

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

**REPLY IN SUPPORT OF MOTION
TO SET BRIEFING SCHEDULE FOR
MOTION FOR WARRANT OF
EXECUTION/RESPONSE TO
CROSS-MOTION TO REMAND**

(Capital Case)

Frank Jarvis Atwood was convicted in 1987 for the 1984 kidnapping and murder of 8-year-old VLH. Motion, Exh. A, at 2. Over the next 30 years, Atwood pursued his appeals in state and federal court, with his federal habeas litigation finally concluding in 2017, rendering him eligible for execution. *Id.* at 2–3. The State has now asked this Court to set a briefing schedule on its anticipated motion for warrant of execution. In response, Atwood barrages this Court with unconvincing and irrelevant arguments while offering no convincing reason why a simple briefing schedule should not issue. He also filed a cross-motion to remand

for evidentiary development. This Court should reject Atwood’s arguments, grant the State’s motion, and deny Atwood’s cross-motion.

A. Granting the State’s motion would not “subvert” its obligations for testing lethal injection chemicals.

Atwood first argues that the State’s motion demonstrates its intent to “subvert” testing obligations imposed by its June 2017 stipulation and district court order (the *Wood* settlement) and ADCRR’s Department Order 710. He challenges the ability of the current testing to establish a beyond-use-date for the compounded pentobarbital that will actually be used in his execution, contends that the State’s proposed briefing schedule renders its testing obligations a “hollow formality” by requiring his response to the motion for warrant to be filed the same day ADCRR must provide a quantitative analysis of the chemical to be used in his execution, and argues that the State’s testing obligations require the issuance of a warrant to be litigated on an extended timeline. Response at 6–16. None of these arguments support denying the State’s motion.

1. This Court is not the forum to litigate beyond-use-dates and testing.

Atwood contends that the current testing that established the compounded pentobarbital’s 90-day beyond-use-date, *see* Motion at 2, cannot provide a beyond-use-date for the compounded batch that will actually be used in his execution and that as a result the State is “leaving to chance the decisive fact of what the actual BUD for the actual execution drugs will be.” Response at 8. However, this is not

the forum to litigate the beyond-use-date of the chemical to be used in Atwood's execution.¹ The State raised the issue of the compounded pentobarbital's beyond-use-date only to explain why it likely would be unable to meet both ADCRR's testing requirements and the requirement not to use expired chemicals under the usual warrant litigation timeline. *See* Motion at 2–4. The relevant issue here is the State's request for an orderly process for seeking a warrant of execution that allows the State and ADCRR to comply with all applicable obligations. If Atwood seeks to challenge the chemical's beyond-use-date, he must do so in an appropriate forum.

2. ADCRR's quantitative testing requirement is irrelevant to whether a warrant should issue under A.R.S. § 13–759(A).

Atwood next argues that the State's proposed briefing schedule will prejudice him by rendering him unable to review the results of ADCRR's quantitative testing (conducted by DPS) on the pentobarbital to be used in his execution before filing his response to the State's motion for warrant. Response at 11–13; *see* Motion at 3 (noting Department Order 710 requires ADCRR to provide results of testing within 10 days of State's motion for warrant; requesting order that response to motion for

¹ In any event, ADCRR's retained compound pharmacist advised ADCRR that the current testing on compounded pentobarbital established that the yet-to-be compounded pentobarbital to be used in Atwood's execution will have a 90-day beyond-use-date. Atwood's concern that the State's approach "leaves to chance" the actual chemical's beyond-use-date is thus unwarranted.

warrant be filed 10 days after motion). Atwood's concern is unfounded because the quantitative testing results are irrelevant to the issues to be decided in the State's motion for warrant of execution.

As noted in the State's Motion, whether a warrant of execution must issue turns solely on whether Atwood's conviction and sentence of death have been affirmed and his first post-conviction proceeding and habeas appellate review have concluded. *See* A.R.S. § 13-759(A); Ariz. R. Crim. P. 31.23(b). Accordingly, those are the only issues the State's Motion for Warrant of Execution will address. *See* Motion, Exhibit A. The statute says nothing about the method of execution, much less the results of quantitative testing of lethal injection chemicals. Any challenge Atwood may wish to raise concerning the chemical has no relevance to the issue to be decided in the State's motion requesting a warrant of execution. He is thus incorrect that failing to receive the quantitative testing results sooner will prejudice his ability to respond to the State's motion. By receiving the quantitative testing results 10 days after the State files its motion, Atwood will be afforded sufficient time to make any inquiries and raise any challenges concerning the compounded pentobarbital in advance of his execution date.

3. The *Wood* settlement is likewise irrelevant to whether a warrant should issue under A.R.S. § 13-759(A).

Atwood similarly contends that the "complexity" of the State's obligations under the *Wood* settlement (Response, Exhibit A), preclude application of the

State’s proposed briefing schedule so that this Court can “fully entertain the adequacy of the preparation and testing of the State’s means to carry out its punishment.” Response at 13–16. This contention, too, is based on the flawed premise that issues related to the *Wood* settlement and the adequacy of ADCRR’s “preparation and testing” are relevant to whether a warrant must issue under § 13–759(A). Because the issues Atwood identifies have no bearing on this Court’s decision on the State’s motion for a warrant of execution under the relevant statute, his concerns are misplaced.

Atwood also asserts that the State’s proposed briefing schedule is untenable because “the basic information on the State’s preparation under its protocol will also inform [his] choice of the method of execution” under A.R.S. § 13–757(B). Response at 15–16. Atwood’s ability to decide between lethal injection or lethal gas is unconnected to whether a warrant should issue under § 13–759(A). Instead, he is permitted to make his decision “at least twenty days before the execution date.” A.R.S. § 13–757(B). Since the time for Atwood to select a method of execution is tied to the execution date rather than the State’s motion for warrant of execution, the State’s proposed briefing schedule has no impact on Atwood’s statutory right to make that decision.

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B. The State's Motion is supported by good cause and granting it would not result in injustice.

1. Atwood's pending successive postconviction proceeding does not preclude the State from seeking a warrant of execution.

Atwood asserts that the State's request for a briefing schedule is "premature" because the State has "stipulated" to forensic testing related to "his pending claim of actual innocence and ongoing forensic investigation in support of that claim." Response at 21. Atwood refers to the claim in his fourth petition for post-conviction relief that the paint found on the bumper of his car did not match the paint on the victim's bicycle, an issue that was litigated at Atwood's 1987 trial.² To support this claim, Atwood sought, as relevant here, to have both the bumper and bicycle removed from the custody of the Pima County Superior Court and sent to his expert in Illinois. See Motion for Release of Physical Evidence, filed 7/15/21. The State objected to removing the evidence from the court's custody, but indicated it would agree to allow Atwood's expert to take samples of the paint evidence while the items remained in the court's custody. Response to Motion for Release of Physical Evidence, filed 7/26/21, at 4. Atwood rejected this proposed method for obtaining the evidence he sought and chose instead to file a special action challenging the superior court's denial of his motion to release the evidence.

² Atwood filed his fourth notice of post-conviction relief on June 25, 2021.

That special action litigation concluded on January 4, 2022, when this Court denied Atwood's petition for review of the court of appeals' denial of jurisdiction.

In December 2021, Atwood sought to have his expert take samples of the paint evidence while the evidence remained in the custody of the superior court, as the State had originally suggested in July 2021. Though several months had elapsed, the State felt it should abide by its earlier representation that it would not object to this course of action. Atwood's expert collected the samples on January 11, 2022.

Thus, the only reason this matter remains pending at this time is because Atwood delayed both in asserting his claim (which was known and litigated at his 1987 trial) more than 30 years after his convictions, and in obtaining the requested testing months after the State agreed to the sample collection. Moreover, in declining to object to Atwood's efforts to take a paint sample, the State did *not* stipulate or agree not to seek a warrant of execution. *See* Response at 19. Nor did the State concede that the claim was even cognizable in Atwood's fourth post-conviction petition. The State's lack of objection to Atwood's collection of the evidence, and Atwood's resulting voluntary delay, are thus not reasons to deny the State's motion.

Next, Atwood invokes A.R.S. § 13-4241(A)(1) and argues that, because he is currently conducting "post-conviction forensic investigation," the State's effort to

seek a warrant of execution violates the Arizona Constitution's separation of powers clause. Response at 21–22. Section 13–4241(A)(1) permits defendants convicted of a felony to obtain forensic testing of evidence under certain circumstances. But the statute says nothing about precluding the State from seeking a warrant of execution under § 13–759(A) while that testing is ongoing. Moreover, Atwood has not filed a “request” for testing under that statute. *See* A.R.S. § 13–4241(A)(1) (convicted defendant may “request” testing under the statute).

Finally, in response to Atwood's suggestion that the State cannot seek a warrant of execution while he has “pending innocence litigation,” he has had more than 30 years to present such a claim in both state and federal court. Response at 22–23. Thus, his case has already received any “heightened standards of reliability before the final punishment is carried out” in his protracted federal litigation (which included an evidentiary hearing on a related paint issue) and in his three prior petitions for postconviction relief. *Id.* at 23. Atwood is not entitled to avoid execution by endlessly and repetitiously filing postconviction relief actions asserting (so far unsuccessfully) evidence of his innocence.

2. Atwood's counsel's other commitments do not justify denying the State's motion.

Atwood asserts that granting the State's motion would “create an irreconcilable conflict” for his lead counsel, who has a capital postconviction

evidentiary hearing scheduled for April 2022. Response at 23–25. While the State is not unsympathetic to counsel’s other obligations, those obligations do not justify precluding the State from seeking a warrant of execution. Moreover, depending on when this Court sets the State’s proposed briefing schedule, Atwood’s counsel may not even experience any conflict between his scheduled evidentiary hearing and warrant litigation in this case. And, as stated in the State’s motion, Atwood already has a copy of the State’s motion for warrant of execution, and his counsel (including co-counsel) can begin working on a response well in advance of April.

3. The State is not required to select inmates for execution in any particular order.

Atwood complains that by seeking to proceed with his execution the State “deviates from previous execution sequencing” because he “is not first or second in line [to be executed], but thirteenth” as determined by “Ninth Circuit Mandate Dates.” Response at 26. But even if Atwood is correct that the past practice has been to seek warrants for inmates in the order in which they complete their federal litigation, the State is not required to adhere to such a procedure. Atwood committed his crimes in 1984 and was sentenced to death in 1987. He does not dispute that he has completed his of-right appeals. The State is not prohibited from seeking Atwood’s execution merely because he was successful in dragging out his federal proceeding for more than 20 years.

The State also is not required to show “good cause” for seeking a warrant for his execution, rather than another eligible inmate. Response at 26. He does not identify any law establishing that the State lacks this discretion. *Id.* Were this Court to deny the State’s motion to set a briefing schedule based on a belief that other inmates should be executed before Atwood, it would infringe on this exercise of discretion and violate separation of powers. *See* A.R.S. § 13–759(A) (“The supreme court shall grant subsequent warrants of execution on a motion by the state.”); *see State v. Wagstaff*, 164 Ariz. 485, 489 (1990) (holding that “executive agencies bear full responsibility for executing the judgment and sentence”).

4. The State was not required to seek a rule change and its motion is supported by good cause.

Atwood argues that 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,” rather than file a motion requesting its proposed briefing schedule. Response at 26–27. But the State’s motion does not seek a new procedural rule for obtaining warrants of execution. Thus, Atwood’s discussion of the rule change process is irrelevant. *See id.* at 26–28. The State’s motion seeks nothing that this Court’s rules do not permit. Arizona Rule of Criminal Procedure 31.3(e) provides that, “[f]or good cause and after considering the rights of the victim, an appellate court may shorten or extend the time for doing any act required by Rule 31, a court order, or an applicable statute.” And Rule 31.3(a)

permits this Court to suspend any provision of Rule 31, and to “order such proceedings as the court directs.”

Atwood nonetheless contends that the State failed to show “good cause” in support of its request because it could have sought a rule change to the same effect as its motion. The good cause supporting the State’s motion, however, is its obligation to comply fully with the requirements of the *Wood* settlement and ADCRR’s Department Order 710. *See* Motion at 1–5. That Atwood suggests the State could have sought the same result by other means does not negate its showing of good cause.

5. The warrant statute contains mandatory language.

Atwood next challenges the State’s assessment that, once the State establishes that Atwood has exhausted his of-right appeals, this Court lacks discretion to deny its warrant motion. Response at 28–30; *see* Motion at 5–6. But A.R.S. § 13–759(A) (which states that this Court “shall” grant an execution warrant after the first post-conviction proceeding concludes and “shall” grant subsequent warrants at the State’s request), speaks for itself and contains mandatory language. So does Rule 31.23(b).

Atwood maintains that construing the statutory use of “shall” as mandatory would violate separation of powers. To the contrary, however, construing “shall” as permissive would grant unlimited discretion to the judiciary to determine

whether the executive branch may carry out a lawfully-imposed sentence on a particular defendant. This arrangement would intrude on the executive's powers and responsibilities, which includes the responsibility for carrying out criminal sentences. *See Wagstaff*, 164 Ariz. at 488–89. Through § 13–759(A), the legislature has directed this Court to verify that an inmate's guaranteed appellate process has concluded before authorizing the executive to carry out an execution. If this Court verifies that it has, the legislature has directed this Court to issue the warrant.³ *See* A.R.S. § 13–759(A). Put simply, the legislature has given this Court a limited, gatekeeper role in carrying out what is ordinarily an executive function.

This arrangement does not encroach on a judicial function. Response at 29. As explained above, the statute and rule require the warrant to issue only if certain prerequisites are met. Atwood will be given the opportunity to establish that those

³ Atwood further argues that an execution warrant falls within the mandamus power conferred on this Court by the Arizona Constitution. Response at 29. But in filing a warrant motion, the State does not “seek[] to compel a public official to perform a non-discretionary duty imposed by law,” as a mandamus action does. *Stagecoach Trails MHC, LLC v. City of Benson*, 231 Ariz. 366, 370, ¶ 19 (2013). Rather, the motion asks the Court to *authorize* an execution pursuant to clearly delineated statutory requirements. *See* Motion, Exhibit A; A.R.S. § 13–759(A). A warrant motion is also not presented through the special action procedure, as a mandamus action is. *See Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 584 n.1 (1994) (“In Arizona, special action relief is the modern equivalent of common law writs such as mandamus and prohibition.”). Moreover, even if the warrant procedure effectively constitutes a mandamus action, Atwood does not explain how that renders the mandatory language in the warrant statute unconstitutional. *See* Response at 29.

prerequisites have not been met, should he choose to do so. This Court will resolve any dispute on that matter, and this procedure does not “enlarge the powers of the Attorney General beyond what is authorized by law.” Response at 29. Instead it carries out the intent of the legislature by requiring this Court to authorize the executive to carry out an execution once the designated appellate process has concluded.

The State has discretion to determine when to seek execution warrants for eligible inmates; this Court’s duty is to ensure that the selected inmates are, in fact, eligible to be executed before the death warrant is issued and to set the execution date. Contrary to Atwood’s claim, this procedure takes no power away from the judiciary. Further, other than asking this Court to read out of the statute its mandatory language (and thereby intrude on the legislature’s authority to enact laws), Atwood offers no interpretation of the statute that would in any manner guide or limit the “directory” nature of the statute. *Id.* at 29. Any rule that vests unbridled discretion in this Court to deny a death warrant for an inmate who is eligible to be executed would invade on the executive’s duty to carry out lawfully-imposed sentences.

Atwood also argues that the State’s reading of the statute is belied by history, pointing to the State’s observation that past warrant litigation has spanned months. *Id.* at 30 (citing Motion at 3–4). But Atwood does not explain how this prolonged

litigation shows that A.R.S. § 13–759(A) does not impose a mandatory duty on this Court, and he identifies no actual inconsistencies resulting from the mandatory nature of the statute.

C. Atwood’s Cross-Motion for Remand should be denied.

Atwood alternatively requests that this Court “remand this matter for evidentiary development” regarding “the 90-day BUD of [the State’s] compounded pentobarbital, and the alleged specialized testing conducted to obtain that date.” Response at 30. His cross-motion for remand should be rejected because granting the State’s motion does not require this Court to make any factual findings on the beyond-use-date and the evidentiary development Atwood seeks is unnecessary.

Atwood rests his request on the assertion that the State’s motion to set a briefing schedule requires this Court to resolve “factual premises wholly outside the record.” Response at 33. But this Court need not make any factual findings regarding the beyond-use-date of the State’s compounded pentobarbital or the testing that established it. The State only referred to those facts for context to explain *why* it sought an order setting a briefing schedule for a motion for warrant of execution. The ultimate issue to be decided will be limited to whether a warrant should issue under § 13–759(A). *See* Motion at 5–6. And the current Motion simply asks this Court to exercise its discretion to ensure that the litigation on that issue proceeds in an orderly manner that allows the State to comply with its

relevant obligations. *See id.* at 2–4; *see also* Rule 31.3(a). Accordingly, neither the pending motion nor a forthcoming motion for warrant of execution require this Court to make factual findings or resolve any factual disputes regarding beyond-use-dates or testing of lethal injection chemicals. The evidentiary development Atwood seeks is thus unnecessary and his cross-motion for remand should be denied.

DATED this 26th day of January, 2022.

Respectfully submitted,

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