ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. AARON BRIAN GUNCHES, Appellant.	CR 13–0282–AP Maricopa County Superior Court No. CR 2003–038541–001 **THE STATE OF ARIZONA'S MOTION TO WITHDRAW MOTION FOR WARRANT OF EXECUTION**

Execution warrant proceedings were initiated in this case when Aaron Brian Gunches filed a motion with this Court requesting issuance of a warrant for his execution. Since then, Gunches has sought to withdraw that request, without objection from the State. Because the State's motion for warrant of execution was prompted by Gunches's now-withdrawn request, and because a thorough examination of the administration of capital punishment in Arizona is warranted before further warrants of execution are sought, the State moves to withdraw its motion seeking issuance of a warrant of execution in this case.

I. The State's motion for warrant of execution was filed because Gunches asked to be executed.

Gunches was sentenced to death after pleading guilty to the first-degree murder and kidnapping of Ted Price. *See State v. Gunches*, 240 Ariz. 198, 200-01, ¶¶ 1-4 (2016) ("*Gunches II*"). On November 25, 2022, Gunches initiated the now-

pending proceedings by filing a "Motion: Issuance of Death Warrant," in which he requested that this Court issue a warrant for his execution. The State filed a response on December 7, 2022, joining in Gunches's motion and also moving for this Court to issue a warrant of execution. *See* A.R.S. § 13-759(A) (providing that the Supreme Court shall issue warrants of execution "on a motion by the state"); Ariz. R. Crim. P. 31.23(b) (similarly providing that warrants of execution shall be issued "[o]n the State's motion"). This Court stated that it anticipated conferencing the motions on January 31, 2023.

On January 4, 2023, however, Gunches filed a motion seeking to withdraw his request. The State did not object to Gunches's motion to withdraw. After Gunches filed his motion to withdraw, this Court confirmed that it "anticipates conferencing all pending motions on January 31, 2023, with issuance of a Warrant of Execution that day, if the motion for warrant of execution is granted." No. CR-13-0282-AP (order filed Jan. 6, 2023).

The State's December 7 motion for warrant of execution was precipitated by Gunches's November 25 request to be executed. Put differently, the State would not have moved for a warrant of execution at this time if Gunches had not asked to be executed. And on that front, circumstances have now changed. In his January 4 filing, Gunches makes clear that he wishes to withdraw his prior motion and no

longer requests to be executed at this time.

Because the State would not have moved for a warrant of execution without Gunches first doing so, and because Gunches now seeks to withdraw his motion, the State likewise moves to withdraw its motion for warrant of execution. Gunches's change in position, however, is not the only reason the State now moves to withdraw its motion for warrant of execution. As further detailed below, the State will not proceed with further executions at least until a thorough review of execution protocols has been conducted.

II. The State does not intend to seek a warrant of execution in any case at least until a thorough examination of the administration of capital punishment in Arizona has been conducted.

a. Arizona has used lethal injection since 1993, with multiple lengthy pauses in executions during the years since its adoption.

The first execution by lethal injection in Arizona occurred in 1993 after the voters amended the state constitution to make lethal injection the State's lawful method of execution. Between 1993 and 2000, 20 individuals were executed by lethal injection.[1] After November 2000, however, no executions occurred until Robert Comer was executed in May 2007. And after Comer's execution, more than three years passed before executions resumed in October 2010. Between

[1] Walter LaGrand was executed by lethal gas at his request in 1999.

2010 and 2013, 13 individuals were executed, all by lethal injection.

b. Executions stopped in 2014 and did not resume until 2022.

The first and only execution in 2014 was the execution of Joseph Wood, who was executed using a two-drug combination—midazolam and hydromorphone—that had not previously been used in the state.[2] Wood's execution took much longer than anticipated, lasting approximately two hours from the first administration of drugs to death. "During that time, Wood was administered 15 doses of lethal-injection drugs, even though Arizona's protocol calls for only two." *First Amend. Coalition of Arizona v. Ryan*, 938 F.3d 1069, 1073 (9th Cir. 2019).

Not surprisingly, litigation followed soon after Wood's execution, and the State agreed to a stay of all executions until the litigation concluded. *First Amend. Coalition of Arizona v. Ryan*, No. 2:14-cv-01447-NVW-JFM, Docs. 67, 68 (D. Ariz.). That stay was vacated in June 2017 when the district court issued its final judgment in the litigation. *Id.* at Doc. 187. Despite the stay being lifted, the State did not seek to carry out any executions for nearly four more years. During these years when executions were not being performed, the State encountered substantial

[2] Previous lethal injection executions in Arizona had utilized a three-drug combination of sodium pentothal or pentobarbital, pancuronium bromide, and potassium chloride, or a single-drug administration of pentobarbital.

difficulties in obtaining lethal injection drugs.[3]

c. The State resumed executions in 2022.

In April 2021, the State initiated proceedings to obtain warrants of execution for Frank Atwood and Clarence Dixon. Rather than file a motion for warrant of execution, the State sought a briefing schedule from this Court on such a motion. The State explained that it required a fixed briefing schedule because the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) intended to use compounded pentobarbital that had a 90-day shelf life. The State thus requested a briefing schedule to ensure that it could compound the drugs at the time it filed a motion for warrant of execution in order to meet mandatory testing requirements and also ensure that the drugs would not expire before the execution date.

However, after this Court granted the State's request and set briefing schedules in both cases, the State moved to modify those schedules. The State explained that, while ADCRR's compound pharmacist had "previously advised ADCRR that the pentobarbital to be used … would have a 90-day beyond-use date once compounded," the pharmacist had revised that opinion and "advised ADCRR

[3] By way of example, federal authorities in July 2015 refused admission of a shipment of sodium thiopental that the State had attempted to import. *See* Feds Confiscate Lethal-Injection Drugs Imported by 2 States (Oct. 23, 2015), https://apnews.com/article/173ced925a864bd3b07e36210c9d3612 (last visited Jan. 19, 2023).

that, until certain specialized testing of a sample batch is conducted," pentobarbital that was compounded for the executions would have an initial beyond-use date of 45 days. *State v. Atwood*, No. CR-87-0135-AP, Motion to Modify Briefing Schedule (filed 6/22/2021); *State v. Dixon*, No. CR-08-0025-AP, Motion to Modify Briefing Schedule (filed 6/22/2021). In response, this Court vacated the existing briefing schedules, denied the State's motions to modify them, and ordered that the State could "renew its scheduling motion after specialized testing to determine a beyond-use date for compounded doses of the drug." *Atwood*, No. CR-87-0135-AP, Order (filed 7/12/2021); *Dixon*, No. CR-08-0025-AP, Order (filed 7/12/2021).

The State renewed proceedings to obtain execution warrants for both Atwood and Dixon in January 2022, filing motions indicating that testing had established that the compounded pentobarbital to be used in the executions had a beyond-use date of 90 days.[4] *Atwood*, No. CR-87-0135-AP, Motion to Set Briefing Schedule (filed 1/5/2022); *Dixon*, No. CR-08-0025-AP, Motion to Set Briefing Schedule (filed 1/5/2022). Ultimately, this Court issued warrants of execution and the State executed Dixon on May 11, 2022, and Atwood on June 8,

[4] As the State later informed this Court, testing ultimately established that the pentobarbital had a beyond-use date of 180 days. *See State v. Hooper*, CR83-0044-AP, Motion to Set Briefing Schedule (filed 7/29/2022).

2022, both using compounded pentobarbital. In October 2022, this Court issued, at the State's request, a warrant of execution for Murray Hooper and the State executed him on November 16, 2022, also using compounded pentobarbital. Nearly eight years had passed between the execution of Joseph Wood and the recent resumption of executions.

d. A thorough review of the administration of capital punishment in Arizona, including lethal injection protocols, is now warranted.

The recent history of executions by lethal injection in Arizona and elsewhere has caused many, including courts, to express concerns regarding whether executions are being carried out constitutionally, humanely, and in compliance with the State's own laws and procedures. In the context of litigation that followed Joseph Wood's execution, for example, the Ninth Circuit noted that although the Constitution did not create an entitlement to certain information relating to execution procedures, the Court was "troubled by the lack of detailed information regarding execution drugs and personnel." *First Amend. Coalition*, 938 F.3d at 1080. In reaching that conclusion, the Ninth Circuit looked at much of the history recited above, which it characterized as "Arizona's checkered past with executions." *Id.*

Similarly, even where courts have held that due process was not violated in Arizona capital cases, some judges have expressed concerns, and sometimes in

harsh terms. *See id.* at 1072 (noting prior concerns with Arizona's execution procedures, citing a perceived "shroud of secrecy surrounding Arizona's execution proceedings and the State's pattern of deviating from its lethal-injection protocols at the last minute") (citations omitted); *see also Wood v. Ryan*, 759 F.3d 1076, 1087 (9th Cir. 2014) ("Arizona's recent history reinforces the role of this information in the public discourse."), *vacated by Ryan v. Wood*, 573 U.S. 976 (2014).

Regardless of whether the State agrees with these characterizations, it is nonetheless concerning that any Court would have such significant and repeated concerns about Arizona's system of capital punishment. And of course, the Court is not alone in raising such concerns.[5] Moreover, while the Ninth Circuit decisions cited above confronted the question of what level of transparency is legally required, that question is fundamentally different in nature than the question of whether the public interest has been served by the previous levels of disclosure.

A system of capital punishment must be underpinned by faithful adherence to the law and public confidence in the system. Transparency helps accomplish

---

[5] *See, e.g.*, States Under Scrutiny for Recent Lethal Injection Failures (Nov. 22, 2022), https://www.azcentral.com/story/news/local/arizona/2022/11/22/arizona-and-others-under-scrutiny-for-recent-lethal-injection-failures/69667483007/ (last visited Jan. 19, 2023).

those dual goals. And on that front, the State need not limit itself to the minimum level of transparency and accountability that the law requires. Accordingly, review of the administration of capital punishment in Arizona is now warranted, as is additional transparency.

Today, Governor Hobbs ordered a review of Arizona's execution procedures and protocols, to be conducted by an Independent Review Commissioner who will issue a final report with recommendations to the Governor and Attorney General. *See* Ex. 1 (Executive Order No. 2023-05.) The Commissioner's review will include:

1. The State's procurement of lethal injection drugs, including but not limited to the source of the drugs, the cost to the State, and any considerations about the drugs such as composition and expiration;

2. The State's procurement of gas chamber chemicals, including but not limited to the source of the chemicals, the cost to the State, and the composition of the chemicals;

3. ADCRR procedures and protocols for conducting an execution by gas chamber and by lethal injection, including but not limited to setting lines for a lethal injection, transparency and media access, access to legal counsel for the inmate, and contingency planning; and

4. Staffing considerations, including but not limited to training, staffing plans to conduct executions, and staff background and experience for administering an execution.

Id.

Such a review – and accompanying pause in executions until state officials and the public can be confident that executions are being carried out lawfully and humanely – is far from unprecedented. Similar reviews have recently been undertaken by Tennessee[6] and Alabama.[7] Indeed, after more than seven months, the Tennessee review recently revealed numerous problems, including a failure to follow execution protocols.[8] A similar review at the federal level is also underway, and followed on the heels of a recent resumption in executions using a single dose of pentobarbital.[9] And, of course, Arizona only recently resumed executions after nearly eight years without one.

In the context of capital punishment, it is vital "to insure that every

---

[6] Tennessee Execution Pause Through 2022 Could Last Longer (June 13, 2022), https://apnews.com/article/politics-executions-tennessee-e4c90328bb6317c11bd98bf9dcdeb68a (last visited Jan. 19, 2023).

[7] Alabama Governor Orders Temporary Halt to Executions After Third Failed Lethal Injection (Nov. 21, 2022), https://www.cbsnews.com/news/alabama-executions-paused-after-3rd-failed-lethal-injection/ (last visited Jan. 19, 2023).

[8] Tennessee Failed to Follow Its Own Execution Protocols Since 2018, New Report Finds (Dec. 28, 2022), https://www.tennessean.com/story/news/politics/2022/12/28/tennessee-death-penalty-state-failed-to-follow-rules/69760185007/ (last visited Jan. 19, 2023).

[9] *See* Attorney General Memorandum: Moratorium on Federal Executions Pending Review of Policies and Procedures (July 1, 2021), justice.gov/d9/2022-12/attorney_general_memorandum_july_1_2021.pdf (last visited Jan. 19, 2023).

safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (citations omitted). The Supreme Court has likewise observed that because of the "qualitative difference" between a sentence of death and any other, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

So too is there a heightened need to ensure any capital sentence is carried out constitutionally, legally, humanely, and with transparency. To that end, no further warrants of execution will be sought at this time, and a detailed review of the administration of capital punishment in Arizona will be conducted.

/ / /

/ / /

/ / /

III. Conclusion.

For the foregoing reasons, the State respectfully moves to withdraw its motion for warrant of execution.

RESPECTFULLY SUBMITTED this 20th day of January, 2023.

Kristin K. Mayes
Attorney General
(Firm State Bar No. 14000)

/s/Alexander W. Samuels
Alexander W. Samuels
Principal Deputy Solicitor General
(State Bar Number 028926)

Jeffrey L. Sparks
Deputy Solicitor General/Chief Counsel
Capital Litigation Section
(State Bar Number 027536)
2005 N. Central Ave.
Phoenix, AZ 85004
Telephone: (602) 542–4686
cldocket@azag.gov

Attorneys for Appellee