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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-19-0025

10 **PETITION TO AMEND RULE**
11 **20(b)(1) OF THE ARIZONA**
12 **RULES OF CRIMINAL**
13 **PROCEDURE**

COMMENT OF THE
STATE BAR OF ARIZONA

14 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
15 of Arizona (the “State Bar”) hereby submits the following as its Comment to the
16 above-captioned Petition.

17 The analysis and details for this Comment are substantially the product of the
18 State Bar’s Criminal Practice and Procedure Committee, composed of a balance of
19 prosecution and defense practitioners, and judicial members.

20 **I. Background of Petition**

21 Rule 20(a) of the Arizona Rules of Criminal Procedure permits a motion for
22 judgment of acquittal following the close of the evidence at trial where “there is no
23 substantial evidence to support a conviction.” Currently, Rule 20(b) permits a
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1 motion for judgment of acquittal to be brought or renewed “no later than 10 days
2 after any verdict is returned.” Petition R-19-0025 seeks to amend Rule 20(b) to
3 permit a motion for judgment of acquittal not only after any verdict is returned, but
4 also in circumstances where the jury fails to reach a unanimous verdict.
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6 **II. Discussion and Analysis**

7 After the close of evidence, but before any verdict is rendered, Rule 20(a)
8 requires a court to enter a judgment of acquittal on 1) any offense formally charged;
9 2) on a finding of an unproven aggravating circumstance; or 3) a finding of an
10 unproven sentencing enhancement “if there is no substantial evidence to support”
11 the conviction, aggravating circumstance or sentencing enhancement.
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13 Rule 20(b) permits a defendant to make or renew a Rule 20 motion for
14 judgment of acquittal only after a verdict is rendered. Subsection (b) of Rule 20, as
15 currently written, does not permit its invocation where the jury is unable to reach a
16 verdict. The Petition seeks to cure that anomaly by providing that Rule 20(b) may
17 be invoked not only after a verdict is reached, but also “*after the court discharges*
18 *the jury, whichever is later.*” (Appendix A of Petition R-19-0025, emphasis in
19 original).
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22 It is axiomatic that no conviction or finding of an aggravating circumstance
23 or sentencing enhancement may stand where there exists no substantial evidence to
24 support it—regardless of a jury finding to the contrary. The same is true when the
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1 jury is unable to reach a unanimous decision concerning the proof. However, the
2 current rule's omission of the latter precludes the court from considering the
3 sufficiency of the evidence *unless* a unanimous verdict is rendered.
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5 The Double Jeopardy Clause "forbids a second trial for the purpose of
6 affording the prosecution another opportunity to supply evidence which it failed to
7 muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978).
8 Double Jeopardy precludes retrial where, *inter alia*, the evidence was legally
9 insufficient to convict. *State v. Ortiz*, 120 Ariz. 384, 586 P.2d 633 (1978); *Peak v.*
10 *Acuna*, 203 Ariz. 83, 85, 50 P.3d 833 (2002).
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12 The practical effect of Rule 20(b)'s current language is problematic in view
13 of the Double Jeopardy Clause of the state and federal constitutions. Where the
14 evidence is demonstrably *legally insufficient* to convict or to prove an aggravating
15 factor or sentencing enhancement, the prosecution may re-try the accused on the
16 crime, aggravating factor or sentencing enhancement *so long as the jury failed to*
17 *reach a unanimous verdict*.
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20 Rule 20(b)'s failure to permit a trial court's consideration of the sufficiency
21 of the evidence post-verdict where the proceedings resulted in a hung jury not only
22 invites a Double Jeopardy violation, the absence of a court ruling under the
23 circumstances vitiates an accused's right to seek review of a Rule 20(b) ruling on
24 special action—before retrial can occur. *See, Richardson v. United States*, 468 U.S.
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1 317 (1984) (orders denying motions for judgment of acquittal have been deemed a
2 final decision for purposes of the Double Jeopardy Clause and thus may be
3 appealable); *Nalbandian v. Superior Court (Corbin)*, 163 Ariz. 126, 130, 786 P.2d
4 977 (App.1989)(special action appropriate vehicle for judicial review of
5 interlocutory double jeopardy claim); *Brown v. State*, 117 Ariz. 476, 477, 573 P.2d
6 876 (1978)(same).

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8 In *Tibbs v. Florida*, 457 U.S. 31 (1982) the Supreme Court explained that
9 unless a defendant can obtain review of an insufficiency of evidence claim prior to
10 retrial occurring, the protections established in *Burks* and its successors would
11 become illusory. Indeed, as the Court in *Abney v. United States*, 431 U.S. 651
12 (1977), explained:
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15 [T]he rights conferred on a criminal accused by the Double
16 Jeopardy Clause would be significantly undermined if
17 appellate review of double jeopardy claims were
18 postponed until after conviction and sentence. * * * It's a
19 guarantee against twice being put to trial for the same
20 offense. * * * Consequently, if a criminal defendant is to
21 avoid exposure to double jeopardy and thereby enjoy the
22 full protection of the Clause, his double jeopardy
23 challenge...must be reviewable before that subsequent
24 exposure occurs.

25 *Id.* at 660-62.

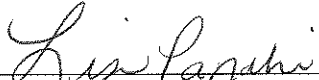
If an accused cannot bring a Rule 20(b) motion when the jury fails to reach a
unanimous verdict, the trial court lacks any opportunity to consider whether the

1 evidence was sufficient at that juncture. If the evidence was not sufficient, the
2 accused may be forced to endure a second prosecution in violation of Double
3 Jeopardy, and interlocutory appellate review is precluded since there is no trial court
4 ruling from which review can be taken. This anomaly is cured by the proposed
5 amendment to Rule 20(b).
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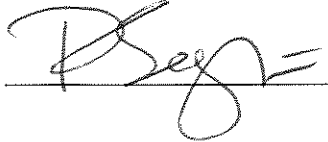
7 **CONCLUSION**

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9 For the foregoing reasons, the State Bar of Arizona respectfully requests that
10 the Petition to Amend Rule 20(b), Ariz. Rules of Crim. Pro., R-19-0025, be adopted.
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12 RESPECTFULLY SUBMITTED this 1st day of May, 2019.
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15 _____
16 Lisa M. Panahi
17 General Counsel
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19 Electronic copy filed with the
20 Clerk of the Supreme Court of Arizona
21 this 1st day of May, 2019.

22 by: 
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