



for The Defense

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

Ring in the New (Part Two)

If you need to be careful what you ask for, who's sorry now?

By Vikki Liles
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Not long after the decision in *Ring v. Arizona*¹ was announced, I was discussing the case with a couple of other defense attorneys. They were fretting over the probability that the Arizona legislature would “fix” the *Ring* problem by making things even worse for clients facing the death penalty. Idealists all, they wanted to march right out to the legislature and apply reason to the process, secure in their belief that

reasonable, logical, cogent arguments would convince every legislator of the folly of the death penalty and the pitfalls already built into the circulating legislation.

As a card-carrying contrarian, I told them not to bother, because, in the first place, except for a few knowledgeable legislators, no one would listen, and, in the second place, *no one would listen!* My counsel was to just hope that the legislature did not understand exactly what it was considering.

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Capital Penalty Phase Argument Misconduct

Chapter One: Understanding the Legal Landscape

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In the wake of *Ring v. Arizona*,¹²² S.Ct. 2428 (2002), defense attorneys in judge-sentencing jurisdictions face new and troubling challenges. One of the more alarming prospects is unleashing prosecutorial grandstanding and invective at

the emotional climax of a high-profile, career-making, political case.¹ When the stakes are the highest, people may do whatever it takes. See, e.g., *Garron v. State*, 528 So.2d 353, 359-60 (Fla. 1988) (prosecutor demonstrated “a classic case of an attorney who has overstepped the bounds of zealous

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Although some prosecutors were heard to chortle during the legislative process that defense attorneys should have been more careful what they asked for when challenging judge-based sentencing, something told me that the rush to pass a new law would have, at the very least, some consequences unintended by its drafters and supporters.

Boy, do I love it when I'm right. The legislature did give the prosecutors everything they asked for, and then some. But, it unwittingly gave capital defendants and their attorneys a lot, too. It may take the next five to ten years to sort out just how screwed up the new capital sentencing scheme really is.

Ring did not land lightly or quietly. The response from those on death row was hope.² The response from prosecutors and victims was anger.³ Indeed, on the very day *Ring* was announced, Arizona Attorney General Janet Napolitano took the extraordinarily bold move of writing to all the presiding judges in the state to tell them not to proceed with any capital sentencings until A.R.S. § 13-703 "is amended to conform to the law."⁴

The Legislative Response

The only response that really mattered was that of the legislators, and it was predictable. They marched into special session on July 30th, and enacted a new capital sentencing scheme on August 1st. Governor Hull signed the bill, which contained an emergency clause making it immediately effective. Essentially written by prosecutors⁵ and allegedly designed to comply with the requirements of *Ring*, the new scheme mandates that juries will decide whether a person accused of capital murder will live or die. The enormity of this

change in the way capital cases are defended, investigated, prepared, tried, and paid for is only beginning to dawn on those involved in these cases. As the *New York Times* noted recently, we are still "roiling."⁶

The legislature actually had three bills to choose from in the special session. S.B. 1001, written by a group of prosecutors, created a new jury-based sentencing scheme with some provisions that were clearly designed to make death sentences even more common than under the old scheme. S.B. 1004 also proposed a jury sentencing scheme, but one slightly more reasonable than the one created in S.B. 1001. It included a one-year moratorium on any executions and required DNA testing of every death row inmate. S.B. 1005 proposed to abolish the death penalty in Arizona. One of these bills was passed with one amendment even the prosecutors didn't to include in the bill as introduced, and the other two never made it out of committee hearings. Can't guess which is which? "Surprise, surprise!"⁷ S.B. 1001 is now the law.

The New Capital Sentencing Scheme

It is important to remember what *Ring* actually requires - only that a jury must find beyond a reasonable doubt all facts that make a person eligible for the death penalty.⁸ *Ring* does *not* require jury sentencing.⁹ The bill did not merely "respond" to *Ring* or simply "fix" what the Supreme Court said was broken. The bill is a complete overhaul of the way death sentences are to be imposed in this state.

The intent of S.B. 1001 is that there be "no hiatus in the imposition of the death penalty in this state" because of *Ring*.¹⁰ To that end, the bill has created an entirely new capital sentencing scheme, set forth in

A.R.S. §§ 13-703, 13-703.01, 13-703.02, 13-703.03, 13-703.04, and 13-703.05, which is to apply to any sentencing or re-sentencing held after August 1, 2002.¹¹ For purposes of this article, these statutes, both new and as amended, will be referred to as the “new” statutes representing the “new” scheme.

Not quite everything is different now. Just as in the old scheme, if the death penalty is not alleged and the accused is convicted of first-degree murder, the trial judge will determine the sentence. The choices are natural life, which is life without parole (“LWOP”), or life with the possibility of parole after 25 years, if the victim was 15 years or over, or after 35 years, if the victim was under 15 years old.¹²

If the death penalty is alleged, the prosecutor must notice “before trial” one or more of the “aggravating circumstances” to be proven.¹³ If a guilty verdict is returned, the “trier of fact” must determine whether to impose the death penalty.¹⁴ The “trier of fact” is presumptively a jury, unless the accused and the prosecution waive the jury and agree to let the judge determine the sentence.¹⁵ The trier of fact is required to make **all** the factual determinations required by A.R.S. § 13-703.01 or the constitutions of the United States or Arizona to impose a death sentence.¹⁶

The sentencing proceeding now consists of two parts. “Immediately” after a guilty verdict is returned, the “Aggravation Phase” of the sentencing proceeding begins, where the “trier of fact” must determine whether one or more of the “aggravating circumstances” listed in A.R.S. § 13-703(F), essentially unchanged from the old statute, have been proven.¹⁷ At this phase, the state must prove the existence of the aggravators beyond a reasonable doubt.¹⁸

Evidence that was admitted at trial and relates to an aggravator will be deemed admitted if the trier of fact is the same one that determined guilt.¹⁹

Under the new scheme, the first jury sitting at the aggravation phase may not have been the jury that determined guilt. This would occur if the defendant was convicted but not sentenced as of August 1, 2002, or is being re-sentenced because the original sentence was overturned after *Ring*. In either instance, a new jury must be impaneled as if the original sentencing had not occurred.²⁰ If the jury that sentences the defendant is not the jury that determined guilt, the jury is not to retry the issue of guilt.²¹

Both the state and the defense can rebut any information received at the aggravation phase, and both must be given “fair opportunity” to present argument on the existence (or non-existence) of any aggravators.²² After the presentation of the evidence at the aggravation phase, the jury will deliberate and decide whether any of the noticed aggravators have been proven. The trier of fact is required to make a special finding whether each alleged aggravator has been proven.²³ A unanimous verdict is required for an aggravator to be proven.²⁴ If the trier of fact unanimously finds that an aggravator was not proven, the defendant is entitled to a special finding that the aggravator was not proven.²⁵ If the trier of fact unanimously finds that no aggravators were proven, then the trial judge must sentence the defendant to life or natural life.²⁶

If the trier of fact (either the jury that determined guilt or the first aggravation phase jury) cannot reach a verdict on any of the alleged aggravating circumstances, then a new jury must be impaneled.²⁷ The new

jury is not to retry the defendant's guilt or any issue regarding aggravators that the first jury unanimously found to be not proven.²⁸ If the new jury is unable to reach a unanimous verdict, the judge will decide whether to sentence the defendant to life or natural life.²⁹

If one or more aggravators have been found, then the "Penalty Phase" of the sentencing proceeding follows "immediately," when the trier of fact must determine whether the death penalty should be imposed.³⁰ A finding that any remaining aggravators have not been proven or the inability of the trier of fact to agree whether the remaining aggravators have been proven cannot prevent the penalty phase.³¹

At the penalty phase, either the state or the defense may present information "relevant" to any of the mitigating circumstances listed in A.R.S. § 13-703(G), regardless of its admissibility under the Rules of Evidence.³² The burden to establish mitigation is on the defense, and the burden of proof is preponderance of the evidence.³³ Evidence admitted at trial that "relates" to any mitigation shall be deemed as admitted if the trier of fact is the same that determined guilt.³⁴

If the trier of fact at the penalty phase is the same jury as at the aggravation phase, any evidence presented at the aggravation phase shall be deemed admitted.³⁵ Either the state or the defense may present "any evidence that is relevant" to determine whether there is mitigation sufficiently substantial to call for leniency.³⁶ However, the state may present "any evidence" that demonstrates that the defendant should not be shown leniency.³⁷ Both sides can rebut any information presented at the penalty phase, and must be given fair opportunity to present argument regarding the

mitigation that has been proven.³⁸

The jury that hears the evidence at the penalty phase must determine whether to sentence the defendant to death. Each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty.³⁹ The trier of fact must "take into account" the aggravators and the mitigation that have been proven, and must impose death if one or more aggravators have been found and it determines there are no mitigating circumstances "sufficiently substantial to call for leniency."⁴⁰ A sentence of death must be unanimous.⁴¹ If the jury unanimously decides that death is not appropriate, then the judge must sentence the defendant to life or natural life.⁴²

If the jury at the penalty phase is unable to reach a verdict, the judge must dismiss the jury and impanel a new one.⁴³ The new jury cannot retry the issue of guilt or the existence of any aggravators – either proven or unproven – found by a prior jury.⁴⁴ If the new jury is unable to reach a verdict, the judge will then impose a sentence of life or natural life.⁴⁵

The victim⁴⁶ is allowed to be present at all phases.⁴⁷ At the aggravation phase, the victim has the right to present "any information" relevant to the proceeding.⁴⁸ At the penalty phase, the victim can present information about the murdered person and the impact of the murder on the victim and other family members.⁴⁹ The victim may present a victim impact statement "in any format."⁵⁰ Although a recommendation from the victim regarding the sentence was prohibited in the bill as introduced, this provision was deleted by amendment in the legislature.

Once a defendant has been sentenced to

death, an automatic appeal will still be made to the Arizona Supreme Court. For cases where the date of the offense is before August 1, 2002, the old standard of independent review and re-weighing the aggravators and mitigation still applies.⁵¹ For offenses that occurred after August 1st, a new standard applies.⁵² In those cases, the review of the Arizona Supreme Court is limited to determining whether the trier of fact abused its discretion “in finding aggravating circumstances and imposing a sentence of death.”⁵³ If the Supreme Court determines an error was made, it must then determine whether the error was harmless beyond a reasonable doubt.⁵⁴ If the court cannot determine whether the error was harmless beyond a reasonable doubt, then the case must be remanded for a new sentencing proceeding.⁵⁵

Whew! Got that? For the visually-inclined, see the diagram on the following page.

The Questions – If Not the Answers

S.B. 1001 is 11 pages, single-spaced. It will probably generate at least 11 million pages of litigation. The prosecutors and the legislature could have followed the K.I.S.S. [Keep It Simple, Son] principle in responding to *Ring*. A new law mandating only that the jurors find one or more aggravators before they were sent home would have been all that *Ring* requires. Instead, we have a new Byzantine scheme just aching for constitutional challenges. The ability to mount particular challenges may depend on where a case sits in the system. So, the first question that must be addressed is which cases, if any, can claim any benefit from *Ring*.

Who benefits from *Ring*?

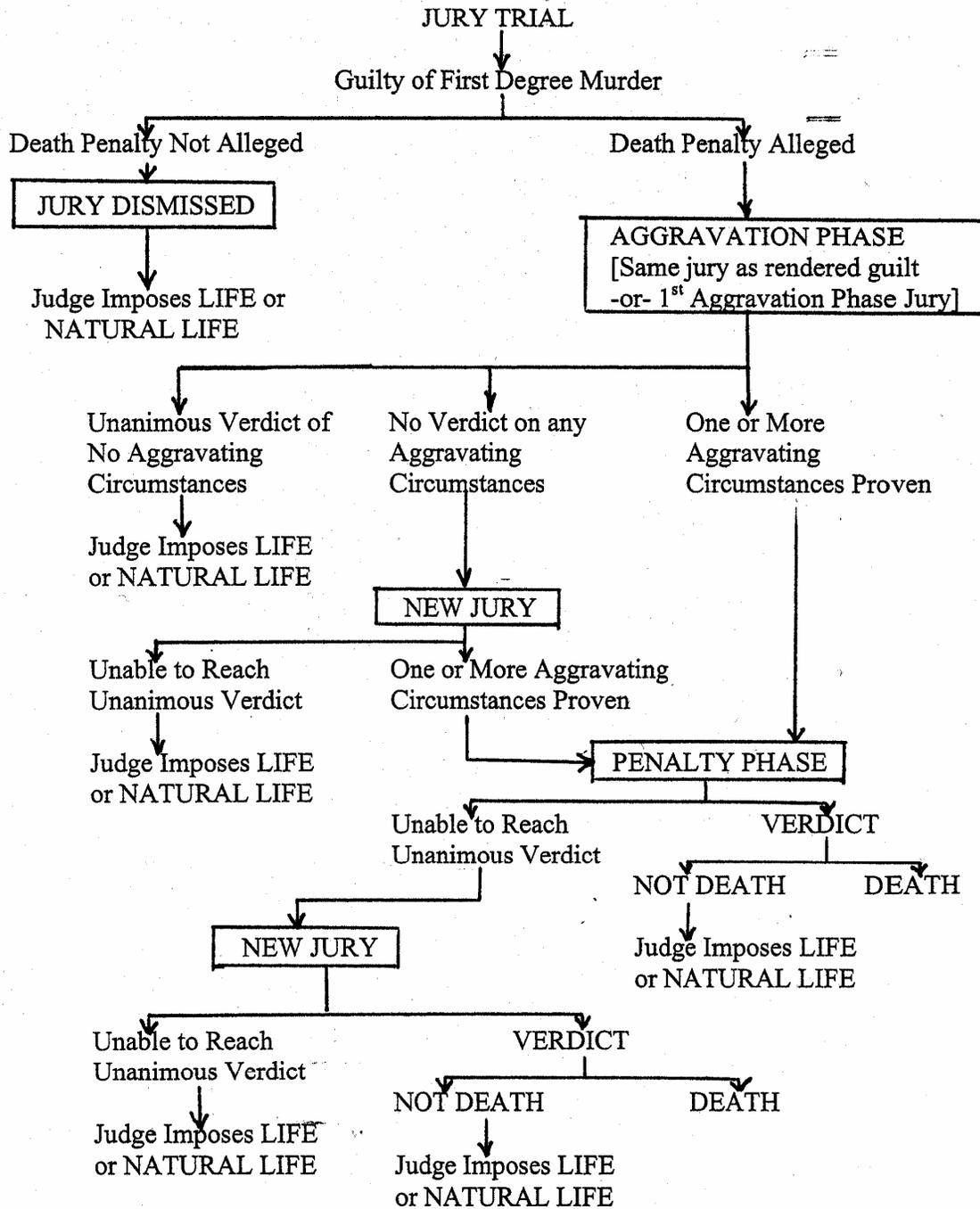
If the state gets to decide who benefits from

Ring, the answer will be no one, including (or maybe especially) Timothy Ring himself. The actual answer may well depend on the status of the case in the process from indictment to final collateral proceedings.

New cases involving offenses committed on or after August 1, 2002, will have to challenge the constitutionality of the new scheme and its individual parts to find any relief. We must concede that the legislature has the power to change any penal law prospectively, so it will be tough to argue that the new scheme can't apply to these cases. It would seem that a properly noticed allegation of the death penalty will subject the defendant to jury sentencing upon conviction. The question for these cases is whether the blatant attempt of the drafters to stack the deck in the state's favor can withstand constitutional scrutiny and whether a defendant might have a better shot at a life sentence before a jury.

For cases pending trial or sentencing at the time *Ring* was announced, the outcome is less clear. The Ninth Circuit found a due process violation, and reversed a death sentence, when a defendant was tried under one death penalty statute, but sentenced under another.⁵⁶ Cases pending trial may not have as strong a due process argument as those where the defendants have already been found guilty by one jury, that jury has since been discharged, and now must face sentencing under a totally re-written sentencing scheme. If the due process argument fails, then those pending trial or sentencing may have to face trial or sentencing by a jury under the new scheme, unless to do so would violate the prohibition against *ex post facto* laws or double jeopardy. As of this writing, the author is unaware of any motion to strike the death penalty that has been granted on due process or *ex post facto* grounds in a

S.B. 1001 Arizona Legislature's Response to *Ring v. Arizona*



case in this posture.

For those already convicted and sentenced, the issue is whether *Ring* can be applied retroactively. In those cases where the mandate from the United States Supreme Court has already issued after direct appeal to the Arizona Supreme Court, the doctrine of *Teague v. Lane*⁵⁷ may limit relief. Under *Teague*, a new constitutional rule of criminal procedure generally will not be given retroactive application to those cases which became final before the new rule was announced unless it could be considered a “watershed rul[e] of criminal procedure.”⁵⁸ If the new rule deals with substantive criminal law, however, it must be applied retroactively.⁵⁹

Thus, the question for those on state or federal collateral review is whether *Ring* announced a new rule of substantive or procedural law, and, if procedural, whether the rule can be considered a “watershed.” It may be possible for a defendant at this stage to benefit from *Ring* as a new rule of criminal law or watershed rule of criminal procedure, only to face re-sentencing before a jury if the new scheme is not *ex post facto* because it is procedural. Feels like we’re in *The Twilight Zone*, doesn’t it?

The situation is different for those cases still on direct appeal before the Arizona Supreme Court or those, like Timothy Ring’s, where the mandate from the United States Supreme Court has not yet issued. The *Ring* decision does apply to those cases.⁶⁰ Within days of the decision, the Arizona Supreme Court ordered briefing on 11 issues in these cases. Some of the questions the court will presumably answer include whether the finding of an aggravator can be implicit in the jury’s verdict, whether the new sentencing scheme will violate the state or federal *ex post facto*

prohibition if applied to these defendants, and whether using a new jury to determine the existence of the aggravators will violate double jeopardy. Oral argument is scheduled for November, and oft-repeated speculation anticipates a decision by the end of the year.

As of this writing, the state has filed its opening brief. Not surprisingly, its position is that no one, including Timothy Ring, is entitled to a new sentencing, claiming in every case the lack of jury findings of the aggravators is but harmless error. For any defendant sentenced solely on the basis of an aggravator such as multiple homicides, an argument can be made that the jury did determine that aggravator on the basis of a guilty verdict for each homicide.⁶¹ On the other hand, in cases involving aggravators such as pecuniary motive, pecuniary gain, or especially heinous, cruel or depraved, alone or in conjunction with others, it will be “impossible to find harmless error where, under *Ring*, [a] defendant was denied a jury trial on one of the . . . bases for the sentence.”⁶²

If the error is not harmless, then the intent of the legislature is that these defendants are to be re-sentenced under the new scheme rather than have their sentences reduced to life or natural life by the Supreme Court or the sentencing judge. The issue then will be whether re-sentencing under the new statutory scheme will violate *ex post facto* or double jeopardy. The answer to this question will be known shortly, and should also provide some guidance for the application of the new scheme for all pending cases involving offenses committed before August 1st.

Some of the Issues

Once the dust settles and the courts decide

who must face sentencing or re-sentencing under the new scheme, the real work begins. Those who might think there will be no issues to raise might want to think again. The new scheme may have solved the *Ring* “problem,” but many more have been created for judges and prosecutors.

In a careful – or even cursory – reading of the new scheme, several issues leap out. At this early stage, before any sentencing proceeding has actually taken place, it is impossible to know every issue that a creative defense attorney could raise or the prosecutors who drafted the legislation could anticipate. Thus, any discussion of the issues to be resolved cannot be exhaustive at this point. Nonetheless, some are more obvious than others.

Eligibility

Before a defendant convicted of first-degree murder can be sentenced to death, additional findings beyond the existence of an aggravator may be required.

*Enmund v. Florida*⁶³ held that the death penalty cannot be imposed in a felony-murder case absent a factual finding that the defendant killed, intended to kill, or attempted to kill. *Tison v. Arizona*⁶⁴ held that “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.” Taken together, *Enmund* and *Tison* require someone to find that the defendant killed, attempted to kill, or intended to kill the victim, or that, in the case of felony murder, the defendant was a major participant in the underlying crime and acted with reckless disregard for human life.

In *Cabana v. Bullock*,⁶⁵ the Court held that an appellate court could constitutionally make the *Enmund* finding. In *Ring*, the trial court made the finding.⁶⁶ The continued vitality of *Cabana* was not decided under *Ring*’s “tightly delineated claim.”⁶⁷ However, it seems likely that the logic of *Ring* dictates that this finding must now be made by the jury before or during the aggravation phase.

Just a week before *Ring* was announced, the Supreme Court decided in *Atkins v. Virginia*⁶⁸ that the Constitution bars execution of the mentally retarded. The decision did not provide direction for how the states are to design procedures to prevent such executions.

Even before *Atkins*, A.R.S. § 13-703.02 prohibited execution of the mentally retarded in Arizona by means of an elaborate testing procedure where a defendant must prove that his or her IQ falls within the definition of mental retardation. Under the statute, the trial judge is required to order IQ testing as soon as the notice of the state’s intent to seek the death penalty is filed. Many capital defense attorneys have resisted that testing so early in the case, and some judges have warned such resistance could amount to waiver.

Like the *Enmund/Tison* finding, logic suggests that the jury should determine if the defendant is mentally retarded, and that refusal to submit to the court-ordered testing of § 13-703.02 cannot constitute waiver. Logic further suggests that even if a defendant were to submit to the statutory testing and found to be not mentally retarded by the judge, the issue can still be raised before the jury as a threshold finding before the aggravation phase begins.

While the state and/or the courts may disagree with whether *Ring* dictates that the *Enmund/Tison* or *Atkins* findings must be made by a jury, the legislature may have made such disagreements moot. In A.R.S. § 13-703.01(P), the trier of fact is required to “make all factual determinations required by . . . the constitution of the United States or this state to impose a death sentence.” No one can seriously dispute that *Enmund/Tison* and *Atkins* have created constitutional bars to the imposition to the death penalty in certain cases. It is unknown whether the legislature intended for these findings to be encompassed by § 13-703.01(P), but the statute’s language seems clear and plain that the jury must make these findings before deciding whether a defendant can be sentenced to death.

Priors

Two aggravators in § 13-703(F) deal with prior felony convictions: F(1) looks to whether a defendant has previously been convicted of an offense that could have been punished under Arizona law with life imprisonment or death, and F(2) looks to whether a defendant has been previously convicted of a “serious offense,” as defined in § 13-703(H)(2).

Before *Ring*, the United States Supreme Court held that the fact of a prior conviction could be found by a judge, even if it increased the statutory maximum sentence.⁶⁹ *Ring* did not address this issue.⁷⁰ Whether *Ring* effectively decided that priors must be found by the jury may not matter under the language of either § 13-703.01(P), as discussed above, or § 13-703(G), which plainly requires the trier of fact to consider priors as aggravating circumstances that must be proven by the state.

Non-capital Counts

The statute is silent regarding how sentencing will proceed for any non-capital counts charged and tried in the same case as the capital count(s). Presumably, the judge will still impose the sentence for such offenses. Presumably, the defendant will still be entitled to a pre-sentence report, which will not be available for the capital count(s), and a mitigation hearing on the non-capital counts.

What remains to be seen is whether the jury will be told about the possibility of consecutive sentences, and how that could guarantee the jurors would never have to fear the defendant would ever get out of prison. Arguably, this should be a mitigating circumstance the jurors should be able to consider in making their decision.

Multiple Juries

If you were paying attention, you now know that a capital sentencing could involve **three** juries. In essence, the state could have three chances to get a death sentence.

Assuming this provision does not violate double jeopardy or have some other constitutional infirmity, it is unclear how this is actually going to work. If one jury is dismissed, how soon must the replacement jury be impaneled? Will the parties be entitled to transcripts of the prior phase(s) before the sentencing continues? What about schedules of the witnesses and experts?

Most troubling is the requirement that jurors on subsequent juries are to be informed they must accept the findings of

the prior juries. Under the old scheme, when the trial judge had any “residual doubt” over the guilt of the accused, the most “likely” result was a life sentence.⁷¹ The Supreme Court of the United States has also recognized that “residual doubt” may often accrue to the defendant’s benefit in systems where a jury makes the sentencing decision.⁷² The system of multiple juries will effectively deny this benefit to a defendant, as later juries are not to “retry” issues already found by earlier juries. If just one juror at either the aggravation or sentencing phases is unwilling to join in a verdict, the sentencing decision will be assigned to a jury that did not hear the trial evidence, and that by definition cannot harbor “residual doubt.” This will diminish the effectiveness of a non-statutory mitigating circumstance, and prevent the jury from adequately considering the relative strengths and weaknesses of the aggravators and mitigators.

Alternate Jurors

Alternate jurors impaneled “for the trial” are not to be released until the completion of the sentencing proceeding.⁷³ Presumably, this means a juror who did not deliberate to determine guilt and did not deliberate to determine the existence of the alleged aggravators along with the rest of the jury would be able to step in for another juror at the penalty phase and vote for death.

Victim Impact Statement and Recommendations

In *Booth v. Maryland*,⁷⁴ the Supreme Court held that victim impact evidence and victim sentencing recommendations were not admissible in capital sentencing proceedings. This decision was partially overruled in *Payne v. Tennessee*,⁷⁵ where

the Court decided that states may choose to allow evidence of the specific harm caused by the defendant to be presented to the jury considering whether the death penalty should be imposed. Notably, *Payne* did not overrule *Booth*’s prohibition against victim sentencing recommendations. Decisions of the Arizona Supreme Court since *Payne* have cited to that case in holding that, while victim impact evidence may be admissible to rebut a defendant’s proffered mitigation, a sentencing recommendation by the victim is not relevant for such rebuttal.⁷⁶

The old law did permit the victim to submit a victim impact statement to the probation officer who prepared the presentence report.⁷⁷ The judge was specifically precluded from considering any recommendation made by the victim regarding the sentence to be imposed.⁷⁸ These provisions have been completely removed from the new scheme, which now allows the victim to present an impact statement “in any format” at the penalty phase, but does not prevent the victim from making a sentencing recommendation. The prohibition on victim recommendations was included in the draft legislation, but was removed during the legislative session.

Under the old system, former § 13-703(D) required a victim who wished to present evidence at the sentencing hearing do so by testifying, thus allowing the defendant to engage in cross-examination. In this new scheme, § 13-703.01(Q) allows the victim to present “a victim impact statement in any format to the trier of fact.”

Does the “any format” language mean that the Rules of Evidence regarding hearsay and foundation can be bypassed with, for example, a “Day-in-the-Life” video of the deceased or a deluge of letters from the

family? Must such evidence be disclosed before trial? Will victim impact evidence be subject to the analyses of Rules 401, 402, and 403? Can the victim avoid cross-examination by presenting impact evidence through a third party? Will judges follow case law and preclude victim recommendations? Who knows?

State Rebuttal of Mitigation

The new scheme alters the state's ability to argue against leniency. Under prior § 13-703(D), the state was limited to rebutting any mitigation evidence presented by the defendant or arguing about its adequacy. Under the amended § 13-703(C), the state is not bound by the Rules of Evidence at the penalty phase, and, under the new § 13-703.01(G), may "present any evidence that demonstrates that the defendant should not be shown leniency."

The new statute imposes no requirement for relevance, assigns no burden of proof to the prosecution, and creates no limitation for the kind of rebuttal that may be offered. This effectively allows the state to expand the list of aggravators without being hampered by those pesky Rules of Evidence. Previously, the state could proffer hearsay statements to rebut a defendant's mitigation under the theory that the Confrontation Clause only pertained to "trials" and not to sentencing hearings.⁷⁹ Now, of course, the aggravation and penalty phases are trials, after which the jury will deliberate and attempt to render a verdict. The state should be limited to the Rules of Evidence in rebuttal, but only time will tell if that is what will happen.

Lack of Special Verdict

Under the old scheme, the judge was to return a "special verdict" no less than 7

days after the completion of the sentencing hearing, so that the judge had adequate time "to consider the evidence, information, and arguments" presented at the hearing.⁸⁰ Under the new scheme, the jurors are not required to spend even 7 minutes considering the evidence if they so choose. While the jury is required by § 13-703.01(E) to make specific findings as to the aggravators proven, there is no requirement for findings regarding the mitigating circumstances presented and considered.

In the past, the special verdict provided a record for appellate review. It allowed the Supreme Court to determine, among other things, whether non-statutory mitigation was given adequate consideration. The court expected a special verdict to contain "findings sufficiently specific" to allow "a meaningful review."⁸¹ A verdict was sufficient if it resolved "the material and relevant factual disputes raised by the evidence" and explained "what significant mitigating circumstances were found and weighed," which allowed the Supreme Court to determine whether any material factor was omitted or not weighed.⁸²

Now, there will be no special verdict for the Supreme Court to review, and no guarantee that a death sentence will be imposed only after a full and appropriate consideration of all the mitigation proffered. This omission, along with the statute's absolute dearth of language explaining how the jury should weigh the aggravating and mitigating evidence is troubling. Additionally, the absence of a requirement mandating that the jury must find, beyond a reasonable doubt, that aggravation outweighs mitigation, reeks of an attempt to make a verdict of death essentially and effectively unreviewable. In a system already riddled with error (remember Ray Krone?), such a result is very troubling.

Trials Will Not Be the Same – Ever Again

It appears there may be some judges and prosecutors who think not much has changed. The misapprehension seems to be that the trial phase of a capital case will be no different than before, and the jury will just have to be kept around for a couple of extra days to do the sentencing. No biggie, right?

Oh, how wrong. Everything is changed in these cases. Let's start, for example, with mitigation. Previously, the search for mitigation did not really gear up until after a defendant was found guilty of first-degree murder. This saved money and time, as efforts could be directed only to those cases actually scheduled for a capital sentencing hearing after an actual conviction for first-degree murder.

Now, however, mitigation must be prepared and ready to go before jury selection, as *voir dire* needs to include questions regarding the prospective jurors' attitudes towards such topics as addiction and mental health issues if relevant to mitigation. This will cost an enormous amount of money, will require a substantial increase in the number of mitigation specialists needed, and increase the amount of time needed to prepare for trial. In particular, the Ninth Circuit seems to take a dim view of capital cases being tried with inadequate mitigation investigation, and is not reluctant to say so.⁸³

An adequate mitigation investigation takes time, as well as money, because "the scope of trial counsel's penalty phase investigation must necessarily be broader than that conducted at the guilt phase."⁸⁴ As the Arizona Supreme Court has said, "[s]o long as the law permits capital sentencing, Arizona's justice system must provide adequate resources to enable

indigents to defend themselves in a reasonable way."⁸⁵

Speaking of trial preparation reminds me of the "rocket docket" in Maricopa County. At present, I do not know of a capital defense attorney who considers him- or herself qualified under Rule 6.8 of the Arizona Rules of Criminal Procedure to try a capital case under the new scheme without more training and trial preparation. Judges who insist upon pushing these cases to trial as soon as the Arizona Supreme Court issues an opinion in the cases on direct appeal may get the pleasure of trying them again.

Jury selection will no longer be a single fun-filled afternoon. In California, jury selection in a high-profile capital case can take weeks. Jury questionnaires will be needed, along with at least some individual, sequestered *voir dire*. Jury sequestration in some cases, especially during the sentencing proceeding, may be required. At first, judges and prosecutors may well resist these procedures as time wasting and expensive. Defense attorneys will have to mount effective arguments and create adequate records on these issues.

Pretrial litigation will also be different. More motions will be litigated, always with an eye towards the impact of the disputed evidence on the jury. During trial, defense attorneys must be even more vigilant against prosecutorial misconduct such as vouching, mis-statements of the law or the facts, and the inevitable attempts to press the jurors to let their emotions reign supreme.

In short, anyone who thinks this is business as usual will soon learn the error of such thoughts. This will be more work for everyone.

What This All Means

If Justice Scalia were here, he could re-route from his trip to *Apprendi*-land, and join our happy band on its way to places no one in Arizona has been before. Is that all bad? Is there any speck of sunlight in the gloom? Actually, there just might be. Consider this: As unbelievable as it may sound, some studies have concluded that judges impose more death sentences than juries, especially where the judges are either elected or stand for a retention vote.⁸⁶ As that would include every trial judge in Arizona, we might have an opportunity to save some lives.

We can also take some small comfort in the unerring attraction of politicians to overkill. Even though the state lost before the United States Supreme Court, the new sentencing scheme is an unmistakable attempt to prevent the application of *Ring* to anyone, even as to Timothy Ring himself. The new legislation did not just respond to Timothy Ring's demand for a constitutional process, but seeks to punish him and all other capital defendants for having made the demand. If the new legislation did nothing more than require a jury finding of aggravators, there would be little to complain about. Instead, the new legislation is an obvious attempt to ensure that Timothy Ring and as many others as possible are executed. In the name of justice, of course.

But all is not lost. While the new scheme is, in many ways, terrifying, it is also rife with opportunities. The scheme will result in protracted litigation, involving the sacrifice of "billions and billions"⁸⁷ of trees and the expenditure of millions and millions of dollars. The effect should be that not

many people are executed in Arizona for quite a while, as all of this cranks through the state and federal courts. The new legislation has given us new issues, new chances, and more time to save our clients.

In the words of Miss Brenda Lee, "Who's sorry now?" Not me. At least, not yet.

Endnotes

1. 536 U.S. ___, 122 S.Ct. 2428 (2002).
2. *Id.*
3. *The Arizona Republic*, June 25, 2002.
4. Letter from Janet Napolitano to "All Presiding Judges," dated June 24, 2002.
5. *The Arizona Republic*, July 9, 2002; July 24, 2002; and July 29, 2002.
6. "A Supreme Court Ruling Roils Death Penalty Cases," *The New York Times*, September 16, 2002.
7. *Gomer Pyle*, CBS Television, sometime way back when.
8. *Ring*, 122 S.Ct. at 2443.
9. *Id.* at 2445 (SCALIA, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. . . . Those states that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding in the sentencing phase or, more simply, by placing the aggravating factor determination (where it more logically belongs anyway) in the guilt phase.")
10. S.B. 1001, sec. 9(A)(1).
11. *Id.* at sec. 7(A).
12. A.R.S. §§ 13-703(A); 13-703.01(A).
13. A.R.S. § 13-703.01(B).
14. A.R.S. § 13-703.01(A).
15. A.R.S. § 13-703.01(R)(1).
16. A.R.S. § 13-703.01(P).
17. A.R.S. § 13-703.01(C).
18. *Id.*
19. A.R.S. §§ 13-703(D); 13-703.01(I).
20. A.R.S. §§ 13-703.01(H) and 13-703.01(O).
21. A.R.S. § 13-703.01(L).
22. A.R.S. § 13-703(D).
23. A.R.S. § 13-703(E).
24. *Id.*
25. *Id.*
26. *Id.*
27. A.R.S. §§ 13-703.01(J) and 13-703.01(L).
28. *Id.*
29. *Id.*
30. A.R.S. §§ 13-703.01(D) and 13-703.01(F).
31. A.R.S. § 13-703.01(F).
32. A.R.S. § 13-703(C).

33. *Id.*
34. A.R.S. § 13-703(D).
35. A.R.S. § 13-703(I).
36. A.R.S. § 13-703.01(G).
37. *Id.*
38. A.R.S. § 13-703(D).
39. A.R.S. § 13-703(C).
40. A.R.S. § 13-703(E).
41. A.R.S. § 13-703.01(H).
42. *Id.*
43. A.R.S. § 13-703.01(K).
44. *Id.*
45. A.R.S. § 13-703.01(K).
46. "Victim" is defined in A.R.S. § 13-703.01(R)(2) as "the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused."
47. A.R.S. § 13-703.01(Q).
48. *Id.*
49. *Id.*
50. *Id.*
51. S.B. 1001, sec. 7(B).
52. *Id.* at sec. 7(C).
53. A.R.S. § 13-703.05(A).
54. A.R.S. § 13-703.05(B).
55. *Id.*
56. *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989).
57. 489 U.S. 288 (1989).
58. *Id.* at 310-311.
59. *Bousley v. United States*, 523 U.S. 614, 620-621 (1998).
60. *Griffith v. Kentucky*, 479 U.S. 314 (1987).
61. *See State v. Jones*, 378 Ariz. Adv. Rep. 32, ¶42 n.12, 49 P.3d 273, 284 n.13 (2002).
62. *Id.* at n.13, 49 P.3d at 284 n.13.
63. 458 U.S. 782 (1982).
64. 481 U.S. 137, 158 (1987)
65. 474 U.S. 376 (1986).
66. *State v. Ring*, 200 Ariz. 267, 280, 25 P.3d 1139, 1152 (2001).
67. *Ring v. Arizona*, 122 S.Ct. at 2437, n.4.
68. ___ U.S. ___, 122 S.Ct. 2242 (2002).
69. *Almendarez-Torres v. United States*, 523 U.S., 224 (1998).
70. *Ring v. Arizona*, 122 S.Ct. at 2437, n.4.
71. *See State v. Harrod*, 200 Ariz. 309, 317 n. 7, 26 P.3d 492 n.7 (2001).
72. *See Lockhart v. McCree*, 476 U.S. 162, 181 (1986).
73. A.R.S. § 13-703.01(M).
74. 482 U.S. 496 (1987).
75. 501 U.S. 808 (1991).
76. *See, e.g., State v. Roscoe II*, 184 Ariz. 484, 502, 910 P.2d 635 (1996).
77. A.R.S. § 13-703D)(Old).
78. A.R.S. § 13-703(E)(Old).
79. *State v. Ortiz*, 131 Ariz. 195, 209, 639 P.2d 1020, 1034 (1981).
80. Ariz.R.Crim.P. 26.3(c)(5).
81. *State v. Kiles*, 175 Ariz. 358, 369, 857 P.2d 1212, 1223 (1993).
82. *Id.*
83. *See, e.g., Turner v. Calderon*, 281 F.3d 851 (2002) (evidentiary hearing granted on ineffective assistance claim where defense attorney announced he was unprepared to proceed with the penalty phase and failed to develop or introduce mitigating evidence).
84. *Id.*
85. *State v. Bocharski*, 200 Ariz. 50, 62, 22 P.2d 43, 55 (2001).
86. J. Leibman, *A Broken System, Part II*.
87. C. Sagan, *Cosmos*, PBS, 1980's.

(Capital Penalty Phase Argument Misconduct continued from page 1)

advocacy ... in his determination to assure that the appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceedings meaningless.”). It is no surprise then that death penalty case law is rife with closing argument misconduct.

Courts that are for the first time encountering jury capital sentencing may mistakenly believe that the penalty phase will remain essentially the same except for replacing the judge with a jury – *i.e.*, procedural (not substantive) changes. *This surely is not the case.* American jurisprudence has long acknowledged that judges (trained, experienced jurists) can winnow out and disregard improper argument. *State v. Beatty*, 158 Ariz. 232, 244, 762 P.2d 519, 531 (1988) (regarding victim impact evidence, “the trial judge in a capital case must be presumed to be able to focus on the relevant sentencing factors and to set aside the irrelevant, the inflammatory, and the emotional factors.”) Courts do not, of course, make the same presumption for jurors. *See State v. Mann*, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997) (regarding victim impact evidence, a capital sentencing jury could not be expected to be able to disregard victim impact evidence). When a human life is at stake, trial judges cannot surmise juries can put aside improper argument. Therefore much more care must go into identifying, and promptly stopping or firmly precluding misconduct. The justice system will be challenged to re-think what evidence and argument that had previously been considered fair game or harmless will be prejudicial when a jury hears it. This series will examine in detail numerous improprieties arising in capital closings to juries. Because misconduct varies with the

facts of each case, lawyers should be aware of the principles unique to capital sentencing so that they can fashion objections accordingly. Chapter One therefore reviews major death penalty precepts.

Death is Different

The starting point of capital jurisprudence is that “death is different.” The death sentence is unique in its severity and irrevocability. *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2031 (1976). The death penalty “is unique in its total irrevocability, ... rejection of rehabilitation, ... absolute renunciation of all that is embodied in our concept of humanity.” *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726 (1972). Consequently, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976). Hence courts carefully scrutinize how capital decisions are reached. *Id.*; *Eddings v. Oklahoma*, 455 U.S. 104, 117-18, 102 S.Ct. 869, 877-78 (1982) (O'Connor, J., concurring). The sentencing scheme must rationally distinguish between those for whom death is an appropriate punishment and those for whom it is not. *Zant v. Stephens*, 462 U.S. 862, 873-80, 103 S.Ct. 2733, 2741-44 (1983).

The Supreme Court held that there must be a valid penological basis for selecting which, among many convicted of the same charges, will be executed. *Stephens*, 462 U.S. at 876-77, 103 S.Ct. at 2742-43; *Enmund v. Florida*, 358 U.S. 782, 788-89, 102 S.Ct. 3368, 3372 (1982). Although noncapital sentences may be imposed to rehabilitate, incapacitate, and deter, the “primary justification for the death penalty is

retribution.” *Spaziano v. Florida*, 468 U.S. 447, 461, 104 S.Ct. 3154, 3162 (1984) (emphasis supplied); *but see Gregg*, 428 U.S. at 184-87, 96 S.Ct. at 2930-31 (justifications for a death sentence are retribution *and* deterrence). Capital retribution is “an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be death.” *Gregg*, 428 U.S. at 184, 96 S.Ct. at 2930.

The imposition of the death penalty ... is an expression of community outrage. Since the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community’s response must be death. *Spaziano* at 461, 104 S.Ct. at 3163.

Death Is Decided in an Emotional and Moral Environment

Because ethical questions and the sense of community outrage profoundly affect a decision to take a life, the penalty phase embraces emotional and moral considerations. Justice Mosk explained that although appeals to sympathy or passions are inappropriate in the guilt phase, at the penalty phase, the jury’s decision turns not only on facts and law, but more importantly on their “moral assessment of those facts.” *People v. Haskett*, 30 Cal.3d 841, 863, 180 Cal.Rptr. 640, 654, 640 P.2d 776, 790 (1982). It is not only appropriate but necessary that the jury weigh the sympathetic elements of the defendant’s background against crimes that offend the conscience. *Id.*

Capital sentencing will always be an emotional decision. *Barclay v. Florida*, 463

U.S. 939, 948-51, 103 S.Ct. 3418, 3424-25 (1983); *Brooks v. Kemp*, 762 F.2d 1383, 1404-05 (11th Cir. 1985).

Reason alone cannot adequately explain a jury’s decision to grant mercy to a person convicted of a serious murder because of that person’s youth or troubling personal problems. Nor can reason alone fully explain the reaction of a juror upon hearing the facts of particular crimes described in their specifically tragic detail. Empathy for a defendant’s individual circumstance or revulsion at the moral affront of his crime ... are not susceptible to full explanation without recourse to human emotion.

Brooks, 762 F.2d at 1405. Therefore, emotional overtones in counsels’ arguments are not necessarily improper. *Id.*; *Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984).

Nonetheless, the capital decision must still have a strong foothold in reason. Juries must face their obligations soberly and rationally, not conveying the impression that emotion trumped reason. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204 (1977). They are therefore obligated to strike a balance between rational and emotional responses. Courts structure this balancing differently; for example, the 11th Circuit distinguishes between the jury’s finding of aggravating/mitigating factors (applying the facts to the law, under a “beyond a reasonable doubt” standard) and its decision to impose the ultimate penalty (a “more amorphous” decision about the moral propriety of death in that case). *Brooks*, 762 F.2d at 1406. The Supreme Court of California applied reason in deciding what evidence the jury would receive while allowing them to respond emotionally to any of it. *See Haskett*, 30

Cal.3d at 864, 180 Cal.Rptr. at 654, 640 P.2d at 790; *People v. Raley*, 2 Cal.4th 870, 916, 8 Cal.Rptr.2d 678, 830 P.2d 712 (1992). Other courts are less discriminating, simply endorsing a “balancing act” between reason and emotion as part of the entire capital disposition process.

The Jury’s Discretion in Deciding Death Must Not Be Invaded

Because of this peculiar role of the jury, the realm of jury discretion is sanctified. It is in this arena that matters of life or death are weighed in a human moral undertaking. This is, without question, the most weighty societal decision conferred on ordinary citizens, and the jury’s independence must be scrupulously preserved. Consequently, argument that reduces the jury’s discretion is highly improper. For instance, urging the jury only to find aggravating/mitigating factors (foregoing a searching inquiry whether the death penalty is appropriate in that case) is, literally, “gravely misleading.” *People v. Edelbacher*, 47 Cal.3d 983, 1039, 254 Cal.Rptr. 586, 622, 766 P.2d 1, 36 (1989). Attempts to lessen the jurors’ sense of their awesome responsibility are likewise improper. For example, in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2635 (1985), the prosecutor improperly urged the jury not to view itself as finally determining whether Caldwell would die, because the Mississippi Supreme Court would review the death sentence for correctness.

Death Penalty Aggravation and Mitigation Parameters

The Eighth Amendment framework provides that aggravation must be strictly circumscribed while mitigation must be wholly open. The two requirements of a constitutional sentencing scheme are that they guide and limit the discretion of the

sentencer while taking into consideration the individual circumstances of the offender and offense. *Jones v. United States*, 527 U.S. 373, 381, 119 S.Ct. 2090, 2098 (1999). To comport with the cruel and unusual punishment clause, a capital sentencing scheme must “be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932. In *Furman*, the Supreme Court did not dictate what factors could be considered, leaving that to the legislature (representing the values of the local community).² *Ramos*, 463 U.S. at 1000, 103 S.Ct. at 3452; *Gregg*, 28 U.S. at 176, 96 S.Ct. at 2926. Nonetheless, aggravation is restricted precisely to the jurisdiction’s statutory aggravators.³

To the contrary, *anything* that tends to mitigate is not only fair game, but must be admitted. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978). In *Lockett*, the plurality concluded that the Eighth and Fourteenth Amendments require that a sentencer not be precluded from considering as mitigation “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.* at 604, 98 S.Ct. at 2964; *and see Eddings*. Moreover, in capital cases, the fundamental respect for humanity underlying the Eighth Amendment “requires consideration of the character and record of the *individual* offender,” so individualizing the accused cannot be reined in. *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991.

Because of this scheme, frustrated prosecutors may try to expand their case illicitly. It is improper for a prosecutor to urge a jury to find an aggravator that is not based on relevant facts in evidence or proper inferences drawn from them. *Brooks*, 762 F.2d at 1408. Similarly, it is

improper for a prosecutor to convert a mitigator into an aggravator. *E.g.*, *Stephens*. This applies to a lack of mitigation as well: death sentences have been reversed due to argument that the lack of statutory mitigators should be used in aggravation. *See, e.g.*, *Edelbacher*, 47 Cal.3d at 1034, 254 Cal.Rptr. at 618, 766 P.2d at 32; *see also People v. Davenport*, 41 Cal.3d 247, 221 Cal.Rptr. 794, 710 P.2d 861 (1985).

Relevant Issues in Death Sentencing

In death cases, relevance takes on a new significance due to constitutional limitations on subject matter. Essential to the capital decision is information about the defendant, his character, and the circumstances of his offense. *Brooks*, 762 F.2d at 1406. With very few restrictions,⁴ information about the defendant and the offense will always be proper. *Brooks*, 762 F.2d at 1406. *Individual* characteristics of the defendant and the crime are crucial considerations. *Woodson*. “The sentencer ... has a constitutional obligation to evaluate the unique circumstances of the individual defendant.” *Spaziano*, 468 U.S. at 459, 104 S.Ct. at 3161. Note that particulars of the accused and crime can cut both ways.

Because of the different considerations when death is an option, topics not normally appropriate for sentencing become “relevant.” For example, the Supreme Court concurred that certain aspects of victim impact⁵ could be relevant as part of the “circumstances of the offense.” *See Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991); *State v. Bernard*, 608 So.2d 966 (La. 1992). Murder has predictable consequences, including that a victim’s family will suffer great loss. *Payne* at 838, 111 S.Ct. at 2616 (Souter, J., concurring) (the foreseeability of the

killing’s consequences “imbues them with *direct moral relevance*.”). It also allows the jury to assess the loss to the community, lending itself to evaluating the defendant’s blameworthiness. *Payne*.

Because of the moral equation, penological concerns are relevant to death penalty argument. “Translating facts into a penalty is an ethical operation requiring consideration of the accepted justifications of the particular punishment.” *Brooks*, 762 F.2d at 1407; *and see Spaziano*, 468 U.S. at 482-83, 104 St. at 3174 (Stevens, J., dissenting). Hence considering retribution is “both proper and inevitable.” *Brooks*, 762 F.2d at 1407; *Spaziano*, 468 U.S. at 461, 104 S.Ct. at 3162. Similarly, the jury may consider incapacitation (*i.e.*, “specific deterrence”) and rehabilitation when weighing whether to allow the defendant to live. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976). Even general deterrence (though principally a legislative concern, *Spaziano*, 468 U.S. at 478, 104 S.Ct. at 3172) can be factored into the capital analysis.⁶ *Collins v. Francis*, 728 F.2d 1322, 1339-40 (11th Cir. 1984); *and see Brooks*, 762 F.2d at 1407, n.39.

Also “relevant” to capital argument *may be* predicting the defendant’s future dangerousness. While many jurisdictions ban such discussion, some allow it under the theory that risk of re-offense often factors into *noncapital* sentencing as part of the individual characteristics of the defendant, so it is “essential” for the capital jury to consider. *Jurek*. The likelihood that she will *not* pose any threat to inmates, guards, or society is pertinent to the jury’s decision whether to allow her to live the rest of her days in prison. Conversely, the likelihood that she *will* pose a continuing threat also informs that decision. *Id.*; *and see Ramos*, 463 U.S. at 1002 n.16, 103 S.Ct. at 3452 n.16; *Barefoot v. Estelle*, 463

U.S. 880, 896-98, 103 S.Ct. 3383, 3396 (1983). Indeed, future dangerousness is relevant to rehabilitation and specific deterrence, legitimate penological interests. *Spaziano*, 468 U.S. at 461-62, 104 S.Ct. at 3163.

When argument is irrelevant (and prejudicial), it becomes “fundamentally unfair,” in violation of the accused’s due process rights. *Hance v. Zant*, 696 F.2d 940 (11th Cir.), *cert. denied*, 463 U.S. 1210 (1983). For example, a particular witness’s testimony may be so inappropriate and damaging that it renders the whole sentencing fundamentally unfair. *Payne*, 501 U.S. at 831, 111 S.Ct. at 2612 (O’Connor, J., concurring, including concerns about certain victim impact statements). Courts examine the infraction under traditional misconduct analysis. *E.g.*, *Brooks*.

Stephens, 462 U.S. at 885, 103 S.Ct. at 2747. Further, some jurisdictions statutorily limit character evidence to mitigation, barring “bad character” from being used against the defendant. *E.g.*, *Edelbacher*, 47 Cal.3d at 1033, 254 Cal.Rptr. at 617, 766 P.2d at 32 (the California criminal code allowed character of the defendant as mitigation, but disallowed it as aggravation).

5. Of course, whether a sentencer in a capital case may consider victim impact at all is a matter for the legislature; but where it is incorporated into statutory aggravators, it is not unconstitutional.
6. Bear in mind that some jurisdictions (either through statute or case law) have limited penological discussions - at least as used to aggravate a sentence. For example, California has stated that general deterrence (of other would-be murderers) is inappropriate because it focuses jury attention on other killers and away from the person they must sentence. Moreover, it is a philosophically unsound because it is based upon “the unproven and illegitimate assumption that [the death penalty] acts as a deterrent to the described ‘potential killers.’” *People v. Wrest*, 3 Cal.4th 1088, 1106, 13 Cal.Rptr.2d 511, 839 P.2d 1020 (1992).

Endnotes

1. Capital prosecutions are “political” virtually by definition. Consequently, they also become big media draws.
2. While statutory shortcomings are not the focus of this article, it is erroneous to presume that the Supreme Court has not imposed any constitutionally based limits on the substantive aggravating factors. *California v. Ramos*, 463 U.S. 992, 1000, 103 S.Ct. 3446, 3453 (1983). For instance, the Court in *Gregg* suggested that excessively vague standards would result in the “arbitrary and capricious” sentencing prohibited by *Furman*. *Gregg*, 428 U.S. at 195, n.46, 96 S.Ct. at 2935, n.46. Additionally, the constitution bars legislatures from excluding mitigation. *See Woodson*.
3. In Arizona, the statutory aggravators include having certain serious prior or current convictions, creating a grave risk of death to a third party, engaging in murder for hire or for pecuniary gain, “especially heinous, cruel, or depraved” acts, or killing a detention officer (while in custody), a police officer (in the line of duty), or a child. *See* A.R.S. 13-703(G) for precise language defining aggravating circumstances.
4. For example, death could not constitutionally be urged on the basis of race, religion, or political belief.



ARIZONA ADVANCE REPORTS

By Terry Adams

Defender Attorney – Appeals



State v. Christian
374 Ariz. Adv. Rep. 8 (CA 1, 5/30/02)

The state appeals the trial court's ruling that a conviction for an offense under A.R.S. 13-901.01(Prop 200) could not constitute an historical prior felony conviction under 13-604(V)(1) for purposes of sentence enhancement. The defendant was convicted of theft and admitted two priors one of which was a Prop 200 case. The Court of Appeals determined that since there was nothing in either 13-901 or 13-604 that precludes the use of a Prop 200 to enhance punishment that the trial court erred, and remanded for re-sentencing. The court didn't mention A.R.S. 13-105(16) which defines felony as "an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state."

State v. Sorkhabi
374 Ariz. Adv. Rep. 6 (CA 1, 5/03/02)

The defendant was charged with resisting arrest while at Casino Arizona, located on an Indian reservation. The arresting officer was an Indian. The trial court dismissed the case with prejudice because federal law preempts state law when the crime is on an Indian reservation and the victim is an Indian. The Court of Appeals found that the state has exclusive jurisdiction over crimes committed by non-Indians against non-Indians on a

reservation, as well as victimless crimes. However the federal court has jurisdiction over crime where the victim is an Indian. The argument here was that resisting arrest was a victimless crime. The court found that the plain language of the statute makes the officer involved in a resisting case a "victim" and affirmed the conviction.

State v. Martinez
375 Ariz. Adv. Rep. 7 (CA 1, 6/4/02)

This appeal addresses the question whether A.R.S. 13-205 requires a defendant to prove the affirmative defense of justification-crime prevention set forth in A.R.S. 13-411 by a preponderance of the evidence. The argument was that because 411(C) says a person is presumed to be acting reasonably if he is acting to prevent the commission of any of the offenses listed in subsection A, the entire statute is exempt from the burden of proof requirement of 13-205. The court found that the legislature only excluded the presumption in 411(C) from the burden shifting change, not any of the elements of the defense. The burden shifting instruction given by the trial court was thus affirmed.

State v. O'Dell
375 Ariz. Adv. Rep. 3 (CA 2, 5/30/02)

The defendant was convicted of DUI in

Pima County. An Intoxilyzer 5000 was used to show his BAC was over .10. Pima County does not have the modem to transfer data from the 5000 to DPS for ADAMS storage so that defendants have access to it. The machine can only store data from 100 completed breath tests and, when full, new data overrides the oldest data. The defendant moved to dismiss because the state had allowed data in the memory of the intoxilyzer used for his breath test to be erased. The motion was granted. The Court of Appeals reversed, holding that the state is under no federal or state statutory or due process obligation to preserve this data, and because there was an insufficient showing that the data contained exculpatory evidence.



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AUGUST 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
7/29 - 8/1	Hamilton Burns Klosinski	Gaines	Andrews	CR02-93525 6 cts. Sexual Conduct w/ Minor, F6N	Not Guilty, Cts. 1 - 2 Guilty, Cts. 3 - 6	Jury
7/29 - 8/2	Lopez Reilly	Franks	Vieau	CR02-06779 7 Cts. Forgery, F4 3 Cts. Poss. Forg. Device, F6	Guilty, Cts. 1-7 Not Guilty, Cts. 8 - 10	Jury
7/30 - 8/1	Clemency Curtis	Gottsfeld	Kelemen	CR02-007018 Agg. Assault, F6	Not Guilty	Jury
7/30 - 8/1	Looney	Gaylord	Adleman	CR02-005073 Agg. Assault, F6 Threatening/Intimidating, M1	Not Guilty	Jury
7/31 - 8/1	Gaziano	Keppel	Anderson	CR02-92530 2 cts. Agg. DUI, F4N	Guilty	Jury
8/2	Jolly Ellig	Hotham	Davidson	CR02-07534 Unlawful Use of Means of Transportation., F5	Guilty	Jury
8/5	Javid Reidy	McVey	Kelemen	CR02-006225 Resisting arrest, F6	Guilty	Jury
8/5 - 8/6	Corbitt	Keppel	Warshaw	CR02-90717 2 cts. Agg. DUI, F4N	Guilty	Jury
8/5 - 8/6	Gaxiola Muñoz Spears	Gerst	Lindquist	CR02-07638 Resisting Arrest, F6	Guilty	Jury
8/5 - 8/6	Stein	Aceto	Thompson	CR02-92088 Burglary 3 rd Degree, F4N	Guilty	Jury
8/12	Jolly	Hotham	Davidson	CR02-7534 Unlawful Use of Means of Transportation, F5	Guilty	Jury
8/12	Washington	Reinstein, P.	Hanlon	CR02-001104 POND for sale, F2	Not Guilty	Jury
8/12 - 8/14	Silva Cuccia	Hilliard	Reddy	CR02-006544 Agg. Assault Dang., F2	Guilty	Jury
8/12 - 8/15	Satuito	McVey	Kamis	CR02-07214 Agg. Assault, F6 Misd. Assault, M1 Agg. Assault Police Officer, F6 PODP, F6 IJP, M1	Not Guilty - Agg. Assault, IJP; Dismissed Misd. Assault; Guilty Agg. Assault Police Officer; Directed verdict PODP	Jury
8/13	Castillo	Foreman	Luder	CR02-007279 MIW, F4; PODD, F4; POM, F6; PODD, F6	Guilty	Jury

AUGUST 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
8/13 - 8/15	Akins	Schwartz	Wright	CR02-07310 Agg. Assault, F6	Mistrial	Jury
8/13 - 8/15	Blair	McClennen	Williams	CR01-17022 PODP, F6; PODD, F4	Guilty	Jury
8/14	Tavassoli	Martin	Basta	CR02-07652 PODD, F4; POM, F6	Guilty PODD Not Guilty POM	Jury
8/14 - 8/15	Hinshaw Kresicki <i>Southern</i>	Jarrett	Warshaw	CR02-92481 2 cts. Agg. DUI, F4N; CR02-91829 2 cts. Agg. DUI, F4N; CR02-95697 2 cts. Agg. DUI, F4N	Mistrial	Jury
8/14 - 8/15	Fimbres	Gottsfeld	Weinberg	CR02-001887 Theft Means Transportation, F3	Guilty	Jury
8/15 - 8/19	Reid <i>Curtis</i>	Hotham	Reddy	CR01-007646 Forgery, F4; Resisting Arrest, F6	Guilty	Jury
8/15 - 8/20	Fox Beatty <i>Gavin</i>	Akers	Herman	CR02-92044 Theft Means Transportation, F3N	Guilty	Jury
8/20 - 8/22	Harris Bradley / Seaberry <i>Curtis</i>	Raves	Steinberg	CR02-007653 Attempt to commit robbery, F5	Not Guilty	Jury
8/20 - 8/22	Scanlan <i>Jaichner</i>	Schneider	Lane	CR02-000489 2 Cts. Agg. DUI, F4	Not Guilty	Jury
8/20 - 8/22	Whelihan	Schwartz	DeBrigida	CR02-06580 POM for Sale, F2 POND for Sale, F2	Guilty	Jury
8/21 - 8/22	Castillo	McVey	Kelemen/ Corcoran	CR02-003992 Agg. Assault, F6 Resist Officer / Arrest, F6	Guilty	Jury
8/22 - 8/26	Hinshaw	Akers	Brooks	CR02-92115 POM for Sale, F4N	Guilty (in absentia)	Jury
8/22 - 8/27	Schreck <i>Curtis</i>	Hilliard	Reddy	CR02-004060 Agg. Assault, F2; MIW, F4 Resist Officer / Arrest, F6	Guilty	Jury
8/28 - 8/29	Aeed <i>Jaichner / Diulus</i>	Cates	Beougher	CR01-017661 Unlawful Use Means Transport, F5	Not Guilty	Jury
8/28 - 8/29	Rothschild Varcoe	Foreman	Adelman	CR02-009421 Theft Means Transportation, F3 PODD, F4; PODP, F6	Not Guilty - Theft Guilty - PODD and PODP	Jury
8/28 - 8/30	Castillo	Galati	Charbel	CR02-007067 Burglary, F3	Hung jury	Jury

AUGUST 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
7/30 – 8/8	Canby Horral	Araneta	Canby	CR01-012071 Murder, 2d Degree Kidnapping, C2F Att. Murder 1 st Degree Agg. Asslt., Dang., C3F Kidnapping, Dang., C2F	Not Guilty Not Guilty Not Guilty Guilty 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
8/18-8/23	Everett	Gerst	CR02-005434 Agg. Assault 2 cts Kidnapping Unlawful use of MOT	Guilty	Jury
8/20-8/28	Everett	Hotham	CR02-004560 Agg. Assault	Guilty of lesser included disorderly conduct	Jury
8/26-9/10	Schaffer	Schwartz	CR02-002249 Sex Aslt Kidnap Armed Robbery Aggravated Asslt Sex Abuse—23 cts	Guilty of 20 cts	Jury

for The Defense

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