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SUPREME COURT OF ARIZONA

KRISTIN K. MAYES, ARIZONA ATTORNEY GENERAL, Petitioner, v. RACHEL H. MITCHELL, MARICOPA COUNTY ATTORNEY, Respondent, AARON BRIAN GUNCHES, Real Party in Interest.	Arizona Supreme Court No. CV-24-0127-SA **BRIEF OF AMICI CURIAE FORMER ATTORNEY GENERAL TERRY GODDARD, FORMER MARICOPA COUNTY ATTORNEY RICK ROMLEY, AND FORMER PIMA COUNTY ATTORNEY BARBARA LAWALL** Filed with the parties' consent in accordance with ARCAP 16(b)(1)(A)

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INTEREST OF *AMICI CURIAE*

This brief is filed *pro bono* on behalf of former Attorney General Terry Goddard, former Maricopa County Attorney Rick Romley, and former Pima County Attorney Barbara LaWall. This brief is submitted in support of the Attorney General's position that she is vested with the exclusive authority to seek execution warrants.

As former elected officials who ran three separate state prosecutor's offices for nearly 50 years combined, *amici* are uniquely situated to share their respective experiences about this issue. In addition, they want to express their concerns about the negative consequences that would result if the law and practice changed such that each county attorney had authority to bind the state in *any* proceeding.

INTRODUCTION

The authority to seek execution warrants rests exclusively with the Attorney General. County attorneys historically have not played a role in this process. For good reason. The law is clear that the power to seek such a warrant resides with the Attorney General.

The Maricopa County Attorney proffers a novel argument that would vest her office with sweeping authority. Distilled, the Maricopa County Attorney believes that just because her office represents the State in *some* proceedings, it therefore has the authority to represent the State in *any* proceeding it chooses. To support this

argument, she proffers that every time "the State" is referenced in the Arizona Rules of Criminal Procedure ("Rules"), it "unequivocally includes *all* prosecuting agencies and prosecutors." Respondent's Supplemental Brief ("MCA's Supp. Brief") at 7 (citations omitted) (emphasis in original). The Maricopa County Attorney then cites over two dozen Rules and concludes that whenever "the State" is referenced in the Rules that it refers to "*all* prosecutors in *all* prosecutions." MCA's Supp. Brief at 9 (emphasis in original). In the Maricopa County Attorney's view, the same conclusion applies to all statutory references to "the State," which means "trial prosecutors are equally entitled to seek execution warrants as they are to conduct capital trial and sentencing proceedings." MCA's Supp. Brief at 12. Not so. For at least three reasons, the Court should reject the invitation for a sweeping change to the law.

First, the statutory framework establishes clear lanes of authority both for the Attorney General and county attorneys. The Attorney General is Arizona's "chief legal officer" who "shall . . . [p]rosecute and defend in the supreme court all proceedings in which this state . . . is a party." A.R.S. §§ 41-192(A) & 193(A)(1). The fifteen county attorneys, on the other hand, were given powers to represent the State and "conduct all prosecutions for public offenses," but only within their respective counties. A.R.S. § 11-532(A)(1). *Amici* never understood this authority to extend to seeking execution warrants.

Second, in their combined 48 years of service as county attorneys or the Attorney General, *amici* cannot recall a single instance when a county attorney sought an execution warrant on the State's behalf. This should not be a surprise. The Attorney General is the only state office that has a dedicated section devoted to managing the myriad of death penalty appellate issues. In addition, the Legislature provides the Attorney General with specific funding to handle these matters. That office is therefore equipped to handle the complex issues that arise with death penalty litigation. In short, the Attorney General is specifically empowered to represent the State in this area.

Third, permitting *any* prosecutor to speak for "the State" in *any* prosecution is bad public policy that would place the courts in untenable positions. This would require courts to resolve internal disputes among the various prosecutors' offices who claimed to be representing "the State" before ever turning their attention to the actual issues of the case. Arizona courts are sufficiently busy without forcing judges to determine conflicting arguments *from the same party*. This change to the law would create substantial internal conflicts, unnecessary inefficiencies among state agencies, and no small amount of aggravation.

The Maricopa County Attorney's request would do little more than sow confusion among an otherwise well-understood and agreed-upon procedure. This Court should reject it.

ARGUMENT

I. Arizona Law Gives The Attorney General Exclusive Authority To Seek Execution Warrants.

The Attorney General is a statewide elected official who serves as "chief legal officer of the state." A.R.S. § 41-192(A). The Legislature has mandated that the Attorney General "shall [p]rosecute and defend in the supreme court all proceedings in which this state or an officer of this state in the officer's official capacity is a party." A.R.S. § 41-193(A)(1). A county attorney is elected by the voters in her respective county and is "the public prosecutor of the county" and shall "within the county . . . conduct all prosecutions for public offenses." A.R.S. § 11-532(A)(1). A county attorney "[o]n receipt of an appellant's brief in a criminal appeal . . . shall furnish the attorney general with a true statement of the facts in the case, together with the available authorities and citations that are responsive to the assignments or specifications of error." A.R.S. § 11-532(B).

Given these clear statutory mandates, previous county attorneys and attorneys general have not been confused about which state office has authority to seek execution warrants. To support her position in the instant matter, the Maricopa County Attorney argues that the Rules permit *any* State prosecutor to represent the State in *any* proceeding. MCA's Supp. Brief at 9 (stating that "*all* prosecutors in *all* prosecutions are necessarily included" in the Rules) (emphasis in original). The Maricopa County Attorney is wrong.

To start, Rule 2.2 provides that "[t]he State may commence a felony action" through either a complaint or indictment. But, of course, that Rule does not mean the Maricopa County Attorney can commence a criminal case in Pima County whenever she chooses. Similarly, under Rule 16.4(a), "the State" can file a motion to dismiss. But chaos would ensue if the Greenlee County Attorney began to file motions to dismiss in criminal prosecutions initiated by the County Attorneys in Graham and Cochise. It is axiomatic that county attorneys' powers and duties are cabined to the county in which they were elected. A.R.S. § 11-532(B). The point is simple: when the Rules refer to "the State" it does not include "*all* prosecutors in *all* prosecutions."

The Maricopa County Attorney sidesteps the severe consequences that her novel position would unleash by suggesting that "[n]o controversy results from the concurrent representation of the State by different legal offices." MCA's Supp. Brief at 16. But that is not accurate. As discussed below, and detailed in the Petitioner's Supplemental Brief at 14-15, this approach could lead to a collision of internal conflicts. Further, the Maricopa County Attorney relies on an inapplicable decision from this Court to support her position. MCA's Supp. Brief at 16 (citing *Crosby-Garbotz v. Fell in & for Cnty. Of Pima*, 246 Ariz. 54, 60 ¶ 24 (2019)). The *Crosby-Garbotz* decision not only cuts against the Maricopa County Attorney's argument but provides strong support for the Attorney General's position.

In *Crosby-Garbotz*, this Court held that the State (represented by the Maricopa County Attorney's Office) was collaterally estopped from prosecuting an individual for child abuse after the State (represented by the Department of Child Safety and its lawyers at the Attorney General's Office) had not met its burden in a dependency trial in juvenile court "of proving by a preponderance of the evidence" that the defendant had inflicted physical injury on the child. *Id.* at 56-60 ¶¶ 4-22. This case stands for the proposition that issue preclusion may apply in a criminal proceeding after the same issue had been litigated during a dependency trial, but it also demonstrates the fallacy of the Maricopa County Attorney's argument.

In *Crosby-Garbotz*, the State argued that the Department of Child Safety ("DCS") and the County Attorney were not the same party so collateral estoppel could not apply. *Id.* at 60 ¶ 24. This Court disagreed: "[t]hat different legal offices handle different cases does not mean that the State is not a party in both actions." *Id.* This Court then explained how "the State" can refer to different agencies at various stages of litigation. For instance, the Attorney General represented the State in the dependency proceeding, while the Maricopa County Attorney represented the State in the criminal proceeding. Notably, this Court found that the "Attorney General's Office, which represented DCS in the dependency proceedings, not only has supervisory authority over county attorneys, *see, e.g.,* A.R.S. § 41-193(A)(4), (5), but is also responsible for handling appeals of criminal cases originally tried by

county attorneys." *Id.* So even though the Attorney General's Office represented the State before the juvenile court and the Maricopa County Attorney's Office represented the State in the criminal proceeding, this Court deemed them "the same party for preclusion purposes because they both act on behalf of the state." *Id.* (citing *People v. Sims*, 651 P.2d 321, 332-33 (Cal. 1982)).

This Court did not suggest in *Crosby-Garbotz*, as the Maricopa County Attorney now urges it to do, that the Maricopa County Attorney could have intervened in the dependency action on behalf of the State. Indeed, her argument in this special action that the Rules refer to *all* prosecutors in *all* prosecutions would permit the County Attorney to appear in dependency proceedings to "represent the public's interest." MCA's Supp. Brief at 20. That isn't the law. *See Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 297 ¶ 30 (App. 2011) (Courts "construe statutory provisions in light of the entire statutory scheme so they may be harmonious and consistent.") (internal quotations and citations omitted). Exclusive authority to seek execution warrants should remain with the Attorney General.

II. The Attorney General Has Always Sought Execution Warrants For The State.

Amici agree with Petitioner—they do not remember a single instance where an execution warrant was sought by a county attorney. *See* Attorney General's Motion to Strike at 13 & Appendix A. The Attorney General has always made the

request on the State's behalf. *Id.* This makes good practical sense. This litigation is fast-moving, complex, and filed in a myriad of courts in different jurisdictions and the Attorney General has the experience, funding, and expertise to handle these appellate issues. The Attorney General's Office has a Capital Litigation Section whose sole responsibility is to manage the State's capital appellate and post-conviction litigation in both state and federal court. To help, the Legislature appropriates funds to the Attorney General's Office each year for "Capital Postconviction Prosecution."

In effect, the Maricopa County Attorney is seeking authority to initiate a process that the Attorney General would then be required to finish. As the Attorney General made clear, there are dozens of motions that are filed *after* this Court grants the State's request to set a briefing schedule for a warrant of execution. *See* Attorney General's Supp. Brief at 26-27 & Appendix A. To permit a prosecutor's office to seek an execution warrant but not follow through with the ensuing litigation would be no different than allowing one prosecutor's office to indict a dozen defendants in a complex fraud matter, but then force another office to handle all the subsequent work. The indictment, like a motion seeking an execution warrant, is the easy part—securing a conviction and navigating the attendant capital-case appellate issues are much more difficult. It stands to reason, then, that the office burdened with litigating

the thorny appellate issues should also be the office with the authority to start the process.

III. The County Attorney's Position Is Bad Public Policy And Unworkable.

To accept the Maricopa County Attorney's position would inject chaos into the court system. As the Attorney General has documented, permitting county attorneys to insert themselves as "the State" into proceedings where the State is already represented by the Attorney General would severely tax the courts. Attorney General's Supp. Brief at 14-15; Attorney General's Motion to Strike at 9-10. This would, at a minimum, necessitate adjudicating internal squabbles among several agencies all of whom claim to represent "the State." This would be entirely impractical.

The State benefits when it has a single voice that speaks on its behalf in a legal proceeding. Forcing courts to delve into intra-quarreling among the various agencies claiming to represent "the State" in a given matter is not appropriate. Not only would this be inefficient and confusing for the courts, it would create inconsistency in how "the State" prosecutes and resolves criminal matters. The goal should be to improve consistency—not make things more discordant. *See, e.g.,* Kent E. Cattani, Paul J. McMurdie, *Death Penalty 101: The Death Penalty Charging Decision in Arizona. Is There A Better Way?*, 53 Ariz. St. L.J. 793, 795 (2021) (arguing that requiring the Attorney General's involvement at the charging stage to help determine whether the

State should seek the death penalty in a case "would improve consistency" and "ensure that those responsible for handling the lengthy appellate and post-conviction proceedings in capital cases [the Attorney General's Office] have input at the outset of the process").

The Maricopa County Attorney's novel position is not viable. The practical results would be disastrous.

CONCLUSION

The exclusive authority to seek an execution warrant rests with the Attorney General. The Court should grant the Petitioner's request for relief.

RESPECTFULLY SUBMITTED this 5th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Civil Appellate Procedure 14(a)(5), undersigned counsel states that this *Amici Curiae* Brief, to which this Certificate is attached, has been prepared in 14-point Times New Roman font, double-spaced, and does not exceed the 5,000-word limit in accordance with this Court's June 25, 2024 Order and ARCAP 16(d)(2).

Respectfully submitted this 5th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2024, Brief of *Amici Curiae* Former Attorney General Terry Goddard, Former Maricopa County Attorney Rick Romley, and Former Pima County Attorney Barbara LaWall, and this Certificate of Service were electronically filed with the Clerk's Office, and pursuant to ARCAP4(f), a copy was e-served via AZTurboCourt to:

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