

**SUPREME COURT OF ARIZONA**

KRISTIN K. MAYES, ARIZONA  
ATTORNEY GENERAL,

Arizona Supreme Court  
No. CV-24-0127-SA

Petitioner,

v.

RACHEL H. MITCHELL, MARICOPA  
COUNTY ATTORNEY,

Respondent,

AARON BRIAN GUNCHES,

Real Party in Interest.

**ATTORNEY GENERAL'S RESPONSE TO AMICUS CURIAE BRIEF IN  
SUPPORT OF RESPONDENT BY ARIZONA VOICE FOR CRIME  
VICTIMS, INC.**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION .....	1
ARGUMENT.....	3
I. AVCV has failed to explain how a victim’s rights to justice and finality provide a county attorney the legal authority to unilaterally act in place of the Attorney General in this Court. ....	3
A. There is no statutory or constitutional basis authorizing a county attorney to represent the State in this Court.....	3
B. The VBR does not authorize a victim to select their prosecutor of choice. ....	6
II. In any event, allowing MCAO to seek a warrant of execution will not remedy the victim’s alleged injury.....	8
III. AVCV encourages an unwarranted expansion of the VBR. ....	10
CONCLUSION .....	15

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Brionna J. v. Dep't of Child Safety</i> , 255 Ariz. 471, 533 P.3d 202 (2023) .....	11
<i>Cook v. State</i> , 230 Ariz. 185 (App. 2012) .....	13
<i>Fay v. Fox in and for Cnty. of Maricopa</i> , 251 Ariz. 537 (2021) .....	6
<i>Griffith Energy, L.L.C. v. Ariz. Dep't of Rev.</i> , 210 Ariz. 132 (App. 2005) .....	13
<i>Lindsay R. v. Cohen</i> , 236 Ariz. 565 (App. 2015) .....	7
<i>Lynn v. Reinstein</i> , 205 Ariz. 186 (2003) .....	7
<i>Marsoner v. Pima Cnty.</i> , 166 Ariz. 486 (1991) .....	4
<i>State ex rel. Napolitano v. Brown</i> , 194 Ariz. 340 (1999) .....	12
<i>State v. Lamberton</i> , 183 Ariz. 47 (1995) .....	6, 7
<i>State v. Reed</i> , 248 Ariz. 72 (2020) .....	12
<i>Sw. Gas Corp. v. Mohave Cnty.</i> , 188 Ariz. 506 (App. 1997) .....	5
<i>Yes on Prop 200 v. Napolitano</i> , 215 Ariz. 458 (App. 2007) .....	13

**Statutes**

A.R.S. § 11-532 .....4  
A.R.S. § 13-757 .....9  
A.R.S. § 41-193(A)(1).....2, 4  
Ariz. Const. art. II, § 2.1(A)(10) .....11  
Ariz. Const. art. II, § 15.....9  
Ariz. Const. art. XII, § 4 .....3, 4  
Ariz. Const. art. 22, § 22.....9  
U.S. Const. amend. VIII.....9

**Other**

H.R. Con. Res. 2030, 56<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess.....5

## INTRODUCTION

Arizona Voice for Crime Victims, Inc. (“AVCV”) spends the bulk of its amicus brief attempting to define the rights to justice and finality. But AVCV has failed to articulate how those rights are of any consequence to the question presented – whether the constitutional and statutory authority, power, and duty to request a warrant of execution pursuant to A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(a) and (b) rests exclusively with the Arizona Attorney General.

Put differently, AVCV has not identified any constitutional, statutory, or other authority that would authorize a county attorney to request a warrant of execution from this Court. Instead, AVCV implicitly acknowledges that the Attorney General maintains the exclusive authority to request a warrant of execution, but disagrees with the way the Attorney General has exercised that authority. This does not provide a basis for this Court to conclude that the Maricopa County Attorney has the legal authority to request a warrant of execution.

The Attorney General recognizes the emotional toll that prolonged criminal and appellate proceedings can take on victims. Indeed, in part for that reason, the Attorney General informed the Maricopa County Attorney

months ago that the Attorney General’s Office intends to resume seeking execution warrants in early 2025.<sup>1</sup> But the Victims’ Bill of Rights (“VBR”) does not provide the right to have a death-row inmate executed on a particular timetable. And even if it did, it is unclear how allowing the County Attorney to request an execution warrant would vindicate that right. After all, this Court held last year in a related dispute that an execution warrant authorizes, but does not require, an execution.

Ultimately, this special action is about whether MCAO is correct that “all prosecutors and prosecuting agencies, without restriction” can seek an execution warrant in this Court, (MCAO Brief at 4), or whether that authority is exclusively vested with the Attorney General, who is authorized to “[p]rosecute and defend in the supreme court all proceedings in which this state or an officer of this state [ ] is a party.” A.R.S. § 41-193(A)(1). And on that question, AVCV offers little support for MCAO’s novel and far-reaching position.

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<sup>1</sup> Letter from Attorney General Mayes to Maricopa County Attorney Mitchell (May 16, 2024) (attached to Petition for Special Action as Exhibit E).

## ARGUMENT

- I. **AVCV has failed to explain how a victim's rights to justice and finality provide a county attorney the legal authority to unilaterally act in place of the Attorney General in this Court.**
  - A. **There is no statutory or constitutional basis authorizing a county attorney to represent the State in this Court.**

Assuming for now that the rights to finality and justice provide the right to an execution on a particular timetable, AVCV has not articulated how the State's "unconstitutional delay" in executing Aaron Gunches authorizes the County Attorney to usurp the role of the Attorney General in requesting a warrant of execution.

AVCV asserts (at 10) that the Court should "construe the applicable rules of procedure in a manner that protects" the victim's constitutional rights under the VBR. To the extent AVCV is attempting to argue that the VBR itself authorizes a county attorney to seek an execution warrant on behalf of the State in this Court over the Attorney General's objection, AVCV is mistaken.

The Constitution expressly states that "[t]he duties, powers, and qualifications of [county] officers shall be as prescribed by law." Ariz. Const. art. XII, § 4. Thus, a county official must "show an *express grant of power* whenever they assert that [ ] statutory authority exists" because "[t]hey have

only those powers that are expressly or by necessary implication delegated to them by the legislature.” *Marsoner v. Pima Cnty.*, 166 Ariz. 486, 488 (1991) (emphasis added).

The VBR contains no language to the contrary, and certainly no “express grant of power” to county attorneys that would be relevant here. *Id.* There is no constitutional authority to override the Constitution’s express directive that “the duties, powers, and qualifications of [county] officers shall be as prescribed by law.” Ariz. Const. art. XII, § 4. The Constitution makes plain that the Legislature defines the limited scope of a county attorney’s authority.

On that front, AVCV–like MCAO–has identified no statute conferring anything close to the type of authority MCAO claims for itself here. *Compare* A.R.S. § 41-193(A)(1) (powers and duties of Attorney General) *with* A.R.S. § 11-532 (powers and duties of county attorneys). Indeed, the Legislature has spoken directly on this subject and said exactly the opposite. *See* A.R.S. § 41-193(A)(1).

This conclusion is further confirmed by the Legislature’s recent rejection of a proposal that would have provided the County Attorney some authority to seek execution warrants in this Court under the exact

circumstances AVCV has asserted in its brief. *See* H.R. Con. Res. 2030, 56th Leg., 2nd Reg. Sess. (as introduced, Jan. 23, 2024) (proposing to amend the Constitution to provide “[i]f the Attorney General fails to request a writ of execution [ ] the county attorney for the county in which the person was convicted shall request the writ of execution.”).

Nor can this Court conclude that MCAO has been delegated the authority to request a warrant of execution from this Court by “necessary implication” through a victim’s right to finality. *Sw. Gas Corp. v. Mohave Cnty.*, 188 Ariz. 506, 509 (App. 1997) (“Powers are not easily established by necessary implication”; rather, there must be “so strong a probability of an intention that one contrary to that which is imputed to the party using the language cannot be supposed.”). Because it is “entirely possible” that the VBR intended to give victims the right to finality without also giving county attorneys the power to represent the State in this Court, the VBR does not authorize county attorneys to seek an execution warrant “by necessary implication.” *Id.*

Throughout its brief, AVCV fails to grapple with not only the respective statutory powers granted by A.R.S. §§ 11-532 and 41-193, but also with the detailed legal and historical analysis of both A.R.S. § 13-759(A) and

Ariz. R. Crim. P. 31.23 outlined in the Attorney General’s Petition for Special Action (at 11-12) and Supplemental Brief (at 20-22). Current law makes clear that the Attorney General is the proper official to seek a warrant of execution from this Court.

AVCV simply wants a different prosecutor – specifically, the Maricopa County Attorney – to represent “the State” in this Court. But AVCV hasn’t provided any legal basis that would authorize such a demand. Again, even assuming the VBR provides the right to an execution on a particular timetable, AVCV fails to articulate how that necessarily confers powers upon county attorneys that are otherwise nowhere to be found.

**B. The VBR does not authorize a victim to select their prosecutor of choice.**

AVCV asserts (at 4) that to give effect to the victim’s rights to finality and justice, the Court must allow MCAO to seek a warrant of execution. But nothing in the VBR empowers a victim to select a new prosecuting agency to represent “the State” in order to vindicate their rights.

“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). “[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). A victim thus has no authority to direct the prosecution or to direct who the prosecutor will be.

And despite AVCV’s attempt (at 3-4) to limit its argument to the facts of this case, the implications of allowing a victim to select a prosecuting agency of choice are far-reaching and unworkable. For instance, if a victim in a matter proceeding in Maricopa County believed their rights had been violated, could that victim request that a prosecutor from Yavapai County act on behalf of “the State” in Maricopa County Superior Court? Or if a victim in Pima County believed the prosecutor should seek the death penalty, could the victim request that the Maricopa County Attorney file a notice of intent to seek the death penalty to vindicate the victim’s perceived rights? The VBR does not contemplate, let alone require such a problematic interpretation.

Based on the victim's objection to the "delay" in Aaron Gunches' execution, AVCV is asking this Court to assign a new prosecutor from a different prosecuting agency to act on behalf of "the State." The victim has no authority to make such a request.

**II. In any event, allowing MCAO to seek a warrant of execution will not remedy the victim's alleged injury.**

Even setting all of the above aside, the relief AVCV seeks—a speedy execution—cannot be obtained through the means it requests—allowing MCAO to request a warrant of execution.

For starters, this Court has held that a warrant of execution authorizes, but does not require, the executive branch to carry out an execution. Order Denying Victim's Petition for Special Action, filed March 22, 2023 (CV-23-0055-SA), at 1-2. There is thus no guarantee that allowing the Maricopa County Attorney to seek a warrant of execution will accomplish what the victim desires—a speedy execution. Nor is there any reason to think that allowing the Maricopa County Attorney to seek a warrant of execution will meaningfully accelerate any execution, as the Attorney General has publicly stated her intent to begin seeking warrants of execution quite soon—in early 2025.

Relatedly, AVCV has failed to address the practical and legal concerns raised in the Attorney General's Supplemental Brief (at 23-28), which clearly dictate that an execution will only proceed if the executive branch is prepared to conduct that execution consistent with its constitutional, statutory, and administrative obligations. *See* U.S. Const. amend. VIII; Ariz. Const. art. II, § 15, art. 22, § 22; A.R.S. § 13-757(A), (B); *see also* Order Issuing Warrant of Execution filed March 2, 2023 at 7 (recognizing that [b]y moving for issuance of the Warrant [ ], the State implicitly avow[s] it could carry out the sentence in compliance with state and federal law.”).

For instance, ADCRR has a legal obligation to comply with Department Order 710, which requires adherence to a strict schedule of tasks, including ensuring that it: (1) possesses the materials to compound injectable pentobarbital; (2) has retained a compounding pharmacist that can compound injectable pentobarbital within the requested timeframe; and (3) that the retained pharmacist can opine that the beyond-use-date of any such compounded pentobarbital will make it possible for ADCRR to comply with its disclosure obligations and to carry out the execution within the timeframe specified by this Court. (AG's Supp. Brief at 24-26). AVCV fails to address the fact that no county attorney can ensure that ADCRR is prepared to carry

out a lawful execution before it requests a warrant of execution. Moreover, because the specific terms of DO 710 are the result of federal settlement agreements, ADCRR's failure to comply with any of its requirements could jeopardize ADCRR's ability to carry out future executions - exactly the opposite of the result AVCV is seeking here.

Thus, in the end, allowing county attorneys to seek execution warrants is more likely to harm victims by dragging them through additional litigation for no purpose than it is to bring about additional executions. *See also* AG's Supp. Br. at 26-28 & Appendix A (detailing extensive litigation that often ensues after a warrant is issued). AVCV concludes that the County Attorney should be permitted to request a warrant of execution from this Court, but ignores that permitting this would not redress the victim's alleged injury. And again, AVCV has failed to address the fundamental question at issue in this case - whether there is any legal basis that authorizes the County Attorney to seek execution warrants. There is not.

### **III. AVCV encourages an unwarranted expansion of the VBR.**

In its brief, AVCV focuses almost exclusively on the VBR, rather than the other sources of potential legal authority that have been the focus of the parties' arguments here. To the extent AVCV makes arguments not made

by MCAO, this Court has made clear that amici cannot expand the issues. *See Brionna J. v. Dep't of Child Safety*, 255 Ariz. 471, 533 P.3d 202, 210 ¶ 37 (2023) (amicus curiae are not permitted to “expand the issues on appeal” or “address an argument not made by either party”). But setting that aside, the interpretation of the VBR offered by AVCV simply is not supported by case law or workable in practice.

The fundamental premise of AVCV’s brief seems to be that a capital crime victim has a constitutional right to have the defendant executed within a particular timeframe. That premise, however, lacks support in existing law. And if the law were changed as AVCV encourages, practical problems would abound.

To be clear, the Attorney General fully agrees that crime victims have a right to finality and justice, which warrant protection. (AVCV Brief at 5-6). The Attorney General also recognizes the toll this case has taken on this particular victim. (AVCV Brief at 7-9).

But AVCV’s purported source of the right it alleges – paragraph ten of the VBR, (Ariz. Const. art. II, § 2.1(A)(10)), which provides the right to a prompt and final conclusion of the case – would need to be greatly (and unwarrantedly) expanded to reach the result AVCV seeks. 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, [ ] neither creates a right nor defines a right peculiar and unique to victims.”<sup>2</sup> *Id.* Rather, paragraph ten encompasses the idea that “the 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.” *State v. Reed*, 248 Ariz. 72, 79 ¶ 23 (2020) (quoting *Brown*, 194 Ariz. at 343-44 ¶¶ 12-13). And 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, the Court in *Brown* also noted that “the rights guaranteed by the VBR extend to victims of all crimes.” *Id.* at 343 ¶ 10.

Moreover, granting victims in capital cases a judicially enforceable constitutional right to have death row inmates executed within some

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<sup>2</sup> 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 ¶ 3.

unspecified-but-sufficiently-speedy amount of time would lead to serious separation of powers problems. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465 ¶¶15-16 (App. 2007) (rejecting challenge to Attorney General’s legal opinion on separation of powers grounds because action could result in courts becoming “direct legal advisors to the government”); *Cook v. State*, 230 Ariz. 185, 188 ¶ 7 (App. 2012) (“It is both reasonable and constitutionally acceptable for the Legislature to delegate the details of implementing the death penalty to [ADCRR,] an agency that is ‘better equipped to undertake the task’ of ensuring it is implemented as uniformly and humanely as possible.”) (quoting *Griffith Energy, L.L.C. v. Ariz. Dep’t of Rev.*, 210 Ariz. 132, 137 ¶ 24 (App. 2005)). Would the Court claim for itself the authority to direct the executive branch whom to execute, and when? And if so, what standards would it apply? There are currently 25 death row inmates who have exhausted all appeals; would the Court need to examine and compare each case to determine which defendant must be executed first? Because Mr. Gunches waived many of his appellate rights, for example, all of the other execution-eligible cases have been pending for longer; how would the Court be required to weigh that fact? AVCV’s reasoning would put the Court in

the position of managing inherently executive decisions. This Court should decline that invitation.

None of this is meant to diminish the suffering this victim and countless other victims in capital cases have endured. But it does illustrate the problems with implementing AVCV's suggested interpretation of the VBR, even assuming Section 10 could be read as AVCV suggests

More to the point here, none of this has anything to do with the question presented in this particular special action—which prosecuting agency is authorized to seek an execution warrant in this Court. In fact, AVCV's arguments here are virtually indistinguishable from the arguments it made in a very different type of action last year, in which AVCV asserted this same interpretation of the VBR in an attempt to require ADCRR to execute Aaron Gunches. *See Price et al. v. Hobbs et al.*, CV2023-004976, Complaint and Petition for Special Action filed March 31, 2023 at 2-3 (asserting the “refusal to carry out the sentence of Aaron Gunches has denied Plaintiff Victims their constitutional rights to justice and finality”); *compare* Complaint at ¶¶ 98-111 *with* Amicus Brief at 6-9. AVCV's repurposing of those same arguments here underscores the irrelevance of those arguments to what is at issue in this narrow special action.

## CONCLUSION

AVCV has not identified any legal authority that would authorize a county attorney to request a warrant of execution from this Court over the Attorney General's objection. Conversely, the Attorney General has an express statutory obligation to represent the State in this Court. The Attorney General also has the responsibility to represent the State and ADCRR in all capital appellate and capital post-conviction proceedings. AVCV encourages the Court to ignore all of this and focus only on the VBR. But the VBR does not provide the authority that MCAO purports to have here.

Even setting all of that aside, a prior decision of this Court in related proceedings last year makes clear that even if MCAO obtained a warrant, the warrant would not require an execution. And the Attorney General has made clear her intent to begin seeking execution warrants soon.

In the end, AVCV provides no reason to stray from the plain text of the legal provisions at issue here – the law provides the Attorney General alone the authority to seek a warrant of execution from this Court.

RESPECTFULLY SUBMITTED this 19th day of August, 2024.

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