

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, ARIZONA
ATTORNEYS FOR CRIMINAL JUSTICE, AND THE FEDERAL PUBLIC DEFENDER FOR
THE DISTRICT OF ARIZONA REGARDING AMENDED PROPOSAL TO AMEND
ARIZONA RULE OF CRIMINAL PROCEDURE 31.23**

Amy Armstrong
Sam Kooistra
**Arizona Capital Representation
Project**
25 S. Grande Ave
Tucson, Arizona 85745
Phone (520) 229-8550
amy@azcapitalproject.org
Arizona State Bar No. 022795
sam@azcapitalproject.org
Arizona State Bar No. 032776

**Arizona Attorneys for Criminal
Justice**

Molly P. Brizgys, AZ Bar No. 029216
MITCHELL | STEIN | CAREY |
CHAPMAN, PC
2600 N. Central Ave.
Suite 1000
Phoenix, AZ 85004
molly@mscclaw.com

Jon M. Sands
**Federal Public Defender – District of
Arizona**
Jennifer Y. Garcia (Arizona Bar No.
021782)
250 North Seventh Ave., Suite 600
Phoenix, Arizona 85007
Telephone [\(602\) 382-2816](tel:(602)382-2816)
Facsimile [\(602\) 889-3960](tel:(602)889-3960)
jennifer_garcia@fd.org

Counsel for Commenters

Pursuant to Rule 28(e) of the Rules of the Arizona Supreme Court and this Court's order, the Arizona Capital Representation Project ("ACRP"), Arizona Attorneys for Criminal Justice ("AACJ"), and the Federal Public Defender for the District of Arizona ("FPD") (collectively "Commenters") submit the following comment to the proposed amendment to Arizona Rule of Criminal Procedure 31.23 circulated by this Court on August 28, 2025 ("Amended Proposal").

A. Interests of the Commenters

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 Amended Proposal, ACRP attorneys have served as counsel or advisory counsel for defendants in two of the four executions conducted by the State since 2022.

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.

B. Introduction

On January 10, 2025, Jason Lewis, Section Chief of Capital Litigation at the Arizona Attorney General's Office, filed a petition to amend Arizona Rule of Criminal Procedure 31.23 ("Petition"). The Petition explained that the beyond-use date ("BUD") of the State's chosen lethal injection drug in combination with certain drug testing and disclosure requirements created time constraints for carrying out an execution. It proposed resolving this State-created dilemma by adopting a fixed, expedited briefing schedule for all motions for warrant of execution.

On May 1, 2025, Commenters filed a response raising a number of objections to the petition ("Comment in Opposition"). Commenters explained that, in comparison with historical practice, the Petition would dramatically and impermissibly curtail the time capital defendants have to prepare litigation in advance of their execution date. Comment in Opposition at 5-11. Commenters also objected that the expedited briefing contemplated by the Petition would apply to every future warrant motion, even if a change to the State's lethal injection protocol or the circumstances of an individual execution made expedited briefing unnecessary. *Id.* at 12-17.

On August 28, 2025, this Court issued an order continuing consideration of the Petition and reopening public comment for a new proposed version of Rule 31.23, the Amended Proposal. The Amended Proposal remedies many of the deficiencies of the proposal contained in the Petition. It requires the State to file a notice at least 65 days prior to the date it intends to file a warrant motion, a duration roughly in line with the pre-warrant briefing period under historic practice. *See* Comment in Opposition at 7-8 (noting pre-warrant litigation period lasting several weeks to a few months); Petition at 4 n.5 (noting a two-month pre-warrant litigation period). Additionally, the Amended Proposal’s special procedures are available not in all cases, as in the Petition, but only where “the State requires a date certain when the Court will consider its motion for warrant of execution[.]” Amended Proposal at 31.23(c).

Nonetheless, Commenters are unable to support the Amended Proposal as currently written. While the overall scheme devised in the Amended Proposal is sound, Commenters have identified three shortcomings, detailed below, which should be addressed before it is adopted as a rule. Absent those improvements, Commenters believe that the status quo procedure, in which the State files a motion for briefing schedule for warrant of execution, would be preferable. *See* Comment in Opposition at 11-12 (arguing that the current ad hoc procedure is preferable to one which impairs the rights of defendants).

C. Objections to the Amended Proposal

Commenters raise three specific objections to the Amended Proposal. First, the Amended Proposal allows the State to avail itself of the special procedures it enumerates without making any showing that reliance on those procedures is necessary. Second, the Amended Proposal divests this Court of discretion to address exigencies that can and have arisen during the warrant briefing process. Third, the Amended Proposal authorizes this Court to place broad, unnecessary, and undesirable limitations on the consideration of amicus briefs.

To illustrate their objections to the Amended Proposal and provide constructive examples of how they might be remedied, Commenters have attached a red line version of the proposal that includes alternative language. Exhibit A. This exhibit is for illustrative purposes only, and Commenters do not intend for it to be construed as a petition under Supreme Court Rule 28.

1. The State must be required to demonstrate that extraordinary procedures are necessary.

As noted above, a principal virtue of the Amended Proposal is that the procedures it enumerates are not automatically applicable to every warrant motion—the State may avail itself of those procedures only when circumstances “require[] a date certain when the Court will consider [the State’s] motion for warrant of execution[.]” Amended Proposal at 31.23(c). In all other cases, the State would simply file a warrant motion that would be litigated under the ordinary briefing schedules that

were typical prior to the State’s adoption of compounded pentobarbital as its lethal injection drug. In theory, then, the State would be authorized to use the Amended Proposal’s special procedures only in circumstances where the peculiarities of its method of execution or some other unique circumstance demands them.

In practice, however, the Amended Proposal invites abusive or mistaken use of its procedures, as it does not require the State to make any showing or even an avowal that the requisite extraordinary circumstances exist. Absent even a minimal showing of necessity, there would be no way to evaluate whether the State’s notice was submitted in bad faith or based upon mistaken information—whether the notice procedure was truly “required,” as the Amended Proposal contemplates.

The possibility of the State getting facts like these wrong is hardly academic. In 2021, the State asked this Court for a warrant briefing schedule in the case of Frank Atwood that was premised on a 90-day BUD for the State’s drugs. *State v. Atwood*, No. CR–87–0135–AP, Motion to Set Briefing Schedule for Motion for Warrant of Execution (4/6/2021). Mr. Atwood objected that the proffered BUD was inaccurate and unscientific and sought evidentiary development. Motion for Assignment for Evidentiary Development (4/28/2021). Although this Court initially denied the relief Mr. Atwood requested, his objection was in the end vindicated—the State was later forced to admit that it had gotten the BUD wrong and ask this Court to Amend its briefing schedule accordingly. Motion to Modify Briefing Schedule (6/22/2021). This

Court ultimately required the State to conduct additional testing of its drugs before it could renew its scheduling motion. Order (7/12/2021).

As this incident illustrates, the State's representations about its method of execution or what it requires are not immune from mistake. But the Amended Proposal renders such errors beyond review. Even if a defendant had proof that the State's notice was based on an unsound foundation, there would be no way to challenge it, since the Amended Proposal limits a defendant's response to narrow scheduling issues. Amended Proposal at 31.23(c)(2). And even if this Court determined that circumstances justifying the notice procedure did not exist, it would be without discretion to act—once the State files its notice, this Court “must” eventually issue a scheduling order. *Id.* at 31.23(c)(1).

The potential for error or abuse here is obvious but easily remedied. The State can be obliged to provide an explanation why it is seeking a warrant under the notice procedure. *See* Exhibit A at 31.23(c). Defendants can be authorized to respond to the full content of the notice, inclusive of such an explanation. *Id.* at 31.23(c)(2). And if this Court determines that the State has not made an adequate showing of necessity, it can be empowered to dismiss the notice. *Id.* at 31.23(c)(1).

These small requirements would impose minimal additional burden on the State. If the State believes there are circumstances that require extraordinary procedures, certainly it will know what those circumstances are at the time it files the notice, making it easy enough to provide an explanation. Indeed, to the extent the use

of compounded pentobarbital constitutes such a circumstance, the State has already provided an explanation to this Court on numerous occasions, including in the warrant-scheduling litigation for all of the post-2022 executions and in Mr. Lewis' petition, all of which alleged a reason why the State's use of compounded pentobarbital necessitated a firm, expedited briefing schedule. Requiring a comparable showing here is a reasonable safeguard against error or abuse.

Imposing such a minimal transparency requirement is additionally important because the Amended Proposal would enshrine a rule of criminal procedure. As Commenters previously emphasized, if adopted as a rule, the Amended Proposal would remain even if the exigent circumstances created by the State's drug selection go away. Comment in Opposition at 12-17. While a defendant facing a warrant today could infer from recent executions the drug-related reasons the State was requesting expedited briefing, that would no longer be true if, for example, the State adopted a new execution protocol, or if through new testing or a new drug supply the State obtained a new BUD under the current protocol. A fixed procedural rule should account for the possibility of such changing factual circumstances.

2. This Court must have discretion to address exigent circumstances.

Under the Amended Proposal, the entire warrant seeking process goes on autopilot the moment the State files its notice of intent. This Court "must" issue a briefing schedule for a warrant motion 30 to 60 days after the notice's filing. Amended Proposal at 31.23(c)(1). That mandatory language, however, divests this

Court of the discretion necessary to address real world exigencies arising during the course of the litigation.

Again, the circumstances surrounding Mr. Atwood's case demonstrate the inadequacy of the Amended Proposal as currently written. *State v. Atwood*, No. CR–87–0135–AP. On January 5, 2022, the State filed its motion to set a briefing schedule for a motion for warrant for Mr. Atwood's execution. On January 28, 2022, Mr. Atwood's lead and sole capital-qualified counsel, Natman Schaye, died suddenly and unexpectedly. Surviving counsel was not qualified to represent a capital client under Rule 6.8 unless associated with counsel qualified under the rule, leaving Mr. Atwood functionally uncounseled while the State was actively seeking to carry out his execution. Although an effort to identify a replacement for Mr. Schaye began immediately, substitute counsel was not identified and appointed until April 4, 2022, 89 days after the state filed its motion for a briefing schedule. In the meantime, this Court reasonably continued deadlines in the warrant-related matters pending before it.

That commonsense exercise of judicial discretion in the face of unforeseeable, extraordinary circumstances would not be possible under the Amended Proposal. If instead of a motion for briefing schedule the State had on January 5 filed a notice under the Amended Proposal, this Court would have been required to issue a briefing schedule no later than March 6. Thus, the briefing schedule would have been set while Mr. Atwood was without capital qualified counsel and nearly a month before counsel was identified and appointed. Similarly, if Mr. Schaye had died on March 7, the

Amended Proposal does not provide a mechanism for this Court to continue or modify a briefing schedule already imposed. Either way, Mr. Atwood would have been required to navigate the most critical period of his capital case—the period leading up to execution—without qualified counsel. Such an outcome is untenable, but it would have been unavoidable if the State had been proceeding under the procedures outlined in the Amended Proposal. While the specific circumstances of Mr. Atwood’s case will hopefully not be repeated, it is not difficult to imagine some other unexpected event that could produce similarly harsh and undesirable results.

Again, the solution is straightforward. This Court could be vested with broad authority to stay, continue, or dismiss a notice or issue other appropriate relief for good cause. Exhibit A at 31.23(c)(4). Such a provision would provide a reasonable safety valve that ensures this Court has the necessary authority to react to the unforeseeable and supply the “flexibility and discretion” necessary for a well-functioning procedural rule. *Encinas v. Pompa*, 189 Ariz. 157, 160-61 (App. 1997).

3. The general rules governing amicus briefs are sufficient here.

Under the Amended Proposal, the order this Court must enter 30 to 60 days after the State files its notice may include “whether the Court will entertain third party responsive pleadings to or briefs of amicus curiae regarding the State’s motion for warrant of execution.” Amended Proposal at 31.23(c)(1)(E). That language, which would allow this Court to prospectively declare that it will not consider amicus briefs, is anomalous, unnecessary, and ill-advised.

Currently, no provision of either the criminal or civil rules expressly authorizes this Court to anticipatorily refuse to entertain any amicus brief. There is good reason for that lacuna. At their best, amicus briefs provide courts with important facts, perspective, or argument that would otherwise be overlooked. *See* United States Supreme Court Rule 37.1 (“An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.”). A preemptive declaration that amicus briefs will not be entertained would foreclose this Court’s ability to consider such useful information before this Court even has the ability to know what it is missing out on. Such premature dismissal of a potentially helpful brief is counter to the rights of the parties, public welfare, and, thus, the overall purpose of the criminal rules. Ariz. R. Crim. P. 1.2. A carve out to categorically exclude amicus briefs in capital cases, when no parallel provision exists in other kinds of cases, would also be contrary to the general constitutional admonition that death penalty cases demand greater scrutiny, not less. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Besides its undesirability, a rule allowing this Court to preemptively forbid amicus briefs is unnecessary, as the existing rules governing amicus briefs already serve a more than adequate gatekeeping function. To file their brief, prospective amici must either obtain the consent of the parties or seek leave from this Court. Ariz. R. Crim. P. 31.15(b)(1). Amicus briefs that are not germane to matters before the Court or otherwise unhelpful are simply not authorized.

This Court already exercised this gatekeeping power in the warrant context earlier this year. During the warrant briefing period for defendant Aaron Gunches, this Court denied a request by a law professor to file an amicus brief in connection with a pending warrant motion, granting leave to refile a motion with a brief “that provides information, perspective, or argument” germane to the issues before the Court. *State v. Gunches*, No. CR-13-0282-AP, Order (1/8/2025). This Court subsequently granted the professor’s request to file an amended brief. *Id.*, Order (1/24/2025). As the serial rejection and admission of these briefs demonstrates, the ability to prospectively proscribe amicus briefs is both unnecessary (because the rules already provide a mechanism for rejecting briefs that are not helpful) and unwise (because amici may have information germane to a warrant motion).

That prospectively barring amicus briefs would be undesirable does not mean, of course, that this Court cannot regulate the manner in which such briefs are submitted. Indeed, in the Gunches litigation, this Court imposed expedited deadlines for prospective amici consistent with the overall briefing schedule imposed on the parties. *Gunches*, *supra*, Order (1/24/2025). This power should be codified in a rule that broadly empowers this Court to issue orders to ensure that warrant litigation conducted under these procedures is timely for all participants, including amici. *See* Exhibit A at 31.23(c)(1)(E).

D. Conclusion

Commenters believe that the scheme embodied in the Amended Proposal is sound, but they cannot support its adoption until the deficiencies outlined above have been addressed. Absent those changes, Commenters continue to believe that the ad hoc system developed by the State in recent years is the preferable way to address the concerns Mr. Lewis raised in the Petition.

Respectfully submitted this 1st day of October, 2025,

/s/ Sam Kooistra

Sam Kooistra

Amy Armstrong

Counsel for Commenter

Arizona Capital Representation Project

Molly Brizgys

Counsel for Commenter

Arizona Attorney for Criminal Justice

Jennifer Y. Garcia

Counsel for Commenter

Federal Public Defender

for the District of Arizona