

for The Defense

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James J. Haas, Maricopa County Public Defender

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*Delivering America's
Promise of Justice for All*

for The Defense

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The Admissibility of Preliminary Field Tests for Controlled Substances

By Timothy Hiatt and Eleanor Knowles, Defender Attorneys

The introduction of chemical field test results at trial is a growing concern for defense attorneys in Arizona. The State has recently been attempting to introduce these tests as conclusive evidence of the presence of a controlled substance. This is an inappropriate purpose for their admission, and the test results should be precluded from trials.

I. How the Preliminary Field Test Works

Field testing kits use chemical reagents that change color when mixed with certain controlled substances. The reagents themselves are individually packaged in plastic pouches. When an officer comes across a substance he believes to be illegal, he places it in the pouch where it mixes with the reagent, and the color produced by the reaction is examined. The resulting color is then compared to a chart provided by the test kit manufacturer to determine what substance with which the color corresponds.

There are several different companies that manufacture field test kits, and the brand used will depend on the law enforcement agency conducting the test. The National Institute of Justice has developed standards for the manufacturers of these test kits, which include instructions and information that must be printed on the packaging.¹ These standards apply to all manufacturers of field test kits. Included among the information that must be included on their packaging is “[a] statement that the kit is intended to be used for presumptive identification purposes only, and that all substances tested should be subjected to more definitive examination by qualified scientists in a properly equipped crime laboratory.”² Additionally, the packaging must include a statement that users should be told that the reagents may give false positive or false negative results.³

II. Attacking the Admissibility of Field Tests

There are several issues associated with the admissibility of these test results at trial. The most important ones are: (1) the potential for false positives, (2) the subjectivity inherently present in the interpretation of the color reaction, and (3) the potential for human error in the administration of the tests. These dangers provide the basis for the

argument that field test results should not be admitted at trial as conclusive evidence of the presence of drugs under *Daubert*.

When the State attempts to introduce field test results, the defense should challenge their admission by requesting a *Daubert* hearing pursuant to Rule 702 of the Arizona Rules of Evidence. Under Rule 702, a witness who is qualified as an expert may testify if: (a) the expert's knowledge will assist the trier of fact in understanding the evidence, (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (d) the expert has reliably applied the principles and methods to the facts.⁴ At a *Daubert* hearing, the judge must determine whether the testimony will be admissible.⁵ When attacking the admissibility of these tests in a *Daubert* hearing, it will be necessary to show how these tests fail to meet the relevant factors to an admissibility determination outlined in *Daubert*. These relevant factors include testability, peer review and publication, error rate and the existence of standards controlling the technique's operation, and acceptance by scientists in the field.⁶

The dangers present in field tests have been recognized by the forensic science community.⁷ While the test results may provide a presumption of the presence of a drug, they are inconclusive for the purposes of positive identification.⁸ Field tests have been subjected to many studies illustrating their potential for false positives. There is also the potential for contamination since these tests are conducted in the field and may be exposed to contaminants. Thus, in order for the substance in question to be conclusively identified, it must be subject to further laboratory testing. Since the only generally accepted purpose for these tests is preliminary identification of a substance, that is the only purpose for which the test results should be admitted pursuant to *Daubert*. In addition to the forensic science community, the Department of Justice is also of the opinion that the tests are for presumptive purposes only, as evidenced by their standards outlined above. Therefore, the tests fail the peer review factor of the *Daubert* standard.

The subjective element of the field tests also puts any standards controlling their operation in question. Whether the color produced by the chemical reaction indicates the positive presence of a controlled substance is a determination that is dependent upon the particular officer conducting the test. Each officer may see the colors differently, and a positive result to one officer may be a negative one to another. This subjectivity may lend itself to a hearsay objection if the test results were introduced at trial. The officers conducting the field tests are qualified to testify to what they observed and the procedures that they took, but it should be argued that they are not qualified to discuss the chemical reactions themselves, how the tests work, and whether the particular color produced by their test indicated the presence of a controlled substance.

Officers qualified as drug recognition experts (DREs) should be questioned about the training that they have received and the standards used to determine the presence of a controlled substance. Factors such as whether the officer compares all of the field tests he conducts to the color chart provided by the manufacturer, and the procedure taken when a test produces a color that does not exactly match the standards are relevant to the officer's qualifications and the reliability of the test results. Courts have ruled that the officer who conducted a field test was not qualified to testify concerning the results of that test where the officer could not identify the type of test, how it worked, and had only administered it one other time.⁹ These are factors that should be brought out to challenge the officer's qualifications. It could further be argued that a representative of the test's manufacturer would need to testify to what a particular color reaction means in terms of the presence of controlled substances.

When dealing with tests administered by Phoenix Police Department officers, it should be noted that their own department reports (DRs) recognize the need for laboratory testing of field tested substances. Every DR from the Phoenix Police Department where the officer conducted a field test states "[i]f trial proceedings are required for the adjudication of this matter, an analysis will be performed by the Phoenix Police Department Crime Laboratory, and a written report will be provided." This statement makes it clear that even the Police Department does not recognize the tests as conclusive and will be relevant in a *Daubert* hearing challenging the test results. You may also find this language in many other law enforcement agencies' reports.

III. Treatment by Other States

Other states, including Kansas and Michigan, have passed statutes allowing for the admission of field test results in preliminary hearings.¹⁰ While these statutes allow for the results to be introduced for a finding of probable cause, they do not allow for admission at trial. A finding of probable cause is the purpose supported by the forensic science field for admission of the test results. In addition to these statutes, several states have recognized the problems associated with the admissibility of field tests in their case law. Texas is one of those states, holding that an officer could not testify that a substance was cocaine, but could testify to the procedure used in performing the field test.¹¹ In making this determination, the Court found that any error in the officer's testimony was harmless because an expert chemist who had independently tested the substance also testified at trial and explained that the field test was merely a presumptive test.¹²

Similarly, the New Mexico Court of Appeals has held that in order for a drug field test to be admissible, the State must prove its scientific reliability.¹³ Where such proof does not exist, the results of a field test may not be relied upon to conclude the identity of a substance.¹⁴ In *Morales*, the Court analyzed the admissibility of the field test results under the *Daubert/Alberico* standard utilized by New Mexico Courts and held that a law enforcement officer's testimony, without more, is insufficient to support admission of field test results when the officer cannot explain the "scientific principles that the test uses, the percentage of false positives or negatives that the test will produce, or the factors that may produce those false results."¹⁵

IV. Conclusion

As the State continues to try to introduce field test results at trial, it is important to be ready to challenge their admission. The test results are subjective, not accepted as conclusive by the forensic science world, and are subject to false positives on a frequent basis. The test manufacturers themselves as well as the Department of Justice have recognized that these tests are preliminary in nature, and substances positively identified by them should be subjected to further testing. All of these factors provide the argument for the suppression of field test results as conclusive evidence of the presence of a controlled substance.

(Endnotes)

1. *Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse NIJ Standard-0604.01*. U.S. Department of Justice, National Institute of Justice Law Enforcement and Corrections Standards and Testing Program, July 2000 <https://www.ncjrs.gov/pdffiles1/nij/183258.pdf>.
2. *Id.* At 7.
3. *Id.*
4. Ariz. R. Evid. 702.
5. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786 (1993).
6. *Id.* at 593, 113 S.Ct. 2795.
7. R.A. Velapoldi & S.A. Wicks, *The Use of Chemical Spot Test Kits for the Presumptive Identification of Narcotics and Drugs of Abuse*, 19 J. Forensic Sci. 636 (1974).
8. S.H. Johns et al., *Spot Tests: A Color Chart Reference for Forensic Chemists*, 24 J. Forensic Sci. 631 (1979).
9. *Carter v. State*, 82 So. 3d 993 (Fla. App. 2011).
10. See Michigan Compiled Laws Annotated § 766.11b; Kansas Statutes Annotated § 22-2902c.
11. *Smith v. State*, 874 S.W. 2d 720 (Tex. 1994).
12. *Id.*
13. *State v. Morales*, 132 N.M. 146, 45 P.3d 406 (N.M. App. 2002) (*overruled on other grounds*).
14. *State v. Delgado*, 148 N.M. 870, 242 P.3d 437 (N.M. App. 2010).
15. See *Morales*, *supra* at 152, 45 P.3d at 412.



Eleventh Annual APDA Conference

By Jim Haas, Maricopa County Public Defender

The Eleventh Annual Arizona Public Defender Association Statewide Conference was held June 26 - 28 at the Tempe Mission Palms Hotel.

Once again, over 1,400 people attended the three-day conference, which offered 148 classes and 18 CLE hours, including up to 16.25 ethics hours.

The conference celebrated the 50th anniversary of *Gideon v. Wainwright*, the landmark US Supreme Court case that guaranteed indigent people the right to appointed counsel. Commemorative key chains were given to those who attended the awards luncheon and the annual t-shirts celebrated the anniversary.

At the awards luncheon, indigent representation staff and attorneys from around the state were recognized for their accomplishments and dedication to our profession and our clients. The honorees were:

Outstanding Administrative Professional – Deb Baker, Coconino County Public Defender; Anna Riddle, Maricopa County Legal Defender

Outstanding Paraprofessional – Bill Rappeport, Tucson Public Defender; Jackie Britt, Pima County Public Defender

Outstanding Performance/Contribution – Barbara White, Navajo Nation Public Defender; Tucson Public Defender Mental Health Team (Dawn Darkes, Roberto Garcia, Sharolynn Griffiths, Mary-Carol Wagner and Arthur Zaragoza)

Outstanding Attorney – Bob Bushor, Maricopa County Legal Defender; Rosa Maria Cortez, Navajo Nation Public Defender

Rising Star – Sarah Erlinder, Coconino County Public Defender; Sarah Bullard, Pima County Public Defender; RJ Parker, Maricopa County Public Defender

Robert J. Hooker – Nesci & St. Louis

This Tucson law firm was honored for their invaluable assistance to public defenders in the area of DUI defense.

Lifetime Achievement – Ed McGee, Yuma County Public Defender; Garrett Simpson, Maricopa County Public Defender

Since Ed and Garrett have been close friends and colleagues throughout their long careers, the APDA board asked each of them to present the Lifetime Achievement Award to the other. Both readily jumped at the chance to honor their revered friend, not knowing that they would also be receiving the award from the other. This provided some of the most poignant moments in the history of the awards.

Gideon – APDA's highest award was presented to the Maricopa County Legal Defender's Office to honor Robert Briney, retired Maricopa County Legal Defender and founding APDA director, who passed away suddenly on June 18.

Among Bob's many accomplishments in his 40+ year career in indigent defense was his pivotal role in obtaining legislative approval of the Public Defender Training Fund, a grant fund that enables public defense offices to send their attorneys to training events like the APDA conference.

The Twelfth Annual APDA Statewide Conference is already scheduled for June 25 - 27, 2014. Mark your calendars!



The Voluntary Act Instruction: A Rara Avis

By The Honorable Robert L. Gottsfield, Maricopa County

A rare bird in Latin and used here in the sense of unusual or uncommon. And that is exactly what the Arizona Supreme Court has to say about the voluntary act instruction, Standard Criminal Instruction 17 (4th Ed. 2012)¹ which is derived from A.R.S. §§13-201 and now 13-105(42).

A.R.S. § 13-201 provides:

Requirements for criminal liability:

The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing.

A.R.S. § 13-105(42) clarifies the term:

“Voluntary act” means a bodily movement performed consciously and as a result of effort and determination.

In *State v. Lara*, 183 Ariz. 233, 902 P.2d 1337 (1995), an opinion written by Justice Martone for a unanimous Court, Lara was convicted of an aggravated assault which was affirmed by the Supreme Court. An individual complained Lara had stalked and assaulted him and would not leave his house. A police officer responded, and Lara pointed a knife at the officer and backed him outside the house and into a fence, calling him names and slashing at him with the knife. When Lara raised his knife and lunged at him, the officer shot him.

He survived, and at the trial a defense psychologist testified that Lara was suffering from organic brain impairment and personality disorder. He opined that in such a person “he would expect to see a reduced ability to use good judgment in social situations, increased agitation, and an increased tendency to fly off into a tantrum or rage as if by reflex.”

Lara asked for a voluntary act instruction² set forth in the statutes cited above. While the trial court denied the instruction, the Court of Appeals reversed, finding denial of the instructions was error.

On review, the Supreme Court acknowledged a crime requires an act, that a guilty mind (*mens rea*) is not enough, and that the “act means a conscious bodily movement caused by effort and determination.” This is contrasted with “a bodily movement while unconscious, asleep, under hypnosis, or during an epileptic fit (which) is not a voluntary act.”

The Court concluded that the expert’s testimony would not support a finding that Lara’s behavior was “reflexive rather than voluntary.” He was conscious, and he “was relentless in his effort and determination.”

Standard Criminal Instruction 17 (4th Ed. 2012), rewritten in light of *Lara*, states:

Voluntary Act

Before you may convict the defendant of the charged crime(s), you must find that the State proved beyond a reasonable doubt that the defendant [committed a voluntary act] [omitted to perform a duty imposed upon

the defendant by law that the defendant was capable of performing]. A voluntary act means a bodily movement performed consciously and as a result of effort and determination. You must consider all the evidence in deciding whether the defendant [committed the act voluntarily] [failed to perform the duty imposed on the defendant].³

The point of this article is that Standard Criminal 17 should not be given in the typical criminal case. It should only be given if the defendant has an expert willing to testify that the defendant has a condition where he can operate reflexively rather than consciously as a result of effort and determination. It has to approach a situation of a bodily movement performed “while unconscious, asleep, under hypnosis or during an epileptic fit.”⁴

Yes, *Lara* is over 15 years old, but it is still good law. In *State v. Moody*, 208 Ariz. 424, 467, 94 P.3d 1119, 1162 (2004) the Supreme Court upheld the trial court’s refusal to give a voluntary act instruction (the defense tracked the language of A.R.S. § 13-201) in a case where defendant on his second trial was convicted on two counts of first-degree murder and sentenced to death. Moody argued that his entire defense was predicated on his contention that he was not in control of his actions and that three doctors who testified stated that Moody reported not being in control of his actions. The Court, however, reaffirmed the holding in *Lara*, concluding that Moody’s alleged dissociative identity disorder, narcissistic personality disorder, and other brain impairments did not support a voluntary act instruction. As noted by Chief Justice Berch: “As in *Lara*, no expert testimony here suggested that Moody’s actions were not performed consciously and as a result of effort and determination.... No mental health expert suggested that Moody was actually being controlled by something or someone else, which is what *Lara* requires to demonstrate the lack of a voluntary act.” 208 Ariz. at 469, 94 P.2d at 1163.

Finally, *State v. Alvarado*, 219 Ariz. 540, 200 P.3d 1037 (App. 2008) lends more recent support to this position. *Alvarado* concerns an appeal from the trial court’s dismissal post-verdict of a promoting prison contraband charge. Division One reversed on the basis that defendant’s act of carrying marijuana into a jail was a voluntary act even though he was involuntarily being transported to the jail and the marijuana was concealed on his person. The Court relied on *Lara* for its analysis. Although *Alvarado* does not explicitly say so, it can be read as cautioning that a voluntary act instruction should not have been given to the jury.⁵

(Endnotes)

1. Not to be confused with RAJI Criminal Instruction No. 6 (4th Ed. 2012) which reads:

VOLUNTARINESS OF DEFENDANT’S STATEMENTS

You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.

A defendant’s statement was not voluntary if it resulted from the defendant’s will being overcome by a law enforcement officer’s use of any sort of violence, coercion, or threats, or by any direct or implied promise, however slight.

You must give such weight to the defendant’s statement as you feel it deserves under all the circumstances.

2. The requested instruction read:

The State must prove that the defendant did a voluntary act forbidden by law. ‘Voluntary act’ means a bodily movement performed consciously and as a result of effort and determination.

3. At the time of *Lara* Standard Criminal 17 read:

The State must prove that the defendant did a voluntary act forbidden by law. You may determine that the defendant intended to do the act if the act was done voluntarily.

4. Justice Martone makes a point of noting that “voluntary” has two separate uses (1) to distinguish a voluntary act (“a determined conscious bodily movement”) from “a knee-jerk reflex driven by the autonomic nervous system” the pertinent distinction used in *Lara*. But it is also used (2) “to describe behavior that might justify inferring a particular culpable mental state.” i.e. permit a jury “to draw an inference of intent from an act that is voluntary”. He concludes that the second meaning of “voluntary” is “likely to be justified in any case in which intent is an issue”.
5. Apparently § 13-201 (now § 13-105(41)) was given.

Writers' Corner

Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including *A Dictionary of Modern Legal Usage*, *The Winning Brief*, *A Dictionary of Modern American Usage*, and *Legal Writing in Plain English*. The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at www.us.oup.com/us/apps/totd/usage. Garner's *Modern American Usage* can be purchased at bookstores or by calling the Oxford University Press at: 800-451-7556.

Is the correct past tense pleaded or pled -- or perhaps plead?

That depends. If you want to be unimpeachably correct, you'll write pleaded in all past-tense uses (has pleaded guilty). If you're happy to defend yourself on grounds of “common” usage based on what many others do -- despite mountains of contrary authority -- you'll probably use pled (has pled guilty). If you're a tin-eared writer who believes there's no right or wrong other than what you yourself think, you might analogize plead to read and use plead as a past-tense form (he plead guilty). Your choice. But first consider two points.

First, in their magisterial *Federal Practice and Procedure*, the incomparable Charles Alan Wright and Arthur Miller give well-pleaded complaint as the only possibility (see § 3566).

Second, in Garner's *Modern American Usage*, I quote eight usage authorities insisting that pleaded is the preferable past-tense form -- the other forms being inferior (see 3d ed. 2009 at 633-34).

If you need still more evidence, see Garner's *Dictionary of Legal Usage* (3d ed. 2011 at 682).

And if the evidence cited there doesn't convince you, then you may be a mumpsimus. Don't know what a mumpsimus is? Look it up in an unabridged dictionary. You may not be happy about the moniker -- but there's still time for you to adopt a more enlightened view.

Please don't say I haven't pleaded with you to adopt the best possible usage in the English-speaking world.

Sources:

- The Chicago Manual of Style § 5.220, at 293 (16th ed. 2010).
- Wilson Follett, *Modern American Usage: A Guide* 338 (1966).
- Garner's *Dictionary of Legal Usage* 682 (3d ed. 2011).
- Garner's *Modern American Usage* 633-34 (3d ed. 2009).
- Charles Alan Wright, *The Law of Federal Courts* 106, 110, 124 (5th ed. 1994).
- The Associated Press *Stylebook and Briefing on Media Law* 192 (2000).
- The New York Times *Manual of Style and Usage* 261 (1999).
- Paul R. Martin, *The Wall Street Journal Guide to Business Style and Usage* 187 (2002).

Can a Fact Proving an Element also Prove an Aggravator?

Updates after *State v. Bonfiglio*

By John Champagne, Defender Attorney¹

In 2011, the Arizona Court of Appeals decided *State v. Bonfiglio*, a case that addressed whether the same facts proving the elements of an offense can also serve double duty as aggravators.² The Court of Appeals determined that facts could be recycled as aggravators, but only “where the degree of misconduct is higher than that requisite to commit the crime.” For instance, if the elements of a crime require a *mens rea* of recklessness, a jury finding of intentional action is sufficient evidence to uphold a conviction. But this level of *mens rea* proves more than just the element of the offense: it proves that the defendant acted more purposefully than necessary to commit a reckless criminal act. The surplus *mens rea* is additional wrongdoing by the defendant. At sentencing, the trial court is within its power to apply the “excess” jury finding of intentionality as an aggravator.

In 2013, the Arizona Supreme Court reviewed the *Bonfiglio* decision on other grounds, giving tacit approval to this practice. For practicing attorneys, the *Bonfiglio* decision highlighted two issues that come up during sentencing: first, attorneys have to put pressure on the trial court to clearly identify all aggravating facts and state, on the record, which they are applying. Second, catch-all aggravators and other novel factual findings might overlap so closely with the elements of the base offense that any possible distinctions are miniscule. These minor aggravators might constitute double punishment under A.R.S. § 13-116 or could be argued as lacking proportionality to the offense under the Eighth Amendment’s “cruel and unusual” punishment clause.

Bonfiglio and its Antecedents

The *Bonfiglio* court reviewed sentencing for a class three aggravated assault. Mr. Bonfiglio found himself caught up in a group fight at a backyard party. One of the guests was attacked during the fight and ended up with multiple stab wounds. Guests at the party fingered Mr. Bonfiglio and accused him of boasting about a stabbing after the brawl died down.

The jury convicted Mr. Bonfiglio, and the trial court based his sentencing range on an active probation violation and his admission to two prior felony convictions. Armed with an additional jury finding that Mr. Bonfiglio “had the ability to walk away from the confrontation,” the court also selected a “slightly aggravated” sentence of 13 years from within the legal range.

On appeal, Mr. Bonfiglio argued that having the choice to walk away is identical to having a knowing *mens rea*, and that having a knowing *mens rea* is already an element of the underlying aggravated assault conviction. But the Court of Appeals disagreed and held that the required *mens rea* for aggravated assault was intentional, knowing, or reckless. The jury verdict alone did not provide enough information to determine which *mens rea* Mr. Bonfiglio had during the offense. And although it was not explicit, the court did not appear willing to speculate as to which *mens rea* (or combination) the jury had found. Instead, the court ruled that any *mens rea* above and beyond recklessness represented a surplus fact that could be used to aggravate the sentence.

The court borrowed its reasoning from *State v. Harvey*, a 1998 decision which contained the degree of misconduct language.³ In *Harvey*, a pre-*Apprendi* case, the jury had been instructed on three levels of offense: murder in the second degree, manslaughter, and negligent homicide. After hearing evidence of how *Harvey*, during a tense verbal fight at a bar, had walked up to a car window, held a gun to it, and then “involuntarily flinched,” killing a passenger. The jury returned a conviction for negligent homicide.

The trial court, however, sentenced Harvey to an aggravated term based on a host of factors: the victim was an innocent bystander; he was 66 years of age; he was the primary means of economic support for his family; his loss caused suffering to his family; the defendant fled from the scene and hid for two days; he buried evidence; he demonstrated extreme recklessness with a gun; and, importantly, he committed a dangerous offense. The court also included one aggravator that would resurface ten years later in *Bonfiglio*, stating:

... there are facts in the record that are substantiated as follows, and that is before you left this establishment, you retrieved your unloaded gun and loaded the gun, that while Mr. Diaz was driving away in his vehicle, you approached the vehicle with the loaded gun in the parking lot, that you had plenty of opportunity to walk away from the situation and you decided not to walk away.

And because of some unknown application of the aggravators listed above, Harvey received 8 years instead of 6.

On appeal, the court struggled to make what it could of the record while upholding the verdict. The trial court's listing of the dangerousness of the offense caused the appellate court trouble. Harvey's use of a gun had already classified his offense as a dangerous one, and the trial court increased the range accordingly. But, because the gun fact had been applied in that context, the court needed some additional factor that would allow Harvey to receive a dangerousness aggravator as well.

Searching the record for another fact that would support a dangerousness aggravation, the court reinterpreted Harvey's "ability to walk away" as a finding that he "intentionally caused his victim serious injury," despite the jury's finding of negligence. Because intentional infliction of a serious injury was a permissible dangerousness aggravator, the court reread this portion of the record as the dangerousness aggravator that the trial court had in mind. Reaching back to *State v. Germain*, the court reapplied the rule that excessive misconduct can simultaneously satisfy the elements of the offense and also support aggravation of a sentence.⁴

Lingering Issues

Read together, *Harvey* and *Bonfiglio* are both peculiar and potentially inappropriate applications of the "misconduct in excess" rule. In either case, it is not clear that the defendants' decision not to walk away from a dangerous situation was indicative of excess wrongdoing that supported an element of the base offense. Mr. Harvey had the chance to walk away, but he chose to stay with his finger on a trigger. When the "involuntary flinching" caused him to fire his weapon, it didn't matter whether he had prolonged the opportunity for an accident: his discharge was either accidental, or it wasn't. A trier-of-fact could certainly have found that the circumstances leading up to the discharge were unnecessary, foolish circumstances, worthy of aggravating his sentence. But hanging around in a dangerous situation does not definitively resolve the issue of *mens rea* at the actual time of the discharge. It is not clear that Harvey supplied any misconduct in excess of that required for the base offense; he likely supplied separate and additional misconduct.

Bonfiglio recycled the same aggravator language, but this time as a catch-all aggravator and not the enumerated intent to inflict serious physical injury aggravator. Mr. Bonfiglio's decision not to walk away before the aggravated assault was almost identical to Mr. Harvey's. But the repeated stabbing and the nature of the assault make reckless "discharge" of his knife a difficult position to take. When the jury found that Mr. Bonfiglio could have walked away, it is likely that they were not implicating his actual *mens rea* at the time of the stabbing, they were merely finding that the onset of the crime was gradual rather than sudden. Even an intentional stabbing could have occurred rapidly; a defendant who stands around with a knife intentionally stabbing a victim could be more blameworthy and aggravation may be appropriate.

Despite each courts' insistence that these cases explained how to deal with facts that exceed the level of proof for the base crime, there is a strong argument that neither is quite on point. Instead, there are other valid interpretations for trial courts' use of the "ability to walk away" aggravator. In a way, the *Bonfiglio* court appears to have been overly engaged with the history of the excess misconduct rule as applied in *Harvey*. The court did not address the argument that Mr. Bonfiglio's actions were separate circumstances surrounding the crime and did not implicate his *mens rea* at the time of the stabbing.

Ultimately, it is clear from the rule in both cases that an additional fact proving a higher degree of *mens rea* than required for the base offense would be adequate to aggravate the sentence. And it is also clear, from A.R.S. § 13-701(D)(24), that a fact proving an additional circumstance surrounding a crime can be used to aggravate. And even where a jury makes wildly inconsistent findings about an aggravator and a verdict, the courts are likely to overlook the issue.⁵

Possible Challenges to Aggravators

Although the barrier to attacking aggravators seems very high, there are some potential challenges. For example, some aggravators are on the cusp of being inherent in crimes, like the presence of an accomplice aggravator in A.R.S. § 13-701(D)(4). In *State v. Calderon*, the trial court incorrectly cited presence of an accomplice as an aggravator during a conspiracy to sell marijuana charge.⁶ The issue here is obvious, but worth pointing out: the presence of another person who aids the defendant is almost guaranteed by the elements of conspiracy. Without another person to agree with before aiding in the commission of offense, there would be no conspiracy. And in *Calderon*, even the trial court was willing to fix the error in a Motion to Reconsider.

But the importance of present accomplices in a conspiracy is not a complete bar to any possible application of this aggravator. Some conspiracies do not require people to physically meet in groups and an aggressive prosecutor might argue that showing up to an aggravated assault with all your co-conspirators in tow might be subject to aggravation: you could have simply arranged the felony over the telephone.

Alert defense attorneys will have to actively identify and argue that specific aggravators are so entwined with the underlying crime that there is no possible finding of excess misconduct. When the Arizona Supreme Court reviewed *Bonfiglio* in 2013, it did not rule on the particular catch-all aggravator, but it did make an important holding regarding the procedure for using a catch-all aggravator. First, catch-all aggravators cannot be used in isolation: they are too vague to provide adequate notice to the defendant. But they can be used when the court has at least one enumerated aggravator available. The traditional best practice is for the trial court to list all the aggravators available and then specifically select and explain the aggravators it is applying.

The issues raised in *Harvey* and *Bonfiglio* both hinged on records where these findings were not stated clearly: in *Harvey*, the court cited dangerousness without saying what was dangerous; and in *Bonfiglio*, the court used the catch-all aggravator without stating which enumerated aggravators it had found. The Court of Appeals has been willing to clean up the record and find justifications for the trial court, but it is worth the extra effort by alert counsel to identify which aggravators a judge is employing and to ensure that there is an acceptable enumerated aggravator available and identified on the record before a trial judge employs a catch-all aggravator.

Dealing with Novel Aggravators

Novel aggravators enter into sentencing under the catch-all aggravator rule. Catch-all aggravators, because of their inherent flexibility, could overlap with almost any element of a crime. A.R.S. § 13-701(D)(24) provides that a trial court may consider as an aggravating circumstance:

Any other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime.

But for “skeletal crimes,” crimes with very few elements, any fact that proves the base offense could arguably be reused to show misconduct in excess of that required to commit the base offense. There is almost no way to prove the elements of a skeletal crime without also implicating facts that will prove an increased level of misconduct. A clear example of this issue is kidnapping, which only requires some form of knowing restraint during the commission of another felony.

While the Model Penal Code and many states have modified kidnapping to cover only the common sense crime of forcibly moving someone from one place to another, Arizona and a few select states have kidnapping statutes that punish even very minor restraints without relocation. Under A.R.S. § 13-1304, every time Arizonan kidnappers knowingly restrain another in the commission of any underlying felony, they are opening themselves up to additional criminal liability.

It might be that any additional means used to secure a victim will subject a defendant to an aggravator. Using a locked door, using restraints, or even gripping a person would all be enough to prove the elements of kidnapping if there were an underlying offense. But each of these facts could prove excessive misconduct: the defendant did not have to put the victim in a closet for ten minutes to commit the offense; or the defendant did not have to tie the victim up to commit the offense. The crime itself is so ambiguous that it hardly makes any sense without some additional circumstances to describe it. But these additional circumstances may become valid aggravators as well as elements.

For even first time felony offenders, a single aggravator could increase their sentencing range under a kidnapping charge from 5 years up to 10 years. Even if the catch-all were applied in addition to another aggravator, a single fact about the kidnapping could be used to add another 2.5 years onto a sentence. While it is a weak legal argument, perhaps the best tools available to practitioners facing serious aggravation for minor factual findings are the state and federal constitutions. Both the Eighth Amendment of the United States Constitution and Article II, Section 15 of the Arizona Constitution prohibit cruel and unusual punishments. Arguing protection under these documents could forbid some aggravators on the grounds that they provide for grossly disproportionate punishment. The United States Supreme Court has been split on how to apply this standard, and some members do not approve of proportionality arguments outside of capital cases. Arizona courts have been unwilling to interpret the Arizona Constitution to provide more protection than the Federal Constitution, but rare case law has applied a proportionality analysis to individualized sets of facts.⁷ So although defense counsel is likely to lose the issue at the trial court, it is worth preserving the constitutional challenge for later debate.

(Endnotes)

1. The author gratefully acknowledges Judge Robert Gottsfield for his assistance with this article.
2. 228 Ariz. 349, 266 P.3d 375 (App. 2011), *aff'd*, ___ P.3d ___, No. CR-12-0018-PR (Ariz. March 6, 2013).
3. 193 Ariz. 472, 476, 974 P.2d 451, 455 (App. 1998), *rev. denied*.
4. 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986).
5. See *State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *State v. Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d 409, 413 (App.2009).
6. 171 Ariz. 12, 827 P.2d 473 (App. 1991), *rev. denied*.
7. See *State v. Davis*, 206 Ariz. 377, 79 P.3d 64, 66-67 (2003) (finding gross disproportionality based on the individualized facts of a sexual misconduct with a minor case that resulted in a 52 year sentence).

Jury and Bench Trial Results

March 2013 - May 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
Group 1					
3/1/2013	Hartley Rankin Christiansen	Bergin	2012-107503-001 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial-Guilty As Charged
3/1/2013	Walker	Gentry-Lewis	2012-131707-001 Aggravated Assault, F5, Attempt to Commit	2	Jury Trial-Guilty As Charged
4/16/2013	Hartley	Miles	2012-009266-001 Narcotic Drug Violation, F4 Drug Paraphernalia Violation, F6	3 2	Jury Trial-Guilty As Charged
Group 2					
3/25/2013	Gurion Munoz Beal	Svoboda	2012-151530-001 Drive w/Lic Susp/Revoke/Canc, M1 Unlaw Flight From Law Enf Veh, F5	1 1	Jury Trial-Guilty Lesser/Fewer
5/17/2013	R. Jones Brazinskas	Gentry-Lewis	2012-134130-001 Aggravated Assault, F4 Aggravated Assault, F6	1 1	Jury Trial-Guilty As Charged
Group 3					
4/1/2013	Adinolfi Salvato	Miles	2011-146802-001 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial-Not Guilty
4/18/2013	R. Parker Salvato Farley	Garcia	2012-127745-001 Resisting Arrest, F6 Disorderly Conduct, M1 Aggravated Assault, F5	1 1 1	Jury Trial-Guilty Lesser/Fewer



Jury and Bench Trial Results

March 2013 - May 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
4/19/2013	Gronski N. Jones Salvato Verdugo Farley Yalden	Reinstein	2011-149237-001 Aggravated Assault, F4 Aggravated Assault, F3 Murder 1st Degree, F1, Attempt to Commit Threat-Intimidate, M1 Burglary 2nd Degree, F3 Criminal Damage, M1	1 2 1 1 1 1	Jury Trial-Guilty Lesser/Fewer
4/25/2013	J. Williams Thompson	Ditsworth	2012-137145-001 Burglary 2nd Degree, F3	1	Jury Trial-Guilty As Charged
4/25/2013	N. Jones Thompson Delrio	Richter	2012-150344-001 Crim Tresp 1st Deg-Res Struct, F6	1	Jury Trial-Guilty As Charged
4/29/2013	Schwartz Gilchrist Farley	Starr	2012-137541-001 Aggravated Assault, F6	1	Jury Trial-Guilty As Charged
5/30/2013	Gronski Thompson Florkowski	Kaiser	2012-127793-001 Marijuana Violation, F4	1	Jury Trial-Guilty As Charged
5/30/2013	Allen Salvato Verdugo	Hegy	2012-143435-001 Aggravated Assault, F6 Crim Tresp 1st Deg-Res Struct, F6	1 1	Jury Trial-Guilty As Charged
5/31/2013	R. Parker Rankin Farley Menendez	Cohen	2011-140907-001 Murder 2nd Degree, F1	1	Jury Trial-Guilty Lesser/Fewer
Group 4					
3/18/2013	W. Wallace Flanagan	McCoy	2012-128256-001 Misconduct Involving Weapons, F6	1	Jury Trial-Guilty As Charged

Jury and Bench Trial Results

March 2013 - May 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
4/4/2013	Tivorsak <i>Verdugo</i>	Svoboda	2011-006960-001 Aggravated Assault, F3	1	Jury Trial-Guilty As Charged
4/19/2013	Becker <i>Leyvas</i>	Brodman	2011-156151-001 Molestation of Child, F2 Sexual Conduct With Minor, F2	1 1	Jury Trial-Guilty As Charged
5/3/2013	Becker Kalman <i>Flannagan</i> <i>Kunz</i> <i>Leyvas</i> <i>Austin</i>	Bergin	2011-145256-001 Murder 2nd Degree, F1 Misconduct Involving Weapons, F4	1 1	Jury Trial-Guilty As Charged
5/15/2013	Manberg Schreck <i>Gilchrist</i>	Brotherton	2012-159060-001 Burglary 3rd Deg-Unlaw Entry, F4 Burglary Possess Tools, F6	1 1	Jury Trial-Not Guilty
5/21/2013	W. Wallace <i>Curtis</i>	Lynch	2012-140953-001 Aggravated Assault, F4	1	Jury Trial-Not Guilty
5/30/2013	Tivorsak <i>Flannagan</i>	Gates	2012-155460-001 Child/Vulnerable Adult Abuse, F4	2	Jury Trial-Guilty As Charged
Group 5					
3/7/2013	Beatty <i>O'Farrell</i>	Gass	2011-155272-001 Drug Paraphernalia Violation, F6 Marijuana Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer
4/5/2013	Ditsworth <i>Romani</i>	Chavez	2012-006322-001 Burglary 3rd Degree, F4	1	Jury Trial-Guilty Lesser/Fewer



Jury and Bench Trial Results

March 2013 - May 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
5/16/2013	Baker	Kaiser	2010-124473-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Not Guilty- Directed Verdict
Group 6					
3/15/2013	Ramos Verdugo	Mahoney	2012-123890-002 Burglary 3rd Degree, F4 Burglary Possess Tools, F6 Aggravated Criminal Damage, F5	1 1 1	Jury Trial-Guilty As Charged
5/2/2013	Sheperd	Lynch	2012-151686-001 Agg Aslt-Deadly Wpn/Dang Inst, F3	1	Jury Trial-Guilty As Charged
5/3/2013	Llewellyn Souther Johnson	Ditsworth	2012-123695-001 Burglary Tools Possession, F6 Burglary 3rd Degree, F4 Aggravated Criminal Damage, F5	1 2 2	Jury Trial-Guilty Lesser/Fewer
5/17/2013	McCarthy Springer	Martin	2012-109593-001 Agg Aslt-Serious Phy Injury, F3 Armed Robbery-With Deadly Wpn, F2 Theft-Means of Transportation, F3	1 1 1	Jury Trial-Guilty As Charged
5/21/2013	McCarthy Souther Springer	Gass	2012-118485-001 Robbery, F4	1	Jury Trial-Not Guilty
Capital					
3/12/2013	Unterberger Ziemba Meginnis Bowman Ralston-Beike	Welty	2009-007924-001 Sexual Assault, F2 Murder 1st Degree, F1	1 1	Jury Trial-Guilty As Charged

Jury and Bench Trial Results

March 2013 - May 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney <i>Investigator</i> <i>Paralegal</i> <i>Mitigation</i>	Judge	CR Number and Charge(s)	Counts	Result
4/5/2013	Falduto Whelihan <i>Brunansky</i> <i>Berry</i> <i>Gonzalez</i>	Granville	2007-008288-001 Burglary 1st Degree, F3 Murder 1st Degree, F1 Sexual Assault, F2	1 1 2	Jury Trial-Guilty Lesser/Fewer
RCC					
3/6/2013	Tom	Jayne	2013-101488-001 DUI w/Bac of .08 or More, M1 DUI-Liquor/Drugs/Vapors/Combo, M1	1 1	Court Trial-Guilty Lesser/Fewer
3/20/2013	Houck	Rogers	2012-145999-001 Prostitution, M1	1	Court Trial-Not Guilty
4/2/2013	E. Parker	Anderson	2012-135065-001 Fail to Comply-Court Order, M1	1	Court Trial-Guilty As Charged
4/5/2013	Griffin Knowles <i>Hayes</i>	Williams	2012-148676-001 Extreme DUI-Bac .15 -.20, M1 DUI-Liquor/Drugs/Vapors/Combo, M1 Dui w/Bac of .08 or More, M1	1 1 1	Jury Trial-Guilty As Charged
Specialty Court Group					
4/19/2013	Dewitt <i>Spizer</i> <i>Hart</i> <i>Gebhart</i>	Bassett	2011-149985-001 Murder 1st Degree, F1	1	Jury Trial-Guilty As Charged
Training					
4/2/2013	Roth	Starr	2012-125155-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

March 2013 - May 2013

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
4/15/2013	Roth	Bergin	2012-125432-001 Marijuana Violation, F6	1	Court Trial-Guilty Lesser/Fewer
Vehicular					
3/1/2013	Conter	Potts	2011-143387-002 Agg DUI-Lic Susp/Rev for DUI, F4 Marijuana Violation, F6	2 1	Jury Trial-Guilty As Charged
3/29/2013	Emerson	Miller	2004-014605-001 DUI-Liquor/Drugs/Vapors/Combo, F4	2	Jury Trial-Guilty Lesser/Fewer
4/2/2013	Dehner	Bernstein	2012-114972-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial-Guilty As Charged
5/22/2013	Dehner Jarrell	Miller	2012-128512-001 Agg DUI-Lic Susp/Rev For DUI, F4 Aggravated DUI-Third DUI, F4	2 2	Jury Trial-Guilty As Charged



Jury and Bench Trial Results

March 2013 - May 2013

Legal Defender's Office - Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result
3/1/2013	Storrs Alkhoury Prusak	Starr	2011-113271-002 Aggravated Assault, F2 Resisting Arrest, F6 Drive By Shooting, F2 Misconduct Involving Weapons, F4	1 1 1 1	Jury Trial-Guilty Lesser/Fewer
3/22/2013	Storrs McReynolds Prusak	Gottsfield	2011-115294-002 Aggravated Assault, F3 Drive By Shooting, F2 Street Gang, F3	1 1 1	Jury Trial-Guilty Lesser/Fewer
4/19/2013	Sitver Koch Carrillo Woodrick	Bassett	2011-158912-001 Aggravated Assault, F2 Dschrng Firearm In City Limit, F6 Misconduct Involving Weapons, F4 Disorderly Conduct, F6 Narcotic Drug Violation, F4	5 1 1 1 1	Jury Trial-Guilty Lesser/Fewer
4/30/2013	Lane	Chavez	2011-163788-001 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial-Guilty Lesser/Fewer

Legal Defender's Office - Dependency

Last Day of Trial	Attorney Case Manager	Judge	Case Number and Type	Result	Bench Or Jury Trial
4/8/2013	Sanders	Mendez	JD15756 Severance Trial	Severance Granted, Client FTA	Bench
4/9/2013	Ripa	Wingard	JD20076 Severance Trial	Severance Granted, Client FTA	Bench
4/12/2013	Fritz	Sinclair	JD21758 Severance Trial	Severance Granted	Bench
4/20/2013	Ross	Sinclair	JD17708 Severance Trial	Severance Granted	Jury
5/3/2013	Fritz	Miles	JD20316 Severance Trial	Severance not granted	Bench

Jury and Bench Trial Results

March 2013 - May 2013

Legal Advocate's Office – Trial Division

Closed Date*	Attorney <i>Investigator</i> <i>Paralegal</i> <i>Mitigation</i>	Judge	CR Number and Charge(S)	Counts	Result
3/13/2013	Elzerman	Davis	2013-107284-001 Shoplifting, M1 Drug Paraphernalia Violation, F6	1	Jury Trial-Guilty Lesser/Fewer
3/29/2013	Rose	Miles	2011-162545-001 Aggravated Assault, F3	1	Court Trial-Guilty As Charged
5/22/2013	Elzerman	Kaiser	2013-107073-001 Aggravated Criminal Damage, M1	1	Court Trial-Guilty Lesser/Fewer
5/23/2013	Elzerman	Mead	2013-107373-001 Agg DUI-Lic Susp/Rev For DUI, F4	1	Court Trial-Guilty Lesser/Fewer
5/29/2013	Lemoine	Albrecht	2013-115522-001 Aggravated Assault, F3	1	Jury Trial-Guilty Lesser/Fewer

Legal Advocate's Office – Dependency

Last Day of Trial	Attorney <i>CWS</i>	Judge	Case Number and Type	Result	Bench Or Jury Trial
03/19/13	Timmes <i>Gill</i>	Udall	JD506898 Severance	Granted	Bench
03/25/13	Timmes <i>Gill</i>	Abrams	JD501772 Severance	Granted	Bench
03/29/13	Timmes <i>Gill</i>	Astrowsky	JD509479 Severance	Granted	Bench
04/08/13	Konkol <i>Nations</i>	Adelman	JS12093 Severance	Granted	Bench
04/17/13	Timmes <i>Gill</i>	Udall	JD509542 Severance	Granted	Bench
04/23/13	Timmes <i>Gill</i>	Beene	JD510474 Dependency	Granted	Bench

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

March 2013 - May 2013

Legal Advocate's Office – Dependency

Last Day of Trial	Attorney <i>CWS</i>	Judge	Case Number and Type	Result	Bench Or Jury Trial
04/26/13	Youngblood <i>Armbrust</i>	Miles	JD18152 & JS12301 Severance	Granted	Bench
05/02/13	Timmes <i>Gill</i>	Astrowsky	JD 509877 Severance	Severed	Bench
05/08/13	Konkol <i>Nations</i>	Miles	JD 21231 Severance	Denied	Bench
05/15/13	Youngblood <i>Armbrust</i>	Adelman	JD 21873 Severance	Severed	Bench
05/15/13	Christian <i>Christensen</i>	Ishikawa	JD 510165 Dependency	Found	Bench
05/22/13	Konkol <i>Nations</i>	Miles	JD 15405 Severance	Granted	Bench
05/28/13	Timmes <i>Gill</i>	Thompson	JD 510878 Dependency	Granted	Bench
05/29/13	Timmes <i>Gill</i>	Abrams	JD 505209 Dependency	Granted	Bench
05/29/13	Timmes <i>Gill</i>	Ishikawa	JD 509503 Severance	Granted	Bench



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