

for The Defense

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The Forgotten Battlefield

The Three P's of Jury Instructions

By Dana Hlavac, Mohave County Public Defender and Vice President, Arizona Public Defender Association

Unfortunately, many courts and attorneys in Arizona have been functioning under two mistaken beliefs about jury instructions for decades: (1) that jury instructions are not ripe for consideration until after the evidence has been received and (2) that the Recommended Arizona Jury Instructions (RAJI) cannot be successfully supplemented, modified, or challenged.

My personal experiences show that these myths can be proven wrong through persistence, hard work, and the help of juryinstructions.com. Formerly known as Forecite, juryinstructions.com is a wealth of research and case law dealing with every aspect of the jury instruction process. Whether you utilize a service such as juryinstructions.com, or simply do the research on your own, it is important to recognize that presenting and arguing jury instructions in a case serves at least three purposes:

- (1) defines the law of the case in order to **prepare**;
- (2) defines the parameters to be used to **present** evidence during trial; and
- (3) expands and **preserves** a record for appellate issues.

PREPARATION AND PRESENTATION

Investigation and Case Analysis

An early analysis of jury instructions in your case may be a significant boost to preparation and trial strategy. See Larry S. Pozner, "Lessons Learned," *The Champion*, NACDL, June 1999 ("Preparation is still the greatest technique for winning"); Fred Metos, "Making a Record for Appeal," *The Champion*, NACDL, May 1999 (discussing the importance of early preparation and its role in arguing for defense jury instructions and against prosecution proposed instructions.) Boiled down to their essence, jury instructions are the fundamental law governing your case. Analyzing and gathering evidence to prepare for a successful defense at trial should include careful consideration of the law expressed in potential jury instructions.

The most basic of jury instructions is the charging instruction. Defining and outlining the key elements to be proved by the prosecutor, as well as



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the key elements of any affirmative defense, will help focus your efforts during the gathering of evidence and analysis of your case. Reviewing applicable jury instructions often provides a natural pathway to a central theme.

An example of how this has been useful to me occurred in a first degree murder case in which my client was accused of premeditated and felony murder of his adult step-daughter. The police reports were all clear, and numerous eye witnesses had witnessed the actual shooting of the step-daughter. However, a pattern of abuse by the step-daughter came to light fairly early, as well as a pattern of ongoing criminal behavior by the step-daughter (drug dealing and manufacturing). Self-defense and defense of others was, at first blush, the obvious way to focus. However, a review of the National Criminal Jury Instruction Compendium (NCJIC) (an included part of the juryinstruction.com service) highlighted a potential “use of force in crime prevention” instruction. It pointed me back to A.R.S. § 13-411, which highlighted a wonderful **DEFENSE** oriented presumption if this defense could be used. The focus of our investigation shifted slightly toward showing what criminal or threatened criminal acts the decedent was engaged in at the time of her shooting. As a result, we were able to establish at trial the commission of an aggravated assault and burglary by the decedent in the time period immediately preceding her being shot. Ultimately, the court reluctantly gave an instruction patterned after the presumption

language set forth in A.R.S. § 13-411(c). In that case, despite at least half a dozen witnesses to the shooting of the victim from within ten feet by the client, the jury returned a manslaughter verdict.

Far too many attorneys believe that the compiling of jury instructions is the last task to be completed prior to trial. Regrettably, there are even some who depend upon the court to pull together what the court believes to be the appropriate RAJI instructions for the case. This practice should never be allowed! The closer the presentation of evidence at trial parallels what is in the instructions, the more likely it is that the jury will follow the theme of your case and ultimately view the evidence from the perspective you theorize.

Witness Evaluation

Jury instructions are also critical in evaluating witnesses and methods of presenting evidence. If a witness is subject to impeachment, you should be considering what, if any, limiting instructions that should be given about any impeachment material. May it be used as substantive evidence, or merely as credibility evidence? The existence or non-existence of limiting instructions may or may not impact the theory of your case and the presentation of a central theme. Similarly, what, if any, instructions are given regarding in-court demonstrations, or video re-enactments? Would your perspective on such an instruction be the same if the demonstration were yours versus the prosecution's? An analysis and review of appropriate jury instructions on the subject in Arizona and other jurisdictions can provide you with valuable guidance when preparing your case for trial.

If you are dealing with alleged eyewitness identification, you should always be cognizant of the problems inherent with this type of testimony. The inaccuracy of eyewitness testimony is well-documented, including recognition by the United States Supreme Court. See *United States v. Wade*, 388 U.S.

Contents

The Forgotten Battlefield.....	1
The Debut of Davis & the Demise of DePiano	10
Practice Pointer	19
Jury and Bench Trial Results	21
Writers' Corner.....	22

218 (1967). While eyewitness identification expert testimony is rarely admitted by Arizona courts, it is not prohibited *per se*. *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208, (Ariz. 1983). You should therefore argue for the use of expert opinion regarding the problems with eyewitness testimony if there is a serious issue in order to preserve the record for appeal.

Use of the resources and citations provided by NCJIC and juryinstructions.com will significantly enhance your ability to focus on the issues surrounding eyewitness identification and prepare appropriate motions and arguments. NCJIC contains an entire section on eyewitness jury instruction strategy. This section contains subjects such as: (1) CAVEAT: Instruction On Identification May Increase The Rate Of Conviction; (2) Laying The Evidentiary Foundation; (3) Eyewitness Identification: Expert Witnesses; (4) Expert Witness Instruction As Substitute For Eyewitness Expert Testimony; (5) Mistaken Identification Defense Does Not Foreclose Other Defenses; (6) Eyewitness Identification: Judicial Notice; (7) Eyewitness Identification: Conveying Psychological Principles During Argument; (8) Shifting The Burden To The Prosecution To Lay The Evidentiary Foundation To Support Its Assumptions About The Eyewitness Testimony; (9) Reference To The Identification As A “Choice” Of The Witness Rather Than As An “Identification” ; (10) Right To Instruction On Eyewitness Identification As Defense Theory; (11) Right To Instruction On Eyewitness Factors; (12) Eyewitness Identification Factors: Federal; (13) Eyewitness Identification Factors: States; (14) Eyewitness Identification: Jury Must Consider All Relevant Factors Together; (15) “Short Form” Instruction On Eyewitness Factors; (16) Mistaken Identity: Right To Instruction On Prosecution Burden; (17) Mistaken Identity Relationship To Presumption Of Innocence; and (18) Improper For Witness To Identify Defendant From Surveillance Photo Unless Witness Previously Knew Defendant Or Defendant’s Appearance Changed. Analyzing

these instructions will aid you in determining how to deal with eyewitness issues in your case early on and direct your investigation toward helpful facts.

Pretrial Motion Practice

The closer the presentation of evidence at trial parallels what will be in the instructions, the more likely it is that the jury will follow the theme of your case and ultimately view the evidence from the perspective you theorize.

While a general rule of practice would be to not file proposed jury instructions any earlier than necessary to avoid “tipping your hand,” sometimes instructions that are interwoven with a motion pursuant to Rule 103, Ariz. R. Evid. for the admission of evidence, such as expert testimony on the battered spouse syndrome, are exceptions

to this rule. Early jury instruction preparation may augment pretrial motion practice.

While your court may not rule on proffered jury instructions until the close of evidence, offering instructions early on can often cause a court to comment on the criteria the court will use later during the trial when considering whether to grant the instruction. A good example of this is from the same previously mentioned first degree murder trial. Our trial team crafted a jury instruction regarding “Battered Person Syndrome”. Pretrial motion practice over this proffered instruction led to the trial court explicitly laying out the standards under which the instruction would be applicable. This assisted in the presentation of evidence in a manner that ultimately led the court to give the instruction to the jury. This instruction was based upon A.R.S. § 13-415. We have since come to know that this specific instruction was a significant part of the jurors’ deliberations concerning what the client felt was going on in light of a long history of abuse by his step-daughter against him.

Another example would be when instructions in a multi-defendant case might be applicable only

to certain defendants and inapplicable to others. Bringing this issue to the court's attention early may very well highlight the need for severance.

By filing a proffered instruction early on in the procedural process in your case and requesting a hearing, you *may* be able to have an advance ruling and guidance from your trial judge directly applicable to your preparation of the case. Even if your judge will not entertain discussion on proffered instructions until the close of evidence, early research into your client's entitlement to instructions is significantly tied to the research needed for trial presentation. The timing of offering a jury instruction is a strategic decision in which the benefit of an early ruling must be balanced against the cost of disclosing strategy too early.

Plea Negotiations

Knowing what jury instructions will be applicable will assist you in plea bargaining. At every stage at which you attempt to obtain a more favorable resolution to your clients' case, you must demonstrate that you have prepared for and are ready to go to trial on a case. Theories used to obtain successful plea bargains can often be developed through early jury instruction preparation.

Developing Your Theory

Jury instructions should be designed to echo the central theories of your case. For example, if one of your theories is that the chief prosecution witness is a liar, you should know that you will be able to obtain an instruction to draw the jury's attention to the particular evidence highlighting this theory. "As far as is lawyerly possible, the appropriate instructions should be anticipated, rather than leaving the compilation of requests and the drafting of special instructions to the inevitably hectic end-

of-trial phase." BNA, *Criminal Practice Manual* § 131.101[6][a] (Pike & Fisher Inc. 1999).

Probably the best time for counsel to draw tentative drafts of instructions is when the case is being prepared for trial, and many lawyers do this as early as the pleading stage. The law that will govern the case will act as a guide during discovery, and in the preparation of the evidence to be presented at trial. Well-prepared and documented instructions may act as a substitute for a trial brief in some jurisdictions, or will be used to supplement the points made in a trial brief. Indeed, the trial brief and proposed instructions serve a similar purpose.

O'Malley, Grenig & Lee, *Federal Jury Practice Instructions*, 7.02 (Preparation of Instructions) p. 458.

Preparing Your Opening

Early consideration of jury instructions is important when determining the most effective defense strategies to use in your opening statement. Knowing which points of law and facts the jury will be instructed on at the end of a case will enhance your ability to craft your opening to highlight those issues to the jury early and maximize their potential for picking up on those key points.

An example of this is what is referred to as "*consciousness of innocence evidence*." The prosecution is entitled to a "*consciousness of guilt*" instructions based upon those factors the prosecutors love to show, such as your client running from the police. Whenever you see an instruction that is distinctly favorable to the prosecution, there is a very strong constitutional argument that a similar inverse instruction must be given when the evidence supports it. Examples of such *consciousness*

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of innocence would be (1) cooperation with law enforcement, (2) consent to search, (3) providing valid and truthful information on an otherwise forged or fraudulent instrument, and other arguably innocent type actions. In Mohave County, we successfully argued for the following instruction:

You may consider whether or not a person attempted to hide, or disguise his identity at the time of the commission of an alleged crime. Hiding or disguising one's identity may tend to establish a consciousness of guilt but this is not sufficient in itself to establish guilt. On the other hand, the absence of an attempt to hide, or disguise one's identity may tend to show that the defendant did not have a consciousness of guilt and this fact alone may be sufficient to create a reasonable doubt as to the defendant's guilt. The weight and significance of these circumstances, if any, are matters for your determination.

The case involved a purported fraudulent check. The evidence introduced showed that the client's name, address, social security number and driver's license number were all handwritten on the check. The argument for the instruction was based on the fact that the evidence showed that if he allowed that information to be placed on the check, then he had "consciousness of innocence" and therefore, no knowledge or intent to defraud. This consciousness of innocence became the central theme to the case — we used it to reiterate the point with each witness and tied it into our opening statement and closing argument.

Preparing Your Closing Arguments

Your closing argument and jury instruction advocacy are closely intertwined. As explained by the Hon. Dennis H. Kolenda, Circuit Judge, Grand Rapids, Michigan, in his article entitled, "Jury Instructions: A Judicial Perspective" (available on juryinstructions.com):

Weave into your arguments to the jury as much of the actual language of the

instructions to be given by the court as you can. However, do not tell the jury that the judge will instruct them thus and so. Just talk to them in the language which you know the judge will use. That way, in the end, when the jury hears the judge instruct them in your words, your credibility is greatly enhanced. Instead of being reminded by the judge that you knew what he or she was going to say, the jury is being told that you know the law, can be trusted on to fairly tell them, and that the judge is in fact agreeing with you, not you with him or her. With any luck, the jurors' natural reaction will be to accept everything else you said. After all, the judge told them that you were correct and can be trusted.

Using Rejection Language to your Benefit

Just as important as which jury instructions are given by the court, are the ones rejected. In cases where jury instruction requests have been rejected, you can sometimes use the grounds for their rejection to get creative in your closing argument. A good example of this was a case I had many years ago in which the client was charged with driving under suspension. The prosecutor had extended a "trial" offer, so we proceeded to trial. At trial, the client testified that he and some friends went to a concert in the client's car, but that one of the friends drove because the client **knew** that his license was suspended. After the concert, the client felt that all of his friends were too drunk to drive, so he chose to drive home. Consequently, the client essentially admitted all of the state's elements during his direct testimony. I argued for "choice of evils" and "necessity" instructions, but was denied both by the trial court. Since the moral necessity was really a nullification issue, I simply argued that the *knowingly* element required the jury to find that the client **knew** his actions were criminally wrong when he chose to drive. I specifically asked the jury to make its verdict a message to the client as to whether he knowingly made a criminal choice. The jury acquitted the client after ten minutes of deliberations.

In addition, in a situation where a judge denies a request based on the judge's belief that the request is adequately covered by the standard instructions, you should be permitted to argue the legal point to the jury. In essence, since the judge has ruled that your offered instruction is essentially the same as the court's, there can be no error if you argue that the court's instruction means the same thing as your language and then simply argue your language to the jury. While this approach does not provide the jury with your written instruction, it does give the jury a perspective that resolves questions about the instruction in favor of your client.

PRESERVING THE RECORD

In *all* cases, in order to ensure that all objections to the trial judge's charge are preserved for appeal, it is important to object before the jury begins deliberations and to do the following:

- (1) ensure that any proposed instructions that are refused are made part of the record;
- (2) make objections on the record;
- (3) if the objection is made prior to the charge by the trial judge, renew the objection after the charge but before the jury retires (or make sure you previously request that the record reflect your continuing objection);
- (4) if the judge instructed improperly (including a situation where a proposed charge is omitted or modified), consider whether you want a corrective instruction or a motion for mistrial (or both if your first choice is denied), and make the chosen request before the jury retires for deliberation; and
- (5) renew the objection in the form of a motion for a new trial if the jury renders a guilty verdict;
- (6) at all times, be specific and give the basis for the requested charge and for objections to the charge by the trial judge. This means you **must** have some legal authority to serve as the basis for your

proffered jury instruction. This authority may be either case law or statutorily based, but must be clear on the record. Whenever possible, refer to the Arizona and U.S. constitutions as a basis.

If you believe that an instruction exists that more accurately describes a legal principle, you should argue for it, even if there is a "stock" instruction. In the end, the trial judge has a large amount of discretion to modify or supplement jury instructions. This means that, as the advocate, you must be clear and articulate in stating the reasons why the instructions you offered are the most suitable and why they are necessary to protect the constitutional rights of your client.

ADVOCACY IN THE INSTRUCTION PROCESS

Juryinstructions.com lists the following fourteen proven strategies for successful jury instruction advocacy beyond pattern instructions:

1. Consider Instructions Early; Lay The Groundwork For The Instruction Before And During Trial
2. Review The Pattern Instructions Critically And Skeptically
3. Use Other Resources To Find Issues Not Addressed In The Pattern Instructions
4. Understand And Argue The Rationale And Legal Underpinnings Of The Issue
5. Seek Preliminary Instructions
6. Model Proposed Instructions On Published Opinions
7. Avoid Argumentative Instructions
8. Relate The Law To The Facts
9. Compare Alternatives And Explain Differences
10. Keep Instructions Simple And Short
11. Prioritize Your Instruction Requests
12. Have Alternative Or Fall Back

Positions

13. Each Instructional Issue Should Be In A Separate Request

14. Develop Strategies For Persuading The Trial Judge To Modify Or Supplement The Pattern Instructions

your substitutes. Nonetheless, draft substitutes. The drafting process will educate you significantly.

Hon. Dennis C. Kolenda, Circuit Judge, Grand Rapids, Michigan, *Jury Instructions: A Judicial Perspective*.

The chances of winning later battles over jury instructions are greatly increased if the groundwork is laid before and during trial because “educating” the judge is crucial to a successful instruction argument. This educational process is more likely to be effective if it is done as part of a consistent, integrated defense strategy rather than as a last minute request that comes without prior notice. “Litigators who desire a special ... instruction are less likely to get it if they simply wait for the end of the case and then request it. The best means for persuading a judge [to give a special instruction] is to wage a case-long campaign of education. Pretrial motions, offers of expert testimony [footnote omitted], and the cross-examination process should all have as their subsidiary goal the acceptance of a request for [a special] instruction.” [Footnotes omitted.] Loftus & Doyle, *Eyewitness Testimony - Civil & Criminal* (Lexis, 3rd ed. 1997) § 12.2, p. 330.

Review all pattern instructions critically and skeptically. Do not accept them simply because they are the standard. Do your own research and do not hesitate to redraft a form instruction where appropriate. Even if they are not inaccurate, it is useful to redraft standard instructions to fit the particulars of your case. Standard instructions do not accommodate the “personality” of the individual case. The more realistically instructed is a jury, the more likely they are to understand the case and to accurately evaluate the issues. Admittedly, judges will almost surely use the standard instructions, ignoring

The best means for persuading a judge to give a special instruction is to wage a case-long campaign of education. Pretrial motions, offers of expert testimony, and the cross-examination process should all have as their subsidiary goal the acceptance of a request for a special instruction.

Because many judges rely primarily on the standard pattern instructions, counsel should be prepared to argue persuasively in favor of any non-pattern instructions. It is rarely sufficient to simply submit a written request even if it is accompanied with supporting citations. Instead, the written and oral argument in favor of an instruction

must explain why the standard instruction is not sufficient and how the proposed instruction will cure the insufficiency. This requires counsel to have a clear understanding of the rationale for the instruction so that the judge can be educated, convinced, and persuaded as to the need for the instruction. Any argument for a proffered instruction should include both a state and a federal constitutional ground in order to preserve complete appellate jurisdiction.

As with many potential appellate claims, instructional error may not be cognizable on appeal unless the error was properly preserved below. A complete failure to object or tendering an erroneous instruction will rarely be reviewable on appeal. In most situations, a simple objection is insufficient to preserve an issue for appeal unless the specific grounds for the objection are stated. Do not hesitate to expound on the basis for your objections and, when possible, try to include everything appropriate. Here again, early preparation of jury instructions will prove significantly helpful when it comes time to state the grounds for objections to tendered or rejected instructions later in the trial.

If, due to inadvertence or neglect, the court fails to rule, it is still the obligation of the objecting party to obtain a ruling from the judge on the objection. Failure to obtain a ruling can result in an unfavorable appellate opinion founded on some basis other than the real reason your judge made the underlying ruling.

"Objections previously made and requests previously denied should be renewed during the final round-up of objections prior to the retirement of the jury. There is a significant economy of time in simply stating for the record that the earlier objections are incorporated. However, unless the particular appellate court has stamped its imprimatur on this procedure, the safer practice is to repeat them." BNA, *Criminal Practice Manual* (Pike and Fisher, 1999) § 131.101[7].

From an appellate point of view, the record will be much stronger, both in terms of preserving the issue and establishing prejudice, if counsel has made it clear on the record that the refusal of the court to give the requested instruction impacted the defense strategy and, in particular, the presentation of evidence by the defense. However, in some jurisdictions, pretrial rulings may not be binding and thus do not necessarily preserve issues for appeal. Hence, if an *in limine* request is denied, it should later be renewed at trial unless there was an appropriate stipulation or court order making the ruling binding for the purpose of appeal. (See e.g., *People v. Morris* (CA 1991) 53 C.3d 152, 187-91 [279 C.R. 720]; *People v. Karis* (CA 1988) 46 C.3d 612, 634, fn 16 [250 C.R. 659]; see also Hollander & Bergman, *Everytrial Criminal Defense Resource Book* (West, 1999) p. 74:1.)

Failure to object to jury instructions may be ineffective counsel. (See *Barron v. State* (FL 1993) 627 So.2d 582, 583 (case remanded for trial court's failure to consider issue of trial counsel's apparent ineffectiveness in failing to object to given instruction); *Hill v. State* (FL 1987) 511 So.2d 567, 568; (defense counsel failed to object at trial or request proper instruction regarding insanity defense); *Palmer*

v. State (IN 1991) 573 NE.2d 880, 880 (defense counsel's failure to object to and appeal from incorrect instruction on voluntary manslaughter in murder trial constituted ineffective assistance of counsel); *Commonwealth v. Thuy* (PA 1993) 623 A.2d 327, 334-35; *Commonwealth v. Roxberry* (PA 1992) 602 A.2d 826, 828 (counsel ineffective for failing to object to omission of alibi instruction); *Commonwealth v. Gainer* (PA 1990) 580 A.2d 333, 336; *Commonwealth v. Horwat* (PA 1986) 515 A.2d 514, 516 (trial counsel ineffective for failing to object to "change of appearance" instruction which did not make it clear that, in order for an inference of consciousness of guilt to arise, the jury must first find that the defendant changed his appearance intentionally for the purpose of avoiding prosecution); *Commonwealth v. Hoetxel* (PA 1981) 426 A.2d 669, 673 (counsel ineffective for failing to object to the absence of a constructive possession instruction).)

CONCLUSION

In summary, here are few tried and true "rules of thumb":

1. Argue that verdict forms should read "Proven" and "Not Proven" versus "Guilty" and "Not Guilty". In the alternative, argue that the Not-Guilty language should come first on the verdict forms, since the presumption is always that the client is innocent.
2. Argue that instructions should **never** contain the word "victim(s)."
3. Argue that when there is an eyewitness, the eyewitness makes a "choice" rather than an "identification."
4. A defense theory that negates an element should never be referred to as a defense.
5. Always state your objections using state and federal constitutional grounds, when possible.
6. Never wait until the end of the case to

prepare your instructions.

7. Never rely on the court to prepare instructions.

8. Always object on the record to unfavorable instructions.

9. Do not feel locked into the RAJI language.

10. Be creative — use caselaw and jury instruction services to assist in preparing instructions.

11. Always have a legal basis for your instructions and be able to argue it.

12. NEVER allow a judge to shut you down until you are confident you have placed ALL of your arguments for or against an instruction on the record.

Examining jury instructions early in your case will assist you in building your case, tearing down the state's case, developing your theory and presenting a solid, consistent case from opening to closing. Solid preparation and the use of services such as juryinstructions.com will help you argue for and against instructions in a manner that will preserve the issues for appeal and provide you with the greatest chance of success.

The Debut of Davis and the Demise of DePiano

The Arizona Supreme Court's Latest Word on Mandatory Sentencing Under A.R.S. § 13-604.01, the "Dangerous Crimes Against Children" Enhancement Statute

By Anna Unterberger, Defender Attorney

Many and conflicting are the criteria by which a society is deemed to be good, but perhaps no test is more revealing than the characteristics of its punitive justice.

Felix Frankfurter

In February 1999, a twenty-year-old man named Tony Davis was charged with four counts of sexual conduct with a minor for having consensual, non-violent sex with two sexually experienced teenage girls: once with Tanya, age 13, and three times with Pam, age 14. He went to trial and was convicted on all four counts in October 1999. After the verdicts were returned, the jurors learned of the sentencing provisions that applied to Tony's convictions. At best, Tony would have to remain in prison until he was 72 years old with no possibility of early release, except by executive commutation. The jurors were so shocked that they unanimously submitted this written, signed statement to the court: "We the jury would like to request executive clemency for Anthony Charles Davis. We feel the punishment for the crime is excessive."

Additionally, the jury foreman wrote a letter to the court and sent a copy to the governor, stating, in part:

We unanimously felt that the statute calls for far too excessive a length of incarceration, considering the facts of this case. (The consensual nature of the sexual acts, the lack of parental supervision, and the small relative age difference between the defendant and the two girls, for examples.) I ask that you take whatever means are in your power to provide a just punishment for Mr. Davis. The 13-year-per-count sentence may be relevant in cases of rape or incest with a

minor child, but seem quite unreasonable considering the facts of this case.

Another juror expressed similar sentiments to the court. She wrote that the law was "extreme and one sided." The sex was consensual, and Tony, "truly meant no criminal action." And, "[w]hile the punishment for Mr. Davis is extremely harsh, the young girls involved should have a penalty to deal with. Mr. Davis' life is ruined forever, while these girls have the opportunity to do this over and over again without any [regard] for the other person."

At Tony's sentencing in December 1999, his mother and stepfather spoke about his childhood physical abuse and his diagnosis of attention deficit disorder. He had spent time in a boys ranch and only finished eighth grade. His most recent psychologist assessed his mental and emotional capabilities as that of a ten-year-old.

The mothers of the teenage girls, as well as the senior adult probation officer who wrote the presentence report, thought that Tony should receive five years in prison.

The judge found that probation was not a legal alternative, and that any aggravating circumstances were outweighed by the mitigating circumstances of Tony's age, his lack of record and "the nature of the totality of the circumstances." He sentenced Tony to the minimum term of imprisonment possible under the charged statutes, which was 52 years of "flat time" (day-for-day, no early release) imprisonment.

The judge then entered a supplemental order pursuant to A.R.S. § 13-603(L) stating that the required sentences were clearly excessive

because, “[t]he defendant was 20 years of age at the time of the alleged offenses. The defendant has no adult criminal record. The defendant engaged in four unlawful acts of sexual intercourse with two females ages 13 and 14. The acts of sexual intercourse were consensual.” The court further noted that the prosecutor joined in the request for early application for executive clemency and that “after the jury learned of the mandated sentence required they unanimously requested executive clemency for the defendant.” The judge ordered that “the defendant may petition the Board of Executive Clemency for commutation of sentence within 90 days from this date.”

Thus began the appellate saga of what would, four years later, result in the Arizona Supreme Court’s opinion in *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003). This appeal entailed my filing opening and reply briefs in the Arizona Court of Appeals, a petition for review after the Court of Appeals denied relief, two supplemental briefs in the Arizona Supreme Court, and two oral arguments before that court, one in Phoenix and one in Tucson.

The next portion of this article highlights Arizona’s pre-*Davis* cruel-and-unusual-punishment caselaw regarding A.R.S. § 13-604.01. But first, it should be noted that Tony did proceed through the executive clemency process — he completed that process before the Arizona Supreme Court heard the first oral argument for his case in May 2002. After holding a hearing, the Board of Executive Clemency unanimously recommended that Tony’s total sentence be reduced to five years of imprisonment. This recommendation was forwarded to Governor Jane Hull, who refused to commute Tony’s sentence in April 2001. The Arizona Supreme Court took judicial notice of this at the first oral argument. Tony again applied for executive clemency in 2003, but by then the board was well aware that the Arizona Supreme Court would issue a ruling on Tony’s case in the near future. In October 2003, the board declined to recommend commutation. The Arizona Supreme Court issued its opinion that same month. So much for an executive resolution of this case.

THE *DAVIS* APPELLATE ARGUMENT: ANALYZING THE CASES OF MR. BARTLETT AND MS. DePIANO

When I first started reading the transcripts for Tony’s case, I was struck by how similar his facts were to those of Kevin Bartlett’s case, which resulted in two Arizona Supreme Court opinions two years apart. In the first opinion, the court noted that constitutional challenges to sentences are reviewed “on a case-by-case basis, according to the circumstances of a particular crime.” *State v. Bartlett (Bartlett I)*, 164 Ariz. 229, 233, 792 P.2d 692, 696 (1990). In *State v. Bartlett (Bartlett II)*, 171 Ariz. 302, 830 P.2d 823 (1992), the court reaffirmed that Bartlett should have been sentenced without the provisions of A.R.S. § 13-604.01, because to do otherwise would result in cruel and unusual punishment. 171 Ariz. at 311, 830 P.2d at 832. Bartlett had originally been sentenced under A.R.S. §§ 13-1405 and 13-604.01 to forty years without the possibility of early release for having consensual sexual intercourse with two 14-year-old girls when he was 23 years old, once with each girl. *Bartlett I*, 164 Ariz. at 230-31, 792 P.2d at 693-94; *Bartlett II*, 171 Ariz. at 303, 830 P.2d at 824.

The court used a three-pronged test. Under the first prong, the court analyzed whether the sentences were grossly disproportionate to the crimes under the facts of the case. After reviewing the applicable mitigating factors, the court stated:

These circumstances are relevant here, not because they excuse the conduct but because the question of ‘gross disproportion’ cannot be resolved without considering all of the factors that aggravate or mitigate the crime. To ignore the facts in determining whether a sentence is cruel and unusual would make the title of the statute — ‘Dangerous Crimes Against Children’ — determine the constitutionality of the sentence imposed. Surely, if this court has a responsibility to review the constitutionality of sentences under the Eighth Amendment, that duty

requires us to apply the standards of the federal constitution to the facts of what occurred, no matter what label the legislature has attached to the criminalizing statute. Legislatures must of necessity paint with a broad brush, leaving it to the courts to measure constitutionality by applying law to facts — the true judicial function.

Bartlett II, 171 Ariz. at 308, 830 P.2d at 829 (footnote omitted).

The factors minimizing the gravity of the offense included the absence of violence or any threat of violence, the defendant's lack of prior felony convictions, his age and immaturity, the consensual nature of the sex, and the evolution of the law and present sentencing standards. *Bartlett I*, 164 Ariz. at 234-36, 792 P.2d at 697-99; *Bartlett II*, 171 Ariz. at 306-09, 830 P.2d at 827-30.

As in *Bartlett*, the evidence in Tony's case showed that he did not use violence or the threat of violence toward the girls; instead, he engaged in consensual sex with them. He was only 20 years old at the time of the acts and emotionally immature. He did not have any prior felony convictions. Here, both sexually-experienced girls had initiated the contact. Their mothers, the presentence writer and the jurors requested leniency for Tony. The trial court ordered that he be allowed to apply early for commutation of sentence. Thus, I argued that Tony's sentences were grossly disproportionate under the first prong of *Bartlett II*.

The second prong required a comparison of sentences imposed upon defendants in Arizona for more serious crimes. 171 Ariz. at 311, 830 P.2d at 831. In *Bartlett II*, the court attached an appendix that quoted from *Bartlett I*, 164 Ariz. at 236-37, 792 P.2d at 699-700. See, *Bartlett II*, 171 Ariz. at 317-18, 830 P.2d at 838-39. In that appendix, the court noted that several class 2 felonies and one class 3 felony (manslaughter), all potentially more serious than child sex crimes, required significantly lesser sentences than those mandated under A.R.S. §

13-604.01. 171 Ariz. at 317, 830 P.2d at 838. These included second degree murder (§§ 13-710(A) & -1104(B)), kidnapping (§ 13-1304(B)), sexual assault of an adult (§ 13-1406(B)), arson of an occupied structure (§ 13-1704(B)), first degree burglary of a residential structure (§ 13-1508(B)), and manslaughter (§13-1103(B)). *Id.*

Manslaughter is now a class 2 felony and, as a dangerous offense, still carries a lesser sentencing range (7 to 21 years) than Tony's offenses, with early release possible. A.R.S. §§ 13-604(I) & -1103(B). Second degree murder of a person who is at least 15 years old now carries a sentencing range of 10 to 22 years. A.R.S. §§ 13-710(A) and 13-1104(B). Sexual assault of an adult carries a sentencing range of 5.25 to 14 years without early release. A.R.S. § 1406(B). The other offenses mentioned in the preceding paragraph, all class 2 felonies, still carry lesser sentences under our current sentencing code even as dangerous offenses (a range of 7 to 21 years), with concurrent sentences and early release from prison possible. A.R.S. §§ 13-604(I) and 13-708. Thus, I argued that Tony's sentences were also grossly disproportionate under the second prong of *Bartlett II* and our current sentencing code.

The third prong required an examination of the punishment in other jurisdictions for the same type of crime. *Bartlett II*, 171 Ariz. at 310, 830 P.2d at 831. I highlighted and compared the sentencing laws from ten states that represented the various geographic areas of the United States and that would criminalize Tony's acts with both Tanya and Pam. They are:

California. Regarding Tanya, Tony could have been convicted of lewd or lascivious acts upon the body of a child who was under 14, and he could have been imprisoned for 3, 6 or 8 years. Regarding Pam, he could have been convicted of unlawful sexual intercourse with a person under 18 and he could have been imprisoned (regardless of whether the offense was designated a felony or a misdemeanor) for not more than a year. His sentences could have been concurrent

and he would have been probation and parole eligible. Cal. Penal Code §§ 261.5, 288(a), 669, 1170, 1203 & 3000.

Connecticut. Regarding Tanya and Pam, Tony could have been convicted of sexual assault in the second degree of a person who was at least 13 but under 16.

He could have been imprisoned for not less than 1 year or more than 10 years, the sentences could have been served concurrently, and he would have been probation and parole eligible. However, 9 months of his sentence could not have been suspended or reduced by the court. Conn. Gen. Stat. §§ 53a-71(a) & (b), 53a-29, 53a-35a(6), 53a-36 & 53a-39.

Indiana. Regarding Tanya, Tony could have been convicted of child molesting by having sexual intercourse with a child under 14, and he could have been imprisoned for 10 years, with up to 10 years added for aggravating circumstances or up to 4 years subtracted for mitigating circumstances. Regarding Pam, he could have been convicted of sexual misconduct with a minor by having sexual intercourse with a child at least 14 but less than 16 and he could have been imprisoned for 4 years, with up to 4 years added for aggravating circumstances and 2 years subtracted for mitigating circumstances. His sentences could have been concurrent, and he would have been probation and parole eligible. Ind. Code §§ 35-42-4-3(a), 35-42-4-9(a), 35-50-2-2, 35-50-6-1 & 35-50-6-3.

Kentucky. Regarding Tanya, Tony could have been convicted of rape in the second degree by having sexual intercourse with a person less than 14. He could have been imprisoned for not less than 5 years nor more than 10 years. Regarding Pam, it appears that he could have been convicted of sexual misconduct by engaging in sexual intercourse with someone who could not consent because she was less than 16, but more than 14.

If so, he could have been imprisoned for not more than 12 months. His sentences could have been concurrent, and he would have been probation and parole eligible. Ky. Rev. Stat. Ann. §§ 510.050, 510.130, 510.140, 439.340, 532.045, 532.060(2)(c), 532.070, 532.090, 532.110 & 533.010.

Maine. Regarding Tanya, Tony could have been convicted of unlawful sexual contact including penetration with a person under 14 and he could have been imprisoned for up to 10 years. Regarding Pam, he could have been convicted of sexual abuse of a minor who was at least 14, but not yet 16, and he could have been imprisoned for less than 1 year. His sentences could have been concurrent and he would have been probation and parole eligible. Me. Rev. Stat. Ann. 17A §§ 254, 255(1)(C), (2) & (3), 1201, 1252 & 1253.

New Mexico. Regarding Tanya and Pam, Tony could have been convicted of criminal sexual penetration in the fourth degree on a child 13 to 16 years old and he could have been imprisoned for 18 months. His sentences could have been concurrent and he would have been probation and parole eligible. N.M. Stat. Ann. §§ 30-9-11(F), 31-18-15(A)(6), 31-18-15.1, 31-20-3, 31-20-5 & 31-21-10.

New York. Regarding Tanya, Tony could have been convicted of rape in the second degree by having intercourse with another person who was less than 14 and he could have been imprisoned for up to 7 years. Regarding Pam, he could have been convicted of sexual misconduct for having sexual intercourse with a female who could not consent because she was less than 17 and he could have been imprisoned for not more than 1 year. His sentences could have been concurrent and he would have been probation and parole eligible. N.Y. Penal Law §§ 60.01, 65.00, 70.00, 70.15, 70.25, 130.05(3)(a), 130.20(1) & 130.30.

Ohio. Regarding Tanya and Pam, Tony could have been convicted of corruption of a minor for engaging in sexual conduct with another person who was at least 13 but less than 16 and he could have been imprisoned for 6 to 18 months. His sentences could have been concurrent and he would have been probation and parole eligible. Ohio Rev. Code Ann. §§ 2907.04, 2929.13, 2929.14, 2929.41, 2951.02 & 2967.13.

West Virginia. Regarding Tanya and Pam, Tony could have been convicted of sexual assault in the third degree by engaging in sexual intercourse with a person who was less than 16 and he could have been imprisoned for not less than 1 year nor more than 5 years. His sentences could have been concurrent, and he would have been probation and parole eligible. W.Va. Code §§ 61-8B-5(a)(2) & (b), 61-11-21, 62-12-1, 62-12-2, 62-12-3 & 62-12-13.

Wyoming. Regarding Tanya and Pam, Tony could have been convicted of sexual assault in the third degree by inflicting sexual intrusion on a victim under the age of 16 and he could have been imprisoned for not more than 15 years. His sentences could have been concurrent and he would have been probation and parole eligible. Wyo. Stat. §§ 6-2-304(a)(i), 6-2-306(a)(iii), 6-10-104, 6-10-107, 7-13-301, 7-13-302 & 7-13-402.

In light of these other sentencing schemes, I argued that Tony's mandatory 13-year, flat time, consecutive prison sentences were also grossly disproportionate under the third prong of *Bartlett II*.

I also discussed the three judge majority opinion in *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996), a child abuse and dangerous crimes against children case where the defendant tried to kill herself and her two children, a crime that fell under A.R.S. § 13-604.01(D), not §

13-604.01(C). I began by noting that it was debatable whether *DePiano* would presently command a majority of the Arizona Supreme Court because only one member of that majority remained on our Supreme Court (Justice Frederick Martone), while both dissenters remained on that court (Justices Thomas Zlaket and Stanley Feldman). By the time that *Davis* was handed down on October 30, 2003, they had all left the court and none of them participated in the *Davis* opinion, although Justice Feldman read the briefs and heard both oral arguments.

Instead of examining “the facts and circumstances of the particular crime and the particular offender”, the *DePiano* majority measured disproportionality by “the nature of the offense generally and not specifically.” 187 Ariz. at 30, 926 P.2d at 497. That majority concluded that “child abuse is a serious *violent* crime.” Thus, the sentencing range was not grossly disproportional and could not be cruel and unusual. *Id.* (emphasis added). And, although the court used A.R.S. § 13-4037(B) to reduce *DePiano*'s sentence to the minimum available under § 13-604.01, it read § 13-4037(B) as not allowing any further reduction. 187 Ariz. at 32, 926 P.2d at 499.

But, even assuming that *DePiano* was relevant and controlling in Tony's case, the sentencing range under A.R.S. §§ 13-1405 and 13-604.01 as a class 2 and dangerous crimes against children resulted in a grossly disproportional sentence when compared to the crime's very generalized description of “sexual conduct with a minor.” And that was because the applicable subsections required a flat time, consecutive sentence with a minimum term of 13 years, for each conviction where a person who is at least 18 has sexual intercourse, albeit consensual and “non-violent,” with a person who, as in this case, was 13 or 14 and already sexually experienced. See, A.R.S. §§ 13-604.01(C), (G), (K) & -1405(B). As the *Bartlett I* court realistically noted, “[w]e must . . . recognize that sexual conduct among post-pubescent teenagers is not uncommon.” 164 Ariz. at 235, 792 P.2d at 698, *quoted in Bartlett II*, 171 Ariz. at 308, 830 P.2d at 829.

Thus, whether the court used the analysis of *DePiano* or *Bartlett II*, the result under A.R.S. § 13-1405 in tandem with A.R.S. § 13-604.01 should be the same, because the mandatory sentences were grossly disproportionate to the nature of the offense under a “specific” analysis, and they could be grossly disproportionate to the nature of the offense under a “general” analysis.

Consequently, and because Tony’s sentences were grossly disproportionate under either analysis, the mandatory sentencing provisions of A.R.S. §§ 13-1405 and 13-604.01 resulted in cruel and unusual punishment under both the federal and Arizona constitutions. The appropriate remedy was that Tony’s sentences should be vacated and remanded for resentencing as class 2 felonies, but without the enhancements of A.R.S. § 13-604.01.

The next portion of this article reviews the Arizona Supreme Court’s resolution of Tony’s case.

THE *DAVIS* OPINION: *DePIANO* DWINDLES DOWN TO A RIVULET THAT MUST BE OVERRULED, THE ARIZONA SUPREME COURT HAS ITS FIRST OPPORTUNITY TO APPLY *EWING* AND *LOCKYER*, AND A.R.S. § 13-4037(B) MEANS WHAT IT SAYS

A three judge majority ruled in Tony’s favor. Justice Rebecca White Berch authored the opinion, with Chief Justice Charles Jones and Judge Nanette Warner (sitting by designation) concurring. Vice Chief Justice Ruth McGregor dissented. Former Justice Feldman did not participate in the decision. If any further rulings are needed from the Arizona Supreme Court regarding the case, Justice Michael Ryan is precluded from participating in the rulings because he sat on the Court of Appeals panel that denied Tony relief. Justice Andrew Hurwitz joined the court after the case was briefed and argued.

The *Davis* majority began with a review of the *Bartlett* and *DePiano* cases, as well as some United States Supreme Court caselaw. The *Davis* majority concluded that it would be aided in its task by the United States Supreme Court’s recent decisions in *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179 (2003), and *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166 (2003). *Davis*, 206 Ariz. at 383, 79 P.3d at 70.

The *Ewing* court was guided in its application of the Eighth Amendment by the proportionality principles in its cases that were distilled in Justice Kennedy’s concurrence in *Harmelin v. Michigan*, 501 U.S. 95, 111 S.Ct. 2680 (1991). *Ewing*, 538 U.S. at 23-24, 123 S.Ct. at 1187. Justice Kennedy identified “four principles of proportionality review — ‘the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors[.]’” These four principles informed the final principle: the Eighth Amendment forbids sentences that are “grossly disproportionate” to the crime. *Ewing*, 538 U.S. at 23, 123 S.Ct. at 1186-87, quoting *Harmelin*, 501 U.S. at 1001, 111 S.Ct. [at 2705].

Before conducting its proportionality review, the *Davis* majority overruled *DePiano*, which now appeared “to be a rivulet diverting from the mainstream analysis”. 206 Ariz. at 384, 79 P.3d at 71. And, *DePiano* must be overruled because “[s]ubsequent guidance from the [United States] Supreme Court suggests that, in assessing the constitutionality of a sentence, the reviewing court should examine the crime, and, if the sentence imposed is so severe that it appears grossly disproportionate to the offense, the court must carefully examine the facts of the case and the circumstances of the offender to see whether the sentence is cruel and unusual.” *Id.*

The *Davis* majority then applied *Ewing* to Tony’s case. First, the majority recognized the primacy of the legislature and its penological judgment. “We recognize society’s strong interest in protecting children and appreciate that it is the legislature’s province to assess the appropriate punishment for crimes against children.” 206

Ariz. at 385, 79 P.3d at 72. Ten years earlier, the court had discussed the group of offenders that were targeted by A.R.S. § 13-604.01. “The legislative history indicates quite clearly that the enactment of § 13-604.01 was calculated to reach criminals who prey specifically upon children. The discussion before the House Judiciary Committee focused upon child sexual molestation, kidnapping, and child abuse. See generally *S.B. 1021, Sexual Offenses; Child Victims: Minutes of Meeting before the Arizona House Committee on Judiciary*, 37th Leg., 1st Sess. (Feb. 18, 1985). Of particular concern was the perceived recidivist nature of the people who commit these crimes.” *State v. Williams*, 175 Ariz. 98, 102, 854 P.2d 121, 135 (1993).

The *Williams* court concluded that “the legislature, in enacting § 13-604.01, was attempting to respond effectively to those predators who pose a direct and continuing threat to the children of Arizona. The lengthy periods of incarceration are intended to punish and deter those persons, and simultaneously keep them off the streets and away from children for a long time. The special penalties . . . are calculated to deal with persons peculiarly dangerous to children.” 175 Ariz. at 102-03, 854 P.2d at 135-36.

In addition to recognizing the primacy of the legislature and its penological judgment, the *Davis* majority also recognized the legislature’s acknowledgment that its penological judgment may result in excessive sentences due to “[t]he broad range of offenses encompassed by the statute under which [the defendant] was charged[.]” 206 Ariz. at 383, 79 P.3d at 70. And that legislative acknowledgment is contained in A.R.S. § 13-4037(B), which mandates that “the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken.”

In reviewing *Ewing* and *Lockyer*, the *Davis* majority noted that “[i]n conducting its analysis in each case, the Supreme Court reviewed the specific facts and circumstances of the offense that led to the imposition of the three-strike enhancement, as well as reviewing each defendant’s prior record.” In *Ewing*, that included the specific facts of the triggering offense, that *Ewing* was on probation when he committed that offense, and *Ewing*’s own long, serious criminal record. 206 Ariz. at 383-84, 79 P.3d at 70-71, citing *Ewing*, 538 U.S. at [28-30], 123 S.Ct. at 1189-90, and *Lockyer*, 538 U.S. at [66-68], 123 S.Ct. at 1169-70. “Thus, in conducting its proportionality review, the Court examined the specific facts and circumstances of the defendant’s crime.” 206 Ariz. at 384, 79 P.3d at 71.

And, in both *Ewing* and *Lockyer*, the court considered that the prosecutor had the discretion to charge the crimes as misdemeanors or felonies and chose to charge the crimes as felonies. Furthermore, the trial judge could have but did not remove the sentence enhancement by defining the triggering offenses as misdemeanors rather than felonies. 206 Ariz. at 387 n.10, 79 P.3d at 74 n.10, citing *Ewing*, 538 U.S. at [16-17], 123 S.Ct. at 1183, and *Lockyer*, 538 U.S. at [67-68], 123 S.Ct. at 1170.

But that was not the end of the analysis by the *Davis* majority. “One other factor motivates us to review the specific circumstances of *Davis*’s case: The legislature permits this court to reduce lengthy sentences when ‘the punishment imposed is greater than under the circumstances of the case ought to be inflicted.’ A.R.S. § 13-4037(B) (2001) (allowing imposition of ‘any legal sentence’). Although *Davis*’s sentence fell within the legal sentencing range, if we find a sentence excessive, A.R.S. § 13-4037(B) imposes on us the duty to review the circumstances of the case to determine whether the sentence imposed is in fact unwarranted.” 206 Ariz. at 384, 79 P.3d at 71.

After recognizing the primacy of the legislature and its penological judgment, and analyzing the objective factors involved in *Davis*, the

majority concluded that “we cannot say that all incidents of sexual conduct are of equal seriousness and pose the same threat to their victims or to society. The broad range of offenses encompassed by the statute under which Davis was charged, coupled with the legislature’s command in A.R.S. § 13-4037(B) and the Supreme Court’s Eighth Amendment jurisprudence, impose on us the duty to apply the law to the specific facts of the cases that come before us to determine the constitutionality of sentences imposed”. 206 Ariz. at 385, 79 P.3d at 72.

The *Davis* dissent failed to address A.R.S. § 13-4037(B) at all. Furthermore, the dissent appears to misunderstand what are “subjective factors” versus what are “objective factors.”

The definitions of “subjective” include “relating to or being experience or knowledge as conditioned by personal mental characteristics or states”, “arising from conditions within the brain or sense organs and not directly caused by external stimuli”, “arising out of or identified by means of one’s perception of one’s own state and processes”, and “lacking in reality or substance: illusory”. *Merriam Webster’s Collegiate Dictionary* (10th ed. 1997) at 1172. This contrasts with the definitions of “objective”, which include “of, relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers: having reality independent of the mind,” “perceptible to persons other than the affected individual” and “involving or deriving from sense perception or experience with actual objects, conditions, or phenomena”. *Id.* at 801.

The factors relied upon by the *Davis* majority were objective, not subjective. The fact that the sex acts at issue here were consensual was based upon the testimony of the girls and Tony at trial and contained in the transcripts. The fact that Tony had no adult criminal record was obtained from available written records and known to the trial judge, counsel for the parties and the presentence report writer. The fact that post-pubescent sex was common was

discussed in published studies, both in hard copy form and on the internet. The fact that Tony had impaired intellectual functioning and was immature was discussed at sentencing and undisputed by the state. The fact that the broad language of A.R.S. § 13-604.01 applies to pedophiles, as well as someone in Tony’s situation, is obvious from simply reviewing the language of the statute. And the fact that no one who knew the facts of this case, including the girls’ mothers, believed that Tony should serve a sentence of imprisonment that was anywhere close to 52 years, is also readily ascertainable from the record via the court file, and the trial and sentencing transcripts. 206 Ariz. at 384-85 & n.5, 79 P.3d at 71-72 & n.5. Every factor relied upon by the *Davis* majority is something that is independent of any personal beliefs that the individual justices may have had. In other words, the factors relied upon were “objective.”

It was only after concluding that Tony’s sentence “appear[ed] to be grossly disproportionate to his crimes” that the majority chose to engage in an intra- and inter-jurisdictional analysis because it “agree[d] with the Supreme Court’s suggestion that such an inquiry might validate the court’s initial impression of gross disproportionality.” 206 Ariz. at 385 & n.6, 79 P.3d at 72 & n.6; *see, Harmelin*, 501 U.S. at 1005, 111 S.Ct. at 2707. And that analysis validated the majority’s previous impression that Tony’s sentence was grossly disproportionate to his crimes.

Having conducted the appropriate analysis, the *Davis* majority abided by previous determinations by the Arizona Supreme Court that “when a punishment is ‘so severe as to shock the conscience of society,’ it ‘violates the constitutional mandate.’” 206 Ariz. at 388, 79 P.3d at 75, *quoting State v. (Randal) Davis*, 108 Ariz. 335, 337, 498 P.2d 202, 204 (1972). The majority then exercised the powers bestowed upon it by the legislature in A.R.S. § 13-4037(B) and remanded Tony’s case for resentencing without the mandatory enhancements of A.R.S. § 13-604.01.

Thus, the Arizona Supreme Court concluded

that it was simply wrong to treat Tony Davis the same way that a pedophile is treated. In other words, “there is no greater inequality than the equal treatment of unequals.” *Dennis v. United States*, 339 U.S. 162, 184, 70 S.Ct. 519, 526 (1950) (Frankfurter, J.).

ARIZONA v. DAVIS: WILL THE UNITED STATES SUPREME COURT TAKE TONY’S CASE?

And, finally, the Tony Davis story may not be over. The state has filed a Petition For Writ Of Certiorari asking the United States Supreme Court to accept Tony’s case and reverse the Arizona Supreme Court’s sentencing ruling. The case is docketed as *Arizona v. Davis*, No. 03-1235. I filed my Brief In Opposition to the Petition on March 31, 2004. If the United States Supreme Court takes the case, it will then be fully briefed in that Court and argued in Washington, D.C. Stay tuned.

CONCLUSION

The moral to this story is: If caselaw that was favorable to you has fallen out of favor within the last few years, but you still feel strongly about your client’s case, forge ahead and make the argument anyway. And that should be especially true if the composition of your state’s high court has changed within that time period. Yes, that may make a difference – I believe that it did here. Carry on!

Practice Pointer

Juveniles Convicted as Adults Are Not Subject to Probation Services Fees

By Elmer Parker, Defender Attorney

While I was carefully reading A.R.S. § 13-901(A) yesterday, it dawned on me that the statute says, “When granting probation to an adult the court shall, as a condition of probation, assess a monthly fee of not less than fifty dollars unless, after determining the inability of the probationer to pay the fee, the court assesses a lesser fee.”

This distinguishes juveniles being prosecuted as adults. Throughout the rest of the statute, in discussing types of probation, restitution and waiver of extradition for probation revocation, the term used is “a person who has been convicted,” which includes both adults and juveniles convicted as adults.

This clearly means that juveniles convicted as adults are not subject to an adult probation services fee. The statute plainly says that the court is to impose such a fee when granting probation to an adult.

The statute uses the term, “a person who has been convicted of an offense” to describe those who may be placed on probation, who may have a fine imposed, who must waive extradition for probation revocation purposes and who is subject to a restitution order. This term clearly includes both adults and juveniles convicted as adults. When the statute turns to the subject of probation services fees, however, it specifically uses the term “adult” in describing who is subject to an order to pay that fee.

A similar statute, §13-603, which also authorizes imposition of probation, fines, restitution or prison sentences, also uses the term, “person convicted of any offense”.

Also, by way of comparison, A.R.S. §§13-604 and 13-604.01, which deal with dangerous

and repetitive offenders and dangerous crimes against children, use the term, “a person who is at least eighteen years of age or who has been tried as an adult” which again clearly refers to both adults and juveniles prosecuted as adults.

It also makes common sense, since juvenile clients at best should be in school and at worst are unemployed or employed at very minimal wage jobs and usually are unable to pay these fees.





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Jury and Bench Trial Results

March 2004

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.

Writers' Corner

Misuse of "Case"

Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including A Dictionary of Modern Legal Usage, The Winning Brief, A Dictionary of Modern American Usage, and Legal Writing in Plain English. He is also editor in chief of Black's Law Dictionary in all its current editions. The ABA Appellate Practice Journal has hailed him as "the preeminent expert in America on good legal writing." The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at www.us.oup.com/us/apps/totd/usage. Garner's Modern American Usage can be purchased at bookstores or by calling Oxford University Press at:800-451-7556.

Part A: Generally.

Arthur Quiller-Couch condemned this word as "jargon's dearest child." On the Art of Writing 106 (1916). H.W. Fowler elaborated on the idea: "There is perhaps no single word so freely resorted to as a trouble-saver, and consequently responsible for so much flabby writing" (Modern English Usage 65 (1926).

The offending phrases include "in case" (better made "if"), "in cases in which" (usually verbose for "if," "when," or "whenever"), "in the case of" (usually best deleted or reduced to "in"), and "in every case" (better made "always," if possible). The word "case" especially leads to flabbiness when used in a passage with different meanings — e.g.: "The popular image of a divorce case has long been that of a private detective skulking through the bushes outside a window with a telephoto lens, seeking a candid snapshot of the wife in flagrante delicto with a lover. Such is not exactly the case." Joseph C. Goulden, *The Million Dollar Lawyers* 41 (1978).

Part B: Meaning "argument."

This meaning is commonplace and is no more objectionable than any other use of the word — e.g.: "With Tenet sitting behind him in the Security Council chamber last week, Powell made his case in a 77-minute speech interspersed with satellite photographs and recordings of intercepted communications." Kevin Whitelaw, "Prosecutor Powell," *U.S. News & World Rep.*, 17 Feb. 2003, at 26.

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