

THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Legal Currents

Guilty is as guilty does

This column, featured every Monday, tackles timely issues important to the local legal community.

BY NICOLE BLACK

Daily Record Columnist



NICOLE BLACK

The U.S. Supreme Court recently granted *certiorari* in a capital *habeas corpus* case arising from the U.S. Court of Appeals for the Ninth Circuit, *Arave v. Hoffman*, 07-110.

The primary issue to be decided, as framed by the Supreme Court, is: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"

While the underlying facts and procedural history of *Arave* are unusually complicated, the facts relevant to the issue raised in the appeal are fairly simple. The defendant was advised by defense counsel to reject the State of Idaho's offer to plead guilty in exchange for a life sentence.

His attorney's recommendation was based on his mistaken belief that, even if Arave received the death sentence following a conviction, Ninth Circuit precedent would result in his sentence being overturned on constitutional grounds.

The Ninth Circuit case relied on by defense counsel, *Adamson v. Ricketts*, 865 F2d 1011 (Ninth Cir. 1988), struck down Arizona's death penalty statute, which was virtually identical to Idaho's death penalty statute. Unfortunately for Arave, subsequent to his conviction after trial the Arizona and Idaho supreme courts disagreed as to whether the two statutes were substantially similar, and the U.S. Supreme Court ultimately resolved the split by upholding the constitutionality of the Idaho statute.

Arave appealed his conviction, alleging he received ineffective assistance of counsel because his trial lawyer failed to consider that the Adamson case could be overturned on appeal.

In light of the way in which the high court framed the

issue when it granted *certiorari*, I am inclined to think the court will conclude that, since Arave had a fair trial, the fact that his attorney may have been ineffective during plea bargaining is irrelevant. In other words, guilty is as guilty does.

Nothing could be further from the truth.

It should not be forgotten that guilt after a "fair" trial does not constitute absolute proof of guilt. To find support for this assertion, look no further than the numerous overturned convictions of those on death row following discovery of exonerating DNA evidence.

When a potentially innocent man's life is at stake, that the trial appeared to be "fair" but was in fact anything but, is of little consolation after a defendant has been unceremoniously executed. It is for this reason Arave's guilt or innocence should be of no moment when determining whether he was deprived of counsel at a critical stage in the criminal proceeding.

In the hospital emergency room, when a patient's life hangs in the balance, there is a reason why the condition is referred to as "critical."

Likewise, the decision of whether to accept a plea bargain when facing a death sentence is no less critical. An error at this stage of the proceeding could very well determine whether the defendant lives or dies. If the plea bargaining process in a capital case is not a critical stage of the proceeding, then what is?

The U.S. Supreme Court's decision in this case is equally critical. In a perfect world, Arave would be given the opportunity to reconsider whether to accept the original plea bargain. I fear, however, that in the imperfect world in which we live, simplistic Forrest Gump-like aphorisms may well reign supreme.

Nicole Black is of counsel to *Fiandach & Fiandach*. She also publishes a popular New York law blog, *Sui Generis*, nylawblog.typepad.com and a blog devoted to legal humor, *Legal Antics*, nylawblog.typepad.com/legalantics.