

# ARIZONA SUPREME COURT

KAREN PRICE,

Petitioner,

v.

HONORABLE KATIE HOBBS, IN  
HER CAPACITY AS THE  
GOVERNOR OF THE STATE OF  
ARIZONA, AND DIRECTOR RYAN  
THORNELL, IN HIS CAPACITY AS  
THE DIRECTOR OF THE ARIZONA  
DEPARTMENT OF CORRECTIONS,  
REHABILITATION, AND REENTRY  
(ADCRR),

Respondent,

AARON BRIAN GUNCHES,

Real Party in Interest.

No. CV-23-0055 SA

Maricopa County Superior Court  
No. CR2003-038541-001

## **AMICUS CURIAE BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE**

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## I. INTERESTS OF THE COUNTY ATTORNEY.

Maricopa County Attorney Rachell Mitchell took an oath to uphold the United States Constitution and the Constitution and laws of Arizona. She is directed by statute to “[a]ttend the superior and other courts within [Maricopa County] and conduct, on behalf of the state, all prosecutions for public offenses.” A.R.S. § 11–532(A)(1). Accordingly, her office prosecuted Aaron Gunches and sought the death penalty for the murder of Ted Price.

Consistent with her oath, the County Attorney has an obligation to ensure that convictions and sentencing obtained by the Maricopa County Attorney’s Office (“MCAO”) are carried out in conformity with the United States Constitution and the laws and constitution of this state. Equally important, the County Attorney has an obligation to ensure that victims’ constitutional and statutory rights are satisfied, including the rights “[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process” and “[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. 2, § 2.1(A)(1), (A)(10). To that end, the County Attorney has standing to seek a writ of mandamus. *See Maricopa Cnty. v. State*, 126 Ariz. 362, 362-63 (1980) (writ of mandamus by Maricopa County to “compel [the director of the Arizona Department of Corrections, Rehabilitation,

and Reentry (“ADCRR”)] to comply with his statutory duty to hold in custody all those persons sentenced”).

The Maricopa County Attorney is a minister of justice, however, and must also uphold defendants’ constitutional rights. After this Court issued a warrant for execution (“Warrant”) in Gunches’s case, the Supreme Court of the United States remanded six cases to Arizona courts based on its recent opinion in *Cruz v. Arizona*, 143 S. Ct. 650 (2023). The issue in *Cruz* was whether certain defendants could file an Arizona Rule of Criminal Procedure 32.1(g) claim to obtain a new penalty phase trial because the jury was not informed “that a life sentence in Arizona would be without parole.” *Id.* at 654. Although Gunches’s jury was not told that a life sentence in Arizona would not be without parole, Gunches knew that he would be parole ineligible if given life, stating, “[i]t’s the same as natural life. I am well aware of that. Actually, I would object to [the State] offering 25 to life when it doesn’t exist.” (Appx. Q, Reporter’s Transcripts (“R.T.”), 2/15/13, at 28.)

Gunches waived mitigation, did not ask the jury to consider leniency because he would never be released from prison, and left the trial court with the conclusion that Gunches “made it clear . . . he had no mitigation. . . . [H]e’s saying give me the death penalty.” (Appx. R, R.T. 8/1/13, at 28.) Gunches has since stated that he volunteered as early as 2018 to have his death sentence carried out. (Appx. A. Mot. for Iss. Of Death Warr., filed 11/25/22.) And just last week, Gunches asked “this

Court to transfer him to the State of Texas, where the law is still followed and inmates can still get their sentences carried out.” (Mot. Comm. & Particip./Self-Rep., Transfer, at 3, filed 3/10/23.)

MCAO does not believe Gunches is entitled to relief under *Cruz*, but MCAO does not know whether Gunches will pursue a claim based on *Cruz*. Given these uncertainties, MCAO asks this Court to grant the writ of mandamus if Gunches does not seek relief under *Cruz* and Rule 32.1(g).<sup>1</sup> It files this *amicus* brief to ensure Governor Katie Hobbs and ADCRR director Ryan Thornell adhere to their oaths of office to enforce the death penalty and comply with victims’ constitutional and statutory rights, while recognizing the uncertainty created by *Cruz*. See Ariz. R. Crim. P. 31.15(b)(1)(B) (“An applicant may file a brief as *amicus curiae* only if . . . the applicant is the State of Arizona or an officer or agency of the State of Arizona, or is an Arizona county, city, or town . . .”).

## **I. QUESTION PRESENTED.**

Whether Governor Hobbs and Director Thornell are threatening to proceed without legal authority and failing to perform a duty—the lawful execution of Aaron Brian Gunches on April 6, 2023—as required by law.

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<sup>1</sup> MCAO believes that a claim filed under *Cruz* and Rule 32.1(g) can be resolved before April 6, 2023. If for some reason, it cannot, MCAO agrees that the execution should be stayed.

## II. INTRODUCTION.

Like all elected and appointed officials, Governor Hobbs and Director Thornell took an oath to uphold the United States Constitution and Constitution and laws of Arizona. *See* A.R.S. § 38–231(A). In Arizona, that means enforcing lawfully imposed sentences, including the death penalty. *See* A.R.S. §§ 13–751, –757, –759. As this Court explained over 100 years ago in response to a warden who refused to comply with, and carry out, the order and directions of this Court to execute the sentence of death:

Of course, it must be understood that men’s opinions and wishes cannot be substituted and made to take the place of the law; that this is a government of laws, and not of men, and that those persons whom the people have chosen to execute the laws must do so, however disagreeable or repugnant to their wishes it may be. It is not a jealousy of our processes that calls forth this expression, but [jealousy] of the law as it exists. The people and their representatives make the laws, and their observation and enforcement is the only sure test of loyalty and certain guaranty of the perpetuity of our government.

*State ex rel. Jones v. Sims*, 17 Ariz. 410, 417 (1915).

On March 2, 2023, this Court issued a warrant of execution and set the time for the judgment and sentence of death pronounced upon Gunches to be carried out by Director Thornell. Despite their oaths, the Governor declared, “Under my Administration, an execution will not occur until the people of Arizona can have confidence that the State is not violating the law in carrying out the gravest of

penalties.” (Appx. H, Statement from Gov. Katie Hobbs on Warr. of Exec. for Aaron Brian Gunches, 03/03/2023.)

MCAO recognizes that enforcing the death penalty is a tremendous responsibility and must be done in a constitutional, thorough, and thoughtful manner. But even a cursory review of Arizona’s execution policies and protocols proves that Arizona’s citizens can be confident its executions are carried out in a constitutional manner.

Arizona’s current execution protocol has been extensively litigated and is the product of multiple settlements between numerous death row inmates and ADCRR. No court has found that Arizona’s current execution procedures and protocols—the very ones used for the three executions completed in 2022—violate the United States or Arizona constitutions. Whatever the basis of the Governor’s concerns, a constitutional violation is not supported by evidence.

In the absence of any constitutional prohibition, no law allows the Governor to unilaterally suspend executions. In fact, the Governor’s unilateral decision to ignore this Court’s Warrant violates the Legislature’s constitutional authority to limit her reprieve power, which it has done by requiring a recommendation from the Arizona Board of Executive Clemency (“ABOEC”) before the Governor may grant a pardon, reprieve, or commutation. The Governor’s unilateral suspension of executions violates Arizona’s Constitution and laws. This Court should recognize

that the Governor and ADCRR director must carry out executions consistent with Arizona law.

### III. FACTS AND PROCEDURAL BACKGROUND.

Over 20 years ago, in November 2002, Aaron Gunches kidnapped, shot, and murdered Ted Price in the desert near Mesa. *State v. Gunches (Gunches I)*, 225 Ariz. 22, 23-24, ¶¶ 2-4 (2010). This Court affirmed the jury's sentence of death. *Id.* at 23-26, ¶¶ 2-6, 8-12, 23; *State v. Gunches (Gunches II)*, 240 Ariz. 198, 201, 207, ¶¶ 4, 42 (2016).

Gunches waived post-conviction relief ("PCR") proceedings and did not pursue federal *habeas corpus* review. (Appx. B, Resp Mot.: Iss. Death Warr./State's Mot. For Warr. Exec., 12/07/2022, at 4.) On November 25, 2022, Gunches filed a *pro per* "Motion: Issuance of Death Warrant" with this Court requesting that "this Court Issue a Death Warrant for him so his Sentence of Death may be carried out immediately . . . so that Justice may be lawfully served and give closure to the Victims['] Family." (Appx. A, at 1.) The State joined "in Gunches' motion and also move[d] this Court to issue a warrant of execution." (Appx. B, at 1.)

Gunches eventually moved to withdraw his request for execution. (Appx. C, Mot.: Withdraw from Iss. of Death Warr., 01/04/2023.) The Attorney General subsequently moved to withdraw its request for execution on January 20, 2023. (Appx. D, State of Arizona's Mot. to Withdraw Mot. for Warr. of Exec.,

01/20/2023.) That same day Governor Hobbs announced Executive Order 2023-5, finding that “Arizona has a history of executions that have resulted in serious questions about ADCRR’s execution protocols and lack of transparency.” Office of the Governor Katie Hobbs, Establishing a Death Penalty Independent Review Commissioner (Jan. 20, 2023), <https://azgovernor.gov/office-arizona-governor/executive-order/5>. (Appx. E, at 1.) Her executive order announced the appointment of a Death Penalty Independent Review Commissioner “to review and provide transparency into the ADCRR’s lethal injection drug and gas chamber chemical procurement process, execution protocols, and staffing considerations including training and experience.” (*Id.*)

This Court then ordered briefing on whether the Attorney General could withdraw its motion. After briefing from the Attorney General, the Victim, Gunches, and *amici curiae*, this Court issued a decision order on March 2, 2023, and filed a Warrant of Execution “fixing Thursday, the 6th day of April, 2023, as the date” for Gunches’ execution and ordered the judgment and sentence of death “shall, pursuant to A.R.S. § 13–757(A), be executed by administering to Aaron Brian Gunches by intravenous injection a substance or substances in a quantity sufficient to cause death.” (Appx. G, *State v. Gunches*, No. CR-13-0282-AP, at 2 (Warr. of Exec., Mar. 2, 2023; see Appx. F, *State v. Gunches*, No. CR-13-0282-AP, at 8 (Decision Order, Mar. 2, 2023) (hereinafter “*Gunches D.O.*”).) This Court further ordered that a



certified copy of the Warrant be delivered to the Director and Superintendent or Warden of the State Prison as “sufficient authority . . . for the execution of AARON BRIAN GUNCHES.” (*Id.*, at 2.)

The following day, Governor Hobbs publicly vowed, “Under my Administration, an execution will not occur until the people of Arizona can have confidence that the State is not violating the law in carrying out the gravest of penalties.” (Appx. H, at 1.) Governor Hobbs declared that “the State and ADCRR do[] not intend to proceed with an execution on April 6, 2023.” (*Id.* at 2.)

ABOEC will hold a clemency hearing on March 23, 2023. In response to the Governor’s public comments, the Victim filed a writ of mandamus in this Court on March 10, 2023.

#### **IV. ARGUMENT.**

The analysis necessarily starts with this Court’s warrant of execution. Without it, the State could not execute Gunches. *See* Appx. F, *Gunches D.O.*, at 8 (“When the State seeks a warrant of execution, § 13–759(A) and Rule 31.23 afford this Court a limited, ministerial gatekeeping role in the State carrying out a death sentence.”); *see* A.R.S. § 13–759(A). The relevant portion provides:

IT IS ORDERED pursuant to A.R.S. § 13-759(A) and Ariz. R. Crim. P. 31.23(c)(1), fixing Thursday, the 6th day of April, 2023, as the date for commencement of the execution time period when the judgment and sentence of death pronounced upon AARON BRIAN GUNCHES by the Superior Court in Maricopa County shall,

pursuant to A.R.S. § 13–757(A), be executed by administering to AARON BRIAN GUNCHEs by intravenous injection a substance or substances in a quantity sufficient to cause death.

(Appx. G, at 2.)

This Court’s Warrant is not permissive—Gunches “shall, pursuant to A.R.S. § 13–759(A), be executed” on April 6, 2023. As explained below, there is no authority authorizing Governor Hobbs and Director Thornell to ignore this Court’s order. No law authorizes the Governor to unilaterally refuse to enforce a sentence, whether it be a term-of-years or capital sentence. In fact, the Arizona Constitution and Arizona Revised Statutes direct the Governor and the Director to carry out the execution, as they would enforce any other criminal sentence.

Moreover, the Governor’s decision to unilaterally suspend executions in Arizona violates Arizona Constitution Article 5, Section 5, and A.R.S. § 31–402 by supplanting ABOEC’s exclusive authority to recommend reprieves. It also violates 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).

**A. THE GOVERNOR IS BOUND BY THE CONSTITUTION AND STATUTES TO CARRY OUT EXECUTIONS AFTER THIS COURT ISSUES A WARRANT.**

The Arizona Constitution directs the Governor to “take care that the laws be faithfully executed” and specifies that she “shall transact all executive business with the officers of the government, civil and military.” Ariz. Const. art. 5, § 4. The

director of ADCRR is one of the Governor's officers, falls under her supervision, and serves "at the pleasure of the governor." A.R.S. § 41-101(A)(1)-(2) (governor supervises executive officer); A.R.S. § 41-1603(A) (director of ADCRR is appointed by the Governor).

As part of the laws Governor Hobbs must enforce, Director Thornell must manage ADCRR and "hold in custody all persons who are sentenced to the department under the law and shall hold such persons for the term directed by the court, subject to law." A.R.S. § 31-201.01(A); A.R.S. § 41-1604(A)(1)-(2) (the Director must administer ADCRR). In fact, this responsibility is "is unqualified. It is a ministerial duty concerning which he has no discretion." *Maricopa Cnty.*, 126 Ariz. at 364 (applying A.R.S. § 31-201.01).

More specifically, the death penalty is an authorized and constitutional sentence in Arizona. A.R.S. § 13-751(A)(1) ("[T]he defendant shall be sentenced to death or imprisonment in the custody of the state department of corrections for natural life . . . ."); A.R.S. § 13-752(A) ("[T]he state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death . . . ."); A.R.S. § 13-757(A) ("The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections."); *see State*

*v. Bush*, 244 Ariz. 575, 599, ¶ 111 (2018) (“Absent a constitutional violation, the propriety of Arizona’s capital scheme is strictly a matter of policy, which is outside our purview under our constitution’s separation of powers.”); *State v. Martinez*, 230 Ariz. 208, 222-23 (2012) (rejecting Eighth Amendment challenge to Arizona’s death penalty statutes).

*1. Section 13–759(A) does not give the Governor discretion to ignore a warrant for execution.*

Despite the fact that the death penalty is the law in Arizona, the Governor has claimed that this Court’s Warrant only “authorizes an execution” but does not “require” one, possibly referencing A.R.S. § 13–759(A). (Appx. H, at 1, also stating “[t]his is consistent with the law and separation of powers between the judicial and executive branches on this most serious exercise of the power of the State.”). This interpretation ignores that the statute authorizes an execution because without a warrant, the Governor cannot carry out an execution. It does not give the Governor discretion to ignore, or direct her officers to ignore, this Court’s warrant.

Section 13-759(A) reads:

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. The time

for execution shall be fixed for thirty-five days after the state's motion is granted.

The requirement for a judicial death warrant is necessary because, unlike a term-of-years sentence, the imposition of a capital sentence is the execution. Until that happens, an inmate's capital sentence remains unexecuted. Because the judicial branch is responsible for the imposition of sentence, the common law, and now § 13–759(A), requires a death warrant to implement the sentence. *See* 4 William Blackstone, Commentaries, app. VI, § 4; *Commonwealth v. Mayloy*, 57 Pa. 291, 296-97 (1868). Absent the warrant for execution, the State cannot execute a capital defendant. *See* A.R.S. § 13–759(A).

Thus, a warrant is a precondition for an execution. In other words, it authorizes an execution and is premised on the constitutional requirement that the Governor will “take care that the laws be faithfully executed.” Ariz. Const. art. 5, § 4; *see Authorize*, *Black's Law Dictionary* (11th ed. 2019) (defining authorize as “[t]o give legal authority; to empower” and “[t]o formally approve; to sanction”).

To be sure, there is no dispute that Governor Hobbs, or Director Thornell, may not refuse to house an inmate with a term-of-years sentence or may not unilaterally choose to release the inmate before the completion of his or her sentence. *See Laird v. Sims*, 16 Ariz. 521, 522, 529-30 (1915). A death sentence is no different. Just as the Legislature imposed upon this Court the ministerial duty of issuing a warrant of execution when appellate proceedings have concluded, *Gunches D.O.*, at 8, the

Legislature also imposed upon the Director the duty of carrying out the sentence imposed. A.R.S. § 13–759(A).

Section 13–759 is built on the foundational constitutional requirement that the Governor faithfully executes the laws, including a death sentence. When a warrant of execution is issued, the clear intent of the statute is that the Director will carry out the execution.

2. *Arizona’s execution protocol does not violate the Eighth Amendment.*

From the announcement of the appointment of a Commissioner who will review Arizona’s execution protocol, to statements made after this Court issued a warrant, Governor Hobbs suggested that the State’s execution protocol violates the Eighth Amendment’s prohibition against cruel and unusual punishments. (*See* Appx. H; Appx. D, at 1.) Her statements, however, ignore the recent extensive and lengthy federal litigation conducted regarding Arizona’s lethal injection protocols, the ensuing agreement entered between the State and the parties involved, and the three constitutional executions that were carried out last year under these protocols.

To start, the Supreme Court held that carrying out a capital sentence using lethal injection does not violate the Eighth Amendment’s prohibition against cruel and unusual punishments. *Baze v. Rees*, 553 U.S 35, 41 (2008) (plurality opinion). The Supreme Court again upheld lethal injection under the Eighth Amendment in

*Glossip v. Gross*, 576 U.S. 863, 867 (2015). And, this Court noted in its March 2, 2023, Decision Order:

[T]he State’s contention that the Court should not issue a warrant of execution “without the State avowing that an execution could actually move forward” is not persuasive. By moving for issuance of the warrant in December, the State implicitly avowed it could carry out the sentence in compliance with state and federal law.

(Appx. F, *Gunches D.O.*, at 7.) This Court further found that Governor Hobbs’ Commissioner review, by itself, “does not demonstrate the State’s inability to lawfully carry out the execution.” (*Id.* at 8.)

In fact, the ADCRR’s current execution protocol is the product of extensive litigation and multiple settlements with death row inmates. Predating Joseph Wood’s execution in 2014, a group of death row inmates sued Arizona over its execution protocols. *First Amend. Coal. of Ariz., Inc. v. Ryan*, 938 F.3d 1069, 1073 (9th Cir. 2019). Following Wood’s execution, “the parties agreed to stay the litigation until the [ADCRR] published a set of revised execution procedures.” *Id.* Several Arizona death row inmates and the State reached three settlements between 2014 and 2017, covering execution chemicals and dosages and other issues related to the carrying out of an execution by lethal injection.<sup>2</sup>

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<sup>2</sup> In 2014, the ADCRR and inmates stipulated to stay proceedings while ADCRR revised ADCRR Department Order 710 and agreed to provide the inmates “any Amended Protocol before it is made available to the public.” (Appx. I, Jt. Stip. For Temp. Stay, *First Amend. Coal. of Ariz., Inc. v. Ryan*, (hereinafter *First Amend.*

Left unresolved were three First Amendment claims:

(1) restricting the ability of execution witnesses to hear the sounds of the entire execution process; (2) failing to disclose the source and quality of the lethal-injection drugs that will be used in the inmates' executions; and (3) failing to disclose specific qualifications of the execution team members who will insert intravenous lines into the inmates.

*First Amend. Coal.*, 938 F.3d at 1072.

On appeal, the Ninth Circuit held that the First Amendment encompasses the right of the public and press to listen and view executions in their entirety but does not entitle inmates to information regarding the lethal injection drugs or the execution team members' qualifications. *Id.* at 1079-80. In response to the Ninth Circuit's ruling, the State and the inmates reached a fourth settlement over

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*Coal.*) Case No. 2:14-cv-01447-NVW, Doc. 67, filed 11/21/14. at 1; ADCRR, *Department Order 710—Execution Procedures* (hereinafter “D.O. 710”), available at <https://corrections.az.gov/sites/default/files/documents/policies/700/0710.pdf>. In 2016, ADCRR agreed to “never again use midazolam, or any other benzodiazepine, as part of a drug protocol,” which resulted in the stipulated dismissal of one claim against ADCRR. (Appx. J, Stip. Sett. Agreement and [Proposed] Ord. for Dismissal of Claim One, *First Amendment Coal.*, Case No. 2:14-cv-01447-NVW, Doc. 152, filed 12/19/16, at 1.) In 2017, ADCRR stipulated to amend D.O. 710 to limit ADCRR's discretion to deviate from the protocols, including changing, “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.” (Appx. K, Stip. Sett. Agreement and [Proposed] Ord. for Dismissal of Claims Six and Seven, *First Amend. Coal.*, Case No. 2:14-cv-01447-NVW, Doc. 186, filed 6/21/17, at 7.) ADCRR also stipulated to provide inmates with a “quantitative analysis of any compounded or non-compounded chemical to be used in an execution,” and to discontinue using chemicals that are beyond-use date and using “any lethal-injection protocol that uses a paralytic.” (*Id.* At 7-8.)



ADCRR's protocols, which allows witnesses to see and hear an execution in its entirety but protects information regarding the execution drugs and execution personnel. (Appx. L, Stip. Sett. Agreement, *First Amend. Coal. v. Shinn*, Case No. 2:14-cv-01447-NVW-JFM, Doc. 201 filed 6/22/20.)

Most importantly, Governor Hobbs's statement ignores the three recent Arizona executions, successfully carried out by the ADCRR in the past 10 months in compliance with ADCRR's stipulated protocol:

Clarence W. Dixon, ADCRR #038977, executed May 11, 2022;<sup>3</sup>

Frank J. Atwood, ADCRR #062887, executed June 8, 2022;

Murray Hooper, ADCRR #047621, executed November 16, 2022.

ADCRR, <https://corrections.az.gov/death-row/most-recent-executions> (last visited Mar. 13, 2023); *see Atwood v. Shinn*, 36 F.4th 901, 904 (9th Cir. 2022) (upholding a district court's finding that Arizona's execution protocols, with modifications for Atwood's degenerative spinal disease, did not violate the Eighth Amendment).

Despite the extensive pre-execution litigation in each of the above listed cases—litigation that precedes most if not all scheduled executions—the courts

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<sup>3</sup> Because Dixon was blind, ADCRR and Dixon stipulated that ADCRR would designate a blind aide to provide certain services during the execution. (Appx. M, Stip. Sett. Agreement and [Proposed] Ord., *Dixon v. ADCRR, et al.*, No. 2:22-cv-00604-DJH, Doc. 11, filed 4/20/22, at 3-5.) ADCRR also stipulated that it would have its pharmacist compound a new batch of pentobarbital prior to the execution. (Appx. N, Stip. Sett. Agreement and [Proposed] Ord., *Dixon v. ADCRR, et al.*, No. 2:22-cv-00743-DJH, Doc. 32, filed 5/9/22, at 3-4; Appx. O, Ord. *Dixon v. ADCRR, et al.*, No. 2:22-cv-00743-DJH, Doc. 34, filed 5/9/22, at 1-2.)

found that Arizona’s lethal injection protocol is constitutional and compliant with the Eighth Amendment.

**B. THE ARIZONA CONSTITUTION LIMITS THE GOVERNOR’S EXERCISE OF EXECUTIVE CLEMENCY POWER. HER UNILATERAL DECISION TO SUSPEND EXECUTIONS IS UNCONSTITUTIONAL BECAUSE IT BYPASSES ABOEC AND USURPS POWERS ENTRUSTED TO THE LEGISLATURE.**

Governor Hobbs’s and Director Thornell’s unilateral refusal to carry out Gunches’s sentence, despite this Court’s issuance of the Warrant, is materially indistinguishable from a reprieve. *Rodriguez v. Sims*, 18 Ariz. 74, 78 (1916) (noting a reprieve “postpones the execution of a judgment for a time”); *see Reprieve, Black’s Law Dictionary* (11th ed. 2019) (“Temporary postponement of the carrying out of a criminal sentence, esp. a death sentence; specif., an official order halting the execution of a prisoner on death row.”). A reprieve falls under Governor Hobbs’s clemency authority. Unlike other states, however, executive clemency in Arizona is limited by the Arizona Constitution and subject to legislative enactments.

Article 5, Section 5 of the Arizona Constitution provides:

The Governor shall have power to grant reprieves, commutation, and pardons, after convictions, for all offenses except treason and cases of impeachment, *upon such conditions and with such restrictions and limitations as may be provided by law.*

(emphasis added). From the early days of Arizona’s statehood, its courts have continuously and consistently interpreted Article 5, Section 5 to permit the

Legislature to regulate the Governor’s ability to issue reprieves, commutations, and pardons. *See, e.g., Laird*, 16 Ariz. at 527-29; *State ex rel. Murphy v. Superior Court*, 30 Ariz. 332, 334-36 (1926); *McGee v. Ariz. State Bd. of Pardons & Paroles*, 92 Ariz. 317, 318 (1962); *State ex rel. Ariz. State Bd. of Pardons and Paroles v. Superior Court*, 12 Ariz. App. 77, 79-80 (1970); *State v. Marquez*, 127 Ariz. 98, 102-03 (1980); *Arnold v. Ariz. Bd. of Pardons and Paroles*, 167 Ariz. 155, 157 (App. 1990); *McDonald v. Thomas*, 202 Ariz. 35, 39-42, ¶¶ 10-17 (2002).

Today, the exercise of the Governor’s pardon, commutation, and reprieve powers are constrained by the ABOEC. *See generally* A.R.S. §§ 31–401 to –446. Under A.R.S § 31–402, “[a] reprieve, commutation or pardon may not be granted by the governor unless it has first been recommended by the board.” *See Galaz v. Stewart*, 207 Ariz. 452, 454, ¶ 8 (2004) (“The primary statutory limitation on this power is that the governor may act only upon recommendations from the [ABOEC].”). Thus, the Governor’s statements and ADCCR’s inactions here are contrary to both long-standing court precedent and the current law.

Indeed, the dispute in this case is strikingly similar to the situation addressed by this Court over a century ago in *Laird*. In that case, the Governor granted an unconditional pardon to a prisoner serving a ten-year sentence for murder, but the superintendent of prisons refused to release him because the Governor had not acted on the recommendation of the board of pardons and paroles (now the ABOEC).

*Laird*, 16 Ariz. at 522; *see also* Penal Code of 1913, § 1302 (“[The board of pardons and paroles] shall have exclusive power to pass upon and recommend reprieves, commutations, paroles and pardons, and no reprieve, commutation, parole or pardon shall be granted by the governor unless the same has first been recommended by said board.”) (Appx. P.)

On appeal, this Court agreed with the superintendent and observed that it was “a matter of common knowledge” around the time of Arizona’s constitutional convention that “considerable feeling and criticism were indulged by the people of the territory over what was generally thought to be an abuse of the pardoning power.” *Laird*, 16 Ariz. at 525. As a result, in defining the pardoning power in a manner “not to be found in any other Constitution of any other state of the Union,” the Court found it reasonable to assume the Constitution’s drafters worded Article 5, Section 5, “to prevent a recurrence of an indiscriminate exercise of the pardoning power.” *Id.*

*Laird* found the passage of the measure establishing the board of pardons and paroles by both the Legislature and people of Arizona “very soon after the promulgation of the Constitution,” dispositive:

At the polls, after a thorough campaign of publicity, both by proponents and opponents of the measure, the people, the ultimate and final source of all power in a democratic form of government, placed their construction on section 5, art. 5, of the Constitution by approving the creation of

the board of pardons and paroles and the power lodged in it. The sovereign people have said that the power of pardon may be conditioned, restricted, and limited to the extent of forbidding its exercise except upon the recommendation of the board of pardons and paroles.

16 Ariz. at 527-28.

If Governor Hobbs's intention to not proceed with an execution stands, it will result in the unconstitutional usurpation of the Legislature's authority to condition and restrict the exercise of the Governor's clemency power. *See* Ariz. Const. art. 3; *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988) ("Nowhere in the United States is this system of structured liberty more explicitly and firmly expressed than in Arizona."). By imposing a reprieve of Gunches's sentence without any input from or proceedings by the ABOEC, the Governor has implicitly, and impermissibly, asserted complete control over the process by which she can exercise her clemency power. *See McDonald*, 202 Ariz. at 41, ¶ 14 (separation of powers test).

There is no meaningful distinction, as far as the clemency power is concerned, between granting a short pause in an execution, and granting a full, unconditional pardon of a lawfully imposed sentence for any conviction. The underlying message sent by Governor's Hobbs's statements and actions is clear: if the execution of a sentence conflicts with her policy objectives, she can nullify the ABOEC and circumvent the statutory process entirely. The drafters of Arizona's Constitution, however, vested with the Legislature the independent responsibility to curb the

Governor’s executive clemency powers specifically to avoid this exact result. *See Laird*, 16 Ariz. at 525 (“It is not unreasonable to assume that the convention endeavored to so word section 5 of article 5 as to prevent a recurrence of an indiscriminate exercise of the pardoning power.”); *McDonald*, 202 Ariz. at 40, ¶¶ 11-12.

By imposing a reprieve in the execution of Gunches’s sentence without following the process delineated by the Legislature, Governor Hobbs now resurrects an issue that had been settled in Arizona since the ratification of its constitution. This Court should find unconstitutional, as it did in *Laird*, Governor Hobbs’s and Director Thornell’s actions and declared intention to unilaterally pause the execution.

**C. GOVERNOR HOBBS’S UNILATERAL DECISION TO GRANT A DE FACTO REPRIEVE VIOLATES THE VICTIM’S CONSTITUTIONAL RIGHT TO A PROMPT AND FINAL CONCLUSION.**

Arizona’s Victim Bill of Rights (“VBR”), by its terms, preserves and protects victims’ rights to justice and finality. Ariz. Const. art. II, § 2.1(A)(1), (A)(10). A victim’s constitutional right to finality warrants protection. *State v. Gates*, 243 Ariz. 451, 454-55, ¶ 16 (Ariz. 2018) (In making a post-waiver determination of whether an intellectual disability evaluation is appropriate in a capital case, trial courts must consider whether an evaluation would prejudice the state or the victims by delaying the trial date.); *Fitzgerald v. Myers*, 243 Ariz. 84, 92, ¶¶ 23-25 (Ariz. 2017) (affirming order denying stay of capital PCR proceedings); *State v. Towery*, 204

Ariz. 386, 391, ¶ 14 (Ariz. 2003) (noting the importance of victims’ constitutional right to finality). This Court implicitly recognized the rights that victims have to justice and finality when it permitted three executions to be carried out last year. *State v. Dixon*, CR08-0025-AP; *State v. Atwood*, CR-87-0135-AP; and *State v. Hooper*, CR83-0044. Here, Gunches kidnapped and murdered Ted Price more than 20 years ago and this Court upheld Gunches’s convictions and death sentence years ago. *Gunches I*, 225 Ariz. at 27, ¶ 26; *Gunches II*, 240 Ariz. at 200, ¶ 1.

The very purpose of enshrining rights to justice and finality into Arizona’s Constitution was to give victims basic rights of “respect, protection, participation and healing of their ordeals.” *Champlin v. Sargeant*, 192 Ariz. 371, 375, ¶ 20 (1998) (noting purpose of VBR and its implementing legislation) (citing 1991 Ariz. Sess. Laws ch. 229, § 2). Ms. Price and her family have a compelling interest in ensuring their rights to justice and finality are upheld; it is essential to “the healing of their ordeals.” *Id.* Arizona’s VBR seeks to minimize the traumatic impact of murder on victims by enumerating rights intended to preserve and protect victims’ rights to justice and due process. Ariz. Const. art. 2, § 2.1; Gessner H. Harrison, *The Good, The Bad, and The Ugly: Arizona’s Courts and the Crime Victims’ Bill of Rights*, 34 Ariz. St. L.J. 531, 531-32 (2002). Yet, this very purpose of the VBR will be frustrated if Governor Hobbs and ADCRR are permitted to unilaterally ignore this Court’s Decision Order and Warrant of Execution.

As discussed above, Governor Hobbs's oath and duty to support the Constitution and laws of Arizona applies with equal force to victims. This Court has already explicitly recognized the victim's rights here by explaining, "[i]n ruling on the pending motions, we are cognizant of the Victim's constitutional right to a prompt conclusion of this case." (*Gunches D.O.*, at 4.) Governor Hobbs's unliteral decision to suspend executions surely violates the victims' rights in this unique circumstance.

The Victim has waited over 20 years for justice and finality. Gunches pled guilty. His death sentence was affirmed on appeal, and he waived additional appellate review. The Victim is entitled to a prompt and final conclusion. Governor Hobbs and Director Thornell cannot unilaterally suspend executions in Arizona.

## **V. CONCLUSION.**

Governor Hobbs has neither discretion nor authority to ignore the warrant of execution, which was issued by this Court after carefully considering whether it could do anything but issue the warrant. *See generally Gunches D.O.* This Court ordered the Warrant delivered to the Director or Warden and ordered that "the same shall be sufficient authority for *them*" to execute Gunches. (Appx. F, at 2) (emphasis added.) Nothing in the Warrant gave Governor Hobbs or Director Thornell any discretion to refuse to carry out the execution.



For the same reasons, Governor Hobbs' assertion that the issuance of a warrant does not require an execution but merely authorizes one is incorrect. Again, the Constitution provides that the Governor *shall* faithfully execute the laws of Arizona. Nothing in the Constitution or laws of Arizona or the Warrant gives the Governor discretion to ignore the Warrant and grant what essentially constitutes a temporary reprieve from the death penalty.

In fact, Governor Hobbs's unilateral decision to grant a de facto reprieve bypasses ABOEC and threatens to usurp powers entrusted to the Legislature. Just as this Court recognized over 100 years ago, the Arizona Constitution's drafters worded Article 5, Section 5, "to prevent a recurrence of an indiscriminate exercise of the pardoning power." *Laird*, 16 Ariz. at 525. As it did in *Laird*, this Court should once again find the Governor's actions and declared intention to unilaterally pause a lawfully imposed sentence unconstitutional.

Finally, Governor Hobbs's decision to act outside Arizona's Constitution and its laws violates the victims' constitutional right to a prompt and final conclusion. Ariz. Const., art. 2, § 2.1(A)(10).

This Court should find that Governor Hobbs and Director Thornell cannot unilaterally refuse to carry out this Court's warrant requiring the execution of Gunches on April 6, 2023. Accordingly, MCAO asks this Court to grant the writ of

mandamus unless Gunches seeks review under *Cruz* or Rule 32.1(g) and that claim cannot be resolved before April 6, 2023.

DATED this 13<sup>th</sup> day of March, 2023.

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*State v. Aaron Gunches*

**Appendices**

- Appendix A: Motion: Issuance of Death Warrant, 11/25/2022
- Appendix B: Resp. to Mot.: Issuance of Death Warrant/State's Motion for Warrant of Execution, 12/07/2022
- Appendix C: Motion: Withdraw from Issuance of Death Warrant, 01/04/2023
- Appendix D: The State of Arizona's Motion to Withdraw Motion for Warrant of Execution, 01/20/2023
- Appendix E: Executive Order 2023-005, *Establishing a Death Penalty Independent Review Commissioner* (Jan. 20, 2023)
- Appendix F: *State v. Gunches*, No. CR-13-0282-AP (Decision Order, Mar. 2, 2023)
- Appendix G: *State v. Gunches*, No. CR-13-0282-AP (Warrant of Execution, Mar. 2, 2023)
- Appendix H: Statement From Governor Katie Hobbs on Warrant of Execution for Aaron Brian Gunches, 03/03/2023
- Appendix I: Joint Stipulation for Temporary Stay, *First Amend. Coal. Of Ariz., Inc. v. Ryan*, Case No. 2:14-cv-01447-NVW, Doc. 67, filed 11/21/14.
- Appendix J: Stipulated Settlement Agreement and [Proposed] Order for Dismissal of Claim One, *First Amend. Coal. of Ariz., Inc. v. Ryan*, Case No. 2:14-cv-01447-NVW, Doc. 152, filed 12/19/16
- Appendix K: Stip. Settlement Agreement and [Proposed] Ord. for Dismissal of Claims Six and Seven, *First Amend. Coal. of Ariz., Inc.*, Case No. 2:14-cv-01447-NVW, Doc. 186, filed 6/21/17

- Appendix L: Stipulated Settlement Agreement, *First Amend. Coal. v. Shinn*, Case No. 2:14-cv-01447-NVW-JFM, Doc. 201 filed 06/22/2020
- Appendix M: Stipulated Settlement Agreement and [Proposed] Order, *Dixon v. ADCRR, et al.*, No. 2:22-cv-00604-DJH, Doc. 11, filed 4/20/22
- Appendix N: Stipulated Settlement Agreement and [Proposed] Order, *Dixon v. ADCRR, et al.*, No. 2:22-cv-00743-DJH, Doc. 32, filed 5/9/22
- Appendix O: Order, *Dixon v. ADCRR, et al.*, No. 2:22-cv-00743-DJH, Doc. 34, filed 5/9/22
- Appendix P: Penal Code of 1913, § 1302
- Appendix Q: R.T. 2/15/13
- Appendix R: R.T. 8/1/13