



# for *The Defense*

▶ ◀ James J. Haas, Maricopa County Public Defender ▶ ◀

## Another Fine Mess...Again A Defender View of the Agonies and Mysteries of *Knapp* Associations

**By Tom Klobas  
Defender Attorney**

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Imagine yourself - you have begun the task of representing a client. The case appears much the same as any other. Perhaps a bit more client dissatisfaction than most, but nothing you can't handle.

Then, you receive a phone call. It is from a "street lawyer" of whose name and reputation you have only the vaguest of recollections. He/she informs you

that, due to the generosity of a family member of your client, he/she is associating with you to handle the client's case. You are further informed that because of the limited nature of the retainer, this attorney isn't taking over the case from you, but will only be assisting you. Welcome to the strange and challenging world of "*Knapp* association."

If a poll were ever taken of members of the office who have had to deal with this type of professional association, I would venture a guess that few would speak well of it. As one cynical veteran of

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## Accident Investigation and Reconstruction

**By Armand Casanova  
Defender Investigator**

An attorney exclaims, "**I need an Accident Reconstructionist!**" A request is submitted to the Trial Group Supervisor to spend "beaucoup" dinero for an expert accident reconstructionist. Low and behold, our attorney finds out that we have an in-house accident investigator and a request form is filled

out for in-house help.

Allow me to be your guide regarding the request for a reconstructionist and what skills are available in-house.

First and foremost, a reconstructionist is not a licensed professional, such as a doctor or attorney, but merely an expert in the field of accident investigation.

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several such encounters phrased it, “they get their money and we still do all the work.” While certainly illustrating the worst fears of such a relationship, that view doesn’t accurately summarize the total scope of what *Knapp* association is, or how it can be both a blessing as well as a curse.

Having recently conducted a jury trial under this scenario, as well as having observed first hand the dynamics of several similar cases handled by other attorneys in the office, it is my intention to describe some of the pitfalls, as well as the benefits, it can bring to a case.

### A Little History

The term “*Knapp* association” identifies the origin of this somewhat infrequent practice. *Knapp v. Hardy*, 111 Ariz.107, 523 P.2d 1308 (1974), was an opinion handed down by our Supreme Court which legitimized the process of permitting a retained attorney to assist a public defender while continuing to preserve the indigency status of the client. In reaching that result, the Court held that “the determination of indigency must be based on [the defendant’s] financial condition and not that of relatives and friends.”<sup>1</sup> The Court felt that the presence of a retained assistant counsel to help out would create a benefit to taxpayers by relieving the public defender of spending both time and public money which might otherwise be expended if the defender had “the sole responsibility for the defense.”<sup>2</sup> (We will revisit this issue of responsibility shortly.)

Once the assisting retained attorney has filed his/her notice of appearance with the trial court, he/she will be entitled to all the “reciprocal rights and duties” of appointed counsel.<sup>3</sup> These include the right to be recognized as counsel by the prosecutor.

The *Knapp* opinion was not uttered without a dissenting voice. Justice Holohan believed that the majority had ignored “the impossible contradiction” of private and taxpayer-supplied counsel simultaneously representing a person in the same matter. He felt that this newly approved concept would “encourage abuse of the public defender system” and lead to “mischief.”<sup>4</sup>

Despite the passage of nearly a quarter century since the *Knapp* opinion was published, there has been very little mention of it in subsequent opinions. The words spoken then are still our only guide on how this strange marriage between members of the private and public bars should function in the representation of a single “indigent” defendant.

### Examining the Peculiarities

Let’s examine the peculiarities of this “marriage” in light of the goal of effective representation by public defenders. Or simply put, how do we keep *Knapp v. Hardy* from becoming something resembling a script for Laurel and Hardy?

The concept of two attorneys working on behalf of the same client on the same case seems on its face to be an attractive proposition. After all, two is better than one, right? Well, not always. And in the case of *Knapp* associations, the latter appears to occur with frequent regularity.

The very effort of the client or his family in seeking alternative representation indicates a significant dissatisfaction with the assigned public defender. After all, clients would see no reason to spend money for legal services if they were satisfied with what they were receiving for free. And the fact that a private attorney has accepted representation should serve as a statement by that attorney that he or she has told the client to expect something that the public defender is not providing. The situation is ripe for serious disagreements over case strategy, selection of defenses, selection of experts, pretrial motion practice, or perhaps the most crucial decision of all, whether or not to accept a plea offer.

The public defender must realize that in a *Knapp* representation, the client will invariably have more faith and trust in the retained attorney and that attorney knows it. After all, a lack of trust in the defender was probably a major reason private counsel was sought. And it matters not whether this lack of faith was the result of a specific dislike of a particular defender, or because of a systematic belief in the mythical superiority of “street lawyers.” This position of the client will be something the public

defender will have to recognize, accept, and cope with throughout the case.

We are all aware that retained counsel are very concerned with the economics of private practice. Simply put, they try to maximize revenue while attempting to reduce expenditures. Since retained counsel has agreed to participate in the case for less than his/her customary fee, that attorney will probably be extremely vigilant about absorbing any more than those expenses which are absolutely unavoidable. In fact, I believe that the availability of public defender resources, particularly investigators and process servers, may be a critical factor in the retained attorney's decision to agree to cut-rate representation. It is safe to conclude that significant expenses such as the use of investigators, retention of experts, conducting scientific tests, and the transportation of witnesses, are not ones which private counsel will willingly absorb. This obvious fact of life was ignored by the *Knapp* court which strongly emphasized the savings which could accrue to the taxpayer through this public-private lawyer combination.

Therefore, the public defender must assert careful control of case expenditures and investigative resources, and not agree to suggestions simply to avoid confrontations. In my experience, this failure to accede to such suggestions may be reported back to the client in a manner which will cause further damage to the already fragile relationship the defender may have with the client.

### **Don't Forget to Lead**

Despite language in *Knapp* which implies a shared responsibility for the defense, expect the court to continue considering the public defender to be lead counsel on the case. After all, the *Knapp* association is defined as "assisting" the public defender. This arrangement can only work successfully if both counsel cooperate fully and, most importantly, accept the public defender as lead counsel. That means the public defender is considered to have the final say on all critical decisions involving the representation (including the previously mentioned expenditure of funds). Yet the retained attorney is often more

experienced than the defender, a feature that no doubt was a selling point in getting the client to retain him/her. Without even considering the role played by individual egos, the retained attorney probably did not get retained by emphasizing that he/she would only serve as backup to someone else. This circumstance can result in a public display before the court, with the public defender seemingly in charge of the case, but a totally different picture outside the courtroom. It is the cause of much defender frustration, especially when the retained counsel fails to appear for scheduled court hearings, safe in the knowledge that the court will only be concerned if lead counsel is not there.

Occasionally the problems you may be having with retained counsel may be such as to justify bringing them to the attention of the trial court. However, don't expect a great deal of help as most courts will be less than eager to inject themselves into squabbles among counsel for the client. From my viewpoint, the best you can expect is a strong statement to all concerned that the defender is lead counsel in the eyes of the court, followed by a plea for the parties to straighten out their differences.

### **Can There Be a Positive Side?**

As an ideal, there is much to be gained from the association of a public defender and retained attorney. Most obvious, and one which was featured in *Knapp* itself, is the ability to share the burden of conducting pretrial interviews. Depending on the resources available to the retained attorney, the defender may also benefit by rapid transcription of interviews. One caveat: always make sure that each party consults before and after such interviews to exchange tapes, and obtain or provide a briefing on what transpired. Failure to do so may limit the productivity of later interviews.

The most successful situations seem to be those where the retention of private counsel is being done with the aim of assisting in a collateral matter. These can include domestic relations, immigration, or licensing proceedings, activities from which the public defender is precluded from representing the client. Here the expertise of retained counsel may be

grounded in these other areas, and no attempt is made to subvert the role of the defender in the criminal cause.

An exceptionally fruitful opportunity occurs when the defender associates with an attorney who is handling the client's matter in a related civil case. One example occurs when the defendant has been charged with a vehicle crime, and the alleged victim is also seeking compensation in a civil action against the client. In a recent instance, a public defender was able to coordinate with and utilize civil discovery practices which included an ability to depose the plaintiff/victim, something not achievable in the criminal matter. Of course, this can occur whether or not the civil lawyer chooses to participate in the criminal representation.

### Proceed With Caution

As one can undoubtedly discern, *Knapp* association is not for the unwary. It focuses heavily on the interrelationship between the two attorneys, as well as between them and the shared client. Perhaps it resembles a "menage a trois" more than a marriage. It is a situation where the public defender should immediately consult with his or her supervisor for guidance upon being informed of the association.

The basic premise of the *Knapp* decision, that two attorneys will always provide competent representation even if one is public and the other private, is flawed. It is not easy for two attorneys, only one of whom is a voluntary participant, each of whom is driven by differing motives, and each of whom has an individual and perhaps widely differing relationship with the client, to operate in an atmosphere of harmony.

In practice, the problems created by such a relationship far out number the benefits, and some of the problems can be insurmountable. It can be one of the most difficult and trying episodes you may ever have to face as a public defender, and under *Knapp*, you have little recourse but to accept this oftentimes unpleasant situation.

### Endnotes

1. 111 Ariz. at 110, 523 P.2d at 1311.
2. 111 Ariz. at 111, 523 P.2d at 1312.
3. *Id.*
4. 111 Ariz. At 114, 523 P.2d at 1315 (Holohan, J., dissenting).



## ***BULLETIN BOARD...has moved!***

### ***Editor's Note —***

***The information contained in the monthly Bulletin Board will henceforth be available exclusively via the web site of the Office of the Maricopa County Public Defender. For access to our staff updates, please visit our internet site at [www.pubdef.maricopa.gov](http://www.pubdef.maricopa.gov).***

# Accident Investigation and Reconstruction

*Continued from page 1*

Education, training, hands on testing and experience will dictate the ability of this person to be an expert and whether or not they will be able to determine **HOW** an accident occurred. In order to do so, certain skills must be developed such as diagramming, evidence collection, forensic examination, photography, mechanical & human behavior, photogrammetry and many more.

## F.A.Q.

### What can an accident reconstruction tell me?

An accident reconstruction often determines significant aspects of an accident, with some limitations. A reconstruction may not be able to tell what color a traffic signal was during an accident. Usually witnesses determine that. Nor can a reconstruction tell you **why** a person acted a certain way or their intent. But a reconstructionist can tell you what is missing or erroneous in a police investigation.

### What are the basic discovery items needed for an accident investigation/reconstruction ?

The basics for any type of accident investigation are:

1. Accident report(s) inclusive of calculations, notes and supplements;
2. Diagram(s) with measurement list; and
3. Photographs.

### Where do I start once I receive an accident case ?

First, you need to determine if your client can be pointed out as the driver. For example, let's say a vehicle collides at high speed with another vehicle and flips several times after impact. All persons involved are ejected. No witnesses, no forensics, no

occupant kinematics studies were ever performed. In short, the state cannot prove that the client was driving.

Accident investigation necessarily involves the identity of drivers. The focus of the above case shifts to the prosecution and their inability to prove who was driving.

Second, you must determine if what you need to know is related to **HOW** the accident occurred. If it is, obtain all the discovery items as listed and then ask for the help of a reconstructionist.

### What can a reconstructionist do beyond evaluating the dynamics of accidents?

Often quite a bit. For instance, we can:

- Determine whether damage or injuries are related to an accident. For example, a victim claims that a client has intentionally tried to run him over and impact on the vehicle, along with injuries, are noted. Inspection of this damage and injuries tells us that the injuries do not match with the damage of the vehicle and can only be done by someone striking the vehicle at a 90 degree angle, not by a glancing blow from a travelling vehicle, as stated by police.
- Diagram scenes using photogrammetry. For example, a robbery occurs at night in an area under construction. A witness claims to recognize our client. The police take photographs of the area. A year later the crime scene has been replaced by new buildings. A reconstructionist can take police photos of the scene and map the area in question, showing that the view from where the witness was is over 100 yards away. This technique is called photogrammetry.
- Evaluate vehicle kinematics and damage studies. Let's consider a boyfriend/girlfriend road rage situation where client is charged for ramming the victim's vehicle. Examination and measurement of damage reveals that the victim's vehicle collided with a cement wall in a separate incident.

### **Do I ask for a reconstructionist if I need a diagram?**

No. All investigators are trained to measure scenes and draw diagrams. They will not be to scale but merely a representation of the scene.

Most cases do not require a scale diagram. That type of diagram may be needed where we want to show the accurate proportions of objects, vision obstructions, visibility issues or bullet travel paths. The tools needed to do a diagram are as simple as a tape measure and as complicated as the AIMS laser device used by engineers and police.

### **What steps are taken to do a reconstruction?**

Once reports and photos are obtained, the reconstructionist should be able to review these reports, view the scene and prepare a preliminary report (verbal or written) based on the given information. This report usually addresses speed and/or time-distance issues. As a general rule, once you know the speed of the vehicles and location of pedestrians, you can calculate where people were, prior to impact. This is particularly helpful when deciding if potential witnesses could have seen the accident.

### **How long does a reconstruction take?**

This answer depends on the type of result you want. If you want a quick overview of what is present and what some of the issues may be, this can be done in a few hours. However, the result is not something you would want to take to court. For example, an attorney gives me all the paperwork available and after a few calculations, generating a diagram and visiting the scene, it is found that his client was travelling above 80 mph in a 40-mph zone. No other issues are noted. The client was intoxicated at the time of the accident. The word PLEA came to mind. It took approximately one half of a day total spread over a week.

If, however, you want to have expert testimony based on the fact that the accident issue is the focus of this

case, then major reconstruction work is needed with reports, reference materials, calculations, photos, scene studies, vehicle studies, diagrams, and.....you get the picture.

In general, a quick overview with a “whatta ya think?” issue is what we encounter the most. That usually involves, at a minimum, the following:

- Review of all paperwork inclusive of T/A reports, DR’s, DRE reports and Supps
- Review of all diagrams and notes
- Review of all photos
- Scene visit
- Diagram recreation
- Calculations

The time consumed for this is usually between 1 to 2 days. If a report is needed, then the time may increase. If a full reconstruction with testimony is needed, then the time needed is significantly increased.

### **I have no education in accident investigation, would you coach me in what questions to ask?**

Yes, we are here to help you prepare a defense, which may include our participation in interviews as well as preparatory work for trial.

*Participation at Interviews:* During interview sessions of police officers, the attorney usually goes through the routine questions and then the reconstructionist continues the interview with questions on the technical issues.

*Court:* A reconstructionist should be able to strategize and help develop a series of questions and answers that may guide and focus the testimony. I insist on being briefed by each attorney who wants me to testify. Each attorney has his/her unique style of presentation and I need to understand that style along with his/her line of questioning so that there are no surprises in court.

### **May I drop in or call for a quick question**

**regarding a case?**

Yes, anytime, however if the case needs a lot of work, we may have to request that an investigator be assigned to it and work as a consulting investigator for reconstruction purposes.

**Can a reconstruction deal with an issue of intoxication?**

No, intoxication is a separate issue in and of itself.

**The client tells me that the vehicle mechanically malfunctioned and they lost control. Can you help?**

NO, an issue of mechanical function can only be addressed by a certified mechanic, with one exception - TIRES. Reconstructionists are trained to examine tires for blowout or malfunctions.

**I want to know if my client is at fault. Can you tell me that from a reconstruction?**

No, fault determination is strictly up to a jury. Many investigators get caught up in that aspect of things when, actually, the investigator can only determine how and, sometimes, why an accident occurred. Whether these factors equate to elements of a crime or not is up to the attorneys to debate. At best, an investigator can determine contributing factors to an accident, however, I would not debate the issue of fault.

**A client tells me that he was accused of not having his lights on at the time of the accident. Can you help?**

Yes, a reconstructionist may be able to determine the issue of ON or OFF on incandescent lights (taillights, headlights etc...). This may come in handy when you have a night-time accident where a victim driving with lights off mitigates the fault of our client.

**The state has an open and shut case, how can you help?**

Just like any other investigation, finding mitigating issues is part of our duties as investigators. The same techniques apply to reconstruction. For example, a client is traveling the speed limit on the freeway and rear-ends a stopped vehicle killing a family. Due to intoxication, this case is hard to defend. However, mitigating circumstances can be found by the reconstructionist when a check for recalls on the client vehicle shows the possibility of faulty brakes and no mechanical inspection has ever been performed. Further, a study of the photos show that the light switch on the victim vehicle was off at the time of the impact.

**I am in another group, how does the request work?**

It may save you a lot of time if you have a preliminary meeting with the reconstructionist to determine how much work needs to be done. If the reconstructionist can help within a few minutes, then a request may be unnecessary. If not, then a request through that group's lead investigator is needed. An example of this is when an attorney has the entire file copied and brought over including costly photos. The question by the attorney was whether or not the location of the sun at that time of day, over a year ago, would hinder the vision of the client while making a left turn. Very minor research revealed that the sun was actually located to the right of the client's view making this a moot issue.

In conclusion, accident investigation and/or reconstruction is a necessity in some cases. The balance of justice may be skewed when the state is the only entity presenting their views of HOW an accident occurred. In-house help is available – take advantage of it!



## Oh Say Can You RCC...By the Court's Early Light!

**By Joel Brown, RCC Lead Attorney and Dan Carrion, Early Representation Division Chief Deputy**

Re-engineering is a term of art currently in vogue with the criminal justice community. The desire of the Court to re-engineer case processing and management has resulted in changes in the way attorneys practice law. One area of profound change involves the handling of felony cases arising out of the justice courts. Since 1989, several attempts have made to consolidate felony cases arising out of justice court into a regional court complex and streamline case processing. A task force studied how to improve case processing and flow from the 23 justice courts to the Superior Court. As a result of the task force study, Presiding Judge Colin Campbell of the Superior Court of Maricopa County issued Administrative Order No. 2000-070, which states in part:

Whereas, the division of criminal case processing between the Justice Courts and the Superior Courts creates unnecessary delay by separating hearings for preliminary hearings, changes of plea, arraignment and early disposition sentencings between different courts in different locations, and

Whereas, the consolidation of criminal case processing within four regional locations in the West, Central, East and Northeast Maricopa County Valley will result in prompter adherence to speedy trial rules set forth in the Arizona Rules of Criminal Procedure, to the benefit of the public, crime victims and defendants, and

Whereas, the Superior Court desires to coordinate its policies on criminal case processing with capital improvement plans of the Maricopa County Board of Supervisors,

1. It is the policy of the Superior Court of Maricopa County to consolidate all front-end felony criminal case processing involving preliminary hearings, changes of plea and early disposition sentencings in one proceeding in...four regional centers.

The first Regional Court Center commenced operations on February 20<sup>th</sup>, 2001 at the Justice Court Complex, 1 West Madison. The Center started processing cases arising out of West Phoenix, Central Phoenix, and East Phoenix #1. On April 20, the Center was moved to the 7<sup>th</sup> Floor of the East Court Building, 101 West Jefferson, and was

expanded to include cases arising out of Maryvale Justice Court. By the end of the summer, felony cases arising out of South Phoenix, East Phoenix #2, Tolleson, Buckeye, and Gila Bend will be included. A northwest Regional Court Center will be opening in Glendale later this year to handle felony cases arising out of that region. A third Regional Court Center is planned for Mesa.

The Public Defender presence in the RCC primarily consists of several senior "mentor" attorneys and a group of new defender attorneys. The RCC serves as a training ground for developing new attorneys' skills and as a bridge between the training class and their introduction into the trial groups. The new attorneys are supported by at least one lead attorney who chiefly acts as a mentor, another experienced attorney who handles the more complex cases, and an on-site file manager.

The attorneys conduct preliminary hearings, plea negotiations, arraignments and sentencings, and handle the misdemeanor calendars of the Justice Courts. Misdemeanor matters continue to be conducted at the Justice Courts (good news for fans of the Space Age Lodge). In coordination with the Justice Courts, the County Attorney and the Public Defender, the misdemeanor calendar per justice court will be condensed to one day a week.

RCC attorneys also conduct misdemeanor jury and non-jury trials. With the assistance of Dan Lowrance, the new attorneys are guided step-by-step through DUI pretrial preparation and trial.

Seminars for the benefit of the newer attorneys are conducted on-site at the RCC. The attorneys remain at the RCC until a group of new attorneys completes training and is ready to enter into RCC.

All preliminary hearings from the Justice Courts are set on a consolidated calendar. The downtown calendar runs Monday through Friday. All in-custody matters are set at 8:30 a.m.; out-of-custody matters are generally set at 10:30.

A typical morning begins with the defense attorney receiving the departmental reports and an offer from the County Attorney. Priority is given to the in-custody clients. Inmates are currently being held in holding cells on the same floor as the court, with the exception of females

and closed custody, who are held on other floors. The placement of the inmates on two floors along with the availability of only two interview rooms creates delay.

RCC attorneys have access to an on-site computer for checking criminal histories, possible conflicts, legal research and e-mail. Availability of e-mail access is very helpful, since RCC attorneys spend most of their time at the RCC.

The preliminary hearings are conducted by a Justice of the Peace from one of the RCC justice courts on a daily, rotating basis. In the event of a bind over (or a waiver with or without a plea), the matter is transferred to the Superior Court part of the RCC.

The Superior Court file is created, along with the assignment of a Superior Court CR number. That process takes five to ten minutes. Then, a Superior Court judicial officer conducts the arraignment. Commissioner Lindsey Ellis is the principal judicial officer at RCC-Downtown. The judicial officer will hear motions for modification of release conditions for those matters where a preliminary hearing was not conducted. However, if a preliminary hearing is held, a motion for release can only be heard by the judicial officer who presided over the hearing. On an experimental basis, a representative of Pre-trial Services is on the 7<sup>th</sup> floor to expedite release determinations. In the near future, the Adult Probation Office may add an officer to handle presentence reports.

If a client signs a plea agreement, a guilty arraignment is held that same day and a sentencing date is set within 30 days. If the matter is relatively minor and straightforward, the sentencing can be held the same day. All sentencings are held at the RCC. Commissioner Ellis presides over all stipulated sentences that involve matters originally charged as class 4, 5, or 6 felonies without prior felony convictions. A Superior Court Judge comes to the RCC to handle sentencings in the other cases, unless the parties stipulate that a hearing officer or commissioner can hear the case. Most sentencings are set in 30 days at 8:30 for matters before the commissioner and at 10:30 for those matters before a superior court judge.

RCC representation is essentially “vertical” for matters resolved in the RCC. In other words, the same attorney handles the plea negotiation, the arraignment, and the sentencing of the client.

Although the RCC is designed to streamline the criminal case processing, there are delays. An out-of-custody client

arriving at 10:30 a.m. may not have a Public Defender available immediately on days with a high volume of in-custody cases. The County Attorney may not have its witnesses available until the afternoon. There may be delays waiting for a court reporter, an interpreter or a Justice of the Peace (the Superior Court component normally has interpreters readily available, but they are precluded from handling matters pertaining to Justice Court, including interviewing clients). Because justice court clerks also rotate, there is a lack of continuity in transferring matters to the Superior Court side. This sometimes results in substantial delays, inconveniencing clients and attorneys.

Overall, however, the RCC has had significant benefits for attorneys and clients. Improved training of new attorneys, increased numbers of preliminary hearings held, having guilty arraignment pleas on the same date as the prelim when a plea is signed, decreased travel time, and decreased “juggling” of schedules that occurs when attorneys in the trial groups handle justice court coverage are some of the benefits we have seen to date. In addition, because of its hybrid nature, some administrative matters may be handled at the time of the first meeting with the client (e.g. transfers to Juvenile Court, transfers between RCC and EDC and ultimately, matters between RCC locations). Those cases, which formerly required a waiver into Superior Court and resolution weeks later, now may be resolved at the first client-attorney setting.

The RCC remains, however, a work in progress. The Superior Court’s plans for expansion, the input of the various Justice Courts, and our ability to meet ongoing expansions with sufficient staffing and office space are among the challenges we face. We welcome your input on these and other issues as the RCC and the Office’s Early Representation Division continue to evolve.



## ARIZONA ADVANCE REPORTS

By Stephen Collins  
Defender Attorney – Appeals



### **Files v. Bernal (State of Arizona)**

346 Ariz. Adv. Rep. 11 (CA 2, 2/27/01)

Files approached an undercover police officer who was posing as a prostitute and offered her “at least \$40.00” for “straight sex.” He was convicted of violating the Tucson ordinance against prostitution. Files argued that because the officer was not a true prostitute, the common law defense of impossibility precludes his prosecution. The Court of Appeals held the defense of impossibility no longer exists in Arizona.

### **State v. Benak**

346 Ariz. Adv. Rep. 14 (CA 1, 1/23/01)

Benak was convicted of possessing a dangerous drug and possessing drug paraphernalia. Prior to trial, the prosecution alleged four nondangerous prior felony convictions including one for aggravated assault. The trial judge ruled that because Benak had been convicted of a prior violent crime, he was not entitled to mandatory probation under A.R.S. Section 13-901.01 (Proposition 200). An eight-year prison term was imposed.

The Court of Appeals held Benak was entitled to probation under 13-901.01 because the prosecution failed to properly allege a prior violent crime. A.R.S. Section 13-604.04 requires the prosecution to allege the violent nature of an enhancement offense in the indictment or information or by a timely pre-trial notice or motion. An allegation of nondangerous prior felonies was insufficient.

### **State v. Miranda**

346 Ariz. Adv. Rep. 26 (SC, 5/4/01)

Disorderly conduct is a lesser-included offense of aggravated assault with a deadly weapon. The Arizona Supreme Court found one cannot place a person in reasonable apprehension of imminent physical danger without also disturbing that person’s peace.

### **State v. Paleo, 346 Ariz. Adv. Rep. 21 (SC, 4/26/01)**

During jury selection, the prosecutor used only four of his six peremptory strikes. One was used on an Hispanic jury panelist. By not using the last two allotted peremptory strikes, the prosecutor prevented the remaining Hispanic panelist from sitting on this jury. This panelist was the last one on the jury list and therefore, was automatically struck by the clerk.

Paleo argued that the prosecutor’s actions constituted racial discrimination in violation of *Batson v. Kentucky*. The Arizona Supreme Court found that there is reason to differentiate between use and nonuse of peremptory strikes, and that waiver of peremptory strikes alone is insufficient to constitute a prima facie case of discrimination.

“Waiver accompanied by something more, could support a prima facie case in various circumstances, for example: (1) when discriminatory statements are made by a waiving party; (2) when a pattern of strikes removing a specific group is shown and waiver results in removal of other members of that group; or (3) where waiver bears on use.” For example, “Failure to apply a stated reason for striking [minority] jurors to similarly situated [non-minority] jurors may evince a pretext for excusing jurors solely on the basis of race.”

**State v. Bocharski**

346 Ariz. Adv. Rep. 27 (SC, 5/3/01)

The trial judge admitted photographs of the murder victim's skull with the top and its contents having been removed. The majority of the Arizona Supreme Court found these photographs had little probative value and "were introduced primarily to inflame the jury." However, the photographs were found to be harmless error because "we can say beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." "Our focus is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."

The trial judge also admitted evidence regarding a violent act by Borcharski while in jail. The majority of the Arizona Supreme Court held this was improperly admitted to show a propensity for violence, but was harmless error.

In this death penalty case, Yavapai County continually delayed in granting sufficient money for a mitigation expert to properly perform her job. Borcharski got frustrated and asked to fire his attorneys and be sentenced immediately. He told the trial judge that his decision to expedite sentencing was based in part on the denials of mitigation funding. The Arizona Supreme Court remanded for a new sentencing because "funding problems interfered with the fair and orderly administration of justice."

The majority also found that the trial judge had improperly considered victim impact evidence in imposing the death penalty. This included recommendations on sentencing from the victim's family. Further, "although presentence reports are not *per se* inadmissible in capital sentencing, a judge must not consider any portion of the report that would otherwise be excluded."

**State v. Trani**

347 Ariz. Adv. Rep. 3 (CA 2, 5/16/01)

The Court of Appeals recited that if prosecutorial misconduct causes a mistrial, a retrial may be barred

by Arizona's Double Jeopardy Clause under the following circumstances:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. Such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. The conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Trani's first trial ended in a hung jury. He was in another state at the time of the murder. In the second trial, the prosecutor told the jury of an inadmissible hearsay statement that Trani had ordered the murder. The trial judge found this was intentional prosecutorial misconduct because it was a very experienced prosecutor who know the case was "thin" and the trial was not going well. The trial judge dismissed the case with prejudice

The Court of Appeals chose to disagree with the trial judge's findings. It found it was an "isolated misstep" and that the case should not have been dismissed with prejudice.



## MAY 2001 JURY AND BENCH TRIALS

### GROUP A

Dates: Start-Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/25-4/30	<b>Reinhart</b>	McVey	Gellman	CR01-00919 2 cts. DUI/Suspended or Revoked License, F5 CR97-01241 PV	Guilty Misdemeanor DUI	Jury
5/1-5/3	<b>Looney</b>	Schneider	Morton	CR00-17936 2 cts. Agg. DUI, F4	Guilty	Jury
5/22-5/24	<b>Terpstra/Rock</b> Brazinkas Jaichner	Holt	Blumenreich	CR00-19416 Agg. Assault, F6	Not Guilty	Jury
5/31-6/1	<b>Hernandez</b>	McVey	Frick	CR00-18473 Unlawful Use of Transportation, F6	Not Guilty	Jury
5/2	<b>Reinhart/Duffy</b>	Reinstein	Blumenreich	CR00-19356 Burglary in the 3 <sup>rd</sup> Degree, F4	Pled day of trial	Jury
5/7	<b>Looney</b> Clesceri Jaichner	McVey	Loefgren	CR00-19500 Agg. Assault, F5; Resisting Arrest, F6	Pled day of trial	Jury
5/30	<b>Terpstra</b>	Akers	Blumenreich	CR01-01944 Forgery, F4 Misconduct with Weapons, M1	Forgery dismissed with prejudice day of trial Misconduct with Weapons dismissed without prejudice	Jury

### GROUP B

Dates: Start-Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
5/1 – 5/3	<b>Tom</b> Muñoz	Hutt	Baldwin	CR00-19016 Theft, F3	Guilty	Jury
5/8 – 5/11	<b>Gray</b> Erb	Gerst	Fuller	CR00-14361 Theft Means Transp., F3 w/2 priors	Not Guilty	Jury
5/8 – 5/10	<b>Maga/Bublik</b> Casanova	McClennen	Shreve	CR99-17506 POND, F4; PODD, F6	Not Guilty	Jury
5/30 – 5/31	<b>Giancola/Bublik</b> King/Muñoz Valentine	Schneider	Gellman	CR01-03265 Agg. Assault, F6	Not Guilty	Jury
5/15	<b>Satuito</b>	Unknown	Villegas	MCR01-00115 IJP	Guilty	Bench
5/16	<b>Satuito</b>	Fletcher	Sherman	CR01-00024 IJP	Not Guilty	Bench
5/21 – 5/23	<b>Owens</b>	McNally	Simpson	CR00-19815 Agg. DUI, F4	Guilty	Jury
5/23	<b>Grimm</b>	Guzman	Basta	CR01-00276 Assault; Criminal Damage	Guilty	Bench
5/14	<b>Maga/Bublik</b> King	McClennen	Gellman	CR01-00271 Forgery, F4	Dismissed day of trial	Jury
5/15	<b>Mitchell</b>	Martin	Green	CR99-00978 Agg. Assault, F5	Dismissed day of trial	Jury
5/22	<b>Mitchell</b>	Martin	Turoff	CR00-19598 PODD, F6; POM, F6	Dismissed day of trial	Jury
5/23	<b>DeWitt</b>	Martin	Lindquist	CR01-01729 Agg. Assault, F6	Dismissed day of trial	Jury
5/29	<b>Maga/Bublik</b> Muñoz	Martin	Lindquist	CR01-01100 Forgery, F4	Dismissed w/o prejudice day of trial	Jury
5/31	<b>Walton</b> Erb	Hilliard	Baca	CR01-03630 Burglary, F2D; Agg. Assault, F3D	Dismissed w/o prejudice day of trial	Jury

## MAY 2001 JURY AND BENCH TRIALS

### GROUP C

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/24 – 5/1	<b>Little / Schmich</b> Arvanitas	Barker	Andrews	CR00-96614 PODP, F6N; PODD, F4N	Hung Jury 6 – not guilty; 2 – undecided	Jury
5/10 – 5/16	<b>Hinshaw / Ramos</b>	Oberbillig	Andrews	CR00-97408 Agg Assault, F3D	Guilty of Lesser Disord Cond, F6N	Jury
5/14 – 5/16	<b>Gaziano</b>	Jarrett	Cook	CR00-94899 Burg 1 <sup>st</sup> Degree, F2D Armed Robbery, F2D Agg Assault, F2D DCAC Agg Assault, F3D	Hung Jury 6 - not guilty 6 – guilty	Jury
5/14 – 5/22	<b>Schmich / Little / Logsdon</b> Klosinski Moncada	Barker	Martinez / Wilson	CR00-93223 Murder 1 <sup>st</sup> Degree, F1D	Guilty of 2 <sup>nd</sup> Degree Murder	Jury
5/21 – 5/23	<b>Stein / Ziemba</b>	Willrich	Gordwin	CR00-97220 Theft of Means of Transportation, F3N	Guilty	Jury
5/22	<b>Davis</b>	Oberbillig	Udall	CR01-90666 Theft, F5N	Guilty	Bench
5/22	<b>Ramos</b> Thomas <i>Rivera / Moncada</i>	Fenzel	Goldstein	CR00-93144 Vulnerable Adult Abuse, F2N	Guilty of Lesser Vul Adult Abuse, F6N	Bench
5/29 – 5/30	<b>Bond</b>	Oberbillig	Bernstein	CR00-95968 Sale of Marijuana und. 2 lbs, F3N	Guilty	Jury
5/2	<b>Aslamy</b>	Fenzel	Blake	CR00-97157 Agg Assault, F3D; Burglary, F4N	Pled day of trial	Jury
5/21	<b>Zazueta</b>	Fenzel	Forness	CR00-97478 Agg Assault, F3D	Dismissed w/o prejudice day of trial	Jury
5/21	<b>Sheperd / Fox</b> Kresicki	Willrich	Goldstein	CR00-94915 3 cts. Sexual Assault, F2N Sex Abuse, F5N	Pled day of trial	Jury
5/22	<b>Corbitt</b>	Fenzel	Cook	CR01-90182 Theft of Mns Tran, F3N 2 cts. Misc. w/ Wpn, F4N 3 cts. POM, F6N 4 cts. PODP, F6N	Pled day of trial	Jury
5/23	<b>Pettycrew</b>	Jarrett	Hudson	CR01-90685 POM, F6N; PODP, F6N	Dismissed day of trial	Jury
5/23	<b>Walker</b>	Gaylord	Doane	CR01-90803 Arm Robbery, F2D Miscond w/ Wpn, F4N	Dismissed w/o prejudice day of trial	Jury
5/29	<b>Corbitt</b>	Fenzel	Weinberg	CR01-90492 2 cts. Agg DUI, F4N	Pled day of trial	Jury
5/31	<b>Carey / Ramos</b> Kresicki <i>Geary</i>	Fenzel	Udall	CR00-94675 Dang Drug Vio, F4N Marij Vio, F4N	Dismissed w/prejudice day of trial	Jury

### COMPLEX CRIMES UNIT

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/30 – 5/8	<b>Liles</b> Brazinskas <i>Molina</i>	Schwartz	Martinez	CR00-010387 Murder 1°, F1D	Guilty	Jury

## MAY 2001 JURY AND BENCH TRIALS

### GROUP D

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/18 – 5/3	<b>Huls / Radovanov</b> Ames Bowman	Jones	Altman / Clarke	CR2000-004812 Murder 2, F1 DCAC Child Abuse, F2 DCAC	Guilty	Jury
4/30-5/2	<b>Falduto</b>	Santana	Musto	CR00-017268 Agg DUI, F4	Guilty	Jury
5/7	<b>Carter</b>	Hutt	Gellman	CR00-018546 2 Ct. of Agg DR, F4	Direct Verdict	Jury
5/9-5/14	<b>Adams / Carter</b>	Wilkinson	Davis	CR00-017682 Armed Robbery, F2 Agg Asslt, F6, Resisting Arrest, F6	Not Guilty	Jury
5/18	<b>Silva</b>	Demars	Herman	TR01-0548CR 2 <sup>nd</sup> DUI CL. 1 Misdemeanor	Guilty-BAC > .10 Hung-Impaired	Jury
5/21-5/24	<b>Reid</b>	Galati	Kozinets	CR00-014193 2 Ct. Forgery, F4	Not Guilty	Jury
5/29-31	<b>Clemency</b> Salvato	Barker	Eaves	CR00-019756 Theft, F3	Guilty	Jury
5/8	<b>Kibler</b> Salvato	Gerst	Reddy	CR01-001737 Theft Means of Trans, F3	Dismissed w/prejudice day of trial	Jury
5/16	<b>Schreck</b>	Budoff	Rogers	CR00-018030 Misconduct Involving Weapons, F4 POM, F6 w/2 priors	Pled on day of trial to: 6 years on misconduct involving weapons; concurrent with a new misconduct involving weapons case	Jury
5/18	<b>Wallace</b>	Wilkinson	Corcoran	CR01-000738 POM, F6 PODP, F6	State designated as misdemeanor day of trial	Bench
5/22	<b>Clemency</b>	McClennan	Lindstedt	CR00-018995 Armed Robbery, F2	Pled day of trial –probation eligible	Jury
5/29	<b>Rothschild</b>	Gerst	Kozinets	CR00-012960 Traffic stolen goods, F3	Dismissed with prejudice day of trial	Jury
5/29	<b>Schreck</b>	Wilkinson	Berstein	CR00-019319 Trespassing res/ struct, F6; Criminal Damage, M2: W/2 priors	Pled to trespass felony 6 w/1 prior day of trial	Jury
5/30	<b>Falduto</b>	Gerst	Corcoran	CR01-000526 Resist officer arrest, F6	Pled to misdemeanor resisting arrest day of trial	Jury
5/30	<b>Radovanov</b>	Budoff	Kamis	CR00-018976 Agg Asslt, F6 Crim Damage, M2	Pled to a misdemeanor day of trial	Jury

### OFFICE OF THE LEGAL ADVOCATE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
5/8-5/21	<b>Everett</b> Cano	Cole	CR2000-013046 1 <sup>st</sup> Degree Murder, Burglary, 2 cts Armed Robbery, Agg Asslt	Guilty	Jury
5/17-5/30	<b>Agan &amp; Eaton</b>	Gerst	CR2000-09994 Murder; Attempted Murder	Guilty	Jury
5/29	<b>Logan</b>	Hilliard	CR2000-019468 Armed Robbery	Guilty	Jury

## MAY 2001 JURY AND BENCH TRIALS

### GRUPE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/30 – 5/3	<b>Ellig</b>	Budoff	Spaw	CR00-016734 Poss. Equip./Chemicals, F3	Guilty	Jury
5/2	<b>Goodman</b>	Gastelum (M.V.J.C)	Edmendsen	CR01-00414 IJP,M1	Not Guilty	Bench
5/22-5/24	<b>Woodfork/ Van Wert</b>	Heilman	Vingelli	CR00-00764 Possess Narc. Drug, F4	Not Guilty	Jury
5/24-5/29	<b>Zigler/Kent Castro/Ames</b>	Araneta	Hunt	CR00-19479 Agg. Assault, F6	Not Guilty	Jury
5/2	<b>Walker</b>	Araneta	Greer	CR01-000825 Agg. Assault, F3D	Dismissed day of trial	Jury
5/8	<b>Smiley/Duffy</b>	Reinstein	Knudsen	CR01-02760 Forgery, F4	Pled day of trial	Jury
5/21	<b>Rock/Zigler</b>	Reinstein	Garcia, A/G	CR01-001471 Conspiracy, F3, Manuf. Dang. Drugs, F2 Poss. Equip./Chem. Manuf., F3 PODDFS, F2 Misc. Inv. Weap., F4 PODP, F6 Child Abuse, F3 Adult Abuse, F3	Pled day of trial	Jury
5/21	<b>Pajerski/Goldstein</b>	Araneta	Ireland	CR01-005614; CR01-000236 POND, F4 PODP, F6	Pled day of trial	Jury
5/23	<b>Roskosz</b>	Reinstein	Gadow	CR00-19188 Kidnapping, F2D Sexual Assault, F2D Armed Robbery, F2D	Pled day of trial	Jury
5/30	<b>Richelsoph</b>	Reinstein	Davis	CR01-02592 2 Cts. Agg. Assault, F3D	Dismissed w/o prejudice day or trial	Jury

### OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/30 - 5/1	<b>Westervelt</b>	P. Reinstein	Pacheco	CR2000-017760 Theft-Means of Trans, F3	Guilty	Jury
5/14 – 5/15	<b>Patton</b>	Ballinger	Kamis	CR2000-16568 POND, F4 PODP, F6	Guilty of POND	Jury
5/22 – 5/22	<b>Shaler</b>	Kaufman	Larish	CR2000-016998 PODD, PODP	Guilty	Jury
5/23 – 5/24	<b>Patton</b>	McClennen	Corcoran	CR2000-19234 POND, F4 PODP, F6	Not Guilty	Jury

## EXcerpts...

2001 – The Juvenile Law Section of the State Bar presents the Terry L. Chandler award on an annual basis at the Bar Convention to recognize excellence in the field of juvenile law. This year the award was given to David and Ellen Katz for their outstanding work in the area of juvenile law. Previous honorees included: The Honorable Nanette Warner, for her work in developing Model Court in Pima County, Glenn Davis, for his work as the legislative liaison to the juvenile law section and Jeannie Parrot, for her work as the juvenile division chief in the Pima County Public Defender's Office for over 25 years.

The Katz' joined the Office of the Maricopa County Public Defender in 1987. About a year or so later, they both transferred to the juvenile division where they found a plethora of waiting issues. It would be hard to find anyone who has affected the practice of juvenile law as significantly as these two. They seem to think like good chess players, always analyzing each issue and anticipating the next move. Anyone researching published cases or court rules in the area of juvenile law will find some of the matters Dave and Ellen worked on including:

*JV-111701 v. Superior Court*, 163 Ariz. 147 (App. 1989), where the court held that it was a violation of equal protection to deny detained children a hearing on the weekend to determine whether they should remain detained.

*JV-132324 v. Superior Court*, 181 Ariz. 337 (App. 1995), where the court held that the juvenile's right to notice the judicial officer begins at the advisory hearing when counsel is appointed.

*In the Matter of Appeal in Maricopa County Juvenile Action No. JV-133051*, 184 Ariz. 473 (App. 1995), where the court held that if a person is not at peace you cannot disturb their peace and cannot be adjudicated for disorderly conduct. (This case was a major victory for the juvenile division resulting in numerous cases being dismissed where a client and a family member participated in a verbal argument. However, in *State v. Miranda*, the court held that the state only needed to show the accused had the intent or knowledge that something would disturb the peace and not that one's peace was disturbed.)

*JV-502820 v. Superior Court*, 181 Ariz. 243 (App. 1995), where the court held that courtesy holds for DES were invalid.

*In re Shane B.*, 198 Ariz. 85, 7 P.3d 94 (2000), where the court held that a juvenile was properly given the first juvenile felony offender warning after begin adjudicated for a felony offense committed before the effective date of the statute that required giving the warning, reasoning that no negative effect results unless the child commits another offense.

*In re Luis A.*, 197 Ariz. 451, 4 P.3d 994 (App. 2000), where the court ruled that speedy trial time limits are violated if an advisory hearing is not held within 30 days of the filings of the citation.

Ellen, along with Barbara Cerepayna, drafted the Juvenile Speedy Trial rules that the Arizona Supreme Court adopted in 1992.

David and Ellen have been married for nearly thirty years. They have three children: Dan who just graduated from the University of Oregon and will begin law school this fall, Rachel who will be a sophomore, and Rebecca who will be a freshman in high school next year. Dave and Ellen continue to do an exceptional job defending the children this office is appointed to represent. They always search for new issues that will assist in the defense of our clients. They are dedicated and passionate about their work. The Terry L. Chandler Award is well deserved. CONGRATULATIONS!

~ Helene Abrams ~

### *for The Defense*

*for The Defense* is the monthly training newsletter published by the Maricopa County Public Defender's Office, James J. Haas, 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.