



for The Defense

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

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Capital Penalty Phase Argument Misconduct Chapter Two: Improper Grounds for the Death Penalty

**By Donna Elm
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Any issue can be improper, depending on the circumstances of the case. But there are some prosecutorial arguments to impose a death sentence that are clearly improper as a matter of law. This chapter addresses recurring types of improper grounds that prosecutors have advanced for capital punishment. Included is taxpayer concerns, religious

concerns, community concerns, future dangerousness, double jeopardy, and estoppel. This list is not exhaustive. The law continues to change, and arguments that are treated as categorically improper in some jurisdictions can be considered legitimate issues for capital sentencing hearings in others. Practitioners are urged to research any issue for the latest decisions in their jurisdiction.

A. Taxpayer Concerns

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"Lay" Miserable

Why Probation Violation Hearings Should Not Be Exempt From Arizona's *Corpus* Rule

**By Garrett Simpson
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In the great conga-line of "The Law," few have to dance as fast as the lowly probationer. Of course, there are probationers who thrive under supervision, but all too often they are treated

as sinners in the hands of an angry Probation Officer. The probationer's humble station only diminishes in Probation Violation Court, where even spiritedly contested proceedings frankly have a *pro forma* air about them, more like a chess

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The law does not permit prosecutors to argue that execution would save taxpayers the expense of incarcerating a defendant for the rest of his days. Costs of “life” incarceration is not among the aggravating factors allowed in Arizona. See A.R.S. §13-703(G); see also *State v. Jonas*, 164 Ariz. 242, 251 fn.5, 792 P.2d 705, 714 fn.5 (1990) (in a non-capital case, the cost of incarceration as a result of unavailability of parole is irrelevant to an Eighth Amendment analysis).

Posing a conflict between self-interests and duty as jurors is always improper. For example:

If he’s given life, it costs money to keep him, thousands of dollars a year to keep a prisoner housed, fed and clothed, and medical care, why should the taxpayers, and that’s you folks, all of us, why should the taxpayers have to keep somebody like [the defendant] the rest of his life when he’s done what he’s done?¹

I could argue that keeping [the defendant] in prison for life at a cost to the taxpayers of \$35,000.00 a year isn’t worth it. But I will not argue that ...²

Thousands and thousands and thousands of taxpayers’ dollars [would be spent maintaining the defendant in prison for life].³

The Courts found numerous faults in both those examples. Preliminarily, the “facts” argued were not correct – \$35,000 annually vastly overstated the cost of life imprisonment (at that time). More importantly, cost is not a legitimate justification for the death penalty. *Brooks*

v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985). It is, therefore, not relevant to the capital phase. In most jurisdictions, costs of incarceration will also not fall within the purview of licit statutory aggravators. Note that in the second example, the Court took a dim view of the prosecutor’s attempt to “unring the bell” (the “rather transparent ruse of mentioning the improper argument but then disclaiming intent to present it”). That impropriety alone might be grounds for a reversal. *Collier v. State*, 101 Nev. 473, 481, 705 P.2d 1126, 1131 (1985).

B. Religious Concerns

References to religion in closing arguments are largely barred. Some states have specific constitutional, statutory, or rule provisions proscribing questioning a person’s religious beliefs – which extends to commenting on religious beliefs. Arizona constitutionally prohibits questioning a person about religious beliefs. See Ariz. Const., Art. 2, §12; *State v. Rankovich*, 159 Ariz. 116, 765 P.2d 518 (1988) (argument regarding defendant’s religion was improper); see also Fed.R.Evid., Rule 610. The testimonial prohibition reasonably could be extended to argument on religious persuasion. The following examples were found unqualifiedly improper:

[Explaining why “Vengeance is mine, sayeth the Lord,” should not dissuade the jury from imposing death, the prosecutor quoted “an eye for an eye” scripture.]⁴

What I am going to ask you to do is totally in keeping with religious principles, ... with the spirit of Christ or God ... [launching into protracted biblical quotes,

concluding] God recognized there'd be people like [the defendant], that's why those commandments were delivered.⁵

[Defense counsel] says don't play God. Let every person be in subjection to governing authorities for there is no authority except from God. Therefore he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves. ... Do what is good and you will have praise for the same, but ... it is an Avenger who brings wrath upon one who practices evil. You are not playing God. You are doing what God says.⁶

The whole cornerstone of our law ... the law of society is based upon those scriptures from the Bible ... replete with circumstances where capital punishment has been applied. "Whosoever sheddeth man's blood, by man shall his blood be shed." ... There's certainly foundation for capital punishment in the Bible.⁷

In the first instance, the California Supreme Court grouched that this invocation of the *lex talionis* (the rules of retributive justice based on Mosaic law) appeared to be a prosecutorial favorite in capital cases. The Court stated, "We cannot emphasize too strongly that to ask a jury to consider biblical teachings when deliberating is patent misconduct." It diminishes the jury's sense of personal responsibility for the verdict and invites them to apply a "higher law" rather than the law provided by the judge. Similarly because the jury should not be asked to

supplant instructed law with Biblical law, a federal court ruled that permitting the jury to take a Bible into deliberations was error. *Jones v. Kemp*, 796 F.Supp. 1534, 1558-59 (N.D.Ga. 1989) (citing cases where the Supreme Court had denied certiorari⁸).

Nonetheless, some jurisdictions have permitted discussions of religion under limited circumstances. For instance, North Carolina authorized biblical references as long as the prosecutor did not infer that state capital law had been divinely inspired. *Hunt v. Lee*, 291 F.3d 284, 294-95 (4th Cir. 2002) (citing *North Carolina v. Barrett*, 343 N.C. 164, 469 S.E.2d 888, 899 (1996)). Additionally, although Georgia disallowed urging capital punishment because of the defendant's religious beliefs, or because a particular faith would require the ultimate sanction, it allowed general allusions to principles of divine law. *Crowe v. State*, 265 Ga. 582, 458 S.E.2d 799 (1995). Incidentally, *Crowe* therefore condoned the following argument (concluding, inexplicably, that it did not suggest that a particular faith required capital punishment):

The Bible says you shall be put to death if you kill somebody.

On the other hand, when the defense injects religion (in terms of mercy or allowing God to judge), rebuttal religion is "invited." For example, "eye for an eye" rebuttal was proper response to the defendant's statement about accepting Christ as his savior. *People v. Montiel*, 5 Cal.4th 877, 934, 21 Cal.Rptr. 705, 737, 855 P.2d 1277, 1309 (1993) (also rejecting the contention that this rebuttal chilled defendant's first amendment rights).

Furthermore, when the defense argued the Abel and Cain murder outcome, the prosecutor responded that the Bible also said, “Render unto Cesar what is Cesar’s.” The Court concluded that this did not invoke impermissible religion but redirected jurors to proper secular concerns. *People v. Jackson*, 13 Cal.4th 1164, 1241 56 Cal.Rptr.2d 49, 94, 920 P.2d 1254 (1996). Note that the “invited” responses in both instances went well beyond proper rebuttal (which should be strictly limited to countering the subject-matter argued by the defense). Moreover, after another Abel and Cain account, a prosecutor responded with a lecture distinguishing biblical references to killing from murdering – properly circumscribing her rebuttal. The Court held that her analysis had been invited, and the prosecutor legitimately deflected the jury’s attention to carrying out California law. *People v. Bradford*, 14 Cal.4th 1005, 1062-63, 60 Cal.Rptr.2d 225, 929 P.2d 544 (1997).

C. Community Concerns

Community concerns create a dilemma for capital sentencing jurisprudence. Although the jury should not consider extraneous matters (like what others think) in making this critical judgment, it must also make a normative decision applying community standards and values. Some states have barred certain community concerns from the jury’s deliberation. Consequently, a particular issue regarding social values will receive diverse treatment in different jurisdictions. Nothing in Arizona’s aggravating factors encompasses community concerns.

1. Community Improvement

Arguing that executing the defendant would be a community service sounds like a tasteless joke, so it is seldom overtly advanced. Nonetheless, it has been urged:

A man of such [infamous] character, and one who is guilty of such crimes should be convicted on general principles and it is your duty ... to convict him for the good of society.⁹

If you let this man have his life, you will be doing ... your community a disservice.¹⁰

In the first case, the court wasted no time in finding that, “Of course, this was not legitimate argument.” “General principles” is too vague to satisfy the Eighth Amendment’s mandate that aggravators be strictly limited; but more critically, social improvement is an unsound argument as a matter of law. Because the trial judge failed to correct this affront, the case was reversed.

2. Community Protection

Arguing that the jurors should sentence the defendant to death for the protection of the community is hardly an improvement:

We must realize that it is our responsibility to protect everybody here and ... out there in the culture of Essex County from the cruel, horrible, inhumane acts of murder.¹¹

Protect the community and protect our fellow citizens. Only the death penalty can do that in this case.

The death penalty will ensure that the community is protected.¹²

The court found the rhetoric in the first example “undoubtedly improper” because it diverted jurors’ attention from the facts before them. It also intimated that jurors could protect themselves or those they love if they would give the ultimate penalty. “With a man’s life at stake, a prosecutor should not play on the passions of the jury.” *Hance v. Zant*, 696 F.2d 940, 951 (11th Cir. 1983). This self-protective, inflammatory suggestion has no place in closing arguments of any kind, especially capital. Additionally, suggesting that the jury “impose the death penalty to satisfy its responsibility to society” distracts the jurors instead from their crucial role. *State v. Ramseur*, 106 N.J. 123, 289, 524 A.2d 188, 321 (1987). It urges them to cast aside deliberative objectivity in favor of concerns “closer to home.” The key danger with the community protection argument, then, is that it persuades the jury to supercede its duty “to render a verdict in accordance with the law and evidence presented” with vigilante mentality.

Note that some courts, nonetheless, allow discussion of community safety as valid deterrence argument. *Id.* (disagreeing with *People v. Lewis*, 88 Ill.2d 129, 58 Ill.Dec. 895, 904, 430 N.E.2d 1346, 1355 (1982)). Alternatively, some treat it as a valid concern with future dangerousness. In *Brooks*, the 11th Circuit held that although these arguments were dramatic, they were relevant to the question whether the defendant would remain a threat to society (so should be executed). As such, community protection could be

part of the jurors’ moral decision whether a defendant should die.

3. *Community Conscience*

“Emotional reaction to social problems should play no role in the evaluation of an individual’s guilt or innocence,” so when a prosecutor argues that a community expects certain things of the jury, it is normally improper. *People v. Williams*, 65 Mich.App. 753, 756, 238 N.W.2d 186, 188 (1975). Consequently remarks reminding jurors that they must act as the conscience of the community (becoming the societal “enforcer”) are barred in many jurisdictions. E.g., *Haberstroh v. Nevada*, 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989). They invite jurors to substitute communal judgment for their individual discretion and divert attention from the case. When combined with inflammatory rhetoric, they exceed the pale of acceptable argument. Examples include:

People on the street are always stopping us and saying, “Something’s got to be done about this crime wave, what can we do ...” You have an opportunity to do something about it right now.¹³

If we don’t punish, then society is going to laugh at us.¹⁴
If we are not angry with the defendant the implication then is we are not a moral community. Your anger is a sign of your caring on the part of this community and its citizens. The chance to see that this killer gets what he deserves is something this society, this community, needs.¹⁵

In the last example, the State contended that its effusiveness was authorized by

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) as a general comment about community standards. However, *Gregg* did not endorse a prosecutor blatantly inflaming a jury to be “moral,” “caring,” and “angry,” or serve as guardian of social “needs.” *Gregg* instead discussed implementing a community’s moral outrage through legislation. *Collier*, 101 Nev. at 479, 705 P.2d at 1129.

Nonetheless, argument about community standards has been upheld in some jurisdictions. See, e.g., *State v. McCollum*, 334 N.C. 208, 226, 433 S.E.2d 144, 153 (1993). That is because community standards are part of the capital equation. See Chap. 1. The Nevada Supreme Court held that such argument “properly focuses on what would be an appropriate punishment under the facts and circumstances of the case, as well as what would be necessary to deter others.” *Witter v. State*, 112 Nev. 908, 925, 921 P.2d 886, 898 (1996). Additionally, the California Supreme Court saw the jury as “exercising essentially a normative task, acting as the community’s representative.” *People v. Edelbacher*, 47 Cal.3d 983, 1037, 254 Cal.Rptr. 586, 620, 766 P.2d 1, 34 (1989). Therefore courts approved these comments:

[Your task is] to set a standard for the community.¹⁶

You the jurors, are called upon in this case to be the world of conscience of the community. And I’m asking you to speak out for the community.¹⁷

I’m not talking about duty. I’m not talking about service. I’m talking about values. Every time a jury sits in a case like this, it is a statement of our values as a

community, as a society. It’s like a banner.¹⁸

[Convict the defendant] because you, ladies and gentlemen, establish the standard in this community by which we shall live.¹⁹

Note, however, that these general proposals to consider social values may have been palatable because they did not contain provocative language. Arizona has rejected arguments that the jury is to set standards for the community by its verdict in non-capital cases. In the last example (a second degree murder case), the Arizona Supreme Court found this improper, but harmless because of the judge’s instructions after sustaining the objection.

Courts have, nevertheless, accepted even inflammatory discussions of community values when the topic is central to the capital decision, such as the social value of life:

This is the time for accountability and responsibility. Death is the only appropriate sentence in this case. Anything less is disrespectful to the dead and irresponsible to the living.²⁰

When we [failed the victims by releasing the defendant] it cost them their lives. Should we fail in this instance, it will take away the meaning and dignity of their lives.²¹

The Court concluded that this argument “merely point[ed] out to the jury that our society values human life,” so that those who do not value it should be killed.

Witter, 112 Nev. at 924, 945 P.2d at 897. Perhaps the better reasoning, however, is that value of a human life will always be a key death penalty consideration for both parties. Trial judges, however, need to remain vigilant to prevent this argument from becoming prejudicially inflammatory.

4. *Community Voice ("Send a Message")*

Related to being the community conscience is being its voice. Prosecutorial advocacy to "send a message" is a mainstay of capital summation. In non-capital cases, Arizona Courts have not proscribed such rhetoric. E.g., *State v. Sullivan*, 130 Ariz. 213, 219, 635 P.2d 501, 507 (1981) (arguing "the State depends on people like you to send a message out to pushers that this is not going to be permitted anymore."). Nonetheless, due to the stricter scrutiny in capital cases, such argument may cross the line when life hangs in the balance. Most of these arguments are directed at the accused or other would-be killers at large. For example:

I'm calling on this jury to speak out for the community and let the John Alloways know that this type of conduct will not be tolerated.²²

Send a message to the Robert Buells of the world that if you are going to commit this kind of crime then you better be expecting to pay the ultimate price yourself.²³

You can tell William Brooks, and you can tell every other criminal like him, that if you come to Columbus and Muscogee County, and you commit a crime – punishable by death – you are going to get the electric chair.²⁴

Some jurisdictions, including Florida, find this type of argument highly improper. See e.g., *Bertolotti v. State*, 476 So.2d 130, 133 (Fla. 1985); *Campbell v. State*, 679 So.2d 720, 724 (Fla. 1996). They reason that the messages are "an obvious appeal to the emotions and fears of the jurors." *Campbell* at 724. Further if the jury sends a message, it should be to that particular defendant, not others. *Id.* Other jurisdictions conclude that "send a message" urgings are permissible, including the 6th Circuit (in the first and second examples above) and Nevada. *United States v. Alloway*, 397 F.2d 105 (6th Cir. 1968); *Witter*, 112 Nev. at 925, 921 P.2d at 897-98. The rationale is that it merely focuses jury attention on the consequences of criminal conduct or justifies death to ameliorate social woes. *United States v. Solivan*, 937 F.2d 1146, 1154 (6th Cir. 1991). It certainly speaks of deterrence, and arguing penological considerations is legitimate. *Williams v. State*, 113 Nev. 1008, 1023, 945 P.2d 438, 447 (1997) (citing *Gregg* and *Witter*). A variation on this theme is to send a message to someone who failed to judge harshly enough. In the example below, the intended receiver was the judge who sentenced the defendant leniently on a prior stabbing.

I hope you send this judge a message that had you done your job back in 1971, [the victims] would be here today.²⁵

The Court recognized that "it is extremely prejudicial" to urge a death sentence as a message to the judiciary; the jury's decision must not be based on a crusading incitation to correct a failure of the criminal justice system.

D. Future Dangerousness Concerns

1. Future Dangerousness in General

Arguing that the defendant poses a continuing threat if he is not executed is fraught with liabilities, including irrelevance, lack of evidence in the record, inflammatory speculation, and focusing the jury on self-protection. Nevertheless, the Supreme Court held that it can be a proper element of capital sentencing. See *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976); *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 1671 (1986) (permitting consideration of past conduct to indicate probable future behavior). Noting that prediction of criminal conduct plays a part in most bail determinations and non-capital sentencings, the Court concluded that it would not offend constitutional guidelines in capital decisions. *Jurek*. Note, too, that lack of future dangerousness has to be allowed as a mitigator. See *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (1976).

Because of its considerable downside, many jurisdictions prohibited or restricted arguing future dangerousness altogether. Florida, Indiana, Kansas, and Louisiana, for example, completely barred it.²⁶ California, Nevada, and the 11th Circuit had rejected it, but reversed themselves.²⁷ Some states placed significant constraints on it: Tennessee allowed it, providing argument does not extend to the possibility of parole; Missouri and Ohio permitted it when based on facts in evidence; Nevada and California sanctioned it as long as it was based on past behavior; California authorized argument (but not expert testimony) predicting future dangerousness.²⁸

Consequently, the propriety of future dangerousness argument turns heavily on the jurisdiction. States that for the first time face jury capital sentencing must decide whether and to what extent to expose a jury to this risky argument. The Arizona codification of legitimate aggravating factors does not include future dangerousness, although it clearly admits certain prior convictions in the life-death weighing – and prior behavior sometimes predicts future conduct. Despite this, Arizona has never permitted a prosecutor to argue speculative future acts as a basis for conviction.

Three examples illustrate how similar arguments can be treated differently, depending on jurisdictions:

For unborn generations in the future, I say enough is enough of this man. [He is] waiting to strike at any moment, coiled like a snake, never knowing when that violence is going to erupt and kill someone.²⁹

Advise the Court to give him death. That's the only way that I know that he's not going to get out on the public.³⁰

[In light of the defendant's past conduct in prison, imposing death would be the only way to ensure that he would not kill again.]³¹

The first example was accepted without question because California broadly allows future dangerousness argument. The second, however, was “undoubtedly improper” under Florida law that did not authorize future dangerousness as an aggravator. The last example arose in Nevada which, at the time, barred such argument unless it was based on evidence

presented to the jury; it was upheld because the jury had heard that while serving a prison term, the defendant had masterminded an escape plan that entailed taking hostages at gunpoint, fashioned a shank and used it to threaten a guard's life in a different escape attempt, and had concealed a piece of angle iron (presumably to use as a weapon) in jail just two days before his penalty phase commenced.

2. *Future Dangerousness in Prison*

A related line of argument is that the defendant should be put to death because he will pose a threat to prison staff or inmates if given a life sentence. For example:

What will provoke him [in prison]? ... Will the next weapon be a fist, a crutch, a fork, a knife, a sharpened bedspring? ... How about the doctor, the nurse, cook, guard, and the other prisoners who don't deserve to be hurt by [the defendant]?³²

There's going to be a lot of male prisoners. [The defendant] will be, I'm sure not the rapee up there. He'll be jeopardizing a lot of inmates ... Do we have a responsibility to those other prisoners who may or may not deserve [the defendant]?³³

Don't let him go back where he can murder again, and perhaps this time a corrections officer, because that is exactly what he has threatened to do. "That's all I need to do to raise my reputation higher." Don't give him the chance. ... Guards don't have eyes in the back of their heads, and

they don't know when a [Defendant] will wrap a shank that he made in a towel and become angry and thrust that into the life of a corrections officer.³⁴

How many of you would like your son or husband being a guard [or] a transportation officer handling him, you think you would feel safe?³⁵

These examples, taken from California and Nevada (which permit broad argument) were upheld. Surprisingly, the last excerpt was given the same blanket approval, despite being a patently erroneous evocation of jurors' protective self-interests.

3. *Future Dangerousness to Community*

Prosecutors have urged the death penalty based upon the danger that the defendant will pose to the community if he gets out of prison. They have warned that the defendant might get a reversal on appeal, a commutation or pardon, be released onto parole, or escape. The vast majority of jurisdictions rejects such argument. It is too speculative to be considered, is not supported by admitted evidence, improperly reduces the jury's sense of responsibility for the death sentence, or is a taboo subject. For instance, argument concerning the potential for reversal on appeal is highly improper:

[Defense counsel] didn't talk to you about the many appeals that people go through. ... She didn't talk to you about the Federal Court of Appeals and how often these cases get reversed on appeal because they're death penalty cases.³⁶

The Court would normally condemn this outrageous rhetoric; however, it was “invited” by defense excesses in closing (suggesting that the defendant would probably be executed for his first capital conviction, so there is no need for a second capital sentence).

Arguments concerning early release, commutation, or pardon are similarly prohibited. For example:

Can you in good conscience say that if you sentence him to life without the possibility of parole, that you have put the cap on [Defendant] forever? No. ... some Supreme Court decision may come down saying that leaving someone in jail without the possibility of parole is a cruel and unjust punishment, and these people must be given a parole date.³⁷

[Defense counsel] said that the rest of his life behind bars with no parole, no probation, no suspension of sentence would be enough ... The statute does say [that], but have you ever heard of pardon, commutation? Those are two things that are given to the Governor of the State of Louisiana. So don't think that life really ever means life.³⁸

In the first example, the comment was improper because it invited the jury to consider speculative and improper factors in deciding capital punishment. However, in an unusual Ohio case (where the law similarly treated it as too “speculative”), contending that a “lifer” could be released was not “speculative” when it was backed up with expert testimony about prison

time computation. See *State v. Cassano*, 96 Ohio.St.3d 94, 111-12, 772 N.E.2d 81, 100-01 (Ohio 2002). In the second excerpt, the Court explained, “An argument based on the law governing pardon and commutation or its administration by the governor ... is entirely inappropriate to a capital sentencing proceeding.”³⁹ Additionally, injecting that into the sentencing decision “tends to skew the legislature’s constitutionally sound sentencing scheme,” thereby subjecting it to constitutional challenge. Moreover, it is not among the approved statutory aggravators.⁴⁰

Arguing the remote possibility of escape is improper in some jurisdictions, but has been allowed in others. The main drawback with the argument is its high improbability, making it exceedingly speculative. Nonetheless in jurisdictions that usually bar it, when there is evidence of prior escape attempts, arguing escape may not be improper. For instance:

How do you get out of prison? You escape. ... A man escaped from a prison in the hills of Tennessee two years ago that was thought to be the most secure cell in the most secure prison in the United States. Why can't this man escape from the Harris County Work Camp?⁴¹

[Defendant] would still have hope, hope of escape B⁴²

[Noting the possibility the defendant might escape,] Whose daughter will be next?⁴³

The first excerpt was, along with considerable other offensive invective, an improper “dramatic appeal to gut

emotion.” The second was summarily denounced by the Nevada Supreme Court as “improper.” Note, however, that the Court later reversed its position (in keeping with its change allowing broad future dangerousness argument), and allowed escape to be mentioned in closing if supported by the evidence. *Howard v. State*, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990). The California Supreme Court in the third example similarly skirted the legitimate issue about speculation and glibly endorsed the argument under the theory that future dangerousness is unquestionably proper argument.

E. Double Jeopardy Concerns

In rare instances, prosecutors argued that the jury should punish the defendant a second time in sentencing. Taken in context, the following arguments asking for double punishment of a prior crime were found highly improper:

Each one of the felony offenses, [referring to the priors and instant robbery, was] worth at least 10 years.⁴⁴

The only way to stop the Roosevelt Bigbees of this world who have killed more than one person ... is the death penalty. ... We have got two people that are dead because of what Mr. Bigbee did.⁴⁵

In the first example, the prosecutor argued defendant’s three prior convictions as a basis for the harshest sentence, 40 years. The 5th Circuit faced a “close question” whether this constituted licit remarks about deterrence and rehabilitation or illicit remarks to re-punish the defendant for his priors. It

bemoaned that the prosecutor had not instead urged the jury to take those priors as evidence that the defendant could not be rehabilitated, or that his violent tendencies warranted the stiffer 40-year sentence B both permissible. Because the prosecutor asked the jury to allocate 10 years per offense, the ensuing maximum sentence violated double jeopardy.

In the second case, the defendant had been tried and sentenced to life for murder before this trial. The prosecutor introduced inflammatory evidence about the prior killing, then implied that imposing death would be an appropriate way to punish the defendant for the first murder as well. The Tennessee Supreme Court reversed, finding that this argument, coupled with the details of the first crime, strongly implied that the jury should sentence the defendant to death to further punish him for the first killing.

As these cases demonstrate, it is easy to phrase an idea thoughtlessly and step over the line from zealous advocacy to reversible double jeopardy. Consequently, trial practitioners and judges should be watchful of what is actually conveyed to the jury in this perilous realm of argument.

F. Estoppel Concerns

Prosecutors have occasionally taken inconsistent positions (as between co-defendants, witness statements) in their arguments. Arizona recognizes judicial estoppel in criminal cases. See *State v. Tower*, 186 Ariz. 168, 182-84, 920 P.2d 290, 303-06 (1996). To invoke the doctrine, the defense must show that (1) the parties are the same, (2) the question is the same, and (3) the prosecution was

successful in the first case because of that inconsistent position. *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977). Judicial estoppel applied in the capital context is especially grave. Commonly, the prosecutor contends in consecutive trials that both co-defendants fired the sole fatal shot, or uses a statement about a single act to prove numerous distinct offenses. Note the following two Texas examples and the third from Arizona:

1) [In Williams's capital trial] Willie Williams is the individual who shot and killed Shafer. ... There is only one bullet that could possibly have done it and that was Williams's. [Then in Nichols's capital trial for the same crime] Willie could not have shot him. ... Nichols fired the fatal bullet and killed the man.⁴⁶

2) [In Jacobs's capital trial, the government portrayed him as the shooter. In Hogan's capital trial for the same shooting] I changed my mind about what happened ... Jacobs is telling the truth when he says Hogan is the one that pulled the trigger.⁴⁷

3) [In an Arizona trial for robbery, the prosecution introduced defendant's statement to prove the robbery:] I tried to get this old man to do what I wanted him to do, but he wouldn't do it. [After conviction, in trial for murder (of a different old man), same statement was admitted to prove the murder].⁴⁸

In the first instance, the Southern District of Texas found a constitutional Due

Process protection from these gross inconsistencies. Noting that multiple individuals might nonetheless be prosecuted for a single murder, the Court distinguished between satisfying accomplice laws of Texas and satisfying laws of physics: both men may be liable for the murder, but they both did not fire the single shot.

The second example was taken up to the 5th Circuit as a habeas corpus action under a claim of "actual innocence" after state courts refused to alter Jacobs's death sentence; treating it hyper-technically, the 5th concluded that Jacobs was not innocent and had provided no "new evidence" for this successive habeas claim. The U.S. Supreme Court denied certiorari and a stay of execution. In a disturbingly terse rejection – and despite *Edmund-Tison* – six justices upheld the ultimate sanction for a probable non-shooter accomplice. Justices Stevens, Ginsburg, and Breyer dissented, deeply troubled about the fundamental unfairness of executing a human being based on a factual determination that the state had formally disavowed. Citing the "heightened need for reliability" in capital determinations, they would have stayed execution. Two days later, Texas lethally injected Jacobs.

In the third example, the Arizona Supreme Court also did not grant relief when an inculpatory statement made by the defendant, referring to a separate, unrelated incident, was introduced by the prosecution to prove culpability in two separate, unrelated trials. The statement was made in reference to a robbery charge and was introduced at the robbery trial to prove guilt. During a subsequent trial of

the defendant on an unrelated capital case, the prosecution again introduced the statement. This time it was to give the jury the impression that the statement was related to the murder, even though the prosecutor used it in the unrelated robbery charge. The defendant was convicted in the first trial of the robbery and in the second on the unrelated murder.

The Court recognized that the doctrine of judicial estoppel was alive and well in Arizona. But they decided that since the robbery jury apparently did not need to rely upon the statement to convict and it wasn't a corner of the prosecution's case, judicial estoppel would not be applied and both convictions could stand. The Court did conclude that the prosecutor's conduct was unethical and constituted misconduct. That and two dollars will get you cold beer.

Interestingly, when there was no evidence shown about whether the jury relied on the inconsistent statement in the first example, the District Court presumed reliance. This is clearly the better-reasoned position, given the mandate of high reliability in a capital decision. The Arizona case can, therefore, be distinguished in situations where the inconsistency contributes to the conviction.

Endnotes

1. *Brooks v. Kemp*, 762 F.2d 1383, 1396 (11th Cir. 1985); see also *People v. Millwee*, 18 Cal.4th 96, 153, 74 Cal.Rptr.2d 418, 453, 954 P.2d 990, 1024-25 (1998); *State v. Jordan*, 80 Ariz. 193, 195-96, 294 P.2d 677, 679 (1956); *State v. Mircovich*, 35 Nev. 485, 492, 130 P. 765 (1913); and see *McGuire v. State*, 100 Nev. 153, 158, 677 P.2d 1060, 1064-65 (1084) (the cost of indigent defendant's witnesses not properly raised before the jury).
2. *Collier v. State*, 101 Nev. 473, 481, 705 P.2d 1126, 1131 (1985).
3. *Tucker v. Kemp*, 802 F.2d 1293, 1296 (11th Cir. 1986).
4. *People v. Hill*, 17 Cal.4th 800, 836-37, 72 Cal.Rptr.2d 656, 052 P.2d 673 (1988).
5. *People v. Wash*, 6 Cal.4th 215, 258-61, 24 Cal.Rptr.2d 421, 861 P.2d 1107 (1993).
6. *People v. Sandoval*, 4 Cal.4th 155, 191-94, 14 Cal.Rptr.2d 342, 841 P.2d 862, cert. granted on other grounds, 114 S.Ct. 40 (1992).
7. *Coe v. Buell*, 161 F.3d 320, 351 (6th Circuit 1998).
8. The Court cited to these cases: *United States v. Giry*, 818 F.2d 120 (1st Cir.), cert. denied, 484 U.S. 855 (1987); *Evans v. Thigpen*, 809 F.2d 239 (5th Cir.), cert. denied, 483 U.S. 1033 (1987); *Tennessee v. Harrington*, 627 S.W.2d 345 (Tenn. 1981), cert. denied, 457 U.S. 1110 (1982). See also *Commonwealth v. Chambers*, 528 A.2d 558 (Pa. 1991); *People v. Wrest*, 3 Cal.4th 1088, 1106, 13 Cal.Rptr.2d 511, 839 P.2d 1020 (1992); *Sandoval*, 4 Cal.4th at 193-94, cert. granted on other grounds, 114 S.Ct. 40 (1992); *People v. Slaughter*, 17 Cal.4th 1187, 120 Cal.Rptr. 477, 47 P.3d 262 (2002).
9. *Knight v. State*, 190 Tenn. 326, 332, 229 S.W.2d 501, 503 (1950).
10. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993).
11. *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987).
12. *Canaan v. State*, 541 N.E.2d 894 (Ind. 1989).
13. *Brooks*, 762 F.2d at 1397.
14. *Flanagan v. State*, 104 Nev. 105, 754 P.2d 836 (1988), vacated on other grounds sub nom, *Flanagan v. Nevada*, 503 U.S. 931, 112 S.Ct. 1464 (1992).
15. *Collier*, 101 Nev. at 479, 705 P.2d at 1129.
16. *Mazzan v. State*, 105 Nev. 745, 750, 783 P.2d 430, 433 (1989).
17. *United States v. Alloway*, 397 F.2d 105, 113 (6th Cir. 1968).
18. *Humphreys v. State*, 2002 WL 1954898 (S.C. June 26, 2002).
19. *State v. Schantz*, 98 Ariz. 200, 215, 403 P.2d 521, 531 (1965).
20. *Domingues v. State*, 112 Nev. 683, 698, 917 P.2d 1364, 1375 (1996). Note that the exact same argument – word for word – was made in another Nevada capital case the same year. See *Witter v. State*, 112 Nev. 908, 924, 921, P.2d 886, 897 (1996).
21. *Williams v. State*, 113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997).
22. *Alloway* at 113.
23. *Buell v. Mitchell*, 274 F.2d 337, 365 (6th Cir. 2001).
24. *Brooks* at 1397.
25. *Commonwealth v. Crawley*, 514 Pa. 539, 559, 526 A.2d 334, 344 (1987).
26. *Darden v. Wainwright*, 477 U.S. 168, 180-81, 106 S.Ct.

- 2464, 2471 (Fla. 1986); *State v. Kleypas*, 40 P.3d 139, 289 (Kan. 2001) (citing *State v. Gibbons*, 256 Kan. 951, 963, 889 P.2d 772 (1995)); *Wisehart v. State*, 693 N.E.2d 23, 60 (Ind. 1998); *State v. Willie*, 410 So.2d 1019, 1032-33 (La. 1982).
27. *27 People v. Miranda*, 44 Cal.3d 57, 111, 241 Cal.Rptr. 594, 724 P.2d 1127 (1987); *Redmen v. State*, 108 Nev. 227, 828 P.2d 395, *cert. denied*, 506 U.S. 880 (1992); *Brooks* (11th Cir.). However Nevada may be retreating from its position; in an unpublished order, the Nevada Supreme Court recently stated that arguing that the defendant should not be given the opportunity to kill anyone again was *improper*, though not prejudicial. See *Valerio v. Crawford*, __ F.3d __, 2002 WL 31056609 (9th Cir. (Nev.) Sept. 17, 2002) (referring to the order).
28. *State v. Nichols*, 877 S.W.2d 722, 732-33 (Tenn. 1994) (can argue future dangerousness, but not possibility of parole); *Middleton v. State*, 2002 WL 1277224 11-12 (Mo.Sup.Ct. June 11, 2002) and *State v. Cassano*, 96 Ohio.St.3d 94, 112-13, 772 N.E.2d 81, 100-01 (2002) (normally cannot argue future dangerousness because it is too speculative, but can when it is a reasonable inference founded in admitted evidence); *Haberstroh v. State*, 105 Nev. 739, 741, 782 P.2d 1343, 1344 (1989) and *People v. Hawkins*, 10 Cal.4th 920, 960, 42 Cal.Rptr.2d 636, 659-60, 897 P.2d 574, 597-98 (1995) (can argue future dangerousness as long as it is based on past violent behavior); *People v. Murtishaw*, 29 Cal.3d 733, 767-75, 175 Cal.Rptr. 738, 631 P.2d 466 (1981) (cannot introduce expert evidence).
29. *Hawkins*, 10 Cal.4th at 960-61, 42 Cal.Rptr.2d at 659, 897 P.2d at 597.
30. *Darden v. Wainwright*, 477 U.S. at 180, 106 S.Ct. at 2471 (Fla.).
31. *Haberstroh*, 105 Nev. at 741, 782 P.2d at 1344.
32. *People v. Millwee*, 18 Cal.4th 96, 150-51, 74 Cal.Rptr.2d 418, 451, 954 P.2d 990, 1022-23 (1998).
33. *People v. Poggi*, 45 Cal.3d 306, 337, 246 Cal.Rptr. 886, 753 P.2d 1082 (1988).
34. *Witter*, 112 Nev. at 898-99, 921 P.2d at 926-28.
35. *People v. Danielson*, 3 Cal.4th 691, 720-21, 13 Cal.Rptr.2d 1, 838 P.2d 729 (1992).
36. *Middleton v. State*, 2002 WL 1277224 11-12 (Mo.Sup.Ct. June 11, 2002).
37. *Poggi*, 45 Cal.3d at 336.
38. *Willie*, 410 So.2d at 1032-34.
39. *Poggi*, 45 Cal.3d at 337. See also *Nichols*, 877 S.W.2d at 732-33; *Collier*, 101 Nev. at 478, 705 P.2d at 1130.
40. Note that when future dangerousness is “at issue,” the Supreme Court held that Due Process *requires* the trial judge to instruct the jury that a “life” sentence means that the defendant will never be released onto parole. See *Shafer v. South Carolina*, 532 U.S. 36, 121 S.Ct. 1263 (2001) (expanding *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 154 (1994)); see also Blume, J., “Future Dangerousness in Capital Cases: Always ‘At Issue,’” 86 Cornell L.Rev. 397 (2001).
41. *Hance v. Zant*, 696 F.2d 940, 952 (11th Cir. 1983).
42. *Collier* at 479, 705 P.2d at 1130 (citing *State v. McLaughlin*, 133 Ariz. 458, 463, 652 P.2d 531, 536 (1982)).
43. *Brooks* at 1411-12.
44. *Rogers v. Lynaugh*, 848 F.2d 606, 611 (5th Cir. 1988).
45. *State v. Bigbee*, 885 S.W.2d 797, 809-12 (Tenn. 1994).
46. *Nichols v. Collins*, 802 F.Supp. 66, 72 (S.D.Tex. 1992).
47. *Jacobs v. Scott*, 513 U.S. 1067, 115 S.Ct. 711 (1995); and see *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994), for the Court of Appeals opinion that resulted in this application for *certiorari* to the Supreme Court.
48. *State v. Towerly*, 186 Ariz. 168, 181, 920 P.2d 290, 303 (1996).



Continued from Lay Miserable: Why Probation Violation Hearings Should Not Be Exempt From Arizona's Corpus Rule, page 1

problem with two moves to “mate” than a straight-up fight.

One of the most dismal scenarios occurs where a probationer is found in violation with no evidence at all, other than the defendant's own alleged out-of-court admissions (e.g., “He told me he had been smoking Marijuana”). Case closed. But such results unfairly flow from a 26-year old mistake named *State v. Lay*, 26 Ariz.App. 64, 546 P.2d 41 (1976), and can be fought.

The opinion in *Lay* — which has never been cited in any reported decision — holds that the Arizona *corpus* rule does not apply in probation violation proceedings. But, *Lay* violates the 14th Amendment guarantee of due process and misreads the Rule of Criminal Procedure upon which the case is based. In cases where there is no evidence besides the probationer's admissions, counsel should consider arguing *Lay* was wrongly decided because there is no legal basis for its finding. Make the *corpus* objection whenever the state proposes to rely solely on a Defendant's alleged out-of-court admissions. Assert that the *corpus* rule applies to probation cases, except for *in-court* admissions, and then only strictly as provided by R.Cr.P. 27.8.

The corpus rule is well established. *State v. Pineda*, 110 Ariz. 342, 519 P.2d 41 (1974) forbids introduction of a defendant's confession until there is first introduced some other evidence of the offense. *Lay* deviates from this black letter law by holding that the corpus rule:

...is not true in a probation revocation hearing, however. Rule 27.8, Rules of Criminal Procedure, 17 A.R.S., allows probation to be revoked upon an admission to the court by the probationer, and there is no requirement of corroborating evidence. The Rule does require the court to determine whether a factual basis for the admission exists, but this is not the same as independent corroboration. The factual basis can be found wholly in a probationer's admissions. As our Supreme Court has held, “(a) ppellant's admission of his failure to abide by the terms of probation were (sic) sufficient cause for revocation,” *State v. Ingles*, 110 Ariz. 295, 296, 518 P.2d 295, 296 (1974). Therefore, analogizing to those situations in which a probationer admits his violations to the court, we hold that corroborating evidence of the “corpus” of the violations of the conditions of appellant's probation, is not required in this instance. With this disposition of counsel's underlying hypothesis, it is unnecessary to consider the quality of the evidence.

But neither *Ingles*, nor another case on which *Lay* relies, *State v. Jackson*, 16 Ariz.App. 476, 494 P.2d 376 (1972), turned on out-of-court admissions. The confessions in those cases *were made in court*. And *Lay* purports to rely on *Ingles*, but that case happened in 1972, *before* adoption of the Rules of Criminal Procedure. Further, *Ingles* is factually

inapplicable. Mr. Ingles admitted — apparently in court — that he'd been “picked up for breaking into a place where medical supplies were kept.” The legal basis for admission of Mr. Ingles confession was A.R.S. § 13-1657(B), a statute that has been repealed. In short, *Ingles* should not apply to contemporary cases.

Next, *Lay*, which came after adoption of the 1973 Rules of Criminal Procedure, misreads Rule 27.8. *Lay* bases its authority explicitly on Rule 27.8. But, while that rule *does* state a probationer may admit to the court violation without the requirement of a factual basis, the rule *does not* permit uncorroborated, out-of-court admissions. In fact, Rule 27.8 *requires* the probationer's admission of violation to be made *to* the court, *in* court, and that “the court shall address the probationer personally” and make certain determinations in order to support a finding the admission was knowing, intelligent and voluntary. These are fundamental due process attributes guaranteed all probationers under the 14th Amendment. See e.g., *Gagnon v. Scarpelli*, 411 U.S. 781 (1973).

What's more, it offends due process guarantees to violate a probationer solely upon a purported admission of violation that is uncorroborated, disputed, and made out-of-court. Rule 27.6 and 27.8 *require* that the admission be in court, with counsel, and made knowingly, intelligently and voluntarily. The rule requires, within its limits, a *Boykin-style* litany. See, *Boykin v. Alabama*, 395 U.S. 238 (1969), cf. *State v. Reyes*, 151 Ariz. 430, 432, 728 P.2d 300, 302 (App. 1986).

Finally, in *Lay* there was actually some corroboration, namely, the defendant's probation officer called the jurisdiction where he'd been arrested and verified that charges were pending. Today you will see cases where *nothing* supports the out-of-court “admission.” And, while Rule 27.7 relaxes the hearsay rule in the context of violation hearings, it does not exempt the proceedings from the corpus rule.

The key to making your record in such a violation hearing is to object to the lack of a corpus, point out *Lay's* defects and urge that due process requires that *corpus* be shown *before* the court receives an out-of-court admission of probation violation.



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ARIZONA ADVANCE REPORTS

By Stephen Collins

Defender Attorney – Appeals



State v. Christian

376 Ariz. Adv. Rep. 3 (CA 1, 6/18/02).

Defendant was convicted of theft of a means of transportation. His sentence was enhanced with a prior Proposition 200 conviction for possession of narcotic drugs under the threshold amount. The Court of Appeals held this was properly used as a historical prior felony conviction.

State v. Schaffer

376 Ariz. Adv. Rep. 6 (CA 1, 6-27-02).

Defendant used his prosthetic arm to assault the victim. It was held that it was an aggravated assault because the prosthetic arm was a "dangerous instrument."

State v. Joachim

376 Ariz. Adv. Rep. 9 (CA 1, 6/27/02).

Police executed a search warrant and seized Joachim's computer containing pornographic images of minors. Pursuant to A.R.S. Section 13-3822, Joachim filed a motion to controvert alleging the computer was not described in the warrant and that probable cause did not exist to issue the warrant. A justice of the peace granted the motion and ordered the computer be returned to Joachim.

Four months later, an indictment was obtained alleging eleven counts of sexual exploitation of a minor. The prosecution sought to introduce the computer into evidence, but the trial judge ruled it was inadmissible because of the ruling of the justice of the peace. The Court of Appeals reversed, holding the proceeding before the justice of the peace was a civil matter and a justice of the peace had no authority to bind a superior court judge in a felony trial.

State v. Siddle

376 Ariz. Adv. Rep. 35 (CA 2, 6/18/02)

In a jury trial, the prosecutor asked a police officer what happened when Siddle was arrested. The officer responded, "I proceeded to *Mirandize* him, and we wanted to ask Mr. Siddle questions." The prosecutor did not follow up on this response. Against the recommendation of the prosecutor, the trial judge then asked, "Did Mr. Siddle make any statements?" The officer responded that Siddle did not make any statements.

On appeal, it was argued that this improperly referred to Siddle's invocation of his right to remain silent. Defense counsel did not object at trial. Therefore, the Court of Appeals held the issue was waived unless it was fundamental error. "Fundamental error is error that deprives a defendant of a right essential to his or her defense and of a fair trial, or goes to the very foundation of the defendant's theory of the case." It was held that there was no error because the officer did not imply that Siddle had invoked his right to remain silent.

Siddle was convicted of possession of a dangerous drug for sale and possession of a deadly weapon during the commission of a felony drug offense. He was sentenced to 9.25 years imprisonment for possession of the drugs and a consecutive 4.5-year prison sentence for the possession of a deadly weapon charge. Siddle argued this violated the prohibitions against double jeopardy and double punishment because the possession charge was a lesser-included offense of possession of a deadly weapon during the commission of a drug felony. The Court of Appeals disagreed, finding the conviction for possession of the deadly weapon during the commission of a drug felony did not necessarily mean the weapon was possessed at the time Siddle possessed the dangerous drugs for sale.

Further, the Court of Appeals held “the legislature clearly intended to permit multiple punishments.”

State v. Meza
377 Ariz. Adv. Rep. 6 (CA 1, 7/2/02)

Meza was arrested for DUI and submitted to two breath tests using Intoxilyzer 5000 unit #2806. The first test registered an alcohol concentration of .160, the second .159 percent. Meza sought discovery of all calibration checks on the machine. At hearings on discovery motions, criminalists at the Phoenix Crime Lab testified that all calibration checks were sent to defense counsel and that no checks were deleted from the records.

Subsequently, it was discovered that the criminalists had deleted records of calibrations that showed the Intoxilyzer might not have been operating properly. This was done to prevent test results perceived as invalid from becoming accessible to defense experts and from being used to discredit the machines and their results. The trial judge found that the prosecutor’s office made a good faith effort to meet its discovery obligations. However, the Court of Appeals held the Phoenix Crime Lab operated as an arm of the prosecutor in matters of discovery. Therefore, the breath test results were suppressed. A motion to dismiss with prejudice was denied. The case was also remanded to the trial court to assess, as an additional discovery sanction, the reasonable costs and fees that the defense incurred as a consequence of the “sanctionable conduct of the State.”

State v. Paxson
377 Ariz. Adv. Rep. 3 (CA 1, 7/9/02)

Paxson was convicted of vehicular manslaughter for the death of a passenger in the vehicle he was driving when it crashed into a tree. He claimed the accident was not his fault but rather caused by the premature deployment of an air bag. The trial judge ruled that Paxson could not present an air bag defense. Paxson argued this was improper because a previous superior court judge had ruled he could present this defense. Arizona Criminal Procedure Rule 16.1(d) provides, “except for good cause or as otherwise provided by these rules, an

issue previously determined by the court shall not be reconsidered.”

The Court of Appeals found that the previous judge’s statement that the air bag defense should not be precluded was more of “a rumination than a ruling,” and at most was a preliminary ruling. Therefore, “the doctrine of law of the case does not prevent a different judge, sitting on the same case, from reconsidering the first judge’s prior nonfinal ruling.” However, the case was reversed because premature deployment of an air bag could be an intervening event that was the superseding cause of the accident.

A design defect can be a superseding cause if it is both unforeseeable and either abnormal or extraordinary. Preclusion of the air bag defense denied Paxson his due process right to present a defense. The trial judge erred in finding that evidence of a premature air bag deployment was too speculative.

Paxson also argued that the vehicle could not be considered a dangerous instrument for sentence enhancement because A.R.S. Section 13-604(P) applies only when the victim is outside the car, not when the victim was a passenger. The Court of Appeals rejected this argument. It was further held that the trial judge properly precluded evidence of the victim’s blood alcohol content.

Evanchyk v. Stewart
378 Ariz. Adv. Rep. 80 (SC, 5/24/02)

A defendant may not be convicted of conspiracy to commit first-degree murder when that conviction is based only on the commission of felony murder. A defendant can be convicted of conspiracy to commit first-degree murder if the state proves the defendant possessed an intent to kill or to promote or aid in killing and made an agreement to kill. The state need not prove the completed offense nor any other offense. A defendant may not be convicted of conspiracy to commit first-degree murder if he had merely the requisite intent to commit the underlying felony.

State v. Carrasco
378 Ariz. Adv. Rep. 88 (CA 1, 6/27/02)

A medical assistant is a “qualified person” to draw blood for DUI purposes.

Stewart v. Smith

378 Ariz. Adv. Rep. 86 (SC, 5/30/02)

Whether an asserted claim was of sufficient constitutional magnitude to require a knowing, voluntary and intelligent waiver for purposes of post-conviction relief, depends not upon the merits of the particular claim, but rather merely upon the particular right alleged to have been violated. Criminal defendants at trial possess essentially two categories of constitutional rights: those which are waivable by defense counsel on the defendant’s behalf and those which are considered fundamental and personal to the defendant such as the right to a jury trial.

State of Arizona v. Martin (Landeros)

378 Ariz. Adv. Rep. 100 (CA 1, 7/23/02)

Arizona Evidence Rule 609 states that prior felony convictions may be used for impeachment *if* the crime was punishable by imprisonment in excess of one year. Therefore, a prior felony conviction pursuant to A.R.S. Section 13-901.01 (Proposition 200) cannot be used for impeachment because imprisonment is not available for the first two offenses.

State v. Spreitz

378 Ariz. Adv. Rep. 5 (SC, 1/3/02)

Ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal will not be addressed by appellate courts regardless of merit.

State v. Finch

378 Ariz. Adv. Rep. 38 (SC, 5/24/02)

After Finch was given his *Miranda* warnings, he requested counsel but stated, “you can ask me questions.” It was held the statement, “you can ask me questions,” superseded the request for counsel.

State v. Phillips

378 Ariz. Adv. Rep. 25 (SC, 5/24/02)

Phillips was convicted of numerous charges resulting from three separate armed robberies. He argued that each armed robbery should have been tried separately. It was held that he was not entitled to severance because facts from each of the robberies were admissible under Arizona Evidence Rule 404(b) to prove identity. Therefore, this evidence would still have been admitted if there were separate trials.

State v. Carlson

378 Ariz. Adv. Rep. 13 (SC, 6/27/02)

At the time of the trial, there was extensive media coverage of defense counsel’s alleged sexual misconduct with a prison inmate that she also represented. During jury selection in Carlson’s case, eleven jury panelists were aware of the publicity. Three were dismissed because they indicated they had a negative opinion of defense counsel and might not be able to serve impartially. Others who indicated that they would be able to put aside their negative feelings and serve impartially were left on the jury panel. The trial judge refused to strike the entire panel.

On appeal, it was argued that the pretrial publicity denied Carlson a fair trial. The Arizona Supreme Court disagreed finding that Carlson failed to show “that the publicity was so unfair, so prejudicial, and so pervasive that we cannot give any credibility to the juror’s answers during voir dire affirming their ability to decide the case fairly.”

Carlson hired a twenty-year-old unemployed drug addict and a seventeen-year-old fast food worker to murder her mother-in-law in order to obtain trust money. One of them went into the victim’s bedroom at night to kill her. He hesitated, closed his eyes and stabbed her eight to ten times. The victim lived with considerable suffering for six months before dying from her wounds. Carlson was sentenced to death for the murder.

The trial judge found three aggravating factors justifying the death penalty. Two pecuniary gain factors were found. One under A.R.S. Section 13-703(F)(4) for procuring the commission of the offense by promise of payment and one under 13-

703(F)(5) for committing the offense in the expectation of pecuniary gain. The Arizona Supreme Court held that because these two factors are so closely related, each factor should not be independently assigned full weight.

The trial judge also found the aggravating factor that the murder was especially heinous, cruel, or depraved. He noted, "defendant might not have foreseen that her co-conspirators would not complete the slaying of the victim in a timely manner, she is nonetheless by law responsible for the ensuing pain and suffering to the victim over a prolonged period of time." The supreme court vacated the finding of this aggravating factor because there is no vicarious liability for cruelty in capital cases absent a plan intended or reasonably certain to cause suffering. Carlson was not responsible for the bungling of her hired killers. After independent reweighing, her sentence was reduced to life imprisonment.

State v. Jones
378 Ariz. Adv. Rep. 32 (SC, 7/10/02)

A.R.S. Section 13-3905 provides that a warrant may be issued for the drawing of blood based only on "reasonable cause" that a suspect committed a felony and that the blood sample may contribute to identifying the perpetrator. The Arizona Supreme Court held that the higher standard of "probable cause" is required to obtain such a warrant. It was found that probable cause existed in this case.

Jones was in custody for several hours and asserted his right to counsel several times. This was videotaped. When he insisted that he "still wanted a lawyer," the police chose to stop videotaping for approximately an hour during which time it was claimed Jones reinitiated conversation. They resumed videotaping once Jones had agreed to make incriminating statements. The Arizona Supreme Court was "troubled by the fact that this reinitiated conversation was not recorded, while the interrogation that preceded it and the confession that followed were."
 "It would be a better practice to videotape the *entire* interrogation process," and "we caution that judges should certainly consider gaps in a tape in deciding issues of waiver and voluntariness."

However, it was decided to defer to the trial court's discretionary finding that the confession was admissible. The trial judge chose to believe the testimony of a police officer as to what happened while the police stopped videotaping. The trial judge gave the officer's testimony more weight because there was no videotape to contradict it.

It was found that autopsy photographs were excessively gruesome and should not have been admitted at trial. The trial judge admitted them claiming that they were relevant to establish premeditation. However, the trial judge later ruled premeditation was not an issue when Jones asked for a lesser-included instruction on second-degree murder. The only real issue at trial was the identity of the perpetrator. It was held that admission of the photographs was harmless error.

State v. Lehr
378 Ariz. Adv. Rep. 6 (SC, 1/30/02)

This case and seven others were consolidated and a *Frye* hearing was held to determine if DNA evidence was admissible. The judge determined the DNA evidence was admissible because it was generally accepted in the scientific community. He was not persuaded that alleged errors by the DPS lab called their protocol into question. This case was then tried before another judge.

The trial judge refused to allow defense counsel to cross-examine DNA experts about the DPS protocol. The trial judge found the reliability of the DPS protocol was "not reviewable by this jury." The Arizona Supreme Court reversed because the *Frye* hearing is only a preliminary hearing regarding the admissibility of scientific evidence. Defense counsel is still entitled to challenge the weight and reliability of the evidence before a jury.



SEPTEMBER 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
8/26	Akins	Gerst	Lane	CR02-006705 Agg. DUI w/priors	Guilty	Jury
8/28 - 8/29	Akins	Gerst	Wolfram	CR01-013365 POMS, F2	Guilty	Jury
9/1 - 9/26	Rock Ames	Granville	Gialketsis	CR02-02547 2 Cts. Agg. Assault, F2 MIW, F4 (while on release)	Guilty	Jury
9/3	Diaz Reidy	Willett	Kelemen	CR02-008673 Resist Ofcr/Arrest, F6 False Rptg, M1	Guilty	Bench
9/3 - 9/4	Terpstra	Gaylord	Bryson	CR02-005114 Agg. Assault, F6	Guilty	Jury
9/3 - 9/5	Reece	Schneider	Sherman	CR02-003157 Resisting Arrest, F6	Hung	Jury
9/3 - 9/6	Green	Martin	Godbehere	CR02-001213 3 Cts. Agg. Assault, F2 Agg. Assault, F5 Unlawful Flight Forgery	Not Guilty - 3 cts. of Agg. Assault, Guilty on all other charges	Jury
9/3 - 9/9	Walker Souther Bowman	Granville	Lynch	CR01-00157 3 Cts. Att. 1° Murder, F2D Agg. Assault, F3D Agg. Assault, F2 DCAC Arson Occupied Structure, F2D	Guilty	Jury
9/5 - 9/11	Satuito	Burke	Baca	CR02-07677 PODD, F4; PODP, F6	Guilty	Jury
9/9 - 9/11	Goldstein	Gerst	Toftoy	CR02-07511A Armed Robbery, F2 Agg. Assault, F3	Not Guilty	Jury
9/11 - 9/12	Valverde	Gottsfeld	Bryson	CR02-007774 Resisting Arrest, F6 Threatening and Intimidating, M1 Assault, M1	Not Guilty - Resisting Arrest and Threatening; Guilty - Assault	Jury
9/11 - 9/17	Farney Elzy	Granville	Adleman	CR02-008863 Child Abuse, F4	Guilty	Jury
9/12 - 9/17	Woodfork	Schneider	Green	CR02-09878 Forgery, F4	Guilty	Jury
9/12 - 9/19	Wallin	Gerst	Knudsen	CR02-010993 Agg. DUI	Guilty (MV)	Jury
9/13	Harris	Hotham	Eliason	CR02-005797 Agg. Assault, F2 Flt from Purs Law Veh, F5	Guilty	Jury
9/16 - 9/22	Taradash Erb Spears	Willett	Kamis	CR02-06617 4 Cts. Agg. Assault, F2D Drive By Shooting, F2D	Guilty	Jury
9/17 - 9/19	Washington / Valverde Del Rio	Schneider	Wisdom	CR02-009382 2 Cts. Sex Assault, F2 Kidnap, F2 Agg. Assault, F4 Assault, M1	Not Guilty - Sex Assaults; Kidnap Guilty of lesser included Unlawful Imprisonment, F6; Guilty - Agg. Assault and Assault	Jury

SEPTEMBER 2002
JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER (CONTINUED)

Dates: Start - Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
9/17 - 9/20	Willmott / Noland Anatra Jaichner	Reinstein	Bernstein	CR02-009485 Agg. Assault on Cop, F2D Agg. Assault, F3D Agg. Assault, F6 Criminal Damage, F6 IJP, M1 2 Cts. Leaving the Scene of an Accident, M3 2 Cts. Criminal Damage, M1	Hung (9-3) - Agg. Assault, F2D; Not Guilty - Agg. Assault, F3D; IJP, Directed Verdicts on 2 Cts. Criminal Damage, M1, Agg. Assault, F6; Guilty - Criminal Damage, F6 and 2 cts. Leaving the Scene, M3	Jury
9/18 - 9/20	Grimm	Gottsfeld	Martin	CR02-07855 Tampering w/Public Record, F6	Guilty	Jury
9/18 - 9/30	Farrell Elzy	Cates	Armijo	CR02-002867 Negligent Homicide, F4 Child Abuse, F5	Guilty - Negligent Homicide, Child Abuse, F6	Jury
9/19	Dennis	De Mars	Levinson	TR02-02028MI DOSL for DUI	Not Guilty	Bench
9/19 - 9/23	Lawson	McClennen	Zimmerrman	CR02-01687 PODD, F4 PODP, F6	Guilty	Jury
9/23 - 9/24	Healy	Hall	Knudsen	CR02-008832 Agg. DUI w/ 2 priors	Not Guilty	Jury
9/23 - 9/24	Moore Gavin	Jarrett	Schultz	CR02-93208 Resisting Arrest, F6N	Guilty	Jury
9/23 - 9/24	Nurmi O'Farrell Curtis	Hotham	Charnell	CR02-006672 Theft, F3 Trafficking in Stolen Prop, F3	Guilty	Jury
9/23 - 9/24	Washington Lucero Anatra	Schneider	Weinberg	CR02-010685 Theft Means Transportation, F3	Guilty	Jury
9/23 - 9/25	Corbitt	Aceto	Mueller	CR01-94764 2 cts. Agg. DUI, F4N	Guilty	Jury
9/24	Valverde	Reinstein, P.	Robinson	CR02-006368 Theft Means Transportation, F3	Guilty	Jury
9/24 - 9/25	Fimbres	McClennen	Steinberg	CR02-009643 Felony Flight, F5	Guilty	Jury
9/24 - 9/25	Grant / Antonson	Gaylord	Herman	CR2002-092119 Agg. Assault on Law Enforcement Officer, F6N	Mistrial	Jury
9/30	Kavanagh Kresicki	Akers	Cutler	CR02-94725 Agg. Assault, F6N	Not Guilty	Jury
9/30 - 10/1	Corey	Raves	Basta	CR02-09310 Conducting Chop Shop, F2	Guilty	Jury

SEPTEMBER 2002 JURY AND BENCH TRIALS

OFFICE OF THE LEGAL DEFENDER

Dates: Start–Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
9/12—9/24	de la Vara deSantiago	Anderson	Boyle	CR01-005342 First Degree Murder Att. Armed Robbery, Dangerous	Guilty	Jury
9/17—9/25	Jones Apple	Rayes	J.Martinez	CR01-018864 First Degree Murder	Not Guilty	Jury

OFFICE OF THE LEGAL ADVOCATE

Dates: Start–Finish	Attorney Investigator Legal Assistant	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
9/3-9/4	F. Gray D. Cano	Hilliard	CR01-017524 (ct 3) TOMOT 3F –2 priors	Guilty	Jury
9/3-9/6	Everett	Hotham	CR02-001911 Armed Robb; Agg. Asslt (Dang)	Guilty	Jury
9/23-9/26	Schaffer	Franks	CR02-007976 Armed Robbery, MIW	Not Guilty	Jury
9/24-9/27	Everett	Wilkinson	CR95-006471 Agg. Asslt Kidnapping	Guilty of less than charged	Jury
9/26 – 9/30	Schaffer	Franks	CR02-007976 Robbery, MIW	Guilty	Jury

for The Defense

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