



for *The Defense*

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

Trial Objections – Use Them or Lose Them!

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**By Beth Klopp¹
Group C Counsel**

In the movie *A Civil Action*, the character played by Robert Duvall is a lawyer and a professor. He tells his class, “When you are in trouble – object.” Later in the movie, the Duvall character is in trial and is asleep. The judge wakes him up and he leaps to his feet and says, “Objection!” The court says, “Sustained.” The moral of

the story is: when in doubt, object!²

In many ways, objections are a trial lawyer's bread and butter. The State has immense power to bring witnesses and evidence against our clients. Objections are our sword to try to keep the adversarial process on an even playing field. In fact, one of the hallmarks of a great trial

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She's My Wife, But We're Not Married

A Brief Historical and Cultural Background for “Informal” Marriages Among Mexican Clients

**By Guy Fimbres
Defender Attorney – Group D**

When representing our clients, we often have to deal with their families. At times their family situation may be relevant to the case itself; at others it may affect sentencing issues. While not all judges do so, some may

consider defendants who are not married but have children to be irresponsible or shirking their duties.

One common ambiguous situation arises when a person is referred to as the client's

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lawyer is the ability to make and meet objections.

We, as trial lawyers, make objections for two primary reasons. We make them to keep harmful information from the jury during the trial, and we make them for the appeal that comes if we lose. Although we all fight tooth and nail for that acquittal, we must never lose sight of the appeal, which is often our client's last chance for a favorable resolution.

Making the Record

When we try our cases, we must see the record in our minds. And in seeing the record, we must remember that, first and foremost, we must ensure that there is a clear record of our trial objections.³ The record must show that counsel objected, the grounds for the objection, and the court's ruling on the objection. The objecting attorney must ensure that the record is clear on all three points.

How do we do this? First, stand up. This is the best way to draw attention to yourself and stop the answer before it is too late. Second, state the objection. This can usually be done in two to four words. "Objection, hearsay." "Objection, Rule 404(b)." "Objection, assumes facts not in evidence." You do not need to say, "excuse me" and you do not need to stand silently while you are waiting for the judge's attention. Stand up, interrupt what is going on, and object. Finally, make sure that the judge rules on your objection. If the judge fails to rule on an objection and tells the witness to continue, or makes a nonverbal ruling (such as a wave), ask for the ruling. A request for the ruling can be as simple as, "What was your ruling?" Remember that

your client has the right, and you have an obligation to your client, to obtain a ruling.

Finally, if you do not feel that you have adequate time to make the record in just a few short words, ask to approach the bench and make your full argument on the record. You should not agree to wait until the next break or the end of the day to make your record, and you should object, on the record, if the judge insists that you wait. Your client is entitled to a contemporaneous record. Do not hesitate to ask for anything that will allow you to make a complete record of your objection and all the grounds for it. Remember: the record, the record, the record.

Timing of Objections

Failure to make a timely objection will result in a waiver of the alleged error. Arizona courts have held that failure to make timely objections operates as a waiver for purposes of appeal.⁴ The time to make the objection is after the question is asked and before the witness responds. However, if the basis for the objection does not become clear until after the answer, or when a witness makes a non-responsive, objectionable statement, objecting to the answer and a motion to strike will preserve the issue for appeal.

Now I know there are times when we make mistakes. We are talking to our client or we simply did not think about the basis for the objection until two or three questions later. Object, even if it is too late. The court may overrule you simply because the objection is untimely, but at least you have given your client a chance at that issue.

Motions in Limine

Motions in limine are devices to raise objections to evidence before trial. But more importantly, motions in limine are essential trial practice tools, especially for the beginning trial attorney. It cannot be stressed enough how important motions in limine are. When you know that you will be objecting to evidence, put it in writing when you have the luxury of researching the issue and thinking about it. "Other acts" or "bad acts" evidence and hearsay are two areas ripe for motions in limine. But don't feel tied to a formula for your motions in limine, remember that anything that can be objected to during the trial can be a subject for a motion in limine. For instance, we have all had those trials where the prosecutor wants to admit 56 photographs of the scene of the crime. Use a motion in limine to object to all but one or two on cumulative or inflammatory grounds.

When used effectively, the motion in limine can streamline the trial, ensure that the jury is not exposed to objectionable evidence and educate the judge on areas in the trial that will be hotly disputed. Motions in limine also are useful learning devices for beginning trial attorneys to practice making objections on paper, which will, in turn, make the spoken objection more polished. Finally, using a motion in limine reduces trial anxiety. Once the motions are argued and ruled upon, the issue objected to in the motion in limine is preserved for appeal without further objection at trial. Arizona courts have consistently held that when a motion in limine is overruled, the objection does not have to be reurged at trial to preserve the issue for appeal.⁵

General vs. Specific Objections

General objections, without an explanation, are not sufficient to preserve error for appeal. "Irrelevant, immaterial, and incompetent" are all examples of general objections. Additionally, although even seasoned attorneys make "foundation" objections, "foundation" is a general objection and without more will not ensure that the issue is preserved for appeal. Counsel must specifically inform the court as to what part of the foundation is lacking. When you use "foundation" as a general objection, the specific objections generally will be: relevance, witness qualification, or authentication and identification. Relevance often involves the use of those "magic words" we were taught in law school. The photograph "fairly and accurately" depicts the scene as it appeared on the relevant date; the item is in the "same condition or substantially the same condition" now as when the witness saw it on the relevant date. Relevance may also be the basis for objecting to an expert opinion, or time frame as to when or where a conversation or interrogation took place. Witness qualification means that the testifying witness has first hand knowledge of the fact or exhibit, or the information underlying the fact or exhibit. Authentication and identification may include chain-of-custody or identification of the parties involved in the conversation.

The reasons for requiring specific objections are to give the judge a chance to make an intelligent ruling and to allow the proponent of the evidence to cure the defect. If the judge overrules one of our specific objections, that issue is preserved

for appeal. However, remember that if there are multiple grounds for an objection, we must address each specific ground to preserve each area for appeal. If the judge overrules our specific objection, even though an alternative objection would have been sustained, we lose that issue for appeal, as the proper objection was not made.

One final note regarding specific objections – if you intend to preserve the issue for appeal, remember to constitutionalize the objection.⁶ Cite both the Arizona and U.S. Constitutions and the specific principles behind your objections, such as confrontation, due process and illegal search and seizure. Remember, the system is supposed to protect our clients' rights, so any violation can be based upon due process.

Saying all that, sometimes all we have, or all we can think of, is a general objection. If that is all you have, use it. There are several positive things that still may occur: the judge may sustain even a general objection, the prosecutor may withdraw the question, and, finally, in those precious few seconds, we may think of the specific objection that is on point.

Motions to Strike, Motions for Mistrial

When a judge sustains our objection, the battle is not always over. If the question itself was objectionable or the witness answered before the objection was ruled upon, the attorney must move to have the question and/or the answer stricken from the record and have the jury instructed to disregard the stricken information. Remember that an objectionable answer remains part of the record without a

motion to strike, even if the objection is sustained!⁷

If, however, you believe that the stricken information is highly prejudicial, a motion for mistrial may be the only remedy left to ensure a fair adjudication of the case. Before you ask for a mistrial, step back and ask yourself if that is really what you want. Trial may be going very well for the defense and a mistrial would actually help the prosecutor repair an otherwise sinking ship.

General Tactical Considerations

Generally, objections should be made when the question is objectionable and the answer will be harmful to your case. However, there are times when a valid objection should not be made. One such instance is when the prosecutor ventures into an objectionable area that was originally off limits. Their questioning may open the door for you to further explore an otherwise inadmissible area. Another instance where strategy may play a role in deciding whether or not to object is the area of foundational objections. Even though the objection is made and sustained, it can easily be cured by the prosecutor.

Another tactical use of objections is to break the pace of opposing counsel. One must, however, remember that making an unfounded objection to disrupt the flow of the trial is unethical. On the other hand, it is not unethical to make a valid objection on an issue that the prosecutor can correct (e.g. "leading"), if it creates a side benefit of breaking the pace of the prosecutor.

A View From the Bench

Prior to writing this article, I spoke with one of the judges in Mesa about his thoughts on how the defense bar is doing in making objections at trial. He said that he thought the defense bar generally, and public defenders specifically, are doing a good job of objecting at trial in all areas except “foundation.” His criticism was that attorneys often object by stating “no foundation,” rather than addressing the specific area in which the foundation is lacking. As discussed earlier, the specific foundation objections generally will be: relevance, witness qualification, or authentication and identification.

Another suggestion made by the judge is the use of memos of law for trial. This is a variation on the motion in limine, but rather than objecting to a specific piece of evidence as is done in the motion in limine, the memo of law deals with general evidentiary issues, such as hearsay or impeachment, with case and rule citations. Like the motion in limine, a memo of law is an excellent way to practice what and how you will say something in trial. One way to differentiate a memo of law from a motion in limine is that in a memo of law you are arguing for the admission of evidence you believe the prosecutor will object to, such as a prosecution witnesses’ other bad act.

Finally, the judge said, “Don’t be afraid to object.” The jury is told that objections are to be expected and are a part of the process. He does not believe that juries hold objections against counsel, and emphasized that we have a duty to object in our zealous representation of our clients.

Two checklists of common objections are provided on the following pages. The lists are not exhaustive, but you may find it useful to keep them in your trial notebooks.

Endnotes

- 1) I decided to write this article because many young attorneys have expressed their frustration with their skills at making objections. Even more experienced attorneys can benefit from this article. In addition to other sources, *Trial Objections Handbook*, by Roger C. Park, 1991, was used extensively.
- 2) Thanks to Bob Stein for this wonderful lead in.
- 3) *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981); *State v. Tostado*, 111 Ariz. 98, 523 P.2d 795 (1974).
- 4) *State v. Mata*, 125 Ariz. 233, 240, 609 P.2d 48, 55 (1980).
- 5) *State v. Ellerson*, 125 Ariz. 249, 609 P.2d 64 (1980); *State v. Coleman*, 122 Ariz. 99, 593 P.2d 653 (1979); *State v. Briggs*, 112 Ariz. 379, 542 P.2d 804 (1975).
- 6) Thanks to Ed McGee and his outline: “What Have You Done for Me Lately? or What Every Appellate Lawyer Hopes Trial Counsel Has Done with Objections, Strike Motions, Offers of Proof, Curative Instructions and Mistrial Requests.”
- 7) *State v. Abbey*, 13 Ariz. App. 55, 474 P.2d 62 (1970).





COMMON BASES FOR OBJECTIONS TO OPENING STATEMENTS AND CLOSING ARGUMENTS

ADDRESSING JUROR BY NAME
ARGUMENTATIVE OPENING STATEMENT
APPEALING TO RACIAL BIAS
APPEALING TO RELIGIOUS BIAS
ASKING JURORS TO STAND IN THE SHOES OF A PARTY¹

CALLS FOR REVENGE
COMMENT UPON FAILURE OF ACCUSED TO TESTIFY

EXPRESSING PERSONAL OPINION

IMPROPER SYMPATHY FOR CRIME VICTIM

MISSTATEMENT OF THE EVIDENCE
MISSTATEMENT OF THE LAW

PERSONAL ATTACKS ON DEFENDANT
PERSONAL ATTACKS ON OTHER COUNSEL
PERSONAL ATTACKS ON WITNESSES
PERSONAL BELIEF OF COUNSEL
PREJUDICIAL AND INFLAMMATORY ARGUMENT

REFERRING TO INADMISSABLE EVIDENCE
REFERRING TO PLEA BARGAINING

STRICKEN MATTER ARGUED

UNDULY EMOTIONAL ARGUMENT

VOUCHING



1) Also known as the "Golden Rule" argument.

COMMON BASES FOR OBJECTIONS

AMBIGUOUS
 ARGUMENTATIVE
 ASKED AND ANSWERED
 ASSUMES FACT NOT IN EVIDENCE
 AUTHENTICATION OR IDENTIFICATION
 LACKING

BEYOND SCOPE OF CROSS
 BOLSTERING BEFORE IMPEACHMENT
 BURDEN SHIFTING

CALLS FOR CONCLUSION
 CALLS FOR NARRATIVE ANSWER
 CALLS FOR OPINION
 CALLS FOR SPECULATION
 CHAIN OF CUSTODY DEFECTIVE
 COMPOUND QUESTION
 CONFUSING
 COUNSEL IS TESTIFYING
 COUNSEL IS HARASSING THE WITNESS

CUMULATIVE

DOCUMENT SPEAKS FOR ITSELF

EXHIBIT SPEAKS FOR ITSELF
 EXPERT TESTIMONY IMPROPER
 EXTRINSIC EVIDENCE INADMISSABLE

FOUNDATION

HEARSAY / CONFRONTATION CLAUSE
 HYPOTHETICAL QUESTION MISLEADING

IMPROPER CHARACTER EVIDENCE (RULE
 404(a))

IMPROPER HYPOTHETICAL QUESTION
 IMPROPER IMPEACHMENT

IMPROPER LAY OPINION
 IMPROPER REHABILITATION
 IRRELEVANT

LACK OF PERSONAL KNOWLEDGE (RULE
 602)
 LEADING QUESTION

MISLEADING THE WITNESS
 MISQUOTES THE WITNESS
 MISSTATES THE EVIDENCE
 MULTIPLE QUESTION

NARRATIVE
 NON-RESPONSIVE¹

“OTHER ACTS” INADMISSABLE (404(b))

PRIVILEGED COMMUNICATION
 PREJUDICE OUTWEIGHS PROBATIVENESS

RULE 403 (exclusion of relevant evidence on
 grounds of prejudice, confusion or waste of
 time)

SPECULATIVE
 SEQUESTRATION RULE VIOLATED

VAGUE
 VIOLATION OF PRIOR COURT RULING

WITNESS IS INCOMPETENT (insane, child,
 or no personal knowledge)

1) Under strict rules of evidence only the questioning attorney may object on “non-responsive” grounds. *Moschetti v. City of Tucson*, 9 Ariz. App. 108, 449 P.2d 945 (1969). Non-examining counsel must object on other grounds to be sustained.

(Continued from page 1)

spouse, but the spouse does not appear to be married to the client. To some, this might appear to be just another sign of the “decline” of the American family. It may appear so to your judge as he or she considers sentencing your client or making other rulings in cases where family issues are relevant. In cases where the client is a Mexican national or recent immigrant, this ambiguous marital status is not necessarily a sign of declining morals or a lack of familial commitment. In some cases it may be useful to educate the judge on this issue.

In looking at the marital status of some Mexican clients, it is important to understand some historical and cultural forces underlying their situations. But first, before looking at the historical and cultural forces, the most practical thing to do is ask your client. He or she may have other motives for their “unconsecrated” marital status, which may have little or nothing to do with cultural issues. While there still may be some cultural forces at work, they may not be the kind that are likely to make your client appear more sympathetic to most judges. But, for those clients who have no apparent ulterior motive for their unsettled marital status, a brief history lesson may help explain why some clients do not “legalize” their marital union, even though they honor that commitment by their actions. This has to do with the complicated relationship of Mexicans with the institutions of church and government.

Religious Influences

Mexico has historically been a very Catholic country, although other religions have made inroads in recent decades.

Mexico, however, has had a complicated relationship with the clergy and that complicated relationship fostered a sense of separation and distance between the people and the church. When Spain’s adventurers conquered Mexico, they set about converting the native peoples, partly as an additional means of social control, partly out of genuine religious fervor. The native religions were driven underground. As Mexico was “civilized,” two types of clerics entered the country. One group, the Regular clergy, was primarily composed of the monastic orders, bound by orders of poverty. These orders, such as the Jesuits and Franciscans, established missions extending up into what are now California, Arizona, New Mexico and Texas. Many of these monks were sympathetic to and even protective of the native peoples. However, the religious orders to which they belonged, taken as a group, were among the largest and wealthiest landowners in the colony.

The other group, the Secular clergy, consisted of regular parish priests who did not have a vow of poverty and for whom priesthood was not just a calling, but a career. Worldly and financial matters were of considerable concern to them, as it was important to make their parishes a profitable enterprise. They charged fees for important sacraments like baptism, marriage and last rites, and those who could not afford them were often refused. The church was also one of the primary lending institutions in colonial Mexico. Secular clerics were often associated with colonial officials and wealthy landowners, and rural priests themselves were often landowners, owning farms, sugar mills and cattle ranches.

Religion, Government and Race

Another institution separating the clergy from the rest of the population was the establishment of *fueros*. These were privileges granted to the clergy and the army. Among them was the privilege that no priest could be tried for a crime by a civil court. *Fueros* were so strong that when Father Miguel Hidalgo was captured after leading the 1810 revolution against Spain, he had to be excommunicated by an ecclesiastical court before he could be tried, executed and dismembered by the colonial government. The battle cry of “*Religión y fueros*” retained its vitality in conservative sectors of Mexican society into this century. The last militant gasp of this sentiment was breathed in the *Cristero* revolt of 1926-29. This revolt witnessed the phenomenon of priests and their supporters violently combating the secularization of society.

Special privileges and withholding official approval of marriages also catered to the Spanish preoccupation with race and status. Up until the revolution of 1810, those born in Spain, *peninsulares*, had privileges that *criollos*, those of pure Spanish blood born in the New World, were denied. Even if they were wealthier, better educated and from more noble families, *criollos* could not hold certain critical business or administrative positions simply because they were not born in Spain. The initial shortage of Spanish women also led to a large number of unions between Spanish men and native women. In time, slaves were imported from Africa to work in the indigo plantations of the Yucatan adding to the ethnic mixture of *metizos* that José Vasconcelos was to call the “Cosmic

Race.” Colonial society was somewhat segregated, but those of pure blood, at least figuratively, had a home. For part of the colonial period, people of mixed race had no legal status, were left in a legal and social limbo, and were referred to as *leperos*. Forbidden to live within the established Spanish or Indian communities, these *leperos* were often left with no other means of survival than to resort to begging or banditry. Ironically, *mestizaje* triumphed and, by the middle of the 19th century, those of mixed blood made up the majority of the population.

At times, racial tension and anger at the almost exclusively white colonial authorities representing church and state exploded. Throughout Mexico’s history local rebellions by whole villages, usually populated entirely by Indians or *mestizos*, were common. Mexico’s government often responded by crushing the rebellions in brutal fashion, the memory of which still lingers in the Mexican conscious. The government continued to represent the interests of the white, the wealthy and the church well into Mexico’s modern history.

Interacting with Government

The social and political influences imposed on colonial Mexican culture continued well after independence. Over time, the most practical way for the common man, who makes up the majority of Mexico’s people, to deal with the power structure was to have as little contact with officials as possible. Mexico today reflects those cultural rifts and, in many respects, is still a land where the few rule the many, especially when control of wealth and governmental institutions are considered. The wealthy still have many

privileges denied to the rest of the population, although the privileges are no longer officially enshrined in the law. The unrest simmering in the state of Chiapas for the last decade shows that the issue of race and the treatment of indigenous peoples is still very much alive. The church has much less political and social control than it once did, but the gilded cathedrals are powerful reminders of the worldly concerns of the church. They also serve as reminders that it is sometimes better to keep both church and state at arms length.

Impact on Marriage

For centuries, poor Mexicans of *mestizo* ancestry applying for formal marriage, either civil or consecrated, have faced several hurdles. It requires them to approach powerful bureaucracies that have often acted against their interests or those of people like them. They would probably be asked for fees, and in the case of the government, a small additional bribe that they have no means to pay. They may be asked to fill out paperwork that they do not have the education to read. Being a product of an informal union themselves they may also lack the documentation that officials may request, or be embarrassed that theirs was an “illegitimate” birth. All of these factors discourage the formal civil or ecclesiastical sanction of marriage. The desire to avoid government officials is amplified here for those who are in the United States illegally. The lack of formal recognition does not mean that these de facto marriages are taken lightly by the men and women living them out. Their very names reflect strong ties of family and heritage that

most Mexicans feel. Their hyphenated last names state first the father’s family name, and then the Mother’s family name.

These marriages are formalized by years, often decades of cohabitation and consecrated by raising children. When a man speaks of his wife or a woman of her husband, that is how they think of that person, and the lack of a church or government document validating their marriage takes nothing from their commitment or their affection for their family.

To find out about a client’s marital status, start with general questions. Do not simply ask why they are not legally married. When talking to your client about their family, asking when they got married or how long they’ve been together pays other dividends. As clients talk to you about their backgrounds, they will feel that you are interested in them as individuals; their trust and confidence in you grows and this can be critical when the time comes to make hard decisions. And, once you understand the client’s motivations, communicating to the judge your client’s commitment to their family, whether or not your client has a marriage certificate, will be much more persuasive.



ARIZONA ADVANCE REPORTS

By Stephen Collins

Defender Attorney – Appeals



State v. Cecil, 363 Ariz. Adv. Rep. 4 (CA 1, 12/24/01)

Appellant argued that the definition of “premeditation” found in A.R.S. Section 13-1101(1) is unconstitutionally vague because it fails to adequately distinguish first-degree murder from second-degree murder and thus allows for arbitrary and discriminatory application of the statute. The majority of the Court of Appeals found the statute, while constitutional on its face, is nevertheless unconstitutionally vague because of the judicial construction of the statute by the Arizona Supreme Court to the effect that premeditation could be “as instantaneous as successive thoughts of the mind.”

The offending “instantaneous” language was not used in Cecil’s trial. Therefore, the conviction was affirmed. This is in accordance with the majority in *State v. Thompson*, ___ Ariz. ___, 34 P.3d 382 (App. 2001).

Calderon-Palomino v. Nichols, 363 Ariz. Adv. Rep. (CA 2, 12/20/01).

A Spanish-only speaking defendant, charged with capital murder, was not entitled to have an extensive number of court documents translated into Spanish. However, the decision does not foreclose the possibility of the defendant presenting a “proper request” for translation of some documents that are “reasonably necessary.”

In re John M., 363 Ariz. Adv. Rep. 22 (CA 1, 12/24/01)

John and three friends drove by an African-American woman and John threw a half-full Mountain Dew can that hit her. Later John yelled a racial epithet at another African-American woman. He was then adjudicated delinquent for disorderly conduct.

A.R.S. Section 13-2904(A)(3) provides:

- A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:

....

3. Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person

Contrary to John’s argument, the Court of Appeals held the throwing of the can was a “gesture” within the meaning of the statute. It was also held that the racial slur was not protected speech under the First Amendment, because it constituted “fighting words.”

State v. Flores, 363 Ariz. Adv. Rep. 3, (CA 2, 11/1/01)

Flores was convicted of possessing a deadly weapon as a prohibited possessor. He claimed he was not given the proper *Miranda* warnings before telling a police officer that he had a prior felony conviction, and therefore, the statement should not have been admitted at trial. The Court of Appeals held it was harmless error because Flores “simply confirmed information that was already a matter of public record and easily verifiable even without his cooperation.”

Flores also argued that under *Apprendi v. New Jersey*, his sentence could not be enhanced for being on probation, because there was no jury finding on this issue. The Court of Appeals rejected the argument.

Fischer v. Kaufman (State of Arizona), 364 Ariz. Adv. Rep. 8 (CA 1, 12/31/01)

Fischer pled guilty to a sexual offense and was placed on probation. Pursuant to her probation terms and A.R.S. Section 13-3821(A)(4), she registered with the Department of Public Safety as a sex offender. After she successfully completed probation, the trial court designated the offense a misdemeanor and granted a motion to terminate sex offender registration. The trial court later reconsidered the motion and vacated its earlier order. The Court of Appeals held the statute requires “lifetime” sex offender registration and there is no authority for a court to terminate the requirement.

The Court of Appeals held that a special action was the appropriate method to address the issue. The issue could not be raised on direct appeal or by the post-conviction relief process.

State v. Sierra-Cervantes, 364 Ariz. Adv. Rep. 9 (CA 1, 1-11-02)

A.R.S. Section 13-205, enacted in 2001, provides “a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense.” The Court of Appeals held that the statute is constitutional and juries should not be instructed that the prosecution bears any burden on self-defense, because the “state has none.” Further, the Court of Appeals held that juries should no longer be instructed the defense has the burden of presenting evidence on self-defense, but should only be instructed that the defense has the “burden of proving self-defense.” “The burden of *raising evidence* of self-defense is subsumed by the burden of *proving* self-defense.”

State v. Cox, 364 Ariz. Adv. Rep. 3 (CA 1, 1/10/02)

Cox was convicted of kidnapping with the intent to promote, further or assist criminal conduct by a criminal street gang. The prosecution claimed the alleged victim was kidnapped and assaulted because he wanted to end his membership in the gang. The alleged victim testified at trial and admitted a prior felony conviction. Cox argued that he should be allowed to establish that the alleged victim’s prior conviction was for aggravated robbery, because the nature of the conviction would tend to show that he was not out of the gang like he claimed. The Court of Appeals held it was not an abuse of discretion for the trial judge to preclude cross-examination on the nature of the prior felony.

The jury was instructed that “criminal street gang” means an ongoing formal or informal association of persons whose members or associated individually or collectively engage in the commission, attempted commission, facilitation or solicitation of *any criminal act*” The instruction was in error because “any criminal act” was improperly substituted for “any felony act.” The Court of Appeals held it was harmless error because the only criminal acts involved in the case were felonies.

Cox argued that under *Apprendi v. New Jersey*, he was entitled to a jury trial on the sentence enhancement allegation that the offense was committed while on release. The Court of Appeals disagreed.

State v. McKeon, 365 Ariz. Adv. Rep. 3 (CA 1, 1/24/02)

McKeon was convicted of two counts of first-degree murder. At trial, he testified that on the day of the murders he was unaware of his actions because he had taken Zoloft and Klonopin as prescribed by his psychiatrist. The trial judge instructed the jury that the use of prescribed medication was not a defense for any criminal act or requisite state of mind.

A.R.S. Section 13-503 reads: “Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances *or the abuse of prescribed medications* does not constitute insanity and is not a defense for any criminal act or requisite state of mind.” The Court of Appeals held that the trial judge improperly instructed the jury, because if McKeon took the drugs pursuant to a prescription, it was not the “abuse of prescribed medications.” However, it was held to be harmless error.

State v. McMahan, 365 Ariz. Adv. Rep. 8 (CA 1, 1/22/02)

A.R.S. Section 28-708(A) provides: “A person shall not drive a vehicle or participate in any manner in a race, speed competition or contest, drag race or acceleration contest, test of physical endurance or exhibition of speed or acceleration or for the purpose of making a speed record on a street or highway.” McMahan argued that the statute is unconstitutionally vague because prohibiting an “exhibition of speed or acceleration” fails to provide any clarification as to whether it encompasses both intentional and unintentional conduct. The Court of Appeals rejected the argument.

Practice Pointer Alert

By Gary Bevilacqua Defender Attorney – Complex Crimes

Be aware of a recent U.S. Supreme Court case which seems to confirm its prior decisions in *Jones* and *Apprendi* that hold that any fact which can be used as an aggravator must be presented to the grand jury or at the preliminary hearing.

The case involves a drug conviction with an enhanced sentence because the amount involved exceeded a threshold amount.

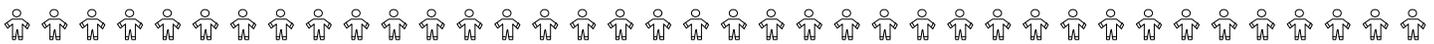
In *U.S. v. Cotton*, 122 S.Ct. 1781 (2002), the Supreme Court reversed the appellate court’s remand for resentencing. The appellate court held that since the aggravating fact that the amount of drugs exceeded the threshold amount was not presented to the Grand Jury, the trial court did not have jurisdiction to impose the higher sentence.

The Supreme Court reversed stating that an indictment defect did not deprive the court of jurisdiction. The court did affirm

that such aggravators need to be determined to exist at the probable cause stage of the case as stated in its prior decision in *Apprendi* and *Jones*. The sentences were affirmed only because the issue was not raised by the defendants at trial. The court went on to apply a 4 prong analysis and found that the imposition of the higher sentence did not violate fundamental fairness. (They reasoned the amount in question was clearly higher than the threshold amount, thus the defendant was on notice of the risk of higher sentence and any grand jury would have found the amount in question to have exceeded the threshold amount.)

Defense attorneys need to object at the trial level to any higher sentences based upon aggravators alleged by the state post indictment.

Based on this, defense attorneys need to object at the trial level to any higher sentences based upon aggravators alleged by the state post indictment. Also, if while awaiting sentencing an aggravator is alleged, argue that the existence or non-existence of the aggravator is not so clear cut and would have been challenged at the trial level if such was an issue before the trial jury.



~~ Career Day Speakers ~~

The Joseph Zito Elementary School kids and staff have expressed their sincere thanks to Law Clerk Jeffrey Tellez and Defender Attorneys Theresa Armendarez, Alfonso Castillo, Joanne Cuccia, Tony Colon, Ingrid Miller, Jeremy Mussman, and Jerry Schreck for speaking at their annual career day on May 30th. Our office provided 8 of the 80 speakers -- teachers and students came away with a much better understanding of what we do and why we do it. Thanks also go out to Shannon Slattery for providing materials to the speakers. Please contact Shannon if you're interested in speaking at any future events -- it's a great way to connect with the community. In addition, it's a fun, energizing way for us to take a step back from day-to-day hecticness and appreciate the work we do by explaining it to others.



APRIL 2002 JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
3/27 - 4/2	Fox / Burns Klosinski Gavin	Oberbillig	Andrews	CR01-95826 Agg Assault, F4N	Not Guilty	Jury
3/28 - 4/1	Sheperd	Willrich	Cutler	CR01-96797 Forgery, F4N	Guilty	Jury
3/29 - 4/19	Falduto	Adleman	Martin	CR01-019030 Resisting Arrest, F6	Guilty	Bench
4/1 - 4/2	Leonard	Akers	Anderson	CR01-96707 2 cts. Agg. DUI, F4N	Guilty of Lesser Included DUI Intoxicating Sub, M1	Jury
4/1 - 4/12	Elm / Houston Bradley Reidy	Hotham	Bennink	CR99-12905 2 Cts. Agg. Aslt. on a Police Officer, F2D (Retrial)	Guilty	Jury
4/2	Diaz/Green	Holt	Adleman	CR01-018763 Trespass, F6 Assault, M3	Trespass-Guilty Assault-Not Guilty	Jury
4/2 - 4/11	Falduto/ Bevilacqua	Martin	Brnovich	CR01-004653 1st Degree Murder, F1 or in the alternative 2nd Degree Murder F1/ DCAC Child Abuse F2/DCAC Child Abuse F4	Guilty: Murder in the 2nd Deg. Guilty: Child Abuse, F2.; Not Guilty: Child Abuse	Jury
4/3	Gaziano	Akers	Doane	CR98-94793 PODD, F4N PODP, F6N	Guilty	Jury
4/3	Castillo	Padish	Pittman	CR01-019370 Failure to Register, F4	Guilty	Bench
4/5	Morris Geary	Johnson	Montgomery	TR01-03960CR DUI, M1	Not Guilty	Jury
4/8	Stein	Johnson	Rivera	CR01-01568FE 3 cts. Interfering w/ Judicial Procedure, M1	Not Guilty	Bench
4/8 - 4/9	Cain	Foreman	Lane	CR02-000158 Agg DUI, C4F	Guilty	Jury
4/8 - 4/18	Farrell Elzy	Cates	Sampson	CR01-015958 3 cts. Child Abuse, F2 3 cts. Sexual Cndct w/mnr, F4 2 cts. Sexual Abuse over 15, F5	Hung Jury	Jury
4/9 - 4/10	Leonard	Akers	Pierce	CR01-96881 Agg. Assault, F6N	Not Guilty	Jury
4/10 - 4/11	Roskosz	Reinstein	Kalish	CR01-18495 2 cts. Agg. Asslt, F3D	Not Guilty	Jury
4/11	Javid Curtis	Martin	Hanlon	CR02-001105 Sale of Narc Drug, F2	Guilty	Jury
4/11 - 4/15	Flynn	Wilkinson	Klepper	CR01-12147 Impt/Trspt Narc Drug for Sale, F2	Guilty	Jury

APRIL 2002
JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER – CONTINUED

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/16 - 4/17	Gaxiola Erb Spears	Gaines	Agra	CR02-00150 2 Cts. Agg. Aslt., F6 Resisting Arrest	Not Guilty – Agg. Aslt. Guilty – Resist. Arrest	Jury
4/16 - 4/18	Hall Jaichner/Francis	Santana	Musto	CR01-12561 Agg. DUI, F4N	Guilty	Jury
4/16 - 4/19	Flynn Souther	Granville	Weinberg	CR02-01132 Burglary 2 nd , F3 Burg. Tools-Possess., F6	Guilty	Jury
4/17 - 4/25	Taradash Munoz Spears	McClennen	Bernstein	CR01-13429 Attempted 1st Degree Murder, F2	Guilty	Jury
4/17 - 4/30	Clemency/Schreck Curtis	Gerst	Nannetti	CR01-10619 Kidnap, F2 Sex Assault, F2 1st Degree Burglary, F2 Armed Robbery, F2, Agg Assault w/deadly wpn, F3	Guilty	Jury
4/22	Nurmi Curtis	Martin	Eliason	CR01-17776 PODP, F4	Not guilty	Jury
4/22	Cuccia	McVey	Anagnopoulos	CR01-016694 Agg-Dangerous, F3D	Guilty	Jury
4/22 - 4/24	Schwartzstein / Ellig Schneider	Keppel	Kay	CR01-19194 Forgery, F4	Guilty	Jury
4/23	Smiley	Albrecht	Vingelli	CR01-18567 2 cts. Forgery, F4 Taking Identity of Another, F4	Guilty	Jury
4/25 - 4/26	Conlon/Willmott	Reinstein	Sherman	CR02-001292 Resisting Arrest, F6 Aggravated Assault, F5	Not Guilty	Jury
4/25 - 4/29	Blair King	McVey	Wright	CR01-18147 Trafficking in Stolen Property, F3	Not Guilty	Jury

APRIL 2002 JURY AND BENCH TRIALS

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
4/10-4/16	Sawyer	Schwartz	Shreve	CR01-018503 Ct.1& 2: Theft Means Trans., C3F Ct.3: PODD, C4F Ct.4: PODP, C6F Ct.5: Unlawful Flgt., C5F	Cts.1,2,3, 5: Guilty Ct.4: Not Guilty	Jury
4/10-4/12	Ramirez	Araneta	Sabah	CR02-000214 Ct.1: PODD, C4F Ct.2: PODP, C6F	Not Guilty	Jury
4/24-4/26	Tallan	Myers	Simpson	CR02-001420 Ct.1: Misconduct Inv. Weapons., C4 w/prior Ct.2: POM, C6F Ct.3: PODP, C6F	Cts.1 & 2: Not Guilty Ct.3: Guilty	Jury
4/22-4/24	Curry	Heilman	Knudsen	Ct.1: Resisting Arrest, C6F Ct.2: Hindering Pros., C5F	Not Guilty	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
4/9-4/10/02	Koestner	McVey	CR2001-0148989 Prohibited Poss. F4 Poss. Of MJ F6	Guilty	Jury
4/17-4/22/02	Schaffer	Oberbillig	CR2001-01378 Kidnap Agg Asslt, both dangerous	Guilty	Jury
4/23-4/29/02	Koestner	Paddish	CR2001-015966 Murder 1	Guilty of less than charged	Jury
4/24-5/2/02	Logan/Schaffer	Foreman	CR2001-008991 Murder 1 X 2 Manslaughter	Guilty	Jury

for The Defense

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