

ARIZONA SUPREME COURT

DANIEL WAYNE COOK, BEAU JOHN
GREENE, ELDON MICHAEL SCHURZ,

Plaintiffs/Petitioners.

v.

STATE OF ARIZONA; ARIZONA
DEPARTMENT OF CORRECTIONS; CHARLES
RYAN, Director, Arizona Department of
Corrections, in his official capacity,

Defendants/Respondents,

CV-12-0271-PR/A

Court of Appeals
No. 1 CA-CV 11-0629 A

Maricopa County
Superior Court
No. CV-2011-011677

THE STATE OF ARIZONA'S OPPOSITION TO PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW.

A.R.S. 13–757(A) provides that the death penalty “shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death” By also providing that the penalty shall be carried out “under the supervision of the state department of corrections,” did the Arizona Legislature improperly delegate its authority to an executive agency, in violation of the state constitution’s doctrine of separation of powers?

II. FACTUAL AND PROCEDURAL BACKGROUND.

A week before Thomas West’s scheduled execution, West, joined by three death-row inmates who were not under warrants of execution, filed a complaint in superior court against the Arizona Department of Corrections (ADC), seeking declaratory and injunctive relief. (Record on Appeal (“ROA”) item 1.) The Plaintiffs alleged that the lethal injection statute, A.R.S. § 13–757(A), improperly delegated legislative power to ADC and thus violated the state constitution’s doctrine of separation of powers. (ROA items 1, 4.) The Plaintiffs also sought a restraining order to prevent ADC from carrying out all executions, including West’s. (ROA item 5.)

The State of Arizona moved to dismiss the complaint, arguing that it failed to allege a claim on which relief could be granted. (ROA item 6.) The State argued that the Legislature had not delegated its authority to make laws to ADC, but rather, like other states, had properly given ADC the authority to develop the protocol to comply with the legislative will to carry out lawful death sentences. (*Id.*)

The trial court set the matter for oral argument, at which plaintiffs conceded that they were not challenging the constitutionality of the protocol, nor were they asserting that the legislature could not delegate authority to ADC to carry out executions. (ROA item 14.) Instead, “they claim[ed] that ADC’s protocol is so devoid of standards that it lacks basic procedural safeguards to support judicial review.” (*Id.*)

The trial court granted the State’s motion to dismiss the complaint, ruling that § 13–757(A) was a proper delegation of discretion. Noting that the legislature properly delegates authority when it defines the agency’s task so that the agency knows the limits of its responsibility to carry out that task, the trial court ruled:

A.R.S. § 13–757(A) meets this requirement. Although Plaintiffs contend that the protocol allows ADC to act arbitrarily and capriciously because it can allegedly deviate from the protocol without notice, this argument can be made anytime an agency or board is vested with the least amount of discretion, no matter how specific the statutory guidelines are. Indeed, a similar argument was made in *Peters v. Frye* [71 Ariz. 30 (1950)], to which the Arizona Supreme Court stated:

Counsel for plaintiffs urges that the discretion allowed the board in the instant case is an ‘unfettered’ one. Such is not and cannot be true, for the courts are always alert to grant review where it is sufficiently shown that a subordinate agency has abused its discretion by acting arbitrarily and capriciously. [71 Ariz. at 36.]

(ROA item 14.)

Following the ruling, Plaintiffs requested special action relief in this Court, as well as a stay of West's execution. This Court denied jurisdiction and refused the stay request. (ROA item 15.) After West was executed, the remaining Plaintiffs filed a timely notice of appeal, and the court of appeals granted review, but denied relief.

In an opinion dated July 26, 2012, the court of appeals rejected Plaintiffs' separation of powers argument, noting that, although the separation of powers doctrine precludes complete delegation of lawmaking power to another body, the lawmaking authority "may allow another body to fill in the details of legislation already enacted." *Cook v. State*, 2012 WL 3055981, at ¶ 6 (citing *Ariz. Mines Supply Co.*, 107 Ariz. 199, 205 (1971)). The court of appeals further found that, in the instant case, the Legislature appropriately delegated "the job of formulating . . . guideline[s] to an agency that is likely better equipped to undertake the task." *Cook*, 2012 WL 3055981, at ¶ 6. Finally, the court of appeals noted that ADC does not have unfettered discretion in formulating guidelines, primarily because any such guidelines must comply with the Eighth Amendment requirement that a protocol "contain [] sufficient safeguards to prevent improper anesthetization" to avoid a "substantial risk of serious harm and . . . serious pain and suffering that would constitute cruel and unusual punishment." *Id.* at ¶ 8 (citing *Dickens v.*

Brewer, 631 F.3d 1139, 1144 (9th Cir. 2011) (discussing and applying *Baze v. Rees*, 553 U.S. 35 (2008)).

The court of appeals also rejected Plaintiffs' argument that ADC's authority under the statute to revise its execution protocol unconstitutionally infringes on Plaintiffs' ability to seek judicial review of changes to the protocol. While expressing concern with "last-minute" changes to the protocol, the court of appeals found that Arizona courts have in fact been able to provide review of ADC's changes, and that ADC's representations regarding the protocol that will be used have included additional provisions that "on their face, if implemented by the Department, should help ensure meaningful judicial review." *Id.* at ¶ 14.

III. REASONS THIS COURT SHOULD DENY REVIEW.

A.R.S. § 13-757(A) provides as follows:

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.

Plaintiffs argue that this statute violates the separation of powers doctrine by improperly delegating legislative authority to ADC, an executive agency. The trial court and the court of appeals correctly rejected this argument, and this Court should affirm those rulings.

A. Standard of review.

This Court reviews the grant of a motion to dismiss for an abuse of discretion, *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11 (2006); this Court reviews constitutional law issues underlying such a motion de novo. *State v. Ramsey*, 208 Ariz. 56, 59, ¶ 12 (App. 2004). “Statutes are presumed constitutional, and the burden of proof is on the opponent of the statute to show it infringes upon a constitutional guarantee or violates a constitutional principle.” *State v. Wagstaff*, 164 Ariz. 485, 494 (1990).

B. Complex, modern government requires blended powers.

Article III of the Arizona Constitution provides:

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except, as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Though such language may seem absolute, Arizona courts have long recognized that a “complete separation of powers is impracticable.” *J. W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405 (App. 1984). Indeed, the courts have observed that “[c]omplex modern government ... requires ... a blending of powers in order to operate with any degree of efficiency.” *Id.* (emphasis added.)

Common examples of blended powers include administrative agencies' rule making and adjudicative powers; the executive veto of legislation; functions of public utility boards and workmen's compensation commissions; and the Legislature's impeachment powers. *Id.*; *Arizona Mines Supply Co.*, 107 Ariz. at 206 (upholding legislative delegation of authority to county board, under Air Pollution Act, to develop pollution regulations). *See also, e.g., Griffith Energy v. Arizona Dept of Rev.*, 210 Ariz. 132, 137, ¶ 23 (App. 2005) (upholding administrative agency's power "to fill in the details" of legislation governing violation of electric generation facilities); and *Lake Havasu City v. Mohave County*, 138 Ariz. 552, 559 (App. 1984) (upholding county department's authority, under statute, to decide kind of health services to provide city).

In *Arizona Mines Supply Co.*, the plaintiff was charged with air pollution, a misdemeanor, for violating county rules enacted pursuant to the Air Pollution Act, A.R.S. §§ 36-771 to 36-790. In defense, the company argued that the rules could not have established an offense because they had been adopted under an invalid delegation of legislative power. This Court disagreed:

We see, then, that while the Legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself. *Without this power legislation would be become oppressive, and yet imbecile.* Local laws almost universally call into action, to a greater or less extent, the agency and discretion, either of the people or individuals, to accomplish in detail what

is authorized or required in general terms. The object to be accomplished, or the thing permitted may be specified, and the rest left to the agency of others, with better opportunities of accomplishing the object, or doing the thing understandingly.

107 Ariz. at 205 (quoting *Peters v. Frye*, 71 Ariz. 30, 35 (1950) (emphasis added in *Arizona Mines*)).

The Court further stated that, while agency discretion should be carried out under “proper standards fixed by the legislature,” the standards “need not necessarily be set forth in express terms if they might reasonably be inferred from the statutory scheme as a whole.” *Id.*

C. ADC is sufficiently guided in developing an execution protocol.

In the context of carrying out an execution protocol, the blending of legislative and executive powers is similarly appropriate. The Legislature has determined that the penalty for capital murder is death or life imprisonment. That determination is within the Legislature’s constitutional power to enact laws and to define crimes and their punishments. *See* Ariz. Const. art. 22, § 22 (mandating that the death penalty shall be carried out by lethal injection “under such procedures and supervision as prescribed by law.”). The Legislature has appropriately delegated to ADC the power to carry out executions.

ADC has developed a thorough and detailed protocol by which to apply lethal injection. The protocol indicates the drugs to be administered, the amounts of each chemical, and the required qualifications of individuals tasked with

administering the chemicals. The protocol, chapter 710 (Execution Procedures) of the Department Order Manual, is publicly available on ADC's website: <http://www.azcorrections.gov/Policies/700/0710.pdf>.

Plaintiffs argue that the Legislature's delegation of authority to ADC fails to provide "reasonably definite standards' that cabin the Executive's discretion." Petition for Review, at 8. Plaintiffs also argue, however, that "the lethal-injection statute does not address a complex matter." *Id.* at 11. Plaintiffs fail to explain why additional "standards" (in unspecified areas) are necessary to carry out a relatively straight-forward assignment from the Legislature.

Contrary to Plaintiffs' claim, §13-757(A) is not invalid merely because the Legislature did not define the chemicals to be used or micromanage the precise protocol. First, the statute plainly defines the punishment to be imposed as death. ADC has no discretion to define the elements of any crime or the penalty to be imposed. Second, the statute makes clear the legislative purpose to impose death by lethal injection. Third, the agency that supervises executions is better qualified to make such decisions.

D. Plaintiffs' argument is routinely rejected elsewhere.

Other jurisdictions have considered and rejected arguments similar to those Plaintiffs assert here. *See, e.g., Brown v. Vail*, 237 P.3d 263 (Wash. 2010); *State v. Sims*, 754 So.2d 657 (Fla. 2000); *State v. Deputy*, 644 A.2d 411 (Del.Super.Ct

1994); *State v. Osborn*, 631 P.2d 187 (Idaho 1987); *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978). In rejecting the claim in *Granviel*, the Texas Court of Criminal Appeals specifically observed that it was appropriate for the legislature to declare a policy (capital punishment), set a standard (the means of execution), then delegate to the director of corrections the power to determine details that the legislature could not practically or efficiently perform. *Id.* at 515.

ADC's discretion in carrying out executions is not unfettered. As noted by the court of appeals, the Eighth Amendment prohibits cruel and unusual punishment and requires that an execution protocol contain sufficient safeguards to avoid a "substantial risk of serious harm." *Dickens*, 631 F.3d at 1144. Plaintiffs' argument that this safeguard is irrelevant to a separation of powers argument is unpersuasive and ignores the fact that an alleged violation of separation of powers would be harmless in this context absent any indication that an inmate is at risk of suffering significant pain.

E. "Last-minute" changes to the protocol have not deprived Plaintiffs of their right to judicial review.

The trial court and the court of appeals properly rejected Plaintiffs' argument that ADC has unfettered discretion over execution procedures that are insulated from judicial review. (ROA item 14.) ADC's execution protocol has always been subject to judicial review. While most protocol challenges take place in federal court, this Court has indicated that such challenges are also available in post-

conviction proceedings under Rule 32 of the Arizona Rules of Criminal Procedure. *State v. Hargrave*, 225 Ariz. 1, 16 (2010); *State v. Andriano*, 215 Ariz. 497, 553 n. 9 (2007).

Plaintiffs nevertheless argue that ADC's ability to change the protocol, together with "ADC's constant avowals to various courts, which have been designed to convince the courts to permit immediately pending executions to go forward—even though ADC's avowals have been repeatedly demonstrated to lack permanence" usurps to the powers of the judiciary to exercise judicial review. Petition for Review, at 13. Plaintiffs ignore, however, that "avowals to various courts" to convince courts to permit immediately pending executions to go forward" in fact demonstrates *a process of judicial review* and highlights the "powers of the judiciary."

Moreover, ADC's "last-minute" avowals have benefitted Plaintiffs. For example, after the Ninth Circuit expressed misgivings about ADC's written policy that ends in-person attorney visitation the evening prior to the execution (with telephone conversations permitted the day of execution), ADC agreed to permit in-person visitation the day of execution notwithstanding its belief that the court's misgivings (related to an alleged denial of access to courts) were unwarranted. So too, ADC's avowal that it would permit execution witnesses to view the placement of IV lines benefitted Plaintiffs. ADC made this change in part to address a

concern voiced by Plaintiffs and the Ninth Circuit that an inmate could suffer significant pain during the IV placement and no one would know about it.¹ Although ADC disagrees that this was a valid concern given the fact that inmates remain conscious after placement of the IV line and are presumably able to describe any suffering that occurred during the IV placement, ADC implemented a new policy and procedure that allows witnesses to watch IV placements via a closed circuit monitor.

Finally, Plaintiffs argue that ADC's actions have been "made in an effort to 'foreclose' the judicial review of its protocol." ADC agrees that it has acted to foreclose legal issues by rendering them moot. There is nothing nefarious about agreeing to alter procedures in a way that benefits inmates and moots litigation.

¹ Plaintiffs have challenged ADC's protocol since 2007 and have failed to demonstrate that any inmate has suffered serious pain or has been at risk of serious pain. See *Brewer v. Landrigan*, 131 S. Ct. 445 (2010) (Mem.); *Dickens v. Brewer*, 631 F.3d 1139 (9th Cir. 2011); *Cook v. Brewer*, 637 F.3d 1002 (9th Cir. 2011); *Beaty v. Brewer*, 649 f.3d 1071 (9th Cir. 2011); *West v. Brewer*, 652 F.3d 1060 (9th Cir. 2011); *Towery v. Brewer*, 672 f.3d 650 (9th Cir. 2012); *Lopez v. Brewer*, 680 F.3d 1068 (9th Cir. 2012).

IV. CONCLUSION.

Based on the foregoing authorities and arguments, the State respectfully requests that this Court affirm the court of appeals' ruling that the trial court properly dismissed Plaintiffs' complaint.

RESPECTFULLY SUBMITTED this 7th day of August, 2012.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Criminal Procedure 31.19(c) and (e), undersigned counsel certifies that the response to the petition for review filed on August 7, 2012 uses a proportionately spaced typeface of 14 points, is double spaced using a roman font, and contains 2,598 words.

/s/
Kent E. Cattani
Division Chief Counsel

2821921

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, I electronically filed The State of Arizona's Opposition to Petition for Review and Certificate of Compliance with the Arizona Supreme Court, by using the Court's AZTurboCourt e-filing system.

Copies of this Opposition and Certificate of Compliance were deposited for mailing this date to:

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