ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. CLARENCE WAYNE DIXON, Appellant.	No. CR–08–0025–AP Maricopa County Superior Court No. CR–2002–019595 Ninth Cir. No. 16–99006 U.S. District Court No. CV–14–258–PHX–DJH **REPLY IN SUPPORT OF MOTION FOR WARRANT OF EXECUTION** (Capital Case)

Clarence Wayne Dixon was convicted and sentenced to death in 2008 for the 1978 first-degree murder of Deana Bowdoin. His conviction and sentence were affirmed by this Court on direct appeal and his post-conviction and federal habeas corpus challenges to his conviction and sentence were unsuccessful. Dixon does not dispute these facts. But he nonetheless opposes the State's Motion for Warrant of Execution because: 1) the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR) has not complied with its requirement that it provide quantitative test results of the drug to be used in his execution; 2) ADCRR has not provided a beyond-use-date for the drug; and 3) litigation regarding DNA testing

and lethal gas executions is ongoing in the superior court.[1] Alternatively, Dixon requests that, if this Court issues a warrant, it concurrently stay his execution. This Court should reject Dixon's arguments and grant the State's motion for warrant of execution.

A. The warrant statute contains mandatory language.

Dixon rests his arguments opposing the issuance of a warrant of execution on the premise that this Court has the discretion to deny or continue consideration of the State's motion. See Opposition at 4–7. 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 too does Rule 31.23(b).

Dixon contends that this Court maintains to deny a warrant of execution even when the requirements of A.R.S. § 13–759(A) are met. But construing the statute's use of "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

[1] Dixon's 17-page Opposition exceeds the 12-page limit set by this Court in its order of February 2, 2022. However, the State has elected not to move to strike his Opposition in order to avoid frustrating the briefing schedule set by this Court in that same order.

the executive's powers and responsibilities, which includes the responsibility for carrying out criminal sentences. *See State v. Wagstaff*, 164 Ariz. 485, 488–89 (1990). Through § 13–759(A), the legislature has directed this Court to verify that an inmate's guaranteed appellate and post-conviction 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. *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.

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 Dixon'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), Dixon offers no interpretation of the statute that would in any manner guide or limit judicial discretion under the statute. Any interpretation that vests unbridled discretion in this Court to deny a death warrant for an inmate who is eligible to be executed would invade the executive's duty to carry out lawfully-imposed sentences.

Dixon also argues that the State's reading of the statute is belied by history, pointing to prior cases where this Court declined to issue a warrant of execution due to pending litigation and asserting that this Court denied the State's first request for a warrant of execution in his case. Opposition at 6–7. But Dixon does not explain how this Court's declination to issue a warrant in those prior circumstances shows that A.R.S. § 13–759(A) does not impose a mandatory duty on this Court. And he is incorrect that this Court previously denied the State's request for a warrant in his case. *Id.* at 7. Instead, this Court previously denied the State's request to modify the briefing schedule on a motion for warrant of execution—the currently pending motion is the first request for issuance of a warrant the State has filed in Dixon's case.

It is undisputed that the conditions of A.R.S. § 13–759(A) are met. This Court should therefore grant the State's motion and issue a warrant of execution.

B. Dixon's arguments regarding ADCRR's lethal injection protocol and pending litigation do not justify denying the State's motion.

Dixon does not dispute that the conditions required by § 13–759(A) for issuance of an execution warrant are met. Consequently, his arguments for denying the State's motion, based on ADCRR's lethal injection protocol and superior court litigation, are irrelevant to whether a warrant must issue. However, even if they were relevant, his arguments do not justify denying the State's motion for a warrant of execution in his case.

1. ADCRR complied with its quantitative testing requirement.

Dixon argues that ADCRR failed to comply with the requirement that it provide a quantitative analysis of the drug to be used in Dixon's execution because the report it disclosed to him is insufficient. Opposition at 7–9. He is incorrect. The quantitative analysis requirement in ADCRR's lethal injection protocol is a direct result of a settlement in *First Amendment Coalition of Arizona, Inc. et al. v. Ryan*, No. CV-14-01447-PHX-NVW (D. Ariz.), which required that ADCRR "provide upon request, a quantitative analysis of any compounded or non-compounded chemical to be used in an execution that reveals, at a minimum, the identity and concentration of the compounded or non-compounded chemicals." Exhibit A, at 2. The report the State provided to Dixon contains just that—it states that the chemical to be used contains "Pentobarbital (a derivative of Barbituric Acid)" in a concentration of "460 ± 92 ng/ml." Exhibit J, Opposition. ADCRR thus complied with the quantitative analysis provision of its lethal injection protocol.

2. Documentation of the drug's beyond-use-date is not required for issuance of warrant of execution.

Dixon next refers to the requirement in ADCRR's lethal injection protocol that it not use any chemical in an execution that has passed its beyond-use or expiration date, and contends that a warrant should not issue because the State has provided "no evidence" regarding the beyond-use date of the drug to be used in his

execution. Opposition at 9–11. But nothing in A.R.S. § 13–759(A) or ADCRR's protocol requires the State to present "evidence" of a drug's beyond-use date before an execution warrant may be issued. Moreover, if this Court were to grant the State's motion on its April 5, 2022, conference date, Dixon's execution would be scheduled for approximately May 10. *See* A.R.S. § 13–759(A) ("The time for execution shall be fixed for thirty-five days after the state's motion is granted."). And as Dixon notes, the State intends to disclose to him documents regarding the testing conducted to establish the drug's beyond-use date shortly. Opposition at 10. That will allow him sufficient time to submit any challenge he deems appropriate to the drug's beyond-use date.

3. Recently completed DNA testing showed there is no doubt as to Dixon's guilt.

Dixon next contends that the warrant should not issue because "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." Opposition at 12. He is incorrect—the testing is completed and has been resolved. As Dixon acknowledges, DPS completed the court-ordered DNA testing and the State provided Dixon with the final report on March 9, 2022, as well as the underlying casefile documenting the testing process on March 10, 2022. The results of testing unequivocally reaffirmed Dixon's guilt. *See* Exhibit M (concluding "[i]t is approximately 71 octillion times more likely"

that Dixon is the contributor of the DNA found on the victim's underwear), Opposition. There is thus no reason to decline to issue a warrant of execution based on the superior court's order for DNA testing.

Dixon also contends that the DNA testing request he filed under A.R.S. §§ 13–4240, –4241, constitutes a "first post-conviction relief proceeding" under § 13–759(A), thus precluding issuance of the warrant. Opposition at 14. But Dixon provides no authority for the novel suggestion that a petition for postconviction DNA testing constitutes a "post-conviction relief proceeding[]" under the warrant statute. Moreover, the DNA petition cannot be his "first" post-conviction proceeding since he already concluded his "first" Rule 32 proceeding years ago. Thus, even if the DNA litigation qualified as a post-conviction relief proceeding, it is not Dixon's "first," and he is therefore incorrect that § 13–759(A) precludes issuance of a warrant.

4. An unrelated, ongoing gas chamber lawsuit has no bearing on whether a warrant should be issued for Dixon's execution.

Dixon also refers to a lawsuit challenging execution by lethal gas under the Arizona Constitution, arguing that "[u]ntil this litigation is resolved, the State's ability to constitutionally carry out cyanide gas executions is in jeopardy." Opposition at 14–15. But neither Dixon, nor any other death row inmate, is a party to that lawsuit. And standing issues aside, that lawsuit has no bearing on the State's ability to constitutionally carry out Dixon's execution.

A defendant, like Dixon, who is sentenced to death for a crime committed before November 23, 1992 will be executed by lethal injection unless he affirmatively chooses lethal gas. Ariz. Const. Art. 22, § 22; A.R.S. § 13–757(B); *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997) ("[U]nless Poland specifically chooses otherwise, he will be executed by Arizona's default method of execution, lethal injection."). Thus, unless Dixon chooses otherwise, he will be executed by lethal injection and any challenge to the constitutionality of execution by lethal gas will be moot. And if he chooses lethal gas, that choice would waive any objection—including a constitutional challenge—to the use of that method. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). Moreover, this Court has repeatedly held that execution by lethal gas is not cruel and unusual punishment under the United States or Arizona Constitutions. *E.g.*, *State v. Greenway*, 170 Ariz. 155, 160 (1991). The ongoing challenge to lethal gas, in a lawsuit to which Dixon is not a party, therefore has no bearing on the State's ability to constitutionally carry out his execution.

C. This Court should reject Dixon's alternative request to issue a warrant but concurrently stay his execution.

Dixon argues in the alternative that, if this Court lacks discretion to deny the State's motion, it should nonetheless concurrently issue a stay of execution until resolution of the DNA and lethal gas litigation. Opposition at 16–17. This Court should reject his alternative request because no cause exists for a stay. As

explained above, none of Dixon's arguments justify denying the State's motion or otherwise delaying his execution for a crime he committed over 40 years ago. As a result, this Court should grant the State's motion and reject Dixon's request for a stay of execution.

DATED this 15th day of March, 2022.

Respectfully submitted,

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EXHIBIT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

First Amendment Coalition of Arizona, Inc.; Charles Michael Hedlund; Graham S. Henry; David Gulbrandson; Robert Poyson; Todd Smith; Eldon Schurz, and Roger Scott,

Plaintiffs,

v.

Charles L Ryan, Director of ADC; James O'Neil, Warden, ASPC—Eyman; Greg Fizer, Warden, ASPC—Florence; and Does 1-10, Unknown ADC Personnel, in their official capacities as Agents of ADC,

Defendants.

No. CV-14-01447-PHX-NVW

ORDER FOR DISMISSAL OF CLAIMS SIX AND SEVEN

Plaintiffs Charles Michael Hedlund, Graham S. Henry, David Gulbrandson, Robert Poyson, Todd Smith, Eldon Schurz, and Roger Scott (collectively, "Plaintiffs"), and Defendants Charles L. Ryan, Director of the Arizona Department of Corrections ("ADC"); James O'Neil, Warden, ASPC–Eyman; and Greg Fizer, Warden, ASPC–Florence (collectively, "Defendants"), have jointly stipulated to dismiss Claims Six and Seven of Plaintiffs' Second Amended Complaint (ECF Nos. 94 & 97) and Supplemental Complaint (ECF No. 163) ("Claims Six and Seven"), based upon the recitals in the parties' concurrently filed Stipulated Settlement Agreement for Dismissal of Claims Six and Seven ("Stipulated Settlement Agreement") (ECF No. 186), and under the terms that follow below.

Having considered the parties' Stipulated Settlement Agreement, and good cause appearing, IT IS HEREBY ORDERED that:

(1) Claims Six and Seven of Plaintiffs' Second Amended Complaint and Supplemental Complaint are dismissed, without prejudice.

(2) Upon any showing by any Plaintiff or any other current or future prisoner sentenced to death in the State of Arizona that any of the Defendants, any of the Defendants' successors, or the ADC intend to engage in or have actually engaged in any of the following conduct (together, the "Prohibited Conduct"):

(a) adopt language in any future version of the ADC's execution procedures that purports to disclaim the creation of rights or obligations;

(b) grant the ADC and/or the ADC Director the discretion to deviate from timeframes set forth in the ADC's execution procedures regarding issues that are central to the execution process, which include but are not limited to those relating to execution chemicals and dosages, consciousness checks, and access of the press and counsel to the execution itself;

(c) change the quantities or types of chemicals to be used in an execution after a warrant of execution has been sought without first notifying the condemned prisoner and his/her counsel of the intended change, withdrawing the existing warrant of execution, and applying for a new warrant of execution;

(d) select for use in an execution any quantity or type of chemical that is not expressly permitted by the then-current, published execution procedures;

(e) fail to provide upon request, within ten calendar days after the State of Arizona seeks a warrant of execution, a quantitative analysis of any compounded or non-compounded chemical to be used in an execution that reveals, at a minimum, the identity and concentration of the compounded or non-compounded chemicals;

(f) use or select for use in an execution any chemicals that have an expiration or beyond-use date that is before the date that an execution is to be

carried out; or use or select for use in an execution any chemicals that have an expiration or beyond-use date listed only as a month and year that is before the month in which the execution is to be carried out;

(g) adopt or use any lethal-injection protocol that uses a paralytic (including but not limited to vecuronium bromide, pancuronium bromide, and rocuronium bromide); or

(h) adopt any provision in any future version of the ADC's execution procedures that purports to permit prisoners or their agents to purchase and/or supply chemicals for use in the prisoner's own execution; then

Claims Six and Seven shall be reinstated and reopened pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and, based on the agreement and consent of the parties granted in their concurrently filed Stipulated Settlement Agreement, an injunction shall immediately issue in this action or in a separate action for breach of the parties' Stipulated Settlement Agreement, permanently enjoining Defendants, Defendants' successors, and the ADC from engaging in any of the Prohibited Conduct.

(3) Plaintiffs shall not be awarded attorneys' fees or costs incurred in litigating Claims Six and Seven unless Defendants, Defendants' successors, or the ADC breach the parties' Stipulated Settlement Agreement, in which case Plaintiffs shall be entitled to an award, either in this action or in a separate action for breach of the parties' Stipulated Settlement Agreement, of their reasonable attorneys' fees and costs incurred in litigating this action from its inception through the date of this Order (which currently are in excess of $2,630,000), as determined by the Court after briefing by the parties. In that circumstance, Plaintiffs shall also be entitled to seek to collect their reasonable attorneys' fees and costs incurred in moving to enforce the parties' Stipulated Settlement Agreement and this Order.

(4) The stay order (Doc. 68) entered November 24, 2014, is vacated.

With the entry of this Order, all claims of all parties have been disposed of. The Clerk shall terminate this case.

Dated: June 22, 2017.

Honorable Neil V. Wake
Senior United States District Judge