ARIZONA SUPREME COURT

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

Atwood asks this Court to appoint a special master, or to remand to superior court, for the purpose of holding an evidentiary hearing "to determine whether sufficient factual bases exist for the alteration of the orderly motion practice established by this Court's Rules." Motion for Assignment ("Motion"), filed 4/28/21. Atwood contends that a factual dispute exists as to the beyond-use date of the compounded pentobarbital the Arizona Department of Corrections, Rehabilitation and Re-entry (ADCRR) intends to use in his execution. *Id.* He also assails the State's efforts to comply with ADCRR's lethal-injection protocol,

which a civil settlement requires ADCRR to follow regardless whether Atwood was a party to that settlement.[1] *Id.* This Court should deny Atwood's motion.

The State has sought a simple *briefing schedule*, which gave Atwood advanced notice of its intent to seek an execution warrant in his case. This advanced notice could, in turn, have permitted Atwood to commence expeditiously his end-stage litigation, including any appropriate civil actions related to the anticipated use of compounded pentobarbital. In fact, many of the complaints in Atwood's present motion, as discussed below, are more appropriately raised in a state or federal civil suit, or addressed through negotiations with ADCRR. Instead of pursuing these avenues, and thus avoiding last-minute crisis litigation, Atwood has elected to inundate this Court with various motions (the present is the first of two motions seeking a remand for an unnecessary evidentiary hearing) and to attempt to convince a county attorney to intervene in this case notwithstanding her lack of jurisdiction. *See* Notice of Filing Supplemental Exhibit to Reply in Support of Motion to Set Briefing Schedule, filed 4/30/21.

The present motion fails because there is no material factual dispute bearing on the State's motion to set a briefing schedule. Atwood's complaints rest

[1] If Atwood is so troubled by the protocol's provisions (which resulted from extensive litigation between the Arizona Attorney General and the Federal Defender's Office, and exists to shield inmates from unconstitutional suffering and to ensure humane and orderly lethal-injection executions), he is free to elect to be executed by lethal gas. *See* A.R.S. § 13–757(B).

primarily on his quarrel with the 90-day beyond-use date for compounded pentobarbital identified in the State's motion to set a briefing schedule. But even assuming, without conceding, that the beyond-use date is only 45 days after compounding as Atwood believes, that fact does not invalidate the State's requested procedure. *See* Motion, at 3–4. To the contrary, under the State's proposed briefing schedule, ADCRR could still comply with all disclosure obligations and conduct Atwood's execution within 45 days of the drug being compounded. Any factual dispute is therefore immaterial to the State's motion, and is best addressed in a different legal forum.

Atwood's remaining arguments fare even worse at establishing a material factual dispute. Atwood directs a litany of challenges at the pentobarbital to be used, all of which are far outside the scope of the present proceeding.[2] To be sure, Atwood will have a full opportunity to challenge the pentobarbital through appropriate legal channels. On request, he will receive from ADCRR disclosure of

[2] Atwood's contention that the choice of compounded pentobarbital was "completely within [ADCRR'S] discretion," Motion, at 3 n.3, ignores the nationwide scarcity of lethal-injection drugs resulting from the "guerilla war against the death penalty" waged by its opponents. *See Glossip v. Gross*, 135 S. Ct. 2726 (2015), No. 14–7955, Transcript of Oral Argument at 14 (question by Alito, J.); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) ("The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay.").

testing results on the compounded drug within 10 days of the State's filing of a motion for warrant of execution; this disclosure will include certification of the beyond-use date. *See* ADCRR Dep't Order 710, Attach D, ¶ C.2 (requiring testing results to be disclosed on request within 10 days of filing motion for warrant of execution).[3] Atwood can then use this information to contest the drug's use as he wishes. But his challenge to the drug's quality, efficacy, and procurement is inappropriate for both this Court and this proceeding.

Atwood specifically asserts (citing nothing in support) that ADCRR has failed to conduct "requisite testing" on the uncompounded pentobarbital powder. Motion, at 4. He further contends (again citing nothing) that ADCRR must conduct such testing before the State can "even seek" an execution warrant.[4] *Id.* Assuming, again without conceding, that Atwood is correct in his apparent interpretation of the protocol as requiring testing on the uncompounded

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[3] The protocol is publicly available at https://corrections.az.gov/sites/default/files/policies/700/0710_031021.pdf.

[4] Atwood also engrafts additional, unwritten testing requirements onto both the protocol and the settlement. *See* Motion, at 6. The protocol requires disclosure of the results of a "quantitative analysis." *See* ADCRR Dep't Order 710, Attach D, ¶ C.2. The separate settlement defines the quantitative analysis as including, "at a minimum, the identity and concentration" of the chemical. *See* Motion to Set Briefing Schedule for Motion for Warrant of Execution, Ex. C, at 2. ADCRR is not required to provide the additional, heightened testing that Atwood highlights in his motion.

pentobarbital—as opposed to the compounded chemical that will actually be used—the protocol's disclosure requirements have not been triggered; accordingly, there is no "requisite testing" to disclose at this juncture. *See* ADCRR Dep't Order 710, Attach D, ¶ C.2. And ADCRR is not required, under the protocol or otherwise, to conduct any testing prior to the State seeking an execution warrant.[5]

Likewise unavailing is Atwood's speculation that the forthcoming quantitative testing *may* reveal impurities or other factors affecting the drug's efficacy. Motion, at 4–5. If the testing reveals any legitimate concerns, Atwood can seek a stay of the warrant or, perhaps, even negotiate a voluntary dismissal by the State. But the mere possibility that the pentobarbital may not test satisfactorily is not a reason to deny the simple briefing schedule the State has requested.

[5] Atwood also cites the federal Food, Drug, and Cosmetic Act (FDCA), in conjunction with a newspaper article, to suggest that the supply of pentobarbital Arizona obtained may be misbranded. *See* Motion at 5 n.6 (citing 21 U.S.C. § 352 and A.R.S. § 32–1967(D)(1)). Atwood neglects to mention that the United States Department of Justice has determined that drugs intended for use in lethal injection are "not subject to regulation under the FDCA." *See Whether the Food and Drug Administration has Jurisdiction over Articles Intended for Use in Lawful Executions*, https://www.justice.gov/olc/opinion/file/1162686/download, at 1–2 (last accessed May 3, 2021). In any event, this question, like most others Atwood raises, is for a different forum and a different proceeding.

Accordingly, there is no material factual dispute to be resolved before ruling on the State's motion.[6] Rather, Atwood's concerns are not challenges to the State's proposed procedure but, instead, are thinly veiled attacks on ADCRR's anticipated use of compounded pentobarbital. As such, his arguments should be raised in a separate method-of-execution challenge or other civil action in state or federal court, which he could have already initiated. This Court should deny Atwood's motion.

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[6] Should this Court disagree and order an evidentiary hearing in this cause number, that hearing should be held in Pima County Superior Court. *See* Motion, at 7–9. This appellate case stems from the underlying criminal judgment and death sentence, which was entered by that court. But the State maintains that a hearing is inappropriate in any event, for the reasons discussed above.

DATED this 7th day of May, 2021.

Respectfully submitted,

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