APPENDIX 2

The Criminal Defense Practice & Procedure Committee Proposal:

Background of Petition

The Maricopa County Attorney's Office proposed an amendment to the Rules of Criminal Procedure. Petitioner seeks to delete Rule 20(a), Ariz.R.Crim.P. This rule requires a trial court to direct a judgment of acquittal on one or more offenses charged "if there is no substantial evidence to warrant conviction." A Rule 20(a) motion may be brought at the close of the prosecution's case-in-chief, and renewed at the close of the trial before submission to the jury.

The remainder of the rule mandates a trial court enter a judgment of acquittal as to any aggravating factor alleged for which there "is no substantial evidence to warrant the allegation." This ruling takes place before the issue is submitted for jury finding.

Rule 20(a) commands: "The court's decision on a defendant's motion shall not be reserved, but shall be made with all possible speed."

Rule 20(b) permits a defendant to renew his request for acquittal on one or more of the offenses charged within 10 days after a verdict is rendered by a jury. This provision does not speak to a post-verdict renewed request for acquittal of an alleged aggravating factor—and with good reason, discussed infra.

The Petition seeks to delete Rule 20(a) in its entirety, and create a rule permitting directed verdict motions only after jury verdict, including for the first

time motions pertaining to the finding of aggravating factors.

Discussion/Analysis

A. MOTIONS FOR ACQUITTAL MADE BEFORE VERDICT:

The majority of Petitioner's reasons underlying its requested rule change are easily defeated by the state and federal constitutions and governing law.

Modification preserves the State's right to jury trial: Both the federal and state constitution guarantee criminal defendants a right to trial by jury—not the State, although a defendant has no constitutional right to waive a jury trial without the State's consent. *Singer v. United States, 380 U.S. 24 (1965)* Because the Due Process Clause prohibits convictions based on legally insufficient evidence, *Tibbs v. Florida, 457 U.S. 31, 45 (1982); State v. Mathers, 165 Ariz. 64, 71 (1990)*, no jury trial right is impaired by directing a verdict since no verdict may be sought, much less obtained, unless "the evidence, viewed in the light most favorable to the prosecution, [permits] any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *State v. West, 226 Ariz. 559, 562, 250 P.3d 1188 (2011).*

Society's interests, as well as crime victims' right to justice and due process, bode against trial court judgements of acquittals rendered prior to submission of the case to the jury: A "right to justice" and "due process" does not mean a right to conviction by a jury. "Society's interest, of course, is not simply

to convict the guilty. Rather its interest is 'in fair trials designed to end in just judgments.'" *Oregon v. Kennedy, 456 U.S. 667, 682, fn. 7 (1982).* Rule 20(a) promotes the interests of all involved in the process.

The law may be unclear or unsettled as to the elements of a criminal offense, causing a judge to enter an erroneous directed verdict of acquittal: Trial judges are bound by the law existing at the time of the alleged offense. Where the elements of an offense are unclear or unsettled, Arizona allows for an interlocutory appeal ("special action") to resolve the issue before the trial even commences, or during the trial itself.

Judges—trial and appellate--often disagree on whether quantum of proof is sufficiently substantial to warrant conviction, and thus the matter should be first resolved by a jury: Petitioner asserts that judgments of acquittal usurps "the jury's role in resolving factual disputes", but this is simply not the case. Trial courts do not, and may not, resolve factual disputes in Rule 20(a) motions. "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona, 497 U.S. 639, 653 (1990), rev. on other grounds, Ring v. Arizona, infra.* There must be a "complete absence of probative facts to support a conviction" before a Rule 20(a) motion will be granted. *State v. Scott, 113 Ariz. 423, 434-35, 555 P.2d 1117 (1976).* Trial courts must consider both direct and circumstantial evidence, may not re-weigh the facts or disregard the

inferences to be drawn from the evidence, nor may it determine the credibility of any witness. *West, supra.; Scott, supra.* "When reasonable minds may differ on the inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *West, supra.*

Because the issue is one of law grounded in the evidentiary proof of record, it is unsurprising that other judges may disagree with a trial court's ruling. "That fact," Petitioner states, "is the reason we have juries." On the contrary, that fact does not render a jury the best tribunal to determine the issue. "A properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *West, supra., 226 Ariz., at 563, quoting Jackson v. Virginia, 443 U.S. 307, 317 (1979).*

Petitioner's chief complaint is that on the extraordinarily rare occasion when Rule 20(a) directed verdicts of acquittal are entered, the judgment is non-reviewable by a higher court because the Double Jeopardy Clause prohibits further fact-finding proceedings following an acquittal by any tribunal. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks v. United States, 437 U.S. 1, 11, fn. 6 (1978).*

Petitioner's aim of securing appellate review and correction of an

erroneously entered directed verdict is understandable, but does not carry the day. At the outset, there exists numerous circumstances in which a defendant's claims of legal error occurring within the trial are procedurally barred, insolating the error from appellate review. A trial court's erroneous denial of a motion to remand for a re-determination of probable cause is insolated from any appellate review in the event of a subsequent conviction by a jury. The failure to file a timely appeal or petition for post conviction relief are additional examples.

Unquestionably, state and federal procedural rules at times insolate from appellate review convictions and sentences imposed in violation of the state and federal constitutions. In *State v. Ring* the capital defendant claimed that the Sixth Amendment required a jury, not a judge, to find the existence or non-existence of one or more aggravating factors which rendered him eligible for the death penalty. The United States Supreme Court agreed, and reversed the sentence of death. *Ring v. Arizona, 536 U.S. 584 (2002).* However, only those death row inmates whose cases were still pending appeal before the Arizona Supreme Court benefited from the highest court's ruling: The multitude of death row inmates sentenced to death following judge-determined aggravating factor(s) were precluded from seeking appellate relief, even though the Sixth Amendment violation was unequivocally established. *Schriro v. Summerlin, 542 U.S. 348 (2004).* Unconcerned over the lack of a procedural avenue affording appellate review and indeed advancing that

very point, as to those condemned the State of Arizona successfully advocated its preference for finality over the constitutional correctness of the outcome.

At bottom, the State's interest in securing the right to appellate review of judicial determination of Rule 20(a) judgments of acquittal must be balanced against the rights and interests of an accused. As to this, Petitioner posits that Rule 20(a) does not protect any "fundamental rights" or "important rights or liberties" of an accused. This is most certainly not the case; it is the very reason underlying the rule's command that rulings on judgments of acquittal "shall be made with all possible speed."

The ease by which one may be criminally accused is frightening. A criminal prosecution may be commenced by the State's filing a Complaint or obtaining an Indictment. The ease of the former is aptly demonstrated by the criminal complaint filed by the now-disbarred former Maricopa County Attorney Andrew Thomas against several sitting superior court judges—including the criminal presiding judge. The ease of the latter is aptly demonstrated by the adage that "a good prosecutor could get a grand jury to indict a ham sandwich"—an observation famously attributed to New York Chief Judge Sol Wechsler in the novel *Bonfire of the Vanities(1997)* referring to a prosecutor's ability to indict without any evidence.

Once charged, the criminally accused is cloaked with the presumption of innocence. *Estelle v. United States, 425 U.S. 501, 503 (1976).* This

notwithstanding, his *liberty interest* is immediately impacted. One's liberty interest is not only implicated in situations of incarceration prior to and during trial when he cannot afford to pay the set bond. It is similarly implicated by "the lesser, but nevertheless substantial, impairment of liberty on an accused while released on bail" including "the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. McDonald, 456 U.S. 1, 8 (1982).*

Thus, although the justice system strives to accurately identify and sanction criminal actors, the Constitution instantiates a competing goal—protecting citizens from false accusations and unsubstantiated convictions. Weighing the repugnance of false accusations and legally unsubstantiated convictions--which by Petitioner's proposed methodology could send an innocent person to jail until correction on appeal—against an unfettered State right to appeal in the *rare* cases where judgment of acquittal is entered (and even more rare, *erroneously* so) compels recognition of the wisdom underlying the procedure as it currently exists. The burden of any handicap is rightly borne by the state.

Although both the civil and criminal systems rely on an adversarial approach, unlike the rules governing civil cases there exists no avenue for pre-trial summary judgement in criminal cases. Compare, Rule 56, R.Civ.P. (affording a party "at any time" to seek summary judgment "as a matter of law" where there exists "no genuine issue as to any material fact") The criminally accused, with his

liberty interests curtailed by the mere filing of the charges, must await the presentation and conclusion of the prosecutor's case-in-chief before seeking to put an end to the ordeal.

Petitioner's stance ignores what is perhaps the most important reason why Rule 20(a) must be afforded the criminally accused at the close of the prosecution's case-in-chief and ruled on "with all possible speed."

A criminal defendant has a constitutional right to remain silent and to force the prosecution to prove its case based solely upon its own evidence; unlike civil cases, a criminal defendant has no obligation to present any evidence. For over 100 years, Arizona has held that where a motion to acquit made at the close of the State's case is overruled and the "defendant elects to go forward with his proof and does not stand on his motion, he takes the chances of having deficiencies in the state's case supplied by later testimony of either the defense or prosecution. (On appeal) [following conviction], the question of sufficiency of the evidence to sustain the verdict * * * is then determined * * * by consideration of all the evidence presented in the case." *State v. Villegas, 101 Ariz. 465, 467, 420 P.2d 940 (1966)*

Thus, after the state rests its case-in-chief a criminal defendant is faced with a choice: If he is convinced that the state's evidence reveals a "complete absence of probative facts" supporting one or more of the elements of the offense, he may forgo his constitutional right to present a meaningful defense to the charges. On

the other hand, if he presents a case, he waives any claim that the prosecutor's case-in-chief was insufficient as a matter of law, waives his constitutional right to force the State to prove each element of the charge(s) based solely upon its own evidence, and runs the risk that his own case will supply the evidence which the State's case-in-chief lacked.

The potential waiver of each of these important, fundamental constitutional rights caused the Arizona Supreme Court to recognize decades ago that a defendant "should not be forced to make his decision in ignorance of the sufficiency of the state's case." Comment, Rule 20, Ariz.R.Crim.P.

Not insignificantly, the prosecutor's responsibility is not to ensure a conviction results, but rather is to "see that justice is done on behalf of *both* the victim and the defendants." *State v. Superior Court (Flores), 181 Ariz. 378, 382, 891 P.2d 246 (App.1985)* (*emphasis* in original) Deleting Rule 20(a) as proposed by Petitioner, and modifying the rules to permit evaluation of the legal sufficiency of the State's case only after a jury verdict is rendered (currently Rule 20(b)), leads to the very result Rule 20(a) was designed to prevent: It forces defendants to make critical decisions in ignorance of the sufficiency of the state's case. Arizona should continue to find such a methodology intolerable.

Neither the analysis nor holding in *Evans v. Michigan, 133 S.Ct. 1069 (2013)* are novel or compel the rule change Petitioner seeks. Indeed, as the Court

recognized, "[a]nd for cases such as this, in which a trial court's interpretation of the relevant criminal statute is likely to prove dispositive, we see no reason why jurisdictions could not provide for mandatory continuances or expedited interlocutory appeals if they wish to prevent misguided acquittals from being entered." *Id., at 1081* Arizona's special action procedure—including the availability of a stay of proceedings and expedited resolution—does just that.

Prudent prosecutors will seek resolution of any ambiguous or unsettled law before trial commences. During trial, prosecutors are free to request that the rare entry of "judgment of acquittal" founded upon an allegedly erroneous legal ruling be held in abeyance while it seeks special action. Indeed, special action is routinely taken on trial court orders entered during trial which do not require entry of judgments. So long as a criminal defendant is not forced to choose whether or not to put on a case before knowing whether the state's case-in-chief is legally sufficient to sustain conviction, no harm arises.

B. SUFFICIENCY OF AGGRAVATING CIRCUMSTANCES:

Last, while Rule 20(a) mandates a court "enter a judgment that an aggravating circumstance was not proven if there is no substantial evidence to warrant the allegation" before submitting the issue to the jury, Petitioner proposes such finding be made after jury determination of the issue. This would work fine under two scenarios: 1) in capital cases where the jury finds an alleged aggravating

factor was not proved beyond a reasonable doubt; and 2) in non-capital cases where it is the judge who ultimately determines the sentence to be imposed, and would not consider an aggravating factor erroneously found proved by a jury.

But such a methodology is wholly untenable in a capital trial where the jury finds an aggravating factor, a judge sets the factor aside as insufficient as a matter of law, and then the jury is asked to decide the life/death question through consideration of the aggravating and mitigating factors.

In the Aggravation Phase of a capital trial, juries are instructed that they must "apply the law to the evidence and in this way decide whether the State has proven beyond a reasonable doubt that an aggravating circumstance exists." In reaching that determination, they are instructed to follow the court's instructions concerning:

- Constitutional Right Not to Testify
- Direct and Circumstantial Evidence
- Credibility of Witnesses
- Testimony of Law Enforcement Officers
- Expert Witnesses
- Evidence, Statements of Lawyers and Rulings
- Defendant's Testimony

Thus, in rendering its verdict on aggravating factors, juries are expressly instructed to consider evidence which has no bearing on the legal sufficiency of the alleged

aggravating factor—evidence such as credibility which may not be properly considered when determining legal sufficiency. Jurors are most certainly not advised of the difference, and cannot be expected to understand it.

A jury which deliberates and finds an aggravating factor proved will never understand why a judge thereafter negated its verdict as to one or more aggravating factors. Indeed, capital sentencing juries are instructed: "Your decision is not a recommendation. Your decision is binding." The instruction would be seriously undermined when a jury finds an aggravating factor to exist, only to be subsequently told that it has been set aside by the trial judge.

The proffered procedural change thus poses a substantial threat to a defendant's constitutional rights to have his life or death sentence determined only upon qualified aggravating factors. Any instruction commanding the jury disregard its former finding of an aggravating factor is insufficient to protect the capital sentencing process.

The United States Supreme Court has repeatedly recognized this fact. *See, e.g., Jackson v. Denno, 378 U.S. 368, 388-89 (1964)*(expressly rejecting proposition that a jury, when determining confessor's guilt, could be relied on to ignore his confession of guilt should it find the confession involuntary); *Bruton v. United States, 391 U.S. 123 (1968)*(despite "concededly clear instructions to the jury to disregard" the co-defendant's confession implicating the defendant when

determining defendant's guilt, "the effect is the same as if there had been no instruction at all.") As has been recognized, "[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." *Id., at 129, quoting Kruelwitch v. United States, 336 U.S. 440, 453 (1949).*

Although it is not unreasonable to conclude that in many cases the jury can and will follow the trial judge's instructions to disregard certain information, the Court's primary recognition in *Denno* and *Bruton* must be taken seriously: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton, at 135.*

Such a context is presented here. Where a human life literally hangs in the balance, a jury instruction directing the jury to disregard an aggravating factor it had previously found proved but was subsequently set aside by the court threatens the constitutionality of the process. It is as fundamentally unfair as telling a jury convened for re-trial that a defendant was formerly found guilty but conviction was set aside on appeal, then instructing it to disregard that fact. Such a practice is constitutionally prohibited for good reason.

The proposed rule modification permitting "acquittal" on an aggravating

factor *after* a jury finds it to exist in a capital case is unworkable for another reason: The timing of the motion under the proposed rule change.

After finding at least one aggravating factor proved, capital juries may or may not be presented with mitigating factors militating against a death sentence. Ultimately juries are asked to determine the most serious question any jury could ever be asked to resolve: Whether the defendant should live or die based on its consideration of the aggravating and mitigating factors presented. This question, presented at the end of the sentencing trial, at times occurs *sooner* than 10 days after a jury finds an aggravating factors proved—but the proposed rule change grants a defendant up to 10 days to challenge the legal sufficiency of an aggravating circumstance a jury found proved. Thus, under the proposed change, a death sentence could be imposed by a jury based in part upon an aggravating factor subsequently found legally insufficient by the court—a circumstance requiring reversal of a death sentence and remand for retrial of the penalty phase.

Conclusion

Petitioner's recommended rule deletion/modification threatens the fairness of criminal proceedings held in Arizona courts and should be rejected for all of the reasons set forth herein. The Criminal Defense Practice & Procedure Committee respectfully requests that the Arizona Supreme Court reject the proposed rule changes.