



for The Defense

▶ ◀ Dean Trebesch, Maricopa County Public Defender ▶ ◀

Legislation Review 2000 at the Arizona Legislature

INSIDE THIS ISSUE:

Articles:

Legislative Review	1
With Liberty, Justice and Backtime for All	1
Vouching, The Series Part 6: Negative Vouching	12

Regular Columns:

Arizona Advance Reports	10
Bulletin Board	9, 11
Calendar of Jury and Bench Trials	20

By Shannon Slattery Defender Attorney – Legislative Liaison

The 2nd Regular Session of the 44th Legislature began January 10, 2000. Legislators called for a 75-day session and there was a request from leadership that members limit the number of bill filings in order to meet the 75-day session goal. The session ended 100 days later on April 18, 2000. A record number of bills, 1,280, were filed by House and Senate members (721 House/ 559 Senate).

Of the bills filed, 420 bills, the second highest number in Arizona history (432 is the highest), were transmitted to Governor Hull for her signature. Fifteen bills were vetoed and three passed without the Governor's signature for a

final total of 405 bills being given chapter assignments as session laws. The general effective date of legislation passed during the 2nd Regular Session is July 18, 2000 unless the bill otherwise provides an effective date or the bill contains an emergency clause, in which case, it is effective upon signature by the Governor.

It was a whirlwind session and, as most of you are aware, my first as the Public Defender's representative at the capitol. There were several bright spots this session, mainly because several items of legislation did not survive. Failed legislation included an attempt to burden prisoners' rights to religious freedom, an attempt to make out-of-state conviction classifications controlling for

(Continued on page 2)

With Liberty, Justice and Backtime for All

Three Reasons Why Your Guilty-Except-Insane Client Should Receive Presentence Incarceration Credit

By Anna M. Unterberger Defender Attorney – Appeals Division

One of the last things that happens when you represent a client, and usually one of the last things on the minds of counsel and the court, is the proper awarding of presentence incarceration credit ("backtime"). While making sure that your client receives the proper amount of backtime is always important, it becomes especially critical when your client is not awarded backtime, and therefore is

discriminated against, because the client has been found guilty except insane ("GEI") and sentenced accordingly.

The GEI verdict may occur through a plea agreement (review is by way of post-conviction relief proceedings), or through a submission to the court that includes police and medical reports, a bench trial, or a jury trial (review is by way of an appeal). If your client proceeds via a submission or a bench trial, make sure that the client is properly

(Continued on page 5)

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purposes of alleging prior convictions, and an attempt to increase the penalty for verbal threats or intimidation to a state employee engaged in his or her official duties from a class 1 misdemeanor to a class 5 felony. A summary of pertinent legislation that did pass is provided in this Legislative Review.

I'd like to take this opportunity to thank all of you for your support and willingness to help me with the myriad issues that were presented this year. A special thanks to everyone who came to the capitol to testify and experience Arizona politics first hand, and to Helene Abrams for her invaluable work on the juvenile competency bill.

The next session's legislative agenda has already begun taking shape. Please pass on any ideas or issues that you think might be of interest for the upcoming session. It's sure to be another wild ride.

Summary of Changes to the Criminal Code

Motor Vehicle/DUI

§28-1381/§13-2831 – Repeals the affirmative defense and prohibits driving or being in actual physical control of a motor vehicle or watercraft with an alcohol concentration of .10 or greater within 2 hours of driving or being in actual physical control if the alcohol concentration results from alcohol consumed either before or while driving.

§28-673 – Adds language to the statute on implied consent in traffic accident cases to mirror implied consent language contained in §28-1381.

§28-1442 – Gives judges discretion to require installation of ignition interlock devices for longer than the current one year period. Mandates installation of ignition interlock devices upon a first time extreme DUI conviction. Requires MVD to administer the ignition interlock program and maintain records on the number of extreme and second time DUI cases where ignition interlocks are ordered and installed.

§4-251 – Prohibits open containers of alcoholic beverages to be possessed in the passenger compartment of any vehicle on any public highway or right of way. (Exceptions: cabs, buses, limos, and living quarters of mobile homes.)

Assault/Domestic Violence

§13-1213 – Makes it a class 1 misdemeanor to intentionally or knowingly aim an operating laser pointer at someone a person knows or has reason to know is a police officer. Laser pointer is defined as, "a device that consists of a high or low powered visible light beam used for aiming, targeting, or pointing out features."

NOTE: This bill passed into law without Governor Hull's signature. In her message to House Speaker Jeff Groscost, the Governor stated:

"I encourage prosecutors throughout this state to continue sending a strong message to those who use laser pointers to harass by charging violators with aggravated assault, a class 6 felony. If any injury results to the officer, the violator can be charged with a class 5 felony."

Interestingly enough, law enforcement, in arguing for this bill, said precisely the opposite – that laser pointers did not fall within the definition of aggravated assault, class 6, and that judges were not allowing such charges, so a new law was required to deal with this specific type of offense.

§13-4401 – Allows a vulnerable adult (as defined in 13-3623) who is the victim of a crime to have the court appoint a representative to exercise the adult victim's rights on his or her behalf (mirrors victim rights provisions for minors). Revises the definition of "custodial agency" and adds a new definition for "release" to include transfer from one custodial agency to another. Defines unlawful grand jury disclosure to include disclosing any grand jury matter, with the exception of allowing a prosecutor to inform a victim of the status of a case.

§13-3601/§13-3602 – Definition of domestic violence is expanded to include children in a broader range of situations, including step-grandparents. Allows an injunction against harassment to be served by the appropriate police agency, constable, correctional officer, or sheriff, depending on the issuing court and plaintiff's wishes. If a domestic partner maintains a residence previously held by both partners, the other may return to the residence once, in the company of a law enforcement officer, to retrieve personal possessions.

§13-3601 – Allows a judge to increase the maximum sentence available in a domestic violence case by up to 2 years if the victim was pregnant and the person responsible for the abuse knew of the pregnancy. Prohibits a judge from ordering joint counseling for a victim and an abuser.

Note: On the positive side, a person convicted of homicide prior to September 30, 1992 may petition the Board of Executive Clemency for a review of sentence if the person convicted was subject to repeated domestic violence by the person who was killed.

Sexually Violent Persons

§36-3717 -- Except for medical necessity or court-ordered

release, it is illegal to transport a sexually violent person from a State Hospital facility except to court for specified hearings or proceedings. Proceedings can be held on grounds of the facility using audiovisual or telephone-conference devices. At a hearing on conditions of detention or treatment at a state licensed facility, the detained person must show that the procedures or actions that are challenged have no reasonable basis in fact or law. The Arizona Department of Health Services is responsible for transporting the sexually violent persons, except to court ordered hearings, in which case, the court will assign a party responsible for transport. DHS and county sheriffs are immune from liability for good-faith acts taken during transport. A provision which would have made it a class 6 felony to escape from civil confinement during transport was removed from the bill.

Prisoners

§13-4240 – Allows a person convicted and sentenced for a felony to request DNA testing of any of the state’s evidence if there is a “reasonable probability” that the person would not have been prosecuted or convicted if exculpatory DNA results had been available, if the evidence was not previously DNA tested, and if the evidence still exists in a condition that allows DNA testing. DNA sampling statute is revised to expand the type of crimes for which DNA samples are to be collected and requires maintenance of samples for at least 35 years.

§31-229.02 – Prisoners who fail to achieve 8th grade literacy level are not eligible for early release to community supervision until they reach the proscribed literacy level or serve their full prison term. Exceptions are made for developmentally disabled persons, foreign nationals, and those with terms less than one year. Also provides for forfeiture of 5 days of early release credit if a prisoner tests positive for drugs while in prison.

§31-242 – Creates a class 1 misdemeanor for a prisoner to access and use the internet, except as authorized by the Department of Corrections. Requires ADOC director to adopt rules limiting internet access and use. Revises statute on prisoner correspondence to prohibit e-mail.

Theft

§13-1816/§13-1817 - Creates a class 3 felony for shoplifting during a “continuous criminal episode,” which is defined as a series of shoplifts from 3 different establishments over 3 separate days, regardless of property value. Creates a class 6 felony to make, use or distribute a bag or device designed to shield merchandise from electronic or magnetic detection (currently a class 4 offense). Creates a class 6 felony to cheat or defraud a merchant by making or using fake sales receipts

or universal product codes (currently a class 4 offense). Financial penalty that may be imposed on an adult or emancipated minor convicted of shoplifting is increased to \$250 from \$100.

Search Warrants

§13-3915 – Tracks U.S. Supreme Court case *Richardson v. Wisconsin*. Allows a magistrate to authorize a “no-knock” warrant upon a reasonable showing that an announced entry would endanger a person or result in the destruction of evidence. Evidence seized by search warrant may not be suppressed based on technical violation of search warrant requirements, except as required by the United States and Arizona Constitution.

Drugs/Child Abuse/Felony Murder

§13-3623 – “Threshold” amount of methamphetamine is expanded to include amphetamine in liquid suspension. Statute against abuse of children and vulnerable adults is expanded to make it a class 2 felony to allow a child or vulnerable adult to enter and remain in a place where drugs are manufactured. The felony murder statute is expanded to include deaths which result during the transportation or trafficking of drugs.

Firearms

§13-3101 – Modifies definition of “prohibited possessor” to include persons on probation for felony offenses or offenses of domestic violence whether felony or misdemeanor.

§13-3107 – Creates a class 6 felony for the criminally negligent firing of a firearm within the city limits. Exemptions include the firing of blanks; firing more than one mile from an occupied structure; self-defense; defense of others. May be cited as “Shannon’s Law.”

§13-3102/13-3108 – Prohibits entities other than the state from regulating firearms and ammunition, except for local taxes on firearms, ammunition and components, and local ordinances which prohibit minors from carrying firearms in public places, parks, trails, etc. Authority to prohibit firearms on school grounds is retained by local authorities.

Evidence

§13-3989.02 – Makes admissible as evidence, subject to hearsay and foundation requirements, public safety radio traffic call recordings and records, including radio calls, data compilation and copies of radio traffic records and recordings with accompanying explanatory materials if accompanied by a specified statement explaining their origin.

Schools

§13-2911 – In response to the Arizona Supreme Court’s decision in *In re Caesar*, this section creates a class 6 felony for “interference with or disruption of an educational institution.” Interference/disruption is defined as causing or threatening injury or damage to school employees, students, or property. Does not require a person to specify injury/damage to be threatened or caused against a particular individual for the statute to apply.

Juvenile

§8-291 – Amends Title 8 relating to juvenile competency proceedings, including: 1) if the court determines competency proceedings are required, the court must appoint two or more mental health experts and follow outlined procedures; 2) provides for screening report from mental health experts; 3) describes new requirements for competency examination; 4) provides a privilege against self-incrimination for statements during any examination or restoration program; and 5) modifies A.R.S. §8-291.10 regarding competency reports and hearings.

§8-308 - Requires parental attendance at juvenile court proceedings. Parental attendance may be waived by the juvenile court upon a showing of good cause. If attendance is not waived, the court may issue an order to show cause why the non-responding parent should not be held in contempt of court for failing to appear.

§8-246 – Amends statutes governing treatment of juvenile offenders, including: 1) ADJC maintains jurisdiction of a juvenile if the juvenile commits an offense while in the custody of ADJC and as a result of the offense is subject to adult probation; 2) mandatory suspension or denial of a driver’s license if a juvenile fails to appear for hearings or follow court orders; 3) one year limitation on juvenile probation term no longer applies to juvenile sex offenders; and 4) restitution payment requirements are consolidated into a single statute.

§15-803 -- A student absent more than 10 per cent of required attendance days may be adjudicated as an incorrigible child. School board rules must include conditions for readmission of a student suspended for more than 10 days. Board rules must be "consistent with the constitutional rights of pupils."

Miscellaneous Legislation of Interest

HB2079 – Creates a study committee of legislators and local government representatives, officially called the Arizona State Retirement System Actuarial Computation Method Legislative Study Committee, to examine and compare actuarial computation methods that may be appropriate for

the Arizona State Retirement System, including entry-age, normal-cost, and project unit-credit methods. In plain language, the legislature is looking at whether and by how much the annual percentage multiplier of the ASRS system may be increased. The committee is required to report by December 1, 2000.

§38-767 – Repeals the requirement that retirees and beneficiaries covered by the Arizona State Retirement System be at least 55 in order to receive the automatic annual benefit increase prescribed by law.

§41-2404 – Expands the Criminal Justice Commission's spending authority to allow it to spend money on efforts to investigate, prosecute and adjudicate crimes by dangerous and repeat criminals. If a crime victim is paid money from the victim compensation fund administered by the Criminal Justice Commission, the fund is subrogated to the victim's rights against the criminal (i.e. the fund can sue the criminal for the money it paid the victim).



With Liberty, Justice and Backtime for All

Continued from page 1

informed by the court of the rights that the client gives up by waiving a jury trial.

Your GEI client should receive backtime toward their sentence in the Arizona State Hospital because to do otherwise would:

- Violate their right to equal protection under the federal and Arizona Constitutions;
- Violate their right to due process under the federal and Arizona Constitutions; and/or,
- Violate the basic tenets of statutory construction, including those of *expressio unius est exclusio alterius* and the rule of lenity.

This article separately analyzes these three arguments. The text of the relevant statutes and their subsections appear in the Appendix at the end of the article.

THE THREE ARGUMENTS

The Equal Protection Argument

Statutes must not violate the equal protection clauses of the federal and Arizona Constitutions. *See*, U.S. Const., Amend. XIV; Ariz. Const., Art. 2, § 13. Courts presume that when enacting a statute, the legislature intends that the statute afford equal protection to the defendant who must remain in jail pending trial because that defendant cannot afford to post bond. *See*, *State v. Gray*, 122 Ariz. 445, 449, 595 P.2d 990, 994 (1979); *State v. Mathieu*, 165 Ariz. 20, 22, 795 P.2d 1303, 1305 (App. 1990).

A denial of equal protection occurs where the defendant receives the maximum sentence for an offense and is not given credit for presentence time spent in jail because of an inability to post bond due to indigency. *See*, *State v. Warde*, 116 Ariz. 598, 600-01, 570 P.2d 766, 768-69 (1977) (“[A] defendant, as a matter of equal protection, must be credited with presentence jail time when such time, if added to the maximum sentence imposed, will exceed the maximum statutory sentence.”); *State v. Sutton*, 21 Ariz. App. 550, 551, 521 P.2d 1008, 1009 (1974) (failing to credit presentence incarceration “amounts to an infringement of freedom and deprivation of liberty and when added to the maximum deprivation of liberty allowed by law results in a denial of equal protection guaranteed by the 14th Amendment of the United States Constitution.”); *cf.*, *Williams v. Illinois*, 399 U.S. 235, 241-42, 90 S.Ct. 2018, 2022 (1970) (holding that in

the context of incarceration in lieu of paying court fines or costs, “once the State has defined the outer limits of incarceration necessary to satisfy its penological interest and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”)

Here, we are faced with two classifications involving the indigent guilty-except-insane defendant that may violate equal protection rights. The first classification is the indigent guilty-except-insane defendant versus the financially-solvent guilty-except-insane defendant. For example, say your GEI defendant were unable to post bond while the defendant’s case proceeded through the criminal justice system, and the defendant was held in custody for two years before being sentenced. The defendant was then sentenced to the Arizona State Hospital for the presumptive term for the crime, as required by A.R.S. § 13-502(D). That defendant will always be subject to two years more of confinement under the guilty-except-insane verdict than the insane defendant who had the financial means to remain out of custody prior to the verdict and sentence.

The second classification is the indigent GEI defendant versus the indigent guilty-and-sane defendant. When a guilty-and-sane defendant is sentenced, there is no question that the client will receive credit for backtime against the sentence to be served in the Arizona Department of Corrections. Thus, and under A.R.S. § 13-709(B), if the court does not award the indigent GEI defendant backtime, the court penalizes that defendant for being found insane.

The Due Process Argument

The federal and Arizona constitutions prohibit government deprivation of liberty without due process of law. *See*, U.S. Const., Amends. V & XIV; Ariz. Const., Art. 2, § 4; *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). “Because a person’s liberty is at stake in a sentencing procedure, it obviously involves the deprivation of due process if the procedure is improper. Therefore, the sentencing process . . . must satisfy the requirements of due process.” *State v. Ritch*, 160 Ariz. at 498, 774 P.2d at 237. Furthermore, “commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *State v. Superior Court (Mittenthal)*, 150 Ariz. 295, 296, 723 P.2d 644, 645 (1986), quoting *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809 (1979).

The *Ritch* Court resolved this issue: should a defendant who was adjudicated as an adult receive backtime against his adult prison sentence for the time that he was held in custody in a juvenile facility? The Court concluded that the defendant must receive credit for his juvenile-facility time. “If appellant is not credited for his entire period of presentence confinement, he will end up serving more total time in

custody than a defendant sentenced to state prison who either was not detained pretrial, or a defendant in custody whose status was as an adult since arrest.” 160 Ariz. at 498, 774 P.2d at 237.

If the court does not award backtime, the indigent GEI defendant’s liberty restriction will always be greater than it would have been if that defendant had been able to post the bond ordered by the court. This results in an improper sentencing procedure that violates due process.

The Statutory Interpretation Argument

“When interpreting the meaning of particular statutory provisions, we seek to discern the intent of the legislature.” *State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992). If a statute is ambiguous, “the court may examine a variety of factors including the language used, the context, the subject matter, the effects and consequences, and the spirit and purpose of the law.” It may also consider the chapter location of the statute. *Id.*

“When a statute is ‘susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.’” *State v. Tarango*, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996), quoting from *State v. Pena*, 140 Ariz. 544, 549-50, 683 P.2d 744, 748-49 (App. 1983). Additionally, and when possible, the court must construe “a statute so as to avoid rendering it unconstitutional [.]” *Ramirez v. Health Partners of Southern Arizona*, 193 Ariz. 325, 330, 972 P.2d 658, 663 (App. 1998).

A sentence is a judicial order requiring a defendant convicted in a criminal case to presently suffer a specified sanction. *State v. Muldoon*, 159 Ariz. 295, 298, 767 P.2d 16, 19 (1988). “[I]n determining whether time spent in a facility constitutes ‘custody’ under our credit statute, the circumstances of placement are of greater significance than the nature of the facility itself.” *State v. Vasquez*, 153 Ariz. 320, 321, 736 P.2d 803, 804 (App. 1987).

The term “in custody” in A.R.S. § 13-709(B) includes periods when the defendant is in the constructive control of jail or prison officials. *State v. Reynolds*, 170 Ariz. at 236, 823 P.2d at 684. When a defendant spends time being committed for diagnostic purposes, that time shall be credited to the sentence of imprisonment that he receives. A.R.S. § 13-605 (B) & (D). A defendant must receive credit for confinement during periods of civil commitment against the sentence imposed for a criminal offense. A.R.S. § 13-606(A) & (B).

When the legislature does not specifically preclude credit for time served regarding a particular circumstance, then it intends that credit be granted under the principle of *expressio unius est exclusio alterius*, i.e., the expression of one thing

implies the exclusion of others. *State v. Fragozo*, 314 Ariz. Adv. Rep. 14, ¶ 5 & n.1 (App. 2000). The court must not by implication or construction read an exception into A.R.S. § 13-709(B). *State v. Ritch*, 160 Ariz. at 497, 774 P.2d at 236.

The government has dual interests in committing an insane defendant who has perpetrated a crime: treatment of the individual’s illness; and, protection of the individual and society from the individual’s potential dangerousness. *State v. Rambeau*, 152 Ariz. 174, 177, 730 P.2d 883, 886 (App. 1986), citing *State v. Superior Court (Mittenthal)*, 150 Ariz. at 297, 723 P.2d at 646; accord, *Addington v. Texas*, 441 U.S. at 426, 99 S.Ct. at 1809 (recognizing that in addition to caring for its mentally-ill citizens, “the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.”) See also, A.R.S. § 13-3994(F)(1) & (2) (the person shall remain committed if still suffering from a mental disease or defect and dangerous; before being released, the person’s entire criminal history shall be considered, and there is no release if the board determines that there is a propensity to reoffend); -(H)(1) (at any release hearing, public safety and protection are primary); -(N)(1) & (2) (before a person may be released, a written examination must include an opinion as to the mental condition of the person and whether the person is dangerous).

While the person is subject to the sentence under A.R.S. § 13-502, the psychiatric review board maintains police-like powers, and the prosecutor, victim, and sentencing county remain involved. See, A.R.S. § 13-3994(L) (a written order of the board is sufficient for any law enforcement officer to take the released person into custody and transport them; a hearing will be held with notice to the person, victim, person’s attorney, the county attorney and the attorney general); -(N) (before any hearing, the person, the person’s attorney and the attorney general or county attorney may choose a doctor to examine the person, and the costs shall be approved and paid by the county of the sentencing court).

As the preceding statutes show, the sentence that the GEI defendant must serve has punitive, as well as restorative, aspects. Society must be protected from the defendant’s potential dangerousness. Before any release, the GEI defendant’s entire criminal history and propensity to reoffend must be considered. Once released, the board may choose to issue an order against the GEI defendant that is the equivalent of an arrest warrant, and have the police take the defendant into custody. The defendant may then be subjected to a hearing that includes the attendance of the State’s attorney, and the victim of the offense.

Here, interpreting A.R.S. § 13-709(B) as allowing a court to refuse to award backtime violates the statutory tenets of *expressio unius exclusio alterius* and the rule of lenity, as well as the previously-discussed constitutional provisions.

Consequently, courts should interpret A.R.S. § 13-709(B) as requiring that the court award the indigent GEI defendant backtime.

CONCLUSION

Indigent, insane persons already have two strikes against them – don't let the court make it three! When the court sentences your GEI client, you should request, and the court should order, that your GEI client receive backtime against the sentence that is imposed as the result of a GEI verdict.

APPENDIX CONTAINING RELEVANT STATUTES

A.R.S. § 13-502.

(A) "A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."

(D) "If the finder of fact finds the defendant guilty except insane, the court shall determine the sentence the defendant could have received pursuant to . . . § 13-701, subsection C, . . . if the defendant had not been found insane, and the judge shall commit the defendant pursuant to § 13-3994 for that term."

A.R.S. § 13-605.

(B) "If after presentence investigation the court desires more detailed information about the defendant's mental condition, it may commit or refer the defendant to the custody of any diagnostic facility for the performance of psychiatric evaluation."

(D) "If after receiving a diagnostic report . . . the court sentences the defendant to imprisonment, the period of commitment . . . shall be credited to the sentence imposed."

A.R.S. § 13-606.

(A) "If, after imposition of sentence authorized by § 13-603 and on the basis of the report and recommendations submitted to the court under subsection B of § 13-605, the court believes that the defendant discloses symptoms of mental disorder, the court may proceed as provided in chapter 5 of title 36."

(B) "After termination of the commitment in subsection A of this section, the defendant shall be returned to the court for release or to serve the unexpired term imposed as authorized by § 13-603. The period of confinement pursuant to the civil commitment shall be credited to the sentence imposed."

A.R.S. § 13-709.

(B) "All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such an offense shall be credited against the term of imprisonment otherwise provided for by this chapter."

A.R.S. § 13-3994.

(A) "A person who is found guilty except insane pursuant to § 13-502 shall be committed to a secure state mental health facility under the department of health services for a period of treatment."

(D) "If the court finds that the criminal act of the person committed pursuant to subsection A of this section caused . . . the threat of death or serious physical injury to another person, the court shall place the person under the jurisdiction of the psychiatric security review board. The court shall state the beginning date, length and ending date of the board's jurisdiction over the person. The length of the board's jurisdiction over the person is equal to the sentence the person could have received pursuant to . . . § 13-701, subsection C[.]"

(F) "A person who is placed under the jurisdiction of the psychiatric security review board pursuant to subsection D of this section is not entitled to a hearing before the board earlier than one hundred twenty days after the person's initial commitment."

(1) "If the psychiatric review board finds that the person still suffers from a mental disease or defect and is dangerous, the person shall remain committed at the secure state mental health facility."

(2) "If the person proves by clear and convincing evidence that the person no longer suffers from a mental disease or defect and is not dangerous, the psychiatric security review board shall order the person's release. . . . Before determining to release a person pursuant to this paragraph, the board shall consider the entire criminal history of the person and shall not order the person's release if the board determines that the person has a propensity to reoffend."

(H) "At any hearing for release or conditional release pursuant to this section:

(1) Public safety and protection are primary."

(I) "At least fifteen days before a hearing is scheduled to consider a person's release, or before the expiration of the board's jurisdiction over the person, the state mental health facility or supervising agency shall submit to the psychiatric security review board a report on the person's mental health. The psychiatric security review board shall determine whether to release the person or to order the county attorney to institute civil commitment proceedings pursuant to title 36."

(L) "If at any time while the person remains under the jurisdiction of the psychiatric security review board it appears . . . that the person has failed to comply with the terms of the person's conditional release or that the mental health of the person has deteriorated, the board . . . may order that the person be returned to a secure state mental health facility for evaluation or treatment. A written order of the board . . . is sufficient warrant for any law enforcement

officer to take the person into custody and to transport the person accordingly. Any sheriff or other peace officer shall execute the order and shall immediately notify the board of the person's return to the facility. Within twenty days after the person's return to a secure state mental health facility the board shall conduct a hearing and shall give notice within five days before the hearing of the time and place of the hearing to the person, the victim, the attorney representing the person, the county attorney and the attorney general."

(N) "Before the initial hearing or any other hearing before the psychiatric review board on the release or conditional release of the person, the person, the attorney who is representing the person and the attorney general or county attorney who is representing the state may choose a psychiatrist . . . or a psychologist . . . to examine the person. All costs in connection with the examination shall be approved and paid by the county of the sentencing court. The written examination results shall be filed with the board and shall include an opinion as to:

(1) The mental condition of the person.

(2) Whether the person is dangerous."

(P) "For the purposes of the section, 'state mental health facility' means a secure state mental health facility under the department of health services."

Special Action Assistance

By
Amy Bagdol, Support Services Manager

You're action **IS** special, and we know that, so a special lead secretary has been drafted to help you through it. Amy Oberholser, Group B Lead Secretary, has become our in-house procedural expert for special actions. She can:

- tell you what forms to use and who delivers what
- show you how to use the conference phone (and tell you who's responsible for setting the calls)
- help your secretary with the packets and numbers of copies
- give you a check list to follow so that your point doesn't look like it's on the top of your head

We're very fortunate to have Amy as a resource. When the time comes, you will appreciate this special service.

Additionally, Russ Born, Training Director, has compiled a special actions notebook containing the rules applicable to special actions, sample petitions, and checklists with practice hints. Each supervisor and trial group counsel has a copy.



BULLETIN BOARD

New Attorneys

Bill Melvin, Defender Attorney, returned to the office on a part-time basis effective June 26, 2000. Bill is assigned to Group E, but he will be doing weekend juvenile court duty beginning in August.

Jennifer Moore, Defender Attorney, joined the office on Monday, June 26, 2000 and will be assigned to Group C. Jennifer graduated from the University of North Dakota School of Law in 1997. Most recently, Jennifer was working for the Mohave County Public Defender's Office.

Margot C. (Meg) Wuebbels, Defender Attorney, returned to the office effective Monday, July 10, 2000. Meg will be assigned to EDC.

Attorney Changes/Moves

Ken Huls will be the new trial counsel for Group D. Ken will assume his new duties July 31, 2000.

Michael Eskander, Defender Attorney at Group C will transfer to Group D effective Monday, July 31, 2000.

Richard P. Kreckler, Defender Attorney at Juvenile assigned to weekend court duty resigned from the office effective Monday, July 3, 2000 to take a contract assignment.

Nathaniel J. Carr, Defender Attorney in Group A, departed the office effective Friday, July 7, 2000. Nate will be in private practice and hold a contract with the Office of Court Appointed Counsel.

Stephen Wall, Defender Attorney in Group A, left the office effective Friday, July 7, 2000, and after a brief military commitment, will enter private practice.

Victoria Washington, Defender Attorney in Group B, departed the office effective Friday, July 14, 2000. Victoria will be joining the Arizona Attorney General's Office.

Brent E. Graham, Defender Attorney with a split Group D and Appeals assignment, transferred from the office effective Friday, July 21, 2000. Brent will be joining the new Maricopa County Office of Legal Advocate.

Doug Passon, Defender Attorney in Group E, resigned from the office effective Friday, July 21, 2000. He will enter private practice at Streich Lang.

Curtis Cox, Defender Attorney in Group D, will be departing the office effective Friday, July 28, 2000. Curtis will be attending Tulane University and pursuing an L.L.M. degree.

Robert Reinhardt, Defender Attorney in Group E, will be departing the office effective Friday, July 28, 2000, and will enter private practice.

Gary J. Bevilacqua, Defender Attorney in the Complex Crimes Unit, will be transferring from the office effective Friday, August 4, 2000. Gary will be joining the new Maricopa County Office of Legal Advocate.

Vernon Lorenz, Defender Attorney in Group C, will be departing the office effective Friday, August 11, 2000. Vernon and his family are relocating to Indiana.

Suzette Pintard, Division Chief, and **Julie Steward**, **Bill Owsley**, and **Hollie Taylor**, Defender Attorneys with the Dependency Unit, have transferred to the newly created Maricopa County Office of Legal Advocate effective July 1, 2000.

ARIZONA ADVANCE REPORTS

By Terry Adams
Defender Attorney – Appeals



State v. Heartfield, 322 Ariz. Adv. Rep. 3 (CA 2, 3/7/00)

Pursuant to a plea agreement, the defendant was found guilty but insane of attempted arson. He was committed to a secure mental health facility for a period of 7.5 years and ordered to pay restitution of \$15,000. On appeal, he challenged the restitution order, arguing that nothing in A.R.S. § 13-502 specifically provides for restitution. The court agreed, finding that guilty but insane is not a conviction and therefore restitution is not appropriate.

State v. Wyman, 322 Ariz. Adv. Rep. 5 (CA 2, 5/30/00)

An employee of a store advised a police officer that the defendant and a companion outside the store were “acting nervous” when they saw the officer. They began to walk away, looking over their shoulders at the officer. The officer drove his patrol car toward them and yelled at them that he wanted to talk to them. They continued to walk. The officer yelled again, but they continued to walk. The officer continued until finally they returned to his car. Eventually a gun was discovered on the defendant and he was arrested and convicted of misconduct involving weapons. The trial court denied the defendant’s motion to suppress. On appeal, the court reversed, finding that under *Terry v. Ohio*, the officer had no reason to detain the defendant and, by walking away, he demonstrated that he wanted to leave and the officer’s response was to yell at him. Under these circumstances, a reasonable person would not have felt free to leave, thus when he went to the patrol car he was seized for Fourth Amendment purposes and the seizure therefore was unreasonable and the gun should have been suppressed.

State v. Sheldon 323 Ariz. Adv. Rep. 34 (CA 1, 6/13/00)

The defendant was about to be released from prison in Arizona on a drug charge when the state sought to detain him under the Sexually Violent Persons Act (“SPVA”) because he had been convicted in California on several sex crimes. The court granted the petition to detain and set a hearing to determine if he should be committed. The state sought to depose him and the defendant objected. The court of appeals held that SPVA proceedings are civil and therefore the Fifth Amendment does not apply and the civil rules provide for depositions and therefore reversed the trial court’s ruling denying the deposition.

State v. Jones, 323 Ariz. Adv. Rep. 28 (CA 1,6/13/00)

The defendant was held to answer after a preliminary hearing based only on an uncorroborated statement. He moved to remand based upon insufficient evidence and the rule of *corpus delicti* prohibiting a conviction on his own uncorroborated confession. The crux of this opinion is that *corpus delicti* does not apply to preliminary hearings and reverses the trial court’s order of remand.

Tate v. Martinez, 323 Ariz. Adv. Rep. 3 (CA 1, 6/8/00)

During jury deliberations the court was informed of juror misconduct involving two jurors discussing the case while outside the jury room. After questioning these jurors with all parties present, the judge chose to replace them with two alternates. However, before this could be accomplished, the jury notified the court that it had reached a verdict. The judge decided to seal the verdict, replace the jurors and instruct the new jury to begin anew its deliberations, over the defendant’s objection. After this was done, the new jury returned a guilty verdict. On appeal, the court affirmed, holding that a verdict is not binding until it is accepted by the court, and the judge acted appropriately. By the way, the first verdict was also guilty.



BULLETIN BOARD

New Support Staff

Laura Gillis is a new Legal Assistant assigned to the Appeals Division effective Monday, June 26, 2000.

Jennifer Reed is a new Office Aide assigned to Group C effective Thursday, June 29, 2000.

Jennifer Rosiek is a new Office Aide assigned to Administration effective Wednesday, July 19, 2000.

Stephanie Medina is a new Office Aide assigned to Group B effective Wednesday, July 19, 2000.

Karen E. Cruz is a new Client Services Coordinator assigned to the Downtown Trial Divisions effective Monday, July 24, 2000. Karen graduated with a B.A. degree from Michigan State University and, most recently, has been working as an Adult Probation Officer for Maricopa County.

Rebecca L. Lukasik is a new Client Services Coordinator assigned to the Downtown Trial Divisions effective Monday, July 24, 2000. Rebecca graduated with a B.S. degree from Northern Arizona University and, most recently, has been working as an Adult Probation Officer for Maricopa County.

Rosemarie Urista will be a new Legal Secretary assigned to Group A effective Monday, August 7, 2000.

Joanie Woods will be a new Legal Secretary assigned to Group D effective Monday, August 7, 2000.

Support Staff Changes/Moves

Patricia Moncada was promoted to Legal Assistant assigned to Trial Group C effective Monday, June 26, 2000.

Glorianna Wood, Legal Secretary from Trial Group D, transferred to the Appeals Division effective Monday, July 3, 2000.

Maria Breen, Defender Investigator in Trial Group C, retired from the office effective Monday, July 3, 2000.

Suzanne R. Graham, Legal Secretary, transferred from the office effective Friday, July 7, 2000, to the new Legal Advocate's Office.

Adrienne Duran in the Records Division resigned from

the office effective Friday, July 14, 2000.

Jeffrey Pape, Office Aide assigned to Group B, departed the office effective Friday, July 14, 2000.

Matt Babicky, Office Aide assigned to Administration, departed the office effective Friday, July 21, 2000.

Margarita Villarreal, Legal Secretary in Group D, departed the office effective Friday, July 21, 2000.

Rick Barwick will be the new lead investigator for Group A. Rick will assume his new duties on Monday, July 24, 2000.

Andrea Robertson in the Records Division departed the office effective July 27, 2000.

Dawnese Agnick, Rhonda Fenhaus, Maria Marrero and Tiffany Williams, Client Services Coordinators with the Dependency Unit, transferred to the newly created Maricopa County Office of Legal Advocates effective July 1, 2000.

Tina Bahe and Dawn Lomahaftewa, Legal Secretaries with the Dependency Unit, transferred to the newly created Maricopa County Office of Legal Advocates effective July 1, 2000.

Indigent Representation Changes

Loretta Barkell is the new Indigent Representation Controller effective Monday, July 24, 2000. Loretta has served Maricopa County for nearly nine years, including three years as the Administrator of the Department of Finance, and three years as the Budget Coordinator and Controller of the General Government Budget in the Office of Management and Budget.

Adam Assaraf, Indigent Representation Controller, left the office effective Friday, July 7, 2000, and returned to the Office of Management and Budget.

Vouching, The Series

Part 6: Negative Vouching

By Donna Lee Elm
Trial Group Supervisor – Group D

Generally, we consider argument that *bolsters* a witness's credibility to be vouching. But, personal opinions of counsel that *undermine* a witness's credibility or the defense presented are also vouching. Because the speaker vouches against (rather than for) a witness, it could be called "negative vouching." Though that terminology does not appear in case law, the Arizona Supreme Court recognized the difference in *State v. Hannon*, 104 Ariz. 273, 275, 451 P.2d 602, 604 (1969). The Court distinguished an opinion of credibility of state's witnesses from an opinion of guilt of the defendant. The latter would be improper but (under the facts of that case) the former was an "invited response."

Most "positive" types of vouching can be done "negatively," and in fact both "Facts Not in Evidence" and "Prosecutorial Screening" are by their nature predominantly "negative." There can also be "negative vouching" in the form of opinions that a witness is not telling the truth, opinions of guilt of the accused, bad character vouching, and a rather virulent form of negative third person vouching suggesting that the defense attorney disbelieves their client.

1. Negative Facts Not in Evidence

"Facts not in evidence," when indicative of guilt or that the defendant or his witnesses are lying, would constitute "negative vouching." In parts of this series on "Vouching" previously published in prior issues of *for The Defense*, examples have already been mentioned including:

*"[Throughout closing, the prosecutor held up a cassette tape that allegedly contained incriminating conversations involving the defendant.]"*¹

*"We could have brought in the neighborhood and have them tell you what they saw."*²

*"Because of a 'rule of law', [the prosecutor] was not allowed to present to the jury other information that would support [the defendant's] conviction."*³

These examples indirectly stated that there was evidence of guilt. Extraneous facts can be subtly used to infer guilt. For

example, in a case where self-defense was urged, the prosecutor improperly argued:

*"[That the prosecutor knew the victim personally and he] believe[d] the decedent had more sense than to attack the defendant without justification."*⁴

The court reasoned that "by undermining the sole basis of the defense, the district attorney added to the evidence his personal opinion that the defendant was guilty."

2. Negative Prosecutorial Screening

Prosecutorial screening of the case – as opposed to screening of witnesses – invariably is "negative vouching." Hence some of the examples set forth in parts of this series previously published in *for The Defense* would constitute "negative vouching," including:

*"We wouldn't be here unless what I'm about to tell you really happened."*⁵

*"The system doesn't put innocent people in jail."*⁶

*"I told you earlier about the obligations of a prosecutor, and one of the obligations is that you don't charge such a serious crime of murder unless you have the proof and the evidence to back it up."*⁷

*"It is my duty and obligation if I become aware that someone's not guilty, to dismiss that case. That's my obligation as a sworn officer of the Court. And we've got two hundred sixty or two hundred seventy other felony cases on this call that all need to be fully and properly prosecuted and investigated."*⁸

Additional examples include these:

*"If I did not believe the evidence in this case proved [defendant's] guilt beyond a reasonable doubt, I would withdraw right here and now."*⁹

*"We would not be here, I submit, ladies and gentlemen, if we did not believe these defendants to be guilty."*¹⁰

"The prosecutor of this county, like all counties, is

under a duty, a duty, a sworn duty, that if he believes in the innocence of the defendant, he has to make that known to the court and to his lawyer."¹¹

Note that the State defended its argument in the second quote directly above by claiming it was an "invited response" to the defense closing. The court sympathized, but still found the prosecution argument to be misconduct. It explained, "egged on by disparaging remarks in the argument of defendants' counsel, his reply is therefore understandable, but not justifiable. No prosecuting officer has a right to go outside the record in arguing the guilt of a defendant." Moreover, the court considering the third example ruled that it was "a pernicious attack upon fundamental concepts of the criminal justice system and exceeds the bounds of legitimate comment on the evidence."

3. Negative Opinion Argument

Four types of negative opinion argument are discussed below: bad character argument, an opinion (first person) of guilt, an opinion (first person) that the defense witnesses are untruthful, and an opinion (third person) of guilt or untruthfulness. Courts tend to find the first, third, and last of those improper, but first person opinions of guilt present a "gray area" of the law -- stating a belief in guilt is very similar to stating the State's ultimate position, namely that the defendant is guilty.

a. Negative Character Opinion

Because the defendant's character is usually not in issue or evidence, bad character argument features both improper injection of a lawyer's personal opinion coupled with inadmissible and irrelevant evidence. Due to it being inadmissible, chances are good that such argument would be advancing facts not in evidence. Moreover, it commonly devolves into unprofessional name-calling and mud slinging. Objections, therefore, would include "vouching," facts not in evidence, and improper argument. Due to numerous sources of misconduct in this type of argument, it is almost always considered improper and prejudicial. Examples of negative character opinions include when prosecutors call the defendant:

*"A cold-blooded killer."*¹²

*"The leader of this pack of murderers."*¹³

*"The wise guys, ... the big shots ... from Scotia."*¹⁴

*"A child abuser."*¹⁵

*"A fraud."*¹⁶

*"A thief, ... con man, ... and swindler."*¹⁷

*"An animal."*¹⁸

*"Scheming, manipulative ..."*¹⁹

*"HIV contaminated."*²⁰

*"Lower than the bone belly of a cur dog."*²¹

*"A loud drunk."*²²

*"Drunk [and] having a good time."*²³

The rule about such negative character evidence is "When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty of the trial judge to intervene to stop improper argument." *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). All but the last of the above quotes were ruled improper (in the last one, the court noted that evidence of his drinking had been admitted). Pejorative references to the defendant are strongly criticized. Finding the first quote above improper, the court explained:

It is no part of the district attorney's duty and it is not his right, to stigmatize a defendant. He has a right to *argue* that *the evidence* proves the defendant guilty as charged in the indictment, but for the *district attorney himself to characterize* the defendant as 'a cold-blooded killer' is something quite different. No man on trial for murder can be officially characterized as a murderer or as 'a cold-blooded killer,' until he is adjudged guilty of murder or pleads guilty to that charge. *Commonwealth v. Capalla*, 322 Pa. 200, 204, 185 A. 203, 205 (1936)(emphasis in original).

These examples would be considered very rude but their offensiveness as vouching is only moderate. They are worse as an etiquette violation than a legal one. Consequently though improper, depending on the rest of the evidence and argument in the trial,²⁴ standing alone, they usually do not result in a reversal of a conviction. However, when the whole temper of the prosecution's case is to malign the defense, and there are repeated, inappropriate slurs, courts will reverse. For example, in *People v. Hicks*, 102 A.D.2d 173, 478 N.Y.S.2d 256 (1984), the prosecutor was inappropriately portraying the defendant as an individual lacking a steady means of employment; a drug user and, possibly, a drug dealer; as someone who shirks his responsibilities by neglecting to support his wife and children; and a habitual liar and, therefore, generally unworthy of belief. The

prosecutor's cross-examination, virtually without exception, was directed at maligning the defendant's character rather than at the offenses of which he was accused.

The Court likened this argument to impeaching (character) by collateral matters -- which was inadmissible in evidence. Similarly, in discussing the effect of the third example above,²⁵ the court reasoned that that was not a fair comment upon the evidence; rather, the prosecutor was stressing matters which were not at all in issue and which may have prejudiced the jury against the defendants. *People v. Nicoll*, 3 A.D.2d 64, 158 N.Y.S.2d (1956).

b. Negative (First Person) Opinion of Guilt

Note that "negative vouching" by an attorney offering his opinion as to guilt is very close to simply arguing the licit position that the defendant is guilty. An Alabama court explained in *Owens v. State*, 51 Ala.App. 50, 282 So.2d 402 (1973):

If a District Attorney says he is guilty, then it's an argument. If a Defense Counsel says he isn't guilty, that's an argument. The argument is not a statement of a fact and the Court doesn't construe it as a statement of fact.

Additionally, it is not improper for a lawyer to state his conclusion, as long as he does not imply that he has personal knowledge of an accused's guilt or innocence. Forbidden expressions of personal belief are easily avoided by insisting that lawyers restrict themselves to disclaimers like, "the evidence shows ..." or some similar form. The Georgia Court of Appeals held: "While counsel should not be permitted in argument to state facts which are not in evidence, it is permissible to draw deductions from the evidence; and the fact that the deductions may be illogical, unreasonable, or even absurd, is a matter for reply by adverse counsel, and not for rebuke by the court." *Hildebrand v. State*, 209 Ga.App. 507, 433 S.E.2d 443 (1993).

Hence it is an indistinct line between the permissible and misconduct. The distinction sometimes lies in the use of "I" statements like "I think," "I believe," or "I know." Such "I" statements are always improper. For example:

*"For what it is worth, I am morally convinced that he is guilty beyond a reasonable doubt."*²⁶

"I think that is overwhelming evidence for preparing for this incident, to kill Mr. Kuhn ... , the argument is going to be, this is an assault. This is an aggravated assault. I don't think so. I think the evidence shows otherwise. ... I don't think there is ever a decision, any question about any guilt, or innocence in this case. I think the

*evidence is overwhelmingly that this man is guilty, but I think in the same sense he is not guilty of that lesser crime of aggravated assault. He is guilty of attempted murder in the first degree."*²⁷

*"I feel that the necessary elements of both of these charges have been fully proved."*²⁸

*"After hearing the People's witnesses here in court, after hearing the defendant's testimony on the stand, my conviction of the defendant's guilt no longer remains a belief but has become an absolute certainty which must in all fairness be shared with you."*²⁹

Moreover, if there was a close question of fact turning on the credibility of the witnesses, then these statements are reversible. *People v. Farrar*, 36 Mich.App. 294, 193 N.W.2d 363 (1971). In an Arizona case, *State v. Hannon*, 104 Ariz. 273, 275, 451 P.2d 602, 609 (1969), the Supreme Court held that "I" statements as to guilt are improper.

Some courts have concluded that the following "I" statements are merely assertions of the government's position:

*"I think old James Sikes is just as guilty as he can be."*³⁰

*"And if you feel he's not guilty, y'all go back there and find him not guilty. But it'll be the wrong decision. I'm telling you that. I am asking you to find him guilty because he's guilty. He's honestly guilty."*³¹

Stating a position is, of course, the essence of argument. "It is not improper for a lawyer to state his conclusion, as long as he does not imply that he has personal knowledge of an accused's guilt or innocence." *Swope v. State*, 263 Ind. 148, 325 N.E.2d 193 (1975). In the first quote directly above, the court overlooked the argument because counsel prefaced it with "It's not testimony, it's just our position." Regarding the second, the court took a practical approach, concluding that "we do not comprehend how the jury could perceive that the prosecutor would think otherwise."

There are other circumstances where courts do not find such negative opinion argument to be misconduct. Most notably, if the statements are qualified by disclaimers like, "the evidence showed," courts usually conclude it is legitimate argument rather than vouching. In an Arizona case, the prosecutor initially argued:

*"I know he did one of those things that happened there."*³²

This was objectionable, but was cured by the follow-up argument that “I think *the evidence shows you* ... he did one of those things.” (Emphasis supplied). In a like vein, when the argument was derived from evidence, even absent any “magic language” of a disclaimer, courts may not consider it misconduct. For example:

*“We, of course, are close to the situation and we’re just so convinced this defendant is guilty. The evidence presented here is so convincing.”*³³

The court realized that this opinion was derived from the evidence, so did not reverse; it did, nonetheless, instruct that such forbidden expressions of personal belief are “easily avoided by insisting that lawyers restrict themselves to statements taking the form, ‘The evidence shows ...’ or some similar form.” Furthermore, courts sometimes will not consider argument improper when it is an “invited response.” For instance, when the defense argued that the state should have done DNA testing, the prosecutor was allowed to respond in rebuttal:

*“The Defense Counsel argues that the State could have DNA testing so they could prove the case beyond any doubt at all. Why? We already knew who did it. She got the license number of his car. We got him through positive identification. Why take the extra step? Why go to the extra trouble because we know positively that we had the right man.”*³⁴

c. Negative (First Person) Opinion of Untruthfulness

Negative opinion argument can go to credibility, as when the prosecutor argues that he does not believe the defense witnesses or thinks the defendant is lying. Courts generally treat this a little more seriously than simple name-calling or negative character argument, and rightfully so: it is *not* collateral but goes to the heart of the defense. Furthermore when the L-word, “liar,” is used, the prosecutor adds pejorative invective. Courts do not condone attorneys’ resort to the L-word. “It is not improper for the prosecution to comment fairly on the credibility of witnesses based on their in court testimony. ... However, while a prosecutor is free to argue that certain evidence tends to make a witness more or less credible, ... he may not state his own belief as to whether a witness is telling the truth.” *State v. Carpenter*, 116 OhioApp.3d 615, 688 N.E.2d 1090 (1996). Examples include:

*“[Repeatedly calling her] a liar.”*³⁵

*“[The defendant’s testimony was] a creation, a fabrication.”*³⁶

*“I am convinced that you likely will concluded that [defense witnesses] were lying.”*³⁷

*“[The prosecutor, not less than forty-one times, asserted his opinion that [defendant] had lied. Including: let] him explain his lies ... He’ll tell any lie that has to be told to get and keep the money. And that includes lying to his attorneys and lying to you on that witness stand. ... That story was hogwash. [Defendant] made it up. ... [defendant and co-defendant] couldn’t keep their lies straight ... He will tell any lie, any lie to get what he wants and that includes lying to you. ... He is truly an accomplished liar, ladies and gentlemen. He is [a] master salesman. And he is giving you the sales pitch of his life. ... Don’t let him lie to you and get away with it.”*³⁸

Courts found all these arguments improper. Concerning the last one, the court held: “The prosecutor may well believe in the correctness of his opinion, and his belief may even be well founded but it is an opinion nonetheless. We have repeatedly held that it is improper for a prosecutor to express an opinion on the credibility of a defendant.”

However, courts are far more tolerant of use of the L-word when it is substantiated in the record. “A prosecutor may argue that a defendant is lying if there is testimony at trial which contradicts defendant.” See *People v. Johnson*, 149 Ill.App.3d 465, 500 N.E.2d 728 (1986). Incidentally, the converse of that is also true; the Court in *Johnson* continued, “However, where a defendant’s testimony is not inconsistent with that of any of the other witnesses, it is improper to argue that defendant is a liar because there is no basis in the record for such an argument.” *Id.* (citing *People v. Strange*, 125 Ill.App.3d 43, 465 N.E.2d 616 (1984); *People v. Rogers*, 172 Ill.App.3d 465, 526 N.E.2d 655 (1988)). Consider the following arguments which, in the context of the rest of the evidence, were not improper:

*“I suggest to you two things; one, he is a liar; and, two, he was the possessor of controlled substances.”*³⁹

*“You let him lie. ... They have had 12 months since the day of the arrest to make a story.”*⁴⁰

*“[Defendant is] a liar.”*⁴¹

In the first of these examples, the court explained that while it was improper argument for “the prosecutor, a quasi-judicial officer, to assert his personal belief in a defendant’s guilt, it is

not improper for him to comment upon the evidence which may bear upon a defendant's credibility, both as a witness and in his statements to an arresting officer." *Quoting State v. Adams*, 76 Wn.2d 650, 458 P.2d 558 (1969). In the second example, the court stated, "While a prosecutor may not offer a purely personal opinion of the guilt of the accused, it is proper for him to argue or express his opinion that the accused is guilty where that opinion is based solely on the evidence." Based on that evidence, "the prosecutor's characterization, while harsh, was not without an evidentiary basis." The last example comes from an Arizona case; the Court of Appeals noted that the defendant had expressly testified that he had lied and defense counsel argued as much in his closing.

d. Negative (Third Person) Opinion of Untruthfulness or Guilt

When an attorney argues that *someone else* thinks the defendant is guilty, it is negative third person opinion. It usually cannot be excused as an expression of the State's position or conclusion from the evidence because the prosecutor is stating a witness's opinion rather than the conclusion that the prosecuting agency reached. Examples include:

*"[The] good cop [who used] good, good police work ... did not believe defendant's denial of guilt [and saved the day by getting defendant to confess]."*⁴²

*"The authorities ... pretty well determined who was the wrongdoer ... and who was the person who was actually causing all of the trouble."*⁴³

*"[In direct examination:] I can advise you at this time that based upon the investigation made by the police officers involved in this case ... that no charges would be brought against [State's witness] as a result of your testimony today."*⁴⁴

*"I doubt in my mind that anyone at this point has any question in their mind about the guilt or innocence of this man."*⁴⁵

The first person opinion rules apply when counsel argues someone else's beliefs. However, injecting a third party's opinions into argument usually means introducing facts not in evidence, which compounds the misconduct. In ordering a new trial after the second argument quoted above, the court indicated that "This permits an inference the district attorney had information not brought out in the case. Such argument would be improper."

4. Negative Third Person Vouching about Defendant or Defense Attorney

There is a subcategory of negative third person vouching that is so insidious and unfair that it virtually *must* result in a mistrial. It goes one step further than argument attacking the defense or honesty of the defendant – argument which, concededly, goes to the heart of the defense. *See* Gershman, B., *Prosecutorial Misconduct*, §10.4(b) (1990). It makes it *personal*. I refer to arguing that either the defendant knows he is guilty (and will be convicted), or his attorney doubts his innocence. For example:

*"[Defendant had testified that he had not intended to come to court for the trial] Mr. Jefferson told you he had no intention of showing up. At this point I will ask you, if he was the unwitting possessor, didn't know anything about it, why, why isn't he going to show up in court? I think this is consistently indicative of a man who is guilty and knows he is guilty."*⁴⁶

*"[Prosecutor asked in cross of defendant] Given the totality of the circumstances in this case, Mr. King, you're not going to be too surprised when you are convicted, are you not?"*⁴⁷

Surprisingly, the second of these cases did not result in a reversal. Though the court found the offensive questioning improper, it hedged because the quoted argument did not suggest that the prosecutor knew from facts other than what was before the jury that the defendant was guilty. This is specious reasoning, and Arizona courts would very likely condemn such argument.

Courts have not hesitated to lambast defense counsel who argued that the State does not believe its witnesses. For instance:

*"[Defense counsel had argued that it was fair to infer from the evidence of the snitch deal that the State must have had some doubt of the veracity of the defendant's confession that it was advancing]."*⁴⁸

*"[Defense counsel suggested in his closing argument that the prosecutor realized after the trial began that he had no case but that he decided] we'll convict them anyway."*⁴⁹

*"[Defense attorney inferred the prosecuting attorney had doubt in his mind as to the guilt of the appellant on the evidence]."*⁵⁰

The first excerpt comes from an Arizona case. Moreover, courts have allowed the prosecutors considerable leeway to respond in rebuttal to these lines of argument. In the second example quoted above, the court held that the following argument by the prosecutor was harmless as a “natural reaction” to the defense attorney’s summation:

*“Believe me, if I were not here presenting the truth I would not be here. I would have by now ended this case as I have the power to do.”*⁵¹

Additionally in the last example quoted above, the court held the following rebuttal argument was an invited response:

*“It has been ruled hundreds of times that my personal opinion has nothing to do with this case but he would infer that I have some doubt - I don’t.”*⁵²

There are additional concerns when the prosecutor argues opposing counsel’s lack of faith in his client. See Annot., Propriety and Prejudicial Effect of Prosecutor’s Argument Giving Jury Impression that Defense Counsel Believes Accused Guilty, 89 A.L.R.3d 26, §2(a). It creates a critical constitutional violation of the 6th amendment (because arguing that counsel disbelieves her client saps the efficacy of counsel). *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983); and see *Chapman v. California*, 386 U.S. 18 (1967). “The essential aim of the 6th Amendment is to guarantee an effective advocate for each criminal defendant.” *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697 (1988). Note that the “harmless error” doctrine does not apply to 6th Amendment violations. *United States v. Amlani*, 111 F.3d 705, 710 (9th Cir. 1997); *United States v. Glover*, 596 F.2d 857 (9th Cir. 1979). While some showing of prejudice may be required to establish a 6th Amendment violation created by disparaging counsel just in front of the defendant, *id.*, that prejudice is obvious and apparent when the disrespectful or denigrating remarks are made *to the jury*. Deliberate destruction of this right is so serious that it can result in a dismissal with prejudice. See *Pool*.

There is also a 14th amendment Due Process violation in the lack of fundamental fairness by this type of improper argument. In *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983), the prosecutor argued that the defense attorney not only realized that his client was guilty but also pressured the state’s witness to change her testimony and perjure herself. Besides the “vouching” impropriety, there were constitutional violations of the rights to counsel and fairness: “Though such prosecutorial expressions of belief are only intended ultimately to impute guilt, they also severely damage an accused’s opportunity to present his case before the jury,” unquestionably destroying the “evenhandedness and fairness that normally marks our system of justice.” Hence the 9th

Circuit recognizes that this pernicious form of vouching undermines both due process and effective counsel.

When the “negative vouching” of the defense attorneys’ opinions occurs, courts usually reverse. Examples where the prosecutor directly argued his opponent’s beliefs include:

*“[In psychologist’s testimony, asked about defense counsel’s statements:] ... How could [the attorney] defend this defendant? ... I believe that [defense counsel] indicated that there was no defense in this case.”*⁵³

*“[Defense attorneys] knew deep down in their hearts [that the defendant] was guilty.”*⁵⁴

*“[Addressing the defense attorney] You have no confidence in your case or his defense.”*⁵⁵

*“[Defense counsel] hadn’t expressed even a shadow of belief in [the defendant’s] innocence.”*⁵⁶

*“[Defense attorney] ‘inadvertently has conceded that the defendant’s testimony is somewhat less than accurate.’”*⁵⁷

As to the first quote above, an Arizona case, the court found what the defense attorney thought was irrelevant, and the prosecutor misstated the conversation between the defense attorney and psychologist; it held that “for ethical as well as legal reasons, an attorney should not imply to the jury that opposing counsel may not believe in the defense presented.” There are additional cases where the defense attorney’s personal beliefs or knowledge about his case are implied but not state directly. For instance:

*“You must wonder, must you not, why defense counsel never even mentions the testimony of his own client. ... Why is that? Consider this question, ladies and gentlemen.”*⁵⁸

*“[Prosecutor speculated what defense counsel would have argued if he had believed that his client’s alibi.]”*⁵⁹

*“[Defense counsel] skulked away from court out of shame [for defending his client].”*⁶⁰

In the first excerpt above, the prosecutor surmised that the defense lawyer was following the ethics canons prescribing steps a lawyer must take when he knows his client is committing perjury. It is always irrelevant and improper to argue counsel’s (as opposed to witnesses’) motives, but using ethics *against* a lawyer/ client is reprehensible and itself unethical.

There is another key pragmatic issue. When the defense improperly impugns opposing counsel, the prosecutor nonetheless could respond in kind in his rebuttal closing, and his vouching would usually be considered an “invited response.” But, where the prosecutor commits the improper conduct in rebuttal, the defense in Arizona is not afforded the same luxury. Consequently, a surprising number of improper closing arguments by prosecutors occur in their rebuttal summation. Therefore, the appropriate remedy (short of a mistrial and a *Pool* hearing) is to allow the defense sur-rebuttal argument. It is the least the court could do to let the defense respond to the State’s “invited” error. Though this procedure has not been documented in Arizona case law, it should be offered as a remedy. There is authority for it in *Ginsburg v. United States*, 257 F.2d 950 (5th Cir. 1958). It surely would have beneficial effects of deterring such misconduct in the future, curing the improper argument, and defense attorneys should ask for it as a remedy if the court does not mistry their case.

Note that the defense should beware it does not “open a door” to this type of negative third person vouching. For instance, the following prosecution rebuttal closings were excused since they had been invited by defense argument.

*“I have to commend [defense counsel] for the job he has been able to do to represent that boy whom I think he knows is guilty. [The Court held that was invited by the defense argument that he had checked out the defendant’s story, concluding] I am here defending on a straight, honest, truthful basis. I think anybody who knows me will tell you that.”*⁶¹

*“[Defense counsel is not representing the defendant because he thinks he is innocent, but because it is his job to handle the case.] [The Court held that was invited by the defense argument:] ... not only that [the defendant] is innocent, but I would not be here if I didn’t think he was innocent, and I wouldn’t be defending him if I didn’t think he was innocent.”*⁶²

While the constitutional violations may be too offensive to survive even the “invited response” excuse, litigators should be careful to avoid giving the prosecution reason to make this argument. Though constitutional issues were not raised in either of those cases, the “invited response” doctrine prevailed over the purely “vouching” and “improper argument” objections. This serves to remind lawyers that they should stand on constitutional grounds whenever possible.

....The next part of this series will cover non-verbal

vouching...Look for the continuation in an upcoming issue...

ENDNOTES

- 1 Thomas v. State, 601 So.2d 191 (Ala.App. 1992).
- 2 Williamson v. State, 459 So.2d 1125 (Fla.App. 1984).
- 3 People v. Castricone, 198 A.D.2d 765, 604 N.Y.S.2d 365 (1993).
- 4 State v. Brown, 313 So.2d 581 (La. 1975).
- 5 State v. Bible, 175 Ariz. 549, 602, 858 P.2d 1152, 1204 (1993).
- 6 State v. Henry, 176 Ariz. 569, 582, 863 P.2d 861, 874 (1993).
- 7 State v. Hernandez, 170 Ariz. 301, 823 P.2d 1309 (App. 1991).
- 8 People v. Wilson, 199 Ill.App.3d 792, 557 N.E.2d 571 (1990).
- 9 Russo v. Commonwealth, 207 Va. 251, 148 S.E.2d 820 (1966).
- 10 People v. Romano, 197 Cal.App.2d 622, 17 Cal.Rptr. 399 (1961).
- 11 State v. Bramlett, 647 S.W.2d 820 (Mo.App. 1983).
- 12 Commonwealth v. Capalla, 322 Pa. 200, 204, 185 A. 203, 205 (1936)(
- 13 Commonwealth v. Joyner, 469 Pa. 333, 264 A.2d 1233 (1976). *And see Commonwealth v. Capalla*, 322 Pa. 200, 185 A. 203(1936).
- 14 People v. Nicoll, 3 A.D.2d 64, 158 N.Y.S.2d (1956).
- 15 State v. Carpenter, 116 OhioApp.3d 615, 688 N.E.2d 1090 (1996).
- 16 People v. Kline, 572 N.Y.S.2d 377 (1991).
- 17 People v. Butler, 57 A.D.2d 931, 395 N.Y.S.2d 36 (1977).
- 18 State v. Gammill, 2 Kan.App.2d 627, 585 P.2d 1074 (1978).
- 19 State v. Duzan, 176 Ariz. 463, 862 P.2d 223 (App. 1993).
- 20 State v. Gray, 25 Kan.App.2d 83, 958 P.2d 37 (1998).
- 21 State v. Smith, 279 N.C. 163, 181 S.E.2d 458 (1971).
- 22 People v. Durham, 154 A.D.2d 615, 546 N.Y.S.2d 444 (1989).
- 23 Hildebrand v. State, 209 Ga.App. 507, 433 S.E.2d 443 (1993).
- 24 Remember that Arizona follows the “totality of the circumstances” of trial test of *United States v. Roberts*, 618 F.2d 540 (9th Cir. 1980).
- 25 In addition to that quote, the District Attorney had suggested that the defendants passed their evenings “building up a tolerance ... for liquor,” and finally offered his opinion that the decedent “was probably closer to God than these defendants have ever been throughout their entire life.”
- 26 People v. Costelo, 24 A.D.2d 827, 264 N.E.2d 136 (1965).
- 27 State v. Van Alstine, 305 Minn. 276, 232 N.W.2d 899 (1975)(emphasis in original).
- 28 State v. Abney, 103 Ariz. 294, 440 P.2d 914 (1968).
- 29 People v. Nicoll, 3 A.D.2d 64, 158 N.Y.S.2d (1956).
- 30 Sikes v. State, 500 S.W.2d 650 (Tex.Crim. 1973).
- 31 Hildebrand v. State, 209 Ga.App. 507, 433 S.E.2d 443 (1993).
- 32 State v. Spain, 27 Ariz.App. 752, 558 P.2d 947 (1976).
- 33 Swope v. State, 263 Ind. 148, 325 N.E.2d 193 (1975).
- 34 Soto v. State, 864 S.W.2d 687 (Tex.App. 1993). *See also*

- State v. Hannon, 104 Ariz. 273, 451 P.2d 602 (1969) (argument that “there is no doubt in anybody’s mind” about the victim’s testimony was “invited” by defense argument attacking her credibility).
- 35 State v. Carpenter, 116 OhioApp.3d 615, 688 N.E.2d 1090 (1996).
- 36 People v. Durham, 154 A.D.2d 615, 546 N.Y.S.2d 444 (1989).
- 37 Ferreira v. Fair, 732 F.2d 245 (1st Cir. 1984).
- 38 State v. Casella, 632 A.2d 121 (Me. 1993).
- 39 State v. Jefferson, 11 Wash.App. 566, 524 P.2d 248 (1974).
- 40 People v. Hine, 88 Ill.App.3d 671, 410 N.E.2d 1017 (1988).
- 41 State v. Smith, 126 Ariz. 534, 617 P.2d 42 (App. 1980).
- 42 State v. Thaggard, 527 N.W.2d 804 (Minn., 1995).
- 43 People v. Bross, 240 Cal.App.2d 49 Cal.Rptr. 402 (1966).
- 44 Commonwealth v. Reed, 300 Pa.Super. 224, 446 A.2d 311 (1982).
- 45 State v. Case, 49 Wash.2d 66, 298 P.2d 500 (1956).
- 46 State v. Jefferson, 11 Wash.App. 566, 524 P.2d 248 (1974).
- 47 King v. State, 780 P.2d 943 (1991).
- 48 State v. Woods, 141 Ariz. 446, 687 P.2d 1201 (1984).
- 49 People v. Fort, 44 Ill.App.3d 62, 357 N.E.2d 1365 (1976).
- 50 State v. Yancy, 32 Wis.2d 104, 145 N.W.2d 145 (1966).
- 51 People v. Fort, 44 Ill.App.3d 62, 357 N.E.2d 1365 (1976).
- 52 State v. Yancy, 32 Wis.2d 104, 145 N.W.2d 145 (1966).
- 53 State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983).
- 54 Myhand v. State, 259 Ala. 415, 66 So.2d 544 (1953).
- 55 Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306 (1931).
- 56 Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960).
- 57 People v. Jones, 74 A.D.2d 854, 857, 425 N.Y.S.2d 376, 379 (1980).
- 58 Bates v. United States, 403 A.2d 1159, 1163 (D.C.App. 1981).
- 59 People v. Allen, 351 Mich. 535, 88 N.W.2d 433 (1958).
- 60 Gilstrap v. People, 30 Colo. 265, 70 P. 325 (1902).
- 61 Homan v. United States, 279 F.2d 767 (8th Cir. 1960).
- 62 People v. Bullock, 40 Ill.App.3d 672, 353 N.E.2d 35 (1976).



JUNE 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/15-6/19	Howe	Schwartz	Mueller	CR 00-02165 Agg. DUI/F4	Guilty	Jury
6/20-6/21	Green	Schwartz	Godbehere	CR 99-17745 3 counts of Agg. Assault/F6 Resisting Arrest/F6	Guilty of 3 counts of Agg. Assault Guilty on misdemeanor Resisting Arrest	Bench
6/20-6/23	Leal	Akers	Takata	CR 00-03102 Trafficking in Stolen Property/F3	Not Guilty	Jury
6/23-6/23	Flores	Warren	Rothstein	TR 00-00988 Misdemeanor DUI/M1	Guilty	Jury

GROUP B

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
5/31 – 6/1	Peterson	Gottsfeld	Workman & Leigh	CR99-009114 Agg Aslt, F6 w/ 2 priors	Guilty	Jury
6/12 – 6/13	Agan	Martin	Davidon	CR00-000241 POM for Sale, F2 Tranps of MJ For Sale, F2	Dismissed POM for Sale; Guilty on the Transp of MJ	Jury
6/13 – 6/14	Peterson	McClennen	McBee	CR99-16148 Resisting Arrest, F6	Guilty	Jury
6/13 – 6/14	Lemoine Erb	Wilkinson	Strom	CR00-000216 Agg Aslt	Not Guilty	Jury
6/14	Navazo	McClennen	Sampson	CR00-02111 Resisting Arrest, F6 Disorderly Conduct, M1	Dismissed day of Trial	Jury
6/20	Washington	Martin	Charnel	CR97-10092 Agg. Ass., 6F; Resisting Arrest, 6F	Pled to C1M assault day of trial	Jury
6/26	Owens/Bublik Kasieta	Martin	Spencer	CR99-008867 Defrauding Secured Creditors, F6	Pled to a Misd prior to trial	Jury
6/26 – 6/27	Lemoine	Gottsfeld	Strom	CR99-00717 Sale of Dang Drug, F2 2 cts PODP, F6	Not Guilty	Jury
6/27	Navazo	Gottsfeld	Lindsey	CR00-001601 Felony Flight, F5	Dismissed day of trial	Jury
6/28	Zubair	Hilliard	Spencer	CR00-005563 Agg Aslt F2 Theft, F3	Dismissed prior to trial	Jury
6/28	Primack Casanova	Martin	Sampson	CR00-002656 Cr Damage, F4	Dismissed day of trial	Jury
6/28	Walton	Judge Crum	Tofstoy	Cr00-00595 1 Ct Interference with Judicial Pro- ceedings	Not Guilty	Bench
6/28	Kratter	McClennen	Charnell	CR00-005125 Agg Assault dang. x3	Dismissed day of trial	Jury
6/28	Gray	Gottsfeld	Strom	CR00-002188 Forgery, F4	Dismissed day of trial	Jury

JUNE 2000 JURY AND BENCH TRIALS

GROUP C

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/13 – 6/14	Gaziano	Barker	Udall	CR2000-090886 Ct. 1 – Theft of Means of Transp/F3	Not Guilty	Jury
6/14 – 6/19	Jolley Cotto	Jarrett	Boode	CR2000-090437 Ct. 1 to 2 – Agg Aslt/F3N	Not Guilty	Jury
6/20 – 6/20	Bond	Jarrett	Griblin	CR2000-090496 Ct. 1 – PODD/F4	Dismissed same day	Jury
6/20 – 6/22	Lundin Ramos Breen	Willrich	Truty	CR1999-094784 Ct. 1 – Burg 3 rd Deg/F4	Guilty	Jury
6/21 – 6/21	Sheperd	Fenzel	Bennink	CR1999-094992 Ct. 1 – Poss/Use ND/F4N	Guilty	Jury
6/26 – 6/27	Walker	Barker	Hudson	CR2000-090879 Ct. 1 – Burg 3 rd Deg/F4N Ct. 2 – Burg Tools Poss/F6N	Guilty	Jury
6/26 – 6/26	Rossi	Fenzel	Brenneman	CR2000-090342 Ct. 1 – Agg Aslt/F6N	Dismissed day of trial with- out prejudice	Jury
6/28 – 6/29	Corbitt	Fenzel	Brenneman	CR1999-095284 Ct 1 – PODD f/sale/F2N	Hung Jury 6 and 6	Jury
6/28 – 6/29	Barnes Beatty	Mundell	Sanders	CR2000-096017 2 cts. Agg DUI/F4	Guilty	Jury

JUNE 2000 JURY AND BENCH TRIALS

GROUP D

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
5/22-6/23	Elm/Adams Salvato Kay	Gerst	Cottor	CR 99-18178A 2 Cts. Armed Robbery, F2 2 Cts. Agg. Assault, F3 2 Cts. Kidnap, F2	1 Ct. Agg. Assault was Hung Jury, Guilty on 5 other counts.	Jury
6/12-6/14	Silva	Ballinger	Lee	CR 00-02095 1 Ct. Flt. From Purs Law Vehicle, F5	Guilty	Jury
6/12	Schreck O'Farrell	Schwartz	Baldwin	CR 00-003285 1 Ct. Burglary 3, F4	Not Guilty	Jury
6/13-6/13	Castillo	Cole	Amiri	CR 99-15948 1 Ct. Theft-Stolen Vehicle, F3	Dismissed with prejudice day of trial	Jury
6/22	Harris	Gerst	Kamis	CR 00-002176 1 Ct. Robbery, F4	Dismissed w/o prejudice	Jury
6/21-6/22	Falduto	Dougherty	Amiri	CR 00-002401 1 Ct. Poss. Of Para. 1 Ct. Poss. Of Dang. Drug	POP-Not Guilty PODD-Guilty	Jury
6/15 & 6/19	Falduto	Ballinger	Linstedt	CR 00-004252 1 Ct. Poss. Of Narc. Drug 1 Ct. Poss. Of Para.	POND-Guilty POP-Guilty	Jury
6/19-6/20	Lerman/Wilson Bradley	Dougherty	Lockhardt	CR 99-15258 1 Ct Burglary 2, F2 w/priors	Guilty	Jury
6/20-6/22	Dwyer	Ballinger	Clarke	CR 98-04833 1 Ct. Fraud Schemes/Artifices, F2 1Ct. Theft, F3	Not Guilty	Jury
6/20-6/22	Enos Barwick	Sheldon	Frick	CR 99-001908 2 Cts. Sell Crack Cocaine, F2	Hung Jury	Jury
6/26-6/30	Castillo	Dougherty	Todd	CR 97-14022 1 Ct. DUI-LQ/Drg/TX, Sub, F4; 1 Ct. Agg DR-Lq/DRg/TX Sub, F6	Guilty	jury
6/14-6/15	Willmott	Dougherty	Adleman	CR 99-00805 1 Ct. Impt/trsp nrc-drg-sa, 2 priors/F2	Guilty	Jury
6/15-6/15	Varcoe	Cole	Clarke	CR 99-15495 2 Cts. Agg assault/resisting arrest	Dismissed with Prejudice	Jury
6/20-6/27	Berko/Cuccia	Cole	Simpson	CR 99-08968 1 Ct. Agg. Assault Dang. with two priors, F3	Not Guilty	Jury
6/22	Adam	Gerst	Lindstedt	CR 99-010090 1 Ct. POND, F4; 1 Ct. PODP, F6	Dismissed	Jury
6/27-6/29	Berko	Akers	Boyle	CR 99-10474 1 Ct. Theft, F3 1 Ct. Attp/Com/Theft, F4 1 Ct. Pom, Grow, Proc, F6 1 Ct. Poss. Of Para., F6 1 Ct. Burg. Tools-possess, F6	Not Guilty on Theft, Guilty on other counts	Jury
6/28 - 6/30	Cox/Enos	Dougherty	Larish	CR 00-02472 1 Ct. Agg. Assault, F5 2 Cts. Resist Ofc/ Arrst, F6	Not Guilty	Jury

JUNE 2000 JURY AND BENCH TRIALS

GRUPE

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/1	Richelsoph	Dunevant	Wilson	CR99-15860 Resisting Arrest/F6	Dismissed w/o prejudice	Jury
6/1	Brown	Reinstein	Garcia (A.G.)	CR00-00720 Poss. of materials for meth. lab/F2	Dismissed day trial to begin	Jury
6/13	Rock	Jones	Davis	CR00-04579 Agg. Asslt./F3D	Dismissed w/o prej. day trial to begin	Jury
6/14 - 6/19	Flynn	Reinstein	Simpson	CR00-03730 Theft of Auto/F3	Guilty	Jury
6/15 - 6/20	Squires/Brown	Jones	Bernstein	CR99-08891 3 Cts. Stalking/F5	Not Guilty all counts	Jury
6/21	Huls Souther	McDougall	Flores	CR00-03432 Theft/F4	Dismissed w/o prejudice	Jury
6/22	Doerfler Castro	Reinstein	Devito	CR00-03032 Agg. Asslt./F3D	Dismissed day trial to begin	Jury
6/27	Squires	Gerst	Ireland	CR99-16498 POM/M1 PODP/M1	Not Guilty all counts	Bench

COMPLEX CRIMES

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/13 - 6/20	Gavin/Zick Salvato Rivera	Sheldon	Shutts	CR1998-017488 Ct. 1 - 1 st Deg. Murder/F1D Ct. 2 to Ct. 8 - Attempt 1 st Deg. Murder/ F2D Ct. 9 to 11 - Agg Aslt/F3D Ct. 12 - Burg 1 st Deg./F2N Ct. 13 - Theft/F2N Ct. 14 - Agg Aslt/F3D	Guilty on all	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/05 - 6/13	Patton Reger	Dougherty	Beresky	CR2000-003698 3 ^o Burglary / F4; Theft / F6	Guilty of Burg, 5 priors; Theft dismissed at Justice Court	Jury

Maricopa County Office of the Public Defender

Vision Statement

TO DELIVER AMERICA'S PROMISE OF JUSTICE FOR ALL

Mission Statement

The Office of the Public Defender protects the fundamental rights of all individuals, by providing effective legal representation for indigent people facing criminal charges, juvenile adjudications, and mental health commitments, when appointed by Maricopa County Superior and Justice Courts.

Goals

- ◆ To protect the rights of our clients and guarantee that they receive equal protection under the law, regardless of race, creed, national origin or socio-economic status
- ◆ To obtain and promote dispositions that are effective in reducing recidivism, improving clients' well-being and enhancing quality of life for all
- ◆ To ensure that all ethical and constitutional responsibilities & mandates are fulfilled
- ◆ To enhance the professionalism and productivity of all staff
- ◆ To produce the most respected and well-trained attorneys in the indigent defense community
- ◆ To work in partnership with other agencies to improve access to justice and develop rational justice system policies
- ◆ To achieve recognition as an effective and dynamic leader among organizations responsible for legal representation of indigent people
- ◆ To perform our obligations in a fiscally responsible manner

for The Defense

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