



for The Defense

▶ ◀ Dean Trebesch, Maricopa County Public Defender ▶ ◀

MENTAL HEALTH DIVERSION APPROACHING REALITY

INSIDE THIS ISSUE:

Articles:

Shaw Award Presented to Ed McGee 7

Utilizing Your Investigators 15

Regular Columns:

Arizona Advance Reports 17

Bulletin Board 14, 16

Calendar of Jury and Bench Trials 18

By Kyle Mickel, Program Manager
Maricopa County Adult Probation
Department

The Arizona media has been awash in recent months with tragic stories describing consequences of mentally ill defendants going without proper treatment and medication. All too often it seems we hear about violent incidents following a mentally ill person's inability to gain services that behavioral health providers are legally compelled to provide. Many of us in criminal justice circles and the behavioral health community have dreamed of the day

when mentally ill defendants, under the right circumstances, could benefit from prosecutorial diversion with treatment and monitoring, instead of languishing in jail awaiting case resolution and transition back into the community. Well, those days are now in sight, thanks to a Superior Court workgroup dedicated to developing a Superior Court felony diversion project.

To understand the true need for mental health diversion, all we need to do is examine the numbers. The Department of Health and Human Services Center

(Continued on page 2)

VOUCHING, THE SERIES

Part 4: Arguing the Risks of Testifying

Part 5: Melodramatic Implications of Acquittal

By Donna Lee Elm
Trial Group Supervisor – Group D

Part 4:
Arguing the Risks of Testifying

Attorneys have argued credibility based upon the risks the witness assumed simply by testifying or by testifying falsely. This usually takes the form of arguing that witnesses would

not risk withering cross-examinations, experts would not risk their reputations, officers would not risk their jobs, snitches would not risk their lives, and no one would risk perjury charges *but for* their testimony being true.

1. Risk of Testifying
(Facing Cross-Examination)

[The complainant was] doubly the

(Continued on page 8)

for The Defense

Editor: Russ Born

Assistant Editors:

Jim Haas

Keely Reynolds

Office: 11 West Jefferson
Suite 5
Phoenix, AZ 85003
(602)506-8200

Copyright © 2000

for Mental Health Services reports approximately three percent of the U.S. adult population suffers from a serious mental illness. In Maricopa County, this number is expected to reach 82,600 this year. Regional Behavioral Health Authorities or RBHAs (formerly ComCare, currently Value Options/ABS--Alternative Behavioral Services) have managed the delivery of general mental health services to indigent Maricopa County residents since 1985. But, most local treatment experts agree, this population encounters increasing difficulty in accessing effective ongoing treatment services. As a result, many patients lose eligibility for the key ingredients necessary to maintain psychiatric stability and well being (case management, housing, medication, treatment, counseling, etc.). Because of disparities and wide gaps in Maricopa County's existing mental health treatment delivery system, a disproportionate percentage of SMI (seriously mentally ill) persons are incarcerated for actions arising from symptoms of their mental illness; not behavior arising from criminal intent. These actions frequently occur during times of psychiatric distress. Once incarcerated, emotionally disturbed inmates spend longer time behind bars than other prisoners, according to the Justice Department's Bureau of Justice Statistics. In Maricopa County, the cost for housing a mentally ill inmate in a psychiatric unit is approximately \$100 per day. This cost is more than three times the amount for housing a non-mentally ill inmate.

Because of disparities and wide gaps in Maricopa County's existing mental health treatment delivery system, a disproportionate percentage of SMI persons are incarcerated for actions arising from symptoms of their mental illness; not behavior arising from criminal intent.

Moving these nonviolent, nonrepetitive mentally ill defendants from jail to diversion offers many benefits, just a few of which include:

- improved mental health and quality of life for participants, their families and communities;
- reduced costs of psychiatric hospitalization (in jail and out of custody);

- anticipated reductions in recidivism;
- reduced lengths of incarceration;
- rapid case processing;
- fewer cases prosecuted;
- presentence investigations saved;
- smaller caseloads for specialized SMI probation officers;
- earlier treatment referral; and
- reduced treatment costs credited to continuity of care.

The concept of SMI diversion with deferred/suspended prosecution is not new to Maricopa County. For three years, a similar model has been practiced in Phoenix City Court with a 69% successful program graduation rate. Under the City

Court model, defense counsel identifies potential diversion defendants. After a diversion referral is made, the RBHA completes an assessment form and provides the information to the Court. If the case is accepted by the City Court for diversion, the prosecutor files a motion for continuance. If the defendant successfully complies with all requirements, the

case is reviewed four months later for dismissal. Defendants achieve dismissal of their case by adhering to the following requirements:

- Cooperate with treatment staff
- Immediately provide case manager with change of address/phone number information
- One face-to-face contact with case manager per week
- One face-to-face contact with psychiatrist or nurse per month
- One phone contact with ABS clinical team per week
- Attend a weekly diversion group for 1.5 hours per week
- Drug testing on a random basis
- Substance abuse or other counseling as re-

requested by the clinical team

- Attend support groups two times per week
- Take prescribed medications as directed
- Follow instructions of ABS clinical team
- Remain law abiding at all times

Like the clients participating in Phoenix City Court's diversion model, Superior Court defendants will also be mandated to successfully complete many diversion requirements. These are outlined in a consent form, which includes waiver of speedy trial, program eligibility requirements, court appearances, restitution and program attendance/cooperation. This document serves as the defendant's contract with the Court to verify willingness to comply (much like the contract currently utilized for TASC diversion clients). In cases deemed appropriate for diversion, a State's *Motion for Suspension of Prosecution and Order* will be filed.

An Adult Probation Department Program Liaison will monitor compliance with diversion expectations through frequent contact with the defendant and ABS clinical team (case manager, psychiatrist, nurse, etc.) and provide detailed monthly reports to the Court, Deputy County Attorney and Defense Counsel. Client status, including all areas of non-compliance, will be addressed in these reports. Meanwhile, severe noncompliance will immediately be reported to the Court, DCA and Defense Counsel. In times of noncompliance, the defendant's case could be reinstated for prosecution through the State's *Notice of Request to Vacate Suspended Prosecution and Order*, depending on the direction from the Court. Noncompliance could result in the defendant being returned to Court for standard case processing. A warrant for the defendant's arrest may accompany this order. On the other hand, when participants successfully complete the diversion elements, the County Attorney will file a *Motion to Dismiss with Prejudice and Order*.

Because most diversion cases will be felonies, the suggested length of the Superior Court diversion model is one year, rather than the four-month

model utilized in City Court. An option for early termination after six months will be built into the diversion model.

The Diversion Workgroup consists of representatives from the Public Defender's Office, County Attorney's Office, Adult Probation, Pre-Trial Services, Court Administration, Clerk of the Court's Office, Value Options, ABS and other behavioral health professionals. Their proposal has received endorsement from several Superior Court policy makers. One reason the proposal has been given the "go-ahead" is a recommendation it be initiated on a limited small-scale pilot basis only comprising those patients currently receiving case management services through Value Options/ABS or other private agencies. Furthermore, the plan is to initially restrict participation to clients residing in Phoenix, so that transportation to a central counseling site does not pose problems. Starting the project on a small-scale basis will help to insure the project's long-term success. Based on projections from referrals to the Phoenix City Court Diversion Project, it is estimated approximately 10 defendants per month could be targeted for inclusion. Participants will be limited to cases arising from Justice Courts in the Phoenix West Precinct, Phoenix East One Precinct and Phoenix Central Precinct. Total program participation will be capped at 20 (two groups of 10) at any given time. As successful program participants graduate, and unsuccessful participants are discharged, they will be replaced with new clients.

It is anticipated that many Superior Court diversion cases will involve charges of drug possession. Because these cases fall under Proposition 200 sentencing statutes, incarceration would be unlikely even without diversion. As procedural problems and concerns are identified, addressed, and resolved, a substantial increase in cases might be handled after completion of the pilot phase. This increase could include non-case managed SMI's and other categories of mentally ill defendants. While many diversion projects exist nationwide to

place mentally ill defendants in treatment instead of jail, our proposal may be the first in the country to offer such diversion on a felony level. The target population will include:

- Patients diagnosed with major mental illnesses who are approved for case management services
- Class 4, 5 and 6 felonies (misdemeanants could be considered on a case-by-case basis)
- Nonviolent offenses
- Victimless crimes, or crimes wherein the victim endorses diversion (family members, friends, police officers, etc)
- No prior felony convictions (pursuant to statute)
- Not currently on probation or parole
- No prior diversion program participation (pursuant to statute)
- Patients who consent to participate in diversion and release confidentiality

The Adult Probation Department is playing a key role in SMI diversion. The Department recently developed the full-time position of Mental Health/Substance Abuse Dual-Diagnosis Counselor. John McCluskey, an ASU doctoral candidate in social work, is performing a variety of counseling functions related to operations of APD's mental health unit and the Community Punishment Program's (CPP) mental health component. He will serve as the Diversion Program Liaison. Meanwhile, McCluskey will also facilitate the counseling sessions under this diversion proposal and be responsible for coordinating administrative tasks related to SMI diversion operations. The Program Liaison will complete monthly progress reports for the Court, County Attorney and Defense Counsel. These reports shall include treatment progress, urinalysis results, medication compliance, clinical staff input, areas of noncompliance and recommendations. McCluskey's treatment curriculum will emphasize substance abuse interventions. Between 25% to

50% of all people with mental health disorders also have a substance abuse problem. In criminal justice populations, the rates are significantly higher than in the general population for both mental health disorders (four times higher) and alcohol/drug disorders (four to seven times higher). Mentally ill persons who also possess substance abuse issues are commonly referred to as the dual diagnosed. The best available research indicates that treating dual diagnoses with an integrated model addressing both problems simultaneously results in more successful outcomes. The SMI diversion treatment model will incorporate state-of-the-art research-based components of addressing dual diagnoses. The treatment curriculum will also include elements designed to deter defendants from the criminal justice system and contribute to their long-term well-being, such as relapse prevention, stress management, money management, healthy pleasures activity, independent living skills, education and vocational rehabilitation assessments.

During the first six months of the one-year diversion program, all clients will engage in twice-weekly intensive counseling sessions (48 total sessions). Thereafter, clients will enter a six-month aftercare phase of diversion. In aftercare, the client will receive vocational rehabilitation counseling while working toward job readiness if appropriate.

While many diversion projects exist nationwide to place mentally ill defendants in treatment instead of jail, our proposal may be the first in the country to offer such diversion on a felony level.

Participants will continue to receive case management services and be monitored by the probation liaison. The probation liaison and ABS case manager may identify alternative resources to benefit the client during aftercare, such as day treatment or education programs. They may also initiate referrals to appropriate available community resources to access ancillary services and maintain continuity of care. Should additional therapy become necessary during aftercare, the client could re-enter the intensive counseling groups. Careful consideration will be taken to make sure client participation in counseling does not interfere

with employment, education or vocational training.

If all treatment goals are met and the client complies with all diversion mandates and remains law abiding, he/she may be considered for successful early termination from diversion after the first six months of participation, subject to the Court's approval, and the *State's Motion to Dismiss with Prejudice and Order* would be filed.

In addition to verifying client compliance to diversion mandates, the Program Liaison's monthly reports to the Court, DCA and Defense Counsel

Between 25% to 50% of all people with mental health disorders also have a substance abuse problem. In criminal justice populations, the rates are significantly higher...The SMI diversion treatment model will incorporate state-of-the-art research-based components of addressing dual diagnoses.

will describe all known areas of noncompliance. If the prosecutor disagrees with the Program Liaison's recommendations to continue diversion in times of low-level noncompliance, they will file the *Notice of Request to Vacate Suspended Prosecution and Order*. Such noncompliance examples would include:

- Failure to attend a counseling session or clinical appointment
- Isolated relapse on illegal drugs
- Isolated failure to contact Program Liaison or case manager as directed
- Isolated failure to take a urinalysis test or blood level check (to verify medication is taken as prescribed)
- Late notification of new residence
- Arrest on misdemeanor warrants pre-dating diversion
- Noncompliance due to factors beyond the de-

pendant's control (hospitalization, family crises, transportation problems, etc.)

- Physical illness
- Changes in case management

Meanwhile, any severe noncompliance will *immediately* be conveyed to the Court, Defense Counsel and DCA via telephone conversation and in writing. Severe noncompliance requiring immediate notification would include:

- New arrest or criminal activity
- Willful failure to comply with diversion requirements
- Three incidents of illegal drug use
- Refusal to submit to urinalysis
- Refusal to take medication as prescribed
- Refusal to submit to blood level checks

If ABS or another case management entity decertifies the client and severs the link for services during diversion participation, the Court will be immediately notified and a recommendation will be made by the Program Liaison.

Timely access to emergency housing for homeless defendants is an important element in this proposal. It also represents the Diversion Workgroup's biggest challenge. Thus far, the subcommittee has been unsuccessful in developing a residential component to the diversion project for homeless participants. Several options are undergoing review and are being discussed at ongoing subcommittee meetings. These options include possible grant funding, temporary housing vouchers from Value Options to ensure beds will be available for homeless diversion participants, or utilizing existing community halfway houses or board and care facilities.

The Diversion Subcommittee plans to convene on a regular basis to monitor the diversion program's development. After the SMI diversion pilot project's first year of operation, the Subcommittee will analyze the successes and challenges encountered,

in order to gauge the program's effectiveness. This process will confirm if the program is successfully accomplishing its purpose. It may lead to other recommendations or modifications to operations as currently proposed.

If the Year-End Review and Analysis indicates success, recommendations may follow for possible program expansion. One such area for expansion could include patients who suffer from mental illness, but lack case management services. Because symptoms of mental illness often do not manifest until the patient reaches their late teens or early twenties, this group could include patients who may be undergoing their first psychiatric episodes. It is hoped that the subcommittee can develop a mechanism to accomplish psychiatric evaluations for these patients in jail, which would lead to linkages with case managers prior to release. Under the current RBHA mental health delivery system, however, this goal cannot be addressed during the pilot phase.

Meanwhile, the Diversion Workgroup supports long-range plans to develop two separate diversion models in Maricopa County:

- Front-end diversion involving police officers and mobile crisis teams aimed at re-establishing linkages to mental health resources after transportation to urgent care centers (instead of arrest). This goal requires a significant increase in personnel and resources, such as crisis workers, vehicles, and easier access to hospitalization (voluntary or involuntary).
- Civil commitment diversion for acute psychiatric patients.

Subcommittee members are also examining SMI diversion models existing in other jurisdictions around the nation. Some of these programs incorporate housing, medical and therapeutic support services, money management and job development skills. Technical assistance gleaned from this research could identify additional alternative oppor-

tunities to complement this diversion proposal.

The subcommittee is also researching the practices of various specialized Mental Health Courts operating in other jurisdictions around the Country. This specialized court process may hold promise for alternative non-adversarial methods of community supervision coupled with treatment, much like current Drug Court and DUI Court models.

For more information on the SMI Felony Diversion Project, contact Deputy Public Defender Donna Elm at 602-506-8223.





Do you have an idea for an article? Would you be interested in writing an article for publication in *for The Defense*?

If so, give us a call with your ideas.

SHAW AWARD PRESENTED TO ED MCGEE

By Jim Haas
Special Assistant

The fifth annual Joseph P. Shaw Award was presented to Appeals attorney Ed McGee at the office holiday party on December 16, 1999. The Shaw Award is the office's "Attorney of the Year" award. It was created in 1995, the year of Joe Shaw's retirement, to recognize his integrity, professionalism and years of dedication to the office and the cause of indigent defense. The award is given each year to the attorney who, in the eyes of his or her peers, best exemplifies those qualities.

Ed was selected for the Shaw Award by a committee made up of eleven members of the office. Each division, trial group, juvenile site, and the support staff was represented. The members of the 1999 Shaw Award committee were Alysson Abe, Juvenile-SEF; Curtis Beckman, Mental Health; Tim Bein, Records; Brian Bond, Trial Group E; Bud Duncan, Trial Group B; Rhonda Fenhaus, Dependency; Jeff Fisher, Trial Group C; Peg Green, Trial Group A; Jim Kemper, Appeals; Tennie Martin, Trial Group D; and Mara Siegel, Juvenile-Durango.

In September, the committee solicited nominations for the award from all employees of the office. Fifteen nominations were received, nominating thirteen attorneys for the award. The committee met and discussed each of the nominations.

A plaque was presented to Ed by Dean Trebesch, and Ed's name will be added to the plaque which is displayed in the Training Facility.

Ed is well-known as the dapper guy in appeals with the amazing mind and affable personality who is always available and willing to drop everything to help anyone in the office. But Ed's contributions to the office and our clients are far more extensive than that.

Ed joined the Public Defender's Office in 1977, after a short stint in private practice. His talents were quickly recognized and he was given a wide variety of responsible positions. He served as supervisor of the City Court Project, the "East Valley Trial Group" (Group C before it moved to Mesa), and Trial Group D. He was chairman of the office hiring committee. He represented the office on the Mojave County Public Defender Search Committee, which was created to resolve the problems that gave us the landmark *Joe U. Smith* case. He

served on the State Bar Committee on Lower Court Reform, and the Sex Offender Treatment Program Advisory Board.

In 1983, Ed was named the State Bar representative on the Phoenix City Court Public Defender Review Committee, which was created to explore ways to provide public defense services for the city. A year later he was named the office representative on the committee. The committee established the Phoenix Contract Administrator's Office and appoints the Contract Administrator. Ed served on the committee for ten years, and was its chairperson from 1990 to 1993.

He embodies every virtue one could ask for in a public defender. His time in service, dedication, intellect, and class all set him apart. And he's a wonderful person to know.

The nomination of Ed for the Shaw Award reads as follows: "He embodies every virtue one could ask for in a public defender. His time in service, dedication, intellect, and class all set him apart. And he's a wonderful person to know. Ed never turns young lawyers away. He always contributes to our appellate training and he actively seeks out new lawyers to help them mature."

In addition, Ed and Joe Shaw were good friends. Ed spent a great deal of time with Joe, and managed to learn more about Joe's fascinating life than anyone, with the possible exception of Joe's wife, Mary Ann. When I set out to write an article about Joe for this newsletter in 1998, I solicited comments and stories from attorneys and judges all over the state. The most extensive response came from Ed, who knew an amazing amount of detail about Joe from their many discussions. When I realized that most of the article was coming from Ed's response, I called Ed and suggested that he be listed as co-author. He agreed. The result appeared in the February 1998 issue of *for The Defense* and is displayed next to the Shaw Award plaque in the Training Facility.

Unfortunately, Joe Shaw passed away in November 1999. It seems very fitting that the 1999 Shaw Award was presented to someone who not only exemplifies the many fine qualities that made us revere Joe Shaw, but who also was such a friend and admirer of Joe. Congratulations, Ed!



Vouching, The Series Part 4 and Part 5

Continued from page 1

victim in this case. Then, if that's not enough, she is brought to the District Attorney's Office where she tells the Deputy District Attorney what happened, another stranger. Then there is a preliminary hearing in front of a judge. Her attacker is there, an attorney for the attacker, and you can see what that's like being questioned by the attorney for your attacker. You've seen what that's like. That's not the end of it. Then there is a trial later on in front of a jury and alternates, total strangers who are all looking at her as she testifies. She tells about things that she doesn't want to remember which she feels ashamed of for no fault of herself. Then she is attacked by a trained lawyer who's hired by the defendant.¹

He testified in Dorchester Court to the manslaughter. He testified in the Grand Jury to the manslaughter. He testified in Roxbury Court to the robbery. He testified before the Grand Jury in the robbery. He's been through the wringer. You saw him on cross examination here, I suggest a grueling cross examination.²

I am sure witnesses in that witness box, and that witness box is not a pleasant experience, I can assure you they were here because they wanted to be here.³

These arguments generally are permitted as fair inferences from the record. That a complainant was grilled on cross would clearly be before the jury, so would not constitute extraneous information. Moreover, it is not geared to inflame the jury. In *Sheppard* (the second example above), the defense urged that that argument led the jury to believe erroneously that the witness was testifying voluntarily when in fact every prosecution witness testifies under compulsion of process. The court rejected that theory, finding the argument harmless; it would not even issue a cautionary instruction afterward. However, in *Turner*, the first example above, the bolstering of the victim was found proper, though the denigrating of opposing counsel was not.

2. Risk of Damaging Their Reputations

This is also a fairly benign type of argument; it does little to inflame the jury. Examples include:

Though Arizona has no law on point, a related decision (officers would not risk their job) found that argument permissibly discussed motive to tell the truth.

A number of them ... are old, experienced officers. They've got 15, 20, 22 years of experience on the force. [The prosecutor expressed her doubt that any of them] would jeopardize his reputation by lying on the witness stand just to convict one defendant.⁴

[The undercover officer was] putting her reputation on the line [risking] a possible perjury indictment.⁵

[The police officer] told you under oath with his reputation, with his entire experience as a police officer [at stake].⁶

Presuming that the details are in the record, this will generally be treated as a fair inference from them. Regarding the first example, the court held it was not improper since the prosecutor confined her remarks to facts in evidence and based her "vouching" on inferences from the record, not her personal beliefs. Moreover, a jury need not be terribly concerned if the worst that happens if they acquit is that someone's reputation is tarnished.

3. Risk of Perjury Charges

[The government accomplice witnesses] would be subject to indictment for perjury and other previously uncharged offenses in the event they testified falsely.⁷

Does that make sense? That a police officer is going to get on the stand and risk perjuring himself under oath?⁸

[The police officer would not testify at trial] and take a risk of being charged with perjury unless he was telling the truth.⁹

Not many jurisdictions consider this type of argument improper, instead they treat it as a logical inference from the evidence. For example, in *People v. Hodges*, 636 N.E.2d 638 (Ill.App. 1993), after the defense challenged the veracity of state's witnesses, the prosecutor was permitted to argue that he did not commit perjury. Though Arizona has no law on point, a related decision (officers would not risk their job) found that argument permissibly discussed motive to tell the truth. See *State v. Tyrrell*, 152 Ariz. 580, 581, 733 P.2d 1163, 1165 (App. 1986). Indeed, the fact that a witness could be prosecuted if he lied is common knowledge; since witnesses take an oath in front of the jury, a perjury argument would either be based on the record or a reasonable inference from it. Arizona courts, therefore, would doubtlessly find the risk of perjury argument not improper.

However, many reported opinions hold it improper (though usually not sufficient for reversal). See e.g., *Knox* (second example above); *Abernathy v. State*, 192 Ga.App. 355, 385 S.E.2d 259 (1990)(the third example above). In *State v. West*, 145 N.J.Super. 226, 367 A.2d 453 (1976), where the prosecutor argued the harm that would befall an officer if he lied under oath, the court sustained the objection, reasoning:

I think you've made your point as to the reason why no one would lie in this case. Punishment, I think, we should leave out of the case.

A novel variation on this theme occurred where the attorney prosecuting that case also testified and then argued his own credibility in closing. The assigned prosecutor had run into the defendant in a bar, and the defendant allegedly confessed to him over drinks. After the defendant gave a different rendition of the facts to the jury, the prosecutor took the stand and testified about the prior inconsistent statement the defendant had made to him in the bar. In closing argument, he argued his own credibility:

I wouldn't come up here, I can assure you, ladies and gentlemen, and take that and fabricate a story like that because that would be perjury. And so if you accept what I said, what he told me, it certainly contradicts what he told the Court when he was on the stand as to how he got that car.¹⁰

The court did not hesitate to reverse for that violation of the right to a fair trial (due process), but did not reverse based upon it being vouching per se. In a related case, the prosecutor who negotiated the snitch deals was called to testify about their "testify truthfully" terms. Somewhat non-responsively, he testified:

I am going to have to tell you what my state of mind was with regard to this. I wanted to make sure that we had as good a case as we possibly could going into the courtroom. I felt that at that time the Government had an excellent case against . . .¹¹

The court noted that when the prosecutor got into his "state of mind" reference, it suggested personal knowledge of the evidence and the jury could have construed his statements of opinion as "expert testimony." It was, therefore, considered improper.

4. Risk of Losing Their Jobs

Can you think of any reason why Officer Lynch would come to court and perjure himself and risk fourteen years on the police force?¹²

[The officers] put their pensions ... on the line to get these two guys?¹³

What does everybody have to lose? Well, Investigator Grant has been a police officer for twelve years. So I'd venture to guess that his pension is vested and he's going to retire with a pretty nice amount whenever he decides to.¹⁴

Courts are split about how to treat this. Some consider it "fair play," a proper inference from the evidence. See e.g., *People v. Mayfield*, 72 Ill.App.3d 669, 390 N.E.2d 1315 (1979). An Arizona court (see first example above) agreed that such phrasing does not amount to improper vouching, but demonstrates that the witness was not motivated to lie. *Tyrrell* 152 Ariz. 580, 733 P.2d 1163 (App. 1986) (citing *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983)).

On the other hand, some courts in other jurisdictions strictly consider such argument improper unless the officers testified about risks to their jobs if they perjured their testimony. See e.g., *Toliver v. United States*, 468 A.2d 958 (D.C.App. 1983) (argument that police would be "written off the force" was improper because it was not grounded in the evidence); *People v. Cox*, 197 Ill.App.3d 1028, 557 N.E.2d 288 (1990) (argument was "technically excessive"). This is probably the correct view, though such argument will often be harmless when seeking reversal.

Of course, when such vouching includes particular facts that go substantially beyond the record, it is improper even in tolerant jurisdictions like Arizona. For example:

The State's attorneys [who testified] would be subject to disbarment if they did not tell the truth.¹⁵

Lieutenant Hansen has been a police officer for over 20 years, another sworn law enforcement officer, and I am sure that he would not put his career and everything that comes with that on the line by coming in here and testifying falsely.¹⁶

The first example above was improper because disbarment was not in the record and was presumably not general knowledge. The second was improper because the details about pension benefits and how long he had been on the force were not in evidence.

There is another reason (which has not been addressed in Arizona case law) why such argument should be considered improper: stating that officers risk being fired for perjury suggests to the jury that an acquittal could significantly jeopardize their careers. It smacks of extortion, or at least improper influence, of the jurors. Juries are not permitted to consider

collateral impact of their decisions - only guilt or lack thereof. Indeed, the court reversed in *State v. Staples*, 263 N.J.Super. 602, 623 A.2d 791 (1993)(the quote directly above), finding this kind of argument violated “fundamental fairness” under the theory that it improperly inferred that an acquittal could cost the officers their jobs. This is a fruitful rationale that should be advanced more frequently.

5. Risk of Death

While loss of reputation or job might not persuade a jury to convict, suggesting that a witness risks death has far greater potential of improperly influencing a jury.

[The testimony of the government’s witness was especially credible since he chose to testify against appellant even though he was convinced that by doing so] he faced certain death.¹⁷

Bates testified despite threats of violence.¹⁸

Mr. Jones exposed himself to grave danger by appearing in court to testify against Mr. Marcessi.¹⁹

[The eyewitness showed courage in testifying because] when he took that stand he knew he would have to return to that same home he had left which is within blocks of the McKinney home and many of the McKinneys, of course, are not in custody. None of them other than this one.²⁰

And what interest do you think Darius Phillips has got in the outcome of this case other than his thoughts of his possible future safety there?²¹

This type of argument generally is considered improper, either as an attempt to bolster a witness’s credibility or as an attempt essentially to extort a conviction. However, when the argued facts were admitted into evidence, courts may just give cautionary instructions.

Part 5:

Melodramatic Implications of Acquittal

Prosecutors sometimes argue against acquittal by suggesting, improperly, that it would lead to exaggerated and unfair results. Lawyers are usually permitted to analyze the evidence and reflect upon what it means. However, misrepresenting or melodramatically mischaracterizing it is improper. Hence courts usually do not tolerate argument where the prosecutor intimates that by acquitting, the jury would call the officers liars, turn its back on the victims, consider the prosecutor unethical for pursuing the charges, and be duped into buying a conspiracy theory -- or worse!

1. Jury Implying Police Were “Liars”

Are you going to say to these officers that you do not believe them when they hold up their hand and swear that he was intoxicated?²²

If the jury did not believe Detective Lovette they would be deciding that the police officer was a liar.²³

Now, this confession is certainly voluntary. I don't think there can be any doubt in your mind. If you don't believe it was voluntary, you're calling this man right here a liar, and that police officer right there a liar, and what reasons do they have to lie?²⁴

[The officers had no reason to perjure themselves, and a verdict of not guilty] would be calling a number of people liars who had no reason to lie.²⁵

What do you think? Officer Williams is making this up?²⁶

Ladies and gentlemen, yesterday you witnessed that someone in this courtroom committed an act of perjury. Either Deputy Detective Brenda Campbell, sworn police officer, who did not know either of the parties, objective, was sworn to uphold the law, committed an act of perjury and told you that [the defendant] admitted it, or the defendant committed an act of perjury when he said he did not. Someone committed an act of perjury. It’s up to you to decide who did it.²⁷

This type of argument is highly improper for several reasons. First, it mildly vouches for the officers. Second, it usually mischaracterizes the defense theory or argument so severely that it unfairly makes it appear ridiculous. *See People v. Spence*, 440 N.Y.S.2d 20 (1981).

Third, in many jurisdictions (including Arizona), the terms “liar” or “perjury” are too strong and inflammatory to use -- especially when the defense did not use that terminology. In *State v. Googins*, 255 N.W.2d 805 (Minn. 1977)(the fourth example above), the court agreed that the prosecution has the right to vigorously argue its witnesses’ credibility and the lack of credibility of the defense witnesses; however, the court warned that “prosecutors tread on dangerous grounds when they resort to epithets to drive home the falsity of defense evidence.” *Id.* (citing *People v. Ellis*, 65, Cal.2d 529,

Courts do not usually tolerate argument where the prosecutor intimates that by acquitting, the jury would call officers liars, turn its back on the victims, consider the prosecutor unethical for pursuing the charges, and be duped into buying a conspiracy theory — or worse!

540, 55 Cal.Rptr. 385, 391, 421 P.2d 393, 399 (1966) (Traynor, C. J.)). The Court felt that the repeated reference to “perjury” was of that nature, and reversed. An Illinois court found the following argument focusing on “perjury” improper:

The hardest thing about my job, Ladies and Gentlemen of the Jury is listening to people, attorneys stand here and say police officers get up on that stand, take an oath and commit perjury, that my witnesses get up on the stand, take an oath and commit perjury. Well, it's not perjury, Ladies and Gentlemen. I resent that.²⁸

In that case, the court also held that the prosecutor's allusion to the “hardest thing about [his] job” and his “resentment” of the possibility that “his witnesses” might lie tended to inject the prosecutor's personal and professional ethos into the credibility determination. *People v. Lark*, 127 Ill.App.3d 927, 469 N.E.2d 728 (1984).

Fourth, it improperly asks the jury to put itself in the position of an unpleasant confrontation with a respected authority figure before it can acquit.

When the prosecution implies that the defense is calling the officers “liars,” the proper objection is “misstates the argument,” though it also can be “vouching” since it asks the jury to consider facts not before them and which they should not consider.

2. Jury Turning Their Backs on Victims

I submit to you, to find this man not guilty, you're going to have to call [the victim] a liar, a trickster ... someone that's wasted your entire day.²⁹

I want you to picture her [complainant] up on that stand, how she testified, because you're going to have to decide something. If you're going to come back in this courtroom, and if you're going to report a not guilty verdict in favor of that man, you're going to tell me, and you're going to tell this young girl that she lied, and everything she told you was a lie.³⁰

That is what he is asking you to consider and if you believe that, you will have to call all of the Commonwealth witnesses liars.³¹

[The prosecutor appealed to jury sympathy for the owner of the lost wrecker, and for potential victims who might have been hurt in the high speed chase.]³²

The same analysis discussed above applies here. Courts gen-

erally would consider this improper argument; in deciding guilt, the jury should not consider (so lawyers should not argue) collateral impact on the victim. Moreover, the argument is intended to inflame the jury and evoke a protective response -- unfairly asking the jury to place themselves in the position of facing a sympathetic victim with disappointment. Although this argument makes no reference to credibility, it could still be considered a form of vouching because it draws the jury's attention to issues not properly before it.

3. Jury Turning Their Backs on Law Enforcement

Similar to argument that the jury is turning its back on victims is the proposition that an acquittal would mean that the jury turned its back on the police (who protect them). For example:

You can, on the one hand, say to Officer R.E. Kelnar and the Houston PD, ‘You may go and do the best you can do to stop crime. We don't mind if you get shot; we don't care, and we are not going to support law enforcement in this county.’ Or by your verdict you may say, ‘Officer Kelnar and those that serve with you, we are proud of you and we appreciate what you are doing for us. We want to help in every way that we can. When Thomas Henry Rhodes takes his pistol and tries to kill you, we are going to support you and find him guilty of the offense of assault to murder with malice aforethought.’³³

[If] we aren't going to believe the Federal Bureau of Investigation in the matter of identification of fingerprints, who are we going to believe? I resent anyone ridiculing that organization, because they'd done such an outstanding job in the war in protecting us.³⁴

I consider Officer Smith to be a professional because by living in the same community he works out of, he is subject to a lot more danger. His family is subject to harassment. ... [L]adies and gentlemen, let try to bring [greater law enforcement] back by showing these officers that the system of justice works.³⁵

Courts generally consider this improper argument because it directs the jury's deliberation toward irrelevant matters. In Texas, as well as other jurisdictions, however, this type of argument would not be improper since it did not involve the prosecutor giving unsworn testimony. Arizona generally does not follow those jurisdictions and presumably would find such argument improper.

4. Jury Concluding Prosecution Acted Unethically

And if you decide that the police lied to you, [you] better loath Mr. Lindmark [another prosecutor involved in the trial] and you better loathe me, because we prosecuted it.³⁶

If you find this man not guilty, ... you're going to have to call me a liar because I've been putting this case on before you.³⁷

To believe [the defense] means that you have to believe the Prosecutor's office is trumping up charges against these two people and fabricating evidence.³⁸

[If the jury did not believe the witness's testimony], then I am an aider and abettor to perjury.³⁹

[Under the canons of professional ethics I had a high obligation, and it would be an enormous injustice to the integrity of my colleague, an assistant district attorney for over 12 years, to even suggest that he would have done anything but tell the truth.]⁴⁰

If you disbelieve those persons, then I am, indeed, a bad person; because I have aided in a conspiracy to convict an innocent person.⁴¹

Note that, depending on the reception the prosecutor gets from his jury, he may not want to advance this theory. Again, the same analysis provided above would apply to these arguments. Clearly, in keeping with this line of case law, these arguments should be considered improper. It invades the province of the jury. *Payne v. State*, 520 P.2d 694 (Ok. 1974). Moreover, the vouching is more apparent: the prosecutor is suggesting indirectly that she would not have prosecuted the case (because that would be unethical) unless it was substantiated. Nonetheless, there remains occasional opinions which hold it is a proper inference from the evidence. See e.g., *People v. Fredericks*, 125 Mich.App. 114, 335 N.W.2d 919 (1983).

5. Jury Buying a Conspiracy Theory

An acquittal would be equivalent to finding that I, the District Attorney's Office, and all the witnesses were liars and had fabricated my case.⁴²

Throughout this trial the Defense Attorneys ... have said the People, the prosecution, would be unable to prove that this is a rival gang and made up a story, a conspiracy. ... If it was a conspiracy, then I would be part of it and somehow I have

molded the testimony and identification of Galvan and the three witnesses, and the police lied.⁴³

To believe that the defendant was framed, you'd have to believe that all the agents had perjured themselves and that I had suborned perjury. If we had wanted to frame Mr. Ziak, we would've done a better job!⁴⁴

The defendant, Charles Parker, is telling you there is a bigger conspiracy, and that conspiracy is between the State's Attorney's office, the Chicago Police Department and between the Jordon family.⁴⁵

Note that this is very persuasive argument, and when the defense theory is ludicrous, it is hard to reject. A significant number of cases report that such argument is not vouching. See e.g., *People v. Williams*, 66 Cal.Rptr.2d 123, 940 P.2d 710 (1997). In the sole Arizona case on point, the prosecutor argued:

Mrs. Silvio, Mr. Ross, and Mrs. Ross conspired to frame two Black people? Two innocent Black people? Would they ask you to convict two innocent Black people so that the alleged real robbers would still be out there?⁴⁶

The Court held that this was "an answer to a charge of conspiring to frame innocent persons and merely points out how absurd it would be to do so." *State v. White*, 115 Ariz. 199, 204, 564 P.2d 888, 893 (1977). This judicial response is not uncommon.

Nevertheless, there may be a mild technical impropriety. In fact, when courts do find it improper vouching, they can react strongly. For example, where the prosecutor argued that in order to acquit, the jury must find that he conspired with his witnesses to commit a crime, the court held that was "vouching to the utmost degree." See *United States v. Phillips*, 527 F.2d 1021 (7th Cir. 1975). In *People v. Stewart*, 459 N.Y.S.2d 853 (1983), the court characterized the prosecutor's conduct as "outrageous."

6. Jury Creating Anarchy

The prosecution has at times attempted to terrorize the jury by intimating or outright claiming that an acquittal would lead to anarchy, the downfall of civilization as we know it, or the American way of life. For example:

If you think that the prosecution has not proved the defendant's guilt beyond every single doubt, we might just as well wipe every law off the books.⁴⁷

If the jury did not believe the government wit-

nesses, they might as well close the books on the prosecution of narcotics offenses.⁴⁸

When you are looking for help, you dial 911, get the Chicago Police Department. You put your faith in these people. If you dial 911, next time I will wait for [the two co-defendants] to come around.⁴⁹

In an interesting twist —
one not calculated to win
the hearts and minds of
the panel — the
prosecution suggested to
the jury that if they
failed to convict, then the
jurors must be defective.

[If the officer who testified to a statement made by defendant after arrest, was lying,] you are all in serious trouble as I am, the Court and everything else. If our police is that bad, then we are in serious, serious trouble!⁵⁰

This is as melodramatic as it is ridiculous, meant to improperly influence the jury. It is calculated to make them feel insecure and fearful should they acquit. It is, of course, highly improper.

7. Jury Is Defective

In an interesting twist -- one not calculated to win the hearts and minds of the panel -- the prosecution suggested to a jury that if they failed to convict, then the jurors must be defective. In other cases, the prosecutor has suggested that the jury would be "sick" if they failed to convict.

If the victim's testimony was not enough [to convict], then there's something terrible, something terribly wrong with you.⁵¹

There is no salve you can put on your conscience; ... Now you are not going to be able to walk out and have that kind of a sedative to make you feel better if you arrive at the wrong verdict. By wrong verdict I mean you don't convict this man ... [Regarding a defense theory] Do you believe that? If you do and this is over, I got time share in Santa Claus's condo at the north pole, and I will sell you some. You are not that big of suckers, and you know that.⁵²

Everyone that is guilty of an act in violation of the law, stands in utter disregard for the law ... a juror that fails to do anything other than to convict those individuals is guilty of a breach of trust, of misconduct as a juror. And I would charge every one of you - each and every one of you with that offense if the verdict in this case were not guilty.⁵³

The Court held that the first example quoted improperly bol-

stered the victim's testimony. As to the second quote, the court reversed, indicating that it was more than the use of colorful language. The statements were a blatant attempt to impinge on juror independence. The third example, oddly, was not found to be improper! Though the defense considered this a threat to charge the jurors with misconduct if they acquitted, the court found that the prosecutor used an antiquated definition for "charge" which does not mean file a criminal complaint, but means to "instruct" the jurors or challenge them to consider it.

ENDNOTES

- 1 *People v. Turner*, 145 Cal.App.3d 658, 193 Cal. Rptr. 614 (1983).
- 2 *Commonwealth v. Sheppard*, 404 Mass. 774, 537 N.E.2d 583 (1989).
- 3 *People v. Franklin*, 64 Ill.App.3d 400, 380 N.E.2d 1082 (1978).
- 4 *People v. Anderson*, 52 Cal.3d 453, 801 P.2d 1107 (1990).
- 5 *People v. DeLong*, 134 A.D.2d 199 (N.Y.App. 1987). Note that the court held this argument, when combined with other, clearer vouching, was improper; however, that holding almost certainly turned on the more serious improprieties, not the excerpt quoted above.
- 6 *People v. Weatherspoon*, 63 Ill.App.3d 315, 379 N.E.2d 847 (1978).
- 7 *United States v. Ricco*, 549 F.2d 264 (2nd Cir. 1977).
- 8 *People v. Knox*, 548 N.Y.S.2d 643, 554 N.E.2d 76 (App. 1989).
- 9 *Abernathy v. State*, 192 Ga.App. 355, 385 S.E.2d 25 (1989).
- 10 *State v. McCuiston*, 88 N.M. 94, 537 P.2d 702 (App. 1975).
- 11 *United States v. McKoy*, 771 F.2d 1207 (9th Cir. 1985).
- 12 *State v. Tyrrell*, 152 Ariz. 580, 581, 733 P.2d 1163, 1164 (App. 1986).
- 13 *Commonwealth v. Kelly*, 417 Mass. 266, 629 N.E.2d 999 (1994).
- 14 *State v. Staples*, 263 N.J.Super. 602, 623 A.2d 791 (1993).
- 15 Adapted from *State v. Braathen*, 77 N.D. 309, 43 N.W.2d 202 (1950).
- 16 *State v. Staples*, 263 N.J.Super. 602, 623 A.2d 791 (1993).
- 17 *Hill v. United States*, 434 A.2d 422 (D.C.App. 1981).
- 18 *People v. Graves*, 142 Ill.App.3d 885, 492 N.E.2d 517 (1986).
- 19 Adapted from *People v. Brown*, 429 N.Y.S.2d 727 (1980).
- 20 *People v. McKinney*, 117 Ill.App.3d 591, 453 N.E.2d 926 (1983).
- 21 *State v. Worthy*, 341 N.C. 707, 462 S.E.2d 482 (1995).
- 22 *Rice v. State*, 161 Tex.Crim. 336, 263 S.W.2d 553 (1953).
- 23 *State v. Carr*, 172 Conn. 458, 374 A.2d 1107 (1977).
- 24 *Collins v. State*, 548 S.W.2d 368 (Tex.Crim. 1976). Note that the argument was not found to be erroneous in this case because the prosecutor had prefaced it with "based upon the evidence."
- 25 *State v. Googins*, 225 N.W.2d 805 (Minn. 1977).
- 26 *People v. McCray*, 562 N.Y.S.2d 48 (1990). Note that McCray is one of the few cases where the court did not consider this argument improper. Such holdings are rare, and usually turn on the facts of the case. If the court feels that such infractions should not result in a mistrial, then the more principled approach is to recognize it as misconduct, but find that that impropriety did not rise to the level of fundamental error. See, e.g., *People v. Williams*, 612 N.Y.S.2d 700 (1994).
- 27 *People v. Killen*, 217 Ill.App.3d 473, 577 N.E.2d 560 (1991).
- 28 *People v. Lark*, 127 Ill.App.3d 927, 469 N.E.2d 728 (1984).
- 29 *Payne v. State*, 520 P.2d 694 (Ok. 1974).
- 30 *People v. Jansson*, 116 Mich.App. 674, 323 N.W.2d 508 (1982).
- 31 *Commonwealth v. Gray*, 270 Pa.Super. 20, 410 A.2d 876 (1979).
- 32 *Blackburn v. State*, 447 So.2d 424 (Fla.App. 1984).
- 33 *Rhodes v. State*, 450 S.W.2d 329 (Tex.Crim. 1970).
- 34 *State v. Trumbull*, 82 N.E.2d 715 (Ohio).
- 35 *People v. Vasquez*, 8 Ill.App.3d 679, 291 N.E.2d 5 (1972).
- 36 *People v. Brown*, 47 Ill.App.3d 920, 365 N.E.2d 514 (1977).
- 37 *Payne v. State*, 520 P.2d 694 (Ok. 1974).
- 38 *People v. Fredericks*, 125 Mich.App. 114, 335 N.W.2d 919 (1983).
- 39 *People v. Lovello*, 154 N.Y.S.2d 483 (1956).
- 40 *People v. Morris*, 42 App.Div. 968, 347 N.Y.S.2d 975 (1973).

- 41 *Commonwealth v. Thomas*, 401 Mass. 109, 514 N.E.2d 1309 (1987).
 42 *People v. Stewart*, 459 N.Y.S.2d 853 (1983).
 43 *People v. Calderone*, 85 Ill.App.3d 1030, 407 N.E.2d 840 (1980).
 44 Adapted from *United States v. Ziak*, 360 F.2d 850 (7th Cir. 1966).
 45 *People v. Parker*, 72 Ill.App.3d 679, 391 N.E.2d 89 (1979).
 46 *State v. White*, 115 Ariz. 199, 564 P.2d 888 (1977).
 47 *State v. Hernandez*, 170 Ariz. 301, 823 P.2d 1309 (App. 1991).
 48 *People v. Linyard*, 151 Cal.App.2d 50, 311 P.2d 57 (1957).
 49 *People v. Moman*, 201 Ill.App.3d 293, 558 N.E.2d 1231 (1990).
 50 *People v. Richardson*, 139 Ill.App.3d 598, 487 N.E.2d 716 (1985).
 51 *People v. Brown*, 125 A.D.2d 321, 510 N.Y.S.2d 135 (1986).
 52 *State v. Porter*, 526 N.W.2d 359 (Minn. 1978).
 53 *People v. Rollins*, 119 Ill.App.2d 116, 255 N.E.2d 471 (1970).



BULLETIN BOARD (continued)

SUPPORT STAFF CHANGES

Jason Swetnam received a promotion to Legal Secretary in Group A effective March 6, 2000

Morgan Alexander left the office on March 10, 2000. Morgan was a Law Clerk in Group E.

Christopher Hylar left the office on March 13, 2000. Chris was a Records Processor.

Raquel Murillo resigned effective March 17, 2000. Raquel was a Secretary assigned to the Juvenile Division at Durango.

Angela M. Fairchild, a Legal Assistant assigned to Group D, resigned and will be departing the office effective April 6, 2000. Angela will be joining the Federal Public Defender's Office and working in their Capital Habeas Unit.

NEW SUPPORT STAFF

Alejandra Dominguez is the new Legal Secretary in Group A effective March 6, 2000.

Keri A. Spear is the new Legal Secretary in the Juvenile Division at Durango effective March 6, 2000.

Deana Contreras is the new Trial Division Receptionist in Group D effective March 6, 2000.

Linda F. Arbizu is the new Office Aide/Trainee in Group C effective March 13, 2000.

Maria R. Olguin will be the new Legal Secretary in Group A effective March 20, 2000.

Rosemary Jones will be the new Legal Secretary in Group B effective March 20, 2000.

Guadalupe E. Mares will be the new Designated File Manager in Group B effective April 3, 2000.

Michael S. Buchanan will be the new Investigator in Group C effective April 10, 2000. Michael is recently retired from the West Valley City Police Department in Utah where he was a police sergeant.

UTILIZING YOUR INVESTIGATORS

By Donald Souther
Investigator – Group D

In the year that I have been with the Public Defenders Office, I have observed that too few attorneys make full use of our investigators. Yes, we do conflict checks, go out looking for exculpatory witnesses and take occasional photos of crime scenes. However, we can help you out with many other investigative needs.

Many of the investigators have expertise and knowledge in the areas of murder investigations, sex crimes, child abuse, weapons, drugs, DUI and accidents, just to name a few. Recently, a list came out of investigators with areas of expertise and contacts. The list did not go into depth about each investigator's knowledge, and is meant to be a starting point for attorneys.

Most of the investigators in the office come from law enforcement backgrounds, and a few have military investigative experience. With years of experience, these investigators have a great deal of insight and knowledge in the area of law enforcement. With this in mind, attorneys should utilize the investigators to dig into the nuances of crime reports by using their insight as to what the police have or haven't done thoroughly. Do not be afraid to ask for an investigator's opinion and help. We are here for that reason. Here are some of the services we can provide:

POLICE REPORTS

Police officers are taught and trained to write reports in a certain way. They are taught to be specific when it benefits the case, but to be vague or general when it doesn't. An investigator can read beyond the subtleties and assist in your evaluation of an investigation. An investigator may also be aware of police procedures that govern how an investigation is handled and why something has or hasn't been done. If an officer has attempted to build his expertise or knowledge in a certain area, such as narcotics, an investigator may be able to tell you if the officer had the opportunity to build the expertise. It may also be possible to verify this information through certain police records and channels.

Simply put, things you may not key on, an investigator might. It doesn't hurt to have a second opinion.

RECORD CHECKS

Through most police jurisdictions, many files are accessible to the public. Investigators can obtain personnel files, internal investigation files, MDT (mobile dispatch terminal) printouts, and dispatch detail records. Also obtainable are officer activity records, details handled and arrests made, motor vehicle records, DPS records and DOC records.

Caution and judgment should be used to obtain records such as personnel and internal affairs files so that this privilege is not abused. These records should only be requested when there is good reason to believe an officer has a history of brutality, harassment, racial prejudice, etc. If it is misused, the privilege will be lifted and a court order must be obtained.

SUBPOENAS

The office has a process server to serve subpoenas. However, if an attorney needs an emergency or last minute subpoena, an investigator can serve it. An investigator can perform this duty **only** if time is available to do so. Remember, however, that all police subpoenas need to be served at least 72 hours in advance.

EXPERT REFERRALS

Investigators have developed a bank of experts that can be accessed for cases in which you may need their expertise. The expert can be contacted by the investigator to obtain all pertinent information such as expert qualifications, resumes, fees charged, and readiness and availability to testify if needed.

CRIMINAL HISTORY

Investigators can do criminal history checks in all Arizona court jurisdictions as well as out-of-state, if you know the county of occurrence.

INTERVIEWING

Investigators can assist attorneys in interviews, especially police case agent interviews. Most police interviews should be handled by the attorneys, since they will be questioning the officers at trial. However, it helps to have an investigator present who may have some insight and questions for the officer that the attorney may overlook. Investigators can assist new attorneys to gain experience in effectively interviewing police personnel.

DIAGRAMS

Investigators can go to crime scenes to take photographs, and can give additional perspective by drawing diagrams and taking measurements to use in court as visual aids. They can also obtain aerial photographs and plot maps, which often have measurements, kept by the city and county.

ACCIDENT RECONSTRUCTION

The office currently has two investigators who are qualified to do complex accident reconstruction. However, most investigators who are from a police background have good general knowledge and experience about the dynamics of accident investigation. Some investigators are also familiar with HGN (horizontal gaze nystagmus) procedures.

POLICE TACTICS

Most of the investigators have knowledge of policies, procedures and training governing use of force, escalation of force, and how certain situations are to be handled. They are also versed in the mechanics of using certain holds and "come-alongs," such as the carotid restraint. Policies and procedures manuals are available for some departments, including Phoenix P.D.

FIREARMS

A few investigators have knowledge and expertise in a variety of firearms, their nomenclature, bullet patterns and reaction to striking different objects and surfaces. GSR (gun shot residue), or lack of it, testing, which Phoenix P.D. uses sparingly, can be useful in determining who fired a weapon. A firearms class is offered by the investigators during the new attorney training period.

JURISDICTION CONTACTS

Most investigators who have retired from law enforcement have contacts in Arizona, as well as out-of-state, that can be helpful in getting information that is otherwise difficult to obtain. By utilizing these contacts, problems in dealing with outside agencies can be avoided.

MEDIA COVERAGE

Most attorneys are aware that we are able to access news video clips and newspaper articles. Newspapers can be helpful, not just for recent articles, but for older articles that may have been forgotten. Investigators can utilize the public library and their microfiche to search out these articles. It can be tedious work, but it is fruitful at times.

So, as you can see, there is a plethora of ways that investigators can assist attorneys. Do not hesitate to tap into this bottomless well of knowledge and experience.



BULLETIN BOARD

ATTORNEYS

Barry J. Handler will be returning to the office after a 2½ year absence. He was previously with the office from 1990-1997. Barry will return as a Defender Attorney assigned to Group D effective March 20, 2000.

Robert Zelms, a Defender Attorney in Group D, resigned his position with the office effective March 24, 2000. Robert is leaving the office to join an insurance defense firm.

Patrice Petersen-Klein, a Defender Attorney in Group B, resigned her position with the office effective March 14, 2000.

Scott Silva, a Defender Attorney in Group C, resigned his position with the office effective March 21, 2000. Scott is leaving to join the Law Offices of David Michael Cantor.

ARIZONA ADVANCE REPORTS

By Terry Adams
Defender Attorney – Appeals

State v. Clary 313 Ariz. Adv. Rep. 3 (CA 1, 1/20/00)

The defendant was arrested for aggravated D. U. I. When asked if he would submit to a blood alcohol test he stated, "I adhere to my rights." The cops obtained a telephonic search warrant and served him but he refused to submit. Several cops subdued him and a phlebotomist drew blood. He moved to suppress the results of the test, which was denied. The Court of Appeals held that neither A.R.S. § 28-1321(D)(1), which allows the taking of blood for alcohol content testing under authority of a search warrant, nor the Fourth Amendment, preclude the use of reasonable force to overcome a defendant's resistance to the execution of a search warrant for the extraction of blood. Here the trial court did not err in concluding that the force was reasonable.

State v. Griest, 313 Ariz. Adv. Rep. 23 (CA 1, 1/27/00)

The defendant was loaned a vehicle for a specific use and told to return it immediately afterward. He did not return it and was found in Prescott with the vehicle and was arrested and charged with theft by conversion. Without objection, the court instructed the jury on the lesser crime of unlawful use of means of transportation (joyriding). He was convicted of joyriding. On appeal he argued that joyriding is not a lesser included offense of theft by conversion. The court of appeals analyzed both statutes and determined that it is a lesser included offense and affirmed the conviction.

State v. Wolter, 313 Ariz. Adv. Rep. 10 (CA 1, 1/20/00)

The defendant was stopped for speeding while riding a 1984 Honda motorcycle on May 1, 1998. The motorcycle had been stolen in May 1997. The defendant was charged with controlling property of another knowing or having reason to know that the property was stolen. The state presented evidence that the value of the bike was between \$2000 and \$3000 based on its value when it was stolen. The defendant maintained that he bought it for \$500 in 1998, which was not refuted. The court instructed the jury to determine the value at the time of the original theft and he was convicted of a class four felony. On appeal, he argued that the value should have been determined as of the time the defendant controlled the property. The court of appeals agreed and since the only value that was presented was \$500 the crime was reduced to a class six.



Stubblefield v. Trombino, 313 Ariz. Adv. Rep. 29 (CA 1, 1/27/00)

A.R.S. §13-901.01 ("Proposition 200") applies to attempted possession of narcotic drugs as well as possession of narcotic drugs.

Richard G., In re, 314 Ariz. Adv. Rep. 36 (CA2, 1/27/00)

The juvenile was adjudicated delinquent on two class one misdemeanors and placed on probation. While on probation he was arrested for possessing a firearm. He was adjudicated delinquent on a felony count of possessing a deadly weapon as a prohibited possessor. On appeal, he contends that the definition of prohibited possessor does not apply to juveniles adjudicated of misdemeanors. The court determined that the statute does apply.

State v. Fragozo, 314 Ariz. Adv. Rep. 14 CA 2, 1/27/00)

The defendant was convicted of aggravated D.U.I. and placed on probation with a mandatory four months in D.O.C. He later was found in violation of probation, reinstated and given an additional eight months in the county jail. Another petition to revoke was filed, his probation was revoked, he was sentenced to prison and only given credit for the eight months. A PCR requested credit for the four months D.O.C. time and was denied. A petition for review was filed and the Court of Appeals gave him credit. Evidently the trial court was relying on A.R.S. §28-1383(I), which excludes any time spent in custody given to someone who fails to participate in alcohol screening pursuant to §28-1383(H). This was not the case here and the defendant was entitled to credit for all time spent in custody.



FEBRUARY 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
2/14 - 2/15	Valverde	Padish	Takata	CR 99-15637 POND/F4 PODP/F6	Guilty	Jury
2/14 - 2/16	Ellig	Akers	Brnovich	CR 99-12801 Aggravated Assault on Juvenile/F6	Guilty	Jury
2/23 - 2/23	Howe	Barclay	Knudsen	TR99-02930CR DUI/M1	Dismissed day before trial	Jury
2/23 - 2/23	Valverde	Baca	Fuller	CR 99-14105 Gang Threat/F4	Dismissed	Jury
2/23 - 2/23	Zick	Akers	Craig	CR 99-11222 Aggravated Assault/F3	Dismissed with prejudice before jury selection	Jury
2/29 - 2/29	Carr Molina	Galati	Cohen	CR 99-07909 POND/F4 PODP/F6	Guilty	Bench

GROUP B

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
1/18 – 1/26	Noble Erb Linden	Arellano	M. Rahi-loo	CR98-011166 Agg Assault, CI 3 Dang	Not Guilty	Jury
1/31 – 2/3	Whelihan	O'Toole	Clarke	CR99-14833 Agg Assault, CI 3 Prohibit Weapon, CI 4	Directed Verdict Agg. Assault; Guilty of Prohibit Weapon, Dang	Jury
2/23 – 2/25	Owens Bublik	Arellano	Reid-Moore	CR99-14926 2 Cnts Assault, CI 1 Misd 1 Cnt Resisting Arrest, CI 6 Felony	Not Guilty- 2 Counts Assault; Guilty Resisting arrest	Jury
2/9 – 2/15	Taradash Owens John King	Gottsfeld	T. Rahi-Loo	CR99-007338 Armed Robbery	Guilty	Jury

FEBRUARY 2000
JURY AND BENCH TRIALS

GROUP C

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
1/31 – 2/2	Burkhart	Ishikawa	Weinberg	CR1999-090686 2 Cts. Agg DUI, F4N	Guilty	Jury
2/8 – 2/11	Jolley Ramos	Ishikawa	Holtry	CR1999-094098 1 Ct. Agg DUI w/Minor Present, F6N	Guilty	Jury
2/17 – 2/18	S. Silva	Barker	Holtry	CR1997-005681 1 Ct. Agg DUI, F4N with 1 prior felony	Guilty	Jury
2/17 – 2/22	Shoemaker	Baca	Arnwine	CR1999-095403 1 Ct. Theft of Vehicle, F3N with 1 prior felony	Dismissed w/ prejudice on 2 nd day of trial	Jury
2/22 – 2/22	Gooday Ramos	Barker	Holtry	CR1999-094565 2 Cts. Agg DUI, F4N	Guilty	Jury
2/22 – 2/25	Klopp-Bryant Felmly Beatty	Ishikawa	Anderson	CR1999-95202 1 Ct. Agg Assault against a Police Officer, F5N 1 Ct. Assault, M1	Guilty	Jury
2/25 – 2/25	Eskander Ramos Rivera	Passey (WME)	Reddy	TR98-13635CR 1 Ct. DUI, M1 1 Ct. Disord. Conduct, M1 1 Ct. Dr. Susp. Lic., M2	Dismissed w/ prejudice	Jury
2/22 – 2/29	Sheperd Beatty Rivera	Jarrett	Zettler	CR1998-093163(A) 1 Ct. Murder 2, F1D	Guilty	Jury

FEBRUARY 2000 JURY AND BENCH TRIALS

GROUP D

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
2/2-2/2	Mehrens	Gerst	Linstedt	CR 99-13773 1 Ct. Att/Comm POND F5	Guilty	Jury
2/4 – 2/4	Varcoe	Gutierrez	Williams	CR 99-03998 1 Ct. DWI	Dismissed	Bench
2/2-2/9	Silva	Crum	Workman	TR99-06789 DOSL, Leaving Scene of Acc, Speeding, No Ins.	Dismissed	Bench
2/8 – 2/10	Grant/Martin Bradley Fairchild	D'Angelo	Charnell	CR 96-11216 Murder 2 F1	Mistrial	Jury
2/8 – 2/9	Zelms	Wotruba	Nabers	CR 99-14683 1 Ct. Agg Assault, F6	Not Guilty	Jury
2/10	Zelms	McVay	Johannes	CR 99-02087 MI IJP, M1	Dismissed	Bench
2/14 –2/17	Cox	Ballinger	Bernstein	CR 99-11825 1 Ct. Harassment, F6 1 Ct. Resist Ofcr/Arrst, F6	Guilty	Jury
2/14-2/17	Parker	Cole	Simpson	CR 99-14027 1 Theft/Stolen Veh, F3 1 Poss Drg Para, F6 1 Marij Pos, Gro,Proc F6	Guilty	Jury
2/14-2/17	Silva	Wilkinson	Adleman	CR 98-05276 5 Cts. SODD, 1 Ct. POM for Sale, 1 Ct. PODD, 1 Ct. PODP	Guilty all counts	Jury
2/15-2/17	Wilson Castillo	Dougherty	Cottor	CR 98-01840B 1 Ct. Burglary 3, F4 1 Ct. Theft, M1	Hung on Class 4 Burglary 7 to 1 Guilty Guilty on Class 1 Theft, M 1	Jury
2/15	Zelms	Gerst	Alexov	CR 99-13324 3 Cts. Agg Assault, F3 Dan- gerous 2 Cts. Endangerment, F6 Dangerous	Mistrial (2/15)	Jury
2/22 - 2/24	Zelms	Gerst	Alexov	CR 99-13324 3 Cts. Agg Assault, F3 Dan- gerous 2 Cts. Endangerment, F6 Dangerous	Not Guilty on all Counts	Jury
2/23	Stazzone	Katz	Sorrentino	CR 98-05264 6 Ct. Sex Asslt, DCAC, un- der 15, F2 2 Cts. Sex Abuse, F5 1 Ct. Sex Asslt, F2	Guilty	Jury

FEBRUARY 2000 JURY AND BENCH TRIALS

GRUPE

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result:	Bench or Jury Trial
1/31-2/2	Brown	Reinstein	Gadow	CR 99-13871 Agg. Assault/F3D 3 Cts. Sex. Assault/F2 Attempted Sex. Assault/F3	Not Guilty 1 Ct. Sex. Assault 2 Cts. Sex. Assault - Hung on lesser & Agg. Assault	Jury
2/2-2/4	Walker	Arellano	Boyle	CR 99-13760 Agg DUI/F4 Assault/M1	Hung on DUI Guilty on Assault	Jury
2/7 -2/10	Flynn	Wilkinson	Schwab	CR 99-15242(A) Sale of Dangerous Drugs/F2	Guilty	Jury
2/7-2/11	Roskosz Souther	Ellis	Newell	CR 99-10934 Discharging a Firearm at a Residential Structure/F2D	Not Guilty	Jury
2/8-2/17	Reinhardt Palmisano Ames <i>Molina</i>	Dunevant	Lynch	CR 99-01384 Murder I/F1	Guilty of Murder 2	Jury
2/10	Walker	Orcutt	Stromm	M00-813 Int.w/Jud.Proc./M1	Dismissed day of trial	Bench
2/10	Carpenter	LeZarga	Beringhaus	CR 99-01072 1 Ct. Assault/M1	Not Guilty	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
1/24 – 2/1	Cleary Apple	Hutt	Eckhardt	CR99-02173 1 Ct. 2 nd Deg. Murder /F1, Dangerous; 4 Cts. Endangerment /F6, Dangerous; 1 Ct. Leaving Serious/ Fatal Accident F3	Guilty	Jury
2/07 – 2/14	Dupont Horrall Rubio	Dougherty	Levy	CR99-03998 Murder 2 / F1, Dangerous	Guilty Lesser Manslaughter	Jury
2/15 – 2/17	Canby De Santiago	O'Toole	Blumenreich	CR99-15246 SOND / F2	Not Guilty	Jury
2/28 – 2/29	Phillips Otero	Reinstein	Ireland	CR99-15270 SOND / F2 ; POND for Sale / F2	Guilty	Jury

Maricopa County Office of the Public Defender

Vision Statement

TO DELIVER AMERICA'S PROMISE OF JUSTICE FOR ALL.

Mission Statement

The Office of the Public Defender protects the fundamental rights of all individuals, by providing effective legal representation for indigent people facing criminal charges, juvenile adjudications, dependency and severance proceedings, and mental health commitments, when appointed by Maricopa County Superior and Justice Courts.

Goals

- ◆ To protect the rights of our clients and guarantee that they receive equal protection under the law, regardless of race, creed, national origin or socio-economic status
- ◆ To obtain and promote dispositions that are effective in reducing recidivism, improving clients' well-being and enhancing quality of life for all
- ◆ To ensure that all ethical and constitutional responsibilities & mandates are fulfilled
- ◆ To enhance the professionalism and productivity of all staff
- ◆ To produce the most respected and well-trained attorneys in the indigent defense community
- ◆ To work in partnership with other agencies to improve access to justice and develop rational justice system policies
- ◆ To achieve recognition as an effective and dynamic leader among organizations responsible for legal representation of indigent people
- ◆ To perform our obligations in a fiscally responsible manner

for The Defense

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 5th of each month.