

Hon. Ronald Reinstein (ret.)  
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**IN THE ARIZONA SUPREME COURT**

|                              |   |                            |
|------------------------------|---|----------------------------|
| IN THE MATTER OF:            | ) | Supreme Court Number       |
|                              | ) | R-25-0010                  |
| PETITION TO AMEND RULE 19.1, | ) |                            |
| ARIZONA RULES OF CRIMINAL    | ) | Comment & Motion to Permit |
| PROCEDURE                    | ) | Late Filing                |
| _____                        | ) |                            |

**Motion to Consider this Late Comment.** The undersigned Chair of the Capital Case Oversight Committee (“Oversight Committee”) requests the Court to consider this late comment. Due to the desirability of filing this comment as promptly as possible, the full Oversight Committee has not considered a draft comment, and undersigned is filing this comment in his individual capacity.

Undersigned anticipated that the issues raised by petition number R-25-0010 would be fully briefed and addressed in comments filed by prosecution and defense agencies, and undersigned acknowledges that the Maricopa County Indigent Defense Agencies filed a comment. A comment was not filed, however, by an Arizona prosecution agency or prosecutorial organization—not by any County Attorney, not by the Arizona Prosecuting Attorneys Advisory Council (“APAAC”),

and not by the Arizona Attorney General, who apparently is not the named petitioner in this matter.

Therefore, stakeholders on both sides of a capital case have not filed comments, as undersigned initially anticipated. It's also noteworthy that the State Bar of Arizona filed a short response to the petition on the May 1 comment deadline suggesting that the Oversight Committee comment on the issue. For these reasons, undersigned moves this Court to accept this late-filed comment.

**Summary of the petition.** This petition proposes to amend Criminal Rule 19.1 (“conduct of trial”) by adding a new section (f) (“penalty phase in a capital case on retrial or after plea of guilty”). The petition contends that the current rule omits a procedure for a penalty phase trial that is heard by a jury (1) other than the one that heard the guilt and aggravation phases, or (2) when the defendant has pled guilty to the charged offense and admitted the aggravating circumstance. In these situations, the penalty phase jury lacks detailed information concerning the murder or the aggravating circumstances. The petition characterized these situations as “reoccurring issues.”

**Flaw in the petition.** The petition on its face is flawed.

The petition at page 1 says,

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.”

The flaw is that the version of proposed new Rule 19.1(f) in Appendix B is not a clean version of the redlined text in Appendix A. Rather, the two versions are substantially different. Compare the first two subparts of the respective versions.

**Appendix A:**

- (1) the defendant may make an opening statement;
- (2) the State may make or defer an opening statement; ...

**Appendix B:**

- (1) the State may make an opening statement;
- (2) the defendant may make or defer an opening statement; ...

This difference is not inconsequential. The contention about “who goes first” is at the heart of this issue. Yet the redlined and clean versions propose diametrically opposite language in these two subparts. Moreover, the difference is carried over into subsequent subparts of proposed new section (f). For example, subpart 6 of the Appendix A version would permit the State to make an opening statement if it had been deferred, whereas subpart 5 in the Appendix B version accords that opportunity to the defendant. In the Appendix A version, subpart 7 gives the State a right of rebuttal; in the Appendix B version, subpart 7 gives the defendant the right to rebuttal. Note also that the Appendix A version has 10 subparts, whereas the Appendix B version has 9 subparts.

The petition represents that Appendix B a clean version of the redline version in Appendix A. The two versions should therefore be substantively identical, yet they are not. Undersigned respectfully submits that stakeholders should not be required to speculate on which version Petitioner intended to submit.

**General comments regarding Rule 19.1(e).** Undersigned provides the following general comments concerning the issue raised by the petition. Initially, undersigned agrees that judges who conduct capital case trials are addressing the issue raised by the petition in different ways.

The starting point, as noted in the comment filed by the Maricopa Defense Agencies, is language in A.R.S. § 13-751(C):

The burden of establishing the existence of the mitigating circumstances included in subsection G of this section is on the defendant. The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence. [Emphasis added.]

Arguably, a party might contend that this burden of proof applies only to the mitigating circumstances that are specifically enumerated in § 13-751(G) and not to non-statutory mitigating factors. See again § 13-751(G):

The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following [list of statutory mitigating circumstances]: ... [Emphasis again added.]

During its discussions of proposed revisions to the penalty phase jury instructions, the Capital Jury Instructions Workgroup, an Oversight Committee subgroup, was mindful that there are both statutory and non-statutory mitigating factors. Whether that distinction influences the issue of which party has the burden of proof, however, might be immaterial, because when the jury considers its penalty phase verdict, it must consider all mitigation evidence, regardless of which party presented it, even if the defendant presented no mitigation evidence at all, or whether the mitigation evidence concerns a statutory or non-statutory factor.

Consistently with the burden of proof, current Rule 19.1 distinguishes the sequence of trial during the post-guilt phases of a capital case. Under section (d) (“aggravation phase in a capital case”), the State, which has the burden of proof during the aggravation phase, makes the first opening statement and offers evidence before the defendant does. Conversely, under section (e) (“penalty phase in a capital case”) of the current rule, the defendant in a penalty phase makes the first opening statement and offers evidence before the State has an opportunity to do so. As a general principle of law, the party with the burden of proof has the first opportunities to address the jury, to present evidence, to offer rebuttal, and to close the argument. Current Rule 19.1(e) regarding penalty phase trials follows this general principle.

Undersigned recognizes that there might be occasions where the procedure in Rule 19.1(e) does not fit the needs of a particular case. But the procedure in Rule 19.1(e) is not inflexible. Rule 19(a) (“generally”), subpart (2), provides:

*Modification.* With permission of the court, the parties may agree to a different method of proceeding than described in this rule.

And as noted at page 6 of the comment from the Maricopa County Indigent Defense Agencies:

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.

When the parties have disagreements about the order of proceeding in a penalty phase trial, Rule 19(a)(2) permits them to fashion a mutually acceptable procedure. In other circumstances, the penalty phase judge, after considering the parties’ input, can direct the procedure that the parties must follow.

**Comment concerning the proposed renumbering of current Rule 19.1(v).**

Several members of the Oversight Committee, including the undersigned, served on the Court’s Committee on Criminal Rules Concerning Victims. That Committee filed a rule petition, R-22-0035, and this Court subsequently adopted that Committee’s proposed amendments. These amendments relocated each provision in a Criminal Rule concerning victims and victims’ rights into a new section (v) of the respective rule, thereby establishing a uniform location throughout the rules where a victim, an attorney, or a judicial officer could readily find a victim’s rights

regarding a particular proceeding. The numbering of Rule 19.1(v) is not a typographic error. Rather, it was intended. The suggestion that this provision revert to a newly renumbered section (h) would make that section an outlier among the entire set of rules and would undermine a meaningful and well-conceived numbering scheme that benefits crime victims and others. Regardless of the disposition of the current petition, the Court should retain Rule 19.1(v) as it is currently designated.

**Conclusion.** Petition number R-25-0010 is flawed, and undersigned requests this Court to deny the petition without prejudice. Alternatively, the Court should continue the petition, which would allow the Petitioner to clarify the text of the proposed amendment to Rule 19.1, and then set a comment period for the clarified proposal.

Respectfully submitted this 8<sup>th</sup> day of May 2025.

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Hon. Ronald Reinstein (ret.)

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