



for *The Defense*

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

Matlock's Back: Third Party Defense Revisited

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By Ken Huls Trial Group D Supervisor

If your bar card has a five-digit number on it, you probably grew up watching quite a bit of *Matlock*. If it has four digits, you watched a lot of *Perry Mason*. Either way, before you actually began practicing law, you figured you knew what defense attorneys did. Those television heroes did not attempt to obtain acquittals for their clients by employing trilogies, "one-word cross," and carefully measured reasonable doubt arguments. No, their trials

never even went to verdict. The charges were dismissed after they revealed the true killer. The guilty third party invariably proved to be a state's witness or a member of the victim's family who was forced to admit his guilt on the stand or was identified as the real killer while he sat in the gallery. *That's* what you figured defense attorneys did, and that's what all of us would love to do if it were only possible.

Then you became a defense attorney and soon discovered

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Please Don't Give Up On *Batson*

By Carol Carrigan Defender Attorney – Appeals

In the January 2002 issue of *for The Defense*, Ed McGee discussed the discouraging progression of cases limiting the relief that our clients can obtain under *Batson v. Kentucky*¹. While I share Ed's concerns, I

urge all defense attorneys not to give up on *Batson*, which still survives as to its second focus: the rights of minority citizens to participate in the justice system.

We often forget that there are two focuses in *Batson*. The first is the defendant's right to be tried by a jury whose members are

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for The Defense

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that not only was *Matlock* taken off the air by the major networks, but the Arizona Supreme Court had made it almost impossible to present a defense of that nature. Well, good news, folks. With their decision in *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002), the Arizona Supreme Court just put Ben and Perry back in business! You, too, can once again go after the real criminal by presenting a third-party defense.

THE THIRD-PARTY DEFENSE

The concept of the third-party defense, often referred to as the “SODDI” (Some Other Dude Did It) defense, is simple and intuitive. One seeks to demonstrate reasonable doubt by presenting evidence that some other person committed the crime. And what could possibly be more important and relevant than evidence of that nature? Of course, nothing. Yet, through a series of decisions, the Arizona Supreme Court built nearly insurmountable barriers to the presentation of this powerful evidence.

The history and status of this defense was thoroughly discussed in these pages just a year ago. Jim Kemper, “The Third-Party Defense,” *for The Defense*, June 2001, vol. 11, iss. 6, p. 1. Mr. Kemper explained that the courts had distinguished two categories of third-party defenses: incriminating statements or confessions by a third party, and all other evidence of third-party culpability. A separate rule governed the admissibility of each type of evidence.

THE “INHERENT TENDENCY” RULE

Before *Gibson*, the admissibility of evidence (other than a confession) that someone else committed the crime was controlled by the so-called “inherent tendency” rule. This rule was clearly articulated by the state

supreme court in *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988).

Mr. Fulminante was on trial for the shooting death of a child. He sought to introduce evidence that the neighbor of the victim drove a motorcycle, owned a .357 revolver, had attempted to kill a police officer, and was suspected of committing crimes against children. *Id.*, 161 Ariz. at 252, 778 P.2d at 617. The trial court excluded the evidence. The state supreme court affirmed that order, and made clear the following:

Before a defendant may introduce evidence that another person may have committed the crime, the defendant must show that the evidence has an *inherent tendency* to connect such other person with the actual commission of the crime. Vague grounds of suspicion are not sufficient. *Id.* (emphasis added).

Thus, the so-called “inherent tendency” rule was solidified as the test for determining the admissibility of most third-party defense evidence. This test was interpreted to be a higher standard of admissibility and motions to present such evidence were routinely denied by the trial courts. As one might expect, the trial court’s discretion in this determination was rarely, if ever, disturbed on appeal.

In the wake of *Fulminante*, it seemed the third-party defense was essentially dead. Yet, as a practical matter, we informally but routinely argued what amounted to a third-party defense at trial. Who has not had a client charged with possessing drugs or a gun where the contraband was found in a car, which at the time of the arrest also contained another person in addition to your client? You argued that the contraband was the other person’s, didn’t you? Of course you did! Now maybe on

your facts your defense would have passed the “inherent tendency” test and maybe it would not have; but no one even questioned your ability to argue this. The fact that they did not question it demonstrates the point: the “inherent tendency” test was illogical, unfair, and counterintuitive. It had to be changed and now it has.

RELEVANCY REIGNS SUPREME

Despite the unambiguous language of *Fulminante*, the Arizona Supreme Court recently declared in *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002), that there *never was* an “inherent tendency” test or rule to begin with! In discussing the issue, the supreme court explained:

The court of appeals used an “inherent tendency” test, which it apparently took from our decision in *State v. Fulminante*. *Id.*, 202 Ariz. at 323, 44 P.3d at 1003.

The court then quotes *Fulminante*, including their words that “the defendant must show that the evidence has an inherent tendency to connect such other person with the actual commission of the crime.” The court clarified that “[w]e do not find, and this court did not intend, a special standard or test of admissibility to be gleaned from *Fulminante*.” *Id.* The proper rule follows: “We hold that Rules 401, 402, and 403, Arizona Rules of Evidence, set forth the proper test for determining the admissibility of third-party culpability evidence. This test must be applied anew to the facts in each case.” *Id.*, 202 Ariz. at 324, 44 P.3d at 1004. The court notes that these rules were *not* referenced in the *Fulminante* opinion.

Rules 401, 402, and 403 are familiar to us all. Rule 401 states: “Relevant evidence’

means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In turn, “[a]ll relevant evidence is admissible Evidence which is not relevant is not admissible.” Rule 402. Rule 403 then advises, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Regarding the application of Rules 401 and 402, the court explains “[t]he proper focus in determining relevancy is the effect the evidence has upon the *defendant’s* culpability. To be relevant, the evidence need only *tend* to create a reasonable doubt as to the defendant’s guilt.” *Gibson*, 202 Ariz. at 324, 44 P.3d at 1004 (emphasis in original). This is important language and clarifies that the defense does not have a burden of proof in establishing the guilt of the third party as a condition to the admissibility of the evidence. The emphasis is on the *reasonable doubt* that the evidence *tends* to create as to your client’s guilt. In fact, the court specifically frowned upon the use of the phrase, “inherent tendency,” and commented that the (old) “rule” forced the defense to prove the culpability of the third party. *Id.* Given that language, it is clear that the “new” “*Gibson*/relevancy” test is not to be interpreted as strictly by the trial court as the old, so-called “inherent tendency” standard.

The court then highlighted the probative value and significance of third-party evidence, and effectively cautioned the trial courts to be careful before excluding it under Rule 403. It is clear that the court is sending a strong message to the trial

judges, and that message is that the jury is generally entitled to hear this kind of evidence.

CONFESSION EVIDENCE

Is the *Gibson*/relevancy rule the last word on admissibility of all types of third-party defense evidence? It should be, and that should be your position.

However, you will recall that Jim Kemper's article on this subject clarified that there were two categories of third-party defense evidence. The remaining category involves incriminating statements or confessions made by the third party. You know, where the word on the street is that some other dude did it, and that is because the other dude has been bragging about it. Obviously, this is powerful evidence and you want to get it to the jury if you have it.

Rule 804(b)(3) of the Arizona Rules of Evidence used to govern the admissibility of these out of court statements, and it is a demanding standard. Some prosecutors might argue that this remains the standard for the admissibility of such statements despite *Gibson*, so beware. Under Rule 804(b)(3), subtitled "Statement against interest," the party offering the statement must first establish that the third party who made the statement is unavailable as a witness. Second, it must be established that the statement strongly tended to subject the third party to criminal liability. Third, the rule required "corroborating circumstances" that "clearly indicate the trustworthiness of the statement." Oh, boy. That last one makes it sound like we are back in "inherent tendency" land!

But that should not be the state of the law. *Gibson* is the most recent word on the subject, and the court unequivocally held that Rules 401, 402, 403 "set forth the

proper test for determining the admissibility of third-party culpability evidence." *Id.*, 202 Ariz. at 324, 44 P.3d at 1004. Note the court did *not* say that this only applied to third-party defense evidence *other than incriminating statements or confessions*. No distinction was made. Additionally, it would be an absurd result for the court to have intended a higher standard for the admissibility of *confessions* by a third party than for other types of evidence. After all, the concerns governing the admissibility of a defendant's confession do not apply since the third party is not on trial and the focus is on the effect the statements have on the reasonable doubt as to the defendant's guilt. Finally, some of the evidence that the defense sought to introduce in *Gibson* was in the form of incriminating statements made by third parties (both knew substantial information about the crime scene which had not been made public). The court made no attempt to differentiate this evidence from the rest of the evidence either in its discussion or holding. Clearly, the court intends for Rules 401, 402, and 403 to govern the admissibility of all third-party defense evidence, and hopefully the trial courts will recognize this without further litigation.

CONCLUSION

The *Gibson* opinion is already impacting our cases and our clients' lives. Recently, one of our colleagues, Marie Farney, obtained an acquittal that she attributes to the presentation of a third-party defense. In another case, Defender Attorney Robyn Varcoe persuaded the state to dismiss a stabbing case after they conducted the third-party defense interviews. This would not have been possible before the court's opinion in *Gibson*. So, get out your template for noticing your defenses pursuant to 15.2(b) and add the third-party defense to your list. Messrs. Matlock and

Mason would be proud.

Finally, congratulations are in order to Chuck Krull, the Defender Attorney who ably represented Mr. Gibson on appeal. Also, my thanks are offered to Jim Kemper, whose previous article provided the basis for much of this piece.



Special points of interest: Research on Jurors with Previous Jury Experience

A poll assessing the effect of having previously served on a jury on prospective jurors has some results we should consider in our practice. The results could affect your jury selection.

- First-time jurors tend to reach conclusions and make judgments before all the evidence comes in; prior jurors, on the other hand, tend to be more fair the second time around and wait until all the facts are known before making up their minds.
- Prior jurors tend to be more neutral and less predisposed to one side or the other than first-time jurors.
- First-time jurors are more likely to believe that when a criminal defendant does not take the stand, he has something to hide; prior jurors are less likely to think that.
- Incidentally, jurors by a wide majority tend to respect the judges, but by a narrow minority, don't respect lawyers. Also, using exhibits helped jurors understand the case by a wide margin.

This information was reported in the *National Law Journal* in an article by David Rovella on 2/27/02.

selected pursuant to nondiscriminatory criteria. Defendants have had this right for over a hundred years.² Until *Batson* was decided, however, a defendant had to overcome what the Supreme Court, in *Swain v. Alabama*³, called the “presumption . . . that the prosecutor is using the State’s challenges to obtain a fair and impartial jury”⁴ *Batson*, *Powers*⁵ and *Hernandez*⁶ were hailed as equal protection victories for the defense. However, what followed was the predictable paring down of the defendants’ rights until the Supreme Court held, in *Purkett v. Elem*,⁷ that it did not really mean what it had said, that any old excuse would do. In short, *Batson* is now in danger of extinction.

How can this significant recognition of defendants’ rights be revived? Perhaps we have not given enough attention to the second focus of *Batson*: the rights of members of the venire to participate in the judicial process. As stated by the court in *Batson*:

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.⁸ (Citations omitted.)

Arizona has its own *Batson*-type decisions in both *Gardner P* and *Gardner II*.¹⁰ Consider what Justice Feldman wrote in *Gardner II*:

At the outset, we reiterate certain basic principles. The law does not permit the state to discriminatorily exclude any “substantial and identifiable class of citizens” from the

privilege and obligation of jury service.¹¹ (Citations omitted.)

And, as Judge Jacobson wrote for the Court of Appeals in *Gardner I*, such an idea is “antithetical to the notion that juries must represent the range of human nature and the variety of human experience.”¹²

Noting Arizona’s rich and diverse racial and ethnic composition, the court in *Gardner II* emphasized that the harm done by such state discrimination is not limited to violation of a defendant’s constitutional rights:

It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship.¹³

The court went on to explain that “worse yet,” the perception is created that criminal justice is imposed **on** minorities rather than used to protect their rights.¹⁴

Consider also what Justice Blackmun wrote in *J.E.B. v. Alabama*:¹⁵

In recent cases we have emphasized that *individual jurors themselves have a right to nondiscriminatory jury selection procedures*. (Citations omitted.) . . . *All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination*.¹⁶ (Emphasis added.)

Under the decisions in *Batson*, its progeny, and in *Gardner I* and *Gardner II*, Arizona trial courts have a responsibility to protect all defendants’ rights to equal protection as well as all **citizens’ rights to participate**.

Furthermore, in *Powers v. Ohio*, Justice Kennedy wrote:

We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have the right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.¹⁷

The court rejected the arguments that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine a juror's objectivity or qualifications.¹⁸

Because of Arizona's diverse racial and ethnic composition, the people of Arizona enjoy an even greater right under *Gardner I* and *Gardner II* to ensure minorities protection from discrimination. The defense can use this second focus in making *Batson* challenges to speak for excluded minority members.

Consider, if you will, that it is little, if any, comfort to the excluded minority juror that other minority members were not stricken. This argument has no legitimacy in the trial courts. The Arizona Supreme Court has made clear that even **some** discrimination is still not acceptable. The exclusion of a single juror in violation of *Batson* requires that counsel represent not only the defendants' rights, but the rights of minorities to participate.

The Ninth Circuit Court of Appeals agrees.

In *Turner v. Marshall*¹⁹, the Ninth Circuit held that Turner was entitled to a new trial where the prosecution gave no legitimate justification for the challenge to a minority juror. The court held that, although the fact that the prosecutor accepted four minority persons on the jury may be considered, it is not dispositive. Quoting from *Palmer v. Estelle*,²⁰ the court noted: "A trial court may consider, but may not rely solely on, the existence of Blacks on a jury when determining whether a prosecutor has violated *Batson*."²¹ Where the prosecutor's explanation for striking a minority juror is unsupported by the record, empaneling other minority jurors will not salvage the discredited justification. The Ninth Circuit concluded that the prosecution's failure to rebut the defendant's *prima facie* showing of racial discrimination as to one juror dictates the grant of a new trial. The court said: "the intent of the supreme court in deciding *Batson* was to guarantee, both to the defendant desiring a jury trial and to the jury venirepersons, that the jury will be selected on a racially nondiscriminatory basis."²²

Since, as Ed McGee noted in his article, prosecutors are being encouraged to resort to half-truths, "if not outright dishonesty," to circumvent *Batson*, the defense needs to keep in mind that, in addition to the defendants' rights, minority rights can be successfully argued as part of a *Batson* challenge.

It's worth thinking about.

Endnotes

- 1) 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
- 2) *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L. Ed. 674 (1880).

(Endnotes continued on page 14)

Practice Pointer: Discovery of On-going Discussions with Police

By Donna Elm
Chief Trial Deputy – Downtown

We have a useful new Ethics Opinion out by the State Bar about the prosecutors' ethical requirement to disclose their discussions with police officers on their cases. The Bar was asked whether prosecutors ethically "may" reveal to the Defense the substance of their discussions with law enforcement personnel.

Ethic Opinion 2001-13 started with analyzing the prosecutors' relations to cops. It found that police (obviously even when the police are victims) are not the prosecutors' *clients*, so there is not confidentiality to their discussions. Sometimes these discussions will constitute witness "statements" subject to mandatory disclosure under the discovery rules. See Ariz.R.Crim.P. Rule 15.4(a)(1) (witness "statements" include a writing signed, adopted, or approved of by the witness, a recording of the witness's verbal communication, or a written record (like notes) of the discussion that contains either verbatim statements or a summary of them). Hence to the extent that discussions with witnesses constitute witness "statements" under the discovery provisions, the State must disclose any such subsequent "statements" to the Defense pursuant to their obligations under Rule 15.1(a)(1).

The Bar went on to say that there also is an affirmative obligation to disclose matters that fall under *Brady v. Maryland*. Note that *Brady* is much

broader than just the *Brady* opinion that requires disclosure of things "exculpatory." It also includes matters that could negate guilt, evidence that could impeach state's witnesses (under *United State v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972)), and evidence that could lessen the punishment. See also *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). Hence, the Bar concluded that prosecution has an affirmative obligation to inform the Defense, for instance, of the death of the officer who had presented to the grand jury; that drug evidence seized had been destroyed (to be conveyed before a plea decision was made); and that a second breath sample was not available for Defense testing in a DUI case. To the extent that discussions with police reveals *Brady* information, then we now have an ethics opinion that reinforces the State's duty to disclose.

You should think about this in making your discovery demands. Note that this is most likely to turn up *after* the case has been filed. When it is probable that the prosecutor and police witnesses discussed the case, make sure you make a "continuing discovery" demand for witness statements. You can cite to this Ethic Opinion 2001-13.



Avoiding Workplace Harassment

By Dottie Storey
Benefits Coordinator – Administration

Employment law is constantly evolving and, as changes occur, the effects on the workforce can be felt emotionally and economically. Employment laws most likely to evolve into complex personnel issues are the anti-discrimination laws — the Americans with Disabilities Act, the Age Discrimination in Employment Act, and various state and local laws. Although these laws do not clearly discuss harassment (speech or nonspeech), courts are interpreting these laws to include two forms of "harassment:" *quid pro quo harassment*, a supervisor threatening to fire or not promote an employee unless sexual favors are granted; and *hostile work environment harassment*, which includes speech or conduct that is "severe or pervasive" enough to create a "hostile or abusive work environment" based on race, religion, gender, national origin, age, disability, or veteran status. In some jurisdictions, harassment may be based on sexual orientation, political affiliation, citizenship status, marital status, or personal appearance, as judged by a reasonable person standard.

A hostile work environment is defined as an environment in which a pattern or practice of harassment has been demonstrated, established by proof that an objective, reasonable person would find the overall environment to be hostile and harassing. An individual plaintiff need only show that he/she has been subjectively harmed by the harassing conduct.

More frequently, courts have been recognizing that a hostile work environment

claim need not need not be based solely on sexual harassment in order to exist. Hostile work environment claims based on claims other than sexual harassment are on the rise. In a federal court case settled in 2000, *Owens v. Archer Daniels Midland*, the court awarded \$4.5 million to the plaintiff because of abuse and harassment he endured from his co-workers. The employee was diagnosed with Posttraumatic Stress Disorder (PTSD), acquired during two tours of duty in Vietnam where he was assigned the responsibility of recovering the bodies of dead American soldiers. Later, while working for Archer Daniels, the employee found himself the brunt of his co-worker's "good-natured ribbing" as a result of PTSD. The ribbing consisted of calling him "crazy" and "psycho Jerry" and banging on equipment near him to scare him. This "teasing" went on for ten years and resulted in the employee's permanent disability. The ex-employee filed suit in federal court for violation of the Americans with Disabilities Act, won his case and was awarded \$4.5 million.

The above example should demonstrate an important fact to supervisors and managers. Should they know of, or suspect, that a member of their staff is being subjected to a hostile work environment, supervisors need to be cognizant of their obligation to take prompt and appropriate action.

For further guidance on this topic, see the guidelines provided on p. 10-12.

Ensuring Workplace Professionalism

Maricopa County maintains an environment of “zero tolerance” against any form of employment discrimination or unlawful harassment. It is the responsibility of all County employees, supervisors, appointing authorities and department heads to actively pursue the elimination of harassment and discrimination in County employment. This practice and procedure defines and outlines the procedures for reporting, investigating, and resolving harassment or discrimination related complaints. Requests for assistance and advice in preventing or eliminating harassment or in correcting apparent harassment may be obtained from the Employment Relations Division of County Human Resources. Employees may also consult Maricopa County Policy and Procedure HR2406.

PRACTICE

1. Employment discrimination includes harassment because of an individual’s race, color, religion, gender, national origin, age or disability.
2. Harassment is any conduct that is so severe and pervasive as to alter an employee’s working conditions, and create a hostile working environment based on race, color, religion, national origin, gender, age, or disability. Harassment includes, but is not limited to:
 - A. Explicitly or implicitly ridiculing, mocking, deriding, or belittling any person.
 - B. Making offensive or derogatory comments based on race, color, religion, national origin, gender, age or disability to another person, either directly or indirectly. Such harassment is a prohibited form of discrimination under both state and federal employment laws.
 - C. Making unwelcome sexual advances, requests for sexual favors, and/or other verbal or physical conduct of a sexual nature or gender-based when:
 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment.
 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
 3. Such conduct is sufficiently severe or pervasive, which in the view of a reasonable person of the same immutable characteristics, would alter the conditions of the employee’s employment and create an abusive working environment.
3. Retaliation against an employee or applicant for filing a harassment complaint may be considered to be grounds for a new harassment complaint.
4. All incidents of alleged harassment involving County employees, that cannot be resolved within the department, should be called to the attention of the Human Resources Department, Employee Relations Division.
5. County employees should raise harassment questions promptly so that an immediate investigation may be conducted and appropriate steps taken.
6. After a thorough investigation has been conducted by either the department or the Human Resources Department, employees who are determined to have been involved in the harassment of another person while on duty or while representing Maricopa County will be disciplined according to Maricopa County Employee Merit Rules, up to and including dismissal from County Employment.
7. It is the responsibility of the Department to:
 - A. Make employees, including supervisors, aware of the County policy regarding harassment. A department may even wish to issue its own internal policy emphasizing the importance of eliminating harassment in the department.
 - B. Formally make supervisors aware of harassment problems and express employer disapproval of harassing conduct.
 - C. Encourage open communication so employees will not feel uncomfortable in bringing forth complaints.
 - D. Investigate all complaints impartially and promptly, keeping the complaint as confidential as possible.

- E. Upon learning of harassment, take prompt corrective actions.
- 8. It is the responsibility of the Supervisor:
 - A. To set a good example. Do not participate.
 - B. Do not condone even seemingly innocent acts of discrimination or harassment.
 - C. Remember that you are management's representative.
- 9. It is the responsibility of the Employee Relations Division of Human Resources to thoroughly investigate employment discrimination allegations brought to its attention by County employees or job applicants, including all complaints of harassment. The Division will notify the department when a complaint is received and work closely with the department throughout its investigation in a spirit of cooperation to reach a resolution. All complaints are handled in a manner that is confidential and will help preclude retaliation against the employee.

PROCEDURE

For the Employee

Any employee who believes that he or she is being harassed by a supervisor, co-worker, customer or client should promptly take the following action:

1. The individual subjected to alleged harassment is encouraged to confront the individual believed to be engaging in the discriminating or harassing behavior in a polite, but firm, manner. He or she should advise the person exhibiting the unwanted behavior that the behavior is inappropriate, unprofessional, or that it makes them uncomfortable, and that they wish the behavior to stop. If this approach is chosen, the complainant may wish to have a witness present, to document the discussion, and the behavior that led to it. If the individual does not wish to address the "harasser," he or she should prepare a written account of the incident(s) of harassment, the date(s) the harassment occurred, and a summary of conversations with the harasser and his/her reactions.
2. In addition to, or in lieu of confronting an individual directly, the complainant should forward a complaint in writing or verbally regarding the alleged discrimination/harassment, to a higher level supervisor, the department head, other appropriate designee within the office, or the Employee Relations Division of Human Resources. Employees are encouraged to formalize a complaint in writing as soon as possible so an investigation can begin promptly, be conducted thoroughly based on the information provided by the complainant, and the problem may be resolved.
3. Employees of the Public Defender's Office with questions or concerns may follow one of two approaches:
 - A. Discuss the matter with a supervisor, progressing through the normal "chain of command" and skipping the immediate supervisor if that individual is the offending party, or
 - B. Discuss the matter with one of our office's designated harassment contact people: Diane Terribile, Larry Grant and Jennifer Willmott.
4. If the employee is dissatisfied with the actions of the supervisor or departmental staff, the complaint may be brought to the Employee Relations Division of the Human Resources Department. An employee or job applicant who believes he or she has been harassed as defined in the definition section, and whose complaint has not been resolved with the department, may file a complaint with the County Human Resources Director, 301 West Jefferson Street, 2nd Floor. Such complaints must be filed timely so that the investigation and corrective action can be effective. The employee filing the complaint may contact the Employee Relations Division at 506-3895 for assistance.

The Employee Relations Division is available to provide advice to any employee who feels that he or she may be a victim of harassment or has any questions on the issue. All inquiries and complaints directed to Employee Relations will be treated in a confidential manner unless directed otherwise by the employee.

For the Supervisor

Any office supervisor who receives a complaint of discrimination or sexual harassment, observes behavior which meets the definitions as outlined in this guideline, or otherwise learns of behavior which meets that definition is expected to immediately notify one of the appointed harassment contacts listed in this practice and procedure.

Supervisors, managers and others serving in lead or "acting supervisor" roles must take appropriate action immediately to ensure that discriminatory or harassing behavior, if it is occurring, is stopped. Supervisors and managers may be subject to personal liability and to disciplinary action for failure to take appropriate action to ensure that employees are not subjected to a discriminatory or harassing work environment.

The immediate supervisor of an employee involved in a harassment complaint shall treat the complaint as confidential and be responsible for taking the following actions:

1. Meeting with the employee to discuss allegations, or to advise them of office procedures for handling these matters.
2. Document the alleged incidents, the persons performing or participating in the alleged harassment, and the dates on which the alleged incidents occurred.
3. Reporting the claim in a timely manner to the appointed harassment contact people.

Department supervisors who wish to discuss situations that may be harassment are also urged to contact the Employee Relations Division.

For the Department

The Public Defender must be notified of all incidents involving harassing or discriminating behavior, which occur while an employee is on duty or representing the Public Defender's Office.

An immediate and thorough investigation will be conducted. Depending on the nature of the complaint, the investigation may be conducted by the designated contacted listed in this practice and procedure, the Employee Relations Division of County Human Resources, or through a joint effort between the department and Human Resources. Every effort will be made to attempt to resolve the problem at the lowest possible level.

Complaints will be handled in a manner to ensure confidentiality, to the greatest extent possible. Normally, a limited number of individuals will be given any detailed information regarding the complaint. Investigative information is not shared with coworkers or others not deemed appropriate or who are not a part of the investigation or disciplinary process. Individuals who are interviewed as part of an investigation are expected to keep the discussions confidential and may be subject to disciplinary action for leaking information.

Upon conclusion of the investigation and after consulting with the investigation team, all disciplinary decisions regarding alleged discrimination or harassment will be made by the Public Defender.

ARIZONA ADVANCE REPORTS

By Terry Adams

Defender Attorney – Appeals



State v. Gant
370 Ariz. Adv. Rep. 3, (CA 2, 3/29/02)

The police were present at a house where drug activity was suspected. The defendant arrived in a vehicle, exited and walked toward the officers. Because of previous contact, the officers knew he was driving on a suspended license and had an outstanding warrant and therefore arrested him. They searched his vehicle and found a weapon and drugs. The trial court denied the motion to suppress.

The court of appeals reversed saying that the search of the vehicle was unlawful. The arrest was lawful, however the court distinguished this case from others because the defendant voluntarily exited his vehicle, not at the request of the officers, nor was he stopped by the officers as in a traffic violation. Because there was no other probable cause to search the vehicle, the motion to suppress should have been granted.

State v. Rosa-Hernandez
370 Ariz. Adv. Rep. 7 (CA 1, 3/28/02)

The defendant sought to call a co-defendant as a witness in a murder trial. The co-defendant had entered a plea of guilty but the time for filing a PCR had not elapsed and the co-defendant advised that he intended to file one. He also took the Fifth Amendment and refused to testify.

On appeal the defendant argued that he

could not take the Fifth because he had plead guilty. The court found that the Fifth Amendment rights survive until the time to file an appeal or PCR has run. The court also found no prosecutorial misconduct when he referred to the defense counsel's opening as a lie, when the jury was instructed to disregard it.

State v. Flores
370 Ariz. Adv. Rep. 11 (CA 1, 3/28/02)

The defendant was stopped riding a bicycle because of an outstanding warrant. A search revealed two small rocks of crack cocaine and \$1.53. He advised the police the crack was not his but he was to deliver it to someone else. He was charged with possession and transporting drugs for the purpose of sale. The trial court suppressed his statements because there was no independent evidence of intent to sell other than the confession, hence no corpus-delicti.

The appeals court affirmed holding that the corpus-delicti rule requires that before incriminating statements can be used the state must present proof that someone committed the crime with which the defendant is charged. Here there was no evidence of sale except the defendant's statements.

State v. Tousignant
371 Ariz. Adv. Rep.3 (CA 1,4/9/02)

The defendant was placed on probation for a second drug charge under Prop. 200. He was given a deferred sixty day jail term as a condition of probation. He violated probation and after a petition to revoke was filed, he requested that he be allowed to reject probation.

The court agreed and terminated his probation as unsuccessful and released him. The state appealed. The court found that A.R.S. 13- 901.01 does not allow for termination of probation but requires that a defendant be reinstated on probation with additional terms. Here the court ordered that the defendant be reinstated with terms including the original sixty days.

Jorge D., In re
371 Ariz. Adv. Rep. 6 (CA 1, 4/9/02)

The juvenile here was questioned by a police officer in the school principal's office regarding an assault. He confessed. The question on appeal was whether the confession was a violation of Miranda and was it voluntary.

Although the court found that the record was insufficient to rule, it set out an objective test to determine these issues. The question is, was it custodial interrogation. The factors used include time and place of interrogation, police conduct, the child's age, maturity and experience, presence of a parent etc. Here the matter was remanded for a hearing.

(Continued from Please Don't Give Up On Batson, page 7)

- 3) 380 U.S. 202, 85 S. Ct. 824, 3 L. Ed. 2d 759 (1965).
- 4) *Swain*, 85 S. Ct. at 837.
- 5) *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).
- 6) *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).
- 7) *Purkett v. Elm*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).
- 8) *Batson*, 106 S. Ct. at 1718.
- 9) *State v. Superior Court (Gardner I)*, 156 Ariz. 512, 753 P.2d 1168 (App. 1987).
- 10) *State v. Superior Court (Gardner II)*, 157 Ariz. 541, 760 P.2d 541 (1988).
- 11) *Gardner II*, 157 Ariz. at 543,
- 12) *Gardner I*, 156 Ariz. at 514, citing to *Peters v. Kiff*, 407 U.S. 493, 503, 92 S. Ct. 2163, 2169, 33 L. Ed. 2d 83 (1972) (for the proposition that a defendant has standing to complain for the excluded juror).
- 13) *Garner II*, 157 Ariz. at 545.
- 14) *Id.* at 546.
- 15) *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).
- 16) *Id.* at 1427, 1428.
- 17) *Powers*, 111 S. Ct. at 1370.
- 18) *Id.* at 1370.
- 19) *Turner v. Marshall*, 1997 U.S. App. LEXIS 19483, 121 F.3d 1248 (9th Cir. filed July 29, 1997); cf. *Fernandez v. Roe* (9th Cir. D.C. No. CV-97-00272-RT-VAP) filed April 8, 2002).
- 20) *Palmer v. Estelle*, 985 F.2d 456, 458 (9th Cir. 1993).
- 21) *Turner*, 121 F.3d at 1254.
- 22) *Id.* at 1255.



JUNE 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
5/30 - 6/3	Javid Curtis	Martin	Coolidge	CR02-01227 2 Cts. Leaving Scene Injury Accident, F6	Guilty	Jury
5/30 - 6/3	Walker Kresicki	Fenzel	Harrison	CR02-91523A Burglary 2nd, F3N	Guilty - Burglary 3rd, F4N	Jury
6/3 - 6/5	Roth King	Gerst	Craig	CR01-18151 Agg. Assault, F3D	Guilty, Misd. Assault	Jury
6/6 - 6/10	Scanlan	Foreman	Sherman	CR02-03108 Theft of Means of Transportation, F3	Guilty	Jury
6/10 - 6/12	Terpstra Jones Francis	Schneider	Washington	CR02-00071 Hindering Prosecution 1°, F5	Not Guilty	Jury
6/11 - 6/20	Kavanagh Thomas Geary	Akers	Denney	CR01-94453 Manslaughter, F2D Agg. Assault, F3D	Guilty - Negligent Homicide, F4D; Agg. Aslt., F3D	Jury
6/13 - 6/27	Parker Reidy	Hotham	Sampson	CR01-015153 Sexual Conduct w/ Mnr, F2	Guilty	Jury
6/18 - 6/25	Hall / Washington Francis / Jaichner	Granville	Pittman	CR01-18560 2 Cts. Child Molesting, F2, DCAC Kidnap, F2, DCAC Trnsf. Obsn. Mat. Mnr., F4 Public Sexual Indecency, F5	Not Guilty	Jury
6/24	Castillo	Martin	Keever	CR02-003495 Agg. Assault, M1	Guilty	Bench
6/24 - 6/26	Aeed / Willmott Brazinskas Jaichner	Cates	Washington	CR02-04507 Unlawful Discharge, F6	Not Guilty	Jury
6/25	Akins Erb	Schwartz	Clarke	CR02-00496 Agg. Assault, F3 Theft, F5 Attempted Theft of Means of Transportation, F4 Criminal Trespass, M1	Guilty on all counts except Criminal Trespass (Dismissed)	Jury
6/25 - 6/26	Shell	Gaylord	Thompson	CR01-97273 Theft, F5N Trafficking in Stolen Property, F3N	Not Guilty - Theft Hung Jury - Trafficking	Jury
6/25 - 6/27	Reece Brazinskas	Donahoe	Robinson	CR02-02041 Forgery, F4	Guilty	Jury
6/25 - 6/27	Walton	Araneta	Williams	CR01-14933 POND, F2 POM, F6 2 cts. MIW, F5 Escape, F6	Guilty	Jury

JUNE 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
6/20—6/24	Sawyer	Araneta	Martin	CR2002-004977 Ct. 1: POND, C4F Ct. 2: PODP, C6F	Guilty	Jury
6/6—6/7	Allen Horrall	Willrich	Herman	CR2001-097398 POM, C6F	Guilty	Bench
6/18—6/26	Curry Horrall	Budoff	Boyle	CR2001-015907 Ct. 1: Murder, 2d Ct. 2-Ct.6: Agg. Assault, C3 Dangerous Ct. 7-10: Endangerment, C6 Dangerous	Guilty (DV on 2 Cts. Agg. Assault)	Jury
6/24—6/27	De la Vara	Gerst	Mayer	CR2002-000700 Ct. 1: Kidnapping, C2F Dangerous Ct. 2: Agg. Assault, C3F Dangerous	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
6/11 -6/19	Storrs Johnson Cano Stovall	Warren Granville	CR2001-012628 Drive-by shooting and Aggravated Assault while on probation	Guilty	Jury
6/17- 6/25	Agan	McClennen	CR2001-008632 Agg Assault and endangerment	Guilty	Jury
6/19	Mitchell	McMurray	CR2001-000081 Interfering w/ judicial proceeding	Guilty	Bench
6/27-6/28	Schaffer	McVey	CR2002-005174 Armed Robb, F2 Agg Asslt, F3 MIW, F4	Guilty	Jury

for The Defense

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