



# for *The Defense*

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

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## Take Control and Never Let Go

Opening Statements

**By Russ Born  
Training Director**

This outline is a guide constructed from bits and pieces of previous articles and pearls of wisdom passed on by other attorneys. We hope you will use it as a tool to feel more comfortable and self-confident during your opening statements.

### Mini-Openings

Furnishing the defense with an additional tool to ensure a fair and impartial jury, Rule 18.5(c) of the

Arizona Rules of Criminal Procedure, provide for mini-openings.

Typical opening statements are presented to the panel of jurors who will hear the case. They are persuasive, common sense presentations in story format, laden with positive facts and themes for the defense.

Mini-openings, however, are presented to the entire venire before voir dire. Thus, the purpose, benefits, and goals of presenting a mini-opening may be somewhat different from those

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## A Review of the 45th Legislature

**By Margarita Silva  
Legislative Liaison**

Overall, the second session of the 45 Legislature was a tiny victory for the Maricopa County Public Defender's Office – mainly because criminal justice-related legislation that passed wasn't as detrimental as it could have been. The September terrorist attacks

prompted a number of bills aimed at detecting, preventing and punishing terrorism. And, as always, the legislature continues to make existing punishments more severe and create new crimes without adding any resources in the criminal justice system. Given that climate, many in the criminal justice system breathed a sigh of

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usually associated with a typical opening statement. Providing the prospective jurors with a quick overview of the case and the defense theory is a common goal for both kinds of openings. But mini-openings provide an additional benefit by allowing the defense the opportunity to discuss distasteful, gruesome, or damaging facts without endorsing their value or importance. Presenting all the facts (good and bad) in mini-openings, forces the jurors to confront their feelings and beliefs before voir dire begins. It also allows the defense team time to observe the reactions of the prospective jurors to the evidence. Watching the reactions of the jurors helps the defense pinpoint those jurors who should be the focus of particularized voir dire. This strategy will not only provide insight into the juror's thoughts and feelings, but also allow counsel to refine voir dire and get more jurors excused for cause.

After the jury is picked, the defense shifts gears. Seizing the momentum from the state and never letting go, the defense presents a dynamic, persuasive, common sense opening in story format. The following are some observations and words of advice about openings.

### **Waiver**

Never, ever, ever, (well, hardly ever) reserve! *NEVER waive!* There are only a few situations where reserving the opening may be beneficial, but the decision to reserve should not be made lightly. Reserving means passing up an opportunity to change the momentum of the trial.

### **Seizing the Momentum**

Opening is the only time during trial when the prosecutor does not have an immediate opportunity to rebut what is said. It is the defense that gets the last word. Use this opportunity to shift the momentum of the case away from the prosecution's theory to

your theory of the case. Remember:

- Do not change your opening to answer points raised by the prosecution's opening.
- Do not promise what you can't deliver.
- Tell a story, lacing it throughout with your theory and themes.

## **METHODS OF PRESENTATION**

### **Storytelling**

Telling a story not only keeps the jurors interest but it keeps your creative juices flowing. Freeing up the mind and soul of the presenter, storytelling bolsters a favorable witness' credibility while undermining the credibility of another, helps the jury to decide who is the hero or who is the villain, and empowers the jurors to be the voice of reason, the "righter" of wrongs, the heroes. Storytelling makes all these things possible, and you are in control of the story. Slanting the story so the jurors believe your client is being treated unjustly arouses a sense of injustice in the jury. This makes them want to do the "right thing." If your "story" is reasonable and you can use some of the state's own witnesses to make it even more plausible, then you have already scored some points.

### **Perspective**

Storytelling allows the presenter to talk about the case from several different perspectives. Not only does this keep the jurors' interest but it can have the added benefit of making the presenter more credible in the eyes of the jury. After all, the defense attorney is not just considering what his client went through but also is concerned with what others were experiencing. Telling part of the story or the whole story from another person's perspective also lends credibility to the defendant's testimony or statements. It may go a long way in helping the jury understand how the

defendant ended up in court, what he was feeling or thinking at the time of the incident and why he did what he did.

### Personalize

Personalize your client. Talk about who he or she is and why they are there.

The opening statement is the sledgehammer that breaks the invisible barrier between the jury and your client! For instance, if your client has good presence, and there is something significant about his size, the way he walks or some other physical characteristic, have him stand up and walk over towards the jury as you introduce him during your story. Let the jury feel that presence.

*Example:* DUI with driver who has a bad leg, or scars from a back operation. It may be to your advantage to show the physical impairments to the jury during opening.

*Your client may be the best piece of demonstrative evidence you could ever have!* *State v. Gaines*, 188 Ariz 511, 937 P.2d 701 (1997).

### Theory & Themes

Themes essentially support the theory that you want the jury to embrace. Take, for example, a DUI impairment case. Lack of impairment is the ultimate theory. The themes may be vehicle problems, nervousness, physical disabilities, lack of sleep, mistrust of machines, the right to refuse a breath test, etc.

- Focus on the themes in opening.
- Build on the themes throughout the trial (cross & direct)
- Argue the theory and themes in closing.

### Theory of the Case & Jury Instructions

Whenever you have a specific, issue-driven

defense or an affirmative defense (e.g. self-defense, crime prevention, no knowledge of suspension), look at the jury instructions tailored for that specific defense. They often contain great language that should be incorporated into your opening. When the jurors hear that same language again during closing and see it again in the jury instructions, your theory is reinforced.

### Demonstrative Evidence

Before using real or other demonstrative evidence in opening, clear it first with the judge and opposing counsel.

- Physical Evidence
- Clothes
- Diagrams

<u>Specific Theory</u>	vs.	<u>General Theory</u>
Value		Reasonable Doubt
Self-defense & 13-411		Bad Investigation
Lesser Included		

If the evidence is important to your case, use it in the opening!

### PROBLEMS

#### Scope of Opening

The opening should be a story that outlines the issues, the evidence and the law. Do not be argumentative. To avoid objections that interrupt your flow, avoid using adjectives and adverbs that draw conclusions.

#### Objectionable Opening Argument:

The police did a slip-shod investigation. They did not care about his/her physical impairments. They wanted a DUI arrest. They purposefully and intentionally did not ask about the affects of his arthritis.

#### Effective Opening Statement:

John just stood there slowly shaking his head, wondering to himself, what kind of investigation is this? The police did not bother to ask him how his arthritis affected his knees. They did not want to take pictures of the scene. Pictures that would show the uneven street and graveled incline. They even failed to talk to the other witnesses in the car who would have told them about John's physical condition. When he politely asked them to check the play in the steering wheel, they laughed, saying they were not certified mechanics.

Remember, if a lawyer has a good faith, reasonable basis for believing certain evidence will be tendered or admitted, the lawyer may comment on that evidence in opening.

### **Objections**

If the judge sustains an objection during your opening, respond with a quick "the evidence will show that..." and continue on with your story telling. If the state is arguing during opening, stand up and object.

### **CANNIBALIZE THE STATE'S CASE**

#### **De-personalize the Prosecutor**

Unless there is a strategic reason to refer to the prosecutor during the trial, try not to. But if you have to refer to them do so as "the prosecutor," "the government" or "the state." Avoid using their name.

#### **Turning the State's Witnesses**

Often during a trial, the state's witnesses have to acknowledge facts that are favorable to the defense theory. Highlighting these facts to the jury during opening and telling them what favorable things the state's witnesses are going to provide steals the thunder from the state's case. It also shifts the jurors' focus away from the state's direct, building anticipation for your cross-examination. During cross-examination when the prosecution witness confirms what

you said during opening, you have gained credibility for yourself, your client, and your theory of the case.

### **Memorized Formal Opening**

The recent shift towards attorney conducted voir dire should lessen the need for any type of memorized or "pat" opening. However, if you need something to make you feel comfortable, to get you rolling, try a short memorized introductory paragraph. The pat opening is a good place to talk about the "power of the jury". Remind them that they are the first people to hear all the facts in this case. The first people to hear the whole story. The people with the power to set things right. Do not, however, say "Ladies and Gentlemen of the jury, what I say to you is not evidence. It is just an opportunity to tell you what I think the evidence will show . . . blah, blah, blah." Be creative!!!

### **Memorized Ending**

Paraphrasing an example from Gerry Spence, "At the end of the trial you may find that the only verdict you can reach is that 'you just don't know.' You don't have all the facts. The state hasn't done their job!" Knowing how you are going to finish your opening allows you to stray from the script and still end on a high note.

### **STYLE**

#### **Notes and Podium**

You should know your case and your theory well enough not to use notes!

Notes – None unless *extremely complicated*, then have headings only.

Podiums – If you have a choice don't use them. Podiums are barriers to good communication. If you are forced to use them, don't hide behind them, stand beside them. If the judge requires you to stand

behind them, then preach from them.

### **Be Yourself**

Use simple language. Do not yell and be argumentative. Make sure your opening does not offend the common sense of the jurors.

Be sincere.  
Be honest.  
Be brief.

### **Practice**

In front of a mirror, in front of your family or friends. The mirror is for expressions and gestures. Your friends and family are for content and comic relief.

### **Voice**

Do vocal exercises in the car, in your office etc. to warm up. To avoid “drymouth,” just before the state is done with their opening, discreetly eat a sweet tart and you won’t need a drink for the entire opening.

### **LAST BUT NOT LEAST, HAVE FUN!**



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relief that things weren’t worse.

Here is a rundown of some of the new laws, with special recognition for the “Weird“ and the “Scary.”

### **Animals**

Animal Cruelty: Adds four new acts to the category of cruelty to animals, two of which are class 6 felonies. They are: intentionally or knowingly allowing any dog that is under the person’s custody or control to interfere with, kill or cause physical injury to a service animal; and intentionally or knowingly obtaining or exerting unauthorized control over a service animal with the intent to deprive the service animal’s handler of the service animal.

Livestock Disease Crime: It is a class 2 felony to knowingly introduce into the state a disease or parasite of animals or poultry if human life is threatened, a class 4 felony if human health is threatened and a class 5 felony if the livestock or poultry industry is threatened. Government and educational institutions are exempt.

### **Drugs**

Controlled Substances: It is a class 4 felony to provide a false prescription for a controlled substance or to obtain a controlled substance by forgery, fraud, deception or subterfuge. “Dichloralphenazone” is added to the Schedule IV list.

DNA Testing an Database: Beginning on January 1, 2003, those convicted of drug offenses will be required to submit to DNA testing; beginning on January 1, 2004, ALL felons will be required to submit to DNA testing. If the conviction is overturned in certain cases, the person’s DNA may be expunged from the database.

Proposition 200: The legislature came up with a number of proposed revisions to Prop 200. It

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will be up to Arizona voters in the next general election to decide whether these proposed changes become law. The proposals include whether to amend Proposition 200 to allow a person who has been sentenced under Prop 200 to be incarcerated in jail or prison if the person has violated probation by committing another drug offense or an act in violation of a court order relating to drug treatment.

In addition, under the proposed amendments, if a person has been sentenced under Prop 200 and the court, upon application by the state, finds that the defendant has failed or refused to participate in drug treatment, the defendant is no longer eligible for probation under Prop 200. Further, a person would not be eligible for Prop 200 upon a third conviction for drug possession or paraphernalia, if the person has refused drug treatment as a term of probation or the person has rejected probation.

### **Miscellaneous**

Credit Card Scanning: It is a class 6 felony to use a scanning device or re-encoder that transfers information from one credit card magnetic strip to another with the intent to defraud and without the permission of the authorized user.

Crime Prevention, Privacy: The National Crime Prevention and Privacy Compact is ratified to allow DPS to release criminal history information to other states and the federal government for non-criminal justice uses, such as crime prevention, employment, licensing, immigration and national security clearances.

Homeland Security: Changes are made to statutes on banking, organized crime, fraud and terrorism. Defines terrorism. Adds new crimes and modifies existing crimes related to terrorism, hoaxes, money laundering, wire

tapping and misconduct involving weapons. There is no statute of limitations for terrorism and lifetime probation may be imposed.

Identity Theft: The current statute is modified to hold a person liable for identity theft regardless of whether the victim actually suffers any economic loss as a result of the crime.

Juvenile Detention: The county courts are now empowered to inquire into the ability of a parent to pay for the child's detention, including food, clothing, shelter and supervision and to make it collectable as a civil judgement. Foster parents and group homes are exempt.

Unauthorized Practice of Immigration Law: It is a class 6 felony to engage in the unauthorized practice of immigration law. There are certain exemptions for law students and graduates and family members.

### **Sentencing**

85% Time: Allows prisoners to earn good time credits upon actual incarceration (county jail) for the offense, as opposed to earning the credits only upon actually entering DOC. This provision was meant to be retroactive and save the state money by releasing several hundred inmates early. However, a subsequent opinion by the attorney general informed the Legislature that it could not be retroactive.

Sentencing Commission: A 27-member commission (including defense attorneys, mandatory!) will study the current sentencing structure, including related laws, policies and practices.

### **Sex Crimes**

Crimes, Sexual and Violent: The Arizona voters will decide in the next general election whether to amend the constitution. The issue deals with the denial of bail to those accused

of sexual assault, sexual conduct of a minor under 15 and molestation of a child under 15, if the proof is evident or the presumption great. The alleged victim's view must be considered by the judge in determining release conditions. Defendants accused of all other sexual offenses must be electronically monitored and be prohibited from contact with the alleged victim. A sex offender probation study committee is established to evaluate the effectiveness of sex offender probation.

Sexual Disease, Blood Borne: In addition to the HIV testing currently required, your client accused of a sexual offense must now also be tested for sexual diseases like syphilis, herpes and gonorrhea.

### **Vehicular**

Driver's licenses, Hit and Run: In a hit and run incident, a court may impose consecutive sentences for other violations related to the same accident. Suspension of the driver's license will be imposed for one year if property damage occurred, 3 years for non-serious physical injury and 5 years for serious injury or death.

Racing on Highways: Drag racing is now a class 1 misdemeanor and a minimum \$250 fine. A second conviction within 2 years will be a class 6 felony and a \$500 minimum fine.  
Watercraft; Extreme DUI: Mirrors the extreme DUI provision for vehicles.

### **Scary New Law**

Postal Inspector as Officer: Allows the U.S. Postal Inspector to cross-certify employees as federal peace officers, giving them the right to exercise all state law enforcement powers for one year. These "officers" must first go through training and pass Arizona peace officer standards and boards to be certified.

### **Weird New Law**

Safe Schools Act: The criminal act of disrupting school operations must be intentional and the definition of interference is expanded to include any act that might lead to evacuation, even if there is no evacuation. Dry ice is a prohibited weapon at school if used to generate gas to cause a mechanical failure, rupture or bursting of a container. *Don't you feel safer knowing that dry ice is not in your child's school?*

Liquor Age Restriction: It is a class 2 misdemeanor for people under 21 to have any spirituous liquor in their body, unless it was consumed as part of a religious practice or exercise, for bona fide medicinal purposes and in a manner not dangerous to public health. This was enacted to catch minors who legally consume alcohol while in Mexico, and then enter the U.S. with legally consumed alcohol in their systems.



## Stipulate? No Thanks.

A Lesson Well Learned

**By Theron Hall**  
**Private Attorney**

Fortune recently smiled upon my client when a judge granted a motion for a directed verdict. Obtaining a directed verdict in a misconduct with weapons case does not occur very often. But, in this particular case, fortune would have passed us by if I had taken the easier route and given in to the pressure to move things along. I learned a very valuable lesson—do not stipulate to anything unless you get something worthwhile in return.

### **The Burden**

The county attorney had to prove that my client was a prohibited possessor. They were alleging two prior felony convictions from 1994 for possession of dangerous drugs, and that my client had failed to restore his civil rights. Even though the alleged convictions could not be used as historical priors pursuant to A.R.S. 13-604, they were relevant for the purpose of Rule 609 and whether or not my client was a prohibited possessor. Before trial started, I informed the court that the state had failed to provide certified copies of the alleged prior convictions.

I also argued that my client was not a prohibited possessor since the two alleged convictions would now fall under Proposition 200; therefore, they should not be labeled as felony convictions for the purpose of making my client a prohibited possessor. The Proposition 200 argument was quickly dismissed by the court, although that issue may still be a good subject for a future article. The court then denied my request to hold a hearing on the alleged priors before trial began.

### **The Beginning of the End**

So over my objection, trial began. But as it turned out, that ruling ended up benefiting my client. The state's first witness testified and then the jury was excused. At that time, the county attorney showed me the original Superior Court files for the alleged prior felony convictions. The files had been retrieved from the Clerk of the Court. The county attorney then announced that a fingerprint technician would be called to compare my client's thumbprints to the thumbprints in the court files. Interestingly, the county attorney had failed to obtain certified copies of any documents to prove the alleged convictions.

I quickly reviewed the court files and noted that they contained all the usual information and documentation, such as thumbprints attached to the sentencing minute entries, pre-sentence reports, plea agreements, etc. I also noted that the files contained my client's birth date, name, address and other personal information. Everything in the files seemed to suggest that it was indeed my client who had been convicted of those crimes.

At that point, I seriously thought about stipulating to the convictions. I reasoned that a stipulation would save time and not be detrimental to our defense: that my client did not know someone else had left a gun in his truck. But, for some reason, I had a gut feeling that I should not stipulate. After all, our job is not to make the state's burden lighter or speed things up for the convenience of the court.

### **Listen to Your Gut and Intuition**

Because of that nagging feeling I called my supervisor and explained the situation. Fortunately, my supervisor gave me excellent advice—don't stipulate to anything, unless you gain an advantage.

I immediately recognized the wisdom of her words. I promptly announced that we would not stipulate to the alleged convictions. Something amazing then happened. The fingerprint technician rolled my client's prints and began the comparison. A few minutes later, the technician informed us that he could not positively identify my client as the same person whose thumb prints were in the court files.

Needless to say, the county attorney got a little nervous and a supervisor from their office soon appeared. After a while, the county attorney handed me one of the court files and showed me what appeared to be a photocopy of a disposition report. The other file did not have any such document. Ironically, the fingerprints on this alleged photocopy of the disposition report matched my client's fingerprints. The state was immediately convinced that they could use the photocopy to prove the alleged conviction.

When the judge returned to the courtroom, I promptly objected to the use of the photocopy. After argument from both sides, the court let the jury go home and took the issue under advisement. I requested additional argument for the next day, so I would have time to research the issue. I made a photocopy of the document and began my research.

### **The Law**

Upon returning to my office, I analyzed the alleged disposition report, which led me to the Arizona Rules of Criminal Procedure, Rule 37.1. I learned that Rule 37.1 mandates the original disposition report be sent to the Department of Public Safety, after the final disposition. I also carefully reviewed the

Arizona Rules of Evidence, Rule 902 dealing with authentication and Rule 1005 dealing with certified copies.

### **A New Dawning**

The next morning during oral argument, I focused on the Rules of Evidence. I explained that, pursuant to Rule 37.1, the original disposition report most likely had been sent to DPS and that the State did nothing to show they exercised any due diligence to obtain the original. I referred to Rule 902 noting that the alleged photocopy of the disposition report was not a self-authenticating document. I also referred to Rule 1005 noting that the alleged photocopy was not a certified copy. I pointed out that the state had not produced any evidence showing that the photocopy was indeed a true and correct copy of the original.

Arguing for the photocopy's admission, the county attorney was adamant that the photocopy met all the proper evidentiary requirements. The county attorney was convinced that the photocopy, by virtue of being found in the court file, did not need to be certified or authenticated, nor was it necessary to produce evidence that it was a correct copy of the original. Needless to say, the county attorney was not pleased by the court's decision to preclude the alleged photocopy of the disposition report. Furthermore, the state was not prepared to offer any other evidence to prove the alleged convictions. I quickly moved for a directed verdict, which was granted.

### **Conclusion**

Stipulating to the alleged convictions would have been a huge mistake. There will always be pressure from the courts to speed cases along and pressure from county attorneys claiming you are "uncooperative and wasting time". Had I stipulated, there would not have been a directed verdict and no advantage would have been gained. Worse, in fact, I

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would have harmed my client. In the future, I will be very wary when considering a stipulation.



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## ARIZONA ADVANCE REPORTS

By Terry Adams

Defender Attorney – Appeals



### **Blake v. Schwartz** **367 Ariz. Adv. Rep. 23 (CA 1, 2/21/02)**

This is an amended opinion that replaces 366 Ariz. Adv. Rep. 10. The defendant was found guilty, except insane of murder. She poured gasoline over her children and herself and ignited it resulting in the death of two of her children. The trial court placed her under the jurisdiction of the Psychiatric Security Review Board (PSRB) pursuant to A.R.S. 13-3994(D) for the duration of her natural life. This appeal addresses the constitutionality of that statute. The issue being whether the statute allows for a release hearing within 120 days of the defendant's initial commitment. The courts have previously held that a mandatory commitment period without the possibility of a release hearing is unconstitutional, the reasoning being that treatment and confinement are not required when a person no longer suffers from a mental disease. Here the court found that the statute provides that the medical director of the facility may request a hearing. Even though the defendant may not request a hearing the

statute is nevertheless constitutional. The court also held that the director has the duty not to abuse his or her discretion in requesting a hearing.

### **Romley v. Schneider** **367 Ariz. Adv. Rep 28(CA 1, 2/12/02)**

The public defenders office was appointed to represent a defendant in an aggravated assault matter. Thinking that the victim may have been a former client the deputy PD moved to withdraw. The victim had the same name as the former client, but there was some question as to whether or not they were the same person. Upon request the court ordered that the victim be fingerprinted. The State took this special action alleging that the order violated the Victim's Bill of Rights. The court found that it did, holding that when a potential conflict cannot be resolved defense counsel's option is not to have a victim fingerprinted, but to consider whether to withdraw. The trial court must then rule on the motion based upon permissible evidence and applicable law. (This is an amended

opinion replacing 366 Ariz. Adv. Rep.15).

**Ryan, In re,  
367 Ariz. Adv. Rep. 5 (CA 1, 2/12/02)**

The defendant was charged with threatening or intimidating in violation of A.R.S. 13-1202 (A)(1). He yelled an obscene death threat while driving by the victim's home. The victim did not hear the threat but his mother did and relayed it to him. The victim was not personally scared nor did he feel threatened. On appeal the question is can one be guilty of the offense when the intended victim did not feel threatened? The court found that there must be a "true threat" however the wording of the statute does not require that the victim feel threatened, therefore the conviction stands. The court also found that both parents of the victim were entitled to restitution for lost wages while attending court hearings.

**State v. Canez  
367 Ariz. Adv. Rep. 37 (CA 1, 2/12/02)**

This is a capital case that addresses many issues. The pertinent ones are as follows. The prosecutor's striking five of the seven Hispanic members of the jury pool did not violate Batson because the prosecutor was able to give race- neutral reasons. The court talks of the effect *Purkett v. Elm* has upon *State v. Cruz*, and although not overruling *Cruz* states: "*Cruz* appears not to have survived *Purkett*." The court found that the defendant was illegally arrested inside his home without a warrant. However found that the statements he made at the police station were not fruits of the poisonous tree. The reasoning was that the state did not obtain incriminating evidence as a result of the arrest being effected illegally in his home rather than legally elsewhere. The court also affirmed the trial court's findings regarding the death sentence.

**Haas v. Colosi (State of Arizona)**

**368 Ariz. Adv. Rep. 8 (CA 1, 2/28/02)**

The Court of Appeals held the superior court may appoint the Maricopa County Public Defender's Office to represent indigent juveniles charged with incorrigibility offenses, even though the offenses cannot result in detention.



## State v. Blackman, 365 Ariz. Adv. Rep. 11 (CA 1, 1/17/02)

### By Stephen Collins Defender Attorney – Appeals

Blackman was convicted of kidnapping and sexually assaulting a fifteen-year old girl with mild to moderate mental retardation. He stated that the sex was consensual. During jury selection, a jury panelist said he was aware of conditions in prison and therefore, he would be “looking for ways to keep the defendant out of prison.” When asked if he would follow the law, the panelist said, “I would be prejudiced in my decisions to follow the law, but I would follow the law.” The trial judge excused the panelist for cause.

On appeal, Blackman argued that the panelist’s statements were merely a layperson’s expression of the presumption of innocence. The Court of Appeals held that, “on this record, we cannot conclude that the trial court clearly abused its discretion in determining that there were reasonable grounds for believing that the panelist could not render a fair and impartial verdict.”

Another jury panelist said he did not believe a mentally retarded girl “could *necessarily* appreciate the consequences of sex and therefore give valid consent to it.” The trial judge refused to strike this panelist for cause. The Court of Appeals found this was an “equivocal” statement and although it was “a close call,” the trial judge did not clearly abuse his discretion.

The Court of Appeals emphasized that, “the burden rests on a party seeking to exclude a potential juror to elicit information demonstrating the juror’s unsuitability.” “It is not the trial judge’s responsibility to conduct defense counsel’s case by devising and asking follow-up questions in an attempt to demonstrate that the panelist had determined the ultimate issue.”

Blackman was tried along with co-defendant Darrion Hartley. The prosecution presented testimony that Hartley had made statements that he and others had forcible sex with the girl. Blackman argued that there should have been severance pursuant to *Bruton v. United States*. There it was held that a defendant is deprived of his Sixth Amendment right to cross-examine witnesses when a non-testifying co-defendant’s

confession incriminating the defendant is admitted at their joint trial, even if the trial court properly instructs the jury to consider the confession as evidence only against the confessing co-defendant.

At trial, Blackman conceded that he was present and participated in the sex acts, but claimed the acts were consensual. The Court of Appeals found the co-defendant’s statements as to forcible sex did not necessarily incriminate Blackman and that the jury was presumed to follow the limiting instruction that the incriminating statements did not apply to Blackman.

In closing argument, the prosecutor told the jury that this was the most important case he had tried and “I can almost assure you” that the verdict will “affect the very fabric of society more than anything you will do for the rest of your lives.” Blackman argued this was impermissible vouching. The Court of Appeals found that, at most, the statements might be “viewed as obliquely placing the prestige of the government behind the case,” but “these unnecessary and irrelevant comments did not deny Defendant a fair trial.”

Judge Fidel dissented on the *Bruton* issue, finding that the co-defendant’s statements “necessarily” incriminated Blackman. Judge Fidel found that the limiting instruction could not cure the problem because, as stated in *Bruton*, “The naïve assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.”



**MAY 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
5/15 – 5/15	<b>Shaler</b>	Kaufman	Sherman	CR01-015298 PODD, C4F PODP, C6F	Guilty	Jury
5/13 – 5/15	<b>Shaler</b>	Hilliard	Kelemen	CR01-014352 Unlawful Use of Transportation, C6F	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
5/6–5/8	<b>Koestner</b>	McClennen	CR02-001959 2 cts. Agg. Assault— F2DCAC Agg. Assault— F3D	Guilty 3 counts Disorderly Conduct--- class 6 dangerous felonies	Jury
5/13	<b>Schaffer</b>	McVey	CR01-019174 Agg. Asslt. Dangerous Criminal damage, M2	Mistrial	Jury
5/15-5/16	<b>Schaffer</b>	McVey	CR01-019174 Agg. Asslt. Dangerous Criminal damage, M2	Guilty	Jury
5/14-5/16	<b>Buck</b>	Paddish	CR02-002672 Agg. Asslt., Dangerous	Guilty	Jury
5/16-5/24	<b>Gray</b> Cano/Stovall	Gallagher	CR01-00917 Child Abuse –F3DCAC Child Abuse – F4	Guilty of lesser	Jury

**MAY 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
4/9 - 4/10	<b>Buckallew</b> <i>Moncada</i>	Oberbillig	Schultz	CR 01-90799 2 cts. POND F/S, F2N PODD F/S, F2N 2 cts. MIW, F4N	Guilty 2 cts. POND F/S; Guilty, PODD F/S; Dismissed w/o prejudice day of trial: 2 cts. MIW	Jury
4/28 - 5/6	<b>Farrell</b>	Budoff	Toftoy	CR01-09116 Armed Robbery, F2 Agg. Assault w/Deadly Weapon, F3	Hung Jury (9 Not Guilty, 3 Guilty)	Jury
4/30 - 5/1	<b>Cain</b>	Hotham	Eliason	CR02-00788 POND F/S, F2 PODP, F6	Guilty	Jury
4/30 - 5/1	<b>Lanterman / Green</b>	Santana	Kever	CR02-01244 Agg. Assault, F6 Disorderly Conduct, M1 Armed Robbery, F2 Agg. Assault, F3 Burglary, F2	Guilty	Jury
5/1 - 5/2	<b>Force</b>	Gerst	A. Musto	CR 01-007490 PODD/PODP	Guilty	Jury
5/1 - 5/6	<b>Reece</b>	Galati	Beougher	CR02-01518 TOMOT, F3	Guilty	Jury
5/1 - 5/6	<b>Lopez</b>	Granville	Kay	CR01-17463 Agg. Aslt. w/Deadly Weapon, F3 Attmpt. Kidnap., F3	Guilty on Agg. Aslt., Guilty Lesser of Attempted Unlawful Imprisonment Dang.	Jury
5/2 - 5/3	<b>Knowles</b>	Jarrett	Baker	CR01-97891 Resisting Arrest, F6N	Verdict 5/22/02 - Guilty of lesser included Resisting Arrest, M1N	Bench
5/2 - 5/7	<b>Flynn</b> <i>Souther</i>	Granville	Vingelli	CR02-02144 POND F/S, F2	Guilty	Jury
5/5 - 5/17	<b>Woodfork</b>	Wilkinson	Vieau	CR02-02361 SOND, F2	Not Guilty	Jury
5/6 - 5/8	<b>Castillo</b> <i>Seaberry</i> <i>Curtis</i>	Foreman	Larish	CR02-000687 Attmpt. Homicide, F2	Guilty	Jury
5/6 - 5/9	<b>Duncan</b> <i>Robinson</i> <i>Spears</i>	Araneta	Clarke	CR02-00464 Agg. Aslt. on a Police Officer, F2	Not Guilty of Agg. Aslt. Guilty of lesser included Disorderly Conduct	Jury
5/7	<b>Fimbres / Varcoe</b>	Martin	Koplow	CR01-019036 Agg. DUI, Lq/Drg/Tox Sub, F4	Guilty of lesser / fewer	Jury
5/7	<b>Primack</b>	Budoff	Kalish	CR02-00394 TOMOT, F3 Failure to Return Rental Prop.; F6	Guilty TOMOT; Not Guilty Failure to Return Rental Prop.	Jury
5/7 - 5/8	<b>Dennis</b>	Willrich	Krabbe	CR01-97384 Disorderly Conduct, F6N	Guilty	Bench
5/7 - 5/8	<b>Javid</b> <i>Fusselman</i> <i>Curtis</i>	Hotham	Corcoran	CR01-17255 MIW, F4	Not Guilty	Jury

**MAY 2002**  
**JURY AND BENCH TRIALS**

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5/7 - 5/8	<b>Hall</b> Brazinskas <i>Francis</i>	Reinstein, P.	Washington	CR02-00045 MIW, F4	Not Guilty - Directed Verdict	Jury
5/7 - 5/9	<b>Fox</b> Kresicki <i>Southern</i>	Akers	Warshaw	CR02-90867 4 cts. Agg. DUI, F4N	Guilty on all counts	Jury
5/7 - 5/9	<b>Meshel</b>	Jarrett	S. Fuller	CR02-002091 Agg. DUI w/priors (4)	Not Guilty	Jury
5/7 - 5/10	<b>Schreck</b> <i>Curtis</i>	Hilliard	Charbel	CR01-19019 3 cts. Burg., F4 w/priors	Not Guilty on 2 cts, Guilty on 1 ct	Jury
5/8 - 5/9	<b>Antonson</b> Arvanitas	Willrich	Alegre	CR01-97698 Fail to Register as Sex Offender, F4N	(Tried in Absentia) Guilty	Jury
5/8 - 5/9	<b>Cutrer</b>	Gaylord	Thompson	CR02-90445 PODD, F4D POND, F6N	Not Guilty	Jury
5/9 - 5/13	<b>Tavassoli</b>	Budoff	Vingelli	CR02-01307 Agg. Assault, F6	Guilty	Jury
5/12 - 5/14	<b>Gaxiola</b> <i>Spears</i>	Gerst	Clarke	CR02-01381 Agg. Assault, F3D MIW, F4	Guilty	Jury
5/13 - 5/14	<b>Conlon / Washington</b>	Buttrick	Loefgren	CR01-14109 TOMOT, F3	Guilty	Jury
5/14	<b>Walton</b>	Araneta	Baca	CR02-00558 PODD, F4 PODP, F6	Guilty of PODP Dismissed PODD	Bench
5/14 - 5/16	<b>Lopez</b> Reilly / Gotsch	Budoff	Wisdom	CR01-16663 2 cts. Sexual Cndct. w/Mnr, F2 Kidnapping, F2	Hung (10-2 N.G.) Sexual Cndct. w/ Mnr.; Guilty Sexual Cndct. w/Mnr.; Not Guilty Kidnapping	Jury
5/15 - 5/16	<b>Corbitt</b>	Keppel	Gordwin	CR01-96082 Agg. Assault, F3N	Not Guilty	Jury
5/15 - 5/16	<b>Silva</b>	Martin	Steinberg	CR01-015121 Forgery, F4	Guilty	Jury
5/16 - 5/21	<b>Terpstra</b> Elzy <i>Francis</i>	Schneider	Sherman	CR01-018032(A) TOMOT, F3 Fraud Use of Credit Card, F5 Theft, M1	Guilty	Jury
5/20 - 5/21	<b>Castillo</b> Fusselman <i>Curtis</i>	Hilliard	Charbel	CR02-002446 Forgery, F4	Guilty	Jury
5/20 - 5/23	<b>Lopez</b>	Schwartz	Lindquist	CR01-13197 Flt. Frm. Purs. Law Veh., F5 2 cts. Endangerment, F6	Guilty	Jury
5/21 - 5/22	<b>Valverde</b>	Schneider	Sherman	CR02-00929 Forgery, F4	Guilty	Jury
5/21 - 5/22	<b>Lanterman / Carrion</b>	Gottsfeld	Musto	CR01-17922 Agg. DUI x 2	Guilty	Jury
5/21 - 5/22	<b>Flynn</b>	O'Toole	Kalish	CR01-11361 Agg. Assault, F3D	Guilty but insane Agg. Asslt. F4	Bench

MAY 2002  
JURY AND BENCH TRIALS

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5/21 - 5/23	<b>Walker</b> Souther	Budoff	Agra	CR01-03576 TOMOT, F3 POM, F6 PODP, F6	Not Guilty TOMOT; Guilty POM and PODP	Jury
5/22 - 5/23	<b>Rock</b> Ames	Araneta	Simpson	CR02-02245 Theft, F3	Guilty of lesser F5 Unlawful Use (W/2 priors while on probation)	Jury
5/22 - 5/28	<b>Schmich</b> Gavin	Keppel	Cutler	CR02-90793 Disorderly Conduct, F6N Agg Assault, F3N	Guilty	Jury
5/23 - 5/30	<b>Whelihan</b>	Wilkinson	Sorrentino	CR01-10387 3 Cts. Child Molest, F2 Kidnap, F2 Attempt Sex. Conduct w/ Minor, F3 Child Prostitution, F2 All DCAC	Guilty Child Molest and Child Prostitution; Not Guilty Kidnap and Att. Sex. Cndct w/ Mnr	Jury
5/28 - 5/29	<b>Valverde</b>	Reinstein, P.	Lemke	CR01-19152 Leaving Scene Injury Accident, F4 Unlawful Use Means Transport., F5	Guilty	Bench
5/28 - 5/29	<b>Tavassoli</b>	Martin	Knudsen	CR02-02997 2 cts. Cruelty to Animals, F6	Guilty of lesser (M1)	Jury
5/28 - 5/30	<b>Fimbres / Green</b> Bradley / O'Farrell	Galati	Weinberg	CR02-002807 Forgery, F4 Poss. Forg. Dev., F2	Guilty Forgery, Rule 20; Not Guilty Poss. Forg. Dev.	Jury
5/29 - 6/5	<b>Healy</b>	Budoff	L. White	CR02-002222 Manslaughter	Guilty	Jury
5/30	<b>Clemency</b>	Foreman	Charbel	CR02-000404 Criminal Damage, F5	Guilty of lesser, F6	Bench

*for The Defense*

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