

“Justice without Quality is Justice Denied”

Report of the Arizona Attorneys for Criminal Justice DUI Committee on Due Process v. Expediency

*A Response to the DUI Case Processing
Committee’s Report for Expedited
Guilty Pleas and Jury Trials*

March, 2006

W. Clifford Girard, Phoenix, Arizona
Committee Chairman

Joseph P. St. Louis, Tucson, Arizona
President, Arizona Attorneys for Criminal Justice

Stephen Paul Barnard, Tucson, Arizona

Kathleen Carey, Phoenix, Arizona

David G. Derickson, Phoenix, Arizona

John Phebus, Phoenix, Arizona

Lisa Posada, Phoenix, Arizona

Curtis A. Rau, Phoenix, Arizona

The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush. There is evidence of the prejudice which results to misdemeanor defendants from this “assembly-line justice.”¹

- Supreme Court of the United States

i. Statement of Purpose

Arizona Attorneys for Criminal Justice (“AACJ”) is a group of over 400 allied legal professionals, dedicated to improving the quality of Justice throughout Arizona. The vast majority of our attorneys practice in the area of DUI defense. Some members practice exclusively in this field. Our organization is comprised of both public defenders and private attorneys. We are in court defending DUI cases every day.

Our primary objective is to ensure that our clients’ constitutional rights are scrupulously enforced. Our job is to ensure that our clients are treated fairly, and that each person accused of a crime has a meaningful day in court, before an even-handed, impartial and unbiased Trier of Fact. Our clients’ Constitutional rights cannot be sacrificed in the name of expediency, or because the courts have a large number of cases to process.

We, too, have a significant stake in making sure that DUI cases are processed efficiently. We are the ones who have to explain to our clients why they are required to appear for hearings where nothing substantive is going to happen, and why the State is allowed to dismiss a case on the morning of trial when an officer is unavailable, and is then allowed to refile and prosecute those charges at a later date.

ii. Background to Proposed DUI Processing Changes and AACJ Response²

In 2005 the Arizona Supreme Court created a DUI Case Processing Committee (“the Committee”), composed entirely of judges, court personnel, a judicial education officer and a former prosecutor. This committee was given the assignment of determining what changes could be made to speed up the processing of DUI cases in Arizona. Strangely, given the issues being considered, neither the defense bar generally, nor AACJ as its representative, was invited to the table to give any input on what issues should be considered. Neither were prosecutors. Instead,

¹ *Baldasar v. Illinois*, 446 U.S. 222, 229 n.2 (1980), *overruled on other grounds, Nichols v. U.S.*, 511 U.S. 738 (1994) (internal quotations and citations omitted).

² The authors of this Report wish to thank Dr. Klein for his influence in the preparation of this report, through his law review article, “Due Process Denied: Judicial Coercion in Plea Bargaining Process,” by Richard Klein, Prof of Law, Touro Law School, J.D. Harvard Law School, 1972, published *HOFSTRA LAW REV.*, Vol. 32:1349, 10/8/2004.

without the input of the lawyers who try these cases, the Committee held a series of meetings to determine what changes would be made in DUI cases.

Defense attorneys and prosecutors were invited to a meeting of the Committee in Tucson, but only at the last minute. During this meeting the Committee did ask for their opinions about what problems they perceived to exist in processing DUI cases. However, the Committee had provided no framework for the discussion. The lawyers asked to be made aware of what the Committee goals were, what changes the Committee would recommend be made, and to be informed of how the Committee would implement those changes. The Committee claimed it had no agenda--- that it was simply trying to determine whether any problems existed in the DUI arena. With this complete lack of guidance, the attorneys did their best to give some type of meaningful input to the Committee.

A few months later the Committee produced a 39 page report, making specific recommendations for changes to speed up the processing of DUI cases. No input was sought from the defense community in formulating or evaluating these proposals, and not all of them will work.

We are the lawyers who prepare these cases. We draft and litigate motions in DUI cases, and we try these cases to juries. We have a unique insight into what is causing the delays in the system, and what can be done to improve the efficiency of the courts. The issues involved here are too important to be decided without considering our concerns. What follows are responses to the Committee's report and suggestions for effective changes that can be made to the court process, This presentation is made by trial lawyers with decades of experience trying these cases, litigating the technical, constitutional and procedural difficulties which are unique to DUI cases, and experiencing earlier court efforts to streamline DUI cases.

iii. Introduction to the AACJ Response

The volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result, and we must continually guard against assembly-line justice, in which expediency is placed ahead of fundamental fairness. Such an obsession with speed often results in inadequate attention given to the individual defendant, and the frequent result is futility and failure.

Argersinger v. Hamlin, 407 U.S. 25, 34-35, 926 S. Ct. 2006, 32 L.Ed.2d 530 (1972) (internal quotations, citations and ellipsis omitted).

“JUSTICE WITHOUT QUALITY IS JUSTICE DENIED”³

In principle, AACJ agrees with the goals set forth by the Committee, including improving the efficacy and education of law enforcement, prosecutors, MVD and the courts. We also support the Committee’s efforts to identify and improve upon effective treatments and sanctions for DUI defendants who have been adjudicated guilty; state sponsored treatment and substance abuse recovery is a worthy goal. More specifically, we agree there needs to be improvement in the key areas identified by the Committee:

- 1) Processing cases faster;
- 2) Identifying effective treatment models;
- 3) Improving the interaction of the different justice agencies.

But, AACJ’s primary concern is that a person accused of DUI does not find himself unconstitutionally prejudiced by the “expedited processing” of his case, not just the State's failure or inability to timely produce relevant evidence prior the first or second pretrial conference. There is also the concern that the accused may be forced to trial before there is adequate time to analyze, develop and present a meaningful defense. This requires time to do witness interviews, investigation, re-testing, find experts and having a time that those witnesses are available for trial.

With all due respect to the Committee’s desire to arrive at “speedy justice,” AACJ cautions against unfair or impossible time deadlines. Even highly trained and tested systems are subject to errors when stressed. DUIs, by their nature, involve the use of specialized equipment which analyzes blood alcohol content. In order to determine whether the State has a viable case, a defense attorney must piece together the records on the equipment to determine whether it was working properly. A defense attorney must also make sure that an officer meets his department’s standards and requirements for conducting field sobriety tests, as well as operating the specialized equipment. Every practicing defense attorney has seen the State’s case fall apart after these types of documents are gathered.

Some members of the judiciary may not understand the importance of obtaining highly technical proof of standards for maintaining and operating these machines, and establishing whether there was compliance with state and federal regulations, manufacturer specifications and nationally accepted standards in the case before the court. Efforts to obtain such information are inaccurately described as ‘fishing expeditions’ by prosecutors and some courts. But to the defendant, whose main accuser is a machine, such information is at least as important to him as similar information is critical to determine whether a jet airliner is airworthy.

The challenge is to improve efficiency of the DUI process without detrimentally affecting the quality of justice administered. Justice delayed may be justice denied; but expediency without

³ *Graver v. Secretary of Health, Ed. & Welfare*, 405 F.Supp. 631, 636-37 (E.D.Pa.1975) (cited in *State v. Uyesugi*, 60 P.3d 843, 881 (Hawaii, 2002)).

regard to fairness will produce injustice.⁴ We must continually guard against assembly-line justice, in which the court's concern for case management is placed ahead of fundamental fairness.

The foundation of our legal system has been the United States and Arizona Constitutions, both of which guarantee a defendant's right to due process. While the courts have sometimes considered due process elastic, expanding or retracting based upon its view of public policy, it has never before overtly favored gradations of due process. Misdemeanor DUI cases have been singled out for this special treatment not because they are more serious than felonies but because they are thought and because there are so many.⁵ The court system can save time and money by promoting pleas. Accordingly, the Committee has recommended abbreviating the legal process in order to encourage plea agreements and thereby alleviate the Court's DUI trial case load. Expedited trial dates would likely encourage earlier plea agreements, but it will no doubt increase the potential for stress and error.

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

No data has been presented to show how long the State takes, per case, to make available necessary discovery and data necessary for the defendant to make an intelligent choice between the alternatives. No officer of the court should tolerate a miscarriage of justice due to an admission of guilt based on insufficient facts.

⁴ See Introduction to Special Report on California Appellate Justice, 45 HASTINGS L. J. 419, 421 (1994).

⁵ "A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice, by inadvertence and lack of due consideration. The great importance of trial by jury is sometimes lost sight of, even in courts of justice, in the disposition of petty misdemeanors, cases of no great moment, and what are called 'plain cases.' In the economy of time, the hurry of business, lack of attention, hasty consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated, and thus vicious practices spring up, creating sources of danger to constitutional right. It is the province and the duty of the courts to keep strict watch over and protect fundamental rights, in all matters that come before them. Those who administer the law should never forget that decided cases make precedents, precedents oftentimes of little moment in themselves, but which, in their accumulated power may, in some emergency, overturn principle and subvert the right of many people." *Priestly v. State*, 19 Ariz. 371, 376 (1918).

Moreover, no data has been presented regarding the number of cases set for trial that, once set, settled in a plea agreement preceding trial. This determination, however, is necessarily dependent upon the expeditious disclosure of those items necessary to make an intelligent decision. More often than not the disclosure is not provided within the first 30 days following an arrest. A significant number of the delays in DUI case processing are a direct result of delays attributable to law enforcement (including criminalists), the prosecution and the MVD.⁶

When calculating a reasonable average time for settlement, mandatory, some time delays are accepted and must be recognized. Where a defendant requests appointment of counsel or time to obtain the services of counsel at the first pretrial disposition conference (“PDC”), affirming this constitutional right in a meaningful way will require resetting the hearing. It is at the PDC that a defendant often obtains the initial discovery containing details of the allegations against him/her and a list of the witnesses the state intends to call. An indigent defendant is generally not represented by counsel at this stage and has no opportunity to assess the truth of the allegations contained in this initial disclosure. Normally a 30 day continuance is needed to secure counsel and discuss the available options, which puts the baseline starting point for effective representation at 60 days after the case is filed. Even that date assumes the results of any chemical tests, and the records establishing the probable validity of those tests, have been disclosed.

I. Basic Data Required by Defense Counsel

- 911 tape
- COBRA data
- Color photos
- Communications of police from car to car
- Dispatch calls
- DR
- DRE supplement
- Fingerprints
- Fire incident number
- Interview tape
- Lab results
 - Blood
 - Breath
- Officer notes
- Other charges
- Priors

⁶ In fact, the November 2005 Report of the DUI Case Processing Committee only identifies one area of concern that delays in processing have anything to do with defendants and their counsel – namely, the availability of the defendant’s criminalist for trial, Chester Flaxmayer, a highly competent DUI defense expert, who is the only such expert in the state of Arizona. This is a recognized problem which has vexed the defense community for nearly two years.

- SQAP reports
- Video tape
- Witness statements

Without such information, defense counsel cannot ethically advise his client to make an informed decision between the alternatives. Many cases will require pretrial questioning of witnesses. Whether or not the machine was working properly or had been misused could result in suppression of key evidence.

An accused is entitled to counsel who has thoroughly investigated and analyzed the case before the client makes a choice between plea or trial. We have a professional obligation to provide the client with the knowledge, skill, preparation and advice necessary for the client to make a truly 'informed decision'. Furthermore, our personal interest in helping the criminal justice system achieve manageable calendars is always subservient to our duties to the client. If we fail to comply with these fundamental directives, we are failing to serve our clients and we are subject to professional discipline.

II. Duties of Defense Counsel

According to the ABA Standards for Criminal Justice, Standards 4-1.2(b) (3d ed. 1993), a defense attorney is to administer justice as an officer of the court by advocating and rendering effective and quality representation with courage and devotion. Counsel's responsibility is to oppose the government in adversary litigation. *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979). Effective assistance of counsel is required by the Sixth Amendment of the United States Constitution, Article II, Section 24 of the Arizona Constitution, the ABA Model Code of Professional Responsibility, Rules of Professional Conduct everywhere, and the ABA Standards for Criminal Justice. In many respects our independence requires defense attorneys to be the contrarian or the ombudsman. The report recommendations could have the unintended effect of making defense attorneys a part of the plea bargain team instead. They would be the ones promoting plea agreements to the charge, to their clients.

The presumption of a defendant's innocence is not a mere formality; it expresses the vital principle of our jurisprudence and procedure. *State v. Hardy*, 128 S.E. 152, 155 (N.C. 1952). Counsel for an accused is supposed to conduct a full investigation and study of the case, including the controlling law and evidence that is likely to be introduced at trial before providing any recommendation concerning a plea. *Walker v. Caldwell*, 476 F. 2d 218 (5th Cir. 1973); ABA Standards, 4-6.1(d). The Court should not accept a plea where a defendant has not had effective assistance of counsel. *Chandler v. Fretag*, 348 U.S. 3 (1954). An attorney's duty is to avoid situations where he or she is induced by the court into taking a plea where he has not had an opportunity to develop the case or present a defense. *Argersinger*, 407 U.S. at 34.

If defense attorneys feel compelled to "triage" in order to please judges, courts, and the system, there are serious ethical problems. Furthermore, we have an obligation to resist any system

that pressures the defense bar to cull their clients and to plead so early in the case that the defense is either unknowledgeable or unprepared to explain the risks and the rewards of proceeding to a plea or trial.

When an expert has a legitimate scheduling conflict and is thus unavailable for trial, we must insist that the court observe its duties to provide fundamental justice, and to reset the trial to accommodate the defense.⁷ Defense attorneys are required to inform their clients of this court imposed policy so that the clients are fully aware of the consequences of not pleading, and can fully appreciate the pressure under which counsel must prepare for their case on an expedited basis. Frequently, the accused has the most difficulty understanding why a court would not continue a case where his expert is not available through no fault of his own. An attorney who does not follow these mandates in order to comply with a judicial request may subject himself to possible disciplinary proceedings. See *Holt v. Whelan*, 199 N.W. 2d 193, 196 (Mich. 1972).

Realistically, expediting trial dates to satisfy an unrealistic unfairly or unconstitutionally impinges on the constitutional rights of the defendant by setting unrealistic trial dates, depriving defendant of his right to an expert witness, counsel and effective assistance of counsel. We do not believe that our judiciary intends these consequences.⁸

III. Duties of the Judiciary

The first Canon of the Model Code of Judicial Conduct informs that an independent and honorable judiciary is indispensable to justice in our society. As stated in *Francolino v. Khulman*, 224 F. Supp. 215, 630 (S.D.N.Y. 2002), the mere appearance of partiality even if unfounded, greatly undermines the credibility of the criminal justice system. Justice Scalia also described the “appearance of justice is as important as its reality.” (*J.E.B. v. Alabama*, 511 U.S. 1227, 161 n. 3 (1994) (Justice Scalia dissenting). See also *Turney v. Ohio*, 273 U.S. 510, 523 (1927). The Supreme Court has said that the “Bill of Rights in general, and the Due Process Clause in particular . . . were designed to protect the fragile values of a vulnerable citizenry from the overbearing concerns for efficiency and efficacy . . .” *Stanley*, 405 U.S. at 656. See also *Glasser v. United States*, 315 U.S. 60, 71 (1942). Chief Justice and noted conservative, the late Warren Burger, asked in his concurring opinion in *Mayer v. City of Chicago*, 404 U.S. 189, 201 (1971), “[w]hatever happened to the idea that an affluent society ought not be miserly in support of justice, for economy is not an objective of the system . . .” He also wrote in 56 ABA J. 325 at 325 (1970) that defendants must be provided with full due process and “full measure of days in court” regardless of expense.

⁷ Judges are contemplating discharging private attorneys from cases who are unavailable or have conflicts on future trial dates. One Superior Court Central Division out of Pima County has already ordered its staff to research its ability to discharge private attorneys whose scheduling may cause conflicts and thereby delay case load management. One attorney has been so threatened. It is believed that more threats will follow.

⁸ However, in certain instances, “many trial judges seem to have become [as] preoccupied with ‘moving’ cases as traffic policemen are with moving vehicles. Moreover, the techniques that they employ are not entirely dissimilar.” Harris, *Annals of Law--In Criminal Court*, NEW YORKER, Apr. 14, 1983, at 45.

The United States Supreme Court in *Glasser* said that upon the trial judges rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. The judge is to conduct himself so that he manifests professional respect, courtesy, and fairness toward the defendant and his attorney. ABA Standards, 6-1.1 (c); Canon 3, *Code of Judicial Conduct*, Rule 81, Rules of the Arizona Supreme Court. In *Sheppard v. Maxell*, 384 U.S. 333 (1966) the Supreme Court mandated that the trial courts must take strong measures to ensure that the balance is never weighed against the accused. In fact, the trial courts have an affirmative duty to intervene to protect the rights of the accused. *Holloway v. Arkansas*, 435 U.S. 475 (1978).

The ABA Criminal Justice Standards link the requirement of judicial impartiality with the public confidence in the integrity of the judiciary. ABA Standard, 6-1.6(a) and (b). Standard 6-3.4 requires that the judge suppress personal predilections and not permit himself to become embroiled in the conflict. The comments to the Rules state that a judge is not to demonstrate even a hint of partiality. ABA Standard 6-3.4 cmt. When a judge abandons his position as a neutral arbiter and takes on the role of an advocate, the system cannot function. See *Bethany v. State*, 814 S.W. 2d 455, 462 (Tex. Crim App. 1991); *State v. Delarosa*, 547 A. 2d 47, 51 (Conn. App. 1988). By advocating a program that has the intent and the effect of pleading more than 80% of the DUI cases in the shortest possible time, without protecting the rights of the defendant, the Court could no longer be viewed as entirely impartial or fair to the defense.

If there is to be a guilty plea, it must be the considered choice of the accused. *Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966). A plea induced by threats is deprived of requisite voluntariness. *Brady v. United States*, 397 U.S. 742, 746 (1970); *United States v. Jackson*, 390 U.S. 570 (1968). The United States Supreme Court says that even subtle threats void a subsequent plea. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). The issue is not whether judge's comments were deliberately designed to induce a guilty plea; it is whether the statements to the defendant had that impact. *Elksnis, supra*, at 253. Prosecutors must take the lead in assuring that investigations of criminal activities are conducted lawfully and in full and ungrudging accordance with the safeguards of the Bill of Rights. ABA Standard, 3-3.1 cmt. In fact, the prosecutors also have a duty to assure that the Courts safeguard the rights of the accused.

The prosecutor has a duty to see that justice for the defendant is being served. The Court has a duty to oversee and assure that right. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976), ABA Standards, 3-2.8(d). One role of the judge is to protect the defendant from prosecutorial misconduct. *United States v. Rogers*, 471 F. Supp. 847, 852 (D.C.N.Y. 1979), ABA Standard 6-1.1(c). It has been held that a plea induced by the influence of a judge cannot be said to have been voluntarily entered. *State v. Cross*, 240 S.E. 2 514 (S.C. 1977); *Commonwealth v. Evans*, 252 A. 2d 689 (Pa. 1969); *State v. Wolfe*, 175 N.W. 2d 216, 221 (Wis. 1970). A judge must be a neutral, impartial and objective adjudicator as to the voluntariness of the plea to appropriately fulfill his judicial duty. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948). The decision on whether to accept a plea offer or to plead to the Court has to be the decision of the defendant acting upon advice of counsel. Attorneys appearing before the courts naturally and ethically want to follow the directives

of the judge in order to expedite pleas, move cases, and---yes--- please judges.⁹ The judiciary must guard itself against exerting its influence too forcefully when essential liberty interests are at risk, as they are in every DUI calendar.

IV. Rights of the Defendant

The Arizona legislature has mandated jury trials for a DUI charge. A.R.S. § 28-1381 (F) and § 28-1382(C) both state that “[a]t the arraignment, the court shall inform the defendant that the defendant may request a trial by jury and that the request, if made, shall be granted.”

The Arizona State Legislature has further mandated as follows:

A.R.S. § 13-114. Speedy trial; counsel; witnesses and confrontation.

In a criminal action defendant is entitled:

1. To have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.
2. To have counsel.
3. To produce witnesses on his behalf; and to be confronted with the witnesses against him in the presence of the court, except that the testimony or deposition of a witness may be received in evidence at the trial as by law prescribed.

Not only has the legislature mandated a DUI jury trial right, the right existed at common law and while Arizona was a territory, a point well litigated in the Arizona cases following last year’s *Derendal* decision.¹⁰ And, the Defense Bar further steadfastly maintains that all criminal defendants have an Arizona constitutional right to a jury trial.¹¹

9 “The rallying cry for those who raise the specter of backlogs as the justification for the expedient disposition of cases is ‘justice delayed is justice denied.’ As one judge has noted, speedy disposition is not to be equated with justice: To suggest that justice delayed is justice denied is not the answer. Justice delayed is not always justice denied, and speedy justice is not always justice obtained. **Increased pressures on the judiciary resulting from increased litigation because of increased use of the courts by our society is an increased burden which must be met by the judiciary alone, without sacrificing the quality of the justice dispensed. The resulting pressures should and must be assumed by the judiciary without complaint. If justice delayed is justice denied, then justice without quality is also justice denied, a result for which the judiciary alone will be held accountable without reference to collateral pressures from whatever source.**” *Graver*, 405 F.Supp. at 636-37 (cited in *Uyesugi*, 60 P.3d at 881) (emphasis added).
10 *Derendal v. Griffith*, 209 Ariz. 416 (2005).

11 Proposition 104 was overwhelmingly adopted by the voters on November 7, 1972. As amended by referendum, **Article 2, Section 23 of the Arizona Constitution currently provides:** “The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for 30 years or more is authorized by law, shall consist of twelve persons. In all criminal cases, the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than 6, and the number required to render a verdict, shall be specified by law.”

Under § 13-114, a defendant is entitled to THREE rights under statute – speedy trial, counsel and the presence of witnesses. However, the Report of the DUI Processing Committee only discussed the first right, and did not investigate, account for or report the importance of the other two factors or how ‘speedy trial’ adversely affects them. Any procedural laws or policies which impinge on a defendant’s substantive rights (*e.g.* substantive due process, right to counsel, right to effective assistance of counsel, right to have witnesses called on his behalf) would serve to circumvent or excoriate the rights conferred on DUI defendants by the Arizona State Legislature. Failure to defer to these well settled matters of law would constitute a violation of the Separation of Powers doctrine and surely invites a confrontation between the judiciary and the legislature.

A heavy volume of cases may create an obsession for speedy dispositions, regardless of the fairness of the result. *Argersinger*, 407 U.S. at 134. This is of particular concern for indigents and appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The constitutional right of an individual charged with a crime to force the government to prove its case without the aid of the defendant, has existed in this country since the earliest days of the Republic. *See Corbitt v. New Jersey*, 439 U.S. 212, 233 (1978) (Justice Stephens *dissenting*), citing *Hardy*, 128 S.E. at 229.

In *Corbitt*, the Court ruled that it was constitutional for a court to grant leniency because of a plea. However, it is also well established that the Court cannot penalize a defendant for exercising a constitutional right. The defendant has every Constitutional right to require the State to meet its burden of proof. *Hardy*, 128 S.E. at 155. Jury trials have been viewed as the normal and preferred method of resolving criminal cases. *See Singer v. United States*, 380 U.S. 24, 35 (1965); *Patton v. United States*, 261 U.S. 276, 312 (1930). There is no public policy requirement for a defendant to waive his Constitutional guarantees and plead guilty at the earliest opportunity in order to meet unreasonable, artificial deadlines to appease systemic inefficiencies. If the judiciary requires counsel and defendant to do so, it could interfere with the attorney-client relationship and the defendant’s basic entitlement to ‘justice’.

In fact, the courts may not constitutionally punish a defendant, if convicted, at time of sentencing for exercising his right to go to trial. *State v. Boone*, 239 S.E. 2d 459, 465 (N.C. 1977). To quote the United States Supreme Court in *Borderkircher v. Hayes*, 381 U.S. 357 (1978), it is unconstitutional for a judge to explicitly punish a defendant for exercising his rights:

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose object is to penalize a person’s reliance on his legal rights is “patently unconstitutional.”

Id at 363. *See also United States v. Jackson*, 390 U.S. 570, 581 (1968).

The Eighth Circuit in *Hess v. United States*, 496 F. 2d 936 (8th Cir. 1974) expressed it well: “Whether a defendant exercises his constitutional right to trial by jury to determine his guilt or innocence must have no bearing on the sentence imposed.” *Id* at 938.

V. The Defense Expert: A Defendant's Right to Produce Witnesses on His Behalf

A. Generally

In many criminal cases, in this instance DUI cases, securing the services of experts to examine evidence, to advise counsel, and to testify at trial is critical.¹² As the commentary to the ABA Standards notes: “The quality of representation at trial . . . may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a[n] . . . expert and, no such services are available.”¹³ A defendant in a DUI case cannot be competently represented if expert services are denied – this proposition applies equally to the occasion when a defendant cannot afford an expert, as well as the times when the bull-rush of the justice system hurries him towards a trial without proper expert assistance.

As early as 1929, Justice Cardozo commented: “[U]pon the trial of certain issues . . . experts are often necessary both for the prosecution and for defense . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.”¹⁴ Similarly, Judge Jerome Frank observed in a 1956 opinion: “The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, *e.g.*, if the defendant cannot pay the fee . . . of an expert . . .” He went on to observe: “In such circumstances, if the government does not supply the funds, justice is denied the poor . . .”¹⁵

The ABA Standards require adequate access to experts for both the defense¹⁶ and prosecution.¹⁷ In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court recognized a due process right to a defense expert: “[W]hen a State brings its judicial power to bear on an indigent in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.” *Id.* at 76. This fair opportunity mandates that an accused be provided with the “basic tools of an adequate defense.”

12 See Paul C. Giannelli, *Ake v. Oklahoma: The rights to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004).

13 Commentary, ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 5-1.4, at 22 (3d ed. 1992).

14 *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929).

15 *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (dissent), *vacated*, 352 U.S. 565 (1957).

16 ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 5-1.4 (3d ed. 1992)

17 ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-2.4(b)(3d ed. 1993).

B. The Arizona DUI Expert “Problem” – Limited Expert Resources to Present Critical Scientific Evidence on Accelerated Basis

“A defendant has a due process and Sixth Amendment right to obtain the testimony of witnesses and compel their attendance.” *Washington v. Texas*, 388 U.S. 14, 18-19 (1967) (cited in *State v. Nieto*, 186 Ariz. 449, 462 (Ariz.App. Div. 1, 1996)). The defendant’s right to compulsory process includes the right to “formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense.” *State v. Ferguson*, 149 Ariz. 200, 204 (1986) (quoting *United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir.1974)). In fact, a defendant is only required to show that a witness’ testimony would be “relevant and material to the defense.” *Washington*, 388 U.S. at 23.

Precluding defense expert testimony is within the power of the court, but only in extreme situations. *State v. Delgado*, 174 Ariz. 252 (Ariz.App. Div. 1, 1993) discusses the court’s right to preclude defense testimony through use of sanctions. The court called it a balancing test, saying “[a]lthough this sanction is available to a trial judge, preclusion is rarely an appropriate sanction for a discovery violation.” *Delgado*, 174 Ariz. at 257 (citing *State v. Wargo*, 145 Ariz. 589 (App 1985)). “A witness should be precluded only as a last resort.” *State v. Tucker*, 257 Ariz. 433, 440 (1988).

The Arizona courts have repeatedly emphasized that the trial court “should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible.” *State v. Smith*, 123 Ariz. 243, 252 (1979); see also *State v. Gutierrez*, 121 Ariz. 176, 181 (Ariz.App. Div 1, 1978) (the witness sanction should only be used “in those cases where other less stringent sanctions are not applicable to affect the ends of justice”).

The State already has expert advantage over the defendant in a DUI breath test case because of the “statutory method” of proving breath alcohol levels without calling an expert witness. Under that provision of law, the State need not call an expert to qualify the machine nor its reading, some courts having held that the State need only present the machine operator with ‘before’ and ‘after’ calibration tests and the test reading.

The burden then shifts to the defense to rebut the machine’s reading. This requires the defense to call an expert witness---a criminalist to testify about errors, malfunctions, and limitations on machine accuracy to show that the reading may not be the defendant’s actual alcohol concentration. One of the recommendations made by the Report of the DUI Case Processing Committee would impermissibly sanction a defendant by precluding the expert from testifying if the expert is unavailable for a particular trial date. While the State only rarely has an expert witness scheduling conflict, the defense has many such conflicts because there are so few experts available. Some judges who see expedition as the goal of the Committee’s recommendations will preclude the defendant from presenting a meaningful defense against the state’s chemical evidence by precluding the expert’s “untimely” testimony. This result contravenes accepted notions of ‘justice’ as reflected in case law, statute and other court rules.

Some courts have already insisted that Chester Flaxmayer---currently the only available in-state expert in the field---be available on a certain date, at a certain time, and have expressed that they will not accommodate the defense by one hour or by one day, in order to move these cases from their docket. These courts hope that such pressure will ‘encourage’ plea agreements. If counsel sought to fly in an out-of-state expert as an alternative to Mr. Flaxmayer, that would create even more scheduling expenses and problems, particularly for public defenders and contract attorneys. The same type of problems would still arise.

Some courts have been encouraged to “speed up” DUI case processing, regardless of Mr. Flaxmayer’s court conflicts and commitments elsewhere. While no such recommendation has been made by this Committee, the Defense Bar is concerned that some judges believe that precluding Mr. Flaxmayer’s testimony is an acceptable method to clear their calendars of trials.

Restrictions on any expert’s testimony infringes on a defendant’s due process rights to present the theory of the case, and in many respects, even a defense, because a breath alcohol test reading can be dispositive of guilt or innocence. *Montano v. Superior Court*, 149 Ariz. 385, 389 (1986). The right of a defendant to call witnesses to present a defense is fundamental. A defendant must have a “meaningful opportunity” to present a complete defense. To safeguard that right, the Court has developed “what might loosely be called the area of constitutionally guaranteed access to evidence.” *California v. Trombetta*, 467 U.S. 479, 485 (1984) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). Restrictions cannot be arbitrary or so disproportionate as to infringe on the defendant’s constitutional rights. This is particularly true when the testimony is used to establish or explain his theory of the case or corroborate other testimony. *State v. Gilfillan*, 196 Ariz. 396 (App. 2000).

VI. Recommendations

In support of the Court’s desire to improve the efficiency and speed of DUI case processing, the Defense Bar makes the following recommendations:

- (1) Increase the number of judges and courtrooms to keep pace with the increasing case loads;
- (2) Increase funding for the overwhelmed public defense agencies;
- (3) Improve turnaround time for the State’s production of necessary evidence;
- (4) Improve flexibility in scheduling to accommodate the defendant’s criminalist;
- (5) Eliminate or modify statutory prohibitions on plea bargains;
- (6) Require that cases dismissed by the state in order to avoid the consequences of Rule 8, including continuance denials, be dismissed with prejudice;
- (7) Enforce current Rule 8 time limits.

VII. Conclusion

In 1972, Supreme Court Justice Douglas warned that:

Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything longer, and so there is no choice but to dispose of the cases. Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous. Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills. That picture is seen in almost every report. The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 *The Legal Aid Brief Case* 151, 152 (1970).

Argersinger, 407 U.S. at 35-36 (internal quotations omitted) (Justice DOUGLAS).

The Defense Bar applauds the Court's progress towards improving the efficiency of law enforcement, the courts, MVD and related agencies. We also support any improvement of state support for treatment and/or reintegration of adjudicated defendants. As long as 'justice' is not sacrificed on the altar of 'speed for speed's sake', the justice system can count on our steadfast support.