

**IN THE SUPREME COURT OF ARIZONA**

STATE OF ARIZONA, ) Arizona Supreme Court  
 ) CR-13-0282-AP  
 )  
 Appellee, )  
 vs. ) Maricopa County Superior Court  
 ) No. CR2003-038541-001  
 AARON BRIAN GUNCHES,  
 Appellant.

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**BRIEF OF AMICUS CURIAE PHILLIPS BLACK, INC.  
IN SUPPORT OF APPELLANT**

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## ARGUMENT

In 2021, under the auspices of the prior Attorney General, the State insisted this Court modify its longstanding motion rules in order to accommodate compliance with the overhauled execution protocol of the ADCRR, which incorporated the terms of Arizona’s settlement in the *Wood* wrongful death federal lawsuit stemming from the 2014 botched execution of Joseph Wood. *State v. Atwood*, No. CR-87-0135-AP (hereafter, “*Atwood*”), Motion to Set Briefing Schedule for Warrant of Execution (“Scheduling Motion”), filed 4/6/21. Under the *Wood* Settlement, the State is obliged to supply to the condemned, within ten days after seeking an execution warrant, quantitative analysis testing of the lethal injection drugs prepared for use in the given execution. Stipulated Settlement Agreement (attached as Appendix F).

The State argued in *Atwood* that the modern experience with warrant motions reflected a substantial period between moving for a warrant and this Court’s issuance of one, which, of course, is then followed, per A.R.S. § 13-759(A), by a 35-day period before the execution date. The State’s concern in litigating to compress this Court’s longstanding process was to permit its compliance with the strictures of the *Wood* Settlement, which proscribe using “in an execution any chemicals that have an expiration or beyond-use date that is before the date that an execution is to be carried out.” *Id.* at 2–3.

In 2022, the State switched from the three-drug protocol used in the Wood death and elected to use compounded pentobarbital, a chemical categorized as a “high-risk compound sterile preparation,” for its lethal injections. ADCRR Department Order 710, effective date 4/20/22. Because it is not manufactured medicine, rather, the drugs are essentially batched by a specialized pharmacist, this kind of compound sterile preparation is subject to standards set forth in the United States Pharmacopeia and National Formulary (“USP”). USP General Chapter 797 Pharmaceutical Compounding – Sterile Preparations (<http://usp.org/compounding/general-chapter-797>). These standards include, crucially, the enunciation of a beyond-use date (BUD)—a use-by date for the given preparation depending upon its classification, here, high-risk, and the temperature conditions it is kept under immediately after the pharmacist renders the salt or powder form of the active pharmaceutical ingredient (API) into an injectable solution. *Id.* In October 2020, Arizona, under the auspices of Attorney General Brnovich, purchased a kilogram of such API from a chemical supplier in Connecticut, Absolute Standards, for \$1.5 million. *See, e.g.,* Ed Pilkington, *Revealed: Republican-led States Secretly Spending Huge Sums on Execution Drugs*, *The Guardian* (Apr. 9, 2021).

Because pentobarbital falls into the high-risk category, its BUD, *only if frozen*,

is 45 days and far shorter if maintained in any other state.<sup>1</sup> That was true long before the litigation in 2021 and 2022 that ultimately yielded warrants to execute three men during 2022 and it remains the pharmaceutical science today. But in 2021, the State insisted that a 90-day BUD applied to the drugs it intended to use for Mr. Atwood. *Atwood*, Reply to Scheduling Motion, filed 4/27/21) at 7–8. The State eventually recognized in that litigation, but only after this Court issued a motion schedule within the timing parameters the State submitted, that its 90-day BUD assertion was erroneous.<sup>2</sup> *Atwood*, Motion to Modify Briefing Schedule, filed 6/22/21. The Court then required the State to take extraordinary steps to ensure the fitness of the drugs, vacating its prior scheduling order and instructing that the “State may renew its scheduling motion after specialized testing to determine a beyond-use date for compounded doses of the drug.” *Atwood*, Order, filed 7/12/21 (attached as Appendix C). Six months later, the State returned with what it submitted qualified as specialized testing. *Atwood*, Motion to Set Briefing Schedule, filed 1/5/22. This initiated the State’s various warrant motions and resulted in the Court proceeding to enter execution dates for Mr. Clarence Dixon, Mr. Atwood, and Mr. Murray Hooper, which the State carried out, respectively, on May 11, 2022, June 8, 2022, and

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<sup>1</sup> If maintained at room temperature, the BUD is a mere 24 hours and if refrigerated, just three days.

<sup>2</sup> As the State put it, “The pharmacist, however, has now revised that opinion and has advised ADCRR that, until certain specialized testing of a sample batch is conducted, pentobarbital that is compounded for Atwood’s execution will have an initial beyond-use date of 45 days.”

November 16, 2022. While the prior Attorney General obtained a death warrant for Mr. Gunches before the conclusion of his term, it lapsed during the transition in his office and the Governor's. One of the first executive orders Governor Hobbs issued upon taking office in January 2023 called for scrutiny of "the ADCRR's lethal injection drug and gas chamber chemical procurement process, execution protocols, and staffing considerations, including training and experience." Executive Order 2023-05 (Jan. 23, 2023) (attached as Appendix D).

**A. The Current Warrant Betrays the State's Unreadiness to Execute**

In setting out to resume executions by first securing a date for Mr. Gunches's death, the State now aims, via a footnote, to bypass the fundamental concerns of the *Wood* Settlement and the ADCRR's execution protocol. Staging a process without adversarial testing effectively frees the State to self-servingly mischaracterize its readiness with the drugs designated for Mr. Gunches, asserting, without explaining the following:

For the compounded pentobarbital to be used, the United States Pharmacopeia designates a default beyond-use date of 45 days from the date of compounding. The beyond-use date may be extended to 90 days, however, upon completion of stability and sterility testing on the drug. Stability testing on the raw material to be used to compound the pentobarbital that will be used in Gunches' execution was completed in 2022. Sterility testing on the compounded pentobarbital that will be used will be conducted shortly after the drug is compounded. Once that testing is completed, the State anticipates that ADCRR's compounding pharmacist will certify that the

pentobarbital to be used in Gunches' execution will have a beyond use date of 90 days from the date of compounding.

*State v. Gunches*, No. CR-13-0282-AP (hereafter "*Gunches*"), Motion to Set Briefing Schedule for Motion for Warrant of Execution at 2 n.1.

The State's desired approach with Mr. Gunches fails to satisfy the minimum criteria under its own execution protocol for three essential reasons.

*Specialized Testing is Absent*

First, the State cannot simply posit by fiat a 90-day BUD, as it has done here. In 2021, it conceded it needed to conduct specialized testing to be able to aver that it had injectable drugs fit for use within 90 days of their formulation. Now, it far from articulates that it is undertaking such testing, as it had done in 2021 in the *Atwood* litigation.

*Arizona's API is Unusable*

Second, the API from which the State has prepared the compounded pentobarbital it has designated for use on Mr. Gunches is the same API the current Director of ADCRR inherited in 2023 from his predecessor. That source pentobarbital sodium is grossly unfit for use at this point for several reasons, including that the API's maker, Absolute Standards, shipped it in an unmarked container, without even the bare minimum packaging or documentation stating at least its expiration date. Michael Kiefer, *Secret Jars in a Prison Fridge Hold AZ's*

*Lethal Injection Drugs, and They May Be Expired*, Arizona Mirror (Jan. 17, 2025).

Such documentation is necessary for the perhaps obvious reason that only labeling can establish the period in which the chemicals arguably could be reliably used.

### **INTEREST OF THE AMICUS**

Attorneys with amicus, Phillips Black, Inc., represent sixteen of the 112 persons currently sentenced to be executed Arizona. Additionally, attorneys at Phillips Black represented Frank Atwood through his 2022 execution. In the course of that representation, amicus gained extensive experience examining the execution processes in Arizona. More broadly, amicus is a national non-profit organization dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under law. Phillips Black further contributes to the rule of law by consulting with capital counsel, conducting death penalty clinical training, and developing research on the administration of criminal justice. Phillips Black attorneys frequently publish scholarship and teach courses on capital punishment. Phillips Black attorneys have extensive experience litigating cases facing imminent execution nationwide, including in Arizona. This experience provides a unique perspective on state warrant practices and the interplay of the executive and judicial branches in the administration of executions.

Further, as the Federal Bureau of Prisons recognized amid its resumption of executions in July 2020, testing documentation, typically in the form of a

Certificate of Analysis attesting to the adequacy of the given API, is a minimum requirement for even entertaining the use of a given substance. Declaration of Raul Campos, Associate Warden at the Federal Medical Center at Carswell, Texas, from *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-00145-TSC, Doc. 36-1 (attached as Appendix G). There is no evidence to suggest the existence of such certification for Arizona's API. Such certificates are not mere formalities, as indicated in the Federal experience, wherein in the preparation for executions in Terre Haute, Indiana, the Government received a gram of pentobarbital sodium powder from a bulk manufacturer—which Absolute Standards is not—and ascertained that an entry of “Fail” registered under the “Related Compounds, Results” field of the paperwork appeared, necessitating the procurement of new API with passing quality assurance marks. *Id.* The Government's pharmacist then prepared an injectable solution from the new, qualifying API and carried out a 365-day study of the solution's stability, before committing to undertaking the thirteen executions in the ensuing six months concluding on January 16, 2021. *Id.*

In contrast, the State of Arizona has merely represented, as set forth above, “Stability testing on the raw material to be used to compound the pentobarbital that will be used in Gunches' execution was completed in 2022.” *Supra*. This sentence offers no pharmaceutical information with respect to the foregoing basic

requirements of the ADCRR's protocol. There is conspicuously no representation that the API was demonstrated to possess sufficient stability for use under the protocol. It is also glaring that there is no representation as to the API possessing sufficient stability for any period.

Absent documentation establishing the expiration date of the API, let alone its chemical adequacy, the maker of the API's assertion would be the only available guidance for the fundamental question of when the chemicals will no longer be fit for their intended purpose. To put it mildly, relying on such a statement with respect to a dangerous chemical such as this drug would be permissible in any conceivable use of the substance. But absent that indication from the maker, there is no conceivable, let alone defensible, framework for using the raw powder essentially left over from the prior corrections administration in unmarked mason jars. Kiefer, *supra*.

Thus, it is highly relevant that the individuals at Absolute Standards responsible for making the API sold to Arizona in October 2020 stated in connection with an attempt to procure an identical quantity of pentobarbital API in April 2022 for use as an alternative method of execution in Tennessee that the Arizona API possessed "a shelf life of 2 ½ years." *Id.* Thus, it is apparent given that ADCRR received its API in October 2020, that the outer limit of its usability

was March 2023. Further, that outer limit is highly charitable, given the observations of how the API apparently has been stored at ADCRR.

*Quantitative Analysis is Woeful*

Third, “quantitative analysis” is an essential requirement under the ADCRR’s protocol, again due to the *Wood* Settlement (*supra*). ADCRR Department Order 710, effective date 10/23/24, Att. D at 2. In 2022, the State relied upon nearly a half-million dollars of “pharmaceutical consulting services” in relation to its preparation of drugs. Jimmy Jenkins, *Arizona Backtracks on Expiration Date for Death Penalty Drugs*, KJZZ 91.5 (Jun. 23, 2021) (disclosing information from public records requests reflecting at least \$440,000 in fees paid). Testing the State supplied in that timeframe concerning the quantitative analysis of its designated execution drugs indicated the use of specialized laboratory equipment for pharmaceutical purposes. *See* Certificates of Analysis (attached as Appendix H). The testing, while still lacking in material respects, reflected information on key considerations such as endotoxicity and pH level.

Currently, the State is using Arizona’s Department of Public Safety to conduct its testing instead of a specialized pharmaceutical lab. The testing the State has supplied purportedly to comply with its protocol obligation to submit quantitative analysis to the condemned within six days of seeking his execution warrant could hardly be more simplistic and less illuminating, in defiance of the

execution protocol and the underlying *Wood* Settlement. See Jimmy Jenkins, *Lab Analysis of Arizona’s Execution Drug Supply Lacks Key Details, Expert Says*, Arizona Republic (Jan. 29, 2025). The testing merely establishes what is scarcely in dispute: that the pentobarbital intended for executing Mr. Gunches is predominantly pentobarbital. An obvious point of quantitative measurement is the identification of all *other* quantities of chemicals in the injectable solution. *Id.* The risks of more botched, and even failed, executions stem from the absence of measurement of all that comprises the injectable solution in question. The State is not setting out to provide this and the volunteer in this prospectively initiating execution is serving the State’s interest of foreclosing meaningful evaluation of the execution drugs, despite the clear requirements of the ADCRR’s protocol.

**B. Little Has Changed About the Problems the Governor Has Identified with the Lethal Injection Process**

Shortly after taking office, Governor Hobbs entered an executive order appointing an “Independent Review Commissioner” 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.” E.O. 2023-05 (Jan. 23, 2023) (attached as Appendix D). The review was to focus on Arizona’s lethal injection processes. It would include scrutinizing the “State’s procurement of lethal injection drugs, including but not

limited to the source of the drugs, the cost to the state, and any considerations about the drugs such as composition and expiration.” *Id.* These were serious concerns, requiring careful study.

To ensure independence, Governor Hobbs decreed that this Commissioner “not be currently or previously employed with the ADCRR and shall have experience with death penalty or lethal injection issues.” *Id.* Consistent with the order, she appointed David Duncan to conduct the review. *Retired Judge Picked to Review Arizona’s Execution Process*, Associated Press (Feb. 24, 2023).

Independent Review Commissioner Duncan had previously served as a federal magistrate judge and currently serves as an arbitrator. *David Duncan*, The National Academy of Distinguished Neutrals, <https://www.nadn.org/david-duncan>.

That March, the Director of the ADCRR provided this Court with a sworn statement outlining his own concerns with Arizona’s execution protocols. Declaration of Ryan Thornell (Mar. 15, 2023) (attached as Appendix E). Director Thornell had “serious concerns about the qualification and competency of the compounding pharmacists and the process used to compound the current supply of lethal injection drugs.” *Id.* at 7. Citing one example, Director Thornell noted that “the prior administration struggled to find a pharmacist and met the contracted pharmacist through a chance encounter.” *Id.* He also noted that at the time “there [was] no known information about the contract that was used for procuring this

service.” *Id.* His statement did not address the source of the uncompounded pentobarbital in ADCRR’s possession, nor its beyond use date.

Though Duncan’s work was ongoing, in May of 2024, Attorney General Kris Mayes announced her intention, anticipating a completion of Duncan’s work and apparently assuming it would find no problems and ADCRR would be prepared to execute, to “begin seeking warrants no later than the first quarter of 2025.” *See* Howard Fischer, *County Prosecutor’s Attempt to Seek Execution Warrant Now Moot*, Arizona Daily Star (Dec. 10, 2024). Shortly thereafter, apparently frustrated with the time the independent review required and without regard for precedent, Maricopa County Attorney Rachel Mitchell began the process of herself requesting an execution warrant in this Court on June 5, 2024. Maricopa County Attorney, *County Attorney Moves to Seek Death Warrant for Gunches* (June 5, 2024) (attached as Appendix F). Before this Court could address the propriety of that unprecedented step, Attorney General Mayes mooted the issue by beginning traditional warrant proceedings, notwithstanding her earlier statement that she would await Duncan’s report before proceeding. To this day, Commissioner Duncan has not issued his report—because the Governor Hobbs fired him and halted the review without receiving the careful independent assessment she had previously determined was needed.

Though Independent Review Commissioner Duncan was not given an opportunity to complete his review, members of the press have obtained a draft of his report revealing serious concerns. He is clear at the outset that the document is his “working rough draft,” and that he had not yet been able to conduct “interviews of the key medical personnel who have been retained for the next execution and [provided] the opportunity [he had] long requested[,] to observe a complete rehearsal of the le[thal] injection protocol.” Duncan Report at 1 (attached as Appendix G). Those deficiencies, he noted, could “affect [his] present conclusion that lethal injection[,] while theoretically achievable is, in actual practice, fundamentally unreliable, unworkable and unacceptably prone to errors.” *Id.*

But Duncan did learn a number of important facts. As it relates to the source of Arizona’s lethal injection drugs, the draft report notes the struggle Arizona has historically had in acquiring drugs, including, in 2011, the United States Department of Justice informing Arizona it had illegally imported drugs for its executions. *Id.* at 5. Then, in 2015, Arizona attempted to import lethal injection drugs from India. This time, the FDA seized the drugs at the Phoenix airport. *Id.* at 6. The draft report does not identify the source of the drugs, and it is sharply critical of the lack of transparency around the entirety of the lethal injection process, describing it as an “impenetrable shroud of secrecy.” Report at 9.

Independent Review Commissioner Duncan noted some examples of “failures that [have occurred] when others are not watching”:

from corrections officials seeking to learn on the eve of an execution what doses of lethal drugs to administer from Wikipedia, to shipments of state procured lethal drugs delivered to a private home in Phoenix with no apparent or verifiable chain of custody, to the storage of lethal drugs in unmarked jars with no labeling whatsoever.

Report at 10. He also described how he intended to discuss in his final report the “unavailability of the appropriate and best drugs for the task.” *Id.* Duncan further notes while he had asked ADCRR to assemble the “cost of the chemicals presently on hand,” he had not yet included that information in his report, *id.* at 8, but reporting indicates the State of Arizona spent some \$1.5 million on pentobarbital. *See* Ed Pilkington, *Revealed: Republican-led States Secretly Spending Huge Sums on Execution Drugs*, *The Guardian* (Apr. 9, 2021).

Revealingly, the Governor’s dismissal of Duncan and the Attorney General’s institution of warrant proceedings without the completion of the ordered independent review came just days after the Director of the ADCRR issued his own statement—this one unsworn—concluding that per its own review of itself, ADCRR is “operationally prepared to proceed with an execution.” Letter at 8, Ryan Thornell (Nov. 22, 2024) (attached as Appendix H). Most relevant here, Thornell’s letter confirmed that the uncompounded pentobarbital ADCRR now possesses was obtained during the prior administration in advance of the last executions it

undertook (of Clarence Dixon, Frank Atwood, and Murray Hooper), meaning the drugs have been in ADCRR’s possession since at least 2022. *Id.* at 7 (“6. Supplier of pentobarbital”). The letter also makes clear that the lack of labeling and markings on the jars containing the pentobarbital “was done at the request of the previous administration.” *Id.* Whatever other tweaks the administration has made to its process, in declaring its readiness, ADCRR has not addressed the intensely problematic reality that, as it has just confirmed, the uncompounded drugs it intends to use to execute Mr. Gunches have expired. A lawful execution cannot proceed without addressing this foundational contradiction in ADCRR’s statements.

### **C. Adversarial Testing in a Factfinding Court Is the Proper Process for Addressing These Issues**

The State’s ability to conduct an execution lawfully is a prerequisite to its securing a viable execution warrant. Many of the issues underlying that determination are fundamentally factual, and the legal analyses depend strongly on factual details.<sup>3</sup> The need for factual development is especially acute now because this is the first time the State has requested an execution warrant since ADCRR has revised its policies, and since various new information about its practices in obtaining and handling drugs has come to light.

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<sup>3</sup> For instance, when were the drugs acquired? What is the scientifically and medically validated beyond-use date for the chemicals? What risks inhere in using chemicals that have expired? Can the drugs on hand satisfy the requirements written into ADCRR’s formal procedures?

This Court cannot adequately consider the legal questions about the propriety of proceeding with an execution without a factual record, and is not equipped to develop such a record itself. *See, e.g., State v. Rogers*, 186 Ariz. 508, 511 (1996) (“Inasmuch as the issue [] was not raised by the state in the trial court and no factual record was made on it, it would be inappropriate for an appellate court to base a ruling on that issue.”); *State v. Brita*, 158 Ariz. 121, 124 (1988) (“It is particularly inappropriate to consider an issue for the first time on appeal where the issue is a fact-intensive one.”); *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 141 ¶ 13 n.2 (2007) (“[A]ppellate courts should not normally make such factual findings in the first instance, particularly in the absence of a trial court evidentiary hearing on the subject.”).

Even where *amici* endeavor to provide an appellate court with factual context, relying only on what is cited in published literature or reported from an *amicus*’s experience, without cross-examination or an opportunity for the presentation of contrary evidence, does not generate the type of robust reliability needed to authoritatively resolve factual questions in any case, let alone in the death penalty context where the need for accuracy and reliability is at its zenith.

Nor are warrant proceedings in an uncontested case an appropriate vehicle to address these questions in the first instance. A case in which neither party is contesting the outcome is no place to consider such critical factual and legal

questions. Our entire legal system is premised on opposing parties presenting the best case for their position; that is how we arrive at the truth. *See United States v. Bagley*, 473 U.S. 667, 675 (1985) (recognizing the “adversary system as the primary means by which the truth is uncovered”); *State v. Bailey*, 132 Ariz. 472, 479 (“The adversary system is the best system yet devised by man to determine the truth.”). The Court cannot have confidence in the strength of its conclusions when no one has presented it with the best arguments for each possible resolution. Indeed, it would be disastrous if, in a future case where a counseled defendant does vigorously challenge the propriety of issuing a warrant, it becomes clear that there were improprieties in the process already used to put Mr. Gunches to death.

Finally, the particular factual issues here are uniquely unsuited to exploration in a case with a pro se litigant (even one actively opposing the State’s position), both because as Independent Review Commissioner Duncan observed, much of the relevant information is difficult to access, even for attorneys, and because it is very technical, requiring expert assistance to evaluate and understand.

Instead of allowing the State to reinstate executions in an adversarial-free setting, this Court should insist on a process that allows for factfinding and one that includes an adversary to the State as it undertakes the most extreme thing it can do to one of its citizens: kill him.

## CONCLUSION

For the foregoing reasons, Amici urge the Court to not set an execution date for Mr. Gunches.

RESPECTFULLY SUBMITTED this 31st day of January, 2025.

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PHILLIPS BLACK, INC.