

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

MURRAY HOOPER,

Appellant.

No. CR 83–0044–AP

Maricopa County Superior Court

No. CR–0000–121686

Ninth Cir. No. 08–99024

U.S. District Court No. CV–98–02164–

PHX–SMM

**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 Murray Hooper. 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 Hooper selects lethal injection as his method of execution, *see* A.R.S. § 13–757(B), ADCRR intends to carry out the sentence using compounded

pentobarbital, as it used in the recent executions of Clarence Dixon and Frank Atwood. Once compounded, based on specialized testing, the drug has a beyond-use date of 180 days from the date of compounding.

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.¹ Therefore, to ensure strict compliance with the protocol, ADCRR intends to carry out the execution during the drug's 180-day shelf life—established by testing—from the date of compounding.

Separately, the lethal-injection protocol requires ADCRR to disclose to Hooper 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 180-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

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

State's motion for warrant of execution is filed in this Court). This is because, as noted above, once the drug is compounded, its 180-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, Hooper 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 intends to consider

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.

and potentially issue the execution warrant and, working backward, calendar deadlines as follows:

1. The State shall file its motion for an execution warrant approximately 30 days before this Court's anticipated conference date. That motion shall be identical to Exhibit A to this pleading.
2. Hooper shall respond to the State's motion within 14 calendar days of the date of the motion's filing.
3. The State shall file its reply, if any, within 7 calendar days of the response's filing.

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 180-day shelf life.

This procedure also will not prejudice Hooper. As discussed, the State has attached to this pleading a copy of its anticipated motion for warrant of execution. *See* Exhibit A. Hooper therefore has received notice of that 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. Hooper 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.³

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

³ 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.

this motion and set a briefing schedule for its upcoming motion for warrant of execution.

DATED this 19th day of July, 2022.

Respectfully submitted,

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