

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,

Appellee,

v.

AARON BRIAN GUNCHES,

Appellant.

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

Maricopa County
Superior Court
No. CR2003-038541-001

**BRIEF OF AMICA CURIAE
PROFESSOR CORINNA BARRETT LAIN
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICA CURIAE

Corinna Barrett Lain is the S.D. Roberts and Sandra Moore Professor of Law at the University of Richmond School of Law. She is one of the nation’s leading authorities on capital punishment. Her book, *Secrets of the Killing State: the Untold Story of Lethal Injection*, will be published in April 2025. Arizona has been a primary subject of amica’s research, as the state has a long history of execution failures that raise critical questions about the humanity and constitutionality of lethal injection.

This Court previously denied without prejudice amica’s “Motion for Leave to File as Amicus,” welcoming a brief “that provides information, perspective, or argument on the narrow issues before the Court on a motion for warrant of execution pursuant to Ariz. R. Crim. P. 31.23(a).” Amica is grateful for the opportunity to address these issues.¹

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

ARGUMENT

I. This Court Has the Authority to Refrain from Issuing a Death Warrant When an Execution Cannot Be Lawfully Carried Out.

The threshold issue before this Court is whether it has the authority to refrain from issuing a death warrant when the bare statutory requirements of A. Rev. Stat. section 13-759(A) and Ariz. R. Crim. P. 31.23(a) have been met. This Court *does* have such authority. A foundational prerequisite for issuing a warrant of execution is that it can be lawfully carried out. This Court recognized as much in its March 2, 2023 order in this case. Decision Order at 7-8, *State v. Gunches*, No. CR-13-0282-AP, 2023 WL 11813238, at *3 (Ariz. Mar. 2, 2023).

The context of that Order is important, because there (as here) the statutory requirements for a warrant had been met. The State at that time argued that a warrant should not issue “without the State avowing that an execution could actually move forward.” *Id.* This Court responded:

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 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.

Id. If the statutory requirements alone dictated the issuance of a warrant, this entire passage would be superfluous. *See Paxton v. McDonald*, 72 Ariz. 378, 382–83 (1951) (“The judgment must be read in its entirety, and it must be construed as a whole so as to . . . give effect to every word and part, if possible . . .”).

Beyond that, the notion that a statute could somehow compel the Court to authorize an unlawful execution is antithetical to the basic precepts of judicial review and separation of powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485 (2006) (“Although each branch of government must apply and uphold the constitution, our courts bear ultimate responsibility for interpreting its provisions.”). Indeed, this Court recognized the foundational requirement of legality in its March 2, 2023 order, stating that it must issue a warrant when “all the requirements under § 13-759(A) and Rule 31.23 have been satisfied, *and* there are no constitutional or statutory impediments to

proceeding.” Decision Order at 9-10, *Gunches*, 2023 WL 11813238, at *4 (emphasis added). Thus, this Court has the authority to refrain from issuing a death warrant when an execution cannot be lawfully carried out.

II. An Execution Under Arizona’s Current Protocol Cannot Be Lawfully Carried Out.

The evidence is overwhelming that Arizona cannot lawfully carry out an execution by lethal injection at this time. Its pentobarbital protocol is sure or very likely to cause a tortuous death even in the best of circumstances, which is why the federal government has now abandoned its pentobarbital protocol.² And the circumstances here are far from optimal. The State is on the cusp of using an inexperienced, untrained team to inject likely expired drugs stored in unmarked mason jars, that were produced by a company that does not make drugs for human consumption, and that will be compounded by a pharmacy that the ADCRR itself has previously disavowed.³ All of that against a backdrop

² The subsequent administration’s executive order does not speak to this. See Exec. Order, *Restoring the Death Penalty and Protecting Public Safety* (Jan. 20, 2025).

³ Michael Kiefer, *Secret Jars in a Prison Fridge Hold AZ’s Lethal Injection Drugs, and They May Be Expired*, AZMIRROR (Jan. 17, 2025), [Kiefer I](#).

of terminating the independent review whose preliminary findings documented fatal flaws in the State’s lethal injection regime.

For decades, a single shot of pentobarbital was thought to be defensible. *E.g.*, *Glossip v. Gross*, 576 U.S. 863, 870 (2015). That changed when two large-scale autopsy reviews discovered that pentobarbital executions cause prisoners to suffer from acute pulmonary edema.

Pulmonary edema is a medical condition in which fluid seeps into the lungs. *Acute* pulmonary edema (also known as “flash pulmonary edema”) occurs when the pulmonary edema is sudden and severe, developing in seconds and minutes rather than hours or days. Acute pulmonary edema is excruciatingly painful, causing individuals to experience the sensation of being waterboarded as they drown in their own fluids.⁴ Afflicted individuals experience “terror, panic, drowning,

⁴ *In re: Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 244488, at *63 (S.D. Ohio, Jan. 14, 2019) (“All medical witnesses to describe pulmonary edema agreed it was painful, both physically and emotionally, inducing a sense of drowning and the attendant panic and terror, much as would occur with the torture tactic known as waterboarding.”).

[and] asphyxiation,” for which patients in the clinical setting would receive morphine “[b]ecause they are in such a state of panic.”⁵

A 2020 national study of over 200 execution autopsies showed that 84 percent of executions using a one-drug pentobarbital protocol—49 of 58—documented acute pulmonary edema.⁶ A more limited review of autopsies from pentobarbital executions in litigation over the federal government’s 2020 executions found the incidence of acute pulmonary edema to be even higher. Of the 27 autopsies reviewed, seven failed to report on the lungs, but the remaining 20 all documented acute pulmonary edema.⁷ Eight were from Arizona executions.⁸ The reviewing doctor concluded that “flash pulmonary edema is a *virtual medical*

⁵ Liliana Segura, “*Our Most Cruel Experiment Yet*”: *Chilling Testimony in a Tennessee Trial Exposes Lethal Injection as Court-Sanctioned Torture*, THE INTERCEPT (Aug. 5, 2018), [Segura](#).

⁶ Noah Caldwell et al., *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sep. 21, 2020), [Caldwell et al.](#)

⁷ See Expert Declaration of Gail A. Van Norman, M.D., *In re Fed. Bureau of Prison’s Execution Protocol Cases*, No. 19-mc-145 (TSC), 2019 WL 13077988 (D.C. Cir. Nov. 1, 2019), ECF 374-3.

⁸ Michael Kiefer, *The “Inner Terror” of Lethal Injection is Cruel, Law Prof Argues in Bid to Stop Gunches Execution*, AZMIRROR (Jan. 6, 2025), [Kiefer II](#).

certainty in any execution carried out under the federal government’s pentobarbital protocol.”⁹

Taken together, these two autopsy reviews establish anywhere from an 84 percent chance (49 of 58 autopsies) to a 100 percent chance (20 of 20 autopsies, and 8 of 8 from Arizona) of a pentobarbital protocol causing prisoners to suffer from acute pulmonary edema as they die. Arizona’s protocol is sure or very likely to result in a torturous death.

In the federal government’s 2020 litigation, the court stayed the prisoners’ executions, finding that they had “amassed an extensive factual record” that pentobarbital would inflict excruciating pain and were *likely to prevail* in their lethal injection challenge.¹⁰ “The scientific evidence before the court overwhelmingly indicates that the [federal government’s] protocol is very likely to cause Plaintiffs extreme pain and needless suffering during their executions,” the court found.¹¹ But the

⁹ Expert Declaration of Gail A. Van Norman, M.D., *supra* fn.7 at 50.

¹⁰ *In re Fed. Bureau of Prisons’ Execution Protocol Cases*, 471 F. Supp. 3d 209, 219 (D.D.C.), *vacated by Barr v. Lee*, 591 U.S. 979 (2020).

¹¹ *Id.* at 218. The notion that prisoners are dead or unconscious when the pulmonary edema occurs has been debunked by medical professionals; *see id.* at 219; *see also* Caldwell, et al., *supra* fn. 6 (explaining why pulmonary edema is physically impossible in a dead person).

Supreme Court lifted the stay, thus ending the litigation because the prisoners were dead.¹²

Now the federal government has come full circle. On January 15, 2025, Attorney General Garland rescinded the federal government’s pentobarbital protocol after a three-year review left “significant uncertainty about whether the use of pentobarbital as a single-drug lethal injection for execution treats individuals humanely and avoids unnecessary pain and suffering.”¹³ “Because it cannot be said with reasonable confidence that the current execution protocol not only affords the rights guaranteed by the Constitution and laws of the United States but also treats individuals being executed fairly and humanely,” Attorney General Garland explained, “that protocol should be rescinded, and not reinstated unless and until that uncertainty is resolved.”¹⁴

The case against executions under Arizona’s protocol is stronger yet. At the time he was dismissed, Judge Duncan’s “present conclusion” was that Arizona’s lethal injection process was “fundamentally

¹² *Barr v. Lee*, 591 U.S. 979 (2020).

¹³ Merrick Garland, Determination Following Review of the Federal Execution Protocol Addendum and the Manner of Execution Regulations, at 2 (Jan. 15, 2025), [Garland](#).

¹⁴ *Id.* (cleaned up).

unreliable, unworkable and unacceptably prone to errors.”¹⁵ This is not the distant past; this is a retired federal judge’s conclusion from two months ago.

Never before in U.S. history has a state embarked upon an independent investigation of its lethal injection regime, only to terminate the review before it was complete—let alone while it was documenting fatal flaws. Arizona now asserts it has done a review *of itself*, and has remedied any deficiencies in its lethal injection processes. The facts show otherwise.

In 2023, ADCRR Director Thornell expressed “serious concerns about the qualification and competency of the compounding pharmacist and the process used to compound the current supply of lethal injection drugs.”¹⁶ Today, the State tells this Court *not* that it found a more competent compounder, but that it changed its mind. The same

¹⁵ David Duncan, *Draft IRC Summary Report on Arizona Execution Preparedness*, at 1 (2024), [Duncan](#).

¹⁶ Jimmy Jenkins, *Arizona Lacks Knowledge and Expertise to Conduct Execution, Governor and Prisons Chief Say*, ARIZ. REPUBLIC (Mar. 16, 2023), [Jenkins](#).

compounding pharmacy that it had “serious concerns about” less than two years ago is now just fine.¹⁷

We now also know that the “API” (active pharmaceutical ingredient) that Arizona is planning to use is the *exact same* API from its prior 2020 purchase—produced by a company that makes drugs for calibrating machines, and stored for the last five years in unmarked glass containers resembling mason jars.¹⁸ ADCRR personnel told Judge Duncan that its API can last forever.¹⁹ That is patently false. *All* drugs are subject to degradation, and that includes APIs.²⁰

On top of all this is Arizona’s abysmal record of unfit, unqualified, and untrained executioners.²¹ Judge Duncan asked to access the current

¹⁷ See Ryan Thornell, ADCRR’s Execution Preparedness, at 6-8 (Nov. 22, 2024), [Thornell](#).

¹⁸ See Kiefer, *supra* fn. 3.

¹⁹ *Id.* When asked for documentation of this, Judge Duncan was told that it was thrown away. *Id.*

²⁰ See Karen M. Alsante, et al., *The Role of Degradant Profiling in Active Pharmaceutical Ingredients and Drug Products*, 59 ADVANCED DRUG DELIVERY REV. 29 (Jan. 10, 2007). Tellingly, Arizona’s API does not even have a label; if it did, that label would state the expiration date. See, e.g., Sigma-Aldrich, product site for pentobarbital sodium salt, [Sigma-Aldrich](#) (listing shelf life of pentobarbital API at 3 years).

²¹ This record is detailed in Michael Kiefer & Dale Baich, *Poorly Executed: How Arizona Has Failed at Carrying Out the Death Penalty*, AZMIRROR (Apr. 24, 2023), [Kiefer & Baich](#) (doctor-executioner with over 20 malpractice suits filed against him); *Dickens v. Brewer*, No. CV07-1770-

medical team, which is new and thus inexperienced, as he had previously found “corrections officials seeking to learn on the eve of an execution what doses of lethal drugs to administer from Wikipedia.”²² He was denied this access and dismissed instead.

Arizona cannot lawfully carry out an execution. Mr. Gunches’s willingness to be executed does not change this fact, nor does it lessen the irrevocable harm that follows when the state takes life in its citizens’ name in a manner that does not comport with the fundamental conditions that have been placed on its ultimate exercise of power.

CONCLUSION

This Court has the authority to refrain from issuing a warrant in this case, and ample good cause to do so. For these reasons, this Court should not to issue a warrant for the execution of Aaron Gunches.

PHX-NVW, 2009 WL 1904294, at *16 n.6, *23 (D. Ariz. Jul. 1, 2009) (Arizona’s false assurance that it was conducting background checks even though not required by protocol); *West v. Brewer*, No. CV-11-1409-PHX-NVW, 2011 WL 6724628, at *6 (D. Ariz. Dec. 21, 2011) (Arizona’s willful violation of protocol by conducting *five* executions with full knowledge that one of its medical team members did not hold a medical license of any kind).

²² [Duncan](#), *supra* fn. 15 at 10.

RESPECTFULLY SUBMITTED on January 23, 2025.

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CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns an amicus curiae brief, and is submitted under Rule 31.12(a)(5). The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 2,271 words.

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