

CV-18-296

IN THE ARKANSAS SUPREME COURT

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

PETITIONER

v. No. CV 18-296

STATE OF ARKANSAS *ex rel.* SCOTT ELLINGTON,
SECOND JUDICIAL CIRCUIT PROSECUTING
ATTORNEY

RESPONDENT

RESPONSE TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

Scott Ellington, appearing below and before this Court as counsel for the State of Arkansas *ex rel.* Scott Ellington, Second Judicial Circuit Prosecuting Attorney (Respondent), offers the following response to the “Emergency Petition for Writ of Mandamus” filed by “State of Arkansas *ex rel.* Leslie Rutledge, Attorney General” (Petitioner).

INTRODUCTION AND BACKGROUND

1. In response to Arkansas’ opioid epidemic, counsel for the Arkansas counties and cities invited Respondent in early March to join litigation against the opioid industry. Respondent reviewed a draft complaint that was substantively

identical to the complaint originally filed on March 15. Respondent concluded—as did nearly every Arkansas county and city—that the strategy of uniting Arkansas governments in litigation against the opioid industry is wise and benefits the counties, cities, and most importantly to Respondent, the State. Respondent understood that Arkansas Attorney General Leslie Rutledge declined numerous invitations to join the cities and counties in a unified front, instead electing to abandon them and proceed on her own volition, as is now confirmed by the instant Petition. Respondent decided to fulfill his duty as a duly-elected Arkansas prosecutor to advocate on behalf of the State in court and does not regret his decision.

2. Contrary to the allegations in the Petition (*see* Petition, at ¶ 3), Respondent has not associated with or otherwise retained *any* private attorneys—out-of-state or otherwise. There is no fee agreement or financial arrangement with any outside counsel, and no private attorneys or any other party control Respondent’s actions. A simple and cursory review of the complaint shows that Respondent stands alone. Respondent has made this clear to Petitioner on multiple occasions and is surprised by Petitioner’s contentions. While Petitioner cites the Affidavit of Charles Harder to support these contentions, the affidavit contains *no such support*. (*Compare* Petition, at ¶¶ 3 *with* Harder Affidavit, at ¶¶ 1-8). Respondent therefore moves to strike these statements as both false and unsupported by any evidence.

3. Petitioner has been aware of Respondent’s joinder with the counties and cities for over two weeks. As such, the timing of the Petition and its designation as “emergency” is puzzling.

4. Petitioner argues that she holds the “exclusive” power to sue on behalf of the State of Arkansas and that its prosecuting attorneys have no such statutory authority. Because she cannot support this with statutory text or case law, Petitioner resorts to her own opinion of “good public policy.” Not only is this the province of the Arkansas Legislature, it is not free of irony. As Petitioner is surely aware, her own private, out-of-state attorneys filed one of the first opioid cases on behalf of the State of California *through the Orange County District Attorney*. (See ¶ 24, *infra*).

5. The Petition should be denied both because it fails to meet each element required for writ of mandamus and fails on its merits.

ARGUMENT

A. Petitioner has failed to satisfy all three necessary elements for issue of a writ of mandamus.

6. The purpose of a writ of mandamus is to enforce an established right or performance of a duty. *Parker v. Crow*, 2010 Ark. 371, at 5-6, 368 S.W.3d 902 (citing *Lackey v. Bramblett*, 355 Ark. 414, 421, 139 S.W.3d 467 (2003)). This Court “has often held that mandamus is an appropriate remedy when a public officer is called upon to do a plain and specific duty, which is required by law and which requires no exercise of discretion or official judgment.” *Id.* at 6. A writ of mandamus

is appropriate only when three factors are established: (1) the duty to be compelled is ministerial and not discretionary; (2) the petitioner has shown a clear and certain right to the relief sought; and (3) the absence of any other adequate remedy. *Id.* The Petition in this case fails to meet *all three necessary elements*.

7. First, the Petition should be denied because only the Circuit Court has original and exclusive jurisdiction. Jurisdiction to issue writs of mandamus against other officials—in contrast to jurisdiction to issue writs against inferior courts—rests originally and exclusively with circuit courts. *See* Ark. Code Ann. § 16-115-102 (“The circuit court shall have power to hear and determine petitions for the writ of mandamus and writ of prohibition and to issue such writ of mandamus and writ of prohibition to all inferior courts, tribunals, and officers in its respective jurisdiction.”); *see also Spatz v. City of Conway*, 362 Ark. 588, 210 S.W.3d 69 (2005) (circuit court had original jurisdiction over petition for writ of mandamus ordering city to set date of election); *Stilley v. Makris*, 343 Ark. 673, 38 S.W.3d 889 (2001) (circuit court had original jurisdiction over pre-election challenge to the validity of initiative petition); *Nethercutt v. Pulaski County Special Sch. Dist.*, 248 Ark. 143, 450 S.W.2d 777 (1970) (jurisdiction of writs of mandamus is restricted to and vested solely in circuit courts).

8. To be sure, this Court exercises superintending control over all the courts of Arkansas. Ark. Const. amend. 80, § 4. Superintending jurisdiction is an

extraordinary power hampered by no specific rules or means. *Foster v. Hill*, 372 Ark. 263, 268, 275 S.W.3d 151 (2008). This Court may “invent, frame, and formulate new and additional means, writs, and processes[,]” and the Court is bound only by the exigencies that call for the exercise of superintending control. *Id.* But here, there is no control for this Court to exercise over the Circuit Court of Crittenden County—superintending or otherwise; neither the Circuit Court of Crittenden County nor Petitioner has acted in Respondent’s case at all.

9. The Court should also deny the Petition because the Circuit Court has not acted or failed to act. Indeed, the Petitioner made no effort to appear in the case or obtain a ruling on the issue presented to this Court, and in no sense has Petitioner been “compelled to seek relief from this Court.” (Petition, at ¶ 2). Under such circumstances, this Court has made clear that a writ of mandamus will not lie. *See, e.g., Parker v. Crowe*, 2010 Ark. 371, *7, 368 S.W.3d 902 (“A writ of mandamus is not the appropriate remedy in this case because petitioners . . . are not alleging that the judge failed to perform an official duty that is ministerial in nature.”); *State v. Nelson*, 246 Ark. 210, 215, 438 S.W.2d 33 (1969) (“The primary function of the writ of mandamus is to require an inferior court or tribunal to act when it has improperly failed or declined to do so.”) (citing *Hammond v. Kibby*, 233 Ark. 560, 345 S.W.2d 910 (1961); *Satterfield v. Fewell*, 246 Ark. 210, 215, 149 S.W.2d 949 (1941); *Thompson v. Foote*, 199 Ark. 474, 134 S.W.2d 11 (1939)).

10. This Court should likewise deny the Petition because Petitioner has an available remedy—namely, bringing the Petition *properly* before the Circuit Court of Crittenden County.

11. Finally, this Court should deny the Petition because the remedy sought—*nonsuit*—is inherently discretionary. This Court has explained that nonsuit of a plaintiff’s claims or case is discretionary because Ark. R. Civ. P. 41(a) grants a plaintiff “an absolute right to such a nonsuit.” *Whetstone v. Chadduck*, 316 Ark. 330, 331, 871 S.W.2d 583, 584 (1994) (citing *Jenkins v. Goldsby*, 307 Ark. 558, 822 S.W.2d 842 (1992)). An action that constitutes an “absolute right” of a party below is plainly discretionary, not ministerial.

B. Petitioner has no clear legal right to Respondent nonsuiting his claims against the opioid industry in the name of the State.

12. The gist of the Petitioner’s argument is twofold: first, that the office of the Attorney General has the “sole and exclusive” authority to bring what Petitioner calls “general civil actions”—a term never used by Arkansas statutory or decisional law—and second, that prosecuting attorneys’ authority to bring suit in the name of the state under Ark. Code Ann. § 16-106-101 is limited to criminal and “quasi-criminal” actions. (*See* Petition, at ¶ 20). Neither argument finds any support in Arkansas statutes or case law.

13. Petitioner relies primarily on statutory grants of authority in Ark. Code Ann. §§ 25-16-702 through -704, which when “[r]ead as a whole,” she contends

demonstrate her “exclusive” authority to bring all “general civil actions” on behalf of the State. (Petition, at ¶ 16). Petitioner’s argument is not only unsupported by the statutory text, it also directly conflicts with it. Petitioner cannot expand her authority beyond the grant provided by the Arkansas Constitution and established “by law.” *See* Ark. Const. art. VI, sec. 22.

14. To begin, § 25-16-702(a) states that Petitioner “shall be the attorney for all state *officials, departments, institutions, and agencies.*” (emphasis added). By its unambiguous terms, subsection (a) limits Petitioner’s representation to *arms* of state government or *individual officials*—or as Petitioner herself recognizes, “*various organs* of state government.” (Petition, at ¶ 16) (emphasis added). Thus, as Petitioner also acknowledges, § 25-16-702(a) obligates her “to represent *agencies* in need of legal assistance.” (*Id.* at ¶ 14) (emphasis added) (citing *Holloway v. Ark. St. Bd. Of Architects*, 352 Ark. 427, 442, 101 S.W.3d 805 (2002)). This obligation does not trigger until an agency “needs” representation and certifies the matter to her attention. *See* Ark. Code Ann. § 25-16-702(a); *see also* *Parker v. Murry*, 221 Ark. 554, 558-60, 254 S.W.2d 468 (1953) (holding that Attorney General may only represent state agency when the agency “‘needs’ the services of counsel and this ‘need’ is certified to the Attorney General”). By its unambiguous terms, § 25-16-702(a) is limited to the Attorney General’s statutory duty to represent state *officials* and *agencies*—and even then, only if needed. In no way, either express or implied,

does § 25-16-702(a) empower Petitioner to prosecute “general civil actions” in the name of the State—exclusive or otherwise.

15. Petitioner also relies on *selections* from Ark. Code Ann. § 25-16-703. (Petition, at ¶ 14). Again, this Court need only observe the statutory text to see Petitioner’s overreach. Not only does § 25-16-703 *not* grant Petitioner the authority she claims, it also demonstrates her *across the board* incorrect interpretation of her statutory authority. Section 25-16-703(a) states in total:

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 of all state *officers, boards, and commissions* in *all litigation* where the interests of the state are involved.

(emphasis added). Section 25-16-703(a) thus grants Petitioner authority: (1) to represent the interests of the State in all matters *in federal court*; and (2) consistent with § 25-16-702(a), to represent state *officials* in all litigation implicating the interests of the State, regardless of forum. Again, the unambiguous text does *not* grant the Attorney General *carte blanche* authority to represent the interests of the State. In fact, to the extent the Legislature granted such authority, it expressly limited it to *federal court*. See Ark. Code Ann. § 25-16-703(a). Petitioner’s selective editing of § 25-16-703(a), (*see* Petition, at ¶¶ 14), does not hide or change its true substance.

16. Nor does § 25-16-704 support Petitioner’s claims. By its express terms, § 25-16-704 speaks only to the Attorney General’s duty to represent the interests of

the State before this Court. It is well-settled that this provision requires the Attorney General to prosecute and defend appeals for the State before this Court. *See, e.g., Kiesling-Daugherty v. State*, 2013 WL 3322335, at *3-4 (Ark. June 27, 2013) (citing Ark. Code Ann. § 25-16-704(a); *Ashcraft v. State*, 144 Ark. 361, 363, 222 S.W. 367 (1919); *Silverburg v. State*, 30 Ark. 39, 40 (1875)).

17. By their plain language, neither § 25-16-702, nor -703, nor -704 grant Petitioner the exclusive authority to prosecute all “general civil actions” on behalf of the State. These statutes are specific and unambiguous delegations of authority, each constrained by express limitations that the Legislature deemed fitting. The Attorney General cannot unilaterally expand their meaning and breadth with the illogical argument that they grant more power when “[r]ead as a whole” than they do by their actual text. If the Legislature intended to grant the Attorney General the unbridled authority Petitioner advocates, it raises the question as to why it placed such limiting parameters within §§ 25-16-702, -703, and -704. *See, e.g., Bolin v. State*, 2015 Ark. 149, at *5, 459 S.W.3d 788 (“Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used, and we construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language.”)

18. Rather than address these clear limitations on her statutory authority, Petitioner seeks to circumvent them through an unrelated provision permitting her

to hire outside counsel. The provision, Ark. Code Ann. § 25-16-702(b)(2), states in pertinent part:

If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel.

Petitioner argues that § 25-16-702(b)(2) is somehow an “exception” to her “exclusive authority” and requires her permission to sue on behalf of the State. (Petition, at ¶¶ 15-17). But by its terms, § 25-16-702(b)(2) simply allows an Attorney General to employ special counsel to assist him or her in prosecuting a suit on behalf of the State, or in defending an official, with the Governor’s permission. Clearly, the reference to “any suit brought on behalf of the State” must be read in context of Petitioner’s statutory authority to bring such suits, as the Legislature specifically delegated *and limited* in §§ 25-16-702(a), -703, and -704. But rather than reading § 25-16-702(b)(2) in the context of these statutory parameters, Petitioner does the inverse; *i.e.*, she uses “any suit brought on behalf of the State” to expand her authority otherwise limited by §§ 25-16-702(a), -703, and -704. This argument is textbook statutory *misconstruction*. It is axiomatic that the “cardinal rule” of statutory construction is “to give full effect to the will of the legislature.” *Bolin*, 2015 Ark. 149, at *7 (citation omitted). Permitting Petitioner to obliterate the limitations imposed by §§ 25-16-702(a), -703, and -704 with a cherry-picked and out-of-context

selection from § 25-16-702(b)(2) would not only defy its common sense reading, but also would thwart the will of the Legislature and the purposeful limitations it placed on the Attorney General's authority.¹

19. By contrast, the statute empowering the Respondent has no such textual limitation. It plainly states, “*All 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 (emphasis added). Thus, this Court has recognized that “[p]rosecuting attorneys are authorized to bring actions in which the State is interested in the State’s name and behalf” *State v. Hammame*, 102 Ark. App. 87, 90, 282 S.W.3d 278 (2008); *see also Scrivner v. Portis Mercantile Co.*, 220 Ark. 814, 816, 250 S.W.2d 119 (1952) (prosecuting attorney has “authority to represent the State in civil actions”).

20. Unable to cite *any* authority restraining or otherwise limiting this statutory grant to criminal or “quasi-criminal” actions, Petitioner simply declares it so by *ipse dixit*. But if, as Petitioner claims, “nearly 150 years of Arkansas practice” demonstrates that § 16-106-101 “merely” allows the State to be named in “*criminal* and *quasi-criminal* proceedings,” Respondent would expect Petitioner to cite at least

¹ Regardless, as noted above, Respondent has *not* retained special counsel to sue on behalf of the State.

a single bit of authority—be it case, statute, or otherwise—supporting her proposition. Because she cannot, Petitioner simply cites to Ark. Code Ann. §§ 5-64-505 and 16-21-103—only two of *many* statutes empowering prosecuting attorneys to act on behalf of the State, many of which also pertain to *civil* claims that *cannot* be construed as “quasi-criminal.” *See, e.g.*, Ark. Code Ann. §§ 16-105-205 (permitting Attorney General *and* prosecuting attorneys to sue on behalf of State to abate specific nuisances); 16-105-403 (same); 5-64-804 (prosecuting attorney may sue in name of state to abate public nuisance); *see also id.* §§ 7-4-106 (prosecuting attorney shall give county board of election commissioners legal advice on civil litigation and defend civil lawsuits against county board or members); 16-21-1107 (prosecuting attorney may hire civil litigation lawyer); 16-21-114 (prosecuting attorney represents counties in all civil litigation concerning counties that have not hired county attorneys). None of those statutes contemplate penalties, fines, or imprisonment that would render them “quasi-criminal.”¹ *See id.* at §§ 16-105-205; 16-105-304; 5-64-804.

¹ While statutes allowing nuisance actions permit “quasi-criminal” penalties for *violating an injunction on a nuisance*—which is contempt of court—, they do *not* provide for penalties for simply maintaining a nuisance. *See id.* at §§ 16-105-203; 16-105-302; 5-64-803.

21. Petitioner thus cites two statutes that she contends supports her argument, but ignores every statute that refutes it. Her position on § 16-106-101 remains arbitrary, unsupported by any authority whatsoever, and should be rejected outright.

22. Regardless, many of the State’s claims in the Crittenden County Circuit Court seek exemplary damages founded on criminal acts. (*See* First Amended Complaint, ¶¶ 419-491); *see also* Ark. Code Ann. §§ 16-124-101, *et seq.* (Drug Dealer Liability Act); 16-118-107 (Civil Action by Crime Victim). Therefore, even if Petitioner’s interpretation of Respondent’s statutory authority is correct—and it is not—, Respondent is fulfilling his responsibilities by seeking to punish and deter criminal acts perpetrated against the State and its citizens.

23. Without legal authority to support her position, Petitioner simply contends that it is “consistent with good public policy and commonsense” that *only* she be able to bring civil litigation on behalf of the State. (Petition, at ¶ 23). While Petitioner have an opinion on what constitutes “good public policy,” such determinations rightfully remain within the province of the Arkansas Legislature. *See, e.g., State v. Hurlock*, 185 Ark. 807, 49 S.W.2d 611, 612 (**“As to whether a law is good or bad law, wise or unwise, is a question for the Legislature and not for the courts.”**) (emphasis added) (citation omitted).

24. In any event, Arkansas is not alone in permitting prosecuting attorneys to sue on behalf of the State. In fact, a California district attorney filed one of the first governmental opioid cases in the name of the State of California in 2014. *See California v. Purdue Pharma L.P., et al.*, No. 30-2014-00725287-CU-BT-CXC (Cal. Super. Ct. 2014); *see also California v. Purdue Pharma L.P.*, 2014 WL 6065907 (C.D. Cal. Nov. 12, 2014) (remanding to state court). Petitioner should be aware of this, as she has retained the *same private, out-of-state attorneys representing the State of California through the Orange County District Attorney* in that case. *See id.*

25. Respondent recognizes that the Attorney General may have common law authority to represent the State in civil litigation, as this Court held in *State ex rel. Williams v. Karston*, 187 S.W.2d 327, 328-29 (Ark. 1945). *But see Newton County v. West*, 739 S.W.2d 141, 143 (Ark. 1987) (citing *Parker v. Murry*, 254 S.W.2d 468 (Ark. 1953)) (“[T]he office of the Attorney General is a constitutional one, but [his or her] duties are statutory.”). Even so, Petitioner’s common law authority does not displace Respondent’s concurrent power delegated by statute. *See, e.g., Morley v. Berg*, 226 S.W.2d 559, 560-62 (Ark. 1950) (Attorney General’s common law authority was *concurrent* with, and did *not* displace, Revenue Commissioner’s statutory authority to sue regarding state permits and leases for removal of sand and gravel from rivers).

C. Petitioner is not prejudiced by Respondent's joinder with the counties and cities.

26. The Crittenden County action does not threaten any rights of the State to assert civil penalties under claims delegated to the Attorney General, such as recovering for violations of the Arkansas Medicaid Fraud False Claims Act, Ark. Code Ann. §§ 20-77-901, *et seq.*, or Deceptive Trade Practices Act, *id.* at §§ 4-88-101, *et seq.* The counties', cities', and State's claims in the Crittenden County suit do not involve issues related to the sale and purchase of opioids by local governments, either directly or through a Medicaid reimbursement program, which prevents them from asserting or seeking any remedy pursuant under these Acts. Accordingly, the State is free to pursue those claims separately. *See Restatement (Second) of Judgments* § 26(c)-(d).

WHEREFORE, Respondent Scott Ellington, appearing below and here as counsel for the State of Arkansas *ex rel.* Scott Ellington, Second Judicial Circuit Prosecuting Attorney, prays that the Emergency Petition for a Writ of Mandamus is denied, and for all other just and appropriate relief.

Respectfully submitted,

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Respondent

CERTIFICATE OF SERVICE

I, Scott Ellington, do hereby certify that on this 4th day of April, 2018, I filed the foregoing document with the Clerk of the Supreme Court, and I served a copy on the following via email:

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/s/ Scott Ellington

Certificate of Compliance

Case Name: *State v. Ellington*
Docket Number: Arkansas Supreme Court No. CV-18-268
Title of Document: Response to Emergency Petition for Writ of Mandamus

I hereby certify that:

I have submitted and served on opposing counsel an unredacted PDF document that complies with the Rules of the Supreme Court and Court of Appeals. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the Court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free from 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: None.

/s/ Scott Ellington
(Signature of filing party)

Scott Ellington
(Printed name)

Second Judicial District Prosecuting Attorney
(Firm)

April 4, 2018
(Date)