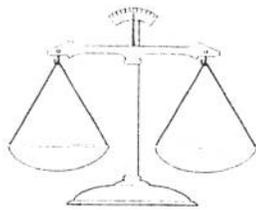


for The Defense



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The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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In my client's case, he was arrested for the misdemeanor offense of Obstructing a Public Thoroughfare (jumping in traffic), a Class 3 Misdemeanor. The officer didn't see this heinous crime take place, but was acting on a tip from an anonymous yet irate motorist who allegedly had to swerve to avoid turning my client into roadkill. My client was stopped several blocks away, pegged as the "jumper", arrested, taken to jail, booked, and searched. The search revealed him to be in possession of marijuana.

The plain language of §13-3883(A)(2) requires that an officer may effect a warrantless arrest for a misdemeanor offense if "the misdemeanor has been committed *in his presence*". (emphasis added). However, the not-so-plain language of §13-3883(A)(4) leaves out the "presence" language contained in (A)(2), suggesting that misdemeanors do not have to occur in the officer's presence for an arrest to be valid.¹ Because of this legislative landmine, your average prosecutor will point to the absence of the "presence" language in section (A)(4) and argue that the "presence requirement" does not exist at all. So, which is it? Is there a presence requirement or isn't there? The following analysis reveals that to read the presence requirement completely out of § 3883 is contrary to legal precedent, logic, and legislative intent.

High Times and Misdemeanors

Warrantless Arrests for Misdemeanors Not Committed in the Presence Of An Officer

By Douglas Passon
Deputy Public Defender

For anyone who has a client who was searched pursuant to a misdemeanor arrest, and the misdemeanor was not committed in the presence of a peace officer, you might need to be prepared to duke it out over §13-3883--especially if that search revealed your client to be in possession of things he or she probably should have left at home.

Do they read the same law books we do?

This issue has long since been resolved in the defendant's favor by the Arizona Supreme Court. In *State v. Nixon*, the Court unequivocally held that under an earlier version of A.R.S. §13-3883, "the only time an officer may arrest without warrant for misdemeanor is when the misdemeanor is committed in his presence." *Nixon*, 423 P.2d at 720. The Court went on to note that, "[t]his was the rule at common law, this was the rule under the predecessor statute [] and this has been the rule staunchly adhered to by this court throughout the years." *Id.*, citing *Adair v. Williams*, 24 Ariz. 422 (1922); *Dungan v. State*, 54 Ariz. 247 (1939); *Platt v. Greenwood*, (cont. on pg. 2)☞

50 Ariz. 158 (1937); *Statev. Gunter*, 100 Ariz. 356 (1966). Although the statute has undergone alterations since the time *Nixon* was decided, this case and its progeny have not been overruled. It is the law of this state.

Moreover, long after the statute was amended to include the provision that the state contends nullifies the presence requirement, the Arizona Supreme Court still adheres to the proposition that misdemeanor arrests must occur in the presence of an officer. In *State v. DeRosier*, 133 Ariz. 154, 650 P.2d 456 (Ariz. 1982), the Court again reiterated the presence requirement for misdemeanor arrests. In that case, the defendant was arrested for trespass and during a search incident to that arrest, the police discovered narcotic drugs. *Id.* at 457. The defendant challenged the narcotics conviction on the basis that his misdemeanor arrest for trespass was illegal. The Court agreed with the lower court's holding that the trespass arrest was valid because "the officer *personally*

observed appellant committing a misdemeanor." *Id.* at 458, (emphasis added). The Court agreed that because the officer witnessed the commission of the misdemeanor, "[he] was justified in arresting appellant in accordance with A.R.S. § 13-3883(2)." *Id.*, citing § 13-3883(2);

Nixon, 423 P.2d 718. See also, *State v. DeWoody*, 122 Ariz. 481, 595 P.2d 1026, 1029 (Ariz.App. 1979)("[w]arrantless arrests for misdemeanors are restricted to those which take place in the officer's presence."); *State v. Pickett*, 126 Ariz. 173, 613 P.d. 837, 838 (1980)(Because the officer personally observed defendant committing a misdemeanor, the officer was justified in arresting him under 12-3883[(A)](2)); *United States v. Ramos*, 39 F.3d. 219, 221, 222 (9th Cir. 1994) (interpreting §13-3883 to require that misdemeanor offenses must be committed in the presence of an officer); WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(b), at 14, § 5.1(c), at 23 (3d. Ed. 1996)(Most states hold to the view that a warrantless misdemeanor arrest may be made only for an offense committed in the presence of a peace officer). I have not uncovered any binding authority that contradicts this long line of established precedent.

You can tell I'm a new guy if I have time to research legislative history²

To say that there is no prohibition against misdemeanor arrests lacking officer presence defies logic and legislative intent. If one accepts the state's reading of §3883, section (A)(2) becomes absolutely meaningless because *any* misdemeanor arrest, presence or no presence, could be undertaken pursuant to section (A)(4). If the

legislature intended to eliminate the presence requirement, it could have easily amended or simply eliminated (A)(2) during its many tinkering with this statute.

A review of the legislative history of § 3883 confirms that there still exists a general prohibition against warrantless arrests for misdemeanors occurring out of the presence of a peace officer, with limited exceptions. Such exceptions are probably limited to violations of the traffic Code (Title 28) and other specifically enumerated exemptions found in other code provisions.

Since the inception of § 3883, the misdemeanor presence requirement has always held a prominent place in this statute. Prior to its amendment in 1972, A.R.S. § 13-3883³ stated that:

A peace officer may, without a warrant, arrest a person:

Moreover, long after the statute was amended to include the provision that the state contends nullifies the presence requirement, the Arizona Supreme Court still adheres to the proposition that misdemeanor arrests must occur in the presence of an office.

1. When he has probable cause to believe that the person to be arrested has committed a felony or misdemeanor in his presence. If the arrest is for a misdemeanor, the arrest shall be made immediately or on fresh pursuit.

2. When the person to be arrested has committed a felony, although not in the presence of the officer.

3. When a felony has in fact been committed, and he has probable cause to believe that the person to be arrested has committed it.

4. When he has probable cause to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it.

5. When the investigating officer has probable cause to believe that the person to be arrested has been involved in a traffic accident and violated any section of Title 28, and that such violation occurred prior to or following such traffic accident. The Arizona traffic ticket and complaint shall be utilized and the person so arrested shall be released as provided in section 28-1054 in all cases not covered in section 28-1053.

(cont. on pg. 3)³

Under section one of the pre-1972 version, an officer could arrest for either a felony or a misdemeanor committed in his presence. Section two explicitly excluded felonies from the presence requirement, leaving the misdemeanor presence requirement intact.

Also of note is that the last section of the statute, section five, deals with traffic accidents and traffic offenses. Section five provides that if an officer has probable cause to believe that a person violated any section of Title 28, the traffic provisions, he can engage in a warrantless arrest. By omitting a "presence" requirement and only requiring probable cause, this section left open the possibility that an officer can arrest a person for a misdemeanor traffic offense committed out of the officer's presence.

In 1972 the statute was amended to exclude the presence language for felony offenses but the legislature preserved the misdemeanor presence requirement by creating the statutory language that now comprises section (A)(2). The legislature also elaborated on the scope of a peace officer's power by adding section four (now section (A)(4)), which allows an officer to make misdemeanor arrests not just for traffic accident-related offenses, but also for traffic offenses that did not result in accident. The legislature changed the above provisions to read:

A peace officer may, without a warrant, arrest a person:

1. When he has probable cause to believe that a felony has been committed and probable cause to believe the person to be arrested has committed the felony.
2. When he has probable cause to believe a **misdemeanor has been committed in his presence** and probable cause to believe the person to be arrested has committed the offense.
3. When he as probable cause to believe that the person to be arrested has been involved in a traffic accident and violated any section of Title 28, and that such violation occurred prior to or immediately following such traffic accident.
4. When he as probable cause to believe a misdemeanor has been committed and probable cause to believe the person to be arrested has committed the offense. The person so arrested shall be released in conformity with the provisions of section 13-4222.

Again, the legislature left the misdemeanor presence requirement intact in section two. Moreover, section three still left open the possibility that an officer can arrest for a misdemeanor traffic offense committed out of the officer's presence and in relation to a traffic accident. It appears that the addition of section four expands upon section three by stating that an officer can arrest for a traffic violation even if the person to be arrested was not involved in a traffic accident. If the legislature intended to entirely eliminate the presence requirement, it could have easily done so by eliminating the presence language from section two. Moreover, if section four dealt with anything other than traffic violations, it logically would have preceded the section three traffic accident provision rather than followed it.

In 1982 the legislature made a significant change to section four which confirms it is a wholly traffic-related provision. After the 1982 amendments, section four read:

4. When he has probable cause to believe a misdemeanor OR A PETTY OFFENSE, AS PRESCRIBED IN § 28-702.01, SUBSECTION E, has been committed and probable cause to believe the person to be arrested committed the offense. The person so arrested shall be released in conformity with the provision of § 13-3903.

(emphasis added). The Act proposing the above changes, House Bill 2136, is an "Act Relating To Transportation." (emphasis added). More importantly, § 28-702.01(E) refers to the speed limit provisions of the traffic code.

Finally, § 13-3903 is the cite and release statute commonly associated with traffic-related offenses. Therefore, in 1982, arrests for misdemeanors committed out of the presence of an officer, if allowed at all, were restricted to speeding violations under Title 28.

In 1983, in another "Act Relating To Transportation," House Bill 2108, the legislature eliminated the language in section four that limited section four arrests to speeding violations. Section four was then amended into its current form. The deletion of the § 28-702.01 language probably suggests that the legislature wanted section four to include more traffic violations than just speeding offenses. However, there is nothing in this transportation-related Act to suggest that the legislature intended to eliminate the presence requirement for ALL misdemeanor offenses.

Why make exceptions to a rule that doesn't exist?

A.R.S. § 13-3602(M) provides further evidence
(cont. on pg. 4) ~~33~~

that there still exists a general prohibition against misdemeanor arrests lacking officer presence. This is the beloved Violation of Orders of Protection Statute. Section (M) sets forth a specific exemption to § 3883(A)(2) by allowing a peace officer to arrest a person for violating an order of protection, "with or without a warrant" and "whether or not such violation occurred in the presence of the officer." There may be other statutes that expressly nullify the misdemeanor presence requirement, I haven't checked them all. However, § 13-3602(M) definitely bolsters the argument that there is a general prohibition against such arrests. Otherwise, why would our legislature, in its infinite wisdom, carve out an exception to a rule that does not exist?

There are two ways of interpreting § 3883 – the state's way, and the right way. The state would have the us believe that there is absolutely no presence requirement for misdemeanor arrests-- that the absence of the "presence" language in §13-3883(A)(4) somehow magically erases the plain language of section (A)(2) and a long line of legal precedent. The right way reflects the sound principal that even the most hardened high-jumping traffic obstructors still deserve a modicum of protection from warrantless intrusions provided by our legislature under §3883.

1. A.R.S. §13-3883, Warrantless Arrests, which states, in relevant part:

A. A peace officer may, without a warrant, arrest a person if he has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

2. A misdemeanor has been committed in his presence and probable cause to believe the person to be arrested has committed the offense.

3. The person to be arrested has been involved in a traffic accident and violated any section of Title 28, and that such violation occurred prior to or immediately following such traffic accident.

4. A misdemeanor has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under § 13-3903.

2. I cannot take all the credit for this part. Corwin Townsend provided substantial assistance with this research.

3. Formerly A.R.S. 13-1403.

The Victims' Bill of Rights - An Equal Protection Problem?

By Craig Orent
Defender Attorney
Office of the Legal Defender

Assume you are a private lawyer trying to make ends meet and in walks potential client John Smith. He is charged with aggravated assault by the state and is being sued by the victim for monetary damages in civil court.

Mr. Smith retains you to handle both the criminal and civil cases. The first thing you want to do is to interview the victim to learn her version of the incident. However, you remember that the Victims' Bill of Rights requires you to communicate with her through the prosecutor and that she can refuse to be interviewed. You make the standard request to the prosecutor and many weeks later you learn she refuses to talk with you. Not all is lost because you believe you can depose her in the civil case.

However, you are disturbed by this differing treatment in the two forums and wonder why you can interview the victim in one forum but not in the other. There is no rational or acceptable explanation for this different treatment, and, therefore, I suggest the scheme violates the Equal Protection Clause of the United States Constitution.¹

Article II, §2.1(A)(5) of the Arizona Constitution provides that victims have the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Generally, a criminal defendant has no constitutional right to pretrial discovery,² including the right to interview witnesses.³ However, Arizona chose to create a right to discovery in criminal cases. There is no question that when a state creates a right it must do so without violating federal constitutional provisions whether or not the federal constitution itself establishes the underlying right. Prior to enactment of the Victims' Bill of Rights, criminal defendants in Arizona had broad discovery rights with virtually the same right to interview victims and witnesses as civil defendants.⁴ Now, however, criminal defendants and their attorneys are treated differently than their civil counterparts.

The differing treatment is based on unsupported and unwarranted assumptions that criminal defendants and their lawyers harass and intimidate victims. Are criminal defense lawyers more likely to mistreat victims than civil attorneys? And what if, as in the above hypothetical, the

(cont. on pg. 5) 

criminal defendant is also a civil defendant and the same attorney represents the defendant in both actions? The alleged "mistreatment of victims" argument does not constitutionally justify the disparate treatment at issue here.

No appellate case in the United States has directly addressed whether providing civil litigants more pretrial discovery rights than criminal defendants violates the Equal Protection Clause. However, a few cases have mentioned the issue, and others have indirectly touched upon it.⁵

The Equal Protection Clause prevents governments from making improper classifications. Therefore, in presenting an equal protection claim, the court must first decide if the state has created a "classification."⁶ As Professor Imwinkelried states, "[t]he basis of classification is the identity of the person asserting the right." (Here the right to interview the victim).⁷ If the person seeking to interview the victim is a civil litigant, she can compel the victim to be interviewed or deposed. However, in the same courthouse, if the person seeking the interview is a criminal defendant, she is denied that same right. The end result is that even when the parties, issues, and attorney for the civil/criminal defendant are identical, the outcome is different depending on which courtroom the defendant is in.

Levels of Scrutiny

Next, the court must decide which level of scrutiny should be applied in deciding the constitutionality of the disparate treatment. The Supreme Court has used three different tests depending on the type of classification at issue. The lowest standard of review, the "mere rationality" test, is applied to classifications involving mainly economic issues, and a classification will be deemed valid if it has some rational relationship to a legitimate government policy.

The middle test, often referred to as the "intermediate test," is applied to classifications involving "quasi-suspect" categories (e.g., gender and illegitimacy). Here the test is whether the means chosen by the legislature serves an important governmental objective and is substantially related to the achievement of that objective.⁸

The next and most stringent test for the state to overcome is the "strict scrutiny" test. It has traditionally been applied to "suspect classifications" (e.g., race) and classifications that impair a "fundamental right."⁹ The test

here is whether the classification or law is necessary to achieve a compelling state interest.¹⁰ This is the test applicable here because fundamental rights are affected by the victim's right to refuse an interview.

A criminal defendant has a fundamental right to a fair trial, to gather facts to prepare a defense, and to be free from governmental restraint. A criminal defendant whose liberty is at stake has a fundamental right to fair treatment in the criminal justice system.¹¹

Access To Witnesses/Strict Scrutiny

Moreover, many courts have indirectly held that, absent compelling circumstances, the government may not hinder or prohibit defendants from accessing information needed to adequately prepare for trial, including access to and interviewing of witnesses. For example, in *Dennis v. U.S.*, 384 U.S. 855, 873 (1966), the United States Supreme Court, in addressing a defendant's general right to discovery stated, "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact... Exceptions to this are justifiable only by the *clearest and most compelling considerations.*" (Emphasis added.)

Moreover, many courts have indirectly held that, absent compelling circumstances, the government may not hinder or prohibit defendants from accessing information needed to adequately prepare for trial, including access to and interviewing of witnesses.

In *United States v. Cook*, 608 F.2d 1175 (9th Cir. 1979), the Ninth Circuit Court of Appeals concluded that the government hid witnesses from the defense, frustrating the defendant's pretrial investigation and preparation. The court stated:

"As a general rule, a witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial.

"Exceptions to this rule are justifiable only under the 'clearest and most compelling circumstances.' Where there is no overriding interest in security, the government has no right to interfere with defense access to witnesses." 608 F.2d at 1180 (Internal citations omitted.)

"Moreover, we have never held that security considerations preclude all defendant pretrial access to government witnesses. Our cases indicate that security concerns only justify a limitation upon the time and place of

(cont. on pg. 6)

access." Id., footnote 2.¹²

The Arizona Supreme Court has stated:

"As a matter of fundamental fairness, ...justice dictates that the defendant be entitled to the benefit of any reasonable opportunity to prepare his defense and to prove his innocence." *Murphy*

v. Superior Court, 142 Ariz. 273, 277 (1984), citing *State ex rel. Corbin v. Superior Court*, 103 Ariz. 465, 468 (1968).

"While there is no general right to discovery in a criminal case, we have recognized that Rule 15.3 [the right to depose witnesses] is intended to effectuate the constitutional right of cross-examination contained in the confrontation clause of the Sixth Amendment of the United States Constitution." Id. (Citations omitted.)

In *State v. Radjenovich*, 138 Ariz. 270 (App. 1983), the defendant claimed his attorney was ineffective because he failed to interview the state's witnesses. In reversing the conviction, the court stated:

"We have no hesitancy in holding that, except in the most unusual circumstances, it offends basic notions of minimal competence of representation for defense counsel to fail to interview any state witnesses prior to a major felony trial." 138 Ariz. at 274.

"While apparently the testimony of the victim and the police officers was summarized in the police reports, it is clear from the trial transcript that these summaries did not include many details which were brought out at trial. By failure of his counsel to interview these witnesses, defendant was placed at a disadvantage at trial." 138 Ariz. at 275 (Emphasis added.)

In *State v. Draper*, 162 Ariz. 433 (1989), the Arizona Supreme Court addressed the legality of a plea agreement which precluded a defendant from interviewing

the victim. The court stated:

"We agree with the court of appeals that a defense counsel's inability to interview the victim, before advising a client to enter an *Alford* plea, may render counsel's assistance ineffective...see also Comment, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 Ariz. St. L.J. 557, 575 ("the single element of factual investigation of a case which defense counsel should not overlook ... is an interview with the victim. Such an interview improves defense counsel's effectiveness in subsequent plea negotiations with the prosecution")." 162 Ariz. at 439 (Emphasis added.)

Therefore, although no court has directly addressed the issues presented here, the courts cited and quoted above indicate that compelling circumstances must exist before the government may interfere with a defendant's right to interview witnesses. Consequently, the "strict scrutiny" standard must be used in deciding the constitutionality of the differential treatment between civil and criminal litigants in the present context.

Consequently, the "strict scrutiny" standard must be used in deciding the constitutionality of the differential treatment between civil and criminal litigants in the present context.

The only conceivable bases for allowing victims to refuse to be interviewed is to protect them from harassment and intimidation by defendants and their attorneys, and to minimize the pain and suffering they experience. Although protecting victims in this way might be a compelling state interest, completely denying attorneys the opportunity to interview the victim - while allowing them to interview other, possibly more sensitive, witnesses - is not necessary to achieve that end. The "strict scrutiny" test requires the state to prove the classification or law is necessary to achieve a compelling state interest. There are far too many alternative means of protecting victims, and the premise that they need protection from defendants and their attorneys is not empirically supported.¹³

The argument that defendants and their attorneys would or might intimidate witnesses and victims was originally used by those opposed to granting any discovery to criminal defendants.¹⁴ In fact, the same argument was made against expanding civil discovery.¹⁵ Obviously, these arguments were rejected in both the civil and criminal forums, and the two systems have not yet collapsed.

(cont. on pg. 7)

The supporters of the Arizona Victims' Bill of Rights did not consider any empirical data or studies supporting the perception that criminal defendants and their attorneys routinely intimidate and harass crime victims. That is not to say it does not happen; it presumably does. However, allowing victims to refuse to be interviewed is tantamount to "throwing the baby out with the bath water." Prior to the amendment's passage, thousands of victims in Arizona were interviewed by criminal defense attorneys. If harassment and intimidation by these attorneys was so rampant, there surely would be statistics evidencing such claims. To deny all contact with victims because, on occasion, a minority of attorneys might cross the line, is unreasonable. "[I]t should not be assumed a defendant [or his attorney] will act improperly without a substantial showing."¹⁶ The general concern that victims should be accommodated does not support such an extreme measure. "The search for truth should not be made more difficult...simply because witnesses [and victims] have unfounded fears or don't want to be 'bothered' by the investigative efforts of defense counsel."¹⁷

Control of Witnesses

In addressing the propriety of the government advising witnesses not to grant interviews to the defense unless the prosecutor was present, the D.C. Circuit Court of Appeals stated:

"Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to....[T]ampering with witnesses and subornation of perjury are real dangers, especially in a capital case. But there are ways to avert this danger without denying defense counsel access to eye witnesses to the events in suit unless the prosecutor is present to monitor the interview. We cannot indulge the assumption that this tactic on the part of the prosecution is necessary. Defense counsel are officers of the court. And defense counsel are not

Necessarily minimizing the significance of the several bits of inconsistent or contradictory data... the prosecutor will often underestimate or overlook the significance that such data might have in the hands of the defendant's advocate."

exempted from prosecution under the statutes denouncing the crimes of obstruction of justice and subornation of perjury....

"A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined." *Gregory v. United States*, 369 F.2d 185, 188 (1966).

Why does the government assume that criminal defense attorneys are more likely to violate ethical rules and laws prohibiting harassment and intimidation of witnesses and victims than prosecutors or civil attorneys? There are many reported cases where prosecutors cross the ethical line, by withholding exculpatory evidence, presenting false evidence or perjured testimony, hiding witnesses, and otherwise influencing witnesses' testimony at trial. The same can be said for civil attorneys. As we all know, there are many more *unreported* instances of such conduct. Should we assume, based on the actions of a few prosecutors and civil attorneys, that all prosecutors and civil attorneys are unethical and dishonest?

Control of Information

Whether prosecutors cross the ethical line or not, it is unfair and inefficient to require defendants to rely on prosecutors to elicit from victims information that will assist their ability to effectively cross-examine witnesses and present a defense.

"[T]here are two additional reasons why the administration of defendant's discovery rights should not be entrusted to prosecutors. First, the responsibility of the prosecutor as an advocate is so demanding of his energies and concentration that he cannot be equally attentive to the preparation of his adversary's defense....

"Secondly, even if the prosecutor were conscientiously dedicated to ferreting out from all that passes through his files whatever might help the defendant, unless he was initiated into all the

(cont. on pg. 8)

nuances of the defense theories he would not be able to recognize much information that could render valuable service for the defendant. The defense may see significance in facts otherwise appearing neutral. Necessarily minimizing the significance of the several bits of inconsistent or contradictory data that commonly accumulate in the course of litigation,

the prosecutor will often underestimate or overlook the significance that such data might have in the hands of the defendant's advocate." *Criminal Discovery for the Defense and the Prosecution - The Developing Constitutional Considerations*, 50 N.C.L.Rev. 437, 458.

Police and prosecutor prepared summaries of victim statements are not and cannot be a substitute for defense interviews.

"...[T]he argument that there is no need for criminal depositions is based on the assumption that 'the prosecution will ordinarily possess written statements or transcripts of testimony of potential witnesses [and victims] of such completeness that additional interrogation by the defense attorney, prior to trial, will be of only marginal value in most cases.

The facile assumption in this argument is inconsistent with the theory of the adversary system. We might as well ask defendants to rely on the prosecutor to cross-examine his own witnesses at trial as assume that the prosecutor will be sufficiently diligent in his interviews with witnesses and thorough in his summary of them to protect the defendant's interests as well as his own. Moreover, the prosecuting attorney does not always interview his witnesses; often this is done only by investigating officers. It is not fair to force the defendant to rely for the accumulation of

It is not fair to force the defendant to rely for the accumulation of evidence necessary to him on the diligence and thoroughness of any police officer...

evidence necessary to him on the diligence and thoroughness of any police officer who is responsible for a particular case and who may or may not have adequate time to devote to any one case. Some witnesses may be interviewed before the full scope of the facts has become clear to the prosecuting authorities and thus before avenues of inquiry have become known to them. In addition, whoever conducted the interview for the government may not be privy to the defendant's side of the story and thus may not be alert to seemingly unimportant details that deserve to be explored." *Id.* at pp. 473-474.

There is no reasonable basis to deny criminal defense attorneys the right to interview victims while allowing prosecutors and civil defense attorneys to do so. Denying them access to victims, like throwing the baby out with the bath water, is an overreaction to a perceived problem that can be addressed in other less drastic ways.¹⁸

Of the twenty states that have enacted "victims' rights" bills, only Arizona and Idaho sanction the right of a victim to refuse a defense interview.¹⁹ A number of the other states, recognizing that at times criminal defense attorneys may cross the line, give victims a general right to be protected from defendants and people acting on their behalf.²⁰

Many states, and the federal government, permit the prosecutor to initiate civil proceedings to prevent or restrain the harassment or intimidation of a victim or witness.²¹ As stated earlier, such conduct may, depending on the severity of the behavior, be unethical and illegal.

Moreover, the state could set certain conditions under which the defense would be allowed to interview victims, such as requiring the interview to be recorded and presented to the prosecutor, requiring the prosecutor or his representative to be present, requiring court approval, requiring the interview to be a formal deposition, or requiring defense attorneys to inform victims of their right to terminate the interview should the attorney behave inappropriately, with the matter thereafter to be addressed by the court.

Victim interviews "would not impose on [victims] any more than their testifying at a preliminary hearing or (cont. on pg. 9)☞

before a grand jury or in civil depositions. A flexible deposition [or interview] procedure could be scheduled in consultation with the witnesses [or victim]. Even granting that some imposition would be involved, such a small inconvenience to a witness [or victim], except in cases meriting a protective order, should not outweigh the fundamental right of a defendant to gather the facts necessary to his defense."²²

I have filed and argued several motions raising these issues. To my surprise, or maybe not, the prosecutors who have opposed my motions have presented weak counter arguments. One prosecutor argued that the Victims' Bill of Rights applies equally to civil lawsuits and therefore, because the civil defendant cannot depose the victim/plaintiff, there is no disparate treatment. This claim is unsupported. Another prosecutor argued that the victim waives her right to refuse an interview upon filing a civil complaint. However, neither he nor the trial court could respond to my reply that when there are two victims and only one files the civil complaint, the second victim can still be deposed despite there being no waiver by her.

The only argument which, at first glance, seemed to have some merit, was that the two different forums are completely different creatures and thus cannot be compared (like the apples vs. oranges analogy). The major distinctions, the prosecutor asserted, are that in the criminal action the plaintiff is the state and is seeking criminal justice, where as in the civil action the plaintiff is a private party seeking property damages. Once again, however, neither the prosecutor nor the court responded to my predictable reaction that these distinctions actually favor the criminal defendant's argument. There is no justification for allowing a party to interview a complaining witness where the worst possible outcome of the proceeding is a loss of property, but to deny that same right to a criminal defendant whose liberty, and sometimes, life, is at stake. Furthermore, the status of the person or entity that initiated the proceedings is irrelevant; in both cases the victim is the complaining witness. Secondly, like the response to the waiver argument made above, when there are two victims and only one files a civil action, the second "non-waiving" or "non-filing" victim is in a position analogous to a victim in a criminal case. That victim did not initiate the complaint in either proceeding but can be deposed in one but not the other.

Hopefully, the next time you come face to face with the Victims' Rights Amendment, some of the issues previously discussed will help level the playing field.

1. This scheme may also violate the First Amendment because it completely prohibits defense attorneys from communicating in any way with alleged victims and because it is overbroad and vague. (See, generally, *Beyond the Victims' Bill of Rights: The Shield Becomes a Sword*, 36 Ariz. Law Rev. 249 (1994)). Although these issues are not addressed in this article, they should be included in any motion challenging the "victim's rights" scheme.

2. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

3. *Minder v. Georgia*, 183 U.S. 559 (1902) (but see the cases cited later indicating in certain circumstances constitutional principles do require pretrial discovery and witness interviews).

4. See former Rules of Criminal Procedure, Rule 15.3 and Rules of Civil Procedure, Rule 26(a).

5. *Munson v. State*, 758 P.2d 324, 331 (Okla. Cr. 1988); *United States v. Breikreutz*, 8 F.3d 688, 691, footnote 3 (9th Cir. 1993); and *Haynes v. People*, 265 P.2d 995, 996 (Colo. 1954).

6. Imwinkelried, *The Right to "Plead Out" Issues And Block The Admission Of Prejudicial Evidence: The Deferential Treatment Of Civil Litigants And The Criminal Accused As A Denial Of Equal Protection*, 40 Emory Law Journal 341, 359 (Spring 1991) (Hereinafter "Imwinkelried".)

7. *Id.* at p. 360.

8. *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

9. *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966).

10. *Eisenstadt v. Baird*, 405 U.S. 438, 447, n.7 (1972).

11. Imwinkelried at p. 369-370, (Citing J. Nowak, R. Rotunda & J. Young, *Constitutional Law* §14.41, at 785 (3d ed. 1986).

12. See also *United States v. Murray*, 492 F.2d 178, 194 (9th Cir. 1973) (same language is in *Cook*, citing *Dennis v. United States*, 384 U.S. at 868-876.)

13. As many of us know from our own experiences, preventing defense attorneys from interviewing witnesses may have the opposite effect of that intended by victim's rights advocates. That is, the victim may be forced to go through the ordeal of testifying at trial, experiencing vigorous and aggressive cross-examination, when, had she granted an interview, the defendant, learning of the victim's quality as a witness, may have agreed to plead guilty before trial; or the prosecutor, seeing the weaknesses in the case, may have made a better offer or even dismissed the case.

14. See, Lafave, *Criminal Procedure*, § 19.3(a), page 479, and generally, *The Criminal Prosecution: Sporting Event Or Quest For Truth?* (William Brennan, Jr.) 1963 Wash. U.L.Q. 279, 290.

15. Lafave at p. 479.

16. *Id.*

17. *Id.*

18. See, *Delaware v. Van Arsdall* (1991) 475 U.S. 673, 679, and *Rock v. Arkansas* (1987) 483 U.S. 44, 56.

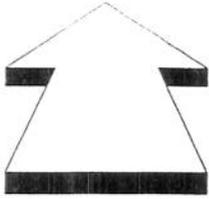
19. See, Idaho Const. Art. I §22(8).

20. See, Missouri Const. Art. I §32(6), New Mexico Const. Art. I §24(3), and Wisconsin Const. Art. I §9m.

21. e.g., "The Victim and Witness Protection Act of 1982," 18 U.S.C. §3523, Cal. Penal Code §136.2(a)(c), and Nev. Rev Stat. §33.015.

22. *Criminal Discovery For The Defense And The Prosecution---the Developing Constitutional Considerations*, 50 N.C.L. Rev. at 473. ■

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ARIZONA ADVANCED REPORTS

A Summary of criminal defense issues in Volumes 235-236

By Steve Collins
Deputy Public Defender

Ricard v. Arizona Department of Transportation, 235 Ariz. Adv. Rep. 23 (Division 1, 1-30-97)

After Ricard was arrested for DUI, he ignored an officer's order not to belch during the 15 minute "deprivation" period. It was held this could not be considered a refusal under the implied consent law. Belching was not prohibited by Arizona Department of Health Services regulations and would not have affected the Intoxilyzer 5000 results.

In re: Steven O., 235 Ariz. Adv. Rep. 16 (Division 1, 1-28-97)

The police satisfied the prerequisite for an investigatory stop by showing "a reasonable suspicion that a person is engaged or about to engage in criminal activity." However, drugs obtained after the stop were suppressed because the mere fact weapons are often used in drug transactions does not justify a frisk. *Terry v. Ohio* requires there be a reasonable suspicion the suspect may be armed and presently dangerous.

State v. Sabala, 235 Ariz. Adv. Rep. 11 (Division 1, 1-28-97)

When the jury announced it was hung, the judge instructed the jury that the court would assist the jury with any problem areas. In response to the jury's request, specific sections of testimony were read to the jury and counsel presented additional arguments to the jury. This complied with new Arizona Criminal Procedure Rule 22.4 and was held to be proper. Although, the better practice is to instruct the jurors not to reveal the numerical split, it

did not amount to coercion when jury revealed the split was 7-1 for conviction. The trial court also "should have expressly admonished the jurors not to surrender their 'honest convictions' for the sake of reaching a verdict," but failure to do so was not fundamental error.

DISSENT: The trial judge's improper instructions coerced the minority juror into unanimity with the majority.

State v. Corona, 236 Ariz. Adv. Rep. 22 (Division 1, 2-1-97)

Defendant was convicted of threatening or intimidating in order to promote gang activity, a class 4 felony. He was denied an instruction on the lesser-included offense of misdemeanor threatening or intimidating. The state argued defendant was not entitled to the instruction because the lesser offense may be committed by a threat to cause "serious" damage which is not required for the felony. It was reversible error to deny the lesser instruction because the information did not charge defendant with threatening to cause "serious" damage. He was charged solely with threatening to cause physical injury. It was improper for the prosecutor to comment that the defense had failed to call an expert to testify on gangs. The mere fact defendant later left the scene did not support flight or concealment instructions. The cautionary instruction for Arizona Criminal Procedure Rule 404(b) should not refer to prior "bad" acts, but only to prior acts. Use of the term "bad" is an improper comment on the evidence. It was improper for prosecutor to shift burden of proof by stating jury had to have a reason to find reasonable doubt. It was held not to be prosecutorial misconduct when prosecutor stated officers testified truthfully, because the defendant "was sufficiently linked to the evidence." Officers testified defendant had admitted gang membership to them. Defense counsel asked why this was not in police reports. It was held to be proper for the officers to mention it was in previous arrest reports to rebut the suggestion they had improperly recorded defendant's admissions.

State v. Everidge, 236 Ariz. Adv. Rep. 37 (Division 2, 12-10-96 made an opinion 01-24-97)

In order to warrant dismissal for preindictment delay, a defendant must show the prosecution intentionally delayed the proceedings to gain an advantage and the delay prejudiced defendant. Defendant was convicted of possession of a narcotic drug. Two prior felonies could not be considered historical prior felony convictions because they were over ten years old and thus outside the time limits in A.R.S. Section 13-604(U). Defendant also had a subsequent 1995 felony conviction. Standing alone, it could not be a historical prior felony conviction because it did not precede the date of the instant offense. A.R.S. Section 13-604(U)(1)(d) provides "any felony conviction that is a third or more prior felony conviction" constitutes (cont. on pg.11) ■

a historical prior. The Court of Appeals held this section could apply to only one of the three prior felonies "and it does not matter if it is the third conviction chronologically or not." Defendant could only be sentenced with one historical prior felony conviction.

***State v. Orendain*, 236 Ariz. Adv. Rep. 8 (Arizona Supreme Court, 02-11-97)**

The jury was instructed there must be specific facts from which it may be "reasonably inferred" the defendant knew of the marijuana's existence. The instruction may cause confusion on the "important requirement that the state must prove each element of defendant's guilt beyond a reasonable doubt." Held to be harmless error under fac of this case.

CONCURRENCE: The instruction was not error at all.

***State v. Rogovich*, 236 Ariz. Adv. Rep. 3 (Arizona Supreme Court, 02-11-97)**

As an expert witness, a medical examiner may offer opinion on autopsy prepared by another medical examiner. However, "if the testifying expert merely acts as a conduit for another non-testifying expert's opinion, the 'expert opinion' is hearsay and is inadmissible, Rule 703 notwithstanding." Although the giving of a Wussler acquittal-first instruction on lesser-included offenses is no longer proper, it does not constitute fundamental error. Defendant did not have to give express permission for defense counsel to advance an insanity defense. Death penalty was properly imposed because of aggravating circumstances of multiple homicides, prior conviction of felony involving violence, and other crimes for which a life sentence or death were imposable. The trial judge properly avoided "double counting." Defendant failed to prove mitigating factor that his capacity to appreciate the wrongfulness of his conduct was impaired. ■

Selected 9th Circuit Opinions

By Louise Stark
Deputy Public Defender

***United States v. Zink* (9th Cir. 1997) 1997 U.S. App. LEXIS 2804**

Zink entered a guilty plea pursuant to a written agreement. One clause was Zink's promise to "pay the full amount of restitution to be determined by the court." The court imposed \$5.8 million in restitution, which amount was known to the parties beforehand, and to which there was no objection. The plea also set out the statutory range of sentences to imprisonment, immediately preceding the paragraph entitled "Waiver of Right to Appeal Sentence." The text went on to explain the waiver of defendant's "right to appeal any sentence imposed by the court in the

case" so long as the sentence was within "the statutory maximum above." In entering the plea the court did not advise Zink of any waiver of appeal, and in fact recited that he had the right to appeal from "the judgement" of the court. The court held that the waiver applied only to the immediately preceding sentences of confinement. There was not a knowing, voluntary waiver of the right to appeal from the restitution order. Zink's appeal was based on the fact that the court imposed the restitution without making a determination of his ability to pay, as then required by federal law. Although it was doubtful that the full amount would ever be repaid, there was no error requiring reversal of the order where Zink knew full well the amount of restitution contemplated at the time he entered his plea and acknowledged his agreement to pay restitution.

***United States v. Reyes-Oseguera* (9th Cir. 1997) U.S. App. LEXIS 2742**

Two co-defendants entered guilty pleas to offenses involving transportation and harboring illegal aliens. They each object to the sentencing court's imposition of a two level enhancement to their sentences for "recklessly creat[ing] a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." This increase is one of many factors which can be and must be considered and calculated pursuant to federal statutory sentencing guidelines. The court rejected the joint argument that the provision would not be held to apply to a flight on foot.

Codefendant Kirsch's claim was rejected, and the sentence affirmed, because his conduct in fleeing across three busy lanes of car traffic at night was clearly contemplated by the statute. (The dissent to this holding pointed out that "Kirsch, a polio victim, hobbled six car lengths before being apprehended" which caused cars to stop.) Reyes-Oseguera merely ran from the passenger side of the vehicle, along the sidewalk or side of the road, causing an agent to chase him. The only other information the court had was hearsay from an officer not present at the chase or apprehension, who only knew that the pursuing agent said "he had to basically tackle...run and jump on top of the guy to stop him." There was no indication that the defendant had put up any resistance or failed to cooperate when caught. On this record the court imposed the two level enhancement for recklessly endangering another, which is now reversed as clear error. The court follows precedent prohibiting a harsher sentence on the basis of mere instinctive flight on foot from law enforcement. It holds that without more, this does not constitute reckless endangerment and risk of serious bodily injury.

(cont. on pg. 12)☞

United States v. Washington (9th Cir. 1997) 1997 U.S. LEXIS 2740

In *Bailey v. United States*, 116 S.Ct. 501 (1995) the Court held that "use" of a firearm in the course of a crime required that it be "actively employed" in the crime, which may include display of or "obvious and forceful presence" of the gun. Mere availability of the weapon without more is not "use" under the statute. Washington went to trial before the *Bailey* decision. Washington and a cousin robbed a bank. During the robbery the cousin swung a shotgun about and pointed it at one man while barking orders to the tellers and customers, and holding them at bay. Washington went to trial on the charge of using a firearm in the course of a violent crime. The jury asked for a definition of "use" and was given the following instruction, which was the standard statement of the law at the time it was given over a defense objection.

"Use means to employ, ...to carry out a purpose or action by means of. It means to derive service from. More than one person can use the same firearm. The use of the firearm must be knowing. A defendant who does not have physical possession of a firearm may still knowingly use the firearm in the course of a violent crime if the firearm is available to the defendant, if the defendant intended that the firearm would be used by another participant in the crime, and if defendant benefitted and intended to benefit from the use of the weapon...."

Because the instruction had, at the time, been held proper, no objection was required to preserve this issue for appeal. The language allowing a verdict of guilty based on an accused "who does not have physical possession" of the gun is arguably improper under *Bailey*, but on the facts of this case any error is harmless.

GREENAWALT V. STEWART (9th Cir. 1997) 1997 U.S. App. LEXIS 1526

Arizona Supreme Court denied a petition for review and special action by death row inmate who apparently sought this relief from a denial of a claim that execution by lethal injection violated federal constitutional rights.

The inmate, whose execution was imminent, then attempted to obtain federal habeas relief in District Court. The federal district court denied his petition for the writ of habeas. Greenawalt then moved for a stay of execution while he 'appealed' the district court action. Since an 'appeal' from that decision was not procedurally possible, the 9th Circuit Court of Appeals treated this as an application for an order permitting consideration of his successive petition for a writ of habeas. The 9th Circuit

followed the April, 1996 "Antiterrorism and Effective Death Penalty Act" which was enacted to limit the presentation of successive claims. In order to avoid dismissal, without consideration of a successive claim the petitioner must show:

1. The claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, which new rule of law was previously unavailable; or 2.a The factual predicate for the current claim was not previously discoverable by exercise of due diligence ; and 2b. those facts, viewed in light of the evidence as a whole and if proven, would be sufficient to establish by clear and convincing evidence that except for constitutional error nor reasonable fact finder could have found the accused guilty. See 28 U.S.C. 2244(b)(1) & (2).

The 9th circuit found that Greenawalt made no prima facie showing that these requirements were satisfied, his claim being neither a new rule of law made retroactive, nor related to actual guilt. The application for authorization of successive habeas petitions and stay of execution was denied.

MOCKAITIS V. HARCLEROD, et. al., 104 F.3d 1522 (9th Cir. 1996)

FACTS AND HISTORY

Hale was in a county jail for burglary charges. Police believed that he participated in three related murders. Hale demonstrated an awareness that many, actually most, of his conversations with visitors were monitored and tape recorded, except for those with his lawyer. A sign warned visitors that any recording equipment was forbidden in the visiting area. A detective discovered that Hale had arranged to make confession (the Sacrament of Penance) to a Catholic priest and, with the help of two prosecutors, obtained a search warrant allowing the audiotape interception of any confession and conversation. The affidavit for the search warrant, which the prosecutors assisted in drafting, acknowledged the understanding of confession as "an integral part of Catholicism....a sacrament." The two prosecutors had the tape transcribed and listened to it. When the taping became public knowledge representatives of the archdiocese met with the County Attorney, Harclerod and obtained a promise not to repeat such taping. They requested that the tape be destroyed. Harclerod moved for the trial court to retain the tape and prohibit any person with knowledge from disclosing the contents without court (cont. on pg. 13) ☞

order. The prosecutor's motion was granted without notice or hearing. Hale was meanwhile indicted for the murders. The plaintiffs here are Father Mockaitis, the priest who conducted the sacrament, and his archbishop. They were unsuccessful in obtaining relief in the state court and so filed a federal lawsuit. Hale was meanwhile indicted for the three murders. In the interim the court granted Hale's own motion for preservation of the tape and transcript as evidence in his defense.

THIS CASE

Father Mockaitis and Archbishop George filed suit in federal district court setting out five claims under federal and state law. The suit alleged that their First and Fourth Amendment rights to free exercise of religion and protection from unreasonable search or seizure were violated, the state's action violated a federal statute prohibiting government from placing an undue burden on the exercise of religion, another violation of federal statute for the wiretapping, and violation of Oregon's constitutional provisions protecting religious freedom. The prosecutor answered by denying any violation and the two criminal defendants objected to any destruction of the tape. The criminal defense attorneys had already listened to the tape, and Hale filed an affidavit revealing the substance of the tape, as it was more exculpatory than not, claiming that it was more accurate and more persuasive, than any recollection he had of the confession and conversation with Father Mockaitis. The district court dismissed plaintiffs' suit, concluding it had to refrain from exercising jurisdiction where it would interfere with an ongoing state prosecution, and because the criminal defendants' right to a fair trial outweighed the priests' First Amendment concerns. It is from this dismissal that plaintiffs appeal, and the 9th circuit reverses.

HOLDINGS

The 9th Circuit reversed the dismissal and remanded to district court for the requested declaratory (holding the taping violated federal law) and injunctive relief prohibiting a repeat of the taping. On remand the court was to determine attorneys fees for all the federal litigation, having substantially prevailed on those claims which may result in such an award. It was error to dismiss the case, and the district court ignored certain valid claims. The destruction and suppression of the tape's contents were not the only remedies requested. Where federal court has jurisdiction, there is an obligation to exercise it, not abstain from deciding the case where serious federal violations are alleged, and can be remedied to a great degree without disrupting state proceedings.

I. Plaintiffs argument under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb has merit, and they had proper standing to bring the claim. The RFRA statute provides that Government may not make or enforce a law which, although neutral

towards religion, substantially burdens the exercise of religion, unless there is a compelling government interest and the least restrictive means are used to further that interest. The state prosecutor's position that the statute was an unconstitutional establishment of religion, because it advances free exercise of religion, was rejected in part because it would prevent the government from protecting that which it guarantees. The necessity to sometimes determine what constitutes religion, and its exercise, in order to enforce this law did not create impermissible entanglement. The prosecutor's additional position was based on his duties to gather, disclose and use evidence in a criminal trial and his neutral application of the authority to monitor jail conversations. The 9th Circuit found that rather than neutral use of the law, the state deliberately sought out the exercise of religion in order to capture evidence. The court concluded that the state did not use the least restrictive means to further a compelling state interest (the gathering of evidence for conviction), and that the taping did substantially burden the priests' exercise of religion. The court did not order destruction of the tape. While its continued existence caused the clergy unease, the penitent chose to reveal the contents of the confession, and this cannot be destroyed. Under the circumstances, since Father Mockaitis knew that a penitent may always make such disclosure, the tape did not additionally burden the exercise of any rights. The request for an injunction to insure that such taping was never repeated was not moot. The earlier stipulation by the state, promising not to do this again, was not satisfactory to fully protect the interests of either the plaintiffs, nor other persons exercising their religious freedom at the jail.

II. The taping did not violate the federal wiretap statute, 18 U.S.C. 2510(5)(a). Although it should not have been done, it was in the ordinary course duty by law enforcement, and not a wilful violation.

III. Father Mockaitis had a reasonable expectation of privacy under the Fourth Amendment. An Oregon statute provided for confidentiality and testimonial privilege regarding communications between a clergyman and communicant, except with the consent of the communicant. A historical review of the traditional respect accorded religion in general, and clergy-communicant discourses in particular, also compelled the finding that the Father's belief in the secrecy and confidentiality of his professional duties were well founded, and protected by the Fourth Amendment. Hale's affidavit described the confession as contrition for committing the burglaries, and for his own anger at being falsely accused of the murders, which he blamed on his companion and now co-defendant Susbauer. The Court's suspicion that Hale knew, and hoped, full well that he was being taped did nothing to diminish Father Mockaitis' expectation of privacy and confidentiality from the eavesdropping of others. (cont. on pg. 14)

IV. Because of this resolution the court did not have to reach the claims made under the Oregon Constitution or the Civil Rights Act, 42 U.S.C. 1983.

UNITED STATES V. ALEXANDER (9th Cir. 1997) 1997 U.S. App. LEXIS 1745

Convictions for 5 counts of unarmed bank robbery reversed, because properly suppressed confession was admitted in second trial on improper basis. The judge had no exception allowing him to depart from the law of the case (the holding that the confession should be suppressed) therefore this was an abuse of discretion. Appellant Alexander was a suspect in bank robberies, and wanted on a warrant for FTA on a cocaine charge. While impaired by drugs and/or alcohol Alexander called 911 to report someone trying to enter his girlfriend's apartment by drilling through a wall. He said he could tell from the sound that the person was wearing a black jacket. When police arrived they found no signs of such an attempt but arrested Alexander. Upon being interrogated three hours later, he confessed to several bank robberies in an hour and a half interview.

1. The motion to suppress confession

Alexander's motion to suppress claimed that he was incapable of a valid waiver of Miranda rights due to intoxication of some type. The tape of the 911 call provided evidence to support this claim, as did affidavits from two witnesses, Hughes and Wilburn. Police testified that he orally waived his rights, appeared rational, coherent, and understood the Miranda warning. The judge granted the motion to suppress the confession, and stated that he relied on the 911 tape, but had concerns about the accuracy of the affidavit witnesses. The court found Alexander to have been delusional and incapable of waiving Miranda rights.

2. Three Motions to Reconsider

During the following months motions were heard by a second judge, Judge Conti. The government first filed but withdrew an appeal of the suppression order. They moved for reconsideration and an evidentiary hearing on the suppression issue. This was denied, relying on the "law of the case." Hughes and Wilburn testified in a pretrial hearing on admissibility of defendant's drug charge in the bank robbery trial. Their testimony as to when defendant was intoxicated or using drugs contradicted some of their previous statements. The court allowed evidence of drug use to show motive for the bank robberies. A second motion to reconsider the confession's admissibility was denied, Judge Conti observing that the inconsistencies were not significant, the witnesses were substantially consistent with previous statements, and the statements were not the basis for the first judge's suppression order.

At trial Wilburn gave testimony that provided additional impeachment of her credibility in general, but not specifically about when defendant was incapacitated by substance abuse. The trial ended in a hung jury. Judge Conti granted the government's third motion for reconsideration and evidentiary hearing on the grounds that the mistrial and impeachment of the witness were "changed circumstances" and that to refuse a hearing would be a "manifest injustice." The suppression order was reversed, the confession admitted at the second trial, and defendant was convicted.

3. The law of the case doctrine did not permit reconsideration of the suppression order

Generally a court may not reconsider an issue already decided by the same court or a higher court in the identical case. The court has discretion to depart from the law of the case where one of the following conditions exist:

- A. The first decision was clearly erroneous
- B. An intervening change in the law occurred
- C. Evidence on remand is substantially different
- D. Other changed circumstances exist
- E. A manifest injustice will result otherwise.

Departure from the law of the case without one of these conditions is an abuse of discretion. The 9th circuit noted the minimal nature of witness impeachment on the subject of defendant's intoxication, the only issue relevant to the suppression. The first judge had not relied upon the witnesses in concluding that the confession was obtained without a valid waiver of Miranda rights. This ruling was based upon the 911 tape, was not clearly erroneous, was supported by the evidence and was plausible. The general impeachment of the witnesses' credibility already existed when Judge Conti denied the second motion to reconsider. Nothing else occurred to justify granting the third motion. The only changed circumstance was the mistrial, which did not support reconsideration. No manifest injustice loomed from refusing to reconsider, based on the factors already discussed minimizing the impeachment, and the fact that suppression was not based on the impeached witnesses. Therefore the departure from the law of the case was an abuse of discretion and requires reversal.

UNITED STATES V. DUK KYUNG KIM (9th Cir. 1997) 1997 U.S. App. LEXIS 2032

Kim's conviction for possession of stolen property from a foreign shipment was affirmed, rejecting his claim that fruits of a search should have been suppressed, and that the evidence was insufficient to support a guilty verdict. Wee was hired by Kim to rent storage units for Kim. The leases were in Wee's name, with Kim and others listed as having authorized access. Wee only had possession of the keys to the units when given to him temporarily. Wee was in charge of unloading some of the

(cont. on pg. 15)^{esr}

goods he now told the FBI he believed to be stolen, and had been the only one present when this occurred. Appellant kept the only key and had general control of the unit. Wee did not have independent authority or permission to open it without Kim's say-so, nor for his own purposes. Wee only entered the unit on Kim's business. The search leading to evidence, and prosecution was conducted upon Wee's consent.

Standard of Review

In a long line of cases the 9th circuit had upheld trial court findings of authority to consent to a search but avoided announcing the standard of review used. The court now explicitly decides that existence of authority to consent to a search is to be reviewed de novo. The issue is a mixed one of law and fact, in which a fact finder must first establish the necessary facts, then select the applicable law and apply it to the facts. Because review requires weighing and balancing of legal doctrines and policies, the court concluded that the de novo standard was correct. Other circuits use different or mixed standards of review on authority to consent.

Actual Authority to Consent

A valid consent to search requires the consent to be given by one with common authority over the property to be searched. This is further defined as joint access or control for most purposes, as contrasted with limited access, or permission to deal with the premises only in a narrow set of circumstances. Wee did not have independent access or permission to deal with the lockers. On the other hand, Wee's name was on the lease, he would sometimes retain the keys for a period of time, and oversee opening and lockers. There was a clear risk that Wee could overstep the scope of his authority or access regarding the storage units. This partial control at times, and total control occasionally led to the conclusion that Kim assumed the risk the Wee would overstep his authority as he did in allowing the search. The court found that actual authority to consent existed, and did not reach the apparent authority argument.

■

Bulletin Board

◆ *New Attorneys*

Theresa Armendarez begins her employment as an experienced attorney assigned to the Southeast Juvenile Office. She holds a B.A. in Communication from Arizona State University and a J.D. from Hastings College of Law at University of California, San Francisco. Since her admission to the Bar in 1994, she has been in private practice and also worked for the Arizona Attorney General's Office.

Mark Dwyer is an ASU College of Law graduate. Since 1988, Mark has been employed as an Assistant Attorney General in the Arizona Attorney General's Office. Mark is assigned to Group D.

Since 1994, **Gerald Gavin** has been the Mohave County Legal Defender. From 1991 to 1994, he practiced as a Deputy Public Defender in Mohave County. He is now assigned to Group D. He holds a B.S. in Public Administration from the University of Arizona and obtained his J.D. from the Southern Illinois University.

Peter Rosales was the Legal Defender in Mohave County and most recently worked for the City of Tempe Municipal Court. He obtained his J.D. from Loyola Law School and a B.S. from Arizona State University. Peter is assigned to Group C.

William Stinson recently joined the office as an attorney in Group C. He is a former Deputy Public Defender from our office and most recently was in private practice. He obtained his J.D. from McGeorge UOP at Sacramento, CA.

◆ *Moves/Changes*

Francisco Sanchez has left the office to join the Federal Public Defender's Office.

Colleen McNally, Group B team leader is transferring to Juvenile late this month. Colleen has been a trial attorney since 1993 and prior to that she worked in the Arizona Attorney General's Office handling cases from juvenile child protective services.

Patti O'Connor is returning to full-time status from her part-time role. Ms. O'Connor is at Mesa Juvenile.

◆ *Support Staff*

Florice Redondo has been hired as a legal secretary in Group B. She is a recent graduate of the American Institute of Legal Studies in Phoenix.

Early this month, **Kathleen Miller**, began work as a legal secretary in Group D. Ms. Miller recently moved here from Massachusetts.

Moves/Changes

Tonya Allen, Tenth Floor Receptionist, has resigned from the office to relocate to St. Louis, Missouri.

■

COMPUTER CORNER

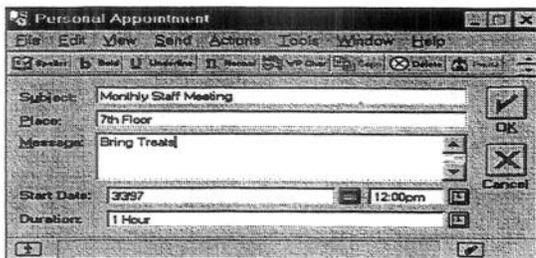
By Susie Tapia and Gene Parker
Information Technologies-Help Desk

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April's FLIP-ITS:

Creating Personal Groups in GroupWise.

Learn how to create your own groups in the GroupWise Address Book for use in addressing mail, appointments, tasks, notes and phone messages. If you often address messages to the same group of people, create a personal group instead selecting them each time from the Address Book. Call the Help Desk at x6198 for your April's FLIP-ITS.

User Tip of the Month:



Use the **Page Up / Page Down** icons on the WordPerfect scroll bar when needing quick access to the next page of the document. The Page Up/ Page Down keys on the keyboard only advance you 24 lines at a time, about half a page. The icons are located at the bottom of the right hand scroll bar.

Happy Computing!



MCPD Attorneys on National TV!

On April 16, from 8:00 to 10:00 p.m., CBS Reports will air a program entitled "Enter the Jury Room." This program is only the second known successful attempt to film jury deliberations in real criminal cases. It offers a rare opportunity to see what actually happens behind that carefully-guarded, closed door.

The program was filmed here in Phoenix, and several of our attorneys are involved. CBS filmed trials conducted by **Tim Agan, Patti Riggs, Lawrence Blieden, Elizabeth Feldman and Michelle Allen, Curtis Beckman, Jeremy Mussman**. Although the focus of the show is on the jury deliberations, CBS filmed the entire trials, and interviewed the attorneys and judges, to provide context and background.

And the Emmy goes to.....

FEBRUARY, 1997
Jury & Bench Trials

OFFICE OF THE LEGAL DEFENDER

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
1/2-1/6	Parzych/L. DeSanta	Armstrong	C.Smyer	96-90663/2 Cts. Sale of Narcotics, Class 2F 94-93492/Prob. Violation	Guilty	Jury
1/15-2/6	Parzych/J. Chornenky	Scott	J.Ditsworth	96-90067/Murder 1, Class 1 Felony Agg.Asslt., Class 3 Dangerous	Guilty Murder 2; Agg.Asslt.Dangerous	Jury

GROUP A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
1/29-2/3	Kristen Curry	Mangum	Eckhardt	CR-95-12120 Aggravated DUI/F4	Guilty	Jury
1/30-2/5	Rick Tosto/ Jones	Yarnell	Roberts	CR-96-08730 Attempted Sex Assault/F3 Kidnapping/F2	Hung (5 not guilty 3 guilty) for the second time. CA dismissed with prejudice. Guilty Kidnapping	Jury
2/10-2/19	Jamie McAlister/ Yarbrough	Hicks	Kramer	CR-96-02343 Aggravated DUI/F4 Aggravated DUI (Drugs)/F4	Not Guilty - Aggravated DUI Guilty - Aggravated DUI (Drugs)	Jury
2/13-2/18	Kristen Curry & Renee Scatena	Sheldon	Garcia	CR-96-04909 Aggravated Assault/F3 (Dangerous)	Not Guilty -- Guilty of Misdemeanor Assault (non-dangerous)	Jury
2/13-2/20	James Cleary	Yarnell	Morrison	CR-96-00367 Aggravated DUI	Hung (6 not guilty 2 guilty)	Jury
2/20-2/25	James Cleary	Yarnell	Lawritson	CR-96-07037 2 cts. Aggravated DUI	Guilty	Jury

GROUP B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
1-21 to 1-23	Colleen McNally	Campbell	Charnell	96-00410 Burglary F3	Hung Jury -- this is the 2nd hung jury on this case.	Jury
2-5 to 2-10	Peggy LeMoine/ Kasietta	Topf	Dion	95-06779 Agg. Asslt., F3, Dangerous	Guilty	Jury
2-10 to 2-12	Daniel Sheperd	Hotham	Frick	96-10387 Arm.Robb, F2, Dangerous Kidnap, F2 Robbery F4	Guilty of Robbery- - lesser included, F4 Non-dangerous	Jury
2-13 to 2-20	James Park	Arellano	Inciong	96-10608 Poss. Crack Cocaine, F4 Poss. Drug Para., F6	Guilty	Jury
2-26 to 2-27	Daniel Sheperd	Topf	Inciong	96-01198 Agg. Asslt., F3 DangerousDisorderly conduct, F6.Dangerous (2 counts)	Guilty	Jury
1-27 to 2-12	Kevin Burns/ Ames	Arellano	Lynch	96-04783 Resisting Arrest, F6 Agg. Asslt., F6 Disorderly Conduct, MI Trespassing, MI	Not Guilty Guilty Guilty Guilty	Jury
2-24 to2-26	Joel Brown/ Castro	Gerst	Pappalardo	96-06193 Disorderly Conduct, F6	Guilty	Jury
1-29 to 2/5	Terry Bublik/ Stacey O'Donnell Corbett	Topf	Droban	96-04527 Agg. Asslt, F6	Not Guilty	Jury
2-19 to 2-21	Mary K. Grenier	Fletcher	Gentile	TR 96-03402 DWI, MI	Not Guilty	Jury
2-10 to 2-12	John Taradash	McDougall	Rea	94-03937 Poss. For Sale Crack, F2; Mscndct. w/Wpns. F4	Guilty	Jury

GROUP C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
Jan. 29 - Feb. 13	Ronan Cotto/ Breen	Araneta	Sandler	94-93887 Ct 1, Consp/Comm Agg Robb, F3; Ct 2, Agg Robb, F3 Ct. 3, First Deg Murder	Ct 1--Guilty of less serious crime of Consp/Comm Theft from Person, F6 Ct 2--Guilty of less serious crime of Theft from a person, F6 Ct. 3--NOT GUILTY	Jury
Feb. 3 - Feb. 5	Coolidge/ Clesceri	Armstrong	Maxwell	96-93488 Agg DUI, F4	Guilty	Jury
Feb. 5 - Feb. 11	Mackey Leonard	Scott	Rizer	96-93656 Agg Aslt on 2 Police Officers, F5	NOT GUILTY as to both officers	Jury
Feb. 10 - Feb. 11	Israel	Hendrix	Rueter	96-90862 PODD, F4	Guilty	Jury
Feb. 10 - Feb. 13	Klobas	Armstrong	O'Neill	96-91053 Sex Aslt, F2	NOT GUILTY	Jury
Feb. 12 - Feb. 15	Levenson/ Thomas	Ishikawa	Vick	96-91775 Agg DUI, F4 Agg Dr w/BAC over .10, F4	Guilty on all	Jury
Feb. 12 - Feb. 18	Bingham/ Breen	Ventre	Maxwell	96-91322 Agg DUI, F4	Guilty	Jury
Feb. 20 - Feb. 24	Lorenz/ Beatty	Ishikawa	Alt	96-93131 Marij Poss for Sale, F4 Sale of Marij, F3	Guilty on all	Jury
Feb. 21 - Feb. 25	Mackey	Pool	Freeman	TR96-02331 N.Mesa J.Ct. DUI, M1	Guilty	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
1/22- 2/6	Donna Elm/ Elizabeth Melamed/ Castro	Martin	Ruiz	CR94-06407 Murder I Agg. Asslt. Capital F3	Guilty 2nd Degree Murder Guilty Agg. Asslt. Dang.	Jury
2/5- 2/12	Jeanne Steiner/ Marie Dichoso- Beavers	de Leon	Keyt	CR96-10084 Agg. Asslt. F3	Hung Jury 7 Not Guilty 1 Guilty	Jury
2/5- 2/7	Gary Bevilacqua	Dougherty	Mroz	CR95-03398 Agg. Asslt. (3 cts) F3	Not Guilty Agg. Asslt Guilty Lesser Included Disorderly Conduct	Jury
2/6- 2/18	Thomas Kibler/ Barwick	Nastro	Barrett	CR96-07566 Agg. Asslt. F3	Guilty	Jury
2/17- 2/26	Joe Stazzone	Bolton	Tucker	CR96-00533 Agg. Asslt. F3D Agg. Asslt. F4ND Kidnap F2	Guilty on all counts	Jury
2/18- 2/19	Jeremy Mussman/ Richard Zielinski/ Fusselman	de Leon	Keyt	CR96-02489 Poss. of Meth. F4 Poss. of Drugs F6 PODP F6	Not Guilty	Jury
2/19- 2/24	Gary Bevilacqua/ Barwick	Wilkinson	Rehm	CR95-10422 Agg. DUI (2 cts) F4	Guilty	Jury
2/19- 2/25	Karen Kaplan/ Dan Carrion/ Barwick	Rogers	Howe	CR96-00415 Public Sex. Indecency (3 cts) F5	Guilty of 2 counts Not Guilty on 1 count	Jury
2/20- 2/25	Margarita Silva/ Jim Wilson/ Bradley	D'Angelo	Fleenor	CR96-04196 Theft F4	Guilty	Jury
2/24- 2/27	Hillary Berko/ Gary Bevilacqua	Nastro	Romano	CR96-10200 POND F4	Hung Jury 6 Guilty 2 Not Guilty	Jury
2/24- 3/4	Pauline Houle	de Leon	Schumacher	CR96-04963 Threatening & Intimidation with Allegations (13-604(T) Gangs) (2 cts.) F4	Ct. I Hung Jury 6 Guilty 2 Not Guilty Ct. II Dismissed	Jury
2/26- 3/4	Carole Larsen/ Barbara Fuqua/ Bradley	D'Angelo	Myers	CR96-06815 Misconduct Involving Weapons-Prohibited Possessor F4	Guilty	Jury