

**IN THE SUPREME COURT
STATE OF ARIZONA**

STATE OF ARIZONA,

Appellee,

vs.

AARON BRIAN GUNCHES,

Appellant.

No. CR-13-0282-AP

Maricopa County Superior Court

No. CR 2003–038541-001

**AMICUS CURIAE BRIEF OF
THE MARICOPA COUNTY ATTORNEY'S OFFICE**

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I. INTRODUCTION.

For over a century, Arizona has required that courts issue warrants for execution, but it has never made their issuance the subject of contested proceedings. Arizona Revised Statutes § 13–759(A) and Arizona Rule of Criminal Procedure 31.23, like their predecessor statutes and rules, prescribe ministerial acts for the issuance of a warrant of execution. The warrant is a part of defendants’ capital sentences, and it provides notice to defendants, victims, and the public when the State will carry out sentences. By doing so, a warrant of execution gives the defendant an opportunity to pursue remaining options for relief, the Arizona Department of Corrections Rehabilitation and Reform (“ADCRR”) an opportunity to prepare for the execution, and the victims an opportunity to exercise their constitutional rights. Because the State’s motion for a warrant of execution does not result in litigation, once the State asks for a warrant, its involvement in that administrative process is terminated. This Court must then issue the warrant.

Having “move[d] this Court to issue a warrant of execution” after affirming that Aaron Gunches meets the statutory and rule-based “requirements for issuance of a warrant” the Arizona Attorney General’s Office now asks to withdraw its motion for issuance of a warrant, writing “[b]ecause the State’s motion for warrant of execution was prompted by Gunches’s now-withdrawn request, and because a thorough examination of the administration of capital punishment in Arizona is

warranted.” (Resp. to Mot.: Issuance of Death Warrant/State’s Mot. for Execution, at 1-4; State’s Mot. to Withdraw Mot. for Warrant, at 1.) The plain language of [A.R.S. § 13–759\(A\)](#), and Rule 31.23(a)(1), however, does not afford the Attorney General that opportunity, and the purpose and history of [§ 13–759\(A\)](#) and [Rule 31.23](#) confirm that withdrawal is not permissible.

Even if this Court disagrees and concludes that the State’s request for a warrant of execution is a contested proceeding, victims’ rights and finality must necessarily loom large over the proceedings. Victims have a constitutional right to a “prompt and final conclusion” of their cases after sentencing. [Ariz. Const. art. II, § 2.1\(A\)\(10\)](#). Despite Gunches’s attempts to waive almost all appellate review, it has been over 20 years since he murdered Ted Price. This Court must balance victims’ rights against the State’s attempt to withdraw its motion for a warrant. The Attorney General’s desire to review execution procedures does not outweigh the victims’ interest in finality. Twenty-one years is long enough. This Court must issue a warrant for Gunches’ execution as provided by [§ 13-759\(A\)](#) and [Rule 31.23\(a\)\(1\)](#).

II. PROCEDURAL HISTORY.

The facts are well documented and do not need to be repeating in this *amicus* brief. Over 20 years ago, in November 2002, Gunches kidnapped, shot, and murdered Ted Price in the desert near Mesa. [State v. Gunches \(Gunches I\)](#), 225 Ariz. 22, 23-24, ¶¶ 2-4 (2010). He was sentenced to death, which this Court affirmed. *Id.*

at 24, 27, ¶¶ 6, 26; *State v. Gunches (Gunches II)*, 240 Ariz. 198, 201, 207, ¶¶ 4, 42 (2016).

Gunches waived post-conviction relief (“PCR”) proceedings and did not pursue federal *habeas corpus* review. On November 25, 2022, Gunches filed a *pro per* “Motion: Issuance of Death Warrant” with this Court requesting that “this Court Issue a Death Warrant for him so his Sentence of Death may be carried out immediately” and “so that Justice may be lawfully served and give closure to the Victims[’].” (Mot.: Issuance of Death Warrant, at 1.) The State joined “in Gunches’ motion and also move[d] this Court to issue a warrant of execution.” (Resp. to Mot. at 1-4.)

Gunches eventually moved to withdraw his request for execution, as did the Attorney General. This Court then ordered briefing on whether the Attorney General’s Office could withdraw its Motion and subsequently authorized the Maricopa County Attorney’s Office (MCAO) to appear as *amicus*.

III. THE PLAIN LANGUAGE, HISTORY, AND PURPOSE OF A.R.S. § 13–759(A) AND RULE 31.23 DO NOT AUTHORIZE THE STATE TO WITHDRAW A MOTION FOR DEATH WARRANT.

It is important to clarify at the outset that the analysis under [A.R.S. § 13–759\(A\)](#) or [Rule 31.23](#) is the same. As discussed below, [Rule 31.23](#) procedurally differs from [§ 13–759\(A\)](#), but the circumstances here satisfy both this Court’s rule and [§ 13-759\(A\)](#). Both provide administrative procedures for the issuance of

warrants of execution. Both allow the State to request warrants. Both direct this Court to issue warrants once requested. And neither create procedures that allow the State to withdraw a request for warrant of execution.

A. Background law.

When reviewing questions of statutory or rule interpretation, this Court looks first at the plain language as the “best and most reliable indicator” of such intent. *State v. West*, 238 Ariz. 482, 489–90, ¶ 20 (App. 2015). If the statute’s or rule’s language is clear and unambiguous, it is unnecessary to resort to other methods of interpretation. *State v. Christian*, 205 Ariz. 64, 66, ¶ 6 (2003); *Xavier R. v. Joseph R.*, 230 Ariz. 96, 98 ¶ 3 (App. 2012). Faced with an ambiguous statute or rule, this Court considers “secondary principles of statutory interpretation, such as the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose.” *State v. Jurden*, 239 Ariz. 526, 530, ¶ 15 (2016); *see Xavier R.*, 230 Ariz. at 98 ¶ 5.

B. The plain language of § 13–759(A) does not allow the State to withdraw a motion for death warrant.

[Section 13–759\(A\)](#) is relatively short and provides:

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.

(Emphasis added.) The procedures outlined in § 13–759(A) create two types of warrants: (1) the initial warrant of execution and (2) second and subsequent warrants of execution. First, this Court must issue the initial warrant if execution when two conditions precedent exist: (1) the conviction and sentence of death are affirmed on appeal and (2) the first post-conviction relief proceedings have concluded.¹ A.R.S. § 13–759(A). When these conditions precedent are satisfied, the statute plainly provides that this Court “shall issue a warrant of execution,” A.R.S. § 13–759(A), indicating a mandatory intent. See *Navajo County Juv. Action No. JV–94000086*, 182 Ariz. 568, 570 (1995). In other words, this Court's obligation to issue a warrant is automatic—it requires no litigation or motion from the State or any other party.

This Court's initial warrants, however, are valid for 35 days, A.R.S. § 13–759(A), and as explained below, function as a prompt for the defendant to

¹ The State can also file a motion for the issuance of the initial warrant. A.R.S. § 13–759(A).

expeditiously pursue federal *habeas corpus* review.² For that reason, almost no initial warrants will result in an execution.

Following the initial warrant, § 13–759(A) imposes only one requirement before the issuance of a second or subsequent warrant—the “State” must ask this Court for a death warrant. The legislature’s use of “State” is telling. The Attorney General is not the only official authorized to request a warrant. *See* A.R.S. § 1–215 (38) (“‘State,’ as applied to the different parts of the United States, includes the District of Columbia, this state and the territories.”). While it is unnecessary to explore the statute’s limits, any appropriate State official can request a warrant, again confirming that the warrant request is ministerial.

Upon the State’s request, this Court must issue second and subsequent warrants. That conclusion is confirmed by the statute’s concluding sentence, which acknowledges this Court will grant the State’s motion. A.R.S. § 13–759(A) (directing the timeframe for execution “after the state’s motion is granted”). The

² The need to alert a defendant to pursue *habeas corpus* remedies has varied over time. Until 1953, federal courts did not review state court application of federal constitutional law. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1563 (2021) (Gorsuch, J., concurring) (citing *Brown v. Allen*, 344 U.S. 443 (1953)). When A.R.S. § 13–759(A) was enacted in 1994, there was no statute of limitations of federal *habeas corpus* proceedings. Two years later, the Antiterrorism and Effective Death Penalty Act of 1996 required that state court prisoners file federal *habeas corpus* claims within one year of the end of state court proceedings. 28 U.S.C. § 2244(d)(1)-(2).

plain language of § 13–759 invites no response from the defendant, provides no avenue for appeal, leaves no discretion, and requires no additional findings by this Court. *See Torres v. State*, 21 Ariz. 401, 402 (1920) (holding that an appeal was prohibited from an order setting the date of execution). Once requested, there is nothing left for the State to do for the issuance of a warrant of execution.

This analysis, admittedly, answers only part of the question, leaving for this Court the determination of whether the State can withdraw its request. The statute provides no method to withdraw a request for a warrant of execution, suggesting that such a procedure is unauthorized. *Cf. State v. Maestas*, 244 Ariz. 9, 13, ¶ 15 (2018). The lack of a withdrawal procedure is sensible, however, given that the State’s request for a warrant of execution is a ministerial act.

Unlike contested hearings where parties are represented by a single entity who may file and withdraw motions, the warrant of execution statute is administrative. For example, if a county attorney requests a warrant, the Attorney General should not have the ability to withdraw that request, although both officers represent the State. *See Crosby-Garbotz v. Fell in and for Cnty. Of Pima*, 246 Ariz. 54, 60, ¶ 24 (2019) (“That different legal offices handle different cases does not mean that the State is not a party in both actions.”). By recognizing the State’s ministerial role, and that once it requests a warrant, § 13–759(A) requires no further State involvement, the statute avoids the potential for a philosophical tug-of-war between dueling

officials taking opposing positions on the issuance of the warrant.³ Simply put, the plain language of § 13–759(A) does not allow the State to withdraw its motion. Once requested, this Court must issue a warrant.

To summarize, § 13–759 creates administrative procedures to issue warrants of executions. Initial warrants must be automatically issued by this Court⁴ without litigation or motion from the State or any other party. Following the initial warrant, the State—not only the Attorney General—must request additional warrants, but this

³ Of course, this Court long ago held that it would be improper for an elected official to refuse to enforce the death penalty based on his or her personal beliefs:

Of course, it must be understood that men’s opinions and wishes cannot be substituted and made to take the place of the law; that this is a government of laws, and not of men, and that those persons whom the people have chosen to execute the laws must do so, however disagreeable or repugnant to their wishes it may be. It is not a jealousy of our processes that calls forth this expression, but [jealousy] of the law as it exists. The people and their representatives make the laws, and their observation and enforcement is the only sure test of loyalty and certain guaranty of the perpetuity of our government.

State ex rel. Jones v. Simms, 17 Ariz. 410, 417 (1915).

⁴ The Statute does not specify how many members of this Court are necessary to issue a warrant. See A.R.S. § 1–214(B) (“Words in the singular number include the plural, and words in the plural number include the singular.”). Historically, a single justice could issue the warrant, Ariz. Code 1939, Ch. 44, § 44–2314 and the plain language of § 13–759(A) authorizes such a result.

is a ministerial function requiring no litigation. Once that request is made, the State's role is completed, and this Court must issue the warrant.

C. The plain language of Rule 31.23 does not allow the State to withdraw a motion for death warrant.

As with § 13–759(A), Rule 31.23 recognizes that the death warrant procedure is administrative, and requests for, and issuances of, warrants are ministerial acts. The key provisions are mostly the same, creating two types of warrants, authorizing the State to request warrants of execution, and directing that this Court “must issue a warrant” when requested. Excluding Rule 31.23(a)'s procedural requirements, the relevant text is short and provides: “After affirming a death sentence, the Supreme Court must issue a warrant of execution if the State files a notice,” and “[o]n the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.” *Ariz. R. Crim. P. 31.23(a)-(b)*.

As relevant here, two notable differences from § 13–759(A) exist. First, Rule 31.23(a) dispenses with the automatic issuance of the initial warrant, requiring a notice from the State that the defendant has exhausted initial State post-conviction proceedings and has not initiated federal *habeas corpus* review. *Ariz. R. Crim. P. 31.23(a)(1)-(a)(3)*. For second and subsequent warrants, Rule 31.23(b) then includes a prerequisite not listed in § 13-759(A)—“federal habeas corpus proceedings and habeas appellate review” must have concluded.

Nothing in the differences listed above creates a substantive right not found in [A.R.S. § 13–759\(A\)](#). The rule invites no litigation, does not authorize a response from the defendant, and provides no independent right to appeal. [Rule 31.23\(a\)](#) does not allow the State to withdraw a motion for issuance for a warrant. Like [§ 13–759\(A\)](#), this Court must issue a warrant when requested under [Rule 32.23\(a\) or \(b\)](#).

Applied here, the plain language of both [§ 13–759\(A\)](#) and [Rule 31.23](#) mandate one result—this Court must now issue a warrant of execution. The Attorney General cannot withdraw the State’s motion for issuance of a warrant, and this Court has no discretion to deny the warrant.

D. The history and purpose of Arizona’s death warrant statutes and rules confirms that the State cannot withdraw its motion for a warrant of execution.

A holdover over from English common law, Arizona has long required judicial warrants of execution for capital offenses because the time of execution was fixed by the judge as part of the sentence. *See* 4 William Blackstone, Commentaries, app. VI, § 4; [Commonwealth v. Mayloy, 57 Pa. 291, 296–97 \(1868\)](#); Ariz. Pen. Code 1901, Tit. 10, Ch. 2, [§ 1023](#) (App’x A). From Arizona’s earliest statutes to [§ 13–759](#) today, the process is mostly unchanged. Issuing the warrant is ministerial.

Early statutes directed the trial judge to issue the death warrant when the judgment of conviction and sentence were rendered. Ariz. Pen. Code 1901, Tit. 10, Ch. 2, § –1023. Unless a timely appeal was taken, “[n]o judge, court, or officer”

other than the governor or the sheriff of the county could stay the warrant once it was issued, and the sheriff could only delay the execution for specifically enumerated reasons, such as insanity and pregnancy. *Id.* §§ –1026–34.

The issuance of the warrant was clearly administrative. The governor was directed to automatically reissue unexecuted warrants in certain situations. For example, with pregnant defendants, the governor could reissue the warrant “[w]hen the governor [was] satisfied that the female [was] no longer pregnant.” Ariz. Penal Code 1901, Tit. 10, Ch. 2, §§ –1032–33; *see id.* §§ –1031 (authorizing the governor to reissue the warrant when a previously insane defendant “becomes sane”). And for warrants that went unexecuted for any reason, the trial judge was required to issue a subsequent warrant “upon the application of the district attorney.” *Id.* § –1034.

This approach remained many years with minor adjustments. *See, e.g.*, Ariz. Pen. Code 1913, Tit. 10, Ch. 2, §§ –1137–1150 (App’x B); Ariz. Rev. Code 1928, Ch. 122, Art. 2, §§ –5119–32 (App’x C); Ariz. Code 1939, Ch. 44, §§ 44–2304 to –2319 (App’x D). Later versions recognized delays for appeal, directing that the “appellate court shall fix a new time for the execution of the sentence and shall issue a warrant.”⁵ Ariz. Code 1939, Ch. 44, § 44–2313. For unexecuted warrants, the law

⁵ This Court was Arizona’s only appellate court until 1965. 1964 Ariz. Sess. Laws., ch. 102, § 1.

eventually authorized the Attorney General to request warrants and any judge of this Court to issue them. *Id.* § 44–2314. Around the 1950s, the legislature deferred to this Court’s rules and removed statutes outlining detailed warrant procedures. *See Burney v. Lee*, 59 Ariz. 360, 364–65 (1942); A.R.S. §§ 13–1656, –1720 (1956) (App’x E); Ariz. R. Crim. P. 343–45 (1956) (App’x F).

Following *Furman v. Georgia*, 408 U.S. 238 (1972), this Court eventually required automatic direct appeals in capital cases. Ariz. R. Crim. P. 31.2(b), 31.2(b) cmt. (1973) (App’x G); *see also* Ariz. State Bar Comm. on Crim. Law, Ariz. Prop. R. Crim. P. at 145–46, Rule 34.2(b) cmt. (1972) (App’x H). And to “reduce unnecessary paperwork” this Court made itself the only court authorized to issue warrants of execution. Ariz. Prop. R. Crim. P. at 131, Rule 29.15 cmt. (1972); Ariz. R. Crim. P. 26.15 cmt., 31.17(c), 31.17(c) cmt. (1973). Those rules, like this Court’s current Rule 31.23, did not require an automatic warrant of execution. *See* Ariz. R. Crim. P. 31.17(c) (1973).

Section 13–759 was enacted in 1994 to require this Court, once PCR proceedings concluded, to automatically issue a warrant of execution, thereby prompting defendants “to begin procedures in federal court if they wish to appeal.” Revised Fact Sheet, S.B.1002, 41st Leg., 2d Reg. Sess. (Feb. 22, 1994); *see also* Bill Summary, S.B.1002, 41st Leg., 2d Reg. Sess. (March 7, 1994) (“The bill specifies that once-postconviction relief proceedings have concluded at the state-court level

in a capital case, the Supreme Court must issue a death warrant . . .”). Likewise, the 1994 amendments “specifie[d] an automatic death warrant once post-conviction relief proceedings have concluded.” *Minutes of Meeting before the H. Commity on Jud. on March 10, 1994*, 41st Leg., 2d Reg. Sess. (statement of Paul McMurdie) (App’x I); *see also* Bill Summary, S.B.1002, 41st Leg., 2d Reg. Sess. (March 7, 1994); *see also* Revised Fact Sheet, S.B.1002.

If there is any doubt § 13-759(A) is administrative, other states have concluded their similarly drafted statutes are ministerial. *See State v. McKenzie*, 894 P.2d 289, 293 (Mont. 1995); *Pate v. State*, 393 P.2d 247, 249 (Okla. 1964); *State v. Miller*, 217 P.2d 287, 293 (1950); *Rose v. Commonwealth*, 55 S.E.2d 33, 35 (Va. 1949). As the Supreme Court of Nebraska explained, the warrant of execution “is nothing more than an extension of the setting of a date.” *State v. Joubert*, 518 N.W.2d 887, 893 (Neb. 1994); *see Rehn v. Bingaman*, 40 N.W.2d 673, 677 (Neb. 1950).

All this confirms what is plain from § 13–759(A)’s text—requesting a warrant of execution is a ministerial act. The judicial branch is responsible for issuing initial warrants of execution to impose defendants’ sentences. When those warrants are not executed within their specified timeframe, additional warrants are necessary to carry out defendants’ sentences. Today, § 13–759, as with Arizona’s early statutes, allows State officials to request subsequent warrants that this Court must issue, and nothing

in Arizona law indicates a State official is entitled to withdraw a request for a warrant of execution.

IV. EVEN ASSUMING A.R.S. § 13–759(A) AND RULE 31.23 ALLOW FOR CONTESTED HEARINGS, VICTIMS’ CONSTITUTIONAL RIGHTS AND THE STATE’S INTEREST IN FINALITY OUTWEIGH THE ATTORNEY GENERAL’S REQUEST TO WITHDRAW ITS MOTION FOR A DEATH WARRANT.

Victims of a crime have a right “[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.” [Ariz. Const. art. II, § 2.1\(A\)\(1\)](#). “Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a ‘prompt and final conclusion of the case after the conviction and sentence.’” [State v. Towery](#), 204 Ariz. 386, 391, ¶ 14 (2003) (quoting [Ariz. Const. art. II, § 2.1\(A\)\(10\)](#)). This serves “[t]o preserve and protect victims’ rights to justice and due process.” [Ariz. Const. art. 2, § 2.1\(A\)](#). It is “[o]nly with real finality can the victims of crime move forward.” [Calderon v. Thompson](#), 523 U.S. 538, 556 (1998).

Similarly, the State also has a legitimate and compelling interest in the finality of judgments. The principle of finality “is essential to the operation of our criminal justice system,” and without finality, “the criminal law is deprived of much of its deterrent effect.” [Teague v. Lane](#), 489 U.S. 288, 309 (1989); *see also* [Thompson](#), 523 U.S. at 555. This Court has noted, “[t]he function of courts is to put an end to

litigation.” *State v. Waldrip*, 111 Ariz. 516, 518 (1975) (citation and quotation omitted).

Here, the victims have a constitutional right to a prompt and final conclusion of this case. To comply with that constitutional right, the State must carry-out Gunches’s sentence. To do so, the State must request, and this Court must issue, a warrant of execution. [A.R.S. § 13–759\(A\)](#); [Ariz. R. Crim. P. 31.23](#). Those ministerial functions are necessary to set the date for execution, and they promote finality of sentences. Only the Governor, upon the recommendation from the Arizona Board of Executive Clemency, can issue a reprieve. [A.R.S. § 31–402\(A\), \(C\)](#); see [Sims](#), 17 [Ariz.](#) at 415. Against this backdrop, the State must necessarily bear a high burden to justify the withdrawal of a motion a death warrant.

Simply put, withdrawing a motion for warrant of execution because the defendant does not want to be executed, and to review approved execution protocols following years of litigation does not meet this stringent burden.

V. CONCLUSION.

The State cannot withdraw a motion for warrant of execution based on the plain language, history, and purposes of [A.R.S. § 13–759\(A\)](#) and [Rule 31.23](#). And even if it could withdraw its motion, the Attorney General has failed to overcome the victims’ constitutional rights and the State’s interest in finality.

RESPECTFULLY SUBMITTED this 16th day of February, 2023.

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