David J. Euchner, SB#021768
33 N. Stone Ave., 21st Floor, Tucson, AZ 85701
TEL: (520) 724-6800
E-Mail: david.euchner@pima.gov

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: Petition to Amend ARCAP 4, 16, and 23, Ariz. R. Crim. P. 31.6, 31.15, and 31.21, and Ariz. R. P. Juv. Ct. 609.	**Comment of David Euchner regarding Petition to Amend ARCAP 4, 16, and 23, Ariz. R. Crim. P. 31.6, 31.15, and 31.21, and Ariz. R. P. Juv. Ct. 609**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, David J. Euchner hereby submits the following comment on the petition to amend various rules of appellate procedure.

Introduction

I have been a full-time appellate practitioner for 18 years. For 13 years, I have supervised the appellate unit of the Pima County Public Defender's Office. For the last 14 years, I have served as a chair or co-chair of the amicus and rules committee of Arizona Attorneys for Criminal Justice, and in that capacity, I file several *amicus curiae* briefs in state and federal appellate courts every year. Soon I will be appearing at oral argument in this Court for the 40th time, as counsel for the party or as an amicus. In addition to the cases where I file an appearance, I advise countless

criminal defense attorneys as well as the occasional civil litigant on Supreme Court practice. My experience in this Court is limited to indigent defense (including juvenile cases), but the issues raised in this Petition are not peculiar to any type of case or "side" of the litigation. Although I am almost always the appellant in the court of appeals, in cases where this Court grants review and I appear at oral argument, I have argued from the petitioner's table in two-thirds of those cases.[1]

I agree with some parts of the Petition, but I largely disagree with it because I think the Petition assumes things about practice in this Court that are not entirely true. I specifically disagree with changing the rules to permit sequential briefing instead of supplemental briefing after review is granted, not only because it will not necessarily improve the briefing but also because it will prolong the briefing process and thus delay justice for all, but especially criminal defendants.

The Petition seeks to make the practice in this Court the same as in the U.S. Supreme Court and other state courts. The fact that Arizona is in a small minority of states that manage supplemental briefing in this manner is reason to consider the proposal, but by itself it cannot be grounds to change our longstanding practice. As the saying goes, "if it ain't broke, don't fix it."

[1] On two occasions (February 25, 2014, and May 10, 2016), I argued back-to-back cases and moved from the Respondent's table to the Petitioner's table.

The "merits stage"

First, the Petition seeks to create a "merits stage" of a case in this Court, which, in their view, would "better delineate the purpose of each stage of briefing." Petition at 4-5. I have heard many experienced practitioners refer to the "merits stage," but I have rarely if ever heard a Justice, staff attorney, or clerk use the term. I have served on task forces to restyle the Rules of Criminal Procedure and the Rules of Procedure for Special Actions; not only do the rules not contain the term "merits stage," but I cannot recall if anyone used the term in task force discussions. Unlike the U.S. Supreme Court, which uses the term "brief on the merits" in its rules, this Court has chosen to use the phrase "after review is granted" to define that stage of the case. ARCAP 16(d)(2), 23(k); Ariz. R. Crim. P. 31.15(d)(2), 31.21(j).

This distinction is not semantic. Since both courts have discretionary review, a successful petition must have a "hook" to grab the Court's attention. Because the U.S. Supreme Court rarely accepts a case where the issue is novel or for error correction, it is of paramount important at the "petition stage" to develop an intractable split of authority as a basis for accepting review. Unlike the U.S. Supreme Court, which must resolve splits of authority among fifty states and twelve federal circuit courts, this Court reviews cases from a single court – the Arizona Court of Appeals. There are two divisions and several panels, and it is possible for one panel to disagree with another, but once the court of appeals decides a question, it is not

merely persuasive but binding precedent on that court for all future cases. *Scappaticci v. Southwest Sav. & Loan Ass'n*, 135 Ariz. 456, 461 (1983). This makes it far less likely that a split of authority will materialize. It is for this reason that this Court lists as a reason to grant review that "no Arizona decision controls the point of law in question." ARCAP 23(d)(3); Ariz. R. Crim. P. 31.21(d)(1)(C). Those same rules recognize another reason is "that important issues of law have been incorrectly decided," *id.*, whereas it is not uncommon for U.S. Supreme Court justices who dissent to criticize their colleagues for granting certiorari on this basis.[2] For these reasons, in this Court, the petition for review is no less a "merits stage" brief than is the supplemental brief.

Perceived lack of quality in simultaneous supplemental briefing

Petitioners perceive a lack of quality in supplemental briefs, which they attribute to the fact that simultaneous briefing requires the parties to anticipate arguments and not be able to respond to their opponents' arguments.

What Petitioners see as a bug, I see as a feature. Simultaneous briefing requires the lawyer to engage in deep thought about the contours of the case, explore

[2] This is true regardless of "liberal versus conservative" viewpoints of the justices. *E.g.*, *California v. Carney*, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting) ("Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles."); *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting) (citing the "two-court rule" in habeas cases as a reason to deny certiorari).

all the angles, and anticipate the best opposing arguments that can be made and counter them. In this way, appellate litigation is like chess. And like chess, litigation is not merely strategy and research but also art. Therefore, litigation requires imagination. Of course, appellate lawyers do not engage in the theatrics of trial lawyers, but that does not mean we should dispense with creativity altogether.

When this Court grants review, the standard order states: "This order should not be construed as an invitation to repeat the contents of the Petition for Review, the Response, or any Reply." Some briefs are written in a manner that repeats the essential arguments but adds new citations, which suggests that some lawyers interpret this order as only prohibiting copy-and-paste jobs. Petitioners' proposal **might** help an unimaginative respondent (then again, maybe not); but it could do nothing to help the unimaginative petitioner.

If Petitioners' proposal were adopted, the best value that litigants will obtain from being able to file an answering brief or reply brief is in addressing the authorities cited in the opening brief or answering brief. I do not see this as good cause for substantially expanding the briefing process, as the litigants can address those authorities at oral argument. Although the 20 minutes of oral argument does go by fast, I have never felt that I lacked opportunity to counter my opponent's supplemental brief while at the podium, and my opponents seem equally able.

Raising new issues in simultaneous supplemental briefing

Petitioners also express concern that parties are using supplemental briefs and responses to amicus briefs to raise new issues. While problems may exist, Petitioners' proposed solution would not address them.

By the time this Court grants review, the parties have already had an opportunity to file briefs in the court of appeals and a petition or response in this Court. The parties should not be raising new issues in their supplemental briefs or in responses to amicus briefs. For years the policy of this Court has been that "[a]rguments raised initially in a supplemental brief are generally deemed waived." *Estate of DeSela v. Prescott Unified School Dist. No. 1*, 226 Ariz. 387, 389 ¶ 8 (2011) (citing *Grand v. Nacchio*, 225 Ariz. 171, 177 ¶ 33 (2010)). Since waiver is a prudential doctrine, this Court may consider an issue raised for the first time in a supplemental brief, but it should do so only when it gives the opposing party an opportunity to respond to the new argument, as occurred in *Willis v. Bernini*, 253 Ariz. 453, 458 ¶¶ 12-13 (2022).[3]

[3] *See Willis v. Bernini*, CR-21-0258-PR (order Jan. 5, 2022) ("As the State's argument may meet the exceptions to the general waiver rule, and the Petitioner has not yet received an opportunity to address it, IT IS ORDERED that the Petitioner may file a sur-reply, not to exceed 20 pages in length, no later than 14 days from the date of this order addressing the arguments raised in the State's simultaneous supplemental brief filed December 14, 2021.").

The "new arguments" problem only exists if this Court fails to police its own rules. Unfortunately, this has occurred twice in the last two years. First, in *State v. Greene*, 255 Ariz. 37 (2023), where the Petitioner's winning argument was first raised in a response to an amicus brief. Second, in *Gilpin v. Harris*, 553 P.3d 169, 176 ¶ 33 (2024), this Court criticized the respondent for not making an argument in his response to the petition for review or the court of appeals, yet the winning argument for the petitioner was first raised in the supplemental brief, as is reflected from the oral argument. In fact, when respondent's counsel said that the Gilpin's failure to raise this issue until her supplemental brief made the case a poor vehicle for the issue, one justice stated, "I would agree with that."[4] Rather than dismiss the case as improvidently granted, however, this Court reached the petitioner's untimely-raised issue and refused to consider the respondent's counter-argument.

Petitioners suggest that if their rule change was adopted, which would permit for an opening-answering-reply schedule, then this would not happen, because the respondent would have an opportunity to file an answering brief to whatever issues are raised in the initial brief. The fallacy is easily exposed: how would the respondent get a chance to answer any claims raised for the first time in a petitioner's reply brief? It would be up to this Court to police its practices, just as it is today.

[4] https://supremestateaz.granicus.com/player/clip/3527?view_id=11&redirect=true, 34:40-35:19.

It is important to remember that this Court is not required to hold oral argument or order supplemental briefing; it may decide the case on the petition for review and any response that is filed. In *State v. Rogers*, 186 Ariz. 508 (1996), this Court granted review and granted relief without a response to the petition for review because the State's position was adequately developed in its briefing in the court of appeals. "We reject the dissent's conclusion that a party may improve its position in this court by failing to respond to a petition for review." *Id*. at 512. Of course, as recognized in *Rogers*, it is preferable to have supplemental briefing and oral argument to provide as much information as possible to the Court. But ultimately, it is this Court's prerogative, and the Petition would build into the rule requirements that this Court does not need to follow in every case. Where the petition and response adequately set forth the issue, this Court has recently made use of decision orders to quickly resolve cases that were wrongly decided below.

The costs of the sequential-briefing proposal far outweigh any benefits

Petitioners acknowledge that additional briefing will require additional time and thus delay the Court's decision. They suggest shortening other windows such as the time between the completion of briefing and the oral argument. Ultimately, it is unavoidable that an expanded briefing schedule means at least one additional month must pass before oral argument may be held. This is particularly important to

criminal defendants whose liberty is restrained while the case is pending, or in juvenile cases where children are entitled to finality.

Appellate practitioners (I am certainly not alone in this) have noticed a recent trend in that this Court takes significantly longer to issue opinions after oral argument. In the 2010s, it was common to get an opinion within 1-2 months. In the 2020s, on the other hand, opinions frequently take more than a year to issue—even in 7-0 cases with no concurrences or dissents. Extending the briefing schedule might give the Court more time on the front end to research the issues so that it will take less time on the back end to write the opinion; but that is not assured to occur.

The cost of the Petitioners' proposal is not merely the extended time to decide the case. There are tangible costs as well. Private litigants will have to pay considerable sums of money for additional briefs. In criminal cases, prosecutors and public defenders, who already carry oppressive caseloads, will have to file an additional brief if the petitioning party; the time it takes to file that brief will necessarily come at the expense of other cases.

Most importantly, because an appeal does not stay the execution of sentence for criminal defendants convicted of felony offenses, *see* Ariz. R. Crim. P. 7.2(c)(1), additional delay may mean additional time served in prison for a person whose trial was unfair. On February 26, 2025, in *State v. Brown*, CR-24-0143, this Court issued a decision order one day after oral argument reversing the convictions and ordering

a new trial with an opinion to issue in due course. The mandate issued on February 28, 2025, and shortly after, the State dismissed the prosecution against Mr. Brown. *See State v. Brown*, Pima County Superior Court No. 20220381-001 (motion filed March 31, 2025; order filed April 1, 2025). Had the Petitioners' process of sequential briefing been in place, Mr. Brown would have served at least another month in prison for a crime that the State no longer believes it can prove.

The Petitioners suggest that sequential briefing will ultimately reduce the number of briefs filed because the responses to amicus briefs will be incorporated in the answering and reply briefs. One of the assumptions behind this conclusion is that every amicus brief receives a response. I know from personal experience that this is not true. In criminal cases where Arizona Attorneys for Criminal Justice files an amicus brief supporting one side, the other party usually does not file a response, since it is not required.

The Petition misreads the language of ARCAP 23(k)(3) to mean that "in cases in which at least one amicus participates, oral argument will typically not occur for at least 84 days after this Court grants review." Petition at 6, 8. That rule, and parallel Criminal Rule 31.21(l)(3), state that oral argument will not occur less than 30 days after the due date for supplemental briefs, "[u]nless otherwise ordered." Since supplemental briefs are typically due 20 days after the order granting review, this means oral argument occurs 50 days after the order, not 84 days. Recently, oral

argument typically occurs at around the 50-day mark; in the 2010s, it was not uncommon for argument to occur less than 30 days after the order.

Miscellaneous provisions

1. Word limits instead of page limits. I agree that word limits are preferable, but I disagree with many of the reasons offered for the change. I agree with the citation to the ABA Council of Appellate Lawyers that "[w]ord limits are superior from a readability standpoint" (cited at Petition at 12). But I disagree that "gamesmanship" is a problem. First, litigants should not be burying legal argument in footnotes. *See State v. Johnson*, 247 Ariz. 166, 211 ¶ 201 (2019) (quoting *State v. Bolton*, 182 Ariz. 290, 298 (1995)). Second, in part because they are a sign of poor advocacy, excessive block quotes are especially disfavored in appellate writing:

> Some lawyers over-quote. If your brief contains one or more block quotes on every page, you are over-quoting. And if your case discussion consists of 15 lines of a block quote, followed by the sentence "The court went on to hold," followed by 20 more lines of block quote, you are unquestionably abusing your quoting privileges.

Randall H. Warner, "Cites for Sore Eyes: Case Law Analysis That Works," 41 *Ariz. Att'y* 18, 23 (December 2004).[5] Third, a litigant who is deterred from using images in a brief by the page limit could have included those images in the court of appeals briefing or in the petition for review.

[5] I appreciate the irony of using a block quote to show why block quotes are disfavored.

I also agree with Petitioners on the selection of 7,000 as the word limit for supplemental briefs and 5,000 for amicus briefs. This would be slightly longer than 20 pages, a 20-page brief and a 3,500-word petition for review is insufficient to develop important constitutional issues in criminal cases.

2. Codifying the page/word limits for supplemental briefs. I understand the Petitioners' position and I do not disagree, but neither do I see it as a big problem. As it would be easy to include this information in the rules without consuming too much space, I think it is a good idea.

3. Codifying the deadline for supplemental briefs. I also agree that it would be good to include this in the rules, though I am skeptical of the claim that inexperienced litigators are denied equal access to justice since they receive the same order upon review being granted as any other litigant. I would suggest that this Court consider extending the standard deadline from 20 days to 28 days to relieve some of the immense pressure on the litigants.

Conclusion

I agree that the Petition offers appropriate minor tweaks to the rules by calling for word limits and incorporating standard practice into the text of the rules. But I believe this Court's system of ordering simultaneous supplemental briefing is working fine, and I think the proposed solution is worse than the perceived problem.

For these reasons, I ask this Court to deny the request to change to a sequential-briefing process.

DATED (electronically filed): April 23, 2025.

By: /s/ David J. Euchner
David J. Euchner

Comment electronically mailed to:

Eric M. Fraser & Joshua Bendor
efraser@omlaw.com
Joshua.Bendor@azag.gov