

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee

v.

FRANK JARVIS ATWOOD,

Appellant.

No. CR-87-0135-AP

Pima County Superior Court
Nos. CR14065 and CR15397

Ninth Circuit No. 14-99002

U.S. District Court No. CV-98-116-
TUC-JCC

**MOTION TO SET BRIEFING
SCHEDULE FOR MOTION FOR
WARRANT OF EXECUTION.**

(Capital Case)

The State of Arizona hereby gives notice of its intent to move for a warrant of execution under Rule of Criminal Procedure 31.23(b) for Frank Jarvis Atwood. A copy of the State's anticipated motion is attached hereto as Exhibit A.¹ 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 the State's motion will be decided by this Court on a date certain and the Arizona Department of

¹ Atwood has two petitions for review pending before this Court (one related to a successive post-conviction proceeding and the other related to a special-action proceeding challenging a procedural ruling entered during the post-conviction proceeding). If this Court has not yet resolved those petitions by the time the State files its motion for warrant of execution, the State intends to simultaneously file a motion to consolidate the warrant request with the pending petitions. The State's anticipated motion to consolidate is attached hereto as Exhibit B.

Corrections, Rehabilitation, and Reentry (ADCRR) can accordingly comply with its testing and disclosure obligations regarding the drug to be used in the execution.

In the event Atwood selects lethal injection as his method of execution, *see* A.R.S. § 13–757(B), ADCRR intends to execute him using compounded pentobarbital. Once compounded, based on current testing, the drug has a beyond-use date (aka expiration date) of 90 days from the date of compounding. The current lethal-injection protocol and a related civil settlement prohibit ADCRR from using or selecting for use any drug that will be expired or past its use-by date at the time the execution is carried out. *See* ADCRR Dep’t Order 710, Attach. D, ¶ A.1.III; *see also* Exhibit C (federal court order).² Therefore, to ensure strict compliance with the protocol, ADCRR intends to carry out the execution during the drug’s 90-day definite shelf life from the date of compounding.

Separately, the lethal-injection protocol requires ADCRR to disclose to Atwood upon request (which he will presumably make), a quantitative analysis of the chemical to be used in his execution within 10 days of the State’s filing of a motion for warrant of execution. *See* ADCRR Dep’t Order 710, Attach. D, ¶ C.2. To ensure ADCRR can meet this obligation to provide testing results within 10 days and also have the compounded pentobarbital be within the 90-day shelf-life

² Departmental Order 710 is publicly available at https://corrections.az.gov/sites/default/files/policies/700/0710_031021.pdf.

on the date of the execution, the drug must be compounded within a few short days before the deadline for providing the testing report (*i.e.*, 10 days after the State's motion for warrant of execution is filed in this Court). This is because, as noted above, once the drug is compounded, its 90-day shelf life will begin to run.

Under an ordinary briefing schedule, assuming no extensions are requested or received, and that this Court does not prescribe different deadlines, Atwood would receive 10 days to respond to the State's motion and the State would receive 5 days to file its reply. *See* ARCAP (6)(a)(2); *see also* Ariz. R. Crim. P. 31.6(e). This Court would then conference the motion and, if it grants the motion, would fix an execution date 35 days from the date the motion is granted. *See* A.R.S. § 13–759(A); Ariz. R. Crim. P. 31.23(c). But when extended filing periods are granted, as is virtually inevitable 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.

The State therefore respectfully requests that this Court issue a set briefing schedule for the State's anticipated motion for warrant of execution. The State requests that this Court identify in advance the date on which it will consider and potentially issue the execution warrant and, working backward, calendar deadlines as follows⁴:

1. The State shall file its motion for an execution warrant (along with its motion to consolidate, if necessary) 16 days before this Court's conference date. The motions shall be identical to Exhibits A⁵ and B to this pleading.
2. Atwood shall respond to the State's motions within 1 calendar day of the date of the Motion's filing.
3. The State shall file its replies, if any, within 6 calendar days of the filing of Atwood's responses.

While the responsive briefing is ongoing, ADCRR will ensure that the pentobarbital is compounded and tested and the testing results disclosed within 10 days of the State's motion's filing (Item #1 above).

This procedure will not prejudice Atwood. As discussed, the State has attached to this pleading a copy of its anticipated motion for warrant of execution. *See Exhibit A.* The State has also attached its anticipated motion to consolidate the

⁴ The State has this date filed a similar motion in inmate Clarence Dixon's case. *See No. CR-08-0025-AP.* The State asks that this Court stagger the respective briefing schedules so that the cases are not conferenced at the same time.

⁵ If a motion to consolidate is unnecessary, the State may omit footnote 1 from the filed motion for warrant of execution. *See Exhibit A, at 1 n.1.*

warrant request with the pending petitions for review. *See Exhibit B.* Atwood therefore has received notice of the State’s motions and can begin to work on his responses, as well as any other last-minute litigation he intends to pursue, while he awaits this Court’s briefing schedule. Atwood has also received, through this motion, advanced notice that ADCRR intends to use compounded pentobarbital in his execution should he select lethal injection, which will enable him to pursue expeditiously any civil challenges he deems appropriate.⁶

Moreover, the issue before this Court in determining whether to issue a warrant is narrow: this Court need only determine whether Atwood’s first post-conviction proceeding and habeas appellate review have concluded. *See A.R.S. § 13–759(A); Ariz. R. Crim. P. 31.23(b).* If those proceedings have terminated, as the State will show, *see Exhibit A*, the relevant statute and procedural rule, respectfully, leave this Court no discretion to deny the warrant. *See 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); Ariz. R. Crim. P. 31.23(b) (“On the State’s motion, the Supreme Court

⁶ Under the protocol, ADCRR is not required to disclose the drug to be used until the State files a motion for warrant of execution. *See ADCRR Dep’t Order 710, Attach. D, ¶¶ C.1 & C.2.*

must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.”) (emphasis added).

Accordingly, in light of this Court’s narrow inquiry, combined with the State’s early disclosure of its anticipated motions for an execution warrant and to consolidate, a firm briefing schedule from the date the Court will conference the motion on the timeframe set forth above is appropriate. For these reasons, the State respectfully requests that this Court grant this motion and set a briefing schedule for its upcoming motion for warrant of execution.

DATED this 6th day of April, 2021.

Respectfully submitted,

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

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Exhibit A

ARIZONA SUPREME COURT

STATE OF ARIZONA,	No. CR-87-0135-AP
Appellee	Pima County Superior Court Nos. CR14065 and CR15397
v.	Ninth Circuit No. 14-99002
FRANK JARVIS ATWOOD,	U.S. District Court No. CV-98-116- TUC-JCC
Appellant.	MOTION FOR WARRANT OF EXECUTION (Capital Case)

Pursuant to A.R.S. § 13-759(A) and Arizona Rule of Criminal Procedure 31.23(b), the State of Arizona moves this Court for a Warrant of Execution for Frank Jarvis Atwood. Atwood's direct appeal, first post-conviction proceeding, and federal habeas proceeding have concluded. Accordingly, under § 13-759(A) and Rule 31.23(b), a warrant of execution must issue.¹ *See* A.R.S. 13-759(A)

¹ Atwood's two pending petitions for review (stemming from a third post-conviction proceeding and a special action, *see* CR-20-0381-T/PC & CR-20-0298-PR (consolidated)) should not prevent the warrant's issuance. *See* A.R.S. § 13-759(A) (stating that Court "shall" issue warrant upon end of first post-conviction proceeding and "shall grant" subsequent warrants on State's motion); Ariz. R. Crim. P. 31.23(b) (stating that court "must" issue warrant upon conclusion of habeas appellate review). Nonetheless, the State has separately moved to consolidate Atwood's two pending petitions for review with the present motion and to consider the petitions (which have been fully briefed) on the same timeline and agenda as this motion.

(“After a conviction and sentence of death are affirmed and the first post-conviction relief proceedings have concluded, the supreme court shall issue a warrant of execution that authorizes the director of the state department of corrections to carry out the execution thirty-five days after the supreme court’s mandate or order denying review or upon motion by the state. The supreme court shall grant subsequent warrants of execution on a motion by the state.”); 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.”).

A jury convicted Atwood of the 1984 kidnapping and first-degree murder of 8-year-old V.L.H. *State v. Atwood*, 171 Ariz. 576, 591–96 (1992). A judge sentenced Atwood to death for the first-degree murder conviction. *Id.* at 591. This Court affirmed Atwood’s convictions and sentences on direct review, *see id.*, and the United States Supreme Court denied certiorari, *Atwood v. Arizona*, 506 U.S. 1084 (1993) (Mem.). The trial court denied Atwood’s first petition for post-conviction relief, this Court denied review, *see No. 97-0289-PC*, and the United States Supreme Court again denied certiorari, *Atwood v. Arizona*, 523 U.S. 1082 (1998).

Atwood filed his federal habeas petition on March 12, 1998, and the district court denied relief on January 27, 2014. *See Atwood v. Ryan*, 2014 WL 289987

(D. Ariz. Jan. 27, 2014). The Ninth Circuit affirmed the district court’s decision on September 13, 2017, *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017), and denied Atwood’s petitions for panel and en banc rehearing on January 8, 2018, with no judge requesting a vote on whether to rehear the matter en banc. *See* Ninth Circuit No. 14–99002, Dkt. # 76. Atwood failed to file a timely petition for writ of certiorari, and the United States Supreme Court denied his motion to file a petition out-of-time. *See Atwood v. Ryan*, 139 S. Ct. 298 (2018) (Mem.).

Atwood’s federal habeas appeals have thus concluded. This Court should therefore issue an execution warrant. *See* A.R.S. § 13–759(A); Ariz. R. Crim. P. 31.23(b).

DATED this ____ day of ____ , 2021.

Respectfully submitted,

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

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Exhibit B

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee

v.

FRANK JARVIS ATWOOD,

Appellant.

CR-87-0135-AP and CR-20-0381-T/PC

Pima County Superior Court
No. CR14065 and CR15397

MOTION TO CONSOLIDATE

(Capital Case)

Pursuant to Arizona Criminal Procedure Rules 31.4(a) and 31.19(b), the State respectfully requests that this Court consolidate the pending motion for warrant of execution, filed under CR-87-0135-AP, with the two pending, fully briefed petitions for review already consolidated under CR-20-0381-T/PC. In CR-87-0135-AP, the State requests a warrant of execution based on the conclusion of Atwood's federal habeas review. *See* A.R.S. 13-759(A); Ariz. R. Crim. P. 31.23(b). The petitions consolidated under CR-20-0381-T/PC relate to a successive post-conviction proceeding in which Atwood unsuccessfully challenged his death sentence on several grounds.

The cases thus arise from the same convictions and death sentence and share common facts. *See* Ariz. R. Crim. P. 31.4(a)(1) ("On motion, by stipulation, or on its own, an appellate court may order appeals or cross-appeals consolidated at any time ... if those appeals or cross-appeals raise a common question of law or fact.").

Moreover, contemporaneous consideration of the petitions for review and the motion for warrant of execution will promote efficiency and foster the expeditious resolution of all pending matters. *See* Ariz. R. Crim. P. 31.19(b) (“An appellate court may issue any order during the course of an appeal that it deems necessary or appropriate to facilitate or expedite the appeal’s consideration.”) For these reasons, the State respectfully requests that this Court consolidate CR-87-0135-AP and CR-20-0381-T/PC and that it consider the petitions that are pending under CR-20-0381-T/PC on the same timeline and the same agenda as the warrant request pending under CR-87-0135-AP.

DATED this ____ day of ____, 2021.

Respectfully submitted,

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

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Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

No. CV-14-01447-PHX-NVW

**ORDER FOR DISMISSAL OF
CLAIMS SIX AND SEVEN**

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.

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

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

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

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

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

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

26 (4) The stay order (Doc. 68) entered November 24, 2014, is vacated.
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1 With the entry of this Order, all claims of all parties have been disposed of. The
2 Clerk shall terminate this case.

3 Dated: June 22, 2017.

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Honorable Neil V. Wake
Senior United States District Judge