

Kevin M. Morrow Esq.
2005 N. Central Ave.,
Phoenix, AZ 85004
602-542-2928
Kevin.Morrow@azag.gov
AZ Bar # 034697.

**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND RULE 19.1,
ARIZONA RULES OF Criminal
PROCEDURE

Supreme Court No. R–

**Petition to Amend Rule 19.1,
Arizona Rules of Criminal Procedure**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the undersigned attorney (Petitioner) respectfully petitions this Court to amend Rule 19.1 of the Arizona Rules of Criminal Procedure (conduct of trial). The proposed amendment to Arizona Rule of Criminal Procedure (“Rule”) 19.1 seeks to address a reoccurring issue that has arisen in the conduct of the penalty phase in capital cases that are not immediately proceeded by a guilt and aggravation phase. Such issue occurs, for example, when the penalty phase is the result of a retrial ordered by this Court, or another court, when a mistrial is declared in a prior penalty phase, or when the defendant pleads guilty to the charged offense(s) and stipulates to aggravating circumstance(s).

A redline version of proposed amended Rule 19.1 identifying additions and deletions is attached at Appendix “A,” and a “clean” version of proposed amended Rule 19.1 is attached at Appendix “B.” Docket entries from *State v. Harris*, CR2016-132194, a recent Maricopa County case where this became an issue, is attached as Appendix “C”.

I. THE NEED FOR AMENDING RULE 19.1.

Rule 19.1(e) lists the nine steps that occur during the Penalty Phase in a Capital Case:

- (e) Penalty Phase in a Capital Case. If a jury finds one or more aggravating circumstances, the penalty phase proceeds as follows:
- (1) the defendant may make an opening statement;
 - (2) the State may make or defer an opening statement;
 - (3) the victim's survivors may make a statement relating to the victim's characteristics and the crime's impact on the victim's family, but they may not offer any opinion or recommendation about an appropriate sentence;
 - (4) the defendant may offer evidence in support of mitigation;
 - (5) the State may make an opening statement if it was deferred, and offer any evidence relevant to mitigation;
 - (6) the defendant may offer evidence in rebuttal, unless the court, for good cause, allows a party's case-in-chief to be reopened;
 - (7) the defendant may present statements of allocution to the jury;
 - (8) the parties may present argument, with the defendant having the opening and closing arguments; and
 - (9) the court must instruct the jury.

Ariz. R. Crim P. 19.1(e).

THE EVOLUTION OF RULE 19.1(e)

The current Rule 19.1 was adopted after the restyling of the Rules in 2017. *See In Re Rules of Criminal Procedure*, No. R-17-0002 (Ariz. Aug. 31, 2017). The previous version of the Rule provided that “With the permission of the court, the parties may agree to any other method of proceeding.” Ariz. R. Crim P. 19.1(d)(9) (2016).

Rule 19.1 was amended in 2022 to add 19.1(f) & (V) related to victim’s rights and the use of a facility dog. *See In Re Rules of Criminal Procedure*, No. R-22-0035 (Ariz. Dec. 8, 2022).

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THE RELEVANT CIRCUMSTANCES ARE REOCCURRING

There are at least three circumstances where the jury at a penalty-phase trial may not have received significant evidence regarding the crimes or aggravating circumstances of a death penalty-eligible murder: a retrial ordered after another proceeding, when the trial court declares a mistrial during the penalty phase, or when the defendant pleads guilty to the charged offense(s) and stipulates to aggravating circumstance(s).

For example, the capital trial of Gilbert Martinez required a second penalty-phase trial after the first jury hung on the penalty phase. *See State v. Martinez*, 230 Ariz. 208, 211–12, ¶¶ 8-9 (2012); *see also State v. Fitzgerald*, 232 Ariz. 208, 210, ¶¶ 6-7 (2013) (new penalty phase trial after mistrial). Efren Medina’s resentencing trial, after being granted PCR relief, also required a second penalty phase trial. *See State v. Medina*, 232 Ariz. 391, 398, ¶¶ 1-2 (2013).

This Court has remanded several cases for new penalty-phase proceeding. *See, e.g., State v. Lynch*, 238 Ariz. 84, 91, ¶ 1 (2015) (affirming new sentence after remand); *State v. Cropper*, 223 Ariz. 522, 524, ¶ 2 (2010) (on remand from supreme court for new aggravating and penalty phase, second jury was impaneled after mistrial); *State v. Rushing*, 243 Ariz. 212, 227, ¶ 69 (2017) (remanding for a new penalty phase proceeding); *see also State v. Rushing*, CR-23-0113-AP (opening brief filed Oct. 25, 2024).

And Aaron Gunches plead guilty to murder and stipulated to an aggravating circumstance (although the jury found an additional aggravator). *State v. Gunches*, 240 Ariz. 198, 200, ¶ 1 (2016).

In all of these examples, the penalty-phase jury was required to determine whether to sentence a defendant to death without a trial on the guilt phase, and in some cases without a trial on the aggravation. *See also Medina*, 232 Ariz. at 401, ¶ 23 (“retrial did not violate the Double Jeopardy Clause”); *State v. Reeves*, 233 Ariz. 182, 185, ¶ 9 (2013) (same).

THE RULE FAILS TO ADDRESS CERTAIN CIRCUMSTANCES

The Rule only provides that: “the State may make an opening statement if it was deferred, and offer any evidence relevant to mitigation;” Ariz. R. Crim P. 19.1(e)(5).

In *State v. Harris*, CR2016-132194 (Maricopa Sup. Ct.), the court conducted a penalty phase retrial with a new jury. Appx. C. The parties were unable to reach an agreement on the order of the presentation of the circumstances of Harris’s crimes and the capital aggravating factors. *Id.*

As the superior court found:

Unfortunately, there is no specific rule that covers a retrial of either the aggravation phase or penalty phase of a capital trial. The Defendant requests the Court follow the rule as is and include facts and circumstances in the questionnaire, additional questioning during voir dire and a detailed statement of the case to be read to the jury in preliminary instructions by the Court. The State proposes the Court allow it to present testimony and evidence following opening statements regarding the facts and circumstances of the crime and the aggravators previously found.

...

As demonstrated from the cases cited by both parties, prior courts have handled this issue in differing manners. There is no prescribed procedure for a penalty phase retrial

Harris Minute Entry *filed* 10/23/23 (Appx. C) (emphasis added).

The court found that “it has the inherent authority based on applicable case law and rules of criminal procedure and rules of evidence to modify the procedure listed in A.R.C.P. Rule 19.1 (e).” *Id.*

Although the court ultimately resolved the issue, it required the parties to meet and confer, file opposing briefing, and do oral argument on the motions. *See* Appx. C.

This Court should adopt the proposed specific rule to govern these unusual, but not uncommon, circumstances and avoid the ad hoc resolutions being adopted by the trial courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to amend Rule 19.1 as set forth in the Appendices.

Respectfully submitted,

/s/ _____

Kevin M. Morrow Esq.

AZ SBN 034697

APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline and bold.)

Rule 19.1. Conduct of Trial

(a)–(e) [No Change]

(f) Penalty Phase in a Capital Case on Retrial or After Plea of Guilty. If a court conducts a penalty phase without conducting a prior guilt or aggravation phase with the same jury, the penalty phase proceeds as follows; unless with the permission of the court the parties agree to any other method of proceeding:

(1) the defendant may make an opening statement;

(2) the State may make or defer an opening statement;

(3) the State may offer evidence in support of the facts and circumstances of the offense and aggravating circumstances;

(4) the victim's survivors may make a statement relating to the victim's characteristics and the crime's impact on the victim's family, but they may not offer any opinion or recommendation about an appropriate sentence;

(5) the defendant may offer evidence in support of mitigation;

(6) the State may make an opening statement if it was deferred, and offer any evidence relevant to mitigation;

(7) the defendant may offer evidence in rebuttal, unless the court, for good cause, allows a party's case-in-chief to be reopened;

(8) the defendant may present statements of allocution to the jury;

(9) the parties may present argument, with the defendant having the opening and closing arguments; and

(10) the court must instruct the jury.

(g)~~(f)~~-Use of a Facility Dog. The court will allow the assistance of a facility dog as directed by A.R.S. § 13-4442.

(h)~~(v)~~ Victims' Rights.

- (1) Victim's Opportunity to Confer with the Prosecutor. The victim must have an opportunity to confer with the prosecutor about trial before the trial begins.
- (2) Identifying and Locating Information. A victim has the right to refuse to testify regarding any identifying or locating information, unless the victim consents or the court orders disclosure after finding a compelling need for the information. The court must conduct a proceeding on a motion to require such testimony in camera.
- (3) Representative of a Minor or Incapacitated Victim. If a representative of a minor victim or an incapacitated victim requests to be recognized during trial, the representative must notify the prosecutor, who must then inform the court of the request outside the presence of the jury. Any communications between the representative and the court during trial must be conducted in the presence of the parties or their counsel, and outside the jury's presence. Any substantive communications must be on the record.

APPENDIX B

Rule 19.1. Conduct of Trial

(a)–(e) [No Change]

(f) Penalty Phase in a Capital Case on Retrial or After Plea of Guilty. If a court conducts a penalty phase without conducting a prior guilt or aggravation phase with the same jury, the penalty phase proceeds as follows; unless with the permission of the court the parties agree to any other method of proceeding:

- (1) the State may make an opening statement;
- (2) the defendant may make or defer an opening statement;
- (3) the State may offer evidence in support of the facts and circumstances of the offense and aggravating circumstances;
- (4) the victim's survivors may make a statement relating to the victim's characteristics and the crime's impact on the victim's family, but they may not offer any opinion or recommendation about an appropriate sentence;
- (5) the defendant may make an opening statement if it was deferred, and offer evidence in support of mitigation;

(6) the state may offer evidence in rebuttal, unless the court, for good cause, allows a party's case-in-chief to be reopened;

(7) the defendant may present statements of allocution to the jury;

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