

Rosemarie Peña-Lynch  
Bar No 023400  
Mcpa. Cnty. Ofc. of Public Defense Svc.  
620 W. Jackson, Suite 3076  
Phoenix, AZ 85003  
(602) 506-7228  
[Rosemarie.Pena-Lynch@maricopa.gov](mailto:Rosemarie.Pena-Lynch@maricopa.gov)

Gary Kula  
Bar No. 012507  
Mcpa. Cnty. Public Defenders Ofc.  
620 W. Jackson, Suite 4015  
Phoenix, AZ 85003  
(602) 506-7711  
[Gary.Kula@maricopa.gov](mailto:Gary.Kula@maricopa.gov)

Steve Koestner  
Bar No. 011566  
Mcpa. Cnty. Ofc. of Legal Advocate  
222 N. Central, Suite 154  
Phoenix, AZ 85004  
(602) 506-4111  
[Steve.Koestner@maricopa.gov](mailto:Steve.Koestner@maricopa.gov)

Shannon Burns  
Bar No. 015976  
Mcpa. Cnty. Ofc. of Public Advocate  
106 E. Baseline Rd.  
Mesa, AZ 85210  
(602) 372-2815  
[Shannon.Burns@maricopa.gov](mailto:Shannon.Burns@maricopa.gov)

Sherri McGuire Lawson  
Bar No. 013605  
Mcpa. Cnty. Ofc. of Legal Defender  
222 N. Central, Suite 8100  
Phoenix, AZ 85004  
(602) 506-8800  
[Sherri.Mcguire@maricopa.gov](mailto:Sherri.Mcguire@maricopa.gov)

## ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Rule 19.1, Arizona  
Rules of Criminal Procedure

Supreme Court No. R-25-0010

Joint Comment by the Directors of the  
Maricopa County Indigent Defense  
Agencies

The penalty phase of a capital trial is unique from any other proceeding in a criminal prosecution. In this setting, a jury is asked to determine whether a defendant convicted of first-degree murder shall be sentenced to life in prison or death. This determination has been described as “an awesome responsibility” by the United States Supreme Court (*Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985)) and this Court has acknowledged

that defendants facing the possibility of death “are accorded heightened procedural safeguards.” *State v. Hildalgo*, 241 Ariz. 543, ¶ 9 (2017).

Because of the potential that a defendant could be sentenced to death, and the defendant has the burden of proving their proposed mitigation by a preponderance of the evidence (Ariz. Rev. Stat. Ann. § 13-751(C)), the current version of Rule 19.1(e) permits the defense to open and close the presentation of evidence. This does not change when a defendant pleads guilty or upon a retrial of a capital penalty phase. The Petition to adopt a new subsection that allows the state to begin the presentation of evidence in a penalty phase retrial, or a penalty phase after a guilty plea, fundamentally changes the jury presentation and eliminates any advantage of opening and closing the presentation of evidence. The proposed rule change triggers challenges to what can be presented and when that evidence is presented. Because the current rule appropriately addresses these issues, the Maricopa County indigent representation offices oppose the Petition.

The Maricopa County indigent representation offices (IR) collectively handle most, if not all, capital cases filed in Maricopa County. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate (OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in opposition to the proposal to adopt a new subpart to Rule 19.1, and this comment outlines the concerns and reasons why the proposed rule change should not be adopted.

**I. In every other trial proceeding of a criminal case, the party carrying the burden is permitted to open and close the presentation of evidence. That should remain the case in a penalty phase retrial, or a penalty phase that occurs after a guilty plea.**

In a criminal trial, the state must prove a defendant guilty of the charged crime beyond a reasonable doubt. Ariz. Rev. Stat. Ann. § 13-115(A). Accordingly, the state can open and close the presentation of evidence. Ariz. R. Crim. P. 19.1(b). In a capital aggravation proceeding, the state has the burden of proving the existence of a capital aggravator beyond a reasonable doubt. Ariz. Rev. Stat. Ann. § 13-751(B). Again, the state can open and close the presentation of evidence. Ariz. R. Crim. P. 19.1(d). Although a defendant need not prove a life sentence is the appropriate sentence, in a penalty phase, the defendant does have the burden of proving the existence of mitigating circumstances by a preponderance of the evidence. Ariz. Rev. Stat. Ann. § 13-751(C). Like the other trial proceedings, the party with a burden in the penalty phase in a capital case, which is the defendant, can open and close the presentation of evidence. Ariz. R. Crim. P. 19.1(e). This should not change simply because the penalty phase is a retrial or because a defendant chose to plead guilty.

A party carrying a burden starts the proceeding from behind. They must present evidence to convince jurors that they have met a certain threshold before a juror is legally permitted to find in their favor. The longstanding process in that situation is to permit the party carrying the burden to open and close the presentation of evidence. *See* Ariz. R. Crim. P. 19.1. There is an advantage to opening and closing the presentation of evidence. The party with the burden gets the opportunity to present their evidence in support of their

position prior to the opposing party presenting evidence countering this narrative. Then after the opposing party presents their evidence, the party with the burden has the final opportunity to rebut the evidence. The process permits the party with the burden to have the first and last opportunity to present evidence. The advantage of getting the first and last opportunity to present evidence to the jury has always been provided with the recognition that this is the appropriate process when a party is placed in a position of overcoming a burden. The proposed addition to Rule 19.1 fundamentally changes that balance when it permits the state to open with the presentation of evidence when the state carries no burden in the penalty phase of a capital trial.

The offense and aggravating circumstances will always include graphic and gruesome evidence related to the murder of a victim. The proposed addition of the new section in the petition will not address the issues it aims to correct but instead gives the state an advantage by being able to present this emotionally charged evidence first in a proceeding in which it carries no burden. For that reason, this Court should not adopt the proposed addition to Rule 19.1.

**II. The current rule provides jurors with the necessary background about the convictions and aggravating circumstances prior to the presentation of mitigation evidence.**

The Petition puts forward the need to inform jurors of the crimes prior to the victim impact statements as one reason for the needed change. However, there are ample opportunities within the current rule to inform jurors of the circumstances of the offense and aggravating circumstances prior to the presentation of evidence. Any need to put the facts of the convictions and aggravating circumstances in context to the jurors before the

presentation of victim impact evidence is already available under the current rule. First, the convictions and aggravating circumstances can be addressed in the juror questionnaires and voir dire. The trial court can include details about the facts of the case and aggravating factors in the jury questionnaire, like the trial court did in the *Harris* case cited in the Petition. Appendix A –Juror Questionnaire in Harris penalty phase retrial, p. 7-8. Second, the trial court can include the prior convictions and aggravating circumstances in the preliminary jury instructions. This is what the trial court did in *Harris*. Appendix B – Penalty Phase Preliminary Jury Instructions for the Harris penalty phase retrial. The judge read over a page of instructions detailing the convictions and aggravating circumstances to the jury prior to opening statements. Appx. B, p. 4-5. Finally, if additional facts are needed to orient the jury prior to the presentation of evidence, both parties are given the opportunity to make opening statements. In opening statements, a party can discuss any evidence they have a good faith belief will be introduced during the proceeding.

No need exists to create an additional process allowing the state to present evidence related to the facts and circumstances of the offense and aggravating circumstances. There are plenty of opportunities to put any necessary facts in context to the jurors prior to the presentation of evidence. The need to put the convictions and aggravation in context is unnecessary as demonstrated by the state’s conduct in *Harris*. The trial court in *Harris* permitted, with some limitations, the process the petition is seeking to add to the rule. See Petition Appendix C, p. 33. However, in *Harris*, the state chose not to present evidence of the circumstances of the crimes and aggravating factors after their opening statement and prior to the victim impact statements, thereby demonstrating that this Petition change is

unnecessary. Appendix C – Minute Entries from Harris penalty phase retrial. The rule, through jury questionnaires, voir dire, jury instructions, and opening statements, already permits the opportunity to present the jury with any necessary context prior to the presentation of evidence and the added language put forward in the Petition is unnecessary.

### **III. The proposed rule change will only increase litigation.**

The Petition for the adoption of a new section to Rule 19.1 recognizes the trial court's inherent authority to modify the process outlined by the rule. As long as trial courts retain that authority, potential litigation seeking a different process exists. The addition of the new section to Rule 19.1 will not eliminate the trial court's authority but will inevitably lead to additional litigation.

At the outset, the proposed addition to the rule invites litigation on the parameters of what evidence the state can present in this new section. The proposed addition to Rule 19.1 also places no limitation on what the state can present in this section on circumstances of the offense and aggravating circumstances. In the context of a penalty phase retrial, if the state is permitted to introduce evidence that was not presented to the prior jury, then it increases the chance that this new section turns into another trial on the same offenses and aggravating circumstances of the prior jury's verdicts. Having a section where there's a possibility of newly contested evidence related to the offense and aggravating circumstances would be contrary to the law requiring the new jury to not retry the issue of guilt or aggravating circumstances. Ariz. Rev. Stat. Ann. § 13-752(K). Under the requested rule change, there will be challenges as to what evidence is relevant and admissible as "facts and circumstances of the offense" which will require pretrial litigation.

Under the current rule, the state is permitted to present any evidence that demonstrates a defendant should not be shown leniency after the defense presentation of mitigation evidence. Ariz. R. Crim. P. 19.1(e); Ariz. Rev. Stat. Ann. § 13-752(G). All this potential litigation is avoided by simply following Rule 19.1(e)(5), which allows the state to present all relevant evidence, including facts and circumstances of the offense and aggravating circumstances, when they present their evidence related to mitigation.

Some of this litigation can be seen in the *Harris* case from Appendix C to the Petition. Even though the trial court allowed the state to make a presentation of the circumstances of the crimes and aggravating factors, there was litigation related to the scope of permissible evidence in that section. The trial court ultimately limited the presentation by the state to two days, one witness, and required the state to disclose “a specific description and list of the testimony and evidence to be presented in its presentation.” Petition Appendix C, p. 33. Under the Petition’s suggested procedure, the trial court would now have the additional task of determining the relevant factors for the presentation of evidence “in support of the facts and circumstances of the offense and aggravating circumstances” prior to the state’s presentation of any evidence relevant to mitigation. There is no additional litigation if the state presents all their relevant evidence in a single section, which under the current rule is appropriately set after the defense presentation of mitigation evidence.

#### **IV. Conclusion**

The Petition seeks to provide an advantage to the State in a capital penalty phase retrial that is contrary to established procedures in every other criminal trial proceeding.

Because the defense carries the burden of proving mitigation, the defense should be permitted to open and close the presentation of evidence in a capital penalty phase retrial. The jury can be provided with any necessary context related to the circumstances of the offense and aggravating circumstances without permitting the state to begin with a limitless presentation of evidence. If clarifying the process that should be followed in penalty phase on retrial, or after a guilty plea, is needed by way of rule change, then the only modification to the rule that is necessary would be:

Rule 19.1 Conduct of Trial

(a)-(d) [No Change]

(e) Penalty Phase in a Capital Case; **Penalty Phase in a Capital Case on Retrial or After Plea of Guilty.**

[No Change]

This would provide guidance to trial courts that the same process should be followed in a retrial or after a guilty plea. The added section sought by the Petition will remove a procedural advantage in a setting which this Court has agreed that defendants should be provided with “heightened procedural safeguards.” For these reasons, the Indigent Defense Offices in Maricopa County recommend this Court reject the proposed addition to Rule 19.1.

Respectfully submitted this day of April 30, 2025.

By /s/ Rosemarie Peña-Lynch  
Rosemarie Peña-Lynch, Director  
Mcpa. Cnty. Ofc. of Public Defense Svc.

By /s/ Gary Kula  
Gary Kula, Director  
Mcpa. Cnty. Public Defenders Ofc.

By /s/ Steve Koestner  
Steve Koestner, Director  
Mcpa. Cnty. Ofc. of Legal Advocate

By /s/ Shannon Burns  
Shannon Burns, Director  
Mcpa. Cnty. Ofc. of Public Advocate

By /s/ Sherri McGuire Lawson  
Sherri McGuire Lawson, Director  
Mcpa. Cnty. Ofc. of Legal Defender