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 [hereinafter Motion], which was filed and served on January 5, 2022.[1] *See* Motion to Set Briefing Schedule for Motion for Warrant of Execution at 7, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. Jan. 5, 2022). The State's Motion is premature and should be denied for two reasons. First there is court-ordered postconviction DNA testing pending pursuant to A.R.S. §§ 13-4240

[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.

and 13-4241—a proceeding which may result in the overturning of Mr. Dixon's conviction and death sentence. Second, the State has presented no evidence that its alleged testing of the compounded lethal-injection drug to be used in Mr. Dixon's execution has reliably determined the drug's beyond-use date. *See* Order, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. July 12, 2021) (authorizing the State to "renew its scheduling motion after specialized testing to determine a beyond-use date for compounded doses of the drug"). Alternatively, Mr. Dixon respectfully asks that the Court stay consideration of the State's Motion until after: (1) the State has provided reliable evidence of the beyond-use date of the drug; and (2) Mr. Dixon's state postconviction DNA litigation has concluded.[2] *See, e.g.*, *State v. Peterson*, 228 Ariz. 405, 411 (App. 2011) (staying consideration of appeal pending lower court's resolution of issues and ordering notice of outcome of lower court proceedings).

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[2] Mr. Dixon preserves his objection to the briefing schedule proposed by the State which affords him "10 calendar days"—rather than the minimum 14 calendar days to which Mr. Dixon is entitled under this Court's rules, *see* Ariz. R. Civ. App. P. 6(a)(2) (affording a party "10 days" in which to respond to a motion); Ariz. R. Civ. App. P. 5(a); Ariz. R. Civ. P. 6(a) (excluding "intermediate Saturdays, Sundays, and legal holidays if the period is less than 11 days"); Ariz. R. Crim. P. 31.6(e)—in which to respond to the State's Motion for Warrant of Execution. (*See* Motion at 4.) The State provides no support for its argument that curtailing Mr. Dixon's response time is necessary, either to comply with its disclosure obligations under the Arizona Department of Corrections, Rehabilitation & Reentry's [hereinafter ADCRR's] lethal-injection protocol, or to preserve the drug's alleged shelf life.

I. Factual background

A. 2021 Warrant Proceedings

On April 6, 2021, the State sought a scheduling order from this Court on its anticipated warrant for Mr. Dixon's execution. *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) [hereinafter 2021 Motion]. Following full briefing by the parties, the Court granted the State's request and set a warrant briefing schedule, but the Court did so in reliance upon the State's unsupported representation as to the 90-day beyond-use date of the drugs to be compounded for Mr. Dixon's execution. *Id.* at 2; Order, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. May 21, 2021).

However, on June 22, 2021, the State requested modification of that briefing schedule because its compounding pharmacist had made serious errors and miscalculations as to the beyond-use date of the execution drug. Motion to Modify Briefing Schedule, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. June 22, 2021) [hereinafter Mot. to Modify Briefing Schedule]. Whereas the State originally claimed that "recently completed testing" by its compounder established that "the drug has a beyond-use date (aka expiration date) of 90 days from the date of compounding" (2021 Motion at 2), the actual shelf life of the

compounded drug had a drastically shorter shelf life of only just 45 days (Mot. to Modify Briefing Schedule at 2).

In light of these troubling revelations, on July 12, 2021, the Court denied the State's motion to modify the warrant briefing schedule, granted Mr. Dixon's request to vacate it, and ordered that "[t]he State may renew its scheduling motion after specialized testing to determine a beyond-use date for compounded doses of the drug." Order, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. July 12, 2021).

B. Current State Postconviction Proceedings

On July 9, 2021, Mr. Dixon filed in Maricopa County Superior Court a Motion for Postconviction DNA Testing pursuant to A.R.S. §§ 13-4240 and 13-4241 based on new expert evidence establishing that he was convicted of first-degree murder and sentenced to death based on fundamentally flawed DNA testing that renders DNA evidence linking him to the crime scientifically flawed and invalid. (Ex. A.)

In the DNA proceedings, Mr. Dixon's expert, Dr. Eli Shapiro, provided uncontroverted evidence that the DNA testing of a stain on victim D.B.'s panties undertaken by the Arizona Department of Public Safety ("DPS") in 2000, and which was used to generate an alleged cold hit to Mr. Dixon that same year, violated well-established forensic testing requirements—including those adopted and required by the Federal Bureau of Investigation. (*See* Ex. B at Exhibit 1.) The reason for that is

straightforward: the DNA analysis undertaken by DPS which purported to link Mr. Dixon to the capital murder of victim D.B. excluded the use of a reagent blank negative control in the DNA extraction process, the use of which is necessary to obtain valid results. (*Id.*) Dr. Shapiro provided further uncontroverted evidence that as a result of DPS's fundamental forensic and scientific errors, the above-described DNA results are scientifically unreliable and invalid. (Ex. B at Exhibit 1; Ex. C at 1, 4.) Thus, the DNA evidence which lays at the core of Mr. Dixon's capital murder conviction and death sentence is invalid, and the identity of the person who deposited the sperm fraction on victim D.B.'s panties has never been resolved with any scientific or forensic validity. (*Id.*)

On December 27, 2021, after full briefing by the parties and oral argument, the Maricopa County Superior Court granted Mr. Dixon's motion for DNA testing pursuant to A.R.S. §§ 13-4240 and 13-4241. (Ex. D.) The Superior Court reached this decision after careful consideration of "Dixon's Motion for Postconviction DNA Testing, filed July 9, 2021, the State's Response, filed August 23, 2021, the Victim's Objection, filed August 23, 2021, and Dixon's Reply, filed August 27, 2021[]," as well as "the exhibits, the argument of the parties, and the underlying history of this matter."[3] (*Id.* at 1.)

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[3] Mr. Dixon supported his motion for postconviction DNA testing with Dr. Shapiro's expert report (Ex. B at Exhibit 1) as well as hundreds of pages of exhibits consisting

Key to the Superior Court's reasoning that Mr. Dixon demonstrated his entitlement to DNA testing under A.R.S. §§ 13-4240 and 13-4241 were the following undisputed facts:

> . . . Dixon's expert witness has stated that the DNA testing, while it reached a result, was not forensically or scientifically valid because a reagent blank control was not utilized. Dr. Shapiro opined that the absence of the reagent blank control means that the validity of the CODIS search and statistical evaluation linking Dixon to the crime is in doubt. **The State has not disputed Dr. Shapiro's opinion**.
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> According to Dr. Shapiro, when the stain was analyzed in November of 2000, standards and protocols required the presence of a reagent blank negative control. Because the actual stain was still available, Dr. Shapiro opines that "it was incumbent upon the laboratory to go back to the original evidence stain on the retained panties, re-cut the stain, and perform an extraction with a reagent blank." (Report at 4.) **Again, the Court notes that the State did not provide any expert opinion to the contrary**.

(Ex. D at 2–3 (emphasis added).)

After granting the motion for testing, the Superior Court ordered Mr. Dixon and the State to "confer and attempt to reach an agreement about the location and method of testing," no later than January 7, 2022, so that testing could be "conducted as expeditiously as possible." (Ex. D at 3.) In the absence of an agreement, the

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of trial transcript excerpts and the scientific reports generated by DPS in his case (Ex. B).

Superior Court ordered Mr. Dixon and the State to "inform the Court as soon as possible so that a hearing can be set on the matter." (*Id.*)

On January 5, 2022, just two days before the DNA testing meet-and-confer deadline, the State instituted proceedings in this Court seeking to commence briefing on a warrant for Mr. Dixon's execution. The State did so without mentioning that its request is in tension with the DNA testing order issued by the Superior Court. (*Compare* Motion at 6–7, *with* Ex. D at 3.)

On January 7, 2022, after failing to reach an agreement over the lab which will conduct the DNA testing, Mr. Dixon and the State [hereinafter the Parties] filed in the Superior Court a joint Notice of Outcome of Meet and Confer and Request for Hearing. (Ex. E.) Therein, the Parties informed the Superior Court that the State requested that DPS carry out the court-ordered DNA testing, whereas Mr. Dixon objected to DPS, given its earlier fundamental forensic and scientific errors, and instead nominated Bode Technology—an independent, accredited, forensic laboratory already on DPS's list of approved laboratories—to expeditiously carry out the testing. (*Id.* at 1–5.) The Parties also "jointly request[ed] a hearing" so that the Superior Court could resolve the dispute. (*Id.* at 1.) A status conference to settle on the Parties' dispute over the laboratory to conduct the DNA testing is scheduled for January 25, 2022.

II. Discussion

A. Postconviction DNA testing of forensic evidence critical to the continuing validity of Mr. Dixon's conviction and death sentence is underway pursuant to A.R.S. §§ 13-4240 and 13-4241, rendering the State's Motion premature and improper.

The State's attempt to commence Warrant proceedings against Mr. Dixon, despite the Superior Court's order for DNA testing under A.R.S. §§ 13-4240 and 13-4241 to resolve, for the first time, the open question of the identity of the individual(s) who deposited the sperm fraction on victim D.B.'s panties, is premature and improper. (*See* Exs. A–D.) In those same DNA proceedings, the Superior Court found that the State failed to present evidence to controvert Mr. Dixon's showing that the DNA testing results underpinning his conviction and sentence were invalid. (Ex. D at 2–3.)

It must follow that the State's request for this Court to nonetheless facilitate its pursuit of Mr. Dixon's execution by establishing a briefing schedule for a warrant of execution amounts to a request that this Court disregard the reasoned judgment of the Superior Court, which is based on uncontroverted evidence that now casts doubt on the reliability of Mr. Dixon's conviction and death sentence. But that is not all. The State's request disregards the heightened reliability demanded in capital cases by the Eighth Amendment to the U.S. Constitution and corresponding provisions of the Arizona Constitution, and also promotes the needless expenditure of judicial resources by requiring Mr. Dixon to litigate simultaneously in two forums, when the

outcome of the proceedings underway in the Superior Court may ultimately moot Warrant proceedings in this Court.

As discussed *supra*, Section I(B), the Superior Court ordered DNA testing to proceed under A.R.S. §§ 13-4240 and 13-4241 after finding it undisputed—upon careful consideration of the Parties' briefing, oral arguments, and voluminous exhibits—that Mr. Dixon's expert evidence established that the DNA test results which lay at the core of his capital conviction and death sentence are invalid. (Ex. D.) Arizona's forensic testing statutes mandate postconviction DNA or other forensic testing where "evidence is still in existence," "[a] reasonable probability exists that [the defendant] would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing" or other forensic testing of the evidence, and "[t]he evidence was not previously subjected to the DNA testing" or other forensic testing now available that "may resolve an issue not previously resolved through testing." A.R.S. §§ 13-4240(B), 13-4241(B); (*See also* Ex. D at 1–2.) The Superior Court explicitly found that Mr. Dixon satisfied each of these statutory provisions. (Ex. D at 3.) In other words, a reasonable probability exists that if the DNA testing now underway in the Superior Court proves exculpatory, Mr. Dixon would never have been prosecuted, convicted, or sentenced to death in the first place. The Superior Court should be allowed to resolve these

important issues before a briefing schedule on a warrant for Mr. Dixon's execution is established by this Court.

The heightened reliability that the Eighth Amendment to the U.S. Constitution and corresponding provisions of the Arizona Constitution demand in capital cases also requires that this Court reject the State's premature pursuit of Mr. Dixon's execution while proceedings in the Superior Court that test the validity of Mr. Dixon's conviction and death sentence are underway. U.S. Const. amend. VIII; *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (explaining that "[b]ecause of th[e] qualitative difference" between death and other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case[]"); Ariz. Const. art. 2, § 15; *State v. Davis*, 206 Ariz. 377, 380–81 (2003) (finding no "compelling reason to interpret Arizona's cruel and unusual punishment provision differently from the related provision in the federal constitution").

The proceedings taking place in the Superior Court were necessitated by the newly discovered egregious forensic and scientific errors committed by the State in carrying out the DNA testing that formed the crux of its case against Mr. Dixon for capital murder twenty-two years ago. *See* Section I(B), *supra*. (*See also* Exs. A–D.) Absent any legitimate forensic evidence connecting Mr. Dixon to victim D.B.'s murder, the State's case against Mr. Dixon has collapsed. In this context, it would

not only be improper, but also a violation of Mr. Dixon's state and federal rights, for this Court to sanction the State's pursuit of Mr. Dixon's execution when the validity of his capital murder conviction and death sentence are in doubt, and when proceedings authorized by Arizona law are underway in the Superior Court to determine their reliability.

Finally, the State's Motion, if granted, will require Mr. Dixon to simultaneously litigate in two state forums and result in the needless expenditure of judicial resources. This is already happening. (*See supra*, Section I(B).) Granting the State's Motion would perversely require Mr. Dixon to proceed with the litigation in the Superior Court that may ultimately result in relief from his death sentence, and at the same time litigate the State's efforts to execute him. It makes little sense from the standpoint of judicial economy for this Court to grant the State's Motion when the outcome of the DNA testing ordered by the Superior Court may moot these Warrant proceedings entirely. *See* A.R.S. § 13-4240(K) ("[I]f the results of the postconviction deoxyribonucleic acid testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this article or the Arizona rules of criminal procedure.").

Indeed, it is surprising that the State would invoke its power to execute Mr. Dixon under these circumstances. This is particularly so, given that prosecutors' responsibilities are those "of a minister of justice and not simply that of an advocate."

See Ariz. R. Sup. Ct. 42, Ethical Rule 3.8 cmt. 1. Those responsibilities include "see[ing] that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." *Id*. It cannot be seriously argued that the State will suffer prejudice while "special precautions [now subject to a court-order in the pending DNA proceedings] are [being] taken." *Id.* And, as the Superior Court has determined, expeditious DNA testing will not undermine the interests of the victim. (Ex. D at 3.) Accordingly, pending the outcome of the DNA proceedings, the State's Motion should be denied.

B. The State's Motion should be denied absent evidence that specialized testing has reliably determined the compounded drug's beyond-use date

The Court should not set a briefing schedule until the State has demonstrated the scientific basis for its undocumented assertion that the compounded pentobarbital to be used in Mr. Dixon's execution has a 90-day beyond-use date (alternatively "BUD"). The State asserts that "based on recently completed testing, the [execution] drug has a beyond-use date (aka expiration date) of 90 days from the date of compounding." (Motion at 2.) However, the State's previous motion seeking a briefing schedule also claimed that the execution drugs had a 90-day BUD from the date of compounding. (2021 Motion at 2.) After that motion was granted, the State admitted that the pharmacist retained to compound the drugs made a serious

error and the drugs would only have a 45-day BUD until "certain specialized testing" was conducted. (Mot. to Modify Briefing Schedule at 2.) The State now claims that this "testing" has been completed and once again asks Mr. Dixon and this Court to credit its unverified contention that the drug will have a 90-day BUD once compounded.

Given the earlier erroneous representations made by the State regarding the alleged efficacy of the compounded drug intended for use in Mr. Dixon's execution, as well as the State's serious and troubling history with selecting and sourcing execution drugs,[4] this Court should refrain from setting a briefing schedule until the

[4] The revelation that the compounding pharmacist retained by ADCRR provided an incorrect initial beyond-use date that precipitated the State's pursuit of Mr. Dixon's execution, *see* Mot. to Modify Briefing Schedule at 2, is the latest manifestation of ADCRR's troubling historical practice of using unreliable drugs and drug sources to carry out executions. In 2010, for example, ADCRR used thiopental that—it was later learned—had been secretly imported in violation of federal drug laws to execute Jeffrey Landrigan. *See Landrigan v. Brewer*, No. CV–10–02246–PHX, 2010 WL 4269559, at *12 (D. Ariz. Oct. 25, 2010) (enjoining Arizona from executing Landrigan "to allow the Court to fully consider his challenge to Arizona's use of sodium thiopental from an unidentified, non-FDA approved source"), *vacated*, 562 U.S. 996 (2010). Subsequently, a district court determined that the importation of sodium thiopental violated the Food, Drug, and Cosmetic Act and permanently enjoined the FDA's importation of the drug. *See Beaty v. Food & Drug Admin.*, 853 F.Supp.2d 30 (D.C. Cir. 2012), *vacated in part sub nom. Cook v. Food & Drug Admin.*, 733 F.3d 1, 12 (D.C. Cir. 2013). In 2015, despite that injunction, ADCRR again attempted to purchase and illegally import sodium thiopental, at a cost of $26,700, from an unlicensed supplier in India; the federal government refused to allow the drug shipment into the country. Chris McDaniel & Chris Geidner, *Arizona, Texas Purchased Execution Drugs Illegally Overseas, But FDA Halts The Import*, BUZZFEED NEWS (Oct. 22, 2015),

State does more than advance unsubstantiated claims regarding the BUD of the drug intended for use in Mr. Dixon's execution. The State has not provided any information[5] about the "specialized testing" that was conducted, the qualifications of the pharmacist and the testing laboratory, and most notably, has not released any of the testing results. The United States Pharmacopeia and National Formulary ("USP-NF") provides guidelines for compounded sterile preparations—a category

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http://www.buzzfeed.com/chrismcdaniel/arizona-texas-purchased-execution-drugs-illegally.

The State also has a decades-long, haphazard approach to implementing its execution protocol including the adoption of a protocol with a short but troubled history in advance of the execution of Joseph Wood. Michael Kiefer, *Drug switch underscores Arizona's struggle with execution standards*, ARIZ. REPUBLIC (March 26, 2014), https://www.azcentral.com/story/news/arizona/death-row/2014/03/26/arizona-switches-drug-executions-death-row/6914575/. Despite representing to Mr. Wood and the courts that there was no reason to be concerned about the drugs or doses ADCRR planned to administer, Wood's execution lasted nearly two hours during which he attempted to rise up against the restraints and gulped for air more than 640 times. Patrick McNamara, *Tucson Killer's Execution Takes Two Hours*, ARIZ. DAILY STAR (July 23, 2014, 10:00 PM), http://tucson.com/news/state-and-regional/3ac6d417-866e-5884-a09b-7244a9c18b46.html. Unbeknownst to his counsel or media witnesses, ADCRR deviated from the execution protocol and administered Mr. Wood fifteen doses of the drug combination before he died. *Arizona inmate Joseph Wood was injected 15 times with execution drugs*, The Guardian (Aug. 2, 2014), https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood.

[5] On July 21, 2021, the Office of the Federal Public Defender sent a public records request to ADCRR seeking, *inter alia*, "[d]ocuments related to the 'specialized testing' that the State referred to in the 2021 Motion, as well as records relating to any other testing or proposed testing of batches of pentobarbital, including testing standards, timelines, protocols, or studies, the results of testing and any raw data or notes." (Ex. F.) The Department partially responded to the request but did not produce any records responsive to this specific request.

that includes compounded pentobarbital—and establishes a maximum beyond-use date of 45 days.[6] The State has not disclosed any information about the "specialized testing" it claims permits an extension of the maximum BUD set by the USP-NF, nor has it provided any results demonstrating the drugs have passed those tests.[7] Absent scientific data that establishes the 90-day BUD of the compounded drug intended for use in Mr. Dixon's execution, the State's motion is premature and should be denied on that ground as well.

III. Conclusion

For the foregoing reasons, Mr. Dixon respectfully asks that the Court deny the State's Motion or, in the alternative, to stay its consideration until after: (1) Mr. Dixon's state postconviction DNA proceedings have concluded; and (2) the State

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[6] United States Pharmacopeia, General Chapter 797, *Pharmaceutical Compounding – Sterile Preparations* (2018), at 5–6. Arizona law requires that compounded drugs adhere to beyond-use dates set by USP-NF. Ariz. Admin. Code. § R4-23-410(B)(3)(d).

[7] It is troubling that the very limited information the State has released about the process of compounding drugs for use in executions includes laboratory test results that demonstrate at least one batch of compounded drugs tested outside the acceptable potency range for pentobarbital. Based on redacted documents that ADCRR released, it appears that at least one sample had a potency of 116%. (Ex. G.) This potency exceeds that permitted by the USP-NF requirements. USP-NF Abstract, Pentobarbital Sodium, https://doi.usp.org/USPNF/USPNF_M62380_04_01.html ("Pentobarbital Sodium contains not less than 98.0 percent and not more than 102.0 percent of C11H17N2NaO3, calculated on the dried basis.").

has provided reliable evidence demonstrating the beyond-use date of its compounded execution drug.

RESPECTFULLY SUBMITTED this 19th day of January, 2022.

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