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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA, Plaintiff, vs. **JUSTIN JAMES RECTOR,** Defendant.	No. CR-2014-1193 **RESPONSE TO DEFENSE MOTION TO PRECLUDE THE IMPOSITION OF DEATH AS A POTENTIAL PUNISHMENT**

COMES NOW, the State of Arizona, by the Mohave County Attorney and through the undersigned deputy, Gregory A. McPhillips, responds to the defendant's motion to preclude the imposition of death as a potential punishment.

As conceded by the defense motion, many of these issues have rulings adverse to defendant's position. Precedent does not allow this Court to grant defendant's motions. Defendant is preserving the objection for appeal.

I. **The Death Penalty is not *Per Se* Cruel and Unusual**

Defendant asserts that the Death Penalty is Per Se Cruel and Unusual. As defendant's motion concedes, this is not so. The U.S. Supreme Court held in *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) that the Death Penalty is not Per Se Cruel and Unusual.[1]

[1] Other cases that reject the assertion that the death penalty is *per se* cruel and unusual punishment. See *State v. Salazar,* 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992); *State v. Gillies,* 135 Ariz. 500, 507, 662 P.2d 1007, 1014 (1983).

II. Execution by Lethal Injection is not Cruel and Unusual Punishment

A. Defendant's motion regarding form of execution is not ripe.

Issues raised in defendant's motion regarding form of capital punishment are not ripe and should therefore be denied. Defendant, who is, at this stage of the proceedings, presumed innocent, has not been tried for first-degree murder. Defendant has not been convicted of any death-eligible crime, much less sentenced to death. His motion therefore raises issues that are not ripe for review by this Court.

The ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur.[2] Arizona appellate courts have consistently held that, "court[s] ordinarily will not decide as to future or contingent rights, but will wait until the event giving rise to rights has happened, or, in other words, until rights become fixed under an existing state of facts."[3]

Several appellate courts that have analyzed the issue raised by defendant, whether the protocol used in the lethal injection process is unconstitutional, and have also addressed the ripeness issue as well. The decisions in these cases clearly indicate that defendant's motion to strike the death penalty based on the method of lethal injection is untimely.

In *Brown v. Livingston*, 457 F.3d 390 (5th Cir.2006), the Fifth Circuit Court of Appeals recently held that "[a] challenge to a method of execution may be filed any time after the plaintiff's conviction has become final on direct review." In this case, as previously stated, the defendant has not been convicted of first-degree murder and sentenced to death, much less has his "conviction" become final on direct review. Clearly, the defendant's motion challenging the method of lethal injection is premature.

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[2] *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 503 (1997).

[3] *U.S. West Communications, Inc., v. Arizona Corporation Commission*, 198 Ariz. 208, ¶ 15, 8 P.3d 396 (App. 2000). *See also Arizona Downs v. Turf Paradise, Inc.*, 140 Ariz. 438, 444, 682 P.2d 443, 449 (1984).

Other appellate courts that have addressed this issue have stated that a capital defendant can only challenge the protocol in the lethal injection process when the defendant's execution was "imminent."[4] Clearly, the defendant's execution in this case is not imminent.

Although the Ninth Circuit Court of Appeals has not resolved the question of when challenges to execution methods are ripe, it is clear that the Ninth Circuit requires a conviction for first-degree murder and sentence of death before the issue of challenging the method of execution is ripe and the proper subject of litigation.[5]

In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), the Supreme Court held that an inmate's competency challenge was properly dismissed as unripe because "his execution was not imminent and therefore his competency to be executed could not be determined at that time." The Court held that the inmate's claim was "unquestionably ripe" only after it was clear that he "would have no federal habeas relief for his conviction or his death sentence, and the Arizona Supreme Court issued a warrant for his execution."[6] We have suggested that a constitutional method becomes ripe when the method is chosen.[7] However, because the execution protocol is subject to change, Beardslee argues that his challenge to the protocol, as opposed to a generic challenge to the statutorily specified method, did not become ripe until his execution was imminent as described in *Martinez-Villareal.*[8]

Although *Beardslee* does not settle the issue of when a challenge to an execution method is ripe, it is clear from *Beardslee* that at the very minimum a capital

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[4] *See Ex Parte O'Brien*, 190 S.W.3d 667, n.2 (2006) (a challenge to the lethal injection chemicals used in Texas was not ripe because the defendant's execution was not imminent); *Colburn v. State*, 966 S.W.2d 511 (1998) (because defendant's execution was not imminent his claim that he could not be executed because he is insane is not ripe).

[5] See *Beardslee v. Woodford*, 395 F.3d 1064, 1069, n.6 (9th Cir. 2005).

[6] *Id.* at 643, 118 S.Ct 1618.

[7] *LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir. 1999).

[8] *Id.*

defendant must be convicted of a death-eligible offense and sentenced to death before a challenge to the method of execution can be properly raised.

B. Execution by Lethal Injection is not Cruel and Unusual Punishment

A.R.S. § 13-704(A) states: "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." The defendant argues that execution by lethal injection using certain chemicals causes pain and should be declared unconstitutional by this Court. However, the Arizona Supreme Court has repeatedly found that lethal injection is a constitutional method of execution.

In *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995), the court stated:

> Hinchey argues that death by lethal injection violates the Eighth Amendment to the United States Constitution because if carried out incorrectly, the procedure could be painful, and if carried out correctly, "he will be aware of the onset of loss of consciousness and will suffer shortness of breath and suffocation not unlike death by lethal gas." ...We have found no legal authority to support this argument. The state cites authority holding that lethal injection is not cruel and unusual punishment,...and argues that medical experts urge that death by lethal injection is the most humane of any method of execution....The state has the better argument. We hold that death by lethal injection is not cruel and unusual punishment....

The court relied on *Hinchey* in *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16, 30 (1999), and stated: "Appellant asserts that execution by lethal injection is cruel and unusual punishment. This court has previously determined lethal injection to be constitutional." And the court has continued to uphold the constitutionality of lethal injection.[9] Likewise, courts in other jurisdictions have upheld execution by lethal injection.[10]

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[9] *See, e.g., State v. Cromwell*, 211 Ariz. 181, 119 P.3d 448, 459-460 (2005); *State v. Galssel*, 211 Ariz. 33, 116 P.3d 1193, 1219 (2005); *State v. Carreon*, 210 Ariz. 54, 76, 107 P.3d 900, 922 (2005); *State v. Canez*, 202 Ariz. 133, 165, 42 P.3d 564, 596 (2002).

[10] *See, e.g., State v. Piper*, 709 N.W.2d 783, 796 (S.D. 2006); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn.2005); *McConnell v. State*, 102 Pl.3d 606, 615 (Nev.2004).

The United States Supreme Court has upheld lethal injection as a constitutional form of execution.[11] The plurality noted that "[t]hroughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge."[12] Precedent already set by the United States Supreme Court and the Arizona Supreme Court must be followed until overruled. "When later opinions of the Superior Court show our constitutional interpretations to be incorrect, we must overrule them and bring our decisions into conformity with Supreme Court precedent."[13] Unless and until the United States Supreme Court holds otherwise, this Court must follow the conclusion of the Arizona Supreme Court and the United States Supreme Court that execution by lethal injection in constitutional.

III. Lethal Injection is not unconstitutionally Vague

The Arizona Supreme Court addressed the issue of lethal injection in July 2007 in *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007). The Court stated:

> Arizona Revised Statutes § 13-704(A) (2001) provides that "[t]he 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." Andriano contends that this statute is unconstitutionally vague because it does not prescribe the type or dosage of drugs that must be administered, the order in which they must be administered, or the qualifications of the personnel who administer them, thereby failing to ensure that death by lethal injection is not cruel and unusual. She argues that to comport with the Eighth Amendment, "[t]he statute must [also] address the inherent difficulties with individual issues ... such as vein accessibility and chemical resistances."
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> Section 13-704(A) constitutionally prescribes that the method of death shall be lethal injection. See *State* v. *Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995) (considering and rejecting argument that death by lethal injection constitutes cruel and unusual punishment). *Hinchey's* pronouncement that lethal injection as a method of execution comports with the Eighth Amendment was not conditioned upon the use of particular procedures in implementing lethal injection. Moreover, the United States Supreme Court has never held that death by lethal injection is cruel and unusual absent specific procedures for implementation, nor does Andriano cite any cases to that effect. Andriano has

[11] *Baze v. Rees*, 553 U.S. 128 (2008).
[12] *Id.* At 62.
[13] *State v. Davis*, 206 Ariz. 377, 384 (2003).

thus failed to establish an Eighth Amendment right to a particular protocol for lethal injection.[FN9 14]

Therefore, lethal Injection is not unconstitutionally vague.

IV. ARS §§ 13-751(E) and 13-751(E) do not unconstitutionally place the burden of proof on the defendant in a Capital case.

Ariz. Rev. Stat. Ann. § 13-751(E) states:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Ariz. Rev. Stat. Ann. § 13-751(G) lists the mitigating circumstances:

> The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following: ...

Defendant asserts that the ARS § 13-751(E) and (G) unconstitutionally places the burden of proof on the defendant in a capital case. As defendant's motion concedes, this is not so. The Arizona Supreme Court held in *State v. Glassel*, 211 Ariz. 33, 52, 116 P.3d 1193, 1212 *opinion corrected on denial of reconsideration*, 211 Ariz. 370, 121 P.3d 1240 (2005) that this sentencing scheme does not create an unconstitutional "presumption of death."

In *Glassel* the Arizona Supreme Court held:

> A conviction for first degree murder, however, does not create a presumption of death. In addition to the elements of the crime, the state must prove at least one aggravating factor beyond a reasonable doubt in order to obtain a death sentence. Only after the state establishes at least one aggravating factor beyond a reasonable doubt does the defendant

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[14] 215 Ariz. at 510. (Footnote 9 states that the lethal injection protocol can be challenged in a Rule 32 proceeding).

> have the burden of proving mitigating circumstances. Such a scheme does not create an unconstitutional "presumption of death."[15]

This objection to the death penalty is also rejected in *State v. Fulminante,* 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988).

V. The Death Penalty properly channels the sentencer's discretion

Defendant asserts that the ARS § 13-751 fails to guide the discretion of the sentenser. This is not so. The Arizona Supreme Court upheld the process by which the sentenser applies discretion in *Glassel* as discussed above.

As defendant's motion concedes, the Arizona Supreme Court held in *State v. West.,* 176 Ariz. 432, 449, 862 P.2d 192, 209 (1993) overruled by State v. *Rodriguez,* 192 Ariz. 58, 961 P.2d 1006 (1998) that this sentencing scheme does narrow the class of death eligible defendants sufficiently to comply with the Eighth Amendment.

Defendant's motion also concedes, the ruling of the Arizona Supreme Court in *State v. Bolton*, 182 Ariz. 290, 310, 896 P.2d 830, 850 (1995). In that case, the Arizona Supreme Court held:

> Under A.R.S. § 13–703(F)(9), an aggravating circumstance is established when an adult commits first degree murder of a victim under fifteen years of age. Defendant argues that this amounts to an automatic death sentence and is unconstitutional. We disagree. As long as state law requires consideration of all mitigating circumstances, it is not unconstitutional to impose the death penalty by statutory mandate if one or more aggravating factors are present and mitigating circumstances are insufficient to warrant leniency.[16]

This objection to the death penalty is also rejected in *State v. Anderson*, 210 Ariz. 327, 359, 111 P.3d 369, 401 *supplemented,* 211 Ariz. 59, 116 P.3d 1219 (2005).

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[15] *State v. Glassel,* 211 Ariz. 33, 52, 116 P.3d 1193, 1212 *opinion corrected on denial of reconsideration*, 211 Ariz. 370, 121 P.3d 1240 (2005). Citing *State v. Anderson,* 210 Ariz. at 347, ¶¶ 76–77, 111 P.3d at 389 (citing cases).

[16] *Bolton*, 182 Ariz. at 310; Citing *Walton v. Arizona,* 497 U.S. 639, 651–52, 110 S.Ct. 3047, 3056, 111 L.Ed.2d 511 (1990); *State v. White,* 168 Ariz. 500, 514, 815 P.2d 869, 883 (1991), *cert. denied,* 502 U.S. 1105, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992).

VI. The Death Penalty allows the Jury to give appropriate weight to mitigation and is therefore Constitutional

Defendant asserts that statute unconstitutionally fails to require either cumulative consideration of multiple mitigating factors or that the jury make specific findings as to each mitigating factor. As defendant's motion concedes, this argument has been rejected. This claim was rejected in *State v. Gulbrandson,* 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995); *State v. Ramirez,* 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994); *State v. Fierro,* 166 Ariz. 539, 551, 804 P.2d 72, 84 (1990).

VII. The prosecutor's discretion to seek the death penalty does not violate the 8th Amendment

Defendant asserts that prosecutor's discretion to seek the death penalty violates the 8th Amendment. As defendant's motion concedes, this is not so. This claim was rejected in *State v. Glassel*, 211 Ariz. 33, 58, 116 P.3d 1193, 1218 *opinion corrected on denial of reconsideration,* 211 Ariz. 370, 121 P.3d 1240 (2005) citing *State v. Sansing,* 200 Ariz. 347, 361, ¶ 46, 26 P.3d 1118, 1132 (2001), *vacated on other grounds by Sansing v. Arizona,* 536 U.S. 954, 122 S.Ct. 2654, 153 L.Ed.2d 830 (2002).

Likewise, the Court rejected the claim that the prosecutor's discretion to seek the death penalty unconstitutionally lacks standards.[17]

VIII. The Grand Jury is not the proper trier of fact to determine probable cause of the aggravating circumstances

Defendant asserts that failure to present aggravating factors to the Grand Jury forbids imposition of the death penalty. As defendant's motion concedes, this is not so. Defendant cites *State v. Glassel*, 211 Ariz. 33, 58, 116 P.3d 1193, 1218.[18] Therefore, defendant's motion must be denied.

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[17] *State v. Salazar,* 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992).
[18] See also, *Chronis v. Steinle*, 220 Ariz. 559, 563, 208 P.3d 210, 214 (2009)

The State notes that Defendant can request a *Chronis* hearing. The Arizona Supreme Court, in *Chronis v. Steinle*, 220 Ariz. 559, 563, 208 P.3d 210, 214 (2009), has held:

> Arizona Rule of Criminal Procedure 13.5(c) allows a defendant in a capital case to request a probable cause determination for alleged aggravating circumstances. Such determinations are to be made following the procedure in Arizona Rule of Criminal Procedure 5, under which the State bears the burden of proof.

This hearing would is held in Superior Court after the indictment.

IX. < reserved to retain defendant's numbering system>

The State did not receive a 9th argument.

X. Whether the death penalty is a deterrent is not for the Court to decide

Defendant asserts that the death penalty is not a deterrent. Additionally, defendant argues that the death penalty does not serve as retribution. This is not an issue for the Court to decide. The U.S. Supreme Court held:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.[19]

XI. Long term incarceration

Defendant asserts that a death sentence will require him to serve long-term incarceration in torturous conditions and that such incarceration is unconstitutional. Defendant is not specific as to the actual article or amendment violated.

This issue is not ripe. The ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur.[20] Arizona appellate courts have consistently held that, "court[s] ordinarily will not decide as to future or

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[19] *Gregg v. Georgia*, 428 U.S. 153, 186, 96 S. Ct. 2909, 2931, 49 L. Ed. 2d 859 (1976); citing *Furman v. Georgia*, supra, 408 U.S., at 403-405, 92 S.Ct., at 2810-2812

[20] *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 503 (1997).

contingent rights, but will wait until the event giving rise to rights has happened, or, in other words, until rights become fixed under an existing state of facts."[21]

XII. Conclusion

As conceded by the defense motion, these issues have appellate rulings adverse to defendant's position. Precedent does not allow this Court to grant defendant's motions. Defendant's motions should be denied.

RESPECTFULLY SUBMITTED THIS 28th DAY OF SEPTEMBER, 2015.

MOHAVE COUNTY ATTORNEY
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By _____
DEPUTY COUNTY ATTORNEY
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A copy of the foregoing
sent this same day to:

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[21] *U.S. West Communications, Inc., v. Arizona Corporation Commission*, 198 Ariz. 208, ¶ 15, 8 P.3d 396 (App. 2000). *See also Arizona Downs v. Turf Paradise, Inc.*, 140 Ariz. 438, 444, 682 P.2d 443, 449 (1984).