



for The Defense

► ◀ Dean Trebesch, Maricopa County Public Defender ► ◀

REDISCOVERING DISCOVERY: BEATING THE BULLET

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By Carol A. Carrigan
Defender Attorney – Appeals

The following article appeared in the April, 1999 issue of AACJ's "The Defender" and is reprinted here for its practical approach and suggestions for obtaining timely discovery, and, hopefully, achieving more effective assistance of counsel.

Q: What is faster than a speeding bullet and just as deadly?

A: The rocket docket.

In State court, the rocket docket is here to stay. The blessings of speed have been given full approval by our courts at all levels. Yet, how do defense attorneys ensure the right to effective counsel as opposed to the courts' right to a speedy trial? The answer lies in the Rules of

Criminal Procedure. The judges' admitted interest in moving things at a frenetic pace do not mean that you must stand in front of the speeding train in the vain hope of slowing it down – just make sure the train does not leave the station without having your client's full due process rights on board. The defense can accommodate the courts' interest in speed and statistics by insisting that all of the Rules of Criminal Procedure, not merely Rule 8, be followed.

RULE 15: THE DISCOVERY RULE

Too little attention has been paid to the higher courts' many pronouncements that the Criminal Rules of Procedure were designed to work in concert. Once the charge has been made,

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STATE'S MOTIONS FOR MISTRIALS AND DOUBLE JEOPARDY

By Michael Ryan
Defender Attorney – Group E

Thank you, Alex: Double Jeopardy Protections for \$500 please. The answer is: Manifest Necessity. What is the State's burden when it asks for mistrial over defendant's objection?

The framers of both the Arizona and United States Constitutions recognized that few

abuses of government power are more tyrannical than successive prosecutions for the same offense. Thus the 5th Amendment of the United States Constitution commands that no "person be subject for the same offence to be twice put in jeopardy of life or limb." Likewise, Article 2, Section 10 of the Arizona Constitution commands that "no person shall . . . be twice put in jeopardy for the same offense." The courts have held, however, that if the accused commits a crime that offends the laws of

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for The Defense

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the defendant noticed, and the parties assembled, the next order of business, in order for the matter to go forward, is discovery. It is important for everyone to be aware, the courts and the parties, that nothing can happen until full discovery is completed. It is for this reason that Rule 15.1 requires that no later than *ten days* after the arraignment. . .the prosecutor *shall* make available to the defendant:

- 1)Names and addresses of all persons to be called with their written or recorded statements;
- 2)Statements of the defendant and any codefendant;
- 3)Names and addresses of experts with statements and test results;
- 4)Papers, documents, photographs, or tangible objects to be used at trial;
- 5)Prior convictions of the defendant;
- 6)Prior acts of the defendant (404(b));
- 7)Mitigation evidence for both the guilt and sentencing phases in addition to all prior convictions of witnesses.

The purpose of Rule 15's early and liberal discovery provisions is to give both parties ample opportunity to investigate the facts and prepare their cases for trial.²

Too many defense attorneys assume that because the rules automatically require the prosecutor to give discovery, a motion for discovery is not necessary. Unfortunately, the almost universal experience of the defense is that discovery, even as to the above-required discovery, is significantly late and usually received piecemeal. Therefore, even though the duty is automatically imposed, the defense should be filing a written motion for discovery immediately upon receipt of each case. This motion for discovery must give notice that these materials will be expected, as provided in the rules, "no later than ten days after the arraignment." In addition, because most cases involve police officer witnesses, the motion for discovery should contain a request for a schedule of police officer interviews within a reasonable period of time.

The case law is filled with sanctimonious pronouncements concerning the right to timely, reciprocal discovery. However, curiously, in most of these cases, the conviction is affirmed.³ Why, given the pronouncements as to the absolute requirements of the rules, is the defense losing these cases? The reason is that the discovery efforts are too little, and too late.

TIMELINESS

In the majority of cases, the discovery request usually follows a request for continuance because discovery is not complete, followed by whole or partial discovery near or during the trial.

The reason for making a written discovery motion as soon as the case is received is to put the court and the prosecutor on notice that you will expect discovery on time. Then, when you do not get it on the tenth day, it is time to call the court's attention to the prosecutor's failure to comply and request sanctions (*see below*).

In order to make your discovery requests complete, you should be sure that you make a *written* request under Rule 15.1(c) for a list of prior convictions of specified defense witnesses. You should also be sure that you file a notice of defenses within ten days of the receipt of any purported disclosure by the prosecution. This not only tells the judge that you will play by the rules, but avoids the prosecutors' being relieved of the necessity to provide further discovery pursuant to Rule 15.1(f). If there is information which is difficult or impossible to obtain without being a member of law enforcement, make a written motion for the additional material pursuant to Rule 15.1(e). This motion should set forth that the defendant is unable without undue hardship to obtain the substantial equivalent by other means. This can be incorporated into your motion for sanctions or brought at a later time as the need becomes obvious. In making this request, keep in mind the provisions of Rule 15.1(d) which outlines the extent of the prosecutor's duty to obtain information. The term "staff" refers to both members of the prosecution staff and any persons who have participated in the investigation as well as information in the hands of other government agencies.⁴ The footnotes to the rule note that this "imposes upon the prosecutor an obligation to insure a flow of all discoverable information to his office from all local law enforcement agencies."

In summary, the request for discovery must be made immediately; the request for an order must be made on the eleventh day. If not, when an appellate court looks at the case, it will look at the overall record and assess as to abuse of discretion or harmless error. Your efforts will be too little⁵ or too late,⁶ and, because you didn't get the discovery you needed, it will be difficult, if not impossible, to show prejudice.

SANCTIONS

Rule 15.7 of the Arizona Rules of Criminal Procedure provides sanctions for failure to comply with any provisions of the rule. These sanctions include:

- 1)Ordering disclosure of the information not disclosed;
- 2)Granting a continuance;
- 3)Holding a witness, party, or counsel in contempt;
- 4)Precluding a party from calling a witness;
- 5)Declaring a mistrial when necessary to prevent a miscarriage of justice.

The first sanction (ordering disclosure) is no sanction at all.

If the court insists upon this slap on the wrist, ask that it be accompanied with some punitive consequence. Be creative, you know your case and know what you would like to have happen.

The second sanction is also no sanction at all. You should oppose it in all rocket docket cases (which is now all of them?). Rule 6.1 affords a defendant effective assistance of counsel. Counsel cannot be effective if time periods for preparation are shortened. Tell the judge that the other time periods within the rules are meant to work in concert and that all of these time periods will be thrown off, including Rule 16.1, the time for filing motions. Certainly, do not agree to a thirty-day continuance. The rules give the prosecutor ten days from arraignment; this should be the absolute outside limit for an order of production. If the court is hesitant, cite those cases which make clear that the court has inherent power to order disclosures.⁷ If the court is determined to give a continuance, insist that it be limited, and insist that the minute entry reflect that this continuance is *by and on behalf of the prosecution*. A defense request that the matter be put off because the State has failed in its duties to give discovery should never be treated as a defense request for a continuance. The record should reflect that the continuance was necessitated by the prosecutor's failure to comply with Rule 15. The next time you are in court on this case and still have not received the discovery, the record is clear that the prosecutor is out of compliance with the rules.

Keeping the record straight sets the matter up for the third sanction which is holding a witness, a party, or counsel in contempt. This truly is a sanction. But does it help your case? Precluding a party from calling a witness does help your case. (But don't let this be you: give notice of defenses timely.) If you start asking for this sanction the first time that you are in front of the judge, it may be more welcome when you are there on a successive occasion.

The fifth sanction is declaring a mistrial. You may or may not want this to happen. Keep in mind that the prosecutor will start over with a clean slate unless you can prove that he deliberately caused the non-compliance with the rules. But also keep in mind that, under the discovery rule, the prosecutor is responsible for his staff, any investigators, and any other law enforcement agencies over which he has control.

If, given the situation in your case, the court refuses to order what the rules require: adequate time to effectively prepare your case, take a special action. There is no adequate remedy by way of appeal (the cases cited in this article should be adequate support for this argument). Moreover, a contraction of any of the time periods for defense preparation in the period between arraignment and trial puts Rule 6.1 in conflict with

Rule 8.

THE RULES AS A COHESIVE WHOLE

Rule 8, the speedy trial rule, sets forth the time periods in which a defendant must be tried. Rule 8.6 provides that if these time limits are violated, the matter shall be dismissed with or without prejudice. The time limits for these rules have been found to be constitutional and reasonable. However, they cannot be constitutional or reasonable if one party (the defense) is prevented from taking advantage of the full time allotted under the rules for preparation.

Courts can be accommodated in their desire for speedy trials if courts will insist upon strict compliance with the rules. Most trial court judges are sticklers for compliance with Rule 16.1 which provides that motions must be made twenty days before trial. This rule is not unreasonable in the context of the rules as a whole if the preceding rule, Rule 15, is strictly enforced. Given the time limits of Rule 8, the requirement that motions be filed twenty days before trial pursuant to Rule 16 is only reasonable if, as contemplated by the rules, the defense has had at least sixty days (90 days minus 10 days for Rule 15.1 and 20 days for Rule 16.1) in which to prepare for and make that motion.

The granting of a continuance for failure of the State to adequately disclose, means that the defense preparation period is compressed. It must be stressed to the trial court and to the system as a whole that a defendant should never be forced to choose between his right to a speedy trial and his right to effective counsel. In addition, it must be stressed that Rule 15 provisions are requirements and requests for discovery do not constitute "fishing expeditions." Too often, because it is necessary for the defense to bring requests for discovery in the face of negligent compliance, judges treat these requests as nuisances. Yet, the defense is entitled to all of these items under the rules. Similarly, when the prosecution permits police officers to avoid timely interviews on a reasonable schedule, this, too, is non-compliance with Rule 15 which requires sanctions.

MAKING THE RULES WORK

Defense attorneys are understandably upset with a rocket docket which rushes cases to trial before the defense is ready. Judges, on the other hand, have an interest in speedy determination of cases. The defendant's right to a speedy trial with effective counsel and the judges' interest in speedy disposition can be accommodated if the criminal rules, every one of them, are enforced.

In order to ensure that the rules are enforced from arraignment to disposition, it may be necessary for the defense to

make motions requiring the prosecution to do what it should automatically do under Rule 15. Therefore, it is suggested that the defense adopt the following procedures under the rules:

- 1) Make immediate request for discovery pursuant to Rule 15 requiring that all discovery be provided by the tenth day;
- 2) If discovery is not provided in full, move the court not only for sanctions but with a motion to preclude, a motion to dismiss, and a motion for accelerated hearing.
- 3) If interviews do not occur or are not scheduled within fifteen days, move to depose these witnesses in order to avoid last-minute interviews.
- 4) Move in writing for additional disclosure pursuant to Rule 15.1(c)(d) and (e).
- 5) File timely notice of disclosure.
- 6) Persist.

The rocket docket directly affects every defense lawyer's concern for effective assistance of counsel. Perhaps Rule 15 is the answer. Let's give it a try.

Endnotes

1. Nota Bene: It is the courts', not the clients', right to speedy trial which will take precedence.
2. *Wright v. Superior Court*, 110 Ariz. 265, 517 P.2d 1261 (1974).
3. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985) (even though State failed to disclose evidence of defendant's prior for burglary, conviction affirmed). *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984) (undisclosed State's witness permitted to testify). *State v. Stewart*, 139 Ariz. 10, 676 P.2d 1108 (1984) (defendant lied about his identity making it okay to grant State's motion to shackle him on day of trial). *State v. Dodds*, 112 Ariz. 100, 53 P.2d 970 (1975) (okay for State to provide summary of statements instead of statements themselves.) *State v. Lawrence*, 112 Ariz. 20, 536 P.2d 1038 (1975) (defense notice of defenses insufficient, therefore, State need not give further discovery). *State v. Jones*, 110 Ariz. 546, 521 P.2d 978 (1974) (State gave no notice of State's expert but defense found out about him three weeks before trial).
4. *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979).
5. *State v. Aldridge*, 108 Ariz. 536, 502 P.2d 1355 (1972) (motion made after trial was in progress).
6. *State v. Piper*, 113 Ariz. 390, 555 P.2d 636 (1976) (in absence of clear abuse of discretion, Supreme Court will not modify ruling of trial court refusing to compel disclosure).
7. *State v. Wallace*, 97 Ariz. 296, 399 P.2d 909 (1965). *State v. Bird-sall*, 116 Ariz. 196, 568 P.2d 1094 (App. 1977).

BULLETIN BOARD

New Attorneys

Arrived February 14, 2000

Zubair A. Aslamy

A 1999 graduate cum laude from the California Western School of Law, Mr. Aslamy has recently relocated from Cottonwood Arizona where he was associated with Apey, Watkins, & Diesel, P.L.L.C.

V. Adam Carter

A 1999 graduate of Pepperdine University School of Law, Mr. Carter served as a judicial extern for Hon. Stephen M. McNamee, Chief United States District Judge for the District of Arizona, prior to his law school graduation.

Barbara O. Dennis

A 1999 graduate of Arizona State University College of Law, Ms. Dennis recently served as bailiff to Hon. Rebecca Albrecht, Superior Court in Maricopa County.

Barbara Falduto

A May 1998 graduate of Thomas Jefferson School of Law in San Diego, Ca, Ms. Falduto has recently relocated from San Diego, CA, where she was a law clerk associated with the Office of the District Attorney and also the Law Offices of Phillip T. Vondra.

Taylor W. Fox

A 1999 graduate of Indiana University School of Law, Mr. Fox has recently relocated from Kalamazoo, Michigan where he was a legal researcher from the law firm of Ryan, Jamieson, Morris & Ryan.

Billy L. Little

A 1999 graduate of Arizona State University School of Law, Mr. Little has been associated with Deloitte & Touche LLP, where he was the Employee Benefits Consultant. Mr. Little is also a Captain (Major Select) in the United States Air Force Reserve.

Trent D. Stewart

A 1997 graduate of the University of Detroit Mercy Law School, Mr. Stewart has been an attorney for East Valley Law Offices, P.C., Gilbert, Arizona, specializing in criminal felony and misdemeanors.



Maricopa County Office of the Public Defender

Vision Statement

TO DELIVER AMERICA'S PROMISE OF JUSTICE FOR ALL.

Mission Statement

The Office of the Public Defender protects the fundamental rights of all individuals, by providing effective legal representation for indigent people facing criminal charges, juvenile adjudications, dependency and severance proceedings, and mental health commitments, when appointed by Maricopa County Superior and Justice Courts.

Goals

- ◆ To protect the rights of our clients and guarantee that they receive equal protection under the law, regardless of race, creed, national origin or socio-economic status
- ◆ To obtain and promote dispositions that are effective in reducing recidivism, improving clients' well-being and enhancing quality of life for all
- ◆ To ensure that all ethical and constitutional responsibilities & mandates are fulfilled
- ◆ To enhance the professionalism and productivity of all staff
- ◆ To produce the most respected and well-trained attorneys in the indigent defense community
- ◆ To work in partnership with other agencies to improve access to justice and develop rational justice system policies
- ◆ To achieve recognition as an effective and dynamic leader among organizations responsible for legal representation of indigent people
- ◆ To perform our obligations in a fiscally responsible manner

State's Motions for Mistrials and Double Jeopardy

Continued from page 1

more than one government such as two States or a State and the Federal Government, or a Tribal Authority and a State or the Federal Government, each of these "sovereigns" may in fact prosecute for the same offense. *See e.g., Heath v. Alabama*, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). This is the so-called dual sovereignty doctrine.

The proscriptions against double jeopardy also prohibit the government from inflicting double punishments for the same offense. But imposing a civil forfeiture and a criminal punishment for the same offense does not offend double jeopardy. *See e.g., United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996).

Perhaps one of the easiest scenarios to analyze under double jeopardy would be an attempt by the same sovereign to try the accused a second time for a crime for which he has already been acquitted or convicted. This is an easy one for most defenders. But federal prosecutors attempted just such a prosecution after an accused was acquitted of a murder. The Supreme Court held that the second prosecution was barred by double jeopardy. *Grafton v. United States*, 206 U.S. 333, 27 S.Ct. 749, 51 L.Ed. 1084 (1907). The more difficult problem arises where the trial court has granted a mistrial. The question then becomes: does double jeopardy bar a retrial?

Mistrials

Double jeopardy attaches once the jury is sworn. *Jones v. Kiger*, ___ Ariz. ___, ___ P.2d ___, 1999 WL 374088 (Div. 1 June 10, 1999). The first question to ask in analyzing whether a second trial is prohibited after the grant of a mistrial is who made the motion. Double jeopardy illustrates a point that sometimes seems to elude prosecutors and judges – that the government is not entitled to the same considerations as the accused. Ordinarily, double jeopardy is not offended when a second trial is conducted after a trial court grants a defendant's motion for mistrial. This is so because the defendant himself is asking to abort the first trial, thereby waiving double jeopardy claims. *See e.g., Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); *State v. Ware*, 27 Ariz. App. 645, 557 P.2d 1077 (Div. 1 1976). In the federal system, the exception to this rule is when the prosecutor intends to "goad" the defendant into asking for a mistrial. Such conduct by the prosecutor results in the double jeopardy bar even where the defendant asked for the mistrial.

The Arizona Supreme Court has specifically held that our double jeopardy provision provides a broader protection than

the federal counterpart on this issue. In *Pool v. Superior Court*, 139 Ariz. 98, 677, P.2d 621 (1984), the Court held that when prejudicial prosecutorial misconduct prompts the defendant to move for a mistrial and the prosecutor was "indifferen[t] to a significant resulting danger of mistrial or reversal," double jeopardy bars retrial. The *Pool* Court specifically rejected *Kennedy's* "goad" standard. Generally speaking, in Arizona, the state is not entitled to mistrials and certainly cannot foment them.

Manifest Necessity

When the defendant objects to a mistrial either on the prosecutor's motion or granted *sua sponte*, the Court since *United States v. Perez*, 22 U.S. 579, 6 L.Ed. 165, 9 Wheat. 579 (1824), has required that the mistrial be supported by a "manifest necessity." *See e.g., Kennedy*, 456 U.S. at 672, 102 S.Ct. at 2087; *Arizona v. Washington*, 434 U.S. 497, 505-06, 98 S.Ct. 824, 830-31, 54 L.Ed.2d 717 fns 17-20 (1978); *United States v. Jorn*, 400 U.S. 470, 481-82, 91 S.Ct. 547, 555, 27 L.Ed.2d 543 (1971) (collecting cases).

Justice Story formulated the standard in the often quoted language from *Perez*:

[T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into considerations, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

Although trial courts may in their discretion grant mistrials over a defendant's objection, manifest necessity "appropriately characterize[s] the magnitude of the prosecutor's burden." *Washington*, 434 U.S. at 505, 98 S.Ct. at 830. A trial court may not grant a mistrial "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485, 91 S.Ct. at 557. According to *Washington*, while trial courts are accorded discretion in granting mistrials over a defendant's objection, there still must be a "'high degree' of necessity before concluding that a mistrial is appropriate." *Washington*, 434 U.S. at 506, 98 S.Ct. at 831. Thus, the discretion accorded trial courts in granting mistrials over defendant's objections vary depending on the circumstances of the case. *Washington*, 434 U.S. at 506-10, 98 S.Ct. at 831-32.

Strict Scrutiny

The strictest scrutiny is applied when trial courts grant mistrials “in order to buttress weaknesses” in the prosecutor’s case. *Washington*, 434 U.S. at 507, 98 S.Ct. at 831. *See also, Kiger*, 1999 WL 374088 at &2. Indeed, the Supreme Court noted that not only would a mistrial granted on this basis be lacking a “high degree” of necessity, it “condemned this ‘abhorrent’ practice.” *Washington*, 434 U.S. at 508, 98 S.Ct. at 831. On the other hand, trial courts are accorded “great deference” in declaring mistrials when the jury is deadlocked, *Washington*, 434 U.S. at 510, 98 S.Ct. at 832 -- the “prototypical example” of manifest necessity. *Kennedy*, 456 U.S. 672, 102 S.Ct. 2087. Other examples of manifest necessity include publicity which taints the jury, a *petit* juror who sat on the grand jury of the same case, or where a military action required the early termination of a court-martial. *Jorn*, 400 U.S. at 481-82, 91 S.Ct. at 555 (citing cases).

Elicitation of Improper Evidence

Rarely will defense counsel’s elicitation of improper evidence support a manifest necessity finding required to grant a prosecutor’s motion for mistrial. For example, in *Browning v. Alaska*, 707 P.2d 266 (Alaska App. 1985), the defendant testified at his trial for driving while intoxicated that he could not “afford to get pulled over for another DWI, [be]cause I could lose my license for ten years, and I’m a truck driver.” *Browning*, 707 P.2d at 267. The Court found that the defense attorney “purposely solicited the testimony,” believing it was admissible. The Court, however, found no misconduct even though that belief was “weak.” *Browning*, 707 P.2d at 270. It found the testimony inadmissible and prejudicial, but held that there was no manifest necessity justifying a mistrial because “the prejudicial effect complained of by the state would have been substantially diluted,” by the trial court’s instructions to disregard the testimony. *Browning*, 707 P.2d at 269. *See also Lewis v. State*, 452 P.2d 892, 896-98 (Alaska 1969) (double jeopardy barred retrial where trial court granted a mistrial on state’s motion because defendant testified that the prosecutor would not allow him to depose an unavailable witness; could have been cured with instruction); *Lillard v. Commonwealth*, 267 S.W.2d 712 (Ky. 1954).

On the other hand, where the defense counsel engages in misconduct which taints the jury with evidence that has nothing to do with establishing the defense or refuting an element of the state’s case, a prosecutor’s motion for mistrial will be found to be supported by manifest necessity. In *Washington*, the defense attorney repeatedly stated in opening that the case was before the jury for a second trial because the prosecutor “hid” evidence in the first trial which prompted the Arizona

Supreme Court to grant a new trial. *Washington*, 434 U.S. at 499, 98 S.Ct. at 827. When the defense attorney was not able to provide the authority for the admissibility of this evidence, after given an opportunity to find such authority, the trial court granted a mistrial over defendant’s objection. The Court held there was a manifest necessity for the mistrial because “counsel aired improper and highly prejudicial evidence before the jury,” tainting the entire panel. *Washington*, 434 U.S. at 515, 98 S.Ct. at 835.

The *Browning* Court specifically distinguished *Washington* on this very point:

We view the prejudice suffered by the state of Arizona in *Washington*, to be significantly greater than the prejudice suffered by the state of Alaska in *Browning*’s case. *Washington*’s attorney successfully painted a picture of a vindictive and overzealous prosecutor’s office, committed to prosecuting his client despite having its hand slapped by an appellate court for trying to hide evidence. The attorney’s words were calculated to instill in the jury hostility towards the prosecutor, as well as to create speculation that the prosecution may have continued to withhold evidence.

Browning, 707 P.2d at 270. *See also, United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) (double jeopardy no bar to retrial where mistrial granted because defense attorney told four times by trial court to stop giving opinions during opening and referred to non-existent evidence that government’s undercover agent attempted to extort money from defendant).

Improperly Excluded Evidence

Where defense counsel elicits evidence that the trial court has erroneously excluded, there is no manifest necessity to grant a mistrial over defendant’s objection. *United States v. Meza-Soria*, 935 F.2d 166, 170-71 (9th Cir. 1991); *Benson v. State*, 111 Nev. 691, 895 P.2d 1323 (1995). *See also, State v. Chapple*, 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); *Miller v. Superior Court*, 189 Ariz. 127, 129, 938 P.2d 1128, 1130 (Div. 1 1997). In *Meza-Soria*, the defendant was indicted for “being an alien who reentered the country after having been deported.” *Meza-Soria*, 935 F.2d at 167. The trial court declared a mistrial over defendant’s objection when it determined that the issue of defendant’s alienage should not have been presented to the jury because that had been adjudicated in the deportation proceedings. The 9th Circuit held that the evidence was admissible. “Thus, there was no good legal reason whatever to grant the mistrial, and that absence of a reason makes the grant an abuse of discretion. It follows that a further trial would violate *Meza-Soria*’s right to be free

from double jeopardy.” *Meza-Soria*, 935 F.2d at 171.

In *Benson*, the defense attorney elicited the victim’s prior consensual sex with the defendant in a rape case. The Nevada Supreme Court had previously rejected the trial court’s order *in limine* that precluded this testimony. Thus, a new trial was barred by double jeopardy. The Court even noted that the prosecutor’s motion was an “unjustifiabl[e] attempt to prevent Benson from putting forth a defense.” *Benson*, 111 Nev. at 698, 895 P.2d at 1328. Recognize, however, that if the defendant consents to a mistrial, although not upon defendant’s motion, double jeopardy will not bar retrial. It is equivalent to making the motion and waiving the claim. *State v. Anderson*, 116 Ariz. 310, 569 P.2d 252 (Div. 1 1977).

Conclusion

Generally, the state is not entitled to a mistrial even if counsel has elicited improper testimony. Where counsel has acted improperly to taint the jury with irrelevant evidence or non-existent evidence calculated to prejudice the jury against the state, double jeopardy will not bar a retrial when a mistrial has been granted over defendant’s objection. Consenting to or moving for a mistrial does not bar retrial unless the prosecutor’s misconduct prejudices the defendant and the prosecutor was indifferent to the risk of mistrial or reversal. In rarely occurring situations such as military actions or unusual publicity, mistrials granted over defendant’s objection can result in retrial. Unfortunately, a good old fashioned mistrial granted because the jury is hung still remains the “prototypical” example of manifest necessity under *Perez*. Curiously, there is virtually no explanation in the cases, including *Perez* for this hung jury rule except the notion that somehow the “ends of public justice” have been thwarted. Perhaps it is time to revisit this issue. What doubt could be more reasonable than eight or twelve people who cannot agree on the accused’s guilt? Allowing a retrial after a hung jury does just what many of the cases say is not manifest necessity – granting a mistrial to assist the state’s weak case.



BULLETIN BOARD *(continued)*

Attorney Moves/Changes

Art Merchant, an attorney in Trial Group D, has been appointed to be the Durango Juvenile Supervisor, effective March 6. Mr. Merchant has been with the Public Defender’s Office since March 22, 1999. Previously, Art worked in the County Attorney’s juvenile division for over 5 1/2 years.

Robert W. Precht, a trial attorney in Trial Group C, resigned his position with the office effective February 25. Mr. Precht joined the Public Defender’s Office on February 9, 1998.

Support Staff Moves/Changes

Lucie Herrera who has been serving since October, 1999 in a special work assignment as the Office’s Lead Secretary Supervisor, along with her regular duties as our Appeals Lead Secretary, has decided to return to her appeals lead secretary role exclusively. Effective February 21, **Amy Bagdol** will assume the position as our Support Services Manager. Amy will now supervise the Lead Secretaries in addition to the Records personnel, Initial Services/ Reception and Process Server in this expanded role.

Amy Oberholser has been given a special work assignment as Group B’s Lead Secretary effective February 21. Amy has been with the office since 1998 and has prior experience at the Attorney General’s Office and with a private firm.

Mercy Tellez resigned effective February 25. Mercy was a Legal Secretary assigned to Group A.

Mike Schwarz resigned effective March 3. Mike was a Systems Analyst assigned to Information Technology.

RULE 404(b) - A PRACTITIONER'S OUTLINE

By Michael Rossi
Defender Attorney – Group C

404(b) Other crimes, wrongs, or acts.

Just reading these words may send chills down your back. It's rather nebulous, isn't it? What the heck does it mean? What does it stand for? Rule 404 provides little explanation as to how it all works. This article will provide insight on how to master and finally be able take down the proverbial Rule 404(b) monster. Rule 404(b) states:

Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Although *common scheme or plan* is not expressly listed in Rule 404(b), case law has established it as a permissible use. *State v. Hughes*, 102 Ariz. 118, 122 (1967).

Let's break it down. In order to determine whether or not other act evidence is admissible, a process must be followed. The process is: 1) Determine whether the evidence is intrinsic or extrinsic; and if extrinsic; 2) Apply the analysis given in *Huddleston v. U.S.*, 485 U.S. 681 (1988) as noted in *State v. Terrazas*, 189 Ariz. 580 (1997).

1) Intrinsic v. Extrinsic Evidence

Determining whether the evidence is intrinsic versus extrinsic foreshadows how the evidence will be handled by the court. There are several factors which signify the presence of intrinsic evidence. Evidence is intrinsic when evidence of the other act or acts, and the evidence of the act in question, are inextricably intertwined. It is also intrinsic if all acts are part of a single episode or the other act or acts were necessary preliminaries to the act in question. *State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996); *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996), quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir.1990). If the trial court finds the other act or acts are intrinsic, then they are admissible without a 404(b) analysis. *Dickens*, 187 Ariz. 1. Otherwise, if the other act or acts are extrinsic, the trial court must conduct a 404(b) analysis. Quite often, we receive a motion entitled *State's Notice of Intent to Use Defendant's Other Crimes, Wrongs or Acts Pursuant to Rule 404(b), Arizona Rules of Evidence*. In so doing, the state, by alleging 404(b),

concedes that the evidence is extrinsic. Therefore, the act that the state wishes to use at trial is an extrinsic act and the *Huddleston/Terrazas* analysis is the next hurdle.

2) Huddleston/Terrazas Analysis

Once the court has decided that the evidence the State wishes to introduce is extrinsic, further analysis must be pursued. This analysis involves four distinct tasks: 1) Finding legal or logical relevance under Ariz. R. Evid. 401 and 404(b); 2) Determining factual or conditional relevancy under Ariz. R. Evid. 104 and 402; 3) Weighing and balancing under Ariz. R. Evid. 403; and 4) Limiting its impact by use of an instruction under Ariz. R. Evid. 105. *Huddleston*, 485 U.S. 681 (1988).

Relevance

Relevant evidence, according to Rule 401, means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, Rule 404 precludes admission of prior acts "for proving action in conformity therewith." Simply put, the question is whether the act is being presented for a relevant purpose or merely to show the character of the accused. Tailoring your argument to fit your particular facts and circumstances and showing that the state is using the other act evidence to prove propensity should keep the evidence out.

Factual or Conditional Relevance

The factual or conditional relevance test in part two hinges on whether the proponent has produced sufficient evidence to show the other act happened, the person in question did the act, and the act was done in such a way that it is legally or logically relevant.

When faced with the level of proof required for the above test, the Arizona Supreme Court adhered to a 1967 standard that the Court of Appeals felt was implicitly overridden. *State v. Hughes*, 102 Ariz. 118 (1967). The Supreme Court clarified the standard and stated that "... for prior bad acts to be admissible in a criminal case, the profferer must prove by *clear and convincing evidence* that the prior bad acts were committed and that the defendant committed the acts." *State v. Terrazas*, 189 Ariz. 580, 582 (1997). The judge determines whether there is sufficient evidence from which the jurors could determine that the other act happened and that the defendant did it.

Additionally, *Terrazas* held that because of the high probability of prejudice from the admission of prior bad acts, the court

must ensure that the evidence against the defendant *directly establishes* “that the defendant took part in a collateral act, and to shield the accused from prejudicial evidence based upon ‘highly prejudicial inferences.’” *Terrazas*, 189 Ariz. at 584.

Balancing

Often times, the state wishes to introduce evidence at trial that is highly prejudicial to a client while at the same time it has little value to the trier of fact. In order to insure a fair trial, the judge is sometimes called upon to act as a gatekeeper.

Rule 403 provides in pertinent part that “(e)vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .” Evidence may be unduly prejudicial if it has a tendency to influence the decision making process through emotion, sympathy or horror. *State v. Vigil*, 288 Ariz. Adv. Rep. 45, 986 P.2d 222 (1999)(citing *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997); *State v. Schurz*, 176 Ariz. 46, 859 P.2d 156 (1993)).

Remember, “when called upon to weigh probative value against unfair prejudice under Rule 403, a trial judge must assure that the state is not permitted to prove a defendant’s guilt of one act through excessively prejudicial evidence of other acts.” *Vigil*, 288 Ariz. Adv. Rep. at 47 (quoting *State v. Ives*, 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996)). Arguments based upon the “excessively prejudicial nature” of other acts are often successful.

Limiting Instruction

Will a limiting instruction cure the unfair impact the evidence will have on the jurors? If an instruction cures the harm, the proffer will be allowed into evidence. We all know, however, that a curing instruction is a legal fiction. Minds draw many inferences.

In Conclusion

As criminal defense attorneys, you will certainly encounter 404(b) issues. Hopefully, this article will provide you with the insight and outline to deal with these issues. File your motions, litigate these issues, and good luck getting those “other acts” precluded.



BULLETIN BOARD (continued)

New Support Staff

Gene Cope has returned to the office as a Records Processor for Group C effective January 14.

Anissa Beltran is the new Legal Secretary in Group D effective February 9.

Matt Babicky is the new part-time Office Aide in Administration effective February 2.

Deborah Brooks is the new Fiscal Analyst in Administration effective February 22.

Doris Roberts is the new Designated File Manager in Group A effective February 28.

Carol Hernandez will be the new Administrative Assistant in SEF effective March 6.

Roxane Mondhink will be the new Legal Secretary in Group C effective March 6.

Cheri Smith will be the new Legal Secretary in Group D effective March 6.

ARIZONA ADVANCE REPORTS

By Terry Adams and Stephen Collins
Defender Attorneys – Appeals



***Cesar R., In re*, 309 Ariz. Adv. Rep. 36 (CA 2, 11/30/99)**

The minor fired four shots into the air in a residential neighborhood located in Pima County. He was adjudicated delinquent on one count of a minor in possession of a firearm, under A.R.S. § 13-3111. On appeal he challenged the constitutionality of that statute. Section 13-3111 prohibits a person under eighteen from possessing a firearm in public, with certain exceptions. Subsection H limits its application to counties with a population over 500,000 people. The appellate court found this subsection to violate Article IV, part 2, §19 of the Arizona Constitution, which prohibits enactment of local or special laws involving the punishment of crimes, thus providing benefits to certain localities. Because this law would only apply to Pima and Maricopa counties, the court found it to be unconstitutional and reversed the conviction.

***State v. Bonnewell*, 309 Ariz. Adv. Rep. 4 (CA 1, 11/23/99)**

Unlike the previous case, a statute prohibiting setting a leg-hold trap on public land passes constitutional muster of Article IV §19 because it applies to all persons in Arizona, and benefits no static class of individuals.

***State v. Vera*, 309 Ariz. Adv. Rep. 3 (CA 2, 11/23/99)**

The defendant was stopped by a patrol officer because of a cracked windshield. A subsequent search of his vehicle revealed a quantity of contraband. His motion to suppress was granted in the trial court and the state appealed. The appellate court reversed. The trial court relied on a federal case in which a car was stopped for the same reason, however that court found that the stop was pretextual. There was no such finding here. The defendant argued that there is no statute in Arizona prohibiting driving a car with a cracked windshield, there is however one requiring all vehicles to have an “adequate windshield” and the court determined that that was sufficient to allow the initial stop.

***State v. Garza*, 311 Ariz. Adv. Rep. 3 (CA 2, 12/1/99)**

After a bench trial, Garza was found guilty of aggravated assault with a deadly weapon. At trial, the property manager of an apartment complex testified she told Garza to leave the premises and, in response, Garza pointed a gun at her and threatened her. On appeal, Garza argued there was insufficient evidence to establish the required element of reasonable

apprehension of imminent physical injury. The property manager never testified she was in fear. The property manager did testify “she was concerned for the safety of children playing nearby and had contacted the police.” The Court of Appeals held “this evidence and the reasonable inferences therefrom were sufficient for the trial court to conclude that the victim was placed in reasonable apprehension of imminent physical injury.” After finding Garza guilty of aggravated assault with a deadly weapon, the trial judge found the prosecution failed to prove the dangerous nature allegation. The Court of Appeals found these “conclusions are inconsistent and irreconcilable because, under the facts in this case, aggravated assault and the dangerous nature allegation both required the state to prove beyond a reasonable doubt that Garza used a deadly weapon.” Under established Arizona law, inconsistent verdicts may be the result of jury leniency and, therefore, are not subject to challenge. The Court of Appeals held there was no reason for a different result if there is a bench trial.

***In re: Roy L.*, 312 Ariz. Adv. Rep. 19 (CA 1, 1/13/00)**

Roy was adjudicated as a delinquent for being a minor in possession of a firearm. The firearm was found as the result of an investigative stop by a police officer. A school security officer had told the officer that other children had seen Roy with a gun. The Court of Appeals held the search was valid under *Terry v. Ohio* because there was a reasonable and articulable suspicion that Roy was involved in criminal activity. Under A.R.S. §13-105(17), Roy was not delinquent if the firearm was inoperable. Roy argued the prosecution failed to prove the firearm was operable because it was never introduced into evidence. The Court of Appeals held the prosecution was not required to prove the operability of a firearm as an element of the offense. The burden was on Roy to come forward with evidence establishing the firearm was inoperable.



JANUARY 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
12/8	Hall Clesceri	Arellano	Craig	CR 99-11227 Agg. Assault/F6 Assault/M1 Criminal Damage/M2	Dismissed	Jury
12/16-12/16	Rempe	Baca	Hunt	CR 99-06232 PO Amphetamines/F4 PODP/F6	Guilty	Jury
1/4	Cotto	Fletcher	Brown	CR 99-01826 IJP/M1	Dismissed	Jury
1/4-1/5	Hernandez	McVey	Fuller	CR 99-14168 Unauthorized Use of Means of Transportation/F5	Guilty	Jury
1/5-1/6	Farney	Ballinger	Hanlon	CR 99-07926 Criminal Damage/F5 Criminal Damage/F6	Not Guilty F5 Not Guilty F6	Jury
1/10-1/12	Carr <i>Molina</i>	Akers	Mueller Forness	CR 99-07912 Resisting Arrest/F6 DUI/M1	Guilty of Resisting Arrest Not Guilty of DUI	Jury
1/11-1/12	Flores Clesceri	P. Reinstein	Maasen	CR 99-07841 Agg. DUI/F4	Guilty	Jury
1/19-1/19	Carr	Baca	Brnovich	CR 99-11229 Possession of Marijuana/F6	Guilty	Bench
1/24-1/25	Farney	McVey	Rizer	CR 99-08714 Att. Burglary-2 nd degree/F4 with 2 priors	Not Guilty F4 Guilty of lesser included Trespass/F6	Jury
1/25	Zick	Akers	Frick	CR 99-02975 Agg. Assault/F3 Dangerous	Dismissed w/o Prejudice	Jury
1/25	Klepper Brazinskas- Pangburn	McVey	Flores	CR 99-12080 Armed Robbery/F2	Dismissed	Jury
1/25	Klepper	Galati	Cohen	CR 99-12819 Resisting Arrest/F6	Dismissed	Jury

GROUP B

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
1/4-1/13	Petersen-Klein Bublik Erb	O'Toole	DeVito	CR99-14015 Aggravated Assault/F3, Dangerous w/2 priors	Hung	Jury
1/6-1/10	Washington	Gottsfeld	Davis	CR 99-08711 Trafficking in Stolen Property/F3 Theft/F4 w/2 priors & on probation	Not Guilty on both counts.	Jury
1/12-1/13	Colon	Gottsfeld	Cotitta	CR99-13142 Unlawful Use of Transportation/ F5	Guilty	Jury
1/18-1/21	Owens Grant King	Jarrett	Craig	CR99-09545 Aggravated Assault/F4	Guilty	Jury
1/25-1/27	Bublik Lopez Muñoz	O'Toole	Novak	CR99-03347 Aggravated Assault/F6 Disorderly Conduct/M1	Guilty on both counts.	Jury

GROUP C

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
1/4 -1/6	Nermyr & Gooday Thomas Rivera	Keppel	Zettler & Denny	CR99-90063 1 Ct. Armed Robbery, F2D 1 Ct. Resist Arrest, F6N 1 Ct. Agg Assault, F5D 1 Ct. Felony Flight, F4N 2 priors	Guilty all counts	Jury
1/6 -1/12	Lorenz M. Rossi	Jarrett	Click	CR99-92719 1 Ct. Sexual Assault, F2D	Guilty	Jury
1/11 - 1/19	Fisher Thomas	Dairman	McCauley	CR99-93126 1 Ct. Child Abuse, F5N	Not Guilty	Jury
1/11 - 1/20	Nermyr & Scott Silva Thomas	Barker	Zettler & Denny	CR96-93970 1 Ct. Drive-by-shooting, F2D 1 Ct. Agg Assault, F3D	Guilty all counts	Jury
1/31	Sheperd	Dairman	Brame	CR99-90933 1 Ct. Shoplifting, F4N 1 Ct. Contrib Delinq/Depend of Minor, MI	Dismissed day of trial (CA filed motion to dismiss on 1/30, granted 1/31)	Jury
1/31 - 2/2	Burkhart	Ishikawa	Weinberg	CR99-90686 2 Cts. Agg DUI, F4N	Guilty all counts	Jury

GROUP D

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
12/27 -1/6	Schreck Varcoe Barwick, Fairchild Jeranis	P Reinstein	Levy	CR 97-06864 1 Ct. Murder 2, F1	Guilty	Jury
1/10	Dwyer	Gerst	Craig	CR 99-13451 1 Ct. Aggravated Assault, F3 D	Dismissed	Jury
1/11-1/12	Berko Cuccia	Gerst	Rodriguez	CR 99-04271 1 Ct. Escape, F4 1 Ct. Aggravated Assault, F6	Guilty of Escape Hung on Agg. Assault	Jury
1/12-1/13	Enos	Wilkinson	Simpson	CR 99-10988 1 Ct. POND, F5	Guilty	Jury
1/13-1/18	Silva	Gerst	Kamis	CR 99-09346 1 Ct . POMS, F4, POM, F6 PODP, F6	Guilty	Jury
1/13-1/20	Mehrens Salvato	Ellis	Lemke	CR 99-14076 2 Cts. Aggravated DUI, F4 (2 Priors)	Not Guilty	Jury
1/18-1/19	Merchant	Ballinger	Simpson	CR 99-10982 1 Ct Burglary, F4	Guilty	Jury
1/19-1/25	Ferragut	Gerst	Naber	CR 99-12580 1 Ct. Theft, F3	Guilty	Jury
1/21-1/25	Harris	Gottsfeld	Alexov	CR 99-12744 1 Ct. Burglary 3, F4	Not Guilty	Jury
1/26	Kibler	Gerst	Simpson	CR 99-12764 1 Ct. Burglary 3, F4	Guilty	Jury
1/10	Wallace	Ballinger	Alexov	CR 99-09719 1 Ct. Aggravated Assault, F3D	Dismissed day of trial	
1/10	Wilson	Gerst	Cottor	1 Ct. Aggravated Assault, F3D	Dismissed day of trial	
1/13	Merchant	Dougherty	Naber	CR 99-12872 1 Ct. Theft, F3	Dismissed day of trial	

GROUP E

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
1/10 -1/14	Passon Ames	Dunevant	Fuller	CR 99-10161 2 Cts. Forgery (W/Priors, on Release)	Guilty (all Counts)	Jury
1/11-1/20	Brown	D'Angelo	Murray	CR 98-17105 Agg. Assault/F3	Guilty	Jury
1/19-1/20	Evans Castro	Schneider	Pitts	CR 99-12930 Theft Means of Transp/F3	Not Guilty	Jury
1/19-1/27	Doerfler	Keppel	Bernstein	CR 99-06089 Stalking/F5	Guilty	Jury
1/24-1/25	Evans	Gottsfeld	Fuller	CR 99-13302 Forgery/F4 Tampering w/Evidence /F6	Guilty (both counts)	Jury
1/25/2000	Walker	Baca	Fuller	CR 99-06661 Mscndct Invlv. Weapons/F4 w/2 Priors & on Probation	Dismissed without Prejudice on day of trial	Jury
1/27/2000	Evans	McVey	Maasen	CR 99-11263 2 Cts. Agg. DUI/F4	Dismissed with Prejudice 2 nd day of trial	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
1/04-1/07	Patton De Santiago	Katz	Clarke	CR99-00779 2 Cts. Agg. Assault / F2 Agg. Assault / F3, Dang. Drive-By Shooting / F2, Dang.	Guilty	Jury
1/10-1/24	Cleary Abernethy	Hilliard	P. Hicks	CR94-03084 2 Cts. Murder 1 / F1, Dang. 2 Cts. Kidnapping / F2, Dang.	Guilty	Jury
1/12-1/20	Parzych	D'Angelo	Murray	CR98-17105B Agg. Assault / F2, Dang.	Guilty	Jury
1/12-1/26	Rick Miller Apple Horral Parker T. Williams	Dougherty	Lynch	CR97-14672 Fraudulent Schms & Artfcs / F2 CR99-01052 Murder 2/ F1, Dang.	Guilty	Jury
1/21-1/21	Allen	Ishikawa	Abuchon	CR99-94567 2 Cts. Indecent Exposure / F6	Guilty	Bench

for The Defense

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