

David K. Byers
Administrative Director
Administrative Office of the Courts
1501 W. Washington, Suite 411
Phoenix, AZ 85007-3327
Phone: (602) 452-3301
Projects2@courts.az.gov

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the matter of:	)	
	)	
PETITION TO AMEND CRIMINAL	)	Supreme Court No. 25-0044
RULES 28.1 AND 28.2 AND VARIOUS	)	
OTHER RULE SETS RELATING TO	)	REPLY
RECORDS RETENTION AND	)	
DISPOSITION	)	
_____	)	

David K. Byers, Administrative Director, Administrative Office of the Courts,
and Petitioner in this matter, hereby replies pursuant to Rule 28(e)(5), Rules of the
Supreme Court of Arizona and this Court's Order dated July 16, 2025.

I. Procedural History

On July 16, 2025, Petitioner filed a petition to include new rules and
amendments governing, or related to, record retention and disposition based on the
[Report and Recommendations of the Advisory Committee on Evidence Retention](#)
(dated March 13, 2025). Petitioner requested expedited consideration and
emergency adoption of the proposed rule amendments.

On July 16, 2025, this Court granted Petitioner’s request for expedited consideration at its August 2025 Rules Agenda and at that Agenda, adopted amendments on an emergency basis, effective January 1, 2026. This Court will consider whether to adopt the amendments on a permanent basis at its November 2025 Rules Agenda.

This petition was open for comment until October 1, 2025, with any reply due by October 15, 2025.

II. Discussion of Comment

This petition received one comment filed on behalf of the Clerk of the Superior Court in and for Maricopa County (“Commentor”). The comment indicates strong support of the work of the Advisory Committee on Evidence Retention (ACER) but seeks greater clarity relating to the provisions of the proposed amendments to Criminal Rule 28.1. The comment raises a number of concerns to be considered, and Petitioner will address each in turn.

A. Proposed Criminal Rule 28.1(b) amendments do not contemplate retention of exhibits when charges are dismissed without prejudice.

The proposed amendments to Criminal Rule 28.1(b) retain much of the substance of current Rule 28.1(b) relating to when a case is “no longer subject to modification,” but moves some of the content pertaining to the exhaustion of state court remedies to a new subpart, in an effort to simplify it and provide clarity. Specifically, current Rule 28.1(b)(1) provides, “When a case is no longer subject to

modification, the clerk must destroy certain records under retention and destruction schedules established by the Supreme Court.” Current Criminal Rule 28.1(b)(2) provides that a case is no longer “subject to modification” after the defendant is acquitted or the court dismisses with prejudice the charges against the defendant. Current Criminal Rule 28.1(b)(2) does not account for cases in which charges are dismissed *without* prejudice.

Petitioner acknowledges that dismissals without prejudice occur from time to time and after conferring with ACER at its October 10, 2025 meeting, sees no reason to exclude dismissals without prejudice from proposed Criminal Rule 28.1(b)(3)(A). Petitioner therefore proposes that this Court further amend proposed Criminal Rule 28.1(b)(3)(A) as set forth in Appendix A to this Reply to add “without prejudice” to proposed Criminal Rule 28.1(b)(3)(A).

Petitioner’s additional proposed amendments to proposed Criminal Rule 28.1(b)(3)(A) as it was adopted on an emergency basis are set forth in Appendix A. Petitioner’s additional proposed amendments to proposed Criminal Rule 28.1(b)(3)(A) as incorporated into the overall amendments proposed by the initial petition are set forth in Appendix B for comparison purposes.

B. It is not clear whether “post-trial motion” in proposed Criminal Rule 28.1(b)(3)(B) includes petitions for post-conviction relief or is limited to post-trial motions under Criminal Rule 24.

A petition for post-conviction relief is a petition, not a motion. The text of proposed Criminal Rule 28.1(b)(3)(B) and (C) therefore does not include petitions for post-conviction relief. The proposed amendments carry over the provisions of current Criminal Rule 28.1(b)(2)(B) and (C). However, after conferring with ACER at its October 10, 2025 meeting, Petitioner supports amending proposed Criminal Rule 28.1(b)(3) to account for petitions for post-conviction relief. Petitioner therefore proposes that this Court further amend proposed Criminal Rule 28.1(b)(3) as set forth in Appendix A to this Reply.

Petitioner's additional proposed amendments to proposed Criminal Rule 28.1(b)(3) as it was adopted on an emergency basis are set forth in Appendix A. Petitioner's additional proposed amendments to proposed Criminal Rule 28.1(b)(3) as incorporated into the overall amendments proposed by the initial petition are set forth in Appendix B for comparison purposes.

C. Evidence retention in capital cases.

Commentor suggests that rule-based guidance be provided relating to whether evidence retention in capital cases is the same as it is in non-capital cases. It is Petitioner's position that Rule 28.1(b) adequately accounts for retention in capital cases and that no explicit distinction is necessary, as the provisions of Rule 28.1(b) apply equally to capital and non-capital cases.

Where the death penalty is imposed, it will take a significant amount of time to exhaust state court remedies and absent unique circumstances, federal habeas relief would most likely be sought. Accordingly, it would be a rather unique capital case where exhibits were ever not retained. In the unique case where federal habeas relief was not sought, there would be no reason for the court to retain the exhibits. Petitioner therefore recommends no additional amendments to Criminal Rule 28.1(b) be made for this purpose.

D. Impact of a petition for a writ of habeas corpus filed in state court.

The comment inquires as to the impact that a petition for a writ of habeas corpus filed in state court has on evidence retention. Petitioner acknowledges that the proposed amendments to Criminal Rule 28.1(b) do not address this, but neither does the current version of Criminal Rule 28.1(b). Nonetheless, it is Petitioner's understanding that petitions for a writ of habeas corpus filed in state court are exceedingly rare, and Commentor has not provided verbiage for Petitioner or ACER to consider. For these reasons and after conferring with ACER at its October 10, 2025 meeting, Petitioner recommends that, for purposes of this petition, no additional rule amendments be made to account for petitions for a writ of habeas corpus filed in state court.

However, in reviewing this comment, Petitioner recognizes that the reference to "habeas corpus" in the proposed amendments to Criminal Rule 28.1(b)(2) may

benefit from clarifying that habeas corpus in this context refers to a petition for a writ of habeas corpus filed in *federal court*. Petitioner therefore proposes further amendments to Criminal Rule 28.1(b)(2) as set forth in Appendix A to this Reply for that purpose.

Petitioner's additional proposed amendments to Criminal Rule 28.1(b)(2) as it was adopted on an emergency basis are set forth in Appendix A. Petitioner's additional proposed amendments to Criminal Rule 28.1(b)(2) as incorporated into the overall amendments proposed by the initial petition are set forth in Appendix B for comparison purposes.

E. The proposed rule amendments do not provide a definition for exhaustion of federal remedies.

Commentor points out that the proposed amendments do not provide a definition as to what “exhausting all federal remedies” means in the context of Criminal Rule 28.1(b)(2) and indicates that clarification would be helpful since determining when all federal remedies have been exhausted can become rather complicated, nuanced, and complex.

Petitioner agrees but points out that current Rule 28.1(b) does not define what it means to “exhaust all federal remedies,” and Commentor has not provided verbiage for Petitioner or ACER to consider. For these reasons, Petitioner is reluctant to attempt to definitively define through this rule petition what it means to “exhaust all federal remedies.”

However, after conferring with ACER at its October 10, 2025 meeting, Petitioner proposes limiting retention to the end of one full federal habeas petition. Petitioner therefore proposes deleting the “exhausting all federal remedies” language from Criminal Rule 28.1(b)(2)(B) and replacing it with “a decision on the first petition for a writ of habeas corpus in federal court, if the defendant filed one.” This will take the guess work out of having to determine when all federal remedies have been exhausted, allowing a better method for determining an end date for retention purposes.

For the same reasons, Petitioner proposes adding a similar concept to proposed Criminal Rule 28.1(b)(3) as a new subpart E relating to petitions for post-conviction relief, i.e., required retention would end at the final resolution of the first timely petition for post-conviction relief rather than having to guess whether a defendant will file successive petitions, otherwise making it impossible to determine an end date for retention. This would provide a balance of the interests in state court post-conviction relief proceedings akin to Petitioner’s proposal relating to federal proceedings.

Petitioner’s additional proposed amendments to Criminal Rule 28.1(b)(2) and (3) as they were adopted on an emergency basis are set forth in Appendix A. Petitioner’s additional proposed amendments to Criminal Rule 28.1(b)(2) and (3) as

incorporated into the overall amendments proposed by the initial petition are set forth in Appendix B for comparison purposes.

III. Request

Petitioner appreciates the comment submitted during the comment period. Petitioner respectfully requests that this Court, at its November 2025 Rules Agenda, adopt on a permanent basis the amendments as set forth in this Court's August 26, 2025 Order, with the exception of Criminal Rule 28.1(b)(2) and (3), which Petitioner requests be further amended and adopted as set forth in Appendix A to this Reply.

Petitioner acknowledges that Criminal Rule 28.1(b)(2) and (3) as proposed in Appendix A substantively differ from the amendments proposed in the initial petition and have not been circulated for public comment. Therefore, if this Court is not inclined to permanently adopt the additional amendments to Criminal Rule 28.1(b)(2)(A) and (B) and (b)(3) without the public having an opportunity to review and comment, Petitioner respectfully requests that this Court adopt the additional amendments as set forth in Appendix A on an emergency basis, effective January 1, 2026, reopen the petition for comment on these additional amendments, and consider permanent adoption at its August 2026 Rules Agenda.

Respectfully submitted this 15th day of October, 2025.

By /s/ David K. Byers

David K. Byers, Administrative Director
Administrative Office of the Courts
1501 W. Washington, Suite 411
Phoenix, Arizona 85007
(602) 452-3301
Projects2@courts.az.gov

Appendix A
Additional Proposed Amendments Shown Against R-25-0044 Emergency
Order

Rules of Criminal Procedure

(deletions shown with ~~strike through~~, new language is underlined)

Rule 28.1 Duties of Clerk

(a) [No change to text from August 26, 2025 Order]

(b) [No change to text from August 26, 2025 Order]

(1) [No change to text from August 26, 2025 Order]

(2) *Definition of “Subject to Modification.”* A criminal case is no longer “subject to modification” when a defendant is acquitted on all charges. Absent an acquittal on all charges, a criminal case is no longer “subject to modification:”

(A) one year after exhausting all state court remedies, if the defendant did not file a petition for a writ of habeas corpus in federal court, or

(B) 90 days after ~~exhausting all federal remedies~~ a decision on the first petition for a writ of habeas corpus in federal court, if the defendant filed ~~a petition for a writ of habeas corpus~~ one.

(3) *Definition of “All State Court Remedies Are Exhausted.”* All state court remedies are exhausted 90 days after:

(A) the trial court dismisses, with or without prejudice, the charges against the defendant, unless a party files a notice of appeal;

(B) the entry of judgment and sentence, unless a party files a notice of appeal, ~~or~~ a post-trial motion or, when the defendant enters a guilty plea that is accepted, a timely notice requesting post-conviction relief under Rule 33;

(C) the trial court denies a post-trial motion, unless a party files a notice of appeal from that denial of that motion; ~~or~~

(D) the trial court receives an appellate court mandate affirming, unless the defendant files a timely notice requesting post-conviction relief under Rule 32; or

(E) the final resolution of the first timely Rule 32 or 33 petition for post-conviction relief.

(c) [No change]

Appendix B
Additional Proposed Amendments Shown Against Petition’s Initial Proposed
Amendments

(deletions shown with ~~strikethrough~~, new language underlined)

Rules of Criminal Procedure

Rule 28.1. Duties of Clerk

(a) [No change to text from August 26, 2025 Order]

(b) [No change to text from August 26, 2025 Order]

(1) [No change to text from August 26, 2025 Order]

(2) *Definition of “Subject to Modification.”* A criminal case is no longer “subject to modification:” when a defendant is acquitted on all charges. Absent an acquittal on all charges, a criminal case is no longer “subject to modification:”

~~(A) after the defendant is acquitted or the court dismisses with prejudice the charges against the defendant;~~

~~(B) 60 days after the entry of judgment and sentence, unless a party files a notice of appeal or a post trial motion;~~

~~(C) 90 days after either a court denies a post trial motion or receives an appellate court mandate affirming the defendant's conviction, unless a petition for writ of certiorari is filed with the United States Supreme Court;~~

~~(D) 25 days after the United States Supreme Court denies certiorari or issues a mandate affirming a conviction, unless a petition for rehearing is filed;~~

~~(E) after the United States Supreme Court denies a petition for rehearing; or~~

~~(F) one year after exhausting all state court remedies, if the defendant did not file a petition for a writ of habeas corpus in federal court, or~~

(B) 90 days after exhausting all federal remedies a decision on the first petition for a writ of habeas corpus in federal court, if the defendant filed a petition for a writ of habeas corpus one.

(3) *Definition of “All State Court Remedies Are Exhausted.”* All state court remedies are exhausted 90 days after:

(A) the trial court dismisses, with or without prejudice, the charges against the defendant, unless a party files a notice of appeal;

(B) the entry of judgment and sentence, unless a party files a notice of appeal, a post-trial motion or, when the defendant enters a guilty plea

that is accepted, a timely notice requesting post-conviction relief under Rule 33;

(C) the trial court denies a post-trial motion, unless a party files a notice of appeal from that denial of that motion;

(D) the trial court receives an appellate court mandate affirming, unless the defendant files a timely notice requesting post-conviction relief under Rule 32; or

(E) the final resolution of the first timely Rule 32 or 33 petition for post-conviction relief.

(c) [No change]