

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

AARON BRIAN GUNCHES,

Appellant.

CR-13-0282-AP

Maricopa County Superior Court

No. CR 2003-038541-001

**RESPONSE TO BRIEF
OF AMICI CURIAE**

In its Motion for Warrant of Execution, the State established that the requirements under A.R.S. § 13-759(A) and Rule 31.23 for issuance of a warrant have been satisfied. Appellant Aaron Brian Gunches elected not to file a response, indicating that he does not dispute the existence of these conditions nor oppose the State's request for a warrant of execution. Amici argue, however, that this Court nonetheless should not issue a warrant of execution. For the reasons below, Amici present no justification for the warrant not to issue.

As noted in the State's motion, A.R.S. § 13-759(A) and Rule 32.23 govern issuance of warrants of execution. These provisions require a warrant to issue upon notice by the State that a defendant's death sentence has been affirmed on direct appeal and the defendant's Rule 32 post-conviction and federal habeas corpus proceedings have concluded. As this Court has recognized, issuance of a

warrant is mandatory when the State provides notice that these statutory and rule-based conditions are satisfied:

[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.

State v. Gunches, No. CR–13–0282–AP (Decision Order, March 2, 2023), at 9–10 (emphasis in original); *see also* 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), and Ariz. R. Crim. P. 31.23(a), (b) (describing conditions under which this Court “*must* issue a warrant of execution”) (emphasis added).

Amici do not dispute that these conditions are met here. Instead, Amici critique the method by which the State intends to carry out Gunches’ execution, seeking to litigate in this proceeding whether the State can “lawfully carry out an execution by lethal injection at this time.” Amicus Lain Br., at 4; *see also* Amicus Phillips Black Br., at 6–15 (challenging State’s lethal injection protocols); Amici Public Health Professionals Br., at 1 (asserting violations of state and federal drug laws). This proceeding, however, is not the appropriate forum for any such a

challenge, which only bears on whether the requirements under A.R.S. § 13–759(A) and Rule 31.23 have been satisfied.¹

Pointing to this Court’s March 2, 2023 order in this case, Amici nevertheless contend that this Court maintains discretion to deny a warrant of execution even when the requirements of A.R.S. § 13–759(A) and Rule 31.23 are met. Specifically, this Court noted in that order that “[b]y moving for issuance of the warrant ... the State implicitly avowed that it could carry out the sentence in compliance with state and federal law,” and that its subsequent motion to withdraw “did not present any evidence that circumstances had changed.” Decision Order (March 2, 2023), at 7. This Court’s acknowledgment, however, that there was no evidence presented that the State was not able to lawfully carry out the sentence was made in the context of the State’s request to withdraw a previously filed motion for warrant of execution. In contrast, at issue here is solely the State’s request for a warrant of execution. This proceeding is thus not the proper forum for Amicus to challenge the propriety of the State’s method of execution. It is undisputed that the conditions of A.R.S. § 13–759(A) are met. This Court should therefore grant the State’s motion and issue a warrant of execution.

¹ Because the parties have not raised the issues Amici detail, they are not properly before this Court and should be disregarded. *See Vangilder v. Arizona Department of Revenue*, 252 Ariz. 481, 493, ¶ 46 (2022) (Amici curiae “will not be permitted to create, extend, or enlarge the issues on appeal.”) (internal quotation marks omitted).

In any case, the criticisms Amici level at the State’s execution protocol fail to establish that the State is unable to lawfully carry out Gunches’ execution. First, relying on litigation over the federal government’s execution protocol and the prior United States Attorney General’s rescindment of that protocol, Amicus Lain contends that pentobarbital—the drug the State will use in Gunches’ execution—“is sure or very likely to cause a tortuous death” by acute pulmonary edema. Amicus Lain Br., at 4–8. However, in assessing a group of federal inmates’ challenge to the government’s intended use of pentobarbital, the Supreme Court rejected that same assertion. There, in its decision vacating a lower court’s stay of execution, the Court noted that the federal government presented an expert who testified that any pulmonary edema occurred only after the prisoner has died or was rendered insensate, and that pentobarbital has been used in over 100 executions without incident, has repeatedly been invoked by prisoners “as a less painful and risky alternative” to other lethal injection protocols, was previously upheld by the Court as applied to a prisoner with a unique medical condition that could only have increased the baseline risk of pain, and has been upheld by numerous federal appellate courts against prisoners’ challenges. *See Barr v. Lee*, 591 U.S. 979, 980–81 (2020).

Next, among generalized criticisms of the Arizona Department of Corrections, Rehabilitation, and Reentry’s execution preparedness, Amici Lain and

Phillips Black suggest that the active pharmaceutical ingredient ADCRR will use to compound the pentobarbital for Gunches' execution is expired because it was purchased in 2020 and has a "shelf life" of only 3 years. Amicus Lain Br., at 10 n.29; Amicus Phillips Black Br., at 6–9. But the manufacturer's website to which Amicus Lain cites makes no mention of a "shelf life." Instead, it notes that pentobarbital sodium salt "has a *retest* date of 3 years from date of manufacture."² (Emphasis added.) Here, the pentobarbital that will be used in Gunches' has been tested and the results of that testing provided to Gunches, confirming a sufficient concentration of pentobarbital in the compounded solution. Amici Lain and Phillips Black's purported concern about the pentobarbital's efficacy is thus unfounded.³

The arguments advanced by the Public Health Professionals (PHP) Amici fare no better. Although none of the issues raised by these Amici are properly before this Court, two points are worth making briefly in response. First, concerning the applicability of the Controlled Substances Act, *see* PHP Amici Br.,

² <https://www.sigmaaldrich.com/US/en/product/sigma/p3761> (accessed Jan. 27, 2025).

³ Amicus Phillips Black's criticism of the adequacy of the State's quantitative analysis of the compounded pentobarbital that will be used for Gunches' executions is likewise unfounded. *See* Amicus Phillips Black Br., at 9–10. The analysis that was provided to Gunches (which was the same type of analysis provided for the three executions in 2022) was precisely what the plaintiff death-row inmates negotiated for and agreed to in the *Wood* settlement.

at 7, amici cannot demonstrate that they or Gunches have a private right of action to enforce its provisions, even if this were the proper forum to make such a challenge. *See West v. Schofield*, 519 S.W.3d 550, 569 (Tenn. 2017) (“In actions brought by death sentenced inmates challenging lethal injection protocols, claims invoking the Controlled Substances Act have not been well received.”) (collecting cases).

Nor can the PHP Amici demonstrate that the Food, Drug, and Cosmetic Act (FDCA) prevents the State from lawfully carrying out an execution using compounded pentobarbital. *See* PHP Amici Br., at 7–8. The federal government has previously provided guidance on whether the FDCA regulates execution drugs, concluding that “[a]rticles intended for use in executions carried out by a State or the federal government cannot be regulated as ‘drugs’ or ‘devices’ under the Federal Food, Drug, and Cosmetic Act.” *See Whether the FDA Has Jurisdiction over Articles Intended for Use in Lawful Executions*, slip op. O.L.C., 2019 WL 2235666 (May 3, 2019). PHP Amici note, however, that the D.C. Circuit has ruled otherwise. *See* PHP Amici Br., at 7–8 (citing *In re Fed. Bureau of Prisons’ Execution Protocol Cases (Execution Protocol Cases)*, 980 F.3d 123, 136–37 (D.C. Cir. 2020)). But the precedents of the D.C. Circuit do not bind this Court, and “[t]he Supreme Court has never resolved ‘the thorny question of the FDA’s

jurisdiction’ over the drugs used in lethal injections.” *Execution Protocol Cases*, 980 F.3d at 136 (quoting *Heckley v. Chaney*, 470 U.S. 821, 828 (1985)).⁴

Instead, the Supreme Court has *allowed* executions to proceed where the inmates have live FDCA claims.” *Middlebrooks v. Parker*, 15 F.4th 784, 792 n.4 (6th Cir. 2021). In *Barr v. Purkey*, — U.S. —, 141 S. Ct. 196 (2020) (Mem.), the Supreme Court vacated a preliminary injunction issued on the basis that federal government’s procuring pentobarbital likely violated the FDCA. That strongly indicates that the Supreme Court does not agree with the D.C. Circuit’s approach to the FDCA in the execution context.

The State’s motion for warrant of execution is not the proper vehicle to challenge the State’s ability to lawfully carry out Gunches’ execution, but even if it were, Amici have failed to demonstrate that ADCRR lacks the ability to lawfully execute Gunches. And the Amici do not dispute that the conditions of A.R.S. § 13–759(A) and Rule 31.23 are met. As a result, the Amici present no reason for this Court to deny the State’s motion for warrant of execution.

⁴ Because the FDCA does not apply to execution drugs, A.R.S. § 32–1971(B) most likely does not apply to execution drugs either.

DATED this 4th day of February, 2025.

Respectfully submitted,

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