

for The Defense

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The Training Newsletter for the
Maricopa County Public Defender's Office

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Old "Open Ends": A Weird Answer To An Ar- cane Question Is, Unfortunately, In. We Lost. The Answer Could, However, Have An Impact On Current Clients.

by B. Bond

Okay. This is esoteric stuff which may come up once in a blue moon, assuming you have a client who has been around awhile. For those of you old enough to remember, this is a variation on the *State v. Sweet* stuff. For those of you who want a rundown of the legal machinations, see my previous article in the June, 1991, *for The Defense*. Here is the (shorthand) "need to know" information:

(1) A class six "open" conviction and sentence entered after October 1, 1978, but prior to August 4, 1984, is not a prior felony under Sec. 13-604, unless the offense was actually designated a felony prior to the conduct comprising the new crime;

(2) A class four "open" conviction and sentence entered after October 1, 1978 but prior to September 5, 1989, is not a prior felony under Sec. 13-604 unless the offense was actually designated a felony prior to the conduct comprising the new crime.

The "why" is the Court of Appeals' Opinion in *State v. Peterson*, 1 CA-SA 91-041, a special action pursued and (oops) eventually lost by yours truly. Mr. Peterson, sentenced finally in March, 1993 for his October, 1990 probation violation, was not too excited by the result. His case was a four "open" erroneously left undesignated before the September, 1989 amendment allowing "undesignated" treatment. We admitted a violation, but argued at "dispo" that the offense could not be designated a felony based on some loose language in *State v. Watkins*, 161 Ariz. 108, 776 P.2d 359 (App. 1989). The judge wasn't quite sure what to do, so he backed my client out of his 1987 plea and sentence (following the reasoning of *State v. Welker*, 155 Ariz. 554, 748 P.2d 783 [App. 1987]).

We screamed double jeopardy; that was denied, then went up on special action. We won the battle, but lost the war in the Court of Appeals. The Court held:

(1) The trial court erroneously vacated the judgment of guilt and set aside defendant's guilty plea; in so doing, it placed him in double jeopardy. [The battle.]

(2) A trial court, confronted with a designation omission as in this case, may belatedly designate the crime, even though the court may not give retroactive, nunc pro tunc, sentence-enhancing status to a belated felony designation. [The war.]

(3) To relieve defendant of double jeopardy, we need not direct the trial court to grant defendant's motion to dismiss. Instead, we direct the trial court to reinstate the original judgment and belatedly supply the missing designation.

Belatedly." What's this "belatedly" stuff? I've heard of "retroactive" and "prospective." Now we've got "belatedly." ^



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Editors' Note: We owe a "thank you" to all of the support staff who gave us extra assistance on the newsletter during the months that Teresa Campbell was on leave. A special thanks goes to Ellen Hudak for her help in formatting and editing our newsletters, and to Heather Cusanek for handling the word processing on the majority of the articles for the February, March and April issues.

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. FOR THE DEFENSE is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

DUI Odds and Ends

by Gary Kula

In this month's column, we will address a number of issues which are commonly encountered in the defense of DUI cases.

I. Refusal Cases

A. Jury Instruction on Search Warrant

We have all heard the arguments of the prosecution dealing with a client's refusal to take a breath test. These arguments range from the prosecution argument that they, the jury, won't hear from one witness (i.e. the breath machine) all the way to the analogy that a refusal to take a breath test is the same thing as a refusal to show a store security guard a receipt as proof that an item had been paid for. Oftentimes, the jury begins their deliberation with the idea that the State really wanted the test evidence, but was unable to obtain it as a result of our client's refusal to cooperate. In order to strike back at this unreasonable argument, you should draft a jury instruction showing that the State did have an opportunity to obtain a sample of our client's blood, urine or other bodily substance, but failed to do so. This can be accomplished through the use of the following instruction:

Defendant's Requested Jury Instruction

Search Warrant

Under Arizona law, if a person arrested for driving while under the influence refuses to submit to the tests designated by a law enforcement officer, the officer may then seek the issuance of a search warrant. This search warrant can then be used to obtain a sample of the person's blood, urine or other bodily substance to determine the alcohol concentration or drug content within that sample.

If the law enforcement officer failed to seek the issuance of a search warrant, you may consider such evidence together with all other evidence.

Source: A.R.S. §28-691(D), A.R.S. §28-692(I).

If you look at the statutes which are cited, you will see that this instruction is a correct statement of the law. This proposed instruction rebuts any State argument or inference that evidence was lacking because of the actions of our client. This instruction places the burden squarely on the prosecution where it rightly belongs.

(cont. on pg. 3)

In order for the court to give this instruction, it is important that you elicit testimony from the police officer that he could have sought the issuance of a search warrant, but failed to do so. In preparing your questioning of the officer, you must be prepared to address the officer's likely response that the issuance of a search warrant can be a time-costly process and is not practical for each and every DUI arrest. In this day and age of telephonic search warrants, you should not allow the officer to use the time element as an excuse for his failure to do a thorough investigation or his failure to use all legal resources and procedures which are available to him. This instruction allows the jury to make the reasonable inference that the officer failed to seek a search warrant because he really was not that interested in finding out about your client's BAC level for fear that it would be inconsistent with his "alleged" observations and opinion on the issue of impairment.

B. Improper Closing Argument by the Prosecution

We have all heard the prosecution's closing argument about how our client's refusal to take a breath test can be likened to a person's refusal to show a store security guard a receipt for the purchase of milk or a jacket or something of the like. You should object to the State's use of such an analogy with a Motion in Limine. This argument is clearly contrary to the presumption of innocence and it impermissibly suggests to the jury that the burden is on your client to prove his innocence. That's not how our system works.

C. State's Proposed Instruction on "Refusal"

You should carefully review the language in the third paragraph of the State's proposed jury instruction on refusal. Oftentimes, the instruction will misstate the law with language that a motorist is not entitled to the assistance of counsel in deciding whether or not to submit to a test. This is a misstatement of the law. If you look at the language in the Juarez case, 161 Ariz. 76, 75 P.2d 1140 (1989) and the Kunzler case, 154 Ariz. 568, 744 P.2d 669 (1987), you will see that the law provides that an individual is entitled to the assistance of counsel so long as it does not unreasonably interfere with the testing process. Depending upon the facts of your particular case, you may ask that this third paragraph be deleted from the proposed State's instruction or be reworded so that it accurately reflects the status of the law as it exists in the State of Arizona.

II Intoxilyzer 5000 Invalid Samples

In recent weeks, a number of cases have come through where the first breath test result on the Intoxilyzer 5000 machine was "INVALID SAMPLE." A second breath test was then given two to three minutes later and a BAC reading was obtained. Under this scenario, the printout card for the first breath test on the Intoxilyzer 5000 will read as follows:

Test BAC ValueTime

Air Blank .00001:14
INVALID SAMPLE .XXX01:15
Air Blank .00001:16

According to the operator's manual for the Intoxilyzer 5000, Breath Analysis Instrument, the manufacturer, C.M.I., states that a printout of "INVALID SAMPLE" means:

"The instrument detected residual mouth alcohol in the subject's breath sample."

If you see this type of printout in your client's case, it is a red flag that mouth alcohol is present. If mouth alcohol is detected, the operator should start an additional observation or deprivation period to ensure that all mouth alcohol dissipates. If a test result reads "INVALID SAMPLE," the manufacturer's operation manual states:

"Since normal body processes eliminate residual mouth alcohol within fifteen minutes, observe the subject for at least fifteen minutes before beginning another breath analysis. During the observation time, the subject may not smoke, eat, drink, or introduce any substance into his mouth. Furthermore, if the subject regurgitates, note the time and delay beginning a breath analysis for at least fifteen minutes."

The current practice of giving a second test within two or three minutes of the first "INVALID SAMPLE" printout is improper. If you run into an "INVALID SAMPLE," you should first determine whether the operator commenced an additional observation or deprivation period. Absent an additional waiting period, you should consider using expert testimony to refute the accuracy of the breath test results. The State's position that the slope detector on the Intoxilyzer 5000 obviates the need for an additional waiting period is weak. This argument is contrary to: 1) the manufacturer's own recognition that there be at least a 15-minute waiting period, and 2) the recent promulgation of regulations by DHS for the Intoxilyzer 5000 which requires a 15-minute deprivation period or a 20-minute observation period. Certainly, the manufacturer and DHS were aware of the presence of a slope detector in the machine. The slope detector is not infallible. The manufacturer knows it; DHS knows it.

(cont. on pg. 4)

III. DHS Approved Checklists

On August 27, 1992, the new Arizona Department of Health Service regulations went into effect. Attorney Roger Blake recently had a case in which he noticed that the breath test operator failed to use the new operational checklist in administering the breath test. As a result of the officer's failure to use the current operational checklist, the admin per se suspension of Mr. Blake's client was voided by the hearing officer of the Arizona Department of Transportation, Motor Vehicle Division. In the order voiding the suspension, the hearing officer relied on the language of A.R.S. §28-695(A)(4) which states, "The operator who conducted the test followed an operational checklist approved by the Department of Health Services for the operation of the device used to conduct the test."

This issue should be used not only for MVD administrative hearings, but should also be raised during trial when the State seeks to introduce the breath test results into evidence. While the State may argue that the checklists are substantially similar, defense counsel should rely on the Fuening decision for the argument that strict adherence to the Arizona Department of Health Services' regulations is required. Fuening vs. Superior Court in and for the County of Maricopa, 139 Ariz. 590, 680 P.2d 121 (Ariz. 1983). It is important that the foundational objection to the checklist be made at the time the State attempts to admit the breath test results into evidence. If this issue is brought to the forefront too early, the State may attempt to have the breath test results admitted into evidence pursuant to the holding in Deason (State ex rel Collins vs. Scidel), 142 Ariz. 587, 691 P.2d 678 (Ariz. 1984). If you are uncertain as to whether the breath test operator used the correct operational checklist in your case, please contact the training division of our office and we can provide you with a copy of the current regulations and current operational checklists for each of the approved breath testing devices.

IV. Discovery

The foundational requirements for the admission of a breath test result into evidence are outlined in A.R.S. §28-695(A). Under A.R.S. §28-695(A)(5), the State must show that:

"The device used to conduct the test was in proper operating condition. Records of periodic maintenance which show that the device was in proper operating condition at a time before and after the test are admissible in any proceeding as prima facie evidence that the device was in proper operating condition at the time of the test. Such records are public records."

For the most part, you will find that the calibration checks are done on a regular basis. In your cases, however, you must find out whether the breath machine was taken out of service following one calibration check, but placed back into service prior to the subsequent calibration check. At first glance at the prior and subsequent calibration check records, it would appear that pursuant to the statute, the machine was in proper operating condition both prior to and subsequent to your client's breath test. On closer examination, however,

you may find that those calibration records do not tell the whole story. For that reason, it is important that you make it a regular practice to request not only the calibration records prior to and subsequent to your client's test, but also the log books as well as other maintenance records which may indicate whether the machine was in continuous service from the time of the first calibration check until the time of the subsequent calibration check. Recently, a case came through the system where the regular, periodic calibration check was done four days prior to the defendant's breath test. That machine was then taken out of service three days after the breath test, but then was placed back into service in time for the next scheduled calibration check. It appeared from the calibration records alone that the machine had been in good working condition throughout that relevant time period. You must be thorough in your discovery requests to make sure that this type of deception does not occur in your cases. ^

PRACTICE POINTERS

Client Perjury

The March edition of The Champion, the NACDL monthly magazine, announced a new ethics advisory opinion (Formal Opinion 92-2). The opinion, adopted by the NACDL Board of Directors, concludes that the constitutional privilege against self-incrimination and the constitutional right to effective assistance of counsel prevent an attorney from revealing a client's perjury to the court, regardless of ethical rules that appear to require disclosure.

Specifically, the opinion rejects the so-called "narrative solution," where attorneys are advised to allow the client to testify without any further assistance from counsel. The problem being that this conduct telegraphs to judge and prosecutor that the client is "lying."

The opinion further prohibits defense counsel from "improving" upon the client's perjury and requires the attorney to make a good faith effort to dissuade any client from engaging in perjury. "In the rare case in which a lawyer is unable to dissuade the client from testifying falsely, the opinion requires the lawyer to examine the client in the usual way and, to the extent tactically desirable, to argue the client's testimony to the jury."

The opinion also adopts the prevailing view among criminal defense lawyers that defense counsel should not act on the belief that a client intends to commit perjury unless the lawyer has "actual knowledge" that testimony will be false or, at least, knows this to be true beyond a reasonable doubt.

(cont. on pg. 5)

Lastly, the opinion notes, and it should be stressed, that the NACDL ethics opinion cannot offer "safe harbor." In close cases lawyers should proceed cautiously with the full knowledge of local ethical rules (and ideally the advice of counsel). Our office will sponsor a criminal law ethics seminar that will deal with client perjury, among other issues, on May 28th. If you do not have a copy of the opinion, it is available from the Training Division.

Search Warrant Affidavits

Dealing with *Franks v. Delaware* issues is sometimes overlooked, especially as caseloads rise. Here is a quick refresher.

The fourth amendment permits defense counsel to challenge a warrant affidavit valid on its face that is misleading. Some cases also support the holding that a deliberate or reckless omission by a government official who is not the affiant can be the basis for a *Franks* suppression.

In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court held that a defendant seeking an evidentiary hearing to determine whether a facially valid affidavit contains false statements, must make a preliminary showing that: (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information. If the accused prevails in a *Franks* evidentiary hearing, evidence obtained on the basis of a search warrant issued on an affidavit containing omissions or misrepresentations must be excluded. The 9th Cir. has extended *Franks* to material fact omissions even by a non-affiant when the omissions are reckless or deliberate and tend to mislead. See *States v. Stanert*, 762 F.2d 775 (9th Cir. 1985).

The leading Arizona case on the issue is *State v. Buccini*, 167 Ariz. 550, 810 P.2d 178 (1991). In a Justice Feldman written opinion, the supreme court noted that the defendant must establish by the preponderance of the evidence that there was a false or misleading statement for the first prong of the *Franks* test, and that on appeal the judge's findings will be reviewed under a "clearly erroneous" standard. The court also noted that on the second *Franks* prong, the court reviews de novo whether a redrafted search warrant affidavit is sufficient to establish probable cause (under *Illinois v. Gates* probable cause exists if "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

Note, in *Buccini* the supreme court upheld the trial court's suppression of the evidence. Justice Cameron, specially concurring, provides an interesting discourse on probable cause, and Justice Corcoran dissented. Justice Corcoran argues that the redrafted affidavit still supports "a reasonable finding of probable cause."

Jury Instructions Prior to Closing

Several judges on the criminal bench have taken to insisting on reading jury instructions prior to closing arguments. So what's the big deal? There are couple of good reasons why defense counsel may consider objecting and making a detailed record for appeal.

First, it is against the general provision of the rule. Rule 19.1(a), Ariz. R. Crim. P. clearly notes eight steps in which the trial should proceed and its order. According to the rule, the judge is to charge the jury last.

The only problem is that two clauses in the rule appear to provide the court some discretion. The first clause notes that the order may be changed "unless otherwise directed by the trial court." The second clause notes that "with the permission of the court, the parties may agree to any other method of proceeding."

Hence, defense counsel may have to do battle with the court and argue that, at the very least, defense counsel must agree to change the order.

If you lose, the record you may want to make is based on the very sound reason the rule exists. It is suppose to promote a fair trial. If the jury does not hear the instructions read by the judge last, what they will hear last is the prosecutor, and he will pepper his final closing with plenty of selective references to jury instructions helping his or her case. Despite the government's burden of proof, this unfairly works to the government's advantage. Remember "primacy" and "recency" from every trial practice course?

Consider always insisting that judge follow the dictates of Rule 19.1(a), Ariz. R. Crim. P., and making a record if your objection is overruled. Specifically note the "unfair" prejudicial effect.

Tainting Jurors By Judges

Last year "*for The Defense*" ran a piece on the practice of some prosecutors and police officers improperly tainting jurors after trials, especially where the client is acquitted.

Arizona State Bar Ethics Opinion 78-42 notes that while it is permissible for lawyers to speak with jurors after trials for purposes of "self-education" or "for evidence of jury misconduct," lawyers may not make comments that tend . . . to influence actions of jurors in future cases."

The opinion condemns prosecutors', and presumably any other lawyers, telling jurors after a trial has concluded that a defendant has a prior conviction, that the prior conviction is the reason he did not testify, that other criminal matters are pending, and that incriminating evidence was suppressed from the case.

(cont. on pg. 6)

When judges or prosecutors inform jurors of our client's priors, other pending cases, or speculate with the jury as to why he did not testify, they are leading jurors to conclude in the future that all defendants have poor character. Moreover, jurors tell their family and friends this information, further "tainting" future jurors. Eventually, the entire Maricopa County jury pool will be tainted and our clients will never get a fair trial.

As noted, while State Bar Ethics Opinion 78-42 was drafted in specific response to improper prosecutor conduct, it should also be applicable to judges. Whether a client is acquitted or convicted, jurors should never leave their service feeling bad, especially because an insensitive prosecutor or judge feels it necessary to tell them about evidence they could not consider at trial. The only purpose for telling jurors this information is to embarrass them and influence their future conduct. And, while not covered specifically by the Code of Judicial Conduct, this behavior appears to fall under the provisions of Canons 1 and 2 (uphold integrity of judiciary and avoid appearance of impropriety by promoting "public confidence in the integrity and impartiality of the judiciary").

One way to combat this practice by a prosecutor or judge is to file a motion prior to trial asking the court not to allow any party to "taint" the jurors following the verdict based on Opinion No. 78-42. This will educate the prosecutor and the judge to this improper conduct. Copies of this opinion are available from the training division.

Recross-Examination

Some trial courts indicate either prior or during trial that they will not allow recross-examination. Defense counsel may want to object at the time of the announcement and during the actual trial. "Blanket" prohibitions are disfavored, and at least one recent Ninth Circuit case has reversed a conviction solely on the basis of the trial court's blanket prohibition of denying defense counsel recross. In *U.S. v. Jones*, 982 F.2d 380 (1992), the Ninth Circuit Court of Appeals noted that "[i]n the case before us, by reason of the district court's policy forbidding recross-examination, new information elicited on redirect examination was not subjected to recross-examination by defense counsel. When material new matters are brought out on redirect examination, the Confrontation Clause of the Sixth Amendment mandates that the opposing party be given the right if recross-examination on those new matters."

Rules of Evidence

Many practitioners may have heard of Sunwolf, a criminal defense lawyer from Denver Colorado, known for her aggressive advocacy for her clients. Among other things, Sunwolf advocates the use of stories that are metaphors for your case in both voir dire and in closing arguments. She notes that if the story is good, objections will be overruled. She says that there are "really only two rules of evidence." First, "the judge will let it in if the prosecutor needs it to convict your client, and two, he'll let it in if it's interesting." ^

Defense Victories, 1992(?)

by James P. Cleary

Arizona appellate court decisions in 1992 provided relief for criminal defendants in several areas. In addition to decisions clarifying the permissible use of prior felony convictions for sentence enhancement or impeachment purposes, appellate court opinions addressed issues of victims' rights, prosecutorial vindictiveness and misconduct, and grand jury procedures.

The outline below highlights what could be characterized as helpful, balancing opinions for a criminal defendant's rights in Arizona courts.

I. Screw-Ups From the Git Go.

Korzep v. Superior Court, ___ Ariz. ___, 838 P.2d 1295 (1991).

Division 1 of the Court of Appeals once again addressed procedural issues arising from this case's extensive litigation history. In its opinion, the court held that *Korzep* was entitled to a remand to the grand jury which indicted her where the grand jurors would be instructed on *Korzep's* self-defense justification defenses which arise out of A.R.S. Sec. 13-411.

O'Meara v. Superior Court, 123 Ariz. Adv. Rep. 13 (10/1/92)(On review before the Arizona Supreme Court - argued 2/17/93).

Division 1 of the Court of Appeals addressed the issue of a prosecutor's duty to instruct grand jurors on the law applicable to the offense under its consideration. The court determined that in a grand jury proceeding considering charges of sale of marijuana, instructions on the definition of "knowingly", read and given to the grand jurors six weeks prior to consideration of defendant's case, was not proper and meaningful instruction to the grand jurors in order to make decisions of indictment. This was deemed fundamentally unfair and required remand to the grand jury for a new determination of probable cause.

II. Now, Wait Just a Minute!

State v. City Court of Tucson, 111 Ariz. Adv. Rep. 79 (4/30/92).

Division 2 of the Court of Appeals confronted the issue of whether the Victims' Bill of Rights prohibited the use and issuance of a pretrial subpoena of a victim. In this case, a victim had been subpoenaed to a probable cause hearing. The court had little difficulty determining that a subpoena for such a court hearing was not a ruse for discovery purposes, which would be disallowed, but a legitimate request for testimony at a court hearing on an issue of probable cause. Under such circumstances, it determined that the Victims' Bill of Rights did not preclude subpoenas for a victim to appear and testify at a court hearing.

(cont. on pg. 7)

State v. Superior Court, ___ Ariz. ___, 836 P.2d 445 (1992).

Division 1 of the Court of Appeals upheld a trial court's order directing a victim to produce his medical records to assist the defendant in asserting a defense to a charge of aggravated assault. The medical records concerned the victim's multiple personality disorder. The court found that a criminal defendant's right to present a defense and confront his accuser, under the circumstances of this case, were constitutional rights which overrode the victim's right to refuse discovery requests under the Victims' Bill of Rights.

S.A. v. Superior Court, 171 Ariz. 529, 831 P.2d 1297 (1992).

Division 1 of the Court of Appeals addressed the issue of whether the Victims' Bill of Rights permits a victim to refuse to testify at an accused's criminal trial. Following its earlier decision and reasoning in the *Roper* case, (the case involving a victim with multiple personalities, *supra*) the court found that a criminal defendant's confrontation rights required a victim's testimony at a criminal trial. Further, its review of evidence available as to the intent of the Victims' Bill of Rights revealed no evidence supportive of a victim's right of refusal to testify at a criminal trial.

III. Gotcha!

State v. Archie, 171 Ariz. 415, 831 P.2d 414 (1992).

Division 2 of the Court of Appeals held that a prosecutor's avowals concerning attempts to locate a victim and assure her presence for trial did not constitute good-faith efforts necessary for a finding of unavailability to allow admission of the victim's former recorded testimony. The court found the record before it contained insufficient facts detailing the prosecution's compliance with the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. A.R.S. Sections 13-4091-4096.

State v. Downing, 171 Ariz. 431, 831 P.2d 430 (1992).

Division 1 of the Court of Appeals reversed a trial court's denial of a defense mistrial motion. The court found that the prosecutor's elicitation of testimony from a police officer (on two occasions) that the defendant, upon arrest and after *Miranda* warnings, exercised his rights to counsel and silence, was not an inadvertent comment on defendant's post-arrest silence. Hence, reversal of the conviction was necessary, due to the apparent repetitive nature of the error.

State v. Tsosie, 171 Ariz. 683, 832 P.2d 700 (1992).

Division 1 of the Court of Appeals upheld a trial court's finding of prosecutorial vindictiveness in the charging and filing of an indictment. The timing and actions of the prosecutors were sufficient to demonstrate an appearance of vindictiveness. The prosecutors' evidence and arguments of non-vindictiveness were not persuasive to overcome the appearance of vindictiveness.

Finally, the court upheld the dismissal of all charges in the indictment. It believed that was the only meaningful remedy to deter future actions of vindictiveness.

IV. Even Judges Have Rights!

State v. Ramsey, 171 Ariz. 409, 831 P.2d 408 (1992).

Division 1 of the Court of Appeals held that the provisions of A.R.S. Sec. 13-3601(H), which required prosecutorial concurrence to defer sentence and judgment for a domestic violence defendant, were unconstitutional. The court found that the legislative requirement of prosecutorial concurrence violated Article 3 of the Arizona Constitution, separation of powers. It determined that the prosecutorial concurrence requirement was, in effect, an executive veto power that unreasonably impeded the judiciary's power to resolve criminal matters.

V. So, You Thought It Was Going To Be Easy!?

State v. Jackson, 108 Ariz. Adv. Rep. 3 (3/3/92)(Depublished).

In this case, Division 1 of the Court of Appeals affirmed a trial court order suppressing a defendant's confessions on the grounds that the state had failed to present adequate proof of the corpus delicti. Of consequence, in the court's opinion, was the unique procedural posture upon which the trial court ruled and the state ultimately appealed.

The suppression finding was made by the trial court on the basis of a pretrial motion *in limine* ruling. Review of the trial court suppression order was limited to clear and manifest error scope of review, where facts and conflicts in evidence were viewed in a light most favorable to the trial court's ruling. On the basis of the record evidence, the court saw no manifest error in the trial court's ruling.

Editor's Note: These case summaries come from a presentation by Jim Cleary, MCPD, at the Arizona Prosecuting Attorneys' Advisory Council Seminar given on February 5, 1993 in Phoenix.

Bulletin Board:

Speakers Bureau

Our Speakers Bureau continues to reach different community groups and schools.

Tamara Brooks discussed the typical public defender case and the criminal justice system at a February 16 meeting of the International Soroptimists.

On February 26, Gerald Kaplan addressed four 7th- and 8th-grade civics classes at Buckeye and reviewed the juvenile court system.

On April 16, Carole Scott Berry, Tamara Brooks, Robert Ventrella and Michael Walz will go to the Palo Verde Middle School's "Career and Drug Education Day," and will speak on the criminal justice system and careers as attorneys.

Latest additions to the Bureau: John Taradash and Thomas Timmer.

Subpoena Power

by Christopher Johns & Ernesto Quesada

Using a subpoena duces tecum is integral to zealous client representation. Independent investigation, a basic defense counsel duty, requires subpoenas for documents that may prove the client's innocence. Additionally, prosecutors' failure to expeditiously provide discovery necessitates aggressive, compulsory process use to guarantee the client's speedy trial rights.

Background

Issuance

The Sixth Amendment grants our clients the same right as the government to compulsory process. That right enable clients to force the attendance of witnesses and documents for court proceedings, except to a grand jury.

Article 21 of the Arizona Criminal Code governs the issuance of subpoenas. A.R.S. Sec. 13-4071 *et seq.* Subpoenas for our clients may be issued by the "clerk of the court in which an indictment or information is to be tried." A.R.S. Sec. 13-4071(B)(1). Since our clients are poor, the "clerk shall, at any time, upon application of the [accused], and without charge, issue as many blank subpoenas . . . as the [accused] requires."

Service

A subpoena may be served by any person, and by either personal service, certified mail, or first class mail, if a certificate of service and return card is returned by the addressee. The proper procedure for each kind of service is described in A.R.S. Sec. 13-4072.

Note, however, personal service is made by showing the original to the witness personally. It includes informing the person of the subpoena's contents and delivering a copy. Written return of service must then be given without delay.

Failure to comply with the subpoena subjects a person to contempt. A.R.S. Sec. 13-4073(A). Further, a person failing to comply with an accused's subpoena is liable for \$100 in a civil action.

Carpenter v. Superior Court

Recently, a Phoenix Police Department Operational Order outlined a policy to resist subpoena requests for documents. Although the order appeared related to overbroad subpoenas, it advocated that all requests for "discovery" must go through the prosecutor and Rule 15, Ariz. R. Crim. P. since "[t]he Public Defender's Office uses subpoenas rather than discovery requests because it is felt that the county attorneys are not cooperating with discovery requests."

At least one trial court agreed, and issued orders to the effect that all "discovery" subpoenas by public defenders must go through the state and the court for approval. A petition for special action by Russ Born and Marie Farney of our office overturned the order, and an opinion should be issued in the near future.

Prosecutorial Misuse of Subpoenas

While the so-called use of "discovery" subpoenas highlights the necessity for defense counsel to narrowly draw and properly use subpoenas, there are other issues defense counsel should keep in mind. Since prosecutors may also use legal process, the opportunity to abuse witnesses and to achieve improper ends are possible.

A significant issue is prosecutorial use of subpoenas for witnesses, including subpoenas of police officers to a prosecutor's office to conduct interviews, and for other purposes. For example, it is not uncommon to find out that for a Rule 15 interview of police officers at the prosecutor's office, a subpoena was used. Likewise, subpoenas issued by prosecutors for suppression hearings and even trials often command the witness to appear at the county attorney's office. A subpoena may also be used to obtain the attendance of an accused's witness for a prosecutor's pretrial interview. The appearance, at least, is that the subpoena is being used in place of Rule 15 in many instances and therefore improperly.

When a subpoena has been issued in a criminal action, Arizona law provides that ". . . the witness shall attend and be present in the court before which he has been summoned . . . until finally discharged by the court." A.R.S. Sec. 13-4074(A).

Is it proper for prosecutors to subpoena witnesses to their offices? While the statute is clear, no Arizona case law is directly on point. However, the federal courts are clear. Rule 17(a) of the Federal Criminal Rules is a little more specific in that it notes that a subpoena is for trial or formal proceedings. Federal case law holds that a federal criminal subpoena does not authorize the government or defense to require a witness to report to some place other than where the trial is to be held.

ABA Standards

The practice of summoning witnesses to the prosecutor's office by use of colorable judicial process has also been severely criticized by the ABA. The ABA Standards for Criminal Justice note that "[i]t is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized to do so. Obviously, the prosecutor cannot be authorized to do so if he or she has issued a subpoena for an office interview that is not related to a legitimate court proceeding at that time in court."

(cont. on pg. 9)

The ABA commentary specifically notes that there "is evidence that some prosecution offices have occasionally scheduled persons for interviews by means of documents that in format and language resemble official judicial subpoenas or similar judicial process even though they lack subpoena power in these instances. Such practices are improper and amount to a subversion and usurpation of judicial power."

Conclusion

The aggressive and proper use of subpoenas is necessary to afford our clients quality legal representation. Proper use of subpoenas requires familiarity with the statutory provisions, rules, and procedures. Misuse of subpoenas by the prosecutor may have to be brought to the trial court's attention. In order to be of benefit to the client, however, the misuse must demonstrate prejudice for purposes of appeal. Hence, the only victory may be to force prosecutors to comply with the law; that itself may be a win for the client. ^

April Brief Bank Deposits

Editor's Note: The Maricopa County Public Defender's Office Brief Bank contains motions, jury instructions and appellate briefs. Terminals for the Brief Bank are located on the 10th Floor in the Main Library, the 3rd Floor in the Appeals Library, Durango Juvenile Facility, and the Southeast Court Center for Trial Group C. The Brief Bank is for the use of county public defenders. The following notes are only some of the recent deposits. Please retrieve information directly from the Brief Bank.

State v. Browning, 1 CA-CR 92-0386 (Opening Brief Filed April 6, 1993).

Author: Carol Carrigan. This brief argues that the lesser-included offense instruction given by the trial court violates the due process clause of the U.S. and Arizona Constitutions. The accused was charged with aggravated DUI. At the close of trial, the trial court, on its own motion and without mentioning it to defense counsel, gave RAJI Standard 22 as to the lesser-included offense of driving on a suspended license. The instruction includes language that the jury may find the accused "guilty of the less serious crime only if you find unanimously" that the state has failed to prove the more serious crime beyond a reasonable doubt. The brief notes that although this instruction was sanctioned in *State v. Wussler*, it deprives the jury of the right to deliberate the lesser offense as part of its deliberations on the principle offense.

State v. Castillo, No. 1 CA-CR 92-900

Author: Paul Prato (Opening Brief Filed March 31, 1993). This brief argues, among other things, that defense counsel's denial for a motion of acquittal was an abuse of discretion, and that the trial court unreasonably restricted defense counsel's cross-examination of the alleged victim.

During cross-examination of the victim, defense counsel attempted to question her about her alleged refusal to consent to a pretrial interview. The court sustained the prosecutor's objections. Later, the judge changed his ruling and allowed defense counsel, as is proper, to question the complaining witness on this issue. Still, the judge cut off defense counsel as he explored why the victim refused the interview, and then instructed the jury about the "constitutional right" of an alleged victim to refuse a pretrial interview. Defense counsel objected.

The brief notes that the right of cross-examination is fundamental, and is not restricted to matters covered on direct. The court's ruling prevented defense counsel from exploring and developing a topic critical to the alleged victim's credibility. Further, the brief notes that while the so-called Victims' Bill of Rights gives alleged crime victims the right to refuse a pretrial interview, it does not give crime victims the right to refuse to testify at an accused's criminal trial. The victims' rights do not affect an accused's substantive right to confront and cross-examine witnesses.

State v. Fisher, CR 92-09373 (Motion to Suppress Filed January 25, 1993).

Author: Ray Schumacher. This motion to suppress argues that the government illegally seized a client, forced him to perform field sobriety tests, and then arrested the accused for DUI. Client and friends were at a bar and left in four cars. They all drove to a grocery store and parked. After they had parked, a police officer approached the group and asked to whom one car belonged. Client admitted owning the car and was then requested to perform tests.

The preliminary hearing was conducted. The client was bound over; however, the police officer failed to appear for suppression hearing, and counsel was allowed to read in his preliminary hearing testimony. Based on that testimony and defense counsel's argument, the case was dismissed.

State v. Fodor, 1 CA-CR 91-1524 (Reply Brief Filed March 17, 1993).

Author: James Rummage. This brief argues, among other things, that a conviction for perjury cannot be upheld because a determination of materiality was not made by the trial court.

State v. Martin, 1 CA-CR 92-1523 (Opening Brief Filed March 24, 1993).

Author: Edward McGee. This brief argues, among other things, that the government's use of an unqualified "propensity" witness (R. Emerick) is reversible error, and that prior bad acts evidence was impermissibly admitted at trial.

(cont. on pg. 10)

State v. Trujillo, 1 CA-CR 92-1530 (April 5, 1993).

Author: Garrett Simpson. This reply brief argues that the trial court abused its discretion by failing to suppress evidence. The defendant was awakened in the middle of the night in his hotel room by knocks on his door, and when he answered his residence was invaded without permission or cause by armed policemen. Defense counsel moved to suppress on the grounds that the contraband was seized after a warrantless arrest violating the Fourth Amendment and the Arizona Constitution.

The burden of proof was on the state since warrantless searches are presumptively invalid. The defendant testified at the motion to suppress, but the government failed to present any evidence.

Despite the clear directive of Rule 16.2(b), requiring the state to carry the burden of evidence by a preponderance of evidence, which it failed to do, the trial court adopted the unsworn and unsubstantiated allegations of the prosecutor to deny the motion. ^

March Jury Trials

February 18

Larry Grant & William Foreman: Client charged with 20 counts sexual misconduct with a minor, two counts custodian interference and one count sexual abuse. Trial before Judge Bolton ended March 10. Client found guilty on two counts sexual misconduct with a minor, guilty on one count sexual misconduct with a minor (class 2 dangerous), and guilty on two counts of custodial interference (class 3). Client found not guilty on 15 counts of sexual misconduct with a minor, hung jury on one count, two counts dismissed. Prosecutor L. Reckart.

March 1

Robert Corbitt: Client charged with unlawful flight. Trial before Judge Sheldon ended March 2. Client found guilty. Prosecutor T. Glow.

Tom Kibler: Client charged with burglary first degree. Investigator A. Velasquez. Trial before Judge Chornenky ended March 3. Client found guilty. Prosecutor L. Ruiz.

March 2

Joe Stazzone: Client charged with murder first degree. Investigator R. Gissell. Trial before Judge Schneider ended March 16. Client found guilty. Prosecutor J. Sandler.

March 3

Randy Saria: Client charged with sale of marijuana. Trial before Judge Dann ended March 10. Client found not guilty. Prosecutor L. Martin.

Jeffrey Victor: Client charged with burglary and theft. Trial before Judge Seidel ended March 4. Both charges dismissed. Prosecutor Grimley.

March 8

Kevin Burns: Client charged with murder. Investigator P. Kasieta. Trial before Judge Hotham ended March 18. Client found not guilty. Prosecutor Barry.

David Goldberg: Client charged with armed robbery (with two priors and on probation). Investigator H. Jackson. Trial before Judge DeLeon ended March 12. Client found not guilty. Prosecutor V. Harris.

William Peterson: Client charged with theft. Trial before Judge Roberts ended March 10. Client found not guilty. Prosecutor M. Hamm.

March 9

Eric Crocker: Client charged with two counts of aggravated DUI. Investigator R. Thomas. Trial before Judge Hilliard ended March 16. Client found guilty (retrial from hung jury). Prosecutor B. Baker.

March 10

Reginald Cook: Client charged with aggravated DUI. Investigator A. Velasquez. Trial before Judge Ryan ended March 12. Client found guilty. Prosecutor Z. Manjencich.

March 11

Daphne Budge: Client charged with one count of possession of narcotic drugs, and two counts of aggravated assault, dangerous. Investigator N. Jones. Trial before Judge Galati ended March 15. During jury deliberations, a plea agreement (which stipulated DOC) was reached. While the judge was taking the plea, the bailiff interrupted to advise that the jury had reached a guilty verdict on one count, and was "hung" on the other two counts. The judge allowed a recess and the plea was renegotiated. The defendant then pled to one count of possession of narcotic drugs and two counts of attempted aggravated assault (all class 4 felonies) with no agreements on sentencing and with probation available. Prosecutor P. Sullivan.

William Foreman: Client charged with burglary (with two priors and on parole). Trial before Judge Bolton ended March 17 with a hung jury. Prosecutor S. Yares.

(cont. on pg. 11)

Doug Harmon: Client charged with burglary and theft (with two priors). Trial before Judge Hendrix ended March 17. Client found not guilty on burglary. Hung jury on theft. Prosecutor M. Morrison.

March 12

Carol Berry: Client charged with armed robbery and aggravated assault. Investigator H. Schwerin. Trial before Judge Trombino ended March 18. Client found not guilty on armed robbery and guilty on aggravated assault. Prosecutor Grimley.

March 15

Brad Bransky: Client charged with sexual assault, armed burglary, sexual abuse and kidnapping. Investigator H. Schwerin. Trial before Judge Martin. Client found not guilty on all counts. Prosecutor Amado.

William Stinson: Client charged with two counts burglary first degree, one count burglary third degree and one count aggravated assault. Trial before Judge Ryan ended March 18. Client found guilty on two counts burglary first degree and one count aggravated assault. Not guilty on burglary third degree. Prosecutor Charnell.

March 16

Jeffrey Victor: Client charged with attempted burglary. Trial before Judge Gerst ended March 17. Client found guilty. Prosecutor Sanders.

Stephen Welihan: Client charged with criminal trespass, disorderly conduct and resisting arrest. Investigator J. Al-lard. Trial before Judge Brown ended March 18. Client found guilty on criminal trespass and resisting arrest. Not guilty on disorderly conduct. Prosecutor Branscomb.

March 22

Timothy Agan: Client charged with armed robbery and kidnapping. Investigator P. Kasietta. Trial before Judge Cates ended March 25. Client found guilty. Prosecutor Charnell.

Robert Billar: Client charged with DUI. Trial before Judge D'Angelo ended March 24. Client found guilty. Prosecutor Spizzirri.

Cathy Hughes: Client charged with DUI. Trial before Judge Brown ended March 23. Client found guilty. Prosecutor M. Ainley.

March 23

David Anderson: Client charged with theft. Trial before Judge Portley ended March 29. Client found guilty. Prosecutor M. Hamm.

Daniel Sheperd: Client charged with possession of marijuana and possession of drug paraphernalia. Trial

before Judge Trombino ended March 25. Client found guilty. Prosecutor Hinchcliff.

March 24

Dennis Farrell: Client charged with armed robbery (with priors). Investigator D. Beever. Trial before Judge Brown ended March 29. Client found not guilty. Prosecutor Amato.

Cathy Hughes: Client charged with possession of marijuana. Trial to the court before Judge Bolton ended March 25. Client found not guilty. Prosecutor M. Troy.

March 29

John Movroydis: Client charged with burglary. Trial before Judge Hotham ended March 31. Client found guilty. Prosecutor Sanders.

March 30

Gary Hochsprung: Client charged with aggravated DUI. Trial before Judge De Leon ended March 31. Client found guilty. Prosecutor Duarte.

March 31

James Cleary: Client charged with trafficking in stolen property. Trial before Judge Chornenky ended March 31. Client found guilty. Prosecutor Clarke.

Editor's Note: Correction -- In the February issue of *for The Defense*, an inaccurate result was reported for the January 29 trial handled by Eugene A. Barnes. The client was charged with possession of narcotic drugs. Correct results: a hung jury (4 to 4) on possession of narcotic drugs; client found guilty of possession of marijuana. State later dismissed the possession of narcotic drugs charge. ^

Arizona Advanced Reports

Volume 129

State v. Baltzell

129 Ariz. Adv. Rep. 20 (Div. 1, 12/15/92)

Defendant was convicted of negligent homicide and reckless endangerment. At sentencing, he was ordered to pay restitution for the family's funeral expenses, travel expenses, lost wages and attorney's fees. At sentencing, defense counsel agreed that funeral expenses were appropriate but that counsel was "not sure about the lawyer's fees and things like that." Defense counsel's comments were too vague to preserve an objection to the court's order. Counsel's approval of part of the restitution is not the same thing as a proper objection to the remainder of the restitution. The issue has been waived absent fundamental error. It was not error to order the restitution in this case. The family's travel and lost wages expenses were part of their duty to come to Arizona and settle the victim's affairs. Customary and reasonable attorney's fees to close the victim's estate are also appropriate items of restitution. No fundamental error occurred.

At trial, the defendant took the stand in his own behalf and was cross-examined. On redirect examination, his lawyer alluded to the fact that another person had not been called as a witness. The prosecutor sought permission to recross-examine the defendant. The trial judge denied the prosecutor's motion. In explaining this to the jury the trial judge stated that "everything about the other gentleman does not make one bit of difference for your decision in this particular case." Defendant claims that this was a comment on the evidence because the judge expressed his opinion about the evidence. Part of the judge's instruction could have been interpreted as a comment that any testimony about the defendant's interaction with the second driver was immaterial. The judge's comment did not mislead the jury. First, defendant helped create the problem by commenting on the other driver's absence. Second, the potentially confusing comment was only a part of the judge's entire statement. The gist of the statement was that the jury not consider the other driver's absence. Third, the comment was combined with a curative instruction that the jury not speculate on the absence from trial of any other person. Finally, defendant's counsel was allowed complete freedom to argue the effect of the other driver's action upon the defendant's conduct. No error occurred.

At trial, an accident investigator testified for the prosecution that the defendant was traveling between 85 and 99 miles per hour just prior to the accident. There was no objection to this testimony. Defense counsel did object to the expert's estimates of speed based upon "occupant kinematics." Two photos of the victim's car with the victim still inside were also admitted over objection. Defendant claims that the testimony was inadmissible because the prosecution failed to demonstrate that occupant kinematics has gained general scientific acceptance. See *Frye v. United States*, 293 F. 1013 (D.C. 1923). Whether the evidence was offered as scientific fact and required to meet the *Frye* test is doubtful. The testimony of the expert was arguably sufficient foundation to

sustain the admission of the evidence. The investigator also was able to testify to the speed of the defendant's vehicle based upon different accident reconstruction techniques. The photographs were relevant to providing a basis for the investigator's opinion and were not gruesome. Conviction and sentences are confirmed.

[Represented on appeal by Lawrence S. Matthew, MCPD.]

State v. Lopez

129 Ariz. Adv. Rep. 3. (12/22/92)

The defendant was convicted of one count of felony murder and one count of child abuse. He was sentenced to death on the felony murder conviction and 22 years imprisonment on the child abuse conviction.

The defendant's one-year-old child was left in his care. When the child's mother returned, the defendant told her that an accident had occurred. The defendant told the mother that the child had pulled a nightstand over on himself. The child's mother wanted to take the child to the hospital, but the defendant refused, saying the child would be all right. Later that day, the child's condition required the defendant to perform CPR on him. He was pronounced dead at a local hospital.

When police were called, the officers read the defendant his *Miranda* rights. The defendant related the same story he earlier had told the child's mother. He then became upset and the interview ended. Later that evening, detectives told the defendant they again wanted to question him, but wished to tape the interview. The defendant admitted that he hit the child and thereafter his *Miranda* rights again were read to him. He indicated that he understood his rights and would continue to answer questions. He never asked for an attorney nor did he refuse to answer any questions. During the interview another detective arrived and decided that the tape recorder was affecting the defendant's candor. The defendant admitted that he was concerned that the child's mother would hear the tape. At that point the detective assured the defendant that she would not hear it.

Hospital personnel advised the police that the injuries found on the child were not consistent with the stories told by the defendant. It was determined that he died of blunt-force trauma to the head, chest and abdomen. A search warrant was obtained for the defendant's apartment.

The defendant was indicted on one count of first-degree murder and one count of child abuse. He moved to suppress all the evidence found pursuant to the search warrant and all his statements to the police. He also moved to preclude the use of his prior conviction for child molestation because the conviction was not final. The trial court denied the motions to suppress, but granted the motion to preclude the use of his prior conviction. The trial court also granted the state's motion to preclude character evidence on behalf of the defendant. Over objection, the trial court admitted the autopsy photographs.

(cont. on pg. 13)

Admission of Statements

The defendant claims that the officers failed to *Mirandize* him prior to each interview and that he was coerced into making the statements. Confessions are *prima facie* involuntary and the state has the burden of showing that they are voluntary. To determine voluntariness, the trial court must look to the totality of the circumstances and determine whether the defendant's will was overborne. In this case, the defendant was given his rights twice. An individual who has been given his *Miranda* rights does not have to be readvised of them prior to any subsequent questioning absent circumstances that would alert police that he might not be fully aware of his rights. In this case, there is no indication that the defendant was not fully aware of his rights during all of the interviews. Therefore, the defendant's statements were not obtained in violation of *Miranda* and the trial court properly denied his motion to suppress.

The defendant also claims that his statements were coerced because he was offered a benefit in exchange for a statement. The defendant contends that he would never have stated that he struck the child if the detective had not promised that he would not play the tape for the child's mother. Although promises of benefits of leniency, direct or implied, are impermissibly coercive, the evidence must show that a promise of a benefit or leniency was made in fact and that the suspect relied on that promise in making the statement. Here, no such promise was made. The detective merely stated that he was not going to play the tape for the child's mother. Even if the statement could be construed as a promise, the second prong of the standard was not satisfied. Prior to the detective's statement, the suspect had already admitted to other detectives that he had struck the child. Therefore, the admission occurred prior to the alleged inducement, making it voluntary.

Gruesome Photographs

The defendant claims that the autopsy photographs of the child were inflammatory, prejudicial and misleading. To determine the admissibility of photographs, the trial court must decide whether they are relevant and whether they aid the jury in understanding an issue in the case. If the photographs are deemed relevant, the trial court must then decide whether they are inflammatory. If they are, the next decision must be whether the danger of unfair prejudice substantially outweighs their probative value.

The defendant was charged with felony murder. The predicate offense was child abuse. The photographs were relevant to prove that the child had been abused. They were not sufficiently inflammatory nor were they misleading, although some showed the bruising on the child's body after lividity had set in and made the bruises appear more severe. The doctor performing the autopsy was cross-examined by defense counsel on the subject of lividity. Therefore, the photographs were properly admitted.

Preclusion of Character Evidence?

The defendant argues that the trial court erred in precluding him from presenting character evidence in regard to his reputation as a nonviolent person. When presenting his case, a defendant may offer evidence of his good character

as substantive evidence from which the jury may infer that he did not commit the crime charged. This type of evidence may be offered as long as it pertains to a trait involved in the charge. Here, the proffered evidence was that the defendant was a nonviolent individual who was caring in his dealings with children. Because these were traits which were relevant to the charge of child abuse, the trial court erred in precluding this evidence.

However, this error was harmless since the defendant had been convicted of child molestation prior to trial. When an accused places his character trait in issue as allowed by Rule 404(a)(1), cross-examination is permitted into relevant, specific instances of similar conduct under Rule 405(a). Given the available impeachment evidence and the overwhelming evidence that the defendant was the only person who could have beaten the child and caused his death, the preclusion of the character evidence was harmless error.

Restitution

Defendant was ordered to pay the cost of the child's medical care as restitution. The defendant contends that the trial court erred in ordering him to pay restitution because the crime for which he was convicted (child abuse) does not have as an element economic loss to any person. A.R.S. Sec. 13-105(11) defines economic loss as "any loss incurred by a person as a result of the commission of an offense." When the victim dies, the restitution is owed to the family. A.R.S. Sec. 13-603(c). Because the child's mother incurred medical expenses resulting from the child's beating, the defendant is liable. Ordering that restitution be paid directly to the hospital was within the court's discretion, since the hospital indemnified the victim for losses caused by criminal acts.

Search Warrant

The defendant argues that the trial court improperly precluded him from impeaching the statements made by the detective when he obtained the search warrant. The affidavit executed to secure the search warrant stated that the child was brought to the hospital with bruises on various parts of his body, including his chest. It also stated that he had blood-filled eyes. The defendant wished to challenge the affidavit by introducing evidence of a discharge summary dictated at the time the doctor made his observations of the child. This summary would have shown that the doctor did not observe blood-filled eyes or bruises on the child's chest.

A defendant cannot challenge the truth of the statements in an affidavit for a search warrant unless he alleges that those statements were deliberately or recklessly false. Only when such an allegation is proved by a preponderance of the evidence does the court excise those false statements and determine if sufficient evidence of probable cause to search exists without the statements. The verbal information given by the emergency room doctors to the detective formed the basis for the search warrant. The discharge summary was not part of the basis for the warrant. No error was committed.

(cont. on pg. 14)

Predicate Offense for Felony Murder?

The defendant claims that A.R.S. Sec. 13-1105(a)(2) is unconstitutional to the extent that the statute makes child abuse a predicate offense for felony murder. He contends that Arizona has limited the felony murder rule under the doctrine of merger and does not allow felony murder where the felony is an offense included in the charge of homicide. He argues that the acts of assault merge into the homicide and may not be deemed a separate and independent felony murder. He further argues that child abuse is merely another form of assault distinguished only by virtue of the victim's age. The defendant fails to realize that if the legislature explicitly states that a specific felony is a predicate felony for felony murder, no merger occurs. The Arizona legislature has specified that child abuse is a predicate felony for first-degree felony murder. Therefore, the defendant was properly convicted under the felony murder theory.

Felony Murder Theory

The defendant contends that the trial court committed reversible error when it allowed the state to proceed solely on the felony murder theory and withdraw the theory of premeditated murder. He claims this error now because he was precluded from having the jury consider lesser-included offenses to first-degree murder even though he raised no objection at trial. The state has the discretion to choose which offense to charge and prosecute. The state could have chosen not to bring a premeditated charge at all. Therefore, there was no error.

Sentences

The trial court found two aggravating factors: (1) the murder was committed in an especially heinous, cruel, or depraved manner under A.R.S. Sec. 13-703(F)(6); and (2) the crime was committed on a victim under 15 years of age. A.R.S. Sec. 13-703(F)(9). The terms "cruel", "heinous" or "depraved" are stated in the disjunctive, thereby any one of them individually may constitute an aggravating circumstance. A murder is especially cruel if the victim experienced physical or mental pain and suffering prior to dying. Here, a doctor who was familiar with the case testified as to the pain the child must have suffered as a result of the numerous injuries inflicted on him. The number of injuries, the severity of the injuries and the fact that the child was conscious for at least 45 minutes before slipping into a coma all contributed to the finding of cruelty in this crime.

"Heinousness" and "depravity" focus on the murderer's state of mind at the time of the murder. Five factors are considered to determine whether a murderer acted in a heinous or depraved manner: (1) his relishing of the murder; (2) the infliction of gratuitous violence on the victim beyond that necessary to commit the murder; (3) the needless mutilation of the victim; (4) the senselessness of the murder; (5) the helplessness of the victim. Here, the murder of the child was senseless. The continued beating he received constitutes heinous conduct. The child was helpless and unable to defend himself or to seek help for his injuries. Still, the defendant tried to make it look like an accident had occurred and refused to seek medical attention

for him. The defendant's decision to protect himself at the expense of the life of his son is the essence of depravity. The trial court did not err in finding that the murder was committed in an especially cruel, heinous, or depraved manner.

The same injuries and conduct support the finding that the child abuse was committed in the same manner. Therefore, the trial court properly sentenced the defendant to an aggravated term of imprisonment for the child abuse conviction.

Defendant contends that the trial court improperly imposed the death sentence because it did not list all the mitigating circumstances the defendant offered and explain its reasons for rejecting them. It is clear that the trial court did consider all mitigating circumstances prior to sentencing.

The court finds no fundamental error and affirms the convictions and sentences.

State v. McPhaul

129 Ariz. Adv. Rep. 63 (Div. 1, 12/24/92)

Defendant was charged with attempted armed robbery, a dangerous offense committed while on parole. He was convicted by the jury and sentenced to life in prison.

At trial, defendant admitted being in the store but claimed that he did not rob anyone. The State introduced a video tape which arguably does not show a knife in the robber's hands. Defendant requested a lesser included instruction on attempted robbery, arguing that the jury could conclude that the robber did not have a knife. The trial judge denied the requested instruction because the defendant had denied participating in the crime charged. The judge reasoned that when a defendant denies having committed a particular offense under oath, he is not entitled to a lesser included instruction. The State has the burden of proving every element of a crime beyond a reasonable doubt. When any theory of the defense is reasonably supported by the evidence, it is reversible error to refuse a lesser included instruction. The State's video tape evidence cast doubt on the presence of a knife. While a knife was recovered in the area, it was never directly linked to the defendant. The video tape was enough to support a jury instruction for the lesser included offense of attempted robbery. The conviction and sentence are reversed.

(cont. on pg. 15)

State v. Stevens

129 Ariz. Adv. Rep. 31 (Div. 1, 12/24/92).

Defendant pled guilty to a class 2 felony with a prior conviction and was sentenced to 10.5 years prison. She received credit for 200 days presentence incarceration. On appeal, she claims she is entitled to 214 days of presentence incarceration credit. The State claims that the Court has no jurisdiction to consider this appeal because of changes to the statutes and the rules regarding appeals which became effective on September 30, 1992. The defendant entered her change of plea and was sentenced before September 30, 1992. The State claims that the Court lost jurisdiction over all appeals from any judgment or sentence imposed pursuant to a plea agreement as of September 30, 1992. These amendments are prospective only and affect only those plea agreements entered after September 30, 1992. Any retroactive effect would be unconstitutional. The Court finds that the State's position is frivolous and retains appellate jurisdiction over plea agreements entered before September 30, 1992. The State concedes that the defendant is entitled to 214 days of presentence incarceration credit and the sentence is modified to reflect the appropriate credit.

[Represented on appeal by Lawrence S. Matthew, MCPD.]

State v. Youngblood, and State v. Herrera-Rodriguez
(consolidated cases)

129 Ariz. Adv. Rep. 11, (Sup. Ct. 1/7/93)

Defendant was convicted of child molestation, sexual assault and kidnapping. The Arizona Court of Appeals reversed his conviction and ordered the dismissal of all charges against the defendant on the ground that the state violated his federal due process rights by failing to preserve semen samples from the victim's body and clothing. The Arizona Supreme Court denied review, but under a writ of certiorari, the United States Supreme Court reversed and held that absent bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.

In a consolidated case, a different defendant was charged with sexual assault, kidnapping, armed burglary and aggravated assault. After a mistrial, the trial court granted a defense motion to dismiss because the state failed to preserve a cotton swab sample from a rape kit. The motion was based upon federal and Arizona due process grounds. The Arizona Court of Appeals reversed the trial court's order of dismissal and ordered that the charges be reinstated. In neither case was there evidence of bad faith.

The second defendant raised his state due process claim in the trial court. The first defendant did not assert his state due process claim until his case was remanded to the Arizona courts by the United States Supreme Court. His claim should have been rejected as untimely since claims not raised below are generally not considered even on direct appeal unless there is a finding of fundamental error. However, because the court originally refused to review the preclusion issue when petitioned to do so by the state, it declines to reach an issue upon which review has been denied.

In *Brady v. Maryland*, 373 U.S. 83 (1963) the United States Supreme Court held that the suppression of exculpatory material evidence by the state violated federal due process, regardless of good or bad faith issues. In *Arizona v. Youngblood*, 488 U.S. 51, the United States Supreme Court held that for this class of evidence, the good or bad faith of the state is relevant because a conscious, intentional or malicious failure to preserve evidence which could be tested suggests that it is evidence that could help to exonerate the defendant. Good faith or bad faith is not relevant in a *Brady* setting because these materials are plainly exculpatory.

The defendants argue that in contrast to federal due process, Arizona due process requires the court to equate nonexistent evidence which might have been exculpatory with existing evidence which is plainly exculpatory. The defendants' argument builds upon the court's DUI jurisprudence, under which Arizona due process requires the police to inform a DUI suspect of his right to an independent alcohol test even if the police choose not to test the suspect. However, DUI cases are unique and the unique evidentiary circumstances surrounding a DUI case justify a narrow exception to the rule that "the state generally has no obligation to aid a suspect in gathering potentially exculpatory evidence". *Montano v. Superior Court*, 149 Ariz. 385 (1986).

A *Willits* instruction complies with the fundamental fairness component of Arizona due process. Under this instruction, trial judges are required to instruct jurors that if they find that the state has lost, destroyed or failed to preserve material evidence that "might" aid the defendant and they find the explanation for the loss inadequate, they may draw an inference that the evidence would have been unfavorable to the state. This instruction is sufficient where the state destroys, loses or fails to preserve evidence unless the state acts in bad faith or the defendant suffers prejudice in fact. Where the nature of the evidence is unknown, there can be no showing of prejudice in fact. Thus, only a showing of bad faith implicates due process.

Both these defendants received a *Willits* instruction at their trials because there was no evidence of bad faith. When the state exhibits bad faith in the handling of critical evidence, it is fundamentally unfair to allow the trial to proceed. Where there is no bad faith, it is fundamentally unfair to bar the state from the courts. The inference that the evidence may be exculpatory is not strong enough to dismiss the case. It is enough to let the jury decide whether to draw the inference. Absent bad faith on the part of the state, the failure to preserve evidentiary material which might have exonerated the defendant does not constitute a denial of due process under the Arizona Constitution.

The judgment of the court of appeals in *Youngblood* is reversed, its opinion vacated, and the convictions and sentences imposed by the trial court are affirmed. The judgment of the court of appeals in *Herrera-Rodriguez* is affirmed, its opinion is vacated, the order of the court dismissing the charges is reversed and the case is remanded for trial.

(cont. on pg. 16)

Chief Justice Feldman dissented in part:

The lead opinion's discussion of the preclusion issue is both dictum and irrelevant to the issue before the court. However, *Youngblood* did raise his due process claim at every stage of the proceedings. He argued that the destruction of evidence violated principles of fundamental fairness, denied him a fair trial and thus, offended due process. *Youngblood* only failed to cite Article 2, Section 4 of the Arizona Constitution when arguing the requirement of fundamental fairness. Rather, he spoke generally of due process without referring to either the state or the federal constitution.

When the Federal Supreme Court held for the first time that bad faith was the *sine qua non* of a due process deprivation, *Youngblood* then asked the state court to follow the Arizona cases and hold that under the Arizona Constitution, bad faith was only one of the tests of a fair trial. It is understandable that he had not done so before, being that the courts had not previously been aware that bad faith was the only factor.

The lead opinion fails to explain why fundamental error does not apply to *Youngblood's* case, even though it acknowledged that there is no preclusion where it occurs. If the state's destruction of evidence denied the defendant a fundamentally fair trial, the issue would not be precluded even if he had failed to raise the evidentiary question.

As to *Youngblood's* failure to raise his state due process claim in the trial court, the U.S. Supreme Court has held that courts have jurisdiction to consider a claim first raised on appeal. When the court of appeals passes on such a claim, as in *Youngblood's* case, the issue is fairly before this court. Although the lead opinion concludes that the court of appeals abused its discretion by deciding the issue, this is legally incorrect. Because *Youngblood* squarely and timely raised his due process claim with each court, the issue was not waived or precluded. Since this court denied review of the issue, it should not address it.

In regard to the loss of evidence, the majority adopts a bright line rule no matter what evidence is lost or how significant its potential exculpatory value. Due process is not violated unless the defendant can demonstrate bad faith on the part of the state. However, this reasoning is flawed. Under *Brady*, when the state has withheld the exculpatory evidence, a new trial is appropriate because the evidence can be produced. Here, the evidence is not available because it has been destroyed. Therefore, retrial would leave the court with the same issue which is determining what remedy to invoke when the evidence has not just been withheld, but destroyed. The issue is not the state's good or bad faith, but whether the defendant received a fair trial as the due process clause of the constitution requires.

The majority also overlooks the effect of the presumption of innocence. Presuming the defendant to be innocent, the proper question is whether the lost evidence had such potential exculpatory value that its destruction significantly impaired his defense. If the lost evidence significantly impairs one's defense, due process rights are prejudiced. Prejudice has always been an independent component of Arizona's due process clause in cases involving the destruction or the failure to preserve significant evidence. The majority ignores its non-DUI cases in which this court has consistently held that the test for fundamental error and due process is

bad faith or prejudice. Before today, bad faith was one of the two elements used in the alternative to determine fundamental fairness. After today, it is the only test.

The majority's holding is bad judicial policy. Instead of deciding the objective question of whether the loss of evidence deprived a defendant of a fair trial, trial courts will concentrate on the subjective intent of the officers and not due care. Today's holding invites bad police work as long as the government does not act in "bad faith." However, the majority leaves "bad faith" undefined at this time. The proper procedure when the government loses potentially exculpatory evidence is for the trial court to balance the degree of culpability of the state, the materiality of the evidence, and the potential prejudice to the defendant in order to protect the defendant's constitutional due process right to a fair trial.

[Defendant Herrera-Rodriguez represented on appeal by Paul Klapper, MCPD].

Towne Development of Chandler v. Superior Court
129 Ariz. Adv. Rep. 48 (Div. 1, 12/2/92)

Civil attorneys attempted to resolve a conflict of interest and avoid disqualification by erecting a "Chinese wall" to keep attorneys screened away from confidential information. The imputed disqualification rule of E.R. 1.10 is absolute. Walling off a tainted attorney as an alternative to imputed disqualification is not permitted.

Volume 130

State v. Hill
130 Ariz. Adv. Rep. 6 (S.Ct. 1/14/93)

The Defendant was found guilty by a jury of the first degree murder of his landlord. The court sentenced the defendant to death.

Sufficiency of the Evidence

Defendant claims that the State's circumstantial evidence is insufficient to sustain the conviction. There was sufficient evidence from which a rational trier of fact could have found Defendant guilty beyond a reasonable doubt. The victim's burning body was discovered at the Mohave County Dump on June 18, 1989. Two weeks before that the Defendant and the victim had a heated argument over money. Shoeprints matching the Defendant's tennis shoes were found near the body. These shoeprints also lead from the victim's truck to the victim's home where Defendant was found. Tire tracks near the victim's body matched the tires from the victim's truck. The Defendant had no significant income, yet when arrested he had over \$200 in his wallet including a receipt dated June 17, 1989 from Best Buy Market. The victim had no money in his wallet. The victim shopped in the Best Buy Market on June 17, but the Defendant had not.

(cont. on pg. 17)

Biased Juror

One juror, a police officer, was acquainted with the prosecutor, the prosecutor's investigator, and the coroner. On his juror questionnaire he stated that he presumed police investigations to be thorough and complete. The trial court refused to strike the juror. The court questioned the juror and the juror assured the judge several times in a credible manner that he could serve fairly and impartially. The trial judge did not abuse his discretion in refusing to strike the juror for cause.

State's Investigator

At trial the Defendant invoked Rule 9.3 excluding witnesses. The Defendant failed to object to the presence of the state's designated investigator throughout the trial. The Defendant did not object when the State called the investigator as the last witness. The Court found that the error, if there was any, was waived by defense counsel's failure to object at trial.

Failure to Preserve Evidence

The State failed to preserve the victim's body, the shoeprints, the glob on Defendant's right shoe and the sales receipt from Best Buy Market. The trial court gave a *Willits* instruction. Under *State v. Youngblood* the Defendant must show bad faith on the part of the State since the exculpatory nature of the evidence is unknown. There was no evidence of bad faith in the record.

Prosecutor's Closing Argument

Defendant claims that the prosecutor gave an improper closing argument. In closing, the prosecutor argued that the *Willits* inference did not apply to the facts of the case. He also stated that he thought the defense attorney was trying to trick the police officer. Defense counsel failed to object to the statements. The Court held that the statements, if improper, did not constitute fundamental error.

Trial Judge's Conduct

The Defendant claimed that the trial judge made improper comments throughout the trial. Defendant claims that the judge coached the prosecutor, unfairly admonished a defense witness, and failed to rule on a motion. Defendant claims that these incidents, when viewed in aggregate form, showed that the judge was not fair and impartial. The Court examined each allegation individually and found that there was no favoritism or bias.

Evidentiary Rulings

In addition to the comments, the Defendant claims that the trial judge's rulings on several evidentiary matters showed bias. Examining each issue individually, the trial judge made appropriate rulings based upon the law and no bias has been shown. Specifically, it was not error to allow the coroner who testified at trial to testify again at the aggravation-mitigation hearing. The trial judge's decision to

allow two undisclosed prosecution witnesses to testify was reasonable, since the judge allowed the defense to postpone cross-examination for four days. The judge refused to allow defense counsel to introduce extrinsic evidence to impeach the State's witness on a collateral matter. There was no individual errors nor aggregate errors showing bias or prejudice on the part of the trial judge.

Change of Judge for Cause

The Defendant argued that the presiding judge of a superior court can never be a sentencing judge in a capital case because the presiding judge appoints the chief probation officer. The argument was that the presiding judge might give the presentence report undue evidentiary weight. There is no inherent conflict based upon the judge's administrative duties over the probation office.

Aggravating Circumstances

The trial judge found the following aggravating circumstances: (1) the Defendant had a prior felony conviction including violence, (2) the murder was especially cruel, heinous or depraved, and (3) the Defendant committed the murder in expectation of pecuniary gain. The judge also found as a mitigating circumstance that the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired by alcohol abuse. The judge then found that the aggravating factors outweighed the mitigating factors.

The defendant was previously convicted in Colorado of assault with a deadly weapon. The State alleged that he had been previously convicted of a felony involving violence. Defendant argues that the State did not prove the use or threat of violence on another person. The State introduced evidence of the Colorado document charging Defendant, as well as the judgment and sentencing documents. The Colorado statutes define assault with a deadly weapon as a felony involving the use or threat of violence. The State proved the required elements beyond a reasonable doubt.

Defendant claims that the crime was not especially cruel, heinous, or depraved. The State introduced evidence that there was smoke in the victim's trachea, which demonstrated that the victim was alive during the fire. There was also evidence that the victim thrashed about while trying to escape the fire. This evidence supports the trial court's finding that the offense was cruel because the victim was conscious and suffered pain at the time of the offense. Having found that the offense was cruel, it was not necessary to address whether the crime was also heinous or depraved.

Defendant claims that the court erred in finding that the murder was committed for pecuniary gain. The court found that there was sufficient evidence for the trial judge to find that pecuniary gain was the motive, not merely the result of the killing.

(cont. on pg. 18)

Mitigating Circumstances

At the mitigation hearing, a defense investigator attempted to testify to hearsay concerning defendant's finances and work. The trial judge sustained a hearsay objection. Although the trial judge may have erred in sustaining the prosecutor's objection, defense counsel failed to make an offer of proof after the objection. Since it cannot be determined whether the testimony would have been significant or favorable to the Defendant, the ruling will not be reversed.

Defendant claims that the judge erred in not listing, discussing, and rejecting each possible mitigating factor proffered by the defense. The trial judge did not err by failing to list and address every mitigating factor set forth by the Defendant. Since the trial judge did enumerate and discuss the mitigating factor raised by the evidence and argued by defense counsel, it was not necessary to discuss other insignificant factors that were not argued by defense counsel.

After an independent review of aggravating and mitigating circumstances, the conviction and death sentence are affirmed. No proportionality review is conducted.

State v. Pac

130 Ariz. Adv. Rep. 36 (Div. 2, 1/14/93)

The Defendant entered an Alford plea to one count of attempted sexual conduct with a minor. The defendant was sentenced to an aggravated term of 15 years. The conviction and sentence were affirmed by the Arizona Supreme Court in *State v. Pac*, 165 Ariz. 294, 798 P.2d 1303 (1990). In affirming the conviction, the supreme court held that the plea was not made involuntary by the trial court's failure to inform him of his statutory ineligibility for early release credits. Subsequently, defendant filed for post conviction relief claiming that defense counsel's failure to advise him that he would be ineligible for early release credits constituted ineffective assistance of counsel. Defendant also claimed that newly discovered evidence existed.

Defendant tried to preserve claims other than ineffective assistance of counsel and newly discovered evidence. The defendant was precluded from relief based upon any issues that had been determined on appeal or adjudicated on the merits before the trial court.

The Defendant claims that defense counsel told him that it was very doubtful that he would be sentenced to the maximum of 15 years. He also stated that counsel said that if he was given 15 years, the most that he would have to serve would be seven and one-half years, plus he would be eligible to earn early release credits. Therefore, the most he would have to serve would be three to four years if the 15 year sentence was imposed. The Court found that the Defendant failed to establish that he was prejudiced by defense counsel's poor advice. The lack of knowledge about his ineligibility for early release credits did not render the plea involuntary, therefore the Defendant failed to establish prejudice to support his claim of ineffective assistance of counsel.

The Defendant alleged newly discovered evidence that there was another "Jim" living in the same trailer park. The Defendant presented no evidence that the other Jim was involved in the crimes and that the impeachment value of the

knowledge of another "Jim" would not have significantly changed the outcome in the case. (See also dissent criticizing the mandatory sentencing scheme and the use of Alford pleas.)

State v. Light

130 Ariz. Adv. Rep. 39 (Div. 1, Jan. 14, 1993)

Defendant was convicted of the sale of dangerous drugs and sentenced to prison. At trial, the State's expert testified that the seized substance contained methamphetamine. Defendant argues that the State failed to prove that the substance had a stimulant effect on the central nervous system. "Dangerous drug" is defined as "Any material, compound, mixture, or preparation which contains any quantity of the following substances...having a potential for abuse associated with a stimulant effect on the central nervous system:" ARS §13-3401(6)(b). ARS §13-3401(6)(b)(xii) specifically lists methamphetamine as a dangerous drug. Defendant argues that the State must prove the substance is methamphetamine and a stimulant effect on the central nervous system. The legislature has defined methamphetamine as being a substance with these effects. The State need not prove this as the legislature has already made this determination.

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State v. Blanton

131 Ariz. Adv. Rep. 15 (Div. 1, 1/26/93)

The defendant pled guilty to negligent homicide. He was sentenced to six months in jail and placed on four years probation. He was also required to pay \$92,349.75 in restitution, \$85,000 of which was to be paid to the victim's auto insurance for funding the settlement in a wrongful death action brought against the defendant.

Defendant argues that the trial court abused its discretion by requiring him to pay restitution to the insurance company. A.R.S. Sec. 13-603(C) provides that if a person is convicted of an offense, the court shall require that person to make restitution to the victim or to the immediate family of the victim if the victim dies. The defendant argues that the term "immediate family" does not include insurance companies. In *State v. Merrill*, 136 Ariz. 300 (App. 1983) the Court of Appeals held that the legislative requirement of restitution to the victim does include the entity suffering the economic loss resulting from appellant's criminal activity. Funeral expenses are also appropriate items for restitution under the statute. Judgement, sentence and restitution order are affirmed.

(Represented on appeal by Edward F. McGee, MCPD.)

(cont. on pg. 19)

State v. Boldrey

131 Ariz. Adv. Rep. 40 (Div. 2, 1/29/93).

Defendant was convicted of several counts of sexual abuse and molestation involving his minor daughter. He was sentenced to consecutive prison terms totaling 72 years.

Defendant claims that the trial court erred in summarily dismissing his Rule 32 petition. His first claim is that newly discovered evidence that the victim was previously molested would likely change the verdict because this evidence would refute the inference that it was defendant who caused the victim's physical condition. Other evidence against defendant was overwhelming. The court's dismissal of the Rule 32 petition was not an abuse of discretion.

Defendant contends that the sentencing procedure was unfair. The victim and her mother were not contacted by the presentence report writer, and were saddened and shocked by the sentence. The trial court would still have found the same aggravating factors that defendant molested and traumatized his own daughter. Defendant waived these "mitigating factors" by failing to raise them at sentencing. This also does not qualify under Rule 32 as newly discovered evidence.

Defendant also claims that *State v. Bartlett*, 164 Ariz. 229 (1990) is a significant change in the law regarding cruel and unusual punishment. The trial judge was aware of *Bartlett* when he pronounced sentence, and *Bartlett* and later cases are not at all like this case.

Defendant received mandatory consecutive sentences. He claims that there is no rational basis for punishing more severely a child molester who touches his victim before intercourse than one who abruptly and forcibly rapes a child without first touching them. Defendant claims that the legislature intended to severely punish repeat offenders and not several acts that occur as part of one "transaction." He contends his acts were part of one "transaction" and consecutive sentences were improper. The legislative intent behind Sec. 13-604.01(J), to impose separate and severe punishment for each and every dangerous crime against children, has a rational basis.

Defendant claims his consecutive sentences constitute double punishment. A.R.S. Sec. 13-116 prohibits double punishment for one "act" or "omission". *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989) interpreted A.R.S. Sec. 13-116 to consider the facts of each crime separately, determine whether a single "act" occurred, and then consider whether the lesser crime caused any additional risk of harm beyond the ultimate offense committed. Defendant could have had sexual intercourse with the victim (the ultimate crime) without necessarily committing any of the remaining crimes. The mandatory consecutive terms were permissible. Convictions and sentences affirmed.

State v. Schumann

131 Ariz. Adv. Rep. 29 (Div. 1, 1/26/93)

The defendant entered into a plea agreement to felony DUI. He would be placed on three years probation, serve six months in prison, and receive credit "for all time previously served."

At sentencing the judge imposed probation and the six months in prison. The judge then imposed a jail term of 217

days, against which he credited defendant's presentence incarceration time. Defendant received no credit against his 6 months DOC sentence.

Defendant claims that he had to receive presentence incarceration credit against his prison sentence imposed as a condition of probation. A.R.S. Sec. 13-709(B) provides that time spent in custody until the time of sentencing shall be credited against the term of imprisonment. *State v. Mathieu*, 165 Ariz. 20, 795 P.2d 1303 (App. 1990) held that there was no distinction between confinement in prison as a traditional sentence or when imposed as a condition of probation. However, trial courts have broad discretion in awarding credit for presentence incarceration. There is no dispute that the court had authority to impose the prison term and the jail term as terms of probation. Here the defendant received credit for incarceration against one of two sentences that the judge had a right to impose. The judge adopted a flexible approach to achieve a rehabilitative goal he deemed desirable. Judgment and sentence affirmed.

(Represented on appeal by Spencer D. Heffel, MCPD.)

State v. Sneed

131 Ariz. Adv. Rep. 30 (Div. 1, 2/4/93).

The defendant was convicted of aggravated assault, a dangerous offense. He was sentenced to 5 years. He was ordered to pay a \$100 felony penalty assessment and an \$8 time-payment fee. The court did not provide a payment schedule at sentencing, but did so by minute entry.

Defendant claims his sentence constitutes double punishment. He claims that the use of the deadly weapon may not be both an element of the crime and used to enhance the sentence range. The Arizona Supreme Court has held that the use of a weapon may be used to increase the charge, to enhance the sentence and to aggravate the sentence without violating double jeopardy or double punishment. *State v. Lara*, 109 Ariz. Adv. Rep. 26 (April 2, 1992).

Defendant also claims that the trial court failed to advise him of the payment schedule for his assessments, and his case must be remanded for resentencing. There is no requirement that the manner of payment be made with the defendant present. A.R.S. Sec. 13-808(A) places the method of payment within the court's discretion. The sentence and conviction are affirmed.

(Represented on appeal by Helene F. Abrams, MCPD.)

(cont. on pg. 20)

State v. Delgado

132 Ariz. Adv. Rep. 13 (CA 1, 2/9/93)

Defendant was convicted of one count of attempted second degree murder (Count I) and five counts of aggravated assault. After the close of evidence, the trial court observed that Count I of the indictment was defective because it alleged that the defendant attempted to recklessly commit an act, and that this is not recognized under Arizona law. See *State v. Adams*, 155 Ariz. 117, 745 P.2d 175 (App. 1987). The defendant moved to dismiss Count I and the State moved to amend Count I. The court gave a jury instruction which effectively amended Count I to conform with the evidence, based upon its discretion in resolving motions to amend an indictment under Rule 13.5(b) of the Arizona Rules of Criminal Procedure. Defendant claims the trial judge was required to dismiss Count I. The defendant is precluded from raising the issue because he did not make a timely pretrial motion under Rule 16, and therefore waived the right to raise it at the end of trial. *State v. Anaya*, 165 Ariz. 535, 542, 799 P.2d 876, 833 (App. 1990). The defendant also had adequate notice of the charge and had had an opportunity to prepare and defend against it. Because the amendment to the indictment required the State to meet a higher burden of proof, the defendant could not show that he was in any way misled or prejudiced by the defect. The defendant has a defense under double jeopardy principles to any subsequent prosecution.

Defendant argues that the trial court committed reversible error when it precluded a defense expert witness from testifying in defendant's case in chief or in surrebuttal. The defendant disclosed that he intended to call an expert witness on the issue of insanity. The State filed a motion to allow their expert witness to examine the defendant. On July 19, 1990, the date set for trial, defense counsel advised the Court that she had just interviewed the State's expert for the first time three days earlier. Defense counsel requested a short continuance in order to obtain a rebuttal witness because the State's expert had criticized the evaluation techniques and methodology used by the defense expert. Defense counsel also advised the prosecutor that she intended to call another expert witness. Trial began several days later but the State did not move to continue the trial due to any late disclosure of the expert witness. Rather, at the close of its case in chief, the prosecutor moved to preclude the testimony of the defense's second expert. The trial judge granted the motion. The defendant claims that he was denied his right to present witnesses in his defense in violation of the United States and Arizona Constitutions. Rules 15.2(b)(c) of the Arizona Rules of Criminal Procedure require disclosure of witnesses within twenty days after the arraignment. Further, Rule 15.6 imposes a continuing duty to disclose. Rule 15.7 gives the Court authority to impose sanctions for discovery violations, including precluding a party from calling an undisclosed witness. However, preclusion is rarely an appropriate sanction for discovery violations. To determine the propriety of the sanction, the judge should consider: 1) how vital the witness is to the case, 2) whether the opposing party will be surprised, 3) whether the discovery violation was motivated

by bad faith, and 4) any other relevant circumstances. The trial court erred in precluding the second defense expert from testifying. This witness was vital to the defense, the State was not surprised, and there was no bad faith on the part of the defense. Additionally, less stringent measures were available and the State was not prejudiced. The defendant showed that the evidence was material to the defense, establishing a Sixth Amendment violation and overcoming harmless error analysis. The conviction is reversed and the case remanded. (Represented on appeal by Helene F. Abrams, MCPD).

State v. Sanchez

132 Ariz. Adv. Rep. 11 (CA 1 2/9/93)

Defendant was charged with possession of narcotic drugs for sale and conspiracy to sell narcotic drugs, both class 2 felonies. He pled guilty to attempted possession of narcotic drugs for sale and attempted conspiracy to sell narcotic drugs, both class 3 felonies with one prior felony conviction. In his factual basis at the change of plea, defendant admitted that he had acted as a middleman in the sale heroin to an undercover police officer. He also admitted a prior conviction for possession of narcotic drugs. The Court sentenced him to 9.5 years imprisonment on each count to run concurrently plus fines and surcharges.

The defendant claims that attempted conspiracy is not a cognizable offense under Arizona law. A.R.S. 13-110 authorizes the reduction, via plea bargain, of a completed offense to an attempted offense. However, the attempted offense must be cognizable under Arizona law. *State v. McClarity*, 27 Ariz. App. 571, 575, 557 P.2d 170, 174 (1976). There are no common law crimes to which defendant can plead in Arizona because they no longer exist in this state. A.R.S. 13-103. Attempt, conspiracy, solicitation, and facilitation are preparatory offenses, and are separate and distinct from substantive offenses. "Attempt" is defined in A.R.S. 13-1001(a)(2) as "any step in the course of conduct planned to culminate in the commission of an offense." To construe "offense" in that sentence to include conspiracy would be absurd, since no course of criminal conduct is "planned to culminate" short of its ultimate object. The preparatory offense of attempt does not apply to the preparatory offense of conspiracy. Attempted conspiracy is not a cognizable offense under Arizona law. The defendant's judgment of convictions and the sentences imposed are reversed, his plea of guilty is vacated, and all original charges are reinstated. (Represented on appeal by Helene F. Abrams, MCPD).

(Volume 132 to be continued in May, 1993 issue)

Personnel Profiles

Cynthia Dobbs began working in our office as a legal secretary in Trial Group D on April 19. Cynthia previously was employed at the Arizona Health Care Cost Containment System Administration (AHCCCS) for approximately two years.

Julie Heathcotte started in Trial Group A as a legal secretary on April 19. Julie, who has a B.A. in Political Science, briefly served as an intern for John McCain last fall. Prior to that she was employed as a legal assistant at the law office of Brian Hendrickson. Julie served in the United States Marine Corps from 1986 to 1987.

Maryann Wright started in Trial Group B as a legal secretary on April 12. Maryann previously worked as an administrative assistant for Food for the Hungry and as executive secretary with the Koll Company. From 1987 to 1988 she was a word processing operator and automated records processor at the Maricopa County Juvenile Court Center.

Mary Miller will begin employment with our office in May as the new attorney for our Mental Health section. Mary is the Assistant Public Fiduciary. Her service in the Public Fiduciary's Office since 1981 has given her considerable knowledge in the mental health/probate fields. ^

Ethics Note

Our office is sponsoring a seminar on ethics on May 28, 1993. The seminar, which will be held from 1:30 to 4:00 p.m. in the Supervisors Auditorium, will satisfy all of the yearly CLE ethics hours required by the state bar. Attorneys from our office are encouraged to attend. To register, contact Teresa Campbell in our Training Division. ^

FYI

What is the average time taken by a jury to reach a verdict in certain cases? Recent information from the National Center for State Courts shows the following:

1. Homicide: 5 hours, 30 minutes
2. Aggravated Assault: 2 hours, 38 minutes
3. Burglary: 2 hours, 19 minutes
4. Narcotics: 2 hours, 12 minutes
5. Robbery: 1 hour, 50 minutes
6. Theft: 1 hour, 40 minutes. ^

JUVENILE March TRIAL RESULTS

Editor's Note: There are many hard-working practitioners in our Juvenile, Mental Health and Appellate Divisions. The results of their work often go unrecognized. Future editions will try to continue highlighting the work of everyone in the office.

Attorney	Number of Trials (Result-Disposition)	Dismissals
Aberbach, Anne-Rachel	0	5
Allen, Robin W.	0	3
Bliss, Susan	4 (3 NG; 1 G-Probation)	10
Carter, William J.	1 (G-Placement)	5
Helme, William J.	2 (1 NG; 1 G-Probation)	3
Kaplan, Gerald M.	0	6
Katz, David A.	1 (G-Probation)	5
Katz, Ellen E.	0	5
Komadina, Jeannette N.	0	6
McGee, Amanda	1 (G-Placement)	8
Melvin, John W. (Bill)	1 (G-ADYTR Commit)	2
Morse, Margaret C.	1 (G-T&C)	5
Natalé, Gail G.	0	2
Pintard, Suzette I.	0	3
Salonick, Richard J.	3 (1 G-Monetary Assessment; 2 G-Probation)	3
Santoro, Karen L.	0	6
Shaw, Teri L.	2 (1 NG; 1 G-JIPS)	8
Smith, David C.	2 (1 NG; 1 G-Probation)	14
Troiano, Vincent W.	1 (NG)	6
Twarog, Mary Ann	2 (1 NG; 1 G-ADYTR Commit)	4
Verdin, Maria	0	6
Whitfield, D. Anne	1 (G-Probation)	3
Zimmerman, Terri G.	3 (3 G-Probation)	4

TRAINING AT A GLANCE

DATE	TIME	TITLE	LOCATION
Friday, April 30	9:00 a.m. - 3:30 p.m.	<i>Training For the DUI Warrior</i>	Northern Arizona University (Flagstaff)
Friday, April 30	1:30 p.m. - 4:30 p.m.	<i>The Year In Evidence</i>	Phoenix Mountain Preserve
Wednesday, May 5	1:30 p.m. - 5:00 p.m.	<i>MCPD's Trial Practice College</i>	MCPD's Training Facility
Thursday, May 6	1:30 p.m. - 5:00 p.m.	<i>MCPD's Trial Practice College (cont.)</i>	MCPD's Training Facility
Friday, May 7	10:00 a.m. - 5:00 p.m.	<i>MCPD's Trial Practice College (cont.)</i>	MCPD's Training Facility
Saturday, May 8	9:00 a.m. - 4:30 p.m.	<i>Aggressive Defense of the Accused Impaired Driver</i>	Westward Look Resort (Tucson)
Thursday, May 13	9:00 a.m. - Noon	<i>Advocacy in Commitment Cases</i>	MCPD's Training Facility
Friday, May 14	9:00 a.m. - 4:00 p.m.	<i>Advocacy in Commitment Cases (cont.)</i>	MCPD's Training Facility
Friday, May 28	1:30 p.m. - 5:00 p.m.	<i>Criminal Defense Ethics: Six Ethical Emergencies</i>	Board of Supervisors Auditorium
Wednesday, June 2	9:00 a.m. - 4:30 p.m.	<i>Mitigation and Investigation of Capital Cases</i>	MCPD's Training Facility
Thursday, June 3	To be announced	<i>Juvenile Law</i>	ASU College of Law (Great Hall)

MCPD T-Shirts

Spring is in the air and so is a renewed interest in owning a Public Defender T-shirt. We are offering a Hanes 100% cotton, Beefy T in white or gray for the price of \$10. In the left breast pocket area, the following words will be printed in royal blue ink: Maricopa County Public Defender's Office. A sample shirt is hanging in Georgia Bohm's office (10th Floor, Luhrs Building). NOTE: the T-shirt does not have a pocket on the front, and this year we will not have any printing on the back of the shirts.

Anybody wishing to purchase one should complete the order form below, and give the form along with a check (payable to "Christopher Johns") for \$10 per shirt to Georgia Bohm before May 25. We should receive the T-shirts by June 15 (depending on the number of orders). **Orders must be prepaid.** Any money left over from the sale of the T-shirts will go to our office's Holiday Fund. Last year we contributed \$147.36 to this event through our T-shirt sales.

T-SHIRT ORDER FORM

Name: _____

Phone Number: _____

	<i>White</i>	<i>Gray</i>
<i>Small</i>		
<i>Medium</i>		
<i>Large</i>		
<i>X-Large</i>		
<i>XX-Large</i>		

Check enclosed for: \$ _____

Please return order form to Georgia Bohm by May 25, 1993.