

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

AARON BRIAN GUNCHES,

Appellant.

KAREN PRICE,

Crime Victim.

Arizona Supreme Court

No. CR-13-0282-AP

Maricopa County Superior Court

No. CR-2003-038541-001

**CRIME VICTIM'S RESPONSE
TO THE STATE OF ARIZONA'S
MOTION TO WITHDRAW
MOTION FOR WARRANT OF
EXECUTION**

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Crime Victim, Karen Price, by and through undersigned counsel, respectfully submits this response in opposition to *The State of Arizona's Motion to Withdraw Motion for Warrant of Execution*, filed January 20, 2023.

I. Background

This case is about the victim's rights to justice and finality enshrined in our state constitution.

Ms. Price's brother, Ted, was murdered in November 2002. Gunches callously ended Ted's life by shooting him three times in the chest and once in the back of the head; each shot on its own enough to kill. *State v. Gunches*, 225 Ariz. 22, 26 (Ariz. 2010). Gunches was indicted nearly a year later for first degree murder and kidnapping. *Id.* at 24. He pleaded guilty to both counts in November 2007. *Id.* After the penalty phase, Gunches was sentenced to death in early 2008. *Id.* This court remanded the case for a new penalty phase in 2010. *Id.* at 27. Gunches again received a death sentence, which this Court subsequently upheld in 2016. *State v. Gunches*, 240 Ariz. 198 (Ariz. 2016). Gunches later waived his Rule 32 and federal habeas proceedings. *Gunches Motion: Issuance of Death Warrant* at 1. He claims that he volunteered to be executed as early as 2018. *Id.* In November of 2022, Gunches took steps to secure a warrant for his own execution so that his victims could have justice, something that has long seemed out of reach. The State of Arizona followed suit and filed its own motion for warrant of execution. Now, however, the State is seeking to

withdraw citing an executive order signed by Governor Hobbs.

For Ms. Price and her family, this ordeal has been painfully traumatic. Ted's murder was just the beginning. Ms. Price is asserting her rights to justice and finality and respectfully asks this Court to issue a warrant of execution. Exhibit 1.

II. Argument

A. *Victims have a right to justice, which will be denied if this Court grants the State's Motion to Withdraw.*

Arizona's Victims' Bill of Rights (VBR) by its terms preserves and protects victims' rights to justice and due process. Ariz. Const. art. II, § 2.1(A). The language of the VBR indicates that even before the VBR was enacted in 1990, crime victims had rights to "justice and due process." The U.S. Supreme Court expressed the idea of justice for victims decades earlier. In 1934, Justice Cardozo wrote that "[j]ustice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). Justice, as expressly stated in Arizona's VBR, is a fundamental basis for each of the constitutional rights that follow.

The plain language of our constitution cannot be ignored. *Deer Valley Unified School Dist. No. 97 of Maricopa County v. Superior Court*, 157 Ariz. 537, 540 (Ariz. 1988). See also, *Meyer v. State*, 246 Ariz. 188 (Ariz. Ct. App. Div. 2019). This Court has yet to specifically address a victim's right to "justice" independent of the constitutional rights designed to preserve and protect a victim's right to justice.

“When interpreting the Arizona Constitution, ‘we seek to give terms the original public meaning understood by those who used and approved them.’” *Matthews v. Indus. Comm’n of Ariz.*, ___ Ariz. ___, ¶ 29, 520 P.3d 168, 174 (2022). This may include looking to “dictionary definitions from the time the provision was adopted.” *Id.* at ¶ 33. To resolve any remaining ambiguity, we may examine the provision’s history. See *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 12 (1986). The plain meaning of the word justice is “the administration of what is just (*as by assigning merited rewards or punishments*).” Merriam-Webster Dictionary (1990) (emphasis added). Justice is an end written into the DNA of our country, a purpose that is enshrined in the preamble of our federal constitution: “We the People of the United States, in Order to form a more perfect Union, *establish Justice*, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” U.S. Const., art. IV, §2 (emphasis added). Federalist 51 adds strands to this DNA. “Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.” The Federalist No. 51 (James Madison).

Justice is woven into the fabric of the laws of the United States and Arizona. For this fundamental right to justice to be preserved and protected, victims in

Arizona have a constitutional right to a “...prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. II, § 2.1(A)(10). This Court has been clear that a victim’s constitutional right to finality warrants protection. See *Fitzgerald v. Myers*, 243 Ariz. 84, 92 (Ariz. 2017); See *State v. Gates*, 243 Ariz. 451 (Ariz. 2018). Recently, this Court implicitly recognized the rights that victims have to justice and to a prompt and final conclusion when it permitted three executions to be carried out last year. *State v. Dixon*, CR08-0025-AP; *State v. Atwood*, CR-87-0135-AP; and *State v. Hooper*, CR8-83-0044.

The State of Arizona owes an obligation of justice to Ms. Price and her family. Both the Arizona Attorney General and the Governor of Arizona have sworn to uphold the Constitution of Arizona. Thus, each is tasked with upholding the victim’s rights to justice and finality. Gunches murdered Ms. Price’s brother more than 20 years ago. He has been legally sentenced to death and this Court upheld his convictions and death sentence. To ensure that the State upholds Ms. Price’s rights to justice and finality, this Court must issue a warrant of execution.

B. *Neither the State of Arizona nor the Governor can unilaterally halt an execution.*

The State’s *Motion to Withdraw Motion for Warrant of Execution* specifies two reasons for this interruption of the rights to justice and finality. First, had Gunches not sought his own warrant, the State would not have sought one either. *State’s Motion* at 3. Second, the State “does not intend to seek a warrant of execution

in any case at least until a thorough examination of the administration of capital punishment in Arizona has been conducted.” *Id.* This thorough examination is “to review and provide transparency into the ADCRR’s lethal injection drug and gas chamber chemical procurement process, execution protocols, and staffing considerations including training and experience.” Executive Order 2023-05 (January 20, 2023).

The state’s position suffers from fundamental errors. First, the quest for “transparency” in the procurement process for lethal injection and gas chamber chemicals violates current Arizona law, which requires anonymity concerning “the identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2.” The anonymity of any person, as defined in A.R.S. § 1-215(28) and A.R.S. § 13-105(30), who participates in or performs any ancillary function(s) in the execution, including the source of the execution chemicals, and any information contained in records that would identify those persons all fall under the protection of A.R.S. § 13-757(C). Arizona’s current protocol has been transparent to the courts and addresses the other concerns listed in the executive order. It has been considered by the federal courts before Frank Atwood’s execution. See https://documents.deathpenaltyinfo.org/ArizonaProtocol_4.20.22.pdf (last

accessed January 27, 2023).

Prior to his execution, Inmate Atwood alleged that ADCRR's lethal injection protocol requiring him to be secured lying down on the execution table for a period of time prior to the administration of lethal drugs would cause him excruciating and unnecessary pain due to a degenerative spinal disease. *Atwood v. Shinn*, 36 F.4th 901, 903 (9th Cir. 2022) (finding protocol in place for Atwood's execution constitutional). The State made accommodations that included a medical wedge and tilting the execution table to a position similar to how Atwood regularly rested in his cell. *Id.* at 904. Atwood also asserted that the protocol assurance that the State would “only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is carried out” and his ability to receive a “quantitative analysis of any compounded or non-compounded chemical to be used in the execution” resulted in a state-created liberty interest that the State ignored. The Ninth Circuit affirmed the District Court’s ruling “even assuming Atwood could establish such a liberty interest, there was insufficient evidence that Arizona has deviated from its Execution Protocol to support his due process claim.” *Id.* Last, Atwood argued that he was deprived of a “state law liberty interest in choosing the manner of his execution because Arizona failed to provide a constitutional choice of lethal gas as a method of execution.” *Id.* However, he failed to timely designate a method so his method of execution was lethal injection by operation of Arizona law.

Id. at 905.

In another instance, Inmate Samuel Lopez, and a group of other inmates challenged Arizona's 2012 execution protocol arguing the following: "1) the ADC's medical procedures for inserting IV catheters in condemned prisoners violates his Eighth Amendment rights; 2) the ADC's January 25, 2012, amendment to Department Order 710 (the "2012 Protocol") violates his right to equal protection under the Fourteenth Amendment; and 3) the ADC's execution protocol violates his rights of access to counsel and the courts." *Lopez v. Brewer*, 680 F.3d 1068 (9th Cir. 2012). Lopez and other inmates were denied relief in the District Court and the Ninth Circuit affirmed. *Id.* at 1071.

Specific to the medical procedures for inserting IV catheters, "Lopez claimed that the ADC's actions surrounding the insertion of IV catheters in condemned prisoners demonstrates an objectively intolerable risk of harm, even where a one-drug protocol is used instead of a three-drug protocol." *Id.* at 1073. However, the "mere presence of pain and discomfort resulting from the placement of IV lines did not constitute 'an objectively intolerable risk of harm' and that some pain was an inescapable consequence of death." *Id.* Lopez's equal protection claim failed as well. *Id.* at 1076. The court noted that the decision on how to administer chemicals may depend on individual and changing factors including the supply of drugs as well as staff availability. *Id.* at 1076.

The State fails to identify any specific issues in Arizona's current protocol or cite to any federal authority that raise concerns of a constitutional dimension. The State notes there are similar reviews in other states, Tennessee and Alabama. *State's Motion* at 10. The Ninth Circuit has previously rejected challenges to Arizona's protocol based on concerns in other states. *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) (challenge to the lethal injection as being cruel and unusual supported by an affidavit who collected reports of "botched" executions in other states, none of which took place in Arizona and proves nothing about Arizona's protocol.)

The attempt to deny justice and finality to victims under a manufactured need for a review of the protocol by the Attorney General and the Governor is unconstitutional. Arizona's constitution grants the power to make a final clemency decision to the Governor. Ariz. Const. art. V, § 5. However, the Governor's clemency authority is limited by Arizona's Board of Executive Clemency. A.R.S. § 31-402(A). "For all persons who committed felony offenses before January 1, 1994, the board of executive clemency shall have exclusive power to pass on and recommend reprieves, commutations, paroles and pardons. A reprieve, commutation or pardon may not be granted by the governor unless it has first been recommended by the board." *Id.* Neither the Governor nor the Attorney General have the power to unilaterally end or interrupt the execution of the laws.

III. Conclusion

Karen Price and her family have the rights to justice and finality. Arizona's VBR promises to preserve and protect the rights to justice and finality by giving crime victims a constitutional right not to be continuously victimized by an unending criminal justice process. The constitutional guarantees of "justice" and a "prompt and final conclusion" of this case remain unfulfilled promises to Ms. Price and her family. They deserve a life after the criminal case is final, one in which they are no longer wondering whether there really ever will be justice. Ms. Price respectfully requests this Court deny *The State of Arizona's Motion to Withdraw Motion for Warrant of Execution* and issue the Warrant.

RESPECTFULLY SUBMITTED this 27th day of JANUARY 2023.

By: _____/s/_____
Colleen Clase
Arizona Voice for Crime Victims
Attorney for Victim, Karen Price

Exhibit 1
Statement of Karen Price
January 2023

In 2002, Aaron Brian Gunches, took the life of my brother, Ted Price. Ted was 40 years old when he was brutally shot and left to die in the Arizona desert. The pain and suffering inflicted on our family didn't stop after we retrieved Ted's body and buried him - it was only the beginning.

Ted was killed in November 2002, but more than a year later an arrest had not been made. Gunches attempted to kill a highway patrolman in La Paz County and the gun he used in that crime matched the gun used to kill Ted. Once the La Paz case concluded, Gunches was extradited to Maricopa County and charged with Ted's murder. In 2008, six years after Ted's murder, Aaron Gunches plead guilty and was sentenced to death. In 2010, the supreme court overturned that decision. In 2013 Gunches was again sentenced to death. It took more than 10 excruciating years for the legal system to convict Gunches. We've patiently waited 10 more years for him to be executed.

Imagine our elation when we finally received the call that the process to execute Gunches had begun when the Attorney General's office filed a request for warrant of execution. We were told that Gunches has been asking to be put to death since 2018 so that his sentence could be carried out and our family could receive closure. We were thrilled that we could finally put this nightmare behind us and never again think about Aaron Gunches.

Our elation didn't last long. First, they delay the decision 30 days, changing the date from January 4th to January 31st. Then Gunches filed a motion on January 4th to withdraw his request to be executed. Finally, we learn that Arizona's new Governor issued an order that would establish an independent review commissioner for death penalty cases. Although the Governor did not explicitly pause executions, Attorney General Mayes filed a motion to withdraw its motion for warrant of execution that her predecessor had JUST filed.

Our family has had to deal with the legal system for more than 20 years and the path to get to where we are today has been challenging and difficult. We patiently endured delays in the legal process required to get Gunches convicted and we've waited patiently for 10 years for him to be executed, but our patience is wearing thin.

Ted's children were 14 and 16 when he was taken from them. They've now spent more of their lives without their father than they did with him. My mother was 61 when her only son was killed. Mom is 81 and she may not live to see her son's killer punished. My remaining sister has a terminal illness and if this execution is delayed, she won't live to see justice served.

The legal system that ensures justice is carried out should not be held hostage by changes in political party. Please don't put our family through any more heartache and pain by allowing partisan games to delay or stop this execution.

Gunches asked to be executed, then changed his mind - we respectfully ask that his motion to withdraw be denied. The Attorney General's office filed a motion to execute Gunches, then changed their mind - we respectfully ask that their request to withdraw their motion also be denied. We respectfully request that the court issue the warrant of execution so that Aaron Gunches can be promptly executed and our family can receive the closure we deserve.