

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 ***The Caldwell issue: Reducing the Jury's Sense of Responsibility***

4 A basic tenet of capital sentencing under the Eighth and Fourteenth
5 Amendments to the United States Constitution is that the jury "confront[s] the gravity
6 and the responsibility of calling for another's death." Caldwell v. Mississippi, 472 U.S.
7 320, 324, 105 S.Ct. 2633, 2637 (1985).

8 The responsibility borne by a sentencing jury is grave and the jury's perception of
9 its single responsibility to determine whether to impose the death penalty cannot be
10 lightened. No dilution of the jury's singular role can be allowed to dull an individual
11 juror's comprehension of that responsibility. State v. Josephs, 174 N.J. 44, 803 A.2d
12 1074 (2002)(citing Caldwell, Darden v. Wainwright, 477 U.S. 1168, 183n.15, 106 S.Ct.
13 2464, 2472 n.15 (1986), and Dugger v. Adams, 489 U.S. 401, 407, 109 S.Ct 1211, 1215
14 (1989)).

15
16 The concern is that if a jury believes it does not make that ultimate decision, it will
17 more likely assign the death penalty. Caldwell, supra. Prosecutors therefore misstate
18 the law by arguing that the jury is not responsible (or not solely responsible) for
19 condemning a fellow human to die, *i.e.* by diluting their role in this monumental decision.

20 **Appellate Courts Bear The Responsibility**

21 The Supreme Court first addressed this issue in Caldwell where the prosecutor
22 argued that if the jury gave the death penalty, it would be reviewed for correctness by
23 appellate courts, specifically stating, "[*The Defense*] would have you believe that you're
24 going to kill this man they know...that your decision is not the final decision...your job is
25 reviewable...for they know, as I know, and as Judge Baker has told you that the
26 decision you render is automatically reviewable by the Supreme Court. Automatically."
27 472 U.S. at 325, 105 S.Ct. at 2637-38 (emphasis added).
28

§
C
R
I
L

Other Members Of The Justice System Share the Responsibility

1
2 The prosecutor commits misconduct when he lessens the jury's sense of its
3 responsibility for a death penalty by sharing the blame with other personnel in the
4 justice system. Note that in this particular type of argument, the prosecution does not
5 suggest that the jury does *not* have responsibility – just that they are not alone in it.
6 Commonly called “*jury dilution*”, it is improper because diminishing jurors sense of
7 responsibility makes it easier for them to render a capital verdict. *E.g. Buttrum v. Black*,
8 721 F. Supp. 1268, 1316-17 (N.D. Ga 1989)(jury was “merely on cog in the criminal
9 justice process”).
10

The Judge Bears The Responsibility

11
12 Prosecutors can commit a Caldwell error by arguing that the jury does not send
13 the defendant to the gurney to be executed....the judge does. Such argument may not
14 be a misstatement of the law; nonetheless, it can lessen the jurors necessary, and
15 awesome, sense of responsibility for a man's life.
16

17 The Illinois Supreme Court found the following argument error as a misstatement
18 of the law (since jury's findings of aggravation/mitigation was binding on the judge) and
19 a Caldwell violation (but concluded it was harmless because the jury was not misled by
20 it.): “Don't for a minute think you are going to be sentencing these two guys to death,
21 because you are not....You make that recommendation to the judge. People v. Fields,
22 135 Ill.2d 18, 54-55, 142 Ill.Dec. 200, 216, 552 N.E.2d 791, 807 (1990).
23

24 Incidentally, this should not be an issue in Arizona where juries sentence.
25 However, the “aggravation phase”, the court should remain vigilant that the prosecutor
26 does not try to minimize or dilute the jury's role by arguing that “all” they are called upon
27 to do (at that point) is decide if there is no single statutory aggravator. To reduce their
28 moral input in that phase would cross the Caldwell line.

1
2 **The Defendant Bears The Responsibility**

3 Under Caldwell and the Eighth and Fourteenth Amendments to the United States
4 Constitution, courts should look critically and objectively at any argument that displaces
5 the responsibility for a death away from the jury. A mainstay of prosecutorial argument
6 is that the jury does not kill the defendant – *he killed himself*. Hoping to deflect the
7 troubling decision to take a life, the prosecutor asserts that the question was already
8 decided for them, incidentally by...likely...the most despised person now in the
9 courtroom.

10 For example, in Buttrum v. Black, 721 F.Supp. 1268, 1316 (N.D.Ga 1989), the
11 prosecutor argued, “[T]he sole responsibility for the death sentence lay on the
12 defendant who signed her own death warrant.” The court found that argument (as well
13 as the jury is but a single “cog” in the criminal justice process) may have affected the
14 jury’s deliberations. *Id.*

15
16
17 **Juror’s Role Is To Kill**

18 It is misconduct to argue that the jury’s role or duty is to kill the defendant and
19 denies the Defendant the right to a fair and impartial jury under the Sixth Amendment to
20 the United States Constitution and Article II, §24 of the Arizona Constitution, and
21 renders any resulting death sentence arbitrary and capricious under the Eighth and
22 Fourteenth Amendments to the United States Constitution and Article II, § 24 of the
23 Arizona Constitution.

24 Such references improperly divert jurors’ attention from the facts that they are to
25 decide. State v. Rose, 112 N.J. 454, 520, 548 A.2d 1058, 1092 (1988). The seminal
26 Supreme Court decision is United States v. Young, 470 U.S. 1, 30, 105 S.Ct. 1038,
27 1053 (1985), where the Court denounced admonitions that the jury would not be doing
28

1 its job" if it acquitted. Many Courts have viewed warnings that a jury would not be 548
2 A.2d at 1093. These arguments focus the jury's attention on matters extraneous to the
3 aggravating and mitigating factors permitted by statute in capital deliberations. They
4 therefore encroach on the province of the jury. See Salazar v. State, 973 P.2d 315,326
5 (Ok.Crim.App. 1998) See Also Garron v. State, 528 So.2d 353, 359 (Fla.1988) ("It is
6 your own sworn duty as you came in and became jurors to come back with a
7 determination that the defendant should die for his actions."); Lesko v Lehman, 925
8 F.2d 1527, 1545 (3rd Cir. 1991) ("[T]he jury had] a duty to even the score which stood at
9 [defendant] two, society nothing."); and Holland v. State, 705 So.2d 307, 348 (Miss.
10 1997)(citing Young) (" [If they voted for death, the jury could remember that] you did
11 your duty to the community.")

12 13 14 **Juror's Duty Is Like A Soldier's At War**

15 Prosecutor's sometimes melodramatically analogize the jury's role to that of
16 soldiers in a war, protecting the citizens of America. This patriotic pitch is improper
17 because it plays no role in the evaluation of an individual's guilt, innocence or sentence
18 and violates the 6th, 8th, and 14th Amendments to the United States Constitution.

19 Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561 (1943), arising during World
20 War II, is the most famous example involving improper war references. The prosecutor's
21 argued:

22 This is war. It is a fight to the death. The American people are
23 relying on you ladies and gentlemen for their protection against
24 this sort of crime, just as much as they are relying upon the
25 protection of the men who man guns at Bataan Peninsula....
26 We are at war. You have a duty to perform here.

26 318 U.S. at 248, 63 S.Ct. at 566.

27 The Supreme Court reversed, warning that "At a time when passion and
28 prejudice are heightened by emotions stirred by our participation in a great war, we do

1 not doubt that these remarks...were highly prejudicial, and that they were offensive to
2 the dignity and good order with which all proceedings in court should be conducted." *Id.*
3 Viereck is a case the court should keep in mind in this post 9/11 / ISIS era of world
4 unrest.

5 See also Hance v. Zant, 696 F.2d 940, 952 (11th Cir. 1983) ("We've had three
6 wars in this Country in just my lifetime, World War II, Korea, and Viet Nam. In each of
7 those wars we drafted young men...pointed them at some individual...and said, this
8 person is the enemy, they are trying to destroy our way of life, when you see this
9 person, kill him...and now were in a war in this Country just as real [and] closer to
10 home than any of those...and now were asking you to take the step to do something
11 about the situation."); and Brooks v. Kemp, 762 F.2d 1383, 1396-97 (11th Cir. 1985)
12 ("Each war, we've taken our young men, put guns in their hands,...and they have killed
13 other human beings who are enemies of our country, and...decorated them and gave
14 them citations, praised them for it. Well I say to you we're in a war in this country...
15 against the criminal element and their winning the war. If we can send a 17 year-old
16 overseas to kill an enemy soldier, is it too much to ask you to go back and vote for the
17 death penalty in this case?.....I submit to you he is the enemy.") Note that Brooks also
18 contained an improper reference that the jurors would become war heroes if they
19 "pulled the trigger" on a death sentence.
20

21 The defense, as in similar motions mentioning the trial judge, does not mean to
22 disparage or imply specifically Mr. McPhillips will attempt any of these problematic
23 tactics. Nothing should be read into this filing in that regard; the defense would file this
24 motion no matter who the assigned prosecutor was, to preserve the issue, protect the
25 record, and alert the parties of the issue. These cases do become emotionally
26 inflamed. The defense points these matters out far in advance of any trial in the hopes
27 of avoiding such arguments potentially being crafted into the States trial presentation.
28

1 They are statements made more times than found in case law, frankly because many
2 defense counsel don't object or preserve the issue. These statements seem logical,
3 and may flow out of an attorney's mouth in the excitement of trial...sometimes on
4 purpose, sometimes not. The defense is respectfully putting the State on notice that
5 should such argument be made, the defense must strenuously object. This could result
6 in a mistrial, forcing us to repeat the entire process, and expensive and time consuming
7 process. If denied at trial, reviewing Appellate and Supreme Courts could easily vacate
8 the proceedings and order a retrial, at great financial expense, as well as emotional
9 expense to the victims family and, of course, Justin Rector and his family.
10 This motion is filed to alert all parties of these potential potholes, in the hopes of
11 avoiding them at trial.

12
13 Mr. Rector is literally facing life or death at trial, his rights must trump other
14 concerns, to insure justice and assure our citizens that convictions are based on reliable
15 evidence, and not improper argument. Failure to protect Mr. Rector from these
16 prejudicial statements will deprive him of his rights under the State and Federal
17 Constitutions to *confrontation, due process of law, equal protection of the law, and*
18 *freedom from cruel and unusual punishment.* U.S. Constitution Amendments V, VI,
19 VIII, and XIV, and Article II, §§ 4, 10, 15, and 24 of the Constitution of Arizona.
20
21
22
23
24
25
26
27
28

1 ORIGINAL of the foregoing filed
2 this 16 day of September, 2015 with:

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

6 COPY of the foregoing
7 Delivered this 16th day
8 Of Sept. 2015, to:

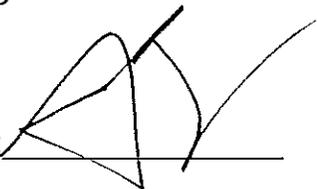
9 Honorable Lee Jantzen
10 Judge of the Superior Court
11 Mohave County Courthouse
12 2nd floor
13 Kingman Arizona 86401

14 Greg McPhillips
15 Assigned Deputy County Attorney
16 PO Box 7000
17 Kingman Arizona 86401

18 Ron Gilleo
19 Mohave County Legal Defender
20 Co-Counsel for Justin Rector
21 PO Box 7000
22 Kingman Arizona 86401

23 Client Justin James Rector
24 Mohave County Jail

25 File

26 By: 

27 By _____