

for The Defense



Volume 7, Issue 7 ~ ~ JULY 1997

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

CONTENTS:

The Secret Society of ROP Designation, aka The Destruction of Due Process	Page 1
The Drug Court Experience	Page 3
From the Phoenix Desk... DUI: a Little Something for Everyone	Page 6
Selected 9th Circuit Opinions	Page 8
Arizona Advance Reports Volume 242	Page 14
Computer Corner	Page 16
Bulletin Board	Page 16
June Jury Trials	Page 18

ROP is the County Attorney's acronym for its Gang/Repeat Offender Program. For a client, being "ROPed," or designated as a "ROPer" means that his case will be handled by the County Attorney's ROP unit. The ROP designation is one which can instantly alter a plea offer from probation eligibility to a quick trip to one of Arizona's lovely department of corrections facilities.

What happens is this: a client is identified as a potential ROPer or "repeat offender" by a detective. This client is then watched like a hawk by the detective and any police officers the detective brings on board for his private law enforcement search for problem individuals. In a snap, this detective, who may or may not perform the actual surveillance, can "introduce" the client, by means of his ROP file, to a committee of ROP detectives. This "secret" committee decides whether or not to ROP the client. The detectives consider a host of criteria such as criminal history, including convictions and arrests, substance abuse problems, types of crimes, and so on. I say "and so on" because no one is exactly sure what other gauges exist.

When he is ROPed, you can actually see the large black print stamped on the client's booking sheet. When the client is ROPed (and are accepted into this prestigious society) his case is sprinted over to the County Attorney's ROP Unit, where it is handled by a special ROP prosecutor. It is at this stage that criminal defense attorneys become familiar with the antics of the ROP unit. The ROP cases are different. They come with special plea offers that are almost always harsher than pleas that might be offered in one of the trial groups.

Who is ROPed, you ask? Well, that is another difficult question. There is no particular identity of a ROPer. In fact, many of you might remember receiving various memoranda from me requesting particular information regarding your ROP cases. The reason for these requests is that my information showed that ROP cases varied greatly and that perhaps the ROP designation was
(cont. on pg. 2)

THE SECRET SOCIETY OF ROP DESIGNATION aka THE DESTRUCTION OF DUE PROCESS

By Ronee F. Korbin
Deputy Public Defender-Trial Group D

Over the last year, I have poured over various documents like a sleuth, roughed up a few detectives and bruised a few county attorneys. All of this was done over the issue of the ROP designation. What is the ROP designation, you ask? The answer is not a simple one.

being applied in a disparate manner. I had clients who were ROPed with numerous priors and on parole, and some who had no priors and no juvenile history. After consulting a nationally recognized constitutional and civil rights expert, it became clear that it was necessary to obtain statistics regarding the imposition of the ROP designation. Unfortunately, it was almost impossible to compile the necessary data.

As a result (and as a consequence of my continued irritation at this designation), I persevered in my attempts to find a way to attack this designation. After several more months, I decided to draft a motion which dealt with the issue. With the help of then-law clerk and present co-public defender Maria Schaffer, we created the motion attached to the back of this newsletter.

Our hypothesis is that the ROP designation is unconstitutional because 1) it fails to provide notice to those who are designated as ROPers, resulting in the destruction of rights guaranteed by the Due Process¹ clause of the Constitution; 2) the delegation of authority to the police by the County Attorney and the usurpation of the County Attorney's powers by the police are violations of the Constitution's Separation of Powers; and 3) the arbitrariness of the ROP designation is a violation of the rights guaranteed by the Equal Protection clause of the Constitution.

Of particular importance with the ROP designation is that there is *no statute* addressing the designation. There are laws dealing with repeat offenders, which provide for sentence enhancement. The problem with ROP designation

Of particular importance with the ROP designation is that there is *no statute* addressing the designation.

is that some designees have no prior felonies and some have a range of priors. I am sure some of you have ROP cases that you feel shouldn't be ROPed, and some that you feel may be well-suited for that designation. This is an example of the arbitrariness of the designation.

The research was arduous because, as you might guess, these issues do not generally lean in our favor. After all, an argument that the County Attorney's plea offer is too harsh is not going to bowl over many Superior Court judges. A defendant is never guaranteed a right to a plea offer, only a right to a trial with a jury. The argument had to go much deeper than that.

Aside from filing the ROP motion, I suggest that all attorneys request an interview with the ROP detective assigned to the case. I have had some success with this request, and have actually had a ROP detective reveal that he had a ROP file. I argued that this was discoverable. One memorable comment from a ROP detective was that he personally does not ROP those who steal to survive. He would only ROP those who steal to support a drug habit. Certainly, this argument made no sense to me and underlines the capricious decision making by the detectives.

Here is a list of proposed questions to ask the ROP detective:

1. Why did you ROP my client?
2. Did you do actual surveillance? If so, where, when, how long and what was the result?
3. Did you ROP him because of substance abuse?
4. Do you have a ROP file?
5. Who decided he should be ROPed?
6. Who compiled the documents/information in that file?

Another suggestion is that you read the motion, make the necessary changes for your case and file it. Request oral argument and an evidentiary hearing, which will hopefully put a ROP detective on the stand. You may not win, but 1) you will preserve the issue for appeal, 2) you may have a special action to raise, and 3) it is a very good discovery tool, that may result in a more reasonable pleas due to the prosecutor's lack of desire to respond to the motion.

CASE EXAMPLE

Very recently, one public defender was prepared for trial for a ROPed client. This client had NO PRIOR FELONY CONVICTIONS but three open cases, aggravated assault dangerous, armed robbery, and two theft cases. According to the attorney, the client has a history with the Phoenix Police Department as they had attempted (cont. on pg. 3)

for The Defense Copyright©1997

Editor: Russ Born

Assistant Editors: Jim Haas
Ellen Kirschbaum
Frances Dairman

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

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.

to “get” him a few years ago for similar charges. To their dismay, a jury found him not guilty and as a result, the police have been after him ever since.

This time they charged him with the above mentioned series of crimes. The original offer required the client to plead straight up and stipulate to a prison term. The attorney filed the ROP motion. Surprisingly, she received a plea offer that was quite acceptable to her client. The state dismissed the armed robbery and aggravated assault case with prejudice as well as one of the theft cases. They dropped the theft to a class 4 from a class 3 felony. The state made no agreements as to his sentence, but made him probation eligible.

Perhaps the receipt of the plea ironically coincided with the filing of the motion, or perhaps the prosecutor did not want to deal with a reply to the motion. The bottom line, however, is that the client received a fair and appropriate plea offer. That is the primary outcome we can hope to achieve.

MY RECENT CASE

Recently, I filed the ROP motion on a case that I believed to be a ROP case. Judge Nastro was supportive of the motion and insisted the county attorney bring her supervisor to provide some background on the ROP designation. Judge Nastro set a settlement conference in his chambers. At the conference, the county attorney conveniently stated that my client was not ROPED. Instead, she explained to the judge that my client was a “special assignment” case assigned to her out of a Task Force Investigation in Glendale. She also said my client was a gang member. In fact, this was the first time over the course of one year that anyone I had interviewed mentioned a gang affiliation. As far as I was concerned, these were merely red herrings.

All I said to the judge was, “If it walks like a duck, quacks like a duck, it’s a duck.” (In this case, it also happens to look, eat and smell like a duck). The judge agreed that was probably the scenario but asked me to refile the motion using the “special assignment” terminology. I filed the motion and merely added a procedural history section that explained what happened in my case. I pointed out that despite the county attorney’s statements, the “special assignment” designation came about from the same type of procedure as the ROP designation, had the same effect and was unconstitutional, no matter how the county attorney’s office wants to label it.

Good luck and please let me know about the

outcome of your motion. Hopefully, this motion can help some of our clients who would be happy not to be a part of a secret society.

1. The Due Process argument was somewhat propelled by information I received from a Public Defender in the State of Oregon. He provided me with information regarding a hearing that was recently mandated by the State in cases where defendants were designated Gang members. The police must provide notice to those they want to designate as Gang members as well as a hearing so that the designation can be refuted. To see that information, please see me.

THE DRUG COURT EXPERIENCE

By Doug Passon
Deputy Public Defender-Trial Group A

Ever since Prop 200 came down, you have probably been seeing more recommendations for Drug Court on presentence reports. In fact, it is now the policy of the probation office to screen *every* drug offender for possible participation in this program. The drug court program seems like a good deal for clients, providing an opportunity to get solid drug treatment, get off probation fast and pay less money. However, before your client can make a decision as to whether drug court is the best way to go, he or she needs to know exactly what they are getting into with this program. The following is a detailed description of the program’s requirements and potential benefits and drawbacks.

A. THE PROCEDURE

Your client will probably be screened for drug court when he/she interviews with APO for his/her PSR. If your client is deemed an appropriate candidate (SEE APPENDIX A, DRUG COURT CRITERIA), the PSR writer will recommend drug court. If the judge agrees with the recommendation (and your client wants it), he/she will sentence your client to the standard terms of probation with drug court as an additional requirement (usually term 18 and 19). There is an automatic sixty day deferred jail sentence that accompanies drug court. However, all jail time, fines, and probation fees are deferred until completion of drug court. If a person doesn’t comply with all the requirements of drug court, they will be kicked back into standard probation and fine and fee payments will begin on a monthly basis.

(cont. on pg. 4)^{MS}

B. THE PROGRAM

In comparing drug court to regular probation, Lisa Whitaker, a drug court probation officer, uses the analogy that drug court is like "summer school" probation - there are many requirements packed into a much shorter time period. If your client plays her cards right, she can finish drug court and be off probation in just seven months, as opposed to regular probation which can be up to three years.

Depending on the individual's needs and compliance, they will attend drug education and counseling sessions one to three times a week. In those visits, they meet with both substance abuse counselors and probation officers.

There are four phases to drug court. The first phase of the program is the "pre-treatment phase." This phase lasts four weeks and lays the foundation for the rest of the program. (SEE APPENDIX B, DRUG COURT CURRICULUM OUTLINE TOPICS). The next phases are called "paths". There are three paths a probationer must successfully navigate to graduate from the program. Each "path" is two months long and covers a wide variety of issues regarding addiction, stress, family, social skills, and so forth. (SEE APPENDIX B, DRUG COURT CURRICULUM OUTLINE TOPICS).

Throughout the seven months, probationers must also participate in the "colors" program. A probationer is assigned a color. Then, they must routinely call a special TASC telephone recording that informs probationers of the "colors of the day". If the probationer wins the jackpot and his/her color is one of the colors de jour, he/she must go to TASC that day to submit to urinalysis.

Probationers are also required to enter into "contracts" stating that they will undergo testing, counseling, and all other program requirements. Every one to two months the person must come before the court for review. At that time, the judge, with the help of the program probation officers and counselors evaluates the probationer's performance in the program thus far.

There is a system of punishments or rewards in place for compliance and non-compliance. Throughout the program, they are rewarded for compliance by a "points" system. For example, as a term of drug court, a sixty day deferred jail sentence is imposed. If a person earns so many points, the judge can reward them by knocking a chunk of that deferred sentence off. That way, if they flunk out of the program and have to do their deferred

sentence, it would be a reduced sentence rather than the full sixty days. The judge can also reward a person by knocking chunks of their standard probation off. That way, if they end up getting booted from the program and placed back on standard probation, they have still succeeded in shortening the span of their probation term by putting forth some effort in the program. When a person is in compliance, they are also rewarded by "positive strokes" from the judge in the form of kind words of encouragement and praise.

There are also punishments involved in the program as incentive for compliance. A person must successfully complete each phase of the program. If they are faltering, the judge can order them to repeat all or part of a two month "path", thereby extending their probation that length of time. If a person is really messing up, the judge starts imposing jail time. Jail time is often imposed when a person is blowing off the requirements of the program such as counseling sessions. Moreover, while a person is generally *not* given jail time for testing positive for drugs, the judge will likely impose jail time for failing to report for drug testing altogether.

The judge looks at the "big picture" when determining sanctions. For example, in one case I witnessed, a gentleman missed about four weeks of 12-step meetings and failed to report to TASC for his testing. The judge took him into custody and gave him one week in jail. In the next case, a gentleman had failed to report to TASC for drug testing and had missed several counseling sessions, but he was fulfilling his community service hours and paying his fees. The judge did not impose jail time but warned the probationer that jail time was guaranteed if he was not in compliance by the next court appearance.

At the end of the seven months, if the probationer successfully completes the program, he/she graduates and is totally off probation. If the offense is undesignated, they generally earn their misdemeanor at that time.

C. BENEFITS OF THIS PROGRAM

TIME: As stated above, if all terms are complied with, this is *fast* track probation and will last a mere seven months as opposed to three years of standard probation. Moreover, there are opportunities to reduce the standard probation term and deferred jail term just in case you get booted from the drug court program and have to go the long haul on standard probation.

MONEY: There is a financial benefit to drug court over standard probation. Standard probation fees are
(cont. on pg. 5) 

typically \$40/month for 36 months, which amounts to \$1440 over the course of probation. Drug court fees are \$16/week (\$64/month) for (hopefully) seven months, plus a \$20 dollar entrance fee, which amounts of \$468. Moreover, on standard probation, if the probation officer orders the probationer to attend private counseling sessions (which is basically a given in a drug case), the probationer is responsible for paying the private counselor out of his/her own pocket. Likewise, a client does not have to pay when he/she reports to TASC for urinalysis (it is usually ten bucks a whiz for those enrolled in TASC). So basically, in drug court, all costs are covered in the \$16/week assessment.

Another financial benefit concerns drug fines. As you know, drug fines usually range from \$750 to \$2000 with a possible additional surcharge. While these fines cannot be reduced or eliminated, they will be deferred and, if the probationer is in compliance, the fines will be converted into a civil judgement. When this happens, the probationer must make payments to the clerk of court.

Finally, unlike probation, a person can “run a tab” at drug court. If a person misses a payment, they can run a tab up to \$50 dollars. If they are over the fifty dollar amount, they must attend “financial group” to learn to handle their finances. It should be noted that one cannot graduate from the program until their fees are paid.

D. DRAWBACKS

JAIL TIME: As part of the program, the court will impose a sixty day deferred jail term. If a person is in full compliance, they will never do that time. However, as stated above, if a person starts missing counseling sessions or failing to report for drug testing they *will* spend time in jail. How much time depends on how badly they are messing up. Moreover, if a person flunks out of the program altogether, that person *must* serve the entire deferred sentence. The other problem here is a “due process” concern in that the judge does not need to go through probation violation proceedings to impose jail time.

SO MUCH TO DO, SO LITTLE TIME: If your client is irresponsible, he/she won't be able to handle drug court. The program is rigorous, requiring several visits to counseling and other groups, possibly totaling up to three groups per week. Once a month court visits and random drug testing add to the pile of challenges a client must meet. That means your client must be organized, disciplined, have reliable transportation, understanding employers and so forth. If your client can't cut it, he or she is hanging' with Sheriff Joe for sixty days.

If your client is irresponsible, he/she won't be able to handle drug court.

E. OTHER USEFUL TIDBITS ABOUT THE PROGRAM

I.V. DRUG USERS: Previously, if your client was an I.V. drug user, he/she would not be eligible for drug court. However, as a result of Prop 200, the drug court program has received additional funding to begin accepting I.V. drug users.

RESIDENTIAL TREATMENT:

Previously, if a person was in drug court and the court determined residential treatment was needed, that person would be placed back on standard probation. Now, however, a person can get a “time-out” of drug court to complete residential treatment. When they are through with treatment, they can resume participation in drug court.

WHERE AND WHEN: Drug Court is held on Fridays:

10:30- 12:00 in Judge Bolton's Court (CCB 402)
3:00 - 5:00pm in Judge Hyatt's Court (CCB 403)

SUCCESS OF PROGRAM: As of December 1996, Drug court was reporting a “graduation” rate of approximately 67 percent.

While nobody really knows how many people re-offend or relapse after graduation from the program, it still seems like a progressive alternative to jail, prison, or good old standard probation.

If you have questions or concerns about drug court, please call: Lisa Whitaker, Drug Court Probation Officer (x1904)¹

1. Special thanks to Ms. Whitaker for her help in preparing this article. ■

FROM THE PHOENIX DESK.... DUI: a LITTLE SOMETHING FOR EVERYONE

By Gary Kula, Assistant Contract Director
City of Phoenix

I have made it a steadfast rule that every five years I clean off the top of my desk, whether it needs it or not. In sorting through the piles of paper, I came across the following articles and studies which may be helpful in defending your next DUI case.

Young Adults, Driving and Attention Deficit Disorder

One situation that we all come across is a young adult who comes in and explains poor driving behavior due to their diagnosed attention deficit disorder. It now appears, based upon a small study conducted on this issue, that there may be some validity to this claim. Recently, a study was conducted by researchers at the University of Massachusetts who found that teenagers and young adults who are diagnosed as having attention deficit disorder (ADD) are significantly more likely to be cited for speeding and other traffic violations than their peers who do not have the disorder. These findings were published in the December 1996 issue of *Pediatrics*. This study, compared the driving records of 25 people from ages 17 to 30 who were diagnosed with ADD, with 23 non-ADD counterparts who had been matched for age, sex, and educational level.

Five people in the ADD group were taking medication used to treat ADD, the most common of which is Ritalin, an amphetamine-like stimulant. Those taking stimulants were asked to stay off of the medication for 24 hours before the test to avoid the performance enhancing affect of these drugs. Researchers measured driving ability through interviews with the subjects and passengers who rode with them, supplemented by computer simulated driving tests and an examination of official motor vehicle records.

The researchers found that the drivers diagnosed with ADD were twice as likely to be cited for speeding and perform more poorly on computer simulated tests compared with their counterparts. The researchers also found that those in the ADD group had significantly more accidents than those in the control group, were more often at fault in those accidents and were more likely to have their licenses suspended or revoked.

The team found that the ADD group did not have problems knowing what to do (their driving knowledge was adequate), but they suffered from performance problems: they failed to apply what they knew. (This summary of the study was compiled Sandra G. Boodman of the Washington Post.)

Flushed Face without Rouge

We have all heard the testimony of police officers that one of the clues they observed indicating that our client was affected by alcohol was red coloring in the face. The explanation of this physical phenomenon was answered in a health

column in the *Consumer Reports* magazine, February 1995, page 89. A subscriber posed the following question:

Question: What causes my face, especially my cheeks, to become scarlet red for a couple of hours after I drink a glass of wine?

Answer: Alcohol causes the skin to become warm and flush because it dilates the blood vessels, allowing increased blood flow. Since a person's face has many blood vessels, the effect may be most noticeable there. However, if the flushing is severe, you may have a skin condition called Rosacea, which would make you more prone to flushing.

If you have a client who appears to have red flushing in their face on a regular basis, or who tells you in a refusal case, that this flushing occurred in spite of the fact that they only had one or two drinks, you may want to research the Rosacea skin condition referred to above.

Smoking, Alcohol, and Grandma

Okay, granted you don't have many DUI clients who are women aged 65 years of age or older. If you do however, you will be better prepared to defend that DUI case at trial if you are familiar with the recent article published in the December 21, 1994 issue of the *Journal of the American Medical Association*. In an article titled, "Smoking, Alcohol, and Neuromuscular and Physical Function of Older Women" (*JAMA*, December 21, 1994, Volume 272, No. 23, Page 1825), a study of 9,704 women aged 65 years or older was conducted. They were tested to determine the associations between current and lifetime

(cont. on pg. 7) ¹⁰³

smoking and alcohol use with physical function in an older population. In assessing their neuromuscular and physical functions, 12 performance tests of muscle strength, agility and coordination, gait and balance were used in addition to self reported functioning status. The researchers found that compared to women who never smoked, current smokers had a 50% to 100% decrease in function. This decrease in function was comparable to a five (5) year increase in age and that these measures significantly worsened with age.

The conclusion of the researchers was that in the tested population, women who smoke are weaker and have poorer balance and performance on measures of integrated physical function than non-smokers. Smoking was clearly connected to a decline in physical functioning. Current, moderate drinkers have better physical function compared with non-drinkers, but associations of function with heavy drinkers could not be assessed. In other words, according to this study, a moderate drinker is better off as far as neuromuscular and physical functions as opposed to women in that same age group who do not drink. Certainly, this study might be worth running up the flag pole in the right case.

Driving While Under the Influence of a Phone

Using a phone in the car has become almost as common as turning on the radio. In a DUI case, your client's use of the car phone may explain the erratic driving observed by the officer. In a recent study reported in the *New England Journal of Medicine*, it was found that talking on a cellular phone while driving poses four (4) times the risk of accidents afforded by normal driving (which is one accident for every 100,000 trips). According to the study, driving while talking on a cellular phone poses the same risk as driving with a blood alcohol level at the legal limit.

In response to this Canadian study, ten members of the Illinois House sponsored legislation that would have made it a crime to use a hand-held cellular phone while driving on the state's roadways. That failed legislative attempt in Illinois represents a growing intolerance of the public towards drivers who are paying more attention to their phone conversation than the task of driving. You probably will find that most members of jury panel harbor the same resentment towards someone who is on the phone and while driving. Once you get past this resentment, the use of a phone may go a long way towards explaining the driving behavior which was thought to be caused by alcohol.

Victim Impact Panels

There has been a trend in recent years for judges to require individuals convicted of DUI to attend victim impact panels. A victim impact panel is a group of three

or four speakers who were seriously injured or whose loved-one was killed in a DUI crash. They present their personal stories to DUI offenders who are ordered by the court to attend the panel. In a recent article published in *Alcohol, Drugs and Driving*, the use of victim impact panels was studied to determine the impact on DUI recidivism. The following is an excellent summary of why it was thought that this would be an effective sentencing option.

"The rationale for the effectiveness of the VIP is that most actions taken against DWI offenders focus on punishment, and consequently, allow the offenders to perceive themselves as victims of the police and to rationalize their arrests as bad luck and victimization. In contrast, the VIP exposes the DWI offender to the deep grief of others hurt by their kind of driving. Such an emotional appeal should be an effective psychological means of changing attitudes of people who have shielded themselves from being exposed to the hurt they have caused or may cause. The VIP directly affects the emotional component of the offenders' attitudes toward drinking and driving by offering the drivers the opportunity to empathize with the victims and the pain and suffering caused by drunk driving. This, in turn, should make drivers more receptive to rational cognitive arguments about the dangers of drinking and driving. Consequently, these drivers should be more inclined to modify their behavior accordingly. In fact, a recent survey of DWI drivers attending the VIP has shown a significant and immediate change in attitudes and behavioral intentions towards drinking and driving as a result of that exposure." (Badovinac, 1994). (Alcohol, Drugs and Driving)

This study looked at the recidivism rates of 2,092 individuals who were arrested for DUI and attended the victim impact panel. In assessing recidivism, the driving records of individuals were analyzed prior to their attending (cont. on pg. 8) ^{EST}

the victim impact panel and compared to their records after attending the victim impact panel. Additionally, these records were compared to the drivers who were assigned to attend the victim impact panel but failed to do so. The conclusion of the researchers was, "based on the results obtained in this study, there is no measurable and consistent impact of the victim impact panel on recidivism." This study did find that in one state, in limited situations, there was a reduction in recidivism in males over 35 years of age. The conclusion of the study however simply stated: "In summary, the victim impact panel is not a very effective tool to modify behavior of all DUI offenders." Victim Impact Panels: Their Impact on DWI Recidivism, Shinar and Compton, Alcohol, Drugs and Driving, Vol. 11, No. 1, Page 73 (1995).

The conclusion of the researchers was, "based on the results obtained in the study, there is no measurable and consistent impact of the victim impact panel on recidivism."

No, You Cannot Complete the Story

In situations where the officer receives information as to erratic driving behavior and then stops a car based on that information, the State will oftentimes attempt to introduce the hearsay statement. The State will argue that the testimony is not hearsay since it is not being offered to prove the truth of the matter asserted but that, rather, it is merely being presented to "complete the story."

To fend off this attempt, you need look no further than *State v. Simms*, 176 Ariz. 538, 863 P.2d 257 (Div. One, 1993). In *Simms*, while the Court of Appeals deferred to the trial court's discretion and did not disturb the decision not to grant a mistrial, strong language was used expressing concern over the introduction of such hearsay testimony. In the opinion, it was stated:

"[W]e strongly disapprove of the practice of introducing evidence of this type under the guise of completing the story of the crime. We note for the benefit of the bench and the bar that the introduction of such evidence may constitute reversible error in cases in which the evidence against the defendant is not as strong as it was in this case." *Simms* at 541.

A motion in limine on this issue could circumvent any possible dispute on this evidentiary issue.

Lies, Damn Lies and Statistics

In 1974, the Grand Rapids study was published by Dr. Borkenstein. In that study, researchers studied accident statistics and conducted extensive surveys and interviews to determine the relative probabilities of a driver causing an accident at given blood alcohol levels. The findings from this study have been quoted in studies, in courtrooms and in legislatures.

If you take a closer look at the findings and statistics of the report however, you will see that while an increasing blood alcohol level increases the probability of an accident occurring, the relative probabilities are still quite insignificant. For example, if you assume:

- 1) a BAC of .15, with a relative probability of 30 (versus 1 for a BAC of .00).
- 2) that in 1990, drivers aged 35 - 39 were involved in four crashes per million miles.
- 3) that in 1990, the average annual mileage is 14,833 miles.

Then: a person would have to drive 205 days or 8,331 miles at a .15 BAC level, in order to have a 50/50 chance of having an accident. These calculations were prepared by Merrill J. Allen, O.D., Ph.D, Indiana University. ■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

UNITED STATES V. TSINHNAHIJINNIE (9th Cir. 1997) 1997 U.S. App. LEXIS 9093

Defendant charged with abusive sexual contact (essentially child molest) of his stepdaughter, under 12 "[o]n or between June 1992 and July 1992 ... [on] the Gila River Indian Reservation, Indian Country." Defendant had been prosecuted in tribal court for similar incidents occurring in May 1994. These were introduced as evidence "to show the likelihood that [defendant] had committed similar crimes in a less serious manner" in the summer of 1992. There was evidence of the child's recollection of differing time frames by naming various teachers in different grades, different homes they had occupied on and off the reservation and which bedroom had been hers at the time of the charged (cont. on pg. 9) ¹³

molests. The mother also testified as to where the family had lived at different times. At no time was the prosecutor able to elicit any testimony that any improper conduct occurred in "Indian Country" in June or July 1992. The defense presented documents proving the family lived off reservation until early August 1992. In response to defendant's appellate claim of insufficient evidence the government argued that the dates were not elements of the crime. This is true, but overlooks the function of the indictment, to know what one is accused of in order to prepare a defense and be protected against another prosecution for the same offense. When there is a variance between the indictment and proof at trial, the question becomes whether it was such that could have misled the defendant at trial, or such that could have affected substantial rights. If the variance does not have such affect, but is immaterial, it is harmless error. The government generally will prevail by showing the crime occurred on a date reasonably near the one alleged in the indictment. Here the disparity was tied up with the jurisdictional requirements of being on the reservation. The appellate court ruled that **no reasonable juror could conclude defendant committed the crimes on the reservation on the charged dates.** The "reasonably near" test did not work for August 1992 because there was no evidence that the crime occurred then. The government failed to comply with the Fifth Amendment right to be free of criminal charges except on facts which satisfied a grand jury, to have fair notice of the accusation, and to be free of double jeopardy. The evidence was insufficient to prove the crimes for which defendant was indicted. [And he cannot be tried again. Former P.D. and current Federal P.D. Gerald Williams was the trial attorney who made the right objections and preserved the issue for appeal.]

UNITED STATES V. KNAPP (9th Cir. 1997) 1997 U.S. App. LEXIS 10581

Knapp and his corporation were convicted of conspiracy to launder money, money laundering, and filing false currency transaction reports. This appeal challenges the propriety and sufficiency of jury instructions. The instruction on currency reporting was erroneous because it removed the element of materiality from the jury's decision. This was in accordance with long established case law that treated materiality as a question of law. Despite there being no objection, since the instruction complied with the "solid wall of authority" at the time, the court held that a subsequent ruling of the Supreme Court was retroactive, and found that removing the question of proof of an element from the jury is a structural error which is never harmless.

UNITED STATES V. HALL (9th Cir. 1997) 1997 U.S. App. LEXIS 9894

After police searched his person, workplace, car

and home and arrested David Dang for trafficking in cocaine (undoubtedly only one of many possible charges) Dang told police that "Ron" was his supplier. As he was pointing out Ron's residence to police, he pointed to a truck approaching and said it belonged to Ron, too. Dang described Ron as a heavyset white male in his 60's who hid his cocaine in cereal boxes and cut-out books. Police followed the truck to the space pointed out and confirmed that the truck was owned by one of several people named Ronald Hall in town. A search warrant was obtained for Ron Hall's trailer by live testimony of a trooper and Dang. A motion to suppress the evidence was granted because the police deliberately or recklessly withheld information crucial to the informant's credibility at the warrant hearing.

**UNITED STATES V. GONZALEZ (9th Cir. 1997) 1997 U.S. App. LEXIS 10583
REQUEST FOR NEW LAWYER -WITHDRAW FROM PLEA**

On the trial date defense counsel indicated that Gonzalez would accept the plea bargain. After a recess the plea was entered, with the usual *Boykin* litany of advisements, and accepted. Four months later, and ten days before sentencing, the client moved for a new lawyer to be appointed. He claimed he never wanted to plead guilty but was coerced and physically intimidated into it when his lawyer became agitated and threatened to smack him between the eyes. He also wrote that he had insisted the morning of trial that he did not want to plead, that conflicts over strategy and witnesses existed before this, and the lawyer told him that his wish to withdraw was highly unlikely to be granted. (Sound familiar?) At sentencing the client maintained he was forced to plead guilty, that a probation officer witnessed the incident,s, and that the lawyer had later admitted some of the conduct. The judge asked the lawyer if the allegations were true. The lawyer denied them. The court denied the motion for new counsel or withdrawal of the plea, based on the usual responses given at the plea proceeding. Given the fact that an independent witness was available (the probation officer) the failure to hold an evidentiary hearing on was an abuse of discretion. The sentencing court also created a conflict of interest between client and counsel when it questioned the lawyer in open court in front of the client, eliciting an answer from the lawyer that undercut the client's veracity and denied him effective assistance at sentencing. (They don't say how to resolve such allegations without creating a conflict when there is no convenient third party witness.) The arguably unreasonable delay in raising the issue was a factor the court could properly explore at a hearing on the matter.

(cont. on pg. 10)☞

**UNITED STATES V. HERNANDEZ 109 F.3d 1450
(9th Cir. 1997) SANITIZING A PRIOR**

Hernandez was a felon, and prohibited from possessing a firearm. He was arrested after police chased a man acting suspiciously, who discarded a gun during the pursuit. Although the police lost sight of the man twice, Hernandez was found hiding nearby, out of breath and looking scared. The defense was misidentification. At the trial for "felon in possession of a firearm" defendant offered to stipulate to his status as felon, one of the elements of the case. The offer was rejected. At trial defendant objected to introduction of an unredacted copy of the prior pack, on the grounds that the nature or facts of the felony were superfluous and prejudicial. The court denied the request to preclude the name of and facts underlying his prior burglary, and to have the parole officer testify only that he'd been convicted of a felony punishable by more than one year (the element necessary). This court held that in rejecting the stipulation and admitting the nature of the conviction the trial court abused its discretion, and reversed the conviction. The error was not harmless, where the evidence was strong but not overwhelming, and the jury at one point believed itself deadlocked before convicting. This court voiced defense's usual position that giving a limiting instruction that the burglary prior was only relevant for the element of felon status is "to ask human beings to act...well beyond mortal capabilities" and reiterated "skepticism of the efficacy of such instructions no matter when they are given."

WILLETS

A claim that defendant was deprived of due process because of the gun was also rejected. He retained an expert to examine and test the gun, and to testify in his first trial. While his first appeal was pending, 20 months after arrest, the state police department holding the gun destroyed it following normal procedures. A computer check had indicated dismissal of state charges and did not reflect the federal charges. The gun was only potentially exculpatory, and there was no bad faith in the destruction.

JOHNSON V. BALDWIN (9th Cir. 1997) 1997 U.S. App. LEXIS 11968 INEFFECTIVE ASSISTANCE OF COUNSEL

Brothers Albert (appellant) and Kevin Johnson were charged with rape and sodomy of Kevin's sometime girlfriend Sharlene. They were tried separately, Albert convicted and Kevin acquitted. The victim testified that at Kevin's house she was introduced to someone Kevin said was his brother "Priest." The three bought liquor and Sharlene shared marijuana with Priest. She became high, and hallucinated twice either before or during the sexual acts. She said that Priest forced her down, and both men undressed her. She said that over 45 minutes Priest raped

her vaginally three times, Kevin raped her once and forced her to perform oral sex. She was distraught when she called a friend who met her, saying she'd been raped. She told police both men ejaculated. Within four hours of the activity she was examined at a hospital. Sharlene had not changed clothes, or washed herself in any manner before the exam. The rape kit, her clothes and the bedspread from the scene were examined. No traces of sperm or any recent sexual intercourse was found in or on any evidence. It was not until a month later that she told police that Priest was said to be Kevin's brother. The victim identified Appellant Albert as Priest, who had raped her. Albert testified in his own defense, saying merely that he was not present at the time of the rapes, and had never met the victim until after the date of the rapes. He did not say where he was or what he was doing at the time of the rapes, but claimed to live with his grandmother and girlfriend at the time. Numerous priors were introduced for impeachment on cross. In his PCR Albert claimed his lawyer told him to lie, and say he was not at the scene of the alleged rapes, and he followed that advice although he was at Kevin's on the night of the alleged rapes. He further claimed that an adequate investigation would have led to abandoning the weak alibi defense and to a stronger defense overall. He was present at Kevin's but had not committed the crimes. The lawyer testified that Albert claimed he was not at the home and denied telling the client to lie. The defense attorney did not investigate any possible alibi witnesses, not even the grandmother or girlfriend. The only witnesses defense counsel spoke to were a nurse and/or doctor who examined the victim, and the victim. Defense counsel met with Albert twice; just before a pretrial conference a month before trial and during a weekend recess of the trial. The court noted that proper investigation would have revealed the lack of support for the claim that Albert was elsewhere, and led to further discussions of defense strategy. Albert's obvious and weak lie did prejudiced the jury in their evaluation of the defense claim that no rape occurred. With proper preparation a much stronger case would have been presented that there simply were no rapes, regardless of where Albert was. The lawyer was not found to have directed perjury, but had given ineffective assistance that contributed to the verdict.

UNITED STATES V. BANCALARI, 110 F.3d 1425 (9th Cir. 1997)

Appellant was convicted of kidnapping and transporting a person across a foreign border, and aiding and abetting [his co-defendant's] use of a firearm in the commission of a crime (the kidnapping). Bancalari had been harassing, assaulting and shanghaiing the estranged mother of his child, Maria Muniz. Muniz was being driven to work by her current boyfriend when Bancalari forced them to stop. His passenger got out of the truck and pointed a gun at the boyfriend, who ran. Bancalari dragged Muniz from
(cont. on pg. 11) ⁸³

the car and forced her into his truck. The passenger got Bancalari's daughter from the car into the truck, and they drove off. At the Mexican border Muniz did nothing to escape or get help. Once across the border Bancalari pulled a different gun than the one used by the passenger, held it on Muniz, dry fired, and showed that it was unloaded but he had bullets. He threatened to use the bullets and have her raped and held in Mexico until and unless she agreed to his conditions. Muniz did not try to escape during the next five days while they were at the homes of various friends and relatives of Appellant. She was allowed to leave after promising to drop any charges, quit work and stop dating the other man. The kidnapping conviction was affirmed. The elements for conviction on aiding and abetting use of a firearm in a felony required a jury to find beyond a reasonable doubt that the accused 1) knowingly and intentionally 2) aided, abetted, counselled, commanded, induced or procured the 3) use or carrying of the firearm 4) during and in relation to the kidnapping. The jury instructions erroneously allowed conviction if the jury found that a kidnapping occurred, Bancalari willfully participated, and that he *knew* the firearm was being carried and used during and in relation to the kidnapping. Knowledge that the firearm was or would be used in the kidnapping was insufficient to convict of this charge, even where he intended to participate in the kidnapping. He could only be convicted if he aided, abetted, counselled, commanded, induced or procured the use and carrying of the firearm.

UNITED STATES V. ROMEO F.3d 141 (9th Cir. 1997) DOUBLE JEOPARDY

Romeo was charged with: 1) Importation of marijuana and 2) possession of marijuana with intent to distribute. A jury acquitted of the possession charge, but hung on the importing. He was arrested driving a car with 18 packages of marijuana totalling 188.45 pounds in the trunk, not hidden. He claimed that he did not know the drugs were there and was merely driving the car across the border for a woman he'd met two days before, with whom he'd spent the intervening time, and who would call him to retrieve the car. This part of the story was less than credible. The only disputed element was knowledge. The elements of the acquitted count, possession with intent to distribute, were that Romeo knowingly possess the marijuana and he possess it with intent to deliver it to someone. The appellate court held that, because the amount of marijuana precluded any dispute that it was intended for delivery to another, the jury necessarily decided that defendant did not have knowledge of the marijuana. Therefore the government could not relitigate the issue of knowledge in a retrial of the importing count, under a collateral estoppel/double jeopardy theory.

DYER V. CALDERON, 113 F.3d 927 (9th Cir. 1997)

Dyer was convicted of four counts of kidnapping,

two counts of attempted murder, and two counts of first degree murder. The state prosecution resulted in the jury imposing the death penalty. This is his appeal from the denial of his habeas petition by federal district court.

Dyer and two companions went to the home of another friend and brought two guns between them. Throughout the evening Dyer and others drank and used drugs. He passed out and awoke to find jewelry had been taken from his person. He made threats to kill or beat up the man he concluded stole them. Dyer pistol whipped the man, although he denied any theft. The two men who arrived with Dyer got in the act, and the trio ended up forcing the other four into a car. After driving a while the four hostages were told to get out and lie on the ground. Two guns were used, and each was shot multiple times. Two of the four survived, and heard the killers saying things like "this bitch ain't dead yet," "check their pulse," "if they're not dead now they'll be dead by morning." The woman survivor felt a gun pressed to her head after a pulse was detected, and heard three clicks as it misfired. She said that throughout the evening, even when beating up the accused jewelry thief, Dyer seemed angry but not out of control or intoxicated. The defense was diminished capacity. Dyer testified that during the evening he ingested marijuana, cocaine, gin, wine, brandy and speedballs of cocaine and heroin. The expert defense witness gave some support to the theory but could not account for the selectivity of Dyer's memory loss and other factors in a way that supported diminished capacity.

INEFFECTIVE ASSISTANCE

Dyer bases his ineffective assistance claim on counsel's alleged failure to adequately investigate, obtain and present evidence of Dyer's use of PCP. Dyer now has depositions from three witnesses that he used PCP hours before the murders. His expert now says this information would have changed her testimony, and could have explained his impairment and memory lapses. The trial lawyer suspected Dyer used PCP because Dyer told one doctor he might have, but did not recall. The lawyer abandoned this avenue of inquiry. The court found this reasonable, given the lack of evidence supporting PCP use at the time, and the tactical decision that the jury might consider it aggravating at sentencing. Even if the investigation was legally inadequate, Dyer didn't prove he was prejudiced where the witnesses were not cooperating at the time of trial, were not particularly credible, would have revealed other damaging testimony and the PCP use would not have led to significantly different expert testimony. The dissent reveals that the expert was hired five weeks into the trial, ten days before testifying and was not told information that might have allowed her to answer the state's hypothetical more effectively for the defense, and the PCP possibility was dropped without asking other people who were interviewed what they knew of PCP use.

(cont. on pg. 12)¹³⁸

BIASED JUROR/MISCONDUCT

After the guilty verdict but before the penalty phase defendant moved for mistrial due to a juror's dishonest failure to respond to voir dire. Jurors had answered questionnaires asking if they, a relative or close friend had been a victim of a crime, or had ever been accused of any offense. The motion for mistrial was denied although the juror had not revealed her brother's death by a shot to the head. In pursuing this issue in post conviction relief Appellant established that: there had been a homicide conviction for the shooting; the juror's mother testified in that criminal proceeding; the family recovered \$15,000.00 in a related wrongful death suit; the juror's father, brother, ex-husband and uncle had been arrested for or accused of crimes including kidnapping (our custodial interference) and rape; a young cousin once tried to sexually assault the juror with a knife; and her home and car had been burglarized multiple times. The juror gave various explanations for why none of these matters had been revealed in voir dire, including: her belief that her brother's death was an accident; that other relatives or their actions were so remote she hadn't thought of them; that she had not known, or forgotten the facts discovered by the defense; and that burglaries were a way of life in Oakland. This opinion upheld lower court findings that the juror was credible, had not lied, and showed no bias that would have supported a strike for cause. The dissent points out that: the brother's death was a shot to the back of the head after being pistol whipped, remarkably similar to the executions in Dyer's case; the juror had argued with her family over the distribution of the wrongful death award, belying her claimed lack of knowledge about some facts; the crime by a too-distant relative that didn't merit remark was a murder charge against an uncle who sometimes lived with the family; her estranged husband, with whom she was still in contact was charged with rape a month before this trial; a brother was charged with narcotics distribution; the juror's post-trial use of her job with California DOC to review Dyer's prison file; her avoidance of 21 attempts to subpoena her. But the majority relied on the finding of credibility and lack of bias in the lower courts, although those findings were made without some of this information, now a part of the record. Dyer also alleges that an improper communication from one surviving witness to three jurors impermissibly prejudiced him. After testifying, the survivor passed the jurors outside the courtroom and said "hang him." The jurors did not have further discussion, may have told the witness not to speak to them, and never discussed the event with other jurors. This error was not of a nature to require reversal.

MISC.

Other claims of ineffective assistance were the failure to properly investigate psychological and social history, organic brain damage and the underlying facts of a prior conviction. Various evidentiary rulings, and jury instructions were claimed to be error. Alleged ex-parte

contact between the judge and some jurors was held to be harmless even if the "you're good jurors" occurred between the guilt and penalty phases. Of the matters which were error, they neither individually nor cumulatively had a "substantial and injurious effect on the outcome."

UNITED STATES V. PUTRA, 110 F.3d 705 (9th Cir. 1997)

This Court previously remanded for a new sentencing hearing because the judge considered (in aggravation) conduct underlying a charge of which defendant was acquitted. In the face of an intervening and contrary Supreme Court decision, they now affirm the sentence based on conduct for which the appellant was convicted but the trial judge found was proven by a preponderance of the evidence. The concurrence notes with criticism the difficulties a defense lawyer has explaining such a rule to the accused, the perplexity no doubt felt by "the man on the street" and the jurors whose determination may be ignored.

UNITED STATES V. ZELAYA, 1997 U.S. App. LEXIS 12632 (9th Cir. 1997)

Zelaya and co-defendant Motz agreed to rob a bank. In order to have a getaway car they went to a dealership and took a car out for a test drive, leaving Motz' telephone number. Zelaya waited in the car while Motz went in with a starter's pistol. Motz told a teller "I'm going to rob you today" and passed a note that read "If you push the alarm I'm going to kill you and all of us." The two got back to Motz' apartment with almost \$2000.00 before police arrived. Zelaya entered a guilty plea to one count of aiding and abetting a bank robbery. The court aggravated the sentence under the federal sentencing guidelines because of the express threat of death, a statutory aggravating factor. In order to apply this increase the court has to establish what scope of criminal activity Zelaya implicitly agreed to undertake with his companion. Then the court determines whether the aggravating conduct (the death threat) satisfies three conditions. It must have been done: 1) during the course of the criminal activity, and 2) in furtherance of the criminal activity and 3) was "reasonably foreseeable in connection with" the criminal activity. The sentencing court knew that the two robbers had been on meth for several days, that the co-defendants never discussed a threat, that Motz did not know what he would say until he got inside, and no evidence showed Zelaya knew about the gun. The only disputed factor was foreseeability of the threat, which the sentencing court resolved against Zelaya in the face of the government and defense position that he had no reason to expect the threat. This court reversed and remanded for a new sentence, finding the aggravating factor improperly applied to this case if the rationale was that a threat is foreseeable in any bank robbery to intimidate someone into

(cont. on pg. 13)☞

compliance. This court said that the foreseeability had to be based on something particular to the case, not a blanket assumption. Part of the analysis was statutory construction, where the statute requires that the sentencer consider each bank robbery individually to see if the factors fit. This is inconsistent with the assumption that a threat is foreseeable in any bank robbery.

UNITED STATES V. NIEBLAS, 1997 U.S. App. LEXIS 13182 (9th Cir. 1997)

Nieblas was on a five year federal probation grant for conspiracy to possess cocaine with intent to deliver. Two of the conditions were that she answer inquiries of the probation officer truthfully, and not associate with anyone engaged in criminal activity or anyone convicted of a felony without specific permission from the probation officer. Upon hearing that a known drug trafficker was dealing out of Nieblas' house, the P.O. called her in for an interview at which customs agents were present. Nieblas admitted the person was a drug trafficker, and that she'd witnessed telephone and in person conversations about drug sales at her home. This was the basis of probation violation proceedings in which her probation was revoked. At the hearing she admitted a dealer was living with her but denied witnessing any deals, and claimed her statements were coerced by the threat of prison into giving information to the customs agents at the interview. She was sentenced to prison on the probation matter, and was never charged with a new offense. On appeal Nieblas argues that the failure to give the Miranda warnings at the probation interview precluded use of those statements. This court notes that it was not a custodial interrogation, making a Miranda warning unnecessary. It also cites case law holding a probationer has no 5th Amendment privilege regarding discussions or questioning on his probation status, although there might be a different result if the information she was required to give to the probation officer incriminated her in a different prosecution.

UNITED STATES V. MAIN, 113 F.3d 1046 (9th Cir. 1997)

Appellant was charged with involuntary manslaughter, the unlawful killing of another without malice in the commission of an unlawful act not amounting to a felony. The state's theory was that Main was driving intoxicated when he crashed and the passenger was killed. The defense was one of misidentification of who was driving. A police officer stopped a pickup truck with three males in the cab. The officer had seen the two passengers, appellant Main and "Hanny" Cole, before. Main was much larger than Cole, wore a baseball cap, and was in the middle of the seat. The officer removed the driver to cite him for DUI, but left the keys in the truck. While the driver and officer were in the patrol car the truck took off and got up to speeds of 70 mph at times. During the chase

the officer thought the passenger was Cole. When he asked the original driver which of the other two was driving the truck, the answer was "Hanny" to which the officer replied "I thought he looked familiar." The truck crashed and went airborne for 135 feet. When the officer got to the scene a minute later Main was lying clear of the truck, but Cole was trapped inside. The officer looked at him cursorily, and thought he was breathing. Afraid of head or neck injuries, he did not move Cole. When help arrived 7 minutes later, Cole was dead. Main had a B.A.C. of .353%. When the officer questioned the original driver again the second driver was never identified by name, just "they" or "them." Dueling expert accident reconstructionists placed Cole and Main behind the wheel, as their respective employers contended. This court refused to consider Main's appeal from an evidentiary ruling precluding Cole's 3 citations for fleeing from police. The trial judge had indicated he would allow the matter to be reargued during trial. Although noting that the evidence was relevant, and admissibility a question on which they were divided, the issue was not considered because Main's lawyer did not renew his motion as the trial developed, thereby waiving the issue. The trial court also rejected a defense instruction explaining that some act or omission of Main's had to be the proximate cause of the passenger's death. Instead the instruction merely told the jury that the state must prove the passenger was killed as a result of an act of Main's, a broader standard. The appeals court reversed on the jury instruction, holding that to be guilty of involuntary manslaughter the death had to be within the risk foreseeably caused by the defendant's conduct; another formulation was that Main's conduct had to be a substantial factor, or proximate, primary, direct, or legal cause of the death.

UNITED STATES V. DUARTE-HIGAREDA, 113 F.3d 1000 (9th Cir. 1997)

Appellant did not speak English, and was present at and assisted by a court interpreter at all the proceedings. At one pretrial conference defense counsel informed the court that, after discussions with the client, they were waiving a jury. He presented a jury waiver form in English, signed by appellant. The lawyer said that he concluded this would benefit the client. There is no allegation that the form was translated into Spanish. When the case was transferred for trial, the trial judge noted the previous waiver of a jury and asked counsel if it still would be a court trial. Counsel answered affirmatively, and no one addressed the client directly on this issue. The judge found him guilty. The waiver could not be shown to be knowing, voluntary and intelligent on this record. Appellant was never informed by the court of the rights he gave up by waiving the jury, nor could an understanding of the consequences be found where the language barrier raised a flag of a special disadvantage or disability. The court failed to discharge its responsibility to ensure a valid waiver. Conviction reversed. ■

ARIZONA ADVANCE REPORTS

A Summary of Criminal Defense Issues: Volume 244-245

By Steve Collins
Deputy Public Defender-Appeals

MILLER V. SUPERIOR COURT, 244 Ariz. Adv. Rep. 19 (Division 1, May 29, 1997)

At Defendant's trial for aggravated assault, his ex-girlfriend surprised the State by changing her story and testifying Defendant had not assaulted her. In closing argument, defense counsel told the jury the ex-girlfriend had come from Massachusetts to testify because "she was not going to let the Defendant get convicted of something that didn't happen." The trial judge and the Court of Appeals agreed with the prosecutor that it was improper for defense counsel to tell the jury the witness had come from Massachusetts. However, the prosecutor chose not to object to this statement, but instead retaliated in rebuttal summation. The prosecutor told the jury that defense counsel could not have known the witness was in Massachusetts unless Defendant had recently contacted her. The trial judge granted a new trial, but refused to dismiss the charge. *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984), sets out the factors required to warrant dismissal for prosecutorial misconduct. The misconduct must cause prejudice which cannot be cured by means short of a mistrial. Further, the misconduct must "amount to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." The trial judge found because it was "invited error," the prosecutor had not pursued the misconduct "for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." Therefore, dismissal was not granted because one of the required factors in *Pool* had not been established. The Court of Appeals found the trial judge was within his discretion in making this finding. The State asked the trial judge to recuse himself on a post-trial motion, because the judge had reported the prosecutor's misconduct to the Arizona State Bar. The Court of Appeals held the judge did not have to recuse himself in this situation. The Court of Appeals also noted the denial of a motion to dismiss is generally not appropriate for special action review, unless the motion is based on a double jeopardy claim.

JUDGE FIDEL, DISSENTING:

The prosecutorial-misconduct was not "invited error," because there was nothing improper about defense counsel stating a witness came from Massachusetts. In any event,

State v. Vincent, 159 Ariz. 418, 768 P.2d 150 (1989), rejected the assertion that "the invited response" doctrine condones the withholding of objection in favor of improper self-help. The Arizona Supreme Court described as "wholly inappropriate the tactic of withholding objection, denying the trial court the chance for prompt corrective action, and awaiting rebuttal to respond." The trial judge found the prosecutor's argument "was devoid of any good faith basis" and "not based upon any good faith belief." Therefore, the requirements of *Pool v. Superior Court* were met and the charge should be dismissed.

Judge Fidel commented:

The State might attack the element of indifference, I suppose, by arguing that its prosecutor foresaw no "significant" risk of mistrial or reversal. That is, the State might argue that its prosecutor calculated from past judicial tolerance of misconduct that he could get away with it and that the trial or appellate judges who confronted his misconduct would do no more than ventilate about is impropriety and pass it off as harmless error. The State has not made this argument, however; nor am I prepared to accept it as a safe harbor from *Pool*.

STATE V. ADAMS, 244 Ariz. Adv. Rep. 25 (Division 1, May 29, 1997)

Defendant was a passenger in a vehicle and had a gun between his seat and the door. Prior to a vehicle search, a police officer could have seen the weapon, only if he had put his head through the passenger window and looked straight down. The gun was a concealed weapon under A.R.S. Section 13-3102(A)(2), because it could not be seen under "ordinary observation." Although defendant was acquitted of forgery counts for presenting false checks, it did not preclude a guilty verdict on fraudulent schemes and artifices based on the same evidence. "Verdicts on different counts of an indictment need not be consistent."

UHLIG V. LINDBERG, 244 Ariz. Adv. Rep. 27 (Division 2, May 22, 1997)

A.R.S. Section 13-107(B)(2), imposes a one-year statute of limitation period on misdemeanors. A.R.S. Section 13-107(F), grants a six-month savings period in which to refile a dismissed misdemeanor, if the dismissal occurs after the expiration of the limitations period or within six months of its expiration. Uhlig's misdemeanor charge was dismissed. It was not refiled until eight months later, but within the one-year statute of limitation. Refiling was not
(cont. on pg. 15)®

barred by the six month limitation in Section 13-107(F). This statute "allows for an extension of the statute of limitations set forth in A.R.S. Section 13-107(B)(2); it does not reduce the overall statute of limitations for misdemeanors to less than one year."

MAZEN V. SEIDEL, 245 Ariz. Adv. Rep. 29 (Arizona Supreme Court, June 10, 1997)

Fire broke out in a storage unit. While firefighters fought the fire they saw a marijuana growing operation in an adjoining storage unit. The police were called and confiscated marijuana without first obtaining a search warrant to enter the unit. The exigent circumstance of the fire justified the initial entry by the firefighters. The marijuana was then discovered in plain view. It was held the police "stepped into the shoes" of the firefighters and did not need to obtain a warrant to enter and seize the marijuana. "Mazen no longer had a reasonable expectation of privacy for that area." The Court noted "ordinarily, smelling burning marijuana is in itself an exigent circumstance justifying the warrantless entry into a building." The "smell of burning marijuana indicates the evidence is disappearing." However, this exigent circumstance did not have to be relied upon as the police were already justified in being present in the storage unit.

JUSTICES MOELLER AND ZLAKET, DISSENTING:

The police arrived one hour and twenty minutes after the fire had been extinguished. The purpose of the warrantless police search was unrelated to putting out the fire or investigating its cause. Although the information given to the police was sufficient to establish probable cause, no amount of probable cause may justify a warrantless search absent exigent circumstances. "The effect of the majority opinion is to create a new exception to the Fourth Amendment's requirement of warrant." "As long as one state agent is lawfully inside a private building, that state agent can authorize another state agent to come in later and seize property for a purpose different from that which led to the first agent's presence."

HENNESSEY V. SUPERIOR COURT, 245 Ariz. Adv. Rep. 25 (Division 1, June 12, 1997)

Hennessey was arrested on February 10, 1994, for DUI. The felony charge was "scratched." The charge was refiled as a misdemeanor, but the summons was sent to the wrong address. In October, 1995, when Hennessey attempted to have his driver's license reinstated, he was notified of the complaint. Hennessey voluntarily appeared for arraignment on November 6, 1995. Trial commenced on February 13, 1996. He argued the 150-day time limit under Arizona Criminal Procedure Rule 8.2(a), required dismissal. It was held there was no violation, because under 8.2(a), the time limit ran from the date of the

arraignment. Hennessey merely asserted a general claim that his Sixth Amendment right to speedy trial was violated. By failing to "specifically" raise this claim, Hennessey waived this claim for purposes of special action review. The Court of Appeals "does not generally accept special action review of a denial of a motion to dismiss." A.R.S. Section 22-375 "limits the scope of our direct appellate jurisdiction over Superior Court judgments in actions originating in inferior courts to claims that challenge the validity or a statute of a tax." "This court cannot enlarge its jurisdiction by granting or denying review in a Rule 32 Petition for Post-Conviction Relief that originated in city court and that sets forth issues over which we would not have direct appellate jurisdiction." However, "special action review is appropriate when Section 22-375 prevents an appellant from raising an issue."

MOHAVE CO. JUV. No. J-96-560 V. SUPERIOR COURT, 245 Ariz. Adv. Rep. 23 (Division 1, June 12, 1997)

In 1993, the state petitioned to have the juvenile adjudicated delinquent. Pursuant to a plea agreement, the juvenile admitted the allegations of delinquency. Consistent with the plea agreement, the juvenile was placed on intensive probation. In 1996, a petition to revoke probation was filed. The state also filed a new petition to find the juvenile delinquent. The juvenile filed a notice of change of judge in the new action. The judge denied the request. It was held the juvenile waived his right to a change of judge under Juvenile Court Rule 20.1(c). This was based on an interpretation that the first "matter or hearing" was "contested" even though adjudication was pursuant to an agreement of the parties.

JUDGE KLEINSCHMIDT, DISSENTING:

There was no waiver because the disposition was not "contested". The disposition was pursuant to a stipulation by the parties. ■

COMPUTER CORNER

By Susie Tapia and Gene Parker
Information Technology/Computers

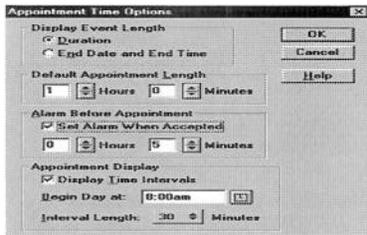
2000th Caller

Congratulations to Ellen Kirschbaum for being the 2000th caller to the Help Desk. Since being established on September 30, 1996 the Help Desk has answered over 2000 calls, averaging 54 calls per week. Keep those calls coming! We love to hear from you.

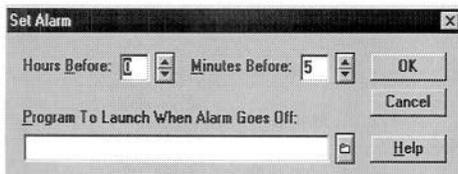


Ring Ring Ring Ring Ring

Always late for those important meetings? Forget the time of day? Did you know the GroupWise scheduler has an alarm option to notify you prior to the start of a meeting or appointment? If the appointment has already been scheduled on your calendar point to that appointment and right click, select "Set Alarm". The display box asks you to fill in the **Hours Before** and/or **Minutes Before** for the alarm to notify you of an upcoming appointment. A small alarm clock appears next to the appointment indicating an alarm has been set.



If you choose to be notified of all appointments choose **File Preferences** from the pull down menus. Then select **Appointment time**, click on the "Set Alarm When Accepted" option and choose a notification time. The notifier must be running in order for the alarm to 'notify' you. Set the tune for the "Alarm" through the notify options. Open the notifier, then choose **Options, Notify Preferences**. On the left hand side select **Alarm** as the **Item Type** then choose a tune to play. Select ok when done and be sure to minimize the notifier not close it.



WordPerfect Keyboard Templates

Keyboard templates are available in the I.T. Department. Stop by or contact x6198 for your copy.

Happy Computing!

BULLETIN BOARD

New Attorneys

Vicki Liles, a former prosecutor with the Maricopa County Attorney's Office, joined our office July 14 (Trial Group B). Ms. Liles has been with the County Attorney's Office since 1990 where she has been a trial attorney in the narcotics bureau and in the organized crime and racketeering bureau. She holds a B.A. from Marquette University in Milwaukee, Wisconsin and obtained a J.D. from Arizona State University College of Law.

Attorney Moves/Changes

Congratulations and Best Wishes to **Colleen McNally**. Colleen will become a Superior Court Commissioner on September 22. Colleen has been with the Public Defender's Office over the last 5 years working as a trial attorney in Group B and most recently as a juvenile attorney. Colleen was active as a Team Leader, a volunteer in our Speaker's Bureau and a participant in the New Attorney Training Program. She has had a great career beginning as a prosecutor with the County Attorney's Office, then moving to the Attorney General's Office working with dependency cases and finally, as a trial attorney with our office.

Colleen said she will greatly miss the relationships she has developed in the Public Defender's Office. Obviously, though, those ties to the Office will never be totally severed since her husband, Mike Fusselman, is a supervising Investigator in Group D.

All of us in the Office wish Colleen the best of luck in her new role. Her swearing in ceremony will be held in early September and she has assured us she's looking forward to everyone being there.

Richard Luna, a trial attorney in Group B is leaving the office.

(cont. on pg. 17)

New Support Staff

Group A has a new office aide, **Carmen Soto**.

Support Staff Moves/Changes

Camille Poe, Sign Language Interpreter is leaving the office effective August 1.

Melanie Lyon, a receptionist in Group C is leaving the office.

Kathy Camuso has resigned to accept a position with the Department of Corrections.

Marguerite (Peggy) Kirby has changed her name to **Marquerite Paulson**. ■

From the U.S. Department of Justice,
Bureau of Justice Statistics.....At midyear
1996--

- * an estimated 518,492 inmates were held in the Nations's local jails, up 7,044 from midyear 1995.
- * an estimated 48.8% of all adults under supervision by jail authorities had been convicted on their current charge.
- * the 12-month increase of 2.3% in the jail population was significantly below the average annual increase of 4.2% since 1990.
- * In 1996 jails reported their lowest occupancy rates in 12 years; at midyear, jails were operating at 8% below their rated capacity (562,020).
- * Since 1990 the number of jail inmates per 100,000 U.S. residents has risen from 163 to 196



***Don't forget to
return your
CLOSED files to
the RECORDS
department!***

**Jury & Bench Trials
June, 1997**

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
5/19-6/3	R.Ellig/R Greth	Galati	Amato	CR 96-01296 Sexual Assault/F2 Attempted Sexual Assault/F2 Sexual Abuse/F2 Kidnapping/F2 Burglary/F2 w/1 prior	Guilty All Counts	Jury
5/28-6/23	M.Farney/N. Jones	Rogers	Hudson	CR 95-08937 Attempted Theft/F5 w/2 priors	Not Guilty	Jury
5/29-6/3	M. Leal & J. Cleary	Yarnell	Armijo	CR 96-06172 Shoplifting/F4 w/2 priors	Guilty	Jury
6/4-6/5	C. Kent	Baca	Lawritson	CR 96-08907 Aggravated DUI/F4	Mistrial	Jury
6/5-6/19	D. Farrell	Yarnell	Hoffmeyer	CR 96-12407 Kidnapping/F2D Sexual Assault/F2D Aggravated Assault/F3D Burglary 1st Degree/F2D	Not Guilty on Kidnapping, Sexual Assault, and Aggravated Assault Burglary 1st Degree-Guilty of Lesser Included Criminal Trespass/F6 Non-Dangerous	Jury
6/16-6/20	R.Tosto/R. Greth & F. Robinson	Baca	Gadow	CR 97-01810 Aggravated Assault/F4 Assault/M1 Criminal Damage/F6	Guilty on Aggravated Assault and Assault Not Guilty on Criminal Damage	Jury
6/16-6/24	R. Ellig/N. Jones	Cole	Rachel Hernandez	CR 96-03561 Aggravated Assault/F3D	Not Guilty Agg Assault 3 Guilty Disorderly Conduct/F6D	Jury
6/17-6/19	K. Curry	Galati	Newell	CR 97-00488 Resisting Arrest/F6	Guilty	Jury
6/19-6/23	C. Kent	Dunevant	Eckhardt	CR 96-12150 Aggravated DUI/F4 (2 counts)	Hung Jury on Count I Guilty on Count II	Jury
6/23-6/24	J.Hernandez/ F. Robinson	Dunevant	Skibba	CR 96-08884 Aggravated Assault/F4	Not Guilty as Charged Guilty of Lesser Included Assault/M1	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
6/2-6/9	J. Movroydis/ J. Castro	Hotham	Rand	CR 96-04745 1 ct. Manslaughter, F2D 2 cts. Aggravated Assault, F2D 3 cts. Leaving Scene with Death/Injury, F3	Not Guilty Manslaughter -- Guilty of Lesser Included Negligent Homicide Cts. 2 & 3 Not Guilty Aggravated Assault, F2D-- Guilty of Lesser Included Aggravated Assault, F4 Ct. 4 Not Guilty Cts. 5 & 6 Directed Verdicts	Jury
6/2-6/3	K.Burns/ J. Castro	Hall	Anthony	CR 96-10676 Grand Theft Auto, F3	Not Guilty	Jury
6/3-6/4	C. Vogel & Richard Luna	Howe	Hauert	CR 97-00841 Possession of Meth., F4	Not Guilty	Jury
6/3-6/5	D. Sheperd	Sargeant	Kuffner	CR 96-12112 Aggravated Assault, F4	Hung (5 Guilty - 3 Not Guilty)	Jury
6/5-6/10	T. Bublik/ J. Castro	Galati	Sigmund	CR 97-02600 Aggravated Assault, F4	Not Guilty	Jury
6/17-6/17	C. Vogel	Crum (Pro tem Maryvale)	Robinson	MCR97-01326 4 cts. Disorderly Conduct, M1	Guilty on all counts.	Bench
6/17-6/17	M. McCullough/ J. Castro	Soto (West Phoenix)	Reineccius	MCR 96-04767 Assault, M1	Not Guilty	Bench
6/17-6/23	F. Gray/ R. Corbett	O'Toole	Williams	CR 96-03681 Aggravated DUI, F4 Driving on a Suspended License, M1	Not guilty Aggravated DUI Guilty Driving on a Suspended License	Jury
6/18-6/23	M. Kamin/ D.Erb	Hilliard	Garcia	CR 97-00916 Aggravated Assault, F6	Not Guilty	Jury
6/20-6/24	C. Vogel & T.Bublik	Dougherty	Wendell	CR 97-02644 Attempted Robbery, F5	Guilty	Jury
6/24-6/25	F. Gray/ D. Erb	Sheldon	Mark Brnovich	CR97-02337 Theft, F3	Guilty	Jury

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
6/16 - 6/19	D.Squires/R. Thomas	Grounds	Cook	CR 97-91069 Attempted Armed Robbery, F3	Guilty	Jury
6/2 - 6/5	J. Leonard & M. Nermyr	Hendrix	Nigro	CR 97-90435 Theft, F3	Not Guilty	Jury
6/23 - 6/25	T. Mackey/R. Thomas	Ishikawa	Gundaker	CR 96-91661 Agg. DUI, F4	Mistrial	Jury
6/23 - 6/23	T. Mackey	Skousen	Fuller	TR 96-09900 DUI, M1	Guilty	Jury
6/2 - 6/4	T. Schmich/R. Thomas	Araneta	McKay	CR96-94962 2 cts. Agg Assault, F3	Not Guilty	Jury
6/20 - 6/20	G. Gaziano	Skousen	Freeman	TR96-10522 DUI, M1	Not Guilty	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
6/3-6/30	J. Brisson & D. Carrion/M. Fusselman	Nastro	Howe	CR-95-06550 2 counts Sexual Conduct w/ Minor F2	Count 1: Guilty Count 2: Hung (7-5 not guilty)	Jury
6/2-6/3	M. Dichoso- Beavers/R. Barwick	Nastro	Tucker, S.	CR-96-10738 I) Resisting Arrest F II) Disorderly Conduct F	Guilty Not Guilty	Jury
6/2-6/4	J. Mussman & K. Huls	D'Angelo	Bayardi	CR-96-13364 Possession of Dangerous Drugs F4 Possession of Drug Paraphernalia F6	Not Guilty	Jury
6/18-6/18	M. Dichoso- Beavers/ S. Bradley	Lex Anderson (Peoria Justice Court)	Sobalvarro	TR 96-03248 DUI (Misdemeanor) A1 and A2	Dismissed/w prejudice	Bench
6/23-6/26	M. Silva & R. Jung	Arriola	Cappellini	CR 96-09682 and CR 96- 11135 2 x Agg. DUI F4	Not Guilty-Agg. DUI and Guilty of Suspended License	Bench
6/23-6/25	M. Dichoso- Beavers	Elizabeth McVay (East Phoenix #1 Justice Court)	Gerrity	MCR 97-00303 and MCR 97-00991 I) Threat Intimid M1 II) Disorderly Conduct M1 III) Obst. Publ. Thor. M3	Not Guilty Not Guilty Guilty/Fine \$150	Bench
6/24-6/27	R. Korbin & R. Zielinski	Katz	Mesh, D.	95-05919 Imp/Trsp. Dang. Drugs, F2 Poss. Sale Meth. F3 Misconduct Inv. Weapons F4 Poss. Dang. Drugs F4 Misconduct Inv. Weapons M1	Guilty	Jury
6/25 - 6/27	J. Schreck	Dougherty	Rehm, A	97-01863; 2 cnts Agg DUI F4 & F6	Guilty	Jury
6/30-6/30	R. Korbin	Katz	Johnson, Al	97-01084 Agg. Assault F3	Dismissed without Prejudice	

Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty/ guilty)	Bench / Jury Trial
6/16- 6/24/97	C. Hughes/E. Soto	Arellano	D. Palmer	CR 95-01261 Drive-by Shooting, F2D 2 Cts. Agg. Asslt., F3D Endangerment, F4D	Hung Jury 10-2 for Acquittal	Jury
6/23- 6/24/97	C. Dupont	Gerst	K. Droban	CR 97-00709 POND, F4	Not Guilty	Jury
6/25-7/1/97	C. Babbitt	Wilkinson	Ryan	CR 96-12538 2 Cts. Agg. Asslt., F3	Not Guilty 1 Ct. Agg. Asslt. Hung Jury 1 Ct. Agg. Asslt. Guilty of Disorderly Conduct	Jury

RONEE F. KORBIN
AZ State Bar #016235
Deputy Public Defender
Luhrs Building
11 W. Jefferson St., Ste. 5
Phoenix, AZ 85003-2302
(602) 506-7928

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

The Accused *,

Defendant.

) No. CR 97-*

)
) **MOTION TO DISMISS OR**
) **ALTERNATIVELY, TO STRIKE ROP**
) **DESIGNATION AS**
) **UNCONSTITUTIONAL**

)
) (Assigned to the Honorable
) Judge *)

)
) (Oral Argument and Evidentiary Hearing
) Requested)

The accused, through undersigned counsel, respectfully requests this Honorable Court to dismiss this case against the accused or alternatively, to strike any designation of the accused as a repeat offender or that he is "ROPed." Failure to grant this motion amounts to violations of the accused's rights guaranteed by both the United States and the Arizona Constitutions.

This Motion is Supported by the attached memorandum of Points and Authorities as well as argument to be made at the time of the hearing.

RESPECTFULLY SUBMITTED this ____ day of *, 1997.

MARICOPA COUNTY PUBLIC DEFENDER

By: _____
RONEE F. KORBIN
Deputy Public Defender

FACTS

Like others accused of crimes in Maricopa County, Mr. * was designated a repeat offender (using the county attorney's terminology, he was ROPED) by the Phoenix Police Department. As a result, his case was diverted to the Gang/ROP Unit of the County Attorney's office. A main consequence of the ROP designation is always a harsher plea offer than would be provided if Mr. *'s case(s) remained in the trial group. These plea offers are based on special ROP policies determined by the county attorney's office. It is counsel's contention that this ROP designation is unconstitutional and unlawful.

LAW

Article three of both the United States and Arizona Constitutions require that the distribution of the powers and duties of the three branches of our government "remain separate and distinct." *State v. Wagstaff*, 164 Ariz. 485, 794 P.2d 118.

I. ROP POLICY HAMPERS THE JUDICIAL PROCESS

The ROP detectives are the agents of the county attorney who is, in turn, part of the executive branch of government. By deciding who will be ROP'ed the detectives and the executive branch infringe upon the judicial function of determining the sentence for a criminally accused. The ROP procedures usurp judicial power and judicial discretion. "While the prosecutor may participate in sentencing proceedings, such as by presentation of aggravating circumstances, separation of powers doctrine embodied in the state constitution prohibits the prosecutor from controlling or deciding what punishment shall be." *State v. Dykes*, 163 Ariz. 581, 789 P.2d 1082 (1990).

II. ROP POLICY IS AN UNCONSTITUTIONAL USURPATION AND DELEGATION OF LEGISLATIVE POWER

In Arizona, a ROP statute does not exist, rather, this is a policy implemented by detectives and prosecutors. Both are members of the executive branch of government. The legislative branch determines what constitutes illegal activity and the possible range of punishment. Clearly, in Arizona, the legislature has determined what types of criminal activity should receive enhanced or aggravated punishment. See A.R.S. 13-604. In *State v. Prentiss*, 163 Ariz. 81, 786 P.2d 932 (1989), the Supreme Court of Arizona, en banc, held that the state legislature had the sole and exclusive power to decide what the law shall be. *Prentiss* at 85 (citing *Wilson v. Ind. Comm'n*, 147 Ariz. 261, 265, 709 P.2d 895, 899 (App.1985)). They further stated, "[I]t usurps the functions of the court only when it declares the meaning of an existing law." *Id.* "The legislature determines what is a crime and what punishment may be exacted for its breach." *Id.*(citing *State v. Marquez*, 127 Ariz. 98, 103, 618 P.2d 592, 597 (1980)). "The legislature may also constitutionally venture into the uncertain world of alleging prior convictions to enhance a sentence." *Id.*(citing *State v. Buchholz*, 139 Ariz. 303, 678 P.2d 488 (App.1983)).

With ROP policy, the executive branch, usurps legislative power. "It is not the role of police, . . . to determine arbitrarily what

activities should be proscribed but, rather, that is the role of legislative bodies. . . .” *State v. Jones*, 177 Ariz. 94, 865 P.2d 138. In the case of the ROP policy, police are, in fact, determining what types of crimes merit an enhanced sentence. They are promulgating a statutory scheme which is clearly the duty of the legislature.

Furthermore, if the legislature has delegated the power to regulate ROP to the police, then that delegation is unconstitutional. “When the subject to which a statute relates is within the scope of legislative power, the test of the statute’s validity within police powers of government is whether the ends sought to be attained are appropriate and regulations imposed are reasonable; the test of reasonableness is whether the regulation makes efficient constitutional guarantees and conserves rights, or is destructive of inherent rights.” *Wallace v. Shields*, 175 Ariz. 166, 854 P.2d 1152. ROP policy is clearly within the ambit of the legislature; however, the delegation of this policy to police is unconstitutional. Because there is no statute or guidelines promulgated by the legislature regarding ROP, there are no protections for the accused. In fact, the lack of guidelines in the case of ROP violates equal protection pursuant the Fifth and Fourteenth Amendment to the United States Constitution and Article II, section twenty four of the Arizona Constitution. See *In the Matter of Pima County Juvenile Appeal No. 74802-2*, 164 Ariz. 25, 790 P.2d 723 (1990).

III. ROP POLICY VIOLATES THE POWER DELEGATED TO THE COUNTY ATTORNEY BY THE LEGISLATURE AND THEREFORE, IT VIOLATES THE PROTECTIONS GUARANTEED BY THE CONSTITUTION.

By creating certain statutes, the legislature provides power to different agencies to carry out particular roles it deems necessary in the functioning of the State. One such power is the power placed in the hands of the County Attorney to enforce the criminal laws of the state and punishments also proscribed by the legislature, by prosecuting those arrested and charged with crimes. This power is then delegated through the county attorney’s office to the deputy county attorneys who are hired to prosecute. The county attorney may make policies and orders which assist in carrying out his duties.

The ROP policy violates the constitution because the county attorney has delegated his authority to the detectives of the police departments who are ultimately making the decision whether or not a particular individual is ROPED. The county attorney’s office takes the case into its ROP unit only after the detectives have designated the individual case a ROP case. The county attorney never questions this designation, but merely takes the word of the detective as the ultimate decision.

By placing this power in the hands of the detectives, the county attorney violates the guarantees of the Constitution, which provide for Equal Protection and Due Process. As a result, this case should be dismissed.

IV. ROP POLICY VIOLATES DUE PROCESS AND EQUAL PROTECTION

Aside from a lack of legislative enactment, proclamation or guidelines, the ROP policy is subject to arbitrary and capricious enforcement by the detectives. No tribunal exists in order to review the ROP designation by these detectives. See *State v. Peralta*, 175 Ariz. 316, 856 P.2d 1194. Their power is unbridled and unchecked. Clearly, this scheme is unconstitutional and violates both the equal protection and the due process clauses of the Fourteenth Amendment of the United States Constitution and Article II, section four of the Arizona Constitution.

“Due process is a fundamental constitutional guarantee, the purpose of which is to protect persons and property rights from arbitrary action of government or public officials.” *Wallace v. Shields*, 175 Ariz. 166, 854 P.2d 1152. Additionally, as stated in *In the Matter of Pima County Juvenile Appeal No. 74802-2*, 164 Ariz. 25, 790 P.2d 723 (1990), by the Supreme Court of Arizona in discussing the constitutionality of a statute, although a law may be impartial on its face, it may still violate an accused’s equal protection rights “if it selectively and discriminately enforced based on an unjustifiable classification such as race, religion or some other arbitrary classification.” *Id.* at 29 (citing *Oyler v. Boyles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506 (1985)).

“It is not (however), the role of the police to determine arbitrarily what activities should be proscribed . That is the role of legislative bodies, and the law should not depend on good human judgment.” *State v. Jones*, 177 Ariz. 94, 98, 865 P.2d 138. In the case of a ROP designation, the police are making such a determination. Furthermore, the accused cannot even challenge a statute because one does not exist. However, with or without a statute, the classification is unconstitutional because the designation is arbitrary and he has neither the right nor the opportunity to challenge the designation. Because the accused’s rights to due process and equal protection are violated by the ROP policy, this case should be dismissed.¹

IV. ROP POLICY IS A VIOLATION OF THE RULES OF DISCOVERY AND CAUSES COUNSEL TO INEFFECTIVELY ASSIST HER CLIENT.

Because of the secretive nature of the ROP policies and the inability to monitor it by the court, counsel cannot properly counsel her client. Any information that is passed between the officer and the detectives and subsequently, between the detectives and the county attorney, should be part of discovery. Failure to provide this information to counsel amounts to a violation of Rule 15, Arizona Rules of Criminal Procedure. As a result of this inability to obtain the information relating to the ROP designation, counsel cannot properly confer with her client regarding the case, the plea offer and why such a harsh plea offer was made. This amounts to ineffective assistance of counsel and violates the fifth and sixth Amendments to the U.S. Constitution and Article II, section 24 of the Arizona Constitution.

As a result of these violations, the state’s case should be dismissed.

¹ In the State of Oregon, an issue similarly litigated resulted in the creation of a hearing process which mandated notice to those persons who the police were going to designate as Gang members. The state created a system whereby those persons could appear at a hearing and challenge that designation before the designation could occur.

CONCLUSION

As a result of the aforementioned Constitutional violations, the accused, through undersigned counsel, respectfully requests this Court dismiss the case, or alternatively, that the Court strike any designation of the accused as a repeat offender. Alternatively, the accused respectfully requests the county attorney to provide a plea offer which is comparable to pleas offered to those who are in same or similar position as the accused rather than to those who are designated as a repeat offender.

RESPECTFULLY SUBMITTED this ____ day of *, 1997.

MARICOPA COUNTY PUBLIC DEFENDER

By: _____
RONEE F. KORBIN
Deputy Public Defender

Copy of the foregoing
delivered this _____
day of *, 1997, to:

THE HON. *
Judge of the Superior Court
Central Court Building
201 W. Jefferson St.
Phoenix, AZ 85003

*
Deputy County Attorney
301 W. Jefferson St.
Phoenix, AZ 85003

BY: _____
RONEE F. KORBIN
Deputy Public Defender