ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. CLARENCE WAYNE DIXON, Appellant.	Arizona Supreme Court No. CR–08–0025–AP Maricopa County Superior Court No. CR2002–019595 U.S. District Court No. CV–14–258–PHX-DJH **REPLY IN SUPPORT OF MOTION TO MODIFY BRIEFING SCHEDULE/RESPONSE TO CROSS-MOTION TO VACATE OR STAY BRIEFING SCHEDULE**

The State hereby replies in support of its Motion to Modify Briefing Schedule and responds to Dixon's Cross-Motion to Vacate or Stay Briefing Schedule (hereinafter "Response/Cross-Motion"). For the reasons stated below, this Court should grant the State's Motion to Modify and deny Dixon's Cross-Motion to Vacate or Stay. In the alternative, if this Court is not inclined to modify the briefing schedule, then staying, not vacating, that schedule is appropriate.

The State's motion concerns a narrow, statutory proceeding that is defined in mandatory language and limited to two specific procedural questions: has the prisoner's "conviction and sentence of death [been] affirmed and the first post-conviction relief proceedings … concluded." A.R.S. § 13–759(A); *see also* Ariz. R. Crim. P. 31.23(b) ("On the State's motion, the Supreme Court must issue a

warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude."). If those conditions are met, then the Court "shall issue" the warrant of execution. A.R.S. § 13–759(A). Given the narrow inquiry here and the clear statutory directive, the schedule proposed by the State is reasonable and Dixon's arguments in response are legally irrelevant to this proceeding.

In any event, to the extent Dixon implies otherwise, the State acted in good faith by reporting to this Court the 90-day beyond-use date initially quoted by the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR's) compound pharmacist. The circumstances and updated opinion are regrettable. Nonetheless, the change in opinion occurred and was disclosed well in advance of the anticipated execution date, while there was still ample opportunity for course-correction. The present situation is thus not analogous to those alleged "last-minute, ad hoc changes" Dixon cites in his Response/Cross-Motion, nor does it show that ADCRR has taken a "haphazard approach to implementing its execution protocol." Response/Cross-Motion, at 4–5, n.3.[1]

Turning to the Response/Cross-Motion's merits, Dixon makes two legal arguments. First, he objects to the State's proposal that he receive four days to

[1] Likewise, Dixon's lengthy and hyperbolic footnote assailing ADCRR's alleged "historical practice of using unreliable drugs and drug sources to carry out executions" does not contribute anything to his legal argument. Response/Cross-Motion, at 3 n.2. Dixon is free to challenge the drug's reliability in a separate civil proceeding. But for purposes of the pending matter, this Court should disregard Dixon's allegations as irrelevant.

respond to its motion for warrant of execution because the ordinary rules afford him ten business days. Response/Cross-Motion at 2 & n.1 (citing ARCAP 6(a)(2)). This argument is unpersuasive, as this Court possesses the authority to shorten or lengthen ARCAP 6(a)(2)'s default time period of 10 days to respond to a motion. Rule 31.3(a) permits the Court to "suspend any provision of [Rule 31] in a particular case, and may order such proceedings as the court directs." *See also* Ariz. R. Crim. P. 31.6(e) (incorporating ARCAP 6(a)(2) and (3) and 6(b)). In addition, Dixon has possessed a draft of the State's motion since April 6, 2021. *See* Motion for Briefing Schedule, filed 4/6/2021, at Ex. A. Thus, in reality, Dixon will have had more than four months to draft his response if the State's Motion to Modify is granted. In fact, as mentioned in the Motion to Modify, he will receive 12 additional days to draft the response under the proposed modified schedule than he would under the schedule currently in place. Motion to Modify, at 4.

Moreover, the State's proposed briefing schedule gives the State only one day to file a reply in support of its motion for warrant of execution, rather than the five business days it would have received under the Rule. *See* ARCAP 6(a)(2); Ariz. R. Civ. P. 6(a)(2). Unlike Dixon, who has received a draft of the State's motion, the State has no advance knowledge of the arguments Dixon will make in his response. The proposed briefing schedule therefore disadvantages the State—not Dixon. And as noted in both the State's Motion to Modify and its Motion for a

Briefing Schedule, the question before this Court in deciding whether to issue an execution warrant is an exceedingly narrow one. *See* A.R.S. § 13–759(A); Ariz. R. Crim. P. 31.23(b).[2]

Second, Dixon contends that the circumstances described in the State's Motion to Modify do not amount to the "highly extraordinary circumstances" required to continue the briefing schedule under this Court's order. Response/Cross-Motion, at 2–4; *See* Order, dated 5/21/21. Dixon contends that the State filed its request for a briefing schedule prematurely and must now bear the cost of the unexpected change in opinion as to the beyond-use date. Response/Cross-Motion at 2–4. But as stated above, the State acted in good faith by relying on the expert opinion ADCRR had received. And Dixon's complaint that the State failed to complete testing "to reliability determine the shelf-life of its execution drugs" has no bearing on the present motion, as the 45-day beyond-use date does not turn on that testing and Dixon does not suggest otherwise. Response/Cross-Motion, at 4.

Finally, if this Court denies the State's Motion to Modify the Briefing Schedule, it should not vacate that schedule and require the State to start anew.

[2] The State does not presume that this Court will "rubber stamp the warrant request." Response/Cross-Motion, at 4. But Dixon has to date failed to dispute, or respond in any fashion to, the State's observation that the relevant statutes and rules leave this Court little discretion to deny a warrant if Dixon's first post-conviction proceeding and habeas appellate review have concluded, which they have. *See* A.R.S. § 13–759(A); Ariz. R. Crim. P. 31.23(b).

Rather, it should stay the briefing schedule, and should direct the State to notify this Court and Dixon when additional testing is completed and disclose whether that testing supports a beyond-use date past 45 days. Even staying the briefing schedule, however, would impose significant costs. Doing so would add further uncertainty to the execution process and frustrate the victims' constitutional right to a "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. Art. 2, § 2.1(A)(10). The State therefore requests that this Court grant its Motion to Modify the Briefing Schedule and deny Dixon's Cross-Motion to Vacate or Stay the Briefing Schedule.

RESPECTFULLY SUBMITTED this 9th day of July, 2021.

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