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# THE DEFENDER

A QUARTERLY PUBLICATION OF THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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## President's Message

By Judy Lutgring

### ***Busy? Good – Me Too. This Won't Take Long!***

"I wake up every morning determined to both change the world and have one hell of a good time. Sometimes this makes planning the day a little difficult."

I steal this quote (or this misquote) from E.B. White. I think it is funny. In truth, though, as a criminal defense lawyer -- an advocate for individuals as well as an advocate for changing the system to defeat injustice -- trying to change the world and to have a good time is often the same thing. Criminal defense lawyers are great company with either goal in mind.

I am a shameless borrower of quotes, closing arguments, ideas for motions, great stories, jokes, cross-examination techniques, and more. There is little I can tell you that you have not heard before. I will not spend the next few paragraphs trying to inspire or impress you with my own ideas, most of which surely originated with minds more brilliant than my own. I just want to tell you a little bit about AACJ, because in speaking about this organization with people who are not currently members, I sometimes hear, "What have you done for me lately?"

What have we done for you lately? I invite you to take a look at this publication, and to check out [www.aacj.org](http://www.aacj.org). I invite you to sit in on one of our meetings, or to talk to one of our active members, and to come to the Winter Seminar, and to officially join the organization. To tell you everything we've done for you lately would take a whole afternoon. However, there are a few things I would like to let you know in this column.

"This is not your father's" AACJ. But it is the ever-working legacy of a dedicated group of lawyers who created it 25 years ago. In any given year, AACJ is what its active members make it. The organization maintains a small office on Ray Road in Chandler, and one full-time employee. Our full-time employee is Executive Director Ellen Salvesen. Her knowledge, experience, and dedication are astounding.

We create seminars for Arizona lawyers several times yearly. The seminars are excellent. Yes, so is the APDA

seminar. I love public defenders and the APDA seminar -- I am a public defender. Come to both!

The AACJ seminars are smaller. DUI practitioners who are serious about winning cases should not miss the annual AACJ seminar held each May, headed for years by Mike Bloom and Steve Barnard. Joe St. Louis has joined in putting that legendary seminar together in recent years.

The annual Winter Seminar has been moved from Prescott to Chandler. The Winter Seminar is a way to recharge your enthusiasm for your practice six months away from the APDA seminar. Last year it got rave reviews. This year will be even better. (See the website for details. January 27 - 28, 2012. Drug case defense. You want to win your "unknowing courier" cases and make your snitch cry?

Come.) We have all poured extreme time and money and life-energy into becoming criminal defense attorneys. It is kind of silly not to go the extra mile by going to the AACJ seminars -- in all seriousness, these can move your skills, knowledge, and enthusiasm from the level of "we, the jury, really liked your argument but we voted guilty anyway" to "not guilty!" The seminars are one of the things AACJ does for you lately, several times a year, every year.

Finally, I ask you to reflect on what it means to be a lawyer in the United States of America. This amazing country was built on the revolutionary premise that individual voices matter and that certain inalienable rights exist. Civilizations rise and fall. It could happen here. There are plenty of quotes about privilege and responsibility, about guarding your liberty or letting it disappear. I am not even going to repeat them here.\* You are the educated and the intellectually gifted -- you know that your participation matters. If you can actively participate with AACJ in making our criminal justice system better -- by working with our always-busy Amicus & Rules Committee, by monitoring and reporting on legislation, by working on a single ad hoc committee project that interests you, by bringing an idea about solving an injustice in the system -- I invite you to

*"we, the jury,  
really liked your  
argument but  
we voted guilty  
anyway"*

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# A Look Back: President's Message, The Defender, September 2001

by Jon M. Sands

I write this a few days after September 11, 2001. Terrible tragedies have taken place, and horrible deeds have resulted in the death of thousands. Sorrow, mourning and righteous anger prevail throughout the Nation.

In the wake of the horrific death and destruction, it is heartening to see that our Constitution and laws survive. What the U.S. Attorney General has described as the largest criminal investigation ever is now ongoing. Yet, from news reports, it appears law enforcement agencies are complying with the constitutional requirements for search and seizure. The Constitution makes the ideals of this Nation invulnerable even though its people and buildings prove all too vulnerable. In pursuing and performing their functions, law enforcement must follow the law. To do so gives credibility to the final result, and shows that we respect individual liberties and life. Following the law is not a hindrance to justice; it is justice. Our Constitution is a solemn covenant among ourselves; one to which we must adhere even under these most tragic circumstances.

In the coming months and years, the smoke from the World Trade Center, the Pentagon and Shanksville will cast a pall over us. That is as it should be. Smoke, however, cannot be allowed to obscure individual justice nor act as a smokescreen for prejudice.

In times of national emergency, there is a fear that the law will hinder rather than aid our country. The Alien and Sedition Acts were enacted to counter the threats of French terrorists in 1798. President Lincoln suspended the writ of habeas corpus during the Civil War. The Trade Union Movement and World War I saw assaults on the right to associate and freedom of speech. The Red Scare led to McCarthyism and witch hunts. In the last quarter century, the "War Against Drugs" and the generalized fear of crime has distorted the criminal justice system. There is no greater shame to our country than the World War II decision, *Korematsu*. In *Korematsu*, the Supreme Court found constitutional the herding of Japanese-Americans into concentration camps because of "a national emergency."

Because we must confront the terrorist threat if for no other reason to protect our children, we will "beef up" security throughout the nation. During that process, we must remain steadfast in our recognition that the rights of the individual must be respected. We must remember that crime, except for isolated despicable acts of terror and war, is neither

ideological nor political. Crime is a result of poverty, substance abuse, mental illness, greed, passion and misjudgment. The acid of political hate or religious prejudice, which can lead to acts of terror and war such as those of September 11, should not be confused with criminal acts and allowed to corrode our Constitution - our solemn covenant. We especially must remember these truths in instances where the criminal defendant is an alien or citizen of foreign ancestry.

Our society will have to make a hard decision. How much power will we give law enforcement to stop and inquire of us about where we are going and why, to go through our belongings, and to eavesdrop on our private communications? To what extent, if any, should we allow the use of racial and ethnic profiling? The rights to security and protection are essential - but we cannot destroy the other basic rights that define our society in order to save those rights. The reconciling of these sometimes conflicting rights must and will be subject to debate. We cannot abdicate the constitutional decision as to what means are used to achieve society's legitimate law enforcement ends. Any new law or anti-terrorism act cannot be permitted to vitiate constitutional protections. A safe society that is not free loses and gives victory to terrorists and belligerents.

As we deal with the aftermath of September 11, we must be vigilant that the law is followed. That is the purpose of AACJ. It will remain so. We stress safeguarding the law because that is what distinguishes our country from other regimes, where a "national emergency" becomes an excuse for suspending law. The explosions that rocked America cannot be allowed to shatter the bedrock of the law. The government, in its efforts to root out domestic and foreign terrorism, must follow this principle. We will act to ensure it does. To do so is patriotism.

This is especially true in our "war against terrorism." A war it is, and it will be waged in this country and throughout the world. As we prosecute those who wish to do us ill, it is best to remember that even the devil gets the benefit of law, even if the devil has the human face of a Bin Laden or McVeigh. We are a country of laws. That is our strength, not our weakness. AACJ is and remains committed to this principle.

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*Jon M. Sands is the Federal Public Defender, District of Arizona. He is a long-time member and a former president of AACJ.*

# The Contumacious Attorney: What to Do When a Judge Issues an OSC for You

by Eleanor L. Miller

## Introduction

Seems like I've been running into a lot of young lawyers lately who have been having problems making it to all of their court appearances. Understandably, in these times of recession, one is likely to take on a few more cases than one would otherwise, and not want to share the "bounty" by having to hire other attorneys to cover court appearances for you. Or, you just might have the bad luck to have two (or more) trials scheduled for the same day and time, especially in the lower level courts (municipal and justice).

Now, most judges, who were out here in the real world practicing law themselves at one time or another, are understanding of these kinds of calendar conflicts. Others are not. Over the last year, I've been contacted by three young attorneys who ran into the intolerant judges. The attorneys were in trial in one lower court, and another lower court judge demanded that they appear in his/her court for trial, nonetheless. In both cases, the intolerant judges issued "orders to show cause" (OSC), and demanded that the attorney appear at a given time, on a given day, to respond – somehow – to the OSC.

Let me walk you (and perhaps some judges who read this publication) through the basics of indirect criminal contempt proceedings, in the hope that you will understand the process a bit better, and know what to do should that OSC come knocking on your door.

The first thing you should do, of course, is what you tell your clients to do: get yourself an attorney. Please don't try to represent yourself. If the judge is serious about holding you in contempt, it is a criminal matter and carries with it the potential for jail time and a substantial fine. Many of us have malpractice insurance that covers contempt. If you do, contact your carrier. However, if you do not, **don't go to court alone**. Sometimes the judge just wants to scare you (or bully you – I know, hard to believe, but it's been known to happen), and having an attorney with you at the first appearance may help resolve the matter then and there, without an actual hearing.

If, however, the judge is serious about holding you in contempt, you are entitled to lots of rights, including a jury trial. This article outlines what you may/may not be entitled to.

## Contempt Proceedings Generally

There are two "types" of contempt, civil and criminal, classified in two ways, direct and indirect.<sup>1</sup> In **any** contempt proceeding, there will always be some combination of these.<sup>2</sup>

Contempt in or near the courtroom, and/or directed at the judge and/or the "dignity of the judicial system," is **direct** criminal contempt, and summarily punishable. So, if you question a judge's parental history with certain special words, or scream, shout and dance on the prosecutor's table when you get the two word verdict, or just decide to "flip off" the judge or prosecutor in court or near (like chambers), you are committing **direct** criminal contempt, and the judge can **summarily** punish you for it.<sup>3</sup>

*The late John Flynn told a wonderful story about direct contempt. He represented a young, mentally disabled man on a charge that he murdered his father. John got an acquittal by laying the blame on the young man's mother, the wife of the decedent. Thereafter, the state filed murder charges against the mother. Naturally, John represented her too. During trial, John and the prosecutor were in chambers with the judge, when, apparently, someone (John?) said something that really set off the prosecutor. As John started walking out the chamber's door, the prosecutor threw a pencil at John's head, which barely missed him, and hit the door jam instead. The judge immediately had the prosecutor taken into custody (direct criminal contempt) and the poor fellow spent a weekend in jail. As he left, John insisted that he heard the prosecutor say, "One of these sons of bitches killed that man, and I'M going to jail!"*

However, if your allegedly contemptuous conduct is not committed in or near the courtroom, the contempt is considered "constructive," or "indirect."<sup>4</sup> Since most attorneys are accused of indirect criminal contempt, that is what this article will address.

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### Indirect Criminal Contempt

Indirect criminal contempt is governed by A.R.S. §§ 12-861 through 12-863. Procedurally, indirect criminal contempt is governed by Rule 33 of the Arizona Rules of Criminal Procedure. Pursuant to Arizona case law and this rule, you are, quite simply, entitled to due process of law: notice of what you are alleged to have done (or not done), and the opportunity to be heard.<sup>5</sup>

In other words, indirect criminal contempt cannot be dealt with summarily, as many judges seem to believe these days. You are entitled to know the “contemptuous conduct” of which you are accused, time to get prepared to answer the accusation, the right to counsel, and a hearing, to which you may subpoena witnesses.<sup>6</sup> This is a criminal proceeding, and you are facing up to six months in jail, and a significant fine.

If it is a “credible person” (and not a judge) accusing you of indirect criminal contempt, they are required to file (1) an affidavit in support of their allegations, or (2) if it is a county attorney, he must file an information (as in criminal information) specifically alleging your contemptuous behavior.<sup>7</sup> It is then, and only then, the court may issue the order to show cause on behalf of someone other than himself.

The procedure the judge must follow is outlined in Rule 33.3.<sup>8</sup>

Except as provided by law or by Rule 33.2 [direct criminal contempt], a person shall not be found in criminal contempt without a hearing held after notice of the charge. The hearing shall be set so as to allow a reasonable time for the preparation of the defense; the notice shall state the time and place of the hearing, and the essential facts constituting the contempt charged ... . The defendant is entitled to subpoena witnesses on his or her behalf and to release under Rule 7.

Importantly, pursuant to Rule 33.4(a) and A.R.S. § 12-863(A) **you are entitled to a jury trial**, if you demand it, or if the judge intends to impose any jail time or a fine greater than \$300.00.

Many judges’ are surprised and chagrined when they are advised of **these** particular little rules. You could, of course, waive the jury, but why in the world would you, unless, of course, the judge advises, **on the record**, that he/she is not going to incarcerate you, or fine you more than \$300.00?

To be adjudicated guilty of indirect criminal contempt, the trier of fact must find, **beyond a reasonable doubt**, that the defendant’s conduct was wilful.<sup>9</sup>

Now for the bad news.

The failure of counsel to be present as required by the

court can, in fact, be indirect criminal contempt, if the trier of fact finds, beyond a reasonable doubt, that it was a wilful act.<sup>10</sup>

So, what do you do when you find out that an OSC has issued?

First, you call a lawyer to represent you. Then you make sure your lawyer files a notice of appearance on your behalf, and obtains a copy of whatever “charging document” the court has issued. (Often, because the judge doesn’t know the rules, the OSC just orders you to appear, and does not contain the allegations of what constituted the contempt. If this happens, your attorney will also request a charging document of some sort.) Your lawyer will then consult with the judge (or court staff) as to when and where the **jury trial** is going to be held, so that your attorney can obtain subpoenas for your witnesses, and otherwise get properly prepared.

At this point in time, it is likely that the judge’s anger at your failure to appear, because you couldn’t be in two places at one time, will have subsided, and the matter can be worked out with a small fine. If not, **exercise your rights**, and make sure that you have a damned good reason for failing to appear.

Depending on the judge’s “involvement” in the contempt, you may or may not be entitled to a change of judge.<sup>11</sup> Most judges know enough to recuse themselves. If he/she doesn’t, my recommendation is to notice the judge pursuant to Rule 10.2. He/she is almost always a potential witness, as are his/her staff.

### **The best defense for a contempt OSC is, of course, to avoid them.**

Again, sometimes, given the nature of our practices and the present economy, it is impossible to do so. Make every effort to have another person cover non-trial appearances, if you cannot make them yourself. If, however, it is a **trial conflict**,<sup>12</sup> get your motion to continue the appropriate trial (usually the “younger” case) filed as soon as you are aware of the conflict. **Don’t plan on one of them “going away.”** “Murphy’s Law” **always** governs the criminal justice system, and the judicial system, in general.<sup>13</sup>

If, however, you find yourself inextricably caught “in two trials at one time,” try to get the judges to communicate about the conflict and work it out. If one or both are unwilling, you are going to be looking at an OSC. Four rules prevail:

- (1) get an attorney,**
- (2) do everything you could have possibly done to avoid the conflict,**

(3) exercise all the rights you have under the foregoing case law and rules, and

(4) make sure your *client* has been apprised of the problem.

Failure to include the client in what is happening may result in another unpleasant experience: a bar complaint. And, in this respect, you should always remember what Molly Ivins used to say, "The first rule of holes: when you're in one, stop digging."

**EDITOR'S NOTE:** *The federal statute defining contempt actions can be found at 18 U.S.C. § 401. An excellent discussion about the elements, civil vs. criminal, direct v. indirect, and relevant case law can be found at, surprisingly, the U.S. Attorney's Manual, Title 9, Chap.9-39.000, [http://www.justice.gov/usao/eous/foia\\_reading\\_room/usam/title9/39mcrm.htm](http://www.justice.gov/usao/eous/foia_reading_room/usam/title9/39mcrm.htm). Ellie's advice above holds equally true for federal contempt actions.*

#### ENDNOTES

1. *Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966); *Korman v. Strick*, 133 Ariz. 471, 473, 652 P.2d 544, 546 (1982).
2. *Ong Hing*, 101 Ariz. at 98, 416 P.2d at 422.
3. *Id.* at 99 and 423.
4. *Id.* at 98 and 422.
5. *Id.*, at 100 and 424.
6. *Id.*; Rule 33.3.
7. A.R.S. § 12-862(A).
8. *Riley v. Superior Court*, 124 Ariz. 498, 499-500, 605 P.2d 900, 901-902 (App. 1979).
9. *Riley v. Superior Court*, 124 Ariz. at 499, 605 P.2d at 901; *Hamilton v. Municipal Court, Mesa*, 163 Ariz. 374, 377, 788 P.2d 107, 110 (App. 1989).
10. *Hamilton, id.* (Read it; it's an important opinion.)
11. Rule 33.4(b).
12. Remember, chosen (usually paid) counsel is not "fungible." *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).
13. "Whatever can go wrong, will."

*Eleanor L. Miller is a former president of AACJ and is in private practice in Phoenix.*

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# How to Approach Cross Examination of a State Criminalist or Expert

by Robert A. "Bob" Palmer, PhD, FABFE, DABLEE

The vast majority of criminalists working for state and local crime labs in Arizona have little more than on-the-job training that is supposed to qualify them for their jobs. Within the scientific community, the title "criminalist" was made up by law enforcement as a job title for crime scene technicians. In the real world, they would be nothing more than lab techs. They may start with a bachelor's degree, majoring in some physical science (although I saw one Department of Public Safety criminalist whose degree was in education). From there they go on to training by "senior technicians" in-house. A handful may seek additional training from one of the available specialized schools, but not all. It is the job of the defense attorney to bring out their shortcomings and demystify their claims of being scientists, toxicologists, etc. That is not going to happen unless you challenge them.

## Examine their qualifications.

First of all, you need to look to what the scientific community says about people with only a bachelor's degree in chemistry who claim to be a scientist or toxicologist. Talk to the PhDs who chair the various departments at our state universities and you find that, at best, these "scientists" might qualify to call themselves "lab techs." It takes advanced graduate degrees - preferably a doctorate - requiring one to do and publish on independent research before the scientific community would accept someone as a scientist. Assuming you are cross-examining one of the few criminalists who has at least a master's degree, you need to question on the subject of his or her master's or doctoral thesis. One state "scientist" did his master's studies on components of asphalt, hardly qualifying him for testifying as an expert in DUI and drug cases.

Any criminalist should be able to back testimony up with published articles in peer reviewed journals. NHTSA (National Highway Traffic Safety Administration) is not a peer reviewed journal, and even the NHTSA manual for DUI and DRE (Drug Recognition Expert) training is no longer a NHTSA-controlled publication. The content is authored by the International Association of Chiefs of Police. Scientific claims have no validity until they are peer reviewed and can be replicated easily. Insist that state experts back claims up with peer

reviewed articles from reliable scientific journals.

Get copies of CVs (curriculum vitae) and ask other defense attorneys if they have copies of CVs from previous cases for the same criminalist. Most true experts continue to improve their education in whatever area they practice. That means a CV from today should have more training included than one from five years ago, and certainly more than ten years ago. If you see claims made on a previous CV that are not on a more current copy, you need to find out why those claims were dropped from the résumé.

One state criminalist passed as an expert always testified he was a toxicologist. His education was solely a B.S. in chemistry earned decades ago from a small, mid-west state college. He testified for years that his "toxicologist" label came from three years of postgraduate training in pharmacology at U of A. That claim showed on his CV for years, but then disappeared and we set out to find why. It turned out that a U of A professor of pharmacology had done three half-day training sessions at this man's crime lab and, of those, he had missed two of them. When *voir dire*d by a Sedona defense attorney about fudging on his CV, this "toxicologist" asked the judge for a recess so he could call the Attorney General's Office, who he felt was his legal counsel. The judge refused and made him answer; he retired shortly after that trial.

Use your pretrial interviews with criminalists to delve into their backgrounds. Who did they work for before the Crime Lab? What were their duties? Under what circumstances did they leave? Verify their answers; do not take them as the truth. One such "scientist" had done nothing more than run tests on lipstick for a cosmetic company, again, hardly qualifying him/her to give expert opinions.

Find out how many days they actually trained on a specific instrument before being certified to operate it. How many calculations of the nature of your case have they done in their lifetime? How many of those occurred since joining the crime lab?

The defense bar needs to get busy keeping files on state criminalists just as the prosecutors do on defense witnesses. Prosecutors have huge files and informal seminars on how to deal with defense experts. They put a lot of effort into

obtaining information to use in both cross examination and voir dire. They have everything from transcripts of past testimony to complete background checks.

#### Challenge the lab and its certification policies.

*The Arizona Republic* published an article November 19, 2010, criticizing crime labs.<sup>1</sup> The article's tag line is *Arizona crime labs need reform experts say. Certifications, techniques called into question.* This dynamite piece quotes a National Academy of Science study that speaks of a lack of certification for individual criminalists, poor quality work, and lack of peer review oversight. The biggest complaint is that labs that are part of a law enforcement agency, as in Arizona, cannot be trusted to be objective. They do not work to examine evidence and see where it leads; they work to make whatever case the police want made. This has led to nationwide scandals regarding evidence tampering. Obtain a copy of the article and have the state's criminalist read highlighted portions into the record in front of the jury and then question if their lab has the same shortcomings.

#### The CSI phenomenon.

One advantage the defense has is what I call the "CSI phenomenon." Jurors **expect** crime labs to work like the ones on television's CSI shows. Do you know that the Las Vegas Crime Lab, upon which the first CSI series was patterned, does not even do their own DNA testing? They send it to a private lab in West Virginia. Jurors expect crime labs to have all the bells and whistles they see on television. However, scientific examinations like instant DNA tests from epithelial cells on a weapon exist only on television. When jurors learn how out-of-date local labs are and how long it takes local labs to get exams done, their faith in the lab's evidence and resulting testimony goes down.

#### Private party experts.

If the state's expert is a private party who works both sides of the fence, doing work for both prosecutors and defense attorneys, they bring a lot of baggage. An expert for the prosecution who has testified that all people are impaired at 0.08 BAC and many are impaired at much lower levels, is then going to be eaten alive when they try testifying in a defense case. The same is true of state criminalists who retire and want to go into private practice for defense attorneys. Their baggage will follow them.

Query your own criminal defense trial lawyer associations and remember there are similar associations for investigators. You can ask your investigator to query the NALI (National

Association of Legal Investigators) website for information on national experts. Most professional investigators are members and it costs nothing to list a question with them. You are then asking thousands of investigators nationwide if they have knowledge of the expert you want to cross. The same is true when hiring an expert. Some are great to work with and others can sell your case down the river. You need to ask if anyone has had experience with a certain individual.

The most important point a defense attorney must remember is never, ever allow a state criminalist to overreach their education. Challenge, challenge, challenge! Get copies of CVs and circulate them. Share information with other defense attorneys. Do not back down and allow these so-called "scientists" to get away with anything.

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*Robert Palmer, Ph. D. is an AACJ member, the owner of Palmer Investigative Services, a Fellow, American Board of Forensic Examiners and a Diplomat, American Board of Law Enforcement Experts.*

<sup>1</sup> <http://www.azcentral.com/arizonarepublic/local/articles/2010/11/19/20101119arizona-crimelabs-reform.html>

## Congratulations to Larry Hammond

*Larry Hammond recently was inducted into the American College of Trial Lawyers. This is an honor enjoyed by fewer than 1% of trial attorneys in any given state. Fellowship is extended only by invitation, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.*

**Congratulations, Larry!!**

# WHY WHAT WE DO IS IMPORTANT YES, VIRGINIA, IT CAN HAPPEN TO YOU, TOO

by Andrea Lyon

The chief prosecutor in Illinois' McHenry County, Louis Bianchi, was acquitted of corruption charges last week for conspiring to do political work on county time and computers. The overall experience, he said, has planted a seed of doubt into his belief in the system, the *Chicago Tribune* reported.

Perspective is everything. Much of the public and nearly all of law enforcement have trouble imagining that the innocent get charged, let alone convicted, but Mr. Bianchi sees things differently now: "I'll always recognize the possibility that someone who was charged may be innocent," he told the Tribune the day after his acquittal. Bianchi told a grand jury hearing unrelated cases, "I want you to know how easy it is to indict someone. . . . I also remind the grand jury it can be a very manipulative, abusive process, as I have experienced . . . that it's an important part of the process. It's not just a rubber stamp."

That feeling is something those of us who defend cases are all too familiar with. It is virtually impossible to do what the law tells us to do -- to presume innocence. Where there is smoke there's fire, right? The police wouldn't arrest an innocent person, would they? They must have done something wrong, right? Please don't misunderstand me -- I understand these sentiments. Indeed, I must admit I have often shared them -- having to work hard to afford my own clients that presumption, especially when I am representing someone who is a "bad guy" -- a gang member, for instance.

I remember when I had to face down my own prejudices in this regard. I was representing a young man who had confessed, before a court reporter, to a triple homicide. I forced myself to investigate the facts, in part because the police officers who extracted the confession had a brutal reputation. And I found to my dismay that I was representing an innocent, terrified man -- someone with no previous arrests and no experience with the police. He knew at least one of the people who had committed this awful crime -- he had been in the apartment when it started and had run for his life. After many hours of interrogation, he told the police that person's name, then the police brought the other suspect into the police station. The other suspect saw my client, so my client backed off the statement. He was terrified

for his life. Caught between a rock and hard place, he decided confessing was safer for him and his family, so that is what he did. The jury acquitted him after less than an hour.

I had not believed him when he told me he was innocent; I just felt professionally obligated to do my job and find out what really happened. After that experience, I have learned to fight those natural presumptions, and I hope that maybe, just maybe, other prosecutors will read what Mr. Bianchi has had to say and realize that anyone can be charged. It is very easy to do, and very difficult to overcome that presumption of guilt. We all have to keep that in mind. Sometimes when it gets hard to speak up for my clients, when I feel the overwhelming opprobrium of the public, or when I get a bit tired, I think of Pastor Martin Miemöller's famous quotation: "First they came for the communists, and I didn't speak out because I wasn't a communist. Then they came for the trade unionists, and I didn't speak out because I wasn't a trade unionist. Then they came for the Jews, and I didn't speak out because I wasn't a Jew. Then they came for me and there was no one left to speak out for me."

So when you next read about an arrest or a trial, take a breath and think to yourself: Maybe this person is innocent. Think of the people who have spent decades behind bars for crimes they didn't commit. And when you next speak about a criminal defense lawyer, perhaps you might want to be a bit more kind -- after all you might need one of our voices one day. Oh, and by the way, Mr. Bianchi isn't through. He faces a second trial in June on additional charges of official misconduct.

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**NOTE:** On August 2, 2011, the judge presiding over Bianchi's trial on official misconduct charges granted Bianchi's motion for judgment of acquittal and dismissed his charges. Bianchi just won third term as McHenry County State's Attorney.

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*Andrea Lyon is an attorney, a Professor of Law at DePaul University and the author of **Angel of Death Row: My Life as a Death Penalty Defense Lawyer**.*

# H is for HABEAS CORPUS:

by Perry Hicks



I don't do Federal Habeas Corpus work. Legal research and legal writing are not my cup of tea. Representing folks on death row requires better writing skills than I own or will ever possess.

But, as a criminal defense lawyer at the trial level, three times I've represented a defendant where it appeared imminent my client was going to be sentenced to death if we went to trial and lost. Especially in those three cases, I tried to put into place any issue which might save my client's life, no matter how farfetched the issue seemed.

In 1986, I represented Robert Lee Jenkins, who was charged with an execution-style prison murder in Douglas, Arizona. My client had a prior for murder (second degree), and the prosecutor, Bill Clayton, was eager to get a death penalty. I used every possible resource, including way too much time of the great Carla Ryan, who was at the time an appellate attorney with the Pima County Public Defender. One suggestion Carla had was that I file a motion requesting the jury sentence my client should he be convicted, rather than the judge, who, though amused by the motion, promptly denied it.

Robert Jenkins was lucky; he was acquitted. *Ring v. Arizona*, decided fifteen years later, was the motion Carla suggested I file and argue. However, *Ring* was not a habeas case, was not retroactive, and might not have saved Robert's life. But the story illustrates that, as trial attorneys and especially in death cases, we need to seek expert help and not be afraid to listen to and follow it. Fifteen years later, come Federal Habeas time, that thirty minute motion could save someone from death.

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*Perry Hicks is a member of AACJ. He is in private practice in Sierra Vista.*

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# For Attorneys: Examining Witnesses Through an Interpreter

by Nancy Festinger

*The following suggestions are made by the Interpreters Office of the Southern District of New York, in the spirit of aiding communication in the courtroom.*

Examining a witness through an interpreter is not identical to examining a witness directly; when moving between languages, the possibilities for misunderstanding, confusion, inexactitude, or error increase substantially. Generally, extra time and patience are needed to prepare a non-English speaker to testify.

In court, American lawyers speak legalese (“I’m moving to sever”), not everyday English. While many Americans are bewildered by legal proceedings, people from other countries are even more at a loss because legal systems vary from country to country. In-court hearings, for example, are not commonly held in Roman law countries, where most legal issues are decided on the papers. Many terms used in U.S. courts are unfamiliar to foreigners:

i.e., *grand jury, jury selection, charge to the jury*, etc. for the simple reason that there are no parallel concepts or procedures in foreign legal systems. An interpreter will convey these terms in the closest equivalent (e.g., *indictment* will be called a ‘*formal accusation*’ or ‘*accusation by the Grand Jury*’) but on no account is an interpreter permitted to offer explanations of procedure because the interpreter’s code of ethics prohibits giving legal advice.

Early on in a case, an attorney would do well to clarify to the witness or defendant the various stages the case will pass through and how long each stage may take.

People perceive the honesty and seriousness of legal proceedings differently, depending on a variety of factors and experiences. In countries with a tradition of corruption, bribery or judiciary inefficiency, the population has learned not to set great store by what happens in court. The American justice system is not universally revered, either, and may appear artificial, inflexible or absurd. Attitude toward the legal system may affect a witness’s demeanor when testifying.

Among the foreign-born, mastery of English varies a

great deal, and for matters of great seriousness, such as legal proceedings, defendants or witnesses frequently request an interpreter, if only to make them feel more secure.

The best interpreters will allow you to follow the natural rhythm of questioning, and will at the same time convey some of the “flavor” of the witness, contributing to a sensation that you are hearing the witness directly, despite the language barrier.

## Getting the Right Interpreter for the Job

Active court interpreters polish their skills every day, and generally, the more experience they have, the better they become. However, interpreters can also develop bad habits or have attitude problems. Some people who work as interpreters do it as an occasional sideline and are not well versed in the legal field. Interpreting ability and style vary,

depending on experience, knowledge and attitude. Stress on an interpreter “to get it right” is significant, and even greater when a case is high profile. An excellent interpreter should have years of experience, be pleasant to work with, have good recall, smooth delivery, no hemming and hawing, call no attention to himself, and express no opinion on the merits of a case.

Consecutive interpretation is that done in Q and A format and differs from simultaneous in that it requires a different set of mental reflexes. Skill levels, interpreting style, and memory capacity vary, so it is wise to choose carefully the interpreter you will use with a witness.

Some interpreters have better short-term memory, and will pause or interrupt less. Some are better than others in diction, performance ability, idiomatic expressions, street slang, or legal jargon. If you work through an Interpreters Office or coordinator, tell that person of any concerns or past experiences so as to avoid a repetition of problems.

In choosing an interpreter, it is best to plan ahead. If plans are not made until the day before, you will likely get a last-minute, patchwork arrangement, especially inadvisable if a witness will be testifying for a long period of time (a day

*Experience has shown that errors of substance are sometimes in the eye of the beholder, and great hay can be made by either side from seemingly unimportant details in a case. In any event, the burden is on the objecting party to show that an error has been made.*

or more). Freelance interpreters who work regularly in court are flexible, but cannot ignore other commitments when trial schedules change without notice. Interpreters are paid for their time, whether or not they are actually interpreting, so waiting time is costly.

If the testimony will be more than brief (over an hour), two interpreters should be assigned to rotate with the witness, so that the interpreter's mental fatigue does not adversely affect the accuracy of the testimony.

### Most Important Step: Prep

Making arrangements for an interpreter is only the first step; then both the witness and interpreter need to be prepped for what will ensue.

### What to Tell the Interpreter

Since words are interpreted not in isolation but in context, for reasons of logic an interpreter needs to have a broad-brush idea of the case. If you take a few minutes to brief the interpreter before starting the assignment, it will help avoid confusion later on, so that the interpreter doesn't imagine another scenario, which may be likely but inapplicable.

The essential material for the interpreter to see ahead of time: a copy of the major case documents such as the complaint, indictment, prior testimony, or relevant tape transcripts.

To ensure continuity and quality, inform the interpreter of when you will be needing an interpreter, *for how long, in what type of proceeding, and for whom.*

### Attorney Checklist for Interpreted Testimony

When briefing the interpreter, be sure to mention:

1. What the case is about: names and nicknames, places, overall plot; what piece of the proceeding the interpreter will be needed for;
2. Any documents likely to be referred to or shown to the witness;
3. Where the witness is from, how many years he or she has lived in U.S. (The witness may use some Anglicisms, whether correctly or incorrectly, and the interpreter should be forewarned);
4. Educational level of witness, any speech defects or particularities;
5. Numbers that may come up: addresses, amount of drugs or money, telephone numbers that will repeatedly be referred to, account numbers, etc.;
6. Any physical evidence that will be referred to or shown to the witness;

7. Any emotional factors that may affect the witness's concentration or delivery: mental problems, fear, jumpiness, etc.;
8. Any key words (descriptions, disputed dialog, slang, code words, etc.) that may be elicited in the testimony.

### What to Tell Witnesses Who Will Testify Through an Interpreter

- Prepare the witness ahead of time, preferably with the same interpreter who will accompany the witness to the stand so that the witness's speech patterns will be familiar to the interpreter and vice versa. Just as a New Yorker might have to concentrate more when listening to an Alabama accent, a Spaniard may have to concentrate more when listening to a Caribbean accent. Accent variation and idiosyncratic speech abound. While interpreters, who are educated speakers, use standardized Spanish, Russian, French, etc., defendants or witnesses may hail from anywhere, and an uneducated speaker will be harder to follow than someone who expresses himself cogently. Interpreters have to "tune in" many different accents or speaking styles, and any lead time is helpful to the ear.
- Instruct witnesses not to direct any comments or questions to the interpreter during the testimony, but to act as though the interpreter were not there. Courtroom testimony is formal and stylized, and it is improper for the interpreter and witness to have any private conversation. If the witness has spoken with the interpreter before in informal settings, he may think there is nothing wrong with engaging the interpreter in conversation while on the stand: he should be told not to fraternize with the interpreter.
- Advise witnesses not to volunteer information but to limit themselves to answering the question, and to direct their answers to the examiner, not to the interpreter.
- Instruct the witness to look either at the attorney or at the jury, and explain that testimony is judged not only by words but by manner of testifying and body language. (Bear in mind that body language varies from culture to culture. In some cultures it is considered polite to answer questions with the eyes downcast, so a witness may have to be coached beforehand, to look up when answering the questions.)
- Instruct witnesses to wait for the question to be translated before they answer, and to answer in their native tongue.

- Advise witnesses to listen to the translation of the question even if they think they understand the English. Tell them to answer briefly, directly and to pause regularly so that the interpreter may render the testimony into English.

**WARNING:** Many witnesses forget to pause, and often interpreters cannot retain all detail in long narratives. It is a good idea to practice the rhythm of Q and A with the interpreter and the witness ahead of time so everyone can get accustomed to the procedure of waiting for the translation.

- Instruct witnesses that if they hear the word “objection,” they should wait for the judge to rule, and then answer only if the objection is overruled.
- Construct questions with extra care. If you insert parenthetical remarks, or backtrack in your formulation of the question, room for misunderstanding increases greatly. It is easier to interpret logical questions and answers than rambling ones. If possible, refrain from questions with double negatives or ambiguous references. When using the word “you,” clarify if you intend the singular or plural (“you yourself ” or “yourself and others”). Remember to wait for the translation of the question and of the answer: even if you yourself can understand the foreign language response, the judge and jury need to hear it from the interpreter.

### What to Do about Mistakes

Interpreters are not immune to mistakes, slips of the tongue, mental blanks, or memory lapses. If an error in interpretation occurs, it should be corrected as soon as possible, hopefully without causing undue embarrassment to the interpreter.

- If you believe a witness’s answer is in error, or that the witness was misunderstood by the interpreter, the best solution is immediately to follow up with a rephrased question.
- Even if you are fluent in the interpreted language, do not substitute your own notion of how the question or answer should be interpreted. Likewise, do not assume that an error has occurred if you don’t hear the word you expect. There is not a one-to-one correspondence between words, but many ways to reproduce sentence content from one language to another.

It is helpful to use language appropriate to the background of the witness. An interpreter is under oath to repeat exactly what is said, at the same level of formality or informality, and cannot “correct” sloppy language, turn

legalisms into simplified language, or correct others’ slips of the tongue. Clear questions elicit clear answers. If the question is ambiguous, filled with double negatives (“*You didn’t say you wouldn’t go there, did you?*”) or constructed with many subordinate clauses (“*And then, although you knew it was wrong, you didn’t, although you could have, stop him from what everyone knows was a mistake?*”), it stands a good chance of being misinterpreted to the witness, which may result in an unresponsive answer.

If a problem persists, it may be on account of technical or culture-bound phraseology: Does the witness know what you mean by “pre-trial proceedings?” Does your question include terms of art, cant, legalese, intentional sarcasm, or ambiguity? Perhaps the witness is unfamiliar with units of measurement, directions (north, south), or neighborhood names, which are often expressed differently in other cultures. Punctuality, concept of time, and precision about time are valued differently in different cultures. An ambiguous answer may be the result of an ambiguous question. The answer may be culture-bound rather than a deliberate attempt to mislead. In some cultures, it is considered polite to be verbose. In other cultures, especially in the Far East, it is polite to assent, but that is different from an *affirmative answer*: a “yes” answer may be equivalent to saying “*Yes, I’m hearing you (but don’t necessarily agree).*” A questioner would do well to bear these cultural and psychological differences in mind so that the wrong impression is not created for the jury.

### Types of Error

The examples that follow will all be in English for illustrative purposes, but of course when rendered through an interpreter, the questions are interpreted from English to a foreign language and the answers, from a foreign language into English.

The error that most concerns us is the **material error**, or **error of substance**.

A substantive error would be “*It was a blue car*” when the witness said “*It was a red car*” or “*I had 2 kilos*” when the witness said “*I had 12 kilos.*” This is also known as *lexical error* (wrong word).

Another type of substantive error is called *contre-sens*, [French for “contradictory meaning”] where the interpretation conveys the exact opposite of what the speaker said; e.g., the witness says “*I don’t know*” and the interpreter renders it as “*I know.*”

Other categories of interpreter error are:

1. Wholesale omission of parts of the question or parts of the answer

A: *"And then when I went downstairs, I mean upstairs, because the house had two floors, I heard something."*

A: [through interpreter] *"Then I heard something upstairs."*

2. Distortion of meaning

A: *"I was never convicted in that case."*

A: [through interpreter] *"I never got sentenced in that case."*

3. Unfamiliar idiom

A: *"She was afraid of dying."*

A: [through interpreter] *"She was scared to death."*

4. Errors in what is called "register conservation," or appropriate level

Q: *"Wouldn't they rat you out if they knew?"*

Q: [through interpreter] *"Wouldn't they talk about you if they knew?"*

(However, it would not be wrong to interpret the question as *"Wouldn't they tell on you if they knew?"*)

5. Inclusion or elimination of "politeness markers" : e.g., It would be wrong if in interpreting the question *"Where were you, sir?"* the interpreter omitted the word "sir."

Likewise, it is wrong for an interpreter to add honorifics or polite language if it is not in the original. Sometimes interpreters do this automatically, without thinking, but it is important that an interpreter not make a witness appear more polite (or less polite) than he is.

6. Conveying hesitancy or certainty where the opposite is expressed

Q: *"Don't you know for a fact he didn't do it?"*

Q: [through interpreter] *"Don't you think you could be mistaken?"*

7. Overly literal renderings, e.g., " I crossed the frontier." for *"I crossed the border."*

8. Grammatical errors, e.g., *"We wasn't ready."*

These few examples show the room for error even in simple sentences, and illustrate the many decisions about words' meaning, impact, and level of formality that interpreters must make thousands of times a day.

Interpreter errors may be caused by: gaps in knowledge or vocabulary; lack of concentration; fatigue; distraction; mishearing; cognitive overload; low memory retention (when an interpreter can't retain all the elements of the message), or "language interference" (An example of interference would

be where the interpreter inadvertently or out of ignorance chooses an expression that sounds like the word used in the original, but means something different, e.g., using deception in English for *"decepción"* in Spanish would be wrong, since the Spanish word means *disappointment*, not *deception*).

Experience has shown that errors of substance are sometimes in the eye of the beholder, and great hay can be made by either side from seemingly unimportant details in a case. In any event, the burden is on the objecting party to show that an error has been made.

### How to Correct the Record

*If there appears to be a problem with the interpretation, request a sidebar and include the interpreter, who will make a correction for the record if one is necessary.* If there is disagreement about the correct interpretation of a word or phrase, the judge will instruct the parties on how to proceed. An interpreter should not be dismissed outright due to a mistaken word or phrase, because it is impossible for anyone to know all words or variants of language usage.

### OTHER PROFESSIONAL CONSIDERATIONS

#### An Interpreter May Ask to Approach

An interpreter may on rare occasion ask to approach the bench for a sidebar if a language issue has come up that may lead to a miscarriage of justice, or in the event that further clarification is required from the court as to how to proceed.

#### Gestures by the Witness

Interpreters should not repeat or characterize any gestures made by the witness. It is up to the attorney to describe for the record what the witness has indicated. If a gesture is very culture-specific, the witness can be asked directly what a particular gesture means in his culture.

#### Expressing Opinions on Other Interpreters' Accuracy

Court interpreters should not offer or be asked to express an opinion on any other interpreter's accuracy unless the request comes from the judge. In the normal course, interpreters will consult or send notes to each other on terminology usage. A "checking" interpreter should not also be engaged in interpreting the very same proceeding. The court interpreters providing the simultaneous interpretation should never be called as witnesses, unless the judge specifically requests them to. Slight variations in the way interpreters render certain expressions are to be expected, and no two interpreters will coincide exactly in all their renditions.

### Translations To Be Introduced into Evidence

Just as tape transcripts must be prepared ahead of time, any translation to be introduced into evidence should be done ahead of time. It is not a good idea to ask the interpreter to provide a sight translation of anything other than a simple or boilerplate document. The language of many legal documents is dense and syntactically complex; to prepare an official translation, a translator needs to have reference material at hand and review it several times in order to produce a well-written text. Translation always takes longer than anyone expects, so please allow the translator the time to do the job properly. Translators who take pride in their work will not hand in an unrefined copy.

There is no legal requirement that documents be translated by a certified interpreter, although some courts have a standard practice to request that certified interpreters prepare the translations. The Court Interpreter's Act (28 USC 1827) does not specifically provide for the translation of documents by certified interpreters.

When seeking translators, it is advisable to give as much detail about the job as possible in advance, to specify the format in which you wish to receive the translation (diskette, hard copy, columns, etc.), and to request an estimate before the translator begins the assignment. Many attorneys are surprised by the cost of translation, but have little awareness of how long it takes to do. Translations cannot be done word for word, but concept for concept, and a lot of structural reformulation must be done when transferring thought from one language to another. For this very reason, a machine is incapable of producing a reliable translation. Keep in mind that a sloppy translation is worse than none at all, because most of the time it will have to be redone, and the cost in the end will be double for the same product.

### Tape Transcripts

Tape transcripts are very time-consuming to produce, and nearly equally time consuming if one interpreter is checking another interpreter's work. The general estimate is that for every minute of tape (assuming good audibility) an interpreter needs 30 to 60 minutes to listen, transcribe and translate.

At the outset, a defense attorney ought to get an idea from the interpreter about how long it would take to complete the assignment (often the interpreter will not be able to tell until listening to a sample of the tape) and what the estimated cost would be. In most districts, defense attorneys need prior authorization from the judge for the

When requesting transcripts to be prepared or reviewed, attorneys should also be sure to specify exactly what they want to accomplish: get a general idea of the content of conversations, get a general opinion on accuracy, see if their client is mentioned, or prepare a transcript to introduce into evidence?

In general, experienced interpreters have special equipment that can slow down the tape speed if needed, and must listen to tapes many times in order to be sure of what was said.

Be sure to ask the interpreter's experience with producing tape transcripts: how many they have done, whether they have worked for both defense and prosecution, whether they have ever testified as an expert witness, etc

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*Nancy Festinger is the Chief Interpreter of the US District Court, Southern District of New York*

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# BOOK REVIEW

## INNOCENT UNTIL INTERROGATED

By Gary L. Stuart  
by Larry A. Hammond<sup>1</sup>



*No one would confess to so heinous a crime had they not committed it.*

Twenty years ago the words: “[N]o one would confess to so heinous a crime had they not committed it,” set the theme for the prosecution of John Henry Knapp. Knapp had confessed to pouring a gallon of Coleman fuel on his sleeping babies, throwing in a match, and incinerating them. He was convicted and sentenced to death in 1974. In 1987 new scientific evidence contradicted his conviction and confession. Knapp was released from prison, only to be recharged three years later by the Office of the Arizona Attorney General. The Knapp case was retried in 1991. Although demonstrably false and coerced, the prosecution’s case continued to rest on Knapp’s confession.

The final pretrial hearings began in March 1991 and the trial itself commenced a few months later. During the beginning of Knapp’s trial, the murders at the Buddhist Temple west of Phoenix occurred. In the middle of Knapp’s trial, the so-called “Tucson Four” murderers all confessed; yet by the end of Knapp’s trial, all of those confessions had been debunked.

I was one of Knapp’s defense lawyers. This image is one I cannot forget. There we were, deep into a jury trial premised by the prosecution on the notion that false confessions to serious crimes simply did not happen. Of course, the jurors had been strenuously admonished not to read, listen or watch on television anything to do with the John Henry Knapp case. However, the jurors had not been admonished to close their eyes and ears to the most infamous massacre in recent Phoenix history. Thus, all of the jurors were exposed to the reality that false confessions can most certainly occur.

The Knapp trial resulted in one of the longest and most contentious jury deliberations in recent Arizona history. At the end of the day, the jury was hung: 6-6. Those interviewed after the trial who favored conviction, did so primarily on the belief that John Henry Knapp would not have confessed to so heinous a crime had he not committed it.

In the middle of the daily swirl of publicity surrounding the Temple murders (and to a lesser extent about the trial of John Henry Knapp), a less noted homicide case arose with the death of a woman named Alice Cameron. Her body was found at a campground along the Verde River northeast of Phoenix. After a lengthy interrogation conducted by the Maricopa County Sheriff’s Office (the same office involved in the Knapp and Temple murder cases), a brain-damaged Vietnam veteran named George Peterson confessed to the murder of the Alice Cameron. Patterson was arrested and began the long march toward trial with the sixteen-hour interrogation, which served standing as the only significant piece of evidence supporting the charge.

The Alice Cameron/George Peterson story is well told in Gary Stuart’s wonderful book under a chapter entitled, “A Murderer Ten Times Over.” The “tenth” murder was the murder of Alice Cameron and the “murderer” was Alex Garcia. Eventually, Garcia admitted responsibility by pleading guilty to the Alice Cameron killing. Soon after, George Peterson was released with little fanfare. He became a footnote in the long story of Arizona’s false confessions.

One of the most troubling aspects of these stories is that they are twenty-years old. Today, some argue that law enforcement, the courts, and the public have learned very little from these experiences. Stuart’s book, *Innocent Until Interrogated*, causes one to wonder why a book about false confessions would be relevant in 2010. After all, in the last fifteen years, the United States has seen 260 DNA exonerations. A disturbingly large number of those exonerations occurred in cases in which the defendant had falsely confessed.

A great deal of attention in the criminal justice community has been placed on this topic. The wonderful Center for Wrongful Convictions, now operating at the Northwestern University School of Law, focuses exclusively on false confessions. Steven Drizin, who heads that project at

the Center, tracks false confessions from across the country. Many of those false confessions have led to front page news. The “Central Park Jogger” became one of the most well known examples because of the multiple confessions, prosecutions, and eventual exonerations in that case. The more recent case of the “Norfolk Four” has also captured journalistic attention. A book about that case was recently published and PBS *Frontline* devoted a full 90 minutes to the case, told again a story of multiple false confessions to a rape and to a murder.<sup>2</sup> In the middle of all of this continued interest in false confessions it is not surprising that John Grisham’s latest book, *The Confession*, has shot to the top of the bestseller list.

One answer to the question of why Gary Stuart’s book is so relevant today is that, very sadly, these cases continue to occur. This is not simply an interesting history of a now healed flaw in the criminal justice system. It remains true that interrogation techniques taught in our law enforcement training programs produce new generations of detectives who continue to use the same methods that produced false confessions in the past.

Sadly, it also remains true that even the simplest of recommendations that will reduce the risk of wrongful confessions are opposed. The best example is the proposed requirement to record all interrogations. Why has the FBI opposed requiring that all interrogations be recorded? Among the most commonly heard answers, the truest seems to be “because we can.” Why has the Arizona Legislature declined for at least four years now to give any serious consideration to bills that would require recordation? An even harder question to answer is why our law enforcement communities have not insistently supported legislation on this topic. One might fairly add to the list of questions an inquiry into why the Arizona courts do not require recordation or permit inferences to be drawn against law enforcement when prosecutors seek to introduce interrogations that are unrecorded.<sup>3</sup> The rulemaking authority of the Arizona Supreme Court certainly extends this far.

These would be fair questions to ask in any state, but they have special significance in Arizona. Gary Stuart’s book stands as a stark reminder of how little we have done about so large a problem. Stuart’s idea for how to address this topic is brilliant. Much has been written about the need for reform in this area, and many of the famous case stories have been the subject of other books, articles, and television productions, yet no one has realized that to really understand why a person would confess to a crime he or she did not commit, one needs to read these confession

transcripts with care. Stuart’s book requires that approach of due diligence. The reader must actually see the words of the interrogators and the defendants as the questions and answers unfold.

Stuart’s approach probably requires a warning to the reader. It can be slow going. Confessions rarely happen in a flicker of an eyelash. They unfold over time, and of course, the questions and the methods used by the questioners often become apparent only when seen with numbing repetition. Stuart could have merely told the reader about the confessions of the “Tucson Four”, moved on to the trial, and then discussed the messy and apparently endless aftermath of the case. Stuart, however, made a different (and I believe wiser) choice in letting the reader climb deep into the interrogation process.

The repetition of the interrogators’ themes is most evident when seen in what becomes more than fifty hours of interrogations. Facts necessary to prove that the accused men were really present at the Temple on that August day in 1991 are provided by the interrogators. Facts provided by the witnesses that do not fit with what the interrogators know to be the case are ignored or twisted to fit. It is a pathetic process. The true details of the Temple Murder confessions may be contrasted nicely with Grisham’s recounting of the rape-murder confession in his recent book. Both stories involve very lengthy confessions – fifteen or more hours. One gets only a short glimpse of Grisham’s fictional confession account while getting every disturbing detail in Stuart’s. I cannot help but favor the Stuart approach. There is really no way to generate public understanding that indeed people do confess to heinous crimes they have not committed without seeing the entire process unfold.

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Twenty years! It is hard not to conclude that our criminal justice system has completely failed. How is it possible that law enforcement continues to extract false confessions? How is it possible that our prosecutors still seek to introduce these false confessions into evidence? How is it possible that our defense lawyers fail in their efforts to exclude false confessions? And – most importantly – how is it possible that judges continue to allow false confessions to be heard at trial, and how do the judges then affirm convictions based on those false confessions?

These questions are not intended to be rhetorical. They are questions that ought to be asked and they are questions that ought to be answered. Here is a recommendation before reading Gary Stuart’s book: in every documented case of a false confession, the participants should be interviewed in

detail and asked to explain the factors that led them to be a part of a case in which a defendant was convicted of a crime he did not commit based upon a confession that proved to be false. This question should be asked most pointedly to the judges because they are the justice system participants who are presumably least affected by the pressures of the adversary system. Thus, judges should be the ones to provide the most helpful insights. I cannot imagine what it must be like for any judge to learn that he or she presided over a trial or signed an appellate or postconviction opinion in any case in which DNA, forensic evidence or other evidence, later proves the conviction wrongful.

We had over 260 DNA exonerations.<sup>4</sup> The one common link between these exonerations is that judges were involved in each case. Indeed, by the time many of these cases resulted in exoneration they had passed through the hands of literally scores of judges. It would be a worthy byproduct of Gary Stuart's book if every trial and appellate judge were to say, "I am determined that I will not preside over, or affirm the conviction of a defendant on appeal, in any case in which a confession of seriously doubtful reliability were presented." A hard look back at every confession that proves false would be a very strong first step.

*Originally printed at Law Journal for Social Justice, Vol. 1.1, p.114 (2011). Reprinted with the author's permission.*

**EDITOR'S NOTE:** Gary Stuart was one of AACJ's speakers at our Fall Seminar in Flagstaff, September 2011.

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#### ENDNOTES

1. The author is one of the founding members of the law firm of Osborn Maledon P.A. in Phoenix, Arizona. He is also one of the founders of the Arizona Justice Project – Arizona's Innocence Project. Over his career, he has been involved in a large number of false confession cases. He will be teaching a course at the Sandra Day O'Connor College of Law at Arizona State University next year on the failures of the criminal justice system. False and coerced interrogations and confessions will be an important part of that class.
2. See generally *Frontline: The Confessions* (PBS television broadcast) available at <http://www.pbs.org/wgbh/pages/frontline/the-confessions/>.
3. EDITOR'S NOTE: Late last year, the Ninth Circuit Court of Appeals, while not requiring interrogations be recorded, held the court can consider "any witness' testimony by noting the lack of a recording," that law enforcement's "failure . . . to use equipment at its disposal might support a larger inference that the agents' testimony did not accurately portray the circumstances surrounding (the) confession," and, in "consider[ing] the totality of the circumstances, it may also consider (a law enforcement agency's) adopted . . . policy of not recording interviews." *United States v. Wright*, 625 F.3d 583, 604 fn.10 (9th Cir. 2010).
4. *Home*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Apr. 25, 2011).

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*Larry Hammond is a member of AACJ and the founder of the Arizona Justice Project. He is with Osborn Maledon.*

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#### *continued from page 3 - President's Message*

contact Ellen Salvesen, or a member of our Board, or me. If you cannot actively participate, join anyway. Those of us who are able to carve out the time to work on the issues and projects that AACJ tackles need to know that you are with us.

Our efforts carry more weight when "AACJ" means "a big organization of defense attorneys who are watching and who vote." AACJ cannot function without a stream of membership and seminar revenue. When AACJ is able to steer a change in a Rule of Criminal Procedure in the right direction, to influence an appellate court to make a pro-defense decision, to protect a zealous lawyer from a contempt citation, to participate in revealing a prosecutor's abuse of power, you win. And in our profession, it is not just about how "the game" is played. Sometimes it really matters if we win.

Being a member of AACJ is a good thing to do for yourself, your clients, and your criminal justice system. It should be a shining example for the rest of the world. I invite you.  
Join.

\*Ok, if this is really going to help:

"Those who expect to reap the blessings of freedom must, like men, undergo the fatigue of supporting it." Thomas Paine

"The only thing necessary for the triumph of evil is for good men to do nothing." Edmund Burke

"But you must remember, my fellow-citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing."  
Andrew Jackson

# Fear and POWERPOINT - Taking the Plunge and Practicing

by Heather Williams

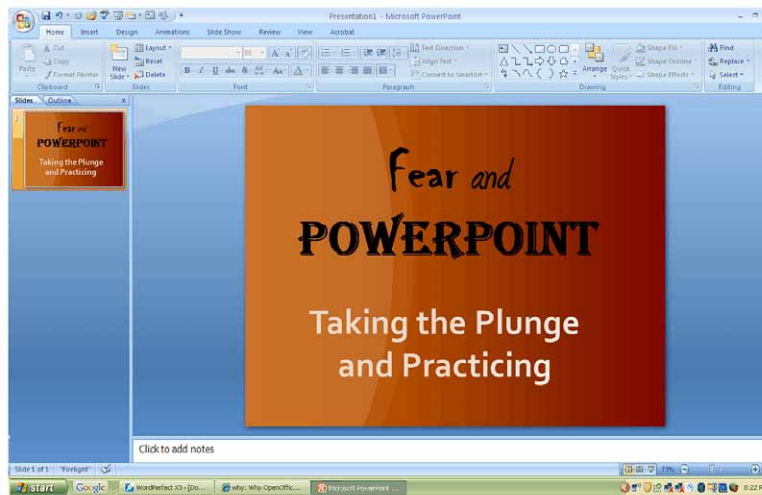
You only just figured out how to send e-mails and, now, the prosecution is coming at you with slick PowerPoint slideshows in Openings, Closings, with experts' testimony, and at sentencings. How can you compete with that?

By doing it too and not losing your superb storytelling skills in the process.

But so many of us are intimidated by the technology. Hopefully this article will whittle away at that intimidation.

First, decide which slideshow program you want to use.

## PowerPoint

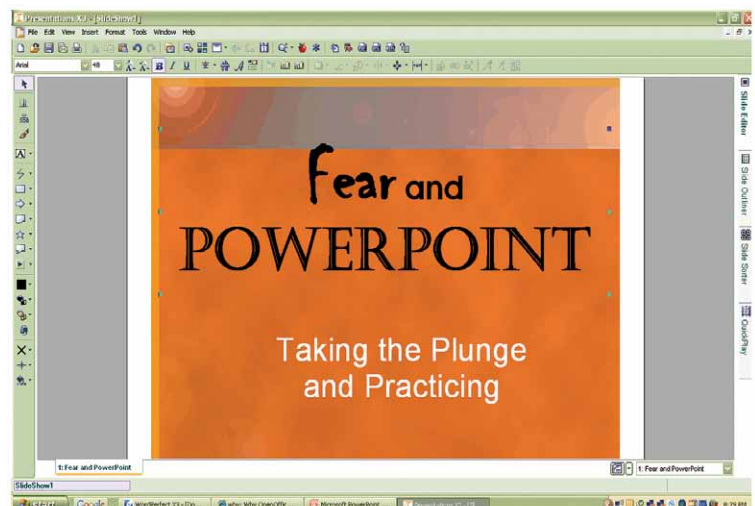


PowerPoint comes as part of Microsoft Office, along with Microsoft Word and Excel. Use the INSERT tab to put in text, pictures, etc. New slides can be created from the HOME tab by clicking on NEW SLIDE.

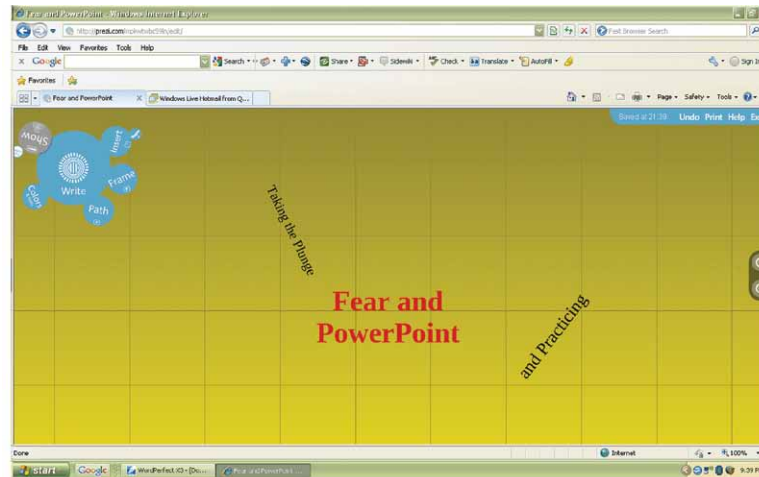
## Presentations

WordPerfect Office Suite has its own program called Corel Presentations or Presentations. The INSERT menu allows you to put in text, pictures, etc. and create new slides.

If you prefer not to spring for the costs of either office software package, there's Open Office. <http://www.openoffice.org/> Inserting text, pictures or a new slide happens by clicking the icons **below** the slide.



# Prezi



Then, if you aren't a linear thinker, there's Prezi, also free in its simplest format. <http://prezi.com/> It doesn't come with as many variables as the other (fonts, colors, animations, etc), but does have a cool way of going from subject to subject. Prezi has video tutorials teaching you how to use it. In many ways it's easier simply because it doesn't provide as many choices as the other programs. Inserting text just requires clicking on the screen and typing. Prezi is a little bit more finicky about inserting pictures, but uses the usual formats digital cameras use: .jpg and .gif.

Whichever software program you decide to use, now play with it. Your assignment is to take your last vacation and create a slide show about it. It will give you a chance to give it:

- a title
- a list
- insert pictures

A few quick tips:

- Pick fonts without serifs. Serifs are those little lines at the ends of letters in fonts like Times New Roman and Courier. Instead use fonts like Arial, Tahoma, or Verdana.
- Five or fewer bullet points a slide. Three is better. The list is an outline, not your talk.
- Keep out extra words: articles (a, the). Replace "at" with @, "and" with &.
- A picture is worth a thousand words.

Give any one of these programs a try. You can't break them and you'll be surprised by how easy they are to use.

Let us know what you'd like to see in future technology articles.

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*Heather Williams is an Assistant Federal Public Defender in Tucson, on the Board of Governors of AACJ and the editor of **The Defender**.*

# Atypical

by Elizabeth Stein

When Shawn Jensen first joined the Marines in 1966, he was a tenacious 17-year-old who never expected to find himself in prison, trapped in a life sentence with little chance of parole. Jensen is a member of a group of prisoners who are known as the "Pre-73 Old Code Lifers."

This is a group of 27 Arizona prisoners who were convicted of first degree murder and sentenced to life in prison between 1956 and August 1973.

Before the sentencing law was changed in August 1973, the punishment for prisoners found guilty of first degree murder was either life in prison or a death sentence. Typically, after about ten years, those sentenced to life could appear in front of the Board of Executive Clemency to be recommended to the Governor of Arizona for commutation.

When the Governor approved, their sentences were commuted and the inmates were released from prison. Most received parole and spent an average of only ten years behind bars.

When the law changed in August 1973, criminals found guilty of first degree murder and sentenced to life were required to serve a minimum of 25 years in prison. In other words, their sentencing is "25 to life." After 25 years, they automatically become eligible for parole (and routinely have been receiving that parole ever since). Those convicted under the new law no longer have to appear in front of the Board of Executive Clemency or be approved by the Governor in order to receive their parole. Instead, they are required only to come before the Parole Board to be granted release.

For those charged under the old, pre-1973 sentencing law who did not receive parole before the law was changed in 1973, parole has become almost impossible to gain. This holds true because the Board of Executive Clemency must recommend their parole which must then be approved by the Governor of Arizona. Unlike the politicians of the 70s and 80s, politicians nowadays are extremely reluctant when it comes to granting amnesty. Now it seems politically unwise to parole a convicted murderer. In an attempt to save their political reputations, governors almost never do so.

While these 27 prisoners have all served between 32 and 46 years (well over the presently required minimum of 25 years) in prison, they are not automatically eligible for parole

because the pre-1973 law still applies. (Once determined, a punishment cannot be augmented or made harsher.) While the intent of the post-1973 law was to make the penalty for murder in the first degree "harsher," in this circumstance, those sentenced under the old code would be more than willing to be subject to the so-called "harsher" new law. For the time being, Shawn Jensen, along with the rest of the "Pre-73 Old Code Lifers," remains in prison, caught between the sentencing laws of the past and the political realities of the present.

Accompanied by his wife, Rhonda, Jensen saunters across the prison yard on visitation days sporting a trendy pair of black Ray-Ban® Wayfarer sunglasses. They contrast the orange jumpsuit they both know all too well.

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the law was changed  
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impossible to gain.*

He heads inside to the small visiting room lined with a bank of vending machines, and strangely painted with a cartoon-like forest setting complete with clouds, birds, and even a harmless looking cartoon bear. Unlike the other inmates in the visitation area, Shawn has no piercings or tattoos. When the sunglasses come off, a pair of friendly blue eyes are revealed. These are eyes that have witnessed far too much.

Jensen begins to recount experiences from his childhood in Phoenix, living with the "foster family from hell."

On March 19, 1948, Roger Steven Jensen was born to Josephine Lescohier and John Jensen. His mother was a schizophrenic who had been carelessly sent away to California by her "well-to-do" family to avoid embarrassment. There, she met John and together they had a baby boy. At only three months old, Roger Steven Jensen was taken from his parents by the Lescohier family and placed in a foster family. He was the corrupted family's best kept secret.

Growing up, Jensen was abused, beaten and neglected. Before he even turned ten, he had suffered several broken limbs and a broken jaw; he even had to repeat the seventh grade because he missed so much school due to his injuries. It seems he was only kept alive because his foster family was receiving large sums of money from Jensen's wealthy biological family.

At age sixteen, with only three semesters of high school under his belt, he left the house without a uttering a word.

With no hesitation, Jensen left his cruel life behind and ventured out into a world that seemed much less scary than the one he had just come from.

He worked for a roofing company while living in a boarding house for a few months until he made friends with a Marine recruiter who inspired him to join despite his very young age and slight build. At the time Jensen joined the Marines, he was 17 years old, stood 5 feet, 5 inches tall, and weighed 111 pounds. Refusing to be held back by his age and size, Jensen fought his way through boot camp and, shortly after graduating, received orders to go to Vietnam in 1967. While fighting in Vietnam, he was called up to serve in the Marine's Special Forces and was part of a Marine Reconnaissance team that conducted patrols deep within enemy territory.

He fights to hold back tears as he remembers the scarring images of war that still remain burned in his memory. Jensen recalls painful stories of losing friends and the constant fear they all had to live with. One particularly terrifying instance occurred when he was shot in battle and fell into a rice paddy. Without aid, he was sure to die, but a friend and fellow marine saved his life by pulling him up. At that very moment, the man who had saved Shawn Jensen's life was shot in the head from behind, his brains splattering onto Jensen's face.

Amidst the painful memories, Jensen strings together, with his brilliant vocabulary, the touching encounter he had with a young Vietnamese boy, naked and orphaned, who he handed over to the next village. Jensen grins at the thought of the young boy wearing his helmet and attempting to salute him. He mimics the gossamer and playful gesture with his own arm.

"Then the wheels started to fall off," he sighs honestly, pointing at his head.

Upon returning to the United States, Jensen experienced a situation in the airport where a woman threw her milkshake onto his uniform and meanly shouted at him, "Baby killer!" He began an emotional downward spiral that today would be diagnosed as Post-Traumatic Stress Disorder. In 1971, PTSD was almost unheard of and therapy for it was scarce.

He suffered from horrifying nightmares and spine-chilling flashbacks. It seemed the war was returning in his mind. Jensen worked as a military policeman for a few years but was eventually discharged from the forces. Unsure what to do, the frazzled 21-year-old began attending services at the same local church he attended growing up in Phoenix.

Jensen describes himself as "mentally unfit for a relationship at that time." He didn't know his very own love story was about to unfold.

It appeared the "ding-bat" and "trollop girls," as Jensen calls them, simply could not wait to befriend the newest member of the church. Yet, none of these giddy young ladies made the cut for Jensen; he was looking for more "depth" than they had to offer. In the same church where he had rejected all the others, he found that depth in Rhonda Jensen.

They both smile as they remember their first date to the cool hangout spot atop Phoenix's South Mountain in 1971. Shawn spotted Rhonda in church and suavely said to her, "You, get in the car. You're coming with me!"

They say the rest is history. The two were married June 24, 1972, and have remained husband and wife for the past 38 years. This extraordinary couple, who has endured so much together, can only be described with one of Jensen's favorite words: "atypical."

A short eight months after the two wed, Shawn Jensen experienced his most frightening flashback to date in the couple's Phoenix home. Rhonda, eager to help her husband, signed him up for therapy at the church where the two met. Jensen was placed on a waiting list and the appointment was scheduled for a few weeks in the future. Unfortunately, no one realized Jensen needed urgent help so the therapy did not come soon enough.

Because he was slowly breaking down emotionally, Jensen was often alone in the desert for an entire day, simply taking in the Arizona sun and practicing his shot.

But one day, while he was only a single silhouette atop the Arizona landscape, a loud plane flew low over Jensen, instantly launching him into a nightmarish flashback. Jensen suddenly saw a man stand up behind a bush and assumed the man was part of the Viet Cong coming to attack him. With nothing but his battle instincts to rely on, Jensen opened fire and, in an instant, the man and his girlfriend were dead.

"He was absolutely terrified," Rhonda expounds gravely.

Scared for his life, Jensen ran up onto a nearby hill where he could see down to the road. The sight of cars on a street snapped him back to reality. Disheveled, still in complete shock, he realized what he had done.

He was later arrested for the crimes and sentenced to life in prison.

His first years in prison were much different than his modern-day experiences in the state correctional system. After receiving extensive therapy for PTSD, Jensen made fast friends with the warden and the two became hunting buddies. He was even allowed to drive his truck out of the prison when he went home for the weekend on frequent furloughs. He would give the warden his word that he would be back on Monday morning. Sure enough. Jensen's integrity always

ensured his return. The most important aspect about life in prison in the 1970s was that getting the governor to sign off on commutation was a somewhat simple task.

Now, almost 38 years have passed. Times surely have changed dramatically. Furloughs cease to exist and a man's integrity means almost nothing anymore. In addition to changes in the Department of Corrections, the political world has evolved into a judgmental and aggressive one. The boot of the political world has been tightly pressed against Jensen's neck for the past 20 years, the hand firmly gripping onto the lock of the prison door.

Together, the Jensens keep up hope that one day Shawn finally will go home. Rhonda, who has spent decades advocating for her husband, confidently states, "He's worth it." She says, "We always keep balls in the air." Whether it is applying for parole or gathering witness statements, their efforts never tire.

Jensen has achieved some outstanding feats. While serving time in an Arizona State Prison, he was the first Arizona prisoner to ever finish graduate school while still an active prisoner. This prisoner, eager for knowledge, received a Master's degree in sociology. He is also extremely well read. Aside from his intelligence, Jensen has proved to be a hard worker; he has held many jobs at the prison and teaches classes whenever he is allowed.

For the time being while he remains imprisoned, he maintains a remarkably positive attitude. Of his own outlook Jensen says he refuses to be jaded or bitter by the negativity for that would only be letting down Rhonda. According to him, he has chosen "positivity" and focuses on reality instead of the "artificial subculture" that is prison.

Jensen acts almost as a father-figure or a mentor to some of the younger inmates. He has earned a great amount of respect from his fellow prisoners. Unlike most others, Jensen does not abuse his power. Instead, he uses it for good, often intervening to maintain as much peace as possible among the inmates. Over the years, he has been the beneficiary of countless letters of appreciation for the things he has done for his fellow inmates and for the positively profound ways he has affected their lives.

Sitting up straight with a look of pride on his face, the atypical Shawn Jensen puts it all in humble and simple terms, "I try to be a bright spot in a dark place."



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# THROWING AWAY THE KEY: Debunking APAAC's 2010 Report on Arizona's Prison Population

by Caroline Isaacs

## Background

On March 30, 2010, the Arizona Prosecuting Attorney's Advisory Council (APAAC) released a report entitled "Prisoners in Arizona, A Profile of the Inmate Population." APAAC and numerous high-profile prosecutors have portrayed the report as providing definitive empirical data regarding the risk level of inmates in Arizona prisons. The report makes the shocking assertion that "the vast majority of current inmates are violent or repeat offenders (94.2%)."<sup>i</sup> It then goes on to credit Arizona's extremely high incarceration rate (6th highest in the nation) with the recent drop in crime rates.

The report was released at a strategic and critical time. Over the last few years, many states have responded to crippling budget crises by enacting sensible sentencing reforms to reduce their prison populations and save millions in taxpayer dollars. For a year prior to the release of the report, an Ad Hoc legislative committee had been holding hearings on the potential for sentencing reform in Arizona. It is unsurprising that the state's prosecutors would see such efforts as deeply concerning.

The report was released primarily to state legislators and various actors in the state's criminal justice system. Press releases and promo materials touted the report as incontrovertible evidence that Arizona's criminal justice system was working exactly as intended and well worth the \$1 billion-a-year price tag. Take, for example, this excerpt from a press release issued by Pima County Attorney Barbara LaWall:

"This report is the most in-depth profile of the Arizona prison population ever attempted," said Pima County Attorney Barbara LaWall, who serves on the Council. "Its findings come at a critical time, as Arizona faces the most severe budget crisis in the 98-year history of our state. It is in our best interests to ensure that the significance of this report is fully understood."

And, in fact, APAAC's report has been used to justify blocking any significant changes to current sentencing law in Arizona, based on the assumption that the report demonstrates that "the right people are in prison and the system works." For good measure, the report subtly employs

the tried-and-true "Willie Horton" scare tactic, proven to deter legislators from considering reforms: The specter of becoming a target for angry voters frightened by the prospect of paroled criminals roaming the streets.

While all of this may make for good political theatre, the major findings of the report are overstated and, in some cases, outright incorrect. In addition to the obvious bias of the organization that commissioned the research, the report has numerous methodological flaws that make its conclusions deeply suspect.

## Data Source

First, it is important to understand that this report is entirely based on information gathered from the Arizona Department of Corrections, not from sentencing courts. This is significant, because the Arizona Department of Corrections (ADC) uses broad categories to classify prisoners based on a set of criteria that may make sense for correctional administrators, but does not provide all the pertinent information about the individual case (aggravating/mitigating factors, plea bargains, etc.). It also gives no indication of which state statutes were violated, making it hard to extrapolate on the relevance of APAAC's report to Arizona's criminal sentencing policies.

It may surprise the average Arizonan to know that there currently is no centralized system to collect actual sentencing data from the various county superior courts. Much information about how sentencing laws are applied is not even computerized, but instead is still kept in paper files. In other words, lawmakers and the people of Arizona really have no idea how the hundreds of sentencing laws on the books are actually working. No one knows how many people were sentenced statewide under a given statute last year, or for how long, or how much it cost. Yet, legislators continue to pass "tough" laws, under the assumption that they are making us safer.

## Analysis

So while the APAAC report purports to prove that our laws are working, it does not (cannot) incorporate any actual sentencing data. Instead, it relies on the Department

of Corrections' interpretation of a person's sentence. It also takes great liberties with the data in order to concoct a shockingly high number of "repeat and violent offenders" in custody.

It begins with the conflation of "repeat" and "violent"—two categories that reflect a very different class of criminal. The fact that most petty criminals and drug addicts have a number of arrests and convictions on their records does not make these low-level offenders dangerous—it merely indicates that our system has failed to rehabilitate or address the root of their criminal behavior. This category is fundamentally flawed because it treats all adult felony convictions the same, giving the false impression that anyone with a prior adult felony conviction must be dangerous. Consequently, this category treats those with homicide priors the same as those convicted of possession of drug paraphernalia.

APAAC's report artificially inflates the number of people it classifies as "dangerous, violent, or sexual offenders" by including prior convictions offense types that are not considered dangerous or violent under state statutes. For example, the Report states that 83.8% of those in custody were "repeat offenders," leading many to assume that all of these individuals had prior adult felony convictions. That however, is not the case. This category includes "both juvenile and adult felonies." (Report at 32). Consequently, individuals who have no prior adult felony convictions and never spent a day in detention are considered "repeat offenders" in the report if they had the misfortune of being adjudicated for a juvenile offense such as punching a fellow student in the nose during a schoolyard fight, throwing a frozen hot pocket at another family member or being a passenger in a stolen car.

The Report also tries to paint the picture that a majority of those in custody are violent offenders, stating that "...52.6% of inmates are currently committed for one or more violent offenses" (Report at 2). This category is deceptive: it includes *any case where there was an injury* (Report at 27). Hence, this includes situations where the injuries were unintentional and unrelated to the underlying crime. For example if a police officer sprained his finger while arresting a defendant for forgery, that defendant would be classified as a "violent offender" under this Report, lumped into the same category as an individual who was convicted of premeditated murder.

The Report further seeks to foment fear of those in custody by stating that "9,260 or 22.9% of inmates are suspected or validated members of prison and street gangs."

(Report at 3). The criteria for inclusion of individuals in this category are seriously flawed. Again, the report combines two separate categories in order to artificially inflate the numbers. Prison gangs are fundamentally different from criminal street gangs, and most often have no relevance outside of the prison environment. Those who are validated by ADC as being bona fide gang members are placed in a "Security Threat Group" (STG) while in ADC. This is an entirely administrative designation, based on the Department's assessment of the threat to the security of the *institution*, not the public. Furthermore, ADC's system for determining gang affiliation is often nothing but conjecture, oftentimes based on nothing more than a misinterpreted tattoo. It is an internal, administrative process and has no legal relevance whatsoever.

The Report also places great emphasis on sex offenses. As stated at page 27 of the Report: "...4,898 or 23.0% (of inmates have been convicted) for at least one sex or *sex-related offense*." (Emphasis added). This category, however, includes individuals who were never charged with a sex offense. For example, if an intake officer at DOC speculates that a defendant forged a check so he could buy pornography, that individual could be considered to have the requisite underlying "sexual involvement" or "sexual motivation" to be labeled a sex offender under the criteria of this Report.

The Drug Trafficking category also is inflated. The report states that 62.3% of nonviolent first time offenders were "drug traffickers" (Report at page 2). This category, however, makes no differentiation regarding the nature of the "trafficking offenses," treating those inmates who are high level members of drug cartels the same as addicted individuals who are taking an undercover police officer to somebody to purchase drugs and then begging the buyer for "a piece of the rock" so they can sustain their addiction. In addition, the criteria, once again, allows inclusion of individuals who were never convicted of sale of drugs.

### Faulty Conclusions

All of this "fuzzy math" is used to support two primary conclusions: (1) that everybody in prison is dangerous and deserves to be there; and (2) that Arizona's high incarceration rate is responsible for the recent drop in crime. These spurious conclusions then are used to bolster APAAC's real agenda—undermining the movement for meaningful sentencing reform in Arizona. It is worth examining the preponderance of evidence that contradicts each of these conclusions.

First, let's unpack the claim that "the right people are in prison and the system works." Dr. Darrell Fischer, the individual with whom APAAC contracted to write the report, was the statistician for the Arizona Department of Corrections for many years. In that capacity, he was responsible for developing a tool to assess the level of risk each individual poses to the community in order to determine which prisoners could be released early. According to this backup data to the APAAC report, this risk assessment tool identifies thousands of individuals in DOC who could be released with little or no risk to the community.

Likewise, the Arizona Supreme Court's initiative for Evidence-Based Practices (EBP) in sentencing has indicated that many more offenders can be safely placed on less restrictive forms of probation rather than sentenced to prison. "EBP is a body of research done through meta-analysis (a study of studies) that has provided tools and techniques that have been proven to be effective at reducing recidivism. These tools and techniques allow probation officers to determine risk and criminogenic characteristics of probationers and place them in appropriate supervision levels and programs."<sup>ii</sup>

Perhaps the most outrageous claim in the APAAC report is that Arizona's high incarceration rate is responsible for the recent drop in crime. This conclusion is challenged in a recent report entitled, "Unlocking America," authored by a distinguished group of criminologists. They assert that

More recent estimates based on individual states and counties within states have estimated the crime-reduction impact of prison growth to be much smaller or nonexistent. Research on crime and incarceration does not consistently indicate that the massive use of incarceration has reduced crime rates.

In sum, studies on the impact of incarceration on crime rates come to a range of conclusions that vary from "making crime worse" to "reducing crime a great deal." Though conclusive evidence is lacking, the bulk of the evidence points to three conclusions: (1) The effect of imprisonment on crime rates, if there is one, is small; (2) If there is an effect, it diminishes as prison populations expand; and (3) The overwhelming and undisputed negative side effects of incarceration far outweigh its potential, unproven benefits.<sup>iii</sup>

The recent experiences of a number of states also stand in stark contrast to APAAC's claim. Severe budget crises have led many states to reduce costs by reducing prison populations. Since 2005, the number of states with declining prison population levels has grown steadily – from 9 in 2006,

14 in 2007, 19 in 2008, to 24 in 2009. Many of these states saw dramatic decreases in crime as they reduced their prison populations.

In Kansas, the violent crime rate fell by 3 percent, while property crime dropped 16 percent. While prison population levels spiraled downward in Michigan, crime rates also fell – with a reduction in violent crime of 11 percent between 2006 and 2008, and a 9 percent reduction in property crime. In New Jersey, the rate of violent crime dropped by 21 percent, while property crime fell by 23 percent. The state of New York has set national records for both crime reduction and prison downscaling. FBI crime data show that by 2008, violent crime had fallen by 32 percent since 1999, and property crime fell by 26 percent.<sup>iv</sup> Compared to these states, Arizona's rate of violent crime reduction of 9.5 percent seems quite modest.

It is also worth noting that Arizona's crime rate is still above the national median in each of the seven types of crime measured in the FBI crime index: Murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft. In October of 2011, the Arizona Republic reported:

The analysis shows that, recently, Arizona's rates of murder, rape and aggravated assault have increased. Arizona's rate of rape, after falling for four straight years, shot up 31.9 percent from 2008 to last year. That jump led the rate to climb by 10.4 percent over the decade, even as the national rate fell by 14.1 percent.<sup>v</sup>

### What's At Stake

It is fairly self-evident that an association of prosecutors, whose financial well-being is tied to criminal convictions, would view the prison downsizing trend as a threat to their self-interest. But, for the average Arizona taxpayer, the benefits are clear. Arizona spent over \$1 billion on prisons in 2011. The Department of Corrections has the third largest operating budget in the state, and eats up 11% of the state's General Fund. As the budget crisis has spurred crippling cuts to health care, education, and social welfare programs, the Department of Corrections was the only budget that saw an *increase*.

A study published by the Center for Economic and Policy Research proposes that alternatives to incarceration for low-level offenders could restore millions of dollars to cashstrapped states:

A reduction by one-half in the incarceration rate for non-violent offenders (who now make up over 60 percent of the prison and jail population) would lower the overall incarceration rate to the level reached in 1993 (which was already high by historical standards).

This would also lower correctional expenditures by \$16.9 billion per year, with the large majority of these savings accruing to state and local governments. These projected savings would amount to almost one-fourth of total corrections budgets. The extensive research on incarceration and crime suggests that these budgetary savings could be achieved without any appreciable deterioration in public safety.<sup>vi</sup>

It is ironic that APAAC cites Arizona's high recidivism rate in its quest to maintain the status quo. If anything, the number of people returning to prison shows that the system is utterly broken. Our prisons are supposedly part of a department of *correction*, but it is clear that they have fallen well short of the goal of helping offenders overcome their addictions or to learn ways to get along in society. The return on taxpayers' billion-dollar annual investment is a 40-60% failure rate.

Arizona continues to face a set of difficult choices as the economic crisis persists. Each year, the state Legislature is confronted with the task of shaving millions from the budget, pitting vulnerable populations against each other in a race to the bottom. The taxpayers of this state deserve solid information about the reasonable options available, not scare tactics and pseudoscience. The prison downsizing experience of 24 states, including very conservative states like Mississippi and Texas, offers us reasonable alternatives grounded in proven techniques and reliable research. Arizona can't afford not to consider these reforms.

#### **Arizona Attorneys for Criminal Justice**

Tel: 480-812-1700 | Fax: 480-812-1736

2340 West Ray Road, Ste. 1, Chandler, AZ 85224-3516

<http://www.aacj.org/>

- i Fischer, Darryl, "Prisoners in Arizona, A Profile of the Inmate Population." March, 2010. Arizona Prosecuting Attorneys Advisory Council.
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**About the Author:** *Caroline Isaacs is the Program Director of the Arizona program of the American Friends Service Committee. She has spent the last 16 years working with the AFSC-Arizona focusing on Criminal Justice issues, including prison privatization, sentencing reform, and prison conditions advocacy. Caroline has a BA in Political Science from The College of Wooster and a Master's in Social Work from Arizona State University. Prior to her tenure at AFSC, she worked in the social services field with homeless teens and is currently an adjunct faculty member at the Arizona State University School of Social Work (Tucson component).*

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