

Hon. Ronald Reinstein (ret.), Chair
Capital Case Oversight Committee
1501 W. Washington St.
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE	)	Supreme Court No. R-25-0016
31.23, ARIZONA RULES OF	)	
CRIMINAL PROCEDURE	)	COMMENT FROM THE CAPITAL
	)	CASE OVERSIGHT COMMITTEE
_____	)	

The Capital Case Oversight Committee (CCOC) submits the following comment to the above-cited rule-change petition. The petition seeks to amend Rule 31.23 of the Arizona Rules of Criminal Procedure, which establishes the procedures by which this Court issues execution warrants. The Chief Justice of this Court referred the matter to the CCOC for examination and recommendation. The CCOC thereafter assembled a workgroup to study the issue. The workgroup, in turn, formulated proposed amendments, which the CCOC discussed and unanimously approved at a public meeting on April 22, 2026. The proposed amendments are attached hereto as Exhibits A (mark-up version) and B (clean version).

I. Background

Rule 31.23(b) provides, in relevant part: “On the State’s motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.” Rule 31.23(c) requires this Court to specify in an execution warrant an execution date that is thirty-five days after the warrant’s issuance. If, however, it is “impracticable” to conduct the execution on the thirty-fifth day, this Court may extend the execution date up to sixty days from the warrant’s issuance. This rule generally aligns with statutory requirements. *See* A.R.S. § 13-759(A) (“The time for execution shall be fixed for thirty-five days after the state’s motion is granted.”).

Since Rule 31.23’s last substantive amendment, *see In the Matter of Rule 31.17(c)(1), Rules of Criminal Procedure*, No. R-13-0050 (Sept. 2, 2014), the landscape surrounding lethal-injection executions in Arizona has changed. As the petition explained in detail, changes to the Arizona Department of Corrections, Rehabilitation, and Reentry’s (ADCRR’s) lethal-injection protocol, required by a civil settlement agreement between ADCRR and a group of death-sentenced inmates, prohibit the Department from conducting executions with chemicals that have not been used within a prescribed expiration date.¹ (Petition at 3-4.) ADCRR

¹ *See* Dep’t Order, 710, Attach. D, ¶ A.1.III, available at <https://corrections.az.gov/sites/default/files/documents/policies/700/DO%20710%20-%20Eff.%205-20-25.pdf>.

currently carries out executions using compounded pentobarbital which, after completion of stability and sterility testing, has a beyond-use date of ninety days from the date of its compounding. (*Id.* at 3.) The protocol and the settlement further require ADCRR to disclose, upon an inmate's request, a quantitative analysis of the chemicals to be used in the execution within ten days of the State requesting an execution warrant. (*Id.* at 3-4.) This requires ADCRR to ensure that pentobarbital to be used in a planned execution is compounded shortly after the State moves for an execution warrant, thereby starting a ninety-day timeline for completing an execution with the compounded drug.²

As the petition explained, it is difficult for the State to satisfy these requirements given the practical reality of pre-warrant litigation, which often involves extensions of filing deadlines and other delays. (*Id.* at 4-5.) To navigate these difficulties, the State has employed in the last several executions an informal procedure by which, before moving for an execution warrant, it asks this court to set a firm briefing schedule for its anticipated motion so the execution will be fixed on a date before the compounded pentobarbital expires. The petition in this matter, filed by the Chief Counsel of the Capital Litigation Section of the Arizona Attorney

² See Dep't Order 710, Attach. D, ¶ C.2, available at <https://corrections.az.gov/sites/default/files/documents/policies/700/DO%20710%20-%20Eff.%205-20-25.pdf>.

General's Office (AGO), sought to amend Rule 31.23 to establish a fixed and accelerated briefing schedule for motions for warrants of execution, allowing ten days for a defendant to respond to such a motion and five days for the State to reply. (Petition, Appendix A.) It further sought to require this Court to schedule the motion for its "next practicable conference." (*Id.*) The petition did not, however, require the State to file a notice advising this Court and the defendant of its intent to seek a warrant. (*Id.*)

The Arizona Capital Representation Project (ACRP), Arizona Attorneys for Criminal Justice, Phillips Black, Inc., and the Federal Public Defender for the District of Arizona (FPD)—all of which employ or count as members attorneys who represent death-sentenced defendants—filed a joint comment opposing the petition. The comment asserted that the proposed rule change would prejudice defendants, make the process of seeking execution warrants less reliable, and limit this Court's discretion during the warrant-issuance process. In particular, the capital defenders noted the absence of any requirement that the State give notice of its intent to seek an execution warrant—which is a component of the current, informal procedure—and asserted that this lack of notice, combined with the abbreviated proposed timelines, would render defendants unable to meaningfully respond to warrant requests. (Joint Capital Defenders' Comment, at 5-12.)

This Court thereafter issued an order, accompanied by draft amendments to the rule, continuing the petition to its November 2025 rules agenda and reopening it for public comment. (Order filed 8/28/25 & Attachment.) This Court's draft amendments would require the State to file a notice of its intent to file a motion for a warrant of execution and to identify in that notice a requested due date for the motion that is not less than sixty-five days from the notice's filing, along with two alternative future dates. (Attachment to 8/25/25 Order.) It would further allow a defendant twenty-one days to respond to the notice; permit the State and any interested victims to reply within seven days; and require the Court, between thirty and sixty days of the notice's filing, to issue an order setting forth due dates for the motion and responsive briefing. (*Id.*) On the same day, the Chief Justice referred the matter to the CCOC, explaining that the Court disfavored the amendments in the initial petition. (Letter dated 8/28/25.) The Chief Justice invited the CCOC to comment on a number of matters, including whether the rule should be amended in the first place, and to review and, if appropriate, recommend changes to this Court's draft amendments. (*Id.*)

The original petitioner thereafter filed a formal comment, opposing the Court's proposal because it contemplated too long of a period between the filing of the notice and the motion and it did not establish fixed timelines for briefing in response to the motion. (Comment by Jason Lewis.) The capital defenders likewise

jointly opposed the Court's proposal, expressing concerns that it limited the Court's discretion and questioning the need to formalize the informal procedure. (Capital Defenders' Second Comment.) This Court continued the petition to its August 2026 rules agenda. (Order filed 11/26/25.)

II. The CCOC's Proposed Amendment

In response to the Chief Justice's correspondence, the CCOC assembled a workgroup composed of judicial officers, this Court's capital case staff attorney, and practitioners from the AGO (including the original petitioner), the FPD, and ACRP, all of whom are experienced in either seeking or opposing execution warrants. The workgroup agreed that Rule 31.23 would benefit from amendment. (*See* Letter dated 8/28/25 (inquiring whether rule should be amended).) In examining the Court's proposed amendments, the workgroup identified and sought to balance various concerns, including:

- The State's need for an orderly, predictable, and, to the extent reasonably possible, abbreviated procedure to accommodate the testing and disclosure requirements under ADCRR's lethal-injection protocol and related civil settlement, as well as operational scheduling issues involving ADCRR;
- Death-sentenced defendants' need for notice of the State's intent to seek execution warrants, as well as their need for a reasonable time to respond in light of their attorneys' other obligations;

- This Court’s need for flexibility in conferencing execution-warrant requests and scheduling execution dates, particularly in view of the time-sensitive litigation surrounding such requests, and its interest in preserving its discretion in ruling on such requests and managing its docket; and
- The interests of statutory victims, including receiving notice of the timeline under which a warrant request may be considered and a warrant issued.

To accommodate these concerns to the greatest extent possible, the workgroup proposes the amendments reflected in Exhibits A and B. The proposal retains the general structure of this Court’s draft amendments but modifies certain timelines in accordance with the State’s need for a predictable and reasonably expedient schedule, adds additional provisions designed to minimize scheduling complications, and expressly reinforces this Court’s discretion to deviate from timelines when good cause so requires.

First, the proposal retains from this Court’s draft the provision that, if the State requires a specific timeline for considering an execution warrant—*i.e.*, if it anticipates conducting an execution with compounded pentobarbital—it file a notice advising the Court of its intent to file the warrant request, accompanied by a copy of the State’s draft motion. (*See* Exhibit A, § (c)(1)-(3).) This requirement formalizes the informal procedure the State has followed in recent executions, and the proposal adds an express service requirement and recognition of victims’ rights. (*Id.*) The

requirement ensures that defendants for whom the State intends to seek warrants, statutory victims, and this Court all receive adequate notice of the State's intent and the opportunity to prepare or respond accordingly. The CCOC's proposal also retains from this Court's draft the opportunity for a defendant to respond to the notice and the State to reply. (*Id.* § (c)(4)). It reduces, however, the defendant's response time from the twenty-one days permitted in this Court's draft to fourteen. (*Id.*) This reduction is reasonable because the defendant's response, under both this Court's draft and the CCOC's, must be limited to the notice's contents and the specific orders the Court may issue under the rule. (*Id.*)

Second, the CCOC's proposal retains from this Court's draft the requirement that the State identify in the notice a specific date on which it plans to file its motion for warrant of execution but omits the requirement that the State identify alternative filing dates. (*Id.* § (c)(2).) In addition, while this Court's proposal would require the State to propose a motion due date no earlier than sixty-five days from the notice's filing, the CCOC's proposal provides that the proposed date be no earlier than thirty-five days from the notice's filing. (*Id.*) But to facilitate this Court's scheduling of all dates—including the motion's due date, the due dates for responsive briefing, the motion's conferencing, and the execution date—the CCOC's proposal also requires the State to identify in the notice any known dates between ninety and one-hundred

twenty days after the notice's filing on which ADCRR could *not* feasibly carry out the anticipated execution. (*Id.*)

Third, the CCOC's proposal includes a presumptive timeline for Court action on the State's notice. (*Id.* § (c)(5).) This timeline differs from that set forth in this Court's draft amendments: while this Court's draft requires it to issue a briefing schedule on the anticipated warrant no sooner than thirty and no later than sixty days from the notice's filing, the CCOC's proposal requires the Court to enter that order no later than thirty-five days from the date of the notice, assuming a response and reply are filed. (*Id.*) But in addition to requiring the State to identify ADCRR's scheduling conflicts as discussed above, the CCOC's proposal would add an express provision allowing this Court to grant stays and continuances, dismiss a notice, or issue any "other appropriate orders" based on a showing of good cause. (*Id.* § (c)(6).) The CCOC believes that this provision, especially when combined with this Court's authority to suspend Rule 31, *see* Ariz. R. Crim. P. 31.3(a), preserves this Court's discretion and provides flexibility for it to accommodate scheduling complications that may arise.

Finally, to further facilitate scheduling, the CCOC's proposal includes a comment noting this Court's traditional preference to fix execution dates on Wednesdays or, in the alternative, on Thursdays or Tuesdays, and directs the State to consider these preferences in proposing dates. (*Id.* at 2026 Cmt.) These day-of-

week preferences accommodate the reality of last-minute execution litigation, which often requires this Court and other courts to review stay requests or other urgent pleadings on the eve of a scheduled execution. Conducting mid-week executions makes it more likely that last-minute pleadings will be filed during regular work hours, when courts are fully staffed and better positioned to rapidly consider and resolve these time-sensitive matters.

III. Conclusion

For all of these reasons, the CCOC agrees that Rule 31.23 would benefit from amendments to establish an orderly and predictable procedure governing the issuance of execution warrants on the State's motion. The CCOC respectfully does not agree with this Court's proposed amendments in their current form. The CCOC instead respectfully requests that this Court adopt the proposed amendments to Rule 31.23 reflected in Exhibits A and B, attached hereto, which consist of modifications to this Court's proposed amendments, approved by the CCOC's bipartisan membership.

RESPECTFULLY SUBMITTED this 30th day of April 2026.

By /s/ _____

Hon. Lacey Stover Gard

Arizona Court of Appeals, Division Two

By /s/ _____

Hon. Ron Reinstein (ret.), Chair

Capital Case Oversight Committee

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Exhibit A: Mark-Up Version

Rule 31.23. Warrant of Execution

(a) **Issuance of Warrant.** [no change]

(b) **Post-Habeas Warrant.** [no change]

(c) **Notice of Motion for Warrant of Execution.**

- (1) **Purpose of the Notice.** If the State requires a specific timeline for the Court's consideration of a motion for warrant of execution, then before filing the motion, the State must file with the Court a notice advising of the State's plan to file the motion.
- (2) **Content of the Notice.** The notice must include as an attachment a copy of the State's planned motion for warrant of execution. The notice also must include a specific date—not less than 35 calendar days after the notice filing date—that the State plans to file its motion. The notice must also include any currently known dates between 90 and 120 days after the notice filing date that would not be feasible for the Arizona Department of Corrections, Rehabilitation, and Reentry to execute the Court's warrant.
- (3) **Service of the Notice.** The State must serve the notice as provided in Rule 31.6(c). The State must indicate it has complied with victims' rights.
- (4) **Response and Replies.** After the State files and serves a notice:
 - (A) the defendant, no later than 14 days after service, may file a response informing the Court of the defendant's position regarding only the content of the State's notice and the specific orders the Court may enter under (c)(5) and (c)(6); and
 - (B) the State and the crime victim may file separate replies to the defendant's response no later than 7 calendar days after service of the response. The replies may address only the specific issues raised in the defendant's response.
- (5) **Court Order.** Not less than 15 calendar days, if no response is filed, but otherwise not more than 35 calendar days after the State filed the notice under (c)(2), the Court must enter an order stating:
 - (A) the date on which the State must file its motion for warrant of execution;

- (B) the date by which the defendant may file a response, if any, to the motion for warrant of execution;
 - (C) the date by which the State and the crime victim may file separate replies, if any, to the defendant's response to the motion for warrant of execution;
 - (D) the date the Court anticipates considering the State's motion for warrant of execution; and
 - (E) any other orders the Court deems necessary to facilitate the timely filing of the State's motion for warrant of execution, defendant's response, and any reply, including specific due dates for third-party responsive pleadings or briefs of amicus curiae regarding the State's motion.
- (6) **Other Court Orders.** For good cause, the Court may stay, continue, or dismiss a notice, or it may enter other appropriate orders.

~~(e)~~(d) **Date and Time of Execution.** [no change]

~~(d)~~(e) **Return on Warrant.** [no change]

Comment to 2026 Amendment

The Court has historically set executions on a Wednesday. If that is not feasible, the setting is on a Thursday, or alternatively, on a Tuesday. However, the Court is not limited to those days. The State should use these days of the week, if possible, when providing the Court dates under (c).

Exhibit B: Clean Version

Rule 31.23. Warrant of Execution

- (a) Issuance of Warrant. [no change]**
- (b) Post-Habeas Warrant. [no change]**
- (c) Notice of Motion for Warrant of Execution.**
 - (1) *Purpose of the Notice.*** If the State requires a specific timeline for the Court's consideration of a motion for warrant of execution, then before filing the motion, the State must file with the Court a notice advising of the State's plan to file the motion.
 - (2) *Content of the Notice.*** The notice must include as an attachment a copy of the State's planned motion for warrant of execution. The notice also must include a specific date—not less than 35 calendar days after the notice filing date—that the State plans to file its motion. The notice must also include any currently known dates between 90 and 120 days after the notice filing date that would not be feasible for the Arizona Department of Corrections, Rehabilitation, and Reentry to execute the Court's warrant.
 - (3) *Service of the Notice.*** The State must serve the notice as provided in Rule 31.6(c). The State must indicate it has complied with victims' rights.
 - (4) *Response and Replies.*** After the State files and serves a notice:
 - (A)** the defendant, no later than 14 days after service, may file a response informing the Court of the defendant's position regarding only the content of the State's notice and the specific orders the Court may enter under (c)(5) and (c)(6); and
 - (B)** the State and the crime victim may file separate replies to the defendant's response no later than 7 calendar days after service of the response. The replies may address only the specific issues raised in the defendant's response.
 - (5) *Court Order.*** Not less than 15 calendar days, if no response is filed, but otherwise not more than 35 calendar days after the State filed the notice under (c)(2), the Court must enter an order stating:
 - (A)** the date on which the State must file its motion for warrant of execution;

- (B) the date by which the defendant may file a response, if any, to the motion for warrant of execution;
 - (C) the date by which the State and the crime victim may file separate replies, if any, to the defendant's response to the motion for warrant of execution;
 - (D) the date the Court anticipates considering the State's motion for warrant of execution; and
 - (E) any other orders the Court deems necessary to facilitate the timely filing of the State's motion for warrant of execution, defendant's response, and any reply, including specific due dates for third-party responsive pleadings or briefs of amicus curiae regarding the State's motion.
- (6) ***Other Court Orders.*** For good cause, the Court may stay, continue, or dismiss a notice, or it may enter other appropriate orders.
- (d) **Date and Time of Execution. [no change]**
- (e) **Return on Warrant. [no change]**

Comment to 2026 Amendment

The Court has historically set executions on a Wednesday. If that is not feasible, the setting is on a Thursday, or alternatively, on a Tuesday. However, the Court is not limited to those days. The State should use these days of the week, if possible, when providing the Court dates under (c).