

for The Defense

■ Training Newsletter of the Maricopa County Public Defender's Office ■

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Capital Penalty Phase Argument Misconduct

Chapter Seven: Victim Impact Argument

Donna Elm, Federal Deputy Public Defender

A basic tenet of capital sentencing is that the finder of facts must consider all the circumstances surrounding the offense. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976). It follows, then, that the prosecution can argue what victim-decedents experienced as they were killed. In most jurisdictions, cruelty or the victim's suffering is an aggravating factor, so the impact of the defendant's conduct on his victim is fair game in summation.

Historically, victim impact had been limited to this subject. Therefore, attempts to introduce the decedent's family's experiences, resulting from their loss, were rebuffed as "irrelevant" and prejudicial. The Supreme Court had held that admitting such evidence and argument in a death penalty case violated the Eighth Amendment. *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529 (1987).

Treatment of victim impact expanded, however, with the advent of victims' rights awareness and ensuing legislation in the 1980's. Under Victims' Bill of Rights enactments, homicide "victims" may include surviving close family such as parents, spouses, children, siblings, or their lawful representatives; Arizona recognizes all these except siblings as "victims." See Rule

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39(a)(1), Ariz.R.Crim.P.; Ariz. Const. Art.2, § 2.1(12)(C); and see A.R.S. § 13-4401(19). In 1991, the Supreme Court reversed *Booth*, expanding relevance in capital sentencing to include impact on decedents' families. *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991). The Court found that this evidence was proper to counteract mitigation concerning a defendant's character evidence as a "uniquely individual human being," admissible under

(continued on page 10)

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Delivering
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for The Defense

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Volume 13, Issue 3

Children Resource Staffing

A Pretrial Avenue to Having Your Client Released From Jail/Detention

Art Merchant, Juvenile Durango Supervisor and Christina Phillis, Juvenile SEF Supervisor

A common problem we face in juvenile court is finding state-funded services for our minor clients. In the past, we have relied on the probation department to locate and pay for services our juvenile clients need. However, since January 2002, there is another option: Children’s Resource Staffing.

Children’s Resource Staffing is a program that is accessible to any child in need of services. The staffing is open to all children under eighteen years of age, regardless of their involvement in the juvenile or the adult system. The goal of the resource staffing is to match children with services in the community. Resource staffings are held on Tuesdays from 1:00 to 5:00 p.m. at the Juvenile Southeast Facility and on Thursdays from 1:00 to 5:00 p.m. at the Juvenile Durango Facility. The staffings are approximately one hour in length.

The staffing participants include a Value Options case manager, a Child Protective Service caseworker, a representative from the juvenile probation department, and a facilitator. The staffing team, the juvenile and his family, when possible, work together to develop a comprehensive plan to address

the welfare of the child. The team addresses issues of living arrangements, mental health, substance abuse and the like. Child Protective Services is able to offer alternative living plans for children who are not able to return home. This resource may be utilized pretrial to locate alternatives to being locked up in county jail or juvenile detention. Consider this option when you have a client under eighteen, who cannot return home due to circumstances such as an alleged victim residing in the home or minor children residing in the home when the client is accused of a crime against children or a sexual offense. Also, service staffings should be used when the accused has no viable living options due to lack of appropriate relatives who can provide the necessary court-sanctioned environment.

Value Options’ participation in the staffing offers the benefits of behavioral health and substance abuse treatment services to clients under eighteen who qualify for Title 19 and Title 21 benefits. Children qualify for Title 19 benefits if they are AHCCCS eligible. Title 21 qualifications are also income-based, and apply where the family’s income makes them ineligible for AHCCCS, but they are still below the poverty level. Also, House Bill 2003 provided funding for children who do not qualify for Title 19 or Title 21. Some of the enhanced benefits available under HB2003 are behavioral health day programs, routine transportation, rehabilitation services, group therapy, family therapy, behavioral management services, intensive outpatient substance abuse and home-based services.

Once your client qualifies for benefits, Value Options should find an appropriate program to address his needs, including residential treatment. During this time of economic hardship, Value Options claims to have significant funding to aid our clients in

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obtaining necessary services. As with many government agencies, they must spend their funding for the fiscal year or risk having it adversely affect their budget for the following year. By uniting our clients with Value Options, we create a winning situation for all.

The probation department may have services available to facilitate the child's release from detention. A minor in the juvenile system may receive placement in a detention alternative program, substance abuse counseling or intensive therapy. Unfortunately, juveniles facing charges in the adult system are not eligible to be placed in juvenile facilities. However, Child Protective Services and Value Options should be able to provide options for placements as alternatives to your client being locked up in Sheriff Joe's Hotel pending a trial.

Children's Resource Staffing has been utilized to obtain release of Public Defender clients accused of child molest and domestic violence from juvenile detention. One client, a twelve-year-old boy, was unable to return home because he was accused of sexually molesting his younger brother. The child was lingering in detention because he had no suitable family members available as a release option. A resource staffing was held and Child Protective Services agreed to place the child in a shelter. After spending months in detention awaiting his adjudication, the minor was released within forty-eight hours of the staffing. In another case, a sixteen-year-old boy was accused of physically assaulting his mother. His mother was unwilling to allow the child to return to the home and there were no relatives with whom the mother was willing to allow the child to reside. The court was unwilling to consider release of the child to his nineteen-year-old brother, so the client wasted away in detention. But, after a Child Resource Staffing, Child Protective Services agreed to shelter the child while they investigated the brother. Once again, a child was released from detention.

Children's Resource Staffing also can be utilized to obtain residential treatment services for your client pre-trial. A fifteen-year-old girl was brought in on violation of probation charges. She had a severe substance abuse problem. The court was not willing to release her out of fear that she would overdose. During a staffing, Value Options agreed to evaluate the child to determine if she was eligible for residential treatment. Value Options placed the client at Parc Place, a residential treatment center, two weeks after the staffing. These are just a few examples of obtaining an alternative to having your client incarcerated by utilizing this resource.

Children's Resource Staffing is available and should be utilized to develop viable options to incarceration.

Children's Resource Staffing is available and should be utilized to develop viable options to incarceration in the county jail or juvenile detention. To request a staffing, you must contact the facilitator, Mary Kay Hoskovec, at (602) 506-4068. Alternate numbers for Mrs. Hoskovec are (602) 506-1032 at the Southeast Facility and (602) 506-4029 at Central Court Building, eighth floor. If Mrs. Hoskovec is unavailable, please contact her supervisor, Bill Callahan, at (602) 506-5904 or (602) 506-0132. The representatives for Value Options are Lawrence Saiz for Southeast and Lanai Green Halgh for Durango. Mr. Saiz may be reached at (480) 731-1053 or (602) 506-2656, and Mrs. Halgh is at (480) 731-1047. The caseworker for Child Protective Services is Maura Kelly, who can be contacted at (602) 264-1360, ext. 4112. ■

Court Institutes Changes for Complex Cases

Jeremy Mussman, Special Assistant Public Defender
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Up until recently, complex cases, such as capital cases, child abuse cases involving shaken baby or brittle bone, multiple defendant wiretap stings and massive fraudulent schemes, were subject to the same presumptive speedy trial limits as all other cases. So, even though every one knew it was ludicrous to assume that a shaken baby case should be on the same track as a possession of marijuana, Rule 8 of the Arizona Rules of Criminal Procedure failed to provide any specific demarcation between these radically different types of matters.

That has changed — as of December 1, 2002 a new timeline for “Complex Cases” is in effect. As explained in Presiding Judge Colin Campbell’s November 20, 2002, Administrative Order:

The Arizona Supreme Court has set new time limits for complex criminal case processing under Rule 8.2, Arizona Rules of Criminal Procedure. Complex cases include (1) all First Degree Murder cases, (2) all cases that will require the court to consider evidence obtained as the result of an order permitting the interception of wire, electronic or oral communication, and (3) any case that the court, in a written factual finding, designates as complex.

All cases filed on and after December 1, 2002 that are determined to be complex shall be tried within one year from arraignment. Rule 8.2(a)(3).

Effective October 11, 2002, all capital murder cases shall be tried within 18 months from arraignment. Rule 8.2(a)(4).

In response to these changes, the court has instituted a new procedure for managing all cases designated “complex”. Judge Campbell’s order provides a detailed explanation of this new approach. It states, in part, that:

1. Effective immediately, all pending capital cases shall be managed by the assigned trial judge pursuant to this Complex Case Management Plan.
 2. Beginning with cases filed on or after December 1, 2002, non-capital criminal cases designated “complex” pursuant to Rule 8.2(a)(3) shall be managed by the assigned trial judge pursuant to this Complex Case Management Plan.
 3. Complex Case Designation
All First Degree Murder cases will be automatically designated as complex by Court Administration at the time of arraignment, pursuant to Rule 8.2(a)(3). As to all other criminal cases that any party wishes to be designated as complex, a written Motion for Complex Case Designation shall be filed with the assigned trial judge no later than 60 days from arraignment. The motion shall be accompanied by a proposed form of order setting forth the factual findings supporting designating the case as complex.
- Factors to be considered in determining if a case should be designated as complex include, but are not limited to, the following:
- a. Number of defendants;
 - b. Number of counts;
 - c. Nature of charges;

- d. Number of witnesses/victims to be called;
- e. Expert witnesses — number, nature of testimony, etc.;
- f. Out-of-town witnesses;
- g. Number of exhibits;
- h. Nature of exhibits;
- i. Defendant’s pro se status;
- j. Complex legal issues.

* * * *

4. Any Motion for Complex Case Designation that is filed more than 60 days from the date of arraignment shall be forwarded by the assigned trial judge to the Presiding Criminal Judge or his/her designee for ruling. Any such motion must include an explanation as to why the complex nature of the case was not known within 60 days of the arraignment.

5. Scheduling Conference
The assigned trial judge shall conduct or set a Scheduling Conference as soon as possible after designating the case as complex. At this Scheduling Conference, the judge will meet with the lawyers who will try the case. The defendant(s) shall also be present. The judge shall set a trial date within one year of arraignment (18 months if a capital case), schedule regular Case Management Conferences and a Settlement Conference, and schedule a Final Trial Management Conference within one week before trial. A minute entry similar to the attached Trial Date Setting & Complex Case Management Schedule (attachment “B”) will be issued at the initial Scheduling Conference.

6. Case Management Conferences
Upon designation of a case as complex, the assigned trial judge shall schedule

regular Case Management Conferences, presumptively every 30 to 45 days, and shall order the plaintiff and defendant(s) to file a Joint Case Management Report at least 2 working days before each conference.

The court will set forth in writing at each Case Management Conference the activities to be completed before the next Case Management Conference.

7. Continuances

The assigned trial judge has the authority, upon a showing of extraordinary circumstances, to continue the trial date to any date within 365 calendar days from arraignment in a non-capital complex case or 18 calendar months from arraignment in a capital case.

Any request or Motion to Continue the trial date beyond 365 calendar days from arraignment in a non-capital complex case or 18 calendar months from arraignment in a capital case must be in writing and clearly state in the caption that the request is for a continuance beyond the 365-calendar-day or 18-calendar-month time limits. The assigned trial judge shall forward any such Motion to Continue to the Presiding Criminal Judge or his/her designee for ruling.

*Cases filed after
December 1, 2002 that
are determined to be
complex shall be tried
within one year from
arraignment.*

At a recent seminar, Judges O’Toole, Franks, Schwartz and Schneider provided further explanation regarding these new procedures. A Rule 8.2 timeline chart from their presentation follows this article on page 8. In addition, a sample motion that may be used to request the court designate a case as complex can be found on page 9. A full set of materials from this seminar are available in the 10th Floor Training Library. Some key points emphasized by the judges are:

- As discussed in section 7 of the Order, the assigned trial judge will have discretion to grant motions to continue the trial date “to any date within 365 calendar days from arraignment in a non-capital complex case or 18 calendar months from arraignment in a capital case”. The use of the term “calendar days” is key — excluded time will not result in an extension of the trial judge’s powers in this regard. So, for example, consider a defendant in a noncapital complex case who has his arraignment on April 1, 2003. Let’s say this defendant is found to be incompetent but restorable and is eventually restored after a short trip to the state hospital. Due to this Rule 11 process, 6 months of his Rule 8 time is excluded. On April 2, 2004, the defendant files a motion to continue. Who hears it? The presiding judge or his designee. Why? Because it was filed more than 365 calendar days after the arraignment.
- The trial judge will rule on motions to designate cases complex, provided that the motion is filed “no later than 60 days from arraignment.” Any motion filed later than that will be heard by the presiding judge or his designee.
- Case Management Conferences will be scheduled “presumptively every 30 to 45 days, and shall order the plaintiff and defendant(s) to file a Joint Case Management Report at least 2 working days before each conference.” The trial judge can schedule these conferences more or less frequently than the suggested 30 to 45 days, based upon the specific needs of cases. The judges recognize that we cannot provide attorney work product or attorney/client information in the Joint Management Report. They emphasized, however, that, even with these restrictions, we should be able to inform the court of the basic status regarding what has been done and what still needs to occur. They also understand that the parties may very well disagree on key issues, such as witnesses who need to be interviewed, trial dates, etc. If that is the situation, then the statement should include a list of those areas upon which the parties cannot agree. Finally the court recognizes that there may be times when one party will not cooperate in getting together with opposing counsel to create a “joint statement”. If that occurs, let the court know in your statement what efforts you undertook to obtain cooperation (e.g., unreturned emails and phone calls).
- There may be times that a number of different judges could potentially hear motions pertaining to different aspects of your case. For example, let’s say that you are in a noncomplex case that is 2 weeks away from its firm trial date when the prosecutor lays a thick packet of 404(b) allegations on you and supplements his list of witnesses with 10 new witnesses to support the 404(b) allegations. Technically, the trial judge would hear any motion to preclude that you file, the Continuance Panel would hear any motion to continue that you file, and the presiding judge would hear any motion to designate complex that you would file! The judges indicated, however, that in this type of scenario it is likely that the trial judge would contact the presiding judge and request to be named his “designee” for the motion to continue and motion to designate complex. This request is likely to be granted.
- There is no right to a “horizontal appeal” if your motion to designate complex is denied — if you want to pursue it, you’ll need to file a special action.

- The judges believe that if these procedures are properly followed, it should greatly assist us in getting the information we need to defend complex cases. They encouraged us to inform them of problem areas in discovery as soon as they occur — the regular case management conferences will be opportunities for the parties to get motions to compel resolved early on in a case and, hopefully, avoid last second surprises. These regular hearings also provide an opportunity for hearing substantive motions in a timely fashion. Finally, the trial judges will be emphasizing the use of settlement conferences in these cases to determine whether there is a possibility of a plea agreement and, if so, how they or the settlement judges can help with the resolution.

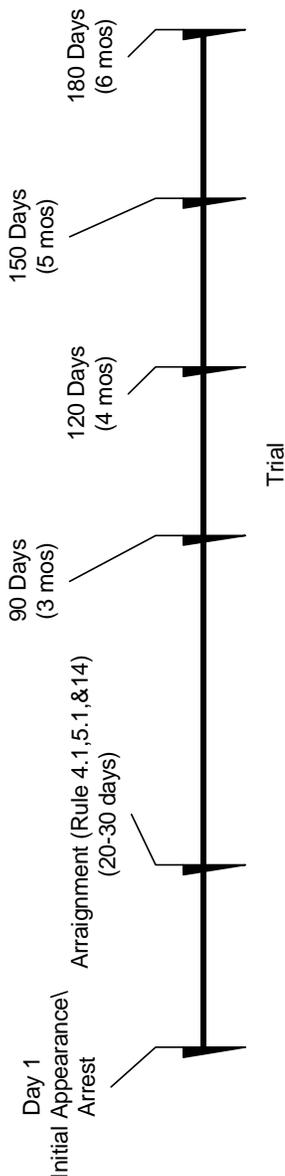
Extending the time limits of Rule 8 acknowledges that for some cases, enforcing the then existing Rule 8 guidelines was not practicable. The extension of Rule 8 time limits along with the ability to designate a case as complex should make the processing of cases run smoother. In addition, it will allow the courts and counsel to spend the extra time needed to prepare complex cases for trial.

Reminders for Managing Complex Cases

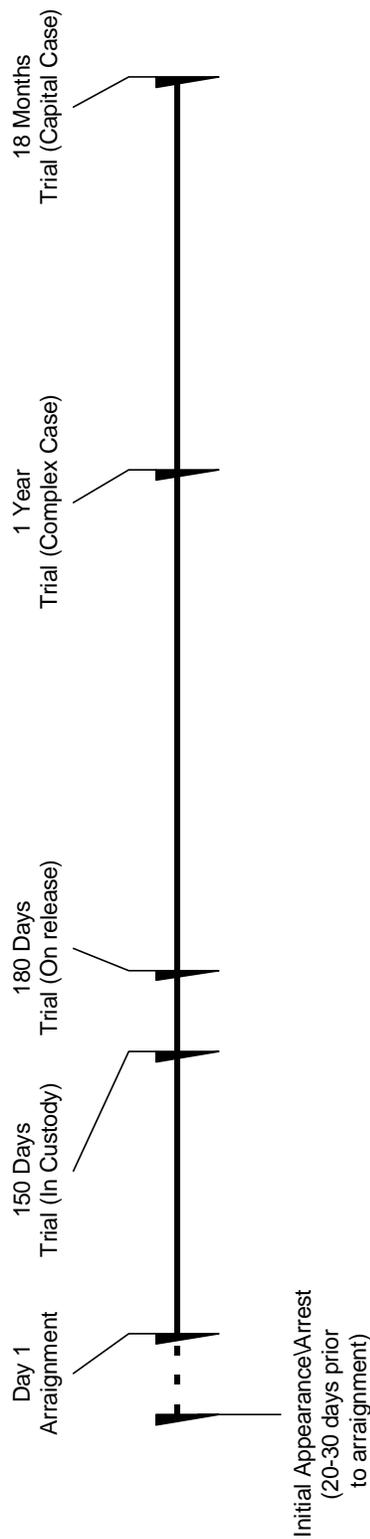
1. Preparation must not take place in the eleventh hour.
2. At the Case Scheduling Conference, review the joint case plan.
3. Specify a trial date when you think the case should be ready, not the last day.
4. Review the number of witnesses, documents, tapes, interpreters, experts.
5. Be prepared to commit to a settlement conference date.
6. Be prepared for the Final Trial Management Conference a week or two before trial.
7. Set realistic goals and ensure they are recorded by the court in minute entries.
8. Be prepared for a written joint status statement before each conference.
9. Be prepared for status conferences to take place on Fridays, unless they will take less than 15 minutes.

Comparison of Rule 8.2 Time Limitations

Previous Rule 8.2



New Rule 8.2 (Effective December 2, 2002)



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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,

No. CR* SAMPLE

Plaintiff,

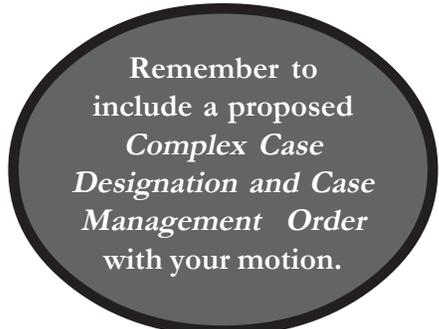
MOTION FOR COMPLEX CASE DESIGNATION

v.

(Hon. *)

CLIENT'S NAME

Defendant.



****SAMPLE****

Pursuant to Rule 8.2 (a) (3) of the Arizona Rules of Criminal Procedure, Defendant, through undersigned counsel, moves this Court to designate the above-entitled matter as a complex case. Pursuant to the Administrative Order Number 2002-112 of the Superior Court of Maricopa County, the Court may consider the following factors in determining if a case should be designated as complex:

- a Number of defendants (INSERT NUMBER) ;
- b Number of counts (INSERT NUMBER) ;
- c Nature of charges (INSERT NARRATIVE) ;
- d Number of witnesses/victims to be called (INSERT NARRATIVE) ;
- e Expert witnesses - number, nature of testimony, etc. (INSERT NARRATIVE) ;
- f Out-of-town witnesses (INSERT NARRATIVE) ;
- g Number of exhibits (INSERT NARRATIVE) ;
- h Nature of exhibits (INSERT NARRATIVE) ;
- i Defendant's pro se status (INSERT NARRATIVE) ;
- j Complex legal issues (INSERT NARRATIVE) ;
- k Other reasons [SPECIFY IN DETAIL THOSE FACTORS THAT APPLY TO YOUR CASE.]

Based on all of the above, Defendant respectfully moves the Court to designate this matter as complex.

RESPECTFULLY SUBMITTED this _____ day of _____, 2003.

MARICOPA COUNTY PUBLIC DEFENDER
By *

continued from *Capital Argument Misconduct*,
page 1

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976). To level the playing field, the sentencer should be reminded that “the victim is an individual whose death represents a unique loss to society and in particular to his family.” *Payne* at 825, 111 S.Ct. at 2608. Therefore, to calculate a capital defendant’s moral culpability and blameworthiness, the “specific harm” he caused by killing the victim was properly considered. Of course it remained for states to determine whether such victim impact fit within their statutory scheme, but after *Payne* lifted the Eighth Amendment ban, many states included victim impact in their aggravators.

The Supreme Court noted, however, that victim impact evidence was intended to present the victim as a unique individual, *id.*, but *not* to encourage comparative judgments about the worth of the victim (in other words, to suggest that one victim’s life might be worth more than others). *Id.* at 823, 111 S.Ct. at 2607. *Payne* was silent as to whether comparisons could, nevertheless, be drawn between the worth of the victim and the defendant. *Payne* was also silent about relying on victims’ sentencing recommendations.

During the Victims’ Rights movement, Arizona included in its statutory aggravators victim impact: “The physical, emotional, and financial harm caused to the victim or, if the victim has died as a result of the conduct of the defendant, the emotional and financial harm caused to the family.” A.R.S. § 13-702(C)(9). However, § 13-702 expressly does not apply to capital sentencing aggravation, which is addressed in § 13-703. A.R.S. § 13-702(F); *State v. Walton*, 159 Ariz. 571, 590, 769 P.2d 1017, 1036 (1989). Arizona capital aggravators conspicuously excluded victim impact. *State v. Atwood*, 171 Ariz. 576, 657, 832 P.2d 593, 674 (1992) (“Although a state may make victim impact evidence relevant to

the decision as to whether or not the death penalty should be imposed, we do not believe that Arizona has done so.”). Nonetheless, victim impact (on both the decedent and his survivors) evidence can still be admitted under *Payne* to counter defendant character evidence; but as such, it could only be used to discount defense mitigation rather than as separate aggravation.

Arizona enacted a Victims’ Bill of Rights that provided for victims to have the right to be heard at sentencing. See A.R.S. § 13-702(E) (“The court in imposing a sentence shall consider the evidence and opinions presented by the victims or the victim’s immediate family at any aggravation or mitigation proceeding”). However, victims’ survivors’ recommendations are not among Arizona’s aggravators, capital or otherwise. They are therefore not acceptable evidence of aggravation. When capital sentencing was done by the trial judge, she was presumed to disregard any survivors’ sentencing advisements. *State v. Bolton*, 182 Ariz. 290, 315-16, 896 P.2d 830, 855-56 (1995); *State v. Mann*, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997). The Arizona Supreme Court distinguished judges’ ability to disregard improper evidence from juries’ capability to do the same, noting that the judicial presumption of considering only the proper evidence would not apply to capital juries. *Id.* Before *Ring*, therefore, these statements were heard by the trial judge (though not relied upon) in capital sentencing:

[Surviving parents provided a letter requesting] the maximum sentence allowable by the State of Arizona.¹

[Victim’s mother described her grief and expressed frustration with the defendant’s failure to show remorse. She wished] defendant would die the same way that the victim had, [asking for] the maximum sentence that this Court will allow.²

[Victim's father testified] I don't think [defendant] should walk the streets again or stay in jail. He should be executed as promptly as possible. [Victim's daughter testified] I don't want him to live. ... I don't want the State to have to pay for him to live.³

Nevertheless post-*Ring*, these survivors' recommendations should not be introduced or argued to capital sentencing juries. *Id.*

A. Victim-Decedent's Experience Dying

Evidence and argument about cruelty, including the impact of defendant's actions on the person(s) killed, is normally highly relevant to a capital decision. Consequently, the prosecutor may be allowed to discuss in detail the victim's suffering as she died. Such argument could be limited (*e.g.*, if it does not fall within that jurisdiction's statutory aggravators, is *too* inflammatory, or violates "Golden Rule" restrictions), but generally, arguing the decedents' experience is not improper:

This wasn't just a bullet in the head. Hit over the head; she's knocked out; she dies. She was savaged for a period, for a significant period of time, by a group of individuals. How many times during this period of time as she was clawing, trying to get up, trying to fight off her attackers, dragged across the ground, beaten, stomped.⁴

He came into that house with a shotgun to blow her away. ... [The victim] looking down the barrels of this shotgun.⁵

You can imagine the pain this young girl was going through as she was laying there on the ground dying. ... Imagine the anguish and pain that she felt as

she was shot in the chest and drug herself from the bathroom to the bedroom.⁶

Imagine the pain they went through both physically and mentally. Mr. Nail, as his life is being snuffed out and worried about his wife in the other room. ... And Mrs. Nail, the same. Somebody's strangling her from behind, and she doesn't know what happened in the garage, and she's dying.⁷

While these stirring accounts are admissible, the latter two were improper due to phrasing that asked the jury to "imagine" what the victims experienced (violating the "Golden Rule" principle). Incidentally, Arizona Courts have also rejected the "Golden Rule" argument. See *Rosen v. Knaub*, 173 Ariz. 304, 309, 842 P.2d 1317, 1322 (App. 1992)(barring "Golden Rule" argument); *City of Phoenix v. Boggs*, 1 Ariz.App. 370, 374, 403 P.2d 305, 309 (1965)(barring asking jury to "put themselves in the shoes of the plaintiff").

1. Placing Jurors' in the Victims' Shoes (the "Golden Rule")

Called the "Golden Rule" violation, the law broadly prohibits asking the jury to place themselves in the shoes of the victims. It is a fine semantic distinction: an attorney may argue a victim experienced X, but she may not argue "imagine" the victim experiencing X. The difference is between subjectivity and objectivity: when asking the jury to *share* in the experience rather than appreciate it at a distance, the advocate goes too far. Hence, in addition to the third and fourth examples above, the following arguments were found to be violations of the Golden Rule:

Can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life?⁸

Think about the sheer terror, think about [first victim] ... when he hears gunshots go off in the car ... and then he gets it in the back of the head. Put yourself in [second victim's] shoes when he hears that loud bang in the back seat and he turns to see what's going on and he gets it in the side of the head.⁹

Sheila Bland was in there working, minding her own business. ... Mike Edmonson, all he wanted to do was to get through with church practice and get his clothes, like we all do. ... They were at the same place you and I might be at 6:00. How many times do we go to the cleaners in our lifetime? ... You think about it.¹⁰

I will not tell you to put yourselves in Mrs. Jacobs' position [then going on to describe what she saw] because that would be improper.¹¹

Interestingly, although most jurisdictions find Golden Rule violations to be "highly improper," some condone it; California admits it pursuant to *Payne*. *People v. Wrest*, 3 Cal.4th 1088, 13 Cal.Rptr.2d 511, 839 P.2d 1020 (1992); *People v. Douglas*, 50 Cal.3d 468, 536, 268 Cal.Rptr. 126, 788 P.2d 640 (1990) ("As a part of victim impact argument, the jury can be urged to put itself in the shoes of the victim."). Consequently, the second example was approved by the Supreme Court of California.

The third example is a close call; the shift from objectively describing what the victims were experiencing to asking the jury to sympathetically experience the same was subtle, but sufficient for the North Carolina Supreme Court to find it violated the Golden Rule. Incidentally, in the last example, the Nevada Supreme Court was not amused by

the prosecutor's subterfuge, disclaiming doing exactly what he did; that was completely improper.

2. Scripting the Victim-Decedents' Thoughts During the Offense

Although prosecutors can argue what the victim-decedents experienced as they were being killed, courts normally strictly limit it to proven facts, hesitating to allow much inference. Consequently, argument describing what the victim was *thinking* - as opposed to physically experiencing - may be banned. This is especially the case when emotionally inflammatory suggestions are offered. For example:

Did she think about Ruth, her mother, to whom she had just talked? Did she think about her brother's undelivered birthday present?¹²

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 childhood? Was she thinking about her daughter, take me but spare Peggy? ... Or maybe she started to pray, we don't know. ... Was she thinking of little Joey, who's going to take care of him, grandma's gone, I'm going to be gone, who's going to raise my little boy?¹³

That must have seemed like a lifetime to [the victim]. ... What did she think when he burst in the door? This can't be happening to me, this isn't real. And later as he was attempting to rape her, she must have thought if this is the worst I can survive. I just have to get through this. While he was making her orally stimulate him, she must have

thought, just endure this but at some point she realized I'm going to die. Did she have even one moment to think about her parents, ... her brother and sister?¹⁴

Courts refer to this as providing a script for the victim, or scripting the victim. On an elementary level, it is improper because it is speculation; though the prosecutor may be able to infer what the defendant's actions against the victim were, he cannot know what the victim was thinking. However, most of these examples compound that impropriety with Golden Rule violations ("imagine" what she felt/thought) and needlessly inflammatory ideas such as references to family. The first example was from California (where Golden Rule is allowed, so the argument was acceptable), but the other two (from Ohio and Nevada, respectively) were considered error. Regarding the last example, the Kansas Supreme Court found that discussion of what the victim experienced was permissible, but not what she was thinking, explaining the difference:

Prosecutors are allowed to introduce relevant evidence to show the victim's mental anguish and further to make arguments and inference from the evidence that the victim suffered such mental anguish, where relevant. However, prosecutors cross the line when they make up an imaginary script that purports to tell the jury what the victim was feeling, where there is no evidence to support such script. At that point, the imaginary script becomes evidence that was not admitted during trial. The prosecutor was correctly allowed to describe the violence of the murder and everything that took place in conjunction with it, as well as to argue to the jury that the victim suffered mental

anguish. However, when the prosecutor began speculating as to the victim's thoughts and essentially making up an internal dialogue for the victim, he crossed the line into blatant appeal to the emotions of the jury. This constituted misconduct.

State v. Kleypas, 40 P.2d 139, 287 (Kan. 2001).

Of course, creating more than thoughts alone goes even further astray. For instance, in a Florida case where there was no evidence about what the victim said during the offense, the prosecutor "emotionally created an imaginary script" of what the victim was *saying* as she died:

Don't hurt me. Take my money, take my jewelry. Don't hurt me.¹⁵

The Court found this improper speculation as well as unfairly inflammatory.

B. Comparing Character of the Victim to that of the Defendant

Character of the victim can be admitted, pursuant to *Payne*, to show the victim as an individual human being - just as the defendant can be portrayed as an individual human being. Of course, victim character can only be admitted when permitted under that jurisdiction's capital sentencing scheme. Consequently, victim character has been upheld in the following examples:

[The victim] had been a loyal husband for 19 years and had supported [his wife and their] 3 children, despite his partial paralysis.¹⁶

[The defendant's death] left [his wife] with two children to support.¹⁷

Although admitting character evidence concerning the victim was permissible to counteract the effect of admitting character evidence concerning the defendant (so in rebuttal), the Court did not encourage drawing comparisons between the worth of the victim and other members of society. *Payne* at 823, 111 S.Ct. at 2607. Nothing was said in *Payne* about drawing contrasts between the worth of the victim and that of the defendant. This issue has not been presented to the U.S. Supreme Court; it was, however recently raised in a South Carolina case relative to the following argument:

[Reciting hardships the upstanding citizen victim overcame] And in 1984 he met Pat and they fell in love, and they got married. That's the same year [the defendant committed] two house break-ins at age 13. [The victim] decides to quit Kemet and ... start building houses in the community he had grown up in. That's the same year [the defendant] is up for his second probation violation and sent to [prison]. ... In 1988 Ashley is born. That's the same year [the defendant] went to jail for two years. And in 1992, [the victim builds] a business in the community. ... I'm talking about value. ... When you look at the character of [the defendant] and when you look at [the victim] ... how profane to give this man a gift of life under these circumstances.¹⁸

[Reciting testimony of the defendant's family who offered the view that he did not deserve death, the prosecutor referred to the victim's mother, arguing that she likewise felt her son had not deserved to die.]¹⁹

The Court found the first comparison unobjectionable because it was not prohibited in *Payne*. The California Supreme Court similarly concluded that the second excerpt was not error.

C. Victim-Survivors' Experience of Loss

Payne allowed evidence of the impact on the victims' survivors to be admitted and argued in the capital life-and-death equation. It should be noted that the language of *Payne* referred to admitting survivors' impact only *after* the defense placed defendant's character into evidence. Nonetheless, the cases since then have not attended to whether the evidence was admitted in the sentencing case in chief or in rebuttal. An excerpt of the argument that was upheld in *Payne* is:

[Nicolas] cries for his mother and sister. He doesn't understand why she doesn't come home. ... Somewhere down the road Nicolas is going to want to know what happened to his baby sister and mother. ... You saw the videotape this morning. You saw what Nicolas will carry in his mind forever. ... Nicolas's mother won't be there to kiss him at night ... or pat him as he goes off to bed, or hold him and sing him a lullaby. ... The brother who mourns for her ... doesn't have anyone to watch cartoons with him. These are things that go into why it is especially cruel, heinous and atrocious.²⁰

It also bears noting that Nicolas was also attacked, almost dying, when his sister and mother were murdered. Therefore, the prosecutor could claim he was simply expanding on already licit discussion of what Nicolas *had* experienced to what he would *continue* to experience.

Other examples of survivors' impact include:

Just think about this 9-year-old boy who will never light up his grandfather's home with his infectious smile.²¹

Next week when it's Thanksgiving and they are sitting around the table, [the victim] won't be there, and never will be again.²²

It is not just [the defendant's family] that has emotions. There are other people that have emotions that are concerned with this case. They are the parents of [the victims] - these people also have feelings.²³

Survivors' experience of their loss is, nonetheless, only permissible when that is among the statutory aggravators approved in a given jurisdiction. But when it is - as in the cases quoted above - such rhetoric is not unconstitutional.

Arizona permits victim experience during the offense as a capital aggravator. A.R.S. § 13-703(F)(6) ("The defendant committed the offense in an especially heinous, cruel or depraved manner.").

D. Victim-Survivors' Sentencing Recommendations

While many states have allowed victim-survivor impact as a capital aggravator, admission of their sentencing recommendation is clearly not relevant. Not only is it biased, but also it can be inflammatory, and the mourning family cannot supplant the jury in its duty to make the crucial decision whether the government will be allowed to take the life of a citizen. Therefore, the following arguments were improper:

[Kathryn Cox read a prepared statement to the jury in which

she demanded that the jury show no mercy to the defendant, and in which she informed them that she intended to do everything in her power to see that he received no mercy.]²⁴

The only proper verdict in this case is a verdict that says he should face the death penalty. His family requests it.²⁵

If [the victim] were here, she would probably argue the defendant should be punished for what he did.²⁶

In the first case, the Nevada Supreme Court found that this testimony "went beyond the scope of what is acceptable as a victim-impact statement;" moreover, it was inflammatory. In the next example, the surviving family had not mentioned anything about sentencing when they testified; when the prosecutor argued in closing that the family was requesting death, the Louisiana Supreme Court held it was not a proper subject (though it was also facts not in evidence). Finally in the last example, the Florida Supreme Court found that it constituted "egregious conduct."

Arizona does not permit victim recommendations at sentencing because it is not among the approved statutory aggravators. See A.R.S. § 13-703(F). In addition, the Arizona Supreme Court expressly held that it could not be considered as an aggravator. *State v. Bolton*, 182 Ariz. 290, 315-16, 896 P.2d 830, 855-56 (1995); *State v. Mann*, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997). The Court had previously permitted victim recommendations to occur, noting that trial judges could disregard such improper evidence. However, the Court recognized that the same would *not* be the case when a jury decided the death sentence. *Id.* Therefore, Arizona law allowing victims to urge the ultimate sanction would not apply now that Arizona is using juries to sentence in death penalty cases.

Closing Thoughts

As an Arizona criminal defense attorney, hailing from the State that has executed 85 people and given us such noteworthy cases as *Ring*, *Miranda*, *Edwards*, *Mincey*, *Fulminante*, and *Youngblood*, I was fascinated to see, when researching Nebraska capital cases, relatively little prosecutorial overreaching. The surfeit of egregious prosecutorial argument that we see in my home state, California, Illinois, Florida, Nevada, or Texas is blessedly minimized in Nebraska. For many of the subjects covered in this series, there simply were no Nebraska death cases reporting such misconduct; if I could find that improper argument at all, it was in non-capital cases. Prosecutorial professionalism and restraint, as well as a judiciary that keeps practitioners “honest” by not tolerating misconduct, rightly should be credited. In a drug prosecution where the county attorney disparaged defense counsel in summation, the Nebraska courts took a strong stand:

We recognize the Nebraska Supreme Court’s reluctance to help the State out of the holes that it digs for itself. “It must be impressed upon the State that this court will not continually search for ways to extricate the prosecution from the results of its own misconduct by labeling such action ‘harmless error.’” *State v. Wade*, 7 Neb.App. 169, 181, 581 N.W.2d 906, 914 (1998) (citing *State v. Johnson*, 226 Neb. 618, 622, 413 N.W.2d 897, 899 (1987)). Nebraska is fortunate - Arizona appellate courts wring their hands over repeated and abusive prosecutorial wrongdoing, but have not taken this firm position to remedy it.

Consequently, the *Ring* decision may not threaten a rift in business-as-usual capital prosecutions in Nebraska to the extent that it has in some other states. Nonetheless, now that Nebraska faces a return to jury capital sentencing, trial lawyers should bear in mind the impact of prejudicial comments that are

advanced in capital penalty phases. Arguments that had been harmless (when presented to a judge) become prejudicial when conveyed to a jury. I hope that this series helps practitioners and judges recognize and avoid damaging argument pitfalls. And may Nebraska continue to avoid being associated with major Supreme Court cases.

Endnotes

1. *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).
2. *State v. Bolton*, 182 Ariz. 290, 316, 896 P.2d 830, 855 (1995)
3. *State v. Gulbrandson*, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995).
4. *Atkins v. State*, 112 Nev. 1122, 1136, 923 P.2d 1119, 1128 (1996).
5. *Jacobs v. State*, 101 Nev. 356, 705 P.2d 130 (1985).
6. *Garron v. State*, 528 So.2d 353, 358 (Fla. 1988).
7. *Williams v. State*, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997).
8. *Bertolotti v. State*, 476 So.2d 130, 133 n.2 (Fla. 1985).
9. *People v. Slaughter*, 27 Cal.4th 1187, 120 Cal.Rptr.2d 477, 495, 47 P.3d 262, 277-78 (2002).
10. *State v. Green*, 336 N.C. 142, 189-90, 443 S.E.2d 14, 26 (1994).
11. *Jacobs*.
12. *People v. Wash*, 6 Cal.4th 215, 263, 24 Cal.Rptr.2d 421, 861 P.2d 1107 (1993).
13. *State v. Combs*, 62 Ohio St.3d 278, 282-83, 581 N.E.2d 1071, 1076 (1991).
14. *State v. Kleyas*, 40 P.3d 139, 287 (Kan. 2001).
15. *Urbain v. State*, 714 So.2d 411, 421 (Fla. 1998).
16. *State v. Williams*, 392 So.2d 619 (La. 1980).
17. *State v. Prejean*, 379 So.2d 240 (La. 1979).
18. *Humphreys v. State*, 2002 WL 1954898 (S.C.Sup.Ct. 2002).
19. *People v. Morris*, 53 Cal.3d 152, 221, 297 Cal.Rptr. 720, 807 P.2d 949 (1991).
20. *Payne v. Tennessee*, 501 U.S. 808, 814-16, 111 S.Ct. 2597, 2603 (1991).
21. *People v. Kidd*, 175 Ill.2d 1, 41, 221 Ill.Dec. 486, 506, 675 N.E.2d 910, 930 (1996).
22. *Brooks v. Kemp*, 762 F.2d 1383, 1410 (11th Cir. 1985).
23. *People v. Stanley*, 10 Cal.4th 764, 832, 42 Cal.Rptr.2d 543, 897 P.2d 481 (1995).
24. *Witter v. State*, 112 Nev. 908, 921-22, 921 P.2d 886, 895-96 (1996).
25. *State v. Scales*, 665 So.2d 1326, 1336 (La. 1995).
26. *Garron* at 359.

Jury and Bench Trial Results

January 2003

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