TRIAL ISSUES

Featuring:

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TOPICS

- Jury selection issues
- Unusual cases and the proper procedure
- Issues during the Aggravation Phase
- Issues during Penalty Phase

A CAPITAL TRIAL IS DIFFERENT…

- Because the jury decides what the sentence will be imposed
- Because the *Penalty Phase* requires consideration of "mitigation" including the testimony about an entire life time, including psychiatric issues
- Because the jurors are asked to make a reasoned moral judgment
- Because jury selection is the most important element to ensure a fair trial

THE JURY DECIDES

- **Three possible decisions:**
  - ***Did the State prove the defendant's guilt beyond a reasonable doubt?***
  - ***Did the State prove an aggravating factor or factors beyond a reasonable doubt?***
  - ***Should the defendant be sentenced to life in prison or to death?***
- **The jury decision between life and death is the biggest difference between a death penalty trial and a "regular trial"**

A REASONED AND MORAL JUDGEMENT

- **Instructed to consider the aggravating factor**
- **Instructed to consider the mitigating factors**
- **Instructed to make a <u>Reasoned and Moral Judgment:</u>**

  In reaching a reasoned, moral judgment about which sentence is justified and appropriate, you must decide how compelling or persuasive the totality of the mitigating factors is when compared against the totality of the aggravating factors and the facts and circumstances of the case. This assessment is not a mathematical one, but instead must be made in light of each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of the mitigating factors found by each juror.

JURY SELECTION

- **Before the trial begins each juror has a different life experience and different views**
- **A prospective juror may have firmly held beliefs about the death penalty based on long term religious, philosophical or political views**
- **Or a prospective juror may have never given the death penalty much, if any thought.**
- **A prospective juror's understanding of the meaning of first degree murder and mitigation could be very different**
- **Where a prospective juror starts the trial could determine the verdict they return**

PROCEDURE

- Time screen
- Use of a questionnaire
- Questioning by the lawyers
  - Individual
  - Small group
  - Large group
- Rehabilitation by the Court

TIME SCREEN

- *A.R.S. § 21-202* defines hardship:
  - Jury service by the prospective juror would substantially and materially affect the public interest or welfare in an adverse manner
  - Jury service would cause undue or extreme physical or financial hardship to the prospective juror or a person under the prospective juror's care or supervision
- *A.R.S. § 21-222* Arizona lengthy trial fund
- Who determines if a hardship exists and when should this be made?

QUESTIONNAIRES

- Should cover at a minimum pre-trial publicity and death penalty issues (explain the process)
  - Consider these issues at the front of the questionnaire
  - Consider the use of both Multiple choice and open ended questions for these issues
  - Carefully consider the overall length
- Protection of personal information and retention of the questionnaires for appeal
- Information sheet for the Juror to take home

QUESTIONING BY THE LAWYERS

- The procedure
  - What group size?
  - Who explains the process?
  - Who goes first?
- What can be asked?
  - Who is qualified to serve?
  - How should the preemptive strikes be used?
  - Stake out questions?
- The goal is to ensure fairness

US SUPREME COURT CASES

- *Witherspoon v. Illinois: 391 U.S. 510 (1968)*
  - Jurors can not be excluded for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction
- *Adams v. Texas: 448 U.S. 38 (1980)*
  - A juror may not be excluded based on his or her opinions about the death penalty unless those opinions would *"prevent or substantially impair the performance of his or her duties as a juror"*

US SUPREME COURT CASES

- *Wainwright v. Witt: 469 U.S. 412 (1985)*
  - US Supreme Court adopts the "substantial impairment" standard from *Adams v. Texas* as the standard for exclusion of jurors for cause
- *Morgan v. Illinois: 504 U.S. 719 (1992)*
  - A defendant must be allowed to "life qualify" or "reverse Witherspoon" the jury to determine their views on the death penalty. The belief that the death penalty should automatically be imposed upon conviction for a capital offense relevant to juror's ability to follow the law.

PREVENT OR SUBSTANTIONALY IMPAIR

- A prospective juror who will automatically impose the death penalty cannot serve
  - *Morgan v. Illinois, 504 U.S. 719 (1992)*
- A prospective juror who will automatically vote against the death penalty cannot serve
  - *Wainwright v. Witt, 469 U.S. 412 (1985)*
  - *Witherspoon v. Illinois, 391 U.S. 510 (1968)*
- A prospective juror cannot serve when their views would prevent or substantionaly impair the performance of their duties
  - *Wainwright v. Witt, 469 U.S. 412 (1985)*

WHAT QUESTIONS ARE OK?

- The examination of prospective jurors shall be limited to inquires directed to bases for challenge for cause and to information to enable the parties to exercise intelligently their preemptory challenges
  - *Rule 18.5 (e)*
- Questions that direct a juror to commit to a certain position before evidence is presented are inappropriate
  - *State v. Smith 215 Ariz. 221 (2007)*
- What does this mean?

ARIZONA CASES

Morgan **does not permit parties to ask questions about how a juror would consider certain evidence**

- *State v. Johnson, 212 Ariz, 425, 133 P.3d 735 (2006)*
  - Questions about juror would assess certain mitigation
- *State v. Glassel , 211 Ariz. 33, 116 P.3d 1193 (2005)*
  - Open ended question about what jurors would consider mitigating
- *State v. Smith, 215 Ariz. 221, 159 P.3d 531 (2007)*
  - Question to jurors about whether they would impose the death penalty if a certain aggravator found

REHABILITATION BY THE COURT

- The trial court must excuse any prospective juror that cannot provide assurances that their views on the death penalty will not affect his ability to decide the issues in this case
  - *State v. Rogue, 213 Ariz. 193, at 204 (2006)*
- Does an agreement to follow the law provide those assurances and eliminate the underlying concern?
- Should the number of potential jurors needed change the need for fairness?

ADDITIONAL JURY ISSUES

- Each side gets ten (10) preemptory strikes in a Capital case
  - *Rule 18.4 (c)*
- The alternates need to return for each new stage of the trial
  - *A.R.S. § 13-751 (M) & Rule 18.5 (i)*
- Privacy issues may exist with the jurors after they have reached a verdict
  - Media
  - Family members

UNUSUAL PROCEDURES

- *A.R.S. § 13-751 & 13-752 and Rule 19* provides procedural rules for a capital trial
- The normal capital trial procedure could include three different "jury verdicts"
  - Did the State prove the defendant was guilty beyond a reasonable doubt?
  - Did the State prove at least one aggravating factor beyond a reasonable doubt?
  - What is a reasoned moral judgment on sentencing?
- To reach a verdict at any stage, the jury must be unanimous in the decision

UNUSUAL PROCEDURES

- *A.R.S. § 13-751 & 13-752 and Rule 19* provides procedural rules for a capital trial
- How do you determine what the first jury decided and how do you tell the Jury?
  - The defendant was convicted of 1st degree murder
  - Or the defendant did the following acts…….
- Does the jury learn the "underlying facts" and how is that done?
- Does this change jury selection?
- Who goes first?
  - Aggravation Phase or penalty phase

AGGRAVATING CIRCUMSTANCES

- The jury may consider the facts already presented during the trial
- Additional facts can be presented
- Legal challenges to the allegations
- Enmund–Tison finding must be made to satisfy the Eighth Amendment's proportionality standard
  - The trier of fact shall make all factual determination required by the constitution… If the State bears the burden the issue shall be determined during the aggravation phase. A.R.S.§ 13-752 (P)

RECALL THE ALTERNATES

- In the event a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror. If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew.
  - Rule 18.5 (h)
- In a capital case, alternate jurors not selected to participate in the guilt phase deliberations shall not be excused if the jury returns a guilty verdict of first-degree murder. During the aggravation phase, the alternate jurors shall listen to the evidence and argument presented to the jury.
  - Rule 18.5 (i)

PENALTY PHASE

The Federal constitution requires that during the penalty phase the jury must make "a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime."

Kansas v. Marsh, 548 U.S. 163 (2006)

PROCEDURE RULE 19 (D)

- **Defense opening**
- **State opening or reserved**
- **Victim Impact**
- **Defense evidence**
- **State opening (if reserved) and evidence**
- **Defense rebuttal**
- **Defendant's allocution**
- **Arguments**
- **The judge shall charge the jury**

VICTIM IMPACT STATEMENT

- **Arizona law allows a victim impact evidence during the penalty phase to rebut mitigation**
  - **See Ariz. Const. art. II § 2.1 (A) (4); A.R.S. § 13-752 (R)**
- **Victim impact evidence should not be allowed if it is 'so unduly prejudicial that it renders the trial fundamentally unfair**
  - ***State v. Dann, 220 Ariz. 351, 369, 207 P.3d 622 (2009)***

State v. Gallardo

- Nature of the Victim's Impact Statement
- Request for Mistrial
- Was a curative statement required?
- Although the jurors were moved by the statements, and some passed a tissue box, the statements were not "so unduly prejudicial" as to render the trial fundamentally unfair. Moreover, the trial court appropriately instructed the jury that victim impact evidence could not be considered as an aggravating circumstance and could be considered "only for [the] limited purpose" of rebutting mitigation.
  - *State v. Gallardo, 225 Ariz. 560, 242 P.2d 159 (2010)*

VICTIM IMPACT STATEMENT

- Number of victims
  - The person's spouse, parent, child grandparents, sibling, or any other person related to the person by consanguinity or affinity to the second degree or other lawful representative
  - A.R.S. § 13-4401 (19)
- Prepared statements
- Produced statements
- Photos
- Music

MITIGATION

Mitigation is any information which could be used to demonstrate that cause for leniency exists when considering the appropriate sentence. Mitigation is not an excuse or justification for the offense, but allows jurors to consider factors, that in fairness and mercy, may reduce the defendant's moral culpability.

MITIGATION

- The trier of fact considers as mitigation any factors proffered by the defendant that are relevant to imposing a sentence less than death, including any aspect of the character or record of the defendant and any circumstances of the offense
  - A.R.S. Sec. 13-751(G); *Lockett v. Ohio*, 438 U.S. 586 (1978)
- The sentencing authority cannot refuse to consider relevant factors
  - *Eddings v. Oklahoma*, 455 U.S. 104 (1982)
- The relevancy standard for mitigating evidence is broadly defined:
  - "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."
    - *McKoy v. North Carolina*, 494 U.S. 433 (1990)

STATUTORY MITIGATION

The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

STATUTORY MITIGATION

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under *§ 13-303*, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

COMMON ISSUES

- Emotional lay witnesses
- Family on both sides of the case
- Expert psychiatric testimony
- Personality disorders
- Future dangerousness
- Developing or new facts during the trial

SCOPE OF REBUTTAL

- The State may present any evidence that demonstrates that the defendant should not be shown leniency.
  - *A.R.S. § 13-752 (G)*
- Trial courts can and should exclude evidence that is either irrelevant to the thrust of the defendant's mitigation or otherwise unfairly prejudicial. Nothing in our death penalty statutes strips courts of their authority to exclude evidence in the penalty phase if any probative value is substantially outweighed by the prejudicial nature of the evidence. Trial courts should not allow the penalty phase to devolve into a limitless and standardless assault on the defendant's character and history.
  - *State v. Hampton, 213 Ariz. 167, 179, 140 P.3d 960, 962 (2006)*

KEEP IN MIND

- The stakes are very high for a capital case for everyone involved
  - *The defendant's life*
  - *The victim's concerns*
  - *The time involved in post verdict proceedings*
- The Standard of practice should be as close to perfect as possible
- Take the time to do it right the first time