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**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND RULE
31.23, ARIZONA RULES OF
Criminal PROCEDURE

Supreme Court No. R–

**Petition to Amend Rule 31.23,
Arizona Rules of Criminal Procedure**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the undersigned attorney (Petitioner) respectfully petitions this Court to amend Rule 31.23 of the Arizona Rules of Criminal Procedure (Warrant of Execution). The proposed amendment to Arizona Rule of Criminal Procedure (“Rule”) 31.23 seeks to add predictability and judicial efficiency to the execution warrant process.¹

A redline version of proposed amended Rule 31.23 identifying additions and deletions is attached at Appendix “A,” and a “clean” version of proposed amended Rule 31.23 is attached at Appendix “B.”

I. THE EVOLUTION OF RULE 31.23.

The current version of 31.23 was adopted after the overhaul of the Arizona Rules of Criminal Procedure in 2018. *See In the Matter of Arizona Rules of Criminal Procedure*,

¹ A similar petition has not been filed within the last five years. *See* Ariz. R. Sup. Ct. 28(a)(4)(A)(iv).

No. R-17-0002 (Ariz. Aug. 31, 2017). The substance of 31.23 was adopted in a previous amendment when the rule was numbered as 31.17(c)(1). *See In the Matter of Rule 31.17(c)(1), Rules of Criminal Procedure*, No. R-13-0050 (Ariz. Sep. 2, 2015). This prior change was adopted at the request of the Arizona Supreme Court’s capital staff attorney in order to foster judicial efficiency in the execution warrant process. *Id.*

II. THE NEED FOR AMENDING RULE 31.23.

The current version of 31.23 provides for the circumstances under which the Arizona Supreme Court must issue a warrant of execution. The rule does not, however, delineate the procedure the court must follow when the State seeks a warrant of execution. The proposed amendment to Rule 31.23 will increase predictability and efficiency in the warrant process. The Arizona Department of Corrections, Rehabilitations, and Reentry (“ADCRR”) must disclose a quantitative analysis of the drugs to be used in a planned execution within 10 days of the State filing a motion for warrant of execution. If the rule is revised to specify the timeline under which the Arizona Supreme Court must consider the State’s motion, ADCRR can ensure that the drugs to be used will not expire before the time specified in any later issued warrant of execution. The proposed amendment will also promote efficiency in the court because it will automatically establish a briefing schedule rather than requiring the court to first set one.

State law requires that the State carry out most death sentences by lethal injection.² A.R.S. § 13–757(A); Ariz. Const. Art. 22 § 22. ADCRR currently uses compounded pentobarbital in all lethal injection executions. After ADCRR compounds a batch of pentobarbital, the drug will have an anticipated beyond-use date of 90 days from the date of compounding.³

ADCRR’s lethal-injection protocol and a related civil settlement agreement impose several requirements regarding the drugs used in a lethal injection execution. First, ADCRR is prohibited from using any drug that is expired or past its beyond-use date at the time the execution is carried out. *See* ADCRR Dep’t Order 710, ¶ A.1.III.⁴ Therefore, to ensure compliance with the protocol, ADCRR must carry out an execution no later than 90 days after the pentobarbital is compounded.

Second, ADCRR must disclose upon request a quantitative analysis of the compounded pentobarbital to be used in the execution within 10 days of the State filing a Motion for Warrant of Execution. *See* ADCRR Dep’t Order 710, ¶ C.2. Thus, to ensure ADCRR has sufficient time to conduct the required quantitative

² Inmates sentenced to death for an offense committed before November 13, 1992, may elect either lethal injection or lethal gas. *See* A.R.S. § 13–757(B). There are 30 inmates in Arizona who may make this election.

³ For the compounded pentobarbital to be used, the United States Pharmacopeia designates a default beyond-use date of 45 days from the date of compounding. The beyond-use date may be extended to 90 days, however, upon completion of stability and sterility testing on the drug. Stability testing on the raw materials ADCRR uses to compound the pentobarbital that will be used in executions was completed in 2022. Sterility testing on the compounded pentobarbital to be used is conducted shortly after the drug is compounded. After post-compounding sterility testing is conducted, the compounded drug is typically given a beyond-use date of 90 days from the date of compounding.

⁴ Department Order 710 may be viewed at: <https://corrections.az.gov/sites/default/files/documents/policies/700/0710%20-%20eff%2010-23-24.pdf>.

analysis and disclose the results, the drug must be compounded shortly after the motion's filing. This is important because once the drug is compounded, its 90-day shelf life will begin to run.

In order to comply with these requirements, ADCRR must first compound the pentobarbital it will use shortly after the State files the Motion for Warrant of Execution and then also ensure that the execution is carried out, pursuant to the warrant issued by the Arizona Supreme Court, no more than 90 days later. Under the applicable rules, and assuming no extensions are granted, the defendant would have 10 days to respond to the State's motion, and the State would have an additional 5 days to reply. *See* ARCAP (6)(a)(2); *see also* Ariz. R. Crim. P. 31.6(e). This Court would then conference the motion and, if granted, would set an execution date 35 days later. *See* A.R.S. § 13-759(A); Ariz. R. Crim. P. 31.23(c). However, extended filing periods are frequently requested and granted. Consequently, the pre-warrant briefing process, not including the statutory 35-day waiting period on the execution warrant, can last for months.⁵

In addition, both the filing of a Motion for Warrant of Execution and issuance of an execution warrant by this Court trigger a host of procedures, requirements, and responsibilities for ADCRR officials and personnel. *See generally* ADCRR Dep't Order 710. A scheduling order from this Court, setting prescribed dates for the filing of a Motion

⁵ For example, the pre-warrant litigation for inmate Robert Glen Jones spanned approximately 2 months. *See* No. CR-98-0537-AP, Motion for Warrant of Execution (filed on June 25, 2013); Warrant of Execution (issued on August 27, 2013). Likely because another inmate was also pending execution, Jones's execution date was fixed for a date past the 35-day statutory waiting period. *See id.*, Warrant of Execution (fixing date for execution as October 23, 2013). Nearly 4 months thus elapsed between the State's request for an execution warrant and Jones's execution.

for Warrant of Execution and for the issuance of a warrant (if the motion is granted), greatly assists ADCRR in its preparation and planning to meet all execution-related requirements.

Because of the above-mentioned requirements, the State has in recent history requested that the Arizona Supreme Court establish a firm briefing schedule in anticipation of the State moving for a warrant of execution. The proposed amendment to Rule 31.23 would obviate the need for this procedure and would enable the State to initiate the process with the filing of a motion for warrant of execution rather than requesting that a briefing schedule be set.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to amend Rule 31.23 as set forth in the Appendices.

Respectfully submitted,

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APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline and bold.)

Rule 31.23. Warrant of Execution

(a) Issuance of Warrant. After affirming a death sentence, the Supreme Court must issue a warrant of execution if the State files a notice stating that:

(1) the defendant has not filed a first Rule 32 petition for post-conviction relief and the time for filing a petition has expired;

(2) the defendant has not filed a petition for review seeking review of a superior court denial of the defendant's first Rule 32 petition for post-conviction relief and the time for filing a petition for review has expired; or

(3) the defendant has not initiated habeas corpus proceedings in federal district court within 15 days after the Supreme Court's denial of a petition for review seeking review of the denial of the defendant's first Rule 32 petition for post-conviction relief.

(b) Post-Habeas Warrant. On the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.

(c) Briefing Schedule. When the State seeks a warrant of execution pursuant to this rule, the defendant may file a response within 10 days after service of the State's motion, and the State may file a reply within 5 days after service of a response. After briefing on the State's motion is complete, the Supreme Court shall consider the State's motion at the next practicable conference.

~~(c)~~(d) Date and Time of Execution. The warrant of execution must specify an execution date that is 35 days after the warrant's issuance. If the Supreme Court finds that it is impracticable to carry out an execution on that date, it may extend the execution date but may not extend it more than 60 days after the warrant's issuance. Additionally, the warrant must:

(1) state the date for starting the execution time period;

(2) state that the warrant is valid for 24 hours beginning at an hour to be designated by the director of the Arizona Department of Corrections;

(3) order the director to provide written notice of the designated hour of execution to the Supreme Court and each party at least 20 calendar days before the execution date; and

(4) authorize the director to carry out the execution at any time during the warrant's duration.

~~(d)~~(e) Return on Warrant. The director of the Arizona Department of Corrections must make a return on the warrant to the Supreme Court showing the manner and time of execution.

APPENDIX B

Rule 31.23. Warrant of Execution

(a) Issuance of Warrant. After affirming a death sentence, the Supreme Court must issue a warrant of execution if the State files a notice stating that:

(1) the defendant has not filed a first Rule 32 petition for post-conviction relief and the time for filing a petition has expired;

(2) the defendant has not filed a petition for review seeking review of a superior court denial of the defendant's first Rule 32 petition for post-conviction relief and the time for filing a petition for review has expired; or

(3) the defendant has not initiated habeas corpus proceedings in federal district court within 15 days after the Supreme Court's denial of a petition for review seeking review of the denial of the defendant's first Rule 32 petition for post-conviction relief.

(b) Post-Habeas Warrant. On the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.

(c) Briefing Schedule. When the State seeks a warrant of execution pursuant to this rule, the defendant may file a response within 10 days after service of the State's motion, and the State may file a reply within 5 days after service of a response. After briefing on the State's motion is complete, the Supreme Court shall consider the State's motion at the next practicable conference.

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