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other sexual activities in which your client allegedly engaged. More and more frequently, the state seeks to do so under the "emotional propensity" exception to Rule 404(b), Arizona Rules of Evidence. This exception, also referred to as "sexual propensity," allows the state to inform the jury of other instances of aberrant sexual behavior in which your client purportedly engaged and allege, through an expert witness, that your client's past shows he has a propensity to commit the offense with which he is currently being charged. Needless to say, these types of accusations are devastating if they get before the jury. The following discusses some strategies that might help you keep these highly prejudicial allegations out of your trials.

## II. Pretrial Discovery

Under Rule 15, Arizona Rules of Criminal Procedure, the state is required to give notice of this type of information at least 20 days prior to trial. In addition, the state should give you copies of any police reports pertaining to these other alleged offenses as well as grant interviews of any individuals who were witnesses or victims of these other incidents. Typically, the state is also required to come forward with an expert to establish propensity.

As discussed in section III of this article, a number of evidentiary hurdles may bar the admission of this evidence at trial. Normally, a court will resolve these issues at a pretrial evidentiary hearing. The state usually attempts to establish propensity by having its expert testify at this hearing. Preparation for this hearing is probably the single most important facet of your battle against these allegations. There are a number of steps you should take to prepare for the hearing.

First, find out as much as you can about the state's expert. The state typically uses the same experts over and over again. Other defense attorneys or defense

(cont. on pg. 2) 

## Strategies for Keeping Sexual Propensity Evidence out of Trials

by Jeremy Mussman, Deputy Public Defender and Marie Dichoso, Law Clerk

### I. Introduction

Defending a sex case is difficult enough when you are trying to address the specific allegations levied against your client. The challenge increases significantly, however, when the state attempts to introduce evidence of



experts may have useful information concerning the state's expert.

Second, conduct a pretrial interview to determine all bases for the expert's conclusions. Unless there are some extremely unusual and unique circumstances, you should not allow the expert to interview your client. Accordingly, the expert's conclusions regarding your client's "sexual propensity" will not be based upon any first-hand contact that the expert has had with your client. Consequently, the expert cannot make a "diagnosis" of your client. His opinions are, therefore, necessarily based on speculation and reliance upon information from third parties.

You should also attempt to establish whether the expert is biased. These experts oftentimes only testify on behalf of the state. Further, since the state uses them so frequently, the state may take it for granted that these experts will provide them with the opinions that they seek. For example, I recently handled a case where the state gave written notice of an expert for sexual propensity **before** the state provided the expert with any materials regarding the case!

Finally, you should attempt to retain your own expert. Even if you cannot find an expert who is willing to testify on behalf of your client, it may still be extremely useful to have an expert as a **nontestifying** consultant to review the materials and assist you in preparing your cross-examination of the state's expert.

### *III. Legal Standards May Bar the State from Introducing Evidence of Alleged Sexual Propensity*

Arizona case law is surprisingly favorable in the area of sexual propensity. Because this evidence is so devastating, numerous hurdles must be overcome before the state can inject it into a trial. Providing the court with a written memorandum setting forth some of the following standards may assist you in your efforts to keep this type of evidence out of your trials.

#### A. Sexual Propensity Should, Arguably, be Limited to Sexual Activities Against Children.

The exception to Rule 404(b) permits proof of other crimes to prove a character trait—a disposition to engage in aberrant sexual behavior. M. Udall, J. Livermore, P. Escher, G. McIlvain, *Arizona Practice: Law of Evidence*, §84, p. 186 (3d ed. 1991). Courts have been persuaded to allow evidence of "prior acts [which] are near in time to the charged offense, similar in nature, and very aberrant. Practically, this has meant a limitation to prosecutions for sexual activities with children." *Id.* at 187.

#### B. The Aberrant Behavior Should Be Near In Time Or Supported By Medical Testimony.

In a case reversing a defendant's conviction of sexual abuse of a minor and child molestation, the court noted that "the reason for requiring the prior uncharged sex acts [of a defendant] to have been committed near in time to the offense charged is to ensure that the emotional propensity existed when the charged crime was committed." *State v. Hopkins*, 866 P.2d 143, 145 (1993), *citing State v. Spence*, 704 P.2d 272, 274 (App. 1985).

The *Hopkins* court further stated:

The present state of the law . . . is that admitting emotional propensity to molest based on acts as remote in time as ten years requires medical testimony which is factually and medically "reliable" about the continuing emotional propensity during the interval between the prior acts and the present charges.

866 P.2d at 146, *citing State of Arizona v. Treadaway*, 568 P.2d 1061, 1065 (1977) and *State ex rel LaSota v. Corcoran*, 583 P.2d 229, 232-33 (1978).

#### C. Even If Allegations Meet The Exceptions To Rule 404(b), The Prejudicial Effect Of The Evidence Often Outweighs Its Probative Value Under Rule 403.

(cont. on pg. 3) 

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Editor: Christopher Johns

Assistant Editors: Georgia Bohm  
Sherry Pape  
Jim Haas

Office: 11 West Jefferson, Suite 5  
Phoenix, Arizona 85003  
(602) 506-8200

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1. Establishing Sexual Propensity Only Establishes that the Evidence Has Probative Value--Admissibility is a Separate Issue.

In a case in which the court reversed the conviction of a defendant accused of attempting to sexually molest his 13-year-old niece, the court held that even if the prosecution establishes sexual propensity or some common scheme or plan, the state must further establish that the evidence has a sufficiently great probative value:

By meeting the requirements of *Treadaway*, the state merely establishes that its evidence has some probative value. It does not qualify the evidence as *admissible* merely to establish that prior sexually aberrant acts are probative of present sexual propensity.

Likewise, it does not satisfy the requirements of admission to establish that such acts are probative of intent, motive, opportunity, or any of the other purposes set forth in Rule 404(b).

*State v. Salazar*, 173 Ariz. Adv. Rep. 3, 5, citing *State v. Stuard* 863 P.2d 881, 891 (1993).

2. The Trial Judge Has a Special Obligation to Ensure a Sufficiently Great Probative Value Exists.

The court emphasized that "the Rule 403 balancing test is important in analyzing any Rule 404(b) evidentiary question." The court reasoned that:

[B]ecause of the risk of improper use, the trial judge has a special obligation to insure that [the] probative value of the evidence for the purpose offered is sufficiently great in the context of the case to warrant running that risk. The discretion of the trial judge under Rule 403 to exclude otherwise relevant evidence because of the risk of prejudice should find its most frequent application in this area.

173 Ariz. Adv. Rep. at 5, citing *State v. Taylor*, 817 P.2d at 492 (quoting M. Udall, J. Livermore, P. Escher, G. McIlvain, *Arizona Practice: Law of Evidence*, §84, pp. 179-80 (3d ed. 1991)).

3. The Trial Judge Uses an Incremental Inquiry to Balance the Probative Value and Prejudicial Effect.

The *Salazar* court also referenced the incremental inquiry trial judges should employ to balance the probative value and prejudicial effect:

[The balancing test of Rule 403] is an incremental inquiry that may be divided into three parts. One question is whether the probative value of the evidence is sufficient that it should be admitted in some form. A second question is what restrictions to place in jury instruction on the usage of the evidence. But a third, and frequently overlooked question, is whether the evidence can be narrowed or limited to protect both parties by minimizing its potential for unfair prejudice while preserving its probative value.

**"Evidence of prior sexually aberrant acts is of such a highly prejudicial nature that it makes the guilty verdict 'almost a formality.'"**

*Id.* at 5, citing *Weinstein's Evidence* §404[18] (1989) at 404-123 to -124.

Admitting sexual propensity evidence serves to inflame the jury, creating overwhelming prejudice. Such prejudice cannot be avoided, even if the prior allegations are somehow "sanitized." As stated by the court in *State v. Hopkins*:

Evidence of prior sexually aberrant acts is of such a highly prejudicial nature that it makes the guilty verdict "almost a formality." (citation omitted). Jurors hearing evidence of prior sexual misconduct may assume too readily that the past misconduct is conclusive proof of the present charge.

177 Ariz. 161, 164, 866 P.2d 143, 146 (App. 1993).

#### IV. Conclusion

Recent cases suggest that the tide is beginning to turn in the area of sexual propensity. Thoroughly brief the court on the stringent standards that apply to this area. Grill the state's expert on the basis for the expert's conclusions in this highly speculative and inflammatory area. Force the state to limit the accusations against your client to the crimes with which he is currently being charged. Ω

## Winners of Newsletter Article Contest

Our newsletter, for **The Defense**, recently conducted a contest for members of our office. During the months of October 1995 through February 1996, employees could submit original, educational articles regarding criminal defense. All qualifying articles were reviewed by a distinguished panel of judges consisting of Dean Trebesch, Maricopa County Public Defender; The Honorable Ronald Reinstein, Presiding Criminal Judge, Maricopa County Superior Court; and Tom Karas, Private Defense Counsel and former Arizona State Bar President.

The judges met on March 12 and were so impressed with the eligible articles that in addition to declaring winners, they created two more winning categories: "Honorable Mention" and "Special Mention for a Series." The judging panel reported that every article was very good and that the overall quality of the finalists was "outstanding." After noting the difficulty in picking just a few winners from such stellar contenders, the judges announced the following winners:

- First Place**                    --**Lawrence Matthew**  
for "Closing Argument: You Can't Teach a Dead Dogma New Tricks" in Vol. 6, Issue 2
- Second Place**                --**Paul Prato**  
for "Preserving Trial Court Error For Appellate Review" in Vol. 5, Issue 12
- Honorable Mention**
- Garrett Simpson**  
for "Sever Counts, or Get It Over All At Once? You'd Better Think Twice" in Vol. 6, Issue 2
- Donna Elm and Lisa Posada**  
for "Justice Without Delay: Speedy Trial-Type Rights" in Vol. 6, Issue 2
- Ed McGee**  
for "Time Well Spent [But Easily Overlooked, Miscalculated or Forgotten]" in Vol. 6, Issue 2
- Special Mention for a Series**
- **David Moller**  
for "Forensics Today . . ." in Vol. 5, Issues 10 and 11;  
Vol. 6, Issues 1 and 2

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Prizes\*:                    First Place=Two Tickets to a Phoenix Suns home game;  
                                      Second Place=\$40 gift certificate to *Planet Hollywood*;  
                                      Honorable Mention/Special Mention for a Series=\$20 gift certificate to *Lombardi's*.  
                                      \* All prizes were donated to the office. (Gift certificates by office management.)  
                                      A special thanks to Bohm & Koudelka, P.C. for the Phoenix Suns tickets.

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**Congratulations to the Winners**  
**and Thanks To All Of Our Writers For Making Our Newsletter Exceptional!**

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## Restitution Basics

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by Paul J. Prato, Supervisor--Appeals Division

Restitution is a critical part of the sentencing process for both the defendant and the crime victim who suffered economic injury as a result of the defendant's conduct. Failure of defense counsel to adequately educate the sentencing judge regarding the restitution issues exposes the defendant to unjustified restitution orders. An understanding of the statutory provisions authorizing restitution will prevent the defendant having to pay unjustified restitution.

### *General Restitution Requirements.*

The criminal code requires that any person convicted of a criminal offense "make restitution to the person who is the victim of the crime or to the immediate family of the victim if the victim has died, in the full amount of the economic loss . . . ." <sup>1</sup> The legislature has limited payment of restitution to the "victim of the criminal conduct for which the defendant was convicted." <sup>2</sup> The legislature did not intend "to require a defendant to pay restitution to any person incurring loss as the result, direct or indirect, of a defendant's behavior[.]" <sup>3</sup>

Not only is the payment of restitution limited to the "victim of the crime," it is also limited to payment of the crime victim's economic losses. Economic loss is defined as any loss incurred as a result of the commission of the offense, including "lost interest, lost earnings, and other losses which would not have been incurred *but for* the offense," but it does not include "pain and suffering" or "consequential damages." <sup>4</sup> Guided by this statutory definition of economic loss, the trial judge is required to "consider all losses caused by the criminal offense or offenses" for which the defendant has been convicted. <sup>5</sup> It is the duty of defense counsel to ensure that only legally defined crime victims are awarded restitution and then only for legally justifiable economic losses.

### *Determining a Causal Connection Between Crime Victim's Economic Loss and Defendant's Conduct.*

Every person suffering economic loss in an event which involved unlawful conduct on the part of the defendant is not entitled to restitution. To sustain an order of restitution, the record must reflect an admitted or legally established causal connection between the defendant's criminal conduct and the economic loss suffered. <sup>6</sup> The analysis required to make this causal connection determination is referred to as "direct result" or "but for" analysis and is described in *State v. Morris*:

[R]estitution is proper when the victim's losses are a direct result of the defendant's conduct, but not if the loss or damage does not flow from the conduct. We also find that the nature and character of the criminal activity may be additional factors in assessing restitution. Thus, we further hold that restitution should be ordered for actual damages, that are the natural consequences of the defendant's conduct or when the court determines that the losses were foreseeable, considering the nature and character of defendant's criminal actions. <sup>7</sup>

Losses which fail to satisfy "direct result" causal analysis scrutiny are deemed to be "consequential damages" for which restitution is not authorized.

A "direct result" analysis resulted in a finding of no restitution owed to the owner of a stolen vehicle by a defendant convicted of trespassing. The defendant was a passenger in the vehicle and knew that the vehicle was stolen. The Arizona Court of Appeals held that the owner was not entitled to restitution for damages to the vehicle or for the value of items stolen from the vehicle because the criminal trespass conviction did not establish a legal causal connection between the defendant's conduct and the damage to the vehicle or the stolen property. <sup>8</sup>

Criminal convictions arising out of automobile accidents are prime examples of cases wherein the "direct result" analysis often results in the defendant not being responsible for the payment of restitution even though persons were injured in the accident or physical damage occurred. For example, a conviction for the driving under influence of alcohol does not result in a legal determination of who was responsible for causing the accident since the elements of the crime require proof only that the defendant was driving or in actual physical control of a vehicle while impaired to the slightest degree by alcohol. <sup>9</sup> The driving under the influence conviction does not establish the necessary causal connection between the illegal conduct and the injuries suffered or damages incurred.

A conviction of leaving the scene of an injury accident does not establish responsibility for causing the accident since the elements of the crime require proof only that the defendant was driving a vehicle involved in an injury or fatality accident, the defendant failed to stop at the scene, and the defendant failed to remain at the scene until fulfilling the legal duty of giving information and rendering aid. <sup>10</sup> There is no direct causal connection between the defendant's adjudicated criminal conduct and the accident cause; consequently, there no legal basis for a restitution order arising out of injuries or damages sustained in the accident. <sup>11</sup>

(cont. on pg. 6) 

Applying a "direct result" causal standard, Arizona courts have approved restitution for medical expenses of the victim,<sup>12</sup> future medical expenses and future lost wages,<sup>13</sup> victim mental health counseling expenses,<sup>14</sup> moving expenses for a sexual assault victim,<sup>15</sup> and a victim's "necessities of life," including transportation, shelter, and food.<sup>16</sup> Expenses which have been disapproved as "consequential damages" include potential losses because of reduced insurance coverage being available to the victim because of the defendant's conduct,<sup>17</sup> victim's relatives' travel expenses to attend court hearings where their presence was not required,<sup>18</sup> and damages for defendant's breach of lease when the defendant unlawfully converted the leased equipment.<sup>19</sup>

#### *Pain and Suffering.*

The legislature excluded pain and suffering from the definition of economic loss.<sup>20</sup> Consequently, it is improper to award restitution to compensate the victim for his or her emotional and mental health, or sorrow as these emotions constitute pain and suffering.<sup>21</sup> It has been held permissible, however, to award restitution for the "costs of alleviating the results of pain and suffering since these costs are an economic loss."<sup>22</sup>

#### *Property Damage.*

If the restitution claim is for property damage determined to have been caused by the defendant's illegal conduct, the amount of restitution must be based upon the fair market value of the property at the time of the loss.<sup>23</sup> Factors to consider in determining fair market value "may include . . . whether the property was new when purchased, the original purchase price, how much time the owner has had the use of the property and the condition of the property at the time of the theft."<sup>24</sup> If the item lost has no readily ascertainable fair market value then "the original purchase price, or even the replacement cost might be considered."<sup>25</sup> If the property is stolen and later recovered then the restitution should be the difference between the fair market value of the property at the time of the loss and the fair market value of the property at the time it was recovered.<sup>26</sup>

#### *Record Must Support Restitution Order.*

Whether awarded for personal injury damages or property damages, the amount of restitution ordered must be supported by the record.<sup>27</sup> An order of restitution based upon speculation is improper.<sup>28</sup>

It is the duty of defense counsel to place a specific objection in the record for any proposed or ordered restitution which falls outside the parameters for restitution created by the legislature. Failure of defense counsel to make a timely and specific objection to an erroneous restitution order may result in a finding of waiver of the right to raise the issue on appeal.<sup>29</sup>

#### *Restitution Based Upon Defendant's Admissions or Agreements.*

While it is unlawful to order the payment of restitution to the victim of an unrelated crime for which the defendant has not admitted guilt or been adjudicated guilty, it is lawful to order such restitution if the defendant agrees to pay restitution to that victim.<sup>30</sup> Likewise, it is unlawful to order restitution by a defendant for an uncharged crime, unless the defendant, in a plea agreement or otherwise, agrees to pay such

restitution.<sup>31</sup> And, absent an agreement to pay restitution, it is improper to order restitution for charges that are dismissed.<sup>32</sup>

The basic rule is that a defendant may be ordered to pay restitution only on charges that the defendant has admitted, or has been found guilty, or upon which the defendant has agreed to pay restitution.<sup>33</sup> Therefore, it is essential that defense counsel advise the client regarding admissions to probation officers or others involving uncharged crimes or crimes which are being dismissed pursuant to a plea agreement. And, of course, defense counsel must take great care to ensure that any plea agreement calling for the payment of restitution is carefully drafted to clearly express the intent of the parties as to the scope of the defendant's restitution responsibilities.

#### *Unsatisfied Restitution Orders.*

Upon completion of the defendant's period of probation or upon expiration of the defendant's sentence, the court is required to issue a restitution order for any unpaid restitution.<sup>34</sup> The restitution order expires five years after it is signed by the court and "may be recorded, enforced and renewed as any civil judgment."<sup>35</sup> Any person entitled to restitution may file a restitution lien.<sup>36</sup> "[R]estitution claims are equal, not superior, to other civil claims."<sup>37</sup>

(cont. on pg. 7) 

**It is surprising  
how many probation  
officers are not aware that  
the payment of restitution  
is automatically stayed  
pending direct appeal.**

### *Restitution is Not Dischargeable in Bankruptcy.*

A criminal restitution order<sup>38</sup> and a criminal restitution lien<sup>39</sup> are criminal penalties for purposes of federal bankruptcy. Neither the order nor the lien are dischargeable in federal bankruptcy proceedings.<sup>40</sup>

### *Workers' Compensation and Other Benefits.*

A defendant's workers' compensation benefits are not subject to assignment or consideration for payment of restitution orders. A.R.S. §23-1068(B) generally exempts workers' compensation benefits from attachment for the payment of debts. The workers' compensation statutes do not provide for collection of criminal restitution against workers' compensation awards.<sup>41</sup> Relying upon the rationale applied to workers' compensation benefits, defense counsel should object to restitution payments ordered to be paid from other disability benefits received by the defendant, such as veterans' benefits, which are protected from civil judgments by either state or federal law.<sup>42</sup>

### *Stay of Restitution Payments Pending Appeal.*

Defense counsel should advise the client who intends to appeal that the payment of restitution is stayed pending the direct appeal.<sup>43</sup> It is surprising how many probation officers are not aware that the payment of restitution is automatically stayed pending direct appeal.

### *Conclusion.*

It is defense counsel's responsibility to educate the sentencing judge regarding the restitution issues. The best way to educate the sentencing judge, and make a record for appeal in the process, is through the filing of a restitution memorandum reflecting defense counsel's own "direct result" and "economic loss" analysis. The memorandum should set forth who is and who is not a crime victim based upon the adjudicated criminal conduct of the defendant. The memorandum should detail the economic losses flowing from the defendant's adjudicated unlawful conduct and the evidence supporting those losses. The memorandum should set forth specific objections to restitution requests that failing to survive "direct result" analysis are classified as consequential damages. Objections should also be set forth targeting damages based upon pain and suffering or claims for amounts that are not supported by competent evidence in the record. Finally, the memorandum should advise the sentencing judge of the existence of any benefits which the defendant receives, such as workers' compensation benefits, which are not subject to restitution claims.

Restitution is an important part of the sentencing process which deserves the full attention of defense counsel. Defense counsel must not by default permit the sentencing judge to make the restitution decisions using only the information received from the prosecution and the probation department. It is defense counsel's responsibility to ensure that the defendant is not required to pay restitution when none is lawfully due or pay more restitution than is lawfully due.

1. A.R.S. §13-603(C).
2. *State v. French*, 166 Ariz. 247, 249, 801 P.2d 482, 484 (App. 1990).
3. *Id.*, 801 P.2d at 484.
4. A.R.S. §13-105(14).
5. A.R.S. §13-804(B).
6. *State v. Morris*, 173 Ariz. 14, 17, 839 P.2d 434, 438 (App. 1992).
7. *Id.* at 18, 839 P.2d at 439.
8. *Maricopa County Juvenile Action No. JV-128676*, 177 Ariz. 352, 868 P.2d 365 (App. 1994).
9. A.R.S. §28-692(A)(1).
10. A.R.S. §28-661.
11. *State v. Skiles*, 146 Ariz. 153, 154, 704 P.2d 283, 284 (App. 1985).
12. *State v. Phillips*, 152 Ariz. 533, 733 P.2d 1116 (1987).
13. *State v. Howard*, 168 Ariz. 458, 815 P.2d 5 (App. 1991).
14. *State v. Wideman*, 165 Ariz. 364, 369, 798 P.2d 1373, 1378 (App. 1990).
15. *State v. Brady*, 169 Ariz. 447, 819 P.2d 1033 (App. 1991).
16. *State v. Morris*, *Id.* at 19, 839 P.2d at 439.
17. *State v. Sexton*, 176 Ariz. 171, 859 P.2d 794 (1993).
18. *State v. Wideman*, *Id.* at 369, 798 P.2d at 1378.

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19. *State v. Pearce*, 156 Ariz. 287, 751 P.2d 603 (App. 1988).
20. A.R.S. §13-105(14).
21. *State v. Carbajal*, 177 Ariz. 461, 464, 868 P.2d 1044, 1047 (App. 1994).
22. *State v. Wideman*, 165 Ariz. at 369, 798 P.2d at 1378.
23. *State v. Ellis*, 172 Ariz. 549, 838 P.2d 1310 (App. 1992).
24. *Id.* at 551, 838 P.2d at 1312.
25. *Id.*, 838 P.2d at 1312.
26. *State v. Reynolds*, 171 Ariz. 678, 682, 832 P.2d 695, 699 (App. 1992).
27. *State v. West*, 173 Ariz. 602, 609, 845 P.2d 1097, 1104 (App. 1992).
28. *State v. Barrett*, 177 Ariz. 46, 49, 864 P.2d 1078, 1081 (App. 1993).
29. *State v. Wideman*, 61 Ariz. Adv. Rep. 33 (App. 1990).
30. *State v. Monick*, 125 Ariz. 593, 595, 611 P.2d 946, 948 (App. 1980).
31. *State v. Reese*, 124 Ariz. 212, 214, 603 P.2d 104, 106 (App. 1979).
32. *State v. Garcia*, 176 Ariz. 231, 236, 810 P.2d 498, 503 (App. 1993).
33. *State v. Pleasant*, 145 Ariz. 307, 308, 701 P.2d 15, 16 (App. 1985).
34. A.R.S. §13-805(A).
35. A.R.S. §13-805(B).
36. A.R.S. §13-806(C)(2).
37. *State v. Woodall*, 162 Ariz. 591, 593, 785 P.2d 111, 113 (App. 1989).
38. A.R.S. §13-805(C).
39. A.R.S. §13-805(I).
40. 11 U.S.C. §1328(A)(3).

41. *State v. Woodall*, 162 Ariz. 591, 592-593, 785 P.2d 111, 112-113 (App. 1989).
42. 38 U.S.C. §3101(a).
43. Rule 31.6, Arizona Rules of Criminal Procedure.

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## Training Calendar

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### April 12

Vince Aprile from Kentucky on (1) Voir Dire--morning session, and (2) Coaching--afternoon session. Details to be announced.

### April 18

"*Hablado Con Sus Clientes*" for Spanish-speaking attorneys and support staff, with Scott Loos of the Office of the Court Interpreter. MCPD Training Facility: Suite 10--Luhrs Arcade; 1:30 to 3:30 p.m. This seminar may qualify for 1 hour CLE. To register, contact Georgia Bohm, 506-3045.

### May 03

"*The Inner Workings of DUI & Death Investigations*"--Fourth Annual Seminar for Investigators. MCPD Training Facility: Suite 10--Luhrs Arcade; 8:30 a.m. to 5:00 p.m. Speakers: Gary M. Kula, Esq.; Michael S. Broughton, Accident Reconstructionist; Philip E. Keen, M.D., Maricopa County Medical Examiner. For further information, contact Georgia Bohm, 506-3045.

### May 10

"*Have You Lost Your Appeal 2?*" Supervisors Auditorium--205 West Jefferson. Speakers: Paul Prato, Supervisor--Appeals Division; Jim Rummage, Ed McGee, Lawrence Matthew, and Carol Carrigan, Deputy Public Defenders--Appeals Division; Bob Doyle, Esq.; and Christopher Johns, Deputy Public Defender. This seminar may qualify for up to 3.75 hours CLE (0.5 hour of Ethics included). For further information, contact Sherry Pape, 506-8200.

### June 14

Look for the announcement on our upcoming Ethics seminar with renowned Galveston, Texas attorney Anthony Griffin.

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## Cases from the Defense Perspective-- 1995

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by James P. Cleary, Deputy Public Defender

Arizona appellate decisions in 1995 resulted in decisions in several areas which could be characterized as favorable to the defense in the criminal arena. The following outline categorizes those decisions into four areas: substantive law decisions, procedural decisions, trial evidentiary decisions, and sentencing decisions.

### I. Substantive Law Decisions

- A. *State v. Sanchez*, 181 Ariz. 492, 892 P.2d 212 (CA-1 1995). The Court of Appeals, Division 1 held that the defendant's conviction for obstructing a criminal investigation, under A.R.S. §13-2409, was invalid. The defendant's action of photographing an unmarked police car is not per se illegal. It is illegal only if it is engaged in knowingly in attempts to interfere with the investigation or prosecution of the person to whom the undercover officer's identity is revealed. Further, there was no evidence showing that the undercover officer was forced to give up his job as an undercover agent. Nor was there any evidence to show that the defendant revealed any undercover agent's identity. Consequently, the conviction was reversed.
- B. *Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (1995). The Court of Appeals, Division 1, reviewed the validity of a prosecution of an individual under A.R.S. §13-3623B1, child abuse, under circumstances where a woman used heroin during pregnancy and thereafter gave birth to a heroin-addicted child. The court found that it would be improper to allow the state to define the crime of child abuse according to the health or condition of the newborn child as it would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy. This would be inconsistent with due process to read the statute that broadly. Consequently, the court ordered that the indictment against the petitioner be dismissed.
- C. *State v. Weinstein*, 182 Ariz. 564, 898 P.2d 513 (CA-1 1995). The Court of Appeals, Division 1, reviewed a trial court dismissal of a prosecution under A.R.S. §13-1804(A)(6) for extortion. The

court held that this statute broadly criminalized expression protected by the first amendment. Accordingly, it held that this section was unconstitutionally overbroad. This section of A.R.S. §13-1804 then joined another section, 13-1804(a)(8), previously found unconstitutional in the court's decision in *State v. Steiger*, 162 Ariz. 138, 781 P.2d 616 (App. 1989).

- D. *State v. Swanson*, \_\_\_ Ariz. \_\_\_, 908 P.2d 8 (CA-2 1995). The Court of Appeals, Division 2, reviewed a defendant's conviction for child abuse under A.R.S. §13-3623(C). The defendant had been charged with committing child abuse by driving a vehicle in an impaired condition with two children in the car. Defendant had been convicted of driving under the influence in the same fact situation. The evidence was that the sole connection with the children and the defendant was that one of the children was a child of the defendant's girlfriend, who was also a passenger in the car, with whom he was living at the time of his arrest, and the other child was a friend of that child. The court said there was insufficient evidence that he had care or custody of the children and therefore could not be found guilty of child abuse. That conviction was reversed.

### II. Procedural Decisions

- A. *State v. Brown (Carter)*, 182 Ariz. Adv. Rep. 20 (CA-2 1995). The court of appeals, in this special action, resolved a conflict between Ariz. R. Crim. P. 5.2, and Rule 26.1 of the Local Rules of Practice in the Superior Courts of Pima County. The local rules allow for alternative methods of making a record in a justice court while criminal rule 5.2 requires the presence of a court reporter for hearings. The court held that the criminal rule prevailed over the local rule. In response to this ruling, the supreme court amended Rule 5.2, Rule of Criminal Procedure, on an experimental basis for Maricopa, Pima, Greenlee, Mohave, Navajo, and Santa Cruz Counties on December 5, 1995, allowing for a record of proceedings to be made by audiotape, videotape or court reporter.
- B. *State v. Superior Court (Mendivil)*, 181 Ariz. 271, 889 P.2d 629 (CA-1 1995). The court of appeals, in this special action, addressed the issue whether a trial court abused its discretion by requiring both the defendant and the state to give reasons for all peremptory strikes, without

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requiring any *prima facie* showing of purposeful discrimination and absent objection by opposing party. The court held, consistent with Arizona and Federal precedent, that a rule requiring explanation for every peremptory challenge may discourage attorneys from exercising their peremptory strikes out of concern that they will be unable to articulate a reason to justify the strike. The court held this was inconsistent with historical purpose of peremptory strikes and therefore set aside the lower court's order requiring articulation of reasons for every peremptory strike.

- C. *In re Pima County Juvenile Delinquency Action Number J-103621-01*, 181 Ariz. 375, 891 P.2d 243 (CA-2 1995). In this appeal from a denial of a motion to suppress, the court reversed the juvenile court and concluded that an officer's pat-down of a juvenile and subsequent retrieval of a baggie of marijuana from the juvenile's pocket was in violation of the juvenile's rights under the Fourth Amendment and the State Constitution. Essentially, the court found that once the officer concluded that an item in the juvenile's pocket was not a weapon, the officer was not free at that time to demand that the item be produced for examination. The state did not respond to the appeal by the juvenile.
- D. *Espinoza v. Martin*, 182 Ariz. 145, 894 P.2d 688 (1995). In this special action review, the supreme court reviewed the court of appeals' approval of a policy adopted by a group of Maricopa County Superior Court judges of summarily rejecting all plea agreements containing stipulated sentences. The court reviewed Rule of Criminal Procedure 17.4(a) and Rule of Criminal Procedure 36. It concluded that the policy of the Maricopa County Superior Courts was an inconsistent local rule with Rule 17.4(a) which mandates that a court shall not participate in any plea negotiations.
- E. *Snow v. Superior Court*, \_\_\_ Ariz. \_\_\_, 903 P.2d 628 (CA-1 1995). The court of appeals, in this special action proceeding, found that a defendant's right to a speedy trial was violated pursuant to Rule 8.2(a), Rules of Criminal Procedure. Under the facts and circumstances, the court concluded that the state did not exercise due diligence in locating the defendant, an Arizona probationer being supervised in the State of Washington. However, the court concluded that dismissal without prejudice was the appropriate remedy.

F. *State v. Salazar*, 182 Ariz. 604, 898 P.2d 982 (CA-1 1995). The court of appeals, in this appeal, reversed the defendant's convictions for second degree murder, possession of marijuana, and possession of drug paraphernalia. The court concluded that under former Canon 3, Code of Judicial Conduct, Rule 81, Rules of the Arizona Supreme Court, the trial judge should have disqualified himself from presiding over the litigation in which the defendant's counsel previously undertook representation of the judge's former secretary in a wrongful termination action against the judge. The court of appeals concluded that a lawyer's representation of a party adverse to the judge suggests that the judge might disfavor the lawyer to the detriment of the lawyer's client. This was an appearance of impropriety that required disqualification of the trial judge. Further, the court found that the trial court erred in granting the state's motion in limine to preclude examination of state witnesses' adjudications of delinquency. The court of appeals found that this was a confrontation clause violation and was not harmless error.

G. *State v. Blackmore*, \_\_\_ Ariz. \_\_\_, 904 P.2d 1297 (CA-1 1995) (Review granted 10-24-95). The court of appeals, in this review of a defendant's conviction for possession of dangerous drugs, reversed and remanded for a new trial concluding that the trial court erred in failing to suppress evidence seized from the defendant. The court, in reviewing the facts, determined that the investigative detention of the defendant was really a *de facto* arrest and there was no probable cause upon which a search of him could have been justified. It concluded that since the defendant was illegally arrested, then any subsequent consent search was invalid and all physical evidence seized after the *de facto* arrest should have been suppressed.

H. *State v. Krone*, 182 Ariz. 319, 897 P.2d 621 (1995). The supreme court reversed the defendant's first degree murder and kidnapping conviction, and resulting death sentence, due to a finding that the prosecution had failed to timely comply with Rule 15.1 of the Rules of Criminal Procedure. The state delivered a videotape of bite-mark evidence relative to the defendant three days before trial. The trial court denied any motions to continue the trial due to the late disclosure and denied any preclusion. In reviewing the Rules of Civil Procedure dealing

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with sanctions, the court concluded that the witness should have been precluded or a continuance should have been granted. It did not find the error to be harmless error due to the crucial nature of the bite-mark evidence.

- I. *State v. Lamberton*, 183 Ariz. 47, 899 P.2d 939 (1995). The supreme court, in this review of a court of appeals' decision, interpreted and reviewed provisions of the Victims' Bill of Rights in the Arizona Constitution. They concluded that while the Victims' Bill of Rights allowed for an opportunity for a victim to be heard concerning release of a convicted defendant, it did not allow the victim to file his/her own petition for review to assert that right.
- J. *State v. Levato*, \_\_\_ Ariz. \_\_\_, 905 P.2d 567 (CA-1 1995) (Review granted on issue A). In this case the court of appeals reversed the conviction of the defendant for nine counts of theft and the sentences imposed. The defendant collapsed due to a heart problem five minutes prior to the jury's delivery of its verdict. The defense counsel refused to waive the defendant's presence at the return of the verdicts. The trial court, however, accepted the verdicts and found the defendant guilty. The court concluded that the defendant's involuntary absence from the return of the verdicts in this case was a structural error. It deprived the defendant of that critical moment of confrontation with the jurors whose duty it was to decide his guilt beyond a reasonable doubt. Consequently, it found that the convictions needed to be reversed for failure of the defendant to be present at a critical stage of the trial.
- K. *State v. Strayhand*, 198 Ariz. Adv. Rep. 21 (CA-1 1995). The court of appeals in this case reversed and remanded for a new trial of defendant's convictions of armed robbery and theft. The court reviewed the issues relative to the voluntariness of defendant's statements and concluded that the court erred in finding that the defendant's statements to law enforcement officers were not the result of threats or a failure to honor his request to stop the interrogation. It further concluded that the statement's submission was not harmless error.
- L. *State v. Rich*, \_\_\_ Ariz. \_\_\_, 907 P.2d 1382 (1995). The supreme court, upon review of a court of appeals' decision, vacated the court of appeals' decision and reversed and remanded the defendant's conviction for sale of marijuana to

the trial court for a new trial. The supreme court concluded that when the jury returned verdicts that found the defendant guilty of both possession of marijuana for sale and the lesser-included offense of simple possession, without advising counsel or the defendant of the inconsistent verdicts, the trial court, in effect, had an *ex parte* communication with the trial jury. The verdict form had an unsigned handwritten legend which said, "Not read by court, not to be considered." The court found there was no harmless error in this *ex parte* communication, reversed the conviction, and remanded for a new trial.

- M. *State v. Kamai*, 204 Ariz. Adv. Rep. 61 (CA-1 1995). The court of appeals reviewed defendant's conviction for theft of an automobile. The facts at trial revealed that the defendant worked for a construction company. He asked the employer if he could borrow a company truck to run a brief personal errand. The employer consented. The defendant took the truck and drove it to California. The employer reported the truck stolen. Several days later it was returned to the employer by the defendant's girlfriend. The trial court refused defendant's requested instruction on the lesser-included offense of unlawful use of a means of transportation. The trial court reasoned that unlawful use is not always a constituent part of a greater crime of theft and the charging document did not describe the crime of unlawful use. The court of appeals disagreed and found that unlawful use, as defined in A.R.S. §13-1803, was comprised solely of the first three elements of auto theft, but did not include the additional element of intent to deprive. Accordingly the requested instruction should have been given. The case was remanded for a new trial.
- N. *State v. Orantez*, 200 Ariz. Adv. Rep. 7 (1995). The supreme court, upon review of a defendant's conviction for kidnapping and sexual assault, reversed the trial court and ordered a new trial based upon newly discovered evidence. The court reviewed the facts that were discovered after trial concerning the alleged victim's use of narcotics on the date of the alleged sexual assault and other matters relative to her methadone treatment. The court reviewed the issues of materiality, cumulativeness, impeachment, and probability of changing the verdict in determining that the newly discovered evidence

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would have an effect on the jury's judgment. Accordingly, the court remanded for a new trial.

- O. *State v. Williams*, 200 Ariz. Adv. Rep. 32 (CA-1 1995). The court of appeals reviewed the conviction of defendant for marijuana possession and possession of drug paraphernalia. It reviewed the trial court's failure to suppress evidence seized from the defendant's residence. The court found that the information provided to a justice of the peace for issuance of a warrant was defective in that there was no adequate description of the place to be served nor any indication that the informant was reliable. Further, it found that A.R.S. §13-3925, the good faith exception to the exclusionary rule, was not met in this case because the officers did not rely in good faith in any objective sense. Consequently, the defendant's conviction was reversed and the court ordered that evidence to be suppressed.

### III. Trial Evidentiary Decisions

- A. *State v. Mott*, 183 Ariz. 191, 901 P.2d 122 (CA-2 1995) (Review granted 9/12/95). The court of appeals reviewed defendant's convictions for child abuse. The court concluded that the trial court's preclusion of defendant's proffered battered woman's syndrome evidence was a denial of due process and consequently reversed and remanded for a new trial. The court concluded that evidence relative to the battered woman's syndrome would negate much of the evidence that was relied upon by the state to show that the defendant acted knowingly or intentionally.
- B. *State v. Grannis*, 183 Ariz. 52, 900 P.2d 1 (1995). The supreme court, upon review of capital convictions and sentences, addressed the issue of whether the trial court erred by admitting pornographic, homosexual photographs into evidence. The court concluded that the introduction of pornographic, homosexual photographs found in a closet in one of the defendant's residences was unfairly prejudicial though marginally probative as to the issues raised in the prosecution. Consequently, under Rule 403, Arizona Rules of Evidence, it concluded that the trial court erred in allowing the introduction into evidence of such photographs as the jurors' verdict may well have been improperly influenced by their revulsion and not entirely based on a belief that the state proved the elements of the crime. The court

found that it was not harmless error to admit the photographs.

- C. *State v. Boles*, \_\_\_ Ariz. \_\_\_, 905 P.2d 572 (CA-1 1995) (Review granted 11/21/95). The court of appeals reviewed defendant's convictions for 18 felony offenses involving four separate victims and several counts of burglary, kidnapping, sexual assault, sexual abuse, sexual conduct with a minor, and child molestation. The court reviewed the issue of whether the trial court committed fundamental error by allowing the state to introduce expert testimony regarding an autorad "match" between defendant's DNA and the samples recovered from two of the four victims. After reviewing the testimony from various pretrial and trial hearings, the court held that in the absence of a foundation consisting of random match probability statistics that satisfy the *Frye* test, or some other generally accepted scientific principle independent of that, probability statistics and opinion testimony of the kind discussed in the case were not admissible. Without foundational testimony, evidence about the significance of a DNA match is limited to testimony that the DNA test did not exclude the defendant as a suspect. In view of defendant's defense of misidentification, the court concluded that the error was fundamental error.
- D. *State v. Bass*, 196 Ariz. Adv. Rep. 32 (CA-1 1995). The court of appeals reviewed questions presented as to whether burglary in the third degree (non-residential structure) was a lesser-included offense of burglary in the second degree (residential structure). In reviewing the particular facts of this case, the court found that an almost completed cabin, while it could be a residential structure, may also be a non-residential structure due to its state of incompleteness. Accordingly, under such facts non-residential burglary can be a lesser-included offense of residential burglary.
- E. *State v. Johnson*, \_\_\_ Ariz. \_\_\_, 905 P.2d 1002 (CA-1 1995) (Review granted 11/21/95). The court of appeals reviewed a defendant's conviction and resulting sentence enhancement pursuant to A.R.S. §13-604(R). The court concluded that this allegation is an allegation that must be resolved by the jury. Consequently, a trial court's finding that a defendant was on release at the time of commission of felony offenses, and subsequent sentences for the same,

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was inappropriate. The court affirmed the defendant's other convictions but deleted the additional two years for the convictions.

- F. *State v. Fernane*, 202 Ariz. Adv. Rep. 84 (CA-2 1995). The court of appeals reviewed defendant's convictions for child abuse and felony murder. Defendant was tried jointly with a co-defendant. The court concluded, after reviewing the record and pretrial motions, that the trial court erred in failing to sever her trial from co-defendant and failing to exclude or otherwise limit evidence of appellant's prior bad acts. The court found merit in defendant's claims that severance was necessary because she and her co-defendant's defenses were mutually antagonistic, and that evidence of the co-defendant's prior acts and the co-defendant's use of defendant's prior acts in his defense would unduly prejudice the defendant's case. In reviewing the evidence the court concluded that under Rule 403, Rules of Evidence, the defendant was prejudiced by the use of prior bad acts generated through the testimony against her and the co-defendant. It further found that the trial court had a continuing duty at all stages of the trial to grant a severance if prejudice appeared. In view of the co-defendant's testimony putting blame on the defendant, the court believed that the appropriate remedy was to sever the cases and the trial court erred in not doing so.
- G. *State v. Hardwick*, \_\_\_ Ariz. \_\_\_, 905 P.2d 1384 (CA-1 1995). The court of appeals reviewed defendant's multiple convictions for sexual offenses against minors. Upon appeal the court addressed the question of whether the state's repeated references to an otherwise inadmissible document entitled "Child Molesters: A Behavioral Analysis" during cross-examination of the defendant constituted fundamental error. The court found that defendant consistently objected to the line of questioning as both hearsay and improper expert opinion, and it found that since there was never admission of this document, or other qualification for its admission into evidence, it was not harmless error to allow cross-examination of the defendant along the lines of this purported profile. It reversed for a new trial.
- H. *State v. Gertz*, 204 Ariz. Adv. Rep. 45 (CA-1 1995). The court of appeals reviewed defendant's convictions and sentences for sexual abuse, kidnapping and fraudulently procuring the administration of a narcotic drug. Upon review

the court was asked to consider whether the trial court had erred in not allowing the defendant to show that one of the victims had filed a civil damages suit against defendant and had also erred by allowing the state unlawfully to use his compelled, immunized testimony from a collateral administrative hearing. The court reviewed Rule 608(b), of the Rules of Evidence, and Sixth Amendment Constitutional analysis. It found that since the evidence was lacking in any other testimony about the victim's lawsuit against the defendant, the trial court erred in not allowing evidence to be presented through questioning of the victim as to the ulterior motive in testifying against the defendant. The court also concluded that cross-examination of the defendant, based upon a review of Arizona Board of Medical Examiner's (BOMEX) proceedings and transcripts, was in violation of A.R.S. §41-1066(c). Consequently, the court found that the prosecutor's use of the defendant's testimony, which had been previously immunized, was in violation of established principles relating to the use of immunized testimony in criminal proceedings. Upon remand, the prosecution was required to prove at a *Kastigar* hearing that it followed reliable procedures for segregating the immunized testimony and its fruits from officials pursuing any subsequent prosecution, and further, that it had a source for all of its evidence wholly independent of the immunized testimony, and that it had not put the testimony to any non-evidentiary, derivative use.

- I. *State v. Jones*, 204 Ariz. Adv. Rep. 38 (CA-1 1995). The court of appeals reviewed defendant's convictions and sentences for two counts of kidnapping, one count of aggravated assault, and one count of sexual assault. The evidence at trial was that the state's theory of kidnapping was based upon two separate incidents as alleged in the indictment. One incident happened when the defendant at knife point took the victim to his trailer. The second act occurred after the incident at the trailer when the defendant drove the victim to a highway after binding her hands and ankles. The court reviewed the evidence and concluded that in this case the crime of kidnapping was complete, with the restraint continuing, at the time the victim was initially compelled into the defendant's vehicle. It found that the continuous confinement of the victim until her escape did

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not give rise to more than one count of kidnapping. Consequently, one of the convictions for kidnapping was vacated.

#### IV. Sentencing Decisions

- A. *State v. Morrison*, 181 Ariz. 279, 889 P.2d 637 (CA-1 1995). The court of appeals reviewed defendant's sentencing and sentence enhancement due to an alleged prior federal felony. The defendant had moved to strike the allegation of the prior felony on the basis that the conviction for such did not necessarily constitute a felony in Arizona. The defendant's prior felony conviction was for bank robbery under federal statutes. The court reviewed, contrasted, and compared Arizona's robbery statutes and the federal statutes. It concluded that there was a difference in the type of intent necessary under Arizona robbery as opposed to a federal robbery. Further, it found that conviction for bank robbery under the federal statutes could be for commission of acts that would not be felonies under Arizona law. Accordingly, the court found that the trial court erred in failing to strike the state's allegation of prior felony convictions. It reversed and remanded for resentencing.
- B. *State v. Baum*, 189 Ariz. Adv. Rep. 5 (CA-1 1995). The court of appeals reviewed defendant's sentencing where he was given a maximum aggravated sentence as a predetermined consequence of violating probation. Upon review of the record and facts, the court of appeals held that the trial court abused its sentencing discretion by punishing the defendant for his probationary breaches rather than his crime. This resulted in a failure to consider all pertinent mitigating and aggravating circumstances. Consequently, the defendant's sentence was vacated and it was remanded for resentencing.
- C. *State v. Williams*, 182 Ariz. 548, 898 P.2d 497 (CA-1 1995). The court of appeals reviewed defendant's convictions and sentences for armed robbery, kidnapping, burglary, and eight counts of sexual assault. In reviewing the transcripts, the court of appeals found that the trial court relied on its memory as to the decision to impose consecutive sentences for the kidnapping in relation to the armed robbery and burglary sentences. The court found that the trial court's memory as to the incident was in error, and found that the victim testified that no knife was displayed until she and the defendant were in her bedroom. The court concluded that since the trial judge said that he would have made the kidnapping sentence concurrent with the armed robbery and burglary sentences if that were the case, then they believed it was appropriate to amend the kidnapping sentence to run concurrently with the armed robbery and burglary sentences. The case reveals the importance of testing a trial judge's memory on appeal.
- D. *Zamora v. Reinstein*, \_\_\_ Ariz. \_\_\_, 904 P.2d 1294 (CA-1 1995) (Review granted 10/24/95). The court of appeals, in this special action, reviewed the trial court's denial of defendant's motion to strike allegations of two historical prior felony convictions. The court accepted jurisdiction because the correct interpretation of A.R.S. §13-604(U)(1)(a) was an issue of statewide importance and likely to reoccur. The court reviewed the pertinent language of the section which read: "Any prior felony conviction for which the offense of conviction **mandated a term of imprisonment, that involved** the intentional or knowing infliction . . ." The court isolated the dispute between the defendant and the state as centering around the significance that should attach to the comma in the portion of the statute emphasized. The court held that this section of 13-604 allowed historical prior felony convictions only for those prior felony convictions which mandated imprisonment and either: (1) involved intentional and knowing infliction of serious physical injury, the use or exhibition of a deadly weapon or dangerous instrument, or the illegal control of a criminal enterprise, (2) involved a violation of A.R.S. §28-697, or (3) involved any dangerous crime against children as defined in A.R.S. §13-604.01.
- E. *State v. Greene*, 182 Ariz. 576, 898 P.2d 954 (1995). The supreme court reviewed defendant's sentences for aggravated assault, kidnapping and sexual assault, while on probation. The court found that sentencing defendant to a life sentence for the sexual assaults was improper. It found that the crime of sexual assault was not so severe that it constituted a physical injury that created a risk of death, cause serious and permanent disfigurement, serious impairment of health, or loss or protracted impairment of the function of any bodily organ or limb. Accordingly, the court found that the crime of sexual assault did not meet the definition for sentence enhancement while on probation.

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- F. *State v. Blackmon*, \_\_\_ Ariz. \_\_\_ 908 P.2d 10 (CA-1 1995). The court of appeals held that the Victims' Bill of Rights did not preclude cross-examination of a victim at a sentencing hearing. Accordingly, the court found that the trial court's failure to allow cross-examination of a victim at a sentencing hearing for the defendant was error. The court found that due process required cross-examination, despite the provisions of the Victims' Bill of Rights.
- G. *State v. Aragon*, 202 Ariz. Adv. Rep. 71 (CA-1 1995). The court of appeals reviewed defendant's sentence for possession of marijuana for sale. The state argued that the defendant was not eligible for probation as he had been convicted of possession of marijuana for sale. The court reviewed defendant's trial proceedings and A.R.S. §13-3405(c). It found that the record of proceedings revealed only that the jury found defendant guilty of possession of over one pound of marijuana for sale. The statute did not authorize probation if the amount was more than eight pounds. The court of appeals concluded that the trial court did not have the authority to determine the weight of marijuana possessed by a defendant for the purpose of determining whether a mandated sentence was necessary. The court found that since the prosecutor did not object to the form of verdict at the time of trial, it could not now object to the sentence of probation.
- H. *State v. Strong*, 205 Ariz. Adv. Rep. 27 (CA-1 1995). The court of appeals reviewed defendant's convictions and sentences for two counts of armed robbery and two counts of kidnapping. The named victims of the two armed robbery counts were a manager and an employee at a restaurant. However, the evidence at trial established that there was only one theft committed by the defendant, i.e., the taking of the money from the restaurant safe. The court concluded that under such circumstances, and interpretation of A.R.S. §13-1902 and 1904, only one armed robbery occurred. Accordingly it found that one of the convictions for armed robbery should have been vacated and it did so.

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## U.S. Supreme Court Decisions 1994-95 Term

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compiled by Max Bessler, Chief Administrator,  
Office of the Legal Defender from Charles H.  
Whitebread's book *Recent Decisions of the United  
States Supreme Court 1994-95 Term*

### •Fourth Amendment

#### Drug Testing:

*Veronia School District v. Acton*, 63 U.S.L.W. 4653 (6/26/95)

A random drug-testing program for student athletes designed to curb district-wide drug use is not an unreasonable search and seizure under the Fourth Amendment.

#### Knock-and-Announce Rule:

*Wilson v. Arkansas*, 115 S.Ct. 1914 (5/22/95)

The common-law, knock-and-announce principle is a part of the reasonableness requirement of the Fourth Amendment and as such, police officers are obligated to announce their presence prior to entering. However, circumstances may exist where an unannounced entry is justified.

#### Exclusionary Rule:

*Arizona v. Evans*, 115 S.Ct. 1185 (3/1/95)

The exclusionary rule does not apply to unlawful arrests that result from clerical errors made by court employees. Instead, police officers may rely on the good-faith exception developed in *U.S. v. Leon*, 468 U.S. 897 (1984).

### •Jury Trial and Guilty Pleas

#### Race-Neutral Peremptory Strikes:

*Pruett v. Elem*, 115 S.Ct. 1769 (5/15/95)

Under the three-part test developed in *Batson v. Kentucky*, 476 U.S. 79 (1986), the second part of the test is satisfied if a race-neutral justification for a challenged peremptory strike is provided. However, the persuasiveness of the justification is analyzed independently in part three where the judge must determine whether the justification is pretextual.

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#### Plea Bargain Waiver Agreements:

*U.S. v. Mezzanatto*, 115 S.Ct. 797 (1/18/95)

Waiver agreements, which permit a prosecutor to use statements made by the defendant during plea bargain discussions to impeach the defendant's testimony at trial if the discussions do not result in a guilty plea, are enforceable if the statement was entered into knowingly and voluntarily.

#### • **Sentencing**

#### Judge-Imposed Death Sentences:

*Harris v. Alabama*, 115 S.Ct. 1031 (2/22/95)

The Eighth Amendment does not require state capital sentencing schemes to define the particular weight that the judge must accord the jury's sentence recommendation.

#### Sentence Enhancement:

*Witte v. U.S.*, 115 S.Ct. 2199 (6/14/95)

The Double Jeopardy Clause is not violated when a defendant is indicted for an offense which was considered relevant conduct for sentence enhancement purposes by the sentencing court in a previous conviction.

#### Criminal Due Process:

*Sandin v. Conner*, 63 U.S.L.W. 4601 (6/19/95)

State prison regulations can create liberty interests protected under the Due Process Clause where the denial of the liberty interest imposes on the prisoner "atypical and significant hardship" in relation to the ordinary incidents of prison life.

#### Ex Post Facto Laws:

*California Department of Corrections v. Morales*, 115 S.Ct. 1597 (4/25/95)

The Ex Post Facto Clause was not violated by an amendment enacted after the prisoner's crime was committed, which enabled the California Board of Prison Terms to postpone the prisoner's next eligibility hearing for up to three years if the Board determined that the prisoner would not likely be paroled in an interim hearing.

#### • **Statutory Interpretation**

#### Conspiracy:

*U.S. v. Shabani*, 115 S.Ct. 382 (11/1/94)

In a conspiracy prosecution under the drug conspiracy statute, 21 U.S.C. §846, the act of conspiring is sufficient to support a conviction and an overt act in furtherance of the conspiracy is not required.

#### Scienter Requirement:

*U.S. v. X-Citement Video, Inc.*, 115 S.Ct. 46 (11/29/94)

The Protection of Children Against Sexual Exploitation Act of 1977 is constitutional because the term "knowingly" contained within the Act requires that the defendant have knowledge that the performer engaged in sexually explicit conduct is under 18 at the time of the activity.

#### Threshold for Criminal Liability:

*U.S. v. Aguilar*, 63 U.S.L.W. 4637 (6/21/95)

Criminal liability under 18 U.S.C. §1503 does not arise if the defendant makes false statements to an investigating agent who has not yet been subpoenaed by the grand jury. However, a defendant can be criminally liable under 18 U.S.C. §2232(c) for disclosing a wiretap even where the defendant did not know that the authorization for the wiretap had expired at the time of the disclosure.

#### Materiality Determinations:

*U.S. v. Gaudin*, 63 U.S.L.W. 4611 (6/19/95)

The Constitution requires that a jury determine whether the false statements made by a defendant are material as defined by 18 U.S.C. §1001.

#### • **Civil Rights and Qualified Immunity**

#### Interlocutory Appeals in Qualified Immunity Cases:

*Johnson, et al. v. Jones Cases*, 115 S.Ct. 2151 (6/12/95)

In cases where a qualified immunity defense may be invoked, a defendant is not entitled to immediate review of a district court's summary judgment order where the order determined that the pretrial record set forth a triable issue of fact.

#### • **First Amendment--Free Speech**

#### Distribution of Anonymous Campaign Literature:

*McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (4/19/95)

A state statute that prevents individuals from distributing anonymous, but accurate, political leaflets unconstitutionally infringes upon the individual's right to free speech. □

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## Trial Results

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### Public Defender's Office:

#### November 28

Donna Elm: Client charged with three counts of aggravated assault and one count of resisting arrest (class 6, non-dangerous felonies), misdemeanor assault and hit-and-run. Investigators B. Abernethy and J. Castro. The aggravated and misdemeanor assault charges were dismissed after a two-day preliminary hearing. Resisting arrest charge was reduced to a class one misdemeanor on the state's motion, over the defense's objection, and the defense's jury demand was denied. Bench trial before Commissioner Trombino ended February 23. Defendant found not guilty. Prosecutor Kane.

#### January 18

Dennis Farrell: Client charged with three counts of aggravated assault and one count of drive-by shooting (all counts dangerous and while on probation). Investigator D. Beever. Trial before Judge N. Lewis ended February 05 with a hung jury (11 to 1 for not guilty). Prosecutor Palmer.

#### January 22

Charles Vogel: Client charged with two counts of aggravated assault (dangerous), 2 counts of endangerment, two counts of armed burglary, theft, and resisting arrest (with one prior and while on parole). Investigator D. Erb. Trial before Judge Skelley ended February 1. Defendant found not guilty of one count of armed burglary, guilty of the lesser charge of criminal trespass, and guilty of all other charges. Prosecutor Davidson.

#### January 26

Wesley Peterson: Client charged with armed robbery, burglary, kidnapping, and sexual assault. Trial before Judge Barker ended February 2. Defendant found guilty. Prosecutor Keppel.

#### January 29

Tim Agan: Client charged with two counts of aggravated assault. Investigator P. Kasieta. Trial before Judge D'Angelo ended February 1. Defendant found guilty. Prosecutor Feinberg.

#### January 30

Karen Clark: Client charged with possession of crack cocaine. Investigator D. Beever. Trial before Judge Hertzberg ended February 5 with a judgment of acquittal. Prosecutor Allen.

Stephen Rempe: Client charged with aggravated assault (dangerous). Trial before Judge Hilliard ended February 7. Defendant found guilty. Prosecutor Schwartz.

Joe Stazzone: Client charged with robbery, kidnapping, attempted robbery, and attempt to commit kidnapping. Trial before Judge Brown ended February 1. Defendant found guilty of robbery and kidnapping. Attempted robbery and attempt to commit kidnapping charges dismissed on date of trial. Prosecutor Collins.

#### February 5

Susan Corey/Kathryn McCormick: Client charged with attempt to commit murder and aggravated assault. Investigator C. Yarbrough. Trial before Judge Bolton ended February 16 with a hung jury. Prosecutor Vercauteren.

Jeanne Steiner: Client charged with possession of narcotic drugs and misconduct involving weapons (a misdemeanor). Investigator S. Bradley. Trial before Judge Seidel ended February 7. Defendant found guilty. Prosecutor Roberts.

Ray Vaca/Mark Potter: Client charged with aggravated assault. Trial before Judge Ishikawa ended February 8. Defendant found guilty. Prosecutor Vincent.

#### February 6

Barry Handler: Client charged with sexual assault, aggravated assault, and sexual abuse. Trial before Judge Hertzberg ended February 14 with a hung jury on sexual abuse charge, not guilty of sexual assault, and guilty of misdemeanor assault. Prosecutor Garcia.

Christopher Trautman: Client charged with robbery. Trial before Judge Scott ended February 9. Defendant found not guilty. Prosecutor Brown.

#### February 8

Robert Billar: Client charged with misconduct involving weapons. Trial before Judge Rogers ended February 9. Defendant found guilty. Prosecutor Whitten.

(cont. on pg. 18) 

Steve Whelihan: Client charged with aggravated assault. Trial before Judge Topf ended February 14. Defendant found not guilty. Prosecutor Rea.

#### February 9

Wesley Peterson: Client charged with DWI. Trial before Judge Passey (North Mesa Justice Court) ended February 9. Defendant found guilty. Prosecutor Smith.

Stephen Rempe: Client charged with leaving scene of accident with death or injury. Trial before Judge DeLeon ended February 16. Defendant found guilty. Prosecutor Manning.

#### February 12

Ray Vaca: Client charged with aggravated assault. Trial before Judge Ishikawa ended February 15. Defendant found not guilty. Prosecutor Blair.

#### February 15

Rob Reinhardt: Client charged with attempted robbery. Trial before Judge Dunevant ended February 17. Defendant found guilty. Prosecutor Morden.

Joe Stazzone: Client charged with resisting arrest, a class 6 felony, and misdemeanor disorderly conduct. Client waived jury in exchange for the state reducing the resisting arrest charge to a class 1 misdemeanor. Bench trial before Judge Seidel ended February 15 with a judgment of acquittal on resisting arrest. Defendant found guilty of disorderly conduct. Prosecutor Lawrence.

#### February 20

Kevin Burns: Client charged with third degree burglary. Trial before Judge Barker ended February 22. Defendant found not guilty of third degree burglary; guilty of lesser-included misdemeanor theft. Prosecutor Kelley.

Elizabeth Feldman/Ronee Korbin: Client charged with attempted armed robbery. Investigator R. Barwick. Trial before Judge O'Melia ended February 27. Defendant found not guilty. Prosecutor Mitchell.

Mike Hruby: Client charged with aggravated assault with weapon (dangerous). Trial before Judge Gerst ended February 26. Defendant found not guilty of aggravated assault; guilty of lesser-included disorderly conduct (non-dangerous). Prosecutor Hoffmeyer.

#### February 21

Jim Park: Client charged with theft. Investigator D. Erb. Trial before Judge Brown ended February 26. Defendant found guilty. Prosecutor Mason.

#### February 22

John Brisson: Client charged with aggravated assault. Trial before Judge DeLeon ended February 26. Defendant found guilty. Prosecutor Gialketsis.

Christine Israel: Client charged with aggravated DUI. Investigator D. Moller. Trial before Judge Ishikawa ended February 26. Defendant found guilty. Prosecutor Smith.

Rob Reinhardt: Client charged with aggravated assault. Trial before Judge Seidel ended February 27 with a hung jury. Prosecutor Roberts.

#### February 26

Gary Bevilacqua/Laura Plimpton: Client charged with five counts of sexual conduct with a minor. Investigator R. Barwick. Trial before Judge Ryan ended February 28. Defendant found not guilty on two counts and guilty on three counts. Prosecutor Greer.

Brian Bond: Client charged with second degree escape. Investigator R. Corbett. Bench trial before Judge Lewis ended February 28. Defendant found guilty. Prosecutor Feinberg.

Bud Duncan: Client charged with four counts of aggravated assault (with a vehicle) and one count of flight from pursuing law enforcement vehicle. Trial before Judge Wilkinson ended February 28. Defendant found guilty. Prosecutor Mroz.

### **Legal Defender's Office:**

#### January 30

Roland Steinle: Client charged with manslaughter and aggravated assault. Trial before Judge Scott ended February 8. Defendant found not guilty of manslaughter; guilty of lesser-included charge of negligent homicide and of aggravated assault. Prosecutor Gann.

#### February 7

Greg Parzych: Client charged with kidnapping (dangerous), attempted armed robbery, and burglary.

(cont. on pg. 19) 

Investigator E. Soto. Trial before Judge Barker ended on February 13. Defendant found not guilty of kidnapping; guilty of lesser-included attempted theft (misdemeanor) and of burglary. Prosecutor Smyer.

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*Editor's Corrections to last month's reported results:*

**October 17** Randall Reece: Client charged with first degree murder and child abuse (dangerous crimes against children). Defendant found not guilty of first degree murder; guilty of reckless child abuse (non-dangerous).

**January 8** Jeremy Mussman: Client charged with aggravated assault, sexual abuse, attempted sexual assault, two counts of kidnapping, and three counts of sexual assault. Defendant found not guilty of attempted sexual assault, one count of kidnapping, and aggravated assault; hung jury on sexual abuse, one count of kidnapping, and three counts of sexual assault. Pursuant to a subsequent motion by the state, all charges on which the jury had hung were dismissed. Prosecutor Sullivan.

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**Linda Lintz**, legal secretary, transferred from Trial Group C to Trial Group D on March 11.

◆ *Speakers Bureau*

**Helene Abrams**, Juvenile Division Chief, spoke to a Juvenile Justice Procedure class at Phoenix College recently. Ms. Abrams discussed the current procedures in juvenile court in comparison with proposals to change the system now being considered (i.e., the Senate bill and the Governor's initiative).

**Donna Elm**, Deputy Public Defender, acted as the judge in the Southwest Regional Mock Trial Competition on February 25. The event, sponsored by American Mock Trial Association (AMTA), allows college and junior college students the opportunity to develop their trial skills. Winners of the event go on to a national competition in Illinois.

**Paul Prato**, Appeals Division Supervisor, spoke to Chaparral High School students on March 06. Mr. Prato addressed indigent defense as a career.

◆ *Miscellaneous*

The annual index of *for The Defense* articles (from the newsletter's inception through December 1995) is now available. Anyone who would like a copy may obtain one from Sherry Pape in our Training Division. Ω

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## Bulletin Board

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◆ *New Support Staff:*

**Peggy Kirby** was hired as a temporary word processor this month. Ms. Kirby, a telecommuter, will transcribe interview tapes.

**Bibi Raza** started on February 27 as Trial Group C's new part-time receptionist. Ms. Raza is a junior at ASU, majoring in sociology. She has prior secretarial and reception experience with the federal government's General Service Administration in Colorado.

◆ *Moves/Changes:*

**Ellen Hudak**, lead secretary in Trial Group B, transferred to Administration on March 20 to quickly step in and fill a void left by Karen Andrews' resignation (effective March 29). Ms. Hudak will be assuming the payroll and accounts payable duties. **Christine Oliver** will serve as Acting Lead Secretary for Trial Group B.

**Jeanne Hyler**, legal secretary, returned to our office on March 25. She is assigned to Trial Group B.

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◇ ◇ ◇ ◇ ◇

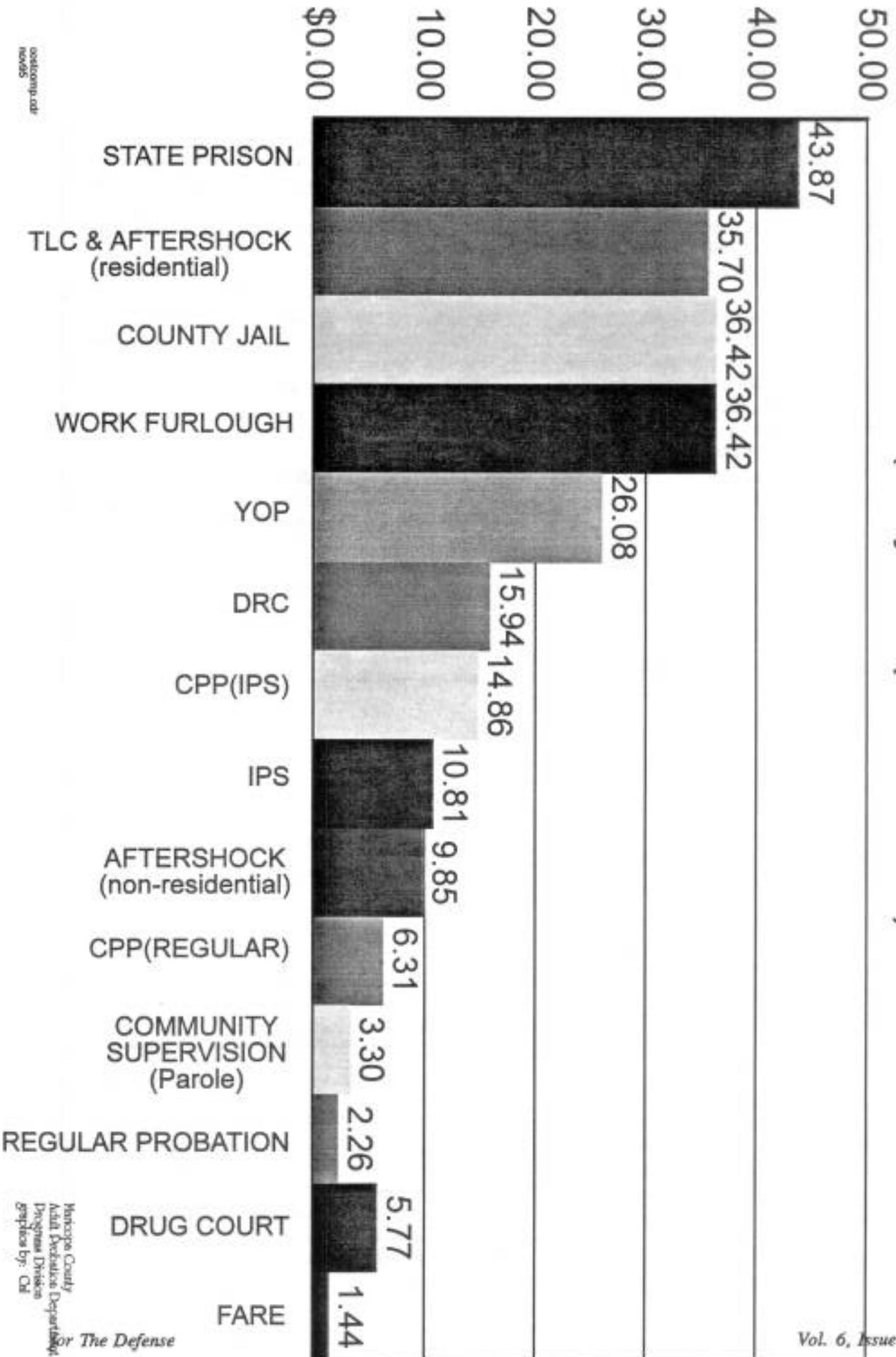
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## This Just In .....

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The Ninth Circuit Court of Appeals has declared Article XXVIII of the Arizona Constitution, which declares English the official language of the State and requires governmental actions to be taken in English, unconstitutional because it violates free speech rights of public employees. The U.S. Supreme Court will hear arguments next term on whether a government employee has a free speech right to disregard the official language of her employer and write government documents in Spanish. Stay tuned..... Ω

# MARICOPA COUNTY CORRECTIONAL COST COMPARISON (Daily Cost per Individual)



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## Computer Corner

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This column is designed to provide simple computer tips helpful to people in the legal field. These tips are fashioned for WordPerfect 5.1 in DOS. If you have any problems, questions or suggestions that you would like to share, please contact Ellen Hudak (506-6633).

### Sorting:

Only rudimentary sorting will be discussed here. If you want to expand your knowledge on more select methods, check your WordPerfect for DOS Reference Manual for such features as Select, Action, Order, and Type.

Sorting can be used to alphabetize lines, paragraphs, or rows within a table (Table feature).

If you are sorting a list with multiple items, (Figure 2), you must first make sure that you have only one *tab* or *insert* between each field. If you have more, you will not be able to sort the various fields.

The first Merge/Sort screen is automatically set up to sort **field** one first. You do not have to go into **Key (3)** (See Procedures below). When you select the Merge/Sort process, your screen will divide and all of the current sort criteria will be displayed (Figure 4).

### Keys:

"Keys" are the words, fields, or phrases within a record used to sort and/or select specific items. Select this option to define the keys you want to use for sorting.

You can use up to 9 keys. Key 1 has priority over Key 2 etc.

*Key 1* indicates that you want the records sorted by the first word (Figures 1 & 2) in the first field of each record. *Key 2* indicates that you want the records sorted by the second word in the first field if two or more of the items are identical (Figure 1).

1	2
Doe, Johnny	
Doe, Maria	
Doe, Jane	
Doe, Tex	

Figure 1: Different keys

1	2	3	4	5
Doe, Johnny	Arizona	988-4441	September 5	Topf

Figure 2: Example of different fields

However, if you want to sort by last name first and then first name second (*Several last names are identical but different first names*) your Merge/Sort menu would look like Figure 3.

Key	Typ	Field	Word	Key	Typ	Field	Word	Key	Typ	Field	Word
1	a	1	1	2	a	1	2	3			

Figure 3: Screen sample for last name, first name sorting.

### Perform Action:

Select Perform Action (1) to begin sorting.

(cont. on pg. 22) 

**Procedures:**

To sort an entire document:

1. Press **Merge/Sort** (Ctrl-F9), then select **Sort** (2).
2. Press **Enter** twice to sort the document on screen.
3. When the **Sort** menu appears at the bottom of your screen, press **Keys** (3) to input necessary keys or fields to sort.  
\*
4. Press **Exit**.
5. Select **Perform Action** (1) to begin sorting.

To sort a particular part of a document:

1. Block portion you want to sort.
2. Press **Merge/Sort** (Ctrl-F9).
3. When the **Sort** menu appears at the bottom of your screen, press **Keys** (3) and input necessary information to sort selected portion. (For simple alphabetizing by last name, first name, *see Figure 3.*) \*
5. Press **Exit**.
6. Select **Perform Action** (1) to begin sorting.

*Tab's*

-----				Sort by Line	-----							
Key	Typ	Field	Word	Key	Typ	Field	Word	Key	Typ	Field	Word	
1	a	1	1	2				3				
4				5				6				
7				8				9				
Select												
Action				Order					Type			
Sort				Ascending					Line sort			

Figure 4: Merge/Sort Screen

\* After you select **Keys** (3) the bottom left-hand side of the screen with read:  
**Type a** = Alphanumeric      **n** = Numeric: Use arrows: Press **Exit** when done.

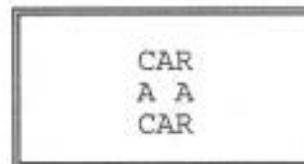
*Alphanumeric* keys are made up of letters or numbers.  
*Numeric* keys are numbers that can be of unequal length.

If you have a multiple-word last names and you put a 1 in the Words column of the Sort menu, the names will not always sort properly. If you force WordPerfect to see the names as a "single" word, the list will sort correctly. Instead of placing a space between "Van" and "Bulow," for example, place a Hard Space (Home-Space Bar) between words you want to keep together. After you have typed your list of names, with the last names first, block list, then press **Merge/Sort** (Ctrl-F9), (2) **Sort** and press (Enter) twice to sort to the screen. In the **Sort** menu, press (3) **Keys**, press (Enter) twice to get to the Words column and enter a 1. Press **Exit** (F7), then (2) **Perform Action**.

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Brainteaser for March.<sup>1</sup>  
 Answer in April's  
 issue of "for The Defense"

**JUST FOR FUN**



1. Answer to February's "Brainteaser" is Six of one or half a dozen of another.