

Jared G. Keenan (AZ Bar #027068)
American Civil Liberties Union
Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
(602) 650-1854
jkeenana@acluaz.org

Attorney for *Amici Curiae*

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,)	Supreme Court No. CR-13-0282-AP
)	
Appellee,)	Maricopa County Superior Court No.
vs.)	CR-2003-038541-001
)	
AARON BRIAN GUNCHES,)	
)	
Appellant.)	
)	

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION AND
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA
IN OPPOSITION TO
MOTION TO EXTEND WARRANT OF EXECUTION

Amici curiae, the American Civil Liberties Union and the American Civil Liberties Union of Arizona, in compliance with this Court’s order of April 3, 2023, submit this brief in opposition to the motion of crime victim Karen Price and the Maricopa County Attorney to extend the warrant of execution for Appellant Aaron Brian Gunches to May 1, 2023.

ARGUMENT

I. THIS COURT’S ORDER DENYING MANDAMUS IS THE LAW OF THE CASE.

On March 22, 2023, this Court decided a narrow question of statutory construction and denied the petition of Karen Price for a writ of mandamus to compel the execution of Aaron Gunches. The Court ruled:

The Arizona statute governing warrants of execution states that this Court’s role is to “issue a warrant of execution that *authorizes* the director of the state department of corrections to carry out the execution.” A.R.S. § 13-759(A) (emphasis added); *see also* 1995 Ariz. Sess. Laws ch. 198, § 3 (1st Reg. Sess.) (deleting from A.R.S. § 13-4040 the words “directing him” (the director) to execute the sentence at the time designated in the warrant of execution). This statutory “authorization” does not serve as a basis for a writ of *mandamus*, which “seeks to compel a public official to perform a non-discretionary duty imposed by law.” To be clear, in the Warrant of Execution, this Court’s language “shall, pursuant to A.R.S. § 13-757(A), be executed by administering to AARON BRIAN GUNCHES by intravenous injection a substance or substances in a quantity sufficient to cause death” refers only to the *method of execution* under § 13-757(A).

Order, March 22, 2023 (Exhibit 1), at 2 (emphases in original; boldface added; some citations omitted). The Court indicated that questions about the scope of the executive branch’s obligations to execute the laws and protect victims’ rights, and the Governor’s power to grant executive clemency, “present mixed questions of law and fact and are not properly before us.” *Id.* at 3.

Two days later, Ms. Price moved to stay the execution of the warrant “in

order to allow the parties an opportunity to resolve the factual issues” before the warrant expired. Motion, March 24, 2023 (Exhibit 2), at 2. This Court promptly denied the motion. Order, March 27, 2023 (Exhibit 3).

Ms. Price, joined by the Maricopa County Attorney, has now filed a new motion to extend the warrant, arguing that the “refusal” of the Governor and ADCRR¹ to “enforce this Court’s warrant” violates the victims’ constitutional rights, the statutory requirement to carry out sentences, and the separation of powers. Motion, March 31, 2023 (Exhibit 4), at 3. None of these grounds offer any reason to question this Court’s statutory construction in its March 22 order, which held that the warrant authorized, but did not mandate, the execution, and that the mandatory language in the warrant referred only to the method of execution. The Court’s ruling was law of the case.

The term “law of the case” refers to a legal doctrine providing that the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested.

Dancing Sunshines Lounge v. Indus. Comm’n of Arizona, 149 Ariz. 480, 482 (1986); accord *In re Monaghan’s Estate*, 71 Ariz. 334, 336 (1951).

Here, the facts, issues, and evidence are not just “substantially” the same, they are exactly the same as they were on March 22. Ms. Price argued then, and

¹ Arizona Department of Corrections, Rehabilitation, and Reentry.

argues now, that the warrant created a mandatory duty for the Governor and Director to execute Mr. Gunches on April 6. This Court ruled that it created no such duty under the governing statute. Ms. Price and the Maricopa County Attorney have offered no new reason to question the Court's interpretation of the statute's meaning, no matter what the outcome of the Superior Court action. The Court's ruling remains the law of the case.

II. NONE OF THE EXCEPTIONS TO THE LAW OF THE CASE DOCTRINE APPLY.

Arizona courts have recognized a number of exceptions to the law of the case doctrine, including those for a change in essential facts or issues, a substantial change in the evidence, manifest error in the first appellate decision, a change in the applicable law, or an initial decision that did not actually decide the issue, did so ambiguously, or did not rest on the merits. *See Dancing Sunshines*, 149 Ariz. at 482-83; *accord Martinez v. Indus. Comm'n of Arizona*, 192 Ariz. 176, 179 ¶ 14 (1998); *Leo Eisenberg & Co. v. Payson*, 162 Ariz. 529, 533-34 (1989).

To begin, this Court's March 22 order was manifestly correct, not erroneous; the statute the Court interpreted has not changed; and the Court unambiguously decided the statutory construction question on the merits.

Nor do the projected evidence and arguments in the Superior Court carry any risk of changing the evidentiary or legal basis for this Court's ruling. For example, the motion maintains that the current protocol was the product of

multiple settlement agreements between the ADCRR and death row inmates, and that the Department has the ability to carry out a constitutional execution. Superior Court Complaint and Petition for Special Action, March 31, 2023 (Exhibit 5), at 15, § A. The motion relies on past events, and does not resolve the Director’s allegations under penalty of perjury that current conditions, as he has found them since assuming his position early this year, make him unable to comply with the law and the Constitution without further review and preparation. Declaration of Ryan Thornell, March 15, 2023 (Exhibit 6). The Director’s statement, along with Arizona’s lengthy history of botched executions, provides a strong basis for the Governor’s exercise of discretion to place a pause on executions. *See* Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Arizona, Feb. 21, 2023 (Exhibit 7), at 2. While the motion disputes some of the Director’s allegations, the factual dispute underscores the wisdom of the statute’s grant of that discretion. And the existence of a factual dispute about the Department’s readiness does not change this Court’s determination that the statute does grant discretion.

Indeed, the publicly available evidence suggests that the Department may not possess any unexpired compounded drug to use in an execution. Compounded drugs have a maximum beyond-use date (“BUD”) of 45 days if stored in a solid, frozen state, according to U.S. Pharmacopeia standards (“USP”). United States

Pharmacopeia, General Chapter <797>, Pharmaceutical Compounding – Sterile Preparations, 5-6 (2018). Arizona administrative code R4-23-410(B)(3) prohibits assigning a beyond-use date beyond that permitted by USP. There is no evidence that the pentobarbital compounded in December 2022 has been stored in a solid, frozen state, and even if so, it was compounded well over 45 days ago. Thus, the pentobarbital available for use in Mr. Gunches’s execution has presumptively already expired.²

Likewise, Ms. Price and the Maricopa County Attorney argue that the Director is “in violation of current DO 710” for not complying with its time frames for conducting executions. Exhibit 5, § B, at 20. The Department’s inability to comply with DO 710 is a reason to pause, not a reason to continue a headlong rush to execution. Similarly, the motion’s general claim that the victims have a constitutional and statutory right to finality (Exhibit 5, Claim 1, at 21) does not mean that finality must prevail over countervailing reasons for caution. Most

² MCAO would presumably argue that the state's pentobarbital has an extended BUD. During the executions last year, the Attorney General stated that the state had completed testing showing that its pentobarbital had a BUD of “at least 90 days” (in the Frank Atwood litigation) up to 180 days (in the Clarence Dixon litigation). U.S. Pharmacopeia standards do permit an extended BUD when it is justified by testing: however, there is a paucity of evidence showing 1) whether the testing completed early last year was even adequate to establish an extended BUD; 2) whether, even if the testing was adequate, the results are still reliable given that a year has elapsed since the testing was completed; and 3) more fundamentally, whether the specific dose of compounded pentobarbital intended for Mr. Gunches has been subjected to such testing.

important, neither DO 710 nor the provisions that guarantee victims' rights can change the meaning of the statutory term "authorize," which provided the narrow basis for this Court's March 22 order.

Finally, this Court has already rejected the premise of Claims 2 and 3, that writs of mandamus and prohibition should issue because the warrant created a mandatory duty to conduct the execution on April 6. Exhibit 5, Claims 2 and 3, at 25, 28. To the extent the claims focus not on Mr. Gunches's warrant but on the Governor's general policy, they provide no basis to extend the warrant.

In effect, Ms. Price and the Maricopa County Attorney seek to shoehorn their broad attack on the Governor's general policy decisions respecting execution warrants into a repetitive attack on the continued validity of this warrant. They will have their day in the Superior Court on their motion for an injunction and declaratory relief. If they fail to convince that court of their legal and equitable entitlement to relief, they can appeal to this Court. But the proceedings on this warrant are, and should be, over. No exception to the law of the case doctrine applies.

CONCLUSION

For the reasons above, this Court should deny the motion to extend the warrant.

RESPECTFULLY SUBMITTED this 4th day of April, 2023.

By: /s/ Jared G. Keenan
Jared G. Keenan
American Civil Liberties Union
Foundation of Arizona