

# for The Defense

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

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## Contents:

LEGISLATION	
* Legislative Summary	Page 1
MOTIONS	
* Motions and Briefs Update	Page 3
ARIZONA ADVANCE REPORTS	
* Volumes 134 & 135	Page 5
MAY JURY TRIALS	Page 8
PERSONNEL PROFILES	Page 9
TRAINING	
* Upcoming Support Staff Training	Page 10

## Legislative Summary

By Christopher Johns

This year the legislature set as a priority adjourning before a self-imposed 100-day deadline, however, not before it passed major legislation effecting the criminal justice system. While the much heralded criminal code revisions captured the headlines, with some predicted beneficial results for our clients, numerous other bills also were passed that are less generous.

The criminal code revisions are effective January 1, 1994; however, many other bills are effective on July 17, 1993. A few emergency measures are effective even earlier. Practitioners should check each legislation for the applicable effective date. Further reference to A.R.S. §§ 1-241 and 243 also may be helpful.

For purposes of this summary, legislation will be listed by popular title and by chapter number for easy reference in the Arizona Legislative Service.

### *SB 1009: Death Penalty By Injection (Chapter 2)*

This bill amends A.R.S. § 13-704 to conform the November 1992 voter-approved (constitutional amendment) use of lethal injection instead of lethal gas to legally kill people convicted of first degree murder. The legislation permits a person sentenced to death before November 23, 1992 to choose between lethal injection or gas. It further amends A.R.S. § 13-705 to give the DOC director authority to appoint a designee to be present at executions, and amends A.R.S. § 13-706 to require the return on death warrant to the trial court and to the Arizona Supreme Court. The legislation was passed with an emergency clause and is effective February 11, 1993.

### *SB 1005: Sex Registration (Chapter 33)*

This legislation amends A.R.S. § 13-3821 so that the requirement for sex offenders from another "state" to register in Arizona is changed to another "jurisdiction." The purpose is to insure that other "jurisdictions" which are technically not states are included under the sex registration statute. Presumably, the statute now includes entities like military bases, federal parks, and Indian reservations. Because of an emergency clause the bill is effective March 26, 1993.

### *SB 1028: Continuous Child Sexual Abuse (Chapter 33)*

This bill amends A.R.S. § 13-604.01, and creates A.R.S. § 13-1417, the new offense of "continuous sexual abuse of a child." A person who commits three or more acts of sexual conduct with a minor, sexual assault, or child molestation over a period of three months or more is guilty of a class 2 felony, punishable as a dangerous crime against children. The bill provides that an accused may not be charged with any other sexual felony offense involving a victim within the same time period as the alleged abuse occurred. A defendant may only be charged with one count of continuous child sexual abuse unless there is more than one victim. It becomes effective July 17, 1993.

(cont. on pg. 2)



*SB 1252: Victim Harassment (Chapter 63)*

This legislation amends A.R.S. § 13-2921(A)(1), so that certain forms of harassment are now a class 6 felony. Other forms of harassment, for example, following a person in public, become a class 1 misdemeanor (increased from a class 3 misdemeanor). It is effective July 17, 1993.

*HB 2118: Radio Communication Interruption (Chapter 74)*

This bill creates A.R.S. § 13-2922 and makes it unlawful for a person to knowingly or recklessly interfere with a police, fire, or medical emergency or non-emergency communication. Interference with an emergency communication is a class 6 felony, and non-emergency communication interference is a class 1 misdemeanor. It is effective July 17, 1993.

*HB 2048: Death Sentence and Life Sentence (Chapter 153)*

This bill amends A.R.S. § 13-703 and creates A.R.S. §§ 13-4021 and 4022. For offenders convicted of first degree murder, the trial court may now impose a sentence of "natural life" that is not subject to commutation or parole, work furlough or work release. It also adds to the list of aggravating factors a "serious offense," whether preparatory or completed (formerly use or threat of violence). Serious offenses are defined and include such crimes as robbery and burglary in the first degree.

**FOR THE DEFENSE**

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**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.

Prior statutes relating to competency for execution are repealed and replaced with A.R.S. §§ 13-4021 and 4022. Under the new provisions, if a death sentence is imposed, a motion may be filed in superior court for a review of the offender's competency. The execution of mentally incompetent offenders remains prohibited. However, this bill allows for a special action with the Arizona Supreme Court to consider a superior court's decision regarding competency. It becomes effective July 17, 1993.

*HB 2097: Building Fortifications and Drugs (Chapter 161)*

This bill adds A.R.S. § 13-3419 to the code and makes it a crime to fortify a home or dwelling to sell, manufacture, or distribute dangerous or narcotic drugs with the intent to impede law enforcement entry. A violation of this provision is a class 4 felony. A lessee or occupant who purposely uses a building for selling, manufacturing or distributing drugs is guilty of a class 6 felony. These provisions are effective July 17, 1993.

*SB 1049: Omnibus Criminal Code Revisions (Chapter 255)*

This bill makes numerous revisions to various statutes in the criminal code. In general it provides the following:

\*Requires offenders sentenced to prison to serve the entire sentence imposed except that a 15% reduction may be granted for good behavior.

\*Requires all offenders released from prison to be supervised for a period of 15% of their sentence.

\*Eliminates DOC's early release mechanisms and abolishes parole.

\*Replaces the parole board with a "board of executive clemency," and a sentencing and parity review committee is established to review sentences.

\*Eliminates "Hannah priors" and replaces it with sentencing ranges that apply to repetitive offenders.

\*Restricts the use of prior felony convictions for enhancement purposes depending upon how old they are.

\*Allows judges to increase or decrease sentences by up to 25%.

\*Establishes threshold amounts of drugs to determine whether an offender will still be probation eligible.

\*Amends the felony murder rule to include marijuana and dangerous drug offenses over certain statutory amounts and involving transportation for sale.

(cont. on pg. 3)

\*Allows the trial court to increase or decrease the presumptive sentence for first degree dangerous crimes against children by 7 years after a finding of mitigating or aggravating circumstances.

\*Prescribes a presumptive sentence of 5 years for sexual abuse. In such cases, the court may increase or decrease the sentence by 2½ years.

\*Allows the court to impose concurrent sentences for child molestation (touching the private parts) if the offense does not involve more than one victim.

\*Provides a defense for consensual sexual conduct with a minor if the victim is between the ages of 15 and 17, and the offender is less than 19 or is attending high school and is not more than two years older than the victim.

\*Increases the threshold amounts for theft and establishes a "supertheft" sentence for amounts over \$100,000.

\*Requires the Administrative Office of the Court and the Board of Executive Clemency (formerly the Board of Pardons and Parole) to devise a plan and implement the transition of community supervision from DOC to the court by December 15, 1996.

\*Provides that the bill is effective on January 1, 1994, and only applies to persons who commit crimes on or after that date.

#### *SB 1139: Guilty But Insane (Chapter 256)*

This bill amends A.R.S. §§ 13-502 and 503, and rewrites Arizona's present criminal insanity law by establishing a verdict of "guilty except insane." A person may be found guilty but insane if at the time of the commission of the offense she was afflicted with a mental disease or defect that causes the person to not know right from wrong. Moral decadence, passion, depravity, alcohol/drug use, disassociative disorders, post-traumatic stress syndrome, or physical injury does not constitute insanity. If the offender's act did not cause death, physical injury or the threat of physical injury or death, she will be committed to a secure state mental health facility for 75 days. A hearing will be held to determine whether the offender should be released or civilly committed. If the offender's crime caused death or physical injury, the court shall place the defendant under the supervision of a newly created "psychiatric security review board" to oversee commitment for the presumptive term of the crime involved. This legislation is effective January 1, 1994.

#### *Other Legislation*

In addition to the above statutory changes, several other laws should be noted. Revisions were made to laws allowing possession of guns on school grounds (SB 1088). Effective August 1, 1993, all persons convicted of sexual offenses must give a blood sample for a DNA test before being released from jail or prison (and must pay for the cost of the test).

Effective July 17, 1993, the counsel for children's behavioral health is required to establish a task force to examine treatment of juvenile sex offenders (SB 1217).

Also, knowingly removing or altering a tattoo or other marking on racing greyhounds is made a class 6 felony effective July 17, 1993 (H 2357). Home arrest and work furlough statutes are amended to add to the list of conditions excluding eligibility that the offender may not be subject to outstanding warrant or detainer by INS (SB 1301).

Plans are underway for a statewide training program sponsored by various agencies (including our office) on November 3rd, and an office-sponsored seminar in early December.

### Motions and Briefs Update

Editor's Note: The Maricopa County Public Defender's Office Brief Bank contains motions, jury instructions and appellate briefs. Terminals for the Brief Bank are located on the 10th Floor in the Main Library, the 3rd Floor in the Appeals Library, Durango Juvenile Facility, and the Southeast Court Center for Trial Group C. The Brief Bank is for the use of county public defenders. The following notes some of the recent deposits. Please retrieve information directly from the Brief Bank.

#### Briefs

*State v. Baxter*, 1 CA-CR 93-0022 (Opening Brief Filed May 7, 1993).

**Author: Stephanie L. Swanson.** This brief argues that the introduction of four prior felony convictions to impeach the accused was cumulative and therefore a violation of due process of law.

*State v. Tremble*, 1 CA-CR 92-0668 (Reply Brief Filed May 25, 1993).

**Author: Larry Matthew.** This reply brief argues two main issues. First, the trial court abused its discretion by permitting the state to introduce irrelevant, inflammatory and unfairly prejudicial evidence of street gang activity, since it was not connected in any way to the cause or reason for a shooting. No "affirmative link" was established to tie the accused to gang activity as a motive. Second, newly discovered evidence was presented to the trial court after the verdict; however, a motion to vacate judgment was denied.

(cont. on pg. 4)

*State v. Nisius*, 1 CA-CR 92-1565 (Opening Brief Filed May 7, 1993).

**Author: Garrett Simpson.** This brief argues that the trial committed manifest error by failing to suppress evidence. Not only was no probable cause shown, but the state itself failed to present enough evidence to even support probable cause. Based only on a generalized description of a "suspicious" and "older Toyota pick-up truck", police stopped one five miles from a robbery. Good discussion of Fourth Amendment law.

*State v. Pry*, 1 CA-CR 93-0260 (Opening Brief Filed May 21, 1993).

**Author: Garrett Simpson.** This brief argues that the case must be remanded for resentencing because the trial court failed to consider mitigating evidence, and since it incorrectly believed that the offender was entitled to earn release credits. In this case the court failed to read medical records submitted on the defendant's behalf. Further, the court erroneously believed that the defendant was entitled to earned release credits (a mistake of law -- under A.R.S. §§ 31-411, 41-1604.06(B) and 41-1604.07, persons given sentences for dangerous crimes against children in the second degree earn no release credits).

*State v. Schoen*, 1 CA-CR 92-0654 (Reply Brief Filed May 24, 1993).

**Author: James Rummage.** This reply brief argues that the trial court erred by failing to allow appellant to introduce evidence of his statements to the police. The trial court prohibited introduction of statements because it concluded that Rule 803(3) was "not intended to permit exculpatory statements by defendants to be offered which are otherwise excludable as unreliable hearsay under the guise of demonstrating some mental state of mind when they made the statements."

*State v. Hughes*, 1 CA-CR 93-0037 (Opening Brief Filed May 23, 1993).

**Author: James Kemper.** This brief argues that the trial court restricted defense counsel's right to present a closing argument in the trial of a prior conviction. Defense counsel's argument focused on the single "latent" fingerprint and sentencing minute entry relied upon to prove the prior. Despite testimony about the print, the trial court sustained an objection to defense counsel's argument on "latent prints."

### Motions

*State v. Roscoe*, CR 127656 (Motion to Preclude The Consideration of Victim Impact Evidence -- Filed April 26, 1993).

**Author: Roland Steinle.** This post-trial motion argues that the state should be precluded from introducing victim impact evidence when considering aggravating and mitigating circumstances required by A.R.S. § 13-702 in a capital case. It argues further that Arizona continues to follow this prohibition adopted in *Booth v. Maryland*, despite *Booth's* recent reversal in *Payne v. Tennessee*. Motion granted.

*State v. Phillips*, TR92-03555CR (Motion to Preclude Defendant's BAC Test Results -- Filed May 1993).

**Author: Gary Kula.** This motion argues that the client's second sample should be precluded because its analysis by an expert shows an error factor more than twice permitted by regulation. Since the state failed to provide a reasonably reliable second sample, it should be suppressed. Good motion for DUI cases with BAC tests.

*State v. Kidde*, CR 92-09979, 92-10458 (Motion for Attorney-Conducted Voir Dire -- Filed April 1993).

**Author Ray Schumacher.** This motion argues for attorney-conducted voir dire under Rule 18.5. Good analysis of case law and argument based on the less fettered right to voir dire in civil cases.

*State v. Carranza*, CR 92-09915 (Motion to Sever Counts -- Filed April 1993).

**Author: Louise Stark.** This motion argues for severance of counts in a second degree murder case. Good discussion of basic severance law.

*State v. Roberts*, CR 93-02258 (Motion to Suppress -- Filed May 1993).

**Author: Elizabeth Feldman.** This motion argues that the search of the defendant's pack of cigarettes after he was stopped for a traffic violation was illegal. Good summary of Arizona automobile search law.

*State v. Frontuto*, CR 93-00697 (Motion to Suppress -- Filed May 1993).

**Author: Carole Carpenter.** This motion argues that the police execution of a search warrant violated the "knock and announce" rule. Since the police failed to give the accused reasonable time to answer the door before breaking in, they violated A.R.S. § 13-3916. Good discussion of Arizona law on knock and announce.

## Arizona Advance Reports

### Volume 134

*State v. Freeman*

134 Ariz. Adv. Rep. 15 (Div. I, 3/18/93)

Defendant, while imprisoned with A.D.O.C., obtained a number of credit card accounts. Using these accounts, defendant purchased mail-order merchandise valued at \$3,500.00. Defendant pled guilty to class 3 felony theft. He was sentenced to 5 years, consecutive to his current sentence. He also was ordered to pay restitution. The victims were given the option of either having the merchandise returned or being included in a restitution order. Defense counsel requested release to the defendant of all the merchandise where restitution was ordered. The judge ordered that the merchandise either be returned to the victims for credit or donated to charity with respondent to pay full restitution. On appeal, defendant contends that if any of the victims do not reclaim their property he is entitled to keep the merchandise because he has been ordered to pay restitution for it. The objectives of mandatory restitution are both to make the offender recognize the consequences of his criminal activity and to make the victim whole. Payment of restitution does not create valid legal title to the stolen goods. By paying restitution to the victims, defendant is neither paying for the goods stolen nor acquiring legal title to the goods. As to any property reclaimed by the victims, defendant must receive credit towards the restitution for that merchandise. As to any merchandise that remains unclaimed, the defendant has no legal title to the property and no standing to contest its disposition except as it affects the amount of restitution imposed. A.R.S. § 13-3942 provides that stolen property not claimed within 6 months shall be delivered to the county treasurer for sale with the proceeds to the county treasury. The portion of the trial court's order giving the property to charity is vacated.

*State v. Landrigan*

133 Ariz. Adv. Rep. 49 (Sup. Ct. 2/25/93)

Defendant was convicted of theft, burglary and felony murder. Defendant was accused of murdering a man and ransacking his apartment. Defendant was sentenced to imprisonment on the theft and burglary charges, and death on the murder charge.

Defendant claims there was insufficient evidence to find him guilty of burglary and felony murder. The trial judge denied both his motion for judgment of acquittal and motion for new trial. There was sufficient evidence to uphold the burglary conviction. The circumstantial evidence suggests that the victim was killed before the apartment was ransacked. Other evidence placed the defendant at the scene of the crime and statements were admitted to prove his motive to commit theft. There was also sufficient evidence to uphold the felony murder conviction. The circumstantial evidence sufficient to sustain the burglary conviction plus defendant's statements that he had killed someone is sufficient to sustain the conviction.

Defendant claims that the judge should have instructed the jury on second degree murder or manslaughter. Defendant did not request these instructions but contends that the failure to give these instructions was fundamental error. In Arizona there is no lesser included homicide offense to the crime of felony murder. There was also insufficient evidence at trial to support any instruction on killing the victim during a sudden quarrel or in the heat of passion.

Defendant claims that the death penalty is unconstitutional because the jury does not make findings of aggravating and mitigating circumstances, and the Arizona statute fails to sufficiently channel the sentencer's discretion. These arguments have been previously rejected.

Defendant claims the death penalty was improperly imposed because the record does not support a finding that the murder was committed for pecuniary gain. Defendant made statements that he was supporting himself through robbery. The evidence supports a finding that pecuniary consideration was a cause, not merely a result, of the murder. The other aggravating record factor of a prior violent felony also is properly supported and no mitigating evidence sufficiently substantial for leniency appears.

Defendant claims that he received ineffective assistance of counsel because the probation officer was instructed not to interview the defendant in preparation for the aggravation/mitigation hearing. At the sentencing hearing defendant instructed his lawyer not to present any mitigating evidence. Counsel's instruction to the probation officer was a tactical decision supported by the defendant's desire not to present mitigating evidence. The decision was also supported by defendant's tendency to volunteer damaging statements at sentencing. The sentences and death penalty are affirmed.

[Represented on appeal by Carol Carrigan, James L. Edgar and John W. Rood, III, MCPD.]

*State v. Luzanilla*

133 Ariz. Adv. Rep. 64 (Div. II, 2/26/93)

Defendant and an accomplice were accused of killing defendant's former girlfriend and her mother, and taking their property. At his first trial, defendant was found guilty of trafficking in stolen property and theft. The first jury failed to reach a verdict on charges of first degree murder. On retrial the jury convicted appellant of two counts of first degree murder. Defendant was sentenced to two consecutive life imprisonment terms for murder and two concurrent prison terms for the other crimes.

(cont. on pg. 6)

Defendant and his accomplice sold the victims' property to a pawn shop in Yuma. At trial, defendant moved for a directed verdict claiming that Pima County did not have jurisdiction over trafficking in stolen property where the event happened in Yuma. Venue is proper in a county in which conduct constituting any element of the offense occurred. A.R.S. § 13-109(A). Proper venue is a jurisdictional requirement in criminal prosecutions. Trafficking in stolen property includes the element of obtaining control of stolen property with the intent to sell. The state presented evidence that appellant possessed the stolen property in Pima County. The state was not required to prove both that appellant possessed the stolen property and that he formulated the intent to sell it while in Pima County. Evidence of the element of possession alone was sufficient to establish venue in Pima County.

At his first trial, the jury acquitted him of first degree burglary. Defendant claims that his retrial on the murder charge violates the double jeopardy clause because there was no underlying felony to support a felony murder theory. When the jury was polled, the murder of the first victim was both unanimously premeditated and felony murder. On the second murder, ten jurors reached their verdicts on a felony murder theory only. The double jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Grady v. Corbin*, 495 U.S. 508 (1990). However, retrial following a hung jury is simply a continuation of a single prosecution and does not raise the specter of successive prosecutions. However, collateral estoppel, an essential part of the double jeopardy clause, is applicable to the retrial of charges contained in a multi-count indictment. Collateral estoppel bars the state from relitigating a question of fact that was determined in the defendant's favor by a particular verdict. The jury's verdict of acquittal on the first degree burglary charge did not necessarily resolve the factual issues. Rather it appears that the jury either misconstrued its instructions or compromised on its verdict. The possibility that the jury acquitted out of compromise is not a basis for refusing to apply collateral estoppel. The internally inconsistent verdicts require the conclusion that the jury acted irrationally. Because the first jury did not necessarily resolve the factual question at issue in appellant's favor, the trial court did not err in allowing the state to argue its case on a felony murder theory.

Defendant's accomplice was tried before the defendant's case came to trial. A witness who testified at the accomplice's trial refused to testify at the defendant's trial. The witness's testimony from the earlier trial was read into evidence. Defendant claims that this violates his rights under the Confrontation Clause to confront the witnesses against him. The judge admitted the testimony under a residual hearsay exception. Defendant first argues that the trial judge erred in considering corroborating evidence and in finding that defendant waived his claim by making threats against the victim. Corroborating evidence is not to be considered in determining the reliability of testimony for Confrontation Clause purposes. *Idaho v. Wright*, 497 U.S. 805 (1990). Defendant is also correct that a finding of waiver by defendant's procuring the unavailability of a witness

should be made only by clear and convincing evidence. However, it is also clear from the record that the trial judge did not base its ruling on either of these two principals. Rather, the court stressed that the testimony bore sufficient indicia of trustworthiness and reliability to allow its admission. No abuse of discretion appears.

Defendant claims that the statements were not made under circumstances of inherent trustworthiness. The trial judge admitted these statements under Rule 804(B)(5) of the Arizona Rules of Evidence. The requisite indicia of reliability must be established by a showing of particularized guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56 (1980). Particularized guarantees of trustworthiness must be shown from the totality of the circumstances. The relevant circumstances include those that surround the making of the statement and that render the declarant particularly worthy of belief. Here the admitted statement was given under oath in open court while the declarant was subject to cross-examination by the accomplice's defense counsel. Other evidence established that the declarant was a good friend of both the defendant and his accomplice, and had no motive to fabricate his statement. The declarant's version of the incident also remained consistent from his initial statement to the police to his later testimony at the accomplice's trial. Both lack of a motive to fabricate and consistent repetition are factors the trial court may consider in determining reliability. No error occurred and, given the corroborating evidence presented at trial, any error would have been harmless beyond a reasonable doubt.

Defendant claims that he should have received a directed verdict on the charge of the premeditated murder of the second victim because there was no evidence that either he or his alleged accomplice acted with the intent or knowledge to support premeditated murder. The jury heard evidence that before the second victim was murdered, defendant heard her come out of her bedroom and walk down the hall. While the time between the first and second murders may have been very brief, even a few seconds could provide sufficient time for defendant to reflect and to premeditate the murder, even if he had not planned it before he arrived.

#### Evidentiary Rulings

Defendant claims that the trial judge erred in allowing the medical examiner to use a styrofoam wig form to demonstrate the trajectory of a bullet. Defendant maintains that the exhibit was irrelevant because trajectory was not an issue. The trial court allowed introduction of the wig form to illustrate the medical examiner's testimony that the shot was fired from very close range and to demonstrate where the gunman would have been standing in relation to the victim. Demonstrative evidence is relevant if it illustrates testimony and will be admitted if its probative value outweighs the danger of unfair prejudice. Defendant also claims that the exhibit was "grisly in the extreme," though this seems unlikely given the admission of crime scene and autopsy photos at trial.

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At trial defendant introduced expert testimony that the defendant did not suffer from any diagnosable mental disorder found in individuals with a propensity for violence. On cross-examination, the prosecutor was allowed to show defendant's tattooed depictions of the Grim Reaper and a horned skull in order to rebut the expert's opinion. Defendant claims that the prosecutor's cross-examination suggested that the tattoos had special symbolism linked to a biker life-style or to violence. The references to the tattoos were not an insinuation of prior bad acts but were offered as rebuttal to appellant's character evidence. The prosecutor properly cross-examined the expert as to whether he had considered defendant's arguably violent and gruesome tattoos in reaching his conclusions. Once an expert offers his opinion, it is proper to inquire and cross-examine the expert concerning his opinion and its sources.

At trial, there was testimony that defendant's accomplice was not known to be violent, and that he and the defendant were virtually inseparable. Defendant sought to admit expert testimony about his accomplice's propensities for impulsiveness and secretiveness. The trial judge denied the opportunity to present this testimony. Defendant claims that the testimony was necessary to rebut the previous testimony. Rule 404(A) of the Arizona Rules of Evidence does not permit the introduction of character evidence of persons other than the accused, the victim or a witness. Further, the trial court's ruling did nothing to prevent appellant from presenting his mere presence defense. Even if the state opened the door to questions about the accomplice's character, the defense had ample opportunity to rebut the state's evidence through its own lay witnesses. The proposed expert testimony was not necessary to complete the picture of appellant's relationship with the accomplice.

### Volume 135

#### *State v. Delgadillo*

135 Ariz. Adv. Rep. 44 (Div. I, 3/30/93)

Defendant and two codefendants were charged with selling marijuana. Defendant entered into a guilty plea and was sentenced. Part of the sentence was a fine of over \$68,000, which was three times the value of the drugs seized. A.R.S. § 13-3405(D). Defendant argues that the court should have split the fine equally among the three codefendants and assessed each defendant only \$22,666, a one-third share. Defendant claims that the fine constitutes cruel and unusual punishment and violates the United States and Arizona Constitutions. He does not argue that the fine is excessive in itself but rather that he is disproportionately punished by being fined for the entire amount of drugs that he jointly possessed with others. A.R.S. § 13-3405(D) provides that the court shall order a person to pay a fine of not less than \$750 dollars (but not to exceed a maximum of \$150,000 dollars). The required fine is not restitution subject to reduction by codefendants' contributions but punishment for the culpability of the defendant. The participation of codefendants does not lessen defendant's culpability. Assessing a mandatory fine against each of two or more codefendants based upon the full amount of drugs seized is not unconstitutionally excessive, unconstitutionally disproportionate, or cruel and unusual.

#### *Hurles v. Superior Court*

135 Ariz. Adv. Rep. 45 (Div. I, 4/1/93)

The defendant is charged with first degree murder and the state is seeking the death penalty. Defendant requested that the court appoint two lawyers to represent him in this capital case. The trial judge denied the motion for appointment of second counsel. Defendant filed a petition for special action at the Arizona Court of Appeals. The County Attorney's Office declined to take a position on the defendant's request, properly acknowledging that it lacks standing in the selection of defense counsel. The Arizona Attorney General's Office responded to the petition for special action on behalf of the trial judge.

The court first determines whether it was appropriate for the Attorney General's Office to respond on behalf of the trial judge. The court decides that there are two kinds of responses in special actions: those that defend an administrative policy of the judiciary, and those that respond that the trial judge ruled correctly. It is proper for a response to be filed in a special action if the purpose of the response is to explain or defend an administrative policy or local rule. It is improper to respond merely to advocate the correctness of an individual ruling in a single case. The response filed on behalf of the trial judge by the Attorney General's Office is stricken.

In reviewing the merits of the petition, the court declines to accept jurisdiction at this time. The court finds that the petition is premature because there was no particularized showing of the need for second counsel in this case, nor evidence regarding customary practice of defense in capital cases.

#### *Saunders v. Board of Pardons and Paroles*

135 Ariz. Adv. Rep. 3, (Sup. Ct., 3/2/93)

Defendant was serving 25 to life on one charge plus four years consecutive to his life sentence. He was paroled from his life sentence and began serving his consecutive sentence. After his second sentence expired, the Department of Corrections did not release him. Defendant filed a petition for writ of habeas corpus. Defendant is not entitled to release. He was paroled pursuant to A.R.S. § 31-412(B), which provides parole for the sole purpose of serving any consecutive term imposed on such prisoner. Parole from an original sentence to a consecutive sentence under A.R.S. § 31-412(B) does not permit a petitioner's release from prison until such time as the original sentence expires or the prisoner is paroled on the original sentence pursuant to A.R.S. § 31-412(A). [See also dissent of Justices Zlacket and Martone.]

## May Jury Trials

### April 28

Andrew Defusco: Client charged with kidnap, vulnerable adult abuse, sexual assault, and sexual abuse. Investigator M. Breen. Trial before Judge Portley ended May 5. Client found **not guilty** on kidnap, guilty on sexual assault and sexual abuse. Judgment of acquittal on vulnerable adult abuse. Prosecutor A. Williams.

Elizabeth Langford: Client charged with aggravated assault, dangerous and criminal littering. Investigator V. Dew. Trial before Judge Grounds ended May 4. Client found **not guilty** on aggravated assault, dangerous. Client found guilty on criminal littering. Attorney General Sheila Polk.

### April 29

Timothy Ryan: Client charged with nine counts of armed robbery and one count attempted armed robbery. Investigator D. Moller. Trial before Judge Hendrix ended May 12. Client found guilty on nine counts of armed robbery and **not guilty** on attempted armed robbery. Prosecutor Martinez.

### May 3

Timothy J. Agan: Client charged with sexual assault and assault. Investigator H. Schwerin. Trial before Judge Martin ended May 6. Client found **not guilty** on sexual assault. Hung jury on assault. Prosecutor Beatty.

Cecil Ash: Client charged with murder, felony flight, theft, endangerment, and five counts of violation of probation. Investigator V. Dew. Trial before Judge Grounds ended May 20. Client found guilty on all counts except murder (hung jury). Prosecutor W. Baker.

Robert Billar: Client charged with twenty-three counts of child molestation. Trial before Judge Hotham ended May 6. Client found guilty on twenty counts of sexual misconduct with a minor, guilty on one count of sexual exploitation, hung jury on two counts of sexual misconduct with a minor. Prosecutor S. Novitsky.

Reginald Cooke: Client charged with possession of narcotic drugs with a prior. Trial before Judge Schneider ended May 6. Client found **not guilty**. Prosecutor M. Troy.

### May 4

Charles Vogel: Client charged with sexual abuse and attempted molestation. Investigator N. Jones. Trial before Judge Colosi ended May 12. Client found **not guilty**. Prosecutor Hoag.

### May 6

Scott Halverson: Client charged with felony trespass. Investigator R. Thomas. Trial before Judge Portley ended May 12. Client found **not guilty**. Prosecutor R. Campos.

John Taradash: Client charged with DUI. Trial before Judge Ryan ended May 6. Client found guilty. Prosecutor P. Hearn.

### May 10

Constantino Flores: Client charged with child abuse and sexual conduct with a minor. Trial before Judge Gerst ended May 19. Client found guilty. Prosecutor R. Redpath.

### May 11

William Foreman: Client charged with burglary (with two priors and while on parole). Trial before Judge Hilliard ended May 14. Client found guilty. Prosecutor S. Yares.

David Goldberg: Client charged with three counts of burglary. Trial before Judge Colosi ended May 24. Client found guilty. Prosecutor M. Kemp.

### May 13

Colleen McNally: Client charged with aggravated DUI. Investigator P. Kasieta. Trial before Judge Pro Tem Shaler ended May 14. Client found **not guilty**. Prosecutor Burkholder.

### May 17

Joseph Stazzone: Client charged with aggravated assault. Investigator R. Gissel. Trial before Judge D'Angelo ended May 19. Client found **not guilty**. Prosecutor V. Harris.

### May 18

Kevin Burns: Client charged with aggravated assault, criminal trespass, and threatening and intimidating (a misdemeanor). Trial before Judge Hall ended May 19. Client found **not guilty**. Prosecutor Barcetti.

Daniel Patterson: Client charged with first degree murder. Investigator H. Brown. Trial before Judge Hilliard ended May 27. Client found **not guilty**. Prosecutor M. Morrison.

### May 20

Daniel Carrion: Client charged with aggravated assault, dangerous (while on probation). Investigator H. Jackson. Trial before Judge Schwartz ended May 27. Client found guilty on lesser included -- disorderly conduct (misdemeanor). Prosecutor J. Fisher.

(cont. on pg. 9)

Andy Defusco: Client charged with false swearing and contracting without a license. Investigation conducted by S. Cotto (law clerk). Trial before Commissioner Burton Scotts ended May 20. Client found **not guilty** on both counts. Prosecutor J. Sandler.

Albert Duncan: Client charged with child abuse. Investigator N. Jones. Trial before Judge Cole ended May 26. Client found **not guilty**. Prosecutor Rechart.

May 24

Larry Grant and James Lachemann: Client charged with possession of narcotic drugs. Trial before Judge Dougherty ended May 26. Client found guilty. Prosecutor J. Wendell.

May 26

Robert Corbitt: Client charged with burglary and theft. Trial before Judge Grounds ended May 27. Client found guilty. Prosecutor Martinez.

**Personnel Profiles**

*Personnel Assignments:*

Sandra Sutphen of SEF-Juvenile was named the lead secretary for that group on **May 24**.

On **June 7** the following changes took effect:

Teresa Campbell assumed Joan Jezierski's duties (after Joan's resignation). Teresa also functions as Diane Terrible's secretary.

Heather Cusanek was transferred to administration to handle Teresa's previous assignments in our Training Division. Irene Jones assumed Heather's position in Trial Group A.

Richard Gissel, former investigator for Trial Group D, has been assigned to the Mesa Juvenile office to help with the increased caseload there.

Norm Jones, investigator for Trial Group B, moved to Trial Group A to fill that group's need for another experienced investigator.

Henrietta Ruiz (former lead secretary of Trial Group B) was transferred to the Mental Health Division to serve as

office administrator at this expanding office. Christine Oliver has been named the acting lead secretary for Group B until the new lead is selected.

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*New Hires:*

Two new investigators started employment with our office.

Rick Barwick, who has a B.A. in Criminal Justice from St. Edward's University in Austin, Texas, started in Trial Group D on **May 26**. Rick conducted investigations for the Air Force's Office of Special Investigations for over 13 years before retiring. While with the Air Force, he completed several special training courses including courses on arson, antiterrorism, drugs, and interviewing/interrogating.

John Castro, who is fluent in Spanish, started in Trial Group B on **June 14**. John comes to our office from Arizona's DES Office of Special Investigations where he worked as an investigator of welfare fraud for approximately 2½ years. Prior to that employment, John was with the Chicago Police Department for 12 years where he conducted criminal investigations relating to public housing, gang and other crimes.

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Our Juvenile Division has added three new attorneys. Christina Phillis, a graduate of Cal Western School of Law, took an attorney position with our office on **May 24**. Prior to that, Christina had served as an extern and as a law clerk in our Juvenile Division.

Michelle Lue Sang will rejoin our SEF-Juvenile office on **June 21**. Michelle worked in our Juvenile Division for approximately 14 months from 1986 to 1987, before she joined the Phoenix City Prosecutor's Office. From 1991 to the present, she worked for the Attorney General's Office in the Child Protective Services Division.

Susan White returned to our office and our Juvenile Division on **May 26**. Susan had worked for us from 1990 to 1992, before she left for North Carolina where she accepted a position as Assistant Appellate Defender.

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On **June 21**, the following 13 attorneys will start our new attorney training program:

Gary Bevilacqua received his J.D. from the University of Arizona College of Law in 1986. He then joined the firm of Minkler & Kirschbaum, and has been a partner there for the last five months. His practice included work in domestic relations, criminal, personal injury, bankruptcy, and estate planning.

(cont. on pg. 10)

Katie Carty was awarded her J.D. at Pepperdine University College of Law in California in 1991, and that same year she became a member of the Arizona State Bar. While at Pepperdine, Mary volunteered at the Homeless Advocacy Project. From 1991 to the present, Mary has served as a Deputy Public Defender in Mohave County.

Sylvina Cotto, who is fluent in Spanish, was sworn in as an attorney in May. She graduated from Arizona State University College of Law, and has served as Trial Group C's law clerk since January. Prior to coming to our office, she was a law clerk at the Attorney General's Office.

Doug Gerlach earned his J.D. at Arizona State University in 1981, and took a position at Brown & Bain, P.A. that same year. His practice there emphasized commercial litigation (trial and appellate), and he also served as director of the firm's in-house trial advocacy and deposition programs. Additionally, Doug has played a longtime role in sports broadcasting.

Michael Hruby received his J.D. from the University of Wyoming and became a member of the Wyoming State Bar in 1982. He then worked as a Deputy County Attorney and later as Assistant District Attorney in Wyoming. In 1986, he became a member of the Arizona State Bar and took a position as Deputy County Attorney in Coconino County. Michael has been a regular guest lecturer at the Criminal Justice Department of Northern Arizona University. His brother-in-law is Luis Calvo.

Nancy Johnson was awarded her J.D. at the University of Nebraska in 1984. She was admitted to the Arizona State Bar this May. Nancy comes to our office from the Arizona Attorney General's Office where she was the Legal Assistant Project Specialist in the Insurance Defense Section.

Troy Landry earned his J.D. at Arizona State University and was admitted to the state bar in 1992. While in law school he completed an externship at the City of Phoenix Prosecutor's Office and served as a law clerk at various law offices, the last being the law office of Terry Pillinger.

Jeremy Mussman received his law degree from U.C.L.A. in 1984. That same year he accepted a position at Snell & Wilmer, and he has worked there since that time in a practice which includes general commercial litigation, personal injury and environmental law.

Barbara Spencer obtained her law degree from Southwestern University School of Law in Los Angeles, California. While in law school, she served as a law clerk in the Los Angeles City Attorney's Office. She was admitted to the Arizona State Bar in October, 1992. Since that time she has been employed as an associate attorney at the law offices of Kenneth Freedman. From 1982 to 1989 (before entering law school), Barbara worked as a psychotherapist at the Schulte Institute in Scottsdale, Arizona. Before going to Schulte, she was employed for eight years as a social worker for Maricopa County.

Dan Treon was awarded his J.D. at the Arizona State University College of Law and was admitted to the Arizona State Bar in May, 1993. He comes to our office from the law firm of Treon, Strick, Lucia & Aguirre where he has been employed as a law clerk since 1991. From 1989 to 1991, Dan taught English in Kyoto, Japan. Dan not only speaks Japanese, but is fluent in Spanish. Dan's father is Richard Treon.

Gabriel Valdez earned his law degree at Arizona State University in 1991. While in law school, he participated in student externships with the City of Phoenix Prosecutor's Office and with our office's Juvenile Division. Gabriel was admitted to the state bar in 1991, and since that time has been practicing law with Calvo, Brown & Saint. Gabriel is fluent in Spanish.

Becky Ward received her J.D. at the Catholic University Law School in Washington D.C. She was admitted to the Arizona State Bar in January of this year. While in law school, Becky served as a law clerk for The Epilepsy Foundation, and worked as a legal intern at the Jane Goodall Institute, National Wildlife Federation and the Department of Justice - Environmental Crimes. Since last fall she has been employed as the bailiff for the Honorable Daniel E. Nastro.

Scott Wolfram obtained his J.D. from the University of the Pacific, McGeorge School of Law in Sacramento, California in 1990. After becoming a member of the Arizona State Bar in 1991, he took a position as associate attorney at the law office of Don Wolfram in Phoenix. Since 1992, Scott has served as a Deputy Public Defender in Pinal County. ^

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### **Upcoming Support Staff Training**

On July 14, our office will sponsor a support staff seminar titled "A County Attorney's Perspective of the Criminal Justice System." This training will be held from 2:00 - 3:00 p.m. in our training facility. Dick Mesh, a Deputy County Attorney for seven years (and a former Maricopa County Public Defender), will be the featured speaker.

People interested in attending should contact Georgia Bohm at X8200. ^