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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MOHAVE**

9 STATE OF ARIZONA,
10 Plaintiff,
11 vs.
12 JUSTIN JAMES RECTOR
13 Defendant.

No. CR-2014-1193
**RESPONSE TO DEFENDANT'S
MOTION TO DISMISS
ALLEGATIONS OF DEATH
PENALTY BECAUSE THE STATE
CANNOT CONSTITUTIONALLY
IMPOSE DEATH**

14 COMES NOW, the State of Arizona, by the Mohave County Attorney and through
15 the undersigned deputy, Gregory A. McPhillips, responds to the defendant's motion to
16 dismiss allegations of death penalty. Defendant's motion should be denied because it is
17 not ripe. Defendant's Motion should be denied because this court already denied this
18 motion.

19 **This Court has already denied this motion in this case**

20 This Court has already ruled on this very motion. Defendant's Motion to
21 Preclude Death as a Possible Punishment alleged the same legal concerns raised in
22 the instant motion. In a Minute Order dated the 9th of December 2015, this court denied
23 defendant's Motion to Preclude death as a Possible Punishment. Issue preclusion
24 disallows defendant from re-raising the issue before the trial court. Further, Defendant's
25 Motion is frivolous and should be denied.



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

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

7 The ripeness doctrine prevents a court from rendering a premature judgment or
8 opinion on a situation that may never occur.¹ Arizona appellate courts have consistently
9 held that, "court[s] ordinarily will not decide as to future or contingent rights, but will wait
10 until the event giving rise to rights has happened, or, in other words, until rights become
11 fixed under an existing state of facts."²

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

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

23 Other appellate courts that have addressed this issue have stated that a capital
24 defendant can only challenge the protocol in the lethal injection process when the

25 ¹ *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 503 (1997).

² *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).

1 defendant's execution was "imminent."³ Clearly, the defendant's execution in this case
2 is not imminent.

3 Although the Ninth Circuit Court of Appeals has not resolved the question of
4 when challenges to execution methods are ripe, it is clear that the Ninth Circuit requires
5 a conviction for first-degree murder and sentence of death before the issue of
6 challenging the method of execution is ripe and the proper subject of litigation.⁴

7 In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45, 118 S.Ct. 1618, 140
8 L.Ed.2d 849 (1998), the Supreme Court held that an inmate's competency challenge
9 was properly dismissed as unripe because "his execution was not imminent and
10 therefore his competency to be executed could not be determined at that time." The
11 Court held that the inmate's claim was "unquestionably ripe" only after it was clear that
12 he "would have no federal habeas relief for his conviction or his death sentence, and the
13 Arizona Supreme Court issued a warrant for his execution."⁵ We have suggested that a
14 constitutional method becomes ripe when the method is chosen.⁶ However, because
15 the execution protocol is subject to change, *Beardslee* argues that his challenge to the
16 protocol, as opposed to a generic challenge to the statutorily specified method, did not
17 become ripe until his execution was imminent as described in *Martinez-Villareal*.⁷

18 Although *Beardslee* does not settle the issue of when a challenge to an
19 execution method is ripe, it is clear from *Beardslee* that at the very minimum a capital
20 defendant must be convicted of a death-eligible offense and sentenced to death before
21 a challenge to the method of execution can be properly raised.

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

⁴ See *Beardslee v. Woodford*, 395 F.3d 1064, 1069, n.6 (9th Cir. 2005).

⁵ *Id.* at 643, 118 S.Ct 1618.

⁶ *LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir. 1999).

⁷ *Id.*

1 **The Arizona Supreme Court has specifically addressed the Joseph Wood**
2 **execution and held this claim is not ripe until the Rule 32 proceeding**

3 The Arizona Supreme Court has already addressed the factual issue of Joseph
4 Wood's execution in *State v. Lynch*, 238 Ariz. 84, ¶¶ 75-78, 357 P.3d 119, 140-41
5 (2015). The Arizona Supreme Court held that the issue is better reviewed during the
6 Rule 32 phase. The Arizona Supreme Court ruled:

7 ¶ 76 Lynch contends that Arizona's death penalty is unconstitutional because it
8 involves torture and a lingering death. He cites the "botched" lethal injection of
9 Joseph Wood III as support for the contention that Arizona cannot humanely
10 implement the death penalty.

11 56 ¶ 77 The United States and Arizona Constitutions prohibit cruel and unusual
12 punishment. U.S. Const. amend. VIII; Ariz. Const. art. 2, § 15. Punishment
13 involving "torture or a lingering death" is cruel. *In re Kemmler*, 136 U.S. 436, 447,
14 10 S.Ct. 930, 34 L.Ed. 519 (1890). This Court and the United States Supreme
15 Court have rejected the argument that lethal injection is cruel and unusual
16 punishment. *See, e.g., Glossip v. Gross*, —U.S.—, —, 135 S.Ct. 2726,
17 2738, 192 L.Ed.2d 761 (2015); *Baze v. Rees*, 553 U.S. 35, 41, 128 S.Ct. 1520,
18 170 L.Ed.2d 420 (2008); *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610
19 (1995).

20 ¶ 78 We decline to reverse our prior rulings on this issue. Moreover, Lynch's
21 challenge to the current execution protocol is premature and may instead be
22 raised in Rule 32 proceedings. *State v. Kiles (Kiles II)*, 222 Ariz. 25, 42 ¶ 92 n.
23 20, 213 P.3d 174, 191 n. 20 (2009) (quoting *141 *State v. Andriano*, 215 Ariz.
24 497, 510 n. 9, 161 P.3d 540, 553 n. 9 (2007)). Lynch's objections to the current
25 injection procedure—the lack of transparency and the protocol to be used—
involve information not contained in the record on appeal and are more properly
raised in a Rule 32 petition. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d
80, 85 (1990) ("One of the purposes of a Rule 32 proceeding 'is to furnish an
evidentiary forum for the establishment of facts underlying a claim for relief, when
such facts have not previously been established of record.'" (quoting *State v.*
Scrivner, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App.1982))).⁸

⁸ *State v. Lynch*, 238 Ariz. 84, ¶¶ 75-78, 357 P.3d 119, 140-41 (2015).

CONCLUSION

Defendant's motion should be denied because it is not ripe. Defendant's Motion should be denied because this court already denied this motion.

RESPECTFULLY SUBMITTED THIS 25TH DAY OF JANUARY, 2016.

MOHAVE COUNTY ATTORNEY
MATTHEW J. SMITH



By _____
DEPUTY COUNTY ATTORNEY
GREGORY A. MCPHILLIPS

A copy of the foregoing sent this same day to:

HONORABLE LEE F. JANTZEN
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