

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

AARON BRIAN GUNCHES,

Appellant.

CR 13–0282–AP

Maricopa County Superior Court
No. CR 2003–038541–001

STATE OF ARIZONA’S SUPPLEMENTAL BRIEF

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QUESTION PRESENTED FOR REVIEW

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?

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I. INTRODUCTION.

Following the State’s withdrawal of its motion for warrant of execution in this matter, this Court asked the parties to brief 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?

Order (Jan. 31, 2023). The answer is yes.

II. SUMMARY OF ARGUMENT.

Carrying out a death sentence is an executive function, with judicial oversight. Under A.R.S. § 13–759(A) and Arizona Rule of Criminal Procedure 31.23, a warrant of execution can issue only when the State acts to seek one. *See* Ariz. R. Crim. P. 31.23(a) (triggered only “if the State files a notice”), 31.23(b) (triggered only “[o]n the State’s motion”). This Court then serves a limited, gatekeeping function by verifying that the inmate has actually exhausted available post-conviction remedies and then issuing a warrant that “authorizes the director of the state department of corrections to carry out the execution.”¹ A.R.S. § 13–

¹ Notably, by statute, the warrant of execution does not require an execution; it “authorizes” one. A.R.S. § 13–759(A).

759(A). Where, as here, the State has withdrawn its motion and informs this Court that it is not requesting authorization to carry out an execution, neither § 13–759(A) nor Rule 31.23 require this Court to issue a warrant.

This interpretation is consistent with the language of the statute and rule, the rule’s history, this Court’s prior practice, and separation of powers principles. Important practical considerations further support this distribution of authority between the judicial and executive branches. The Department of Corrections, Rehabilitation, and Reentry (ADCRR) must comply with a multitude of legal requirements and obligations when carrying out an execution. Thus, a warrant should issue only when the State is prepared to conduct an execution and is actually seeking a warrant from this Court to do so. But when, as here, the State has withdrawn its motion based on its intent to review execution procedures and the need to ensure that an execution can occur in compliance with all laws and requirements, no warrant should issue.

III. ARGUMENT.

A. The State’s withdrawal of its motion for warrant of execution should be given effect.

In our system of party presentation, parties should typically be afforded the right to withdraw their own motions before those motions are ruled upon.

Courts have recognized or applied this right in a variety of contexts. *See, e.g., Dada v. Mukasey*, 554 U.S. 1, 21 (2008) (holding that “the alien must be

permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period”); *State v. Super. Ct. in and for Cnty. of Navajo*, 180 Ariz. 384, 385 (App. 1994) (holding prosecutor could withdraw motion to transfer juvenile for prosecution as adult); *Hammons v. Table Mtn. Ranches Owners Ass’n, Inc.*, 72 P.3d 1153, 1157 ¶ 21 (Wyo. 2003) (post-trial motions to alter or amend); *People v. Steinhoff*, 195 N.W.2d 780, 781 (Mich. Ct. App. 1972) (motion for leave to present insanity defense); *Cardenas v. Super. Ct. in and for L.A. Cnty.*, 363 P.2d 889, 891 (Cal. 1961) (motion for mistrial); *Altsman v. Kelly*, 9 A.2d 423 (Pa. 1939) (motion to remove a nonsuit).

Whatever the context, when a party withdraws a motion it “has a practical effect as if the party had never brought the motion.” *Caldwell-Baker Co. v. Southern Ill. Railcar Co.*, 225 F. Supp. 2d 1243, 1259 (D. Kan. 2002); *see, e.g., Hammons*, 72 P.3d at 1157 ¶ 21 (“A motion withdrawn leaves the record as it stood prior to the filing of the motion, *i.e.*, as though it had not been made.”); *Donohue v. CBS Corp.*, No. 17–CV–7232, 2018 WL 1679315, at *1 (S.D.N.Y. 2018) (unpublished) (collecting cases); *Gunn v. Drage*, No. 2:19–CV–2102–JCM (EJY), 2020 WL 7889080, at *3 (D. Nev. 2020) (unpublished) (“This court joins the many courts that have found that the withdrawal of a motion has a practical effect as if the party had never brought the motion.”) (cleaned up) (collecting cases); *In re Feuerstein*, 48 N.Y.S.3d 356, 356–57 (App. Div. 2017) (stating

“record should not have included” declaration attached to withdrawn motion).

These principles apply squarely here. The State moved the Court to issue a warrant of execution, and the State now withdraws its request. That Rule 31.23(a) speaks of a “notice” rather than a “motion” does not dictate a different result regarding the State’s ability to withdraw the request. Whether the State files a “notice” under subsection (a) or a “motion” under subsection (b) after federal habeas proceedings conclude, the purpose is the same: the State is seeking a warrant of execution from the Court because it believes it is prepared to carry out an execution. And regardless of how the request is styled, there is no difference with respect to the State’s ability to withdraw the request.

Even assuming a distinction, the result does not change here. For starters, the State didn’t file a notice here; it filed a motion.² And even in the context of “notices,” a party often retains the right to withdraw one previously filed. A notice, after all, often signals a party’s intent to take specific action, but that

² Thus, to the extent the Court concludes that a strict reading of the rule renders it duty-bound to issue a warrant when “the State files a notice,” Ariz. R. Crim. P. 31.23(a), even if any such “notice” is later withdrawn, it is perhaps determinative that the State didn’t file “a notice” here. No. CR–13–0282–AP (Response to Motion: Issuance of Death Warrant/State’s **Motion** for Warrant of Execution, which concludes: “The State therefore joins in Gunches’ motion and also **moves this Court** to issue a warrant of execution.”) (emphasis added).

intent—or the understanding on which it was based—can change.

Any “notice” under Rule 31.23(a) is functionally no different. Although any “notice” filed pursuant to Rule 31.23(a) places the Court on notice of specific facts, it likewise announces to the Court the State’s intent (and ability) to move forward with an execution.³ In this way, a “notice” under Rule 31.23(a) is analogous to a notice of appeal or a notice of intent to seek the death penalty—both of which, of course, the State could later withdraw for any number of reasons. Just as a party may withdraw those notices, so too should the State be permitted to withdraw its motion here.

For all these reasons, the Court should permit the State’s withdrawal of its motion for warrant of execution and could end its inquiry there.

B. In the absence of an active request for a warrant by the State, neither A.R.S. § 13–759(A) nor Rule 31.23 require this Court to issue a warrant of execution simply because an inmate is eligible.

Under Arizona’s system of separation of powers, the authority and responsibility to implement criminal sentences, including sentences of death, rests within the executive branch. “This Court, along with the courts of our sister states, has long recognized the division of power and the transfer of jurisdiction over a

³ It would be nonsensical for the State to file such a notice, knowing that it would trigger issuance of a warrant, if the State was not prepared to move forward with an execution.

felon from the judicial to the executive branch of government upon conviction.” *State v. Wagstaff*, 164 Ariz. 485, 488 (1990) (collecting cases). As this Court has explained, “the judiciary’s function ends with a verdict of acquittal, the revocation of probation, or the final entry of a judgment and sentence.” *Id.* As a result, “[u]pon entry of a final judgment and sentence of imprisonment, legal authority over the accused passes by operation of law to the Department of Corrections” and the executive branch “bear[s] full responsibility for executing the judgment and sentence.” *Id.* at 488-89.

This distribution of authority between the executive and judiciary applies no less to sentences of death than to sentences of imprisonment. Through § 13–759(A) and Rule 31.23, this Court has a limited, gatekeeping role in the implementation of death sentences by, in response to the state’s notice (under Rule 31.23(a)) or motion (under Rule 31.23(b)), verifying that an inmate’s appellate and post-conviction process has concluded before authorizing the executive to carry out an execution. Section 13–759(A) provides for certain circumstances under which a warrant may issue:

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.

Rule 31.23 helps to implement the statute's procedures. First, Rule 31.23(a) provides for issuance of a warrant of execution upon the State's filing of "a notice" that the defendant has failed to timely initiate Rule 32 post-conviction relief proceedings, timely file a petition for review from the denial of post-conviction relief, or initiate federal habeas corpus proceedings within 15 days. Second, Rule 31.23(b) states that a warrant must be issued if the State files a motion requesting one after the defendant's federal habeas corpus proceedings have concluded.

These provisions reflect the common-sense notion that a warrant should issue only when the State actively seeks a warrant, given that it is the State that holds the responsibility to carry out any execution and the discretion over when and how to fulfill that responsibility. Rule 31.23(a), just like Rule 31.23(b), notably requires specific action from the State. Absent that requirement, the Court could become on notice of one of the facts detailed in Rule 31.23(a) in a variety of ways; indeed, the Court could be put on notice of those facts through public court dockets or even media reports.

But the Court cannot issue a warrant of execution *sua sponte*. That is because the rule does not merely require that the Court learn of these facts. Rather, the rule requires that the State expressly take action to inform the Court that the statutory requirements have been met, demonstrating that the State is actively seeking authorization to proceed with an execution. Where, as here, the State has

withdrawn its motion for warrant of execution, the rule does not require that the Court issue a warrant. Requiring the Court to issue a warrant that the State is no longer seeking would make little sense. Both the statute and rule make clear that a warrant of execution merely authorizes ADCRR to act. A.R.S. § 13–759(A) (a warrant “authorizes the director of the state department of corrections to carry out the execution”); Ariz. R. Crim. P. 31.23(c)(4) (“[T]he warrant must . . . authorize the director to carry out the execution”). A withdrawn motion removes any need for the Court to provide that authorization.

The history of Rule 31.23 helps illustrate the point. *See State v. Winegardner*, 243 Ariz. 482, 484 ¶ 5 (2018) (“When the language can reasonably be read more than one way . . . we may consider the rule’s subject matter, legislative history, and purpose, as well as the effect of different interpretations, to derive its meaning.”) (citations omitted). A prior version of subsection (a) required no express action from the State. *See Attach. D* (2014 order amending prior version of rule) (“After a conviction and sentence of death are affirmed and the first post-conviction relief proceeding pursuant to Rule 32.4(a) has concluded by the denial of a petition for review . . . the Supreme Court . . . shall issue a warrant of execution.”). And under that regime, warrants frequently issued where no execution would actually occur, causing a series of needless events requiring work from a variety of individuals and institutions, including the Court. *See Attach. E*

(Rule Change Petition from Arizona Supreme Court Staff Attorneys' Office, filed in Dec. 2013); *see also Chronis v. Steinle*, 220 Ariz. 559, 561 ¶ 11 (2009) (“[W]e find the petition for the adoption of the rule useful in considering the rule’s background and context.”).

Although the 2014 rule change was triggered by a petition that specifically singled out how the interplay between state proceedings and federal habeas proceedings frequently resulted in the issuance of warrants where no execution would be carried out, the logic motivating the change applies with equal force here. For good reason, Rule 31.23(a) requires not just that the Court be on notice of specific facts, but that the process be initiated by “the State fil[ing] a notice.” Issuance of a warrant without the State avowing that an execution could actually move forward would be needless and wasteful, as this Court recognized in changing the rule after a petition from its own Staff Attorneys’ Office.

Finally, this Court has acknowledged through prior practice that Rule 31.23 should not be read as formalistically as would be required to hold that a warrant must issue under the circumstances now present here. In several cases, where circumstances made clear that an execution would not actually occur, this Court has denied the State’s motion for an execution warrant under Rule 31.23(b)’s

predecessor, Rule 31.17(c)(2), even though that subsection said the Court “**shall** issue subsequent warrants of execution upon motion by the state.”⁴ See Attach. F (prior orders of this Court) (emphasis added); Ariz. R. Crim. P. 31.17(c)(2) (2010).

In sum, under Arizona law, the executive is responsible for initiating proceedings once it is prepared to carry out an execution, this Court then determines whether the inmate is eligible and, if so, issues a warrant authorizing the executive to proceed. This statutory and rule-based distribution of authority does not require this Court to issue a warrant when the executive is not seeking to proceed with an execution and has thus withdrawn its motion.

C. Important practical considerations counsel against issuing a warrant absent the State’s affirmative request.

Important practical and logistical considerations further support the statutory and rule-based distribution of authority between the executive and the judiciary when it comes to carrying out sentences of death. Carrying out a death sentence is

⁴ These cases denied motions for warrants where new post-conviction proceedings were pending, even though initial PCR proceedings and federal habeas proceedings had concluded. The decisions reflect the reality that this Court has authority, at a minimum, to construe the rule in a way that avoids absurd results. See *Ariz. Dep’t of Economic Sec. v. Lee ex rel. Cnty. of Maricopa*, 228 Ariz. 150, 154 ¶¶ 16-21 (App. 2011) (declining to read “shall” language as mandatory because doing so “poorly serves the statute’s purpose” and “risks absurd results”); *Milwaukee Cnty., Wis. v. Donovan*, 771 F.2d 983, 990 (7th Cir. 1985) (“The legislature’s use of terms such as ‘shall’ and ‘must,’ rather than ‘may,’ does not automatically require that the provision be construed as mandatory . . .”).

one of the State's gravest responsibilities. Consequently, myriad constitutional and other legal obligations dictate precisely how the State must implement a death sentence. Issuing a warrant of execution only when the State has affirmatively requested one thus ensures that, when a warrant is issued, the State is prepared to meet all of its obligations in carrying out the execution.

First and foremost, the State must abide by federal and state constitutional prohibitions against cruel and unusual punishment in carrying out executions, as well as provisions of the Arizona Constitution and state law specifying the method of execution that must be used. *See* U.S. Const. Amend. VIII; Ariz. Const. art. 2, § 15, art. 22, § 22; A.R.S. § 13-757(A), (B).

Additionally, after several years of litigation regarding ADCRR's execution procedures following the 2014 execution of Joseph Wood, the State entered into a settlement agreement to incorporate numerous provisions into its required procedures for carrying out executions. These binding requirements applicable to all executions in Arizona include: not changing the quantities or types of drugs to be used without notice to the inmate and applying for a new warrant of execution; strict timelines for testing execution drugs and providing inmates with the test results; a strict prohibition against using expired drugs; and specific restrictions on the type of drugs that may be used. *See* Attach. A (*First Amendment Coal. of Ariz. v. Ryan*, D. Ariz. No. 2-14CV01447, Doc. 186, Stipulated Settlement Agreement,

filed June 21, 2017); Attach. B (*id.*, Doc. 187, Order for Dismissal of Claims Six and Seven, filed June 22, 2017). The State faces stiff legal penalties if it violates any of these agreed-upon requirements. Attach. B at 3.

Moreover, ADCRR's 37-page execution procedures are not only lengthy but also granular. *See* Attach. C. These written procedures govern the execution process in minute detail, including, among other issues, the presence of witnesses, training schedules, qualifications of execution personnel, and the types and quantities of drugs that must be used. *Id.* The settlement agreement referred to above expressly prohibits ADCRR from deviating from any of those written procedures that are "central to the execution process," including provisions "relating to execution chemicals and dosages, consciousness checks, and access of the press and counsel to the execution itself." Attach. A at 7; Attach. B at 2.

As a practical and legal matter, an execution can proceed only if the executive branch is prepared to meet every one of these requirements and obligations. Even if an inmate had exhausted all post-conviction relief, the State should not seek an execution warrant when the State cannot carry out an execution in compliance with state and federal law. For example, if the State lacked the required type of drugs, lacked unexpired drugs, was unable to timely complete testing requirements, or lacked the necessary qualified personnel, it would not request a warrant of execution because any ensuing execution would fail to comply

with the State’s mandatory obligations.

Equally plausible is a situation in which the State was initially prepared to carry out an execution and therefore sought a warrant from this Court, but later learned that circumstances had changed. Execution drugs can expire, for example, or the State’s compound pharmacist might be unable to compound the drugs in time to comply with the State’s testing requirements. Staffing realities might change such that there are insufficient or inadequately trained personnel to staff the execution. Or a delay might arise in identifying and clearing a spiritual advisor. *Cf. Ramirez v. Collier*, 142 S. Ct. 1264, 1273 (2022) (recounting that “Texas withdrew [the inmate’s] death warrant” after the inmate asserted free exercise claims and later changed its execution protocol). Under such circumstances, the State would assuredly withdraw its request for a warrant because, again, to proceed would violate the State’s legal obligations. It would be unusual—and ultimately pointless—if this Court were nonetheless required to issue the warrant anyway.

In the context of this case, the State’s logistical position has changed since the original motion was filed on December 7, 2022. Since that time, there has been significant personnel turnover at ADCRR in many positions, including the Director and those responsible for ADCRR’s execution protocols. ADCRR is under new leadership who is actively recruiting and hiring for agency-wide vacancies. Given the transition, ADCRR cannot ensure it has adequate and properly trained

personnel to meet its responsibilities in carrying out an execution.

Given the multitude of obligations that bind the executive branch in carrying out an execution, it is entirely logical that any process under Rule 31.23 must be triggered by the State. This Court's role, in contrast, is to verify that an inmate is eligible for execution and, if requested by the State, issue a warrant authorizing the execution. To conclude that this Court lacks discretion to do anything other than issue a warrant of execution any time the State puts the Court on notice that the requirements of Rule 31.23(a)(1)-(3) have been met, even when the State has subsequently withdrawn its request for a warrant, would require this Court to issue warrants even with the knowledge that an execution will not or cannot take place. Neither § 13-759(A) nor Rule 31.23 compel this absurd result.

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IV. Conclusion.

For the foregoing reasons, the State respectfully requests that this Court decline to issue a warrant for Gunches' execution.⁵

RESPECTFULLY SUBMITTED this 16th day of February, 2023

Respectfully submitted,

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⁵ The State understands that the Maricopa County Attorney's Office intends to file an *amicus curiae* brief in this matter and may express a different view on some of the questions presented here. But, of course, it is the Attorney General who represents the State for purposes of these proceedings. See A.R.S. § 41-193(A).