

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

MOTION TO SET BRIEFING SCHEDULE FOR MOTION FOR WARRANT OF EXECUTION

The State of Arizona hereby gives notice of its intent to move for a warrant of execution for Aaron Brian Gunches under A.R.S. § 13-759(A) and Arizona Rule of Criminal Procedure 31.23(b). A copy of the State's anticipated Motion for Warrant of Execution is attached hereto as Exhibit A. For the reasons that follow, the State respectfully moves this Court to establish a firm briefing schedule in advance of the motion's filing to ensure that it will be decided by this Court on a date certain and the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) can accordingly comply with its testing and disclosure obligations regarding the compounded pentobarbital to be used in the execution.

State law requires the State to inflict Gunches' death sentence by lethal injection. A.R.S. § 13-757(A); Ariz. Const. Art. 22 § 22. ADCRR will carry out Gunches' lethal injection using compounded pentobarbital, as it used in the three

executions occurring in 2022. Once compounded, ADCRR anticipates that the drug will have a beyond-use date of 90 days from the date of compounding.¹

ADCRR's lethal-injection protocol and a related civil settlement agreement impose several requirements regarding the drugs used in a lethal injection execution. First, ADCRR is prohibited from using any drug that is expired or past its beyond-use date at the time the execution is carried out. *See* ADCRR Dep't Order 710, Attach. D, ¶ A.1.III.² Therefore, to ensure compliance with the protocol, ADCRR must carry out Gunches' execution no later than 90 days after the pentobarbital is compounded.

Second, ADCRR must disclose to Gunches upon request a quantitative analysis of the compounded pentobarbital to be used in his execution within 10 days of the State filing a Motion for Warrant of Execution. *See* ADCRR Dep't Order 710, Attach. D, ¶ C.2. Thus, to ensure ADCRR has sufficient time to

¹ For the compounded pentobarbital to be used, the United States Pharmacopeia designates a default beyond-use date of 45 days from the date of compounding. The beyond-use date may be extended to 90 days, however, upon completion of stability and sterility testing on the drug. Stability testing on the raw material to be used to compound the pentobarbital that will be used in Gunches' execution was completed in 2022. Sterility testing on the compounded pentobarbital that will be used will be conducted shortly after the drug is compounded. Once that testing is completed, the State anticipates that ADCRR's compounding pharmacist will certify that the pentobarbital to be used in Gunches' execution will have a beyond-use date of 90 days from the date of compounding.

² Department Order 710 may be viewed at: <https://corrections.az.gov/sites/default/files/documents/policies/700/0710%20-%20eff%2010-23-24.pdf>.

conduct the required quantitative analysis and disclose the results, the drug must be compounded shortly after the motion's filing. This is important because once the drug is compounded, its 90-day shelf life will begin to run.

In order to comply with these requirements, ADCRR must first compound the pentobarbital it will use for Gunches' execution shortly after the State files the Motion for Warrant of Execution and then also ensure that the execution is carried out, pursuant to the warrant issued by this Court, no more than 90 days later. Under the applicable rules, and assuming no extensions were granted, Gunches would have 10 days to respond to the State's motion, and the State would have an additional 5 days to reply. *See* ARCAP (6)(a)(2); *see also* Ariz. R. Crim. P. 31.6(e). This Court would then conference the motion and, if granted, would set an execution date 35 days later. *See* A.R.S. § 13-759(A); Ariz. R. Crim. P. 31.23(c). But when extended filing periods are requested, as frequently occurs in capital cases, the pre-warrant briefing process alone, not including the statutory 35-day waiting period on the execution warrant, can last for months.³

³ For example, the pre-warrant litigation for inmate Robert Glen Jones spanned approximately 2 months. *See* No. CR-98-0537-AP, Motion for Warrant of Execution (filed on June 25, 2013); Warrant of Execution (issued on August 27, 2013). Likely because another inmate was also pending execution, Jones's execution date was fixed for a date past the 35-day statutory waiting period. *See id.*, Warrant of Execution (fixing date for execution as October 23, 2013). Nearly 4 months thus elapsed between the State's request for an execution warrant and Jones's execution.

In addition, both the filing of a Motion for Warrant of Execution and issuance of an execution warrant by this Court trigger a host of procedures, requirements, and responsibilities for ADCRR officials and personnel. *See generally* ADCRR Dep't Order 710. A scheduling order from this Court, setting prescribed dates for the filing of a Motion for Warrant of Execution and for the issuance of a warrant (if the motion is granted), greatly assists ADCRR in its preparation and planning to meet all execution-related requirements.

The State therefore respectfully requests that this Court issue an order setting a briefing schedule for a warrant of execution. The State requests that the order set dates for the filing of the Motion for Warrant of Execution, response, and reply, and also identify the anticipated conference date on which the Court will issue the warrant if the motion is granted.⁴ *See State v. Hooper*, No. CR-83-0044-AP (Order, Aug. 24, 2022); *State v. Atwood*, No. CR-87-0135-AP (Order, Apr. 5, 2022); *State v. Dixon*, No. CR-08-0025-AP (Order, Feb. 9, 2022). While the responsive briefing is ongoing, ADCRR will ensure that the pentobarbital is compounded and submitted for quantitative analysis, and will disclose the results of the quantitative analysis within 10 days of the filing of the the Motion for Warrant of Execution. This schedule would ensure that ADCRR can meet its

⁴ In order to accommodate administrative considerations relevant to the compounding process, the State respectfully requests that this Court set the filing date for a Motion for Warrant of Execution on a Friday.

obligation to provide results of a quantitative analysis of the compounded pentobarbital and carry out the execution within the drug's 90-day shelf life.

This procedure will not prejudice Gunches. As discussed, the State has attached to this pleading a copy of its anticipated Motion for Warrant of Execution. Gunches therefore has notice of that motion and can begin to work on his response, as well as any other pre-execution litigation he intends to pursue, while he awaits this Court's briefing schedule. Gunches has also received, through this motion, advanced notice that ADCRR will use compounded pentobarbital in his execution, which will enable him to prepare any legal challenges he deems appropriate.

Moreover, the issue for this Court to decide once the State files a Motion for Warrant of Execution is a narrow one:

[O]nce a motion or notice, pursuant to § 13-759(A) or Rules 31.23(a) or (b), is filed by the State requesting a warrant of execution showing that all the requirements under § 13-759(A) and Rule 31.23 have been satisfied, and there are no constitutional or statutory impediments to proceeding, absent a subsequent showing of good cause that the requirements listed in §13-759(A) and Rule 31.23 have not been satisfied, this Court *must* issue the warrant and authorize the State to carry out the execution.

State v. Gunches, No. CR-13-0282-AP (Decision Order, March 3, 2023), at 9-10 (emphasis in original); *see also* A.R.S. 13-759(A) (directing that “the supreme court *shall* issue a warrant of execution” once the first post-conviction proceeding has concluded, and that the “supreme court *shall* grant subsequent warrants of execution on a motion by the state”) (emphasis added), and Ariz. R.

Crim. P. 31.23(a), (b) (describing conditions under which this Court “*must* issue a warrant of execution”) (emphasis added).

A firm briefing schedule is appropriate in light of the anticipated 90-day beyond use date of the compounded pentobarbital ADCRR will use, the procedural and legal requirements ADCRR must follow, this Court’s narrow inquiry on a Motion for Warrant of Execution, and the State’s early disclosure of its anticipated motion. For these reasons, the State respectfully requests that this Court grant this motion and set a briefing schedule for the State’s forthcoming Motion for Warrant of Execution.

DATED this 6th day of December, 2024.

Respectfully submitted,

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