

for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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A Noble Institution

by Dean Trebesch,
Maricopa County Public Defender

Thirty years ago this month a new law office opened its doors in Phoenix. September of 1965 marked the unheralded beginning of the Maricopa County Public Defender's Office.

There wasn't much here then . . . a few cases being handled by a handful of staff squeezed into some old,

cramped office space. 1965 was before mandatory sentencing, when crime was less noticeable and rehabilitation was still the highest priority of the criminal justice system.

Only a small group of lawyers practiced criminal law back then and a good share of them were fairly eccentric, I've been told. Phoenix itself was a relatively small town in 1965. Neither the Central Superior Court Building nor most of our jails had yet been constructed.

In those 30 years much has happened. We have gone from Sam Goddard as Governor to Fife Symington, from the Warren Court to the Rehnquist Court. I was a teenager and most of you probably were not born.

Many extraordinary attorneys have passed through these doors, laboring as deputy public defenders. Some of the best are here right now. None seem to have regretted their time here. In fact, most have warm memories recalling the tough yet rewarding experiences they shared with colleagues and friends. This listing includes politicians, numerous appellate and superior court judges, and notable others who once graced our hallways.

As I contemplate this milestone, and consider what I might say that would be fitting, I realize what is important is not the number of years the office has been in existence or even the illustrious names of the people who practiced law here. The importance of the occasion is instead derived from why they were here and what they endeavored to accomplish.

In many ways, it is an awful job. Usually, the facts of a case are against you, the case law is against you, and the system seems to be asking you to simply speed things along. Resources are skimp, clients are in dire straits, while you are overworked, underpaid, and unappreciated by the community.

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While pondering all of this I am struck by the observation that I, personally, have devoted 14 years of my life to this task. For nearly half of that 30 years, I have been a part of the action, in one way or another, of an office I knew nothing of 30 years ago.

What could entice and gratify so many people? Cecil Patterson said it best, I believe, during his recent investiture ceremony as Division One's newest Appellate Judge. Judge Patterson, a former member of this office, recognized the enduring importance of ensuring the words "equal justice under the law."

Those words are still at risk these days when it seems that nearly as much is spent on O.J. Simpson's defense as is available in our office's annual budget to defend over 40,000 individuals.

Whether the issue is Mark Fuhrman or a simple witness misidentification by a well-meaning observer, our clients need the protection we give them. Relishing the role of underdog, inherently being skeptical of what the government claims happened, anxiously trying to improve someone's circumstances and future--these are the special characteristics of this office that have kept it alive for 30 years, and more.

**. . . the enduring
importance of ensuring
the words
"equal justice
under the law."**

Far too often we have been right and the government has been wrong. Instead of just celebrating our 30 years, I am transfixed by the thought of what would happen if we were NOT here. The truth-seeking process rests largely on our shoulders, and no matter how underfunded we may be, that noble and critical objective is what makes it all worthwhile. Liberty and the presumption of innocence should never be taken for granted. For 30 years this remarkable office has displayed the grit to protect these rights, and to defend when no one else would. Ω

Mark IV GCI Hearing Update

by Gary Kula

For several months now, there has been a hearing taking place in Phoenix Municipal Court challenging the use of the Mark IV GCI and the maintenance procedures, or lack thereof, used by the Phoenix Crime Lab. On September 5, 1995, the Honorable Elizabeth Finn, Judge of the Municipal Court, presiding over the hearing, made 186 findings of fact and 13 conclusions of law as to the hearing and the defense's request to examine and test the Mark IV GCI machine used by the City of Phoenix. Given the scope of the findings of fact, the findings made by Judge Finn have been consolidated into a paragraph format for the purpose of this article. The findings of fact include:

The Mark IV GCI (GCI) was originally produced with a regulated power supply. The GCI, as originally approved by the Arizona Department of Health Services (ADHS), had an internal pump with power from an internal power board.

The air pump of the GCI, as originally approved by the ADHS, was powered by a plug running from the internal power board to a power source inside of the machine. The GCI was built with this power supply to eliminate any effect from power line fluctuations. The Phoenix Police Department's crime lab (PCL) retrofitted its GCIs with an external air pump at some time during

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for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

the late 1980's. The retrofitted air pump is powered by a separate cord running from the external pump to an external power source, a wall socket. This type of power source, a wall socket, has no regulation. The ADHS never approved the retrofitted GCI with this type of configuration, i.e., an external pump powered by an external power source. Fluctuations in electrical power through residences and commercial establishments can vary as much as six to ten percent within a short time frame. Voltage irregularities may cause changes in the operation of the GCI. Such fluctuations can result in an irregular flow of air to the machine. The irregular flow of air and/or irregularity in electrical power can result in inaccurate readings not detected by periodic calibration tests.

The PCL has no plans to put any of their GCIs back into service as the PCL has permanently replaced the GCIs with Intoxilyzer 5000's. The PCL is probably the only police agency in the United States still using the GCI. The GCI manufacturer has not been able to supply replacement parts or repair support for several years.

The manufacturer recommended maintenance for the GCI in its "owner's manual." The manufacturer's owner's manual gave guidelines for such maintenance. The PCL does not follow the manufacturer's owner's manual's recommendations for such maintenance. The PCL does not perform preventative maintenance on a scheduled basis. It performs preventative maintenance on an "as needed" basis. The PCL does not own and is not sure that they ever owned a copy of the manufacturer's "Maintenance Manual."

The PCL staff contains no personnel with any expertise in electronics. The PCL has repaired electronic components of the GCIs. The PCL has replaced circuit boards in the GCIs. The PCL does not possess any schematic diagrams of the Mark IV GCI. The PCL does not use any schematic diagrams when it diagnoses problems with the GCIs. The PCL does not use any schematic diagrams when it works on or repairs GCIs. The PCL performs most of its repairs within the physical confines of its blood alcohol lab. The PCL has no separate facility for its electronic repairs. The PCL has no specialized tools which it uses to repair GCIs. The PCL uses ordinary screwdrivers, wrenches, pliers, and soldering guns. The PCL does not use an oscilloscope when it attempts to diagnosis or repair a GCI. The parts used for repair of GCIs include the use of parts from failed GCIs.

The Phoenix Crime Lab only maintains calibration records for recording any information about maintenance, replacement parts or any other data relating to GCI's. The PCL has no records and cannot produce any records of repair or maintenance to these machines other than what is contained on the calibration records. The calibration records used by the PCL do not indicate the source of parts used for repair. The calibration records used by the PCL do not always indicate what repairs were made. The PCL kept no records for repairs if the device was not "in use" per the definition of the state's experts. The calibration records used by the PCL do not indicate who made the repair. The calibration records used by the PCL do not indicate where the repair was made. The practice of the PCL is to not record on the calibration records all of the specifics of any repair. The calibration records used by the PCL do not indicate what repairs were performed by outside suppliers.

The PCL [Phoenix Police Department Crime Lab] does not own and is not sure that they ever owned a copy of the manufacturer's "Maintenance Manual."

The PCL has returned GCIs to the manufacturer for repair. The PCL has obtained replacement parts or parts for repairs for the GCIs. The Phoenix Crime Lab has no records for:

- a. any purchase orders for such parts purchased to repair the GCIs;
- b. any shipping documents from the manufacturers of parts used for repair of the GCIs;
- c. any invoices from parts manufacturers for parts used to repair the GCI's;
- d. any correspondence between the Phoenix Crime Lab and the supplier of any parts for the GCIs;
- e. any purchase orders between the manufacturer of the GCI and the Phoenix Crime Lab for any repairs to the GCIs;
- f. any shipping documents between the Phoenix Crime Lab and the manufacturers of the GCIs for devices shipped to the manufacturer for repair;
- g. any invoices between the PCL and the manufacturer of the GCI for any repair services;

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h. any correspondences between the Phoenix Crime Lab and the manufacturer of these machines.

The PCL maintains an inventory of parts for the repair of the GCIs. No documents exist which indicate the source from which those supplies were received. Records other than calibration checks which come into the possession and control of the Phoenix Crime Lab on a routine basis pertaining to machine maintenance, repair, and adjustment are either destroyed or not preserved. The PCL does not report to the ADHS when it takes a breath testing machine out of service. The PCL does not report to the ADHS when it retires a breath testing machine. The PCL does not perform any "failure analysis" of its breath testing machinery.

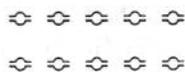
The City Prosecutor's Office filed a discovery notice claiming that the PCL has:

- a. a quality assurance plan approved by ADHS, and
- b. a certificate of approval of said plan along with the work sheet which accompanied it.

Kevin Knapp, a criminalist with PCL, has no knowledge of these documents. Knapp, has never seen these documents. Knapp, testified that the PCL does not maintain a written quality assurance program for the GCI but for the maintaining of calibration records.

If you have a case involving the Mark IV GCI, you may want to call Cliff Girard or Chris McBride to obtain a copy of their motion challenging the use of this breath testing device.

Editor's note: Mr. Kula is in private practice in Phoenix after serving for five years as a Deputy Public Defender at the Maricopa County Public Defender's Office. While at our office, he conducted in-house DUI training and served as the DUI Editor for this newsletter. His private practice is limited to criminal defense with an emphasis on DUI cases. Ω



RoUND uP ThE UsUal sUsPEcTs: A Column of Practice Pointers and Other Information for Public Defenders . . .

I think crime pays. The hours are good, you travel a lot.

--Woody Allen,
Take the Money and Run (1969).

Honey, I Locked Up Another One

Just in case you haven't checked the basic numbers, let's go over them to make sure everyone is on the same page.

Okay, in 1980 there were one-half million people in U.S. prisons and jails. Proportionally, at the time, that was a much higher number of people than virtually every other Western country. In the years since, violent crime has actually decreased (okay, not by much), but today there are nearly one and a half million people behind bars. Two-thirds of them are black or Hispanic.

Last year's Omnibus Crime Bill, the one currently under attack (first by the U.S. House and now by the Senate), contains close to \$8 billion for the construction of high-security prisons and the now famous "boot camps." There's also almost another \$9 billion for police.

On December 31, 1994, state and federal prisons held 1,053,738 inmates. That's about a 8.6% (83,300) increase over the previous year.

Billing Pretrial Indigent Clients for Medical Services

I haven't heard much more about the Maricopa County Jail's plan to charge our clients, apparently both pretrial and post-plea or trial, since it was announced several weeks ago. Diligent *Suspect* readers, who peruse the Op-Ed and letter sections of *The Arizona Republic*, may have read the excellent letter by Peter Claussen, trialmeister and bikenik, exposing the myth that poor health care for clients only affects them. It, of course, affects everyone who must, as part of their profession, use the jail facility. It's no secret that tuberculosis cases are on the rise in Arizona and the jail population presents a significant number of people who may not ever have obtained the most basic immunizations and health care.

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This is an issue that affects our clients' and our own health.

Here's some general background information that practitioners may find helpful:

In 1976 the U.S. Supreme Court established in *Estelle v. Gamble*, 429 U.S. 97 (1976), that the government [state] has an affirmative obligation to provide medical care for prisoners. Later cases establish that, at least in the context of prisons, there is an obligation to provide for prisoners' basic needs, which include medical care and treatment.

When the State by affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety-- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

DeShaney v. Winnebago County DSS, 489 U.S. 189, 199-200 (1989) (emphasis added).

The other issue, of course, that other public defender offices (particularly in Washington D.C. and New York City) have experienced, is the working environment for lawyers. There are risks to being a criminal defense lawyer. Many of our clients are mentally ill, and (like everyone else) defense lawyers are subject to assaults by clients.

That issue is different, however, from seeing clients in a county facility where basic health concerns may be ignored. Billing for medical care access may have the effect of helping to eliminate the number of inmates who come to sick call; however, it is also a deterrent to inmates who may legitimately be sick. It forces inmates to choose how to spend their money. This is especially true since many of what we could think are basic necessities must be purchased by inmates from the commissary (shampoo, toothpaste, sanitary napkins, and other necessities). Some jails in the South, for example, charge inmates for over-the-counter medications. Result: inmate health in general will deteriorate.

Since jail populations usually haven't had access to decent health care, the situation is even more serious. Many big city jails have experienced outbreaks of tuberculosis--putting at risk inmates, jail personnel, and

visitors (like lawyers and probation officers who must regularly enter the jail). HIV/AIDS inmates are another concern. Deterring them from diagnosis, education, and treatment further increases transmission risks for the whole community.

Criminal defense lawyers with information on the adequacy of medical care and/or physical abuse of inmates by Maricopa County Jail staff should contact Bob Bartels, Assistant U.S. Attorney, or Jean Lawson at 514-7532. The U.S. Attorney's Office is currently conducting an investigation of the Maricopa County Jails pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA).

Defense Group in Need of Support

The National Legal Aid and Defender Association (NLADA) is experiencing tough times. Congress has reduced the Legal Services Corporation funding by one-third forcing many legal aid offices nationally to let their membership in NLADA lapse. The organization's *Defender Division* also has

suffered a major loss in membership. Public Defenders may become members of NLADA for only \$60.00 per year. Contact NLADA at 1625 K Street, NW, Suite 800, Washington, D.C. 20006, (202) 452-0620.

The policy arm of NLADA's Defender Division is the *Defender Council* which consists of 15 public defenders or other indigent defense advocates either elected nationally by the membership or appointed by the Executive Director, Clint Lyons. Last summer, Christopher Johns was appointed to the Defender Council by Mr. Lyons.

NLADA Makes Death Penalty Motions Available

NLADA also has compiled on computer diskettes numerous capital pleadings from the Maryland Public Defender's Office, the Indiana Public Defender Council, and capital litigator and trainer Jim Thomson of California. For a listing of any of the pleadings or other inquiries about them, contact Bob Burke, Senior Attorney, NLADA, 1625 K Street, NW, Suite 800, Washington, D.C. 20006, (202) 452-0620.

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NLADA is also updating its 1990 *National Directory of Death Penalty Mitigation Specialists*. The new edition will be called *The National Directory of Specialists for Capital Case Investigation: Penalty Phase and Clemency*. It will be published in 1996. For information about the directory, please contact Jill Miller, c/o Bob Burke (202) 452-0620.

AACJ Proposes Draft of New Rule of Criminal Procedure

At its recent seminar in Scottsdale, the Indigent Defense Committee of AACJ proposed petitioning the Arizona Supreme Court for amendments to Rules 6.1 through 6.7. The proposed rule change would create an Indigent Defense Commission and would provide various mechanisms to monitor caseloads and provide compensation for indigent defense attorneys. ^CJ Ω

INS Detainers/Holds

The following letter from Humberto Rosales, private counsel, to Dean Trebesch, Public Defender, describes an issue of importance regarding the representation of non-citizens of the United States. Mr. Rosales is a former member of the Maricopa County Public Defender's Office and served as a deputy public defender from 1981 to 1983.

Dear Mr. Trebesch:

I came across an issue that impacts upon Hispanic defendants convicted of a drug offense(s) who have been granted probation and have been authorized Work Furlough. I deemed it worth sharing with your staff.

Recently, I argued a Petition for Writ of Habeas Corpus before Judge Bernard Dougherty. The matter involved a defendant convicted of a drug offense who was granted Work Furlough as a term of his probation. Sheriff Arpaio was refusing the inmate's release for Work Furlough after the Immigration and Naturalization Service (INS) placed their usual "hold." The defendant/inmate is a lawful, permanent resident of the U.S.

I began the case by exhausting administrative remedies and I discovered from the INS that the letter faxed to MCSO [Maricopa County Sheriff's Office] in matters involving Mexican and Hispanic inmates is simply a "Notification of a Pending Investigation" and it is not a

Detainer or a Hold. The letter clearly indicates that the notice is in no way intended to interfere with any lawful orders issued by the superior court, and is not for the purpose of detaining inmates who have been given Work Furlough authorization.

At a hearing on the matter, Judge Dougherty made a finding that the matter was a proper matter to be heard with regard to the statute allowing for a Writ of Habeas Corpus. The INS letter was admitted into evidence, and the Judge also ruled that the letter given to MCSO is not a "hold" or a "detainer," but simply a notice given to MCSO by INS of a pending investigation. He agreed with the interpretation given the letter by the INS, and he ordered MCSO to allow the inmate to continue with his Work Furlough grant.

Please advise your Deputy Public Defenders that the INS "hold" does not apply to defendants who have been placed on probation, who are lawful permanent residents of the U.S., and who have been granted Work Furlough as a condition of probation. The letter submitted to MCSO is a standard letter and clearly indicates that the INS does not want to interfere with the right to enjoy Work Release or Work Furlough.

For too many years now, defendants in similar situations have been denied their Work Furlough benefit because the INS "hold" goes unchallenged. Defendants need to be advised that if the MCSO refuses their release for Work Furlough, they do have a proper remedy. The defendant must be a lawful permanent resident to come within the protection of the Habeas Corpus statute.

If your staff should have questions on this issue, please have them call me at 254-4455.

Cordially,

Humberto Rosales

In subsequent correspondence, Mr. Rosales noted:

Should your employees find it necessary to issue a subpoena on a federal employee, there is a Federal Regulation that must be complied with, otherwise, the agents will not respond to the subpoena or their attorneys will come in to quash the subpoena. As promised, enclosed is the copy of the Federal Regulation. . .

[See Pages 7 - 11]

(c) This directive is effective immediately.
[49 FR 11625, Mar. 27, 1984]

Subpart B—Production or Disclosure in Federal and State Proceedings

SOURCE: Order No. 919-80, 45 FR 83210,
Dec. 18, 1980, unless otherwise noted.

§ 16.21 Purpose and scope.

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term *employee of the Department* includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or

procedural, enforceable at law by a party against the United States.

§ 16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

§ 16.23 General disclosure authority in Federal and State proceedings in which the United States is a party.

(a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the "originating component" as defined in § 16.24(a) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney's official duties: *Provided*, Such an attorney shall consider, with respect to any disclosure, the factors set forth in § 16.26(a) of this part: *And further provided*, An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney's judgment, any of the factors specified in § 16.26(b) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (hereinafter referred to as "the EOUST"), or such persons' designees.

(b) An attorney may seek higher level review at any stage of a proceeding, including prior to the issuance of a court order, when the attorney determines that a factor specified in § 16.26(b) exists or foresees that higher level approval will be required before disclosure of the information or testimony in question. Upon referral of a matter under this subsection, the responsible Assistant Attorney General, the Director of EOUST, or their designees shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the De-

partment attorney handling the case or matter.

§ 16.24 Procedure in the event of a demand where disclosure is not otherwise authorized.

(a) Whenever a matter is referred under § 16.22 of this part to a U.S. Attorney or, under § 16.23 of this part, to an Assistant Attorney General, the Director of the EOUST, or their designees (hereinafter collectively referred to as the "responsible official"), the responsible official shall immediately advise the official in charge of the bureau, division, office, or agency of the Department that was responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony was demanded acquired the information in question, employed such person (hereinafter collectively referred to as the "originating component"), or that official's designee. In any instance in which the responsible official is also the official in charge of the originating component, the responsible official may perform all functions and make all determinations that this regulation vests in the originating component.

(b) The responsible official, subject to the terms of paragraph (c) of this section, may authorize the appearance and testimony of a present or former Department employee, or the production of material from Department files if:

(1) There is no objection after inquiry of the originating component;

(2) The demanded disclosure, in the judgment of the responsible official, is appropriate under the factors specified in § 16.26(a) of this part; and

(3) None of the factors specified in § 16.26(b) of this part exists with respect to the demanded disclosure.

(c) It is Department policy that the responsible official shall, following any necessary consultation with the originating component, authorize testimony by a present or former employee of the Department or the production of material from Department files without further authorization from Department officials whenever possible: *Provided*, That, when information

is collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the Department or by the EOUST, the Assistant Attorney General in charge of such a division or the Director of the EOUST may require that the originating component obtain the division's or the EOUST's approval before authorizing a responsible official to disclose such information. Prior to authorizing such testimony or production, however, the responsible official shall, through negotiation and, if necessary, appropriate motions, seek to limit the demand to information, the disclosure of which would not be inconsistent with the considerations specified in § 16.26 of this part.

(d)(1) In a case in which the United States is not a party, if the responsible U.S. attorney and the originating component disagree with respect to the appropriateness of demanded testimony or of a particular disclosure, or if they agree that such testimony or such a disclosure should not be made, they shall determine if the demand involves information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department or the EOUST. If so, the U.S. attorney shall notify the Director of the EOUST or the Assistant Attorney General in charge of the division responsible for such litigation or investigation, who may:

(i) Authorize personally or through a Deputy Assistant Attorney General, the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment or in the judgment of the Director of the EOUST, is consistent with the factors specified in § 16.26(a) of this part, and none of the factors specified in § 16.26(b) of this part exists with respect to the demanded disclosure;

(ii) Authorize, personally or by a designee, the responsible official, through negotiations and, if necessary, appropriate motions, to seek to limit the demand to matters, the disclosure of which, through testimony or documents, considerations specified in § 16.26 of this part, and otherwise to

take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

(iii) If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Director of the EOUST or the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General, for final resolution to the Deputy or Associate Attorney General, as indicated in § 16.25 of this part.

(2) If the demand for testimony or other disclosure in such a case does not involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department, the originating component shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the responsible official may refer the matter to the Deputy or Associate Attorney General, as indicated in § 16.25 of this part. If the originating component determines that disclosure would not be appropriate and the responsible official does not refer the matter for higher level review, the responsible official shall take all appropriate steps to limit the scope or obtain the withdrawal of a demand.

(e) In a case in which the United States is a party, the Assistant General or the Director of the EOUST responsible for the case or matter, or such persons' designees, are authorized, after consultation with the originating component, to exercise the authorities specified in paragraph (d)(1) (i) through (iii) of this section: *Provided*, That if a demand involves information that was collected, assembled, or prepared originally in connection with litigation or an investigation supervised by another unit of the Department, the responsible official shall notify the other division or the EOUST concerning the demand and the anticipated response. If two litigating units of the Department are unable to resolve a disagreement concerning disclosure, the Assistant Attorneys General in charge of the two divisions in disagreement, or the Director

of the EOUST and the appropriate Assistant Attorney General, may refer the matter to the Deputy or Associate Attorney General, as indicated in § 16.25(b) of this part.

(f) In any case or matter in which the responsible official and the originating component agree that it would not be appropriate to authorize testimony or otherwise to disclose the information demanded, even if a court were so to require, no Department attorney responding to the demand should make any representation that implies that the Department would, in fact, comply with the demand if directed to do so by a court. After taking all appropriate steps in such cases to limit the scope or obtain the withdrawal of a demand, the responsible official shall refer the matter to the Deputy or Associate Attorney General, as indicated in § 16.25 of this part.

(g) In any case or matter in which the Attorney General is personally involved in the claim of privilege, the responsible official may consult with the Attorney General and proceed in accord with the Attorney General's instructions without subsequent review by the Deputy or Associate Attorney General.

§ 16.25 Final action by the Deputy or Associate Attorney General.

(a) Unless otherwise indicated, all matters to be referred under § 16.24 by an Assistant Attorney General, the Director of the EOUST, or such person's designees to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the matter is referred personally by or through the designee of an Assistant Attorney General who is within the general supervision of the Deputy Attorney General, or (2) to the Associate Attorney General, in all other cases.

(b) All other matters to be referred under § 16.24 to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the originating component is within the supervision of the Deputy Attorney General or is an independent agency that, for administrative purposes, is within the Department of Justice, or (2) to the Associate Attorney General, if the originating compo-

nent is within the supervision of the Associate Attorney General.

(c) Upon referral, the Deputy or Associate Attorney General shall make the final decision and give notice thereof to the responsible official and such other persons as circumstances may warrant.

§ 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection,

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

(c) In all cases not involving considerations specified in paragraphs (b)(1) through (b)(6) of this section, the Deputy or Associate Attorney General will authorize disclosure unless, in that person's judgment, after consider-

ing paragraph (a) of this section, disclosure is unwarranted. The Deputy or Associate Attorney General will not approve disclosure if the circumstances specified in paragraphs (b)(1) through (b)(3) of this section exist. The Deputy or Associate Attorney General will not approve disclosure if any of the conditions in paragraphs (b)(4) through (b)(6) of this section exist, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. In this regard, if disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, consideration shall be given to:

(1) The seriousness of the violation or crime involved.

(2) The past history or criminal record of the violator or accused.

(3) The importance of the relief sought.

(4) The importance of the legal issues presented.

(5) Other matters brought to the attention of the Deputy or Associate Attorney General.

(d) Assistant Attorneys General, U.S. Attorneys, the Director of the EOUST, U.S. Trustees, and their designees, are authorized to issue instructions to attorneys and to adopt supervisory practices, consistent with this subpart, in order to help foster consistent application of the foregoing standards and the requirements of this subpart.

§ 16.27 Procedure in the event a department decision concerning a demand is not made prior to the time a response to the demand is required.

If response to a demand is required before the instructions from the appropriate Department official are received, the responsible official or other Department attorney designated for the purpose shall appear and furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate Department official and shall respectfully request the court or authority to stay the demand

pending receipt of the requested instructions.

§ 16.28 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 16.27 of this chapter pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions rendered in accordance with §§ 16.24 and 16.25 of this part not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall, if so directed by the responsible Department official, respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 16.29 Delegation by Assistant Attorneys General.

With respect to any function that this subpart permits the designee of an Assistant Attorney General to perform, the Assistant Attorneys General are authorized to delegate their authority, in any case or matter or any category of cases or matters, to subordinate division officials or U.S. attorneys, as appropriate.

APPENDIX TO SUBPART B—REDELEGATION OF AUTHORITY TO THE DEPUTY ASSISTANT ATTORNEY GENERAL FOR LITIGATION, ANTITRUST DIVISION, TO AUTHORIZE PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

1. By virtue of the authority vested in me by 28 CFR 16.23(b)(1) the authority delegated to me by that section to authorize the production of material and disclosure of information described in 28 CFR 16.21(a) is hereby redelegated to the Deputy Assistant Attorney General for Litigation, Antitrust Division.

2. This directive shall become effective on the date of its publication in the *FEDERAL REGISTER*.

[Amdt. No. 960-81, 46 FR 52356, Oct. 27, 1981]

August Trials

July 24

Michael Hruby: Client charged with three counts of child molestation. Investigator N. Jones. Trial before Judge Hertzberg ended August 3. Defendant found guilty. Prosecutor Amato.

July 27

Mara Siegel: Client charged with 11 counts of child molestation. Investigators J. Allard and B. Abernethy. Trial before Judge McDougall ended August 9. Defendant found **not guilty** on five counts; guilty on one count; and five counts were dismissed mid-trial. Prosecutor Heilman.

July 31

Tim Agan: Client charged with two counts of aggravated assault. Trial before Judge Brown ended August 2. Defendant found guilty. Prosecutor Mason.

Gene Barnes: Client charged with forgery. Investigator T. Thomas. Trial before Judge Ishikawa ended August 3 with a hung jury. Prosecutor Brown.

Genii Rogers: Client charged with two counts of aggravated assault (dangerous) and one count of misdemeanor assault. Trial before Judge Dougherty ended August 3. Defendant found guilty of two counts of lesser included disorderly conduct and misdemeanor assault. Prosecutor Clark.

Renee Scatena: Client charged with unlawful flight (with four priors and while on parole). Investigator R. Gissel. Bench trial before Judge Hilliard ended August 2. Defendant found **not guilty** of unlawful flight; guilty of lesser included misdemeanor: failure to obey police. Prosecutor Blomo.

August 1

Pauline Houle: Client charged with aggravated DUI (with two prior misdemeanor DUIs). Trial before Commissioner Lewis ended August 3. Defendant found guilty. Prosecutor Manjencich.

August 2

Brian Bond: Client charged with two counts of aggravated assault. Trial before Judge Dunevant ended August 9. Defendant found guilty. Prosecutor Davidon.

August 8

Tom Timmer: Client charged with aggravated DUI. Trial before Judge Lewis ended August 10. Defendant found guilty in absentia. Prosecutor Mann.

August 9

Cecil Ash: Client charged with theft. Investigator T. Thomas. Trial before Judge Armstrong ended August 10. Defendant found **not guilty**. Prosecutor McCauley.

Vernon Lorenz: Client charged with assault. Investigator D. Moller. Bench trial before Judge Passey (North Mesa Justice Court) ended August 9. Defendant found guilty. Prosecutor Gundacker.

August 14

Slade Lawson/Vernon Lorenz: Client charged with criminal damage and aggravated assault. Investigator T. Thomas. Trial before Judge Ishikawa ended August 17. Defendant received a judgment of acquittal on criminal damage and guilty on lesser included disorderly conduct. Prosecutor Puchek.

Kevin White: Client charged with aggravated assault. Investigators T. Thomas and V. Dew. Trial before Judge Araneta ended August 23. Defendant found **not guilty**. Prosecutor Martinez.

August 15

Dan Sheperd: Client charged with aggravated robbery. Trial before Judge Hauser ended August 18. Defendant found guilty. Prosecutor Macias.

August 16

Peter Claussen: Client charged with two counts of sexual assault and one count of kidnapping. Investigator B. Abernethy. Trial before Judge Seidel ended August 25 with a hung jury on sexual assault and guilty on kidnapping. Prosecutor Rapp.

Colleen McNally: Client charged with one count of endangerment, one count of possession of dangerous drugs, and one count of hindering prosecution. Investigator P. Kasieta. Trial before Judge Lewis ended August 29. Defendant found **not guilty** on endangerment; guilty on possession of dangerous drugs and hindering prosecution. Prosecutor Stuart.

(cont. on pg. 13) 

August 17

Tom Timmer: Client charged with aggravated assault (dangerous). Investigator C. Yarbrough. Trial before Judge Gerst ended August 28 with a hung jury. Prosecutor Lynch.

August 21

Larry Grant/Nancy Hines: Client charged with aggravated assault. Trial before Judge Hauser ended August 23. Defendant found guilty. Prosecutor Myers.

August 24

Elizabeth Feldman: Client charged with aggravated assault. Trial before Judge Jones ended September 1. Defendant found guilty of lesser included. Prosecutor Collins.

August 28

Larry Blieden: Client charged with sexual conduct with a minor, kidnapping, and attempted sexual conduct with a minor. Investigator J. Castro. Trial before Judge Kaufman ended August 31. Defendant found **not guilty** of kidnapping; guilty of sexual conduct with a minor and attempted sexual conduct with a minor. Prosecutor Duax.

Doug Harmon: Client charged with aggravated assault. Trial before Judge Barker ended August 29. Defendant found guilty. Prosecutor Mills. Ω

Bulletin Board

Personnel

New Attorneys:

Joel Glynn, a former deputy public defender, deputy county attorney, and commissioner for Maricopa County, returned to our Appeals Division on September 25. Mr. Glynn previously served in our office from 1974 to 1980.

Suzette Pintard, formerly a trial attorney with our office, returned on September 25 to assume a half-time position at our Mesa Juvenile office.

New Support Staff:

Cassie Goodwin joined Trial Group A as a legal secretary on September 18. Ms. Goodwin just received her A.A. in legal assistance and has ten years of secretarial experience. For the past four years she has been employed at a savings and loan association.

Ricardo Greth will start as the new investigator in Trial Group A on October 2. Mr. Greth, who is fluent in Spanish, served with the Phoenix Police Department for over 20 years in various officer and detective capacities.

Cruz Robayo began employment as a clerk in our records division on August 16. Ms. Robayo has been with Maricopa County since 1984, clerking for the Medical Center, AHCCCS Eligibility, and Health Services.

Francisco Sanchez joined Group C as a law clerk on August 14. Mr. Sanchez earned his B.S. in Business from California State University at Northridge and his J.D. from Arizona State University.

Mike Schwarz started in our Computer Systems division on September 11. Many of us will remember Mr. Schwarz from approximately five years ago when he worked in our office through another county agency.

Miscellaneous

Jamie McAllister, trial attorney in Group A, recently was named as one of "21 Young Lawyers Leading Us Into the 21st Century" by the American Bar Association's Young Lawyers Division. As part of this recognition, Ms. McAllister was profiled in an article in the Summer, 1995 issue of the *Young Lawyers Division's Barrister Magazine*.

Promotions:

The following legal secretaries recently received promotions:

Linda Gilbert
Michelle Lovejoy
Sherry Pape
Shanon Rath
Donna Robertson
Ellie Smith
Maryann Wright
Stephanie Valenzuela

The promotions were awarded based on performance management evaluation scores, attorney feedback, and interviews conducted by a panel of office

(cont. on pg. 14) ☞

staff. Rose Salamone, Administrative Support Manager, noted that our office hopes to offer new promotional opportunities to support staff in January of 1996.

Speakers Bureau

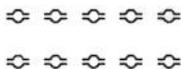
Brad Bransky, a new member of our Speakers Bureau, spoke to three groups of students at Estrella Junior High School's Career Day on September 25. Mr. Bransky presented the criminal defense perspective of work in the legal arena.

Christopher Johns will speak on October 6 at a "What Kind of Role Model are You?" dinner sponsored by C.I.T.Y. DADS, a nonprofit gang prevention and intervention agency founded by parents of children involved in or killed by gangs. The event will be held at the Phoenix Civic Plaza and will also feature Wallace Reynolds, reporter for Channel 12, and Freddie Villalon, Councilman from the City of Tolleson.

Anyone interested in helping youth in gangs or at risk of joining a gang may volunteer to be part of C.I.T.Y. DADS' Mentoring Program. Their program includes a "character check" and a two-hour orientation for volunteers. Office #: 247-7802.

Clothing Closet

Tim Bein, Client Clothing Closet manager, requests that clothing NOT be returned to the closet via anonymous, inter-office mail. Inter-office mail tends to abuse the clothing, and these mailings prevent the Closet staff from conducting the prescribed check-in process. Ω



SUBSCRIPTIONS

Annual subscriptions for our newsletter, **for The Defense**, expire on September 30. If you are a subscriber and wish to continue the delivery of your monthly newsletter, or if you want to start a new subscription, please let us know as soon as possible. The year's subscription (which runs from October 01 to September 30) is still only \$15.00.

Please send your name, mailing address, and a \$15.00 check or money order (payable to "Maricopa County") to

Office of the Public Defender
Maricopa County
132 South Central, Suite 6
Phoenix, Arizona 85004
ATTN: Sherry Pape

The following news item was sent anonymously to the Editor:

"Going That Extra Mile for Your Client"

**Batson Does Not Apply To Prohibit
Peremptory Strikes Based On Obesity**

United States v. Santiago-Martinez, 58 F.3d 422 (9th Cir. 1995)
District of Arizona, Paul G. Rosenblatt
Panel: Goodwin, Farris, Kleinfeld (PC)

The defendant sought to use the striking of obese venire persons to overturn his conviction. Affirmed.

The prosecutor struck three people who defense counsel claimed were obese. **Defense counsel also claimed to be obese**, although he acknowledged that the defendant was not. The district court denied the defense challenges to the peremptory. The court held that equal protection analysis of *Batson vs. Kentucky*, 476 U.S. 79 (1986), does not apply to prohibit peremptory strikes on the basis of obesity. No court has yet held that discrimination on the basis of obesity is subject to "heightened scrutiny" under the Equal Protection Clause. Ω

Computer Corner

This column is designed to provide simple computer tips helpful to people in the legal field. These tips are designed for WordPerfect 5.1 in DOS. If you have any suggestions that you would like to share, please contact Georgia Bohm at *for The Defense* (506-3045). If you have any problems or questions regarding the tips offered below, contact Ellen Hudak in Trial Group B (506-8331) or Georgia.

Miscellanea

● Adding Width for Binding

You are working on a document that will have two-sided pages and will be bound in book form (e.g., manuals, reports, or that new novel you are writing). You have been struggling to make different margins of the even-numbered pages vs. the odd-numbered pages so that the left-hand pages will have a wide right margin and the right-hand pages will have a wide left margin.

A quick way to shift text away from a bound edge is available via WordPerfect's **Print (Shift-F7)** key. Hit **Print (Shift-F7)** and select **(B)** for **Binding Offset**. Type the amount of space you want added to the margin to make room for binding. For example, if you have the left and right margins set at 1" and you want the text to print 1.5" from the bound edge of the page, enter .5" as the binding offset. The opposite margin on that page then will be only .5" wide. Thus every right-hand page will have a left margin of 1.5" and a right margin of .5"; every left-hand page will be the opposite (a left margin of .5" and a right margin of 1.5"). Press **Exit (F7)** to return to the document.

Since the entire text shifts either to the right or left, you may want to adjust your margins accordingly.

After activating this feature, check the effect in **View Document**.

A code for binding is not shown in **Reveal Codes (F11)**. However, the binding offset is saved with your document and remains in effect until you change it again.

● Justification

If you want to temporarily change the justification of a section of text, place your cursor at the beginning of the section, turn on **Block**, and move your cursor to the end of the targeted section. Hit **Center (Shift-F6)** to center the blocked text. (Remember: this will center each line of the block **individually**, so your left and right margins on the block will be "ragged.") Hit **Flush Right (Alt-F6)** to right justify the text. In either case, you will need to verify that you want to change the justification, so hit **Y** for "Yes" at the prompt.

● Spell Check

You have inherited someone else's computer and when you use **Spell Check**, you find that it accepts spellings or abbreviations that you do not want because the previous user added these words/abbreviations to the **Spell Check** feature. (For example, your new computer accepts "th"--so your typos on the word "the" are never caught.) How do you delete these miscreants from your computer?

Hit **List Files (F5)** and find the file named **WP{WP}US.SUP**. Hit **1 Retrieve** which will bring up the list of words that have been added to your computer's **Spell Check**. Delete any listed word(s) that you do not want accepted in your work. Exit the file in the usual manner, replacing the old file with the new, corrected file.

NOTE: For some of us, the file will not be found in **WPMAIN**. My list is in **WP51**.

After hitting **List Files (F5)**, I highlight **Parent <DIR>** at the top of the right column on my files screen. I hit **Enter** twice to bring up the basic directory **C:*.***. I highlight **WP51 <DIR>** and hit **Enter** twice. In **WP51**, I highlight the file **WP{WP}US.SUP**. Then I hit **1 Retrieve** and proceed to delete any unwanted word(s). Ω



Contest



for The Defense is conducting a contest for members of the Maricopa County Public Defender's Office during the months of October 1995 through February 1996. This contest is designed to encourage and reward contributors to our training publication.

Any employee of our office may submit an original, unpublished, educational article of 200 words or more regarding criminal defense for use in the newsletter. If the article is accepted for publication (after a standard screening by the editor), the author automatically is entered in the contest.

All qualifying articles published in the newsletter during the months of October 1995 through February 1996 will be reviewed by a distinguished panel of judges consisting of Dean Trebesch, Maricopa County Public Defender; The Honorable Ron Reinstein, Presiding Criminal Judge, Superior Court of Maricopa County; and Tom Karas, Private Defense Counsel and former Arizona State Bar President. The judges will be looking for creative and thought-provoking writing on educational, criminal defense topics.

The first place winner will receive two tickets to a Phoenix Suns home game (aisle seats, 16th row, section 123); the second place winner will receive a \$40 gift certificate for dinner at *Planet Hollywood*.

- NOTE:
- Articles need to be submitted by the 10th of the month to be considered for that month's issue.
 - No staff member of *for The Defense* is eligible to win.