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Is Captain Bly Still Sailing?

When May An Element of a Conviction Be Used As Sentence Enhancement and Aggravation?

By the Honorable Robert L. Gottsfield

Editor's Note: *This month's lead is an article written by Maricopa County Superior Court Judge Robert Gottsfield. The thoughts and opinions, of course, are Judge Gottsfield's. Readers should note that Captain William Bligh, who Judge Gottsfield uses to illustrate the complexities of the Arizona case of State v. Bly, has been historically vilified in favor of master's mate Fletcher Christian. When set adrift from the HMS Bounty by Christian and fellow mutineers, Bligh managed to sailing an incredible 4,000 miles in an open boat in which all 18 of the men with him survived! The Bounty, a new book by Caroline Alexander, attempts to navigate the murky waters about what really happened aboard the fabled ship in 1789, and was published last month.*

The Arizona Supreme Court first spotted *Bly*¹ in 1980 when it held that using a handgun not only converted a robbery into an armed robbery (§13-1904), but also enhanced the offender's sentence (§13-604-dangerous offender-prison mandatory), and served as an aggravating factor for sentencing [now §13-702(C)(2)].

According to the Supreme Court, the use of the handgun for more than one sentencing purpose did *not* violate either the Constitution's double punishment² or double jeopardy prohibitions.³ The court reasoned that the fact that the prosecutor possessed discretion to decide whether to allege the dangerous or repetitive nature of an offense did not violate either the due process or equal protection clause.⁴

Following *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it is also reasonable to conclude that a jury need *not* determine aggravating circumstances in non-capital cases under §13-702(C)⁵. Instead, those circumstances may be found by the court to be true if supported by reasonable evidence in the record.⁶

However, on September 18, 2003, significant amendments became effective modifying §13-702(C) aggravators and §13-703.01 concerning capital cases. The amendment to §13-702(C)⁷ changes (C) (19) to read as follows:

"The offense was committed in retaliation for a victim's



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either reporting criminal activity or being involved in an organization, other than a law enforcement agency, that is established for the purpose of reporting or preventing criminal activity.”

The amendment moves the catch-all provision, formerly §13-702(C) (19) to (C) (20) in the statute. Further, the amendment to §13-703.01⁸ adds new subsection Q to require the trial court to consider the aggravating and mitigating circumstances listed in §13-702(C) when the death penalty is not alleged, or was alleged but is not imposed. The amendment’s practical effect is to overrule the Arizona Supreme Court’s recent decision in *Viramontes*.⁹

Back to *Bly* for a moment to set up this commentary. At the time *Bly* was decided, the aggravating factor of §13-702(C) (2) [then §13-901.01(C) (2)] read: “Use, threatened use or possession of a deadly instrument during the commission of a crime.”

A bevy of decisions followed *Bly*, applying its logic to convictions for armed robbery,¹⁰ aggravated assault,¹¹ second-degree murder,¹² negligent homicide¹³, first-¹⁴ and second-¹⁵ degree burglary, and sexual assault and kidnapping¹⁶. The appellate courts applied *Bly*’s rationale even though the use of a deadly weapon or dangerous instrument, or some other

aggravating factor, for example, intentional or knowing infliction of serious physical injury, [§13-702(C)(1)], was an element of the crime for which the defendant was convicted. The reasoning of *Bly*, a non-capital case, was also used to justify the imposition of an aggravated sentence based on pecuniary gain in a first-degree felony murder case.¹⁷ In the felony murder case, the underlying felony was robbery and the defendant argued, without success, that *Bly* should not apply as the same facts were needed to prove the aggravating circumstance and the robbery.

The foundation of all these cases, as articulated in *Bly*,¹⁸ is that the role of the legislature is to define crimes and prescribe punishment. On the other hand, the judiciary only has discretion to the extent articulated by the legislature.¹⁹ If the presence of a deadly weapon or a serious physical injury as an element of a crime motivates the legislature to punish crimes more severely (such as mandatory prison), it may appropriately create legislation providing for the additional punishment. An offender is not being punished more than once for a single act, but merely receiving a substantial punishment for a single severe crime,²⁰ and trial courts are required²¹ to consider the aggravators listed in §13-702(C) in the sentencing of non-capital convictions.

The DUI Exception

“Captain” *Bly*, so to speak, encountered smooth sailing from 1980, when he first set out, although, in 1989, the Arizona Supreme Court in *Orduno*²² carved out an exception in DUI cases. It held that the motor vehicle the defendant was operating could *not* also be used to enhance the sentence as a “dangerous instrument” under §13-604. The court reasoned that the vehicle was “an essential and necessary element of the crime.” Significantly, the *Orduno* court noted that *Bly* did not deal with a sentencing enhancement factor that was a “necessarily” included element of the underlying felony.²³

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Also, in what has become a pivotal case, in 1996, in *State v. Germain*,²⁴ Division One considered the application of the catch-all provision of now §13-702(C)(20), which sets forth as an aggravating circumstance to be considered by the trial court in non-capital cases: “Any other factor that the court deems appropriate to the ends of justice.”

In *Germain*, an inebriated defendant, while speeding, crossed the center line colliding head-on with an approaching motorcycle, killing both riders and injuring his passenger. The defendant was convicted of two counts of reckless manslaughter. At sentencing, the trial court listed as an aggravating circumstance, among others, that defendant had been driving recklessly for several miles. The *Germain* court, in an opinion which is often cited and relied upon,²⁵ held that reckless conduct, which is merely sufficient to constitute an element of reckless manslaughter, cannot be used as an aggravator. This was because reckless conduct had not been separately listed (as use of a deadly weapon and infliction of serious physical injury are) by the legislature as an aggravator, which the court felt was the basis for the *Bly* decision. The court in *Germain* found, however, that under the unusual facts presented, reckless conduct could be used as an aggravator under the catch-all provision. According to the Court:

Were the courts of this state permitted to enhance punishment, in the absence of any legislative intent, by using the very elements of the crime as aggravating factors, the carefully structured statutory scheme providing for presumptive sentences would be undermined. Where the degree of the defendant’s misconduct *raises to a level beyond that which is merely necessary to establish an element of the underlying crime*, the trial court may consider such conduct as an aggravating factor under the broad language of (the catch-all provision).²⁶

But then came *State v. Lara*,²⁷ a three-masted, three-decker galleon with cannon blazing. The issue in *Lara* was whether manslaughter,

armed robbery and kidnapping convictions in consolidated cases could be enhanced and aggravated when a weapon was used in the one case, and intentional or knowing infliction of serious physical injury resulting in death was present in the other. *Bly* was upheld even though the Supreme Court was uncomfortable with its decision.

Vice Chief Justice Moeller, writing for the majority, concluded that but for “*stare decisis*” and the “hundreds, if not thousands”²⁸ of non-DUI cases resolved relying on *Bly* and similar cases, the result might be different. He noted the better view²⁹ might be that expressed by the Court of Appeals in *Lara*³⁰ (Fidel, J.), which relied upon *Orduno* and *Germain*; namely, that an element of a crime cannot be used as an aggravating factor unless it is more than “an essential and irreducible element”³¹ of the crime and “surpasses the definition of the crime”³².

Chief Justice Feldman, specifically concurring, went further, writing that *Bly* was “illogical”, “seemingly followed only in Arizona”, and “we simply cannot undo that which has been done but can only hope that the legislature will correct our errors.”³³

While *Lara* had not scored a direct hit on Captain *Bly*, the Arizona legislature promptly acted and did. In 1993, Section 13-702(C) (2) was amended to read, with respect to the aggravators, “Infliction or threatened infliction of serious physical injury” [702(C) (1)] and “Use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime “except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under §13-604.”³⁴ [702(C)(2)] [Emphasis supplied.]

So is Captain Bly still sailing? An analysis of recent cases helps provide the answer.

In *State v. Tschilar*,³⁵ the issue was whether the “number of victims”, used by the trial court as an aggravator, although not specifically listed

as an aggravator in §13-702(C), may be used nevertheless under the catch-all provision §13-702(C)(20) [then §13-702(C)(18)]. As in *Germain*, the answer is yes. The Court of Appeals (Ehrlich, J.), reasoned that the kidnapping and assaulting of four teenagers all at one time “arguably creates a greater risk of physical and emotional injury as to each as they see the others terrorized or injured and arguably represents a graver offense to society.”³⁶ The Court disagreed with defendant’s argument that because a “victim” is a necessary element of each offense that “the number of victims” is also an element of each offense. Finally, while citing *Germain*, but also echoing *Orduno* and the Arizona Supreme Court’s approval (but for “*stare decisis*” of Judge Fidel’s reasoning in *Lara*), the *Tschilar* court noted that use of the catch-all was proper as an aggravator when the element in question “rises to a level beyond that merely necessary to establish the underlying crime.”³⁷

In still another case, *State v. Alvarez*,³⁸ the defendant was convicted of multiple counts of second-degree burglary and sexual abuse involving six victims in six unrelated incidents occurring at different times, of entering an apartment and committing sexual abuse. The trial court enhanced the sentences pursuant to §13-702.02 as multiple offenses not committed on the same occasion, but consolidated for trial (enacted also in 1993, it increased the range of sentence for each class of offense). In addition, the trial court aggravated the sentences on ten of the thirteen counts, citing “multiple victims,” apparently under the catch-all provision.

Division Two remanded for resentencing, finding that it was proper to enhance the sentences under §13-702.02, but not then aggravating ten of the sentences under §13-702(C)(1). The court interpreted the catch-all provision as requiring “any additional fact or circumstance not elsewhere specifically provided for or incorporated into our carefully structured statutory scheme”³⁹ (citing *Germain*). It was error, wrote the court, to use “multiple victims” or even “multiple offenses” (even if not coextensive in every case as in the case of a defendant who commits multiple offenses

against a single victim) as an aggravator in this case, because there were no “multiple victims in the sense in which that term is normally used, denoting multiple victims of a single act, episode, or scheme.” Defendant did not commit the offenses against “all six women simultaneously or in the course of a continuous spree or rampage.”⁴⁰ The *Alvarez* court distinguished *Tschilar*, where there were “multiple contemporaneous victims in a single incident.”⁴¹ *Alvarez* limited the use of the catch-all in language reminiscent of the 1993 legislative amendments to §13-702(C) (1) and (2):

We do not view it - and do not believe the legislature intended it - as permission for a court to simply cite again in aggravation a fact or circumstance that has already been reckoned into the statutory scheme elsewhere, either as an element of the offense or a basis for enhancing the range of sentence, as essentially happened here.⁴²

The *State v. Montoya*⁴³ decision, filed April 1, 2003, determined that a defendant convicted of participating in a criminal street gang [under §13-2308(G)] cannot have his sentence enhanced on the basis that he had acted to promote, further or assist criminal conduct by a criminal street gang under §13-604(T) (requires that three years be added to any sentence). There is no double punishment under §13-116 because the section is not designed to cover sentence enhancement.⁴⁴ But it constitutes double punishment in violation of the prohibition against double jeopardy and due process in this particular case when the defendant is “punished twice for the *identical* conduct prohibited by two distinct statutes”,⁴⁵ which may be raised for the first time on appeal.⁴⁶ Regarding the aggravators listed in §13-702(C), the Court found its decision consistent with that section, especially in light of the 1993 legislation enacted to “avoid double punishment in sentencing”.⁴⁷ The *Montoya* court distinguished *Bly* and *Lara*, which affirmed the aggravation and enhancement of a sentence “using one element” of a crime, because, in *Montoya*, “defendant’s one act of participation

in a criminal street gang,”⁴⁸ used to enhance the sentence, also resulted in the original conviction. A strong dissent by Judge Thompson argued that the decision was contrary to the Supreme Court’s *Lara* decision, which held that, even though manslaughter always involves death, the sentence could be enhanced by the fact that the defendant caused serious physical injury resulting in death. Moreover, he reasoned that the Supreme Court in *Lara* rejected Judge Fidel’s view in the Court of Appeals that sentence enhancement was only permissible for conduct that exceeds the elements of the underlying offense. A petition for review has been filed in *Montoya* and a decision on whether to accept it or not will be rendered in a few weeks, which throws a wrench into any of the following conclusions.

Well, is Captain Bly still sailing? Yes, but he is listing to port.

To summarize present law, *Bly*, and those many cases relying on it, affirms the legislative prerogative and mandate that an element of an offense may be used as an aggravator or enhancer, or both, without violating double punishment, double jeopardy or due process prohibitions, in the following circumstances:

1. In capital cases, if the element is listed separately as an aggravator in §13-703(F)⁴⁹ or as an enhancer.⁵⁰ In a first-degree murder case, under the recent amendment, if the death penalty is not alleged (no notice of intent filed), or was alleged but not imposed, if the element is listed as an aggravator in §13-702(C).

2. In non-capital, non-DUI cases, if the element is listed separately as an *enhancer* (§13-604 or some other enhancing statute), as long as the *identical* elements of the underlying crime are not used to enhance so as to amount to being punished twice for the same conduct in violation of due process and the prohibition against double jeopardy (*Montoya*). Going out on a limb, it is believed, if the Arizona Supreme Court grants review of *Montoya*, that it will

affirm the Court of Appeals’ holding that the 1993 amendments to §13-702(C) (1) and (2) demonstrate the legislative intention not to punish more than once for identical conduct, especially in light of that court’s misgivings about its decision in *Lara*.

3. In non-capital, non-DUI cases, if the element is listed separately as an *aggravator* under §13-702(C) (1) (“Infliction or threatened infliction of serious physical injury”), or §13-702(C) (2) (“Use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of a crime”), such elements have been legislatively restricted to one application. Consequently, if “an *essential* element of the offense of conviction,” they cannot be used to either enhance or aggravate a sentence.

4. In non-capital, non-DUI cases, the remaining aggravators specifically listed in §13-702(C)(3-19)⁵¹ may be used to aggravate a sentence even if comprising an element of the crime, because the legislature has listed them as such and it is that body, under our system, which prescribes punishment. Many, if not most, of these aggravators would not often constitute “an *essential* element of the offense of conviction” (as proscribed only for §13-702(C) (1) and (2) aggravators). A Division One case, *State v. Conde*,⁵² decided after *Lara* and before the 1993 legislation, upheld aggravated sentences under §13-702(C)(6), “expectation of the receipt of anything of pecuniary value”, for armed robbery and first-degree burglary, even though an element of the charged offenses. Judge Gerber advised that the court must follow *Lara* “regardless of our own analysis.” In a future case concerning §13-702(C)(3-19), when an element is thought to be an “essential element,” the prosecutor can argue *Conde*, *Bly*, the Supreme Court’s *Lara* decision, the end result in *Tschilar*, and the reasoning of Judge Thompson in his dissent in *Montoya*. The defense can argue *Orduno*, *Germain*, and the many cases approving it,⁵³ the approval by the Supreme Court of Judge Fidel’s Court of Appeals decision in *Lara*, and how the reasoning of the recent decisions in *Tschilar*, *Alvarez* and *Montoya* restrict the use of the catch-all provision of

§13-702(C)(20). Perhaps the strongest defense argument is that, after *Lara*, the legislature tipped its hand by enacting the 1993 legislation restricting the use of §13-702(C) (1) and (2) aggravators, showing a clear intention, as those sections now read, to restrict the further use as an aggravator or enhancer of any circumstance which is “an essential element of the offense of conviction”.

5. In non-capital, non-DUI cases, the catch-all provision of §13-702(C)(20) - “Any other factor that the court deems appropriate to the ends of justice” - it can now be argued, in light of *Germain*, *Tschilar*, and *Alvarez*, can be used to aggravate a sentence *only* where the defendant’s conduct “rises to a level beyond that merely necessary to establish the underlying crime”.⁵⁴

Endnotes

1. *State v. Bly*, 127 Ariz. 370, 621 P.2d 279(1980). Actually, at the time *Bly* was decided, the use of a weapon increased defendant’s sentence in a fourth way by making parole unavailable until 2/3 of the sentence was served, rather than the then usual ½ under A.R.S. §41-1604.06(D). *Id.* at 127 Ariz. 371, 621 P.2d 280. *Bly* also has a comprehensive discussion of the legislative intent regarding the sentencing options under the then new Criminal Code.
2. A.R.S. Sections 13-116 and 13-604(M). And see *State v. Ochoa*, 189 Ariz. 454, 461, 943 P.2d 814, 821 (App. 1997), *rev. denied* Sept. 16, 1997, *cert. denied*, 522 U.S. 1083 (1998) (prohibition against double punishment of §13-116 does not cover sentence enhancement).
3. The double jeopardy prohibition of the Fifth Amendment to the United States Constitution is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Bly*, at 127 Ariz. 371, 621 P.2d 280. See also *Missouri v. Hunter*, 459 U.S. 359 (1983)(cumulative punishment for two separate crimes arising out of same conduct does not violate double jeopardy if within the legislature’s intent); *State v. Torrez*, 141 Ariz. 537, 539, 687 P.2d 1292, 1294 (App. 1984) (increasing sentence range for prior convictions and making current sentences flat time because on parole not double jeopardy); *State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983), *rev. denied* Sept. 9, 1983 (priors used to enhance and aggravate).
4. *State v. Olsen*, 157 Ariz. 603, 607-8, 760 P.2d 603, 607-8 (App. 1988), *rev. denied* Sept. 14, 1988 [§13-604 dangerousness enhancement provision invoked by prosecutor alone not contrary to due process or equal protection and does not constitute cruel and unusual punishment under four-part test of *Solem v. Helm*, 463 U.S. 277 (1983)]; *State v. Bucholz*, 139 Ariz. 303, 308-9, 678 P.2d 488, 493-4 (App. 1983), *rev. denied*, March 16, 1984 (upholding former §13-604(H) so-called “Hannah” priors). See also n.17 infra.
5. *State v. Brown* (McMullen Real Party In Interest), 205 Ariz. 325, 70 P.3d 454 (2003); *State v. Padilla*, __ Ariz. __, __ P.3d __, 402 Ariz. Adv. Rep. 7 (CA1, 6/19/03) (jury need not determine whether prior convictions existed even if such fact increases the penalty for a crime beyond the prescribed statutory maximum).
6. *State v. Meador*, 132 Ariz. 343, 645 P.2d 1257 (App. 1982). In a capital case, aggravating circumstances must be proven beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980), *cert. denied*, 449 U.S. 986 (1980). In non-capital cases see also, *State v. Shuler*, 162 Ariz. 19, 780 P.2d 1067 (1989) (court may not consider as aggravating circumstances mere arrests which are unsupported by evidence of bad acts or illegal conduct); but misconduct for which there is evidence, even after acquittal of such misconduct after a trial, can be used *State v. Anderson*, 177 Ariz. 381, 384-5, 868 P.2d 964, 967-8 (App. 1993), *rev. denied* Mar. 16, 1984, *cert. denied*, 512 U.S. 1224 (1994); *State v. Kelly*, 122 Ariz. 495, 488-9, 595 P.2d 1040, 1043-4 (App. 1979). And see, *State v. Ethington*, 121 Ariz. 572, 574, 592 P.2d 768, 770 (1979) (judge can consider the original charge for which there is evidence even though jury convicted of lesser charge).
7. 2003 Ariz. Sess. Laws, ch. 225, §1.
8. 2003 Ariz. Sess. Laws, ch. 255, §2. Certain sections, but not that referred to in the text, do not become effective until the Arizona Supreme Court or the United States Supreme Court rules it constitutional for a victim in a capital case to make a sentencing recommendation.

9. *State v. Viramontes*, 204 Ariz. 360, 361, 64 P.3d 188, 189 (2003)(trial court limited to §13-703 factors in first-degree murder prosecutions even where state does not seek death penalty – now changed by §13-703.01Q).
10. *State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1981).
11. *State v. Kerr*, 142 Ariz. 426, 435, 690 P.2d 145, 154 (App. 1984). *See also State v. Rodriguez*, 126 Ariz. 104, 107, 612 P.2d 1067, 1070 (App. 1980) decided before *Bly*.
12. *State v. Just*, 138 Ariz. 534, 551, 675 P.2d 1353, 1370 (App. 1983); *State v. Meador*, 132 Ariz. 343, 346, 645 P.2d 1257, 1260 (App. 1982). Both cases found that death of the victim is an appropriate aggravating factor in convictions for second degree murder, as well as use of a dangerous instrument to either further aggravate the sentence under §13-702, or to enhance under §13-604, as use of a dangerous instrument is listed in each statute.
13. *State v. Olsen*, *supra* n.4.
14. *State v. Rybolt*, 133 Ariz. 276, 281, 650 P.2d 1258, 1263 (App. 1982), overruled on other grounds, *State v. Diaz*, 142 Ariz. 119, 688 P.2d 1011 (1984).
15. *State v. Martinez*, 130 Ariz. 80, 81, 634 P.2d 7, 8 (App. 1981).
16. *State v. Williams*, 182 Ariz. 548, 559, 898 P.2d 497, 508 (App. 1995); *State v. Rodriguez*, 145 Ariz. 157, 176, 700 P.2d. 855, 874 (App. 1984).
17. *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984), *cert. denied*, 471 U.S. 1111 (1985). As noted in *State v. Harrod*, 200 Ariz. 309, 323, 26 P.3d 492, 506 (2001) Carriger was sentenced to death in 1978, won a new trial in 1998, and was freed through a plea agreement with a sentence of time served. *Harrod* was reversed and remanded (536 U.S. 953) in light of *Ring* and the Arizona Supreme Court eventually vacated *Harrod*'s death sentence and remanded for resentencing ___ Ariz. ___, 65 P.3d 984, 396 Ariz. Adv. Rep. 45 (SC, 4/3/03).
18. *Bly*, at 127 Ariz. 371-3, 621 P.2d 280-2; *State v. Carriger*, *supra* n.17 at 143 Ariz. 161, 692 P.2d 1010; *State v. Gutierrez*, 130 Ariz. 148, 149, 634 P.2d 960, 961 (1981).
19. Unless, as noted in *Bly (Id.)* “the punishment is so severe as to be disappropriate to the crime”, citing *State v. Mulalley*, 127 Ariz. 92, 618 P.2d 586 (1980) (eighth amendment is limitation on both legislative and judicial action), overruled on other grounds, *State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987). *See also Harmelin v. Michigan*, 501 U.S.957 (1991) (fact conviction of a dangerous offense made prison mandatory does not by itself violate eighth amendment); *Solem v. Helm*, 463 U.S. 277 (1983) (four-part test to determine whether sentence constitutes cruel and unusual punishment under federal or state constitution); *State v. Bartlett*, 171 Ariz. 302, 830 P.2d 823 (1992), *cert. denied*, 506 U.S. 992 (1992) (*Bartlett II*) (vacating 40-year mandatory sentence without possibility of early release on conviction of two counts of sexual conduct with a minor) disapproved in part in *State v. DePiano*, 187 Ariz. 27, 30, 926 P.2d 494, 497 (1996), *cert. denied*, 519 U.S. 1098 (1997) (34 flat years for two counts of intentional or knowing child abuse reduced to 24 flat years). *DePiano*, which prohibited an individualized analysis of the facts of the case to determine if the sentence was unwarranted, was just overruled by the Arizona Supreme Court in *State v. Davis*, CR-01-0423PR, October 30, 2003 (sentencing 22 year old to a mandatory minimum of 52 years without possibility of parole for having voluntary sex with two post-pubescent teenage girls grossly disproportionate to the crime, violating Eighth Amendment). *See also* n.4 *supra*.
20. *Supra* n.18.
21. *State v. Greene*, 192 Ariz. 431, 444, 967 P.2d 106, 119 (1998), *cert. denied*, 526 U.S. 1120 (1999) (aggravated sentences for robbery, kidnapping and theft-by-control convictions proper under §13-702(C) (5) (heinous, cruel or depraved) and (C) (6) (pecuniary gain) aggravators).
22. *State v. Orduno*, 159 Ariz. 564, 566, 769 P.2d 1010, 1012 (1989). *See also State v. Pitts*, 178 Ariz. 405, 874 P.2d 962 (1994) (where an aggravated DUI conviction is based on driving on a suspended or revoked license there is no violation of *Orduno* to use prior misdemeanor DUI convictions to aggravate a sentence, because the aggravated DUI is not based on previous DUI convictions); *State v. Paxson*, 203 Ariz. 38, 43, 49 P.3d 310, 315 (App. 2002) (Arizona courts have consistently held that a vehicle may qualify as a dangerous instrument under §13-604 in non-DUI cases; use of automobile held not a statutory element of manslaughter and crime can be enhanced even where victim was passenger in defendant's vehicle).
23. *Id.* at 159 Ariz. 567, 769 P.2d 1013.
24. *State v. Germain*, 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986). The catch-all provision

of then §13-702(D) (13) read when *Germain* was decided: “Any other factors which the court may deem appropriate to the ends of justice.”

25. *State v. Harrison*, 195 Ariz. 1, 4, 985 P.2d 486, 489 (1999) (trial court’s use of fleeing from police as an aggravator of unlawful flight conviction improper under *Germain* test for propriety of use of §13-702(15) [now (20)] catch-all where court does not articulate why this element of conviction “rose to a level beyond that necessary to establish the element of the crime”); *State v. Harvey*, 193 Ariz. 472, 476, 974 P.2d 451, 455 (App. 1998), *rev. denied* March 23, 1999 (infliction of serious physical injury is *essential* element of negligent homicide conviction under §13-702(C)(1), but can use defendant intended or knew his conduct would cause serious physical injury under catch-all of §13-702(C)(15) [now (20)], where judge sets forth reasons the conduct “is higher than that requisite to commit the crime,” citing *Germain* and *Tinajero*, *infra* this note; same reasoning for use of “extreme recklessness” as aggravator); *State v. Tinajero*, 188 Ariz. 350, 357, 935 P.2d 928, 935 (App. 1997), *rev. denied* April 29, 1997 (aggravating factor under *Germain* test that defendant fled scene without regard to victims properly used and did not merely restate an element of leaving scene of accident conviction, but remanded for resentencing, inter alia, as improper to use injury to victim as aggravator at aggravated assault sentencing unless judge meant the “severity” of the injuries), disapproved on other grounds *State v. Powers*, 200 Ariz. 363, 364, 26 P.3d 1134, 1135 (2001)

26. *Id.* at 150 Ariz. 290, 723 P.2d 108.

27. *State v. Lara*, 171 Ariz. 282, 830 P.2d 803 (1992).

28. *Id.* at 171 Ariz. 285, 830 P.2d 806. *See also State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992), *cert. denied*, 509 U.S. 912 (1993) which says of *Lara* “the court reluctantly followed a line of cases invoking statutory construction, while recognizing that the court as presently constituted would probably have reached a different result if it were writing on a clean slate”. Similar misgivings were expressed by Judge Gerber in dissent in *State v. Malone*, 171 Ariz. 321, 323, 830 P.2d 842, 844 (App. 1991) which case was consolidated with *Lara*, the opinion vacated and decided in favor of *Bly* by the Arizona Supreme Court.

29. *Id.*

30. *State v. Lara*, 170 Ariz. 203, 205-6, 823 P.2d 70, 72-3 (1990) sentence vacated 171 Ariz. 282,

830 P.2d 803 (1992)

31. *Id.* As quoted by Justice Moeller at 171 Ariz. 284, 830 P.2d 805.

32. *Id.* As quoted by Justice Moeller at 171 Ariz. 285, 830 P.2d 806.

33. *Supra* n. 28.

34. 1993 Ariz. Sess. Laws, ch. 255, §11.

35. 200 Ariz. 427, 435, 27 P.3d 331, 339 (App. 2001), *rev. denied* as improvidently granted Mar. 27, 2002. The case also holds that *Apprendi* (530 U.S. 466) does not require a jury to make the finding whether kidnapping victims were released unharmed because conviction of kidnapping is a class 2 felony and if released unharmed a class 4 felony. Thus the fact of release does not expose defendant to a punishment exceeding that permitted by the verdict (i.e. the sentencing range of a class 2 felony), but only allows a punishment less than that allowed by the verdict.

36. *Id.*

37. *Id.*

38. 205 Ariz. 110, 67 P.3d 706 (2003).

39. *Id.* at 205 Ariz. 113, 67 P.3d 709. *See State v. Thompson*, 200 Ariz. 439, 27 P.3d 796 (2001) which clarifies the correlation between the enhancement statutes §13-702.02 which is more lenient (and was meant to replace “*Hannah*” priors) and §13-604 (historical prior felony convictions) and reaffirms that a conviction occurs when a plea is accepted by a judge or a verdict is returned by a jury.

40. *Id.* at 205 Ariz. 112, 67 P.3d 708.

41. *Id.*

42. *Id.* at 205 Ariz. 113, 67 P.3d 709.

43. *State v. Montoya*, 204 Ariz. 526, 527, 65 P.3d 475, 476 (App. 2003).

44. *Supra* n.2.

45. *Supra* n.43. *But see State v. Siddle*, 202 Ariz. 512, 47 P.3d 1150 (App. 2002), *rev. denied* Oct. 29, 2002 (conviction of drug offenses and for possession of a deadly weapon during a felony drug offense under §13-3102(A) (8) do not violate double jeopardy).

46. *State v. Millanes*, 180 Ariz. 418, 421, 885 P.2d 106, 109 (App. 1994), *rev. denied* Dec. 20, 1994 (violation of double jeopardy is fundamental error).

47. *Supra* n. 43 at 204 Ariz. 528, 65 P.3d 477. On May 26, 2003 the legislature also amended §13-703(F)(2) to provide that a “serious crime” committed at the same time as a murder or if not committed on the same occasion consolidated for trial, can be used as an aggravator of the murder conviction.

2003 Ariz. Sess. Laws, 1st Reg. Sess., ch. 255, §1. But note that in the supplemental opinion in *State v. Rutledge*, ___ Ariz. ___, 76 P.3d 443, filed Sept. 16, 2003, the Supreme Court found the amendment did not apply to *Rutledge*, whose crimes were committed prior to the date of the amendment, and ruled to the contrary.

48. *Id.*

49. See *State v. Carlson*, 202 Ariz. 570, 581, 48 P.3d 1180, 1191 (2002) in which Justice Feldman cites *Bly* in a capital case for the proposition that a judge can properly use a single fact to support the application of more than one aggravating factor, as long as the factor is not weighed twice; *State v. Mann*, 188 Ariz. 220, 227, 934 P.2d 784, 791 (1997), *cert. denied*, 522 U.S. 895 (1997) (use of multiple homicide [§13-703(F)(8)] and heinous, cruel, or depraved [(F)(6)] as aggravators for first-degree murder not double punishment because “not elements of first-degree murder (a crime that can be committed in a number of different ways)”, citing *Lara and Lowenfield v. Phelps*, 484 U.S. 231 (1988). See also n.17 *supra*.

50. Such as under §13-604(T), but there would have to be a jury finding. See also n. 47.

51. Value of property; accomplice; especially heinous, cruel or depraved; pecuniary gain; procuring commission of offense by payment; public servant offense; physical, emotional and financial harm to victim or if deceased to family; death of unborn child; prior felony within 10 years of new offense; wearing body armor; victim 65 or disabled; offense by fiduciary; hate crime; alcohol concentration of 0.15 or more while driving; ambushing victim; in presence of child; *State v. Lee*, 189 Ariz. 608, 620, 944 P.2d 1222, 1234 (1997), *cert. denied*, 523 U.S. 1007 (1998) (use of pecuniary gain may be used as aggravator of armed robbery conviction because legislature has listed it as an aggravator and, in any event, to prove pecuniary gain the state must show the actor’s *motivation* was the expectation of pecuniary gain and to prove robbery the state must show a *taking* of property); *State v. Greene*, *supra*, n. 21.

52. *State v. Conde*, 174 Ariz. 30, 36, 846 P.2d 843, 849 (App. 1992), *rev. denied* March 17, 1993. See also *State v. Fagnant*, 173 Ariz. 10, 14, 839 P.2d 430, 434 (App. 1992) (pecuniary gain not essential element of trafficking in stolen property or fraudulent schemes), vacated on other grounds, 176 Ariz. 218, 860 P.2d 485 (1993); *State v. Gillen*, 171 Ariz. 358, 830 P.2d 879 (App. 1992) (pecuniary gain not

essential element of theft by misrepresentation or control).

53. See n. 25 *supra*.

54. *Tschilar*, *supra* n. 35.

Developing a DUI Case Theory

Some Factors to Consider

By Rebecca Potter, Vehicular Crimes Unit Supervisor

When working on a DUI case, practitioners shouldn't overlook obvious facts that will more than likely be deciding factors in the case. A few basic questions that should be asked are:

1. What did the client's driving look like before being stopped?
2. What did the client look like? and,
3. How did the client behave after he or she was stopped by the police?

It's easy to get caught up in all the other issues that go along with a DUI case and forget some of the most crucial evidence. All the technical knowledge in the world will not win a case if the above factors are not favorable or cannot otherwise be explained.

When analyzing the client's reported driving behavior, think carefully about whether it is a sign and symptom of alcohol impairment, or just sloppy driving that many of us engage in at one time or another.

For example, speeding is a common reason police use to pull people over. On the other hand, most speeders don't have alcohol impairment issues. Speed by itself doesn't tell a jury much about impairment (except perhaps in the very extreme cases).

The National Highway Traffic Safety Administration published a study in 1997 called *The Detection of DWI and BAC's Below .10*. This study purports to give a list of driving cues and post-stop cues that can reliably predict impairment at a .08% or above. Although any one cue has as much probability of predicting DUI as flipping a coin, it is a list of driving and post-stop cues that the police are trained to consider in deciding whether to pull someone over or make an arrest for DUI. The percentage of predictability in this study was higher if more than one cue was present. This isn't

all that surprising because, as you will see, these cues are common sense indicators of possible impairment. NHTSA's "predictability of impairment" estimates follow the list of each of these types of cues.

The Driving Cues

Problems Maintaining Proper Lane Position

- * Weaving (moving toward one side of the lane and then the other)
- * Weaving across lane lines (vehicle's wheel crosses the lane line)
- * Straddling a lane line (the vehicle is moving straight, but is on the lane line or left of center)
- * Swerving (an abrupt turn away from a straight course when the driver realizes he or she has drifted out of the proper lane position)
- * Turning with a wide radius (the vehicle drifts to the outside of the lane or into another lane in a curve or while turning a corner)
- * Drifting (vehicle is moving at an angle to lane)
- * Almost striking a vehicle or other object (passing unusually close to an object)

Predictability of impairment is 50% to 75% when these cues are present.

Speed and Braking Problems

- * Stopping problems (too far, too short, or too jerky)
- * Accelerating or decelerating for no apparent reason
- * Varying speed
- * Slow speed

Predictability of impairment is 45% to 70% when these cues are present.

Vigilance Problems

- * Driving in opposing lanes or wrong way on one-way street
- * Slow response to traffic signals
- * Stopping in lane for no apparent reason
- * Driving without headlights at night
- * Failure to signal or signal inconsistent with action

Predictability of impairment is 35% to 65% when these cues are present.

Judgment Problems

- * Following too closely
- * Improper or unsafe lane change
- * Illegal or improper turn (too fast, too jerky, too sharp)
- * Driving on other than the designated roadway
- * Stopping inappropriately in response to officer
- * Inappropriate or unusual behavior (throwing things out of car, arguing)
- * Appearing to be impaired

Predictability of impairment is 35% to 90% when these cues are present.

The Post-Stop Cues

- * Difficulty with motor vehicle controls
- * Difficulty exiting the vehicle
- * Fumbling with driver's license or registration
- * Repeating questions or comments
- * Swaying, unsteady or balance problems
- * Leaning on the vehicle or other object
- * Slurred speech
- * Slow to respond to officer/officer must repeat
- * Provides incorrect information, changes answers
- * Odor of alcoholic beverage from the driver

Predictability of impairment is greater than or equal to 85% when these cues are present.

Driving and Post-Stop Cues Combined

For both the driving cues and post stop cues, the probability of being over .08% BAC increases when combined with any other cue or when combined with certain cues.

- * Weaving plus any other cue: Predictability of impairment is at least 65%
- * Any two cues: Predictability of impairment is at least 50%
- * Driving without headlights at night and any other cue: Predictability of impairment is greater than or equal to 50%
- * Failure to signal or signal inconsistent with action: Predictability of impairment is greater than or equal to 50%

Evaluating Absence of Cues or Alternate Explanations

In evaluating a DUI case, it is important to notice what cues were *not* present. It is also essential to find out if there was an alternate reason why one or more of these cues may have been present. For example, fumbling for registration could be due solely to nervousness.

It is also crucial to note how many of these cues are actual traffic violations. Straddling a lane line is not a traffic violation but is listed as a driving cue. Therefore, if this were the only thing the officer noted, one would need to ask whether the officer had probable cause to make the stop in the first place.

Each case has its own unique set of facts and circumstances. But if you look at the individual case and ask the three basic questions, you should be able to make an accurate evaluation of the client's case.

Eyewitness Evidence

Do the Eyes Have It?

By Armand Casanova, Defender Investigator

Many people assume that "the eyes have it." Research has revealed, however, the failure of human memory when it comes to eyewitness identification, and trial courts now need to incorporate those findings into their procedures. The growing number of wrongfully convicted individuals who have been exonerated by DNA evidence has given the world a real appreciation of the problems of relying on "the eyes."

Since so many of our cases involve witnesses and eyewitness testimony, familiarity with the subject is imperative for criminal defense attorneys and investigators. I have put together some sample issues culled from a report that was published as a guide to investigators. The information can be used in a couple of ways.

As an attorney, you can pose questions of investigating officers about how they interview witnesses. As investigators, we can refresh our witness interview techniques or assist attorneys in their efforts to provide quality representation.

In 1998, the National Institute of Justice convened a technical working group of law enforcement and legal practitioners. The group, along with researchers, explored and developed improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system. The group's full report can be found at: <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>.

The legal system has routinely relied on the testimony of eyewitnesses—probably nowhere more than in criminal cases. Although the evidence eyewitnesses provide may be tremendously helpful in developing leads, identifying criminals, and exonerating the innocent, this evidence is not infallible. Even honest and well-meaning witnesses can make errors, such as identifying the wrong person or

failing to identify the perpetrator of a crime.

The NIJ guide is not a legal mandate. On the other hand, it promotes sound professional practices. The guide is not intended to impose legal criteria for the admissibility of evidence. Instead, it sets out rigorous criteria for handling eyewitness evidence in a more demanding manner, similar to standards governing the use of physical trace evidence. The report encourages the highest levels of professionalism.

After reviewing the National Institute of Justice Research Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Attorney General Janet Reno directed NIJ to address the pitfalls in those investigations that may have contributed to wrongful convictions. The most compelling evidence in the majority of those 28 cases was the eyewitness testimony presented at trial.

The Planning Panel agreed that eyewitness evidence, in general, may be improved and made more reliable through the application of currently accepted scientific principles and practices. It acknowledged that research has shown that a witness's memory of an event may be fragile and that the amount and accuracy of information obtained from a witness depends in part on the method of questioning. What follows are some of the key recommendations.

Methods of Questioning

A. Obtaining Information From the Witness(es)

1. Establish rapport with the witness.
2. Inquire about the witness's condition.

3. Use open-ended questions (e.g., “What can you tell me about the car?”); augment with closed-ended questions (e.g., “What color was the car?”). Avoid leading questions (e.g., “Was the car red?”).

4. Clarify the information received with the witness.

5. Document information obtained from the witness, including the witness’s identity, in a written report.

6. Encourage the witness to contact investigators with any further information.

7. Encourage the witness to avoid contact with the media or exposure to media accounts concerning the incident.

8. Instruct the witness to avoid discussing details of the incident with other potential witnesses.

B. Initial (Pre-interview) Contact With the Witness

1. Develop rapport with the witness.

2. Inquire about the nature of the witness’s prior law enforcement contact related to the incident.

3. Volunteer no specific information about the suspect or case.

C. Conducting the Interview

1. Encourage the witness to volunteer information without prompting.

2. Encourage the witness to report all details, even if they seem trivial.

3. Ask open-ended questions (e.g., “What can you tell me about the car?”); augment with closed-ended, specific questions (e.g., “What color was the car?”).

4. Avoid leading questions (e.g., “Was the car red?”).

5. Caution the witness not to guess.

6. Ask the witness to mentally recreate the circumstances of the event (e.g., “Think about your feelings at the time”).

7. Encourage non-verbal communication (e.g., drawings, gestures, objects).

8. Avoid interrupting the witness.

9. Encourage the witness to contact investigators when additional information is recalled.

10. Instruct the witness to avoid discussing details of the incident with other potential witnesses.

11. Encourage the witness to avoid contact with the media or exposure to media accounts concerning the incident.

D. Recording Witness Recollections

1. Document the witness’s statements (e.g., audio or video recording, stenographer’s documentation, witness’s written statement, written summary using witness’s own words).

2. Review written documentation.

3. Ask the witness if there is anything the witness wishes to change, add, or emphasize.

E. Assessing the Accuracy of Individual Elements of a Witness’s Statement

1. Consider each individual component of the witness’s statement separately.

2. Review each element of the witness’s statement in the context of the entire statement. Look for inconsistencies within the statement.

3. Review each element of the statement in the context of evidence known to the investigator from other sources (e.g., other witnesses’ statements, physical evidence).

F. Maintaining Contact With the Witness

1. Reestablish rapport with the witness.
2. Ask if the witness has recalled any additional information.
3. Follow interviewing and documentation procedures in subsections C, “Conducting the Interview,” and D, “Recording Witness Recollections.”
4. Provide no information from other sources.

Field Identification Procedure (Showup)

A. Conducting Showups

1. Determine and document, prior to the showup, a description of the perpetrator.
2. Consider transporting the witness to the location of the detained suspect to limit the legal impact of the suspect’s detention.
3. When multiple witnesses are involved:
 - a. Separate witnesses and instruct them to avoid discussing details of the incident with other witnesses.
 - b. If a positive identification is obtained from one witness, consider using other identification procedures (e.g., lineup, photo array) for remaining witnesses.
4. Caution the witness that the person he/she is looking at may or may not be the perpetrator.
5. Obtain and document a statement of certainty for both identifications and nonidentifications.

B. Recording Showup Results

1. Document the time and location of the procedure.
2. Record both identification and non-

identification results in writing, including the witness’s own words regarding the witness's level of certainty.

Procedures for Eyewitness Identification of Suspects

A. Composing Lineups

1. Include only one suspect in each identification procedure.
2. Select fillers who generally fit the witness’s description of the perpetrator. When there is a limited/inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.
3. If multiple photos of the suspect are reasonably available to the investigator, select a photo that resembles the suspect’s description or appearance at the time of the incident.
4. Include a minimum of five fillers (non-suspects) per identification procedure.
5. Consider that complete uniformity of features is not required. Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
6. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature (e.g., scars, tattoos) used to describe the perpetrator by artificially adding or concealing that feature.
7. Consider placing suspects in different positions in each lineup, both across cases and with multiple witnesses in the same case. Position the suspect randomly in the lineup.
8. When showing a new suspect, avoid reusing fillers in lineups shown to the same witness.

9. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.

10. View the spread, once completed, to ensure that the suspect does not unduly stand out.

11. Preserve the presentation order of the photo lineup. In addition, the photos themselves should be preserved in their original condition.

B. Instructing the Witness Prior to Viewing a Lineup

1. Instruct the witness that he/she will be asked to view a set of photographs.

2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.

3. Instruct the witness that individuals depicted in lineup photos may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

4. Instruct the witness that the person who committed the crime may or may not be in the set of photographs being presented.

5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.

6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in the witness's own words, how certain the witness is of any identification.

C. Conducting the Identification

1. Provide viewing instructions to the witness as outlined in subsection B, "Instructing the Witness Prior to Viewing a Lineup."

2. Confirm that the witness understands the nature of the lineup procedure.

3. Avoid saying anything to the witness that may influence the witness's selection.

4. If identification is made, avoid reporting to the witness any information regarding the individual the witness has selected prior to obtaining the witness's statement of certainty.

5. Record any identification results and the witness's statement of certainty as outlined in subsection D, "Recording Identification Results."

6. Document in writing the photo lineup procedures, including:

a. Identification information and sources of all photos used.

b. Names of all persons present at the photo lineup.

c. Date and time of the identification procedure.

7. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case, and discourage contact with the media.

D. Recording Identification Results

1. Record both identification and **non-identification** results in writing, including the witness's own words regarding the witness's level of certainty.

2. Ensure results are signed and dated by the witness.

3. Ensure that no materials indicating previous identification results are visible to the witness.

4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

Conclusion

The NIJ guide provides an excellent standard against which eyewitness identifications can be measured. If you can demonstrate that the procedures used by the police in your case fall short of this standard, you are well on your way to "opening the eyes" of judges and jurors to the fallibility of eyewitness identification.

Interesting in Learning Spanish Legal Terminology?

Phoenix College is offering a Spanish Legal Terminology Course in its Spring 2004 Class Schedule.

The class will emphasize legal terminology, including specific vocabulary and linguistic structures. The class is conducted entirely in Spanish.

For further information, contact the Legal Studies Department at Phoenix College by calling (602) 285-7216

Feedback to the Editors

In response to Christopher Johns' article in our October 2003 issue, Judge Barry Schneider of the Maricopa County Superior Court provided us with the following examples of how his court handles jury instructions on lesser-included offenses.

16. LESSER-INCLUDED OFFENSES

A. Murder in the Second Degree

The crime of Murder in the First Degree includes the lesser offense of Murder in the Second Degree. You may consider the lesser offense of Murder in the Second Degree if either:

1. You find the defendant not guilty of Murder in the First Degree; or
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of First-Degree Murder.

You cannot find the defendant guilty of Murder in the Second Degree unless you find that the state has proved each element of Murder in the Second Degree beyond a reasonable doubt.

The crime of second-degree murder requires proof of any one of the following:

1. The defendant intentionally caused the death of another person; or
2. The defendant caused the death of another person by conduct which she knew would cause death or serious physical injury; or
3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct which created a grave risk of death and thereby caused the death of another person.

The difference between first-degree murder and second-degree murder is that second-degree murder does not require premeditation by the defendant.

If you determine that the defendant is guilty of either first-degree murder or second-degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second-degree murder.

B. Manslaughter by Sudden Quarrel or Heat of Passion

The crime of Murder in the Second Degree includes the lesser offense of Manslaughter by Sudden Quarrel or Heat of Passion (Manslaughter). You may consider the lesser offense of Manslaughter if either:

1. You find the defendant not guilty of Murder in the Second Degree; or
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of Murder in the Second Degree.

You cannot find the defendant guilty of Manslaughter unless you find that the state has proved each element of Manslaughter beyond a reasonable doubt.

The crime of manslaughter requires proof of the following three things:

1. The defendant intentionally killed another person; or

The defendant caused the death of another person by conduct which she knew would cause death or serious physical injury; or

Under circumstances which plainly showed an extreme indifference to human life, the defendant caused the death of another person by consciously disregarding a grave risk of death. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; and

2. The defendant acted upon a sudden quarrel or heat of passion; and
3. The sudden quarrel or heat of passion resulted from adequate provocation by the person who was killed.

"Adequate provocation" means conduct or circumstances sufficient to deprive a reasonable person of self-control. There must not have been a "cooling off" period between the provocation and the killing. A "cooling off" period is the time it would take a reasonable person to regain self-control under the circumstances.

If you determine that the defendant is guilty of either second-degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.

A. Negligent Homicide

The crime of Manslaughter includes the lesser offense of Negligent Homicide. You may consider the lesser offense of Negligent Homicide if either:

1. You find the defendant not guilty of Manslaughter; or
2. After full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of Manslaughter.

You cannot find the defendant guilty of Negligent Homicide unless you find that the state has proved each element of Negligent Homicide beyond a reasonable doubt.

The crime of negligent homicide requires proof that the defendant, by criminally negligent conduct, caused the death of another person.

"Criminal negligence" means that the defendant failed to recognize a substantial risk of causing the death of another person. The risk must be such that the failure to recognize it is a gross deviation from what a reasonable person would do in the situation.

The distinction between manslaughter and negligent homicide is this: for manslaughter the defendant must have been aware of a substantial risk and consciously disregarded the risk that her conduct would cause death.

Negligent homicide only requires that the defendant failed to recognize the risk.

If you determine that the defendant is guilty of either manslaughter or negligent homicide but you have a reasonable doubt as to which it was, you must find the defendant guilty of negligent homicide.

21. CLOSING INSTRUCTION - VERDICT

When you go to the jury room you will choose a foreperson to be in charge during your deliberations and he or she will sign any verdict. He or she will preside over your deliberations.

You are to decide this case without sympathy, bias or prejudice. The parties expect that you will carefully and impartially consider all of the evidence, follow the law stated in these instructions and reach a just verdict regardless of the consequences.

All twelve of you must agree on any verdict you reach. All twelve (12) of you must agree whether the verdict is guilty or not guilty.

You will be given four (4) forms of verdict which read as follows:

MURDER IN THE FIRST DEGREE

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the defendant,

GUILTY _____

NOT GUILTY _____

UNABLE TO REACH A VERDICT _____

MURDER IN THE SECOND DEGREE

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the defendant,

GUILTY _____

NOT GUILTY _____

UNABLE TO REACH A VERDICT _____

MANSLAUGHTER BY SUDDEN QUARREL OR HEAT OF PASSION

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the defendant,

GUILTY _____

NOT GUILTY _____

UNABLE TO REACH A VERDICT _____

We, the Jury, find that the defendant DID _____ DID NOT _____ commit a dangerous offense.

NEGLIGENT HOMICIDE

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the defendant,

GUILTY _____

NOT GUILTY _____

We, the Jury, find that the defendant DID _____ DID NOT _____ commit a dangerous offense.

Arizona Advance Reports

Our regular column will return next month. Thank you for your patience!



Welcome!

Five lawyers completed the office's three week training program in October. Pictured below are Matt MaCleod, Julie Howe, Christopher Johns (Training Director), Cathryn Whalen, Paul Knost, and Blaine Griffin.



Jury and Bench Trial Results

October 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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