

# for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

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## Two Trials in an Informant Case

Who Really Judges the Truth?

By Donna Elm, Deputy Federal Public Defender

In what would be an ordinary marijuana conspiracy trial, the Ninth Circuit offered some extraordinarily insightful dicta, recognizing that informant trials superimpose two very different stories. *In United States v. Schoneberg*, 388 F.3d 1275 (9<sup>th</sup> Cir. 2004), *amended (without substantive changes)*, 396 F.3d 1036 (2005). Jeremiah Schoneberg was charged for his minor involvement in a marijuana distribution and money-laundering scheme. Though he had been charged with ten co-defendants, he was tried alone. The others, including the undisputed leader of the group (an old high school dealer buddy of his called Woodbury), had all plea bargained their cases. Woodbury cut a cooperation deal and testified against Schoneberg at his trial.

There were no wire tapped conversations, no video surveillance tapes, in fact no evidence implicating the defendant aside from what Woodbury said. Woodbury's account of Schoneberg's involvement was at odds with Schoneberg's at every point. For instance, Woodbury testified that he had delivered a pound of marijuana to Schoneberg who was dealing it in smaller quantities; although Schoneberg confirmed that he obtained

that marijuana from Woodbury (who suggested that they should deal it for him), instead he and his girlfriend smoked almost half of it over a period of time. Woodbury testified that Schoneberg wired money to repay the dealer Woodbury had gotten the marijuana from; but Schoneberg claimed that when Woodbury demanded payment, they gave him back the balance of the dope and cash that they had on hand, later paying him with an additional \$1,000 check.

The money laundering charges arose from money orders being sent to repay Woodbury's supplier. Woodbury paid friends (including Schoneberg on three occasions) \$50 to purchase and send the money orders using cash that he provided them. Woodbury testified that Schoneberg knew he was making drug payments by this ruse; on the other hand, Schoneberg claimed he was simply doing a favor for a friend, having no idea what the money was for or who it was going to. As often is the case in informant trials, it all came down to a credibility contest.

But the jury was given a few facts that tended to tip the scale in



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Woodbury's favor. First, he had already gotten his deal and was sentenced before he testified at trial. This would leave the jury with the impression that he had no motivation to lie (having been safely sentenced to a substantial period of prison). Second, Woodbury's doctor was called to establish that he was suffering from cystic fibrosis and would not survive to get out of prison; consequently, the jurors were left to infer that he really had nothing to gain by lying for the government.

Those facts could be offset by evidence that the plea agreement left open the possibility that the prosecution would move for a reduction in sentence after testifying, something permitted in federal practice. Of course, whether Woodbury's sentence would be lowered was based on whether he "testified truthfully" and whether his testimony was "truthful" was left to the "sole discretion" of the prosecutor.

The prosecution *loves* to have those "testify truthfully" clauses in its cooperation agreements. It puts the defense in a pickle: if the defense wants to introduce the cooperation agreement to impeach the informant with his motive to lie, they have to contend with the government's certification of truthfulness implicit in the "testify truthfully" term. That phrase reinforces the informant's testimony by a separate promise to be truthful. Additionally, it suggests that the prosecutor would be verifying the testimony to ensure its veracity, which is just thinly disguised vouching. Finally, it provides the prosecutor with a dandy argument for closing: "if he lied to you, he'd lose his deal."

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Therefore, when the "testify truthfully" clause is before a jury, defense attorneys usually point out the motive to please the prosecutor and attack the elusiveness of the verification that the informant had been truthful, contending that the fox has been left to guard the henhouse. That is exactly where the defense was going in its cross of Woodbury when it hit a snag:

The trouble started when defense counsel asked Woodbury to confirm that under his agreement, "the only party that is going to determine whether you're telling the truth today, as you're standing on the witness stand, is the United States government, the United States Attorney." Woodbury answered, "I don't know sir. I don't know how the law works." Before defense counsel could begin punching away at what was arguably an evasive and misleading answer, the judge said, "What are you getting at? The jury decides whether he's telling the truth." *Id.* at 1278.

Only momentarily derailed, the defense renewed its impeachment efforts. After reading Woodbury the relevant language of the plea agreement, counsel asked if it meant that "the United States, those folks right there, a party to this lawsuit, are the sole people to determine whether you're telling the truth or not." When Woodbury repeated his ignorance of the law response, the prosecutor objected to this "misrepresentation" by the defense. The judge sustained, noting that "The jury in this case is the sole determiner of the credibility of the witnesses." Further attempts to impeach the "testify truthfully" clause with a "sez who?" line of questioning were cut off when the judge finally exploded:

"Stop that, ... I am not going to tell you anymore. ... I'm telling you not to talk about that it's the government's obligation to determine the truth, because it isn't. It's the jury's determination in this case." *Id.* at 1278.

Thereafter, the defense was not successful in convincing the judge that it should be entitled to  
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# Roper v. Simmons

## Supreme Court Strikes Down Juvenile Death Penalty

By Paula Harms, Deputy Federal Public Defender

In a long awaited decision, the United States Supreme Court in *Roper v. Simmons*, \_\_\_ S.Ct. \_\_\_, \_\_\_ U.S. \_\_\_, 2005 WL 464890 (March 1, 2005), held that the Eighth Amendment prohibits the execution of juveniles who were under the age of 18 at the time of the murder. The following summarizes key aspects of the opinion.

Justice Kennedy authored the decision, joined by Stevens, Ginsburg, Souter and Breyer. At age 17, Simmons planned to commit murder, talking of his plan in "chilling, callous terms" and assuring his friends that they could "get away with it" because they were minors. The victim's face was wrapped in duct tape, she was hog tied, and then thrown from a bridge, where she drowned in the river below. Little mitigation was offered, other than his capacity for love and his youthful age. However, on post-conviction, counsel did uncover evidence of a difficult home environment, and abuse of alcohol and drugs. After Simmons was denied relief in all state and federal courts, the U.S. Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eight Amendment prevents the execution of the mentally retarded. Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that juveniles could not be executed. Although prevailing U.S. Supreme Court precedent expressly allowed the execution of juveniles between the ages of 16 and 18, *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Missouri Supreme Court resentenced Simmons to life without the possibility of release, under the reasoning of *Atkins*, stating:

By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. As society matures, it draws its meaning from evolving standards of decency. Although earlier cases had stated that

the Court's independent judgment had no bearing on this determination, the Court has now returned to the earlier rule "that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty."

In addition, 30 states prohibit the execution of juveniles, a number which includes 12 states who reject the death penalty altogether. In the past ten years, only three states have actually executed juveniles. Although the number of states who have taken action against the use of the juvenile death penalty has been slower than the number of states who have taken steps to ban the execution of the mentally retarded (five since *Stanford*, which allowed the death penalty for those between 16-18 in 1989, and 16 since *Penry*, which allowed the execution of the mentally retarded in the 1989), the change from *Stanford* is significant because of the "consistency of the direction of change" and particularly in light of the "trend in recent years toward cracking down on juvenile crime in other respects." Although the pace of change has been slower in the past 15 years for a ban on juvenile executions, at the time *Stanford* was decided, 12 death penalty states had already banned it, as opposed to two states who had a ban against executing the retarded in 1989, when the Court heard *Penry*. This shows that the impropriety of executing juveniles "gained wide recognition earlier than the impropriety of executing the mentally retarded." As in *Atkins*, the objective indicia of consensus in this case - the rejection of the juvenile death penalty in the majority of the States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice - provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded,

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# Crawford and Rule 703

## What Foundation is Now Needed For Forensic Tests?

By Stephen Wallin, Defender Attorney

The State has forensic tests done, either in its own lab or in a contract lab. Then the State's expert witness gives opinion testimony that relies on the forensic tests. But the person who performed the forensic tests doesn't testify.

No problem under Rule 703, as long as the expert states that the tests are of a type reasonably relied upon by experts in the field. But does Rule 703 survive *Crawford* unscathed? A Maricopa County Superior Court Judge has recently ruled that it does not. The following summarizes arguments that were presented to the court.

*Crawford*, of course, held that “[w]here testimonial evidence is at issue...the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” The *Crawford* Court concluded that the statement at issue there (a tape recorded statement given to the police by a witness during a station house interrogation) met any conceivable definition of the term “testimonial.”<sup>1</sup> Therefore, the Court decided to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>2</sup> Thus, *Crawford* cannot be limited to station-house interrogations; it remains to be seen how much further *Crawford* extends, but there can be no doubt that it extends further.

It appears, however, that the Court intends for us to use the term “testimonial” in “its colloquial, rather than any technical legal, sense.”<sup>3</sup> Accordingly, the *Crawford* Court quoted with approval from Webster's 1828 dictionary:

Testimony: “is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>4</sup>

The Court went on to say that “[a]n accuser who makes a formal statement to government officers

bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>5</sup>

One formulation the Court cited seems especially applicable to this situation:

Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.<sup>6</sup>

In our hypothetical, the forensic test was obtained for the sole purpose of obtaining evidence against the defendant which could be presented at trial via testimony, in one form or another. The forensic analysis was paid for by the State. The forensic report was addressed to the lead detective. The lab tech who performed this analysis drafted the report and sent it to the detective — all at the detective's request — was certainly making “a formal statement to government officers.” Certainly the lab tech was not making “a casual remark to an acquaintance.” The report is certainly a “solemn declaration...made for the purpose of establishing or proving some fact,” i.e. that certain forensic evidence implicates the defendant. Likewise, the circumstances were such that the lab tech(s) could hardly avoid knowing that the “the statement would be available for use at a trial.” Indeed, that was the whole purpose of seeking the forensic analysis. Thus, it would seem to be “testimonial” within the meaning of *Crawford*.

The State, though, will make several arguments. First, they will argue that the lab report is a “business record,” and note that *Crawford* recognizes that business records were a recognized exception to the confrontation requirement in 1789 (Rule 703, in contrast, can be traced back only to about 1900). That is a good argument, as long as we are talking

about typical business records: ordinary bank records in a fraud case, or medical records in an aggravated assault case. Such records probably are not testimonial because they were not created in anticipation of being used in a criminal trial. In 1789, this is no doubt the sort of thing people meant by business record—and it is what we usually mean by the term even today.

But *Crawford's* definition of “testimonial” requires us to look behind the label at the substance of the statement and the circumstances surrounding its origin. Thus, the concept cuts across the traditional hearsay exceptions. Law enforcement has come a long, long way since 1789. When the confrontation clause was drafted, police investigation consisted primarily of tracking down and interviewing witnesses. Forensic examinations, and the records thereof, played no part. Today, in contrast, forensic examinations are very often the heart of the police investigation and of the prosecution’s case. When a forensic lab accepts business from the police, its output is police business; such a lab report is no more a business record than are the constable’s notes of a witness’s statement.

Second, the State will cite *State v. Rogovich*, 188 Ariz. 38, 932 P.2d 794 (1997). In that case, the medical examiner testified regarding the cause of death based upon an autopsy performed by a non-testifying physician (i.e. the person who had performed the autopsy had left the medical examiner’s office). *Rogovich* held that “Admitting the substance of a non-testifying expert’s opinion is not a hearsay use at all. Facts or data underlying the testifying expert’s opinion are admissible for the limited purpose of showing the basis of that opinion, not to prove the truth of the matter asserted. Testimony not admitted to prove the truth of the matter asserted by an out-of-court declarant is not hearsay and does not violate the confrontation clause. Thus, the defendant’s confrontation right extends to the testifying expert witness, not to those who do not testify but whose findings or research merely form the basis for the witness’s testimony.”

Of course, *Rogovich* predates *Crawford*; thus the Court did not even attempt to determine

whether the statement was “testimonial.” But the State’s argument is that *Rogovich* stands for the proposition that the lab report in a case like our hypothetical is not a statement at all, much less a testimonial statement.

Such an argument reads too much into *Rogovich*; our Supreme Court is not that clairvoyant. In any case, other courts have always recognized Rule 703 as a hearsay exception. Indeed, with all due respect to the *Rogovich* Court, this is one of the very few opinions of our Supreme Court whose logic is difficult to follow.

It is legalistic formalism of the worst sort to suggest, for instance, that a lab report which says the defendant had methamphetamine in his system, is not being introduced into evidence, when the State’s expert, relying on the lab report, opines that the defendant had methamphetamine in his system. Ask yourself: might the expert’s opinion be different if the lab report were negative? For purposes of *Crawford* analysis, the substantive reality is that the lab report is being offered by washing it through the expert. If the lab report cannot be offered directly, it cannot be offered indirectly via subterfuge.

Likewise, it is simply fatuous to deny that the lab report is being offered for the truth of its contents, but instead is offered simply to assess whether the expert’s opinion has adequate support. To state the obvious, the lab report does not support the expert’s opinion unless the lab report is true. And why do we accept it as true? Because the expert says it is “reliable.”

It is at this point, of course, that Rule 703 collides headlong with *Crawford*. Rule 703 leaves it up to the State’s expert to decide whether the lab report is “reliable.” The central teaching of *Crawford*, however, is exactly to the contrary: the confrontation clause demands that the reliability of testimonial statements be assessed in one way, and one way only: by cross examining the declarant in open court.

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# The Initial Assessment Project

By Linda Shaw, Mitigation Specialist

Despite our best intentions and efforts, heavy caseloads make the development of mitigation evidence a real challenge at times. As part of an effort to address this concern, Shelley Davis and I developed the Initial Assessment Project in July 2002 to provide defender attorneys with a psychosocial snapshot of their indicted, in-custody clients as soon after assignment as possible. We partnered with Arizona State University School of Justice Studies in this endeavor.

The project operates on the assumption that every indicted defendant has a psychosocial profile that is crucial to the defender attorney representing him. This information may be integrated into the overall strategy for the case: obtaining records, working out a favorable plea agreement, preparing for trial, and/or preparing for sentencing.

The Initial Assessment Project is innovative and imaginative, yet simple and concise in its execution. It attempts to address the progressive nature of criminal behavior and activity by focusing on the underlying causes of crime that may go unrecognized until a serious crime is committed. It enhances the special relationship defender attorneys have with their indigent clients who, in many cases, have never had the opportunity to reveal the true nature of their life experiences to anyone who was influential.

The Project builds on the unique role of the defense as the *only* agency in the criminal justice paradigm that can present in-depth information about the defendant to the Court necessary to achieve an effective sentence. Other agencies often see our clients exclusively through the jaded prism of their prior criminal acts and present charges. The client's humanity is lost in a sea of police reports and witness interviews.

Without psychosocial information presented in a timely manner, opportunities are lost to potentially extricate a motivated and deserving client from a lifetime of criminal activity through ignorance of what issues are truly precipitating his criminal behavior.

Substantial research shows the over-representation of defendants with medical, mental health, and substance abuse problems in the criminal justice system. However, little attention has been paid to addressing the issue of these conditions among pretrial inmates.

According to Angela Harvey, PhD. candidate, who led the A.S.U. team, "...substantial lip service is given to meeting offender needs, (however) actual knowledge of the prevalence of ordinary and special needs in offender populations has been subjected to minimal empirical scrutiny. Identifying the particular needs of offenders through the application of a formal needs assessment is only a recent phenomenon and usually does not take place at entry into the criminal justice system, i.e., pre-trial".<sup>1</sup>

This lack of early needs assessment is particularly troubling since the percentage of jail detainees – both male and female – with mental disorders is substantially higher than among the general population. In addition, medical problems, cognitive impairments and substance abuse issues are over-represented in our jail population.<sup>2</sup>

## THE INITIAL ASSESSMENT INSTRUMENT

For the Initial Assessment Project, a simple yet comprehensive assessment tool was designed in English and Spanish. It encapsulates each client's mental health, substance abuse, family, medical and educational history.

Each entry represents pertinent information

regarding the client that probably wouldn't otherwise be available to the attorney at the initial stages of the case.

Most importantly, revelation of how many times the client has previously been to jail and/or prison—in conjunction with newly revealed information about mental health/substance abuse/special education issues—is crucial in planning pre-plea and sentencing strategies.

A general information form is also generated by the Initial Services Unit to provide the attorney with pertinent contact information. That form also touches on other important features of a client's profile such as whether the client is a military veteran, whether he has a valid driver's license and what his work history has been prior to his arrest. This information assists in drafting release motions, assessing the appropriateness of advocating for a probation grant and/or seeing the client's present criminal predicament in light of his level of education.

Both forms are distributed daily by our Initial Services staff assisted by interns from Arizona State University. All information is confidential.

#### METHODOLOGY OF A.S.U. STUDY

Angela Harvey lead a team of six A.S.U. undergraduate students who went into the jails with a screening tool constructed by them to reflect the criteria set forth in the Initial Assessment instrument. Three hundred twenty pretrial individuals indicted for felony offenses were interviewed at the Maricopa County jails. Each was represented by a Maricopa County Public Defender.

Every week, the Office gave each interviewer 10 – 15 new names of clients assigned to them during the previous week. Eighty four percent of the inmates agreed to voluntarily participate. Each inmate was given the option of refusing to answer any question. The interviews were conducted over a four-month period between December 1, 2002 and April 1, 2003. The following summarizes some of the reports key

findings:

#### PREVALENCE OF MENTAL ILLNESS AMONG PRE-SENTENCE INCARCERATED DEFENDANTS

Deinstitutionalization and the lack of community-based services for persons with major mental disorders are the prominent explanations given for the increased numbers of these individuals being ensnared by the criminal justice system.<sup>3</sup>

Estimates of mental illness among incarcerated populations vary from 8 – 16% depending on the methodology utilized for the research.<sup>4</sup> In addition, literature suggests that between 6 – 15% of persons in jails have psychiatric disabilities.<sup>5</sup>

However, in the A.S.U. sample, 56.9% of participants reported a mental health problem "...in the last 30 days" and 64.3% reported a mental health problem "...in their life."<sup>6</sup> Yet, only 5.6% reported receiving mental health treatment in the last 30 days and only 20.8% reported receiving mental health treatment sometime during their lives.<sup>7</sup> Furthermore, only 18.2% reported taking prescribed medications for a mental health condition.<sup>8</sup>

Common sense dictates that treating mental health disorders in jail has substantial benefits to the inmate and detention personnel, as well. As stated by Ms. Harvey, "[m]ental health litigation has established the legal right to treatment in custodial facilities—for pretrial detainees...among the benefits, good mental health treatment can reduce security risks by minimizing the symptoms of mental illness, thereby decreasing potential disruptions to jail routines and injuries to staff and detainees."<sup>9</sup>

There are post-sentencing benefits as well:

Because mentally disordered offenders have a difficult time adjusting to community life, they are often returned to custody for violating a condition of their

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# New Attorney Class of Spring



Front Row (left to right): Michelle Cain, Felicia Bermudez, Sarah Loeng, Brenda Sandoval (Yuma County)  
Back Row (left to right): Heather Belt, Michael McCarthy (Yuma County), Christopher Johns (MCPD Training Director), Nicholas Dehner Richard Randall, Edward Lewis, Veronica Briggs (Yuma County)



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impeach Woodbury with his incentive to curry prosecution favor. After dismissing the jury for the day, the judge reiterated: "I don't want you telling the jury that it's the government's decision as to who is telling the truth in this case." Arguing from the very language of the agreement, the defender correctly pointed out that, "Well, it kind of is." Indeed, that's the whole point.

On appeal, Schoneberg asserted that he was deprived of his confrontation rights under *Davis v. Alaska*, 415 U.S. 308 (1974). *Davis* was cited for the principle that "Exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-17. The problem with the judge precluding Schoneberg from this cross, the Ninth Circuit noted, was that although the jury was made aware of the agreement to reduce the sentence later, they never got to hear how this affected Woodbury's motivation to satisfy the prosecutor. The Ninth Circuit held that where a plea agreement allows for some benefit to a witness for his testimony, the defendant must be permitted to cross examine him to show what benefit he expects, what will trigger it, and why the witness might testify falsely in order to gain said benefit. *Schoneberg*, 388 F.3d at 1279.

It's a good holding, but that's not the best part of this opinion. In some of the more interesting dicta to come down the pike in a long time, the Ninth Circuit briefly analyzed the communication processes taking place during this critical juncture of the trial:

Everyone in a trial speaks to an audience, usually the jury, but the audience that mattered to Woodbury's fate was not the jury, it was the prosecutor. *Id.* at 1280.

This succinct recognition of Woodbury's trial being staged during Schoneberg's trial offers an intriguing framework to argue the defense case to the jury. Imagine the power of setting up this "two trials" framework in opening argument:

*Ladies and gentlemen, you were told that this is Mr. Schoneberg's trial, but there is a second and equally important trial taking place before you at the same time. You should give this second trial every bit as much attention as you give to Mr. Schoneberg's trial because it will be as important in deciding this case. Both trials turn on credibility, on who is to be believed: Schoneberg or Woodbury? But there is a critical difference.*

*The trial the prosecution described is Mr. Schoneberg's. You are the audience for that trial. You get to decide if he is telling the truth, weigh how he testifies, consider his motives, decide if he is biased, and check if his account is corroborated. You will do the same in weighing the credibility of his accuser, Woodbury.*

*But in the second trial, you are not the audience. It is a trial for Woodbury alone, and his audience - who he has to convince - is not you but the prosecutor. You see, Woodbury cut a deal with the prosecution for his testimony that you are about to hear. Yes, he has already been sentenced, but you will learn that his "sweetheart deal" allows him to get that sentence reduced after his testimony in this case. What are the conditions for this substantial benefit? You will see in his cooperation deal only that he quote-unquote "testify truthfully."*

*But here's the catch: it is not you who decides his "truthfulness" in Woodbury's trial. You will see that it is the same prosecutor who introduces his testimony that decides if it was quote-unquote "truthful," who decides if he gets out of prison alive. Furthermore, there is no limit to how much time off his sentence the prosecutor will give him, and you will hear that he knows that he has to convince the prosecutor of his quote-unquote "truthfulness" to get as much time off as possible.*

*So while Woodbury testifies to you, watch the second trial unfolding, his testimony*

*to the prosecutor as his audience, his attempt to make the prosecutor happy. Watch what he says and how he acts to get as much freedom as his words can buy. Pay attention to that trial because when you are weighing his story against Mr. Schoneberg's testimony, you will have to consider what audience Woodbury was playing to and how much he could "win" by satisfying that audience.*

Although this may draw an "argument" objection, you are always allowed to state your theory of the case or your position in your opening. You can explain your position in about a minute, and cite to *U.S. v. Schoneberg* if necessary. Obviously you cannot belabor the point, so move quickly onto discussing facts supporting your case or impeaching the state's case. But the critical paradigm has been set in the jury's mind. The "two-trials-in-an-informant-case" theory may take the defense a long way just in opening.

in "impetuous and ill-considered actions and decisions." Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, often because they have less control over their own environment." Third, the character of a juvenile is not well-formed, and their struggle with their own identity "means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character," making the chances for reform greater.

The Court then examined the two social purposes of the death penalty, retribution and deterrence. Retribution is not a compelling purpose when the defendant is a juvenile because their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Similarly, in regard to deterrence, it is unlikely that a juvenile will perform "the kind of cost-benefit analysis" regarding their crime and the possibility of execution. In addition, life without the possibility of parole is an especially severe sanction for a young person.

The state argued that a jury's ability to take into account individual circumstances, including youth, was sufficient to protect those juveniles with diminished capacities. However, there is an "unacceptable likelihood" that the cold-blooded nature or brutality of the particular crime will "overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."

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***Continued from Roper v. Simmons, p. 3.***

as "categorically less culpable than the average criminal."

The Eighth Amendment applies with "special force" to the death penalty, available only for a narrow category of crimes which involve "extreme culpability." Three general differences between juveniles under 18 and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." First, the "comparative immaturity and irresponsibility of juveniles" often results

The Court also drew from international law to support its holding, relying heavily on "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." Only seven other countries have executed juveniles since 1990 (Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo, and China) and since then, all of them have either abolished it or "made public disavowal of the practice." "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that

the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."

Justice Stevens, joined by Ginsburg, wrote a short concurrence to emphasize that the meaning of the Constitution cannot be frozen in time. If it were, the Constitution would now allow the execution of seven year-olds.

Justice O'Connor authored her own dissent, notable for its agreement with the majority that determining the meaning of the Eighth Amendment involves an exercise of the Court's own independent moral judgment, not just a survey of the judgment of the various state legislatures and the actions of sentencing juries. Their own moral judgment "is an integral part of the Eighth Amendment inquiry - and one that is entitled to independent weight in reaching our ultimate decision." In *Atkins*, the moral proportionality argument was compelling and "bolstered the Court's confidence that the objective evidence . . . herald[ed] the emergence of a genuine national consensus." However, in this case, although it is "beyond cavil" that as a class, juveniles are generally less mature and this bears on their comparative moral culpability, the majority provided no evidence that it is only in "rare" cases that a seventeen-year old murderer will possess sufficient maturity and act with "sufficient depravity to warrant the death penalty." In fact, Mr. Simmons appears to be such a juvenile, as he took into account the risk of punishment in deciding whether to commit a murder. Juveniles are simply too broad and diverse of a class to "warrant a categorical prohibition." Unlike the mentally retarded, who by definition, possess the lifelong cognitive and behavioral characteristics which make them less culpable, "[t]here is no such inherent or accurate fit between age and the personal limitations" which make the death penalty inappropriate. The requirement of an individualized sentencing determination is sufficient to protect juveniles and allow immaturity to be considered as a mitigating circumstance.

Justice O'Connor also noted with approval

the majority's reliance upon foreign and international law in analyzing the Eighth Amendment. The "special character" of the Eighth Amendment allows this because our "Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries."

Justice Scalia authored a dissent joined by Rehnquist and Thomas, criticizing the majority as "proclaim[ing] itself sole arbiter of our Nation's moral standards" and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Less than 50% of death penalty states prevent the execution of juveniles. States which reject the death penalty in its entirety should not be counted in this analysis because counting them "is rather like including old-order Amishmen in a consumer-preference poll on the electric car." Legislative change in four states is only a subtle shift, and should not "take the issue entirely off the table for legislative debate." In fact, since *Stanford* was decided in 1989, the number of juveniles sentenced to death or executed "has held steady or slightly increased."

Scalia also attacked the Court's conclusion that juries could not be trusted to properly weigh evidence of immaturity when confronted with the evidence of the crime: "[w]hy not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors 'overpower[ed]' by 'the brutality or cold-blooded nature' of a crime, . . . could not adequately weigh these mitigating factors either." Further, "the basic premise" of the majority - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand." Scalia concluded his dissent by stating that the Missouri Supreme Court's decision to ignore the prevailing precedent of *Stanford*, although understandable, "is no way to run a legal system." "To allow lower courts to behave as we do, 'updating' the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public

officials."

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**Continued from *Crawford* & Rule 703, p. 5.**

"Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.... The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability."<sup>7</sup>

Under Rule 703, the reliability of the lab report is not even assessed by a neutral judge. It is assessed by the government's hired gun. If reliability assessments by this honorable Court do not pass constitutional muster, reliability assessments by the State's paid witness surely can fare no better.

The State will also cite several lower court post-*Crawford* decisions which hold that *Crawford* requires no changes in the application of Rule 703 (generally speaking, courts have fallen all over themselves to find ways to rule that *Crawford* changes nothing). Some courts have limited *Crawford* to its facts. Some have said that the lab tech would merely authenticate the lab report anyway (!). Some have simply announced a bald conclusion.

A few courts, however, have actually tried to apply *Crawford*'s language. In *People v. Rogers*, 8 A.D. 3d 888, 780 N.Y.S. 2d 393 (2004), the New York Court recognized that the defendant had a 6<sup>th</sup> Amendment right under *Crawford* to cross examine the lab tech regarding the testing methodology. The Court reasoned that because the test was initiated by the prosecution and generated by its desire to discover evidence against the defendant, it was testimonial under *Crawford*. Defense counsel might also examine *Rollins v. State*, — A.2d —, 2005 WL 183156 (Md.App.,2005) ("We hold that the findings in an autopsy report of the physical condition of a decedent, which are routine, descriptive and not analytical, which are objectively ascertained and generally reliable and enjoy a generic indicium of reliability, may be received into evidence without the testimony of the examiner. Where, however, contested conclusions or opinions in an autopsy report are central to the determination of corpus delicti or criminal agency and are offered into evidence, they serve the same function as testimony and trigger the Sixth Amendment right of confrontation.); and *Smith v. Ala.* 2004 WL 921748, not yet released for publication, ruling that the autopsy examiner must testify under *Crawford*.

The full text of the Motion and Reply can be accessed on the MCPD shared drive/vehicular

directory under *Crawford* motion re 703.doc and *Crawford* motion re 703 reply.doc.

(Endnotes)

<sup>1</sup> *Crawford* at \_\_\_, 124 S.Ct. at 1364-65 and n.4.

<sup>2</sup> *Id.* at \_\_\_, 124 S.Ct. at 1364.

<sup>3</sup> *See, Crawford* at \_\_\_, 124 S.Ct. at 1365, n. 4, where the Court specifically said it was approaching the term “interrogation” in that manner, and equated its approach to defining “interrogation” with its approach to defining “testimonial”.

<sup>4</sup> *Crawford* at \_\_\_, 124 S.Ct. at 1364.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (citing the amicus brief filed by the National Association of Criminal Defense Lawyers).

<sup>7</sup> *Crawford* at \_\_\_, 124 S.Ct. at 1370.

## PREVALENCE OF MEDICAL PROBLEMS AMONG INCARCERATED PRE-TRIAL DEFENDANTS

There is a strong correlation between medical problems and criminal behavior among our pretrial clients.

According to Angela Harvey’s report, research is rife with documentation of the association between “...high-risk sexual activity, poverty, race/ethnicity, homelessness, unemployment, violence, limited access to preventive and primary health care, and alcohol and other drug use. Barriers to health care access and poor health care habits have severely limited the contact that inmates have with the health care system prior to incarceration.”<sup>12</sup> Further, “[p]ost release planning and continuation of health care is essential in order for inmates to make a transition back into the community in order to intervene in the cycle of addiction and crime.”<sup>13</sup>

Results of the study conducted by the A.S.U. research group revealed that 72.1% of defendants received some type of medical treatment in their lifetimes.<sup>14</sup> In addition, 45.4% of the sample reported one or more previous head injuries.<sup>15</sup>

## PREVALENCE OF SUBSTANCE ABUSE AMONG INDIGENT DEFENDANTS INCARCERATED IN THE MARICOPA COUNTY JAILS

Literature suggests that 55% of convicted offenders who are incarcerated reported drug use in the month preceding their offense.<sup>16</sup> In the A.S.U. sample, 65.4% of the participants reported using alcohol to intoxication or illegal drugs at least once in the last 30 days before their arrest.<sup>17</sup> The three most commonly used drugs were alcohol, marijuana and methamphetamines.<sup>18</sup>

As with mental health and medical impairments, few inmates reported adequate treatment for their underlying substance abuse problem. Only 7.4% of the sample had obtained some type of substance abuse treatment in the 30 days prior to incarceration and only 22.3%

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### ***Continued from Initial Assessment, p. 7.***

probation, parole, or supervised release.<sup>10</sup>

Dr. Linda Teplin, Professor of Forensic Psychiatry at Northwestern University Medical School, has conducted many studies in the area of inmates with mental disabilities. She commented on the benefit of stabilizing mentally ill inmates in a jail setting: “...crisis intervention treatment within jails may...serve to break the recidivistic cycle for those persons with psychiatric and substance abuse problems.”<sup>11</sup>

reported receiving some type of substance abuse treatment in their lifetime.<sup>19</sup>

#### PREVALENCE OF COGNITIVE DEFICITS/ LEARNING DISABILITIES/MENTAL RETARDATION AMONG PRESENTENCE DEFENDANTS IN THE MARICOPA COUNTY JAILS

Although the A.S.U. team did not include this category in their questionnaire, our instrument includes the question: “Were you ever in special education” to address this vital area. Informal statistics kept by our team of interns revealed that 32% of interviewed defendants reported enrollment in special education classes during their school careers. This suggests the possibility that they may suffer from learning disabilities, mental retardation and/or traumatic brain injuries.

Defender attorneys routinely make decisions regarding the appropriateness of referring defendants for Rule 11 screening. However, even when a defendant is NOT appropriate for Rule 11 evaluation, knowledge of his overall level of cognitive functioning is imperative for effective plea negotiation, mitigation at sentencing, and proper post-sentence community or in-custody placement.

Dr. Nancy Cowardin, a prominent mitigation specialist from Pasadena, California, has made her career developing alternative sentencing plans for defendants with learning disabilities and associated disorders. In her 1998 presentation before the National Association of Sentencing Advocates, Dr. Cowardin defined a plethora of terms that may become blurred or misstated in a criminal defense setting.

For example, if a defendant has been in special education classes, that could mean that he is emotionally disturbed, learning disabled, mentally retarded, visually handicapped, hearing impaired, physically handicapped, speech impaired, or suffers from attention deficit disorder. Emotional disorders are distinct from learning disabilities and may include personality and conduct disorders. Learning disabilities specifically refer to difficulties that result

from attention, perceptual, language/symbol, or academic skills below expected levels of performance.

Characteristics of these conditions manifest themselves in many ways. Learning disabled defendants often make impulsive decisions disregarding consequences and are unable to intuit people or actions that can lead to trouble with the law often getting blamed for unwitting criminal acts initiated by others.

A finding of mental retardation means that the defendant has a significantly sub-average general intellectual functioning along with an inability to adapt to normal life situations. It is a condition that occurs during the developmental stages of childhood. An adult cannot become mentally retarded.

There is also a strong correlation between defendants who have been in special education classes and illiteracy. Defense attorneys should factor that into requests for these defendants to sign legal documents, including plea agreements.

Traumatic brain injuries result when sudden physical damage is inflicted on the brain. Many of our defendants suffer from significant brain trauma from motor vehicle accidents, child abuse, sports injuries, or violent crimes. Head injuries vary in significance. In some cases, no residual damage occurs. In others, the defendant is not so lucky. Problems with concentration, organizing thoughts and becoming easily confused or forgetful are common. Typically, defendants with major head trauma have trouble solving problems, making decisions, and planning. Judgment is often affected.

Recently, one of our clients refused to take a plea agreement that was favorable to him. He went to trial and lost. We found out that he had a significant brain trauma when developing mitigation issues for sentencing. His inability to form a conclusion from a logical set of facts cost him dearly.

Cognitive impairments and head injuries are

separate and distinct from mental illness and should be treated as such. Interventions made for mentally ill defendants are not appropriate for this group of offenders. However, services are available through the Department of Developmental Disabilities, Department of Economic Security Workforce Development Office and the Office of Vocational Rehabilitation.

## CONCLUSION

The objective of the Initial Assessment Project is to reduce the recidivism of our indigent defendant population by:

- \* Identifying psychosocial issues early in the pretrial stage of the case
- \* Obtaining pertinent records
- \* Referring appropriate cases to mitigation specialists, paralegals, investigators
- \* Arranging for psychological/psychiatric evaluations in appropriate cases
- \* Making specific requests of the Court at sentencing for proper placement on specific probation caseloads, facilities at D.O.C., jail programs and/or appropriate community agencies.

We are hopeful that these assessments will give attorneys, judges, probation officers, and correctional health providers greater insight into the root causes of many clients' difficulties and thereby lead to more effective resolution of their cases.

### (Endnotes)

<sup>1</sup> Ashford, J.B., Sales, B.C., & Reid, W.H. (Eds.) (2001.)

*Treating adult and juvenile offenders with special needs.* Washington, D.C. American Psychological Association.

<sup>2</sup> Teplin, L.A. (1994, February). "Psychiatric and substance abuse disorders among male urban jail detainees." *American Journal of Public Health*, 84 (2), 290-293.

<sup>3</sup> Schnapp, W.B. & Cannedy, R. (1998, March). "Offenders with mental illness: Mental health and criminal justice best practices." *Administration and Policy in Mental Health*, 25 (4), 463-466

<sup>4</sup> Bureau of Justice Statistics (1999, January) *Substance abuse and treatment, state and federal*

*prisoners.* <http://www.usdoj.gov/bjs/dcf/duc.htm>

<sup>5</sup> Walsh, J.& Holt, D. (1999, Fall). "Jail diversion for people with psychiatric disabilities: The sheriffs' perspective." *Psychiatric Rehabilitation Journal*, 23 (2), 153-161

<sup>6</sup> Harvey, A. (2004, April) *The Maricopa County Jail Research Project: Understanding the influence of mental health, substance abuse and medical problems among pretrial inmates and their legal implications.* Arizona State University.

<sup>7</sup> Id., p. 15.

<sup>8</sup> Id., p. 16.

<sup>9</sup> National Institute of Justice (1997, January). *Providing services for jail inmates with mental disorders.* Washington D.C.: U.S. Department of Justice.

<sup>10</sup> Freitas, S.I. (1997, March). "Mentally disordered offenders: Who are they? What are their needs?" *Federal Probation*, 61 (1), 33-36.

<sup>11</sup> Teplin, L.A. (1984, July). "Criminalizing mental disorders: The comparative arrest rate of the mentally ill." *American Psychologist*, 39 (7), 794-803.

<sup>12</sup> Harvey, p. 15.

<sup>13</sup> Krane, K.M. (1998, April) "Intervening among the invisible population." *Corrections Today*, 60 (2), 122-126.

<sup>14</sup> Harvey, p. 15.

<sup>15</sup> Id.

<sup>16</sup> Bureau of Justice Statistics (1998, April). *Profile of jail inmates.* <http://www.ojp.usdoj.gov/bjs/dcf/duc.htm>

<sup>17</sup> Harvey, p.16.

<sup>18</sup> Id.

<sup>19</sup> Id.

# Jury and Bench Trial Results

## January 2005

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group A</b>						
1/5 - 1/10	<b>Roy / Willmott</b>	Foreman	Murphy	CR04-020016-001DT Burglary 3°, F4; Theft, M1 Assault, M1; Criminal Damage, F6	Guilty	Jury
1/5 - 1/11	<b>Farrell</b>	Santana	Kittridge	CR04-020432-001DT Aggravated Assault, F2D Assault, M2	Not Guilty of Assault; Guilty of Aggravated Assault non-dangerous	Jury
1/10 - 1/11	<b>Fischer Sain</b>	Cates	Fuller	CR04-018877-001DT Misconduct Involving Weapons, F4	Guilty	Jury
1/11 - 1/13	<b>Kirchler Carson / Jones Curtis</b>	Trujillo	Steinberg	CR04-020784-001DT 5 cts. Child Abuse, F4 Misconduct Involving Weapons, M1	Mistrial; 1 ct. Child Abuse Dismissed w/prejudice on 1/11/05; Misconduct Involving Weapons - Severed on 1/11/05 *** After Retrial Not Guilty - 1 ct. Child Abuse; Guilty - 3 cts. Child Abuse	Jury
1/26 - 1/31	<b>Lucero Carson Curtis</b>	Donahoe	Vaitkus	CR04-014663-001DT Resisting Arrest, F6 IJP, M1	Not Guilty Resisting Arrest; Guilty - IJP	Jury

# Jury and Bench Trial Results

## January 2005

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecu- tor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group C</b>						
1/6 - 1/11	<b>Jones</b>	Ishikawa	Starovich	CR04-038262-001SE 2 cts. Aggravated Assault, F6	Guilty on 1 ct. Agg. Assault; Not Guilty on 1 ct. Agg. Assault	Jury
<b>Group E</b>						
1/7	<b>O'Farrell</b>	Gutierrez	Bonaguidi	CR04-124689-001DT IJP, M1	Guilty	Bench
1/10 - 1/12	<b>Cooper / Schwartzstein</b>	Granville	Pastor	CR04-015702-001DT 2 cts. Agg. Assault, F6 Assault, M1	Not Guilty	Jury
1/24 - 1/26	<b>Houston / Evans</b>	Martin	Voyles	CR04-018044-001DT PODD, F4 PODP, F6	Guilty	Jury

# Jury and Bench Trial Results

## January 2005

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Vehicular</b>						
1/3 - 1/6	<b>Souccar</b>	Cunanan	Ingram	CR03-026471-001DT 2 cts. Agg. DUI, F4	Mistrial	Jury
1/10 - 1/12	<b>Iniguez</b>	Cunanan	Ingram	CR04-011937-001DT 2 cts. Agg. DUI, F4 Agg. DUI, F6 Extreme DUI, F6	Guilty	Jury
1/20 - 1/26	<b>Budge</b>	Nothwehr	Knudsen	CR04-017853-001DT 2 cts. Agg. DUI, F4	Ct. 1 Dismissed Ct. 2 Guilty	Jury

# Jury and Bench Trial Results

## January 2005

### Legal Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecu- tor	CR# and Charges(s)	Result	Bench or Jury Trial
1/11 - 1/12	Schaffer	Blakey	Kay	CR2004-007768-003 DT Agg.Robbery, F3 Asst.Crim.Synd., F3	Dismissed w/o prej. 2nd day trial	Jury
1/19 - 1/25	Navazo	Galati	Valenzu- ela	CR2004-022820-001 DT Armed Robbery, F2 Misc.Inv.Weap., F4	Not guilty Armed Rob- bery; Guilty MIW	Jury

### Legal Advocate's Office

Dates: Start - Fin- ish	Attorney Investigator Paralegal	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
1/10 - 1/11	Everett	Arellano	CR2004-040386-003-SE 2 cts. Armed Robbery, F2D 3 Cts. Agg Assault, F3D Drive-By-Shooting, F2D	After 1 Day of Trial Plead to Armed Rob. 1 ct. and Drive-By-Shooting 1 ct	Jury
1/17 - 1/24	Todd	O'Toole	CR2003-026366-001-DT 2nd Deg. Murder F1	Guilty	Jury



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