



for *The Defense*

▶ ◀ **Dean Trebesch, Maricopa County Public Defender** ▶ ◀

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Highway Drug Courier Profiles in Y2K: Another Nail in the Coffin of the 4th Amendment?

**By Diana Lee Patton
Defender Attorney – Legal
Defender's Office**

Despite a growing fear that the war on drugs is lost, many citizens seem willing to accept the erosion of their right to be free from unreasonable search and seizure – gambling or hoping that the relinquishment of some freedoms will help win the war. The weakening of the Fourth Amendment in the name of stemming drug trafficking¹ has been even more serious than that which occurred in the motor vehicle cases² in the 70's. Thus, it stands to reason that when drug trafficking and motor vehicles are joined as a single search and seizure issue, the Fourth Amendment will suffer accordingly. But, at least for now, it is

still possible to challenge detentions of motorists based on profiling of what a drug courier is supposed to “look like.”

The highway “drug courier profile” is a “rather loosely formulated list of characteristics” used by law enforcement to distinguish between those who are carrying narcotics and those who are innocent travelers.³ It was derived from the DEA’s airport drug courier profiles of the 70's and 80's, which in turn were based upon the FAA’s skyjacker profile devised in the 60's and 70's.⁴ The skyjacker profile alone was based on information compiled according to scientific method; the drug courier profiles are based upon collective experiences of law enforcement agencies.

Factors to Consider

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Adolescent Offenders in the Adult Court System

**By Alberta Stone
Client Services Coordinator –
Juvenile Durango**

During the past four years there has been a significant increase in adolescent offenders being tried in Maricopa County adult court. This increase in adolescent population is related to the direct filing statute 13-501 A and B. This statute grants prosecutors the authority in certain circumstances to file charges in adult court against children under the age of

eighteen. Individuals who work with adolescents in the adult court system may find it necessary to develop an informed awareness of adolescent behavior and mental health needs. This article presents a discussion of the mental health challenges of adolescent offenders.

Cases involving adolescent offenders should be assessed individually. The nature of the crime alone is not sufficient to determine how an adolescent should be sentenced. The

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Among highway drug courier profile characteristics are: appearing to be a foreigner;⁵ driving a one-way rental car;⁶ paying for the rental car with cash or with someone else's credit card;⁷ traveling across country;⁸ carrying a small amount of luggage;⁹ appearing to be nervous and in a hurry when stopped by police;¹⁰ driving below the speed limit;¹¹ driving above the speed limit;¹² looking at the police vehicle;¹³ not looking at the police vehicle;¹⁴ traveling on a route known to be used by drug couriers;¹⁵ driving a late model car¹⁶ or large luxury car;¹⁷ traveling late at night¹⁸ or early in the morning;¹⁹ appearing to be a husband and wife team of Spanish descent;²⁰ driving a car while wearing jeans with a tie, being nervous, not making eye contact, coming from a "source" city, and placing the car's registration on the passenger seat;²¹ driving a dirty car;²² and driving a clean car.²³

Courts usually hold that a match between the suspect's appearance and profile factors can be considered reasonable suspicion to briefly detain the person and investigate further, but all are in agreement that the profile cannot amount to probable cause to search the car.²⁴ One court dismissed the drug courier profile as a "classic example of those 'inarticulate hunches' that are insufficient to justify a seizure under the fourth amendment."²⁵ Courts seem to have two main objections to the drug courier profile: (1) many factors also resemble innocent, lawful behavior;²⁶ and (2) the "drug courier profile has a chameleon-like quality; it seems to change itself to fit the facts of each case."²⁷

Arizona's Approach

The most recent Arizona cases are *State v. Magner*,²⁸ in which the detention was held illegal, and *State v. Omeara*,²⁹ in which the detention and search were upheld. In *Magner*, defendant was pulled over on Interstate 40 outside of Flagstaff for driving 71 mph in a 65 mph zone. During the stop and preparation of a written warning, the officer observed the following: (1) Mr. Magner avoided eye contact, (2) he flinched the one time that he did make eye contact ("nervous"), (3) he was unusually upset about the stop, (4) he wore sneakers and jeans with a tie ("attempting to present as a businessman to any passing patrolman"), (5) the car's registration was on the seat, not in the glove compartment (causing the officer to "wonder whether defendant had a gun in the glove box"), (6) Mr. Magner was traveling from Tucson ("a known source for illegal drugs"), (7) the car was dirty ("travel from Point A to Point B as fast as they can without cleaning their cars"), and (8) an overnight bag was on the seat ("to keep the contents of the trunk hidden").³⁰

The court addressed each one of these observations individually, and offered all kinds of innocent explanations for them – e.g., nearly everyone is nervous while being stopped by a policeman, and avoiding eye contact did not fall

into the category of "dramatic nervousness."³¹ The court also observed that the registration on the front seat should not have prompted suspicion, since the officer never asked the defendant why it was there as opposed to somewhere else – it could have been removed from its usual place in preparation for the traffic stop itself. Because the officer did not ask, his assumption that there might be a gun in the glove compartment was unreasonable. With regard to defendant's choice of apparel, the court was willing only to say that wearing a tie on a cross-country trip seemed "unusual," but again, without the officer inquiring, could not be considered "suspicious." That the officer believed Tucson was a "source city" for drugs was discarded with little discussion, as defendant had given an adequate explanation of his presence there. The court also declined to find a dirty car suspicious in the middle of a long trip, as it would make more sense to clean the car at the end of the trip.³² Lastly, while the court found the officer's inference reasonable that the overnight bag was on the seat because drugs occupied the trunk, they found it equally reasonable that the bag was there for "easy access to items such as a shaving kit or toothbrush."³³

The court concluded that the traffic stop for speeding was legitimate, but further detention was unjustified:

[The officer] would have been authorized to continue defendant's detention for a brief period to ask further questions about the circumstances [the officer] deemed suspicious. [Cites omitted.] However, [the officer] asked further questions only with respect to defendant's visit in Tucson, which produced nothing to enhance the suspicion of criminal activity. [Cites omitted.] The end result, when evaluating all of [the officer's] observations, together with the unclarified inferences from those observations, is that [the officer] had no more than a "hunch" that defendant was involved in transporting drugs. This is not enough under the Fourth Amendment to justify defendant's detention.³⁴

Thus, a motion to suppress should always point out that although the drug courier profile can add up to reasonable suspicion, once the officer decides to investigate further, *he'd better investigate further*,³⁵ not just snoop around for more drug courier factors, or the detention may be illegal. Remember, the drug courier profile *never* supports probable cause to search.

The *Omeara* case presented a different fact pattern, and that is why it is distinguishable from *Magner* and thoroughly consistent with it. In *Omeara*, the officer observed behavior that was suspicious on its face, not explainable as "innocent"

behavior. He saw several men talking, getting in and out of two cars, and switching cars. When the officer followed one of the cars, it made two illegal U-turns in heavy traffic and the officer lost track of the car temporarily. When he located the car, the other car joined it and they began traveling together.

During the traffic stop for the U-turns, the officer issued a written warning. The officer asked for consent to search, which was refused. The officer sniffed the outside of the trunk lid and detected the heavy odor of fabric softener, which he knew from his experience was used to mask the odor of marijuana. He continued to detain defendant for 45 to 50 minutes while a drug-sniffing dog was brought to the scene; when the dog alerted, the officer had probable cause to obtain a telephonic search warrant, and 349 pounds of marijuana were seized.³⁶

In upholding the detention and search, the court quoted the dissent in *Magner* approvingly,³⁷ and this may be why some construe it as contrary to *Magner*. But the fact is that *Omeara* does no damage to the holding in *Magner* – they just say the same things in different ways. Every observation the officer made in *Magner* had far more numerous innocent explanations than guilty ones. In *Omeara*, the car-switching actions were patently suspicious, and the officer would have been dilatory had he not investigated further. There was no apparent innocent explanation for the car switching, and later, for the two cars to be separating, then rejoining one another. And the illegal U-turns were intrinsically “guilty” acts requiring at least an explanation from the operator.

Using the Caselaw

Law enforcement officers are notorious for “backpedaling” at suppression hearings to remedy, in hindsight, any defect in the traffic stop. Search and seizure fact patterns are so fact-intensive that officers constantly tap-dance on the witness stand to save the state’s case. Two things help here.

First, make it clear *before* your pre-hearing interview that the officer should review his departmental report and be prepared to make any changes at the interview. Plan your interview carefully and lock the officer into the facts and observations that indicate that he made the stop based on the drug courier profile. He won’t want to admit it, so don’t put words in his mouth. Give him every opportunity to amend his report.

Second, you must believe that the officer while writing his report, or during the interview, or on the witness stand, is conversant in a black-letter way with the latest drug courier profile cases. Just as cops throw around terms like “plain view” and “exigent circumstances” without really knowing what they mean (except they heard them in training), the officer will know that he must somehow transform his

inarticulate hunch into reasonable suspicion. Thus, your officer will borrow facts from recent case law and plug them into your client’s traffic stop, whether or not the terms fit or the circumstances really existed. This is why you should involve your client in the suppression hearing preparation. He may not even recognize himself, or his actions, as portrayed in the police report. The circumstances may be that altered! In that event, you are not condemned to a “swearing contest,” because the officer may have twisted the truth in such a way that his testimony can be challenged by evidence that calls the officer’s testimony into question. For example, the officer might testify that your client did not make eye contact. But you learn from your client that there was no eye contact because the client was wearing his only pair of prescription glasses – sunglasses. You then verify that sunglasses are the only glasses impounded in his jail property.

Conclusion

Contrary to what some may think, there is still something left to work with in motions to suppress when the investigatory detention is based upon the drug courier profile. The recent cases, *Magner* and *Omeara*, are distinguishable from one another and completely compatible, and the *Omeara* case should not be construed to further erode the right to be free of unreasonable search and seizure.

Endnotes

- 1 See generally, *Miles of White Lines: Use of the Drug Courier Profile by State Law Enforcement Agencies on the Highway as Reasonable Suspicion to Detain Motorists*, 30 Ariz. L. Rev. 949 (1988).
- 2 “Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable.” *United States v. Chadwick*, 433 U.S.1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977), citing *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973), *Texas v. White*, 423 U.S. 67 (1975). And, “The answer lies in the diminished expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.” *Id.*, citing *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).
- 3 *United States v. Johnson*, 516 So. 2d 1015 (Fla. App. 1987)(upholding suppression of evidence seized pursuant to a drug courier profile stop).
- 4 See supra, *Miles of White Lines*.
- 5 *State v. Cohen*, 103 N.M. 558, 560, 711 P.2d 3, 5 (N.M. 1985).
- 6 *Valcarcel v. State*, 718 S.W. 2d 359, 361 (Tex. 1986).
- 7 *Cohen*, 103 N.M. at 560, 711 P.2d at 5.
- 8 *Valcarcel*, 718 S.W.2d at 362.
- 9 *Id.*
- 10 *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

- 11 *Id.*
- 12 *Johnson*, 516 So. 2d at 1018.
- 13 *State v. Magner*, 191 Ariz. 392, 956 P.2d 519 (1998).
The officer did not cite speeding as a drug courier factor, but opined that drug couriers' cars are dirty because they "drive from Point A to Point B as fast as they can" without stopping to wash their cars.
- 14 *Valcarcel*, 718 S.W.2d at 362.
- 15 *Department of Highway Safety and Motor Vehicles v. Coleman*, 505 So.2d 668, 670 (Fla. App. 1987).
- 16 *Id.*
- 17 *Id.*
- 18 *Johnson*, 516 So.2d at 1018.
- 19 *United States v. Smith*, 799 F.2d 704, 706 (11th Cir. 1986).
- 20 *Valcarcel*, 718 S.W.2d at 362.
- 21 *State v. Magner*, 191 Ariz. 392, 956 P.2d 519 (1998) (detention and search suppressed).
- 22 *Id.*
- 23 *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir.), *cert denied*, ___ U.S. ___, 117 S.Ct. 624, 136 L.Ed. 2d 546 (1996).
- 24 E.g., the outcome of *State v. Omeara*, 297 Ariz. Adv. Rep. 3 (Div. 2, April 27, 1999) would have been quite different if the officer had proceeded directly to a warrantless search on the basis of the odor of fabric softener.
- 25 *United States v. Smith*, 799 F.2d 704, 707 (11th Cir. 1986). *But see State v. Cohen*, 103 N.M. 558, 711 P.2d 3 (1985), in which a match of seven profile characteristics did amount to reasonable suspicion to detain the suspects after the lawful reason for the initial stop had expired.
- 26 *United States v. Westerbann-Martinez*, 435 F. Supp. at 698.
- 27 *Id.*
- 28 191 Ariz. 392, 956 P.2d 519 (App. 1998).
- 29 297 Ariz. Adv. Rep. 3 (Div. 2, April 27, 1999).
- 30 956 P.2d at 523.
- 31 *Id.* at 524.
- 32 *Id.* at 525. In an almost tongue-in-cheek aside, the court observed that cars that appeared "too clean" also were associated with drug couriers. *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir.), *cert denied*, ___ U.S. ___, 117 S.Ct. 624, 136 L.Ed. 2d 546 (1996).
- 33 956 P.2d at 525.
- 34 956 P.2d at 527 [emphasis added].
- 35 The *Omeara* court said that the holding in *Magner*, does not "mandate questioning by the officer during investigatory stop; rather, it simply permits or authorizes questioning." 297 Ariz. Adv. Rep. at 4. However, this reasoning fails because it is circular: the officer is permitted to question, and if he does not question, there is no basis for the continued detention.
- 36 297 Ariz. Adv. Rep. at 3.
- 37 "We agree with the following observations by the dissent

in *Magner*: When addressed individually, almost any factor short of a 10 pound bale of marijuana on the front seat of the vehicle may have an innocent explanation. . . . [T]he relevant inquiry is not whether the particular behavior is innocent or guilty, but rather the degree of suspicion that attaches to the particular types of non-criminal acts. *Omeara* 297 Ariz. Adv. Rep. at 4, quoting *Magner*, 191 Ariz. at 401-02, 956 P.2d at 528-29 (Voss, J., dissenting).



THE ALPHA PROGRAM – SHERIFF JOE’S IN CUSTODY SUBSTANCE ABUSE TREATMENT PROGRAM

By Linda Shaw
Client Services Coordinator – Group A

The ALPHA Program is an outstanding example of how certain highly motivated defendants with substance abuse problems might be able to take a “lemon” (being in custody) and turn it into “lemonade.” ALPHA is designed to treat inmates who are sentenced to at least six (6) months in the County jail and are serious about wanting to learn strategies for overcoming their use of drugs.

As a licensed outpatient treatment facility, ALPHA provides a three-step program which includes group motivation, six weeks of intense therapy, and post/recovery treatment. Participants are required to attend courses on anger management, preparing for the world of work, cognitive restructuring and three additional self-help electives. Inmates are also required to participate on ALPHA work crews which keeps them constructively occupied between classes.

Since ALPHA began in February 1996, over 600 men and women have graduated from the program. “These graduates have demonstrated a recidivism rate of only 14% compared to the norm of 63% for all Maricopa County Sherriff’s Office inmates,” according to Thelda Williams, Sheriff Joes’ Program Director. Judy Lorch is the Program Manager at Durango.

The ALPHA Program is available to sentenced inmates on a volunteer basis. If you have a strong candidate for the program, have him/her fill out a tank order immediately following sentencing.



BULLETIN BOARD

ATTORNEYS

Retiring

The Juvenile Division will lose one of its most colorful characters on May 30, 2000 when **John W. “Bill” Melvin** retires. Bill has been a fixture in our Juvenile-Durango division since 1991, but his history in the office and as a player in the Maricopa County criminal justice system goes back much farther than that.

Bill started at the University of Illinois, from which he received a B.S. in Mechanical Engineering in 1956, and a M.S. in Theoretical and Applied Mechanics in 1959. He then moved to Phoenix, where he worked as an Assistant Professor of Engineering Science at ASU. In 1971, he began law school at ASU, graduating in 1974.

Bill worked in private practice from 1974 to 1978. He was then appointed to the position of Justice of the Peace in the East Phoenix #2 Justice Court. In 1984, Bill served as a pro tem judge in the Phoenix Municipal Court. In 1985, he first went to work in the Public Defender’s Office, then headed by Ross Lee.

In 1986, Bill was again appointed as JP in East #2, where he served until 1988. From 1988 to 1989, Bill served as a pro tem JP and commissioner in Superior Court.

In 1989, Bill returned to the Public Defender’s Office for good. He was a trial attorney in Trial Group B until 1991, when he transferred to juvenile.

Bill has agreed to return to work for the office part-time as a justice court attorney in the upcoming Trial Group E horizontal representation pilot project.

BRAIN INJURED CLIENTS: HOW CAN WE HELP TO REPRESENT THEM EFFECTIVELY

By Patrick Linderman
Client Services Coordinator – Group C

“Have you ever sustained a serious head injury? If yes, were you unconscious or in a coma for this injury?” These are two of the most important questions I always ask of every defendant I interview. If head injury history is overlooked, the attorney could be missing some of the most crucial mitigation in a case. Repeatedly I encounter cases in which head injury history, while very important to the case, is absent from pre-sentence reports and sentencing arguments.

Recently, I assisted on a case in which the defendant had a nine-year history of epilepsy that initiated shortly after a major head injury. The head injury was a result of a bicycle accident. For almost a decade, the defendant had been unable to obtain a license to operate a vehicle. Eventually, medication interventions were exhausted and the doctors felt they had to turn to more extreme measures. They performed a frontal lobe lobotomy. Not more than a year after the operation he was given permission to drive a car. He was in an accident and was charged with two counts of negligent manslaughter.

I highlight this case because it demonstrates how important an accurate medical history can be to mitigation. When I received the pre-sentence report, there was no mention of a prior head injury, epilepsy, or operations. I was appalled. How can the judge make an appropriate decision regarding sentencing if this information is not disclosed? When this information was eventually brought to light, it softened the position of the County Attorney, the victim’s family, and the judge. It also destroyed the validity of the Probation Officer’s recommendation. Lastly, it reduced the impact that his prior criminal record could have had on sentencing.

The Public Defender representing this client believed that the defendant’s epilepsy may have contributed to the accident. She also determined that the epilepsy may have contributed to the defendant’s prior criminal convictions. If the attorney had not asked about the client’s medical history, this defendant may have been convicted for a very lengthy term of incarceration. As it turned out, the defendant was sentenced to less than half the time the County Attorney was recommending.

I was impressed that the attorney: first, asked the right questions about the client’s medical history; second, determined that additional information was needed; and lastly, requested assistance from other professionals. This

article will focus on taking that first step to recognize a brain-injured client.

It is important to note that individuals who have experienced some type of traumatic brain injury (TBI) are more likely than the general population to become involved with the criminal justice system. According to the Centers for Disease and Control (CDC), about 2% of the U.S. population currently live with disabilities from TBI. If an attorney handles 200 cases a year, the potential for having five to ten TBI cases is very high. I would presume that most of those cases have strong mitigating value.

The challenge for attorneys is recognizing the TBI individual. I have found that many times this is difficult because the TBI person may be embarrassed by their injury, may be forgetful (memory loss), or may not process your questions well enough to answer them thoroughly. Additionally, they may say what they feel you want to hear – placate.

With these difficulties in mind, what are some other clues to help you recognize if your client has had a TBI?

A TBI can affect a person cognitively, physically and emotionally. The physical consequences are usually the easiest to recognize. The visual clues should encourage you to immediately think about asking the client about any past brain injuries or hospitalizations. The cognitive and emotional clues are less obvious.

In the recent article titled: “*The Cost and Causes of Traumatic Brain Injury*” on the web site for the Brain Injury Association of America (<http://www.biausa.org/costsand.htm>), they list numerous cognitive and emotional consequences that, if present, should cause an attorney to question whether a client is suffering from a brain injury. It should be noted that many of these consequences are similar to mental disorders. It should also be noted that, though these signs and symptoms may be similar, they should not be considered equal. In other words, the cause of cognitive and emotional consequences within a mentally ill patient is completely different than the cause of these consequences in a TBI client. Additionally, the treatments also must be different.

Cognitive Consequences Can Include:

- Short term memory loss; long term memory loss
- Slowed ability to process information
- Trouble concentrating or paying attention for periods of

- time
- Difficulty keeping up with a conversation; other communication difficulties such as word finding problems
 - Spatial disorientation
 - Organizational problems and impaired judgement
 - Unable to do more than one thing at a time

Physical Consequences Can Include:

- Seizures of all types
- Muscle spasticity
- Double vision or low vision, even blindness
- Loss of smell or taste
- Speech impairments such as slow or slurred or stuttered speech
- Headaches or migraines
- Fatigue, increased need for sleep
- Balance problems
- Scars
- Hearing loss
- Paralyzation of a limb
- Awkward gait

Emotional Consequences Can Include:

- A lack of initiating activities, or once started, difficulty in completing tasks without reminders
- Increased anxiety
- Depression and mood swings
- Denial of deficits
- Impulsive behavior
- More easily agitated
- Egocentric behaviors
- Difficulty seeing how behaviors can affect others.

You don't need to be an expert in the field of TBI. Just make use of these important clues. More often than not, you will know when to be sensitive to the needs of a TBI defendant and be able to effectively inquire as to their head injury history. My general rule of thumb, while crude, is still helpful - look for scars. If present, ask. Additionally, if a client tends to be very agitated, it is highly possible that they are either mentally ill or they have had a TBI.

An agitated client may:

- Call too often either because they forgot or because they are overly anxious
- Repeat themselves many times during a conversation
- Fail to follow through on tasks asked of them
- Have repeated term violations
- Be easy to anger or become explosive (violence is

common among TBI clients)

A good working knowledge of how to recognize when an expert (neurologist) should become involved in a case is essential. Once the determination is made to have an evaluation conducted, make sure that any medical records to assist the doctor are obtained. Call local advocates for the brain-injured to gain any advice that would be helpful. Review recent articles on the internet. Lastly, make sure that to call relatives, friends, coworkers, or church members, to gain information from them. Remember, your client may be forgetful and may be embarrassed.

Recognizing and taking action to help a brain injured defendant may save the client precious years of incarceration. The Department of Corrections does have mental health units to address and maintain mentally ill inmates. However, as I mentioned above, a mental illness is not equivalent to a TBI. By saving your client years of incarceration, you may be saving them years of abuse and manipulation. DOC does not have the full resources to sustain a TBI inmate. The TBI inmate is at risk to deteriorate while they are incarcerated. They are prone to being manipulated. They are also prone to being misunderstood by prison staff. These consequences are above and beyond the Court's intended punishment.

Our goal is to provide "effective legal representation" as stated in our office's Mission Statement. One circumstance in mitigation includes that in which the defendant is suffering from a mental or physical condition that significantly reduces their culpability for the crime. TBI is a mitigating factor that should never be overlooked. Familiarity with the basic signs and symptoms of TBI can enhance your ability to represent your client. Always take just a couple of minutes during your client interview to determine whether they have ever sustained a TBI. This may be the crucial information for which you can base much of your sentencing arguments. Never let this opportunity go unchecked.



BULLETIN BOARD (continued) **ATTORNEYS**

New Attorneys

Christian C. Ackerley is a new Defender Attorney assigned to Group E effective Monday, May 22, 2000. Chris graduated from Lewis and Clark Law School. He joins us from the Mohave County Public Defender's Office where he has been practicing since 1996.

Kathleen N. Carey is a new Defender Attorney assigned to Group C effective Monday, May 22, 2000. Kathleen graduated from Arizona State University Law School. Most recently, Kathleen has been a Staff Attorney for Insight Direct USA. Previously, she was a Legal Extern with our office and with the Tempe City Attorney's Office.

Andrew A. Clemency is a new Defender Attorney assigned to Group D effective Monday, May 22, 2000. Andrew graduated from Rutgers Law School. Most recently, Andrew has been with the Maricopa County Attorney's Office and prior to that he was in private practice.

John Price DeWitt is a new Defender Attorney assigned to Group B effective Monday, May 22, 2000. John graduated from the University of Arizona Law School. Most recently, John has been working part-time as a law clerk for the Federal Public Defender's Office and as a part-time contract attorney for Osborn Maledon. Prior to becoming an attorney, John was a career journalist and served as a staff writer for the Arizona Business Gazette, the Arizona Daily Star and the Capitol Times.

Kenn M. Hanson is a new Defender Attorney assigned to Group E effective Monday, May 22, 2000. Kenn graduated from the University of San Diego Law School. Most recently, Kenn has been practicing with Doherty and Alex. Prior to that, Kenn spent approximately 4 years with the Mohave County Public Defender's Office.

Jonathan D. Hinshaw is a new Defender Attorney assigned to Group C effective Monday, May 22, 2000. Jonathan graduated from the University of Wyoming Law School. Most recently, Jonathan has been a felony clerk with the East Phoenix Justice Court #1.

Chad Pajerski is a new Defender Attorney assigned to Group E effective Monday, May 22, 2000. Chad graduated from Arizona State University Law School.

Most recently, Chad has been Corporate Counsel for Carnegie Hill Corporation.

Matthew Smiley is a new Defender Attorney assigned to Group E effective Monday, May 22, 2000. Matthew graduated from Valparaiso University Law School.

Attorney Moves/Changes

David Cutrer, Law Clerk assigned to Group C, has been promoted to Defender Attorney effective Monday, May 22, 2000.

Kara Geranis, Law Clerk assigned to Group D, has been promoted to Defender Attorney effective Monday, May 22, 2000.

Craig Logsdon, Law Clerk assigned to Juvenile Durango, has been promoted to Defender Attorney effective Monday, May 22, 2000. Craig will be assigned to Group C.

Jaime Noland, Law Clerk assigned to Group A, has been promoted to Defender Attorney effective Monday, May 22, 2000.

Brent Graham, Defender Attorney assigned to Group D, has been selected to fill the half-time appellate slot. Brent will do half-trial work and half-appellate work, and will eventually perform his half-trial work in the probation violation unit once his existing caseload winds down.

Noble Murphy, Defender Attorney assigned to Trial Group C, departed the office effective Friday, May 19, 2000. Noble will be joining the firm of Weingart and Penrod.

Tom Garrison, Defender Attorney assigned to the Dependency Unit at SEF will transfer to the Delinquency Unit effective May 30, 2000.

Rodrick Carter, Defender Attorney in Trial Group A, will be departing the office effective Friday, June 9, 2000.

Carole Carpenter, Defender Attorney assigned to Trial Group E will make a lateral transfer to Juvenile Durango effective June 12, 2000. Carole will fill the vacancy left at Durango by Bill Melvin's retirement.

Christopher Flores, Defender Attorney assigned to Trial Group A will be departing the office effective Friday, June 30, 2000.

Adolescent Offenders in the Adult Court System

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behavioral problems of adolescents vary. Some adolescent offenders engage in delinquent behavior frequently, and others on rare occasions. Consideration also needs to be given to an adolescent's level of emotional maturity, cognitive development, age, and cognitive deficits. If detained for a lengthy period of time, incarcerated adolescents are likely to miss important developmental opportunities and milestones that will impact subsequent development.

Too often, adolescent offenders have mental health problems that have not been properly diagnosed and addressed. A significant number of these young people have problems with substance abuse, depression, family conflict, and conduct. Depression in adolescent offenders may be overshadowed by their behavioral problems. These offenders are likely to have mental health problems that coexist with substance abuse problems. Keep in mind that young offenders are usually school dropouts, students with learning disorders or disabilities, and poor academic achievers.

Most adolescent offenders have significant emotional problems. An adolescent's inability to regulate his negative emotions contributes to the emergence of psychological disorders. Adolescents frequently find their emotions overwhelming and threatening to themselves. Emotions become self-defeating when a person does not know how to manage them. Adolescent offenders frequently lose control of their emotions. They will often attempt to protect themselves from uncomfortable feelings by using illegal substances, and aggressing or retaliating against others. For example, an adolescent may aggress and retaliate against others in order to avoid feelings of helplessness and weakness.

It is important to understand why delinquent adolescents exhibit distorted thinking and faulty beliefs about self and society. Some adolescents may suffer from cognitive impairments due to organic problems, brain injury, and the effects of physical abuse. Additionally, anger and rage also contribute to impairments in the adolescent's thinking processes. Anger and rage are the consequences of real or imagined victimization by others. Individuals may be prone to solely view adolescent offenders as victimizers and not as victims. This tendency to view adolescent offenders as solely victimizers obscures the fact that these offenders have needs that are unique to their developmental stage.

Changes in federal and state laws in the 1990's were the legislature's attempt to deal with the increase in violent youth crime. The purpose of these laws was not to rehabilitate these

adolescents. These laws have been implemented with the intent to protect the public from adolescents who commit serious crimes. In the case of adolescent offenders, the position that our responsibility is solely to impose penalties or consequences for criminal behavior ignores the need to address the mental health issues of adolescent offenders.



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

If so, give us a call with your ideas.

ARM YOURSELF TO WIN THE *BATSON* CHALLENGE

By Lawrence Matthews Defender Attorney – Appeals

The “*Batson* Checklist” will increase your chances of succeeding when making a *Batson* challenge. The checklist is designed specifically to aid you in showing disparate treatment between the juror(s) the prosecutor seeks to strike and the remaining jurors on the panel.

To win a *Batson* challenge one of two things will have to happen. Either the prosecutor will have to give a gender related or race related reason for the strike (which is an impermissible basis for a peremptory strike), or you will have to be able to convince the judge that he should not believe the gender/race neutral reason given by the prosecutor. Since most prosecutors will be smart enough to hide their true intentions, you will nearly always have to attack and destroy the prosecutor’s credibility to win. Here is where the checklist comes in.

Most prosecutors are not very creative when it comes to offering a pretextual reason for a strike. Most justify the strike on the basis of education, employment, personal or family contact with the criminal justice system, age, prior jury service, special knowledge, etc. Upon viewing the checklist, you will see these categories and others across the top of the checklist. During and prior to *voir dire* you can record a lot of this information as it relates to each of the jurors. Then, when the prosecutor is told to provide a reason for striking a particular juror, the odds are very good that you will have at your fingertips information on other jurors relating to that same fact with which you can undermine the prosecutor’s credibility.

To understand how this works you need to be aware that the law recognizes that a reason given for a

strike becomes highly questionable when other similarly situated jurors are not struck by the prosecutor. For example, in *United States v. Chinchilla*, 874 F.2d 695, 698-99 (9th Cir. 1989), the court held that because the prosecutor struck the only prospective Hispanic juror purportedly due to the location of his residence, but did not strike non-Hispanic jurors who lived in the same neighborhood, such disparate treatment was strongly suggestive of a discriminatory intent. Thus, discrimination may be shown when jurors with the same or similar characteristics as the stricken jurors still remain on the panel. See, *State v. Eagle*, 265 Ariz. Adv. Rep. 28, (App. 1998), and *Turner v. Marshall*, 121 F.3d 1248, 1254 (9th Cir. 1997).

A survey of case law from many jurisdictions reveals that disparate treatment of

potential jurors belonging to a protected group (racial minority or gender) is by far the most prevalent reason for rejecting proffered neutral explanations in *Batson* challenges. With the help of the checklist, you will be in a position to identify most if not all other jurors with the shared characteristic who have been left on the panel by the prosecutor. This will greatly enhance your chances of successfully retaining the challenged juror.

Copies of the *Batson* Checklist may be obtained from Keely Reynolds, Debbie Rosiek, or from any of the other Legal Assistants in the office. Please submit comments or suggestions about improving the checklist to the author.

ARIZONA ADVANCE REPORTS

By Terry Adams
Defender Attorney – Appeals

State v. Johnson **318 Ariz. Adv. Rep. 3 (CA 2, 3/30/00)**

The defendant was charged with count one sexual conduct with a minor by penetrating the minor victim's vagina with his finger, and count three child molestation by causing the victim to touch his penis with her hand. At trial, she testified that he put his penis into her vagina and he made her put her mouth on his penis. The state moved to amend the information to conform to the evidence presented. The trial court granted the motion over his objection and denied his rule 20 motion. The appellate court reversed holding that Rule 13.5(b) only allows an amendment to a charging document that "does not change the nature of the offense charged or prejudice the defendant in any way." The court concluded that the amendment changed the nature of the offenses and therefore was reversible error.

State v. Marshall **319 Ariz. Adv. Rep. 32 (CA 1, 4/20/00)**

The defendant was convicted of numerous counts of sexual crimes involving a minor under fifteen. During trial, the victim testified on direct examination about some acts that were not contained in the indictment. The defendant moved for a mistrial under Rule 404(b). The prosecutor avowed that he was unaware of this evidence prior to it being testified to. The court denied the motion. On appeal, the court held that barring willful ignorance or other bad faith a prosecutor cannot reasonably be required to disclose in advance information the victim unexpectedly reveals for the first time during trial. Also had these particular acts been disclosed, they would have been admissible as evidence of propensity. The defendant's counsel requested a separate verdict requiring that the jury determine whether the victim was under fifteen at the time of the events, and disclosed intentions to argue that the state had not proved this. The trial judge indicated that the defense had a duty to disclose that it would challenge state's evidence regarding this, and refused the verdict and prohibited counsel from arguing it. However, the court of appeals found this to be error, but because counsel argued



anyway that it was harmless.

State v. Saenz **319 Ariz. Adv. Rep. 3 (CA 2, 4/6/00)**

After the defendant was found guilty of murder but before sentencing, immigration authorities contacted the detective involved and advised him that a Mexican national had confessed to the murder. The defendant filed a petition under Rule 32 for a new trial based on newly discovered evidence. The trial court granted the petition and the state filed for review. First, the court held that a Rule 32 was improper unless the defendant has been sentenced, however, the court agreed to hear it on the merits. The court determined that the defendant knew of the alleged confession prior to trial through the confessor's sister who was the defendant's wife. The defendant never advised counsel. The court held that evidence known by the defendant, even if not by counsel, is not newly discovered. The court granted review and reinstated the conviction.



BULLETIN BOARD (continued)**SUPPORT STAFF*****New Support Staff***

Margarita G. Villarreal is a new Legal Secretary assigned to Trial Group D effective Monday, May 8, 2000.

Evan Romberg returned to the office as an Initial Services Specialist effective Friday, May 26, 2000.

Tiffany Williams is a new Client Services Coordinator assigned to the Dependency Unit effective Monday, May 22, 2000. Tiffany graduated from Northern Arizona University with a B.A. in Criminal Justice and Sociology. Most recently, Tiffany worked for Child Protective Services and she has prior experience as a Youth Supervisor for the Maricopa County Juvenile Detention Center.

Vivian Arnold-Bethel is a new Client Services Coordinator effective Monday, May 22, 2000. Vivian graduated from Long Island University with a B.A. in Criminal Justice. Most recently, Vivian worked as a Probation Officer for the New York City Probation Department.

Caroline Aeed will be a new Law Clerk assigned to Trial Group A effective Tuesday, May 30, 2000. Caroline is graduating from the University of Wyoming. She interned with the Wyoming Defender Program and also interned with our office for 2 periods as a volunteer. Her father is local lawyer, Fred Aeed.

L. Kirk Nurmi will be a new Law Clerk assigned to Trial Group D effective Tuesday, May 30, 2000. Kirk is also graduating from the University of Wyoming. He was the student director of the University Public Defender Clinic and was a paralegal at the Public Defender's office.

Derron D. Woodfork will be a new Law Clerk assigned to Trial Group E effective Tuesday, May 30, 2000. Derron is graduating from Southwestern University. He has previously volunteered with our office as an intern.

Janel Glynn will be returning to the office as a Trainee assigned to the Records Division downtown effective Thursday, June 1, 2000.

Albert G. Reilly will be a new Defender Investigator effective Monday, June 5, 2000. Al just recently retired from the Drug Enforcement Administration where he has worked as a Special Agent since 1970.

Raymond Del Rio will be a new Legal Assistant effective Monday, June 12, 2000.

Support Staff Changes

Lupe Hodge, a Legal Secretary assigned to Juvenile – Durango departed the office effective Friday May 19, 2000.

Norma Munoz, a Client Services Assistant in Initial Services, has been given a special duty assignment as our new Training Administrator. Norma began her duties on Monday, May 15, 2000.

Darlene Stearns, Legal Secretary in Appeals, departed the office effective Wednesday, May 10, 2000.

Cynthia Calvery, Office Aide in Appeals, departed the office effective Wednesday, May 10, 2000.

Iris I. Pais, Receptionist departed the office effective Friday, May 19, 2000.

Allen C. Johnson, Client/Server Programmer/Analyst in the Information Technology Division departed the office effective Friday, May 19, 2000.

Christian Lopez, Office Aide in Trial Group E is departing the office effective Wednesday, May 31, 2000.

APRIL 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/3-4/4	Hall/Davis Clesceri	Akers	Fish	CR 99-013737 Disorderly Conduct Dangerous with one dangerous prior/F6	Not Guilty	Jury
4/18-4/18	Rossi Robinson	Padish	Beresky	CR 99-014897 Forgery/F4	Case dismissed without prejudice day of trial	Jury
4/19-4/20	Klepper	McVey	Beresky	CR 99-15447 Resisting Arrest/F6	Guilty	Jury
4/24-4/24	Hall	Tolby	Larsen	CR 99-03409(A) FE Criminal Trespass/F6 with one dangerous prior designated mis- demeanor	Not Guilty	Bench
4/27-4/27	Davis	Akers	Petrowski	CR 99-15668 Kidnapping/F2 Att. Sexual Assault/F3 with 3 pri- ors	Dismissed without prejudice day of trial	Jury
4/27-5/2	Valverde	Padish	Pittman	CR 99-18167 Armed Robbery/F2D Misconduct Involving Weapons/F4	Not Guilty	Jury
5/2-5/2	Flores Clesceri	Padish	Devito	CR 00-01983 Stalking/f5	Pled guilty to F6 Open	Jury

GROUP B

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
3/30 - 4/4	Colon/ Peterson Munoz	Hilliard	Cotitta	CR99-13143 Criminal Damages, F5	Not Guilty	Jury
4/10	Tom	O'Toole	Rahi-Loo	CR99-002029 POND, Drug, F4 PODP, F6	Def. Pled prior to Trial	Jury
4/11- 4/12	Taradash	Padish	Reid-Moore	CR99-10464 Agg Assault, F5	Not Guilty	Jury
4/17 - 4/18	O'Donnell King	Padish	Spencer	CR99-16156 Forgery, F4	Hung	Jury
4-18 - 4/19	Walton	Wotruba	Clarke	CR99-17444 Custodial Interference, F6	Hung	Jury
4/24	Walton	Hilliard	Novak	CR99-07976 Aggravated Assault, F5	Guilty	Jury
4/24 - 4/24	Mitchell/Bublik	O'Toole	Reid-Moore	CR99-07905 PODD and PODP w/ priors	PODD-Guilty PODP-Dismissed	Jury
4/26 - 4/27	Colon / Peterson King	Hilliard	Charnell	CR99-14318 Forgery, F4	Not Guilty	Jury

APRIL 2000 JURY AND BENCH TRIALS

GROUP C

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR # and Charge(s)	Result:	Bench or Jury Trial
4/3 – 4/3	Klopp-Bryant	Wilkins	Flanigan	CR00-00267 2 Cts Assault/M1 1 Ct. False Imprismt/M1	Not Guilty on All Counts	Bench
4/4 – 4/10	Antonson Hamilton	Aceto	Brame	CR1999-094963 1 Ct. Theft/F5N	Not Guilty	Jury
4/5 – 4/6	Alcock	Ishikawa	Brenneman	CR1999-094979 1 Ct. PODD/F4N	Guilty	Jury
4/6 – 4/13	Klobas Thomas	Keppel	Aubuchon	CR1999-092268 1 Ct. Kidnap/F2D 2 Cts. Sex Cond w/Mnr/F2D 1 Ct. Child Molest/F2D	Not Guilty – Kidnap & Sex Conduct with Minor Directed Verdict –	Jury
4/10 – 4/10	Shoemaker	Gerst	Andersen	CR2000-090800 1 Ct. Miscond. w/Wpns/F4N	Directed Verdict	Jury
4/11 – 4/25	Rossi	Jarrett	Curtis	CR1999-095460 1 Ct. Resist Ofcr. Arrest/F6N	Not Guilty	Bench
4/17 – 4/19	Zazueta	Jarrett	Griblin &Weinberg	CR1999-095600 1 Ct. Marijuana Poss. Grow. Pro- cure/F6N	Mistrial on mari- juana charge Guilty on PODP	Jury
4/19 – 4/19	Murphy	Galati	Bennink	CR1999-090714 1 Ct. PODD/F4N 1 Ct. PODP/F6N	Guilty on Both Counts	Jury
4/19 – 4/20	Stein Thomas	Hall	Aubuchon	CR1999-093800 3 Cts. Sex Abuse/F5N	Not Guilty on All Counts	Jury
4/19 – 4/19	Pettycrew	Goodman	Kozinets	TR98-04160 1 Ct. Dr. w/Lic Susp and/or Re- voked/M1	Guilty	Jury
4/20 – 4/20	Pettycrew	Johnson	Brooks	CR99-02943AMI 2 Cts, Interf w/Jud Proc/M1	Directed Verdict on Both Counts	Jury
4/24 – 4/24	Felmy Ramos Breen	Keppel	Bennink	CR2000-090407 1 Ct. Theft of Means of Transpor- tation/F3N	Dismissed with Prejudice day of trial	Jury
4/24 – 4/24	DuBiel Thomas	Ishikawa	Blair	CR1999-095073 1 Ct. Theft/F3N	Dismissed without Prejudice day of trial	Jury
4/26 – 4/27	Bond	Galati	Andersen	CR1999-095276 1 Ct. Burglary 2 Deg./F3N	Guilty	Jury

APRIL 2000
JURY AND BENCH TRIALS

GROUP D

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4//6-4/12	Martin/Ferragut	P. Reinstein	Ruiz	CR97-04060 3 Cts. Agg. Assault, F2; 1 Ct. Agg. Assault, F3	Not Guilty: 3 Cts. Class 2 DCAC and Hung: 1 Ct. Class 3 Aggravated Assault	Jury
4/10 -4/13	Schreck	Katz	Pacheco	CR99-14162 1 Theft-stolen veh F3 1 Flt frm purs law veh F5	Guilty	Jury
4/24/00	Ferragut	Schwartz	Kamis	CR00-00730 1 Agg Assault F6	Dismissed w/ Prejudice at trial	Jury
4/17-4/19	Silva Salvato	P. Reinstein	Devito	CR99-17652 1 Ct. Child Abuse, F2 (DCAC) 1 Ct. Kidnap, F2 (DCAC)	Class 3 non- dangerous Guilty unlawful im- prisonment Class 1 Misdemeanor	Jury
4/18-4/20	Enos	Katz	Clarke	CR99-16109 1 Ct. Theft-stolen veh., F3 1 Ct. POND, F4	Guilty	Jury
4/21/00	Adams	Gerst	Clarke	CR99-18123 1 Ct. Forgery, F4	Dismissed w/o Preju- dice	Jury
4/24-4/25	Cox	Dougherty	Clarke	CR00-00653 1 Ct. Agg Assault, F3	Guilty	Jury
4/24-4/25	Silva	Gerst	Lee	CR00-000363 1 Ct. Agg. Assault, F6 1 Ct. Resist Ofc/Arrest, F6	Not Guilty/Guilty	Jury
3/31/00	Ferragut	Ballinger	Sorrentino	CR99-12580 2 Cts. Kidnap, F2 1 Ct. Agg Assault, F3 1 Ct. Sex abuse ovr/15, F5 2 Cts. Assault, M1	Dismissed w/o Preju- dice	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
3/27 – 4/05	Dupont Horrall	Katz	Simpson	CR99-10467A Theft / F3 Burglary 3° / F4	Guilty of Class 4 Theft and Burglary	Jury
3/31 – 4/13	Parzych Abernethy, Otero Rubio	Dougherty	Lynch	CR98-16764 1 st Degree Murder / F1	Guilty of 2 nd Degree Murder	Jury
4/11 – 4/13	Taylor Otero	Akers	Brinker	CR99-16726B PODD for Sale / F2	Guilty	Jury
4/20 – 4/26	Patton Otero	Sheldon	Gialketisis	CR99-14146 Burglary, 1° / F2, Dang. Agg. Assault / F3, Dang. Misconduct w/ Wpn / F4	Guilty	Jury

APRIL 2000
JURY AND BENCH TRIALS

GRUPE

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/3-4/7	Walker / Evans Souther	O'Toole	DeVito Altman	CR 99-12591 Agg. Asslt./F3D Agg. Asslt./F6 Asslt./M1 Theft of Means of Transp./F3	Guilty Agg. Asslt./ F3ND Guilty of Theft of Means of Transp. Not Guilty Agg. Asslt./M1 Dismissed Agg. Asslt./F6 day trial was to begin	Jury
4/10-4/17	Goodman Kent	Jones	Newell	CR 99-10250 Agg. Asslt on Officer/F3	Hung Jury	Jury
4/17-4/18	Evans	S. Gerst	Pierce	CR99-16422 Theft F/3 Trfk. Stln. Prop F/3	Hung Jury	Jury
4/18	Rock Castro	Arellano	Kerchansky	CR 99-07374B 3 Cts. Agg. Asslt./F3D	Dismissed w/o preju- dice day trial was to begin	
4/18-4/24	Pelletier / Wray	Gottsfield	Lamm	CR 99-14121 Agg. Asslt/F3D	Guilty of Misd. As- sault	Jury
4/19	Doerfler	Jones	Ireland	CR 99-17406 Agg. Asslt./F6	Not Guilty	Bench
4/19-4/20	Richelsoph	Schwartz	Mueller	CR 99-16619 2 Cts. Agg. DUI	Guilty both counts	Jury
4/20	Rock	Arellano	Pierce	CR 99-07208 Theft of Means of Transp./F3	Directed Verdict	Jury
4/23-4/25	Palmisano	Reinstein	Lamm	CR 99-17926 Agg. Asslt. on Officer/F5 Shoplifting/F6	Guilty on both counts	Jury
4/24 – 4/28	Kent / Goldstein Gotsch	Hotham	Kerchansky	CR99-11045 Burglary 2/F3 Agg. Asslt./F4 Criminal Damage/F5	Not Guilty	Jury
4/25-4/27	Roskosz	Arellano	Eckhardt	CR 98-14241 Agg. Asslt./F3D Resist. Arrest/F6	Guilty both counts	Jury
4/26-4/28	Brown	Kamin	Schwab	CR 2000-00997 Theft/F3	Guilty of Theft/F6	Jury



**The Arizona Prosecuting Attorneys Advisory Council
and
The Maricopa County Public Defender's Office**



Proudly Present

Annual Ethics Seminar

June 23, 2000

1:30p.m. – 4:45p.m.

**Mesa Community and Conference Center
Palo Verde Ballroom
201 North Center Street
Mesa, Arizona 85211**

Panelists will include:

**Hon. Michael D. Ryan – Arizona Court of Appeals
Michael C. Cudahy – Office of the Attorney General
Edward F. Novak – Streich Lang
Jess A. Lorona – Ryan, Woodrow & Rapp**

For Further Information Contact:

**Arizona Prosecuting Attorneys Advisory Council at (602) 265-4779
or**

for The Defense

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