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 MOTION FOR ASSIGNMENT FOR EVIDENTIARY DEVELOPMENT

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Appellant Frank Atwood, through counsel, moves this Court for an order directing the holding of an evidentiary hearing to determine whether sufficient factual bases exist for the alteration of the orderly motion practice established by this Court's Rules as sought by the Attorney General's pending Motion to Set Briefing Schedule for Warrant of Execution ("Scheduling Motion"). Specifically, that motion claims that the Court's orderly motion practice must be altered to meet the State's alleged 90-day span before the compounded drugs it has chosen under its protocol will have, in effect, expired. Mr. Atwood further requests that this Court appoint a special master to conduct this hearing or, in the alternative, assign this matter to an appropriate superior court division to conduct it. This motion is brought pursuant to the constitutional guarantees to due process and to be free from cruel and unusual punishment Ariz. Const. II, §§4, 15, Art. VI, §5 cl. 4; U.S. Const. Amends. V, VIII, XIV; and A.R.S. §12-2103(A).

As described below, the Attorney General raises factual issues in his Scheduling Motion that are neither matters of judicial notice nor any other manner of acceptance without proof. The Scheduling Motion itself is *premised* upon these factual issues for which the Attorney General has proffered no evidence. It is also premised on two documents to which Mr. Atwood had no opportunity to contribute: ADCRR Dept. Order 710, and the settlement agreement in 2017 that the Attorney General reached in *Wood, et al., v. Ryan*, U.S. District Court for the District of Arizona case no. CV-14-

01447-PHX-NVW (the "Wood Settlement").[1] While Mr. Atwood does not dispute the propriety of this Court deciding the Scheduling Motion, it must do so premised upon factual findings rather than unsubstantiated claims. At bottom, a mere motion cannot "transform[] this court into a factfinder resolving disputed issues of fact." *Miller v. Bd. of Supervisors*, 175 Ariz. 296, 301 (1993).

ARGUMENT

On April 6, 2021, the Attorney General filed the Scheduling Motion asking for an expedited warrant briefing schedule based on the purported expiration of the State's compounded pentobarbital, as well as on constraints imposed by the State's lethal injection protocol and the Wood Settlement that require the State to provide Mr. Atwood "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." Scheduling Motion at 2. *Id.* at 2-3.

In his response, Mr. Atwood argues that the Attorney General failed to provide any evidence to support the existence of the alleged emergency which necessitates an expedited briefing schedule, and he suggests that more evidence is needed before this Court can fairly consider the Attorney General's extraordinary request. Response to

[1] Mr. Atwood was not a party to that litigation. *See Wood*, No. 2:14-cv-1447-NVW-JFM, Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claims Six and Seven; Doc. 186 (Jun. 21, 2017 D. Ariz); Order for Dismissal of Claims Six and Seven; Doc. 187 (Jun. 22, 2017); attached as Exhibit C to the Scheduling Motion.

Motion to Set Briefing Schedule for Motion for Warrant of Execution (4/20/2021), at 10-13 ("Scheduling Motion Response"). In his Reply, the Attorney General does not acknowledge the factual gaps identified by Mr. Atwood, much less address them. Instead, he simply reasserts, without support, that the State's chosen drug has "a 90-day shelf life" after it is compounded.[2] Reply (4/27/2021), at 7-8.

The Attorney General's Scheduling Motion disclosed the State's choice of compounded pentobarbital as its execution drug,[3] and relies on that selection as somehow establishing that expedited, novel briefing is necessary. Specifically, the Attorney General claims, without support, that the State will have only 90 days from the filing of its warrant motion to carry out the execution. Scheduling Motion at 2. But, at an evidentiary hearing, Mr. Atwood will present scientific evidence establishing that compounded pentobarbital becomes unusable, at the latest, in *half* that time—45 days.[4] The Scheduling Motion raises grave questions about the State's intention to use

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[2] The State's casual use of "shelf-life" betrays a disregard for vital distinctions between manufactured pharmaceutical products and the niche industry of compounded pharmaceuticals. While the former products indeed possess a shelf-life, regulations governing the latter contemplate a "beyond-use date." *See infra* n.4.

[3] As Mr. Atwood has previously explained, the selection of compounded pentobarbital was completely within the State's discretion, as neither the protocol nor the Wood Settlement required the selection of that drug in that form. Scheduling Motion Response at 11-12.

[4] The United States Pharmacopeia and National Formulary ("USP-NF") provides guidelines for pharmaceutical products which serve as the "official compendium" for pharmaceutical regulation under Arizona law. A.R.S. §32-1901(61). *See also* USP, "USP and FDA Working Together to Protect Public Health," *available at* https://www.usp.org/about/public-policy/usp-fda-roles (last accessed 4/27/2021).

compounded pentobarbital. Rather than the 90-day window—which would likely permit, without need of an expedited schedule, full briefing of the warrant motion followed by the statutory 35-day period from warrant to execution, A.R.S. §13-759(A)—the State's choice of compounded pentobarbital actually forecloses its ability to carry out a lawful execution due to the drug's beyond-use date and the State's aforementioned obligation to conduct quantitative testing on the compounded chemicals. The need for evidentiary development could hardly be starker or have more importance.

Additionally, the Attorney General provides no evidence that the State has conducted the requisite testing on the powder form of the chemicals it has procured for compounding into injectable pentobarbital. In order for the State to even seek an execution warrant and thereby put in motion its compounding of pentobarbital into an injectable liquid form, it would first need to have determined that the active pharmaceutical ingredients (API) of the source powder are viable. By contrast, the federal government began the process of obtaining and testing drugs nearly two years

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USP-NF guidelines provide that high-risk level compounded sterile preparations ("CSPs")—a category that includes compounded pentobarbital—have a maximum beyond-use date of 45 days. Exhibit 1, United States Pharmacopeia, General Chapter 797, *Pharmaceutical Compounding – Sterile Preparations* (2018), at 5-6. *See also id.* at lines 30 (providing that "beyond-use date is determined from the date or time the preparation is compounded."). Notably, this maximum 45-day beyond-use date also applies to low- and medium-risk CSPs. *Id.* at lines 32. Arizona law requires compounded drugs adhere to before-use dates set by USP-NF. Ariz. Admin. Code. §R4-23-410(B)(3)(d).

before it resumed executions in July 2020. During this process, the government discovered that the first batch supplied to it was riddled with impurities that could impair potency.[5] Presently, the Scheduling Motion's overarching premise of 90 days from warrant motion to execution is made without any factual support to allow any conclusion that such a span is founded on purity and potency testing, as it must be in order to satisfy the applicable law (*supra*) and the State's settlement obligations.[6]

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[5] According to Raul Campos, Associate Warden at the Federal Medical Center at Carswell, Texas, upon delivery from the bulk manufacturer, an initial sample of the pentobarbital's API, *viz.* "one gram of pentobarbital sodium powder," was tested on October 26, 2018, and failed. Exhibit 2, *Roane et al. v. Barr*, No. 1:19-mc-00145-TSC, Declaration of Raul Campos, Doc. 36-1 at 2 (Nov. 12, 2019 D. D.C.) ("Campos Declaration"). As Prof. Michaela Almgren has explained, the failed testing on November 6, 2018, raised serious concerns as to the potency, and thus efficacy, of the compounded drug in a lethal injection procedure. Exhibit 3, *Roane*, *supra*, Declaration of Dr. Michaela Almgren, Doc. 26-15 at 9-10. After this initial failure, the manufacturer produced an additional 10 grams of API for Bureau of Prisons testing on February 1, 2019, which was ultimately found to conform to USP-NF specifications. Exhibit 2, Campos Declaration at 2. Thereafter, the Bureau of Prisons procured 150 grams of the given API. *Id.*

[6] Further, earlier this month media investigation revealed that ADCRR received pentobarbital sodium salt—the API used in compounded pentobarbital—from an unknown supplier in unlabeled jars and boxes. Ed Pilkington, The Guardian, "Revealed: Republican-led states secretly spending huge sums on execution drugs." (4/9/2021). If accurate, this would be a violation of federal law, which imposes strict labeling requirements. 21 U.S.C. §352. *See also* A.R.S. §32-1967(D)(1) (requiring compounded drugs comply with federal law). Arizona has previously relied on questionable sources for drugs used in lethal injections, including once illegally obtaining drugs from a wholesaler operating out of the back room of a London driving school. Owen Bowcott, The Guardian, "London firm supplied drugs for US executions." (1/6/2011).

Under the Wood Settlement and ADCRR's resulting protocol,[7] the quantitative chemical analysis required 10 days after a warrant motion must supply scientific bases for determining whether the particular compounded pharmaceuticals in question will function in a lethal injection as intended—that is, whether the chemicals in the injectable form are sufficiently potent and stable to cause death and to do so in the manner set forth in the protocol and without violating the Eighth Amendment prohibition against cruel and unusual punishments. Thus, such quantitative analysis must supply data under the prevailing scientific standards for pharmaceutical compounding in relation to (i) potency, (ii) pH, (iii) osmolarity, (iv) stability, and (v) sterility.[8] In short, the Scheduling Motion asks this Court to jettison precedent and its own procedures to accommodate the exigencies from the 10-day testing requirement of the State's chosen lethal drug, but provides no evidence that the emergency situation it describes is real or—crucially—that its choice of lethal drug is viable for use under the governing protocol resulting from the Wood Settlement. It is well settled, even since territorial days, that, where evidence is conflicting, this Court will not act as a finder of fact. *Steinfeld v. Zeckendorf*, 10 Ariz. 221, 233 (1906). *See also Brown*

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[7] *See* ADCRR D.O. 710.

[8] *See generally, e.g.*, Exhibit 1, United States Pharmacopeia, General Chapter 797. These guidelines form the basis of both Arizona and federal pharmaceutical regulations. *See* n.4, *supra*.

v. Sears, Roebuck & Co., 136 Ariz. 556, 563 (App. 1983) (holding that trier of fact determines ultimate factual questions, not the appellate court).

The factual questions begged by the Scheduling Motion are not only complex but also raise whether the State is able to lawfully and constitutionally use the lethal injection drug that it has chosen. Neither this Court nor Mr. Atwood should be forced to take the Attorney General's representations about the necessity of an expedited briefing schedule as a matter of faith, *especially* when the assertions, on their face, raise the larger question of whether the State can proceed in the manner it intends without violating state and federal law.

This Court has long recognized that when, as here, a matter is before it under its original jurisdiction and "a question of fact is involved," the Court is to "remand it to the superior court to take evidence and determine the facts." *Donaldson v. Sisk*, 57 Ariz. 318 (1941). The Court has four reasonable alternatives regarding the assignment of the evidentiary hearing. First, it could employ its inherent powers to appoint a special master to conduct the hearing. *State v. Superior Court,* 39 Ariz. 242, 247-48 (1931) (the inherent powers of the courts "may be defined as such powers as are necessary to the ordinary and efficient exercise of jurisdiction."); A.R.S. §12-2013(A); *State v. Smith*, 184 Ariz. 456, 459 n.2 (1996), *quoting State v. Superior Court*, 39 Ariz. at 247-48 ("this court may order that 'other proceedings be had, as justice may require …'").

Second, it could direct the hearing to be conducted by the Maricopa County Superior Court. This is the county from which the companion *Dixon*[9] case arose, as well as where the vast majority of death verdicts originate.[10] It is also the county in which, at the State's discretion, all civil suits against it would be tried. A.R.S. §12-822(B). The factual issues raised by the Scheduling Motion—largely revolving around matters of science—are more akin to civil than criminal litigation.

Third, the Court could send the matter to Pinal County Superior Court, the location where all male death row inmates are held and where executions are conducted. This assignment would be consistent with the Arizona Constitution, Art. VI, §18 ("The superior court or any judge thereof may issue … writs of habeas corpus on petition by or on behalf of a person held in actual custody within the county."). *See also Eyman v. Deutsch*, 92 Ariz. 82, 84 (1962) (Constitution permits "use of the writ of habeas corpus in the county where any person is in actual custody.").

Finally, the matter could be returned to Pima County Superior Court, where Mr. Atwood was sentenced. Whatever the venue, such a remand is called for here, given the constitutional requirement that death sentences be subjected to heightened

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[9] This Court's case no. CR–08–0025–AP.

[10] *See* Progress Report of the Capital Case Oversight Committee to the Arizona Judicial Council (Dec. 2018) at 7, *available at* https://www.azcourts.gov/Portals/74/CCOC/2018ReportCCOC.pdf?ver=2019-11-25-132849-687 (last accessed 4/28/2021).

standards of reliability before they may be carried out. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

For the foregoing reasons, Mr. Atwood respectfully requests that this motion be granted.

RESPECTFULLY SUBMITTED this 28th day of April, 2021.

/s/*Natman Schaye*
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