

# for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

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## When Is a Lesser Guilty Verdict Not An Acquittal of the Greater Charge?

Why the Jury Instructions You Provide Matter!

By Christopher Johns, Training Director

Jury instructions matter—especially in cases when there may be lesser-included instructions. If you do not include a question for the jury to determine whether it acquitted the accused on the greater charge, you probably have *not* protected the client from a retrial on the greater offense in the event she wants to appeal guilt on the lesser conviction.

What? Read the standard lesser-included jury instruction. A jury may deliberate or reach a so-called “lesser-included offense” if it “either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts [it] cannot agree whether to acquit or convict [on] that charge.” See *State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). It hasn’t always been this way.

### Lost in Translation

It is written in the Talmud, a collection of Jewish law, that once an acquittal is pronounced it is irrevocable; the judgment can never be reopened, nor the trial resumed even if evidence surfaces showing

guilt. The principle that “no one must be twice put in jeopardy of life and limb” enshrined in the Bill of Rights may have originally been derived from the biblical book of Exodus.

A recent shift in Arizona law on when a jury may proceed to consider a lesser offense makes it necessary for practitioners to consider whether to include an interrogatory or space on verdict forms to ensure that the client can appeal a lesser-included guilty verdict. Here’s why.

The basic black letter law is unchanged. If your client is convicted of a lesser-included offense of the crime charged, that conviction may be treated as an implied acquittal of the greater charge and *may* bar retrial following a successful appeal. *Price v. Georgia*, 398 U.S. 323 (1970); *Green v. U.S.*, 355 U.S. 184 (1957).

On the other hand, if a jury expressly states that is deadlocked on the greater charge, no acquittal will be implied and retrial following appeal is *not* barred by double jeopardy. *U.S. v.*



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James J. Haas, Maricopa County Public Defender

*Bordeaux*, 121 F3d 1187 (CA 1997) (using state law analysis).

None of this was much of an issue in Arizona because for years lesser-included verdict forms were crafted to follow the holding in *State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74, 76 (1984). *Wussler* held that lesser-included jury verdict forms required that a jury find the accused *not guilty* of the greater crime before considering a lesser. Then, *State v. LaBlanc* came down and the waters got muddied.

**State v. LeBlanc May Leave the Issue of Guilt on the Greater Offense Open**

What changed are the circumstances under which a jury may consider a lesser-included offense.

In *State v. LeBlanc*, 186 Ariz. 437, 440, 924 P.2d 441, 444 (1996) (a case handled on appeal by the Chief Trial Deputy of our office, Paul Prato), our supreme court *directed* trial courts to “give a ‘reasonable efforts’ instruction in every criminal case involving lesser-included offenses.” That instruction permits jurors to consider a lesser offense “*if, after full and careful consideration of the evidence, they are unable to reach agreement with respect to the greater offense because they either (1) find the accused*

*not guilty on the **greater charge**, or (2) after reasonable efforts cannot agree whether to **acquit** on that charge.* See *Gusler v. Wilkinson ex rel. County of Maricopa*, 199 Ariz. 391, 18 P3d 702 (App. 2001). *LeBlanc’s* logic is predicated on the concept that it is better practice to allow the jury to proceed if it cannot reach a verdict on the greater offense. As Justice Zlaket wrote, “it now appears that requiring the jury to do no more than use reasonable efforts to reach a verdict is the better practice and more fully serves the interests of justice.”

**A Practical Concept**

As a practical matter, it also would tend to lessen the chance for the jury to hang on a greater offense. The Arizona Supreme Court further acknowledged the practical effect by noting that a *LeBlanc* instruction would reduce “the significant costs of retrial.”

Put another way, *LeBlanc’s* holding for how verdict forms should read in lesser offense cases gives a jury more opportunities to reach a verdict—albeit on a lesser offense. Most appellate practitioners viewed that as a good thing. The reasoning was that it probably reduced false unanimity, compromise and coerced verdicts as well.

While *LeBlanc* is fairly straightforward as to what is required, many trial courts, either unaware or simply through indifference to *LeBlanc*, continued to use a *Wussler* instruction. Since inherent in *Wussler* is acquittal first language, our clients were often, perhaps unknowingly, protected from retrial on the greater offense when they appealed guilty verdicts on lesser-included convictions. Why? A *Wussler* instruction unambiguously records the jury’s intent. *Wussler’s* language meant that the jury necessarily decided innocence on the greater charge. And, when the failure to give a *LeBlanc* instruction was raised on appeal, our appellate courts consistently held that error is harmless. See, e.g., *State v. Cordova*, 198 Ariz. 242, 8 P.3d 1156 (App. Div. 2, 2000).

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# Can Detectives Interrogate a Defendant After He is Represented by Counsel?

By Vicki Lopez, Defender Attorney - Trial Group E

The short answer is no . . . . . and yes!

Most criminal defense attorneys have had the unnerving experience of finding out that law enforcement detectives went to visit their client while in custody to question him about other “uncharged incidents” or matters “unrelated” to his current case. It seems as though such interviews should be prohibited since the defendant is represented by an attorney or, at the very least, the officers should be required to contact the attorney to allow the attorney to be present at the interview.

However, after researching this issue, it is clear that the present law delineates when the defendant’s right to counsel prohibits such interviews and when it does not. This delineation hinges on the defendant’s Fifth Amendment right to counsel [when the defendant invokes his right to remain silent and asks for a lawyer] and his Sixth Amendment right to counsel [defendant’s right to have an attorney assist with his defense in all criminal prosecutions].

## FIFTH AMENDMENT

When an accused invokes her right to remain silent and requests an attorney, the invocation prohibits the police from any subsequent interrogations of the client regarding current charges, and also prohibits interrogations regarding uncharged incidents. The police cannot reinitiate any interrogation regarding any matter once the accused has invoked her constitutional rights. The only exception to this rule is if the accused contacts the police and initiates the interrogation by indicating that she wants to talk to them. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Case law on this issue dates back to 1964 when the U.S. Supreme Court pronounced this rule in *Massiah v. U.S.*, 377 U.S. 201, 84 S.Ct.1199, 12 L.Ed.2d 246 (1964). The Supreme Court refined its holding in the *Edwards* case. *Edwards* holds that an accused who invokes his right to counsel is not subject to further interrogation by the authorities until counsel has been made available. 451 U.S. at 485-485, 101 S.Ct. at 1885. The Court thought that it had set forth a bright-line rule that could easily be followed by court, counsel and law enforcement agencies. However, the Court found that it needed to be more specific. In *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Court emphasized that the invocation of the right to remain silent and have an attorney present applied not only to subsequent interrogations regarding the charged events, but also to subsequent interrogations regarding separate investigations. The Court further held that it didn’t matter that the officer conducting the second interview did not know that the defendant had invoked at the time of his arrest. The officer’s lack of knowledge did not justify the failure to honor the defendant’s request under the Fifth Amendment.

In 1990, the Court again was forced to clarify the rule in *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). In *Minnick*, the Mississippi courts interpreted the *Edwards* rule that subsequent interrogations could not occur until counsel had been made available to the accused to mean that once the accused has consulted with her attorney, she can be questioned again without the presence of counsel. The *Minnick* opinion removed all possibilities of wiggling around the rule, holding that:

...we have interpreted the rule to bar police-initiated interrogation unless the

accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

498 U.S. at 153, 111 S.Ct. at 492. Therefore, if the client invoked and asked for an attorney when she was arrested, then detectives CANNOT interview the client later, regarding the current case *or any other unrelated matter* unless the attorney is present or unless the client contacted the police and asked them to come back and talk.

The remedy is suppression of any evidence from the tainted interview, regardless of whether or not the accused signed a waiver, because his statements are presumed involuntary. *Edwards*, 451 U.S. at 484-485, 101 S.Ct. at 1884-1885.

## SIXTH AMENDMENT

The Sixth Amendment provides that the accused shall have the assistance of counsel for his defense in all criminal prosecutions. In *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the U.S. Supreme Court held that once the Sixth Amendment right to counsel had attached and been invoked, it could not be waived during any subsequent police interview. Consequently, the police are barred from interviewing the accused regarding the current charged matter unless his attorney is present.

The reason that the police can interview a client who is represented by counsel in one case about matters unrelated to that case [assuming, of course, that the defendant did not invoke when he was arrested on the current charges] is because the Sixth Amendment right to counsel is offense specific. It cannot be invoked once for all future prosecutions because the right does not attach until the prosecution of the charges

actually begins. *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 4636, 115 L.Ed.2d 158 (1991).

The theory behind this analysis is that the police have an interest in investigating new or additional crimes and this investigation is often necessary after an individual has been formally charged with one crime. The public's interest in allowing the police to pursue investigations of criminal activity would be frustrated if evidence pertaining to charges that had not yet been filed [and therefore no Sixth Amendment right to counsel had yet attached] because even though no Sixth Amendment right had attached at the time the evidence was obtained, the evidence was excluded merely because other charges were pending at that time and the defendant had an attorney representing him on those other charges. *Maine v. Moulton*, 474 U.S. 159, 179 – 180, 106 S.Ct. 477, 488-89, 88 L.Ed.2d 481 (1985).

The main difference between the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel is that the Sixth Amendment right arises out of the fact that the defendant has been formally charged with a crime and is facing a state apparatus that has been geared up to prosecute him. The Fifth Amendment right is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise because of the nature of such interrogation. Those pressures exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges. *Roberson*, 486 U.S. at 685, 108 S.Ct. at 3003.

This information can be effectively used in your practice a couple of different ways. There is a form entitled *Invocation of Fifth and Sixth Amendment Rights* that is available on our shared drive. An attorney can make it part of his or her standard practice to use this form with every client. The form is filed as a pleading, with a copy to the client, to the County Attorney and to the client's probation officer, if she has one. If she is approached for interrogation, she can show her interrogators the form, which

effectively invokes her rights under the Fifth Amendment if she had not already done so and she cannot be questioned without her assigned attorney present. If you find that any of your clients have been subsequently interrogated, check to see if they invoked when they were arrested on your case. If they did, you have a sure-fire motion to suppress as soon as the new case is filed.

Using these steps in your practice will hopefully reduce the frustration and aggravation experienced by all attorneys as a result of subsequent police interrogations.

## Defender System Talks

### Arizona Public Defender Association Meets in Flagstaff

The Coconino Public Defender's Office, headed by Allen Gerhardt, hosted the August 8, 2003 APDA board meeting in Flagstaff. Members present included President Dan DeRienzo (Yavapai), Vice President Jim Haas (Maricopa), Treasurer Dana Hlavac (Mohave), Secretary Emery La Barge, and board members Craig Williams (La Paz), Gary Kula (Phoenix), and Mark Suagee (Cochise). Susan Kettlewell and Isabel Garcia (Pima) appeared telephonically. Members Jeremy Mussman, Christopher Johns and Kathleen Carey also attended.

The Board discussed the success of the First Annual APDA Conference and agreed that a conference date should be set as soon as practical for next year. Gary Kula reported that the judicial conference should be set this year in late September after the Arizona State Bar selects its annual conference date.

Board members agreed that the annual conference should be held simultaneously with the judicial conference. While other venues will be reviewed, the success and reasonable costs negotiated for holding the conference at the Tempe Mission Palms makes it a preferred location.

While Gary Kula has agreed to continue to be on the annual conference committee, the Board

appointed Christopher Johns to lead the APDA Conference Committee.

Chris Ackerley, a Navajo County defender attorney, made a presentation to the Board for sponsoring a basic sex crimes seminar specifically for non-DNA cases. A consensus was reached that the seminar would be best for the APDA Annual Conference.

Additional ideas for presentations at the next annual conference included presentations on DNA, DUI, and topics relative to paralegals, a session on confidentiality issues, and more ethics training. The Board also agreed that finding a dynamic and defense-oriented keynote speaker should be a priority.

Jim Haas and Dana Hlavac led a discussion about the need for APDA to create committees. Specifically, Jim noted that APDA needs a long-term plan for the future. Jim agreed to head a Strategic Planning Committee.

A Standards Committee was created and Pima County Public Defender Susan Kettlewell agreed to chair the committee. Gary Kula and Christopher Johns will staff the Education Committee.

*Continued in Defender System Talks, page 13*

# An Inside View of the Services Provided by Central Arizona Shelter

By Fredrica Strumpf, Defender Attorney - Trial Group D

As Public Defenders, we have the opportunity to spend time with individuals who do not have permanent living arrangements. It seems that a good number of our clients are “staying with friends for awhile” or have similar housing. Due to family circumstances, finances, drug use, or legal matters, many defendants do not have a stable residential option.

The luckier ones can shuffle between homes of friends and relatives and acquaintances. But as we know, a good number end up living out of their vehicles or in the street. And so these people, with no support system to address this basic need, must rely on the services available in the community.

Central Arizona Shelter Services (CASS) provides a roof and some basic services to individuals with no other options. According to CASS resources, there are over 13,000 homeless people in Maricopa County at any given time. CASS is the largest residential provider to homeless people, providing beds for 400 adults at its downtown facility. Additionally, CASS has a family shelter that serves approximately 120 adults and children.

CASS has some services geared toward helping individuals with special needs. However, it is clear that a homeless shelter cannot meet such diverse needs without community involvement. Rather, CASS focuses on offering the most basic services, to help maintain residents’ stability and, in ideal circumstances, assist individuals in improving their lives.

In addition to sleeping quarters, CASS provides showers, hygiene supplies, laundry facilities, and some clothing. Case managers assist residents in setting independent living goals. Residents can also receive help in obtaining employment and with childcare. Community

resources such as food and medical care are available within walking distance; residents may obtain bus tickets to use more distant resources. Additionally, volunteer programs at the downtown facility bring other services, including basic legal assistance.

ASU Law School’s Homeless Legal Assistance Program (HLAP) is a pro bono project involving students at the law school and local attorneys who volunteer their time (see [hlapl原因@asu.edu](mailto:hlapl原因@asu.edu)). HLAP visits five residential facilities in the valley, including CASS. Given its size, CASS tends to have more frequent visits and significantly more clients than other shelters.

Twice a month, students meet with residents to screen for legal matters. Sometimes, there are no legal issues and attorneys will end up not meeting certain individuals. Other times, the attorney will sit down and provide basic advice to the individual. Legal matters range from criminal to landlord/tenant to domestic relations. The attorney’s responsibility is not so much to resolve any problems, but to direct the client and/or student to resources that can help resolve the problems. Sometimes, this is as simple as providing directions to the self-help area of the law library. However, some issues are complex, and the students and attorneys may have to track down attorneys skilled in certain areas who are willing to volunteer time and resources to help.

As with all pro bono services, attorneys must be sure not to overstep their field of knowledge. Both CASS residents and students are understanding, and would rather hear “I don’t know, let me check with someone else,” than to have an attorney fumble for information that may not be accurate. Attorneys working for the Public Defender’s Office who are interested in doing volunteer work for HLAP

need to be cognizant of several additional special circumstances. First, they need to review the office's practices and procedures regarding outside pro bono activities (see, e.g., Guideline Number D-4) and submit a written request to Jim Haas, as described in the guideline. They should also review A.R.S. Section 11-583, which sets forth the legal requirements that must be met for public defenders to represent private clients.

Second, if the request is approved, the attorney will still need to check carefully for conflicts before assisting specific individuals at CASS. Public defender attorneys cannot take on cases for people who are already represented, initiate lawsuits against the county, or provide more than basic advice (i.e. "your court date is x, and you need to show up to this court and speak to your lawyer at that time") on most criminal matters. Even with these restrictions, attorneys provide a much needed service. They work as part of a team of staff and volunteers who are providing tools and assisting individuals in preparing a life beyond homelessness.

I would encourage you to visit CASS, if you have not already done so. Don't just drive by the facility; make an appointment and tour the property—it should take an hour, including the commute there and back. Find out what services now exist and what hopefully will be put in place over the next several years. By familiarizing yourself with services available or unavailable to your clients, you will be able to better advocate for those living at CASS. And, if you are so motivated, consider giving one to two evenings a year to provide basic legal guidance to some CASS residents.

## Homelessness in Maricopa County

CASS keeps records of the following general statistics pertaining to homelessness in Maricopa County:

- \* One in five is under the age of 18.
- \* Approximately 50% of the homeless community are substance abusers.
- \* At least 25% have serious mental health disorders such as depression or schizophrenia. 11% are considered dual diagnosed for both substance abuse and mental health problems.
- \* 25% are female victims of domestic violence.
- \* 40% are veterans.
- \* 11% are over 60 years old.
- \* 40% of the homeless are families with children.
- \* Approximately 21% have had felony convictions.

(See <http://cass-az.org/cass03.html>)

# Come Join Us for ...

## A Day at the Races

### Wednesday, October 22

“PD Downs” – Training Facility

Post Times: 11:30am & 1:30pm

- ❖ All proceeds to benefit CASS, Central Arizona Shelter Services
- ❖ All staff (downtown and off-site) encouraged to attend one of the sessions
- ❖ Speakers:                   Representatives from United Way and CASS
- ❖ Guest Auctioneer:   Bob Guzik
- ❖ Objective: to bet on your favorite horse (cash donation) and collect your winnings in funny money. Videotapes of actual horse races will be played to determine if you win, place or show! Funny money will be used at the auction to bid on prizes.
- ❖ Prizes – gift certificates, 2 DVD players, and other great stuff
- ❖ Food and Drink including baked goods, nachos, and popcorn
- ❖ 50/50 tickets available for purchase (split the pot with CASS)

Donations needed -- For further information contact  
Judi Wheeler (602)506-6633

*Continued from Jury Instructions Matter, page 2*

But giving the *LeBlanc* instruction means that, unless there is a blank in the verdict form to indicate on which theory the jury proceeded to a lesser offense, the client may be exposed to retrial and have to forfeit an appeal.<sup>1</sup>

## How to Protect the Client

Where it is beneficial to the client, which would be in virtually every case, a lesser instruction should read something like:

The crime of \_\_\_\_\_ includes the lesser offense of \_\_\_\_\_. You may consider the lesser offense of \_\_\_\_\_ if either:

(1) You find the defendant *not* guilty of the [insert greater offense]; or

(2) After full and careful consideration of the facts, you cannot agree on whether to find the accused guilty or not guilty of [the greater offense].

You cannot find the defendant guilty of the [insert the lesser offense] unless you find that the state has proved each element of [the lesser offense] *beyond a reasonable doubt*.

Please indicate whether: 1) you proceeded to the lesser offense because you found the accused not guilty of the greater offense; or 2) you proceeded to the lesser offense because, after full and careful consideration, you could not find the accused guilty or not guilty of the greater offense.

\_\_\_\_\_ Not guilty of the greater offense.

\_\_\_\_\_ After full and careful consideration, could not reach a verdict on the greater offense.

## I'll Be Back

If the jury marks *not* guilty, the client is absolutely protected by the double jeopardy clause. She can appeal a lesser conviction certain in the knowledge that the jury acquitted her of the greater offense and, if the lesser

conviction is reversed on appeal, the state cannot seek a retrial on the greater offense.

Should the jury indicate that it could not reach a verdict on the greater offense, her appellate lawyer can explain the risks of an appeal. In some cases, the risk may be worth it.

But without a determination of whether the jury acquitted the client on the greater offense, the client may be unnecessarily left exposed to the possibility of a practical denial of the right to appeal.

## Bottom Line

Careful review of verdict forms is a part of good trial practice. Under *LeBlanc*, you must request that the jury indicate how it got to the lesser offense to protect the client from retrial on the greater offense following a successful appeal.

Should the trial court refuse your verdict form, carefully make a record that without a place for the jury to show whether it acquitted the client on the greater offense, she is being denied the right to a full and fair trial under the federal and state constitutions.

### Endnote

<sup>1</sup>It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser-included offenses the trial court may be willing to submit to the jury. Indeed, because the decision is so important as well as so similar to the defendant's decision about the charge to which to plead, the client should be the one to decide whether to seek submission to the jury of lesser-included offenses. See ABA Standards for Criminal Justice Discovery and Trial by Jury (ABA, 2nd ed., 1980) (Standard 4-5.2 commentary).

# Flawed Legislation Lacks Checks and Balances

By Howard Grodman, Deputy Public Defender - Coconino County

There's a little law out there that gives the County Attorney unchecked authority over certain children, parents, and the state agency mandated to protect children from abuse and neglect in cases where the County Attorney is not even a party. A.R.S. § 8-201(13)(a)(iv) defines a "dependent child" to include "a child who is adjudicated to be:...(iv) Incompetent or not restorable to competency and who is *alleged* to have committed a serious offense as defined in § 13-604." (emphasis added) A troubling element of this definition is the mere allegation by the County Attorney that the child committed a serious offense.

I noticed this rarely used definition when I worked for the Attorney General representing Child Protective Services (CPS). A child who was charged with aggravated assault by a threatening exhibition of a deadly weapon or dangerous instrument was found incompetent to stand trial and not restorable. The County Attorney gave notice to CPS that he was asking the court to declare the child dependent. It was CPS's opinion, following its investigation, that the parents were not improper parents and were capable of meeting the child's needs including obtaining appropriate services for him. Although the juvenile judge rejected the County Attorney's request for a summary declaration of dependency (which was upheld on appeal in a memorandum decision), the judge did declare the child dependent based on this definition after appointing counsel and following the niceties of the Juvenile Court Rules. The Attorney General's Office appellate division declined to appeal this determination, but rather informed me that they would seek to have this flawed legislation that provides no opportunity for the parties to verify the County Attorney's allegation that the child actually committed a serious offense "corrected." This was several years ago and the legislation hasn't been corrected.

Those of us who have worked in juvenile court understand that there is a tendency for juvenile judges to seek to protect all children who pass before them by providing them and their parents with available services. It's both the nature of the position of juvenile judge and the desire not to be found on the cover of the morning newspaper accused of passing on an opportunity to provide a troubled youth with needed services when the youth subsequently harms someone or is harmed. This legislation is well meaning: assure that services are provided to a child, when they cannot be imposed through the juvenile probation department due to the juvenile's incompetence to stand trial. However, it unfairly infringes on the rights of parents and children to be free of government intrusion without due process of law, and it utilizes CPS resources that should be targeted to preventing children from being abused and neglected.

Children charged with aggravated assault, sexual assault, armed robbery, or kidnapping are "alleged to have committed a serious offense as defined in § 13-604." When all is said and done, how often does a charged aggravated assault turn out to be a disorderly conduct, a sexual assault to have been consensual, an armed robbery to have been an unarmed robbery, a kidnapping to have been an unlawful imprisonment? Disorderly conduct, consensual sex, unarmed robbery, and unlawful imprisonment are not serious offenses as defined in § 13-604, and therefore children accused of those offenses who are determined incompetent to stand trial are not *ipso facto* dependent.

As the U.S. Supreme Court most recently noted in *Troxel v. Granville*, 503 U.S. 57, 65 (2000), "The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel* invalidated a third party visitation statute that allowed any person to

petition for forced visitation so long as the visitation would serve the best interests of the child. *Id.* at 67-69. Important to the Supreme Court was the absence of a requirement that the respondent was an unfit parent, “for there is a presumption that fit parents act in the best interests of their children.” *Id.* at 68.

Likewise, there is no requirement of parental unfitness in A.R.S. § 8-201(13)(a)(iv). Yet the juvenile court that declares the child dependent grants itself the power to award the child, presumably according to the child’s best interests, to an institution, a foster care agency, a relative, a non-relative, or to a parent “subject to the supervision of department of economic security.” A.R.S. § 8-845. Of course, the child’s wish to remain at home and without the supervision of the department of economic security is disregarded.

In addition to the interference of the rights of the parents and desire of the child based on a mere accusation, A.R.S. § 8-201(13)(a)(iv) taps the limited resources of CPS in an area outside of their mandate. A.R.S. § 8-802 delineates the power and duties of CPS. CPS workers “shall receive reports of dependent, abused, or abandoned children and be prepared to provide temporary foster care for such children on a twenty-four hour basis,” receive information about children who may be in need of protective services, notify the police, conduct an investigation, possibly take the child into temporary custody, determine whether the child is in need of protective services, offer services designed to resolve unresolved problems, and make a written report of the investigation. CPS is not mandated to intervene into families where the child is either so mentally deficient or immature to be incompetent, and is accused of having committed a serious offense. Limited CPS resources should be directed to investigating reports that 5-year-old twins are being raised in cages rather than for servicing mentally incompetent children with adequate parents.

The juvenile competency laws already contain options for the provision of services to a juvenile

found incompetent to stand trial. A.R.S. § 8-291.10(H) provides for the initiation of civil commitment proceedings, if appropriate, and a dependency *investigation*. Such investigation could uncover whether or not the parents are fit parents and capable of obtaining needed services for their child. Only those juveniles accused of a serious offense are necessarily dependent by definition.

There is another definition of dependency that raises eyebrows, A.R.S. § 8-201(13)(a)(iii), wherein an under 8-year-old who is found to have committed a delinquent or incorrigible act is dependent. While this is troubling (the juvenile court can have full dependency authority over a 5-year-old who disturbs the peace of a person or household (or restaurant full of people) by engaging in seriously disruptive behavior or making unreasonable noise—what 5-year-old is so pure as to have not committed disorderly conduct?), there was a legislative determination that families of under 8-year-old delinquents and incorrigibles need protective services, presumably because the parents cannot control their young child. At least in that instance there is a requirement of a judicial determination that the under 8-year-old actually committed the act; in the case of the incompetent child accused of a serious offense there is only the requirement that the child be accused of the act.

I sincerely hope that this flawed legislation is corrected or that an aggrieved party, including CPS, challenges it in the appellate courts.

# Many Thanks to Our Courthouse Experience Volunteers

The Public Defender's Office had a grand total of 18 volunteers to assist with Courthouse Experience tours. That is almost double the number of people who volunteered in previous years. We would like to extend our thanks and give recognition to the following people who volunteered their time to this worthwhile endeavor.

Kathleen Carey

Vicki Lopez

Danny Evans

Michael Lamphier

Steve Wallin

Jim Dailey

Stacey O'Donnell

Danielle Rosetti

Alfonso Castillo

Michael Vincent

Mara Siegel

Paul Klapper

David Brown

Terri Zimmerman

Karen Kaplan

Robert Lerman

Jennifer Moore

Jose Montano

# Arizona Advance Reports

By Terry Adams, Defender Attorney - Appeals



State v. Box  
404 Ariz. Adv. Rep. 3 (CA 1, 7/31/03)

A police officer may legally stop someone for a traffic violation that he personally did not observe but was radioed to him by another officer. When a drug detection dog alerted on the defendant's trunk, there was sufficient probable cause to search.

State v. Smyers  
405 Ariz. Adv. Rep. 7(CA 1, 7/29/03)

The trial court erred in failing to "sanitize" a prior for child abuse in a trial for furnishing harmful (sexual) items to a minor for purposes of Rule 609. The decision of the defendant not to testify based on this required reversal.

State v. Darrell  
405 Ariz. Adv. Rep. 10(CA 1, 7/31/03)

A trial judge may not effectively implement a plea cut-off date, by rejecting all potential pleas

except a plea to the charges, based solely on the procedural posture of the case at issue.

State v. Hazlett  
406 Ariz. Adv. Rep. 3(SC, 8/12/03)

The statute prohibiting the creation and possession of child pornography is not unconstitutional for being overly broad, however the statute requires that the material prohibited must be of an "actual child" and the jury must be so instructed.

State v. Keener  
406 Ariz. Adv. Rep. 8 (CA1, 8/21/03)

The collective knowledge of several police officers may be considered for probable cause to arrest someone for a misdemeanor as well as a felony. (See State v. Box, supra)

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*Continued from Defender System Talks, page 5*

A technology committee will also be formed, as well as committees for investigators, paralegals, and administrative assistants.

The Board also discussed developing a legislative agenda. Maricopa County's legislative liaison, Kathleen Carey, briefed members about the last session, and about legislators' growing receptivity to consider public defender positions.

Of major concern to rural areas is the lack of uniform bond guidelines. Bond may be set at strikingly different amounts for similar or identical offenses even when individuals have similar community ties. Likewise, there is a lack of uniformity in fines for various low level offenses.

Other topics discussed included the securing of a domain name for APDA, getting APDA members involved with our office's trial college, making materials available from the APDA Conference on disk, and the MCPD's work on the Community-Oriented Defender Network.

The next scheduled meeting is set in Phoenix on December 4, 2003 in conjunction with the Maricopa County Public Defender's Office Death Penalty Seminar.

Every public defender employee is a member of the APDA. Dues are paid for by the offices.

# Jury and Bench Trial Results

## August 2003

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of for The Defense, please contact the Public Defender Training Division.



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### *for The Defense*

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