

for The Defense

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Maricopa County Public Defender's Office

Dean W. Trebesch,
Maricopa County Public Defender

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Preclusion of Witnesses

by Roland J. Steinle, III

Often as the case enters the final stages of preparation, a last-minute motion is filed by you or against you. The usual request for relief includes a request for preclusion.

In *State v. Zimmerman*, 166 Ariz. 325, 802 P.2d 1024 (1991), the court set forth that the preclusion remedy in Rule 16.1(C) exists to insure the orderly pretrial procedures in the interest of expeditious judicial administration. The court stated "[I]t is a judicial remedy designed to protect judicial interests." Its invocation rests in the sound discretion of the court.

State v. Delgado, 174 Ariz. 252, 848 P.2d 337 (1993), set forth a balancing test to determine whether preclusion is

justified. In determining the propriety of the sanction, the court should consider (1) how vital the witness is to the case, (2) whether the opposing party will be surprised, (3) whether the discovery violation was motivated by bad faith, and (4) any other relevant circumstances. See, *State v. (Joe U.) Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984), *State v. Tucker*, 157 Ariz. 433, 440, 759 P.2d 579, 586 (1988).

The court also set forth the underlying philosophy: Although preclusion is a remedy available to the trial court, it is rarely an appropriate sanction for a discovery violation. A witness should only be precluded as a last resort. The court stated the exclusion of prosecution witnesses is not recommended because its results are capricious, and may produce a "disproportionate windfall for the defendant." On the other hand, exclusion of defense evidence may lead to an unfair conviction. Either result would defeat the objectives of discovery.

In *State v. (Joe U.) Smith, supra*, the court reversed a conviction where the trial court precluded testimony of a defense alibi witness who appeared during the second day of trial. In *State v. Delgado, supra*, the court found it was error to preclude a defense expert on insanity. The court, in that case, relied heavily on the Sixth Amendment right to present a defense, and also on the fact that it was the defendant's burden of proof on the issue of insanity. In *State v. Zimmerman, supra*, the court found that the trial court did not abuse its discretion when it considered an untimely motion in limine. The court found it was better to address the issue of the admissibility before trial rather than disrupt proceedings for a lengthy foundation determination during the course of trial. In most cases, the appropriate remedy is a continuance.

In dealing with preclusion, counsel should stress the state law. In *Michigan v. Lucas*, 500 U.S. ____, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991), the Supreme Court stated that preclusion of evidence for failure to comply with a notice requirement does not per se violate the Sixth Amendment. The Supreme Court did remand the case for consideration of a number of factors including lack of surprise by the prosecution.

Finally, an error is subject to the harmless error analysis. To establish a Sixth Amendment violation, the defendant must show that the evidence was material to the defense. *State v. Delgado, supra; State v. Fuller*, 143 Ariz. 571, 574, 694 P.2d 1185 (1985). ^

The Corporate Victim

By Christopher Johns¹

Is a corporation a "victim" under the Victims' Rights Implementation Act and what rights do corporate employees have as alleged victims when the corporation is harmed?

Arizona is one of the few states that elevated crime victims' rights to a constitutional status.² Making alleged victims almost parties to the criminal action insures a clash between the constitutional rights of the accused and the protections enacted for crime victims.

Appellate decisions concerning the constitutionality of various portions of the Victims' Rights Implementation Act ("Act") have been slow to materialize.³ A frequently murky area for practitioners is who is the victim when a corporation is robbed or burglarized?

Victim Definition

In the Arizona Constitution and the Act, "victim" is defined as a person against whom a criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child, or other lawful representative, except if the person is in custody for an offense or is the accused.

FOR THE DEFENSE

Editor: Christopher Johns, Training Director
Assistant Editors: Georgia A. Bohm and Heather Cusanek
Appellate Review Editor: Robert W. Doyle
DUI Editor: Gary Kula

Office: (602) 506-8200
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004

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While corporations have been defined as "persons," the Act also specifically provides that a corporation is a victim but with considerably more limited rights than an "individual" alleged victim. The specific rights of corporations are enumerated in A.R.S. 13-4404. The gist of statute is to provide a mechanism for corporations to receive compensation.

A frequently murky area for practitioners is who is the victim when a corporation is robbed or burglarized?

Hence, the corporation's present or past employees do not appear to be entitled to any special victim status. In other words, unless the employee of the corporation is an "individual" victim himself--that is, a person "against whom the criminal offense has been committed," the employee has no special rights merely because he is employed by the victim corporation.

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Duty to Inform

Let's say a defense attorney and investigator go to a convenience store to view the scene and talk to potential witnesses. The actual clerk who was the victim of a robbery is not on duty. Must the

public defender and investigator inform the employees of victims' rights? I don't think so.

Lawyers are obligated to support the Constitutions and laws of the U.S. and Arizona. There is no constitutional duty or statutory provision or rule that explicitly provides that a defense attorney, including her agents, must advise victims of their rights.

ER 8.4(d) requires lawyers to conduct themselves in a manner that is not prejudicial to justice's administration. Since this rule is so broad it is generally interpreted very conservatively. While it may be good practice for defense attorneys to inform victims of their rights (for purposes of cross-examination), it seems unlikely that it is clearly prejudicial to the administration of justice not to do so.

A major caveat is ER 4.3. Where a lawyer's interests are adverse to a victim or witness, ER 4.3 provides that a lawyer must inform the person that she is not *disinterested*. Plus, ER 4.3 further stands for the proposition that lawyers should not, while representing a client, give advice to an unrepresented person other than to obtain counsel.⁴

Defense attorneys, when dealing with an alleged victim or witness, may use methods to obtain evidence in violation of a third person's rights. Hence, if an alleged victim requests information about his legal rights, a defense lawyer should inform the person of his rights.

(cont. on pg. 3)

Corporate Crime Scene

Back to the corporation crime scene. A.R.S. 13-4433(B) provides that victims should not be contacted except through the prosecutor's office.⁵ However, the separate definition of a corporate victim in A.R.S. 13-4404 fairly implies that A.R.S. 13-4433(B) is *not* applicable to corporations. Plus going back to the original victim definition again provides a strong argument that corporations are simply not included.

The comment to ER 4.2 provides that if a corporation is a party to the action, employee contact may be prohibited. Usually, however, there has to be an adversarial relationship. A good argument is that since the corporation is not a litigant, and since the corporation's interests only *may* be adversarial to the defendant (or the prosecutor), the restriction of contacting employees of a corporation under ER 4.2 does not seem applicable.

Basically, it appears that a criminal defense lawyer may legally and ethically visit a corporation crime scene and speak to employees of the alleged victim corporation unless the employee was personally victimized by the crime. In that case, A.R.S. 13-4433(B) is applicable.

¹ Special thanks goes to Roslyn Moore-Silver. Ms. Moore-Silver and the State Bar Ethics Committee have worked long and hard on a draft opinion on which much of this article is based. The author and Ms. Moore-Silver are presently working on a similar written piece for the *Arizona Attorney*.

² Seven states, including Arizona, have elevated victims' rights to constitutional status. The other six are: Florida, Michigan, Texas, Washington, Rhode Island, and California.

³ Ariz. Rev. Stat. Ann. Section 13-4401, *et. seq.*

⁴ See Comment to ER 4.3.

⁵ See Stellisa Scott's note in Vol. 36 of the Arizona Law Review entitled *Beyond the Victim's Bill of Rights: The Shield Becomes a Sword*. The note argues persuasively that A.R.S. 13-4433(B) is constitutionally overbroad because it

sweeps protected speech within its ambit. A much less restrictive alternative is possible.

Basically, it appears that a criminal defense lawyer may legally and ethically visit a corporation crime scene and speak to employees of the alleged victim corporation unless the employee was personally victimized by the crime.

Congress's decision to equate one gram of crack with 100 grams of powder cocaine. The classification therefore violates the equal protection clause of the 5th Amendment.

You will recall that *for the Defense* chronicled a similar injustice under Arizona's new thresholds for mandatory prison in drug sale cases. See January's "*Are Arizona's Drug Laws Race Neutral?*" Under the new Arizona criminal code,

a person who sells over 750 milligrams of "crack" cocaine faces mandatory prison. The threshold for powder cocaine is 9 grams--well over 10 times more. Virtually all crack arrests are of African-Americans.

Facts

The Missouri case arose after Edward Clary was arrested for possession with intent to distribute 67.76 grams of cocaine base. Clary

pleaded guilty under 21USC 841(b)(1)(A)(iii), the fed's "crack statute." The sentence carries a mandatory, minimum 10-year sentence.

Before sentencing, however, Clary, who is an African-American, filed a motion challenging the constitutionality of the crack statute, arguing that the sentencing enhancement provisions, as well as federal sentencing guidelines, violated the equal protection clause of the Fifth Amendment.

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PRACTICE TIPS

Unconscious Injustice

According to a Missouri Federal District Court, "unconscious racism" infected

(cont. on pg. 4)

While the Eighth Circuit had previously rejected constitutional challenges to the statutory scheme, it had acknowledged in *U.S. v. Marshall*, 998 F.2d 634 (CA 8 1993) the "extraordinary disparity in punishment between possession of cocaine powder and cocaine base", and invited the presentation of "new facts or legal analysis.

"Invidious Quality" Action

In order to prove an equal protection violation, an accused must prove that the "invidious quality" of government's discriminatory action may "ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). If there is no direct evidence of overt racism, an accused may make a prima facie case "by showing [that] the totality of the . . . facts gives rise to an inference of discriminatory purpose." *Id.*

As the opinion notes, black people have been punished more severely for violating the same law as whites since the nation's inception. A dual system of criminal punishment based on racial discrimination may be traced back to slavery times. The court further noted that few paid attention to the escalating violence in inner cities when drug dealers and gangs were only killing each other or an occasional hapless victim. It has only been when suburbanites and European tourists became the targets of violence that government responded.

The court further said that "unconscious racism" on legislative decisions is a new way to define the issue. "Purposeful" discrimination tests are an inadequate response to the more subtle and deeply buried forms of racism. Although intent per se, the court notes, may not have entered Congress's enactment of the crack statute, its failure to account for a foreseeable disparate impact that would effect black Americans in grossly disproportionate numbers is violative of the equal protection clause.

In *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), the U.S. Supreme Court listed the circumstantial evidentiary factors that may show a racially discriminatory purpose exists. They are: (1) adverse racial impact of the official action, (2) historical background of the decisions, (3) specific sequence of events leading up to the challenged decision, (4) departures from normal procedure sequence, (5) substantive departure from routine decisions, (6) contemporary statements by decision makers, and (7) the inevitability or foreseeability of the consequence of the law.

Statistical Evidence Alone May Be Sufficient

And, in cases where statistical evidence alone is "stark", it may be accepted as the sole source of proof of an equal protection violation. For example, in Missouri between 1988 and 1992, 98.2 percent of the defendants convicted of crack cocaine charged were black. Nationally, 92.6 percent of the defendants convicted during 1992 of the federal crack cocaine violations were black, and 4.7 percent were white. In comparison, 45.2 percent of powder cocaine defendants sentenced were white. Only 20.7 sentenced for powder violations were black.

Moreover, 1992 federal figures show that while blacks comprise 1.6 million of the illegal drug use population, 8.7

million whites admit to illegal drug use. Most surprisingly, according to the National Institute on Drug Abuse, of all individuals who have ever used crack in the U.S., 64.4 percent are white, 26.2 percent are black, and 9.2 percent are Hispanic. Yet, African-Americans are four times as likely as whites to be arrested on drug charges.

Finally the court said that:

It would be far more fair and just, and in keeping with the "get tough" rhetoric of today, to require that both black and white violators serve the same 10 years imprisonment, be it "crack" or powder cocaine.

Further, the court noted that the prosecutorial selection of cases on the basis of race is constitutionally impermissible.

Practitioners should consider challenging Arizona's statutory scheme that distinguishes between black and white defendants on the basis of the form of cocaine.

Editor's Note. Any Maricopa County Deputy Public Defender with a sale case over 750 milligrams of crack should contact me if you would like to work together to challenge the statute. The ideal case would be a sale of crack involving less than 3 grams. Any other party, including county public defenders outside of Phoenix, court-appointed or private counsel who have a case suitable for challenging the statute, please also let me know. If possible, an amicus may be arranged by either the Maricopa County Public Defender's Office and/or the Hazell B. Daniels Bar Association (formerly the Black Lawyer's Association).

Is the County Attorney's Gun Policy Discriminatory?

What if a county attorney's office announced a gun policy that claims that there will be no plea bargains (except for one meaning prison) where a so-called deadly weapon is involved. In other words, a "no probation" policy. What if the county attorney's office also claims that it will make exceptions in certain cases. What if all of the exceptions were for white defendants?

Well, according to an article in an Arizona newspaper, Paul Ahler, Chief Deputy Maricopa County Attorney, said that since the "No Probation" policy went into effect on October 1, 1993, exceptions have been made to the policy. According to Ahler, in fact, about ten exceptions have been made.

(cont. on pg. 5)

No one knows, at least in our office, what the racial make-up is of the ten exceptions. And, for that matter, no one knows what "criteria" is used by the County Attorney's office to grant the so-called exceptions. Hmm, I wonder what could it be? Is it written? Why doesn't the county attorney's office publish it? (See, e.g. Standard 2.5 ABA The Prosecution's Function--each prosecutor's office should maintain general policies to guide the exercise of prosecutorial discretion). The point, of course, is that an unwritten, subjective, and what appears to be just-plain-arbitrary policy smacks of discrimination---not to mention poor public policy.

And, for that matter, no one knows what "criteria" is used by the County Attorney's Office to grant the so-called exceptions.

Attorney Challenges "Gun" Policy

One Phoenix criminal defense attorney is doing something about it. David L. Erlichman is a private lawyer who presently represents a client affected by the policy.

Erlichman has filed a motion requesting that he be given the police reports of the cases where Ahler says that exceptions have been made. Erlichman's client has not been offered a probation-eligible plea agreement because of the policy, despite the fact that he represents a first-time offender. In fact, according to Erlichman's motion, he wasn't even aware that an exception was available until he read the newspaper article quoting Ahler.

Like the "crack" cocaine statute, an argument may be made that if the prosecutor is selectively granting exceptions, i.e., to only whites for the gun policy, the program has a discriminatory impact on our clients. The reverse may also be true. What if the overwhelming majority of cases involve African-Americans and Hispanics who are being sent to prison under the gun policy? What if the numbers exceed the black and Hispanic populations in this jurisdiction? Can a prima facie case be made? Maybe. At least in cases where no deals are being made anyway, this is an area that may be explored.

Copies of the Erlichman motion are available from the Training Division. Please call Heather Cusanek at 506-8200.

Law Review Article Argues A.R.S. 13-4433(B) Violates First Amendment

Practitioners will recall that *for the Defense* ran a series of articles arguing that although the Victims' Bill of Rights may allow a victim to refuse a defense interview, it does not follow that the defense may be prevented from directly asking the victim for one. A.R.S. 13-4433(B) essentially requires defense counsel to channel an interview request through the prosecutor.

Forcing the request for a defense interview to be made with a prosecutor, who does not represent the victim, and

who is in an adversarial relationship with the defense, poses numerous difficulties. For example, the vague use of the word "promptly" in A.R.S. 13-4433(B) provides no guidance for when requests will be made and imposes no deadline on prosecutors to advise defense counsel of the status of the request, often effectively stonewalling defense discovery.

Stellisa Scott has written a note based on *for the Defense* arguments and a special action filed by Christopher Johns (*Mayer v. State of Arizona*). The article argues that A.R.S. 13-4433(B) is unconstitutionally overbroad and must be more narrowly drawn. Entitled *Beyond The Victims' Bill of Rights: The Shield Becomes a Sword*, copies of the article are available from the trial group supervisors or from the Training Division.

Forcing the request for a defense interview to be made with a prosecutor, who does not represent the victim, and who is in an adversarial relationship with the defense, poses numerous difficulties.

County Attorney's Office Responds to Article

Last month *for the Defense* ran an article by the editor and Terry Bublik about practice tips on TASC cases. Part of the article pointed out the low participation by African-Americans in TASC. In addition to a letter received

from Barbara Zugor, TASC's Executive Director (see Page 21), *for the Defense* also received a response from Jerry Landau, Chief of the Controlled Substances Division of the Maricopa County Attorney's Office. Mr. Landau indicated that there is no intent by TASC to discriminate based upon race and that every attempt is made run the program fairly.

Additionally, Mr. Landau indicated that a change in eligibility requirements now permits eligibility for clients even if they have a prior *misdemeanor* conviction.

Mitigation Hearings & Victims

Can a victim be compelled to attend a client's mitigation hearing? That's the challenge that Donna Elm recently faced in one of her cases. Donna wanted to be able to examine the victim concerning issues in the case that would bear upon sentencing and filed a motion to compel the victim's presence. The government opposed.

Presiding Criminal Judge Ronald Reinstein ruled that Donna's client has no right to compel the victim's attendance. Judge Reinstein distinguished Donna's case from the holding in *State ex rel Dean v. City of Tucson*, 173 Ariz. 515, 844 P.2d 1165 (App. 1992). That case held that an alleged victim could be compelled to appear at a pretrial hearing. Additionally, Judge Reinstein ruled that the confrontation clause is not applicable to sentencing hearings relying on *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1982). CJ ^

**THE CASE FOR QUALITY:
Thoughts on the Workload Review Guidelines**

by Christopher Johns

These are tough times for indigent defense. A \$22 million budget deficit may mean that many services provided by the county are literally going to have to be rationed. Rationing justice is a risky business.

The Workload Review Guidelines drafted by the Office are important because while these are difficult budget times, it is not time to lower the quality of legal services for the criminally accused.

Training Standards

Presently, public defender training directors from around the country are working on drafting "Training, Education & Development Standards" for the National Legal Aid and Defender Association (NLADA). While they have not been proposed to the NLADA Board of Directors yet, and may undergo more revisions, Standard 9.1 - Quality Assurance provides that:

The defender organization should develop and implement professional and ethical quality processes to insure quality representation of defender customers.

The workload review guidelines are important because they are necessary to insure some level of quality below which practitioners should not go. There is, however, another element of quality assurance that, especially in a time period of high workload and increasing caseloads, cannot be forgotten.

Independence

There is an ongoing debate in some public defender offices about how much independence lawyers should exercise. Lawyers have developed a culture of working as "lone rangers," particularly in criminal defense. Independence is greatly valued, so much so that the ABA Model Rules stress that attorney independence is critical to providing effective legal representation for individual clients. ABA Model Rule 2.1 provides that "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Working alone, however, has its risks. Criminal cases

today are more complex. Workloads are higher and resources are lacking. With the advanced, technological, crime-apprehension tools like DNA fingerprinting, new demands are imposed on defense counsel. Also, working alone can very often lull practitioners into a rut where they do not think creatively about cases.

The Workload Review Guidelines drafted by the Office are important because while these are difficult budget times, it is not time to lower the quality of legal services for the criminally accused.

ABA Model Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer.

What are quality assurance mechanisms for criminal defense lawyers in a public defender's office? In the "old days" it might have meant "running" something by a senior lawyer. But the "old days" are gone and effective quality assurance of the delivery of legal services requires more.

Working alone, however, has its risks. Criminal cases today are more complex. Workloads are higher and resources are lacking.

the office; 4) creating time to watch other lawyers; 5) establishing case file review by supervisors; 6) asking clients for feedback on representation through client surveys, and 7)

Some quality assurance procedures that public defender's offices are using include: 1) thinking about cases creatively from the beginning with brainstorming; see e.g. Stephen Rench, *Building the Powerfully Personal Criminal Defense*, 42 Mercer L. Rev. 569 (1991); 2) coaching by supervisors and other senior attorneys; 3) doing mock cross and direct examinations, as well as mock openings and closings with members of

creating performance standards and goal setting for evaluations.

The bottom line is that in a public defender's office, some form of quality assurance, which does not interfere with the essential ethical command of attorney independence, is needed.

Quality Representation

The bottom line is that in a public defender's office, some form of quality assurance, which does not interfere with the essential ethical command of attorney independence, is needed. The ABA Rules also recognize this issue in Model Rule 1.1 concerning competence, and in

(cont. on pg. 7)

Both the Kentucky and Colorado defenders have pioneered, as part of the representation in cases, a pretrial review process. The gist of the process is that supervisors take the time to go over cases with new attorneys before motion deadlines and trials. The goal is to help the attorney reject ineffective defenses, do a dress rehearsal, make sure important motions have been filed, and prepare the case for trial. Case review insures that the reasons for trial strategies have been adequately thought through.

This formal process is different from the informal "staffing" that goes on with cases. That must continue. Additionally, quality assurance means defense lawyers have to continually develop creative ideas to represent clients.

The role of the defense attorney, obviously, is not just to process cases. We have to stand for and insist upon quality.

MARICOPA COUNTY PUBLIC DEFENDER WORKLOAD REVIEW GUIDELINES

I. References

A. Ethical Rules

- ER 1.1 Competence
- ER 1.3 Diligence
- ER 1.16 Declining or Terminating Representation
- ER 3.2 Expediting Litigation
- ER 5.1 Responsibilities of a Partner or Supervisory Lawyer
- ER 5.2 Responsibilities of a Subordinate Lawyer
- ER 5.4 Professional Independence of a Lawyer
- ER 8.4 Misconduct

B. State Bar Ethics Opinions

- Formal Opinion No. 86-4 Workload of Public Lawyers
- Formal Opinion No. 87-13 Control of Professional Judgment by Third Parties
- Formal Opinion No. 90-10 Overwork and the Duties of Competence and Diligence

C. Cases

State v. (Joe U.) Smith, 140 Ariz. 355, 681 P.2d 1374 (Ariz. 1984)

D. Other Professional Standards

ABA Standards for Criminal Justice Prosecution and Defense Function, Standard 4-1.3(e)(3d ed. 1993).

ABA Standards for Criminal Justice Providing Defense Services, Standard 5-5.3 Workload (3d ed. 1992).

National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.4 (1973).

II. Purpose

These guidelines establish a uniform procedure to be followed by public defender attorneys when the attorney's workload exceeds ethical standards.

III. Definition of Workload

Workload is defined as the amount of attorney time required to competently represent all assigned clients. Factors determining workload include: 1) the attorney's level of experience, 2) number of assigned cases, 3) number of active cases, 4) complexity of assigned cases, 5) number of probable jury trials, 6) speed of case resolution, 7) extent of available support services, 8) court congestion and procedures, 9) prosecution filing and plea agreement policies, and 10) all other factors affecting the time required for the attorney to competently represent assigned clients.

Other factors include, but are not limited to, travel time to and from justice courts, jails and superior court; time spent waiting at justice courts, jails, and superior court; time required for legal research and investigation; and time spent on required activities such as meetings, record keeping, training, and other administrative matters.

IV. Ethical Duty of Attorney

An attorney's workload exceeds ethical standards when the size of the workload interferes with quality representation of all clients. When an attorney believes that his or her workload exceeds ethical standards, the attorney should seek relief from the trial group supervisor. If the attorney is dissatisfied with the decision of the trial group supervisor, the attorney may appeal the decision to the chief trial deputy.

The procedure listed below is intended for use by all public defender attorneys. It is not, however, intended to preclude withdrawal from a case if the attorney believes that it is unethical to proceed. If, after following the steps outlined below, the attorney believes that present workload violates ethical standards, the attorney may move to withdraw regardless of the opinion of office management. (See Formal Ethics Opinion No. 90-10.) However, the motion to withdraw must be filed independently of these guidelines.

V. Procedure

An attorney seeking relief from the trial group supervisor should:

- 1) obtain a computer print-out of all assigned cases from the office computer section,
- 2) update the printout to reflect recent caseload changes,
- 3) identify those cases of unusual complexity, cases involving in-custody clients, cases which will require special preparation, and cases that will likely result in trial,
- 4) be prepared to discuss with the supervisor all factors contributing to the problem, and,

(cont. on pg. 8)

5) if possible, present the supervisor with a proposed plan to reduce the attorney's workload, with minimal prejudice to present clients, and minimal hardship to other attorneys in the trial group.

VI. Duty of Supervisor

1) The trial group supervisor should diligently monitor the workloads and caseloads of all attorneys in the trial group. Cases should be assigned fairly and equitably, taking into consideration the experience and ability of each attorney.

2) A trial group supervisor who is approached by an attorney who believes that his or her workload exceeds ethical standards shall carefully review the attorney's workload, taking into consideration the factors outlined in Paragraph III.

3) If the supervisor does not believe that the attorney's workload exceeds ethical standards, the supervisor should explain the reasons for the decision, and work with the attorney to develop a performance plan. The performance plan should outline appropriate steps to permit the attorney to maintain the present workload while insuring quality representation of all clients. In addition, the supervisor should carefully monitor the attorney's workload to insure that the attorney continues to meet ethical standards.

4) If the supervisor agrees that the attorney's workload exceeds ethical standards, the supervisor should take appropriate steps to reduce the attorney's workload. Appropriate steps may include:

- a) reassignment of active cases to other attorneys,
- b) temporary reduction in justice court assignments, and/or
- c) temporary reduction in indictment assignments.

5) If the supervisor agrees that the attorney's workload exceeds ethical standards, the supervisor shall determine: a) whether any other attorney in the trial group is reasonably available to accept additional cases and b) whether another attorney in the trial group is reasonably available to accept additional justice court or indictment assignments.

6) If no attorney in the trial group is reasonably available to accept additional cases or assignments and there is no other method reasonably available to reduce the attorney's workload, the supervisor and the attorney should review the attorney's active cases and identify those cases that are appropriate for continuance or withdrawal.

VII. Prioritization

It is the policy of this office to prioritize the representation of those clients who would be prejudiced by delaying the trial date. As a rule, cases involving clients who are in-custody and who would see no benefit in delaying the date set for trial should be prioritized. The following cases should be given the lowest priority:

- 1) cases involving out-of-custody clients,
- 2) cases most recently assigned to the attorney, and
- 3) cases where the defendant has no objection to a delay.

VIII. Filing Motions to Continue or Withdraw

A motion to continue or motion to withdraw for the reasons listed in these guidelines should be filed only if there are no alternative methods of reducing an attorney's workload to meet ethical standards. Motions filed pursuant to these guidelines should be filed only when the attorney and the supervisor agree that the attorney's caseload exceeds ethical standards.

These guidelines are not intended to affect motions to continue or motions to withdraw filed:

1) when the attorney's workload, in the opinion of the trial group supervisor, does not exceed ethical standards,

2) when the attorney's workload exceeds ethical standards, but the attorney is able to handle the case within reasonable time limits without prejudice to the client by continuing or withdrawing from other cases, or by reducing case assignments.

IX. Motions to Continue

If the attorney and the supervisor agree that the attorney's workload temporarily exceeds ethical standards, but will meet ethical standards in the near future, the attorney, after identifying cases meeting the criteria defined in Paragraph VII, should immediately move to continue appropriate cases for the time period that is reasonably necessary to prepare the case for trial. The requested length of the continuance should reflect the attorney's present and future workload, taking into consideration the number of cases with firm trial dates, the number of in-custody clients, and any workload increase anticipated in the near future. In all cases, the attorney should confer with the client prior to filing the motion to continue.

The attorney should attempt to resolve all workload problems by continuing cases involving out-of-custody clients. If continuing cases involving out-of-custody clients does not reduce the attorney's workload to ethical standards, it may be necessary to continue some cases involving in-custody clients. If it is necessary to continue cases for clients who are in-custody, the attorney should move to continue those cases that a) the client is least prejudiced by the delay, b) will require the greatest amount of trial preparation, and c) have received the least amount of trial preparation.

X. Motions to Withdraw

If the attorney and the supervisor agree that a) the attorney's workload exceeds ethical standards and b) there is no other method, including the filing of motions to continue, that will reduce the attorney's workload to ethical standards, the attorney should move to withdraw from a sufficient number of cases to reduce the attorney's workload to ethical standards. In moving to withdraw, the attorney should prioritize cases in the manner set forth in Paragraph VII.

A motion to withdraw is an extreme measure that should only be filed if there is no other method for the attorney to meet ethical standards.

(cont. on pg. 9)

XI. Content of Motion

The caption of a motion filed pursuant to these guidelines shall read:

[MOTION TO CONTINUE TIME LIMITS UNDER RULE 8.2(d)] or [MOTION TO WITHDRAW]
ATTORNEY WORKLOAD EXCEEDS ETHICAL STANDARDS

(Oral argument requested)

The opening paragraph of the motion shall state:

"Defense counsel moves [that this case be continued for trial until _____] [to withdraw from this case] for the reason that counsel's workload presently exceeds ethical standards. The [continuance] [withdrawal] is necessary to provide quality representation for the client and to meet the ethical standards set forth in the Arizona Rules of Professional Conduct. Counsel has reviewed all workload factors with counsel's trial group supervisor and no other method is reasonably available to reduce present workload. Specific reasons for the motion are set forth below."

The motion should include the following:

- 1) the nature of the case;
- 2) a discussion of the steps already taken to prepare for trial;
- 3) a discussion of the reasons that the motion was filed in this particular case. For example, "this case was selected for a motion to [continue] [withdraw] because a) the client is not in-custody and would not be prejudiced if the case is continued, b) the case is a complex fraud case that will require significant attorney time to prepare, and/or c) the client has no objection to the motion.";
- 4) a discussion of all workload factors affecting a prompt disposition of this case;
- 5) a list of active cases likely to result in trial, including firm trial dates, expected length of trial, reasons why the case will not result in a change of plea, the status of trial preparation, and additional steps necessary to prepare for trial;
- 6) a summary of other active cases; and
- 7) any other information relevant to the motion.

XII. Presence of Trial Group Supervisor

The trial group supervisor shall be present at oral argument on any motion approved pursuant to these guidelines. The supervisor should be prepared to provide the court with reasons that the attorney's caseload exceeds ethical standards, reasons the case cannot be reasonably assigned to another attorney, and any other information relevant to the motion. In the absence of the supervisor, the trial group coordinator or chief trial deputy shall attend the proceeding.

March Trials

February 16

Phil Vavalides: Client charged with seven counts of armed robbery (dangerous and with priors). Trial before Judge Dougherty ended March 3. Client found guilty on five counts of armed robbery (non-dangerous); two counts of armed robbery were dismissed. Prosecutor L. Stalzer.

February 22

Robert Corbitt: Client charged with aggravated assault. Trial before Judge Jarrett ended March 1. Client found **not guilty** of aggravated assault. Client found guilty of disorderly conduct. Prosecutor B. Miller.

Susan Corey: Client charged with aggravated assault (with two priors). Trial before Judge Anderson ended March 4. Client found guilty (priors dismissed). Prosecutor Clark.

February 23

Curtis Beckman: Client charged with forgery. Trial before Commissioner Jones ended March 2. Client found guilty. Prosecutor K. Bailey.

February 24

Susan Bagwell: Client charged with attempted sexual assault, false reporting and indecent exposure. Trial before Judge Hertzberg ended March 4. Client found guilty of attempted sexual assault, misdemeanor assault, misdemeanor false information, and three counts of misdemeanor indecent exposure. Prosecutor L. Schroeder-Nanko.

Frank Conti: Client charged with 18 counts of child molestation. Investigator R. Thomas. Trial before Judge Portley ended March 4. Client found guilty on 17 counts of child molestation and **not guilty** on 1 count of child molestation. Prosecutor A. Williams.

George Gaziano: Client charged with three counts of aggravated assault on a law enforcement officer. Investigator M. Breen. Trial before Judge Roberts ended March 1. Client found **not guilty**. Prosecutor G. McKay.

Barbara Spencer: Client charged with possession of narcotic drug. Trial before Judge Hauser ended March 1. Client found **not guilty**. Prosecutor A. Davidon.

February 25

Dan Lowrance: Client charged with seven counts of child molestation. Investigator C. Yarbrough. Trial before Judge Gerst ended March 4. Client found guilty on six counts of child molestation. Prosecutor B. Jorgenson.

(cont. on pg. 10)

February 28

David Anderson: Client charged with sexual assault. Trial before Judge Jarrett ended March 10. Client found guilty. Prosecutor R. Campos.

Genii Rogers: Client charged with DUI, possession of marijuana, and possession of drug paraphernalia. Trial before Commissioner Chornenky ended March 4. Client found **not guilty** on possession of marijuana and possession of drug paraphernalia charges. Client found guilty of aggravated DUI. Prosecutor Z. Manjencich.

Rickey Watson: Client charged with theft. Trial before Judge Barker ended March 1. Client found guilty. Prosecutor K. Mills.

March 2

Bob Doyle: Client charged with misdemeanor DUI. Trial before Judge Macbeth ended March 2. Client found **not guilty**. Prosecutor D. Drexler.

March 7

Curtis Beckman: Client charged with trespass. Trial before Judge Brown ended March 10. Charges were dismissed. Prosecutor D. Patton.

Valerie Shears: Client charged with armed robbery (dangerous) and aggravated assault (dangerous). Trial before Commissioner Colosi ended March 11. Client found guilty of robbery and misdemeanor assault. Prosecutor J. Moody.

March 8

Marie Farney: Client charged with theft (with 2 priors and while on parole). Investigator C. Yarbrough. Trial before Judge Cole ended March 10. Client found guilty. Prosecutor J. Blomo.

Dan Patterson: Client charged with murder. Investigator H. Brown. Trial before Judge Hilliard ended March 17. Client found guilty of second degree murder and two counts of armed robbery. Prosecutor T. Sanders.

Thomas Timmer: Client charged with armed robbery (dangerous). Trial before Judge DeLeon ended March 10. Client found guilty. Prosecutor R. Wakefield.

Raymond Vaca: Client charged with possession of narcotic drugs (with 2 priors). Trial before Judge Portley ended March 9. Client found guilty. Prosecutor J. Martinez.

March 9

Gary Bevilacqua: Client charged with criminal damage, burglary, and aggravated criminal damage. Bench trial before Judge O'Melia ended March 16. Client found **not guilty** by reason of insanity. Prosecutor A. Johnson.

March 14

Daphne Budge: Client charged with aggravated assault (dangerous). Investigator M. Fusselman. Trial before Judge Gerst ended March 21. Client found guilty. Prosecutor H. Schwartz.

Peter Claussen: Client charged with aggravated assault. Trial before Judge Howe ended March 17. Client found **not guilty**. Prosecutor D. Patton.

Peg Green: Client charged with DUI. Trial before Judge Nastro ended March 16. Client found guilty. Prosecutor J. Duarte.

James Lachemann: Client charged with aggravated DUI. Investigator D. Erb. Trial before Judge Cole ended March 23 with a hung jury. Prosecutor P. Hearn.

Elizabeth Langford: Client charged with child molestation. Investigator G. Beatty. Bench trial before Judge Portley ended March 16. Client found guilty. Prosecutor D. Macias.

Charlie Vogel: Client charged with armed robbery. Investigator J. Castro. Trial before Judge Topf ended March 17. Client found **not guilty**. Prosecutor L. Kane.

March 15

Peggy LeMoine: Client charged with aggravated assault and resisting arrest. Investigator D. Erb. Trial before Judge Schafer ended March 17. Client found **not guilty** on aggravated assault and guilty on resisting arrest. Prosecutor M. Tinsley.

March 16

Valerie Shears: Client charged with aggravated assault. Trial before Commissioner Colosi ended March 21. Client found **not guilty**. Prosecutor D. Patton.

March 17

Vonda Wilkins: Client charged with 2 counts of armed robbery. Investigator M. Breen. Trial before Judge Portley ended March 23. Client found **not guilty**. Prosecutor T. McCauley.

March 21

David Goldberg: Client charged with aggravated assault (dangerous). Investigator A. Velasquez. Trial before Judge O'Melia ended March 23. Client found guilty. Prosecutor R. Hinz.

John Movroydis: Client charged with sale of narcotic drug and possession of drug paraphernalia. Investigator P. Kasietta. Trial before Judge Topf ended March 29. Client found guilty. Prosecutor K. Bayley.

(cont. on pg. 11)

Karen Noble: Client charged with conspiracy to sell marijuana, possession of marijuana for sale, and possession of drug paraphernalia. Investigator J. Castro. Trial before Judge Galati ended March 29. **Judgment of acquittal** on the conspiracy to sell marijuana charge; client found guilty of other charges. Prosecutor A. Davidon.

Barbara Spencer: Client charged with possession of narcotic drug. Trial before Judge O'Melia ended March 31 with a hung jury. Prosecutor R. Mitchell.

James Wilson: Client charged with attempted murder in the first degree. Trial before Judge Seidel ended March 25. Client found **not guilty** of first degree murder but found guilty of attempted murder in the second degree. Prosecutor L. Krabbe.

March 22

James Cleary: Client charged with aggravated assault. Investigator C. Yarbrough. Trial before Judge Dougherty ended March 25. Client found **not guilty** of aggravated assault; guilty of disorderly conduct. Prosecutor Meier.

Greg Parzych: Client charged with two counts of burglary. Investigator D. Moller. Trial before Judge Grounds ended March 23. Client found guilty. Prosecutor J. Martinez.

Wesley Peterson: Client charged with kidnapping and aggravated assault. Trial before Judge Sheldon ended March 24. Client found **not guilty** on kidnapping and aggravated assault charges. Client found guilty of disorderly conduct. Prosecutor V. Cook.

March 23

Michelle Allen: Client charged with aggravated assault (dangerous). Investigator R. Barwick. Trial before Commissioner Colosi ended March 31. Client found **not guilty**. Prosecutor A. Johnson.

Nancy Johnson: Client charged with theft. Trial before Judge DeLeon ended March 24. Client found guilty. Prosecutor L. Tinsley.

Jeanne Steiner: Client charged with two counts of criminal trespass. Trial before Judge Gerst ended March 25. Client found **not guilty** on one count of criminal trespass (misdemeanor); hung jury on one count of criminal trespass (felony). Prosecutor H. Schwartz.

Phil Vavalides: Client charged with two counts of aggravated assault (dangerous). Investigator D. Erb. Trial before Judge Cates ended March 31. Client found guilty of two counts of disorderly conduct (misdemeanor). Prosecutor D. Patton.

March 28

Wesley Peterson: Client charged with aggravated assault. Trial before Judge McVey ended March 30. Client found **not guilty** on aggravated assault charge. Client found guilty of disorderly conduct. Prosecutor G. McKay.

Barbara Spencer: Client charged with one count of aggravated DUI and one count of resisting arrest. Trial before Judge Seidel ended March 30. Client found guilty. Prosecutor S. Bartlett.

March 29

Valerie Shears: Client charged with one count of aggravated DUI. Trial before Judge D'Angelo ended March 31 with a hung jury. Prosecutor T. Doran.

March 30

Daniel Treon: Client charged with interfering with judicial proceedings. Investigator J. Castro. Trial before Judge Soto ended April 4. Client found **not guilty**. Prosecutor Righi. ^

DUI 1992: Defenses for Acquittal* 4.25 CLE hours	05/22/92	Hyatt
Professional Conduct of the Criminal Lawyer: Fairness, Conflict & Confidentiality* 2.50 CLE hours--Ethics	06/05/92	Omni
The Courtroom, Real-Life Theater: An Attorney's Guide to An Actor's Tools 1.45 CLE hours	07/31/92	Training Facility (NOT open)
Appellate Writing Skills 2.45 CLE hours	08/14/92	Training Facility
Client Relations* 2.75 CLE hours--includes .50 Ethics	09/25/92	Supervisors Aud.
Practicing Under the Gun: Strategies for Fighting Back* 5.00 CLE hours--includes .50 Ethics	10/09/92	Supervisors Aud.
Client Relations (repeat of 9/25 smnr.) 2.50 CLE hours--includes .50 Ethics	12/04/92	Training Facility
Sentencing Representation: Details that Can Make a Difference for your Client 2.50 CLE hours	01/22/93	Supervisors Aud.
Have You Lost Your Appeal? 4.25 CLE hours	02/26/93	Supervisors Aud.
Indian Crimes Seminar (w/ Federal P.D.'s Ofc.) 5.50 CLE hours 3.50 CLE hours	03/19/93 03/20/93	Supervisors Aud. "
Training for the DUI Warrior (w/ Coconino County P.D.'s Ofc.) 5.00 CLE hours	04/30/93	NAU - Flagstaff, AZ
Advocacy in Commitment Cases 8.00 CLE hours	05/13&14/93	Training Facility (open)
Criminal Defense Ethics: Six Ethical Emergencies 2.50 CLE hours	05/28/93	Supervisors Aud.

Juveniles in Crises plus Ethics 5.00 CLE hours + 1 hour of Ethics	06/03/93	ASU - Tempe, AZ
Cultural Diversity & Client Relations 5.50 CLE hours	09/24/93	Supervisors Aud.
Tell Me No Lies: Handling Confession Cases 5.50 CLE hours--includes .50 Ethics	10/22/93	Holiday Inn Crowne Plaza
Art of Advocacy / Act of Communication for Criminal Defense Attorneys 5.00 CLE hours	11/10/93	Training Facility (NOT open)
Sexual Harassment 2.00 CLE hours	12/07/93	Training Facility (NOT open)
Deciphering the New Criminal Code: A Defense Perspective 5.25 CLE hours	12/17/93	Supervisors Aud.
MCPD Trial College 16.0 CLE hours	03/16-18/94	ASU
"Driving While Under the Influence of Drugs" 6.00 CLE hours	04/08/94	Supervisors Aud.
"If It Wasn't For Bad Luck, I'd Have No Luck At All" 4.75 CLE hours	05/13/94	Supervisors Aud.
Ethics (to be titled) 3.00 CLE hours	06/03/94	Supervisors Aud.

* Specialization Approval received from State Bar
NOTE: No specialization approval system as of January 1994.

**Maricopa County Public Defender
Training Schedule**

Date	Time	Title	Location
04/20/94	9:00 - 5:00	Support Staff/Attorney Training: 2nd Annual Criminal Investigators Seminar	MCPD Training Facility
05/13/94	9:00 - 4:00	Attorney Training: "If It Wasn't For Bad Luck, I'd Have No Luck At All" The Current Condition of the 4th Amendment	Supervisors Auditorium
05/20/94	9:30 - 11:30	Support Staff/Attorney Training: "Dealing with Questioned Documents" with Arthur Walters	MCPD Training Facility
06/03/94	1:00 - 5:00	Attorney Training: Ethics (to be titled)	Supervisors Auditorium

Editor's Note: Arizona Attorneys for Criminal Justice (AACJ) is sponsoring the "7th ANNUAL SEMINAR ON AGGRESSIVE DEFENSE OF THE ACCUSED IMPAIRED DRIVER" on Saturday, May 21 from 9:00 a.m. to 4:45 p.m. at the Westward Look Resort in Tucson. Attorneys from our office who are interested in attending should contact Heather Cusanek in our Training Division.

Arizona Advance Reports

State v. Bible

145 Ariz. Adv. Rept. 3 (S.Ct. 8/12/93)

Trial Judge Richard K. Mangum

Defendant was charged with and convicted of first degree murder, kidnapping and child molestation. He was sentenced to death and two consecutive terms of imprisonment.

I. Pretrial Publicity and Jury Voir Dire

Defendant claims that the trial court erred in denying his motion to change venue because of pretrial publicity. Prior to trial, the local papers were full of articles referring to inadmissible evidence in the defendant's case. Because of the extensive pretrial publicity, nearly all potential jurors had some knowledge of the case. Defendant argues that the outrageous pretrial publicity in this case requires that prejudice be presumed. If a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery, prejudice will be presumed. *Murphy v. Florida*, 421 U.S. 794 (1975). The burden to show that pretrial publicity was presumptively prejudicial rests with the defendant and is an extremely heavy burden. While some of this pretrial publicity approaches the outrageous standard, most of the reports were factually based and nearly all the information reported was admitted at trial. This case falls short of those rare and unusual cases where prejudice is presumed.

Defendant claims that the pretrial publicity actually prejudiced his case. Prejudice occurs where the potential jurors could not impartially judge the guilt of the defendant. The defendant must show that the prejudicial material will probably result in the defendant being deprived of a fair trial. While almost all the potential jurors had heard something about the case, all jurors indicated they could set aside any opinions they might have and decide the case based upon the evidence at trial. Given the jurors' questionnaires, their answers, and the rather short, oral voir dire, defendant has not shown actual prejudice.

Defendant argues that the conduct of his trial coupled with the pretrial publicity presumptively deprived him of a fair trial. During trial, outbursts and displays of emotion adverse to the defendant occurred. Defendant claims that these in-court occurrences, coupled with the extensive pretrial publicity, created a carnival atmosphere that denied him a fair trial. Prejudice may be presumed when the record reveals that the trial lacked the solemnity and sobriety appropriate to a judicial proceeding. To presume prejudice, in-court proceedings must be so inherently prejudicial as to pose an unacceptable threat to a defendant's right to a fair trial. There were some news articles describing disturbing events that might show prejudice. However, there is no record as to what actually occurred in court. Newspaper articles detailing these occurrences are insufficient to establish that the trial court failed to control the court room. The issue is left to post-conviction relief proceedings to ascertain the extent of these events and their possible effect on the trial. However, trial judges are to take measures to ensure

that those who come to see the trial are spectators and not advocates. While the public has the right to watch the trial, it does not have any right to participate in it or indicate a desired outcome.

Defendant claims that the trial judge erred by failing to conduct individualized voir dire. The perspective jury members filled out a questionnaire. The trial judge conducted a fairly short, oral voir dire of the entire panel. The defendant requested individual voir dire. Individual voir dire is useful in cases involving massive publicity or unusually sensitive subjects and is designed to encourage full disclosure. Whether to conduct individualized voir dire, however, is left to the trial court's discretion. In this case the written questionnaire addressed many of the questions that might otherwise have been covered in individualized voir dire. There were also no incidents during voir dire which impermissibly tainted the panel. Though the procedure used in this case involved risks of taint, the danger did not materialize and the trial court did not abuse its discretion.

Defendant argues that the scope of voir dire was inadequate to secure an impartial jury. At trial, defendant was content with the extent of the oral voir dire. Defense counsel agreed with the trial court's proposed questions and had no additional matters for the court to discuss with the jury panel. Defendant is precluded from raising any claim regarding the scope of panel voir dire.

Prior to trial, the perspective jury filled out a questionnaire form. After introductory statements, the defendant, his attorney, and the prosecutor left. The trial judge remained and answered perspective jurors questions on the record. Defendant claims that the trial judge should have advised him of the specific exchanges with the prospective jurors. A criminal defendant has a right to be present during voir dire. However, the defendant waived his right in this case by voluntarily leaving. The trial judge gave defendant personal notice of the proceedings and told defendant that he would remain to answer questions. By voluntarily leaving, defendant waived his right to be present.

Defendant also claims that it was improper for the trial court to communicate with the panel while the questionnaires were being completed. It is improper for a trial judge to communicate with the panel, unless the defense has been notified and given the opportunity to be present. In this case, the defendant and his attorney were notified and given the opportunity to be present. The trial judge was not required to make the defendant and his lawyer remain, and the record does not show any impropriety in the trial judge's responses to the questions asked.

(cont. on pg. 17)

Defendant argues that the trial judge should have stricken 12 of the 14 trial jurors for cause. Defendant did not make this objection at trial and has waived the issue absent fundamental error. Two jurors had qualified opinions as to guilt. Others indicated that they would find it difficult but not impossible to be fair and impartial. Several jurors were familiar with the crime scene or the people involved in the case. Each juror believed they could set aside their feelings, and sit fairly and impartially. These problems, without more, did not require disqualification. Several jurors knew something about DNA testing, with varying opinions as to reliability. Mere knowledge about relevant scientific testing procedures does not disqualify a potential juror. One juror had previously served on a murder case. Prior jury duty in a similar but unrelated case does not automatically disqualify a juror. One juror indicated in the questionnaire that he would not treat the testimony of police officers as he would other witnesses, did not understand that the state had the burden of proof and did not agree with the presumption of innocence. This juror also indicated that he could fairly and impartially listen to and weigh the evidence, and render a verdict in accordance with the law. Although a follow-up or inquiry with this juror would have been appropriate, no fundamental error occurred. While it might have been appropriate to have excused some of these jurors or at least question them further, the defendant asked for neither, and no fundamental error occurred.

Defendant claims it was error to not sequester the jurors. Defense counsel did not ask for sequestration of the jury before trial. No fundamental error occurred. Sequestration is discretionary and there is no record of jury misconduct. While there may have been an incident where a juror saw some news reports of the trial, there is no record of what occurred. On this record, no error occurred.

During trial, a state's witness noted in open court that he knew a juror. The court and defense counsel questioned the juror. The trial judge found that the juror could continue to sit. Defense counsel later moved to have the juror selected as an alternate. The trial judge refused and that juror eventually became the foreman. A defendant may make a challenge for cause against a juror after trial begins provided the grounds for the challenge were not known earlier. In deciding whether a juror may continue to sit where there is late disclosure that he knows a state's witness, the court must consider the relationship between the witness and the juror, whether the juror will properly assess the testimony, the importance of the testimony, and whether the testimony is disputed. While the witness and juror had been friends in high school and college, they had not spent any time together recently. The juror stated he would assess the witness's testimony as he would any other witness. The juror also stated that he had not discussed the case or the witness's line of work with the witness. Additionally, the witness's testimony was un rebutted and was not part of the core of the state's case. Although it would have been better to have selected this juror as the alternate, the court did not abuse its discretion in denying the motion.

II. Prior Bad Acts

Prior to trial, the prosecution sought to admit evidence of the defendant's 1981 convictions for sexual assault and kidnapping. The court found the evidence admissible to show identity but not emotional propensity. The victim of the 1981 incident testified at trial and the jury was given a limiting instruction. Defendant claims that his prior bad act was inadmissibly used to prove his character. To be admissible under Rule 404(b), the state must show that the defendant committed the prior offense, that the prior offense was not too remote in time, that the offense was similar to the offense charged, and that the prior offense was committed with a person similar to the victim. Defendant admitted his 1981 conviction. The prior offense occurred 8 years before, but only one year after defendant's release from prison. The similarities between the 1981 conviction and the 1989 offense included the same area, the use of a vehicle, similarities between the victims, similarities in the manner of the offense, and the use of a knife. There were also differences, including age and relationship to the victim. However, absolute identity in every detail can not be expected. Where an overwhelming number of significant similarities exist, the evidence of the prior act may be admitted. The evidence in this case shows enough of a signature to admit the evidence to show identity under Rule 404(b).

DNA Evidence

When arrested, the police noticed blood on the defendant's shirt. Later DNA testing showed a match between the victim's DNA and the DNA in the blood. There was no match to the defendant's DNA. Defendant claims that the DNA testing used here is not generally accepted in the relevant scientific community and fails the *Frye* test. See *United States v. Frye*, 293 F. 1013 (D.C. Cir. 1923). In deciding whether to look at the *Frye* test of general acceptance in the relevant scientific community or the recent *Daubert* tests of reliability for pertinent evidence based on scientifically valid principles, the court leaves whether *Daubert* is to be accepted for another day and applies the *Frye* test.

Defendant claims that the foundational showing for the *Frye* test should have been done out of the presence of the jury. The trial court has discretion in deciding whether a foundational showing under *Frye* is to be made outside the jury's presence. While making this showing has its advantages, the trial court is not required to hold a foundational hearing outside the jury's presence. The state made a proper foundational showing regarding the testing lab's performance.

Defendant claims that the testing lab's match standards are not generally accepted in the relevant scientific community. The accuracy of a match determination is very important and any match involves some subjectivity. Other courts have found that this particular testing lab's match criteria comply with *Frye* and defendant advances no good argument that these cases are wrong. The lab's match criteria are generally accepted within the relevant scientific community.

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At trial, the lab's expert testified that the probability of a random match in this case ranged anywhere from 1 in 60 million to 1 in 14 billion. Defendant contends that the trial court erred in admitting the lab's statistical probability evidence. A state expert testified that the data base used for these statistics was suspect. A defense expert testified that the lab's statistical probability calculations were not generally accepted in the relevant scientific community. The statistical probability calculations in DNA evidence have been a center of controversy in the scientific community. Cases from other states confirm a lack of general acceptance of the lab's statistical probability calculations in the relevant scientific community. The trial court erred in admitting the probability testimony. However, this error was harmless in this case. The other evidence in this case points with unerring consistency to one inarguable conclusion: The defendant killed the victim. The guilty verdict in this case was unaffected by the improper admission of the DNA evidence.

III. Right to Counsel

On the eve of trial, defendant filed a motion to continue claiming ineffective assistance of counsel. Defendant called his attorneys as witnesses, but did not request additional counsel to represent him during the hearing. The trial judge denied the motion. Defendant now argues that he was denied his right to counsel during that hearing. At the hearing, one of defendant's attorneys appeared, represented his interests, and protected his rights. No error occurred.

Defendant also asked to remove his lead attorney, claiming a lack of trust and confidence. The trial judge denied the motion. Although an indigent criminal defendant has a right to competent counsel, this right does not include choice of counsel and does not guarantee a meaningful relationship. Conflict between counsel and a defendant is but one factor, and a mere allegation of lost confidence does not require appointing substitute counsel. While there were some disagreements as to tactics and strategy in this case, there were no irreconcilable conflicts.

IV. Evidentiary Issues

Defendant moved to preclude any evidence of his flight. The trial judge denied the motion, admitted the evidence, and gave a flight instruction. Flight constitutes an admission by conduct. To be admissible, there must be evidence of flight from which can be inferred a consciousness of guilt for the crime charged. At the time of his arrest, defendant was driving a stolen vehicle and was wanted for theft. Just because a defendant is wanted on another charge, however, does not make evidence of flight per se inadmissible. Further, the crimes charged in this case included the theft of the vehicle. No error occurred.

At trial, Arizona Department of Corrections Counselor Robert Emerick testified that defendant had told him several years ago that the only remorse he had for his prior crime was that he had been caught and that there was somebody left behind to report him. Emerick also gave damaging testimony that the defendant was a very dangerous man and left memorable impressions about his sexual deviance pattern. Defendant claims this testimony was inadmissible hearsay. Hearsay may be admitted if it is a

statement of a declarant's then existing state of mind. An essential element of the murder charge is premeditation. While the defendant's statements could be interpreted in more than one manner, they could reasonably be interpreted to mean that the defendant would never again leave a victim alive to testify against him. The testimony showed his state of mind and was relevant to premeditation and motive. The trial court did also not abuse its discretion in finding that the probative value outweighed the danger of unfair prejudice.

Defendant claims it was fundamental error to admit testimony about human blood stains found on his pants and boots. Defendant claims there was no link between these stains and the day of the victim's abduction. In this case, defendant was wearing the pants and boots when apprehended hours after the victim's abduction. The closeness in time between the abduction and defendant's arrest raises an inference that he wore this clothing at the time the victim was killed. The evidence was relevant and admissible.

The state introduced DNA evidence from the blood found on defendant's shirt. The testing used approximately 70% of the available sample. Defendant moved to preclude the test results claiming that the testing destroyed the usable sample. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not deny him due process of law. Defendant does not allege bad faith by the state, a necessary element of this claim. Further, there was a good faith effort made to take only as much as was needed for the state's tests. No error occurred.

As part of the investigation, the victim's mother was hypnotized. The trial court excluded the mother's pre- and post-hypnotic description of the vehicle. However, others were allowed to testify as to her pre-hypnotic statements. The victim's mother apparently did not testify at trial and defendant claims a denial of his Sixth Amendment right to confront the witness. The mother's statements were admissible as excited utterances. When hearsay testimony comes within a firmly rooted exception, the confrontation clause is satisfied.

At trial, a dog handler claimed that his dog alerted on the defendant's vehicle. The handler testified there was a doubt in his mind whether the dog was working the victim's or the defendant's scent at that time. Defendant claims that the testimony was irrelevant and without foundation. The testimony was relevant because it tended to connect the defendant with the victim. There was also no inadequacy in the foundation for the tracking evidence. The testimony was also not prejudicial to the defendant.

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V. Other Trial Issues

Defendant claims that the trial judge showed bias against his trial counsel by interrupting his questions and refusing to limit such comments to off-the-record discussions. A trial judge must control the courtroom to help ensure a fair trial. While a trial judge must be impartial, a trial judge also has discretion to prevent repetitive, irrelevant, or argumentative questioning, even when opposing counsel does not object. While one comment by the trial judge about trying to teach counsel a lesson was improper, this statement was made outside the presence of the jury and did not unfairly prejudice the defendant.

Defendant moved for a judgment of acquittal because there was insufficient evidence of child molestation. The victim was 9 years old, her corpse was naked, her hands were bound, the defendant's pubic hair was found near the body, and defendant was wearing no underwear when arrested. Substantial evidence existed to warrant conviction. The trial judge also did not err in refusing a new trial on this basis.

During testimony about the defendant's prior convictions, the victim's father ran out of the courtroom and cursed loudly. The jury was told to disregard the outburst and the victim's father was excluded from the courtroom for the remainder of the trial. When defense counsel moved for a mistrial, the judge denied it, noting there was never any doubt in the jury's mind about how the victim's father felt about the defendant. The only information conveyed was the father's animosity towards the defendant, a feeling that could have hardly surprised the jurors. In light of the nature of the outburst, the instructions to the jury, and the exclusion of the victim's father, the trial court did not abuse its discretion.

The defendant was arrested for stealing a truck. The police seized his clothes for testing without a warrant. Defendant claims there was no probable cause to seize his clothes and the evidence taken from the clothing should have been suppressed. This type of warrantless seizure does not violate the defendant's Fourth Amendment rights. Here the authorities merely tested that which had properly come into their possession. The defendant was properly arrested and his clothes were properly taken. Later testing his clothes without a warrant did not violate his Fourth Amendment rights.

Defendant claims that the jury was given an erroneous instruction on child molestation. The instruction given omitted a requirement that the act be motivated by an unnatural or abnormal sexual interest or intent. Defendant failed to object at trial, waiving all review but fundamental error. Defendant did not defend on the basis that he was not so motivated; he defended on the basis that he didn't do it. The acts committed, by their very nature, manifest motivation by an unnatural or abnormal sexual interest in children. No fundamental error occurred.

VI. Prosecutorial Misconduct

Defendant claims that the prosecutor committed misconduct by referring to some of the questions in the jury questionnaire as "silly." The comment was inappropriate, especially where the jury knew that defense counsel wrote the questionnaire. The remark fell far short of actionable

misconduct and the judge told the panel that the questions were approved by the court. No error occurred.

During opening statement, the prosecutor vouched for the witnesses who would be called and the prosecutor suggested that evidence not presented supported the witnesses' testimony. Defense counsel did not object and the jury was not instructed to disregard the remark. However, given the entire record of this case it is not probable that the jury was influenced by these remarks and the statement probably did not deny defendant a fair trial. The comments, though highly improper, did not constitute fundamental error.

During opening statement, the prosecutor suggested that the victim was tortured. The defendant claims these statements were unsupported by the evidence and were improper. The comment during opening statement that the victim was "perhaps tortured" was improper. Opening statement is counsel's opportunity to tell the jury what evidence will be introduced, not a time to argue the inferences from the evidence. There was no direct evidence that the victim was tortured. The comment during opening statement was improper but no reason to reverse. While the comment was improper, at that point it was a reasonable inference from evidence later introduced and would have been proper during closing argument. The comment during closing argument that the victim may have tormented was proper. The improper comment did not deprive the defendant of a fair trial in this case.

During both opening and closing statements, the prosecutor referred to the rights of the victims and their families. Appeals to a jury's innate sense of fairness between a defendant and the victim can not prevail. A jury in a criminal trial is not expected to strike some sort of balance between the victim's and the defendant's rights. The statements encouraged the jury to decide the case on emotion and ignore the court's instructions. The statements should have been stricken and a corrective jury instruction given. However, in this case the jury received proper instructions later and the defendant was not denied a fair trial. No fundamental error occurred.

VII. Sentencing

In reviewing the death penalty, the Supreme Court affirms the death sentence. The court found that the trial court erred by relying on the previous convictions as aggravating circumstances, because under the statutory definition of the crime, neither the use nor threat of violence was a necessary element. However, the killing was especially cruel and the victim was under 15 years of age. The court finds no significant mitigating evidence, discounting defendant's claim that his withdrawal from alcohol and drugs substantially impaired his capacity. The court determines that there is no point in remanding this case for resentencing. Even though one of the three aggravating factors was inappropriate, in the absence of any mitigating evidence there is no purpose to remanding for resentencing. The death penalty is affirmed.

Bulletin Board

Speakers Bureau

Christopher Johns has been active speaking on the criminal justice system--addressing students at Rio Salado Community College (Jodi Weisberg's class) on March 24, at ASU's Law School Career Day on March 29, and at Gateway Community College on April 13.

Michelle Lue Sang spoke on April 12 to an 8th-grade class at Carson Junior High School. She discussed the P.D. perspective on the criminal justice system, plea bargaining, and what a criminal attorney realistically can do for a client.

Anne Whitfield recently joined our Speakers Bureau, and on April 29 will go to Career Day at Deer Valley Middle School. There she will speak to three different classes on what a career as an attorney is like, what training/education you need to be an attorney, and what Arizona's juvenile justice system is like.

Trial College

The Maricopa County Public Defender's (MCPD) 2nd Annual Trial Skills College was held March 16 - 18. Twenty-four attorneys attended the college which was conducted at Arizona State University's College of Law. Attendees' legal experience ranged from one month to seven years practicing law. Some attendees had never handled a jury trial while others had up to 38 jury trials. Experience in bench trials ranged from handling 0 up to 40 such trials.

Attendees gave high praise to all of the college instructors: **Russ Born** (MCPD), **Bob Doyle** (MCPD), **Larry Grant** (MCPD), **Bill Foreman** (private practice, Phoenix), **Tom Henze** (private practice, Phoenix), **Christopher Johns** (MCPD), **Andrea Lyon** (director of the Illinois Capital Resource Center, Chicago), and **Emmet Ronan** (MCPD). One attendee seemed to sum up the opinions of all, noting in the college's evaluation, "Great, great program!!" ^



2234 North 7th Street
Phoenix, Arizona 85006-1656 Tel. (602) 254-7328

March 23, 1994

Mr. Christopher V. Johns
Editor, For the Defense
Public Defenders Office
132 South Central
Suite 6
Phoenix, Arizona 85004

Dear Mr. Johns:

In your recent article in For the Defense, "Taking the Judge to TASC - Some Practice Considerations" there were several issues addressed that may have given the reader an inaccurate perception of the program.

1. Although the statistics you cite about the ethnicity of clients who volunteer to participate in TASC are correct, what does the 7.9% of black participants really indicate?

From March 1989 through February 1994, there were a total of 23,397 drug possession cases reviewed for Diversion. Of that number 10,223 (43.7%) were cases eligible for Diversion. Of that figure, 4,615 (45.1% of the 10,223) volunteered for Diversion. TASC does not have the data to determine the aggregate number of Afro-Americans represented in the overall arrestee population nor do we have data reflecting the aggregate number of Afro-Americans represented in the eligible population. Without these numbers I believe the conclusions you draw relative to race bias in the TASC Diversion program are unfounded.

2. Your statement that "Blacks may be less likely to be offered a treatment option, and their relative poverty compared to whites means they cannot "buy" their way out of charges as affluent whites can" is again not supported by the facts.

No client who has chosen to participate in the Diversion program has been turned away because he/she did not have the ability to pay their fees. The program guidelines were intentionally designed to avoid the exclusion of any participant based on ability to pay. As a reflection of this policy, TASC currently services a 22% indigent client population in the one year Diversion program. Please note that clients deemed to be indigent receive full program services (counseling, case management, drug education and drug testing) at no charge. In addition, many more clients (33.5%) are participating in the program on a sliding fee scale, meaning that their fees are based on their ability to pay.

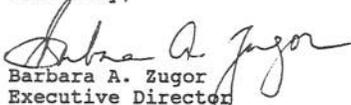
Given the ever increasing number of indigent and sliding fee clients during the last three years, the struggle to maintain the financial integrity of the program has become more and more difficult. Unfortunately, if a client fee supported program cannot sustain itself, the alternative may be no diversion option for any client - rich or poor.

3. Your statement that "The person also is most frequently employed full-time and makes over \$14,000 annually" was probably true in 1992. However, currently the average annual salary level of clients in the diversion program is now only \$10,000.

I hope you will print this letter in your next issue of For the Defense.

Although I believe your article drew several unfounded conclusions, we at TASC look forward to continued support of the Public Defenders office so together we can continue to provide an opportunity for first time felony offenders to not only avoid a conviction but to make a commitment to a drug free lifestyle.

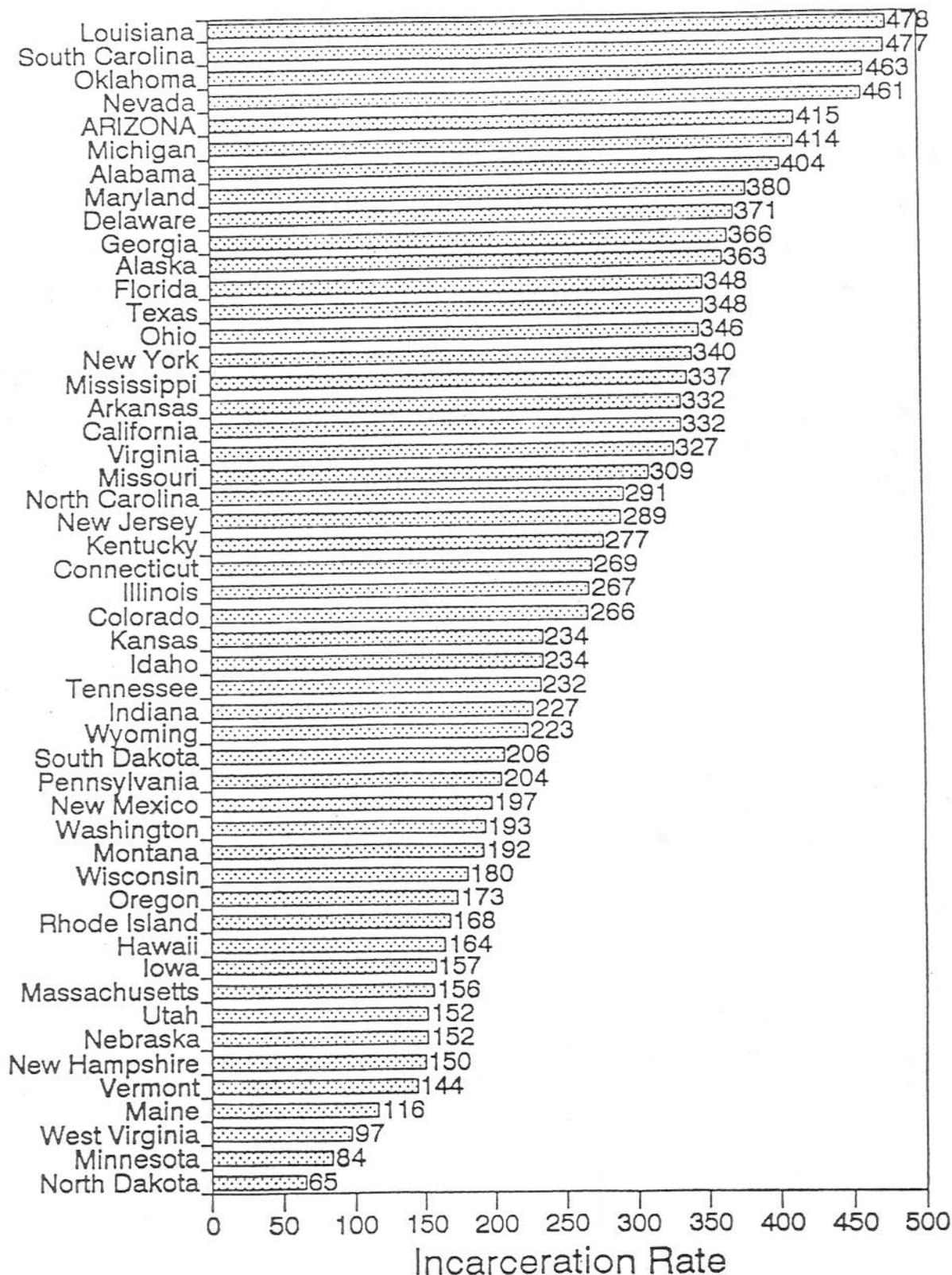
Sincerely,


Barbara A. Zugor
Executive Director

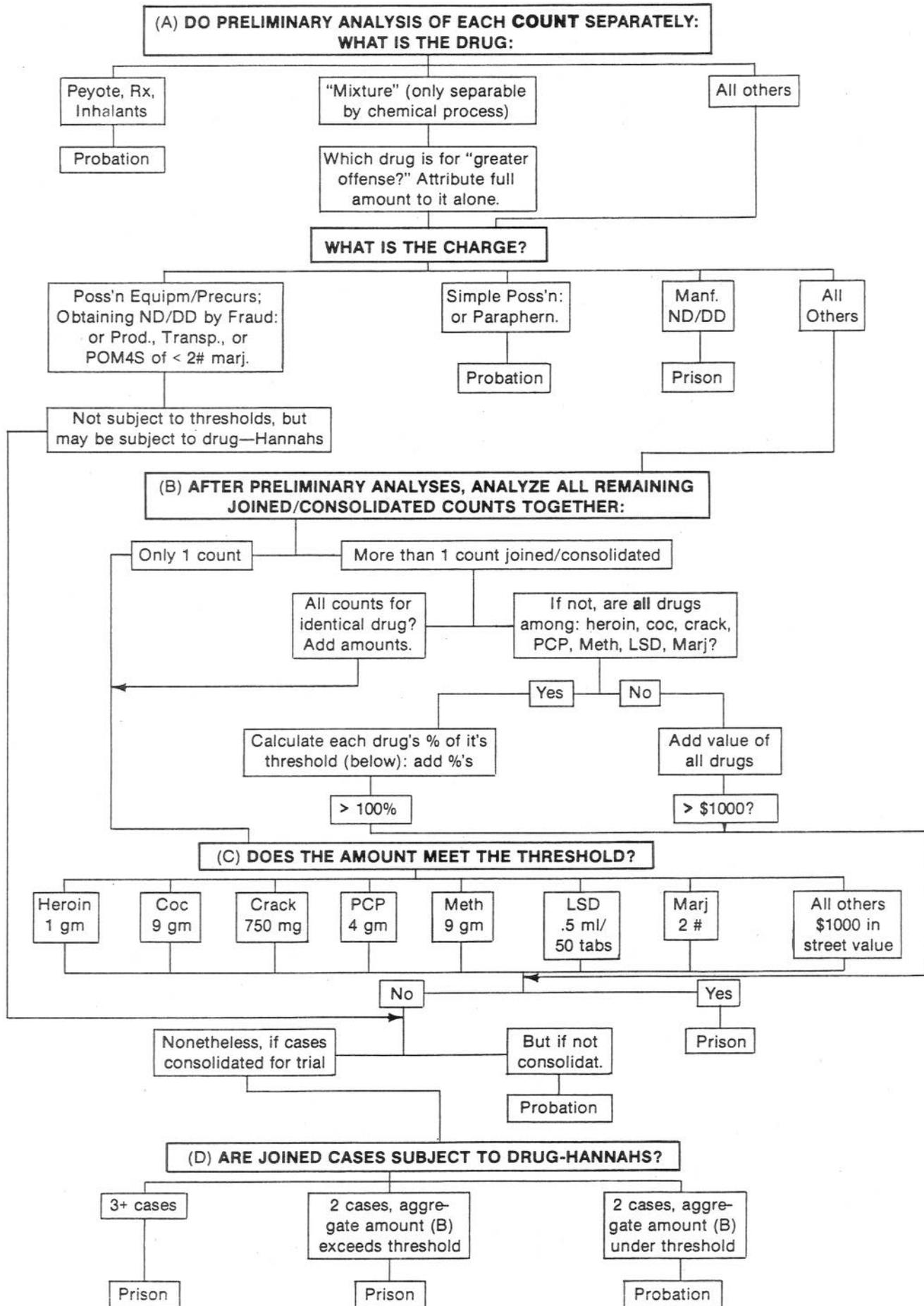
BAZ:sjw

ARIZONA DEPARTMENT OF CORRECTIONS

Incarceration Rate Rankings of the States, December 31, 1992



DRUG OFFENSE MANDATORY PRISON FLOW CHART



FOR THE DEFENSE APRIL INDEX*

Number of states that executed people during 1992: 13
Number of persons executed in 1991: 14
Number of persons executed in 1992: 31
Average number of years a person was under death sentence before execution in 1992: 9 years and 6 months
(2 months shorter than the year before)
Number of persons sentenced to death in 1992: 265
Number of persons who died waiting for imposition of the death penalty: 7
Number of prisoners whose death sentences were overturned on appeal in 1992: 117
Number of persons sentenced to death whose sentences were commuted in 1992: 2
Total number of persons, state and federal under a death sentence at the end of 1992: 2,575
Percentage of persons under sentence of death in 1992 who were white: 58.6% (1,508)
Percentage of persons under sentence of death in 1992 who were black: 40.0% (1,029)
Percentage of persons under sentence of death in 1992 who were American Indian: 0.9% (24)
Percentage of persons under sentence of death in 1992 who were Asian American: 0.5% (14)
Percentage of persons under sentence of death known to be of Hispanic origin: 7.6% (196)
Number of women in 1992 sentenced to death: 36 (1.4%)
Median age of all inmates under a death sentence: 35 years
Average age at which persons are sentenced to death in 1992: 29
Percentage of prisoners under death sentence in the South: 56%
Percentage of prisoners under death sentence in the West: 22%
Percentage of prisoners under death sentence in the Midwestern States: 16%
Percentage of prisoners under death sentence in the Northeastern States: 6%
State with largest number of persons held on death row: Texas (344)
Number of executions in Arizona during 1992: 1
Number of executions in Texas during 1992: 12
Number of persons under death sentence in Arizona in 1992: 103
Number of executions between January 1, 1977 and December 31, 1992: 188

*Source U.S. Department of Justice: Bureau of Justice Statistics Bulletin: Capital Punishment 1992. Compiled by the editor.