

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

**MOTION TO MODIFY BRIEFING
SCHEDULE**

(Capital Case)

The State of Arizona hereby respectfully moves to modify the briefing schedule this Court established in this matter for the State’s Motion for Warrant of Execution under A.R.S. § 13–759(A). The State’s anticipated motion has previously been disclosed, *see* Motion to set Briefing Schedule, filed 4/6/21, at Ex. A, and it is presently due to be filed on July 21, 2021, for an anticipated conference date of August 24, 2021. Order, filed 5/21/21. Should this Court grant an execution warrant on August 24, Atwood’s execution would occur 35 days later, on September 28, 2021. *See* A.R.S. § 13–759(A). This request is supported by the existence of “highly extraordinary circumstances,” *see* Order, filed 5/21/21, in the form of new information recently acquired from the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR) bearing on the compounded

pentobarbital's beyond-use date. Moreover, Atwood will not suffer any prejudice from modifying the briefing schedule.

ADCRR's retained compound pharmacist previously advised ADCRR that the pentobarbital to be used in Atwood's execution would have a 90-day beyond-use date once compounded. *See* Motion to Set Briefing Schedule, filed 4/6/21, at 2. The State moved for a briefing schedule in good-faith reliance on that opinion. The pharmacist, however, has now revised that opinion and has advised ADCRR that, until certain specialized testing of a sample batch is conducted, pentobarbital that is compounded for Atwood's execution will have an initial beyond-use date of 45 days. The specialized testing could extend the beyond-use date of subsequently compounded doses from the same batch of pentobarbital. However, this testing has not yet commenced and will not be completed in time to accommodate the briefing schedule.

As discussed in previous pleadings, ADCRR's compound pharmacist will compound the pentobarbital shortly after the date on which the State's Motion is filed to comply with the protocol's testing and disclosure requirements. *See* ADCRR Dep't Order 710, Attach. D, ¶ C.2.¹ Under the current briefing schedule—which was set in reliance on the previously quoted 90-day beyond-use

¹ Publicly available at https://corrections.az.gov/sites/default/files/policies/700/0710_031021.pdf.

date—the pentobarbital will expire prior to Atwood’s anticipated execution on September 28. Under the terms of a civil settlement, ADCRR may not “use or select for use in an execution” any chemicals having a beyond-use date falling before the date of an execution. *See* Motion to Set Briefing Schedule, filed 4/6/21, at Ex. C, pp. 2–3, ¶ (2)(f).

Accordingly, the State respectfully requests that this Court modify the briefing schedule currently in place so that the September 28 projected execution date will fall within the 45-day initial beyond-use date of the compounded pentobarbital. As stated above, this Court has identified an anticipated conference date of August 24, 2021, *see* Order, filed 5/21/21, and the State has already disclosed to this Court and counsel a copy of the Motion for Warrant of Execution that it intends to file. *See* Motion to Set Briefing Schedule, filed 4/6/21, at Ex. A.

The State thus proposes the following briefing schedule:

- The State shall file its Motion for Warrant of Execution no later than 5:00 p.m. on August 13, 2021;
- Atwood shall respond to the Motion no later than 5:00 p.m. on August 17, 2021;
- The State shall file its reply, if any, no later than 5:00 p.m. on August 18, 2021.

Atwood will not suffer any prejudice from modifying the briefing schedule. This is the first request for any sort of modification to the briefing schedule. Moreover, Atwood’s current deadline for responding to the State’s motion (a copy

of which he has had for months, thereby enabling him to begin work on his response) is August 4, 2021. *See* Order, filed 5/21/21. The State’s proposed modification would thus give him an additional 13 days to prepare his response. And as discussed in prior pleadings, *see* Motion to Set Briefing Schedule, filed 4/6/21, at 5–6, this proceeding is limited to the narrow question whether the “conviction and sentence of death [have been] affirmed and the first post-conviction relief proceedings have concluded.” A.R.S. § 13–759(A); *see* Ariz. R. Crim. P. 31.23(b). Atwood’s response to this question should therefore be fairly easy to prepare.²

Accordingly, for the foregoing reasons, the State respectfully moves to modify the briefing schedule that the Court established in this matter for the State’s Motion for Warrant of Execution.

² In the event this Court is not inclined to modify the briefing schedule as discussed above, then the State respectfully moves in the alternative for a temporary stay of the briefing schedule. This option is not preferred because it would necessitate scheduling a new conference date for the execution warrant and, by extension, result in a new projected execution date. This would create unnecessary delay and emotional trauma for the victims in this aging capital case. *See* Ariz. Const. Art. 2, § 2.1(A)(10) (entitling victim to prompt and final conclusion of the case). However, this option would allow ADCRR to confirm that the compounded chemical will carry a longer beyond-use date. Should this Court stay the proceeding, the State will promptly notify this Court and counsel when testing is complete and any new beyond-use date determined.

DATED this 22nd day of June, 2021.

Respectfully submitted,

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