

for The Defense

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James J. Haas, Maricopa County Public Defender

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*Delivering America's
Promise of Justice for All*

for The Defense

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Contents

Does the "Must Find Defendant Guilty" Instruction Violate the Sixth Amendment?.....	1
Sixth Annual APDA Conference Honors Conrad Baran and Bob Hooker.....	5
Upcoming Training.....	8
Defending Against the Police K-9 Team.....	9
Jury and Bench Trial Results.....	13

Does the "Must Find Defendant Guilty" Instruction Violate the Sixth Amendment?

The Alternative Nullification Instruction

By Robert L. Gottsfield, Maricopa County Superior Court Judge

Former Presiding Judge, Superior Court, Maricopa County, B. Michael Dann, now retired but still a jury reform guru,¹ has long thought the common instruction given in Arizona criminal cases violates the Sixth Amendment and has now written about it.² The instruction in essence advises the jury that the role of a juror in a criminal case is to convict the defendant, if the state has proven every element of a certain charge beyond a reasonable doubt, and to acquit the defendant if the state has not done so, with all doubt resolved in favor of defendant.³

His contention is that this kind of mandatory instruction invades the jury's constitutional prerogative to return a verdict against the weight of the evidence and the law. His plea is "an alternative instruction that provides jurors with guidance for the wise and rare exercise of constitutionally sanctioned nullification."⁴

The Sixth Amendment provision that the accused be tried "by an impartial jury" is key to this argument:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

The United States Supreme Court has at times disparaged the nullification power. *Strickland v. Washington*, 460 U.S. 668, 695 (1984) ("lawless"); *Dunn v. United States*, 284 U.S. 390, 393 (1932) ("an assumption of a power which the jury has no right to exercise"); *Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) ("unreasonable"); *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (verdicts returned for "impermissible reasons").

At other times it has lauded the jury's discretionary power. *Duncan v. Louisiana*, 391 U.S. 145, 156-157 (1968) (Sixth Amendment applicable to states through Due Process Clause; the power of nullification by the jury is a defense against arbitrary law enforcement); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (an "essential function of the jury"); *United States v. Martin Linen Supply Co.*, 430 U.S. 569, 572 (1977) (their "overriding responsibility"); *Jones v. United States*, 526 U.S. 227, 245 (1999) (historically, attempts to limit opportunities for juror nullification have failed); *Apprendi v. New Jersey*, 530 U.S. 466, 479, n.5 (2000) (power to acquit in the face of guilt finds its origins in common law tradition; called " 'pious perjury' on the jurors' part", citing Blackstone); *Gregg v. Georgia*, 428 U.S. 153, 199 n. 50 (1976) (implies that prohibiting the discretionary act of jury nullification should not be permitted). As noted forty years ago in *Duncan*, supra, and alluded to by Judge Dann which in this author's view remains accurate:

(T)he most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.⁵

Judge Dann discusses the interesting case of *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) where two famous opinions, the majority by Judge Leventhal and the dissent by Judge Bazelon "constitute a *tour de force* on the historical and modern (as of 1972) views toward instructing juries in a straight-forward manner".⁶ The specific issue prompting the opinions in *Dougherty* was whether the trial court erred in refusing to instruct the jury of its right to acquit defendants and to disregard instructions of the court even as to matters of law and the court's refusal to allow the defense to argue the issue.

The majority agreed that in those rare situations where the jury votes to disregard the instructions on the law as a matter of conscience, it may actually enhance the rule of law, but there was no need to charge it. There was no need because the way the jury system operates in fact "the jury will not convict when they empathize with the defendant, as when the offense is one they see themselves as likely to commit, or consider generally acceptable or condonable under the mores of the community".⁷

Judge Bazelon, in his dissent on the jury nullification issue thought there was "no justification for, and considerable harm in this deliberate lack of candor".⁸ Acknowledging that "nullification is not a defense recognized by law, but rather a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case... the impact of the judge's instruction...was almost surely to discourage the jury from measuring the defendant's action against community concepts of blameworthiness".⁹

All one would ever need to know about the pros and cons of the power of nullification are set forth in the contrasting opinions and they are recommended reading on the issue. While surely a tough call, this reviewer sides with the majority opinion and has ever since he debated a federal judge on the issue some twenty years ago. While there is no definitive Arizona case on the issue the Ninth Circuit view is that a nullification instruction should not be given *U.S. v. Powell*, 955 F.2d 1206, 1212-13 (9th Cir. 1991).

Interestingly Judge Dann cites research done since the *Dougherty* opinions:

Studies report that while jurors who are given affirmative nullification instructions are more likely to discuss issues of conscience in deliberations, and that acquittals increase in cases in which strong appeals to conscience might be expected, that overall rates of acquittals and hung juries do not increase dramatically.¹⁰

Judge Dann offers a short form instruction, which he does not recommend because it fails to inform jurors of their power to return a verdict against the weight of the evidence and the law and gives no guidance on how to exercise it, as well as a longer more complete instruction which he favors. In his view only the latter instruction satisfies the Sixth Amendment mandate that the accused be tried “by an impartial jury”.

His shorter instruction would come right after the judge has explained the presumption of innocence and the reasonable doubt standard. Instead of using: “If the state has proven every part of a charge beyond a reasonable doubt, you must find the defendant guilty”, the jury would be told:

“Before returning a verdict of guilty, all of you must agree that the guilt of the defendant for the crime charged has been proven beyond a reasonable doubt.”¹¹

Another way of saying this, offered by Judge Dann is: “A verdict of guilty is authorized only if you all agree that the defendant’s guilt has been proven beyond a reasonable doubt.”¹²

Judge Dann believes these ‘minimalist’ approaches to instructing juries on their ‘constitutional prerogative’ is not adequate but better than the mandatory language “must or its equivalent”, “shall find”, “duty to convict” and “should”, all of which terms have been upheld. He notes that such terms are used in Arizona and 23 other states and all federal circuits. Another seven states use the admonition “should”. The remaining states do not require mandatory language.¹³

He espouses the longer form instruction hereafter set forth as it better satisfies the goals of “truthfulness, comprehensibility, and helpfulness and legal accuracy”¹⁴ with respect to the jury’s power of nullification. It makes clear that the power should only be exercised in the exceptional case (such as the “acquittals of political dissidents, those accused of aiding slaves in violation of fugitive slave laws, Prohibition-era liquor law violators, and peaceful war protestors”).¹⁵ He realizes there is also a downside such as “the frequent refusals of all-white Southern juries to convict whites who murdered or assaulted African-Americans and civil rights workers”.¹⁶

His recommended long form instruction reads as follows:

It is presumed by our system of criminal justice that juries are the best judges of the facts. Accordingly, you are the sole judges of whether, considering all the evidence, the defendant’s guilt has been proven beyond a reasonable doubt.

Because judges are presumed to be the best judges of the law, you must accept my instructions as being correct statements of the generally accepted legal principles that apply in a case of this type.

These principles are intended to help you in reaching a fair result in this case. You are also entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe strongly that conscience and justice require a verdict of not guilty. No one can require you to return a verdict that does violence to your conscience.

You should exercise your judgment and examine your conscience without passion or prejudice, but with honesty and understanding. Give respectful consideration to my instructions on the law, as they will help you in arriving at a conscientious determination of justice in this case. This is your highest duty as a juror, as representatives of the public, and as officers of this court.¹⁷

Judge Dann’s view, shared by many scholars of the modern jury (whose writings are set forth in the article) is “that the jury’s prerogative to acquit despite the evidence and the law is an important component of the criminal defendant’s Sixth Amendment right to the trial by jury.”¹⁸ And that

consequently telling jurors they have no legal choice but to convict if the jury finds each element of a particular charge proven beyond a reasonable doubt, is not justified. He concedes that the trial judge is bound by the law of his or her jurisdiction and most jurisdictions favor the “must convict” or its equivalent language.

While in the run of the mill case the nullification instruction should and will be rejected by the trial court, in the rare case where the defense believes there is a chance for a nullification verdict, because of “overreaching, tyrannical, or otherwise errant government officials, including prosecutors and judges”¹⁹, offer the long form of nullification instruction. Even if rejected by the trial court, you will have made the record you need to make and you cannot be accused of letting your client down by failing to buy the ticket that gave you and the defendant an opportunity to win the lottery.

In a recent opinion Judge Jack B. Weinstein of the Eastern District of New York, determined that twelve counts of receiving child pornographic images which had a minimum sentence of five years for each image, was such a case.²⁰

(Endnotes)

1. Judge Dann was recently honored by the ABA Commission on the American Jury Project for his “tremendous efforts to implement the Principles for Juries and Jury Trials on both state and national levels (leading) to an increase in confidence in our system of justice and an improvement in the roles of jurors across the country.” He can be reached at m.dann@cox.net See also B. Michael Dann and Valerie Hans, Recent Evaluative Research on Jury Trial Innovations, 41 Ct.Rev. 12 (2004); B. Michael Dann and George Logan III, Jury Reform: The Arizona Experience, 79 *Judicature* 280 (1996); B. Michael Dann, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 *Ind. L.J.* 1229 (1993);
2. 91 *Judicature* 12, July-August 2007. For selected reading see Keith E. Niedermeier, Irvin A. Horowitz, and Norbert L. Kerr, Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?, 23 *Law and Human Behavior*, 331 (No. 3 1999); R. Alex Morgan, Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but it Won’t Be, 29 *Ariz. St.L.J.* 1127 (Winter 1997); Michael A. Haskel, Jury Nullification, *N.Y.S. Bar J.*, January 2005, at 31; Donald C. Dilworth, Jury Nullification: When Jurors Leave the Law Behind, *Trial*, at 12 (May 1996); Noel Fidel, Preeminently a Political Institution: The Right of Arizona Juries To Nullify the Law of Contributory Negligence, 23 *Ariz.St.L.J.*, (Spring 1991);
3. Arizona’s typical reasonable doubt instruction provides, in pertinent part: If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.
4. *Supra* n.2 at 91 *Judicature* 12.
5. 391 U.S. at 157.
6. *Duncan v. Louisiana*, at 391 U.S. 156.
7. At 473 F.2d 1132.
8. *Id.* at 1139.
9. *Id.* at 1140.
10. *Supra* n.2 at 18.
11. *Supra* n.2 at 17.
12. *Id.*
13. *Id.* at 12, 14-15.
14. *Id.* at 19.
15. *Id.* at 13. The 18th century acquittal of Peter Zenger of seditious libel is also often cited as in *Dougherty*, *supra* n.7 at 1130.
16. *Id.*
17. *Id.* at 18-19.
18. *Id.* at 16. And see *U.S. v. Polizzi*, ___ *Supp.2d* ___, 2008 WL 1886006 (E.D.N.Y.2008), decided April 1, 2008 by Judge Jack B. Weinstein (“Weinstein on Evidence”) who cites the Dann article (at 112) with approval and has an exhaustive discussion of jury nullification and telling jurors of sentencing consequences both of which he approves of in select cases.
19. *Id.* at 14.
20. See n.18.

Sixth Annual APDA Conference Honors Conrad Baran and Bob Hooker



By Jim Haas, Maricopa County Public Defender

The Sixth Annual Arizona Public Defender Association Statewide Conference was held June 16 to 18 at the Tempe Mission Palms Hotel.

The conference was dedicated to two true heroes of indigent representation who were lost this past year – Navajo County Deputy Public Defender Conrad Baran and Pima County Public Defender Bob Hooker. Biographies and photos of Conrad and Bob were included in a special “In Memoriam” page in the conference schedule of events. At the awards luncheon, memorial videos were played and marble “lady justice” statues were presented to Conrad’s wife, Navajo County Deputy Public Defender Linda Houle, and Bob’s wife, Sharon. The statues bore inscriptions stating, “Friend, Colleague, Champion of Justice.” In addition, a new APDA award named for Bob Hooker was presented.

Over 1200 people attended. The faculty included more than 220 presenters, including nine Ph.D.’s and five M.D.’s. The faculty included presenters from New York, Chicago, Los Angeles, San Francisco, Cleveland, North Carolina, Georgia, Maryland, Texas, Hawaii, and Mexico. The conference offered 125 classes plus 16 pre-conference classes and three post-conference classes over three days for a total of 18 CLE hours. Once again, APDA took over the entire Mission Palms hotel and most of the nearby Courtyard Marriott hotel.

The conference began with a screening of the award-winning documentary, *The Trials of Darryl Hunt*, which details the story of a brutal rape/murder case and a wrongly convicted man, Darryl Hunt, imprisoned nearly 20 years for a crime he did not commit. The film followed Mr. Hunt and his attorney, Mark Rabil, as they fought deeply-entrenched racism, appalling prosecutorial misconduct, shocking court rulings, and setback after setback, to finally obtain justice. The film was inspiring in its demonstration of the incredible dedication and perseverance of Mr. Hunt and Mr. Rabil. It dramatically conveyed the message that those who take on the difficult task of representing the indigent must never, ever give up. It answered the question that most public defense practitioners ask themselves from time to time - “why do I do this?”



Darryl Hunt, Pamela Peoples-Joyner, Mark Rabil

To the surprise of the audience, when the credits began to roll, Phoenix Public Defender Gary Kula introduced Darryl Hunt and Mark Rabil, who walked from the back of the room to the stage amid a thunderous standing ovation. It was a moving moment, with many in the crowd fighting back tears, including, I am told, some grizzled veterans of numerous public defense battles.

Mr. Hunt and Mr. Rabil answered questions from the audience, and then, after a break, spent over an hour with a smaller group talking about their experiences.

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 – **Anselma Torres**, Office Manager of the Pascua Yaqui Public Defender’s Office.

Outstanding Urban Administrative Professional – **Joneen Siguette**, Legal Secretary, Pima County Public Defender’s Office.

Outstanding Rural Paraprofessional – **Ricky Mauldin**, Investigator, Mohave County Public Defender’s Office.

Outstanding Urban Paraprofessional – **Steven Gardner**, Investigator, Pima County Public Defender’s Office.

Outstanding Performance/Contribution – **Keely Farrow**, Maricopa County Public Defender’s Office.

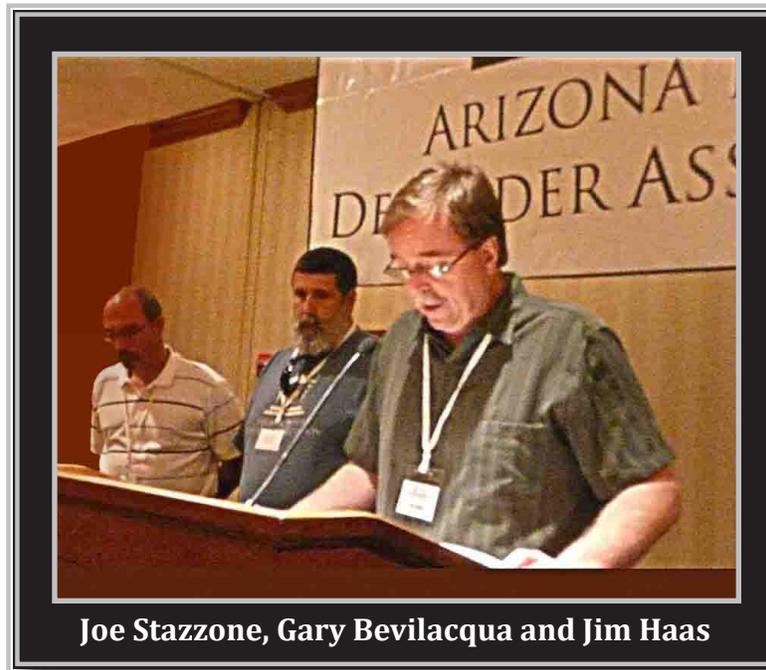


“Rising Star” Award – **Lisa Stronawski**, Pinal County Public Defender’s Office.

“Rising Star” Award – **CeCelia Valentine**, Pima County Public Defender’s Office.

Outstanding Rural Attorney – **Kevin O’Brien**, Coconino County Public Defender’s Office.

Outstanding Urban Attorney – **Gary Bevilacqua** and **Joe Stazzone**, Maricopa County Public Defender’s Office.



Joe Stazzone, Gary Bevilacqua and Jim Haas

Lifetime Achievement Award – **Donna Elm**, Federal Public Defender’s Office.

The Robert J. Hooker Award was created to honor Bob, who, though a public defender only three of his 36 years in practice, was always a public defender at heart. He did a substantial amount of work for clients who could not pay him, or who could not pay him much. Bob bridged the gap between private attorneys and public defenders. The Hooker Award was therefore created to recognize a private attorney, attorneys or firm who have provided extraordinary assistance to a public defender or public defender client without regard to the financial, political or other costs of such assistance.

The inaugural Robert J. Hooker Award was presented to **Lewis & Roca**, and especially **Douglas McDonald, Randall Papetti, Jon Weiss, Adele Ponce, and Pamela Ramsey**, in recognition of their exceptional commitment of time, effort, expertise and resources to the representation of a client of the Mohave County Public Defender’s Office.

The conference showcased the incredible talent that we enjoy in the Arizona public defense community. Once again, there was that energy, that *buzz*, that seems to be unique to this conference. It was a great way to recharge our batteries and reinvigorate our passion for our work.

The Seventh Annual APDA Statewide Conference is already scheduled for June 17 – 19, 2009. Mark your calendars!



MARICOPA COUNTY PUBLIC DEFENDER TRAINING DEPARTMENT

We make every effort to sponsor quality programs for attorneys and support staff. Most of the programs provide CLE.

To view all upcoming training events, click the link below:

[MCPD/AACJ Common Calendar](#)

If you have registration questions or if there is a topic that you would like to present, please contact Celeste Cogley via email

cogleyc@mail.maricopa.gov or phone 602-506-7711 X37569.

UPCOMING BROWN BAGS

August 15, 2008 12:00pm —1:30pm

Harry Ryon, Investigator MCPD
Changing your thinking about An Auto—
Pedestrian Collision

September 12, 2008 12:00pm—1:30pm

International Rescue Committee (IRC)

- What is IRC?
- Refugee 101 including one Refugee’s Experiences
- Youth Abroad and in the Phoenix Area

Upcoming from IRC—
Human Trafficking: ALERT

If you missed it at the APDA...

September 19, 2008 12:00pm– 1:30pm

Armand Casanova, Investigator MCPD
Death of a Princess:
Investigation into the Crash

October 3, 2008 12:00pm—1:30pm

Rebecca Kirchler, Assistant Training
Director MCPD
Collateral Consequences

Fall 2008

New Attorney Training —

Defending Against the Police K-9 Team

By Richard Gissel, Juvenile Public Defender Investigator

Nearly every law enforcement agency has access to a police canine program. Canine teams serve in various police roles: looking for lost children, working with SWAT entry teams, or finding explosives and illegal contraband. It is not hard to understand why police departments use canine teams since the mere presence of a police dog can defuse potentially violent situations. Further, since upwards of 70% of police canines receive cross-training as detector dogs, they play a big role finding illegal contraband.

Detector dogs, sometimes called sniffer dogs, are trained to work using their senses to detect various substances. Detector dogs can search for substances including drugs, explosives, cancer, currency, mold, termites, and even the chemical substances in optical disks (DVD). The detector dog's sense of smell is 2000 times more sensitive than that of humans, allowing them to detect individual scents even when combined or masked by other odors.

The use of detector dogs to sniff vehicles during routine traffic stops has become commonplace and the United States Supreme Court ruled their use to be lawful. Writing for the majority in *Illinois v. Caballes*, Justice John Paul Stevens wrote; "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."¹

Although the Supreme Court ruled the use of detector dogs is lawful, there are courts in many jurisdictions which are still undecided about how to proceed when a dog's alert is challenged. How must the State prove the dog's reliability? How much proof is required?

To answer these questions, the courts have ruled that a police service dog used in any capacity must be trained, certified, and reliable. For example, one federal case which helps outline the minimum requirements for a patrol dog certification is *Kerr v. City of West Palm Beach*. The court held "The handler must have complete control over the actions of his dog. With such control, the handler can recall and restrain the dog before a bite occurs. Alternately, the handler can quickly remove the dog from an apprehended suspect."² Such training ensures the police canine will continue to respond to the commands of the handler with speed. Without such training, the dog's responsiveness to commands will decay, resulting in more frequent and possible serious injuries to those the canine team is apprehending.

If the handler cannot justify the dog's response to the possible presence of contraband or explosives, the handler cannot demonstrate the dog's reliability. Training and certification records are essential in proving a detector dog's reliability in court. The U.S. Ninth Circuit Court of Appeals ruled in *United States vs. Cedano-Arellano*, that a detector dog's training and certification records are discoverable by the defense. "These materials at issue are crucial to defendant's ability to assess the dog's reliability, a very important issue in his defense, and to conduct effective cross-examination of the dog's handler."³ Without complete training and certification records there is the possibility the dog's reliability can be called into question and evidence suppressed.



The Sniff Alert

The Supreme Court ruled in *United States v. Place* that a “sniff” is not a “search” within the meaning of the fourth amendment.⁴ Also, the Supreme Court found in *Horton vs. California* that, since the use of a canine is not a “search,” no permission is required to conduct that sniff. Therefore, once a



canine sniff produces a “positive alert,” probable cause exists to either obtain a search warrant or to conduct a warrantless search under one of the exceptions to the warrant requirement. However, there is debate on what a “positive canine alert” entails.⁵

Canines are trained to hit on an exact scent and give an exact response in exchange for a reward. The canine can be trained to present two different responses: aggressive or passive. The aggressive response requires the canine to scratch or bite at the location from which the scent is originating. The passive response means the canine places its nose as close to the source of the scent and then sits down facing the source.

Canine handlers contend that the animal's response occurs when the canine's nose enters the odor's range they are trained to detect. These behaviors, referred to as “positive canine alerts,” can fluctuate from canine to canine and are solely interpreted by their handlers.

This makes interpretation of detector dog's responses an inexact science. Thus, a “false positive alert” is always a possibility.

False Positive Alerts

Just like people, a canine can have an off-day and no reliable handler will say their canine never has a false positive alert. Scent residue from previous contraband can cause false alerts weeks, months, or even years after a measurable quantity of the illegal contraband was present. Other reasons, like weather, topography, and even the handler's misinterpretation of the canine's response, can mean a false positive alert. This is why the training and certification records become important.

In *Matheson v. State*, the appellate court suppressed the evidence of drugs obtained during a lawful traffic stop. The defense moved to suppress the drugs, contending that the dog's ability to detect drugs was unreliable. The prosecution presented evidence the canine received training and was certified by a national police canine association. The defense countered with an expert who said the training was deficient and the national certification did not meet minimum standards. It was further learned that the dog's handler admitted that he did not keep a record of the canine's false positive alert rate. The court noted that previous cases involving the canine held that training and certification of the canine established prima facie proof that the canine was reliable. However, it held that the defense could introduce evidence to rebut this presumption. Based on the testimony in this particular case, the court ruled the training the canine received with the lack of performance history created doubts about the canine's reliability. Therefore, the canine's alert did not give the handler probable cause to search the vehicle.⁶

Certification Requirements

As previously discussed, the courts have stated that a police service dog must be trained, certified, and reliable. To meet these objectives the United States canine police industry established certain criteria for an annual certification currently supported by the four largest United States police canine associations: United States Police Canine Association (USPCA), North American Police Work Dog Association (NAPWDA), National Police Canine Association (NPCA), and National Narcotic Detector Dog Association (NNDDA). Arizona also has its own certifying body in the Arizona Law Enforcement Canine Association (ALECA) and its direct affiliation with the National Police Canine Association. Although each national association has its own certification criteria, nearly all Arizona police canine programs follow those outlined by ALECA. The five certification categories include Patrol/Utility, Explosive, Narcotics, Tracking, and Meat Game.⁷ Each category has minimum performance objectives that are met for the police canine to become certified in a particular field.

**ARIZONA LAW ENFORCEMENT CANINE ASSOCIATION
NARCOTIC DETECTION DOG
PERFORMANCE STANDARDS
(1/2007)**

This test is designed to show the Handler's ability to interpret detection service dog's alert when locating listed narcotic odors. Training aids will be in place thirty (30) minutes prior to the searched should include vehicles and buildings.

PERFORMANCE OBJECTIVES

E.1 Vehicle and Building Narcotic Odor and Detection: The handler will understand and interpret the trained narcotic detection service dog's alert on a minimum of marijuana and cocaine training aids plus their derivatives. Optional narcotic odors to certify on are; heroin, methamphetamine, and their derivatives.

A. The type of dog alert indication will be left up to the service dog's handler and the handler's department.

E.2 Passing or Failure Efficiency Rate: The Handler must maintain a yearly passing efficiency rate of understanding and interpreting when his assigned narcotic detection service dog has alerted or is in the odor of narcotics the dog has been trained to detect.

E.3 The yearly National Narcotic Detector Dog Association classification and certification is also recognized as a valid test for Arizona Police Service Dog Narcotic Detector Teams This second certification is not mandatory, but is desirable.

Many police canines are crossed-trained as patrol/detector dogs, meaning they carry certifications as both a patrol dog and a detector dog in one of the four remaining categories. However, a canine is trained to identify a single detectable odor and its derivatives. Training a canine in more than

one area can produce dire consequences. For example, if a canine is trained to detect explosives and narcotics, the question will arise about what odor is being identified. Even if the canine could be trained to produce two separate positive alerts, an aggressive response for narcotics and passive for explosive, there remains the possibility that the canine could mix the two responses. The result could mean the accidental detonation of an explosive device. Thus, police canines should only receive certification as either an explosives, narcotics, tracking, or meat game detector dog.

Summary

When defending the accused in cases involving police canine teams, remember to examine both the training and certification records of the canine. Scrutinize not only the canine's successes but also its failures. The courts have ruled that a police canine must be reliable to be effective and the only true measure of this is a recognized program of training, certification and success in the field.

References

1. *Illinois v. Caballes*, 125 S. Ct. 834 (2005) U.S. Supreme Court
2. *Kerr v. City of West Palm Beach*, 875 F. 2d 1546 (1989) U.S. Court of Appeals Eleventh Circuit
3. *United States v. Cedano-Arellano*, (332 F. 3d 568 (2003) U.S. Court of Appeals Ninth Circuit
4. *United States v. Place*, 462 U.S. 696 (1983) U.S. Supreme Court
5. *Horton v. California*, 496 U.S.(1990) U.S. Supreme Court
6. *Matheson v. State*, 28 FLW D1791, 2nd DCA, (2003)
7. Arizona Law Enforcement Canine Association, <http://www.alecapolicek9.com/>



Jury and Bench Trial Results

April / May 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
4/3 - 4/8	Baker Brazinskas <i>Ralston</i>	Foster	Humm	CR07-132873-001DT POND, F4	Not Guilty	Jury
4/28 - 4/29	Woodson <i>Ralston</i> <i>Williams</i>	Comm. Johnson	Humm	CR006-169855-001DT PODD, F4	Guilty	Jury
4/23 - 5/6	Reece Rankin <i>Del Rio</i> <i>Leigh</i>	Duncan	Hoffmeyer	CR06-148029-002DT Murder 2nd Deg., F1D 3 cts. Agg. Assault, F3D	Guilty	Jury
4/30 - 5/5	Fischer	Newell	Reed	CR07-156042-001DT Burg. 3rd Deg., F4	Guilty	Jury
5/12 - 5/13	Bradley Rankin	Holding	Hernacki	CR07-161123-001DT POM, F6 PODP, F6	Guilty	Jury
5/13 - 5/19	Jakobe Sain <i>Curtis</i>	Grant	Steinberg	CR07-129976-001DT Agg. Assault, F4	Not Guilty	Jury
5/13 - 5/20	Fischer	Johnson	Reed	CR07-160796-001DT Burg. 2nd Deg., F3	Guilty of lesser included Attempted Burg. 2nd Deg.	Jury
5/27 - 5/28	Friddle	Duncan	Humm	CR07-179121-001DT Agg. Assault, M1 Resisting Arrest, M1	Guilty	Bench
Group 2						
4/1 - 4/2	Mestaz Reilly	Gaines	Horn	CR07-147693-001DT MIW, F4 MIW, M1	Not Guilty	Jury
4/8 - 4/14	Robinson Bublik	Buttrick	Arino	CR06-130477-001DT Agg. Domestic Viol., F5	Not Guilty	Jury
4/29 - 5/1	Robinson Romani	Mroz	Herman	CR06-156060-001DT POND, F4 PODP, F6	Guilty both counts	Jury
4/30 - 5/7	Roskosz	Johnson	Voyles	CR07-177225-001DT 2 cts. Agg. Assault, F3D Agg. Assault, F6 Criminal Damage, M2	Not Guilty all counts	Jury
5/5 - 5/6	Kozelka Teel Souther	Holding	Golomb	CR07-175589-001DT Sexual Abuse, F5 Public Sexual Indecency, F5	Directed Verdict	Jury
5/7 - 5/8	Mealey Rosell	Sanders	Herman	CR07-173004-001DT Resisting Arrest, F6	Not Guilty	Jury

Jury and Bench Trial Results

April / May 2008 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 2 (Continued)						
5/5 - 5/8	Leonard Crawford Souther Springer	Anderson	Okano	CR07-165572-001DT Agg. Assault, F3	Guilty	Jury
5/15 - 5/19	Crawford	Myers	Gilla	CR2007-146804-001DT Agg. Domestic Violence, F5	Guilty	Jury
5/19 - 5/27	Roskosz	Spencer	Weinberg	CR07-154611-001DT Manslaughter, F3D	Guilty	Jury
5/20 - 5/28	De La Torre	Contes	Thomas	CR 2007-177875-001-DT Agg. Assault (police officer), F6	Guilty	Jury
Group 3						
4/2 - 4/3	Cooper Williams	Holding	Leckrone	CR07-159925-001DT Forgery, F4	Guilty	Jury in absentia
4/1 - 4/3	Kalman Kunz Spizer Sikora	Verdin	Mackmer	CR07-160125-002DT Burg. 3rd Deg., F4 Burg. Tools Poss., F6	Not Guilty on both	Jury
4/7 - 4/8	Tivorsak Delatorre	Holding	Mackmer	CR07-157531-001DT Agg. Assault, F6 Criminal Trespass 3rd Deg., M3	Guilty on both	Jury
4/10 - 4/15	Spurling Sikora Kunz	Verdin	Vaitkus	CR07-006524-001DT POND for Sale, F2 MIW, F4 POM, F6	Guilty on all charges	Jury
4/17 - 4/23	Kalman Burgess Sikora	Svoboda	Luder	CR07-168524-001DT Burg. 3rd Deg., F4 Burg. Tools Poss., F6	Guilty	Jury
Group 4						
3/27 - 4/7	Sheperd	Sanders	Otis	CR07-114675-001SE Molest of Child, F2 5 cts. Sex. Cond. w/Minor, F2	Guilty	Jury
3/31 - 4/2	Whitney	Abrams	Judge	CR07-116563-001SE Agg. Assault, F6	Guilty	Jury
4/7 - 4/10	Braaksma Thomas Houser	Sanders	Maroney	CR07-159515-001SE Burg. 3rd Deg., F4 Theft, F4	Not Guilty	Jury
4/7 - 4/14	Gaziano	Abrams	Rodriguez	CR07-162281-001SE 2 cts. Armed Robbery, F2D	Guilty	Jury
4/16 - 4/17	Whitney	Arellano	Hymas	CR07-130970-001SE PODD, F4 PODP, F6	Guilty	Jury

Jury and Bench Trial Results

April / May 2008 2008

Public Defender's Office

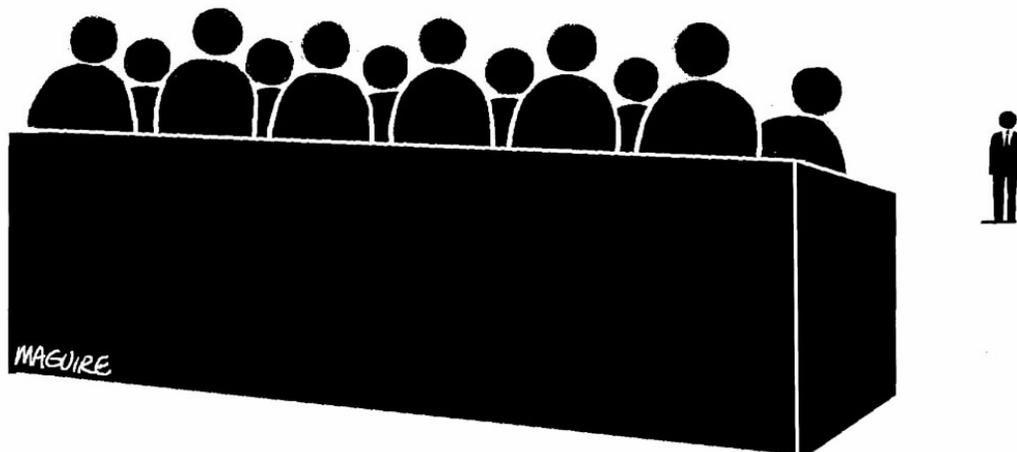
Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 4 (Continued)						
4/17 - 4/22	Engineer Thomas Houser	Contes	Maroney	CR07-140807-001SE Theft, F6 Trafficking in Stolen Property, F3	Not Guilty	Jury
4/21 - 4/23	Gaziano	Abrams	Blum	CR06-180201-001SE 2 cts. Agg. Assault, F3D Disorderly Conduct, F6D Criminal Damage, F6	Guilty	Jury
4/24 - 4/28	Dehner	Newell	Telles	CR05-033150-001SE Robbery, F4 TOMOT, F3 Disorderly Conduct , M1 Asslt.-Intent/Reckless, M1	Directed Verdict of Acquittal	Jury
4/28 - 5/5	Turley	Arellano	Bonaguidi	CR07-031290-001SE 2 cts. Agg DUI, F4	Guilty	Jury
4/28 - 5/5	Turley	Arellano	Bonaguidi	CR07-155724-001SE TOMOT, F3 Unlawful Flight from LE Veh., F5	Guilty	Jury
5/5 - 5/8	Ziemba Coward	Udall	Murphy	CR07-171793-001SE Burg. 3rd Deg., F4 2 cts. Theft, M1	Not Guilty of burglary; Guilty of lesser- included 2nd degree criminal trespass and theft counts	Jury
5/9	Klopp Thomas	Williams	Kolsrud	TR07-106595 SP 2 cts. DUI, M1	Guilty	Jury
5/14 - 5/19	Dehner	Sanders	Beatty	CR07-149219-001SE 2 cts. Sexual Abuse, F5	Guilty	Jury
5/20 - 5/23	Gaziano	Arellano	Otis	CR07-182294-001SE 2 cts. Molest. of Child, F2	Guilty	Jury
5/27	Whitney Salvato	Arellano	Maggi	CR07-006641-001SE Agg. Harrassment, M1	Guilty	Bench
Vehicular						
4/7 - 4/10	Timmer	Passmonte	Hom	CR04-037810-001 DT 2 cts. Agg DUI, F4 2 cts. Agg DUI, F6	Guilty	Jury
4/17 - 4/23	Taylor	Passmonte	Harder	CR05-009570-001 DT 2 cts. Agg DUI, F4	Guilty	Jury
Capital						
2/5 - 4/10	Patterson Tavassoli Davis Flannagan Resop	Granville	Levy	CR03-032707-001 SE 1 ct. Murder, F1D 1 ct. Burg., F2D 1 ct. Arson of Occupied Structure, F2D	Guilty Sentenced to Life with the possibility of parole after 25 years	Jury

Jury and Bench Trial Results

April / May 2008 2008

Legal Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
4/7 - 4/16	Abernethy McReynolds	Garcia	Plicht	CR2008-006145-001DT 3 cts Aggr. Assault, F3D	Not Guilty	Jury
4/7 - 4/17	Ivy Hill	Contes	Rassas	CR2007-130432-001SE 2 cts Trafficking in Stolen Property, F3 Influencing a witness, F5	Guilty	Jury
4/8	Sanders	Sinclair	AG	JD15188 Dependency Trial	Dependency found	Bench
4/22	Kolbe	Oberbillig	AG	JD506322 Guardianship Trial	Guardianship granted	Bench
4/29 - 5/28	Garfinkel	Brain	Gomez	JD10210 Dependency Trial	Dependency Found	Bench
5/5 - 5/7	Babbitt	Duncan	Hoffmeyer	CR2006-148029-001DT Murder 2nd Degree, F1D Agg. Assault, F1D 3Cts, Agg. Assault, F3D	Guilty	Jury
5/6 - 5/15	Rothschild	Spencer	Basta	CR2007-132471-001 Murder 2nd Degree, F1D Misconduct Involving Weapons, F4D	Guilty	Jury
5/11 - 5/14	Ivy	Mahoney	Schultz	CR2007-030342-001SE Theft - Means of Transportation, F3	Not Guilty	Jury
5/28	Allen	Burke	Hymas	CR2007-147085-001DT POM, F6	Not Guilty	Jury



Jury and Bench Trial Results

April / May 2008 2008

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
4/8 - 4/10	Reinhardt	Comm. Newell	CR2007-129416-001 F4	Guilty	Jury
4/17 - 4/22	Lemoine Mitchell	Grant	CR2007-163513-001 F2 (Dang); Agg. Assault - 2 Cts-F3 (Dang)	Guilty on Both	Jury
2/21 & 4/28	Owsley Marrero	Hannah	JD-15356 Severance	Severance Granted	Bench
4/1 & 4/10	Todd	Hoag	JD-506233 Severance	No Result	Bench
4/23 to 5/6	LeMoine Prieto Stovall	Duncan	CR2006-148029-004-DT; 2nd Deg. Murder -F1D; Agg. Assault (3 Cts)-F3D	Guilty	Jury
4/29 to 5/6	Lunde Christianson	Gama	JD14916 - Severance	Severance Granted	Bench
5/8	Todd Indovino	Oberbillig	JD504599 - Severance	Severance Granted	Bench
5/9 & 5/13	Todd Indovino	Comm. Owens	JD504800 - Dependency	Dependency Found	Bench
5/15	Todd Indovino	Oberbillig	JD506749 - Severance	Severance Found	Bench
5/19	Todd Indovino	Araneta	JD507283 - Contested Placement	Child Ordered to Remain with Paternal Grandparents	Bench



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for The Defense

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