

for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

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Missing Persons

Dismissals, Continuances and Double Jeopardy

By Hon Robert Gottsfield, Maricopa County Superior Court

Dismissals Prior To Trial/Normally Without Prejudice

If important prosecution witnesses are not available on the day of trial, the state should move for a dismissal or a continuance. With respect to a dismissal, it should be without prejudice unless the court sets forth a reason and "particularized finding that to do otherwise would result in some articulable harm to the defendant." *State v. Wills*, 177 Ariz. 592, 594-95, 870 P.2d 410, 412-13 (App. 1993), *rev. denied*, April 5, 1994.

Requirements of Rules 8.6 and 16.6

Arizona Rule of Criminal Procedure 8.6 provides that if speedy trial rules are violated the court "shall on motion of the defendant, or on its own initiative, dismiss the prosecution with or without prejudice."

Rule 16.6(a) advises that on motion of the prosecutor showing "good cause" the court "may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8."

The dismissal "shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be with prejudice."

Rule 16.6(d). The court shall state on the record the reasons for its dismissal order. Rule 16.6(c). The defendant "shall be released from custody, unless the defendant is in custody on some other charge, and any appearance bond exonerated." Rule 16.6(e).

Generalized Findings/Speedy Trial Rules Violation/Showing Actual Prejudice Required

The trial court's generalized finding that the "interests of justice" require a dismissal, *Wills, supra*, or that "finality" should obtain, *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991), *rev. denied*, Oct. 20, 1992, do not support a dismissal with prejudice. A violation of Rule 8 speedy trial time limits without more does not support a dismissal with prejudice. *State ex rel. Berger v. Superior Court in and for Maricopa County*, 111 Ariz. 335, 340-41, 529 P.2d 686, 691-92 (1974); *State v. Garcia*, 170 Ariz. 245, 248, 823 P.2d 693, 696 (App. 1991). If the defendant can show the state delayed for the purpose of gaining an advantage or to harass him, and if he can show actual prejudice to his cause as a result of the state's conduct, a dismissal with prejudice would be justified. *State v. Torres*, 116 Ariz. 377, 569 P.2d 807 (1977); *Garcia, supra*.



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Must Show Impairment of Ability to Defend

A request by a prosecutor to dismiss immediately prior to trial is not alone sufficient to justify a dismissal with prejudice. *Gilbert*, 172 Ariz, at 405, 837 P.2d at 1140. Although a dismissal on the eve of trial “may be an annoyance and an inconvenience to the defendant and her attorney, the defense failed to articulate how these last minute dismissals actually hurt her ability to defend against the charges.” *Id.* The “prejudice” claimed by defendant that he was ready to go to trial when the motion to dismiss was made is insufficient to warrant a dismissal with prejudice. *Quigley v. City Court of the City of Tucson*, 132 Ariz. 35, 643 P.2d 738 (App. 1982). The timing of the prosecution’s request for dismissal does not aid the defendant. *Gilbert*, 172 Ariz. at 405, 837 P.2d at 1140; *Quigley*, 132 Ariz. at 37, 643 P.2d at 740.

The most important consideration as to whether a dismissal should be with or without prejudice is whether a delay will result in prejudice to the accused, such that the delay would actually impair the accused’s ability to defend against the charges. *Gilbert*, 172 Ariz. at 404-05, 837 P.2d at 1139-40; *In Re Arnulfo G.*, 205 Ariz. 389, 391, 71 P.3d 916, 918 (App. 2003), *rev. denied*, Sept. 9, 2003.

The repeated failure of the police officer to submit to a defense interview and the speculation by the defendant about the reason for the officer’s failure

may justify preclusion of the officer’s testimony and a dismissal of charges but the dismissal would have to be without prejudice unless the defendant shows particularized prejudice. *Wills*, 177 Ariz. at 594-95, 870 P.2d at 912-13.

Refiling Charges/Speedy Trial Rules

Where there is a dismissal without prejudice, so that the state may refile the charges, the time limits of the speedy trial rules begin anew. *State v. Avriett*, 25 Ariz. App. 63, 64, 540 P.2d 1282, 1283 (1975).

Continuances Prior to Trial/Normally No Double Jeopardy Concerns

A prosecutor’s request for a continuance prior to empaneling the jury and made on the eve of trial because the state’s “main man,” such as a victim or arresting officer, is unavailable and the prosecutor has no knowledge either witness is reluctant to testify, should be granted. *State v. Kasten*, 170 Ariz. 224, 226-27, 823 P.2d 91, 93-94 (App. 1991) (victim), *rev. denied*, Feb. 4, 1992; *State v. Vasko*, 193 Ariz. 142, 971 P.2d 189 (App. 1998) (arresting officer), *rev. denied*, Jan. 12, 1999. *See State v. Williams*, 144 Ariz. 433, 441, 698 P.2d 678, 686 (1985) (granting continuance motion of co-defendant on morning of trial to locate 22 alibi witnesses in effect causing a severance and denying the motion of defendant to continue, affirmed where no prejudice results); *State v. Zuck*, 134 Ariz. 509, 514, 658 P.2d 162, 167 (1982) (where court allows state’s disclosure of its chief witness in violation of disclosure rules only two days before trial, defense should have requested a continuance); *State v. Dickens*, 187 Ariz. 1, 10, 926 P.2d 468, 477 (1996) (continuance granted state, *inter alia*, to obtain witness testimony found not error even though state later conceded witness not that important), *cert. denied* 522 U.S. 920 (1997).

Requirements of Rule 8.5/ Extraordinary Circumstances for Continuance

Rule 8.5, Arizona Rules of Criminal Procedure, requires (1) a written motion; (2) specific facts in support of the motion; and (3) certification by the signer that the motion is made in good faith and not for the purposes of undue delay.

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Practice Pointer

State Fails to Disclose Jail Tapes: What Do You Do?

By Jennifer Stewart, Defender Attorney

So, you are in the middle of trial and your client is testifying. All is well, until the prosecutor starts asking him questions about something he said to his girlfriend over the phone recently. Now, your client is in custody, so the prosecutor is clearly talking about jail calls. The prosecutor indicates in her questioning that your client made up his version of the events, and had his girlfriend go along with it. Is this proper?

Absolutely not.

Recently, several prosecutors have decided that our clients' jail calls, otherwise known as recorded statements made by the defendant, do not require disclosure. So, why is this improper, and what can you do, both before and during trial to remedy the problem?



Rule 15.1(b)(2) of the Arizona Rules of Criminal Procedure requires that the State disclose *any statements of the defendant*, within thirty days after arraignment, and there is a continuing duty to disclose after that under rule 15.6 of the Arizona Rules of Criminal Procedure. The rule is not conditioned upon the type of statement, whether or not it is considered *Brady* material, or whether or not the State plans on using it at trial. The State has claimed in these situations that our clients should know what they said already, and the tape is simply impeachment material. So, they are saying that their failure to disclose was deliberate, and they have the tapes but do not have to give them to us. Further, the State may argue that they are not going to use the call itself to impeach the witness, and they only need a good faith basis for the question. Therefore, disclosure is not required. **Rule 15.1 does not make any of these distinctions, and the State can cite no authority that allows them to keep this information from us.**

Lastly, the State may try to argue that you could have requested the jail tapes yourself,

and therefore, you are the one to blame for not having them. First, Rule 15.1 does not distinguish between things we could possibly try to order ourselves and those that we can't. Second, in the past MCSO has opposed any requests that a defense attorney has made to get jail tapes directly, and it has been MCSO's position that we must go through the Maricopa County Attorney's Office to get these tapes.

If this happens in trial, argue Rule 15.1 required disclosure, and the State's failure to give you the tape is a violation of your client's Due Process rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution as well as Article II, §§ 4 and 24 of the Arizona Constitution, and

violates your client's right to a complete defense. You cannot defend your client against the alleged statements unless you know what was said, and in what context. In addition there may be *Brady* material on these tapes that you are unaware of. Further, the fact that the State's failure to disclose is willful rather than inadvertent constitutes prosecutorial misconduct. Request a mistrial and that the court impose sanctions against the prosecutor under Rule 15.7 of the Arizona Rules of Criminal Procedure.

If your motion for a mistrial is denied, you have several options. First, request specific findings regarding your motion. Is the court denying it because the State has no duty to disclose, or because the failure to disclose does not warrant a mistrial? Second, ask the judge to order that the tapes be disclosed immediately. Go through the hours of calls, and find what the State was referring to. If they misstated anything, or if you would have been able to rehabilitate your client on redirect if you had the tapes at that time, then file a Motion for New Trial based on the new

information and the court's previously incorrect ruling.

If a Motion for New Trial needs to be filed, it must be filed within ten days after the verdict has been rendered, under Rule 24.1 of the Arizona Rules of Criminal Procedure. If, like many of us, you are strapped for time and are unable to listen to ten or eleven hours of jail calls within the ten days after trial, you still have one more remedy: a Motion to Vacate the Judgment, pursuant to Rule 24.2 of the Arizona Rules of Criminal Procedure. A Motion to Vacate the Judgment must be filed within sixty days after the entry of judgment of guilt and sentence, but before the defendant's appeal is perfected. The conviction can be vacated based on newly discovered material facts, or if your client was convicted in violation of his

constitutional rights. If this doesn't work, then at least you will have preserved the issue for appeal. As you can see, if it is the middle of trial before this issue is raised, you face much more difficult circumstances than if it is addressed ahead of time.

Therefore, my suggestion is this: File a motion specifically requesting that any jail tapes the State has be disclosed immediately, and request that there be ongoing disclosure with regard to these tapes. You may be surprised to find out that the State has jail tapes more often than you would think. Address the issue pretrial, so that there is a ruling in place and any surprise of this kind at trial will be against a court order, making your case even stronger for sanctions. ✦

Fourth Annual APDA Conference



By Jim Haas, Maricopa County Public Defender

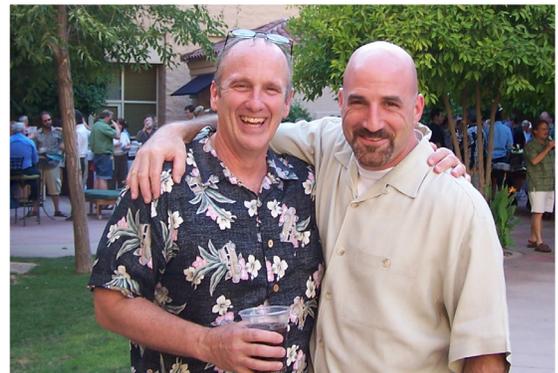
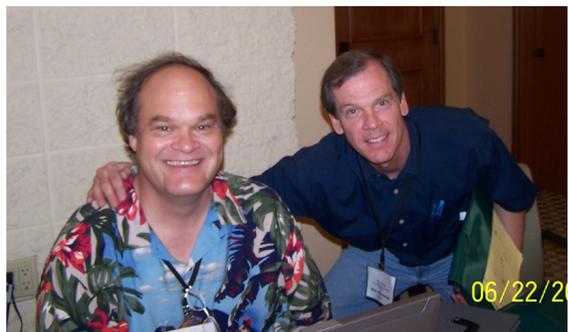
The Fourth Annual Arizona Public Defender Association Statewide Conference was held June 21 to 23 at the Tempe Mission Palms Hotel.

Once again, more than 900 people attended. The faculty consisted of 170 speakers who did 106 presentations. The 280 rooms that APDA reserved at the Mission Palms were fully booked before the conference brochure went out.

At the awards luncheon, staff and attorneys from public defender offices and programs around the state were recognized for their accomplishments and dedication to indigent representation over the past year. The honorees were:

- ◆ Outstanding Rural Administrative Professional – **Sally Barela**, Coconino County Public Defender's Office
- ◆ Outstanding Urban Administrative Professional – **Linda Bell**, Maricopa County Public Defender's Office
- ◆ Outstanding Rural Paraprofessional – **Fay Towne**, Paralegal, Mohave County Public Defender's Office
- ◆ Outstanding Urban Paraprofessional – **T. J. Horrall**, Investigator, Maricopa County Legal Defender's Office
- ◆ Outstanding Rural Performance/Contribution – **Yolanda Najera-Ewing**, Interpreter, Pinal County Public Defender's Office
- ◆ Outstanding Urban Performance/Contribution – **Mark Hamblin**, Pima County Public Defender's Office

- ◆ Outstanding State Performance/Contribution – **Mary Durand**, Mitigation Specialist
- ◆ “Rising Star” Award – **John Napper**, Maricopa County Legal Defender’s Office
- ◆ Outstanding Rural Attorney – **Joseph Terranova**, Yuma County Legal Defender’s Office
- ◆ Outstanding Urban Attorney – **Bruce Peterson**, Maricopa County Legal Advocate’s Office
- ◆ Lifetime Achievement Award – **Ellen Edge Katz** and **David Katz**, Maricopa County Public Defender’s Office



A Jury of Teenaged Peers

By Suzanne Sanchez, Attorney Supervisor, and Chris Phillis, Attorney Manager

Delinquent youths participating in the Teen Court diversion program appear before juries of teenaged peers. The program achieves a 98% success rate, which is significantly higher than any other youth diversion program. Even more astounding is the recidivism rate - only nine percent of teen court participants will reoffend, while fifteen percent of juveniles involved in other diversion programs will receive a new referral.

Maricopa County Teen Court began more than sixteen years ago as a teaching exercise by Bill Graham, then a teacher at Tempe High. Mr. Graham, without the knowledge of his students, would orchestrate a mock robbery. The school resource officer would interview witnesses and write a police report. Eventually the culprit would be caught. The students then participated in trying of the accused under the guidance of Deputy Public Defender Dan Lowrance and Deputy County Attorney Hugo Zettler. The jury trial was presided over by a Justice of the Peace. After a number of years, Margaret Trujillio, Tempe Justice of the Peace, recognized the potential of this exercise and requested the Superior Court, Juvenile Division, to begin an official teen court program. The court agreed and Mr. Graham was selected as Maricopa County Teen Court Moderator.

For fifteen years the Public Defender's Office had little involvement with the exception of Russ Born who has mentored the Glendale youth for three years. That changed in October of 2005 when attorneys with the Maricopa County Public Defender's office began serving as Teen Court mentors at all six of the teen court sites. Bill Graham contacted the managing attorney for the juvenile division and requested assistance with the program. With their usual eagerness to serve the community, public defenders willingly volunteered their time to assist with the program.

The process for Teen Court begins when a youth accused of a delinquent act is selected for Teen

Court diversion. The youth and a parent arrive at a Teen Court site in their community. A juvenile probation officer interviews the child and parent. If the child denies the charge, the matter is sent to superior court, juvenile division, for further proceedings. If the child admits the charge and agrees to participate in Teen Court diversion, the child's case is placed on the Teen Court docket for that day.

High school students serve as defense and prosecuting "attorneys." These student "attorneys" work under the guidance of mentors from the Maricopa County Public Defender's Office. At least one faculty member from a local high school volunteers at each Teen Court. Justices of the Peace preside over the proceedings.

Each teen court hearing occurs before a jury of teenaged peers. Some of the jurors are volunteers, while others serve as part of a Teen Court diversion consequence. In teen court, the "defendant" has already admitted the allegation. The purpose of the hearing is to decide the "sentence" the child will receive for his delinquent behavior. Prior to the hearing, "defense counsel" meets with the client to gather positive information to persuade the jury that only a minimal consequence is needed. During the hearing the student "attorneys" assist the jury by telling the story of the case through witnesses, including the delinquent child. The student "attorneys" then present aggravating and mitigating factors and recommend consequences. The proceedings include opening statements, evidentiary objections and closing arguments.

To prepare the students for their roles as attorneys, Russ Born provides training at Washington High School. Unbeknownst to these students, they undergo a "mini public defender training course" to enhance their ability to affectively present their peers. Thus, while the "attorneys" begin the program insecure and shy, they leave as zealous advocates.

Teen Court serves our community well. Ninety-eight percent of the diverted youths are successful and only nine percent will ever reoffend. The student “attorneys” gain valuable experience, enjoy their participation, and often are inspired to join our profession. The mentors have a sense of accomplishment based upon the achievements of the “attorneys”.

Maricopa County’s Teen Court program is one of the longest running in the nation. The program has Teen Courts in Central Phoenix,

Tempe, Chandler, Gilbert, Fountain Hills, Glendale, and Maryvale. For the 2005 to 2006 school year, mentors from the Maricopa County Public Defender’s Office were Alysso Abe, Russ Born, Bryn DeFusco, Tom Garrison, Judy Huddleston, Jason Leach, Art Merchant, Chris Phillis, Suzanne Sanchez, Eleanor Terpstra, Ann Whitaker, and Terri Zimmerman. On June 7, 2006, these volunteers along with Jim Haas and Dan Lowrance, were recognized at a ceremony at the Maricopa County Board of Supervisors’ Auditorium.



Continued from Missing Persons p. 2

Subsection (b) limits the grounds for granting the continuance: “A continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.” It also limits the permissible period of the continuance: “A continuance may be granted only for so long as is necessary to serve the interests of justice.”

Subsection (b) also requires that in ruling on the motion, the court consider the victim’s constitutional right to a speedy disposition of the case in conjunction with the defendant’s constitutional right to a fair trial. The court must state specific reasons for the continuance on the record. Rule 8.5(b).

The comment to Rule 8.5 speaks of a continuance for no more than 30 days, but that dealt with the prior law; Rule 8.5 currently has no time limit. A certification now takes the place of a formal affidavit. See *Midkiff v. State*, 29 Ariz. 523, 243 P. 601 (1926).

Appellate Review/Abuse of Discretion/Not Law of Case

The decision whether to grant or deny a motion for continuance is solely within the sound discretion of the trial judge. The appellate court will not disturb this decision unless there is a clear abuse of discretion and the ruling is shown to be prejudicial to the defendant. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260 (1990), cert. denied, 500 U.S. 929 (1991); *State v. Lukezic*, 143 Ariz. 60, 68, 691 P.2d 1088, 1096 (1984).

The prejudice that a defendant must show to establish an abuse of this discretion concerns his inability to present a defense, not the state’s ability to make its case. *Kasten, supra; Zuck, supra*. To the appellate court, the explanation a defendant provides to justify a request for a continuance constitutes a critical factor in determining whether the trial court abused its discretion in denying the request. *State v. Lamar*, 205 Ariz. 431, 437, 72 P.3d 831 (2003).

If one continuance is denied a party can still ask again as a ruling denying a motion for a continuance in a criminal case does not constitute the “law of the case.” *State v. Reynolds*, 123 Ariz. 117, 597 P.2d 1020 (App. 1979), *rev. denied*, July 10, 1979.

Unavailability of Main Players/ Vacation Not Sufficient

Continuances prior to trial have been granted because of the unavailability of police officers, *Vasko, supra*, (Army Reserve training course); but cf. *State v. Strickland*, 27 Ariz. App. 695, 558 P.2d 723 (1976) (error to grant continuance where motion filed on morning of trial and merely alleged police officers on vacation and unable to testify; police officers like prosecutors should be required to make some adjustments in their schedules to be available for trial), *rev. denied*, Jan. 11, 1977, unavailability of a prosecutor, *State v. Mendoza*, 170 Ariz. 184, 823 P.2d 51 (1992) (in another trial), although a prosecutor’s vacation is not an extraordinary circumstance justifying a continuance, *State v. Corrales*, 26

Ariz. App. 344, 548 P.2d 437 (1976); nor is the vacation of the medical examiner, *State v. Heise*, 117 Ariz. 524, 573 P.2d 924 (App. 1977) (improper to grant continuance on day of murder trial where prosecutor knew beforehand the medical examiner would be on vacation), *rev. denied*, Jan 24, 1978; the unavailability of defense counsel, *State v. Jackson*, 23 Ariz. App. 473, 534 P.2d 281 (1975); but cf. *State v. West*, 168 Ariz. 292, 812 P.2d 1110 (App. 1991) (refusal to grant continuance affirmed where there had been several continuances, defendant had been in jail eight months, and counsel was not prepared to try the case on the first firm trial date and still could not give a positive assurance she would be ready for the next trial), *rev. denied*, June 25, 1991; and even the absence because of illness of the trial judge. *Lukezic, supra*.

Need to Prepare/Notices on Judge

Continuances for further trial preparation are routinely granted but it is not error to refuse a continuance where the investigation or testimony is cumulative or used solely for impeachment, *State v. Jones*, 185 Ariz. 471, 917 P.2d 200 (1996), or the evidence would be inadmissible, *State v. Laffoon*, 125 Ariz. 484, 610 P.2d 1045 (1980), or precluded by prior rulings, *State v. Cramer*, 174 Ariz. 522, 851 P.2d 147 (App. 1992), *rev. denied*, May 18, 1993. The filing of a notice of change of judge by either party justifies a continuance and exclusion from the calculation of speedy trial time. *State v. Henry*, 191 Ariz. 283, 955 P.2d 39 (App. 1997), *rev. denied*, May 19, 1998.

Where Denial of Continuance May Deprive Defendant of Adequate Counsel

A refusal to grant a continuance where defense counsel has not had a reasonable time to prepare is error depriving defendant of effective assistance of counsel and any conviction must be reversed. *State v. McWilliams*, 103 Ariz. 500, 446 P.2d 229 (1968) (one week from appointment and did not receive transcript of former trial or preliminary hearing until three days before trial). Continuances should also be granted for defense counsel to obtain the transcript of a preliminary hearing, *State v. Daniels*, 96 Ariz. 375, 396 P.2d 4 (1964) (conviction set aside where continuance refused where transcripts not available); or a police report, *State v. Grice*, 123 Ariz. 66, 597

P.2d 548 (App. 1979), *rev. denied*, June 26, 1979; but not to find the defendant himself where he had adequate notice of the date of trial. *State v. Thornburg*, 111 Ariz. 254, 527 P.2d 762 (1974).

Request to Proceed Pro Se

A defendant's right to counsel includes the right to proceed without a lawyer and to represent himself. *Faretta v. California*, 422 U.S. 806, 836 (1975); *State v. Lamar*, 205 Ariz. 431, 435-36, 72 P.3d 831, 835-36 (2003). This requires a voluntary and knowing waiver of his right to counsel and an unequivocal and timely request to proceed *pro se*. *Id.* at 435-36.

A request to continue made as part of a request for self-representation is considered timely if made before the jury is empaneled and should be granted by the trial court. *Id.* If the court should permit the self-representation but deny the accompanying motion to continue, it is not necessarily error depending on the case's history, giving due regard to the victim's rights to a speedy trial, the trial court's prerogative to control its own docket and the practical challenge of assembling the witnesses, lawyers and jurors at the same place and time. *Id.*

When Double Jeopardy Kicks In

All the above refer to reasons for motions to continue or dismiss, often with missing persons as a cause, prior to empaneling the jury. Thereafter, the Double Jeopardy Clause of the Fifth Amendment kicks in and there is a new ballgame. This protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense. *United States v. Dinitz*, 424 U.S. 600, 606 (1976). It is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

Jeopardy attaches once the jury is empaneled and sworn and the proceedings commence. *State v. Riggins*, 111 Ariz. 281, 283, 528 P.2d 625, 627 (1974). When a judge in a non-jury trial begins to hear evidence is when jeopardy attaches. *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *Matter of Hunt*, 266 S.E.2d 385, 388 (N.C. App. 1980).

As noted in *Dinitz*, 424 U.S. at 606, there are two principles involved:

Underlying this constitutional safeguard is the belief that ‘the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.’ (Citation omitted). Where, as here, a mistrial has been declared the defendant’s ‘valued right to have his trial completed by a particular tribunal’ is also implicated. (Citations omitted).

Bad Faith Conduct Causing Prejudice May Bar Retrial

A defendant’s request for a mistrial usually removes any barrier to re prosecution even if it was necessitated by the prosecutor’s legal error. *Dinitz*, 424 U.S. at 607. An exception exists which bars retrials where there is such bad faith conduct by a judge or prosecutor that is not merely the result of mistake, negligence, or minor impropriety, and amounts to intentional misconduct pursued for an improper purpose causing such prejudice to the defendant that the only cure is a mistrial. *United States v. Jorn*, 400 U.S. 470, 485 (1971); *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984); *State v. Marquez*, 113 Ariz. 540, 542-43, 558 P.2d 692, 694-95 (1976); *State v. Korovkin*, 202 Ariz. 493, 495, 47 P.3d 1131, 1133 (App. 2002), *rev. denied*, Sept. 24, 2002. Even in the case of a conviction, however, prosecutorial misconduct, if present, would not merit a reversal unless it denied defendant a fair trial. *State v. Atwood*, 171 Ariz. 576, 608, 832 P.2d 593, 625 (1992), *cert. denied*, 506 U.S. 1084 (1993).

Manifest Necessity Test

The issue of whether there can be a new trial after a mistrial has been declared without the defendant’s request depends on whether “there is a manifest necessity for the (mistrial), or the ends of public justice would otherwise be defeated,” thereby affording the prosecutor one full and fair opportunity to present the evidence to an impartial jury. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). This opinion of Mr. Justice

Story (how often can you cite as authoritative an opinion of a court from 1824 especially of the United States Supreme Court?) has been consistently followed by our highest court. See *Arizona v. Washington*, 434 U.S. 497, 506 n.18 (1978) (manifest necessity found to grant new trial where prosecution withheld exculpatory evidence and defense in opening statements at second trial commented on it); *Dinitz*, 424 U.S. at 607 (notwithstanding over-reaction by trial judge removing defense counsel from courtroom was not done in bad faith so a manifest necessity for a retrial was present); *Illinois v. Somerville*, 410 U.S. 458, 461 (1973) (manifest necessity existed to have retrial where indictment defective and could not be cured by amendment before evidence taken after jury empaneled where retrial caused minimal delay); *United States v. Jorn*, 400 U.S. 470, 481 (improper to grant mistrial to enable government’s witnesses to consult with their own attorneys); *Wade v. Hunter*, 336 U.S. 684, 689 (1949) (proper to grant new court martial on a rape charge where the commanding general decided that the tactical situation brought about by a rapidly advancing army required discontinuance of trial and transfer of charges to another headquarters and where not continued to obtain witnesses). See also *Gori v. United States*, 367 U.S. 364, 368-69 (1961) (second trial and conviction upheld although trial judge at first trial sua sponte declared mistrial without defendant’s express consent apparently to prevent the prosecutor from bringing in evidence of other crimes).

Mistrials Granted Sua Sponte

Manifest Necessity is the law of Arizona and it has often been applied where the trial judge grants a mistrial sua sponte. See *McLaughlin v. Fahringer*, 150 Ariz. 274, 723 P.2d 92 (1986) (trial court’s sua sponte mistrial order over defendant’s objection barred retrial where court’s concern over possible delay to determine inadmissibility of evidence did not rise to level of manifest necessity); *Klinefelter v. Superior Court*, 108 Ariz. 494, 496, 502 P.2d 531, 533 (1972) (judge’s sua sponte mistrial declaration over defense objection where state’s witness during cross examination by defense twice referred to excluded information barred second trial under double jeopardy manifest necessity principles), *Jones v. Kiger*, 194 Ariz. 523, 526, 984 P.2d 1161, 1164 (App. 1999) (sua sponte trial

court declaration of mistrial was improper over defendant's objection based on police officer's testimony that the amount of narcotics found was consistent with an anonymous informant's information); *State v. Givens*, 161 Ariz. 278, 778 P.2d 643 (App. 1989) (sua sponte declaration of mistrial, over defendant's objection, did not bar retrial where defendant's last minute request for competency examination caused the jury to be on hold for one week pending the trial). See also *Korovkin, supra*; and Former Jeopardy as a Bar to Retrial of Criminal Defendant after Original Trial Court's Sua Sponte Declaration of a Mistrial, 40 A.L.R. 4th 741 (1985).

Hung Jury/Juror Misconduct/Jury Deliberation Too Short

A manifest necessity to declare a mistrial and thus permitting a retrial, has been found when the jury can not agree on a verdict, the trial judge became too ill to proceed, when jurors read a newspaper article showing that the court had held defendant in contempt and when the prosecutor engaged in misconduct not sufficient to bar reprosecution. *Jones*, 194 Ariz. at 526, 984 P.2d at 1164. Indeed the classic case where a mistrial does not bar a retrial is a hung jury. *Washington, supra*, 434 U.S. at 509; *Dreyer v. Illinois*, 187 U.S. 71, 85-86 (1902).

It is, however, an abuse of discretion to declare a mistrial where the jury has not had sufficient time to deliberate. *State v. Moore*, 108 Ariz. 532, 502 P.2d 1351 (1972) (while premature mistrial can bar retrial it did not where a nine-three decision existed 24 hours into jury deliberation after a twelve day trial on armed robbery and attempted murder charges and jury foreman said agreement unlikely), *cert. denied* 412 U.S. 906 (1973); *State v. Fenton*, 19 Ariz. App. 274, 506 P.2d 665 (1973) (grand theft and simple assault retrial barred where case submitted to jury after five trial days, only eight hours of deliberation took place and there was no indication jury would not be able to agree).

Consenting to Mistrial/Jury Selection Mistrial

Where a defendant consents to a retrial after a mistrial has been declared any double jeopardy concerns are obviated. *State v. Henderson*, 116

Ariz. 310, 569 P.2d 252 (App. 1977), *rev. denied*, Sept. 15, 1977. A mistrial granted during jury selection does not raise double jeopardy concerns. *State v. Potts*, 181 S.W. 3d 228 (Mo. App. S.D. 2005).

Declaring Mistrial Over Defendant's Objection

On the issue whether a trial judge can declare a mistrial over the objection of the defendant and without his request because of a government error, the cases go both ways. See Division One's opinion (Kleinschmidt, J.) in *Jones, supra*, and cases cited therein, for an excellent discussion holding that it should rarely, if ever, be done because of the significant interest of the defendant in determining whether to let the present jury decide his case. It disapproves of an earlier Arizona case to the contrary, *State v. Reynolds*, 11 Ariz. App. 532, 466 P.2d 405 (1970). See the Arizona case *State v. Fenton, supra*, for the proposition that mere silence or failure to object to a jury's discharge by a sua sponte declaration of the trial judge is not such a consent as will constitute a waiver of jeopardy.

For the opposite view, see *State v. Crutchfield*, 567 A.2d 449 (Md. 1989), *cert. denied* 495 U.S. 905 (1989), which is a case where the trial judge sua sponte declared a mistrial following the improper admission, in violation of defendant's *Miranda* rights, of statements he made to the police. *Crutchfield* argues that even if defendant does not consent to the mistrial there is a manifest necessity for it where the improper admission is highly damaging and it is done solely for the defendant's protection, even if defendant is not given the opportunity to strike the testimony and offer a curative instruction. *Crutchfield* relies on *Arizona v. Washington, supra*, but that case dealt with a trial error made by the defendant and not the prosecutor.

The United States Supreme Court has issued conflicting opinions on the issue. *Compare: Jorn*, 400 U.S. at 485 (trial court should not foreclose defendant's option to continue a trial until "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings") *with: Gori*, 367 U.S. at 367 (mistrial, declared without defendant's request or

objection, did not bar retrial where judge believed prosecutor was asking questions which would lead to disclosure of prior convictions, where mistrial done for sole benefit of defendant).

Continuances During Trial

A continuance in the middle of trial, after jeopardy attaches, should only be granted where exigent circumstances exist. *State v. Blodgett*, 121 Ariz. 392, 590 P.2d 931 (1979). That being said, a short continuance is permitted during trial for many of the same reasons noted above in the cases of requests for continuances prior to trial, such as the illness of the accused, prosecutor, defense counsel or judge. *Jones*, 194 Ariz. at 526, 984 P.2d at 1164; *Jourdan v. State*, 341 A.2d 388 (Md. 1975) (prosecutor). There is authority that the permanent incapacity of any of these main players can result in a mistrial without jeopardy attaching. *United States v. Potash*, 118 F. 2d 54 (2d Cir. 1941), *cert. denied*, 313 U.S. 584 (1941). A short continuance should be granted to obtain an interpreter for a witness. *In Re Mark R.*, 449 A.2d 393 (Md. 1982).

Continuance to Produce Witness/Granting Mistrial Where Prosecution Witness Missing May Bar Retrial/Duty to Keep Track Of Witnesses

Short continuances to produce a witness are also permissible, whether or not the witness has been subpoenaed. *Daniels v. State*, 674 S.W. 2d 949 (Ark. App. 1984) (three weeks continuance in trial to court on theft charge where a failure of communication between prosecutor and defense counsel required state to obtain another witness); *Matter of Hunt*, 266 S.E. 2d 385 (N.C. App. 1980) (9 days and 42 days in two separate juvenile proceedings to the court); *State v. Carter*, 220 S.E. 2d 313 (N.C. 1975), *vacated on other grounds by Carter v. North Carolina*, 428 U.S. 904 (1976) (7 day jury trial delay due to unexpected surgery of scheduled witness does not raise double jeopardy implications where no prejudice to defendant's case). *But cf. State v. Gretzler*, 126 Ariz. 60, 87, 612 P.2d 1023 (1980) (no error in refusing defendant's motion to continue after jury was empanelled so that defense could find missing witness and obtain results of ballistics and fingerprint tests where witness' testimony would

have been cumulative and it was not shown how the tests would have benefited the defense case).

It may very well be an abuse of discretion causing jeopardy to attach for a trial court to grant *the state's motion for a mistrial* on the basis that a state's witness has not appeared. This is because the prosecutor should know before empaneling a jury whether a state's witness, whether subpoenaed or not, will be available for the trial. If not available, the prosecutor should move for a continuance or a dismissal without prejudice before the jury is selected and sworn in. *Downum v. United States*, 372 U.S. 734 (1963); *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931). As noted in *Downum*:

The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances'...For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'

372 U.S. at 736 (citations omitted).

Cornero, which is cited in *Downum*, says it all:

The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and discovery after he had called some or all of his witnesses. It is uniformly held that, in the absence of sufficient evidence to convict, the

district attorney cannot by any act of his deprive the defendant of the benefit of the constitutional provision prohibiting a person from being twice put in jeopardy for the same offense.

48 F.2d at 71. *Accord: United States v. Stevens*, 177 F.3d 579 (6th Cir. 1999) (mistrial not justified by prejudice suffered by government being unable to produce witness at trial after having told jury what it expected witness to say; key witness' refusal to testify even after being granted immunity and jailed for three weeks did not create a manifest necessity for mistrial and retrial barred by double jeopardy; one purpose served by mistrial would be to allow government to gather more evidence and pursue possibility witness would eventually testify, both of which are unacceptable under double jeopardy principles); *Ex parte Brown*, 907 S.W. 2d 835 (Tex. Crim. App. 1995) (double jeopardy barred retrial where witness whom both state and defendant intended to call, could only testify on first day of the trial, where state did compel her attendance on the first day of trial and did not compel her attendance throughout trial by a body attachment).

Downum advises that whether the absence of the prosecution's material witnesses can ever justify a discontinuance of a trial after empanelment without jeopardy attaching depends on the facts of each case. *Id.* 737. In that case, a 5-4 decision with the opinion written by Justice Douglas, the witness had been subpoenaed but the subpoena was not served while in *Cornero*, *supra*, the witnesses were co-defendants who had pleaded guilty and were released under bond to appear for sentencing on the day of trial. Given the reasoning of *Downum*, where there was only a two-day delay before a second jury was empaneled *Id.* 739. It would appear that the prosecutor may have a difficult time to avoid a dismissal with prejudice, even if a short continuance is granted to obtain a witness, where the prosecution witness never does appear and where the prosecutor knew or should have known the witness might not appear.

Downum is often distinguished on the basis that the prosecutor had no reason to believe his witness would not appear before empanelment and it came as a complete surprise for which the

prosecutor was blameless. *McCorkle v. State*, 619 A.2d 186 (Md. App. 1993), *cert. denied* 626 A.2d 371 (Md. 1993) (mistrial declared on unexpected absence of key prosecution witness for whom a body attachment was issued and could not be found, was manifest necessity where prosecutor did not know in advance or when jury empaneled and did not cause it and when witness appeared for two days of trial and gave assurances to judge and counsel he would be present and both parties made extensive reference in opening statements to witness' expected testimony); *United States v. Gallagher*, 743 F. Supp 745 (D. Or. 1990) (manifest necessity existed for granting government's motion for mistrial where key government witness abruptly and unexpectedly volunteered he was a liar and then refused to answer questions, where both prosecutor and defense had both emphasized his testimony in opening statements. *State v. Dunns*, 629 A.2d 922 (N.J. Super. A.D. 1993), *cert. denied* 636 A.2d 524 (1993) (double jeopardy did not bar retrial because of refusal of state's key witness to testify but was barred on speedy trial grounds where defendant has already served 20 months and was remote possibility witness would ever testify having been jailed for 3 months on contempt charges; even if state asked witness prior to trial, whether she would testify there was no way to know until she was placed in front of a jury); *cf Pryor v. Bock*, 261 F. Supp. 2d 805 (E.D. Mich. 2003), *aff'd* 116 Fed. Appx. 565 (6th Cir. 2004) (not selected for publishing in Federal Reporter) (defendant impliedly consented to mistrial when he did not object to trial court's declaration of mistrial and insisted trial could not proceed without prosecutor's missing witness whom defendant intended to use to impeach another witness).

There is also a line of cases with jeopardy not attaching where a witness is threatened or murdered and there is a reasonable basis for belief that defendant caused it which takes it out of the *Downum* rationale. *United States v. Mastrangelo*, 662 F.2d 946 (2d Cir. 1981), *cert. denied* 456 U.S. 973 (1982). *United States v. Khait*, 643 F. Supp. 605 (S.D. N.Y. 1986). 

Jury and Bench Trial Results

April 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group A						
4/3 - 4/4	Farrell Page	Burke	Vaitkus	CR05-137887-001DT Aggravated Assault, F3D	Not Guilty	Jury
4/6 - 4/14	Kirchler Hales Curtis	Akers	Steinberg Kalish	CR05-008868-001DT Child Abuse, F4	Guilty of lesser charge of Child Abuse (done recklessly) F5.	Jury
4/6 - 4/24	Farney Carson Armstrong	French	McKessy	CR05-005379-001DT Theft, F2	Guilty	Jury
4/13	Engle	Burke	Shipman	CR05-125411-001DT PODD, F4	Not Guilty	Jury
4/17 - 4/18	Iacob Willmott Hales	Burke	Shipman	CR05-140858-001DT Criminal Trespass 1° - Residential Structure, F6 Criminal Damage, M2	Guilty	Jury
Group B						
4/4 - 4/19	Dominguez MacLeod Romani McDonald	Klein	Sorrentino	CR05-013146-001DT 10 cts. Sexual Exploitation of a Minor and Dangerous Crimes Against Children, F2	Not guilty	Jury
Group C						
4/18 - 4/19	Dehner	Sanders	Bennett	CR05-131893-001SE POND, F4	Guilty	Jury
Group D						
3/28 - 4/26	Harris Dwyer O'Farrell Curtis	Mahoney	Leinson Woo	CR05-115081-001DT Fraud. Schemes, F2 TOMOT, F6 7cts. Forgery, F4 Theft, F5 Theft, F6	Guilty	Jury
4/4 - 4/7	Traher Seaberry Trimble Curtis	Cunanan	Low Suzenski	CR05-005604-001DT Agg. Assault, F6	Not Guilty	Jury
4/12 - 4/18	Klapper Bradley	Stephens	Hoffmeyer	CR05-116626-001DT Attempted Murder 2, F2D Agg. Assault, F3D	Guilty	Jury

Jury and Bench Trial Results

April 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group D (Continued)						
4/17 - 4/18	Jackson Schreck Curtis	Rayas	Fuller	CR05-131763-001DT Criminal Damage, F6 Possess Burglary Tools, F6	Guilty	Jury
4/17 - 4/19	Cain	Davis	Valdez	CR05-011969-001DT PODD, F4	Guilty	Jury
4/17 - 4/20	Reasons Vincent	Trujillo	Rassas	CR05-128151-001DT Endangerment, F6 Unlawful Imprisonment, F6	Not Guilty Unlawful Imprisonment Guilty of Endangerment	Jury
4/24 - 4/24	Jackson	Sanders	Rassas	CR05-012826-001DT Burglary 3rd Degree, F4	Dismissed with prejudice	Jury
Group E						
4/11 - 4/18	Davison Evans Del Rio	Granville	Letellier	CR05-142660-001DT Agg. Assault, F6	Hung Jury (7-1 Not Guilty)	Jury
4/25 - 4/26	Starrs	French	Whitney	CR05-011327-001DT Agg. Assault, F6 IJP, M1	Not Guilty - Agg Asslt Guilty - IJP	Jury
04/20 - 4/28	Bublik/Rees Munoz Del Rio	Gama	Linn	CR04-021876-001DT Theft, F3 Forgery, F4	Not Guilty - Theft Guilty - Forgery	Jury
Group F						
3/30 - 4/6	Watson	McClennen	McGregor	CR05-138801-001SE Agg. Assault, F3D 2 cts. Disorderly Conduct, F6D	Guilty of Agg. Assault Guilty of Disorderly Conduct Not Guilty of Disorderly Conduct	Jury
4/10 - 4/13	Peterson	McClennen	McGregor	CR05-121081-001SE Agg. Assault, F3D Assault-Intent/Reckless, M1 Assault, M3 Agg. Assault, F4 2 Cts. Agg. Assault, F6	Guilty on Agg. Assault, F4 All other charges dismissed	Jury

Jury and Bench Trial Results

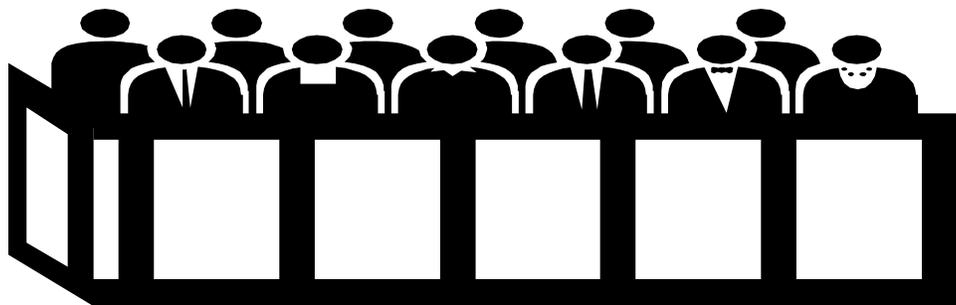
April 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Vehicular						
4/11 - 4/13	Mais	Anderson	Salcido	CR05-135485-001SE 2 cts. Agg. DUI, F4	Guilty	Jury
4/12 - 4/12	Conter	Nothwehr	Kelemen	CR05-119521-001DT 4 cts. Agg. DUI, F4 Resisting Arrest, F6	Dismissed	Bench
4/24 - 4/26	Conter	Burke	Harder	CR05-013717-001DT Negligent Homicide, F4 Endangerment, F6	Not Guilty of Negligent Homicide Guilty of Endangerment	Jury
Homicide						
4/21	Stazzone Bevilacqua Klosinski Berry	McClennen	Gallagher	CR02-093045 Capital Murder	Phase II: Not Eligible for Death Penalty	Jury

Legal Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
2/21 - 4/20	Shriver	Gottsfeld	Barry	1993-08116 Murder 1, F1, Resentencing	Death Penalty	Jury



Jury and Bench Trial Results

April 2006

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
3/30 to 4/5	Glow Sinsabaugh	Porter	CR2005-009677-001-DT Sale of DD - F2; POM - F4 Proh. Possessor - F4 MIW - F4	Guilty	Jury
3/29 to 4/3	Craig Mullavey	Holt	CR2004-016941-001-DT Agg. Asst - F4	Not Guilty	Jury
4/17 to 4/21	Craig Prieto Stovall	Holt	CR2005-134247-001-DT MIW - F4	Hung	Jury
4/6 to 4/10	Gray Stovall Sinsabaugh	Donahoe	CR2005-013827-001-DT Burglary 3rd Deg-3x - F4	Not Guilty	Jury
4/17 to 4/20	Gray Sinsabaugh	Blakey	CR2002-002488 Murder 2nd Degree Retrial on Sentencing Aggravators	4 Factors found of 5 (5th struck on Rule 20 Motion)	Jury
4/19 to 4/24	LeMoine Mullavey Prieto Stovall	Holt	Agg. Asst - F3 Dang Agg. Asst - F6 ND Burglary 1st Deg - F3 ND	Guilty	Jury

M

C

P

D

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for The Defense

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