ark. 703, 708, 187 S.W.2d 327, 329 (1945); *see* Ark. Const. art. VI, sec. 22; *see also Holloway v. Ark. St. Bd. of Architects*, 79 Ark. App. 202, 214, 86 S.W.3d 391, 399-400 (2002) ("As a constitutional officer, the Attorney General has been entrusted with broad duties as the State's chief civil law officer and is expected to discharge these public duties to the best of his or her abilities."), *overruled in part on other grounds*, 325 Ark. 427, 101 S.W.3d 805



(2003). Foremost among those responsibilities is her exclusive duty to “be the attorney for all state officials, departments, institutions, and agencies” and “prosecute any suit brought on behalf of the state.” Ark. Code Ann. 25-16-702(a), (b)(2).

2. By vesting that authority exclusively in the Attorney General, the General Assembly sought to avoid intragovernmental conflict and to ensure that the State speaks with one voice. Indeed, the very fact that the State has been compelled to seek relief from this Court to resolve a wholly unnecessary conflict aptly illustrates the wisdom of that considered judgment.

3. Despite that clear judgment, on March 15, 2018, Ellington filed a civil lawsuit in the State’s name in Crittenden County Circuit Court. Add. 1-143. That lawsuit seeks millions of dollars in damages that the State has incurred as a result of the national opioid epidemic. But lacking the resources to successfully prosecute that action, Ellington associated with private, out-of-state attorneys who are not accountable to the Governor, the Attorney General, the General Assembly, or the people of Arkansas. Violating principles of good government and public policy, as a result of Ellington’s actions, those same private attorneys also stand to claim *significant* damages (in excess of the contingency fee caps set forth in Arkansas law) that would otherwise go to the State to address the opioid epidemic. Yet without this Court’s immediate intervention, the actions of those private attorneys and Ellington will decisively prejudice the State’s ability to pursue its own case against

opioid manufacturers. That case, filed in Pulaski County Circuit Court, is *State v. Purdue Pharma L.P., et al.*, No. 60CV-18-2018 (“State’s Opioid Litigation”).

4. While that alone justifies emergency relief, this Court’s intervention is also required because Ellington’s unlawful actions have impaired the State’s sovereignty and threaten to hamstring our statewide, constitutional officers’ ability to carry out the will of the people. Indeed, permitting a single prosecutor—who is accountable to only *some* Arkansans—to direct the entire State’s actions would set a dangerous precedent that is inconsistent with principles of representative government.

5. To end that harm, the State brings this emergency petition for a writ of mandamus ordering Ellington to immediately nonsuit the claims that he purported to bring on the State’s behalf in the Crittenden Litigation.

### **Background**

6. On January 24, 2018, the Attorney General publicly announced an investigation of the manufacturers of prescription opioids for suspected violations of Arkansas law, including among other things, the Medicaid Fraud False Claims Act, Ark. Code Ann. 20-77-901, *et seq.*, and the Deceptive Trade Practices Act, Ark. Code Ann. 4-88-101, *et seq.*, which she enforces.

7. Despite the Attorney General’s announced investigation, on March 15, 2018, Ellington filed the Crittenden Litigation as relator for the State. Add. 1-143. In that litigation, Ellington, several cities and counties, and their private, out-of-

state counsel alleged that manufacturers, distributors, and doctors have acted negligently, created a public nuisance, violated the Uniform Narcotic Drug Act, Ark. Code Ann. 20-64-201, *et seq.*, the Uniform Controlled Substances Act, Ark. Code Ann. 5-64-101, *et seq.*, and the Drug Dealer Liability Act, Ark. Code Ann. 16-124-101, *et seq.* Those claims differ significantly from—and in some cases conflict with—those made in the State’s Opioid Litigation. *See* Add. 282-333.

8. Late on March 15, 2018, Arkansas Municipal League’s General Counsel Mark Hayes notified the Attorney General’s staff that a consortium of private attorneys had filed the Crittenden Litigation. Add. 338. The next day, Hayes provided the Attorney General’s staff with a copy of the complaint, and at that point, the Attorney General’s staff became aware of Ellington’s participation in the Crittenden Litigation. *Id.* The Attorney General’s staff had no advance notice of Ellington’s intention and would have objected. Indeed, while the Attorney General and her staff had met with the Arkansas Municipal League and the Association of Arkansas Counties about their potentially bringing a lawsuit, there was *no* suggestion that Ellington might unlawfully file a lawsuit on the State’s behalf. *Id.*

9. Between March 16 and March 23, 2018, the Attorney General and her staff met with representatives of the Arkansas Municipal League and the Association of Arkansas Counties as well as their out-of-state counsel concerning the Crittenden Litigation. *Id.* During these meetings, the Attorney General’s Office sought

to determine how the State was joined in the Crittenden Litigation without notification, to discuss claims raised in that complaint that conflicted with the State's interest, and the risks (including, potential foreclosure of claims that only the Attorney General may assert and removal to federal court and transfer to a Multidistrict Litigation venue in Ohio) created by that litigation. *Id.* During those discussions, the Municipal League, the Association of Counties, and their out-of-state counsel asked the Attorney General to "lead" their lawsuit. But they made clear that while the Attorney General could play the role of a figurehead—leading the Crittenden Litigation—private, out-of-state counsel would control that litigation and determine what was best for the people of Arkansas. Add. 339. Nor would they agree to nonsuit the claims purportedly brought on the State's behalf. *Id.*

10. Following those discussions, Deputy Attorney General Charles Harder also spoke with Ellington on March 21, 26, and 27, 2018, to discuss his decision to unlawfully file a lawsuit on the State's behalf and how that might be rectified. *Id.* Ellington expressed concern about how his inclusion as the lead plaintiff in the Crittenden Litigation potentially compromised important State claims under the Medicaid Fraud False Claims Act and the Deceptive Trade Practices Act. *Id.* He acknowledged that his authority does not extend beyond the Second Judicial District and indicated a willingness to rectify the matter, but he did not specify how that could be accomplished without private, out-of-state counsel recruiting another

prosecuting attorney to take his place. *Id.* In response to a final request, Ellington failed to nonsuit the claims he unlawfully filed. *See* Add. 334.

### **Argument**

11. The purpose of a writ of mandamus is to enforce an established right or the performance of a duty. *Centerpoint Energy, Inc. v. Miller County Circuit Court*, 372 Ark. 343, 349, 276 S.W.3d 231, 236 (2008). Mandamus is issued to compel an official or judge to take some action. *Id.* To obtain a writ of mandamus, the petitioner must show: (1) a clear and certain right to the relief sought; and (2) the absence of any other adequate legal remedy. *Id.*

12. Here, the Attorney General has sole and exclusive authority to prosecute civil actions of the type that Ellington purported to bring on the State's behalf. But without an immediate writ from this Court, the State cannot timely prevent Ellington from wrongfully usurping the Attorney General's role and potentially forfeiting damages belonging to the State. Nor is there any other way for the State to put an immediate end to the irreparable harm currently being inflicted upon the State by having its name and sovereignty invoked in a case that it did not bring.

#### **I. Arkansas has a clear and certain right to the relief sought.**

13. The Attorney General derives her authority as the State's chief civil law officer from the Arkansas Constitution. *See* Ark. Const. art. VI, secs. 1, 3, 4, 22. In particular, our Constitution provides that the "Attorney General shall perform such

duties as may be prescribed by law.” Ark. Const. art. VI, sec. 22.

14. Principal among those duties, the General Assembly has determined that, “[t]he Attorney General *shall be* the attorney for *all* state officials, departments, institutions, and agencies.” Ark. Code Ann. 25-16-702(a) (emphasis added); *see also* Ark. Code Ann. 25-16-703 (“The Attorney General shall maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts and shall be the legal representative . . . in all litigation where the interests of the state are involved.”); Ark. Code Ann. 25-16-704 (“The Attorney General . . . shall maintain and defend the interests of the state in all matters before [this] tribunal.”). Hence, “[w]henver any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention” and that legal work shall be provided by the “Attorney General and his or her assistants.” Ark. Code Ann. 25-16-702(a)-(b)(1); *see also Holloway*, 352 Ark. at 442, 101 S.W.3d at 815-16 (the Attorney General is statutorily obligated to represent agencies in need of legal assistance).

15. The only exception to that rule is where the Attorney General believes it is “necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit . . . .” Ark. Code Ann. 25-16-702(b)(2); *see also id.* at 25-16-714 (contingency fee arrangements). To ensure that no one usurps the Attorney General’s role and attempts to “prosecute any suit brought on behalf of the state,”

Arkansas Code provides that “any person violating” those provisions “shall be subject to” criminal penalties and “upon proper proceedings, removed from office.”

Ark. Code Ann. 25-16-702(b)(2), (d).

16. Read as a whole, those provisions clearly and unambiguously vest the Attorney General with the sole and exclusive authority to institute civil suits like the one purportedly brought by Ellington on the State’s behalf. To start, by reciting the various organs of state government and providing that the Attorney General “shall be” their attorney, the statutory scheme unambiguously vests the Attorney General with the sole authority to represent the State in general civil actions. Indeed, having listed all those organs, it would have been duplicative to also command that the Attorney General shall represent the State itself.

17. But even if there were some uncertainty in Section 25-16-702(a) about whether the General Assembly also meant to include the State, Section 25-16-702(b)(2) makes unmistakably clear that the employment of an attorney outside of the Attorney General’s Office to “prosecute any suit on behalf of the *state*” is prohibited without express authorization from the Attorney General. Ark. Code Ann. 25-16-702(b)(2) (emphasis added).

18. That straightforward statutory reading also comports with the well-established common law principles against which the statutory language must be interpreted. *See Karston*, 208 Ark. at 707-708, 187 S.W.2d at 329. Under those

default common law rules, “[t]he attorney general is the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest” with the only exceptions being where “the constitution or a constitutional statute may provide otherwise.” 7 Am. Jur. 2d 1; *accord* 7A C.J.S. 47 (“The authority of the state attorney general pursuant to constitutional and statutory provisions to represent the state government in civil actions or proceedings is, generally, exclusive, whether pursuant to state constitutional provisions or statutes, subject to waiver by the attorney general. . . .”). Thus, as this Court long ago recognized in applying those principles, the Attorney General is empowered to “control and manage all litigation in behalf of the state” and enjoys the “unquestioned right” to “institute proceedings to restrain acts which are injurious to public health, safety, or morals.” *Karston*, 208 Ark. at 708, 187 S.W.2d at 329. And it is hard to square that extraordinarily broad authority with the notion that others likewise enjoy the authority to prosecute (and thereby control and manage) general civil actions on the State’s behalf.

19. Applying those principles and the plain statutory language, it is unambiguously clear that Ellington (and the private counsel he has associated with) lacks the authority to bring the Crittenden Litigation on the State’s behalf and the State is entitled to an order directing him to dismiss those claims. Indeed, as set forth above, Ellington could only bring such an action if he first obtained permission

from the Attorney General “to prosecute any suit brought on behalf of the state.” Ark. Code Ann. 25-16-702(b)(2). He never sought (or obtained) that permission.

20. To justify his extraordinary action, in the Crittenden Litigation’s complaint, Ellington purported to rely on a statute providing that, “[a]ll actions in favor of and in which the state is interested shall be brought in the name of the state and shall be prosecuted by the prosecuting attorney.” Ark. Code Ann. 16-106-101.

But contrary to Ellington’s suggestion, that section does not authorize him to bring general civil actions on the State’s behalf. Rather, nearly 150 years of Arkansas practice establishes that provision is merely designed to allow the State to be named as a party in *criminal* and *quasi-criminal* proceedings in which prosecuting attorneys have specific authority to act. *See, e.g.*, Ark. Code Ann. 5-64-505 (describing property subject to civil forfeiture); Ark. Code Ann. 16-21-103 (setting forth the prosecuting attorney’s duty to commence and prosecute criminal actions).

21. Ellington’s much broader reading of that provision would also shockingly suggest that *only* prosecuting attorneys could institute civil actions on the State’s behalf. But it is not at all clear how such a broad reading of a single statute—never before suggested—could be squared with common law principles or the elaborate statutory scheme governing the Attorney General’s duties. And rather than focus on a single phrase in isolation, as Ellington apparently has, this Court must view the various statutes governing State actions “as a single system[.]” and give “effect

to the general purpose of the [statutory] system.” *Arkansas County v. Desha County*, 342 Ark. 135, 141, 27 S.W.3d 379, 383 (2000); *cf. Henderson v. Russell*, 267 Ark. 140, 144-45, 589 S.W.2d 565, 568 (1979) (language is not read in isolation).

22. Applying that standard, Ark. Code Ann. 16-106-101 must be read consistently with the provisions set forth above providing that the Attorney General shall be the attorney for all state organs and the requirement that anyone else wishing “to prosecute any suit brought on behalf of the state” shall first obtain the Attorney General’s permission. Ark. Code Ann. 25-16-702(a), (b)(1). And the only way to do that is to read Ark. Code Ann. 16-106-101 as it was clearly intended—to grant prosecuting attorneys the authority to name the State in criminal and quasi-criminal actions when carrying out their specifically-enumerated duties. *See* Ark. Code Ann. 16-21-101 *et seq.* (powers of prosecutors).

23. Likewise, only that reading is consistent with good public policy and commonsense. *See Clark v. Johnson Regional Med. Cntr.*, 2010 Ark. 115, \*8, 362 S.W.3d 311, 316 (this Court will not “engage in statutory interpretations that defy common sense and produce absurd results”); *State v. Owens*, 370 Ark. 421, 426, 260 S.W.3d 288, 292 (2007) (similar). In fact, if the State’s twenty-two prosecutors are all entitled to bring civil actions on the State’s behalf, there is a distinct possibility that the State will end up pulled in different directions, routinely take inconsistent and competing positions, and be—as is likely here if Ellington’s suit

continues—foreclosed from bringing better claims as a result of decisions undertaken by individual prosecutors. It would also create an incentive for local prosecutors to bring civil claims in the name of the State and settle those claims in a manner that benefits *their* constituents and not the people of Arkansas as a whole.

24. Further, as this case illustrates, embracing Ellington’s view would mean that prosecuting attorneys could file claims on the State’s behalf and then associate with outside attorneys who—because they do not work for the Attorney General—are not subject to the contingency fee caps established by the General Assembly. *See* Ark. Code Ann. 25-16-714 (caps applicable to fee arrangements with Attorney General). And permitting prosecuting attorneys to work with outside counsel that is not subject to those strict caps manifestly violates law and public policy.

25. Therefore, the State is entitled to the relief it seeks commanding Ellington to dismiss the lawsuit that he purportedly brought on the State’s behalf.

## **II. The State has no other adequate legal remedy.**

26. Mandamus is properly ordered when there is an established right, and the law does not have a specific remedy with which to enforce that right. *City of W. Memphis v. City of Marion*, 332 Ark. 421, 426, 965 S.W.2d 776, 779 (1998). A writ of mandamus is not available if an appeal is an adequate remedy. Ark. R. Sup. Ct. 6-1(a). There is no adequate remedy here, outside of an extraordinary writ, to rectify Ellington’s unauthorized representation of the State.

27. An appeal is not an adequate remedy because the Attorney General does not represent the State in the Crittenden Litigation and entering an appearance in that litigation would jeopardize the State's ability to pursue its own lawsuit. Moreover, since the State is not a party to Ellington's lawsuit, the State does not have any right to appeal any judgment or decision in that lawsuit.

28. In any event, the State cannot wait until that lawsuit has concluded to take action because the complaint creates ambiguity regarding which of the State's damages can be recovered and by which public official. Waiting until an appeal could be heard in the Crittenden Litigation could likewise subject the majority of the State's remaining claims to the applicable statute of limitations.

29. Furthermore, as described *infra*, the complaint does not and cannot legally address the majority of the State's damages associated with the opioid epidemic. If Ellington continues to purport to act on behalf of the State, the State's damages could be resolved for far less than the Attorney General could seek and any resolution would be negotiated by counsel that is not accountable to the Governor, Attorney General, General Assembly, or people of Arkansas.

### **III. Emergency relief is required.**

30. This dispute is not academic. Certain causes of actions that can be asserted against opioid manufacturers—indeed, some of the most viable—are available *only* to the Attorney General and have not been asserted in the Crittenden Litigation.

For instance, the Attorney General—and only the Attorney General—is statutorily authorized to seek civil penalties and various other types of relief for the State under the Deceptive Trade Practices Act pursuant to relaxed standards inapplicable to other litigants. Ark. Code Ann. 4-88-113. Similarly, the Medicaid Fraud False Claims Act is another crucial cause of action that provides exclusive authority to the Attorney General to pursue civil penalties and other relief for commission of Medicaid fraud against the State. *See* Ark. Code Ann. 20-77-902.

31. Given those limitations, if Ellington is permitted to proceed, the State and its citizens face the distinct possibility of being foreclosed from bringing those claims and being substantially prejudiced in its recovery. In fact, even though the Attorney General has now filed a separate action in Pulaski County Circuit Court, the potential preclusive effect of legal determinations made in the Crittenden Litigation could result in the loss of *millions* of dollars in damages that would otherwise have been awarded to the people of Arkansas.

32. Time is also of the essence in this matter. Defendants named in the Crittenden Litigation have a practice of removing opioid-related litigation to federal court at every opportunity, including where, as here, a state has been improperly named as a plaintiff. *See People of the State of Illinois, et al. v. Purdue Pharma L.P., et al.*, No. 17-cv-616 (S.D. Ill.), Dkt. No. 1. Removal of the complaint—which must occur within thirty days of its filing—will likely result in its inclusion

in the multidistrict litigation pending in Cleveland, Ohio where opioid-related lawsuits have been consolidated. There, a moratorium on all substantive filings has issued, and once removed, the State's ability to obtain dismissal of the claims Ellington purported to bring on the State's behalf will be greatly diminished, if not nonexistent. And because the relief sought in this petition is of statewide importance and a significant question of Arkansas law, it is far more appropriate for these issues to be decided by this Court.

33. Moreover, the State's sovereign interests are implicated with every passing moment by the filing of a complaint in the State's name without the permission of the State's exclusive legal representative in such matters.

34. Further, while—as described above—the State attempted to convince Ellington to remedy the situation himself and avoid the need for this Court's intervention, Ellington has refused to acquiesce to that request.

35. Given the State's extremely urgent need for relief, the State requests that this Court require Ellington to respond to this petition within three days.

### **Conclusion**

WHEREFORE, Petitioner State of Arkansas prays that its petition be granted; that Respondent Scott Ellington be required to respond within three days; and for all other just and appropriate relief to which it may be entitled.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Nicholas J. Bronni, certify that I have served the foregoing via electronic mail, on the 2nd day of April, 2018, addressed to:

Mr. Scott Ellington  
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/s/ Nicholas J. Bronni  
Nicholas J. Bronni

Case Name: State of Arkansas v. Ellington  
Docket Number: CV-18-268  
Title of Document: Emergency Petition for Writ of Mandamus

**CERTIFICATE OF COMPLIANCE AND IDENTIFICATION OF PAPER DOCUMENTS NOT IN PDF FORMAT**

**Certification: I hereby certify that:**

I have submitted and served on opposing counsel (except for incarcerated pro se litigants) an unredacted and, if required, a redacted PDF document that complies with the Rules of the Supreme Court and Court of Appeals. The PDF document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

**Identification of paper documents not in PDF format:**

The following original paper documents are not in PDF format and are not included in the PDF document(s): None.

/s/ Nicholas J. Bronni  
(Signature of filing party)

Nicholas J. Bronni  
(Printed name)

Arkansas Attorney General's Office  
(Firm)

April 2, 2018  
(Date)