

**IN THE SUPREME COURT
STATE OF ARIZONA**

STATE OF ARIZONA,

Appellee,

v.

AARON BRIAN GUNCHES,

Appellant.

No. CR-13-0282-AP

Maricopa County Superior

Court No. CR2003-038541-001

**BRIEF OF *AMICUS CURIAE*
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INTEREST OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ) is the Arizona state affiliate of the National Association of Criminal Defense Lawyers. AACJ offers this brief because Victim Price and the Maricopa County Attorney's Office (MCAO) (collectively, "Movants")¹ continue to disregard the limits of this Court's authority. This perpetual litigation has reached the point of invoking the image of "jumping the shark."² That Movants are engaging in protracted litigation without any legal basis is shown by the lack of any legal authority for their motion beyond the generalized right to "finality." [Ariz. Const. art. 2, § 2.1\(A\)\(10\)](#). If Movants were sincere about its arguments, it would have pursued timely litigation in superior court and created an evidentiary record. Their motion to extend the warrant is nothing more than a Hail Mary pass that continues the news cycle on this story. This Court should stop entertaining their arguments.

¹ [A.R.S. § 13-4437\(A\), \(C\), and \(D\)](#), read in conjunction, do not authorize joint representation of Victim Price's interests by private counsel and MCAO. Moreover, it is the Attorney General and not MCAO who fulfills the role as "the prosecutor" in this case. Therefore, MCAO's action in this case is without statutory authority.

² See https://en.wikipedia.org/wiki/Jumping_the_shark (last visited April 2, 2023) ("The idiom 'jumping the shark' is pejorative and is used to argue that a creative work or outlet appears to be making a stunt in a seemingly exhaustive attempt to generate elevated attention or publicity to something that was once perceived as popular, but is no longer. The phrase was coined in 1985 by Jon Hein in response to a 1977 episode from the fifth season of the American sitcom *Happy Days*, in which Fonzie (Henry Winkler) jumps over a shark while on water-skis.").

ARGUMENTS

I. This Court can resolve the motion based on laches.

On January 20, 2023, Governor Hobbs issued Executive Order 2023-05, and the Attorney General acknowledged “concerns regarding whether executions are being carried out constitutionally, humanely, and in compliance with the State’s own laws and procedures.” AG Motion to Withdraw at 7. Price then filed a motion for this Court to issue the warrant notwithstanding the fact that both Aaron Gunches and the State withdrew their respective motions.

In its first amicus brief in this litigation, AACJ noted that even if a victim did have a right to demand an outcome, the issues raised by the Governor were so obviously fact-intensive, i.e., whether the State was actually prepared to move forward with an execution, that it would require an evidentiary hearing. AACJ Brief in *Gunches* (filed February 16, 2023), at 3-4.

After this Court issued the warrant, and Governor Hobbs announced the State was not prepared to allow an execution to move forward, Price filed a special action directly in this Court and AACJ repeated the point that an evidentiary hearing would be required before any court could conceivably order an execution to occur. AACJ Brief in *Price v. Hobbs* (filed March 15, 2023), at 8. When this Court denied Price’s special action on March 22, 2023, it cited the factual dispute between the

declarations of Director Thornell and former Assistant Director Strada, and the denial was without prejudice to Price filing in a court of competent jurisdiction.

This brief is filed on April 4, 2023. It is now: 1) 74 days after the State's intention was clear not to execute Gunches presently; 2) 47 days after AACJ first put Price on notice of the need for an evidentiary hearing; 3) 32 days after Governor Hobbs was reported as saying that the State was not prepared to perform any executions; 4) 20 days after AACJ again put Price on notice of the need for an evidentiary hearing; 5) 13 days after this Court clearly signaled to Price that she could file in a trial court.

On the same day as their motion in this Court, Movants have asked for an Order to Show Cause Hearing in Maricopa County Superior Court. They waited until March 31, 2023, late in the business day, to file for this request. There is a hearing set for April 6, 2023, at 1:30 p.m., and no evidentiary hearing was ordered so apparently it was not requested.

Even at this late hour, Movants remain dilatory.

The doctrine of laches applies here. “[T]he laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party’s unreasonable delay prejudices the opposing party or the administration of justice.” *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Although Price claims her right to “justice” is being thwarted, it is Price who is deliberately interfering with the administration of justice by Governor

Hobbs and Director Thornell, who is responsible for all inmates in the Department of Corrections and not just Aaron Gunches.

Moreover, [ADCRR Department Order 710](#) requires several actions to occur a full 35 days prior to any execution. While a prisoner may have no right to enforce the rules within this DO,³ Governor Hobbs and Director Thornell must “faithfully and impartially discharge the duties of the office...” [A.R.S. § 38-231\(E\)](#); [Ariz. Const. Art. 5, § 4](#).

Price correctly noted that the failure to follow the timelines set forth in the settlement would constitute a breach. Motion to Extend Warrant of Execution at 2-3. But compliance with the settlement is impossible if this Court grants Movants’ request to extend the warrant to May 1 since there will be less than 35 days to comply with numerous requirements. *See* [ADCRR Department Order 710](#) at 11-13.

Director Thornell has already confessed that the Assistant Director vacancy makes following Department Order 710 impossible. Thornell Declaration at 6. The Assistant Director’s duties 35 days before the execution include identifying and assigning “team leaders” and ensuring that “staff participating in the execution

³ *See Atwood v. Shinn*, No. CV-22-00860-PHX-MTL, Dkt. 46 (district court found that a prisoner under an execution warrant has no Fourteenth Amendment liberty interest in the DOs and settlement related thereto).

receives adequate training, written instruction and practice, all of which is documented.” [ADCRR Department Order 710](#) at 12.

Breach is certain if this Court extends the warrant schedule to May 1.

The consequences of breach of the settlement are not trivial. Breach will cost Arizona taxpayers north of three million dollars (more than \$2,950,000 plus “reasonable attorney fees and costs incurred in moving to enforce the parties’ Stipulated Settlement Agreement”). [First Amendment Coalition v. Shinn, No. CV-22-00860-PHX-NVW, Dkt 202, Order for Dismissal of Claims Three and Four](#) (filed Jun. 26, 2020).

The context of the settlement and the obligations that it creates only cements Price’s latest motion in laches. This Court routinely applies laches in election cases out of concern that dilatory conduct would require the judiciary to “steamroll through delicate legal issues in order to meet” deadlines. [Mathieu v. Mahoney, 174 Ariz. 456, 459 \(1993\)](#) (internal citation omitted).

Price hopes that this Court will steamroll through and issue an order that could never be faithfully enforced. There is delay and prejudice. If this Court decides the merits under this abbreviated timeframe, “the quality of the judicial decision making [will be] seriously compromised” since there will be “little time for reflection and wise decision making.” [Mathieu, 174 Ariz. at 460-61](#) (internal citation omitted). This Court should find this claim barred by laches.

II. By allowing an extension of the warrant, Arizona Rule of Criminal Procedure 31.23(c) conflicts with A.R.S. § 13-759, which strictly limits the warrant to be executed on the thirty-fifth day thereafter.

Much like this Court interpreted [A.R.S. § 13-759](#) to preclude the State from moving to withdraw its motion⁴ seeking an execution warrant, this Court should interpret [A.R.S. § 13-759\(A\)](#) to prohibit extensions of the warrant. This is because the statute is silent on whether extensions may be granted. Rather than contemplate extensions, [A.R.S. § 13-759\(A\)](#) provides only for a “fixed” date when the execution is authorized.

The legislature has thus limited this Court’s authority to issue a warrant of execution only on these terms. The warrant does not merely require the execution to occur within 35 days; the Court is authorized only to issue a warrant for an execution to occur on the 35th day. *Id.*

[Arizona Rule of Criminal Procedure 31.23\(c\)](#), on the other hand, permits this Court to extend the warrant for as much as sixty days. Nothing in the statute contains anything resembling an authorization to extend the warrant. The legislature knows how to say that the time for executing a warrant may be extended, because it has done so with search warrants: “Upon expiration of the five day period, the warrant is void unless the time is extended by a magistrate.” [A.R.S. § 13-3918\(A\)](#).

⁴ See *State v. Gunches*, No. CR-13-0282-AP, Decision Order at 10 (filed Mar. 2, 2023).

As AACJ and the State have already noted, [A.R.S. § 13-759\(A\)](#) merely “*authorizes* the director of the state department of corrections to carry out the execution” (emphasis added). *See* AACJ *Amicus* Brief at 2-3 (filed Mar. 15, 2023); Respondents’ Joint Response to Petition for Special Action at 9-11 (filed Mar. 15, 2023). If the director does not carry out the execution on the thirty-fifth day as authorized by the warrant, the legislature has assigned this Court the ministerial task of issuing subsequent death warrants upon “motion by the state.” *Id.* Thus, the State need not seek extensions of a warrant since, as this Court has already noted, [A.R.S. § 13-759\(A\)](#) mandates that this Court issue a subsequent warrant if the State files a motion asking for one. *See* Decision Order at 5-10 (filed Mar. 2, 2023).

Lastly, [A.R.S. § 13-759\(A\)](#) is crystal clear on whom may file a motion for a subsequent warrant: the State. Nothing in the statute confers party status upon a victim. Nothing in the statute confers executive authority to a victim. It is evident that the legislature has not vested victims with the authority to enforce execution warrants or to seek extensions of a warrant.

That power lies with the state. If the state seeks to carry out an execution past the deadline proscribed in [A.R.S. § 13-759\(A\)](#), there is but one path to do so: file a motion for a subsequent warrant. *Id.*

This Court’s deviation from the [A.R.S. § 13-759\(A\)](#) in [Ariz. R. Crim. P. 31.23\(c\)](#) to permit an extension of an execution warrant creates an irreconcilable conflict between the statute and rule. *See State v. Brearcliffe*, CV-21-0174-SA, 2023 WL 2621280, at *4 ¶ 21 (Ariz. Mar. 24, 2023). Laws that authorize a court to act—including limitations on that authority—are substantive in nature. A court may not enlarge its authority beyond the power vested in it by the legislature. *Vargas v. Greer*, 60 Ariz. 110, 118 (1942).

[A.R.S. § 13-759\(A\)](#) implicitly recognizes the constitutional obligation of the executive branch to assess whether the director can carry out an execution on a fixed date. The legislature did not vest that authority with this Court. Nor could it, as it would be impracticable. But the authority to determine whether an execution is “impracticable” is found only by invention in this Court’s rule. [Ariz. R. Crim. P. 31.23\(c\)](#).

This Court cannot vest such power upon itself in contradiction of the statute. “[W]ere this Court to interpret” [Rule 31.23\(c\)](#) “to give the Court unchecked discretion” to determine whether it is impracticable to carry out an 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.” *See* Decision Order at 10 (filed Mar. 2, 2023).

III. This litigation disrupts Governor Hobbs and Director Thornell from their responsibilities to thousands of other prisoners.

Director Thornell's Declaration filed in conjunction with Price's earlier special action shows that his focus is on the order in *Jensen v. Thornell*, No. CV-12-00601-PHX-ROS. AACJ, whose members have represented many of the inmates in the Department of Corrections, are particularly concerned about that case because their clients have been suffering from countless untreated maladies for many years. Unlike former Director Ryan, who was held in contempt for noncompliance with a settlement agreement, and then former Director Shinn, who was also held in contempt for noncompliance and who "had little interest in changing the underlying reality" and made a "half-hearted attempt to generate a piece of paper he could cite to avoid contempt," *id.* Dkt. 4335, ep 110, Director Thornell avows that he is taking the issue of prisoner health seriously. AACJ takes Director Thornell at his word and looks forward to ADCRR complying with Judge Silver's order.

Jensen v. Thornell (originally captioned *Parsons v. Ryan*) was filed in 2012. In 2014, prison officials settled the case, promising to improve health care and conditions in isolation. But in the seven years between settling the case and trial, Plaintiffs repeatedly described preventable suffering and deaths, including deaths by suicide in solitary confinement, that were occurring in Arizona's prisons, leading the

District Court to take the extraordinary step of rescinding the settlement agreement and setting the case for trial.

Following a 15-day trial in 2021, Judge Silver ruled that ADCRR systematically violates the constitutional rights of people incarcerated in the state's prisons by failing to provide them minimally adequate medical and mental health care, and by subjecting them to harsh and degrading conditions in solitary confinement units. In her ruling, Judge Silver wrote that ADCRR Director David Shinn's testimony "made clear that he has adopted a strategy of pretending the problems he knows about do not exist." *Jensen*, Dkt. 4335, ep 111.

Director Thornell, who inherited this broken and unconstitutional system from his two predecessors, has limited time to get ADCRR into compliance with Judge Silver's orders and limited resources with which to do it. In fact, following her ruling that ADCRR systematically violates the constitutional rights of those incarcerated in its prisons, Judge Silver issued a 64-page remedial order, 54 pages of which details a draft injunction ordering what ADCRR must do to comply with the Constitution. *Jensen*, Dkt. 4380.

It is unconscionable that Movants would knowingly interfere with Director Thornell's compliance with a federal court's order based on nothing more than an abstract notion of "finality." Price and MCAO are not responsible for creating the situation that ADCRR is in regarding *Jensen*, but they are fully responsible for

wasting time and resources that are needed to bring ADCRR in compliance with Judge Silver's order. This Court should put an end to this litigation.

IV. This litigation is designed solely to generate press.

With each recent filing by Price, there has been corresponding press coverage that bears little resemblance to what was actually filed in court.

Most recently, Movants have filed for an order to show cause in Maricopa County Superior Court. Although the order states it is a 30-minute return hearing and no evidence will be taken, the Associated Press headline reads: and the opening line states that "Arizona Gov. Katie Hobbs has been ordered to appear in court Thursday in her efforts to halt pending executions."⁵

A few weeks ago, Price told the press, "Not only has our family been victimized by inmate Gunches and the emotional aftermath of Ted's murder, we are now being victimized by the governor's failure to recognize and uphold our constitutional rights to justice and finality."⁶ These eye-catching headlines may score political points, but cases are tried in the courtroom and not in the court of public opinion.

⁵ Associated Press, "Arizona governor must appear in court on pause of executions," April 1, 2023, <https://apnews.com/article/execution-death-row-pause-arizona-44b733f78d142d72087fce30a94f2f6e> (last visited April 3, 2023).

⁶ Associated Press, "Arizona governor blasted for plans to defy execution order," March 15, 2023, <https://apnews.com/article/arizona-governor-execution-ted-price-9f3006f376322d450ea01f9418d41322> (last visited April 3, 2023).

Nothing in Movants' filings in this Court or the Maricopa County Superior Court reflects additional legal research or new factual investigation having been conducted in the last couple of weeks. Instead, these filings appear more like a motion for reconsideration, the basis being dissatisfaction with the outcome.

CONCLUSION

AACJ requests that this Court deny Movants request with prejudice. The time has come for this litigation to cease.

RESPECTFULLY SUBMITTED this 4th day of April, 2023.

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