

for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

James J. Haas, Maricopa County Public Defender

Volume 17, Issue 5

August 2007



*Delivering America's
Promise of Justice for All*

for The Defense

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The Police Taser and You

How to Preserve Key Evidence

By David Kephart and Jesse Turner, Defender Attorneys



Eventually, every moment of every day will be caught on video. From ATM's to cell phones to traffic signs, if a camera can be integrated into it, then chances are it already is. And now, thanks to Taser International, the 10 most excruciating seconds of your client's life will forever be captured in the form of a black-and-white digital video.

According to Taser International, the newest versions of their model X-26 Taser now comes fully equipped with a camera and a digital memory that can store up to 90 minutes of video and sound. The camera is activated when the taser is switched to "fire mode," and it will continue recording a black-and-white video at 10 frames per second until the taser is switched off. The camera is also infrared, which means it can record in total darkness. The video image will contain the serial number of the particular taser, the time and date, and your client screaming for his or her life. The videos can be easily downloaded to a computer using a standard USB port and Taser International's proprietary software. The police departments that have purchased the new X-26 Tasers will have the means to download and store the videos.

Also, according to Taser International, some of the older model X-26 Tasers will eventually have cameras in them because the cameras are now integrated into the battery packs. This means that if an old X-26 Taser receives a new battery pack, then it will now have a camera. However, even if the taser does not have a video camera, it still records the date, time, and duration of every single trigger pull, for up to 1500 trigger pulls. This information can also be easily downloaded to a computer.

This evidence is discoverable under 15.1(b)(8) as evidence that can tend to mitigate or negate guilt, and 15.1(g) as evidence that a defendant has a substantial need for and cannot obtain without undue hardship. Pursuant to *Carpenter v. Superior Court*, 176 Ariz. 486, 862 P.2d 246 (App. 1993), a discovery request seeking to *obtain* records from an investigating agency should be communicated through the prosecutor. A timely discovery request for these records, just like for 911 calls, is *of the essence* because they are preserved in the taser for only a limited period of time. Once the video memory reaches 90 minutes, it starts recording over itself. This is the same for the trigger pull information. Police departments also have no duty to download the videos after an incident, so a timely discovery request will be critical in preventing the destruction of this evidence. Although the request to obtain the records must go through the prosecutor, a letter can be sent to the police department requesting that the video be *preserved*.

Finally, attorneys should not assume a video does not exist because the police report does not indicate a taser was used. As mentioned, if a taser is switched to “fire mode” then the camera is activated. This does not mean the taser is actually deployed. Police reports may not indicate that the officer or another officer at the scene pulled their taser out. In addition, officers that carry the older X-26 Taser may not realize that new battery packs have cameras. In sum, attorneys should think beyond the police reports and act quickly in *preserving* taser records for every officer at the scene.



Old Wine, New Bottles

How to Handle Supplemental Indictments

By Garrett Simpson, Defender Attorney - Capital Unit

Neither do men put new wine into old bottles: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved. Matthew 9:17 (KJV) ¹

From to the sublime to the ridiculous: there is a legal equivalent to those horror films where malign spirits hop from one person's body to another's, draining the life from the hosts as they relentlessly pursue the protagonists. We've all seen, experienced first-hand, or at least heard of cases where suddenly, mid-litigation, a misbegotten beast arises. It's called a "supplemental indictment." This creature usually pops to the surface when the county

attorney goes back to the grand jury to fix some defects or oversights in the original charging document. The state's whole theory of the case may have changed by chance, or nature's changing

course, and the original indictment that looked so good now seems more than a little shopworn. So, off to the grand jury they go. Sooner or later the old indictment will have to be dismissed, otherwise you won't be on notice what the charges really are. But many times, the defense will be presented with this shiny new supplemental indictment some months into the case and yet be expected to hold to the original timeline of the original charge, including motion deadlines, discovery and plea cut-off dates. Even the fast-approaching trial date from the old case will be passed off as binding. Don't buy into this. A new indictment with a new CR-number is a new case. Your client is entitled to a new "clock," a new last-day and a new change of judge, if it suits you.



In *Godoy v. Hantman*, 205 Ariz. 104, 67 P.3d 700 (2003)² there were two prosecutions; the first one was dismissed without prejudice; later, the case was re-filed. The Arizona Supreme Court wrote in *Godoy*, "We conclude that a new indictment begins a separate matter and that the right to a peremptory change of judge applies as if no prior action had been filed," *Id.* at ¶ 1. The Court in *Godoy* stated that R.Cr.P. 10.2(a) entitles either party in a criminal case to a change of judge as a matter of right, *Godoy* at ¶ 6, and held that "a court cannot disregard a timely notice of a change of judge," *Id.*, citing *State v. Shahan*, 17 Ariz. App. 148, 149, 495 P.2d 1355, 1356 (1972) ("A litigant has a peremptory right of disqualification of a judge and if filed timely the court is in error to deny the transfer to another judge.").

When the grand jury comes back with a supplemental indictment, the client is confronted with a brand-new charge. It doesn't matter if the original number is dismissed before or after the new indictment is returned. There is no procedure to allow the state to circumvent the provisions for the orderly and appropriate administration of justice in the new case — as set out in the Arizona Rules of Criminal Procedure — by applying the timelines of a defunct, dismissed case. The Supreme Court's reasoning in *Godoy* directs that the fact of a new indictment and the effect of the dismissal of the earlier action, not their sequence, are what determine the outcome.

¶ 7 We have considered the effect of the issuance of a new indictment in other contexts. Arizona courts consistently hold that time limits for purposes of the right to a speedy trial begin to run anew when a grand jury reindicts a defendant following

the dismissal of an earlier action against the defendant. (Citations omitted). We see no reason to treat time limits for filing a notice of change of judge differently.

¶ 8 Moreover, Godoy’s argument would require us to regard as “continuing” a case that the trial court has dismissed. **Once Judge Hantman dismissed the initial proceeding against Godoy, however, nothing remained of that action and the indictment was void of effect.** See *Bowman v. State*, 103 Ariz. 482, 483, 445 P.2d 841, 842 (1968) (“[W]hen a motion to quash an information is granted there is no case pending in the Superior Court until a new information is filed.”); see also *State v. Freeman*, 78 Ariz. 281, 285, 279 P.2d 440, 442- 43 (1955); *State v. Coursey*, 71 Ariz. 227, 233, 225 P.2d 713, 717 (1950); *Pray v. State*, 56 Ariz. 171, 175, 106 P.2d 500, 502 (1940). Arizona’s Rules of Criminal Procedure provide no mechanism to reinstate a void indictment. The State could again initiate criminal proceedings against Godoy following the dismissal only by either obtaining a new indictment or filing a complaint. Ariz. R.Crim. P. 2.2. When the new case began, Rule 10.2 provided each party a peremptory right to change the judge within the time permitted by the rule. See *New Mexico v. Ware*, 115 N.M. 339, 850 P.2d 1042, 1045 (Ct. App.1993) (obtaining a new indictment begins the case anew, “with all procedural rights inuring to the parties”).

Faced with this pickle, you might assert that it circumvents due process of law to violate the Rules of Criminal Procedure by applying time constraints of the old, void, dismissed case to the new charge. In capital matters, Rule 8.2(a)(3), Rules of Criminal Procedure says your client gets one year for pre-trial preparation. It violates the Eighth Amendment to subject a defendant to a potential capital sentence to a shorter preparation time. The fact there was a prior action should not be allowed to interfere with the client’s right to prepare a defense to the new indictment. Point out to the judge that for instance, if the old case’s timelines attach, you can’t file a 12.9 motion to remand on the new charge. And if the judge says, “Well, sure you can, that’s different,” ask the court why.

If you’re ever put in this position the proper remedy is special action. Think about the old, dismissed action as a lever to pry open the doors of the appellate court. “[A]n order of dismissal without prejudice may not be appealed by a defendant; the appropriate avenue of review is a petition for special action,” *State v. Alvarez*, 210 Ariz. 24, 107 P.3d 350 (App. 2005). Or ask for a new judge. When that’s denied, assert, “Appellate challenges relating to a peremptory request for a change of judge are appropriately reviewed by special action,” *Bergeron ex rel. Perez v. O’Neil*, 205 Ariz. 640, ¶ 11, 74 P.3d 952 (App. 2005). Special action jurisdiction is also appropriate because there is no right of appeal from an improperly denied motion to dismiss with prejudice, or an improperly granted motion to dismiss *without* prejudice. See, A.R.S. § 13-4033.

Finally, even if your client has an arguable remedy at law, the appellate court is not precluded from taking special action jurisdiction. See e.g., *Arizona Dept. of Public Safety v. Superior Court*, 190 Ariz. 490, 494, 949 P.2d 983, 987 (App. 1997).

(Endnotes)

1. See also Kenny Loggins’s “Same Old Wine” from 1971’s “Loggins & Messina” album *Sittin’ In*, the lyrics of which — although written about the Vietnam War — are hauntingly timely today.
2. *Accord, State v. Paris-Sheldon*, ___ Ariz. ___, 154 P.3d 1046 FN6 (App. 2007).

PRESENTED BY MARICOPA COUNTY PUBLIC DEFENDER

The Newest Developments in Brady & Crawford

with Ira Mickenberg
Friday, October 5, 2007

8:15 am - 9:00 am **Registration &
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9:00 am - 12:00 PM **Brady**
12:00 pm - 1:30 pm **Lunch on your own**
1:30 pm - 4:30 pm **Crawford**
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To register and make payment, please contact
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Parking--Wells Fargo Parking Garage

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Parking--Wells Fargo Plaza

This garage is attached to the conference center and is \$9.00 all day (will not be validated).

The Speaker...

Ira Mickenberg is a criminal defense lawyer, defender trainer, and consultant from Saratoga Springs, NY. Ira has designed and taught trial, appellate, post-conviction and capital training programs for public defender organizations throughout the nation. He has also represented indigent defendants in the United States Supreme Court, the U.S. Courts of Appeal, and the highest courts of several states, and has done extensive felony work. From 1988-1994, Ira was founder and Attorney-in-Charge of the Office of the Appellate Defender in New York City. Ira has been certified as an expert witness in federal courts on subject of effective assistance of appellate counsel, and has taught criminal law, criminal procedure and appellate advocacy at American University School of Law, New York Law School, the University of Dayton School of Law, and Williams College.

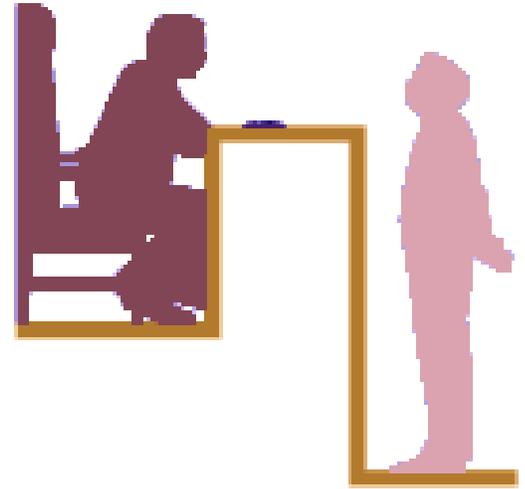
When the Right to Counsel is Indispensable

Defense Attorneys Are Not Fungible

By Amy Kalman, Defender Attorney

The right of a defendant to the assistance of counsel is one of the most vital rights accorded by the constitutions of the United States and Arizona. See U.S.C.A. Const.Amend. 6; A.R.S. Const. Art. 2, § 24.¹

Arizona Rule of Criminal Procedure 8.5 (b) states that motions to continue trial will only be granted “upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.”² Recently, a county attorney and deputy public defender found themselves both in trial (coincidentally, with one another) on the date that a certain trial was to begin. They filed a joint motion to continue the case, which was denied by the court, stating that this was not a sufficiently extraordinary circumstance to warrant the continuance. Because the deputy public defender could not literally be in two places at once, it was presumed that he would appoint another attorney in his office to handle the case. However, there was no competent counsel within the Public Defender’s Office who was prepared to try the case. The case was quite complex, a class 2 felony where the defendant, due to priors, faces a substantial prison term if convicted. Additionally, the deputy public defender had represented the defendant in his first trial on this issue, and there would be no way to acquaint new counsel with the matters in such a short period of time.



The defendant would be placed in the position of, on the literal eve of his new trial, being assigned an attorney who had no familiarity with his case. While this particular situation was solved through other means, with high caseloads and the busy schedules of the courts, county attorneys, and public defenders, this risks becoming an all-too-common scenario. The indigent defendant should not become a victim of scheduling rush, reducing his “right” to representation to a mirage. It is both a violation of the substance of that right and a unique victimization of those who cannot afford private counsel, and it should be avoided whenever possible.

THE DEFENDANT’S RIGHT TO EFFECTIVE COUNSEL

“Although we have a strong interest in the prompt and expeditious handling of criminal trials, **this interest cannot outweigh defendant’s constitutional right to be represented by counsel.**” *State v. Schaaf*, 169 Ariz. 323, 328, 819 P.2d 909, 914 (1991), (emphasis added) (internal citation omitted).

The Arizona Court of Appeals previously found an abuse of discretion in a civil context, when the attorney was, through no fault of his own, in another trial and the judge denied a continuance.³ If the necessity for counsel is so important as to merit a continuance in a civil action, then it is even more vital in a criminal context where the defendant’s liberty is at stake and they have a constitutional right to representation.

The defendant must be given adequate time to consult with counsel to allow for adequate preparation. The court of appeals rejected the “farce or mockery of justice” standard proposed by the state in *State v. Jackson*, holding instead that the counsel in that case was inadequately

prepared to preserve the rights of the defendant. 23 Ariz. App. 473, 474, 534 P.2d 281, 282 (App. 1975).⁴ The court held that there was prejudice to the defendant and the conviction was reversed.

Although likewise reluctant to declare it a per se rule, the Arizona Supreme Court noted *Jackson* and held that the preservation of the right to counsel “necessarily includes allowing counsel reasonable time to prepare his defense.” *State v. Salinas*, 129 Ariz. 364, 367, 631 P.2d 519, 522 (1981).⁵

EQUAL PROTECTION

In addition to due process, the disparate treatment between a defendant represented by private counsel and a defendant represented by the public defender’s office raises significant constitutional concerns. The United States Supreme Court recognized that a defendant who could afford to hire his own private counsel is due no less consideration than one who could not. *Mickens v. Taylor*, 535 U.S. 162, 169, FN2, 122 S.Ct. 1237, 1242 (2002).⁶

By the same token, a defendant without the means to hire his own counsel should not be penalized by the appointment of counsel. If a defendant with the means to hire a solo practitioner does so, and that solo practitioner has one trial that conflicts with another, a continuance is the only possible recourse. A private solo practitioner cannot compel another attorney to take on a case. The defendant who, by the nature of his means, is assigned a public defender, should not be penalized because the public defender’s office has more than one attorney, and should not be ordered to proceed while represented by an attorney who is unfamiliar with his case.

A BALANCING TEST

The Arizona Supreme Court applied a balancing test in *State v. Hein*, taking into account the following factors: whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory. 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983). In *Hein*, the Court held that the denial was not an abuse of discretion partially because the continuance would have inconvenienced the prosecutor and the co-defendant, as well as a jury pool who was already present and ready to be sworn. *Id.*⁷

It is vital that the attorney experienced with the case be the one representing the client at trial. While it may be necessary to have other attorneys stand in for minor proceedings, the courts should strive to preserve the defendant’s right to an attorney who is knowledgeable about the case. A violation of the right to assistance of counsel ultimately undercuts the efficiency of the court system. If a violation of this right is found following a criminal conviction, the only proper remedy is vacating the conviction. *State v. Rosengren*, 199 Ariz. 112, 117, 14 P.3d 303, 308 (App. 2, 2000) (“Because we value the right to counsel so highly, when the right to counsel is violated, then the conviction obtained as a direct result must be set aside.”) (internal citation omitted). This would only lead to costly and lengthy retrials, further stalling the courts. By applying the test set forth in *Hein*, and by reserving the denial of a continuance for only the most egregious of circumstances, the courts can better provide for judicial economy while upholding one of the most cherished rights of the criminal justice system.

Endnotes

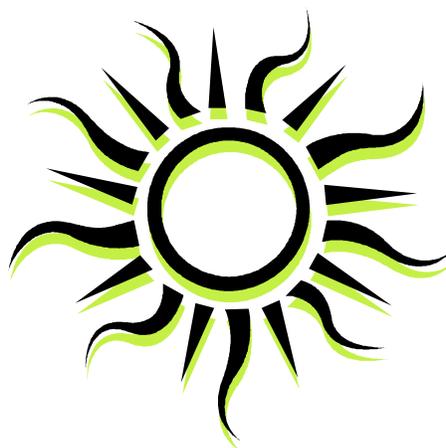
1. The right has been clarified and encoded in the Arizona Rules of Criminal Procedure.

A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment

or confinement after a judgment of guilty. The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and **sufficiently in advance of a proceeding to allow adequate preparation therefor.**

Ariz. R. Crim P., Rule 6.1 (emphasis added).

2. Ariz. R. Crim P., Rule 8.5(b).
3. "We do not believe that a counsel is required to be in two courts at the same time. Marvin Johnson was W. Francis Wilson's attorney in the divorce action and through no fault of his own found himself engaged in a trial in another Division of the same court on the day the instant case was called for trial. Under the circumstances he could not be present. W. Francis Wilson was the sole stockholder of Arizona Hotels, Inc., a general partner in the limited partnership. His presence was indispensable to aid any counsel in the defense of the action. The fact that he was in trial in another court was probably not of his own choosing and we believe it was an abuse of discretion for the trial court to deny a continuance at that time." *Camelback Partners v. Weber* 9 Ariz.App. 452, 454, 453 P.2d 548, 550 (Ariz.App. 1969).
4. "On the day of trial the Deputy Public Defender was in trial at another court. As a result, another Deputy Public Defender appeared on his behalf and filed a motion for continuance pursuant to Rule 8.5, Rules of Criminal Procedure, 17 A.R.S., alleging that the attorney assigned to the case was in trial at another court and would not be available until the next day, July 18, 1974. The motion was argued to the court and the Public Defender stated that there was a serious question concerning effective assistance of counsel in that he had not had an opportunity to read the preliminary hearing transcript, the police report or the grand jury report and had just talked to the defendant in the hall that morning. The court denied the motion to continue, apparently on the grounds that the motion did not present exigent circumstances within Rule 8.5 and that the matter would thus proceed to trial." *Id.* at 473-474, 281-282.
5. *Accord State v. Yard*, 109 Ariz. 198, 200, 507 P.2d 123, 125 (1973); *State v. McWilliams*, 103 Ariz. 500, 501, 446 P.2d 229, 230 (1968).
6. The Court cited its decision in *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716 (1980) ("A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel.").
7. Additionally, the court had already granted two continuances in the case, and the case was not complex.



Explaining Plea Agreements to Spanish-Only Defendants

Linguistic and Cultural Obstacles You Can Avoid

By Scott Loos, Office of the Court Interpreter

Editors' Note: This article originally ran in *for The Defense*, Volume 12, Issue 2.

Considering that the daily practice of the indigent defense counsel is often occupied with the description, explanation and execution of the ubiquitous plea agreement, the issue of its treatment through an interpreter seems an important one.

The apparent inability of the non-English speaker to grasp the concept of an agreement has much to do with the way in which the idea is expressed. For the purposes of this piece, we'll assume the defendant is a Spanish-speaker, but much of this applies to other foreign language speakers communicating through an interpreter.

WHAT DOES "TAKE A PLEA" MEAN

First, let's keep in mind that plea bargains are not universally employed in the courts of the world. Even if the client were an English speaker from New Zealand or Kenya, the way in which the plea agreement impacts the criminal process would have to be explained. One of the biggest obstacles to this explanation is quite simple: the use of the word "plea."

Unfortunately, English is a language that loves ellipsis. When we say "plea," it is almost never to an actual "plea" that we refer: it is almost always short for "plea **agreement**" or "plea **of guilty**" or "**change of plea proceedings**" or some other permutation of the negotiation and acceptance of this settlement of the case. Especially among the less-gifted interpreters of the world, the tendency is to always interpret a word unit from language "A" with the same word unit from language "B," even though we can see above that "plea" doesn't always hold the same sense. Therefore, the version in the interpreted language is not the same in each case either.

The word "plea" in the sense of an answer to the charges is often translated into the Spanish word "declaración." The Spanish "declaración" can mean "statement," "testimony," "finding" or any number of other concepts denoting an oral proclamation or reporting. This is one of the reasons that the Spanish-only criminal defendant (let's call him SOCD) launches off on an elaborate elocution when asked how he pleads, or simply says "yes."

The Mexican legal term *declaración preparatoria* refers to a proceeding at approximately the same point as our arraignment, but in which the defendant can narrate a factual basis if he wishes to answer the charges by admitting responsibility. The proceeding itself in Mexico includes both the terms "answer the charges" and "admit responsibility." When most attorneys review the plea agreement and its subsequent court proceeding with the client, the concept of admission of guilt and acceptance of the agreement are not linked. Thus the frequent, "I am saying I'm guilty but no, the marijuana was not mine, I didn't have a knife, I didn't touch her that way, etc."

Compare this proceeding to the probation revocation proceeding, in which the words "plea" "guilty" and "not guilty" are not in play. The defendant usually has no problem with "admit" or "deny" since they go to their recognition of wrongdoing.

THE CONCEPT OF NEGOTIATIONS

The introduction of the concept of plea negotiations requires additional review as well. The presumption that all defendants, no matter what their national origin, language identity, education level, etc., are somehow immersed in American criminal defense procedure is ludicrous.

For example, to refer to the proposed settlement of the case with the word “offer,” often misinterpreted into Spanish as “oferta” is a problem. It is again, elliptical: what kind of offer? In addition, the word “oferta” in Spanish also means “supply” (as in economics), or “sale” as in reduced cost for merchandise. It does not carry with it the concept of a proposal by the government to resolve the case at hand. Referring to the “offer” as the “agreement proposed” or “what the State is proposing in order to decide your case” makes a great deal more sense when translated.

THERE IS A CHOICE?

The next step is the concept of the two options. The endless question “Do you want to go to trial or do you want to take the offer?” is often meaningless for the first-time offender. They have no visual concept of either of these choices. If go to trial is interpreted literally, it means in Spanish “file the case, bring an action, take someone to court,” not “allow the state to bring the evidence against you and then we launch a defense against it.” The word usually used to interpret “trial” is “juicio,” which actually means “process” in general, the entire case from filing to disposition. It does not connote in the SOCD’s mind a specific series of sessions with testimony and exhibits, all aimed at a group of people called a jury and whose goal is to make a decision as to guilt or innocence.

In fact, in most SOCD’s minds, the “juicio” is already in progress: the day they were first brought to court for the lightning-fast “arraignment” started the juicio and it’s still going on. Keep in mind that Mexican criminal procedure does not have a series of appearances before the trial judge giving him or her an update on the case’s progress. There is no plea agreement, no discussion in open court of the path the case is taking. Most pleadings are done in writing, and only when it is time to “bring evidence” is there something we might recognize as a “trial.”

Although the Mexican constitution does make mention of jurors, the reference is to law-trained individuals sitting en banc to determine cases, and it is not the practical norm in criminal process. Citizens are not summoned to decide cases. Even when the concept of juries is explained to the SOCD, the image is that he will have the opportunity to address them or chat with them to explain his position vis-à-vis the charges.

In making the decision as to whether to accept the State’s proposal or to have evidence brought against him, the defendant is told he has the right to confront his accusers. To a layman, even an English-speaking layman, what we know to be confrontation is not an argument or a disagreement, as it would sound, but rather a very rigorously standardized questioning of a witness. The image that the SOCD often has is of a proceeding in Mexican law called a “careo” (literally, face-off) held at the probable cause stage of the process which truly does imply a discussion among victims and defendants of the facts of the case, not an American courtroom confrontation. In Mexican law, the term “confrontación” is usually used to refer to a show-up or one-on-one confrontation between a witness and a defendant, usually at or near the scene of the offense or at a police facility. The solution: apprise the SOCD of his right to be present in the courtroom when his accusers tell their tale.

CONCLUSION

In summary, the goal is to treat this subject with clarity and caution. When referring to the plea agreement, it’s wiser to call it “the agreement” rather than “the plea.” When referring to the “guilty plea,” call it that, since technically, the not-guilty plea was already entered at the arraignment. If you mean the actual proceeding in court, refer to it that way rather than “your plea is on Wednesday.” In addition, some rehearsal is necessary: everyone knows that the court will ask “How do you plead, guilty or not guilty?” Be certain the SOCD knows that this calls for a choice of one of the two. Also distinguish this from the factual basis. In general, never assume that the mere translation of your words into the foreign language will make it any more comprehensible than it would be in English to someone totally outside the judiciary realm.

Editors' Note: Spanish and English handouts attorneys can give to their clients who are considering a plea agreement follow this article. The Spanish handout explains many of the concepts addressed by Mr. Loos in terms that most Spanish speaking clients will comprehend.

What is a Plea Agreement – English Version

A Plea Agreement (often referred to as a “plea”) is a written contract between a defendant and the State. A typical plea agreement consists of an offer made to the defendant to reduce the charges against him or dismiss some of these charges in exchange for the defendant entering a guilty plea and giving up his right to a trial. The County Attorney has the option to offer a plea agreement or not to offer a plea agreement. If there is no plea agreement offered or if the defendant chooses not to accept a plea agreement that has been offered, then the case is set for trial. If a case goes to trial, then the state will try to prove to a jury that the defendant is guilty of some or all of the charges filed against him. If a jury agrees with the state and finds the defendant guilty, then the judge will sentence the defendant pursuant to the mandatory sentencing terms required for the crime for which the defendant was found guilty. If the jury concludes that the state has not proven its case and finds the defendant not guilty, then the defendant will be released on all of the charges that he went to trial on.

There are advantages and disadvantages in the plea bargain process. Your case is usually wrapped up more quickly with a plea agreement than if you go to trial. Often, some of the charges or allegations that would require a harsher sentence are dropped as part of the agreement. As a result, with most plea agreements, your sentence will be better than if you were to go to trial and lose. In order to do a plea agreement, however, you must agree to plead guilty to the charges in the plea agreement and give up your right to a trial to try to prove to a jury that you are not guilty. This includes calling witnesses to testify on your behalf, you testifying on your own behalf, your attorney cross examining the State’s witnesses, and your right to file an appeal.

The decision about whether to accept a plea agreement or go to trial must be your own decision. No one can make that decision for you. You and your attorney must sit together and discuss things like “what are my chances of winning at trial?”; “does the possible sentence I would get if I went to trial and lose make it very risky for me to pass up a favorable plea agreement?”; “is it likely that the plea agreement being offered might get better if I wait?”; and “how can we respond to the evidence that the state intends to try to convict me with?” Sometimes, it is better to accept a plea agreement, sometimes it is not. Your attorney and you need to go through the police report and evidence that the state has to decide which is the best way to go. The County Attorney almost always sets a “plea cut-off date.” That date is the deadline for you to accept the plea. If that deadline passes, then the County Attorney normally says you must go to trial.

If you decide to accept a plea offer, you will go to court for a hearing referred to as a “Change of Plea”. That is where the judge will review with you the plea agreement and either accept or reject the plea agreement. In order to accept the plea agreement, the judge needs to make sure that you understand the written plea agreement. You will need to plead guilty to the charge agreed upon in the plea agreement and provide a specific “factual basis” describing why you are guilty of this crime. If the judge does accept your plea, you will not be sentenced at that time. Instead, the judge will schedule a sentencing date, approximately 30 days away. You, along with your attorney, friends and family members, will have a chance to speak to the judge at your sentencing to make sure that the judge knows the positive things about you before the judge decides on your final sentence. Your attorney can discuss a number of other things with you that you can do to get ready for sentencing, like writing letters and signing up for rehabilitation programs.

This is just a summary of the very important issues that you should consider when deciding whether to go to trial or whether to take a plea agreement. Please discuss these crucial issues in detail with your attorney before making any final decision. This may be one of the most important decisions you make in your life – make sure you fully understand your options.

What is a Plea Agreement – Spanish Version

Un convenio resolutorio es un contrato por escrito, celebrado entre un acusado y el abogado de la parte acusadora, (“el fiscal, al cual se refiere a veces como “el fiscal del condado,” o “el fiscal del estado,”) cuyo fin es el de resolver el caso contra el acusado sin llevarse a cabo el juicio oral. El juicio oral es una diligencia celebrada ante el juez en el cual el abogado de la parte acusadora (el fiscal) presenta pruebas para demostrar que el acusado cometió el acto ilícito, mientras que el abogado defensor del acusado trata de demostrar que el acusado no lo cometió. El convenio típico consiste en la propuesta hecha por el fiscal (el abogado de cargo) al acusado, en la cual explica cómo rebajará la gravedad de las acusaciones contra el acusado o pedir que algunas de las acusaciones se desestimen a cambio del reconocimiento de culpabilidad de parte del acusado y sin que haya un juicio oral. Al Fiscal del Condado le corresponde decidir si se debe permitir un convenio resolutorio o no. Si el fiscal no propone un convenio o si el acusado decide no aceptar el convenio propuesto, entonces se señala una fecha para el juicio oral. Si éste se celebra, el fiscal tratará de probarle ante un jurado (un grupo de ciudadanos convocados para decidir el caso) que el acusado es culpable de todas las acusaciones o un parte de ellas. Si los jurados aceptan lo presentado por el fiscal y le declaran culpable al acusado, el juez le impondrá una pena al acusado, conforme a lo que marque la ley por tal ilícito. Si los jurados deciden que el fiscal no ha probado su caso y si le declaran al acusado “no culpable,” al acusado se le pondrá en libertad con respecto a todas las acusaciones presentadas en su contra durante el juicio oral.

El sistema del convenio resolutorio mediante un reconocimiento de culpabilidad tiene tanto sus ventajas como sus desventajas. Normalmente se resuelve el caso más rápido con un convenio que con un juicio oral. Muchas veces, como parte del convenio, se retiran algunas de las acusaciones o pretensiones (declaraciones hechas por el fiscal) que conllevan penas más severas. Como resultado, en la mayor parte de los casos resueltos por tales convenios, la pena será más leve que la impuesta después de un juicio oral en que le declaran culpable al acusado. Para llevar a cabo tal convenio, el acusado debe reconocer haber cometido las acusaciones que figuran en el convenio resolutorio. Además, debe optar por no ejercer su derecho al juicio oral, donde tendrá que demostrar al jurado que no es culpable. Entre estas garantías se incluyen el derecho de llamar a testigos para que declaren a su favor, su derecho de prestar testimonio en nombre propio, y el derecho a que el abogado defensor haga preguntas a los testigos de cargo. Además significa que tiene el derecho a que un tribunal de mayor instancia revise su caso mediante una apelación.

La decisión de aceptar un convenio resolutorio o someterse a un juicio oral le corresponde a Ud. Nadie puede tomar tal decisión por usted. Ud. y su abogado se deben reunir para consultar acerca de varios asuntos, por ejemplo, “¿qué posibilidad tengo de ganar el juicio oral?” “La pena que arriesgo si optara por el juicio oral y lo perdiera ¿es demasiado para rechazar el convenio?” “Es probable que mejoren el convenio propuesto si espero?” y “¿Cómo respondemos ante la prueba que la fiscalía desea presentar en mi contra con fines de condenarme?” A veces, vale más aceptar el convenio y a veces no. Ud. y su abogado defensor deben repasar el informe policial y las pruebas que tiene la fiscalía en su contra para poder decidir cuál es la mejor opción. El fiscal casi siempre fija una fecha límite para la aceptación del convenio. Si se vence el plazo, el fiscal insiste por lo general que se celebre el juicio oral.

Si decide aceptar un convenio resolutorio, Ud. se presentará ante la sala para lo que se llama un “Cambio de Contestación.” El juez repasará el convenio con Ud. y lo aceptará o lo rechazará. Para poder aceptar el convenio y su contestación a los cargos, el juez debe estar convencido que Ud. comprende el convenio resolutorio escrito. Tendrá que contestar “culpable” a las acusaciones acordadas en el convenio escrito y declarar lo que se llama el fundamento fáctico, en que le describe al juez lo que hizo para ser responsable por este ilícito. Si el juez acepta su convenio y su contestación, no le impondrá la pena en esa ocasión. El juez fijará una fecha para la imposición de la pena a aproximadamente 30 días. Ud., su abogado, sus amistades y familiares tendrán la oportunidad de comentar ante el juez en los actos de sentencia para asegurarse de que el juez sepa lo favorable de Ud. antes de tomar la decisión definitiva sobre su pena. Su abogado defensor puede informarle de varias otras cosas que pueden hacer para prepararse para la imposición de la pena, tales como escribir cartas o inscribirse en programas para readaptación.

El presente es sólo un resumen de los asuntos más importantes que Ud. debe tomar en cuenta cuando decida someterse al juicio oral o aceptar un convenio resolutorio mediante la contestación de culpable. Consulte con su abogado defensor en detalle de estos asuntos importantes antes de tomar su decisión definitiva. Esta puede ser una de las decisiones más importantes que Ud. tome en su vida, y es de suma importancia que Ud. esté enterado de las opciones a su disposición.

Tips for Gringo Lawyers

Communicating with the Spanish-Speaking Client

By Alex Navidad, Navidad & Leal PLC

Editors' Note: This article originally ran in *for The Defense*, Volume 12, Issue 2.

One of the most challenging aspects of practicing criminal law in Arizona is representing clients who speak little or no English. The majority of these clients are illegal immigrants from rural Mexico. These clients come with built in challenges arising from the difference in language and culture. Even with the aid of an interpreter, many lawyers find themselves having communication and trust problems that effect the representation they provide their clients. Either the client distrusts the lawyer or the lawyer distrusts that the client understood what was explained. This problem stems from misunderstanding the most important detail about Spanish speaking clients: their culture. It's easy to forget that people from other countries do not have the same perspective and focus that we do. It also means that we are on different planes of thought when it comes to the attorney-client relationship.

There are no law school or CLE courses to prepare us for this challenge. However, we can improve our relationship with our clients by understanding their point of reference and culture. I've tried to put together five basic tips on Latin American culture and hope that they will help you better understand and communicate with your Spanish-speaking clients. As you will see, the secret to successful communication and to getting along with Spanish-speaking clients (or anyone for that matter) lies in understanding where they come from. If you understand their origins and their past you can more easily advise them on the decisions they need to make in their future.

1: MAS DESPACIO POR FAVOR

One of the biggest differences between Gringos and people South of them is pace (no, not the salsa). Everyone in El Norte is always in such a rush! We drive fast, talk fast, eat fast, decide fast and explain the law fast. If you have ever visited Mexico, Costa Rica, El Salvador or any other Latin American country you probably noticed that people are not in such a hurry. People sit and talk for hours. In my family, we tell the same old stories for an hour before we begin to talk about something new. Something about the passage of time makes Latinos feel comfortable. I know you can't be at the jail all day chatting, so what can you do about being a speed bred Gringo?



The first step is not to rush your first encounter with your client. Before you mention any charges, plea agreements or take out your sentencing charts I suggest you begin by introducing yourself and explaining that you are a defense lawyer that is there to help. Let them know that your goal is to ensure that they understand what is happening to them and to help them make a good decision in their case. Explain that even though you are going to give them advice, it is the client who ultimately decides what to do. You do not work for the government and you will do what you can to help. Take your time on this and ask if they have any questions as to who you are. Although this

seems very basic and formal, it is necessary. Too often with Spanish speakers, attorneys "cut to the chase" much too fast. Latinos are accustomed to a formal introduction and this will go a long way.

Second, listen to the irrelevant facts and excuses that your client has to say. It doesn't matter if he's lying or telling you completely useless information. Let him finish his thoughts. Do not interrupt. The client will stop eventually. After your client's discourse on the finer points of irrelevant thought, you can explain why his story may get him life.

Finally, be honest with your client and explain that you will not visit every day and that you are busy. If he has questions he needs to ask them while you have an interpreter available. You may have to explain some things more than once. Be patient and remember your audience. Imagine being jailed in China and having a Chinese lawyer explaining their system.

TIP 2: Y TU FAMILIA QUE!

Every Spanish-speaking client I've encountered had one thing in common. They love to talk about family. Family is the center of conversation in Latin America. Life revolves around family. Always ask about their kids, parents, wives (yes I mean plural). I always ask my clients about their family and I write the information down while I'm talking to them. This may be completely irrelevant as to why he shot someone at El Capri, but your client will appreciate that you think his family is important. Ask the client if he has had contact with his family. Send the family a short letter informing them of the change of plea date or sentencing date. Tell your client that the family is free to write letters for you to give to the judge. Even if you have a stipulated plea, the family will appreciate being involved at your client's court dates.

Talking about family may also give you insight in to what matters to this client. Once you know what's important to the client, you can mold your advice and suggestions with references to his family. Explain to the client how old his wife and kids will be when he gets out of prison if he accepts a plea versus losing at trial. This part of your conversation will not take long, but it will give you very useful insights into your client. More importantly, your client will have a feeling that you care about his case and how it affects his family.

TIP 3: EDUCATION

To truly grasp the education problem, imagine explaining the concept of jury trials and plea agreements to fifth graders and you are on your way. Most of our Spanish-speaking clients are from rural areas and have little or no schooling. Do not assume they can read and write Spanish. Always ask your client how many grades he finished.

Also, even a well-educated Mexican is still alien to our system of "justice." Trials in Mexico and the United States are completely different animals. Do not assume that your client understands what a trial entails. This is true even if the client says he knows what a trial is. Explain and draw where everyone sits in a courtroom. Also, explain their roles. This is very important because the roles of judges, prosecutors and defense lawyers are completely different in Mexico. Judges take a much more active part in communicating with the client in Mexico. Advise your client that talking to the judge is usually bad in el Norte.

Finally, perhaps our most basic blunder is the use of too high of a register. Always tone down your vocabulary and legalese. Do you remember your vocabulary in third and fourth grade? The concept of probable cause and factual basis are absolutely alien. Suppression and grand jury are totally useless. Try to explain words like verdict and motions as concepts such as "decision by the jury" and "written request to the judge." A good rule of thumb is that if a twelve-year-old would not understand, then fully explain the concept. Twelve years old is usually the time many rural Mexicans begin to work full time.

TIP 4: VIVA LA REVOLUCION

If there is anything that Mexicans can agree on is that you can't trust the government. However, Mexicans don't believe that their government is necessarily more corrupt than ours. This astute observation sometimes works against public defenders. The same government that pays the prosecutor, pays the judge and pays "the public defender." This is true and it is simple logic. What can you do? Reassure your client that you work for him and not the government. Tell your client what you will do for him. Explain how you evaluate the case, the plea agreement the defenses and the testimony of the witnesses. Most Mexican clients will not understand your role so it is essential that it be explained. Again, this is just an extension of taking your time and lowering the register. With patience and reassurance you will gain your client's confidence and trust.

TIP 5: "VAYA CON DIOS"

Finally, learn some Spanish phrases. Anything will do. "esta fregado (it's a bad situation)" is one of my favorites. You will probably kill the language in the process, but your clients will appreciate the interest you have taken in their language. This is simple salesmanship. You might even seem charming. Spanish is an easy language to learn so don't be shy.

It's not easy being an immigrant, but it's also no walk in the park being a gringo lawyer who knows little Spanish. It's a difficult task, but as you know, not an insurmountable one. With patience and understanding you will begin to better understand your clients and their needs. Place these tips in the back of your mind and the next time you meet some Spanish-speaking clients you will see your relations become mucho mejor.



Jury and Bench Trial Results

June 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
5/29 - 6/11	Reece Evans Armstrong	Blakey	Cohen	CR06-148575-001DT 3 cts. Child Molestation, F2 DCAC (2 alleged victims)	Not Guilty on all counts	Jury
6/4 - 6/6	Turner Stewart Brazinskas Curtis	Gaines	Tasopoulos	CR06-179163-001DT MIW, F4	Not Guilty	Jury
6/11	Woodson Smith Ralston	Gaines	Coates	CR06-137581-001DT PODD, F4	Not Guilty	Jury
6/11 - 6/14	Jakobe Sain Armstrong Curtis	Ryan	Munoz	CR05-006264-001DT Theft, F3 Trafficking in Stolen Property, F3	Hung Jury Theft - 10 Not Guilty/2 Guilty; Trafficking - 6 Not Guilty/6 Guilty	Jury
6/14 - 6/19	Barraza	Comm. Johnson	Godbehere	CR06-177721-002DT Burglary 3rd Deg., F4 Criminal Damage, F4 Possession of Burglary Tools, F6	Criminal Damage Dismissed; Guilty on other 2 counts.	Jury
6/18 - 6/19	Farney Evans Armstrong	Comm. Cunanan	Eidemanis	CR06-180364-001DT Ct. 1, Agg. Assault, F3D Ct. 2, Agg. Assault, F3D Ct. 3, Agg. Assault, F3D Ct. 4, Criminal Trespass, F6 Ct. 5, Agg. Assault, F6	Not Guilty - Count 3; Counts 1, 2, 4, & 5 Dismissed w/o Prejudice the First Day of Trial.	Jury
Group 2						
6/6 - 6/13	Taradash Reilly Del Rio	Lee	Rassas	CR06-178286-001DT Armed Robbery, F2D Burglary, F2D	Guilty	Jury
6/8	Kephart Souther	Ditworth	Tennen	CR06-168703-001DT Agg. Assault, F6 Assault, M3 Resisting Arrest, M1	Agg. Assault - Dismissed Assault - Not Guilty Resisting Arrest - Guilty	Bench
6/26 - 6/27	Davison	McMurdie	Sammons	CR07-111060-001DT Resisting Arrest, F6 Agg. Assault, F6	Guilty	Jury

Jury and Bench Trial Results

June 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 3						
6/18 - 6/19	Traher Charlton	Mahoney	Harris Lee	CR07-107392-001DT Resisting Arrest, F6 Agg. Assault, F6 Interfer w/Judicial Proceeding, M1	Resisting Arrest - Not Guilty Agg. Assault - Not Guilty Interfer w/Judicial Proceeding - Dismissed	Jury
4/30 - 5/4	Traher Bradley Charlton Browne	Abrams	Rubalcalba	CR06-012725-001DT Child/Vulnerable Adult Abuse, F5	Not Guilty	Jury
5/14 - 5/16	Traher Browne	Mahoney	Shipman	CR06-173160-001DT PODD for Sale, F2 PODP, F6	Guilty both counts	Jury
Group 4						
5/31 - 6/6	Petroff Peterson Antonson Baker	Arellano	Schultz	CR05-142263-001SE Theft, F3	Mistrial - Hung Jury	Jury
6/4 - 6/5	Little	Hilliard	Corasiniti	CR06-179048-001SE TOMOT, F3 Burglary Tools Poss., F6	TOMOT - Not Guilty Burglary Tools - Directed Verdict	Jury
6/4 - 6/13	Sheperd	Udall	Lucca	CR06-102072-001SE POM/Sale, F2 Sale/Transport of Marij., F2 PODP, F6	Guilty	Jury
6/5 - 6/8	Crocker Arvanitas Coward	Sanders	Baker	CR06-030975-001SE Armed Robbery, F2D	Guilty	Jury
6/7 - 6/13	Fluharty	Arellano	Judge	CR05-030325-001SE Agg. Assault, F3D	Not Guilty	Jury
6/11 - 6/12	Brink Peterson	Hall	Harbulot	CR06-116629-001SE 2 cts. PODD, F4 POM, F6	PODD - Not Guilty POM - Guilty	Jury
6/12 - 6/14	Akins	Ishikawa	Robinson	CR06-179403-001SE TOMOT, F3	Guilty	Jury
6/14 - 6/18	Gaziano Quesada	Stephens	Baker	CR06-163793-001SE Sexual Abuse, F4 Sexual Assault, F2	Mistrial	Jury
6/18 - 6/25	Brink Thomas	Sanders	Harbulot	CR07-101337-001SE Forgery, F4	Guilty	Jury

Jury and Bench Trial Results

June 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Vehicular						
6/11 - 6/13	Sloan Casanova	Anderson	Foster	CR06-160723-001 DT Agg. DUI, F4	Guilty	Jury
6/13 - 6/19	Souccar	Nothwehr	Hazard	CR06-177187-001 DT 2cts. Agg. DUI, F2	Guilty lesser Misd. DUI on both counts.	Jury
6/28 - 6/29	Conter Ryon	Holding	Hale	CR06-150784-001 DT 2cts. Agg. DUI, F4	Guilty	Jury



Jury and Bench Trial Results

June 2007

Legal Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
6/5	Shanahan	Oberbillig	Villanueva	JD505548 Dependency Trial	Dependency Found - Client submitted on 1st day of trial	Bench
6/6	Shanahan	Rees	Herrera- Gonzales	JD506508 Dependency Trial	Dependency Found - Client submitted on 1st Day of trial	Bench
6/11	Kolbe	Rees	AG	JD506448 Guardianship Trial	Guardianship Granted	Bench
6/12 - 6/13	Jolly	Houser	Scott	CR2006-169628-001 Narcotic Drug Violation, F4, 1 Ct	Not Guilty	Jury
6/18	Kolbe	Araneta	AG	JD505529 Severance Trial	Severance Granted	Bench
6/25	Bushor	Keppel	AG	JD506669 Dependency Trial	Dependency Found - Client submitted	Bench
6/25	Garfinkel	Hannah	Vecio	JD15606 Dependency Trial	Dependency Found	Bench

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
06/12 - 6/14	Gray Sinsabaugh	Comm. French	CR07-005354-001-DT MIW-F4 - 6 priors	Guilty	Jury
6/14	Klass Sherry	Kemp	JD14949 - Severance Mental Illness and Defect	Under Advisement	Bench
6/4 - 6/29	Christian Christensen	Oberbillig	JD503646 - Severance	Severance Granted	Bench
6/25 - 6/27	Romberg (Advisory Counsel)	Garcia	CR03-019891-001-DT Res. Arrest-F6	Guilty	Jury
6/25	Yongblood	Holt	JD12208 - Dependency	Dependency Found	Bench
6/25	LeMoine	Ishikawa	CR05-104816-001-DT Res. Arrest; Assault; Class 1 Misd.	Guilty	Bench
6/6 - 6/8	Rich Mullins	McVey	JD14048 - Termination	No Termination	Bench
6/5 - 6/7	Konkol	Schwartz	JD15199 - Severance	Severance Granted	Bench

SAVE THE DATE

December 6 & 7, 2007

2007 DEATH PENALTY SEMINAR

**Phoenix Convention Center
100 North 3rd Street
Phoenix, Arizona**

This seminar is designed to meet the Arizona Supreme Court C.L.E. requirements for criminal defense attorneys engaged in death penalty litigation under Rule 6.8, AZ Revised Criminal Procedures. It will provide valuable information to any lawyer who anticipates involvement in the defense of homicide cases.

**MORE INFORMATION WILL BE MADE
AVAILABLE SOON**



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for The Defense

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