

# for The Defense

The Training Newsletter for the  
Maricopa County Public Defender's Office

Volume 3, Issue 2 -- February 1993

Dean W. Trebesch,  
Maricopa County Public Defender

## Contents:

INSIDE OUT	Page 1
DUI	
* Horizontal Gaze Nystagmus Test	Page 2
PRACTICE TIPS	
* Finding Impeachment	Page 4
* Collateral Effects of Plea Agreements	Page 5
SEX OFFENDERS-	
A Challenge for All of Us	Page 6
ADMINISTRATION	
* Downtown Security	Page 8
TRIAL PRACTICE	
* Brief Bank Deposits	Page 8
* U.S. Constitutional Arsenal	Page 17
ARIZONA ADVANCED REPORTS	
* Volumes 120, 121, 124, 125, 127	Page 9
JANUARY JURY TRIALS	Page 15
PERSONNEL PROFILES	Page 16
TRAINING CALENDAR	Page 18

## INSIDE OUT

by Tom Klobas

Remember the "good old days" when your school class would take a field trip to the local zoo? Remember how when you got back to school you wrote a report about your trip? Well, this is my report on a recent visit to that fine state-run boarding home known as the Arizona State Prison Special Management Unit at Florence.

Known far and wide by the acronym "SMU," (not to be confused with that other institution of advanced learning located in Dallas, Texas), it represents the ultimate in the art of human incarceration. You probably know all about incarceration, that thing which a certain class of government employees continually insist is the only way to "protect the community."

Having done some reading in the history of punishment, prisons, torture, and various other aspects of what we now know as the science of penology, I thought I had a pretty good grasp of what I was about to see. Boy, was I wrong.

First, let me describe what SMU is all about. It's designed to have the "worst of the worst," those several hundred inmates who are not only a risk to the public but more importantly, are also a risk to the prison staff or other inmates. In DOC lingo, they are labeled "I-5." They are a pretty motley crew: gang leaders, satan worshipers, death-row types, aficionados of the "the shank," and other tormented souls you would not want to include in your next social gathering. Most earn the right to come here after they have worn out their welcome at other prison units.

Approaching the low-rise facility that houses SMU, it is easy to imagine that the interesting combination of desert landscaping, razor wire crowned chain-link fencing, and electrical gates is the facade of yet another of those high tech, non-polluting (albeit security conscious) industrial firms that dot the sun belt.

The picture begins to change when you are briefed in room adorned with collections of inmate gang photos (both single and group shots), pictures of stabbing victims, and displays of shanks and other products of what appear to be clever but mischievous minds. Our guide points out several that were obtained "just last week."

You next tour the living quarters. Within the cold concrete and steel passageways, two rules predominate: no person ever leaves the building unless for major surgery, and none leave their 8' x 12' single-bunk cells without restraints and an escort. The "exercise yard" is merely a cell-sized room with a sky light. Inmates are not allowed to physically associate with each other. They remain in this surrealistic state for each and every day of their time at SMU, sometimes many years since these are not your prime candidates for early parole. Missing are even the familiar steel bars which, due to the NFL-quality throwing arms of some inmates, have been replaced by drilled steel panels. A strong impression is created that residency here is truly a dehumanizing experience which seems designed to bring out latent psychotic qualities in anyone.

Which brings me to the point I touched on earlier -- protection of the community. Upon being asked what happens when an inmate housed under these conditions "maxes out," our guide was quite candid. "We give them \$50 and escort them to the gate, sometimes with an armed guard." Any adjustment period, follow-up or community supervision? "Nope." Nor does there appear to be any considera-

(cont. on pg. 2)



tion given toward civil commitment of the inmates suffering from mental illness even though they represent a significant number of I-5's. The response was shocking. After many years of being locked up in a human kennel, all for the purpose of "protecting the community," the inmate is quite literally tossed into this same community, some while under medication. This makes little sense. If there were a need to create more victims, one would have to struggle to come up with a more effective strategy. As our guide points out, the \$50 stash is frequently used to purchase drugs, alcohol or a weapon. The result is tragic, shocking and totally predictable.

Why does this happen? Remember, we are in Arizona where it is politically fashionable to be "tough on crime." All of us are aware of the significant percentage of our clientele which is mentally impaired. Why is it that this State, which is eager and willing to invest millions in a criminal justice and corrections system that leads to the absurd consequences exemplified above, is unwilling to fund its mental health system, a system which if properly administered, can preclude the unwarranted and unnecessary release back into the community of deranged individuals solely because a period of time has expired?

It makes me wonder. Perhaps there is no greater example of our political leaders' willingness to trade political gain for societal pain.

Those who wish to share the eye-opening experience of a visit to SMU or the other accommodations that complete the prison complex at Florence should notify Georgia Bohm in Training of your interest so that other group trips can be arranged. ^

## FOR THE DEFENSE

Editor: Christopher Johns, Training Director  
Assistant Editors: Georgia A. Bohm and Teresa Campbell  
Appellate Review Editor: Robert W. Doyle  
DUI Editor: Gary Kula

Office: (602) 506-8200  
132 South Central Avenue, Suite 6  
Phoenix, Arizona 85004

FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. FOR THE DEFENSE is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

## Horizontal Gaze Nystagmus Test

by Gary Kula

Most jurors walk away from a DUI trial having definite opinions about the Horizontal Gaze Nystagmus (HGN) Test. Some feel that it is a very scientific test which should be given considerable weight in determining whether an individual is under the influence of alcohol. Other jurors walk away shaking their heads in disbelief that the prosecution actually tried to convince them that it is a scientific and reliable means of testing to be used by police officers on the side of the road.

As defense attorneys, we often have to walk a fine line in attacking the HGN Test at trial. If we focus too much attention on the HGN Test, the jury will think that we are worried about it and they will probably pay more attention to the test than they would have if we left it alone. On the other hand, if we fail to discredit the test, we face the risk that the HGN Test will be given considerable weight by the jurors in reaching their verdict. Defense attorneys should not feel, however, that they are in a "Catch-22" situation. Rather, through careful analysis of the facts of their particular case, a strategy of attack can be planned in such a way that the test is discredited in a number of ways in the shortest amount of time possible.

In planning your trial strategy for attacking the results or reliability of the HGN test, you might consider the following ideas in questioning the officer:

\* Scrutinize the certification process. In order to be certified, an officer must administer the HGN Test to a minimum of 35 subjects prior to their final certification practical exam. You should examine the officer's HGN logs to see how many of those 35 tests were actually performed out in the field versus the number that were performed on voluntarily dosed subjects in a controlled environment such as a police station. You should inquire about how many times out of the 35 the officer had to be correct in order to take the final practical exam.

Once the officer completes 35 practice tests, they must then achieve an 80 percent score on a final practical exam. Look at the officer's HGN logs to see whether or not they passed this final practical exam on their first try. This practical exam involves 8 to 15 subjects being dosed with various amounts of alcohol. The officer is then given an opportunity to perform the HGN Test on all of the subjects. Following the completion of the HGN Tests, the officer is then asked to identify those five individuals of which he is most confident of his HGN Test results. Oftentimes you will find from a review of the HGN logs that the officer selects the easiest five (i.e., those with the highest or lowest BAC levels). Of those five individuals, the officer's HGN test results must be correct on four. This four-out-of-five testing establishes the required 80 percent final practical exam score set by the certifying agencies. Once you work out the percentages of the officer to become certified from the time he started his 35 practice tests until the time he finished the final practical exam, you will find that most jurors are not very impressed.

\* When subpoenaing the officer's HGN logs, you should also ask that the officer bring with him his DUI training

(cont. on pg. 3)

manual. You can then use the manual to cross-examine the officer on his administration of the HGN Test and other field sobriety tests. If the officer states that he no longer has his training manual, you should use that to your advantage in establishing that the officer does not have a source by which he can continue to reference whether he's administering the HGN Test and the field sobriety tests correctly.

\* You should check the officer's HGN logs to determine whether the HGN Test is regularly administered. In the lower court *Blake* decision (*State v. Blake*, 149 Ariz. 287, 718 P.2d 189 (C.A.2A, 1985)), the court cited the foundational requirements for the admissibility of HGN evidence. One of these requirements was evidence that the officer has maintained his skill by continually working with the test. *Blake* at 290-1. If the officer has not been administering the HGN Test on a regular basis, you should make a foundational objection to HGN Test evidence being admitted at trial.

\* You should question the officer about how he maintains his accuracy in predicting whether an individual is above or below .10 BAC. Since most officers will tell you that there is no objective measuring device to be used out in the field to ensure that they are correct in their estimation of an angle, you should be prepared to question the officer using the National Highway Transportation Safety Administration (NHTSA) study "Improved Sobriety Testing." This study recommends that officers do a monthly check using a template to make sure that their accuracy rate in estimating the 45-degree angle has been sustained.

\* Ask the officer about when they fill in their HGN log. You will find that in most cases, the officer does not fill in his HGN log until after he has found out the results of the breath test or your client has already refused testing. You should also inquire of the officer whether his HGN log prediction of above or below .10 BAC is based solely upon the results of the HGN test or also upon other available information such as your client's performance on the field sobriety tests, visual cues, driving and so forth.

\* While an officer will often testify about their high percentage in using the HGN test to predict whether or not a person is above or below .10 BAC, you should scrutinize the HGN logs to determine whether the officer is able to maintain that same degree of accuracy in identifying those individuals with BAC's between .08 and .12.

\* In examining an officer's HGN logs to calculate his accuracy percentage in estimating whether individuals are above .10 BAC, you should isolate those cases where individuals are below .10 and determine the officer's accuracy percentage in identifying these individuals.

\* During the course of your interview with the police officer, ask him to demonstrate how he performed the HGN Test. If the officer does not perform the test in accordance with the NHTSA guidelines, you should make a foundational objection to the admission of the HGN test results. *State v. Blake*, 149 Ariz. at 290-1, *State ex rel. McDougall vs. Ricke*, 161 Ariz. 462, 778 P.2d 1358 at 1361 (Ariz. App. 1989).

\* Ask the officer about his administration of the HGN Test. The NHTSA studies recommend that if there are poor lighting conditions, a penlight be used. There are also specific requirements as to the speed at which the stimulus is moved, the distance at which the stimulus should be held, and the number of times the test should be completed in each direction. If the officer is not familiar with these recommen-

dations or performed the test in a manner inconsistent with these recommendations, you should use the NHTSA studies to call into question the accuracy of his findings.

\* You should question the officer about the significance of the degree of the angle of onset. According to some NHTSA studies, a 45-degree angle of onset represents a BAC reading of .06 percent. For an individual with a BAC of .10, the angle of onset would be approximately 41 degrees.

\* Ask the officer about what he looks for once he determines the angle of onset. Unless the conjunctiva (white of the eye) is showing in the corner closest to the ear, the test result is not valid. It is also important to note that some individuals cannot deviate their eyes more than 45 degrees.

\* When questioning the officer about the angle of onset or the presence of distinct nystagmus at maximum deviation, keep in mind that approximately 50 to 60 percent of the population will display symptoms of nystagmus when their eyes are moved to the lateral extreme position.

\* You must call to the jury's attention the inconsistency between the officer's testimony as to the precision involved in the HGN testing process versus the officer's testimony that the defendant was falling over, unable to keep his balance and barely able to stand up at all. It doesn't make sense that this individual who can't even stand up without leaning against a car can hold his head perfectly still so that the officer can determine whether the angle of onset was before 45 degrees.

\* Do not allow the officer to rely too heavily on the smooth pursuit portion of the HGN Test. This is the least reliable portion of the test and it requires that the officer be perfect in moving the stimulus in a consistent manner at a consistent speed so as to avoid causing impaired pursuit through his own actions. You should also use the NHTSA studies to determine whether or not the officer's description as to smooth pursuit is consistent with prescribed BAC levels. The type and nature of deficiencies in smooth pursuit vary depending upon an individual's BAC level.

\* If the officer observes at least four of the six cues, the NHTSA studies indicate that such a test result correlates to a 77 percent probability of a BAC level of .10 percent. You should consider inquiring about the testing conditions which were present when this accuracy rate was established and contrast them to the roadside conditions which were present in your case.

\* In the NHTSA studies, there is an indication that the angle of onset of HGN at a BAC of .10 decreases by about five degrees when circadian rhythms reach their nadir. Accordingly, the officers should adjust their criteria in determining the angle of onset by about five degrees between midnight and 5:00 a.m. (NOTE: This point is a source of dispute within the scientific community.)

\* Ask the officer about how he determines where the 45-degree angle is. Be prepared for a wide-ranging assortment of answers. Bring a protractor to court with you.

\* Where the HGN Test is done under poor roadside conditions or where a breath test is later refused, you should question the officer about his failure to perform the HGN Test again at the station. You may want to remind the officer about his HGN training done under the same ideal condi-

(cont. on pg. 4)

tions as can be found in a station. You may also want to ask the officer whether or not his test results may have been more accurate and accordingly, whether it would have been fairer to the defendant to perform the test for a second time under ideal station conditions.

\* You should question the officer as to whether he has performed the HGN Test on every DUI suspect. You should compare his number of DUI arrests to the number of entries he has in his HGN logs.

\* You should question the officer as to how many times he has let a driver go after he has detected at least four cues on the HGN Test. This may be helpful in exposing the officer's mind-set which probably was established within minutes of his stop of your client. A numerical answer should be used to diminish the significance of the test.

\* You should question the officer about his lack of medical training. The jury should know that the officer was trained by another officer to perform the HGN Test. There is no ophthalmologist or any medical personnel present during the training process. Under further inquiry, it can be seen that the officer does not understand the causes of nystagmus or exactly what it means.

\* You should question the officer to determine whether he is 100 percent certain that what he observed was HGN and not one of the other types of nystagmus. There are over 45 types of nystagmus recognized by the ophthalmological medical community.

\* You should question the officer about the existence of natural nystagmus. In their studies for NHTSA, Southern California Research Institute (SCRI) also recognized that three percent of the population may have early-onset nystagmus without having consumed any alcohol.

\* Question the officer about other causes of nystagmus. The list of causes includes antihistamines, depressants, brain damage, illness, fatigue, and numerous others which the officer is not trained to detect and never bothers to inquire about.

\* Many of the Drug Recognition Expert (DRE) trained officers will testify about the presence of vertical nystagmus. While vertical nystagmus may be found at very high BAC levels, it has not been validated by SCRI or NHTSA as an indicator to be used by police officers in DUI cases.

\* You should question the officer as an "expert" about articles which cite the inaccuracy of the HGN Test. During the initial interview you might also get a list of the articles or studies the officer has been trained with, relies upon, and considers authoritative.

This list was compiled from books, studies, seminars and trial transcripts. It is not meant to be all-inclusive. Its purpose is to give you some ideas to get the ball rolling in preparing your questioning of the officer about the HGN Test during the interview and at trial. There are several articles that you may want to consider reviewing prior to your preparation of an HGN cross-examination. These articles include:

a. Cowan and Jaffee, "Proof and Disproof of Alcohol-Induced Driving Impairment through Evidence of Observable Intoxication and Coordination Testing," 9 Am. Jur. Proof of Facts Third, 459 (1990);

b. Pangman, "Horizontal Gaze Nystagmus: Voodoo Science," 2 DWI Journal 1 (1987);

c. Rouleau, "Unreliability of the Horizontal Gaze Nystagmus Test," 4 Am. Jur. Proof of Facts Third, 439 (1989);

d. NHTSA Studies: "Development and Field Test of Psychophysical Tests for DWI Arrest," (DOT-HS-805-864); "Psychophysical Tests for DWI Arrest," (DOT-HS-802-424); "Improved Sobriety Testing," (DOT-HS-806-512); and "Field Evaluation of a Behavioral Test Battery for DWI" (DOT-HS-806-475).

These studies and publications, as well as others, are available through the training division of our office. ^

## **Practice Tips**

by Christopher Johns

### **Finding Impeachment**

Criminal defense lawyers need to be nosy. A healthy dose of curiosity often reveals information that will assist the client in negotiating a plea agreement or at suppression hearing, or at trial. Having Paul Drake--a good investigator is also invaluable.

The criminal defense lawyer, however, needs to have in his or her arsenal a ready list to check for information. Many top practitioners always check all other court files of their own clients, and those of witnesses. Sometimes former files alone are a gold mine of information. Earlier presentence reports of clients often give a practitioner insight into the client, and presentence reports of witnesses or alleged victims are invaluable in developing impeachment. When checking in our own office for former files, practitioners need to keep in mind our juvenile and mental health divisions may also be sources of information.

Additionally, in previous newsletter issues, checking the "Form 4" that is filled out by arresting officers in warrantless arrest cases has been stressed. This form is only going to be found in the court file despite the fact that written statements are contained in it by the client and by the officers at the time of arrest. In fact, when possible, the court's file should always be checked starting at justice court and when the case hits superior court. Where else can you check for impeachment?

#### **Records:**

To impeach a prior witness, you'll need records. These may be prior prison records, e.g., disciplinary and parole reports. Department of Motor Vehicle Records may be useful; as well as the obvious, these may contain such information as restrictions on a driver's license because of poor eyesight.

Other records may include medical and psychological information. For example, the client may have been hospitalized for mental illness or other relevant treatment. Welfare records may lead to information showing that a witness made perjurious statements to obtain benefits; information may show that the witness was working when he or she claimed to be indigent.

(cont. on pg. 5)

Drug or alcohol treatment programs may also have records that will provide information.

#### Financial Data:

Especially in cases that involve money, checking financial information may be pertinent (often this is important for restitution issues or establishing value during trial).

Most witnesses have some financial records. These may be applications for bank loans and credit reports. In some cases, tax information may be pertinent, e.g., when dealing with an informant that is being paid by the government. Perhaps in some cases, an alleged victim or witness may have a Zoe Baird problem reflecting on their credibility as a witness.

Any employment information may be a source for impeachment. Employment resumes, applications, and evaluations may contain many useful statements. Likewise, property ownership records may reveal other financial information. Especially, revealing may be partnership or corporation records involving witnesses.

#### Criminal Background:

Criminal records are an obvious source of impeachment information. Besides the court file, practitioners may consider extending their search for impeachment to include grand jury, guilty plea and sentencing hearing transcripts. Also, check any transcripts of probation violation proceedings; defendants tend to do and say many things in order to avoid further jail or prison.

#### Police Information:

Law enforcement information may include more than other departmental reports. For example, previous booking photos of witnesses may show a "different look" than the clean-cut witness on the stand. Further, field interrogation cards may contain information. Obviously, every case where a witness has acted as an informant is fair game.

Less obvious ideas for impeachment may be other complaints by a witness or alleged victim that were false or unfounded. For example, former allegations that a child has been molested or that the alleged victim has been the subject of a sexual assault.

#### Civil Suits:

Criminal lawyers sometimes forget that witnesses and alleged victims may have been involved in civil matters that bear upon their credibility. For example, in child molestation cases stemming from custody battle disputes, domestic relations files may show a particularly bad custody battle with other outlandish charges against the client or untrue statements in order for one party to obtain higher support payments or child custody. Paternity suits, and other related proceedings may also be helpful.

#### Interviews:

Perhaps because of victims' rights, interviews of family and friends now are even more important in developing impeachment information. This may include interviews with distant relatives, neighbors, and co-workers.

### Collateral Effects of Plea Agreements

Recently our office sponsored a seminar on sentencing which stressed details that may make a difference in the way plea agreements are structured. For example, always putting the longest sentence last, when there are consecutive sentences, will most help the client with earned release credits. Although courts have been hesitant to invalidate plea agreements because a client has not been informed of collateral consequences, rules of professional conduct stress that an attorney must explain matters to a client "to the extent reasonably necessary to permit the client to make informed decisions regarding [your] representation." See ER 1.4.

As a practical matter, our clients rarely have any other way to find out the consequences of a plea agreement or a conviction at trial. For example, in the case of immigration consequences of plea agreements, practitioners need to remember that our clients have often risked their lives and all of their savings in order to get to this country. The effect of their plea agreement on their ability to later enter this country legally (preventing exclusion in a plea agreement if they are currently an illegal immigrant) or whether they will be deported now (losing their present legal immigrant status) may be paramount to the client.

The following is a short list of collateral effects:

#### *A.R.S. Sec. 13-603 (G)* (Loss of Professional Licenses)

This statute gives the trial court the discretion to order that a person or enterprise convicted of any felony forfeit, have suspended or revoked any license or charter granted by any state agency or political subdivision. Hence, by order of the court and not the agency involved, a professional, e.g., real estate agent, dentist, lawyer, plumber, electrician, may lose his or her license to engage in the profession.

#### *A.R.S. Sec. 13-904* (Suspension of Civil Rights & Occupational Disabilities)

Many of our clients are young. Any felony conviction is in reality a life sentence. This statute suspends the right to vote, to hold public office, and serve as a juror. This statute also delineates competency as a witness for felons, and what employment may be denied on the basis of a conviction.

Practitioners should be aware that under A.R.S. Sec. 13-912, restoration of civil rights is automatic for first-time offenders. This, however, does not include the right to possess firearms unless the person applies for a "discharge" under the provisions of A.R.S. Sec. 13-906.

#### *A.R.S. Sec. 13-1415(B)* (Forced Testing for HIV)

This statute allows clients to be tested for HIV if a victim requests it, and the court finds that "sufficient evidence" exists that "significant exposure" occurred. It requires an evidentiary hearing. This statute has significant due process problems and has been challenged by our office, particularly on the grounds that it has been used to test individuals several years following the conviction (*ex post facto* application). Please contact the training division if you are assigned a case like this, or any case involving the rights of HIV clients. I have conducted an evidentiary hearing on this issue and have filed a special action that may be useful.

(cont. on pg. 6)

**A.R.S. Sec. 13-3418 (Ineligibility to Receive Public Benefits)**

Our clients are poor and many receive public benefits. Although few people know about this statute, it is important that defense counsel know that a client convicted of any drug offense (e.g., possession of marijuana) may become ineligible to receive public benefits. Denial of the benefits may be ordered for a specific time by a judge and includes such "benefits" as scholarships, welfare benefits, and public housing. Note: if confronted with a judge attempting to order a public benefit denial to a client, that if the denial is in conflict with the laws of the United States, the court order is restricted. See A.R.S. Sec. 13-3418(B).

**A.R.S. Sec. 13-3821 (Sex Registration)**

Most practitioners know that clients convicted of any violation of chapter 14 or 35.1 (obscenity) of Title 13 must register as sex offenders; however, there are also consequences for a client that changes his/her address within or outside his/her county of residence.

**A.R.S. Sec. 13-3822 (Notice Change Address Sex Offenders)**

This statute makes it a class 6 felony if a client fails to "promptly" inform the sheriff of a county that he has moved and is required to register as a sex offender (since the client will always have a prior, exposure is significant). This statute has been attacked for vagueness on the issue of what is "promptly." At least one superior court judge has dismissed the charges on that basis. An appeal by the state was later dismissed. If you have a case like this, please let me know.

**A.R.S. Sec. 13-281 (DNA Testing)**

As well as sex registration, any person convicted of a violation of Sec. 13-1403, 1404, 1405, 1406, 1410, 1411, 1412 or 13-3608, must submit to DNA testing. This is so law enforcement can keep on file your client's DNA for later use. Reports are maintained by DPS.

**A.R.S. Sec. 13-697.01 (Forfeiture Vehicles in Aggravated Driving Cases)**

This statute allows the trial court to order a motor vehicle owned and operated by a person convicted of felony DUI to be forfeited.

Practitioners may also want to familiarize themselves generally with the provisions of A.R.S. Sec. 13-4301 *et. seq.* These provisions delineate what and when property of an accused or convicted person may be legally taken by the government.

Please keep in mind that there are many ways to help clients avoid some of the collateral consequences of plea agreements. For example, exclusion of an illegal immigrant may be avoided by pleading clients to charges that are not drug related or that do not involve moral turpitude.

Additionally, many things may be negotiated in a plea if a practitioner is aware that a problem may exist. Strategically it may be better sometimes not to educate the prosecution on many of these issues. However, rarely is it ever to defense counsel's or the client's advantage to not know what the important consequences of a plea will be. The best weapons are knowledge and the assumption that the client needs to be informed of the full ramifications of a guilty verdict or plea. ^

**SEX OFFENDERS -  
A CHALLENGE FOR ALL OF US**

by Lori Scott, Supervisor, Maricopa County Adult Probation

What do we know about sex offenders? Much more than we did several years ago, but not nearly as much as we may learn in the next 10 to 20 years. For example, incest offenders are routinely charged and convicted in a system that until 20 years ago barely acknowledged that the activity occurred. Reported cases of child sex abuse increased by 2100% between 1976 and 1986; the population of sex offenders in prison increased by 48% from 1988 to 1990. As these offenders and their victims become an increasing presence in the criminal justice system, how can we rationally and safely manage their impact?

In the past five years, the number of sex offenders placed on probation in Maricopa County has risen dramatically. A recent departmental census listed 1,202 offenders officially on probation for sex offenses; we estimate another 100 who have pled to such charges as aggravated assault or criminal trespass. 537 are now on lifetime probation, and that number will continue to grow as the Court uses that sentencing option. The total number also includes approximately 200 offenders who received both prison and probation; we are beginning to supervise these offenders as they are released from the Department of Corrections.

We now have seven officers who supervise caseloads of 50 offenders each, plus four surveillance officers who work in all areas of the valley. Nevertheless, this means that at any given time only 350 sex offenders are managed by a specialized officer. We are working within budget constraints to increase this number.

Our job is to impose some meaningful external controls on such offenders until they can, through treatment, demonstrate that they have been able to develop internal controls and insight regarding their behavior. This is the rationale we have used to justify to the Legislature and others that many sex offenders can be supervised in the community safely and effectively, and certainly, more cheaply. We have learned through the years that offenders are very good at minimizing, justifying, and rationalizing their behavior, and without strict rules of supervision and meaningful treatment, this behavior will continue. We have spent the past few years trying to develop some safeguards and guidelines by which we can fulfill our obligation to protect the community from further victimization while at the same time helping the offender to change.

In addition to the 17 sex offender terms, we utilize a two-page definition of "no contact," letters to immediate family members who will be affected by the "no contact" terms, rules and guidelines of visitation, an expectation of the clarification process between offender and victim, and reunification guidelines. Many of these expectations concern reunification of incest offenders, the most difficult aspect of this caseload.

(cont. on pg. 7)

Unfortunately, after an incest offender has been placed on probation, Child Protective Services (CPS) is usually no longer involved in the case and presumes that we will take over. That means that our officers must become caseworkers whenever reunification is desired by all family members. Often wives or girlfriends become angry with us as representative of a "system" which will not allow life to go on as before. Sometimes they have been given conflicting information by CPS, defense attorneys, prosecutors, therapists, and others, as to the possibility and timing of reunification.

Even though the victims may express a desire for such immediate contact, it is often under pressure from the mother or other family members who see the victim's report as the reason for the disruption to the family unit, and all the legal and financial consequences. There is also the "trauma bond" issue, which entangles children into conflicting feelings of love for their father, but hatred for what he did. Children need time and space to sort out these feelings, and to heal, just as the offender needs that separation to begin taking an honest look at himself and his behavior. It is important for us to maintain that separation between victim and perpetrator until both have completed extensive therapy.

As a probation department, we have developed our own guidelines of reunification out of frustration at the lack of consistency in the therapeutic community, and having observed effective programs in other jurisdictions. Most of our rules are adopted from programs in Wisconsin, Vermont, Oregon, Washington, and Colorado. We have been accused of being too strict by some advocates of premature reunification, but we believe that sending a convicted offender into a home with children is like giving a felony DWI offender a fifth of whiskey and a set of car keys.

Research (and our own field experience) has shown that offenders who are into one form of paraphilia often have a history of other sexual deviances. Abel and Becker revealed that the average offender in their study had engaged in an average of 3.5 additional paraphilias. In a recent sample of 41 exhibitionists referred by our officers for treatment, 38 admitted to "hands-on" behaviors involving minors, a startling statistic which blows the image of the "harmless" old man in a raincoat. Often judges and defense attorneys believe that an offender is at no risk to his own children, or to children of a different gender than the victim. This is not necessarily true, and until we can get a better picture of the defendant's risk, we believe that it is better for any potential victims that his contact with children, all children, be restricted.

Abel's studies showed that 44% of incest offenders revealed a number of non-related child victims, and a large number of offenders who had avowed no attraction to same-sex children disclosed a history of victimization of children of both sexes. In a recent study by Finkelhor and Williams of incest fathers, 26% of the men were classified as "sexually preoccupied," possessing a "clear and conscious (often obsessive) sexual interest in their daughters." Some of the men in this category were further classified as "early sexualizers," who admitted that they regarded their daughters as sex objects from birth.

In 1991 McGrath published a comprehensive analysis of risk factors based on actual studies and clinical experience

up to that date. He noted higher recidivism in molesters with multiple victims, out-of-home victims, prior record, crossing of age and gender, use of alcohol, and high impulsivity.

We have not developed our supervision rules without basis or foundation, and if an offender is truly serious about addressing his problems, he will succeed. Field supervisors ask these questions about every case:

- 1) Who is at highest risk?
- 2) What conditions put the defendant at risk?
- 3) How can the risk be lowered while the defendant is on probation?

If we can monitor the environment of an incest offender, for example, to make sure that he is not allowed in an intimate living situation with children until treated, then he could be at low risk to reoffend. If, however, that offender is placed in his or someone else's home with a potential victim before he or his partner has learned anything about his behavior, then he is a very high risk.

While we know that the use of the polygraph and plethysmograph are not popular with defense attorneys, we often use polygraphs at the beginning of the defendant's probation to demand some honesty and accountability. We do not ask for names or places, but we would like as complete a sexual history as possible in order that the offender can work on all his paraphilias. If he started out as a voyeur or exhibitionist and then progressed to a hands-on offense, he will need to examine the factors which led to those original behaviors and how he conditioned himself to take more and more risks. We have found that the use of the polygraph can save months or years of struggling through the entrenched denial and minimization of some offenders and helps them deal with their issues more quickly and effectively.

The plethysmograph can be used to measure the defendant's arousal level as he progresses in therapy and tries to extinguish his arousal to children, for example. It's not used as a "lie detector" or to punish, and is only one aspect of an overall treatment strategy which we use to diminish risk. Those who complain about the "invasiveness" of the plethysmograph have not objected in all the years officers have been asking offenders to urinate in front of them from drug testing. The emotionalism and squeamishness of our culture surrounding sexual issues is interesting, however, and the controversy remains.

The bottom line is that sex offenders can be treated effectively in the community at a low risk and at a great cost saving. We duplicated a study by Robert Prentky of Massachusetts in which he calculated the cost of investigating, prosecuting, and sentencing a sex offender to prison for seven years, including victim treatment and services. In Arizona this would amount to \$122,000. A seven-year treatment and community supervision plan would be \$15,400, and if the offender could then be lowered to maintenance level, the cost drops to \$720 per year. Along with periodic polygraphs, the offender can pay most of the cost himself.

We still have a great many needs. On our wish list would be a type of residential facility in which sex offenders could be incarcerated and treated for 2-3 years and gradually released into the community. This would help us in dealing

(cont. on pg. 8)

with the young (18-21) or remanded offenders who come to us with high needs in addition to their sexual issues. They often have little work experience, few employment skills, poor schooling, no social skills, highly dysfunctional families, and no place to live. Few agencies will deal with them because of their offense. Yet they can be helped the most if they can receive effective treatment. This is an issue we would like to see everyone in the system work toward and support.

At this time, if your client is a good bet for probation, it would be beneficial to all if he is at least made aware of the 17 sex offender terms, and that probation means working on his problem, not just reporting to a probation officer once a month. Consider looking at probation as a supervision plan which would lower the offender's risk and increase the benefits of therapy. In the end, we all would like to make the community a less risky place for our children, while walking the fine line between defendants' and victims' rights. Please don't hesitate to call for more information, or references for the statistics cited.

Lori Scott, Supervisor, 992-8507  
With Adult Probation since 1983.

Previously worked with sex offenders at Arizona State Prison in Florence after receiving a Master's Degree in Counseling at ASU.

Supervises a newly created unit of seven specialized officers and four surveillance officers.

Recently authored a chapter on sex offenders for a new criminal justice textbook. ^

## Downtown Security

Our office recently sponsored an in-house training session on "Downtown Security." The main speakers were officers from the PPD Bicycle Detail. Margaret Mullen, Executive Director of the Downtown Phoenix Partnership, Inc., and David Porter, Facility Supervisor of the Downtown Security Guides, also appeared and provided valuable information.

The police officers noted the low crime rate and high response time in the downtown area. They advised staff to feel free to contact them to report any long-term, suspicious activity or discuss any problems. They welcome the opportunity to get to know the people and work environments in the area. The Bicycle Detail office number is 534-2454. This is not the number to use in an emergency.

**NOTE: In case of an emergency, call 9-911.**

Be sure to use the extra "9" to get out of the county system, and be sure to give your specific location to 911 personnel, e.g., 11 W. Jefferson, 6th floor, Room 605.

The officers advised people not to give money to panhandlers sometimes encountered in this neighborhood. If a panhandler is in need of shelter, job information or referrals for other services, he/she may go to CASS, 1209 West Madison Street. For medical and mental health care, refer the panhandler to MARICOPA COUNTY HOMELESS SHELTER CLINIC, 1201 West Madison Street. If a panhandler needs a meal or substance abuse treatment, he/she may go to ST. VINCENT DE PAUL, 119 South 9th Avenue.

In addition to the Bicycle Detail, the downtown features the Downtown Security Guides. These guides are seen bicycling in purple shirts, handing out information. They do more than give directions, however. They are trained security officers. They do NOT carry weapons, but do have mobile phones and radios. They serve as extra eyes and ears for the police, and are here

Mon. - Thurs., 7:00 a.m. to 11:00 p.m.

Fri. - Sat., 7:00 a.m. to 1:00 a.m.

Sun., 11:00 a.m. to 9:00 p.m.

An extra benefit of the guides is their willingness to escort anyone to his/her vehicle at night. They may be reached at the following numbers: Office 253-1005; Mobile Phone 228-4801; FAX 253-0403.

The Downtown Phoenix Partnership sponsors the PPD Bicycle Detail and the Downtown Security Guides, and Margaret Mullen emphasized the partnership's commitment to a safe and well-planned downtown. The partnership has initiated a communications network so that any downtown facility may FAX information on an unusual incident or crime to their downtown headquarters. That information will be relayed quickly to other offices and security personnel in the area. The partnership's FAX forms are kept by our FAX machine on the 10th floor of the Luhrs Building. Any recurring problems or suggestions for the downtown may be directed to Ms. Mullen at 254-TOWN. ^

## BRIEF BANK DEPOSITS

Editor's Note: As Bob Briney reported for our November 1992 issue, the Maricopa County Public Defender Motion and Brief Bank is operational. Terminals are located on the 10th floor in the main library, the third floor appeals library, Durango Juvenile Facility, and in Trial Group C at the Southeast Court Center. The following article notes some of the recent deposits in our Brief Bank as a sampling.

Please retrieve any motions or briefs discussed from the Motion and Brief Bank.

## Suppression Issues

*State v. Bullock*: CR-92-07848 (filed January 26, 1993).

**Author: David Goldberg.** This motion argues that the warrantless search for cocaine forced from a client's mouth by means of a dangerous choke-hold was unconstitutional.

(cont. on pg. 9)

Following an evidentiary hearing, the trial court found that the "officers involved here clearly exceeded the lawful bounds on use of force to extract evidence from a suspect's body." Motion to suppress granted and case dismissed.

*State v. Chiago*: CR-91-06249 (filed January 27, 1992)

**Authors: Anita Rosenthal and Peggy LeMoine.** This motion argues that police conduct in entering an apartment where loud music was allegedly playing does not constitute an "exigent circumstance" for a warrantless search. Marijuana seized as a result of the illegal warrantless search was suppressed and the case dismissed.

*State v. Contreras*: CR-92-06983 (filed October 26, 1992)

**Author: Ray P. Schumacher.** This motion argues that the warrantless search of an apartment based upon an undisclosed informant's tip that the people in it were using drugs was unconstitutional. It further argues state's assertion that a warrantless search of a probationer was legal was unsupported by reasonable cause. Case dismissed.

*State v. Romero*: No. 1 CA-CR 91-1595 (filed June 15, 1992).

**Author: Garrett W. Simpson.** This brief argues that the seizure of the accused at gunpoint by officers, absent probable cause, did not fall under *Terry*, and that the trial court abused its discretion in not suppressing statements and items seized as a product of the illegal seizure.

### Discovery

*State v. Johnson*: No. 1 CA-CR 92-0849 (filed February 3, 1993).

**Author: Stephen R. Collins.** This brief argues that the trial court properly dismissed the case because the prosecutor repeatedly failed to disclose a felony conviction of the complaining witness (pending).

*Carpenter v. Superior Court*: CR-92-09314 (filed February 1, 1993).

**Author: Russ G. Born.** This special action argues that an order issued by a superior court judge prohibiting the public defender's office from issuing "discovery" subpoenas without a judicial approval is an abuse of discretion. The order was overturned by the Court of Appeals and an opinion is to follow.

### Trial Issues

*State v. Lonnie Thorton*: No. 1 CA-CR 92-1110 (filed February 4, 1993).

**Author: Lawrence Matthews.** This brief argues that a new trial should be ordered since the defendant had a constitutional right to a 12-person jury and only an 8-person jury was empaneled (pending).

*State v. Allen*: CR-91-09771 (filed August 10, 1992).

**Author: Nicholas Hentoff.** This motion argues that expert testimony regarding the Child Sexual Abuse Accommodation Syndrome (CSAAS) must be precluded because

it does not meet the *Frye* test, is irrelevant, will not aid the jury, and even if marginally probative is outweighed by its prejudicial effect.

### Victims' Rights

*State v. Superior Court*: CR-92-05708 (filed December 15, 1992).

**Author: Christopher Johns.** This special action response and response to petition to review argues that the legislative enactment allowing peace officers to be interviewed even when they claim they are victims is constitutional even in view of the Victims' Bill of Rights, and because of police officers' special status as instrumentalities of the state, therefore peace officers cannot be "victims" if acting in the course of their duties. (Petition for review pending before the Arizona Supreme Court).

*Dawe v. Superior Court*: CR-92-02627 (filed September, 1992).

**Author: Karen Kemper.** This special action argues that the trial court abused its discretion by reconsidering the ruling of another trial judge that a witness was not a victim--where the alleged victim merely claimed that he lost funds and was not named in the indictment (jurisdiction declined).

### Arizona Advanced Reports

#### Volume 120

*Peterson v. Superior Court*  
120 Ariz. Adv. Rep. 14 (Div 1, 8/27/92)

Defendant pled guilty to possession of a dangerous drug, a class 4 open-ended offense. He was sentenced to probation and the offense remained undesignated. During probation revocation proceedings, a judge noticed a flaw. The statute in effect at the time of the defendant's sentencing called for the offense to be designated a felony or misdemeanor at the time of sentencing, but not be left undesignated (the statute has since been changed). The trial judge vacated the judgment of guilt and reset the case for trial. The defendant moved to dismiss on double jeopardy grounds. The motion was denied, and a petition for special action taken.

The trial court erred in dismissing the case. The court may correct the original judgment by supplying the omitted designation. Neither party appealed the original judgment, and its terms became final. To now vacate that judgment would upset the expectations of both parties. As double jeopardy would require dismissal, vacating the judgment would also defeat the public's interest. The trial court's

(cont. on pg. 10)

order of dismissal is reversed and the court directed to designate the offense a misdemeanor or a felony, but with prospective effect only.

[Represented on special action proceedings by Brian C. Bond, MCPD.]

*State v. Helffrich*

120 Ariz. Adv. Rep. 10. (Div. 1, 8/27/92)

Defendant Robert Anthony Helffrich was acquitted of aggravated assault because he was not responsible by reason of insanity. Two months after being committed to the Arizona State Hospital, the director of the hospital filed a notice of conditional release pursuant to A.R.S. Sec. 13-3994(C) and Sec. 36-540.01. Helffrich's motion for dismissal or unconditional release was denied. He appealed.

The defendant argued that A.R.S. Sec. 13-3994(C) violated due process because it allows a person in his position to be on conditional release for an indefinite period. The court relied on *Jones v. United States*, 463 U.S. 354 (1983). In *Jones*, the U.S. Supreme Court upheld the indefinite commitment of those acquitted by reason of insanity. The Arizona Court then reasoned that because conditional release is a less restrictive form of treatment than commitment, the standards set by *Jones* meet or exceed the due process requirements for conditional release. The court noted that the purpose behind the conditional release provisions is to treat the defendant's mental health and to protect himself and others should he become dangerous. If the nature and duration of conditional release is reasonably related to that purpose of release, due process is not violated.

The defendant challenged the constitutionality of A.R.S. Sec. 13-3994(C), arguing that the indefinite conditional release for the criminally committed and conditional release for a specified time for those civilly committed creates a special class in violation of the Equal Protection Clause. Because there is a rational basis for treating acquittees different than those civilly committed (under *Jones*), there was a rational basis for subjecting the groups to different conditional release procedures.

The court held that because the plain language of Sec. 13-3994(B) merely entitles an acquittee to a release hearing within 50 days of his commitment, due process is not violated if a hearing is not held and the acquittee failed to request one at the time. Under the statute, the defendant must request a hearing at 50 days.

The court also held that the 120-day time period for a conditional release hearing was in line with due process because Sec. 13-3994(D) also allows for an expedited hearing based upon a petition by the evaluating or treating agency. The court concluded that the law is "flexible and responsive to an acquittee's improved mental condition." The case is remanded to the superior court to determine whether the defendant is no longer a danger to himself or others and entitled to unconditional release.

[Represented on appeal by Helene F. Abrams and Terry J. Adams, MCPD.]

Volume 121

*State v. Superior Court*

121 Ariz. Adv. Rep. 48 (Div. 1, 9/10/92)

Defendant, who had been drinking since noon, went out to his car at 7 o'clock. The car was parked in a private parking lot of a cabin park. The property contained driveways which turned onto a public street. The defendant got in his car and turned on the engine and heater. Two local residents heard the motor running for an hour. When the residents checked, defendant was asleep at the wheel. They turned off the ignition, took the keys and called 911. The police arrived and arrested the defendant. A breathalyzer test showed a blood alcohol content of .19. Defendant was charged with DUI.

At a non-jury trial, defendant claimed he had no intent to drive the car onto a public roadway. The State argues that the defendant was in actual physical control because he never voluntarily ceased to exercise control over the vehicle before passing out. A.R.S. Sec. 28-692(A) punishes drivers who are in actual physical control. Actual physical control manifests a legislative intent that the law apply to persons having control of the vehicle, even if they are not actually driving it. While defendant argues that his actions show no intent to drive, the subjective intent of the defendant was irrelevant. To not be in actual physical control, a driver must place his vehicle outside the flow of traffic and turn off the engine. An intoxicated person sitting behind the steering wheel of a motor vehicle is a threat to the public safety and welfare. The conviction is affirmed.

*State v. Conde*

121 Ariz. Adv. Rep. 35 (Div. 1, 9/10/92)

The defendant was charged with first degree murder, as well as several counts of robbery, aggravated assault, and burglary. At trial, he decided to represent himself with advisory counsel. He was convicted as charged and sentenced to life in prison plus lengthy consecutive sentences.

Defendant claims he was incompetent to waive counsel and conduct his own defense. Defendant's contentions are based on a post-trial diagnosis by a psychologist who found he suffered from paranoid delusions. The trial court did not err in denying him a new trial or resentencing. Prior to trial, defendant was examined by a psychiatrist for a Rule 11 prescreen. That psychiatrist found no grounds to question defendant's competency to assist in his own defense or to enter a guilty plea. After executing a waiver of counsel, defendant was examined by a different psychiatrist who found him competent to represent himself, provided he had access to advisory counsel. Defendant's conduct of his own defense also belies any claim of incompetency. There was no abuse of discretion in concluding that no reasonable grounds existed to question the defendant's competency to conduct his own defense or his competency at sentencing.

The defendant was injured during his arrest and was hospitalized. The first interrogation occurred in the intensive care unit. The defendant was in pain, drifted in and out of consciousness and had to be shaken to get his attention.

(cont. on pg. 11)

The second interrogation occurred a week later in the hospital detention ward. The defendant was in much better physical condition and had taken no medication prior to the interrogation. Both interrogations yielded similar inculpatory comments. The trial court found that the statements made in the first interrogation were involuntary and inadmissible. The trial court also found that the second statement was involuntary but could be used for impeachment. Defendant argues that the trial court's finding that the second statement was involuntary precludes its use to impeach him if he testified. The State responds that the defendant cannot raise this issue because he did not testify at trial. A defendant, whose confession without Miranda warnings was ruled admissible for impeachment, cannot challenge that ruling if he does not testify. *State v. Conner*, 163 Ariz. 97 (1990). All of the policy reasons for declining to consider a defendant's claim in the absence of his testimony apply whether the statement was obtained in violation of Miranda or was involuntary. The court also addresses the merits of the defendant's claim and finds that the defendant's second statement was not coerced or involuntary. Defendant claims that his second statement was the product of the first involuntary interrogation. The second statement was involuntary only in the sense that it was obtained while the defendant was in custody prior to delayed initial appearance. While the statement was involuntary in terms of A.R.S. Sec. 13-3988, it was not coerced. The trial court did not abuse its discretion in finding that the second statement was not coerced and could be used as impeachment evidence.

Defendant claims that the court improperly imposed maximum sentences based upon aggravated factors that were elements of the charged offense. The trial court properly considered the challenged aggravating factors in imposing sentence, notwithstanding that those factors are also elements of the charged offenses. *State v. Lara*, 109 Ariz. Adv. Rep. 26 (1992). The convictions and sentences are affirmed.

(Represented on appeal by James M. Likos MCPD).

*State v. Hatfield*

121 Ariz. Adv. Rep. 54 (Div. 2, 9/8/92)

Defendant was convicted of three counts of sexual conduct with a minor. Trial court determined that application of the mandatory sentencing provisions of A.R.S. Sec. 13-60401 would constitute cruel and unusual punishment. The sentence is remanded for reconsideration under *State v. Bartlett*, 830 P.2d 823 (1992).

Defendant claims that his confessions were involuntary because the police improperly coerced him. During his interrogation, the detective told him the victim was pregnant, when she knew that was not true. Defendant claims that the detective's suggestion that an abortion might be performed, caused him to confess in order to prevent that from happening. The court rejects the argument because the detective had no knowledge of appellee's views on abortion and appellate did not confess when this ruse was attempted.

Defendant claims that the detective's suggestion that the victim instigated the sexual activity and it had just gotten out control renders his confession involuntary. Appellee did confess after the detective made that suggestion. In determining whether a confession was voluntary, the court must

consider the totality of the circumstances and the effect they had upon the defendant's will. Under certain circumstances, police officers may use psychological tactics to elicit statements from a suspect. Under Arizona law, detectives may play upon a defendant's sympathies, use fraud or trickery, and appeal to defendant's conscience so long as there is additional evidence indicating that the defendant's will was not overborne or that the confession was false or unreliable. While the court did not condone the detective's use of this ruse, no clear and manifest error was found. The conviction and sentence are affirmed.

*State v. Moreno*

121 Ariz. Adv. Rep. 56 (Div. 2, 9/8/92)

The defendant was stopped for driving under the influence and failed field sobriety tests. He was given three intoxilyzer tests within a five-minute period. The result of the first two tests were not made part of the record because the testing officer had not observed the appellant for 20 minutes before those tests. The result of the third test was admitted. Defendant claims that the third test should not be admitted. A.R.S. Sec. 13-28-692.03(A) provides that the foundational requirements for admission of the tests require a 20-minute observation period or duplicate tests within .02 percent of each other. Defendant contends that the statute always requires duplicate tests. The statute does not require duplicate tests for a test result that is preceded by a 20-minute observation. Defendant's statutory interpretation would render single test results completely inadmissible and is not the intent of the legislature.

Defendant claims that the jury was improperly instructed on the statutory presumptions regarding alcohol concentration. Defendant claims the presumptions shift to the defendant the burden of persuasion and violate the due process clause. The presumptions found in A.R.S. Sec. 28-692(E) do not violate the due process clause and were included in the jury instructions at appellant's specific request. Any invited error is waived on appeal.

Defendant claims the trial court abused its discretion by refusing to run his state sentence concurrent with a federal sentence not yet imposed. It is error to order that a sentence be served consecutively to a future sentence; *State v. King*, 166, Ariz. 342 (1991). Imposing a state sentence concurrent with an unimposed federal sentence is equally difficult to implement and equally restrictive of the court's sentencing discretion.

*Matter of Maricopa County Juvenile Action No. JV125409*

121 Adv. Ariz. Rep. 43 (Div. 1, 9/10/92)

The juvenile was found delinquent and was placed on supervised probation. The court further ordered that he pay a probation service fee of \$25 per month. The juvenile claims the court has no authority to impose probation fees directly on a juvenile. A.R.S. Sec. 8-241(B) provides that the court shall order the parent of a child to pay a probation fee, but does not grant the court authority to impose the fee on the

(cont. on pg. 12)

juvenile. However, A.R.S. Sec. 8-241(C) provides that the court shall impose on the juvenile reasonable mandatory assessments if the court determines that an assessment is an aid of rehabilitation. Though the court failed to specifically set forth the juvenile's financial status or ability to pay, it is clear from the record that the court considered these factors when it imposed the probation fee. The totality of the evidence suggests that the juvenile could pay and the court considered this as a way to rehabilitate the juvenile. The court's imposition of the probation fee directly on the juvenile was not an abuse of discretion, especially where imposition of the fee upon the parents would serve no rehabilitative purpose as the juvenile no longer resided in their home.

*Lee v. Superior Court*  
121 Ariz. Adv. Rep. 20 (Div. 1, 9/3/92)

In a DUI case, the city court judge granted the defendant's motion to suppress. The state dismissed the charge without prejudice and appealed. The superior court judge reversed the order granting suppression. The state refiled the DUI charge over seven months after the dismissal and over 18 months from the time of the initial charge. Defendant contends that the case must be dismissed. The one year statute of limitations (A.R.S. Sec. 13-107(B)(2)) had run and over six months had passed since the dismissal (A.R.S. Sec. 13-107(F)). The state exercised its statutory right to appeal and properly moved for a dismissal without prejudice to pursue that appeal. The time between the filing of the state's notice of appeal and the issuance of the superior court decision is excluded from the six-month period of A.R.S. Sec. 13-107(F).

#### Volume 124

*Hedlund v. Sheldon*  
124 Ariz. Adv. Rep. 3 (Div. 1, 10/8/92)

Defendant and his co-defendant were charged with first degree murder. A severance was granted because each made inculpatory statements which were inadmissible against their co-defendant. The trial judge ordered that dual juries be empaneled to hear the case. The two juries would hear most of the same evidence, but separate opening statements, closing arguments and some testimony. The Arizona Court of Appeals ordered that the trial judge's ruling be reversed. The Supreme Court overrules *State v. Lambright*, 138 Ariz. 63 (1983) and provides an appendix of trial procedure rules for empaneling and handling dual juries.

*State v. Elmore*  
124 Ariz. Adv. Rep. 31 (Div. 1, 10/22/92)

Defendant was placed on probation. After a revocation hearing, he was sentenced to prison. At his revocation hearing, defendant objected to evidence based upon the psychologist/client privilege. On appeal, defendant claims that the admission of this evidence violated a federal confidentiality statute. Defendant did not object on these grounds and his general privilege objection was insufficient to preserve this issue for appeal.

Defendant claims that his due process rights were violated because the probation terms were too vague. Defendant contends he was not adequately notified of what conduct was required to complete the mandatory drug treatment programs. Appellant's probation officer testified that they specifically discussed the treatment program. The program director testified that the program rules were explained. A program counselor and others testified that they discussed the type of participation needed to complete the program. Defendant was adequately notified of the conduct required to complete the program.

Defendant claims the trial court improperly allowed a non-party to arbitrarily enforce the terms of probation. He contends that the program personnel arbitrarily threw him out of the treatment program. The state, not the program, enforced appellant's probation terms and the trial court, not the program, revoked appellant's probation. The program merely imposed and enforced its standard rules and regulations.

Defendant claims there was insufficient proof that he violated his probation. While the state did not establish defendant failed to participate at all in the program, it did establish that appellant failed to complete the program successfully. The evidence supports a finding that the program's dismissal of the defendant was reasonable and that defendant failed to successfully complete the program.

Defendant contends that the trial court should not have considered the presentence report because it contained information concerning appellant's prior bad conduct and the biased opinion of appellant's probation officer. The report contains a history of appellant's bad conduct because the probation officer based her sentencing recommendation in part on defendant's propensity to reoffend. This was a valid sentencing consideration. The revocation and sentence are affirmed.

*State v. Rowan*  
124 Ariz. Adv. Rep. 42 (Div. 2, 10/27/92)

Defendant was convicted of maintaining a house of prostitution and transporting a person for purposes of prostitution. Defendant claims that he should have received a judgment of acquittal on the charge of transporting a person for purposes of prostitution because there was no evidence that defendant knowingly transported anyone through or across the state. A.R.S. Sec. 13-3201 prohibits knowingly transporting through or across this state any other person for the purpose of prostitution. The trial judge denied a motion for judgment of acquittal, finding that the distance traveled was immaterial. The legislative intent behind A.R.S. Sec. 13-3210 was to stop the forced transportation of women into this country for purposes of prostitution. The statute was intended to serve a nonlocal interest and was not intended to prohibit one local resident from driving another local resident within the same county to engage in prostitution. A.R.S. Sec. 13-3210 requires something more than simply driving someone down the street. The trial court erred in denying appellant's motion for a judgment of acquittal.

(cont. on pg. 13)

Defendant contends that the trial court erred in denying his motion for a directed verdict on the charge of operating or maintaining a prostitution enterprise. Evidence established that defendant answered a phone call, discussed a price for a service, drove the prostitute to the motel and was apprehended with a beeper matching the correct telephone number. This evidence, along with the evidence of the act of prostitution, was sufficient to prove defendant engaged in a prostitution enterprise under A.R.S. Sec. 13-3211(6). There was also sufficient evidence to show that appellant operated or maintained a prostitution enterprise under A.R.S. Sec. 13-3211(3).

The police contacted defendant through an advertisement in a newspaper replete with listings of sex-related services. Defendant's advertisement had no picture and did not explicitly offer sexual relations. Other ads were considerably more graphic and less discrete. Defendant objected to the admission of the entire newspaper on the grounds that it was prejudicial. The trial judge overruled the objection and admitted the entire paper. Defendant's ad specifically advertised a massage. The entire paper was relevant to show that the massages offered were sexually oriented rather than therapeutic. The paper was admissible to complete the story to the jury. No abuse of discretion was shown.

During trial, defendant admitted that he had a prior felony conviction. He claims the trial court failed to advise him that if he was on felony probation, he would be required to serve any sentence flat. The trial judge advised him that he would be probation eligible and failed to advise him of the statutorily mandated flat sentence. Rule 17.2(b) requires that defendant admitting a prior conviction be advised of any special conditions regarding sentencing. The court is unable to determine from the record whether defendant understood the effect an admission of a prior conviction and probation status would have on his possible sentence. The case is remanded for an evidentiary hearing relating to appellant's admission of the prior conviction.

#### Volume 125

*State v. Cordero*

125 Ariz. Adv. Rep. 22 (Div. 2, 10/30/92)

#### I. Conspiracy

Defendants Cordero and Lara-Aguilar stole a vehicle. Their compatriot, Contreras, drove the car. During flight from the police, Contreras nearly hit a small child and a woman. Cordero and Lara-Aguilar were charged with Endangerment, Unlawful Flight and other crimes. The trial court ordered the charges of endangerment and unlawful flight be dismissed.

The State appealed, arguing that under the *Pinkerton* doctrine, if the defendant is guilty of conspiracy, the defendant is also guilty of offenses committed by his co-conspirators acting within the scope and furtherance of the conspiracy. Because endangerment and unlawful flight offenses were reasonably foreseeable crimes expected to occur in a conspiracy to steal a car and drive it to Mexico, the defendants were vicariously liable under *Pinkerton*. The *Pinkerton* doctrine is not viable in Arizona because the conspiracy statute, Sec. 13-1003, does not address substance crimes committed during the course or in furtherance of a

conspiracy. (But see *State ex rel. Woods v. Superior Court*, 169 Ariz. 552 (App. 1991)).

Although the Superior Court was correct in dismissing based on the conspiracy doctrine, the defendant could have been held to answer for the same charges based on accomplice liability. When read together, Sec. 13-301 and Sec. 13-303 require that an accomplice must knowingly and with criminal intent participate, associate or concur with another in the commission of a crime. There was sufficient evidence to establish probable cause based on accomplice liability.

#### II. Due Process and Fair Trial

Defendants claim their right to a fair trial and due process were infringed upon where the court dismissed a juror who could not speak English. A person who does not read and write English may be constitutionally barred from jury service.

*State v. Tober*

125 Ariz. Adv. Rep. 17. (Sup. Ct. 11/3/93)

Tober and Black were indicted for sale of unregistered securities under A.R.S. Sec. 44-1841 and transactions in securities by unregistered dealers under Sec. 44-1842. They raised money for a real estate venture by selling promissory notes to investors. Defendants claim that these notes were not securities. The defendants moved to quash the indictment for vagueness. The Arizona Supreme Court held that for registration purposes, A.R.S. Sec. 44-1801(22) (which defines "security" as "any note") is not vague because other sections of the chapter make it clear which kind of notes are not securities. An unconstitutionally vague statute is one that requires a person to guess at its meaning. Because the section on securities makes it clear which type of notes are not securities, no guessing was required. The Supreme Court reverses the Court of Appeal's opinion, *State v. Tober*, 170 Ariz. 573, and remands the matter for consideration of the remaining issues on appeal.

#### Volume 127

*State v. Cramer*

127 Ariz. Adv. Rep. 28 (CA 2, 11/27/92)

Defendant was charged with the unlawful production of marijuana with a weight of eight pounds or more. In their investigation of the defendant, police used an infrared heat-seeking device which revealed an abnormal amount of heat coming from the interior of the house. Utility bills showed that defendant was using two to three times more water and electricity than average. An anonymous informant further reported observing 50 to 100 marijuana plants in the defendant's bedroom. Using this information, the police obtained a search warrant. The defendant was convicted and appealed.

At trial defendant was precluded from presenting a medical necessity defense. The legislature has determined that the harm caused by the production of marijuana is such that

(cont. on pg. 14)

no necessity will justify its illegal production. The legislature has expressly provided detailed exemptions by statute. The burden of proving that one is within a protected category is on the defense. Since the defendant has not met this burden, the defendant was not entitled to a necessity instruction.

Immediately prior to trial, the trial judge precluded defendant's primary defense. Defendant requested a continuance, but received only a one-day continuance. Denial of more than a one-day continuance for the defendant to develop a new defense was within the trial court's discretion. The defendant was not prejudiced by this ruling.

The defendant next argued that the marijuana should have been suppressed because the police lacked probable cause. Looking at the totality of the circumstances, the magistrate had sufficient information to issue a search warrant. Regarding the anonymous informant's reliability, the defendant waived any challenges by not providing the trial court with a sufficient factual record. With regard to the infrared heat-measuring device, the court cited U.S. Supreme Court cases for the proposition that utilization of extra-sensory, non-intrusive equipment does not constitute a search for purposes of the Fourth Amendment.

Defendant argued that his due process rights were violated when the court failed to instruct the jury that the government had the burden to prove the weight of marijuana beyond a reasonable doubt. The Court of Appeals looked to (1) the verdict form which included a special interrogatory asking jurors to determine weight, (2) the indictment, and (3) defendant's closing argument which stated that the state had to prove the weight of marijuana beyond a reasonable doubt before they could find the defendant guilty. The conviction was affirmed.

*State v. Johnson*  
127 Ariz. Adv. Rep. 5 (SC, 11/24/92)

Defendant was charged with two counts of aggravated assault and one count of first degree burglary. On the opening day of trial the judge instructed the jury that defendant was innocent until proven guilty beyond a reasonable doubt. On the next day, counsel gave closing arguments in which both reiterated the State's burden of proof. The trial judge, however, did not re-instruct the jury on the State's burden. Neither counsel requested the re-instruction or objected to the trial judge's failure to give it. The prosecutor did request the trial judge to modify the special form of verdict to include an instruction that the allegation of dangerousness had to be proven beyond a reasonable doubt. The judge immediately gave the jury the following oral charge:

"I want to make it perfectly clear that your decision of guilty or not guilty must be based upon your conviction beyond a reasonable doubt, whatever that conviction is.

If on any count you find the defendant guilty, then your determination as to whether the allegation of dangerousness is true or not true must also be beyond a reasonable doubt."

Again, neither counsel objected. Defendant was convicted on all counts.

The Supreme Court reversed the conviction and remanded for a new trial. The court held that judges must instruct juries on basic legal principles, such as the burden of proof and reasonable doubt, before deliberations. This re-instruction must take place regardless of the brevity of the trial. The court could not find beyond a reasonable doubt that the verdict was unaffected. It held that the failure to re-instruct the jury on basic legal principles vital to defendant's rights, coupled with the erroneous burden of proof instruction given just before the jury began deliberations, mandated a new trial (see also dissents).

*State v. Martin*  
127 Ariz. Adv. Rep. 22 (CA 1, 12/10/92)

Defendant was convicted in municipal court of driving a motor vehicle while under the influence of an intoxicating liquor. Prior to trial the defendant filed a motion to dismiss the driving under the influence charge (A.R.S. Sec. 28-692(A)(1) on vagueness grounds. The defendant also filed a motion to dismiss the charge of having a BAC of .10 within two hours of driving (A.R.S. Sec. 28-692(A)(2)) on vagueness and overbreadth grounds. The motions were denied. On appeal, the judgment was affirmed.

Rule 13(b) limits appellate review solely to the facial validity of a challenged statute when an action is originated in municipal court and appealed to superior court. Its jurisdiction does not extend to examining the application of the statute to an individual defendant. If the statute is constitutional, the inquiry is at an end.

A.R.S. Sec. 28-692(A)(1) is not vague. Defendant argued that the words "impaired to the slightest degree" does not provide a standard by which an ordinary person can know what is prohibited and act accordingly. The court disagreed, holding that the stringency of the standard "to the slightest degree" effectively puts the public on notice that one who drinks and drives does so at his own peril.

Defendant next argued that A.R.S. Sec. 28-692(A)(2) is vague and contains an ambiguous standard of a BAC of .10 or more which does not relate to the statute's purpose. By establishing a specific, objective criterion of a pre-defined BAC with which to compare an individual's BAC, the statute provides notice of the prohibited conduct with sufficient particularity. The statute gives fair notice that a BAC of .10 within a two-hour period of driving violates A.R.S. Sec. 28-692(A)(2).

The defendant also claims that A.R.S. Sec. 692(A)(2) is overbroad. Since the defendant does not allege the statute infringes on First Amendment freedoms and is not a member of a class of "innocent" defendants, the defendant lacks standing. To convict a defendant of A.R.S. Sec. 28-692(A)(2), the State must prove beyond a reasonable doubt that defendant's BAC was .10 or more within two hours of driving. The affirmative defense in Sec. 28-692(B) does not shift this burden as the defendant had claimed.

(cont. on pg. 15)

The court then dismissed defendant's claims of double jeopardy and privilege against self-incrimination, holding that these two arguments exceeded its limited jurisdiction.

Editor's Note: Special recognition and thanks go to the following attorneys who assisted with this month's Arizona Advanced Reports summaries: John Brisson, Greg Parzych, Pat Ramirez, Paul Ramos, and Genii Rogers.

## January Jury Trials

### December 30

Douglas K. Harmon: Client charged with burglary (3rd degree). Trial before Judge Hendrix ended January 05. Client found guilty. Prosecutor T. Glow.

### January 04

Timothy J. Agan: Client charged with aggravated DUI. Trial before Judge Ryan ended January 05. Client found guilty. Prosecutor Z. Manjencich.

Timothy J. Ryan & Roland J. Steinle: Client charged with murder (2nd degree), 2 counts aggravated assault dangerous, 2 counts DUI, and 4 counts endangerment. Investigator George Beatty. Trial before Judge Sheldon ended January 08. Client found guilty of manslaughter, 2 counts aggravated assault, 2 counts DUI, and misdemeanor endangerment. Prosecutor N. Miller.

### January 05

David I. Goldberg: Client charged with trespassing and criminal damage with 2 priors (on parole). Trial before Judge D'Angelo ended January 05. Client found not guilty. Prosecutor P. Howe.

### January 06

Reginald L. Cooke: Client charged with aggravated DUI. Investigator Michael Fusselman. Trial before Judge Hall ended January 12. Client found guilty of a lesser-included offense (misdemeanor). Prosecutor M. Spizzirri.

Robert C. Corbitt: Client charged with solicitation for molestation of a child and 4 counts of sexual indecency to a minor. Trial before Judge Grounds ended January 15. Client found guilty. Prosecutor S. Evans.

Karen Marie A. Noble: Client charged with murder (1st degree). Investigator Norman C.P. Jones. Trial before Judge Galati ended January 22. Client found not guilty of 1st degree murder; guilty of murder (2nd degree) and aggravated assault. Prosecutor B. Shutts.

### January 07

William Foreman: Client charged with 2 counts burglary with 2 priors (on parole). Trial before Judge Bolton ended January 14 with a judgment of acquittal on Count I; hung jury on Count II. Prosecutor S. Yares.

John F. Movroydis: Client charged with resisting arrest and aggravated assault. Investigator Norman C.P. Jones. Trial before Judge Cole. Client found not guilty on both counts. Prosecutor J. Grimley.

Daniel G. Sheperd: Client charged with 2 counts aggravated assault and criminal trespassing. Trial before Commissioner Ellis. Client found guilty on 1 count aggravated assault and criminal trespassing; not guilty on second count aggravated assault. Prosecutor G. McCormick.

### January 11

Thomas R. Kibler: Client charged with possession of narcotic drugs and possession of drug paraphernalia. Trial before Judge D'Angelo ended January 13. Client found guilty of possession of drug paraphernalia; hung jury on possession of narcotic drugs. Prosecutor V. Harris.

John Taradash: Client charged with possession of narcotic drugs. Investigator Harold Schwerin. Trial before Judge Seidel ended January 13. Client found not guilty. Prosecutor M. Armijo.

Kevin D. White: Client charged with offering to sell narcotic drugs. Investigator Robert Thomas. Trial before Judge Portley ended January 14. Client found guilty. Prosecutor R. Harris.

### January 12

Roland J. Steinle: Client charged with offering to sell narcotic drugs. Trial before Judge Sheldon ended January 14. Client found guilty. Prosecutor C. Smyer.

Thomas M. Timmer: Client charged with child molestation (14 counts). Investigator Daniel Beever. Trial before Judge Hertzberg ended January 27. Hung jury on all counts; new trial starts March 4. Prosecutor L. Schroeder-Nanko.

### January 14

Nina T. Stenson: Client charged with aggravated DUI. Investigator Michael Fusselman. Trial before Judge Brown ended January 27. Client found guilty. Prosecutor J. Burkholder.

Stephen J. Whelihan: Client charged with aggravated assault. Investigator James Allard. Trial before Judge Ryan ended January 21. Client found guilty. Prosecutor G. McCormick.

(cont. on pg. 16)

January 18

Jerry M. Hernandez: Client charged with 2 counts aggravated assault, dangerous. Trial before Judge Grounds. Client found guilty of disorderly conduct (count II); count I dismissed. Prosecutor B. Miller.

January 20

Jeffrey L. Victor: Client charged with possession of dangerous drugs, possession of marijuana, 3 counts possession of prescription drugs, and possession of drug paraphernalia. Investigator James Allard. Trial before Judge Hotham ended January 22. Client found guilty of possession of drug paraphernalia; not guilty of possession of dangerous drugs and 2 counts possession of prescription drugs; possession of marijuana and 1 count possession of prescription drugs dismissed. Prosecutor Hinchcliffe.

January 21

Slade A. Lawson: Client charged with aggravated assault, dangerous, and criminal damage. Investigator David Moller. Trial before Judge Sheldon ended January 25. Client found not guilty. Prosecutor D. Udall.

Leonard T. Whitfield: Client charged with burglary. Investigator Maria Breen. Trial before Judge Portley ended January 25. Client found guilty. Prosecutor K. Mills.

January 25

Susan W. Bagwell: Client charged with aggravated assault, dangerous. Investigator Donald Tadiello. Trial before Judge Hertzberg ended on January 28 with a judgment of acquittal on the charge of aggravated assault; guilty on lesser charge of simple assault, misdemeanor. Prosecutor Steve Lynch.

J. Scott Halverson: Client charged with child abuse. Investigator George Beatty. Trial before Judge Grounds ended January 28. Client found not guilty. Prosecutor N. Miller.

John Taradash: Client charged with sale of narcotic drugs. Investigator Norman C.P. Jones. Trial before Commissioner Ellis ended with a hung jury. Prosecutor D. Schlittner.

January 26

Gary J. Hochsprung: Client charged with aggravated assault, dangerous. Investigator Daniel Beever. Trial before Judge Ryan ended on January 29. Client found not guilty on aggravated assault; guilty on misdemeanor assault. Prosecutor G. Thackeray.

January 29

Eugene A. Barnes: Client charged with possession of narcotic drugs. Trial before Judge Ryan ended on February 2. Client found not guilty of possession of marijuana; guilty of possession of narcotic drugs. Prosecutor Deborah Schumacher.

\*\*\*\*\*

Special Mention: Although the following trial did not go to the jury for deliberation, the special circumstances of the case merit listing in this column.

December 01, 1992

Leonard T. Whitfield: Client charged with Possession of Forgery Device, Possession of Dangerous Drugs, Possession of Narcotic Drugs, Sale of Narcotic Drugs and Possession of Drug Paraphernalia, committed while on parole and with 7 priors. After 2½ weeks of trial, defendant entered a plea of guilty on December 16, pleading to Possession of Drug Paraphernalia with a sentence of 330 days, time served. Prosecutor: J. Fisher. ^

Sentencing Advocacy

Peggy Simpson, Client Services Coordinator (C.S.C.): Client had three prior felony convictions for obtaining dangerous drugs by fraudulent means as was the current offense. Pre-plea attempts to obtain a probation-eligible plea failed. A written proposal was submitted by C.S.C. with a recommendation for "the most lenient term possible under the law." Stating the reasons given in the proposal, the judge sentenced the client to less than the presumptive term.

Attorney: Nina Stenson ^

Personnel Profiles

Colleen McNally will begin employment with us as a trial attorney on March 08. Colleen has spent the past two years in the Child Protective Services Unit of the Attorney General's Office. Prior to that, she worked at the Maricopa County Attorney's Office for three years, serving in a trial group, their Narcotics Bureau, and their Sex Crimes Bureau. Colleen is the spouse of Mike Fusselman, Lead Investigator for Trial Group D.

Shanon Rath joined our office as a legal secretary in Appeals on February 16. She recently moved to Arizona from Minnesota where she worked as a legal secretary for an attorney in a private practice which covered criminal, juvenile, and family law. ^

## Training Division U.S. Constitutional Arsenal

**Appellate Due Process** - *Evitts v. Lucey*, 105 S.Ct. 830 (1985).

**Cruel and Unusual Punishment** - *Trop v. Dulles*, 78 S.Ct. 590 (1958).

**Double Jeopardy** - *Benton v. Maryland*, 89 S.Ct. 2056 (1969).

**Fair and Impartial Judge: Trial** - *Johnson v. Missouri*, 91 S.Ct. 1778 (1971); **Appeal** - *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986).

**Fair and Impartial Jury** - *Irvin v. Dowd*, 81 S.Ct. 1639 (1961).

**Fair Trial in a Fair Tribunal** - *In re Murchison*, 75 S.Ct. 623 (1955).

**Fundamental Fairness** - *Lisenba v. California*, 62 S.Ct. 280 (1941).

**Guiding Hand of Counsel** - *Brooks v. Tennessee*, 92 S.Ct. 1891 (1972).

**No Evidence of Guilt** - *Thompson v. Louisville*, 80 S.Ct. 624 (1960).

**Presumption of Innocence** - *Estelle v. Williams*, 96 S.Ct. 1691 (1976); *Taylor v. Kentucky*, 98 S.Ct. 1930 (1978).

**Presumption of Judicial Vindictiveness** - *North Carolina v. Pearce*, 89 S.Ct. 2072 (1969).

**Presumption of Prosecutorial Vindictiveness** - *Blackledge v. Perry*, 94 S.Ct. 209 (1974).

**Proof Beyond Reasonable Doubt** - *In re Winship*, 90 S.Ct. 1068 (1970).

**Prosecutorial Vindictiveness** - *U.S. v. Goodwin*, 102 S.Ct. 2485 (1982).

**Right of Self-Representation** - *Faretta v. California*, 95 S.Ct. 2525 (1975).

**Right to a Public Trial** - *In re Oliver*, 68 S.Ct. 499 (1948).

**Right to Be Free From Self-Incrimination** - *Harris v. New York*, 90 S.Ct. 643 (1971).

**Right to Be Present in the Courtroom** - *Illinois v. Allen*, 90 S.Ct. 1057 (1970).

**Right to Compulsory Process** - *Washington v. Texas*, 87 S.Ct. 1920 (1967); *United States v. Valenzuela-Bernal*, 102 S.Ct. 3440 (1982).

**Right to Conflict-Free Counsel** - *Holloway v. Arkansas*, 98 S.Ct. 1173 (1978); *Cuyler v. Sullivan*, 100 S.Ct. 1708 (1980).

**Right to Confrontation** - *Pointer v. Texas*, 85 S.Ct. 1065 (1965).

**Right to Counsel: Felony Trial** - *Gideon v. Wainwright*, 83 S.Ct. 792 (1963); **Misdemeanor Trial** - *Argersinger v. Hamlin*, 92 S.Ct. 2006 (1972); *Scott v. Illinois*, 99 S.Ct. 1158 (1979); **Appeal** - *Douglas v. California*, 83 S.Ct. 814 (1963).

**Right to Cross-Examination** - *Pointer v. Texas*, 85 S.Ct. 1065 (1965).

**Right to Defense Expert** - *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985).

**Right to Effective Assistance of Counsel: Trial** - *McMann v. Richardson*, 90 S.Ct. 1441 (1970); **Appeal** - *Evitts v. Lucey*, 105 S.Ct. 830 (1985).

**Right to Notice** - *Cole v. Arkansas*, 68 S.Ct. 514 (1948).

**Right to Present Defense** - *Chambers v. Mississippi*, 93 S.Ct. 1038 (1973).

**Right to Speedy Trial** - *Klopfer v. North Carolina*, 87 S.Ct. 988 (1967); *Barker v. Wingo*, 92 S.Ct. 2182 (1972).

**Right to Testify** - *Rock v. Arkansas*, 107 S.Ct. 2704 (1987).

**Test for Effective Assistance of Counsel** - *Strickland v. Washington*, 104 S.Ct. 2052 (1984).

**Trial Only When Competent** - *Pate v. Robinson*, 86 S.Ct. 836 (1966); *Drope v. Missouri*, 95 S.Ct. 896 (1975).

**Unconstitutional Insufficiency of the Evidence ("No Rational Trier of Fact" Test)** - *Jackson v. Virginia*, 99 S.Ct. 2781 (1979).

**Unconstitutional Prosecutorial Misconduct** - *Donnelly v. DeChristoforo*, 94 S.Ct. 1868 (1974).

**Maricopa County Public Defender  
Training Schedule**

DATE & TIME	SUBJECT	FACULTY
02/25/93 2:00-4:00 Training Facility	<i>PPD &amp; Gangs, Part II</i>	Sgt. Paul Ferrero, PPD
02/26/93 10:00-4:00 Supervisors Auditorium	<i>HAVE YOU LOST YOUR APPEAL? Strategies For Winning At Trial Or On Appeal</i>	Helene Abrams, Carol Carrigan, Brent Graham, Jim Kemper, Charles Krull, Paul Prato and Ed Bassett
03/11/93 2:00-4:30 Training Facility	<i>AIDS &amp; the Criminal Justice System</i>	Dr. Lynne Kitei, Patty Jo Angelini Christopher Johns
03/19&20/93 9:00-4:30 9:00-1:00 Supervisors Auditorium	<i>Indian Crimes Seminar</i>	Federal and State Practitioners including 9th Circuit Court of Appeals Judge William Canby and Mara Siegel
*05/5-8/93 Training Facility	<i>First Annual MCPD Trial College</i>	To Be Determined
05/13 & 14/93 Training Facility	<i>Mental Health Training</i>	To Be Determined
*05/28/93 Supervisors Auditorium	<i>Criminal Law Ethics</i>	Robert W. Doyle and Panel
*06/25/93	<i>DUI Seminar</i>	To Be Determined

\* Tentative dates.