IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,	)	No. CR–87–0135–AP
	)	
Appellee,	)	Pima County Superior Court
	)	Nos. CR14065 and CR15397
v.	)	
	)	Ninth Circuit No. 14–99002
FRANK JARVIS ATWOOD,	)	
	)	U.S. District Court No. CV–98–116–
Appellant.	)	TUC–JCC
	)	
	)	(Capital Case)

APPELLANT'S RESPONSE IN OPPOSITION TO APPELLEE'S MOTION TO SET BRIEFING SCHEDULE FOR MOTION FOR WARRANT OF EXECUTION

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Appellant Frank Atwood, through counsel, hereby responds to the State's Motion to Set Briefing Schedule for Motion for Warrant of Execution (4/6/2021) ("Mtn."). The compressed briefing schedule the Attorney General proposes threatens to execute a man who is factually innocent and legally ineligible for the death penalty. It also abandons Arizona precedent, violates separation of powers, and curtails Mr. Atwood's procedural rights, all in the service of accommodating the State's apparent inability to comply with its unilaterally adopted execution protocol and the terms of its settlement of a lawsuit to which Mr. Atwood was never a party. Given the Attorney General's stated intention to carry out at least twenty executions before his term concludes, his request to alter fundamental procedural rules would disfigure the law and establish a damaging precedent for incursions into the judiciary's workings. The Motion must be denied.

I. PRELIMINARY STATEMENT

The Attorney General's motion invokes the State's failure to contemplate the implications of its 2017 lethal injection settlement. Mtn. at 1. The Motion seeks to create a procedure contrary to this Court's procedural rules, Ariz. Sup. Ct. R. 28, and in violation of the separation of powers, Ariz. Const. Art. 3.

Granting the motion would dramatically rewrite Arizona's long-established execution warrant process. Executions should—as Arizona has always sensibly done—proceed in the sequence that the condemned conclude their initial federal habeas corpus proceedings. The Attorney General avers that a backlog of twenty such

inmates now exists.[1] This backlog was caused by the State's cessation of executions after a botched execution in 2014. The Motion seeks to take advantage of that backlog to now allow the State to unilaterally control who faces execution and who waits. Accepting the State's procedure would jettison decades of precedent concerning the judiciary's most solemn task, the adjudication of warrant motions under A.R.S. §13-759 (the "Warrant Statute").[2]

On July 23, 2014, the unfathomably botched execution of Joseph Wood spanned one hour and fifty-seven minutes—it was so prolonged, the parties conducted a thirty-minute telephonic emergency stay hearing *while* it transpired.[3] Prior to his execution, Mr. Wood challenged the constitutionality of the State's lethal injection protocol.[4] In the wake of his unconstitutional death, other plaintiffs continued the suit, which resulted in a June 21, 2017, settlement agreement, the requirements of which gave rise to the scheduling motion at issue here. Though Mr. Atwood was never a party to that suit, the State bound itself with those terms in

[1] *E.g.*, Jimmy Jenkins, Steve Goldstein, *Arizona Department of Corrections says it has lethal injection drugs, ready to resume executions*, KJZZ 91.5, Mar. 5, 2021; Craig Smith, *AZ Attorney General oversees return to executions*, KGUN9, Mar. 26, 2021.

[2] §13-759(renumbered variously since effective date of Oct. 1, 1978).

[3] *Wood, et al.*, *v. Ryan*, *et al.*, No. 2:14-cv-1447-NVW-JFM, Minute Entry; Doc. 33 (Jul. 23, 2014 D. Ariz.)

[4] *Wood*, No. 2:14-cv-1447-NVW-JFM, Complaint for Equitable, Injunctive, and Declaratory Relief [42 U.S.C. § 1983]; Doc. 1 (Jun. 26, 2014 D. Ariz.).

relation to any execution, irrespective of whether the condemned was a plaintiff.[5] *See* §II(C), *infra*.

The Motion purports to address a timing concern stemming from the 90-day expiration the State's chosen execution drug. Mtn. at 2-3. Its proposed schedule would preclude the development and presentation of evidence of Mr. Atwood's innocence—efforts that to date have been frustrated by the pandemic—and would truncate this Court's pending review, inter alia, of the illegality of his death sentence.[6] The Pima County Attorney, the prosecuting authority responsible for Mr. Atwood's conviction and death sentence, has asked the Attorney General for time to review the case—something needed to ensure the reliability of this complex case. *See* §II(B), *infra*. But the Motion at bar would foreclose investigation of this judgment's reliability before the irreversible sentence is carried out, thereby running afoul of fundamental constitutional mandates. *Woodson v. North Carolina*, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting) ("One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life.").

The Court must deny this Motion and instruct the State to proceed under the Warrant Statute in a manner consistent with the decades of that law's operation.

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[5] *See* Mtn. Ex. C.; *see also* Arizona Department of Corrections, Rehabilitation & Reentry ("ADCRR") Dep't Order 710, cited in the Motion at 2 n.2.

[6] CR-20-0381-T/PC.

II. ARGUMENT

A. The State Aims To Subvert Decades Of Practice In Setting Execution Dates Under The Warrant Statute.

The Attorney General's effort to schedule Mr. Atwood's warrant is striking in relation to the cohort who completed their initial collateral review before Mr. Atwood. Further, this effort stands out in relation to the group who, unlike Mr. Atwood, are no longer meaningfully challenging their judgments.

Mr. Atwood concluded federal habeas corpus litigation in the Ninth Circuit on October 10, 2018.[7] Attorney General Brnovich has repeatedly asserted that twenty men have "exhausted appeals" and are thus eligible for execution warrants.[8] Among this list, twelve concluded their litigation prior to Mr. Atwood.[9] The present Motion gives no rationale for leapfrogging Mr. Atwood to the front of this line in contravention of the established practice in Arizona under the modern death penalty statute.[10]

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[7] *Atwood v. Ryan*, 4:98-cv-115-JCC, Mandate; Doc. 526 (D. Ariz.).

[8] *See* n.1*, supra.*

[9] *See* Ex. 1, which reflects the men the Attorney General has identified he intends to execute and the date, for each individual, when the Ninth Circuit issued its mandate in relation to the appeal of their habeas corpus application. Ten condemned men obtained Ninth Circuit mandates after the Wood debacle and before Mr. Atwood obtained his on Oct. 10, 2018. In addition, two other men have been out of the Ninth Circuit even longer. Messrs. Williams and Styers's circuit court mandates are dated, respectively, Nov. 6, 2006, and Jul. 1, 2009.

[10] The Attorney General simultaneously moved for warrant motion scheduling regarding Mr. Clarence Dixon. Mr. Dixon's federal habeas corpus litigation concluded

In its history of capital punishment, Arizona has encountered no circumstances remotely like the current backlog after the Wood debacle. The Warrant Statute, now A.R.S. §13-759, initially took effect on October 1, 1978.[11] It was employed in Arizona's first modern era execution, the April 6, 1992, execution of Donald Harding. Arizona executed thirty-seven men in the following twenty-two years, concluding with Joseph Wood.[12] The State consistently sought execution warrants promptly after the condemned's initial federal habeas corpus litigation concluded.[13] The execution warrants were obtained in the order in which each condemned man concluded his federal appeal—first in, first out.[14]

The only exception to this orderly practice resulted from lethal injection litigation, *Dickens v. Brewer*, commenced on September 14, 2007,[15] and concluded in the Ninth Circuit on April 27, 2011.[16] *Dickens* impeded execution warrants for nearly four years and thus created a backlog of cases in which federal habeas corpus litigation had concluded. Upon *Dickens*' conclusion, the Attorney General obtained

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in 2020. *See Dixon v. Shinn*, 140 S. Ct. 2810 (2020) (Mem.). The Attorney General similarly offers no rationale for moving Mr. Dixon to the front of the line.

[11] Originally numbered as §13-4006.

[12] *See* Ex. 2, which tabulates Arizona's 37 executions under the modern death penalty statute and identifies the date the Ninth Circuit issued its mandate, along with the date of execution.

[13] *Id.*

[14] *Id.*

[15] *Dickens, et al., v. Brewer, et al.*, No. 2:07-cv-1770-NVW (D. Ariz.)

[16] *Dickens, et al., v. Brewer, et al.*, No. 09-16539 (9th Cir.)

warrants and resumed executions. Apart from a volunteer,[17] the Attorney General sought warrants and conducted their executions essentially in the order their federal cases concluded.[18]

The pending scheduling motions for Messrs. Atwood and Dixon reflect the Attorney General's view that the selection of condemned men for execution is entirely his prerogative. Indeed, the State does not pretend to supply a legal rationale for selecting Mr. Atwood (nor for choosing Mr. Dixon, *supra* n.10), ahead of all others. The State's motion breaches the practice under the Warrant Statute since its enactment.

B. The State Aims To Prevent Review Of Mr. Atwood's Judgment, Heretofore Frustrated During The Pandemic And By A Miscarriage Of Process.

On April 6, 2021, Pima County Attorney Laura Conover requested the Attorney General extend her office the courtesy of a "temporary hold on any death

[17] Jeffrey Landrigan, executed on October 26, 2010. Ex. 2.

[18] The *Dickens* suit concluded in the Ninth Circuit on April 27, 2011. Shortly before its conclusion, Eric King—who was not a party to *Dickens*—obtained a March 29, 2011, execution date, which was ultimately carried. On May 25, 2011, Arizona executed Donald Beaty, whose mandate had issued from the court of appeals on June 17, 2008. Beaty's mandate was issued four months before King's, but due to a stay that this Court entered on Feb. 4, 2010, in recognition of his pending state successor petition on lethal injection, CR-85-0211, Beaty's execution took place slightly after King's. On June 30, 2011, Arizona executed Richard Bible, whose mandate had issued on March 19, 2010. Rounding out the group, on July 19, 2011, Arizona executed Thomas West, whose mandate had issued on August 11, 2010.

warrants from Pima cases" to enable her to review those convictions and sentences.[19] Promising to "proceed expeditiously," Ms. Conover cited "the unfortunate part of this Office's history that led to several disbarments and the undesirable result of appellate litigation that was born out of prosecutorial misconduct." *Id.*

The Attorney General responded first by stating—erroneously—that Mr. Atwood's convictions and sentence were "obtained by the Attorney General's Office ..."[20] It is true that the trial prosecutor left the County Attorney's office for the Attorney General's before trial. However, he was sworn as a Special Pima County Attorney Deputy to allow him to continue with the case,[21] a fact recognized by the Attorney General's Office.[22] Compounding his error, Attorney General Brnovich rejected Ms. Conover's request out of hand, stating that any review by her office would be "unnecessary, as well as untimely," and that he "take[s] seriously the finality of jury verdicts, as well as the constitutional rights afforded crime victims to a prompt and final resolution of a criminal case."[23] Notably, he expressed no concern for the constitutional rights of the condemned.

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[19] Ex. 3, Letter (4/6/2021).

[20] Ex. 4, Letter (4/15/21).

[21] Ex. 5, Excerpt, Interview of John Davis (9/26/2013).

[22] Ex. 6 at 5, Motion (11/20/1985).

[23] Ex. 4. Mr. Brnovich's deference to jury verdicts is misplaced in the case of Mr. Atwood's death sentence, which was imposed by a judge, not a jury.

The Attorney General's effort to expedite Mr. Atwood's execution impairs the County Attorney's effort to fulfill her ethical and legal duties. *See generally* ER 3.8. *See also In re Peasley,* 208 Ariz. 27, 35-34 (2004) (noting that "courts generally recognize that the ethical rules impose high ethical standards on prosecutors"). Contrary to the Attorney General's suggestion that investigation by the County Attorney would be unnecessary and untimely, the rules impose on Ms. Conover an ongoing duty to "inquire into" the "new, credible and material evidence" in a "a court in which [she] exercises prosecutorial authority …" ER 3.8(g)(2). *See also* ER 3.8(h) (when presented with evidence establishing innocence of defendant convicted in prosecutor's jurisdiction, prosecutor "shall take appropriate steps…to set aside the conviction").

The Attorney General handles most capital appeals and post-conviction proceedings, but that convention is required neither by rule nor statute. In contrast, A.R.S. §11-532(A)(1) grants county attorneys the authority to "conduct, on behalf of the state, all prosecutions for public offenses" within their county. Indeed, the ethical obligations outlined above make sense only if county attorneys retain prosecutorial authority even after a conviction is final.

The Attorney General not only refuses to fulfill this duty, but seeks to ensure the County Attorney cannot do so before Mr. Atwood is executed. Last year, his office repudiated a stipulation entered into to allow Mr. Atwood time to investigate

his innocence.[24] It opposed a stay to permit investigation. Most strikingly, it misleadingly argued that Mr. Atwood could bring innocence claims at a later date while simultaneously preparing, in secret, to moot future investigation by procuring the drugs necessary to resume executions and prioritizing his ahead of all but one other.[25] Now, it seeks to set Mr. Atwood's execution date and thereby truncate consideration of his pending claims before this Court related to his actual innocence and innocence of the death penalty. *State v. Atwood*, CR-20-0381-T/P. These actions and the Attorney General's devotion to "the finality of jury verdicts" renders hollow his representation that Mr. Atwood's case has been subjected to "stringent review."

The Motion also ignores the fact that Mr. Atwood's counsel—his first unconflicted counsel since the case left state court—have been precluded from meeting with him or conducting meaningful investigation for well over a year by the pandemic. Counsel, appointed in June 2019, were required to familiarize themselves with the massive file, which occupies more than 100 bankers boxes plus many videotapes and digital data, and litigate the issues pending before this Court. Only

[24] *See* CR-20-0381-T/PC, Petition for Review of a Special Action Decision of the Court of Appeals (10/13/2020), at 3-4.

[25] *E.g.* CR-20-0381-T/PC, State of Arizona's Response to Petition for Review of Denial of Post-Conviction Relief (11/13/2020), at 54 (arguing that denial of Mr. Atwood's requested stay occasioned no prejudice because "Rule 32 does not bar Atwood from raising an actual-innocence or newly discovered evidence claim in another successive proceeding").

then were counsel ready to begin investigation, a time that coincided with the pandemic-induced shutdown.

The Attorney General's proposed briefing schedule is the latest entry in a pattern of hostility to meaningful examination of Mr. Atwood's conviction and sentence. He would have this Court disregard Mr. Atwood's substantial pending claims and instead adopt an unprecedented, accelerated briefing schedule, all to ease the State's concerns surrounding compliance with its 2017 settlement obligations and ADCCR's execution protocol.

The Supreme Court has long recognized that the "qualitative difference" between death and other punishments requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson,* 428 U.S. at 305. The Attorney General's accelerated briefing schedule cannot be reconciled with that heightened need for reliability.

C. The State's Deficient Execution Planning Cannot Justify The Court Disfiguring Arizona's Procedural Rules.

The motion seeks to justify the truncated briefing schedule by pointing to ADCRR's execution protocol and the decision to use compounded pentobarbital as its method of execution, which together allegedly create a 90-day window during which the execution must be carried out, beginning at the date the warrant motion is filed. Mtn. at 2-3. The reality of the emergency alleged here is questionable. It was recently disclosed that the State has obtained enough of the necessary precursor

chemical to compound 200 lethal doses of pentobarbital.[26] If the compounded drug should expire during the course of litigation, 199 additional lethal doses would still remain.

Regardless, if the Attorney General does describe a genuine constraint on ADCRR's ability to carry out an execution, it is a problem of the State's own making. Neither this Court nor Mr. Atwood is obligated to trade orderly process for haste merely to accommodate the State's lack of foresight or discretionary choice of an illegally obtained, questionably sourced, and chemically specious[27] execution drug.

There are two sources of this artificial 90-day timetable, both attributable to theState's discretionary actions. First, ADCRR's protocol requires it to disclose a quantitative analysis of the execution drugs within 10 days of the filing of the warrant motion.[28] This provision implements a duty ADCRR assumed pursuant to a settlement it entered resolving a prior civil lawsuit.[29] Second, ADCRR has elected to use compounded pentobarbital as its execution drug, which the Attorney General represents has a 90-day shelf life from the date of compounding.[30] While the settlement agreement prohibits ADCRR from using expired drugs, it does not require

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[26] Ed Pilkington, The Guardian, "Revealed: Republican-led states secretly spending huge sums on execution drugs." (4/9/2021).

[27] *Id.*

[28] Mtn. at 2 (citing ADCRR Dep't Order 710, Attach. D, ¶C.2).

[29] *Id.*, Ex. C at 2.

[30] *Id.* at 2.

use of pentobarbital.[31] Similarly, ADCRR's protocol adopts pentobarbital as the execution drug of first resort but does not require that the department use a compounded form of the drug.[32]

The Attorney General's 90-day timetable was not unavoidable; it is a direct consequence of a series of choices, all made by the State. The State chose to enter the settlement agreement. Mr. Atwood, by contrast, was not party to that litigation. Both the election of pentobarbital and the choice to use its compounded version were likewise entirely the State's decisions. To the extent it finds itself constrained by the 90-day timetable, the State has only itself to blame.

Moreover, the Attorney General offers nothing to demonstrate the necessity of these choices. No explanation is offered as to why ADCRR elected to use compounded pentobarbital—the ultimate source of the 90-day timetable—as opposed to the non-compounded version of the drug, or a different drug altogether. While the choice of drug is within the discretion of the State (subject to constitutional and other limitations), the Attorney General makes no effort to justify an exercise of that discretion which allegedly requires the abandonment of both this Court's rules and all previous practice within this state. Mr. Atwood cannot have his procedural rights curtailed, much less be put to death, on so thin a record. At a minimum, this

[31] *See id.*, Ex. C.

[32] ADCRR Dep't Order 710, Attach. D, ¶C.

Court is entitled to know the reasons for ADCRR's election of pentobarbital and the suitability of alternatives before deciding whether to grant the Attorney General's unprecedented scheduling motion. If the Attorney General maintains his request for an expedited briefing schedule, this Court should remand for an evidentiary hearing to determine the reasonable necessity of the selection of pentobarbital as the execution drug.

D. The Proposed Briefing Schedule Seeks To Unlawfully Decree A New Procedural Rule.

The Arizona Constitution gives this Court exclusive power to "make rules relative to all procedural matters in any court." Ariz. Const. Art. 6 §5(5); *State v. Hansen*, 215 Ariz. 287, 289 ¶9 (2007) (Supreme Court's procedural rulemaking power is exclusive). A "rule" within the meaning of this power is any procedural requirement that "prescribes a course of conduct uniformly applicable to parties and their attorneys to govern the manner in which claims or demands are made or defenses asserted." *State ex rel. Romley v. Ballinger*, 209 Ariz. 1, 3 ¶9 (2004). If such a rule is incompatible with procedures promulgated by the executive or legislative departments, this Court's rule prevails. *Seisinger v. Siebel*, 220 Ariz. 85, 89 ¶8 (2009).

Pursuant to its rulemaking power, this Court adopted a number of rules relating to the timing of motions practice. *See e.g.*, Ariz. R. Crim. P. 1.9; ARCAP 6(a)(2). This Court further requires that the adoption, amendment, or abrogation of any rule follow a set, deliberative process—a petition, public comment, and, potentially, further study

by a committee—before a prospective rule change is considered, much less adopted. Ariz. Sup. Ct. R. 28(a). Even when this Court proposes a rule change, the proposal must be subject to public comment. Ariz. Sup. Ct. R. 28(b). Rules of procedure "may be revised only through [this Court's] inherent power to interpret procedural rules or through the procedures established in Rule 28." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420 ¶12 (2008).

Notwithstanding the foregoing requirements, the Attorney General presumes that this Court will abandon existing rules and adopt a novel, expedited procedure to govern a future motion for execution warrant. Mtn. at 4. This expedited schedule includes, inter alia, a *one-day* deadline for Mr. Atwood to respond to the Attorney General's warrant motion (decreased from 10),[33] while paradoxically giving the State six days to reply (increased from five), a major and substantive change in Mr. Atwood's procedural rights. *Compare id. with* ARCAP 6(a)(2). The Attorney General argues this accelerated motion practice—at least, accelerated for Mr. Atwood—is necessary because ADCRR, through its counsel, the Attorney General, settled the

[33] The Attorney General insists this one-day turnaround is not prejudicial because the State's warrant motion has already been disclosed. Mtn. at 4-5. This suggestion presupposes that counsel are able to devote themselves fully to preparing a response to the warrant motion, ignoring the tidal wave of activity surrounding late-stage capital litigation—such as this response. Moreover, the Attorney General concedes that under a normal schedule, pre-warrant litigation may last for months. *Id.* at 3 n.3. The notion that this process could be compressed into a single day is, beyond merely self-serving, absurd.

lawsuit from its last execution unthoughtfully and adopted an execution protocol that, together, would render the normal litigation period for such a motion inconvenient for the State. Mtn. at 2-3.

The novel warrant briefing procedure the Attorney General proposes would effectuate a new procedural rule. In addition to Mr. Atwood's and Mr. Dixon's cases,[34] the infirmities of ADCRR's execution protocol will undoubtedly lead the Attorney General to seek the same briefing schedule for all future warrant motions.[35] Because the proposed procedure would uniformly "affect[ ] the manner in which litigants assert or defend claims," it constitutes a rule. *Romley*, 209 Ariz. at 3 ¶8. Further, there is every reason to believe the Attorney General would apply his rule to the twenty—or more—executions he vows to oversee before his term concludes.[36] Such a "dramatic change" to the procedural rules governing execution warrants "should occur through rulemaking," not through the ad hoc proposal of a single party. *Craig v. Craig*, 227 Ariz. 105, 107 ¶15 (2011) (citing Rule 28).

Because the constitution gives this Court exclusive rulemaking authority, the Attorney General's efforts to abruptly introduce a new rule through litigation violates separation of powers. Ariz. Const. Art 3; *id.* Art. 6 §5(5). *See State v. Bejarano*, 158 Ariz.

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[34] No. CR-08-0025-AP.

[35] Should the Attorney General propose a different warrant briefing schedule for subsequent defendants, it would demonstrate that the novel procedure urged here is not actually necessary.

[36] *See* n.1, *supra*.

253, 254 (1988) (statute which invaded this Court's rulemaking authority violated separation of powers). Adoption of a rule outside the framework established by Rule 28 is impermissible, both as a circumvention of this Court's rulemaking procedures and as a violation of Mr. Atwood and other capital defendants' rights to due process. *Cullen*, 218 Ariz. at 420 ¶12; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542 (1978) (recognizing right to procedural due process in rulemaking); U.S. Const. amends. V, XIV. This is particularly true here, where the proposed rule diminishes the procedural rights of Mr. Atwood and any other Arizona defendant facing an execution warrant. The Attorney General offers no explanation why this Court can or should abandon the prescribed rulemaking process in favor of a makeshift rule meant to bailout the shortcomings of an execution protocol neither Mr. Atwood nor this Court played any role in writing.

E. This Court Has Discretion To Deny A Motion For Execution Warrant.

In justifying the expedited briefing schedule he proposes, the Attorney General asserts that when the State moves this Court to issue an execution warrant, this Court "has no discretion to deny the warrant." Mtn. at 5. In support of this argument, the Attorney General points to what he asserts is mandatory language in the Warrant Statute and associated rule. *Id.* at 5-6 (citing A.R.S. §13-759(A), Ariz. R. Crim. P. 31.23(b)). Because such a mandatory reading of that statute and rule would render both unconstitutional, however, the Attorney General is wrong, and this Court has discretion to deny the State's warrant motion. Plainly, if the Attorney General were

correct, this scheduling motion would be unnecessary because, upon a warrant motion, the Court would have nothing to consider.

The Attorney General's argument is at odds with past warrant practice. As the Attorney General acknowledges, previous warrant litigation lasted months, an eventuality the scheduling proposal is expressly designed to avoid. Mtn. at 3 n.3. It is unclear why warrant motion litigation would last so long if, as the Attorney General suggests, the question before this Court will be a very narrow one.

The answer to this apparent discrepancy is that the Warrant Statute is not mandatory. As this Court has observed, "[a]lthough the word 'shall' usually indicates a mandatory provision, the word has also been construed to indicate desirability, preference, or permission." *Ariz. Downs v. Ariz. Horsemen's Foundation*, 130 Ariz. 550, 554 (1981). See also *id.* (collecting cases). The statutory word "shall" should be given "a directory sense rather than in a mandatory sense" when necessary to preserve the constitutionality of a statute. *Id.* at 554-55. *See also Dep't of Rev. v. So. Union Gas Co.*, 119 Ariz. 512, 514 (1978) (facially mandatory language may be read as merely directory when latter construction better effectuates the will of the legislature). Here, a mandatory reading of the Warrant Statute would unconstitutionally confer the inherently judicial power to issue an execution warrant to the Attorney General, in violation, once again, of separation of powers.

The Arizona constitution establishes separate judicial, legislative, and executive departments and provides "no one of such departments shall exercise the powers

properly belonging to either of the others." Ariz. Const. Art. 3. This separation of powers requirement is "part of an overall constitutional scheme to protect individual rights." *State v. Prentiss*, 163 Ariz. 81, 84 (1989).

The constitution further vests the State's judicial power in the judicial department, headed by this Court. Ariz. Const. Art. 6 §1. To determine whether a statute violates separation of powers, this Court asks (1) the essential nature of the power being exercised; (2) the legislature's degree of control in the exercise of that power; (3) the legislature's objective; and (4) the practical consequences of the action. *State ex rel. Woods v. Block*, 189 Ariz. 269, 276 (1997). This approach "preserves the essential goal of the separation of powers theory," which is to prevent "the concentration of the whole power of two or more branches in one body." *Id.* (quotation omitted).

Under a mandatory reading, the Warrant Statute violates separation of powers. First, the power to issue an execution warrant is inherently judicial. The warrant, which instructs the director of ADCRR to carry out the execution, is analogous to the mandamus power that is constitutionally vested in this Court. Ariz. Const. Art. 6 §5(1); *Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs*, 249 Ariz. 396, 404 ¶16 (2020) (writ of mandamus compels a public official to perform a non-discretionary duty imposed by law). By vesting power to issue execution warrants in this Court, the statutory scheme itself acknowledges that the power to issue execution warrants is judicial in nature. *See State v. Joubert*, 518 N.W.2d 887, 893-95 (Neb. 1994)

(state supreme court has statutory and inherent power to set execution dates and issue death warrants). Indeed, if this Court's role was merely to mechanically approve the discretionary actions of the Attorney General, it would be more sensible to vest the warrant power in the executive, as is the case in other capital jurisdictions. *See e.g.*, 28 CFR §26.3; Fla. Stat. §922.052(2)(b).

Second, under a mandatory reading, the legislature's encroachment on the judicial power is complete, as the statute *requires* this Court to issue the warrant, essentially transferring all discretion to the Attorney General.

Third, regarding the objective of the legislature, the question is whether the legislature intended to foster cooperation between the judicial and executive departments or, conversely, to establish the executive's superiority over this Court in an area that is essentially judicial. *Block*, 189 Ariz. at 277. Because it would render this Court subservient to the Attorney General, only the latter interpretation of the legislature's objective is tenable under a mandatory reading of the Warrant Statute.

Finally, the practical consequences of the Warrant Statute, if mandatory, are extreme. Under the Attorney General's reading, this Court has *no* discretion in the exercise of a judicial power. Instead, this Court is reduced to a rubber stamp acting at the direction of the executive department, and there would be no independent check on the Attorney General's ability to set execution dates.

Because it would divest this Court of an inherently judicial power and transfer it to the executive, the mandatory reading of the Warrant Statute urged by the

Attorney General is unconstitutional. This Court must therefore save the statute by rejecting the Attorney General's interpretation and instead read it as merely directory. *Ariz. Downs*, 130 Ariz. at 554. This Court therefore has discretion to decide whether or not to issue an execution warrant when presented with a motion by the State.[37]

As with his efforts to rewrite procedural rules on the fly, the suggestion that this Court lacks power to deny a motion for an execution warrant is of a piece with similar efforts by the Attorney General to unlawfully expand the powers of that office. This Court recently rejected those efforts. *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127 (2020) (rejecting Attorney General's claim that statute grants that office open-ended discretion to prosecute any action he deems to advance the state's interest). It must do so again here.

F. The Proposed Briefing Schedule Is Unconstitutional In Light Of Disruptions Caused By The COVID-19 Pandemic.

Mr. Atwood has previously outlined to this Court the myriad disruptions to basic defense functions caused by the pandemic.[38] These disruptions are substantially

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[37] The Attorney General's argument that Criminal Rule 31.23(b) makes issuance of a death warrant mandatory on the State's motion also fails the separation of powers hurdle. Just as the constitution forbids one department from usurping the powers of another, it also provides that one department may not completely delegate its own powers to another. *Ariz. Downs*, 130 Ariz. at 554; *State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971). A mandatory reading of Rule 31.23(b) would impermissibly delegate this Court's warrant issuing power to the executive department.

[38] CR-20-0381-T/PC, Petition for Review of a Special Action Decision of the Court of Appeals (10/13/2020), at 8-12.

still in place, not least of all because ADCRR continues to prohibit attorney-client visitation, seriously impeding Mr. Atwood's ability to consult with counsel regarding innocence investigation, warrant litigation, clemency, and any other subject. Proceeding with Mr. Atwood's execution under the Attorney General's proposed schedule before these disruptions are fully mitigated would violate Mr. Atwood's rights to due process and the assistance of counsel. U.S. Const. amend. V, VI, XIV.

It would also be unsafe to schedule executions while COVID-19 remains a threat to the community. ASPC-Eyman, where Mr. Atwood is housed, has reported over 2,000 prisoner cases of the virus, or almost 40% of the complex's inmate population.[39] An analysis of recent federal executions concluded that they were "superspreader" events which contributed to a rapid spread of the virus.[40] Under these conditions, proceeding with executions as the Attorney General urges would pose a grave risk to prisoners, staff, witness, and the broader community. That danger cannot be tolerated.

III. Conclusion

For the reasons detailed above, it is respectfully submitted that the Motion be denied.

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[39] *ADCRR COVID-19 Dashboard*, ADCRR, https://corrections.az.gov/adcrr-covid-19-dashboard (last visited Apr. 20, 2021)

[40] Michael Tarm et al., Associated Press, "AP analysis: Federal executions likely a COVID superspreader" (2/5/2021).

RESPECTFULLY SUBMITTED this 20th day of April, 2021.

/s/Natman Schaye
Natman Schaye
Sam Kooistra

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