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ARIZONA SUPREME COURT

STATE OF ARIZONA,

Plaintiff/Movant,

v.

AARON BRIAN GUNCHES,

Defendant/Respondent.

No. CR-13-0282-AP

Maricopa County Superior Court
No. CR2003-038541-001SE

**MOTION TO SET BRIEFING
SCHEDULE FOR MOTION FOR
WARRANT OF EXECUTION**

(Capital Case)

The State of Arizona notices its intent to move for a warrant of execution for Aaron Brian Gunches under A.R.S. § 13-759(A) and Arizona Rule of Criminal Procedure (“Rule”) 31.23. A draft of the State’s anticipated motion is attached. *See* Exhibit (“Exh.”) A. For reasons that follow, the State moves this Court to establish

a firm briefing schedule to precede the motion's filing to ensure that the State's motion will be decided by this Court on a date certain and thus allow the Arizona Department of Corrections, Rehabilitation, and Reentry ("ADCRR") an opportunity to comply with its testing and disclosure obligations regarding the drug to be used in the execution.

I. BACKGROUND

In 2007, Gunches pleaded guilty to the first-degree murder and kidnapping of Victim TP. *State v. Gunches*, 225 Ariz. 22, 23-24, 27, ¶¶ 1-6, 26 (2010) ("*Gunches I*"). This Court affirmed the convictions but vacated the sentence. *Id.* at 27, ¶ 26. A new penalty-phase jury returned a death sentence, and this Court affirmed the jury's sentence. *State v. Gunches*, 240 Ariz. 198, 200-01, 207, ¶¶ 1-4, 41-42 (2016), *cert. denied*, 580 U.S. 1174 (2017) ("*Gunches II*").

After Gunches waived his right to post-conviction-relief ("PCR") proceedings, the superior court dismissed his PCR Notice in June 2018. *State v. Gunches*, Maricopa County Superior Court No. CR2003-038541-001 (Minute Entry filed on June 8, 2018). (Exh. B, Decision Order filed 3/02/23, at 6-7, 10; Exh. C. Warrant of Execution filed 3/02/23, at 2-3.) In October 2018, Gunches filed a notice in the federal district court waiving "Federal Habeas Review." *Gunches v. Ryan*, Dist. of Ariz. No. CV-18-3346-PHX-DLR (Doc. 1). The following month, the district court dismissed the notice on jurisdictional grounds. *Id.* at Doc. 3.

In November 2022, Gunches filed a pro se pleading seeking a warrant of execution. (Exh. B at 1.) A month later, the State via the Office of the Arizona Attorney General (“Attorney General’s Office”) joined Gunches’ request. (Exh. B at 2.) In doing so, the Attorney General’s Office averred that the conditions for issuance of a warrant of execution under § 13–759(A) and Arizona Rule of Criminal Procedure 31.23(a) were satisfied. (Exh. B at 2, 6.)

In January 2023, Gunches asked to withdraw his request to issue the death warrant, and the then-newly-elected Arizona Attorney General likewise sought to withdraw its motion for a warrant. (Exh. B at 2.) Two months later, this Court granted the State’s motion for a warrant of execution; denied the State’s motion to withdraw the warrant; and denied Gunches’ motions as moot. (Exh. B at 10-11.) In so doing, this Court concluded,

[O]nce a motion or notice, pursuant to § 13-759(A) or Rules 31.23(a) or (b), is filed by the State requesting a warrant of execution showing that all the requirements under § 13-759(A) and Rule 31.23 have been satisfied, and there are no constitutional or statutory impediments to proceeding, absent a subsequent showing of good cause that the requirements listed in §13-759(A) and Rule 31.23 have not been satisfied, this Court *must* issue the warrant and authorize the State to carry out the execution.

(Exh. B at 9-10.) Because of litigation that followed the warrant’s issuance, however, the warrant expired before the execution was carried out. (*See* Exh. D, Decision Order filed 4/5/23.)

II. ANALYSIS

When an initial death warrant expires before the execution takes place, “[t]he supreme court shall grant subsequent warrants of execution on a motion by the state.” A.R.S. § 13-759(A). This Court issued the prior warrant of execution because the statutory and procedural conditions for the warrant’s issuance were satisfied; those conditions have not changed since then. The Maricopa County Attorney’s Office (“MCAO”) prosecuted Gunches “on behalf of the state” in this case and thus is entitled to seek a subsequent warrant under § 13-759(A). *See* A.R.S. § 17-103 (directing county attorneys to prosecute and defend “on behalf of the state”); *State v. Payne*, 223 Ariz. 555, 562, ¶ 19 (2009) (explaining “[t]he county attorney, as the public prosecutor of the county, is statutorily obligated to conduct, on behalf of the state, all prosecutions for public offenses”) (quoting A.R.S. § 11–532(A)(1)) (internal quotation marks omitted).

Furthermore, as this Court noted in its March 2, 2023, Decision Order (Exh. B at 3), victims in Arizona have a constitutional right to a “prompt and final conclusion of the case after the conviction and sentence.” *See* Ariz. Const. art. II, § 2.1(A)(10); *Fitzgerald v. Myers*, 243 Ariz. 84, 92, ¶ 25 (2017) (recognizing victims’ constitutional right to finality, which warrants protection). And “[a]t the request of the victim, the prosecutor may assert any right to which the victim is entitled.” A.R.S. § 13–4437(C); *see* Ariz. R. Crim. P. 39(d)(1) (directing prosecutors

to assist victims in enforcing victims' rights). Here, the Victims have asserted their rights to finality and seek MCAO's assistance in protecting their constitutional rights to a prompt and final conclusion of the case. *See* Exhibit E.

That the Attorney General's Office, not MCAO, successfully moved for the prior warrant does not limit MCAO's authority to request a subsequent warrant here. Although § 41-193(A)(1) empowers the Attorney General's Office to represent the State in this Court, that statute does not, expressly or implicitly, vest exclusive authority in the Attorney General to do so. Instead, "§ 41-193 lists duties, not powers" that "are specific and granular[,]" thereby creating "duties of legal representation rather than broad grants of authority." *See State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 132, ¶ 19 (2020). Further, § 41-193(A) affirmatively contemplates nonexclusive authority in the Attorney General where it states that the Attorney General Office's department of law may exercise its powers "[u]nless otherwise provided by law." Therefore, the lack of participation by the Attorney General's Office in making this request is immaterial.

Accordingly, because Gunches' offense occurred after November 23, 1992, ADCRR must proceed by utilizing "an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections." A.R.S. § 13-757(A)-(B); *see also Gunches I*, 225 Ariz. at 23-24, ¶¶ 1-6 (offenses occurred in November 2002). Upon information and

belief, ADCRR can carry out executions using compounded pentobarbital because ADCRR used this method to execute Clarence Wayne Dixon, Frank Jarvis Atwood, and Murray Hooper in 2022. Once compounded, pentobarbital should have a beyond-use date of 90 days from the date of compounding if certain testing from 2022 is still valid; otherwise, the beyond-use date should be 45 days. (*See* Exhibit F, Motion to Set Briefing Schedule for Motion for Warrant of Execution in *State v. Atwood*, No. CR-87-0135-AP *filed* 1/5/22.) The current lethal-injection protocol and related civil settlement prohibits ADCRR from using or selecting for use any drug that will be expired or past its use-by date at the time the execution is carried out. (*See* Exhibit F at 13-16.) *See* ADCRR Dep't Order 710, ¶ A.1.III.¹

The lethal-injection protocol also requires ADCRR to disclose to Gunches upon request, a quantitative analysis of the chemical to be used in his execution within 10 days of the State's filing of a motion for a warrant of execution. *See id.* To ensure ADCRR can meet this obligation to prove testing results within 10 days and also have the compounded drug be available within the 45-day or 90-day beyond-use date on the date of the execution, the drug must be compounded no more than a few days before the deadline for providing the testing report. This is because as noted above, once the drug is compounded, its beyond-use date will begin to run.

¹ ADCRR Departmental Order 710 is available at <https://corrections.az.gov/sites/default/files/documents/policies/700/0710-AL.pdf> (last visited June 4, 2024).

Under an ordinary briefing schedule, assuming no extensions are requested or received, and this Court does not prescribe different deadlines, Gunches would be afforded 10 days to respond to the State's motion for execution and the State would thereafter have 5 days to file its reply. *See* ARCAP (6)(a)(2); *see also* Ariz. R. Crim. P. 31.6(e). This Court would then conference the motion and if the motion is granted, would fix an execution date 35 days from the date the motion is granted. A.R.S. § 13-759(A); Ariz. R. Crim. P. 31.23(c). But if extended filing periods are granted, as often occurs in capital litigation, the pre-warrant briefing process alone, not including the statutory 35-day waiting period on the execution warrant, can last for much longer than the 35-day time frame.

The State, therefore, requests that this Court issue a briefing schedule for the State's anticipated motion for a warrant of execution. The State requests that this Court identify in advance the date on which it will consider and potentially issue the execution warrant and, working backward, calendar deadlines as follows:

1. The State shall file its motion for an execution warrant (along with its motion to consolidate, if necessary) approximately 30 days before this Court's conference date. The motion shall be identical to Exhibit A.
2. Gunches shall respond, if he chooses, to the State's motions within 10 calendar days of the date of the motion for a warrant of execution is filed.
3. The State shall file its reply, if any, within 5 calendar days of the filing of Gunches' response.

While the responsive briefing is ongoing, ADCRR should ensure that the drug to be used is compounded and the testing results disclosed within 10 days of the State's filing of the motion for a warrant of execution. This schedule would ensure that ADCRR can comply with its obligation to provide quantitative testing of the compounded drug within 10 days after the State files its motion for a warrant of execution and carry out the execution within the drug's beyond-use date.

This procedure will not prejudice Gunches. As discussed above, the State has attached to this pleading a copy of its anticipated motion for a warrant of execution. (*See* Exh. A.) Gunches, therefore, will have received notice of the State's motion and can begin preparing any response, along with any litigation he may wish to pursue, while he awaits this Court's briefing schedule. Moreover, the issue before this Court in deciding whether to issue a warrant is narrow: this Court need only determine whether Gunches' first PCR proceeding and habeas corpus review have concluded; a determination it previously made and for which the circumstances are unchanged. (*See* Exhs. B, C.) *See* A.R.S. § 13-759(A); Ariz. R. Crim. P. 31.23(a), (b). Because the relevant proceedings are terminated, issuance of the warrant is mandatory. *See* A.R.S. § 13-759(A) (directing the supreme court to issue a warrant of execution once the first post-conviction relief proceeding has concluded and that the "supreme court shall grant subsequent warrants of execution on a motion by the state"); *see also* Ariz. R. Crim. P. 31.23(a), (b).

III. CONCLUSION

Given this Court's narrow inquiry and the State's early disclosure of its anticipated motion for a warrant of execution, a firm briefing schedule from the date that this Court conferences the motion is appropriate. For these reasons, the State requests that this Court grant this motion and set a briefing schedule for the State's forthcoming motion for a warrant of execution.

Respectfully submitted this 5th day of June 2024.

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY /s/ _____
Philip D. Garrow
Deputy County Attorney

INDEX OF EXHIBITS

<u>Exhibit</u> A	Motion for Warrant
<u>Exhibit</u> B	AZ Supreme Court Decision order 3/2/2023
<u>Exhibit</u> C	Warrant of execution 3/2/23
<u>Exhibit</u> D	AZ Supreme Court Decision order 4/5/2023
<u>Exhibit</u> E	AVCV Declaration and Letter
<u>Exhibit</u> F	Atwood Motion to Set Briefing Schedule

EXHIBIT A

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ARIZONA SUPREME COURT

STATE OF ARIZONA,

Plaintiff/Movant,

v.

AARON BRIAN GUNCHES,

Defendant/Respondent.

Arizona Supreme Court No.:
CR-13-0282-AP

Maricopa County Superior Court No.:
CR2003-038541-001SE

**MOTION FOR WARRANT OF
EXECUTION**

(Capital Case)

Under A.R.S. § 13-759(A) and Arizona Rule of Criminal Procedure (“Rule”) 31.23(a), the State of Arizona moves this Court for a Subsequent Warrant of Execution for Aaron Brian Gunches. Gunches’ direct appeal, first post-conviction relief (“PCR”) proceeding, and federal habeas corpus proceeding are concluded. A prior warrant of execution was issued for that reason, and those circumstances are

unchanged. Accordingly, upon motion of the State, the Arizona Supreme Court must issue a subsequent warrant of execution. *See* A.R.S. § 13-759(A) (providing that once a conviction and sentence of death have been affirmed and the first PCR proceedings have concluded, the Arizona Supreme Court must issue a warrant of execution authorizing “the director of the state department of corrections to carry out the execution thirty-five days after the supreme court’s mandate or order denying review or upon motion by the state[; t]he supreme court shall grant subsequent warrants of execution on a motion by the state”); Ariz. R. Crim. P. 31.23(a), (b).

In 2007, Gunches pleaded guilty to the first-degree murder and kidnapping of Victim TP. *State v. Gunches*, 225 Ariz. 22, 23–24, 27, ¶¶ 1–6, 26 (2010) (“*Gunches I*”). This Court affirmed the convictions but vacated the death sentence. *Id.* at 27, ¶ 26. A new penalty-phase jury returned a death sentence and this Court affirmed the jury’s sentence. *State v. Gunches*, 240 Ariz. 198, 200–01, 207, ¶¶ 1–4, 41–42 (2016), *cert. denied*, 580 U.S. 1174 (2017) (“*Gunches II*”).

Gunches waived his right to post-conviction-relief (“PCR”) proceedings, and the superior court dismissed the PCR Notice in June 2018. *State v. Gunches*, Maricopa County Superior Court No. CR2003-038541-001 (Minute Entry filed on

June 8, 2018). (Exh. B,¹ Decision Order filed 3/02/23, at 6-7, 10; Exh. C, Warrant of Execution filed 3/02/23, at 2-3.) In October 2018, Gunches filed a notice in the federal district court waiving “Federal Habeas Review.” *Gunches v. Ryan*, Dist. of Ariz. No. CV-18-3346-PHX-DLR (Doc. 1). The following month, the district court dismissed the notice on jurisdictional grounds. *Id.* at Doc. 3.

In November 2022, Gunches filed a pro se pleading seeking an execution warrant. (Exh. B at 1.) A month later, the State via the Office of the Arizona Attorney General (“Attorney General’s Office”) responded to and joined Gunches’ request, asking this Court to issue a warrant of execution for Gunches. (Exh. B at 2.) In the response, the Attorney General’s Office averred that the conditions for issuance of a warrant of execution under § 13–759(A) and Arizona Rule of Criminal Procedure 31.23(a) were satisfied. (Exh. B at 2.)

In January 2023, Gunches asked to withdraw his request to issue the death warrant, and the then-newly-elected Arizona Attorney General likewise sought to withdraw its motion for a warrant. (Exh. B at 2.) That March, this Court granted the State’s motion for a warrant of execution; denied the State’s motion to withdraw the warrant; and denied Gunches’ motions as moot. (Exh. B at 10-11.) In so doing, this Court concluded,

[O]nce a motion or notice, pursuant to § 13-759(A) or Rules 31.23(a)

¹ The exhibits refer to those attached to the instant pleading and may differ from the motion that will ultimately be filed.

or (b), is filed by the State requesting a warrant of execution showing that all the requirements under § 13-759(A) and Rule 31.23 have been satisfied, and there are no constitutional or statutory impediments to proceeding, absent a subsequent showing of good cause that the requirements listed in §13-759(A) and Rule 31.23 have not been satisfied, this Court *must* issue the warrant and authorize the State to carry out the execution.

(Exh. B at 9-10.) But as a result of litigation that followed the warrant's issuance, the warrant expired before the execution was carried out. (*See* Exh. D, Decision Order filed 4/5/23.)

Based on the foregoing, the State moves this Court for a subsequent warrant of execution under A.R.S. § 13-759(A) and Rule 31.23.

Respectfully submitted this XX day of XX, 2024.

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY /s/ _____
Philip D. Garrow
Deputy County Attorney

EXHIBIT B

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,) Arizona Supreme Court
) No. CR-13-0282-AP
 Appellee,)
) Maricopa County
 v.) Superior Court
) No. CR2003-038541-001
 AARON BRIAN GUNCHES,)
) **FILED 3/02/2023**
 Appellant.)
 _____)

DECISION ORDER

Per Curiam

The narrow question before this Court is whether the criteria for issuing a warrant that authorizes the execution of Appellant Aaron Brian Gunches, set forth in statute and this Court's rules, are satisfied. If those criteria are met, under statute and rule the Court "shall" and "must" issue the warrant. As the State has placed the Court on notice that the criteria are satisfied, and no party having asserted otherwise, the Court's duty is to issue the warrant that authorizes the execution.

Procedural History

On November 25, 2022, Gunches, acting pro se, filed a *Motion: Issuance of Death Warrant* requesting that the "Court issue a Death Warrant for him so his sentence of death may be carried out immediately. . . . so that justice may be lawfully served and give closure to the Victims family."

On December 7, 2022, the Appellee State of Arizona (State) filed a *Motion for Warrant of Execution* in this matter notifying the Court that the conditions for issuance of a warrant of execution, pursuant to A.R.S. § 13-759(A) and Arizona Rules of Criminal Procedure 31.23(a) and (b), had been satisfied. The State's motion asked the Court to issue a Warrant of Execution for Gunches.

On January 4, 2023, Gunches, through counsel, filed a *Motion: Withdraw from Issuance of Death Warrant (Expedited Judgment Requested)* that did not include a specific response or objection to the State's Motion for Warrant of Execution.

On January 11, 2023, the Crime Victim, Karen Price ("Crime Victim" or "Victim"), through counsel, filed a *Notice of Appearance Under A.R.S. § 13-4437(A)*. The next day, she filed a response opposing Gunches' motion.

On January 20, 2023, newly elected Attorney General Mayes filed *The State of Arizona's Motion to Withdraw Motion for Warrant of Execution*, moving to withdraw its motion for warrant of execution "[b]ecause the State's motion for warrant of execution was prompted by Gunches' [] now-withdrawn request, and because a thorough examination of the administration of capital punishment in Arizona is warranted before further warrants of execution are sought." *The State of Arizona's Motion to Withdraw Motion for Warrant of Execution*, in effect, asks the Court to deny the State's *Motion for Warrant of Execution*.

Earlier that same day, Governor Hobbs issued Executive Order 2023-05 establishing a *Death Penalty Independent Review Commissioner* “to review and provide transparency into the [Arizona Department of Corrections, Rehabilitation, and Reentry’s (“ADCRR”)] lethal injection drug and gas chamber chemical procurement process, execution protocols, and staffing considerations including training and experience.” Office of the Governor Katie Hobbs, *Establishing a Death Penalty Independent Review Commissioner* (Jan. 20, 2023), <https://azgovernor.gov/office-arizona-governor/executive-order/5>.

On January 31, 2023, the Court continued the pending motions for warrant of execution and motions to withdraw motions for warrant of execution to February 28, 2023, and ordered supplemental briefing from Gunches, the State, and the Crime Victim, addressing a single question:

Because the State’s original motion for warrant of execution placed this Court on notice that the requirements of A.R.S. § 13-759(A) and Ariz. R. Crim P. 31.23(a) have been satisfied, and because the State’s motion to withdraw does not assert otherwise, does this Court have authority to do anything other than issue the Warrant of Execution?

On February 16, 2023, Gunches, the State, and the Crime Victim filed supplemental briefs. The Maricopa County Attorney’s Office (“MCAO”) also filed *Amicus Curiae Brief of the Maricopa County Attorney’s Office*. The Court also received *amici curiae* briefs from Arizona Attorneys for Criminal Justice (“AACJ”), the Federal Public Defender for the District of Arizona (“FPD”), and the American Civil

Liberties Union and American Civil Liberties Union of Arizona (“ACLUAZ”).

Victims’ Rights

Arizona’s Victims’ Bill of Rights preserves and protects a victim’s rights to a “prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. II, § 2.1(A)(10); see also *Fitzgerald v. Myers*, 243 Ariz. 84, 92 ¶ 25 (2017) (stating a victim’s constitutional right to finality warrants protection). Gunches murdered Ted Price more than twenty years ago, and this Court upheld his convictions and death sentence years ago. *State v. Gunches*, 225 Ariz. 22, 27 ¶ 26 (2010); *State v. Gunches*, 240 Ariz. 198, 200 ¶ 1 (2016). In ruling on the pending motions, we are cognizant of the Victim’s constitutional right to a prompt conclusion of this case.

Statutory and Legal Analysis

A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23

The controlling statute and rule of criminal procedure defining this Court’s limited judicial oversight when the State seeks a warrant of execution are A.R.S. § 13-759(A) and Rules 31.23(a) and (b). The statute states:

After a conviction and sentence of death are affirmed and the first post-conviction relief proceedings have concluded, the supreme court shall issue a warrant of execution that authorizes the director of the state department of corrections to carry out the execution thirty-five days after the supreme court's mandate or order denying review or upon motion by the state. The supreme court shall grant

subsequent warrants of execution on a motion by the state. The time for execution shall be fixed for thirty-five days after the state's motion is granted.

A.R.S. § 13-759(A) (emphasis added). Rule 31.23 provides the procedures for implementing § 13-759(A), stating in relevant part:

(a) Issuance of Warrant. After affirming a death sentence, the Supreme Court *must* issue a warrant of execution if the State files a notice stating that:

(1) the defendant has not filed a first Rule 32 petition for post-conviction relief and the time for filing a petition has expired;

(2) the defendant has not filed a petition for review seeking review of a superior court denial of the defendant's first Rule 32 petition for post-conviction relief and the time for filing a petition for review has expired; or

(3) the defendant has not initiated habeas corpus proceedings in federal district court within 15 days after the Supreme Court's denial of a petition for review seeking review of the denial of the defendant's first Rule 32 petition for post-conviction relief.

(b) Post-Habeas Warrant. On the State's motion, the Supreme Court *must* issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.

Ariz. R. Crim. P. 31.23(a), (b) (emphasis added).

When interpreting terms, we give words "their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *Fann v. State*, 251 Ariz. 425, 434 ¶ 25 (2021) (citation omitted). We interpret statutes "to avoid constitutional difficulties" that would arise from choosing one interpretation over another. *State v. Gomez*, 212 Ariz. 55, 60 ¶ 28 (2006).

Rule 31.23 is silent on §13-759(A)'s requirement that "[a]fter a conviction and sentence of death are affirmed and the first post-conviction relief proceedings have concluded, the supreme court *shall* issue a warrant of execution." (Emphasis added.) Rule 31.23 does, however, go a step further than § 13-759(A)'s use of the word "*shall*" and eliminates virtually all of this Court's discretion by stating that the Court *must* issue a warrant when "the State files a notice" that any one or all three specific requirements pursuant to Rule 31.23(a) are met, or, pursuant to subsection (b), "on the State's motion" for warrant of execution pursuant to § 13-759(A) when federal habeas corpus proceedings and habeas appellate review have concluded.

Here, the State notified the Court on December 7, 2022, that the requirements of Rule 31.23(a)(1), (a)(2), and (a)(3) have all been satisfied in Gunches' case (and pursuant to § 13-759(A) the, "or upon motion by the [S]tate" provision is satisfied), requiring the Court to issue the requested warrant of execution absent good cause why the motion for warrant of execution should not be granted.

Good Cause Does Not Exist for the Court to Exercise its Limited Discretion to Refrain from Issuing a Warrant of Execution on Motion by or Notice from the State

The State's contention that "[i]n our system of party presentation, parties should typically be afforded the right to withdraw their own motions before those motions are ruled upon" misses the mark. While the caselaw is replete with judicial holdings that parties can and should be allowed to withdraw a motion, see *State v.*

Superior Court, 180 Ariz. 384, 385 (App. 1994) (holding prosecutor could withdraw motion to transfer juvenile for prosecution as adult), in the instant case, § 13-759(A) and Rule 31.23 eliminate the Court's discretion to refrain from issuing a warrant of execution once notified that the conditions for doing so exist.

The State (and AACJ, FPD, and ACLUAZ) argues that several recent cases, see State's Supplemental Brief, Appendix F, support its position that this Court is not compelled to issue a warrant of execution merely because it was requested by the State. However, in each case this Court denied the State's motion for warrant of execution because the Court either determined or was presented with information that the requirements of § 13-759(A) and Rule 31.23 either were not satisfied or were no longer satisfied due to actions taken after the State filed its motion for warrant of execution. No party asserts that is the case here.

Furthermore, the State's contention that the Court should not issue a warrant of execution "without the State avowing that an execution could actually move forward" is not persuasive. By moving for issuance of the warrant in December, the State implicitly avowed it could carry out the sentence in compliance with state and federal law. The State's motion to withdraw that request six weeks later did not present any evidence that circumstances had changed. We acknowledge that Governor Hobbs has established a task force to "review and provide transparency into the ADCRR's lethal injection

drug and gas chamber chemical procurement process, execution protocols, and staffing considerations including training and experience." But the review itself 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. Thus, the review itself does not constitute good cause for refraining from issuing the warrant.

"Upon entry of a final judgment and sentence of imprisonment, legal authority over the accused passes by operation of law to the Department of Corrections" and the executive branch "bear[s] full responsibility for executing the judgment and sentence." *State v. Wagstaff*, 164 Ariz. 485, 488-89 (1990). When the State seeks a warrant of execution, § 13-759(A) and Rule 31.23 afford this Court a limited, ministerial gatekeeping role in the State carrying out a death sentence. That role is to verify that an inmate's appellate and post-conviction reviews (and where appropriate federal *habeas corpus* proceedings and *habeas* appellate review) have concluded before *authorizing* the State to carry out an execution. See A.R.S. § 13-759(A); Rule 31.23. Consequently, the issue before us does not present a non-justiciable political question, as the State and *amici* contend. See *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 7 (2006) (defining political questions as "decisions that the constitution commits to one of the political branches of government

and raise issues not susceptible . . . to discoverable and manageable standards”).

The State also mistakenly asserts that: (1) the provisions of Rules 31.23(a) and (b) reflect the common-sense notion that a warrant should issue only when the State actively seeks a warrant, given that it is the State that holds the responsibility to carry out any execution and the discretion over when and how to fulfill that responsibility; and (2) this Court cannot issue a warrant of execution *sua sponte*.

To the contrary, § 13-759(A) requires this Court to issue a warrant of execution *sua sponte* when the defendant’s conviction and sentences have been affirmed on appeal (i.e., this Court has issued the Mandate) and post-conviction relief proceedings have concluded (i.e., either the time to file a petition for review has passed or this Court has issued its final ruling on a petition for review). Rule 31.23, however, requires that the State take express action and “file[] a notice stating” any one or any combination of the enumerated requirements are satisfied, thereby notifying this Court that the State is actively seeking authorization to proceed with an execution. When this notice is filed by the State, the Rule requires that this Court *must* issue a warrant.

In sum, once a motion or notice, pursuant to § 13-759(A) or Rules 31.23(a) or (b), is filed by the State requesting a warrant of execution showing that all the requirements under § 13-759(A) and Rule

31.23 have been satisfied, and there are no constitutional or statutory impediments to proceeding, absent a subsequent showing of good cause that the requirements listed in §13-759(A) and Rule 31.23 have not been satisfied, this Court *must* issue the warrant and authorize the State to carry out the execution.

Indeed, were this Court to interpret § 13-759(A) and Rule 31.23 to give the Court unchecked discretion to deny the State's request for a warrant of 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.

Therefore, because A.R.S. § 13-759(A) and Rule 31.23 expressly confer limited discretion on this Court, and the State has filed a motion for warrant of execution that establishes the requirements for this Court to issue a warrant of execution pursuant to § 13-759(A) and Rule 31.23, the State's motion to withdraw its motion for warrant of execution does not, on the current record, provide good cause why this Court should not issue the requested warrant of execution. Accordingly, the Court orders as follows:

IT IS ORDERED: State's Motion for Warrant of Execution is Granted.

IT IS FURTHER ORDERED: The State's Motion to Withdraw Motion for Warrant of Execution is Denied.

IT IS FURTHER ORDERED: Gunches' Motion: Issuance of Death Warrant is Denied as moot.

IT IS FURTHER ORDERED: Gunches' Motion: Withdraw from Issuance of Death Warrant is Denied as moot.

DATED this 2nd day of March 2023.

/s/
ROBERT BRUTINEL
Chief Justice

Justice John R. Lopez IV, Justice James P. Beene, and Justice William G. Montgomery are recused and did not participate in the determination of this matter.

Pursuant to Article 6, Section 3 of the Arizona Constitution, by prior order of this Court, the Honorable John Pelander, Justice (Retired) of the Arizona Supreme Court, was designated to sit on this case until it is finally determined.

TO:

Kristin K. Mayes
Alexander W Samuels
Jeffrey L Sparks
John Pressley Todd
Emily Skinner
Aaron Brian Gunches, ADOC 145371, Arizona State Prison, Florence -
Eyman Complex-Rynning
Jon M Sands
Cary S Sandman
Amy Armstrong
Therese Day
Jason Lewis
Colleen Clase
Rachel H Mitchell
Nicholas Klingerman
David J Euchner
Kevin D Heade
Charlotte G Merrill
Jared G Keenan
Josh Spears
Alberto Rodriguez

EXHIBIT C

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,) Arizona Supreme Court
) No. CR-13-0282-AP
 Appellee,)
) Maricopa County
 v.) Superior Court
) No. CR2003-038541-001
 AARON BRIAN GUNCHES,)
) **FILED 3/02/2023**
 Appellant.)
 _____)

WARRANT OF EXECUTION

This Court heard and considered the appeal in the above-entitled cause on April 21, 2016, and on September 1, 2016, affirmed the judgment of the Superior Court in Maricopa County, State of Arizona, and filed its OPINION, which remains in effect and has not been affected by any subsequent decision of this or any other Court.

On May 23, 2018, Appellant filed a "Waiver of State Collateral Review (Post-Conviction Relief)" seeking to voluntarily waive his right to post-conviction relief proceedings. On June 4, 2018, the superior court found Appellant competent to waive his right to post-conviction review pursuant to Ariz. R. Crim. P. 32. The superior court further found that Appellant knowingly, intelligently, and voluntarily waived his right to post-conviction review pursuant to Ariz. R. Crim. P. 32, and that there was no basis upon which to deny Appellant's request. Therefore, the superior court granted Appellant's request to waive post-conviction relief proceedings pursuant to Ariz. R. Crim. P. 32. Appellant did not file a petition for review in this Court pursuant to Ariz. R. Crim. P. 32.16.

On December 7, 2022, the Appellee State of Arizona, filed a "Motion for Warrant of Execution," moving this Court to issue a

Warrant of Execution, which motion was granted by this Court on March 2, 2023.

Therefore, pursuant to A.R.S. § 13-759 and Ariz. R. Crim. P. 31.23,

IT IS ORDERED pursuant to A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(c)(1), fixing Thursday, the 6th day of April, 2023, as the date for commencement of the execution time period when the judgment and sentence of death pronounced upon AARON BRIAN GUNCHES by the Superior Court in Maricopa County 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.

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and certify a true and correct copy of this Warrant and shall cause the same to be delivered to the Director of the Department of Corrections and the Superintendent or Warden of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them, pursuant to A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(c)(4), for the execution of AARON BRIAN GUNCHES.

IT IS FURTHER ORDERED pursuant to Ariz. R. Crim. P. 31.23(c)(2) that this Warrant is valid for twenty-four (24) hours beginning at an hour to be designated by the Director of the Arizona Department of Corrections, Rehabilitation and Reentry ("ADCRR" or "Department of Corrections"), with written notice of the designated hour to be given to the Supreme Court and parties at least twenty (20) calendar days

EXHIBIT D

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,) Arizona Supreme Court
) No. CR-13-0282-AP
 Appellee,)
) Maricopa County
 v.) Superior Court
) No. CR2003-038541-001
 AARON BRIAN GUNCHES,)
) **FILED 4/5/2023**
 Appellant.)
)
)

O R D E R

On March 31, 2023, Crime Victim Karen Price and Maricopa County Attorney Rachel H. Mitchell on behalf of Crime Victim Brittney Kay, filed a *Motion to Extend Warrant of Execution* requesting that this Court extend the Warrant of Execution the Court issued on March 2, 2023, stating it "shall be sufficient authority to [the Director of the Department of Corrections and the Superintendent or Warden of the State Prison], pursuant to A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(c)(4), for the execution of AARON BRIAN GUNCHES" on April 6, 2023.

The *Motion to Extend Warrant of Execution* requests that the Court extend the date of execution twenty-five days to May 1, 2023, pursuant to A.R.S. § 13-4437(A) and (C) and Ariz. R. Crim. P. 31.23(c).

On April 3, 2023, the Court issued an Order that the Court would consider the *Motion to Extend Warrant of Execution* following expedited briefing and set dates for simultaneous briefing by Crime Victim Karen Price and Maricopa County Attorney Rachel H. Mitchell on behalf of Crime Victim Brittney Kay, Appellee, Appellant, and any *Amicus Curiae* that wished to file an *amicus* brief, and for responses to *amicus* briefs by Crime Victim Karen Price and Maricopa County Attorney Rachel H. Mitchell on behalf of Crime Victim Brittney Kay, Appellee, and Appellant.

On April 4, 2023, prior to the deadlines imposed in the Court's April 3, 2023, order, the Court received briefs from Crime Victim Karen Price and Maricopa County Attorney Rachel H. Mitchell on behalf of Crime Victim Brittney Kay, Appellee, and Appellant. The Court also received *amicus curiae* briefs and motions to appear as *amicus curiae* from Arizona Attorneys for Criminal Justice, American Civil Liberties Union and American Civil Liberties Union of Arizona, and the Federal Public Defender for the District of Arizona. The Court also received *Crime Victims' Joint Response to Amici* filed by Crime Victim Karen Price and Maricopa County Attorney Rachel H. Mitchell on behalf of Crime Victim Brittney Kay.

Upon consideration by the Court, and GOOD CAUSE APPEARING,

IT IS ORDERED that the individual motions to appear as *amicus curiae* filed by Arizona Attorneys for Criminal Justice, American Civil Liberties Union and American Civil Liberties Union of Arizona, and the Federal Public Defender for the District of Arizona are granted. The *amicus* briefs shall be filed as of April 4, 2023.

IT IS FURTHER ORDERED that the *Motion to Extend Warrant of Execution* is denied, without prejudice to ongoing proceedings in the trial court or foreclosing future appropriate relief.

IT IS FURTHER ORDERED striking Part IV of Arizona Attorneys for Criminal Justice *amicus curiae* brief, entitled "This litigation is designed solely to generate press." This part of the brief is not a substantive argument on the motion and instead is an improper attack on the motivations and ethics of the Victim and opposing counsel. Counsel for Arizona Attorneys for Criminal Justice are admonished to review Rules of the Supreme Court of Arizona 41(b)(7), the Oath of Admission, and the State Bar of Arizona Creed of Professionalism for rules of appropriate conduct toward opposing parties and counsel.

DATED this 5th day of April 2023.

/s/

ROBERT BRUTINEL
Chief Justice

Justice John R. Lopez IV, Justice James P. Beene, and Justice William G. Montgomery are recused and did not participate in the determination of this matter.

Pursuant to Article 6, Section 3 of the Arizona Constitution, by prior order of this Court, the Honorable John Pelander, Justice (Retired) of the Arizona Supreme Court, was designated to sit on this case until it is finally determined.

TO:

Colleen Clase

Rachel H Mitchell

Nicholas Klingerman

Emily Skinner

Aaron Brian Gunches, ADOC 145371, Arizona State Prison, Florence -

Eyman Complex-Rynning

Kristin K. Mayes

Alexander W Samuels

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Sambo Dul

Noah Gabrielsen

Joshua D. Bendor

Philip Casey Grove

Kevin D Heade

Brett William Johnson

Colin P Ahler

Tracy Olson

Rusty D Crandell

Linley Wilson

Jon M Sands

Cary S Sandman

Amy Armstrong

Therese Day

Jason Lewis

Alberto Rodriguez

EXHIBIT E



Arizona Voice for Crime Victims
111 East Taylor Street
Phoenix, AZ 85004

Telephone: 480.600.2661
www.voiceforvictims.org

June 4, 2024

Declaration by Arizona Voice for Crime Victims, Colleen Clase, Chief Counsel

1. Arizona Voice for Crime Victims represents Victim, Karen Price. Ms. Price is the sister of Ted Price.
2. Ms. Price supports any efforts by the State of Arizona to carry out Inmate Gunches' death sentence.
3. Ms. Price has constitutional rights to justice, due process, and to a prompt and final conclusion of the criminal proceedings.
4. Ms. Price has spent more than two decades waiting for justice and for a final conclusion of the criminal proceedings.
5. When the Motion for a Warrant of Execution was filed in late 2022, Ms. Price had hoped that this criminal matter would finally conclude. That hope was dashed by the delay that subsequently occurred.
6. Inmate Gunches himself is eager to have his death sentence carried out and has made his position known to the Arizona Supreme Court, litigants, and victims.

To the best of my knowledge, these statements are true.

A handwritten signature in black ink, appearing to read "Colleen Clase", written over a horizontal line.

Colleen Clase
Attorney for Victim, Karen Price



Arizona Voice for Crime Victims
111 East Taylor Street
Phoenix, AZ 85004

Telephone: 480.600.2661
www.voiceforvictims.org

May 17, 2024

Statement by Arizona Voice for Crime Victims, Colleen Clase, Chief Counsel

Arizona Voice for Crime Victims, on behalf of Karen Price, strongly supports the efforts of Maricopa County Attorney, Rachel Mitchell, and her staff for the continued pursuit of justice and finality in the Gunches murder prosecution. Ms. Price's brother, Ted, was murdered by Inmate Gunches in late 2002. She and her family have spent more than two decades waiting for justice and for the prompt and final conclusion of the criminal proceedings, which Arizona's constitution guarantees to victims of crime. The unilateral delay imposed by Governor Hobbs and Attorney General Mayes has been grossly unfair and unjust. Our hope is that this unnecessary and unconstitutional wait will soon come to an end and that justice will be realized by the Price family, thanks to the efforts of Rachel Mitchell.

EXHIBIT F

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee

v.

FRANK JARVIS ATWOOD,

Appellant.

No. CR-87-0135-AP

Pima County Superior Court
Nos. CR14065 and CR15397

Ninth Circuit No. 14-99002

U.S. District Court No. CV-98-116-
TUC-JCC

**MOTION TO SET BRIEFING
SCHEDULE FOR MOTION FOR
WARRANT OF EXECUTION.**

(Capital Case)

The State of Arizona hereby gives notice of its intent to move for a warrant of execution under Rule of Criminal Procedure 31.23(b) for Frank Jarvis Atwood. A copy of the State's anticipated motion is attached hereto as Exhibit A. For the reasons that follow, the State respectfully moves this Court to establish a firm briefing schedule in advance of the motion's filing to ensure that the State's motion will be decided by this Court on a date certain and the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) can accordingly comply with its testing and disclosure obligations regarding the drug to be used in the execution.

In the event Atwood selects lethal injection as his method of execution, *see* A.R.S. § 13-757(B), ADCRR intends to execute him using compounded

pentobarbital. Once compounded, the drug has a beyond-use date of 90 days from the date of compounding. In April 2021, the State filed a similar motion in this case based on an opinion from ADCRR’s retained compound pharmacist that, once compounded, the pentobarbital to be used would have an initial beyond-use date of 90 days. After this Court set a briefing schedule, however, the compound pharmacist revised his original opinion and advised that, until certain specialized testing of a sample batch was conducted, pentobarbital compounded for Atwood’s execution would have an initial beyond-use date of 45 days. No. CR-87-0135-AP, Motion to Modify Briefing Schedule, filed June 22, 2021. That testing has now been completed, establishing that the pentobarbital to be used in Atwood’s execution will have a beyond-use date of at least 90 days.

The current lethal-injection protocol and a related civil settlement prohibit ADCRR from using or selecting for use any drug that will be expired or past its use-by date at the time the execution is carried out. *See* ADCRR Dep’t Order 710, Attach. D, ¶ A.1.III; *see also* Exhibit B (federal court order).¹ Therefore, to ensure strict compliance with the protocol, ADCRR intends to carry out the execution during the drug’s 90-day shelf life—established by the recent testing—from the date of compounding.

¹ Departmental Order 710 is publicly available at https://corrections.az.gov/sites/default/files/policies/700/0710_031021.pdf.

Separately, the lethal-injection protocol requires ADCRR to disclose to Atwood upon request (which he will presumably make), a quantitative analysis of the chemical to be used in his execution within 10 days of the State's filing of a motion for warrant of execution. *See* ADCRR Dep't Order 710, Attach. D, ¶ C.2. To ensure ADCRR can meet this obligation to provide testing results within 10 days and also have the compounded pentobarbital be within the 90-day shelf-life on the date of the execution, the drug must be compounded no more than a few days before the deadline for providing the testing report (*i.e.*, 10 days after the State's motion for warrant of execution is filed in this Court). This is because, as noted above, once the drug is compounded, its 90-day shelf life will begin to run.

Under an ordinary briefing schedule, assuming no extensions are requested or received, and that this Court does not prescribe different deadlines, Atwood would receive 10 days to respond to the State's motion and the State would receive 5 days to file its reply. *See* ARCAP (6)(a)(2); *see also* Ariz. R. Crim. P. 31.6(e). This Court would then conference the motion and, if it grants the motion, would fix an execution date 35 days from the date the motion is granted. *See* A.R.S. § 13-759(A); Ariz. R. Crim. P. 31.23(c). But when extended filing periods are granted, as is virtually inevitable in capital cases, the pre-warrant briefing process

alone, not including the statutory 35-day waiting period on the execution warrant, can last for months.²

The State therefore respectfully requests that this Court issue a set briefing schedule for the State's anticipated motion for warrant of execution. The State requests that this Court identify in advance the date on which it will consider and potentially issue the execution warrant and, working backward, calendar deadlines as follows³:

1. The State shall file its motion for an execution warrant (along with its motion to consolidate, if necessary) approximately 30 days before this Court's conference date. The motion shall be identical to Exhibit A to this pleading.
2. Atwood shall respond to the State's motions within 10 calendar days of the date of the motions' filing.
3. The State shall file its replies, if any, within 5 calendar days of the filing of Atwood's responses.

² For example, the pre-warrant litigation for inmate Robert Glen Jones spanned approximately 2 months. *See* No. CR-98-0537-AP, Motion for Warrant of Execution (filed on June 25, 2013); Warrant of Execution (issued on August 27, 2013). Likely because another inmate was also pending execution, Jones's execution date was fixed for a date past the 35-day statutory waiting period. *See id.*, Warrant of Execution (fixing date for execution as October 23, 2013). Nearly 4 months thus elapsed between the State's request for an execution warrant and Jones's execution.

³ The State has this date filed a similar motion in inmate Clarence Dixon's case. *See* No. CR-08-0025-AP. The State asks that this Court stagger the respective briefing schedules so that the cases are not conferenced at the same time.

While the responsive briefing is ongoing, ADCRR will ensure that the pentobarbital is compounded and tested and the testing results disclosed within 10 days of the State's motion's filing (Item #1 above). This schedule would ensure that ADCRR can comply with its obligation to provide quantitative testing results of the compounded pentobarbital within 10 days after the State files its motion for a warrant of execution and carry out the execution within the drug's 90-day shelf life.

This procedure also will not prejudice Atwood. As discussed, the State has attached to this pleading a copy of its anticipated motion for warrant of execution. *See Exhibit A.* Atwood therefore has received notice of the State's motion and can begin to work on his response, as well as any other last-minute litigation he intends to pursue, while he awaits this Court's briefing schedule. Atwood has also received, through this motion, advanced notice that ADCRR intends to use compounded pentobarbital in his execution should he select lethal injection, which will enable him to pursue expeditiously any civil challenges he deems appropriate.⁴

Moreover, the issue before this Court in determining whether to issue a warrant is narrow: this Court need only determine whether Atwood's first post-conviction proceeding and habeas appellate review have concluded. *See A.R.S. §*

⁴ Under the protocol, ADCRR is not required to disclose the drug to be used until the State files a motion for warrant of execution. *See ADCRR Dep't Order 710, Attach. D, ¶¶ C.1 & C.2.*

13–759(A); Ariz. R. Crim. P. 31.23(b). If those proceedings have terminated, as the State will show, *see* Exhibit A, the relevant statute and procedural rule, respectfully, leave this Court no discretion to deny the warrant. *See* A.R.S. 13–759(A) (directing that “the supreme court *shall* issue a warrant of execution” once the first post-conviction proceeding has concluded, and that the “supreme court *shall* grant subsequent warrants of execution on a motion by the state”) (emphasis added); Ariz. R. Crim. P. 31.23(b) (“On the State’s motion, the Supreme Court *must* issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.”) (emphasis added).

Accordingly, in light of this Court’s narrow inquiry, combined with the State’s early disclosure of its anticipated motions for an execution warrant and to consolidate, a firm briefing schedule from the date the Court will conference the motion on the timeframe set forth above is appropriate. For these reasons, the State respectfully requests that this Court grant this motion and set a briefing schedule for its upcoming motion for warrant of execution.

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DATED this 5th day of January, 2022.

Respectfully submitted,

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

s/Jeffrey L. Sparks
Acting Chief Counsel
Capital Litigation Section
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Phoenix, AZ 85004
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(State Bar Number 27536)

Attorneys for Appellee

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee

v.

FRANK JARVIS ATWOOD,

Appellant.

No. CR-87-0135-AP

Pima County Superior Court
Nos. CR14065 and CR15397

Ninth Circuit No. 14-99002

U.S. District Court No. CV-98-116-
TUC-JCC

MOTION FOR WARRANT OF
EXECUTION

(Capital Case)

Pursuant to A.R.S. § 13-759(A) and Arizona Rule of Criminal Procedure 31.23(b), the State of Arizona moves this Court for a Warrant of Execution for Frank Jarvis Atwood. Atwood's direct appeal, first post-conviction proceeding, and federal habeas proceeding have concluded. Accordingly, under § 13-759(A) and Rule 31.23(b), a warrant of execution must issue. *See* A.R.S. 13-759(A) ("After a conviction and sentence of death are affirmed and the first post-conviction relief proceedings have concluded, the supreme court shall issue a warrant of execution that authorizes the director of the state department of corrections to carry out the execution thirty-five days after the supreme court's mandate or order denying review or upon motion by the state. The supreme court shall grant subsequent warrants of execution on a motion by the state."); Ariz. R.

Crim. P. 31.23(b) (“On the State’s motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.”).

A jury convicted Atwood of the 1984 kidnapping and first-degree murder of 8-year-old V.L.H. *State v. Atwood*, 171 Ariz. 576, 591–96 (1992). A judge sentenced Atwood to death for the first-degree murder conviction. *Id.* at 591. This Court affirmed Atwood’s convictions and sentences on direct review, *see id.*, and the United States Supreme Court denied certiorari, *Atwood v. Arizona*, 506 U.S. 1084 (1993) (Mem.). The trial court denied Atwood’s first petition for post-conviction relief, this Court denied review, *see* No. 97–0289–PC, and the United States Supreme Court again denied certiorari, *Atwood v. Arizona*, 523 U.S. 1082 (1998).

Atwood filed his federal habeas petition on March 12, 1998, and the district court denied relief on January 27, 2014. *See Atwood v. Ryan*, 2014 WL 289987 (D. Ariz. Jan. 27, 2014). The Ninth Circuit affirmed the district court’s decision on September 13, 2017, *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017), and denied Atwood’s petitions for panel and en banc rehearing on January 8, 2018, with no judge requesting a vote on whether to rehear the matter en banc. *See* Ninth Circuit No. 14–99002, Dkt. # 76. Atwood failed to file a timely petition for writ of certiorari, and the United States Supreme Court denied his motion to file a petition

out-of-time. *See Atwood v. Ryan*, 139 S. Ct. 298 (2018) (Mem.).

Atwood's federal habeas appeals have thus concluded. This Court should therefore issue an execution warrant. *See* A.R.S. § 13-759(A); Ariz. R. Crim. P. 31.23(b).

DATED this ___ day of ____, 2022.

Respectfully submitted,

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

s/Jeffrey L. Sparks
Acting Chief Counsel
Capital Litigation Section
2005 N. Central Ave.
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Attorneys for Appellee

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

First Amendment Coalition of Arizona, Inc.;
Charles Michael Hedlund; Graham S. Henry;
David Gulbrandson; Robert Poyson; Todd
Smith; Eldon Schurz, and Roger Scott,

Plaintiffs,

v.

Charles L. Ryan, Director of ADC; James
O’Neil, Warden, ASPC—Eyman; Greg
Fizer, Warden, ASPC—Florence; and Does
1-10, Unknown ADC Personnel, in their
official capacities as Agents of ADC,

Defendants.

No. CV-14-01447-PHX-NVW

**ORDER FOR DISMISSAL OF
CLAIMS SIX AND SEVEN**

Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, “Plaintiffs”), and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections (“ADC”); James O’Neil, Warden, ASPC—Eyman; and Greg Fizer, Warden, ASPC—Florence (collectively, “Defendants”), have jointly stipulated to dismiss Claims Six and Seven of Plaintiffs’ Second Amended Complaint (ECF Nos. 94 & 97) and Supplemental Complaint (ECF No. 163) (“Claims Six and Seven”), based upon the recitals in the parties’ concurrently filed Stipulated Settlement Agreement for Dismissal of Claims Six and Seven (“Stipulated Settlement Agreement”) (ECF No. 186), and under the terms that follow below.

1 Having considered the parties' Stipulated Settlement Agreement, and good cause
2 appearing, IT IS HEREBY ORDERED that:

3 (1) Claims Six and Seven of Plaintiffs' Second Amended Complaint and
4 Supplemental Complaint are dismissed, without prejudice.

5 (2) Upon any showing by any Plaintiff or any other current or future prisoner
6 sentenced to death in the State of Arizona that any of the Defendants, any of the
7 Defendants' successors, or the ADC intend to engage in or have actually engaged in any
8 of the following conduct (together, the "Prohibited Conduct"):

9 (a) adopt language in any future version of the ADC's execution
10 procedures that purports to disclaim the creation of rights or obligations;

11 (b) grant the ADC and/or the ADC Director the discretion to deviate
12 from timeframes set forth in the ADC's execution procedures regarding issues that
13 are central to the execution process, which include but are not limited to those
14 relating to execution chemicals and dosages, consciousness checks, and access of
15 the press and counsel to the execution itself;

16 (c) change the quantities or types of chemicals to be used in an
17 execution after a warrant of execution has been sought without first notifying the
18 condemned prisoner and his/her counsel of the intended change, withdrawing the
19 existing warrant of execution, and applying for a new warrant of execution;

20 (d) select for use in an execution any quantity or type of chemical that
21 is not expressly permitted by the then-current, published execution procedures;

22 (e) fail to provide upon request, within ten calendar days after the State
23 of Arizona seeks a warrant of execution, a quantitative analysis of any
24 compounded or non-compounded chemical to be used in an execution that reveals,
25 at a minimum, the identity and concentration of the compounded or non-
26 compounded chemicals;

27 (f) use or select for use in an execution any chemicals that have an
28 expiration or beyond-use date that is before the date that an execution is to be

1 carried out; or use or select for use in an execution any chemicals that have an
2 expiration or beyond-use date listed only as a month and year that is before the
3 month in which the execution is to be carried out;

4 (g) adopt or use any lethal-injection protocol that uses a paralytic
5 (including but not limited to vecuronium bromide, pancuronium bromide, and
6 rocuronium bromide); or

7 (h) adopt any provision in any future version of the ADC's execution
8 procedures that purports to permit prisoners or their agents to purchase and/or
9 supply chemicals for use in the prisoner's own execution; then

10 Claims Six and Seven shall be reinstated and reopened pursuant to Rule 60(b)(6) of the
11 Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties
12 granted in their concurrently filed Stipulated Settlement Agreement, an injunction shall
13 immediately issue in this action or in a separate action for breach of the parties'
14 Stipulated Settlement Agreement, permanently enjoining Defendants, Defendants'
15 successors, and the ADC from engaging in any of the Prohibited Conduct.

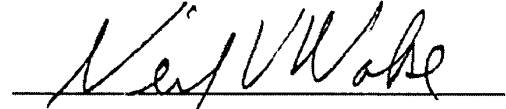
16 (3) Plaintiffs shall not be awarded attorneys' fees or costs incurred in litigating
17 Claims Six and Seven unless Defendants, Defendants' successors, or the ADC breach the
18 parties' Stipulated Settlement Agreement, in which case Plaintiffs shall be entitled to an
19 award, either in this action or in a separate action for breach of the parties' Stipulated
20 Settlement Agreement, of their reasonable attorneys' fees and costs incurred in litigating
21 this action from its inception through the date of this Order (which currently are in excess
22 of \$2,630,000), as determined by the Court after briefing by the parties. In that
23 circumstance, Plaintiffs shall also be entitled to seek to collect their reasonable attorneys'
24 fees and costs incurred in moving to enforce the parties' Stipulated Settlement Agreement
25 and this Order.

26 (4) The stay order (Doc. 68) entered November 24, 2014, is vacated.
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With the entry of this Order, all claims of all parties have been disposed of. The Clerk shall terminate this case.

Dated: June 22, 2017.



Honorable Neil V. Wake
Senior United States District Judge