

for The Defense

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Maricopa County Public Defender's Office

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CONTENTS:

TRIAL PRACTICE

- *Prosecutorial Misconduct Page 1
- * Committees Evaluate ER 1.10 Change Page 4
- * Filing Special Action Petitions Page 5
- * Office Forms Committees Page 8

PRACTICE POINTERS

- * Why We Do What We Do Page 6
- * The Propensity to Allow Propensity Page 6
- * Beware Those Damage Estimates Page 7
- * Those Rising Fines and Surcharges Page 7
- * No Bond Holds Page 7
- * Why Clients Should Be "Accused" Page 7
- * Presentence Investigation & Reports Page 7

SEXUAL HARASSMENT POLICY Page 8

AUGUST JURY TRIALS Page 10

ARIZONA ADVANCE REPORTS *Volume 136 Page 11

POLICE PROCEDURES Page 15

MEDICATIONS USED IN PSYCHIATRY Page 18

TRAINING AT A GLANCE Page 20

Prosecutorial Misconduct: Does That Deputy County Attorney Have a Beeper?

by James P. Cleary

"It's a real status symbol in our office. The beeper means that county attorney has really progressed from justice court duty, and is a good soldier in the fight against crime."

-- Anonymous

The modern age of prosecution has spawned a technological phenomenon in the ranks of a prosecutor's office. This phenomenon is most frequently manifested by prosecutors who appear in court in the course of their duties with a beeper attached to their belt, or in their pocket or their

purse. It would seem that the advantage of such a beeper is to keep that prosecutor in close contact with his or her office, or law enforcement personnel, in the investigation and preparation for cases. It is not uncommon for that prosecutor to be on call to police agencies to answer inquiries relative to on-going investigations against a suspect or an accused. While such a device may have certain implications for that prosecutor's status in an office, it also raises that prosecutor's status in civil rights controversies to that of a defendant. This past term the United States Supreme Court in *Buckley v. Fitzsimmons*¹ continued its precedent which makes prosecutors, who overstep the line between an advocate and an investigator, a defendant in a civil rights suit. The Court's holding has far-reaching implications which may ultimately affect a prosecutor's ability to act as an advocate in a prosecution when the beeper has embroiled them in the investigative stage of a prosecution, thus making them a witness.

Buckley v. Fitzsimmons

Buckley v. Fitzsimmons addressed the scope of liability for a prosecutor in a civil rights action under 42 U.S.C. § 1983.² At issue in the case were claims by a person suspected of a crime, who was ultimately exonerated, that a prosecutor should be liable for monetary damages for fabricating evidence against that person in the course of an investigation and conducting a press conference where alleged defamatory remarks were made about the suspect. The Court was faced with the question of whether prosecutors were entitled to absolute immunity for their actions or whether they were only entitled to qualified immunity. The difference being that absolute immunity would provide no basis for a suit against the prosecutors,³ while qualified immunity would allow them to escape liability for their actions only if they were acting in objectively reasonable good faith reliance on established precedent.⁴

The Court concluded, based upon the complaint of the civil rights plaintiff, that a valid claim for monetary relief was stated against the prosecutors. In reviewing the facts of the case the Court concluded that the actions of the prosecutors in that case, allegedly fabricating evidence against the suspect and conducting an allegedly defamatory press conference against the suspect, were not actions consistent with those of an advocate in a court of law.

(cont. on pg. 2)

The Court held, consistent with its prior decisions and precedent in *Imbler v. Pachtman*,⁵ and *Burns v. Reed*,⁶ that the prosecutors were engaging in investigative or administrative functions at the time of the alleged fabrication of evidence and alleged defamatory press conference. The Court held that such functions and activities of a prosecutor's role

were not entitled to absolute immunity from the damage claims as such functions bore no relationship to their advocacy functions as an officer of the court in a judicial proceeding.

The *Buckley* decision appears to adopt some "bright line" rules that would help to evaluate whether a prosecutor's actions in a criminal prosecution were "advocacy" functions or "administrative or investigative" functions. For "advocacy" functions a prosecutor is deemed to be acting as a pure advocate with no need to worry about damage claims due to absolute immunity. However, when a factual determination is made that the actions of the prosecutor were in an "administrative or investigative" capacity, then such actions would be outside the role of an advocate and place the prosecutor in a position of a potential defendant in a civil rights damage suit.

Ethical Implications -- Lawyer as a Witness

The *Buckley* decision is consistent with ethical guidelines relative to an attorney's ability to act as an advocate when he or she becomes a fact witness. ER 3.7,⁷ with minor exceptions, prohibits a lawyer from acting as an advocate at a trial in

This past term the United States Supreme Court in *Buckley v. Fitzsimmons* continued its precedent which makes prosecutors, who overstep the line between an advocate and an investigator, a defendant in a civil rights suit.

which the lawyer is likely to be a necessary witness. It would seem self-evident that if a prosecutor's actions would make them eligible only for qualified immunity in a civil rights action, then those same actions would disqualify the prosecutor from acting as an advocate in a criminal prosecution. The *Buckley* analysis of "advocate" versus "administrative or investigative" role could be employed in addressing any questions that would arise due to a prosecutor, the one with the beeper, becoming embroiled in investigative analysis of a case against an accused, or suspect.

The *Burns v. Reed* decision of the Supreme Court allowed a prosecutor to enjoy only qualified immunity in a civil rights suit where the prosecutor's actions were claimed to be in the role of an advisor for a law enforcement agency as to whether certain investigative facets of a case should be followed or completed. *Buckley* extended the *Burns* reasoning to a situation where the prosecutors engaged in witness shopping for an expert who would provide adverse testimony against an accused. It seems clear that in both situations the prosecutor's role was more as an investigator as opposed to an advocate. Under such scenarios it would be an appropriate defense motion to request recusal of a prosecutor and his or her office in a case where the securing of evidence against an accused or suspect is performed in an "administrative or investigative" capacity as opposed to an "advocacy" capacity.

Normally, the issue of whether a prosecutor is acting as an advocate or an investigator would most easily be resolved by a determination of whether the actions occurred prior to indictment or after an indictment. However, the *Buckley* decision makes clear that the filing of a complaint or indictment does not automatically guarantee a prosecutor absolute immunity from liability for actions taken after commencement of a prosecution.⁸ This holding by the Supreme Court clearly brings into question what a prosecutor is doing when they respond to a page on his or her beeper.⁹

FOR THE DEFENSE

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(cont. on pg. 3)

Practical Implications

A prosecutor who is on call to law enforcement agencies runs the risk of being disqualified under the *Buckley* analysis and ethical rules when investigation reveals that the law enforcement personnel in contact with the prosecutor are wittingly, or unwittingly, drawing that prosecutor into the investigative phase of the prosecution. The Supreme Court made clear in *Buckley* that a prosecutor certainly has a right, as an advocate, as well as a duty, to interview witnesses and evaluate evidence in order to either file charges against a suspect or prepare for trial against an accused.¹⁰ However, whether a prosecutor is engaging in an advocacy function when he or she does this, as opposed to a non-advocacy function, will be determined after a thorough investigation of the role of the police and prosecutor at the time of the action.

The determination that probable cause exists to arrest an individual is not the end of any inquiry as to whether a prosecutor's role is beyond or limited to that of an advocate. *Buckley* makes clear that a prosecutor, assisting in execution of a search warrant, shopping for witnesses, advising police as to how to secure evidence and conducting press conferences runs the risk of making himself or herself a witness in a prosecution. When a prosecutor's functions go beyond that of trial preparation, or probable cause hearing preparation, then the prosecutor is making himself a witness who cannot prosecute the case. Not only does the prosecutor have an ethical obligation to withdraw from the prosecution, or at least alert the court that such an issue may exist, he or she also faces potential liability for participation in any conduct that may later be questioned.

The beeper phenomenon in prosecutions is often detailed in police reports. Police detail individuals at scenes of investigation, at scenes of execution of search warrants, contacted during the course of interrogations, and presence of prosecutors when discussions occur as to physical items of evidence to be used for corroboration of any probable cause or prosecution tactics. Appropriate discovery in such cases would always require inquiry as to whether the prosecutor was being contacted as an advocate or as a fellow investigator. If the latter appears to be the situation, then the prosecutor's role as an advocate must be challenged and questioned in court in order that an accused may face any charges against himself or herself without the presence of a fact witness hiding behind the cloak of an advocate.

Conclusion

Buckley v. Fitzsimmons logically extends prior precedent from the Supreme Court relative to a prosecutor's liability for damage claims in a civil rights action. Its analysis, often cited as a "functional" analysis, appears consistent with ethical considerations which guide any lawyer's obligations and responsibilities in presentation of evidence before an adjudicative agency or body. The modern technological phenomenon of the "beeper" county attorney¹¹ clearly re-

quires an analysis in any investigation of a charge against an accused as to whether the prosecutor is not only liable, when civil rights claims are generated during a prosecution, but also require inquiry as to whether the prosecutor or his or her office may continue the prosecution against an accused.

As with any rise in status in any part of society, the acquisition of a beeper by a deputy county attorney carries with it additional and, it would seem, more onerous responsibilities. It is not an appropriate answer to queries about the methodology of investigation for a prosecutor to respond that effective law enforcement demands a close working relationship between law enforcement agencies and prosecutorial agencies. *Buckley* and the Rules of Professional Conduct require a prosecutor to perform this "beeper" role in a manner consistent with appreciation for an accused's civil rights as well as his own responsibilities as an ethical prosecutor.

In reviewing the facts of the case the Court concluded that the actions of the prosecutors in that case, allegedly fabricating evidence against the suspect and conducting an allegedly defamatory press conference against the suspect, were not actions consistent with those of an advocate in a court of law.

ENDNOTES

¹*Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, (1993).

²42 U.S.C. § 1983 imposes liability for civil rights violations upon every person who under color of law "... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws..."

³*See, Imbler v. Pachtman*, 424 U.S. 409 (1976).

⁴*See, Harlow v. Fitzgerald*, 457 U.S. 800, 807, 818 (1982); *Butz v. Economou*, 438 U.S. 478, 508 (1978).

⁵*See, Footnote 3, supra.*

⁶500 U.S. ___, 111 S.Ct. 1934 (1991).

⁷Rules of Professional Conduct, 17A A.R.S. Sup. Ct. Rules, Rules of Professional Conduct, Rule 42 ER 3.7.

⁸The Court stated: "Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Buckley, supra* ___ U.S. ___, 113 S.Ct. 2606, 2616, Fn. 5 (1993).

(cont. on pg. 4)

⁹The Arizona Supreme Court has recognized for some time the dire consequences for a prosecution's case when a prosecutor's role as an advocate/witness is raised. *See, State v. Harding*, 137 Ariz. 278, 285-86, 670 P.2d 383, 390-91 (1983).

¹⁰*Buckley, supra* ___ U.S. ___, 113 S.Ct. at 2615-16.

¹¹Of course, a prosecutor's lack of status as a "beeper" county attorney does not mean he is not subject to the *Buckley* analysis, or the Rules of Professional Conduct. A "non-beeper" county attorney can easily become embroiled in "administrative or investigative" endeavors in the course of a prosecution e.g. contacting victims for case updates, transferring physical evidence for trial preparation. ^

Committees Evaluate ER 1.10 Change

Recommends No Changes

The State Bar Criminal Rules Committee on September 8, 1993, recommended to the State Bar Board of Governors that proposed amendments to ER 1.10 of the Code of Professional Conduct should not be adopted. The next day, the State Bar Criminal Rules Committee also voted to recommend that the amendments not be adopted. Both committees are made up of prosecutors and defense lawyers. The Board of Governors will take up the issue later this month and make recommendations to the Arizona Judicial Council and Supreme Court. The Supreme Court still could adopt the rule despite the nearly unanimous rejection of it by the state bar committees.

The amendments to ER 1.10 were proposed by the Maricopa County Superior Court Judges and filed by a petition to the Arizona Supreme Court on June 10, 1993. The petition was signed by Maricopa County Presiding Judge C. Kimball Rose. The supreme court voted not to send the proposed rule change out for public comment, but instead to the State Bar for further study. When rule changes are proposed, the supreme court has the discretion to deny the petition, send it out for public comment or submit it for further study.

According to the petition, there is "a perceived increase" in disqualification motions by the Maricopa County Public Defender's Office. The petition sought to keep the public defender's office on more cases by allowing "screening" in the office. No provision was made for the increased caseloads to the office or for creating an expensive filing system that would prohibit attorneys from seeing old files. Screening generally has been rejected by legal commentators as an acceptable way to eliminate conflicts. The purpose of ER 1.10 is to prevent attorneys from circumventing confidentiality rules and using information (even unintentionally) to hurt a former client. Leakage can happen in so many ways in a large firm that it is impossible to police.

ER 1.10 Is Used In Almost Every State

At the meeting of the Criminal Justice Committee, Tom Hoidal, a federal public defender and chair of the ethics committee, noted that no jurisdiction that he knows of had modified ER 1.10, the imputed disqualification rule. Additionally, Bob Briney and Christopher Johns attended the meetings to explain the negative impact such a rule would have on the public defender's office. Particular concern was focused on the fact that the rule would limit present clients' effective representation and "chill" advocacy. It was also stressed that most jurisdictions have created alternate public defender offices as an economical way to handle conflicts of interest.

Many criminal defense lawyers also viewed the proposed rule change as "lowering" public defender ethics for purely financial reasons with no regard to clients. The ethical rules were promulgated to protect a client's confidences and secrets, and ensure that information acquired during representation is never used against a client without her consent. Board of Governors chairman, Michael Kimmerer noted after that meeting that such a rule would send the wrong message to the public at a time when the image of lawyers is under attack by the media and the public.

Comments Stress Understanding Rules

The public defender's office also drafted a comment for the criminal rules committee that was adopted for submission to the Board of Governors.

Among other things, the comment stresses that many criminal defense lawyers and judges are unfamiliar with how to apply ER 1.9 and 1.10, and that confusion is the major source of the problem. The comment notes that the Model Rules of Professional Conduct adopted in Arizona reject the appearance of impropriety standard to resolve disqualification motions.

Essentially to disqualify an attorney, a former client must show that an attorney-client relationship existed, that a current client's interests are now adverse to her, and that the prior representation is substantially related to the present representation. The court must assume that confidences were disclosed.

Under the new code, however, most commentators agree that the presumption is rebuttable. In other words, if there is no file and the former attorney has left the office, the attorney cannot show that any confidential information can be used against the former client.

According to some commentators, the best practice is to review files of all potential witnesses for conflicts as soon as possible. If confidential information exists that is "materially adverse" and "substantially related" to the present litigation, the attorney must withdraw. Many commentators stress, however, that the confidential information that may be used should be protected. That is, the attorney must either bring the motion ex parte or provide for an in camera inspection so that only the judge can view the information.

(cont. on pg. 5)

Attorney Bob Doyle in our office has developed a "confidential memorandum" that he files under seal. Some commentators also have stressed that another judge should view it so that she is not tainted by the information during the proceedings. Many other public defender offices across the country also require that supervisors review all motions for disqualification.

Copies of the Criminal Rules Committee Comment are available from the Training Division (506-8200).

Rule Studied for Attorney Sanctions

In a related matter, both the Criminal Rules Committee and the Criminal Justice Committee also discussed another proposed rule change by the Maricopa County Superior Court Judges. This one would create a rule similar to Rule 11 of the Civil Rules to allow sanctions for "frivolous" motions. The Criminal Rules Committee, chaired by Ed Novak of Lewis and Roca, voted to have a representative of our office and the County Attorney's Office meet with Judge Rose and Judge Reinstein to determine what the superior court judges' concerns are before voting on the rule. The Criminal Rules Committee will file a petition to extend the time it has to prepare a comment. ^ CJ

Filing Special Action Petitions

by Timothy J. Ryan and Kevin D. White

Many attorneys wonder whether to file a special action petition when handed an adverse decision by a trial court. If an attorney has any such questions, consulting the *Arizona Appellate Handbook*, Volume I, Chapter 7 is helpful. The handbook provides useful information as to the appropriateness of filing a petition for special action in any given case. Assuming an attorney decides to file a special action, he or she must follow a specific set of procedures to increase the chances of winning.

First, the attorney must request a stay of proceedings at the superior court level before proceeding with the special action. See Rule 7(c), Arizona Rules of Civil Appellate Procedure.

The superior court must then either grant or deny the request for stay. If the request for stay is denied, then an application for stay of proceedings may be filed with the Arizona Court of Appeals along with the petition for special action. If the request for stay is not made, then there will be no stay of proceedings at the superior court level.

The caption for the petition for special action must list the defendant as the Petitioner, the superior court judge as the Respondent, and the Maricopa County Attorney as the Real Party In Interest. The petition should have a blank space for the court of appeals to stamp a special action number. Below that, the attorney should list the Maricopa County Superior Court Cause Number. If the parties are improperly listed in the caption, then the court of appeals may not accept the petition. See Rule 2(a), Arizona Rules of Procedure for Special Action.

Immediately after the caption page, a petition for special action should contain a table of contents listing the information contained in the petition. The table of contents should include page numbers for the petition for special action, the grounds for the special action, the memorandum of points and authorities, the "jurisdictional statement" as to why the appellate court should accept jurisdiction of the special action, the statement of the issues, the statement of facts material to a consideration of the issues presented, the argument containing the petitioning party's contentions with respect to the issues presented, and the reasons underlining the argument in the petition for special action, as well as citations to authorities, statutes and other appropriate references to the record.

A petition for special action should not exceed 30 pages, exclusive of any appendix. See Rule 7(e), Arizona Rules of Procedure for Special Action. If the appendix itself exceeds 15 pages, then the appendix must be bound separately. See Rule 7(e), Arizona Rules of Procedure for Special Action.

Once the petition for special action is prepared, the attorney should find as many relevant documents as possible to be included in the appendix. Often the problem is one of time. Sometimes the attorney must file the petition for special action before the minute entry orders or other relevant documents can be included in an appendix. In those cases the attorney should simply refer to the items not yet available, with an avowal that the items, e.g., minute entry orders, will be forwarded once received by the petitioning party. Once these minute entry orders and other relevant documents are received, counsel should file those items as a supplement to the appendix.

It makes good sense to do the table of contents in rough draft. Once you have completed the final draft of your petition for special action, you then may fill in the page numbers on your table of contents as to the specific portions of the petition and where they can be found.

The petition for special action must include six copies for the Arizona Court of Appeals, one copy for the Respondent Judge, one copy for the Deputy County Attorney assigned to the case, one copy for the Appeals Division of the Maricopa County Attorney's Office, and it has been considered normal practice to send one copy to the Arizona Attorney General's Office. The copies should be brought along with the original petition to be stamped with the assigned case number when the petition is filed.

Once the petition is filed, the court of appeals will enter an order setting dates directing service and fixing time for response. Such an order sets the dates for argument on the petition for special action, directs the petitioner's attorney to ensure that all other parties receive copies of the petition, and sets a time for the Respondent or Real Party In Interest to file a response to the petition for special action. The attorney for the petitioner must ensure that all parties and counsel receive copies of the Order, and must file a Certificate of Service with the appellate court.

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If the trial court does not grant the request for stay, the petitioning attorney should file a *separate* pleading designated as application for stay of proceedings. The attorney filing the petition should immediately contact the assigned Deputy County Attorney and make sure that he/she is able to appear either personally or telephonically for oral argument on short notice after the petition is filed. The petitioning attorney should determine who is the assigned "duty" judge for the Arizona Court of Appeals on the date the petition is filed. Once the judge is determined, the attorney should arrange oral argument on the application for stay of proceedings as soon as possible. The request for stay should indicate when both parties are available for argument and why the request for stay is appropriate.

Once the petition for special action and the appendix are prepared, the best thing to do to avoid wasted time and effort is to simply contact the Clerk at the Arizona Court of Appeals, 542-4821, and review the caption and elements of the petition for special action. The staff at the court of appeals is very helpful and willing to ensure that an attorney's time is not wasted. However, one should be warned that they are hypertechnical about defects in the captions and the page length of the pleadings, and are merciless in refusing to accept the filings of pleadings that do not conform with the applicable appellate rules. With this in mind, attorneys contemplating the filing of a petition for special action should never sacrifice quality or adherence to the rules because of time limits. Following the check list of rules set forth above will best ensure the proper filing of a petition for special action.

Practice Pointers

Why We Do What We Do?

If you hadn't noticed, indigent defense is under attack. Caseloads are rising. Some proclaim that the "system is broken." A proposed rule change is aimed at lowering public defender ethics. Another asserts that sanctions are necessary to create more "professionalism" in criminal defense lawyers. A guest editorial in the newspaper promotes the idea that public defenders hinder "justice." What do we make of all this?

Take heart. Someone, in the most unlikely of all places--*Harvard Law Review*, has written something that illuminates why we do what we do. In *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, published in the April edition of the *Harvard Law Review*, Professor Charles J. Ogletree explores this vexing subject.

Ogletree is the former training director and chief trial deputy of the District of Columbia Public Defender Service. He left the public defender's office in 1990 to head Harvard Law School's Criminal Justice Institute.

One of many children, Ogletree's sister became a police officer in California. In 1982 she was stabbed to death in her home. Her grisly murder shook the very foundation of all Professor Ogletree thought he stood for as a public defender---but not for long. He is as dedicated as ever.

For Professor Ogletree the essence of being a public defender is based on something more than philosophy. For Ogletree we do what we do because of "empathy and heroism."

Professor Ogletree's article notes that most scholarship in the area of justifying the role of public defenders focuses on philosophical, moral and con-

stitutional arguments. While they may be important, he notes that those rationales do little to prevent public defender "burn out."

For Professor Ogletree the essence of being a public defender is based on something more than philosophy. For Ogletree we do what we do because of "empathy and heroism." He urges law schools to "employ teaching techniques that encourage students to see their clients as people and themselves as heroes."

In particular, Professor Ogletree argues that lower caseloads at his former office allowed "attorneys to devote a significant amount of time to each individual client." The office also encouraged attorneys to find ways to empathize with clients.

"Heroism," Ogletree says, was promoted in his office because it "stressed the value of winning." According to Ogletree, "supervisors and colleagues provided invaluable feedback and support to attorneys on their cases. Lawyers routinely rehearsed their opening statements and closing arguments in front of at least two supervisors before going to court. In all these ways, the office stressed the importance of obtaining excellence in one's profession and of providing each client with the best possible defense."

For anyone wishing a copy of the Ogletree article, it is available from the Training Division.

The Propensity to Allow Propensity

Previous *for the Defense* articles have explored the 404(b) problem, particularly as it relates to Arizona's judge-made "propensity" catchall to the rule. For what must seem like an eternity for clients doing long prison sentences, courts allowed the testimony of Robert Emmerick to get propensity evidence in. Those rulings came despite the clear language in *McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973) and *Treadaway* that 404(b) propensity testimony should be allowed only after expert "medical" evidence supporting its introduction. Mr. Emmerick was neither a medical doctor nor a psychologist.

Now the government routinely uses a doctor. Dr. Steven Gray has made a living of testifying for the government that our clients always seem to have an emotional propensity to commit aberrant acts and that they are not remote in time. Amazingly, Dr. Gray is able to do so based, usually, solely on reading police reports.

(cont. on pg. 7)

In a recent case Roland Steinle gambled on a different tactic. The defense allowed Dr. Gray to interview the defendant. At the hearing to determine whether the evidence should be admitted, Dr. Gray failed to provide any information that he gleaned from the defendant that would substantiate "propensity." And, the defense called Dr. John DiBacco to testify that the methodology used to arrive at the defendant's "propensity" was faulty.

Although the state's motion was denied in part and granted in part, practitioners with this issue should contact Roland Steinle for advice. The State took a special action from the ruling; however, a stay was denied. The client then went to trial on this matter and was acquitted.

Beware Those Damage Estimates to City Cars

In case you are unfortunate enough to have a client rear-end a police car, take note. One poor soul did, but had a good lawyer. In this case the client also was charged with DUI. The plea agreement provided for restitution to the City of Phoenix for damage to the police car.

An official-looking estimate was produced by the Phoenix Equipment Management Division. Labor was listed at \$25.00 per hour and parts were listed at full retail price for a total of \$5,195.97.

Defense counsel wanted to obtain a second estimate for the restitution hearing. There was also the pesky issue of full retail price for parts. After inquiries, it was learned that the car was already repaired. The attorney was told that normally parts are obtained from other cars out-of-service. A call to another supervisor at risk management then produced the real "smoking tailpipe." The car had been sent to a non-city body shop for repair and the city had been charged \$2,676.91 for parts and labor.

Needless to say, restitution is a major issue for poor clients, and must always be investigated.

Those Rising Fines and Surcharges

Along with all the other criminal code revisions, don't miss this one. Effective January 1, 1994, our clients will be paying a \$12.00 "time payment fee" instead of \$8.00. This money goes to the judicial collection enhancement fund. See *A.R.S. § 12-113*. Additionally, the surcharge will be increased to 46 percent on "every fine, penalty, and forfeiture imposed and collected by the courts for criminal offenses and any civil sanction . . ." See *A.R.S. § 12-116.01*.

No Bond Holds

Here's a common scenario: client is charged with new offense on bond. At the preliminary hearing or another forum, bail is denied because of the "alleged" no bond status. No bond is set.

Attorney Michael Hruby (Group A) points out and has developed a motion that underscores the fact that the government must provide evidence to support the claim. Often, they are unprepared to do so.

A call to another supervisor at risk management then produced the real "smoking tailpipe."

Here's how it works (with some help from law clerk Rene Scatena). Based on Art. II, sec. 22 of the Arizona Constitution, Rule 7.5(C) provides in part: "The court may revoke release of a person charged with a felony if, after a hearing, the court finds (1) that there is probable

cause to believe that the person committed a felony during the period of release and that the proof is evident or the presumption is great as to the present charges."

Hence, Rule 7.5 provides four things that must happen before the court revokes release: 1) a verified petition, 2) a hearing, 3) a finding of probable cause, and 4) a finding that the proof is evident or the presumption great as to the present charge.

But the story doesn't end there. How about A.R.S. 13-3968. It says, among other things, "[a]fter a hearing and upon a finding that the [accused] has willfully violated the conditions of . . . release, the court may impose different or additional conditions . . ."

Typically, however, many clients are being denied bail without a hearing or a determination that "the proof is evident or the presumption great" as to the new charge. They are simply held. In other words, defense counsel's job includes making some determination and/or demanding a hearing that the presumption is great before bail is unavailable. It is the government's burden, not the accused, to show that bail is limited. The mere fact that a person is indicted is insufficient evidence that the proof is evident and the presumption is great. See *Martinez v. Superior Court*, 26 Ariz. App. 386, 548 P.2d 1198 (1976); see also *Dunlap v. Superior Court*, 169 Ariz. 82, 817 P.2d (1991) (state may see reexamination of release conditions if new evidence establishes proof is evident and presumption great).

Why Clients Should Be "Accused" and Not "Defendant"

Motions in the Training Division form book and in many newsletter articles denote our clients as the "accused" instead of "the defendant." It's not just that "the defendant" is what prosecutors call our clients. It's more than that. "Defendant" makes it sound like our client must defend himself. We know, however, that the burden is not on our clients in theory---though perhaps in reality.

Using the client's name in motions, letters and proceedings is still important. A name humanizes the client, and the term "accused" lets everyone know that the government has only brought accusations that it must prove.

Presentence Investigation & Reports

As always for the Defense stresses zealous advocacy for our clients at sentencing. Here are a few cases and ideas for the sentencing hearing.

(cont. on pg. 8)

Remember, the trial court may not consider mere arrests as aggravating factors at sentencing. *State v. Schuler*, 780 P.2d 1067 (1989). If the client maintains his innocence following a jury verdict, a no contest plea, or an *Alford* plea, it should not be used as an aggravating factor. *See, e.g., State v. Holder*, 745 P.2d 138 (1987).

The client also has the right not to answer the presentence investigator's questions, and the court should not penalize the client for exercising that right. *See State v. Kerekes*, 673 P.2d 979 (1983). ^ CJ

Office Forms Committees on Ethics and Capital Representation

Ethics Committee

Dean Trebesch has asked several members of the office to form a committee on the ethical problems relating to conflicts of interest in the trial divisions. A major focus of committee members will be the current debate on how to address in the trial divisions former client disqualification motions. The committee's chairperson is Tom Klobas, trial group supervisor of Group D. Bob Brincy, Bob Guzik, Bob Doyle and Christopher Johns also are participating. (Helene Abrams will head a committee working on conflicts in the juvenile division.)

The goal of this committee is to deliver recommendations for the Office and set guidelines for procedures in conflict of interest cases to standardize our motions to withdraw. Robert Spangenberg, a nationally known criminal defense consultant, is advising the committee. Mr. Spangenberg is an expert on indigent defense systems and has advised many public defender offices, as well as funding authorities, on how to handle conflicts of interest.

The committee is dedicated to maintaining the highest ethical principles, and to preserving the confidentiality and loyalty of our clients, both present and former.

Capital Representation Committee

Last year Dean Trebesch asked that Bob Guzik and Christopher Johns chair a committee to develop recommendations for enhancing the quality of the Office's capital representation.

The committee also included Catherine Hughes, Paul Prato, Emmet Ronan, and Tom Klobas. After several meetings the committee drafted and delivered recommendations to Dean for approval.

Among other things, the committee recommended that an on-going committee be created to continually enhance guidelines for representation in capital cases, share information, and monitor capital case representation. The recommendations also included guidelines for the qualifications of lead and associate counsel in capital cases.

This month Roland Steinle and Mara Siegel were appointed by Dean to head the Office's Capital Representation Committee. The committee will be meeting to select other committee members, and begin the process of setting up mechanisms in the office to further improve the quality of representation. Individuals interested in assisting the committee should contact Roland Steinle and Mara Siegel. ^ CJ

Sexual Harassment

The following is a restatement of our office policy on sexual harassment. NOTE: Employees in our department with questions or concerns may follow one of two approaches, (1) discuss the matter with a supervisor, progressing through the normal "chain of command" and skipping the immediate supervisor if that individual is the offending party, or (2) discuss the matter with one of our office's designated, harassment contact people, Jim Haas or Diane Terrible.

Maricopa County Sexual Harassment Policy and Procedure

Definition

Sexual harassment is defined as any unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature when:

*Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.

*Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

*Such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive working environment. Retaliation against an employee or applicant for filing a sexual harassment complaint may be considered to be grounds for a new sexual harassment complaint.

County Policy on Harassment

Maricopa County prohibits sexual harassment by all employees at all levels. It is the responsibility of all County employees, supervisors, appointing authorities, and department heads to actively pursue the elimination of sexual harassment in County employment. All incidents of alleged sexual harassment involving County employees which cannot be resolved within the department should be called to the attention of the Personnel Department, Employee Relations Division. County employees should raise sexual harassment questions promptly so that an immediate investigation may be conducted and appropriate steps taken.

(cont. on pg. 9)

After a thorough investigation has been conducted by either the department or the Personnel Department, employees who are determined to have been involved in the sexual harassment of another person while on duty or while representing Maricopa County will be disciplined according to Maricopa County Employee Merit Rules. This discipline may include dismissal from County employment.

Employee Responsibilities

Any employee who believes that she or he is being sexually harassed by a supervisor, co-worker, customer or client should promptly take the following action:

1. The person felt to be involved in the harassing should be confronted in a polite but firm manner. This person should be told how the harassing is perceived and to cease it immediately. Feelings of intimidation, offense or discomfort should be expressed to the harasser. If practical, a witness should be present for this discussion. If a confrontation is not possible, a memorandum should be written describing the incident(s) of harassment, the date(s), a summary of any conversations with the harasser and the harasser's reactions. This should be retained for future use.

2. If the harassment continues or if it is felt that some employment consequences may result from the confrontation with the harasser, the employee may, either orally or in writing, bring the complaint to a higher level supervisor, the department head, other appropriate person within the department or the Employee Relations Division of the Personnel Department. This should be done as soon as possible so the problem may be resolved.

3. If the employee is dissatisfied with the actions of the supervisor or departmental staff, the complaint may be brought to the Employee Relations Division of the Personnel Department in accordance with the Procedure detailed herein.

4. The Employee Relations Division of the Personnel Department is available to provide advice to any employee who feels that he or she may be a victim of sexual harassment or has any questions on the issue. All inquiries and complaints directed to Employee Relations will be treated in a confidential manner unless directed otherwise by the employee.

Department's Responsibilities

Department should:

1. Make all employees, including supervisors, aware of the County policy regarding sexual harassment. A department may even wish to issue its own internal policy emphasizing the importance of eliminating sexual harassment in the department.

2. Formally make supervisors aware of sexual harassment problems and express employer disapproval of sexually harassing conduct.

3. Encourage open communication so that employees will not feel uncomfortable in bringing complaints forth.

4. Investigate all sexual harassment complaints impartially and promptly, keeping the complaint as confidential as possible.

5. Upon learning of sexual harassment, take prompt corrective actions.

Supervisor's Responsibilities

1. Set a good example. Do not participate.
2. Do not condone even seemingly innocent acts of discrimination or harassment.
3. Remember that you are management's representative.

Requests for assistance and advice in preventing or eliminating sexual harassment or in correcting apparent sexual harassment may be obtained from the Employee Relations Division of the Personnel Department.

Responsibility of the Employee Relations Division of Personnel

The Employee Relations Division of the Personnel Department is responsible for thoroughly investigating employment discrimination allegations brought to its attention by County employees or job applicants, including all complaints of sexual harassment. The Employee Relations Division will notify the department when a complaint is received and work closely with the department throughout its investigation in a spirit of cooperation to reach a resolution. All complaints are handled in a manner which is confidential and will help preclude retaliation against the employee.

Complaint Procedure

An employee or job applicant who believes he or she has been sexually harassed as defined in the definition section, and whose complaint has not been resolved with the department, may file a complaint with the Maricopa County Personnel Director, 301 West Jefferson Avenue, 2nd Floor. Such complaints must be filed timely so that the investigation and corrective action can be effective. The employee filing the complaint may contact the Employee Relations Division at 506-3895 for assistance. Departmental supervisors who wish to discuss situations which may be harassment are also urged to contact the Employee Relations Division. The Employee Relations Division's investigative findings and recommendations will be reviewed with the appointing authority.

August Jury Trials

July 16

Peter Claussen: Client charged with conspiracy to commit murder. Trial before Judge Cole ended August 12. Client found guilty. Prosecutor C. Bibles.

July 29

Robert Billar: Client charged with attempted murder and aggravated assault (dangerous). Investigator H. Jackson. Trial before Judge Bolton ended August 4. Client found guilty. Prosecutor H. Schwartz.

August 2

Donna Elm: Client charged with unlawful flight. Investigators B. Abernathy and J. Allard. Trial before Judge Schafer ended August 3. Client found guilty. Prosecutor J. Grimley.

August 6

Rickey Watson: Client charged with 2 counts of aggravated assault. Investigator H. Jackson. Bench trial before Judge Schneider ended August 25. Client found **not guilty**. Prosecutor G. Thackery.

August 9

Reginald Cooke: Client charged with aggravated DUI. Trial before Judge O'Melia ended August 11. Client found guilty of lesser included offense (driving with suspended license). Prosecutor M. Ainley.

August 10

Scott Halverson: Client charged with fraudulent schemes with two priors. Investigator G. Beatty. Trial before Judge Grounds ended August 12. Client found guilty. Prosecutor N. Miller.

Mara Siegel: Client charged with aggravated assault. Trial before Judge Galati ended August 11. Client found guilty. Prosecutor K. Rapp.

August 11

Stephen Avilla: Client charged with aggravated assault (dangerous and while on probation). Trial before Judge Ryan ended August 12. Client found guilty of disorderly conduct. Prosecutor M. Barry.

August 16

Eugene Barnes: Client charged with 14 counts of child abuse. Investigator D. Beever. Trial before Judge Hilliard ended August 19. Client found guilty on lesser charge. Prosecutor T. Clarke.

August 23

Stephen Avilla: Client charged with two counts of burglary (with priors and while on parole). Investigator P. Kasieta. Trial before Judge Cole ended August 26. Client found **not guilty**. Prosecutor D. Rodriguez.

Albert Duncan: Client charged with manslaughter. Investigator B. Abernathy. Trial before Judge Hertzberg ended September 7. Client found guilty. Prosecutor K. O'Connor.

Paul Ramos (2nd chaired by Timothy Ryan): Client charged with burglary in the third degree. Investigator M. Breen. Trial before Judge Portley ended August 26. Client found **not guilty**. Prosecutor M. Vincent.

August 24

John Brisson: Client charged with possession of narcotic drugs and possession of dangerous drugs (with priors). Trial before Judge Schneider ended August 26. Client found guilty. Prosecutor Armijo.

Greg Parzych (2nd chaired by David Fuller): Client charged with burglary. Investigator D. Moller. Trial before Judge Grounds ended August 27. Client found guilty. Prosecutor J. Martinez.

Joseph Stazzone: Client charged with aggravated DUI. Investigator R. Barwick. Trial before Commissioner Colosi ended August 27. Client found guilty. Prosecutor Z. Manjencich.

August 25

Susan Bagwell: Client charged with aggravated assault. Investigator H. Brown. Trial before Judge Schaffer ended August 27. Client found **not guilty**. Prosecutor J. Fisher.

Elizabeth Melamed: Client charged with aggravated DUI. Investigator J. Castro. Trial before Judge Brown ended August 26. Client found guilty. Prosecutor J. Beene.

August 26

Kevin Burns: Client charged with attempted possession of narcotic drugs (cocaine). Trial before Judge Martin ended August 30. Client found **not guilty**. Prosecutor M. Troy.

Thomas Kibler: Client charged with sexual assault, kidnapping, and aggravated assault. Trial before Commissioner Jones ended August 30. Client found **not guilty**. Prosecutor J. Beatty.

August 30

Karen Noble: Client charged with aggravated assault on a detention officer (with priors). Investigator B. Abernathy. Trial before Judge Ryan ended August 31. Client found guilty (without priors). Prosecutor R. Walecki. ^

Arizona Advance Reports

Volume 136

State v. Green,
136 Ariz. Adv. Rep. 3, (S.Ct. 4/1/93)

Defendant was placed on probation for a class 3 felony. Pursuant to the domestic violence statute (A.R.S. § 13-3601(H)), the court deferred further proceedings without entering a judgment of guilt. Less than two months after being placed on probation, defendant attempted to kill his wife and her boyfriend. Defendant was convicted. The court enhanced defendant's sentence under A.R.S. § 13-604.02(A) because he committed the offense while on probation for a prior felony. Defendant's sentence was properly enhanced. A.R.S. § 13-604.02(A) requires a life sentence if a person convicted of any felony offense involving the use or exhibition of a deadly weapon or dangerous instrument commits it while on probation for a conviction of a felony offense. Conviction means that a defendant has been found guilty or has pled guilty, although there has been no sentencing or judgment by the court. By placing the defendant on probation after pleading guilty, the previous court accepted the fact that the defendant was guilty although under A.R.S. § 13-3601(H) no formal judgment was entered. Probation under the domestic violence statute is probation for a conviction of a felony offense under A.R.S. § 13-604.02.

State v. Spencer
136 Ariz. Adv. Rep. 5, (Sup. Ct., 4/8/93)

The defendant kidnapped a woman, forced her to withdraw cash from an automatic teller machine, raped her, stabbed her, and set her on fire. She died. He was convicted of first degree murder and sentenced to death. Defendant claims that there was insufficient evidence to support the verdict. The circumstantial evidence presented at trial was more than sufficient.

The trial court admitted a prior statement by defendant that he wanted to stab and burn a different individual. This evidence was not offered to prove defendant's bad character. It was offered to prove identity, plan and premeditation, purposes that expressly support the admission of "other crimes" evidence under Rule 404(b). It was not an abuse of the trial court's discretion to conclude that the probative value of the statement outweighed its prejudicial effect.

Defendant claims that the trial court should have instructed the jury *sua sponte* on lesser included offenses of first degree murder. There was insufficient evidence presented at the trial to support an instruction on lesser included homicide offenses. The cut on the defendant's hand was insufficient evidence to support an inference that the victim attacked the defendant and he killed her in the heat of passion.

The defendant's death sentence is affirmed. The trial court properly found that the murder was committed in expectation of pecuniary gain and committed in an especially heinous, cruel or depraved manner. Defendant had prior

convictions for offenses involving the use or threat of violence. Defendant had also been convicted of an offense for which life imprisonment had been imposed. The trial judge rejected potential mitigating factors of good behavior at trial, alibi evidence, his confession, medical problems, and a history of substance abuse. Since the trial court properly concluded that there were no mitigating factors, it was not necessary for the trial court to balance aggravating and mitigating factors. [Represented on appeal by James M. Likos, MCPD].

State v. Garcia,
136 Adv. Rep. 10 (Div. 1, 4/6/93)

Defendant was the driver of a car involved in a drive-by shooting. He was convicted of aggravated assault, a dangerous offense. He was acquitted of two counts of endangerment. He was sentenced to five years in prison.

Defendant argues that the trial court erred in refusing to instruct the jury that facilitation is a lesser included offense of aggravated assault. Facilitation is not a lesser included offense. An offense is a lesser included offense only when the greater offense cannot be committed without including the lesser. A lesser included offense can be established by statutory language *or* by use of language in the charging document which explicitly includes each element of the lesser included offense. While facilitation and accomplice liability differ only in the requisite mental state, there is no independent criminal act in being an accomplice. Rather, A.R.S. §13-303 is only a legal theory upon which to base a substantive offense. Alleging that the defendant acted as an accomplice does not alter the substantive offense.

Defendant argues that the mandatory sentence for his dangerous offense constituted double jeopardy/double punishment, violates the separation of powers doctrine, and violates the 8th Amendment. Mandatory sentencing for a dangerous offense does not violate the defendant's constitutional rights. The double jeopardy and double punishment provisions do not prevent a state from exploiting the use of a weapon both to intensify the offense -- here, assault to aggravated assault -- and support an allegation of dangerousness. Nor does mandatory sentencing violate the separation of powers doctrine. The legislature may implement sentencing ranges within which courts exercise discretion, and further, establish means by which the executive branch (via the prosecutor) may shift the sentencing range. Threats of malfeasance (judicial removal based upon intentional disregard of the mandatory sentence scheme) and sentence enhancement (after proof of dangerousness or prior convictions) restrict but do not eliminate a court's discretionary powers. Finally, the 8th Amendment was not at issue, as the five-year sentence was not grossly disproportionate.

Defendant claims that the award of restitution was improper for the endangerment acquittals. The award of restitution was reversible error. Restitution may only be awarded on charges for which a defendant is found guilty, has admitted guilt, or has agreed to pay. As the defendant here was acquitted on the endangerment accounts, the award of restitution is without legal basis.

(cont. on pg. 12)

State v. Simms
136 Ariz. Adv. Rep. 14 (Div. 1, 4/8/93)

Defendant was convicted on three counts of sale of narcotic drugs. As a result of defendant's pretrial motion, the state was precluded from presenting testimony that an informant had introduced the undercover police officers to defendant. At trial, however, a police officer testified that the police got involved with the defendant because they had information that the defendant was selling narcotics. The trial court granted defendant's motion to strike the response, but denied the motion for mistrial. The trial judge did not abuse his discretion in denying a mistrial. The jury was instructed to disregard the stricken testimony and it is unlikely that the statement influenced the jury. The practice of introducing this type of evidence under the guise of completing the story of the crime is disapproved. The introduction of such evidence may constitute reversible error in cases where the evidence against defendant is not as strong as in this case. [Represented on appeal by James R. Rummage, MCPD].

Schade v. D.O.T.,
136 Adv. Rep. 23 (Div. 2, 4/6/93)

Defendant's license was suspended for refusing to submit to a urine test for narcotics after having earlier submitted to a DUI alcohol breath test. The superior court vacated the suspension, maintaining that there was no justification for the requested second test, and that defendant had complied with the informed consent law. The state appealed.

The review standard for administrative decisions is whether the agency action was illegal, arbitrary, capricious, or involved an abuse of discretion. Use of the word 'or' in the phrase "consent... to a test or tests... for the purpose of determining alcohol concentration *or* drug content..." within A.R.S. § 28-691(A) does not form a disjunctive clause. Such interpretation is inconsistent with the purpose of the implied consent law, which seeks to remove drivers who may threaten their own safety and others, insure prompt revocation of the dangerous driver's license, and assure a penalty for refusing to provide physical evidence.

No relevant authority exists to support the assertion that law officers must attempt to identify the type of intoxicant and thereafter select a test to verify that suspicion. The choice of test or tests is at the discretion of law enforcement officers. While endless testing would raise questions of intolerable state action, a single additional test does not create those concerns.

State v. Quick
136 Ariz. Adv. Rep. 26 (Div. 2, 4/8/93)

Defendant was charged with seven counts of various dangerous crimes against children. He pled no contest to one amended count of attempted sexual abuse. Defendant's change of plea and sentencing were presided over by a particular judge. That judge had been an attorney in the Public Defender's Office at the time the charges against defendant were pending. Defendant was represented by a

different public defender. The judge was unaware of this conflict and the issue was not brought to his attention until after the change of plea and sentencing. Under these circumstances, the appropriate remedy was to vacate the sentence and assign the case to a different judge for resentencing. There was no basis, however, for concluding that the alleged conflict could reasonably have influenced the change-of-plea proceeding. A change-of-plea proceeding, unlike sentencing, is ministerial in nature. The defendant has already been resentenced, and no other relief is required.

Defendant claims he received ineffective assistance of counsel because his attorney did not seek special action relief when the judge denied his motion to remand the case back to the grand jury. The claim was waived when defendant pled guilty. Even if not waived, defendant has failed to show prejudice.

State v. Duzan,
136 Ariz. Adv. Rep. 33 (Div. 1, 4/13/93)

Defendant, who was in charge of accounting for M Company, deposited \$96,000 into a personal account from an account she opened with M Company funds. She was found guilty of a fraudulent scheme.

During trial defendant wanted to admit three former employees' complaints naming M and his company, and alleging breach of contract, sexual harassment, discrimination, and intentional infliction of emotional distress. The court did not admit the evidence. Defendant argues that this is proper impeachment under Rule 404 (Prior Bad Acts) and Rule 405(B) (Pertinent Character Traits) to show that M's business was used by M for a steady stream of female companionship. She argues that M opened the door after testifying that the business solely existed to provide for his family. The central issue was whether the defendant knowingly obtained any benefit from the M Company by means of false or fraudulent pretenses. This evidence is irrelevant and the prejudice outweighs any probative value.

The defendant sought to admit statements by former co-workers regarding alleged sexual encounters with M. This evidence was not admitted. The defendant did not raise this issue at the trial level, and the issue was waived.

During the prosecutor's closing arguments he said:

[Defense counsel] continues to just tell you, oh, all those facts aren't in court. I submit to you they're crucial, because they show beyond a reasonable doubt that this defendant is a scheming, manipulative person. *I stand before you and tell you that she is.* [Emphasis added.]

(cont. on pg. 13)

Earlier defense counsel had indicated:

We had Angie over here. Oh, the prosecutor is going to tell you that she's a cold, calculating, evil, vicious woman who goes around starting affairs with older men and takes their money. The prosecutor is allowed to say that. You're allowed to believe differently because you see her. Now she was sitting on the stand and -- okay, I'm not unbiased. But look, I didn't see a cold, calculating woman out there. I saw a frightened, fearful, tearful, hurt, insecure, timid woman.

Defendant appealed alleging fundamental error. First, the defendant failed to object to the prosecutor's statement. While the prosecutor's comments may be improper regarding his opinion, these comments do not deprive her of a fair trial. The prosecutor's remarks were in response to defense counsel's description as to how the prosecutor has characterized his client. Second, these comments were preceded by the prosecutor's permissible comments that the facts show beyond any reasonable doubt that the defendant is a scheming, manipulative person. Finally, the jury was instructed that the opening and closing arguments were not evidence. No fundamental error occurred.

Defendant argues fundamental error because the prosecutor argued that even if M had told her to take the money, she was guilty of fraudulent schemes because the Internal Revenue Service and Mrs. M had not approved. The defendant argued that these statements are misleading as to the elements of the offense. The trial court did not error in allowing this testimony. Defense failed to object to these remarks and the jury was properly instructed on the elements of fraudulent schemes and artifices.

The defendant argues that the court abused its discretion in allowing the prosecutor to argue punishment when he mentioned that part of her conviction might result in having her pay back the \$96,000 that she stole from M Company. The prosecutor further mentioned that if convicted she may have to pay restitution of \$96,000 back to the victim. Defendant argued that this was improper and did not give her a fair trial. These statements are not improper. An order of restitution is an attempt to restore the victim and is not punishment. Furthermore, the prosecutor's comments were a fair rebuttal to the comments made by the defense. The prosecution's comments were also fair reference to defense counsel's question when defendant was asked whether M or anybody representing M ever tried to collect any money from her or sue her for any money. Finally, the jury was instructed not to consider the possible punishment and cautioned that closing arguments were not evidence.

The court gave the following reasonable doubt definition:

The term reasonable doubt means doubt based upon reason. This does not mean imaginary or possible doubt. It is a doubt which may arise in your minds after a careful and impartial consideration of all the evidence or from the lack of evidence.

The defendant did not object to this instruction or request that it be modified. The defendant argued that the court committed fundamental error by giving this instruction because it excludes a juror's possible doubt and shifts the burden of proof. The instruction is proper. The defense requested a reasonable doubt instruction and accepted the

state's instruction. Similar versions of instructions at issue have been upheld by the United States and Arizona Supreme Courts. [Represented on appeal by Garrett W. Simpson, MCPD.]

State v. Superior Court (Blendu),
136 Adv. Rep. 37 (Div. 1, 4/13/93)

Defendant appealed his civil traffic ticket, alleging that the judge erred in weighing witness credibility. The city did not file a response. The superior court commissioner held that the city's failure to respond was a "confession of error". Rule 38, Ariz. R. Proc. Civ. Traffic, only sets time limits for the state's response. That section reads: "The appellee's memorandum shall be filed within twenty days after service of appellant's memorandum." However, failure to respond will subject an appellee (city) to "confession of error" analysis if -- and only if -- a debatable issue has been raised which also appears in the record. An appellate court cannot re-balance conflicting credible testimony where the record is sufficient. Reasserting the same factual argument does not create a debatable issue.

State v. Carnegie,
136 Ariz. Adv. Rep. 38, (Div. 1, 4/13/93)

Defendant was sentenced on two counts of fraudulent schemes and artifices. The court, during sentencing, refused to give him credit for the day he spent in jail while being booked. Defendant spent less than 12 hours in jail during this time. Defendant is entitled to get credit for the time he spent in jail while being booked. A.R.S. § 13-709(B) states that:

All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such an offense shall be credited against the term of imprisonment otherwise provided by this chapter.

This statute does not distinguish between whole day and a half day. Defendant must receive a whole day's credit regardless of how much time he spent during booking.

[Represented by Spencer D. Heffel, MCPD.]

Edwards v. Arizona Department of Transportation
136 Ariz. Adv. Rep. 40 (Div. 1, 1993)

Defendant was arrested for driving under the influence of intoxicating liquor. He refused to take the breath test after being advised of the implied consent law under A.R.S. § 28-691. The officer did not inform defendant that he may be eligible for restricted driving privileges after 30-days' suspension pursuant to A.R.S. § 28-694(B). Defendant's license was suspended.

(cont. on pg. 14)

Defendant claimed that he was deprived of due process because the warnings read to him by the officer were legally incorrect in that a person who tests higher than the legal limit will not necessarily have his license suspended for a full 90 days. Defendant also claimed that the deficient warnings made his decision to refuse not knowing and voluntary, and he relied on the deficient warnings to his detriment.

A.R.S. § 28-691(B) is not legally incorrect. Due process does not require an officer to advise a DUI suspect of all possible eventualities under the implied consent statute. The warning given sufficiently sets forth the likely consequences of refusal. Section 28-694(B) provides an exception to the suspension if the violator qualifies, but it does not affect the presumption itself. Due process does not require that the law enforcement officer explain the nuances of A.R.S. § 28-694.

State v. Arnoldi
136 Ariz. Adv. Rep. 42 (Div. 2, 1993)

Defendant was convicted of 20 sexual offenses including child molestation, sexual abuse, sexual conduct, attempted sexual conduct, and kidnapping. These offenses involved his minor daughters and were committed on five separate occasions. Defendant denied any molestation. The defendant was sentenced to 18 consecutive life sentences and an additional 32 consecutive years.

Defendant claims he was not competent to stand trial because he could not competently assist his attorney. The testimony of the state's expert, combined with the court's observation of defendant in a prior hearing, constitute reasonable evidence that supports the court's finding of competency.

Defendant claims the trial court violated A.R.S. § 13-116 by sentencing him to consecutive sentences for single acts that are punishable under different statutes. Defendant was sentenced consecutively on all counts for closely related sex acts committed at the same time. Additionally, the court imposed consecutive sentences for the kidnapping and the sexual charges as to two of the daughters.

The determination for the court was whether the crimes with each daughter were "single acts" precluding consecutive sentencing. The "identical elements" test is still used to make this determination. However, additional factors are now examined as well. The facts supporting each crime will be considered separately, subtracting the evidence necessary to convict on the "ultimate charge." If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible. The next consideration is to determine if it was "factually impossible" to commit the ultimate crime without also committing the secondary crime. If factually impossible, then the conduct is more likely a single act. The final consideration is to determine if conduct in the second crime caused the victim any additional risk of harm beyond that inherent in the ultimate crime. If so, then the court should find multiple acts. Single acts require concurrent sentences, while multiple acts may support consecutive sentences. Comparing sexual conduct and child molestation on these facts, touching and penetration are not identical elements. It is factually impossible to penetrate without touching, and there is no additional harm between

touching and penetration. The consecutive sentences for sexual conduct (intercourse) and child molestation are modified to run concurrently.

Comparing kidnapping with the sexual offenses, the elements of the offenses are not identical. The defendant could not have engaged in these sexual offenses without restraining the victims. In one case, the facts of the kidnapping show no additional risk of harm. Concurrent sentences were required. In the other case, the facts were more egregious, an additional risk of harm was present, and consecutive sentences were permissible.

The state contends that consecutive sentences for both kidnappings are required because A.R.S. § 13-604.01 controls over A.R.S. § 13-116. The older statute, A.R.S. § 13-116, is paramount in the statutory scheme of sentencing. Violation of A.R.S. § 13-116 requires concurrent sentences despite other statutes.

Defendant claims that any consecutive sentences violate double jeopardy. Defendant's argument is based upon out-of-state cases expressing a view previously rejected in Arizona.

Defendant claimed the judge erred by not giving definitions to the jury regarding "sexual intercourse" or "private parts." There was no objection at trial. The court's failure to read definitions did not deprive the defendant of a right essential to his defense. No fundamental error occurred.

The defendant claimed the trial court improperly enhanced sentences with prior convictions for offenses committed on the same occasion under A.R.S. § 13-604(H). Defendant committed several offenses on five separate occasions. Each occasion involved a single victim and a continuous series of acts. Enhancement of sentences with "priors" for acts committed on the same occasion violates A.R.S. § 13-604(H). The matter is remanded for resentencing. ^

Editor's Note: A special thanks to Troy Landry, Jeremy Mussman, Gabriel Valdez, and Scott Wolfram for their help with this month's Advance Reports.

For The Record:

Our Appeals Division is a great (and perhaps unsung) resource for people with questions on appeals. A "duty attorney" is on call every weekday for anyone with a question in this field. Our Appeals Division has answered numerous queries from attorneys and judges around the state. One recent issue was whether a client who has an appeal pending must pay probation fees and restitution in the meantime. (The answer: "Yes" to fees; "No" to restitution [Rule 31.6].) If you have a question, you may call the duty attorney at (602) 506-8220. ^

OFFICE RESOURCES ON POLICE PROCEDURES

By Bob Doyle

Police departments are paramilitary organizations with strict rules of operation. Most departments document those rules by issuing "operations orders" or "policy manuals." Over the years, various people in our office have obtained different manuals from a wide range of agencies. We are currently gathering and cataloging everything we can find. In addition to publishing the current list, we are also making sure that every trial group lead investigator has a full set of everything we find. The training director also has a full set. If you have any similar materials, please call Bob Doyle at 506-8316. Any new materials received will be announced through an updated list in this newsletter.

Phoenix Police Department		
Title	Order #	Date Issued/Revised
General Investigative Procedures	C-5	February '91
Reports	E-2	August '87
Information Source Policy and Procedures	A-1.13	April '91
Informant Policy and Procedure -- Drug Enforcement Bureau	B-4	July '91
Search and Seizure	B-5	April '91
Search Warrant Procedures -- Drug Enforcement Bureau	B-5	July '91
Prisoners	C-7	February '91
Arrest	B-1	February '91
Training Bureau Lesson Plan -- Interview and Interrogation	5.4	April '91
Radio Codes	33	February '91
Use of Force	A-8	June '91
Training Bureau Lesson Plan -- Use of Force	3.7.01 8.4.0	February '92
Discipline, Misconduct and Investigation of Citizen Complaints	B-2	February '91
Barricade/Hostage Negotiation Plan	G-1	February '91
Traffic Accident Investigation	F-1	February '91
Citations and Repair Orders	F-2	May '92
City Traffic Codes	F-3	February '91
Driving While Under the Influence	F-4	February '91
State Traffic Code	F-5	February '91
Traffic Patrol and Enforcement	F-6	February '91
Wreckers	F-7	February '91
Practical Guide for Dealing with Gangs		
Gang Information		
Crime Detention Laboratory Manual		

Scottsdale Police Department		
Technical Investigation Procedure Manual:	Arson, Assault, Bombing, Burglary, Document Exams, Hit and Run, Murder, Narcotics Cases, Robbery, Sex Crimes, and Evidence Collection.	

Glendale Police Department		
Title	Order #	Date Issued/Revised
Property/Evidence	10.1/60.400	June '81 and July '91

Arizona Department of Public Safety		
Title	Order #	Date Issued/Revised
Pursuit Operations	31.01	
Use of Force	22.00	July '90
DUI Training Manual		
Intoxilyzer 5000 Training Manual		

Arizona Department of Transportation		
Title	Order #	Date Issued/Revised
Motor Vehicle Division Handbook for Requesting Motor Vehicle Records		July '90

Arizona Law Enforcement Officer Advisory Council (ALEOAC)		
Title	Order #	Date Issued/Revised
Manual		1986
Report Writing Manual		September '89

Other Agencies		
Title	Order #	Date Issued/Revised
United States Drug Enforcement Agency Handbook		
United States Bureau of Alcohol, Tobacco and Fire Arms-Conspiracy	#5128-01	January '73
National Law Enforcement Institute Forensic Evidence Collection		
Los Angeles Police Department -- Homicide Investigation		

MEDICATIONS COMMONLY USED IN PSYCHIATRY

by Dr. Jack Potts

Most psychiatric medications have very little abuse potential because of the uncomfortable side effects and their long half-life (time related to metabolism of active compounds to inactive compounds). (Shorter half-life drugs often have a faster onset and more of a "Kick.") *Change* in medications is most often an issue in incompetency. Starting on a new drug with rapid increases can often lead to increased sedation, something which time and "tolerance" can minimize. Also, *abruptly* stopping a routine medication (given in therapeutic amounts) can cause an unwarranted increase in symptoms (be it sleeplessness, anxiety, or hallucinations) which could interfere with competency. A good rule of thumb is that if a patient/defendant has been on prescribed medication for more than a few days, cognitive impairment should not be a problem.

For a defendant in custody within Maricopa County, Dr. Leonardo Garcia-Bunuel, myself, or the present Clinical Director of Medicine, Dr. Gale Steinhauer, can be reached almost immediately to give a "mini-consult" (with a patient's permission). We are available through the Maricopa County Sheriff's Office paging system or 256-5302.

The following is a list of medications commonly used in psychiatry that criminal law practitioners should be familiar with:

I. Antipsychotic (Neuroleptic) Medications:

All of these are *primarily* indicated for treatment of major mental illnesses that are accompanied by psychosis. They have little, if any, abuse potential and all have major side effects which can often be ameliorated by other medications. *All* are equally effective in treating psychosis; their differences are in side effects and potency per milligram.

Medication	Potency
Thorazine -- chlorpromazine	Granddaddy of medications, quite sedating
Haldol -- haloperidol	Very potent but less sedating
Navane -- thiothixene	Similar to Haldol
Prolixin -- fluphenazine	Similar to Haldol
Loxitane -- loxapine	Relatively sedating
Stelazine -- trifluoperazine	Similar to Haldol
Mellaril -- thioridazine	Quite sedating, other side effects, less than with Haldol
Serentil -- mesoridazine	Relatively sedating

II. Antidepressive Medications:

Indicated for use in treating major depressions and related states. Virtually no abuse potential because of long half-life and side effects. Most have initial sedating effects; however, tolerance builds quickly and defendants on these medications usually need to remain on them at certain therapeutic doses for months. Usually doses are started relatively low and competence is not an issue. Smaller doses (less than therapeutic levels) are often used to help individuals sleep.

Medication	Usual Therapeutic Levels Per Day
Flavil -- amitryptiline	150 mg -- 300 mg
Tofranil -- imipramine	150 mg -- 300 mg
Sinequan -- doxepin	150 mg -- 300 mg
Desyrel -- trazodone	200 mg -- 600 mg
Pamelor -- nortryptiline	75 mg -- 150 mg
Norpramin -- desipramine	100 mg -- 200 mg
Asendin -- amoxapine	200 mg -- 400 mg

III. Antianxiety (anxiolytic) Medications:

These are usually of the benzodiazepine class (as is Valium). *All* have abuse potential with the faster acting medications (with a shorter half-life, i.e., metabolize faster) possibly creating withdrawal problems. Not usually indicated for *major* mental illness. Can interfere with competency if a defendant has only been on them for a relatively brief period of time. Indicated for anxiety states and usually used for less than 30--90 days.

Medication	Life
Valium -- diazepam	Long half-life
Librium -- chloriazepoxide	Long half-life
Xanax -- alprazolam	Short half-life
Ativan -- lorazepam	Short half-life
Restoril -- temazepam	Short half-life
Tranxene -- clorazepate	Medium-long half-life

IV. Other Psychiatric Medications:

These usually have minimal side effects (such as drowsiness) which could interfere with competency.

Medication	Effects
Cogentin -- benztropine	Used to treat side effects of antipsychotic medications.
Artane -- trihexphenidyl	Similar to Cogentin.
Symmetrel -- amantadine	Similar to Cogentin.
Lithium --	Mood stabilizing medication primarily used to treat Manic-depressive illness.
Tegretol -- carbamazepine	Anti-seizure medication used as "second-line" choice for Manic-depressive illness.
Inderal -- propranolol	Antihypertension (blood pressure) medication with uses for Lithium side effects and some impulse/aggressive behaviors in children/adolescents.



TRAINING AT A GLANCE

DATE	TIME	TITLE	LOCATION
Fri., October 22	8:00 a.m. - 5:00 p.m.	<i>"Tell Me No Lies: Handling Confession Cases"</i>	Holiday Inn Crowne Plaza
Wed., October 27	9:30 a.m. - 11:00 a.m.	<i>Support Staff Training "Our Juvenile Justice System"</i>	MCPD Training Facility
Wed., November 10	10:00 a.m. - 6:00 p.m.	<i>"Art of Advocacy/Act of Communication for Criminal Defense Attorneys"</i>	MCPD Training Facility
Wed., November 17	(to be announced)	<i>Criminal Code Revisions Telecast in conjunction with Arizona Supreme Court, et al.</i>	(To Be Announced)
Wed., December 01	1:30 p.m. - 3:30 p.m.	<i>"The Changing Criminal Code: A Support Staff Primer"</i>	MCPD Training Facility
Fri., December 17	(to be announced)	<i>Criminal Code Revisions (to be titled)</i>	Board of Supervisors Aud.