



for *The Defense*

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

Explaining Plea Agreements to Spanish-Only Defendants Linguistic and Cultural Obstacles You Can Avoid

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By Scott Loos Office of the Court Interpreter

Considering that the daily practice of the indigent defense counsel is often occupied with the description, explanation and execution of the ubiquitous plea agreement, the issue of its treatment through an interpreter seems an important one.

The apparent inability of the non-English speaker to grasp the concept of an agreement has much to do with the way in which the idea is expressed. For the

purposes of this piece, we'll assume the defendant is a Spanish-speaker, but much of this applies to other foreign language speakers communicating through an interpreter.

What Does "Take a Plea" Mean

First, let's keep in mind that plea bargains are not universally employed in the courts of the world. Even if the client were an English speaker from New Zealand or Kenya, the way in which the plea agreement impacts the criminal process would have to be

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Tips for Gringo Lawyers on Communicating with the Spanish-Speaking Client

By Alex Navidad Navidad & Leal PLC

One of the most challenging aspects of practicing criminal law in Arizona is representing clients who speak little or no English. The majority of these clients are illegal immigrants from rural Mexico. These clients come with built in challenges arising from

the difference in language and culture. Even with the aid of an interpreter, many lawyers find themselves having communication and trust problems that effect the representation they provide their clients. Either the client distrusts the lawyer or the lawyer distrusts that the client understood what was explained. This problem

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for The Defense

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explained. One of the biggest obstacles to this explanation is quite simple: the use of the word “plea.”

Unfortunately, English is a language that loves ellipsis. When we say “plea,” it is almost never to an actual “plea” that we refer: it is almost always short for “plea **agreement**” or “plea **of guilty**” or “**change of plea proceedings**” or some other permutation of the negotiation and acceptance of this settlement of the case. Especially among the less-gifted interpreters of the world, the tendency is to always interpret a word unit from language “A” with the same word unit from language “B,” even though we can see above that “plea” doesn’t always hold the same sense. Therefore, the version in the interpreted language is not the same in each case either.

The word “plea” in the sense of an answer to the charges is often translated into the Spanish word “declaración.” The Spanish “declaración” can mean “statement,” “testimony,” “finding” or any number of other concepts denoting an oral proclamation or reporting. This is one of the reasons that the Spanish-only criminal defendant (let’s call him SOCD) launches off on an elaborate elocution when asked how he pleads, or simply says “yes.”

The Mexican legal term *declaración preparatoria* refers to a proceeding at approximately the same point as our *arraignment*, but in which the defendant can narrate a factual basis if he wishes to answer the charges by admitting responsibility. The proceeding itself in Mexico includes both the terms “answer the charges” and “admit responsibility.” When most attorneys review the plea agreement and its subsequent court proceeding with the client, the concept of admission of guilt and acceptance of the agreement are not linked. Thus the frequent, “I am saying I’m guilty but no, the marijuana was not mine, I didn’t have a knife, I didn’t touch her that way, etc.”

Compare this proceeding to the probation revocation proceeding, in which the words “plea” “guilty” and “not guilty” are not in play. The defendant usually has no problem with “admit” or “deny” since they go to their recognition of wrongdoing.

The Concept of Negotiations

The introduction of the concept of plea negotiations requires additional review as well. The presumption that all defendants, no matter what their national origin, language identity, education level, etc., are somehow immersed in American criminal defense procedure is ludicrous.

For example, to refer to the proposed settlement of the case with the word “offer,” often misinterpreted into Spanish as “oferta” is a problem. It is again, elliptical: what kind of offer? In addition, the word “oferta” in Spanish also means “supply” (as in economics), or “sale” as in reduced cost for merchandise. It does not carry with it the concept of a proposal by the government to resolve the case at hand. Referring to the “offer” as the “agreement proposed” or “what the State is proposing in order to decide your case” makes a great deal more sense when translated.

There is a Choice?

The next step is the concept of the two options. The endless question “Do you want to go to trial or do you want to take the offer?” is often meaningless for the first-time offender. They have no visual concept of either of these choices. If *go to trial* is interpreted literally, it means in Spanish “file the case, bring an action, take someone to court,” not “allow the state to bring the evidence against you and then we launch a defense against it.” The word usually used to interpret “trial” is “juicio,” which actually means “process” in general, the entire case from filing to disposition. It does not connote

in the SOCD's mind a specific series of sessions with testimony and exhibits, all aimed at a group of people called a jury and whose goal is to make a decision as to guilt or innocence.

In fact, in most SOCD's minds, the "juicio" is already in progress: the day they were first brought to court for the lightning-fast "arraignment" started the *juicio* and it's still going on. Keep in mind that Mexican criminal procedure does not have a series of appearances before the trial judge giving him or her an update on the case's progress. There is no plea agreement, no discussion in open court of the path the case is taking. Most pleadings are done in writing, and only when it is time to "bring evidence" is there something we might recognize as a "trial."

Although the Mexican constitution does make mention of jurors, the reference is to law-trained individuals sitting *en banc* to determine cases, and it is not the practical norm in criminal process. Citizens are not summoned to decide cases. Even when the concept of juries is explained to the SOCD, the image is that he will have the opportunity to address them or chat with them to explain his position vis-à-vis the charges.

In making the decision as to whether to accept the State's proposal or to have evidence brought against him, the defendant is told he has the right to confront his accusers. To a layman, even an English-speaking layman, what we know to be *confrontation* is not an argument or a disagreement, as it would sound, but rather a very rigorously standardized questioning of a witness. The image that the SOCD often has is of a proceeding in Mexican law called a "careo" (literally, face-off) held at the probable cause stage of the process which truly does imply a discussion among victims and defendants of the facts of the case, not an American courtroom confrontation. In Mexican law, the term "confrontación" is usually used to refer to a show-up or one-on-

one confrontation between a witness and a defendant, usually at or near the scene of the offense or at a police facility. The solution: apprise the SOCD of his right to be present in the courtroom when his accusers tell their tale.

Conclusion

In summary, the goal is to treat this subject with clarity and caution. When referring to the plea agreement, it's wiser to call it "the agreement" rather than "the plea." When referring to the "guilty plea," call it that, since technically, the not-guilty plea was already entered at the arraignment. If you mean the actual proceeding in court, refer to it that way rather than "your plea is on Wednesday." In addition, some rehearsal is necessary: everyone knows that the court will ask "How do you plead, guilty or not guilty?" Be certain the SOCD knows that this calls for a choice of one of the two. Also distinguish this from the factual basis. In general, never assume that the mere translation of your words into the foreign language will make it any more comprehensible than it would be in English to someone totally outside the judiciary realm.

Editors' Note: Please refer to page 4 of this issue for a handout attorneys can give to Spanish speaking clients who are considering a plea agreement. The handout explains many of the concepts addressed by Mr. Loos in terms that most Spanish speaking clients will comprehend. An English version of the handout follows on page 5. Both the Spanish and English versions are available on the Public Defender's common shared drive under PD-Forms.



What is a Plea Agreement – Spanish Version

Un **convenio resolutorio** es un contrato por escrito, celebrado entre un acusado y el abogado de la parte acusadora, (“*el fiscal, al cual se refiere a veces como “el fiscal del condado,” o “el fiscal del estado,”*”) cuyo fin es el de resolver el caso contra el acusado sin llevarse a cabo el juicio oral. El **juicio oral** es una diligencia celebrada ante el juez en el cual el abogado de la parte acusadora (el fiscal) presenta pruebas para demostrar que el acusado cometió el acto ilícito, mientras que el abogado defensor del acusado trata de demostrar que el acusado no lo cometió. El convenio típico consiste en la propuesta hecha por el fiscal (el abogado de cargo) al acusado, en la cual explica cómo rebajará la gravedad de las acusaciones contra el acusado o pedir que algunas de las acusaciones se desestimen a cambio del reconocimiento de culpabilidad de parte del acusado y sin que haya un juicio oral. Al Fiscal del Condado le corresponde decidir si se debe permitir un convenio resolutorio o no. Si el fiscal no propone un convenio o si el acusado decide no aceptar el convenio propuesto, entonces se señala una fecha para el juicio oral. Si éste se celebra, el fiscal tratará de probarle ante un **jurado** (un grupo de ciudadanos convocados para decidir el caso) que el acusado es culpable de todas las acusaciones o un parte de ellas. Si los jurados aceptan lo presentado por el fiscal y le declaran culpable al acusado, el juez le impondrá una pena al acusado, conforme a lo que marque la ley por tal ilícito. Si los jurados deciden que el fiscal no ha probado su caso y si le declaran al acusado “no culpable,” al acusado se le pondrá en libertad con respecto a todas las acusaciones presentadas en su contra durante el juicio oral.

El sistema del convenio resolutorio mediante un reconocimiento de culpabilidad tiene tanto sus ventajas como sus desventajas. Normalmente se resuelve el caso más rápido con un convenio que con un juicio oral. Muchas veces, como parte del convenio, se retiran algunas de las acusaciones o **pretensiones** (declaraciones hechas por el fiscal) que conllevan penas más severas. Como resultado, en la mayor parte de los casos resueltos por tales convenios, la pena será más leve que la impuesta después de un juicio oral en que le declaran culpable al acusado. Para llevar a cabo tal convenio, el acusado debe reconocer haber cometido las acusaciones que figuran en el convenio resolutorio. Además, debe optar por no ejercer su derecho al juicio oral, donde tendrá que demostrar al jurado que no es culpable. Entre estas garantías se incluyen el derecho de llamar a testigos para que declaren a su favor, su derecho de prestar testimonio en nombre propio, y el derecho a que el abogado defensor haga preguntas a los testigos de cargo. Además significa que tiene el derecho a que un tribunal de mayor instancia revise su caso mediante una apelación.

La decisión de aceptar un convenio resolutorio o someterse a un juicio oral le corresponde a Ud. Nadie puede tomar tal decisión por usted. Ud. y su abogado se deben reunir para consultar acerca de varios asuntos, por ejemplo, “¿qué posibilidad tengo de ganar el juicio oral?” “La pena que arriesgo si optara por el juicio oral y lo perdiera ¿es demasiado para rechazar el convenio?” “Es probable que mejoren el convenio propuesto si espero?” y “¿Cómo respondemos ante la prueba que la fiscalía desea presentar en mi contra con fines de condenarme?” A veces, vale más aceptar el convenio y a veces no. Ud. y su abogado defensor deben repasar el informe policial y las pruebas que tiene la fiscalía en su contra para poder decidir cuál es la mejor opción. El fiscal casi siempre fija una fecha límite para la aceptación del convenio. Si se vence el plazo, el fiscal insiste por lo general que se celebre el juicio oral.

Si decide aceptar un convenio resolutorio, Ud. se presentará ante la sala para lo que se llama un “Cambio de Contestación.” El juez repasará el convenio con Ud. y lo aceptará o lo rechazará. Para poder aceptar el convenio y su contestación a los cargos, el juez debe estar convencido que Ud. comprende el convenio resolutorio escrito. Tendrá que contestar “culpable” a las acusaciones acordadas en el convenio escrito y declarar lo que se llama el **fundamento fáctico**, en que le describe al juez lo que hizo para ser responsable por este ilícito. Si el juez acepta su convenio y su contestación, no le impondrá la pena en esa ocasión. El juez fijará una fecha para la imposición de la pena a aproximadamente 30 días. Ud., su abogado, sus amistades y familiares tendrán la oportunidad de comentar ante el juez en los actos de sentencia para asegurarse de que el juez sepa lo favorable de Ud. antes de tomar la decisión definitiva sobre su pena. Su abogado defensor puede informarle de varias otras cosas que pueden hacer para prepararse para la imposición de la pena, tales como escribir cartas o inscribirse en programas para readaptación.

El presente es sólo un resumen de los asuntos más importantes que Ud. debe tomar en cuenta cuando decida someterse al juicio oral o aceptar un convenio resolutorio mediante la contestación de culpable. Consulte con su abogado defensor en detalle de estos asuntos importantes antes de tomar su decisión definitiva. Esta puede ser una de las decisiones más importantes que Ud. tome en su vida, y es de suma importancia que Ud. esté enterado de las opciones a su disposición.

What is a Plea Agreement – English Version

A Plea Agreement (often referred to as a “plea”) is a written contract between a defendant and the State. A typical plea agreement consists of an offer made to the defendant to reduce the charges against him or dismiss some of these charges in exchange for the defendant entering a guilty plea and giving up his right to a trial. The County Attorney has the option to offer a plea agreement or not to offer a plea agreement. If there is no plea agreement offered or if the defendant chooses not to accept a plea agreement that has been offered, then the case is set for trial. If a case goes to trial, then the state will try to prove to a jury that the defendant is guilty of some or all of the charges filed against him. If a jury agrees with the state and finds the defendant guilty, then the judge will sentence the defendant pursuant to the mandatory sentencing terms required for the crime for which the defendant was found guilty. If the jury concludes that the state has not proven its case and finds the defendant not guilty, then the defendant will be released on all of the charges that he went to trial on.

There are advantages and disadvantages in the plea bargain process. Your case is usually wrapped up more quickly with a plea agreement than if you go to trial. Often, some of the charges or allegations that would require a harsher sentence are dropped as part of the agreement. As a result, with most plea agreements, your sentence will be better than if you were to go to trial and lose. In order to do a plea agreement, however, you must agree to plead guilty to the charges in the plea agreement and give up your right to a trial to try to prove to a jury that you are not guilty. This includes calling witnesses to testify on your behalf, you testifying on your own behalf, your attorney cross examining the State’s witnesses, and your right to file an appeal.

The decision about whether to accept a plea agreement or go to trial must be your own decision. No one can make that decision for you. You and your attorney must sit together and discuss things like “what are my chances of winning at trial?”; “does the possible sentence I would get if I went to trial and lose make it very risky for me to pass up a favorable plea agreement?”; “is it likely that the plea agreement being offered might get better if I wait?”; and “how can we respond to the evidence that the state intends to try to convict me with?” Sometimes, it is better to accept a plea agreement, sometimes it is not. Your attorney and you need to go through the police report and evidence that the state has to decide which is the best way to go. The County Attorney almost always sets a “plea cut-off date.” That date is the deadline for you to accept the plea. If that deadline passes, then the County Attorney normally says you must go to trial.

If you decide to accept a plea offer, you will go to court for a hearing referred to as a “Change of Plea”. That is where the judge will review with you the plea agreement and either accept or reject the plea agreement. In order to accept the plea agreement, the judge needs to make sure that you understand the written plea agreement. You will need to plead guilty to the charge agreed upon in the plea agreement and provide a specific “factual basis” describing why you are guilty of this crime. If the judge does accept your plea, you will not be sentenced at that time. Instead, the judge will schedule a sentencing date, approximately 30 days away. You, along with your attorney, friends and family members, will have a chance to speak to the judge at your sentencing to make sure that the judge knows the positive things about you before the judge decides on your final sentence. Your attorney can discuss a number of other things with you that you can do to get ready for sentencing, like writing letters and signing up for rehabilitation programs.

This is just a summary of the very important issues that you should consider when deciding whether to go to trial or whether to take a plea agreement. Please discuss these crucial issues in detail with your attorney before making any final decision. This may be one of the most important decisions you make in your life – make sure you fully understand your options.

Tips for Gringo Lawyers

Continued from page 1

stems from misunderstanding the most important detail about Spanish speaking clients, their culture. It's easy to forget that people from other countries do not have the same perspective and focus that we do. It also means that we are on different planes of thought when it comes to the lawyer client relationship.

There are no law school or CLE courses to prepare us for this challenge. However, we can improve our relationship with our clients by understanding their point of reference and culture. I've tried to put together five basic tips on Latin American culture and hope that they will help you better understand and communicate with your Spanish-speaking clients. As you will see, the secret to successful communication and to getting along with Spanish-speaking clients (or anyone for that matter) lies in understanding where they come from. If you understand their origins and their past you can more easily advise them on the decisions they need to make in their future.

1: Mas Despacio Por Favor

One of the biggest differences between Gringos and people South of them is pace (no, not the salsa). Everyone in El Norte is always in such a rush! We drive fast, talk fast, eat fast, decide fast and explain the law fast. If you have ever visited Mexico, Costa Rica, El Salvador or any other Latin American country you probably noticed that people are not in such a hurry. People sit and talk for hours. In my family, we tell the same old stories for an hour before we begin to talk about something new. Something about the passage of time makes Latinos feel comfortable. I know you can't be at the jail all day chatting, so what can you do about

being a speed bred Gringo?

The first step is not to rush your first encounter with your client. Before you mention any charges, plea agreements or take out your sentencing charts I suggest you begin by introducing yourself and explaining that you are a defense lawyer that is there to help. Let them know that your goal is to ensure that they understand what is happening to them and to help them make a good decision in their case. Explain that even though you are going to give them advice, it is the client who ultimately decides what to do. You do not work for the government and you will do what you can to help. Take your time on this and ask if they have any questions as to whom you are. Although this seems very basic and formal, it is necessary. Too often with Spanish speakers, attorneys get to the chase much too fast. Latinos are accustomed to a formal introduction and this will go a long way.

Second, listen to the irrelevant facts and excuses that your client has to say. It doesn't matter that he's lying or telling you completely useless information. Let them finish their thoughts. Do not interrupt. The client will stop eventually. After your client's discourse on the finer points of irrelevant thought, you can explain why his story may get him life.

Finally, be honest with your client and explain that you will not visit every day and that you are busy. If he has questions he needs to ask them while you have an interpreter available. You may have to explain some things more than once. Be patient and remember your audience. Imagine being jailed in China and having a Chinese lawyer explaining their system.

Tip 2: Y Tu Familia Que!

Every Spanish-speaking client I've encountered had one thing in common. They love to talk about family. Family is the center

of conversation in Latin America. Life revolves around family. Always ask about their kids, parents, wives (yes I mean plural). I always ask my clients about their family and I write the information down while I'm talking to them. This may be completely irrelevant as to why he shot someone at El Capri, but your client will appreciate that you think his family is important. Ask the client if he has had contact with his family. Send the family a short letter informing them of the change of plea date or sentencing date. Tell your client that the family is free to write letters to the judge. Even if you have a stipulated plea, the family will appreciate being involved at your client's court dates.

Talking about family may also give you insight in to what matters to this client. Once you know what's important to the client, you can mold your advice and suggestions with references to his family. Explain to the client how old his wife and kids will be when he gets out of prison if he accepts a plea versus losing at trial. This part of your conversation will not take long, but it will give you very useful insights into your client. More importantly, your client will have a feeling that you care about his case and how it affects his family.

Tip 3: Education

To truly grasp the education problem, imagine explaining the concept of jury trials and plea agreements to fifth graders and you are on your way. Most of our Spanish-speaking clients are from rural areas and have little or no schooling. Do not assume they can read and write Spanish. Always ask your client how many grades he finished. Also, even a well-educated Mexican is still alien to our system of "justice." Trials in Mexico and the United States are completely different animals. Do not assume that your client understands what a trial entails. This is true even if the client says he knows what a trial is. Explain and draw where everyone sits in a courtroom. Also, explain their roles.

This is very important because the roles of judges, prosecutors and defense lawyers are completely different in Mexico. Judges take a much more active part in communicating with the client in Mexico. Advise your client that talking to the judge is usually bad in el Norte.

Finally, perhaps our most basic blunder is the use of too high of a register. Always tone down your vocabulary and legalese. Do you remember your vocabulary in third and fourth grade? The concept of probable cause and factual basis are absolutely alien. Suppression and grand jury are totally useless. Try to explain words like verdict and motions as concepts such as "decision by the jury" and "written request to the judge." A good rule of thumb is that if a twelve-year-old would not understand, then fully explain the concept. Twelve years old is usually the time many rural Mexicans begin to work full time.

Tip 4: Viva la Revolucion

If there is anything that Mexicans can agree on is that you can't trust the government. However, Mexicans don't believe that their government is necessarily more corrupt than ours. This astute observation sometimes works against public defenders. The same government that pays the prosecutor, pays the judge and pays "the public defender." This is true and it is simple logic. What can you do? Reassure your client that you work for him and not the government. Tell your client what you will do for him. Explain how you evaluate the case, the plea agreement the defenses and the testimony of the witnesses. Most Mexican clients will not understand your role so it is essential that it be explained. Again, this is just an extension of taking your time and lowering the register. With patience and reassurance you will gain your client's confidence and trust.

Tip 5: "Vaya con Dios"

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Finally, learn some Spanish phrases. Anything will do. “esta fregado (it’s a bad situation)” is one of my favorites. You will probably kill the language in the process, but your clients will appreciate the interest you have taken in their language. This is simple salesmanship. You might even seem charming. Spanish is an easy language to learn so don’t be shy.

It’s not easy being an immigrant, but it’s also no walk in the park being a gringo lawyer who knows little Spanish. It’s a difficult task, but as you know, not an insurmountable one. With patience and understanding you will begin to better understand your clients and their needs. Place these tips in the back of your mind and the next time you meet some Spanish-speaking clients you will see your relations become mucho mejor.



ARIZONA ADVANCE REPORTS

By Terry Adams



State v. Bass, 357 Ariz. Adv. Rep. 3 (CA 2, 9/26/01)

The defendant was convicted of conspiracy to commit sexual conduct with a minor under the age of fifteen. The conviction arose out of Internet communications between him and an undercover cop posing as a thirteen-year-old girl. On appeal he attacked the conviction on two grounds. One, since sexual conduct with a minor necessarily requires an agreement of two people, the conspiracy is actually part of the offense and not a separate crime. The court held that this offense does not require that the parties act in concert, and if it did a minor can’t consent anyway. Second, the defendant argued that since a minor can’t consent, it’s impossible to conspire with the victim. The court found that in Arizona conspiracy can be unilateral. Conviction upheld. The defendant also argued that his sentence of lifetime probation was illegal under A.R.S. 13-902(E). The court agreed because he was convicted of a preparatory offense and therefore 13-902(E) doesn’t apply, however the court had authority to require that he register as a sex offender under A.R.S. 13-3821.

State v. Boyd, 357 Ariz. Adv. Rep. 5 (CA 1, 9/25/01)

The defendant was convicted of D.U.I. while his license was suspended and while having a dangerous drug in his body. The evidence showed that he had taken an over-the-counter drug that contained a chemical (GBL), marketed as a steroid that builds muscle and promotes sleep. After GBL is ingested it turns to a substance known as GHB. GHB is a dangerous drug, GBL is not. On appeal he argued that A.R.S. 13-1381(A)(3) violates due process because, it failed to give him notice that his action, i.e., ingesting GBL, was illegal. The court agreed, finding that the statute was void for vagueness as applied to Boyd because he did not “possess” the prohibited substance until it had metabolized in his body. Conviction reversed.

State v. Sierra-Cervantes, 357 Ariz. Adv. Rep. 8 (CA 1, 10/02/01)

The defendant was convicted of aggravated assault a class three dangerous felony. On appeal he challenged the jury instruction on self-defense. The court instructed the jury that the defendant must first prove justification by a preponderance of the evidence. The state then bore the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. The court discusses the justification statute and finds that after the passage of A.R.S. 13-205, the defense must prove it by a preponderance of the evidence, however the state no longer has any burden to prove otherwise. The state always has the burden

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Never Stipulate to State's Evidence Except for Sound Tactical Reasons or Sufficient *Quid Pro Quo*

By Jim Edgar
Defender Attorney – Appeals Division

Tiger Woods is an exceptional and gifted athlete, to that we all can attest. But even Tiger Woods is required by the Rules of Golf to make his one-foot putts. It is extremely unlikely that Tiger will miss those putts, but the Rules require that Tiger make them. It is also extremely unlikely that one of Tiger's competitors will walk up to him and say "I know you are going to make it, lets just stipulate to it and get on with the tournament". Anyone witnessing or reading about such an event would start scratching their head, wondering what the competitor was thinking with thousands of dollars at stake. That same sort of scratching and look of befuddlement can be observed among the ranks of appellate attorneys. It occurs when a form of the above stipulation is entered into, not at a golf tournament, but during a trial with a person's liberty at stake. That particular practice brings us to the reason for this article.

Criminal defense attorneys should refuse to stipulate to prosecution evidence unless sound tactical reasons exist or the prosecution has offered sufficient *quid pro quo*. Defense counsel must require the prosecutor to prove its case with its own evidence beyond a reasonable doubt. Defense counsel's job is not to aid the prosecutor by stipulating to facts the state has to prove in court. It is much more likely that the state will fumble than it is that Tiger will miss a one-foot putt. Do not stipulate away your opportunities.

Obviously, defense counsel must follow the procedural and ethical rules. But neither set of rules requires defense counsel to stipulate to state's evidence without a sufficient reason. If anything, counsel's duty to represent the

defendant with zeal includes a requirement that a stipulation be entered only for a sound tactical reason or *quid pro quo*. Defense counsel's job is to make it less likely the state will obtain a conviction.

In many of our cases, the evidence of guilt appears overwhelming and all defense counsel can do is to hope for a prosecution fumble. Stipulating to state's evidence makes it less likely that the prosecutor will fumble.

There are valid and invalid reasons for stipulating to state's evidence. Hopefully, this article will encourage defense counsel to think twice when the pressure to stipulate arises.

Valid Reasons to Stipulate to State's Evidence

1. If a stipulation to state's evidence is tactical in nature, the defendant does not suffer from ineffective assistance of counsel. For example, it has been held not to be ineffective for counsel to stipulate to the judge informing the jury of the defendant's other crimes because the decision was calculated to, and did, keep out the tangible, documentary evidence of the defendant's prior convictions. *See State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989).

2. It may be reasonable to stipulate to state's evidence to avoid gory details, such as a bite mark. *See People v. Rich*, 45 Cal. 3d 1036, 248 Cal. Rept. 510 (1988).

3. Defense counsel's desire to focus the jury's attention on an issue, such as consent or self-defense, may be a valid tactical reason to stipulate to non-disputed state's evidence. It may be reasonable in a case where a fair

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chance of a favorable verdict exists to stipulate to state's evidence if by doing so the defense gains credibility with the jury.

4. Receipt of a specific benefit may justify stipulating to state's evidence. Some examples: dropping sentencing allegations such as dangerousness, release status or historical convictions; dismissing or not filing other criminal charges.

5. Stipulating to state's evidence may be appropriate if the state stipulates to defense evidence.

Invalid Justifications for Stipulating to State's Evidence

None of the following are valid reasons for stipulating to state's evidence.

1. Valuable courtroom time will be saved.
2. Saves public defender resources by shortening the trial allowing defense counsel to focus on more important matters, in this or other cases. Perhaps a major homicide trial is waiting to be investigated or is riding the calendar and needs more work.
3. The trial judge will be pleased because the trial is shortened and he can better administer the court's calendar.
4. Saves the prosecutor the time, trouble, manpower, and expense of proving facts contained in the stipulation.
5. Reduces the prosecutor's hostility because the state will not be forced to prove facts that are not in dispute. The prosecutor might even develop friendly feelings toward defense counsel and treat this or future clients more leniently.
6. Better statistics for the trial court,

prosecuting agency, and the defense agency.

7. A shorter trial saves transcript costs and the appeals are less costly.

Conclusion

It is not our job to curry favor of the judges and prosecutors by moving cases along expeditiously. We can be pleasant but firm in our representation of our clients. It is not a compliment when the trial judge congratulates defense counsel for moving the case along by stipulating to the state's evidence. It is not the role of defense counsel to move the case along expeditiously.

By making it clear to the prosecution and the judges that we will stipulate only when we receive valid *quid pro quo*, it is more likely that *quid pro quo* will be offered.

Defense counsel must resist the urge to stipulate to state's evidence if tactical reasons and *quid pro quo* are lacking.

I encourage you to make the state prove its case without our assistance. It is important that our clients be granted the full benefit of the burden placed on the state to establish guilt with its own evidence beyond a reasonable doubt.



The 12.9 Dagger

Stop Those Dog Indictments In Their Tracks

By Jennifer Willmott

Trial Group Counsel – Group A

Imagine yourself sitting at your desk with a brand new file neatly lying in front of you. You begin the typical things you do to open this fresh file. Eventually, you're reading the police reports. You scan over the statements your client allegedly made to the police while saying thanks out loud to whomever is listening, that your client's statements don't really hurt him. You pour over the other witness statements in the case. With each turn of a page your excitement grows. "This case is trial bound," you think to yourself. "But of course there must be something I haven't read yet that really nails the case for the state." Because of course, as firm believers in the justice system, there must be something more to the case, surely evidence this weak wouldn't pass muster in a grand jury proceeding. Yet you keep reading, and there is nothing. In disbelief you yell from your office, "This is it? How in the world could a grand jury have possibly indicted this guy?"

We have all had these cases at one time or another and probably asked ourselves the same rhetorical "How and Why" question. Well one of the first places to look for an answer is at the grand jury proceedings. Did the prosecutor do anything wrong to obtain the indictment? Were any errors committed?

Remember, a motion to remand must be filed in a timely manner (i.e. no later than 25 days after the transcript has been filed or 25 days after the argument, whichever is later.) Make sure to file a motion to extend this time prior to the deadline if you'll need more time.

There are several areas under which grand jury proceedings can be attacked. Generally

speaking, you look for a violation of due process. Every person accused of a crime is entitled to due process of law during grand jury proceedings. See Rule 12.9, Ariz. Rules of Criminal Procedure; *Crimmins v. Superior Court*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983); *State v. Emery*, 131 Ariz. 493, 506, 642 P.2d 838, 851 (1982). Due process requires the use of an unbiased grand jury and the evidence must be presented in a fair and impartial manner. See *Herrell v. Sargeant*, 189 Ariz. 627, 629, 944 P.2d 1241, 1243 (1997); *Emery*, 131 Ariz. at 506, 642 P.2d at 851.

1. Grand Jury Bias

A grand juror must be able to base his decision solely on the applicable law and the evidence presented. See *Emery*, 131 Ariz. at 506, 642 P.2d at 851 (citing *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980)). Jurors are often quickly and easily rehabilitated with a few questions that elicit a response indicating that the juror can "try" to be fair and impartial. A finding of bias or a lack of bias is "within the discretion of the trial court" and will not be reversed on appeal unless the trial court's determination was "clearly erroneous." *Id.* (citing *Priestly v. State*, 19 Ariz. 371, 374, 171 P. 137, 138 (1918)). Practically speaking, this means that if you can't convince the trial judge that a grand juror was biased, the defendant has little chance of winning on appeal.

When reviewing the grand jury proceedings, look for statements from a juror indicating possible bias. If there are statements that call the juror's impartiality into question, see if, at some point, the juror indicated they could be fair or try to be fair. Remember a grand juror's knowledge of your client or his past is an insufficient showing of bias; you

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must be able to demonstrate “an actual predisposition against him.” *Emery*, 131 Ariz. at 507, 642 P.2d at 852 (quoting *Murphy v. Florida*, 421 U.S. 794, 800 n. 4 (1975)).

2. Fair and Impartial Presentation of Evidence

Much more fertile ground for remand is found in the conduct of the county attorney and witnesses during the grand jury proceedings. The county attorney has two main duties in grand jury proceedings: (1) to instruct the jury on the applicable law, and (2) to make a fair and impartial presentation of the evidence.

Making a fair and impartial presentation of the evidence is a much less clear obligation on the prosecution. This area seems to be the major reason for grand jury remands. Did the county attorney omit some evidence? Did the witness (police detective) misstate the facts of the case? Unfortunately, the Arizona Supreme Court stated that there is no mechanical test to determine whether the grand jury had a fair and impartial presentation of evidence, but fairness and impartiality must be determined on a case-by-case basis. See *Trebus*, 189 Ariz. 621, 626, 944 P.2d 1235, 1240 (1997).

a. Inaccurate or Incomplete Witness Testimony

Inaccurate and misleading testimony to the grand jury denies the defendant substantial procedural rights. *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). Furthermore, because a defendant has no effective means of cross-examining or rebutting the testimony given before the grand jury, it is particularly incumbent upon the prosecutor who witnesses the use of misleading or incomplete testimony to correct the record before the grand jury. *Nelson v. Royston*, 137 Ariz. 272, 277, 669 P.2d 1349, 1354 (App. 1983). A return of the indictment against the defendant with the use of misleading testimony amounts to a denial of substantial due process. *Id.*

b. Failure to Instruct on Applicable Law

Instructing the jury on the applicable law is a fairly straightforward issue. The county attorney *must* instruct the grand jury on *all* applicable statutes, including statutes related to defenses that are directly applicable to the case. See *Crimmins*, 137 Ariz. at 42, 668 P.2d at 885 (holding the prosecutor had a duty to instruct on citizen’s arrest statutes). However, the county attorney need only instruct the grand jury on the highest charge supported by the evidence and may omit lesser-included offenses. See *State v. Superior Court (Mauro Real Party in Interest)*, 139 Ariz. 422, 425, 678 P.2d 1386, 1389 (1984). Don’t forget that instructions are read at the beginning of the jury’s term. Make sure the grand jury is told which statutes are applicable to your case, are given copies of those statutes and that the county attorney asks if anyone wants the statutes reread or clarified. See *O’Meara v. Gottesfield*, 174 Ariz. 576, 578, 851 P.2d 1375, 1377 (1993).

Even if you notice that the county attorney instructed on a defense statute, the necessary facts that support the statute must be presented as well. As an example, in the *Herrell* case, Mr. Herrell was indicted for Aggravated Assault, a class 3 dangerous felony. During the grand jury proceedings, the state referenced certain justification statutes, but did not properly explain the relevance of those statutes to the grand jurors. Furthermore, even though the state read the appropriate justification statute, it failed to present known evidence to support the justification statute. *Id.* at 630, 944 P.2d at 1244. The court found that the grand jury should have been properly instructed as to the appropriate law and given the full factual background so it could make the determination as to whether Mr. Herrell was justified in using force. *Id.* at 631, 944 P.2d at 1245.

c. Clearly Exculpatory Evidence

Compounding the difficulty in analyzing the case-by-case standard to determine fair and impartial proceedings is the fact that the

county attorney need not present all exculpatory evidence to the grand jury, but rather, only “clearly exculpatory” evidence need be presented. *See Trebus*, 189 Ariz. at 625, 944 P.2d at 1239. “Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury from finding the existence of probable cause.” *Id.*

Furthermore, “Grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so.” Ariz. Rev. Stat. § 21-412 (1990). The Arizona Supreme Court has held that this statute gives the person under investigation a right to request that a grand jury consider exculpatory evidence submitted by the person under investigation. *See Herrell*, 189 Ariz. at 629, 944 P.2d at 1243; *Trebus*, 189 Ariz. at 623, 944 P.2d at 1237. When the person under investigation makes a request to submit exculpatory evidence, the prosecutor is under a duty “to inform the grand jury of any exculpatory matters” so the grand jury, not the prosecutor, may decide whether to consider the proffered evidence. *See Herrell*, 189 Ariz. at 629, 944 P.2d at 1243; *see also Trebus*, 189 Ariz. at 623-24, 944 P.2d at 1237-38. If the evidence sought to be introduced is not exculpatory, then the prosecutor need not present it to the grand

jury. *See Trebus*, 189 Ariz. at 625-26, 944 P.2d at 1239-40.

So the next time you cry out, “how could a grand jury indict my poor client,” look through the grand jury transcript. You may find that the grand jury was missing some key information or was given misleading evidence. And if the facts, law, and the judge are with you, you may just get that remand. Remember that if a remand is granted, you should inform the prosecutor of any exculpatory evidence you would like submitted before the new grand jury on behalf of your client.



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to prove the elements of the underlying offense beyond a reasonable doubt. The instructions here were error but in the defendant’s favor therefore the conviction was affirmed.

State v. Sepulveda, 357 Ariz. Adv. Rep. 11 (CA 2, 10/02/01)

The defendant was convicted in 1992 of armed robbery a dangerous offense. The court found that he was on parole when the offense was committed and enhanced his sentence. On appeal, he argues that, after the United States Supreme Court’s decision in *Apprendi v. New Jersey*, he was entitled to a jury determination of his release status before his sentence could be enhanced. The court determined that his conviction and sentence were final before *Apprendi*, and found that *Apprendi* would not be applied retroactively.

Kevin A., In re, 358 Ariz. Adv. Rep. 19 (CA 1, 10/09/01)

After an adjudication of delinquency for criminal damage, the court established a deadline for the victim to file a verified statement of restitution with accompanying documents. The deadline was thirty days after which restitution would be closed. The victim sent an unverified estimate to the prosecutor, which was not presented until after the deadline had passed. The court ordered restitution. The court of appeals vacated the order, holding that the juvenile court was without jurisdiction. The court held that the need for finality to permit the juvenile a speedy appeal bars the court from vacating a restitution deadline without any reason.



DECEMBER 2001
JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
11/2 - 12/3	Harris / Green Seaberry Curtis	Davis	Martinez	CR01-009683 2 nd Degree Murder	Guilty	Jury
12/3 - 12/6	Woodfork	Anderson	Mayer	CR01-10064 Burglary 3 rd , F6	Guilty	Jury
12/3 - 12/4	Primack / Ellig	Gottsfeld	Todd	CR01-11907 Unlawful Flt, Agg. DUI	Guilty	Jury
12/3 - 12/11	Bevilacqua	Davis	Clayton	CR01-001909 Murder 1 ^o , F1D, Burglary 1 ^o ; F2D Kidnapping, F2D	Guilty	Jury
12/04 - 12/05	Aeed Clesceri Francis	Hoag	Loefgren	CR01-008852 Attempted Residential Burglary, F4	Not Guilty	Jury
12/05 - 12/10	Looney	Willett	Craig	CR01-012535 2 cts. Agg. Assault, F6 Assault, M1	Not Guilty on ct. 1 Agg. Assault Guilty on ct. 2 Agg. Assault & Assault	Jury
11/29 - 12/4	Felmly Geary	Fenzel	Bennink	CR01-92097 Depositing Explosives, F4N Attempt to Commit Arson of Occupied Structure, F2N	Guilty	Jury
12/10 - 12/11	Valverde	McNally	Beougher	CR01-012916 Theft Means of Transportation, F3	Hung Jury	Jury
12/10 - 12/11	Blieden King Oliver	Oberbilling	Brnovich	CR01-07166 Aggravated Assault, F3D Kidnapping, F2	Mistrial	Jury
12/10 - 12/18	Klopp-Bryant / Hinshaw Arvanitas Geary	Willrich	O'Neill	CR00-94954 6 cts. Armed Kidnapping, F2D Armed Sexual Assault, F2D	Guilty	Jury
12/10 - 12/18	Clemency Bradley	Hotham	Reddy	CR01-08599 Misconduct Involving Weapon, F4 2 Cts Agg. Asslt, F6	Guilty – MIW, F4 Not Guilty on 2 cts. Agg. Asslt, F6	Jury
12/10 – 12/12	Lopez Castro	Burke	Kay	CR01-11636 Armed Robbery, F2	Guilty	Jury
12/10 - 12/11	Ziemba / Leonard	Keppel	Weinberg	CR01-95616 DUI w/passenger under 15yrs, F6N	Guilty	Jury
12/11 - 12/12	Reinhart / Rock	Gottsfeld	Vengelli	CR01-012943 PODD, F4, PODP, F6	Guilty	Jury
12/11	Scanlan	Cates	Adleman	CR01-013336 Promoting Prison Contraband, F2	Mistrial	Jury

DECEMBER 2001 JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/11 - 12/13	Satuito Robinson <i>Oliver</i>	Gerst	Gellman	CR01-06847 Aggravated Assault, F4	Not Guilty	Jury
12/12 - 12/13	Leonard / Ziemba	Fenzel	Gonzalez- Brewster	CR01-92194 2 cts. Agg. DUI, F4N	Not Guilty	Jury
12/13 - 12/19	Blieden Kasieta <i>Valentine</i>	Burke	Boyle	CR01-09231 Murder 2 nd degree, F1	Guilty	Jury
12/19 - 12/20	Hamilton / Walker	Oberbillig	Wilson	CR01-94544 Agg. Assault, F6N	Not Guilty	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
12/17 - 12/17	Sawyer	Gottsfeld	Klepper	CR01-011117 POM, F6 PODP, F6	Guilty	Bench
12/12 - 12/14	Granda	Heilman	Koplow	CR01-009142 POFS, F1 PODD, F2	Ct.1:Not Guilty Ct.2:Guilty, Lesser Included	Jury

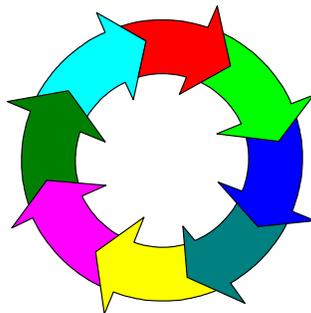
OFFICE OF THE LEGAL ADVOCATE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
11/26-12/7	Everett/Sherwin	Keppel	CR1999-090001 Murder 1 st degree Att. 2 nd degree murder	Guilty	Jury
12/11-12/13	Gray Cano & Stovall	Anderson	CR2001-12774 Theft of MOT, 3F	Guilty	Jury
12/19	Schaffer	Gottsfeld	CR2001-013644 Kidnap, F2 Asslt F6; M1X2	Mistrial	
12/17 - 12/19	Storrs Stovall, Prieto, and Cano	Martin	CR 2001- 002379 2 cts. Aggravated DUI	Guilty	Jury

The Maricopa County Public Defender's Office
and
The Criminal Justice Executive Council of the State Bar of Arizona

Present

Immigration Consequences of Criminal Cases



Friday, February 22, 2002
12:30 p.m. to 4:30 p.m.

Maricopa County Board of Supervisors Auditorium

For further information, contact the State Bar of Arizona.

for The Defense

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