

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 OPPOSITION TO MOTION TO SET BRIEFING
SCHEDULE FOR MOTION FOR WARRANT OF EXECUTION AND
CROSS-MOTION FOR ASSIGNMENT FOR EVIDENTIARY
DEVELOPMENT**

Natman Schaye
Sam Kooistra
Arizona Capital Representation Project
25 S. Grande Ave.
Tucson, Arizona 85745
Phone (520) 229-8550
natman@azcapitalproject.org
Arizona State Bar No. 007095
sam@azcapitalproject.org
Arizona State Bar No. 032776

Counsel for Frank Jarvis Atwood

I. POSTURE

The present scheduling motion represents the State’s second effort in nine months to set a date for Mr. Atwood’s execution. Motion to Set Briefing Schedule for Motion for Warrant of Execution (1/5/2022) (the “Motion”). The first attempt began with the State’s filing of a scheduling motion on April 6, 2021. Motion to Set Briefing Schedule for Motion for Warrant of Execution (4/6/2021). In that motion, the State disclosed that it intended to use compounded pentobarbital to carry out a lethal injection execution of Mr. Atwood, and it asserted—wholly without evidentiary support—that its drugs had a 90-day “shelf life from the date of compounding.” *Id.* at 2. That motion also noted that the State’s lethal injection protocol required the disclosure of “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.” *Id.* Although unstated in the motion, that step in the protocol implements an obligation imposed by the *Wood* Settlement.¹ *See id.*, Exhibit C thereto, at 2. Because the drug had to be compounded to provide this analysis, the State argued that an expedited briefing schedule was necessary to ensure that Mr. Atwood’s execution could be carried out prior to the drug’s expiration. The motion accordingly proposed a schedule under which a motion for warrant of execution would be filed 16 days before this Court’s

¹ *See* §II(A), *infra*.

conference day, with Mr. Atwood given one day to respond and the State afforded six days to reply. *Id.* at 3-4.

Mr. Atwood opposed this motion on multiple grounds. Appellant's Response in Opposition to Appellee's Motion to Set Briefing Schedule for Motion for Warrant of Execution (4/20/2021). Mr. Atwood argued, *inter alia*, that the alleged 90-day timeframe from compounding to execution, could not justify the unprecedented expedited motion practice, as that timeframe was entirely attributable to two discretionary choices made by the state: the selection of compounded pentobarbital as opposed to some other drug, and the 10-day disclosure requirement found in the execution protocol and *Wood* Settlement. *Id.* at 11. In light of the State's failure to provide any evidence or explanation for these decisions and the record's silence on that point, Mr. Atwood suggested the matter should be remanded for evidentiary development before this Court ruled on the motion. *Id.* at 12-13. Mr. Atwood also noted that prioritizing him for execution over other inmates who has exhausted their appeals earlier was inconsistent with past Arizona practice, and he argued that scheduling his execution would frustrate review of claims then pending before this Court. *Id.* at 4-6, 9. In its reply, the State argued that the proposed expedited briefing process was intended only to ensure an "efficient and fair warrant process." Reply in Support of Motion to Set Briefing Schedule for Motion to Warrant of Execution (4/27/2021), at 7-10.

While that scheduling motion was still pending, Mr. Atwood filed a motion asking this Court to assign the matter for evidentiary development. Appellant's Motion for Assignment for Evidentiary Development (4/28/2021). Mr. Atwood noted that the State had failed to proffer any evidence in support of the supposed 90-day beyond-use date ("BUD") for compounded pentobarbital, the indispensable factual premise of the scheduling motion. *Id.* at 1-2. By contrast, he pointed to pharmaceutical regulations indicating that compounded pentobarbital has a BUD of at most 45 days and potentially much shorter, depending on storage conditions. *Id.* at 3-4 n.4. He also noted that the State's motion gave no evidence demonstrating that any testing whatsoever for potency or other measures had been conducted on the planned execution drugs. This silence was in contrast with the federal government's nearly two-year process of drug testing before it resumed executions in July 2020. *Id.* at 4-5. *See also id.* at 5 n.5 (discussing declarations documenting the federal government's execution preparations). Mr. Atwood argued that he "should [not] be forced to take the Attorney General's representations about the necessity of an expedited briefing schedule as a matter of faith," and asked that the cause should be remanded for evidentiary development to resolve the factual disputes raised by the State's motion. *Id.* at 7-9.

In its response, the State provided no factual support for its proffered 90-day timeline or any of the other factual disputes identified by Mr. Atwood. Response to Motion for Assignment for Evidentiary Development (5/7/2021). Instead, the State

argued that it had “sought a simple *briefing schedule*” and asserted that “there is no material factual dispute bearing on the State’s motion to set a briefing schedule.” *Id.* at 2 (emphasis original). The State insisted without elaboration that even with 45-day BUD, the procedure proposed in the scheduling motion was viable.² *Id.* at 3. It characterized Mr. Atwood’s motion as “not [a] challenge[] to the State’s proposed procedure but, instead, [a] thinly veiled attack[] on ADCRR’s anticipated use of compounded pentobarbital.” *Id.* at 6.

In reply, Mr. Atwood noted that the State “inexplicably refused to provide any evidence substantiating the 90-day mark” underlying the scheduling motion.

Appellant’s Reply to Response to Motion for Assignment for Evidentiary Development (5/14/2021), at 1. He further argued that the discrepancy between the unsupported 90-day BUD claimed by the State and his own evidence of a maximum 45-day period—a difference bearing on both the necessity of the proposed expedited scheduling and the ability of the State to lawfully carry out Mr. Atwood’s execution—belied the assertion that there was no material factual dispute, requiring evidentiary development. *Id.* at 3-6.

Thereafter, on May 21, 2021, this Court granted the scheduling motion in part. Rather than grant the compressed schedule asked for in that motion, this Court

² The State did not address that, per the regulations cited by Mr. Atwood, 45 days was that outside estimate for the drug’s viability, or whether the State’s procedures could ensure even that shortened viability window.

ordered the State to file its warrant motion on July 21, 2021, granting Mr. Atwood 14 calendar days to respond and the State seven calendar days to reply. Order (5/21/2021). The order noted that the motion would be considered at an anticipated conference date of August 24, 2021. *Id.* In the same order, this Court denied the pending motion for evidentiary development. *Id.*

However, Mr. Atwood's concerns about the State's unsubstantiated 90-day BUD proved to be justified. On June 22, 2021, the State filed a motion seeking modification of the May 21 order. Motion to Modify Briefing Schedule (6/22/2021). The motion stated that the State's retained pharmacist had "revised" their opinion and now "advised... 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." *Id.* at 2. The State provided that given a 45-day BUD, the compounded drugs would expire prior to Mr. Atwood's execution. It accordingly renewed its request for expedited briefing on the warrant motion. *Id.* at 2-3.

Mr. Atwood opposed the requested modification of the briefing schedule, noting that the 45-day BUD was hardly unforeseeable—Mr. Atwood himself had raised that fact, which the State disregarded out of hand. Appellant's Opposition to Motion to Modify, and Cross Motion to Vacate, Briefing Schedule (7/7/2021), at 12-13. Mr. Atwood asked that the briefing schedule be vacated and the State instructed "to seek a warrant when it is able to compound drugs and timely provide related testing information in a manner consistent with its legal obligations." *Id.* at 14. This

Court thereafter denied the motion to modify the briefing schedule, vacated the May 21 order, and authorized the State to “renew its scheduling motion after specialized testing to determine a beyond-use date for compounded doses of the drug.” Order (7/12/2021).

The present motion renews the efforts begun in April 2021. The current motion asserts that testing had been completed “establishing that the pentobarbital to be used in Atwood’s execution will have a beyond-use date of at least 90 days.” Mtn. at 2. As has been the State’s practice, no evidentiary support is provided to substantiate the alleged testing or purported 90-day BUD. Nevertheless, the State again requests expedited briefing, this time requesting that the motion be filed 30 days before this Court’s conference date, with Mr. Atwood given 10 days to respond and the State 5 days to reply. *Id.* at 4.

II. ARGUMENT

A. THE STATE SEEKS TO SUBVERT ITS OBLIGATIONS FOR TESTING LETHAL INJECTION CHEMICALS

Through a June 2017 stipulation and corresponding district court order, the State resolved, with the class of Arizona prisoners who may face execution, federal litigation concerning the State’s 2014 botched execution of Mr. Joseph Wood. *See* Ex. A (stipulation and order from *Wood* Settlement). Critical to judging the present Motion are two pharmaceutical testing obligations the State accepted as part of that

stipulation. *See* Ex. B (Declaration of James H. Ruble, PharmD, JD (1/20/22)), at 3 (¶ 13).

For purposes of this Motion, the first relevant obligation is the settlement’s BUD requirement. The State must establish that the chemicals it intends to use in executing the given prisoner (here, Mr. Atwood), has a BUD that is later than the execution date. *Id.* The second obligation to examine is ADCRR’s requirement “to produce ‘a quantitative analysis’ that reveals, ‘at a minimum, the identity and concentration of the compounded . . . chemical[.]’” *Id.*; Ex. A at 5 (Doc. 186 at 5) & 13-14 (Doc. 187 at 2-3).³ The State’s proposed briefing schedule subverts both of these obligations.

1. To Comply with the State’s Settlement Obligations, ADCRR’s Pharmacist Must Adequately Compound its Lethal Injection Chemicals *Before* the State Moves for an Execution Warrant

The Motion submits: “testing has now been completed, establishing that the pentobarbital to be used in Atwood’s execution will have a beyond-use date of at least 90 days.” Mtn. at 2. Actually, at most, ADCRR has tested compounded pentobarbital other than the batch to be used in Mr. Atwood’s execution. Per the State’s own representations, it has *not* yet compounded the pentobarbital that ADCRR intends for Mr. Atwood, and having not been compounded, the batch cannot yet be tested for BUD. This is not a meaningless semantic distinction, as BUD cannot be extrapolated

³ Also included as Ex. B to Appellee’s Motion.

between different batches of compounded pentobarbital. *See* Ex. B at 9 (¶¶ 40-41). ADCRR’s pharmacist thus currently has no knowledge of any extended BUD that *could* apply to the pentobarbital that *would* be compounded for use in Mr. Atwood’s execution. But that is precisely the BUD data that the State needs to provide to obtain a lawful execution warrant.

The Motion explains that “to ensure strict compliance with the [execution] protocol, ADCRR intends to carry out the execution during the drug’s 90-day shelf-life—established by the recent testing—from the date of compounding.” Mtn. at 2. The State makes it clear that it intends to compound the batch of pentobarbital it would use in Mr. Atwood’s execution only *after* it moves for an execution warrant. Mtn. at 3. Those representations fail; “recent testing” cannot establish a BUD for compounding that will be done at a later date. Ex. B at 10 (¶ 47).⁴ The BUD of the batch of pentobarbital that will ultimately be used to execute Mr. Atwood cannot be inferred from the BUD of a separate, earlier compounded batch—the science does not work that way. *Id.* at 9 (¶ 41).

The State is thus leaving to chance the decisive fact of what the actual BUD for the actual execution drugs will be. The State does this after mischaracterizing its

⁴ Prof. Ruble has explained the problem:

the State, through its pharmacist, must first establish the BUD for the specific batch of pentobarbital to be used in the specific execution *before* initiating a motion for an execution warrant. The State seems to explain that it will not compound the CSP to be used in Mr. Atwood’s execution until it files the motion for an execution warrant. This appears to reflect a deep misunderstanding of how a BUD is determined with respect to any specific CSP. Ex. B at 10 (¶ 47).

testing of one batch of compounded pentobarbital as providing certainty about the BUD of a to-be-compounded batch. *Id.* at 9-10 (¶ 44).

Further, under the State's scenario, when ADCRR's pharmacist does compound the intended pentobarbital batch at or around the date the State files its execution warrant motion, the pharmacist will not possibly know the BUD for the actual lethal injection chemicals at the moment the batch is made. *Id.* at 6 (¶ 28).

Reaching that conclusion requires multiple measurements over a substantial timespan, a procedure the State's proposal does not contemplate. *Id.*

Under the State's approach, the most that it may be able to aver when it files its execution warrant motion will be only what the empirics under the USP have established concerning a high-risk compounded sterile preparation ("CSP"), like pentobarbital. The outer-limit BUD for that will be, as highlighted in the litigation in this Court last spring, only 45 days. *Id.* at 5 (¶ 25). The pharmacist will be limited, *as a best case scenario*, to the USP-established BUD of 45 days for properly compounded high-risk CSPs pursuant to USP <797>. *Id.*

The State is thus poised to repeat the shambolic turn of events it engineered last spring due to ill-conceived motions premised on unsubstantiable BUD statements. First the BUD was 90 days. Then it was 45 days. *Supra.*

For the State to be able to offer a verifiable BUD greater than the empirical 45-day outer-limit under USP <797>, ADCRR's pharmacist must be able to conduct

competent testing over a timespan sufficient to apply established pharmaceutical methods to yield a specific BUD for the specific batch. Ex. B at 6 (¶ 28). But, according to this Motion, the State has no intention of proceeding in a scientifically sound way.

The State needs a scientifically supported BUD for the parties and this Court to understand the latest date for which an execution can be scheduled—and, crucially, whether that date is possible under the operation of the Arizona scheme (*see* A.R.S. §13-759(A)). The State has a clear, unobstructed path to obtaining a lawful execution date and that is simply to compound and test. It can return to the Court when it actually possesses a batch with a BUD sufficient to afford the ordinary motion practice and statutory date-setting process run its course.⁵

It is not merely the case that this Motion is wrongheaded on when and how it can establish a BUD. Rather, it is dangerous because it aims to eliminate, in effect, the other key testing obligation from the *Wood* Settlement. The Motion makes plain the State's intention regarding its settlement obligations. The State intends to avoid its obligations while exploiting the benefit of its bargain—the court-ordered resolution that has permitted this very attempt to resume executions with Mr. Atwood.

⁵ The recent experience in the federal death penalty executions from July 2020 through January 2021 sheds light on that path. Ex. B at 6, 8-9 (¶¶ 27, 37-38). Through its Bureau of Prisons, the federal government secured a compounding pharmacy to conduct extensive testing to demonstrate that the vials from its testing batch had an ample timeframe—according to the federal government, the tested batch possessed a year-long BUD. *Id.*

2. The State Seeks to Vitiating its Testing Obligation by Securing a Briefing Schedule that Would Afford Atwood Literally No Time to Evaluate ADCRR's Testing

a. Before Appellant's Response to an Execution Warrant Motion, The State is Obligated to Provide Crucial Testing of the Chemicals it Would Use in the Execution

The present Motion seeks not merely to rely on the foregoing violation of the *Wood* Settlement's requirement to establish a BUD later than the execution date. It further aims to eliminate the entire point of the requirement the State is now invoking to justify securing a fixed scheduling order from the Court. Namely, the State is leveraging its ten-day reporting requirement from the date it files its execution warrant motion. The State aims to eliminate the capacity of Mr. Atwood to make any use of the pharmacist's required testing by forcing Appellant to respond to the State's execution warrant motion in ten calendar days (Mtn. at 4), *which would be the same day* the State would be due to provide to Appellant the required testing data generated by ADCRR's pharmacist (Mtn., Ex. B (Doc. 187 at 2-3)).

Under the settlement, the provision of reliable testing results is intended to enable the condemned to examine the compounded chemicals to ensure that the particular batch would be capable, as a matter of pharmaceutical science, of causing death as intended under ADCRR's protocol. Ex. B at 3 (¶ 12). For the prisoners, the core benefit of the *Wood* Settlement may be its requirement of pharmaceutical testing to determine the stability of the compounded pentobarbital. *Id.* at 5 (¶ 22). Stability is

the central consideration because it measures the chemicals' potency over time; that is, it permits scientific establishment of whether, by a date in the future, the chemical will possess the potency it needs in order to work as it is intended to work in the execution protocol. *Id.* 5 (¶ 23-24).⁶ Testing may establish the compounded chemical's stability, but dedicated stability testing, alone, fails to account for the necessity of verified storage conditions between the dates of testing and the ultimate use, given that if a CSP is "not stored properly," it "can be damaged and rendered unusable" by inadequate refrigeration or other storage conditions. *Id.* at 10 (¶ 48). That vital factor dictates the requirement of verified, "contemporaneous logs of the temperature, humidity, and related conditions." *Id.* at 10 at (¶ 45).

A further essential factor to establish from such testing is sterility, which ensures that contamination will not compromise the compounded chemical's stability. *Id.* at 7 (¶ 32). Testing data must verify that the allocated batch of pentobarbital will not suffer in potency, in the end, due to contamination. *Id.* at 8 (¶ 34); *see generally Gissendaner v. Commissioner, Georgia Dept. of Corrections*, 803 F.3d 565 (11th Cir. 2015) (rehearsing stay of execution entered on eve of date due to emergence of "cloudy"

⁶ With respect to stability, Prof. Ruble's declaration sets forth the professional and scientific standards applicable to pharmacists, in order to satisfy the testing terms of the *Wood* Settlement[:] . . . (i) whether its pharmacist conducted serial tests for potency using an empirically validated, stability-indicating method, (ii) which stability-indicating method the pharmacist applied, (iii) empirical research documenting the efficacy of the State's chosen method in assessing the stability of compounded chemicals, to include quantification of the accuracy of the method, and (iv) the quantitative results of the State's testing.

Id. at 7 (¶ 31).

quality of compounded pentobarbital reflecting impurities and compromised potency).

The Motion argues that forcing Appellant to respond on the day Appellee must provide its testing data “will not prejudice Atwood.” Mtn. at 5. That could not be further from the truth. The State’s rhetoric implies that the testing data is an entirely hollow formality. Anything more than that, then the State would need to acknowledge that Mr. Atwood would need a reasonable time to review and obtain an expert evaluation of the supplied testing before concluding whether the pentobarbital intended for his execution is fit for that purpose.

b. The Nature and Importance of the Testing Requires Sustaining the Court’s Longstanding Process for Determining Whether to Issue an Execution Warrant

As discussed herein, the State is deeply misguided in its contention that an execution warrant is, in effect, mandatory upon a motion’s facial satisfaction of certain statutory terms and thus accords the Court possesses “no discretion to deny the warrant.” Mtn. at 6 (citing A.R.S. §13-759(A), Ariz. R. Crim. P. 31.23(b)). *See also* §II(B)(5), *infra*. For the reasons just highlighted regarding the nature of the testing-related analysis that the State is obligated to produce by ten days from filing its motion, the State’s effort now to reduce Appellant’s time for response to the same number of days it has pursuant to the *Wood* Settlement for producing testing analysis would be not merely perverse, it would be cynical. The history of execution warrant practice in this jurisdiction establishes a recognition that the Court’s determination

whether to grant a motion—even when it ultimately *does* grant it—routinely requires extensive preparation and considerable time to arrive at the given result. Ex. C (Appellant’s “Execution Warrant Motion Practice and Execution Date Setting, 1992 – 2014”).

In the Court’s decades of warrant litigation history, it has not encountered more complex and consequential considerations than what should be anticipated with respect to the State’s obligations—if properly performed—under the *Wood* Settlement. As outlined herein, the nature of the bargain struck in *Wood* entails substantive obligations for the State with respect to how it is to construct and perform lethal injections. §II(A), *supra*. Critically, the settlement is also due to produce highly complex scientific data reflecting whether the State is prepared to conduct an execution pursuant to its own protocol and consistent with its avowed design—to directly and immediately cause death in a manner free from a breach of the constitutional threshold of extreme pain. *See Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

The Motion’s assertion that the Court should issue an execution warrant essentially automatically is divorced from the obvious consequences that the Court will encounter from *Wood*’s testing and reporting requirements. The complexity of the matters dictate extensive treatment and thorough consideration; the least prudent path would be to short circuit Mr. Atwood’s ability to present those issues and this Court’s opportunity to deliberate and decide. Yet that is the course the State urges.

In the less complicated period pre-*Wood* Settlement, the Court, in the ordinary course of its work under the framework of its rules and the statutory scheme, frequently permitted substantial time for briefing in opposition and reply before affording itself time to reach its decision.⁷ As noted, the act of compounding pentobarbital does not, in and of itself, create disabling constraints and uncertainty. Ex. B at 6 (¶ 27). The pharmaceutical science affords every reason to expect that, if performed competently and properly tested, ADCRR's compounding should readily yield a sufficient BUD for the Court to conduct this gravely important work free from exceptional time pressure. *Id.* The very last step the Court should take now is to contract its process and thereby its ability to fully entertain the adequacy of the preparation and testing of the State's means to carry out its punishment. Despite that reality, the State is urging the effective elimination of Appellant's ability to make use of the disclosures the State, as a result of *Wood*, now must provide and the Court must thoroughly evaluate.

Finally, the basic information on the State's preparation under its protocol will also inform Mr. Atwood's choice of the method of execution. A.R.S. §13-757(B). For there to be a meaningful election between Arizona administering its current lethal injection protocol and administering the statutory alternative of lethal gas, the State

⁷ For examples, in both the litigations for Mr. Robert Jones and Mr. Edward Schad, the time between the State's motion and Appellant's response was 31 days. Ex. C. In 2013, Mr. Jones was executed 120 days after the State's motion and Mr. Schad was executed 106 days after the corresponding motion. *Id.*

must provide reasonable clarity on the ADCRR's preparation with respect to both methods. Yet the State has remained opaque and is seeking to obviate Appellant's ability, through the ordinary adversarial process of the anticipated warrant motion, to test the State's preparedness and weigh what the State provides pursuant to *Wood* against the choice of cyanide gas. The public record of Arizona's preparation concerning each method further reflects the ADCRR's deficiencies and the resulting prejudice to the condemned, underscoring the need for adversarial testing.⁸

B. THE STATE HAS NOT ESTABLISHED GOOD CAUSE FOR ITS MOTION, AND GRANTING IT WOULD DO INJUSTICE.

The State's motion asks this Court to suspend the usual rules governing motion practice in favor its proposed firm, expedited briefing schedule. To grant such a request, this Court must find there is good cause and that suspension of the rules would be "in furtherance of justice[.]" Sup. Ct. R. 26. As explained below, the State has not established good cause for its request, and scheduling Mr. Atwood's execution now would be contrary to law and work an injustice. The State's motion should be denied.

1. The State's Motion Would Impermissibly Moot Innocence Investigation and Litigation Pending in Superior Court

⁸ See, e.g., Ed Pilkington, "Revealed: Republican-led states secretly spending huge sums on execution drugs," *The Guardian*, Apr. 9, 2021; Robert Anglen, "Lawyers: State botched purchase of gas chamber chemical in effort to resume executions," *Arizona Republic*, Jun. 4, 2021.

The State asks this Court to begin scheduling Mr. Atwood's execution despite pending litigation and forensic investigation related to his innocence. The outstanding forensic testing was stipulated to by the State and is authorized by statute. Scheduling Mr. Atwood's execution before the conclusion of that investigation and related litigation would be premature and violate both separation of powers and Mr. Atwood's statutory and constitutional rights.

a. Relevant Background

At Mr. Atwood's 1987 trial, the prosecution presented testimony from FBI crime lab analyst James Corby, who testified that pink paint found on the bumper of Mr. Atwood's car was a chemical match for the paint from the victim's bicycle. This testimony was crucial to the case against Mr. Atwood and was repeatedly invoked by the prosecution during closing arguments. RT3/24/1987 at 23-24, 26, 175. On direct appeal, this Court called the paint evidence "significant" and relied on it to find independent proof of Mr. Atwood's guilt. *State v. Atwood*, 171 Ariz. 576, 595, 598 (1992). The crime lab's analysis of the paint more than 35 years ago is the only direct forensic examination of the paint evidence that has been conducted before now.

On June 25, 2021, Mr. Atwood filed a notice of post-conviction relief in Superior Court, indicating that he intended to bring a successive post-conviction petition based upon newly discovered evidence and actual innocence under Rules

31.1(e) and (h). The following month, Mr. Atwood filed a motion⁹ seeking release of the bicycle, bumper, and related items in the custody of the Pima County Superior Court and Pima County Sheriff's Department to a forensic laboratory so that the paint evidence could be subjected to new testing using contemporary methods and technologies unavailable at the time of trial. That motion was supported by a declaration and report from forensic scientist Christopher Palenik. Ex. D, Palenik Declaration (7/2/2021). *See also id.* at Appendix A thereto (hereinafter "Palenik Report").

Based upon his review of FBI crime lab's work product, Corby's testimony, and similar materials, Dr. Palenik opined that there were grave reasons to doubt the reliability of Corby's conclusion that the bumper and bicycle paints matched. For example, Dr. Palenik observed that the FBI's own data showed the presence of elements in the bicycle paint that were absent from the paint smear on the bumper. Such a discrepancy "would generally be considered sufficient reason to eliminate the bicycle paint as a source of the smear," yet Corby did not even acknowledge it. Palenik Report at 11. Dr. Palenik further opined that there are numerous forensic techniques—unavailable at the time of trial, many only developed in the past few years—which would be able to compare the paint samples with far greater accuracy

⁹ Motion for Release of Physical Evidence (7/15/2021).

and probative weight than Corby's decades-old analysis. *Id.* at 11-12, 14-18. The State opposed release of the evidence.

On August 5, 2021, the Superior Court denied Mr. Atwood's motion to release the bicycle and bumper to Dr. Palenik's lab, and Mr. Atwood sought special action review of this order. Ariz. Ct. App. No. 2 CA-SA 21-0047; Ariz. Sup. Ct. No. CR-21-0349-PR.¹⁰ While special action proceedings were pending, undersigned contacted counsel for the State to determine if they would consent to a procedure in which Dr. Palenik collected samples of the paint evidence for later analysis at his lab.¹¹ The State did not object to this procedure, and on December 23, 2021, Mr. Atwood filed an unopposed motion for an order to facilitate sample collection.¹² That motion was granted on January 4, and Dr. Palenik traveled to Tucson to collect samples on January 11. It is estimated he will have results to report within a matter of weeks.

During the pendency of the above activities, Mr. Atwood filed his post-conviction petition on November 19, 2021. The State filed its Response on December 21, 2021. Mr. Atwood's reply is currently due on January 25, 2022.

¹⁰ This Court dismissed this special action proceeding on January 5, 2022.

¹¹ Mr. Atwood's request in his original motion was to have the items shipped directly to Dr. Palenik's lab in Illinois. That procedure, as opposed to having Dr. Palenik travel to Tucson to collect samples, was preferable as it would obviate the time and expense of possible return trips to Tucson to collect additional samples.

¹² While the motion was unopposed, the State did file a response "to clarify its position and to address the arguments he makes in support of" the motion. Response to Motion for Order to Allow Forensic Sample Collection (12/23/2021). Notably, this response did not reserve the right to seek Mr. Atwood's execution while the forensic testing contemplated by the motion remained outstanding.

Mr. Atwood's pending innocence claim is substantial. As noted above, Dr. Palenik found notable shortcomings in Corby's original paint comparison, including unexplained data that could rule out the bicycle as the source of paint on the bumper. Palenik Report at 11. During Dr. Palenik's January 11 personal inspection of the bicycle and bumper, he observed blue paint covering some of the pink paint on the bumper, an overlay that "indicate[s] that the pink layer was transferred to the bumper before the blue layer." Ex. E at ¶¶3-4, Supplemental Palenik Declaration (1/20/2022). *See also id.* at Appendix 2 (photographs of the pink and blue paints). Mr. Atwood was arrested just three days after the victim's disappearance. If the victim's bike were the source of the pink paint, Mr. Atwood's car would have had to have been involved in a separate collision with a blue object—in the exact same location of the car—during that brief window. This unlikely outcome casts further doubt on the prosecution's critical forensic evidence from trial. Dr. Palenik's full forensic evaluation of the paint evidence should be forthcoming in a matter of weeks.

As noted in Mr. Atwood's pending post-conviction petition, the unreliability of Corby's paint testimony is not the only reason to doubt his conviction.¹³ Despite a thorough search of Mr. Atwood's car by the FBI, no physical evidence was found there or elsewhere connecting him to the victim. Other forensic evidence suggests that the prosecution's timeline of the crime is highly implausible if not outright

¹³ See Petition for Post-Conviction Relief (11/19/2021), at 8-10.

impossible.¹⁴ And multiple witnesses reported seeing the victim in the company of an unknown woman *after* the time Mr. Atwood supposedly committed this crime. That suspect was later identified by police as a woman with a criminal history and pattern of deeply unstable behavior, including an attempt to kidnap a child days before, and a block away from, the location from where the victim ultimately disappeared. Without Corby’s testimony, it is difficult to imagine how Mr. Atwood’s conviction could stand.

b. Scheduling Mr. Atwood’s Execution During the Pendency of his Innocence Litigation Would be Improper

The State seeks the setting of Mr. Atwood’s execution date despite his pending claim of actual innocence and ongoing forensic investigation in support of that claim—testing to which the State stipulated. The State’s request is premature, contrary to the will of the legislature, and violates Mr. Atwood’s rights. The Motion should be denied.

Scheduling Mr. Atwood’s execution before Dr. Palenik’s evaluation is even submitted would be against the will of the Arizona legislature and violate separation of powers. Last year, the legislature unanimously passed a bill to facilitate advanced forensic testing during post-conviction. Laws 2021, Ch. 157, §1. The resulting statute allows a felony defendant to, “[a]t any time,” request evidence “in the possession or control of the court or the state” be subjected to forensic testing “using a technique

¹⁴ Specifically, the presence of adipocere on the victim’s remains suggests her body was buried, yet it would have been virtually impossible for Mr. Atwood to have kidnapped, killed, and then buried the victim under the prosecution’s own timeline.

that was not available at the time of sentencing and that has become widely accepted in the scientific community through advances in technology.” A.R.S. §13-4241(A)(1). In other words, the legislature created a vehicle to facilitate the exact kind of post-conviction forensic investigation that Mr. Atwood is currently pursuing. Separation of powers forbids the Attorney General from rendering the legislature’s intent a nullity by executing Mr. Atwood before this statutorily authorized forensic investigation is complete. *Ariz. const. Art. III; Johnson Util., L.L.C. v. Ariz. Corp. Comm’n*, 249 Ariz. 215, 222-23, ¶29 (2020), citing *Shute v. Frohmiller*, 53 Ariz. 483, 488-90 (1939) (under Article III, duties of the Attorney General are subject to laws passed by the legislature); *Rios v. Symington*, 172 Ariz. 3, 12 (1992) (executive may not substitute its judgment for that of the legislature).

Additionally, §13-4241 confers on Mr. Atwood and any other defendant the right to forensic post-conviction testing of evidence which qualifies under the statute. This right is substantive. *Seisinger v. Siebel*, 220 Ariz. 85, 95, ¶39 (2009). Substantive rights conferred by the legislature cannot be diminished by the action of a coordinate branch. *Daou v. Harris*, 139 Ariz. 353, 358 (1984); *Pima County v. McCarville ex rel. County of Pinal*, 224 Ariz. 366, 368, ¶8 (App. 2010). The Attorney General’s request to proceed with Mr. Atwood’s execution at this time would essentially abrogate Mr. Atwood’s statutory right to have the paint evidence subjected to forensic testing.

Mooting Mr. Atwood’s investigation by killing him would also violate his constitutional rights to due process and freedom from cruel and unusual punishment.

Moving to execute Mr. Atwood before this investigation concludes would be contrary to the constitutional command that death sentences must be subjected to heightened standards of reliability before the final punishment is carried out. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). It would also effectively deny Mr. Atwood the assistance of his expert, Dr. Palenik. *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). U.S. Const. amends. V, VIII, XIV.

The State does not offer any argument, compelling or otherwise, why the Court should ignore pending innocence litigation and proceed with scheduling Mr. Atwood's execution. Indeed, the State's motion does not even acknowledge this litigation or Dr. Palenik's still outstanding forensic testing. Scheduling Mr. Atwood's execution under these circumstances would violate separation of powers and Mr. Atwood's constitutional rights even if the State were not also seeking an unprecedentedly expedited warrant briefing schedule.

2. Appellant's Lead Counsel Is First Chair in a Capital Post-Conviction Evidentiary Hearing Scheduled to Begin in April

Proceeding with scheduling warrant briefing as the State requests would create an irreconcilable conflict for Mr. Atwood's undersigned lead counsel, Natman Schaye. In addition to his duties in the present case, Mr. Schaye also represents capital post-conviction petitioner Wayne Prince. *State v. Prince*, Maricopa Cty. No. CR1998-004885. Mr. Schaye has represented Mr. Prince since 2012. Ex. F at ¶2, Schaye Declaration (1/20/2022). Mr. Prince's case is complex even by the standards of capital cases, as it

involved three separate jury trials. *Id.* The Superior Court found nine claims in Mr. Prince’s petition colorable, and on March 1, 2021, it set an evidentiary hearing on those claims. *Id.* at ¶¶3-4.¹⁵ Reflecting the complexity of the case, that hearing is scheduled to last for 20 full days between April 4 and April 29, 2022, and Mr. Schaye anticipates calling 75 witnesses, including nine experts, during that hearing. *Id.* Mr. Schaye was appointed to Mr. Prince’s case pursuant to Arizona Rule of Criminal Procedure 6.8 because of his co-counsel’s limited trial experience, and for the same reason he is primarily responsible for conducting the upcoming hearing. *Id.* at ¶¶2, 5. In light of the scale and complexity of the case, Mr. Schaye anticipates that he will “need to spend nearly all my professional time and energy over the next three and one-half months preparing for and conducting [the Prince] evidentiary hearing.” *Id.* at ¶5.

The State’s election to move to schedule Mr. Atwood’s execution at this time creates a material conflict for Mr. Schaye. *See generally Holloway v. Arkansas*, 435 U.S. 475 (1978). Scheduling the State’s warrant motion for the Court’s upcoming conferences would leave Mr. Atwood essentially without his lead counsel as the State moves to execute him. Mr. Schaye would be unavailable to assist in responding to the State’s warrant motion, any litigation presented by the State’s mandatory disclosure of its quantitative testing, or any of the myriad other causes likely to arise during late-

¹⁵ This hearing was originally set for the spring of 2020 but that schedule was vacated due to the COVID-19 pandemic. *Id.* at ¶4.

stage capital litigation. This would be intolerable.¹⁶ Because the State is represented by the same prosecuting agency in both the Prince and Atwood cases, it was aware of this conflict. Yet the present motion does not acknowledge the conflict, much less offer an explanation why it should be disregarded in its request for firm, expedited briefing.

3. The State Improperly Deviates from its Process of Sequencing Executions

The State's decision to forge ahead with scheduling Mr. Atwood's execution despite his pending innocence litigation and Mr. Schaye's clear conflict is all the more strange because the selection of Mr. Atwood deviates from previous execution sequencing. As noted last spring, historically the state has scheduled executions on a "first in, first out" basis, moving for warrants in the chronological order that defendants complete their initial federal habeas litigation.¹⁷ By that measure, among the individuals the Attorney General has identified as "eligible" for execution, Mr. Atwood is not first or second in line, but thirteenth. *See* Ex. G, Ninth Circuit Mandate Dates.

To the extent the State will argue that the Attorney General has discretion to sequence executions as he deems fit, that argument is irrelevant. The issue is not

¹⁶ The reverse of the conflict, denying Mr. Prince his only experienced courtroom attorney during a complex capital evidentiary hearing, is also unacceptable.

¹⁷ See Appellant's Response in Opposition to Appellee's Motion to Set Briefing Schedule for Motion for Warrant of Execution (4/20/2021), at 4-6.

whether the Attorney General has discretion, but whether his exercise of it justifies the extraordinary accommodation the State is requesting. Here, the State has deviated from past practice in a way that creates a conflict for Mr. Atwood's lead counsel and disregards a credible, pending claim of actual innocence. It offers no explanation for this inexplicable and prejudicial choice. Granting the State's motion under these circumstances would not be in furtherance of justice. The State has not met its burden of showing good cause of its Motion.

4. The State Has Had Ample Time to Simply Petition for a New Procedural Rule Governing Warrant Practice

The State's scheduling motion for Mr. Atwood is substantially similar to the one it brought against him a year ago and to the current and previous motions brought against Mr. Dixon. Because the lethal injection limitations the State alleges are not unique to these defendants, identical expedited scheduling will presumably be proposed for any other defendants the Attorney General seeks to execute in the future. As such, the motion is not an *ad hoc* solution to case-specific circumstances, but something more akin to a petition for a new procedural rule. *See State ex rel. Romley v. Ballinger*, 209 Ariz. 1, 3 ¶9 (2004) (a procedural requirement is a rule "if it 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").

Given the forgoing, it is unclear why the Attorney General did not simply petition under Supreme Court Rule 28(a) for a new procedural rule governing warrant

practice. He had ample opportunities to do so. Because of the Attorney General's lack of transparency, it is unclear when he became aware that alteration of this Court's usual warrant motion practice was needed to accommodate the handling of the State's BUD testing obligation. Plainly this dilemma was known in advance of the prior motion for scheduling filed on April 6, 2021. Given that date, it is conceivable that the Attorney General was aware of these circumstances far enough in advance to have submitted a rule change petition by the January 10, 2021, deadline for consideration during last year's rules agenda. If he only became aware of these timing issues after that deadline, he could have asked that the rule be suspended so that this Court could consider an untimely petition.¹⁸ If he felt the wait for this Court's regular rules agenda was too long, he could have asked that his petition be considered on an expedited basis.¹⁹ And of course, if he decided for whatever reason to forego the 2021 rulemaking cycle, he could have filed a rule change petition in advance of the January 10, 2022, deadline.

A rule change petition would have allowed for deliberative consideration of the State's proposed procedure. It would have given a forum for input beyond the instant parties to include the views of other capital defendants and prosecuting agencies,

¹⁸ Sup. Ct. R. 28(i).

¹⁹ Sup. Ct. R. 28(h). To be clear, Mr. Atwood does not believe that the desire to execute someone a few months earlier constitutes the kind of "compelling circumstances" which would justify emergency rulemaking. The point, rather, is that the Attorney General did not make this or any other rulemaking requests.

victims, members of the community, and other stakeholders. Instead, the State has chosen to advocate for its expedited briefing schedule at the last moment and with minimal input. Adopting such an approach is the State's prerogative. However, when considering whether good cause exists to suspend the rules in favor of the State's proposal, this Court should rightly ask whether doing so would be "in furtherance of justice." Sup. Ct. R. 26. The State offers nothing demonstrating that adoption of its quasi rule outside the rulemaking framework would further justice.

5. This Court has Discretion to Deny the State's Warrant Motion

The State argues that the compressed briefing schedule it proposes is appropriate because the issue before this Court on a warrant motion is "narrow." Mtn. at 5-6. Pointing to the words "must" and "shall" in a rule and statute, the State contends that, should this Court determine Mr. Atwood has completed his first post-conviction and appellate habeas review, it has "no discretion to deny the warrant." *Id.* at 6 (citing A.R.S. §13-759(A), Ariz. R. Crim. P. 31.23(b)). The State is incorrect.

The cited language does not eliminate the Court's discretion. "Although 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). A "directory" rather than "mandatory" reading is preferred when the former approach would better preserve the constitutionality of a statute or effectuate the will of the legislature. *Id.* at 554-55; *Dep't of Rev. v. So. Union Gas Co.*, 119 Ariz. 512, 514 (1978).

Here, a mandatory reading of the statute would violate both separation of powers and the will of the legislature. Issuance of a death warrant is an inherently judicial function. *See State v. Joubert*, 518 N.W.2d 887, 893-95 (Neb. 1994). Separation of powers requires the judicial department to exercise that function. Ariz. Const. art. III. The warrant, which orders the director of ADCRR to carry out an execution, falls within the power of mandamus “and other extraordinary writs to state officers” vested in this Court by our constitution. Ariz. Const. Art. VI §5(1). Consistent with the constitution, the legislature, through §13-759(A), expressly assigned the power to issue a death warrant in this Court, not the executive. If the Court has no discretion to deny the Attorney General’s warrant motion, it is effectively the Attorney General, and not this Court, exercising the judicial function of issuing a death warrant. Because such an outcome would be contrary to both separation of powers and the will of the legislature, the statutory and regulatory language the State relies on must be read as directory, not mandatory.²⁰ This Court has recently rejected other statutory interpretations which would enlarge the powers of the Attorney General beyond what is authorized by law. *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127 (2020). It should do so again here.

²⁰ A mandatory reading would also be contrary to the will of the legislature as it would allow the Attorney General to short circuit forensic testing pursued under §13-4241 by requesting a warrant. *See* §II(B)(1), *supra*.

Additionally, history belies the reading the State urges. The State admits that pre-warrant briefing “can last for months.” Mtn. at 3-4. *See also* Ex. C (table of warrant motion and execution date setting), discussed *supra*. If this Court’s discretion is as limited as the State urges, there would be no reason for the Court to have repeatedly granted such extended briefing.

C. THIS COURT SHOULD REMAND THIS MATTER FOR EVIDENTIARY DEVELOPMENT

For the reasons stated above, good cause does not exist to grant the State’s motion, and it should be denied. Additionally, the State’s motion is premised on two factual assertions which are completely without support in the record: the 90-day BUD of its compounded pentobarbital, and the alleged specialized testing conducted to obtain that date. Ex. B at 7 (¶ 30). Without a meaningful record for these points, there is no factual basis for the Court to grant the State’s motion. *Cubbison v. Cubbison*, 45 Ariz. 14, 16 (1935). Accordingly, should this Court not deny the State’s motion, Mr. Atwood respectfully moves the Court to remand this matter for evidentiary development prior to ruling.

Like its motion from April of last year, the State’s present request urges that expedited warrant briefing is necessary because the lethal drug expires 90 days after compounding. Mtn. at 2-3. The State asserts that only an expedited briefing schedule will allow it to both meet its obligation to provide a quantitative analysis of the lethal drug and follow through on Mr. Atwood’s actual execution before the 90-day time

limit expires. *Id.* at 3-4. Unlike last April, the State now alleges a basis (albeit a vague one) for this 90-day mark: “certain specialized testing” which purportedly established the drug’s extended BUD. Mtn. at 2. This addition is presumably in response to this Court’s July 12, 2021, order, which required such testing before the State could renew its motion.

Both factual allegations are material to consideration of the State’s motion. The purported 90-day BUD is the motion’s gravamen, since absent that ticking clock there would be no reason to adopt such a highly compressed briefing schedule.²¹ And the “certain specialized testing” alleged to have occurred bears upon whether the State is in compliance with this Court’s prior order and thus able to bring its motion at all. Ex. B at 6-7 (¶ 29-30); 8 (¶ 35); 11 (¶ 51); *see also id.* at 9 (¶ 42).

Despite the centrality of these issues to the Motion, the record is silent on both points.²² Instead, the State essentially asks both Mr. Atwood and this Court to take its

²¹ Notably, the State is inconsistent in its characterization of this deadline. Despite generally referring to a 90-day BUD, in one instance it refers to a BUD “of *at least* 90 days,” implying that the actual BUD may be even longer. Mtn. at 2 (emphasis supplied). The experience of the federal government suggests that with adequate testing a BUD longer than 90 days is attainable. Ex. B at 6 (¶ 27). But a longer BUD also means that the ticking clock justification underlying the entire motion is null, eliminating the need for expedited briefing. The State’s willingness to waffle on this basic point underscores the need to take evidence before ruling on its extraordinary request.

²² A third, implicit material assertion is the reasonableness of the State’s selection of compounded pentobarbital in the first place. Even if, *arguendo*, we accept the representation that this drug has a 90-day BUD, the State has not argued (much less demonstrated) the necessity of selecting that particular drug. It is conceivable that a full briefing schedule in line with historic Arizona practice might be possible but for the State’s unfortunate drug selection. Mr. Atwood should not be forced to accept a truncated briefing schedule simply because the State chose the wrong drug. Whether good cause exists to grant the State’s motion thus hinges, at least in part, on the necessity of using compounded pentobarbital and the viability of alternatives. Yet the record is silent on this point as well.

factual assertions as a matter of faith. But the State has already demonstrated that it is not entitled to that benefit of the doubt.

Last spring, the State also suggested the BUD for its compounded pentobarbital was 90 days. When Mr. Atwood pointed to regulations and expert opinion showing that that figure was 45 days, the State dismissed these inconvenient facts as “immaterial.” It was only in June, a month after this Court set a briefing schedule, that the State returned to this Court to admit that its anonymous pharmacist had “revised” their opinion and now concluded that the presumptive BUD of the drug was 45 days after all. *See supra*. Even if we assume that the State relied in good faith on the pharmacist’s earlier opinion, there are plainly reasons to doubt the basic competency of their chosen expert.²³ Given this recent history, there is no reason the State’s unsupported factual assertions should be taken at face value. Indeed, as explained in §II(A)(1), *supra*, the State’s present assertion that it has obtained a reliable 90-day BUD for the drugs meant to kill Mr. Atwood is scientifically implausible.

Even absent the foregoing history, the State’s request that this Court rule on a motion based on disputed facts outside of the record would be inappropriate. It is long established that this Court “cannot accept the unsupported statement of [a party] or his counsel as to the facts,” but rather “can hear cases only on the verified and

²³ There are numerous documented challenges to calculating the stability of a compounded drug in general, and pentobarbital in particular, underscoring the need for a competent pharmacist to determine BUD. Ex. B at 6 (¶ 29).

authenticated record.” *Regan v. O’Steen*, 47 Ariz. 87, 90-91 (1936). *See also Cubbison*, 45 Ariz. at 16 (this Court “cannot consider” alleged facts which do not appear in the record). This self-imposed limitation reflects the reality that “[i]t is not the function of this court nor is this court equipped to act as a trier of fact.” *Weiss v. Superior Court of Pima County*, 106 Ariz. 577, 581 (1971). Here, there is no verified and authenticated record supporting the State’s factual assertions. Without evidence backing those allegations, there is no sound basis to grant the pending motion.

That the record currently may be inadequate for this Court to rule on the State’s motion does not mean it will always be so. When, as here, a matter is before this Court under its original jurisdiction and “a question of fact is involved,” the Court should “remand it to the superior court to take evidence and determine the facts.” *Donaldson v. Sisk*, 57 Ariz. 318 (1941). When a more complete record related to the State’s execution drug has been developed, this Court would be able to rule on the Motion.

This Court should decline the State’s invitation to rule on a motion based on factual premises wholly outside of the record. Instead, before ruling, the Court should remand this action with instructions to conduct an evidentiary hearing regarding: 1) the actual BUD of the State’s compounded pentobarbital, 2) what testing was conducted to obtain that BUD, 3) whether chemicals other than compounded pentobarbital were considered for use in the State’s lethal injection protocol, and 4) any other matters this Court deems relevant to consideration of the Motion.

For the forgoing reasons, it is respectfully requested that Mr. Atwood's cross-motion be granted.

III. CONCLUSION

For the reasons stated above, the Motion should be denied. Alternatively, the Court should remand this matter for evidentiary development prior to ruling on the Motion.

RESPECTFULLY SUBMITTED this 20th day of January, 2022.

/s/ Natman Schaye
Natman Schaye
Sam Kooistra
Counsel for Petitioner Frank Atwood