

Jason D. Lewis
Deputy Solicitor General/Section Chief of Capital Litigation
Arizona Attorney General's Office
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-7989
Jason.Lewis@azag.gov
AZ Bar # 032461.

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

RULE 31.23, RULES OF CRIMINAL
PROCEDURE

Supreme Court No. R–25–0016

**COMMENT TO MODIFIED
AMENDMENT TO RULE 31.23 OF
THE RULES OF CRIMINAL
PROCEDURE**

Petitioner submits the following comment pursuant to this Court's order, filed August 28, 2025, continuing Petition No. R–25–0016 to the November 2025 Rules Agenda and inviting comments on the modified amendment contained in the order.

As the petition originally set out, the proposed amendment to Arizona Rule of Criminal Procedure 31.23 seeks to add predictability and judicial efficiency to the execution warrant process. The proposed amendment does this by delineating strict timelines for a response and reply after the State has moved this Court for a warrant of execution pursuant to Rule 31.23. The proposed amendment also encourages this Court to conference the State's motion for warrant of execution as soon as practicable, the effect of which should result in the issuance of a warrant of execution setting an execution date 35

days later. Prompt briefing and consideration of the State’s motion for warrant of execution is crucial because once the drugs to be used in an execution are compounded, which must occur within days of the State filing its motion for warrant of execution, their beyond-use-date will expire after 90 days.

I. THE COURT’S MODIFIED AMENDMENT.

In its modified amendment, this Court proposes that the State initiate execution warrant proceedings by first filing a notice of motion for warrant of execution. This process mirrors the current procedure the State employs, although the modified amendment restricts the State’s discretion in requesting a date on which to file a motion for warrant of execution to one not less than 65 days from the date of the State’s notice. *See* Modified Amendment to Rule 31.23(c) (“In the notice, the State must provide a specific date it plans to file its motion for warrant of execution that is not less than 65 days after the date the notice is filed with the Court and propose at least two alternative future dates.”) The pre-warrant-motion time period contemplated by the modified amendment exceeds that which is typically experienced under the State’s current procedure. *See State v. Djerf* (64 days from motion for briefing schedule to motion for warrant of execution); *State v. Gunches* (35 days from motion for briefing schedule to motion for warrant of execution); *State v. Hooper* (38 days from motion for briefing schedule to motion for warrant of execution); *State v. Dixon* (50 days from motion for briefing schedule to motion for warrant of execution); *but see State v. Atwood* (92 days from motion for briefing schedule to motion for warrant of execution).

While this time period is small in comparison to the length of time these cases have been pending, the State must always ensure that the victims' rights to finality and a swift disposition are protected. More importantly, the State has an interest in reducing delay during the execution process to minimize the emotional impact on victims as they are thrust back into death penalty proceedings. Many victims have often been waiting decades for the final disposition in capital cases, and as is often the case there will be no active proceedings requiring their involvement when a death-row inmate becomes eligible for execution. But because the State contacts the victims and asks for their input when deciding whether to seek a warrant of execution, the time between that renewed contact and the execution date becomes critical to those victims.

Accordingly, the State objects to the length of time set out in the modified amendment as it pertains to the time between the filing of a notice and the filing of a motion for warrant of execution. However, consistent with the time periods observed in prior executions, the State would support an amendment providing for the State to file a motion for warrant of execution no less than 35 days after the filing of the notice contemplated by the modified amendment.

The modified amendment further provides for a response time of 21 days after the State files its notice and 7 days from the time of the response for the State to file a reply. *See* Modified Amendment to Rule 31.23(c)(2)–(3). The modified amendment does not, however, specify any such time period addressing response and reply times on the State's motion for warrant of execution. The original proposed amendment seeks to codify these

time periods, chiefly to ensure that litigation surrounding the State's motion for warrant of execution does not exceed the time for which the drugs to be used remain efficacious. As the State explained in its Petition:

State law requires that the State carry out most death sentences by lethal injection.¹ 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.²

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.³ 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 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.

¹ 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.

² 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.

³ Department Order 710 may be viewed at:
<https://corrections.az.gov/sites/default/files/documents/policies/700/0710%20-%20eff%2010-23-24.pdf>.

Petition to Amend Rule 31.23, Arizona Rules of Criminal Procedure, filed January 10, 2025, at 3–4.

Because the modified amendment fails to set out response and reply times on the State’s motion for warrant of execution, it would not solve the problem that the Petition sought to address. The State therefore does not support the modified amendment. However, the State would support an amendment consistent with the timeline proposed for response and reply to the State’s notice, namely 21 days and 7 days. This would ensure that the State’s warrant motion can be briefed and considered within a reasonable period of time and that this Court can set an execution date within the 90-day time period the State’s execution drugs remain viable.

Respectfully submitted,

/s/ Jason D. Lewis

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Section Chief of Capital Litigation
Arizona Attorney General’s Office
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