

for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

James J. Haas, Maricopa County Public Defender

Volume 18, Issue 7

September 2008



*Delivering America's
Promise of Justice for All*

for The Defense

Editor: Dan Lowrance

Assistant Editors:
Jeremy Mussman
Susie Graham

Office:
620 West Jackson, Ste. 4015
Phoenix, AZ 85003
(602) 506-7711

Copyright © 2008

Contents

Sentencing Consequences.....	1
The Road to Citizenship	6
What We Could Teach The Cops About Coercion.....	7
The Duty of Counsel to Advocate for Client Acceptance of Plea Bargains ..	10
Top Ten Things You Should Know About Probation.....	14
Workforce Development Programs Designed to Assist Ex-Offenders	16
Jury and Bench Trial Results.....	18

Sentencing Consequences

By Robert L. Gottsfield, Maricopa County Superior Court Judge

Are There Certain Cases Where the Sixth Amendment Requires That a Jury Be Told of Sentencing Consequences?

Yes, according to evidence guru and District Court Judge (Eastern District of New York) Jack B. Weinstein (“Weinstein on Evidence”) in *U.S. v. Polizzi*, 549 F. Supp. 2d 308 (2008).¹ In a 236-page opinion (with 288 pages of appendices) Judge Weinstein reverses jury verdicts on twelve counts of receiving child pornographic images because the trial judge failed to grant defendant’s request that the jury be told of the statutory minimum sentence of five years for each image and be permitted to argue punishment to the jury.

Judge Weinstein’s view is that the United States Supreme Court has recently placed “a new emphasis on colonial and British history contemporaneous with adoption of the Sixth Amendment (which) now requires, in the narrow special group of cases illustrated by the current one, that the jury know of the mandatory minimum if that is what defendant asks for”.² He further explains that:

A well-informed jury responsive to the needs of both society and the defendant might well consider, given the special circumstances of the present case, that intensive psychiatric treatment and control outside of prison is the desirable end to this criminal litigation. Such an approach might, in these unusual circumstances, do more to protect society than a long prison term with rudimentary psychiatric help likely to be available behind prison walls. It would recognize that ultimately prisoners must be released and that the return of unrehabilitated prisoners to society presents a serious danger (citation omitted). A verdict of not guilty by reason of insanity, which might well have resulted from a proper charge, would not have meant release. Rather, it would have led to a suitable institution for treatment—the sensible result suggested by jurors in the instant case (citation omitted).³

Judge Weinstein argues that a majority (this is a surprise to this writer)⁴ of the Supreme Court now favors Justice Scalia’s approach to Sixth Amendment interpretation, which is that “judges must look to criminal

practices of the Thirteen Colonies and England in 1791, when the amendment was adopted.”⁵ His research reveals “that the petit juries of 1791 would have been aware of any harsh sentence imposed mandatorily upon a finding of guilt of a particular crime.”⁶

Without going into this research⁷, but based on it and his cogent discussion of recent Supreme Court cases⁸, Judge Weinstein concludes that he erred in not granting the defendant’s motion to inform the jury of the sentence that would result from guilty verdicts and not letting defense counsel argue punishment.⁹

With respect to modern Supreme Court jurisprudence, he discusses *United States v. Booker*, 543 U.S. 220 (2005) (one majority opinion concluded that statutory provisions mandating the U.S. Sentencing Guidelines were unconstitutional; a different majority then rendered the Guidelines advisory rather than mandatory); *Crawford v. Washington*, 541 U.S. 36 (2004) (a review of English and early American historical materials determined that testimonial statements of a witness who did not appear at trial were inadmissible unless she was unavailable to testify and the defendant had a prior opportunity for cross-examination, overruling the previous precedent *Ohio v. Roberts*); *Blakely v. Washington*, 542 U.S. 296 (2004) (holding unconstitutional Washington State sentencing procedure); *Ring v. Arizona*, 536 U.S. 584 (2002) (invalidating Arizona law allowing trial judges to find aggravating factors necessary to impose capital punishment); and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).

Judge Weinstein believes that the Supreme Court’s *Booker-Apprendi* line of sentencing decisions and the reinvigoration of the Confrontation Clause in *Crawford* “reaffirm three propositions that support the argument that juries can be trusted” with the information concerning sentencing consequences.¹⁰

These are (1) the high value the Supreme Court places on the right to a jury trial, the fundamental constitutional right embodied in the Sixth Amendment and thus the jury’s historic sentencing role, providing “a check on the courts, executive, and legislature equivalent to that of the voter on elected officials;”¹¹ (2) the fact the Court, when “interpreting the Sixth Amendment, relies on criminal practice the Court believes existed in the late eighteenth century”¹²; and (3) the Court does not hesitate to overturn “long-established federal law, with some measure of reasoned disregard for the consequences of doing so, when it determines that precedent impinges on the powers historically exercised by juries (or in *Crawford*, the historical scope of the confrontation right).”¹³

To this can be added Judge Weinstein’s analysis of other sentencing cases which suggest that the Supreme Court recognizes the jury’s power to moderate the law’s harsh effects. Here he discusses the language of the Court in *United States v. Gilliam*, 994 F.2d 97 (2d. Cir. 1993) where the Second Circuit affirmed the trial court’s decision not to require the government to accept the defendant’s proposed stipulation that he had a prior felony and was a felon under the felon-in-possession statute. If the stipulation had been accepted the jury would have been deprived of learning the nature of the statute under which defendant was being tried and would only have decided whether he possessed a gun at the time alleged. The Second Circuit, emphasizing the potential harm to the traditional jury role, stated:

But there is harm done by his proposal, harm to the judicial process and the role of the jury in determining the guilt or innocence of the accused as charged. *Gilliam*’s proposal violates the very foundation of the jury system. It removes from the jury’s consideration an element of the crime, leaving the jury in a position only to make findings of fact on a particular element without knowing the true import of those findings. ...The jury speaks for the community in condemning such behavior, and it cannot condemn such behavior if it is unaware of the nature of the crime charged.¹⁴

Judge Weinstein discusses the variability of results depending upon the informed and non-informed juror. Some juries will have someone on the panel who actually knows the punishment and informs his or her co-jurors. Others will have no such informed person. Still others will have an ill-informed person with influence on the decision. “This kind of exchange undoubtedly occurs frequently in juror deliberations, but is almost impossible to detect or even to investigate”, he notes.¹⁵ He discusses the authority and a number of instances where “(d)isparate impact caused by disparate levels of juror knowledge can lead to serious equal protection and due process issues.”¹⁶

It should also be noted that Judge Weinstein’s seminal opinion in *Polizzi* also constitutes a ringing endorsement of the innate power of jurors to refuse to convict or nullify the laws charged to them in a proper case.¹⁷

In Arizona the Arizona Supreme Court has made clear that the role of the court and jury in a jury trial are distinct with the exclusive function of the former to set forth the law and do the sentencing and the latter to determine the factual issues raised by the case and thus deciding whether defendant is guilty or not guilty. While in capital cases juries now do the sentencing [*Ring v. Arizona*, 536 U.S. 584 (2002) (Ring II)] in all other cases this dichotomy holds firm. *State v. Tims*, 143 Ariz. 196, 198, 693 P.2d 333, 335 (1985); *State v. Koch*, 138 Ariz. 99, 105, 673 P.2d 297, 303 (1983); *State v. Waggoner*, 144 Ariz. 262, 264, 697 P.2d 345, 347 (App. 1984), modified on other grounds, 144 Ariz. 237, 697 P.2d 320 (1985); *State v. Eisenlord*, 137 Ariz. 385, 396, 670 P.2d 1209, 1220 (App. 1983).

These cases provide that the trial court should not instruct on the sentencing consequences and defendant is not entitled to argue punishment to the jury. The Ninth Circuit is in agreement. *Evalt v. United States*, 359 F.2d 534 (9th Cir. 1966).

Notwithstanding, following Judge Weinstein’s lead, a careful practitioner may want to move to have the jury advised of the penalty and to permit argument of the same, in a proper case such as one like *Polizzi* the subject of this piece. We have had such a case *State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006), *cert. denied*, 127 S.Ct. 1370 (2007)¹⁸ and we have cases like it all the time.

Berger is actually referred to by Judge Weinstein (2008 WL 1886006, 48) and holds that, based on defendant’s possession of child pornography, the imposition of 20 consecutive 10-year prison terms (under A.R.S. Sections 13-3553 and 13-604.01) upon his conviction of 20 counts of sexual exploitation of a minor under 15-years of age, is not cruel and unusual punishment. See also *State v. Long*, 207 Ariz. 149, 83 P.3d 618 (App. 2004), *rev. denied* (20-year aggravated and consecutive sentence for sexual exploitation of a minor under fifteen years upheld against Eight Amendment Challenge).

While the Eighth Amendment may be applied to lengthy sentences of incarceration in non-capital cases, *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003), successful challenges are exceedingly rare. *Solem v. Helm*, 463 U.S. 277, 289-90 (1983), overruled on other grounds by *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality opinion), with *Solem* still recognized as controlling authority in, e.g., *United States v. Frazier*, 981 F.2d 92, 95 (3rd Cir. 1992), *cert. denied*, 507 U.S. 1010 (1993).

The trial court should properly deny your written and well-crafted motion, which should only be used in the exceptional case, to have the jury instructed as to the sentencing consequences and to permit you to argue punishment to the jury. So will the Court of Appeals as it, as well as the trial court, are bound by the Arizona Supreme Court cases of *Tims* and *Koch* cited above.

But you will have made your record and preserved the issue on the chance that our higher court would accept Judge Weinstein’s view of the mandate of the Sixth Amendment in a proper case.

(Endnotes)

1. An opinion brought to this writer's attention by B. Michael Dann, former and now retired Presiding Judge, Superior Court, Maricopa County who is cited in the opinion at 2008 WL 1886006 at 112. Westlaw compresses the 288 page opinion to 120 pages but inexplicably leaves off the conclusion and appendices. The full opinion, as noted by Judge Dann, can be picked up at <http://www.nyed.uscourts.gov/pub/rulings/cr/2006/6cr22moj040108.pdf>.
2. 2008 WL 1886006, 134. Interestingly the Arizona Supreme Court Committee, Chaired by former Presiding Judge B. Michael Dann, on More Effective Use of Juries, called Jurors: The Power of Twelve (November 1994) <http://www.supreme.state.az.us/jury/execsumm.htm>, voted 8 to 4, favoring a rule requiring that criminal juries be informed at the outset of trial and in the final instructions of the range of sentence for the offenses charged. The Committee's final report, consisting of 132 pages of text and 81 pages of appendices, was unanimously approved by the Arizona Judicial Council in October, 1994. There were 55 recommendations constituting a total reform of the Arizona jury system many of which were put into effect, but not the sentencing consequence recommendation.
3. Id.
4. This writer assumed the interpretive technique of a Justice Breyer, taking "account of significant historical changes in sociology, technology, politics and legal systems" (Id. at 90.) would be more appealing to the four more liberal Justices and to swingman Justice Kennedy most of the time.
5. Id. at 91.
6. Id.
7. Id. at 91-112.
8. Id. at 113-127.
9. Id. at 134 et seq.
10. Id. at 113. And see *Neder v. United States*, 527 U.S. 1, 30, (1999) (harmless error rule applies to failure to submit issue of materiality to jury) in a concurring in part, dissenting in part, opinion by Justice Scalia: "Perhaps the Court is so enamored of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution."
11. Id.
12. Id.
13. Id.
14. Id. at 126.
15. Id. at 128.
16. Id.
17. Id. at 92-130. See also Gottsfield, Does the "Must Find Defendant Guilty" Instruction Violate the Sixth Amendment? The Alternative Nullification Instruction, for The Defense, June/July, 2008, at 1, based on an article by Judge Dann. *Polizzi* is mentioned at n.18.
18. And see *United States v. Williams*, ___ U.S. ___ (06-694), May 19, 2008, in an opinion by Judge Scalia (7-2) upholding a federal statutory provision imposing criminal penalties for offers to provide and requests to obtain child pornography, against First Amendment and vagueness objections, setting forth a 25 year history by the Court of such protection. Violation of the statute incurred a minimum sentence of 5 years imprisonment to a maximum of 20 years for each violation. See also *State v. Taylor*, 160 Ariz. 415, 773 P.2d 974 (1989) (upheld consecutive sentences for possession of each of 50 photographs of children engaged in sexual conduct where defendant took the photographs himself, which were part of 74 convicted counts of sexual offenses with children; the 85 consecutive life sentences with parole eligibility after 2,975 years does not constitute cruel and unusual punishment).

Sponsored by Maricopa County Public Defender

Transferred Youth

A Probation Officer's Perspective

**Presented by Specialized Probation Officers
Jade Crawford, David Pixley and Jason Overmyer**

.....
Friday, October 3, 2008
12:00pm -- 1:30pm

Downtown Justice Center
620 W. Jackson, 5th Floor Training Room

May qualify for up to 1.5 hours CLE



.....
This brown bag discussion will cover:

- ▣ Probation Officer's Perspective Supervising Transferred Youth and Adult Offenders
- ▣ Most Common Issues
- ▣ Expectation Differences/ Youth vs. Adult
- ▣ Why a Specialized Unit?
- ▣ What Can Defense Counsel Do to Increase Chances that Probation will be Successful?

If you have any questions or would like to register, please contact Celeste Cogley at 602-506-7711 X37569 or email cogleyc@mail.maricopa.gov

The Road to Citizenship

By Christine Workman, Records Processor Lead



The Maricopa County Public Defender's Office is proud to announce that David Chuol, of the records unit, attained his U.S. citizenship on August 22nd, 2008. David is a former Sudanese refugee that relocated to the United States in 1998 to escape the ongoing civil war between the Islamic fundamentalists of the North and the diverse Christian ethnic groups of the South. David relocated at age 15 as part of the Lutheran Immigration and Refugee Services movement, after being displaced from his village in southern Sudan.

Prior to relocating, David lived in a village with his family for approximately ten years. In the village, he lived in a small hut made of grass and was responsible for tending to his family's livestock. Due to a lack of resources and the desire of David's parents for their children to attend school, David and his family uprooted to a refugee camp in Ethiopia. David lived in the camp for roughly five years as he waited for the processing of his immigration paperwork. Although the camp provided a better life for David and his family, the camp still lacked security and the resources to provide basic necessities such as food, water, and shelter.

On May 8th, 1998, David made his journey to the United States. He left behind his family and friends for the opportunities that the United States has to offer. At first, David settled in Fort Worth, Texas. He only lived there a short period before moving to Marshalltown, Iowa to reunite with family and friends who relocated from Sudan years earlier. There, David attended high school, lived in a youth shelter, and became assimilated into American culture. Years later, David moved to Phoenix, Arizona to flee the cold weather of the Midwest.

In 2004, David was hired on at the MCPD as an office aide. Since then, he has worked hard to improve his communication skills and to demonstrate his abilities. In 2006, he was promoted to a records processor and is currently responsible for providing support to the attorneys in EDC. In addition, David is a part-time student at Phoenix Community College. He is working towards an Associates Degree in Criminal Justice and is hoping to graduate during the 2009 Spring semester. David hopes that the experience he gains from this office combined with his education will make it possible for him to attain a position with the Federal Government as an undercover DEA officer.

We are all very proud of David and his accomplishments. He has overcome huge obstacles and achieved so much in such a short period of time. He has adapted to a new culture, made a new home for himself, and is living the American dream. David is a wonderful person with many outstanding qualities and we are confident that he will achieve his goals and continue to succeed in all that he attempts.

Editors' Note: Defense attorneys often struggle with how far they should "push" clients to enter into favorable plea agreements. The following two articles, which originally ran in *for The Defense* in 1999, provide insightful perspectives on this topic.

What We Could Teach The Cops About Coercion

By Cathy Kelly, Director of Training, Missouri State Public Defender System

Editors Note: This article originally appeared in the *The Champion*, May 1998, and is reprinted with the author's permission.

Last year Judy Clarke, in her President's Column, posed the question, "How far does a lawyer go in advising a client to plead guilty?" Her column was borne of a case where the lawyer clearly had not gone far enough, having failed to even convey a proffered plea bargain to his client. Yet at the end of her column, Judy suggests we look ourselves in the mirror and examine the *other side* of that coin as well - "do we often push too hard for a guilty plea?" Oh, yes.

We call it "the hammer." In the hands of some, it is wielded with finesse of a sculptor's chisel, in others with the sheer, blunt force of a sledgehammer. But however smooth the technique, if the police did it, we'd be screaming coercion. And we'd be right.

Somewhere, somehow, many of us (myself included!) have lost sight of our role as criminal defense attorneys. We've moved out of the arena of "legal advisor and advocate" into that of "guardian *ad litem* at large." We have taken it upon ourselves to not only decide what is in the best interest for each of our clients, but to force that decision upon them whether they like it or not.



And why not? Face it, most of our clients are pathetic, dysfunctional people! Poor in both money and education. Sadly lacking in judgment and analytical skills. Chemically dependent. Developmentally disabled. Scarred from simply trying to survive amid the war zone that is their neighborhood or family. If they could make decent decisions on their own, they wouldn't be in the mess they are now! Aren't *we* much better equipped to decide what is best for them? We with our years of education and experience navigating the waters of the criminal justice system? We *know* what is best for them. Isn't it our duty to save them from their own blindness? To run all the hard, cold numbers, and come up with the future that offers the lowest total? And if they don't get it, can't see it, absorb it, recognize that we are right - do we just walk away and let them go blindly on to disaster? Of course not! We hammer away and hammer away - with our chisel or our sledgehammer or something in between- until, *eventually*, we succeed in twisting even the recalcitrant around to our way of seeing the world. And we can close our files comfortable that we have served our clients well. But have we?

I was very good with the hammer. The chisel was my style, wielded with lots of finesse. I prided myself on being a persuader. Soft, soothing, persistent - the "good" cop, concerned about the well-being of my client, who just wanted to "make it all go easier on them." With very few exceptions, I succeeded in getting my clients to plead whenever I thought they should. I even began teaching other lawyers my "techniques."

But I couldn't quite shake that beaten look in the eyes of those clients whom I'd pushed and hammered away at, wearing them down into a plea I knew they didn't really want, until they'd simply given up. I took something from those people they will likely never get back. I took their trust and used it, manipulated it, to my vision of what was right for them; and their own needs, wants, desires, be damned. I stripped many of them of the last shreds of their dignity, pride, and self-respect in the name of the almighty total number. Oh, they left the courtroom with less years, but they also left with less to sustain them through those years. I was wrong. And they were wronged by my actions.

Ticking of a Clock

Our problem is not that we mean our clients harm. Just as most benevolent dictators, we have the best of intentions. The problem is simply that we evaluate the quality of our clients' futures based solely upon *numbers* - years, months, weeks or days. Time is the only currency we recognize. What we have lost sight of is the simple truth that life is more than days, weeks, months or years in which it is measured. No matter how pathetic or dysfunctional. No matter how dependent or disabled or scarred. *To us and to our clients*, life is more than the ticking of a clock.

It's maintaining your self-respect and the right to self-determination. For some it's about refusing to bow down or beg for mercy *even* when they're outnumbered and know full well how the battle will end. For some it's simply about a deep, overwhelming human need to prove they have *some, tiny* semblance of control in the face of an onslaught hundreds of times more powerful than themselves. For others, it's about having a voice, a say, a right to be heard and a *chance* to be understood, no matter how small. It's about hope, and family, dignity and pride. Sometimes it's simply about holding on to who you are. None of these things fits into any sentencing grid or equation. That doesn't make them any less real. Or any less important.

Good Cop/Bad Cop

Forget the client for a minute. Let's just talk about us. The fact is, playing God is extremely stressful! When we appoint ourselves as the deciders of our clients' fates, we assume a *tremendous* burden. Not only must we agonize over what is in the best interests of this person we know appallingly little about, there's also this little issue of forcing another human being to bend to your wishes against their own will. Coercion is an *exhausting* endeavor, no matter what the context, whether you're playing the good cop or the bad one. It drains a tremendous amount of energy. And when it becomes a way of life, a regular part of our practice, we wind up burning ourselves out and not even realizing why. We simply no longer have the energy for the fight any longer.

I was *amazed* at the reduction in my stress levels when I finally gave up responsibility for my clients' choices. I've also learned I'm not alone in that discovery! It is so much easier to simply lay out the choices, give your advice, and then stand back and let the persons who will have to live with those consequences make their own decisions. I now explain to all my clients that I recognize people have different issues and that I *don't* know what's most important to them. I explain that I have some clients who simply want to get out of their situation with the least amount of time, to put it behind them and move on with their lives as quickly as they can. But I also acknowledge that I have other clients for whom other things are more important - call it principle or pride or some other issue in their life that makes it more important to them that they fight this charge all the way, although they risk a whole lot more time by doing so. And I explain to my clients that the choice is theirs.

I make sure they *understand* that risk. And I tell them that if they're going to fight this thing for the sake of principle, they need to feel strongly enough about that principle that at the end of the trial when they're facing that life sentence, they're still sure they did the right thing. But then I shut up. I back off. I answer questions, if asked, and I try to let them choose their own course. (And you

know? I was *amazed* at how many more of them wound up following my advice on their own accord without my even *having* to push, or prod, or persuade. I guess people aren't all that different than most animals. They're much more willing to follow you if they don't feel they're being forced.)

Make It Their Choice

All I ask is that you give it a try. Put on a new pair of glasses and take a look at your clients through a new lens. They do not come to us seeking a keeper or a parent or a guardian. They come seeking a voice. Be their advisor. Be their voice. Be their advocate. But do not dismiss their pride, their need to exercise control or to fight for their own self-respect, as simply blind stupidity. The choice is truly theirs. Let's let them make it.



The Duty of Counsel to Advocate for Client Acceptance of Plea Bargains

By Edward F. McGee, Defender Attorney, Appeals

In the present climate of mandatory sentencing and "truth" in sentencing, many prosecuting agencies have decided to turn the screw yet again by placing restrictions on plea bargaining. Examples include barring defense interviews of crime victims, conditioning offers on the agreement of defense counsel to file no pretrial motions, limited charge or sentencing bargains to a "single benefit", or imposing plea cutoff deadlines. These disagreeable practices have caused defense lawyers to conclude that the plea bargaining process is often a waste of time and that the satisfaction to a defendant of having "gone down swinging" may outweigh the slight benefits offered by the state. A recent article in this very publication advocated this approach.¹ What is worrisome, however, is the conclusion of some commentators that in persuading a client to plead out, the lawyer is substituting his will for that of the defendant and that this may constitute a corrupt and immoral act. This, reportedly, is the philosophy of Judy Clarke, counsel for the "Unabomber", Ted Kaczynski, who, as we all know, copped a plea.

This article will summarize the obligations of counsel to present and explain the government's offer, and will explore recent case law holding that there exists a duty for counsel to advocate for his client's acceptance of a plea bargain, even when the client insists he will accept no offer.

The duties of counsel, prior to pleading a client guilty, are set forth comprehensively in the ABA Standards for Criminal Justice, Chapter 4: the Defense Function.² Reduced to their essence, the Standards require that in dealing with a single client,³ counsel should:

1. Explore non-trial disposition of the defendant's case, as through diversion;⁴
2. Keep the defendant advised of the progress of plea negotiations;⁵
3. Promptly communicate and explain all significant proposals made by the prosecutor;⁶
4. Refrain from recommending acceptance of a plea until counsel has become appropriately familiar with the facts and applicable law;⁷
5. Candidly advise a defendant of his prospects, both by plea and at trial;⁸
6. Refrain from over or understating the risks, hazards or prospects so as to exert undue influence on the defendant's decision to plead;⁹ and
7. Leave for the defendant, after full consultation, the decision whether to accept the plea agreement.¹⁰

These standards were the product of decades, if not centuries, of philosophizing about the role of counsel.¹¹ Since their creation, however, we have seen develop a concern with victims' rights and an obsession with speedy disposition which has reduced many of these standards to little more than *desiderata*.¹²

Into this mix, the Second Circuit has now injected an additional agreement: the requirement that in a serious case, with no plausible defense, counsel must affirmatively advocate for client acceptance of the state's offer. In *Boria v. Keane*,¹³ the Second Circuit granted habeas relief to a defendant who had insisted on trial because he could not bear the humiliation of having his children hear him admit to narcotics offenses. The Second Circuit found defense counsel ineffective for allowing his client to reject the government's offer without having given him any advice on the wisdom of doing

so. The *Boria* court looked at EC 7-7 of the ABA Model Code of Professional Responsibility (1992) which provides that:

A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable*. (Emphasis added [by the Court of Appeals]).

The *Boria* court also quoted approvingly from Anthony G. Amsterdam in TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988) in which the author observes:

The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. The decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, against the client's will. [citation omitted] But counsel may and *must give the client the benefit of counsel's professional advice on this crucial decision*. § 201 at 339 (the word "must" was emphasized by the author; otherwise the emphasis is [that of the Court of Appeals])¹⁴.

Boria does not stand alone. The courts in all jurisdictions addressing it have held that failure of counsel to advise a client of the adverse consequences of plea bargain rejection is just as ineffective as failure to advise of the consequences of acceptance.¹⁵ In all these cases, the reviewing courts found that failure to advise a defendant of the consequences of rejection met both the "deficient performance" and "actual prejudice" prongs of *Strickland v. Washington*.¹⁶

The more difficult question for many courts has been what remedy to apply. In *Boria*, the Second Circuit ordered the conviction to stand, but released the defendant from prison due to New York state court procedural peculiarities and the fact that the defendant had already served twice as much time as the original plea offer contemplated. In cases where defendants have, through the incompetence of earlier counsel, been forced to accept unfavorable plea terms with subsequent counsel, some courts have ordered resentencings, presumably to give effect to the earlier offer.¹⁷ *In re Alvernaz*,¹⁸ however, was a case where the defendant had gone to trial after rejecting an offer, and it took a different tack. There, because the defendant had never unequivocally indicated that he would have accepted the offer if counsel had recommended it, the California Supreme Court offered the state options: it could either take the defendant to trial again, or re-extend the original plea offer.

No appellate decision involving a failure to advocate for plea acceptance has come to the author's attention in which a defendant serving a substantial sentence has had a higher court vacate a conviction and order specific performance, requiring the prosecution to completely re-extend the original offer. That, however, was the remedy ordered in *United States v. Blaylock*,¹⁹ a decision in which counsel had failed to communicate any offer at all, and in the situation where counsel has failed to "talk turkey" to his client, it can be fairly argued that no offer was ever effectively communicated in the sense contemplated by the ABA Standards and related case law.

For trial counsel, failure to bring all his experience and knowledge to bear in directing the defendant to accept a plea offer can have serious implications. The author is aware of two matters in the past two years in Maricopa County where such a claim has been prosecuted in Rule 32 post-conviction relief proceedings. One case was a first degree murder prosecution where the defendant claimed that his lawyer had not adequately explained the offer. The other case was a child molesting prosecution in which the defendant asserted that his lawyer was chronically intoxicated and that because of this, he had no confidence in his advice that he should take the plea. In the murder case, the trial court set aside the conviction and directed the state to re-extend a plea offer of second degree murder. They did not find that counsel had failed to advocate for plea acceptance, but that he had failed to understand that the offer was not contingent upon acceptance by a

codefendant and that he didn't really consider that there was anything viable on the table. In the child molesting prosecution, the claim was disallowed, ostensibly because the trial court was not persuaded that the defendant would have accepted the plea even if his lawyer had not been a drunk. Needless to say, regardless of whether one's client claims his lawyer has not understood that a plea offer was available, or whether his client didn't have confidence in his advice because of his drinking problems or even where counsel simply fails to use all his skill and experience to persuade a defendant of the folly of plea bargain rejection, the result for trial counsel is the same: professional embarrassment, possible bar discipline and theoretically, malpractice liability.²⁰ Defending against such a claim can also consume a lot of time. Worst of all, perhaps, for the institutional public defender, is reinforcement in the client community of the common suspicion that appointed lawyers are indifferent to the fate of their clients. All of these are things counsel can avoid by the simple expedient of accurately assessing a client's prospects and the value of the plea offer and then presenting the offer to the client in no uncertain terms, if that is the only realistic option the defendant has. Pleading a reluctant client out to a mountain of time in a tough case can be emotionally wrenching and physically exhausting. Trial, in comparison, is easy. Nevertheless, our fiduciary obligation to our clients requires that we do this. Just ask Judy Clarke.²¹

(Endnotes)

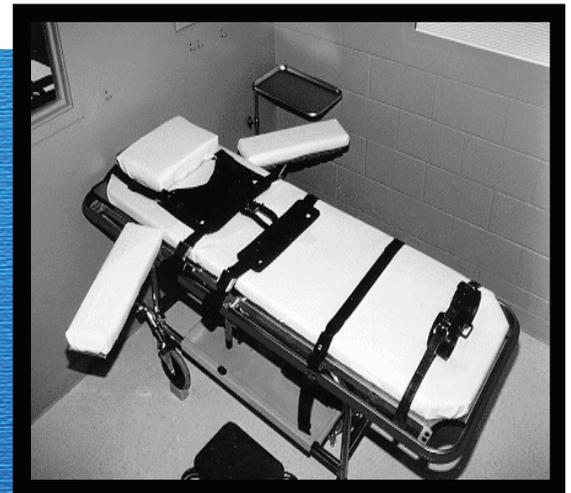
1. Grant, *Go to Trial*, 9 FOR THE DEFENSE, Issue 1, 4 (1999).
2. ABA Standards for Criminal Justice, Chapter Four: The Defense Function (Approved February 11, 1991).
3. Two standards deal with the responsibility of a lawyer toward other clients, which is a topic beyond the scope of this article. Those standards are 4-6.2(d) [barring concessions favorable to one client which are detrimental to another client in another matter] and 4-6.2(e) [obliging counseling representing multiple clients in the same case to refrain from making aggregated agreements without fully informing each client of the nature of the claims or pleas and obtaining the consent of each client, presumably as to the entire package].
4. Standard 4-6.1(a)
5. Standard 4-6.2(a)
6. Standard 4-6.2(b). *See also*, *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1994).
7. Standard 4-6.1(b)
8. Standard 4-5.1(a)
9. Standard 4-5.1(b)
10. Standard 4-5.2(a)(ii).
11. Cicero wrote extensively to this friend and fellow lawyer, Trebatius, on the duties of lawyers to clients. Wilkin, *ETERNAL LAWYER* (1947), 235.
12. Consider, for example, the now almost humorous hand-wringing in *State v. Draper*, 162 Ariz. 433, 784 P.2d 259 (1989), where the Arizona Supreme Court intimated that while a plea agreement conditioned upon waiver of a victim interview might not be a *per se* violation of public policy, it could, in certain cases interfere with the defendant's due process right to prepare a defense.
13. *Boria v. Keane*, 99 F.3d 492 (2nd Cir. 1996).
14. *Boria*, *supra*, 99 F.3d at 496-497.
15. *In re Alvernaz*, 2 Cal 4th 924, 934, 830 P.2d 747, 749 8 Cal Rptr.2d 713, 719 (1992); *see also*, *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989), reinstated, 726 F.Supp. 1113, *aff'd*, 940 F.2d 1000 (6th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 915 (1992); and *Lewandowski v. Makel*, 949 F.2d 844 (6th Cir. 1991).
16. *Strickland v. Washington*, 465 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.
17. *E.g.*, *Carmichael v. United States*, ___ F. Supp. ___, 1998 LEXIS 20313 (Filed 12-16-98).
18. *In re Alvernaz*, *supra*, 2 Cal.4th 924, 830 P.2d 747, 8 Cal.Rptr.2d 713 (1992).
19. *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1994).
20. Malpractice liability, in this context, however, as my colleague James Kemper is wont to point out, is attenuated by the fact that the remedy for criminal malpractice is the granting of post-conviction relief, which corrects the error and minimizes damages, except perhaps for attorney's fees, in the event that the defendant retained counsel to handle his post-conviction relief claim.
21. Ted Kaczynski, who was notoriously insistent on going to trial, has reportedly filed a post-conviction challenge to his guilty plea, asserting that it was coerced. *Washington Post*, Apr. 26, 1999, Section A, at 2.

SAVE THE DATE!

Death Penalty 2008 Annual Conference December 4 & 5, 2008

**Presented by Federal Public Defender, Maricopa
County Public Defender, Office of the Legal
Defender and Office of Legal Advocate**

*This seminar is designed to meet
the Arizona Supreme Court C.L.E.
requirements for criminal defense
attorneys engaged in death pen-
alty litigation under Rule 6.8, AZ
Revised Criminal Procedures.*



**Phoenix Convention Center
Phoenix AZ**

**Registration and Agenda
will follow in the next few
weeks.**

**Questions? Contact Celeste
at 602-506-7711 X37569**

Top Ten Things You Should Know About Probation

By Richard Randall, Defender Attorney

In the four years I have been with the Public Defender's Office, I have processed several thousand probation violation cases. In those cases I have been surprised by some of the basic concepts involved in probation. I believe we may be doing a disservice to our clients by not making certain that they know what they are getting into when they accept a plea agreement resulting in probation. The following are the top ten things I believe our clients should know in order to make an informed decision concerning probation.

1. Your probation officer is not your mother.
 - ▶ Probation officers do not necessarily care if you are successful. They will not watch your back and they frequently do not believe you. Probation officers are changed frequently and a forgiving probation officer will oftentimes be replaced by an officer who will hold you absolutely accountable.
2. Probation is punishment not treatment.
 - ▶ Probation officers are not therapist or counselors. Probation is intended as a punishment and should be considered in light of the fact that probation keeps you out of prison. You cannot expect or demand favorable treatment because of your age, family, emotional problems, or addiction to drugs. Your family cannot demand or expect favorable treatment because of your age, family, emotional problems or addiction to drugs.
3. Payments are not the most important thing.
 - ▶ You will not be revoked for not making payments if you do everything else right on probation and you are not able to make the payments. Probation is not about paying the government to stay free.
4. Probation officers never forget.
 - ▶ What you do wrong on probation stays in your file. If a Petition to Revoke is filed, everything you've done wrong will be brought back. It does not matter if your P.O. already gave you a consequence for a violation.
5. You get no credit for good time on probation. Probation can ultimately result in more prison time than had you gone to DOC at the outset.
 - ▶ The months that you have done well on probation do not count as back time if you are revoked to prison. If you get violated and are reinstated with jail, you could ultimately spend more time incarcerated than you would have spent had you gone to DOC at the outset. Commissioners generally apply your probation term jail time to only one of your offenses. If you ultimately go to prison and your sentences are served consecutively, you will serve all your time on the sentence to which your probation related jail time was not applied.

6. The success rate is discouraging.
 - ▶ There are about 24,000 people on standard probation and about 1,500 on intensive probation. About 60% of standard probationers complete probation. About 40% of intensive probationers complete probation. (Maricopa County Adult Probation Department 2007 Annual Report)
7. Intensive Probation is house arrest.
 - ▶ While on Intensive Probation you will be required to follow a schedule. You will have no personal time to do as you please. Your surveillance officer can come by your home at 2:00 a.m. to check on your whereabouts.
8. Probationers are presumed guilty.
 - ▶ There is generally no bond for probationers who are arrested on new charges or on a Petition to Revoke. If you challenge a Petition to Revoke, guilt is determined by a preponderance standard. There is a bias towards guilt shared by the State and by the Court. Hearsay is admissible in Probation Court.
9. Probation is expensive.
 - ▶ Probation Service Fees are usually \$50 per month. In addition, there are substance abuse counseling fees, payments on fines and restitution, and drug testing fees. Often, monthly costs exceed \$100 and can be much more.
10. Lifetime probation is no bargain.
 - ▶ It is very difficult for a defendant to ever get off of lifetime probation. Youthful offenders are likely to violate lifetime probation at some point and end up in prison.
 - ▶ Young defendants who plead guilty in “close” sex cases just to guarantee they are not sent to prison are at an extremely high risk to be violated. In addition to all of the above, “close” case sex offenders are required to attend counseling sessions aimed at admissions and attended by predators. Their types of employment are limited, employers are contacted and their relationships are controlled.



Workforce Development Programs Designed to Assist Ex-Offenders

Tammy Velting, Mitigation Specialist



Arizona Women's Education and Employment (AWEE) has two programs to assist ex-offenders transition into the workplace and reintegrate back into the community after a period of incarceration. Both programs offer career counseling, work readiness training, case management, relapse prevention support groups for those with substance abuse issues, assistance with finding and keeping a good job, and help with transportation and childcare expenses. The goals of their programs are to offer the support necessary to help the clients find and retain employment at a livable wage and reduce recidivism. The programs are Paths to Living Free and Choices for Changed Lives.

The Paths to Living Free program assists male and female clients age 18 and older. They must have been sentenced as an adult and be incarcerated for a minimum of four (4) months in jail or state prison. The client must contact AWEE within six (6) months of their release from custody in order to be eligible. AWEE will assist the client for nine (9) months once accepted. No violent or sex offenders are accepted in this program.

The Choices for Changed Lives program targets men and women 18-29 years old who are being released from the state or federal adult prison system. AWEE is one of only five organizations in the country to receive federal funding to this program. AWEE has partnered with five agencies in the community to be direct service providers to the clients. The providers are paid based on performance so if the client does not achieve certain goals within the specified time frame, the provider will not get paid. Consequently, the providers are highly motivated to assist the clients. Although sex offenders are not eligible for this program either, Choices for Changed Lives will accept violent offenders. The client must contact AWEE within sixty (60) days of their release from prison. Once accepted, clients are eligible to receive services from this program for (18) months.

Clients need to contact AWEE to schedule an intake assessment in order to be accepted into either of the programs. Their phone number is 602-223-4333 and the office is located in central Phoenix. Information on both programs is also available on their website, www.AWEE.org.

Sponsored by Maricopa County Public Defender

A Realistic Guide to Cross-Examination and Challenging the Tainted Witness

Presented by Ira Mickenberg
Nationally known Criminal Defense Lawyer and Defender Trainer

Monday, November 17, 2008

Session I: Cross-Examination

- A reliable method of impeaching witnesses, with prior inconsistent statements, omissions, prior bad acts, and past convictions.
- How to control the runaway witness.
- A simple technique for preparing your cross-examination and making sure it advances your theory of defense.
- How to ask effective leading questions in a way that neutralizes prosecution objections

Session II: Taint Hearings

- Recognizing the most common situations in which the State irreparably taints witnesses before trial--child witnesses, identification cases, sex cases.
- How to persuade a judge and/or jury that the State's witness has been tainted.
- Effective motion practice to preclude the tainted witness from testifying.
- Understanding the science of suggestiveness

Parking -- Wells Fargo Parking Garage

Located north of the Conference Center on 2nd Ave and Van Buren, the cost is only \$3.00 when validated by the Conference Center.

Parking -- Wells Fargo Plaza

This garage is attached to the Conference Center and is \$9.00 all day (the Conference Center will not validate this parking)

Wells Fargo Conference Center
100 W. Washington
Phoenix, AZ

Near the corner of 1st Ave/Washington

Check In/Continental Breakfast:
8:30am -- 9:00am

Session I
A Realistic Guide to Cross-Examination
9:00am -- 12:00pm

Lunch On Your Own
12:00pm -- 1:30pm

Session II
Challenging the Tainted Witness
1:30pm -- 4:30pm

Registration Fees

No fee for Public or Legal Defender or Legal Advocate.

Contract Counsel \$100.00

Private Counsel \$125.00

Registration Deadline

Friday, November 7, 2008

See below for contact information

May qualify for up to 5.5 hours CLE

If you would like to register or if you have questions, please contact Celeste Cogley at 602-506-7711 X37569 or via email cogleyc@mail.maricopa.gov--Send Checks or Money Orders to

Maricopa County Public Defender, DTJC, 620 W. Jackson Suite 4015, Phoenix, AZ 85003

Jury and Bench Trial Results

July 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
7/3 - 7/8	Jakobe	Grant	McAdams	CR07-110701-001DT TOMOT, F3	Guilty in absentia	Jury
7/7 - 7/17	DeWitt Brazinskas Leigh	Harrison	Anderson	CR07-166556-003DT 4 cts. Kidnapping, F2D 4 cts. Theft by Extortion, F2D Smuggling Humans, F4 Conspiracy to Smuggle Humans, F4	Guilty - all counts	Jury
7/9 - 7/14	Reece	Donahoe	Losicco	CR05-124753-001DT POND f/s, F2 POM f/s, F4 PODD, F4	Guilty of POND f/s; Not Guilty of POM f/s - Guilty of lesser included POM; Guilty of PODD	Jury
7/15 - 7/17	Rosenberg Davis Rankin Ralston	Grant	Kuwata	CR07-179747-001DT Unlawful Flight, F5	Guilty	Jury
7/21 - 7/23	Fischer	Duncan	Marquoit	CR07-112160-001DT Taking ID of Another, F4 Forgery, F4	Guilty	Jury
7/28 - 7/29	DeWitt Browne	McMurdie	Lowe	CR07-008735-001DT Unlawful Imprisonment, F6 Aggravated Assault, F6 DV	Not Guilty	Jury
7/30 - 7/31	Turner Rankin	Brnovich	Marquoit	CR08-048242-001DT Forgery, F4	Not Guilty	Jury
Group 2						
7/1	Steinfeld	Whitten	Allegre	CR07-163609-001DT Agg. Assault, F6 Resisting Arrest, F6 Escape 3, F6	Directed Verdict on Agg. Assault, Guilty of Resisting, Arrest and Escape	Bench
7/7 - 7/15	Taradash Ryon Souther Del Rio	Whitten	Collins	CR06-005113-001DT Negligent Homicide, F4D	Guilty Negligent Homicide, F4 ND	Jury
7/14 - 7/22	Potter Urista Springer	Brnovich	Sponsel	CR07-009032-001DT Agg. Assault, F2D TOMOT, F3 Agg. Assault, F6 Resisting Arrest, F6	Guilty all counts	Jury
7/15 - 7/17	Colon	Blomo	Robinson	CR07-149290-001DT TOMOT, F3	Guilty	Jury

Jury and Bench Trial Results

July 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 2 (Continued)						
7/16 - 7/28	Roskosz Thompson <i>Del Rio</i>	McMurdie	Murphy	CR07-005055-001DT Murder 2, F1D Agg. Assault, F3D	Not Guilty of Murder 2 Guilty of lesser offense, Disorderly Conduct w/Weapon, F6D on Count 2	Jury
7/23 - 7/28	Steinfeld Urista	Steinle	Thomas	CR08-101271-001DT Unlawful Discharge of Firearm, F6D	Guilty	Jury
7/23-7/24	Scott Reilly	Blomo	Gilla Todd	CR08-109176-001DT Unlawful Imprisonment, F6 Assault, M1 Criminal Damage, M1	Guilty on Unlawful Imprisonment and Assault; Criminal Damage Dismissed day of trial	Jury
Group 3						
7/1 - 7/3	Mata <i>Williams</i>	Donahoe	Hernacki	CR07-178684-001DT Agg. Assault, F6 Disorderly Conduct, M1	Not Guilty - Assault Direct Verdict - Disorderly Conduct	Jury
7/7 - 7/8	Clemency Spizer <i>Browne</i> <i>Del Rio</i>	Kemp	Basta	CR07-008720-001DT Murder 2nd Deg., F1D Agg. Assault, F3D 3 cts. MIW, F4 POM, F6	Guilty of 1 ct. MIW and POM; All other charges dismissed day of trial	Jury
7/15 - 7/16	Roach Schreck	Holding	Otis	CR07-174494-001DT POM, F6	Guilty	Jury
7/21 - 7/28	Spurling Sikora <i>Kunz</i>	Spencer	Church	CR08-048158-001DT Attempted Theft, F4 3 cts. Theft of Credit Card Obt Fraud Means, F5	Att Theft-dismissed w/o prejudice day of trial Guilty on all other counts	Jury
7/21 - 7/23	Mata <i>Williams</i>	Mroz	McAdams	CR08-112053-001DT TOMT, F3	Guilty	Jury
7/29 - 7/31	Sanford Delatorre <i>Brown</i>	Jones	Eidemanis	CR06-012844-001 DT Child/Vulnerable Adult Abuse, F4	Guilty of Lesser, F5	Jury
6/23 - 6/24	Jackson <i>Browne</i>	French	Arino	CR07-115203-001DT Agg. Assault, F6	Not Guilty	Jury
Group 4						
6/23 - 7/3	Barnes	Udall	Otis	CR07-030927-001SE Sexual Conduct w/Minor, F2 2 cts. Molestation of Child, F2	Guilty	Jury
7/2	Akins	Sanders	Judge	CR06-148159-001SE Failure to Return Vehicle, F6	Directed Verdict	Bench

Jury and Bench Trial Results

July 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 4 (Continued)						
7/7 - 7/9	Ditsworth	Abrams	Hymas	CR07-169036-001SE Agg. Harassment, F6	Guilty	Jury
7/11 - 7/15	Brink	Contes	Bartz	CR07-125789-001SE Agg. Assault, M1	Guilty	Bench
7/14 - 7/16	Braaksma Salvato	Udall	Micflikier	CR07-031135-001SE TOMOT, F3	Guilty	Jury
7/21 - 7/24	Dehner	Abrams	Fuller	CR07-178699-001SE Armed Robbery, F2D 2 cts. Agg. Assault, F3D	Armed Rob.-Not Guilty Agg. Assault-Not Guilty Agg. Assault-Dismissed by Prosecution	Jury

Legal Defender's Office

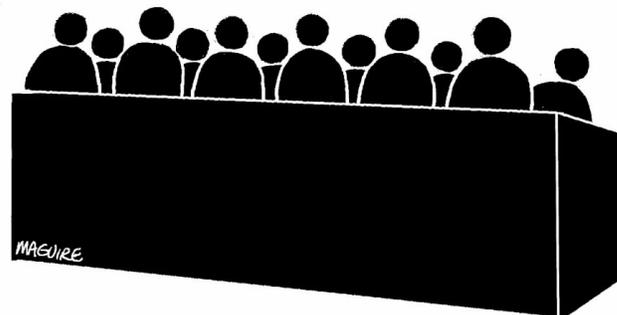
Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
7/10	Cuccia Horrall	Mahoney	McAdams	CR06-178884-002DT Unlawful Use of Means of Transportation, F5	Directed verdict of acquittal	Bench
7/15	Ross	Brain	AG	JD16564 Dependency Trial	Dependency Found	Bench
7/17	Bushor	Keppel	AG	JD507034 Severance Trial	Severance Granted	Bench
7/17	Jolly	Jones	Diekelman	CR2007-155688-001 POM, F6 PODP, F6	Guilty	Bench
7/18	Bushor	Keppel	AG	JD50715 Dependency Trial	Dependency Found	Bench
7/25	Bushor	Akers	AG	JD506904 Guardianship Trial	Guardianship Granted	Bench

Jury and Bench Trial Results

July 2008

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
7/8 to 7/10	Tucker	Hoffman	CR07-139968-001-DT 8 Cts. Sex Conduct W/Minor, F2 Child Molestation, F2 Sexual Abuse, F3	Change of Plea; Sexual Conduct W/Minor and Att. Child Molestation W/ Lifetime Prob.	Jury
5/27 to 7/3	Glow Mullavey	Steinle	CR05-009256-001-DT 3 Cts of DCAC Intentional Child Abuse, F2	Ct. 1-Lesser-Neg. Child Abuse; Ct. 2 Lesser Neg. Child Abuse; Ct. 3 Lesser Reckless Child Abuse	Jury
7/16 & 7/23	Lunde Canecchia	Bergin	JD15399 Severance	Under Advisement	Bench
7/15 to 8/1	Koestner Mullavey Sinsabaugh	Ditsworth	CR07-109517-001-DT st Deg. Murder, F1 Agg. Asst., F3 Drive By Shooting, F2 Shooting Occupied Structure, F2	Guilty of 2nd Deg. Murder; Agg. Asst.; Drive By Shooting; Shooting at Occupied Structure	Jury
7/16	Owsley Marrero	Hannah	JD15982; Neglect	Temporary Custody Affirmed	Bench



Maricopa County
Public Defender's Office
620 West Jackson, Ste. 4015
Phoenix, AZ 85003
Tel: 602 506 7711
Fax: 602 506 8377
pdinfo@mail.maricopa.gov

for The Defense

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

