

# for The Defense

■ Training Newsletter of the Maricopa County Public Defender's Office ■

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## The Diagnosis and Treatment of the Prosecutorial Misconduct Virus

Two Case Studies

By Anna Unterberger, Defender Attorney - Appeals Division

While a prosecutor “may strike hard blows, he is not at liberty to strike foul ones.”

*Berger v. United States*, 295 U.S. 78, 88 (1935)

### INTRODUCTION

Yes, we’ve weathered another flu season, but don’t let your guard down. Just waiting to infect your next case may be another kind of virus. You must learn to diagnosis and treat this virus before it compromises your client’s legal rights. It is known as: The Prosecutorial Misconduct Virus, or “PMV.”

Prosecutorial misconduct is harmless error on appeal *only if* the Court finds, beyond a reasonable doubt, that the misconduct did not contribute to or affect the verdict. When making that determination, the Court must consider the cumulative prejudice from *all* instances of prosecutorial misconduct. *State v. Hughes*, 193 Ariz. 72, 78-80, 969 P.2d 1184, 1190-92 (1998). In determining the prejudice,

the Court should consider the experience of the prosecutor. An experienced prosecutor has a “greater appreciation of the advantages” of committing prosecutorial misconduct. Extensive experience helps a prosecutor “understand how a jury would react to unfavorable evidence.” *In re Zawada*, 208 Ariz. 232, 238-39, 92 P.3d 862, 868-69 (2004).

In an effort to help you with developing your own case-specific vaccines, this article offers two PMV case studies, as well as a prototype multiphase inoculation process.

### CASE STUDY #1

ISOLATING AND CONTAINING PMV THAT TENDS TO TARGET INSANITY DEFENSE CASES: THE HUGHES/ZAWADA VIRUS

MCPD Attorney Steve Collins did extensive research and analysis regarding the 26 instances of



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Editor: Christopher Johns

Assistant Editors:

Jeremy Musman

Keely Farrow

Office:

11 West Jefferson, Ste 5

Phoenix, AZ 85003

(602) 506-8200

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prosecutorial misconduct that occurred in *State v. Roque*, Arizona Supreme Court CR 03-0355-AP (still in the briefing stage), a capital case where MCPD Attorneys Dan Patterson and Bob Stein presented an insanity defense. This case study reviews some of Steve’s research and analysis from the *Roque* Opening Brief.

*Zawada* involved prosecutorial misconduct that included, “(a) appeals to fear by the jury if [defendant] was not convicted, (b) disrespect for and prejudice against mental health experts that led to harassment and insults during cross-examination, and (c) improper argument to the jury.” 208 Ariz. at 233-35, 92 P.3d at 863-65. The opinion resulted from misconduct in the *Hughes* murder case, where Hughes pursued an insanity defense and presented substantial evidence of insanity.

Hughes had argued with his sister’s boyfriend and said he would shoot him. He went to his car, got a shotgun, came back and shot and killed the boyfriend. He drove away and then returned, but fled the scene when he saw the police. During a high-speed chase, he shot at the police. Six mental health experts found that Hughes was mentally ill. The prosecution’s “theory of the case” was that Hughes, “is nothing but a mean drunk,” and, “there is no insanity in this case.”

Dr. Jack Potts testified for the defense in *Hughes* and concluded that Hughes was insane. Hughes was consistent in describing

the circumstances of the murder and was not malingering. Even though Hughes knowingly fled from the police, Dr. Potts still found Hughes legally insane. And the fact that Hughes was intoxicated at the time of the crimes did not change the doctor’s conclusion. Furthermore, the Court discussed that the fact that a “defendant was talking normally after he was in custody, ‘does not negate the more subtle and insidious forms of insanity with which the mind may be possessed.’” 193 Ariz. at 83, 969 P.2d at 1185, citing *State v. Overton*, 114 Ariz. 553, 556, 562 P.2d 726, 729 (1977).

In cross-examining Dr. Potts, the prosecutor asked the doctor if he knew whether the defense investigator had talked witnesses into supporting an insanity defense. The Court held this “fabrication” argument was prosecutorial misconduct, because it is unethical for a prosecutor to impugn the integrity or honesty of opposing counsel. This misconduct was intended to “undermine Defendant’s primary defense” of insanity, “and it did so.” 193 Ariz. at 86, 969 P.2d at 1188.

The Court found that the prosecutor “overwhelmed Defendant’s insanity defense” with prosecutorial misconduct. The Court “condemned this win-by-any-means strategy.” *Zawada*, 208 Ariz. at 237, 92 P.3d at 867. “[P]rosecutors’ duties exceed those of lawyers generally[.]” “A prosecutor is not simply another lawyer who happens to represent the state. Because of the overwhelming power vested in his office, his *obligation to play fair* is every bit as compelling as his responsibility to protect the public.” 208 Ariz. at 236, 239, 92 P.3d at 866, 869 (citation omitted and emphasis added).

“In fact, the rules prescribe a detailed and specific role for mental health professionals to assess a criminal defendant’s mental state. See Ariz. R.Crim. P. 11.” Faced with expert testimony for the defendant, a prosecutor “can rebut the testimony with controverting evidence,” or he can “attack the defense expert through legitimate cross-examination.”

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# Restitution: Joint and Several Liability Between Children and Parents

By Art Merchant, Juvenile Durango Supervisor, Chris Phillis, Mesa Juvenile Supervisor and Suzanne Sanchez, Juvenile Appeals Attorney

Restitution raises significant issues for defendants, but it is extremely problematic for juveniles. All of us are familiar with joint and several liability for restitution between co-defendants, but in juvenile court the parents also can be held responsible for restitution. However, holding parents jointly and severally liable with their children can have dire consequence for juveniles.

There are two statutes pertaining to payment by parents for financial losses caused by their children: A.R.S. § 12-661 and A.R.S. § 8-344.

A.R.S. § 12-661(A) imposes civil liability. *In re Kory L.*, 194 Ariz. 215, 219, 979 P.2d 543, 547 (App. 1999). Parents can be held *civilly* liable for up to \$10,000.00 for monetary damages that their children cause. A.R.S. § 12-661(A) states:

Any act of malicious or willful conduct of a minor which results in any injury to the person or property of another, to include theft or shoplifting, shall be imputed to the parents or legal guardian having custody or control of the minor ... and such parents or guardian having custody or control shall be jointly and severally liable with such minor[.]

Civil liability pursuant to A.R.S. § 12-661(A) is true vicarious liability. *Kory L.*, 194 Ariz. at 219, ¶ 12, 979 P.2d at 547. Therefore, pursuant to A.R.S. § 12-661(A), parents and their children are jointly and severally liable for civil damages. *Id.*

However, A.R.S. § 8-344, the other statute authorizing payment by parents, is not a civil vicarious liability statute. *Kory L.*, 194 Ariz. at 219, 979 P.2d at 547. Accordingly, A.R.S. § 8-

344 does not authorize joint and several restitution between parents and children. Instead, A.R.S. § 8-344 contains separate provisions concerning (1) payment of juvenile-delinquency restitution awards by delinquent children, and (2) payment of juvenile-delinquency restitution awards by parents of delinquent children. The two provisions state:

(1) “[T]he court, after considering the nature of the offense and the age, physical and mental condition and earning capacity of the juvenile, shall order the juvenile to make full or partial restitution.” A.R.S. § 8-344(A).

(2) “In ordering restitution pursuant to section A of this section, the court may order one or both of the juvenile’s custodial parents to make restitution[.]” A.R.S. § 8-344(C).

A.R.S. § 8-344(C) is not a true vicarious liability statute. *Kory L.*, 194 Ariz. at 219, 979 P.2d at 547. Rather, the purpose of the statute is to have the parents pick up the slack to make the victims whole if the juvenile is unable to pay full restitution within a reasonable time or before the juvenile’s eighteenth birthday. Hence, A.R.S. § 8-344(C) does not authorize joint and several restitution between parents and children. *Id.* at 219, 979 P.2d at 547. Instead, A.R.S. § 8-344(C) “contemplates that, if a parent is ordered to pay restitution, the juvenile and the parent will be ordered to pay *separate* amounts.” *Id.* at 219, 979 P.2d at 547 (emphasis added).

If a child is held jointly and severally liable with his parents, the child can suffer unintended consequences. A child must

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# The Damaging Presentence Report

By Rebecca Lukasik, Mitigation Specialist

After your client has entered a guilty plea or was found guilty at trial, an adult probation presentence report will be ordered by the court in a twenty-eight day time frame. In most cases, we should take immediate action to prepare for the sentencing date. The first step involves contacting the assigned probation officer before the officer submits their recommendation to the court. We may have relevant information that has not been submitted to the probation officer that will help persuade the officer towards a favorable recommendation (e.g. mental health records, letters by family and previous employment, social security records, and military awards). In addition, it is helpful to alert family members and other contacts that the probation officer may be trying to contact them.

In the past, I have attended a number of presentence interviews with the client and the attorney in the case. The probation officer usually does not mind if you are present at this interview and this will ensure you know all the information that has been discussed during the meeting. If you are not able to attend the interview, then I would suggest you prepare your client for the questions that will be asked during the presentence meeting.

Due to time constraints, you may not be able to contact the probation officer before they write the report. Therefore, you may need to deal with a damaging presentence report. As we have all seen in the past, some of these reports may be flawed (e.g. impressions and recommendations not flowing from facts, inaccurate or incomplete information, relevant information left out). We are left to do damage control of these misleading reports.

As a former adult probation officer, I know that two of the most influential sentencing factors

for judges are the description of the offense and the defendant's criminal history. In many of these reports, the description of the offense may be based solely on the complaint and police reports. In addition, over time there may be changes in witness information and they frequently do not include defense witnesses. Oftentimes, these reports lack information about the circumstances of the offense and it does not contain witness discrepancies. Furthermore, many presentence reports do not mention the offender's remorse, and what they do offer is the offender's version documented in "slang" terminology. With regard to the victim statements, this information may have come from police reports instead of a recent statement. They may not follow up with the victim, whose views may change over time.

The second part of the report that should be closely examined is the criminal history. Juvenile prior records, in particular, sometimes have inaccuracies between "petitions" and "adjudications." We all know that adjudications occur when juveniles are actually charged and sentenced. However, sometimes the Adult Probation Department will mistakenly list the petitioned charges as adjudications.

In adult criminal convictions, the Adult Probation Department may list offenses when the client was not even arrested. Even if a case has been dismissed, it may sometimes be noted as a disposition not reported. You may want to check Court files on these cases to see the actual results, especially for violent offenses. You may want to write a sentencing memo to the Court including the client's description of the offenses if there were mitigating circumstances surrounding the prior offenses.

Of course, the social history should be scrutinized, especially if the presentence writer leaves out information regarding mental health, sexual abuse, and physical abuse. Mitigation specialists will provide a full description of the client's social history in a report addressed to the court. We generally ask for a mitigation hearing in order to have an adequate amount of time to analyze the presentence report. If there is not a mitigation specialist working on the case, you may want to compose your own written memo to the court explaining any mistakes in the presentence report and additional information that may be beneficial for the court to consider at the time of sentencing. If your

client will be serving a term in prison, you should ask the judge to attach your report to the presentence report so the Department of Corrections has accurate information about your client, especially if the client has mental health issues.

In conclusion, when you receive an adult probation presentence report, look closely at all the information given, including what is missing from the report. Showing the discrepancies in a damaging report may help you convince the court to order a more appropriate sentence than that recommended by an incomplete, inaccurate report.



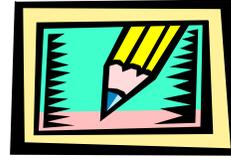
## Got the Writer's Bug?

Then, consider submitting an article for publication in  
*for The Defense.*

Articles, practice pointers and other training related  
information are welcome at anytime...So, submit your  
next article to one of our editors soon!



## Writers' Corner



### Garner's Usage Tip of the Day: counterfeit

*Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including A Dictionary of Modern Legal Usage, The Winning Brief, A Dictionary of Modern American Usage, and Legal Writing in Plain English. The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at [www.us.oup.com/us/apps/totd/usage](http://www.us.oup.com/us/apps/totd/usage). Garner's Modern American Usage can be purchased at bookstores or by calling the Oxford University Press at: 800-451-7556.*

#### **counterfeit; imitation; forgery.**

These words overlap to some degree. Although something "counterfeit" is always an "imitation," an "imitation" may not be "counterfeit." A counterfeit article is an illegal imitation <a counterfeit Gucci handbag>.

An "imitation" is an exact copy, or a thing made to resemble something else. It is usually identified as a copy <the label says "imitation leather">.

A "forgery" is a document made or altered in a way that harms another's rights. Before the advent of paper money, the distinction between "forgery" and "counterfeiting" was clear because "counterfeiting" referred only to the making of false coins. But once money began to grow on trees, criminals looked for ways to copy it — and this activity also came to be known as "counterfeiting." Today, the usual expressions are "counterfeit a \$20 bill" and "forge a check."



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*Continued from Restitution page 3*

remain on probation until all restitution is paid; therefore a child may be kept on probation several additional years based solely on the parents' failure to pay. If the parents' restitution remains unpaid when the juvenile turns eighteen, the child will suffer additional consequences. The child may incur a restitution lien as a result of his parents' failure to pay restitution. The juvenile will receive an unsuccessful release from probation, which will prevent him from setting aside his adjudication and expunging his juvenile record, and from receiving a misdemeanor on an undesignated felony.

probation and enter adulthood with clean juvenile and financial records will depend on his parents' payment of restitution. The parents may be unable to pay for financial reasons, or may willfully disregard paying restitution out of spite, thereby forcing their child to suffer life-long consequences.

Courts must be made aware that A.R.S. § 8-344 precludes the parents from being held jointly and severally liable with their child. Otherwise the child may suffer life-long consequences.

Holding a juvenile jointly and severally liable with his parents places him at their mercy. The ability of a juvenile to be successful on





# APDA

## Third Annual Conference Program Information

This year's conference will endeavor to capture the spirit of public defender work as we again cast aside the traditional seminar format to offer you an unparalleled program featuring approximately 20 "feature programs" in addition to over 90 other course options. The conference will open with a plenary presentation of "Gideon's Legacy" followed by an array of unique and diverse courses designed to enhance your professional skills and promote your physical and mental well-being.

Here is a sampling of the courses that will be presented.

<b>FEATURED PROGRAM:</b> Questioned Documents –Including the "true story" behind the Dan Rather/CBS debacle involving the examination of the alleged "Bush" National Guard memo	<i>Sandra Ramsey-Lines</i>
<b>FEATURED PROGRAM:</b> Preparing Living Wills and Health Directives (repeated Thursday 1:45 p.m.)	<i>Barbara Volk-Craft</i>
<b>FEATURED PROGRAM:</b> Changing the Community's Perception of Public Defenders	<i>Kirsten Levingston</i>
<b>FEATURED PROGRAM:</b> Defending the Internet Criminal Case using Computer Forensics	<i>Lonnie Dworkin</i>
<b>FEATURED PROGRAM:</b> Accident Reconstruction for Everyone	<i>Armand Casanova, Paul Gruen</i>
<b>FEATURED PROGRAM:</b> Ethical Issues for Support Staff	<i>Andrew Clemency</i>
<b>FEATURED PROGRAM:</b> Cross-Examination of the Expert in DUI Cases	<i>Chester Flaxmayer, Christopher McBride</i>
<b>FEATURED PROGRAM:</b> "Safe Haven" Pleas to Non-Deportable Crimes	<i>Holly Cooper, Kathy Brady</i>
<b>FEATURED PROGRAM:</b> Jury Dynamics	<i>Sunwolf</i>
<b>FEATURED PROGRAM:</b> Things Your Mother Never Told You About Forensic Pathology	<i>Dr. Daniel Brown</i>
<b>FEATURED PROGRAM (Ethics):</b> Writing Creative, Defense-Oriented, Jury Instructions	<i>Terry Bublik, Dan Carrion, Brent Graham</i>
<b>FEATURED PROGRAM:</b> Shaken Baby Syndrome	<i>Ann Bucholtz, M.D.</i>
<b>FEATURED PROGRAM:</b> Developing a Theme for your Case	<i>Steve Rench</i>
<b>FEATURED PROGRAM:</b> Team Approach to Working with Clients with Mental Health Issues	<i>Kellie Lenz, Linda Shaw, Ada Barrios, Lloyd Jaquez, Fredrica Strumpf</i>
<b>FEATURED PROGRAM:</b> Innovative Voir Dire for every case - Juror Incompetency and the Challenge for Cause	<i>Sunwolf, Russ Born</i>
<b>FEATURED PROGRAM (Ethics):</b> Trends in Discipline Case Law – including the <i>Peasley</i> , <i>Zwada</i> and <i>Moak</i> cases, the most current ethics opinions, and important developments concerning ER 3.3, "candor toward the tribunal"	<i>Karen Clark, State Bar Ethics Counsel</i>
<b>FEATURED PROGRAM:</b> Availability and Utilization of Interpreters, Transcribers and Translators, Ethical issues, Interpreter Qualifications and Certification	<i>Scott R. Loos, Juan Carlos Cordova, Sabine Michael, Kathy Schaben, Steve Morrissey, Blanca Lucht, Cindy Price, Ramón Delgadillo, Raúl A. Román, Alfred Gonzalez, Gerson Díaz, Victoria Vasquez</i>
<b>FEATURED PROGRAM:</b> "Hold My Beer and Watch This" – Causes and Manners of Death	<i>Dr. Daniel Brown</i>

*Additional details available this issue on the back cover*

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A prosecutor “cannot attack the expert with non-evidence” or improper argument, and “undermine the very purpose of the rule.” Nor may a prosecutor use “irrelevant, insulting cross-examination and baseless argument designed to mislead the jury and undermine the very purpose of the rule [Ariz. R.Crim. P. 11].” 208 Ariz. at 237, 92 P.3d at 867.

Also, watch out for prosecutors expressing their opinions about the validity of the defense expert’s analysis and/or conclusions, or the defendant’s test results. The American Bar Association *Standards Relating to the Administration of Criminal Justice* 3-5.8, provide that a prosecutor should not express his personal belief or opinion regarding the truth or falsity of any testimony or evidence. It is improper for a prosecutor to vouch for the truth or falsity of the testimony of a witness, or the guilt of a defendant. Vouching is “condemned because it unfairly exploits the tremendous power and prestige of the prosecutor’s office to manipulate the jury’s assessment of the evidence.” “When the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be[.]” Vouching is especially unfair to a defendant, because it is unsworn testimony not subject to cross examination. Gershman, Bennett L., *Prosecutorial Misconduct* (ed. 1990), § 10.5.

The *Zawada* Court cited with approval *Florida Bar v. Schaub*, 618 So.2d 202 (Fla. 1993). Schaub was suspended from the practice of law for three reasons, including that he “inserted his personal opinions on psychiatry and the insanity defense into his questioning.” *Zawada*, 208 Ariz. at 239-40, 92 P.3d 869-70. It is also improper for a prosecutor to argue “that psychiatrists create excuses for criminals.” *Hughes*, 193 Ariz. at 84, 969 P.2d at 1196.

In *Hughes*, the prosecutor argued that the defendant was telling lies and that Dr. Potts was Hughes’ “mouthpiece” in presenting these lies to the jury. The Court held this was an improper comment on Hughes’ right not to testify under Article 2, § 10 of the Arizona Constitution and A.R.S. § 13-117(B), and that the improper comment resulted in fundamental error. 193 Ariz. at 86, 969 P.2d at 1198; *see also Griffin v. California*, 380 U.S. 609, 612-15 (1965) (holding that a prosecutor may not even indirectly comment about the fact that the defendant did not testify at trial).

Also, in *Hughes*, the prosecutor argued that Dr. Potts’ psychiatric evaluation “is not a science, it’s an art. It’s an art. It’s guesswork.” He “could no more tell you what was going on inside of that man’s mind than [he] can tell you whether or not he was abducted by a UFO.” The Court held the prosecutor was arguing that Dr. Potts was a “fool” or a “fraud,” which constitutes prosecutorial misconduct. 193 Ariz. at 84-86, 969 P.2d at 1196-98.

#### THE MULTIPHASE PMV INOCULATION PROCESS: PRE-TRIAL, DURING TRIAL, POST-TRIAL, AND MAYBE, A POOL MOTION

Begin inoculating against PMV at the **pre-trial phase**. If your prosecutor is known for certain misconduct, address that misconduct “up front” by filing a pretrial motion and requesting oral argument. Here’s how this worked a few years ago regarding “misstatement of the law” prosecutorial misconduct. *See e.g., State v. Serna*, 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990) (discussing this type of misconduct).

MCPD Attorney Jim Rummage and I were chatting about some of our pending appellate issues, when Jim mentioned that he had raised an issue of prosecutorial misconduct where the prosecutor told the jurors during closing argument that the State didn’t have to prove its case beyond “any” reasonable doubt or beyond “all” reasonable doubt, just beyond “a” reasonable doubt. I told him that I had raised a very similar issue where the

prosecutor had used the beyond “all” reasonable doubt language. When we checked our transcripts, we found that our cases involved *the same prosecutor*. In unpublished decisions, the Arizona Court of Appeals made it clear to the prosecutor in both of our cases that he was to stop making those arguments *immediately*, because they were misstatements of the law.

A few months after that, Attorney Greg Parzych called me before one of his jury trials to discuss whether there were any recent appellate rulings that might apply to his client’s case, and he told me the case facts. I asked him who the prosecutor was, and it was the same prosecutor who had recently been admonished in the appeals handled by Jim and me. I told Greg about the appellate rulings. Greg then moved pretrial that the prosecutor be precluded from making the improper statements in closing argument, and the trial court granted the motion. Thus, Greg was able to “shut down” the prosecutor before jury selection had even begun.

Continue with the next phase of your PMV inoculation, which is **during the trial**. Even if you’ve already addressed the issue of prosecutorial misconduct pretrial, each time that misconduct occurs during the trial, make a specific, contemporaneous objection. See *e.g.*, *State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978). For example, “Objection, misstates the law.” If the objection is sustained, move to strike and for an instruction to disregard the statement and/or conduct. See *State v. Woods*, 141 Ariz. 446, 455, 687 P.2d 1201, 1210 (1984). If the situation warrants it, move for a mistrial.

If the motion for mistrial is denied and your client is convicted, move on to the **post-trial phase** by filing a Motion For New Trial under Rule 24.1(c)(2), ARCP; subsections (c)(4) and (5) may also be applicable. Discuss all of the instances of prosecutorial misconduct that occurred, the relevant constitutional, statutory and/or case law and request oral argument. You may also want to request that

your supervisor approve funding to have the portions of the trial containing the misconduct transcribed and then attach these transcripts to your Motion. Here’s what happened regarding one of my jury trials.

In closing argument, the prosecutor (and yes, it was the same one who in later cases made the misstatements of law in closing argument regarding reasonable doubt, and who was then admonished on appeal) commented on the fact that my client did not testify by literally pointing his finger at my client as she sat at the defense table and telling the jurors that they didn’t hear any testimony from the witness stand denying the State’s evidence. Perceiving a bit of a problem with this, I objected and asked for a sidebar with the court reporter. At the bench and on the record, I then made my objection that the prosecutor had commented on the fact that my client did not testify, which violated both the Federal and Arizona Constitutions, as well as statutory and case law. I moved for a mistrial, and alternatively that the statements be stricken, the jurors be instructed to disregard the statements, and the prosecutor be admonished by the court in front of the jury. All of those motions were denied, and my client was convicted.

I filed the Motion For New Trial, made my factual and legal arguments and attached a copy of the transcript of the closing arguments. My oral argument for the Motion included a reenactment of the prosecutor pointing at my client. The Motion was granted. MCAO then removed the prosecutor from the case, the new prosecutor made a plea offer that reduced my client’s prison exposure to 50% of that contained in the original offer, and my client accepted the offer and was sentenced.

But let’s say that the Motion was granted, but the client decided *not* to accept the plea, and the case had to be retried. Your last phase of the PMV inoculation may be filing a **Pool Motion** and arguing for a *dismissal with prejudice* on double jeopardy grounds.

Both the Federal and Arizona Constitutions require dismissal of a case with prejudice due to certain levels of prosecutorial misconduct coupled with double jeopardy considerations. Concerning the Federal provision, the United States Supreme Court has said:

Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, “[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.” *United States v. Dinitz*, *supra*, 424 U.S., at 609, 96 S.Ct., at 1080. Only where the governmental conduct in question is intended to “goad” the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

*Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). The Court had previously recognized that in potential mistrial situations, “the defendant generally does face a ‘Hobson’s choice’ between giving up his first jury and continuing a trial tainted by prejudicial or prosecutorial error.” *United States v. Dinitz*, 424 U.S. 600, 609 (1976).

*Kennedy* was a plurality opinion where Justice Stevens filed one of the concurrences, which was joined by three other Justices:

The rationale for the exception to the general rule permitting retrial after a mistrial declared with the defendant’s consent is illustrated by the situation in which the prosecutor commits prejudicial error with the intent to provoke a mistrial. In this situation the defendant’s choice to continue the tainted proceeding or to abort the proceeding and begin anew is inadequate to protect his double jeopardy interests. For, absent a bar to reprosecution, the defendant would simply play into the prosecutor’s hands

by moving for a mistrial. The defendant’s other option — to continue the tainted proceeding — would be no option at all if, as we might expect given the prosecutor’s intent, the prosecutorial error has virtually guaranteed conviction. There is no room in the balance of competing interests for this type of manipulation of the mistrial device.

*Kennedy*, 456 U.S. at 686 (Stevens, J., concurring) (footnote omitted). Justice Stevens noted that a prosecutor might want to provoke a mistrial in order to shop for a more favorable trier of fact or correct deficiencies in his case. 456 U.S. at 686 n.19. In concurring in the judgment not to bar a retrial, it was important that, “[t]he isolated prosecutorial error occurred early in the trial, too early to determine whether the case was going badly for the prosecution.” 456 U.S. at 692.

In another concurrence, Justice Powell noted that “there was no sequence of overreaching prior to the single prejudicial question. . . . [I]t is evident from a colloquy between counsel and the court, out of the presence of the jury, that the prosecutor not only resisted, but was also surprised by, the defendant’s motion for a mistrial.” 456 U.S. at 680. The plurality opinion concluded that a prosecutor’s intent should be determined from objective facts and circumstances when deciding if double jeopardy should bar a retrial. 456 U.S. at 675.

The same argument under the Arizona Constitution is even easier made in light of our Supreme Court’s opinion in *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984). The prosecutor involved in *Pool* was the same prosecutor whose misconduct was at issue in *Hughes and Zawada*.

The *Pool* Court first noted that, even under the objective fact test of the *Kennedy* plurality, the record contained little to justify the trial court’s ruling that the prosecutor did not intentionally provoke a mistrial. 139 Ariz. 106-07, 677 P.2d at 269-70. This included the

fact that “[t]he trial had not gone well.” 139 Ariz. at 107, 677 P.2d at 270. The Court then set forth a test broader than that of the *Kennedy* plurality:

We hold, therefore, that jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court under the following conditions:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

139 Ariz. at 108-09, 677 P.2d at 271-72 (footnote omitted). After conducting a *de novo* review of the record, the *Pool* Court concluded that the prosecutor’s purpose “was, at best, to avoid the significant danger of acquittal which had arisen, prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal. Accordingly, we hold that jeopardy attached and retrial is barred.” *Id.*

## CASE STUDY #2

ERRADICATING THE VIRULENT STRAIN OF PROSECUTORIAL VINDICTIVENESS: YES, IT CAN BE DONE

*State v. Goettel*, 1 CA-CR 03-0936 & 1 CA-CR 03-0937 (consolidated), Arizona Court of Appeals memorandum (unpublished) decision filed November 4, 2004, was a “State’s appeal.” The State argued that the trial court abused

its discretion by dismissing Ms. Goettel’s cases *with* prejudice due to prosecutorial vindictiveness. I represented Ms. Goettel on appeal. Here’s what happened. **Note:** When you argue an issue to the trial court, *do not* cite to a memorandum decision as authority. See Rule 111(c), Rules of the Supreme Court of Arizona, 17A, A.R.S. (“Memoranda decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of *res judicata*, collateral estoppel or the law of the case or (2) informing the *appellate* court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.” (emphasis added)). But you may use the reasoning within that decision to make your *own* argument, including the published case citations.

### The Diagnosis And Treatment At The Trial Level

After the State was unable to coerce a plea from Ms. Goettel in her first case, and five days before her trial date of September 3, 2003, the State revealed that it had indicted her in a second case on the class 4 felony Aggravated DUI charged in the first case (driving under the influence of alcohol with a suspended license), as well new charges of a class 6 felony DUI (having a person under 15 in the car) and a class 1 misdemeanor charge of False Reporting To Law Enforcement Agency, all arising from the same incident on February 21, 2003, and all based on facts known to the State at the time of Ms. Goettel’s arrest for the class 4 felony Aggravated DUI. Her “last day” for speedy trial purposes was October 4, 2003.

The release questionnaire filled out by the police and filed in the first case included the information that Ms. Goettel (1) was arrested because she did not have an ID, although a

license was later found in her car (she lied to the police), (2) had a 3-year-old and a 4-year-old child in the car with her, and (3) ran a red light, had a moderate odor of alcohol on her breath and had breath alcohol test readings of .090 and .073, with a field test reading of .085.

In court and before Judge Buttrick, the State played dilatory games. Instead of the assigned prosecutor being present to handle the matter and be available for questioning by the judge, the case was handed off to the coverage prosecutor, who could, and did, engage in “deliberate ignorance” regarding the assigned prosecutor’s reasons for dismissing and reindicting. The coverage prosecutor orally moved to dismiss the single-count indictment in the first case and vacate the trial date.

Luckily for Ms. Goettel, The Force (MCPD Attorney Jeff Force) was with her. Jeff told the court that this was the first that he had heard of any dismissal, he hadn’t received any paperwork regarding the reasons, and that, “I can’t but think that this is an attempt to get around Rule 8. The new charges . . . stem from the same incident back in February of this year and [are] nothing that was unknown to the police at that time. So if there is a dismissal, I would ask that it be with prejudice.”

And then came the “deliberate ignorance” from the coverage attorney: “Although I do not have the new complaint, because I am covering this for another attorney, I believe that there are additional charges that were not known to the original charging attorney at the time of initial charging, so I believe that was the basis for the reindictment by the grand jury.”

But as Jeff noted, that simply wasn’t true. “At the time of the stop, it’s alleged that [Ms. Goettel] had children under the age of fifteen in the car. They were photographed. The State, in their discovery, provided birth certificates on the children, but that was

never charged. It was alleged. The other new charge is that she gave a false name at the time, and that was fully flushed out in the police report as well.” Jeff then renewed his motion to dismiss with prejudice.

Judge Buttrick believed that Jeff had “a pretty good argument,” and the judge then articulated his reasons for that belief. “I mean if all of these matters you’re contemplating bringing to trial occurred as a result of one incident, then they should have been filed all at the same time or not. *I agree that it certainly seems unjust* to pick and choose to say we’re going to dismiss the aggravated DUI . . . but we’ll go ahead with the class 6 because you’ve got children under the age of fifteen. If you wanted to do that, why wasn’t that done at the time?” (emphasis added) The coverage attorney again pleaded ignorance: “I’m the coverage attorney. I do not know why.” She never offered to call the assigned attorney, or even to review the State’s case file to see if it contained any relevant information.

Nevertheless, Judge Buttrick gave the prosecution a break at that point. He vacated the September 3rd trial date and ordered the prosecution to file a motion to dismiss “forthwith,” with the defense response due ten days later. The decision would then be made regarding whether the dismissal was with or without prejudice.

The State continued with its dilatory tactics, violated Judge Buttrick’s order and failed to file the motion to dismiss “forthwith.” After waiting on the State for two weeks, Jeff had no choice but to file the motion himself, and he moved that both of the Aggravated DUI charges be dismissed with prejudice. The bases were that (1) Ms. Goettel had a right to a speedy trial under Rule 8, ARCP, and the State was trying to circumvent that right, and (2) the State knew of the bases for the two new charges in the indictment at the time of Ms. Goettel’s arrest because they were contained in the police reports, but it chose not to pursue them until it was close to the

trial date on the first charging document. Jeff discussed that the new charges involved DUI with a child in the car and false reporting. He also discussed that the State had violated Rule 16.1, ARCP, by failing to make a motion to dismiss at least 20 days prior to trial, and that he believed that the State's failure to carry its burden of showing good cause under Rule 16.6, ARCP, was due to the State retaliating against Ms. Goettel for refusing to accept the State's plea offer, and/or to circumvent Rule 8. Furthermore, Jeff had relied on the first charging document when he advised Ms. Goettel and prepared her defense, and he had been ready to go to trial. Allowing the State to "manipulate the system" at Ms. Goettel's expense would not be in the interests of justice.

The assigned prosecutor didn't file a response.

On September 25, 2003, Ms. Goettel had to appear in court, yet again, to be recharged with class 4 felony Aggravated DUI, as well as the two other charges. This, of course, caused her Rule 8 time limits to begin anew, and put her last day at 180 days from September 25th, well beyond October 4, 2003. See Rule 8.2(a)(2), ARCP.

On September 26, 2003, Jeff filed a motion in both cases to reinstate Ms. Goettel's previous release conditions, which only required that she report by telephone to pretrial services once a week, and that she report in person when she had a court date. When she was arraigned in the second case, those conditions became substantially more onerous by including drug and alcohol monitoring. Jeff also noted that Ms. Goettel was employed, and that the State had obtained the indictment in her second case on August 5th, but never said a word about it until August 28th.

The assigned prosecutor didn't respond to that motion either.

On October 1, 2003, Judge Buttrick granted the motion to reinstate Ms. Goettel's original release conditions and deleted the drug and

alcohol monitoring. On October 17, 2003, he dismissed with prejudice the class 4 felony Aggravated DUI charge in both cases.

### The Diagnosis And Treatment At The Appellate Level

I began the appellate argument by noting that all motions that are made less than 20 days prior to trial shall be precluded, "unless the basis therefore was not then known." Rule 16.1(b), (c), ARCP. The court may grant a prosecutor's motion to dismiss if the prosecutor shows good cause, and the court finds "that the purpose of the dismissal is not to avoid the provisions of Rule 8." The dismissal shall be with prejudice if the court finds that the interests of justice require it. Rule 16.6(a) & (d), ARCP; *State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (App. 1991). The court's findings regarding the interests of justice may be made through oral, transcribed findings. *Granados*, 172 Ariz. at 407, 837 P.2d at 1142; *State v. Gilbert*, 172 Ariz. 402, 405, 837 P.2d 1137, 1140 (App. 1991).

The next portion of the argument addressed the Rule 8 issue, beginning with the fact that the Rule 8 speedy trial right is "more restrictive" of the State than is the Sixth Amendment. *State v. Tucker*, 133 Ariz. 304, 308, 651 P.2d 359, 363 (1982). A person who is out of custody must be tried within 180 days of their arraignment. Rule 8.2(a)(2), ARCP. When the State violates Rule 8 time limits, the case *shall* be dismissed, and it may be dismissed with prejudice. Rule 8.6, ARCP.

"[C]onstitutional guarantees of due process protect criminal defendants against prosecutorial action taken to penalize them for invoking legally protected rights." *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992), citing *Blackledge v. Perry*, 417 U.S. 21 (1974); see also U.S. Const., Amends. VI & XIV (right to jury trial and due process); Ariz. Const., Art. 2, §§ 4 & 23 (same).

"Prosecutorial vindictiveness' occurs when the government retaliates against a defendant for

exercising a constitutional or statutory right.” *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d. 164, 165 (App. 1997), *citing United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987). Such action is “patently unconstitutional.” *Brun*, 190 Ariz. at 506, 950 P.2d at 165, *quoting Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

A defendant may demonstrate “prosecutorial vindictiveness by proving ‘objectively that the prosecutor’s charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.’” *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702, *quoting United States v. Goodwin*, 457 U.S. 368, 384 (1982); *accord Brun*, 190 Ariz. at 506, 950 P.2d at 165. The doctrine also “applies if there is a realistic likelihood of vindictiveness in the decision to reindict a criminal defendant.” *State v. Noriega*, 142 Ariz. 474, 486, 690 P.2d 775, 787 (1984), *citing Blackledge*, 417 U.S. at 26.

In some circumstances, a defendant “may rely on a presumption of vindictiveness.” *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702, *citing Meyer*, 810 F.2d at 1245; *accord Brun*, 190 Ariz. at 506, 950 P.2d at 165. This presumption arises where the defendant carries the initial burden of establishing facts that realistically suggest a likelihood that the State “upped the ante” in retaliation for the defendant asserting her procedural rights. *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702, *citing Meyer*, 810 F.2d at 1245, and *United States v. Heldt*, 745 F.2d 1275 (9th Cir. 1984); *accord Brun*, 190 Ariz. at 507, 950 P.2d at 166, *quoting Meyer*, 810 F.2d at 1246. The burden then “shifts to the prosecution to show that the decision to prosecute was justified.” *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702, *citing Heldt*.

Prosecutorial vindictiveness may occur during “the pretrial setting.” *Tsosie*, 171 Ariz. at 686-87, 832 P.2d at 703-04, *reviewing Meyer*, 810 F.2d at 1246; *accord Brun*, 190 Ariz. at 507, 950 P.2d at 166. “The critical question in a pretrial setting is whether the defendant has

shown ‘that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption.’” *Tsosie*, 171 Ariz. at 687, 832 P.2d at 704, *citing Meyer*, 810 F.2d at 1246.

Here, the State’s motion to dismiss could have been denied on procedural grounds, because the State failed to comply with the 20-day time limit of Rule 16.1, ARCP, and/or because it failed to carry its burden of showing good cause, and that the dismissal was not to avoid Rule 8 time limits, as required under Rule 16.6, ARCP.

But the record also showed that the assigned prosecutor “upped the ante” because Ms. Goettel refused to plead guilty and asserted her Rule 8 right to a timely trial. And because she did that, she had to appear in court and miss work to be arraigned on the second charging document, as well as undergo the anxiety and concern of having additional charges filed against her and more onerous release conditions imposed upon her. *See Snow v. Superior Court (Romley)*, 183 Ariz. 320, 325, 903 P.2d 628, 633 (App. 1995) (finding that actual prejudice in the Rule 8 context includes the defendant being subjected to anxiety or concern).

Additionally, the record showed that the facts supporting the two new charges were known to the assigned prosecutor at the time that the Aggravated DUI was first charged, and that the significance of those facts had not changed. *See Goodwin*, 457 U.S. at 381. We also had the telltale facts of a concerted effort by the assigned prosecutor to be unavailable, both in court and in writing, so that he did not have to explain to Judge Buttrick why his recharging decision was *not* vindictively motivated. In other words, it *was* so motivated. And we had the assigned prosecutor’s concerted effort ably assisted by the coverage prosecutor’s deliberate ignorance regarding the assigned prosecutor’s reasons for recharging the Aggravated DUI *six months* after Ms. Goettel’s arrest and original charge.

Equally disturbing was the prejudice to Ms. Goettel's defense if the second class 4 felony Aggravated DUI charge were allowed to stand. Not only would she have to defend against a felony driving under the influence charge, she would also, *in the same trial*, have to defend against being a bad mother (the class 6 felony charge), and being a dishonest person (the misdemeanor charge). This was actual prejudice by any standard, and it would certainly give the State a tactical advantage. Thus, Ms. Goettel was entitled to a dismissal *with prejudice*. *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993); *Granados*, 172 Ariz. at 407, 837 P.2d at 1142; *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139; *State v. Garcia*, 170 Ariz. 245, 247, 823 P.2d 693, 696 (App. 1991).

Anyone who read the record could see what was going on here. The State had a less than stellar case, failed to coerce a plea and at the last minute upped the ante, as well as tried to extend the last day for another six months. The bottom line was that Judge Buttrick's findings, as well as the record, supported the conclusion that the State engaged in prosecutorial vindictiveness, according to the standard set forth in *Goodwin*, *Tsosie*, and *Brun*, *supra*. See *Wills*, 177 Ariz. at 595, 870 P.2d at 413 (reviewing court will look to the trial court's findings, as well as the record, when determining whether a case should be dismissed with prejudice).

The Court of Appeals agreed with our argument. "At the time of dismissal, the defendant's speedy trial time had expired. The trial court's statements at the August 28 hearing show that the trial judge agreed with the defendant's argument that the State was attempting to circumvent the defendant's right to a speedy trial under Rule 8. Because the State failed to explain its position to the trial court, either by filing its own motion to dismiss or responding to the defendant's motion, it was not unreasonable of the trial court to accept the defendant's arguments as true without further findings or comments.

Given the State's silence, the trial court could find a Rule 8 violation. In this case, there is sufficient evidence in the record for us to presume that the trial judge believed that the State delayed to gain a tactical advantage, so a dismissal with prejudice may be appropriate. See *Garcia*, 170 Ariz. at 247, 823 P.2d at 695. Although a Rule 8 violation does not mandate dismissal with prejudice, it is within the trial court's discretion to do so. *Id.*" *Goettel* at 8-9.

And keep in mind that a dismissal with prejudice may be justified for both the "original" charge or charges and the "additional" charge or charges. "If in cases of vindictive prosecution the trial court judge may only dismiss the additional charge, the prosecutor will have nothing to lose by acting vindictively. The government's position, if accepted, would remove the deterrent effect of the doctrine of prosecutorial vindictiveness — a doctrine which the supreme court *designed* to be largely prophylactic in nature, see *Blackledge*, 417 U.S. at 26[.] We will not countenance the government's attempt to so vitiate the prohibition against prosecutorial vindictiveness." *Meyer*, 810 F.2d at 1249 (emphasis in original), *quoted with approval in Tsosie*, 171 Ariz. at 688, 832 P.2d at 705.

## CONCLUSION

Sometimes lawyers have to play doctor. Instead of working in laboratories, we work in courtrooms. Instead of concocting vaccines through the use of petri dishes, microscopic organisms and chemical analyses, we file motions, make objections and present oral arguments. But the result that we're trying to achieve is the same — we're trying to stop a type of infection.

Doctors have their patients. And we have our clients. Do what you can to stop your clients' cases from being infected by PMV.

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## March 2005

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of *for The Defense*, please contact the Public Defender Training Division.



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*Additional details inside this issue on page 7*

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602-506-5678  
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M

C

P

D

Maricopa County  
Public Defender's Office  
11 West Jefferson, Suite 5  
Phoenix, AZ 85003  
Tel: 602 506 8200  
Fax: 602 506 8377  
[pdinfo@mail.maricopa.gov](mailto:pdinfo@mail.maricopa.gov)

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