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7
8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**
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11 In the Matter of:

Supreme Court No. R-17-0028

12 **PETITION TO DELETE RULE 20,**
13 **TO ADD RULE 24.1, AND TO**
14 **RENUMBER RULES 24.4, 24.2,**
15 **24.3, AND 24.4 OF THE ARIZONA**
16 **RULES OF CRIMINAL**
17 **PROCEDURE**

COMMENT OF
THE STATE BAR OF ARIZONA

18 The State Bar of Arizona ("State Bar") opposes the Maricopa County
19 Attorney's proposed changes to the Arizona Rules of Criminal Procedure.
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21 **I. BACKGROUND OF PETITION**

22 The Maricopa County Attorney's Office has proposed an amendment to the
23 Rules of Criminal Procedure. It must be noted that this is the second consecutive
24 year that Petitioner has sought this exact modification to the criminal rules. The
25 Court denied last year's petition.

Petitioner seeks to delete Rule 20, Arizona Rules of Criminal Procedure. This

1 rule requires a trial court to direct a judgment of acquittal on one or more offenses
2 charged “if there is no substantial evidence to warrant a conviction.” ARIZ. R. CRIM.
3 P. 20(a). A Rule 20(a) motion may be brought at the close of the prosecution’s case-
4 in-chief and renewed at the close of the trial before submission to the jury. *Id.*

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6 The remainder of the rule mandates a trial court enter a judgment of acquittal
7 as to any aggravating factor alleged for which there “is no substantial evidence to
8 warrant the allegation.” *Id.* This ruling takes place before the issue is submitted for
9 jury finding. *Id.* Rule 20(a) further commands: “The court’s decision on a
10 defendant’s motion shall not be reserved, but shall be made with all possible speed.”
11 *Id.*

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13 Rule 20(b) permits a defendant to renew his/her request for acquittal on one
14 or more of the offenses charged within 10 days after a verdict is rendered by a jury.
15 *Id.* R. 20(b). This provision does not speak to a post-verdict renewed request for
16 acquittal of an alleged aggravating factor—and for good reason, discussed *infra*.
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19 The Petition seeks to delete Rule 20(a) in its entirety and create a rule
20 permitting directed verdict motions only after a jury verdict, including for the first
21 time motions pertaining to the finding of aggravating factors.
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1 **II. DISCUSSION/ANALYSIS**

2 **A. MOTIONS FOR ACQUITTAL MADE BEFORE VERDICT**

3 The majority of Petitioner's arguments underlying its requested rule change
4 are easily defeated by the state and federal constitutions and other governing law.
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6 **1. Rule 20(a) Does Not Remove the State's Right to Have a Jury Decide**
7 **a Criminal Case.**

8 Both the federal and state constitutions guarantee criminal defendants a right
9 to trial by jury, although a defendant has no constitutional right to waive a jury trial
10 without the state's consent. *Singer v. United States*, 380 U.S. 24, 36 (1965) (holding
11 that defendant's waiver of jury trial may be conditioned on consent by the
12 prosecuting attorney and trial judge). The Due Process Clause prohibits convictions
13 based on legally insufficient evidence. U.S. CONST. amend. XIV, § 1; *See, e.g., Tibbs*
14 *v. Florida*, 457 U.S. 31, 45 (1982); *State v. Mathers*, 165 Ariz. 64, 71, 796 P.2d 866,
15 873 (1990). Thus, no jury trial right is impaired by directing a verdict because no
16 verdict may be sought, much less obtained, unless "the evidence, viewed in the light
17 most favorable to the prosecution, [permits] any rational trier of fact [to find] the
18 essential elements of the crime beyond a reasonable doubt." *State v. West*, 226 Ariz.
19 559, 562, 250 P.3d 1188, 1191 (2011).
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1 **2. Erroneous Rule 20(a) Rulings Do Not Require Abrogation of the Rule.**

2 Petitioner's focuses on the extraordinarily rare occasion when Rule 20(a)
3 directed verdicts of acquittal are entered, and such judgment is non-reviewable by a
4 higher court because the Double Jeopardy Clause prohibits further fact-finding
5 proceedings following an acquittal by any tribunal. "[W]here the Double Jeopardy
6 Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced,
7 for the Clause has declared a constitutional policy, based on grounds which are not
8 open to judicial examination." *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978).
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10 Petitioner's aim of securing appellate review and correction of an erroneously
11 entered directed verdict is understandable, but does not warrant deletion of Rule 20.
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14 In the criminal justice system, there exist numerous circumstances in which
15 claims of legal error occurring within the trial are procedurally barred, thus
16 insulating the error from appellate review. For instance, a trial court's erroneous
17 denial of a motion to remand for a re-determination of probable cause is insulated
18 from any appellate review in the event of a subsequent conviction by a jury. The
19 failure to file a timely appeal or petition for post-conviction relief are additional
20 examples.
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22 Petitioner cites *State v. Ruiz*, 239 Ariz. 379, 372 P.3d 323 (App. 2016), where
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1 the judge stated on the record that he was dismissing two of the counts under Rule
2 20(a), then later stated he was reversing his dismissal. *Id.* at 382-84, 372 P.3d at 326-
3 27. On appeal, the appellate court correctly reversed the subsequent convictions due
4 to double jeopardy. Now, compare *Ruiz* to *State v. Newfield*, 161 Ariz. 470, 778
5 P.2d 1366 (App. 1989). In *Newfield*, the court initially indicated it was granting the
6 defendant's Rule 20(a) motion. *Id.* at 471, 778 P.2d at 1367. Further discussion
7 ensued between the court and the parties, and the court then stated that the statute
8 had been misread and the motion was denied. *Id.*

11 On appeal, Newfield argued that double jeopardy must bar his conviction
12 because the court had granted his Rule 20(a) motion. The appellate court disagreed,
13 noting that the record reflected a continuing discussion and that, unlike the judge in
14 *Ruiz* who "reversed" his dismissal, the judge in *Newfield* ruled on the motion only
15 once and denied it. *Id.* at 472, 778 P.2d at 1368. Thus, the Double Jeopardy Clause
16 was not violated. *Id.*

19 There is a better way to address Petitioner's concerns than by abrogating Rule
20 20(a). Simply, judges should exercise caution in timing and manner of addressing a
21 Rule 20(a) motion. When the court seeks input from all sides and then discusses the
22 issue with the parties before ruling, errors may be avoided.

1 It must be noted that in *Ruiz*, the trial judge ruled on the Rule 20(a) motion
2 and then received input from the prosecutor, and reversed himself. *Ruiz*, 239 Ariz.
3 at 383, 372 P.3d at 327. Review of all of the Arizona cases discussed in *Ruiz*
4 supports the position of this Comment. *State v. Musgrove*, 223 Ariz. 164, 221 P.3d
5 43 (App. 2009); *State v. Millanes*, 180 Ariz. 418, 885 P.2d 106 (App. 1994);
6 *Newfield*, 161 Ariz. at 471, 778 P.2d at 1367. In the cases where a Rule 20(a) motion
7 was erroneously granted, it happened in the absence of input from the state.
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10 A criminal prosecution is commenced when the state files a Complaint or
11 obtains an indictment. Once charged, the criminally accused is cloaked with the
12 presumption of innocence. *See, e.g., Estelle v. United States*, 425 U.S. 501, 503
13 (1976). This notwithstanding, his/her liberty interest are immediately impacted.
14 One's liberty interest is not only implicated in situations of incarceration prior to and
15 during trial, and when the accused cannot afford to pay the set bond; it is similarly
16 implicated by "the lesser, but nevertheless substantial, impairment of liberty on an
17 accused while released on bail" including "the disruption of life caused by arrest and
18 the presence of unresolved criminal charges." *United States v. McDonald*, 456 U.S.
19 1, 8 (1982).
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23 Thus, although the justice system strives to accurately identify and sanction
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1 criminal actors, the Constitution provides for a parallel, but sometimes competing
2 goal—protecting the accused from false accusations and unsubstantiated
3 convictions. The burden of proving all elements of the crime is rightly borne by the
4 state.
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6 Although both the civil and criminal systems rely on an adversarial approach,
7 unlike the rules governing civil cases there exists no avenue for pre-trial summary
8 judgment in criminal cases. *Cf.* Ariz. R. Civ. P. 56 (affording a party “at any time”
9 to seek summary judgment “as a matter of law” where there exists “no genuine issue
10 as to any material fact”). The criminally accused, with his/her liberty interests at
11 stake, must await the presentation and conclusion of the prosecutor’s case-in-chief
12 before seeking a directed verdict based on insufficient evidence or some other
13 procedural error. The accused must be afforded the opportunity to seek judgment of
14 acquittal at the close of the prosecution’s case-in-chief, ruled on “with all possible
15 speed.” ARIZ. R. CRIM. P. 20(a). A criminal defendant has a constitutional right to
16 remain silent and require the prosecution to prove its case based solely upon the
17 state’s evidence. Unlike civil defendants, a criminal defendant has no obligation to
18 present any evidence. For over 100 years, Arizona has held that where a motion to
19 acquit made at the close of the state’s case is overruled, and the “defendant elects to
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1 go forward with his proof and does not stand on his motion, he takes the chances of
2 having deficiencies in the state's case supplied by later testimony of either the
3 defense or prosecution. "(On appeal) [following conviction], the question of
4 sufficiency of the evidence to sustain the verdict * * * is then determined * * * by
5 consideration of all the evidence presented in the case." *State v. Villegas*, 101 Ariz.
6 465, 467, 420 P.2d 940, 942 (1966) (quoting *State v. Weis*, 92 Ariz. 254, 261, 375
7 P.2d 735, 740 (1962)) (omissions in original).

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10 Thus, after the state rests its case-in-chief, a criminal defendant is faced with
11 a choice: the defendant may forgo his/her constitutional right to present a defense,
12 or present a defense, and waive any claim that the state's case-in-chief was
13 insufficient as a matter of law. The potential waiver of each of these fundamental
14 constitutional rights caused the Arizona Supreme Court to recognize decades ago
15 that a defendant "should not be forced to make his decision in ignorance of the
16 sufficiency of the state's case." ARIZ. R. CRIM. P. 20 cmt.

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19 It must also be remembered that the prosecutor's responsibility is not to ensure
20 a conviction, but rather to "see that justice is done on behalf of *both* the victim and
21 the defendants." *State v. Superior Court (Flores)*, 181 Ariz. 378, 382, 891 P.2d 246,
22 250 (App. 1985) (emphasis in original). Deleting Rule 20(a) as proposed by
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1 Petitioner, and modifying the rules to permit evaluation of the legal sufficiency of
2 the state's case only after a jury verdict is rendered (currently Rule 20(b) forces
3 defendants to make a critical decision on how to proceed with his/her own defense,
4 even if the state's case is insufficient. Rule 20(a) protects this important procedural
5 protection for a criminal defendant.
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7 **3. Victim Due Process vs. the Due Process Guaranteed to an Accused.**

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9 Petitioner argues that victim "due process in a criminal case should include
10 the right to have final, case-ending judicial decisions reviewed by a higher court."
11 Pet. at 10. The Arizona Constitution enumerates the due process rights of victims
12 and this is not one of them. ARIZ. CONST. art 2, § 2.1(A)(1)-(12). Although
13 § 2.1(A)(11) grants a "right" to have all rules governing criminal procedure protect
14 victims, in 1990 this Court "narrowly construed" the provision to "deal . . . only with
15 *procedural rules pertaining to victims* and not with the substantive general subject
16 of the [supreme court's] rule making power." *Slayton v. Shumway*, 166 Ariz. 87, 92,
17 800 P.2d 590, 595 (1990) (emphasis added).
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20 The Arizona Supreme Court has consistently held that the "scope of
21 legislative rulemaking power under the VBR extends to those rules that define,
22 implement, preserve, and protect *the specific* rights *unique* and *peculiar* to crime
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victims, as guaranteed and *created by* the VBR.” *State v. Brown*, 194 Ariz. 340, 343, 982 P.2d 815, 818 (1999) (emphasis added); *State v. Hansen*, 215 Ariz. 287, 290, 160 P.3d 166, 169 (2007); *Champlin v. Sargeant*, 192 Ariz. 371, 373 n.2, 965 P.2d 763, 765 n.2 (1998) (stating that rulemaking power under the VBR “extends only so far as necessary to protect rights created by the [VBR] and not beyond”).

Slayton and its progeny make clear that § 2.1(A)(11) cannot require consideration of VBR in connection with all Arizona Rules of Criminal Procedure. 166 Ariz. at 89, 92, 800 P.2d at 592, 595. As explained in *Day v. Superior Court*, 170 Ariz. 215, 216, 823 P.2d 82, 83 (App. 1992), “[§2.1(A)(11)] merely provides the mechanism to protect rights *created* by the Victim's Bill of Rights” (emphasis added). An accused’s Due Process and Double Jeopardy guarantees are superior to any state constitutional “due process” or right to be “treated with fairness” granted by VBR. *State v. Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997); *State v. Bible*, 175 Ariz. 549, 603, 858 P.2d 1152, 1206 (1993); *Romley v. Superior Court*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992). Rule 20(a) promotes the interests of all involved in the criminal process.

B. SUFFICIENCY OF AGGRAVATING CIRCUMSTANCES

Interestingly, nowhere in Petition R-17-0028 does the Petitioner address the

1 section of Rule 20(a) that applies to the aggravation phase of death penalty case.
2 Rule 20(a) mandates that a court “enter a judgment that an aggravating circumstance
3 was not proven if there is no substantial evidence to warrant the allegation” before
4 submitting the issue to the jury. Petitioner proposes such finding be made *after* jury
5 determination of the issue. This would apply under two scenarios: (1) in capital
6 cases where the jury finds an alleged aggravating factor was not proved beyond a
7 reasonable doubt; and (2) in non-capital cases where it is the judge who ultimately
8 determines the sentence to be imposed, and would not consider an aggravating factor
9 that a jury erroneously found to be proved. But such a methodology is wholly
10 untenable in a capital trial where the jury finds an aggravating factor, a judge sets
11 the factor aside as insufficient as a matter of law, and then the jury is asked to decide
12 the life/death question through consideration of the aggravating and mitigating
13 factors.
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16 In the aggravation phase of a capital trial, juries are instructed that they must
17 “apply the law to the evidence and in this way decide whether the state has proven
18 beyond a reasonable doubt that an aggravating circumstance exists.” RAJI
19 (CRIMINAL) 3d, CAPITAL CASE 1.3. In reaching that determination, the jury is
20 instructed to follow the court’s instructions concerning:
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- 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 a verdict on aggravating factors, juries are expressly instructed to consider evidence that 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 that deliberates and finds an aggravating factor proved will likely not 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.” *Id.* CAPITAL CASE 2.6. 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.

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

The U.S. Supreme Court has repeatedly recognized this fact. *See, e.g., Bruton v. United States*, 391 U.S. 123 (1968) (holding that 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”); *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). 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.” *Bruton*, 391 U.S. at 129 (quoting *Kruelewitz v. United States*, 336 U.S. 440, 453 (1949)) (omissions in original).

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

1 Court's primary recognition in *Denno* and *Bruton* must be taken seriously: "[T]here
2 are some contexts in which the risk that the jury will not, or cannot, follow
3 instructions is so great, and the consequences of failure so vital to the defendant, that
4 the practical and human limitations of the jury system cannot be ignored." *Id.* at
5 135.
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7 Such a context is presented here. Where a human life literally hangs in the
8 balance, an instruction directing the jury to disregard an aggravating factor it had
9 previously found proven, but was then set aside by the court, threatens the
10 constitutionality of the process. It is as fundamentally unfair as telling a jury
11 convened for re-trial that a defendant was formerly found guilty but conviction was
12 set aside on appeal, then instructing it to disregard that fact. Such a practice is
13 constitutionally prohibited for good reason.
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16 The proposed rule modification permitting "acquittal" on an aggravating
17 factor *after* a jury finds it to exist in a capital case is unworkable based on the timing
18 of the motion under the proposed rule change.
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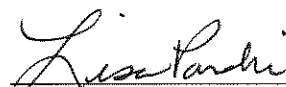
20 After finding at least one aggravating factor proven, capital juries may or may
21 not be presented with factors mitigating against a death sentence. Ultimately, juries
22 are asked to determine the most serious question any jury could ever be asked to
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1 resolve – whether the defendant should live or die based on its consideration of the
2 aggravating and mitigating factors presented. This question, presented at the end of
3 the sentencing trial, sometimes occurs *sooner* than 10 days after a jury finds
4 aggravating factors proved—but the proposed rule change grants a defendant up to
5 10 days to challenge the legal sufficiency of an aggravating circumstance a jury
6 found proved. Thus, under the proposed change, a death sentence could be imposed
7 by a jury based in part upon an aggravating factor subsequently found legally
8 insufficient by the court—a circumstance requiring reversal of a death sentence and
9 remand for retrial of the penalty phase.
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12 CONCLUSION

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14 Petitioner’s recommended rule deletion/modification threatens the fairness of
15 criminal proceedings held in Arizona courts and should be rejected for all of the
16 reasons set forth herein. The State Bar respectfully requests that the Arizona
17 Supreme Court reject the proposed rule changes.
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19 RESPECTFULLY SUBMITTED this 22nd day of May, 2017.

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22 Lisa M. Panahi
23 General Counsel
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1 Electronic copy filed with the
2 Clerk of the Arizona Supreme Court
3 this 22nd day of May, 2017.

4 by: 
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