

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 SINGLE
RESPONSE TO BRIEFS OF
AMICI CURIAE**

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INTRODUCTION

Crime Victim, Karen Price, by and through undersigned counsel, respectfully submits this single response to the *Briefs of Amici Curiae* filed by the Maricopa County Attorney’s Office (MCAO), the Federal Public Defender for the District of Arizona (FPD), the Arizona Attorneys for Criminal Justice (AACJ), and the American Civil Liberties Union and American Civil Liberties Union of Arizona (ACLU) as allowed by this Court’s February 17, 2023 order. Ms. Price respectfully asks this Court to uphold her rights to justice and finality, guaranteed by Arizona’s Victims’ Bill of Rights (VBR), Ariz. Const. art. II, § 2.1(A)(10), by issuing the warrant of execution.

LEGAL ARGUMENT

I. Victim, Karen Price, has standing to assert her constitutional rights to justice and finality.

AACJ argues that “[v]ictims are not parties and cannot control the issues, and the VBR does not require that a person be executed.” *AACJ’s Amicus Brief* at 14-15. The FPD echoes AACJ’s argument. *FPD’s Amicus Brief* at 14-15. Ms. Price “suffers no ‘palpable injury’ if [Inmate Gunches is not executed].” *AACJ’s Amicus Brief* at 14. “In Arizona, ‘[t]o establish standing, a plaintiff must show a palpable injury from the challenged conduct.’” *AACJ’s Amicus Brief* at 14 *citing* *Fay v. Fox*, 251 Ariz. 537, 541 (Ariz. 2021). Yet, this Court acknowledged in *Fay* that “[n]o injury is more

palpable or direct than infringement of a constitutional right.” *Fay* at 541 citing *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (complaint containing allegations that a state statute effected an apportionment that deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action, and the right asserted was within reach of judicial protection under the Fourteenth Amendment). The constitutional rights at issue for Ms. Price are the rights to justice and finality. “To preserve and protect victims' rights to justice and due process, a victim of crime has a 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). Not issuing a warrant of execution will constitute an infringement of Ms. Price’s constitutional rights to justice and finality.

Fay does not preclude Ms. Price from participating in the briefing and assisting this Court to determine whether it can “do anything other than issue a [w]arrant of [e]xecution.” *Fay* appropriately noted that “the right to be heard depends upon whether a victim's express rights are directly implicated by the matter at issue.” *Fay* at 542. See § 13-4437(A). In holding that “a victim has a right to be heard on the merits of a Rule 32.1(f) motion for a delayed appeal to contest a restitution award,” *Fay* left it to the courts to “decide in the first instance the appropriate scope of participation in this and any subsequent proceedings.” *Fay* at

542. Here, this Court has recognized Price’s right to due process by inviting her participation in this briefing. Additionally, A.R.S. § 13-4437(A) allows Ms. Price to assert and seek to enforce her constitutional rights to justice and finality in this Court.

AACJ argues that the VBR does not require an execution. *AACJ’s Amicus Brief* at 14. Despite the fact that Ms. Price supports the completion of punishment in this case, she did not direct the prosecution of the case. A.R.S. § 13-4419(C). The State of Arizona decided to seek the death penalty. A.R.S. § 13-751, 752 (“If the state has filed a notice of intent to seek the death penalty...”); Ariz. R. Crim. P. 15.1(i)(1)(A) (“No later than 60 days after a defendant's arraignment in superior court on a charge of first-degree murder, the State must provide notice to the defendant of whether the State intends to seek the death penalty”). Ms. Price has endured a seemingly unending capital process. The VBR does, however, preserve and protect her rights to justice and finality. Ariz. Const. art. II, § 2.1(A)(10). These rights may be asserted regardless of the sentence imposed—life, natural life, or as in this case, death. The obligation of ensuring Ms. Price receives justice and finality lies with all branches of our state government. The duty of this branch is to issue the warrant.

II. The issuance of a warrant of execution is required and is a ministerial duty entrusted to this Court.

“[A.R.S.] § 13–759(A) and [Ariz. R. Crim. P.] 31.23, like their predecessor

statutes and rules, prescribe ministerial acts for the issuance of a warrant of execution.” *MCAO’s Amicus Brief* at 1. AACJ argues that the State’s authority, through the Attorney General, to move for a warrant of execution under A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23 means that both the power to issue and withdraw warrants presents a political question concerning the executive branch’s ability to carry out the execution, upon which this Court cannot intrude. *AACJ’s Amicus Brief* at 2. Additionally, it argues that this Court’s authority to issue warrants is contingent upon the executive branch and that the separation of powers doctrine requires this Court to defer to the State’s desire not to proceed with seeking the warrant of execution for Inmate Gunches. *AACJ’s Amicus Brief* at 2-3. Yet, the opposite is true. The State’s ability to seek a warrant of execution is prescribed by this Court and the duty to issue a warrant of execution lies solely with this Court.

AACJ ignores the plain text of A.R.S. § 13-759(A), specifically that this Court vested the State with the power to seek a warrant of execution under Ariz. R. Crim. P. 31.23:

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).

There is no doubt that this Court is mandated to issue the warrant under the plain language of the statute. *See* https://www.azleg.gov/alisPDFs/council/2023-2024_bill_drafting_manual.pdf at 80 (last accessed February 23, 2023) (“Use ‘shall’ only to impose a duty to act”). It is the timing of a warrant of execution rather than its issuance that turns “upon motion by the state.” *Id.* Thus, the statute vests the judicial branch, and not the executive branch, with the duty to issue the warrant.

Likewise, Ariz. R. Crim. P. 31.23(a) and (b) represent this Court’s decision, as the body vested with the duty to issue warrants of execution, to allow the State to advise when that duty has been triggered:

(a) Issuance of Warrant. 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.

(b) Post-Habeas Warrant. On the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.

Notably, the rule does not purport to be the exclusive means through which this Court must issue a warrant of execution. This Court's power and duty to issue warrants of execution is confirmed by the history of death warrants in Arizona and in the United States. *See generally MCAO's Amicus Brief*. From statehood to today, the issuance of warrants of execution has been vested in the judicial branch; first with the superior court, as an automatic function of sentencing, and then with the supreme court, once appellate proceedings were completed and the defendant's legal remedies were exhausted. *Id. See, e.g.,* Ariz. Pen. Code 1901, Tit. 10, Ch. 2, § 1023; Ariz. Pen. Code 1913, Tit. 10, Ch. 2, §§ 1137–1150; Ariz. Rev. Code 1928, Ch. 122, Art. 2, §§ 5119–32; Ariz. Code 1939, Ch. 44, §§ 44-2304 to 2319; Ariz. R. Crim. P. 31.17(c) (1973); Ariz. R. Crim. P. 31.23 (2023). *See Appendix to MCAO's Amicus Brief*. The fact of the matter is that the State's involvement in issuing warrants of execution is recent in the grand scheme to Arizona's criminal law. *See Exhibit J* (Petition to Amend Rule 31.17 No. R-13-0050) of *FPD's Amicus Brief*.

III. Absent legal cause, the power to intervene in an execution is vested in the executive branch. Thus, this Court lacks discretion to refuse to issue a warrant of execution.

The FPD asserts that this Court's actions in *State v. Dixon*, CR-08-0025-AP, and *State v. Atwood*, No. CR-87-0135-AP, demonstrate this Court has discretion whether

to issue a warrant despite notice that A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23 have been satisfied. *FPD's Amicus Brief* at 2. The FPD argues that orders issued in those cases, as well as others, reveal that this Court, in exercising its inherent and constitutional power to manage its own docket, has the discretion to decline or delay issuing a warrant of execution upon a showing of good cause. *FPD's Amicus Brief* at 7. Interpreting this Court's duty to issue a warrant of execution in a manner that would grant it the unfettered discretion to decline or delay issuing the warrant would usurp the executive branch's authority. It is also at odds with the history and purpose underlying the issuance of warrants of executions in Arizona and the United States.

The Arizona Constitution gives the Governor power to grant reprieves, commutation, and pardons for all offenses except treason and impeachment, "upon such conditions and with such restrictions and limitations as may be provided by law." Ariz. Const. art. V, § 5; A.R.S. § 31-443. The Governor's pardon, commutation, and reprieve powers are limited by A.R.S. § 31-402, which states, "[a] reprieve, commutation or pardon may not be granted by the governor unless it has first been recommended by the board." *See also, e.g., Galaz v. Stewart*, 207 Ariz. 452, 454 (Ariz. 2004) ("The primary statutory limitation on this power is that the governor may act only upon recommendations from the Board of Executive Clemency."); *McDonald v. Thomas*, 202 Ariz. 35, n.2 (Ariz. 2002) ("The governor's exercise of the clemency power over all felony offenses is effectively subject to the

Board’s prior approval.”); *Laird v. Sims*, 16 Ariz. 521, 525 (Ariz. 1915) (“The language used in our Constitution defining the pardoning power is not to be found in any other Constitution of any other state of the Union, and the difference is significant.”).

Because the discretionary power to pause, reduce, or nullify a defendant’s sentence lies exclusively with the executive branch, this Court’s authority over warrants of execution cannot be converted into a *de facto* mechanism for obtaining a reprieve. *See* Ariz. Const. art. III; *State v. Wagstaff*, 164 Ariz. 485, 489–90 (Ariz. 1990) (discusses distribution of power between executive and judiciary); *Wigglesworth v. Mauldin*, 194 Ariz. 432, 436 (Ariz. Ct. App. 1999) (“Given this history, courts traditionally have taken the position that clemency lies outside the adjudicative process and generally escapes review by the courts.”). The FPD’s arguments are inconsistent with the historical function and purpose of a warrant of execution. *See generally* *MCAO’s Amicus Brief*. For much of Arizona’s history, a warrant of execution was to be issued automatically at sentencing, and served as a signal for appellate proceedings to begin. Ariz. Pen. Code 1901, Tit. 10, Ch. 2, § 1023; Ariz. Pen. Code 1913, Tit. 10, Ch. 2, §§ 1137–1150; Ariz. Rev. Code 1928, Ch. 122, Art. 2, §§ 5119–32; Ariz. Code 1939, Ch. 44, §§ 44 2304 to 2319; Ariz. R. Crim. P. 343–45 (1956). *Id.* The narrow, mandatory function of warrants of execution has remained consistent within Arizona law since statehood, even as this

Court has changed the timing to avoid the administrative redundancy of issuing, staying, and reissuing the warrant. Ariz. R. Crim. P. 31.2(b), 31.17(c), 31.17(c) cmt. (1973).

Delaying the issuance of a warrant for administrative purposes and delaying the issuance of a warrant because a party or court simply does not wish to move forward with the execution, without legal cause or pending litigation, are entirely different acts. This Court's January 31, 2023 order recognized that there may be instances that delay issuances of the warrant for administrative purposes: "...and because the State's motion to withdraw does not assert otherwise..." Order, *State v. Gunches*, No. CR-13-0282 (January 31, 2023). The former is a permissible exercise of this Court's power to manage its docket and to process cases efficiently. For example, in *Dixon* and *Atwood*, this Court declined to issue a warrant of execution once the issues were raised by the State surrounding the beyond use date of the execution drugs and testing protocols. *FPD's Amicus Brief* at 2-6. The other orders cited by the FPD's Amicus Brief indicate that there were still legal challenges related to the execution protocol that were going to be filed in state or federal court. *FPD's Amicus Brief Exhibits*. The latter, delaying an execution, simply because a party does not wish it to go forward an unconstitutional foray into powers reserved for the executive branch.

The FPD argues that the South Carolina Supreme Court recently did

something similar in refusing to issue a warrant. *FPD's Amicus Brief* at 7, FN 5; *FPD's Exhibit I*. The South Carolina Supreme Court recognized there was ongoing method of execution litigation. This situation may be analogous to what happened in past Arizona cases cited by the FPD. However, there is currently no pending litigation nor has “*the State's motion to withdraw [] assert otherwise...*” Order, *State v. Gunches*, No. CR-13-0282 (January 31, 2023).

CONCLUSION

Ms. Price respectfully requests this Court issue the warrant of execution as mandated by A.R.S. § 13-759(A).

RESPECTFULLY SUBMITTED this 23rd day of February 2023.

By: _____/s/_____
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