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**ARIZONA SUPREME COURT**

<b>STATE OF ARIZONA,</b>	)	
<b>Appellee,</b>	)	<b>CR-13-0282-AP</b>
	)	
<b>v.</b>	)	<b>Maricopa County Superior Court</b>
	)	<b>No. CR 2003-038541-001</b>
<b>AARON BRIAN GUNCHES,</b>	)	
<b>Appellant.</b>	)	

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**BRIEF OF FEDERAL PUBLIC DEFENDER  
FOR THE DISTRICT OF ARIZONA AS *AMICUS CURIAE***

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## **IDENTITY AND INTEREST OF *AMICUS CURIAE***

The Federal Public Defender for the District of Arizona (“FPD”) represents condemned Arizona prisoners in habeas proceedings and collateral litigation, including before this Court related to execution warrants. The FPD’s mission is to protect the rights of its clients and ensure that their sentences are carried out in compliance with the United States and Arizona Constitutions. As counsel for most of the Arizona prisoners presently subject to sentences of death, the FPD has a strong interest in the outcome of the question presented in this Court’s January 31, 2023 Order.<sup>1</sup>

## **STATEMENT OF THE ISSUE**

The Court asked for briefing on this 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?

## **INTRODUCTION**

This Court retains the “authority to do anything other than issue a Warrant of Execution[.]” even though “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[.]” Order, *State v. Gunches*, No. CR-13-0282-AP (Ariz. Jan.

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<sup>1</sup> Counsel for the parties did not author any part of this brief. *See* Ariz. R. Crim. P. 31.15(a).

31, 2023). In July 2021, in *State v. Dixon* and *State v. Atwood*, the Court declined to issue warrants after it had notice that § 13-759(A) and Rule 31.23 were satisfied.<sup>2</sup> Instead, the Court vacated the warrant litigation in both cases following the State’s disclosure that it was unable to proceed with either execution under the briefing schedules. Order, *State v. Dixon*, No. CR-08-0025-AP (Ariz. July 12, 2021); Order, *State v. Atwood*, No. CR-87-0135-AP (Ariz. July 12, 2021). *Dixon* and *Atwood* show the Court has the authority not to issue a warrant despite notice that § 13-759(A) and Rule 31.23 are satisfied.

The Court’s actions in *Dixon* and *Atwood* are consistent with its longstanding practice, procedural rules, and inherent authority, pursuant to which it has frequently acted other than to issue execution warrants mechanically and immediately upon notice that § 13-759(A) and Rule 31.23 are satisfied. The State having notified the Court that further review is necessary before the Arizona Department of Corrections, Rehabilitation and Reentry (“ADCRR”) can execute Mr. Gunches, the Court should exercise that authority to grant the parties’ motions for withdrawal.

## ARGUMENT

### **I. The Court has often taken actions other than issuing a warrant despite notice that A.R.S. § 13-759(A) and Rule 31.23 are satisfied.**

In *State v. Dixon*, the State gave notice on April 6, 2021, that the requirements for issuance of a warrant had been met. *See* State’s Motion to Set Briefing Schedule for

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<sup>2</sup> Unless otherwise noted, Rules and statutory sections cited herein are Arizona Rules of Criminal Procedure and Arizona Revised Statutes.

Motion for Warrant of Execution at 5, *Dixon*, No. CR-08-0025-AP (Ariz. Apr. 6, 2021). Its filing included documentation that the requirements of § 13-759 and Rule 31.23 were satisfied. *See id.* at Ex. A. The State did not request a warrant but, “[to] comply with its testing and disclosure obligations” imposed by its own protocols and a federal court order, sought a briefing schedule. *Id.* at 1; *id.* at Ex. B.

As of that day, the Court had notice that the requirements in § 13-759 and Rule 31.23 had been met, but it did not issue a warrant. Consistent with the State’s request, it directed the State to move for a warrant of execution later and scheduled subsequent briefing and a conference date on that motion. Order, *Dixon*, No. CR-08-0025-AP (Ariz. May 21, 2021).<sup>3</sup> One month later, the State moved to modify the briefing schedule, citing its inability to compound legal execution drugs under that schedule in compliance with court- and ADCRR-mandated testing protocols. *See* State’s Motion to Modify Briefing Schedule, *Dixon*, No. CR-08-0025-AP (Ariz. June 22, 2021). The State’s motion made clear that despite its request for a modified briefing schedule, the requirements for issuing a warrant remained satisfied. *See id.* at 4 (asserting its request had no relation to whether a warrant could issue under Arizona law, which it argued instead turned only on “the narrow question whether the ‘conviction and sentence of

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<sup>3</sup> The Court has issued similar scheduling orders or continuances here, reflecting the same exercise of its constitutional and rule-based authority to manage its cases. *See* Order, *Gunches*, No. CR-13-0282-AP (Ariz. Dec. 21, 2022); Order, *Gunches*, No. CR-13-0282-AP (Ariz. Jan. 31, 2023); *see also* Order, *State v. Hooper*, No. CR-83-0044-AP (Ariz. Aug. 24, 2022) (similar scheduling order).

death [have been] affirmed and the first post-conviction relief proceedings have concluded.’ A.R.S. § 13-759(A); *see* Ariz. R. Crim. P. 31.23(b).”). The State alternatively sought “a temporary stay of the briefing schedule” on its previously lodged motion for a warrant. *Id.* at 4 n.5.

Although the Court remained on notice that the requirements for issuance of a warrant had been met, it did not issue a warrant or temporarily stay briefing on whether one should issue. The Court instead vacated the warrant briefing schedule entirely. *See* Order, *Dixon*, No. CR-08-0025-AP (Ariz. July 12, 2021). It set no deadline for a motion for issuance of a warrant and allowed the State to “renew its scheduling motion after specialized [drug] testing[.]” *Id.* The State renewed its request for a briefing schedule six months later, after subsequent drug testing. *See* State’s Motion to Set Briefing Schedule for Motion for Warrant of Execution, *Dixon*, No. CR-08-0025-AP (Ariz. Jan. 5, 2022). A warrant issued three months later. *See* Warrant of Execution, *Dixon*, No. CR-08-0025-AP (Ariz. Apr. 5, 2022).

If the Court had no “authority to do anything other than issue the Warrant of Execution” once the State “placed this Court on notice that the requirements” in the statute and rule had been satisfied, *see* Order, *Gunches*, No. CR-13-0282-AP (Ariz. Jan. 31, 2023), then having received such notice in *Dixon*, the Court would have issued one. Instead, it vacated all briefing and conferencing and left to the State whether to renew its motion. *See* Order, *Dixon*, No. CR-08-0025-AP (Ariz. July 12, 2021).

The Court followed the same procedure in *Atwood*. On April 6, 2021, the State requested a briefing schedule on a Motion for Warrant and documented for the Court that a warrant could lawfully issue. *See* Motion to Set Briefing Schedule for Motion for Warrant of Execution, *Atwood*, No. CR-87-0135-AP (Ariz. Apr. 6, 2021). After that schedule had been set, the State moved to modify it—not based on any changes to the circumstances necessary for a warrant to issue under § 13-759 and Rule 31.23, but instead to account for the need for further testing of its execution drugs. *See* Motion to Modify Briefing Schedule, *Atwood*, No. CR-87-0135-AP (Ariz. June 22, 2021). Rather than modify the briefing schedule, the Court vacated it entirely and refrained from issuing a warrant, noting that the “State may renew its scheduling motion after” further testing of its execution drugs. *See* Order, *Atwood*, No. CR-87-0135-AP (Ariz. July 12, 2021).<sup>4</sup> As in *Dixon*, the Court’s action demonstrates that it retains authority to decline to issue a warrant even after receiving notice that § 13-759 and Rule 31.23 are satisfied.

The Court’s longstanding historical practice is consistent with the discretion it exercised recently in *Dixon* and *Atwood*. In Dan Cook’s case, the Court declined to issue a warrant—despite the State requesting one and notifying the Court § 13-759(A) and Rule 31.23 were satisfied—because of ongoing litigation surrounding the legality of the State’s method of execution. Ex. A (Order, *State v. Cook*, No. CR-88-0301-AP (Ariz.

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<sup>4</sup> After delays caused by, among other things, the death of *Atwood*’s counsel, a warrant did not issue until May 3, 2022, more than a year after the State first gave notice one could issue.

Apr. 1, 2009) (denying State’s motion for execution warrant based on “proof of filing a Rule 32 notice of post-conviction relief . . . challenging the constitutionality of Arizona’s lethal injection protocol”). Neither § 13-759(A) nor Rule 31.23 identify post-conviction litigation as a basis to refuse to issue a warrant. And although Rule 32.18, then codified as Rule 32.4(f) (2009), limits the circumstances permitting a stay of execution based on a second or successive Rule 32 petition, that provision applies only after the Court has already issued a warrant and “fixed the time for executing the sentence[.]” The Court in *Cook* did not first fix a time for the execution and then concurrently stay the execution. The Court instead exercised its authority to not issue a warrant at all.

*Cook*, *Atwood*, and *Dixon* are not outliers. This Court has repeatedly denied motions for warrants or continued them for reasons other than non-compliance with § 13-759(A) or Rule 31.23. *E.g.*, Ex. B (Order, *State v. King*, No. CR-91-0084-AP (Ariz. May 6, 2009) (denying State’s motion for warrant based on “proof of filing a Rule 32 notice of post-conviction relief”)); Ex. C (Order, *State v. Beaty*, No. CR-85-0211-AP/PC (Ariz. Feb. 4, 2010) (“In light of the pending post-conviction relief petition, IT IS ORDERED that the Motion for Warrant of Execution is denied.”); Ex. D (Order, *State v. Bible*, No. CR-90-0167-AP (Ariz. Sept. 22, 2010) (denying State’s motion for warrant “in light of the Motion for Reconsideration of Trial Court’s Denial of Bible’s Request for Postconviction DNA Testing pending in the Coconino County Superior Court”);

*see also* Exs. E, F, G, H (continuing consideration of the State’s warrant motions in several cases for reasons other than failure to show compliance with the requirements in § 13-759(A) and Rule 31.23).<sup>5</sup>

**II. Neither A.R.S. § 13-759(A) nor Rule 31.23(a) withdraw the Court’s discretion to manage its docket.**

The Court’s authority to manage its own proceedings, reflected in the foregoing cases, is both inherent and constitutionally based. Ariz. Const. art. VI, § 5(5); *State v. Reed*, 248 Ariz. 72, 76 ¶ 10, 77 ¶ 16 (2020); *Slayton v. Shumway*, 166 Ariz. 87, 89, 91 (1990) (describing the Court’s “inherent rulemaking authority” and “inherent power, even absent explicit constitutional provision or legislative consent, to formulate their own procedural rules”). Neither statute nor rule withdraws the Court’s “inherent power to make any orders necessary to carry out’ its appellate function.” *Royce C. v. Dep’t of Child Safety*, 252 Ariz. 129, 138 ¶ 28 (Ct. App. 2021) (quoting *Rodriguez v. Williams*, 104 Ariz. 280, 282 (1969)). Nothing in the statute or rule restricts the Court’s constitutional authority to decline to issue a warrant in a specific case. Indeed, as the cases above

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<sup>5</sup>This Court is not alone in exercising discretion to withhold a warrant despite seemingly mandatory statutory language. The South Carolina Supreme Court recently refused to issue an execution warrant to “conserve judicial, attorney, and Department of Corrections resources,” citing ongoing method of execution litigation. *See* Ex. I (Order, *Mabdi v. South Carolina*, Appellate Case No. 2014-002131 (S.C. Feb. 9, 2023)). It did so despite previously interpreting the issuance of a warrant as an automatic, “ministerial” function of the court under a statute directing that one “shall” issue under certain circumstances. *Roberts v. Moore*, 505 S.E.2d 593, 593 (S.C. 1998) (mem.); *In re Stays of Execution in Capital Cases*, 471 S.E.2d 140, 140 (S.C. 1996) (mem.).

show, the Court routinely exercises that power to decline to issue warrants. *Cf. State v. Hansen*, 215 Ariz. 287, 289 ¶ 8 (2007) (“[W]e attempt to construe statutes and rules in a way that averts needless constitutional tension[.]”).

Even if the rule or statute were construed to withdraw from the Court the power to refrain from issuing warrants, neither mandates when those warrants must issue.

First, although Rule 31.23(a) directs that a warrant “must” issue after the State gives notice that its conditions are met, it is silent on the timing of a warrant’s issuance, leaving that to the Court’s inherent discretion. Even if Rule 31.23(a) mandated a warrant’s immediate issuance—contrary to historical practice—Rule 31.3(a) empowers the Court to suspend its operation here. *See* Rule 31.3(a) (“For good cause, an appellate court, on motion or on its own, may suspend any provision of this rule in a particular case, and may order such proceedings as the court directs.”). Rule 31.3(a) is consistent with, and an articulation of, the Court’s “inherent power to make any orders necessary to carry out” its functions. *Rodriguez*, 104 Ariz. at 282; *see also Slayton*, 166 Ariz. at 89, 91. The State’s representation that it is unprepared to execute a warrant of execution is “good cause” for suspension of a rule that would nonetheless mandate one’s issuance. *Cf. Hansen*, 215 at 289 ¶ 8. Good cause not to issue a warrant is further shown by the significant costs the State and courts would bear upon its issuance. *See, e.g., Ex. J* (Petition to Amend Rule 31.17, No. R-13-0050, at 3 (describing amendments to precursor to Rule 31.23 as aimed to prevent automatic but “unnecessary issuance of a

warrant[,]” citing “significant administrative costs associated with issuance of execution warrants” and need to “conserve judicial resources”); Ex. K (ADCRR Department Order 710 – Execution Procedures at 11-14 (describing the various costly and time-consuming procedures that ADCRR must immediately undertake upon receiving a warrant of execution)). Thus, even if Rule 31.23(a)’s language is deemed mandatory, in this case the Court can and should suspend its operation under Rule 31.3(a).

Second, and similarly, although § 13-759 provides that a warrant of execution “shall” issue upon satisfaction of its requirements, it does not mandate when that issuance must occur. Instead, the timing of a warrant’s issuance has long been understood to be subject to this Court’s rulemaking authority. Beyond the historical practice documented above, this Court’s rules themselves reflect the understanding that warrants do not automatically issue under the statute; rather, the timing of their issuance is a procedural matter left to this Court.

For example, although § 13-759 makes no mention of federal habeas, Rule 31.23 only permits the issuance of a warrant for defendants who have waived post-conviction review and federal habeas proceedings, or whose federal habeas proceedings and appeals have concluded. *See* Rule 31.23(a), (b). This is an update to the Court’s earlier practice of routinely “issu[ing] the warrant on the same date that it denies the petition for review[,]” before a federal habeas petition could be filed. *See* Ex. J (Petition to Amend Rule 31.17, No. R-13-0050, at 2); *see also, e.g.*, Rule 31.17(c) (2014). Because such

warrants were routinely stayed by the federal courts, the current scheme was proposed to minimize “the significant administrative costs associated with issuance of execution warrants” that went unexecuted and to “conserve judicial resources in both the state and federal courts.” Ex. J at 3.<sup>6</sup>

The Court adopted this scheme in 2015 despite § 13-759’s silence about delaying the issuance of execution warrants to permit defendants to file a federal habeas petition. The scheme’s adoption necessarily reflects an understanding that the statute does not mandate the immediate but “unnecessary issuance of a warrant” upon satisfaction of the basic statutory requirements for one to issue. Ex. J at 3, 4. Instead, *when* a warrant issues was (and is) a procedural matter subject to the Court’s rulemaking authority.

Warrant issuance is not the only example of the Court maintaining control over the timing of executions despite the facially rigid statute. For example, § 13-759(A) provides that the “time for execution shall be fixed for thirty-five days after the state’s motion is granted.” It makes no mention of stays or delayed executions. The Court has nonetheless adopted rules allowing for both. *See, e.g.*, Rule 31.23(c) (providing the Court “must specify” a date of execution 35 days after the warrant’s issuance, but empowering

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<sup>6</sup> That the present-day Rule 31.23 requires a “notice” from the State under section (a) but a “motion” under section (b) prior to the issuance of a warrant appears merely to be a holdover from the historic version of the rule, under which a “notice” of the expiry of state proceedings would trigger the first warrant’s issuance; a stay would be entered upon the filing of federal habeas; the old warrant’s 35-day authorization period would expire; and the State would return to this Court by motion for a new warrant upon the conclusion of federal habeas. *See* Rule 31.17(c) (2014).

this Court to extend an execution date 25 days beyond the date “fixed” by the statute if the Court “finds [this date] impracticable”); Rule 32.18 (empowering this Court to stay executions due to pending litigation not discussed in § 13-759).

Interpreting the uses of “shall” in § 13-759 as mandating immediate action is also uncompelling as a matter of statutory interpretation. Even if the term implied a mandatory duty, it states no period in which that duty must be discharged. When the legislature wants an actor to take an action immediately, it says so. *See, e.g.*, A.R.S. § 13-123(A) (“The clerk shall immediately furnish a copy of the certificate to the chief judge of the superior court[.]”); A.R.S. § 20-172(A) (“The superior court shall immediately consider the director’s petition and shall immediately issue without notice[.]”); A.R.S. § 22-373(A) (“On an appeal to the superior court, the justice of the peace or presiding officer of a municipal court shall immediately, without charge, transmit a copy of the court file[.]”). Each of those uses of “immediately” would be superfluous if the word “shall” mandated immediate action. That “the legislature knows how to specify when” an action must occur, but “did not do so” in § 13-759, reflects the decision not to impose such a time-constraint on the Court. *See Leibsohn v. Hobbs*, 254 Ariz. 1, 49 ¶ 14 (2022).

Moreover, even if § 13-759 is read as mandating immediate action, this constraint would be modifiable under the Court’s rules. *See* Rule 31.3(e) (“For good cause and after considering the rights of the victim, an appellate court may shorten or extend the

time for doing any act required by Rule 31, a court order, *or an applicable statute.*” (emphasis added)). The reasons described *infra* demonstrate good cause to do so.

Construing § 13-759(A) as mandating a contrary outcome here would render the statute unconstitutional. This is an additional reason to interpret it as permissive. *See Hansen*, 215 at 289 ¶ 8; *Garcia v. Butler in & for Cnty. of Pima*, 251 Ariz. 191, 195-96 ¶¶ 18-19 (2021) (language will not be interpreted as mandatory when unconstitutional results would follow; declining to interpret statute as giving “the state . . . complete discretion” over initiating competency screenings and “depriving the trial court of any oversight in the exercise of that discretion[,]” because doing so “would violate basic due process principles”); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 596 ¶¶ 31-32 (2017), *as amended* (Aug. 17, 2017) (interpreting “shall” as permissive rather than mandatory to preserve a statute’s constitutionality).

“The Arizona Constitution allocates to this Court the ‘[p]ower to make rules relative to all procedural matters in any court[,]’” and the “legislature may not enact a statute that conflicts with [this Court’s] rulemaking authority.” *State v. Bigger*, 251 Ariz. 402, 412 ¶ 35 (2021) (quoting Ariz. Const. art. VI, § 5(5) (second alteration added)). The legislature may enact “‘reasonable and workable’ procedural laws if they supplement rather than conflict with court procedures[,]” but when the legislature’s and the judiciary’s rules “conflict, the court procedure prevails.” *Reed*, 248 Ariz. at 76 ¶ 10. Section 13-759’s constitutionality thus turns on whether it (a) dictates an outcome

inconsistent with this Court's own procedural rules, and (b) is procedural rather than substantive. *Id.* at 76 ¶¶ 9, 10.

Because the Court has retained the discretion to modify Rule 31.23(a), *see, e.g.*, Rule 31.3(a), interpreting § 13-759 as divesting the Court of that discretion regarding the issuance of warrants creates a direct conflict, *see, e.g.*, *Bigger*, 251 Ariz. at 413 ¶ 37 (finding statute unconstitutional where court rule “allows trial courts to hear untimely petitions when the delay is not attributable to the defendant” but “the statute purports to withdraw a court’s power to do so”).

The statute is also procedural and not substantive. “[T]he substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion.” *Reed*, 248 Ariz. at 76 ¶ 13 (quoting *State v. Birmingham*, 96 Ariz. 109, 110 (1964)). In *Reed*, the Court struck down a statute directing courts to dismiss criminal appeals upon an appellant’s death. *Id.* at 75 ¶ 8. The Court found the statute procedural because it “directs how a court must process a pending appeal upon the occurrence of an event[.]” *Id.* at 77 ¶ 16. The Court reasoned that “disposition of the appeal” is part of the “legal machinery’ enforcing the substantive right to appeal[.]” and thus within its rulemaking powers. *Id.*

The same conclusion follows for “disposition of” a motion for a warrant. Section 13-759 does not address the substantive question of when a judgment of death may

issue—indeed, it presupposes a final judgment exists—but instead “directs how a court must process a pending [motion for a warrant] upon the occurrence of an event[.]” namely, the conclusion of ancillary postconviction proceedings. *Reed*, 248 Ariz. at 77 ¶ 16. A motion, like an appeal, the “disposition of [which] is a matter of court procedure,” means that “the legislature has no authority to direct the courts in how they adjudicate” such matters. *Id.* at 76 ¶ 16.

Moreover, the constitutional concerns arising from construing § 13-759 as mandatory would not be obviated by characterizing the statute as a legislative enactment under the Victim’s Bill of Rights (VBR). The VBR’s “legislative rulemaking authority extends only so far as necessary to protect victims’ VBR-granted rights and does not otherwise infringe the Court’s constitutionally granted rulemaking authority.” *Reed*, 248 Ariz. at 78 ¶ 20 (discussing *Slayton*, 166 Ariz. at 92). This Court has repeatedly struck down statutes mandating specific outcomes in post-trial proceedings—for example appeals or Rule 32 petitions—even if they further victims’ interests in some respect, where that interest is not “unique and peculiar to victims.” *Id.* at 79 ¶ 22. Although the victims here have articulated their interest in prompt issuance of a warrant, that interest is not “unique and peculiar to victims:” “the judicial system as a whole is vitally interested in advancing the goal of prompt, fair resolution of all actions, including criminal cases, for the benefit of all participants as well as victims.” *Id.* at 79 ¶ 23 (quoting *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 (1999)); *see also* Motion to

Appear as *Amicus Curiae* by Maricopa County Attorney's Office, *Gunches*, No. CR-13-0282-AP (Feb. 7, 2023) (articulating prosecutorial agency's own similar interests).

If § 13-759 is construed as mandating a specific outcome to warrant motions, it is inconsistent with this Court's rules and its retained discretion regarding motions for warrants of execution, and thus unconstitutional. *See Reed*, 248 Ariz. at 78 ¶ 19, 80 ¶ 27.

### CONCLUSION

This Court has the power to act other than issuing a warrant despite notice from the State that the requirements of § 13-759(A) and Rule 31.23(a) have been satisfied. It has exercised that power time and again. Under the Arizona Constitution, the Court's inherent authority, and the Rules of Criminal Procedure, the Court can and should decline to issue a warrant of execution or delay doing so in this case.

Respectfully submitted this 16th day of February, 2023.

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