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ARIZONA SUPREME COURT

In the matter of:

PETITION TO AMEND ARIZONA
RULES OF CIVIL PROCEDURE 15
AND 21, ARIZONA RULE OF
CRIMINAL PROCEDURE 31, AND
THE RULES OF THE SUPREME
COURT

Supreme Court No. R-22-0041

Joint Comment by the Directors of the
Maricopa County Indigent Defense
Agencies

The Indigent Representation Offices in Maricopa County largely support petitioners' proposals. Regarding petitioners' proposal related to responses to

amicus briefs, the Offices support a modified version that would still allow a party to enter necessary clarifications that arise from amicus curiae briefs. The Offices support petitioners' proposal regarding appellate decisions based upon unbriefed issues. And the Offices take no position regarding the attorneys' fees proposal.

1. The Indigent Representation Offices support a modified version of the proposal regarding responses to amicus briefs.

In the criminal realm, the Indigent Representation Offices have not seen the sort of abuse discussed in the petition. For the most part, counsel have not seen parties respond to supportive amicus briefs. And when there have been responses, it has been to identify a point of disagreement.

That said, petitioners' goal is laudable, but the proposal's focus on *disagreement* is too narrow.

There are times when a party does not *disagree* with an amicus party's position but must still *clarify* how the amicus party's position applies to their case.

This happened in *State v. Porter*, No. 20-0147-PR. In *Porter*, amici American Civil Liberties Union of Arizona, Arizona Attorneys for Criminal Justice, and Los Abogados Hispanic Bar Association asked this Court to strengthen *Batson* protections, "even if only prospectively." *State v. Porter*, No. 20-0147-PR, Br. of Amici ACLU-AZ, AACJ, Los Abogados, pg. 1; *see also id.* at 9, 11. In her response, Porter agreed "with the general proposition that this Court should strengthen the protection provided by *Batson*." *State v. Porter*, No. 20-0147-PR, Resp. Amici Br.,

pg. 1. But Porter was also concerned the comment “could be construed so as to deny Ms. Porter relief.” *Id.* Porter thus filed the response to clarify that she should be entitled to relief regardless of whether this Court construed the statement as addressing retroactivity or preservation. *Id.*

Ms. Porter did not *disagree* with the amici in her case, but her brief was still *responsive*. She simply responded in a manner that sought to clarify how amici’s argument should be applied to the facts of her case.

Because clarification is an appropriate objective for a response to an amicus curiae brief, the Indigent Representation Offices would propose alternative language:

Proposed amendment:	Alternative amendment:
A party may respond to an amicus curiae brief. <u>A response may address only points of disagreement with the amicus brief.</u>	A party may respond to an amicus curiae brief <u>only as necessary to clarify or dispute points raised by amicus curiae.</u>

This alternative retains petitioners’ core objective: to ensure responses are responsive. A response to an amicus brief should not be used as a tool to expand the word or page counts. But it also acknowledges that responsiveness does not demand disagreement. A clarification is still responsive.

2. The Indigent Representation Offices support petitioners’ proposal regarding appellate decisions on unbriefed issues.

The Indigent Representation Offices agree with the petitioners’ proposal. It is

a sensible solution to a pervasive and ongoing problem. And it is a uniquely harmful problem in criminal cases, where a person’s appeal can be rejected on a basis they never had the opportunity to address.

This Court has repeatedly warned that appellate courts should not reach out and decide issues that were not briefed by the parties. *See State v. Porter*, 251 Ariz. 293, ¶ 5 (2021); *State v. Robertson*, 249 Ariz. 256, ¶ 9 (2020); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, ¶ 45 (2017). As Justice Scalia noted, this policy “distinguishes our adversary system from the inquisitorial one.” *U.S. v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *see also McNeil v. Wisconsin*, 501 U.S. 171, 181 fn.2 (1991). And the North Carolina Court of Appeals has recognized the fundamental unfairness of appellate courts inserting issues without briefing: “An appellate court cannot be both an advocate for one of the parties, and at the same time be an impartial arbiter of the case.” *In re J.E.M., Jr.*, 727 S.E.2d 398, 400 fn.1 (N.C. App. 2012).

This is because decisions reached without the participation of the parties risk being wrong. As this Court noted in *State v. Robertson*, the reason courts “should heed the principles underlying the waiver doctrine” is to “prevent the court from deciding cases with no research assistance or analytical input from the parties.” *Robertson*, 249 Ariz. 256, ¶ 9. *Robertson* itself was an example of just that risk. There, the court of appeals ruled that a defendant appealing their probation

revocation had invited error. *Id.* at ¶ 6. This Court rejected the panel’s decision on at least three bases. *Id.* at ¶¶ 10, 14, 22.

And the parties that lose a case on grounds introduced by the court are left with no real recourse.

A petition for review provides no meaningful protection. This Court accepts only a small percentage of petitions for review. And most of those petitions do not concern the sort of error correction that is involved when appellate courts decide cases on unbriefed issues.

Nor does a motion for reconsideration. Rather, because the panel has already issued a decision, any ruling on a motion for reconsideration would be tainted by the biases created by the initial decision—especially confirmation bias. “Confirmation bias ... connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.” Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *Rev. Gen. Psychol.* 175, 175 (1998). Put differently, confirmation bias is “the propensity to seek out and value evidence that reinforces conclusions we have already reached.” Lawrence Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 *J.L. & Pol’y* 7, 9 (2013).

Confirmation bias can be particularly harmful in light of the primacy effect and belief persistence. The primacy effect is described as follows: “When a person

must draw a conclusion on the basis of information acquired and integrated over time, the information acquired early in the process is likely to carry more weight.” Nickerson, *Confirmation Bias*, 2 Rev. Gen. Psychol. at 187. “Once a belief or opinion has been formed, it can be very resistive to change, even in the face of fairly compelling evidence that it is wrong.” *Id.* This is belief persistence. *Id.* A person is “more likely to question information that conflicts with preexisting beliefs,” and “can be quite facile at explaining away events that are inconsistent with their established beliefs.” *Id.*

Concrete belief in a hypothesis isn’t even necessary: “What is considerably more surprising than the fact that people seek and interpret information in ways that increase their confidence in favored hypotheses and established beliefs is the fact that they appear to seek confirmatory information even for hypotheses in whose truth value they have no vested interest.” *Id.* at 178. Merely focusing on a hypothesis can create a conditional reference frame, which in turn “influences subsequent hypothesis-evaluation processes” *Id.* at 203.

Once a court has issued a decision on an unbriefed issue, the natural tendency toward confirmation bias means the court is more likely “to seek out and value evidence that reinforces” that conclusion. Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 J.L. & Pol’y at 9. The information and conclusion the court already acquired and found persuasive “is likely to carry more weight” in any

subsequent analysis. Nickerson, *Confirmation Bias*, 2 Rev. Gen. Psychol. at 187. And it does not matter that the court has no vested interest in the outcome. *Id.* at 178. The mere fact that the court already inserted an issue, reached a conclusion, and found facts to support that conclusion, “influences subsequent hypothesis-evaluation processes” *Id.* at 203.

The only meaningful way to correct the error is to prevent it on the front end. Petitioners’ proposal does just that.

Conclusion

The core objective of petitioners’ first proposal is well taken—responses to amicus curiae briefs should be responsive. But responsiveness does not demand disagreement. As a result, the Indigent Representation Offices would propose an alternative that still allows responses to clarify their view on a point raised by amicus curiae.

The Indigent Representation Offices support petitioners’ second proposal to restrict an appellate court’s ability to decide cases on unbriefed grounds.

Respectfully submitted this 30th day of April, 2023.

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