

for The Defense

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

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Motion to Remand to the Grand Jury: O'Meara is Alive and Well...Not!!!

by Slade Lawson and Tim Ryan

The Roman poet Sextus Propertius wrote in his poem *Elegius*, "There is something beyond the grave; death does not end all, and the pale ghost escapes from the vanquished pyre." His sole purpose in creating this verse, approximately two thousand years ago, was to help criminal defense lawyers come to grips with how to approach grand jury decisions after the Arizona Supreme Court emasculated the Arizona Court of Appeals' holding in *O'Meara v. Superior Court*, 123 A.A.R. 13 (App. 1992). Even though the glimmer of hope served up by the Arizona Court of Appeals has been stripped away, all is not lost. What follows is a brief review of some of the areas that still remain open for defense counsel to file a remand motion.

Arizona law requires that grand jury proceedings be conducted in a fair and impartial manner. An accused may not be denied a substantial procedural right during the course of a grand jury proceeding. If an accused has been denied a substantial procedural right during these proceedings, then defense counsel may ask that the case be returned to the grand jury for a redetermination of probable cause.

Indictments may be challenged in accordance with Rule 12.9, Arizona Rules of Criminal Procedure. Motions filed pursuant to Rule 12.9 must be filed within 25 days after the filing of the grand jury proceeding's transcript. If there are issues which may be raised, but the 25-day time limit is about to expire, defense counsel may preserve the issues by filing a *Motion for Extension of Time Limits* within the 25-day time period after the transcript is filed.

You may ask, "What are substantial procedural rights?" There are many. As a practical matter all procedural rights of the accused should be scrutinized by reviewing the grand jury transcript and asking whether the prosecutor is giving a fair and accurate picture of the facts and the applicable law in the grand jury presentation.

First, defense counsel should review the prosecutor's presentation of the law. The prosecutor should advise the grand jury of *all* applicable statutes. Further, the prosecutor should not allow any unauthorized persons to attend the proceedings. And, the prosecutor should not engage in any conversations off the record with the grand jury. If the panel members ask to be instructed as to a particular statute or affirmative defense, the prosecutor must provide an accurate and satisfactory answer. The prosecutor also should provide complete instructions on all applicable law as determined by the facts of the case, even if the grand jury does not ask any specific legal questions.

Separate from the legal instructions, specific rules govern how the evidence is presented to the grand jury. For example, prosecutors may not allow witnesses to testify in a misleading manner. In *Crimmins v. Superior Court*, 137 Ariz. 39, 668 P.2d 882 (1983) a police officer lied to the grand jury about what had happened. Mr. Crimmins was a burglary victim. During the burglary, Crimmins nabbed one of the suspects in his home and detained the burglar by locking him in a car. The burglar escaped and ran to his parents' home. The parents then had Crimmins arrested for kidnapping.

(cont. on pg. 2)

Crimmins wanted to tell his side of the story to the grand jury. The prosecutor, however, ignored Crimmins' request to testify before the grand jury. At the grand jury proceeding the prosecutor asked questions regarding the incident, to which the testifying officer responded by exonerating the detained youth of any culpability in the burglary at Crimmins' house. This testimony directly contradicted the information in police reports regarding the incident. The Arizona Supreme Court held that this misconduct violated Crimmins' due process rights, inasmuch as the prosecutor failed to make a fair and impartial factual presentation of the case.

Misstating the facts is an obvious violation of due process. A less obvious method is when the prosecutor ends up "hiding the ball." In *Nelson v. Royston*, 137 Ariz. 272, 669 P.2d 1349 (App. 1983), the Arizona Court of Appeals was presented with this issue. In that case, one of the grand jurors asked the testifying witness if the accused was under psychiatric care at the time of the incident. The testifying officer played dumb even though he had specific information that the accused was under psychiatric care at the time, and knew that the accused may not have fully comprehended his actions. The court ruled that the prosecutor had a duty to correct the officer's evasive testimony that the prosecutor knew to be misleading. Failure to correct the officer's misleading testimony required remanding the case to the grand jury for a redetermination of probable cause.

The prosecutor does not, however, have an affirmative duty to present exculpatory evidence, only "clearly exculpatory" evidence. Clearly exculpatory evidence, as defined in *State v. Superior Court* (Mauro), 139 Ariz. 422, 678 P.2d 1386 (1984), is "evidence of such weight that it would deter the grand jury from finding the existence of probable cause." In practical terms this is evidence that warrants dismissal of the charges, a rather difficult burden to prove for the defense attorney.

Additionally, the U.S. Supreme Court recently held in *U.S. v. Williams* (1992) that

federal prosecutors have no duty to present exculpatory evidence. Practitioners should continue, however, to rely on rulings based on independent state grounds of Arizona's case law that holds "clearly exculpatory" evidence must be presented.

Even though the Arizona Supreme Court now sanctions the grand jury's reliance on stale statutory instructions, such as in *O'Meara*, there are still areas ripe for attacking how the grand jury was conducted. The most important step is to obtain the grand jury transcript immediately and determine the deadline for filing a *Motion to Remand*. Even if there are no remand issues, the transcript is an important impeachment tool to use against the officer who testified during the grand jury proceeding.

Challenges should be made whenever irrelevant and prejudicial information is presented, such as testimony given in the context of "completing the story." Statements of co-defendants should be challenged if the same statements would be inadmissible at trial. Prosecutors should not be allowed to present presumptively inadmissible evidence such as prior acts covered by Rule 404(b), Arizona Rules of Evidence. Whatever the evidence in question, seasoned defense attorneys know that reviewing the government's probable cause determination is essential to effective representation and trial practice. Even though *O'Meara* is not alive and well, defense counsel should continue to fight the rubber stamp effect of the grand jury system. As the Earl of Chesterfield said, "Whatever is worth doing at all, is worth doing well."

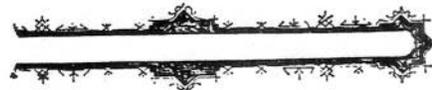
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FOR THE DEFENSE

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DUI: Interstate Compact, Rule 8, Corpus

By Gary Kula

The purpose of this month's column is to provide you with a brief synopsis of several motions which have been written by other attorneys. If you would like copies of them, please contact either the author of the motion directly or the training division of our office.

A. MOTION TO DISMISS THROUGH THE USE OF THE INTERSTATE COMPACT ACT.

In his motion to dismiss, Deputy Public Defender Ray Schumacher effectively used the provisions of the Driver's License and Non-Resident Violator Compact Act (A.R.S. § 28-1601 *et. seq.*) (hereinafter "Compact"), as a basis for attacking the allegation that his felony DUI client's driving privileges were revoked.

FACTS:

Client's driver's license was revoked in Arizona. Client was issued a driver's license in compliance with the Interstate Compact Act in another state. Client was arrested for felony DUI (DUI while license revoked) while passing through Arizona.

MOTION TO DISMISS:

Where a client legally obtains a driver's license in another state in compliance with the Compact, Arizona, as a member state, must give full accreditation to the validity of the license. In order to establish that the client legally obtained a license in compliance with the Compact, special attention must be given to the wording of the statute which states:

APPLICATIONS FOR NEW LICENSES

Upon application for a license to drive, the licensing authority in a party state shall ascertain whether the applicant has ever held, or is the holder of a license to drive issued by any other party's state. The licensing authority in this state where application is made shall not issue a license to drive to the applicant if:

(1) the applicant held such a license, but the same has been suspended by reason, in whole or in part, of a violation and if such suspension, has not terminated.

(2) the applicant has held such a license, but the same has been revoked by reason, in whole or in part, of a violation and if such revocation has not terminated, **except that after the expiration of one year from the date the license was revoked, such person may make application for a new license if permitted by law.** The licensing authority may refuse to issue a license to any applicant if, after investigation, the licensing authority determines that it will not be safe to grant to such person the privilege of driving a motor vehicle on the public highways.

(3) the applicant is the older of a license to drive issued by another party's state and currently in force unless the applicant surrenders such license.

A.R.S. § 28-1601, Article V (**Emphasis added**).

The language in the act is clear. A practical application of the language may lead to a situation where it appears that your client does not have valid driving privileges in Arizona despite the expiration of the revocation or suspension, yet, has been issued a valid driver's license in another state in compliance with the Interstate Compact Act. Should such a situation arise, Arizona may not allege that the client's driving privileges are suspended or revoked and must instead, "make the reciprocal recognition of licenses to drive..." A.R.S. § 28-1601, Article 1(b)(2).

B. RULE 8:

In another of his motions, Ray Schumacher used the provisions of Rule 8 and several Hinson-related cases in support of his request for dismissal.

FACTS:

The client is arrested for felony DUI and is released on his own recognizance. The defendant appears for his preliminary hearing but is informed that the case has been scratched. Four months later, the defendant is indicted and a summons is issued. There is no evidence that the defendant ever received the summons or that any attempts were made to personally serve the defendant. Four months later, the summons is returned and a warrant is issued for the defendant's arrest. Two years later, the defendant is arrested. The permanent and still present mailing address of the defendant's parents is listed on several documents including the police report, the defendant's driver's license, and MVD records. The police report also contains the permanent phone number for the defendant's parent's residence.

MOTION TO DISMISS:

While the Hinson holding has gone the way of the ten-cent phone call, the speedy trial provisions of Rule 8 remain intact. Rule 8.2(a) states in relevant part: "every person against whom an indictment, information or complaint is filed shall be tried by the court having jurisdiction of the offense within 150 days of the arrest or service of the summons...." A violation of the speedy trial rule will result in the charges being dismissed with or without prejudice at the discretion of the court. Rule 8.6 of the Arizona Rules of Criminal Procedure.

(cont. on pg. 4)

The issues to be considered under a Rule 8 claim are whether the delay was occasioned by the defendant and whether the state exercised due diligence in attempting to locate and serve the defendant. Where the facts indicate that the delay was not occasioned by the defendant's failure to appear at a hearing or attempt to abscond, the inquiry must turn as to whether the state exercised due diligence. In determining whether due diligence was exercised, you should look to the facts and holdings of several of the Hinson prodigy cases. Those cases include *Snow, Armstrong, Duron v. Fleischman*, and *Tarkington* (citations omitted). In these cases, there are several helpful examples and illustrations as to the efforts which must be made by the state in locating and serving a defendant. In the present case, the state at all times had a good address and a working phone number for the defendant and/or his parents. Where the state fails to use information which is in their possession, take reasonable steps and exercise due diligence in the prosecution of a case, dismissal is the appropriate remedy.

(Helpful Hint: You should look at the court file and the sheriff's office warrant worksheet to see what efforts were made to serve the defendant.)

C. CORPUS DELICTI:

You will find an excellent discussion of corpus delicti issues in a memorandum which was recently filed in the superior court by W. Clifford Girard, Jr. In his memorandum, the two issues which are specifically addressed are:

1. What constitutes sufficient evidence to warrant a reasonable inference of a corpus delicti?
2. Does corpus delicti apply to an admission against interest as well as to a confession?

This memorandum was recently reprinted in "The Misdemeanant," the newsletter of the City of Phoenix Public Defender Contract Administration Office. If you have a case involving an issue of corpus delicti, this memorandum will provide valuable guidance through its summary of recent court decisions from across the country. For additional information, you may contact him at 252-7160.

On a sidenote, several requests have been made for motions challenging A.R.S. § 28-692(L) which states: "a statement by the defendant that he was driving a vehicle which was involved in an accident resulting in injury or to death of any person is admissible in any criminal proceeding without further proof of corpus delicti if it is otherwise admissible." If anybody has filed any motions or memorandums challenging this statute as an invasion of the ruling-making power of the Supreme Court (Article VI, Section V of the State Constitution), please contact me.

D. MVD HEARINGS: IMPLIED CONSENT SUSPENSIONS

The next time you are at an MVD hearing where the issue is whether your client's driving privileges should be suspended for 12 months as a result of his refusal to take a breath test, you may want to argue the Ohio Court of Appeals' decision in *Hudson v. Brown*, 613 NE2d 817 (Ohio App. 10 District 1983). In the *Hudson* case, the court overturned the order of suspension and ruled that the motorist had not been fully advised as to the consequences of his

decision to refuse to take a breath test. The court ruled that the warnings were deficient in that they failed to advise the motorist that if he refused to take the test, he would be required to pay a reinstatement fee and provide proof of insurance before his license could be reinstated.

In Arizona, the same argument applies because a motorist seeking to have his driving privileges reinstated following an implied consent suspension must carry SR-22 insurance for three years and pay a reinstatement fee. Additionally, if ordered by the court to complete alcohol abuse classes or treatment (A.R.S. §28-692.01), the implied consent suspension will not terminate until proof is presented that he has completed or is satisfactorily participating in alcohol abuse classes or treatment (A.R.S. §28-454). The Arizona statute is also similar to the one examined in the *Hudson* case in that in both statutes the scope of the implied consent hearing includes the inquiry as to whether the motorist was informed of the consequences of refusal. (A.R.S. §28-691(G)).

In response to your argument, the State will most likely rely on *Edwards v. Ariz. Dept. of Transportation*, 136 AAR 40 (Div. One, Filed 4-15-93). The *Edwards* case may be easily distinguished since the only issue directly addressed by the court was whether the motorist should have been advised that a 60-day work permit exception may be available as part of the 90-day admin per se suspension.

PRACTICE POINTERS

The "Rule"

We all know Rule 615, Arizona Rules of Evidence, as "the Rule." See also Rule 9.3, Rules of Criminal Procedure (exclusion of witness and spectators). "The Rule" is the exclusion of witnesses, and as most all practitioners know, it is designed to prevent one witness from hearing what another witness in trial has testified about. "The Rule" is often critical to a fair trial, and except for the amendments accommodating so-called "victims' rights," it has remained relatively unchanged for a long time.

Not infrequently, however, the issue of witnesses (particularly police officers and civilians not under the prosecutor's control) breaking "the Rule" is the basis for a mistrial motion. Often, it also is just ignored. Why? One of the big problems with "the Rule" is that it is hard to police. Defense counsel usually has a lot of other matters to handle during a trial more important than standing around and watching witnesses. A second problem, "the Rule" often is viewed today as more of a perfunctory formality than a necessary fairness for the client, and is seen less as a "sword" to slice off a few heads on behalf of the accused.

(cont. on pg. 5)

For those of you still trying, here are some thoughts. Continue filing motions for lawyer-conducted voir dire. If you want a short course on what I know, please give me a call. Remember, being, or at least seeming, fair is the key, and asking lots of open-ended questions. "Why do you feel that way? What would be the danger in that? Does anyone else have a thought or feeling on that?" You get the drift.

The other thing you may do, if you ever get the chance, is also to gear a couple of questions to let the jurors know that they have rights. That's essential, because in a sense you become their advocate when you do that. For example, you may let them know they have the right to give whatever level of weight they want to a witness's testimony. They have the right to demand from the prosecution that each and every single reasonable doubt is addressed. They have a right to agree with one another and to disagree with one another. They have a right to decide the case based upon a lack of evidence. They have a right to decide that there isn't enough proof, etc. The follow-up to these kinds of questions is then to ask the juror(s) how they feel about the rights (and duties) they have as jurors.

If you can't get lawyer-conducted voir dire, consider empowering the jurors during your closing. Don't just tell them about reasonable doubt, empower them to make a decision by letting them know their options.

Propensity and Prior Bad Acts

One of the most common trial errors is the admission of uncharged bad act evidence. By now everyone pretty much knows that Arizona case law has developed a "propensity exception" in *State v. McFarlin*, 517 P.2d 87 (1973) and *State v. Treadaway*, 568 P.2d 1061 (1977). Basically, those cases hold that when conduct involves an element of "abnormal sex acts" and there is sufficient basis to accept proof of "similar acts" near in time to the charged offense, the court will let in the evidence "of the accused's propensity to commit such perverted acts." Normally, the state also must have expert medical testimony to get in that stuff. Usually, the testimony is pretty bogus.

Here's the good news. A recent 9th Circuit federal case may give some relief. It holds that some prior bad act evidence may be so egregious as to offend the due process clause of the Fourteenth Amendment. The case is *McKinney v. Rees*, 1993 U.S. App. LEXIS 13487, 9th Cir., filed June 10, 1993).

McKinney, using *Estelle v. McGuire*, 112 S.Ct. 475 (1991) as a reference point, attempts to answer the question of when does character evidence to show propensity constitute a violation of the Due Process Clause? *McKinney* notes the long tradition prohibiting other bad act evidence, and particularly points out that 37 states (not Arizona!) have established rules forbidding the admission of character to show propensity. (See footnote 2). Practitioners should be aware of this decision; although the analysis is not crystal clear, it may provide a basis for a beefed-up Rule 404(b) motion. At print time, the Training Division only has a copy from LEXIS; however, it should soon appear in the Federal Reporters or may be available in advance sheet form from our Appeals Division. Check with Ed McGee.

Changes to DSM-III-R

The Diagnostic and Statistical Manual of Mental Disorders is scheduled to be changed this year. The new version will be called DSM-IV. As most practitioners know, familiarity with this publication is essential to advocate for our numerous clients with mental illness, mental retardation or organic brain damage. Not only is this information important to developing a theory of the case, defense, and themes for trial, it also is extremely important in plea negotiations, as well as at sentencing for mitigation purposes.

DSM-III-R, still presently in use, is published by the American Psychiatric Association. It first was published (DSM-1) in 1952. At that time, it contained 106 different diagnostic categories. By the time of DSM-III's publication in 1980, there were 265 classifications, and the 1987 DSM-III-R contained 296. The trend has been to become more and more inclusive in diagnosis.

Although advance information about DSM-IV indicates that it will be conservative in nature, when interviewing medical experts in this area, practitioners may want to start exploring whether the practitioner has familiarized himself with expected changes in the DSM-III-R.

Remember, the room for diagnostic error and disagreement between experts using DSM-III-R has always been huge--hence the importance of a sympathetic expert. Of particular importance, practitioners will want to explore the fact that despite changes to Arizona's insanity law, purporting to eliminate any defense that is drug related, beginning with DSM-IV there will be a diagnosis showing that substance abuse may cause a psychotic disorder.

As more information becomes available on this issue, and copies of DSM-IV are obtained, *for The Defense* will publish more information. ^ CJ

Arizona Advance Reports

State v. William Diaz Herrera, Sr.
135 Ariz. Adv. Rep. 7

State v. William Diaz Herrera, Jr.
135 Ariz. Adv. Rep. 14

State v. Mickel William Herrera
135 Ariz. Adv. Rep. 23 (Sup. Ct. 3/4/93)

William Diaz Herrera, Sr. (Senior), William Diaz Herrera, Jr. (Junior) and Mickel William Herrera (Mickel) were tried on charges of first degree felony murder, kidnapping and aggravated robbery. All three defendants were sentenced to death for the murder and to consecutive prison sentences on the other convictions.

(cont. on pg. 8)

Facts

On June 30, 1988, Senior was drinking in a desert area of southwest Phoenix. With him were his sons Junior, Mickel and Ruben. Also present was Mickel's girlfriend Mary. They parked their cars by some trees on a dirt road near an irrigation canal. A passing motorist thought the cars had been in an accident and notified a Sheriff's Deputy. The deputy radioed in and stopped to speak to the men. He asked the men for identification. Senior refused to comply and cursed at the deputy. The deputy put him in the back seat of his patrol car. The deputy then asked Mary for some identification. Senior called to Ruben to open the door of the sheriff's car. The deputy then began arguing with Junior and Mickel. Ruben let Senior out of the car and Senior went toward the officer. Junior and the deputy argued, and Junior hit the deputy. Senior joined the fight, kicked the deputy and cursed him. Junior threw the deputy's portable radio and hit the deputy in the forehead. Mickel wrestled the deputy's revolver away from him and ordered him down on the ground. Mickel pointed the gun at the deputy while Junior and Senior shouted "Shoot him, shoot him." Mickel shot the deputy. After the shooting the family fled in two vehicles. When other officers arrived at the scene, the deputy was dead. He had been shot once through the right eye and had a gash on his forehead. Dirt was embedded in the buttocks, crotch and leg areas of his trousers. The deputy died from a gunshot wound at close range. Powder burns indicated that the deputy's hands were in front of his face when the gun was fired.

Mickel and Junior were convicted at a joint trial of first degree felony murder, aggravated robbery and kidnapping. Senior was convicted at a separate trial of first degree felony murder and kidnapping. Ruben pled guilty to kidnapping in exchange for his testimony and was sentenced to 10 years in prison.

Trial Issues - Senior

Senior claims that the indictment charging him with kidnapping violated his right to due process because it gave him no idea what mental state existed at the time of the offense. Senior failed to raise this argument at trial and has waived it absent fundamental error. The indictment charged Senior with knowingly restraining the deputy with the intent to inflict death or with the intent to place the deputy in reasonable apprehension of imminent physical harm or knowingly restraining the deputy with the intent to interfere. Although the indictment charged alternative mental states, it clearly informed Senior of each and every mental state upon which the indictment was based. He was informed of the nature and cause of the accusation and was not denied due process. Further, any error was harmless because Senior did defend against each and every mental state charged; he denied participating in any of the offenses.

Senior claims that the kidnapping instructions did not adequately instruct the jury about the decisions it must reach unanimously before finding him guilty of kidnapping. Senior failed to raise this issue at trial and has waived the argument absent fundamental error. The jury instruction stated that kidnapping requires proof that the defendant knowingly restrained another person with intent to commit one of four

enumerated acts. Senior argues that he was denied his constitutional right to unanimous jury verdict because some jurors could have thought him guilty of one of the four acts while others found him guilty of committing a different act. Senior claims he could have been convicted of kidnapping even though the jury could not unanimously agree on the manner in which he committed the crime. In Arizona, kidnapping is one crime regardless of whether it occurs as a result of any of the enumerated acts. While a defendant is entitled to unanimous jury verdict on whether the criminal act has been committed, a defendant is not entitled to unanimous verdict on the precise manner in which the act was committed. The jury need not agree on the manner in which the defendant committed the offense.

Senior also claims that his murder conviction must be reversed because felony murder cannot be premised on kidnapping. Senior argues that kidnapping merges into a subsequent homicide where there is a single victim. The record establishes that the kidnapping and subsequent murder of the deputy were not conceptually identical and did not occur as part of the same act. Rather, the kidnapping occurred when the deputy was attacked and forced to lie on the ground. The murder occurred later when Senior's order to shoot the deputy was carried out.

Trial Issues - Junior

Junior argues that the trial court erred by denying his motion for judgment of acquittal on the felony murder charge because the evidence was insufficient to warrant a conviction for aggravated robbery. A defendant is entitled to a judgment of acquittal only when there is no substantial evidence to warrant the conviction. An acquittal should not be directed if the evidence is such that reasonable minds may differ on the inferences to be drawn therefrom. The state introduced substantial evidence that Junior committed aggravated robbery. Aggravated robbery is robbery aided by an accomplice. The state introduced evidence to show that property was taken from the deputy against his will by force with the aid of an accomplice. The state proved these elements in both the taking of the deputy's gun and the taking of his radio.

Junior also argues there was insufficient evidence for the kidnapping conviction. A person commits kidnapping by knowingly restraining another person with the intent to inflict death, to inflict physical injury, to place the victim in reasonable apprehension of imminent physical harm, or to interfere with the performance of a governmental function. Junior is liable as an accomplice for Mickel's restraint of the deputy and for personally interfering with the deputy's governmental function. The motion for judgment of acquittal was properly denied.

(cont. on pg. 9)

Here are some ideas to beef-up "the Rule" and use it more effectively as a tool for the client's fair trial. First, forget the standard "oral" motion to invoke "the Rule" and prepare something more substantial. The problem with the oral motion is that the judge casually grants it and nobody, especially not the judge, so he or she has an out later, explains in detail what "the Rule" prohibits the witnesses from doing. Hence, when the witness is seen talking with the case agent later, it is generally excused (usually some bogus, innocuous reason is given for the conversation). I suspect, but cannot prove, that police officers are particularly egregious violators of "the Rule." Usually chatty by nature, and particularly motivated to "put the bad guys away," law enforcement personnel will discuss the case with their supervisors, buddies, spouses, and other prosecutors not assigned to the case.

1. File a Written Motion for Witness Sequestration

The solution: a written motion (that could be developed into a form and then tailored for each case). This motion, timely brought 20 days before trial, should specifically delineate the do's and don'ts for witnesses. The motion also should incorporate an order, copies of which can be provided to witnesses, particularly cops, so that everyone is clear on the "rules" we are going to play by during the trial. The motion should include an order containing at least the following:

*Witnesses may not enter the courtroom or be present in the courtroom, except during their own testimony.

*After taking the witness stand, witnesses may not discuss their testimony or the questions asked of them with any other witness in the case.

*Before taking the witness stand, witnesses may not discuss their testimony or the questions to be asked of them with any other witness in the case.

*Witnesses are advised that they should discuss this case only with the attorneys or investigator, because there are many people who may be called as witnesses in this case of whom they may be unaware or may not recognize.

*Witnesses may not discuss anything about the case in the presence of or within hearing distance of any juror.

*Witnesses may not discuss testimony of witnesses or questions asked of witnesses by the attorneys with any people who were present in the courtroom watching the trial.

*This order shall remain in effect after closing arguments and until a unanimous verdict is reached.

*Any witness who observes a violation of this order should immediately inform the court or the court's bailiff.

*Any witnesses, including police officers, who have questions about what this order means should immediately inform the attorneys involved in

One of the big problems with "the Rule" is that it is hard to police. Defense counsel usually has a lot of other matters to handle during a trial more important than standing around and watching witnesses.

this case.

Well, you get the point. Now we have something concrete. There may be additions and deletions as necessary. The distributed order makes it very clear, in writing, what may and may not be done. Judges should be less prone to forgiveness, given the order's exactness. Note, in particular, that the order continues until a verdict is reached instead of until the witness is excused. This is important for mistrials or hung juries, so that the witnesses are not tainted until after defense counsel is sure he or she has a *not guilty* verdict.

To further drive home the point, the order may be mailed to the police officers involved and other witnesses. Before trial (or the more risky approach, during trial), examination should include a few questions about whether they have followed "the Rule" and subsequent court order. Defense counsel has a right to know whether the witness is biased based upon conversations they have had with others, including the prosecutor.

2. Motions in Limine

Second, and a related issue, is about all the great stuff you kept out in your pretrial motion in limine (more properly, motion to suppress). For example, the police are not to testify that there were beer cans in the car or that the client mentioned "Oops, you got me again." The typical scenario is that you litigate it and win, and then the prosecutor is supposed to tell all of the officers who will testify not to mention the suppressed evidence. Lo and behold, it pops out of the officer's mouth on the witness stand.

At side bar, the prosecutor candidly admits, "Oh your honor, I must have forgotten!" "But your honor," you say incredulously, "How could Ms. Dimwit forget?"

"Well, defense counsel, this was an honest mistake," says the judge. "I'll order the jury to disregard the remark. If you want, you may ask for a curative instruction," continues the judge.

(cont. on pg. 6)

Request that the judge bring all the police officers into chambers and instruct them all at once exactly what evidence they are not to testify about.

You, of course under your breath, mutter, "Thanks for nothing!"

Here are my suggestions (this actually worked for me at a trial where I won a bunch of motions to keep out stuff--but knew the cops would play games). Request that the judge bring all the police officers into chambers and instruct them all at once exactly what evidence they are not to testify to. This bypasses having to rely on the prosecutor to not only remember, but to properly instruct law enforcement witnesses about prohibited evidence. This way if it slips out--- your mistrial motion is clear and should be granted.

"Judge, there ain't no excuse," you gloat. "The officers were instructed by you in chambers not to mention that malt liquor can and they did. We move for a mistrial. My client can't possibly get a fair trial in light of the prosecution's deliberate misconduct."

And, of course, if it is really bad, you now have beefed up your *Pool v. Superior Court*, 677 P.2d 261 (1984) motion (intentional conduct by prosecutor causing mistrial and prejudice to accused may warrant dismissal on double jeopardy grounds).

Likewise, in really complicated cases, a written order may be prepared specially delineating what has been prohibited so that it is CLEAR, folks. This is particularly important where you know "tender" issues are going to come-up.

Confessions

Okay, so it is hard to win a complete suppression of confessions. But, defense counsel should keep in mind that even if you lose the suppression motion on legal grounds before the judge, you still get a second bite at the apple. You are entitled to re-litigate that during the trial and to get a jury instruction. "You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily." (Standard Criminal No. 6).

One step in investigating confession cases that is often overlooked is viewing the place where the "alleged confession" was obtained. For example, you will recall that in the case of Mike McGraw in the Temple murder case, he was taken to a downtown Phoenix hotel room. At first blush, that might not seem very coercive, but inspection of the room might demonstrate a great deal of cross-examination to the contrary.

Likewise, defense counsel needs to see the interrogation room that the police used to get statements from clients. What color was it? How big? If, for example, it is really small and four officers are in the room with your client, that might

make a big difference in assessing the coercive atmosphere of the interrogation.

In order to paint a picture for the judge during the suppression evidentiary hearing, and more importantly during trial, you need to know every detail of the interrogation. Seeing the "scene" of the interrogation is absolutely critical. There may be all kinds of stuff in the room that may create a coercive atmosphere that your client and the police will never mention, like a recent newspaper article about the death penalty visibly tacked to the wall!

Practitioners also should be aware that the Maricopa County Sheriff's Department has obtained videotaping equipment for taping confessions. Apparently, they intend to use it for high-profile cases. As for the Defense gets more information on the Sheriff's Department's videotaping program, we will include it in the newsletter. But undoubtedly, you will want to know why they videotape some cases and not others? Who decides? Was everything videotaped? Where was the camera? Anyway, you get the picture. While the videotape may work against you, it may also be what turns

victory into defeat for the prosecution.

Jury Voir Dire

Okay, I'm weighing in and entering the debate on voir dire, too. I'm for it. Having recently returned from the National Criminal Defense College in Macon, Georgia, where I got to conduct voir dire on real jurors (the college pays them!), it's a must for getting a fair trial. What's more, it's fun, and if you build a rapport with the jurors, it's obviously in your client's best interest.

Think of voir dire as a lawyer guided group interview and discussion of the legal, and most importantly, emotional issues in your case. For example, if race is an important emotional element of your case, it's got to be discussed. Remember, this is an effort to find people most likely to identify with the dominant emotions of your case and to sensitize them to their responsibility in hearing the evidence.

Here's the scoop. The State Bar Criminal Rules Committee has proposed the change to the rules; however, the Board of Governors hasn't acted yet. Hmm, doesn't

anyone know someone on the board.

(cont. on pg. 7)

In order to paint a picture for the judge during the suppression evidentiary hearing, and more importantly during trial, you need to know every detail of the interrogation. Seeing the "scene" of the interrogation is absolutely critical.

Think of voir dire as a lawyer guided group interview and discussion of the legal, and most importantly, emotional issues in your case. For example, if race is an important emotional element of your case, it's got to be discussed. Remember, this is an effort to find people most likely to identify with the dominant emotions of your case and to sensitize them to their responsibility in hearing the evidence.

Junior claims that his aggravated robbery conviction can not serve as a basis for the felony murder conviction because the deputy's death was not a result of the robbery. A person commits felony murder when such person commits or attempts to commit aggravated robbery and such person causes the death of any person. A death is in furtherance of an underlying offense if the death resulted from any action taken to facilitate the accomplishment of the felony. The crime of aggravated robbery may be a continuous crime. The robbery of the deputy did not end when Mickel had the gun and Junior had the radio. A person commits robbery where the person uses force with intent to prevent resistance to such person taking or retaining property. The definition of robbery includes any and all force used by a person in an effort to retain the property. Murdering the deputy to prevent him from regaining his gun was in furtherance of the aggravated robbery. A proper basis exists for Junior's felony murder conviction.

Junior argues that the trial court erred by denying his motion for judgment of acquittal because the offense of kidnapping merges into the subsequent murder conviction and may not be used as a basis for felony murder. The kidnapping and murder of the deputy were not conceptually identical and did not occur as part of the same act. The kidnapping occurred when the deputy was attacked and forced to lie on the ground. The murder occurred when Junior's order to shoot the deputy was carried out.

Junior argues that the felony murder rule is unconstitutional because it presumes the defendant has the intent to kill from the defendant's intent to commit the underlying felony. While the felony murder doctrine does not require specific intent to kill, it does require proof of the mental state required for commission of the relevant felony. The mens rea necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony.

Junior argues that his felony murder conviction is unconstitutional because the trial court gave the jury improper instructions. The trial judge gave the following instruction: "You may infer that the defendant intended to cause or knew he could cause, or attempt to cause death, the death of another person from the defendant's use of a deadly weapon or dangerous instrument, if you find that the killing was done without circumstances of legal justification or excuse, and done in such a way that it was likely to produce death." Junior argues that this instruction shifts the burden of proof by allowing the jury to infer intent from the use of a deadly weapon. The instruction given was permissive rather than mandatory. Under the instruction, the jury may, but is not required to, infer intent to commit the offense from the possession of the gun. Instructions that create a permissive inference do not ordinarily shift the burden of proof because the state is still required to convince the jury that the conclusion should be inferred based upon the facts. A permissive presumption will not affect the "beyond the reasonable doubt" standard unless the facts of the case suggest no rational way for the trier of fact to make the connection permitted by the inference. No error occurred.

After the shooting, Senior told Ruben that Senior shot the deputy. Junior moved to admit Ruben's testimony as a statement against Senior's penal interest. The trial court refused to admit the evidence. Junior's guilt is as an ac-

complice and is not controlled by whether Mickel or Senior fired the fatal shot. Even if Senior did shoot the deputy, the evidence supports defendant's felony murder conviction as Senior's accomplice. Ruben's statement was irrelevant, and the trial judge's decision was neither erroneous nor prejudicial.

Junior claims that the trial court erred in denying his request for Rule 11 examination due to his alcohol use. A Rule 11 prescreen found no evidence that Junior suffers from a mental illness and recommended against a full Rule 11 examination. No error occurred.

Junior also claims that his alcohol use required the court to appoint a psychiatrist to aid in the preparation and presentation of his defense. A trial court is not required to appoint a psychiatrist unless the defendant intends to raise the issue of his mental condition at trial. Junior did not pursue the issue of his mental condition at either the trial or at sentencing. Further, the effect of alcohol intoxication and alcoholism are within the common knowledge and experience of the jury and no expert would have been necessary. Testimony that Junior drank a case of beer and three-fourths of a bottle of wine did not provide a threshold basis for further examination.

On post-conviction relief, Junior claims that his attorney was ineffective because he failed to follow up on his alcoholism. He claims that his extreme consumption of alcohol influenced his judgment at the time of the offense and impaired his ability to assist his trial counsel. His statements upon arrest demonstrate his specific recall of the events. Trial counsel was not ineffective for failing to develop this evidence further.

Trial Issues - Mickel

Mickel claims that the judge improperly denied his motion for judgment of acquittal on the felony murder charge because the prosecution did not establish that the deputy's death resulted from an action taken to facilitate the accomplishment of other felonies. Mickel claims that the evidence did not show that he started out to commit some other type of felony and ended up committing murder. The prosecution introduced sufficient evidence to support Mickel's aggravated robbery and kidnapping convictions. There is substantial evidence supporting the jury's determination that the deputy's murder resulted from acts taken to facilitate the deputy's kidnapping. No error occurred.

Mickel claims there was insufficient evidence to support his conviction for aggravated robbery. The evidence indicates that Mickel forcibly deprived the deputy of his gun. Mickel admitted at trial that he physically wrested the gun from the deputy. This constitutes the use of force against the deputy for the purpose of depriving him of his property. This act occurred while Junior was physically present and participating in the scuffle, making him an accomplice.

(cont. on pg. 10)

Mickel claims there is insufficient evidence to convict him of kidnapping. A person commits kidnapping by knowingly restraining another person with the intent to interfere with the performance of a governmental or political function. A.R.S. § 13-1304(A)(5). When Mickel took the deputy's gun and ordered him to lie on the ground, Mickel restrained the deputy and intended to interfere with the deputy's performance of his duty.

Mickel contends that he was improperly convicted of felony murder because he murdered the deputy to prevent Senior's arrest, not to facilitate the aggravated robbery or kidnapping. Mickel's attempt to prevent the arrest was an attempt to interfere with the deputy's performance of a governmental function, an act of kidnapping. The deputy's death did in fact facilitate the kidnapping.

At his trial with Junior, Junior's post-arrest statements were admitted. Junior did not testify. Mickel contends that admission of Junior's statements violated the Confrontation Clause. Under *Bruton v. United States*, 391 U.S. 123 (1968), a defendant is deprived of his right to confrontation when a non-testifying co-defendant's confession inculcating defendant is introduced at trial. However, the Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession if the trial court gives a proper limiting instruction and eliminates the defendant's name and any reference to his existence. *Richardson v. Marsh*, 481 U.S. 200 (1987). Mickel claims that his trial should have been severed from Junior's trial under *Bruton*. Mickel claims that the trial court did not adequately remove all references to him from Junior's statements. Mickel contends that admitting Junior's statement that he heard Senior yell "Shoot him, shoot him" was error because the statement implied Mickel was the shooter. The subject of the sentence "Shoot him, shoot him" is the implied pronoun "you," and in light of the other evidence introduced at trial, Mickel was the only possible "you." The admission of this statement did not violate the confrontation clause because it contained no direct reference to Mickel, was not facially incriminating and did not directly refer to Mickel's existence. The statement became incriminating only when linked with other evidence introduced at trial, including Mickel's own testimony that he was holding the gun when Senior said "Shoot him, shoot him." Because Junior's statement did not incriminate Mickel without the linkage provided by the other evidence, it is presumed that the jury followed the trial court's limiting instruction to use Junior's confession only against Junior. The prosecutor also did not urge the jury to use Junior's confession against Mickel.

Mickel sought to introduce Ruben's statement that Senior confessed to shooting the deputy. Mickel claims Senior's statement to Ruben is an admission against Senior's interest. There is no evidence in the record indicating exactly what Ruben said, waiving the issue. Further, Ruben's statement would be irrelevant. Mickel was convicted of felony murder and acquitted of premeditated murder. Mickel admitted his part in the kidnapping and robbery. Mickel is guilty of felony murder as an accomplice even if Senior actually pulled the trigger.

Mickel argues that the prosecutor prejudiced the jury with an inflammatory closing argument by urging them to convict Mickel in order to do justice and maintain law and order. When taken in context, the prosecutor's statements

about justice and protecting society did nothing more than tell the jury that if they find the defendant guilty beyond a reasonable doubt, then they have a duty to protect society and our system of justice by returning a guilty verdict. The statements did not improperly urge the jury to convict Mickel for reasons solely irrelevant to his guilt or innocence.

Sentences

Senior's Sentence: Senior's death sentence is affirmed. Senior committed the deputy's murder in an especially cruel manner. The deputy suffered both physical pain and mental anguish before his death, and Senior was actively engaged in causing that pain and anguish. Senior commanded Mickel to shoot the deputy. The murder was especially cruel because the deputy was helpless and tried to shield himself from the fatal shot. The trial judge improperly relied on evidence introduced at Junior's and Mickel's trial. The trial judge also erroneously found that Senior kned the deputy in the groin. While a number of the trial court's findings in the special verdict are not supported by the exact language of the record, there is no error with these findings either individually or cumulatively. Senior's participation in the offense was substantial, and the requirements of *Florida v. Enmund*, 458 U.S. 782 (1982), regarding the death penalty for accomplices, have been satisfied.

Junior's Sentence: Junior's death sentence is affirmed. The trial judge properly found that the murder was committed in an especially cruel manner. There was evidence that Junior inflicted mental anguish and physical abuse on the victim before his death. The trial judge properly discounted Junior's young age of 20 because of the extent and degree of his participation in the deputy's murder. Junior was not a minor participant and his consumption of alcohol was not sufficient to impair his capacity to appreciate the wrongfulness of his conduct. While the evidence shows that Junior was drinking, no evidence suggests that he was impaired at all. Junior's sentence of life imprisonment for his kidnapping conviction committed while on parole or probation was also appropriate. His probationary status from Texas was proved by certified copies and his statements to the police.

Mickel's Sentence: Mickel's death sentence is reversed and reduced to life imprisonment. The trial judge properly found the aggravating circumstance that Mickel committed this murder in an especially cruel manner. The trial court also properly found Mickel's age of 18 and his deprived childhood as mitigating factors. The trial judge also properly rejected Mickel's employment record, lack of a criminal record, intoxication and mental impairment as mitigating circumstances. However, the trial judge erred in not finding that Mickel was under unusual and substantial duress at the time of the crime. Senior's directions to Mickel to shoot the deputy were substantial and immediate. Mickel had little opportunity to consider the consequences of his actions. Mickel committed the murder under duress, although not such as to constitute a defense to prosecution. The mitigating circumstances in this case taken as a whole, are sufficiently substantial to outweigh the single aggravating circumstance. [See also Dissent.]

MOTION AND BRIEF BANK

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

Motions

State v. Moore, CR 93-00385 (Motion to Dismiss Prior Conviction as Matter of Law--Filed July 1993).

Author: Donna Elm. This motion argues that the government may not prove a prior conviction as a matter of law, since there is insufficient evidence to show a constitutional "knowing and intelligent" waiver of counsel. The state must establish beyond a reasonable doubt that at the time of the accused's prior conviction she was represented by a lawyer, or knowingly and intelligently waived the right to counsel. Since a constitutionally infirm conviction may not be used to enhance a charge at a later proceeding, the government should be precluded from enhancing the accused's sentence in the event of a conviction at trial.

In this particular case the government has no evidence that the accused knowingly and intelligently waived counsel. There is no transcript of the proceeding, and there is no record expressly establishing that the accused was advised of his rights. Motion pending.

State v. Williams, CR 93-00735 (Motion to Disclose Informant--Filed July 1993).

Author: Mara Siegel. This motion argues that in addition to having a confidential informant's identity revealed concerning the guilt or innocence in a case, it may be constitutionally necessary in order to show that information substantiating probable cause. When the informant is confidential, the accused lacks access to the information necessary for a *Franks v. Delaware*, 438 U.S. 154 (1978) hearing. Pending.

Briefs

State v. Carrillo, 1 CA-CR 92-1827 (Opening Brief Filed July 25, 1993).

Author: Larry Matthew. This brief argues that the trial court improperly limited the scope of the defendant's expert's testimony. The defendant was charged with aggravated assault. Before trial an expert was retained to testify about the defendant's character traits that would have affected his perceptions at the time of the assault. The government opposed the testimony and an offer of proof hearing was conducted. The trial court allowed some testimony of the expert, but precluded him from explaining the traits and what effect they could have on a reasonable person's fear. Pending.

State v. Martin, 1 CA-CR 92-1523 (Reply Brief Filed July 12, 1993).

Author: Ed McGee. This brief makes several arguments. First, it argues that the state's propensity witness, Robert Emerick, is unqualified. This is especially true in light of the Arizona Supreme Court's rulings in *Treadaway* and *Corcoran* that require "reliable expert medical testimony" where the prior bad acts are remote in time.

Further, the brief argues that the trial court committed fundamental reversible error by allowing the prosecution to introduce evidence of the accused's burglary conviction in its case-in-chief, and other prior bad act testimony, without sufficient evidence to have it taken to a jury. Pending.

State v. Carothers, 1 CA-CR 92-1780 (Opening Brief Filed July 23, 1993).

Author: Stephanie Swanson. This brief argues, among other things, that the prosecutor repeatedly attempted to shift the burden to the defendant and misstated the law. Additionally, the prosecutor struck the only black member of the prospective jury panel, and the government failed to give a race-neutral explanation for the strike.

State v. Keeley, 1 CA-CR 93-0191 (Opening Brief Filed July 22, 1993).

Author: Paul Prato. This brief argues that the defendant was denied a fair trial because a police witness commented on post-arrest right to remain silent and a request for a lawyer. Defense counsel's objection was sustained. It is error to present an accused's post-arrest silence or request for a lawyer (*Doyle v. Ohio*). Pending. ^

July Jury Trials

June 29

Doug Harmon: Client charged with 12 counts of sexual conduct with a minor. Investigator V. Dew. Trial before Judge Sheldon ended July 15. Client found guilty on 9 counts; **judgment of acquittal** on 3 counts. Prosecutor Evans.

June 30

Joseph Stazzone: Client charged with burglary (with one prior). Trial before Judge O'Melia ended July 1. Client found guilty. Prosecutor Tucker.

July 7

Carole Carpenter: Client charged with DUI. Investigator D. Erb. Trial before Judge O'Melia ended July 9. Client found guilty. Prosecutor Bartlett.

(cont. on pg. 12)

Colleen McNally: Client charged with resisting arrest (while on probation). Trial before Judge Hall ended July 9. Client found **not guilty**. Prosecutor Richards.

July 8

Randall Reece: Client charged with attempted armed robbery and aggravated assault (dangerous). Investigator D. Beaver. Trial before Judge Dougherty ended July 14. Client found guilty. Prosecutor Rodriquez.

July 9

Donna Elm: Client charged with interfering with judicial proceedings. Trial before Judge Guzman ended July 9. Client found **not guilty**. Prosecutor Doran.

July 12

David Anderson: Client charged with one count of aggravated assault and two counts of sexual abuse. Investigator R. Thomas. Trial before Judge Roberts ended July 23. Client found **not guilty** on aggravated assault. Client found guilty of sexual abuse. Prosecutor Campos.

Catherine Hughes and Michelle Allen: Client charged with aggravated assault, kidnapping and burglary. Trial before Judge Brown ended July 15. Client found guilty. Prosecutor V. Harris.

July 13

Kevin Burns: Client charged with aggravated assault. Investigators B. Abernathy and N. Jones. Trial before Judge Ryan ended July 14. Client found guilty. Prosecutor Rapp.

Ray Schumacher: Client charged with theft (with priors and while on parole). Trial before Judge O'Melia ended July 14. Client found **not guilty**. Prosecutor Hinz.

July 14

William Stinson: Client charged with aggravated assault. Trial before Judge Ryan ended July 15. Client found guilty. Prosecutor Ruiz.

July 15

Ray Schumacher: Client charged with robbery (with two priors). Trial before Judge Bolton ended July 15. Client found guilty. Prosecutor Yares.

Kevin White and Tim Ryan: Client charged with aggravated assault. Investigator D. Moller. Trial before Judge Hendrix ended July 21. Client found **not guilty**. Prosecutor Smyer.

July 19

Colleen McNally: Client charged with possession of narcotic drugs (with prior) and possession of marijuana. Trial

before Judge Galati ended July 21. Client found guilty. Prosecutor Tinsley.

Valerie Shears: Client charged with sale of narcotic drugs, resisting arrest, and aggravated assault (with two priors). Trial before Judge Schwartz ended July 23. Client found **not guilty** on sale of narcotic drugs, and guilty on resisting arrest. Hung jury on aggravated assault charge. Prosecutor Schlittner.

Rickey Watson: Client charged with aggravated assault. Trial before Commissioner Jones ended July 28. Client found guilty. Prosecutor Schwartz.

July 20

Paul Ramos: Client charged with aggravated DUI and resisting arrest. Investigator V. Dew. Trial before Judge Sheldon ended July 23. Client found guilty. Prosecutor Wells.

Mara Siegel: Client charged with five counts of sale of narcotic drugs. Trial before Judge Martin ended July 21 with a mistrial. Prosecutor Davidon.

July 21

Christine Funckes: Client charged with aggravated assault and resisting arrest. Investigator H. Schwerin. Trial before Judge Ryan ended July 22. Client found **not guilty** on aggravated assault, guilty on resisting arrest. Prosecutor Richards.

Joseph Stazzone: Client charged with aggravated DUI. Trial before Judge D'Angelo ended July 27. Client found guilty. Prosecutor Ainley.

July 22

Scott Halverson: Client charged with two counts of burglary. Investigator V. Dew. Trial before Judge Roberts ended July 29. Client found **not guilty** on one count and guilty on one count. Prosecutor Glow.

Jerry Hernandez: Client charged with aggravated DUI. Trial before Judge Portley ended July 28. Client found guilty. Prosecutor Wells.

July 26

Gary Hochsprung: Client charged with nine counts of theft. Investigator N. Jones. Trial before Judge Gerst ended August 5. Client found guilty. Attorney General Baskin.

Peggy LeMoine: Client charged with aggravated assault. Investigator H. Schwerin. Trial before Judge Martin ended July 28. Client found guilty. Prosecutor Macias.

Stephen Whelihan: Client charged with possession of narcotic drugs and possession of marijuana. Trial before Judge Galati ended July 28. Client found guilty. Prosecutor J. Davis.

County Policy on Political Activity

Election time gives rise to questions about county employees' involvement in politics. The County Manager, Roy Pederson, recently issued a memo reminding us that county rules contain restrictions regarding political activity. His memo included the following:

In summary, these Rules state that:

1) A County employee shall not be a member of any national, state or local committee of a political party.

2) A County employee shall not be a candidate for nomination or election to any paid or unpaid public office, whether partisan or nonpartisan.

3) A County employee shall not take part in the management or affairs of any political party or of any political campaign, except that an employee may express opinions and attend meetings for the purpose of becoming informed, concerning the candidate for public office and the political issues and cast a vote.

The above provisions do not apply to school board elections, junior college district governing board elections or serving as a member of the governing board.

A County employee shall not use political endorsement in connection with an appointment to a position in the County classified service.

An employee who violates the restrictions on political activity shall be subject to a suspension of not less than thirty (30) days or dismissal.

POLITICAL ACTIVITY "DO's AND DON'Ts":

YOU MAY register and vote as you choose, and assist in voter registration drives.

YOU MAY express your opinion about candidates and issues.

YOU MAY attend political rallies and meetings, and make contributions to candidates.

YOU MAY join a political club or party.

YOU MAY sign nominating petitions.

YOU MAY campaign for or against ballot measures except where a conflict of interest is created.

YOU MAY display political stickers on personal vehicles.

YOU MAY be a candidate for election to a school board.

YOU MAY wear political badges/buttons during work hours, except when the badges/buttons support a candidate for the department in which you work.

YOU MAY NOT campaign for partisan candidates for political parties.

YOU MAY NOT make campaign speeches or engage in other activity to elect a partisan candidate or be a candidate.

YOU MAY NOT organize or manage political rallies or meetings, or solicit contribution on behalf of a candidate.

YOU MAY NOT hold office in a political club or party.

YOU MAY NOT circulate nominating petitions.

YOU MAY NOT campaign for or against a candidate or slate of candidates in a partisan election.

YOU MAY NOT distribute campaign material in a partisan election.

YOU MAY NOT run for and hold public office whether paid or unpaid, whether partisan or nonpartisan.

YOU MAY NOT wear badges/buttons if you wear a uniform or have regular contact with the public.

YOU MAY NOT engage in any political activity (party oriented or not) which interferes with your job or which utilizes County supplies, equipment, facilities or staff.

If further clarification is necessary, please contact the Employee Relations Division of the Human Resources Department at 506-3895. ^

Personnel Profiles

Ellen Hudak, a legal secretary in Trial Group A, has been named the new lead secretary for Trial Group B. Ellen assumed her new role on August 16. Russ Born reportedly is devastated at the loss of his "right arm."

Catherine Hughes, a trial attorney in Group D, has been appointed by the Governor to serve on the State Sentencing and Parity Review Study Committee. The committee will review the sentences in the Arizona criminal code to look at appropriateness and parity in sentencing. A committee report with recommendations for the Governor and legislature is planned for completion by December 15.

Gary Kula, a trial attorney with our office since 1989 and an acknowledged authority on DUI's, has been appointed by the Governor to serve on a new, 16-member, DUI advisory council. The council was established to study several issues in the area of DUI treatment programs and reporting systems, and will provide a report to the Governor and the legislature by December 31.

Garrett Simpson, an attorney in our appeals division, saved the life of a three-year-old child in front of our downtown building on August 16. Garrett and Amy Bagdol noticed a vehicle parked at the Jefferson Street curb. The driverless vehicle had its engine running and had two children inside -- one baby strapped to an infant seat and one toddler. The toddler became restless and opened the car door, falling into the street and oncoming traffic. Garrett rushed into the street and scooped up the child, carrying him to safety. The children's mother appeared from a bail bonds office and was unable to express gratitude. ^



THE DEFENSE ATTORNEY

Perhaps the greatest calamity that can befall a human being in our society is to be charged with a criminal offense. Based on mere accusations, the government, through the machinery of criminal prosecution, focuses its formidable powers against the individual. Amassed against the accused will be the prosecutor, the police and often times the general public. The process may rend apart the accused's family, alienate his friends and destroy his own feelings of self worth. He will be forced to undergo public proceedings, many of which he may not understand, and in which the prosecution will constantly point the accusatory finger as if to say "By his deeds, he is no longer one of us." Very often the stakes are high. A judgment against the accused may require him to forfeit his property, his freedom, even his life. Into this breach steps defense counsel. Sworn to protect the client's interests to the best of his ability, defense counsel, too, may incur the wrath of public disapproval, but his solemn oath will require him to provide the best defense the law will allow no matter what the personal costs. Armed with little more than his wits and his knowledge of the criminal law, he will become the voice through which the accused will, in effect, do battle with the awesome powers of his own government. Our adversary system requires no less than that defense counsel become a "brother in arms" to the accused in this battle. Defense counsel must be prepared to stand and fight for his client against public outcry; he must stand and fight for his client throughout his trial; and he must stand and fight for his client at the time final judgment is entered. Such a system is not efficient. It is not designed for "swift justice." Indeed, some would say that it is not designed for "justice" at all. But if posterity judges a free society by how it treats its individual members, it should be of considerable consolation to us all that our system does not require an accused to stand alone. ^

JUVENILE July 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 goes unrecognized. Once again this month we want to highlight our Juvenile Division's work.

Attorney	Number of Trials (Result-Disposition)	Dismissals
Allen, Robin W.	0	4
Bliss, Susan	3 (2 NG; 1 G-Placement)	8
Carter, William J.	2 (1 G-Work Hours/1-G T&C)	5
Heiler, Suzanne K.	0	3
Helme, William J.	0	2
Kaplan, Gerald M.	2 (G-Probation)	1
Katz, David A.	3 (1 NG; 2 G-Work Hours)	4
Katz, Ellen E.	0	2
Komadina, Jeannette N.	0	3
Lue Sang, Michelle C.	0	2
McGee, Amanda	1 (G-JIPS)	4
Melvin, John W. (Bill)	5 (4 G-Probation; 1-Placement)	3
Morse, Margaret C.	3 (G-Probation)	8
Natalé, Gail G.	1-NG	8
Phillis, Christina M.	1 (G-Probation)	4
Pintard, Suzette I.	0	4
Salonick, Richard J.	2 (1 G-Probation; 1 G-ADYTR)	2
Santoro, Karen L.	0	1
Shaw, Teri L.	2 (G-Probation)	10
Smith, David C.	3 (G 2-Probation; 1-Work Hours)	13
Troiano, Vincent W.	1 (G-Probation)	3
Twarog, Mary Ann	0	4
White, Susan G.	0	7
Whitfield, D. Anne	3 (1 G-Work Hours; 2-Probation)	5
Zimmerman, Terri G.	0	8

TRAINING AT A GLANCE

DATE	TIME	TITLE	LOCATION
Wed., September 15	10:00 a.m. - 11:00 a.m.	<i>Support Staff Training "Criminal Appeals: Trying for a Rematch"</i>	MCPD Training Facility
Fri., September 24	9:00 a.m. - 4:30 p.m.	<i>"Cultural Diversity & Client Relations"</i>	Board of Supervisors Aud.
Fri., October 22	8:00 a.m. - 5:00 p.m.	<i>"Handling Confession Cases"</i>	Holiday Inn Crowne Plaza
Wed., December 1	1:30 p.m. - 3:30 p.m.	<i>"The Changing Criminal Code: A Support Staff Primer"</i>	MCPD Training Facility
Fri., December 3	(to be announced)	<i>Criminal Code Revisions (to be titled)</i>	Board of Supervisors Aud.

BULLETIN BOARD

Name Change

The name of our Pretrial Services section changed this month to **Initial Services**. This renaming was done to avoid any further confusion with the court's pretrial services. With the section's change to **Initial Services** comes the change of staff's title to **Initial Services Specialist**.

Subscriptions

for The Defense subscriptions expire at the end of September. Current subscribers who wish to continue the delivery of their monthly newsletter with no interruption should renew by September 15. New subscribers who wish to start regular delivery of *for The Defense* also will want to submit their subscriptions by September 15. The year's subscription (which runs from October 01 to September 30) is still only \$15.00.

For subscriptions, please send your name, mailing address and a \$15.00 check (payable to "Maricopa County") to:

Maricopa County Public Defender's Office
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004
ATTN: Heather Cusanek