IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. AARON BRIAN GUNCHES, Appellant.	No. CR-13-0282-AP Maricopa County Superior Court No. CR2003-038541-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF BOTH PARTIES

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TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ) is the Arizona state affiliate of the National Association of Criminal Defense Lawyers. AACJ offers this brief in part because the defendant is self-represented. *See* Ariz. R. Crim. P. 31.15(b)(2)(B)(i). AACJ is also concerned about the ramifications of a judicial encroachment into areas properly reserved for the executive branch.

This Court's order dated January 31, 2023, asks if it has the "authority to do anything other than issue the Warrant of Execution?" This is the wrong question, because the question as phrased by the Court assumes a power it does not possess. Simply put, the Court has no authority to issue an execution warrant when neither party to the litigation wants it. On the contrary, the warrant requires a request from the executive branch, through the Attorney General.

Both Aaron Gunches and the Attorney General have filed motions to withdraw their requests for a warrant. With no request to grant one, this Court cannot issue a warrant. Furthermore, the stated bases for the Attorney General's withdrawal of its motion reflect a need to conduct a broader inquiry into how the executive branch seeks warrants and carries out executions—an investigative process that invokes the political question doctrine. AACJ asks this Court to recognize that the doctrines of separation of powers and political questions prevent this Court from wading into the waters of an issue that is properly reserved for the executive branch.

ARGUMENTS

I. Whether the executive branch appropriately exercises its discretion in seeking an execution warrant is a political question.

On January 20, 2023, Governor Hobbs issued Executive Order 2023-05, which acknowledged "serious questions about ADCRR's execution protocols and lack of transparency" and ordered an independent review of such protocols. In conjunction with that order, the Attorney General acknowledged "concerns regarding whether executions are being carried out constitutionally, humanely, and in compliance with the State's own laws and procedures." AG Motion to Withdraw at 7. While not admitting past wrongdoing by predecessors, both the Governor and the Attorney General take the position that their duties to faithfully execute the laws require them to conduct such a review before seeking any further executions. Both documents reflect a considered position by elected officials to "faithfully and impartially discharge the duties of the office…" A.R.S. § 38-231(E); *see also Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 125 ¶ 24 (2015) (quoting A.R.S. § 38-231(E)-(F)); Ariz. Const. Art. 5, § 4. This kind of decision by elected officials cannot be challenged in court because it is a nonjusticiable political question.

"The Arizona Constitution entrusts some matters solely to the political branches of government, not the judiciary." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 351 ¶ 16 (2012). Flowing from "the basic principle of

separation of powers," a non-justiciable political question is presented when "there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192 ¶¶ 11-12 (2007) (cleaned up); *see also Forty–Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 7 (2006) (defining "political questions" as "decisions that the constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards").

Kromko controls the issue in this case. There, citizens brought an action against the Arizona Board of Regents for charging tuition for public universities that far exceeded what could reasonably be considered "as nearly free as possible." 216 Ariz. at 192 ¶ 10. Although "free" could be adjudicated, there was no mechanism for the judiciary to determine what would constitute "as nearly free as possible." In Gunches' case, the executive branch officials responsible for carrying out executions need to conduct an investigation, including "access to ADCRR records and … conduct[ing] interviews [ ] of ADCRR staff." This investigation is well beyond the scope of judicial inquiry. This Court is ill-suited to engage in such factfinding, which is why original jurisdiction in appellate courts is limited. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 428 ¶ 130 (2020) (Bolick, J., dissenting) (filing special action directly in Supreme Court inappropriate when

"the action requires us to consider difficult factual issues that are disputed by the parties"). This Court exercises original jurisdiction only in extraordinary cases that involve purely legal questions. *State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 595 ¶ 23 (2017).

The fact that courts have yet to intervene to prevent an Arizona execution or even order that the condemned be permitted to know the precise manner in which the execution be carried out demonstrates the courts' recognition that courts are unable to determine such determinations. As the Supreme Court has recognized:

> [T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

Nixon v. United States, 506 U.S. 224, 228-29 (1993). In this case, the determination whether a method of execution is in fact cruel requires investigation that is best conducted by the political branches.

The Governor of Arizona appoints the Director of the Arizona Department of Corrections, Rehabilitation, and Re-Entry (ADCRR), who in turn is tasked with supervising executions. A.R.S. § 13-757(A). ADCRR has developed execution protocols with detailed procedures because it is "better equipped to undertake the

task of ensuring [the death penalty] is implemented as uniformly and humanely as possible." *Cook v. State*, 230 Ariz. 185, 188 ¶ 7 (App. 2012) (internal quote omitted).

In arguing for a warrant of execution in *State v. Atwood*, the Attorney General has explained that "[t]he State has discretion to determine for which eligible inmates it will seek death warrants; 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."[1] The executive branch's discretion not to seek a warrant of execution is virtually unchallengeable. "Generally, the courts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers." *State v. Murphy*, 113 Ariz. 416, 418 (1976). "Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by" the official exercising discretion. *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983) (internal citations omitted). This Court has recognized prosecutors' "wide discretion" in determining when to pursue the death penalty. *State v. Ovante*, 231 Ariz. 180, 186 ¶ 21 (2013), as well as abuse of judicial authority when a court orders a prosecutor to pursue death. *Murphy*, 113 Ariz. at 418.

[1] *State v. Atwood*, CR-87-0135-AP, Reply in Support of Motion to Set Briefing Schedule for Motion for Warrant of Execution/Response to Cross-Motion to Remand (filed 1/26/2022), at 14-15.

As the Attorney General pointed out, no executions occurred between 2000-2010 (except for Robert Comer, who requested execution) or between 2014-2022. The recent eight-year pause was due entirely to ADCRR's conduct in changing protocols and ultimately causing Joseph Wood to suffer for two hours before he ultimately died. *First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1073 (9th Cir. 2019). The Attorney General and ADCRR agreed to stay executions while ADCRR developed new protocols. *Id*. No one apparently questioned the executive branch's authority to halt executions. The situation in 2023 is no different than in 2014; the Governor (through her appointed ADCRR Director) and Attorney General seek to pause executions while they review protocols. This exercise of discretion is hardly revolutionary; in fact, it is typical. The only thing unusual about this situation is the suggestion by Victim's Counsel that this Court has authority to issue a warrant of execution absent a request from the Attorney General.

II. Separation of powers principles require this Court to respect the executive's intention not to proceed with an execution warrant.

Article 3 of the Arizona Constitution provides that "[t]he powers of the government of the state of Arizona shall be divided into three separate departments, [and] such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." "By dispersing authority among various institutions of state government, the framers

of the Arizona Constitution manifested their distrust of concentrations of power." *State v. Wagstaff*, 164 Ariz. 485, 487 (1990) (citing John Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 70 (1988)). This Court has quoted Chief Justice Marshall's description of the powers of each branch:

> 'The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.'

Giss v. Jordan, 82 Ariz. 152, 160-61 (1957) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46-47 (1825)).

Long-standing separation of powers principles compel the conclusion that this Court must have the authority to exercise judicial review over motions for execution warrants. Likewise, when the executive disclaims an intention to carry out an execution, this Court's judicial authority is limited by the desire of the executive branch. By requiring the filing of a motion by the State, the Legislature ensures that there is judicial review of the Attorney General's decision to seek an execution. This is important because it provides assurance to the people of the State of Arizona that an impartial judiciary has authorized the act and it is not an extrajudicial killing. Moreover, judicial review is available to ensure compliance with A.R.S. § 13-757 related to the manner of execution. *Cook*, 230 Ariz. at 190 ¶ 16.

The idea that judicial review is necessary to prevent illegal or arbitrary enforcement of the law is well understood in our case law; but it is self-evident that the executive branch requires no authorization when it chooses *not* to act. When the Attorney General requests a warrant of execution and has satisfied all the statutory requirements, and there are no constitutional or political impediments to proceeding, this Court is empowered to issue the warrant and authorize the execution. But this Court's authority is not triggered unless the Attorney General requests this Court to approve the executive's exercise of authority. In this process, this Court serves as a check against unlawful executive action. When it comes to the execution process, neither branch can act alone; they must agree on the course of action.

An apt analogy to this process is the "two-man rule" that "require[s] the presence of two or more authorized people at all times." *See* Wikipedia, "Two-man rule," https://en.wikipedia.org/wiki/Two-man_rule (last visited February 9, 2023). In the case of nuclear weapons, two people hold a launch key so that missiles cannot be launched unless both authorized persons agree—a scenario developed in a pair of popular films, *The Hunt for Red October* and *Crimson Tide*. *Id*. Applied to the situation in this case, Gunches and the Attorney General both inserted their key, but before this Court could insert and turn its key, the other key was removed.

Any action this Court takes in the absence of a pending request from the Attorney General would create a constitutional crisis. It would involve this Court

going beyond its constitutional and statutory authority to authorize the executive branch to carry out an execution. Instead of authorizing execution, it would be a direct order to the executive branch to execute a person. Since the executive branch possesses the exclusive "power to grant reprieves, commutation, and pardons," Ariz. Const. art. 5, § 5, it is self-evident that the judiciary cannot exercise that power.

By involving itself so deeply into a process that is supposed to be carried out by the executive branch, this Court may sacrifice "whatever neutral and detached posture existed at the outset" of this process as it "undert[akes] to telescope the processes of the application for a warrant, the issuance of the warrant, and its execution." *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327, 328 (1979). "A neutral and detached magistrate does not 'lose ... his character as such merely because he leaves his regular office in order to make himself readily available to law enforcement officers who may wish to seek the issuance of warrants by him.'" *State v. Stanley*, 167 Ariz. 519, 526 (1991) (quoting *Lo-Ji*, 442 U.S. at 328 n.6). However, where the executive branch specifically disclaims any request for a warrant, issuing the warrant necessarily treads too far onto powers reserved for another branch.

III. A.R.S. § 13-759 respects the constitutional discretion of the executive to withdraw a warrant motion and the judicial to deny a warrant motion.

On its face, this Court's order for briefing on its discretion under its own rule, Arizona Rule of Criminal Procedure 31.23, and the Legislature's procedural statute,

A.R.S. § 13-759, raises a political question or evokes constitutional questions concerning well-established separation of powers principles. But this Court can avoid addressing the constitutionality of § 13-759 by interpreting it in accordance with the canons of statutory construction. This is because the Legislature has already accounted for the discretion of the executive and judiciary required by the Arizona Constitution in drafting § 13-759.

The Legislature's choice of two words compels this conclusion. The first is the Legislature's authorization of subsequent warrants upon the "motion" of the state. § 13-759(A). The second is the directive that this Court "shall" grant the warrant if the state files such a motion. *Id.* This Court should examine both words and give "their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *Fann v. State*, 251 Ariz. 425, 434 ¶ 25 (2021) (internal citations omitted). This Court also should interpret § 13-759(A) "to avoid constitutional difficulties" that would arise from choosing one interpretation over another. *State v. Gomez*, 212 Ariz. 55, 60 ¶ 28 (2006). Combined, both canons lead to the obvious conclusion that § 13-759(A) does not require this Court to issue execution warrants when the state withdraws its request. Such a straightforward application will avoid an absurd result where this Court assumes the role of executioner in spite of the executive's protest.

A. "Motion" means "request," and requests can be withdrawn or denied.

A.R.S. § 13-759(A) and Rule 31.23(b) require the state to file a "motion" when it elects to pursue an execution warrant. "Motion" means "a written or oral application requesting a court to make a specified ruling or order." "Motion," Black's Law Dictionary (11th ed. 2019). A "request" is "the act of asking for something to be given or done, especially as a favor or courtesy." "Request," Dictionary.com (available at https://www.dictionary.com/browse/request). By requiring the state to file a motion with this Court to obtain an execution warrant, it is evident that the Legislature acknowledged that the state could withdraw its motion and that this Court had the authority to deny the state's request.

At common law, the right to withdraw an action in civil cases was considered a matter of right. *Schintzuis v. Lackawanna Steel Co*., 224 N.Y. 226, 231, 120 N.E. 137, 138 (1918). Under this Court's rules, moving parties maintain the right to withdraw their action where the opposing party agrees. *See* Ariz. R. Civ. P. 41(a) (voluntary dismissal of civil action); Ariz. R. Crim. P. 31.24 (voluntary dismissal of criminal appeal); ARCAP 26 (voluntary dismissal of civil appeal).

The right to withdraw motions from the court's consideration ensures that courts maintain their proper role "as passive instruments of government" in an adversarial justice system. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (internal citation omitted). "In our adversary system, in both civil and

criminal cases, in the first instance and on appeal, [courts] follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). "That is, [courts] rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id*. "As a general rule, our adversary system is designed around the premise that the parties know what is best for them.'" *Id*. at 244 (cleaned up).

If this Court construes A.R.S. § 13-759(A) to prohibit the state from withdrawing its motion for an execution warrant, it will deprive the executive branch of the authority generally vested to all moving parties in civil and criminal cases.

B. "Shall" should be interpreted as directory rather than mandatory to avoid rendering the statute unconstitutional.

Finally, § 13-759(A) states that this Court "shall grant subsequent warrants on a motion by the state." "Although the word 'shall' usually indicates a mandatory provision, the word has also been construed to indicate desirability, preference, or permission." *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 554 (1981). *See also Dep't of Rev. v. So. Union Gas Co.*, 119 Ariz. 512, 514 (1978) (facially mandatory language may be read as merely directory when latter construction better effectuates the will of the Legislature). The statute, construed as a whole, compels the conclusion that the Legislature intended "shall" to "indicate desirability, preference or permission." This is because § 13-759(A) provides no

guidance as to what this Court must find to be required to issue a "subsequent" execution warrant. Rather than delineate the bases that would mandate issuing a warrant, the Legislature instead left it subject to this Court's determination based on the reasons provided by the state's motion.

Generally, motions "must include a memorandum that states facts, arguments, and authorities pertinent to the motion." Ariz. R. Crim. P. 1.9. Thus, because the Legislature omitted the requirements that would mandate this Court's compliance, the Legislature obviously intended "shall" to be permissive and premised upon the bases provided in the state's motion.

A.R.S. § 13-759(A) stands in stark contrast to Rule 31.23(b), which states: "On the State's motion," this Court "must issue" an execution warrant "when the federal habeas corpus proceedings and habeas appellate review conclude." Ariz. R. Crim. P. 31.23(b). Thus, the conundrum this Court faces is one of its own making, as it has promulgated a rule that sets for mandatory compliance based on conditions not set forth in the statute.

The Legislature has not mandated this Court to grant an Attorney General's motion for an execution warrant based on a showing that the appeals have concluded. Nor has the Legislature upended the traditional role of courts by denying to the executive branch the authority to change its mind and withdraw a request for an execution warrant, particularly where the condemned agrees with the state.

This Court should interpret "shall" in § 13-759(A) as directory because it is necessary to preserve the statute's constitutionality. Reading it as mandatory would render it unconstitutional in two ways: it would deprive this Court of its procedural rulemaking authority, *see* Ariz. Const. art. 6, § 5(5), and it would vest the judiciary with executive powers. Neither outcome is tenable.

IV. Victims are not parties and cannot control the issues, and the VBR does not require that a person be executed.

Adherence to separation of powers requires that this Court cannot order the executive branch to take action unless they are duty bound by statute to take that action without exercising discretion. In such a situation, an aggrieved party can file a petition for special action seeking mandamus relief under Ariz. R. P. Spec. Act. 3(a). However, the Legislature has authorized that such a complaint may only be filed by a "party beneficially interested." A.R.S. § 12-2021. Thus, even though the Arizona Constitution contains no "case or controversy" provision, *see Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 19 (2003), the statute governing mandamus actions requires the petitioning party to have standing. In Arizona, "[t]o establish standing, a plaintiff must show a palpable injury from the challenged conduct." *Fay v. Fox*, 251 Ariz. 537, 541 ¶ 22 (2021). A victim does not have standing to sue to make an execution happen, because a victim suffers no "palpable injury" if it does not occur.

While the Victim's Bill of Rights (VBR) enshrines a victim's right to a "prompt and final conclusion of the case after the conviction and sentence," Ariz. Const. art. 2, § 2.1(A)(10), it "does not guarantee victims any particular appellate disposition," *State v. Reed*, 248 Ariz. 72, 79 ¶ 24 (2020). In *Fay*, this Court held that a victim had the right to be heard on a defendant's motion to disturb a final judgment by filing a motion for delayed appeal. 251 Ariz. at 542 ¶ 28. In so doing, it distinguished the circumstances in *State v. Lamberton*, where the victim sought to file a petition for review of a grant of post-conviction relief. *Id.* ¶ 27 (citing *Lamberton*, 183 Ariz. 47, 51 (1995)). This Court affirmed the view in *Lamberton* "that crime victims are not 'parties' to criminal proceedings, and that the victim was not aggrieved because the trial court order did not 'operate to deny her some personal or property right, nor does it impose a substantial burden upon her.'" *Id.* (quoting *Lamberton*, 183 Ariz. at 49-50). This Court squarely held firm in the view that victims may not initiate a proceeding. *Id.* ¶ 28. Whereas *Fay* involved a restitution order that directly benefitted the victim, in this case victims do not obtain any direct benefit or harm from Gunches being executed (or not).

CONCLUSION

AACJ requests that this Court recognize that separation of powers prevents this Court from taking unilateral action to issue a Warrant of Execution.

RESPECTFULLY SUBMITTED this 16th day of February, 2023.

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