

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE
31.23, ARIZONA RULES OF
CRIMINAL PROCEDURE

Supreme Court No. R-25-0016

**COMMENT OF THE ARIZONA CAPITAL REPRESENTATION PROJECT, PHILLIPS
BLACK, INC., ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, AND THE FEDERAL
PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA REGARDING PETITION TO
AMEND ARIZONA RULE OF CRIMINAL PROCEDURE 31.23**

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Pursuant to Rule 28(e) of the Rules of the Arizona Supreme Court and this Court's order of January 21, 2025, the Arizona Capital Representation Project ("ACRP"), Phillips Black, Inc., Arizona Attorneys for Criminal Justice ("AACJ"), and the Federal Public Defender for the District of Arizona ("FPD") (collectively "Commenters") submit the following comment opposing the above referenced petition ("Petition") submitted by Jason Lewis, Section Chief of the Capital Litigation Unit of the Attorney General's Office ("Petitioner").

ACRP is a non-profit legal services organization that represents capital defendants and provides training and consultation to teams defending capital clients throughout the State of Arizona. ACRP's mission is to improve the quality of representation afforded to capital defendants in Arizona. As is relevant to the current Petition, ACRP attorneys have served as counsel or advisory counsel for defendants in two of the four executions conducted by the State since 2022.

Phillips Black, Inc. is a national nonprofit law practice dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under the law. Its attorneys have extensive experience litigating cases facing imminent execution nationwide, including in Arizona, where they represent 17 of the 111 persons currently sentenced to be executed.

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. One of AACJ's specific purposes is

to protect and ensure by rule of law those individual rights guaranteed to all people, rich and poor alike, by the Arizona and Federal Constitutions, and to resist all efforts made to curtail such rights.

The FPD represents condemned Arizona prisoners in federal habeas proceedings and collateral litigation, including before this Court related to execution warrants. The FPD's mission is to protect the rights of its clients and ensure that their sentences are carried out in compliance with the United States and Arizona Constitutions. As counsel for most of the Arizona prisoners presently subject to death sentences, the FPD has a strong interest in the outcome of this rule change petition

I. Introduction

Petitioner, who leads the Attorney General's Office unit that represents the State in all capital post-trial actions through and including warrant proceedings, forthrightly explains the reasons for the Petition's proposed amendment. Petition at 3-5. At present, the Arizona Department of Corrections, Rehabilitation, and Reentry ("ADCRR"), the executive branch agency responsible for carrying out executions, has chosen to use compounded pentobarbital to perform lethal injection executions. Disclosure obligations imposed pursuant to a civil settlement (entered into by the Attorney General's Office on behalf of the State) and ADCRR's execution protocol require ADCRR to compound the pentobarbital to be used in an execution shortly after the Attorney General files the State's motion for warrant of execution. Once compounded, the pentobarbital must be used within its beyond-use date ("BUD").

ADCRR claims to have testing demonstrating that its supply of pentobarbital has a 90-day BUD. Petitioner’s proposal would establish a fixed, expedited briefing schedule for warrant motions—10 days to respond, five days to reply—and require this Court to rule on such a motion at its “next practicable conference” to ensure that the warrant is issued and defendant executed within that 90-day window. Essentially, the proposed amendment would codify a version of the informal practice the Attorney General has employed to cope with logistics of compounded pentobarbital executions over the last three years. *Id.* at 5.

Because the proposed amendment would prejudice defendants and fail to provide a reliable or universal solution to the problem it purports to address, Commenters oppose the Petition. The proposal would restrict this Court’s discretion at a time when discretion is needed most, prejudice capital defendants by imposing unprecedently accelerated briefing timelines that impair defense counsel’s ability to oppose the warrant and prepare other collateral challenges to the execution, and create delay throughout the criminal legal system. It would work this mischief with minimal, if any, benefits gained in the bargain. More generally, amending the rules is the wrong remedy to address the idiosyncrasies of the State’s current choice of lethal injection drug, a factual predicate that is neither universally applicable nor immune to change. For the reasons explained below, undersigned ask that the Petition be denied.

II. Reasons the Petition Should Be Denied

A. The proposed amendment prejudices capital defendants, limits the discretion of this Court, and burdens the criminal legal system.

In recent years, the State has selected a drug for lethal injection executions, compounded pentobarbital, that possesses properties incompatible with this Court's historic warrant motion. Whether or not the drug's impracticalities were apparent at the time ADCRR chose it for executions, they are well known now. Rather than finding an alternative drug without these limitations, the Petition would have this Court contort its Criminal Rules to permanently enshrine those shortcomings into perpetuity. But this answer to compounded pentobarbital's manifest impracticality is no solution at all. The Petition's proposal would prejudice defendants, impinge on this Court's ability to manage its own docket, and impose additional burdens that would be felt throughout the State's judicial system, all just to accommodate ADCRR's discretionary selection of a drug whose logistical unfitness has been known for years.

Since 2022, Arizona has executed four men: Clarence Dixon, Frank Atwood, Murray Hooper, and Aaron Gunches. In each case, the Attorney General filed a motion for a briefing schedule asking this Court to set dates to file the warrant motion, response, and reply. *State v. Dixon*, No. CR-08-0025-AP, Motion to Set Briefing Schedule for Motion for Warrant of Execution (Jan. 5, 2022); *State v. Atwood*, No. CR-87-0135-AP, Motion to Set Briefing Schedule for Motion for Warrant of Execution (Jan. 5, 2022); *State v. Hooper*, No. CR-83-0044-AP, Motion to Set Briefing

Schedule for Motion for Warrant of Execution (July 19, 2022); *State v. Gunches*, No. CR-13-0282-AP, Motion to Set Briefing Schedule for Motion for Warrant of Execution (Dec. 6, 2024). Critically, in each case, the scheduling motion disclosed the warrant motion that would later be filed if expedited scheduling was granted.

Thus, by the time the warrant motion was filed, the defendant in each case had already had time to review it and prepare a response. In Mr. Dixon’s case, 50 days elapsed between the warrant motion’s initial disclosure and the date it was filed; for Mr. Atwood, 92 days; for Mr. Hooper, 17 days; and for Mr. Gunches, 35 days. Responding to such a motion is no small task. For example, Mr. Atwood’s opposition to the warrant motion and supporting exhibits, largely consisting of expert declarations, totaled 88 pages. *Atwood, supra, Opposition to Motion for Warrant of Execution* (4/20/2022). Preparing a pleading of that scale—reviewing relevant records, engaging experts, legal research, drafting—was feasible under this Court’s historic, flexible warrant motion practice. It was possible in *Atwood* because of the early disclosure of the warrant motion. Under the proposed rule’s mandatory timeline, where first notice of the warrant motion comes with its filing, it would be impossible.

Responding to the motion itself is hardly defense counsel’s only task when a warrant motion is filed. When a warrant is sought, counsel must immediately begin preparing appropriate collateral challenges to the looming execution, such as competency claims, methods challenges, and clemency applications. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death*

Penalty Cases, 31 Hofstra L. Rev. 913, 1081 n.335 (2003) (citation omitted) (“ABA Death Penalty Guidelines”) (during warrant phase, “time commitments for counsel increase, ‘due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.’”). As the State has acknowledged elsewhere, scores of motions are filed in various venues during this timeframe. Many of these motions are not ripe until an execution date is set. *See Panetti v. Quarterman*, 551 U.S. 930 (2007). In Mr. Atwood’s case, the State noted that over 140 motions were filed in 14 distinct warrant-related actions. *Mayes v. Mitchell*, No. CV-24-0127-SA, *Attorney General’s Supp. Br. Re: Her Exclusive Auth’y to Request a Warrant of Exec’n*, at 26 (Ariz. July 22, 2024). By further compressing the period for this litigation, the proposed rule would limit an inmate’s ability to bring legal challenges to the execution and courts’ ability to carefully adjudicate them.

Setting aside the unusual case in Atwood where some delay was attributable to the death of defense counsel during the scheduling motion’s pendency, the remaining defendants had on average an additional 34 days to prepare a response to the warrant motion (along with other warrant-related litigation) on top of the time contemplated in the scheduling motion itself.¹ Historically, pre-warrant briefing periods of such duration are unremarkable, as the Attorney General has acknowledged. *See Atwood, supra*, Motion to Set Briefing Schedule for Motion for Warrant of Execution, at 3-4

¹ What’s more, as discussed below, in each of the four cases this Court allowed the parties *more* time for briefing than is contemplated in the proposed rule.

(noting “when extended filing periods are granted, as is virtually inevitable in capital cases, the pre-warrant briefing process alone... can last for months”).

Early disclosure of the warrant motion and the head start on litigation it gave defendants was not incidental. To the contrary, the Attorney General admitted that early disclosure was essential to ensure that the defendant was not prejudiced. As the Attorney General explained in Mr. Atwood’s case:

This [briefing schedule] procedure also will not prejudice Atwood. As discussed, the State has attached to this pleading a copy of its anticipated motion for warrant of execution... *Atwood therefore has received notice of the State’s motion and can begin to work on his response, as well as any other last-minute litigation he intends to pursue*, while he awaits this Court’s briefing schedule.

Atwood, *supra*, Motion to Set Briefing Schedule for Motion for Warrant of Execution, at 5 (emphasis supplied).² In other words, the Attorney General justified the proposed accelerated briefing schedule because the defendant had advance notice a warrant was being sought and could prepare accordingly.

Notably, even with early disclosure, this Court rejected requests for schedules like the one in the Petition. In *Dixon* and *Atwood*, the Attorney General requested a timeline consistent with the Petition’s proposal: 10 days to respond, five to reply. In both cases, this Court rejected that request and issued a schedule providing 14 days to respond and seven to reply. *State v. Dixon, supra*, Order (2/9/2022); *State v. Atwood, supra*, Order (4/5/2022). Thus, even with the warrant motion’s early disclosure, this

² Substantially identical language appears in the other three scheduling motions.

Court has refused to grant the expedited briefing schedule the Petition seeks to codify in the Criminal Rules.³

Neither feature of the recent warrant motion practice before this Court—early disclosure of the warrant motion or this Court’s rejection of a 10-day response deadline—is reflected in the Petition. It proposes the expedited briefing of the Attorney General’s most exacting recent scheduling requests (a schedule this Court twice rejected) but omits the early disclosure that makes expedited briefing fair and feasible. Imposing accelerated deadlines on capital defendants with no accommodation is constitutionally dubious on any occasion, as the Eighth Amendment requires procedures supplying heightened reliability in death cases.

Caldwell v. Mississippi, 472 U.S. 320, 323 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).⁴ They are particularly inappropriate in the warrant context, when demands on counsel’s time are already at an extreme and an artificially compressed timeline would so overburden counsel as to impair their client’s right to the effective assistance

³ In *Hooper*, claiming a 180-day BUD, the State requested and this Court granted the standard 14-day response/seven day reply deadline. *Hooper, supra*, Motion to Set Briefing Schedule for Motion for Warrant of Execution, at 4; *id.*, Order (8/24/2022). In *Gunches*, the State reverted to a 90-day BUD and did not request a specific schedule, instead referring this Court to the scheduling orders in the other three cases, which this Court replicated for Mr. Gunches. *Gunches, supra*, Motion to Set Briefing Schedule for Motion for Warrant of Execution, at 4; *id.*, Amended Order (1/8/2025).

⁴ Indeed, the Arizona Rules of Criminal Procedure generally afford capital defendants more generous time allowances than non-capital defendants. *See e.g.* Ariz. R. Crim. P. 32.7(a) (affording non-capital defendants 60 days to file an initial post-conviction petition versus 12 months for capital defendants).

of counsel. ABA Death Penalty Guidelines, 31 Hofstra L. Rev. at 1081 n.335; American Bar Association, Criminal Justice Standards for the Defense Function, Standard 4-1.8(a) (4th Ed. 2017) (defense counsel should not accept workload that precludes quality representation); *Strickland v. Washington*, 466 U.S. 668 (1984).

In addition to prejudicing defendants, the proposed amendment would limit this Court's discretion, preventing it from crafting a more equitable schedule or addressing exigent circumstances. On its face, the proposal contemplates no flexibility in the time limits it imposes. The rule also requires this Court to rule on the motion at its next "practicable" conference date, impairing this Court's discretion to set a briefing schedule that affords adequate process for the defendant, contemplates the burden of the Court's overall docket, or responds to exigent circumstances.⁵ Mr. Atwood's case, where lead defense counsel died suddenly while warrant litigation was ongoing, is an object lesson in the wisdom of avoiding rules that inhibit this Court from dealing with the unexpected. But the proposed rule eschews such flexibility.

Moreover, in most if not all cases, the expedited briefing contemplated by the Petition would be unduly burdensome and highly disruptive even by the standards of warrant litigation. A motion for warrant of execution signals the beginning of a litigation emergency, including not only responding to the motion itself but also

⁵ The proposed rule would also hinder this Court from altering the briefing schedule for executions using a method that does not impose the onerous time constraints associated with compounded pentobarbital. *See* §B, *infra*.

initiating the myriad collateral challenges to be pursued should the warrant issue. For defendants represented by panel attorneys, be they solo practitioners or small organizations such as ACRP or Phillips Black, the staffing necessary to absorb this added workload over such a dramatically compressed time period does not exist. Even for larger organizations with correspondingly larger caseloads, the shuffling of personnel necessary to respond to the emergency would be chaotic on the timeline the Petition proposes.

This reality would evaporate the judicial economy rationale Petitioner proffers for the rule. *See* Petition at 2. Whatever minor efficiencies the new rule would afford this Court, defense counsel represent clients other than the one who is the subject of the warrant. The crisis that accompanies an expedited warrant motion will inevitably lead to continuances and other delays in untold other cases. The proposed rule would disrupt litigation in matters throughout Arizona's judicial system to save this Court the trouble of ruling on a single scheduling motion.

Given the prejudice it would impose on defendants, constraints it would place on this Court, and burden it would cause in other cases, the benefits of the proposed rule would have to be substantial to justify its adoption. The Petition does not identify a sufficiently weighty benefit, and it is doubtful one could exist. The Attorney General is free to continue requesting whatever briefing schedule is feels is appropriate in a given case. Alternatively, ADCRR can exercise its discretion to select a different lethal injection drug that does not require the extraordinary procedures needed to

accommodate compounded pentobarbital. Until then, the process and flexibility afforded under the *ad hoc* briefing schedule practice the Attorney General has successfully employed four times over the last three years provides a better solution to the impracticalities of ADCRR’s drug selection than the one proffered by the Petition.

B. Adopting a rule of criminal procedure that prejudices capital defendants for the convenience of the State is an inappropriate remedy for circumstances created by State that are neither universal nor fixed.

Even if the proposal did not impose unacceptable burden on defendants or the courts, it should still be rejected because it seeks to address a problem that is not the proper target of a universally applicable rule of procedure. Generally, “arbitrary, one-shoe-fits-all” approaches are “antithetical to the purpose of procedural rules,” which are meant to embody “notions of flexibility and discretion[.]” *Encinas v. Pompa*, 189 Ariz. 157, 160-61 (App. 1997). Here, the proposed rule would require all warrant proceedings to follow special procedures meant to address the peculiarities of ADCRR’s current compounded pentobarbital lethal injection protocol. But that protocol is neither universally applicable nor immutable.

First, lethal injection is not the mandatory method of execution for all condemned Arizona prisoners. Article 22, Sections 22 of the Arizona Constitution mandates lethal injection prospectively but permits prisoners sentenced to death for crimes committed before November 23, 1992, to elect between lethal injection and lethal gas. According to the Petition, there are 30 condemned Arizona prisoners—

more than a quarter of the current population of death row—entitled to make that selection should the Attorney General secure a warrant for their execution. Petition at 3 n.2. Petitioner gives no indication that lethal gas presents the same time constraints created by ADCRR’s current lethal injection protocol, yet the proposed rule does not contemplate executions carried out using other methods. The Petition identifies no reason why its fixed and accelerated briefing schedule would be necessary or appropriate for any method of execution other than ADCRR’s current lethal injection protocol, even though another method is already authorized under current law.⁶

Even for prisoners facing execution by lethal injection, the time constraints created by the State’s choice of drug are hardly immutable. While the constitution mandates lethal injection for death sentences imposed for all post-1992 offenses, ADCRR retains broad discretion to determine how to conduct such executions, including drug selection. ADCRR is exempt from the rulemaking process governing most other administrative agencies, giving considerable discretion and flexibility in adopting a new execution protocol. A.R.S. §41-1005(A)(7). Over the years, it has employed that license to adopt different drugs for killing Arizona prisoners, with the

⁶ The current execution protocol actually calls for this election of method to occur 21 days before the execution, i.e., two weeks after the warrant issues, and after the State is required to disclose its quantitative analysis. ADCRR Dep’t Order 710, §2.1.2.2; A.R.S. §13-757(B). It is unclear whether the State would thus compound and test a batch of drug for every execution without first knowing whether the inmate will elect that method, or whether perhaps the State will seek to revise its procedures to address this anomaly, but its need to address this type of issue is a perfect example of why the present regulations should not be codified in the criminal rules.

compounded pentobarbital protocol in use since 2022 being preceded by at least two others. *See* Michael Kiefer, *Drug switch underscores Arizona's struggle with execution standards*, ARIZ. REPUBLIC, Mar. 26, 2014 (noting Arizona's transition from a three-drug protocol based on thiopental to a two-drug protocol based on Midazolam).

Notably, the Petition does not explain the process by which ADCRR settled on its current protocol or claim that compounded pentobarbital is the only feasible means for conducting lethal injection executions. A survey of lethal injection jurisdictions, however, reveals many using protocols other than Arizona's one-drug pentobarbital protocol, demonstrating that alternatives are practical and available. Death Penalty Information Center, "State-By-State Execution Protocols," available at <https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols> (accessed April 24, 2025). The availability of these alternatives makes ADCRR's continued reliance on compounded pentobarbital all the stranger and Petitioner's request that this Court modify the rules to accommodate that choice all the more unreasonable.

At any time, ADCRR could exercise its discretion to adopt a new protocol based upon a different drug with a different BUD. Alternately, ADCRR could maintain the current protocol but obtain a supply of industrially manufactured pentobarbital, mooting the issues that arise from compounding. Of course, a different protocol could present its own temporal or other problems that would have to be addressed in the warrant process, but that contingency is the point—it makes little

sense to adopt a fixed and universally applicable procedural rule catering to the idiosyncrasies of ADCRR’s current lethal injection protocol when the protocol is so readily susceptible to change.

Underscoring that point, there is no guarantee that the proposed rule will remain fit for purpose even with the current lethal injection protocol and drug supply. The Petition states that the 90-day BUD it relies on is derived from testing completed in 2022. Petition at 3 n.3. That testing was presumably performed on pentobarbital compounded from the supply of pentobarbital active pharmaceutical ingredient (“API”) obtained by ADCRR in 2020, and that same pentobarbital API will be used to compound lethal drugs in future executions under the protocol.⁷ Ed Pilkington, *Revealed: Republican-led states secretly spending huge sums on execution drugs*, THE GUARDIAN, Apr. 9, 2021. Whether the 90-day BUD obtained in 2022 was ever accurate is questionable. Exhibit A, *Dixon v. ADCRR*, No. CV 22–00743–PHX–DJH (D. Ariz.), Supplemental Expert Report of Dr. Michaela Almgren (3/31/2022) (pharmacist opining that stability data disclosed by the State insufficient to establish extended BUD). As the State’s API supply ages and degrades, it is increasingly doubtful that an already questionable extended BUD obtained from testing performed years earlier on

⁷ The currently proffered 90-day BUD is based on 2022 “[s]tability testing on the raw materials ADCRR uses to compound the pentobarbital that will be used in executions[.]” Petition at 3 n.3. If ADCRR obtained a different supply of pentobarbital API, it would need to undergo new extended BUD testing, potentially resulting in a different BUD.

API that is now likely expired will be reliable. *See* Michael Kiefer, *Secret jars in a prison fridge hold AZ's lethal injection drugs, and they may be expired*, ARIZ. MIRROR, Jan. 17, 2025 (ADCRR failed to provide commissioner with records documenting expiry date for API supply; noting pentobarbital API manufacturer listing three-year shelf life for that product). Indeed, that the State claimed a 90-day BUD in the Dixon and Atwood executions, 180 days for Hooper, and returned to 90 days for Gunches, *see* n.3, *supra*, reflects a BUD that is, at best, a moving target and thus a poor basis for a fixed rule.

Any changes to the BUD would obviate the rationale for the proposed amendment. A critical examination of ADCRR's current API supply could result in a BUD that is significantly *shorter* than 90 days, making the proposed rule impractical.⁸ Any change to the BUD would render the proposed rule an albatross if adopted, resulting in warrant litigation that is pointlessly accelerated or hopelessly too slow, and necessitating further litigation to lengthen or shorten timeframes. The risk of such an outcome cannot be justified, particularly in light of the demonstrated adequacy of the Attorney General's recent warrant scheduling practice to secure timely executions.

Using a rule of procedure to accommodate ADCRR's lethal drug selection would also run counter to the purpose of the criminal rules, which are construed "to

⁸ For example, the United States Pharmacopeia ("USP") provides that high-risk level compounded sterile preparations like compounded pentobarbital have a maximum presumptive BUD of 45 days. USP <797>, *Pharmaceutical Compounding – Sterile Preparations* (2018), at 5-6. It would be impossible to carry out an execution under proposed rule's timeframes with a BUD approaching that presumptive USP baseline.

secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.” Ariz. R. Crim. P. 1.2. A rule which prejudices capital defendants, invites additional litigation, and eliminates flexibility does not advance these purposes. Moreover, if adopted, the proposal’s expedited briefing schedule would remain in place even if the exigency justifying it goes away. ADCRR could adopt a new lethal injection method without the logistical hurdles associated with the current protocol, but the criminal rules would retain a procedure that infringes defendants’ rights to solve a problem that no longer exists. Undoing the rule would require a new petition under Rule 28, consuming public resources and ensuring that the zombie rule remained in place for months or years after its justification, thin to begin with, has evaporated. Such a result would not serve the public welfare.

C. Imposing expedited briefing on capital defendants to accommodate a problem of the State’s creation would be inequitable.

Finally, the proposed rule should be rejected because it would inequitably impose burdens on capital defendants in order to accommodate Arizona’s problematic choice of drug. As two arms of the same branch of State government working to carry out the same goal, the Attorney General’s Office and ADCRR should be able to design a viable method for carrying out their duties under the Constitution and statutes of this State, rather than forcing all capital defendants and

this Court to submit to a rigid and unreasonable procedure to accommodate their apparent inability to arrive at a workable process.

As discussed *supra*, the proposed rule would force an unprecedentedly compressed warrant briefing schedule on capital defendants. But the “exigent” circumstances demanding this diminution of process are attributable primarily to ADCRR’s selection of compounded pentobarbital for lethal injections rather than a drug that does not require the same extraordinary procedures. The State, not capital defendants, should bear the consequences of the State’s own choices. Significantly, ADCRR appears to have selected compounded pentobarbital as its lethal drug years after it, represented by the Attorney General, entered into the settlement agreement that imposes the disclosure requirements necessitating early compounding. *Compare* First Amend. Coal. of Ariz. v. Ryan, No. 2:14-cv-01447 (D. Ariz), Stipulated Settlement Agreement (June 21, 2017) (ADCRR agrees in 2017 to provide quantitative analysis within 10 days of filing warrant motion) *with* Pilkington, *supra* (noting acquisition of pentobarbital API in 2020). The State invited the time crunch the Petition now seeks to codify.

Whatever the wisdom of that decision, the selection of compounded pentobarbital and its consequences rest with the State. Principles of equity disfavor prejudicing one party because of another party’s lack of diligence, or rewarding a party for an error that party invited. *Cf. League of Ariz. Cities and Towns v. Martin*, 219 Ariz. 556, 558-60 ¶¶6, 13 (2009) (doctrine of laches equitably bars party from bringing

delayed claim where delay lacks justification and would prejudice a counterparty; doctrine is “based on the principle of fundamental fairness”); *State v. Diaz*, 168 Ariz. 363, 366 (1991) (equitable invited error doctrine bars party from benefiting from error it injected into the record). The selection of compounded pentobarbital was an exercise of state discretion. This Court should not adopt a rule that prejudices defendants to mitigate a problem the State created for itself and can solve itself.

For similar reasons, the historic example of a prolonged warrant briefing period cited in the Petition is not persuasive. Petition at 4 n.5 (discussing case where “Nearly 4 months... elapsed between the State’s request for an execution warrant and [the defendant]’s execution”). Petitioner notes that the pre-execution period was lengthy in that case “[l]ikely because another inmate was also pending execution[.]” *Id.* But the Attorney General is the only entity authorized to bring motions for warrants of execution. *See* A.R.S. §41-193(A)(1) (attorney general shall prosecute “all proceedings” in this Court in which the State is a party). If pre-execution litigation is prolonged because multiple warrants are being prosecuted at once, blame lies solely at the Attorney General’s feet. As with ADCRR’s problematic drug selection, capital defendants should not be penalized to compensate for the State’s lack of foresight. In both cases, the solution is more competent administration by the State, not the adoption of extraordinary new rules of procedure.

III. Conclusion

The proposed rule would prejudice defendants by eliminating process that the Attorney General has previously deemed essential to a fair warrant proceeding. It would do so to accommodate the particular requirements of a method of execution that is neither permanent nor universal, could be replaced at any time, and was voluntarily adopted and retained by ADCRR despite notice of its shortcomings. The proposed rule would provide minimal benefit that would justify or excuse these unacceptable circumstances, and it would impose extraordinary new and disproportionate burdens on defendants, counsel, and the courts. For those reasons, this Court should reject the Petition.

Respectfully submitted this 1st day of May, 2025,

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