

IN THE COURT OF APPEALS OF MARYLAND

NO. 80

SEPTEMBER TERM, 1994

STEVEN HOWARD OKEN

V.

STATE OF MARYLAND

Murphy, C. J.
Eldridge
Chasanow
Karwacki
Bell
Raker
McAuliffe, John F. (Retired,
specially assigned)

JJ.

DISSENTING OPINION BY BELL, J.

FILED: June 13, 1996

The majority holds that the appellant has waived the right to raise, on post-conviction, the issue of the trial court's refusal to ask the venire, on its voir dire, questions sufficient to uncover the prospective jurors' attitudes about the death penalty. This is so, it reasons, because the appellant failed to raise the issue on direct appeal and, in addition, there are no "special circumstances", see § 645A(c)(1)¹ of the Maryland Uniform Post Conviction Procedure Act, Maryland Code (1957, 1992 Repl. Vol., 1995 Supp.) Article 27, §§ 645A - J, justifying that failure. The majority goes on to opine that, even if not waived, the issue lacks substantive merit. I disagree with both bases for the decision on this point.

In Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L. Ed.2d 492 (1992), the Supreme Court held that "reverse Witherspoon"² questions, i.e., those which seek to determine the

¹ Maryland Code (1957, 1992 Repl. Vol., 1995 Cum. Supp.) Article 27, § 645A(c)(1) provides, as relevant:

[A]n allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal, (whether or not the petitioner actually took such an appeal) ... unless the failure to make such allegation shall be excused because of special circumstances.

² Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Witherspoon questions are those designed to elicit information concerning the prospective juror's attitude against the death penalty. Id. at 522, 88 S.Ct. at 1770, 20 L.Ed.2d at 785.

prospective jurors' predisposition in favor of the death penalty, must be asked in order to avoid a constitutional deficiency. Id. at 726, 112 S.Ct. at 2230-31, L.Ed.2d at 504. See Evans v. State, 333 Md. 660, 672-73, 637 A.2d 117, 123 (1994). Thus, "Morgan simply recognizes that the principles first propounded in Witherspoon v. Illinois, [391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)] demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting.'" Evans, 333 Md. at 672-73, 637 A.2d at 123 (quoting Morgan, 504 U.S. at 731, 112 S.Ct. at 2231, 119 L.Ed.2d at 504). The Court made clear, however, that "follow the law" type questions and questions that inquire generally into the prospective juror's ability to be fair do not suffice to satisfy that inquiry, it being clear that

jurors could in all truth and candor respond affirmatively [to such questions], personally confident that such dogmatic views are fair and impartial ... it may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining ... dogmatic beliefs about the death penalty would prevent him or her from doing so.

Morgan, 504 U.S. at 735, 112 S.Ct. at 2233, 119 L.Ed.2d at 506-07.

The post conviction court recognized, as this Court previously had done in Evans, 333 Md. at 672, 637 A. 2d at 123, that Morgan did not enunciate new law. Nevertheless, it did not rule, as the State had asked it to do, that, by not raising it on direct appeal, the appellant had waived the Morgan issue. Instead,

the court addressed the merits of the appellant's contention, noting that Morgan and Evans "flesh[ed] out a very murky area of the law." By taking that approach, at the very least, the post conviction court, found, if only implicitly, sufficient "special circumstances" to excuse the appellant's failure to raise the Morgan issue on direct appeal. And because the presence or absence of "special circumstances" is a factual issue, the trial court's finding in that regard is entitled to great deference and, indeed, should not be set aside unless clearly erroneous. See Maryland Rule 8-131(c);³ Heat & Power Corp. v. Air Prods. & Chems., Inc., 320 Md. 584, 578 A.2d 1202 (1990). The factual finding of special circumstances certainly is not clearly erroneous. The majority, however, approaches the matter as if it involved a question of law. The majority is wrong in doing so.

The majority is also wrong on the merits. The post conviction court acknowledged that this Court, in Evans, "specifically" approved four voir dire questions that minimally should be asked to qualify the venire with respect to the death penalty. That

³ Maryland Rule 8-131(c) provides:

(c) Action Tried Without a Jury.- When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

court recognized, at the same time, that, in this case, only two of those questions were actually propounded to the venire. To shield the failure of the trial court to ask all four of the questions from the sanction of reversal, the post conviction court relied on the follow up questions that the trial court asked some, but not all, of the prospective jurors. That is also the approach taken by the majority. ___ Md. ___, ___, ___ A.2d ___, ___ (1996) [slip op. at 16-17]. In holding that the trial court did not abuse its discretion when it refused to propound the appellant's proposed voir dire questions to the prospective jurors, the majority

asserts:

The initial questions were specifically tailored to inquire into a prospective juror's preconceptions regarding the death penalty and to reveal whether those preconceptions would be an obstacle to impartially sentencing the defendant given the facts and the law. The follow-up questions were sufficient to disclose any bias identified in the responses to the initial questions. Together, the questions were sufficient to identify a juror's state of mind concerning the death penalty and the juror's ability to evaluate the evidence impartially.

Id. at ___, ___ A.2d at ___ [slip op. at 17]. It concluded "that the voir dire questions '[o]n their face ... were clearly sufficient ... to determine whether prospective jurors were death-penalty dogmatists,' and thus, the voir dire satisfied the standard enunciated in Morgan and Evans." Id. [slip op. at 17] (quoting Evans, 333 Md. at 677, 637 A.2d at 124).

The four questions propounded to the venire in this case were:

Do you have any strong feelings, one way or the other, with regard to the death penalty?

Do you feel that your attitude, regarding the death penalty, would prevent or substantially

impair you from making a fair and impartial decision on whether the Defendant is not guilty or guilty, based on the evidence presented and the Court's instructions as to the law?

Do you feel your attitude, regarding the death penalty, would prevent or substantially impair you from making a fair and impartial decision on whether the Defendant was or was not criminally responsible by reason of insanity, based on the evidence presented and the Court's instructions on the law?

Do you feel that your attitude, regarding the death penalty, would prevent or substantially impair you from sentencing the Defendant, based upon the evidence presented and the Court's instructions as to the law which is applicable?

By way of contrast, the appellant had requested that the following questions be propounded:

Are there any murders or any type of murders where no matter what excuses or explanations are offered, you would feel that the person responsible should get the death penalty? What are they?

Are there any circumstances which you could consider as a basis for not imposing the death penalty in the case of a person who has been proven guilty of first degree murder? ...

Would you be able to vote for a sentence of imprisonment for life, and not death, even though Steven Oken was found guilty of first degree murder, if you found that the aggravating circumstances proven by the state do not outweigh the explanations or mitigating circumstances presented to you by the defendant?

As indicated, the trial court refused to ask any of the questions proposed by the appellant, even though each of them was relevant to

the proper qualification of the jury with respect to the death penalty.

In Evans, the trial court included in its voir dire four questions essentially as follows:

Some feel that the death penalty should be imposed in every case of first degree murder, and others feel that the death penalty should never be imposed. Do you feel or do you have any strong feelings one way or the other about the imposition of the death penalty?

Do you feel that your attitude, regarding the death penalty, would in any way prevent or substantially impair you from making a fair and impartial decision as to the Defendant's sentence in accordance with your oath as a juror, based upon the evidence presented and the Court's instructions as to the law which is applicable?

After listening to the evidence and applying the law, if you were convinced that the appropriate sentence would be death, would you be able to vote for the death penalty?

On the other hand, after listening to the evidence and applying the law, if you were not convinced the appropriate sentence should be death, but were convinced life was the appropriate sentence, would you vote for that alternative?

The defendant had asked that the venire be asked: Would the fact that Vernon Evans has been convicted of two first degree murders in this case cause you to automatically vote for the death penalty, regardless of the facts?

This Court was satisfied that "[t]he questions posed to the venirepersons were sufficient to uncover any pro-death penalty bias and measure that bias against the standard for juror exclusion."

Evans, 333 Md. at 677, 637 A.2d at 125. We accordingly affirmed

the trial court's denial of the defendant's requested instruction on that point. Id.

Although I dissented on other grounds and did not share, in toto, the majority's rationale, I agreed with the majority's bottom line conclusion on the Morgan issue. Therefore, I joined that part of the opinion. Id. at 700, 637 A.2d at 137 (Bell, J., dissenting). Convinced that the voir dire question the defendant sought to have propounded -- whether "the fact that Vernon Evans has been convicted of two first degree murders in this case [would] cause you to automatically vote for the death penalty, regardless of the facts" -- was relevant to the issue before the court, I rejected the majority's conclusion that "the specific circumstances of a particular crime are irrelevant to one's pre-existing bias or predisposition and thus cannot be factored into the court's evaluation of a jury's ability to judge impartiality." Id. at 703, 637 A.2d at 138 (quoting 333 Md. at 675, 637 A.2d at 124-25). Nor was I convinced that the proposed question was deficient for seeking advance clues from the prospective jurors with regard to their assessment of "an important aggravating factor." Id. My joining the majority was prompted by my belief that "the voir dire questions asked, taken cumulatively, required each prospective juror to come to grips with the issue which the question proposed by the appellant addressed; each had to consider whether he or she would act automatically or only after considering all relevant issues and facts." Id., at 702, 637 A.2d at 138.

This was consistent with my view of the purpose, and the manner, of conducting, voir dire, as set forth in my dissenting opinion in Davis v. State, 333 Md. 27,59, 633 A.2d 867, 883 (1993):

Under Maryland law it is clear that the focal point of voir dire is the trial judge. It is the trial judge that has responsibility for regulating and conducting voir dire. It is the trial judge that controls the process; he or she determines: what questions to ask on voir dire; whether, and when, to allow counsel to ask follow up questions; and whether, and when, a prospective juror is dismissed for cause. It follows, therefore, that it is the trial judge that must decide whether, and when, cause for disqualification exists as to any particular venireperson. Neither the venire nor the individual venirepersons occupies such an important position.

Thus, I opined, in Evans, that

[i]n cases of this kind - when the issue is whether a prospective death penalty juror is predisposed for, or against, the death penalty - the critical inquiry is into the propriety of the trial court's exercise of discretion in determining whether the prospective juror is qualified to sit in that particular case. Ordinarily, ... that inquiry involves a determination of the prospective juror's state of mind, i.e., whether the juror is biased or prejudiced. This, in turn, is informed by how the juror views, and reacts to, the death penalty.

333 Md. at 701, 637 A.2d at 137. Explaining my conclusion that the trial court in Evans did not abuse its discretion, I said:

First of all, ... the series of questions which the venire was asked were sufficient to permit the trial court to determine whether a prospective juror was biased or prejudiced to the point where he or she could not render a fair and impartial capital sentencing verdict.

To be sure, the information voir dire elicited did not focus on identifying which side of the death penalty issue may have caused the prospective juror's apprehension or bias; the purpose of eliciting the information was only to identify its effect from that juror's perspective. And the fact that the voir dire was conducted on an individual basis, requiring the prospective juror to answer each of the questions, permitted the trial court to assess each juror's credibility on the basis of factors that could not be discerned from the appellate record.

Id. at 702, 637 A.2d at 138 (citing Wainwright v. Witt, 469 U.S. 412, 429, 105 S.Ct. 844, 855, 83 L.Ed.2d 841, 855 (1985)).

I continue to adhere to those views. Their application to the case sub judice leads to only one conclusion: the death penalty voir dire propounded to the venire in this case was inadequate to "life qualify" that venire. For that reason, I dissent. Accordingly, believing that the appellant is entitled to a new sentencing proceeding, see Morgan, 504 U.S. at 739, n.11, 112 S.Ct. at 2235, n.11, 119 L.Ed.2d at 509, n.11, I would reverse and remand the case for that purpose.

I recognize that, in order to be sufficient, questions put to the venire need not be in a specific form or asked in a particular way; they need not be identical to the questions asked in Evans. While the formulation need not be uniform, the content and purpose of the questions must be, however. The questions must direct the juror's focus to his or her attitude toward the death penalty and explore how she or he would act when called upon to make the decision meaning life or death to the defendant. The questions

must also be designed to provide the court with meaningful information with which it could determine, factually, each juror's credibility both on the basis of the information directly elicited from the prospective jurors and on the basis of intangible factors that cannot be discerned from the appellate record. Because I believe the questions asked in Evans minimally did so, a comparison of the questions asked in this case with those asked in Evans will demonstrate the inadequacy of the subject voir dire questions.

As we have seen, the voir dire on the death penalty in the instant case contained only two questions which were substantially similar to the questions we found minimally sufficient in Evans.⁴ The question concerning the jurors' feeling, one way or the other, is, in form and content, substantially identical to the Evans' counterpart. The fourth question asked in this case is substantially identical to the second Evans question. Rather than directing the prospective jurors' attention to factors relevant to

⁴ In Evans, we did not purport to approve each individual question as being, by itself, a sufficient question to elicit the appropriate information. Rather, the questions were viewed as a group to determine whether, cumulatively, they had the desired effect. Consequently, when considered in conjunction with the other three questions asked, the second question in Evans, the one asking for the juror's bottom line conclusion as to his or her ability, consistent with the evidence and the court's instruction, to reach a fair and impartial decision as to the defendant's sentence, was not considered to be a general fairness and follow the law type question. Viewed by itself, however, it is clear that that is all that it is - it asked the jury to make its assessment and report that assessment to the court. The court is then required to accept that response without in any way exploring the basis for that assessment.

each individual juror's attitude toward the death penalty, the critical issue to be addressed at this stage, both it and its Evans counterpart ask for each juror's assessment of his or her ability to be fair and impartial concerning the determination of the defendant's sentence, and to abide by the oath and follow the court's instructions. The remaining two questions in this case, those for which there is no Evans counterpart, take the same form; their focus, too, is aimed at determining each juror's assessment of his or her ability to be fair and impartial and "follow the law", albeit with respect to different, though related issues. In this case, the second question's focus was on the step just prior to sentencing, the determination of the defendant's guilt or innocence. Criminal responsibility was the subject of the third question. Except for the first question, therefore, in this case, in each instance, the only information sought was the juror's assessment of whether he or she would be affected by his or her feelings about the death penalty to the extent that he or she would be unable to follow the court's instructions or the oath he or she took and, consistent with the evidence presented, render a fair and impartial decision with respect to the appellant's culpability, criminal responsibility or the appropriate sentence.

Except for the first question concerning the juror's attitude toward the death penalty, none of the questions asked in this case is sufficient to uncover juror bias. The remaining three questions are, rather, in the nature of general fairness and "follow the law"

type questions. See Bowie v. State, 324 Md. 1, 23, 595 A.2d 448, 458 (1991); Morgan, 504 U.S. at 735, 112 S.Ct. at 2233, 119 L.Ed.2d at 506-07. Such questions are insufficient to meet the Morgan requirements, id., and, as such, rendered the voir dire inadequate. That is reversible error. See Bowie, 324 Md. at 23-24, 595 A.2d at 459.

In Evans, the voir dire questions we found minimally sufficient consisted of a pro-death question - asking each prospective juror whether he or she would be able to vote for the death penalty if he or she were convinced that it was the appropriate sentence - and a pro-life question - asking the prospective jurors whether they would be able to vote for life imprisonment as the appropriate sentence when they were convinced that it was. Questions designed to elicit that information were submitted by the appellant, albeit in a different form. The information those questions sought to elicit was designed to uncover bias in favor of the death penalty, a cause for disqualification of a juror. Morgan, 504 U.S. at 731, 112 S.Ct. at 2230-31, 119 L.Ed.2d at 504; Evans, 333 Md. at 677, 637 A.2d at 138-39; Bowie, 324 Md. at 23, 595 A.2d at 458. Therefore, the appellant's proposed voir dire questions should have been asked. See Hill v. State, 339 Md. 275, 279, 661 A.2d 1164, 1166 (1995); Davis v. State, 333 Md. at 35, 633 A.2d at 871; Bowie, 324 Md. at 23-4, 595 A.2d at 456; Casey v. Roman Catholic Archbishop, 217 Md. 595, 605, 143 A.2d 627, 631 (1958). The failure of the trial court

to propound those questions to the venire was error, rendering the voir dire inadequate and requiring reversal of the appellant's death sentence, Bowie. 324 Md. at 23-4, 595 A.2d at 459.

The majority recognizes that the questions asked in the instant case were not the equivalent of those asked in the Evans case. Nevertheless, the majority is impressed by the fact that the trial judge asked follow-up questions of those prospective jurors' whose responses to any one of the four questions was in the affirmative or indicated that clarification was needed. Those follow up questions, it says, were sufficient to salvage the death penalty voir dire. As the appellant points out, however, the problem with the majority approach is that follow up questions were only asked of some prospective jurors, when the prospective juror answered a question in the affirmative or ambiguously. No follow-up questions were asked of those jurors who answered "no" to all of the questions. As the appellant recognizes and points out:

It is quite possible that a prospective juror could harbor pro-death penalty sentiments yet still answer "No" to the question posed by the trial court herein regarding strong feelings (death penalty voir dire question No. 1). For instance, a prospective juror could answer "No" to question No. 1 but still always favor the imposition of the death penalty in cases involving first degree felony murder where the underlying felony is a sex offense, the circumstances of this case. In effect, this juror would not have "strong feelings" for or against the death penalty in general but only in limited circumstances not addressed by the overly broad nature of the court's questions. However, under the trial court's method of questioning, there would be no way to elicit

this information since no follow-up questions would be asked in order to determine the basis for the "No" answer.

The Appellant's Reply Brief at 5. See also State v. Conner, 440 S.E.2d 826, 840 (N.C. 1994)(citation omitted). Morgan, as we have seen, also recognized this possibility when the death penalty voir dire questions are general fairness and "follow the law" type questions, as I believe these are, which do not focus the attention of each venireperson to his or her attitude toward the death penalty. 504 U.S. at 735, 112 S.Ct. at 2233, 119 L.Ed.2d 506.

To the trial court, and apparently the majority agrees, it is significant that the record of the voir dire proceedings does not disclose affirmatively that any person who sat on the jury had a predisposition in favor of the death penalty. Where, however, as here, the death penalty voir dire is inadequate, it is not surprising that the record will not disclose such bias. Where questions designed to uncover pro-death penalty bias were not asked of all jurors as a matter of course, it can be, and, indeed, it should be, expected that prospective jurors can, and will, be accepted for jury service without their predispositions and biases properly and adequately having been explored. Moreover, the failure to explore the predisposition and biases of such jurors, because it rendered impossible any determination that any one or more of them was, in fact, biased, dooms to failure the "harmless error" argument that the trial court and the majority seem also to be

espousing. See Bowie, 324 Md. at 11, 595 A.2d at 453. In any event, under Morgan, what is relevant is whether the prospective jurors were adequately voir dired, not whether the record discloses any juror bias, the uncovering of which was the only purpose of asking the questions in the first place. It seems to me perfectly clear that if the death penalty voir dire is inadequate, the absence of an affirmative showing on the record that any one of the prospective jurors was biased in favor of the death penalty does not mean that no members of the jury were biased. What biases a juror may or may not have, under the circumstances, could only be the subject of speculation; therefore, a new sentencing hearing is required.

When the defendant was tried in this case, he had already pled guilty to first degree murder in Maine and been sentenced there to life imprisonment without parole. As its name implies, that sentence meant that he was ineligible for parole and would have to serve all of his sentence; he was required to be imprisoned for the remainder of his life. That sentence was an accomplished fact. It was not a contingency which could only become a reality upon the Maryland jury impaneled to try the appellant's case determining that a sentence of life imprisonment without parole was the appropriate sentence in this case.

Maryland law requires the consideration of aggravating and mitigating circumstances and the weighing of those circumstances to determine the proper sentence. See Maryland Code (1957, 1992 Repl.

Vol., 1995 Cum. Supp.) Art. 27 § 413(d), (g), and (h). Section 413(g)(8), dealing with mitigating circumstances, permits the sentencing jury to find as a mitigating circumstance "[a]ny other facts which [it] ... specifically sets forth in writing." To be sure, the appellant's counsel told the jury, in opening statement, that the appellant was serving a life without parole sentence in Maine, and even argued that it could be considered a nonstatutory mitigating circumstance. The appellant's counsel did not, however, offer proof of the Maine sentence during the sentencing proceedings. Nor did he request a jury instruction informing the jury that it could consider the Maine sentence in determining whether there were mitigating circumstances applicable to the appellant. Moreover, the appellant's counsel did not object when the trial court instructed the jury concerning the appellant's parole eligibility in prospective terms, i.e. that "should [the appellant] receive a sentence of life imprisonment or life imprisonment without the possibility of parole, [that sentence] may be taken into account by you in your consideration of mitigating circumstances as well as in your determination of whether the appropriate sentence is death or life imprisonment." And the appellant's counsel did not ask the court to answer the jury's question concerning the possibility of the appellant's being released even if he were sentenced to life without parole by informing it that the appellant had already been sentenced to life without parole in Maine and by instructing it that that fact also

has a bearing on whether the appellant would ever be released and, indeed, could itself be dispositive.

The post conviction court, denying relief, found and relied upon the facts that the appellant's counsel told the jury in closing argument that the appellant was already under a sentence in Maine of life without parole and that the trial court instructed the jury that, in the case it was trying, it could sentence the appellant to life without parole and consider that sentence as a nonstatutory mitigating circumstance. Accepting those rationales, the majority upholds the denial of post conviction relief on that ground as well.

The standard for determining whether there has been ineffective assistance of counsel is whether trial counsel's performance fell below prevailing professional norms and whether that deficiency prejudiced the appellant. State v. Thomas, 328 Md. 541, 556, 616 A.2d 365, 373 (1992), cert. denied, 508 U.S. ___ 113 S.Ct. 2359, 124 L.Ed.2d 266 (1993). To meet the latter standard, the defendant must show that, but for the unreasonableness of his or her counsel's performance, there is a "substantial possibility" that the outcome of the trial may have been different. Williams v. State, 326 Md. 367, 376, 605 A.2d 103, 107 (1992); Bowers v. State, 320 Md. 416, 425-26, 578 A.2d 734, 38-39 (1990). The standard is no longer simply "outcome determinative." "An analysis focusing on mere outcome determination without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is

defective." Lockhart v. Fretwell, 510 U.S. ____, 113 S.Ct. 838, 842, 122 L.Ed.2d 180, 189 (1993); Sampson v. State, 506 N.W.2d 722, 726 (N.D. 1993).

The record in this case, clearly in my view, demonstrates ineffective assistance of counsel. The trial court was clearly erroneous in concluding otherwise. Accordingly, on this ground as well, the appellant is entitled to a new sentencing proceeding.

In Maryland, it is well settled that arguments of counsel are not evidence, a fact of which juries regularly are reminded by pointed jury instructions to that effect. On the other hand, it is at least as well settled in this State that the focal point -- the most important personality -- in a jury trial is the trial judge, to whom the jury more likely than not will defer. See State v. Hutchinson, 287 Md. 198, 206, 411 A.2d 1035, 1040 (1980) ("The trial judge is the central figure at trial, having the chief responsibility of steering the jury through the maze of evidence. In such role, the trial judge may influence the jury by the inflection of his voice, his words, his conduct and his assessment of the evidence, if known."). Consequently, it can be expected that the jury will pay greater attention to what the trial judge instructs than to the arguments a defendant's counsel might make. Indeed, this Court, in Williams v. State, 322 Md. 35, 47, 585 A.2d 209, 215 (1991), held that arguments of counsel can not effectively substitute for instructions by the court. (Quoting Taylor v. Kentucky, 436 U.S. 478, 488-89, 90 S.Ct. 1933, 1936, 56 L.Ed.2d

468, 477 (1978). In a concurring opinion, Justices Souter and Stevens made the same point. Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. 2187, 2198-99, 129 L.Ed.2d 133, 141 (1994) (quoting Boyde v. California, 494 U.S. at 384, 110 S.Ct. at 1200, 108 L.Ed.2d at 331. It is not surprising, therefore, that the United States Supreme Court has recognized that:

[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as a statement of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

Boyde v. California, 494 U.S. 370, 384, 110 S.Ct. 1190, 1200, 108 L.Ed.2d 316, 331 (1990). See also Johnson v. State, 325 Md. 511, 519, 601 A.2d 1093, 1096-97 (1992).

It is also significant that, in response to arguments characterizing an improper argument by counsel as prejudicial, the appellate courts of this State have frequently relied on the instruction that arguments of counsel are not evidence, at least as a partial basis, to avoid ordering reversals of convictions or, in capital cases, the capital sentence. See, e.g., Evans, 333 Md. at 682, 637 A.2d at 128; Oken v. State, 327 Md. 628, 677, 612 A.2d 258, 282 (1992); Booth v. State, 327 Md. 142, 178, 608 A.2d 162, 179 (1992); Tully v. Dauber, 250 Md. 424, 436, 244 A.2d 207, 214 (1968); Nicholson v. Blanchette, 239 Md. 168, 176, 210 A.2d 732, 736 (1965); Market Tavern, Inc. v. Bowers, 92 Md. App. 622, 657, 610

A.2d 295, 313 (1992); Marks v. State, 84 Md. App. 269, 292, 578 A.2d 826, 839-40 (1990); Hairston v. State, 68 Md. App. 230, 241, 511 A.2d 73, 78 (1986); McDowell v. State, 31 Md. App. 652, 665, 358 A.2d 624, 631 (1976); Murphy v. Board of County Comm'rs, 13 Md. App. 497, 503, 284 A.2d 261, 265 (1971). These rulings are premised, no doubt, on the presumption that juries follow the trial court's instructions. See e.g., Poole v. State, 295 Md. 167, 175, 453 A.2d 1218, 1223 (1983); Washington v. State, 293 Md. 465, 471 445 A.2d 684, 687 (1982); State v. Moulden, 292 Md. 666, 679 n.8, 441 A.2d 699 n.8 (1982); Blanchfield v. Dennis, 292 Md. 319, 325, 438 A.2d 1330, 1333 (1982); Stevenson v. State, 289 Md. 167, 191, 423 A.2d 558, 571 (1982)(Eldridge, J. dissenting); Wilson v. State, 261 Md. 551, 570, 276 A.2d 214, 224 (1971); Hunter v. State, 193 Md. 596, 604, 69 A.2d 505, 508 (1949); Cohen v. State, 173 Md. 216, 232, 196 A. 819, 823 (1937), cert. denied, 303 U.S. 660, 58 S.Ct. 764, 82 L.Ed.2d 1119 (1938).

There can be no doubt that the appellant was already under a sentence of life imprisonment without parole. Nor can it be doubted that there is a significant difference between an event that has already occurred and a contingency. The difference is even more pronounced when the contingency is critical to the ultimate decision required to be made in the case and the very jury that is charged with making that decision must also decide how to resolve the contingency. Therefore, it should have been argued, as it was, albeit somewhat ambiguously, that the Maine sentence was a

nonstatutory mitigator and, on the basis of that fact alone, the appellant's counsel should have sought a jury instruction to that effect. It is true that the presentence report also indicated that the appellant was subject to the Maine sentence and accurately characterized it, proving the sentence, and its meaning, by reference to court records and judicial pronouncements and causing the jury to be instructed consistent therewith, would have been more persuasive and forceful. Moreover, that would have forced the jury to come to grips with a present reality, rather than grappling with how it should handle a prospective one. This is particularly the case when, as here, whether, and how, that sentence could be used by the jury to determine the appropriate sentence in this case was, at best, ambiguous. The court never instructed the jury as to the effect of the Maine sentence, notwithstanding there being conflicting arguments on the issue. The prosecutor told the jury, in closing argument, that it should disregard the Maine sentence and focus on the Maryland sentence only. As we have seen, the appellant's counsel argued just the opposite.⁵

The ineffective assistance the appellant received was also

⁵ The State raised the question of the appellant's future dangerousness. It is interesting to note that the appellant's response focused entirely on the effect of the Maryland proceedings. Whether, and how, the Maine sentence was relevant was, at best, a secondary consideration. To the extent it was mentioned at all, it was only by way of counsel's argument. Indeed, it was in the context of the pending jury sentence that the trial court defined "life without parole"; whether that definition also applied to the Maine sentence was left to the jury to determine and, then, only by implication.

prejudicial. It is impossible to determine what the jury would have done had counsel sought and received an instruction with regard to the Maine life imprisonment without parole sentence and also caused the trial court to respond to the jury's question relative to the possibility of the appellant's release by referencing the fact that the appellant was already serving a life sentence without parole. That, based only on counsel's argument, at least one juror found the Maine life sentence without parole to be a mitigating circumstance, is telling in that regard.