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IN THE SUPREME COURT OF THE STATE OF ARIZONA

DANIEL WAYNE COOK, BEAU JOHN GREENE, ELDON SCHURZ, Plaintiffs/Appellants, vs. STATE OF ARIZONA; ARIZONA DEPARTMENT OF CORRECTIONS; CHARLES RYAN, Director, Arizona Department of Corrections, in his official capacity, Defendants/Appellees.	No. _____ Court of Appeals Division One No. 1 CA-CV 11-0629 Maricopa County Superior Court No. CV2011-011677 **PETITION FOR REVIEW**

PETITION FOR REVIEW
EXPEDITED REVIEW REQUESTED

Pursuant to ARCAP Rule 23, Appellants Cook, Greene, and Schurz respectfully ask this Court to accept jurisdiction of this petition for review and reverse the court of appeals's decision affirming the superior court's decision upholding the constitutionality of A.R.S. section 13-757(A), Arizona's lethal-injection statute.

Because Appellant Cook is under a warrant of execution and is scheduled to be executed on Wednesday, August 8, 2012, he asks pursuant to ARCAP Rule 3 that this Court expedite consideration of this petition for review. Cook also requests oral argument.

Statement of the Issues

This case is about one question: Under Article 3 of the Arizona Constitution, may the Legislature delegate complete policy-making authority to the Executive, while simultaneously eviscerating the Judiciary's ability to review the consequences of that delegation of authority? The answer is no. In order to constitutionally delegate any of its policy-making authority, the Legislature must provide "reasonably definite standards which govern the exercise of the power[.]"[1] The Legislature has failed to provide this guidance, and has instead delegated *all policy-making authority* to the Executive.

Standard of Review

This Court reviews the constitutionality of a statute *de novo*, and, when possible, construes the statute to uphold its constitutionality.[2]

Statement of Facts Material to Consideration of Issues Presented

On July 13, 2011, Daniel Cook, who is scheduled to be executed on August 8, 2012, and three other plaintiffs[3] filed a civil complaint in the Maricopa County Superior Court, alleging that Arizona's capital-sentencing statute, A.R.S. section 13-757(A), represents an unconstitutional delegation of authority by the Legislature

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[1]*Schechter v. Killingsworth*, 93 Ariz. 273, 285, 380 P.2d 136, 144 (1963).

[2]*State v. Cromwell*, 211 Ariz. 181, 188, P38, 119 P.3d 448, 455 (2005) (*citing State v. Davolt*, 207 Ariz. 191, 214, P99, 84 P.3d 456, 479 (2004)).

[3]Thomas West was the lead plaintiff at the time the suit was filed. He was executed on July 19, 2011.

to the Executive, in which the Legislature not only abrogated its constitutional responsibilities, but also engaged in a concomitant action of legislative fiat that stripped the Judiciary of its constitutional province to evaluate legislative action.[4] The plaintiffs alleged that these actions violated the separation-of-powers clause of the Arizona Constitution.

The plaintiffs subsequently appealed the matter to the Court of Appeals.[5] After the parties completed the briefing in the matter, Appellants then asked the court to accelerate the appeal, owing to the upcoming scheduled execution of appellant Cook,[6] and the court granted the motion.[7]

Before the Court of Appeals held argument, it issued an order directing the parties to be prepared to address the effect of the June 5, 2012, changes to the

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[4]Verified Compl. for Special Action, Declaratory and Injunctive Relief, and Order to Show Cause, *West*, No. CV-2011-011677 (Maricopa Cnty. Super. Ct.), filed July 13, 2011.

[5]Notice of Appeal, *West*, No. CV-2011-011677 (Maricopa Cnty. Super. Ct.), filed Aug. 23, 2011.

At the same time, other death-row prisoners were (and are) litigating the constitutionality of ADC's lethal-injection protocol, which ADC has issued (and rewritten multiple times, as well as making multiple ad hoc unwritten changes). This litigation is unrelated to the Arizona Constitution; rather, it is a challenge to under the Eighth and Fourteenth Amendments of the U.S. Constitution–issues not relevant to the instant matter. *See infra* at A1.

In the course of that litigation, ADC changed its protocol yet again, on June 5, 2012, and asked the U.S. District Court to dismiss the prisoners' lawsuit, in part because the most recent change "foreclosed" certain of the prisoners' claims. ADC's request to foreclose judicial review based on its repeated ad hoc changes and avowals to its multiple protocols *is* at issue in this matter. *See infra* at B.

[6]Mot. to Accelerate Appeal, *West v. State*, No. CA-CV 11-0629 (Ariz. Ct. App.), filed June 28, 2012.

[7]Order, *West v. State*, No. CA-CV 11-0629 (Ariz. Ct. App.), filed July 5, 2012.

protocol.[8] After hearing argument on July 24, 2012, the court issued its opinion two days later, in which the court affirmed the judgment of the superior court.[9]

Following the court's issuance of its opinion, Appellants filed a motion for reconsideration,[10] asking the court to reconsider Section II of its opinion,[11] because the court reached that portion of its decision after relying on the June 2012 protocol changes, which were made after the case had been litigated in the superior court, and after appellate briefing was complete.[12] In so doing, the court was forced to reach its decision without having the benefit of certain facts that developed after the matter had been litigated in the superior court. Accordingly, Appellants presented that information and asked the court to take judicial notice of those facts; the court denied the motion.[13]

Reasons for granting the petition

This Court should accept review of and grant relief on this petition because the status of Arizona Constitution's separation-of-powers doctrine is unclear. On the one hand, the Court has definitively held that "nowhere in the United States is this system of structured liberty [of separation of powers] more explicitly and firmly expressed

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[8]Order, *Cook*, No. CA-CV 11-0629, filed July 12, 2012.

[9]*Cook v. State*, 2012 WL 3055981 (Ariz. Ct. App. July 26, 2012) (Attachment 1).

[10]Mot. for Reconsideration (App. 1).

[11] *Cook*, 2012 WL 3055981, at *3.

[12]*Id.*, at *5 ¶ 17.

[13]Order, *id.*, filed July 27, 2012.

than in Arizona."[14] On the other hand, however, Arizona's cases do not easily distinguish the types of legislative delegation that will survive constitutional scrutiny.

This case provides an opportunity for the Court to 1) reassert Arizona's commitment to the separation-of-powers doctrine; and 2) clearly state that a legislative delegation of authority will not survive constitutional scrutiny when that delegation provides *only* the purpose of the Legislature's action, but provides *no* standards or other guidance. In other words, this case presents the Court with the opportunity to state that standardless delegation of policy-making authority does not meet Arizona's strong commitment to the separation of powers.

A. When the Legislature passed the lethal-injection statute, it provided no guidance, standards, or constraints, on the Executive's actions.

In order for the Legislature to constitutionally delegate any of its authority to the Executive Branch, it must constrain the Executive Branch with definite standards and limitations.[15] The Legislature ignored these requirements when it relinquished all its power in the lethal-injection context to the Executive Branch in the following thirty-seven words:

> 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."[16]

The lethal-injection statute only provides the *purpose* of that lethal-injection statute: that the condemned be rendered dead by the injection of a substance or substances. No words of constraint exist, no standards are present, no limitations

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[14] *State ex rel. Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997) (*quoting Mecham v. Gordon*, 156 Ariz. 297, 300, 751 P.2d 957, 960 (1988) (alteration in original).

[15] *Schecter*, 93 Ariz. at 285, 380 P.2d at 144 (*citing* Davis, Administrative Law Treatise section 2.10 (1958)).

[16] A.R.S. § 13-757(A).

inform the statute's purpose, and no guidance exist by which the Judiciary may review actions taken under the statute. That is, as long as the Executive kills the prisoner with an injection of a substance or substances, then the Executive has complied with the statute's stated purpose, which is killing the prisoner by the injection of a lethal substance.

Here, then, the Legislature disposed of all its authority *and obligation* to make policy decisions in one of the most solemn, irreversible decisions that society makes: the decision to take the life of a human being. In so disposing of its policy-making authority and obligations without providing standards and guidance to the Executive, it gave to the Executive the unfettered authority "which vests in a person . . . free of any standard independent of his . . . own mind and judgment the power of supplying, or giving force to, or suspending its terms . . . ."[17] This delegation "is unconstitutional as a delegation of the power reposed exclusively in the legislature."[18]

This is the gravamen of Appellants' argument. However, the court of appeals misunderstood this separation-of-powers argument in two crucial ways. First, it mistakenly imported the United States Constitution's Eighth Amendment jurisprudence into Arizona's separation-of-powers doctrine.[19] Second, when the court asserted that the Legislature could not provide 'the details of the execution process itself[,]" it misunderstood Appellants' argument as to the type of guidance the Legislature must provide.[20]

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[17]*Hernandez v. Frohmiller*, 68 Ariz. 242, 256, 204 P.2d 854, 863-64 (1949) (citation omitted).

[18]*Id.*

[19]*Cook*, 2012 WL 3055981, at *3 ¶ 8.

[20]*Id.*, at *2 ¶ 7.

1. This case is not about the Eighth Amendment.

The Court of Appeals erred when it held that "the United States Constitution also implicitly guides and limits the Department's discretion by requiring the Department's protocol to . . . avoid a 'substantial risk' [of harm and pain] that would qualify as 'cruel and unusual punishment' under the Eighth Amendment."[21]

As an initial matter, it is important to note that constraints imposed by the U.S. Constitution cannot be classified as "policy guidance." The Legislature may not escape its constitutional obligation under the Arizona Constitution to provide guidance by saying, implicitly or explicitly, that the Executive must follow the U.S. Constitution. Nor may the Executive claim that it has received adequate policy guidance from the Legislature in the guise of an implicit or explicit requirement to follow the U.S. Constitution. This is so because the U.S. Constitution is the "supreme law of the land;"[22] state officials must follow it regardless of whether the Legislature specifically directs them to do so.

Moreover, Appellants are *not* complaining of potential violations of the Eighth Amendment in this suit under Arizona's *separation-of-powers* doctrine (although in the context of a civil-rights lawsuit, it would be significant that the court of appeals expressed "serious concerns under the Eighth Amendment's prohibition of cruel and unusual punishment,"[23] and under the Fourteenth Amendment.[24]) Rather, as discussed below, Appellants argue that *the Legislature provided no policy guidance of any kind*.

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[21]*Cook*, 2012 WL 3055981, at *3 ¶ 8.

[22]U.S. Const. art. VI, cl. 2.

[23]*Id.*, at *4 n.5 (citations omitted).

[24]*Id.*

2. The Legislature has a duty to guide the Executive.

When the Legislature provides direction to an Executive agency, it has innumerable policy decisions it can make, and on which it may draw to guide the Executive. Appellants have not suggested that the Legislature must encapsulate all the details of the execution protocol in that statute. Instead, Appellants ask only that the Legislature provide the constitutionally requisite "reasonably definite standards"[25] that cabin the Executive's discretion. It is up to the Legislature to decide what areas those "reasonably definite standards" encompass, as well as what details to leave to the Executive.[26] But under Arizona's separation-of-powers doctrine, the Legislature cannot leave all but the purpose of the statute (here, the causing of death of the condemned by an injection of some substance or substances) to the discretion of the Executive.[27]

In this statute, the Legislature has not engaged in constitutionally *legitimate* delegation, which permits the delegation of mere "ministerial minutia" of carrying out an execution to ADC, or the delegation to an agency with special expertise the authority to fill in the details in an area in which it would be impractical for the

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[25] *Schechter*, 93 Ariz.at 285, 380 P.2d at 144.

[26] For example, the Ohio Legislature decided that executions pursuant to its lethal-injection statute would be accomplished quickly and painlessly. Ohio R.C. § 2949.22(C).

The Arizona Legislature could have made a similar decision. Or, it could have decided that "quick" was an appropriate policy decision—for example, for the protection of witnesses—but that a "painless" execution was not a necessary consideration. Again, these are policy decisions specific to the manner in which the Legislature wishes to have executions carried out; they are not relevant to Eighth Amendment considerations.

[27] *See Hernandez*, 68 Ariz. at 256, 204 P.2d at 863-64.

Legislature to establish a comprehensive rule.[28]

Rather, the expertise of ADC is institutionalizing and rehabilitating those convicted of crimes. But through A.R.S. section 13-757, the Legislature has permitted an Executive Branch agency that has no expertise in the scientific or medical aspects of lethal injection to develop its medically-based Protocol, without any statutory standards or guidance. State prison officials have no specialized knowledge about bringing about death in through a quasi-medical procedure; yet the Arizona Legislature gave the Executive Branch (ADC) no guidance about how the scientific and medical aspects of lethal injection should be evaluated.

The standardless thirty-seven-word statement, which merely establishes the purpose of lethal injection, stands in contrast to constitutionally proper legislation that allows administrative agencies to make rules and regulations "within proper standards fixed by the legislature" and which "are normally sustained as valid . . . ."[29] Here, the statute contains not even a "basic standard, i.e., a definite *policy* and rule of action [that] will serve as a guide for the administrative agency . . . ."[30] Again, the statute contains only a purpose: the prisoner shall be killed by lethal injection of some substance.

This statute stands in stark contrast to that which this Court upheld in *Arizona Mines*. There, this Court upheld "two separate, distinct and adequate standards[,]"[31] which dealt with Maricopa County air-pollution rules and regulations. The first

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[28]*State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205, 484 P.2d 619, 625 (1971).

[29]*Id.* (emphasis added).

[30]*Ariz. Mines Supply Co.*, 107 Ariz. at 205, 484 P.2d at 625.

[31]*Id.* at 206, 484 P.2d at 626.

standard required that those rules and regulations be "necessary and feasible."[32] The second standard directed the rules and regulations "to contain pollution standards 'at least equal to or more restrictive than those adopted by the board of health.'"[33] The Arizona pollution statute, then, contained standards that, *inter alia*, compared the regulations in question to the restrictive nature of other standards. The Court found "no difficulty in upholding the legislative delegation of authority since adequate standards were set up."[34] No similar language in the lethal-injection statute constrains ADC.

Nor is the lethal-injection statute related to a complex matter best left to agency discretion, unlike the issue of pest and crop controls that the Court addressed in *State v. Wacker*.[35] In that case, the Court upheld a statute that authorized the Arizona Commission of Agriculture and Horticulture to "'[m]ake and enforce all rules, regulations and orders necessary to * * * prevent introduction of a crop pest or disease into the state . . . .'"[36] The Court upheld that statute because the Legislature was addressing a complex matter: conditions that vary "from disease to disease, and pest to pest, even from locality to locality, so that it is *plainly impossible* for the legislature to designate a precise rule of conduct in advance of administrative

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[32]*Id.*

[33]*Id.*

[34]*Id.,*484 P.2d at 626. *See also Griffith Energy v. Ariz. Dep't of Revenue*, 210 Ariz. 132, 108 P.3d 282 (App. 2005) (upholding legislation because standards provided in statute were sufficient to guide the Executive Branch).

[35]86 Ariz. 247, 344 P.2d 1004 (1959).

[36]*Wacker*, 86 Ariz. at 249, 344 P.2d at 1006 (first two deletions in original).

determination."[37]

The lethal-injection statute does not address a complex matter;[38] instead, the statute is like the public-health statute that the Court rejected in *State v. Marana*. That statute "permitted the State Board of Health to enact rules to 'regulate sanitation and sanitary practices in the interests of public health' and to 'protect and promote the public health and prevent disability and mortality.'"[39] The Court struck this statute because it was "a complete delegation of legislative power."[40] Most significantly, the Court explained, "It may safely be said that a statute which gives unlimited regulatory power to a commission, board or agency with *no prescribed restraints nor criterion nor guide to its action* offends the Constitution as a delegation of legislative power. *The board must be corralled in some reasonable degree and must not be permitted to range at large* and determine for itself the conditions under which a law should exist and pass the law it thinks appropriate.'"[41]

The statute at issue in this case fails the Arizona Supreme Court's tests. First, unlike the complex matter at issue in *Wacker*, A.R.S. § 13-757(A) deals not with a

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[37] *Ariz. Mines Supply Co.*, 107 Ariz. at 206, 484 P.2d at 626 (emphasis added).

[38] Certainly, the individual requirements relating to the actual execution protocol may encompass a variety of more complex issues, such as the medical conditions of individual prisoners. Those matters may be appropriately left to the agency in charge of carrying out the statute; nevertheless, the guidance relating to overall policy decisions about the taking of human life (*i.e.*, not the individual details pertaining to the taking of an individual life) are the proper province of the Legislature.

[39] *Wacker*, 86 Ariz. at 249, 344 P.2d at 1006 (*discussing State v. Marana Plantations*, 75 Ariz. 111, 252 P.2d 87, 89 (1953)).

[40] *Id.*

[41] *Id.* (emphasis added).

complex, variable problem. Rather, it deals with a simple, direct issue, the purpose of which is entirely encapsulated in the thirty-seven words of the statute: that ADC shall supervise the lethal-injection death of condemned prisoners. Second, A.R.S. § 13-757(A) fails to define ADC's course of conduct, and instead provides ADC with nothing more than the statute's purpose; similarly, the Legislature fails to provide prescribed restraints or any criteria, and it fails to guide ADC's actions. Thus, the statute fails to corral ADC's actions (as ADC's actions, as described below, demonstrate).

B. ADC has, in fact, violated the Arizona Constitution's separation of powers doctrine.

The Court of Appeals is correct that "the Department's history of deviating from or changing its protocol at the last minute raises . . . a separation of powers concern under the Arizona Constitution."[42] However, the court erred when it held that the Arizona Department of Corrections (ADC) had "not yet violated the Arizona Constitution's separation of powers doctrine."[43]

The court's error here was generated not by a misunderstanding of the law, but by a lack of facts pertaining to ADC's actions that came to light after the matter had concluded in the superior court—facts that came about as a result of later-occurring executions, and through post-execution litigation relating to ADC's failure to follow its protocol in those executions. Thus, because that court did not have in the record before it the history of ADC's actions, the court was unable to realize the full impact of its conclusion. ADC's history demonstrates that it has, in fact, "violated the Arizona Constitution's separation of powers doctrine."[44]

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[42] *Cook*, 2012 WL 3055981, at *4 ¶ 14.

[43] *Id.*, at *5 ¶ 18.

[44] *Id.,* at *5 ¶ 18.

The Court of Appeals stated that the Executive's actions "threatens to 'usurp the powers,' of the Judiciary, that is, its duty to exercise judicial review."[45] The court was concerned with the fourth of the four factors the courts use for evaluating separation-of-powers claims: "the practical consequences of the [branch's] actions."[46] The court's assessment is accurate: "[ADC's] recent practice of amending or deviating from its protocol at what could be characterized as the eleventh hour could have the practical consequence of obstructing judicial review of its changes."[47]

But because the court was unaware of ADC's actions that have unfolded since the Appellants in this matter originally brought their suit, the court was unaware of the facts surrounding 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. Accordingly, Appellants respectfully direct the Court's attention to the multiple avowals that ADC has made in an effort to "foreclose" the judicial review of its protocol. *See supra* at Section III, Statement of Facts Material to Consideration of Issues Presented. Appellants also ask this Court to consider the information Appellants put forth in their motion for reconsideration, App. 1, that describes the history of the multiple avowals that ADC has made in order evade judicial review. Appellants submit that this evidence concretely demonstrates three significant points: 1) the illegitimacy of the Legislature's delegation of standardless policy-making authority; 2) the effect that this standardless delegation has on judicial review; and 3) the effect that the Executive's implementation of the standardless delegation has

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[45] *Id.,* at *5 ¶ 16.

[46] *Id.*, at *4-5 ¶¶ 15-16 (*quoting State v. Donald*, 198 Ariz. 406, 416, ¶ 37, 10 P.3d 1193, 1203 (App. 2000)).

[47] *Id.*, at *5, ¶ 16.

in obliterating judicial review.

Conclusion

For these reasons, this Court should accept review of this petition for review, should grant relief, and should hold that A.R.S. § 13-757(A) violates the Arizona Constitution's separation-of-powers clause.

Respectfully submitted this 6th day of August, 2012.

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