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11
12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
13 **IN AND FOR THE COUNTY OF MOHAVE**

14 **STATE OF ARIZONA,**

15 Plaintiff,

16 vs.

17 **JUSTIN JAMES RECTOR**

18 Defendant.

) NO: CR 2014-01193

) **DEFENDANT'S MOTION *IN LIMINE* //**
) **PRETRIAL OBJECTIONS //** **TO**
) **IMPROPER PROSECUTORIAL**
) **ARGUMENTS THAT UNDULY INFLAME**
) **A JURY**

(ASSIGNED TO THE HON. LEE JANTZEN)

19 Defendant Justin James Rector, by and through undersigned counsel, hereby
20 moves this court *in limine* to prevent improper arguments by the prosecutor that can
21 unduly inflame a juror as more fully se

22 This motion is supported by the 6th Amendment to the United States Constitution,
23 and Article 2, §24 of the Arizona Constitution, as further explained in the Memorandum
24 of Points and Authorities attached hereto and incorporated herein.
25

26 **RESPECTFULLY SUBMITTED** this 12th day of May, 2015.
27

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By: 

GERALD T. GAVIN
Co-Counsel for the Defendant

By: 

RON GILILEO
Co-Counsel for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

The prosecution must not be permitted to unduly inflame the jury, arouse their sympathy for victims, or excite their passions against Mr. Rector; to do so violates the Defendant's right to a fair and impartial jury under the Sixth Amendment to the United States Constitution, and Article II § 24, of the Arizona Constitution, and renders any resulting death sentence arbitrary and capricious under the Eighth and 14th Amendments to the United States Constitution, and Article II, §24 of the Arizona Constitution.

Normally, trial argument is governed by prohibition of all provocative rhetoric. Capital case law does not permit excessive or unfairly gut-wrenching summation. The California Supreme Court aptly formulated the rule of this quandary:

On the one hand, it should allow evidence and argument on Emotional though relevant subjects that could provide legitimate Reasons to sway the jury to show mercy or to impose the ultimate Sanction. On the other hand, irrelevant information, or inflammatory Rhetoric that diverts the jury's attention from its proper role or Invites an irrational, purely subjective response should be curtailed.

People v. Haskett, 30 Cal. 3d 841, 864, 180 Cal.Rpt. 640, 654, 640 P.2d 776, 790 (1982).

Hence, factors that identify inflammatory argument in capital cases include:

- > Emotional *and* irrelevant content;
- > emotional content inviting an irrantional response; or,
- > emotional content inviting a subjective response; or,
- > emotional content diverting the jury's deliberations from its duty.

1 Wcommon theme repeated in case law that are illustrated below.

2 **A. Inflammatory Argument in General**

3 **1. Argument Emotionally Depicting the Crime**

4 By interjecting emotional triggers into discussion of the crime, the prosecutor may
5 prejudice the jurors against the defendant so that they do not weigh both sides'
6 evidence fairly. Such exaggerated accounts of the offense include:

7 *This may be the most atrocious crime that has occurred here.*

8 *The victim's house was not his castle, but his crucifixion block.*

9 **2. Argument Emotionally Depicting the Victim's Experience**

10 When the emotional argument includes a palpable description of what the victim
11 or her family went through, it increases the likelihood of evoking a subjective horror that
12 clouds the jury from considering mitigation, defense evidence, and argument. For
13 example:
14

15 How many of you want your child to be drug across a wooded field
16 ...to have the skin scraped off her young back like that after these
17 defendants had raped her and abused her body? The photographs..
18 ...showing Sabrina bleeding from her nose, her mouth, how many
of you would like to have your child look like that?....Your child to
end up in a morgue, to have her body split open to determine how
she died?

19 State v. McCollum, 334 N.C. 208, 224, 453 S.E.2d 144, 152 (1993), citing United States
20 themselves in place of the victims will not be condoned...").

21 This argument has multiple faults: it improperly asks the jury to place themselves
22 in the shoes of the victim and the victim's family, draws attention away from evaluating
23 the issues by evoking an overwhelming sense of fear, and advances the irrelevant issue
24 of the autopsy.
25

26 **3. Argument Inviting a Subjective Hate Response**

27 The State goes to far when the prosecutor wants to "share the hate" with the jury
28 expounding on his personal animus toward the defendant. For instance:

1 ...I wish [the victim] had had a shotgun in his hand when he walked
2 in the back door, and had blown [the defendant's] faceoff. I wish
3 that I could see him sitting here with no face, blown away by the
4 shotgun....[H]e fired into the boy's back, saving one [bullet]. Didn't
5 get a chance to use it. I wish he had used it on himself.

6 Darden v. Wainwright, 477 U.S. 168, 181 n.12, 106 S.Ct. 2464, 2471 n.12 (1986).

7 In the first example, the Nevada Supreme Court found the prosecutor's
8 expressions of his overt abhorrence "undoubtedly improper." In the second example,
9 the 4th Circuit concluded that the prosecutor's revulsion was "needlessly inflammatory".

10 **B. Argument Appealing to Fear**

11 There is no valid reason to advance arguments that appeal to jurors' fears. It
12 invites a subjective response and diverts attention from the case to self-preservation.

13 Argument appealing to fear, therefore, is improperly inflammatory in death cases. For
14 example:

15 He's exercising his rights. What about the rights of each and every
16 one of you to be safe in your home? How about you, Mr. Kirby? Do
17 you want your wife raped in your own house?

18 Johnson v. State, 453 N.E.2d 365, 368 (Ind.App. 1983).

19 If you find Levine not guilty, you are going to give him license to
20 rape and the fact will be that a young girl can to to a party, she
21 can turn down his intentions and try to leave. She can be dragged
22 back in the house by her hair, thrown in the apartment, and raped,
23 scream for help.....So any one of your daughters, if that happens,
24 there's no problem.

25 McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984).

26 If you cut Donnell Cosey loose, you are going to be cutting loose
27 a person who is going to be out there to rob you and I.

28 Cosey v. State, 93 Nev. 352, 566 P.2d 83 (1977).

Because these arguments directly invoke jurors' self interests (to the
detriment of their obligations to the defendant and justice system), courts condemn
them. In all these cases, the death sentence was reversed or remanded.

Prosecutors can appeal to fears indirectly by comparing the defendant with notorious killers: Hitler and Manson are popular, as are local villains. For example:

You may have made the comment...that we ought to get rid of these guys, speaking in general terms about Charles Manson or somebody like that.

Howard v. State, 106 Nev. 713, 721, 800 P.2d 175, 180 (1990). The Nevada Supreme Court held that it was improper for a prosecutor to compare the defendant with a notorious criminal.

Another means of appealing to jurors' fear with inflammatory imagery is through creative name-calling. The prosecutor may issue a scathing description of the defendant; alternatively, she may seek to de-humanize him either by calling him a non-human, a machine, an animal or a plant. For example:

Look at what you have seen. Its wickedness. Don't let the wickedness spread like a bay tree. Cut it down. It is evil. What you have is evil to the core. Like a rattlesnake

State v. Murrillo, 349 N.C. 573, 698, 509 S.E.2d 752, 773 (1998).

A cold-blooded killer, a ruthless killer. [E]xhibiting deep-seated violence. It's vicious violence. Its brutal violence. Violent to the core, violent in every atom of his body...The coldest violence most people have ever encountered.

Urbin v. State, 714 So.2d 411, 420 n.9 (1998).

A cancer that should be cut out to save the body of society.

Brooks v. Kemp, 762 F.2d 1383, 1397 (11th Cir. 1985).

Courts denounce such epithets when vivid and prejudicial metaphors are presented and the prosecutor may unduly inflame the jury against the defendant.

C. Argument Appealing to Vengeance

It is improper to urge the jury to sentence the defendant to death to avenge the victims. Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985). While punishment and retribution can be appropriate issues for capital sentencing, the State must avoid

1 references invoking a more primal, gut-level reaction of vengeance and should not
2 "inflame" the jury with overly emotional argument or rally them to vigilante justice via
3 deliberation. Examples include:

4 Give the defendant the same consideration he gave his victims.

5 State v. Bigbee, 885 S.W.2d 797, 812 (Tenn. 1994).

6 Exhibit the same sympathy that was exhibited by these men
7 on January 3rd, 1980. No more..no more....right now, the score
8 is John Lesko and Michael Travaglia two, society nothing. When
will it stop?...Who is going to make it stop? That is your duty.

9 Lesko v. Lehman, 925 F.2d 1527, 1540-41 (3rd Cir. 1991).

10 The death penalty....should be done for the right motive, it
11 should be done for the love of the victims...and his future
victims.

12 McCarty v. State, 765 P.2d 1215, 1221 (Okla.Crim.App. 1988).

13 Note (in the second example) the offensiveness of human lives being reduced to
14 keeping score in a competition between the killers and society; this is especially
15 inflammatory rhetoric. The courts found such arguments encouraged retaliatory
16 sentencing, so were improper. Combined with other misconduct, these arguments
17 contributed to reversals.

18 The defense understands the entire tenor of the trial is emotional. The defense
19 believes our colleagues at the State would not intend to cause error, especially after
20 completing so much of the trial. The motion is filed in hopes the Court will also alert the
21 State to avoid playing to the underlying emotion, and in the heat of closing arguments
22 not to be tempted to make dramatic statements that may improperly endanger the
23 legitimacy of the trial, improperly harm the defendant, or cause a remand or reversal at
24 a later date, forcing all the parties to relive the experience of another capital trial.
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1 ORIGINAL of the foregoing filed

2 this 12th day of May, 2015 with:

3 Clerk of Court
4 401 E Spring Street
5 Kingman Arizona 86401

6 COPY of the forgoing
7 Delivered this _____ day
8 Of May, 2015, to:

9 Honorable Lee Jantzen
10 Judge of the Superior Court
11 Mohave County Courthouse
12 2nd floor
13 Kingman Arizona 86401

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26 File

27 BY: 