



for The Defense

▶ ◀ James J. Haas, Maricopa County Public Defender ▶ ◀

Article Review: *On Dispensing Injustice*, by the Hon. Rudolph J. Gerber

INSIDE THIS ISSUE:

Articles:

Gerber's On Dispensing Injustice	1
The Court Speaks Only Through Its Record	1

Regular Columns:

Arizona Advance Reports	11
Calendar of Jury and Bench Trials	12

By Jeremy Mussman Special Assistant Public Defender

Judge Rudolph Gerber's article in the spring issue of the *Arizona Law Review* (43 Ariz. L. Rev. 135, Spring 2001) is essential reading for anyone involved in our criminal justice system. Judge Gerber has been an integral part of our state's legal system for most of his adult life. In addition to being the author of *Criminal Law of Arizona*, (1993), *State Bar of Arizona*, a well- respected treatise on the nuts and bolts of criminal law, his three years as a prosecutor in the Maricopa

County Attorney's Office, nine years as a judge in the Maricopa County Superior Court, and thirteen years as jurist in Division One of the Arizona Court of Appeals (he just retired this past spring) provide him with a wealth of knowledge and a true "insider's perspective" of criminal justice in Arizona over the past 25 years. His words carry the weight of a man who has dedicated a great deal of his professional life to pursuing justice that is truly just. This review provides excerpts from Judge Gerber's article.

Judge Gerber begins the article with

(Continued on page 2)

The Court Speaks Only Through Its Record

Don't Silence That Voice By Agreeing to Off-the-Record Proceedings

By Paul Prato Appeals Division Chief

The Superior Court of Arizona is a court of record. What is the significance of this fact for the criminal defense attorney and his or her client?

The reason for "the creation of courts of record is founded on the proposition

that judicial records are not only necessary but indispensable to the administration of justice."¹ The record is "indispensable to the administration of justice" because "[t]he court speaks only through its records, and the judge speaks only through the court."² It is this record that appellate courts review for error in the trial court proceedings. If there is no record, whether written or

(Continued on page 9)

for The Defense
 Editor: Russ Born
 Assistant Editors:
 Jeremy Mussman
 Keely Reynolds
 Office: 11 West Jefferson
 Suite 5
 Phoenix, AZ 85003
 (602)506-8200
 Copyright © 2001

the following:

Twenty-two years as an Arizona trial and appellate judge include not just shoveling smoke or wading with alligators but some regret about our justice itself. At one recent lunchtime gathering, my seasoned judicial colleagues all somberly agreed that despite our oaths and best intents, we Arizona judges do considerable injustice, much of which, worse still, is unavoidable. Another memory recalls three colleagues agreeing that they would prefer to be tried in any European court than in the present Arizona court system. Hence this discordant swan song to acknowledge causing injustice in the name of judging, by trying to unearth the hidden messages buried in this system of two faces.

That well intentioned judges admit to doing harm probably strikes a sour note. After all, this is the American judiciary, not that of the former Soviet Union or of Hitler's Germany, and one might expect its judges to sing its praises. But history is no friend here. We Arizona judges mechanically apply some criminal laws and procedures that teach the wrong lessons to those who need to learn the opposite. To some of this mis-education we are blind or silent. Our judicial robes hinder frank evaluation of the policies that create these harms. While many Arizona judges privately are critical of our justice system, their public silence is profound.

When judges allow mechanical tinkering to squelch critical thinking, we diminish a view of the justice we invoke. As we oil the wheels of the justice system, we often find it easier to apply more oil than to replace squeaky wheels. It need not be so. The English common law allowed its judges an inner moral compass to assess the justice of their rulings, using equity to correct statutory excesses. In our state, unlike England, that moral compass has been deflected by unsophisticated "tough" solutions to crime that discourage honest queries about cost-benefits, tax results, effect on crime rates, deterrence, and ultimately basic fairness. Ill-advised criminal policies eventually breed public

disrespect when they teach contradictory lessons.
43 Ariz. L. Rev. at 135-36.

The judge then goes on to provide his analysis of problems and possible solutions in a number of areas, including mandatory sentencing, plea bargains, the "war on drugs", and the death penalty.

With regard to mandatory sentencing, he writes:

Originally conceived in the 1980s to ensure equal sentences for similar offenders and to avoid supposed judicial leniency, the mandatory-sentencing scheme now dominates felony sentencing in Arizona and causes the following serious injustices: (a) disproportionate severity of sentence to crime; (b) reduction in trials by an increase in plea bargaining; (c) prosecutorial rather than judicial control of sentencing; (d) lack of individualization of sentences; and (e) deterrence fallacies.

* * *

Arizona's severe mandatory sentencing has promoted plea bargaining to the point of extinguishing any realistic right to trial...Severe mandatory sentences effectively make the constitutional right to trial too risky to be exercised, even for an innocent defendant. Trial has ceased to be a realistic option precisely because of the mandatory sentencing wedge.
Id. at 136, 138.

Judge Gerber describes the role that prosecutors now play in the system as a result of the leverage afforded them by mandatory sentencing:

Prosecutors now regularly charge defendants with mandatory sentence counts, only to dismiss them later in a plea bargain. In a recent year, Arizona prosecutors dismissed repetitive offender allegations in 76% of all cases in return for a guilty plea. Severe mandatory sentences coerce pleas that in turn, circumvent the mandatories. The

result: departure from the statutory mandate, a sophisticated form of lawbreaking .

* * *

In shaping a criminal case, Arizona prosecutors now have more clout than judges. The prosecutor decides not only which offenses to charge but also whether to seek enhancement and aggravation, whether to offer a plea, what it will be, and whether a sentence is stipulated. These are the most significant decisions shaping a trial and sentence. No judicial or legislative controls nor procedural rules limit these choices. The office decisions of prosecutors, often recently graduated from law school, are discretionary, disparate, unregulated, hidden from public scrutiny, and judicially unreviewable. Though the visible courtroom rulings of the more experienced judiciary are reviewable, these rulings achieve less penal impact than the hidden discretionary decisions of prosecutors. The shaping of an Arizona criminal case from beginning to end results less from judicial or statutory control and more from the arbitrary whims of prosecutors.

This switch in proper roles divests the public's more scrutinized, more carefully chosen, more experienced, and more impartial judiciary from any comparable role in supervising or standardizing these decisions. This role reversal, which probably does not meet an informed public's expectations nor that of our constitution, also collides with the differing levels of scrutiny we use to choose these role-players in the first place.

Id. at 139.

The judge goes on to state:

Mandatory sentences assume that all those committing the same crime resemble each other in culpability and that "one size fits all"-- assumptions flatly falsified in any judge's criminal calendar. The venerable ritual of sentencing has become a puppet show where defendants are not individuals but criminal classes and judges' discretion is

hamstrung by generic legislative decrees.
Id. at 141.

Judge Gerber quotes the following from *A National Symposium on Sentencing: Report and Policy Guide*, Am. Judicature Society, State Justice Institute, Chicago, 1998:

If the objective of our criminal justice and prison system is to protect the public safety by incarcerating incorrigible offenders and rehabilitating as many others as possible, then the prevailing policy of prison only, with no treatment or preparation for return to the community, is insane. It makes absolutely no sense.

Id. at 144.

The Judge offers the following as one approach to addressing these problems:

Arizona's rigid mandatory sentences embody these deterrence illusions and also generate the cookie-cutter inequities of "one size fits all." Much of what legislators expect from severe mandatory sentencing would result from making mandatory sentences less severe and more flexible, with judges authorized to vary them, within broad limits, for individual aggravating or mitigating reasons. Converting all mandatory penalties to less severe presumptive sentences would sacrifice few of the positive values of mandatories and avoid the fungibility of preset, cookie-cutter dispositions.

In a truly flexible presumptive approach, judges could take account of all mitigating or aggravating circumstances without the subterfuge of plea bargaining. Aggravating and mitigating factors would permit an articulated departure from the presumptive norm and, in the process, diminish plea bargaining around mandatories to reach a fair penalty. The gain would be both punishment that fits the individual and fidelity to sentencing statutes. Not least of all, sentencing authority would return to those subject to public scrutiny--judges--rather than remaining in prosecutors.

Id. at 145.

With regard to plea bargaining, Judge Gerber writes :

Plea bargaining is not just a part of Arizona's justice system; today it is the system. More than ninety-five percent of defendants enter guilty pleas. The injustice lies not so much in that fact as in bargaining's dual links to mandatory sentences and loss of the right to trial.

Arizona trial courts routinely now reach condemnation without adjudication. When adjudication appears on the horizon, prosecutors use sentencing mandates to threaten a greater sanction to discourage it. Our court system has become a vice: the system favors a plea and penalizes the constitutional right to a trial instead of vice versa. Leverage pressures realistically extinguish the constitutional right to a trial for most defendants.

Plea bargaining has become necessary in the first place not for policy but for lawyers' caseloads. Most criminal attorneys depend on plea agreements to move cases. Trials fall like a wrench in this turnstile. More importantly, and more germane to this thesis, a trial becomes illusory when defendants face a draconian mandatory sentence more severe than it would be in a plea agreement.

Plea bargaining negotiations reinforce an attitude of manipulation when defendants discover that our bargaining bazaars operate by threat, bluster, and push-pull gymnastics matching their own criminal wiles. Instead of standing for statutory principle, our courts' bargaining stalls echo manipulative attitudes similar to those of the criminal precisely by sanctioning disregard of mandatories. Rehabilitation is thus seriously compromised from the start, because plea bargaining reinforces in the criminal the very manipulative mentality we seek to eradicate, namely, that the letter of the mandatory law does

not need to be followed.

Bargaining regularly circumvents federal sentencing guidelines in at least thirty percent of all cases; deviation from state mandatories is probably higher. Precisely because of their preset severity, rigid sentencing mandates actually increase the impetus for plea bargaining to escape their severity for a more proportional sentence. Bargaining also shifts sentencing from judges to prosecutors and drives prosecutorial discretion more deeply underground. The message: Circumventing mandatory sentences by plea bargains is statutorily dishonest, but the dishonesty and secrecy are caused by statutory severity itself.

Neither attorneys nor judges announce their willful evasion of mandated penalties, of course, so bargaining occurs secretly in the bowels of the court, far from public scrutiny. By far the most important vehicle for statutory evasion is charge bargaining, which leads to the dismissal of readily provable counts. Horizontal charge bargaining and superseding indictments replace offenses with high statutory mandates.

Id. at 145, 146.

The judge also provides insights on drug policies, including:

After alcohol and tobacco, pot is now America's number one drug choice, offering a transient, introspective high that at one extreme can cure nausea or, at the other, elevate evening sitcoms to devastating wit. Its prohibition establishes a baseline cultural hypocrisy that we cannot escape, ruining lives to build a penal empire so that politicians can appear tough.

Our marijuana laws reflect the principle that empirical medical data about health effects are irrelevant to legislation. Our marijuana policy has become a prohibition in quest of a rationale, a desperate search to find some medical reason to validate an earlier culturally inspired prohibition. The claims made in the 1970s and 1980s about the

effects of marijuana--that it causes brain and chromosome damage, sterility, infertility, and even homosexuality-- have never been proven and likely never will. Marijuana may pose dangers still unknown, but criminal law criminalizes known harms, not the unknown, and we do not penalize without first knowing what the harm is. Marijuana laws turn this principle on its head.

* * *

We continue to penalize marijuana not for any medical or physiological reason but for cultural and ethnic reasons: we dislike the lifestyles of those who use it.

Id. at 151, 153.

With regard to “hard drugs”, the Judge observes that:

Blanket prohibition lies at the core of the drug problem. The diversion of substantial police, judicial, and prison resources to arresting, prosecuting, and incarcerating millions of drug users and dealers, mostly minorities, at an annual national cost of tens of billions of tax dollars and untold human lives, is not simply a drug or racial problem but a drug prohibition problem. When drug dealers kill one another and innocent bystanders, that's a prohibition problem. When drug addicts steal or prostitute themselves to support drug habits made more expensive by the black market, that's also a prohibition problem. When addicts spread the HIV virus because sterile syringes are not legally and readily available, that, too, is a direct result of prohibition.

Our drug war has achieved a self-perpetuating life fueled by the fruits of seizures and forfeitures making drug policing profitable and acquisitive for enforcers. However irrational as a government policy, it is fully rational as a law enforcement empire-building strategy. The debate about hard drugs goes nowhere if it remains a choice between waging a scorched-earth war as though defeat

were impossible or surrendering completely to legalization. So long as the question appears in these bleak extremes, we will continue to reduce our prison empires to expensive but ineffective cold turkey centers. Contrasted to our drug policy, other Western countries follow a principle of harm reduction to minimize drugs' injury rather than stamp them out. They do not expect, as we naively do, to make their countries drug-free, and they do not rely, as we do, on draconian criminal laws as the first line of defense.

Tobacco and alcohol, not heroin or cocaine, are the most widely abused and deadly drugs ingested by our nation's teenagers and young adults as well as by criminals. Eighth graders in America today drink alcohol at least three times as often as they use hard drugs. It is hypocrisy to suggest, falsely, that drug abuse is a worse social problem than alcohol or nicotine addiction.

* * *

Politicians spouting tough but unfounded rhetoric have led us to believe (1) that prisons are full of incorrigible psychopaths, (2) that treatment does not work, and (3) that addiction is a moral weakness that any individual can correct simply by willpower. The truth is that our state prisons are, wall-to-wall, more than half full of non-violent minority addicts and abusers; that legal alcohol is far more criminogenic than illegal hard drugs; that treatment works better than many long-shot cancer therapies; and that, like diabetes or hypertension, drug addiction is a chronic disease that requires continuing treatment. It might be less threatening to our expanding narco-military empire if drug policymakers spoke in terms of getting smart instead of merely getting tough.

* * *

Our drug sentences are too punitive, often more so than violent crime penalties. We could mitigate this harshness with little risk of expansion of drug

use to give shorter sentences to retail drug sellers; to de-emphasize arrests for simple possession; and to shift drug resources from prison into prevention and treatment. Fairness, penal efficiency, and less plea bargain pressure would result.

Id. at 155, 156, 158.

Judge Gerber doesn't shy away from any of the big issues impacting the criminal justice system. For example, he states the following regarding the death penalty:

The present sound-bite symbolism of the death penalty serves only vote-hungry politicians. As the slaughter house in Texas shows, the death penalty is the great vote-getter, premised on public demand for an executioner: retribution plus revenge plus retaliation equals re-election. Those who disregard that political chicanery follow former Governors Dukakis, Cuomo, and other principled politicians down the fatal path of appearing soft on crime. Setting out a crime policy that doesn't include the death penalty today requires unusual patience tied to persistence and courage, the latter difficult in an era of politicized penology. Many prosecutors and judges say privately that they're against the death penalty, yet in the courtroom and city square no one is willing to mount the podium and say that the public executioner wears no clothes.

The state's example of taking life in order to emphasize the value of life teaches the exact opposite of what it intends; it mimics the parent saying to a child, "That'll teach you to hit your brother"--then hitting the child to teach that lesson. Philosopher Michel Foucault observes that the rampant abuse of power in state executions itself creates crime. Excessive and arbitrary executions at the end of the eighteenth century incited people to violence. Moreover, the terror of the public execution created its own illegality. On execution days, work stopped, the taverns were full, the authorities were abused, insults or stones were thrown at the executioner, fights broke out, and no better prey for thieves existed than the curious

throng around the scaffold. Why? Because people taught by this example of official lethal violence copied the violence. In our country in the last century, this same modeling phenomenon generated the monastic prison, private executions, and more embarrassing forms of punishment deservedly hidden from public view.

Foucault's observation applies to the transmission of all penal norms. Like any other law but more emphatically, capital punishment shows government teaching a lesson by modeling power. We kill the killer, we say, to show that killing is wrong. Under that logic, we equally should rape the rapist, steal from the thief, and pummel the assaulter. That we don't do so says that, in these instances, we understand the counterproductive modeling lesson that somehow we miss in killing the killer. The positivist teaching of our present death ethic is not subtle: if you have power, you may kill those who threaten it. This axiom exactly matches the attitude of most capital offenders. Recent research amply supports this brutalization lesson: the example of an official execution, instead of deterring killings, actually prompts some marginal persons to follow our state's lethal example.

Capital punishment offends on both moral and technical grounds even apart from politicians' noxious swooning over it. For those who do not or cannot address the moral issues, there remain the disturbing facts, supported by national and international data, that our capital punishment falls disproportionately on minorities, especially blacks and Hispanics, and sweeps some innocent defendants--at least twenty-three already executed--in its wide nets, such as the eighty-nine wrongfully convicted, wholly innocent death row inmates recently released from the nation's death rows, living testimonials to the high rate of capital error.

* * *

If politicians lack the courage to confront capital punishment's counter-productivity head-on, we could achieve at least modest departures from the existing demagoguery. Our embarrassing slaughterhouse practices suggest that capital defendants need to have truly expert legal counsel at public expense. Politician judges, prosecutors, and lawmakers who campaign on public executioner promises to liberally impose the death penalty ought to be disqualified by law and ethical rule from any involvement in any capital case, simply because their electoral pandering eviscerates any plausible remnant of impartiality. Id. at 159, 160, 163.

Judge Gerber offers a number of observations regarding the rate of incarceration, including:

The most shocking aspect of our incarceration mania is not the quantity of persons we incarcerate but their quality. While we are putting more hard-core and violent types behind bars than ever before, we are also imprisoning more non-violent offenders than ever before--78.2% of Arizona's 1999 prison admittees were non-violent offenders. The largest segment of Arizona's prison population--58%--now consists of non-violent first time and repeat offenders: 15,019 out of a total 25,836 in 1999. Of all inmates, twenty-one percent are imprisoned only for non-violent drug offenses. Incarceration levels for non-violent drug offenses have mushroomed since 1980.

This blanket incarceration policy is hitting the wrong targets. As criminologists Zimring and Hawkins note, "(T)o the extent that general increases in the severity of penal policy narrow the gap between the punishment for dangerous and non-dangerous offenses, the law's educative and moralizing emphasis on violence is actually diminished by across-the-board increases in penal severity."

When most prisoners are violent offenders, the distinctiveness of violent crime sharpens. But when

many non-violent offenders also go to prison, the distinction between the violent and the non-violent blurs. As the absolute severity of many violent offenses increases, the relative severity of the punishments for individual offenses diminishes. If the punishments for both robbery and burglary increase, but the punishments for burglary increase more than those for robbery, the penal gap between robbery and burglary narrows. The utilitarian calculus that arguably animates potential offenders' decisions will produce a higher ratio of robberies to burglaries than under a more discriminating regime. Id. at 165.

The article covers a number of additional areas, contains a plethora of footnotes citing to pertinent studies and statistics, and offers various possible solutions to the issues that are raised. The following excerpt from the article's conclusion provides a good synopsis of the overall message that Judge Gerber is endeavoring to get across:

If the law is a teacher, Arizona's criminal justice system, as described above, teaches lessons such as the following:

people who do bad acts do not deserve to be treated by principle

people who invoke justice are allowed to mistreat criminals

our criminal law, supposedly more careful, abandons principles enshrined in civil law regarding mental state, individual culpability, and admission of mental state evidence

we will correct non-violent criminals by incarcerating them with violent criminals

we penalize the drugs preferred by youngsters and minorities while ignoring the more harmful drugs (alcohol, tobacco) of the adult world

people committing the same crime are indistinguishable in culpability

manipulative plea bargaining will extinguish an offender's manipulative attitudes

we create sentences so severe and so mandatory as to generate plea bargaining to escape them

we laud the constitutional right to trial while generating guilty plea pressures to deny it

we kill to teach that killing is wrong

This state has adopted gulag policies that reflective people who care for the obverse of the lessons above should abhor. This state's crime policy has been driven over the past quarter-century by exaggerated fears, political ideology, and electoral opportunism rather than by criminological data. Indeed, no other field of government endeavor shows such a chasm between government policy and scholarly research.

*Our political debate on crime in this state rarely addresses real crime-cutting measures like gun control, jobs, and mandatory education or government service during the juvenile crime-prone years. Our lawmakers instead model the politics of image, of getting and staying elected. A naive public misconstrues slogans like the "War on Drugs" as solutions. But, like war, justice itself is not self-justifying--Hitler and Stalin, after all, also invoked it. As Karl Jaspers reminded the German people in *The Question of German Guilt* after World War II, passive acquiescence is a greater danger than questioning policy, especially when lawmakers regularly give the public what they think it wants--tough talk and tough symbols without any empirical research on their lessons and effects. Toughness occurs at the expense of*

justice.

Id. at 167, 168.

These excerpts are just a portion of Judge Gerber's through-provoking article. By recognizing the proverbial "elephant in the middle of the room," Judge Gerber takes on issues that, although at the core of our system, are rarely addressed. Clearly a focus on day-to-day case processing creates a real danger of myopia — perhaps the time has come to refocus, take Judge Gerber's insights to heart, and work toward a system of justice in the purest sense of the word.

Complete copies of Judge Gerber's article are available in the Luhr's Building 10th Floor Library.



The Court Speaks

Continued from page 1

electronically recorded, there is nothing for an appellate court to review. The most common instances of unrecorded proceedings are those declared to be off-the-record.

The superior court record consists of all exhibits introduced or admitted into evidence; pleadings and documents in the court file; and the transcript of the oral proceedings.³ The clerk of the court and the court reporter are primarily responsible for recording the proceedings of the court. It is the clerk's responsibility to "[k]eep books of record required by law or rule of court."⁴ In Maricopa County the clerk of the court is responsible for ensuring the pleadings, orders and minute entries and other documents related to the case are placed in the appropriate individual case file.⁵ The deputy clerk is responsible for recording the minutes of court proceedings. The deputy clerk is also responsible for controlling exhibits marked for identification or introduced as evidence.⁶

It is the responsibility of the court reporter to make a verbatim record of all oral proceedings before the court, unless excused by the judge.⁷ The court reporter's transcript of the oral proceedings is a crucial part of the record that is reviewed by the appellate court when error is alleged. If the oral proceedings are not recorded either by a court reporter or an electronic recording device, there is no verbatim record for the appellate court to review. The result of the absence of a record is waiver of any issue in the proceedings not recorded.⁸ It is axiomatic that defense counsel should never agree to waive the recording of oral proceedings by a court reporter. If the court directs the court reporter not to record the proceedings defense counsel must object to preserve the issue for appeal. Off-the-record means *no record!* The accused is also entitled to a record made contemporaneously as judicial events unfold.

Defense counsel must object to an order by the trial court that interferes with the making of a contemporaneous record because its absence does not constitute fundamental error.⁹ This problem most often arises in bench conferences during trial. An individual judge's belief that the contemporaneous recording of bench conferences or other proceedings interferes with the smooth flow of the trial does not trump the defendant's right to a contemporaneous record.

The court reporter is an indispensable partner if trial counsel is going to make a useful record for appeal, but so also is the superior court judge. It is the rulings of the judge that most often are the subject of appellate review. Every time the judge rules *against* the defense a potential appellate issue is created. So, it is incumbent upon trial counsel to provide the judge with as many opportunities as possible to make rulings in the case. And it is counsel's responsibility to see to it that the court rules on all motions and objections and that "a record of the rulings makes its way to the reviewing court."¹⁰

It is not unprofessional for defense counsel to object when error is about to occur or has occurred in a proceeding. It is defense counsel's duty to object. The objection gives the superior court judge an opportunity to correct the error. This is only fair. And the failure to bring the error to the court's attention by means of a proper objection or motion will usually result in waiver of the issue for appellate purposes.¹¹

Finally, trial counsel must keep in mind superior court judges are well versed in the law of waiver. If the judge can get defense counsel to agree to whatever the judge wants to do or has done, waiver occurs and there is no issue for appeal. It is for this reason that judges seek to obtain defense counsel's agreement. The words "no objection" signify agreement; agreement, absent fundamental error, means no issue for appeal.

The court of record is "indispensable to the administration of justice" for the defendant. It is defense counsel's duty to protect the defendant's right to this record by never agreeing to off-the-record proceedings and by making the appropriate motions and objections to avoid waiver of issues.

Endnotes

- 1) *Herren v. People*, 147 Colo. 442, 363 P.2d 1044, 1046 (1961).
- 2) *Id.*
- 3) Rule 31.8(a)(1), Arizona Rules of Criminal Procedure.
- 4) A.R.S. § 12-283(A)(3).
- 5) Rule 2.4, Local Rules of Practice for Maricopa County.
- 6) Rule 2.8(b), Local Rules of Practice for Maricopa County.
- 7) A.R.S. § 12-223(A).
- 8) *State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983).
- 9) *State v. Paxton*, 186 Ariz. 580, 589, 925 P.2d 721, 730 (App. 1996).
- 10) *State v. Lujan*, *supra* at 328, 666 P.2d at 73.
- 11) *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975).



The Office of the Maricopa County Public Defender

in cooperation with

The Maricopa County Legal Defender's Office, The Federal Public Defender's Office, and
The Arizona Capital Representation Project

Present their

Annual Death Penalty Conference

The afternoon of December 6th and all day on December 7th, 2001
AMC Theatre, Arizona Center

Topics will include everything you've always wanted to know about DNA, how to litigate DNA issues, hot topics in forensics, computer trial management and presentation technology and recent caselaw effecting capital representation.

Registration information will be forthcoming...

ARIZONA ADVANCE REPORTS

By Terry Adams



Leon G, In re, 353 Ariz. Adv. Rep. 3 (SC, 7/12/01)

The defendant was found by a jury to be a sexually violent person as defined by A.R.S. section 36-3701.7. Based on this finding, the trial judge ordered his commitment to the Arizona State Hospital. The Court of Appeals reversed the order finding the statute unconstitutional. This case reverses the Arizona Court of Appeals decision and upholds the constitutionality of Arizona's Sexually Violent Persons Act; A.R.S. sections 35-3701 to 36-3717. The act complies with substantive due process requirements. The court also found that a separate finding of volitional impairment is not required.

State v. Espinosa, 353 Ariz. Adv. Rep. 9 (CA 2, 7/31/01)

The defendant was charged with three counts of sexual assault, two counts of kidnapping, one attempted sex assault and one aggravated assault. He was offered to plead to one count attempted sex assault with a maximum sentence of 3.75 years. He accepted the plea, but before he could enter the plea the prosecutor withdrew it because the victim did not agree. The matter went to trial and he was convicted of several counts and was sentenced to 14 years. He filed a rule 32 petition and the trial court found that the plea was improperly withdrawn and set aside the conviction. The state petitioned for review and the Court of Appeals found that the defendant was precluded from raising the matter because he did not raise it in the trial court before proceeding to trial, and reinstated the 14 year term. A hard lesson learned for not making a record in the trial court.

Joel R., In re, 354 Ariz. Adv. Rep. 15 (CA 2, 8/21/01)

The defendant was found delinquent on one count of fleeing from a law enforcement vehicle, a class five felony. The facts indicated that a deputy sheriff pursued the vehicle the defendant was driving through a residential area at speeds up to 55 miles per hour. The pursuit occurred at night and the deputy had his emergency lights and bright "take down" lights activated. At no time did he activate the siren. The issue on appeal was that the use of the siren was an essential element of the offense. This was based on State v. Nelson 146 Ariz. 246, which holds that a

pursuing law enforcement vehicle must have both lights and siren activated. The court of appeals found this language to be dictum because the statute requires the use of a siren only as "reasonably necessary." Therefore the adjudication was affirmed.

State v. Green, 354 Ariz. Adv. Rep. 5 (SC, 8/17/01)

The defendant was convicted of one count of sexual abuse. Prior to trial the state sought to use two prior sexually related felony convictions from 1982. Even though they were more than ten years old the court allowed their use for impeachment purposes, but did not allow the nature of the offenses to be used. The Supreme Court reversed the convictions stating that before a prior that is ten years old or older can be used, the state has the burden of proving exceptional circumstances. The fact that it is a one on one credibility issue is not enough. The trial court made no such finding here.

State v. Hernandez, 354 Ariz. Adv. Rep. 3 (CA 1,8/14/01)

The defendant worked for a freight company. The company hired a private investigator to investigate thefts at the company. He posed as a worker and befriended the defendant. During this relationship the matter of cocaine came up. The investigator requested that the defendant sell him some cocaine. The defendant resisted but eventually agreed. The investigator contacted the police who were made aware of the future transaction. The defendant sold some to the investigator and was later arrested and convicted. He attempted to use an entrapment defense but was precluded from doing so. The court of Appeals affirmed holding that the investigator was not a police agent and therefore entrapment was not available.



SEPTEMBER 2001 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/30-9/4	Hall Barwick	Franks	Toftoy	CR01-08456 Forgery, F4	Guilty	Jury
9/6-9/11	Looney Elzy	Fenzel	Coolidge	CR01-08498 2 cts. Agg DUI, F4	Guilty	Jury
9/18-9/19	Valverde	Gaines	Hunt	CR01-08532 Agg. Assault, F6 Assault, M1	Guilty	Jury
9/18-9/26	Farrell	Anderson	Toftoy	CR01-09116 Armed Robbery, F2D Agg. Assault, F3D	Hung Jury- 6 to 6	Jury
9/25-9/27	Scanlan	Gaines	Toftoy	CR01-08767 Transferring/Transporting over Two Pounds of Marijuana For Sale, F2 8 cts. Misconduct w/ Weapons, F4	Guilty of T/T MFS Guilty of 7 cts. MIW Not Guilty 1 ct. MIW	Jury
8/13	Looney	Fenzel	Toftoy	CR01-02241 PODD, F4 PODP, F6	Pled day of trial	Jury
9/11	Hall Francis	Willett	Musto	CR01-02596 Agg. DUI, F4 with one historical prior	Pled day of trial	Jury
9/13	Looney	Franks	Fuller	CR01-07877 2 nd Degree Trafficking in Stolen Property, F3 with one prior	Pled to charge without a prior day of trial	Jury
9/10	Farrell	Franks	Brnovich	CR01-05381 Agg. Assault, F3D	Dismissed day of trial	Jury
9/17	Noland Elzy	Budoff	Corcoran	CR01-08510 Theft of Means of Transportation, F3 with 2 priors and allegation that client was on probation	Dismissed day of trial	Jury
9/19	Looney	Willett	Hunt	CR01-07138 Unlawful Use of Means of Transportation, F5 with a prior while on probation	Dismissed without prejudice day of trial	Jury
9/25	Hall	Tolby	Clarke	TR01-01386CR DUI, M1	Dismissed with prejudice day of trial	Jury

**SEPTEMBER 2001
JURY AND BENCH TRIALS**

GROUP B

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
9/4 – 9/6	Colon	Topf	Green	CR01-05317 Theft of Means of Transportation, F3	Not Guilty	Jury
9/4 – 9/6	Grimm	Davis	Robinson	CR01-08586 2 cts. Disorderly Conduct, F2D; Misconduct Involving Weapons, F4	Guilty	Jury
9/12	Walton	Passey	Swingle	MCR01-00714 IJP	Guilty	Bench
9/17 – 9/19	Noble King/Kasieta <i>Oliver</i>	McClennen	Lindquist	CR99-04813 Sale of Narcotic Drug, F2	Guilty	Jury
9/24 – 9/26	Grimm	McClennen	Flanigan	CR01-07143 Criminal Trespass	Not Guilty	Jury
9/13	Colon	McClennen	Charnell	CR01-06983 Theft of Credit Card, F5	Dismissed day of trial	Jury

GROUP C

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
9/5 – 9/7	Klopp-Bryant / Lee	Akers	Denney	CR01-92926 2 Cts. Agg DUI, F4N	Guilty	Jury
9/17 – 9/19	Kavanagh / Klopp-Brant <i>Rivera</i>	Keppel	Doane	CR01-92409 Agg Assault, F4N	Not Guilty	Jury
9/17	Moore, J.	Wilkins	Herman	CR01-00821 Interfering w / Judicial Proceedings, M1N	Dismissed day of trial	Bench
9/25	Kavanagh	Oberbillig	Schultz	CR01-93020 POM, F6N PODP, F6N	Pled to a class 1 misdemeanor day of trial, no Prop. 200	Jury

SEPTEMBER 2001 JURY AND BENCH TRIALS

GROUP D

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/20	Billar	Foreman	Musto	CR2001-008461 Aggravated DUI, F4 Agg DUI, F4	Guilty	Jury
9/24-9/26	Geranis Reidy	Davis	Gallagher	CR2001-003874 Resisting Arrest, F6	Guilty	Jury
9/27-9/29	Billar	Foreman	Greer	CR2001-07910 Resisting Arrest, F6 F	Not Guilty of Resisting Arrest; Guilty of Lesser Included Disorderly Conduct, Non-Dang.	Jury
9/4/01	Clemency	Foreman	Nelson	CR2001-003155 Misconduct Involving Weapons, F4; POM, F6	Dismissed the day of trial: Motion to Suppress granted	Jury
9/10	Falduto	Wilkinson	White	CR00-019045 LVE ACDNT w/ DTH/INJ, F5	Pled to 6 open day of trial	Jury
9/20	Reid Salvato Reidy	Foreman	Corcoran	CR01-009097 Disorderly Conduct, F6	Dismissed day of trial	Jury
9/24	Cain Bradley	Davis	Godbehere	CR01-06834 Mscndct Inv Weapons, C4F	Pled day of trial	Jury
9/24	Adams Bradley Curtis	Budoff	Pacheco	CR01-07144 POND, F6	Dismissed day of trial	Jury
9/24	Adams Seaberry Reidy	Foreman	Anagnopoulos	CR01-004862 Burglary, F3	Dismissed day of trial	Jury
9/24	Silva	Davis	Kamis	CR01-09223A Armed Robbery, F2	Pled to 6 open, Facilitation to Commit Armed Robbery on day of trial	Jury
9/26	Cain Bradley	Davis	Gingold	CR01-006776 Burglary 3, F4	Pled day of trial	Jury

OFFICE OF THE LEGAL ADVOCATE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
9/13-9/17	Agan	Wilkinson	Knudson	CR2001-003983 Agg Assault, F4	Guilty	Guilty
9/18	Everett	McNally	Mueller	CR2001-003082 Agg assault Felony Flight Resisting arrest	Guilty	Jury
9/20-10/1	Logan & Sherwin Cano	Coker		CR1999-003536 3 cts Murder 1 st , Burg 1 st	Guilty	Jury
9/24-9/25	Schaffer	Hotham	Frick	CR2001-005646 Asst. criminal street gang, F3 Threatening/intimidating, F4	Guilty	Jury

SEPTEMBER 2001 JURY AND BENCH TRIALS

GRUPE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/21 – 8/28	Evans Souther <i>Del Rio</i>	Franks	Aubuchon	CR01-07273 Agg Asslt; F3D	Guilty	Jury
9/4 – 9/5	Dergo	Heilman	Sampson	CR01-06343 Sexual Abuse, F5	Guilty	Jury
9/13 – 9/17	Evans/Smiley Ames <i>Del Rio</i>	Anderson	Evans	CR01-06753 Fraudulent Schemes/Artifices, F2 2 Cts. Traffick Stolen Property, F2 2 Cts. Burglary in 3 rd Deg., F4	Guilty	Jury
9/13 – 9/19	Bublik/Van Wert Reilly	Gottsfeld	Raymond	CR01-06154 5 cts. Armed Robbery, F2 Agg. Asslt., F3D Burglary, F2D	Guilty 3 cts. Armed Robbery; 2 cts. Dismissed; Guilty Agg. Asslt. and Burglary	Jury
9/14 - 9/14	Woodfork/Ellig	Hoag	Manning	CR01-04911 POND F/S, F2; PODP, F6	Guilty	Jury
9/20 - 9/20	Woodfork	Anderson	Vingelli	CR01-00881 2 Cts. Agg Asslt, F6; Resisting Arrest, F6	Not Guilty on one Agg Asslt; Guilty on one Agg Asslt and Resist Arrest	Jury
9/24 – 9/25	Evans Souther <i>Del Rio</i>	Schneider	Gellman	CR00-09410 Agg Assault, F3D	Guilty	Jury
9/25	Goodman	Gastellum	Moya	CR01-00449 Interfering w/Judicial Proc., MI	Not Guilty	Bench
9/25 - 9/26	Dergo Gotsch	Hutt	Adleman	CR01-06136 Agg. Asslt., F4	Guilty	Jury
9/4	Benson Souther	Gottsfeld	Clarke	CR01-008554 3 Cts. Tres I/Res Strc-FNC, F6 False Imprisonment, F6 4 Cts. Intrfr Judicl Procd, M1	Dismissed without prejudice day of trial	Jury
9/6	Dergo	Heilman	Kalish	CR01-08776 2 Cts. Forgery, F4	Pled day of trial	Jury
9/11	Dergo Ames	Heilman	Clarke	CR01-07597 Agg. Asslt., F4 Crim. Trespass, F6 Damage Property, M2	Dismissed day of trial	Jury
9/13	Squires	Heilman	Raymond	CR97-12732 POND, F4; PODP, F6	Pled day of trial	Jury
9/17	Benson Castro	Gottsfeld	Koplow	CR01-004001 Agg Asslt w/Ddly Wpn, F3	Pled day of trial	Jury
9/17	Rock	Gottsfeld	Mayer	CR01-001193 Trespass, F6, Damage, M	Dismissed with prejudice day of trial	Jury
9/24	Pajerski	Gottsfeld	Mayer	CR00-10755 TOMT, F3	Pled day of trial	Jury
9/25	Lopez	Hilliard	Green	CR01-07984 Robbery, F4; Agg. Asslt., F3D	Dismissed day of trial	Jury
9/26	Rock	Gottsfeld	Knudsen	CR01-06735 Forgery F4, PODD, F4, PODP, F6	Pled to lesser day of trial	Jury

SEPTEMBER 2001 JURY AND BENCH TRIALS

GROUP F

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
9/7 – 9/7	Felmy	Johnson	Zia	TR01-4145 DUI, M1N	Not Guilty	Jury
9/12 – 9/13	Knowles Rivera	Foreman	Washington	CR01-07976 Resisting Arrest, F6N	Not Guilty	Jury
9/14 – 9/14	Stein	Johnson	Duggan	TR01-0246 2 Cts. DUI, M1N Extreme DUI, M1N	Guilty	Jury
9/20 – 9/24	Hamilton	Jarrett	Weinberg	CR01-93616 2 Cts. DUI, F4N	Guilty of lesser included DUI, M1N both counts	Jury
9/26 – 9/26	Gaziano	Fenzel	Andersen	CR01-92080 POND, F4N Marijuana Viol., F6N Drug Paraphernalia Viol., F6N	Guilty	Jury
8/20	Little Thomas	Akers	Pierce	CR01-92153 Agg. Assault, F4N Assault, M1N	Dismissed day of trial	Jury
9/17	Buckallew	Pearce	Brooks	TR01-01110 DUI, M1N	Dismissed without prejudice day of trial	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/22 – 9/12	Miller, Rick Abernethy Reger Bolinger	Hilliard	Lynch	CR99-14482 Murder 1, F1, Dangerous; Armed Robbery, F2, Dang.; Burglary, F2, Dang.; Theft, F3; Kidnapping, F2, Dang.; Sexual Assault, F2, Dang.	Guilty of Murder 1; remaining charges dismissed <i>Note: this was a retrial after a hung jury ended the first trial.</i>	Jury
8/28 – 9/04	Ivy	Jarrett	Brooks	CR01-090550B SOND, F2;	Guilty	Bench
9/10 – 9/10	Granda	Gottsfeld	Agra	CR01-07107 POND, F4; POM, F6; PODP, F6	Guilty <i>Note: the defendant was tried in absentia</i>	Jury
9/10 – 9/12	Westervelt Horrall	Donahoe	Davis	CR01-07385 2 Cts. Agg. Assault, F6; Resisting Arrest, F6	Not Guilty of 1 Ct. Agg. Assault; Guilty on others	Jury
9/10 – 9/26	Canby / Jones Horrall / Otero Bolinger / Williams	Cates	Clayton	CR99-16742 3 Cts. Murder 1, F1, Dang.; Att. Murder, F2, Dang.; Burglary, F2, Dang.	Guilty	Jury

for The Defense

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