Jon M. Sands
Federal Public Defender
District of Arizona
Charlotte G. Merrill
Arizona Bar No. 029786
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, AZ 85007
(602) 382-2816
Charlotte_Merrill@fd.org

ARIZONA SUPREME COURT

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

SECOND BRIEF OF FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA AS *AMICUS CURIAE*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
IDENTITY AND INTEREST OF *AMICUS CURIAE* 1
STATEMENT OF THE ISSUE 1
INTRODUCTION 2
ARGUMENT 2

I. The protocol requires certain preconditions to an execution that cannot be satisfied by May 1, 2023 3

II. These preconditions are necessary to attempt to minimize the risk of unconstitutional harm from an execution. 8

III. The conditions imposed by court order are but one of ADCRR's many legal obligations, which may not simply be jettisoned to achieve an execution on the Movants' demanded timeline 11

CONCLUSION 14

TABLE OF AUTHORITIES

Federal Cases

Baze v. Rees,
553 U.S. 35 (2008) 8

Beaty v. Brewer,
791 F. Supp. 2d 678 (D. Ariz. 2011) 9

Dickens v. Brewer,
631 F.3d 1139 (9th Cir. 2011) 8, 9

First Amend. Coal. of Ariz., Inc. v. Ryan,
938 F.3d 1069 (9th Cir. 2019) 10

First Amendment Coalition of Arizona, Inc. v. Ryan,
No. 2:14-cv-01447-NVW-JFM (D. Ariz. June 21, 2017), ECF No. 186 .... *passim*

Guardian News & Media L.L.C. v. Ryan,
225 F. Supp. 3d 859 (D. Ariz. 2016) 7

Turner v. Safley,
482 U.S. 78 (1987) 12

State Cases

Lindsay R. v. Cohen,
236 Ariz. 565 (App. 2015) 13

State ex rel. Napolitano v. Brown,
194 Ariz. 340 (1999) 13, 14

P.M. v. Gould,
212 Ariz. 541 (App. 2006) 13

Price v. Hobbs,
No. CV-23-0055-SA (Ariz. Mar. 15, 2023) 5, 6, 7

S.A. v. Superior Ct. of Ariz.,
171 Ariz. 529 (App. 1992) 13

State v. Lamberton,
183 Ariz. 47 (1995) 13

State v. Riggs,
189 Ariz. 327 (1997) 13

Rules

Ariz. R. Crim. P. 31.15(a) 1

Other Authorities

Ariz. Dep't of Corrs., Department Order 710 .... *passim*

Ariz. Dep't of Corrs. News Release (Jul. 24, 2014), available at
https://files.deathpenaltyinfo.org/legacy/ 12

Memorandum, Office of the Attorney General (Jul. 1, 2021), available at
https://www.justice.gov/opa/page/file/1408636/download 12

Statement From Governor Katie Hobbs on Warrant of Execution for
Aaron Brian Gunches (Mar. 3, 2023) 5

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Federal Public Defender for the District of Arizona ("FPD") represents condemned Arizona prisoners in habeas proceedings and collateral litigation, including before this Court related to execution warrants. The FPD's mission is to protect the rights of its clients and ensure that their sentences are carried out in compliance with the United States and Arizona Constitutions. As counsel for most of the Arizona prisoners presently subject to sentences of death, and as counsel in the federal litigation resulting in Arizona's current execution protocol, the FPD has a strong interest in the outcome of the March 31, 2023 Motion to Extend Warrant of Execution ("Motion") filed jointly by Karen Price and the Maricopa County Attorney's Office ("Movants").[1]

STATEMENT OF THE ISSUE

On March 2, 2023, the Court issued a warrant of execution for Aaron Brian Gunches, authorizing the Arizona Department of Corrections, Rehabilitation & Reentry ("ADCRR") to execute him on April 6, 2023. On March 31, the Movants jointly filed the Motion, asking the Court to extend the execution date by 25 days, to May 1, 2023. On April 3, the Court called for briefs addressing the merits of the Motion and the source and extent of the Court's authority to extend the execution date.

[1] Counsel for the parties did not author any part of this brief. *See* Ariz. R. Crim. P. 31.15(a).

INTRODUCTION

ADCRR revised its execution protocol pursuant to a settlement agreement entered in federal court in 2017. That protocol sets forth the requirements for carrying out an execution and pursuant to the settlement, sharply limits ADCRR's authority to "deviate from or make adjustments to any material aspects of the execution process." Department Order ("DO") 710 at 1.[2] The protocol requires ADCRR to take certain steps before carrying out an execution—steps necessary to reduce the likelihood that an execution will inflict the cruel and unusual punishment prohibited by the United States and Arizona Constitutions, but steps that cannot be completed by May 1, 2023. Even if the Court extends the warrant to May 1, ADCRR could not carry out an execution on or before that date. Thus, whatever the Court's authority to extend the execution date, the Movants cannot show that doing so would be anything but futile.

ARGUMENT

When the State asked to withdraw its request for a warrant of execution for Aaron Gunches, the Movants denied that the Court had discretion to grant the request. They characterized the Court's duty to issue a warrant as automatic, administrative, and ministerial. The State explained it was not prepared to carry out an execution at present: it observed among other things that significant personnel turnover at ADCRR

[2] The Department Order is publicly available on ADCRR's website, here: https://corrections.az.gov/sites/default/files/documents/policies/700/0710.pdf (last visited Apr. 4, 2023).

prevented it from ensuring adequate and properly trained staff. Despite these significant practical considerations, the Movants continued to insist on a warrant and an execution, including in a mandamus action initiated to compel an execution.

Now acknowledging that "it is impracticable to carry out the execution on April 6, 2023," the Movants ask the Court to extend the warrant to May 1, 2023. Motion at 2. They say this is necessary to permit them to litigate claims raised against the Governor and ADCRR in a special action filed in Maricopa County Superior Court on March 31 and to provide ADCRR with "an opportunity to comply with Department Order 710 if [they] are successful." Motion at 3.

As demonstrated below, however, ADCRR cannot comply with DO 710 even if the Court extends the warrant to May 1, 2023. DO 710's material preconditions to an execution are binding on ADCRR because of a federal court-ordered settlement agreement and are necessary to ensure that any execution complies with the Eighth and Fourteenth Amendments. Those conditions cannot be satisfied for a May 1 execution.

Because ADCRR cannot comply with DO 710 even if the Court extends the warrant, the Movants have failed to justify the need for their requested relief.

I. The protocol requires certain preconditions to an execution that cannot be satisfied by May 1, 2023.

Department Order 710 establishes the protocols for executions. They "shall be followed as written." DO 710 at 1. Although the Director of ADCRR is permitted "limited deviations" for certain unexpected contingencies, his discretion is sharply

limited. *Id.* Apart from written exceptions, "the Director shall not have any authority to deviate from or make adjustments to any material aspects of the execution process, including, but not limited to, . . . the timeframes established by this Department Order." *Id.*[3]

This limitation on ADCRR's discretion was a product of a stipulated settlement agreement between several parties, including several clients of the FPD and the Director of ADCRR. *See* Stipulated Settlement and Agreement and [Proposed] Order for Dismissal of Claims Six and Seven, *First Amendment Coalition of Arizona, Inc. v. Ryan*, No. 2:14-cv-01447-NVW-JFM (D. Ariz. June 21, 2017), ECF No. 186 ("Settlement"). The settlement-required preconditions to an execution apply to all current and future prisoners sentenced to death in Arizona and bind ADCRR as a contractual matter. *E.g.*, Settlement at 5 ("[T]he parties intend this Stipulated Settlement Agreement to be enforceable by, and for the benefit of, not only the Plaintiffs but also current and future prisoners sentenced to death in the State of Arizona" and "to bind Defendants, the ADCRR, and Defendants' Successors.").

DO 710's timeframes are strictly delineated: they begin thirty-five days prior to the day of execution. Given this timeframe, ADCRR cannot satisfy all the necessary

[3] DO 2.1.2.3 affords ADCRR's Director with "authority to change the timeframes established in this Department Order in order to address certain unexpected or otherwise unforeseen contingencies *only with regard to minor or routine contingencies* not central to the execution process." DO 710 at 3 (emphasis added). The Movants concede the protocol imposes "strict timelines." Motion at 2.

protocol-imposed preconditions to an execution (detailed herein) by May 1, the date on which the Movants have now requested Mr. Gunches be executed. Thirty-five days before May 1 was March 27—eight days ago. The Governor has stated executions will not resume until the review of an independent commission has been completed, *see* Statement From Governor Katie Hobbs on Warrant of Execution for Aaron Brian Gunches (Mar. 3, 2023), and the new Director of ADCRR has identified several bases to conclude that the Department could not and did not begin taking the steps necessary for a May 1 execution on March 27, *see* Decl. of Ryan Thornell at 6, *Price v. Hobbs*, No. CV-23-0055-SA (Ariz. Mar. 15, 2023) ("Thornell Decl.").

Among other duties, in the thirty-five day window, ADCRR must identify and assign team leaders and members for each of the teams involved in preparing for and carrying out an execution, confirm preventative maintenance and an equipment inventory for Housing Unit 9, where executions occur, and "[a]ctivate[] the training schedule ensuring staff participating in the execution receives adequate training, written instruction and practice, all of which is documented." DO 710 at 12–13.

The need for adequate preparation is reflected in the protocol. Among the various teams ADCRR activates for an execution—including the Housing Unit 9 Section Teams comprising the Restraint and Special Operations Teams responsible for confining the condemned, preparing the syringes, and administering the lethal drugs; and the Intravenous ("IV") Team responsible for establishing two functioning IV lines—

team leaders (and in some cases team members) must be carefully selected and trained. *E.g.*, DO 710 at 4 (requiring ADCRR to establish "a training schedule and identify dates for period on-site practice by the Housing Unit 9 Section Teams, to include 10 training scenarios within the 12 months preceding the scheduled execution," and to ensure "periodic testing of all of the equipment in Housing Unit 9"); DO 710 at 6 (requiring ADCRR to review the proposed IV Team members' "qualifications, experience, and/or any professional license(s) and certification(s) they may hold," review their "[l]icensing and criminal history" "upon the Issuance of a Warrant of Execution," and ensure all IV Team members "thoroughly understand all provisions contained herein as written and by practice").

ADCRR cannot satisfy all these requirements for a May 1 execution. For one example, DO 710 mandates that thirty-five days before an execution, the Assistant Director for Prison Operations discharges several of the required duties discussed above. That position "[i]dentifies and assigns team leaders and members," DO 710 at 12, "[c]onfirms preventative maintenance in Housing Unit 9 occurs and that an equipment inventory is completed," DO 710 at 12, and "[a]ctivates the training schedule ensuring staff participating in the execution receives adequate training, written instruction and practice," DO 710 at 13. But as of March 15, 2023—just twelve days before the protocol directs that ADCRR initiate the foregoing complex procedures—that position remained vacant. *See* Thornell Decl. at 6. For a second example, as noted

above, ADCRR must conduct a thorough review of proposed IV Team members qualifications and background. DO 710 at 6. As of March 15, however, no IV Team members had even been identified. *See* Thornell Decl. at 9. For a third, ADCRR must affirm that all equipment in Housing Unit 9 is in working order, and the protocol and related court orders require cameras in multiple places. *See* DO 710 at 4; *see also* DO 710 Attach. D at 4. But as of March 15, the closed-circuit camera system in Housing Unit 9 needed maintenance and upgrades before it could work properly, and a timeline to fix it had not been determined. *See* Thornell Decl. at 10.[4]

The Movants have requested extending the April 6 date because ADCRR cannot comply with DO 710 by then. The same is true of May 1. Because the Movants have not demonstrated that extending the warrant to that date would be anything other than a futile exercise, the Court should deny their Motion.

---

[4] Beyond minimizing the risk of harm to condemned prisoners, a camera system also ensures the public's and the news media's First Amendment rights. *Cf. Guardian News & Media L.L.C. v. Ryan*, 225 F. Supp. 3d 859, 879–80 (D. Ariz. 2016) ("The public and the press enjoy a qualified First Amendment right of access to view executions in their entirety, including each administration of the means of achieving death, and Defendant has not overcome this right of access. The Court therefore grants Plaintiffs a permanent injunction requiring Defendant to allow execution witnesses to view the entirety of the execution, including each administration of drugs.").

II. These preconditions are necessary to attempt to minimize the risk of unconstitutional harm from an execution.

Beyond binding ADCRR as a contractual obligation, the preconditions in Arizona's protocol are also necessary (although not sufficient) to protect condemned prisoners' Eighth and Fourteenth Amendment rights. Beyond violating the settlement, departure from Arizona's strict protocol risks significant harm and unnecessary suffering—the standards set out in *Baze v. Rees*, 553 U.S. 35 (2008).

In *Baze*, the Supreme Court turned back Eighth Amendment challenges to Kentucky's execution procedures because the state had "put in place several important safeguards" to avoid unconstitutional harm, noting for example the qualifications of its IV team members and observing that its execution team attended training sessions required by its written protocol. 553 U.S. at 55, 56. The dissenters in *Baze* likewise examined the adequacy of the written procedures, arguing that Kentucky's protocol lacked the safeguards other states had adopted. *Id.* at 119–21 (Ginsberg, J., dissenting).

When the federal courts have addressed challenges to Arizona's execution procedure, they have similarly focused on safeguards in the protocol—just as the Thornell declaration reveals ADCRR to be doing now. In *Dickens v. Brewer*, for example, the court found that Arizona's protocol had sufficient safeguards to satisfy *Baze*. No. CV-07-1770-PHX-NVW, 2009 WL 1904294, at *18 (D. Ariz. July 1, 2009), *aff'd*, 631 F.3d 1139 (9th Cir. 2011). It was those safeguards that were found to avoid a "substantial risk of serious harm,' 'sufficiently imminent dangers,' or a risk of harm that

is 'sure or very likely to cause . . . needless suffering.'" *Id.* at *20. Indeed, in *Dickens*, the court rejected an Eighth Amendment challenge to the State's refusal to select and disclose the identity of execution team members as long as ADCRR "compl[ied] with the Arizona Protocol in selecting and training a Medical Team—or refrain[ed] from conducting any executions until [it did] comply with the Arizona Protocol." *Id.* at 23.

In *Dickens*, both the U.S. District Court and the Ninth Circuit Court of Appeals emphasized the protocol's safeguards' critical role in preserving its constitutionality. *See id.* at *24 ("The Arizona Protocol, as defined in this Order, does not violate the Eighth Amendment if it is implemented as written."); *Dickens v. Brewer*, 631 F.3d 1139, 1149 (9th Cir. 2011) ("[I]t is critical for Arizona to follow the procedures set forth in the Protocol when conducting an execution[.]"). Subsequent court orders are to similar effect. *E.g.*, *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *12 (D. Ariz. Dec. 21, 2011) ("The responsibility of carrying out an execution is a weighty one. It is thus critically important that ADC adhere to its written protocol to minimize the risk of maladministration."); *Beaty v. Brewer*, 791 F. Supp. 2d 678, 684 (D. Ariz. 2011) (rejecting Eighth Amendment challenge considering "safeguards" in Arizona's protocols).[5]

---

[5] Although several challenges to pre-2017 versions of Arizona's protocol—and to Arizona's frequent and last-minute departures from those protocols—were upheld against Eighth Amendment challenges, persistent problems with the state's executions ultimately led to the settlement.

And when the federal courts have criticized the way Arizona has historically conducted executions, those frustrations have frequently been tied to last-minute changes to the State's procedures or vague standards preventing meaningful judicial review. Thus, in *Towery v. Brewer*, the Ninth Circuit observed,

> [b]ecause the death penalty is undeniably the most serious penalty available to a State, the procedures for such penalty must be implemented in a reasoned, deliberate, and constitutional manner. Over time, the State of Arizona, however, has insisted on amending its execution protocol on an ad hoc basis—through add-on practices, trial court representations and acknowledgments, and last minute written amendments—leaving the courts with a rolling protocol that forces us to engage with serious constitutional questions and complicated factual issues in the waning hours before executions. This approach cannot continue.

672 F.3d 650, 653 (9th Cir. 2012). In *Lopez v. Brewer*, the Ninth Court observed that "[r]ecent exercises of the Director's discretion [gave the court] further cause for concern. For example, detailed execution logs have given way to vague generalities about the execution." 680 F.3d 1068, 1075 (9th Cir. 2012) (rejecting challenge to execution but "caution[ing], yet again, that Arizona's ad hoc approach risks going beyond *Baze*'s safe harbor."); *First Amend. Coal. Of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1082 (9th Cir. 2019) (Berzon, J., concurring) (lamenting that Arizona's "deviations in protocol are not isolated").

These concerns about Arizona exercising broad discretion to act within vague standards and pursuant to ad hoc amendments to its execution procedures animated the lawsuit ending in the settlement currently binding ADCRR. *E.g.*, Settlement at 1, 7

(noting that the stipulated agreement resolved the plaintiffs' Eighth and Fourteenth Amendment challenges to "ADC's reservations of excessive discretion in its execution procedures, and Defendants' past and proposed future exercises of that discretion, including through 'last-minute deviations from critical aspects of its announced execution process'"). Compliance with Arizona's execution protocols is therefore not merely a matter of contractual obligation—it is necessary to avoid cruel and unusual punishment.

III. The conditions imposed by court order are but one of ADCRR's many legal obligations, which may not simply be jettisoned to achieve an execution on the Movants' demanded timeline.

The foregoing reflects that before conducting an execution, ADCRR must evaluate whether any planned execution satisfies Arizona's execution protocol, the federal settlement informing several of its key provisions, and the Eighth and Fourteenth Amendments. Those considerations are not exhaustive. The Governor, who oversees ADCRR, must take care that a multitude of laws are faithfully executed in the context of executions, including those protecting defendants, the First Amendment rights of the public and press, federal and state pharmaceutical regulations, and their own contractual obligations under the settlement agreement.

That the government may need to halt executions to ensure these myriad and sometimes competing duties are *all* faithfully executed is neither unsurprising nor unprecedented. In July 2021, the United States stopped executions pending review of

its policies and procedures.[6] And, as documented in the ACLU's amicus brief filed in this Court on February 21, 2023, Tennessee and Alabama recently did something similar. Even in Arizona, the State's current administration is not the first to delay proceeding to executions to review the execution process. *See* Ariz. Dep't of Corrs. News Release (Jul. 24, 2014), available at https://files.deathpenaltyinfo.org/legacy/Documents/AZDOCStatementJosephWood.pdf. When a corrections department recognizes limitations to its ability to comply with written procedures and identifies a need for internal review of its compliance with those procedures, institutional limitations counsel against interference. *Cf. Turner v. Safley*, 482 U.S. 78, 84–85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.").

The victims' rights do not require otherwise. The participatory rights Arizona confers to statutory victims do "not include the authority to direct the prosecution of

[6] Consistent with the State's observations here, the U.S. Attorney General observed that the risk of harm to condemned prisoners "need not meet the Court's high threshold for . . . relief, or violate the Eighth Amendment, to raise important questions about our responsibility to treat individuals humanely and avoid unnecessary pain and suffering." *See* Memorandum, Office of the Attorney General (Jul. 1, 2021), available at https://www.justice.gov/opa/page/file/1408636/download (last visited Apr. 4, 2023).

the case," *Lindsay R. v. Cohen*, 236 Ariz. 565, 567 (App. 2015), or to "control the proceedings." *State v. Lamberton*, 183 Ariz. 47, 49 (1995). Victims are not "'parties' to the prosecution," and they may not "usurp the prosecutor's unique role." *Lindsay R.*, 236 Ariz. at 567 (quoting *Lamberton*, 183 Ariz. at 49). Even liberally construed, neither the Victim's Bill of Rights nor its implementing statutes permit the victim "to invade the state's province" of enforcing the criminal laws. *Lindsay R.*, 236 Ariz. at 568. When a victim's interests conflict with a defendant's federal constitutional rights or the interest of the broader society, as represented by the State, in enforcing its laws, the victim's interests must yield. *See State v. Riggs*, 189 Ariz. 327, 330–31 (1997) (recognizing federal constitutional protections for criminal defendants prevail over conflicting state constitutional rights for victims); *P.M. v. Gould*, 212 Ariz. 541, 546 (App. 2006) (recognizing State's interest in prosecuting crime outweighs victim's interest in refusing to testify); *S.A. v. Superior Ct. of Ariz.*, 171 Ariz. 529, 532 (App. 1992) (similar).

The Movants have invoked their rights to "due process, justice, and a prompt and final conclusion." (Motion at 3.) But unlike other rights enumerated in the Victim's Bill of Rights, these interests are not "unique" to them. *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 (1999). Plainly the State and criminal defendants have an interest in due process and justice. And "the judicial system as a whole is vitally interested in advancing the goal of prompt, fair resolution of all actions, including criminal cases."

Id. at 343 (limiting rulemaking authority when right was not unique to victims but instead shared by all parties in the judicial system).

Ultimately, the Movants do not think Mr. Gunches' case has resolved soon enough. But that is no justification for extending the warrant to a date by which ADCRR is unprepared to comply with the protocol and risks violating at least its contractual obligations and the federal and state constitutions. Instead, the Court should deny the Movants' request to extend the warrant and, assuming it expires with no execution, address any renewed requests for warrants from the Attorney General after the Governor concludes her review of Arizona's death-penalty process and the State can take care that all relevant state and federal laws are faithfully enforced in carrying out the ultimate punishment.

CONCLUSION

The Court should deny the Movants' request to extend the warrant of execution.

Respectfully submitted this 4th day of April, 2023.

Jon M. Sands
Federal Public Defender
District of Arizona

s/Charlotte G. Merrill
Charlotte G. Merrill
Assistant Federal Public Defender