



for The Defense

▶ ◀ James J. Haas, Interim Maricopa County Public Defender ▶ ◀

2001 A.D. (After Dean): The End of An Era Public Defender Dean Trebesch Appointed to Superior Court Bench

INSIDE THIS ISSUE:

Articles:

2001 A.D. (After Dean):
The End of an Era 1

Until We Meet Again 1

Juvenile Information
Sharing 4

Let's Put On Those
Preliminary Hearings 10

Regular Columns:

Arizona Advance Reports 12

Bulletin Board 8,9

Calendar of Jury and
Bench Trials 14

By Jim Haas Interim Public Defender

Where to begin?

On December 6, 2000, Governor Jane Hull selected Dean Trebesch for a position on the Maricopa County Superior Court bench. Dean was sworn in on January 29, 2001. Dean had been the director of the Public Defender's Office since August 1987, and had directed the office through a period of tremendous growth in size and professionalism. Okay, there's the *Arizona Republic* version. Despite the fact that most of us in the

office knew that this appointment was inevitable, the news was still stunning. Most of us have only known this office under Dean's direction, and it is hard to imagine the office without him. Those who have been around long enough to remember the office BD (before Dean) universally recognize the many accomplishments that Dean has achieved for the office and indigent representation in Maricopa County and Arizona.

This article will be an attempt to recognize some of those accomplishments, and to chronicle what Dean has done for this office. It is not

(Continued on page 2)

Until We Meet Again

By Honorable Dean Trebesch Judge of the Maricopa County Superior Court

After thirteen and one-half years as the Public Defender, I am saddened by what my departure will mean to me personally. I feel like I am losing a part of myself, a part of my family. You have kept me going over those years and I appreciate your work and your friendships more

than you will ever imagine. Although times have been difficult on occasion, what we stand for and what we have accomplished makes me appreciate every day I have spent here.

Let me close by reciting words I wrote for this publication in September of 1995. They still apply:

A NOBLE INSTITUTION

(Continued on page 7)

for The Defense
Editor: Russ Born
Assistant Editor:
Keely Reynolds

Office: 11 West Jefferson
Suite 5
Phoenix, AZ 85003
(602)506-8200

Copyright © 2001

intended to list all of the achievements, as that would simply be impossible.

BD, there were no paralegals or client service coordinators, and relatively few investigators. There were no initial services interviewers, and no process server. The office consisted of approximately 90 attorneys, and annual attorney turnover hovered over 50%. Caseloads were horrendous, and withdrawals due to workload eventually resulting in the firing of Ross Lee, Public Defender for some 18 years.

Dean took over and immediately secured permission and funding to hire 42 new attorneys and 26 additional support staff. He managed to lure back to the office 18 experienced Public Defender attorneys who had left, including Bob Guzik. (Rumor has it that Guzik was Dean's main competition for the PD job. Dean, who is a Civil War nut, followed Abraham Lincoln's example and made his main rival a member of his "cabinet." Both men deny this, so you just know its true.)

Dean beefed up the training program, updated the performance evaluation process, and implemented a multi-level attorney classification plan. He cut attorney turnover to 16% in his first year.

Dean set about to improve support staff ratios and to implement different types of support staff to improve the efficiency and professionalism of the office. BD, the investigators did everything but scrub floors: they did all initial defendant interviews, served all subpoenas, developed mitigation evidence and assisted in the identification of alternatives to incarceration, assisted with case organization and preparation, did court runs, deliveries and pickups of all kinds. Dean created the Initial Services unit to do initial defendant interviews, the Client Services program to assist with mitigation, the Litigation Assistant program to organize and prep cases, and hired a process server, runners and aides. He freed the investigators to do what they do best, and hired specialists to do the other duties. He also increased the minimum qualifications for investigators, and closely monitored the investigator hiring process. Dean personally interviewed every investigator hired,

right up until the day he left. The outcome was a dramatic increase in the professionalism of the entire support staff, resulting in the excellent group that serves the office today.

Dean secured grant funding from the state to deal with new drug laws, enabling the office to hire additional attorneys and staff. This was a first for the office, but would not be the last successful effort by Dean to secure state funding for the improvement of the office.

In 1989, Dean managed to push through legislation creating the Public Defender Training Fund. This fund enabled the office to greatly expand its training program. It made it possible for the office to augment its training staff, to present statewide seminars and an annual Trial College, and to send attorneys around the country to obtain the best training available.

It was when I was in my first year with the office that I realized the Training Fund is something special. I was sent to Atlanta for NCDC's "Killer Cross" program and, during a break, I looked over the list of participants, which was broken down by state. Other than Arizona, the state which had sent the most participants was California, with four. Our office had *nine* attorneys at that seminar! Virtually every faculty member I met said something to me about the reputation enjoyed by our office for its dedication to training and quality representation.

We take the Training Fund for granted now. But it was, and is, a remarkable and rare achievement by Dean that has tremendously improved not only our office, but all of the public defense offices and the practice of many private criminal defense attorneys in Arizona.

Another major accomplishment was the automation of the office. Considering that most of the world has automated since 1987, this would not seem to be a big deal. However, Dean was able to accomplish it, putting a PC on nearly every desk in the office, without being provided any additional funding. In 1995, after the County Attorney's Office had been

fully automated for a couple of years, we still had very few computers. Dean put together a proposal to put PCs on most desktops, at a cost of over \$500,000. The Office of Management and Budget turned down the proposal, telling Dean that, if he wanted computers, he would have to find the money. Amazingly, Dean managed to do it, in a relatively short time period, by creative management and sheer will.

In 1994, when the national and local economy took a nosedive, and Maricopa County was in serious financial trouble, the office was ordered to cut staff. Knowing that this would be devastating to the office, Dean came up with several innovative ways to accomplish the county's goals without involuntary RIFs. He proposed that each staff member take four days off without pay, and appealed to those who could afford it to "donate" more by taking more days off. He felt that this effort, plus normal attrition, might accomplish the county's goals without cutting staff. Through Dean's leadership and staff's commitment to him, the office rallied around the proposal, and Dean managed to get us through the RIF with minimal impact.

During Dean's tenure, at least three productivity studies of the Public Defender's Office were performed. In each, consultants made recommendations for change, of course - that is what consultants are paid to do. But all of the consultants have been impressed by the quality of the office, and have praised Dean for his commitment to quality representation and a professional operation.

The most recent productivity study resulted in 39 recommendations, many of which are intended for the system, not just the Public Defender's Office. This may seem like a lot of recommended changes, until you realize that these consultants usually find many more improvements that need to be made. For example, their study of the indigent defense system in Indianapolis resulted in more than eighty recommendations. The consultants have told us repeatedly that there are things that we do better than they do in their offices, and that we have given them many good ideas.

Throughout his tenure, Dean worked to make this a professional office that is recognized by the other criminal justice participants as an important player. BD, the Public Defender was rarely recognized as participants or consulted on systemic issues. Through Dean's effort and insistence, we are now "at the table" when criminal justice issues are discussed. Because of this, we have been able to point out the hidden costs and unintended consequences of many decisions being considered by various criminal justice agencies, and have been able to mitigate the adverse impact on our office and our clients in many situations.

To this same end, Dean created the Legislative Liaison position, which has given us a presence and an impact at the legislature. Through the liaison, we have been able to provide a great deal of information to legislators on criminal justice issues, and to provide them the "other side of the story". This was a fairly novel, and controversial, idea at first; but now, our presence is accepted and appreciated by legislators, legislative staff, and even our adversaries.

These are just a few of the many accomplishments that Dean attained for the office. He would insist that others deserve much of the credit, but those of us who worked closest to him know better. He set the tone, gave the direction, took the risk and the heat, and "carried the water" on these efforts.

Many of the things that we now take for granted, Dean had to fight for. Nothing has come easily, and Dean often paid a personal price for his unrelenting effort to improve the office. He has left an indelible mark on the office, and on indigent defense throughout Arizona.

Because of Dean, we are now in a position to take even greater strides and to continue toward our goal of becoming the best indigent defense office in the country.

Now...what's that saying about standing on the shoulders of giants?



JUVENILE INFORMATION SHARING.... IN THE BEST INTERESTS OF WHOM?

By Helene Abrams
Juvenile Division Chief

Does this sound familiar? You call the Juvenile Division and ask for a file on a juvenile. The response is: "You can't have it." Why would one division of the office not share this information with another division? Why are they being so mean to me? I assure you there is no intention to be mean or uncooperative. But, there are some questions that need to be answered before we turn over a file.

Are you requesting a paper file or an electronic file? Electronic files are the property of the Juvenile Court and accessible only if the client is or was ours. We check to determine who represented the child before accessing any confidential documents kept on JOLTS (Juvenile on Line Tracking System). Is the child under 18 or over 18? Access to electronic files on children over 18 is restricted.

Paper Files

Our paper files are kept for 5 years and then destroyed. If you are requesting a paper file, is the child a former client of the juvenile division who is now a client in the adult division? If so, there may be information to share but the paper file should not leave juvenile. This is so that it remains available in case someone else needs it at another time. You may, however, come by and look in the files and copy whatever you'd like. **BE AWARE THAT MANY OF THE DOCUMENTS ARE CONFIDENTIAL.** This means that these documents must remain confidential in your handling of them.

Electronic Files

If you are requesting a file on a witness, victim or co-defendant, this is usually done because you suspect there may be a conflict. First we determine if the child was previously or is currently represented by the juvenile division. If the child was never represented by this office, we cannot access the file nor provide any information. If, however, the child is or was represented by us, we can check the electronic file to determine if there is confidential information accessible to us (and therefore to you). Once accessible confidential information is identified, the motion to withdraw should be filed. E.R. 1.6, 1.7, 1.9 and 1.16, *Okeani v. Superior Court*, 178 Ariz. 180, 871 P. 2d 727 (App. Div. 1 1993), *review denied*. No mention of the child's name, file number, JV

number, DOB or other identifying information should appear in the motion. We need to protect the client from disclosure which suggests there was juvenile court involvement. Rule 609 (d), Rules of Evidence, *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). A motion which states that a witness (even the victim is a witness) listed in the police report is a current client or a former client of our office along with the fact that confidential information is available should be sufficient to allow for our withdrawal. The earlier one finds this type of conflict, the better for the client, the court, the new attorney and everyone else.

Types of Juvenile Files

There are two types of juvenile files. One is the legal file maintained by the clerk of the court and one is the red or social file maintained by juvenile probation. The red file is actually red. Rule 19, Rules of Procedure for the Juvenile Court, describes the different files and the contents of each. Both legal and social file information are included in our office file. Legal file information is kept separate from social file information in the JOLTS electronic file.

*Rule 19. Records and Proceedings*¹

A. Contents of the Juvenile Court Files

1. *Legal File.* The legal file of the juvenile court shall consist of all pleadings, motions, minute entries, orders, or other documents as the court may order. The legal file shall be open to public inspection without order of the court, except upon a finding by the court of a need to protect the welfare of the victim, another party or a clear public interest in confidentiality. The court shall state its reasons for withholding the legal file, or portions thereof, from public inspection.

2. *Social File.* The social file shall be maintained (sic) by the probation department and may consist of all social records, including diagnostic evaluations, psychiatric and psychological reports, treatment records, medical reports, social studies, child protective services records, police reports, predisposition reports, detention records, and records and reports or work product of the probation department for use by the court in formulating and implementing a rehabilitation plan for the juvenile and his or her family. The social files of the juvenile shall be confidential and

withheld from public inspection except upon order of the court.

B. Proceedings...

The Legal File

This rule distinguishes between what is open to public inspection and what is confidential. The legal file will contain the charging document(s), minute entries, motions or other pleadings and other documents the court thinks should be there. Anytime a child is referred to the juvenile system, the legal file documents will be added to the existing file. In other words, a new file is *not* opened each time a child comes back to the court. This file is open to public inspection unless the court finds it needs to be confidential. The disposition report (similar to a presentence report) is *not* in the legal file. It is in the social file.

The Social File

The social (aka red) file contains social records, e.g. school records, medical records, psychological evaluations, chronies (probation officer's chronological notes, MCI's (most current information report prepared by probation before a court appearance) etc. These records are "maintained as the work product of juvenile probation officers and staff for use by the Court in formulating and implementing a rehabilitation plan for the juvenile and his or her family." All of these records are confidential. But not all of these records are available on every child or included in the electronic file or sent to the attorney representing the child.

The important thing to note here is that these records are prepared for the purpose of determining a rehabilitative plan for the child and his family. In order to gain the trust and cooperation of the child and his family, they are told this information will be used only for this purpose. The use of documents prepared years ago is an important consideration. When this information is used elsewhere, it is used for a different purpose and destroys the trust created by us and the Court in the treatment of the child. It is for this reason that *all* social file records need to remain confidential.

Examples crop up daily about how the prosecutors read from a client's psychological evaluation at a hearing on a motion to reduce bail or how the presentence report is replete with quotes from a juvenile transfer summary or disposition report. While some information is public record, other information is not. Release and use of this information could be very psychologically damaging to the child and his family but is also a violation of the Rules of Procedure for the Juvenile Court. Anything used in a criminal court is public information (unless the hearing is closed). The confidential nature of these documents must be maintained in such a proceeding.

When SB 1446 was implemented on July 21, 1997, it included a section on juvenile records. I think a look at this statute confirms that the legislature had no intention of destroying what the rule protects, i.e. the social file.

A.R.S. 8-208 Juvenile court records; public inspection; exceptions

A. The following records relating to a juvenile who is referred to juvenile court are open to public inspection:

- 1. Referrals involving delinquent acts, after the referrals have been made to the juvenile court or the county attorney has diverted the matter according to 8-321.*
- 2. Arrest records, after the juvenile is an accused as defined by 13-501.*
- 3. Delinquency hearings.*
- 4. Disposition hearings.*
- 5. A summary of delinquency, disposition and transfer hearings.*
- 6. Revocation of probation hearings.*
- 7. Appellate review.*
- 8. Diversion proceedings involving delinquent acts.*

B. On request of an adult probation officer or state or local prosecutor, the juvenile court shall release to an adult probation department or prosecutor all information in its possession concerning a person who is charged with a criminal offense.

C. The juvenile court shall release all information in its possession concerning a person who is arrested for a criminal offense to superior court programs or departments, other court divisions or judges or as authorized by the superior court for the purpose of assisting in the determination of release from custody, bond and pretrial supervision.

D. On request by the appropriate jail authorities for the purpose of determining classification, treatment and security, the juvenile court shall release all information in its possession concerning persons who are under eighteen years of age, who have been transferred from juvenile court for criminal prosecution and who are being held in a county jail pending trial.

E. The court shall edit the records to protect the identity of the victim or the immediate family of the victim if the victim has died as a result of the alleged offense.

F. Except as otherwise provided by law, the records of an adoption, severance or dependency proceeding shall not be open to public inspection.

G. The court may order that the records be kept confidential and withheld from public inspection if the court determines that the subject matter of any record involves a clear public interest in confidentiality.

H. The disclosure of educational records received pursuant to 15-141 shall comply with the family educational and privacy rights act of 1974 (20 United States Code 1232g).

Section A lists the records open to public inspection. Social file information is not included, nor was it intended to be. It was the understanding during legislative discussions that the files should remain separated and the social file information should not be made public. Sections B, C, and D existed under previous law. These sections require the court to release *all* information in its possession to the various agencies, persons or places specified. But, the agencies that receive all records must comply with the rules regarding confidentiality. Section G was added to allow the court to protect records now open to public inspection “if the court determines that the subject matter of any record involves a clear public interest in confidentiality”. This language mirrors the language in Rule 19 (A)(1), which also allows the court to withhold from the public, information in the legal file presumed available if the court makes the requisite findings. The (A)(2) section of the Rule flips the presumptions and requires the court to withhold from public inspection the information in the social file “except upon order of the court”.

Preventing the Use of Confidential Information

What should you do in the criminal court when a presentence writer quotes extensively (mistakenly and unintentionally perhaps) from the juvenile’s psychological evaluation prepared five years ago. Can you request the hearing be closed to discuss this confidential information? Should you ask to have the PSR sealed and a new one prepared? Should you request a new judge who has not read the report? Is the judge entitled to know what is in the social file reviewed by the probation officer? Can this be done and still protect the confidential status of this information?

I don’t know. But I do know that many people are under the impression that all this information is fair game to be used to argue for an increase in the number of years in prison the court should impose. I know that many families would not provide this information if they knew that years later it would be the reason for an aggravated prison term. I know that the juvenile system is here to help children and families to fix

things and without this important, confidential information we could not develop the best plan. So my suggestion is to keep this information from the public arena. Request that reports be sealed. Request that confidential information be redacted from PSR’s. Remind the court and the prosecutor that these reports were created to be used for a completely different purpose and that use of those reports now is destructive and unwise.

Conclusion

So back to the files. If you call and tell us that you represent a former client of ours, we will try to find the files, both paper and electronic. We will pull the files for your review and copying if you’d like. We trust you will remember the confidential nature of much of the information contained in the file and will let others know too. But please don’t take the files. We’d like to have them available for the next person who calls asking for them.

Endnote

1. The new Rules of Procedure adopted by the Arizona Supreme Court become effective on January 1, 2001. I included the text of the new rule in this article. The important changes include the ability of a party to request withholding of the legal file from public inspection and the expansion of the documents that are placed in the social file, e.g. treatment records and police reports. The intended use of the social file has not changed. See former Rule 19.1, Rules of Procedure for the Juvenile Court.



Until We Meet Again

Continued from page 1

Thirty years ago this month a new law office opened its doors in Phoenix. September of 1965 marked the unheralded beginning of the Maricopa County Public Defender's Office.

There wasn't much here then....a few cases being handled by a handful of staff squeezed into some old, cramped office space. 1965 was before mandatory sentencing, when crime was less noticeable and rehabilitation was still the highest priority of the criminal justice system.

Only a small group of lawyers practiced criminal law back then and a good share of them were fairly eccentric, I've been told. Phoenix itself was a relatively small town in 1965. Neither the East nor the Central Superior Court Building had yet been constructed.

In those 30 years much has happened. We have gone from Sam Goddard as Governor to Fife Symington, from the Warren Court to the Rehnquist Court. I was a teenager and most of you were probably not born.

Many extraordinary attorneys have passed through these doors, laboring as deputy public defenders. Some of the best are here right now. None seem to have regretted their time here. In fact, most have warm memories recalling the tough yet rewarding experiences they shared with colleagues and friends. This listing includes politicians, numerous appellate and superior court judges, and notable others who have graced our hallways.

As I contemplated this milestone, and consider what I might say that would be fitting, I realize what is important is not the number of years the office has been in existence nor even the illustrious names of the people who practiced law here. The importance of the occasion is instead derived from why they were here and what they endeavored to accomplish.

In many ways, it is an awful job. Usually, the facts of the case are against you, the case law is against you, and the system seems to be asking you to simply speed things along. Resources are skimp, clients are in dire straits, while you are overworked, underpaid, and unappreciated by the community.

While pondering all of this I am struck by the observation that I, personally, have devoted 14 years of my life to this task. For nearly half of that 30 years, I have been a part of the action, in one way or another, of an office I knew nothing of 30 years ago.

for The Defense

What could entice and gratify so many people? Cecil Patterson said it best, I believe, during his recent investiture ceremony as Division One's newest Appellate Judge. Judge Patterson, a former member of this office, recognized the enduring importance of ensuring the "equal justice under the law."

Those words are still as risk these days when it seems that nearly as much is spent on O.J. Simpson's defense than is available in our office's annual budget to defend over 40,000 individuals.

Whether the issue is Mark Fuhrman or a simple witness misidentification by a well-meaning observer, our clients need the protection we give them. Relishing the role of underdog, inherently being skeptical of what the government claims happened, anxiously trying to improve someone's circumstances and future — these are the special characteristics of this office that have kept it alive for 30 years, and more.

Far too often we have been right and the government has been wrong. Instead of just celebrating our 30 years, I am transfixed by the thought of what would happen if we were NOT here. The truth-seeking process rests largely on our shoulders, and no matter how underfunded we may be, that noble and critical objective is what makes it all worthwhile. Liberty and the presumption of innocence should never be taken for granted. For 30 years, this remarkable office has displayed the grit to protect these rights, and to defend when no one else would.



BULLETIN BOARD

New Attorneys

Tom Klobas, recently retired Deputy Public Defender, returned to the Office as a part-time Defender Attorney assigned to work in Trial Group E, effective the week of December 25, 2000.

Suzette Pintard returned to the Office as a part-time Defender Attorney effective January 16, 2001. Suzette will be assigned to the EDC Unit.

Eleanor Satuito has accepted a Defender Attorney position with this Office, effective January 22, 2001. Ms. Satuito is a 2000 graduate of Arizona State University School of Law. She will be assigned to Trial Group E following attorney training.

David Rothschild will join the Office as a Defender Attorney, effective January 22, 2001. Mr. Rothschild is a 1995 graduate of St. Mary's University School of Law and joins the Office from private practice. He will be assigned to Trial Group D following attorney training.

Timothy R. Grimm has been hired for a Defender Attorney position with the Office effective January 22, 2001. Mr. Grimm is a 1998 graduate of Duquesne University School of Law. He will be assigned to Trial Group B following attorney training.

It was announced in our last issue that **Robert Kavanagh, Tarah Javid, and Michael Scanlan** accepted Defender Attorney positions effective January 22, 2001. Their group assignments upon completion of attorney training will be as follows: Kavanagh to Trial Group C, Javid to Trial Group D and Scanlan to Trial Group A.

Attorney Moves/Changes

Shelley Davis has been selected as the new supervisor for Group A effective January 8, 2001. With her experience in Group A as its Counsel, she will be able to swiftly adjust to this new challenge.

Joe Stazzone joins the expanded Complex Crimes Unit as a death penalty attorney addition. **Mark Dwyer** also joined the Complex Crimes Unit as the fraud attorney addition. They will shift over to their new responsibilities sometime in February. Both are very respected attorneys who are experienced in these fields.

Emma Lehner, Deputy Public Defender assigned to Trial Group A, will remain in her position with the Public Defender's Office. It had been announced on December 7, 2000, that she would be leaving for the Republic of Palau effective January 12, 2001.

Darshak Shah, Deputy Public Defender assigned to Trial Group A, has resigned his position with the Public Defender's Office, effective January 5, 2000. Darshak is relocating to New Jersey with his wife while she finishes her medical school residency.

Dean Trebesch, Maricopa County Public Defender, resigned his position effective Friday, January 19, 2001. Judge Trebesch began his appointment to the Maricopa County Superior Court Bench on Monday, January 22, 2001.

Faith Klepper, Deputy Public Defender assigned to Trial Group A, has resigned her position with the Office of the Public Defender, effective February 2, 2001. Faith has been with this office since February 9, 1998. Ms. Klepper has accepted a position with the Maricopa County Attorney's Office.



Do you have an idea for an article? Would you be interested in writing an article for publication in *for The Defense*?

If so, please give us a call to discuss your ideas.

BULLETIN BOARD (continued)

New Support Staff

Hector J. Diaz has been hired as a Law Clerk, effective Tuesday, December 26, 2000. Hector has been assigned to Trial Group C in Mesa.

Brett Brueck has been hired as a downtown Records Processor, effective Tuesday, December 26, 2000.

Irene Esqueda has been hired as a Legal Secretary assigned to Trial Group C in Mesa, effective Tuesday, December 26, 2000.

Leah Fillbach Lenzendorf has been hired as Law Clerk, effective January 8, 2001. Ms. Lenzendorf is a 1998 graduate of Hamline University School of Law in St. Paul, Minnesota.

Jim Knapp has been hired as a part-time Law Clerk for the Juvenile Division at Durango, effective January 16, 2001. Jim will graduate this May from Arizona State University School of Law and was one of Dan Lowrance's students last spring semester.

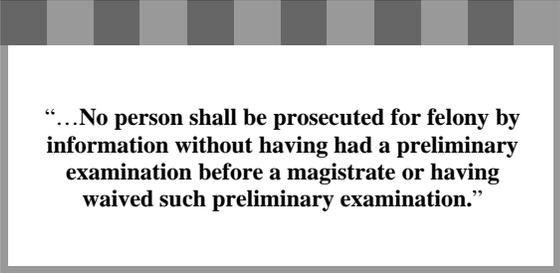
Support Staff Moves/Changes

Jason Swetnam, Legal Secretary assigned to Trial Group A, has resigned from his position with the Public Defender's Office, effective January 5, 2001. Jason transferred to the Maricopa County Legal Defender's Office.

Magdalena Galindo, Administrative Assistant at Juvenile Durango, has resigned her position with the Office of the Public Defender, effective January 26, 2001.

LET'S PUT ON THOSE PRELIMINARY HEARINGS

By Paul Ramos
Trial Group Counsel – Group C



“...No person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination.”

As one can see, the Arizona Constitution guarantees a defendant the right to a preliminary hearing when being charged by information. The Constitution also provides the defendant with the ability to waive his preliminary hearing. As attorneys in the Public Defender's Office, most of us have justice court duties and handle a number of scheduled preliminary hearings. A problem arises however, when attorneys straight waive preliminary hearings without receiving any type of benefit for their clients. Should we be conducting preliminary hearings? Yes! Are there some situations when waiving a preliminary hearing is ok? Yes.

But before considering a waiver it is important to remember that the preliminary hearing is a critical stage of the proceedings. Certainly our clients are entitled to effective representation at this stage. Waiving the hearing without receiving some type of benefit for our clients raises the question of whether we are truly being effective. What “benefits” are sufficient enough to waive the preliminary hearing? Of course this is open to debate, but there are some common “benefits” that suffice. They will be discussed later in this article. If there's any question in your mind as to whether or not your client is actually receiving a benefit, put on that preliminary hearing!

Sharpening Skills

Newer attorneys should conduct preliminary hearings whenever they can! I have always emphasized the preliminary hearing as an important training tool. The “hearing” provides attorneys with the opportunity to develop their “litigation style” in a lower stress environment. It also can be used to develop cross examination skills and the ability to recognize certain objections. In most justice courts, the attorney is not provided with discovery until the morning or afternoon of the hearing. The attorney is afforded little time to prepare and as a result the attorney is confronted with the need to “think on his feet.” Any way you look at it, newer

attorneys can only benefit from conducting preliminary hearings. Take advantage of this training tool!

Impeachment

The preliminary hearing can provide attorneys with an effective impeachment weapon for trial. By conducting the preliminary hearing, you obtain the witnesses' statement under oath. A prior statement under oath is likely to have more force and effect on jurors than one that is not. It is so much more effective to accredit a prior statement under oath. After all, the witness swore in open court to tell the truth and the pre-lim was conducted just days after the arrest. Their memory was fresh and of course, they were asked the following questions: “Is there anything else about this case that you now remember after going over the events with the prosecutor and myself? Is there anything you would like to add that is not in your report?” This can be quite a weapon so use it!

Plea Offers

Attorneys should make every effort to conduct preliminary hearings when the Deputy County Attorney does not make a reasonable plea offer. Time and time again you see unreasonable plea offers tendered at justice court followed by a straight waiver. The case is then moved to Superior Court and the new Deputy County Attorney tenders a more reasonable offer. Often times the Deputy County Attorney at justice court is new and does not know what a reasonable offer is, or is afraid to tender a reasonable offer because of policy considerations. Sometimes you encounter a Deputy County Attorney who is just outright unreasonable. Often the Deputy County Attorney expects a straight waiver if the defendant does not accept the plea offer. Don't give in to this expectation! Let the prosecutor know that there is a price to be paid for unreasonable plea offers. The “price” is extra work in the form of a hearing. When you force the preliminary hearing, you may find yourself receiving dismissals for assorted problems encountered by the prosecution including, but not limited to the lack of a victim or key witness. Who knows, if you put on the preliminary hearing you might even win!

Instilling Trust

Client relations are certainly a consideration in this line of work. A large number of defendants have the mistaken perception that Public Defenders are not “real attorneys,” that they are in training to become real attorneys, or are working

hand-in-hand with the Deputy County Attorney. Often times, client relations are an uphill battle for the defense attorney. Since the preliminary hearing is the starting gate for the attorney/client relationship, why not get the relationships started on the right track? How do you do this? You put on the preliminary hearing! Of course this isn't the cure-all, but it may give your client the satisfied feeling that you are "fighting for him."

Every now and then you will receive the case at justice court that requires the prosecutor to put the alleged victim on the witness stand in order to make the case. Obviously, in light of victim's rights laws, the defense attorney is not able to interview the alleged victim prior to trial. When you encounter this type of case, you want to take advantage of the opportunity to cross-examine the alleged victim. Especially if the victim will say they don't want to prosecute and that they said some things in anger that the police took out of context.

Straight Waiver

Now that I have covered why you should conduct preliminary hearings, let's talk about when an attorney may straight waive a hearing and the benefits the client should receive in exchange for the straight waiver. Who usually benefits from a straight waiver of the preliminary hearing? The Deputy County Attorney, of course. The case is resolved quickly; they don't have to put on the hearing, which also involves locating and contacting witnesses to get them to court. In most cases the Deputy County Attorney does not give up anything to benefit the defendant in return. This is heaven for them. The defense attorney should seek out some benefit for their client in order to waive the hearing. What are these benefits?

They include:

1. The obvious option is a waiver with beneficial plea agreement.
2. A straight waiver for TASC.
3. A straight waiver in exchange for no objection to an O.R. release or bond reduction, where you know the J.P. will not be inclined to otherwise grant your motion.
4. Although this isn't binding on the new Deputy County Attorney, the justice court Deputy County Attorney may make a note in the file requesting that the original plea offer remain open. This usually applies when you have a reasonable plea offer, but your client is hesitant to accept the offer at that time and the court will not grant a continuance.

5. A suppression issue exists and you wish to preserve your right to interview the witness at a later time. A number of justices of the peace will prevent counsel from questioning witnesses concerning suppression issues. When you are in front of that particular justice of the peace, you may want to consider waiving the hearing so that you can interview the witness and question him concerning all aspects of the issue.

Conclusion

Certainly the list above isn't exhaustive, but if you are contemplating a straight waiver of a preliminary hearing, make every effort to obtain some benefit for you client. Straight waivers are a quick way to work the cases from justice court to Superior Court, but you need to consider whether you are effectively representing your client at that stage when you straight waive. Let's put on those preliminary hearings!



ARIZONA ADVANCE REPORTS

By Defender Attorney – Appeals



State v. Beasley, 333 Ariz. Adv. Rep. 5 (CA 1, 10/31/00)

A.R.S. Section 13-501(B)(5) grants the county attorney the discretion to try as an adult a juvenile, who is charged with a felony, is at least fourteen years old, and is a chronic felony offender. A chronic felony offender is defined as a juvenile who has had two prior and separate adjudications and dispositions for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult.

Beasley's status as a chronic felony offender was premised on two prior adjudications which occurred before the passage of Proposition 102, the Juvenile Justice Initiative. Prior to the passage of this initiative, the law was that evidence of juvenile adjudications could not be used against a juvenile except in juvenile court. The Court of Appeals held that using the prior adjudications against Beasley was an improper retroactive application of the present law. The finding that Beasley was a chronic felony offender was vacated.

State v. Roark, 333 Ariz. Adv. Rep. 8 (CA 1, 10/26/00)

A police officer received information that a white truck at a certain location was stolen. The officer obtained a search warrant for the house where the truck was located. Paragraph six of the warrant allowed the officers to search for all serial numbers and identification numbers at the house. When the officers searched the house they discovered a methamphetamine lab.

The trial judge found paragraph six turned the warrant into a general warrant which is prohibited by the Fourth Amendment. Search warrants must particularly describe the things to be seized to prevent the general, exploratory rummaging in a person's belongings. As paragraph six was invalid, the trial judge suppressed evidence of the meth lab.

The Court of Appeals agreed that paragraph six was invalid. However, it held the invalid portion of the search warrant could be redacted without making the entire warrant invalid.

State v. Smith, 333 Ariz. Adv. Rep. 8 (CA 1, 11/2/00)

Smith was convicted for sale of dangerous drugs, a class 2

felony, and placed on intensive probation. He was then found in violation of probation when he pled guilty to possession of dangerous drugs, a class 4 felony. Under A.R.S. Section 13-917(B), when a defendant commits a new felony while on intensive probation, the probation must be revoked and a term of prison imposed. However, the trial judge reinstated Smith on intensive probation. The State appealed.

Smith contended A.R.S. Section 13-901.01 (Proposition 200) was an overriding statute that allowed him to be reinstated on probation. The Court of Appeals disagreed because the underlying crime was the sale of dangerous drugs which is excluded from the provisions of 13-901.01.

State v. Welch, 333 Ariz. Adv. Rep. 3 (CA 1, 10/26/00)

Welch was convicted and sentenced for manufacturing methamphetamine; possession of chemicals and equipment for the purpose of manufacturing methamphetamine; and possession of drug paraphernalia. The Court of Appeals held it was a violation of double jeopardy to convict Welch for both manufacturing methamphetamine and possession of chemicals and equipment for the purpose of manufacturing methamphetamine. The conviction for the lesser-included offense of possession chemicals and equipment was reversed.

The Court of Appeals held possession of drug paraphernalia was not a lesser-included offense of manufacturing methamphetamine. Welch's possession of a glass pipe used for the ingestion of drugs was found to be a crime independent of the manufacture of a dangerous drug. Thus, there was no double jeopardy problem.

The dissenting judge would have upheld the convictions on all three charges.

In re Victoria K., 334 Ariz. Adv. Rep. 35 (CA 1, 11/7/00)

Victoria was charged with hindering prosecution. The judge found the prosecution failed to prove this charge, but on his own motion adjudicated Victoria delinquent for providing false information to a police officer. The Court of Appeals held this was improper because providing false information to a police officer is not a lesser-included offense. The judge had no authority to sua sponte amend the delinquency petition.

State v. Kessler, 334 Ariz. Adv. Rep. 9 (CA 1, 11/14/00)

A special condition of Kessler's probation was that he abide by all written sex offender regulations. This included a regulation that he "not initiate, establish, or maintain contact whatsoever with any child under the age of 18 nor attempt to do so." Kessler was found in violation of probation for his failure to comply with this regulation. He had initiated contact with children at a church retreat.

On appeal, Kessler challenged the overbreadth of the regulation arguing it denied him his First Amendment rights to religious freedom and freedom of association. The Court of Appeals rejected these claims.

State v. Rosengren, 334 Ariz. Adv. Rep. 16 (CA 2, 11/16/00)

Rosengren was the driver in a single-vehicle accident in which his passenger died. The police arrested Rosengren and urged him to provide a blood sample. He asked to contact his father and told the officers that his father was an out-of-state attorney. The police denied the request. An officer then administered an HGN test and Rosengren was arrested for manslaughter.

Alleging a violation of his right to counsel and to due process, Rosengren moved to dismiss the charge. After an evidentiary hearing, the trial judge found the police had violated the right to remain silent and the right to counsel. The judge suppressed the results of a blood test: the results of the HGN test; Rosengren's refusal to voluntarily submit to a blood test; and all observations and statements of Rosengren that occurred after his arrest.

The trial judge found that dismissal was not appropriate because Rosengren had a blood sample provided to him and he had exculpatory evidence available to him in the form of favorable observations of the paramedics and videotape of him on the night of the accident. The blood was drawn by hospital personnel and was found not to be the result of the denial of counsel.

The Court of Appeals held the trial judge granted the appropriate relief. The evidence was suppressed not under the exclusionary rule, but rather on due process grounds.

State v. Bass, 334 Ariz. Adv. Rep. 3 (CA 1, 11/9/00)

Bass was charged with vehicular manslaughter and claimed the accident was the result of the actions of her passenger and another driver. The written instructions properly informed the jury that an event is superseding only if unforeseeable and with benefit of hindsight, abnormal or extraordinary.

The transcript "depicts an oral instruction fraught with problems." It was unclear whether the errors occurred because the judge misspoke or were due to mistranscription by the court reporter. It is presumed the transcript is correct in the absence of compelling evidence to the contrary. The Court held there was not fundamental error because the jury benefited from sufficiently clear written instructions.

The trial judge admitted hearsay statements by unidentified persons at the scene soon after the crash. The State argued the statements were admissible under the excited utterance exception. However, the witnesses did not actually see the accident but merely made statements about reckless driving by her prior to the accident.

The excited utterance exception requires a declaration under stress of excitement caused by a startling event. The excited utterance requirement is met when a person's "mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence." The accident would have qualified as a startling event, but they did not see the accident. Merely seeing reckless driving did not qualify as a startling event.

The hearsay statements were also inadmissible because the declarants were unidentified. This prevented the defense from challenging the credibility of the declarant. In this situation the party seeking to introduce the statements carries a burden heavier than where the declarant is identified to demonstrate the statements' circumstantial trustworthiness. The prosecution failed to meet this burden, as it produced no witnesses to testify as to the veracity of the declarants.

Admission of the statements was also found to be a violation of the confrontation clause because they were unreliable. The Arizona Supreme Court was not "convinced that the tainted evidence had no impact," and therefore found it was not harmless error.

The dissenting judge felt the hearsay statements were excited utterances.

DECEMBER 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
11/15-11/21	Howe Clesceri <i>Molina</i>	Akers	Pittman	CR00-03433 2 cts. Molestation of a Child DCAC, F2	Not Guilty	Jury
11/28-11/28	Howe Elzy	Hotham	Brinker	CR00-09688 Discharging Firearm at Residential Structure, F2 Agg. Assault, F3D	Pled to Discharging Firearm at Residential Structure/F2 non- dangerous felony	Jury
11/30-11/30	Howe	McVey	White	CR00-00474 Felony Flight, F5 2 cts. DUI, M1	Pled to Endangerment/F6 undesignated and 1 ct. of DUI/M1	Jury
12/4-12/5	Looney / Davis	McVey	Cohen	CR99-09771 2 cts. Forgery, F4	Guilty of 1 ct. of Forgery Ct. 2 dismissed w/o prejudice	Jury
12/11-12/11	Looney / Valverde <i>Jaichner</i>	Jones	Forness	CR00-16439 2 cts. Forgery F4 Criminal Impersonation, F6 with 1 DCAC prior	Pled to Crim. Impersonation; 2 cts. Forgery dismissed	Jury
12/11-12/11	Howe / Shah Brazinskas <i>Jaichner</i>	McVey	Bailey	CR00-09668 2 cts. Sexual Assault, F2 Kidnapping, F2	Pled to Unlawful Imprisonment/F6 open	Jury
12/18-12/18	Howe	Schwartz	Hunt	CR00-11693 Agg. Assault, F6 Assault, M1	Dismissed w/o prejudice	Jury

GROUP B

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/07	Kratter	McClennen	Charnell	CR00-014798 Armed Robbery, F2D Agg. Assault, F3D	Dismissed w/o prejudice day of trial	Jury
12/07 - 12/13	Whelihan Munoz	Budoff	Davis	CR00-009624 Aggravated Assault, F3 or in the alternative F4	Guilty of Misdemeanor Assault	Jury
12/12- 12/13	Peterson	McClennen	Workman	CR00-012053 Resisting Arrest, F6 w/4 priors	Guilty	Jury
12/14-12/18	Owens	Gottsfeld	Gellman	CR00-012115 Agg. DUI, F4	Guilty	Jury
12/14 - 12/18	Whelihan Erb	Hilliard	Jennings	CR00-013048 Burglary, F3 w/priors	Dismissed with Prejudice	Jury
12/19-12/21	Owens	Gottsfeld	Shreve	CR00-014103 Criminal damage,-F5	Guilty of Criminal Damage-CI. 6 felony	Jury

DECEMBER 2000 JURY AND BENCH TRIALS

GROUP C

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
11/20 – 12/4	Shell Arvanitas Casanova	Willrich	Gingold	CR99-92743 3 cts. Manslaughter, F2D 3 cts. Endangerment, F6D	Retrial Guilty, but non-dangerous	Jury
12/1 – 12/1	Felmy Klosinski	Johnson	Brooks	TR00-00678 EMA DUI, M1N	Dismissed Day of Trial	Jury
12/4 – 12/19	Shell	Willrich	Arnwine	CR00-91529 Fraud Schemes/Artifices, F2N Theft, F3N	Retrial (1 st trial 6 to 2 Not Guilty) Theft – dismissed Fraud – Guilty	Jury
12/6 – 12/6	Gaziano	Jarrett	O'Neill	CR00-91709 Sexual Conduct w/Minor, F2N	Pled Guilty Day of Trial	Jury
12/7 – 12/7	J. Moore	Willrich	Andrews	CR00-94283 Burglary 1 st Degree, F2D Attp. Theft Means Trans., F4N	Pled Guilty Day of Trial to Burglary 2 nd Degree, F3N	Jury
12/11 – 12/11	Felmy / Ramos	Fenzel	Brenneman	CR99-93755 2 cts Agg. DUI, F4N	Dismissed Day of Trial	Jury
12/12 – 12/13	Walker	Barker	Griblin	CR00-93619 Dang Drg. Violation, F4N PODD, F6N	Guilty	Jury
12/13 – 12/13	Felmy /Ramos Arvanitas	Fenzel	Blake	CR00-93700 PODD, F4N PODP, F6N	Dismissed Day of Trial	Jury

DUI UNIT

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/6–12/11	Timmer	Jarrett	Mueller	CR00-02969 Agg. DUI	Guilty	Jury

COMPLEX CRIMES UNIT

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/8–12/21	Gavin / Moore Thomas <i>Southern</i>	Keppel	Imbordino	CR98-091481 Murder, F1D Arson-Occupied Structure, F2D Criminal Damage, F4	Not Guilty on Murder 1; Lesser Included Murder 2 – Hung (3G/9NG); Arson – Hung (5G/7NG); Criminal Damage – Hung (5G/7NG)	Jury

DECEMBER 2000 JURY AND BENCH TRIALS

GROUP D

Dates: Start–Finish	Attorney Investigator Litigation Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/4-12/6	Clemency	Budoff	Amiri	CR00-010375 Misconduct w/Weapon, F4	Guilty	Jury
12/4-12/6	Billar	Cole	Evans	CR00-00445 PODD for Sale, F2 Misconduct w/Weapon, F4	Guilty of Simple POM, not the sale; and guilty of misconduct w/weapons	Jury
12/6	Carter	Budoff	Hipps	CR00-013921 POM/PODP	Dismissed w/o prejudice	Bench
12/7	Radovanov	McVey	Vignlli	CR00-00390 CR00-00053 CR00-01074 Numerous cts. Interference Judicial Proceeding	Pled 2 cts. IJP msdm.; 1 ct. dismissed	Jury
12/11	Enos Fusselman	Gerst	Simpson	CR00-011291 Dr-Lq/Drg w/ Minor, F6	Suppression granted, and case dismissed	Bench
12/13	Radovanov / Parker	Goodman	Jann	TR00-13394 Drvng Susp. Lic. M1	Guilty	Bench
12/14	Radovanov	Budoff	Gellman	CR00-009406 Agg. DUI, F4	Dismissed w/Prejudice	Jury
12/15	Dwyer Carter	Hilliard	Kever	CR00-11344 Resist Ofcr/arrst, F6	Not Guilty	Bench
12/18-12/19	Clemency	McClennon	Reddy	CR00-011726 Resisting Arrest, M1 Agg. Asslt, M1	Guilty – CA designated both charges on misdemeanors to deprive defendant of jury	Bench
12/19	Schreck	Ballinger	Shabnam	CR00-015742 Burglary 3, F4	Dismissed	Jury
12/19	Radovanov / Huls	Ballinger	Nabor	CR00-009526 POND, F4 PODP, F6	Guilty	Jury

OFFICE OF THE LEGAL ADVOCATE

Dates: Start–Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/1	Eaton	P. Reinstein	Lamm	CR00-001450 Forgery, F4 CR99-011851 Drive-by shooting, F2D Transp MJ, F2	Guilty	Bench
12/7	Schaffer	Hilliard	Imbordino	CR00-006934 Second degree murder, F2	Dismissed	Jury

DECEMBER 2000 JURY AND BENCH TRIALS

GRUPE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/4	Dergo Gotsch	Sheldon	Hanlon	CR99-16738 Agg. Asslt., F6	Guilty – Misdemeanor Assault	Bench
12/4 – 12/5	Roskosz	Mangum	Stewart	CR00-11391 PODD/FS, F2 TODD/FS, F2	Not Guilty	Jury
12/5	Richelsoph	Schneider	Simpson	CR00-00177 Sale of Narc. Drug, F2	Plead Day of Trial	Jury
12/11	Squires	Jones	Kay	CR99-04294 POND, F6; PODD, F4; POM. F4; PODP, F4	Dismissed w/Prejudice Day of Trial	Jury
12/12	Flynn	Araneta	Kay	CR00-06491 POM, M1 PODP, M1	Guilty	Bench
12/12	Rock	Reinstein	Hunt	CR00-13638 Agg. Asslt. on Minor, F6	Plead Day of Trial	Jury
12/13	Squires	Jones	Gallagher	CR00-15400 Agg. Asslt., F2D	Plead to Misdemeanor Day of Trial	Jury
12/18 – 12/20	Ackerley	Araneta	Kamis	CR00-11422 Agg. Robb., F3	Not Guilty	Jury
12/19	Van Wert	Hall	Neugerbauer	CR00-12246 Agg. DUI, F4	Guilty	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
11/28 – 12/8	Cleary Abernethy	McClennen	Ruiz	CR1994-10138 6 Cts. Agg. Assault, F3D	Not Guilty Agg. Assault, F3D; Guilty 5 Cts. Agg. Assault, F3D	Jury
12/4 – 12/13	Dupont De Santiago	Schwartz	Duvandeck	CR2000-12518 1° Burglary, F2D 2 Cts. Agg. Assault, F3D Endangerment, F6D	Guilty	Jury
12/4 – 12/14	Curry De Santiago	Hall	Lamm	CR2000-03487 Drive-By Shooting, F2D 2 Cts. Agg. Assault, F3D	Not Guilty Agg. Assault, F3D; Guilty Drive-By Shooting, F2D Agg. Assault, F3D	Jury



The Maricopa County Public Defender's Office
and
The City of Phoenix Public Defender's Contract Administrator's Office
present their

Annual DUI Seminar



Friday, February 23, 2001
8:30 a.m. through 5:00 p.m.

Topics

- ◆ ADAMS
- ◆ Blood Tests
- ◆ Suppression of Blood
- ◆ Useful Internet Sites

The afternoon will consist of breakout sessions on Juvenile DUI Issues,
Trial Issues, and Advanced DUI Issues

Holiday Inn, 1600 South Country Club Drive, Mesa Arizona

For information contact Stephanie McMillen at (602) 506-7569.

for The Defense

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 5th of each month.