



for The Defense

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

Ring in the New (Part One)

How the United States Supreme Court Has Brought Turmoil and Tumult to Capital Litigation in Arizona¹

**By Vikki Liles
Defender Attorney – Homicide
Unit**

A while ago, I was in a jewelry store, just browsing and daydreaming, when my eye caught a flash of green in a display case. There, nestled in a cradle of black velvet, was the most amazing ring I had ever seen. More than five carats of South American green rock, practically flawless, with that elusive blue fire at its core. Two huge trilliant cut diamonds

flanked the emerald, all set in platinum and 18-karat yellow gold. The sales clerk brought it out of the display case, and I slipped it on my trembling hand. It was gorgeous. Finally, with a sigh, I took it off, and gave it back to the clerk. I left the store, hopelessly in love with that ring.²

These days, as a capital defense attorney in Arizona, I'm in love with another amazing "ring," specifically the decision of the

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Arizona Public Defender Association, Inc.

A League of Our Own

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For years, public defenders in Arizona have talked about establishing a statewide organization devoted to their work and the improvement of indigent representation. On

May 20, 2002, this goal was attained, when the Arizona Public Defender Association was incorporated.

The effort to create APDA began in earnest last September, when Emery La Barge, Navajo County Public Defender, invited the

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United States Supreme Court in *Ring v. Arizona*.³ In that decision, the Court declared the Arizona capital sentencing scheme was unconstitutional and violated the Sixth Amendment right of the accused to a jury trial. That procedure allowed a judge to determine the presence or absence of the aggravating factors required for imposition of the death penalty. Since the *Ring* decision was announced on June 24, 2002, the Arizona Legislature has met and passed a new sentencing scheme in an attempt to “fix” the “problem” created by *Ring*. It remains to be seen – and will probably take years of appeals to find out – whether, in their haste to fix one problem, the Legislature created dozens of more opportunities to litigate issues in capital cases and save clients’ lives.

The *Ring* decision and the new statutory scheme for imposing the death penalty have arguably created more turmoil in Arizona capital litigation than any other decision since *Furman v. Georgia*⁴ declared the death penalty unconstitutional in 1972. In Part I of this article, we’ll examine the old sentencing scheme, the prior decisions that led to *Ring*, and the decision itself. In the next issue, we’ll look at the new sentencing scheme, the issues it has created, and the questions yet to be answered.

The Road to *Ring*

1. The old capital sentencing scheme.

Prior to *Ring*, sentencing in a capital case was governed by A.R.S. § 13-703, which set forth sentencing requirements for first-degree murder; A.R.S. § 13-703.01, required the Arizona Supreme Court to conduct an independent review of all

death sentences; A.R.S. § 13-703.02, provided for an evaluation of the IQ of all defendants in cases where the death penalty was alleged; and A.R.S. § 13-703.03, provided for an optional pre-screening evaluation of the competence and/or sanity of all defendants in cases where the death penalty was alleged. For purposes of this article, these statutes will be designated as the “old” statutes representing the “old” scheme (regardless of what The Blue Book requires).

Under the old scheme, after a jury returned a verdict of first-degree murder, the jury was dismissed.⁵ The sentencing of all persons convicted of first-degree murder was conducted solely before the trial judge.⁶ The judge was required to set a date for a “separate sentencing hearing” to determine the existence or nonexistence of any aggravating or mitigating circumstances for the purpose of deciding the sentence to be imposed.⁷ If the death penalty was not alleged, the choice was between “natural life,” with no possibility for release, commutation or parole on any basis ever, or “life,” with the possibility of release or parole after 25 years if the victim was 15 or more years old, or after 35 years if the victim was under 15.⁸

If the death penalty was alleged, the sentencing hearing was supposed to be held not less than 60 nor more than 90 days from the determination of guilt, unless “good cause” was shown.⁹ In practice, capital sentencing hearings rarely took place within that deadline, as the defense almost always required more time to investigate the client’s life and background to find mitigation to present at the hearing. It was not unusual for hearings to be held six months or more

after trial, depending upon the needs of the mitigation investigation. Significantly, most of the mitigation investigation took place *after* the trial, in order to minimize expenses and more efficiently utilize the scarce resources of the capital mitigation specialist. It made no sense to work up the full mitigation required in a capital sentencing until the client was actually convicted of an offense for which the death penalty could be imposed. So, in cases where the client pled guilty to a non-capital offense or a verdict of less than first degree murder was returned, thousands and thousands of dollars were saved.

Under the old scheme, the prosecution was not required to give notice of the aggravating circumstances¹⁰ it intended to prove, or the names of all witnesses and experts on a list of all aggravating evidence before trial. But they were required to provide such notice 10 days after a verdict of first degree murder.¹¹ The defense was required to notice the mitigating circumstances¹² it hoped to prove, including the names of witnesses and experts and a list of all evidence, within 20 days of the verdict.¹³

At the hearing, only the judge made all "factual determinations" required by the statutes or the constitutions of the United States and the State of Arizona.¹⁴ The judge was required to disclose all material contained in any presentence report, if one had been prepared, except such material as the court determined needed to be withheld for the protection of human life.¹⁵ The victim could submit a written victim impact statement, an audio or video tape statement, or make an oral impact statement to the probation officer preparing the presentence report. The

probation officer was required to consider and include in the presentence report the victim impact information regarding the murdered person and the economical, physical and psychological impact of the murder on the victim and other family members. The victim also had the right to be present and testify at the hearing. Once again, they could present information about the murdered person and the impact of the murder on the victim and other family members.

Any information relevant to any mitigating circumstances could be presented, regardless of its admissibility under the Rules of Evidence.¹⁶ But the admissibility of information relevant to any of the aggravating circumstances was governed by the Rules of Evidence. Evidence that had been admitted at the trial and that related to either aggravating or mitigating circumstances was to be considered without the need to reintroduce it at the sentencing hearing. The prosecution and the defense were permitted to rebut any information received at the hearing. Additionally, they were to be given fair opportunity to present arguments challenging to the adequacy of the information that established the existence of any of the aggravating or mitigating circumstances. The burden of establishing the existence of any aggravating circumstances was on the prosecution, and the burden of establishing the existence of any mitigating circumstances was on the defendant.¹⁷ "Beyond a reasonable doubt" was the standard that attached to the state's burden of proving aggravating circumstances. The lesser burden of "preponderance of the evidence" attached to the defense burden to prove mitigating circumstances.¹⁸

The judge was required to return a “special verdict,” setting forth all findings as to the existence or nonexistence of each of the aggravating circumstances and as to the existence of any of the mitigating circumstances.¹⁹ In evaluating the mitigating circumstances, the court was to consider any information presented by the victim regarding the murdered person and the impact of the murder on the victim and other family members, but was prohibited from considering any recommendation made by the victim regarding the sentence to be imposed.²⁰ In deciding whether to impose a sentence of death or life imprisonment, the judge was required to “take into account” the aggravating and mitigating circumstances, and was required to impose a sentence of death if one or more of the enumerated aggravating circumstances was found and there existed no mitigating circumstances sufficiently substantial to call for leniency.²¹

After a sentence of death was imposed, the case was automatically appealed to the Arizona Supreme Court. The court was to conduct an “independent review” of the judge’s findings of aggravation and mitigation and of the propriety of the death sentence.²² If the court found an error in the findings, it was to “independently determine if the mitigation is sufficiently substantial to warrant leniency in light of the existing aggravation.” If the court found the mitigation was not sufficiently substantial to warrant leniency, then it was required to affirm the death sentence. If, however, the court found that the mitigation was sufficiently substantial to warrant leniency, then it was required to impose a

life sentence.²³

This was the scheme under which all defendants in capital cases were sentenced in Arizona until June 24, 2002, when *Ring v. Arizona* was announced.

2. Mr. Walton, Mr. Jones and Mr. Appendi

The *Ring* decision did not come out of the blue, but is the culmination of a series of Supreme Court decisions over a dozen years. Understanding where *Ring* has brought us requires an understanding of where we started. For that, we must briefly recount the tales of Mr. Walton, Mr. Jones, and Mr. Appendi.

For years, Arizona defense attorneys routinely filed motions in capital cases challenging the judge-only sentencing scheme. The Supreme Court addressed these arguments in *Walton v. Arizona*,²⁴ where Mr. Walton argued that every finding of fact underlying the sentencing decision in a capital case must be made by a jury, rather than by a judge.²⁵ The Court rejected this argument, and explained that:

Aggravating circumstances are not separate penalties or offenses, but are “standards to guide the making of [the]choice” between the alternative verdicts of death and life imprisonment. Thus, under Arizona’s capital sentencing scheme, the judge’s finding of any particular aggravating circumstance does not of itself “convict” a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not “acquit” a

defendant (*i.e.*, preclude the death penalty).²⁶

The Court concluded that the states were not required to denominate aggravating circumstances as “elements” of the offense or permit only a jury to determine the existence of such circumstances. The Court held that the Arizona capital sentencing scheme did not violate the Sixth Amendment.²⁷ Thus, it should have appeared the matter was settled. *Au contraire!*

Nine years later, the Court considered the difference between a “sentencing factor” and an “element of an offense” in *Jones v. United States*.²⁸ In that case, the issue was whether the federal carjacking statute²⁹ defined three distinct offenses or a single crime with a choice of three maximum penalties.³⁰ As the statute existed at the time, the maximum penalty for carjacking was 15 years, unless serious bodily injury or death occurred during the offense, which upped the penalty to, respectively, a maximum of 25 years or life imprisonment.³¹

Mr. Jones was indicted on weapons and carjacking offenses.³² The indictment did not allege a serious bodily injury, nor did the jury instructions mention any injury.³³ Mr. Jones was convicted of both offenses. He was sentenced to a 25-year sentence based on the recommendation in the presentence report, which, for the first time, alleged that one of the victims of the carjacking had suffered serious bodily injury.³⁴ Mr. Jones argued futilely to the trial judge that the recommendation was out of bounds. He argued that serious bodily injury was not a sentencing factor, but rather an element of the offense, which had neither been pleaded in the

indictment nor found by the jury.³⁵ The judge was unmoved, and gave Mr. Jones the 25 years.

The Supreme Court reversed, and held that the statute established three separate offenses, with distinct elements, “each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.”³⁶ *Jones* should be considered the first stake in *Walton’s* heart.

The next year, the Court issued what may be one of its watershed opinions in *Apprendi v. New Jersey*.³⁷ In that case, it appears Mr. Apprendi fired several bullets into the home of an African-American family that recently moved into a previously all-white neighborhood.³⁸ He was arrested, and admitted he was the shooter. He made a statement, which he later retracted, that he did not want the occupants of the house in the neighborhood because they were black.

He was indicted on 23 counts, none of which either referred to New Jersey’s hate crime statute or alleged that he had acted with a racially biased purpose. He eventually entered a plea on three of the counts. After the judge accepted the plea, the prosecutor filed a formal motion to enhance the sentence, alleging that one of the counts was committed with a biased purpose. After a hearing, the judge found that the crime was motivated by racial bias, and sentenced Mr. Apprendi to an enhanced sentence.³⁹ Mr. Apprendi appealed, arguing that due process required the finding upon which his enhanced sentence was based to be proved to a jury beyond a reasonable doubt.⁴⁰

The question, as framed by Justice Stevens, the author of the opinion, was “whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt.”⁴¹ The Court began its analysis by noting that the answer to the question was “foreshadowed” by the opinion in *Jones*.⁴² After an extensive re-examination of its prior cases on the issue and the history upon which the cases relied, the Court confirmed the rule announced in *Jones*:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case [*Jones*]: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”⁴³

The Court noted that this “rule ensures that a State is obliged ‘to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices’ of exposing all who are convicted to the maximum sentence it provides.”⁴⁴ Possibly sensing

a potential future problem, the Court did try to distinguish *Walton* by noting:

[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.⁴⁵

The Court further explained that:

[T]he capital cases are not controlling [because] “[o]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to a jury trial on all the elements of the charge.”⁴⁶

The Court then sent the case back to New Jersey, because the “procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.”⁴⁷

Justice O’Connor, in the kind of dissent commentators always label as “sharp” or “stinging,” took exception to the opinion and to the majority’s characterization of *Walton* and the Arizona capital sentencing scheme. She correctly explained that,

under Arizona law, a defendant convicted of first-degree murder could only be sentenced to death if the judge found the existence of a statutory aggravating factor.⁴⁸ She further explained that if the judge does not find the existence of an aggravating factor, the maximum penalty authorized by the jury's verdict is life imprisonment.⁴⁹ She was baffled by the distinction of *Walton* offered by the majority, which claimed that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence.⁵⁰ She labeled that claim "demonstrably untrue," and emphatically declared:

A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.⁵¹

Justice O'Connor concluded that the "Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense," and that Arizona law "removes from the jury the assessment of a fact that determines whether a defendant can receive the maximum punishment."⁵² She prophetically proclaimed, "If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it offers today."⁵³

Apprendi became the second stake in *Walton's* heart, but it still wasn't dead. Before, during, and after *Jones*, defense attorneys had continued to attack *Walton*

and ask for jury findings on the aggravating circumstances to no avail. After *Apprendi*, the stage was set for a real challenge to the way Arizona decided who shall live and who shall die. It should come as no surprise that the search was on for the perfect case to argue that *Walton* should be overruled. Then along came Timothy Stuart Ring.

*State v. Ring*⁵⁴

On November 28, 1994, a Wells Fargo armored van was highjacked from the Dillard's store at Arrowhead Mall in Peoria.⁵⁵ The van was found later that day in the parking lot of a Sun City church. Its doors were locked, its engine was running, its driver was dead - and over \$800,000 in cash and checks were missing.

Within a short time, the police developed information that three suspects - James Greenham, William Ferguson, and Timothy Ring - were possibly involved. The police built their case with wiretaps, trash covers, surveillance, and search warrants. The three were all eventually arrested and indicted for murder and robbery. (As an aside, the case does present an interesting lesson in what not to do after committing a crime. Specifically, if one does manage to knock off an armored van and steal \$800 grand, it would be unwise to: 1) tell your girlfriend, 2) spend the loot on fancy, expensive, and attention-grabbing toys, 3) pay for those big-ticket items in cash, 4) put evidence in your trash before burning it to molecular ash, and 5) talk to your future co-defendants on the telephone about the job.)

Based on what the Arizona Supreme Court would later describe as

“circumstantial evidence,” Ring was convicted of felony murder. Significantly, the jury was unable to reach a unanimous verdict on premeditated murder, but did unanimously find Ring guilty of felony murder.⁵⁶ Therefore, it would be left to the judge to make the findings required by *Enmund v. Florida*⁵⁷ and *Tison v. Arizona*⁵⁸ before the death penalty could be imposed. Under those cases, a defendant convicted of felony murder is only “death-eligible,” if there are specific findings that the defendant actually killed, attempted to kill, or intended to kill, or was a major participant in the underlying felony and demonstrated reckless indifference to human life.

At the sentencing hearing held before the judge, Greenham, who had conveniently cut a deal after Ring’s guilty verdict, testified. Greenham told the judge that he, Ferguson, and Ring had planned and executed the robbery. Greenham also told the judge that Ring was the leader, that he shot the driver, and that he later wanted to be “congratulated” on his marksmanship.⁵⁹

In his special verdict, the judge found that Ring killed the driver and that he was a major participant in the robbery, which exhibited a reckless disregard for human life. Thus, the first barrier to the death penalty was crossed by *Enmund/Tison* finding. The judge found two statutory aggravating factors: that the offense was committed in expectation of pecuniary gain and that it was committed in an especially heinous, cruel and depraved manner. The judge found Ring’s minimal criminal record as a non-statutory mitigating circumstance. The judge then determined that the mitigating evidence,

when weighed against the aggravating evidence, was insufficient to call for leniency, and sentenced Ring to death.⁶⁰

On direct appeal to the Arizona Supreme Court, Ring argued that, in light of *Jones* and *Apprendi*, the Arizona capital sentencing scheme violated the Sixth and Fourteenth Amendments. The state countered that *Walton* was good law. Justice Feldman, writing for the court, noted that the state was technically correct, but also acknowledged that “both cases raise some question about the continued viability of *Walton*.⁶¹

The court reviewed the *Apprendi* analysis of Arizona law, and found it wanting. In fact, the court found Justice O’Connor’s dissent in *Apprendi* to be the more correct explanation of the Arizona capital sentencing scheme.⁶² Indeed, the court determined that the *Enmund/Tison* findings and those in support of the aggravating circumstances were based solely upon Greenham’s testimony, which was never heard by the jury, and the “the death sentence required the judge’s factual findings.”⁶³ Nevertheless, the court reluctantly concluded that *Walton* controlled, and that the Arizona capital sentencing scheme had not been held unconstitutional under either *Jones* or *Apprendi*.⁶⁴ After a review of all the other issues raised by Ring, the court affirmed both his conviction and his death sentence.⁶⁵

Ring v. Arizona

On January 11, 2002, the United States Supreme Court agreed to hear Ring’s challenge to the constitutionality of allowing a judge, rather than a jury, make

the critical findings in a capital case.⁶⁶ On June 24, 2002, the Court announced its decision, and it was no less ground shifting than a “big one” on the Richter Scale. Within the first three paragraphs of the opinion, Justice Ginsburg, writing for the seven-member majority, declared:

Apprendi's reasoning is irreconcilable with *Walton*'s holding . . . , and today we overrule *Walton* in relevant part. Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.⁶⁷

The Court began by recounting the facts as set forth by the Arizona Supreme Court in *State v. Ring*. It accepted the findings of the Arizona court that the evidence at trial failed to prove beyond a reasonable doubt that Ring was a major participant in the armed robbery or that he actually murdered the armored van driver.⁶⁸ It accepted that, under Arizona law, Ring could not be sentenced to death unless further findings, beyond the jury's verdict, were made.⁶⁹ Most importantly, it acknowledged that the Arizona Supreme Court not only disputed the *Apprendi* majority's description of Arizona's capital sentencing system, but instead completely agreed with Justice O'Connor's reading of Arizona law in her *Apprendi* dissent.⁷⁰

Once having accepted the interpretation of Arizona law by its highest court, the *Ring* majority necessarily conceded that the maximum penalty Ring could have received based solely on the jury's verdict was life imprisonment.⁷¹ This was so, the Court declared, because a death sentence

in Arizona “may not be legally imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt.”⁷² As framed by Justice Ginsburg, the question presented was “whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.”⁷³

The issue, as it turned out, was really whether the statutory aggravating factors should be treated as elements of the offense of capital murder. The Court began to grapple with the issue by re-examining *Walton*'s determination that Arizona's aggravating factors were not “elements of the offense,” but were “sentencing considerations' guiding the choice between life and death.”⁷⁴ The Court noted that *Walton* drew support from *Cabana v. Bullock*⁷⁵ and its holding that the *Enmund* finding could be made by an appellate court. The Court recounted the reasoning of the *Walton* majority that, because the Constitution did not require the *Enmund* finding to be proved as an element of capital murder, it also did not require aggravating circumstances to be considered elements of the offense to be determined only by a jury.⁷⁶ The Court noted that Justice Stevens had urged in his *Walton* dissent that the Sixth Amendment required a jury determination of the facts that must be established before death can be imposed, and that the Arizona aggravators operate as statutory elements of capital murder because death cannot be imposed in their absence.⁷⁷

Turning next to *Jones*, the Court noted

that its attempt to distinguish *Walton* in that case turned on the determination that the finding of aggravating facts operated as a choice between a greater and lesser sentence, and not as a process of raising the ceiling of a sentencing range.⁷⁸ The Court noted the dissent of Justice Kennedy in *Jones*, where he questioned the continuing interpretation of Arizona law, and argued that the maximum penalty Mr. Walton could have received without the finding of at least one aggravating circumstance was life imprisonment.⁷⁹

That left the Court to deal with *Apprendi*. The Court determined that the *Apprendi* majority reconciled *Walton* with the rule announced in *Apprendi* only because the majority believed first-degree murder in Arizona could be punished by death based on a jury verdict of all the elements of capital murder.⁸⁰ But recognizing that the Arizona Supreme Court found the *Apprendi* majority's portrayal of Arizona capital sentencing law to be incorrect, and deferring to the Arizona court's construction of Arizona law as authoritative, the Court was "persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*."⁸¹ The Court then administered the last rites, and pronounced *Walton* dead at last:

[W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of death. [citation

omitted] Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S. at 494, n.19, 120 S.Ct., 2438, the Sixth Amendment requires that they be found by a jury.⁸²

At the end of her opinion, Justice Ginsburg expressed a profound and all too rare vision of the rights guaranteed even to, or perhaps especially to, those facing society's ultimate sanction when she wrote: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both."⁸⁴

That should be the last word, but of course it isn't. The Court did not answer every question left to ask, because it found that "Ring's claim is tightly delineated." Therefore, the decision did not reach whether prior felony convictions need to be found by a jury, or whether the Sixth Amendment applies to mitigating circumstances, or whether the jury can or should decide if death should be imposed.⁸⁵ Nor did the Supreme Court determine if any error in Ring's sentence was harmless because, as the state argued, a pecuniary gain finding was implicit in the jury's guilty verdict.⁸⁶ Instead, the Court remanded that issue to the Arizona Supreme Court, and Mr. Ring may not yet be able to move out of death row.

There is much entertainment and irony in the concurring and dissenting opinions.

Justice Scalia, caught on the horns of a dilemma between his abhorrence for what he believes the Court has done to the Eighth Amendment and his love for the Sixth Amendment, chose to “travel with the happy band” to “*Apprendi*-land.”⁸⁷ Justice Breyer concurred in the judgement, but remains convinced that the Eighth Amendment requires a jury to make the decision to sentence a defendant to death.⁸⁸

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And finally, Justice O’Connor can only resent how her dissent in *Apprendi* was used in *Ring* to kill *Walton*. She also dissented in *Ring*, where she repeated her view that the *Apprendi* decision was unjustified, and lamented the “severely destabilizing effect” that decision has had on the criminal justice system due to the “countless” cases where sentences have been challenged based on the decision.⁸⁹ Justice O’Connor predicted that *Ring* would only add to the documented increase in the workload of the judiciary with challenges from those already on death row in Arizona and the other states likely to be affected by the opinion.⁹⁰ As a prophet, Justice O’Connor was right about the eventual demise of *Walton*, and she is probably right about that other prediction as well.

Next month, in Part II of “*Ring* in the New,” we’ll look at the Legislature’s response to *Ring*, the new capital sentencing statutes, and the issues yet to be resolved.



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1. Hooray!
2. Why didn't I buy the ring? Because it cost \$65,000 and I'm a Public Defender, that's why.
3. 536 U.S. ___, 122 S.Ct. 2428 (2002).
4. 408 U.S. 238 (1972).
5. See Ariz.R.Crim.P. 22.5(a).
6. A.R.S. § 13-703(C)(Old).
7. A.R.S. § 13-703(C)(Old).
8. A.R.S. § 13-703(A)(Old).
9. Ariz.R.Crim.P. 26.3(c)(1).
10. The aggravating circumstances were listed in A.R.S. § 13-703(G)(Old):
 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
 2. The defendant was previously convicted of a serious offense, whether preparatory or completed.
 3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
 4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
 5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
 6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
 7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
 8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.
 9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
 10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.
11. Ariz.R.Crim.P. 15.1(g)(2).
12. The mitigating circumstances were listed in A.R.S. § 13-703(H)(Old), and required the judge to consider as mitigating circumstances any factors proffered by the defendant or the state (*right!*) which were relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense. This was obviously meant to conform to the requirements of *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104(1982), *Saffle v. Parks*, 494 U.S. 484 (1990), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), which collectively stand for the propositions that the defendant must be allowed to present relevant mitigating evidence, the sentencer must be allowed to consider any aspect of the defendant's character, and the state can neither bar relevant mitigating evidence from being considered nor limit relevance so severely that the evidence can never be part of the sentencing decision. The mitigating circumstances listed in § 13-703(H)(Old) included, but were specifically not limited to the following:
 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution
 2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
 3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
 4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
 5. The defendant's age.
13. Ariz.R.Crim.P. 15.2(g)(1)(a).
14. A.R.S. § 13-703(C)(Old).
15. A.R.S. § 13-703(D)(Old).
16. *Id.*
17. *Id.*
18. See, e.g., *State v. Kayer*, 194 Ariz. 423, 984 P.2d 31 (1999).
19. A.R.S. § 13-703(E)(Old).
20. *Id.* This provision was an attempt to keep within the confines of *Payne v. Tennessee*, 501 U.S. 808 (1991).
21. A.R.S. § 13-703(F)(Old).
22. A.R.S. § 13-703.01(A)(Old).

23. *Id.*
24. 497 U.S. 639 (1990).
25. *Id.* at 647.
26. *Id.* at 648 (quoting *Poland v. Arizona*, 476 U.S. 147, 156 (1986)).
27. *Id.* at 649.
28. 526 U.S. 227 (1999).
29. 18 U.S.C. § 2119. The statute defined “carjacking” as the taking of a motor vehicle while using a firearm.
30. *Id.* at 229.
31. *Id.* at 230.
32. *Id.*
33. *Id.* at 230-231.
34. *Id.* at 231.
35. *Id.*
36. *Id.* at 251-252.
37. 530 U.S. 466 (2000).
38. *Id.*
39. *Id.* at 471.
40. *Id.*
41. *Id.* at 469.
42. *Id.* at 476.
43. *Id.* at 490 (quoting *Jones*, 526 U.S. at 252-253 (opinion of STEVENS, J., concurring)).
44. *Id.* n.16.
45. *Id.* at 496 (citing *Walton* at 647-649 and at 709-714 (STEVENS, J., dissenting)).
46. *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257, n.2 (SCALIA, J., dissenting)).
47. *Id.*
48. 530 U.S. at 537 (O’CONNOR, J., dissenting).
49. *Id.*
50. *Id.* at 538.
51. *Id.*
52. *Id.* at 541.
53. *Id.* at 538.
54. 200 Ariz. 267, 25 P.3d 1139 (2001).
55. *Id.* at 270, 25 P.3d at 1142.
56. *Id.* at 280, 25 P.3d at 1152.
57. 458 U.S. 782 (1982).
58. 481 U.S. 137 (1987).
59. *Id.* at 272, 25 P.3d at 1144.
60. *State v. Ring*, 200 Ariz. at 273, 25 P.3d at 1145.
61. *Id.* at 278-279, 25 P.3d at 1150-1151.
62. *Id.* at 279, 25 P.3d at 1151.
63. *Id.* at 280-281, 25 P.3d at 1152-1153.
64. *Id.* at 280, 25 P.3d at 1152.
65. *Id.* at 284, 25 P.3d at 1156.
66. 534 U.S. 1103 (2002).
67. 122 S.Ct. at 2432.
68. *Id.* at 2434.
69. *Id.*
70. *Id.* at 2436.
71. *Id.* at 2437.
72. *Id.* (quoting *State v. Ring*, 200 Ariz. at 279, 25 P.3d at 1151).
73. 122 S.Ct. at 2437.
74. *Id.*
75. 474 U.S. 376 (1986).
76. 122 S.Ct. at 2438.
77. *Id.*
78. *Id.* at 2439.
79. *Id.* (citing *Jones*, 526 U.S. at 272 (Kennedy, J., dissenting)).
80. *Id.* at 2440.
81. *Id.*
82. *Id.* at 2443.
83. *Id.*
84. *Id.* at 2437, n.4.
85. *Id.*
86. *Id.* at n.7.
87. *Id.* at 2445 (SCALIA, J., concurring).
88. *Id.* at 2446 (BREYER, J., concurring).
89. *Id.* at 2449 (O’CONNOR, J., dissenting).
90. *Id.*

Appellate Review Primer for Trial Lawyers

By Christopher Johns
Defender Attorney – Appeals

Atticus Finch, the Maycomb, Alabama lawyer in Harper Lee's novel *To Kill a Mockingbird*, has become synonymous with zealous advocacy. For Atticus there is never a question about him representing Tom Robinson, a black man in the 1930's Jim Crow South. He does not think of the case as being a "dog" or a "loser," or a "long form guilty plea"—terms sometimes uttered by even the best intentioned lawyers.

Atticus aims to represent his client despite the fact that Robinson is vilified and presumed guilty because of the color of his skin. As a lawyer and a person, Atticus only knows one way to represent anyone—with all his heart and skill.

Anticipating Appeal

After the trial, Atticus tells his daughter, "We're not through yet. There'll be an appeal, you can count on that." Atticus tried his client's case to win—but rest assured he never forgot that he also needed to make a record for appeal. You can also bet that Atticus was familiar with the appellate standards of review. No trial lawyer gives the full measure of representation unless a *useable* record accompanies the client's case and the lawyer understands standards of review. Why? As a practical matter, the review standard most often determines the appeal's outcome.

A trial lawyer needs more than a passing familiarity of what will be required for

reversal of the trial court's rulings in order to make a record. The danger of waiver is the trial advocate's evil twin—if you don't file a motion, object to it, and make an offer of proof that delineates the prejudice to your client—you may be remembered not for what you did, but for what you did not do.

Trial vs. Appeal

Unlike at trial, an appellate argument does not rely on witnesses and their credibility, or evidence and its admissibility. The record is usually frozen in time like a photograph. The appellate lawyer must fashion the best possible argument from what is already captured in the record. In order for an appellate court to review an issue, the trial lawyer must have preserved the claim by making a specific objection at or before trial.

It is the unusual case indeed when for the first time on appeal the appellate court recognizes an issue entitling the client to a new trial. If the trial lawyer hasn't contemplated the issue, argued it, and shown how it prejudices his client, it often is waived or of limited value to the client on appeal.

Much depends upon the trial lawyer's understanding the contemporaneous objection rule that requires the lawyer to make immediate claims about improper admission or exclusion of evidence, prosecutorial misconduct, judicial misconduct, erroneous jury instructions, juror bias or sentencing errors. The point is to give the court an opportunity to cure

the error.

Integral to “trial savvy”—making an appellate record while simultaneously trying the case—is an understanding of appellate review standards. Know what the appellate lawyer has to show, educate the trial court, and make a record that conforms to the standard of review, and you shape an appellate record that may help the client obtain a new trial.

Stating the Standard of Review on Appeal is Now Mandatory

On appeal, a statement of the standard of review is mandatory. Since January, 1998, Rule 31.13(c) (1) requires the appellant to articulate the appropriate review standard at the outset of each argument. The rule provides that “with respect to each contention raised on appeal, the proper standard of review on appeal *shall* be identified”

Fundamentally, the review standards channel the degree of success for an appellate argument’s success. Without a solid foundation, not much can be built. Appellate counsel must analyze each step in the case to pinpoint the possible errors and the standards used to review those errors. Each review standard delineates the degree of deference an appellate court must give to the trial court decisions during the trial. For the appellate court it is a guide for assumptions about how much leeway it should permit when reviewing the lower court’s ruling. The deference the appellate court can give to the trial court’s rulings is almost total (abuse of discretion) to virtually no deference at all (*de novo* review).

The rule’s point is to focus the appellate advocate on the first question the appellate court is going to ask. How much freedom or leeway of examination does the court have to reverse the lower court’s judgment? Remember, however, that the ability to reverse is offset by the notion that the appellate court, where possible, must uphold the trial court’s rulings. But, a trial court’s mistake is never beyond correction by an appellate court, especially if the trial lawyer has made the proper record.

While appellate courts have articulated individual standards of review peculiar to a particular issue, traditionally, commentators divide review into three categories: (1) questions of law, (2) questions of fact, and (3) matters of discretion. Sometimes, of course, an issue may be a mixed question of law and fact. In that case, the standard of review may depend on which matter predominates. As with most things legal, the review standard may be subject to debate. For example, whether there is a reasonable suspicion for a stop is necessarily fact intensive, but it is a mixed question that overall is reviewed *de novo*. See, e.g., *United States v. Michael R.*, 90 F.3d 340, 345 (9th Cir. 1996); *State v. Wyman*, 197 Ariz. 10, 3 P.3d 392 (App. 2000).

De Novo Review

Questions of law are reviewed *de novo*. See, e.g., *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) (whether a jury instruction properly states the law); *State v. Leon*, 197 Ariz. 48, 49, ¶ 2, 3 P.3d 968, 969 (App. 1999) (statutory

interpretation). *De novo* is the least deferential standard. It means that the appellate court reviews the issue as if it is in the same position as the trial court. This may be a very good thing for the client. When arguments are based on the law, the appellate court must consider the issue as if it has not been heard before by the trial court already. In other words, the appellate court will substitute its judgment for that of the trial court, and the playing field is leveled for the appellate advocate. If the trial court's decision on the law is incorrect, chances for a reversal increase—although a new trial is not always necessary.

The kind of issues that you can preserve based on *de novo* review include challenges to jurisdiction, speedy trial violations, suppression issues, double jeopardy claims, jury instructions, and, probably most importantly, interpretations of statutes.

Clearly Erroneous

The clearly erroneous standard applies to the trial court's factual findings. This is a significantly differential standard. It requires that the appellate court determine that a definite mistake has been made. Consequently, an appellate court must accept the lower court's factual findings unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. *See Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992). Most often a clearly erroneous finding is associated with the review of witness testimony. *See, e.g., Burnette v. Bender*, 184 Ariz. 301, 304, 908 P.2d 1086, 1089 (App. 1995).

Abuse of Discretion

Many issues fall under abuse of discretion. It is the most deferential treatment given to trial court decisions, and consequently is hard—but not impossible—to overcome on appeal. Abuse of discretion rulings are particularly subject to create a powerful record by elucidating the prejudice to the client. For example, making an offer of proof of how the ruling impacted the client at trial may give the appellate lawyer the “abuse” needed to support a reversal. Think of this standard as always requiring the answer to the question *why*. What are the reasons why the court should have ruled your way?

What is an abuse of discretion? It is when the trial court makes a ruling that is “manifestly unfair, exercised on untenable grounds or for untenable reasons.” *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 498 (App. 1992). Basically, the appellate court needs to be firmly convinced that the trial court committed a clear error of judgment. *See, e.g., Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000) (noting that reversal under an abuse of discretion standard is only possible “when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.”), *cert. denied*, 121 S.Ct. 628 (2000).

Abuse of discretion rulings include decisions on whether to admit or exclude evidence, witness testimony, pretrial publicity issues, scope of voir dire, and limiting cross-examination. Recently, in *State v. Jones*, ___ Ariz. ___, ¶ 8, 49 P.3d

273, 378 Ariz. Adv. Rep. 32 (2002), the Arizona Supreme Court noted that as a practical matter the standard of review for the admissibility of an accused's statements, often previously characterized as "clear and manifest error," for practical purposes, was the same as an abuse of discretion standard. Citing *State v. Chapple*, 135 Ariz. 281, 297, n. 18, 600 P.2d 1208, 1224, n. 18 (1983), the court wrote that "clear and manifest error, whatever it may mean, is really shorthand for an abuse of discretion, and that is the term [the court] will use." *Jones* at ¶ 18. *Chapple* called it an abuse of discretion when the trial court bases its reasons on grounds that "are clearly untenable, legally incorrect, or amount to a denial of justice." *Id.*

Harmless Error

Even when an appellate court finds error based on one of the above review standards, it does not guarantee reversal. Technically, harmless error is probably not a standard of review, but all fifty states have adopted some form of the harmless error rule. And, most importantly, the United States Supreme Court has held that even federal constitutional error may be harmless. What does that mean? In general, harmless error means that the appellate court must be satisfied beyond a reasonable doubt that the error did not *contribute* to a guilty verdict. It is not the same as, however, saying the appellant is guilty beyond a reasonable doubt. Did the error affect the verdict?

Exceptions to Harmless Error

Although the harmless error rule applies to all error when a proper objection is

made, the U.S. Supreme Court has carved out a rare form of trial errors that "defy analysis" by harmless error reasoning. This trial error is called "structural" and is the kind of error that is so antithetical to a fair trial and the reliability of the verdict that a reversal is necessary. Structural error requires automatic reversal. An example would be a defective reasonable doubt instruction or denial of counsel. The concept is that the error cannot be quantified. See *Chapman v. California*, 386 U.S. 18, 23 (1967).

Additionally, when a trial lawyer fails to object to error, appellate counsel may try to persuade the appellate court to examine what would otherwise be waived under the rubric of "fundamental error." To qualify as fundamental error, however, the error must be clear, egregious, and curable only by a new trial. *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 526, 628 (1991). Error is fundamental "when it goes to the foundation of the case, takes from a defendant a right essential to the defense, or is of such magnitude that it cannot be said it is possible for the defendant to have had a fair trial." *State v. Cornell*, 179 Ariz. 314, 329, 878 P.2d 1352, 1367 (1994). For example, if the trial lawyer fails to object to an incorrect jury instruction, the appellate court will review the error only for fundamental error.

Obviously, leaving the client to plead fundamental error on appeal places the client at a distinct disadvantage. It is an onerous standard to persuade the appellate court to overcome. Unlike structural error, fundamental error is subject to the harmless error rule.

Conclusion

The review standard determines an appeal's outcome. Showing abuse of discretion is difficult. Factual findings are usually not clearly erroneous. Most reversals are on questions of law (although clearly established precedent is infrequently overruled).

Although Atticus Finch is an imaginary character, there is a plaque in Monroeville, Alabama, where Hollywood filmed the movie that reads "The legal profession has in Atticus Finch, a lawyer-hero who knows how to use power and advantage for moral purposes, and who is willing to stand alone as the conscience of the community." The plaque is a noble symbol of the role of the criminal defense lawyer. There is, however, another vision that Atticus brings to mind. In the book Atticus tells his children that "You never really understand a person until you consider things from his point of view—until you climb into his skin and walk around in it."

If you walk around in your client's skin, you'll know what kind of appeal he wants—the same kind as you would want—one where the best issues have been carefully preserved.



(Continued from Arizona Public Defender's Association – page 1)

directors of Arizona's county public defender offices to a meeting at AACJ's fall seminar in Scottsdale. Eleven of the state's eighteen directors attended, and all expressed interest in forming a statewide organization. At the next meeting, in December 2001, sixteen county public defenders and one city public defender attended, and the effort gained momentum. After several more meetings and some pro bono advice from a few civil attorneys, the APDA filed its Articles of Incorporation with the Arizona Corporation Commission.

APDA is a non-profit corporation. Its initial Board of Directors includes the heads of seventeen county public defender offices and the Phoenix Public Defender. The Board voted to add a director to represent support staff interests, and elected Diane Terrible to this position. The Board has decided to add front-line attorneys to the Board, and will discuss the details at the next meeting.

APDA's initial officers are: Yavapai County PD Dan DeRienzo, President; yours truly, Vice President; Mohave County PD Dana

Hlavac, Treasurer; and Navajo County PD Emery LaBarge, Secretary. Non-Board members who have been instrumental in creating the organization include Diane Terribile, Jeremy Mussman, Chris Johns, Shannon Slattery, Margarita Silva, Russ Born, Richard Lynch, Randy Callendar, and Chris McBride.

The members of APDA include everyone who works for a public defender office or indigent representation contract administrator's office. Membership is automatic and there are **NO MEMBERSHIP DUES**. The Board decided that no dues would be imposed for membership until APDA can show members that an investment in APDA is well worth it.

The immediate goal of APDA was to improve communication and collaboration between the public defense offices around the state, including county, city, federal and tribal offices. One of the first things that APDA did was to set up a listserve so that the directors and other interested parties could quickly exchange ideas and information. Annual reports and caseload statistics were exchanged so that each office could see what the others were doing.

It didn't take long for APDA to get its first taste of what can be accomplished through improved cooperation and communication. Last spring, armed with statistics from other counties, Mohave County PD Dana Hlavac was able to show his county manager that adding staff to his office would be the most cost-effective means to handle the county's growing caseloads. The result was an increase of approximately 33% in funding and 50% in staffing, including the addition of nine

attorneys and three investigators.

APDA's existence was quickly recognized by the Arizona Legislature. In House Bill 2289, the legislature created the Joint Study Committee on State Funding of the Court System. The bill specified that the committee would include a public defender to be named by APDA. APDA named Dana Hlavac as the public defender member to serve on this important committee.

The long term goals of APDA are to promote the core values of indigent representation: providing quality representation to our clients; protecting our clients' constitutional rights, and thereby preserving the rights of all; striving for dispositions that are effective in addressing our clients' underlying problems, giving them the best chance of success; and making indigent representation a satisfying and rewarding career choice for attorneys, paraprofessionals, and support staff.

How will APDA foster these values? Some of the ideas that the directors have discussed include: creating a motion, brief, and jury instruction bank accessible throughout the state; providing training and networking opportunities; working with national and local defense organizations to stay on the cutting edge of indigent representation; establishing a presence at the legislature and working to obtain a seat on the Arizona Criminal Justice Commission; seeking grant funding; assisting in the local and national movements to provide student loan repayment assistance for public defender attorneys; improving the quality and uniformity of data collection for

(Continued on page 21)

ARIZONA ADVANCE REPORTS

By Stephen Collins

Defender Attorney – Appeals



State v. Hylton

372 Ariz. Adv. Rep. 7 (CA 1, 4/30/02)

Hylton, a Proposition 200 defendant, was originally placed on supervised probation for a term of three years. He was found in violation of probation because he failed to report and failed to notify his probation officer of a change of address. Hylton was then reinstated on unsupervised probation for a term of one year. The Court of Appeals vacated the sentence because A.R.S. Section 13-901.01 requires that a Proposition 200 defendant be reinstated on probation “with new and additional conditions.” The statute does not require any particular additional term.

State v. Gibson

372 Ariz. Adv. Rep. 5 (SC, 5/1/02)

In 1974, the body of Taylor Courtney was found in a Phoenix apartment. The cause of death was three gunshots to the head. There had been post mortem removal of his penis, scrotum and testes. D.B. and J.W. had been with the victim shortly before the murder and were considered primary suspects. Both knew substantial information about the crime scene, which had not previously been made public, and neither gave alibis that could be corroborated. D.B. pointed to J.W. as the possible perpetrator because of an alleged sexual relationship between the victim and J.W.’s wife. J.W. also suffered from severe mental health problems. The case lay dormant until 1995 when

police with the help of the Automated Fingerprint Identification System matched a fingerprint from the murder scene with that of Gibson. The victim, J.W., D.B. and Gibson were all from the same small Arizona town. From April to June 1996, Gibson’s ex-wife was interviewed by police officers on several occasions. She told the officers about a package Gibson had given her two months after the murder. Over the course of the interviews, her recollection of the contents of this package evolved from liver to a poultry neck to a penis. Gibson was then charged with murder.

Prior to his jury trial, Gibson argued that the trial court should allow evidence of D.B.’s and J.W.’s potential involvement in the murder. The trial judge precluded such evidence because there was no evidence “that has an inherent tendency to connect either D.B. or J.W. with the actual commission of the murder.” This ruling was based on language in *State v. Fulminante*, that for the admission of third-party culpability evidence, a “defendant must show that the evidence has an inherent tendency to connect such other person with the actual commission of the crime.”

The Arizona Supreme Court reversed Gibson’s murder conviction, rejecting the “inherent tendency test.” This test is “unhelpful” and “unclear to a fault; for one thing, a ‘tendency’ does not ‘inhere.’” Further, the test improperly implies that a defendant is required to prove to a judge’s

satisfaction that another person “really” committed the crime or was “largely” connected to it. There is no special category of proof required for the admission of third-party culpability evidence. Arizona Evidence Rules 401, 402 and 403 set forth the proper test. The evidence “need only tend to create a reasonable doubt” as to whether a defendant committed the offense.

State v. Schinzel
373 Ariz. Adv. Rep. 3 (CA 1, 5/9/02)

Schinzel was inside an apartment when he was arrested and handcuffed because of outstanding warrants. Before giving him his *Miranda* rights, the police asked him about the existence of drugs inside the apartment and his statements led them to seize illegal drugs. The State argued there was no *Miranda* violation because the questions were about crimes other than those that resulted in the original arrest. The Court of Appeals rejected the argument and held the drugs should have been suppressed.

After asking Schinzel about the location of drugs in the apartment, an officer held up a baggie of methamphetamine. Schinzel then told the police where drugs could be found. The State argued these drugs were properly admitted into evidence because Schinzel’s statements after being shown the baggie were not prompted by the police. The State contended the statements constituted an “independent source” for discovering the evidence and were untainted by any *Miranda* violation. The Court of Appeals disagreed, finding that when the officer held up the baggie, it was the “functional equivalent of

questioning.” The conduct was “reasonably likely to have elicited a response.” Thus, the officer’s act triggered Schinzel’s *Miranda* rights.



(Continued from Arizona Public Defender Association – page 19)

budgeting and staffing purposes; and establishing caseload and performance standards.

What can APDA do for you? What can you do for APDA? The beauty of being in “on the ground floor” of an organization is that you can have an impact on its direction and goals. APDA is interested in your ideas and concerns, and we invite you to participate.

The next meeting of the Board of Directors will be held in our Training Facility on Saturday, October 19, from 10:00 a.m. to noon. You are invited to attend.



JULY 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
3/8 - 7/19	Nurmi <i>Curtis</i>	Davis	Steinberg	CR01-12338 Agg. assault Resist arrest MIW	Not Guilty, Agg. Assault Guilty Except Insane, Resisting Arrest, MIW	Bench
6/17 - 6/18	Buckallew <i>Moncada</i>	Oberbillig	Warshaw	CR02-91127 2 cts. Agg. DUI - lic susp / rev for DUI, F4N	Guilty	Jury
7/2 - 7/3	Maga Clesceri <i>Spears</i>	Gerst	Williams	CR02-05876 Theft of Means Transportation, F3	Guilty	Jury
7/9 - 7/16	Farrell	Ballinger	Kay	CR02-02488 Attempt to Commit Murder 1°, F2	Guilty	Jury
7/14 - 7/16	Gaxiola Clesceri <i>Spears</i>	Schwartz	Lemke	CR02-03426 Leaving Scene of Accident Death or Serious Injury, F4	Guilty	Jury
7/15 - 7/18	Walker Ames <i>Bowman</i>	Hotham	Vieau	CR02-06727 Agg. Assault, F3 (w/ 2 priors, on probation) Burg. 3 rd Degree (w/ 2 priors, on probation)	Not Guilty, Agg. Assault Guilty, Lessor - simple assault, C1M, Burg. F4	Jury
7/15 - 7/18	Meshej	Granville	Koplow	CR02-004837 Agg. DUI w/ priors (2)	Mistrial	Jury
7/16	Rock	Gastelum	Delgado	CR02-00595(M) IJP, M1	Not Guilty	Bench
7/17 - 7/19	Dergo	Dougherty	Kay	CR02-02824 MIW, F4	Guilty	Jury
7/17 - 7/19	Terpstra	Gaylord	Bryson	CR02-05114 Agg. Assault, F6	Hung	Jury
7/17 - 7/24	Little Buckallew Klosinski <i>Moncada</i>	Akers	Harrison	CR02-92015 Armed Robbery - Threat To Use Weapon, F2N	Guilty	Jury
7/18	Farney Elzy	Burke	Loefgren	CR02-06643 Forgery, F4 w/one prior and on probation	Not Guilty	Jury

JULY 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
7/18 - 7/21	Jolly	Gerst	Basta	CR02-06426 POM f/s, F4 PODP, F6 2 cts. DUI, M1	Guilty	Jury
7/22	Aeed / Lowrance <i>Jaichner</i>	Hall	Stroutner	CR02-03866 Agg. DUI, F6	Mistrial	Jury
7/22	Green	Martin	Godbehere	CR2002-001800 Unlawful flight, F5	Guilty	Jury
7/22 - 7/23	Hinshaw Klosinski	Willrich	Mueller	CR02-91412 2 cts. Agg. DUI, F4N; PODD, F4N; POM, F6N	Guilty	Jury
7/22 - 7/23	Terpstra Elzy	Gottsfeld	Sherman	CR02-04487 Agg. Assault, F6	Not Guilty	Jury
7/22 - 7/24	Primack Ames	Anderson	Vingelli	CR01-016941 2 cts. of Theft of Credit Card, F5 Fraud. Use Credit Card, F5 Taking ID of another, F4	Guilty	Jury
7/22 - 7/25	Dergo	Franks	Vieau	CR02-06981 Agg. Assault, F3D	Not Guilty	Jury
7/22 - 7/25	Farrell Jones	Cates	Beougher	CR02-01379 Agg. Assault, F2 Unlawful Flight from Law Enforcement Vehicle, F5	Not Guilty, Agg. Assault; Guilty, Unlawful Flight	Jury
7/23	Mitchell	Araneta	Sampson	CR02-03401 Sex Abuse over 15, F5 Burglary 2, F3	Guilty	Jury
7/23 - 7/24	Scanlan	Hotham	Hanlon	CR02-01478 Forgery, F4	Guilty	Jury
7/25 - 7/29	Moore Gavin	Keppel	Cutler	CR02-92503 Unlawful Flight, F5N	Mistrial	Jury
7/29 - 7/30	Washington	Schneider	Beougher	CR02-06364 PODD for Sale, F2	Mistrial	Jury
7/30 - 7/31	Pajerski	Granville	Klepper	CR02-03559 Agg. Assault, F3 Resisting Arrest, F6	Guilty	Bench
7/31	Riggs King	Tolby	Breger	CR01-01784MI 2 cts. IJP	Not Guilty	Bench

JULY 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
7/10–7/11	Tallan	Hotham	Eliason	CR02-003531 Forgery, C4F	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
7/1/-7/2	Schaffer	McVey	CR02-2874 Armed Robb X 2; MIW; Agg Asslt	Guilty of less than charged	Jury
7/8-7/9	Schaffer	McVey	CR02-005174 Armed Robbery; MIW	Guilty	
7/8 –7/10	Agan Stovall	Foreman	CR02-005171 Agg Assault	Guilty	Jury
7/10	Schaffer	McVey	CR02-006123 Armed Robb; MIW; Agg Asslt	Not Guilty	Jury
7/11-7/19	B. Peterson S. Brazinskas Marcia Wells	Schneider	CR01-0033841) 1 ct. Att. Muder 2 (DCAC) 4 cts Child Abuse (CI 2 DCAC) 4 cts Child Abuse (CI 4)	1) Hung 2) Guilty 3) Guilty	Jury
7/2-7/29	Schaffer	Granville	CR02-002789(B) Armed Robb; Burg-1; Agg Asslt, F3; Agg Asslt, F2; MVT	Guilty	Jury
7/29-8/5	Koestner	Gerst	CR02-002168 Armed Robbery; MIW; Destroying Evidence	1) Hung 2) Guilty 3) Guilty	Jury
7/29-7/31	F. Gray D. Cano	Anderson	CR01-17524 Agg Assault, 3FD; Criminal Trespass 6F	1) Guilty – non- dangerous 2) Guilty	Jury

for The Defense

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