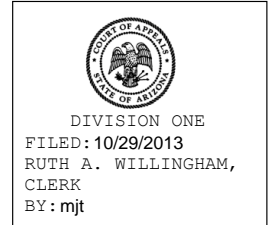


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



ELDRIDGE GITTENS (1); JASON NEIL)	No. 1 CA-SA 13-0254
NOONKESTER (2); JUSTIN MCMAHAN)	
(3); ZACHARY BAXTER (4); JOSE)	DEPARTMENT B
ALEJANDRO ACUNA (5); RUDOLPH)	
JOHN CANO, JR. (6); ABEL HIDALGO)	Maricopa County
(7); DENNIS LEVIS (8); JONATHAN)	Superior Court Nos.
RAY COLE (9); CRAIG DEVINE (10))	
RYAN WILLIAM FOOTE (11); DARNELL)	CR2010-007912-002 DT(1)
RUENA JACKSON (12); JAMES CLAYTON)	CR2011-138281-001 DT(2)
JOHNSON (13); THOMAS RILEY (14);)	CR2012-139607-001 DT(3)
JASPER PHILLIP RUSHING (15);)	CR2012-007399-001 DT(4)
JESUS BUSSO-ESTOPELLAN (16);)	CR2011-140108-001 DT(5)
MANUEL ANTONIO GONZALES (17),)	CR2009-160953-001 DT(6)
)	CR2011-005473-001 DT(7)
)	CR2011-008004-001 DT(8)
Petitioners,)	CR2011-151833-001 DT(9)
)	CR2010-168096-001 DT(10)
)	CR2011-150239-001 DT(11)
v.)	CR2010-007912-001 DT(12)
)	CR2010-048824-001 DT(13)
)	CR2011-008004-002 DT(14)
THE HONORABLE JOSEPH KREAMER,)	CR2010-007882-001 DT(15)
Judge of the SUPERIOR COURT OF)	CR2011-133622-001 DT(16)
THE STATE OF ARIZONA, in and for)	CR2012-154880-001 DT(17)
the County of MARICOPA,)	
)	DECISION ORDER
Respondent Judge,)	
)	
STATE OF ARIZONA ex rel. WILLIAM)	
MONTGOMERY,)	
)	
Real Party in Interest.)	
_____)	

This matter was considered by Presiding Judge Peter B. Swann and Judges Maurice Portley and Samuel A. Thumma during a

regularly scheduled conference held on October 22, 2013. After consideration, and for the reasons that follow,

IT IS ORDERED in the exercise of its discretion, the court declines special action jurisdiction.

I. Procedural Background.

Each Petitioner is facing a murder charge in Arizona Superior Court, Maricopa County, and in each case the State has filed a notice seeking the death penalty. No Petitioner has started trial; no Petitioner has been found guilty of murder and the death penalty has not been imposed on any Petitioner.

Petitioners moved to dismiss the death penalty allegations, claiming Arizona Revised Statute (A.R.S.) section 13-751 (2013)¹ -- Arizona's death penalty statute -- is unconstitutional because it: (1) fails to genuinely narrow the class of persons eligible for the death penalty; and (2) violates equal protection guarantees, given different approaches to the death penalty by the various counties in Arizona. Petitioners requested an evidentiary hearing on the motion.

The superior court received extensive briefing, including supplemental briefing on multiple issues related to the original motion, and received and considered extensive filings and exhibits relating to the motion. The superior court

¹ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

heard oral argument in January 2013 and May 2013. In considering the motion, the court assumed all facts alleged by Petitioners were true.

Having considered these materials, the superior court denied Petitioners' request for an evidentiary hearing and denied Petitioners' motion. The court rejected the narrowing argument, noting "this argument has been previously rejected by the Arizona Supreme Court" in *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991) and *State v. Hausner*, 230 Ariz. 60, 89, n.9, 280 P.3d 604, 633 n.9 (2012). The court rejected the equal protection argument, noting Petitioners "made no argument that the State has acted with discriminatory intent as to any of the" Petitioners and that, in *State v. Ovante*, 231 Ariz. 180, 185-86, 291 P.3d 974, 979-80 (2013), the Arizona Supreme Court "held that a showing that defendants in Maricopa County are more likely to receive the death penalty than similarly-situated defendants in other counties did not constitute an Equal Protection violation."

Petitioners filed this special action, claiming the superior court (1) abused its discretion in denying the request for an evidentiary hearing; (2) erred in rejecting the narrowing argument and (3) erred in rejecting the equal protection argument. The State filed a response opposing the petition.

II. Special Action Jurisdiction.

Special action jurisdiction is highly discretionary, and is generally disfavored when used to consider the denial of a motion to dismiss. Special action jurisdiction is not appropriate "where there is an equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a).

Applying these principles, as noted by the State:

The petition seeks to bar imposition of the death penalty but a jury has not even found Petitioner[s] guilty of first degree murder. And even if a jury does find [them] guilty of first degree murder, it may decline to impose the death penalty. And even if a jury does impose the death penalty, appeal is mandatory in capital cases so Petitioner[s] can raise [their] attacks on the constitutionality of Arizona's death penalty statute on appeal.

In addition, the issues Petitioners raise may be obviated before trial (through plea agreements or otherwise). Accordingly, as to each Petitioner, accepting special action jurisdiction at this time could result in addressing thorny legal issues "on a situation that may never occur." *Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, 536, ¶ 13, n.6, 278 P.3d 310, 314 n.6 (App. 2012) (citation omitted; discussing ripeness and standing). Moreover, should the death sentence be imposed on any of the Petitioners, that individual retains an equally "plain, speedy, and adequate remedy" by way of direct appeal to the Arizona Supreme Court. See A.R.S. § 13-4031; Ariz. R. Crim. P. 31.2; *Neary v. Frantz*,

141 Ariz. 171, 177, 685 P.2d 1323, 1329 (App. 1984) ("A remedy does not become inadequate merely because more time would transpire by pursuing a conventional action.").

Addressing the lack of an evidentiary hearing, Petitioners claim appellate review is "illusory if there is no adequate record made in the" superior court. Petitioners, however, raised two constitutional issues and made substantial filings with the superior court. A portion of those filings included in Petitioner's appendix with this court total approximately 560 pages. Similarly, the superior court considered the documents Petitioners filed -- both the actual exhibits and summaries of those exhibits -- and assumed as true all of Petitioners' factual submissions when ruling on the motion. Petitioners have failed to show how this record would make any appeal illusory.

For all of these reasons, this court declines special action jurisdiction.

_____/S/_____
SAMUEL A. THUMMA, Judge