Hon. Ronald Reinstein (ret.), Chair
Capital Case Oversight Committee
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SUPREME COURT OF ARIZONA

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| PETITION TO AMEND RULE 19.1, ARIZONA RULES OF CRIMINAL PROCEDURE | ) ) ) ) ) ) ) | Supreme Court No. R-25-0010<br><br>**STATUS REPORT FROM THE CAPITAL CASE OVERSIGHT COMMITTEE and REQUEST TO DEFER CONSIDERATION** |

The Capital Case Oversight Committee ("Committee") is submitting this status report with a request that the Court defer consideration of R-25-0010 until a later Rules Agenda, which would allow the Committee additional time to prepare a recommendation.

**I. Background.** A.R.S. § 13-751(D) in part requires admission at a penalty phase trial of "evidence that is admitted at trial and that relates to any aggravating or mitigating circumstance …if the trier of fact considering that evidence is the same trier of fact that determined the defendant's guilt …" Section (E) of that statute requires the penalty phase trier of fact to "take into account the aggravating and mitigating circumstances that have been proven." This process readily applies when the penalty phase jury also sat for the guilt and aggravation phases. But what if that jury did not sit for the prior phases? Such a scenario could occur when:

- The first jury hung in the penalty phase, or there was otherwise a mistrial during the penalty phase.

- The defendant pled guilty and admitted the aggravating circumstances, thereby foregoing trials on guilt and aggravation.

- The defendant's sentence was reversed on appeal, and the case was remanded for a penalty phase retrial.

- A new penalty phase trial was ordered in state or federal post-conviction proceedings.

- A change in the law required a new penalty phase trial.

**II.** **__Discussion.__** In these circumstances, a new penalty phase jury is "cold," that is, it has not heard evidence concerning guilt or aggravation to provide context for its penalty phase determination. How does the new jury acquire that evidence?

The procedure is currently addressed on an ad hoc basis. Occasionally, the parties agree to a procedure. Otherwise, the trial judge enters an order that prescribes the procedure. There is no assurance these procedures will be uniform, raising the prospect of due process and equal protection issues. Rule petition No. R-25-0010 sought to codify the process. Because the petition was internally inconsistent, the

Court in August 2025 continued the matter, and in the interim, referred it to the Capital Case Oversight Committee for review and a recommendation.

Undersigned Chair established a workgroup to propose amendments. The workgroup met several times and exchanged multiple drafts. Earlier this month, it formulated two alternative versions. The two versions contained identical text for the proposed amendments to Rule 19.1(f), but they varied in the proposed comments to those amendments. Meanwhile, other Committee members proposed an alternative version, and then variations of that version. Most members agreed that Rule 19.1 should specify a process for a penalty phase retrial, but the Committee meeting on April 24, 2026, concluded with no consensus regarding that process.

The issues implicated by a penalty phase retrial are challenging and not easily resolved. They include the following:

- Should the new penalty phase jury be informed of the underlying guilt and aggravation evidence at the beginning of a penalty phase retrial, or later, when the State presents mitigation rebuttal evidence? If the latter, and notwithstanding appropriate instructions, might the jury construe the State's presentation as new aggravating circumstances?

- If information is provided to a jury at the beginning of the penalty phase retrial, should it be provided as evidence, i.e., by a prosecution witness, such as a case agent, with accompanying opportunities for defense cross-examination?

- Would the parties' stipulated summary of the guilt and aggravation phase evidence be an adequate alternative to a witness' testimony?

Even if it would be, is it realistic to believe that prosecutors and defense counsel would agree on a stipulation?

- If the parties nonetheless agree to a summary, rather than a stipulation, would the jury be permitted to consider that summary as evidence, or would the trial judge instruct the jury that the summary is not evidence?

- If the judge prepares a summary (assuming the judge conducted the prior phases and was familiar with the facts) and reads it to the jury, would that constitute an improper comment on the evidence?

- How does any proposal reduce the possibility of residual doubt, that is, a juror second-guessing the prior jury verdicts, notwithstanding an instruction to accept the prior verdicts as established?

- How does any proposal meet the requirements of due process and equal protection, while also being sufficiently flexible to accommodate a complex case, e.g., one with multiple victims, crime scenes, extensive expert testimony, or a massive amount of circumstantial evidence?

**III. Request That the Court Defer Consideration of R-25-0010.** With its mix of experienced prosecutors, defense counsel, a victim advocate, and judicial officer members, undersigned believes that the Oversight Committee is well-suited for developing a consensus recommendation on these penalty phase retrial issues. And the workgroup and Committee members are willing to have further conversations toward that goal. However, they need more time to meet and discuss these and other relevant questions.

This matter is presently set for the Court's consideration on the August 2026 Rules Agenda. Undersigned is accordingly requesting that the Court defer consideration of R-25-0010 to a future Rules Agenda.

RESPECTFULLY SUBMITTED this 30th day of April 2026.

By _/s/___________________________
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Capital Case Oversight Committee

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