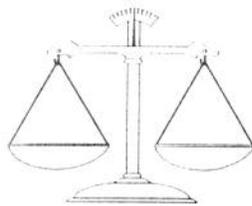


# for The Defense



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

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*Standardized Field Sobriety Testing*, U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA) (Printed 5/87), p. VII-6. This accuracy rating was good enough to lead the Supreme Court of Arizona to hold that the HGN test satisfies the *Frye* test for admissibility and to state that, "officers can be trained to observe these phenomena [HGN cues] sufficiently to estimate accurately whether BAC is above or below .10 percent." *State v. Superior Court (Blake)*, 149 Ariz. 269, 279, 718 P.2d 171, 181 (1986).

The difficulty of countering the HGN test causes many defense attorneys to ignore the test in trial while others like to ask questions about the other possible causes of HGN, such as genetic defects and medication. But what few defense attorneys realize is that there are many *legal* issues surrounding the HGN test and its admissibility in trial. Unfortunately, the case law surrounding HGN is confusing and unclear. Many trial judges and attorneys are uneducated about the specific holdings of these cases. Without a defense objection, courts often will allow a prosecutor to use HGN testimony for inadmissible purposes. It is usually up to the defense attorney to raise the important questions and then provide the legal answers.

### Three Rules of Law

There are three major rules of law that a defense attorney must be aware of in order to combat the admissibility of HGN testimony in a DUI trial. First, if the state is only charging a defendant with an A1 count violation (the count that alleges that a defendant was impaired by alcohol to the slightest degree), a police officer may only testify that HGN test results indicate possible neurological dysfunction, one cause of which could be alcohol ingestion. Second, if there is a breath or blood test, regardless of when it was administered, a police officer may testify that HGN performance indicates a BAC level over .10%. This is because the HGN testimony is considered to be "corroborating" the chemical analysis. Third, if the defense received an affirmative defense instruction, requiring the state to then prove a BAC of .10% or over at the time of driving, the HGN testimony

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## HORIZONTAL GAZE NYSTAGMUS EVIDENCE AND ITS PROPER USE IN DUI TRIALS

By Scott Silva  
Deputy Public Defender - Group C

If you have ever tried a DUI case, then you are familiar with the horizontal gaze nystagmus test (also referred to as the "HGN" test). Those who are familiar with this test know how difficult it can be to cross examine a police officer about HGN. The problem for defense attorneys is that the HGN test, when administered correctly, is a reasonably accurate scientific test. According to research, the HGN test can predict whether or not a suspect's blood alcohol concentration is at least a .10% almost 77% of the time. *DWI Detection and*

may not be the basis for a conviction on the A2 count (the count that alleges that a defendant was over a .10% BAC within two hours of driving). Therefore, if no retrograde extrapolation is done in such a case, or if there is no breath test near the time of driving, the defense is entitled to a Rule 20 directed verdict on the A2 count as a matter of law.

In order to understand these three rules of law, it is necessary to understand the case law surrounding HGN testimony and its admissibility. Over the years, Arizona courts have addressed three major questions concerning the use of HGN evidence in trial. First, when may the state use the results of an HGN test against an accused in a DUI trial? Second, how may the state use the results of an HGN test against an accused in a DUI trial where only the A1 count is charged? Third, how may the state use the results of an HGN test against an accused in a DUI trial where there is a chemical analysis performed, and both the A1 and A2 counts are charged?

#### When Is HGN Admissible?

In every DUI trial, HGN evidence is admissible against an accused. According to the Supreme Court of Arizona, in any DUI case where the "impairment" count is charged (A1 count), HGN evidence is "admissible...as evidence that the driver is under the influence." *Blake*, 149 Ariz. at 279. Since the state charges the A1 count in every DUI case, HGN test results will always be admissible against the accused as scientific evidence of impairment.

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for The Defense

#### DUI Cases Involving Only the A1 Count

The holding in *Blake*, however, does not explain how the officer must phrase his or her HGN testimony when trying to prove that the defendant was "impaired" for purposes of the A1 count. Although *Blake* states that the HGN test results may be used to "prove that [the defendant] was under the influence," the court does not

specify how the officer may testify in this regard. *Id.* In 1990, the Supreme Court of Arizona clarified the matter when it held that in the absence of a chemical analysis, "HGN test results may be admitted only for the purpose of permitting the officer to testify

that, based on his training and experience, the results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion." *State ex rel. Hamilton v. City Court of City of Mesa*, 165 Ariz. 514, 519, 799 P.2d 855, 860 (1990). Therefore, in any case where there is no chemical analysis (and only the A1 count is at issue), a police officer may testify that, based on his training and experience, the HGN test result indicated possible neurological dysfunction, one cause of which could be alcohol ingestion.

#### DUI Cases Involving A1 and A2 Counts

But *Hamilton* does not explain how an officer may testify in a case where there is a chemical analysis performed and the A2 count is also charged. For example, in such a case may the officer testify that, based on his training, a certain number of HGN cues is indicative of a person being over a .10% BAC level? This is the most important HGN question facing defense attorneys in DUI cases because such testimony can be so damaging to a defendant's case. It is much easier to downplay a "sign of impairment" than it is to downplay that the defendant was over a .10% BAC level.

The answer to this question is complicated because the case law is complicated. In *Blake*, the Supreme Court of Arizona held that HGN results may be used to "corroborate" a chemical analysis but may not be used to "quantify" the accused's BAC level in any case. *Blake*, 149 Ariz. at 280. The court stated that for purposes of the A1 count, HGN results are admissible only as evidence that the driver is "under the influence." *Id.* If a driver is charged with being over the legal limit of .10% BAC (the A2 count), the results may be used to corroborate any chemical analysis in such as case. *Id.* But the court in *Blake* did not explain what it meant by the terms "quantify" and "corroborate." Is the state "quantifying" a chemical analysis (such as blood test) when the officer testifies that the HGN results indicate a blood alcohol content of .10%

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or over? This question was answered to some degree by the Court of Appeals of Arizona in *State ex rel. McDougall v. Ricke*, 161 Ariz. 462, 778 P.2d 1358 (Ariz.App. 1989) (the defendant took a breath test which revealed a BAC of .16%; HGN test given and expert testified that it indicated over a .10% BAC. Court held this testimony was admissible). In *Ricke*, the “corroboration” of a chemical analysis in an A2 case includes testimony that HGN performance indicates that a person was over a .10 BAC level. *Ricke*, 161 Ariz. at 465. The court stated:

Accordingly, we believe that the *Blake* court’s intention was to allow testimony, subject to the limitations stated in *Blake*, that the results showed a blood alcohol content greater than .10%. In our opinion, the court’s statements prohibiting horizontal gaze nystagmus testimony to ‘quantify’ blood alcohol content were intended to preclude the use of nystagmus test results to independently establish specific blood alcohol amounts as required by Arizona statutory provision discussed in *Blake*. *Id.*

One would assume that whenever there is a chemical analysis test, like there was in *Blake* and *Ricke*, the results of an HGN test are admissible to show a blood alcohol content greater than .10%. However, *Ricke* and *Blake* fail to answer another important question: Must the chemical analysis being corroborated relate to the time of driving? In both of those cases a breath test--which was the chemical test being corroborated--was given near the time of driving. But what happens if your case involves a blood or breath sample taken almost two hours after the time of driving? In such a case, one may argue that the HGN testimony is not being used to “corroborate” the chemical analysis. Most likely, the HGN test was given close to the time of driving, not two hours later when the blood or breath test was administered.

The importance of the chemical analysis in relation to HGN testimony was evident in the court’s decision in *State ex rel. Hamilton v. City Court of City of Mesa, supra*. In *Hamilton*, there was no blood or breath test given though the HGN test was performed. The court held that absent a chemical analysis, the police officer could not testify that the HGN test results indicated a blood alcohol content over .10%. *Hamilton*, 149 Ariz. at 516-17. The court stated:

**“But what happens if your case involves a blood or breath sample taken almost two hours after the time of driving? In such a case, one may argue that the HGN testimony is not being used to ‘corroborate’ the chemical analysis.”**

Although we held in *Blake* that HGN test results are admissible to confirm or challenge the accuracy of a chemical analysis of BAC and as evidence that a driver was under the influence, we emphasized that it is not admissible in any criminal case as direct, independent evidence to quantify blood alcohol content...HGN test results, although satisfying *Frye* for limited purposes, are inadmissible to estimate BAC in any manner, including estimates of BAC over .10%, in the absence of a chemical analysis of blood, breath, or urine. *Id.*

Again, *Hamilton* never directly addresses the issue of whether or not such HGN testimony is admissible when the chemical analysis occurred well after the time of the HGN test (there was no chemical analysis in *Hamilton*). However, what *Hamilton* does make clear is that such HGN testimony is only admissible to “confirm” or “challenge” a chemical analysis.

In 1998, the Court of Appeals of Arizona reviewed a case in which a breath test was taken almost one hour after the time of driving and HGN testimony was given to support a BAC level of .10%. That case was *State v. Cannon*, 275 Ariz. Adv. Rep. 15 (Ariz.App. 1998). In *Cannon*, an HGN test was performed and indicated all 6 cues. A breath test was taken and indicated a .109% and a .097% BAC level at approximately 41 minutes and 48 minutes after the time of driving. The police officer then testified that the HGN test results indicated a BAC level over .10%.

What makes *Cannon* different than other DUI cases, however, is that in *Cannon* the defense was given an affirmative defense instruction. Because a defense expert was able to provide “some credible” evidence that the defendant could have been below a .10% BAC level at the time of driving, the state then had the burden of proving that the defendant’s BAC level at the time of driving was over .10%. Unfortunately for the state, they could not perform a retrograde analysis to the time of driving. Instead, the state relied on the HGN testimony to prove that the defendant was guilty of the A2 count.

Ultimately, the court held that such use of the HGN testimony was improper and that the defendant should have been entitled to a directed verdict on the A2 count. *Cannon*, 275 Ariz. Adv. Rep. at 17. The court stated:

Without a breath test at the time of driving, and without a retrograde extrapolation to determine defendant's BAC level at the time of driving, [the officer's] testimony regarding the HGN test was the only evidence the jury could have relied upon to quantify the defendant's BAC level at the time of driving. *This evidence should not have been admitted as direct, independent evidence to quantify defendant's BAC level* (emphasis added). Therefore, the trial court correctly entered a directed verdict on count two following the jury's verdict. *Id.*

*Cannon*, when read in conjunction with the other DUI cases, clears up most of the questions surrounding the use of HGN testimony. Although a police officer may testify that HGN test results indicate a BAC level over .10% in any DUI case where a chemical analysis is present, such testimony may not be the sole basis for a conviction on the A2 count. Thus, in any DUI case where the state must prove a BAC level over .10% at the time of driving, there must be a breath test given near the time of driving, or a retrograde extrapolation performed back to the time of driving. Absent this, the defense is entitled to a directed verdict on the A2 count regardless of the HGN testimony. Unfortunately, these holdings also indicate that there is little a defense attorney can do to preclude such HGN testimony in any DUI case involving a chemical analysis. If the state has either a breath or blood test as evidence, the HGN testimony is admissible--albeit for a limited purpose.

### Conclusion

The four cases previously discussed, although confusing, do provide rules a defense attorney can use to combat the admissibility of HGN testimony in a DUI trial. However, many judges are still not aware of these holdings. If you have a case where there is a blood draw or breath test but no retrograde can be performed--and you think you have a good shot at the affirmative defense--you should probably have a written motion for a Rule 20 directed verdict ready to hand the judge. We may not be able to get rid of the HGN test, but we can certainly use the case law to our advantage. ■

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## GO TO TRIAL

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BY L. GRANT

Trial Group Supervisor - Group B

Whenever our clients are charged with criminal offenses, that upon conviction will require serving time in the Department of Corrections, the heat is on for the defense attorney. The question is whether we, as public defenders, will melt under the heat of the criminal justice system or whether we will stand at the bar and say, "I want a trial."

I contend that we must take significantly more of our cases to trial. Why? For one thing, when charged with a crime, our clients are entitled to a trial under the Constitution of the United States of America. Thus, we start with the proposition that our clients are innocent unless and until proven guilty as charged. That may mean that our client did not commit the crime or that the state has overcharged our client. It may mean that the state cannot prove its case against our client beyond a reasonable doubt. Conversely, the County Attorney starts with the proposition that our clients have committed the crime charged or that, if the client did not commit the crime charged, he nonetheless committed some other crime and therefore he deserves to have a felony conviction on his record.

The obvious reality is that some of our cases are not triable. In those circumstances it is our job to work the case and the county attorney to get the best deal possible for our clients. Not reflected in the number of cases which are actually taken to

trial, however, is the substantial number of cases in which the county attorney's offer is unreasonable given the facts of the case. Despite that, we, as defense attorneys, are often fearful of going to trial, paralyzed by the threat of mandatory sentencing. It is often easier, at least in the short-term, to justify accepting an unduly harsh plea agreement because the potential threat posed by mandatory sentencing seems to loom so much larger. I have learned to live with that fear, embrace it, and dance with it in every trial.

### The Challenge

No one needs to be reminded that there are too many cases in the system, with too few courtrooms, judges, attorneys, and staff to try them all. We should not, however, try to help alleviate that problem by pleading our

**"If you have a case where there is a blood draw or breath test but no retrograde can be performed--and you think you have a good shot at the affirmative defense--you should probably have a written motion for a Rule 20 directed verdict ready to hand the judge."**

clients so that the cases can keep moving through the system. I know of no valid reason why we should. But, I can think of several ethical reasons why we should not.

Currently the system is suffering under a heavy burden. That burden is not only a result of an increase in cases but also unduly harsh sentencing laws. Policies calling for mandatory prison, even though probation and jail may be more appropriate, increasing the percentage of case filings and imposing short plea cutoff dates only exacerbate the problem.

In our role as officers of the court, we as defense attorneys have a responsibility to address the problem. We must be willing to participate in a dialogue with the other parties in the system, to help find or suggest a solution. But this responsibility should not deter us from our constitutional mandates and our duty to zealously represent our clients at all times. In Maricopa County that means demanding more trials, and forcing the county attorney to prove their case. If the county attorneys have to prove their allegations, if they know you are willing to dance with your fear at trial, then better plea offers will follow. More trials will force them to look at their cases more realistically. Until that time, go to trial.

I would be remiss if I did not, however, recognize that the reality of an individual defendant's situation is the paramount consideration when we represent each individual. We cannot, therefore, have the singular purpose of taking every single case to a jury trial to achieve a goal "for the greater good."

There are, however, other reasons specific to the individual defendant that warrant taking a particular defendant's case to a jury trial in the face of potentially harsh mandatory sentencing consequences. Those reasons are ones sometimes overlooked. If, for example, your client faces a fairly significant period of incarceration whether they plead or lose at trial, they may derive some satisfaction from "going down swinging." If they have to do the time, at least they will not live with the regret that their side of it was never heard. Moreover, for a 25 or 30 year-old defendant, what is the real difference between a sentence of 25 or 30 years and one of say 150 years? Either way to that defendant, it's a lifetime.

### **Bench Trials**

That said, there is still a middle ground. It is a seldom used way to try more cases while taking account of an individual defendant's need to have at least a somewhat

prompt resolution of their case. A way in which more cases would go to trial within the constraints of an overburdened judicial system. That underutilized tool is the bench trial. The reason why I'm willing to embrace my fear in a bench trial is because I believe in the integrity of the judicial system.

Obviously the decision whether to attempt to proceed to trial without a jury depends on the judge, the prosecutor, the client, the facts and circumstances of the case, and on defense counsel's opinion regarding the advisability of trying the case to a judge without a jury. Admittedly, there are some judges before whom you should be cautious about trying a case without a jury. Needless to say, you don't need a second prosecutor in the courtroom who, when the going gets tough, is willing to bail the county attorney out from under a fatal error. A little investigation on your part, along with a little advice from other attorneys, will help you avoid this pitfall.

**"The reason why I'm willing to embrace my fear in a bench trial is because I believe in the integrity of the judicial system."**

As Rule 18.1 (b) Arizona Rules of Criminal Procedure permits the defendant to waive his right to a jury trial only "with consent of the prosecution and the court," everyone must agree to a trial without a jury. That rarely happens primarily because the county attorneys, the judges, and the defense attorneys are plagued by their own separate fears.

Defense attorneys are afraid that judges will treat a bench trial as a long form guilty plea. They fear that the judges will believe the reason for taking a bench trial is because the client is guilty.

Prosecutors, on the other hand, are afraid of just the opposite. They fear that the judge will think they have a bad case and don't want to suffer a defeat at the hands of a jury.

In many cases, judges themselves fear bench trials. If they acquit or do not convict a defendant as charged, they are afraid of being seen as "soft on crime".

I contend that we must get over our mutual fears of each other. If the case is the type of case that should be tried to the judge, try it to the judge. If the case is the type of case that should go to the jury, try it to the jury. Try more cases, but keep an open mind about bench trials.

### **When Should You Waive a Jury?**

That being said, the question becomes, "what type of case should we consider trying as a bench trial?" As a general proposition the majority of cases that we should

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consider for bench trials are those where the client is charged with class four, five, and six felonies. However, under the right circumstances we should also consider trying more serious felonies as bench trials when our client derives a substantial, up front, benefit from waiving his right to a jury trial. For example, the state may agree to drop one or more of your client's prior felony convictions, or agree not to allege that the offense was committed while your client was out on release or on probation or parole. They may agree to amend the charge or drop several counts.

Since coming to the Public Defenders Office in July of 1989, I have tried only one bench trial<sup>1</sup>. In that case my client was charged with failure to return rental property, a class five felony. He rented a video then failed to return it for two months. The victim wanted restitution equal to the profit he would have made if the tape had been returned on time and been rented to other customers for every day of that two-month period. My client had no prior felony convictions so the state offered my client a class six undesignated offense, with probation and no jail, and with full restitution. In my mind this is the perfect case to try to the court without a jury.

My client's story was clear and simple. At the time he and his wife were proceeding with a divorce. He had rented the video and spent an evening at his wife's house, hoping for a reconciliation with her. Unfortunately, his wife kicked him out of the house without the video. At trial I introduced a copy of the divorce decree and a copy of an order of protection which prevented my client's return to his wife's house to retrieve the video. There was no need to interview the victim or the police prior to trial. Had this case gone to a jury trial, it would have taken two to three days of court time. As a trial to the bench it took about one hour on a Friday afternoon to obtain an acquittal for my client<sup>2</sup>.

Dance with your fear. Try those cases. Try them to the jury. Try them to the judge. But try those cases.

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1. I have made many attempts to try more bench trials but the county attorneys have always rejected my offers.

2. It is perhaps worthy of note that the judge before whom I tried the case was the Honorable Frederick Martone.



## DAY REPORTING CENTER: What Every Attorney Should Know

By Paul Ramos  
Trial Group Counsel - Group C

While reading Mike Rossi's *A Working Inmate Is A Happy Inmate* in the December 1998 issue of *for The Defense*, I thought to myself "what useful information this is for the newer attorneys in the office." Following this line of thinking, I would like to describe, in more detail, the Day Reporting Center (D.R.C.).

The Day Reporting Center is a program of strict community supervision (house-arrest) sponsored by the Maricopa County Adult Probation Department. The goals of the program as described by the probation department are:

1. To expand a continuum of community based sanctions and various treatment options available to the court.
2. To provide a safe and cost effective method of reintegrating non-violent probation inmates in the community.
3. To provide a broad spectrum of structured reintegration services to non-violent probation inmates serving commitments in the county jail.
4. To reduce the daily sentences of probation inmates in the county jail.
5. To provide highly structured supervision sanctions and services coordinated from a central locus.
6. To serve as a clearing house for probation treatment programs and services.

### Eligibility Guide Lines

In order to be eligible for the Day Reporting Center Program probationers must meet the following criteria:

1. They must be furlough eligible for the terms and conditions of probation.
2. They must display a non-violent pattern of behavior.
3. They must have an acceptable and verifiable address.
4. They must not be in need of residential treatment.

5. They must have access to transportation.
6. They must be willing to participate in the program.
7. They must not have charges pending.
8. Not have a history of sex offense convictions.

Note: When your client is being screened for the work furlough program they are usually being screened for the Day Reporting Center as well. A simple rule of thumb is: If they have been found eligible for the work furlough program, then they are usually found eligible for the Day Reporting Center.

### Program Availability

The program is available to those eligible probationers who are currently serving jail time as a term of probation and have 60 days or less remaining on the jail term. They must also serve half of their jail sentence. For instance, if a 4 month jail term was ordered, the probationer must serve 2 months in jail prior to entering the program. Furthermore, the probationer must have educational, vocational, and/or serious employment needs.

**“The probation staff then reviews program expectations with the probationers, and completes a case plan outlining the program goals.”**

### Cost

As with the work furlough program the probationer must pay to take part in the Day Reporting Center program. A probationer must pay one hour of their gross wage per day, plus a two dollar per day administrative fee to be a participant in D.R.C.. For example, if the probationer makes five dollars an hour he must pay that five dollar rate plus a two dollar administration fee or a total of seven dollars per day. The minimum payment for D.R.C. is seven dollars a day. If the probationer is unemployed, payments are made at the discretion of the supervising officer.

### Program Outline

The Day Reporting Center Program consists of three phases:

*Phase One* is the orientation and lasts approximately two weeks;  
*Phase Two* is the actual program;  
*Phase Three* is the transition and occurs during the last two weeks prior to the release date.

During Phase One of the program, participants report daily to the Day Reporting Center. The probation officer or surveillance officer will, or should, make a

minimum of two field contacts during the orientation phase. Also, the residence of the probationer will be verified. The probation staff then reviews program expectations with the probationers, and completes a case plan outlining the program goals. This plan includes daily itineraries. The structured daily itinerary consists of an hour by hour schedule of courses offered at the Day Reporting Center or other community based agencies. For those probationers who are employed, the daily structured itinerary also includes their jobs.

Phase Two is the meat of the program. Probationers report daily to the Day Reporting Center unless otherwise directed. The probation officer or surveillance officer will make a minimum of two field contacts. During Phase Two, weekly schedules including daily itineraries are completed by the probationers, and approved by the probation staff. During this phase, the case plan designed during Phase One is implemented.

Phase Three, the transition stage, occurs during the last two weeks prior to the probationers release date. During this phase, a probationer will report to the Day Reporting Center a minimum of three times weekly. The probation officer or surveillance officer should make a minimum of two field contacts. Participants in the Day Reporting Center program are under “house arrest” and will remain in the program until the completion of their original jail sentence. They are required to remain at home in the evenings. The probationer will take part in an exit interview with the probation staff. The focus of this interview is to discuss future plans once they are placed on field supervision. Finally, the case is transferred from the Day Reporting Center supervising probation officer to the field supervision officer.

### Program Description

Courses and programs offered at the Day Reporting Center address a variety of needs. The program appears to focus on four main areas. These are:

1. Education
2. Substance abuse counseling
3. Individual and group counseling
4. Job development and job search

These courses and programs are intended to assist the probationer in the development of the skills necessary to successfully integrate back into society.

Probation officers and surveillance teams, along with the probationer, are responsible for developing treatment plans and conducting individual and group counseling sessions. Since the probationer is technically under arrest and serving a jail term, they are continually monitored by surveillance officers. The surveillance officers will make unscheduled home visits during the day, night, and on weekends. Furthermore, the probationers must submit to regular urinalysis testing. The probationers are required to follow the rules and regulations of the program, if they violate these rules and regulations they may be subject to return to jail for the remainder of their term or to probation violation proceedings.

### Short Term Enhanced Probation (S.T.E.P.)

The S.T.E.P. program is restricted to probation violation cases. This is a program of house arrest in lieu of Maricopa County Jail time. It has the same time limit of up to 60 days. As an incentive, the court will order a thirty to sixty day deferred jail term while the probationer is at the D.R.C. Upon successful completion of S.T.E.P., the jail term will be deleted. Although S.T.E.P. may be ordered for any type of violation, it is usually reserved for cases involving minor violations. Furthermore, if your client has a good job, acceptance into S.T.E.P. is more likely. This will allow the probationer to have their freedom restricted while not jeopardizing their livelihood.

### Youthful Offender Program (Y.O.P.)

This program targets non-dangerous defendants, ages 14 to 25, who are eligible for D.R.C. Defendants participate in the program for approximately six months. The participants take part in Phases One through Three. During this time, they participate in substance abuse treatment, vocational, educational, and life skills programming.

### Practice Tips

When you have a client who may be subject to jail time as a term of probation, make sure they are screened for work furlough and the Day Reporting Center prior to their sentencing date. Remember, the results of the work furlough/Day Reporting Center screening are merely the probation departments determination whether your client is appropriate for the programs. If your client has been found inappropriate by the probation department for work furlough and Day Reporting Center, consider asking the court to order your client into the programs. Of course you will have to argue that your client does not pose a risk to

society even in light of his history; and/or that he can benefit from individual or group counseling whether it be substance abuse or anger control; and/or that he is fully capable of maintaining steady employment or could benefit from job skills training. This is not a complete list of areas to focus on, so be creative. Your client's freedom is at risk.

The probation department guidelines limit the amount of time in the Day Reporting Center to 60 days.

The court can override this guideline. The courts can, and have, ordered defendants into the Day Reporting Center for more than the maximum two month period.

If you plan on asking the court to order your client into the Day Reporting Center without first serving half the

jail term, and the court is agreeable to this, remember that pick-ups for the Day Reporting Center are every Tuesday. If you have that out-of-custody client who is going directly into the Day Reporting Center, you should ask for a self-surrender date, approximately two weeks from the date of sentence, to begin on the Monday evening prior to a Tuesday pick-up date. This will give the probation department enough lead time to get your client on the list for that date.

### Conclusion

The next time you have a client facing jail time as a term of probation, think about work furlough and the Day Reporting Center. In those special cases that we all get from time to time, you may be able to persuade the court to order your client directly into D.R.C. Give it a try, your client will appreciate it. ■

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## INTERVIEWS AND INTERROGATIONS - THE REID TECHNIQUE

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By Tom Thomas  
Investigator - Trial Group C

One of the most difficult aspects of trying cases is developing a method of defense to a client's confession. Clients make statements for many reasons, ranging from physical/psychological coercion to guilty conscience. The defense attorney's job is to examine the interrogation session closely and prove to the jury that this session, and ensuing statements, don't prove guilt.

A couple of years ago, I had the opportunity to attend both the basic and advanced courses of the Reid Technique of interviews and interrogations. Just about every week I watch "NYPD Blue" and see shortened versions or partial applications of Reid, used by television characters to obtain confessions. The purpose of this article is to give attorneys some insight into the teachings of the Reid Technique in an effort to assist in developing ideas to be used during interviews or court testimony, that would help weaken the value of a confession.

The Reid Technique is broken into two basic phases, the interview phase and the interrogation phase. The interview is a non-accusing gathering of information. A structured set of questions are asked, some of which are for administrative purposes, i.e. name, address, date of birth, etc., and some that address the issue or crime. During the interview the interrogator is to listen and watch for how the person answers and reacts to the questions. These questions are to invoke verbal and non-verbal behavioral symptoms indicative of truth or deception. Examples of interview questions that address the issue are:

1. Do you know why I have asked to talk to you today?
2. We are investigating the (crime). Did you (crime)?
3. Who do you think did the (crime)? Now, let me say this, if you only have a suspicion I want you to tell me that, even though you may be wrong. I'll keep it confidential and not report it to the person. Who do you think did the (crime)?
4. Did you ever think about doing a (crime) even though you didn't go through with it?
5. What do you think should happen to a person who would (crime)?
6. How do you think the results of the investigation will come out for you?

Toward the end of the interview phase, the interviewer may ask a *Bait Question*. The bait question suggests that there is some physical evidence/witness concerning the crime. The purpose of the bait question is to give the suspect something to think about and to possibly change an original denial.

*Example:*

Interviewer: "Joe, you say that you have never been in the office where the safe is. Fingerprints have been taken from the safe. Is there any reason why your

fingerprints would be found on the safe?"

Based upon the answers to the interview questions, the investigator should narrow the suspect list and move into the interrogator's phase. There are nine steps of the interrogation.

1. **A directive positive confrontation.** "I have the results of our investigation into the (crime). The results clearly indicate that you are the person who did the (crime)." Or "based on the results of your interview, you have not told me the whole truth about this (crime)."

2. **Theme development.** The interrogator proposes reason and motives that would serve to morally (not legally) justify or excuse the criminal behavior. The theme is developed as to *why* the suspect did the crime, not *if* the suspect committed the crime.

3. **Handling Denials.** A denial is any statement or action made by the suspect which contradicts or indicates a refusal to accept the truthfulness of an allegation. The interrogator listens and evaluates the first denial and then prevents the suspect from making any further denials.

4. **Overcoming Objections.** A statement that is proposed by the suspect as an excuse or a reason why the accusation is false. The interrogator draws out the object.

*Example:*

Suspect: "I would never do anything like that."

Interrogator: "Why is that Joe?"

Suspect: "I don't need the money, I have money in the bank."

Interrogator: "I hope that's true Joe, because then that tells me that you did this on the spur of the moment thing, and you're not a career criminal, where maybe you needed the money."

5. **Obtain and retain the suspect's attention.** The interrogator must be aware of when the suspect's attention has been lost, because they won't buy into any of the themes or admit to anything. At this point the interrogator becomes sincere and enthusiastic with the suspect, moves in and touches the suspect on the arm or shoulder. The interrogator reestablishes eye contact.

**"The defense attorney's job is to examine the interrogation session closely and prove to the jury that this session, and ensuing statements, don't prove guilt."**

6. **Handling the suspect's passive mood.** The interrogator observes the suspect for signs of surrender. The suspect is less tense, head and body slump and appears defeated. The suspect is listening and starting to buy into the interrogator's themes.
7. **Presenting an alternative question.** At this point the interrogator asks the suspect a question which offers the suspect two incriminating choices. No matter which choice the suspect picks it will be the first admission of guilt. This admission can be as little as a nod of the head.
8. **Having the suspect provide details of the incident orally.** The suspect has bought into the alternative question and has made a verbal or non-verbal admission. The interrogator then gets the suspect to verbally provide details of how the incident took place. During this step, the interrogator gets the suspect to give details that only the actual perpetrator would know.
9. **The written confession.** The interrogator gets the suspect to write, in his own words, how and why the incident happened.

*Example:*

Interrogator: "Did you plan this out for a long time before hand Joe, or was it just a spur of the moment thing? It was just a spur of the moment thing wasn't it Joe?"

*Example:*

Interrogator: "Joe, I'd like you to write out your side of the story, explaining exactly what you told me about the (crime). Write out how it happened and why it happened. This is important because it shows that you want to get the matter straightened out."

John E. Reid and Associates is considered to be the most prestigious organization instructing in the techniques of interviews and interrogations. Reid teaches that if the suspect provides deceptive answers (which are open for interpretation) during the interview and/or gives a weak denial when first confronted at the interrogation, he is guilty. The interrogator continues to verbally pursue the suspect until an admission is made.

The two classes I attended were also attended by 21 individuals from local law enforcement agencies. If those agencies are using these methods, then maybe an understanding of these techniques will help when examining or interviewing the interrogator.

NOTE: The information provided in this article was taken from class notes and the Reid Techniques Manuals, which are available in my office. ■

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## ARIZONA ADVANCE REPORTS

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By Terry Adams  
Deputy Public Defender - Appeals

*Jerry B., In re, 283 Ariz. Adv. Rep. 19 (CA 1, 11/27/98)*

In January 1998, the defendant was placed on probation for an offense committed in September 1996. In February 1998 he admitted a new felony charge and was placed on juvenile intensive probation authorized by A.R.S. § 8-241(C). This statute became effective July 21, 1997, after he committed the first offense. On appeal he argued that the application of the statute was *ex post facto*. The court held it was not. When he reoffended, section 8-241 had taken effect, therefore, the increased penalty he received after reoffending was not a retroactive application.

*State v. Fontes, 283 Ariz. Adv. Rep. 17(CA 2, 11/25/98)*

The defendant was observed stealing an item in a supermarket by an off-duty sheriff's deputy, employed as a plainclothes security officer. When he approached the defendant he showed him a badge and identified himself as a sheriff's deputy. The defendant ran, and the deputy pursued and caught him. In attempting to arrest him a struggle ensued. Eventually he was subdued and arrested. The defendant was convicted of aggravated assault on a peace officer, and resisting arrest. He argued on appeal that the deputy was not a "peace officer" "engaged in the execution of any official duties" as required by the respective statutes. The court held that an off duty peace officer is still a peace officer and by showing his badge and identifying himself made the defendant aware. Also, since he observed the theft he was engaged in official duties.

*State v. King, 283 Ariz. Adv. Rep. 6 (CA 1, 11/24/98)*

A police officer stopped to assist the defendant's wife whose car had broken down. She advised him that she had an argument with her husband and had sustained a small cut on her finger. The officer insisted on returning to contact the defendant. The defendant was not upset, showed no signs of leaving and was not threatening to the officer. He remained inside his house and the officer decided to arrest him for domestic violence. The defendant requested to make a phone call which was denied by the

officer. The defendant turned and walked further into his home at which time the officer reached in and grabbed him and placed him under arrest. Later cocaine was discovered in his wallet. The appellate court held that there were no exigent circumstances sufficient for the officer to enter the defendant's home without a warrant. A warrant could have been obtained if an arrest was necessary. The evidence should have been suppressed.

*State v. Sanders*, 283 Ariz. Adv. Rep. 10(CA 1, 11/24/98)

The defendant was arrested for D.U.I. Before taking the breathalyzer she asked to call her attorney. The police officer allowed her to call and she got her attorney's answering service which requested a call back number and the attorney would call her "right back". The officer refused and later testified that there was only one phone and it was frequently busy. The appellate court held that this was a denial of her right to counsel because she was not given a reasonable opportunity to consult her attorney. The remedy for a violation of the right to counsel is dismissal.

*State v. Root*, 284 Ariz. Adv. Rep. 4(CA 1, 12/10/98)

The defendant was charged with aggravated DUI for a third DUI within 60 months. Prior to trial, he offered to stipulate to his prior DUIs and moved in limine to preclude the state from mentioning the priors and to preclude the court from reading the information which included reference to his two priors. The trial court precluded the state from mentioning the priors but refused to redact the information. The appellate court reversed saying that the defendant's stipulation was sufficient to establish that element of the offense. The court also held that when a defendant's BAC is not measured within two hours of driving, the state can meet its burden of showing greater than .10 by retroactive extrapolation evidence. ■

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## BULLETIN BOARD

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### *New Attorneys*

**Dave Fuller** will return to the office on February 1. He is returning to the office from Braud Westensee, LTD., a private firm in Illinois. He previously worked for MCPD from 1991 to 1995. He earned his J.D. from DePaul University College of Law and his B.A. in Psychology from Northern Illinois University.

### *Attorney Moves/Changes*

**Elizabeth Feldman** left Group D on January 22. She has been with the office since 1992. She will be working in a part-time capacity for Judge Myers.

### *New Support Staff*

**Chris Acree**, Clerk, started with the office in the Records Division on January 6. She was most recently employed as a clerk/typist for a private law firm.

**Dylan Jose** began as the office aide for Appeals on January 13.

**Janis Pelletier** began working as a Law Clerk in Group D on January 19. She graduated from ASU College of Law last May, and was admitted to the bar in October. She has clerked for several firms and had an externship with the Arizona Center for Law in the Public Interest.

**Socorro Rodriguez**, Client Services Assistant, began on December 28. She brings with her four years of experience as an Eligibility Officer with Ventura County.

**Donald Souther** began with the office as an Investigator for Group B on January 19. He was most recently employed as an investigator for Cave Creek Investigations. Previous to that he served 22 years as a police officer for the Hayward, CA police department.

Welcome to the new volunteers! **Julie Sitver** will be assisting in the DUI Unit, **Miki Csaky** will be providing support to Group D, and **Ron Lopez** will be assigned to Group B.

### *Support Staff Moves/Changes*

**Dave Ames**, Investigator from Group B, assumed a "floater" position on January 19.

**Lisa Gilbert** began a special work assignment as support staff lead at SEF on January 25. **Carol Miller** will step into that function for Durango.

**Julie Roberg** became a permanent fixture in the Information Technology Department on January 25. ■



## December 1998 Jury and Bench Trials

### Group A

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
11/12-11/13	Ryan Clesceri	Baca	Johnson	CR 98-09252 Burglary/ F4; Theft/ F6	Not Guilty - Burglary Guilty - Theft	Jury
12/2-12/4	Valverde Jones	Dougherty	Luder	CR 98-12367 Theft/ F3 with 2 priors while on probation	Guilty	Jury
12/3-12/3	Klepper	Baca	Todd	CR 98-06641 Forgery/ F4 with 2 priors	Dismissed without prejudice	Jury
12/3-12/7	Howe Robinson	Baca	Flores	CR 97-09363 Theft/ F3 Trafficking in Stolen Prop/ F3	Mistrial	Jury
12/8-12/11	Wuebbels Erb Garrison	Dunevant	Godbehere	CR 98-10723 Theft/ F3 reduced to F5 during trial	Guilty	Jury
12/9-12/10	Ryan	Dougherty	Astrowsky	CR 98-00336 2 Cts Sexual Conduct with a minor /F6	Guilty	Jury
12/10-12/18	Passon	Galati	Devito	CR 98-11192 3 Cts Agg. Assault dangerous/ F3 Disorderly Conduct dangerous/ F6 Misconduct Involving Wrapons/ F4	Guilty	Jury
12/16-12/17	Hernandez	Dougherty	Ireland	CR 98-13305 Theft/ F5 with 2 priors on release	Guilty of lesser included Theft/F6 Other allegations under advisement	Jury

## Group B

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
11/10-12/01	<b>Grenier &amp; McCullough</b> Castro <i>Brink</i>	O'Toole	Levy	CR 97-00726 1° Murder/ F1D Attempted 1° Murder/ F2D Attptd Armed Robbery/ F3D Poss. of Marij. for Sale/ F4D Sale-Trans. of Marij./ F3D Involving or Using a Minor in a Drug Offense/ F2D	Not Guilty - Murder 1° Guilty - Second degree Guilty - Aggravated Assault Guilty Directed verdict Directed verdict  Directed verdict	Jury
11/23-12/3	<b>Lopez</b> King	Arellano	Pitts	CR 97-05917 Kidnapping/ F2D 2 Cts Sexual Assault/ F2D Sexual Abuse/ F5D Aggravated Assault/ F3D Theft/ F3; Theft/ F6; Assault/ M1	Not guilty all counts except- Hung jury - Theft, F3; 8 to 4 for not guilty	Jury
11/30-12/1	<b>McCullough</b> Erb	Hutt	Proudfit	CR 98-11056 Agg. Assault/ F3D	Not guilty	Jury
11/30-12/1	<b>Park</b> Erb	Hotham	Frick	CR 98-11734 Theft with priors/ F4	Not guilty	Jury
12/2-12/3	<b>Roth</b>	Hotham	Bailey	CR 97-11676 Poss. of Narcotic Drugs/ F4 Poss. of Drug Paraph./ F6	Not guilty	Jury
12/10-12/15	<b>Liles</b>	Howe	Kerchansky	CR 98-09536 Theft/ F3; Resist. Arr./ F6 Escape/ F5; Criminal Damage/ misdemeanor	Not guilty on Theft charge Guilty on other charges	Jury
12/14-12/15	<b>Walton</b>	Cole	Adams	CR 98-13378 Poss. of Marijuana/ F6	Not guilty	Jury

## Group C

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
11/30- 12/2	<b>Schmich</b> Castro	Dairman	Ron	CR 98-92714 1 Ct. Theft of Credit Card/ F5 1 Ct. Possession of Drug Paraphernalia/ F6	Ct. 1 - Not Guilty - Ct. 1 Ct. 2 - Dismissed by State	Jury
12/7	<b>Zazueta</b>	Arrow (Pro Tem)	Forness	CR 98-0800 Assault/ M1 Disorderly Conduct/ M1	Not Guilty Directed Verdict	Bench
12/7	<b>Murphy</b>	Aceto	Cook	CR 98-93191 1 Ct. Misconduct Involving Weapons/ F4 1 Ct. Possession of Dangerous Drugs/ F4	Guilty on both counts (Submitted to Judge on DR)	Bench
12/11	<b>Dunlap-Green &amp; Moore</b> Beatty	Hamblen	Anderson	TR 98-02486 2 Cts DUI/ M1	Guilty	Jury

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
12/14	Zazueta	Ore	Parks	TR 98-10396-CR 1 Ct. Driving on Suspended License (A & B)/ M1	Not Guilty on Driving on Suspended License (B), plead to Driving on Suspended License (A)	Bench
12/14- 12/15	Bingham Thomas	Ellis	Carter	CR 98-92020 1 Ct. Forgery/ F4	Not Guilty	Jury
12/15	DuBiel Moller	Hamblen	Anderson	CR 98-1159-FE 1 Ct. Interfering w/Judicial Procedure/ M1	Not Guilty	Bench
12/18	Nermyr Beatty	Ellis	Goldstein	CR 98-93243 1 Ct. Resisting Arrest/ F6	Mistrial	Jury

## Group D

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
10/27-11/13	Schaffer & Berko Barwick	Nastro	Armijo	CR 97-0575(B) 1° Murder/ F1	Guilty	Jury
11/16-12/4	Schaffer & Berko Barwick <i>Bowman</i>	Dunevant	Mitchell	CR96-12423 22 Cts.of Kidnap/ F2 1 Ct. Sex Asslt/ F2 1 Ct. Armd Robb/ F2	Not Guilty 1 Ct. Armd Robb. Guilty other counts.	Jury
11/18-12/16	Kibler & Leyh	D'Angelo	Krabbe	CR 96-06833 3 Cts 1° Murder/ F1; 5 Cts Agg. Asslt./ F3; 2 Cts Endangermnt/ F6	Death Penalty Murder 1 Directed Verdict Guilty 2° Murder	Jury
12/1	Willmott	Reinstein	Pacheco	CR 98-04655 1 Ct. Possession of Methamphetamine/ F4	Not Guilty	Jury
12/1	Bevilacqua	Gottsfield	Cottor	CR 98-07836 Attpt/Com possess narc. Drug./ F5	Guilty	Bench
12/2-12/7	Enos	Akers	Hammond	CR 98-06682 1 Ct. Forgery/ F4	Guilty	Jury
12/9	Enos	Katz	Hammond	CR 96-11859;96-12495 1 Ct. Theft/ F3; 1 Ct. Theft/ F4; 1Ct. Criminal Damage/ F5	Guilty	Jury
12/10-12/15	Force & Timmer Schroeder	Kamin	Neugebauer	CR 98-11064 Agg DUI/ F4 Agg dr-ba/ F4	Hung jury	Jury
12/10	Silva O'Farrell	Gerst	Proudfit	CR 98-01652 1Ct. G/T Vehicle/ F3	Dismissed by state w/o prejudice	Jury

12/11	Willmott	Katz	Farnum	CR-98-10183 1 Ct. Aggravated Assault/ F6 1 Ct. Resting Arrst/ F6	Ct. 2 - Dismissed After Evidence, Ct. 1 Lesser - Guilty disorderly Conduct/ M1	Bench
12/15-12/17	Claussen & Varcoe	Gerst	Wolack	CR98-09933 1 Ct. Armd Robb./ F2	Mistrial	Jury
12/16	Ferragut	Kamin	Neal	CR 98-10671 1 Ct. Unlawful Flight/ F6	Guilty	Jury
12/18	Willmott	McVay	Lamb	CR 98-01905(FE) 1 Ct. IJP/ M1	Not Guilty	Bench
12/18	Huls	McVay	Brame	CR 98-01899 IJP / M1	Not Guilty	Bench

## DUI Unit

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
12/1-12/4	Wray	Kamin	Poster	CR98-08535 1 Ct. Agg DUI/ F4	Not Guilty	Jury
12/1-12/3	Carrion	Hutt	Eckhardt	CR97-04917 2 Cts Agg DUI/ F4	Not Guilty on Agg DUI over .10 Guilty on Agg DUI	Jury
12/2-12/7	Timmer	Reinstein	Lawritson	CR98-00779 1 Ct. Agg DUI/ F3 1 Ct. Agg DUI/ F4 1 Ct. Endangerment/ F6	Not Guilty	Jury
12/9-12/16	Carrion	Akers	Worth	CR97-13956 1 Ct. Agg DUI/ F4	Not Guilty - DUI Guilty - Suspended License	Jury

## Major Felony

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
12/3-12/15	Bransky	Martin	Martinez	CR 96-07148 Murder 1°/ F1	Guilty	Jury

# Office of the Legal Defender

Dates: Start/Finish	Attorney Investigator	Judge	Prosecutor	CR# and Charge(s)	Result w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
12/14- 12/17	Allen	Dairman	Arnwine	CR 98-91745 G/T-Vehicle/ F3	Not Guilty - Guilty of Lesser Included, Theft/ F5	Jury
12/1-12/14	Babbitt & Parzych Soto	O'Toole	Charnell	CR 97-11718 2 Cts 1 °Murder/ F1D 3 Cts Att.1 °Mrder/ F1D	Not Guilty 1° Murder Guilty of 2 °Murder Not Guilty Att 1° Murder Guilty of Att.2° Murder	Jury
12/2-12/8	Steinle Abernethy	McVey	McIlroy	CR 97-01847 1 ° Murder/ F1D	Guilty	Jury
12/3-12/14	Ivy Pangburn	Ishikawa	Brenneman	CR 98-92253 Armed Robbery/ F2 Agg.Asslt/ F3	Hung Jury (9-3 for conviction)	Jury

**Don't forget to register for:**



*Friday February 26, 1999*

*Tovrea Mansion  
4633 E. Van Buren St.  
Phoenix, Arizona*

*To register contact Salina Godinez (602) 506-7569*