

# APPENDIX C

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MOTION TO  
ESTABLISH  
PENALTY PHASE  
RETRIAL  
PROCEDURE  
08/28/2023

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,

Plaintiff,

vs.

KIPLING DAVID HARRIS,

Defendant.

CR2016-132194-001

MOTION TO ESTABLISH PENALTY PHASE  
RETRIAL PROCEDURE

(Assigned to the Honorable Geoffrey H  
Fish, Div. CRJ26)

The State of Arizona, by and through undersigned counsel, hereby requests the Court to establish the procedure of the upcoming penalty phase retrial given the parties' inability to reach an agreement on the order of the presentation of the circumstances of Harris's crimes and the capital aggravating factors that the State bore the burdens of proving in Harris's guilt and capital aggravation phases.<sup>1</sup> The State asks the Court to adopt the State's

<sup>1</sup> Per the Court's direction, the State and Harris conferred regarding their positions on the order of the presentation of the circumstances of Harris's convictions and the capital aggravating factors via email. The email chain is attached as Attachment 1.

proposed procedure: (1) Preliminary jury instructions; (2) Harris opening statement; (3) State opening statement; (4) State presentation of the circumstances of the crimes and the aggravating factors; (5) Victim impact statements; (6) Harris presentation of mitigation; (7) State presentation; (8) Harris rebuttal presentation; (9) Harris allocution; (10) Final jury instructions; (11) Harris closing argument; (12) State closing argument; and (13) Harris rebuttal closing argument.

Unlike the initial capital trial, when the jury had received evidence of Harris's guilt, had found Harris guilty, had received evidence of the capital aggravating circumstances, and had found proven the existence of the capital aggravating circumstances all before the outset of the penalty phase, the prospective jury for the penalty phase retrial will not have received a single piece of evidence to contextualize the convictions and the capital aggravating circumstances—both of which they must respect—by the time that opening statements commence. And opening statements are not evidence.

The prospective jury should receive the evidence underlying Harris's convictions and capital aggravating circumstances before the presentation of Victim impact statements to properly orient the jurors to the identities and associations of the Victims, why Harris committed the crimes against them, how Harris committed these crimes, and why the jurors will have been tasked with determining whether Harris should receive death sentences as punishments for his first-degree murder convictions. Doing so would place the prospective jury in the position most comparable to the position of the original jury at this stage of the

trial: the most apt position to assess the impact of the Victims' statements and to then assess whether Harris's purported mitigation is sufficiently substantial to call for leniency in light of the circumstances of the crimes, the severity of the capital aggravating circumstances, and Harris's character, propensities, criminal record, other acts, etc. The State should be the party to present this evidence to the prospective jury at this stage of the penalty phase retrial because it is the party that presented the evidence and bore the burdens of proving Harris's guilt and the capital aggravating circumstances in the first place. And nothing precludes the Court from adopting this procedure for Harris's penalty phase retrial.

In a penalty phase retrial, the State may properly introduce the evidence underlying a defendant's convictions and the capital aggravating circumstances that have made the defendant eligible to be punished by a sentence of death. *See State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 472 ¶ 17, 123 P.3d 662, 666 (2005) ("[T]he jurors must assess whether to impose the death penalty based upon each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence."). In a penalty phase retrial, the State may introduce both evidence detailing the circumstances of the crimes and "evidence pertaining to the aggravating circumstances previously found." *State v. Prince*, 226 Ariz. 516, 526-27 ¶¶ 16-20, 250 P.3d 1145, 1155-56 (2011). A.R.S. § 13-752(G) generally authorizes the admission of evidence concerning the circumstances of the crimes and the aggravating factors. *Id.* at ¶ 20. A jury cannot perform its duty to assess whether to impose the death penalty based upon each

juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating evidence "without knowing relevant facts about the circumstances of the murder and the aggravating factors, making aggravation-phase evidence directly relevant to whether the mitigation is 'sufficiently substantial to call for leniency.'" *Id.* at ¶ 16.

Rule 611 of the Arizona Rules of Evidence outlines that the Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to make those procedures effective for determining the truth and to avoid wasting time. The Arizona Rules of Criminal Procedure "are intended to provide for the just and speedy determination of every criminal proceeding." Ariz. R. Crim. P. 1.2. "Courts, parties, and crime victims should construe these rules to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare." *Id.* Rule 19.1 of the Arizona Rules of Criminal Procedure *generally* applies to all trials; however, it does not contemplate the procedure of a capital penalty phase *retrial*. And Rule 19.1(b) allows the Court to deviate from the prescribed order of trial.

As long as a trial court's procedures "are not inconsistent with applicable constitutional and statutory provisions, as well as our rules of court, '[t]rial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them.'" *Hedlund v. Sheldon*, 173

Ariz. 143, 146, 840 P.2d 1008, 1011 (1992); *see also State v. Goudeau*, 239 Ariz. 421, 449, ¶¶ 89, 92, 372 P.3d 945, 973 (2016) (citing the inherent authority of the trial court as referenced in *Hedlund* as a basis that authorized the trial court to allow the State to make 13 separate opening statements over the defendant’s objections). The Court accordingly may—and should—adopt the State’s proposed order of the penalty phase retrial. Of note, consistent with the above referenced authorities and A.R.S. § 13-751(E), the State, prior to the presentation of the Victim impact statements and any defense mitigation presentation in the penalty phase retrial of *State v. Noonkester* (CR2011-138281-001) was permitted to present the testimony of the case agent, who was subject to cross-examination, to contextualize for the jury the circumstances of the crimes.

Furthermore, “[t]he new jury shall not retry the issue of the defendant’s guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved.” A.R.S. § 13-752(K). And the Court has already ruled that Harris “may not present evidence and argue residual doubt to the jury concerning his conviction of first-degree murder in the penalty phase. However, this preclusion does not prohibit [Harris] from presenting evidence concerning the circumstances of the offense he believes the jury should consider as mitigating.” Minute Entry dated April 10, 2023. Moreover, on direct appeal from a defendant’s conviction, an appellate court reviews “the facts in the light most favorable to sustaining the verdicts and resolve[s] inferences against the defendant.” *State v. Burns*, 237 Ariz. 1, 20 ¶ 72, 344 P.3d 303, 322 (2015). These



limitations and principles further support the State's position that it be the party to first present the prospective jury with the evidence underlying Harris's convictions and capital aggravating circumstances. Harris, who cannot attack the sufficiency of his convictions or the original jury's findings of the capital aggravating circumstances, may, consistent with the Court's ruling, then present the circumstances of the crimes that he believes that the jury should consider as mitigating during his mitigation presentation.

For the foregoing reasons, the State requests the Court to adopt the State's proposed penalty phase retrial procedure.

Submitted August 28, 2023.

RACHEL H. MITCHELL  
MARICOPA COUNTY ATTORNEY

BY:



/s/ John J Uglietta  
Deputy County Attorney

Copy mailed/delivered August 28, 2023, to:

The Honorable Geoffrey H Fish  
Judge of the Superior Court

Alicia Dominguez  
Nikolas Forner  
620 W Jackson St Ste 4015  
Phoenix, AZ 85003  
Attorneys for Defendant

BY:



/s/ John J Uglietta  
Deputy County Attorney

# ATTACHMENT 1

## John Uglietta (MCAO)

---

**From:** Alicia Dominguez (OPD) <Alicia.Dominguez@Maricopa.Gov>  
**Sent:** Thursday, August 3, 2023 3:18 PM  
**To:** Kristin Larish (MCAO); John Uglietta (MCAO)  
**Cc:** Jessi Wade (MCAO); Jennifer Carper (MCAO); Alicia Dominguez (OPD); Nikolas Forner (OPD); Leann Griffin (OPD); Thomas Denning (OPD); Tom Leazotte (tklinvestigations@gmail.com); Brandon Farley (OPD)  
**Subject:** RE: Harris Penalty Phase Retrial; Compliance with the Court's 7/31/23 Request for the Parties to Consult

We understand and agree that the circumstances of the offense and aggravating factors will be presented to the jurors during this retrial of the penalty phase. We object to the state presenting those facts prior to the start of the defense presentation. We intend to present circumstances of the crime and aggravating factors that are relevant to helping the jury determine the appropriate punishment. None of your cited cases dictate that the state must go first or that the state must present the offense/aggravation evidence to the jurors. *Prince* states that “the state and the defendant may introduce evidence pertaining to the aggravating circumstances previously found.” 226 Ariz. 516, ¶ 18. We maintain that the defense can present the circumstances of the offense and aggravators, and the order of the penalty phase should proceed as the Arizona Supreme Court outlined in Rule 19.1(e).

---

**From:** Kristin Larish (MCAO) <LarishK@mcao.maricopa.gov>  
**Sent:** Thursday, August 3, 2023 9:42 AM  
**To:** Alicia Dominguez (OPD) <Alicia.Dominguez@Maricopa.Gov>; Nikolas Forner (OPD) <Nikolas.Forner@Maricopa.Gov>  
**Cc:** Kristin Larish <larishk@mcao.maricopa.gov>; John Uglietta <ugliettj@mcao.maricopa.gov>; Jessi Wade <wadej@mcao.maricopa.gov>; Jennifer Carper <carperj@mcao.maricopa.gov>  
**Subject:** Harris Penalty Phase Retrial; Compliance with the Court's 7/31/23 Request for the Parties to Consult

Thank you for the clarification. And, pursuant to the Court’s request that the parties confer regarding the retrial procedure, the State’s proposal is that prior to the start of your penalty phase evidence, the State present an outline of the evidence underlying the convictions and the aggravating factors previously found. The State would do so by presenting brief testimony from a case agent (presumably Detective Holmstedt) and perhaps Detective Martin to address the specific aggravating factors, including those factors supported by certified documents. In this retrial, the State may properly introduce evidence related to the crimes and the aggravating factors previously found proven. *State ex rel Thomas v. Granville (Baldwin)*, 211 Ariz. 468, ¶ 17 (2005) (“the jurors must assess whether to impose the death penalty based upon each juror’s individual qualitative evaluation of the fact of the case, the severity of the aggravating factors, and the quality of any mitigating evidence.”) In *Prince*, the Arizona Supreme Court specifically held that, in a penalty phase retrial, the State may introduce evidence of the crimes and “introduce evidence pertaining to the aggravating circumstances previously found.” *State v. Prince*, 226 Ariz. 516, 526, ¶¶ 16-20 (2011). “Construing § 13-752(G) as generally authorizing the admission of evidence concerning the circumstances of the crime and the aggravating factors thus preserves the entire statutory scheme’s constitutionality.” *Id.* at 527, ¶ 20. Jurors are unable to perform their duty to assess whether to impose the death penalty based upon each juror’s individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating evidence “without knowing relevant facts about the circumstances of the murder and the aggravating factors, making aggravation-phase evidence directly relevant to whether the mitigation is ‘sufficiently substantial to call for leniency.’” *Id.* at 526, ¶ 16.

As decided by the Court on 4/10/23, the defense will not be permitted to argue residual doubt: "Defendant may not present evidence and argue residual doubt to the jury concerning his conviction of first-degree murder in the penalty phase. However, this preclusion does not prohibit Defendant from presenting evidence concerning the circumstances of the offense he believes the jury should consider as mitigating." *State v. Moore*, 222 Ariz. 1, 22, ¶ 133 (2009) ("Once a person is found guilty beyond a reasonable doubt, claims of innocence or residual doubt do not constitute mitigation for sentencing purposes."). See also A.R.S. § 13-753(K) ("The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved."). Following this procedure and giving the State the opportunity to present a brief outline of the facts of the case and the aggravating circumstances found proven is consistent with due process as outlined in *Prince* and maintains fidelity with the fact that the State had the burden of proof in the prior two phases. In further support of the State's proposal, upon conviction, a reviewing court reviews "the facts in the light most favorable to sustaining the verdicts and resolve inferences against the defendant." *State v. Burns*, 237 Ariz. 1, 20-21, ¶ 72 (2015). The introduction of testimony by the case agent/detective regarding the circumstances of the offense and the aggravating factors prior to the defense's penalty phase evidence will also assist the jury, as they "may consider the circumstances of the crimes in its evaluation of mitigation." *State v. Garza*, 216 Ariz. 56, 68 (2007); see also *State v. Nordstrom*, 230 Ariz. 110, 115 (2012) (Evidence of defendant's four felony murders and that he was on parole at time of murders was relevant to whether defendant deserved leniency, even when defendant did not present any mitigation).

The State's proposal is also supported by Rule 1.2 of the Arizona Rules of Criminal Procedure and Rule 611 of the Arizona Rules of Evidence despite Ariz. R. Crim. P. 19.1(e)'s prescribed order of a penalty phase. Rule 19.1 generally applies to all trials. As long as a trial court's procedures "are not inconsistent with applicable constitutional and statutory provisions, as well as our rules of court, '[t]rial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them.'" *Hedlund v. Sheldon*, 173 Ariz. 143, 146 (1992). The court may accordingly adopt the State's proposed order of this penalty phase retrial. The State's proposal is also supported by *State v. Goudeau*, 239 Ariz. 421, 449, ¶¶ 89, 92 (2016), as the Supreme Court cited the inherent authority of the trial court as referenced in *Hedlund* as a basis that had authorized the trial court to allow the State to make 13 separate opening statements over the defendant's objections. Consistent with the above referenced authorities, and A.R.S. §§ 13-751(E) and – 752(G), the State was permitted to present truncated testimony of the case agent (subject to cross) to educate the jurors prior to victim impact statements and the start of the defense penalty phase evidence in the Noonkester penalty phase retrial, CR 2011-138281, the testimony occurring on April 16, 2019.

---

**From:** Alicia Dominguez (OPD) <[Alicia.Dominguez@Maricopa.Gov](mailto:Alicia.Dominguez@Maricopa.Gov)>

**Sent:** Monday, July 31, 2023 5:23 PM

**To:** John Uglietta (MCAO) <[ugliettj@mcao.maricopa.gov](mailto:ugliettj@mcao.maricopa.gov)>; Kristin Larish (MCAO) <[LarishK@mcao.maricopa.gov](mailto:LarishK@mcao.maricopa.gov)>

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<[tklinvestigations@gmail.com](mailto:tklinvestigations@gmail.com)>; Leann Griffin (OPD) <[Leann.Griffin@maricopa.gov](mailto:Leann.Griffin@maricopa.gov)>; Alicia Dominguez (OPD) <[Alicia.Dominguez@Maricopa.Gov](mailto:Alicia.Dominguez@Maricopa.Gov)>

**Subject:** RE: Harris Penalty Phase Retrial

Sure. Our position is that defense goes first in presenting evidence for the penalty retrial.

---

**From:** John Uglietta (MCAO) <[ugliettj@mcao.maricopa.gov](mailto:ugliettj@mcao.maricopa.gov)>

**Sent:** Monday, July 31, 2023 5:20 PM

**To:** Alicia Dominguez (OPD) <[Alicia.Dominguez@Maricopa.Gov](mailto:Alicia.Dominguez@Maricopa.Gov)>; Kristin Larish <[larishk@mcao.maricopa.gov](mailto:larishk@mcao.maricopa.gov)>

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**Subject:** RE: Harris Penalty Phase Retrial

Thank you, Alicia. Judge Fish asked the parties to confer and attempt to reach an agreement regarding which side would begin the presentation of evidence related to the circumstances of the crimes. Will you please confirm that what you wrote in the preceding email is your position in this regard, i.e., that the defense will go first?

---

**From:** Alicia Dominguez (OPD) <[Alicia.Dominguez@Maricopa.Gov](mailto:Alicia.Dominguez@Maricopa.Gov)>

**Sent:** Monday, July 31, 2023 1:12 PM

**To:** Kristin Larish (MCAO) <[LarishK@mcao.maricopa.gov](mailto:LarishK@mcao.maricopa.gov)>; John Uglietta (MCAO) <[ugliettj@mcao.maricopa.gov](mailto:ugliettj@mcao.maricopa.gov)>

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<[Leann.Griffin@maricopa.gov](mailto:Leann.Griffin@maricopa.gov)>

**Subject:** Harris Penalty Phase Retrial

We will start the testimony for the retrial set in October. We will send you a list of the witnesses that may be called during our penalty presentation. Thanks.



**Alicia Dominguez**

Attorney

**Office of the Public Defender**

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RESPONSE TO  
STATE'S  
MOTION TO  
ESTABLISH  
PENALTY PHASE  
RETRIAL  
PROCEDURE  
09/11/2023

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,

Plaintiff,

v.

KIPLING DAVID HARRIS (001),

Defendant.

No. CR 2016-132194-001DT

**RESPONSE TO STATE’S MOTION  
TO ESTABLISH PENALTY PHASE  
RETRIAL PROCEDURE**

(Honorable Geoffrey Fish)

Complex Capital Case

The Defendant Kipling Harris objects to the penalty phase procedure requested by the state in its motion. Mr. Harris asks this court to deny the state’s motion and follow the procedure outlined in the Arizona Rule of Criminal Procedure 19.1(e). A deviation from the procedure in Rule 19.1(e) would violate Mr. Harris’ constitutional rights under the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments of the United States Constitution and Article II, Sections 4, 15, and 24 of the Arizona Constitution. This motion is supported by the following Memorandum of Points and Authorities.



### **Memorandum of Points and Authorities**

Mr. Harris objects to the procedure requested by the state. The state's proposed procedure for the second penalty phase has no legal support. The state merely wants the opportunity to embellish the facts of the case and turn the jurors against Mr. Harris prior to hearing his mitigation evidence. Instead, Mr. Harris asks this court to follow the procedure outlined in Rule 19.1(e):

- 1) Preliminary Jury Instructions;
- 2) Mr. Harris' Opening Statement;
- 3) State's Opening Statement;
- 4) Victims' Statements;
- 5) Mr. Harris' Mitigation Presentation;
- 6) State's Penalty Phase Presentation;
- 7) Mr. Harris' Rebuttal Presentation;
- 8) Mr. Harris' Allocution;
- 9) Mr. Harris' Closing Argument;
- 10) State's Closing Argument;
- 11) Mr. Harris' Rebuttal Closing Argument;
- 12) Final Jury Instructions.

The state claims that the jury "will not have received a single piece of evidence to contextualize the convictions and the capital aggravating circumstances" prior to opening statements. *See* State's Motion P. 2. This assumption is procedurally false. First, each

juror will read the facts of the case in the jury questionnaire, including details of the four aggravating factors.

Second, during jury selection, jurors will be individually questioned about their ability to accept and respect the prior first degree murder verdicts of the first jury, and the four aggravating factors for each first degree murder. To ensure that each juror is willing to do that, details about the crime and the aggravators will need to be explored through voir dire. A juror cannot sit as a juror until that juror understands the crimes Mr. Harris has been convicted of and the aggravating factors that make him eligible for the death penalty.

Third, a detailed statement of the case can be read to the jurors with the preliminary jury instructions. This statement can include details of the crime, the identities and relationships of the victims, co-defendants, and investigators, and details of the aggravating factors.

Finally, the jurors will hear all the details of the case during opening statements. The opening statements will step the jurors through the facts of the case, as well as the facts supporting the aggravating factors. The state notes that opening statements are not evidence. However, sworn testimony is not required to provide the jurors with the details of the crime and orient them to everyone involved in the case, including victims, defendants, and investigators. Proving the circumstances of the case and the aggravating factors is not necessary because the jurors will have already accepted that they exist and are proven. The state has no burden and as such, no legal duty to present the circumstances of the crime and aggravating factors. At the end of opening statements, the jurors will have all the information they need to put context to the victims' statements.

The state claims that the jurors “must respect” the convictions and capital aggravating circumstances by the time that opening statements commence. *See* State’s Motion P.2. Yet the state’s recommended procedure has opening statements prior to the state’s presentation of the circumstances of the crime. *See* State’s Motion P.2. Therefore, this argument has no weight, and as explained above, the jurors will have ample information about the facts of the case by the time the victims make their statements.

The questionnaire, jury selection, jury instructions, and opening statements will orient the jurors to the facts of the case, the identities of the victims, how/why the crime was committed, and why the death penalty is a possible punishment. The state’s claim that they must present the circumstances of the crime and aggravating factors to “properly orient the jurors” is disingenuous and unwarranted. Neither *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468 (2005) or *State v. Prince*, 226 Ariz. 516 (2011) support the state’s proposed procedural order for this second penalty phase. *See* State’s Motion P. 3. In fact, *Baldwin and Prince* merely acknowledge that the jurors must assess whether to impose the death penalty based upon their individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence.” *Baldwin* at ¶ 17; *Prince* at ¶ 20. Neither of these cases hold that the state should present the facts of the case prior to victim statements or mitigation evidence.

The state next gives this court the authority to control the order of presenting evidence to ensure fairness, eliminate unnecessary delay, and protect the fundamental rights of the individual. *See* State’s Motion, P. 4. However, the state’s proposed procedure fails to protect Mr. Harris’ fundamental constitutional rights. *See* U.S. Const. amend. 5, 6,

8, 14; Ariz. Const. art. II, §§ 4, 15, 24. The state's plan, in essence, makes them the sole presenters of the circumstances of the crime, which is not authorized by law for a capital penalty phase trial. It also gives them the chance to turn the jurors against Mr. Harris based solely on the facts of the case, providing a bad first impression of Mr. Harris, so that when his mitigation evidence is presented, the jurors discount it. As for eliminating unnecessary delay, Mr. Harris calling a witness to provide details of the crime will expedite this second penalty phase much better than allowing the state that opportunity. As this court is aware from the first trial, the state's guilt phase presentation took three times longer than they claimed it would take, and the state's mitigation rebuttal presentation took twice as long as they claimed it would take. Allowing the state to present the facts of the case would cause nothing but delay.

The plain language of a rule is the 'best and most reliable index of [the rule's] meaning.' *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114 ¶ 7. The plain language of Rule 19.1(b), contrary to the state's argument, does not apply to the capital penalty phase procedure outlined in Rule 19.1(e), and the plain language of Rule 19.1(e) clearly describes the order of a capital penalty phase. If the supreme court wanted a different procedure for the second penalty phase of a capital trial, it could have addressed that in Rule 19.1 to change the order of the presentation of evidence, but it did not. Therefore, the plain language of the rule dictates the procedural order, which is the procedure Mr. Harris is requesting.

The state additionally attempts to tell this court that since a detective was allowed to testify prior to victim statements in *Noonkester*, this court should do the same thing. *See*

State's Motion, P. 5. However, in the retrial of the penalty phase in *State v. Joshua Villalobos* (CR2004-005523), the court followed the procedure outlined in Rule 19.1(e) with opening statements, victim statements, and defendant's mitigation presentation of evidence. *See State v. Villalobos*' iCIS Docket #774, Day 8 of Trial. The counter argument then is since the procedure in Rule 19.1(e) was followed in *Villalobos*, this court should also follow Rule 19.1(e). There is nothing special about Mr. Harris' second penalty phase that demands that this court modify the procedure set out in Rule 19.1(e). The plain language of the rule provides Mr. Harris with a fair and impartial trial and protects his constitutional right to due process. U.S. Const. amend. 5, 14; Ariz. Const. art. II, §4.

Finally, the state wants this court to believe that because an appellate court reviews cases with the intent to sustain the verdicts that the state should present the facts of the case. There is no correlation between the two issues. Just as the state claims Mr. Harris can present mitigating circumstances from the facts of the case after the state's presentation, the state, after Mr. Harris presents his evidence, can present facts of the case relevant to the jurors' life or death decision. How an appellate court reviews the case has no bearing on who presented the information and in what order the information is presented.

Therefore, Mr. Harris asks this court to enforce the plain language of Rule 19.1(e) and follow the procedure clearly described therein.

RESPECTFULLY SUBMITTED this 11th day of September 2023.

MARICOPA COUNTY PUBLIC DEFENDER

By: /s/  
ALICIA M. DOMINGUEZ  
NIKOLAS FORNER  
*Attorneys for Kipling Harris*

Copy of the foregoing motion  
electronically filed/delivered  
this 11th day of September 2023, to:

**Honorable Geoffrey Fish**  
Judge of the Superior Court  
South Court Tower  
175 W. Madison Street  
Phoenix, AZ 85003

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By: /s/  
ALICIA M. DOMINGUEZ  
*Deputy Public Defender*

MINUTE ENTRY  
- COMPLEX  
CASE  
MANAGEMENT  
CONFERENCE  
10/03/2023

HONORABLE GEOFFREY FISH

CLERK OF THE COURT  
Y. Zych  
Deputy

STATE OF ARIZONA

KRISTIN LARISH  
JOHN J UGLIETTA  
KIRSTEN VALENZUELA

v.

KIPLING DAVID HARRIS (001)

ALICIA MARIE DOMINGUEZ  
NIKOLAS D FORNER

CAPITAL CASE MANAGER  
JUDGE FISH

JESSICA ANN GATTUSO

COMPLEX CASE MANAGEMENT CONFERENCE

1:31 p.m.

Courtroom 7B SCT

|                       |                                                        |
|-----------------------|--------------------------------------------------------|
| State's Attorney:     | Jordan Uglietta, Kristin Larish and Kirsten Valenzuela |
| Defendant's Attorney: | Alicia Dominguez and Nikolas Forner                    |
| Defendant:            | Present                                                |
| NOK Counsel:          | Vanessa Kubota                                         |
| NOK:                  | Present                                                |

Court Reporter, Catherine Turner, is present.

A record of the proceedings is also made digitally.

The Court has received and reviewed the Complex Case Joint Case Management Report filed 09/26/2023.

Court and counsel discuss pretrial matters.



The Court has received Defendant's Motion to Dismiss Notice of Intent to Seek Death – Double Jeopardy and Due Process filed 09/22/2023.

THE COURT NOTES the Motion will be tickled for a Response and Reply to be filed in the timely matter and this Court previously granted the Motion to exceed the page limit (*See minute entry dated 09/28/2023, filed 10/02/2023*).

The Court has received and reviewed Defendant's Motion to Strike the Jury Panel if Underrepresentation filed 09/14/2023.

The Court has received and reviewed Defendant's Motion for Stay filed 09/20/2023.

LET THE RECORD REFLECT the Court denying Defendant's Motion to Stay via separate minute entry. (*See minute entry dated 09/22/2023, filed 09/25/2023*).

The State makes an oral Motion to Extend the Time to file the proposed jury questionnaire questions due to Trial being continued.

Argument is held.

IT IS ORDERED granting the State's oral Motion and extending the time to file the proposed jury questionnaire questions to **10/18/2023**.

Scheduling is discussed.

Court and Counsel discuss pretrial matters.

IT IS ORDERED setting the following deadlines:

- Defendant's expert report/ summary (*including report, summary and collateral disclosure, witness interviews, raw data*) is to be disclosed no later than **10/31/2023**.
- All defense mitigation disclosure (*non-expert*) is due no later than **10/20/2023**.

Discussion is held.

The State is to contact the Court Reporter for any requested transcripts from witness testimony from the penalty phase.

The Court has received and reviewed the State's Motion to Establish Penalty Phase Retrial Procedure filed 08/28/2023 and Defendant's Response filed 09/11/2023.

Discussion is held.

IT IS ORDERED setting Oral Argument (regarding *State's Motion to Establish Penalty Phase Retrial Procedure*) on **10/04/2023 at 1:30 p.m.** before this division.

IT IS FURTHER ORDERED resetting the Final Trial Management Conference from 11/04/2023 to **11/06/2023 at 10:30 a.m.** before this division.

IT IS ORDERED affirming the Trial date of **11/13/2023 at 10:30 a.m.** in this division.

#### JOINT CASE MANAGEMENT REPORTS:

No less than two working days before each Case Management Conference, the parties shall file a Joint Case Management Report. This report will inform the Court of:

1. The specific progress made since the last Case Management Conference in completing activities previously established by the Court and the parties;
2. Specific case preparation to be completed before the next Case Management Conference;
3. Witnesses who have been interviewed in the preceding month;
4. Witnesses who will be interviewed in the upcoming month;
5. Pending issues to be resolved.

IT IS ORDERED that no time be excluded.

LAST DAY REMAINS: **12/02/2023.**

IT IS FURTHER ORDERED affirming prior release orders.

2:07 p.m. Matter concludes.

MINUTE ENTRY  
- ORAL  
ARGUMENT  
10/04/2023

HONORABLE GEOFFREY FISH

CLERK OF THE COURT  
M. Mogel  
Deputy

STATE OF ARIZONA

KRISTIN LARISH  
JOHN J UGLIETTA  
KIRSTEN VALENZUELA

v.

KIPLING DAVID HARRIS (001)

ALICIA MARIE DOMINGUEZ  
NIKOLAS D FORNER

CAPITAL CASE MANAGER  
JUDGE FISH

JESSICA ANN GATTUSO

ORAL ARGUMENT

1:29 p.m.

Courtroom SCT 7B

|                       |                                        |
|-----------------------|----------------------------------------|
| State's Attorney:     | Jordan Uglietta and Kirsten Valenzuela |
| Defendant's Attorney: | Alicia Dominguez and Nikolas Forner    |
| Defendant:            | Present                                |

Court Reporter, Tara Kramer, is present.

A record of the proceedings is also made digitally.

This is the time set for Oral Argument re: State's Motion to Establish Penalty Phase Retrial Procedure.

LET THE RECORD REFLECT that the victims' next of kin are present and represented by counsel, Jessica Gattuso.

Discussion is held regarding outstanding pleadings.

Counsel for the State orally moves for an extension of time and to exceed the page limit to file its Response to the Defendant's Motion to Dismiss Notice of Intent to Seek Death-Double Jeopardy and Due Process, filed 09/22/2023.

IT IS ORDERED granting the State's request and extending the deadline to 10/16/2023.

IT IS FURTHER ORDERED granting the State's request to exceed the page limit.

Counsel for the State informs the Court that a pleading titled State's Notice to Supplement the Record Regarding Oral Argument 09/18/2023 has been efiled and provides the Court with a CD intended to be attached as an exhibit to the State's Notice.

State's exhibit 1 is marked for identification

IT IS ORDERED retaining State's exhibit 1 (exhibit to the State's Notice to Supplement the Record Regarding Oral Argument 09/18/2023) for appellate purposes.

Discussion is held regarding outstanding transcripts.

The Court has received and reviewed the State's Motion to Establish Penalty Phase Retrial Procedure filed 08/28/2023, the Defendant's Response to State's Motion to Establish Penalty Phase Retrial Procedure filed 09/11/2023, and the State's Reply to Harris' Response to the State's Motion to Establish Penalty Phase Retrial Procedure filed 09/19/2023.

Counsel present argument to the Court.

IT IS ORDERED taking the State's Motion to Establish Penalty Phase Retrial Procedure under advisement.

Discussion is held regarding procedural matters pertaining to exhibits.

IT IS ORDERED affirming the Trial date of 11/13/2023 at 10:30 a.m. before this division.

IT IS FURTHER ORDERED affirming the Final Trial Management Conference on 11/06/2023 at 10:30 a.m. before this division.

IT IS FURTHER ORDERED setting next Capital Case Management Conference (CCMC) on 10/25/2023 at 1:30 p.m. before this division.

JOINT CASE MANAGEMENT REPORTS:

No less than two working days before each Case Management Conference, the parties shall file a Joint Case Management Report. This report will inform the Court of:

1. The specific progress made since the last Case Management Conference in completing activities previously established by the Court and the parties;
2. Specific case preparation to be completed before the next Case Management Conference;
3. Witnesses who have been interviewed in the preceding month;
4. Witnesses who will be interviewed in the upcoming month;
5. Pending issues to be resolved.

LAST DAY REMAINS: 12/02/2023 (retrial of penalty phase).

IT IS ORDERED affirming prior custody orders.

2:01 p.m. Matter concludes.

MINUTE ENTRY  
- UNDER  
ADVISEMENT  
RULING /  
CAPITAL CASE  
10/23/2023

HONORABLE GEOFFREY FISH

CLERK OF THE COURT  
A. Gonzalez  
Deputy

STATE OF ARIZONA

KRISTIN LARISH  
JOHN J UGLIETTA

v.

KIPLING DAVID HARRIS (001)

ALICIA MARIE DOMINGUEZ  
NIKOLAS D FORNER  
EDWARD F NOVAK

CAPITAL CASE MANAGER  
JUDGE FISH

JESSICA ANN GATTUSO

#### UNDER ADVISEMENT RULING / CAPITAL CASE

This matter was taken under advisement regarding State's Motion to Establish Penalty Phase Retrial Procedure filed August 28, 2023. The Court has considered State's Motion, the Defendant's Response filed September 11, 2023, the State's Reply filed September 19, 2023, and the oral argument held October 4, 2023.

The parties are unable to agree on how the penalty phase should proceed to provide context and facts regarding the Defendant's convictions from the guilt phase and the aggravation phase of the prior trial.

A.R.C.P. Rule 19.1 lays out the process of trial. A.R.C.P. 19.1(e) covers the 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.

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 the instructions to jurors in the penalty phase states, “[jurors’ decisions] must be made in light of each juror’s individual, qualitative evaluation of the facts and circumstances of the case, the severity of the aggravating factors, and the quality or value of the mitigating factors found by each juror.” (See Mitigation Assessment and the Sentence Burden of Proof Capital RAJI). “Trial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them.” *Hedlund v. Sheldon*, 173 Ariz. 143 at 146 (1992). Arizona Rules of Evidence, Rule 611(a) states:

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) Make those procedures effective for determining the truth.
- (2) Avoid wasting time; and
- (3) Protect witnesses from harassment or undue embarrassment.

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. The Court’s focus in setting forth the procedure for the retrial is to assure each juror has the proper context and facts that were established in the prior jury’s findings of guilt and the aggravating factors. This Court finds 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). To that extent, the Court will adopt the State's proposed procedure, but will put a strict time limit on the evidence to be presented.

**IT IS ORDERED** the penalty phase will proceed as follows:

1. Preliminary Instructions.
2. Defendant's Opening Statement.
3. State's Opening Statement.
4. State's presentation of the circumstances of the crimes and the aggravating factors. This will be limited to a maximum of two trial days. The State shall call one witness only (presumed to be the case agent) to present this testimony and evidence. The witness shall be subject to cross-examination from the defense.
5. Victim Impact Statements.
6. Defendant's Mitigation.
7. State's Rebuttal.
8. Defendant's Sur-Rebuttal.
9. Defendant's Allocution.
10. Final Jury Instructions.
11. Defendant's Closing Arguments.
12. State's Closing Arguments.
13. Defendant's Final Closing Arguments.

**IT IS FURTHER ORDERED** the State shall disclose to the defense no later than **November 3, 2023** a specific description and list of the testimony and evidence to be presented in its presentation.