



for *The Defense*

▶ ◀ James J. Haas, Maricopa County Public Defender ▶ ◀

Capital Penalty Phase Argument Misconduct

Chapters Three & Four: Misstating Death Penalty Law and Misstating the Jury's Role in Capital Sentencing

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**By Donna Elm
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In non-capital cases, defense counsel will encounter the garden variety of vouching and misstatements of law proffered by the prosecution. Capital cases, however, add another dimension: namely the opportunity to misrepresent the law of capital sentencing as it applies to the jurors' sentencing function. Although judges (who presumably know the law) can readily disregard exaggerations or misdirection, jurors cannot. They

are more easily led astray by spirited but incorrect recitations of "law." Consequently, courts in jury-sentencing states closely circumscribe argument pertaining to the law for deciding life or death.

These chapters address: 1) how prosecutors, when presenting argument to a capital sentencing jury, misstate the law that encompasses the application of mitigating and aggravating factors, and 2) how prosecutors misstate the jury's role in capital sentencing.

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Undesignated Driver

What Does it Take to Keep a Class 6 Undesignated at the Time of Sentencing?

**By Jeremy Mussman
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In these days of the "supersonic rocket docket," a premium is placed on cranking "easy" plea agreements through the system at a high rate of speed. The plea agreement viewed as being among the most routine is the old reliable

"Class 6 Undesignated." The "6 Open," as it is often called, has a balance of punishment and reward that is attractive to the prosecution, defense and the courts. In large part this is because the "carrot" of earning a misdemeanor can be used as motivation for defendants to do

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for The Defense

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Misstating Death Penalty Law

A. Misstating the Law

1. Oversimplifying the Capital Decision

Capital sentencing law is by no means easy to grasp, even for trained jurists, so lawyers commonly try to explain it in simpler terms. That is naturally fraught with the danger of making it so basic that it omits critical components. One of the more common misrepresentations is that the capital decision is merely deciding whether aggravators outweigh mitigators:

The law is such that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty.¹

And if you find that the aggravating circumstances in this case tip the scale more, then the death penalty is an appropriate sentence.²

Both of these examples left out the huge aspect of juror discretion in deciding the moral social response to a killing. In the first excerpt, the prosecutor disavowed even *weighing* the factors – urging the jury just to tally which side has more. The Florida Supreme Court found it “egregious” and, in conjunction with other improper argument, ruled that this was “a classic case of an attorney who had overstepped the bounds of zealous advocacy and entered the forbidden zone of prosecutorial misconduct.” However, the Nevada Supreme Court in the second example failed to criticize the prosecutor for this erroneous portrayal; it reasoned that he had argued death was *an* option – not the only option. Although that may not have been prejudicial, the Court did a disservice by not censuring it. Other samples of over-

<p>One of the more common misrepresentations is that the capital decision is merely deciding whether aggravators outweigh mitigators.</p>

simplification or misstatement of capital law include:

[The jury’s task is to decide whether the defendant was] good or bad.³

[Its task] is to determine whether the defendant had crossed the line.⁴

[One who has been guilty of such crimes] should be convicted on general principles.⁵

These examples reduce capital sentencing law to a level so basic that it misleads the jury. In the first instance, the judge sustained the objection and instructed the jury properly, so the jury was not misled. The Tennessee Supreme Court found the last excerpt and related argument “thoroughly unsound as a matter of law,” and reversed; moreover, a sentence of death has to rest on capital law, not “general principles.”

Under Arizona’s new *tri*-furcated capital procedure, the jury must first decide whether any aggravators are proven, then it proceeds to the weighing as to the death penalty. See A.R.S. § 13-703.031 (C,D). Prosecutors may try to oversimplify the “aggravation phase” by arguing that the jury’s task is *only* to decide

whether certain factors exist, contending that the discretionary and moral nature of capital sentencing only applies to the “penalty phase.” However, the aggravation phase is undoubtedly part of the capital sentencing, so courts and defenders should reject arguments oversimplifying the task of the “aggravation phase.”

2. Mixing Law of Guilt with Law of Sentencing

Prosecutors have sometimes improperly argued guilt (rather than blameworthiness) issues in the penalty phase:

[Referring to the “extreme mental disturbance” mitigator as] whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was impaired as a result of a mental disease or defect. That’s the old insanity defense. Did he know what he was doing was criminal? ...No indication he had any psychotic break or anything even approaching it. ... Not a factor in mitigation.⁶

[In Mississippi, where voluntary intoxication does not qualify as “insanity,” characterizing the defense as trying to prove the defendant] was so drunk that they didn’t know what they were doing.⁷

[When brain damage, intoxication, paraphilia, and schizophrenia were offered as mitigators,] the defense expert couldn’t say that the brain damage caused either murder. ... A pint of Canadian Mist did not cause this murder. ... The defendant’s paraphilia did not kill [the victim]. The crux of this issue about schizophrenia is it simply doesn’t matter...because the murder was intentional and planned and it was organized. Schizophrenia just doesn’t enter into the picture of this murder.⁸

The pitfall of these arguments is that prosecutors switch the law of mitigation (favorable to the defense) with that of guilt (favorable to the state). Courts found that the argument applied the wrong legal standard. However, the first mix-up was “readily understandable” - the California Supreme Court concluded that it had not led the jury away from considering potentially mitigating evidence, and the second misstatement was corrected by the instructions. Kansas, on the other hand, found the final example “clearly

improper,” reflecting “a complete lack of understanding of the concept of mitigating circumstances.”

3. Ignoring the Law

It is, of course, improper in most jurisdictions to argue that the jury should ignore the law. Arizona courts flatly reject overt nullification argument. The Supreme Court of Florida found that this argument (to counter the defense bid for life in prison) invited the jurors to disregard present law:

We all know in the past laws have changed. And we all know that in the future laws can change.⁹

The Florida Supreme Court was outraged, asserting that such rhetoric “has absolutely no place in trial, especially when asserted by the State,” which had mandated (through its own lobbying efforts) the alternative “no parole” life sentence.

B. Misstating Aggravating and Mitigating Factors

The general legal principle underlying a constitutionally sound capital scheme is that aggravation should be limited and mitigation maximized. Therefore, when a prosecutor misstates what constitutes aggravation or mitigation, he may infringe on a defendant’s Eighth and Fourteenth Amendment rights. This takes the form of invoking non-statutory aggravators, suggesting lack of mitigation is an aggravator, and using mitigation as aggravation.

1. Non-Statutory Aggravation

In most jurisdictions (including Arizona), aggravating evidence is strictly limited to statutory factors. Consequently, it is highly improper to urge the jury to sentence a defendant to death based on other matters. Examples include:

[Where victim impact is not among the aggravators:] Can you imagine the terror of that? A gun right to your head, was she thinking of her husband, who was going to take care of him? ... Was she thinking about her daughter, take me but spare Peggy? That's the aggravating circumstance, what she went through.¹⁰

[Where victim status was not (but a heinous killing was) aggravating:] There is nothing more heinous than killing a family member like your wife. [The jury should consider the heinousness of killing a wife as aggravation.]¹¹

In the first example, the court strongly denounced invoking non-statutory factors in aggravation. The last example, however, was proper argument. The prosecutor argued the legitimate issue of heinousness as aggravation; any number of facts could be used to infer heinousness, including the victim's status. The prosecutor did not, after all, argue that the victim's status was itself an aggravator.

a. Prior Bad Acts as Aggravation

Unless the statutory scheme expressly permits discussions of other "bad act" conduct in aggravation, the prosecutor may not argue it as aggravation. Note that this applies even though bad act facts came into evidence in the guilt phase. For example:

Even though prior bad acts were not among the aggravators, the prosecutor contended that prior assaultive and threatening acts towards defendant's former wife, a threat to kill the accomplice, and physical abuse of a third woman should be considered by the jurors.¹²

[Where defendant got life for a prior murder:] What are the circumstances that the defendant claims mitigate against the death of [instant victim] and the death of [prior victim]?¹³

In the first example, the prior bad acts were not part of the statutory aggravation scheme, so arguing them was highly improper. In the other example where prior convictions were admissible, the court still denounced the argument. Reversing, it felt that this argument effectively eliminated a life option for the jury because to give life when the defendant already is serving a life sentence is to give no punishment at all for the second murder. The Court specifically noted that although the prior *conviction* may be used as aggravation, the *sentence* could not. Hence, "encouraging the jury to impose an additional punishment" for the additional conviction was improper.

The situation worsens when the prosecutor advocates capital punishment based on prior offenses the defendant *might have done*. In a California case, the overzealous prosecutor responded to the defense argument of no criminal record:

Having no record just means you haven't been caught.¹⁴

The Court recognized that this invited the jury to speculate (and punish) the defendant for undetected crimes. Though it was improper, the jury specified that they found as a mitigator that the defendant lacked a criminal history – so the potentially devastating statement turned out harmless.

The situation degenerates further when the prosecutor asks the jury to assign punishment for matters that had been dismissed! Consider the case where the jury had acquitted defendant on several counts, but convicted him of first degree murder: it was highly improper for the prosecutor to

argue in the penalty phase that the jury had erred in its acquittal, so they should correct that by increasing the punishment on the convicted counts. See *People v. Haskett*, 30 Cal.3d 841, 864, 180 Cal.Rptr. 640, 655, 640 P.2d 776, 791 (1982).

2. Lack of Mitigation as Aggravation

Recall that mitigation is broad while aggravation is strictly limited, hence non-statutory aggravators are generally prohibited. In cases where the defense has little mitigation to offer (or the defendant refuses to allow his attorneys to present mitigation¹⁵), the prosecution may argue for death because the defendant has no excuses, justification, or redeeming qualities: essentially turning lack of mitigation into an aggravator. This is improper because lack of mitigation is not a codified aggravator in Arizona. See A.R.S. § 13-703(F). Much of the law treating this arose in California where the misconduct is referred to as a *Davenport* issue. The first example below is taken from the *Davenport* case:

The prosecutor argued that the lack of certain potentially mitigating factors (§ 190.3 (d,g,h)) showed that the defendant had acted calmly, deliberately, and of his own free will when he committed the murder.¹⁶

The prosecutor argued at length that the murder was not the result of extreme mental or emotional disturbance, or of extreme duress, and it was completely without moral justification. While not referring to those as “aggravating,” he concluded: When you’re considering the circumstances in aggravation, you’re considering all those factors that I’m arguing.¹⁷

What the Court ignores is misconduct by the prosecutor who infers that lack of mitigation aggravates the crime. This is an area that defenders and trial judges should be very cognizant of.

In *Davenport*, the California Supreme Court recognized that the prosecution turned the lack of those mitigators into aggravation. Noting that the absence of mitigation does not render the crime more offensive, the Court concluded that the argument’s form likely confused the jury about mitigation and aggravation, so was improper. The Court, citing *Davenport*, also found the second example improper.

The *Davenport* holding has been distinguished many times. The Court ruled that it was not improper to argue that mitigators are entitled to little weight or did not outweigh the aggravators. *People v. Millwee*, 18 Cal.4th 96, 152, 74 Cal.Rptr.2d 418, 452, 954 P.2d 990, 1024 (1998). Further, the prosecutor can argue lack of statutory mitigators – as long as she “merely notes their absence” without transforming that into an aggravator. *People v. McDermott*, 28 Cal.4th 946, 1003, 123 Cal.Rptr.2d 654, 698, 15 P.3d 874, 911 (2002). However, note that, even in *Davenport*, the prosecutor did not actually refer to lack of mitigators as “aggravation.” The Court draws a terribly fine line, allowing broad argument that mitigation does not exist and apparently only finding that problematic when coupled with the prosecutor’s *express* reference to aggravation. *E.g., People v. Gutierrez*, 28 Cal.4th 1083, 1155, 124 Cal.Rptr.2d 373, 427, 52 P.3d 572, 617 (2002). What the Court thereby ignores is misconduct by the prosecutor who *infers* that lack of mitigation aggravates the crime. This is an area that defenders and trial judges should be very cognizant of.

a. Lack of Remorse as Aggravation

The law provides that only approved statutory aggravators should be considered in aggravation in the penalty phase. Nonetheless, what about remorse – or the lack thereof? Courts have traditionally

considered the remorse issue in non-capital sentencings; a person with no remorse is more likely to re-offend, more dangerous, and more blameworthy. However, aggravators are usually made up of affirmative acts, not the absence of some conduct or quality. Hence lack of remorse does not fit in an aggravation scheme. It certainly is not an Arizona aggravator. See A.R.S. § 13-703 (G). Moreover, arguing lack of remorse could (depending on circumstances) be a comment on a defendant's silence, in violation of his fifth and/or sixth Amendment rights. There is, therefore, a tension between strong evidence of future dangerousness and a statutory scheme that bars its consideration. Courts consequently hesitate to find it improper – though doubtlessly it is.

[The defendant had been given] every opportunity to express sorrow, sympathy, pity, remorse. Nothing. No remorse, nothing. Just a fear that he'd be caught. Selfish. Remorseless. You know, it's not the defendant's size that frightens you. It's his attitude. ... And I submit to you that that is a very strong aggravating factor, his attitude toward the crime afterward.¹⁸

You haven't heard one person get on the stand and say that ... he broke down and cried about it, saying, "I'm sorry Floyd Murray got shot. I'm sorry I shot Belinda." ... If you came in this courtroom and no one told you any different and looked over at the defense table, you would think you have three lawyers sitting there. You don't see a person drooped over the chair with tears running down his face.¹⁹

When [the defendant testified at trial], and told you about the crime, ... that he was just having a frustrating day, and he took it out on Norma, did you get any sense at all that he was sorry

for his conduct? Is there anything he said or anything in his demeanor that indicated to you that he felt compassion and remorse for his victim?²⁰

The California Supreme Court approved of the last example because, although the prosecutor clearly commented on lack of remorse, he did not say it should be considered as an aggravator. *Id.* (citing *People v. Proctor*, 4 Cal.4th 499, 545, 15 Cal.Rptr.2d 340, 842 P.2d 1100 (1992)). Similarly, in the second example, the Court upheld that rhetoric because the prosecution can note that a statutory mitigator is *not* present. The California Supreme Court later drew a distinction, permitting comment on "overt remorselessness;" *People v. Gonzalez*, 51 Cal.3d 1179, 1231-32, 275 Cal.Rptr. 729, 800 P.2d 1159 (1990). Of course, if the defense presented remorse, the prosecution would be entitled to rebut it. *E.g.*, *People v. Heishman*, 45 Cal.3d 147, 189, 246 Cal.Rptr.673, 753 P.2d 629 (1988).

Some jurisdictions circumvent the issue whether lack of remorse is a statutory aggravator. For instance, Louisiana concluded that the remorse issue is part and parcel of the legitimate comment on characteristics of the defendant. See *State v. Summit*, 454 So.2d 1100, 1108 (La. 1984). It is not a death penalty aggravator in Arizona, though case law has dealt with it in non-capital cases. See *State v. Tinajero*, 188 Ariz. 350, 935 P.2d 928 (1997) (lack of remorse can be used to aggravate a sentence in non-capital cases, unless the defendant had maintained his innocence throughout the proceedings).

3. Mitigation Used as Aggravation

It is misconduct to label as aggravating circumstances that instead mitigate. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983). Not only does the prosecutor misstate the law of aggravation, but also he improperly

deprives the defendant of legitimate mitigation – in violation of the Eighth Amendment. This section reviews ways the prosecution uses mitigation as aggravation.

a. Disadvantages Growing Up as Aggravation

In *Urbin v. State*, 714 So.2d 411 (Fla. 1998), the defense had called Urbin's mother to testify in the penalty phase about deprivations in his early years. The prosecution turned her testimony into an aggravator by calling her the "mistress of excuses" and criticizing her because:

She never once tried to express concern, that remorse, that sorrow to the family of [the victim].²¹

Her feelings toward the victim's family are not, of course, relevant, nor are they any proper consideration as to how severely the defendant should be punished. The Florida Supreme Court noted that these attacks prejudiced him by arousing animosity against her, "turning the substantial mitigation of parental neglect against him;" they were improper.

On the other hand, the California Supreme Court found no impropriety when, after the defense had introduced the defendant's upbringing, the prosecutor argued:

[With the personal and economic resources available,] he had no excuse to have committed the crimes.²²

The Court did not explain its reasoning, but the distinction may lie in the fact that the defendant's background did not show deprivation, so was not mitigating.

b. Model Prisoner as Aggravation

In a case where the defense had presented evidence and argued that the defendant had been a model prisoner, the prosecutor argued:

[Though the victims were dead and buried,] defendant, 3180 days later, still sitting around here in a coat and tie, got the run of the Central Prison. ... and we're sending him to college.²³

The Court, incredibly, found that this was proper rebuttal of the defense mitigator. This was incorrect; proper rebuttal would have been that the defendant was *not* a model prisoner (for instance, he started fights and was shiftless). Instead, the argument urged the jury not to treat what was clearly a mitigator as mitigation, suggesting that they punish him for the wonderful life he's had in prison.

c. Church Activities as Aggravation

In a California case, the defense presented powerful mitigation regarding his involvement in church and religious faith. In closing the prosecutor argued:

[Defendant teaching children's Sunday school] scared the daylights out of me. [She wondered what lessons the children would learn from him, in view of his describing himself as a pimp, murderer, adulterer, thief, and gambler?]²⁴

This argument was not improper, because the prosecutor did not *overtly* state that the defendant's church involvement should be considered aggravation. Nonetheless, it is difficult to distinguish between improper use of mitigation as aggravation and licit rebuttal of (*i.e.*, disproving) mitigation. The Court characterized the argument as "appropriate response to defendant's previous testimony as to his good character ... of religious devotion." Note, however, that in that jurisdiction (California), offering limited character

evidence opens the door to wide open bad character evidence – which is *not* the case in Arizona. See *State ex rel. Pope v. Superior Court, Maricopa County*, 113 Ariz. 22, 25, 545 P.2d 946, 949 (1976)(when a defendant offers a particular character trait, the state can impeach him as to that trait).

d. Brain Damage and Addiction as Aggravation

In an Oklahoma case where the defendant’s organic brain damage and alcoholism were presented in mitigation, the prosecutor argued that those very things:

...were really things that count against the defendant in this case.²⁵

On appeal, the defendant argued this violated his Eighth and Fourteenth Amendment rights to have his retardation considered as mitigation. However, Oklahoma decided that nothing in the argument “prohibited” the jury from considering the defendant’s mental capacity, so the prosecutor was “well within the bounds of fair argument.”

This appears to fly in the face of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733 (1983) (misconduct to label as aggravating circumstances that mitigate).

e. Mercy as Aggravation

A common problem is using the concept of mercy against the defendant by urging the jury to show the defendant the same “mercy” that he showed the victim. For example:

Give him the same justice that he gave to Voorhies Toucheque.²⁶ If you are tempted to show this defendant mercy, if you are tempted to show him pity, I’m going to ask you to show him the same amount of mercy, the same amount of pity that

he showed Jason Hicks, ... and that was none.²⁷

When you think of sympathy for [Defendant], think about Sonia Niles as she lay there. When you think of compassion and pity for [Defendant], think of Shelley P. and her plea not to hurt her, not to rape her.²⁸

I anticipate in a few minutes, the defense will ask for mercy for the life of [Defendant]. There was nobody there on January 9th to ask for mercy for Vada Langston. ... Nobody was there when she was shot the first time to ask for mercy for her life.²⁹

Different jurisdictions have come up on opposite sides of this issue. Many courts have held that this represents an improper appeal to sympathy. *E.g., Lesko v. Lehman*, 925 F.2d 1527, 1545 (3rd Cir. 1991); *Lawson v. Dixon*, 3 F.3d 743, 755 (4th Circuit 1993); *Richardson v. State*, 604 So.2d 1107, 1109 (Fla. 1992); *Crowe v. State*, 265 Ga. 582, 592-93, 458 S.E.2d 799 (1995); *Le v. State*, 947 P.2d 535, 554-55 (Okla.Crim.App. 1997); *Bigbee v. State*, 885 S.W.2d 797, 809-12 (Tenn. 1994); *Williams v. State*, 945 P.2d 438, 444-45 (Nev. 1997). The second example above from Florida was considered an unnecessary appeal to the jurors’ sympathies. Other courts, however, have allowed the argument as circumstances of the crime as long as the prosecutor does not suggest that the jury is *prohibited* from showing mercy because he showed none. *E.g., People v. Ochoa*, 19 Cal.4th 353, 464-66, 79 Cal.Rptr.2d 408, 966 P.2d 442 (1998); *State v. Summit*, 454 So.2d 1100, 1108-09 (La. 1984); *Commonwealth v. Hackett*, 558 Pa. 78, 93-94, 735 A.2d 688 (1999); *State v. Klepas*, 40 P.3d 139, 285-86 (Kan. 2001). The first and third examples above, from Louisiana and California respectively, were allowed. The Kansas Supreme Court in *Kleypas* also

Argument that suggests that a jury may not consider something as mitigating misstates the law.

permitted this argument so that the jury can evaluate whether the defendant deserves mercy.

4. *Misleading Jury about Duty to Consider Mitigation*

In capital cases, the sentencer must not be precluded from considering “any aspect of a defendant’s character or record, and any of the circumstances of the offense” offered in mitigation. *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978)). Consequently, argument that suggests that a jury may not consider something as mitigating misstates the law. Obviously, however, the State should be able to counter mitigation evidence offered by the defense; the proper way to do that is to attack the evidence rather than the principle of mitigation. Thus arguing that certain evidence does not sufficiently mitigate is distinguished from arguing that that type of mitigation should not be considered.

a. Discounting Sympathy

Specifically, a jury must not be told that it should not consider or should discount sympathy. In *People v. Easley*, 34 Cal.3d 858, 867, 196 Cal.Rptr.2d 309, 671 P.2d 813 (1983), the judge actually instructed the jury that they were not to consider sympathy in rendering their verdict. The Supreme Court of California found this violated *Eddings* and *Lockett*. “Although appeals to sympathy or passions of the jury are inappropriate at the guilt phase, at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury’s moral assessment of the facts as they reflect on whether the defendant ought to be put to death.” *Id.* at 880.

Nevertheless, courts have devised creative ways around this. The North Carolina Supreme Court found the following derogation of sympathy to be permissible:

This is not a matter of sympathy or prejudice at this time. This is a matter for you to look at what you’ve seen. ... Get rid of it, members of the jury. And if you follow the law, that’s what you will do.³⁰

The Court conceded that it would be improper for the prosecutor to preclude the jury from considering compassion, but concluded that he could discourage the jury from considering “mere sympathy” not related to the evidence of the case. The Court made the additional distinction between the prosecutor *telling* the jury it *could* not consider sympathy and *suggesting* that it *should* not.

b. Discounting Prison Adaptability

The defense may offer as a reason to give life in prison that the defendant had adapted well to prison life. The prosecution may improperly refute not the evidence but how the jury could use it:

How could [the defendant’s adjustment to prison life] mitigate these vicious crimes?³¹

The Supreme Court of California disagreed with the defense that this instructed the jury that it could not consider prison adaptability as mitigation; instead the prosecutor was arguing that prison adjustment did not outweigh the defendant’s violent history. It is a fine semantic line, to be sure, between contending that evidence is insufficient to mitigate and that it does not mitigate in principle – but such distinctions are the stuff that capital lawyering is made of.

c. Discounting Mercy

The prosecution should not so disparage mercy as to cause the jury to disregard it as mitigation. While a prosecutor may argue that certain evidence does not call for mercy, she should not argue that mercy itself is improper. For example:

Mercy? I submit to you that we should have no sympathy with the sentiment that springs into action whenever a criminal is about to suffer for a crime. ... The false humanity that starts and shutters when the axe of justice is about to fall is a dangerous element for the peace of society. We have had too much of this mercy.³²

The federal district court found this argument to be improper because, while the prosecutor can argue that mercy is not warranted by these facts, it is error “when the prosecutor argues that it is mercy itself that is inappropriate.”

Misstating the Jury’s Role in Capital Sentencing

A. The *Caldwell* Issue: Reducing the Jury’s Sense of Responsibility

A basic tenet of capital sentencing law is that the jury “confront[s] the gravity and the responsibility of calling for another’s death.” *Caldwell v. Mississippi*, 472 U.S. 320, 324, 105 S.Ct. 2633, 2637 (1985).

The responsibility borne by a sentencing jury is grave and the jury’s perception of its signal responsibility to determine whether to impose the death penalty cannot be lightened. ... No dilution of the jury’s singular role can be allowed to dull an individual juror’s comprehension of that responsibility.

State v. Josephs, 174 N.J. 44, 803 A.2d 1074 (2002) (citing *Caldwell*, *Darden v. Wainwright*, 477 U.S. 168, 183 n.15, 106 S.Ct. 2464, 2472 n.15 (1986), and *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215 (1989)). The concern is that if a jury believes it does not make that ultimate decision, it will more

likely assign the death penalty. *Caldwell*. Prosecutors therefore misstate the law by arguing that the jury is not responsible (or not solely responsible) for condemning a fellow human to die by diluting their role in this monumental decision.

1. Appellate Courts Bear the Responsibility

The Supreme Court first addressed this issue in *Caldwell* where the prosecutor argued that if the jury gave the death penalty, it would be reviewed for correctness by appellate courts:

[The defense] would have you believe that you’re going to kill this man and they know – that your decision is not the final decision. ... Your job is reviewable. ... For they know, as I know, and as Judge Baker has told you that the decision you render is automatically reviewable by the Supreme Court. Automatically.³³

In “automatically reviewing” the case, the Supreme Court found this was an Eighth Amendment violation, noting that it offered jurors a highly attractive “out” to avoid their awesome responsibility. Similar issues concerning appellate review have drawn fire:

During voir dire, the prosecutor explained to a juror that the appellate process would be long and thorough, asking him directly whether that information “comforted” him.³⁴

The next step in the long process of justice is the jury makes a decision as to what is an appropriate punishment. You are not the last step. You are the next step.³⁵

The New Jersey Supreme Court found that first example was error, though not reversible, given the totality of instructions on the law. The Nevada Supreme Court did not find that the second quote reduced the jury’s sense of responsibility; it was an isolated and indirect reference. However, the better distinction

may lie in the fact that the prosecutor did not refer to appellate review, only “steps” - which could mean many things. Nonetheless, the Court correctly warned that prosecutors should refrain from comments about future criminal proceedings.

2. The Legislature/Voters Bore the Responsibility

Prosecutors sometimes argue that the jury does not kill the defendant, the legislature does when it passes capital punishment laws. Sometimes this is couched as relieving the jury of its duty because the will of the people is what will execute the defendant. Examples include:

Whether or not [the defendant] should live or die was decided by the voters of this state when they passed this death penalty law, when they set the criteria. They decided who lives and dies. You decide does aggravating outweigh mitigating. ... The law does the rest. You do not decide life or death. The law does that.³⁶

In imposing [death] ... you act as a representative of all of the people of this state who, by statute and by constitutional amendment, have imposed upon every citizen called to jury service the solemn duty to impose the death penalty whenever the evidence shows a preponderance of aggravating factors.³⁷

We had a recent election in which several of our Supreme Court justices were perceived by our voters not to be applying the death penalty law. They are gone now. There’s no question that it is the policy expressed by the

will of the populace that there be a death penalty in California.³⁸

This sampling (all, coincidentally, California cases) led to different results. The first case was found erroneous, contributing (with many other improprieties) to reversal. The other two examples, however, were brushed aside summarily as correct, though the court was troubled by calling the jury a “representative” of the people.

The prosecutor commits misconduct when he lessens the jury's sense of its responsibility for a death penalty by sharing the blame with other personnel in the justice system.

3. Other Members of the Justice System Share the Responsibility

The prosecutor commits misconduct when he lessens the jury’s sense of its responsibility for a death penalty by sharing the blame with other personnel in the justice system. Note that the prosecution does not suggest that the jury does *not* have responsibility – just that they are not alone in it. Commonly called “jury dilution,” it is improper because diminishing jurors’ sense of responsibility makes it easier for them to render a capital verdict. *E.g., Buttrum v. Black*, 721 F.Supp. 1268, 1316-17 (N.D.Ga. 1989) (jury was “merely one cog in the criminal process”). Nevertheless, courts stretch to prevent reversals. For example:

[The jury would not be alone in sentencing the defendant to death, but was the] last link in a process [including police, the grand jury, the district attorney, and the trial judge.]³⁹

There were police officers involved in the investigation of this case. ... Surely they share responsibility in what was done. ... They submitted the case to the Office of the District Attorney [who was] the charging entity in this case. The judge presided over the trial. ... It’s certainly my earnest hope that ... you aren’t going to be lured into feeling

guilty.⁴⁰

I had to make the decision to seek the death penalty. Before I could do that, the ... police department had to bring evidence to me. And all of you, the jury and my staff and the police departments and their experts did what we did because it's our responsibility.⁴¹

Frequently, courts excuse jury dilution argument due to repeated correct instructions and argument of law – hence the jury presumably was not misled by this misstatement of law. The 11th Circuit followed this rationale in discounting the first example. The 10th Circuit distinguished the second example from *Caldwell*, asserting that it was a permissible commentary on what went into the prosecutor's decision to pursue death. The Nevada Supreme Court condoned the third example as “invited response” to defense argument that was aimed at “guilt-tripping” the jurors into a life sentence. Note, however, that the “invited error” doctrine should not apply: the prosecution may only respond “in kind” if the defense had engaged in improper argument – but defense rhetoric about the weighty moral issues of capital punishment is entirely proper.

4. *The Judge Bears the Responsibility*

Prosecutors can commit a *Caldwell* error by arguing that the jury does not send the defendant to the electric chair – the judge does. This usually occurs in states where juries serve only as finders of fact, deciding what aggravators and mitigators exist, or where they make “recommendations” of sentence. Such argument is not normally a misstatement of law; nonetheless, it can lessen the jurors' awesome sense of responsibility for a man's life. For example:

You aren't the ones that are imposing the punishment yourself. It's your recommendation that's binding on the

Court.⁴²

A lot of times the defense tries to lay a guilt trip on you. ... Don't be fooled for one minute. It's not your decision whether or not he gets life without parole or the death penalty. It's that man seated right up there.⁴³

Don't for a minute think you are going to be sentencing these two guys to death, because you are not. ... You make that recommendation to the Judge.⁴⁴

A jury that returns a verdict of a recommendation of death, that's only a recommendation to the Court, who later sentences the defendant. ... Because juries don't sentence people to death in Missouri. ... The judge has a veto vote. It doesn't matter whether you return a recommendation for the death penalty. ... When I say “imposing the death penalty,” what you're doing is recommending to Judge Long to consider it.⁴⁵

In the first case, the North Carolina Supreme Court missed the point, upholding that argument because it was a correct statement of the law. The fact that appellate courts would review a death sentence was *also* a correct statement of the law in *Caldwell*; the law misstated in *Caldwell* was that the jurors' role in death decisions was minimal. That defect also exists in this North Carolina example.

The second example from Alabama was found to be error, but not reversible (since it was an “invited response”). The Illinois Supreme Court held that the third example was a misstatement of law (since the jury's finding of aggravation/mitigation was binding on the judge), but concluded it was not a *Caldwell* violation because the jury was not misled by it. However, the 8th Circuit reversed the last

example from Missouri; the Court found repeated references to judge sentencing were intended to diminish the jury's sense of responsibility under *Caldwell*. Acknowledging the "technical accuracy" of the prosecutor's rendition of law, the 8th Circuit concluded nonetheless that the argument "misled the jury as to its role in sentencing process in a way that allowed the jury to feel less responsibility than it should for its sentencing decision."

Incidentally, this should not be an issue in Arizona where juries sentence. However during the "aggravation phase," defenders and judges should remain vigilant that the prosecution does not try to minimize or dilute the jury's role by arguing that "all" they are called upon to do (at that point) is decide if there is a single statutory aggravator. To reduce their moral input in that phase would cross the *Caldwell* line. Cases like *Driscoll* (the last example above) establish that it is a *Caldwell* error for the prosecutor to diminish the jury's sense of responsibility for death even when only deciding factual bases for aggravators and mitigators.

5. Other Juries Bore the Responsibility

Occasionally, defendants are facing a second capital verdict, having already been sentenced to death in an earlier trial. It is improper to lessen the jury's sense of responsibility in the present trial by suggesting that the *other* jury is responsible for the defendant dying, not them. The Illinois Supreme Court did not hesitate to reverse a capital case where the jury had been informed of the defendant's pre-existing capital sentence. In *People v. Woolley*, 2002 WL 254025 (Ill. 2002), the judge had told the jury about the prior sentence during voir dire. The Court held that such evidence (a non-statutory aggravator) was never admissible. Moreover, it "may diminish the jury's sense of responsibility in determining whether the

defendant *should* be sentenced to death."⁴⁶

The year before *Caldwell* came down, the Supreme Court decided *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004 (1994), where the state had admitted evidence that the defendant was sentenced to death already in a previous trial. The Supreme Court held that did not "affirmatively mislead the jury regarding its role in the sentencing process so as to diminish its sense of responsibility." *Romano* was distinguished because that evidence was never argued as a basis to reduce the jurors' role. Nonetheless, this shows that if the prosecutor were to argue or even infer lessening of responsibility, it would be improper.

Remain vigilant that the prosecution does not try to minimize or dilute the jury's role by arguing that "all" they are called upon to do is decide if there is a single statutory aggravator.

6. The Defendant Bears the Responsibility

A mainstay of prosecutorial argument is that the jury does not kill the defendant – he killed himself. Hoping to deflect the troubling decision to take a life, the prosecutor asserts that question was already decided for them, incidentally by the least attractive person in the courtroom. For example:

And you didn't put him here. He put himself here. You're not responsible for facing this death verdict. He's responsible for it. And I don't want you to transfer that, or feel guilty, or feel like it's your responsibility. ... But if you give him the death penalty, ... then you're not responsible for it. He's responsible for putting you in this position.⁴⁷

Sometimes defense attorneys [try] to give you the impression that you are killing the defendant if you vote for the death penalty. But you are not killing him. He killed himself ... when

he chose to rape and sodomize and slit the [victim's] throat and stab her. ... He killed himself. You are not killing him if you come back with a penalty of death.⁴⁸

[The sole responsibility for the death sentence lay on the defendant who] signed her own death warrant.⁴⁹

Most courts have not found such argument improper, although clearly under *Caldwell* and its progeny, it should be highly suspect. While it relieves jurors of blame, it finds support in another basic principle of our justice system: an individual must be held accountable for his actions. Perhaps this argument has been upheld so often because, philosophically, judges are loathe to take the position that the accused should *not* be responsible for his punishment. Perhaps, too, judges consider it a truism. But truth is not a defense to this argument; even in *Caldwell*, the argument about appellate review was *truthful*. Courts should look critically and objectively at this argument, because it unequivocally displaces the responsibility for a death penalty away from the jury.

In the first two excerpts, courts followed their philosophical bents, justifying overruling objections in a variety of ways. In the first case, the Louisiana Supreme Court found no *Caldwell* violation, distinguishing the argument on the thin thread that there was no reference to appellate review; nevertheless, the Court echoed that this argument “ventured dangerously close to an attempt to lead the jury to shirk its responsibility.” The Court in the last example, however, found that argument (as well as that the jury is but a single “cog” in the criminal justice process) may have affected the jury’s deliberations.

7. Conclusion

Caldwell correctly barred the government

from undermining jurors’ individual moral responsibility in a capital decision. Nonetheless, the flood of *Caldwell* claims that ensued – and how seldom they reversed cases – suggests that it rarely provides relief. In many cases, it is excused as “harmless,” but the fact of the matter is that *some* harm could be done by this argument. Consider this California example, doubtlessly the high water mark of jury dilution:

They said, “Are you going to kill [the defendant]?” ... over and over again. ... [The defendant] is the murderer. The defense wants the jury ... to feel like the murderer. They want to turn the table and put you on the defensive. If you do what the facts say, if you do what the law says you should do, you then are the murderers. Is that a valid argument? Is that anywhere in these factors? ... If you are the murderers, then how about the people on death row in California, a hundred plus, are the juries who convicted them made up of killers? ... If you are killers then 68-70 percent of the people of this state [who voted for death penalty] are killers in the same regard. If you are killers then the legislature of this state ... who enacted the law of capital punishment ... are murderers too. The District Attorneys, they are killers too. And the judge who has to review the death cases, ... they affirm it, they are killers too. And the Court of Appeals in this state, the Supreme Court, if they affirm the death penalty cases, ... I guess they are killers too. And if the governor fails to commute a sentence in a death penalty case, I suppose the governor is a killer too.⁵⁰

At that point, the trial judge (on his own motion) directed the jury to disregard the remark about the governor. The better approach is to correct any *Caldwell*

encroachment promptly at trial with strong objection; because of the influence it could have on jurors, trial courts should sustain it and remind (instruct) the jury on the law that gives them broad discretion.

B. Juror's Role is to Kill

1. Jury's Duty to Sentence the Defendant to Death

It is misconduct to argue that the jury's role or duty is to kill the defendant. Such references improperly divert jurors' attention from the facts that they are to decide. *State v. Rose*, 112 N.J. 454, 520, 548 A.2d 1058, 1092 (1988). The seminal Supreme Court case is *United States v. Young*, 470 U.S. 1, 30, 105 S.Ct. 1038, 1053 (1985), where the Court denounced admonitions that the jury would not be "doing its job" if it acquitted. Many courts have viewed warning that a jury would not be doing its job or duty as one of the most egregious forms of misconduct. *Rose* at 521, 548 A.2d at 1093. These arguments focus the jury's attention on matters extraneous to the aggravating and mitigating factors permitted by statute in capital deliberations. They therefore encroach on the province of the jury. See *Salazar v. State*, 973 P.2d 315, 326 (Ok.Crim.App. 1998). Examples where such argument was held improper include:

It is misconduct to argue that the jury's role or duty is to kill the defendant.

It is your sworn duty as you came in and became jurors to come back with a determination that the defendant should die for his actions.⁵¹

[The jury had] a duty to even the score which stood at [defendant] two, Society nothing.⁵²

[If they voted for death, the jury could remember that] you did your duty to the community.⁵³

Improper "duty to kill" argument is, however, distinguished from permissible argument calling jurors to do their duty to decide the sentence. Additionally, prosecutors can exhort jurors to "do their duty," without suggesting more. Hence the following arguments were not error:

Deciding the proper penalty is an important duty of citizenship.⁵⁴

I ask you on behalf of the State of Kansas to now perform the duty that you have been charged with by law. I ask you to retire to the jury room, and to return a verdict of guilty.⁵⁵

The second excerpt is a closer call, but note that the plea for a certain result is *not* tied to the admonishment to do their "duty."

2. Jurors' Duty Is Like Soldiers at War

Prosecutors sometimes melodramatically analogize the jury's role to that of soldiers in a war, protecting the citizens of America. This patriotic pitch is improper because an "emotional reaction to social problems should play *no role* in the evaluation of an individual's guilt or innocence." See Balske, D., Prosecutorial Misconduct During Closing Argument: The Arts of Knowing When and How to Object and of Avoiding the "Invited Response" Doctrine, 37 Mercer L.Rev. 1033, 1037 (1986). Examples include:

This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the men who man the guns at Bataan Peninsula. ... We are at war. You have a duty to perform here.⁵⁶

We've had three wars in this country just in my lifetime, World War II, war in Korea, war in Viet Nam. In each of

those wars we drafted young men, ... pointed them at some individual ... and said, this person is the enemy, they are trying to destroy our way of life, when you see this person, kill him. ... We're engaged in a war in this country just as real [and] closer to home than any of those ... and now we're asking you to take the step to do something about this situation.⁵⁷

Each war, we've taken our young men, ... put guns in their hands, ... and they have killed other human beings who are enemies of our country, and ... we decorated them and gave them citations, praised them for it. Well I say to you we're in a war in this country ... against the criminal element and they're winning the war. If we can send a 17-year-old overseas to kill an enemy soldier, is it asking too much to ask you to go back and vote for the death penalty in this case? ... I submit to you that he's an enemy.⁵⁸

The first is from *Viereck v. United States*, 318 U.S. 236, 63 S.Ct. 561 (1943). Arising during World War II, it is the most famous example involving improper war references. The Supreme Court reversed, warning that "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks ... were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted." *Viereck* is a case every defender should keep close at hand in this post-9/11 era. The other examples were similarly held improper. Note that the final example also contained an improper inference that the jurors would become war heroes if they "pulled the trigger" on a death sentence.

Endnotes

1. *Garron v. State*, 528 So.2d 353, 359 (Fla. 1988).
2. *Williams v. State*, 113 Nev. 1008, 1020-21, 945 P.2d 438, 446 (1997).
3. *People v. Cunningham*, 25 Cal.4th 926, 1022, 108 Cal.Rptr.2d 291, 366, 25 P.3d 518, 582 (2001).
4. *People v. Millwee*, 18 Cal.4th 96, 150, 74 Cal.Rptr.2d 418, 451, 954 P.2d 990, 1022 (1998).
5. *Knight v. State*, 190 Tenn. 326, 331, 229 S.W.2d 501, 503 (1950).
6. *People v. Berryman*, 6 Cal.4th 1048, 1094, 25 Cal.Rptr.2d 867, 896, 864 P.2d 40, 69 (1993).
7. *Holland v. State*, 705 So.2d 307, 345 (Miss. 1997).
8. *State v. Kleypas*, 40 P.3d 139, 281-82 (Kan. 2001).
9. *Urbin v. State*, 714 So.2d 411, 419 (Fla. 1998).
10. *State v. Combs*, 62 Ohio St.3d 278, 282-83, 581 N.E.2d 1071, 1076 (Ohio 1991).
11. *State v. Marshal*, 148 N.J. 89, 690 A.2d 1 (1997).
12. *People v. Danielson*, 3 Cal.4th 691, 721, 13 Cal.Rptr.2d 1, 838 P.2d 729 (1992).
13. *Kleypas*, 40 P.3d at 290-91.
14. *State v. Summit*, 454 So.2d 1100, 1110 (La. 1984).
15. *E.g., Battenfield v. State*, 953 P.2d 1123, 1127 (Okla.Crim.App. 1998); *Wallace v. State*, 893 P.2d 504, 512 (Okla.Crim.App. 1995).
16. *People v. Davenport*, 41 Cal.3d 247, 288-89, 221 Cal.Rptr. 794, 710 P.2d 861 (1985).
17. *People v. Edelbacher*, 47 Cal.3d 983, 1034, 254 Cal.Rptr. 586, 618, 766 P.2d 1, 32 (1989).
18. *People v. Cain*, 10 Cal.4th 1, 77, 40 Cal.Rptr.2d 481, 892 P.2d 1224 (1995).
19. *People v. Dyer*, 45 Cal.3d 26, 81-82, 246 Cal.Rptr. 209, 243, 753 P.2d 1, 34-35 (1998).
20. *People v. Osband*, 13 Cal.4th 622, 706, 55 Cal.Rptr.2d 26, 92, 919 P.2d 640, 724 (1996).
21. *Urbin*, 714 So.2d at 421.
22. *Osband*, 13 Cal.4th at 705, 55 Cal.Rptr. at 91, 919 P.2d at 723.
23. *State v. Green*, 336 N.C. 142, 189, 443

- S.E.2d 14, 25-26 (N.C. 1994).
24. Cunningham, 25 Cal.4th at 1023-24, 108 Cal.Rptr.2d at 367-68, 25 P.3d at 583.
 25. Johnson v. State, 928 P.2d 309 (Okla.Crim.App. 1996).
 26. State v. Summit, 454 So.2d 1100, 1109 n.15 (La. 1984).
 27. Urbain, 714 So.2d 411, 421 (1998).
 28. People v. Jackson, 13 Cal.4th 1164, 1241, 56 Cal.Rptr.2d 49, 94, 902 P.2d 1254 (1996).
 29. State v. Bigbee, 885 S.W.2d 797, 810 (Tenn. 1994).
 30. State v. Murillo, 349 N.C. 573, 609, 509 S.E.2d 752, 773 (N.C.1998).
 31. People v. Morris, 53 Cal.3d 152, 221, 279 Cal.Rptr. 720, 807 P.2d 949 (1991).
 32. Buttrum v Black, 721 F.Supp. 1268 (N.D.Ga. 1989).
 33. Caldwell v. Mississippi, 472 U.S. 320, 325, 105 S.Ct. 2633, 2637-38 (1985).
 34. State v. Josephs, 174 N.J.44, 803 A.2d 1073 (2002).
 35. Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445-46 (1997).
 36. People v. Farmer, 47 Cal.3rd 888, 929, 254 Cal.Rptr. 508, 764 P.2d 940 (1989).
 37. People v. Clark, 3 Cal.4th 41, 167, 10 Cal.Rptr.2d 554, 833 P.2d 561(1992).
 38. People v. Rowland, 4 Cal.4th 238, 276, 14 Cal.Rptr.2d 377, 401, 841 P.2d 897, 921 (1992).
 39. Tucker v. Kemp, 802 F.2d 1293, 1296 (11th Cir. 1986).
 40. Evans v. State, 112 Nev. 1172, 1205, 926 P.2d 265, 286 (1996).
 41. Fox v. Ward, 200 F.3d 1286, 1300 (10th Cir. 2000).
 42. State v. McCollum, 334 N.C. 208, 225, 433 S.E.2d 144, 153 (1993).
 43. Bryant v. State, WL 1046430 14 (Ala.Crim.App. 1999)(unpublished).
 44. People v. Fields, 135 Ill.2d 18, 54-55, 142 Ill.Dec. 200, 216, 552 N.E.2d 791, 807 (1990).
 45. Driscoll v. Delo, 73 F.3d 701, 712 (8th Cir. 1995).
 46. The Court cited to two other Illinois cases where the jury had been informed of a prior death sentence: People v. Davis, 97 Ill.2d 1, 72 Ill. Dec. 272, 452 N.E.2d 525 (1983), and People v. Hope, 16 Ill.2d 265, 108 Ill.Dec. 41, 508 N.E.2d 202 1986).
 47. State v. Scales, 655 So.2d 1326, 1334-35 (La. 1995).
 48. People v. Bradford, 14 Cal.4th 1005, 1062, 60 Cal.Rptr.2d 225, 929 P.2d 544 (1997).
 49. Buttrum v. Black, 721 F.Supp. 1268, 1316 (N.D.Ga. 1989).
 50. People v. Stanley, 10 Cal.4th 764, 827-28, 42 Cal.Rptr.2d 543, 897 P.2d 481 (1995).
 51. Garron v. State, 528 So.2d 353, 359 (Fla. 1988).
 52. Lesko v. Lehman, 925 F.2d 1527, 1545 (3rd Cir. 1991).
 53. Holland v. State, 705 So.2d 307, 348 (Miss. 1997) (citing Young).
 54. People v. Osband, 13 Cal.4th 622, 705, 55 Cal.Rptr.2d 26, 91, 919 P.2d 640, 723 (1996).
 55. State v. Gibbons, 256 Kan. 951, 961, 889 P.2d 772, 780-81 (1995).
 56. Viereck v. United States, 318 U.S. 236, 248, 63 S.Ct. 561, 566 (1943).
 57. Hance v. Zant, 696 F.2d 940, 952 (11th Cir. 1983).
 58. Brooks v. Kemp, 762 F.2d 1383, 1396-97 (11th Cir. 1985).



Continued from Undesignated Driver: What Does it Take to Keep a Class 6 Undesignated at the Time of Sentencing?, page 1

well on probation. The successful probationer will be rewarded with a misdemeanor, while a defendant who does poorly will be saddled with a designated felony.

Some courts, however, take the position that, absent a stipulation specifying “the offense shall remain undesignated at the time of sentencing,” the judge has a “triple option” at sentencing: designate it a misdemeanor, keep it undesignated, or designate it a felony. Is this correct?

Well, clearly, the best practice with any plea agreement is to spell out all terms of sentencing with as much clarity and specificity as possible. In a perfect world, the stipulation portion of the agreement (located in paragraph 2 of most Maricopa County plea agreements) should be used to specify “shall remain undesignated at time of sentencing.” After all, plea agreements are contracts and, as such, the specific language and the intentions of the parties are of paramount importance. *Santobello v. New York*, 404 U.S. 257 (1971); *United States v. Lewis*, 979 F.2d 1372 (9th Cir. 1992); *Meija v. Irwin*, 195 Ariz. 270, 987 P.2d 756 (App. 1999).

But what if the plea agreement doesn't specify “shall remain undesignated at the time of sentencing?” For example, let's say you represent Corky Calhoun, a 22 year-old fellow with no prior felonies. He's charged with a class 4 possession of dangerous drugs and a class 6 possession of drug paraphernalia. The meth and the infamous baggy were found in his shirt pocket after a legitimate stop and search. You meet him and he takes full responsibility. He is anxious to plead to an agreement that can give him a "shot at a misdemeanor." You tell him that you anticipate getting a “6-open” plea that will give him the opportunity to earn a

misdemeanor if he successfully completes probation. The prosecutor does, in fact, send you the “6-open” plea, but all it states in paragraph 2 is “stip probation, shall not be designated a misdemeanor until successful completion of probation.” Neither you nor the prosecutor discuss the meaning of this language. At the change of plea proceeding, Corky enters into the plea agreement. Nothing is stated at the time of sentencing by any of the parties or the judicial officer regarding whether it is to remain designated or undesignated. A month later, however, the sentencing judge says she intends to designate it a felony. Is your client stuck? Maybe not.

As stated by the United States Supreme Court in *Santobello v. New York*, 404 U.S. 257, 264 (1971):

[The plea] phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.

In *State v. Watton*, 164 Ariz. 323, 326; 793 P.2d 80, 83 (1990), the court recognized that “[a] defendant must thoroughly understand the plea's potential ramifications and be apprised of both the sentencing range and rights forfeited.” Because they are contractual in nature, the interpretation and enforcement of plea agreements calls for the use of traditional principles of contract law. *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991); *McKenzie v. Risley*, 801 F.2d 1519, 1526 (9th Cir. 1986). Accordingly, if there was a mutual mistake among the parties (i.e., the prosecution intended to leave the issue of designation up to the judge at sentencing, the defense believed the plea required it to remain undesignated), then rescission is the appropriate remedy. *State v. Stevens*, 154 Ariz. 510, 514, 744 P.2d 37, 41 (1987); *Restatement (Second) of Contracts*,

Section 17, comment c (1981). This is consistent with Rules 17.4 and 17.5 of the Arizona Rules of Criminal Procedure, which provide that the defendant should be given an opportunity to withdraw from a plea agreement if a provision of the plea is rejected by the court or to correct a “manifest injustice.”

If, however, both parties intended the same meaning, the plea agreement should be enforced with regard to the requirement that the offense remain undesignated at the time of sentencing. In our hypothetical, the ability to “earn a misdemeanor” was a material fact that was part of Corky’s understanding of the agreement and, as far as the defense knew, the intention of the prosecution as well. To the extent that the court believes this intent was not clearly manifested by the language of the agreement itself, the court has the power to reform this written agreement to conform to the subjective intentions of the parties. *State v. Gourdin*, 156 Ariz. 337, 340, 751 P.2d 997, 1000 (App. 1988); *Phil Bramsen Distribution, Inc. v. Mastroni, et al*, 151 Ariz. 194, 198, 726 P. 2d 610, 614 (App. 1986).

Based on these principles, the first issue raised in our example is, to use the language of the *Santobello* court, whether Corky is “reasonably due” a class six undesignated felony at the time of sentencing. The plea itself stipulates that he will be placed on probation and that the offense “shall not be designated a misdemeanor until the successful completion of probation.” A reasonable interpretation of this language is that a defendant in this situation will be given an opportunity to earn a misdemeanor by being placed on probation. The only way that opportunity exists is if the offense remains undesignated at the time of sentencing. Therefore, it can be argued that an undesignated felony is “reasonably due” under the language of this plea agreement, particularly if nothing was said to the contrary at the change of plea proceeding. If the court disagrees and maintains that the

plea agreement should not be subject to this interpretation, the appropriate resolution under our scenario is not to designate it a felony. Rather, under the cases and rules discussed above, the appropriate resolution would be “reformation” (i.e., amending the plea agreement to reflect the requirement of undesignation) or “recission” (i.e., allowing the defendant to withdraw from the plea agreement).

Those of you who have researched this area may be asking, “But what about *State v. Diaz*, 173 Ariz. 270, 842 P.2d 617 (1992)?” After all, the *Diaz* decision is frequently cited as dispositive authority for the “triple threat” option at sentencing. It is, however, distinguishable from our scenario and most of the “6 undesignateds” that come across our desks. *Diaz* concerned a situation where the defendant signed a plea agreement in which he pled guilty to possession of marijuana, a class six “open-ended” offense. The court held that this “open-ended” language was insufficient to require the court to keep the matter undesignated at sentencing. It appears as though this reference to an “open-ended” offense was the *only* language in that plea agreement pertaining to agreements made between the parties. Apparently, there were no stipulations set forth in the plea at issue in that matter (such as probation, earning a misdemeanor upon successful completion of probation, etc.). The court also noted that the defendant in that case “had four prior felony convictions, two of which involved the sale of drugs, and he had been sent to prison twice.” 842 P. 2d at 618. The court also emphasized that “[t]he dialogue between the commissioner and defendant at the change of plea hearing clearly establishes that the plea agreement was not intended to and did not take away any of the trial court’s options at the time of sentencing.” 842 P.2d at 620.

Accordingly, it appears as though Mr. Diaz was in a far different situation than the defendant in our hypothetical. Based on his

prior felonies, DOC terms and lack of any stipulation to probation, the court had a strong basis for concluding that a reasonable interpretation of the plea agreement in *Diaz* left all of the sentencing judge's options open. Finally, the court in *Diaz* focused its decision on the specific language of the plea agreement, applicable statutes, and the dialogue at the change of plea proceeding. The decision makes no reference to statements from the defendant or defense counsel in that case avowing to the court that it was their clear understanding when the plea was entered that it would remain undesignated at the time of sentencing. Rather, it smacks of a situation where a defendant with four prior felonies and two previous DOC stints was trying to take what was, in effect, a "no agreements" plea and turn it into a "class 6 undesignated, stip probation" plea. In our hypothetical, Corky and his defense counsel had a genuine, good faith belief that the plea required the offense to remain undesignated at sentencing and provide Corky with the opportunity to earn a misdemeanor upon successful completion of probation.

In conclusion, it must be emphasized that the best practice is to use specific stipulations to nail down every possible variation in how a plea can be interpreted. If you fail to do so, however, carefully examine all of the surrounding circumstances. If it turns out that a good faith argument can be made that your client is "reasonably due" a result that was not specified in the written plea agreement and was not foreclosed by the description of the plea at the change of plea proceeding, don't "roll over." Instead, try using these well established contract principles to get your client the benefits of the bargain you and your client reasonably believed to exist.



The Poppy Seed Jungle

The In's and Out's of Drug Testing

By Michelle Arvanitas
Investigator - Group C

On several occasions I have heard attorneys making comments in an attempt to decipher the drug tests performed on our clients. Questions arise such as "What type of drugs do they test for?" and "How long do they stay in human systems?" Federal government guidelines promulgated by the National Institute on Drug Abuse (NIDA) require companies to have a testing system in place. NIDA compliant testing must test for 5 specific categories of drugs, sometimes referred to as the "NIDA 5." The 5 categories are:

1. Cannabinoids (marijuana, hashish)
2. Cocaine (cocaine, crack, benzoylecognine)
3. Amphetamines (amphetamines, methamphetamines, speed)
4. Opiates (heroin, opium, codeine, morphine)
5. Phencyclidine (PCP)

The trick is determining, with a high level of accuracy, whether any of the NIDA 5 are in the person being tested. The following is an overview of the three primary types of drug tests: blood, urine, and hair.

Urine Test

- Most common type of testing because it is the least expensive (\$25-\$50).
- Detects use primarily within the past week (longer with regular use).
- Can be affected by abstaining from use for a period of time before the test.
- Can be done at home.
- Is often temperature tested in an effort to ensure sample integrity.

Hair Test

- Is considered the least intrusive method of drug testing.
- More expensive than urine tests (\$100-\$150).
- Detects substance use over a longer time period.
- Does not usually detect use within the past week.
- Requires a sample of hair about the diameter of a pencil and 1.5 inches long. It cannot be done with a single hair.
- Tests positive a little more than twice as often as a urine test. In a recent study, out of 1823 paired hair and urine samples, 57 urine samples tested positive for drugs of abuse; while 124 hair samples from the same group tested positive.
- Is not significantly affected by brief periods of abstinence from drugs.
- Can sometimes be used to determine when use occurred and if it has been discontinued. Drugs, such as opiates (codeine, morphine, heroin) lay down on the hair shaft very tightly and are shown not to migrate along the shaft, thus, if a long segment of hair is available one can draw some "relative" conclusions about when the use occurred. However, cocaine, although very easy to detect, is able to migrate along the shaft making it very difficult to determine when the drug was used and for how long.
- Claims to be able to reliably differentiate between opiate and poppy seed use.

Blood Test

- Is considered the most intrusive method of testing.
- Is the most expensive method of testing.
- Is the most accurate method of testing.
- Is the least common method of testing (most likely due to cost).

Test Sensitivity

The Substance Abuse and Mental Health Services Association (SAMHSA) provides guidelines for what qualifies as a positive drug test. If a test does not give results higher than the guidelines, it does not qualify as a "positive" test. If an immunoassay test gives positive results, a second gas chromatography test must also give positive results before a result of "positive" is announced. The following chart shows the minimum required for a positive result:

SUBSTANCE	IMMUNOASSAY	GC/MS
Cannabis	50 ng/ml	15 ng/ml
Cocaine	300 ng/ml	150 ng/ml
Opiates	300 ng/ml	300 ng/ml
Amphetamines	1000 ng/ml	500 ng/ml
PCP	25 ng/ml	25 ng/ml

Detection Periods

The following chart shows approximate time periods that drugs can be detected in the body using the more common urine or hair tests. There is some variance due to body fat and metabolism of the individual.

SUBSTANCE	URINE	HAIR
Alcohol	6-12 hrs	n/a
Amphetamines	4-5 days	up to 90 days
Barbiturates	2-12 days	n/a
Benzodiazepines	1-42 days	n/a
Cannabis (single use)	24-72 hrs	up to 90 days
Cannabis (habitual use)	up to 12 wks	
Cocaine	4-5 days	up to 90 days
Codeine/Morphine	2-4 days	up to 90 days
Heroin	8 hrs	up to 90 days
PCP	2-10 days	up to 90 days

False Positives

Unfortunately, false positives are not unusual. While I was a probation officer, I had a client who tested positive for opiates. He was a "compliant probationer" so I had some concerns regarding the accuracy of the test. We were in the process of submitting paperwork for an early termination on his probation. Due to the "dirty u/a" (dirty

urinalysis), early termination was no longer possible. The probationer was adamant that he was not on opiates. We chose to challenge this positive u/a. His u/a was retested using a more sensitive test. The test revealed that the positive u/a was due to poppy seeds. He had consumed three poppy seed muffins, one muffin for three days. After this was confirmed we were able to complete the termination process and give him an early release from probation.

A number of other, less well known, substances can cause false positives. They include:

- ◆ Ephedrine, pseudoephedrine, propylephedrine, phenylephrine, or desoxyephedrine (Nyquil, Contac, Sudafed, Tavist-D, Dimetapp, etc.).
- ◆ Phenegan-D (Robitussin Cold and Flu, Vicks, Nyquil, etc.).
- ◆ Over-the-counter diet aids with phenylpropanolamine (Dexatrim, Accutrim).
- ◆ Over-the-counter nasal sprays (Vicks, Afrin).
- ◆ Asthma medications (Marax, Bronkaid tablets, Primatine tablets).
- ◆ Prescription medications (Amfepramone, Cathne, Etafediate, Morazone, phendimetrazine, phenmetrazine, benzphetamine, fenfluramine, dexdenfluramine, Redux, mephentermine, Mesocarb, Methoxyphenamine, phentermine, amineptine, Pholedrine, Hydroxymethamphetamine, Dexedrine, amifepamone, clobenzorex, fenproporex, mefenorex, fenelylline, Didrex, dextroamphetamine, methphenidate, Ritalin, pemoline, Cylert, selegiline, Deprenyl, Eldepryl, Famprofazone).
- ◆ Kidney or liver infection or disease, diabetes.

Conclusion

Something like eating poppy seed muffins or treating a head cold with Nyquil should not send a person to jail. Positive results on drug tests can and should be challenged if you believe any of the above listed substances or conditions existed at the time of testing. Good luck!



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ARIZONA ADVANCE REPORTS

By Terry Adams

Defender Attorney – Appeals



Peak v. Acuna

379 Ariz. Adv. Rep. 23(SC, 8/9/02)

The jury at defendant's murder trial was instructed on 1st degree, 2nd degree and manslaughter. They acquitted on 1st and manslaughter but found guilty on 2nd degree. The defendant moved for a new trial based on the grounds that the verdict was contrary to the weight of the evidence, and moved for dismissal based on Rule 20. The court granted the motion for a new trial. The defendant then moved for dismissal of 2nd degree murder because she was acquitted of manslaughter, a lesser of 2nd degree, so double jeopardy would bar a trial on 2nd degree. The trial court denied the motion and this special action ensued. The Supreme Court found that normally the defendant would be correct, however manslaughter, instead of deleting an element of the greater offense, adds an element: heat of passion. Thus an acquittal does not necessarily mean that she did not commit 2nd degree murder. However, the court was troubled by the order for a new trial based on the lack of evidence. The court found that double jeopardy would not bar a new trial if the judge concluded that the verdict was contrary to the weight of the evidence, but would if the evidence was insufficient to support the verdict. The matter was remanded for the trial court to clarify its ruling.

State v. Jeffery

379 Ariz. Adv. Rep. 3 (CA 2, 7/30/02)

The defendant was convicted of kidnapping during a home invasion. She was with an individual who killed himself before he could be arrested. Her defense was duress applied by the other person. On appeal, she contended that A.R.S. 13-205, which requires a defendant to prove that she acted under duress, is unconstitutional. The court found there was no need to treat the duress defense any different than insanity, self-defense, defense of another, or entrapment, all of which have been found constitutionally sound in requiring the defendant to prove the defense by a preponderance of the evidence. No due process violation, conviction affirmed.

State v. Smith

379 Ariz. Adv. Rep. 19 (SC, 7/29/02)

This is a death penalty case out of Yuma County. The judge who presided over the trial and sentencing was acquainted with two relatives of the victim. These relatives worked in various capacities in and around the county court house. The defendant moved for a change of judge and a change of venue. A hearing was conducted in Pima County. The court found that the defendant knew of these relationships months before the motion was filed and therefore a Rule 10.1 motion was untimely. The Supreme Court reviewed this on its merits based upon the Code of Judicial Conduct. It found that the relationship was

attenuated so no violations were found. Also the relatives did not appear at any court proceedings. Therefore the judge's disqualification was not required. The court did consolidate this matter with the other cases that are pending under *Ring v. Arizona*.

State v. Herrera
380 Ariz. Adv. Rep. 10 (CA2, 8/13/02)

During the defendant's D.U.I. Trial, the arresting officer volunteered: "They have done studies that show a correlating percentage of people, if you see two cues in each test, you see a correlating percentage as to how many people are over .10." The defendant moved for a mistrial, which was denied. The cop also opined, based upon the F.S.T.'s, that "I felt he was impaired to the slightest degree." Again no mistrial. The court of appeals affirmed, finding that the testimony was inappropriate, but did not require a mistrial. As to the first statement, the cop did not reveal the correlating percentage, therefore the statement was too indefinite. Also, the state introduced the breath test, which was over .10, therefore it was cumulative. As to the second statement, the trial court immediately struck the opinion and gave a curative instruction. And the trial court expressed its opinion that the defendant could still get a fair trial, thus it engaged in the analysis required by case law.

State v. Meza
380 Ariz. Adv. Rep.3 (CA 1, 8/15/02)

The state appeals the trial court's order precluding the use of breath results based upon discovery violations. The defendant cross appeals the court's denial of his motion to dismiss. This involves about a two-year

discovery battle regarding the ADAMS database of calibration checks on the Intoxilyzer 5000. The court of appeals found the court did not err and suppression was the proper sanction.

State v. Prion
380 Ariz. Adv. Rep. 13 (CA 1,8/15/02)

This is a capital murder case where the trial court denied the defendant's request to use third party culpability evidence and denied his motion to sever the murder from kidnapping and aggravated assault charges against another victim. The Supreme Court reversed. The court found that the proper focus in determining relevancy of third party culpability evidence is the effect of the evidence upon the defendant's culpability. It need only tend to create a reasonable doubt. The court was unable to conclude that if the proffered evidence was admitted that the result would have been the same. As to severance, the court found that the crimes were not intertwined, they were not proveable by the same evidence, and they did not arise out of a series of connected acts. None of the exceptions under Rule 13.3 existed, therefore, the counts should have been severed.



OCTOBER 2002 JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
9/3 - 9/4	Cain	McVey	Charnell	CR02-007333 2 cts. Agg. Assault, F3D	Not Guilty	Jury
9/3 - 10/1	Roth	Gerst	Zimmerman	CR02-09180 2 cts. Forgery, F4	Ct. 1 Guilty Ct. 2 Not Guilty	Jury
9/4 - 9/10	Buckallew	Jarrett	Wahlin	CR02-92754 Child Molest, F2N Burglary, F3N	Hung Jury - Child Molest; Not Guilty - Burglary	Jury
9/23 - 9/24	Nurmi O'Farrell <i>Curtis</i>	Hotham	Charnell	CR02-06672 Theft, F3 Trafficking in Stolen Prop., F3	Guilty	Jury
9/25 - 10/1	Whelihan	Schwartz	Sabbah	CR02-08119 Theft Means Transportation, F5 POM, F6	Guilty	Jury
10/1 - 10/4	Gaziano	Jarrett	Cutler	CR02-93991 Poss. Of Weapon by Prohib. Person, F4N	Not Guilty	Jury
10/2 - 10/3	Varcoe / Rothschild	Foreman	Bernstein	CR02-008857 Attpt 2 nd Deg. Murder, F2 Agg. Assault, F3	Ct. 1 Not Guilty Ct. 2 Guilty	Jury
10/2 - 10/7	Castillo	Hotham	Charbel	CR02-008078 POND, F4 PODP, F6	Guilty	Jury
10/3 - 10/8	Roskosz	McVey	Vingelli	CR02-011396 Burglary in the 2nd Degree, C2F Agg. Assault, C3D	Guilty	Jury
10/3 - 10/8	Shoemaker	Jarrett	Duggan	CR02-92482 POM, F6N POND, F4N	Guilty - POM Not-Guilty - POND	Jury
10/4	Nurmi Fusselman <i>Landau</i>	Granville	Keleman	CR02-094530 Resisting Arrest, F6	Not Guilty	Jury
10/8	Aeed	Cates	Aubuchon / Stewart	CR02-005408 PODD, F4 PODP, F6	Guilty	Jury
10/8 - 10/9	Scanlan	Kaufman	Sherman	CR02-010177 SOND, F2	Guilty	Jury
10/8 - 10/11	Burns / Spurling Klosinski <i>Gavin</i>	Gaylord	Denney	CR02-08299 Gang Threatening and Intimidation, F4N	Not Guilty F4, Guilty Lesser Included, Threatening and Intimidation.	Jury

**OCTOBER 2002
JURY AND BENCH TRIALS**

OFFICE OF THE PUBLIC DEFENDER (CONTINUED)

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
10/10 - 10/22	Little Arvanitas <i>Rivera / Moncada</i>	Jarrett	Lynch	CR02-91243 Manslaughter, F2D	Guilty	Jury
10/11	Schwartzstein	Rayes	Stoutner	CR02-11886 2 Cts. Agg. DUI, F4	Ct. 1 Dismissed Ct. 2 Guilty	Jury
10/15 - 10/17	Reece	Gaines	Bryson	CR02-09454 Forgery, F4	Not Guilty	Jury
10/18 - 10/21	Rothschild <i>Reidy</i>	Gottsfeld	Ingram / Bernstein	CR02-010502 Agg. Harrassment, F6	Not Guilty	Jury
10/21 - 10/23	Cain	Schwartz	Greene	CR02-011645 2 Cts. Agg. DUI, F4	Guilty	Jury
10/21 - 10/23	Farrell Anatra	Cates	Robinson	CR02-005075 Theft Means Transportation, F3	Guilty	Jury
10/21 - 10/23	Reece Brazinskas	Schneider	Simpson	CR02-07215 2 Cts. Agg. DUI, F4	Guilty	Jury
10/21 - 10/23	Kavanagh <i>Gavin</i>	Akers	Cutler	CR02-91946 Theft Means Transportation, F3N	Guilty	Jury
10/23 - 11/04	Meshel	Gerst	Lane	CR02-012964 2 Cts. Agg. DUI	Guilty	Jury
10/24 - 10/28	Valverde	Schneider	Simpson	CR02-009296 Agg. DUI, F4	Not Guilty F4; Guilty of lesser included DUI, M1	Jury
10/24 - 10/29	Enos	Franks	Adleman	CR02-010498 POND, F4 PODP, F6 Resist Officer/ Arrest, F6	Guilty	Jury
10/24 - 10/29	Kavanagh Arvanitas <i>Gavin</i>	Akers	Montgomery	CR02-91864 4 Cts. Agg. DUI, F4N	Cts. 2, 4 - Guilty Cts. 1, 3 - Not Guilty	Jury
10/28	Washington / Dailey	Cates	Sherman	CR02-10307 Agg. Assault, F6	Not Guilty	Jury
10/28 - 10/30	Rothschild <i>Landau</i>	Galati	Davidson	CR02-013210 Agg. Assault, F4 2 Cts. Dom. Violence, F5 Theft, F6	Guilty	Jury
10/29 - 10/31	Cuccia <i>Reidy</i>	Hilliard	Larish	CR02-012302 Narc Drug For Sale, F2 PODP, F6	Hung	Jury
10/29 - 11/04	Carey / Potter <i>Moncada</i>	Fenzel	Perkowski	CR02-0955190 Agg. DUI while license suspended - Rev for DUI, F4	Guilty	Jury

OCTOBER 2002 JURY AND BENCH TRIALS

OFFICE OF THE LEGAL DEFENDER

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
10/29-10/31	Tallan Abernethy	Anderson	Luder	CR02-007937 Misconduct Involving Weapons, F4	Guilty	Jury

OFFICE OF THE LEGAL ADVOCATE

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
10/1-10/8	F. Gray Mullavey	Hilliard	CR02-002508 Aggravated assault, F3D	Guilty	Jury
10/8-10/10	C. Johnson Stovall	Foreman	Endangerment (Dangerous)	Not Guilty	Jury
10/15-10/17	Schaffer	Hotham	CR02-007228 Sexual conduct with a minor Child molest	Guilty sex conduct; molest dismissed prior to trial	Jury
10/23-10/30	Agan	Hotham	CR02-009528 6 cts. Sex conduct with a minor Other charges dismissed prior to panel being sworn.	Guilty of 3 counts sex conduct.	Jury
10/23-10/24	Koestner	P. Reinstein	CR02-008684 Theft of vehicle F3	Not Guilty	Jury
10/28-11/5	Buck	Gerst	CR02-006616 Promoting prison contraband F2 (two priors)	Not Guilty	Jury

for The Defense

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