

Kevin D. Heade
AZ State Bar # 029909
Arizona Attorneys for Criminal Justice
P.O. Box 2457
Florence, AZ 85132
(520) 866-7199
Kevin.Heade@Gmail.com

**IN THE SUPREME COURT
IN AND FOR 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.

Arizona Supreme Court
No. R-25-0005

**Arizona Attorneys for Criminal
Justice (AACJ) Comment Opposing
Changes to Simultaneous
Supplemental Briefing but
Supporting Substituting Word
Limits for Page Counts in the
Arizona Supreme Court.**

Pursuant to Rule 28(e) of the Arizona Supreme Court Rules, Arizona Attorneys for Criminal Justice (“AACJ”) respectfully submits this comment opposing the Petition’s proposal to abandon simultaneous briefing but supporting the proposal to adopt word limits in lieu of page counts in briefs filed before the Arizona Supreme Court.

I. Statement of Interest.

Arizona Attorneys for Criminal Justice (“AACJ”), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them.

AACJ opposes the proposal to move from simultaneous briefing to sequential briefing in cases before the Arizona Supreme Court because the existing practice effectively prioritizes efficiency and fairness. Both values are integral to the interests of criminal defendants and their counsel, particularly since waiting for finality on appeal is often accompanied by significant costs for criminal defendants.

However, AACJ supports the portion of the proposal to move away from page limits in favor of word counts in briefs filed before the Arizona Supreme Court. In a digital age, word counts promote comprehension and reduce the cognitive load. This promotes fairer resolutions of disputes that are often complex.

II. The Efficiency of Simultaneous Briefing Protects Multiple Interests.

The Petition acknowledges that shifting from simultaneous briefing to sequential briefing will generally delay proceedings before the Arizona Supreme Court. To counter-balance the delay, the proposal suggests cutting more than two full weeks off the time counsel has to prepare for argument. [Petition at 4-10.](#)

But the proposal fails to account for the significant costs it would uniquely impose upon criminal defendants.

A. Even “modest” delays are substantial for criminal defendants.

[Rule 7.2\(c\)\(1\)\(B\)](#) of the Arizona Rules of Criminal Procedure imposes strict limits on a trial court’s ability to grant bail to a criminal defendant after a “sentence involving imprisonment” is issued. Bail pending an appeal is permissible only if the defendant establishes that s/he is “in such physical condition that continued confinement would endanger the defendant’s life.” *Id.* Although consistent with the general consensus that a criminal defendant has no constitutional right to bail following a criminal conviction, Arizona’s approach to bail pending appeal nonetheless differs from other jurisdictions with “liberal” policies permitting bail pending appeal if certain circumstances are met. *See* [8 C.J.S. Bail § 66](#). Under more “liberal” approaches to bail, defendants may stay incarceration by establishing that the appeal is taken in good faith, not frivolous, and that there is no risk to the community for his or her release pending appeal. *Id.*

It is evident that if a case is granted discretionary review by this Court that it would not be frivolous. Yet, defendants whose criminal convictions are tainted with legal error and even those whose appeal contains a substantial probability of

prevailing must often wait in prison for a final resolution of their constitutionally guaranteed right to appeal.¹

And spending just one day behind bars beyond what is necessary can have devastating impacts on criminal defendants. This is because, “[f]rom the prosaic to the exceptional, constitutional prison law fails to ameliorate many of the inhumane and dangerous conditions people experience in prisons and jails. Prison and jail officials can breach the regulatory state's safeguards with constitutional impunity. Aaron Littman, *Free-World Law Behind Bars*, 131 *Yale L.J.* 1385, 1394 (2022) (advocating for more regulatory oversight of prisons and detailing conditions in prisons found to pass constitutional muster, including foreign objects in food such as “teeth, a rock, a worm, vermin, and maggots.”); *see, also*, Kristen Dorman, *ACLU: Inmates lives can't wait for slow fixes to Arizona prison health care*. KJZZ.org (available at <https://www.kjzz.org/kjzz-news/2025-02-21/aclu-inmates-lives-cant-wait-for-slow-fixes-to-arizona-prison-health-care>) (detailing decade-long federal lawsuit over healthcare concerns in Arizona’s prisons.)

Given the realities of life in prison, few people waiting for a new trial or dismissal of a criminal case would characterize the prospect of spending six or more additional days in prison as “modest.” *See* [Petition at 10](#) (describing increased

¹ *See* Ariz. Const. Art. II, Sec. 24 (guaranteeing right to appeal).

timeline). But criminal defendants will also be forced to bear additional financial costs if this Court shifts from simultaneous to sequential briefing.

B. More briefing and less time to prepare for argument does not promote efficiency.

The proposal will also impose additional costs and burdens on criminal defendants and their counsel. Whether employed in private practice or by a public defender office, attorneys who appear before the Arizona Supreme Court invariably do so while juggling demanding caseloads. Sequential briefing will add a reply brief to the process while potentially taking away more than two weeks to prepare for argument. *See* [Petition at 7-8](#).

Often by the time a criminal defendant gets to the Arizona Supreme Court, his resources to retain counsel will have been substantially depleted by the cost of trial and the intermediate appeal. Paying for counsel to file a reply brief or review a reply brief will add to the already significant costs of the proceedings. And unlike civil cases, criminal defendants have no recourse to recoup their expenses if they prevail on appeal. *See, e.g.,* [Cao v. PFP Dorsey Investments, LLC, 257 Ariz. 109, ¶¶ 46-47 \(2024\)](#) (differentiating attorneys fees awards for contract violation and eminent domain).

Indigent defense attorneys who appear before the Arizona Supreme Court do so subject to the pressures of a continuous stream of appointed cases. Although appointed counsel may regulate his or her caseload by declining to take a case at the

onset of an appeal, s/he has no control over the timelines set by an order from the Arizona Supreme Court granting review. Adding an additional brief while subtracting more than two weeks of time to prepare oral argument will put an immense additional strain on indigent defense counsel's time to prepare. Oral argument preparation is essential since well-briefed criminal appeals often involve complex and always-evolving constitutional issues that may cause even the most seasoned jurists to be confused. *See, e.g. State v. Melendez, CR-23-0215-PR, 2025 WL 940025, at *16 (Ariz. Mar. 28, 2025)* (Timmer, C.J., concurring) (discussing the confusing constitutional status of *Miranda v. Arizona*, 384 U.S. 436 (1966), under our federalist system of justice.)

Concerns for efficiency over unnecessary delay also promotes victims interests in finality. *See Ariz. Const. Art. II, Sec. 2.1(10)* (providing for right to “prompt and final conclusion of he case after the conviction and sentence.”) And the same concerns are consistent with the rationale of the Arizona Attorney General's Office for opposing the adoption of intermediate en banc reconsideration. *See Arizona Attorney General's Office Comment at 4-10, R-25-0012* (filed Apr. 25, 2025) (opposing en banc reconsideration proposal because of increased costs and delay).

These burdens should be weighed in favor of keeping the existing simultaneous briefing system. Moreover, the proposal will not eliminate the Petitioners' concerns with new issues briefed for the first time before this Court.

C. Existing procedures promote efficiency and fairness.

The Petition claims that sequential briefing will prevent the parties from raising new and unpreserved claims for the first time in the Arizona Supreme Court. [Petition at 4](#). But the Petition offers no analysis as to why sequential briefing would not also incentivize raising new issues for the first time before the Arizona Supreme Court. Surely, sequential briefing would not deprive a party of the opportunity to respond to new arguments by guaranteeing the parties responsive briefing.

And as David Euchner's comment establishes, new arguments are generally rejected when raised for the first time in the Arizona Supreme Court. A more faithful application of this rule with simultaneous briefing would discourage such new and undeveloped arguments being raised for the first time before the Arizona Supreme Court more than providing responsive briefing. *See* Comment of David Euchner at 6-8, [R-25-0005](#) (filed Apr. 23, 2025).

III. Word Limits Promote Better Writing in the Digital Age.

AACJ supports moving to word limits instead of page numbers as a means of governing the size of briefs filed before this Court. "The experience of the reader is a paramount consideration for legal writers, and as the profession transitions from

paper to electronic files, numerous issues arise relating to how visual aspects of the document affect that experience.” Ellie Margolis, *Visual Legal Writing A Bibliography*, 18 *Legal Comm. & Rhetoric: JALWD* 195, 197 (2021).

Among the topics considered by experts is the importance of white space in briefs.

Briefs should be written to reduce the cognitive load on the reader, and the increased use of white space in digital briefs is essential to this goal. Mary Beth Beazley, *Writing for A Mind at Work: Appellate Advocacy and the Science of Digital Reading*, 54 *Duq. L. Rev.* 415, 448 (2016).

By shifting to word limits and away from page counts, lawyers and jurists alike will benefit from reduced cognitive load and improved comprehension.

Respectfully submitted this 30th day of April, 2025

By: /s/ Kevin D. Heade
Kevin D. Heade
Arizona Attorneys for Criminal Justice