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ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend Rule 19.1, Arizona
Rules of Criminal Procedure

Supreme Court No. R-25-0010

Comment by the Maricopa County Public
Defender

The United States Supreme Court decided *Ring v. Arizona* on June 24, 2002.¹ The Court held that a trial judge determining the presence of aggravating factors for the imposition of a death sentence to be a violation of a defendant's Sixth Amendment right to a jury trial.² After the *Ring* opinion, this Court implemented Rule 19.1(d) of the Arizona Rules of Criminal Procedure that, with a few later additions, closely mirrors the current version.³ Since that time, trial courts in Arizona have conducted penalty phase retrials with a jury other than the jury who decided the defendant's guilt.

For over 20 years, trial courts have dealt with the issue outlined in the petition without the need to implement a new order specifically for a second penalty phase or after a guilty plea. The original petition did not elaborate with any specificity on the problems

¹ 536 U.S. 584 (2002).

² *Id.*

³ Rule 19.1. Conduct of trial, 17 A.R.S. Rules Crim. Proc., Rule 19.1, amended and effective Oct. 11, 2002.

with the retrials or penalty phases after a guilty plea that demands a change to Rule 19.1. Much like the original petition, the language in the modified amendments fundamentally changes the dynamics of the presentation of evidence to the disadvantage of the defendant, who is the only party that carries a burden in this phase of trial. As long as trial courts retain the authority to modify the order outlined in Rule 19.1(e), any change can be made based on the specific circumstances and unique needs of each case. This allows for specific modifications based on specific case needs instead of an overarching rule that fundamentally changes the order of the presentation of evidence.

This comment provides the court with additional information directly related to the modified amendments attached to this Court’s Order Continuing Petition’s Consideration and Reopening for Public Comment Modified Amendments to Rule 19.1 of the Rules of Criminal Procedure (“modified amendments”). The information provided in the Joint Comment by the Directors of the Maricopa County Indigent Representation Agencies to the original petition is incorporated in this comment and applies to the modified amendments and should be considered by this Court but will not be repeated in detail here.⁴

Founded in 1965, the Maricopa County Public Defender’s Office (MCPD) is the largest indigent-representation organization in both Maricopa County and the State of Arizona. Over the last several decades, the Office’s Capital Unit has represented hundreds of defendants at all stages of capital litigation. The Capital Unit is uniquely positioned to offer its perspective on the pending rule-change petition; the attorneys in Capital have been

⁴ See Appendix A.

operating under this rule from its inception 20 years ago to the present. MCPD submits this comment in opposition to the Modified Amendments to Rule 19.1 of the Rules of Criminal Procedure filed November 26, 2025. This comment and the comment filed on the original petition outline the concerns and reasons why a proposed rule change should not be adopted.

I. There is no current need to modify the rule or change the order of the trial.

The possibility of penalty phase retrials to a jury has been the law since 2002.⁵ Later that year, this Court put forward the rule for the order of presentation during that phase of trial.⁶ So, for every remanded case with a vacated death sentence, and every case that resulted in a hung jury in the first penalty phase, the trial courts have operated under a very similar version of the current rule. The issue of the presentation of evidence in the penalty phase retrial, or after a guilty plea, is not a problem the trial courts have failed to resolve. No appellate opinion has addressed an issue with the order of the presentation of evidence in a penalty phase retrial, and no systemic problem has been raised or addressed by this Court's precedent.

As pointed out in Hon. Ronald Reinstein's (ret.) comment to the original petition, the rule change petition was brought forward by a single attorney general. The petition was not supported by any County Attorney, the Attorney General, or the Arizona Prosecuting Attorneys Advisory Council. There wasn't a single comment in support of adopting the petition at the time. No interested party identified, or expanded upon, the problem the

⁵ 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 (S.B. 1001) (WEST).

⁶ See footnote 3.

petition broadly claimed. While the petition finds problematic the “ad hoc resolutions being adopted by the trial courts,” what the petition labels a problem could easily be labeled as a benefit to the participants that the trial court was able to hear argument and determine the best order for the penalty phase specific to that case. The petition is a solution in search of a problem.

There is no language in the modified amendments that would eliminate the trial court’s discretion to modify the order of the penalty phase, discretion they’ve exercised when needed for 20 years. So, changing the rule to allow the state to present evidence first won’t eliminate future litigation over the order of the penalty phase and puts forward an order that fundamentally changes the order of the presentation of evidence.

As described in our prior comment, the capital penalty phase is unlike any other trial in the criminal setting. The jury is asked to determine whether an individual should be sentenced to life in prison or death. To do this they are presented with evidence of mitigating circumstances, which includes the circumstances of the offense.⁷ Both the defendant and the state can present any evidence of mitigating circumstances.⁸ The state can also present “any evidence that demonstrates that the defendant should not be shown leniency including any evidence regarding the defendant’s character, propensities, criminal record or other acts.”⁹ Allowing the defendant to open the presentation of evidence doesn’t preclude the state from introducing relevant evidence of the convictions or aggravating circumstances during their presentation of evidence.

⁷ A.R.S. § 13-751(C), (G).

⁸ A.R.S. § 13-752(G).

⁹ *Id.*

In contrast to the original petition, the modified amendments attached to this Court's Order Continuing Petition's Consideration appear to give the state three options. The state can (1) make an opening statement, (2) defer opening statements, and prior to victim statements and the defense's mitigation presentation offer evidence in support of the facts and circumstances of the offense and aggravating circumstances found by the prior jury, or (3) defer both opening statements and offer of evidence. The modified amendment infers that opening statements or an offer of evidence will sufficiently provide the jury with any information they may need about the prior convictions and aggravators before the defense presentation of evidence. If opening statements can be sufficient to provide the jury with information on the circumstances of the crime and aggravators, then there is no need for the state to present evidence first.

As stated in our previous comment to the original petition, there are ample opportunities within the current rule to inform the jury about the circumstances of the offense and aggravating factors prior to the defense's mitigation presentation, including juror questionnaires, juror voir dire, preliminary jury instructions, and opening statements.¹⁰ All of these steps prior to the victims' impact statements and defense presentation put the facts of the convictions and the aggravating circumstances in context for the jurors prior to victim statements.

Additionally, the statutes regarding capital trials do not give the state a monopoly on the presentation of evidence for the conviction or aggravating circumstance in a penalty

¹⁰ See Appendix A, p. 4-6.

phase. Circumstances of the crime can be mitigating, or assist the defense in establishing a nexus between the mitigation and the crime, and defense counsel may present those circumstances to the jury. Creating a nexus between the defendant's mitigation and the crime is something the defense consistently attempts to do because the jury is instructed it can "impact the quality and strength of the mitigation evidence."¹¹

After the defense presents their evidence, the state may present relevant evidence in support of the circumstances of the crime and aggravating factors found by the prior jury. By the time the jury retires to deliberate, they will have all the relevant evidence either party wishes to introduce. Nothing warrants the state to begin the presentation of evidence in this phase. The current rule strikes the appropriate balance for the presentation of evidence and allows both parties to present all relevant evidence.

II. The modified language fails to account for the party with the burden in the penalty phase.

The previous comment filed by Maricopa County IR to the original petition discussed at length the problem with allowing the state to present evidence first when they carried no burden at the penalty phase.¹² The modified amendments face the same problem as they permit the state, if they defer opening statements, to start the presentation of evidence when they carry no burden.

The defendant has the burden of proving mitigating circumstances by a

¹¹ RAJI, Capital Case 2.3 – Mitigation "You are not required to find there is a connection between a mitigating circumstance and the crime committed in order to consider the mitigation evidence. Any connection or lack of connection may impact the quality and strength of the mitigation evidence."

¹² See Appendix A, p. 3-4.

preponderance of the evidence.¹³ A.R.S. § 13-752(P) addresses the defendant’s burden and states “[i]f the defendant bears the burden of proof, the issue shall be determined in the penalty phase.” Finally, jurors are instructed that “[i]f you unanimously agree there is no mitigation, or mitigation is not sufficiently substantial to call for leniency, then you shall return a verdict of death.”¹⁴

The universal legal principle that the party with the burden gets to start the presentation of evidence should apply in a penalty phase retrial. The only burden in the penalty phase lies with the defendant, and this Court’s rule has always permitted the defendant to begin the presentation of evidence. The fact that a death sentence was remanded, that a prior jury was unable to reach a unanimous verdict on the sentence, or a defendant pled guilty to the charges, is not significant enough to alter the premise that the party with the burden begins the presentation of evidence. While most states adopted a two-stage trial to determine capital sentencing, Arizona’s capital proceedings are unique by having a three-phase trial where the defendant carries a burden in the final phase. When this Court fashioned a rule to deal with the order of a penalty phase, this Court allowed the defendant to begin the presentation of evidence. That should not change.

If the proposed amendments were adopted, Arizona would stand alone in placing a burden on the defendant but allowing the state to present evidence first.¹⁵ Not only would

¹³ A.R.S. § 13-751(C).

¹⁴ RAJI Capital Case 2.6 – Mitigation Assessment and the Sentence Burden of Proof; *See also State v. Rushing*, 573 P. 3d 72, ¶ 39 (Ariz. 2025) (citing A.R.S. § 13-751(E)) (“Jurors were required to impose the death sentence if they found ‘no mitigating circumstances sufficiently substantial to call for leniency.’”).

¹⁵ Other than Arizona, there are 5 states that allow a penalty phase retrial to a jury after a hung jury at the first penalty phase. None of the other states have a different order on retrial or allow the party without a burden to

that be unprecedented, but allowing the state to defer their opening statement in exchange for offering evidence in support of the facts and circumstances of the offense and aggravating circumstances would be a unique process. While there may be times when Arizona should stand alone in adopting a new process or procedure, it should do so to resolve a significant problem and not change for change's sake. There is no confusion or problem with the current order of presentation of evidence in a penalty phase that requires a modification of the current rule.

III. Conclusion.

There was an original petition, several comments, and an order continuing the petition's consideration and reopening comments on modified amendments to Rule 19.1 all addressing possible changes to the rule. Much effort has been expended trying to find an appropriate process that remains consistent with the law. But maybe the better question is whether there is a need to modify the rule in the first place? The Arizona Legislature has not passed a new statute, the Supreme Court has not issued a new opinion, and this Court's precedent has not noted any discord regarding the order of the presentation of evidence in a penalty phase retrial. The current rule should remain in place and trial courts will continue to resolve any specific issues that arise on this topic, as they have for the last 20 years.

start the presentation of evidence. See Alabama (Ala. Code § 13A-5-45, § 13A-5-46; AL ST RCRP Rule 19.1); Arkansas (Ark. Code Ann. § 5-4-602, § 5-4-603, § 5-4-616, § 16-64-110); California (Cal. Penal Code § 190.1, §190.3, § 190.4, *People v. Pineda*, 13 Cal.5th 186, 257 (2022) (“We adhere to our earlier precedents holding that (1) the death penalty statute does not violate the United States Constitution insofar as it does not require findings made beyond a reasonable doubt regarding the existence of specific aggravating factors (other than § 190.3, factors (b) & (c)), that aggravating factors outweigh mitigating factors, or that death is the appropriate sentence...”); Nevada (Nev. Rev. Stat. Ann. § § 175.141, § 175.554, § 175.556); Oregon (Or. Rev. Stat. Ann. § 163.150, *State v. Stevens*, 311 Or. 119, 147-148 (1991) (“At the penalty phase, the state also has that burden of proof. The trial court did not err in permitting the prosecutor to make a rebuttal argument at the penalty phase.”)).

As put forward in the previous comment, 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. For these reasons, the Maricopa County Public Defender's Office recommends this Court reject the modified amendments to Rule 19.1.

Respectfully submitted this day of May 01, 2026.

By /s/ Lina G. Garcia
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Appendix A

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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.

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