

# for The Defense

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Maricopa County Public Defender's Office

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Maricopa County Public Defender

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## Jury Instruction--Getting the Jury to Vote Your Way

By Carol Carrigan

After all that effort you've put into trying the case, wouldn't it be nice if the jury voted your way? Proper jury instruction may mean the difference between conviction and acquittal. However, you must make specific requests and objections, and make sure that they are in the record. In this area, "there's no harm in asking" becomes "if you don't ask specifically and make sure it is in the record, you have not asked at all." Parties must comply to the letter with Rule 21.3(c) which mandates that:

No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof or to the submission or the failure to submit a form of verdict unless the party objects thereto *before the jury retires* to consider its

verdict, stating *distinctly the matter* to which the party objects and the grounds of his or her objection.

Merely repeating a request for or objection to an instruction without an explanation as to why the instruction is necessary in the case or how the instruction is flawed amounts to no objection at all. *State v. Guerrero*, 58 Ariz. 421, 120 P.2d 798 (1942).

The requirements of Rule 21.3(c) make it necessary, therefore, to have a meaningful, recorded settlement conference at which specifics are set forth in the record. Effective representation requires nothing less even where there is a local "custom" to discuss in chambers with no court reporter present with an insufficient record made subsequently. Consider Justice Feldman's comments in his concurring opinion in *State v. Bay*, 150 Ariz. 112, 722 P.2d 280:

No local "customary procedure" can repeal the rules of evidence nor the legal requirements created by the decisions of this Court. . . . I am not unaware of the pressures which may exist from time to time in particular areas to "get along by going along." However, the difficult job of a trial lawyer occasionally makes it necessary to plant one's feet and protect a client's interest by making a record even if such obduracy defies custom.

Settlement conferences should be made on the record in the first instance and there should be enough specificity that the reviewing court may understand the objection or argument along with the language being discussed (reference to instruction numbers without more may render the discussion meaningless).

Be prepared with the correct law. If your instruction is refused, tell the court what law entitles the defendant to the instruction. If you object to the giving of an instruction, inform the trial court what law prevents it; e.g., not supported by the evidence, incorrect summary of the statute. If the proposed instruction is a misstatement of law or misleading, give the trial court an absolutely correct statement of the law. A statement of the law which is only close gets no cigar.

You are entitled to instruction on any theory reasonably supported by the evidence.

Ask for instruction on any term having a common but different meaning; e.g., "negligent."

(cont. on pg. 2)

Be aware that Article 6, Section 27 of the Arizona Constitution prohibits judges from commenting on the evidence, e.g., what is a material fact. Object to any instructions which constitute comments on the evidence.

Ensure that the court complies with Rule 19.1(a)--"Order of Proceedings." The jury should not retire to deliberate with the last words they hear being those of the prosecutor. The last words they hear should be those of the impartial arbiter. Therefore, instructions should be given after, not before, final argument. The rule provides that you must agree to any other method of proceeding.

Be alert to the opportunity to request additional instructions in light of the prosecutor's final argument.

Be aware that the "new" Arizona RAJIs are not written in stone. However, it is difficult to get an appellate court to decide that any of these instructions constitute fundamental error though they may be flawed. Meaningful objection at the trial level would result in relief. Following are suggestions as to objections to the new RAJIs.

## I. STANDARD CRIMINAL JURY INSTRUCTIONS

### STANDARD CRIMINAL 5

#### *Presumption of Innocence - Reasonable Doubt*

The proposed definition of the term "reasonable doubt" which excludes possible doubt from reasonable doubt and equates possible doubts with imaginary doubts should be deleted.

## FOR THE DEFENSE

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**SOURCE:** *Cage v. Louisiana*, 498 U.S. 39, 11 S. Ct. 328, 112 L. Ed. 2d 339 (1990); *Sullivan v. Louisiana*, 508 U.S. \_\_\_, 113 S. Ct. 2078 (1993).

**NOTE:** The question whether the giving of this definition is fundamental error is currently before the Arizona Supreme Court in *State v. Oscar C. Chavarria*.

### STANDARD CRIMINAL 13

#### *Non-Defense to Criminal Liability -- Absence of Other Participant*

The final sentence of this instruction: "The only matter before you for your decision is the guilt or innocence of (name of defendant)" is defective. The sentence should either be deleted or the following sentence substituted: "The only matter for you to decide is whether the State has proven the case against \_\_\_\_\_ (name of defendant) beyond a reasonable doubt."

**SOURCE:** *State v. Portillo*, 157 Ariz. Adv. Rep. 7 (Div. One filed Jan. 25, 1994).

**NOTE:** A defendant is not required to prove he is innocent. The jury's only determination is whether the State has proven the case against the defendant beyond a reasonable doubt.

### STANDARD CRIMINAL 14

#### *Entrapment*

The final sentence of the instruction: "If you determine that the defendant was entrapped, you must find the defendant not guilty" should be deleted and the following sentence substituted therefor: "If you cannot determine beyond a reasonable doubt that the defendant was not entrapped, then you must find the defendant not guilty."

**SOURCE:** *State v. Burciaga*, 146 Ariz. 333, 705 P.2d 1384 (App. 1985); *State v. Bean*, 119 Ariz. 412, 581 P.2d 257 (App. 1978); A.R.S. § 13-115(a).

(cont. on pg. 3)

**NOTE:** It is not the defendant's responsibility to introduce reasonable doubt as to an element of a crime, rather, it is the State's responsibility to prove the element beyond a reasonable doubt. *State v. Mincey*, 130 Ariz. 389, 398, 636 P.2d 637, 646 (1981), *cert. denied*, 455 U.S. 1003 (as cited in *Hunter* at 142 Ariz. 90).

STANDARD CRIMINAL 17

*Intention Inferred From Voluntary Act*

**NOTE:** To avoid jury confusion, this instruction should not be given when an affirmative defense such as entrapment or self-defense is raised.

STANDARD CRIMINAL 22

*Lesser-Included Offense (which now requires unanimous acquittal of the greater offense before the lesser offense can be considered)*

The following instruction should be substituted:

The crime of \_\_\_\_\_ includes the less serious crime(s) of \_\_\_\_\_. You may find the defendant guilty of the less serious crime if the State has failed to prove the more serious crime beyond a reasonable doubt and if the State has proved the less serious crime beyond a reasonable doubt.<sup>1</sup>

\_\_\_\_\_  
**SOURCE:** *United States v. Johnnie T. Warren*, 984 F.2d 325 (9th Cir. 1993).

<sup>1</sup>The Arizona Supreme Court followed the minority view in *State v. Wussler*, 139 Ariz. 428, 679 P.2d 74 (1984); however, the considerable drawbacks (including the increase in hung juries) of requiring unanimity before consideration may be given to a lesser are set forth in Justice Feldman's concurring opinion.

STANDARD CRIMINAL 27

*Mere Presence*

The following mere presence instruction should be included in the Arizona Criminal RAJIs; see *State v. Portillo*, 157 Ariz. Adv. Rep. 7 (Div. One filed Jan. 25, 1994).

Guilt cannot be established by the defendant's mere presence at a crime scene or mere association with another person at a crime scene. The fact that the defendant may have been present does not in and of itself make the defendant guilty of the crimes charged.

**SOURCE:** *State v. Portillo*, 157 Ariz. Adv. Rep. 7 (Div. One filed Jan. 25, 1994).

STANDARD CRIMINAL 28

*Identification*

The following identification instruction should be included in the Arizona RAJIs:

Before returning a verdict of guilty, you must be satisfied beyond a reasonable doubt that the in-court identification of the defendant was independent of the previous pre-trial identification.

\_\_\_\_\_  
**SOURCE:** *State v. Dessureault*, 104 Ariz. 384, 453 P.2d 955 (1969); *State v. Watson*, 134 Ariz. 1, 653 P.2d 351 (1982).

**NOTE:** If requested, the court must instruct the jury to make this identification determination. *Dessureault*.

II. STATUTORY CRIMINAL JURY INSTRUCTIONS

4.13

*Justification Defense and Acquittal*

The second paragraph:

"If you decide that the defendant's conduct was justified, you must find the defendant not guilty [of the crime of \_\_\_\_]" must be deleted.

This is precisely the language which was found to be fundamental error in *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984). This sentence implies that the jury must "decide that the defendant's conduct was justified" when the converse is true: the jury must acquit unless the State proves beyond a reasonable doubt that the defendant's conduct was not justified.

The following instruction should be substituted for RAJI 4.13:

You have heard evidence regarding the issue of [self-defense] [justification]. The State has the burden of proving beyond a reasonable doubt that the [defendant did not act in self-defense] [defendant's conduct was not justified]. You must find the defendant not guilty unless the State proves beyond a reasonable doubt that the [defendant did not act in self-defense] [defendant's conduct was not justified].

(cont. on pg. 4)

\_\_\_\_\_  
**SOURCE:** A.R.S. § 13-105(6)(b); *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984).

10.01

*Attempt*

The instruction as given omits the requirement of A.R.S. § 13-1001(A) that:

"A person commits attempt if, *acting with the kind of culpability otherwise required for commission of an offense*, such person" engages in the conduct described in the three paragraphs of the instruction.

In order to correctly state the law, the first sentence must be amended as follows:

The crime of attempt to \_\_\_\_\_ requires proof that the defendant, acting with the kind of culpability otherwise required for commission of \_\_\_\_\_:

1. Intentionally engaged in conduct which would have been a crime if the circumstances relating to the crime were as the defendant believed them to be; *or*

2. Intentionally (committed) (failed to commit) any act which was a step in a course of conduct which the defendant (planned would end) (or believed would end) in the commission of a crime; *or*

3. Engaged in conduct intended to aid another person to commit a crime, in a manner which would make the defendant an accomplice, had the crime been committed or attempted by the other person.

\_\_\_\_\_  
**SOURCE:** A.R.S. § 13-1101(A).

14.06

*Sexual Assault*

The instruction should be modified in accord with the old MARJIs which properly focused on both the victim and the defendant and whether the defendant was aware that there was no consent. The definition of "without consent" should be modified as follows:

"Without consent" means that

[the defendant was aware or believed that the other person was coerced by the [immediate] [threatened] use of force against a person or property.]

[the other person could not consent because of [a mental disorder] [drugs] [alcohol] [sleep] [\_\_\_\_\_], and the defendant knew or should reasonably have known about the other person's condition.]

[the defendant was aware or believed that the other person was intentionally deceived about the nature of the act.]

[the defendant was aware or believed that the other person was intentionally deceived to believe that the defendant was [his] [her] spouse.]

\_\_\_\_\_  
**SOURCE:** MARJI

III. NON-CRIMINAL CODE JURY INSTRUCTIONS

28.691(A)

*Refusal To Submit To Test*

The third paragraph of this instruction should be deleted and the following paragraph substituted therefor:

A motorist is entitled to consult with his attorney if such consultation does not interfere with the investigation.

\_\_\_\_\_  
**SOURCE:** *State v. Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989); *State v. Kunzler*, 154 Ariz. 568, 744 P.2d 669 (1987).<sup>^</sup>

\_\_\_\_\_  
**"Approved" Entrapment Instruction  
May Shift Burden of Proof**

by Garrett Simpson

Trial counsel may want to specifically object on the record at the jury instruction settlement conference to the "conditionally approved" entrapment instruction set out in R.A.J.I. Criminal Standard 14 [". . . if you determine that the defendant was entrapped, you must find the defendant not guilty."] because the instruction arguably shifts to entrapped citizens the burden of proving their innocence.

(cont. on pg. 5)

When a defendant raises entrapment, "the state has the burden of proof of establishing beyond a reasonable doubt that the accused was not entrapped," *State v. Burciaga*, 146 Ariz. 333, 335, 705 P.2d 1384 (App. 1985); *State v. Bean*, 119 Ariz. 412, 581 P.2d 257 (App. 1978); A.R.S. § 13-115(a). It is arguably reversible to tell the jury that it has to determine the client was entrapped, before it may acquit, when the law actually is that the citizen must be acquitted if there remains a question whether he was entrapped, *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966); *Burciaga*; *State v. Boccelli*, 105 Ariz. 495, 497 (1970); A.R.S. § 13-115(a). There is an immense difference between these two propositions. Remember,

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determine the client was entrapped, before it may acquit, when the law actually is that the citizen must be acquitted if there remains a question whether he was entrapped, *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966); *Burciaga*; *State v. Boccelli*, 105 Ariz. 495, 497 (1970); A.R.S. § 13-115(a). There is an immense difference between these two propositions. Remember,

[I]t is not the defendant's responsibility to introduce reasonable doubt as to an element of a crime, rather, it is the state's responsibility to prove the element beyond a reasonable doubt, "*State v. Mincey*, 130 Ariz. 389, 398, 636 P.2d 637, 646 (1981), cert. den., 455 U.S. 1003 [as cited in *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984), at 142 Ariz. 90].

You might want to suggest the instruction to be re-cast to read, "... if you cannot determine beyond a reasonable doubt that the defendant was not entrapped, then you must find the defendant not guilty." The instruction in *Hunter* was an approved R.A.J.I., too, so don't let that discourage you. ^

## Immigration Law and the Public Defender

by Carol Cotera

### I. The Present State of U.S. Immigration Laws

Congress makes our immigration laws. They derive their authority from several of the enumerated powers in the Constitution as well as case law. Until 1917, there were some limitations on immigration. After 1917, the law has become increasingly restrictive to the point that today it is impossible to immigrate absent some familial connection already established in the United States. For the purposes of your position as public defenders, concern yourselves with only two important dates: 1986 and 1990.

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### A. IRCA - A One-Time "Flush" of the System

In 1986, Congress sought to address the problem of undocumented aliens residing in the United States. Even though the quota system and waiting lists were long established, Congress decided to "flush" the system and see how

many undocumented aliens were actually living in the United States under color of law. They passed the Immigration Reform and Control Act of 1986 (IRCA), also known as Simpson-Rodino, Pub. L. 99-603, 100 Stat. 3359. This bill had two major provisions known as "Amnesty" (Section 245A) and "SAW" (Section 210). To qualify for Amnesty, aliens only had to prove that they have been living in the U.S. since prior to January 2, 1982 continuously and after a three-step process they would receive legal permanent residence. The SAW program was a special deal for the heavy agriculture states because they were concerned about the availability of field workers. Pursuant to this program, any person (man, woman, or child) who performed at least 90 man-days of field work during the period from May 1, 1985 - May 1, 1986 would also be granted permanent resident status after a two-step process.

What IRCA created was a nightmare of bureaucracy, forms, misinformation, fees, and over four million new legal residents. Many of your clients are either new resident aliens themselves or they are related to one of the new resident aliens. They are primarily Hispanic, low-income, and sometimes monolingual in Spanish. The IRCA law was so unusual from regular immigration procedure, that many people have the misconception that it reflects the trend in the law and that there will be another "special program" someday soon to give another group of people a fast and easy way to become permanent residents. These people are sadly mistaken, because the trend in the law is toward *more* restrictive rules as is evidenced in the new Immigration Act of 1990.

### B. IMMACT 90 - Follow-Up to IRCA "Everyone Get in Line"

The Immigration Act of 1990 (IMMACT 90) was signed into law on November 29, 1990 and became Public Law No. 101-649, 104 Stat. 4978. This act is the most sweeping reform of immigration law since the 1952 McCarran-Walter Act. What this law does is reform all of the numerical quotas for the various preferences for immigration,

change business visa procedures and possibilities, and significantly tighten the law with relation to criminal aliens.

(cont. on pg. 6)

For you as public defenders, just remember that IMMACT 90 changed almost every area of legal immigration and greatly affected criminals. We will go into more detail later in the presentation regarding some of the specific provisions affecting criminals such as new definition of "aggravated felony" and retroactive inclusion of convictions for state offenses analogous to the federal offenses enumerated in §101(A)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(A)(43). One important point to remember about IMMACT 90 is that the waiting lines for legal immigration are longer and slower for Mexican nationals. New legal residents, either Amnesty or SAW, must wait between 8-10 years before they can legally immigrate their immediate family members. This means, for example, that a man may not bring his wife and minor children into the U.S. even though he is a legal resident. For this reason, preservation of lawful status is imperative.

The other major change in IMMACT 90 is elimination of all Judicial Recommendations Against Deportation (JRADS) effective November 29, 1990. It applies to all convictions entered on or after the effective date of the Act. I will discuss JRADS further in this presentation.

## II. Public Defender Role and Duty Toward Alien Clients

As public defenders, your duty to represent your clients is established by both federal and state law. The way in which the issue of your duty to inform an alien client about the immigration consequences of a conviction arises is under Rule 17.1(b) of the Rules of Criminal Procedure on voluntariness of pleas of guilty. The case law in Arizona is limited to two cases. As we examine these cases, bear in mind that there is also a substantial body of federal case law about the severity of deportation as a punishment and that a California statute exists which broadens the duty to inform about immigration consequences in California.

In *State v. Rodriguez*, 17 Ariz. App. 553, 499 P.2d 162 (1972) appellant had been convicted of possession of marijuana for sale, fined \$1000, and placed on probation. After discovering that his conviction would result in his deportation to Mexico, appellant sought to modify his sentence, withdraw the guilty plea, and vacate the conviction on the ground that he was not informed that the plea could result in his deportation from the United States. The Arizona Court of Appeals held that deportation was a collateral consequence of a conviction and that no duty to inform arose.

Fifteen years later, the Arizona Court of Appeals revisited this issue. In *State v. Vera*, 159 Ariz. 237, 766 P.2d 110 (1988) the issue was whether a plea of guilty of arson of an occupied structure was rendered involuntary because the trial court failed to advise an alien defendant about the immigration consequences of his plea. Defendant claimed that the trial counsel did not inform him of possible deportation. The decision examined a Florida case, *Edwards v. State*, 393 So. 2d 597

(Fla. App. 1981) that concluded "although deportation was a collateral, rather than direct, consequence of a plea, the severity of the sanction rendered it a 'unique collateral consequence' justifying special treatment." Despite this case, the Arizona Court of Appeals sided with the greater body of case law that follows the analysis in *Rodriguez* and upheld the Trial Courts' acceptance of the guilty plea. In a special concurrence, Judge Fidel noted that "whether deportation can be dismissed as merely a 'collateral consequence' which need not be anticipated by a knowing pleader or whether it is so important a consequence that its risks must be explained is, in my view, so significant a question as to require eventual reexamination of *State v. Rodriguez*."

Although these Arizona cases do not establish an affirmative duty to advise about immigration consequences of convictions, the federal cases that have created the bulk of an alien's right to fundamental due process consistently hold that deportation is "exile," "banishment," and one of the severest and most permanent of penalties. *Woodby v. INS*, 385 U.S. 276 (1966); *Barrera-Leyva v. INS*, 637 F.2d 640 (9th Cir. 1980); *Ramos v. INS*, 695 F.2d 181 (5th Cir. 1983).

The Code of Professional Responsibility discusses a lawyer's duty to inform his/her client in ER 1.4(b): "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." For most alien clients, foremost in their minds is their immigration status. Oftentimes, they have risked their lives to come to the United States and spent their life savings in the process. Therefore, this area cannot be overlooked in the criminal representation process.

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(cont. on pg. 7)

Practically speaking, your clients have no other means to learn about the immigration consequences of their conviction. There are no public defenders for aliens in deportation hearings. What they are given is a list by the INS of social service agencies that contains some possible low-cost services. In Maricopa County, there are four agencies on the list. Of those four, only two have attorneys. The only other alternatives for aliens are a few private attorneys (about 12-14) who will accept criminal aliens cases, usually at a substantial fee. Therefore, for the majority of alien defendants, you will be their only attorney and consequently, their only resource for advice about the immigration consequences of their conviction.

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Once granted, a JRAD prevented the Immigration and Naturalization Service from using the conviction as a basis for deportation. JRAD's were only effective for crimes considered to be "crimes of moral turpitude" which would be a basis for deportation under § 212(a)(2)(A)(i) (I) & (II) of the INA. JRAD's never applied to drug convictions. Section 505 of the Immigration Act of 1990, Pub. L. 10-649 (104 Stat. 4978)

eliminates all JRADs. The effective date is November 29, 1990. There had been some discussion about application of this law retroactively, to include JRADs granted prior to the date of enactment. Presently, the position of the Immigration and Naturalization Service is that all JRADs entered prior to the date of enactment of IMMACT 90 will still be effective (see Memorandum of February 4, 1991 of INS regarding IMMACT No. 38, supplement #5).

### III. Analyzing Your Case: Low, Medium, or High Risk Assessment

The best approach for analyzing your case is to perform a risk assessment. This means that you must follow the steps I've outlined in the chart below (see Page 8) starting with a determination of the type of status that your alien has. The lowest risk cases, meaning that deportation is almost guaranteed no matter what you do, are aliens who are undocumented or are non-resident visitors or students. For these people, they have no status to lose and the effect of their criminal behavior is to essentially "turn them in" to the INS. At more moderate risk level are legal residents who commit misdemeanor or less serious crimes. There are protections in the immigration laws for mild offenders. Nevertheless, you should analyze the case for immigration consequences just to make sure that the alien will not lose his/her status. The most risky cases are the new residents and long-time residents who commit serious crimes. These are the most at risk because the alien has the most to lose. He/she has lived in the United States a substantial amount of time and probably has never lived anywhere else. The law becomes very subtle with regard to relief for these people, therefore, creative plea bargaining may make all the difference. For cases which you determine to be in the high risk category, you may consider an expert opinion before recommending any plea. Also, with so much to lose, these may be cases where going to trial would be the best alternative.

*Editor's Note:* Carol Cotera formerly worked at the Friendly House providing services to immigrants. She presently is on a leave of absence from Community Legal Services. This article was originally prepared for a seminar sponsored by our office through the Public Defender Training Fund. ^

### IV. Elimination of JRADS

Prior to the Immigration Act of 1990, there was device known as a Judicial Recommendation Against Deportation (JRAD) that allowed a sentencing judge to recommend that an alien not be deported as a result of his criminal activity.

## ANALYZING YOUR CASE

Determine Status	Examine Document	Type of Crime	Questions to Ask
Undocumented	Recent Entrant	Felony (i.e. Drugs, Violence) <b>(LOW)</b>	1. Have you been here greater than seven years? 2. Are others in your immediate family legal? 3. Is this your only problem with the law? 4. Have you or someone else made any type of applications? 5. Would your life be threatened if you returned to your country? * If answer to any of these is yes - <b>HIGH RISK</b>
	Longer Residence Plus Family Ties	Misdemeanor or Less Serious Felony <b>(MED)</b>	
Newly Legalized Alien	Card Expired	Rejected or Doesn't Know What Happened <b>(LOW TO MED)</b>	
	Green Strip or Determine Date of Adjustment	Examine Date of Lawful Residence <b>(HIGH)</b>	
Long-Time Legal Resident	Examine Card and Determine Date of Adjustment	Felony <b>(VERY HIGH RISK)</b>	
		Misdemeanor - Less Risky, But Use <b>Caution</b>	
Non-Resident Visitor or Student	Examine Passport	Deportation Inevitable Unless Immediate Family Ties <b>(LOW)</b>	

## **TAKING THE JUDGE TO TASC: Some Practice Considerations**

By Christopher Johns and Terry Bublik

### *African-Americans Treated Differently?*

When a group of Scandinavian researchers recently went to Minneapolis to study U.S. drug policy, they wanted to know why two approaches were being used --- medical treatment for affluent whites and the criminal justice system for blacks.

The statistics are alarming. Nationwide, African-Americans are four times as likely as whites to be arrested on drug charges, despite the fact that studies show that blacks do not use drugs more than whites.

Maricopa County's TASC program's own statistics show a comparable trend in Arizona. Blacks may be less likely to be offered a treatment option, and their relative poverty compared to whites means that they often cannot "buy" their way out of charges as affluent whites can.

Information about ethnicity of clients for TASC shows that overall 67.88 percent of those in the program between 1989 and 1992 were white. During that same period, Hispanic participation was 22.5 percent, and blacks were just 7.9 percent. Asians and Native-Americans comprised 1.2 and 0.5 percent respectively. (See chart on Page 11.) The low participation by blacks, considering that DOC's prison population is almost 18 percent African-American, seems significant. The black population for Maricopa County is approximately 4.5 percent and Arizona has a total African-American population of about 3 percent.

When it comes to offenses such as cocaine, narcotics and drug fraud, the disparity is even greater. Only 4 percent of black males participated in the program. In fact, TASC's own composite of their typical participant is a white male born between 1964 and 1968. The person also is most frequently employed full-time and makes over \$14,000 annually.

### *Make An Equal Protection Argument*

One consideration for practitioners is simply to insist on TASC as one option for African-American clients in the plea negotiations' stage even if the state has not raised it as a possibility or claims that the client does not qualify. If TASC is not offered, a record should be made at the time of

entering into the plea agreement to preserve a possible future post-conviction relief claim for the client. Additionally, providing the statistical information and challenging the evaluation criteria for the client may result in a TASC offer or at least provide some leverage for a better deal.

An argument might even be made that since drug laws are disproportionately enforced against blacks, the "first-time felony drug offender" requirement is inherently discriminatory. In places like Minneapolis, for example, blacks are actually 22 times more likely to be arrested for a drug offense than a white person. Likewise, leverage should be applied on economic disparity grounds of participation. The bottom line is that blacks simply do not have the same income and are less likely to take advantage of the program.

The legal argument is that the program and its administration by the Maricopa County

Attorney's Office violate equal protection of the law. As most practitioners know, equal protection is "essentially a direction that all persons similarly situated should be treated alike." An equal protection violation may be shown by establishing that a facially neutral statute [rule or program] is applied in a racially discriminatory way. And, under some circumstances, a discriminatory inference may be drawn from a statute's disproportionate impact on a particular group, and may also be inferred from the "inevitable or foreseeable impact of a statute."

### *Use the Disparity As A Sentencing Factor*

Even if a challenge of the program is unsuccessful or its discriminatory impact may not be used to leverage a better plea agreement for the African-American client, defense counsel's effort may sensitize the probation department's presentence writer and the judge to what appears to be a dis-

criminatory drug policy. This may be used as a strong argument for probation or some other alternate sentencing plan for the black client when, for example, a "no agreements" plea gives the judge some discretion in sentencing.

(cont. on pg. 10)

**Maricopa County's TASC program's own statistics show a comparable trend in Arizona. Blacks may be less likely to be offered a treatment option, and their relative poverty compared to whites means that they often cannot "buy" their way out of charges as affluent whites can.**

**When it comes to offenses such as cocaine, narcotics and drug fraud, the disparity is even greater. Only 4 percent of black males participated in the program. In fact, TASC's own composite of their typical participant is a white male born between 1964 and 1968. The person also is most frequently employed full-time and makes over \$14,000 annually.**

Applying TASC Monies To Drug Fines

When the client does "flunk out" of TASC, there is another important practice issue. TASC requires, for example, in the case of a cocaine charge, that the client pay a \$2,845.00 fee. In most cases \$1,200 of that so-called "fee" goes to the Arizona Drug Enforcement Fund (hmm--- don't the prosecutors get that back!). \$50.00 goes for a jail fee, and \$1,595.00 goes to TASC for all therapy, seminars and urine tests.

**An argument might even be made that since drug laws are disproportionately enforced against blacks, the "first-time felony drug offender" requirement is inherently discriminatory. In places like Minneapolis, for example, blacks are actually 22 times more likely to be arrested for a drug offense than a white person.**

to "disclose any information in the prosecution's possession or control . . . which would tend to reduce punishment . . ."

For example, the dismissal documents will chronicle why the client was dismissed from TASC, how long he/she was in the program, and how well he/she participated. Records may show that the client regularly submitted to urinalysis and

was "clean," and that he/she completed counseling. This information will also help document whether the client was dismissed from TASC solely for economic reasons.

If the client did fairly well in TASC, he/she most likely is a good candidate for probation. Also, it makes a very strong argument against any jail time if the client substantially complied with TASC requirements. Of course, the downside is obvious.

The documents may show information that does not help the client. However, it is almost always better to have this information than to proceed without it. If it

Get All The Client's TASC Records

The first tip in dealing with the client dismissed from the program, regardless of ethnicity, is simply to make sure that you get all documents from TASC that chronicle the client's participation. These documents are *critical* to any effective advocacy for a client who has been dismissed from TASC. The papers may be requested from the prosecution under Rule 15, obtained from TASC or through use of a subpoena. In particular, defense counsel should obtain the "TASC Diversion Submittal Form," and the ledger and form for an "unsuccessful discharge."

**The first tip in dealing with the client dismissed from the program, regardless of ethnicity, is simply to make sure that you get all documents from TASC that chronicle the client's participation.**

hurts your client, you can bet the prosecution will have it.

Make Sure Judge Orders Monies Paid Credited In Minute Entry

The first consideration in reviewing the records is to determine how much of any monies the client paid went to the drug fund assessment. For example, if \$500 has been paid into the fund, the client should receive that offset at sentencing, and have the trial court reflect the payments in the minute entry.

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<sup>1</sup> Practitioners should be aware that in some circumstances if the client is already on ACHCCS (Arizona's alternative to Medicaid), the client may qualify for services.

<sup>2</sup> See *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

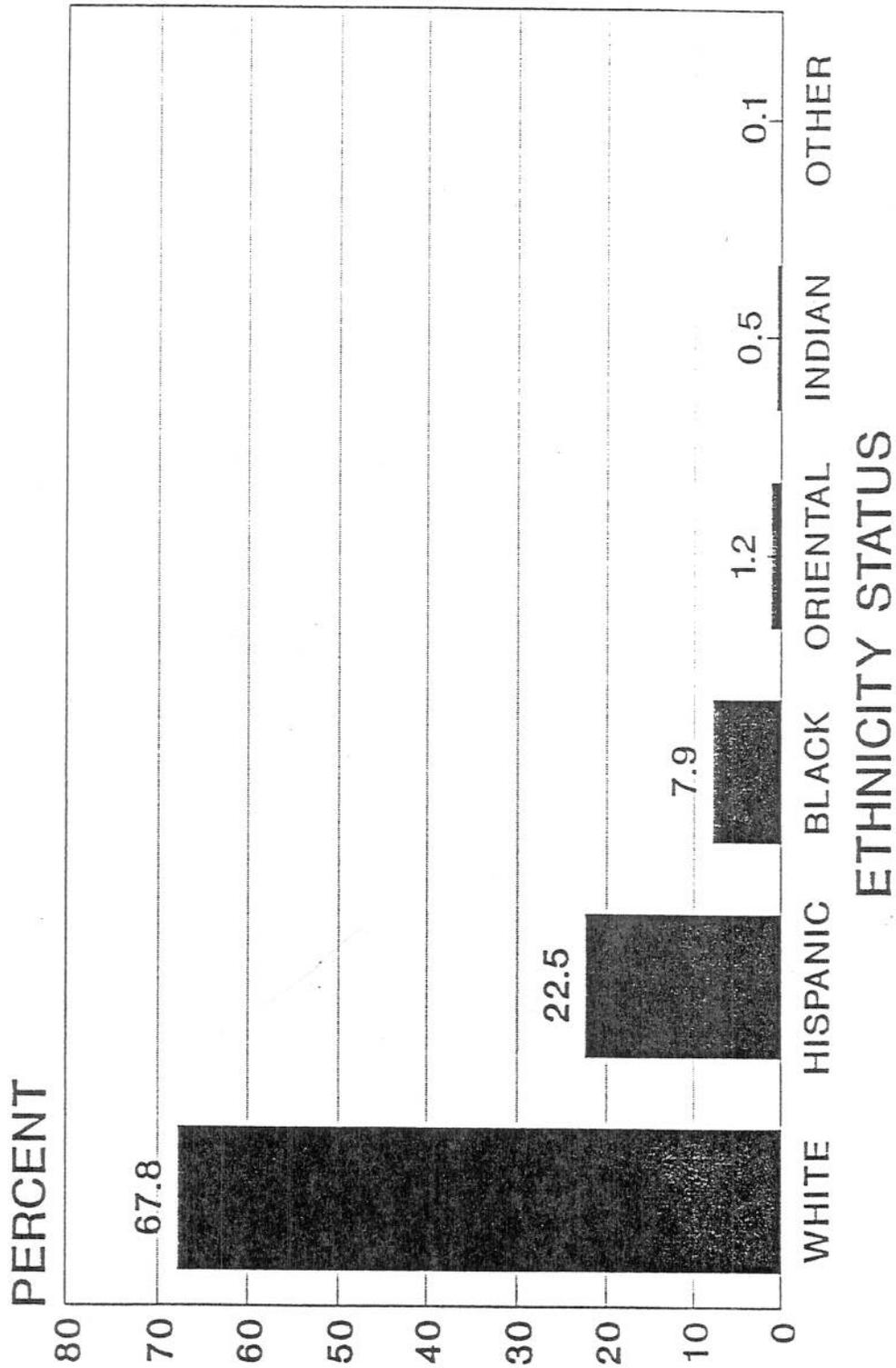
<sup>3</sup> See *Personal Administrator v. Feeney*, 442 U.S. 256 (1979).

<sup>4</sup> Rule 26.8(b), Ariz. R. Crim. P. ^

Dismissal Reasons

The other reason the dismissal documents are important is that they may contain information that is particularly helpful to the client at sentencing. You may want to note that there is an additional duty of the prosecutor

# 1989 - 1992 ETHNICITY OF CLIENTS Adult Deferred Prosecution Program



TASC MIS

## Defending a Drug Case on the Issue of Usable Amount: Where's the Beef?

by John Taradash

### Definition of "Usable Amount"

Although few drug trials actually proceed on a defense of usable amount, occasionally the issue will surface. Defense counsel should be familiar with the issues involved to effectively represent clients charged with possession of drugs.

In *State v. Moreno*,<sup>1</sup> the Arizona Supreme Court held that "only in those cases where the amount is incapable of being put to any effective use will the evidence be insufficient to support a conviction." An amount is sufficient if "useable under the known practices of narcotic addicts."<sup>2</sup>

A substance does not have to produce a narcotic effect before it constitutes a usable amount.<sup>3</sup> Narcotic effect varies greatly between persons. Consequently, it is "virtually impossible to be able to say, with any degree of certainty, what quantity of a certain drug would be required to produce a drug effect."<sup>4</sup>

Usable amount is a requirement in possession crimes because "[a]s a matter of law the intent necessary to establish the crime of possession is not present when the amount is so minute as to be incapable of being applied to any use."<sup>5</sup> However, the usable amount requirement does not apply where the crime charged is sale because the transfer of any amount plus other accompanying circumstances may indicate an intent to sell.<sup>6</sup>

### Examples of "Usable Amount"

Some examples of usable amounts<sup>7</sup> include:

- 1) Four cotton wads containing approximately .2 milligrams of heroin.<sup>8</sup>
- 2) 45 grams of residue identified as marijuana.<sup>9</sup>
- 3) .3 grams of marijuana.<sup>10</sup>

As long as the prosecutor establishes a proper foundation, minute amounts may be admitted into evidence. Consequently, defense counsel will likely need to present contrary evidence from his or her own expert on the issue of usable amount.

### Foundation

The state must call an expert to testify to foundational elements. However, "it takes very little foundation for a witness to testify that an amount of a substance which can be seen, weighed and tested is a usable quantity."<sup>11</sup> A chemist with experience in a crime lab is qualified to testify as to usable amount if he or she had discussions about usable amount with narcotics officers.<sup>12</sup> Moreover, the state is not required to show "what amount will create a certain effect."<sup>13</sup>

### When to Challenge "Usable Amount"

Unfortunately there is no bright-line rule for when to defend a case based on the issue of usable amount. Independent lab analysis may be appropriate when the amount of the substance is relatively minute or when the client brings the issue to your attention. Counsel should routinely advise clients of the usable amount requirement at an early stage of representation.

In a recent office case, the jury acquitted on the issue of usable amount after a quick deliberation. The defendant was charged with possession of narcotic drugs arising from the police confiscating a syringe found on his person. The defendant's forensic expert testified that quantitative analysis<sup>14</sup> indicated the liquid found inside the syringe was not a usable amount because if solidified it would be

barely visible to the naked eye. Moreover, defendant's expert compared the minuscule amount to a line of cocaine and to the Federal Guidelines. The amount was several times less than these other standards.

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(cont. on pg. 13)

### Questions for the State's Chemist

Surprisingly, some of the state's chemists are unable to answer some basic questions about drug testing. Among the questions defense counsel may wish to ask of the state's chemist are the following:

- \*What is a usable amount?
- \*What tests were used to determine whether the amount was usable?
- \*On what guidelines do you rely?
- \*What training have you had in determining whether a drug is usable?
- \*Why do you believe this amount is usable?
- \*What is qualitative analysis?<sup>15</sup>
- \*What is quantitative analysis?<sup>16</sup>
- \*Why was only qualitative analysis performed?
- \*With whom have you discussed the meaning of usable amount and what was discussed?
- \*Have you discussed cocaine or the investigation of cocaine with the police officers?
- \*What is the minimum amount which may indicate a presence of the drug?

### Independent Testing

Once counsel wishes to have the drug independently tested, a motion should be submitted to the court.<sup>17</sup> Certainly the defendant is entitled to have the drug independently tested in order to guarantee a fair trial.

Defendant's motion should request that a sufficient quantity of the alleged substance be released to defendant's investigator. The court should not be overly concerned in allowing defendant's investigator to handle the substance because the investigator should be exempted from criminal prosecution pursuant to statute.<sup>18</sup>

### Conclusion

In drug cases where apparently no defense is available, usable amount is an issue worth considering when the substance is particularly small in quantity. If presented properly, a jury may acquit because reasonable doubt exists and because the minute amount of the illegal drug does not offend their consciences.

<sup>1</sup> 92 Ariz. 116, 374 P.2d 872, 875 (1962).

<sup>2</sup> *Id.*

<sup>3</sup> *State v. Murray*, 162 Ariz. 211, 782 P.2d 329, 331 (App. 1989).

<sup>4</sup> *Id.*

<sup>5</sup> *State v. Ballesteros*, 100 Ariz. 262, 413 P.2d 739, 741 (1966).

<sup>6</sup> *Id.*

<sup>7</sup> As a reference, the Federal Sentencing Guidelines provide typical weight of certain drugs per dose, pill or capsule: e.g., 1 marijuana cigarette, .5 gm; methamphetamine, 5 gm; mescaline, 500 mg.

<sup>8</sup> *State v. Moreno*, supra n. 1.

<sup>9</sup> *State v. Laurino*, 19 Ariz. 82, 492 P.2d 1189, 1190 (1972).

<sup>10</sup> *State v. Murphy*, 117 Ariz. 62, 570 P.2d 1070, 1075 (1977).

<sup>11</sup> *State v. Hersch*, 135 Ariz. 528, 662 P.2d 1035, 1039 (App. 1982).

<sup>12</sup> See supra, n. 11, *Hersh*.

<sup>13</sup> *State v. Martinez*, 15 Ariz. App. 10, 485 P.2d 600, 602 (1971).

<sup>14</sup> *Quantitative analysis* determines the relative quantities of the constituent elements of a compound or mixture. Defense counsel should be aware that police chemists generally only perform a *qualitative analysis* to determine whether the substance shows a presence of a particular drug. This type of testing is severely limited because a substance may show a presence in a compound although its percentage in the compound is less than one percent!

<sup>15</sup> See supra, n. 14.

<sup>16</sup> See supra, n. 14.

<sup>17</sup> Rule 15.1(e), Arizona Rules of Criminal Procedure, allows the court to order disclosure "[u]pon motion of the defendant showing that he has a substantial need in the preparation of his or her case for additional material or information."

<sup>18</sup> See A.R.S. § 13-3412 which provides exceptions for those who lawfully acquire such drugs. ^

## Practice Tips

### *Point of View and Opening Statement*

Okay already. You've heard it a million times. A good opening statement tells a story. It begins with a headnote like: "This is a case about an injustice that happened on a hot night three months ago." Then it develops the theory of the case by using various themes that are in every case.

But how does a good storyteller tell a story? Well, how does a book, movie or television show tell a story? When telling a story you must have a point of view. The point of view may be the client's, the police's, the alleged victim's or an independent witness's, but in order for the jury to follow the story, point of view is crucial. Usually, for defense counsel, point is view is going to be that of the client. What this means is that you must tell the story of the case from the client's perspective. How did the client see the events? Alternatively, like a Greek chorus or an independent videotape, you may tell the story from a totally unbiased-sounding perspective.

For example, you might start by saying: "If you had been at Van Buren Street and Central on June 30th last year at 8:00 o'clock, you would have seen a tall, black man rob Joe Smith. That tall, black man is not in the courtroom today, because my client is an innocent man. This is a case about a mistaken identification."

Remember also that point of view may change. However, it is important to include transitions in changing from one point of view to another. In order to really have an effective opening statement, you need a non-lawyer to listen to it. Find a relative or friend and try giving your opening statement from different points of view until you hit upon the most effective.

### *Presiding Judge Implements Administrative Order Affecting Client Appeal Rights*

This is one of those double-whammy practice tips. Public defender wags know that *Practice Tips* is wild about lawyer-conducted voir dire. That is, defense counsel should take every chance to have an opportunity to "connect" with the jury and plead her case. Good voir dire is like Montiel or Phil Donahue. Defense counsel gets to have a conversation with the jury like they have in the lunchroom about issues that really matter in the case like racism, justice, fairness, undue deference to authority, and a host of other concepts that judge-conducted, leading-question voir dire will never uncover.

Public defender aficionados also know that if you ain't putting them jury instructions on the record, the client is being short-changed on appeal. Along comes new so-called Administrative Order No. 94-016. This one, done on February 24, 1994, says that from now on in Maricopa County, only in cases where the death penalty has been imposed will the trial record automatically include the record of voir dire, opening and closing, and settling of jury instructions! In all other criminal cases, according to the order, record of voir dire of the jury, the opening and closing arguments [sic] of counsel and jury instructions shall not be included unless

specifically designated by a party in a motion showing good cause and upon order of the trial court on such motion."

Practitioners may want to make sure they document in the file all irregularities, claims, and error in voir dire, all prosecutorial misconduct, whether objected to or not in opening *statement* and closing argument as well as in the settling of jury instructions, to insure clients have the benefit of appellate review as to whether their trial was fair. More information may be developed on this by our appellate section in the near future. ^CJ

## DEFENSE VICTORIES, 1993 (?)

By James P. Cleary

Arizona appellate decisions from 1993 resulted in decisions in several areas which could be claimed as defense victories in the criminal arena. The following outline categorizes those decisions into five areas: substantive law decisions; procedural decisions; procedural decisions -- guilty pleas; trial evidentiary decisions; and sentencing decisions.

### Substantive Law Decisions

1. *State v. Sanchez*, 132 A.A.R. 11 (CA-1 1993). The Court of Appeals held that attempted conspiracy is not a cognizable offense under Arizona law. Attempt and conspiracy are both deemed preparatory offenses under Arizona law.

2. *State v. Jones*, 154 A.A.R. 11 (CA-1 1993). The Court of Appeals held and affirmed the finding of the Maricopa County Superior Court that a Maricopa County ordinance dealing with adult, live-entertainment establishments was unconstitutionally vague and overbroad.

### Procedural Decisions

1. *State v. Vannoy*, 137 A.A.R. 36 (CA-1 1993). The Court of Appeals held that in a DUI prosecution where the state uses a deficient sample breath test as evidence at trial it must also comply with precedent which requires it to provide the defendant with a breath sample, even if the sample or breath test is registered as deficient.

2. *State v. Hone*, 138 A.A.R. 27 (CA-1 1993). The Court of Appeals held that A.R.S. § 24-261(c), which authorizes stop of livestock trailers for documentation checks, is unconstitutional because it empowered Arizona livestock officers to conduct random, roving patrol stops of any vehicle capable of carrying hides or livestock without a reasonable suspicion or probable cause based on articulable facts.

(cont. on pg. 15)

3. *State v. Cook*, 140 A.A.R. 25 (CA-1 1993). The Court of Appeals affirmed a trial court finding that imposition of a \$150,000 penalty in a prior administrative proceeding constituted punishment within the meaning of the double jeopardy clause of the Fifth Amendment to the United States Constitution thus barring the state from prosecuting the defendant for violations of criminal laws relative to securities violations and securities fraud.

4. *State v. Gissendaner*, 141 A.A.R. 43 (CA-1 1993). The Court of Appeals upheld a superior court order suppressing evidence where the facts reveal that police entered a residence to apprehend a defendant without an arrest warrant and there was no factual basis for exigent circumstances to excuse the need for a warrant. The court found this on the basis of facts indicating that the individual searched was only an overnight guest.

5. *State v. Hursey*, \_\_\_ Arizona \_\_\_, 861 P.2d 615 (1993). The Supreme Court concluded, upon review of trial court and Court of Appeals rulings, that defendant was entitled to a new trial when he was prosecuted in a trial where his prior convictions resulted in cases where he had been represented by the prosecutor, prior to the prosecutor becoming a member of the County Attorney's Office.

#### Procedural Decisions -- Guilty Pleas

1. *State v. Renner*, 145 A.A.R. 50 (CA-1 1993). It was held in this case that neither the state constitution nor the Rules of Criminal Procedure impede one judge from accepting a plea agreement rejected by another. The court interpreted Rule 17.4, Rules of Criminal Procedure, in a manner which found that there were no limitations on a second judge's discretion to entertain and independently review any plea that parties may choose to enter.

#### Trial Evidentiary Decisions

1. *State v. Delgado*, 174 Ariz. 252, 848 P.2d 337 (CA-1 1993). The court, using an analysis as to the appropriateness of sanctions for preclusions of witnesses, concluded that under the facts of this case preclusion of a defense rebuttal expert was inappropriate. The court found that while the analysis included harmless error analysis, the preclusion of the defense rebuttal expert was an error that was not harmless.

2. *State v. Simms*, \_\_\_ Ariz. \_\_\_, 863 P.2d 257 (CA-1 1993). In a narcotics prosecution, the court criticized and disapproved of the practice of introducing evidence pertaining to how an undercover officer contacted defendant, and reasons for contacting the defendant, under the guise of completing the story of the crime. While the error was not reversible, the court instructed that the introduction of such evidence may constitute reversible error in cases in which the evidence against the defendant is not as strong as it was in this case.

3. *State v. Lang*, \_\_\_ Ariz. \_\_\_, 862 P.2d 235 (CA-1 1993). A conviction for first degree murder was reversed following a hearing and findings that a detective testifying

for the state and acting as an investigator at trial was deemed to have had improper conversations with jurors in the course of the trial. The Court of Appeals concluded that it was entirely possible that the detective's behavior and conversations with juror members affected the jury verdict.

4. *State v. Huerta*, 175 Ariz. 262, 855 P.2d, 776 (1993). The Supreme Court concluded that a juror who expressed an inability to be impartial should have been dismissed for cause. Further, the court held that the Arizona Rules of Procedure do not require a harmless error analysis. Rather, reversal is necessary to properly emphasize the right to peremptory challenges in Arizona.

5. *State v. Cruz*, 175 Ariz. 395, 857 P.2d 1249 (1993). A challenge to peremptory strike of a juror by the prosecution, pursuant to *Batson v. Kentucky*, is not successfully met, and the objection overcome, where a facially neutral, but wholly subjective, reason for using that challenge is cited, and the record contains nothing else to support the stated reason. Here comments concerning a juror's demeanor, as the basis for striking, are deemed to be elusive, intangible and easily contrived explanations which the court requires trial courts to consider with a healthy skepticism.

6. *State v. Chavarria*, 145 A.A.R. 61 (CA-1 1993). The court held that the trial court's use of the optional definition of reasonable doubt, contained in RAJI manuals, is an inappropriate statement of reasonable doubt and it should not be given. The court held that under the facts of this case it was harmless error to give such a definition of reasonable doubt.

7. *State v. Fisher*, 176 Ariz. 69, 859 P.2d 179 (1993). The court held that a "letter of agreement", witnessed by the parties and signed by the trial court judge, containing an agreement requiring a testifying witness's testimony to be consistent with prior testimony or statements, is unenforceable and grounds for a new trial. Further, the court found that a subsequent confession of a witness, to the crime for which the defendant was convicted, was newly discovered evidence requiring a new trial.

8. *State v. Hopkins*, 147 A.A.R. 59 (CA-1 1993). A conviction for child molestation and sexual abuse was reversed where prior bad acts were admitted without sufficient expert testimony that such prior acts demonstrated a continuing emotional propensity to molest children.

9. *State v. Bingham*, 176 Ariz. 146, 859 P.2d 769 (CA-1 1993). Here a conviction was reversed where the record demonstrated that a venire person had demonstrated sufficient bias to require that that prospective juror be discharged for cause. The failure of the trial court to strike the juror for cause, thus requiring use of a peremptory challenge to strike the juror from the jury panel, was reversible error.

(cont. on pg. 16)

10. *State v. Winkler*, 176 Ariz. 212, 859 P.2d 1345 (CA-2 1993). The court, upon special action review, concluded that RAJI 25.12, hindering prosecution, was an incorrect statement of the law and should not be given in a prosecution for hindering prosecution. The court found that the RAJI had an element that did not appear in the statute: the requirement that the person be *charged* with a felony at the time the defendant rendered assistance.

11. *State v. Romanosky*, 176 Ariz. 118, 859 P.2d 741 (1973). Here the court reversed murder and robbery convictions due to the trial court's failure to give the reasonable doubt jury instruction at the conclusion of the case. The court concluded that failure to so give instruction resulted in error more than harmless.

12. *State v. Rojas*, 154 A.A.R. 66 (CA-1 1993). The court reversed convictions for child molestation and sexual conduct with a minor where a juror was deemed to have engaged in misconduct by asking whether a defendant would be sentenced right away when a verdict returns or when a defendant is found guilty. Further the same juror gave the bailiff a note, during deliberations, with a \$20.00 bill enclosed, to give to the two victims in the case. The court found that the events cast an irrevocable cloud over the jury's fairness and impartiality, and it was better to grant a motion for mistrial and start over again.

#### Sentencing Decisions

1. *State v. Freeman*, 174 Ariz. 303, 848 P.2d 882 (CA-1 1993). The court found that payment of restitution is not intended nor does it create a valid legal title in stolen goods, for which restitution is ordered. However, a defendant is to be credited on restitution amounts for value of any merchandise recovered and returned to victims.

2. *State v. Herrera (Mikel)*, 174 Ariz. 387, 850 P.2d 100 (1993). Death penalty imposed upon 18-year-old was vacated. Supreme Court found that mitigating factors outweighed aggravating factor. Issues of duress, defendant's age, dysfunctional family background, alcohol abuse, and IQ all weighed in favor of a life sentence as opposed to the death penalty.

3. *State v. Arnoldi*, 176 Ariz. 236, 860 P.2d 503 (CA-2 1993). Here court found that sentences in child molestation convictions should be run concurrent under analysis of A.R.S. 13-116.

4. *State v. Carnegie*, 174 Ariz. 452, 850 P.2d 690 (CA-1 1993). Court held that a defendant should be given credit, full day, for presentence incarceration for first day in custody regardless of the actual number of hours spent in custody on that date.

5. *State v. Garcia*, 136 A.A.R. 10 (CA-1 1993). Court held that ordering restitution to be paid to victims on counts dismissed at trial was improper. A court may impose restitution only on charges for which a defendant has been found guilty, to which he has admitted, or for which he has agreed to pay.

6. *State v. Hovey*, 175 Ariz. 219, 854 P.2d 1205 (CA-1 1993). A court, considering amount and payments for restitution, must consider a defendant's economic circumstances and ability to pay in making such orders.

7. *State v. Reynolds*, 175 Ariz. 207, 854 P.2d 1193 (1993). Court held that late time payment fee, \$8.00, may be imposed only one time against a defendant where there are multiple counts and one sentencing order.

8. *State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (1993). Court held that in a vehicular homicide prosecution the crime did not become a dangerous crimes against children simply because one of the victims or any victims were under 15 years of age.

9. *State v. Padilla*, 176 Ariz. 81, 859 P.2d 191 (CA-1 1993). Here the court found that resentencing was proper where defendant's counsel represented other members in the family and had previously participated in guilty plea and sentencing hearings for other family members involved in crime. Court found that this was a denial of effective assistance of counsel in sentencing proceedings.

10. *State v. Foy*, 176 Ariz. 166, 859 P.2d 789 (CA-1 1993). Court found that restitution for full economic loss to the victim does not include payments of interest on restitution amounts ordered by a trial judge.

11. *State v. Benson*, 176 Ariz. 281, 860 P.2d 1334 (CA-1 1993). Here the court adopted and stated that the procedure for designating an undesignated offense was to do it with notice to all parties involved.

12. *State v. Pitts*, 148 A.A.R. 13 (CA-1 1993). Court found that a trial court cannot consider a defendant's prior DUI convictions as aggravating factors where those convictions are necessary elements of the offense which increases the severity of the crime for which the defendant is being sentenced.

13. *State v. Stuard*, \_\_\_\_ Ariz. \_\_\_\_, 863 P.2d 881 (1993). Court held in a capital case that mental impairment was sufficient to mitigate defendant's death sentence to life.

14. *State v. Styers*, 154 A.A.R. 32 (1993). Court found that convictions for child abuse in premeditated murder prosecution required reversal of child abuse conviction where abuse and murder occurred at the same time. ^

## Bulletin Board

### *Speakers Bureau Update*

Cecil Ash addressed two classes at Mesa High School on February 28. Cecil talked about the criminal justice system, with a special note on the impact of drugs and alcohol on criminal conduct.

Paul Lerner spoke to a "Concepts and Issues in Justice" class at Arizona State University in early March. Paul presented the defense perspective on the criminal justice system with a special look at mandatory sentencing and plea bargaining.

## February Jury Trials

### January 26

Lisa Gilels: Client charged with three counts of armed robbery and three counts of kidnapping (while on probation and parole). Investigator C. Yarbrough. Trial before Judge Anderson ended February 10. Client found guilty. Prosecutor R. Wakefield.

### January 31

James Cleary: Client charged with five counts of child abuse. Investigators H. Brown and D. Beever. Trial before Judge Hilliard ended February 25. Client found guilty on three counts of child abuse, guilty of aggravated assault and guilty of lesser included offense of criminal negligence. Prosecutor Shroeder-Nanko.

Christine Funckes: Client charged with one count of burglary, and two counts of theft (with two priors while on parole). Investigator J. Castro. Trial before Judge Ryan ended February 2. Client found guilty on one count of burglary and one count of theft, and **not guilty** on one count of theft. Prosecutor McCormick.

Jerry Hernandez: Client charged with sexual abuse and attempted sexual assault. Investigator V. Dew. Trial before Judge Portley ended February 9. Client found guilty. Prosecutor S. Evans.

Elizabeth Langford and Sylvina Cotto: Client charged with burglary. Trial before Judge Roberts ended February 2 in a mistrial which later was dismissed with prejudice. Prosecutor C. Leisch.

Craig McMenemy: Client charged with leaving the scene of an accident. Trial before Judge Guzman ended January 31. Client found guilty. Prosecutor D. Drexler.

### February 1

Scott Halverson: Client charged with aggravated DUI. Trial before Judge Barker ended February 4. Client found guilty. Prosecutor T. Tejera.

Gary Hochsprung: Client charged with burglary. Trial before Judge Dougherty ended February 3. Client found guilty. Prosecutor S. Lynch.

Rebecca Potter: Client charged with possession of narcotic drug. Trial before Judge Seidel ended February 3. Client found **not guilty**. Prosecutor J. Davis.

Robert Ventrella: Client charged with aggravated assault (dangerous). Investigators H. Schwerin and B. Abernethy. Trial before Judge Cates ended February 4. Client found **not guilty**. Prosecutor J. Dominy.

### February 2

Curtis Beckman: Client charged with sale of a narcotic drug. Trial before Judge Hauser ended February 23. Client found guilty. Prosecutor P. Sullivan.

George Gaziano: Client charged with kidnapping and aggravated assault. Investigator T. Thomas. Trial before Judge Jarrett ended February 9. Client found guilty. Prosecutor J. Hicks.

### February 3

Gary Bevilacqua: Client charged with possession of marijuana, and production of marijuana. Trial before Judge Bolton ended February 7. Client found **not guilty**. Prosecutor D. Schlittner.

Craig McMenemy: Client charged with misdemeanor DUI. Trial before Judge Bloom ended February 7 with a hung jury. Prosecutor Riggo.

### February 7

Susan Bagwell: Client charged with two counts of manslaughter, theft, and leaving the scene of an injury accident. Investigators D. Beever and N. Jones. Trial before Judge Sheldon ended February 18. Client found **not guilty** on two counts of manslaughter and guilty of leaving the scene of an injury accident; hung jury on theft charge. Prosecutor J. Duarte.

Peggy Lemoine: Client charged with shoplifting. Investigator J. Castro. Trial before Judge Martin ended February 10 with a hung jury. Prosecutor T. Mason.

Elizabeth Melamed: Client charged with aggravated assault. Investigator B. Abernethy. Trial before Judge Schwartz ended February 9 with a hung jury. Prosecutor D. Cunanan.

(cont. on pg. 18)

February 8

Daniel Treon: Client charged with aggravated DUI. Investigator J. Allard. Trial before Judge Jones ended February 17. Client found guilty. Prosecutor P. Hearn.

February 9

Thomas Kibler: Client charged with trafficking in stolen property, theft, and burglary. Trial before Judge Gerst ended February 10. Client found guilty. Prosecutor R. Hinz.

Joseph Stazzone: Client charged with aggravated DUI (with two priors). Trial before Judge Gerst ended February 9. Client found guilty. Prosecutor T. Doran.

Thomas Timmer: Client charged with aggravated DUI (with priors). Trial before Judge Wilkinson ended February 14. Client found guilty. Prosecutor Doran.

February 10

Peg Green: Client charged with DUI, and three counts of endangerment. Trial before Judge Hall ended February 15. Client found **not guilty** on one count of endangerment, and guilty of DUI and misdemeanor endangerment. Prosecutor Manjencich.

February 11

Roland Steinle: Client charged with theft. Bench trial before Judge Portley ended February 17. Client found **not guilty**. Prosecutor T. McCauley.

February 14

David Goldberg: Client charged with armed robbery (dangerous), and aggravated assault (dangerous and while on parole). Investigator A. Velasquez. Trial before Judge O'Toole ended February 17 with a hung jury. Prosecutor L. Ruiz.

Colleen McNally: Client charged with conspiracy to sell narcotic drug. Investigator J. Castro. Trial before Judge Galati ended February 16. Client found guilty. Prosecutor J. Davis.

Rickey Watson: Client charged with criminal trespass. Trial before Judge Barker ended February 16. Client found **not guilty**. Prosecutor K. Mills.

February 15

Carole Larsen-Harper: Client charged with possession of dangerous drugs for sale. Trial before Judge Chornenky ended February 18. Client found guilty. Prosecutor K. Mann.

February 16

Kevin Burns: Client charged with armed robbery. Investigator B. Abernethy. Trial before Judge Ryan ended February 22. Client found **not guilty**. Prosecutor R. Puchek.

Albert Duncan: Client charged with aggravated assault. Investigator J. Castro. Trial before Judge Hauser ended February 18. Client found guilty. Prosecutor J. Dominy.

Peggy LeMoine: Client charged with aggravated assault. Investigator H. Schwerin. Trial before Judge Topf ended February 24. Client found **not guilty**. Prosecutor C. Macias.

February 17

Elizabeth Langford: Client charged with aggravated assault and resisting arrest. Trial before Judge Barker ended February 24. Client found guilty (with three priors while on probation). Prosecutor W. Baker.

February 22

Andy DeFusco: Client charged with burglary and theft. Trial before Judge Portley ended February 25 with a hung jury. Prosecutor T. McCauley.

Rebecca Donohue: Client charged with aggravated assault. Investigator P. Kasieta. Trial before Judge Martin ended February 28. Client found **not guilty**. Prosecutor J. Grimley.

February 24

Troy Landry: Client charged with armed robbery. Investigator B. Abernethy. Trial before Judge Ryan ended February 25. Client found guilty of lesser included offense of theft. Prosecutor A. Kever. ^

## 1992 and Criminal Victimization

Rates of crime either declined or remained stable in the United States in 1992, according to statistics recently compiled and analyzed in the National Crime Victimization Survey (NCVS) Report. (See Figure 1.) The survey measures both crimes that are reported to police and crimes that go unreported. Half of violent crimes and over 60% of crimes overall went unreported in 1992. The survey measures personal thefts; the household crimes of burglary, larceny, and motor vehicle theft; and the violent crimes of rape, robbery, aggravated and simple assault.

The survey further noted the following about 1992 crime statistics.

- Persons 12 years or older living in the United States experienced 18.8 million victimizations involving violence or personal theft.

- 14.8 household crimes were committed.

- The number of violent crimes did not differ significantly from 1981 (the peak year for crime in the United States). Approximately 6.6 million violent crimes occurred in both 1981 and 1992. (See Table 1.)

- While violent crime rates did not change significantly compared to figures for 1991, rates of theft (both personal and household) decreased.

- The robbery rate was lower in 1992 than at its highest point in 1981.

- The rate of household burglary was significantly lower than at any time throughout the 70's or 80's.

- Motor vehicle thefts were most likely to be reported to the police (75%), while larcenies without contact were the least likely to be reported to police (30%).

- Blacks were more likely to be victims of violent crimes than whites; households with the lowest incomes were more likely than higher income households to be victims of violent crimes; and persons under age 25 were more likely to be victims than older individuals.

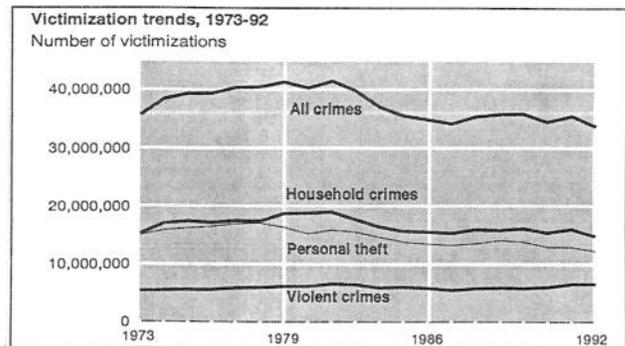


Figure 1

Table 1. Victimization levels for selected crimes, 1973-92

	Number of victimizations (in 1,000's)			
	Total	Violent crimes	Personal theft	Household crimes
1973	35,661	5,360	14,970	15,340
1974	38,411	5,510	15,889	17,012
1975	39,266	5,573	16,294	17,400
1976	39,318	5,599	16,519	17,199
1977	40,314	5,902	16,933	17,480
1978	40,412	5,941	17,050	17,421
1979	41,249	6,159	16,382	18,708
1980	40,252	6,130	15,300	18,821
1981	41,454	6,582	15,863	19,009
1982	39,756	6,459	15,553	17,744
1983	37,001	5,903	14,667	16,440
1984	35,544	6,021	13,789	15,733
1985	34,864	5,823	13,474	15,568
1986	34,118	5,515	13,235	15,368
1987	35,336	5,796	13,575	15,966
1988	35,796	5,910	14,056	16,830
1989	35,818	5,861	13,829	16,128
1990	34,404	6,009	12,975	15,419
1991	35,497	6,587	12,885	16,025
1992	33,649	6,621	12,211	14,817
1981-92*	-18.8%*	.6%	-23.0%*	-22.1%*

\*Total victimizations peaked in 1981.

\*The difference is statistically significant at the 95% confidence level.

## FOR THE DEFENSE MARCH INDEX\*

Percentage of offenders committed to DOC sentenced for drug/alcohol specific offenses: 37%  
Percentage of total DOC inmate population convicted of driving under the influence of drugs/alcohol: 6%  
Number of worship services conducted by DOC during FY 1993 by prison pastoral staff: 11,079  
Number of inmates assigned to paid work projects in DOC: 9,372  
Range of wages for work projects: \$0.15 to \$0.80 per hour  
Racial group that reads more than any other: African-Americans  
Percentage comparison of readers by racial group: Blacks: 88% vs. 85% of Hispanics, 83% of whites.  
Racial group that gardens more than any other: Whites: 55% vs. 45% of blacks, 47% of Hispanics  
America's favorite color: blue  
Only member of the U.S. Supreme Court opposed to the death penalty in all cases: Supreme Court Justice Harry Blackmun  
Average monthly growth of DOC population in 1972: 10.6 inmates  
Average monthly growth of DOC population between 1987-1993: 97.0  
Projected prison population for DOC in the year 2000: 25,000 inmates  
Construction costs' savings DOC claims it saves by double bunking inmates: \$76,752,000  
Total number of women admitted to DOC in FY 1993: 799  
Total number of women admitted to DOC in FY 1979: 162  
Number of inmates committed to DOC as of June 30, 1993 for drug offenses: 20.6%  
Number of inmates committed to DOC as of June 30, 1993 for DUI: 6.0%  
Number of inmates committed to DOC as of June 30, 1993 for homicide: 8.1%  
Percentage of whites in DOC as of June 30, 1993: 47.1%  
Percent of Caucasian correctional officers working for DOC in 1993: 72.2%  
Percent of Hispanic correctional officers working in DOC in 1993: 20.9%  
Percentage of blacks in DOC as of June 30, 1993: 17.2%  
Percent of African-American correctional officers working for DOC in 1993: 5.1%  
Percent of Arizona's population that is black: 2.8%  
Percent of Arizona's population that is white: 71.8%  
Percentage of Native Americans as of June 30, 1993 in DOC: 3.4%  
Percentage of Mexican Nationals in DOC as of 30, 1993: 8.6%  
Percentage of Asians in DOC as of June 30, 1993: 1.0%  
Percentage of inmates between the ages of 30-34 in DOC as of June 30, 1993: 20.7%  
Percentage of inmates over 60 years of age in DOC as of June 30, 1993: 1.8%

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\*Sources: *Arizona Department of Correction: A Collection of Facts About Arizona Corrections. November 1993;*  
*The Nation, March 14, 1994 edition. Compiled by the editor.*