

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
SUPPLEMENTAL BRIEF**

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INTRODUCTION

Crime Victim, Karen Price, by and through undersigned counsel, respectfully submits this *Supplemental Brief*, at this Court's request, to address the following question:

Because the State's original motion for warrant of execution placed this Court on notice that the requirements of A.R.S. § 13-759(A) and Ariz. R. Crim P. 31.23(a) have been satisfied, and because the State's motion to withdraw does not assert otherwise, does this Court have authority to do anything other than issue the Warrant of Execution?

Ms. Price respectfully asserts that this Court must issue a *Warrant of Execution* to preserve and protect her rights to justice and finality, which are enshrined in Arizona's constitution. Ariz. Const. art. II, § 2.1 (A)(10). Additionally, our constitution expressly provides for executions to be completed: "[t]he judgment of death shall be inflicted by administering an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death except that defendants sentenced to death for offenses committed prior to the effective date of the amendment to this section shall have the choice of either lethal injection or lethal gas." Ariz. Const. art. XXII, § 22.

Our constitutional provisions are mandatory, "unless by express words they are declared to be otherwise." Ariz. Const. art. II, § 32. Nothing in our constitution

allows this Court discretion in issuing a *Warrant of Execution* once a death row inmate's appellate remedies have been exhausted.

A.R.S. § 13-759(A), which controls here, is in harmony with the proper and effective administration of justice and consistent with Arizona's constitutional provisions. Adherence to the requirements of the statute will carry out the purpose of our constitution, specifically the rights that a victim has to justice and finality as well as the completion of a death sentence. Thus, a *Warrant of Execution* must be issued for Inmate Gunches.

ARGUMENT

I. A.R.S. § 13-759(A) controls and requires this Court to issue the warrant without a motion by the State. Ariz. R. Crim. P. 31.23(a) does not control because the matter is substantive and even if procedural the VBR gives the legislature the power to enact procedural laws to protect victims' rights, here to justice and finality.

“[I]t is fundamentally the province of the legislature to ‘[d]efin[e] crimes and fix[] penalties...’” *State v. Patel*, 251 Ariz. 131, 140 (Ariz. 2021). Arizona's legislature has fixed the penalty for first degree murder, committed by adult offenders, to include a sentence of death in certain circumstances. A.R.S. §§ 13-751, 13-752. A death sentence in Arizona is not without constitutional safeguards for the convicted offender. Crane McClennen, *Capital Punishment in Arizona*, Arizona Attorney, October, 29, 1992, at 17 (noting the Arizona legislature reacted to *Furman v. Georgia* to ensure that the death penalty was constitutionally applied). *See Furman*

v. Georgia, 408 U.S. 238 (1972) (holding the death penalty unconstitutional and in violation of the Eighth Amendment prohibition against cruel and unusual punishment when imposed in an arbitrary and capricious manner leading to discriminatory results). *See also* A.R.S. §§ 13-751 through 13-759. Offenders sentenced to death are guaranteed numerous appellate remedies. *Id.* Once those remedies are exhausted, a warrant of execution *must* be issued by this Court:

After a conviction and sentence of death are affirmed and the first post-conviction relief proceedings have concluded, the supreme court *shall* issue a warrant of execution that authorizes the director of the state department of corrections to carry out the execution thirty-five days after the supreme court's mandate *or* order denying review or upon motion by the state. The supreme court shall grant subsequent warrants of execution on a motion by the state. The time for execution shall be fixed for thirty-five days after the state's motion is granted.

A.R.S. § 13-759(A) (emphasis added).

“It is generally agreed that a substantive law creates, defines, and regulates rights while a procedural one prescribes the method of enforcing such rights or obtaining redress.” *In re Shane B.*, 198 Ariz. 85, 88 (Ariz. 2000) *citing State v. Allen*, 118 Ariz. 95, 96 (Ariz. Ct. App. 1977). In the criminal context, substantive law “either defines a crime or involves the length or type of punishment.” *Allen citing Lamb v. Kansas Parole Bd.*, 15 Kan. Ct. App. 2d 606, 610 (1991). Since A.R.S. § 13-759(A) involves a type of punishment, it controls in this instance. *Albano v. Shea Homes*, 227 Ariz. 121, 127 (Ariz. 2011) (statute of limitations are generally

procedural but a statute of repose defines a substantive right). When a constitutionally enacted statute conflicts with a rule of procedure, the statute prevails. *Id.* Thus, under A.R.S. § 13-759(A), this Court must issue a warrant in this instance.

“The cardinal principle of statutory interpretation is that the intent of the legislature is to be ascertained and followed.” *Mendelsohn v. Superior Court in and for Maricopa County*, 76 Ariz. 163, 169 (Ariz. 1953) (defining statutory meaning on an aggrieved party) (internal citation omitted). “The second, at least in Arizona, is that statutes shall be liberally construed to effect their objects and to promote justice...[.]” *Id.* “These principles of interpretation take precedence over all others, the remaining rules being only ancillary and used to assist in the proper application of the two first set forth...” *Id.* “The best and most reliable index of a statute’s meaning is its language.” *HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364 (Ariz. Ct. App. 2001) (holding that the legislature’s use of the word “shall” in the context of A.R.S. § 12-1198(A) is mandatory).

Our legislature intended for this Court to issue a warrant so that a death sentence can be carried out once a death row inmate’s appellate remedies have been exhausted. “[T]he supreme court *shall* issue a warrant of execution.” A.R.S. § 13-759(A) (emphasis added). The use of the word “shall” denotes a mandatory directive. *HCZ Const., Inc.* at 361. A general principle of statutory construction is

that the use of the word “may” generally indicates a permissive provision; in contrast, the use of the word “shall” typically indicates a mandatory provision. *State v. Lewis*, 224 Ariz. 512, 515 (Ariz. Ct. App. 2010) (discussing the use of “shall” and “may”) quoting *State v. Seyrafi*, 201 Ariz. 147, 150 (Ariz. Ct. App. 2001). A.R.S. § 13-759(A) contains no other language suggesting the statute is discretionary. *State v. Rogers*, 227 Ariz. 55, 57 (Ariz. Ct. App. 2010) (holding the trial court did not have discretion to waive a surcharge when express language of the statute is clear that it “shall be imposed”). Had the legislature intended for a statute to be discretionary, it would have clearly said so. *Id.* Here, it is clear that A.R.S. § 13-759(A) is non-discretionary.

This Court may issue the warrant even without a motion by the state. “...after the first post-conviction relief proceedings have concluded... *or* order denying review *or* upon motion by the state.” A.R.S. § 13-759(A) (emphasis added). A.R.S. § 13-759(A) does not require that the State file a motion, but provides three instances that trigger an issuance of a warrant. The word “or” generally means a “disjunctive particle used to express an alternative or to give a choice of one among two or more things.” *State ex rel. Montgomery v. Brain*, 244 Ariz. 525, 528 (Ariz. Ct. App. 2010) citing *State v. Bowsher*, 225 Ariz. 586, 587 (Ariz. 2010) (“The word ‘or’ generally means ‘[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.’”) quoting Black's Law Dictionary 1095 (6th ed.

1990)); *In re Ryan A.*, 202 Ariz. 19, 23 (Ariz. Ct. App. 2002) (“or” has its typical disjunctive meaning) *citing Rutledge v. Arizona Bd. of Regents*, 147 Ariz. 534, 556-57 (Ariz. Ct. App. 1985) (“The word ‘or’ is defined as ‘[a] disjunctive particle used to express an *alternative* or *to give a choice* of one among two or more things.’”) *quoting* Black’s Law Dictionary 1246 (4th ed. 1968).

Even if this Court believes that A.R.S. § 13-759(A) is procedural in nature, the VBR gives the legislature the power to enact procedural laws to protect victims’ rights, here to justice and finality. Ariz. Const. art. II, § 2.1(D). Thus, A.R.S. § 13-759(A) should be interpreted to protect Ms. Price’s rights to justice and finality. Issuing a warrant, as required under A.R.S. § 13-759(A), is in harmony with the proper and effective administration of justice. Adherence to the requirements of the statute will carry out the purpose of our constitution, specifically the rights that a victim has to justice and finality as well as the completion of a death sentence. Ariz. Const. art. II, § 2.1(A)(10); Ariz. Const. art. XXII, § 22.

II. Even if Ariz. R. Crim. P. 31.23(a) applies, the requirements are met because the State’s first filing is all that was needed to trigger the “must issue.”

If this Court determines that the requirements of Ariz. R. Crim. P. 31.23(a) apply, the express language of the rule requires this Court to issue a warrant once the State makes the requisite filing.

After affirming a death sentence, the Supreme Court *must issue a warrant of execution* if the State files a notice stating that:

(1) the defendant has not filed a first Rule 32 petition for post-conviction relief and the time for filing a petition has expired;

(2) the defendant has not filed a petition for review seeking review of a superior court denial of the defendant's first Rule 32 petition for post-conviction relief and the time for filing a petition for review has expired; or

(3) the defendant has not initiated habeas corpus proceedings in federal district court within 15 days after the Supreme Court's denial of a petition for review seeking review of the denial of the defendant's first Rule 32 petition for post-conviction relief.

Ariz. R. Crim. P. 31.23(a) (emphasis added).

In the present case, all of the requirements of Rule 31.23(a) have been met. After Inmate Gunches filed his pro per motion seeking a warrant for his own execution, the State responded also seeking a warrant. *State's Response To Motion: Issuance Of Death Warrant/State's Motion For Warrant Of Execution ("State's Motion")*, filed December 7, 2022. The State has already advised this Court that "[b]ecause Gunches' case meets the requirements for issuance of a warrant, the State joins in Gunches' motion and also moves this Court to issue a warrant of execution." *State's Motion* at 1. "In Gunches' case, the conditions for issuance of a warrant of execution have been met." *State's Motion* at 2.

After affirming Inmate Gunches' death sentence in 2016, this Court filed a Notice of Post-Conviction Relief. *State's Motion* at 3. "Gunches subsequently moved to waive his post-conviction relief proceeding. On June 4, 2018, the post-conviction court found that Gunches was competent to waive Rule 32 review and that he 'knowingly, intelligently, and voluntarily waived his right to Rule 32 review,' and granted Gunches' motion to dismiss the Notice of Post-Conviction Relief." *State's Motion* at 4 *citing* State v. Gunches, Maricopa County Superior Court No. CR2003-038541-001 (Minute Entry, filed on June 8, 2018).¹ "Several months later, on October 17, 2018, Gunches filed a "Notice of Waiver of Federal Habeas Review" in the federal district court." *State's Motion* at 4 *citing* Gunches v. Ryan, Dist. of Ariz. No. CV-18-3346-PHX-DLR (Doc. 1). On November 11, 2018, the district court dismissed Gunches' Notice for lack of jurisdiction. *Id. citing* Doc. 3.

The State has not provided any indication to this Court that the requirements of Ariz. R. Crim. P. 31.23(a) have not been met, nor can it now assert otherwise. The State has already advised this Court:

Gunches' convictions and sentence of death have been affirmed and his first post-conviction proceedings have concluded. See A.R.S. § 13-759(A). Additionally, even though only one of these conditions need exist, Gunches 'has not filed a first Rule 32 petition for post-conviction relief and the time for filing a petition has expired' because he voluntarily dismissed his first post-conviction

¹ The State also notes that Gunches was evaluated by two different experts during this time and deemed competent. *State's Motion* at 3.

proceeding, see Ariz. R. Crim. P. 31.23(a)(1), and Gunches did not ‘initiate[] habeas corpus proceedings in federal district court within 15 days after . . . the denial of [his] first Rule 32 petition for post-conviction relief,’ id. 31.23(a)(3).

Arizona’s constitution requires “all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.” Ariz. Const. art. II, § 2.1(A)(11). Arizona’s constitution does not leave room for interpretation, but rather mandates that court rules are construed to protect victims’ rights. Ariz. Const. art. II, § 32. In this instance, the victims’ rights that demand protection are Ms. Price’s constitutional rights to justice and to a “prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. II, §§ 2.1(A) and (A)(10). Ensuring that Rule 31.23(a) is construed in a way that protects Ms. Price’s constitutional rights to justice and finality means this Court must issue the warrant of execution. Any interpretation that gives this Court discretion whether or not to follow Rule 31.23(a) will run afoul of Ariz. Const. art. II, § 2.1(A)(11).

III. This Court must issue the warrant because failure to do so would deny the victim the rights to justice and finality.

To preserve and protect victims’ rights to justice and due process, victims have a constitutional right “[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. II,

§ 2.1(A)(10). The terms of the VBR expressly require protection of victims’ rights to justice and finality. 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) (holding that state may not dispose of its school trust lands other than by compliance with the specific terms and conditions of the Arizona Constitution). This Court has previously held the same in the context of the VBR. *Knapp v. Martone*, 170 Ariz. 237 (Ariz. 1992) (holding a mother not charged with the offense met the constitutional definition of a victim affording her the right to refuse a defense interview). “It is important to emphasize that Arizona courts must follow and apply the plain language of this new amendment to our constitution.” *Id.* at 239. Under the plain language of our constitution, Ms. Price’s rights to justice and finality must be protected and upheld.

“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 (Ariz. 2022). This may include looking to “dictionary definitions from the time the provision was adopted.” *Id.* at ¶ 33. The plain meaning of the word “justice” is “the maintenance or administration of what is just...the assignment of merited rewards or punishments; the administration of law.” “Justice,” *Merriam-Webster Dictionary Online*, <https://www.merriam-webster.com/dictionary/justice>, last accessed

February 11, 2023. The plain meaning of the word “final” is “not to be altered or undone.” “Final,” *Merriam-Webster Dictionary Online*, <https://www.merriam-webster.com/dictionary/justice>, last accessed February 11, 2023. Justice for Ms. Price means that Inmate Gunches’ punishment, a legal sentence in Arizona, will be carried out. Once punishment is carried out, finality will be realized.

The State of Arizona owes an obligation of justice and finality to Ms. Price and her family. The State is obligated to follow the intent of the legislature in ensuring punishment is carried out and that the purpose of our Constitution in ensuring justice and completion of punishment is fulfilled. Inmate Gunches has been sentenced to death, a legal sentence in Arizona, and this Court upheld his convictions and death sentence. Inmate Gunches’ waiver of post-conviction and federal habeas rights constitutes an exhaustion of his appellate remedies. To ensure the obligation of justice and finality is met, this Court must issue a warrant of execution.

CONCLUSION

To preserve and protect Ms. Price’s constitutional rights to justice and finality, A.R.S. § 13-759(A) must be followed and a warrant of execution issued.

RESPECTFULLY SUBMITTED this 16th day of February 2023.

By: _____/s/_____
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