



for The Defense

▶ ◀ Dean Trebesch, Maricopa County Public Defender ▶ ◀

INSIDE THIS ISSUE:

Articles:

Cross Examination/Bias and Motive 1

When Is A Threat A "True Threat"? 1

Vouching, The Series Part 7 12

Regular Columns:

Arizona Advance Reports 10

Bulletin Board 9, 11

Calendar of Jury and Bench Trials 16

Cross Examination/Bias and Motive Part II

**By Russ Born
Training Director**

In the June 2000 issue of *for The Defense*, part one of this article explained how courts of review closely scrutinize issues relating to bias and motive. It was noted that close scrutiny is warranted because the bias/motive inquiry is a Sixth Amendment confrontation issue, not governed by the rules of evidence that deal with impeachment. The second part of this article will explore other relevant areas for the bias and motive inquiry.

**Accomplice, Co-Defendant,
Informant (Cont.)**

Penalty

State v. Melendez 121 Ariz. 1, 588 P.2d 294 (1978)

Melendez was found guilty of first-degree murder. The trial court refused to allow cross-examination which would elicit facts showing that a testifying witness was escaping the possibility of receiving the death penalty or life imprisonment. The Arizona Supreme Court reversed, holding that the cross-examination was unduly restricted and the jury

(Continued on page 2)

When Is A Threat A "True Threat"? Issues Raised by Statutes Prohibiting "Threatening"

**By Vincent Troiano, Vicki
Liszewski, and Theresa
Armendarez
Defender Attorneys – SEF
Juvenile**

"I'm going home to get my mom's gun and I'm coming back to school to shoot you, teacher!"

For making this statement, your juvenile

client is charged with threatening or intimidating, a class one misdemeanor under A.R.S. § 13-1202, or interference with or disruption of an educational institution, a class six felony under A.R.S. § 13-2911. But the juvenile's mother has no gun and has never owned a gun. In fact, the juvenile lives in a group home and does not even know where his mother is. Will this information get the petition dismissed? Don't count on it.

(Continued on page 6)

for The Defense
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had a right to hear and weigh the evidence.

Civil Suit or Threat of Criminal Prosecution

State v. Gertz, 186 Ariz 38, 918 P.2d 1056 (1995) (for discussion see part one June 2000); *State v. McMurtry*, 10 Ariz. App. 344, 458 P.2d 964 (1969)

In *McMurtry*, the victim filed a civil suit against the defendant in a justice court. The suit sought payment for some auto parts. During the criminal trial for theft of the same parts, the trial judge refused to allow the defense to ask the victim about the civil suit. Additionally, the victim had earlier threatened the defendant's father, warning him that if the father did not pay for the stolen items, a criminal charge would be filed against the son.

The trial judge also refused to allow cross-examination concerning the threat. The appellate court reversed. Refusal to allow inquiry into the evidence concerning the civil suit and threats of criminal charges was error. The jurors should have been made aware of the victim's conduct so they could better judge the veracity of his testimony.

Turley v. State, 48 Ariz. 61, 59 P.2d 312 (1936)

Turley was an attempted murder case where the defendant was charged with attempting to kill her husband. The trial court prohibited cross-examination of a female witness regarding her signing of a criminal complaint for statutory rape against another witness. The female witness dropped the complaint before the trial began. The defense wanted to show that one witness was intimidating the other with the threat of a criminal charge. The trial court would not allow the inquiry, ruling that it was too collateral. The Arizona Supreme Court reversed, holding that this is exactly the type of inquiry that helps expose the motive and bias of a witness and should be allowed.

Personal Relationships, Divorce, Sexual Orientation

The above topics are all prime areas to explore when exposing a witness's bias, motive and prejudices. These areas of interpersonal relations often generate strong personal emotions that influence the manner in which witnesses testify. Unfortunately, some judges seem to get a little squeamish and end up limiting the inquiry if it embarrasses the witness or is deemed to be politically incorrect. But no one ever said that inquiry into a witness's motive or bias was going to be uneventful and sterile. The bias and motive inquiry often embarrasses the witness, makes them feel uncomfortable and holds them up to the scrutiny of the jury. But, as most courts

of review realize, this scrutiny and possible embarrassment are overshadowed by a defendant's Sixth Amendment right to confrontation. After all, if a jury convicts after hearing the particular factors which give rise to the witness's prejudice or bias, then the conviction is more sustainable. Limiting the scope of the bias and motive inquiry in the guise of preventing embarrassment or offending political correctness often results in reversal on appeal.

Divorce & Love Interest

State v. Rothe, 74 Ariz. 382, 249 P.2d 946 (1952)

In *Rothe*, the defendant was charged with aggravated assault against his wife. She had written a letter to a friend about her feelings. Calling her husband an animal, she explained in the letter how she would get a divorce and marry another man. The trial court did allow cross-examination of the victim concerning her feelings towards another man who was not her husband. When the defense counsel sought to introduce extrinsic evidence (the letter she wrote to a girlfriend concerning her feelings), the trial court excluded it on the grounds that it was immaterial and irrelevant. The letter talked about how she would obtain a divorce then go to meet her lover once the trial was over.

The Arizona Supreme Court reversed, ruling that the motives of a witness when testifying are "never regarded as immaterial or irrelevant" and ruled that the letter itself should have been allowed into evidence. The Court reiterated that great latitude is allowed for cross-examination and that it is always proper to allow inquiry into the motive or bias of a witness.

Sexual Orientation

State v. Wargo, 140 Ariz 70, 680 P.2d 206 (1984)

In *Wargo* the prosecution was allowed to introduce evidence of the homosexual relationship between a witness for the defense and the defendant. The court held that the evidence was admissible to show a bias or motive on behalf of the witness to testify in a particular way.

Juvenile Charges, Convictions, Status

Juvenile Charges & Modus Operandi Of Victim

State v. Taylor, 9 Ariz App. 290, 451 P.2d 648 (1969)

The defendant shot the alleged juvenile victim when the defendant thought the victim was trying to burglarize his house. Defendant tried to cross-examine the victim concerning the victim's two previous charges in juvenile

court of breaking and entering. The modus operandi used by the victim in both previous cases was similar to the defendant's situation. The trial court did not allow cross-examination concerning the prior conduct.

The appellate court reversed. If the elicitation of a victim's previous misconduct would only bear upon their general credibility, then cross may be limited. Here, however, where the "misconduct bears an inferential connection with a factual issue in the case, the consideration of the discomfiture of the witness must yield to the ascertainment of the truth, at least to the extent of permitting cross-examination."

Juvenile Probation at Time of Crime

State v. Van Den Berg, 161 Ariz. 192, 791 P.2d 1075 (1990)

In *Van Den Berg*, the defendant claimed that he had interrupted the victim and the victim's friends when they were committing an act of trespass or burglary. The state moved in-limine to preclude the defendant from introducing any evidence regarding the victims' possible juvenile records. The records may have shown that, at the time of the alleged aggravated assault, the victims were still on juvenile probation. But at the time of the trial, the victims were no longer on juvenile probation. Therefore, the state argued that any motive or bias that the juveniles may have had at the time of the crime no longer existed. The trial court granted the motion in-limine and the defendant was convicted.

The appellate court reversed, holding that the defendant had a right to know if the witnesses were on juvenile probation at the time of the crime. If they were on probation, then the defense had a right to introduce this evidence as it raised issues of possible bias or motive. The bias or motive was the possible penalties the witnesses may have faced if their probation had been revoked due to their illegal conduct.

Juvenile Convictions – Juvenile DOC Records

State v. Morales, 120 Ariz.517, 587 P.2d 236 (1978); *State v. Morales*, 129 Ariz 283, 630 P.2d 1015 (1981).

Both *Morales* cases arise from the same incident. Morales was convicted of murder and his first conviction was reversed by the Arizona Supreme Court in 1978. He was retried and convicted a second time. His second conviction was also reversed by the Arizona Supreme Court in 1981.

Basically, the cases stand for the proposition that juvenile convictions as well as a juvenile's D.O.C. records cannot be sheltered from the defense, despite statutes to the contrary. The defense not only has a right to have access to the information, but also to use it in cross-examination to show the bias and motive of the witness.

See also; *Davis v. Alaska*, 415 U.S.308, 94 S.Ct.1105 (1974)

Bias of Police & Prosecutors

Police Conspiracy

State v. Nilsen, 134 Ariz 433, 657 P.2d 421 (1982)

Nilsen stands for the proposition that it is proper to cross-examine the police in order to show that a police conspiracy allegedly targeted an individual. It was also proper to question the police regarding the alleged subsequent cover-up. In this case, the prosecution specifically recognized the admissibility of evidence to show police conspiracy and cover-up as relevant to show bias motive or prejudice. Defense counsel was allowed to argue the theory in opening, closing and during cross-examination, therefore, the case was affirmed.

Internal Affairs Investigations & Police Officer's Prior Conduct

State v. Cadena, 9 Ariz App. 369, 452 P.2d 534 (1969)

Cadena started out as a domestic violence case. An officer who was called to the scene was allegedly assaulted by Cadena. This officer became the named victim. The officer, who was called by the state as a witness, had previously been involved in several domestic violence investigations. During one particular incident, the occupant of the home was killed. This resulted in a lawsuit against the officer and an internal affairs investigation into his conduct. The defense wanted to question the officer regarding the suit and investigation to show that the officer had a professional as well as personal interest in securing a conviction against the defendant in this case. The trial court ruled against the defense.

The appellate court reversed the conviction, holding that the inquiry into this area to show the officer's bias was proper. Here there may have been a motive for the officer to obtain a conviction. "It is a fundamental proposition of law that the jury is entitled to be apprised of any bias, prejudice or hostility which a particular witness may feel toward a party to a lawsuit or prosecution in order that the jury may better be able to evaluate the true worth of the witness's testimony."

Prosecutor's Bias

State v. Aldrich, 75 Ariz 53, 251 P.2d 653 (1952)

In this case, the actual copy of the complaint for assault with a weapon, was changed (inter-lineation) to reflect a different type of pistol following a subsequent search of the

defendant's house. Originally it was described as a revolver which one of the officers clearly saw. After a search turned up a semi-automatic weapon, but no revolver, the complaint was changed, possibly by the prosecutor, to reflect the results of the search. The defendant sought to inquire of a police officer if the prosecutor had personal reasons for wanting the defendant convicted. Additionally, the defendant wanted to question his wife as to the issue of a third person encouraging her to file the complaint. The trial court disallowed both areas of cross-examination.

The Arizona Supreme Court reversed. All of the above issues were relevant to the issues of bias or motive to testify or act in a particular way. As such, the jurors should have been allowed an opportunity to hear and weigh the testimony. This is so notwithstanding the fact that the witness may be entirely innocent of any of the implications inferred from the questions.

Miscellaneous Bias and Motive Cases

Experts

State v. Bailey, 132 Ariz. 472, 647 P.2d 170 (1982)

Cross-examiner can always cross on expert's credentials, employment history, number of times testified for a particular side, funding source, etc.

Failure to Honor Subpoena

State v. Hallman, 137 Ariz. 31, 668 P.2d 814 (1983)

In order to show that a particular witness favored the defense, the state was allowed to impeach a defense witness with the fact that they failed to honor a state subpoena but testified for the defense. Even where impeachment is slight, if it goes to bias or motive, the jury should hear it.

Rehabilitating Bias

State v. Farmer, 126 Ariz 569, 617 P.2d 521 (1980)

The state was allowed to ask a defense witness about being indicted on the same charges as the defendant. Their purpose was to show bias or prejudice in favor of defendant. The trial court, however, would not allow the defense to admit evidence of the other witness's acquittals on the same charges in order to rehabilitate their credibility.

The Supreme Court of Arizona reversed. Originally, the trial court's ruling at the beginning of the trial, which kept out evidence of the acquittals, was correct. But then the state cross-examined one witness regarding their charges that were

still pending. They elicited during cross-examination that he was facing the same charges as the defendant. The defense then asked to bring out the facts about the other witness's acquittals to show that these witnesses were not afraid of the pending prosecution. The Arizona Supreme Court held that it was unfair to leave the jury with the inference that all the witnesses were awaiting trial and therefore had a motive to testify falsely.

Victims

Ever since the passage of the Victims' Rights Amendment, prosecutors continually file motions in-limine seeking to restrict and confine cross-examination of victims. The problem is that many of these motions in-limine overreach, resulting in relevant information being kept from the jury. Although the following two cases do not fall into the true bias/motive category, they do illustrate that Victims' Rights should not trump a defendant's Sixth Amendment right to confrontation.

Drug Use (Victim)

State v. Orantez 183 Ariz. 218, 902 P.2d. 824 (1995)

In *Orantez*, there was significant evidence of the victim's drug use near the time of the alleged rape. The state moved in-limine to preclude the defense from bringing out evidence of the drug addiction and use of drugs. The state's position was that the defense just wanted to show the drug abuse to make the witness look bad in the eyes of the jury. Testifying outside the hearing of the jury, the alleged victim of the rape said that at the time of the rape she was not using drugs. Though she had a ten-year heroin addiction, which was now being treated by methadone, she denied using heroin during March or April prior to the alleged rape on April 8. The state argued that the information was not relevant and too prejudicial. The trial court agreed; the appellate court affirmed; the Arizona Supreme Court reversed. The court found that the victim's ability to perceive, remember, and relate would be affected if using drugs at the time or near the time of the event. Therefore the defense evidence concerning the victim's drug usage was relevant. See also: *State v. Piatt* 132 Ariz. 145, 644 P.2d. 881 (1981)

Offers of Proof

When a defense counsel is denied the ability to cross-examine regarding issues of bias and motive, it is imperative that they make an "offer of proof" on the record. The offer of proof is simply a recitation to the court reporter of the questions the cross-examiner would have asked this witness. It does not need to contain the answers that the cross-examiner expected to receive. This is because it is the jurors and not the trial

court or appellate courts that decide how much weight should be given the testimony. In the very least, the jurors have the right to hear the information. Whether they believe that the witness's testimony was influenced by a bias or motive is their decision.

State v. Holden, 88 Ariz. 43, 352 P.2d 705 (1960)

This case demonstrates the importance of a good offer of proof. During cross-examination of an accomplice, the trial court refused to allow questions showing that the witness was shifting the blame and attempting to get even with the defendant. The defendant had caused the witness some financial losses and the defense wanted to bring them out to show bias on the part of the witness. Also, the defendant sought to show that the accomplice was protecting a friend by casting blame on the defendant. The trial court again would not allow questions seeking to expose the motive concerning the friend.

The defense counsel made an "offer of proof" on the record in the form of written questions, enumerating several areas of bias that he wished to explore on cross-examination. Based upon the offer of proof, the Arizona Supreme Court reversed.

Conclusion

Every witness testifies for a reason. Many times it is simply to help ascertain the truth, to see that justice is done. Sometimes the search for truth and justice takes a back seat to motivations such as revenge, spite, greed, prejudice or love. Where testimony is influenced by personal bias, motive or prejudice, the defendant has a Sixth Amendment right to expose it to the jury. Relying upon their combined life experiences and innate understanding of human nature, the jurors can then decide the proper weight to be given the testimony.



Special points of interest: There Is Hope For Those Who Struggle With Alcohol and/or Drug Addictions

**By Vivian Bethel
Client Services Coordinator- Group E**

Finding

appropriate treatment for our clients can be difficult. Here are two residential programs that may be useful for your clients: "Back to Life" and "New Life for Girls of Arizona."

Back to Life is a six-month, alcohol and substance abuse residential program for men. It touts itself as a "no hand out," self-sufficient, work-oriented residency. This program is for individuals who are dedicated to resolving their addictions through discipline and hard work. The residents are mandated to attend daily counseling sessions, as well as support themselves by providing general labor to local businesses. Back to Life is a self-help program that is designed and operated by former alcohol and/or drug dependent persons. They do not have trained counselors, psychologists, doctors or nurses.

New Life for Girls of Arizona, is a Christian, non-profit, residential alcohol and/or substance abuse program for women eighteen years old and older. This program also provides care for pregnant women and women with young children who do not have any help available to them from family or friends. It also assists residents who may have legal issues to resolve.

The average length of this program is one year. It is comprised of three phases. During the first phase, residents are placed in a home-like environment where they receive maximum personal attention from staff members and pastoral counseling. In the second phase, the residents are transferred to Dover, Pennsylvania, where they attend Biblical classes and continue pastoral counseling. The last phase consists of evaluation of residents' readiness to re-enter society. There is a graduation ceremony for those who complete the program. Residents can begin GED classes during this phase as well. There are Victory Homes available for residents to live in while they attend school or work.

New Life for Girls also has a Center for Children and Mothers in Glenn Rock, Pennsylvania. This is a home where women and their children can go to begin the healing process in their relationships. Women attend parenting classes and are involved in counseling. The length of this program varies depending on the needs of the children and women. The average length of this program is one year.

Back to Life is located at 3949 E. Earll Drive, Phoenix, AZ 85018. The telephone number is 602-224-4123. New Life for Girls of Arizona is located at 6216 North 27th Avenue, Phoenix, AZ 85017.

When Is A Threat A “True Threat”?

Continued from page 1

Both of these statutes prohibiting threats raise significant constitutional issues.

The first question is, when is a threat a “true threat?” In part, A.R.S. § 13-1202(A)(1) provides:

- A. A person commits threatening or intimidating if such person threatens or intimidates by word or conduct:
1. To cause physical injury to another person or serious damage to the property of another . . .

Certainly the lack of any requirement of any degree of *mens rea* stands out. There is no language that refers to the mental state of the perpetrator. As we all know, the statutes that refer to intentional conduct all too often also allow lesser standards to suffice to criminalize human activity. Language such as “knowingly” and the even more amorphous “with reckless disregard” are used to criminalize human conduct. Perhaps A.R.S. § 13-1202 is a preview of future trends to finally reach the bottom of the evidentiary barrel and attempt to prohibit *malum in se conduct* as if it were *malum prohibitum*.

Crimes are generally categorized as either *malum in se* or *malum prohibitum*.

“...An act is said to be *malum in se* when it is inherently and essentially evil, that is immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. . . .” 2 Black’s Law Dictionary 959 (6th Ed. 1990)

Malum Prohibitum is an act “... not inherently immoral, but becomes so because its commission is expressly forbidden by positive law” *Id.* at 960.

Similar to assault, threatening to cause physical injury to another arguably falls most appropriately within the classification of a *malum in se* crime. Therefore, the lack of any specific reference to a degree of *mens rea* causes concern and it may be argued that the statute is overbroad.

Additionally, the statute lacks the structure of language defining the effect of the conduct on a reasonable person. Language referring to conduct that threatens or intimidates when only a reasonable person would be threatened or intimidated by such conduct would add some structure to the standard of proof.

Therefore, arguably, this is a *malum in se* statute poorly

written as a *malum prohibitum* law. Specifically, there is conduct prohibited without any designation as to the *mens rea* of the alleged actor. Additionally, there is no reference to any requirement as to the impact of the conduct on the recipient, the alleged victim.

The state may argue A.R.S. § 13-202(B) which provides:

If a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability *unless the proscribed conduct necessarily involves a culpable mental state*. If the offense is one of strict liability, proof of a culpable mental state will also suffice to establish criminal responsibility. (Emphasis added.)

If the state argues that threatening or intimidating necessarily involves a culpable mental state – which one? There is still the vagueness and overbreadth argument.

Furthermore, the rationale that the proscribed conduct necessarily involves a culpable mental state raises the questions, what is the proscribed conduct, and when is a threat a threat? To be more explicit, practitioners involved with the factual underpinnings of the filings regarding this statute may see filings that involve “conditional” threats.

In *Watts v. United States* 89 S.Ct. 1399, 394 U.S. 705, 22 L.Ed.2d 664 (1969), a conditional threat was held not to be a true threat. Obviously, in attempting to define when a threat is actually a true threat, there will be an overlap with free speech concerns.

The threat in *Watts*, according to an investigator for the Army Counter Intelligence Corps, involved the defendant allegedly saying, “They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . .” 89 S.Ct. at 1401.

The U.S. Supreme Court noted that petitioner’s counsel, in moving for a judgment of acquittal, advocated in part that the statement was expressly made conditional upon an event. The event would be induction into the Armed Forces, which petitioner vowed never would occur. Furthermore, both petitioner and the crowd laughed after the statement was made.

The statute in question in *Watts* was even more specific than A.R.S. § 13-1202 in that it did require knowingly or willfully making the prohibited threat. However, it still infringed on

protected speech. Additionally, the Supreme Court indicated that, whatever the willfulness requirement implies, the statute requires the government to prove a true threat. The statute prohibited any person from “knowingly and willfully (making) any threat to take the life of or to inflict bodily harm upon the President of the United States.” 89 S.Ct. at 1400. As stated above, at least under the circumstances of this case, a true threat is not a conditional threat.

Most of our clients who are accused of threatening and intimidating, or accused under the new statute, A.R.S. § 13-2911, Interference with or Disruption of an Educational Institution, use speech that can be defined as nothing more than “blowing off steam.” The First Amendment prohibits punishment for this type of speech because it normally does not amount to “fighting words.”

In order to constitute “fighting words,” the speech must be likely to provoke an ordinary citizen to a violent reaction.” See *In re Louise*, 1999 WL 977053. The U.S. Supreme Court has stated that the state may only convict people whose speech disturbs the peace where there is a danger that the listener will be incited to violence. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

Since *Chaplinsky*, the Court has reflected the “desire to limit the broad implications of the doctrine,” and narrow the meaning of “fighting words,” in order to protect “a certain amount of provocative and challenging speech.” See Rotunda and Nowack, *Treatise on Constitutional Law*, Section 20.39 (3d ed. 1999). In *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed.2d 1131 (1949), in holding that the defendant had the constitutional right to denounce certain minorities, the Court stated that the purpose of free speech was “to invite dispute” and that “[i]t may indeed best serve its high purpose when it induces a condition of unrest.” *Id.* And in *Cohen v. California*, 403 U.S. 15, 22, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), the Court held that protecting the sensibilities of others is not a sufficient justification for regulating speech, especially where the speech is easily avoidable. Moreover, the fact that the challenged speech included expletives did not strip it from constitutional protection because “one man’s vulgarity is another’s lyric.” *Id.*

The Arizona Court of Appeals has held that intentional misbehavior at school, including cussing at the teacher in front of the class and kicking over school furniture, is not “imbued with elements of communication.” *In re Julio*, 302 Ariz. Adv. Rep. 5, 990 P.2d 683 (Ct. App. 1999). It is clear that in *Julio*, the behavior that was punished was not the communicative aspect of the speech, but rather the disruptive impact that the tantrum had on the class. On the other hand, cursing at the school principal and assistant principal, coupled with storming out of the office against the administrator’s

orders, does not amount to “fighting words,” and is not punishable. *In re Louise*, 1999 WL 977053.

Obvious hyperbole and ranting and raving, while possibly showing signs of immaturity, is constitutionally protected speech and may not be punished. So, arguably, are “conditional threats” such as those illustrated above. Again, these types of statements show a lack of maturity and may only be made to “blow off steam.”

A.R.S. § 13-2911, as amended by the legislature in April 2000, makes it a felony to interfere with or disrupt an educational institution. The statute reads, in pertinent part:

- A. A person commits interference with or disruption of an educational institution by doing any of the following:
 1. For the purpose of causing, or in reckless disregard of causing, interference with or disruption of an educational institution, threatening to cause physical injury to any employee of an educational institutional or any person attending an educational institution.
 2. For the purpose of causing, or in reckless disregard of causing, interference with or disruption of an educational institution, threatening to cause damage to any educational institution, the property of any educational institution, the property of any employee of an educational institution or the property of any person attending an educational institution.
 3. Knowingly going on or remaining on the property of any educational institution for the purpose of interfering with or disrupting the lawful use of the property or in any manner as to deny or interfere with the lawful use of the property by others.
 4. Knowingly refusing to obey a lawful order given pursuant to subsection C of this section.
- A.
- B. *To constitute a violation of this section, the acts that are prohibited by subsection A, paragraph 1 or 2 of this section are not required to be directed at a specific individual, a specific educational institution or any specific property of an educational institution.* (Emphasis added)

The issues presented by the enactment of this statute are numerous, but suffice it to say that overbreadth, vagueness and First Amendment concerns abound. As discussed above regarding A.R.S. §13-1202A(1), the new language added to

§13-2911 renders the statute both overbroad and vague. The statute is not narrowly tailored to balance First Amendment rights with the government's right to regulate. *Any* act is prohibited which disrupts or threatens, even if the threat is not specifically directed to any person or place at the educational institution. This gives rise to the question of how the statute will be enforced. Teachers and administrators are certainly given broad discretion to determine what type of act or speech violates the statute. The statute also violates First Amendment protections as discussed above.

Additionally, will this statute take away any argument regarding conditional threats? If the threat does not have to be communicated to anyone, how is anyone threatened? What if the threat is written, but not discovered until later, past the date of the threat? For example, the threat is "Everyone will die on March 10" and the writing is not discovered until March 17. Is this a threat and a violation of the statute? Isn't this type of threat an impossibility?

Counsel for juveniles and/or adults charged under A.R.S. § 13-2911 should explore not only the constitutional problems noted above, but also should consider the arguments of a "conditional threat" versus a "true threat."

One final question raised by these statutes: Is A.R.S. § 13-1202(A)(1) now a lesser-included offense of A.R.S. § 13-1204(A)(2)? Possibly!

State v. Morgan, 128 Ariz. 362, 625 P.2d 951 (Ariz. App. 1981) indicated that A.R.S. § 13-1202(A)(1) is not a lesser-included offense. However, A.R.S. § 13-1202 has been changed since that ruling. The *Morgan* court, using the older version of the statute, indicated that the distinction between the old threatening and intimidating statute and assault under A.R.S. § 13-1204(A)(2), was in the language of the old A.R.S. § 13-1202, which required the defendant's intent to terrify as part of the proof needed to convict. In 1994, the Arizona legislature deleted the requirement of proving the defendant's intent to terrify. Therefore, the rationale in *Morgan* no longer applies and A.R.S. § 13-1202 may be a lesser-included offense of A.R.S. § 13-1204.

A stylized illustration within a black border. It shows a white document with wavy lines representing text, a yellow pencil with a black eraser, and a purple and pink circular background with yellow stars. A dashed line and an 'X' mark are on the document, suggesting editing or a draft.

**Do you have an
idea for an article?
Would you be interested
in writing an article for
publication in
for The Defense?**

If so, give us a call.

BULLETIN BOARD

New Attorneys

David Cutrer has been promoted to Defender Attorney and is assigned to Trial Group C effective Monday, August 7, 2000. David graduated from Indiana University School of Law and, most recently, he has been with our office as a Law Clerk.

Trent R. Buckallew started with the office as a new Defender Attorney assigned to C effective Monday, August 21, 2000. Trent graduated from California Western School of Law and, most recently, he was an attorney with the Mohave County Public Defender's Office.

Michael J. Dergo is a new Defender Attorney assigned to Trial Group E effective Monday, August 21, 2000. Michael graduated from Northern Illinois University School of Law.

Jelena Radovanov joins the office as a new Defender Attorney assigned to Trial Group D effective Monday, August 21, 2000. Jelena graduated from Arizona State University School of Law, and was a student intern with our office.

Brad J. Reinhart joined our office as a new Defender Attorney assigned to Trial Group A effective Monday, August 21, 2000. Brad graduated from George Washington University School of Law.

Jerald A. Rock has signed on as a new Defender Attorney assigned to Trial Group A effective Monday, August 21, 2000. Jerald graduated from the University of Mississippi School of Law and, most recently, he was an associate attorney with the Ambrose Law Firm.

Darshak Shah has been newly hired as a Defender Attorney assigned to Trial Group A effective Monday, August 21, 2000. Darshak graduated from California Western University School of Law. He has previous experience with the County as a Bailiff.

Candace Zigler is also newly employed as a Defender Attorney assigned to Trial Group E effective Monday, August 21, 2000. Candace graduated from Arizona State University School of Law.

Robert D. Duffy will join the office as a new Defender Attorney assigned to Trial Group E effective Monday, October 2, 2000. Robert graduated from Loyola University School of Law. Currently, Robert is attending our new attorney training class and will be sworn in on September 26, 2000.

Michael Lee will be a new Defender Attorney assigned to Trial Group C effective Monday, October 2, 2000. Michael graduated from Nova South Eastern University Shepard Broad Law Center. Michael will be sworn in on September 26, 2000.

Attorney Changes

Gary Bevilacqua, Defender Attorney assigned to the Complex Crimes Unit, has decided to remain with the office. It had previously been announced that Gary would be departing the office to join the new Office of Legal Advocates.

Maria Schaffer, Defender Attorney assigned to Trial Group D, departed the office effective Friday, August 18, 2000, and joined the Maricopa County Office of Legal Advocates.

BULLETIN BOARD (continued)

ARIZONA ADVANCE REPORTS

By Stephen Collins
Defender Attorney – Appeals



***State v. French*, 325 Ariz. Adv. Rep. 28 (CA 2, 6/15/00)**

In his second petition for post-conviction relief, Defendant claimed trial counsel was ineffective for failing to request an alibi instruction. Defendant also claimed ineffective assistance of appellate and Rule 32 counsel for not raising this issue on direct appeal and in the first petition for post-conviction relief. The State argued the issue was precluded under Arizona Criminal Procedure Rule 32.2 because it could have been raised in the previous petition. Defendant argued it was not precluded because the Comment to Rule 32.2(a)(3) provides: "If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings (sic) is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel." The Court of Appeals held that Rule 32.2(a)(2) applies only to issues so egregious that they amount to constitutional error. The claimed error here was found to be mere trial error. Therefore, relief was denied.

***State v. Poyson*, 325 Ariz. Adv. Rep. 11 (SC, 7/6/00)**

Defendant was convicted of first-degree murder and sentenced to death. He claimed his drug use at the time of the crime should have been considered as a mitigating factor under A.R.S. Section 13-703(G)(1). This section is phrased disjunctively. A defendant can show either that he was unable to conform his conduct to the requirements of the law, or that he could not appreciate the wrongfulness of his conduct. The defendant must prove "substantial impairment" from drugs or alcohol. That he was merely "buzzed" is insufficient. Defendant was diagnosed with antisocial personality disorder. This was not a mitigating factor because there was no indication in the record that "the disorder controlled his conduct or impaired his mental capacity to such a degree that leniency is required."

***State v. Anderson*, 325 Ariz. Adv. Rep. 3 (SC, 6/15/00)**

Defendant was convicted of first-degree murder and sentenced to death. In selecting the jury, the judge used a written questionnaire. In answering the questions, three prospective jurors stated they were opposed to the death penalty on moral or religious grounds and could not set aside these beliefs. All three were removed from the jury panel for cause over defense counsel's objection and request he be allowed oral voir dire that might rehabilitate them. The Arizona Supreme Court stated it was proper to remove these jurors if their positions were final and unequivocal. However, defense counsel was entitled to question the prospective jurors orally and thus ascertain if they could set aside their

opposition to the death penalty and render a fair and impartial verdict. The trial judge's refusal to allow oral questioning, constituted structural error. Therefore, harmless error analysis was inapplicable and reversal was required.

***State v. Jones*, 325 Ariz. Adv. Rep. 17 (SC, 6/15/00)**

Arizona Evidence Rule 801(d)(1)(B) provides that an out-of-court statement is not hearsay if the declarant testifies at trial, is available for cross-examination, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." The rule requires the statement to have been made before the motive to fabricate arose. A witness's testimony against Defendant was consistent with statements the witness made to the police immediately after the murders in this case. Defense counsel argued that the witness may have committed the murders and therefore, had a motive to fabricate at the time of the murders. It was held the prior statements were improperly admitted, but were harmless error. Defendant was sentenced to death. The trial judge found there was an aggravating factor under A.R.S. Section 13-703(F)(1) because Defendant was convicted of another offense for which a sentence of life imprisonment or death was imposable. Defendant was convicted of six first-degree murders. Each was found to satisfy the (F)(1) factor for the other murders. The Arizona Supreme Court held the other murders could be used as convictions even though it was prior to sentencing. The other murders could be used regardless of the order in which they occurred or the order in which the convictions were entered. Defendant argued that his potential for rehabilitation was a mitigating factor. It was held this factor was not proven because of Defendant's antisocial personality disorder and "inability to live in accordance with societal rules."

***In re Paul M.*, 325 Ariz. Adv. Rep. 37 (CA 2, 6/15/00)**

Juvenile told a teacher's aide to "fuck off." This did not constitute "abuse" of a teacher under A.R.S. Section 15-1507.



New Support Staff

Roberta Rodriguez is a new Legal Secretary/Floater effective Monday, July 24, 2000.

Heather Addis is the new Legal Secretary in Trial Group D effective Monday, August 7, 2000.

Nan Smith is the new Office Aide assigned to Group E effective Wednesday, August 9, 2000.

Christine Orabuena is the new Office Aide assigned to Trial Group E effective Monday, August 14, 2000.

Carolyn Partis is the new Legal Secretary assigned to the DUI Unit effective Monday, August 14, 2000.

Helen White is the new Legal Transcriptionist (Telecommuting) effective Tuesday, August 15, 2000.

Jennifer Williams is the new Legal Secretary assigned to Group B effective Monday, August 21, 2000.

Matt Elm returned to the office effective Monday, August 21, 2000. Matt will be the Office Aide in Administration.

Kathleen Wilmer is a new Legal Assistant effective Tuesday, September 5, 2000. Kathleen graduated from the University of Arizona with a degree in journalism and received her paralegal certificate from the Arizona Paralegal Training Program.

Earl T. Ashmore will be a new Defender Investigator at our Durango Juvenile office beginning Monday, September 11, 2000. Earl graduated from Eastern Illinois University and, most recently, has been an Investigator with the Arizona Board of Technical Registrations.

Reva Woods will be the new Legal Secretary/Floater beginning Monday, September 11, 2000.

Gayland Seaberry has been hired as a new Defender Investigator effective Monday, September 18, 2000. Gayland graduated from Central Washington University and has defense investigative experience in the State of Washington.

Support Staff Changes

Kareem Calvin, formerly a Records Processor downtown, has been promoted to Appeals Assistant effective Monday, August 7, 2000.

Laura Collings, a Legal Secretary assigned to Trial Group C, has been given a special duty assignment as the new Lead Secretary for Group C effective Monday, August 21, 2000.

Michelle Wood, Legal Secretary assigned to the DUI Unit, is now a part-time Transcriptionist/Floater effective Monday, August 21, 2000.

Marcos Medina, formerly an Office Aide, has been promoted to Records Processor effective Monday, August 21, 2000.

Jennifer Rosiek, formerly an Office Aide, has been promoted to Records Processor effective Monday, August 21, 2000.

Sarah Smith, Records Processor assigned to Group C, departed the office on Friday, August 25, 2000.

Edward Yue, Defender Investigator assigned to the Juvenile Division at Durango, retired effective Friday, July 28, 2000.

Anissa Beltran, Legal Secretary assigned to Group D, departed the office effective Friday, July 28, 2000.

Jennifer Reed, Office Aide assigned to Group C, departed the office effective Wednesday, August 2, 2000.

Stacey Peterson, Legal Secretary assigned to Group C, departed the office effective Friday, August 11, 2000.

Lisa Born, Office Aide assigned to the Appeals Division, departed the office effective Friday, August 18, 2000.

Barbara Brown, Lead Secretary assigned to Trial Group C, departed the office effective Friday, August 18, 2000.

Vouching, The Series

Part 7: Nonverbal Vouching and Constitutional Issues

By Donna Elm
Trial Group Supervisor – Group D

This is the seventh chapter in a series on vouching. In it, we discuss vouching for a witness demonstrably (nonverbally) and litigating constitutional rights jeopardized by vouching.

J. Non-Verbal Vouching

Non-verbal vouching would fall under the rubric of “bolstering a witness’s credibility,” and hence it is impermissible. There is, however, precious little case law on the subject, perhaps because trial records are normally records of what was *said* rather than what was *done* by lawyers. Non-verbal vouching includes these examples that have arisen in trials in Maricopa County Superior Court:

The prosecutor rolled his eyes during the defense attorney’s closing argument.

During the defense summation, the prosecutor shook his head from side to side, signifying “no,” that what defense counsel was arguing was wrong.

In a child molest case, when recounting the child’s testimony about what had occurred, the prosecutor began crying.

During his closing argument, the defense attorney began to cry when discussing the impact on his client of being wrongfully accused.

None of these examples were the subject of published opinions, and most did not draw objections. Unfortunately, we pay attention to the substance of what is *said*, neglecting what attorneys *do* that vouches for or against certain evidence. Litigators are reminded that unless they *watch* (and not just *listen*) for vouching, they may miss these subtle but powerful forms of vouching.

Rolling the eyes and shaking the head “no” are direct comments on the evidence or argument. They are exactly like saying that something is or is not true. But, they probably have greater impact than verbalizing “that’s not true,” or “he is lying”: body language is more influential because it is widely thought to be more reliable than words (*i.e.*, you can lie with you words, but your face will reveal you). Hence the jury might believe that such non-verbal cues are unplanned, spontaneous expressions of deep beliefs.

Similarly, there should be *no place* for counsel in either camp crying in a trial. By crying, *e.g.*, for a child molest victim or a wrongfully accused defendant, counsel is portraying a deep belief in the victim or client, which is improper vouching. The effect of crying is dramatic. It conveys that the attorneys must be convinced by the victim or defendant, because they are moved to tears. Again, such acts are likely to have more impact on the jury than simply and clinically arguing “I believe her” due to the emotionality unduly affecting the jury. It is improper vouching, and should be objected to and made part of the record.

There is an Arizona homicide case involving attorney crying that should be distinguished. In *State v. Bailey*, 132 Ariz. 472, 647 P.2d 170 (1982), the defense objected to the male prosecutor and detective weeping during the testimony of the dead victim’s mother. *Id.* at 474, 647 P.2d at 172. The court concluded that some of the jurors saw this display, though they had not paid much attention to it, but that the prosecutor’s and detective’s emotion was genuine. Furthermore, the court noted that none of the jurors cried. Therefore, the motion for mistrial was denied. On appeal, little attention was devoted to this issue; the court reversed on other grounds and simply affirmed the trial court on the crying issue because the judge was in the best position to decide if the emotion was genuine or not. *Id.* at 477, 647 P.2d at 175.

Whether the conduct was genuine, however, has never been the touchstone for vouching. Most who have vouched would insist that they genuinely believe their assertions. The prejudice lies in the impact on the jury, not whether the impetus was genuine or not. So, the court’s reasoning in *Bailey* (based on genuineness) should not be applied when emotional displays are used *to vouch*.

However, the crying done in *Bailey* probably was not “vouching” and that may account for the result. It was not material. There is no question but that the mother lost her son, something that engenders great sympathy. They cried, then, about a point that both parties would concede. It still was unprofessional, and perhaps inflamed the jury, but it was not used to vouch for whether her son was dead. That is *different* from crying about a point that is highly contested like whether the child was sexually assaulted or whether the defendant had been wrongfully accused. In those cases, the crying would be used to vouch. When emotional displays are used to vouch for a witness, counsel should object and demand a mistrial (because the emotional effect on the jury could be irreparable).

Sometimes the non-verbal vouching is done *indirectly*. In *United States v. Ziak*, 360 F.2d 850 (7th Cir. 1966), the prosecutor vouched orally that the government agents “came in and told the truth.” During his summation, the prosecutor was allowed to sit in the witness chair. The court found that these “theatrics” had a pronounced (and subliminal) vouching effect: the prosecutor occupied the location recognized as the symbol of truth and justice by the jury. Hence, by sitting in a witness seat, the prosecutor “vouched” for his argument as if it were sworn testimony.

Because non-verbal cues are not part of the record, it is imperative that attorneys both object and make a record when this occurs, saying for example:

“Objection, counsel has been shaking his head back and forth, signifying “no” during the last few sentences I spoke, thereby communicating to the jury that he did not believe what I was saying or had information not before them indicating that what I was saying was not true.”

There is no case law on the subject of non-verbal vouching in Arizona, and almost none elsewhere too. In addition, I could find no commentary on non-verbal vouching in the major treatises on improper argument. If I could leave the reader with one thought, it would be that case law should be generated on this issue. There is a related Arizona case where gesturing during closing argument was litigated; although it concerned comment on the defendant’s silence as opposed to vouching, we can use it by analogy. In *State v. Still*, 119 Ariz. 549, 582 P.2d 639 (1978), the prosecutor argued:

“I’ve never heard any explanation [pointing to defense table] for why this man told Mr. Young the story about having a mine down in Mexico.”¹

In this case, the defense did make the proper record, preserving the fact of the gesture. After discussing how the argument, coupled with pointing at the defendant, could only have meant that the defendant was remaining silent, the court noted that “The prosecutor’s pointing toward appellant emphasized the appellant’s failure to take the witness stand to testify to his side of the story.” 119 Ariz. at 552, 582 P.2d at 642. The court held it violated the defendant’s constitutional rights, and reversed. Though *Still* was not about vouching, it does demonstrate that non-verbal cues can be made part of the record and used to bring claims of misconduct in closing argument.

K. Constitutional Issues Implicated by Vouching

Constitutionalizing objections is critical for demonstrating how damaging the argument is, establishing fundamental

error, and preserving issues for review. Bear in mind that state as well as federal constitutional rights should be raised because state ones may be broader than their federal counterparts.

Note that even when the defense attorney fails to object, when the misconduct is so severe that it deprives the defendant of a fundamental constitutional right (like to a fair trial), the court is under an obligation to intervene. *E.g.*, *State v. Findlay*, 198 Conn. 328, 344, 502 A.2d 921, *cert. denied* 476 U.S. 1159 (1986).

The primary constitutional infirmity arising from vouching is a due process² violation. Vouching is a fundamentally unfair practice. In the seminal *Roberts* decision, the Ninth Circuit acknowledged that “such comments have the clear potential of affecting adversely the defendant’s right to a fair trial.” *United States v. Roberts*, 618 F.2d 530, 534 (9th Cir. 1980). Due process is expressly discussed in many federal decisions. *E.g.*, *Ijemba v. United States*, 53 F.3d 338 (9th Cir. 1995); *Hernandez v. Lewis*, 72 F.3d 135 (9th Cir. 1995); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464 (1986). To rise to the level of a due process violation, the rule is:

It “is not enough that the prosecutor’s remarks were undesirable or even universally condemned.” *Darden v. Wainwright*, 699 F.2d at 1036. The relevant question is whether the prosecutors’ comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. Christoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974). *Darden*, 477 U.S. at 179, 106 S.Ct. at 2471.

Courts have considered a number of factors relevant in deciding whether a defendant is prejudiced (to the point of a due process violation) by vouching. Those include: (1) the extent to which the vouching was “invited”; (2) the severity of the misconduct; (3) the frequency of the misconduct; (4) the centrality of the misconduct to critical issues in the case; (5) the strength of the curative measures taken; and (6) the strength of the state’s case. *State v. Williams*, 204 Conn. 523, 539, 529 A.2d 653 (1987); and see *United States v. Modica*, 663 F.2d 1173 (2nd Cir. 1981)(listing factors #2, 5, and 6, above).

In keeping with due process standards, no constitutional violation will be found unless the defense can establish that it was *prejudiced* by the argument. The test is expressed as: “in light of all of the facts and circumstances, was the misconduct so egregious that no curative instruction could reasonably be expected to remove the prejudicial impact.” *Id.* That is, of course, something the courts seldom find. The federal courts, therefore, have found no due process violations in these arguments:

*“You don’t charge such a serious crime of murder unless you have the proof and the evidence to back it up. ... If he hadn’t shot and killed Jewl, the defendant wouldn’t be here.”*³

*After hypothesizing what the defendant might have said had he chosen to testify, the prosecutor then undercut that hypothetical position to show that those claims lacked credibility.*⁴

*The prosecutor repeated a witness’s statement then said, “And I’m sure that’s what happened.”*⁵

*During voir dire, the prosecutor expressed his belief that the defendant would be found guilty.*⁶

In the first case, the court acknowledged that this was improper but reasoned that, because evidence of guilt was overwhelming, the argument did not “have substantial and injurious effect or influence in determining the jury’s verdict.” No prejudice. In the other three examples above, the court surprisingly concluded that the argument was not improper! See § M(3), below, for in-depth discussion of problems with how courts are evaluating vouching objections. In the second excerpt, the court stated that this was not vouching. In the third, the court concluded from the context that “rather than vouching, it appears the prosecutor was only exhorting the jury to view the testimony in a particular light.” In the last example, the court permitted such argument in *voir dire* to death-qualify the jury.

Interestingly, Arizona cases virtually never refer to due process when analyzing vouching claims, though many do apply typical due process language. In *State v. Martinez*, the court reversed for improper vouching, noting that it “took from the defendant the fair trial to which he was entitled.” 175 Ariz. 114, 121-22, 854 P.2d 147, 154-55 (App. 1993) (citing *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) for the proposition that failing to intervene with vouching deprived the defendant of a fair trial). In *State v. Leon*, the Arizona Supreme Court applied due process language in analyzing vouching: “[vouching] can thus jeopardize the defendant’s right to be tried solely on the basis of evidence presented to the jury ... induc[ing] the jury] to trust the Government’s judgment rather than its own view of the evidence.” 190 Ariz. 159, 163, 945 P.2d 1290, 1294 (1997). In *State v. Dumaine*, due process was expressly implicated when the prosecutor negatively vouched that defense counsel did not believe what he had just argued. 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989). While it is appropriate that *Dumaine* recognized a constitutional infirmity, the stronger constitutional objection would be that the argument rendered defense counsel ineffective.

While inadvertent or unthinking vouching (*see, e.g., State v. Lee*, 185 Ariz. 549, 917 P.2d 692 (1996)), may not rise to the level of a constitutional violation, there can be little question that blatant, repeated, or profoundly damaging vouching would implicate due process. Cumulative misconduct has resulted in new trials. Bear in mind that, although Arizona does not recognize the federal “cumulative error doctrine,” it does look at prosecutorial misconduct which, if cumulative, could result in a dismissal. *See State v. Hughes*, 193 Ariz. 72, 78, 969 P.2d 1184, 1190 (1998).

Practitioners should continue to raise state due process grounds in addition to the federal counterpart. Bear in mind that the Arizona Supreme Court has interpreted the state due process clause more broadly than the federal one in some areas. Other courts have applied state due process grounds to remedy improper vouching. *E.g., State v. Williams*, 204 Conn. 523, 529 A.2d 653 (1987).

As previously discussed in a prior part of this series, negative third party vouching as to what defense counsel believes would clearly interfere with the defendant’s right to effective representation of counsel.⁷ Reviewing a few examples, from that chapter:

*The defense attorneys “knew deep down in their hearts” that the defendant “was guilty.”*⁸

*Addressing the defense attorney: “You have no confidence in your case or his defense.”*⁹

*Defense counsel “hasn’t expressed even a shadow of a belief in” the defendant’s innocence.*¹⁰

*Defense attorney “inadvertently has conceded that the defendant’s testimony is somewhat less than accurate.”*¹¹

There is a very persuasive case to be made that these arguments have destroyed or irreparably damaged any effective representation by the defense attorney. It is shameful that lawyers did not raise the sixth amendment (and state counterparts) in those cases. In *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983), the prosecutor argued that the defense attorney not only realized that his client was guilty, but also pressured government witnesses to commit perjury. The court acknowledged the constitutional dimension: “Though such prosecutorial expressions of belief are only intended ultimately to impute guilt, they also severely damage an accused’s opportunity to present his case before the jury.” In fact, the 9th Circuit held that violated both due process and effective assistance provisions. *Id*

Endnotes

- 1 119 Ariz. at 550, 582 P.2d at 640.
- 2 U.S. Const., 5th and 14th Amendments; Ariz. Const., Art.2, § 4.
- 3 *Hernandez v. Lewis*, 72 F.3d 135 (9th Cir. 1995).
- 4 *United States v. Tate*, 921 F.2d 282 (9th Cir. 1990).
- 5 *Stephens v. City and County of San Francisco*, 954 F.2d 727 (9th Cir. 1992).
- 6 *Nefstad v. Baldwin*, 66 F.3d 335 (9th Cir. 1995).
- 7 U.S. Const., 6th and 14th Amendments; Ariz. Const., Art.2, §24.
- 8 *Myhand v. State*, 259 Ala. 415, 66 So.2d 544 (1953).
- 9 *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306 (1931).
- 10 *Greenberg v. United States*, 280 F.2d 472 (1st Cir. 1960).
- 11 *People v. Jones*, 74 A.D.2d 854, 857, 425 N.Y.S.2d 376, 379 (1980).



Future Technology:

Chuck Brokschmidt, I.T. Mgr.

There is very little in this world that changes as quickly as technology. Thinking back over my last 15 and a half years working in Maricopa County, I can recall many changes that have occurred in technology management, hardware and software, and the application of technology to the way the county operates on a daily basis. One must wonder, "What could possibly be next?" Not just at work, but in our personal lives as well, technology is slowing down for no one.

The June 19, 2000 issue of Time magazine featured an article on the future of technology, offering a glimpse of things to come. For those of us wondering what might be in store for ourselves and our children, the article offered many insights into technologies (and the uses of these technologies) that might seem as wild-eyed to us now as an automatic teller machine may have seemed to our grandparents.

How "wild-eyed" are some of these things? How about things like smart cars that do the driving while you sit back and relax, or electronic novels, speeding the demise of the printed book? Maybe genetically engineered " Frankenfoods" that are pest and drought resistant as well as more nutritious will suit your palette.

The coming of "nanotechnology" may introduce tiny "nanobots" that could be released into your body to fight disease. These molecular-size machines manipulate matter one atom at a time, and could be used in applications such as manufacturing and assembly, environmental cleanup, and molecular medicine.

As time marches on, so do the capabilities of technology. In the years ahead, we will see a more widely accepted application of computer controlled homes, biometric personal identification, and "smart-cards" that contain what you used to think of as your bank account. Which of these future-predictions are science fiction and which becomes part of our daily lives remains to be seen. The possibilities are endless, and skeptics abound, but think about how wild-eyed today's personal computers and their capabilities would have been to previous generations!

Works Cited

"Visions 21 Our Technology." Time 19 June 2000: 60-116.

JULY 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/12-6/21	Farney/Reece Brazinskas Molina	Padish	Myers	CR 99-13320 Murder 1 st Degree/F1D Agg. Assault/F3D	Guilty of Murder 2 nd Degree Dangerous and Agg. Assault Dangerous	Jury
7/5-7/6	Valverde	Reinstein	Takata	CR 00-03329 3 cts. Agg. Assault/F6	Guilty on 2 cts. Not Guilty on 1 ct.	Jury
7/11-7/12	Ellig Jones	McVey	Fish	CR 99-17965 Non-Residential Burglary/F4	Guilty	Jury
7/12-7/18	Hernandez Jones	Schwartz	Mueller	CR 00-02640 Child Abuse/F2DCAC	Not Guilty/F2, Guilty of lesser included Child Abuse/F5	Jury
7/18-7/20	Cotto/Klepper	Willrich	Aubuchon	CR 00-04979 PODD/F4	Mistrial	Jury
7/27-7/27	Leal	Akers	Hunt	CR 00-06882 Agg. Assault/F6	Dismissed day of trial	Jury
7/28-7/28	Cotto	Henry	Knudsen	TR 00-00567CR DUI/M1	Dismissed with Prejudice prior to trial	Jury

GROUP B

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/28 - 7/5	Blieden	Hilliard	Spencer	CR99-14187 2 Cts Trafficking in Stolen Property/ F3	Guilty 1 Ct Trafficking Stolen Property F3, 1 Ct Dismissed by the Court after the state rested	Jury
7/27	Tom	McClennen	McBee	CR99-12968 Sale of Narcotic Drugs/ F2 (w/ 1 Prior)	Pled day of trial	Jury
7/5 - 7/6	Roth	Martin	Baca	CR2000-001457 Attempted POND, F5	Guilty	Jury
7/6 - 7/11	Healy Munoz	Gottsfeld	Davis	CR99-018057 Agg Aslt/ 4F	Not Guilty Agg Aslt, Guilty Misd Aslt	Jury
7/11 - 7/13	Walton Casanova	Wotruba	Hunt	CR99-17444 Custodial Interference/ F6	Not Guilty	Jury
7/6 - 7/13	Blieden King	Hilliard	Brnovich	CR2000-003380 1 Ct Kidnapping/ F2D 1 Ct Agg Aslt/ F3D	Not Guilty Agg Aslt, Not Guilty Kidnapping, Hung on lesser of Unlawful Imprisonment, F4	Jury
7/13	Aslamy Casanova	Gottsfeld	Cotitta	CR2000-006373 Agg Aslt/ F3D	Dismissed	Jury
7/14 - 7/21	Gray King	Gottsfeld	Gadow	CR2000-003832 Sex Assault x 2/ 2F; Kidnap/ 2F Burglary 2 nd /3F	Not Guilty Sex Assault & Kidnap Guilty lesser offense Criminal Trespass	Jury
7/16 - 7/21	Blieden Casanova	Hilliard	McBee	CR2000-002623 1 Ct Armed Robbery/ F2D 1 Ct Kidnapping/ F2D	Guilty Armed Robbery, F2D and Guilty of lesser offense Unlawful Imprisonment/ F4	Jury
7/18 - 7/20	Healy King	Galati	Reid-Moore	CR2000-003861 Agg Aslt Dangerous/ F3	Guilty Agg Aslt F3D	Jury
7/24 - 8/1	Gray King	McClennen	Bailey	CR99-16749 Sex Assault /F2; Kidnap/F2D Agg Aslt/ F3D & F4	Guilty Sex Assault, Guilty Non- Dang Kidnap, Guilty Misd As- sault Guilty to Agg Aslt	Jury
7/24 - 7/26	Healy Casanova	Areneta	Wilson	CR99-13219 PODD for Sale/ F2 ; PODP/ F6	Guilty	Jury
7/25	Colon Casanova	Hilliard	Shreve	CR2000-005540 Agg Aslt/ F6	Dismissed 1 day prior to Trial	Jury
7/27	Navazo	Gottsfeld	Green	CR99-07157 PODD, F4; PODP, F6	Guilty on both charges	Jury
8/1	Aslamy	Hilliard	Hunt	CR2000-001974 Agg Aslt, F4	Dismissed day of trial	Jury

JULY 2000 JURY AND BENCH TRIALS

GROUP C

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/26	Zazueta	Jarrett	Craig	CR2000-090901 1 Ct. Agg. Assault, F6N	Dismissed with prejudice day of trial	Jury
6/28 – 7/7	Lundin Thomas	Barker	Goldstein	CR2000-090598 Ct. 1 – Agg Assault, F3N Ct. 2 – Stalking, F5N	Guilty on Agg Assault; Lesser included on Stalking	Jury
7/10	Hamilton Breen	Oberbillig	Boode	CR1999-095590 Ct. 1 – Unauthorized Use of Vehicle F5N	Dismissed day of trial	Jury
7/10	Felmly / Shoemaker Beatty	Dobronski (Scottsdale)	Zia	CR00-0115 1 Ct. Interfering w/ Judicial Proceeding, M1	Guilty	Bench
7/10	Whitfield Beatty	Jarrett	Udall	CR2000-090838 Ct. 1 – Criminal Trespass 1st Deg. F6N	Dismissed without prejudice day of trial	Jury
6/26 – 7/12	Peterson / Nermyr Thomas Rivera	Keppel	Altman	CR1999-091677 Ct. 1 – 2 nd Degree Murder, F2DCAC Ct. 2 – Child Abuse, F2DCAC	Not Guilty	Jury
7/11 – 7/13	Ramos Davis	Willrich	Holtry	CR1999-094595 Ct. 1 – Agg. DUI, F4N	Guilty	Jury
7/11 – 7/14	Nermyr Gavin Moncada	Keppel	Hughes	CR1999-091878 Ct. 1 – Criminal Damage, F6N w/2 Dangerous Priors Ct. 2-3 – Agg Assault, F2D	Guilty	Jury
7/13 – 7/16	Lorenz / Eskander Breen	Oberbillig	O'Neill	CR1999-095252 1 Ct. Sexual Assault, F2N 1 Ct. Kidnapping, F2N 1 Ct. Agg. Assault, F3N	Not Guilty Not Guilty Guilty Agg. Assault, F4N	Bench
7/17 – 7/18	Zazueta (Advisory counsel)	Barker	Blair	CR1999-095404 2 Cts. Theft, F3N 1 Ct. Fit. Frm. Purs. Law Veh., F5N	2 Cts. Theft dismissed with prejudice 1 Ct. Fit. Frm. Purs. Law Veh. Guilty	Jury
7/18	Peterson	Jarrett	Brenneman	CR2000-090708 1 Ct. Agg Assault, F3D	Dismissed without prejudice day of trial	Jury
7/17 – 7/19	Pettycrew	Houg	Weinberg	CR1999-095937 2 Cts. DUI w/passenger under 15 years old, F6N	Guilty	Jury
7/17 – 7/20	Moore Little	Keppel	Evans	CR1999-094705 1 Ct. Child Molest, F2 1 Ct. Sexual Abuse under 15, F3	Not Guilty	Jury
7/20	Pettycrew	Johnson	Brooks	CR99-1976 Ct. 1 – Assault, M1	Dismissed w/o prej. day of trial	Jury
7/20 – 7/21	Walker	Barker	Weinberg	CR2000-090381 2 Cts. Agg DUI, F4N	Guilty	Jury
7/24 – 7/26	Cotto Thomas	Hoag	Blair	CR2000-091584 Ct. 1 – Unlawful Flight, F5N Ct. 2 – Unauthorized Use of Transportation, F5N	Guilty	Jury
7/25 – 7/28	Klopp-Bryant Fox Klosinski	Anderson	Sandish	CR1999-095916 Ct. 1 – Agg DUI, F4N Ct. 2 – Agg DUI, F4N Ct. 3 – Resist Arrest, F6N	Guilty Agg DUI Not Guilty Resist Arrest	Jury

JULY 2000 JURY AND BENCH TRIALS

GROUP D

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/14 – 6/19	Lorenz / Eskander	Oberbillig	O'Neil	CR 99-95252 1 Ct. Rape, F2; 1 Ct. Kidnapping, F2 1 Ct. Agg Assault, F3	Not Guilty – Rape and Kidnapping Guilty – Lesser Included Agg. Asslt	Bench
7/10	Willmott	Gerst	Flores	CR 2000-001074 3 Cts. Agg. Assault, F2 1 Agg. Asslt w/DW, F3	Dismissed	Jury
7/17	Silva	Gerst	Amiri	CR 2000-005485 2 Cts. Kidnap, F2; 1 Ct. Robbery, F4	Dismissed	Jury
7/17	Schaffer	Dougherty	Simpson	CR 2000-0004204 1 Ct. Poss. Narc. Drug-Sale, F2 1 Ct. Marijuana-Other, F6	Not Guilty – POND For Sale, F2 Guilty – POND, F4 Guilty – POM	Jury
7/17	Adams	Sheldon	Amiri	CR 2000-02148 F60 Disorderly Dangerous, F4 POND, F6 PODP	Plea to lesser F60 PODP	Jury
7/17	Willmott	Gerst	Lee	CR 2000-002609 1 Ct. Conduct chop shop, F2 3 Cts. Theft means of trnspr, F3	Dismissed	Jury
7/17	Parker	Cole	Larish	CR 99-17986 1 Ct. Armed Robbery, F4 2 Cts. Threaten / Intimidation, M1	Dismissed	Jury
7/18	Silva	McDougall	Larish	CR 2000-004178 1 Ct. Pos. Dang. Drg., F2 1 Ct. Pos. Drg. Paraphernalia, F6	Guilty	Jury
7/18	Wallace	Gerst	Davidon	CR ? POMFS, F2; TOMFS, F2	Dismissed	Jury
7/18 – 7/21	Cox	Araneta	Kamis	CR 99-17471 1 Ct. Pos. Narc Drug, F4 1 Ct. Mscndct Inv. Wpns, M1	Not Guilty	Jury
7/19	Parker	Schwartz	Baldwin	CR 2000-000044 1 Ct. POND- 4 Sale; 1 Ct. POND	Not Guilty Dismissed w/Prej.	Jury
7/21	Martin	Coles	Clarke	CR 2000-03840 1 Ct Agg. Assault w/Dang.Weap, F3	Dismissed	Jury
7/24	Martin	Ballinger	Eckhardt	CR 2000-005889 1 Ct Leaving Scene of Accident With Serious Physical Injuries, F3	Dismissed	Jury
7/24	Adams	Ballinger	Amiri	CR 2000-03638 1 Ct. Agg Assault, F6	Dismissed w/Prejudice	Jury
7/24	Handler	Gerst	Eaves	CR 2000-04270 1 Agg. Asslt/ Resist Officer/Arrest F6 w/prrs	Dismissed	Jury
7/24	Handler	Keppel	Greer	CR 2000-05439 1 Ct. Agg Asslt Dang. w/priors	Dismissed	Jury
7/25	Geranis / Cox	Yarnell	Simpson	CR 99-16299 1 Ct. Mscndct. Inv. Weapons, F4	Guilty	Bench
7/24-7/26	Wilmott Bradley	Ballinger	Adleman	CR 99-18250 1 Ct. Pond, 1 Ct. Podd	Guilty	Jury
7/26	Varcoe	Ballinger	Reddy	CR 2000-12519 1 Ct. Unauth. Use Veh Transprt F6 w/2 prrs	Dismissed	Jury
7/25-7/28	Castillo / Elm / Mehrens	<i>Gottsfeld</i>	Neugebauer	CR 99-10393 2 Cts Agg. DUI, F4	Guilty	Jury
7/25	Varcoe	Gerst	Adleman	CR 99-12969 1 Ct. Agg. Assault, F3	Dismissed w/o prejudice	Jury

DUI UNIT

Dates: Start-Finish	Attorney	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
7/24 – 7/28	Carrion	Heilman	Lemke	CR00-02597 4 Cts. Agg DUI, F4 1 Ct. Lvg Scn Accdnt., M0	Guilty of 4 Cts. Agg DUI, State dismissed Lvg Scene Charge	Jury

JULY 2000 JURY AND BENCH TRIALS

GRUPE

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
7/1	Klapper	Jones	Adams	CR 99-05206 Theft/F3	Dismissed	Jury
7/5 - 7/6	Rock	McDougall	Simpson	CR 00-00998 Burglary/F4	Not Guilty	Jury
7/5 - 7/6	Walker	Fields	Hanlon	CR 99-12796 Burglary/ F4	Hung	Jury
7/12	Rock	McDougall	Pacheco	CR 99-14106 Poss. of Stln. Credit Card/F5	Dismissed w/o prejudice day of trial	Jury
7/17 - 7/19	Pelletier	Jones	Blumenreich	CR 00-04036 Miscndt. Inv. Weap./M1 Resist. Arrest/F6 POND/F4	Guilty Resisting Arrest & POND Miscndt. Inv. Weap. dis- missed	Jury
7/17	Walker	Araneta	Clarke	CR 99-09009 False Imprison./ F6	Dismissed w/prej.	Jury
7/17 - 7/18	Klapper	Wilkinson	Newell	CR 99-17149 Burg./F4 Poss.Burg.Tools/F6	Guilty	Jury
7/19	Klapper	McDougall	Gadow	CR 00-06268 Sex Abuse/F5 2 Cts. Kidnap/F2 2 Cts Agg Aslt. /F3D	Dismissed day of trial	Jury
7/26	Goldstein	Jones	Newell	CR 00-02990 Agg. Asslt. /F3D	Dismissed w/Prejudice	Jury
7/26-7/27	Goldstein	Burke	Blumenreich	CR 00-04393 Mscndct. Inv. Weapons/ F4	Guilty	Jury
7/27	Roskosz	Araneta	Lamm	CR 00-03110 Trafficking in Stolen Prop./F3 Theft/F6	Hung (7-1 for acquittal)	Jury
7/31 - 8/1	Van Wert	Reinstein	Mayer	CR 00-02885 Fraud. Use of Credit Card/F	Hung (4NG, 3G & 1 undecided)	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
7/10 - 7/17	Parzych Apple	Hall	Amato	CR99-02219 2° Murder, F1, Dangerous; Agg. Assault, F2, Dang., Crimes Against Children 3 Cts. Agg. Assault, F3, Dang.	Guilty	Jury
7/19 - 7/20	Curry	Wilkinson	Simpson	CR2000-000921 Att. POND, F5	Guilty	Jury
7/19 - 7/24	Shaler Apple	Martin	Frick	CR2000-002687 PODD for Sale, F2; PODD, F4; POM for Sale, F4; PODP, F6	Guilty	Jury
7/20 - 7/24	Funckes Abernethy	Davis	Rahi-Loo	CR2000-005200 Theft of Means of Transportation, F3	Not Guilty	Jury
7/25 - 7/25	Patton	Galati	Lindstedt	CR99-18249 POND, F4 PODP, F6	Guilty	Jury

The Office of the Maricopa County Public Defender
and
The Office of the Federal Public Defender

Presents

The Annual Death Penalty Seminar



October 26 & 27, 2000

On October 26 in the afternoon and all day on October 27, 2000, the Office of the Maricopa County Public Defender and the Office of the Federal Public Defender will present the Annual Death Penalty Seminar. This 1½ day intense seminar will concentrate on a variety of capital case issues including an AEDPA update, capital case competency issues, and habeas case rules. The format is a combination of lecture and small group breakout sessions.

Further information will be distributed at a later date.

for The Defense

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