



for The Defense

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

T'aint So, Huh? The New Dualism in *Batson* Analysis

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By Edward F. McGee¹
Defender Attorney – Appeals

“Question: How can you tell when a lawyer is lying? Answer: When his lips are moving.” Old lawyer joke.

For those of us who tried cases when *Swain v. Alabama*, 380 U.S. 202 (1965), was the law of the land, *Batson v. Kentucky*, 476 U.S. 79 (1986), seemed to herald a new age. An age in which the plain language of the impartial jury, due process and equal protection guarantees of the state and federal

constitutions, would be given real effect in the jury selection process. No longer would we be limited to challenging the composition of the venire and venting our wrath on that hapless government functionary known as the jury commissioner. Now we could directly target the evil of abusive peremptory strikes and take vengeance on opposing counsel who used such strikes to deny our clients their Sixth and Fourteenth Amendment rights. Or so we thought. What we had overlooked in rejoicing at the arrival of *Batson*

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Friends Don't Let Friends ... Go Off the Record

By Garrett Simpson
Defender Attorney – Appeals

Civil libertarians today deplore the prospect of “secret military tribunals” in Afghanistan with no public record or right of appeal. Such things seem remote, even fantastical. But, we can replicate those conditions right here in Maricopa County Superior Court

by simply letting the court go off the record. Quick now, who is George Halliday and why should he matter to you as a criminal defense attorney? Halliday is the Abraham Zapruder of civil rights. He is the man who made the now-historic Rodney King videotape.¹ Why should Halliday be on every trial lawyer's mind every time the

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was that effective challenge to the strikes of opposing counsel obliged us to prove that our adversaries' motives were evil. We had to prove that in exercising a questioned strike, opposing counsel had sought to advance an agenda based on race or gender or other improper considerations. In its original formulation, *Batson* required the strike opponent to articulate a cognizable challenge (race, for example); following this, the strike proponent had to offer a neutral explanation for his choice; and then the trial court had to determine whether, despite the proponent's explanation, the opponent had established purposeful discrimination. *Batson*, *supra*, 476 U.S. at 96-98. *Batson* made it clear that not just any explanation would do, and that some explanations would, *per se*, not be sufficient. *Id.*

In the wake of *Batson*, trial courts throughout the country began disallowing peremptory strikes on such broad bases that the United States Supreme Court found it necessary to curb enthusiasm for this new-found fairness in jury selection. Thus, in *Purkett v. Elem*, 514 U.S. 765 (1995), the Supreme Court refined the *Batson* test, diluting it to the extent that it required only the proponent of a challenged strike to state a neutral basis for his action. Although the proponent was obliged to do more than merely deny improper motive, his reasons were not required to be "persuasive, or even *plausible*." [Emphasis supplied.] *Purkett*, *supra*, 514 U.S. at 768. It then fell to the opponent of the strike to prove that the rationale for the strike was pretextual, and that the strike was actually based on race, gender or some other protected characteristic. Effectively, *Purkett* required the strike opponent to prove that his adversary was lying – and therein lay the rub. The difficulty in staging an effective *Batson* challenge is well illustrated by the difficulty that courts have had in deciding what test to use when a strike proponent, much like an accused caught red-handed, offers more than one explanation for his conduct, in an effort

The taint test can lead to abuses that only perpetuate the problems *Batson* sought to correct.

to hedge his bets. Two schools of thought have arisen on how to treat such duplicity. State courts have adopted what can be effectively called a "taint" test, in which any bad reason stated for a strike trumps a good reason.² The federal courts, on the other hand, have resorted to a more complicated procedure called "dual motivation analysis," in which the trial judge is obliged to determine whether the strike proponent would have exercised his strike even if he had had no discriminatory motive.³

On its surface, the state court "taint test" would seem to be a more genuine reflection of what the authors of our constitutional protections intended – to ensure that the accused in every criminal case gets an impartial jury, selected without any discriminatory motive on the part of the court or the prosecution. As will be seen, however, the taint test can lead to abuses that only perpetuate the problems *Batson* sought to correct, while the more rigorous dual motivation analysis of the federal courts would seem to best promote the openness and truthfulness that all Americans have come to consider the hallmarks of their court system.

The taint test is well-illustrated by *State v. Lucas*, 199 Ariz. 366, 18 P.3d 160 (App. 2001), where the prosecutor's strike of a black man was disallowed, not because he was an attorney (a good reason), but because state's counsel also said she didn't want southern males on her jury (a bad reason). Other states have reached similar decisions, and, in fact, so far as the author can determine, no state court of last resort has embraced any other approach. However, none of these decisions appears to be grounded in any discernible continuum of United States Supreme Court decisional law. In this respect, the first state court decisions appear to have been effectively an *ad hoc* development, borne of an enthusiasm to embrace the spirit, if not the letter of *Batson*,

without regard to how that decision might fit into the larger matrix of Supreme Court equal protection jurisprudence.

The federal rule, on the other hand, derives from the equal protection analysis used by the United States Supreme Court in a series of civil cases over several decades. They involved claims of discrimination in other government activity, such as education and housing, where defendants had claimed that they would have taken the same action, even in the absence of an improper motive.

Howard v. Senkowski, 986 F.2d 24, 26-28 (2nd Cir., 1993). As the Second Circuit saw it in *Howard*, the issue turned upon the fact that the Supreme Court had long held that “. . . racial discrimination under the Equal Protection clause requires a ‘racially discriminatory purpose,’ and that a racially ‘disproportionate impact’ will not suffice [citations omitted].” *Id.* Thus, with dual motivation analysis, the trial judge must actually determine whether the prosecution has truthfully stated its purpose – mere knee-jerk reaction to one bad-sounding reason for juror exclusion will not suffice.

United States v. Darden, et al., 70 F.3d 1507 (8th Cir., 1995) is a good example of how dual motivation analysis works. *Darden* was a huge RICO prosecution of members of a drug gang known as the Jerry Lewis Organization. At the outset of the nine-month trial in this matter, the prosecutor used a peremptory strike to remove a young black woman from the venire. When the defense challenged this strike, the prosecutor stated several race-neutral reasons for his decision, and then added, that in his own experience, young black females “. . . tend to testify on behalf of and be more sympathetic toward individuals who are involved in narcotics” *Darden*, 70 F.3d at 1530-31. This explanation was problematic because it implicated both racial and gender considerations.⁴ Applying dual motivation analysis, the Eighth Circuit found that although the prosecutor’s desire to exclude young black women was neither race

nor gender-neutral, other reasons given for the strike (youthful age, silence during voir dire, naiveté and general inexperience in life) were legally sufficient to justify it. Because of this, and because the prosecutor had previously struck two white jurors who had also said nothing during voir dire, the Court of Appeals allowed the strike. In the view of the Court of Appeals, the government would have used a peremptory strike to remove the juror in question even in the absence of the one non-racially neutral motive. The Eighth Circuit found the trial court was in the best position to judge the motives of the prosecutor, and that the trial court had made a more than sufficient record of all that it had considered in evaluating the government’s candor. *Id.* 70 F.3d at 1531. And, of course, by ruling this way, the Court of Appeals saved the government and the district court the expense and the inconvenience of having to re-do one of the longest trials in the history of the Eastern District of Missouri.

At first blush, the state court taint-based rule would seem to offer the accused in a criminal case the broader degree of protection. After all, under the taint theory, if the prosecutor states a single bad motive, the defendant gets a new panel, or, if the matter has already gone to appeal, a new trial. It is this prospect of an immediate, dramatic adverse result that creates potential for mischief. While the fully candid prosecutor might state all his reasons, good and bad, if he knew that articulation of a bad reason would not necessarily be fatal to his cause, the prospect of dismissal of a desirable panel, or even complete reversal on appeal is powerful inducement to conceal one’s full array of motives. It is entirely likely that even as this is being written, some training officer somewhere is suggesting techniques to prosecutors that may permit them to say enough to save their peremptory strikes from *Batson* challenges, without saying so much as to create an unfavorable result. Even as our more enlightened clients have learned over the years to tell police officers that they want a lawyer as soon as

they are read their *Miranda* warnings, thinking prosecutors will soon learn that every *Batson* challenge should be countered with a single, well-considered explanation, and not with a “stream of consciousness” outpouring more revealing of true motives. In the end, the taint rule will encourage prosecutors to resort to half-truths, if not outright dishonesty. The dual motivation analysis approach, on the other hand, tends to promote openness, and over the long run, should dispose prosecutors to be more forthcoming in their explanations for the use of peremptory strikes.

If concealment of prosecutorial motives for peremptory strikes were not bad enough, the taint rule would seem to present potential for an even more undesirable result: alteration of the facts upon appellate review in order to sustain a strike disallowed by the trial court, in a case where dual motivation analysis would have saved the strike by application of legal principles. Thus, for example, in *State v. Shuler*, __ S.C. __, 545 S.E.2d 805 (2001), we find the South Carolina Supreme Court, which had earlier announced an absolute taint-based rule, reviewing not only the printed transcripts, but also the audio and video tape recordings of the jury *voir dire*, to reverse a trial court finding that a prosecutor’s *Batson* strike explanation was a “subterfuge.” *Shuler* was doubtless problematic for the South Carolina court, because it was a high-profile felony murder case where the defendant had confessed and where DNA evidence confirmed his identification as the perpetrator. Clearly, it was not the sort of case that state court judges, who must stand for re-election, like to see reversed on a technicality. The problem *Shuler* presented, of course, was that only three years earlier, in *Payton v. Kearse*, *supra*, at note 2, the South Carolina court had adopted a rule requiring reversal, and the *Shuler* trial court had found that the state’s explanation for its peremptory strike was a

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subterfuge for race-based exclusion. Confronted with the necessity of eating its own recent decision, or with making the trial judge eat his, lest an admitted murderer win a new trial, the South Carolina court opted to present the trial judge with a dog’s dinner. It paid no more than lip service to its own rule that the findings of a trial judge are accorded great deference on appeal. *Shuler*, *supra*, __ S.C. at __, 545 S.E.2d at 615. And, it tended to undermine confidence in the court’s own motives, to the extent that while it was willing to reverse in a case where a white juror had been struck for being a “redneck,” (as in *Payton*), it would not grant relief in a case where a black juror was struck for being too slow to answer how she felt about the death penalty. In the end, where the rule could not yield, it was the truth that had to bend.

The ultimate resolution of the conflict between the state court “taint” rule and the federal court “dual motivation analysis” will probably come from the United States Supreme Court. Despite the suggestion in *Howard v. Senkowski*, 986 F.2d at 28, that dual motivation analysis would have application only in the “. . . relatively infrequent cases where improper motivation is shown to be part of the prosecutor’s motivation,” subsequent developments have shown that such cases are in fact quite common. And, although the Supreme Court denied *certiorari* in *Darden*,⁵ and more recently in *Lucas*,⁶ given the sharp division between the state and federal rulings on the subject, the day cannot be far off when some defendant or some attorney general will succeed in getting the attention of the United States Supreme Court on the topic. This will probably occur, either by way of a request to resolve a conflict between federal circuits, should one eventually adopt taint analysis, or by way of resolution of the conflict between the universal state court rule and the general federal rule.⁷

It is tempting, in the present environment, to encourage criminal defense counsel in our state to take full advantage of the taint rule adopted by *Lucas* – indeed considerations of ineffectiveness would seem to require them to do so.⁸ On the other hand, Arizona lawyers should be mindful of the fact that in response to their reliance on this rule, their courtroom adversaries will doubtless have been schooling themselves in ways to avoid tipping their hands any more than necessary to get their peremptory strikes sustained. The very success of defense counsel in forcing the issue with *Lucas* and the taint rule may in the end drive the truth about juror strikes deep underground. At jury selection time, our lawyers would be well advised to watch their adversaries' lips.

Endnotes

1. With grateful assistance from Garrett W. Simpson, whose case, *State v. Lucas*, 199 Ariz. 366, 18 P.3d 2001, prompted this entire discussion.
2. *E.g.*, *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998) [characterization of juror as a "redneck" trumped claims she was opinionated, stubborn, headstrong and came from a family that had problems with the law]; *State v. King*, 215 Wis.2d 295, 572 N.W.2d 530 (App. 1997) [strike for gender trumped strike for age]; *Rector v. State*, 213 Georgia App. 450, 444 S.E.2d 862 (1994) [strike of black venire-woman for having a gold tooth trumped strikes for being only a high school graduate, for having menial employment, for being a divorcee and for having sons who were janitors]; *Moore v. Texas*, 811 S.W.2d 197 (Texas App. – Houston, 1991) [strike of black juror for belonging to a minority club trumped strike for hesitating in answers on *voir dire* about assessing punishment].
3. Consider, for example, *United States v. Tokars*, 95 F.3d 1520 (11th Cir., 1996) [existence of gender-neutral grounds for striking disproportionate number of men saved all strikes of men]; *United States v. Darden*, 70 F.3d 1507 (8th Cir., 1995) [strike on ground that young black women are sympathetic to drug dealers not clearly erroneous where AUSA also claimed juror had been silent during *voir dire*, and where he had previously struck two white women for similar silence]; *Jones v. Plaster*, 57 F.3d 417 (4th Cir., 1995) [case remanded for trial court to determine whether strike of black school principal was also rooted in non-racially discriminatory considerations]; and *Howard v. Senkowski*, 986 F.2d 24 (2nd Cir., 1993) [Pre-*Batson* state court trial, with post-*Batson* appeal, where federal district court, on *habeas* review, had done no more than find that prosecutor had given non-pretexual reasons for excluding a black juror; matter remanded to federal district court to apply dual motivation analysis or to send case back to state trial court to make same determination].
4. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the

United States Supreme Court extended the protections of *Batson* to gender-based peremptory strikes.

5. *Darden v. United States*, 517 U.S. 1149 (1996).
6. *Arizona v. Lucas*, __ U.S. __, 122 S.Ct. 506 (2001).
7. *Lucas* would seem to have been an almost ideal vehicle for resolution of this conflict. Although the order of the Supreme Court denying *certiorari* is silent on the point, the author is informed by counsel for *Lucas* that the Arizona Attorney General did not file its *certiorari* application until the state court mandate had already issued, so the possibility exists that the state's petition was simply untimely.
8. Arizona lawyers should also always couch their objections to peremptory strikes of jurors in terms of violations of the Arizona Constitution. Even if the United States Supreme Court should one day adopt dual motivation analysis as the federal constitutional standard for evaluating *Batson* challenges defended on multiple grounds, Arizona and its sister states need do no more than shift their basis of decision to the equal protection guarantees of the state constitutions. Given the broad base of support for taint analysis in state courts, it seems quite likely that if cut adrift from the United States Constitution, the Arizona courts would find other mooring in Sections 4, 13 and 24 of the Arizona Constitution.



Juvenile Residential Treatment Programs

By Rebecca Lukasik
Client Services Coordinator

Most of the juveniles in our court system have substance abuse problems, mental health disorders and/or an unstable family environment. What do we do about it? If we place them back in the environment that they came from, their problems will not disappear. Incarceration, on the other hand, does not provide these juveniles with proper treatment. An alternative would be to place these youths in residential treatment facilities. The following two juvenile facilities should be considered when establishing an alternative sentencing plan.

Youth Development Institute

1830 East Roosevelt
Phoenix, Arizona
(602) 254-0884

Youth Development Institute provides intensive and specialized treatment for up to eighty-four children and youth in a secure residential setting. This locked facility supplies intensive treatment for emotionally handicapped children and those with behavior disorders. A full range of treatment services, including academic programming, group and individual counseling, therapeutic recreation, behavior management and psychosocial rehabilitation are provided.

The secure facility is divided into four separate units:

1. Voyager Unit for boys ages 11-17 with the primary diagnosis of conduct disorder or oppositional defiant disorder
2. Quest Unit for boys ages 8-17 with general mental health issues;

3. Odyssey Unit for girls ages 10-17 with behavioral and/or mental health issues; and
4. Journey Unit for boys, ages 11-17, providing specialized treatment for boys with sexually aggressive behavior.

Canyon State Academy

20061 East Rittenhouse Road
Queen Creek, Arizona
(480) 987-9700

Canyon State Academy is home to troubled boys ages 8 to 18, living in family-style cottages and residential dormitories on a 188-acre campus. This facility provides several opportunities for change. They include accredited schools and counseling programs, vocational training certification, work experience and community service venues as well as productive business.

In addition, families of these juveniles receive training and support at the campus as well as their homes. After each boy leaves the campus, aftercare staff assists these youths in the transition back home.

These two programs are an important resource for the attorney to be aware of when seeking a secure environment, short of incarceration, for the client.



Shaw Award Presented to Mara Siegel

By Jeremy D. Mussman
Special Assistant Public Defender

The seventh annual Joseph P. Shaw Award was presented to Mara Siegel at our holiday party on December 13th. The Shaw Award is our "Attorney of the Year" award. It was created in 1995, the year of Joe's retirement, to recognize his integrity, professionalism and years of dedication to the office and the cause of indigent defense. The award is given each year to the attorney who, in the eyes of his or her peers, has exemplified those qualities.

Mara was selected for the Shaw Award by a committee made up of fourteen members of the office. Each trial group, juvenile site, and division, including support staff, was represented. The members of the 2001 Shaw Award committee were Alysso Abe, Mesa Juvenile; Josephine Jones, Mental Health; Audrey Braun, Records; Matt Smiley, Trial Group E; John Taradash, Trial Group B; Lance Antonson, Trial Group C; Bob Stein, Trial Group F; Marie Farney, Trial Group A; Terry Adams, Appeals; Myrna Parker, Trial Group D; Gary Bevilacqua, Complex Crimes Unit; Dan Healy, Vehicular Crimes Unit; Robert Lerman, Early Representation Unit; and Nancy Johns, Durango Juvenile.

In September, the committee solicited nominations for the award from all employees of the office. Seventeen nominations were received, nominating twelve attorneys for the award. The committee met several times, discussed each of the nominations, and ultimately chose Mara.

Mara's contributions to this office and the indigent defense community as a whole are

wide ranging. During the course of her 23 year legal career (the last 13 years of which have been spent with our office) Mara has become well-known as a relentless fighter for her clients' rights. She is a tireless defender known for her sophisticated motion practice and exceptional trial skills.

She has taught trial skills throughout the state and the country for the National Institute of Trial Advocacy, the Arizona College of Trial Advocacy, the State Bar, the Arizona Capital Representation Project, AACJ, and our office. In addition, she has served on numerous committees, including the Arizona Supreme Court Jury Reform Committee that recommended the changes to our jury rules in 1995. In short, this former taxi driver has come a long way. We are fortunate that our office has been along for a good part of the ride. Mara is truly a remarkable person and attorney, and well deserving of the 2001 Joe Shaw Award. Congratulations, Mara!



Friends Don't Let Friends..Go Off the Record

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gavel falls and trial commences? Halliday knew to keep the lights turned on and to make a record. Even though he was not trained as a lawyer, he intuitively grasped the importance of making a record that could be reviewed by an appalled American public and, eventually, a jury. He kept the videotape grinding away. And, while few of consequence would have believed King's version of events without the tape, with it, the day was King's.

In the seminal case of *Griffin v. Illinois*,² the United States Supreme Court struck down a state practice of denying appellate review to those persons unable to afford a trial transcript. Fundamental fairness and the prohibition of invidious discrimination required no less. Thus, your client has a federal constitutional right to a transcript, but that right is meaningless if there is nothing to transcribe. And the while the court has a duty to see that the record is made available,³ the onus is always on counsel to make the record.

Keeping the "tape," that is, the record, grinding away is part and parcel of our jobs. Yet, time and again criminal defense lawyers—for no good reason—let the court go off the record. Never, ever let the court go off the record. The job of trying cases requires your assuring that every word uttered in the courtroom—whether live or on tape—is taken down *verbatim seriatim* and then transcribed for appeal. Crucial items oftentimes left out of the record on appeal include testimony, argument, bench conferences and all matters in chambers. I am sorry to report that we must add to this list "jury instructions." There is an alarming trend of judges not having the reading of jury instructions taken down and transcribed by the court reporter. Multiple

drafts and revisions of written instructions abound in records. The reason it is necessary to transcribe what is read to the jury is so that there is assurance that the instructions actually given the jury in writing are confirmed to be the one and the same read in court. Anything less is substandard practice and defense counsel must oppose it without exception.

In at least two cases now on appeal in this office, the trial judge refused to allow the court reporter to take down the reading of the instructions and then proceeded to misplace the written instructions. How these cases will be resolved is anyone's guess. But you can stop this from happening in cases you will try today and beyond.

Under the Arizona Constitution, every defendant has the right to a public trial and an appeal.⁴ Neither right can be enforced if there is no record establishing the appellate or post-conviction contention that the superior court acted unlawfully upon your client. When an incomplete record is presented to an appellate court, it must assume that any testimony or evidence not included in the record on appeal supported the action taken by the trial court.⁵ Under the Arizona Rules of Criminal Procedure, a party questioning the sufficiency of the evidence to support the action of the trial court has the burden of including a transcript of the testimony in the record on appeal to furnish a basis for appellate review.⁶ If the court orders the reporter not to make notes, the matter may be lost forever. The rules are simple: Refuse to do business outside the presence of a working reporter. The reporter is an officer of the court and is supposed to be there for you.⁷ But your client waives the right to a public trial on the record and the right to appeal from what happens off-the-record if you don't make the

Never, ever let the court go off the record — the job of trying cases requires that you assure every word uttered in the courtroom is taken down *verbatim seriatim*.

objection.⁸ Poof! Suddenly you're in Kabul!

So, as soon as the court telegraphs to the reporter to stop taking notes, you must object. Don't be bullied into waiving. Try something like this, and repeat it every time the judge wants to go off the record:

Your Honor, the defendant objects. Under the 14th Amendment and article 2, sections 4 and 24 of the Arizona Constitution, my client has the right to a public trial in a court of record and the right to appeal. Rule 31.8 of the Criminal Rules requires the appellant to protect the record and allows the appellant to designate the entire proceedings as part of the record. None of these rights may be protected if any part of the proceedings is not taken down verbatim. There is no adequate way to reconstruct these proceedings once they have taken place and the court's intended omissions will interfere with my client's fundamental rights.

What if the court says, "You've made your record, counsel. Now move on"? Your position must be clear. You should ask at once for a continuance so you may seek a stay in a special action because there is no remedy at law for a record that doesn't exist. Follow through and fear not. The Arizona Court of Appeals has welcomed special actions where the issue is interference with the right to a court reporter.⁹ And a court reporter ordered not to take notes is no better than having no reporter at all. Please ask your supervisor to point you in the right direction if you feel that a special action will help you keep the lights turned on and the record churning away. Your clients will thank you, whatever the outcome.



Endnotes

1. Aoki, Keith, "AUTHORS, INVENTORS AND TRADEMARK OWNERS: PRIVATE INTELLECTUAL PROPERTY AND THE

- PUBLIC DOMAIN PART I," FN 152, 18 Colum-VLA J.L. & Arts 1 (Part I) (1993).
2. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 834 (1985).
3. See, e.g., *Norvell v. Illinois*, 373 U.S. 420, 83 S.Ct. 1366, 1368 (1963).
4. Article 2, Section 24, Arizona Constitution.
5. *State v. Wilson*, 95 Ariz. 372, 390 P.2d 903 (1964); *Picow v. Baldwin*, 77 Ariz. 395, 272 P.2d 613 (1954); *Balestreri v. United States*, 224 F.2d 915 (9th Cir. 1955); *United States v. Vanegas*, 216 F.2d 657 (9th Cir. 1954).
6. Rule 31.8(b)(2), *In re Maricopa County Juvenile Action No. J74449A*, 20 Ariz.App. 249, 511 P.2d 693 (1973).
7. A.R.S. Sec. 12-223: "A. The court reporter shall attend court during the hearing of all matters before it unless excused by the judge. He shall make stenographic notes of all oral proceedings before the court, but unless requested by court or counsel, he need not make stenographic notes of arguments of counsel to a jury, nor of argument of counsel to the court in the absence of a jury."
8. Objection to absence of court reporter is waived if not timely made. *In re Maricopa County, Juvenile Action No. J-74449A* (App. Div.1 1973) 20 Ariz.App. 249, 511 P.2d 693
9. *State v. Brown*, 182 Ariz. 66, 893 P.2d 66 (App. 1995).

Benita “Bingle” Dizon Commitment to Excellence Award

**By James J. Haas
Public Defender**

Several years ago, our office created the Commitment to Excellence Award to recognize support staff members who had performed above and beyond the call of duty. Every year, the Public Defender personally chose recipients in recognition of the fact that the support staff are the unsung heroes of our office. All of us know that the backbone of our office is a support team of secretaries, legal assistants, client service coordinators, investigators, and records processors. Far too often, however, we fail to give these individuals the recognition they so richly deserve. Our Commitment to Excellence Award provides such recognition.

Recent events have given us reason to take a closer look at our relationships with support staff, including how we demonstrate that the vital work that they do behind the scenes is, often times, every bit as important for our clients as the work we lawyers do in the courtroom. We lost one of our true unsung heroes in November, when Benita “Bingle” Dizon passed away. Bingle was a legal secretary in our Appeals Division, and an integral part of our office for more than thirteen years. Bingle worked her way up “through the ranks,” beginning her career as a records processor. From the start, however, her dedication, warmth, and innate ability to figure out how to get things done were apparent to all who worked with her.

Bingle took over the records processing function in our Appeals Division in 1990. In short order, she established herself as a key

part of the division, making order out of chaos in a number of different areas. A single sentence in Chuck Krull’s article in last month’s *for The Defense* hit the nail on the head: “Working with Bingle made me a better attorney and a better person.”

Clearly, Bingle was a well deserving recipient of our Commitment to Excellence Award. It was an honor and a privilege to present the award to her family at last month’s holiday party.

To further honor Bingle, we have decided to make some changes in the Commitment to Excellence Award. Beginning next year, the Commitment to Excellence Award will be presented to one support staff member chosen by a committee of attorneys and staff, following the same type of process that we’ve used to determine the recipient of the Shaw Award. Beginning this year, the recipient’s name will be permanently displayed on a plaque in the Training Facility, next to the Shaw Award plaque. And, beginning this year, the award will be known as the Benita “Bingle” Dizon Commitment to Excellence Award.



Helene Abrams – MCBA Distinguished Public Lawyer of the Year

By Keely K. Reynolds
Special Projects Manager

Helene Abrams, our Juvenile Division Chief and a former Shaw Award recipient, continues to be recognized for her distinguished service to indigent defense. Helene was chosen as the recipient for the Maricopa County Bar Association's 2001 Distinguished Public Lawyer of the Year Award. Helene has been an attorney with the Maricopa County Public Defender's Office since 1981. She did adult trial work from 1981 to 1985, and then transferred to the Juvenile Division. In 1987, she rejoined the Trial Division, spending three years there before transferring to the Appeals Division in 1990. In 1993, Helene was named Juvenile Division Chief, a position she continues to hold today.



innumerable criminal and juvenile justice committees and has helped draft important legislation and rules regarding juvenile justice issues. She has also taught numerous seminars and continuing legal education classes, judged moot court competitions, and is very active in her local PTA.

Helene has always been known as a compassionate and fierce advocate for her clients. She has earned the respect and admiration of her colleagues.

Suzanne Harward, an attorney in our Juvenile Division at Durango, presented this year's Distinguished Public Lawyer Award to Helene on November 15, 2001 at the MCBA's annual luncheon.

Congratulations, Helene, on receiving this well-deserved recognition.

Helene also finds time to be active in her community. Helene has served on



*Best Wishes to All of Our
 Readers for a Safe, Peaceful and
 Happy New Year!*

ARIZONA ADVANCE REPORTS

By Stephen Collins



State v. Gross, 355 Ariz. Adv. Rep. 3 (CA1, 9/4/01)

A jury convicted Gross of two counts of forgery, class 4 felonies. The trial judge then took judicial notice from the superior court file that the offenses were committed while released on bond from another felony. Under A.R.S. Section 13-604(R), this added an additional two years imprisonment to the sentence.

On appeal, the additional two years on each sentence was vacated. It was held that *Apprendi v. New Jersey* requires that a jury, not a judge, determine the release status under Section 13-604 (R). In *Apprendi*, the United States Supreme Court concludes that “the relevant inquiry is one not of form, but effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” If it does, then it is the “functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an ‘element’ of the offense.”

When a sentence enhancement is overturned on appeal, and a defendant has waived a double jeopardy claim, no rules or statutes preclude a different jury from determining the sentence enhancement on retrial. However, retrial with a different jury is not permitted when the State is responsible for the need for the retrial. Here the Arizona Court of Appeals found that the State was not at fault because it had complied with the requirements of Section 13-604(R) as amended by the legislature.

State v. Logan, 355 Ariz. Adv. Rep. 6 (SC,

9/16/01)

Logan was a paralegal who prepared a will for an elderly couple and obtained a durable power of attorney from them. He then took their money, which he used for his personal expenditures. He was charged with theft under A.R.S. Section 13-1802(A)(1) which provides, “a person commits theft if *without lawful authority*, the person knowingly controls property of another with the intent to deprive the other person of such property” (emphasis added).

Defense counsel requested the standard RAJI instruction that did not include the language, “without lawful authority.” The Arizona Supreme Court held Logan waived the issue on appeal because defense counsel invited the error. It did not matter whether it was fundamental error. “Equity favors the application of the usual rule of invited error rather than the exceptional rule of fundamental error.”

In 1996, the Arizona Supreme Court determined that it “would no longer issue qualified approvals for any jury instructions.” Therefore, the fact defense counsel requested a standard RAJI instruction was found to be no excuse.

State v. Olcavage (Adair), 355 Ariz. Adv. Rep. 42 (CA 1, 8/30/01)

The Arizona Court of Appeals held that for DUI purposes, trained phlebotomists are qualified to draw blood for testing purposes without the supervision of a physician or a registered nurse.

State v. Hensley, 356 Ariz. Adv. Rep. 5 (CA 1, 9/20/01)

Pursuant to a plea agreement, Hensley pled no contest to possession of dangerous drugs. He had two prior armed robbery convictions, but the prosecution neither alleged nor proved them. Hensley was placed on probation for four years.

A month later, the prosecution filed a petition to revoke probation and Hensley admitted he was in violation. The prosecution alleged that Proposition 200 (A.R.S. Section 13-901.01) did not apply because of the violent prior convictions. The trial judge ruled that Proposition 200 prevented her from imposing a prison sentence. Therefore, she terminated probation.

The Arizona Court of Appeals held that Proposition 200 must be applied when the prosecution fails to allege and prove a prior violent felony. Therefore, Hensley could not be sent to prison. However, it was also held that probation could not be terminated. A.R.S. Section 13-901.01(E) requires the trial judge to assess new conditions of probation when there is a probation violation in a Proposition 200 case.

State v. Ibanez, 356 Ariz. Adv. Rep. 12 (CA 1, 9/18/01)

In a DUI case, a jury panelist said her ability to be fair in deciding the facts would be affected because of her religious beliefs and the fact her ex-husband was an alcoholic. When the trial judge then inquired, “Are you saying you don’t know whether you could be fair or impartial,” she responded, “Yes.” Under continued questioning from the trial judge, the panelist responded it would be “hard” to be fair and impartial. Later, she said it would be “difficult” to be fair and impartial. However, the trial judge refused to excuse her for cause. Defense counsel had to use a peremptory challenge to remove her from the jury.

The Arizona Court of Appeals held that the trial judge erred in not excusing the panelist for cause, because “she never ultimately acknowledged that

she could be objective.” It was also held that automatic reversal of the case was required under *State v. Huerta*.

State v. Roman, 356 Ariz. Adv. Rep. 11 (CA 1, 9/18/01)

Roman was convicted of promoting prison contraband because he possessed methamphetamine while in prison. The trial judge rejected the claim that Proposition 200 (A.R.S. Section 13-901.01) was controlling. A sentence of four and one-half years imprisonment was imposed. The Arizona Court of Appeals affirmed, finding that Proposition 200 only applies to offenses committed in the community, not to offenses committed in jail or prison.

Urs v. Maricopa County Attorney’s Office, 356 Ariz. Adv. Rep. 41 (CA 1, 9/20/01)

Article 2, Sections 23 and 24 of the Arizona Constitution guarantee a trial by jury to all criminal defendants. The Arizona Supreme Court has held that if an offense warranted a jury at the time the Arizona Constitution was enacted, a jury is still required for that offense today.

Urs was charged with reckless driving. The Arizona Court of Appeals held he was entitled to a jury trial, because it was a jury-eligible offense at common law.



NOVEMBER 2001 JURY AND BENCH TRIALS



OFFICE OF THE PUBLIC DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
10/15-10/23	Kibler Salvato	McVey	Adelman	CR01-003099 Aggravated assault w/ deadly weapon, F2 Aggravated assault w/deadly weapon, F3 Aggravated assault, F4 Aggravated assault, F6 Kidnap, F2	Guilty 11 cts Not Guilty 2 cts	Jury
10/23 - 11/1	Lopez	Heilman	Sampson	CR01-06365 Child Molest, F2	Not Guilty	Jury
10/29-11/7	Klopp / Ziemba Arvanitas Geary	Willrich	O'Neill	CR00-94954 Armed Kidnapping, F2D 6 cts. Armed Sexual Assault, F2D	Hung jury 1 Not Guilty 11 Guilty	Jury
10/30 – 11/6	Cutrer Klosinski	Willrich	Cutler	CR01-92237 Theft Means of Transportation, F4N	Guilty	Jury
10/30 – 11/14	Burns / Moore Klosinski Southern	Akers	Vercauteren	CR00-95932 Murder, F1D	Guilty	Jury
10/31 - 11/5	Ackerley	Budoff	Simpson	CR01-08356 Aggravated Assault, F3D Misconduct Involving Weapons, F4D Discharging Weapon Within City, F5D	Guilty	Jury
11/1	Gaziano	Fenzel	Schultz	CR01-94806 Forgery, F4N	Guilty	Jury
11/1/01	Javid / Enos	Gottsfeld	Kay	CR01-010701 Disorderly Conduct, F6D	Guilty	Jury
11/4 – 11/5	Gaziano	Fenzel	Hudson	CR01-94806 Theft of Credit Card, F5N	Guilty	Jury
11/5	Billar	Franks	Anapolous	CR01-003686 Aggravated Assault, F6 Aggravated Assault, F4	Not Guilty	Jury
11/5	Lopez	Hilliard	Green	CR01-10856 Resisting Officer Arrest, F6	Guilty	Bench
11/7	Cain	Hoag	Lemke	CR01-010169 Aggravated DUI, F4	Guilty	Jury
11/8 - 11/14	Dergo	Gottsfeld	Godbehere	CR01-10955 Misconduct Involving Weapons, F4	Guilty	Jury

NOVEMBER 2001 JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
11/9	Cutrer	Johnson	Warshaw	CR01-00999 Indecent Exposure, M1N	Hung Jury 1 – Guilty 5 – Not Guilty	Jury
11/13	Nurmi / Green	Holt	Nelson	CR01-011046 Disorderly Conduct, F6	Not Guilty	Jury
11/13-11/15	Looney Barwick	Fenzel	Sherman	CR01-011392 Theft of Means of Transportation, F3 Unlawful Flight F5	Guilty	Jury
11/13 - 11/14	Ackerley	Hall	Luder	CR01-10761 Theft of Means of Transportation, F3	Guilty	Jury
11/13 - 11/14	Duffy / Squires	Hoag	Washington	CR01-02871 Criminal Trespass, F6	Not Guilty	Jury
11/14	Hill King	Ballinger	Kuhl	CR01-11096 Shoplifting, F6	Guilty, M1	Jury
11/14-11/16	Dwyer	Budoff	Aginopolis	CR98-04634 Misconduct Involving Weapons, F4	Hung Jury 6 – Guilty 2 – Not Guilty	Jury
11/14 – 11/19	Taradash Valentine	McClennen	Green	CR01-08762 Aggravated Assault Kidnapping	Not Guilty	Jury
11/15-11/16	Kibler	Fields	Mayer	CR01-006163 POND for sale, F2 PODD, F2 POM, F6 PODP, F6	Guilty	Jury
11/15-11/19	Cain	Hotham	Kamis	CR01-010985 SOND, F2	Guilty	Jury
11/15 – 11/19	Primack / Ellig	Foreman	Todd	CR01-08928 POND F/S, F4 PODP, F6	Guilty	Jury
11/16	Cuccia	Gutierrez	Montgomery	CR01-00742 Theft	Not Guilty	Jury
11/20	Clemency	Davis	Larish	CR01-012425 PODD, F4 PODP, F6 Resisting Officer Arrest, F6	Guilty	Jury
11/26-11/28	Dennis / Klopp Klosinski	Fenzel	Brooks	CR01-93147 Forgery, F4N	Guilty	Jury
11/27-11/28	Kibler O'Farrell	Foreman	Pittman	CR01-10585 Sexual Abuse over 15, F5	Guilty	Jury
11/28	Cain	Hotham	Baily	CR01-018318 Sex Abuse, F5	Not Guilty	Jury
11/30	Adams / Parker Salvato	Budoff	Hunt	CR00-18078 Attempted Murder, F2D	Guilty but Insane	Bench

NOVEMBER 2001 JURY AND BENCH TRIALS

OFFICE OF THE LEGAL ADVOCATE

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
10/22-11/19	Everett	Anderson	CR01-006104 32 Counts Sex-related crimes	18 cts. Guilty 14 cts. Not Guilty	Jury
11/8-11/9	Agan	Hutt	CR01-001232 Possession of Narcotic drug class 4	Not Guilty	Jury
11/15-12/4	Schaffer C. Johnson	Yarnell	CR00-002023 1 st Degree Murder, F-1 Theft, F-3	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
11/14-11/19	Westervelt	Franks	Larish	CR2001-004992 Aggravated Assault	Guilty	Jury



for The Defense

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