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 **OPPOSITION TO MOTION FOR WARRANT OF EXECUTION** (Capital Case)

Clarence Wayne Dixon, through undersigned counsel, hereby opposes the State of Arizona's Motion for Warrant of Execution [hereinafter Motion], which was filed and served on February 24, 2022.[1] *See* Motion for Warrant of Execution at 3, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. Feb. 24, 2022). The State premises its Motion on two claims: first, that this Court has no discretion under A.R.S. § 13-759(A) and Rule 31.23(b) of Arizona's Rules of

[1] Counsel respectfully provides the Court with notice 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.

Criminal Procedure to deny the Motion; and second, that Mr. Dixon "has nothing pending in any state or federal court." (Motion at 1–2.) Neither assertion is correct.

First, neither A.R.S. § 13-759(A) nor Rule 31.23(b) of Arizona's Rules of Criminal Procedure divest this Court of its independent judicial discretion to deny or continue consideration of the State's Motion. Interpreting the statute's language as mandatory would sanction absurd and unconstitutional results, including by requiring this Court to rotely issue execution warrants even as to death sentences that may violate due process or result in cruel and unusual punishment. *See Garcia v. Butler in & for Cnty. of Pima*, 251 Ariz. 191 ¶ 18 (2021) (language will not be interpreted as mandatory when unconstutional results would follow); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 596 ¶¶ 31–32 (2017), *as amended* (Aug. 17, 2017) (interpreting "shall" as permissive rather than mandatory to preserve the statute's constitutionality). Neither the legislature nor the State's Attorney General have the power to divest this Court of its constitutional authority or usurp judicially mandated prerogatives. What is more, the State's reading of Rule 31.23(b) ignores Rule 31.3(a) which empowers this Court to suspend the operation of Rule 31.23(b) under the appropriate circumstances. *See* Ariz. R. Crim. P. 31.3(a) (providing that "[f]or good cause, an appellate court, on motion or on its own, may suspend any provision of this rule in a particular case, and may order such proceedings as the court directs[]").

Second, as explained below, this Court has historically exercised its discretion to regulate the issuance of execution warrants, especially when litigation is pending which might affect the reliability or validity of a defendant's conviction, sentence, or execution method. (*See* Exs. A–H (orders denying or continuing consideration of motions for execution warrant).)

Third, the State has not produced the requisite *quantitative* (as opposed to *qualitative*) analysis of its compounded execution drug (*see* Ex. J; *see also* Ex. K) which its execution protocol required within 10 days of the Motion's filing. *Cf.* Ariz. Dep't of Corr., Rehab. & Reentry, *Dep't Order 710—Execution Procedures*, Attachment D at 2 (Mar. 10, 2021), https://corrections.az.gov/sites/default/files/policies/700/0710_031021.pdf. The State has also not demonstrated that the compounded drug to be used in Mr. Dixon's execution has a beyond-use date (BUD) that exceeds 45 days and, therefore, will not be expired when the time comes. *Cf. id.* at 1 ("ADC will only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is carried out."). Under these circumstances, this Court's issuance of an execution warrant would render the State in violation of its own protocol and, consequently, Mr. Dixon's state and federal due process rights. *Id.* Ariz. Const. art. II, § 4; U.S. Const. amend. XIV.

Finally, the State's assertion that there is no pending litigation is inaccurate. (*See* Motion at 2.) Consistent with the process mandated by the legislature, in December 2021, the Maricopa County Superior Court ordered postconviction DNA testing to proceed in Mr. Dixon's case which is not yet fully resolved. (*See* Ex. I (Order, *State of Arizona v. Clarence Wayne Dixon*, No. CR-2002-019595 (Maricopa Cnty. Super. Ct. Dec. 27, 2021) ("IT IS ORDERED granting the Motion for Postconviction DNA Testing.")).)

Litigation is also pending that challenges the State's ability to carry out executions—including Mr. Dixon's specifically—using cyanide gas under Article 2, Section 15 of the Arizona Constitution. Verified Complaint, *Jewish Cmty. Relations Council of Greater Phoenix, et al. v. State of Arizona, et al.*, No. CV2022-001875 (Maricopa Cnty. Super. Ct. Feb. 15, 2022). This Court should, in keeping with its precedents, exercise its discretion to deny or, alternatively, continue consideration of the State's Motion until this litigation—which is critical to the validity of Mr. Dixon's conviction, death sentence, and method of execution—is resolved.

I. This Court has discretion to deny or, alternatively, continue consideration of the State's Motion and should exercise that discretion here.

Neither A.R.S. § 13-759(A) nor Rule 31.23(b) of Arizona's Rules of Criminal Procedure vitiate this Court's discretion to deny or continue consideration of a motion for warrant of execution. The State's claim to the contrary relies on language

in these provisions mandating that this Court "shall," *see* A.R.S. § 13-759(A), or "must," *see* Ariz. R. Crim. P. 31.23(b), issue a warrant of execution after a conviction and death sentence are affirmed and the first postconviction proceeding concluded. (*See* Motion at 1.) The State's argument under A.R.S. § 13-759(A), if credited, would license Mr. Dixon's automatic execution while depriving him of access to the courts and his fundamental rights to due process. *Barbier v. Connolly*, 113 U.S. 27, 31 (1884). This Court is not stripped of its independent judicial power to say when the execution of a citizen may proceed, or to determine when the state or federal constitutions, or even the appearance of justice itself, impose barriers to that result. A.R.S. § 13-759(A) need not be interpreted so as to unconstitutionally divest this Court of its judicial mandate to protect and enforce constitutional rights. *Garcia*, 251 Ariz. ¶ 18.

Further, the State's argument is belied by this Court's unopposed exercise of judicial discretion to decide precisely <u>*when*</u> a warrant of execution "must" or "shall" issue, including by denying a warrant motion that is prematurely sought.[2] It also

[2] The legislature cannot, consistent with the Arizona Constitution's separation of powers requirement, tread on this Court's exclusive rulemaking authority or dictate how it manages its docket. *See* Ariz. Const. art. III ("The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."); *see also, e.g.*, *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342 ¶ 7 (1999)

ignores Rule 31.3(a) of Arizona's Rules of Criminal Procedure which expressly provides that "[f]or good cause, an appellate court, on motion or on its own, may suspend any provision of this rule in a particular case, and may order such proceedings as the court directs." In other words, Rule 31.3(a) empowers this Court to suspend Rule 31.23(b) and its mandatory warrant-issuing requirements under the appropriate circumstances—contrary to the State's claim otherwise. (*See* Motion at 1–2.) Rule 31.23(b) and the corresponding statute must be interpreted and applied in this fashion in order to avoid dire unconstitutional consequences. *Garcia*, 251 Ariz. ¶ 18; *State ex rel. Brnovich*, 242 Ariz. at 596 ¶¶ 31–32.

This Court's precedents demonstrate that not only does it retain discretion to deny a warrant motion, but it has not hesitated to exercise that discretion where pending litigation critical to the reliability of a capital defendant's conviction, death sentence, or method of execution remains unresolved. (*See* Ex. A (Order, *State of Arizona v. Daniel Wayne Cook*, No. CR-88-0301-AP (Ariz. Apr. 1, 2009) (denying State's motion for warrant of execution based on "proof of filing a Rule 32 notice of post-conviction relief . . . challenging the constitutionality of Arizona's lethal injection protocol")); Ex. B (Order, *State of Arizona v. Eric John King*, No. CR-91-

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(holding that statute's lowering of the time limits for filing postconviction petitions directly conflicted with Ariz. R. Crim. P. 32.4(c), thus violating this Court's exclusive constitutional rulemaking authority). But that is precisely the constitutional problem that the State's narrow reading of A.R.S. § 13-759(A) would invite. (*See* Motion at 1–2.)

0084-AP (Ariz. May 6, 2009) (denying State's motion for warrant of execution based on "proof of filing a Rule 32 notice of post-conviction relief")); Ex. C (Order, *State of Arizona v. Donald Edward Beaty*, No. CR-85-0211-AP/PC (Ariz. Feb. 4, 2010) ("In light of the pending post-conviction relief petition, IT IS ORDERED that the Motion for Warrant of Execution is denied)); Ex. D (Order, *State of Arizona v. Richard Lynn Bible*, No. CR-90-0167-AP (Ariz. Sept. 22, 2010) (denying State's motion for warrant of execution "in light of the Motion for Reconsideration of Trial Court's Denial of Bible's Request for Postconviction DNA Testing pending in the Coconino County Superior Court")).) Moreover, this Court denied the State's first request for a warrant of execution for Mr. Dixon because the State had not conducted the specialized testing necessary to extend the beyond-use date of its compounded execution drugs beyond 45 days. *See* Order at 1, *State of Arizona v. Clarence Wayne Dixon*, No. CR-08-0025-AP (Ariz. July 12, 2021). It should do so again here.

A. The Court should deny the State's Motion because the State has not complied with the requirement in its execution protocol that Mr. Dixon receive a quantitative test result within 10 days of the Motion.

The State's execution protocol requires that "[a] quantitative analysis of any compounded or non-compounded chemical to be used in the execution shall be provided upon request within ten calendar days after the State seeks a Warrant of Execution." *Dep't Order 710—Execution Procedures*, Attachment D at 2. The State filed its Motion on February 24, 2022 (Motion at 2) and noticed its intent to use

compounded pentobarbital to carry out Mr. Dixon's execution should he elect that method (Ex. L). That same day, under Department Order 710, Attachment D, counsel for Mr. Dixon requested that the State produce, within ten calendar days, a quantitative analysis of the compounded pentobarbital the State intends to use if an execution date is scheduled for Mr. Dixon.

On March 4, 2022, the State produced a heavily redacted single page that indicates only that the compounded substance contains pentobarbital. (*See* Ex. J.) Notably, that document does not provide a beyond use date for the compounded drug. (*See generally id.*) As expert pharmacologist Dr. Michaela Almgren explains in her report, the single page produced by the State "does not provide appropriate quantitative analytical data for the compounded pentobarbital and does not provide accurate information about the drug quality and potency because an improper testing methodology was used." (Ex. K ¶¶ 5, 14; *see also id.* ¶¶ 34–35.) Moreover, the single page disclosed by the State "do[es] not indicate the actual amount of pentobarbital in the sample tested and therefore it is not certain that the drug is safe and effective before the intended use." (Ex. K ¶ 5.)

By failing to produce a quantitative analysis of the compounded drug intended for use in Mr. Dixon's execution, the State has violated the provisions of its own execution protocol as well as Mr. Dixon's state and federal due process rights. *See Dep't Order 710—Execution Procedures*, Attachment D at 2; *see Bennett v. Ariz.*

State Bd. of Pub. Welfare, 95 Ariz. 170, 172 (1963) (noting Article 2, Section 4 of the Arizona Constitution "is the corollary to the first clause of the 14th Amendment of the United States Constitution[,]" and "[i]ts purpose is to preserve personal . . . rights against arbitrary action of public officials"); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (determining that where the State "create[s]" a right for prisoners, "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated").

This error cannot now be cured because the execution protocol's 10-day disclosure deadline has already lapsed. The Court should therefore deny the State's Motion and order it to renew its request for an execution warrant once it is prepared to comply with its execution protocol by producing the requisite quantitative analysis of its compounded execution drug.

B. The Court should deny the State's Motion because the State has not provided a beyond-use date for its execution drug as verified or assigned by its compounding pharmacy or the testing lab.

The State's execution protocol mandates that "ADC will only use chemicals in an execution that have an expiration or beyond-use date that is after the date that an execution is carried out." *Dep't Order 710—Execution Procedures*, Attachment D at 1.

On June 22, 2021, however, the State advised Mr. Dixon and this Court *after* initiating warrant proceedings that "until certain specialized testing of a sample batch is conducted, pentobarbital that is compounded for Dixon's execution will have an initial beyond-use date of 45 days" and "will expire prior to Dixon's anticipated execution." Motion to Modify Briefing Schedule at 2–3, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. June 22, 2021). Since then, the State has presented no evidence either to Mr. Dixon or this Court to support its newly revised claim that "certain specialized testing" establishes that "the pentobarbital to be used in Dixon's execution will have a beyond-use date of at least 90 days." Motion to Set Briefing Schedule for Motion for Warrant of Execution at 2, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. Jan. 5, 2022).

On March 4, 2022, counsel for Mr. Dixon requested that the State produce all documents related to the specialized testing of its compounded execution drug. On March 7, 2022, the State agreed to do so in the coming days and noted it would not object to Mr. Dixon supplementing this Opposition following his receipt of that information. The existence and reliability of specialized testing conducted in this arena is of critical importance. Dr. Almgren explains that "[s]tability studies [ ] help to determine the appropriate storage conditions for the medications that assure the drug will maintain its potency and pharmacological activity." (Ex. K at 7.) Without

this information "it [is] impossible to confirm the adequacy of the compounding procedure used, the suitability of the inactive ingredients and their expiration dates, the ingredients and amounts/concentrations used, and whether any adjustments were made to assure that the medication was prepared correctly to produce the desired effect." (Ex. K ¶ 27; *see also id.* ¶ 35.) Until this information is provided, and the State has established that the beyond use date of its compounded execution drug has been reliably extended beyond 45 days, this Court should decline the State's invitation to issue a warrant for Mr. Dixon's execution. (*Id.* ¶ 33 (Dr. Almgren opining that "[w]ithout access to [compounding] logs, it is not possible to verify that the drugs are properly prepared and can be used without causing unnecessary suffering to the prisoner[]").)

C. The Court should deny the State's Motion because litigation critical to the reliability of Mr. Dixon's conviction, death sentence, and method of execution is underway in the Superior Court and not yet fully resolved.

Litigation bearing on the reliability of Mr. Dixon's conviction and on the State's ability to execute him consistent with Arizona constitutional guarantees is not yet concluded. As detailed in Mr. Dixon's Response to the State's Motion for Briefing Schedule which he incorporates here by specific reference[3] for brevity's

[3] Mr. Dixon is aware of the prohibition on incorporation by reference in opening briefs on direct appeal. *See State v. West*, 238 Ariz. 482, 498 n.10 ¶ 55 (App. 2015). However because this Opposition is not tantamount to an opening brief on direct

sake, *see* Response to Motion to Set Briefing Schedule for Motion for Warrant of Execution at 4–12, *State of Arizona v. Clarence Wayne Dixon*, No. CR-08-0025-AP (Ariz. Jan. 19, 2022), postconviction DNA testing of forensic evidence critical to the validity of Mr. Dixon's conviction and death sentence is underway pursuant to A.R.S. §§ 13-4240 and 13-4241 and not yet resolved.

Because Mr. Dixon satisfied the statutory requirements, the Maricopa County Superior Court ordered DNA testing to proceed in Mr. Dixon's case pursuant to A.R.S. §§ 13-4240 and 13-4241 after finding it undisputed 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. I.)

On March 9, 2022, in connection with postconviction DNA litigation underway, the State disclosed a one-page forensic examination report from DPS that contains no scientific information; rather, it contains only an unsupported conclusion. That conclusion asserts that, "The STR DNA profile from the sperm targeted fraction [on the cutting from the victim's panties] is from a single contributor. It is approximately 71 octillion times more likely to obtain the observed STR DNA profile if item 78.A (Clarence Dixon) is the contributor than if a random, unrelated individual is the contributor. Additional STR loci have been entered into

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review of Mr. Dixon's conviction and sentence, he respectfully submits that this prohibition is inapplicable here.

CODIS." (Ex. M.) Because the "report" contains no scientific data or support, it does not address the matters specified in the Superior Court's testing order and leaves important threshold questions unanswered, including: whether an extraction negative control was used in the DNA extraction process (which was the fundamental error that lab personnel from DPS made during the first testing); whether the testing was conducted "blind"—without the analyst having access to Mr. Dixon's profile until after the analyst completed the testing on the stain; the method by which the reported statistical probabilities were calculated; what "[a]dditional STR loci" were located, as well as what DPS's CODIS entry revealed; whether the process undertaken by DPS to generate the disclosed results complied with requisite scientific and forensic standards, as well as the court order specifying the method of DNA testing (*see* Ex. N); and whether DPS accurately interpreted its results. Mr. Dixon's counsel requested the data and documentation substantiating DPS's report and, on March 10, 2022, counsel for the State provided that information and counsel for Mr. Dixon are reviewing it. The parties and the Superior Court should be allowed to resolve these important issues before a warrant for Mr. Dixon's execution is issued by this Court.

The litigation in the Superior Court under A.R.S. §§ 13-4240(B) and 13-4241(B) is not subject to Rule 32's successor petition bar as it amounts to Mr. Dixon's "first post-conviction relief proceeding[]" under Arizona's postconviction

DNA statutory provisions. *Cf.* A.R.S. § 13-759(A) (authorizing issuance of execution warrant only "*[a]fter* . . . the first post-conviction relief proceedings have concluded" (emphasis added)); Ariz. R. Crim. P. 31.23(a). Even were this Court to adopt the State's reading of A.R.S. § 13-759(A) and Rule 31.23(a) of Arizona's Rules of Criminal Procedure (*see* Motion at 1–2), their provisions do not support issuance of an execution warrant under the circumstances present here.

Also unresolved is the State's ability to constitutionally execute Mr. Dixon using cyanide gas. (*See* Ex. I at 3 (noting the crime for which Mr. Dixon was convicted occurred in 1978)); A.R.S. § 13-757(B) ("A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date."); Ariz. Dep't of Corr., Rehab. & Reentry, *Dep't Order 710—Execution Procedures*, Attachment E (Mar. 10, 2021), https://corrections.az.gov/sites/default/files/policies/700/0710_031021.pdf (providing that those executed by lethal gas are strapped to a chair in the center of the gas chamber, after which levers are used to drop sodium cyanide into a pot of sulfuric acid underneath the chair, which releases deadly hydrogen cyanide gas into the air).

On February 15, 2022, the Jewish Community Relations Council of Greater Phoenix (JCRC) sued the State seeking to enjoin its use of cyanide gas in any

executions and from making expenditures related to its cyanide gas program. Verified Complaint, *Jewish Cmty. Relations Council of Greater Phoenix, et al. v. State of Arizona, et al.*, No. CV2022-001875 (Maricopa Cnty. Super. Ct. Feb. 15, 2022). JCRC's lawsuit alleges that the State's "use of lethal gas, particularly cyanide gas, as a means of capital punishment violates all core tenets of Article 2, section 15 of the Arizona Constitution's prohibition against cruel and unusual punishment. Specifically, Defendants' lethal gas protocol is unconstitutional as applied in its use of cyanide gas." *Id.* at 24, ¶ 110. Until this litigation is resolved, the State's ability to constitutionally carry out cyanide gas executions is in jeopardy.

It follows that Mr. Dixon's statutory right to "choose" a method of execution that does not require him to sacrifice his constitutional rights, *see* A.R.S. § 13-757(B), is likewise jeopardized. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution–and, in particular, in accord with the Due Process Clause."); *Wolff*, 418 U.S. at 557. Under these circumstances, the State's Motion should be denied.

Even assuming, however, that A.R.S. § 13-759(A) and Rule 31.23(b) of Arizona's Rules of Criminal Procedure remove this Court's authority to deny the State's Motion, this Court nonetheless has discretion to continue its consideration for the same reasons already discussed, *supra*. *See generally* Ariz. R. Crim. P. 31.3.

(*See also* Exs. E–H (this Court continuing consideration of the State's warrant motions in *King*, *Bible*, *Towery*, and *Moormann* including based on pending or forthcoming litigation).)

II. Alternatively, the Court should issue a stay of execution concurrently with a warrant of execution.

If this Court concludes that it lacks discretion to deny the State's Motion, then upon issuing a warrant of execution it should concurrently issue a stay for the reasons already discussed, *see* Sections I, *supra*, and incorporated herein by reference. Rule 32.18 of Arizona's Rules of Criminal Procedure authorizes this Court to issue a stay of execution where an applicant demonstrates with particularity that any postconviction claims he seeks to litigate "are not precluded under Rule 32.2." Ariz. R. Crim. P. 32.18.

Historically, this Court has stayed executions pending the outcome of ongoing litigation critical to the reliability of a person's death sentence or method of execution. (*See, e.g.*, Ex. O (Order, *State of Arizona v. Jeffrey Timothy Landrigan*, No. CR-90-0323-AP (Ariz. Oct. 11, 2007) (staying Jeffrey Landrigan's execution "in light of the grant of certiorari in *Baze v. Rees*[]"); Ex. P (Order, *State of Arizona v. Joseph R. Wood*, No. CR-14-0232-PC (Ariz. July 23, 2014) (staying Joseph Wood's execution "pending the Court's consideration of his petition for review of the denial of post-conviction relief[]").)

As demonstrated *supra*, Section I, and detailed in Mr. Dixon's January 19, 2022, Response to the State's Motion for a Briefing Schedule, court-ordered 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. *See* Response to Motion to Set Briefing Schedule for Motion for Warrant of Execution at 4–12, *State of Arizona v. Clarence Wayne Dixon*, No. CR-08-0025-AP (Ariz. Jan. 19, 2022). And because litigation challenging the constitutionality of the State's ability to execute Mr. Dixon using cyanide gas is also underway, *see* Verified Complaint, *Jewish Cmty. Relations Council of Greater Phoenix, et al. v. State of Arizona, et al.*, No. CV2022-001875 (Maricopa Cnty. Super. Ct. Feb. 15, 2022), this Court should stay Mr. Dixon's execution until those matters are resolved.

III. Conclusion

For the foregoing reasons, Mr. Dixon respectfully asks that the Court deny the State's Motion or continue its consideration until after Mr. Dixon's state postconviction DNA proceedings and the JCRC civil litigation have concluded. Alternatively, and for the same reasons, Mr. Dixon respectfully asks that the Court issue a stay of execution concurrently with any warrant of execution.

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RESPECTFULLY SUBMITTED this 10th day of March, 2022.

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