

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

vs.

CLARENCE WAYNE DIXON,

Appellant.

No. CR-08-0025-AP

Maricopa County Superior Court No.
CR-2002-019595

Ninth Circuit No. 16-99006

U.S. District Court No. CV-14-258-
PHX-DJH

**RESPONSE TO MOTION TO SET
BRIEFING SCHEDULE FOR
MOTION FOR WARRANT OF
EXECUTION**

(Capital Case)

Clarence Wayne Dixon, through undersigned counsel, hereby responds to the State of Arizona’s Motion to Set Briefing Schedule for Motion for Warrant of Execution (hereafter, “Motion for Briefing Schedule”) which was filed and served on April 6, 2021.¹ *See* Motion to Set Briefing Schedule for Motion for Warrant of Execution at 6, *State of Arizona v. Clarence Wayne Dixon*, No. CR-08-0025-AP (Ariz. Apr. 6, 2021). In light of the State’s intention to seek a warrant for Mr. Dixon’s execution, *id.* at 5-6, Mr. Dixon agrees with the State that it is appropriate for this

¹ As an initial matter, counsel respectfully provides notice to the Court that Justices Beene, Lopez, and Montgomery may have conflicts of interest in this case due to their prior employment and/or involvement in this case.

Court to set a briefing schedule² for the State’s anticipated motion for warrant of execution (alternatively hereafter, “Motion for Execution Warrant”), *id.* at 1, and identify in advance the dates on which it will conference the State’s Motion for Execution Warrant and, if granted, potentially issue a warrant of execution, *id.* at 3–4.

However, Mr. Dixon respectfully asks that the Court commence the briefing schedule on the State’s Motion for Warrant of Execution no earlier than September 2021 due to the ongoing threat to public health created by the COVID-19 pandemic. Most importantly, the ongoing pandemic, coupled with the Arizona Department of Corrections, Reentry and Rehabilitation’s (ADCRR’s) continued suspension of all

² As stated, Mr. Dixon agrees that in the event lethal injection is the method of execution, a briefing schedule that accommodates the State’s disclosure obligations under ADCRR’s lethal-injection protocol and the corresponding civil settlement agreement is appropriate. *See* Motion for Briefing Schedule at 2. However he objects to the briefing schedule proposed by the State which affords him just 1 calendar day in which to respond to the State’s Motion for Warrant of Execution, while affording the State 6 days to reply. *Id.* at 4. The State argues that this curtailed briefing schedule “will not prejudice Dixon” because it has opted to include its anticipated motion for a warrant of execution as an exhibit to its Motion for Briefing Schedule. *Id.* at 4–5. But that is simply no justification for this Court to suspend the operation of Rule 6(a)(2) of Arizona’s Rules of Civil Appellate Procedure—particularly in a capital case—pursuant to which Mr. Dixon is entitled to 10 days in which to respond to the State’s motion for warrant of execution, and the State has 5 days in which to reply. Ariz. R. Civ. App. P. 6(a)(2); Ariz. R. Crim. P. 31.6(e). The State has advanced no argument for why curtailing Mr. Dixon’s response time in the way it has proposed, while expanding its own time in which to reply, is necessary in order to both comply with its disclosure obligations under ADCRR’s lethal-injection protocol and preserve the drug’s shelf life.

legal and expert visitation, continues to prevent Mr. Dixon and his counsel from preparing for clemency proceedings or moving forward under warrant of execution at this time.

I. Factual background

a. The COVID-19 pandemic

For the past year, ADCRR has suspended all legal and expert visitation in response to the public health crisis created by the COVID-19 pandemic. *See COVID-19 Management Updates*, ADCRR, <https://corrections.az.gov/covid-19-management-updates?page=1> (last visited Apr. 12, 2021). Prisons throughout ADCRR, including the facility where Mr. Dixon is housed, remain closed. *Id.* As a result, no member of Mr. Dixon's legal team has been allowed to visit him since March 11, 2020, and no experts have been allowed to interview or evaluate Mr. Dixon during that time.

The crisis that precipitated these closures is ongoing. On April 17, 2021, the CDC reported 31,382,266 cases of COVID-19 in the United States and 563,216 deaths. *COVID Data Tracker*, Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#cases_totaldeaths (last visited Apr. 17, 2021). According to the Arizona Department of Health Services, as of April 17, 2021, there were 853,050 cases of COVID-19 in Arizona and 17,151 deaths. Ariz. Dep't of Health Services, <https://www.azdhs.gov/covid19/data/index.php> (last

visited Apr. 17, 2021). On April 12, 2021, the Arizona Department of Health Services reported 806 new cases of COVID-19 diagnosed that day. Ariz. Dep't of Health Services, <https://www.azdhs.gov/covid19/data/index.php#confirmed-by-day> (last visited Apr. 19, 2021).³ And, while vaccinations are proceeding statewide, at this time 61.9% of Arizona's population remains unvaccinated. Ariz. Dep't of Health Services, <https://www.azdhs.gov/covid19/data/index.php#vaccine-admin> (last visited Apr. 19, 2021).

b. COVID-19 in ADCRR and vaccine access

Across ADCRR's ten facilities, 12,268 prisoners and 2,754 staff have tested positive for COVID-19 since the start of the pandemic, including 441 prisoners at the Arizona State Prison Complex in Florence, Arizona where Mr. Dixon is housed. *ADCRR COVID-19 Dashboard*, ADCRR, <https://corrections.az.gov/adcrr-covid-19-dashboard> (last visited Apr. 19, 2021). Forty-three prisoners are confirmed as having died due to contracting COVID-19, while that has been deemed the preliminary cause of death for eleven others. *Id.* The prison in Florence where Mr. Dixon is housed, and one other facility, has seen the highest number of COVID-19 fatalities. *Id.*

³ Data for April 12, 2021, is provided because the website notes that "Illnesses in the last 4–7 days may not be reported yet."

As of April 16, 2021, ADCRR reported having 19,980 doses of the COVID-19 vaccine in supply and administering 13,903 vaccines to prisoners throughout its ten facilities. *COVID-19 Management Updates*, ADCRR, <https://corrections.az.gov/covid-19-management-updates> (last visited Apr. 18, 2021). Mr. Dixon received his first dose of the COVID-19 vaccine on March 17, 2021. He is eligible to receive his second dose of the vaccine but, as of today's date, has not yet received it.

II. Discussion

A. Postponing, for a reasonable period, the briefing schedule on the State's anticipated Motion for Warrant of Execution is necessary under current circumstances

The threat to public health—including to the health of Mr. Dixon, his legal team, and ADCRR prisoners and staff—presented by the ongoing COVID-19 pandemic, together with ADCRR's suspension of all legal visitation for more than one year in response to this health crisis, render the State's Motion for Briefing Schedule premature and make a reasonable postponement of that briefing schedule necessary.

As discussed *supra*, Section I(a), Mr. Dixon's last visit with any member of his legal team occurred more than one year ago on March 11, 2020—two days before ADCRR suspended all in-person visitation. His federal habeas proceedings also concluded amidst what remains a global public health crisis. *See Dixon v. Shinn*, 140

S. Ct. 2810 (2020) (mem.) (denying petition for writ of certiorari on May 26, 2020). In the absence of visitation with his legal team or necessary experts, Mr. Dixon cannot prepare for, or meaningfully access, the clemency proceedings the State affords him.⁴ *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–89 (1998) (O’Connor, J., concurring in part and in the judgment); *see also San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193 Ariz. 195, 196 (1999) (citing Ariz. Const. art. II, § 4); U.S. Const. amend. XIV; Ariz. Const. art. II, § 4.

Mr. Dixon’s request for a postponement of the briefing schedule is not novel in light of current events. In recognition of the continued threat to public health presented by the COVID-19 pandemic, courts in Tennessee and Texas have postponed executions on public safety grounds. *See, e.g.*, Exs. A–C. Just last month, on March 15, 2021, the 346th District Court of El Paso County, Texas denied a request from the State of Texas to schedule the execution of death-row prisoner Fabian Hernandez, citing Mr. Hernandez’s “intent[ion] to seek clemency[,]” and finding that:

[] Due to the COVID-19 pandemic, counsel was unable to meet with Mr. Hernandez because all visitation in the Texas Department of Criminal Justice (TDCJ) was suspended.

⁴ Mr. Dixon is also visually disabled due to being legally blind in both eyes.

[] Due to the COVID-19 pandemic traveling to meet with Mr. Hernandez posed a significant health risk to not only counsel but anyone else that wished to travel to TDCJ.

...

[] Even though TDCJ resumed visitation in a limited capacity today, there is still an unnecessary risk not only to TDCJ personnel, but to the victim's family as well as to the defendant's family who will be present during the execution process.

Ex. A at 1–2. Because of the identified public health concerns, the court scheduled the State of Texas's request for a warrant for Mr. Hernandez's execution for a status conference in June 2021 at which time those concerns would presumably be reassessed. *See id.* at 2. In January 2021 and December 2020, meanwhile, the Tennessee Supreme Court postponed the executions of Oscar Franklin Smith and Byron Lewis Black, citing "the multiple issues caused by the continuing COVID-19 pandemic." Exs. B, C.

Here, the ongoing threat to public health presented by the COVID-19 pandemic, coupled with Mr. Dixon's inability to meet with his legal team for more than a year since the pandemic began, warrant commencing the briefing schedule on the State's anticipated Motion for Warrant of Execution no earlier than September 2021. As discussed *supra*, Section I(b), vaccine access is becoming more widely available, including to Mr. Dixon and prisoners throughout ADCRR, signaling that in-person visitation between Mr. Dixon, his legal team, and experts may be safe to resume in a few months' time.

Finally, because pentobarbital's 90-day shelf life does not begin to run until its compounding, *see* Motion for Briefing Schedule at 2, a reasonable postponement of the briefing schedule on the State's anticipated motion for a warrant of execution will not prejudice the State of Arizona, which, like Texas and Tennessee, also has an interest in safeguarding public health.

III. Conclusion

For the foregoing reasons, Mr. Dixon respectfully asks that the Court commence the briefing schedule on the State's Motion for Warrant of Execution no earlier than September 2021.

RESPECTFULLY SUBMITTED this 20th day of April, 2021.

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