ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. AARON BRIAN GUNCHES, Appellant.	CR 13–0282–AP Maricopa County Superior Court No. CR 2003–038541–001 **THE STATE OF ARIZONA'S BRIEF IN OPPOSITION TO MOTION TO EXTEND WARRANT OF EXECUTION**

Twenty-eight days after Governor Hobbs publicly announced that no execution would occur on April 6—and nine days after this Court denied Movant Karen Price's petition for a writ of mandamus—Movants Karen Price and Brittney Kay moved this Court for a 25-day extension of the currently pending warrant of execution in this case. Movants lack standing to seek such relief. And their motion raises potential questions regarding the constitutional allocation of power between the Legislature and Judiciary, to the extent any conflict exists between A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(c).

But this Court need not confront those questions. Even assuming Movants have authority to seek an extension, and even assuming this Court has the power to grant one, this Court should nonetheless deny an extension because an extension would accomplish nothing—an execution will be no more "practicable" on May 1 than it would be on April 6. Indeed, as is explained below, Movants seem to

acknowledge this reality in their own motion.[1]

I. Even assuming this Court has the discretion to grant an extension here, it should not do so.

"If the Supreme Court finds that it is impracticable to carry out an execution [on the 35th day], it *may* extend the execution date but may not extend it more than 60 days after the warrant's issuance." Ariz. R. Crim. P. 31.23(c) (emphasis added). Put differently, the language of the Rule provides this Court discretion to extend a warrant up to 25 additional days.[2] Here, the State has sought no extension, which would serve no purpose whatsoever. Even setting aside the myriad issues with Movants' continuing legal arguments regarding the State's obligation to carry out an execution after issuance of a warrant that simply "authorizes" an execution, it is already too late for an execution to legally occur on

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[1] Just as this Court need not confront constitutional questions to decide this motion, the Court likewise need not decide whether the County Attorney has any authority to represent Brittney Kay in this action, although the County Attorney likely has no such authority. Section 13-4437(C) provides that "[a]t the request of the victim, the prosecutor may assert any right to which the victim is entitled." Although the County Attorney was once "the prosecutor" at a different stage of this case, the Attorney General is plainly now the prosecutor in these proceedings. There is no reason to believe that § 13-4437(C) authorizes a prior prosecutor to seek relief over the objection of the current prosecutor.

[2] As discussed further below, the relevant statute does not contemplate any such extension. Section 13-759(A) provides that, where the State has filed a motion for a warrant of execution, "[t]he time for execution shall be fixed for thirty-five days after the state's motion is granted."

May 1. Consequently, any extension would only waste judicial resources as Movants ultimately seek a result (i.e. a May 1 execution) that cannot legally occur. This Court should decline to grant any such pointless extension.

Movants seek a 25-day extension in an attempt to litigate their newest special action, Maricopa County Superior Court No. CV2023-004976, which again seeks mandamus relief to require the Governor and Director to execute Gunches on a certain date—now May 1—after their last special action failed. But, as Movants have implicitly acknowledged in their own motion, an execution could not possibly occur on May 1 even if an extension is granted.

Movants acknowledge that ADCRR Department Order 710 and a related federal settlement agreement require adherence to a schedule of tasks that must begin 35 days before an execution, if an execution is going to be carried out. *See* Mtn. at 2 & n.1. They thus appropriately acknowledge that carrying out an execution on April 6 "is impracticable because both the Governor and ADCRR will not have complied with the strict timelines imposed by ADCRR's Department Order 710." *Id.*

Movants ignore, however, that compliance with those "strict timelines" would remain impossible even if the warrant is extended for 25 days. May 1, the suggested new date, is 27 days from today and 31 days from the filing of Movants'

motion. Thus, even by the time Movants had filed their motion, compliance with D.O. 710 and the federal settlement agreement had become impossible under any circumstance.[3]

This was not inevitable. To the extent Movants have standing to seek a 25-day extension (which they do not), they could have sought one *much* earlier. They have been on notice since March 3 that the Governor and Director did not intend to carry out an execution on April 6. That was 59 days before May 1. And even assuming Movants were right to wait until after their first special action was denied (which they did not have to do), that order was issued nine days before the instant motion was filed and 40 days before May 1. Instead of seeking an extension as contemplated by the Rule, they instead filed a "motion to stay the warrant of execution" and a "motion for clarification" that was, for all intents and purposes, a motion for reconsideration. This Court appropriately denied both motions. Four days after those orders, Movants finally moved for a 25-day extension. Movants' delay in seeking a 25-day extension has rendered any such extension pointless in all events. No execution could occur on May 1.

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[3] As the State has previously noted, it could face severe penalties for violating the settlement agreement, the requirements of which were adopted in a federal court order. *See First Amend. Coal. of Ariz., Inc. v. Ryan*, No. CV-14-01447-NVW, Doc. 187 (Order) at 3 (D. Ariz. June 22, 2017).

For this reason among others, the State cannot move forward with an execution on May 1, even if an extension is granted. As this Court has noted, neither A.R.S. § 13-759(A) nor this Court's warrant of execution mandates that an execution occur. *See generally* Decision Order (Mar. 22, 2023). And the timelines of D.O. 710, which carry special force in light of the D.O.'s central role in the federal settlement, exist for good reason. *See, e.g.*, D.O. 710, §§ 8.1.1 (requiring assignment of personnel 35 days in advance to ensure adequate preparation), 8.1.4 (requiring training of relevant personnel beginning 35 days in advance to ensure adequate training), 8.3.2 (requiring certain media access beginning 35 days in advance).[4]

Even if the State had otherwise been prepared to move forward with an execution, certain tasks under D.O. 710 could not have been timely performed during the pendency of the current warrant. *Compare* D.O. 710, §§ 8.1 and 11.1 (requiring Assistant Director of Prison Operations to perform certain key tasks) *with Price v. Hobbs*, No. CV-23-0055, Respondents' Joint Response to Petition for Special Action, Ex. 1 (Thornell Declaration) at ¶ 14 (detailing how on March 15—

[4] D.O. 710 is available through several prior filings, including as Attachment C to the State's February 16 Supplemental Brief. It is also available online at https://corrections.az.gov/sites/default/files/documents/policies/700/0710.pdf (last visited Apr. 3, 2023).

13 days after the warrant was issued—the Assistant Director of Prison Operations position was vacant after the change in administration).[5]

As even Movants have recognized by acknowledging the 35-day timeline in D.O. 710, ADCRR cannot carry out an execution consistent with all legal obligations at this time, even if the warrant was extended to May 1. Movants' motion should be denied on this basis alone. To the extent this Court has discretion to grant an extension under Rule 31.23(c), it should not exercise that discretion to grant a pointless extension that will result in continued expenditure of significant judicial resources to needlessly litigate matters relating to the current warrant where no execution can occur under that warrant.

II. Movants lack standing to move for an extension.

For the reasons explained above, this Court can simply deny the requested extension without confronting other questions raised by the motion. To do otherwise would force this Court to unnecessarily confront questions of constitutional import, including interpretation of the Victims' Bill of Rights ("VBR") and separation of powers questions regarding possible conflict between A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(c). If the Court disagrees,

[5] In this way and others, the State was simply in a different position after the change in administration than it was when a warrant was sought in December 2022.

however, it should hold that Movants lack standing to move for an extension of a warrant of execution.

"This Court has long held that victims are not 'parties' to a criminal prosecution." *Fay v. Fox in and for Cnty. of Maricopa*, 251 Ariz. 537, 542, ¶ 32 (2021) (Timmer, V.C.J., dissenting) (citing *State v. Lamberton*, 183 Ariz. 47, 49-50 (1995)); *see also Lynn v. Reinstein*, 205 Ariz. 186, 191, ¶ 15 (2003) ("[V]ictims are not parties to a defendant's criminal case."). Because "[t]he VBR does not make victims 'parties' to the prosecution," it "does not allow victims to usurp the prosecutor's unique role." *Lindsay R. v. Cohen*, 236 Ariz. 565, 567, ¶ 8 (App. 2015) (citation omitted). Movants have cited no provision that they even allege gives them standing to file a motion as a non-party in this criminal case.

Indeed, because a victim is not a "party," a victim has no "right to control the proceedings, to plead defenses, or to examine or cross-examine witnesses." *Lamberton*, 183 Ariz. at 49. "[T]he prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused," including any victims. *Id.* at 50 (citation omitted). Accordingly, a victim may not affirmatively seek certain relief, such as by filing a petition for review. *See id.* ("[T]he simple fact that the State has commenced a proceeding does not entitle the Victim to commence another proceeding by filing her own petition for review."). In the face

of these long-settled principles, Movants cite no authority indicating that they have the right to file a motion like the one filed here.

To be sure, victims often have a right to be heard in proceedings where another party seeks relief. In *Fay*, for example, this Court held that a victim could *respond* where the defendant sought to file a delayed appeal. 251 Ariz. at 540, 541 ¶¶ 15, 24. But even permitting the victim a right of response in that context drew a dissent from two justices of this Court. *See id.* at 542-44, ¶¶ 32-38 (Timmer, V.C.J., joined by Brutinel, C.J., dissenting). As those justices noted, the right to be heard is only granted in limited circumstances by the VBR and Victims' Rights Implementation Act ("VRIA"). *Id.* at 542-43, ¶ 33 (citing Ariz. Const. art. 2, § 2.1(A)(4) ("granting a right '[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing'"); *id.* § 2.1(A)(9) ("granting a right '[t]o be heard at any proceeding when any post-conviction release from confinement is being considered'"); A.R.S. §§ 13-4414(A), -4440(A), -4441(A)). Similarly, this Court's "rules provide victims the right to be heard at various criminal proceedings." *Fay*, 251 Ariz. at 543, ¶ 33 (Timmer, V.C.J., joined by Brutinel, C.J., dissenting) (citing Ariz. R. Crim. P. 39(b)(7)(A)-(I)); *see also* Ariz. R. Crim. P. 39(a)(1) (defining "criminal proceeding" as "any matter scheduled and held before a trial court, [ ] including any post-conviction matter"); A.R.S. § 13-

4401 (similarly limiting term "criminal proceeding" to trial court proceedings). Although the right to respond asserted in *Fay* was not specifically delineated in those provisions, the majority held that the victim had a right to respond rooted in A.R.S. § 13-4437(A), which provides that "the victim has standing to seek an order, to bring a special action or to file a notice of appearance in a trial court or an appellate proceeding, seeking to enforce any right or to challenge an order denying any right guaranteed to victims."

Movants here seek something dramatically different than was sought in *Fay*. Citing no authority, they seek not a right to be heard or a right to respond, but rather a right to affirmatively move for relief in this criminal case, in which they are not parties. *Cf. Fay*, 251 Ariz. at 542, ¶ 28 (noting that "Fay is not seeking to initiate anything," but rather only to be heard on whether a petition filed by the defendant should be granted).

To expand § 13-4437(A)'s reach to the motion here would be to expand *Fay* dramatically, from a right to respond in one circumstance to a right to initiate unprecedented requests for relief in very different circumstances. Put differently, interpreting § 13-4437(A) to give Movants authority to file a motion to extend a warrant of execution here could open the door to a variety of unprecedented filings by victims in criminal cases, so long as those victims could argue that their filing is

connected in some way to a "right guaranteed to victims." A.R.S. § 13-4437(A). This Court should decline to interpret § 13-4437(A) so expansively, which would permit Movants "to usurp the prosecutor's unique role" in these capital proceedings, not to mention render superfluous specifically delineated constitutional, statutory, and rule-based rights to be heard. *Lindsay R.*, 236 Ariz. at 567, ¶ 8.

And here, it is worth noting that Movants articulate no way in which the motion to extend itself "seek[s] to enforce any right . . . guaranteed to victims." A.R.S. § 13-4437(A). Victims do not have a right to 25-day extensions of warrants of execution. Nor do they have a right to extensions that serve only to keep live for a little while longer a subsequent special action after having lost a special action in this Court. And as noted before, while Movants have a right to a "prompt and final conclusion," they certainly have not established that the right encompasses a right to have Gunches executed on a particular date. Instead, this Court has already concluded that issuance of a warrant does not require ADCRR to proceed with an execution on a particular date.

Finally, Movants' right to a "prompt and final conclusion of the case," found in paragraph ten of the VBR, cannot give rise to such an unprecedented right to file motions as if a party in a criminal case. Ariz. Const. art. 2, § 2.1(A)(10). In

another context, this Court has held that "[p]aragraphs one through nine of the VBR not only create rights, but create rights unique and peculiar to crime victims." *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343, ¶ 12 (1999). "Paragraph ten, however, which addresses a general 'speedy trial' right, neither creates a right nor defines a right peculiar and unique to victims."[6] *Id.*

This Court has thus held that paragraph ten is fundamentally different in nature than most of its counterparts in the VBR. "'[T]he judicial system as a whole is vitally interested in advancing the goal of prompt, fair resolution of all actions, including criminal cases, for the benefit of all participants as well as victims.'"[7] *State v. Reed*, 248 Ariz. 72, 79, ¶ 23 (2020) (quoting *Brown*, 194 Ariz. at 343-44, ¶¶ 12-13); *see also id.* (reaffirming that paragraph ten "neither creates a right nor defines a right peculiar to victims").

Movants have cited no statute, rule, constitutional provision, or case that they allege gives them standing to file their unprecedented motion. This Court

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[6] Although the Court used "speedy trial" language in referencing paragraph ten, its holding was plainly about the broader right to a "prompt and final conclusion"—the provision at issue in *Brown* dealt with deadlines for filing petitions for post-conviction relief. *Id.* at 341, ¶ 1.

[7] The Court in *Brown* also noted that "the rights guaranteed by the VBR extend to victims of all crimes" in rejecting the idea that the Legislature might give victims of capital crimes benefits under the VBR not extended to victims of non-capital crimes. *Id.* at 343, ¶ 10.

should decline Movants' apparent invitation to assume without analysis that Movants have such standing. Indeed, close analysis of the relevant authorities reveals that it would be unprecedented to confer such standing upon them. Movants, who are not parties to this case, should not be permitted to file the instant motion.

III. This Court should not reach the question of whether constitutional tension exists between A.R.S. § 13-759(A) and Rule 31.23(c).

To the extent tension between A.R.S. § 13-759(A) and Rule 31.23(c) exists, the State takes no position regarding how that tension must be resolved. However, whether unavoidable (and perhaps constitutional) tension exists between these two provisions is a question that this Court need not confront here. *See R.L. Augustine Const. Co. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 370 (1997), *as corrected* (May 21, 1997) (The Court "will not reach a constitutional question if a case can be fairly decided on nonconstitutional grounds.") (internal citations omitted); *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (following practice of "refusing to decide constitutional questions when the record discloses other grounds of decision"). For the reasons identified above, this Court should thus deny the motion without reaching this question.

Although the State takes no position on how any potential tension must be

resolved, it does provide some detail here regarding some of the issues that may be implicated by that question. The statute, A.R.S. § 13-759(A), provides that "[t]he time for execution shall be fixed for thirty-five days after the state's motion is granted." No potential extensions are expressly contemplated by the statute.

Meanwhile, Ariz. R. Crim. P. 31.23(c) likewise acknowledges the 35-day timeframe, stating that "[t]he warrant of execution must specify an execution date that is 35 days after the warrant's issuance." Going further, though, the Rule provides: "If the Supreme Court finds that it is impracticable to carry out an execution on that date, it may extend the execution date but may not extend it more than 60 days after the warrant's issuance." Ariz. R. Crim. P. 31.23(c).

When possible, courts should construe statutes and rules "in a way that averts needless constitutional tension." *State v. Hansen*, 215 Ariz. 287, 289, ¶ 8 (2007). But if a statute and a rule contain patently contradictory instructions, the court will determine which one prevails. *Id.* Generally, "[w]hen a rule and a statute conflict, the rule will govern if the matter concerns a procedural right, and the statute will govern if the matter concerns a substantive right." *Patterson v. Mahoney*, 219 Ariz. 453, 456, ¶ 11 (App. 2008) (citing *Hansen*, 215 Ariz. at 289, ¶ 9). Courts commonly define substantive laws as those that "create[], define[] and regulate[] rights," while procedural laws "prescribe[] the practice, method,

procedure or legal machinery by which the substantive law is enforced or made effective." *Id*. at ¶ 12 (citations omitted); *see also* Decision Order at 5 (Mar. 2, 2023) (noting in the context of subsections (a) and (b) that "Rule 31.23 provides the procedures for implementing § 13-759(A)").

To be clear, both the Legislature and the Judiciary have rulemaking power, and the Legislature has authority to make statutory procedural enactments. Typically, however, "in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails." *Seisinger v. Siebel*, 220 Ariz. 85, 89, ¶ 8 (2009). One exception to this general principle was discussed in *Hansen*, and provides that if a procedural law is enacted pursuant to the Legislature's constitutional rulemaking authority, it will govern over a conflicting procedural rule. 215 Ariz. at 290, 291 ¶¶ 10, 17. There, while assuming without deciding that the statute at issue was procedural in nature, the Court found that because the Victims' Bill of Rights in the Arizona Constitution provided the Legislature with the authority to "enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims," a procedural statute that affected victims' rights fell within the Legislature's constitutional rulemaking power and controlled over a conflicting court rule. *Id*. at 290-91, ¶¶ 11, 14-17; *cf.* Ariz. Const. art. 22, § 22 (providing that in judgments of death, "lethal injection or

lethal gas shall be administered under such procedures and supervision as prescribed by law.").

Again, the State takes no position regarding whether irresolvable and/or constitutional tension exists between A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(c). This Court, however, need not and should not wade into those waters. Ample reason exists to deny the motion here without reaching these questions.

CONCLUSION

With no citation to authority, Movants seek (or more accurately just assume they have) unprecedented authority to file an unprecedented motion. A close look at the law reveals that they do not. Even if they did, however, and even assuming this Court has power to grant their motion, the motion should be denied in this Court's discretion. Even with an extension, the ultimate relief Movants seek—an execution on May 1—will remain legally impossible. After months of rushed litigation and hundreds of pages of filings in this Court (and now the Superior Court) by an array of parties, victims, and amici, it is time to put an end to the litigation surrounding the current warrant of execution.

RESPECTFULLY SUBMITTED this 4th day of April, 2023.

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