

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, ) Arizona Supreme Court  
 ) No. CR-13-0282-AP  
 Appellee, )  
 ) Maricopa County  
 v. ) Superior Court  
 ) No. CR2003-038541-001  
 AARON BRIAN GUNCHES, )  
 ) **FILED 3/02/2023**  
 Appellant. )  
 \_\_\_\_\_ )

**DECISION ORDER**

*Per Curiam*

The narrow question before this Court is whether the criteria for issuing a warrant that authorizes the execution of Appellant Aaron Brian Gunches, set forth in statute and this Court's rules, are satisfied. If those criteria are met, under statute and rule the Court "shall" and "must" issue the warrant. As the State has placed the Court on notice that the criteria are satisfied, and no party having asserted otherwise, the Court's duty is to issue the warrant that authorizes the execution.

***Procedural History***

On November 25, 2022, Gunches, acting pro se, filed a *Motion: Issuance of Death Warrant* requesting that the "Court issue a Death Warrant for him so his sentence of death may be carried out immediately. . . . so that justice may be lawfully served and give closure to the Victims family."

On December 7, 2022, the Appellee State of Arizona (State) filed a *Motion for Warrant of Execution* in this matter notifying the Court that the conditions for issuance of a warrant of execution, pursuant to A.R.S. § 13-759(A) and Arizona Rules of Criminal Procedure 31.23(a) and (b), had been satisfied. The State's motion asked the Court to issue a Warrant of Execution for Gunches.

On January 4, 2023, Gunches, through counsel, filed a *Motion: Withdraw from Issuance of Death Warrant (Expedited Judgment Requested)* that did not include a specific response or objection to the State's Motion for Warrant of Execution.

On January 11, 2023, the Crime Victim, Karen Price ("Crime Victim" or "Victim"), through counsel, filed a *Notice of Appearance Under A.R.S. § 13-4437(A)*. The next day, she filed a response opposing Gunches' motion.

On January 20, 2023, newly elected Attorney General Mayes filed *The State of Arizona's Motion to Withdraw Motion for Warrant of Execution*, moving to withdraw its motion for warrant of execution "[b]ecause the State's motion for warrant of execution was prompted by Gunches' [] now-withdrawn request, and because a thorough examination of the administration of capital punishment in Arizona is warranted before further warrants of execution are sought." *The State of Arizona's Motion to Withdraw Motion for Warrant of Execution*, in effect, asks the Court to deny the State's *Motion for Warrant of Execution*.

Earlier that same day, Governor Hobbs issued Executive Order 2023-05 establishing a *Death Penalty Independent Review Commissioner* “to review and provide transparency into the [Arizona Department of Corrections, Rehabilitation, and Reentry’s (“ADCRR”)] lethal injection drug and gas chamber chemical procurement process, execution protocols, and staffing considerations including training and experience.” Office of the Governor Katie Hobbs, *Establishing a Death Penalty Independent Review Commissioner* (Jan. 20, 2023), <https://azgovernor.gov/office-arizona-governor/executive-order/5>.

On January 31, 2023, the Court continued the pending motions for warrant of execution and motions to withdraw motions for warrant of execution to February 28, 2023, and ordered supplemental briefing from Gunches, the State, and the Crime Victim, addressing a single 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?

On February 16, 2023, Gunches, the State, and the Crime Victim filed supplemental briefs. The Maricopa County Attorney’s Office (“MCAO”) also filed *Amicus Curiae Brief of the Maricopa County Attorney’s Office*. The Court also received *amici curiae* briefs from Arizona Attorneys for Criminal Justice (“AACJ”), the Federal Public Defender for the District of Arizona (“FPD”), and the American Civil

Liberties Union and American Civil Liberties Union of Arizona (“ACLUAZ”).

### ***Victims’ Rights***

Arizona’s Victims’ Bill of Rights preserves and protects a victim’s rights to a “prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. II, § 2.1(A)(10); see also *Fitzgerald v. Myers*, 243 Ariz. 84, 92 ¶ 25 (2017) (stating a victim’s constitutional right to finality warrants protection). Gunches murdered Ted Price more than twenty years ago, and this Court upheld his convictions and death sentence years ago. *State v. Gunches*, 225 Ariz. 22, 27 ¶ 26 (2010); *State v. Gunches*, 240 Ariz. 198, 200 ¶ 1 (2016). In ruling on the pending motions, we are cognizant of the Victim’s constitutional right to a prompt conclusion of this case.

### ***Statutory and Legal Analysis***

#### *A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23*

The controlling statute and rule of criminal procedure defining this Court’s limited judicial oversight when the State seeks a warrant of execution are A.R.S. § 13-759(A) and Rules 31.23(a) and (b). The statute states:

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). Rule 31.23 provides the procedures for implementing § 13-759(A), stating in relevant part:

(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.

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

When interpreting terms, we give words "their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *Fann v. State*, 251 Ariz. 425, 434 ¶ 25 (2021) (citation omitted). We interpret statutes "to avoid constitutional difficulties" that would arise from choosing one interpretation over another. *State v. Gomez*, 212 Ariz. 55, 60 ¶ 28 (2006).

Rule 31.23 is silent on §13-759(A)'s requirement that "[a]fter 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." (Emphasis added.) Rule 31.23 does, however, go a step further than § 13-759(A)'s use of the word "*shall*" and eliminates virtually all of this Court's discretion by stating that the Court *must* issue a warrant when "the State files a notice" that any one or all three specific requirements pursuant to Rule 31.23(a) are met, or, pursuant to subsection (b), "on the State's motion" for warrant of execution pursuant to § 13-759(A) when federal habeas corpus proceedings and habeas appellate review have concluded.

Here, the State notified the Court on December 7, 2022, that the requirements of Rule 31.23(a)(1), (a)(2), and (a)(3) have all been satisfied in Gunches' case (and pursuant to § 13-759(A) the, "or upon motion by the [S]tate" provision is satisfied), requiring the Court to issue the requested warrant of execution absent good cause why the motion for warrant of execution should not be granted.

*Good Cause Does Not Exist for the Court to Exercise its Limited Discretion to Refrain from Issuing a Warrant of Execution on Motion by or Notice from the State*

The State's contention that "[i]n our system of party presentation, parties should typically be afforded the right to withdraw their own motions before those motions are ruled upon" misses the mark. While the caselaw is replete with judicial holdings that parties can and should be allowed to withdraw a motion, see *State v.*

*Superior Court*, 180 Ariz. 384, 385 (App. 1994) (holding prosecutor could withdraw motion to transfer juvenile for prosecution as adult), in the instant case, § 13-759(A) and Rule 31.23 eliminate the Court's discretion to refrain from issuing a warrant of execution once notified that the conditions for doing so exist.

The State (and AACJ, FPD, and ACLUAZ) argues that several recent cases, see State's Supplemental Brief, Appendix F, support its position that this Court is not compelled to issue a warrant of execution merely because it was requested by the State. However, in each case this Court denied the State's motion for warrant of execution because the Court either determined or was presented with information that the requirements of § 13-759(A) and Rule 31.23 either were not satisfied or were no longer satisfied due to actions taken after the State filed its motion for warrant of execution. No party asserts that is the case here.

Furthermore, the State's contention that the Court should not issue a warrant of execution "without the State avowing that an execution could actually move forward" is not persuasive. By moving for issuance of the warrant in December, the State implicitly avowed it could carry out the sentence in compliance with state and federal law. The State's motion to withdraw that request six weeks later did not present any evidence that circumstances had changed. We acknowledge that Governor Hobbs has established a task force to "review and provide transparency into the ADCRR's lethal injection

drug and gas chamber chemical procurement process, execution protocols, and staffing considerations including training and experience." But the review itself does not demonstrate the State's inability to lawfully carry out the execution. Any change in circumstances since the State's December motion is currently speculative based on the record. Thus, the review itself does not constitute good cause for refraining from issuing the warrant.

"Upon 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." *State v. Wagstaff*, 164 Ariz. 485, 488-89 (1990). When the State seeks a warrant of execution, § 13-759(A) and Rule 31.23 afford this Court a limited, ministerial gatekeeping role in the State carrying out a death sentence. That role is to verify that an inmate's appellate and post-conviction reviews (and where appropriate federal *habeas corpus* proceedings and *habeas* appellate review) have concluded before *authorizing* the State to carry out an execution. See A.R.S. § 13-759(A); Rule 31.23. Consequently, the issue before us does not present a non-justiciable political question, as the State and *amici* contend. See *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 7 (2006) (defining political questions as "decisions that the constitution commits to one of the political branches of government

and raise issues not susceptible . . . to discoverable and manageable standards”).

The State also mistakenly asserts that: (1) the provisions of Rules 31.23(a) and (b) 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; and (2) this Court cannot issue a warrant of execution *sua sponte*.

To the contrary, § 13-759(A) requires this Court to issue a warrant of execution *sua sponte* when the defendant’s conviction and sentences have been affirmed on appeal (i.e., this Court has issued the Mandate) and post-conviction relief proceedings have concluded (i.e., either the time to file a petition for review has passed or this Court has issued its final ruling on a petition for review). Rule 31.23, however, requires that the State take express action and “file[] a notice stating” any one or any combination of the enumerated requirements are satisfied, thereby notifying this Court that the State is actively seeking authorization to proceed with an execution. When this notice is filed by the State, the Rule requires that this Court *must* issue a warrant.

In sum, once a motion or notice, pursuant to § 13-759(A) or Rules 31.23(a) or (b), is filed by the State requesting a warrant of execution showing that all the requirements under § 13-759(A) and Rule

31.23 have been satisfied, and there are no constitutional or statutory impediments to proceeding, absent a subsequent showing of good cause that the requirements listed in §13-759(A) and Rule 31.23 have not been satisfied, this Court *must* issue the warrant and authorize the State to carry out the execution.

Indeed, were this Court to interpret § 13-759(A) and Rule 31.23 to give the Court unchecked discretion to deny the State's request for a warrant of execution, the result would be the Court inappropriately involving itself in a determination assigned to the executive branch, contrary to this Court's statutory role to provide only review and authorization.

Therefore, because A.R.S. § 13-759(A) and Rule 31.23 expressly confer limited discretion on this Court, and the State has filed a motion for warrant of execution that establishes the requirements for this Court to issue a warrant of execution pursuant to § 13-759(A) and Rule 31.23, the State's motion to withdraw its motion for warrant of execution does not, on the current record, provide good cause why this Court should not issue the requested warrant of execution. Accordingly, the Court orders as follows:

**IT IS ORDERED:** State's Motion for Warrant of Execution is Granted.

**IT IS FURTHER ORDERED:** The State's Motion to Withdraw Motion for Warrant of Execution is Denied.

**IT IS FURTHER ORDERED:** Gunches' Motion: Issuance of Death Warrant is Denied as moot.

**IT IS FURTHER ORDERED:** Gunches' Motion: Withdraw from Issuance of Death Warrant is Denied as moot.

DATED this 2nd day of March 2023.

\_\_\_\_\_  
/s/  
ROBERT BRUTINEL  
Chief Justice

Justice John R. Lopez IV, Justice James P. Beene, and Justice William G. Montgomery are recused and did not participate in the determination of this matter.

Pursuant to Article 6, Section 3 of the Arizona Constitution, by prior order of this Court, the Honorable John Pelander, Justice (Retired) of the Arizona Supreme Court, was designated to sit on this case until it is finally determined.

TO:

Kristin K. Mayes  
Alexander W Samuels  
Jeffrey L Sparks  
John Pressley Todd  
Emily Skinner  
Aaron Brian Gunches, ADOC 145371, Arizona State Prison, Florence -  
Eyman Complex-Rynning  
Jon M Sands  
Cary S Sandman  
Amy Armstrong  
Therese Day  
Jason Lewis  
Colleen Clase  
Rachel H Mitchell  
Nicholas Klingerman  
David J Euchner  
Kevin D Heade  
Charlotte G Merrill  
Jared G Keenan  
Josh Spears  
Alberto Rodriguez