



for *The Defense*

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

INSIDE THIS ISSUE:

Articles:

Awakening from a "Bad Knapp"	1
The Basics of Rule 404(c)	1
Five Steps to Concise Motion Writing	7

Regular Columns:

Arizona Advance Reports	9
Calendar of Jury and Bench Trials	12

Awakening from a "Bad Knapp"

**By Marty Lieberman
Private Defense Attorney**

Editors' Note: In the July 2001 edition of this newsletter, we ran an article entitled "Another Fine Mess... A Defender View of the Agonies and Mysteries of Knapp Association". This article focused on the difficulties that can occur when a defendant retains a private attorney to assist his court appointed counsel. This type of relationship, commonly referred to as a "Knapp Association," is based upon Knapp v. Hardy, 111 Ariz. 107, 523 P.2d 1308 (1974), an Arizona Supreme Court case that discusses this practice, and which

recognized that court appointed counsel can be assisted by privately retained counsel. Since this practice does not result in an outright substitution of private counsel, it has long been the position of the Maricopa County Public Defender's Office that our office is the primary attorney of record. Therefore, primary responsibility and the "final say" regarding strategies and actions undertaken by "the defense team" lies with the assigned Deputy Public Defender.

There are a number of different scenarios under which this type of association can be abused and

(Continued on page 2)

The Basics of Rule 404(c) and Recent Caselaw Interpreting the Rule

**By Lawrence Matthews
Defender Attorney –
Appeals**

In 1997, Rule 404 of the Arizona Rules of Evidence was expanded by the addition of Rule 404(c). That section deals with the procedures to be followed by a court where the accused is charged with a "sexual offense". Specifically, the section

addresses the issues arising from the prosecutors' desire to present "evidence of other crimes, wrongs, or acts...showing that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." According to the comment to the rule, the rule was enacted to codify the case law

(Continued on page 4)

for The Defense

Editor: Russ Born

Assistant Editors:

Jeremy Mussman
Keely Reynolds

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

Copyright © 2001

misused. For example, it is grossly inappropriate for a private attorney to negotiate a lower fee telling the family that he'll "run the show," but use the Public Defender resources for his investigation and costs. Similarly, it is unacceptable if a private attorney negotiates a Knapp agreement and then swoops in, demanding to make all scheduling and strategy decisions. Fortunately, there are far more situations where a Knapp association can be of tremendous benefit to the court appointed counsel and the client. In the following article, Marty Lieberman, a well respected private attorney who has been involved in many successful Knapp associations, explains some tried and true methods that can make Knapp work.

A Knapp association can be a real benefit for the client if each of the attorneys understands his or her role and communicate effectively with each other and with the client. After all, isn't it better to have two attorneys who know the case, who can bounce ideas off of each other, and divide the tasks? It is an unfortunate fact of life, especially in these days of compressed pre-trial preparation time, plea deadlines and the like, that public lawyers are overworked. Wouldn't it be nice to have another lawyer who can bear some of the load? Moreover, if the public and private lawyer agree on strategy and decision making, the client is more likely to agree with these decisions when both lawyers provide the same advice.

In order for the association to be a positive one for both the attorneys but, most importantly, for the client, the following suggestions are made:

1. Identify each attorney's role as soon as the Knapp association is made.

Indeed, it has been my practice to contact the public lawyer **before** accepting a Knapp role because it may be that another lawyer is not needed. For example, a TASC deferral is not going to need two lawyers. On the other

hand, I recently "Knapped" onto a complex fraud case where the public lawyer was delighted to have some assistance. We spoke prior to my association and, afterwards, met to discuss the current posture of the case and the division of tasks.

In my most recent Knapp association, the client had two separate cases. One was a moderately simple assault case, although there were interesting legal issues presented in connection with justification. The second was a complex white-collar fraud / theft case. Because I was asked to get involved a few months after charging, all of the interviews in the assault case had been completed. I agreed with the public lawyer that I would merely serve as a sounding board and, if needed, work on evidentiary issues that may arise during trial. A law clerk, if you will. What public lawyer wouldn't welcome such help?

The week before trial, it became apparent that the justification issues were complex (involving citizen's arrest, defense of premises, defense of crime prevention and self-defense all wrapped up into one). Because the public defender needed time to prepare for witness examination, closing argument, jury selection, etc., I agreed to take the lead on the legal issues surrounding the justification defenses. The client insisted I sit through the trial in case any "emergencies" happened and, after explaining that he was wasting his money, I did so. In order not to seem a complete bump on a log, I took copious notes during the testimony and, each evening, sent a list of important points of the testimony and my thoughts on how that could be developed with other witnesses or during closing argument. The lawyer trying the case told me that it was extremely helpful to him in putting his thoughts together for the next day of trial. I also prepared and argued the jury instructions relieving the lawyer of this role and freeing his time for other more exciting things.

In the second case, a complex white-collar case, written disclosure had not yet been made. Accordingly, I agreed with the legal defender to assume part of the task of sifting through the reams of paper and thereafter, to be co-counsel at trial. We agreed, early on, to try the case together. We have split the motion work and have each taken on specific issues relating to bond and discovery motions as we go along. All decisions relating to investigation and motion work are jointly made.

A public investigator had already begun his work and I was invited to work with the investigator. Although he would take ultimate direction only from the public lawyer, this presents no problem because the lawyers are jointly making decisions and coming to agreement prior to assigning the investigator. Let's face it, although there are some tactical decisions that may cause dissension, most of the work we do, both pretrial and during trial, is not very controversial and agreement can be reached on most issues.

In each of these cases, the *Knapp* association has been a positive one. This is because roles were defined early on and the lawyers have stuck to those agreements.

2. The public lawyer and the private lawyer must be "on the same page" as to all decisions.

Clients will sometimes play one attorney against the other. "But, X said that we were going to call my girlfriend at trial," when, in fact, X said that he would consider calling the girlfriend at trial after reviewing all of the evidence. Make sure that before any advice is given to the client, the lawyers agree. If you cannot agree, then the client needs to understand that it is an issue involving a close judgment call. It must be explained to the client that reasonable persons may differ and why that is so. Present a united front to the extent possible.

3. Each lawyer must abide by their commitments.

If you say you are going to do something, do it! If you cannot do something, or do not think it is a good idea, say so.

4. If the private lawyer is retained just to monitor and advise the client (or her family), make sure that the public lawyer understands this.

If this is the case, the public lawyer should advise *Knapp* counsel of developments but, in my opinion, need not confer with respect to decision making. Only if *Knapp* counsel is involved in the day to day work in the case, should the decision making be joint. This kind of an association can be a positive one. Some clients will listen to retained counsel when they won't heed the advice of public lawyers. Although stupid, this is a fact of the practice. The public lawyer can effectively "use" the retained lawyer by having retained counsel explain why certain decisions have been made and advising the client as to the decision he should make.

Not all *Knapp* associations are going to be positive. But most should be. The retained lawyer should not "take control." Nor should the public lawyer resent working with another. So long as the roles are defined and commitments are met, everyone benefits. The retained lawyer gets paid, the public lawyer is relieved of some of the load, and the client has the benefit of two lawyers working on her case. Let's embrace *Knapp*, not run from it.



The Basics of Rule 404(c)

Continued from page 1

previously set out in *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973) and *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977).

1. The nuts and bolts of Rule 404(c).

Pursuant to the rule, several prerequisites must be complied with prior to the admission of such evidence. *First*, the prosecutor must disclose to the accused no later than 45 days before trial, all the acts the prosecutor intends to use. This disclosure must be made pursuant to the dictates of Rule 15.1 of the Arizona Rules of Criminal Procedure. *Rule 404(c)(3), Arizona Rules of Evidence.*

Second, the other acts evidence must be relevant to show that the accused had a character trait giving rise to an aberrant sexual propensity to commit the offense(s) charged.

Third, before such relevant evidence may be admitted, the judge *is required* to make certain findings on the record as follows: 1) the evidence is sufficient to permit the trier of fact to find that the accused committed the act(s); 2) commission of the other act(s) provides a reasonable basis to infer the accused possessed a character trait giving rise to an aberrant sexual propensity to commit the crime(s) charged; and 3) admission of the other act(s) will not unfairly prejudice the accused. *Rule 404(c)(1)(A)-(D).*

With regard to the unfair prejudice component of Rule 404(c), there are a minimum of eight factors that the judge must consider dealing with remoteness of the other act(s), similarity/dissimilarity, strength of the evidence, frequency of the act(s), surrounding circumstances, intervening events, and other relevant factors. *Rule 404(c)(1)(C)(i)-(viii).*

Fourth, a limiting instruction is required. *Rule 404(c)(2).* Finally, if such evidence is admitted, the accused has the right to offer evidence to rebut the other acts or any inferences that may be derived therefrom.

2. A word about the notice requirement of the rule.

The notice provision of Rule 404(c)(3) requires that the prosecutor give notice of the act(s) pursuant to the terms of Rule 15.1 of the Rules of Criminal Procedure. According to Rule 15.1(a)(6), a prosecutor is required to provide the defense with “[a] list of all prior acts of the defendant which the prosecutor will use [at trial].” Pursuant to Rule 404(c)(3), this notice must be provided 45 days prior to the final trial setting or at a later time upon a showing of good cause. Upon receiving notice, the defense must disclose its rebuttal evidence according to the terms of Rule 15.2 of the Rules of Criminal Procedure, and disclosure of rebuttal evidence may be made no later than 20 days after receipt of the state’s disclosure unless good cause can be shown.

a. Police reports do not provide sufficient notice.

Many times a prosecutor will claim compliance with Rule 404(c) notice requirements by presenting the defense with a copy of the police reports containing the allegations of the various victims. This is not enough to satisfy the notice requirements of Rule 404(c)(3). Although there is no Arizona case that addresses compliance with the notice provision of Rule 404(c)(3), the Supreme Court of Kentucky has addressed the notice requirements of its own version of Rule 404(c) in *Daniel v. Commonwealth*, 905 S.W.2d 76 (Ky. 1995).

In *Daniel*, the only notice provided to the accused was the police report. Relying on an

earlier case, the *Daniel* Court ruled that merely providing a police report does not provide reasonable notice pursuant to Rule 404(c). The *Daniel* Court reasoned that fundamental fairness compelled early specific disclosure in order “to permit a reasonable time for investigation and preparation.” *Id.* at 77, citing *Gray v. Commonwealth*, 843 S.W.2d 895, 897 (Ky. 1992).

The need for specific and timely disclosure can be traced to the component of Rule 404(c) that permits the accused to present evidence to rebut proof of the other crimes and any inferences arising therefrom. When an accused is not provided with a list as required by Rule 15.1(6) of the Rules of Criminal Procedure, the defense is at a severe disadvantage in preparing rebuttal evidence.

2. Caselaw interpreting Rule 404(c).

As of the date of this article, there have only been two cases that make more than a mere passing reference to Rule 404(c). The first of these, *State v. Marshall*, 197 Ariz. 496, 4 P.3d 1039 (App. 2000), involves a brief discussion of Rule 404(c) and its relation to an argument that the accused was wrongfully denied severance. *Marshall* argued on appeal that the judge should have entered specific findings required by Rule 404(c)(1)(A)-(D) when he denied severance. *Id.* at 499 ¶ 5, 4 P.3d at 1042. The Court of Appeals intimated that the judge should have made the findings but held that any error was harmless in light of the fact that the judge made a specific finding that the prejudicial effect of joinder of certain counts did not outweigh the probative value of the evidence

to be presented on those counts. *Id.* at 499 ¶ 7, 4 P.3d at 1042.

The second and most recent case to address Rule 404(c) is *State v. Garcia*, 351 Ariz. Adv. Rep. 10 (App. Division One, July 10, 2001). *Garcia* is an extremely important case for the

defense. In *Garcia*, the accused was denied severance of multiple counts of sex crimes involving multiple victims. As to uncharged acts, the accused sought to implement Rule 404(c) to limit the testimony of other acts. The prosecutor responded by filing a motion *in limine* arguing that under *State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977), and its progeny, the state was permitted to introduce other acts without the need to submit to Rule 404(c) screening or even to a Rule 403 prejudice analysis. The judge agreed and refused to conduct either a Rule 404(c) or Rule 403 analysis. *Garcia* at ¶¶ 4-5 and ¶¶ 29-31.

Garner and its progeny hold that other sex acts may be introduced against an accused to show a lewd disposition by the accused toward a particular victim and that this evidence is an exception to the general rule excluding character evidence. *Garner*, 116 Ariz. at 447, 569 P.2d at 1345. On appeal, *Garcia* argued that the *Garner* line of cases predated Rule 404(c) and if the reasoning of those cases was permitted to continue unaffected by Rule 404(c), then the rule was meaningless. A unanimous Court of Appeals agreed:

[A]lthough the *Garner* line of cases suggests the probative potential of uncharged act evidence to establish a lewd disposition toward a given victim, it does not establish a wholesale or unmonitored avenue of admission. Nothing in those cases relieves the need to consider,

uncharged act by uncharged act, whether the probative value of the particular evidence over-balances its potential for unfair prejudice.

Garcia at ¶ 37, citations omitted.

The *Garcia* Court, however, only set aside a

(Continued on page 6)

(Continued from page 5)

single conviction. It permitted the remaining two convictions to stand by finding that the judge's error was harmless in light of physical evidence of guilt. *Id.* at ¶¶ 38-42. Both sides have filed for review in the Arizona Supreme Court so the Court of Appeals may not have had the final word. Until such time as the Arizona Supreme Court rules otherwise, however, *Garner* and its progeny may not be used to skirt the requirements of Rule 404(c).



EXcerpts...

from letters received by the Public Defender

Summer 2001 – I wanted to take a moment and relate my impressions while working in the Public Defender's Office this summer as a volunteer extern. I cannot praise the program enough. The experience I gained while working in your office is invaluable to me in that it solidifies my desire to be an attorney and practice in the area of criminal law.

Throughout the summer I worked with attorneys writing motions, conducting interviews, preparing for trial, and participating in jury selection. I wanted you to know that every employee who I interacted with was very generous with their time and advice. Specifically, I feel Dan Lowrance, Billy Little, Craig Logsdon and Robert Stein deserve mention. Dan is always around to help and make sure the externs are getting the best experience they can. Billy, Craig and Robert kept me involved in every aspect of the cases they were working on, sought my advice, and contributed greatly to my understanding of what it is like to practice criminal law. The result is I have gained more valuable skills this summer than the sterile bubble of law school has any hope of teaching me.

I cannot imagine a better job or more beneficial experience for a law student.

Five Steps to Concise Motion Writing

By Peg Green
Trial Group D Counsel

When it comes to plain talk, lawyers are the worst. Most speak and write as if they live in a repository for dead bodies. When they write briefs that some poor trapped judge must read, they fill them with heavy, gray, lifeless, disgustingly boring word gravel-piles of it, tons of it. When I read most briefs I want to scream, I want to throw the brief out the window and jump. If I could find the author, and had the power, I would make the villain eat the thing a page at a time without salt or catsup. Gerry Spence, *How to Argue and Win Every Time* 105(1995).

In this era of cases moving through the system at warp speed, writing motions that are concise, to the point and persuasive is more important than ever. There are five ways you can tighten up your writing to create strong, winning motions.

UNCOVER BURIED VERBS

Say what?? What is a buried verb? A buried verb is a noun ending in a suffix such as -ition, -ision, -ment, -ence, -ance, -ity.¹ Words like administration (administer), knowledge (know) and litigation (litigate) are examples of buried verbs. The better choice is to use only the verb if possible. Doing so eliminates prepositions, eliminates extra words and humanizes the text. The result is a concise product that allows the reader to easily visualize your point.²

AVOID THE PASSIVE VOICE

This sounds like Catholic grade school

grammar class. The passive voice results when the subject doesn't perform the action of the verb.³ For example, "The deadline was missed by the prosecutor." In active voice, the same sentence reads, "The prosecutor missed the deadline."

What's wrong with the passive voice? Passive voice adds unnecessary words. If it doesn't add words, it usually fails to say exactly who has done what. Finally, it makes it hard for the reader to process. Active voice saves words, says directly who has done what, and meets the readers' expectations of an actor-verb-object order.⁴

MINIMIZE PREPOSITIONAL PHRASES

This doesn't refer to the latest successful pick-up line one might use at a singles' bar. That would be a prepositional phrase. A prepositional phrase using the word "of" is the phrase to avoid in your efforts to write tight and concise motions. Eliminate the "ofs" in your writing, and you will see your motion writing become more direct, to the point and persuasive.

ELIMINATE REDUNDANCIES

Choose the best word and let it stand alone. It goes against our nature as lawyers to say something just once. Write a short sentence, end it with a period and stop. Resist the urge to say it again, in a slightly different way. Make your point, make it clear, and stop.

PURGE INFLATED LAWYERISMS

What fun is being a lawyer if we can't use words no one else understands? What good

(Continued on page 8)

(Continued from page 7)

is your law degree if you can't throw around words and phrases that no one else has used for a few hundred years? "...if the phrase is one you wouldn't use in ordinary conversation with a friend or family member, then it is a lawyerism and you should dump it even from your legal discourse."⁵

Want to see the flab really melt away from your writing? Throw those wordy lawyerisms out of your motions forever. Try using "because" instead of "for the reason that" or "if" instead of "in the event that," or "daily" instead of "on a daily basis."

Motions that are short and concise but still make your argument will get the full attention of your judge. They take less time to draft, and force you to sharpen your focus. Remember, paragraphs consist of three or more sentences. Sentences should be short

with a subject and a predicate. Streamlining your motion practice will strengthen your overall level of practice. Ultimately, your client benefits, and that is the principle reason behind all of your hard work as a defense attorney.

ENDNOTES

1. Garner, Byron., *Advanced Legal Writing and Editing*, LawProse (2001) at p. 21.
2. *Id.* at p. 22.
3. *Id.* at p. 25.
4. *Id.* at p. 26.
5. *Id.* at p. 32.



The Office of the Maricopa County Public Defender

in cooperation with
The Maricopa County Legal Defender's Office, The Federal Public Defender's Office, and
The Arizona Capital Representation Project

Present their

Annual Death Penalty Conference

The afternoon of December 6th and all day on December 7th, 2001
AMC Theatre, Arizona Center

Topics will include everything you've always wanted to know about DNA, how to litigate DNA issues, hot topics in forensics, computer trial management and presentation technology and recent caselaw effecting capital representation.

Registration information will be forthcoming...

ARIZONA ADVANCE REPORTS

Stephen Collins



State v. Viramontes, 350 Ariz. Adv. Rep. 3 (CA 2, 6/19/01).

Viramontes was convicted of first-degree murder. The prosecution did not seek the death penalty. The trial judge imposed natural life and stated that was the “presumptive sentence.”

The Court of Appeals remanded the case, holding that there is no presumptive term for first-degree murder. They rejected claims that aggravating factors must be found pursuant to A.R.S. Section 13-703 and that aggravating factors must be found beyond a reasonable doubt. 13-703 does not apply unless the death penalty is imposed.

Pursuant to A.R.S. Section 13-702, the trial judge found aggravating factors because Viramontes “committed the murder for fun and that he is a danger to society.” The Court of Appeals found this could justify a natural life sentence.

State v. Nordstrom, 350 Ariz. Adv. Rep. 16 (SC, 6/21/01)

Nordstrom was convicted of six counts of first-degree murder for the shooting of two men in a smoke shop and four people at a firefighters’ hall. He was sentenced to death.

Prior to trial, he moved for a change of venue because of media publicity. The Arizona Supreme Court considered “the effect of pretrial publicity, rather than its quantity.” It held that Nordstrom failed to “show that the jurors have formed preconceived notions concerning the defendant’s guilt and that they cannot lay those notions aside.” The trial judge had prevented “actual prejudice” by removing thirty-seven of two hundred prospective jurors because of their responses.

A witness saw a man running from the smoke shop immediately after the murders. When shown a photo array containing a picture of Nordstrom, she could not identify him. Later, after seeing pictures of Nordstrom on the news, she identified him. Nordstrom claimed the admission of the later identification violated due process. The Arizona Supreme Court held there was no due process violation because there was no state action involved. The media, not the State, tainted the identification.

“Our conclusion does not mean that due process concerns can

never be implicated in the absence of state action.” “It is conceivable that the due process clause prohibits identification testimony that falls below some minimal threshold of reliability when the defendant’s right or ability to bring the testimony’s weaknesses to the jury’s attention is somehow restricted.”

A defense eyewitness identification expert testified that “people have a remarkable ability to remember that they have seen a face before but an ability to remember where they have seen that face no greater than chance,” and “post-event information such as a lineup or a statement of certainty that the right person has been apprehended can influence the content of the memory.” It was held that the trial judge properly precluded the expert from expressing any opinion about the accuracy of eyewitness testimony in this case.

Under *Franks v. Delaware*, a trial court must suppress evidence seized pursuant to a warrant if a defendant proves, by a preponderance of the evidence, that the affiant knowingly, intentionally, or with reckless disregard for the truth, made a false statement to obtain the warrant and that the false statement was necessary to a finding of probable cause. The Arizona Supreme Court found the police officer in this case did not recklessly, knowingly, or intentionally omit facts in obtaining the search warrant.

Officers went to Nordstrom’s home to execute a search warrant. They made a forcible entry only a few seconds after knocking. The Arizona Supreme Court held this was permissible. Danger to officers may constitute an exigent circumstance justifying an exception to the knock-and-announce requirement for entering a home to serve a search warrant.

On appeal, Nordstrom had only one attorney. He cited the comments to Arizona Rule of Criminal Procedure 6.8 as well as the American Bar Association and National Legal Aid and Defender Association guidelines as support for the argument that second counsel should have been appointed. The Arizona Supreme Court held there was no reversible error, because there was neither prejudice nor a violation of the rules.

State v. Ring, 350 Ariz. Adv. Rep. 5 (SC, 6/20/01)

Ring was convicted of first-degree murder and sentenced to death. The murder happened during the robbery of a Wells Fargo armored van. On appeal, Ring argued that wiretap evidence should have been suppressed. A wiretap is only allowed if normal investigative techniques have been tried and failed, or are unlikely to succeed. The Arizona Supreme Court held this “necessity requirement” had been met.

The Arizona Supreme Court held that evidence that a third party may have committed the murder was properly precluded at trial. “For third-party defense evidence to be admitted at trial, the defendant must demonstrate that the evidence has an ‘inherent tendency’ to connect the third party to the ‘actual commission’ of the crime.”

Defense counsel filed an untimely motion for a new trial. “The trial court has no jurisdiction to grant a new trial motion if it is not made within ten days after the verdict.” The Arizona Supreme Court stated that such an untimely motion “will not be addressed by this court on appeal.”

Ring argued that the judge-sentencing procedure in Arizona capital cases violates the Sixth and Fourteenth Amendments. The United States Supreme Court decisions in *Jones v. United States* and *Apprendi v. New Jersey* were cited in support of this argument. The Arizona Supreme Court acknowledged “that both cases raise some question about the continued viability of *Walton [v. Arizona]*,” which allowed judge-sentencing. However, it was concluded that *Walton* is still the controlling authority, because “we are bound by the Supremacy Clause in such matters.”

Another man involved in the robbery, testified that after the murder, Ring said, “you guys are forgetting something ... you’re forgetting to congratulate me on my shot.” Based solely on this testimony, the trial judge found Ring “relished” the murder and this constituted the aggravating factor of especially heinous and depraved. The Arizona Supreme Court vacated this finding, because, “Although Defendant’s statements reflect a calculated plan to kill, satisfaction over the apparent success of his plan, and an extreme callousness or lack of remorse after the murder, the evidence does not support a finding that Defendant actually relished the act of murdering” the guard.

The State claimed the murder was especially heinous and depraved because it was “senseless.” The Arizona Supreme Court held the facts did not support this claim. “Any murder is senseless in its brutality and finality. Yet not all murders are senseless as this term is used to distinguish those first-degree murders that deserve a death sentence and those that do not.”

In any event, “Senselessness alone cannot support a heinous/depraved finding.” However, the death penalty was still

upheld because of the aggravating factor of pecuniary gain.

State v. Garcia, 351 Ariz. Adv. Rep. 10 (CA 1, 7/10/01)

Garcia was charged with nine counts of child molestation and one count of indecent exposure. Over objection, the trial judge allowed the admission of numerous uncharged sexual acts with minors. This was allowed to show a propensity for aberrant sexual behavior.

The Court of Appeals held this was an abuse of discretion because it was not done in compliance with Arizona Evidence Rules 404(c) and 403. Under Rule 404(c), before a judge may admit evidence of these other acts, the judge must specifically find:

- A. The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
- B. The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
- C. The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.

The Court of Appeals held the improper admission of the uncharged acts was harmless error on two counts of child molestation, but reversed on the count of indecent exposure.

On appeal it was argued the indecent exposure conviction should be reduced from a felony to a misdemeanor because the jury was not instructed that an essential element of the crime is the child has to be less than 15 years of age. The Court of Appeals held the instruction was unnecessary because defense counsel did not contest the age of the victim.

State v. Sansing, 351 Ariz. Adv. Rep. 3 (SC, 7/2/01)

Sansing called the Living Springs Church and requested the delivery of a food box for his family. The lady who delivered the food was then murdered. Sansing pled guilty to first-degree murder, kidnapping, armed robbery and sexual assault. He was sentenced to death.

In the special verdict, the trial judge concluded the victim was a person who “stood out like a shining light, as a true Samaritan” and who “kept her faith in God to the end.” On appeal, it was argued it was improper to use the victim’s character as an aggravating factor. The Arizona Supreme Court held the trial judge did not consider the victim’s

character, but that the statements referred to the helplessness of the victim and the senselessness of the crime.

The trial judge found that Sansing initially planned to rob the victim and found pecuniary gain as an aggravating factor. The Arizona Supreme Court held pecuniary gain was not an aggravating factor because the facts do not establish that expectation of pecuniary gain was the motive for the murder. The murder was a separate event and “a murder committed in the context of a robbery is not per se motivated by pecuniary gain.”

The existence of the aggravating factor of cruelty was upheld because it was found that the victim was conscious and therefore, suffered during the murder. The victim’s daughter requested mercy for Sansing. It was held that “13-703(D) expressly forbids the consideration of any recommendations made by a victim regarding the sentence to be imposed.” The death sentence was affirmed.

State v. Thompson, 352 Ariz. Adv. Rep. 3 (SC, 7/12/01)

Thompson committed two drug-related felonies on July 8, 1997 and December 19, 1997. On December 30, 1997 he committed a theft. In May 1998 he pled guilty to the two drug charges, but absconded before sentencing. He was taken into custody in September 1998 and was charged with the theft. He was sentenced on all three convictions at a consolidated hearing on January 29, 1999.

Thompson argued the drug charges could not be historical prior felony convictions for enhancement, contending that one is not convicted until one is sentenced. The Arizona Supreme Court disagreed, finding that one is convicted when there has been a determination of guilty by verdict finding or acceptance of a plea. However, “if offenses are consolidated for trial, the conviction on the prior offense cannot precede the conviction for the subsequent offense.” When felonies are tried together, any enhancement must be pursuant to A.R.S. Section 13-702.02, which covers multiple offenses not committed on the same occasion.

State v. Powers, 352 Ariz. Adv. Rep. 10 (SC, 7/12/01)

Powers struck two people with his vehicle and left the scene. The Arizona Supreme Court held he could not be convicted of two counts of leaving the scene of an accident. The focus of the crime is the scene of the accident, not the number of victims of the accident.

State v. Tschilar, 352 Ariz. Adv. Rep. 4 (CA 1, 7/17/01)

Tschilar was convicted of kidnapping four teenagers. Under A.R.S. Section 13-1304, kidnapping is a class 2 felony unless

the victim is released voluntarily without physical injury and prior to committing any other felony. If these requirements are met, it is a class 4 felony. Tschilar argued that under *Apprendi v. New Jersey*, he could not be sentenced for class 2 felonies in the absence of jury findings that the victims were harmed before being released.

The Court of Appeals disagreed. It held that *Apprendi* recognized a distinction between aggravating and mitigating factors and permits a judge to reduce a sentence. It was held that *Apprendi* did not change the holding in *State v. Eagle* that the safe release of the victim is not an element of kidnapping.

State v. Harrod, 352 Ariz. Adv. Rep. 11 (SC, 7/16/01)

Harrod was found guilty of the murder of Jeanne Tovrea. At trial, defense counsel wished to introduce an alleged confession to the murder made by a death row inmate to another inmate. The Arizona Supreme Court held this was inadmissible hearsay because there was no showing the declarant was unavailable and there was no clear indication of the trustworthiness of the statement.

The trial court excluded statements from Harrod’s wife under the marital communications privilege, but allowed testimony regarding her observations during the marriage, such as the receipt of Federal Express packages and the burning of a package. The Arizona Supreme Court held this was proper and that marital communications may be used for impeachment if a defendant testifies.

Witnesses may testify only as to matters recalled and recorded before hypnosis. Here a witness submitted to an attempt at hypnosis. The trial judge found by a “preponderance of the evidence” that the witness had not actually been hypnotized and allowed him to testify. The Arizona Supreme Court held this was the proper standard of proof.

AUGUST 2001 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/6-8/14	Valverde	Buttrick	Cohen	CR01-03544 Theft, F3	Hung – 5 Guilty, 3 Not Guilty	Jury
8/9-8/10	Aslamy	Cates	Beougher	CR01-06644 Forgery, F4	Guilty	Jury
8/13-8/16	Aslamy	Willett	MacRae	CR01-04296 MIW, F4	Guilty	Jury
8/16-8/21	Looney	Schneider	Hunt	CR00-16149 2 cts. Agg. Assault, F3 Criminal Damage, F6 with prior while on probation	Not Guilty	Jury
8/2-8/2	Rempe	Franks	Hunt	CR01-04357 Agg. Assault, F4	Dismissed without prejudice day of trial	Jury
8/27-8/27	Rock Barwick	Budoff	MacRea	CR01-02928 PODD, F4 PODP, F6	Pled day of trial to PODP, M1 with sum- mary probation	Jury
8/30-8/30	Valverde	Anderson	Washington	CR01-06750 Discharge Firearm into Structure, F2D 2 cts. Endangerment, F6D	Pled day of trial	Jury

GROUP B

Dates: Start-Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/2-8/7	Colon	Topf	Green	CR01-05317 Theft of Means of Transportation, F3	Hung – 7 Not Guilty, 1 Guilty	Jury
8/6	Giancola King Valentine	Doherty	Vick	CR01-04651 Shoplifting, F4	Guilty	Jury
7/31-8/8	Lopez Erb Valentine	McClennen	Martinez	CR00-09219 Murder 1, F1 Armed Robbery, F2	Guilty	Jury
8/20-8/21	Giancola Valentine	Yarnell	Baca	CR00-17992 Resisting Arrest, F6	Guilty	Jury

COMPLEX CRIMES UNIT

Dates: Start-Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/23 – 8/31	Stazzone	Cates	Sampson	CR01-001947 4 cts. Sex Conduct w/Minor, F2 DCAC 2 cts. Att. Sex Conduct w/Minor, F3 DCAC Child Molest, F2 DCAC Sex Abuse, F3 DCAC	Guilty of 3 cts. Sex Conduct, 1 ct. Att. Sex Conduct, 1 ct. Child Molest Not Guilty of 2 cts. Sex Conduct, 1 ct. Att. Sex Conduct, 1 ct. Sex Abuse	Jury

AUGUST 2001 JURY AND BENCH TRIALS

GROUP C

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/15 – 8/15	Kavanagh	Ore	Mercer	TR01-00833 & 00834 Dr. w/ Lic. Susp., M1N	Guilty	Bench
8/22 – 8-23	Sheperd	Fenzel	Cutler	CR00-96827 PODD, F4N; PODP, F6N	Guilty	Jury
8/28 – 8/31	Moore, J. Klopp-Bryant	Gaylord	Cutler	CR01-92453 Armed Robbery, F2D	Guilty	Jury
8/1 – 8/1	Zazueta	Johnson	Duggan	CR01-00401M Assault, M1; False Reporting, M1	Dismissed without prejudice day of trial	Bench
8/6 – 8/6	Zazueta	Fenzel	Schultz	CR01-91044 Agg Assault, F6N	Dismissed without prejudice day of trial	Jury
8/27- 8/27	Carey	Wilkins	Henry	CR00-1364M Interfering w/ jud. Proc, M1	Dismissed without prejudice day of trial	Bench
8/27 – 8/27	Fox	Akers	Hoffmeyer (AG)	CR01-92522(A) Dang Drug – Manuf, F2N Dang Drug – Poss Equip Manuf, F3N Dang Drug Vio, F4N Drug Parapher Vio, F6N	Dismissed without prejudice day of trial	Jury
8/28 – 8/28	Kavanagh	Akers	Forness	CR01-93164 Agg Assault, F3D; Threat-Intim, M1N Criminal Damage, M2N	Dismissed without prejudice day of trial	Jury

DUI UNIT

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Results	Bench or Jury Trial
7/25 – 8/1	Force Casanova	Reinstein	Lemke	CR2001-000159 Manslaughter	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
8/06 – 8/07	Patton Apple	Davis	Larish	CR00-15656 Burglary, F3	Guilty	Jury
8/09 – 8/20	Cleary Abernethy / Reger Bolinger / Williams	McClennan P. Reinstein	Martinez	CR00-09219 1 st Degree Murder, F1; Armed Robbery, F2	Guilty	Jury
8/20 – 8/23	Canby Abernethy de Santiago Bolinger / Williams	Foreman	Greer	CR00-07559 1 st Degree Murder , F1; 2 cts. Agg. Assault, F2; 3 cts. Kidnapping, F2; Armed Burglary, F2; Sexual Assault, F2D	Guilty	Bench
8/28 – 8/29	Granda	Heilman	Vingelli	CR01-03890 Resisting Arrest, F6	Not Guilty	Bench

AUGUST 2001 JURY AND BENCH TRIALS

GROUP D

Dates: Start-Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
7/31-8/1	Cain	Doughton	Simpson	CR01-001303 2 Cts Agg DUI, C4F (2 priors, on probation)	Directed Verdict	Jury
7/25-8/1	Schreck	Budoff	Shawna Naber	CR01-003198 Offer Sell Narc. Drug	Guilty	Jury
8/14-8/15	Harris Salvato	McVey	Hunt	CR01-004092 Agg Assault, F4	Not Guilty	Jury
8/14 – 8/15	Clemency Seaberry	Foreman	Naber	CR01-001914 Burglary 2, F3; Unauth Use-Veh/Trnsp, F5	Not Guilty	Jury
8/14-8/16	Falduto	Budoff	Reddy	CR01-004092 Theft of Means of Transportation, F3	Guilty	Jury
8/15	Carter	Dougherty	Fuller	CR01-000531 Burglary	Guilty	Bench
8/15	Geranis/Green	Anderson	Morten	CR00-019791 2 Cts. Agg Dr.-Lqi Drg/Tx Sub, F4	Guilty	Jury
8/15-8/17	Adams Seaberry Baugh	Doughton	Flores	CR01-019170 Theft of Means of Transportation, F3	Not Guilty	Jury
8/16	Kibler	Reinstein	Mayer	CR98-005888B Offer Sell Dng. Drug, F2 Poss Sale Meth, F3 Smug/Trpt Meth, F2 Mscndct. Inv. Weapons, F4	Offer to Sell Dng. Drug Dismissed, Guilty All Other Charges (Case tried in Absencia)	Jury
8/16	Blair	Carrillo	Perkowski	MCR01-01336 Assault, MI	Not Guilty	Bench
8/21 – 8/23	Huls / Javid Fusselman	Hotham	Kever	CR01-05946 Agg Assault w/dly weapon, F3	Not Guilty	Jury
8/22	Kibler	Budoff	Naber	CR01-004861 Fls Impris-Vio/Frd, F6	Guilty Class 1 Misd.	Bench
8/22	Silva	Steinle	Larish	CR01-003685A Agg Aslt w/ Ddly Wpn, F3 Flt Frm Purs Law Veh, F5	Guilty	Jury
8/24	Nurmi	Gutierrez	Court	MCR01-00214 IJP MI	Directed Verdict	Bench
8/27	Enos	Davis	Bernstein	CR01-002789 Agg, Dom. Viol., F5	Guilty	Bench
7/23	Billar	Sticht	Lindstedt	CR99-17111 Misconduct Involving Weapons	Pled day of trial	Jury
8/20	Falduto	Wilkinson	Musto	CR01-000237 Agg DUI, F4	Dismissed with prejudice day of trial	Jury
8/21	Billar	Hotham	Adelman	CR01-006138 Aggravated Assault w/Ddly Weapon; Possession of Narcotic Drug, F4	Dismissed day of trial	Jury
8/21	Kibler O'Farrell	Wilkinson	Reddy	CR01-005276 Theft Means of Transportation, F3	Dismissed day of trial	Jury
8/23	Carter	Budoff	Kamis	CR01-006383 Armed Robbery, F2; Burglary 1, F2 Forgery, F4	Dismissed day of trial	Jury
8/29	Willmott Fusselman	Budoff	Lindstedt	CR01-001444 Armed Robbery, F2D	Pled to class 6 open on day of trial	Jury

AUGUST 2001 JURY AND BENCH TRIALS

GRUPE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
7/31 – 8/3	Goldstein Reilly	Davis	Hunt	CR01-01765 Agg. Asslt., F4	Not Guilty	Jury
8/1 – 8/3	Hanson	Pillinger	Agra	CR01-04562 Forgery, F4	Mistrial	Jury
8/1 – 8/8	Ackerley / Pajerski	Anderson	Knudson/ Koplow	CR01-001375 (Note: CR01-06317 was consolidated into this cause #). Agg. Asslt., F2D ; Cruelty to Animals, F6; Agg. Asslt., F6	Not Guilty Agg. Asslt. F2D and Cruelty to Animals, F6 Guilty Agg. Asslt., F6	Jury
8/2 – 8/3	Roskosz	McVey	Raymond	CR01-06668 Burglary, F4	Not Guilty	Jury
8/8 - 8/9	Richelsoph	Kaufman	Pittman	CR00-16161 Burglary, F3; 3 Cts. Sex Abuse, F5	Hung Jury 7 NG to 1 Guilty	Jury
8/20 – 8/21	Benson Gotsch	Araneta	Simpson	CR00-12158 Mscndct. Inv. Weapons, F4	Guilty	Jury
8/23	Squires	Anderson	Simpson	CR01-03594 Unlawful Flt., F5	Guilty	Bench
8/27	Zigler/Pajerski Ames	Heilman	Vingelli	CR01-03890 Resisting Arrest, F6	Not Guilty	Bench
8/28 – 8/30	Rock/Richelsoph Ames	Yarnell	Charnell	CR01-00623(C) Armed Robbery, F2D	Not Guilty of Armed Robbery But Guilty of Lesser Misdemeanor Theft	Jury
8/30	Flynn	Schneider	Gellman	CR00-08683 POND, F4	Guilty	Bench
8/31	Benson	Araneta	Simpson	CR93-00433(A) Unauth Use – Veh/Trnsp, F6 CR96-11827 Flt Frm Purs Law Veh, F5; Theft, F5	Guilty	Bench
8/7 – 8/15	Evans/Walker	Gaines	Davidon	CR00-19854(C) POM f/s, F2; Mny. Lndring. 2 nd Deg, F3; PODP, F6	Pled during trial	Jury
8/14	Smiley	Reinstein	Raymond	CR01-06127 Agg. Asslt. w/Ddly. Weap., F3 Mscndct. Inv. Weap., F4	Pled day of trial	Jury
8/14	Smiley	Reinstein	Koplow	CR01-04568 Disord. Cndct., F6D	Pled day of trial	Jury
8/15	Dergo	Heilman	Vingelli	CR00-02376 POND, F4; PODP, F6	Pled day of trial to PODP, F6	Jury
8/21	Roskosz	Reinstein	Madeira	CR01-07933 LVE ACDNT-DTH/INJ F3	Pled day of trial	Jury
8/28	Smiley	Reinstein	Adams	CR01-07907 Forgery, F4	Pled day of trial	Jury
8/28	Flynn	Araneta	Knudsen	CR01-05013 SOND, F2; POND, F4; POM, F6	Dismissed with prejudice day of trial	Jury
8/29	Dergo	Heilman	Hoffmeyer	CR01-06801 MODD, F2; Pos. Eqp./Chm. Mnu. DD., F3; PODD, F4	Pled day of trial to Attmpt. MODD, F3	Jury

AUGUST 2001 JURY AND BENCH TRIALS

GROUP F

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
7/31 – 8/1	Buckallew / Rosales Rivera	Jarrett	Nothwehr	CR01-91734 2 Cts. Agg DUI, F4N	1 ct. Guilty 1 ct. Not Guilty	Jury
8/13 – 8/15	Leonard	Oberbillig	Anderson	CR01-92194 2 Cts. Agg. DUI, F4N	Hung Jury 4 – Guilty 4 – Not Guilty	Jury
8/13 – 8/22	Gaziano	Jarrett	Cook	CR00-94899 Burglary, F2D; Armed Robbery, F2D Agg. Assault and Dangerous Crimes Against Children, F2D Agg. Assault, F3D	Ct 1 – Guilty Ct. 2 – Guilty Ct. 3 – Not Guilty Ct. 4 - Guilty	Jury
8/20 – 8/20	Felmy	Jarrett	Hudson	CR01-92298 Theft, F6N	Guilty	Bench
8/1 – 8/1	Jolley	Freestone	Zia	TR01-00135 DWI Liq/Drug/Tox Sub.	Pled day of trial to Endangerment, M1	Bench
8/20 – 8/20	Felmy	Fenzel	Pierce	CR01-91771 Agg. Assault, F6N	Dismissed without prejudice day of trial	Jury
8/29 – 8/29	Little	Willrich	Brenneman	CR01-92190 Agg. DUI – Passenger Under 15, F6N	Dismissed with prejudice day of trial	Bench
8/30 – 8/30	Hamilton	Oberbillig	Brookes	CR01-92010 POM, F6N; PODP, F6N	Pled day of trial to lesser, 6 open	Bench
8/30 – 8/30	Burns	Willrich	Bernstein	CR01-93218 Misconduct Involving Weapons, F4N	Dismissed with prejudice day of trial	Jury

OFFICE OF THE LEGAL ADVOCATE

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
8/6	Logan	Wilkinson	CR98-03983 Murder 1 st ; 2cts Att Murder; Shooting at Res. Struct.; Criminal Synd.; 3cts Endan; MIW	Guilty	Jury
8/8 - 8/9	Agan	Willett	CR2000-019688 Car theft	Not guilty	Jury
8/14 - 8/24	Everett Cano	Ballinger	CR2000-017640 33 cts of sexually related child crimes	Guilty on less than charged	Jury
8-21- 8/23	Schaffer	Gaylord	CR2001-005754 POND, PDP	Guilty on both counts	Jury

for The Defense

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, James J. Haas, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 5th of each month.