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**IN THE SUPREME COURT OF
THE STATE OF ARIZONA**

STATE OF ARIZONA,

Appellee,

vs.

AARON BRIAN GUNCHES,

Appellant.

No. CR-13-0282-AP

Maricopa County Superior Court
No. CR 2003-038541-001

**CRIME VICTIMS' JOINT
RESPONSE TO AMICI**

INTRODUCTION

Amici American Civil Liberties Union (ACLU), Arizona Attorneys for Criminal Justice (AACJ), and Federal Public Defender for the District of Arizona (FPD) (collectively, the Amici) all argue that there should be an end to this litigation. An end to litigation is exactly what the victims are seeking after over 20 years of waiting for Aaron Gunches's sentence to be carried out. That end was

possible had the Governor and Director of the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) carried out Gunches's execution on the heels of three successful, constitutional executions.

And while the Amici couch their calls for the end of litigation in the need for finality, they fail to acknowledge that there is nothing final about permitting this Court's Warrant of Execution (Warrant) to expire on April 6, 2023. Instead, it will leave inmate Gunches's lawfully imposed sentence in limbo, with no timeline for finality. Ultimately, none of Amici provide persuasive reasons why this Court should not extend the warrant by 25 days pursuant to Rule 31.23(c),¹ which will allow crime victims Karen Price and Brittney Kay (Crime Victims) time to litigate their constitutional right to finality.

I. The Law of the Case Doctrine Does Not Apply to Crime Victims' Special Action or Request to Extend the Warrant of Execution.

The ACLU argues that this Court's March 22, 2023, decision order constitutes the law of the case with respect to the ongoing litigation concerning the Warrant, including the Crime Victims' superior court special action complaint and motion to extend the Warrant. As a preliminary matter, the Court should not consider this

¹ AACJ's amicus brief is wholly untethered from the facts and law applicable to this case. Moreover, its allegations concerning the Crime Victims' and the Maricopa County Attorney Office's actions and motivations are groundless. This Court would be well within its discretion to strike the AACJ brief, given that it bears little connection to its asserted interests and is not helpful for this Court.

argument because amici are not permitted to raise new issues and their briefs “may not create, extend, or enlarge issues beyond those argued by the parties.” *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 84 (1981); accord *City of Tempe v. Prudential Ins. Co. of Am.*, 109 Ariz. 429, 432 (1973).² There is no indication that the Governor or Director have argued, or will argue, that this Court’s March 22, 2023 Decision Order constitutes the law of the case for any issues raised in the Crime Victims’ superior court special action complaint or request to extend the Warrant.

Even if the Court determines it is appropriate to consider this argument, the “law of the case” doctrine is “generally held to be a rule of policy and not one of law,” and this Court “has recognized that the doctrine . . . is a harsh rule . . . that . . . should not be strictly applied when it would result in a manifestly unjust decision.” *Dancing Sunshines Lounge v. Indus. Comm’n*, 149 Ariz. 480, 482 (1986). Accordingly, as the ACLU itself recognized, the doctrine is not applied when, among other things: (1) “the issue was not actually decided in the first decision”; “the prior appellate decision was not on the merits”; or (3) “there has been a substantial change of evidence.” *Id.* at 483.

Each of these exceptions is met here concerning the Crime Victim’s superior court special action complaint and request to extend the Warrant. First, the March

² Because the parties filed simultaneous briefs, the ACLU did not have the benefit of knowing what the parties would argue.

22 Decision Order, at best, foreclosed seeking a writ of mandamus against the Governor and Director solely based on A.R.S. §§ 13–757 and –759(A). This Court carefully confined its analysis to those statutes, and simultaneously acknowledged the substantial questions raised regarding the Governor’s oaths and obligations, as well as the Crime Victims’ constitutional rights. (3/22/23 Decision Order at 1–3.) As a result, the ACLU’s claim that all mandamus and prohibition-related issues were decided by the March 22 Decision Order and now operate as law of the case is simply incorrect. *See State v. Fulminate*, 193 Ariz. 485, 491, ¶ 13 (1999) (rejecting application of law of the case doctrine based on statements by the United States Supreme Court on the state of evidence when the Court “was not required to and did not actually determine whether the evidence was sufficient to support a conviction”); *Humphrey v. State*, 249 Ariz. 57, 68, ¶ 40 (App. 2020) (same when previous trial court judge did not “expressly decide” whether public records claim should be dismissed).

Second, the Court’s March 22 Decision Order dismissed the Crime Victims’ remaining claims “*without prejudice* to [Crime Victims] seeking relief in a future action.” (3/22/23 Decision Order at 4, emphasis added.) Thus, the Court explicitly recognized that it did not intend the March 22 Decision Order to decide any claims “on the merits” other than those explicitly addressed in its decision order. The Crime

Victims' complaint and petition for special action raises new claims for special action relief, as well as claims for declaratory and injunctive relief.

Finally, the ACLU's assertion that "the projected evidence and arguments in the Superior Court" do not carry the risk of "changing the evidentiary or legal basis for this Court's ruling" is directly at odds with the March 22 Decision Order. (ACLU Amicus Brief at 4.) In its order, this Court based its dismissal, in part, on its finding that the Crime Victims' claims "present mixed question of law and fact that are not properly before us." (3/22/23 Decision Order at 3.) It stretches the boundaries of belief to say that there is no possibility that the evidentiary or legal basis for March 22 Decision Order might change, when the order itself expressly acknowledged that mixed questions of *both fact and law needed to be developed*. Accordingly, there is no basis to apply the law of the case doctrine to bar consideration of the Crime Victims' request to extend the Warrant.

II. The Governor and Director's Failure to Comply with their Constitutional and Legal Obligations Cannot Be the Basis for Permitting the Warrant to Expire Prematurely.

The FPD asserts that "ADCRR cannot comply with DO 710 even if the Court extends the warrant to May 1, 2023," because 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." (FPD Amicus Brief at 3.) The FPD further asserts

that those “conditions cannot be satisfied for a May 1 execution,” and 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.” *Id.*

In essence, the FPD is arguing that the Governor and Director should be allowed to use DO 710 as both a sword and a shield to defeat claims of malfeasance or inaction, by allowing that very malfeasance or inaction to justify dismissal of a warrant of execution. *See Health–Chem Corp. v. Baker*, 915 F.2d 805, 810 (2d Cir. 1992) (“Health–Chem makes no claim that it took virtually every action within its power to perform its duties under the contract and therefore cannot assert the defense of impossibility.”); *United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL–CIO*, 816 F. Supp. 864, 874 (S.D.N.Y. 1992) (“In contract law . . . the defense of impossibility is not available to one who . . . did not take virtually every action within his or her power to perform.”); *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842-43 (2d Cir. 1975) (“To recognize impossibility where, as in the case before us, the party pleading the defense has intentionally incapacitated itself from performing would defy this case law and all good sense.”); *see also* 55 C.J.S. Mandamus § 19 (Mar. 2023 Update) (“[I]t is not grounds for denying the writ that the respondent’s own wrongful act rendered it impossible to perform the duty in strict compliance with statutory requirements as to the time and manner of performance.”).

The FPD acknowledges that ADCRR is contractually bound by Arizona’s execution protocol (FPD Amicus Brief at 8), and further acknowledges that 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.* at 4.) Additionally, the FPD points out that “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).” (*Id.* at 4, n.3.) Despite these acknowledgements, the FPD cites no authority in support of the Governor and ADCRR’s refusal to comply with their constitutionally mandated duty to execute lawful sentences in compliance with the Constitution and the Constitution and laws of Arizona.³

In their pending superior court special action complaint, the Crime Victims seek to hold the Governor and Director accountable for their dilatory actions, including their failure to follow the procedures outlined in DO 710, thereby placing Gunches’s lawful execution in jeopardy. The purpose of the litigation is to resolve

³ While the FPD references previous Arizona capital cases detailing issues which led to the execution protocol settlement (*see* FPD Brief at 8-10), these cases are not relevant to Gunches’s execution. Further, this analysis does not take into account the three successful and constitutionally-compliant executions that ADCRR carried out within the past year.

whether the Governor and Director have, without justification, abdicated their responsibility to carry out a lawfully imposed sentence, and by doing so have deprived the Crime Victims of their constitutional rights to due process, justice, and a prompt and final conclusion to these decades-long proceedings. Extending the date of execution to May 1, 2023, will allow the parties and the superior court an opportunity to address unresolved factual matters (as recognized by this Court), and to allow the superior court an opportunity to craft a remedy should the court rule in the Crime Victims' favor.

III. The Crime Victims have the Right to Develop Their Claims Related to the Governor and Director's Failure to act on the Warrant of Execution, and to Alert the Court of the Impracticability of Moving Forward with the Execution on April 6.

Throughout the litigation related to the Warrant issued by this Court, Crime Victims have asserted their constitutional rights to justice and finality. Ariz. Const. art. 2, § 2.1(A) and (A)(10). Crime Victims' rights continue to be enforceable in this case. Ariz. Const. art. 2, § 2.1(A)(10) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right[] [t]o a speedy trial or disposition and prompt and final conclusion of the case *after the conviction and sentence.*") (emphasis added).; Cf. *State v. Butler*, 252 Ariz. 346, 351, ¶ 18 (App. 2021) (noting that A.R.S. § 13-4433(H) extends beyond termination of criminal proceeding).

The constitutional right to finality was recognized by this Court in issuing the Warrant. *Decision Order* at 4, CR 13-0282 (March 2, 2203) (“In ruling on the pending motions, we are cognizant of the Victim’s constitutional right to a prompt conclusion of this case.”). Further, in denying relief in Victim Price’s Petition for Special Action, CV-23-0055, this Court acknowledged that Victims may seek relief in a future action. *Decision Order* at 4, CV-23-0055 (March 22, 2023).

In the context of the Victims Bill of Rights (VBR), due process requires that a victim is afforded an opportunity to participate and to be heard when victims’ constitutional and/or statutory rights are implicated. “The victim’s right to due process attaches to those substantive rights” in the VBR. *Fay v. Fox*, 251 Ariz. 537, 541, ¶ 24 (2021). “The ‘fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.* (internal citations omitted). Victims have “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...” A.R.S. § 13-4437(A); *See also* Ariz. R. P. Spec. Act. 2(a)(2). This right to assert victims’ constitutional rights necessarily includes the right to seek redress, including alerting the court of the need to extend the Warrant to fully litigate Crime Victims’ claims.

Because their rights to justice and finality are at stake, Crime Victims should certainly be able to participate in this litigation and they should be able to do so without being subjected to baseless accusations when asserting and attempting to enforce their constitutional rights. *See* Ariz. Const. art. II, § 2.1(A)(1) (Victims have a right “[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.”). Contrary to the assertions by Amici, Crime Victims have not attempted to “direct the prosecution of the case” nor have they claimed to be “parties” to the criminal case as asserted by Amici. (FPD Amicus Brief at 12-13.) Rather, Crime Victims have used mechanisms provided by law to seek enforcement of their rights.

Amici seem to suggest that the Crime Victims cannot advance their constitutional rights to justice and finality as these “[rights] are not unique to victims.” (FPD Amicus Brief at 13-14) (citing *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 343 (Ariz. 1999)). *Brown*, however, does not remove a victim’s standing to assert and enforce any state constitutional right. Instead, while noting that the right to a speedy trial was not unique and particular to victims, *Brown* addressed the legislative authority to adopt time limits for filing a petition for post-conviction relief. *Brown* at 343, ¶¶ 12-13. Reading *Brown* as precluding a victim from asserting and enforcing their constitutional right to finality would be entirely inconsistent with the spirit and purpose of the VBR, which gives victims the basic

rights of “respect, protection, participation and healing of their ordeals.” *Champlin v. Sargeant*, 192 Ariz. 371, 375, ¶ 20 (1998) (noting purpose of VBR and its implementing legislation) (quoting 1991 Ariz. Sess. Laws ch. 229, § 2).

Amici note that a victim’s constitutional right yields to a criminal defendant’s federal constitutional rights. (FPD Amicus Brief at 13.) However, Amici fail to note that, to date, no court has found that Gunches’s federal constitutional rights have been violated or are at risk of being violated. In issuing the Warrant, this Court noted that the Governor’s review “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.” (3/22/23 Decision Order at 1-3.) “[T]he State implicitly avowed it could carry out the sentence in compliance with state and federal law” when it sought the warrant. *Id.* at 7. And “[t]he State’s motion to withdraw that request six weeks later did not present any evidence that circumstances had changed.” *Id.* On this record, Gunches has no federal constitution right to which the Crime Victims’ state constitutional rights to finality must yield.

CONCLUSION

Crime Victims seek to enforce their constitutional rights to justice and finality. Extending the Warrant 25 days pursuant to Rule 32.13(c) will allow Crime Victims the opportunity to address unresolved factual matters in the superior court and provide Crime Victims the possibility of avoiding violations of their constitutional

rights under the VBR. Accordingly, Crime Victims request this Court extend the Warrant until May 1, 2023.

Respectfully submitted this 4th day of April, 2023.

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