for The Defense

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Remember: Jury Instructions Are Orphans

By Garrett Simpson, Defender Attorney - Appeals

Sometimes when I'm in the basement at the Luhr's Building getting my hair cut, Tony will have on "Jerry Springer" or "Maury Povich." My favorite train wrecks on these shows are when they announce who is, or isn't, the D.N.A.-certified daddy of "Baby X." When the patriarchy is determined, hilarious bedlam invariably ensues. Don't let that happen to your jury instructions. In court, your instructions are all *orphans*. Never let a prosecutor smear your client with his "paternity" of the instructions you requested.

Here's a case in point: I had an old client - long dead, now, of natural causes - who had a fondness for long knives and a short way with the rest of the world. I thought at first it was by dumb chance I represented him repeatedly. But it came to pass he'd taken to announcing at his initial appearances that I was his public defender because we'd always got such good results together.

Many years later I got an appeal from my old client; it would be his last hurrah. He had come out of retirement for one last knife fight; but fully expecting the same vindication in court that he had enjoyed on the street, he was nonplussed to find himself convicted of aggravated assault dangerous.

My old client testified in his own behalf; after all, he had fewer prior felony convictions than a previous governor. He gave the jury every assurance that he had acted in self-defense. However, when settling the instructions his attorney had got the court to instruct on simple assault and disorderly conduct as lesser-included offenses.[1] But the prosecutor made hay with this in front of the jury, arguing in rebuttal that my old client couldn't have had much confidence in his self-defense plea because *he* had been the one who'd asked for the instructions on the lesser-included offenses. The defense motion for a mistrial was denied on grounds defense counsel had opened the door to the prosecutor's wildly improper argument. How? By inferring in the defense closing that it had been the prosecutor who had asked for the lessers. The rule trod on here was Rule 21.3(b) of the Rules of Criminal Procedure, stating that

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the jury must never, ever be told which party requested any given instruction.[2]

In *State v. Stambaugh,*[3] the Court of Appeals considered a case where a prosecutor made a similar argument against defense counsel. The Court wrote that:

> The fact that appellant, like the state, had offered an instruction on the lesser included offense of involuntary manslaughter was not a matter that the jurors would have been justified in considering in determining their verdict. . . . In context, the prosecutor's reference to defense counsel's request for the instruction was doubly prejudicial: it implied, first, an admission that appellant was guilty of the lesser offense and, second, duplicity on the part of defense counsel.[4]

The Court of Appeals said that the defense argument invited an appropriate response, but did not excuse what had happened there. The Court wrote, "We believe the prosecutor's argument clearly violated the well-established rule most recently enunciated in *State v. Landrum*, 112 Ariz. 555, 561, 544 P.2d 664, 670 (1976). In determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case, we have stated the best rule to be:

> Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks, * * *"[5]

Here's where judges will sometimes go wrong: prosecutors will argue theories of guilt under both the original charge and the lesser(s), but when defense counsel points out the inconsistency, the state will accuse defense counsel of "opening the door" or "inviting error" and the judge will sometimes let the prosecutor ostensibly "re-level the playing field" by allowing the state to tell the jury that it was the defense that asked for the lesser. In fact, whenever you hear a prosecutor say that you "opened the door" or "invited the error," you should not be diverted by introspection. Instead, think about exactly what kind of mischief it is that the state proposes.

For instance, imagine your client is charged with burglary and you get a lesser instruction for trespassing. If the state in closing argument militates for the trespass conviction, it is merely fair play for you to 1) argue, within reason, that the state has effectively abandoned its case for burglary, 2) urge for a complete acquittal, consistent with your client's plea, and 3) maintain the jury must never be told the lesser-included was your idea, even if you are praying with all your heart that the jury will come back with the trespass. There will always be those cases where the theory of the defense is that the client was overcharged and the real crime was the lesser. Go for it. The sooner the jury knows that is your theory, the greater your credibility will be. But in the typical all-or-nothing case where the lesser is a safety net of sorts, revealing that you proposed the lesser included instruction violates the rules, makes your client look guilty, and it makes you look like a liar because you just sat down after saying the evidence, or lack of evidence, supports a complete acquittal; yet there you were in chambers indulging in some lawyer's trick to get a lesser charge. Thank goodness that nice prosecutor blew the lid off your deceptions.

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Court Watch

~ How to Be Guilty of Resisting Arrest *and* Escaping Custody
~ *Blakely* and Proposition 200

By Daniel P. Schaack

Editors' Note: This article previously appeared in a recent issue of Maricopa Lawyer. *It is reprinted with permission from the* Maricopa Lawyer*, the official publication of the Maricopa County Bar Association.*

It sounds like a clever riddle with a nightmarish fact situation that you might get on an essay question on the bar exam: Can you simultaneously be guilty of both resisting arrest and escape? In *State v. Stroud*, 209 Ariz. 410, 103 P.3d 912 (Ariz, 2005), the Supreme Court overruled the Court of Appeals and held that you can.

A Bisbee police officer, William Silva, saw Sudden Rio Stroud sitting in a car. Because Stroud had an outstanding felony arrest warrant, Silva ordered him to place his hands on the patrol car. Stroud began to obey the order but questioned why he was being arrested. He tried to evade Silva when informed of the warrant, so the officer grabbed Stroud's shirt collar, pushed him against the car and held him there, telling him that he was under arrest.

Stroud continued to struggle and kick, so Silva used pepper spray. The tactic backfired: some of the spray got into Silva's eyes, and he lost his grip. Stroud broke free and ran. He was eventually nabbed by another officer.

This incident led to Stroud being charged with both resisting arrest and escape. He was convicted of both counts and sentenced to consecutive terms totaling four years. The Court of Appeals reversed the escape conviction, concluding that Stroud could not be convicted of both escape and resisting arrest. It held that Silva had never completed the arrest, so Stroud could not have escaped custody. *State v. Stroud*, 207 Ariz. 476, 88 P.3d 190 (App. 2004).

The Supreme Court reversed. Writing for a unanimous court, Justice Rebecca White Berch held that both convictions could stand.

Supreme Court's Analysis

Under A.R.S. § 13-2508(A), resisting arrest consists of attempting to or actually preventing a peace officer from making an arrest by using or threatening to use physical force, or by other means that raise a substantial risk of physical injury. Under A.R.S. § 13-2503(A)(2), a person commits escape by knowingly attempting to or actually escaping from custody arising from having been arrested for, charged with, or convicted of a felony.

Berch reasoned that the facts in Stroud's case allowed convictions for both crimes, and decried the Court of Appeals' attempt to reconcile the two crimes. "[N]o such reconciliation is necessary," she wrote. "The crimes are separate, each consisting of elements that differ from those that constitute the other. . . . One is not a lesser-included offense of the other."

In concluding that Silva had never actually arrested Stroud, the Court of Appeals had relied on other state court decisions' definitions of "custody," a faulty analysis according to Berch. "Arizona statutes," she wrote citing A.R.S. §13-2501(3), "specifically define 'custody' as the 'imposition of actual or constructive restraint pursuant to an on-site arrest.'" Consistent with this section, she noted that A.R.S. § 13-3881 provides that an "arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest."

Thus, to prove Stroud committed escape, the state needed to prove that he had been

arrested and in custody, that is, that he was actually restrained pursuant to an arrest. Berch and the Supreme Court determined that the facts allowed a jury to find that Stroud had indeed been arrested: "[T]he record shows that during the ongoing struggle, '[Officer] Silva grabbed Stroud's shirt collar, leaned him against his car, and held him down' while repeatedly telling 'Stroud he was under arrest.'"

"The jurors could reasonably have concluded that Silva's actual restraint of Stroud satisfied the definition of 'custody,'" Berch continued. "This action, coupled with the declaration to Stroud that he was under arrest, provided sufficient evidence to support a guilty verdict on the charge of second-degree escape . . . ."

Berch also chided the Court of Appeals for its reliance on the Supreme Court's opinion in *State v. Sanchez*, 145 Ariz. 313, 701 P.2d 571 (1985), in holding that Silva had not actually restrained Stroud. She noted that in *Sanchez*, the police officer "never was closer than ten to fifteen feet from the defendant, who walked away when the officer began to walk toward him." Consequently, *Sanchez* involved not actual, but constructive, restraint. "While we reaffirm the thrust of that opinion—that one cannot escape unless one has been actually restrained or arrested—we believe the Court of Appeals has unmoored the language of the opinion from its contextual anchor," Berch wrote.

So, if after reading the facts, you wrote down that Stroud could be convicted of both resisting and escape, you may move on to the next bar exam question. Just hope that it's not about the rule against perpetuities.

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The biggest topic in criminal law for the last year has been the Supreme Court's attack on sentencing schemes in which the judge may give convicted people longer sentences based on facts not found by the jury. A big topic in Arizona some years back was the Drug Medicalization, Prevention, and Control Act of 1996, better known as "Proposition 200." Both were involved in a recent case in the Court of Appeals, where the court held that a provision of Prop 200 did not survive constitutional scrutiny. *State v. Gomez*, 209 Ariz. 373, 102 P.3d 992 (Ariz. App. 2004).

Melissa Jean Gomez was charged with possession of small amounts of methamphetamine and marijuana. As a first-time offender, she was a potential candidate for treatment under Prop 200. Prop 200's goal is to change the way the criminal justice system treats minor drug possession charges. It metes out punishment in a graduated sequence that precludes prison time for first- and second-time offenders unless certain statutory factors are present. If a statutory factor is present, then the defendant may be sent to prison.

One such statutory factor found in A.R.S. § 13-901.01(B) is that the defendant "has been convicted of or indicted for a violent crime." If that is true, then the defendant is not eligible for Prop 200 probation. Because Gomez had been indicted for manslaughter ten years ago, the state alleged that she was ineligible for probation.

But Gomez was never tried for manslaughter: the state had dropped the charges because "there was no reasonable likelihood of conviction." In her drug case, she moved to strike the state's allegation of prior indictment, but the trial court was unimpressed with her argument. After she was convicted, it sentenced her to prison for two and a half years.

Blakely meets Proposition 200

Gomez found a more sympathetic ear in Division One of the Court of Appeals. Writing for a unanimous panel, Judge Lawrence F. Winthrop held that A.R.S. § 13-901.01(B)'s prison time provision for persons indicted for—but not convicted of—a previous violent offense is unconstitutional.

Winthrop relied on the Due Process Clause's requirement of proof beyond a reasonable doubt for every element of a criminal charge. Pointing to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004), he noted that this standard applies not only to the conviction but to additional facts that may be used to increase the penalty beyond the statutory maximum allowed by the guilty verdict itself. Because Gomez was a first-time offender, Prop 200 set that statutory maximum as probation.

But Prop 200 did not intend to let all first- and second-time offenders off with probation. Winthrop noted that "[t]he purpose of section 13-901.01(B) is to exclude violent offenders from the mandatory probation penalty generally applicable to at least the first two convictions for personal possession of drugs." This provision nevertheless floundered under the Constitution.

"Because the trial court imposed a sentence exceeding the 'statutory maximum' based on the finding that Gomez had been indicted for a violent crime," Winthrop wrote, "that factor is subject to the *Apprendi* rule that the fact be found beyond a reasonable doubt." A grand jury indictment, he noted, is issued on a finding of probable cause, not proof beyond a reasonable doubt. "Given the lower burden of proof applied in grand jury proceedings, the mere fact of an indictment for a violent crime cannot be deemed to establish beyond a reasonable doubt that the person indicted is a violent offender." That portion of Prop 200 therefore violates *Apprendi*, he held.

He also blocked any attempt the state might make to get around the *Apprendi* problem by arguing that Prop 200 does not require that the defendant be a violent offender but only that she had been indicted for a violent crime. The legislature may not, Winthrop held, discard the presumption of innocence. Quoting the Supreme Court, he wrote that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

Joining in Winthrop's opinion vacating the sentence were Judge Susan A. Ehrlich and Judge Stephen M. Desens of the Cochise County Superior Court.

New Attorney Class - April 2005

From left to right: Russ Born (Trainer), Katie Shelley, Jamie Jackson, Wendy Mays, and David Greene

Is Momentary, Innocent Handling a Defense?

By Stephen Whelihan, Defender Attorney

"Yes, my fingerprints will be on the gun, but it is not mine. It was on the seat when my friend picked me up to go to work. He told me to just put it in the holster under the seat, so I did." If the convicted felon on probation who said this is telling the truth, is he guilty of misconduct with weapons? Will your judge give instructions that adequately convey to the jury the answer to this question?

The answer to the first question is no. Merely momentary and innocent handling of a gun constitutes a defense to the charge of possessing a gun while being a prohibited possessor. *State v. Tyler*, 149 Ariz. 312, 718 P.2d 214 (Div. 1, 1986); *State v. Carlos*, 199 Ariz. 273, 17 P.3d 118 (Div. 2, 2001). In *Tyler*, the defendant claimed that he found a prohibited weapon, a sawed-off shotgun, which he figured had been planted on his premises by somebody else, and he took only such possession of it as was necessary to insure its safe disposal. 149 Ariz. at 315-316. The trial court refused an instruction requested by the defendant that included a requirement that the State prove beyond a reasonable doubt that the defendant possessed the weapon with criminal intent. Id. The majority opinion found that the requested instruction was an incorrect statement of the law, and that the defendant's theory of the case was adequately covered by the instructions the trial court gave. The trial court instructed that "Possessing means knowing to have physical possession or otherwise exercise dominion or control over the property." The majority reasoned that, under the defendant's theory of the case, his momentary, innocent handling of the prohibited weapon from his property to a neighbor's property would fail to show the necessary degree of "dominion" or "control" to fit the ordinary meaning of those words. 149 Ariz. at 316. Thus the majority of the Court acknowledged that momentary, innocent handling was a valid defense to a charge of possession, but found that it was sufficiently covered by the ordinary significance of "dominion", meaning "absolute ownership", or "control", meaning "have power over". Id. That these words convey the existence of the defense appears to be unmitigated fiction. To see this, one need only consider whether anyone on the jury could possibly conclude that Mr. Tyler did **not** "have power over" the shotgun when he took it and moved it in order to safely dispose of it.

In any event, the majority in *Tyler* went on to recommend an additional instruction that would be proper in such a case:

[The State must prove beyond a reasonable doubt that the defendant] did willfully have or keep a pistol in his possession with the intent to control the use and management thereof, or that defendant did willfully have a pistol in his control with the power and intent to guide or manage such pistol.

(Id. at 316-317). This recommendation belies the conceptual confusion of the majority as to the nature of the defense because it focuses on the *mens rea,* while the court's reasoning for upholding the conviction was based on analysis of the *actus reus,* i.e. possession, meaning "dominion" or "control". This conceptual confusion is, of course, another reason to reject the majority's reasoning that the momentary innocent handling defense is adequately conveyed in standard instructions. If judges in the court of appeals have difficulty with these legal concepts, jurors cannot be presumed to construct them on their own out of the "ordinary meaning" of "dominion or control".

In his dissent, Judge Kleinschmidt agreed with the majority in *Tyler* that temporary, innocent handling is a defense to possession, citing *State v. Phinis*, 199 Kan. 472, 482, 430 P.2d 251, 259 (1967); *State v. Flaherty*, 400 A.2d 363, 367 (Me. 1979); and *People v. LaPella*, 272 N.Y. 81, 4 N.E.2d 943 (1936). 149 Ariz. at 317,

718 P.2d at 219. He dissented, however, because he found that the instruction given did not convey the idea that the jury could acquit if "the jury infers that the defendant did not *intend* to control the weapon beyond his innocent and momentary handling" citing *State v. Neal*, 215 Kan. 737, 740, 529 P.2d 114, 116 (1974). Id. (Emphasis in original). Thus the dissent understood the defense as relating to *mens rea.*

In *Carlos*, *supra*, the Court reversed the defendant's convictions for dangerous assault by a prisoner and promoting prison contraband, holding that the trial court's preclusion of the defendant from calling the victim as a witness violated his Sixth Amendment right to compulsory process. 199 Ariz. at 279, 17 P.3d at 124. The Court found that this was not harmless error because the victim's testimony might have "supported Carlos's claims that his actions during the fight, including his momentary handling of the shank, were in self-defense", citing *Tyler, supra*, for the proposition that mere momentary innocent handling of a prohibited weapon fails to show the necessary degree of dominion or control to be criminal possession. 199 Ariz. at 280, 17 P.3d at 125. Here again, the conceptual confusion (*actus reus* or *mens rea*?) rears its head. If Carlos took the knife in hand to defend himself, it is unclear how it can be said that he did not "have power over" it (actus), or that he did not "intend to control its use and management" (mens). Even the instruction recommended in *Tyler* does not appear to adequately convey Carlos' defense.

In a recent decision, Division Two of the Court of Appeals followed the rationale of *Tyler,* but declined to offer an opinion on the instruction recommended therein. In *State v. Lopez,* 209 Ariz. 58, 97 P.3d 883 (App. 2004) the defendant requested the court to instruct the jury that "passing control [of an item] does not constitute possession of that item". The court found "no authority" supporting this instruction and found that the standard instruction that was given "adequately expressed the concept of possession". It is a shame that nearly 20 years later, the fiction foisted on us by the *Tyler* court is still with us. But do not give up!

In a recent trial, a defense attorney did not argue "momentary, innocent handling", did not request such an instruction, and did not object when the prosecutor, to rebut statements of the defendant himself, argued that there is no such defense. In a memorandum decision upholding the conviction, a panel of Division 1 found no fundamental error, but explicitly approved the *Tyler* instruction, saying it "would be better" to give it in this circumstance, and "leaving for another day" the issue of whether counsel was ineffective for failing to ask for it. The decision also upbraided the prosecutor for misstating the law. It is puzzling how the court could have made these pronouncements, and yet found that the standard instructions adequately conveyed the existence of the defense, when those same instructions evidently did not convey the idea to the defense attorney (who presumably read the instructions), the prosecutor (who presumably would not intentionally misstate the law), the judge (who failed to *sua sponte* correct the prosecutor's misstatement), or the state's attorney on appeal (who argued on appeal that it did not exist). The challenge for the trial lawyer is to persuade the trial court that the standard instructions do not adequately convey the concept, and that the court should exercise its discretion to further justice, not to perpetuate the fiction fabricated in *Tyler.* The trial lawyer should offer the instruction recommended in *Tyler,* but should also fashion an instruction tailored for the circumstances of the case. For example, in a case like *Carlos,* the *Tyler* instruction would be inadequate, so an alternative instruction supported by the underlying principles should be offered.

Hopefully, this article has made it more likely that the answer to the second question is "yes". But if not, at least it may give the lawyer on appeal an opportunity to end *Tyler's* fiction.

Continued from Jury Instructions p.2

Don't let them do that to your client. Stop the music, ask for a sidebar and make your record. Tell the judge that Rule 21.3(b) forbids this, and under *Stambaugh* and *Landrum* nothing you argued can be used as justification for the state to reveal that you are the party who asked for the lessers. If the cat's already out of the bag, or if the court is determined to let it in, move for a mistrial, arguing the revelation that you asked for the lessers will surely influence the verdict, satisfying the appellate test for relief. When you make your motion, cite to the Sixth and Fourteenth Amendment rights to an impartial jury and to due process of law. A jury deliberately given inadmissible prejudicial information is not impartial and it violates fundamental fairness to do so.

If you stand your ground on this you will earn the court's respect, your client's praise, and you will be acting to protect the sanctity of the jury. As G.B. Shaw put it,

> In all cases, if the jury is capable of thinking for itself and not doing merely what the judge directs . . . the verdict will give effect to the education and consequent moral principles . . . of the jury, facts or no facts, law or no law. It will be an act of conscience under the covenant of grace."[6]

I'm sure my old client would have agreed.

(Endnotes)

[1]"A lesser-included offense is one that consists solely of some but not all of the elements of the greater offense such that it would be impossible to commit the greater offense without committing the lesser," *State v. Tschilar*, 200 Ariz. 427, ¶ 39, 27 P.3d 331 (2001).

[2] "Duty of the Court.The court shall not inform the jury which instructions, if any, are included at the request of a particular party."

[3] *State v. Stambaugh*, 121 Ariz. 226, 589 P.2d 469 (App. 1978).

[4] 121 Ariz. 228, 589 P.2d 469

[5] Id., citing, *State v. Landrum*, 112 Ariz. 555, 561, 544 P.2d 664, 670 (1976)

[6] Shaw, George Bernard, Everybody's Political What's What?, p. 299, Dodd Mead & Co. New York, N.Y. (1945).

Lawyers Band Together to Bring Back Right to Jury Trial

By Kathleen Carey, Legislative Liaison

In the wake of the Arizona Supreme Court's decision in Derendal (*Derendal v. Griffith*, 104 P.3d 147, 209 Ariz. 416 (Ariz. Jan 14, 2005)), a band of defense attorneys came together under the flag of the AACJ and began research on Arizona common law and the right to a jury trial. In the end, the group concluded that an Arizona citizen has a right to jury trial for ALL crimes, which includes both felonies and misdemeanors. See compiled findings and research at www.azjurytrialrights.com. Included are approximately 100 forensically photographed documents from the state's historical archives, including handwritten minutes by the territorial justices of the peace for such horrendous offenses against the public as "wandering the streets," "vagrancy", "misdemeanor," "using profane language," "refusing to show meat hide," and "insulting and abusing a teacher." Also included are misdemeanor assault, possession of handgun, and criminal damage. Please visit the website, www.azjurytrialrights.com – it is currently appropriate to file a jury demand on all misdemeanors. The website has contact people to assist you with your pleadings. For the office of the Public Defender, please contact me. Currently, a number of cases are making their way through special action proceedings.

Who's on First and What's on Second?

Discerning the Conditions for Determining What is a *Blakely*-compliant Aggravator?

By Diane Alessi, Criminal Staff Attorney and the Hon. Robert Gottsfield, Maricopa County Superior Court Judge

Abbott and Costello would have a field day with how the Arizona Court of Appeals is handling the issue of whether an aggravated sentence complies with *Blakely v. Washington* [1] and *Apprendi v. New Jersey*.[2] Given the *Blakely* mandate, it is arguable that the court's diverse opinions are understandable.

In *Blakely*, which applied the principles set forth in *Apprendi* to the state of Washington's non-capital sentencing scheme, the United States Supreme Court held the Sixth Amendment requires that a jury determine beyond a reasonable doubt the existence of any fact which increases a sentencing range beyond the statutory maximum. "The statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[3]

For Arizona the "statutory maximum" sentence for *Blakely* purposes is the presumptive term.[4]

To increase the presumptive sentence the trial judge must find that aggravating factors are either *Blakely*-exempt or beyond a reasonable doubt *Blakely*-compliant.

Exempt Aggravators

Blakely, consistent with *Apprendi*, determined that prior convictions, whether a felony or a misdemeanor conviction,[5] need not be determined by a jury or admitted by the defendant to be considered a sentencing aggravator and are thus *Blakely*-exempt. Division Two has held that neither A.R.S. §13-604 (P) nor *Blakely* requires a jury trial on the allegation of prior convictions and that the state must prove them by clear and convincing evidence rather than beyond a reasonable doubt.[6] The state must prove that the accused is the same person who previously was convicted, which is usually established by fingerprint evidence, as well as the fact of the conviction itself.[7] The foundation case *State v. Hauss,*[8] remains good law, standing for the proposition that a conviction must normally be shown by a certified copy. Since *State v. McCann*,[9] there is a presumption that a prior conviction remains valid. Thus a defendant who challenges the finality of his conviction must present some "credible evidence" that his convictions are invalid; the state does not have to "establish the negative" that nothing changed the conviction's validity.[10]

Compliant Aggravators

Blakely-compliant aggravators are any factors (1) found by a jury beyond a reasonable doubt, (2) which are inherent in the plea, conviction, or jury's verdicts[11] or (3) were admitted by the defendant,[12] that justify a sentence imposed for more than the presumptive term.[13]

It is the differing views of the Court of Appeals judges concerning the conditions required for a finding that an aggravator is *Blakely*-compliant that brings to mind the Abbott and Costello routine.

Can a trial judge consider additional aggravating circumstances not found by a jury when at least one aggravating factor is beyond a reasonable doubt *Blakely*-compliant (or exempt for that matter)? Yes, says a panel from Division One[14] with which a panel from Division Two agrees[15] (the *Martinez/Chiappeta* position). That's wrong says a different panel from Division One,[16] with which yet another panel from Division Two agrees,[17] as only the jury can find aggravating factors and they must find them all (the *Munninger/Timmons* position).

We even have a situation where the author of the opinion of the court followed the analysis that when at least one aggravating factor is found by a jury beyond a reasonable doubt (or there is a *Blakely*-exempt prior conviction) the trial judge can find additional aggravating factors beyond a reasonable doubt, while the two concurring opinions, which agreed with the result in the case, nevertheless adopted the contrary position that the jury must find all aggravating factors (except prior convictions).[18]

A further wrinkle for an Abbott and Costello riff is that yet another panel of Division Two (the *Alire/Aleman* faction) has held that if there is a *Blakely*-exempt aggravator (e.g., a prior conviction) with the record showing no mitigators this combination permits a trial judge to find additional aggravators, beyond a reasonable doubt, although not found by the jury.[19] A panel of Division One has disagreed with this holding.[20]

A recap of the split in the Court of Appeals between the divisions and within each division itself concerning when a sentence complies with *Blakely*, shows that 5 judges agree with *Martinez/Chiapetta*; 11 judges agree with *Timmons/Munninger*; 3 judges agree with the view that if there is one aggravator present and the record shows no mitigators, additional aggravators may be found by the trial judge (*Alire/Aleman*); and 3 judges disagree with that view (*Pitre*).

Thankfully, argument was held on *Martinez* on March 28, 2005 before the Arizona Supreme Court and the decision is imminent. Another case, *State v. Henderson*,[21] was argued on May 26, 2005, dealing with whether a harmless error analysis can be applied to both *Apprendi* error and *Blakely* error, which the court may want to decide with *Martinez*. This harmless error issue has resulted in yet another split, albeit a smaller one. One judge from Division One and two from Division Two believe that *Blakely* error is structural and not subject to harmless error analysis.[22] The majority of the panels weighing in on this issue hold that *Blakely* error results in an illegal sentence that unless harmless, constitutes fundamental error.[23]

Note that *Blakely* does not apply to a non-capital first-degree murder sentence[24] or to a mitigated sentence.[25] A trial court may convene a jury trial during the sentencing phase of a non-capital case on the issue of whether there are facts supporting the imposition of an aggravated sentence.[26] Aggravating factors need not be alleged in the charging document or subjected to a probable cause determination.[27] This is also the law with respect to aggravating factors in a capital case that need not be alleged in the indictment or information.[28]

The legislature, at the recently concluded session, amended §13-702 (non-capital felony sentencing scheme) and §702.01 (exceptional aggravating/mitigating circumstances scheme)[29] to meet *Blakely* concerns. Although signed by the Governor on April 1, 2005, it did not contain an emergency clause so it will not become law until 90 days from adjournment, or on August 12, 2005. It adopts the *Martinez/Chiappeta* approach, directing that a defendant is eligible for an aggravated sentence if one or more of the 20 aggravating circumstances set forth in §13-702 is found by the jury beyond a reasonable doubt. If that occurs, the trial court may find by a preponderance of the evidence additional aggravators to determine the sentence. In the case of exceptional circumstances under §13-702.01, the jury must find beyond a reasonable doubt at least two aggravating factors.

[Endnotes)

[1] 542 U.S. _____, 1245 S.Ct. 2531 (2004). See "Blakely v. Washington:Illuminating Apprendi's Scope," *for The Defense*, Volume 14, Issue 7/8, at 1-2, 9-10 (July/Aug 2004).

[2] 530 U.S. 466 (2000).

[3] *Blakely*, 124 S.Ct. at 2537.

[4] *State v. Henderson*, 209 Ariz. 300, ¶6, 100 P.3d 911, 913-14 (App. 2004), review granted; *State v. Resendis-Felix*, 209 Ariz. 292, n.1, 100 P.3d 457, 459 n. 1 (App. 2004); *State v. Brown*, 209 Ariz. 200, ¶12, 99 P.3d 15, 18 (2004). Note that *United States v. Booker*, 543 U.S. _____, 125 S.Ct. 738 (2005), held that *Blakely/*

Apprendi applies to the Federal Sentencing Guidelines and prohibits a federal judge from increasing a sentence beyond the maximum authorized by the facts established by a plea of guilty or a jury verdict, unless those facts are at some point found by a jury to exist beyond a reasonable doubt (prior convictions excepted). At the same time the majority opinion severed two provisions of the Sentencing Reform Act of 1984 that made the guidelines mandatory and held that the guidelines remain advisory, requiring a sentencing court to consider guideline ranges as one factor in crafting a "reasonable" sentence. This in effect has given federal judges greater sentencing discretion than they had before.

[5] *State v. Aleman*, 210 Ariz. 232, 109 P.3d 571 (App. 2005).

[6] *State v. Cons*, 208 Ariz. 409, 94 P.3d 609 (App. 2004).

[7] *Cons*, 208 Ariz. at 415, 94 P.3d at 615.

[8] 140 Ariz. 230, 681 P.2d 382 (1984).

[9] 200 Ariz. 27, 21 P.3d 845 (2001).

[10] *Cons*, 208 Ariz. at 416, 94 P.3d at 616.

[11] *State v. Aleman*, 210 Ariz. 232, 109 P.3d 571 (App. 2005); *State v. Oaks*, 209 Ariz. 432, ¶23, 104 P.3d 163, 168 (App. 2004); *State v. Gatliff*, -----209 Ariz. 362, 102 P.3d 981 (App. 2004) (jury verdict of arson of an occupied structure necessarily includes a finding of dangerousness that permits an aggravated sentence and thus no *Blakely* error); Cf. *State v. Pena*, 209 Ariz. 503, 104 P.3d 873 (App. 2005) (under §13-702, trial court cannot use an essential element of the offense to impose a sentence; even though minimum sentence imposed, error not harmless because sentence might have been different without the improper aggravator).

See also "Is Captain Bly Still Sailing? When May An Element of a Conviction Be Used As Sentence Enhancement and Aggravation?" *for The Defense*, Volume 13, Issue 12, at 1-9 (Dec. 2003); *State v. Cleere*, 210 Ariz. 212, 109 P.3d 107 (App. 2005)(affirming use of box cutter as a dangerous instrument in attempted murder conviction to establish the dangerous nature of the offense in order to enhance the range of sentence and finding use of infliction of very serious physical injury to the victim, whose throat had been slit with the box cutter, as an aggravator does not violate §13-702(C)(1); vacating sentence on other grounds due to *Blakely* violation); §§13-702(C)(1) and (2)(permitting as aggravators infliction or threatened infliction of serious physical injury and use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime "except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under §13-604." This remains the law under the recent amendment to §13-702, as to which, see n. 29 infra).

[12] "In cases in which a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, we will regard that factor as established." *State v. Ring*, 204 Ariz. 534, ¶93, 65 P.3d 915, 944 (2003)(Ring III).

See also *State v. Miranda-Cabrera*, 209 Ariz. 220, ¶30, 99 P.3d 35, 42 (App. 2004) (defendant's trial testimony satisfies

Blakely); *State v. Finch*, 205 Ariz. 170, 68 P.3d 123 (2003) (defendant's admission that he had shot victim to prevent his reporting the robbery established pecuniary gain motive); *State v. Aleman*, 210 Ariz. 232, 109 P.3d 571 (App. 2005).

[13] *State v. Oaks*, 209 Ariz. 432, ¶23, 104 P.3d 163, 168 (App. 2004); State v. Resendis-Felix, 209 Ariz. 292, 9, 100 P.3d 457, 460 (App. 2004).

[14] *State v. Martinez,* 209 Ariz. 280, 100 P.3d 30 (App. 2004), review granted. Accord: *State v. Estrada*, 210 Ariz. 111, 108 P.3d 261 (App. 2005)(No Sixth Amendment right to have jury determine additional aggravators if prior convictions are an aggravator); *State ex rel. Smith v. Conn*, 209 Ariz. 195, 98 P.3d 881 (App. 2004).

[15] *State v. Chiappeta*, 210 Ariz. 40, 107 P.3d 366 (App. 2005).

[16] *State v. Munninger,* 209 Ariz. 473, 104 P.3d 204 (App. 2005).

[17] *State v. Timmons*, 209 Ariz. 403, 103 P.3d 315 (App. 2005). Accord: *State v. Burdick*, 209 Ariz. 452, 104 P.3d 183 (App. 2005); *State v. Aleman*, 210 Ariz. 232, 109 P.3d 571 (App. 2005); *State v. Pitre*, 210 Ariz. 93, 107 P.3d 939 (App. 2005); *State v. Cleere*, 210 Ariz. 212, 109 P.3d 107 (App. 2005).

[18] *Chiappeta*, supra n.15.

[19] *State v. Alire*, 209- Ariz. 517, 105 P.3d 163 (App. 2005). This is also the view of the concurring judges in *Chiapetta*, supra n.15. Accord: *State v. Aleman*, supra n.17. But see, *State v. Pitre*, supra n. 17, holding that a defendant has a Sixth Amendment right to have the jury determine all aggravating factors even if no mitigators are present.

[20] *State v. Pitre*, supra n. 17.

[21] *State v. Henderson*, supra n. 4, in which a panel of Division One (one judge concurring in result but disagreeing with reasoning) holds that *Blakely* error is trial error rather than structural error and hether it is harmless or not must be decided on a case-by-case basis as determined in *Ring III*, supra n. 12. Accord: *State v. Resendis-Felix*, supra n. 4.

[22] *State v. Henderson*, supra n. 4 (Weisberg, J., concurring); *State v. Resendis-Felix*, supra n. 4 (Eckerstrom, J., dissenting); *State v. Aleman*, supra n. 17 (Florez, J., dissenting).

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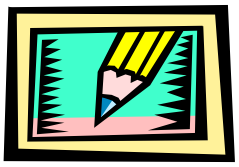
Writers' Corner

Garner's Usage Tip of the Day: danglers



Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including A Dictionary of Modern Legal Usage, The Winning Brief, A Dictionary of Modern American Usage, *and* Legal Writing in Plain English. *The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at* www.us.oup.com/us/apps/totd/usage. Garner's Modern American Usage *can be purchased at bookstores or by calling the Oxford University Press at: 800-451-7556.*

Present-Participial Danglers.
Mispositioned words can cause grammatical blunders. The classic example occurs when the wrong noun begins the main clause — that is, a noun other than the one expected by the reader after digesting the introductory participial phrase. E.g.: "The newspaper said that *before being treated* for their injuries, *General Mladic* forced them to visit the wards of wounded at the Pale hospital, telling them, 'here's what you have done' and 'you have also killed children.'" Marlise Simons, "Report Says Serbs Tormented 2 French Pilots," *N.Y. Times*, 29 Dec. 1995, at A5. That wording has General Mladic being treated for others' injuries. Danglers reflect a type of bad thinking. Another manifestation of this error is to begin the main clause with an expletive (e.g., "*it*" or "*there*") after an introductory participial phrase: "*After reviewing* the aforementioned strategies, *it* becomes clear that there is no conclusive evidence regarding their success." Bernard J. Putz, "Productivity Improvement," *SAM Advanced Mgmt. J.*, 22 Sept. 1991, at 9. (A possible revision: *Even a detailed review of those strategies provides no conclusive evidence about how successful they are.*)

As that example shows, danglers occurring after an introductory word are just as bad as others but are harder for the untrained eye to spot — e.g.: "I have always found John Redwood thoughtful, intelligent and rather convivial. I sincerely hope that we can remain friends after the dust has settled. He has conducted a skilled campaign. Yet, *being* a thoughtful man, I suspect that in his heart of hearts he wishes some of his supporters . . . would just disappear." Jerry Hayes, "A White-Knuckle Ride I Cannot Join," *Independent*, 30 June 1995, at 21. (The writer here seems to attest to his own thoughtfulness. A possible revision: "*Yet because he is a thoughtful man, I suspect that in his heart of hearts he wishes . . . .*" Or: "*Yet I suspect that, because he is a thoughtful man, in his heart of hearts he wishes . . . .*")

Past-Participial Danglers.
These are especially common when the main clause begins with a possessive — e.g.: "*Born* on March 12, 1944, in Dalton, Georgia, Larry Lee Simms's qualifications . . . ." Barbara H. Craig, *Chadha: The Story of an Epic Constitutional Struggle* 79 (1988). (Simms's qualifications were not born on March 12 — *he* was. A possible revision: "*Born on March 12, 1944, in Dalton, Georgia, Larry Lee Simms had qualifications that . . . .*")

Dangling Gerunds.
These are close allies to dangling participials, but here the participial acts as a noun rather than as an adjective when it is the object of a preposition:

"*By instead examining* the multigenerational ethnic group, *it* becomes clear that the Irish had fully adjusted to American society by the time of the First World War." Michael Cottrell, Book Rev., *Canadian Hist. Rev.*, Sept. 1994, at 453. (A possible revision: "*By instead examining the multigenerational ethnic group, we see that the Irish . . . .*")

Jury and Bench Trial Results April 2005

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of *for The Defense*, please contact the Public Defender Training Division.

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[23] *State v. Henderson*, supra n. 4; *State v. Resendis-Felix*, supra n. 4; *State v. Martinez*, supra n. 14; *State v. Miranda-Cabrera*, 209 Ariz. 220, 99 P.3d 35 (App. 2004); *State v. Timmons*, supra n. 17; *State v. Burdick*, supra n. 17; *State v. Munninger*, supra n. 16; *State v. Aleman*, supra n. 17; *State v. Pitre*, supra n. 17; *State v. Cleere*, supra n. 17.
[24] *State v. Fell*, 209 Ariz. 77, 97 P.3d 902 (App. 2004), review granted; *State v. Martinez*, supra n. 14.
[25] *State v. Pena*, 209 Ariz. 503, 104 P.3d 873 (App. 2005); *State v. Miranda-Cabrera*, supra n. 23.
[26] *Aragon v. Wilkinson*, 209 Ariz. 61, 97 P.3d 886 (App. 2004). See also *State ex rel. Smith v. Conn*, 209 Ariz. 195, 98 P.3d 881 (App. 2004) (state can allege pretrial aggravating factors and request jury determination).
[27] *Conn*, supra n. 26.
[28] *McKaney v. Foreman*, 209 Ariz. 268, 100 P.3d 18 (2004).
[29] H.B. 2522/S.B. 1093. *Blakely*, 124 S.Ct. at 2537.

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