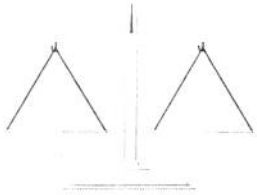
for The Defense



Volume 8, Issue 11 ~~ November 1998

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

CONTENTS:

When the Verdict is Contrary to the Weight of the Evidence, Thirteen Just May Be Your Lucky Number — Page 1

What We Could Teach the Cops About Coercion — Page 4

As Quad A Goes, So Goes the System? — Page 6

Self Defense and the Unintended Victim — Page 8

Investigator's Corner — Page 10

Arizona Advance Reports — Page 11

Selected 9th Circuit Opinions — Page 12

Bulletin Board — Page 13

October Jury Trials — Page 14

WHEN THE VERDICT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE, THIRTEEN JUST MAY BE YOUR LUCKY NUMBER

By James R. Rummage
Deputy Public Defender - Appeals

Every once in a great while it happens. Although the trial judge has denied your Rule 20 motion, and the jury convicted your client swiftly, you can tell that the judge is not entirely comfortable with the verdict. Maybe he thinks there's a chance your client might really be innocent, or maybe he thinks the case warranted conviction on the lesser offense instead of the greater. Maybe he has a lingering doubt that just won't go away. Whatever is the case, it's time for a Rule 24.1 Motion for New Trial for the reason that the verdict is contrary to the weight of the evidence. As a practical matter, this kind of motion only has a real possibility of success when the judge himself has residual doubts about the verdict. A Motion for New Trial for the reason that the verdict is contrary to the weight of the evidence allows the judge to act as the "thirteenth juror" and to, in essence, "hang" the jury. Unfortunately, though, some judges are unfamiliar with the standard they should apply when ruling on such a motion and, unaware of the broad power they have to grant such a motion, they avoid battling with their conscience by deferring to the jury's decision. This is legally wrong, and it is the trial lawyer's duty to educate the judge as to the proper standard for evaluating a Motion for New Trial for the reason that the verdict is contrary to the weight of the evidence.

It is provided in Arizona Rules of Criminal Procedure, Rule 24.1(c)(1):

> c. Grounds. The court may grant a new trial for any of the following reasons:
> (1) The verdict is contrary to law *or to the weight of the evidence* . . . .

Subsection (c)(1) provides two different bases upon which the trial court can grant a new trial. The first — "the verdict is contrary to law" — is essentially the same as a motion for judgment of acquittal. However the second basis — "contrary to the weight of the evidence" — is quite different, and provides the trial judge with infinitely greater discretionary power to grant a new trial.

All too often, a trial judge will deny a Motion for New Trial based on the claim that the verdict is contrary to the weight of the evidence by stating that he or she has looked at the evidence again, that it clearly supports the jury's verdict, and that there's nothing he or she can do

(cont. on pg. 2) ☞

about it. This may ease a judge's conscience, believing that they do not have the power to second-guess the jury, but what the judge has done is to confuse "*weight* of the evidence" with "*sufficiency* of the evidence." When the judge misunderstands his duty on this motion, you are doomed from the start. You must clarify for the judge the difference between the two standards listed in Rule 24.1(c)(1).

The method by which a trial court must determine whether to grant a new trial upon a claim that the verdict is contrary to the weight of the evidence is much different than the test used to determine whether to grant a motion for judgment of acquittal. As the Court of Appeals explained in *State v. Clifton*, a trial court's only power when ruling on a motion for judgment of acquittal is to determine whether it was possible for a reasonable man to conclude from the evidence that the defendant is guilty beyond a reasonable doubt.[1] In making that limited determination, the trial court must defer to the jury's right to determine credibility, weigh the evidence, and draw reasonable inferences therefrom.[2] In ruling on a motion for judgment of acquittal, the trial court cannot draw its own conclusions from the evidence, but must view the evidence in the light most favorable to the state, resolving all reasonable inferences in favor of the state.[3]

"When deciding whether the verdict is contrary to the weight of the evidence, the trial court is not required to defer to what the jury must have concluded about the evidence, but is instead free to second-guess the jury, if the court disagrees with the jury's factual conclusions."

The restrictions listed above do not, however, apply when the court is called upon to determine whether the verdict is contrary to the weight of the evidence. When considering a Motion for New Trial based on a claim that the verdict is contrary to the weight of the evidence, the trial court itself not only may, but should, "weigh the evidence, and act to prevent a miscarriage of justice even though . . . there is substantial evidence to support the verdict."[4] When deciding whether the verdict is contrary to the weight of the evidence, the trial court is not required to defer to what the jury must have concluded about the evidence, but is instead free to second-guess the jury, if the court disagrees with the jury's factual conclusions. The above quote from *Clifton* makes it crystal clear that the trial judge is free to grant a new trial based on the weight of the evidence even when the case would not warrant a judgment of acquittal: A motion for new trial may be granted "*even though . . . there is substantial evidence to support the verdict.*"

In *State v. Thomas*, in discussing a Motion for New Trial which argued that the verdict is contrary to the weight of the evidence, the Arizona Supreme Court stated, "The trial judge, so far as this duty is concerned, sits as a thirteenth juror, and he, as well as the jury, must be convinced that the weight of the evidence sustains the verdict, or it is his imperative duty to set it aside . . . ."[5] In the same case, the Arizona Supreme Court cited with approval the proposition that, "In a criminal case the trial judge has an even greater duty than in a civil case to see that the trial is just. The verdict must be supported by proof beyond a reasonable doubt."[6] In other words, not only must the jury be convinced of the defendant's guilt beyond a reasonable doubt, but the judge must be convinced as well. The judge, sitting as the thirteenth (or ninth) juror, can "hang" the jury, and give the defendant a new trial.

The Court of Appeals explained in the *Clifton* case the reason for the distinction between the standards for judging "weight of the evidence" versus "sufficiency of the evidence." When granting a motion for judgment of acquittal, the court explained, the trial court is making a final disposition of the case, thus such a motion should not be granted unless there is no evidence which would allow a reasonable person to conclude the defendant is guilty. "On the other hand, in setting the verdict aside the Court merely grants a new trial and submits the issues for determination by another jury. It is appropriate that in the latter instance, the court should have wide discretion in the interest of justice."[7] This is something trial attorneys should emphasize to the trial court: If a motion for new trial is granted because the verdict was contrary to the

(cont. on pg. 3) ☞

for The Defense Copyright©1998

Editor: Russ Born

Assistant Editors: Jim Haas
Lisa Kula

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

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 5th of each month.

weight of the evidence, the trial judge would not be automatically setting your client free. All the judge would be doing is giving your client a second shot at the case with a second jury. As a practical matter, your client might also receive a second shot at a plea bargain, if appropriate.

In the *Clifton* case, the trial court erroneously believed that the motion for new trial was based on the same insufficiency of the evidence claim which had been presented in the Rule 20 motion for judgment of acquittal.[8] This error is still regularly committed by trial courts today. In addition, judges often fail to weigh the evidence themselves, as called for by a motion for new trial based on the weight of the evidence. While declining to weigh the evidence is appropriate when ruling on a motion for judgment of acquittal under Rule 20, it is not the approach to be taken when ruling on a motion for new trial which argues the verdict is contrary to the weight of the evidence. When deciding the latter, the trial judge should weigh the evidence himself, including decisions on credibility, and should come to his own conclusion about whether guilt has been proven beyond a reasonable doubt. If the trial judge feels that it has not been proven, or that the state has failed to prove beyond a reasonable doubt the element which distinguishes the greater offense from the lesser offense, then he or she should grant the defendant a new trial on the original charge.

"If the motion for new trial based on the weight of the evidence is to have any benefit for your client, you must be able to convince the trial judge."

Unfortunately, if you lose the motion for new trial based on the weight of the evidence, there is essentially nothing that can be done to save it on appeal. Since it amounts to a factual finding by the judge which is essentially the same as a jury verdict, the appellate courts require a showing that the evidence is insufficient before they will overturn the judge's denial of a motion for new trial based on the weight of the evidence. Thus, this sort of motion puts you in no better position on appeal than does a motion for judgment of acquittal. If the motion for new trial based on the weight of the evidence is to have any benefit for your client, you must be able to convince the trial judge.

Sometimes the state has argued that in order for the defendant to prevail in the trial court on a motion for new trial based on the weight of the evidence, he must show that the evidence was insufficient. This sort of argument is based on a misreading of the case law. Two cases often cited for this proposition are *State v. Spears*[9] and *State v. Landrigan*.[10] The essence of what those cases say on the point is, "Under Rule 24, a new trial is required only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime."[11] Prosecutors sometimes reverse the meaning of this sentence, and interpret it as saying that a showing of insufficient evidence is required before a new trial may be granted. That is not what the passage says. It simply says that the only time a new trial is *required* under rule 24 is when the evidence is insufficient. It does not prevent the trial judge from granting a new trial any time he weighs the evidence and concludes that he is not convinced beyond a reasonable doubt.

This distinction can be illustrated by analogy to the jury's duty and power when deciding whether the defendant is guilty or not guilty. In making the decision on guilt or innocence, the jurors are free to weigh the evidence, to consider the credibility of witnesses, etc., and to reach whatever conclusion they deem proper on the issue of guilt or innocence, just as the judge is free to do in deciding a Rule 24 motion on the weight of the evidence. The only limitation on the jury's decision regarding guilt or innocence is that when the evidence is insufficient to support a finding of guilt beyond a reasonable doubt, an acquittal is *required*. That obviously does not mean that the only time a jury can acquit is when the evidence is insufficient. It simply means that a jury verdict will be second-guessed by the appellate court only when there is insufficient evidence to support the finding of guilt. The same is true for a motion for new trial based on the weight of the evidence under Rule 24. When the evidence is insufficient, a new trial under Rule 24 is *required*.[12] Beyond that, the judge is free to decide whether to grant the new trial or not. All that *Landrigan* and *Spears* say is that in reviewing the trial court's denial of a motion for new trial, the appellate court can only second-guess the trial court's ruling if the evidence was insufficient to support a finding of guilt.

If there is any question about the meaning of *Spears* and *Landrigan* on this point, it can be resolved by a review of *State v. Neal*,[13] the case from which *Spears* and *Landrigan* derive the language in question. In *Neal*, the Arizona Supreme Court noted that, "Absent an abuse of discretion, we will not disturb the trial court's ruling," on a motion for new trial based on the weight of the evidence.[14] The court went on to explain, "In this context, there was an abuse of discretion warranting a new trial only if the evidence was not sufficient to allow the jury to find beyond a reasonable doubt that Neal premeditated Mary Carter's murder."[15] Thus, *Neal* makes clear that insufficiency of the evidence is the standard to be applied when evaluating the trial court's ruling on appeal. The

(cont. on pg. 4) ☞

Neal opinion does not suggest that insufficiency of the evidence is the standard to be applied by the trial judge in deciding the motion in the first instance. Neither *Neal* nor *Spears* nor *Landrigan* alters what is said in *Clifton*, *Thomas* and many other cases: In deciding whether the verdict was contrary to the weight of the evidence, the judge sits as the thirteenth juror, weighing the evidence, evaluating credibility, and deciding whether he or she is convinced beyond a reasonable doubt of the defendant's guilt.

In the vast majority of cases, a motion for new trial because the verdict is contrary to the weight of the evidence would be a vain effort. But every so often, when the judge seems uncomfortable with the verdict, such a motion could well be successful, and should be filed. Whenever such a motion is filed, the trial attorney must take it upon himself or herself to educate the trial judge on the duties and powers to be exercised in deciding such a motion. Make sure the judge understands they are more than just a rubber stamp for the jury. Make the judge face their conscience. Make the judge decide whether they personally believe the defendant is guilty, or whether they should instead do the right thing as the thirteenth juror by "hanging" the jury and giving the defendant a new trial. Every once in while, thirteen may be your lucky number.

■

1. 134 Ariz.345,348,656 P.2d 634 (App. 1982)
2. *Id.*
3. *Id.*
4. 134 Ariz. At 348, quoting *Cano v. Neill*, 12 Ariz. App. 562, 570, 473 P.2d 487, 495 (App. 1970) (emphasis added).
5. *State v. Thomas*, 104 Ariz. 408, 412, 454 P.2d 153 (1969), quoting *Brownell v. Freedman*, 39 Ariz. 385, 389, 6 P.2d 1115, 1117 (1932).
6. 104 Ariz. At 412, quoting *State v. Bogard*, 88 Ariz. 244, 248, 354 P.2d 862, 864 (1960).
7. *Id.*, quoting *United States v. Robinson*, 71 F.Supp. 9, 11 (D.D.C. 1947).
8. 134 Ariz. At 347.
9. 184 Ariz. 277, 908 P.2d 1062 (1996).
10. 176 Ariz. 1, 859 P2d 111 (1993).
11. 176 Ariz. At 4, 859 P.2d at 114.
12. If the evidence wree truly insufficient, the defendant could not in fact be retried, even when the court makes that finding in its ruling on a motion for new trial. *State v. Moya*, 129 Ariz. 64, 67, 628 P2d 947, 950 (1981) (When, on a motion for new trial, the trial court found the evidence insufficeient to support a finding of premeditation, the defendant could not be prosecuted again on the charge of first degree murder.)
13. 143 Ariz. 93, 692 P.2d 272 (1984).
14. 143 Ariz. At 97, 692 P.2d at 276.
15. *Id.*

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 the finesse of a sculptor's chisel, in others with the sheer, blunt force of a sledgehammer."

We call it "the hammer." In the hands of some, it is wielded with the 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

(cont. on pg. 5) ☞

just walk away and let them go blithely 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."

"Oh, they left the courtroom with less years, but they also left with less to sustain them through those years."

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 the 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 our 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

(cont. on pg. 6) ☞

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. ■

AS QUAD A GOES, SO GOES THE SYSTEM?

By Rena Glitsos
Trial Group Supervisor - Group A

Things are rough in Group A right now. Why, you may ask yourself, should I care since I'm not in that group? In the past, that may have been a reasonable response to hearing about the travails of another trial group. Those days may soon be gone. . .

"In case you haven't heard, the court system is in the process of experimenting with changes in Quad A that could ultimately spread throughout the entire criminal court system in Maricopa County."

In case you haven't heard, the court system is in the process of experimenting with changes in Quad A that could ultimately spread throughout the entire criminal court system in Maricopa County. These changes involve altering the way guilty pleas are set up and scheduled, who does the sentencings, when motions and hearings are scheduled, how trials are set, and the amount of time allocated daily to trials. The purpose of this article is to generally describe the proposed and implemented changes as they now stand, so that others can be forewarned about what may be coming their way in the future.

Caveat: change has been happening very quickly here and there's been a lot of confusion about just what is going to happen. Some of the details haven't been worked out. As a result, the information contained here may be subject to modification. However, it seems that the general objectives have remained constant and probably will continue to do so.

As you may be aware, there is a widespread attitude among the judiciary that there is just too much delay in the criminal justice system. Without going into the validity of this assumption, suffice it to say that this is what many judges believe and it's this belief that has been the driving force behind the wholesale revamping of Quad A, also known as the "experimental quad." The overall objective of the outlined changes is to *move things faster*. Whether the changes result in doing so remains to be seen. Whether it will be good for our clients also remains to be seen...

The following is an outline of the changes that have occurred and are currently expected to occur:

1. **Virtually all pleas must now be scheduled with a "plea officer."** This is a new position created solely for the purpose of taking guilty pleas. Homicides, sex cases, large fraud cases and high profile cases remain with the superior court judge that they're assigned to, as do cases with three or more defendants. All other cases are sent to the plea officer for the change of plea. Scheduling has been problematic - on some days, the plea officer is scheduled to handle waivers with plea out of justice court in the morning and then on other mornings when regular guilty pleas are scheduled, the calendar doesn't start until 10:00 because it was thought that this would present less conflict with those matters that remain on morning calendar. The reality is that scheduling conflicts still exist.

   Other problems include difficulties with quickly scheduling the changes of plea and avoiding a gap between the plea cut-off date and the time that you can actually get in to do the plea. It's very difficult to get in immediately to do a COP if you're in superior court on a matter and the client is ready to plead right then and there.

2. **Class 4, 5 and 6 felonies are sent to a court commissioner for sentencing after pleading in front of the plea officer.** Right now, all other cases go back to the superior court division where the case originated. Eventually, the courts hope to have all sentencings done by commissioners except for homicides, sex cases, large fraud cases, high profiles and cases with three or more defendants.

3. **All cases that are bound over or straight waived out of justice court go to the commissioner.** An Initial Pre-Trial Conference (IPTC) is set before the commissioner on a date that is BEYOND the current

(cont. on pg. 7) ☞

45 day plea cut- off date, which is now the standard cut-off time limit under the current policies in the county attorney's office. If the case is resolved before the IPTC, the change of plea is scheduled before the plea officer. Then the case is sent back to the commissioner for sentencing.

4. **Any bind over or straight waiver that is not resolved will be sent by the commissioner to the superior court division that the case is assigned to for trial.** "Realistic" trial dates will be scheduled...

5. **Here's a twist: If a computer problem can be worked out, clients who straight waive or are bound over will be arraigned at justice court, rather than having to come downtown weeks later for their not guilty arraignment.** This is the result of efforts to eliminate not guilty arraignments altogether. Now here's the kicker - no one is sure at what point the case is assigned to a superior court division. Sound confusing? You bet - and it'll be even more confusing the first time someone has a motion to remand and doesn't know who to file it with while, in the meantime, the clock is ticking....

6. **Morning calendars as we know them, are set to be abolished beginning January 18, 1999. The goal is to have only 4 or 5 sentencings scheduled in the morning in each superior court division.** Trials will begin at 9:30 a.m. This is already happening, which has been one of the major problems with the plea officer's scheduling a 10:00 a.m. start time for that calendar.

7. **In Quad A, Fridays will be "law and motion days."** All evidentiary hearings, substantive motions and IPTC's on cases in those courts will be set on Fridays in the superior court division where the case is assigned. Complex sentencings will also be scheduled on law and motion day. This will necessitate the rescheduling of one of our justice court coverage days. It will no longer be feasible for our group to cover an all day justice court when the attorneys will more than likely all have something going on in superior court, possibly even throughout the day.

Other changes have also been proposed. Among them is a plan to have the JP's take waivers with plea at justice court. This would require some rule changes and many attorneys don't seem all that comfortable with the notion of a non-lawyers taking pleas. Maybe if JP's were required to also be attorneys, there would be fewer qualms about this....

In an effort to reduce the amount of running around that attorneys have to do in the mornings, court administration approached us about working together to schedule attorneys in specific courts on specific days of the week. There is a tentative plan to try and do so, however it must be flexible enough to accommodate the lawyer's schedules and it will not be a consideration in reassigning cases internally. Thus, it won't (as I understand it) be rigid, but will instead act as a guideline to try and reduce the number of places that attorneys are expected to be.

Another proposed change for purposes of trying to reduce the amount of running around involves reducing the number of judges in each quadrant to four, along with a commissioner, so that all of the judges for each group could all be on one floor. A fifth group of judges would be created (would we be "quints" then?). This is something that is contemplated for later on and is, to my knowledge, not a done deal.

The whole purpose of all of these changes is to allow judges more time to conduct trials four solid days out of the week. Will they have this effect? No one knows yet...while these changes may free judges up, they don't free up the lawyers who still have to make regular appearances in front of the commissioner and the plea officer, in addition to their weekly justice court coverage and trial schedules. Factor in the county attorney's 45 day plea cut- off policy, which creates more work on the front end of cases that were traditionally worked up later in their life cycles, and you have potential turmoil.

"Factor in the county attorney's 45 day plea cut- off policy, which creates more work on the front end of cases that were traditionally worked up later in their life cycles, and you have potential turmoil."

Well, that's the gist of what's been going on Group A. It may not be of interest to you right now, but don't be surprised if later on in 1999 you, too, find yourself facing these changes. Just remember that you won't be the first to have endured them and, if it's any consolation, keep in mind that ideally, some of the bugs should have been worked out by the time you're subjected to all of this. ■

SELF DEFENSE AND THE UNINTENDED VICTIM

By Rick Miller
Deputy Legal Defender

Feeling threatened, your client fires a preemptive volley, missing his target and striking an unintended victim. The government's allegation of murder is grounded in the age-old doctrine of transferred intent. The defendant will not escape responsibility where the intended harm differs from the actual harm merely because a different person was injured or killed. A.R.S. §13-203(B)(1); *State v. Rodriguez-Gonzales*, 164 Ariz. 1, 790 P.2d 287 (App.1990). Will your client's defensive measures also travel with the bullet, or is he automatically liable for his justified act of self-preservation because an unintended victim was caught in the cross-fire?

"Will your client's defensive measures also travel with the bullet, or is he automatically liable for his justified act of self-preservation because an unintended victim was caught in the cross-fire?"

The answer is mixed. To the extent that he fired in self-defense, he is not guilty of crimes involving the mental state of intent or knowledge. However, depending on the level of care he used in response to the perceived threat, he may be accountable on theories of reckless or negligent criminal behavior for the harm inflicted on the innocent bystander.

ARIZONA LAW

This issue has been presented to the Arizona appellate courts on only one occasion. In *Mayweather v. State*, 29 Ariz. 460, 242 P. 864 (1926), the defendant accidentally shot his friend while embroiled in a shoot-out with another person named Alvin Downs. The court conducted the trial "as though appellant had taken the life of Downs, the person at whom he shot," 242 P. at 864, and instructed the jury that, "[i]f the defendant fired at Downs and the bullet which he fired killed [the deceased], he is either liable or excusable in the same manner as though the bullet which he fired had killed Downs." *Id.* at 864, 865. The Arizona Supreme Court found this instruction to be "a correct statement of the law." *Id.*, at 865. *Mayweather*, however, predates our current criminal code by nearly one-half century, and the opinion did not address whether the defendant could have been responsible under reckless and negligent theories of homicide. Under A.R.S. §13-401, these lesser levels of *mens rea* are applicable.

> Even though a person is justified under this chapter in threatening or using physical force or deadly physical force against another, if in doing so such person recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in *a prosecution for the reckless injury or killing* of the innocent third person.
> A.R.S.§ 13-401(A) (emphasis added).

This statute does not abolish the *Mayweather* doctrine of transferred self-defense. It merely tempers the transfer, imposing liability for the reckless, and presumably negligent, use of justifiable force against another. Prosecutors who argue that A.R.S. §13-401(A) prohibits self-defense in all cases involving unintended victims ignore the plain language of the statute and overlook the history behind the legislation. The defense of justification is available for crimes involving harm to third parties, but the defendant may be prosecuted for his reckless or negligent use of that defense.

THE MODEL PENAL CODE

Most of Arizona's criminal code, including A.R.S. §13-401, is derived from the Model Penal Code. *State v. Willoughby*, 181 Ariz. 530, 892 P.2d 1319 (1995).

> When the actor is justified . . . in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded . . . is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

MPC and Commentaries, Part I, § 3.09(3) (1962). Our courts frequently look to the MPC to interpret Arizona criminal statutes. *State v. Weinstein*, 182 Ariz. 564, 898 P.2d 513 (App. 1995); *State v. Cid*, 181 Ariz. 496, 892 P.2d 216 (App. 1995). The commentary to this section illustrates that its intent is to allow prosecutions for recklessness or negligence to go forward, while at the same time allowing for the transference of self-defense for crimes involving intent and knowledge:

> **Risk of Injury to Innocent Persons**. Subsection (3) deals with the case where the actor is justified in using force against the person of another but recklessly or negligently creates the risk of injury of innocent persons at the same time. Such

(cont. on pg. 9) ☞

recklessness or negligence may in some cases preclude any justification under the Model Code. But even when the force is deemed justifiable with respect to its target, the claim may be advanced that the actor was reckless or negligent with respect to others.

The object of Subsection (3) is to preserve the possibility of lodging such a charge. Thus, an actor who believed that deadly force was necessary in order to preserve his own life could be prosecuted for his reckless or negligent endangering of other lives during the course of saving his own. . . .The justifying incident, in other words, does not provide the occasion for reckless or negligent conduct towards innocent persons.

Model Penal Code § 3.09, commentary at 154 (1962).

Sensibly, then, a person may defend himself against the force of another, but must do so with prudence and caution. To the extent that he recklessly or negligently hurts innocent people, he can be prosecuted for reckless or negligent crimes. The underscoring policy of § 3.09 was discussed in academic circles following the acquittal of Bernhard Goetz:

The MPC makes certain justification defenses -- including self-defense -- unavailable in prosecutions for reckless or negligent offenses against bystanders. . . . Section 3.09(3) is based on the idea that the rights of bystanders must be balanced against an individual's privilege to use force. The balance struck by the MPC, as well as by the common law, is that the incident justifying the use of force does not provide a legitimate ground for negligent or reckless conduct toward bystanders.

"Sensibly, then, a person may defend himself against the force of another, but must do so with prudence and caution."

Barlow, Ann E., *Self-Defense and Reckless Crimes Against Third Parties: Has New York Forgotten Innocent Bystanders?*, Columbia J. of Law & Social Problems, 22:417, at 423 (1989).

OTHER JURISDICTIONS AND AUTHORITIES

The Model Penal Code and A.R.S.§ 13-401 were not the first authorities to discuss these competing interests. The principle has early 20th century roots:

If, in the justifiable defense of himself against apparent danger of death or serious bodily injury, a party unintentionally or accidentally injures a bystander, the exigency excuses the act, and he is guilty of no offense, provided it was in a proper and prudent exercise of self-defense.

Warren, Oscar Leroy, *Warren On Homicide*, Vol.I, § 164 (1914). *See also Wharton's Criminal Law*, § 136 ("If, in performing the lawful act of using deadly force to defend himself, the defendant misses his assailant and kills an innocent bystander, this would constitute an 'excusable homicide,' provided the defendant was not guilty of criminal negligence in performing the act.").

More modern criminal law authorities have echoed this principle:

If A in proper self-defense aims at his adversary B but misses B and unintentionally strikes innocent bystander C, he is not liable for C's injury or death. But the result is otherwise if under all the circumstances . . . A was reckless with regard to C. In such a case he would be liable for battery if he merely injures, involuntary manslaughter if he kills, C.

LaFave, Wayne R., *Substantive Criminal Law*, Vol.I, § 5.7(g) (1996).

Throughout the United States, courts consistently recognize that self-defense excuses the conduct of the defendant accused of intentionally or knowingly injuring the innocent third party, while holding him responsible for the reckless or negligent harm he causes. Ferdinand Tinio, Annotation, *Unintentional Killing of or Injury to Third Persons During Attempted Self-Defense*, 55 A.L.R.3d 620 (1974); *People v. Levitt*, 203 Cal.Rptr. 276, 156 Cal.App.3d 500 (1984) (just as one's criminal intent follows the corresponding criminal act to its unintended consequences, so too one's *lack* of criminal intent follows the corresponding *non*-criminal act to its unintended consequences); *People v. Mathews*, 154 Cal.Rptr. 628, 91 Cal.App.3d 1018 (1979) (doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander); *Pinder v. State*, 8 So. 837 (Fla. S.Ct. 1891) (unintended killing of innocent bystander excusable if person fired in the proper and prudent exercise of self-defense); *State v. Phillips*, 583 S.W.2d 526 (Mo. S.Ct., 1979) (self-defense instruction appropriate where seven-year-old "tragic victim of this

(cont. on pg. 10) ☞

whole senseless affair" was killed in cross-fire); *State v. Hamilton*, 557 P.2d 1095 (N.M. S.Ct. 1976) (approving instruction that "intent would transfer unless you find as a fact that the defendant acted in self-defense"); *Juarez v. State*, 886 S.W.2d 511 (Tex. App. 1994) (self-defense instruction appropriate where defendant shot at group of people, killing innocent woman who stood behind the crowd); *Brunson v. State*, 764 S.W.2d 888 (Tex.App. 1989) (defendant, who aimed at one person but shot and killed his 13-year-old daughter, entitled to self-defense plea).

CONCLUSION

Persons who fire in self-defense must do so in a non-reckless, carefully measured fashion. A.R.S.§ 13-401 precludes justification as a defense to prosecutions for reckless conduct which results in the injury or killing of innocent third parties. The plain language of the statute, the Model Penal Code, and the other authorities discussed above demonstrate, however, that justification is a viable defense that transfers to the unintended victim for crimes such as first degree murder and intentional aggravated assault. ■

INVESTIGATOR'S CORNER

By Paulette Kasieta
Lead Investigator--Group B

There were many positive comments about Curtis Yarbrough's debut article in "*for The Defense*" (August 1998 issue) in which he highlighted the career of Eddie Yue. It's always nice to get to know the people we work with. Following Curtis' lead, this article will feature John Castro. John was chosen because he is our "floater" and has been working with all four trial groups.

"You're here for nine hours, you might as well work."

John Castro was born in Puerto Rico. His family moved to Chicago when John was four years old. John attended Lane Tech High School (as did Russ Born and Phoenix Public Defender Gary Kula). In 1970 and 1971, John served as an M.P. in the Army. He received an A.A. in Criminal Justice from the Chicago State University and holds a Paralegal degree from the American Institute, in Phoenix.

John's investigative background started during his career with the Chicago Police Department, where he worked from 1978, until the end of 1990. John's career with Chicago Police Department included assignments as a tactical officer and gang specialist. Being a good family man, John listened to his family, quit the police department and moved out to Phoenix in the end of 1990. John's family consists of his wife Alice, daughter Carin, son Juan, and two dogs.

As ace investigator for Group B, John has set the example for quality investigations. He's worked many demanding cases, including the Wells Fargo armored car robbery and related homicide. John is well known for his willingness to help out in any situation, which means a lot of time spent on requests for a Spanish speaker. John is fluent in Spanish, which is another reason why he is a valuable asset to the office, especially as the floater. All four groups have the benefit of utilizing John's investigative and language skills.

When he's not working, John is obsessed with golf, which he hopes to one day master. John also enjoys playing softball, and he helped to organize the United Way's team this year. His pet peeve is co-workers who take advantage of each other and don't do their share of the work. John's motto fits right along with his pet peeve, "You're here for nine hours, you might as well work."

Whether you meet up with John while working with him on a case, on the golf course, or on the softball diamond, I think you'll find he's a lot of fun and an all around nice guy. We're glad to have John as part of our team.

Congratulations to John King, Group B's newest investigator. John completes his newbie probationary period on turkey day and moves from just practicing, into the role of a real investigator.

Welcome to Jill Schroeder, Group D's newest investigator. We're delighted to see that the bastion of male investigators finally has someone to keep them on their toes. For all of you golfing obsessed investigators, Ms. Schroeder is looking forward to working on her golf swing without the impairment of the San Francisco fog.

NOTEWORTHY TIPS

- Investigators have been answering a lot of questions recently about the feasibility of getting witnesses who are Mexican citizens across the border and into the courtroom. Debbie Brink, Litigation Assistant

(cont. on pg. 11) ☞

Supervisor, was invaluable in assisting us in this endeavor. Debbie put together the following information in an effort to answer questions you may have about the logistics concerning Mexican citizens as witnesses.

- All Mexican citizens, who are needed as witnesses in one of our trials, need to have their travel into the U.S. approved by the I.N.S. The approval form is known as Form I-131. It's official heading is "Public Interest Parole Request." A completed Form I-131, including Parts 1, 2, 3, 4, 8, & 9, must be submitted to I.N.S. along with the following:
  1. A letter of concurrence from the County Attorney handling the case.
  2. A *detailed* itinerary showing their date of entry, port of entry, and what documents will be presented at the port of entry for identity verification.
  3. Who will be responsible for the applicant during their stay in the U.S.
  4. The address where the applicant will stay while in the U.S.
  5. How the applicant will be provided for during their stay.
  6. The applicant's departure date.

Any questions about the above can be answered by the I.N.S., at 379-6666, or Debbie Brink x8934. ■

ARIZONA ADVANCE REPORTS

By Terry Adams
Deputy Public Defender - Appeals

***State v. Claybrook*, 279 Ariz. Adv. Rep. 20 (CA 1, 10/8/98)**

The defendant's Arizona drivers licence was suspended in 1986. He subsequently moved to Utah and obtained a license there, and he never reapplied for his Arizona license. In 1996 he was arrested for D.U.I. in Arizona. He was convicted of agg. D.U.I. The appellate court upheld the conviction stating that the defendant could not legally operate a motor vehicle in Arizona until he reapplied for and received his Arizona driver's licence, his valid Utah licence notwithstanding. The court did find however, that there was insufficient evidence to show his B.A.C. was over .10 within two hours of driving, because the intoxilyzer test was given more than two hours after his arrest and the state failed to produce any relation back evidence.

***State v. Johnson*, 279 Ariz. Adv. Rep. 10 (CA 1, 9/29/98)**

Jurors called for trial in a justice court need not be residents of the court's precinct, they only need to be residents of the county in which the precinct sits.

***State v. Dominguez*, 280 Ariz. Adv. Rep. 6 (CA 1, 10/15/98)**

The defendant twice sold drugs to an undercover cop. After his conviction, the court sentenced him under A.R.S. §13-702.02. On appeal the court held that A.R.S. §13-3419(A) preempts §13-702.02 in drug offenses not committed on the same occasion. This makes the defendant probation eligible whereas §13-702.02 requires prison. The court's failure to instruct the jury *sua sponte* on the defense of mere presence and on identification testimony under *State v. Dessureault* was not fundamental error.

***State v. Greene*, 280 Ariz. Adv. Rep. 20 SC, 10/20/89)**

This is a capital case where the Supreme Court upheld the death penalty even though it reversed the trial court's finding that the murder was especially heinous or depraved, leaving only the aggravating factor of pecuniary gain. The evidence showed a robbery gone awry. The dissent written by Justice Zlaket is an excellent commentary on the death penalty given under these circumstances, well worth reading. Unfortunately it's not the majority opinion.

***State v. Pettit*, 280 Ariz. Adv. Rep. 12 (CA 1, 10/20/98)**

The defendant was arrested driving a car that was found to contain a large amount of drugs. He was taken into custody along with his brother who was a passenger. The defendant was not given *Miranda* warnings. During questioning he was told by the police that they were not interested in his involvement with the drugs, but were trying to further an investigation of the defendant's brother who was a known drug dealer. The court upheld the trial court's ruling that statements made were in violation of *Miranda* and involuntary and could not be used for any purpose (statements obtained in violation of *Miranda* may nevertheless be used to impeach a defendant at trial provided they were voluntarily made). The court found that the statements were coerced because the officers led the defendant to believe that his statements would not be used against him, and that the defendant relied on this promise. ■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

***Rhoden v. Rowland*, 154 F.3d 1034 (9th Cir. (Cal) 1998)**

The conviction was reversed where the trial court ordered the defendant shackled during trial, without sufficient or apparent reason, violating due process, and the shackles were visible to the jury at some point, causing prejudice. The shackles were ordered after a hearing that revealed no compelling need for this extreme measure, and over defense objection. The defendant was ordered to keep his legs under the defense table, and care was taken to escort him to and from the courtroom so no jurors saw him. After conviction, the defendant established that several jurors did see the restraints at some point, but that this was not discussed in deliberations. Lower courts held that the jury's knowledge was therefore harmless. This opinion points to cases holding that visible restraints (like jail uniforms) in court during trial are inherently prejudicial in front of a jury. Some distinction is made when the jury sees the same garb or items in a brief or inadvertent glimpse outside the courtroom. It isn't quite clear whether this court would have reversed if the shackling had been justified.

***United States v. Young*, 153 F.3d 1079 (9th Cir. (Hawaii) 1998)**

The motion to suppress evidence due to illegal search was denied, denial upheld here. Two thousand grams of meth in a cardboard box were attempted to be sent via Federal Express from L.A. to Honolulu. Due to blanks on the airbill, a pepper smell, and payment in cash, FedEx security was suspicious and opened the box, finding what looked like packets of dope. FedEx resealed the box and sent it to FedEx corporate headquarters in Tennessee. They opened it, and called the D.E.A. D.E.A. field tested it and had FedEx send the box to Honolulu, as addressed. Once there, the feds got a warrant allowing them to put a beeper in the box to alert them when it was opened. The defendant retrieved and opened the box. The trial court's determination that FedEx acted for its own business purposes was not clearly erroneous. FedEx was not acting as an instrument or agent of the government, which was not involved in the development or design of FedEx's policies or procedures. The defendant was unsuccessful in asserting that there are (secret?) directives from the government regarding policies for shippers, which might establish such a nexus.

***United States v. Bulacan*, 156 F.3d 963, amended by 1998 WL 770646 on 11-6-98 (9th Cir. (Hawaii) 1998)**

The defendant was charged with drug offenses after an administrative (security) search of her backpack upon entering a federal building. The search was pursuant to a federal regulation, with the primary purpose to search for weapons, including explosives, which could be as small as a quarter. Officers were also directed to search for violations of the ban on possession or use of drugs, alcohol or gambling on federal property. They had broad discretion in how extensive a search would be, and what containers to open. This expanded the scope of the searches to an unreasonable degree with no objective criteria to guide the searches. Administrative searches are an exception to the Fourth Amendment's warrant requirement, but must be reasonable. The addition of the second, improper motive, made the entire administrative scheme unconstitutional. The government failed to show that the administrative purpose in searching for drugs, alcohol or gambling evidence outweighed the privacy interests of the public. Cases of administrative searches at international borders are distinguished.

***United States v. Moore*, 1998 WL 682173 (9th Cir. (Cal.) 1998)**

Moore, LeMaux and others were charged and convicted in a drug conspiracy. Moore alleges that he was prejudiced by an actual conflict of interest on his lawyer's part, and by an irreconcilable conflict in his relationship with his lawyer. Prior to trial, Moore's appointed lawyer noted that he knew LeMaux "in passing" and had no conflict. The record now reflects that the lawyer (Cozens) lived next door to LeMaux for 8-10 months during which LeMaux offered him a place to stay and the use of a gun for home defense; during Moore's trial Cozens and LeMaux ate and drank together. Moore's claim of conflict points to Cozens' failure to investigate or present a defense that would contradict LeMaux's defense. On this record, this court says Moore didn't show an actual conflict of interest.

When Moore told Cozens to approach the government with a counteroffer to their plea offer, Cozens didn't inform him of the rejection of this counteroffer and other changed circumstances until after the deadline for Moore to accept the original plea. Moore threatened to file a malpractice suit. This did not create a conflict.

The breakdown in communications that began with the plea fiasco continued. Moore pointed to Cozens' lack of preparation, failure to communicate and to mutual distrust between the two. The trial court entertained motions to appoint a different lawyer, which were

(cont. on pg. 13) ☞

supported by Cozens, five times in the six weeks before trial actually began. The trial court each time denied the motion unless new counsel would be prepared on the then-current trial date. Moore went to trial and, at the trial court's urging, sentencing with Cozens. This court reverses the convictions based on this error, finding an irreconcilable conflict between Cozens and Moore which interfered with the defense.

***United States v. Doe*, 155 F.3d 1070 (9th Cir. (Ariz) 1998)**

A 17-year-old Navajo was arrested by tribal police for stabbing five men in two separate incidents on the reservation several hours earlier. Tribal police called in the F.B.I. With tribal police present, an F.B.I. agent read Doe his Miranda rights, explaining what "coercion" meant when it became necessary, but did not inquire as to Doe's age. Doe confessed to his part in the crimes but was not arrested for a federal offense until 3.5 years later. The trial court suppressed the statement, holding that it could not find a knowing, intelligent, voluntary waiver of rights, in part because Doe wasn't given the option of having his parents present, pursuant to federal law. This court reverses, noting that a juvenile's waiver of rights is reviewed, like an adult's, by a 'totality of circumstances' test. This court finds that the trial court erred in its fact finding. This court also says that the federal law didn't apply, because the defendant was not in federal custody for any federal crime. But, the case is remanded for further "factual determination as to whether there was an actual collaboration between federal and tribal officers" to violate Doe's federal procedural rights. The dissent argues that both federal and tribal statutes required police to notify a juvenile's parents prior to questioning, making this rationale not rational, and notes the obvious joint action by the feds and tribal police in handling the investigation.

***United States v. Garcia*, 151 F.3d 1243 (9th Cir. (Ariz) 1998)**

A general implicit agreement between fellow gang members to support each other in fights against rival gangs is not sufficient to support conspiracy to commit assault without more. Two co-defendant Bloods (Garcia and Humo) arrived separately at a party where Crips were present. Each was insulting and issued provocation to fight to Crips. No evidence suggested the Bloods planned anything for this party, nor were they seen talking to each other at the party. When shooting broke out, Garcia, Humo and other Bloods were seen shooting at Crips, and vice versa. Both defendants were charged with conspiracy to assault the four people injured by gunfire. Unlike Humo, Garcia was not charged with any actual assault counts, and no evidence showed he'd shot any of the four. An implicit agreement can be inferred from evidence. The government claims that the provoking acts by the co-defendant shows the existence of a prior agreement and/or agreeing to be a gang member proves his agreement to support fellow Bloods in fights. A gang expert testified. This court rejects the reasoning, holding that "proof that [defendant] engaged in illegal acts with others is not sufficient to demonstrate the existence of a conspiracy. ... An inference of an agreement is permissible only when the nature of the acts would logically require coordination and planning." The inference is impermissible here, where no evidence suggests prearrangement or acting in concert, merely chaos and escalating tensions. The court points to the danger and unfairness of this guilt by association theory.

***Chaney v. Stewart*, 156 F.3d 921 (9th Cir. (Ariz) 1998)**

Two appointed mental health experts determined that defendant was competent to stand trial, and opined he was legally sane at the time of the offense (1981). Three weeks before trial, the defense counsel discovered new, potentially relevant research, and moved for two experts on this new condition to be appointed and to do three new tests. The first two experts testified that there was little chance defendant had the condition. Despite denial of this motion defense counsel paid for the two additional experts to review the considerable test results and reports on the defendant and testify at trial. They said that they were certain, or 65% certain, respectively, that the defendant suffered from temporal lobe disorder. The jury convicted. The court refused to appoint the experts for sentencing purposes, reasoning that the trial testimony was sufficient. The death sentence was imposed. Failure to allow the additional tests at guilt phase is harmless, if error at all, due to the timing of the request, security concerns with the testing, the witnesses did testify based on sufficient material, and the weight of other evidence insures that denial of the request was not a significant factor in the verdict. The trial court's discretion is sufficiently broad to preclude finding error here. ■

BULLETIN BOARD

New Attorneys

Curtis Cox will join the office on December 14. He earned his J.D. from the University of North Carolina at Chapel Hill and his B.S. in Business Administration from the University of Missouri at Columbia. He has worked as an attorney for the Missouri State Public Defender System since 1991. Most recently, he was a lead attorney for that office's Capital Litigation Office.

(cont. on pg. 14) ☞

Attorney Moves/Changes

Brian Bond transferred from Group A to Group B on November 23, but will remain in the same office location.

Mara Siegel transferred from Group B to Juvenile - Durango on November 16.

New Support Staff

Lorenzo Muñoz joined the office as an Investigator for Group B on November 3. He has served with the East Chicago Police Department for 25 years. Lorenzo holds a B.S. in Business with a minor in Criminal Justice from Calumet College in Indiana.

Support Staff Moves/Changes

Barbara Brown has accepted a special work assignment as lead secretary for Group C effective November 16.

Ron Corbett transferred from Group B to Group C on November 30.

Taz Clark stepped down as the lead secretary for Group C on November 16. She will remain with Group C as a legal secretary. ■

October 1998
Jury and Bench Trials

Group A

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: (w/ hung jury, # of votes for not guilty/guilty)	Bench or Jury Trial
9/29-10/8	**Farney** Castro	P.Reinstein	Davis	CR 98-03985 Disorderly Conduct/F6	Guilty	Jury
10/6-10/14	**Zick & Klepper** Clesceri	Jarrett	Robinson	CR 98-03579 Agg. Assault/F3D PODD/F4	Guilty	Jury
10/8-10/14	**Rossi & Green**	Gottsfield	Johnson	CR 98-07054 PODD/F4 PODP/F6	PODP-Hung PODD-Guilty	Jury
10/13-10/23	**Rock & Ellig** Robinson *Garrison*	Baca	McIlroy	CR 97-08371 2° Murder/F1	Not Guilty	Jury
10/14-10/15	**Hernandez**	Gottsfield	Greer	CR 98-06991 Child Abuse/F4 on parole with 2 priors	Dismissed after opening statements	Jury
10/14-10/27	**Hruby** Robinson	McVey	Hicks	CR 96-07432 2 cts. Att. 2nd Degree Murder/F2 with 2 priors	Guilty on both counts	Jury
10/15-10/15	**Passon**	Tolby	Gellman	TR 98-02434 Driving While Suspended/M1 Leaving the Scene of an Accident/M1	Not Guilty - Driving While Suspended Directed Verdict - Leaving the Scene of an Accident	Jury
10/26-10/27	**Flores & Davis**	Bolton	Adams	CR 98-08078 POND/F4 PODP/F6	Guilty	Jury
10/28-11/2	**Farney** Brazinskas	McVey	Hernandez	CR 98-09966 2° Burglary/F3 with 2 priors alleged	Not Gulty	Jury
10/28-11/3	**Farrell** Jones	Gerst	Kalish	CR 98-05246 Armed Robbery/F2D	Guilty	Jury

Group B

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
9/29-10/1	**McCullough**	Gottsfield	Poster	CR 98-03072 2 cts - Agg DUI/ F4	Guilty	Jury
10/-10/5	**Walton** Kasieta	O'Toole	Proudfit	CR 98-07796 Robbery/ F4	Not Guilty - Robbery Guilty of lesser-included, Theft from Person	Jury
10/06-10/06	**F. Gray**	Hutt	Neugebauer	CR 98-08085 POND/ 4F;PODP/ 6F; POM/ 6F	Guilty on all three counts	Bench
10/06-10/06	**F. Gray**	Hutt	Neugebauer	CR 98-09759 POND/ 4F; PODP/ 6F	Guilty on both counts	Bench
10/6-10/8	**Agan**	Gottsfield	Poster	CR 98-07492 Aggravated DUI/ F6	Hung 4-4	Jury
10/06-10/08	**Liles**	O'Toole	Adams	CR 98-05398 Poss. Meth/ F4 PODP/ F6	Hung 4 to 4	Jury
10/13-10/13	**Kratter**	Hutt	Kalish	CR 98-08455 Poss. of Marijuana/ F6 PODP/ F6	Guilty	Bench
10/13-10/14	**Doerfler**	Arellano	Murray & Rahi-Loo	CR 98-03533 Attempt to Possess Narcotic Drugs/ F5	Not Guilty	Jury
10/13-10/14	**Peterson**	O'Toole	Kalish	CR 97-06895 Theft/ F3	Guilty	Jury
10/15-10/15	**Noble** Ames	Hotham	Merchant	CR 98-07349 Unlawful Use of Means of Transportation/ F6 (reduced to misdemeanor for bench trial)	Not Guilty	Bench
10/15-10/20	**Roskosz**	Mangum	Rahi- Loo	CR 98-03595 Armed Robb/ F2 Burglary/ F2	Guilty on both counts	Jury
10/19-10/22	**Whelihan** Ames	Ellis	Cappelini	CR 98-03810 4 cts of Agg DUI/ F4	Guilty	Jury
10/20-10/23	**Taradash** Erb	Hotham	Rosen	CR 98-04972 Conspiracy to Mnftg. Dangerous Drugs/ F2 Poss. of Equip. to Mnftg. Dangerous Drugs/ F3 Attmpt. Mnftg. of Dangerous Drugs/ F3 Miscndct Inv.Wpns/ F4 Poss. of Dangerous Drugs/ F4 Poss. of Marijuana/ F6	Directed Verdict - Conspiracy to Manufacture Dangerous Drugs Guilty - all other counts	Jury

(cont. on pg. 16) ☞

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/2-10/23	**Klapper**	Barker	Manuel Bustamante	CR 97-04811 PODD/ F4 PODP/ F6 Resist.Arrest/ F6	Guilty on all three counts	Jury
10/26-10/28	**Brown** Ames	Hotham	Merchant	CR 98-06643 3 cts. Aggravated Assault/ F3	Not Guilty - 1 ct. agg. Asslt Guilty - other counts	Jury
10/28-10/29	**Roth & Kratter** Corbett	Bolton	Luder	CR 98-07875 Possession of Narcotic Drugs, F4 Possession of Drug Paraphernalia, F6	Not Guilty - PODP Guilty - POND	Jury

Group C

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
9/30-10/1	**Klopp-Bryant & Dunlap-Green**	Ellis	Hancock	CR 98-92033 1 ct. POND/F4 1 ct. PODP/F6	Guilty	Jury
10/1-10/5	**Schmich & Rossi** Thomas *Rivera*	Schwartz	Lundin	CR 98-90878 1 ct. Forgery/F4	Guilty	Jury
10/2-10/2	**Mabius**	Passey	Park	TR 98-00600 Misd. DUI/M1	Guilty	Jury
10/7-10/8	**Vaca**	Barker	Bennink	CR 97-95429 1 ct. Flt Frm Law Veh/F5	Guilty	Jury
10/8-10/16	**Lachemann & Bingham** Castro	Aceto	Jennings	CR 98-93125 1 ct. Kidnap/F2 2 cts. Sex Asslt/F2 1 ct. Burglary/F3	Hung on 1 Ct. Sex Aslt (11 guilty to 1 not guilty) Guilty of Kidnaping, Burglary, & 1 Ct. Sex Aslt;	Jury
10/8-10/14	**Stein** Moller	Ellis	Carter	CR 98-92422 Burglary 2°/F3	Guilty	Jury
10/9-10/9	**Zazueta & Bingham**	Orr	Sampanes	TR 98-05362 1 ct. DUI/M1	Guilty	Jury
10/9-10/9	**Mabius**	Johnson	Rosales	CR 98-0494 1 ct. Assault/M1	Guilty	Bench
10/13-10/16	**Mabius & Cotto**	Dairman	Lundin	CR 97-95671 1 ct. Poss. Meth/F4 1 ct. PODP/F6	Not Guilty on both counts	Jury

(cont. on pg. 17) ☞

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: (w/hung jury, # of votes for not guilty/guilty)	Bench or Jury Trial
10/14-10/16	**Antonson**	Ellis	Aubuchon	CR 97-90468 1 ct. Agg Aslt/F6	Dismissed w/ prejudice	
10/19-10/19	**Lachemann**	Dairman	Hancock	CR 98-90773 1 ct. POM/F6	Dismissed w/o prejudice	Jury
10/21-10/26	**Sheperd**	Aceto	Craig	CR 98-92359 Burglary 3°/F4	Guilty	Jury
10/22-10/28	**Silva & Murphy**	Keppel	Jennings	CR 98-92706 Agg DUI/F4 Agg Dr. w/BAC >.10/F4	Guilty on both	Jury
10/26-11/2	**Fisher**	Ellis	Aubuchon	CR 98-93407 2 cts. Agg Aslt/F3D 1 ct. Miscdct w/pn/F4	Mistrial	Jury

Group D

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result (w/ hung jury # of votes for not guilty / guilty)	Bench or Jury Trial
10/1-10/6	**Willmott** O'Farrell	Katz	Pacheco	CR-98-04655 1ct. Possession of Dangerous Drugs/ F4	Hung Jury (4 NG - 4 G)	Jury
10/5-10/5	**Silva** Applegate	Protem	Patterson	TR98-0819 2 cts. Misd. DUI/ M	Dismissed without Prejudice	Jury
10/5-10/6	**Huls**	Gerst	Kerchansky/ Worty	CR 98-07908 PODD/ F4 PODP/ F6	Mistrial	Jury
10/8-10/8	**Huls**	D'Angelo	Hammond	CR98-09294 Attpt/Com Obt Narc By Fraud/ F4	Guilty	Jury
10/9-10/14	**Billar**	Kamin	Coury	CR 98-08757 1 ct. Theft/ F4	Guilty	Jury
10/19-10/19	**Enos**	Gutierrez	Mueller	Interfering with Judicial Proceedings	Guilty	Bench
10/20-10/21	**Huls**	Gerst	Kerchansky/ Worty	CR98-07908 Re-tried PODD/ F4 PODP/ F6	Not Guilty	Jury
10/22-10/22	**Nickerson** Bradley	Kamin	Pacheco	CR98-00809 Agg. Assault/ F3 W/2 priors	Guilty	Jury
10/23-10/23	**Schreck** Barwick	Comm. Reinstein	Boyle	CR98-09915 Agg. Dr-LQ/DRG/TX/ F4	Guilty	Jury
10/26-10/26	**Silva**	Protem	Raymond	TR98-06134 2 cts. Misd. DUI/ M	Dismissed without Prejudice	Jury

(cont. on pg. 18) ☞

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: (w/hung jury, # of votes for not guilty/guilty)	Bench or Jury Trial
10/27-10/27	**Leyh**	Anderson	Hunt	CR98-02368A MI Simple Assault Case/ F1 Misdemeanor	Dismissed	Bench
10/27-10/27	**Leyh**	Anderson	Hunt	CR98-02215AMI Simple Assault Case/ F1 Misdemeanor	Not Guilty	Bench

DUI Unit

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/26-10/28	**Timmer**	Barker	Engleman	CR97-07661 1 ct. Agg DUI/ F4	Guilty	Jury

Office of the Legal Defender

Dates: Start/Finish	**Attorney** Investigator *Litigation Assistant*	Judge	Prosecutor	CR# and Charge(s)	Result w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
9/14-10/1	**Hughes** Soto	Dougherty	McIlroy	Murder 1°/ F1 Agg.Asslt/ F	Not Guilty 1° Murder Guilty Manslaughter	Jury
10/19-10/27	**Miller & Lamb** Abernethy	D'Angelo	Lynch	CR 97-12554 Consp.to Commit 1° Murder/ F1 1° Murder/ F1 1° Burglary/ F	Guilty Consp.to Commit Murder I Not Guilty Murder 1 and Burglary 1st Deg.	Jury
10/6-10/9	**Dupont** Pangburn	Hilliard	Schesnol	CR97-11175 (B) Ct.1:Agg.Asslt/ F6 Ct.2:Agg.Asslt/ F3D Ct.3:Agg.Asslt/ F3D Ct.4:Agg.Asslt/ F3D	Dismissed Not Guilty Guilty, Simple Asslt/ M1 Guilty	Hung Jury
10/14-10/15	**Patton**	Kamin	Hammond	CR 98-05741 POND/ F4	Guilty	Jury

INSIDE ADDITION

The Insider's Monthly November 1998

TRAINING NEWS

Now it's easier than ever to earn college credits. Mesa Community College is offering classes in its Judicial Studies program during the lunchtime hour at the Superior Court and the Supreme Court. Classes are held on Tuesdays and Thursdays from 12:00 - 1:00 pm. Classes currently being offered are:

Judicial Ethics	Dec. 1, 1998 - Mar. 30, 1999
Civil Procedure	Jan. 19, 1999 - May 6, 1999
Role of Court Staff	April 6, 1999 - May 27, 1999

In addition, the University of Phoenix will be offering classes in the evenings specifically for Maricopa County Employees. You can earn credits towards a Bachelor of Science in Business/Management or a Master of Arts in Organizational Management. Be sure to watch the *Newsline* for upcoming information meetings. All of these classes may be eligible for tuition reimbursement. For more information, contact Lisa Kula, Training Administrator x63045. ■

THE LIGHTER SIDE

The *Massachusetts Bar Association Lawyers Journal* recently printed the following questions actually asked during trial.

1. Now, doctor, isn't it true that when a person dies in his sleep, he doesn't know about it until the next morning?
2. The youngest son, the 20-year-old, how old is he?
3. Were you present when your picture was taken?
4. Were you alone or by yourself?
5. Was it you or your younger brother who was killed in the war?
6. Did he kill you?
7. How far apart were the vehicles at the time of the collision?
8. You were there until the time you left, is that true?
9. Q: She had three children, right?
   A: Yes.
   Q: How many were boys?
   A: None.
   Q: Were there any girls?
10. Q: You say the stairs went down to the basement?
    A: Yes.
    Q: And these stairs, did they go up also?
11. Q: How as your first marriage terminated?
    A: By death.
    Q: And by whose death was it terminated?
12. Can you describe the individual?
    A: He was about medium height and had a beard.
    Q: Was this a male or a female?
13. Q: Is your appearance here this morning pursuant to a deposition notice that I sent to your attorney?
    A: No, this is how I dress when I go to work.
14. Q: Doctor, how many autopsies have you performed on dead people?
    A: All my autopsies are performed on dead people.
15. Q: All your responses must be oral, OK? What school did you go to?
    A: Oral.
16. Q: Do you recall the time that you examined the body?
    A: The autopsy started around 8:30 pm.
    Q: And Mr. Dennington was dead at the time?
    A: No, he was sitting on the table wondering why I was doing an autopsy.
17. Q: So the date of conception was August 8th?
    A: Yes.
    Q: And what were you doing at the time?
20. Q: You were not shot in the fracas?
    A: No, I was shot midway between the fracas and the naval. ■

Recycling Update

By Michelle Wood

I have about 60-65 white recycling boxes for offices, if you are interested. Please send me an e-mail. If I get requests for more boxes than I have on hand, I will request more from the vendor. I also have a bin on the 7th floor for Newspapers recycling. If you have any questions, comments or suggestions for the recycling program, please feel free to give me at call at 506-5759 or send me an e-mail. Thank you for supporting this program. ■

Bring all your good cheer,
to our yearly fete
It will be great fun,
on that you can bet

The place you should be,
on that fateful day
Is Coyote Springs,
just across the way

It starts right at three,
so please don't be late
The music and skits,
they just cannot wait

We'll toast to whoever,
wins the "Joe Shaw"
Because they do practice
such outstanding law

We'll have refreshments,
that's food and that's drink
We promise to you,
Russ's jokes will not stink

December seventeen,
not too far away
Make your plans now,
to be there that day!