

for The Defense

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Picking a Jury: Voir Dire and the Discriminating Use of Peremptory Challenges

By Mara Siegel

Introduction

Trial lawyers underuse voir dire. We spend months conducting pretrial interviews, filing motions, analyzing law, and marshalling the evidence before entrusting a client's future to a handful of strangers. However, we often spend less than an hour developing a strategy for choosing those strangers.

The selection of jurors is crucial to winning a trial, and counsel should prepare for jury selection by filing motions

requesting: (1) attorney-conducted voir dire; and (2) distribution of a juror questionnaire.

Special care should be given to making Batson²/Gardner³ challenges if the State exercises peremptory challenges based on a juror's residence or economic status, or designed to exclude people who belong to a "cognizable group," such as African-Americans, Hispanics, Asians, "white ethnics," or women.

I. How Many Peremptory Challenges Are Allowed In A Criminal Case?

In most criminal cases, Rule 18.4(c), Ariz. R. Crim. P. allows each party six peremptory challenges. In capital cases, each side has ten peremptory challenges. If there is a joint trial of several defendants, each is allowed one-half the number of peremptory challenges allowed to one defendant. The state does not receive additional peremptory challenges.

II. What Is The Role Of Juror Questionnaires?

Generally, jurors are more honest and forthcoming about sensitive subjects posed in written questionnaires than they are in open court. The ideal practice is to combine the use of juror questionnaires with attorney-conducted voir dire (see Section III).

A. Should Counsel Request A Hearing On The Use Of The Juror Questionnaire?

File a motion (attach the juror questionnaire) requesting the court to distribute questionnaires to prospective jurors. In the motion, request a pretrial hearing. Before the hearing, meet with the prosecutor and try to agree on the questionnaire. A stipulated questionnaire increases the chance of approval by the court. If the prosecutor objects to crucial questions, do not delete them solely for the sake of the prosecutor's assent. Argue your questions to the court; at worst, you will make a record.

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B. What Are Effective Arguments In Favor Of The Use Of The Juror Questionnaire?

At the hearing, explain that the questionnaire will save valuable court time and spare jurors from disclosing extremely personal information on sensitive subjects like prior sexual assault, racial prejudice, substance abuse, mental illness, or criminal history. Argue that juror questionnaires are admissible by Supreme Court rules in civil trials (Rule 47(b)(2) Ariz.R.Civ. P.).⁴ Volunteer to make copies of the questionnaire. If the questionnaires are distributed before morning calendar, the jury can usually complete them by 11:00 a.m. This allows time to copy the completed questionnaires for the court, prosecutor, and defense.⁵

C. What Should Trial Counsel Do If The Court Denies The Use Of The Juror Questionnaire?

If the court refuses the questionnaire, but allows attorney-conducted voir dire, ask the questions covered in the questionnaire. Make sure that the court has denied your motion to distribute the juror questionnaires, and that a copy of the juror questionnaire is filed with the court for appeal.

III. Is Attorney-Conducted Voir Dire Permissible In Criminal Cases?

**Trial lawyers
underuse
voir dire.**

A. What Is The Law In Arizona Concerning Attorney-Conducted Voir Dire?

Attorney-conducted voir dire is permissible, but discretionary, in criminal cases.

Rule 18.5(d), Ariz. R. Crim. P., discusses voir dire in criminal cases:

"The court shall conduct the voir dire examination, putting to the jurors all appropriate questions requested by counsel.

The court may in its discretion examine one or more jurors apart from the other jurors.

If good cause appears, the court may permit counsel to examine an individual juror." (Emphasis added).

Because attorneys in civil cases may conduct voir dire (Rule 47(b)(2), Ariz.R.Civ.P.)⁶, arguably, denying that same right to a criminal defendant violates the Fifth and Fourteenth Amendments of the United States Constitution, and article II, section 4 of the Arizona Constitution.

B. Why Is Attorney-Conducted Voir Dire More Effective In Eliciting Juror Bias?

Because of the political climate, coupled with excessive media coverage concerning drugs, violence, and crime in general, juries are very predisposed to convict. Research shows that 60% to 80% of every jury panel starts out with a bias against the accused. "In short, the jury panel feels affinity with the prosecutor and none with the defense attorney or his client." Giuliucci, "Jury Selection: Who Should Question Potential Jurors-Judges or Lawyers?" *The LaSalle Street Chronicle*, November 6, 1985. Because most judges conduct voir dire, it is difficult to tell what jurors really think about your client, the alleged crime, or any sensitive issues that may arise during trial.

Judges often ask leading questions which do not elicit the information we need. We have little information about a potential juror beyond the material contained in the juror information card. Often, we operate on stereotypes, which may be very dangerous.

Attorney-conducted individual voir dire on a sequestered basis is the most effective way to learn what type of juror a person will make. As a practical matter, even in highly publicized cases, judges are hesitant to allow sequestered individual questioning on topics other than pre-trial publicity or sensitive subjects (e.g., prior child abuse, molestation, or rape) unless a particular juror requests to discuss a matter in private.

Attorney-conducted voir dire of the entire panel facilitates jurors' interaction with counsel, one another, and your client. It often elicits juror bias articulated by one juror, but felt by many. For example, a defendant should testify and tell her side of the story; a defendant must be guilty or he would not have been charged with a crime.

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C. What Are Effective Arguments In Favor of Attorney-Conducted Voir Dire?

Although the criminal rules only permit attorney-conducted voir dire for "good cause," you must convince the court that it is essential to the defendant's right to a fair trial, hence the state and federal Constitutions mandate it. Additionally, since voir dire can neutralize the effect of anticipated prejudice, Turner v. Louisiana, 379 U.S. 466 (1965); Irvin v. Dowd, 366 U.S. 717 (1961); you must convince the court that without attorney-conducted voir dire one cannot make intelligent decisions on peremptory challenges. See, Swain v. Alabama, 380 U.S. 202 (1965); United States v. Blanton, 700 F.2d 298 (6th Cir. 1983).

D. What Should Counsel Do If The Court Denies Attorney-Conducted Voir Dire And The Jury Questionnaire?

If the court denies your request for sequestered questioning of jurors, ask the court to allow jurors to decide whether they want to discuss a particular subject privately. Jurors could simply raise their hands to request sequestered inquiry on that topic. If the court distributes juror questionnaires, you will probably learn sensitive information that can be the subject of further inquiry.

If the court has denied your request for sequestered, individual, attorney-conducted voir dire, request attorney-conducted voir dire of the entire panel in open court.

If the court refuses both attorney-conducted voir dire and the jury questionnaire, file your questionnaires. Incorporate your questionnaire into defendant's requested voir dire. Following each question, write: Given_ Refused_. Ask the judge to rule on each question.

If the court alone conducts voir dire, but agrees to ask your questions, be sure that they are, in fact, asked. If not, discreetly remind the court. If a follow-up question is necessary, ask for it. Note: most courts allow counsel to approach bench after the court has completed its voir dire to ascertain if there are any additional follow-up questions.

IV. Batson Challenges And The Right To A Jury Drawn From A Cross-Section Of A Community

In Arizona, one of the most important aspects of jury selection is insuring that the jury is drawn from a fair cross-section of the community. (Gardner I & II), *supra*. The Batson challenge prohibits prosecutors from using peremptory challenges based on inherently unfair discrimination. Peremptory strikes may be voided under Batson when based on ethnic heritage, national origin, religious affiliation, ethnic status, ancestry, or gender. Under the recent United States Supreme Court opinion, Georgia v. McCollum, 112 S.Ct. 2348 (1992), the Equal Protection clause of the Fourteenth Amendment now prohibits defendants from engaging in purposeful discrimination in the exercise of peremptory challenges. Under McCollum, Batson challenges may now be used not only by, but against, the defendant.

A. Who Is The Subject Of The Batson Challenge?

1. What Is A Cognizable Group Under Batson?

Based on Batson, a cognizable group is one definable and limited by:

- (1) some clearly identifiable factor;
- (2) a common set of ideas, attitudes or experiences; and
- (3) a community of interests, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.

United States v. Biaggi, 673 F.Supp. 96, 100 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89, *cert. denied*, 489 U.S. 1052 (1989) (quoting United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987)).

What constitutes a "cognizable group" is very broad. Since Batson, numerous state and federal cases have expanded not only what constitutes a "cognizable group," but also who has standing to raise a Batson claim.

2. Can An African-American Defendant Challenge Exclusion Of An African-American Juror?

Based on the Equal Protection clause of the Fourteenth Amendment, the United States Supreme Court prohibits the prosecution from exercising peremptory challenges based solely on the juror's race or on the assumption that African-American jurors, as a group, cannot impartially consider the state's case against an African-American defendant. Batson, 476 U.S. at 89. The court enunciated a three-part test for establishing a prima facie case of purposeful discrimination:

- (1) juror is a member of a cognizable racial group;
- (2) members of the defendant's race have been excluded through the exercise of the prosecutor's peremptory strikes;
- (3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory challenges to excuse the venire person on the basis of race. *Id.* at 94-96.

Clearly, Batson holds that an African-American defendant has standing to challenge a prosecutor's use of peremptory challenge to strike an African-American juror solely on account of race.

3. Are Hispanic, Native Americans And Asians Entitled To Batson Coverage?

Batson coverage has been implicitly extended to preclude race-based exclusion of "Hispanic" jurors, by reason of their ethnic heritage. Hernandez v. New York, 111 S.Ct. 1859 (1991). Similarly, "Mexican-Americans" as well as "Spanish surnamed" jurors have presumed group characteristics that fall under Batson. Castaneda v. Partida, 430 U.S. 482 (1977).

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Judges often ask leading questions which do not elicit the information we need.

See also, Fields v. People, 732 P.2d 1145 (Colo. 1987). In Arizona, "Hispanics are a cognizable racial group for equal protection purposes." State v. Reyes, 163 Ariz. 488, 490, 788 P.2d 1239, 1241 (Ct. App. 1989).

Native Americans are a "cognizable group" under Batson. United States v. Chalen, 812 F.2d 1302, 1313-1314 (10th Cir. 1987); United States v. Bedonje, 913 F.2d 782 (10th Cir. 1990) (members of Navajo nation are a cognizable group under Batson).

Applying the Equal Protection analysis, Division One of the Arizona Court of Appeals held that Asians constitute a cognizable racial group. State v. Jordan, 171 Ariz. 62, 828 P.2d 786 (Ct. App. 1992).

4. Are "White Ethnics" Members Of A "Cognizable Group?"

Batson has been extended to "white ethnics." "Italian Americans" are a "cognizable racial group" subject to Batson. United States v. Biaggi, 673 F. Supp. at 101; but see, contra, United States v. Sgro, 816 F.2d 30.

5. Is Ethnicity, Religious Affiliation, Or Ancestry Subject To Batson Protection?

The extension of Batson protection to "white" and "ethnic minority" jurors is logically consistent with the holding in Batson. The expansion of Batson "provides some measure of protection against changing biological, anthropological, and socio-political concepts of race." Recent Developments: Edmonson v. Leesville Concrete Co.: Will the Peremptory Challenge Survive Its Battle With the Equal Protection Clause?, 25 J. Marshall L.Review, 37, 48 (1991).

a. Ethnicity And Religious Affiliation

The United States Supreme Court has not specifically addressed whether ethnic origin or religious affiliation is covered by Batson. However, two cases decided in 1987, addressed claims brought under the United States Civil Rights Act of 1886, and equated the term "race" with "identifiable classes of persons" who were subjected to intentional discrimination "solely because of their ancestry or ethnic characteristics." St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-618 (1987).

In St. Francis College, the court held that Section 1981 of the Civil Rights Act was intended to protect Arab-Americans. In his concurring opinion, Justice Brennan observed that the line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place of birth or nation of origin is not clear; at least in Title VII context, these terms overlap. St. Francis College, 481 U.S. at 614.

In Shaare Tefila Congregation, the court noted that although Jews are now considered "Caucasian" and not members of a separate race, this does not preclude them from being considered a "cognizable group" or from being protected from intentional discrimination. Shaare Tefila Congregation, 481 U.S. at 617.

b. Ancestry

The United States Supreme Court has extended Batson coverage to ancestry. Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077, 2088 (1991); Hernandez, supra; Powers v. Ohio, 111 S.Ct. 1364 (1991). French-Canadians, for example, have been recognized as a distinctive group whose deliberate exclusion on the basis of group characteristics violates the Massachusetts Declaration of Rights. Commonwealth v. Gagnon, 449 N.E.2d 686, 691-92 (Mass. App. Ct. 1983). Armenians are a distinctive group under the Massachusetts Declaration of Rights. Commonwealth v. Garabedian, 503 N.E.2d 1290, 1293-94 (Mass. 1987).

In Gardner II, relying on the Sixth Amendment of the United States Constitution, the Arizona Supreme Court implicitly recognized ancestry⁷, ethnicity, and religious affiliation as identifiable groups meriting Batson protection. Gardner II, 157 Ariz. at 545.

6. Can A Prosecutor Strike A Juror Based On His Residence Or Economic Status?

Although upholding the trial court's ruling that the State presented a neutral explanation for striking a Hispanic male grocery clerk⁸, Division One of the Arizona Court of Appeals considered the juror's "economic background" in addition to his race. State v. Reyes, 163 Ariz. 488, 491, 788 P.2d 1239, 1242 (Ct. App. 1990). In his dissent, Judge Kleinschmidt relying on Gardner II, expressed "doubt . . . whether membership in a particular socio-economic class is a legitimate reason for the exercise of a peremptory challenge." Id. at 1243.

However, in United States v. Bishop, 959 F.2d 820 (9th Cir. 1992), the Ninth Circuit examined the prosecutor's strike of an African-American juror who lived in a predominantly low income, high crime, African-American neighborhood. Id. at 821. The prosecutor noted that the juror, was an eligibility worker from Compton, California, where its residents were "anesthetized to . . . violence, and more likely to think that the police probably [used] excessive force." Id. at 825. The prosecutor struck this juror, in part, because her residence made her more likely to believe that the police "pick on Black people." Id. at 821. The Ninth Circuit rejected that justification because it "referred to collective experiences and feelings that [could have been] just as easily . . . ascribed to vast portions of the Afro-American community." Id. at 825. The court further held:

"Implicitly equating low-income, black neighborhoods with violence, and the experience of violence with its acceptance, it referred to assumptions that African-Americans face, and from which they suffer, on a daily basis. Ultimately, invocation of residence both reflected and conveyed deeply ingrained pernicious stereotypes." (citation omitted).

"Government acts based on such prejudice and stereotypical thinking are precisely the types of acts prohibited by the equal protection clause of the Constitution." (citation omitted).

Id. at 825-826.

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The court cautioned against using residence as a pretext to exclude jurors "... where residence is utilized as a surrogate for racial stereotypes - as, for instance, a shorthand for insensitivity to violence - its invocation runs afoul of the guarantees of equal protection." *Id.* at 826.

The court further noted the critical role residence plays as a perpetuating factor in continued racial segregation:

"In our racially diverse society, residence, alas, has come to play a critical role as a bastion of enduring racial segregation. In many ways, residential patterns mirror the unspoken biases and prejudices that continue to plague our minds. While we may not 'recognize the ways in which our cultural experience has influenced our beliefs about race' (citation omitted), the color lines that partition our cities bear witness to a destructive effect. . . . Through mental association, African-Americans, their neighborhoods, crime and violence all become amalgamated, giving rise to tenacious stereotypes - innocent and unintentional perhaps, but stereotyped nonetheless. They are and must remain unwelcome in the courtroom."

Id. at 827-828. The Ninth Circuit Appeals reversed Bishop's conviction.

7. Can Jurors Be Excluded On The Basis Of Gender?

Constitutionally, gender and race classifications have been analyzed differently. *United States v. DeGross*, 913 F.2d 1417, 1422 (9th Cir. 1990) *aff'd en banc*, 960 F.2d 1433 (9th Cir. 1992); Comment, Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges, 22 *Pac.L.J.* 1305, 1327 n.5 (1991).

Recently, the Missouri Court of Appeals noted how courts have treated women as opposed to African-Americans, differently for Batson purposes:

"The Batson court did not limit its holding to groups which traditionally received strict scrutiny analysis. [citation omitted]. Rather, the Supreme Court was concerned with protecting members of an identifiable group, like blacks, that have historically been the victim of invidious discrimination. Id. In Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 1771, 36 L.Ed.2d 583, 592-93 (1973), gender classification was accorded heightened scrutiny under the Constitution. 411 U.S. at 688. Indeed, the court observed that because of 'gross, stereotyped distinctions between the sexes . . . , throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.' [citation omitted]."

State v. Pullen, No. 56820, No. 58075 at p. 29 (Mo. Ct. App. June 9, 1992) LEXIS, Gen Fed Library, Dist. File).

Although the United States Supreme Court has not addressed whether gender-based exclusion is prohibited in jury selection, *State v. Burch*, 830 P.2d 357, 361 (Wash. Ct. App. 1992), it was held that systematically excluding women from jury venires is a form of gender discrimination that violates a defendant's Sixth Amendment right to a representative jury. *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

Many states, which extend Batson coverage to gender, rely on their state constitutions. See *People v. Mitchell*, 593 N.E.2d 882, 888 (Ill. Ct. App. 1992); *State v. Burch*, 830 P.2d

at 362-63; *State v. Gonzales*, 808 P.2d 40, 47-49 (N.M. 1991); *State v. Levinson*, 795 P.2d 845, 349 (Haw. 1990); *People v. Blunt*, 162 A.D.2d 86, 561 N.Y.S.2d 90 (1990).

Although not basing its decision on the Missouri State Constitution, the Missouri Court of Appeals extended Batson coverage based on gender. *State v. Pullen*, No. 56820, No. 58075 at p. 29.

In DeGross, the Ninth Circuit Court held that the prosecutor improperly excluded a woman juror just because he desired more men on the jury. *Id.* at 1426. The prosecutor's reasoning "constituted an admission of purposeful gender discrimination which . . . violated not only DeGross' [but also the juror's] equal protection rights." *Id.*

Gender-based Batson protections are not limited to women. In Blunt and Mitchell, the New York Supreme Court and Illinois Court of Appeals (respectively) held that a male defendant had standing to claim that men were improperly excluded from selection. Blunt, 561 N.Y.S.2d at 92; Mitchell, 593 N.E.2d at 888-889.

Several jurisdictions have reached opposite results, holding that the federal constitution does not prohibit the state's use of peremptory challenges to strike jurors based on gender. In fact, Justice Sandra Day O'Connor writing in support of the court's denial of the petition for certiorari in Brown v. North Carolina, stated that Batson should be solely limited to the racially discriminatory use of peremptory challenges. 479 U.S. 940, 941-42 (1986). Several lower courts have adopted positions similar to Justice O'Connor's. *State v. Culver*, 444 N.W.2d 662 (Neb. 1989); *Hannan v. Commonwealth*, 774 S.W.2d 462 (Ky. Ct. App. 1989); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988).

Race and gender issues arise when the State exercises peremptory challenges based on a woman's surname. A surname will not necessarily assist to determine the race or ethnic group of a female juror. Reliance on surnames may improperly include or exclude married women who have adopted their husband's name. *J. Marshall L.Rev.*, vol. 25 at 50-51.

Arizona appellate courts have not yet decided whether Batson coverage should be extended to include gender. *State v. Pierce*, 170 Ariz. 527, 826 P.2d 1153 (Ct. App. 1991). Division One of the Court of Appeals did not have to reach this issue in Pierce, because the defendant's objection to the stricken juror was untimely and thus waived. *Id.* at 1156-1157. As Arizona does not have any constitutional provisions prohibiting gender discrimination, one should consider arguing the analogous state law such as A.R.S. Sec. 41-1463, which prohibits employers, employment agencies, and labor organizations from discriminating against the employee because of race, color, religion, age, handicap, national origin or sex.

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8. Can A White Defendant Challenge The Exclusion Of Jurors From Cognizable Groups?

The United States Supreme Court recently narrowed the Batson test, rejecting the requirement of racial identity between the defendant and the excluded juror(s). Thus, a white defendant has standing to object to exclusion of non-white jurors. Powers v. Ohio, 111 S.Ct. 137. Three years earlier, in 1988, the Arizona Supreme Court reached the same conclusion. In Gardner II, relying on Peters v. Kiff, 407 U.S. 493 (1972), the Arizona Supreme Court held that a white defendant may challenge a prosecutor's discriminatory peremptory strikes of African-American jurors. Gardner II, 157 Ariz. at 544-454, see also, Gardner I, 156 Ariz. at 512. Accord, State v. Reyes, 163 Ariz. 488, 490, 788 P.2d 1239, 1241 (Ct. App. 1989).

B. Setting Up A Batson Challenge

There are three steps to establish a Batson Equal Protection violation. They are:

1. the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race;
2. if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking that particular juror; and,
3. the trial court must determine whether the defendant has carried the burden of proving purposeful discrimination.

Hernandez, 111 Sup. Ct. at 1866. A "neutral explanation" in this context is something other than the juror's race. Id. "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." Id. at 1866.

Accordingly, courts need not delve into prosecutors' underlying motivations as long as they can provide a race-neutral explanation. For example, peremptory challenges based on deficiencies in educational background of African-American jurors was a race-neutral reason under Batson. United States v. Hinojosa, 958 F.2d 625 (5th Cir. 1992). Striking the only African-American juror did not offend Batson where he had been convicted of misdemeanor assault and indicted for burglary. Significant involvement of African-American juror's family with the criminal justice system held to be a racially neutral reason. State v. Reyes, 163 Ariz. 490-91. A Hispanic woman's unstable employment, overly enthusiastic responses during voir dire, youthfulness, employment as a massage therapist, and busy work schedule, held racially neutral explanations. State v. Hernandez, 170 Ariz. 301, 823 P.2d 1309, 1313-14 (1992).

However, the Court of Appeals rejected peremptory challenge of a Hispanic woman who "only [had] a ninth grade education." State v. Boston, 170 Ariz. 315, 317, 823 P.2d 1323, 1325 (Ct. App. 1992). The court found only two cases holding that lack of education alone supports a peremptory challenge of a racial minority. United States v. Harrell, 847

F.2d 138 (4th Cir. 1988); Winfield v. Commonwealth, 404 S.E.2d 398 (Va. Ct. App. 1991). The court held that "the state failed to rebut the defendant's prima facie showing that the strike was exercised on the basis of race, and thus, the trial court erred in permitting the peremptory challenge." 170 Ariz. at 315, 823 P.2d at 1325. Although noting that lack of education may be a legitimate reason for the use of a peremptory challenge, the court noted:

"the . . . correlation between a person's level of education on the one hand, and their intelligence and common sense on the other, is not so clearly established as to automatically justify the removal of a minority member of limited education in a case like this one. Too, the exercise of a strike for reasons of lack of education is apt to have a disparate impact on members of a racial minority, and can easily serve as a pretext for purposeful discrimination." Id.

Advocates should not complacently accept the state's exclusion of jurors from "cognizable groups" simply because they or their families have previous criminal histories (Bailey, Reyes), have limited education (Boston) or appear too forthcoming to the court (Hernandez). Counsel should explain to the court that the prosecutor's explanation is merely a pretext for impermissible generalizations regarding race, ethnicity, economic status, or gender.

If an objection to a peremptory challenge is not timely made, it will be forever waived.

C. Setting Up A Batson/Gardner Challenge In Arizona: The Right To A Jury Drawn From A Fair Cross-Section Of The Community

1. The Defendant's Right To A Jury Drawn From A Fair Cross-Section Of The Community

Affirming Batson, the Arizona Supreme Court extended its coverage to a defendant's Sixth Amendment right to a fair trial. Gardner II, 157 Ariz. at 544.

In addition, the Arizona Supreme Court prohibits the state from discriminating in selecting trial jurors:

"Any discriminatory exclusion from either the jury panel or the trial jury directly impairs the constitutional right to the opportunity to obtain a jury drawn from a cross section of the community. (Citation omitted. . . .) [t]he State's discrimination against a 'distinctive group' deprives a defendant of the opportunity to obtain a trial jury representing a fair cross section of the community." (Emphasis in original.) (Citation omitted.)

Id. at 545.

(cont. on pg. 7)

Over a century of statutory and federal common law based on the Equal Protection clause of the Fourteenth Amendment prohibits excluding a juror based on race. Congress recognized this in the Civil Rights Act of 1875, making it a criminal offense to exclude persons from jury service on account of their race. See, 18 U.S.C. Sec. 243. In three subsequent cases, the United States Supreme Court confirmed the statute's validity, as well as the broader constitutional imperative of race-neutrality in jury selection. See, Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Ex parte Virginia, 100 U.S. 339 (1880). From Strauder through McCullum, the court has held that Equal Protection prohibits exclusion from jury service based on race. Strauder, 100 U.S. at 308; McCullum, 112 S.Ct. at 2351.

Jury service "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering . . . a respect for law." Duncan v. Louisiana, 394 U.S. 145 (1968) (Harlan, J., dissenting). Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process. Powers, 111 S.Ct. at 1369.

Although Holland v. Illinois, 493 U.S. 474, 478 (1990) held that federal common law does not afford a juror a Sixth Amendment right not to be excluded from jury service, the Arizona Supreme Court held inapposite. Gardner II at 546. The United States Supreme Court refused to accept the state's petition for certiorari in Gardner, one year after its decision in Holland thus, Gardner remains the law in Arizona. Finally, the Arizona Supreme Court decied the effect of discrimination on the entire jury system:

"The harm done by such State discrimination is not limited to violation of defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship. Worse yet, such methods create a perception that the American criminal justice system is imposed on certain minorities rather than operating to protect the further rights of all citizens."

Gardner II, 157 Ariz. at 545-546.

2. Does A Defendant Have Standing To Object To Race-Based Exclusion Of Jurors Through Peremptory Challenges Based On The Sixth And Fourteenth Amendments?

Generally, litigants must assert their own legal rights and interests, and cannot rest claims to relief premised on the legal rights or interests of third parties. United States Dept. of Labor v. Trilett, 110 S.Ct. 1428 (1990). However, this fundamental restriction has certain limited exceptions. The United States Supreme Court has recognized the right of litigants to bring actions on behalf of third parties when three criteria are satisfied: (1) the litigant has suffered an "injury-in-fact" giving him/her a "sufficiently concrete interest" in the outcome of the disputed issue; (2) the litigant had a close relationship to the third party; and (3) there is some concern about the party's ability to protect his/her own interests. Singleton v. Wulff, 428 U.S. 106, 112-16 (1976). The court has permitted several defendants to challenge their convic-

tions by raising third party's rights. See, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). The Supreme Court held:

"Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venire person excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interest makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venire person's rights."

Powers, 111 S.Ct. at 1372 (relying on Singleton, Eisenstadt, Griswold, McGowan v. Maryland, 366 U.S. 420 (1961), and Doc v. Bolton, 410 U.S. 179 (1973)).

D. Batson And Gardner Challenges: Practical Tips

1. When Is The Batson Challenge Made?

The Batson challenge must be made as soon as the prosecutor has exercised his peremptory challenge to strike a member of a "cognizable group." Having the court rule on each Batson challenge as it arises gives the defense a tactical advantage.

2. Can The Batson Challenge Be Waived If Not Timely Raised?

If an objection to a peremptory challenge is not timely made, it will be forever waived. Failure to timely raise a Batson challenge does not constitute fundamental error. State v. Holder, 155 Ariz. 83, 85, 475, P.2d 141, 143 (1987). It is uncertain when the challenge must be raised to be timely, but failure to raise it after the jury has been empaneled and the stricken jurors excused it too late. State v. Pierce, 170 Ariz. 527, 826 P.2d at 1157; State v. Harris, 157 Ariz. 35, 754 P.2d 1139 (1988).

3. What Is The Defendant's Burden Of Proof?

Once the prosecutor has stricken a juror from a "cognizable group," defense counsel must make a prima facie showing that the prosecutor's peremptory challenge was based on race, gender, economic status, etc. Hernandez, 111 S.Ct. at 1860. The standard required to establish this purposeful discrimination has experienced dramatic evolution since Batson. See, State v. Jordan, 171 Ariz. 62, 828 P.2d 790 (1992). However, there must be some minimal nexus between the peremptory strike and the juror's race. Id.

(cont. on pg. 8)

Trial counsel should make a record concerning pertinent information about the juror, such as race, sex, educational background, or economic status. Have copies of the juror information card, known as "Office of the Jury Commissioner Biographical Information" filed with the court, as well as the original questionnaire(s). The juror information card contains such crucial information as the juror's age, marital status, number and ages of children, employment, spouse's employment, educational level, law degree or any courses taken in law, law enforcement experience, felony convictions, prior jury service, and most importantly, race. In the juror information cards, the juror is asked to indicate their race by checking one of six boxes: (1) "Black non-Hispanic;" (2) "white non-Hispanic;" (3) "Hispanic;" (4) "Native-American;" (5) "Asian;" and, (6) "Other (specify)." Finally, each juror is required to certify, under penalty of law, that the information provided in the information card is true and correct. If a juror contradicts this information during voir dire, further inquiry may be necessary.

Ask the prosecutor to stipulate that the juror is African-American, Hispanic, Asian, etc. As part of the Batson challenge, point out that there are no other members of that particular juror's "cognizable group" on the entire venire. If the prosecutor strikes a juror from a "cognizable group," but does not strike a juror from a non-cognizable group where both have provided identical information, point out this disparate treatment by the prosecutor. For example, a prosecutor may keep a white juror with prior criminal history, but strike an African-American juror for the same reason. Argue that the peremptory challenge is being used as a pretext to strike the African-American juror based on race.

When making a prima facie showing under Batson, remember that the Court of Appeals has held that "Batson applies to all ethnic and racial groups." State v. Jordan, 171 Ariz. 62 (citing United States v. Bucci, 839 F.2d 825, 833 (1st Cir.), cert. denied, 488 U.S. 844 (1988)). Make sure that you cite both Batson (Fourteenth Amendment) and Gardner (Sixth Amendment).

4. If The Defendant Meets His/Her Burden Under Batson, Does The Prosecutor Have To Articulate A Race-Neutral Explanation For Striking The Juror?

Once the defendant has established a prima facie showing under Batson, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking that juror. Listen carefully to the prosecutor's explanation; be prepared to establish that the challenge is a pretextual attempt to exclude jurors from "cognizable groups." Note that the juror has a right to participate in this important democratic process-sitting in judgement for fellow citizens. Powers, 111 S.Ct. 1364; Gardner II, 157 Ariz. 541.

5. What Is The Court's Role In Deciding Whether It Will Sustain The Prosecutor's Peremptory Challenge?

Once the prosecutor has attempted to articulate a race-neutral explanation for exercising his strike and the defendant has rebutted the prosecutor's argument, the trial court must then determine whether the defense has met its burden

in proving the prosecutor's strike was based on purposeful discrimination. Hernandez, 111 S.Ct. at 1866.

If the defense is successful, the juror will not be stricken. Otherwise, ask the court to take judicial notice that the juror is a member of a "cognizable group." If the court fails to state the factors it considered in accepting the prosecutor's explanation, request the court to do so. The appellate court must have a basis for evaluating the trial court's decision.

V. Conclusion

Attorney-conducted voir dire and juror questionnaires are invaluable tools when selecting those strangers who will decide the fate of your client. Given the post-Batson/Gardner litigation, this is one area that is fertile ground for favorable appellate review. ^

Endnotes:

1. The author wishes to thank Donna Elm and Ernesto Quesada, Law Clerk, for their invaluable editing of this article.

2. Batson v. Kentucky, 476 U.S. 79 (1986).

3. State v. Superior Court (Gardner), 156 Ariz. 512, 753 P.2d 1168 (Ct. App. 1987); State v. Superior Court (Gardner), 157 Ariz. 541, 760 P.2d 541 (1988), cert. denied, 111 S.Ct. 1638 (1991) (hereinafter referred to as Gardner I and Gardner II, respectively).

4. The court shall conduct a preliminary oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination. (Emphasis added).

5. Once the questionnaires are filled out by the jurors, the court generally will not want to release them to defense counsel to photocopy. If the court, however, is hesitant to undertake photocopying each of the questionnaires, offer your photocopying services.

6. See, supra, note 4.

7. See also, State v. Jordan, supra, where the court held that persons of Asian decent are entitled to Batson protection.

8. The prosecutor explained that he struck the juror because he had a "sister who is spending time in prison for assault, one of the charges against the defendant. . ." and "because of the panel member's age and appearance (i.e., his poor dress), he might be of an economic background such that he would relate sympathetically to the defendant's involvement in a working-class barroom fight." Id. 163 Ariz. at 491.

Adult Probation Court Liaison Program

By Ron Mitchell, APO, Supervisor, Court Liaison Program

The Adult Probation Court Liaison Program was initially developed to aid the workload of the Adult Probation Department's 250 field officers. With field officers located throughout the entire valley, many officers had to travel to superior court for probation violation hearings and wait several hours for a hearing which usually resulted in an admission by the defendant, or a continuance. The program has proven to benefit not only probation officers, but virtually all players in the probation violation court process.

Several months after the Maricopa County Superior Court initiated the Quadrant B Probation Violation Court, the Adult Probation Department responded with the first Court Liaison Officer. This officer's duties entail receiving the court arraignment calendar a few days in advance, contacting the assigned probation officer to learn if the officer already has a recommendation in mind (routine cases), and determining if the case can be disposed of at the arraignment stage, via oral recommendation by the liaison officer. The recommendations for appropriate cases are then discussed with the deputy public defender who consults with the defendant prior to the arraignment. The deputy county attorney also is notified, and if all are in agreement, the case is disposed. The defendant gets sentenced at the arraignment, eliminating up to 40 days of custody time spent waiting for disposition. (What a great time to come up with a program that reduces jail time!)

Since January of 1992, this program has expanded to operate in all three probation violation calendars. Plans to staff the final quadrant servicing SEF are made, and we will be ready to respond when that quadrant implements a probation violation calendar. Note that as of the end of August 1992, we have moved 1,031 cases to disposition at the arraignment.

The public defenders involved in this process have responded quickly and efficiently. It saves them a lot of time normally spent on jail visits for consultation and trying to track down particulars of each case such as new charges, the probation officer's intentions, etc. In addition, the public defender can become actively involved in the actual staffing of the case. An experienced probation officer is always present in court to answer questions concerning intermediate sanctions offered by the Probation Department, resources available in the community, as well as the feasibility of any other creative sentencing alternative.

Considering the fact that all players involved in the probation violation process benefit from this program, we still have not yet reached our full potential. We all share a common goal in that we are searching for the most fair, just, and effective method to deal with an ever-increasing number of clients. This program could not have experienced so much success without the much appreciated cooperation and efficiency of the Public Defender's Office. We thank you for your role in this process, and invite your comments, questions, ideas and suggestions. Call Ken Groom (435-7732), Ron Mitchell (506-3371), or better yet, go to any one of the three PV quads and talk to the liaison officers, Penny Kanter, Jean Fox, Ed Turner, Cindy McKenzie and Kim Otto. ^

D.R.C. Opens

By Robert Cherkos

... to furlough selected offenders from incarceration into a program of strict community supervision and structured reintegration services.

-- Day Reporting Center Mission Statement

One bond election and six years later, the first Day Reporting Center (D.R.C.) in Maricopa County became operational on August 18, 1992. It should come as no surprise to anyone following the suit in Federal Court that our jails are woefully overcrowded. This provided the impetus for the County to fund the first Day Reporting Center.

The primary focus of day reporting is to help reduce the jail population and provide reintegration services to inmates who have approximately 60 days left to serve (**yes, they will be earning jail credit while in the program!**). Inmates are furloughed into a program very similar to Intensive Probation. The major difference is the amount of time that each probationer will spend at the Center. Instead of referring clients "out" for services, they will be referred "in." Joining the Literacy Center, the Community Punishment Program, and the Community Restitution Program (community service) will be the following private sector providers: **Tri-City Behavioral Health, East Valley Youth and Family Services, Alcoholics Anonymous, and Rational Recovery.** All will be located at the D.R.C. and their services will be available to other probation and non-probation clients.

To be considered eligible for the program, clients must (1) be given jail as a term of probation, be furlough-eligible, and have approximately 60 days left to serve; (2) not have a serious history of violent behavior; (3) have an acceptable, verifiable address; (4) have access to transportation; (5) not have charges pending or outstanding warrants; and (6) be willing to participate in the program.

Thus far we have diverted 25 probationers from the Jail -- three already have successfully completed the program. These clients are currently being monitored by two supervision teams operating out of the East Day Reporting Center. Due to the need to divert more clients, funds were made available through the Home Detention Program to add three additional supervision teams this October. They will expand services to the West Valley and Central Corridor. Each team can supervise approximately 30 clients. By April we hope to have operational Day Reporting Centers in the Central and West Valley.

Referrals to the program come from a variety of sources, including probation officers, probationers, Work Furlough, family members, and attorneys. Very soon there will be a screening team to handle all referrals to Day Reporting and Work Furlough programs. Presently, inquiries about the program can be made at the East Day Reporting Center. Just call 464-6300 and ask to speak with any D.R.C. staff member. ^

(cont. on pg. 10)

Editor's Note: Robert Cherkos, the D.R.C. Supervisor, has been a probation officer for 20 years. After obtaining an undergraduate degree in Liberal Arts at Arizona State University (no Criminal Justice Program existing at that time), he started his probation career at the Maricopa County Juvenile Probation Department and transferred to the Adult Division in 1986.

PRACTICE TIPS

Issues Regarding Police & Prosecutors

Personnel Files of Police Officers

In *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), the Ninth Circuit Court of Appeals held that the government has a duty to examine the personnel files of law enforcement officers it intends to call as witnesses if a defendant requests production of the files. This ruling was based on the grounds that the accused has a right to the production of exculpatory evidence in the possession of the government.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), an accused has a right to the production of exculpatory evidence in the possession of the government. This right, protected by the Due Process Clause of the Fifth and Fourteenth Amendments, requires the government to turn over any information about its witnesses that could cast doubt on their credibility. See, *U.S. v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1974); *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984) ("The prosecutor's oath of office, not the command of a federal court, should have compelled the government to produce any favorable evidence in the personnel records."). Hence, under *Henthorn*, and *Brady*, the government has a duty to examine the personnel files of its law enforcement officer-witnesses for such material.

Practitioners should stay alert for appropriate state cases to test *Henthorn*. For example, a recent *Arizona Republic* headline noted that several undercover officers were under investigation for irregularities in the use of drug "buy" money. A couple of years ago, a Phoenix undercover officer was involved in buying drugs for his own use and converting taxpayer dollars. Several officers in Mesa remain under investigation for possible sexual misconduct.

The *John Henry Knapp* case may be illustrative of the types of exculpatory information (audio tapes, witnesses' interviews, fingerprints, etc.) that may be withheld in some cases by law enforcement and prosecutorial agencies. Hence, aggressive pre-trial investigation is necessary in all cases proceeding to trial.

Cases involving assault on a police officer (where the client indicates that the police used excessive force initially) or claims of law enforcement irregularities in drug busts should prompt practitioners to consider requesting the production of personnel files. Alternatively, a request may be made to have the government or the court examine files for exculpatory evidence. Arguably, a specific request gives

the client some recourse if exculpatory evidence is later revealed that reflects upon the officer's credibility.

Keep Newspaper Articles About Police Officers

One way to assist clients and protect them against unprofessional law enforcement practices is to keep a file of all newspaper articles about police misconduct. For example, a Tuesday, November 5, 1991, *Arizona Republic* article was captioned "Policeman Fired Over Excessive Force." The same article also listed another officer who was fired over his involvement in a house of prostitution. Notwithstanding the holding of *Henthorn* and *Brady*, prosecutors rarely will inform defense counsel that an arresting officer has been dismissed, fired, reprimanded or had his credibility otherwise previously questioned (although it clearly falls under their duty as prosecutors, as *Brady* indicates).

Several years ago, I noticed that the officer responsible for an arrest had been dismissed from the force for misconduct. The misconduct clearly involved his credibility. The prosecutor went so far as to avow (to me) that the officer had indicated a willingness to testify (he was unavailable for the preliminary hearing). The client held tough, insisting on a preliminary hearing. The case was dismissed. Most likely, it will be an exceptional case that will prompt the government to use a police officer that has been discredited for some type of previous misconduct.

An April 1991 *Phoenix Gazette* article chronicles the discipline received by police officers for brutality against citizens from 1985 to 1990. This article is a handy reference. If an officer in your DR shows up on the list, depending upon the type of case, you may have a good motion to discover other information that may bear upon his or her credibility. A pretrial motion assuring its admissibility may also be considered depending upon the nature of the material. If the information is solely for impeachment, a different strategy may be employed.

Agreements By Officers To Violate Miranda (*Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992))

This comes as no shock to experienced practitioners (or our clients), but particularly in high-profile cases, police officers sometimes agree before interviewing a client to violate *Miranda*. A recent Ninth Circuit Court of Appeals case documents this practice by the Tucson Sheriff's Department. This case should be read by any practitioner handling a high-profile case or who has a voluntariness issue pending before a trial court. All judges should read this one also.

(cont. on pg. 11)

In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), the United States Court of Appeals upheld claims by a plaintiff (Cooper) that he could sue the Tucson Sheriff's Department and other officials over their violation of his civil rights. This lengthy case involves a suspect (later completely exonerated) who was held incommunicado for 24 hours, during which time he was incessantly interrogated, despite his initial request for an attorney. The client's repeated pleas were ignored and a whole range of psychological intimidation techniques was used in order to coerce incriminating statements from the suspect (although Cooper never confessed, the officers obtained information that would have appeared incriminating in any trial if he were charged -- like he had assaulted his wife before and that he did not have an alibi for the time period in question). Cooper was picked up because of an erroneous match of his fingerprints by an uncertified criminologist. The prints were later found not to be a match.

Testimony during a hearing in the case established a plan by law enforcement officers to violate any person picked up for questioning so that officers could solve the series of sexual assaults by the "Primetime Rapist." Cooper was not the first detained and subjected to a violation of his rights. The opinion also documents several techniques that officers planned to use to interrogate suspects. The Court wrote that:

"Members of the Task Force knew their intentional violation of all aspects of Miranda would exclude any confession from the prosecutor's case-in-chief. However, they hoped the confession would, in Barkman's words, 'deprive [the suspect] of the opportunity of forming an insanity defense' [citations omitted] They also hoped the confession would prevent the defendant from testifying at his own trial. Sergeant Taylor stated: 'The idea is if they're not going to be able to use the statement, at least it keeps him off the stand.'"

Under examination, the officer in charge of the investigation testified that:

Q. You know that. Okay.

And are you also aware, based upon all the experience and update training you have and so forth, that [sic] request for an attorney must be scrupulously honored; isn't that correct?

A. That's correct.

Q. All right. And are you aware that in denying that request, that you were denying [Cooper] a constitutional right?

A. Was I aware that it was in violation of the U.S. Constitution?

Q. Yes.

A. Is that a question?

I was aware of the fact that, yes, we would be violating his--rights.

Q. All right. Why were you willing to participate in that violation?

A. As I stated yesterday, we had discussions, we referring to Weaver, Barkman and myself, in reference to, when the [suspect] was located, that the first thing he would invoke

would be the right to an attorney. And we had very, very little evidence in terms of all the cases involved. [Legal objection omitted]. Barkman's thinking was identical. First, of all, traditionally, I have believed and taught that when an attorney or someone asserts a right of silence or attorney, cease, scrupulously honor their request, for several different reasons.

But there comes a time when in a major case having major criminal ramifications on public safety you may make a conscious decision to continue the interrogation decision to honor the request.

I have done it. I will in all probability continue to do it. I do not do it lightly . . . [M]y feelings are, if you're going to do interrogation, do it, but report it. Admit.

Later, the officer stated:

A. You know, whether he asked for an attorney or for his mommy or whatever he asked for, if he asked to remain silent, I wasn't going to stop. We decided it was going to be very clear-cut, forget his Miranda rights, the hell with it.

The Cooper case is an eye-opening reminder of how interrogations may be conducted by law enforcement.

. . . police officers sometimes agree before interviewing a client to violate Miranda.

Prosecutor Policies

A frequent refrain from prosecutors is that they can only offer a plea agreement according to their "office policy." Are you entitled to see the policy? For example, the Maricopa County Attorney's Office has certain written policies that it distributes to its deputies. How do you know if the policy is being followed? The obvious way is to ask for a copy of the policy. Several attorneys in the office have received copies of various policies that outline guidelines for plea agreements. Showing the written policy to a client may assist him in understanding a plea agreement that appears too harsh. Moreover, outlining the policy as part of the plea proceeding establishes a record of why the parties agreed to such a harsh plea (information that later attorneys reviewing the file would not know).

What if the prosecutor refuses? You may have grounds to discover the policy or have it produced. One discovery technique that practitioners need to stay aware of is Arizona's Public Records law. See, A.R.S. Sec. 39-121 et seq. That statute provides that "[p]ublic records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."

(cont. on pg. 12)

Other Issues

Rule 11 Motions May Be Filed in JFC

Practitioners using the Justice Felony Center may make Rule 11 motions in felony cases. After conducting the preliminary hearing, the judge should conduct an arraignment. Prescreens (although not provided by the Rule) are preferred in JFC. The case is then assigned to a superior court division for a determination of the Rule 11 based upon the prescreen. If you have questions about the procedure for prescreens or selecting mental health experts for Rule 11's, contact Mark Lloyd (1509).

Commenting on the Alleged Victims' Right to Refuse a Pretrial Interview

When alleged victims refuse to participate in a pretrial interview, defense counsel at trial has every right to ask, comment, discuss, and cross-examine the alleged victim on this issue. Support for this issue is found in A.R.S. Sec. 13-4433(E), which states that "[i]f the defendant or the defendant's attorney comments at trial on the [alleged] victim's refusal to be interviewed, the court shall instruct the jury that the [alleged] victim has the right to refuse an interview under the Arizona Constitution."

Motions by prosecutors to prevent defense counsel from commenting on the alleged victim's unwillingness to participate in the truth-finding process should be vigorously opposed! Cross-examination on this issue is vital to showing that the alleged victim (practitioners may want to use the term "complaining witness" since it does not have the same emotional impact as "victim") is biased. It is also essential for the jury to understand why you are less prepared than with other witnesses that you have interviewed.

Besides the provisions of A.R.S. Sec. 13-4433(E) that clearly support your client's right to comment on the complaining witness's refusal to have a pretrial interview, case law is on your client's side. The Sixth Amendment right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. A denial of cross-examination (without waiver) is constitutional error and no amount of showing of want of prejudice will cure it.

Practitioners should review and keep a copy of *Smith v. Illinois*, 320 U.S. 129 (1968) in their trial notebook as authority (if it is needed!) that our clients are constitutionally entitled to wide latitude in cross-examination. That right includes, for example, the right to place witnesses in their proper setting. Unless extraordinary reasons exist, defense counsel is entitled to develop where the witness lives, former

names, and whether they have spoken before with defense counsel.

Motions to Preclude Prosecutor from Conferring With Complaining Witness

Likewise, under *Smith v. Illinois*, you are entitled to ask the complaining witness the nature and extent of conversations with the prosecutor. No communication between a prosecutor and a complaining witness is privileged. Moreover, some practitioners may want to consider, especially when confronted with a pretrial motion in limine on limiting cross-examination of an alleged victim, motions to limit the prosecutor's contact with the alleged victim.

Recently, the Supreme Court in *Perry v. Leeke*, 488 U.S. ___, 109 S.Ct. ___, 102 L.Ed.2d 624 (1988), held that an accused does *not* have the right to confer with defense counsel during a brief recess in his testimony. This decision, ostensibly decided to further hamper defense counsel,

should be used a two-way sword by the alert defense attorney ("What's good for the goose . . ."). The decision noted that cross-examination is more likely to elicit truthful responses if it goes forward without the witness having an opportunity to consult with his or her lawyer. It further noted that "[t]he reason for the rule (precluding a

Motions by prosecutors to prevent defense counsel from commenting on the alleged victim's unwillingness to participate in the truth-finding process should be vigorously opposed!

witness from consulting with counsel during his or her examination) is one that applies to all witnesses--not just defendants. It is common practice for a judge to instruct a witness not to discuss his or her testimony with third parties [the prosecutor] until the trial is completed."

Alert defense counsel should file the above motion to preclude the prosecutor from further coaching complaining witnesses during trial. The prosecutors will argue that A.R.S. Sec. 13-4419 gives victims the right to confer with the prosecutor. However, defense counsel should note that the rights enumerated in Sec. 13-4419 do not give alleged victims the right to confer with the prosecutor *during* trial.

(cont. on pg. 13)

Complaining Witnesses As Former Clients

An issue that is becoming more prevalent is an alleged victim that is a former client. Some judges are seeking to obtain waivers from the former client so that they may testify. Several ethical issues arise in these circumstances. First, the prosecutor is often asked to help secure the waiver. Note, however, that the prosecutor is in an adversarial relationship since his agency previously prosecuted the complaining witness. Second, defense counsel is in a precarious position (depending upon what he or she thinks about how the complaining witness is going to testify). If he advises the former client to waive the conflict (which may not be in the former client's best interest), it will appear he did so to help the new client. The opposite may also be true. In this case, defense counsel, the court or the prosecutor should allow the complaining witness independent counsel in order to make a knowing, voluntary and intelligent decision about whether to waive a privilege.

Who Is A Victim?

Many county attorneys seem to be confused about who a victim is. Practitioners need to remember that the definition, especially in child abuse and molestation cases, is not as broad as some prosecutors seem to think. A good argument may be made that the definition is very narrow when it comes to others standing in the place of the victim. According to the Arizona Constitution (Victims' Bill of Rights) an (alleged) victim is "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative." Just because an alleged victim is a child does not make the parents of the child "victims." Nothing prevents defense counsel from contacting the mother or father of the victim for interviews. There is no rule or requirement that the county attorney be contacted, nor are any of the provisions of Rule 39 automatically applicable.

In order for the parents to be victims if the child is alive, for example, in a child molestation case, the child must be incapacitated. The Arizona Constitution, Victims' Rights Implementation Act, or Rule 39 does not define incapacitated for purposes of the parents' standing. Presumably, before the parents can claim "victim" status there must be a showing that the child is incapacitated. See, e.g., A.R.S. Sec. 14-5101 (the probate code) defining an "incapacitated person." The definition does not include being underage. That is, defense counsel or the state must have a hearing to show the child is incapacitated so as to prevent interviews with the parents.

Note the benefit for defense counsel. Rarely, would it be in the state's interest to have the child declared incapacitated (since this might easily be equated with competence to testify--at least some arguments open up).

Moreover, A.R.S. Sec. 13-4403 of the Victims' Rights Implementation Act specifically addresses the above issue. Alleged victims may have a lawful representative appointed if they are emotionally unable to exercise any right. Some showing must be made of the inability to exercise the victim's rights. However, note that amendments this year make it clear that the person designated a lawful representative (again by a hearing) cannot be a bona fide witness. If they

are, they are disqualified from serving as a lawful victim's representative in most circumstances. Rarely, again, will there be a case where the parent is not a "bona fide" witness.

Further, A.R.S. Sec. 13-4403 specifically provides the criteria the court must follow to appoint a person to act on behalf of a minor victim or incapacitated person. This must be done by a hearing. *Just having a prosecutor say that the parent is acting as the lawful representative is insufficient.* Note, as well, that A.R.S. Sec. 13-4403 prohibits, unless there is a hearing where the court finds otherwise, a minor's representative from discussing the facts of the case with the complaining witness.

Practitioners need to closely read A.R.S. Sec. 13-4403 and the definition of a "victim" before assuming that parents, relatives, and spouses are "victims" because of their relationship to the complaining witness.

Subpoenaing Minor Victims

Defense attorneys should keep in mind that *State v. City Court of the City of Tucson*, 111 Ariz. Adv. Rep. 79, (1992) a Division Two case, makes it clear that nothing contained in victims' rights rules or legislation prevents defense counsel from subpoenaing an alleged victim to pretrial hearings. Moreover, there is no right of victims to refuse to testify at court proceedings.

Practitioners need to be aware, however, of the special rules governing the service of process on minors. Subpoenas in criminal cases are governed by the Rules of Civil Procedure. Rule 4 addresses the process. Rule 4.1(b) governs service on minors.

Service on minors under 16 years must be upon the minor and upon the minor's father, mother or guardian if they are in the state. If not, the minor and the person having the care and control of the minor must be served. Note that a subpoena, regardless of upon whom it will be served, may be served individually, or at the person's dwelling or usual place of abode by leaving it with someone that is of suitable age and discretion living at the same address. CJ ^

September Jury Trials

August 24

Eric G. Crocker: Client charged with trafficking in stolen property (class 3). Trial before Judge Katz ended with a hung jury (2nd time) September 02. Prosecutor J. Martinez.

August 26

Timothy J. Ryan: Client charged with theft (class 6). Trial before Judge Grounds ended September 01. Client found guilty. Prosecutor J. Beatty.

(cont. on pg. 14)

September 01

David R. Fuller: Client charged with aggravated DUI (class 5). Investigator V. Dew. Trial before Judge Sheldon ended September 03. Client found guilty. Prosecutor S. Wells.

Christine M. Funckes: Client charged with aggravated assault with two priors. Trial before Judge Martin. Client found guilty of misdemeanor assault. Prosecutor M. Branscomb.

September 02

Kevin L. Burns: Client charged with aggravated assault. Investigator N. Jones. Trial before Commissioner Colossi. Client found not guilty. Prosecutor G. McCormick.

September 03

J. Scott Halverson: Client charged with aggravated DUI (class 5). Trial before Judge Sheldon ended September 08. Client found guilty. Prosecutor B. Baker.

September 04

Susan W. Bagwell: Client charged with carrying a concealed weapon. Bench trial before Judge Dougherty ended September 05. Client found guilty. Prosecutor M. Wales.

September 08

Thomas M. Timmer: Client charged with aggravated DUI. Investigator D. Beever. Trial before Judge Dougherty ended September 10. Client found guilty. Prosecutor M. Spizzirri.

September 09

Frank J. Conti, Jr.: Client charged with possession of dangerous drugs for sale (class 3). Investigator V. Dew. Trial before Judge Sheldon ended September 17. Client found guilty of the lesser-included offense (class 4). Prosecutor R. Harris.

September 10

Daniel B. Patterson: Client charged with aggravated assault (dangerous). Investigator D. Tadiello. Trial before Judge Hertzberg ended September 16. Client found not guilty of aggravated assault and guilty of simple assault. Prosecutor A. Massis.

Leonard T. Whitfield: Client charged with aggravated DUI (class 5). Investigator R. Thomas. Trial before Judge Portley ended September 14. Client found guilty. Prosecutor M. Barry.

September 14

Wesley E. Peterson: Client charged with sale of marijuana (class 3). Trial before Judge Sheldon ended September 15. Client found guilty. Prosecutor M. Winter.

September 15

Reginald L. Cooke: Client charged with resisting arrest. Investigator R. Gissel. Trial before Commissioner Trombino ended September 21. Client found not guilty. Prosecutor R. Hinz.

September 16

Daniel R. Raynak & Leslie A. Newhall: Client charged with theft. Investigator H. Schwerin. Trial before Judge Dougherty ended September 29. Client found not guilty. Prosecutor Harris.

Jeffrey L. Victor: Client charged with three counts of aggravated assault. Investigator R. Gissel. Trial before Judge D'Angelo. Client found not guilty. Prosecutor D. Bash.

September 17

Slade A. Lawson & Timothy J. Ryan: Client charged with two counts of attempted theft, seven counts of theft, two counts of credit card theft and one count of fraudulent schemes. Investigator M. Breen. Trial before Judge Hendrix ended September 30. Client found guilty of two counts of attempted theft, five counts of theft, two counts of credit card theft, and one count of fraudulent schemes; found not guilty on one count of theft; one count of theft dismissed. Prosecutor T. McCauley.

James M. Likos: Client charged with aggravated assault. Trial before Judge Duncvant ended September 19. Client found not guilty. Prosecutor G. Thackery.

Raymond Vaca: Client charged with burglary (class 3). Investigator V. Dew. Trial before Judge Portley ended September 23. Client found guilty. Prosecutor M. Barry.

(cont. on pg. 15)

September 21

Robert C. Billar: Client charged with sale of narcotic drugs (two priors). Trial before Judge Seidel ended September 22. Client found guilty. Prosecutor R. Knapp.

Louise Stark: Client charged with transporting marijuana and escape. Investigator D. Erb. Trial before Commissioner Gerst ended September 25. Client found guilty. Prosecutor L. Martin.

September 22

William Foreman: Client charged with burglary and theft (3 priors). Trial before Judge Dann ended September 28. Client found not guilty of burglary and guilty of theft. Prosecutor R. Nothwehr.

Randall V. Reece: Client charged with dog-napping (theft). Investigator C. Yarbrough. Trial before Judge Hertzberg ended September 25. Client found not guilty. Prosecutor D. Drexler.

September 23

Shelley T. Davis: Client charged with aggravated DUI. Investigator D. Beever. Trial before Judge Martin ended September 24. Client found not guilty. Prosecutor S. Atkinson.

September 24

Vicki A.R. Lopez: Client charged with burglary and possession of burglary tools. Investigator J. Allard. Trial before Judge Anderson. Client found guilty. Prosecutor J. Grimley.

September 30

Thomas M. Timmer: Client charged with aggravated assault. Trial before Judge Martin ended October 02. Client found guilty. Prosecutor D. Drexler. ^

Editor's Note: This month we have included in our jury trial summaries the names of the Public Defender investigators that were assigned to cases that went to trial. Our investigators, like everyone in the office, are dedicated to providing the best quality legal services possible. They are an integral and important part of our defense team, and their efforts often go unheralded. While *for The Defense* may not be able to feature the assigned investigators every month in the jury trial section, this is one small way the office can give our investigators the recognition they deserve.

Not all of the important work that they do, however, is for trial. For example, recently Howard Jackson did an outstanding job for a trial attorney in locating a third-party custodian for release, and some essential witnesses. In this particular case, the essential witnesses provided the county attorney with the "truth" of what really happened. The county attorney confronted the complaining witness with the information and she admitted lying to the police. *An injustice was avoided.* The case was dismissed and our client was released from custody.

This is just one of the many examples of the fine work our investigators do for our office. To all of them--keep up the good work!

September Sentencing Advocacy

PEGGY SIMPSON, Client Services Coordinator: Client had a Robbery charge, a class 4 felony, from 1988. He did not appear for sentencing. His current charge was for Forgery, a class 4 felony. Psychological reports from 1988 cast the client in a very negative light. A new psychological report was ordered and yielded more favorable results. The probation officer had recommended a presumptive term in D.O.C. A written proposal was submitted by Client Services Coordinator. On September 23, 1992, Judge Voss sentenced the client to four years Intensive Supervision with Shock Incarceration. Attorney: Robert Billar.

PEGGY SIMPSON, Client Services Coordinator: Client had pled to Possession of Marijuana, a class 6 felony. He had two prior felonies and had been to D.O.C. The probation officer recommended more than the presumptive. A written proposal was submitted by Client Services Coordinator. On September 21, 1992, Judge Schneider sentenced the client to three years probation, no further jail. Attorney: Constantino Flores.

P.S. Of a total of six C.S.C. (Group D) sentencings for September, the probation officer had recommended prison for five clients. Five clients were sentenced to probation. ^

Arizona Advanced Reports

Volume 115

State v. Barrs

115 Ariz. Adv. Rep. 34 (CA 1, 6/18/92)

Defendant pled no contest to attempted burglary, and was sentenced to imprisonment. He was ordered to pay the \$100.00 felony assessment and \$10.00 in restitution. The restitution order, however, was not imposed orally at sentencing, but rather was included in the minute entry of the sentencing proceedings. The court held this was a lawful sentence imposed in an unlawful manner. The court also pointed out that the right to restitution belongs to the victim, and is not a discretionary matter for the state or the court. The restitution order was vacated and remanded to the trial court for resentencing.

[Represented by Alex D. Gonzalez, MCPD.]

State v. Daugherty

115 Ariz. Adv. Rep. 12 (CA 1, 6/16/92)

Defendant was convicted of pandering, a class 5 felony. Defendant's case was tried separate from her co-defendant, defendant's boyfriend and co-owner of "Night Moves." The business advertised itself as a "modeling and companionship" service.

Defendant argues that the trial court erred by admitting hearsay testimony concerning statements made by co-defendant during a three-way conversation with an undercover policewoman at a bar. Noting that the defendant actively participated in the conversation, the court held that the statements were admissible as adopted admissions.

Defendant also argues that because the state failed to prove a *corpus delicti* for the pandering charge, her motion for a directed verdict (judgment of acquittal) should have been granted. The court distinguished *State v. Jackson*, 108 Ariz. Adv. Rep. 3 (March 3, 1992), and held that in cases such as this, where the statements themselves are the *corpus delicti* of the defined crime, the state need not produce corroborating evidence of the crime independent of the proven statements. The conviction and sentence are affirmed.

[Represented by Stephen R. Collins, MCPD.]

State v. DiGiulio

115 Ariz. Adv. Rep. 25 (CA 1, 6/16/92)

The victim's house was burglarized and property taken. The victim suspected the defendant, but defendant denied any participation. Desperate for the return of his property, the victim offered to pay defendant to help him locate the property. Defendant agreed, but wanted written authorization. The victim gave the defendant written authority to recover the property and absolved him of responsibility or prosecution for the theft. The victim contacted the police,

who followed the defendant. The property was located at a store; the owner testified defendant had sold the property to him. Defendant was convicted of trafficking in stolen property.

Defendant argues that the evidence at trial was insufficient to support his trafficking conviction because, at the time of defendant's transfer of the property back to the victim, the property was no longer stolen. Defendant argues that his arrangement with the victim constituted an agency relationship. The court noted that violating the duty of loyalty or failing to disclose adverse interests voids an agency relationship. While defendant was "authorized" to recover the property for the victim, he lacked "lawful" authority to do so since the defendant misled the victim.

Defendant contends that his conviction for trafficking must be vacated because fundamental error occurred in the jury instructions. The court found fundamental error in the jury instruction on trafficking in the first degree. An essential element was omitted: that defendant must have participated in the theft, as well as the trafficking, of stolen property. The court found it unnecessary to remand for retrial because the instruction adequately informed the jury of the elements of trafficking in the second degree, a lesser-included offense. Although the court could not find a case where a modification of the judgment of conviction to a lesser offense had been ordered to rectify an inadequate jury instruction, the court modified the judgment to reflect defendant's conviction for trafficking in the second degree and remanded for resentencing.

Defendant argues that his acquittal on theft charges constitutes inconsistent jury verdicts. The court rejected defendant's argument, noting that there is no constitutional requirement that verdicts be consistent.

After the jury's verdict, defendant admitted a prior felony conviction. Defendant argues that the trial court erred because, at the time defendant admitted his prior felony conviction, the trial court failed to advise him that he would have to serve 2/3 of any sentence imposed before parole. The court affirmed the trial court's finding of a prior felony conviction, and noted that the defendant may properly raise this allegation by a petition for post-conviction relief.

[Represented by James M. Likos, MCPD.]

State v. Lopez

115 Ariz. Adv. Rep. 44 (CA 2, 6/23/92)

During an attempted drug sale and armed robbery, defendant's accomplice is shot and killed by the police. Defendant is charged and convicted of sale of narcotics, attempted armed robbery, and felony murder.

(cont. on pg. 17)

Defendant claims on appeal that the Arizona's felony murder statute was improperly applied because defendant was under arrest at the time of the shooting, making the attempted robbery complete and precluding any charge of felony murder. The court rejected this argument, finding that whether or not the defendant was subdued when the shooting occurred was in dispute. Even assuming defendant had been disarmed, the felony murder rule would still apply because the defendant's actions were the proximate cause of the accomplice's death. Additionally, the court rejected the defendant's argument that he was entitled to an instruction defining arrest because defendant's arrest was irrelevant to the application of the felony murder rule.

Defendant claims that Pima County had no jurisdiction over the drug offense because all elements happened in a different county. The trial court had jurisdiction because there was conduct constituting an element of the offense which occurred in two counties, giving either county jurisdiction. A.R.S. Sec. 13-109(B)(1).

Defendant claims he is entitled to a new trial because one juror failed to inform the court that he had problems understanding English. The juror had sufficient understanding of English to serve as a juror where he was able to understand and answer all voir dire questions without an interpreter.

Defendant claims he was entitled to a severance because his defense was antagonistic to his co-defendants. Defendant was not improperly denied severance because the defenses of the three co-defendants were not inconsistent or mutually exclusive.

State v. Mayer

115 Ariz. Adv. Rep. 43 (CA 2, 6/16/92)

Defendant argued that the trial court improperly engaged in an *ex parte* discussion with the probation officer prior to sentencing, and that he must be resentenced. The court held that no violation of the Code of Judicial Conduct occurred since a probation officer is an officer of the court, and is not conferring with the judge "by or for one party."

State v. Rodriguez

115 Ariz. Adv. Rep. 36 (CA 2, 6/11/92)

Defendant was stopped for a DUI offense. In a span of 11 minutes, defendant was tested three times using the Intoxilyzer 5000. The first two tests resulted in BAC's greater than .020 of each other (.148 and .125). The officer, having been instructed by his superior that "the two tests have to be within .020 of each other," tested the defendant a third time with a result of .130. The trial judge granted a motion to suppress the test results, and the state sought special action relief. Rejecting the respondent judge's ruling "that a law enforcement officer could continue to obtain BAC, *ad infinitum*, until the results were within .02 of each other," the court held that administering more than two breath tests is not grounds for suppression.

Defendant also moved to suppress the field sobriety test results on *Miranda* grounds. The trial judge concluded that the FST's were testimonial in nature, they were obtained while defendant was in custody but not "Mirandized," and were inadmissible. The court disagreed, stating that under *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988), the person was not in custody for purposes of *Miranda*. Special action relief is granted and the case was remanded for further proceedings.

State v. Batista, 115 Ariz. Adv. Rep. 44 (CA 2, 6/16/92)

Opinion published at 106 Ariz. Adv. Rep. 52

State v. Campos, 115 Ariz. Adv. Rep. 44 (CA 2, 6/16/92)

Opinion published at 97 Ariz. Adv. Rep. 22

Both opinions ordered depublished and redesignated memorandum decisions.

Pima County Juv. Action No. 108965-02

115 Ariz. Adv. Rep. 35 (CA 2, 6/11/92)

Minor claims that the order adjudicating him delinquent on a charge of possessing a deadly weapon on school grounds must be reversed because his conduct did not constitute a cognizable offense. Minor argues that because of recent statutory changes, passage of chapter 316 with an emergency clause effectively repealed chapter 237, which is inconsistent with the former. The court disagreed, following the rule of statutory construction that where one statute does not expressly repeal the former, the two are construed to give effect to each.

Minor also claims that the authorized version of the statutes did not give him constitutionally adequate warning that his conduct was proscribed. The court disagreed noting that, in any event, any error was clearly technical where the petition stated the offense in narrative form as well as citing to the statute.

Volume 116

State v. Reed

116 Ariz. Adv. Rep. 12 (CA 1, 6/18/92)

Defendant beat up a school bus driver inside a school bus. He was convicted of aggravated assault under A.R.S. Sec. 13-1204(A)(6) for assault on a "person employed by any school."

Defendant argues that the bus driver, being employed by a "school district" and not a "school" was not therefore a "person employed by any school." The Court of Appeals rejected this argument based on statutory construction and legislative intent behind A.R.S. Sec. 13-1204(A)(6), and affirmed defendant's conviction and sentence. Defendant was properly convicted of aggravated assault under A.R.S. Sec. 13-1204 (A)(6).

[Represented by James L. Edgar, MCPD.]

(cont. on pg. 18)

State v. Richardson

116 Ariz. Adv. Rep. 17 (CA 1, 6/25/92)

Defendant pled guilty to two separate offenses and was placed on probation. He received concurrent terms of probation, but with one year flat in the county jail on each case to be served consecutively. Defendant claims that he cannot be given two years in jail as a term of probation. Under A.R.S. Sec. 13-901(F), a trial court may order consecutive one-year periods in the county jail as a term of probation for separate offenses. (Overruling *State v. Weigel*, 27 Ariz. App. 343, 554 P.2d 1286 (1976)).

State v. Chavez

116 Ariz. Adv. Rep. 22 (CA 1, 6/25/92)

Defendant pled guilty to a pair of unrelated felonies and was placed on probation with additional jail time. His probation was later revoked and he received consecutive prison sentences. He had done substantial time in jail initially awaiting trial, as a term of probation, and awaiting probation revocation proceedings. The judge credited all the time to one sentence and no time to the other sentence.

Pretrial jail time credits can only be credited to one sentence when probation is later revoked and consecutive sentences are imposed, pursuant to *State v. CruzMata*, 138 Ariz. 370, 674 P.2d 1368 (1983), and *State v. Cuen*, 158 Ariz. 86, 751 P.2d 160 (App. 1988). Jail served concurrently for two offenses as a condition of probation likewise can only be credited to one sentence when probation is later revoked and consecutive sentences are imposed.

[Represented by Spencer D. Heffel, MCPD.]

State v. Cook

116 Ariz. Adv. Rep. 41 (CA 2, 6/30/92)

Defendant was convicted of DUI while on a suspended license. Defendant argues on appeal that it was error to permit the prosecutor to correlate results of the HGN test with blood alcohol content. The Court of Appeals held that even though the officer's testimony correlating HGN to BAC levels was inadmissible under *State ex rel Hamilton v. City Court (Lopresti)*, 165 Ariz. 514, 799 P.2d 855 (1990), the defendant opened the door to this testimony during cross-examination when defendant created the impression that the officer's 97% accuracy rate in administering the HGN was based only on unsupervised self-reporting. The prejudice did not outweigh the probative value of this evidence because there was only one brief mention of any correlation with chemical test results, and the officer did not attempt to estimate the defendant's blood alcohol level.

Defendant claims it was error to deny the defense request for a continuance when a defense witness failed to appear. There was no error in denying the defense's motion to continue because there was no showing that the witness could have been located and produced within a reasonable period of time had a continuance been granted.

State v. Lane

116 Ariz. Adv. Rep. 27 (CA 1, 6/30/92)

Defendant was on the home arrest program. He pled guilty to escape for failing to return home after an authorized job search. The plea included the admission of two prior felony convictions and stipulated to the maximum six years flat on the escape charge. The trial court sentenced the defendant to the maximum six years, to be served consecutively to the sentence he was serving at the time of his escape.

Defendant argues on appeal that it was improper for the trial court to enhance his sentence for escape with his escape status. The Court of Appeals found that the defendant committed the escape while "on release", and that supported the enhanced sentence. Because the sentence enhancement was proper, defendant's argument that his plea was involuntary because the court advised him he would be sentenced to "flat time" fails. The court's warning was correct and the defendant's plea to flat time was therefore knowingly made.

Defendant was also not entitled to be advised by the judge of his right to a trial by jury on the allegations of his prior conviction. *State v. Barnes*, 167 Ariz. 186, 805 P.2d 1007 (1991).

[Represented by Carol Carrigan, MCPD.]

State v. Saez

116 Ariz. Adv. Rep. 19 (CA 1, 6/25/92)

Defendant was convicted of importation of a narcotic drug, possession of a narcotic drug for sale, conspiracy to sell a narcotic drug, attempted sale of a narcotic drug, and four counts of sale of a narcotic drug. Defendant claims that the court erred in denying his motion to suppress the cocaine seized at the time of his arrest. The court affirmed the trial court's denial of the motion to suppress. The defendant's car had been stopped pursuant to a tip from a "reliable informant" that the defendant was going to a cocaine sale at a restaurant at a set time. The tip was corroborated when defendant and his car were seen going towards the restaurant near the appointed time. This was enough for reasonable suspicion to stop the car. When the police saw the defendant pour a powder into a jug of water, this created probable cause for an arrest. The seizure of the jug and the baggie was valid as incident to that arrest. That the agents had their guns drawn as they approached the vehicle did not make the arrest premature.

Defendant claims there was insufficient evidence to convict him of conspiracy to sell a narcotic drug. The court found sufficient evidence of intent to sell and an agreement to sell from evidence that a witness had told defendant of a third person's interest in buying drugs, from defendant's making telephone calls to acquire the drugs, and defendant's telling the witness to bring the third person to a restaurant. Intent to sell and an overt act in furtherance of sale were proved with evidence that the witness took the third party to the restaurant, where defendant told the third party he could get the drugs in Los Angeles. The court did not find it necessary that the offense be completed to sustain a conviction for conspiracy.

(cont. on pg. 19)

Defendant claims there was insufficient evidence to support the attempted sale conviction. The court found ample proof of attempted sale of a narcotic drug in the evidence that defendant took steps toward commission of a sale of a narcotic drug. The evidence consisted of meeting with the third party to set up the sale, calling Los Angeles to obtain the drugs, and arranging to meet with that third party to complete the sale.

Defendant claims his conviction for sale of narcotics rests upon the unqualified testimony of the buyers that it was narcotics. As to whether a drug user may offer an expert opinion that a substance is a narcotic drug, the court followed the majority of jurisdictions and held that drug abusers or addicts may possess sufficient qualifications to testify about matters at issue in a narcotics prosecution. In this case the witnesses were properly qualified as experts where they testified as to extensive personal use of cocaine, and familiarity with packaging and the effects of cocaine. The court deemed it immaterial that no chemical analysis was performed on the cocaine.

Volume 117

State v. Superior Court

117 Ariz. Adv. Rep. 31 (CA 1, 7/21/92)

The state filed a special action to the Court of Appeals when a juvenile court commissioner ordered a six-month continuance of a transfer hearing in order to take

into consideration the juvenile's future conduct. The Court of Appeals held that the juvenile court does not have authority to continue a transfer hearing for an extended period of time to take the juvenile's future conduct into consideration. The Court of Appeals considered Rule 14 of the Rules of Procedure for Juvenile Court and that "future conduct" is not one of the facts set forth in deciding whether to transfer a juvenile for criminal prosecution as an adult. The Court of Appeals also considered Rule 6.1 of the Rules of Procedure for Juvenile Court effective 1 March 1992, and deemed it to reflect a Supreme Court policy restricting continuances in juvenile court.

State v. Decker

117 Ariz. Adv. Rep. 16 (SC, 7/16/92)

Defendant was convicted of second degree burglary and theft. At sentencing, the trial court used the defendant's Iowa misdemeanor conviction for enhancement purposes; the Court of Appeals agreed but the Arizona Supreme Court vacated.

The Arizona Supreme Court compared the Iowa conviction with Arizona law and found that the defendant's Iowa offense would have been a felony in Arizona. The court analyzed that while defendant's prior conviction in Iowa made him eligible for enhancement under A.R.S. Sec. 13-604(I), none of the enhancement provisions (A.R.S. Sec. 13-604(A-G)) applied to defendant. The Arizona Supreme Court found that because defendant's 1978 Iowa conviction was classified as a misdemeanor and not a felony, the prior

conviction could not be used to enhance the defendant's sentence. The pertinent enhancement provision was A.R.S. Sec. 13-604(B), which provides that a person who has been previously convicted of "any felony" shall be given an enhanced sentence. The Arizona Supreme Court interpreted "any felony" to mean that a person should not be given an enhanced sentence if he/she has been previously convicted of an offense which, if committed in this state, would have been classified as a felony. The foreign state's classification of a conviction as a misdemeanor or a felony determines whether it is a misdemeanor or felony for the purposes of sentence enhancement in Arizona.

State v. Melendez

117 Ariz. Adv. Rep. 12 (SC, 7/16/92)

An inmate defendant was charged with first degree murder of another inmate. Before trial, the trial court granted defendant's motion to suppress communications defendant made to another inmate who had served as one of defendant's "jailhouse lawyers" in preparation for a prison disciplinary hearing arising from the same killing. The Court of Appeals reversed the trial court's ruling and the Arizona Supreme Court granted review.

Arizona Department of Corrections regulations give an inmate the right to be assisted by another inmate as his appointed representative in prison disciplinary proceedings. The Arizona Supreme Court held that it would be fundamentally unfair and violate the defendant's due process rights under art. II, sec. 4 of the Arizona Constitution for the state to be permitted to introduce testimony garnered from communications between defendant and his formal inmate representative. The Supreme Court declined to reach the issue of whether the statutory attorney-client privilege would apply to communications with inmate representatives, or whether the defendant's rights under the United States Constitution had been violated.

State v. Woody

117 Ariz. Adv. Rep. 44 (CA 2, 7/14/92)

The defendant was charged with second degree murder but was convicted of manslaughter, DUI and driving with BAC over .10. Defendant, on appeal, argues for a reversal because the state was permitted to introduce evidence of a prior DUI. The Court of Appeals found that the details of his prior DUI conviction were properly introduced under Rule 404(B) to show whether defendant's mental state reflected a reckless indifference to human life.

Prior to trial, defendant moved to suppress the BAC test results because the police did not preserve or inform defendant of his right to an independent sample. The motion to suppress the BAC test results was properly denied based on *State v. Kemp*, 168 Ariz. 334, 813 P.2d 315 (1991), where the Supreme Court ruled that enforcement officers were not required to inform a suspected drunken driver that he had a right to a portion of the sample so long as the sample is available for testing at trial. In this case there was evidence that a sample was available at the time of trial.

(cont. on pg. 20)

Defendant claims it was prosecutorial misconduct to argue that defendant was "in fact" guilty during opening statement and closing argument. The Court of Appeals noted that the defendant did not object to the statements. The Court of Appeals found no fundamental error in the prosecutor's remarks that the defendant was "in fact" guilty. Considering the substantial evidence of defendant's guilt, the fact that the court instructed the jury that counsel's arguments were not evidence, and the fact that the defendant was convicted of the lesser-included offense of manslaughter, no fundamental error occurred.

Defendant also claims prosecutorial misconduct for referring to the presence of the victim's family at trial. While it was improper for the prosecutor to argue about the presence of the victim's family throughout the trial, the judge's curative instruction that the presence or absence of the victim's family was not relevant should have been effective.

This conviction was the defendant's first dangerous offense. His sentence was properly enhanced with two prior non-dangerous convictions as a repetitive non-dangerous offense. *State v. Smith*, ____ Ariz. ____, 828 P.2d 778 (App. 1992).

Volume 118

State v. Superior Court

118 Ariz. Adv. Rep. 27 (CA 1, 7/30/92)

The state seeks review in this special action of the trial court's rejection of a plea agreement on the ground that it contained a stipulated sentence. The trial court explicitly indicated its displeasure on the record with the fact that the plea agreement left no sentencing discretion to the court. The state contends that a trial court does not have authority to reject an entire plea agreement based on a finding that a stipulated sentence is inappropriate. Instead, because the trial court rejected only the sentencing provision, it is required under Rule 17.4 to accept the plea subject to rejection of the sentencing provision, limiting the sentencing judge to the statutory range for the counts to which he pled guilty. The appeals court disagreed, finding no abuse of discretion in the trial court's rejection of the plea in its entirety because the trial court has wide discretion in deciding whether to accept or reject a plea agreement. Special action relief is denied.

The state also contends that the trial court abused its discretion in striking the state's allegations of *Hannah* priors by finding that the mandatory enhanced sentencing range would subject the defendant to cruel and unusual punishment. The appeals court agreed, finding this order was improper because the prosecution has sole discretion to file an allegation of prior convictions for purposes of invoking enhanced sentencing, and the court has no discretion to dismiss the allegation. The court did note, however, that application of mandatory enhanced sentencing provisions may constitute cruel and unusual punishment, but that determination is usually made at sentencing, not prior to trial. The state's allegation of prior convictions is reinstated.

State v. Superior Court

118 Ariz. Adv. Rep. 31 (CA 1, 7/30/92)

Defendant, charged with DUI, moved to suppress the BAC test results because he might have consumed alcohol at the hospital after his arrest but before the test. The trial judge granted the motion to suppress. The state sought special action relief when the superior court affirmed the trial judge's suppression of defendant's blood and breath tests. The question of whether the defendant had consumed alcohol while in the hospital emergency room after an automobile accident was not one of law, but was rather one for the jury. The fact that the officer did not smell alcohol on defendant's breath at the accident scene was not determinative. The superior court is directed to reverse the order of the trial judge.

State v. Rivera

118 Ariz. Adv. Rep. 19 (CA 1, 7/28/92)

Defendant pled guilty to two counts of attempted sexual conduct with a minor. Defendant argues that the record contained an insufficient factual basis to support his guilty plea on Count III. The court disagreed, finding that defendant's acknowledgement that he "performed the sexual act" was made immediately after he admitted a specific sexual act on Count I (placing his mouth on [X]'s penis). The extended record, including the police reports, also support the factual basis.

The trial court sentenced defendant on Count I to a mitigated 5-year prison term, but also ordered that if defendant was released early, he was to serve one full year in jail. Defendant argues that the trial court exceeded its sentencing authority by imposing a one-year jail sentence on Count I. On Count III, the trial court suspended the imposition of sentence and placed defendant on lifetime probation. The appeals court held that the trial court exceeded its authority in imposing the one-year jail sentence in Count I, but affirmed the one-year jail sentence imposed in Count III as a term of probation.

Defendant argues that the trial court improperly imposed an \$8.00 time payment fee twice, one for each count. The appeals court agreed, reasoning that the Legislature intended that the time payment fee be assessed only once per person, unlike the felony assessment fee that may be applied per felony.

State v. Snider

118 Ariz. Adv. Rep. 13 (CA 1, 7/23/92)

Defendant, found to have violated the terms of his probation, was reinstated on probation but required to serve a year in jail.

(cont. on pg. 21)

At the violation hearing, the probation officer testified to the urinalysis test results without the state having introduced the test reports themselves. Defendant argues that the trial court erred by permitting the state to introduce unreliable hearsay. The court disagreed, noting that the defendant did not present any evidence to refute the reported test results, nor did the defendant testify that he had not used drugs. The results were also corroborated by observations of the probation officer.

Defendant argues that the trial court erred by imposing a full year's probationary jail term without credit for the time defendant had spent in custody awaiting violation hearing and disposition. The court disagreed, citing A.R.S. Sec. 13-901(F) allowing up to one year in jail "within the period of probation." Time spent in custody during probation revocation proceedings is not "within the period of probation" and does not count against the maximum one year in jail.

[Represented by James M. Likos, MCPD.]

Volume 119

State v. Green

119 Ariz. Adv. Rep. 23 (CA 2, 8/11/92)

The defendant was convicted of two counts of attempted murder and kidnapping. At the time of the offense, defendant was on probation under A.R.S. Sec. 13-3601(H)(domestic violence) for aggravated assault.

The Court of Appeals held that under A.R.S. 13-3601(H) no prior felony yet existed. Although the defendant pled guilty to aggravated assault, this guilty plea is neither a determination of guilt nor a conviction for purposes of impeachment or sentence enhancement. Had probation been revoked prior to trial, a judgment of guilt would have been entered, and the conviction could have been used for impeachment and sentence enhancement. The enhanced sentence was vacated in this case, but the improper impeachment was harmless error under *State v. Ferreira*, 152 Ariz. 289, 731 P.2d 1233 (App. 1986).

The Court of Appeals also found that the state improperly argued the facts surrounding the probation offense during rebuttal, but the Court of Appeals deferred to the trial court's ruling denying a new trial because the defendant failed to object to the statements during rebuttal. ^

Editor's Note: Our thanks to Leslie Newhall and Nina Stenson for assisting Appellate Review Editor Bob Doyle with the Arizona Advanced Reports summaries this month. Anyone interested in helping with this section of the newsletter should contact the editor or Bob Doyle.

Personnel Profiles

Sheryl Lossing began employment as a legal secretary in our Appeals Division on October 26th. Sheryl, who has an AA from Glendale Community College, was previously employed as a legal secretary with Beer, Toone and Ryan, P.C.

Martha Perches started as an office aide in Group B on September 30th. Martha, a recent high school graduate, has office/reception experience from her past employment with Olan Mills. She plans to attend evening college courses beginning in January, 1993. Martha replaced Julie Avilla who is now the office's Investigative Aide. ^

Public Defender's Office Speakers Bureau

Our Speakers Bureau continues to grow as more attorneys join. Anne-Rachel Aberbach, Larry Matthew, Paul Prato, Garrett Simpson and Robert Ventrella are our most recent additions.

The number of requests for speakers has grown as well. In September, Paul Prato, Garrett Simpson and Larry Matthew spoke to a group of South Mountain High School students on criminal defense work as a career.

On October 7th, Tom Klobas spoke on the topic of the Public Defender's Office to an evening Justice Studies class at Phoenix College.

On October 30th, Anne-Rachel Aberbach and Dan Raynak will go to Peoria Elementary School for an on-campus retreat for 7th- and 8th- grade students. Ms. Aberbach and Mr. Raynak will spend the morning talking to four different groups about the justice system and the consequences of criminal activity.

Anyone interested in joining our Speakers Bureau or finding a speaker for an event should contact Georgia Bohm at 506-8200. ^

