

Dear Mock Trial Teacher and Attorney Coaches:

The Arizona Foundation for Legal Services & Education and the Young Lawyers of Arizona welcome you and your team to the 2004-2005 Arizona High School Mock Trial Program.

Please review all of the material carefully. If you have any questions about registration or administration of the program, please contact Susan Nusall with the Arizona Foundation for Legal Services & Education at 602-340-7361. If you have any questions about the case, the Rules of the Program or the legal aspects of the program, please contact your local Regional Coordinator or the State Legal Counsel Coordinator, Danelle Liwski with the Pima County Juvenile Court in Tucson at (520) 740-4711 or post your question(s) on the Mock Trial website, www.azflse.org/mocktrial.

The Regional Tournaments will be held on February 26, 2005 and the State Tournament will be held on March 12, 2005.

Case Materials

This year's problem, as you will see, is a criminal case. The case has been written by a committee of volunteers from the legal community and any similarity or resemblance of any character to an actual person or entity is strictly unintentional and coincidental. The Arizona Foundation for Legal Services & Education and The Young Lawyers of Arizona would like to thank the following for help in developing this year's problem: Lt. Robert Kimmins (Pima County Sheriff's Department), Anthony Payson (Pima County Public Defender's Office), Elizabeth Hurley (Pima County Attorney's Office), Amy Krauss (Sole Practitioner), Dewain Fox (Fennemore Craig), Pam Gates (Bryan Cave), William Gates (Karsten Manufacturing Corporation), Ruby Rojo (Pima County Juvenile Court JAA), Kenneth Wagner (Pima County Juvenile Court Clerk), and Nikki Chayet (Tucson City Court Magistrate). Also, for their assistance with technical matters, we would like to thank Jeffrey Schrade (Arizona Foundation for Legal Services & Education) and Alvaro Flores (Arizona Foundation for Legal Services & Education). The problem could not have been completed without their assistance.

Program and Evidence Rules

All team members are expected to know both of these sets of rules. Please make sure that students are thoroughly familiar with these rules. They can be found on the website, www.azflse.org/mocktrial, in the Download center.

Forms

Please become familiar with how and when the necessary forms are needed and comply with the requirements shown below.

Score Sheet and Ratings

A score sheet and the criteria for scoring to be used by the judges at the Regional Tournaments and the State Tournament are included in the case materials. Your students should be aware of the scoring system that is used to rate their performance. We recommend using the scoring sheet when students engage in trial practice runs. **Remember that each side has only 35 minutes to present their case this year.** Please note in Rule III.1 that there are mandatory penalty points for exceeding time limits during closing arguments.

Mock Trial Participants List – REVISED – PLEASE READ!!!

The Participant List for your team is now on line. If you registered on line, you should have already filled in your students' names. These can be edited at any time up to January 28, 2005. If you did NOT register on line, but sent in a paper registration, your team has been entered for you online and you will be required to submit the student names ON LINE prior to January 28, 2005. Please go to the website at www.azflse.org/mocktrial and click on register on line. Login, click on personalized teacher page, Mock Trial Regional Tournament, and "edit this team". If you do not submit the names on line by the deadline, your team may be prohibited from competing. Any requests to make changes to your team roster after January 28th are subject to approval by your Regional Coordinator. **NO EXCEPTIONS!!!** A list of regional coordinators is available on the website. If you encounter any problem in completing the online input of student names, please contact Liliana Duran at 602-340-7260.

Student Roster

The Student Roster form is the official form you are to use on Tournament Day. Please make certain that you have at least **FIVE COPIES** on hand the day of the tournament. The team is responsible for completing this form and presenting it to the judge/bailiff at the beginning of each round including the Finals Round.

Preparing Students to Participate

The Steps in a Mock Trial and Pre- and Post- Activities resources can help students develop a basic understanding of the mechanics of a trial and presents students with ten situations in which they must apply the rules of evidence. An answer key is provided for coaches. You are also provided with a suggestions sheet and helpful hints designed to guide attorney-coaches in working with students. Please take a few moments to review these materials to better prepare you for using these techniques with your students. They are available on the website, www.azflse.org/mocktrial , in the Download Center.

State Tournament

The State Tournament is scheduled for Saturday, March 12, 2005 at the Federal Courthouse located in downtown Phoenix. Teams that did not compete in the Maricopa County Regional Tournament will be eligible for overnight lodging the evening before the State Finals. More details about the State Tournament will be forthcoming.

National Mock Trial Tournament

The National Mock Trial Tournament will be held May 5-7, 2005 in Charlotte, NC. The Arizona Foundation for Legal Services & Education will apply for funding from the Academic Contest Fund Committee for funding to help offset travel-related costs for the state winner. However, the exact amount will not be determined until mid-2005 when the matter is heard before the State Board of Education. Once those funds are approved, the Arizona Foundation for Legal Services & Education will work directly with the state winner on the expenses to be reimbursed. It is strongly recommended that schools have a fundraising plan in place in the event that they are the State winners and are eligible to travel to the National Tournament.

We hope you enjoy the problem. We thought the characters opened the doors for a fun trial!!!!
Have fun and good luck with your tournaments!

Susan Nusall
Mock Trial State Coordinator

Danelle Liwski,
Legal Counsel Coordinator

2004-2005 HIGH SCHOOL MOCK TRIAL PROBLEM

- I. State of Arizona v. Pat Smith – Introduction
- II. Affidavits
 - A. Prosecution Case
 1. Detective Vic (Victoria) Estrada
 2. Dr. Willie Williams
 3. Chris Dunn
 - B. Defense Case
 1. Pat Smith
 2. Dr. Taylor Shea
 3. Terry Walker
- III. Statutes and authorities
 - A.R.S. § 13-1102
 - A.R.S. § 13-1103
 - A.R.S. § 13-1104
 - A.R.S. § 13-409
 - A.R.S. § 13-410

Courts minute entry on the motion concerning
A.R.S. §§ 13-409 and 13-410 (1 page)

Indictment of Pat Smith (1 page)
- IV. Case Law

State v. Walton, 133 Ariz. 282, 650 P.2d 1264 (App. 1982)
- V. Exhibits
 1. Merck Manual – General (2 pages)
 2. Merck Manual – Atherosclerosis (5 pages)
 3. Merck Manual – General/arteriosclerosis (1 page)
 4. Scene diagram parking lot only (1 page)
 5. Scene diagram Super King only (1 page)
 6. Scene diagram Super King and parking lot (1 page)
 7. Frank Howe 7-10-02 prior (1 page)
 8. Frank Howe 9-15-00 prior (1 page)
 9. Dispositional Minute entry RE: Pat Smith (2 pages)
 10. Dr. Willie Williams Report (1 page)
 11. Dr. Taylor Shea Report (1 page)
 12. Delinquency Petition Pat Smith

STATE OF ARIZONA V. PAT SMITH

Pat Smith has been charged with Second Degree Murder and the lesser-included offenses of manslaughter and negligent homicide. The charges arise from the August 20, 2002 death of Frank Howe following an incident between Frank Howe and Pat Smith at the Super King grocery store. The parties stipulate as follows:

1. The exhibits provided with the case materials will be pre-marked for identification with the exhibit numbers used in the case materials.
2. Authenticity (but not foundation) is stipulated for all exhibits.
3. All witness affidavits are presumed to have been signed before trial. Each witness has reviewed his/her affidavit for accuracy and completeness immediately prior to the trial, and no changes were made. Each exhibit, that bears a signature block is presumed to have been signed on the date indicated on the exhibit.
4. Frank Howe died on August 20, 2002. Identification of the deceased as Frank Howe is not an issue.

AFFIDAVIT OF PAT (PATRICIA) SMITH

1. My name is Pat (Patricia) Smith.
2. Since high school graduation I have worked as a security guard at a number of retail and grocery stores in town. I've been trying to get a job with the Sheriff's Department, but haven't been hired yet. My test scores have been above average, and I am in the best shape of anyone I know. I think the reason I haven't been hired is because my father has had a lifelong feud with Rick Estrada, who is a big wig at the Department.
3. I have been employed by Super King as a security guard since August 1, 2001. They hired me because they had a lot of shoplifting during the summer. Other security guards weren't able to control the thieves, so they brought me in to get the situation under control. The manager, Terry Walker, told me the store was losing lots of money because of the shoplifting that was going on. When I was hired, Terry told me he/she chose me because he/she knew I could protect their merchandise and their store. In fact, when he/she hired me, Terry told me about a time that a shoplifter knocked over an old lady while trying to run out of the store and the lady ended up with a broken leg.
4. I am an excellent all-around athlete, but my favorite sport is martial arts. In high school I started getting serious about karate. I took lessons from the best "Sen Sei" in town, and in just two years I earned my black belt. I started competing in fight classes, and I won nearly every time. My karate chop was legendary around town. I can easily break wooden boards with my hands or feet, but the rumor about me breaking a horse's leg is not true. The horse's leg was only bruised. Karate chops are rated on a scale of K-1 to K-6, with K-6 being the most severe, depending on the strength used to deliver the blow. Until the incident with Frank Howe, I had never used a karate chop beyond K-3, and that was only because someone threatened my girlfriend/boyfriend with a knife. At a karate meet in January 2002, one of the younger students gave me a K-5 to the ear. Since then, I've had difficulty with my hearing on the left side.
5. On August 20, 2002, I was at the Super King, standing near the front of the store, when a guy bolted for the door. I was wearing my security guard uniform: blue shirt, a security patch, and dark blue pants. I had seen this person before and knew him to be a shoplifter from earlier in the summer. His name was Frank Howe, and he was approximately 5 feet, 6 inches tall, and weighed about 180 pounds.
6. Frank Howe had a cigarette lighter, a pack of cigarettes, and a package of diapers in his hands. The items were not in a bag and he wasn't holding a receipt. It is store policy that items must be bagged after they are rung-up and receipts must be given to the customer.
7. On the afternoon in question, the store was crowded. There were people of all ages, including old ladies and mothers with children.
8. I felt it was my responsibility to catch Frank before someone got hurt and make sure that he never did this again.

9. Frank ran by me. As I ran toward Frank, he said, "leave me alone or I'll stuff you full of lead!" I replied, "If you try it, you'll be sorry." I meant what I said. Frank didn't listen. He ran out the front door.
10. Frank dropped the diapers, and reached for his pocket. Based on his comment, I was sure that Frank was reaching for his gun, and I was afraid of what might happen to me and the innocent bystanders. I immediately gave him the "K-5 move," which I knew would do the trick. The move is a karate chop to the chest. My "Sen Sei" told me that the K-5 move should only be used in the most serious situations. Frank fell down.
11. Frank still tried to reach for his pocket, so I jumped on him and did the K-2 so I could get his attention. This time it worked.
12. Frank lay on the ground, not moving, with his hand still in his pocket. When I pulled his hand out, I saw that Frank had a receipt. I looked at the receipt, and it showed that he paid for the cigarettes and diapers, but not the lighter. Super King sells lighters like the one Frank had in his hand.
13. Terry Walker seemed very concerned and said to me, "I heard him threaten you! I heard him say, 'leave me alone and I'll stuff you full of the real stuff!'" Terry Walker repeated this at least three times while we were in the parking lot waiting for the Sheriff's Deputy to arrive. I didn't even know Terry saw anything, with those carpet cleaners and all.
14. I believed that I was protecting myself and the store's property and patrons. When Frank called out to me, I believed this was a threat and when he reached into his pocket I thought he would pull out a weapon. I believe I acted appropriately in defense of persons and property.
15. I know that Detective Estrada thinks that I'm a lifelong criminal based on some old documents he/she dug up from when I was 17. I thought that was supposed to have been expunged from my record, because I haven't been in trouble since then. Anyway, as I told the Court back then, the marijuana joint found in my backpack was not mine. I don't know who put it there. Of course, the Court didn't believe me and I had to serve some weekends at the detention facility. That was the worst time of my life and there's no way I'm going through that again.

AFFIDAVIT OF TAYLOR SHEA, MD, PhD, BA, BS

1. I attended New York University, Brooklyn, as an undergraduate from 1973 until 1977. I graduated with honors with a Bachelor of Science degree in chemistry and a Bachelor of Arts degree in physical education. I ranked third out of 452 students in my class. I also attended New York University for my graduate studies in chemistry. In 1979, I received my PhD degree in biochemistry. I attended medical school at the Johns Hopkins University and received my M.D. degree in 1984. I completed my residency in anatomic pathology at Bethesda Naval Hospital.
2. I am currently the chairperson of the Forensic Pathology Department at the University of Texas, Austin. We employ a state-of-the-art laboratory and an internationally renowned staff to establish the cause and manner of death of humans and other animals.
3. Although it is always preferable to examine the actual cadaver as close as possible to the time of death, we can reliably determine the cause of death years or even decades after death using secondary sources (such as reports, photographs and tissue samples).
4. I have testified twice for the State and several dozen times for the defense in homicide trials. I have also testified a dozen times for plaintiffs in tobacco cases and have written several articles on the effects of tobacco and marijuana on the lungs.
5. The Texas State Prosecutors Association has filed a complaint against me with the Texas Medical Examiner's Office alleging that my testimony was false and biased in favor of the defense in three separate cases. They have previously tried to indict me for perjury, but the grand jury refused to issue charges. I categorically deny the allegations that I provided false testimony. Furthermore, none of these allegations has been proven.
6. The legal defense team for Pat Smith contacted me in December 2002. They requested that I review for accuracy the autopsy report of Frank Howe (the deceased) prepared by Dr. Willie Williams. Specifically, the defense counsel was convinced, and wanted me to confirm, that the deceased's heart attack was not caused by a blow to the chest.
7. In order to make my findings I received 2 vials of blood intact and sealed with the initials of Dr. Williams. I also received the preserved heart in a sealed container with Dr. Williams' initials on the seal.
8. I prepared a brief report summarizing my review of Dr. Williams' autopsy and my conclusions. Based on my review of the materials in this case, I believe that Dr. Williams' autopsy fell below the standard of care, and as a result Dr. Williams' conclusions are in error.
9. The good doctor failed to test for and find barbiturates. Habitual use of such drugs can lead to congestive heart failure. People with high blood pressure or heart disease face increased risks from the use of barbiturates and marijuana, because the use of such drugs elevates the heart rate and increases the strain on the heart.
10. Dr. Williams obliterated any evidence as to whether Mr. Howe's ribs had been cracked by a blow to the chest when he/she cracked open the cadaver's sternum without thoroughly photographing everything first. As a result, Dr. Williams' conclusion that a blow to the deceased's chest cracked the 5th and 6th ribs can neither be confirmed nor refuted.

11. Most disturbingly, Dr. Williams failed to notice that the deceased's coronary vessels were between 95-100% blocked.

12. This level of blockage is severe and should be noticed by a 1st year resident. It is a clear sign of a heart attack waiting to happen. The technical term for the blockage is atherosclerosis, which is a form of arteriosclerosis and is a coronary artery disease. Section 16 of the Merck Manual contains a general discussion of these conditions at Chapter 201 (Arteriosclerosis) under the Topics of General and Atherosclerosis, and at Chapter 202 (Coronary Artery Disease) under the Topic of General. I regularly rely on the Merck Manual as an authoritative treatise, as do most of the doctors that I know in my field, and can testify regarding the cited sections if asked.

13. As part of my review of Dr. Williams' conclusions, I examined the deceased's heart that was removed and preserved by Dr. Williams. I obtained the heart directly from Dr. Williams. Examination of the heart itself is the only way to determine whether a subject suffered a cardiac contusion. Cardiac contusion is an infrequent, but potentially serious, result of a deceleration injury. The exact incidence of cardiac contusion cannot be determined, as the diagnostic criteria vary. Postmortem evidence suggests, however, that myocardial contusion is present in only 14% of immediate fatalities from blunt trauma. Based on my review of the heart, I believe that the injury to the heart was moderate and was not an incidence of cardiac contusion.

14. It is my opinion that Mr. Howe died of congestive heart failure that would have occurred whether or not Pat Smith struck him. In fact, it is entirely possible that running out of the store would have been enough by itself to put that heart over the edge. Accordingly, I do not believe that Pat Smith can be held responsible for Mr. Howe's death.

15. My fees are \$275 per hour for out-of-court work and \$350 per hour for in-court testimony, plus any necessary travel expenses. To date I have been paid \$5,500 for my work in this case. This of course does not include my in court time.

AFFIDAVIT OF TERRY WALKER

1. My Name is Terry Walker.
2. I live at 120 N. Pantano Blvd, Apartment 220 in Tucson, Arizona.
3. I am the manager of the Super King Grocery store at 220 N. Pantano Blvd.
4. I am 34 years old, divorced with 2 wonderful and beautiful children. My children are 7 and 8. I spend as much time with them as I can – they are my life. Sally is an excellent swimmer and Jimmy is GREAT at football.
5. I have worked for Super King all of my life – or at least it seems that way.
6. I got my first job there when I was just 14. My Dad worked for Super King and they let me work as a stocker in the back of the store for a few hours each week. It was a good job at the time and it still is – I've been at the same store from the beginning.
7. Once I turned 16 and Super King saw my true potential, they put me out on the floor and I started working more hours. During the school year I worked about 30 hours a week, and in the summer I worked at least full time, maybe more.
8. After I graduated from High School, I knew Super King was going to be my career, so I started full time at 18. I worked in every department –produce, meats, canned goods, and boxed goods. I know the store inside and out.
9. When I turned 20 I was promoted to manager of the produce section. I was really happy, as this was a great move up for me. At the same time I got married, so life was really going my way.
10. I was made assistant manager at the store when I was 30, and at 32 I became the manager. I am the only manager of a Super King who does not have a college education. They are a great company to work for.
11. I know the competition would not let me be a manager without that degree, but Super King recognizes that I have worked my way up and know this store better than anyone with a piece of paper ever could. I truly worked my way up from the bottom.
12. I love my job. The people at Super King have been very good to me. Even during my divorce when times were tough and it was rough on me, they let me move my schedule around so I could see my kids whenever I needed to. You see that is what I mean about what a great company Super King is.
13. I have worked with Pat Smith for the past 3 years. He/She has always been a great employee. You should see his/her personnel file. There is nothing but great stuff in there. I know that Pat would never break the law.
14. I was working the day that Pat had the problem with that good for nothing Frank Howe. I don't want to speak ill of the dead, but Frank was a problem from the day he was born. I used to go to school with Frank. He was a jerk then and was a jerk until the day he died.

15. Pat, on the other hand, is a great person. I can always rely on him/her for work and I have seen great promise in Pat. He/She reminds me of myself. Pat has worked up from the bottom to security chief. Pat should have been accepted to the police academy the last go round. I know I gave a great recommendation, but you know the police academy - you have to know someone to get in there. Plus Pat and this Captain Estrada don't get along because Pat's Dad dated the Captain's ex-wife - Vic Estrada's Mom. The Captain always blamed Pat's Dad for breaking up his marriage and said Pat's family would pay for his heartache. At least that has always been the word on the street. Anyway, I am proud I stood by Pat and he/she still works for me. I could not have a better employee.
16. On August 20, 2002, when Frank caused all these problems, I had been working in my office. My office is in the southwest corner of the store. I heard Pat call out on the radio that he/she had spotted a 2-5 (that's our code for a shoplifter). Pat indicated he/she was headed out the door. I love to watch the shoplifters' faces when they are caught so I got up to go check it out.
17. As I was coming to our main entrance, which is on the southeast end of the store, I heard Pat yelling for Frank to stop and I could tell Pat was running. Then I heard Frank yell "leave me alone before I stuff you with lead." Just as I was coming around our display of carpet cleaners, Pat and Frank were headed outside the store. I saw Pat grab for Frank and Frank just fell. Sure, when Pat grabbed for Frank he/she pushed Frank a little, but it wasn't like that little push could cause any real injury. Pat was just doing a good day's work. Frank was just doing what he always does -- lie, steal and cheat for his own benefit.
18. After I ran out to check on Pat, Pat and I noticed that Frank was not getting up. I went inside to call the police and an ambulance. Once the police arrived they did their investigation and at first it was no big deal. They took pictures and a few statements and left. They knew Frank was a loser and that Pat was just doing a good job.
19. Later the situation changed. This Captain Estrada heard about it from his son/daughter and made a big deal where there was nothing. The Detective came back to the store and had me place a TW on a diagram for where I was standing when I saw Pat grab for Frank. I told him/her I was not sure, after all it had been a little while.

AFFIDAVIT OF VIC (VICTORIA) ESTRADA

1. My name is Vic (Victoria) Estrada.
2. I am currently employed by the Sheriffs Department. I am a sheriff's deputy and detective.
3. I am single with no children. At this time in my life I have little time for socializing. My work is my life and between my on duty hours and the extra off duty assignments I pick up, there is little time for the dating scene.
4. I have been employed with the Sheriff's Department since 1999 and was promoted to detective in January 2002. Many people think I got the job as detective because of my father, but I am the hardest working deputy out there. I have always scored the highest on all my performance evaluations and any test required by the department. My father Rick may be a Captain, but I earned this job.
5. I have always wanted to follow in my Dad's footsteps with the Department. I wanted to go in right after high school, but you have to be 21. My Dad told me to use that time to get an education because you can do more with the department if you have a degree. So I went to ASU and majored in criminal justice. I graduated with a 4.0 in 3 years and started the academy a month after I turned 21. I was born to be a deputy.
6. I have always prided myself on my work. In every case I have worked there has been a conviction. I know my stuff.
7. I remember all of my investigations and I will never forget the arrest of Pat Smith. The investigation started on August 20, 2002. I did a complete investigation and made my arrest on September 21, 2002.
8. Initially some uniforms were called to the Super King because of a shoplifter. I was on my way to the station and heard the radio call saying security needed assistance because the shoplifter was on the run.
9. After I arrived at the station I had a call to go to the Super King. I thought the shoplifter must have injured the security guard and I was ready to do my best work. You know security guards should be treated like law enforcement. I worked that job in college.
10. When I arrived at the scene I saw Frank Howe face down on the parking lot and Pat Smith was standing proudly over him. I knew it was Pat because my Dad had spoken of him/her before. I did not know anything about him/her really, just that my Dad had said some bad stuff about his/her family. This of course had nothing to do with my investigation.
11. The first thing I did at the scene was to get the spectators to move back. They were crowding around the body, not to mention the damage they were doing to my crime scene. I spoke to the paramedics who confirmed that Frank was dead when they arrived.

The paramedics indicated they did not move the body. Of course, I didn't touch the body either. There were no visible signs of injury on him at that time.

12. I then began looking for witnesses in the crowd. I interviewed several people, but most people showed up afterwards. Some witnesses told me they saw Frank running out and Pat Smith was trying to catch him. Other witnesses said Frank looked like he was in a hurry, but was definitely not running. Some witnesses stated they thought Frank was caught stealing again. They could not believe that Pat had attacked Frank for such a small amount of merchandise. They heard Frank say, "leave me alone and let me give you the stuff back," but Pat just yelled, "You're gonna be sorry!"
13. One of the main witnesses that day was Terry Walker, the Super King manager. After I spoke to him/her at the scene I was sure that Pat was just doing his/her job. Terry let me know that he/she had seen it all and that Pat was just trying to stop Frank. Terry heard Pat yell for Frank to stop and Terry also stated that Pat just barely pushed Frank and Frank fell. Plus, like I said, there weren't any marks on Frank at the time.
14. I thought this was going to be an open and shut case. But like I said I always do my job, so I did not stop until I had crossed all my T's and dotted all my I's.
15. One of the things I did at the scene was make a diagram of the area. When I went back to the store to finish the investigation I knew what Terry said could not be true. There is no way Terry could have seen anything around those carpet cleaners. Moreover, the physical assault happened outside, and none of the witnesses said they saw Terry outside the store when it happened. I also heard from some of the Super King employees that Terry was worried the store would be sued and he/she would do anything to protect the store. Terry was telling the employees to make sure they all told me he/she saw the whole thing.
16. The other main witness, Chris Dunn, had a much better view of the crime. I know that Pat used unreasonable force from Chris' statement. Plus the OME (Office of the Medical Examiner) let me know that the day of the incident there would not have been marks on Frank immediately after the assault.
17. When I interviewed Terry about what I learned from Chris, Terry tried to convince me that Chris was unreliable. Terry informed me that he/she fired Chris from Super King after being told by several employees that Chris was a thief. Terry said Chris would say anything to get Super King in trouble.
18. Also I learned in my investigation that Pat is quite the athlete. Pat was a karate champ in high school. Pat's high school friend told me Pat was deadly with his/her blows. I also heard that Pat once hit a horse with a karate blow and it broke the horse's leg.
19. Finally, as part of my investigation, I did a criminal background check on Pat. I found that Pat was adjudicated as a juvenile delinquent for smoking marijuana when he/she was 17 years old. You know how it is --- once a criminal, always a criminal. I forwarded a copy of the Delinquency Petition and the Disposition Minute Entry for Pat to the prosecutor's office.

20. I did not do a criminal background check of Frank Howe because there was no need to. After all, Frank's dead and not on trial here. Pat's defense counsel showed me copies of documents they said they obtained from a private investigator. The documents are Tucson City Court records with respect to prior shoplifting charges against Frank. Pat's defense counsel asked me to confirm the accuracy and authenticity of the documents, which I did.

21. For these reasons I arrested Pat – like I said, I always get the criminal.

AFFIDAVIT OF WILLIE WILLIAMS, MD

1. I obtained my Bachelor of Science degree in molecular biology from Stanford University in 1973. I attended the University of Arizona School of Medicine, where I obtained my M.D. degree in 1978. I have been a Resident in Pathology at the Pima County Morgue from 1983 to present.
2. I have participated in over 1,000 autopsies, including over 500 in which I was the principal medical examiner.
3. I have testified in court dozens of times as an expert witness. I usually testify for the State, but at least twice I have been a witness for the defense. I have also testified in a handful of civil automobile accident cases.
4. The State pays my salary (\$178,000 per year plus benefits). I receive no additional fee for testifying when I am testifying for the State.
5. The Chief Medical Examiner of the State of Arizona reviews my autopsy reports. She has never reprimanded me; nor have I ever been reported for incompetence.
6. In 1993, a colleague filed a grievance suggesting that I had accepted money to perform a private autopsy. Such behavior clearly would have violated my professional and ethical duties. A board of inquiry determined that there was not enough evidence and returned a finding of inconclusive.
7. On Wednesday, August 21, 2002, I conducted the autopsy of Frank Howe. Present during the autopsy were my assistant, Brooke Bennett, and Detective Vic (Victoria) Estrada. Detective Estrada identified the body. I also compared the cadaver to the general identifying information of the victim from the police reports, i.e. the deceased had the same height, weight and tattoo on his right shoulder blade as the victim described in the reports.
8. Palm prints, fingerprints and photographs of the deceased were taken. Hair, skin and blood samples were taken. Photos were taken and the heart was removed and preserved. Extra blood samples were taken so they could be provided to the defense after charges were brought. All of these items were kept under my control pending the outcome of this matter.
9. The body was that of a malnourished, young adult male. It was received unclad within a white plastic body bag.
10. The left forearm showed prior needle marks consistent with drug abuse, but in my opinion that prior drug used did not contribute to the subject's death.
11. During my exam, I drew blood for testing. I filled four vials, sealed them and initialed the seal. I sent two vials for sampling and two vials to Dr. Taylor Shea. I also removed the heart and placed it in preserving solution, sealed the container, and initialed the label. Dr. Shea requested the heart for examination and it was provided to him/her in the sealed container.
12. There was obvious trauma to the chest including bruising.

13. I cracked open the sternum and separated the rib cage in order to remove and examine the heart, which is standard protocol when conducting an autopsy.

14. Examination of the Cardiovascular System revealed the following injuries: (1) the heart was severely bruised and showed evidence of hemorrhaging; and (2) the aorta, venae cavae and pulmonary arteries had some, but not significant, atherosclerosis. The damage to the heart is what is known as cardiac contusion, which is a serious complication of a deceleration injury. In short, the deceleration force affects the viscoelastic chest wall, causing direct pressure on the myocardium.

15. I have read the Affidavit of Dr. Taylor Shea and the report by Dr. Shea. I agree with Dr. Shea that the Merck Manual is authoritative, and I myself rely on it frequently. I disagree, however, with the conclusion formed by Dr. Shea. I followed all the standard protocols and performed all the standard tests during the autopsy of Mr. Howe. Moreover, the death rate from coronary artery disease for men in Mr. Howe's age group is only one in every 10,000. Although the risk of death from coronary artery disease increases for people in various risk groups, the odds are very much against Dr. Shea's conclusions.

16. While examining the body Detective Estrada was very interested in the bruising. The Detective said there were not any obvious signs of injury when he/she was at the crime scene. I explained that with this type of injury there are not necessarily immediate signs of trauma.

17. Detective Estrada also seemed very anxious that I find something to indicate a crime in this matter. He/she kept going on about how this must be a homicide and how proud his/her Dad would be when he found out that Pat Smith was going to be arrested for murder. Of course, none of this mattered to my autopsy of the body. To me it's all about the science. The cops they always talk.

18. My examination of the body, as well as a review of the police reports prepared in this case and the Affidavit of Vic (Victoria) Estrada, lead me to conclude that Mr. Howe died of a heart attack caused, at least in part, by a severe blow to the chest. Further details regarding my conclusion may be found in the summary Autopsy Report that I prepared in this matter.

AFFIDAVIT OF CHRIS DUNN

1. My name is Chris Dunn.
2. I am 33 years old. I am currently unemployed, but I previously worked at Super King. I was fired in May 2002 because they accused me of stealing. I have never stolen anything, and I am considering suing Super King for defamation of character.
3. I have known Frank Howe since we were kids. We went to High School together and hung out a lot. After Frank had a baby with his ex-girlfriend in early 2002, we didn't get to hang out together as much, because Frank had to do his fair share taking care of the baby. Frank also was unemployed, but I have never known him to steal.
4. On August 20, 2002, Frank and I had lunch together at McDonald's. Although it was lunchtime, Frank only ordered water. He ate half of my french fries and most of my quarter pounder, which I was glad to share with him. I felt bad, though, because I knew he shouldn't be eating junk food. Frank had recently told me that his cholesterol level and his high blood pressure alarmed his doctor.
5. After lunch, Frank needed some smokes. I tried to get him to quit like his doctor said to, but Frank just wouldn't listen. Frank and I were supposed to be at a job fair at 3:00. Because it was almost 1:30 and we needed to change our clothes, I told Frank we were cutting it close and should hurry. Frank said he would. We drove over to the Super King and Frank went inside. At first I waited in the car, but Frank was taking so long I decided to go in. As requested by the Detective I marked Exhibit 4 with an "A" in the spot where I parked the car at the Super King.
6. As soon as I stepped inside the door I saw Frank running. I was relieved that he was hurrying like I told him. Just then I saw Pat Smith running after Frank. Pat was the one who accused me of stealing and now he/she was going after Frank, too. Frank stopped and said, "Leave me alone, and let me give you the stuff back." But Pat just ignored him and kept chasing him right by me and outside the store.
7. Pat jumped into a karate stance, which I recognized from him/her showing off while we were working together at the store. Pat was turned so that I could see his/her profile. I could also see Frank from the side.
8. Pat bragged to me that he/she had once broken a horse's leg with a "K-6" karate chop. Pat had told me that he/she really wanted to be a Sheriff's Deputy, and Pat knew that his/her karate and this security job could get him/her there if only someone could see how brave and fit he/she is. Pat told me never to mention the horse incident.
9. Pat gave Frank a "K-6" to the chest. I've never studied martial arts, but I recognized this move from Pat showing off. From the look on Frank's face, I knew he/she couldn't breathe. As Frank gasped for air, he tried to reach into his pocket, but before he could get his hand out, he stopped moving. That's when Pat jumped on top of him and did it again.

10. Somebody standing at the door of the Super King yelled, "Call the police!" Pat immediately pulled out his/her cell phone and made the call. Pat strutted proudly around Frank.
11. The police and ambulance showed up quickly, but it did not matter. Frank was already gone.
12. At first the police were treating Pat like some kind of hero, but then the truth came out and Pat is going to get what he/she deserves.
13. I put a "B" on Exhibit 4 to show where I was standing when Pat murdered Frank in cold blood. I was about 100 meters away from them when Pat attacked Frank and killed him.
14. I am trying to convince Frank's parents to join me in any lawsuit that I decide to bring against Super King. They deserve everything they get.



Arizona Revised Statutes Annotated [Currentness](#)

Title 13. Criminal Code [\(Refs & Annos\)](#)

[Chapter 4.](#) Justification [\(Refs & Annos\)](#)

→§ 13-409. Justification; use of physical force in law enforcement

A person is justified in threatening or using physical force against another if in making or assisting in making an arrest or detention or in preventing or assisting in preventing the escape after arrest or detention of that other person, such person uses or threatens to use physical force and all of the following exist:

1. A reasonable person would believe that such force is immediately necessary to effect the arrest or detention or prevent the escape.
2. Such person makes known the purpose of the arrest or detention or believes that it is otherwise known or cannot reasonably be made known to the person to be arrested or detained.
3. A reasonable person would believe the arrest or detention to be lawful.



Arizona Revised Statutes Annotated [Currentness](#)

Title 13. Criminal Code [\(Refs & Annos\)](#)

[Chapter 4.](#) Justification [\(Refs & Annos\)](#)

→§ 13-410. Justification; use of deadly physical force in law enforcement

A. The threatened use of deadly physical force by a person against another is justified pursuant to [§ 13-409](#) only if a reasonable person effecting the arrest or preventing the escape would believe the suspect or escapee is:

1. Actually resisting the discharge of a legal duty with deadly physical force or with the apparent capacity to use deadly physical force; or
2. A felon who has escaped from lawful confinement; or
3. A felon who is fleeing from justice or resisting arrest with physical force.

B. The use of deadly physical force by a person other than a peace officer against another is justified pursuant to [§ 13-409](#) only if a reasonable person effecting the arrest or preventing the escape would believe the suspect or escapee is actually resisting the discharge of a legal duty with physical force or with the apparent capacity to use deadly physical force.

C. The use of deadly force by a peace officer against another is justified pursuant to [§ 13-409](#) only when the peace officer reasonably believes that it is necessary:

1. To defend himself or a third person from what the peace officer reasonably believes to be the use or imminent use of deadly physical force.
2. To effect an arrest or prevent the escape from custody of a person whom the peace officer reasonably believes:
 - (a) Has committed, attempted to commit, is committing or is attempting to commit a felony involving the use or a threatened use of a deadly weapon.
 - (b) Is attempting to escape by use of a deadly weapon.

(c) Through past or present conduct of the person which is known by the peace officer that the person is likely to endanger human life or inflict serious bodily injury to another unless apprehended without delay.


(d) Is necessary to lawfully suppress a riot if the person or another person participating in the riot is armed with a deadly weapon.

D. Notwithstanding any other provisions of this chapter, a peace officer is justified in threatening to use deadly physical force when and to the extent a reasonable officer believes it necessary to protect himself against another's potential use of physical force or deadly physical force.

C

Arizona Revised Statutes Annotated [Currentness](#)

Title 13. Criminal Code [\(Refs & Annos\)](#)

 [Chapter 11.](#) Homicide [\(Refs & Annos\)](#)

→§ 13-1102. Negligent homicide; classification


A. A person commits negligent homicide if with criminal negligence such person causes the death of another person.

B. Negligent homicide is a class 4 felony.

C

Arizona Revised Statutes Annotated [Currentness](#)

Title 13. Criminal Code [\(Refs & Annos\)](#)

 [Chapter 11.](#) Homicide [\(Refs & Annos\)](#)

→§ 13-1103. Manslaughter; classification

A. A person commits manslaughter by:


1. Recklessly causing the death of another person; or
2. Committing second degree murder as defined in [§ 13-1104, subsection A](#) upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim; or
3. Intentionally aiding another to commit suicide; or
4. Committing second degree murder as defined in [§ 13-1104, subsection A, paragraph 3](#), while being coerced to do so by the use or threatened immediate use of unlawful deadly physical force upon such person or a third person which a reasonable person in his situation would have been unable to resist; or
5. Knowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred.

B. Manslaughter is a class 2 felony.

C

Arizona Revised Statutes Annotated [Currentness](#)

Title 13. Criminal Code [\(Refs & Annos\)](#)

 [Chapter 11.](#) Homicide [\(Refs & Annos\)](#)

→§ 13-1104. Second degree murder; classification

A. A person commits second degree murder if without premeditation:

1. Such person intentionally causes the death of another person; or
2. Knowing that his conduct will cause death or serious physical injury, such person causes the death of another person; or
3. Under circumstances manifesting extreme indifference to human life, such person recklessly engages in conduct which creates a grave risk of death and

thereby causes the death of another person.

B. Second degree murder is a class 1 felony and is punishable as provided by [§ 13-604, subsection S](#), [§ 13-604.01](#) if the victim is under fifteen years of age or [§ 13-710](#).

C

Arizona Revised Statutes Annotated [Currentness](#)

Title 13. Criminal Code ([Refs & Annos](#))

[Chapter 2](#). General Principles of Criminal Liability ([Refs & Annos](#))

→§ 13-205. Affirmative defenses; burden of proof

A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title. [\[FN1\]](#)

B. This section does not affect the presumption contained in [§ 13-411, subsection C](#) and [§ 13-503](#).

CREDIT(S)

Added by [Laws 1997, Ch. 136, § 4](#).

[\[FN1\]](#) [Section 13-401 et seq.](#)

**ARIZONA SUPERIOR COURT
PIMA COUNTY**

HON. KATHLEEN A. QUIGLEY

CASE NUMBER: CR – 012345

DATE: October 18, 2004

IN THE MATTER OF
State of Arizona
V.
Pat Smith

MINUTE ENTRY

After hearing motions in the above matter the court hereby orders that: (i) A.R.S. §§ 13-409 and 13-410 apply to security personnel; and (ii) security personnel are treated as “peace officers” for purposes of A.R.S. §§ 13-409 and 13-410.

Dated this 18th day of October, 2004.

HON. KATHLEEN A. QUIGLEY
Shirley Peters, Deputy Clerk
By Ruby Rojo, J.A.A.

Judge Kathleen Quigley
Calendar Office
County Attorney’s Office:
Public Defender’s Office:
Probation Office:

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,)	
)	
Plaintiff,)	CAUSE NO.
)	
vs.)	GRAND JURY INDICTMENT
)	
PAT SMITH,)	888-GJ-888
)	
Defendant.)	
_____)	

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse PAT SMITH and charge that in Pima County:

COUNT ONE: (SECOND DEGREE MURDER, A CLASS ONE FELONY)

On or about the 20th day of August, 2002, PAT SMITH intentionally caused the death of FRANK HOWE; OR caused the death of FRANK HOWE by engaging in conduct, to wit: a karate kick, knowing that such conduct would cause death or serious physical injury; OR caused the death of FRANK HOWE by recklessly engaging in conduct manifesting extreme indifference to human life, to wit: a karate kick, which created a grave risk of death, in violation of A.R.S. § 13-1104(A) (1), (2) and (3).

IN THE ALTERNATIVE

COUNT TWO: (MANSLAUGHTER, A CLASS TWO FELONY)

On or about the 20th day of August, 2002, PAT SMITH recklessly caused the death of FRANK HOWE; OR intentionally caused the death of FRANK HOWE upon a sudden quarrel or heat of passion; OR caused the death of FRANK HOWE by recklessly engaging in conduct manifesting extreme indifference to human life, to wit: a karate kick, which created a grave risk of death, while being coerced to do so by the use of unlawful deadly physical force upon such person, in violation of A.R.S. § 13-1103 (A) (1), (2) or (4).

IN THE ALTERNATIVE

COUNT THREE: (NEGLIGENT HOMICIDE, A CLASS FOUR FELONY)

On or about the 20th day of August, 2002, PAT SMITH caused the death of FRANK HOWE, by engaging in criminally negligent conduct, to wit: a karate kick, in violation of A.R.S. § 13-1102.

PIMA COUNTY ATTORNEY

By _____

Foreperson of the Grand Jury

Dated

Court of Appeals of Arizona,
Division 1, Department A.

STATE of Arizona, Appellee,
v.
Thomas Bennett WALTON, Appellant.

No. 1 CA-CR 5130.

June 29, 1982.
Rehearing Denied Aug. 6, 1982.
Review Denied Sept. 14, 1982.

Defendant was convicted in the Superior Court, Coconino County, Cause No. CR-9052, J. Thomas Brooks, J., of second-degree murder, and he appealed. The Court of Appeals, Ogg, P. J., held that: (1) denial of motion for a new determination of probable cause was not error; (2) statutes defining first-degree murder, second-degree murder, manslaughter, and negligent homicide contained distinguishable characteristics and were not violative of due process and equal protection; (3) photographs of deceased were probative of issue of distance between defendant and victim and were admissible despite claim of undue gruesomeness; (4) evidence, including testimony of numerous eyewitnesses, various investigating officers, and county pathologist, was sufficient to sustain conviction; (5) admission of an X ray of rib of victim and testimony of physician concerning X ray was not error; (6) instruction that defendant would not be subject to death penalty in event jury found him guilty of first-degree murder was not prejudicially erroneous; and (7) presumptive term of ten and one-half years, with credit for 162 days of presentence incarceration, was not excessive.

Affirmed.

West Headnotes

[1] Grand Jury 33
[193k33 Most Cited Cases](#)

Defendant was not entitled after a full trial to a new finding of probable cause based on claims that police officer testified to inaccurate and misleading information which led grand jurors to believe that defendant was not intoxicated at time of offense and that prosecutor misstated to grand jury the law concerning the element of premeditation required for first-degree murder. [A.R.S. § 13-1101](#); 17 [A.R.S. Rules Crim.Proc., Rule 12.9\(a\)](#).

[2] Criminal Law 1134(10)
[110k1134\(10\) Most Cited Cases](#)

Neither the propriety of withholding evidence from a grand jury nor the propriety of the instructions to a grand jury need be considered on an appeal from a subsequent conviction.

[3] Criminal Law 1134(10)
[110k1134\(10\) Most Cited Cases](#)

Where jury, after a full trial and presentation of results of both the intoxilyzer and the blood test, and after being completely and accurately instructed on the elements of all degrees of homicide, found the defendant guilty of second-degree murder beyond a reasonable doubt, defendant, challenging grand jury's finding of probable cause, should have sought relief by way of special action prior to trial, and could not by an appeal from conviction obtain review of matters relevant to a determination of probable cause which had no effect on subsequent trial. [A.R.S. § 13-1101](#); 17 [A.R.S. Rules Crim.Proc., Rule 12.9\(a\)](#).

[4] Constitutional Law 258(2)
[92k258\(2\) Most Cited Cases](#)

Due process requires that criminal offenses be defined in terms of sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, because a person should not be required, at the risk of his liberty, to speculate as to the meaning of criminal statute. [U.S.C.A. Const. Amend. 14](#).

[5] Constitutional Law 212
[92k212 Most Cited Cases](#)

Equal protection of the laws guarantees like treatment to all persons who are similarly situated, but it does not deny to a state the power to classify in the adoption of police law, and the legislative classification will not normally be set aside if any set of facts rationally justifying it is demonstrated to or perceived by the courts.

[U.S.C.A.Const.Amend. 14.](#)

[6] Constitutional Law 🔑251.4

[92k251.4 Most Cited Cases](#)

A statute which is defined in terms so vague as to render it incomprehensible to a person of ordinary intelligence violates due process. [U.S.C.A.Const.Amend. 14.](#)

[7] Constitutional Law 🔑48(1)

[92k48\(1\) Most Cited Cases](#)

There is a strong presumption supporting the constitutionality of a legislative enactment.

[8] Constitutional Law 🔑48(1)

[92k48\(1\) Most Cited Cases](#)

The burden rests on the party challenging the validity of a statute to establish that it is unconstitutional.

[9] Homicide 🔑523

[203k523 Most Cited Cases](#)

(Formerly 203k8)

The second-degree murder statute under which the defendant was convicted of second-degree murder was not unconstitutional on ground that the requirement to sustain a conviction under the statute was indistinguishable from the requirement to sustain a conviction for first-degree murder with premeditation; since first-degree murder required a showing of premeditation, and second-degree murder required a showing that offense was committed intentionally or knowingly but without premeditation, there still existed a perceptible measure of difference in that premeditation was required to precede killing by a length of time to permit reflection. [A.R.S. § § 13-1101](#), subd. 1, 13-1104, 13-1105, subd. A, par. 1; [U.S.C.A.Const.Amend. 5, 14.](#)

[10] Homicide 🔑522

[203k522 Most Cited Cases](#)

(Formerly 203k8)

In defining first-degree murder as requiring a showing of premeditation and second-degree murder as requiring a showing that offense was committed intentionally or knowingly but without premeditation, the legislature clearly intended that there be two grades of murder with premeditation as the distinguishing factor between first and second-degree murder. [A.R.S. § § 13-1101](#), subd. 1, 13-1104, 13-1105, subd. A, par. 1.

[11] Constitutional Law 🔑250.1(2)

[92k250.1\(2\) Most Cited Cases](#)

[11] Constitutional Law 🔑258(3.1)

[92k258\(3.1\) Most Cited Cases](#)

(Formerly 92k258(3))

[11] Homicide 🔑523

[203k523 Most Cited Cases](#)

(Formerly 203k8)

[11] Homicide 🔑655

[203k655 Most Cited Cases](#)

(Formerly 203k32)

Statutes defining reckless second-degree murder and reckless manslaughter are not violative of equal protection on theory that they are indistinguishable and are not violative of due process on theory that they are void for vagueness. [A.R.S. § § 13-105](#), subd. 5(c), 13-1103, subd. A, par. 1, 13-1104, subd. A, pars. 1-3, 13-1105, subd. A, par. 1; [U.S.C.A.Const.Amend. 14.](#)

[12] Homicide 🔑709

[203k709 Most Cited Cases](#)

(Formerly 203k74)

Culpable mens rea of "recklessly" in context of reckless manslaughter consists of a conscious disregard of a substantial and unjustifiable risk involving a gross deviation from the standard of conduct that a reasonable person would observe in the circumstances. [A.R.S. § § 13-1103](#), subd. A, par. 1, 13-1104, subd. A, par. 3.

[13] Homicide 🔑546

[203k546 Most Cited Cases](#)


(Formerly 203k23(1))


The culpable mental state of "extreme indifference" in context of crime of reckless second-degree murder is greater in degree of criminality than the culpable mental state involved in the crime of reckless manslaughter. [A.R.S. § § 13-1103](#), subd. A, par. 1, 13-1104, subd. A, par. 3.

[14] Homicide 🔑546


[203k546 Most Cited Cases](#)


(Formerly 203k23(1))

[14] Homicide  **709**
[203k709 Most Cited Cases](#)
(Formerly 203k74)


[14] Homicide  **657**
[203k657 Most Cited Cases](#)
(Formerly 203k23(1))


Since manslaughter requires only a showing of recklessness, and reckless second-degree murder requires also a showing of extreme indifference to human life which creates a grave risk of death to another in addition to requirement of recklessness, two distinct measures of care differentiate the condition of recklessness expressed in the two statutes defining the crimes, and an extreme indifference creating a grave risk of death to another is a more culpable mental state than the requirement of a conscious disregard of a substantial and unjustifiable risk. [A.R.S. § 13-1103](#), subd. A, par. 1, 13-1104, subd. A, par. 3.

[15] Homicide  **708**
[203k708 Most Cited Cases](#)
(Formerly 203k74)


[15] Homicide  **709**
[203k709 Most Cited Cases](#)
(Formerly 203k74)


Negligent homicide, established when a person fails to perceive a substantial and unjustifiable risk and when failure to perceive risk is a gross deviation from standard of care which a reasonable person would observe, is distinguished from reckless manslaughter in that for latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, the defendant is unaware of the risk. [A.R.S. §§ 13-105](#), subd. 5(d), 13-1102, subd. A, 13-1103, subd. A, par. 1.


[16] Constitutional Law  **250.1(2)**
[92k250.1\(2\) Most Cited Cases](#)

[16] Homicide  **655**
[203k655 Most Cited Cases](#)
(Formerly 203k32)

Statutes defining reckless manslaughter and negligent homicide are not unconstitutional as violative of equal protection because they are indistinguishable from each other; the awareness of the risk is a meaningful distinguishing factor between the two offenses. [A.R.S. §§ 13-105](#), subd. 5(d), 13-1102, subd. A, 13-1103, subd. A, par. 1; [U.S.C.A.Const.Amends. 5, 14](#).

[17] Constitutional Law  **258(3.1)**
[92k258\(3.1\) Most Cited Cases](#)
(Formerly 92k258(3))

[17] Homicide  **523**
[203k523 Most Cited Cases](#)
(Formerly 203k8)

[17] Homicide  **655**
[203k655 Most Cited Cases](#)
(Formerly 203k32)


Statutes defining first-degree murder, second-degree murder, manslaughter, and negligent homicide necessarily overlap to some degree, but they contain readily perceptible distinctions between each grade of homicide discussed and are not violative of due process as being indistinguishable. [A.R.S. §§ 13-105, 13-1102 to 13-1105](#); [U.S.C.A.Const.Amends. 5, 14](#).

[18] Criminal Law  **438(6)**
[110k438\(6\) Most Cited Cases](#)

Photographs showing presence or absence of powder burns or "tattooing" at entrance wound were relevant to determination of distance between victim and defendant at time of fatal shooting and, as such, were admissible over claim that they were "sordid, gruesome and depicted the deceased in an inflammatory manner."

[19] Criminal Law  **438(7)**
[110k438\(7\) Most Cited Cases](#)

Admissibility of arguably gruesome photographs is a question addressed to discretion of trial court and depends on whether probative value is outweighed by prejudicial effect of their admission.

[20] Criminal Law  **404.70**
[110k404.70 Most Cited Cases](#)
(Formerly 110k404(4))

[20] Criminal Law 🔑438(7)

[110k438\(7\) Most Cited Cases](#)

[20] Criminal Law 🔑1169.1(10)

[110k1169.1\(10\) Most Cited Cases](#)

Where it appears that sole purpose of introducing a gruesome photograph or an article of clothing is to prejudice the jury, admission is reversible error, but where photograph or article of clothing is directly probative of a claim of self-defense, admission of items is not so inflammatory as to outweigh their probative value.

[21] Criminal Law 🔑753.2(4)

[110k753.2\(4\) Most Cited Cases](#)

A trial court is under no obligation to grant a motion for a judgment of acquittal where there is substantial evidence that defendant has committed crime charged; trial court should not grant a motion for a judgment of acquittal if reasonable minds can differ on inferences to be drawn from evidence. 17 [A.R.S. Rules Crim.Proc., Rule 20](#).

[22] Homicide 🔑1146

[203k1146 Most Cited Cases](#)

(Formerly 203k254)

Evidence, including testimony of numerous eyewitnesses, various investigating officers, and county pathologist, was sufficient to sustain conviction of second-degree murder. [A.R.S. § § 13-604](#), subd. G, 13-1104.

[23] Criminal Law 🔑629.5(5)

[110k629.5\(5\) Most Cited Cases](#)

(Formerly 110k629)

The listing of the names of witnesses for use in the state's case-in-chief is adequate notice to defendant to be prepared for their testimony at any time, and such testimony may be admitted on rebuttal. 17 [A.R.S. Rules Crim.Proc., Rule 15.1](#), subd. f.

[24] Criminal Law 🔑627.8(6)

[110k627.8\(6\) Most Cited Cases](#)

(Formerly 110k700)

While the State did not specifically disclose the existence of the rib and the X ray of the rib of the victim until the X ray was made during trial, where it was clear that the X ray evolved out of the testimony of the late-disclosed defense witnesses, and the defendant was given an opportunity to question the physician witnesses prior to the admission of the X ray and was also given an opportunity to move to allow one of his own witnesses to examine the rib and the X ray, trial court did not err in admitting the X ray. 17 [A.R.S. Rules Crim.Proc., Rule 15.7](#), subd. a(4).

[25] Criminal Law 🔑1172.9

[110k1172.9 Most Cited Cases](#)

Instruction that if defendant was convicted of first-degree murder death penalty would not be sought was not a basis for establishing reversible error on ground that punishment was not an issue for jury where defendant was not found guilty of first-degree murder, but of second-degree murder, and was not prejudiced thereby. [A.R.S. § § 13-604](#), subd. G, 13-1104.

[26] Sentencing and Punishment 🔑58

[350Hk58 Most Cited Cases](#)

(Formerly 110k986.2(1))

The balancing of the aggravating and mitigating circumstances in determining a sentence is not based upon mere numbers of aggravating or mitigating circumstances; it is the duty of the trial court to take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to call for the lesser term. [A.R.S. § 13-702](#), subd. E.

[27] Criminal Law 🔑1184(1)

[110k1184\(1\) Most Cited Cases](#)

When a sentence is within statutory limits, it will not be modified or reduced on appeal unless from the circumstances, it clearly appears that trial court abused its discretion in imposing sentence; an abuse of discretion is characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts necessary for an intelligent exercise thereof. [A.R.S. § 13-702](#), subd. E.

[28] Homicide 🔑1567

[203k1567 Most Cited Cases](#)

(Formerly 203k354(1), 203k354)

Presumptive term of ten and one-half years, with credit for 162 days of presentence incarceration, imposed on conviction of second-degree murder was based on defendant's character and background and nature of offense itself and was not subject to being reduced as excessive since it reflected a meaningful exercise of discretion. [A.R.S. § § 13-604](#), subd. G, 13-702, subd. E, 13-1104.

*285 **1267 Robert K. Corbin, Arizona Atty. Gen. by William J. Schafer, III, Chief Counsel, Crim. Div., and

Robert S. Golden, Asst. Attys. Gen., Phoenix, for appellee.

Aspey, Watkins & Diesel by Frederick M. Aspey, Flagstaff, for appellant.

OPINION

OGG, Presiding Judge.

The defendant was convicted of second degree murder while armed, in violation of [A.R.S. § § 13-1104](#) and [13-604\(G\)](#), following a trial by jury. He was committed to the Department of Corrections to serve a presumptive term of 10 1/2 years, with credit for 162 days of presentence incarceration. He raises seven issues on appeal:

1. Whether the trial court erred in denying his motion for a new determination of probable cause;
2. Whether the trial court erred in denying the defendant's motion to dismiss based on his claim that [A.R.S. § § 13-1102](#) through [13-1105](#) violate equal protection and are void for vagueness;
3. Whether the trial court erred in admitting into evidence photographs of the deceased which the defendant claims were unduly gruesome and prejudicial;
4. Whether the trial court erred in denying the defendant's motion for a judgment of acquittal based on the defendant's claim that the evidence was insufficient to warrant a conviction;
5. Whether the trial court erred in allowing into evidence an x-ray of the rib of the victim and testimony concerning the x-ray by a physician when the defendant asserts that the x-ray had not *286 **1268 been disclosed by the prosecutor prior to trial;
6. Whether the trial court erred in instructing the jury that the defendant would not be subject to the death penalty in the event the jury found the defendant guilty of first degree murder;
7. Whether the sentence imposed by the trial court was excessive.

The defendant was charged by indictment with having committed first degree murder resulting from the shooting death of the victim, Johnny Cordova, during an altercation at the Rose Tree Bar in Flagstaff. The defendant, admitting that he shot the victim, contended that he killed Cordova in self-defense. The state presented its case in support of the first degree murder charge through the testimony of numerous eye witnesses to the offense, various investigating officers, and the county pathologist. A critical issue in the case was the distance between the defendant and the victim at the time of the shooting. In support of his claim of self-defense, the defendant called as witnesses a forensic pathologist, Dr. Benham, and a mathematician, Dr. Moore, who, together, reconstructed the path of the bullet through the body of the victim, calculating the angle of the bullet, and from that, the distance between the victim and the defendant at the time of the shooting. In rebuttal, and over the objection of the defendant, the state introduced into evidence an x-ray of the rib of the defendant and the testimony of the county pathologist to the effect that the bullet fractured the rib and deflected. This testimony in rebuttal tended to contradict the findings of Dr. Benham and Dr. Moore.

The shooting was investigated by Flagstaff police officer Cooper who responded to a call to the Rose Tree Bar at approximately 5:00 p.m. on August 17, 1980. As he entered the bar, Cooper observed the body of the victim lying on the floor near the west wall, and heard people in the bar stating that the defendant had shot the victim. Cooper called an ambulance for transporting the victim to the Flagstaff Community Hospital. The victim was pronounced dead at approximately 5:17 p.m.

Cooper took a statement from Dolly Cordova, the wife of the victim. Dolly told Cooper that her husband was tending bar and that she was sitting on a bar stool when the defendant entered the bar. The defendant approached her and touched her hair, stating what pretty hair she had. The victim told the defendant to stop touching his wife, but apparently the defendant did not heed this request. Dolly told Cooper that her husband walked from behind the bar toward the wall of the bar where he picked up a pool cue and approached the defendant. She stated that the defendant then shot the victim first in either the neck or facial area, causing her husband to turn around. She indicated that her husband walked toward the northwest corner of the pool table and stopped, and that the defendant approached him by several steps, fired his gun, and again shot the victim.

Prior to trial, Dolly Cordova was interviewed by the defendant's counsel and investigator. During the interview she stated that she felt that the defendant was defending himself at the time of the shooting. She said that at the time of the shooting, the victim was holding the pool cue as if it were a baseball bat with which to hit the defendant. She testified at trial that her husband was very jealous and would become violent if she spoke to other men. She related an incident where she had been sitting in the bar speaking to one of the victim's brothers when the victim became jealous and pushed his brother and began hitting her until she was knocked unconscious. She also testified at trial that she was afraid of the family of the victim because they blamed her for the killing and they had threatened to

take her children away from her. Finally, at trial, when she was asked whether she thought the defendant had shot the victim in self-defense, she responded: "I don't know."

The state also called other eye witnesses whose testimony varied considerably. One witness testified that the defendant shot the victim twice in the back and that there was an approximately thirty-second interval *287 **1269 between the two shots which were fired. The victim was in fact shot once in the face and once in the side. Another witness testified that the shots were less than a second apart. One witness indicated that he saw the victim approaching the defendant and that while the victim was walking fast, he did not appear to be angry or upset. Still another witness indicated that the victim appeared to be extremely angry as he approached the defendant. Dolly Cordova and another witness testified that the defendant was 15 feet from the victim at the time of the shooting. Another witness indicated that the defendant and the victim were ten feet apart at the time of the shooting.

The state's criminalist, Ken Kowalski, conducted tests on gunshot residue found around the hole in the shirt worn by the victim at the time of the shooting. The hole in the shirt was just under the left armpit, and was thus caused by the fatal second shot inflicted by the defendant. Kowalski testified that as a result of his test, he was able to determine that the gunshot wound was not a contact or near contact wound, which he defined as six inches or less from the victim. He also testified that the tests established that the shots could not have been fired from a distance greater than nine to ten feet from the victim. The defense called Dr. Moore, a mathematician from Northern Arizona University, who calculated the distance between the victim and the defendant at the time of the shooting as between 3.8 feet to 5 feet based upon the angle of the path of the bullet through the body. Dr. Moore did indicate that his calculations could vary if the victim were not standing upright at the time of the shooting.

The evidence also revealed that immediately after the shooting, the defendant left the Rose Tree Bar on foot and proceeded toward the police station. He was picked up by Officer Tullis in a patrol vehicle and transported to the Flagstaff police station where the officer advised the defendant of his *Miranda* rights. The defendant agreed to make a statement to the police officers. He told them that he and his friend, Keith, went to the Rose Tree Bar to have a couple of drinks and play some pool. When the defendant entered the bar, he saw a pretty girl sitting there and he walked up to her and said, "Hello, pretty lady", and touched her on the shoulder. The victim told him not to touch his girl, and the defendant moved away from the girl stating, "I'm sorry, I just said hello." The defendant indicated that the victim then broke from behind the bar, ran around the bar, and grabbed a pool cue from the cue rack. The defendant told the officers that he shot the victim twice to keep him from hitting him with the pool cue. He stated that he did not aim, but that he just shot. He also indicated that he did not want to shoot the victim, but that he had been hit in the head several years before with a pool cue and had recurring problems as a result of his injuries. An intoxilyzer test indicated that the defendant's blood alcohol reading was .06, and a subsequent blood test showed that his blood alcohol reading was .15. The defendant's statement to the police was tape recorded, and the recording was played for the jury.

THE GRAND JURY PROCEEDINGS

[1] Defendant first contends that the trial court erred in denying his motion for a new finding of probable cause made pursuant to [Rule 12.9\(a\), Rules of Criminal Procedure, 17 A.R.S.](#) He argues that the police officer testified to inaccurate and misleading information which led the grand jurors to believe that the defendant was not intoxicated at the time of the offense. He further argues that the prosecutor misstated the law concerning the element of premeditation required for first degree murder.

Before issuing a true bill charging the defendant with first degree murder on August 21, 1980, the Coconino County Grand Jury heard the testimony of Detective James of the Flagstaff Police Department. James related the defendant's statement to the grand jury and also related the statements of other witnesses to the shooting which differed from the defendant's version. *288 **1270 Detective James responded to a question from a grand juror that the defendant's breathalyzer results showed that the defendant had a blood alcohol of .06, with .10 as the presumptive level for one to be under the influence of alcoholic beverages. Detective James did not introduce evidence of the blood alcohol test because the results of that test had not been received by him at the time of the grand jury proceedings.

Following Detective James' testimony, the prosecutor presented to the foreman a proposed form of indictment charging the defendant with first degree murder. At that time, a grand juror asked the prosecutor to read the definition of premeditation. The prosecutor read to the grand jury the definition of premeditation in [A.R.S. § 13-1101](#), and also told the grand jury that premeditation could be "as instantaneous as the conscious thoughts of the human mind." The defendant contends that this instruction was from a case decided under the old code and has no application to the concept of premeditation defined under the current criminal code.

[2][3] We need not determine the propriety of withholding evidence from a grand jury or the propriety of the instructions to a grand jury on an appeal from a subsequent conviction. [State v. Verive, 128 Ariz. 570, 627 P.2d 721 \(App.1981\)](#); [State v. Neese, 126 Ariz. 499, 616 P.2d 959 \(App.1980\)](#). The trial jury, after the full trial and the presentation of the results of both the intoxilyzer and the blood tests, and after being completely and accurately instructed on the elements of all degrees of homicide, found the defendant guilty of second degree murder beyond a reasonable doubt. This court has held that in such circumstances, in order to obtain review of the denial of the motion for a new finding of probable cause, a defendant must seek relief by way of special action prior to trial. A defendant may not by an appeal from a conviction obtain review of matters relevant to a determination of probable cause which had no effect on the subsequent trial. [State v. Verive, supra](#); [State v. Neese, supra](#).

MOTION TO DISMISS

Prior to trial, the defendant filed a motion to dismiss the indictment, challenging the constitutionality of the first degree murder, second degree murder, manslaughter and negligent homicide statutes, [A.R.S. § § 13-1102 through 13-1105](#). The defendant asserted that the statutes overlap, are unconstitutionally vague, and constitute a denial of equal protection. The trial court denied the motion to dismiss, and at trial, instructed the jury on the elements of first degree murder, second degree murder, manslaughter and negligent homicide. The trial court also instructed the jury on the states of mind of intentionally, knowingly, recklessly, and negligently, pursuant to [A.R.S. § 13-105](#).

[4][5][6] Due process requires that criminal offenses be defined in terms of sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute because a person should not be required, at the risk of his liberty, to speculate as to the meaning of a criminal statute. [State v. Limpus, 128 Ariz. 371, 625 P.2d 960 \(App.1981\)](#). Equal protection of the laws guarantees like treatment to all persons who are similarly situated; however, the Fourteenth Amendment does not deny a state the power to classify in the adoption of police law, and a legislative classification will not normally be set aside if any set of facts rationally justifying it is demonstrated to or perceived by the courts. [State v. Kelly, 111 Ariz. 181, 526 P.2d 720 \(1974\), cert. denied 420 U.S. 935, 95 S.Ct. 1143, 43 L.Ed.2d 411 \(1975\)](#). Thus, "[a] statute which prescribes different degrees of punishment for the same acts committed under like circumstances by persons in like situations is violative of a person's right to equal protection of the laws." [People v. Calvaresi, 188 Colo. 277, 534 P.2d 316, 318 \(1975\)](#). A statute which is defined in terms so vague as to render it incomprehensible to a person of ordinary intelligence violates due process. [State v. Limpus, supra](#).

*289 **1271 [7][8] The defendant asserts in this case that the homicide statutes, [A.R.S. § § 13-1102 through 13-1105](#) violate both due process, as being void for vagueness, and equal protection as creating distinctions without a difference in the classification of the various degrees of homicide. In analyzing the statutes in this case, this court must keep in mind certain principles of review. First, the courts do not demand mathematical precision from the legislature, and there is a strong presumption supporting the constitutionality of a legislative enactment. [State v. Arnett, 119 Ariz. 38, 579 P.2d 542 \(1978\)](#); [State ex rel. Williams v. City Court, 21 Ariz.App. 318, 519 P.2d 71 \(1974\)](#). Thus, the burden rests on the party challenging the validity of a statute to establish that it is unconstitutional. [State v. Yabe, 114 Ariz. 89, 559 P.2d 209 \(App.1977\)](#).

[9] The defendant first asserts that the second degree murder statute under which he was convicted is unconstitutional in that the requirement to sustain a conviction under that statute is indistinguishable from the requirement to sustain a conviction for first degree murder with premeditation pursuant to [A.R.S. § 13-1105\(A\)\(1\)](#). [FN1] [A.R.S. § 13-1105\(A\)\(1\)](#) provides:

FN1. The state argues that the defendant has no standing to attack the constitutionality of [A.R.S. § 13-1105\(A\)\(1\)](#) because he was not convicted of first degree murder. We disagree. The defendant was convicted of second degree murder and he attacks the constitutionality of [A.R.S. § 13-1105\(A\)\(1\)](#) as it relates to second degree murder. Inherent in his equal protection claim with regard to [A.R.S. § 13-1104](#) is an assertion of the unconstitutionality of [A.R.S. § 13-1105\(A\)\(1\)](#). We conclude therefore that the defendant has standing to raise this issue.

A. A person commits first degree murder if:

1. Knowing that his conduct will cause death, such person causes the death of another with premeditation;

[A.R.S. § 13-1101\(1\)](#) defines premeditation as follows:

"Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

As Judge Gerber points out in his treatise, " 'Premeditation' is the distinguishing feature of first degree murder. Its essence is reflective intent to kill. Premeditation requires some 'length of time' sufficient to permit the defendant to reflect on what he is about to do." R. Gerber, *Criminal Law of Arizona* at 147 (1978).

[10] The defendant asserts that first degree murder with premeditation is impossible to distinguish from either intentional or knowing second degree murder as defined in [A.R.S. § 13-1104\(A\)\(1\) and \(2\)](#). That statute states:

A. A person commits second degree murder if without premeditation:

1. Such person intentionally causes the death of another person; or
2. Knowing that his conduct will cause death or serious physical injury, such person causes the death of another person;

* * *

The culpable mental states of intentionally and knowingly are defined in [A.R.S. § 13-105\(5\)\(a\) and \(b\)](#) as follows:

(a) "Intentionally" or "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

(b) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists.

It is apparent from a reading of [A.R.S. § 13-1105](#) in conjunction with [A.R.S. § 13-1104](#) that first degree murder requires a showing of premeditation, while second degree murder requires a showing that the offense was committed intentionally or *290 **1272 knowingly but without premeditation. [FN2] It is thus clear that the legislature intended that there be two grades of murder with premeditation as the distinguishing factor between first and second degree murder. See *People v. Sneed*, 183 Colo. 96, 514 P.2d 776 (1973). While there may not appear to be a great difference between premeditated first degree murder and intentional or knowing second degree murder, and while the distinction between the two may be difficult to apply, there still exists a perceptible measure of difference in that premeditation must precede the killing "by a length of time to permit reflection." In construing premeditation under the prior criminal code, the Arizona Supreme Court quoted the following instruction as a correct statement of the law:

[FN2. [A.R.S. § 13-1104\(A\)\(3\)](#) also provides that second degree murder may be committed recklessly, but the defendant does not argue that reckless second degree murder is indistinguishable from first degree murder.

In order to find a deliberate and premeditated killing you must find more reflection on the part of the defendant than is involved in the mere formation of the specific intent to kill.

[State v. Magby](#), 113 Ariz. 345, 352, 554 P.2d 1272, 1279 (1976).

In light of the definition of premeditation in the current criminal code, it is apparent that *State v. Magby* has continuing utility, and thus, it is this period of reflection, regardless of the length of time of the reflection, which distinguishes first degree murder from intentional or knowing second degree murder. [FN3] We conclude, therefore, that [A.R.S. § § 13-1105\(A\)\(1\)](#) and 1104(A)(1) and (2) do not violate equal protection inasmuch as there is a perceptible measure of difference between the statutes. We also conclude that a person of ordinary intelligence can perceive the distinctions between first degree murder and second degree murder, and that therefore, the statutes are not unconstitutionally vague.

[FN3. The Criminal Code Commission's draft defining premeditation provided: "when such intention or knowledge precedes the killing by an *appreciable* length of time to permit reflection." (emphasis added). See R. Gerber, *supra* at 147. The legislature adopted the Code Commission draft except it deleted the word "appreciable".

[11][12][13] The defendant also asserts that [A.R.S. § 13-1104\(A\)\(3\)](#), defining reckless second degree murder and [A.R.S. § 13-1103\(A\)\(1\)](#), defining reckless manslaughter violate equal protection because they are indistinguishable, and that they violate due process because they are void for vagueness. [A.R.S. § 13-1104\(A\)\(3\)](#) provides:

A. A person commits second degree murder if without premeditation:

* * *

3. Under circumstances manifesting extreme indifference to human life, such person recklessly engages in conduct which creates a grave risk of death and thereby causes the death of another person.

[A.R.S. § 13-1103\(A\)\(1\)](#) provides:

A. A person commits manslaughter by:

1. Recklessly causing the death of another person.

The culpable mental state of "recklessly" is defined in [A.R.S. § 13-105\(5\)\(c\)](#) as follows:

(c) "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

Thus, manslaughter pursuant to [A.R.S. § 13-1103\(A\)\(1\)](#) is committed where a person has no homicidal intentions but causes death recklessly. The culpable mens rea of *recklessly* consists of a conscious disregard of a substantial and unjustifiable risk. The risk required for conviction of manslaughter ~~*291~~ ~~**1273~~ must involve "a gross deviation from the standard of conduct that a reasonable person would observe in the circumstances." However, for one to commit second degree murder pursuant to [A.R.S. § 13-1104\(A\)\(3\)](#), the legislature has established a more culpable mental state. In commenting on reckless manslaughter in comparison with reckless second degree murder, Judge Gerber states:

In treating this situation expressly as manslaughter, this section reflects a judgment that the culpable mental state of extreme indifference in new [A.R.S. § 13-1104\(A\)\(3\)](#) is greater in degree of criminality than the culpable mental state involved here.

R. Gerber, *supra*, at 152.

[14] The Criminal Code Commission points out in its committee notes that the extreme indifference to human life involved in reckless second degree murder distinguishes reckless second degree murder "from the less culpable recklessness involved in" reckless manslaughter. Arizona Revised Criminal Code, Arizona Criminal Code Commission at 128 (1975). The commission points out that "shooting into a crowded room or derailing a speeding train may be examples of [the] excessive recklessness" required for reckless second degree murder. *Id.* Accordingly, while manslaughter requires only a showing of recklessness, reckless second degree murder requires also a showing of "extreme indifference to human life" which created a "grave risk of death" to another in addition to the requirement of recklessness. Clearly then, two distinct measures of care differentiate the condition of recklessness expressed in the two statutes, and an extreme indifference creating a grave risk of death to another is a more culpable mental state than the requirement of a conscious disregard of a substantial and unjustifiable risk. See, e.g., [People v. District Court, 185 Colo. 78, 521 P.2d 1254, 1257 \(1974\)](#), where the Colorado Supreme Court held that "an extreme indifference to human life is clearly a more culpable standard of conduct [than recklessly], especially where necessarily coupled with the additional requirement that there be created a *grave* risk of death." (emphasis in original).

[15] The defendant also argues that reckless manslaughter as defined in [A.R.S. § 13-1103\(A\)\(1\)](#) is indistinguishable from negligent homicide, which is defined as follows:

A person commits negligent homicide if with criminal negligence such person causes the death of another person.

[A.R.S. § 13-1102\(A\)](#).

The culpable mental state of criminal negligence is set forth in [A.R.S. § 13-105\(5\)\(d\)](#) as:

(d) "Criminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Thus, negligent homicide is established when a person fails to perceive a substantial and unjustifiable risk, and when the failure to perceive the risk is a gross deviation from the standard of care which a reasonable person would observe. Negligent homicide is distinguished from reckless manslaughter in that for the latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, he is unaware of the risk. See R. Gerber, *supra*, at 150.

[16] We conclude, therefore, that two distinct states of mind differentiate reckless manslaughter from negligent homicide. The legislature obviously intended that the awareness of the risk be a meaningful distinguishing factor

between the two offenses. Accordingly, we find that the statutes defining reckless manslaughter and negligent homicide do not violate the equal protection clause of the Constitution.

[17] The defendant argues, nevertheless, that all the homicide statutes herein *292 **1274 discussed are void for vagueness and therefore violative of the due process clause of the Constitution. This due process claim hinges exclusively on the equal protection claim inasmuch as the sole thrust of the defendant's due process argument is that because the statutes are indistinguishable for equal protection purposes, they are, *a fortiori*, void for vagueness. He does not argue that the statutes are void for vagueness in any other regard. While the homicide offenses necessarily overlap to some degree, we have concluded that there are readily perceptible distinctions between each grade of homicide discussed herein. It follows, therefore, that the defendant's due process claim must likewise fail.

ADMISSION OF PHOTOGRAPHS

The defendant contends that the trial court erred in admitting into evidence various photographs of the deceased based on his claim that the photographs were inflammatory and cumulative. The defendant objected at trial to the admission of the photographs as being both inflammatory and cumulative, and the trial court sustained the objection as to four of the photographs but allowed eight photographs into evidence. [FN4] The defendant argues that the photographs were "sordid, gruesome and depicted the deceased in an inflammatory manner" and that it was reversible error for the trial court to allow them into evidence particularly since the defendant never denied that he shot the deceased.

[FN4] Although the state contends that the defendant has waived his objection as to the inflammatory nature of the photographs, the record reveals that the defendant objected to the photographs not only because they were cumulative but also on the grounds that "they have no effect but to attempt to inflame the jury."

[18] We disagree. Even though the defendant did not deny that he shot the deceased, his defense at trial was self-defense, and the most heavily contested issue at trial was the distance between the victim and the defendant at the time of the shots. Both the angle of the bullet as it entered and traveled through the body, and the presence or absence of powder burns or "tattooing" at the entrance wound were relevant to the determination of the distance between the victim and the defendant at the time of the shooting. It was established by testimony that an elliptical entrance wound, as opposed to a round entrance, would indicate an acute angle of entry of the bullet. Therefore, the photographs were probative on the issue of distance. Moreover, another factual issue was whether the victim had been shot in the back or in the side. The photographs tended to show that the victim had been shot in the side. Therefore, the photographs were directly relevant to and helped clarify the factual issues presented to the jury.

[19][20] The admissibility of arguably gruesome photographs is a question addressed to the discretion of the trial court, and depends on whether the probative value is outweighed by the prejudicial effect of their admission. State v. Steele, 120 Ariz. 462, 586 P.2d 1274 (1978). Thus, where it appears that the sole purpose of introducing a gruesome photograph or an article of clothing is to prejudice the jury, the admission of such items is reversible error. *Id.* However, it is clear that the photographs introduced in this case were directly probative on the defendant's claim of self-defense, and our review of those photographs leads us to conclude that they were not so inflammatory as to outweigh their probative value. We find no error.

DENIAL OF THE MOTION FOR JUDGMENT OF ACQUITTAL

For his next argument, the defendant contends the trial court erred in denying his motion for a judgment of acquittal based on his claim that the evidence is insufficient to support the conviction. State v. Sety, 121 Ariz. 354, 590 P.2d 470 (App.1979).

[21] On appeal, this court must view the evidence in a light most favorable to sustaining the jury verdict. State v. Acree, 121 Ariz. 94, 588 P.2d 836 (1978). The trial court may grant a judgment of acquittal *293 **1275 pursuant to Rule 20, Rules of Criminal Procedure, 17 A.R.S., only if there is "no substantial evidence to warrant a conviction." The trial court is under no obligation to grant a motion for a judgment of acquittal where there is substantial evidence that the defendant has committed the crime charged, and the trial court should not grant a motion for a judgment of acquittal if reasonable minds can differ on the inferences to be drawn from the evidence. State ex rel. Hyder v. Superior Court, 128 Ariz. 216, 624 P.2d 1264 (1981). " 'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." State v. Jones, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). Moreover, it is the duty of the jury to resolve conflicts in the evidence. *Id.*

[22] We have reviewed the record and find there is substantial evidence to sustain the conviction. We therefore find that the trial court did not err in denying the motion for a judgment of acquittal.

REBUTTAL EVIDENCE OF X-RAY

At the close of the defendant's case, he moved *in limine* to preclude the state from introducing into evidence a rib and an x-ray of the rib taken from the victim. The basis for the objection was that the x-ray and rib had not been disclosed to the defendant prior to trial and that a proper foundation had not been established for the admission of the x-ray or the rib. The trial court denied the motion and admitted the x-ray. Following the trial court's ruling, Dr. Vorpahl, the pathologist who performed the autopsy, testified that it was his opinion from looking at the x-ray that the bullet ricocheted off the 7th and 8th ribs of the victim after having entered the body at the level of the 5th and 6th ribs. Based on this testimony, the state argued that Dr. Benham could not have accurately calculated the angle of the path of the bullet through the body of the victim. On appeal, the defendant argues that the admission of the x-ray of the rib was reversible error because the x-ray had not been disclosed to the defense at any time prior to trial.

The record reveals that Dr. Vorpahl had testified during the state's case-in-chief that he believed that the bullet had cracked the rib in question and ricocheted off it. Dr. Vorpahl's name and address had been disclosed to the defendant prior to trial, and indeed, the defendant noticed Dr. Vorpahl as one of his own witnesses well prior to trial. Approximately a week before trial, the defense gave notice that it intended to call Dr. Moore concerning his calculations of the distance between the victim and the defendant at the time of the shooting based on the angle of the bullet through the body. During the trial, the state had the rib in question x-rayed. Dr. Vorpahl testified at the motion *in limine* that it was standard procedure during an autopsy to retain portions of tissue along the track of a bullet, and that he had saved the rib pursuant to that practice. He further indicated that he had spoken with defense counsel two to three times prior to trial, but he had not disclosed to them that he had saved the rib because neither defense counsel asked and because the condition of the rib was not an issue until Dr. Moore's testimony. Based on the foregoing, the trial court allowed the state to introduce the x-ray, and indicated that the defendant could move to allow Dr. Benham to examine the rib and testify in surrebuttal, and that the court would consider such a motion at the time it was made. The defendant did not move to allow Dr. Benham to examine the rib and present his conclusions at any time thereafter.

[23] [Rule 15.1\(f\), Rules of Criminal Procedure, 17 A.R.S.](#), provides:

Upon receipt of the notice of defenses required from the defendant under rule 15.2(b) the state shall disclose the names and addresses of all persons whom the prosecutor will call as rebuttal witnesses together with their relevant written or recorded statements.

With regard to the application of [rule 15.1\(f\)](#), the supreme court has expressly stated that the listing of the names of witnesses for use in the state's case-in-chief is adequate notice to the defendant to be prepared *294 **1276 for their testimony at any time, and such testimony may be admitted on rebuttal. [State v. Hatton, 116 Ariz. 142, 568 P.2d 1040 \(1977\)](#). Further, this court has stated:

The criminal discovery rules do not require the state to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses.

[State v. Wallen, 114 Ariz. 355, 361, 560 P.2d 1262, 1268 \(App.1977\)](#); *see also*, [State v. Guerrero, 119 Ariz. 273, 580 P.2d 734 \(App.1978\)](#).

[24] While the state did not specifically disclose the existence of the rib and the x-ray of the rib until the x-ray was made during trial, it is clear that the x-ray evolved out of the testimony of the late disclosed defense witnesses, in particular, Dr. Moore. Where, as here, the defense witness was not disclosed until a week prior to trial, we conclude that imposing the sanction of preclusion of the rebuttal testimony would be unnecessarily harsh. *See* [Rule 15.7\(a\)\(4\), Rules of Criminal Procedure, 17 A.R.S.](#); [State v. Smith, 123 Ariz. 243, 599 P.2d 199 \(1979\)](#). The defendant was given an opportunity to question the physician witnesses prior to the admission of the x-ray. He was also given an opportunity to move to allow Dr. Benham to examine the rib and the x-ray, which he failed to do. Under these circumstances, we cannot fault the prosecutor for failing to anticipate that the angle of the bullet through the body would be at issue. We find no error in the ruling of the trial court admitting the x-ray. [State v. Lewis, 121 Ariz. 155, 589 P.2d 29 \(App.1978\)](#).

INSTRUCTION REGARDING DEATH PENALTY

The defendant next asserts that the jury should not have been instructed concerning a stipulation that the death penalty would not be sought regardless of the verdict. Prior to trial, the following stipulation was entered into between the defendant, his counsel, and the prosecutor:

The State of Arizona, by and through the undersigned Deputy County Attorney and the Defendant Thomas Bennett Walton, by and through his attorney Frederick M. Aspey, hereby stipulate and agree that the defendant will not receive the death penalty in this case in the event that the jury returns a verdict of guilty on the charge of first degree murder.

IT IS FURTHER STIPULATED and agreed by and between the parties herein that the Court shall inform the prospective jurors of this stipulation at the time of jury selection.

IT IS FURTHER STIPULATED and agreed by and between the parties herein that at the time of trial the jury shall be instructed by the Court that irrespective of the verdict, the Defendant will not be subject to the death penalty.

During jury selection the jury panel was told by the trial court that if the defendant were convicted of first degree murder, the death penalty would not be sought. At the conclusion of the evidence, the jury was also instructed as follows:

You were instructed that if you return a verdict of guilty on the charge of First-Degree Murder, the Defendant will not be subject to the death penalty.

In deciding whether the Defendant is guilty or not guilty, do not consider the possible punishment.

Defense counsel signed the stipulation at the insistence of the defendant, but during the settling of the instructions, he objected to the death penalty instruction on the grounds that punishment was not an issue for the jury.

[25] In *State v. Van Dyke*, 127 Ariz. 335, 337-38, 621 P.2d 22, 24-25 (1980), in addressing this issue, our supreme court stated:

It is true a defendant is entitled to a jury verdict based on the evidence and without regard to the possible punishment, but here, by agreement of the parties, the jury was informed that no death sentence would be rendered. It was not only proper according to the very terms of the stipulation to "instruct" the jury but necessary to direct that this stipulation was to play no part in its deliberations. *295 **1277 Further, it was important to let this jury know how to deal with this particular stipulation in regard to all other stipulations. (citation omitted).

We find that *Van Dyke* is dispositive of the issue in this case. Further, we note that the defendant in *Van Dyke* was found guilty of two counts of first degree murder, and that therefore any claim of prejudice resulting from the allegedly improper instruction with regard to the penalty for first degree murder would certainly be more persuasive in that case than in this case where the defendant was found guilty not of first degree murder, but of second degree murder. Under these circumstances, it appears clear that the instruction had no effect on the verdict of the jury. We find no error.

SENTENCE

For his last issue, the defendant contends that the trial court imposed an excessive sentence and requests this court to invoke its authority pursuant to [A.R.S. § 13-4037\(B\)](#) to modify the defendant's sentence. The record reveals that both the defendant and the state requested a presentence hearing, the defendant for the purpose of presenting mitigating testimony, and the state for the purpose of presenting aggravating testimony. Numerous witnesses appeared at that hearing and testified for the defense, as to the defendant's peaceful, loving and law-abiding nature, and for the state, as to the defendant's known violent propensities. The trial court heard all of the testimony and read the presentence report. Prior to imposing the presumptive term, the trial court found the following aggravating circumstances:

- (I) The defendant has an extensive prior arrest history;
- (II) That the defendant has been arrested for several offenses involving the use of weapons;
- (III) As found by the jury, the crime did result from the use of a deadly weapon.

The trial court also found the following mitigating circumstances:

- (I) The defendant's age of 63 years;
- (II) The fact that the defendant was intoxicated at the time the offense was committed;
- (III) The defendant does not have a prior felony conviction;
- (IV) The defendant cooperated with law enforcement agencies from the time of his arrest;
- (V) The defendant appears to be sincerely remorseful for what occurred;
- (VI) There was evidence of provocation and the need for self-defense, although the jury did not find this evidence to be sufficient to justify an acquittal or to justify finding the defendant guilty of the lesser offense.

The trial court found that the aggravating and mitigating circumstances were not sufficient to call for a greater or lesser term than the presumptive term, and ordered the defendant committed to the Department of Corrections for the presumptive term of 10 1/2 years with credit for presentence incarceration of 162 days.

The defendant argues on appeal that since the trial court found six mitigating factors and only three aggravating

factors, it is difficult to understand how the trial court could have imposed the presumptive term. The defendant also asserts that in view of his age, the sentence imposed may very well end up to be a death sentence. We find these contentions insufficient to compel us to invoke our authority pursuant to [A.R.S. § 13-4037\(B\)](#), to reduce the defendant's sentence.

[26][27] The balancing of the aggravating and mitigating circumstances in determining a sentence is not based upon mere numbers of aggravating or mitigating circumstances. [State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 \(1979\)](#); [State v. Henderson, 133 Ariz. 259, 650 P.2d 1241 \(1982\)](#); [State v. Marquez, 127 Ariz. 3, 617 P.2d 787 \(App.1980\)](#). It is the duty of the trial court to "take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to call for the lesser term." [A.R.S. § 13-702\(E\)](#). When a sentence *296 **1278 is within statutory limits, it will not be modified or reduced on appeal unless, from the circumstances, it clearly appears that the trial court abused its discretion in imposing sentence. [State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 \(1980\)](#). An abuse of discretion is characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts necessary for an intelligent exercise thereof. [State v. Patton, 120 Ariz. 386, 586 P.2d 635 \(1978\)](#).

[28] It is clear that the trial judge carefully exercised his discretion in determining the sentence in this case. The trial court noted that the case was a particularly difficult one for purposes of sentencing, and our review of the record leads us to appreciate the trial court's difficulties in imposing sentence in this case. While the presentence report recommended a mitigated term of eight years, it is clear to this court that the trial court carefully considered the defendant's character and background and the nature of the offense itself, and rejected after due deliberation the recommendation of the presentence report.

The trial court's deliberation in this case reflects a meaningful exercise of discretion, and we find no abuse thereof.

For the foregoing reasons, the judgment and sentence are affirmed.

FROEB and CORCORAN, JJ., concur.

133 Ariz. 282, 650 P.2d 1264

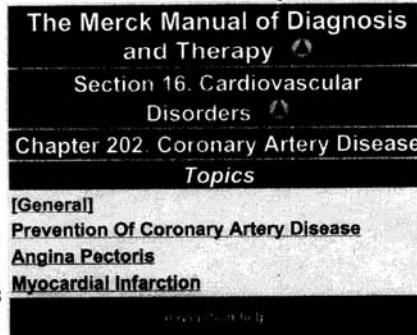
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[General]

Most coronary artery disease (CAD) is due to subintimal deposition of atheromas in the large and medium-sized arteries serving the heart. Risk factors and the pathogenesis of atherosclerotic lesions and CAD are discussed in Chs. 15 and 201. Less often, CAD is due to coronary spasm, which is usually idiopathic (with or without associated atheroma) or may be due to drugs such as cocaine. Rare causes include an embolus to the coronary artery, Kawasaki syndrome (see Ch. 265), and vasculitis (eg, in SLE).



Coronary atherosclerosis is characteristically insidious in onset, is often irregularly distributed in different vessels, and can abruptly interfere with blood flow to segments of the myocardium, most often due to rupture of an eccentric atheromatous plaque with consequent intraluminal thrombosis.

The major complications of CAD are angina pectoris, unstable angina, MI, and sudden cardiac death due to arrhythmias. In the USA, CAD is the leading cause of death in both sexes, accounting for about one third of deaths each year.

Although the precise pathogenesis of CAD is unclear, the risk factors are well known: high blood levels of low density lipoprotein cholesterol (LDL-C) and lipoprotein a, low blood levels of high density lipoprotein cholesterol (HDL-C) and serum vitamin E, and poor physical fitness. High blood levels of triglycerides and insulin reflecting insulin resistance may be risk factors, but the data are less clear. CAD risk is increased by tobacco use; diets high in fat and calories and low in phytochemicals (found in fruits and vegetables), fiber, and vitamin E and C or, at least in some persons, diets with relatively low levels of omega-3 polyunsaturated fatty acids (PUFAs); poor stress management; and inactivity. Several systemic diseases (eg, hypertension, diabetes, hypothyroidism) are also associated with increased CAD risk.

Recent studies have shown an association between CAD and a common variant of the platelet fibrinogen receptor (P1^{A2}), found in 20% of Americans. The presence of this variant may be as strong a predictor of CAD as cigarette smoking and hypertension. Whether giving antiplatelet therapy to persons with this variant can prevent CAD remains to be established.

Homocysteine has recently been identified as a risk factor for coronary, peripheral, and

cerebral vascular disease. Patients with homocystinuria, a rare recessive disease, have plasma homocysteine levels 10 to 20 times above normal (hyperhomocysteinemia) and accelerated, premature vascular disease. Homocysteine has a direct toxic effect on endothelium and promotes thrombosis and oxidation of LDL. Normal values range from about 4 to 17 $\mu\text{mol/L}$. Modest elevations of total plasma homocysteine have multiple causes, including low levels of folic acid, vitamins B₆ and B₁₂, renal insufficiency, certain drugs, and genetically controlled variations in homocysteine metabolic enzymes. Patients with homocysteine values in the top 5% have a 3.4 greater risk of MI or cardiac death than those in the lower 90% after adjustment for other risk factors. Increased homocysteine levels are associated with increased risk regardless of etiology. Recent studies suggest a graded risk even in normal-range homocysteine; thus, reduction of normal plasma levels may be advantageous. The most simple and effective way to reduce plasma homocysteine is administration of folic acid 1 to 2 mg/day, which has essentially no side effects except in untreated vitamin B₁₂ deficiency. Many authorities recommend that patients with CAD be screened for plasma homocysteine levels and, unless the values are in the lower normal range, treatment be initiated with folic acid. (See also [Hyperhomocysteinemia](#) in Ch. 132.)

Patients with CAD undergoing atherectomy have biologic markers suggesting coronary artery localization of *Chlamydia* infection. The role of this and other putative infectious agents in the genesis of CAD is being investigated.

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SEARCH

Atherosclerosis

A form of arteriosclerosis characterized by patchy subintimal thickening (atheromas) of medium and large arteries, which can reduce or obstruct blood flow.

The prevalence of clinical manifestations of atherosclerosis in general increases in postmenopausal women and begins to approach that in age-matched men.

The Merck Manual of Diagnosis and Therapy

Section 16. Cardiovascular Disorders

Chapter 201. Arteriosclerosis

Topics

[General]

Atherosclerosis

Nonatheromatous Arteriosclerosis

Pathology and Pathogenesis

Atherosclerotic plaque consists of accumulated intracellular and extracellular lipids, smooth muscle cells, connective tissue, and glycosaminoglycans. The earliest detectable lesion of atherosclerosis is the fatty streak (consisting of lipid-laden foam cells, which are macrophages that have migrated as monocytes from the circulation into the subendothelial layer of the intima), which later evolves into the fibrous plaque (consisting of intimal smooth muscle cells surrounded by connective tissue and intracellular and extracellular lipids).

Atherosclerotic vessels have reduced systolic expansion and abnormally rapid wave propagation. Arteriosclerotic arteries of hypertensive persons also have reduced elasticity, which is further reduced when atherosclerosis develops.

Two main hypotheses have been proposed to explain the pathogenesis of atherosclerosis: the lipid hypothesis and the chronic endothelial injury hypothesis. They are probably interrelated.

The lipid hypothesis postulates that an elevation in plasma LDL levels results in penetration of LDL into the arterial wall, leading to lipid accumulation in smooth muscle cells and in macrophages (foam cells). LDL also augments smooth muscle cell hyperplasia and migration into the subintimal and intimal region in response to growth factors. LDL is modified or oxidized in this environment and is rendered more atherogenic. Small dense LDL cholesterol particles are also more susceptible to modification and oxidation. The modified or oxidized LDL is chemotactic to monocytes, promoting their migration into the intima, their early appearance in the fatty streak, and their transformation and retention in the subintimal compartment as macrophages. Scavenger receptors on the surface of macrophages facilitate the entry of oxidized LDL into these cells, transferring them into lipid-laden macrophages and foam cells. Oxidized LDL is also cytotoxic to endothelial cell and may be responsible for their dysfunction or loss from the more advanced lesion.

An atherosclerosis model has been studied in monkeys fed a cholesterol-rich diet. Within 1 to 2 wk of inducing hypercholesterolemia, monocytes become attached to the surface of the arterial endothelium through the induction of specific receptors, migrate into the subendothelium, and accumulate lipid (hence, foam cells). Proliferating smooth muscle cells also accumulate lipid. As the fatty streak and fibrous plaque enlarge and bulge into the lumen, the subendothelium becomes exposed to the blood at sites of endothelial retraction or tear, and platelet aggregates and mural thrombi form. Release of growth factors from the aggregated platelets may increase smooth muscle proliferation in the intima. Alternatively, organization and incorporation of the thrombus into the atherosclerotic plaque may contribute to its growth.

The chronic endothelial injury hypothesis postulates that endothelial injury by various mechanisms produces loss of endothelium, adhesion of platelets to subendothelium, aggregation of platelets, chemotaxis of monocytes and T-cell lymphocytes, and release of platelet-derived and monocyte-derived growth factors that induce migration of smooth muscle cells from the media into the intima, where they replicate, synthesize connective tissue and proteoglycans, and form a fibrous plaque. Other cells (eg, macrophages, endothelial cells, arterial smooth muscle cells) also produce growth factors that can contribute to smooth muscle hyperplasia and extracellular matrix production.

These two hypotheses are closely linked and not mutually exclusive. Modified LDL is cytotoxic to cultured endothelial cells and may induce endothelial injury, attract monocytes and macrophages, and stimulate smooth muscle growth. Modified LDL also inhibits macrophage mobility, so that once macrophages transform into foam cells in the subendothelial space they may become trapped. In addition, regenerating endothelial cells (after injury) are functionally impaired and increase the uptake of LDL from plasma.

The atherosclerotic plaque may grow slowly and over several decades may produce a severe stenosis or may progress to total arterial occlusion. With time, the plaque becomes calcified. Some plaques are stable, but others, especially those rich in lipids and inflammatory cells (eg, macrophages) and covered by a thin fibrous cap, may undergo spontaneous fissure or rupture, exposing the plaque contents to flowing blood. These plaques are deemed to be unstable or vulnerable and are more closely associated to the onset of an acute ischemic event. The ruptured plaque stimulates thrombosis; the thrombi may embolize, rapidly occlude the lumen to precipitate a heart attack or an acute ischemic syndrome, or gradually become incorporated into the plaque, contributing to its stepwise growth.

Risk Factors

Major nonreversible risk factors for atherosclerosis include age, male sex, and family history of premature atherosclerosis. Major reversible risk factors are discussed below. Evidence also strongly suggests that physical inactivity is associated with an increased risk of CAD. Although personality type has been proposed as a risk factor, its role is controversial.

Abnormal serum lipid levels: Elevated levels of low density lipoprotein (LDL) and reduced levels of high density lipoprotein (HDL) predispose to atherosclerosis. The association of total serum cholesterol and LDL cholesterol levels with the risk of CAD is direct and continuous. HDL levels are inversely correlated with CAD risk. The main cause

of reduced HDL are cigarette smoking, obesity, and physical inactivity. Low HDL is also associated with the use of androgenic and related steroids (including anabolic steroids), β -blockers, hypertriglyceridemia, and genetic factors.

Cholesterol level and CAD prevalence are influenced by genetic and environmental factors (including diet). Persons with low serum cholesterol levels who move from a country with low CAD prevalence to a country with a high CAD prevalence and who tend to alter their eating habits accordingly develop higher serum cholesterol levels and an increased risk of CAD.

Hypertension: High diastolic or systolic BP is a risk factor for stroke, MI, and cardiac and renal failure. The risk associated with hypertension is lower in societies with low average cholesterol levels.

Cigarette smoking: Smoking increases the risk of peripheral artery disease, CAD, cerebrovascular disease, and graft occlusion after reconstructive arterial surgery. Smoking is particularly hazardous in persons at increased cardiovascular risk. There is a dose relationship between the risk of CAD and the number of cigarettes smoked daily. Passive smoking may also increase the risk of CAD. Men and women are both susceptible, but the risk for women may be greater. Nicotine and other tobacco-derived chemicals are toxic to vascular endothelium.

Cigarette smoking increases LDL and decreases HDL levels, raises blood carbon monoxide (and could thereby produce endothelial hypoxia), and promotes vasoconstriction of arteries already narrowed by atherosclerosis. It also increases platelet reactivity, which may favor platelet thrombus formation, and increases plasma fibrinogen concentration and Hct, resulting in increased blood viscosity.

Diabetes mellitus: Both insulin-dependent and non-insulin-dependent diabetes mellitus are associated with earlier and more extensive development of atherosclerosis as part of widespread metabolic derangement that includes dyslipidemia and glycosylation of connective tissue. Hyperinsulinemia damages vascular endothelium. Diabetes is a particularly strong risk factor in women and significantly negates the protective effect of female hormones.

Obesity: Some studies have found that obesity, particularly truncal obesity in men, is an independent risk factor for CAD. Hypertriglyceridemia is commonly associated with obesity, diabetes mellitus, and insulin resistance and appears to be an important independent risk factor in persons with lower LDL or HDL levels and in the nonelderly. Not all triglyceride elevations are likely to be atherogenic. Smaller, denser very low density lipoprotein particles may carry greater risk.

Physical inactivity: Several studies have associated a sedentary lifestyle with increased CAD risk, and others have shown that regular exercise may be protective.

Hyperhomocysteinemia: Elevated blood homocysteine due to a genetically determined decrease in its metabolism may cause vascular endothelial injury, which predisposes the vessels to atherosclerosis (see also Ch. 201 and Hyperhomocysteinemia in Ch. 132).

***Chlamydia pneumoniae* infection:** *Chlamydia pneumoniae* infection or viral infection

may play a role in endothelial damage and chronic vascular inflammation that may lead to atherosclerosis.

Symptoms and Signs

Atherosclerosis is characteristically silent until critical stenosis, thrombosis, aneurysm, or embolus supervenes. Initially, symptoms and signs reflect an inability of blood flow to the affected tissue to increase with demand (eg, angina on exertion, intermittent claudication). Symptoms and signs commonly develop gradually as the atheroma slowly encroaches on the vessel lumen. However, when a major artery is acutely occluded, the symptoms and signs may be dramatic. Specific ischemic disorders related to occlusion are described elsewhere in §16 and in [Ch. 174](#).

Diagnosis

Atherosclerosis is suspected based on the risk factors and on its symptoms and signs, of which there may be few. Atheromatous obstruction is commonly confirmed by arteriography or Doppler ultrasonography. Diagnosis of specific manifestations (eg, CAD) is described elsewhere in *The Manual*.

Hyperlipidemia (see also [Ch. 15](#)) commonly presents with symptoms and signs of premature obliterative atherosclerosis affecting the brain (cerebral transient ischemic attacks or stroke), heart (angina pectoris or MI), intestine, and lower extremities (intermittent claudication). Xanthomas (in the creases of hands and elbows and along tendon sheaths) and xanthelasmas are sometimes associated with hyperlipidemia, particularly of the familial type. Recurrent attacks of acute pancreatitis, with or without alcoholism, suggest hypertriglyceridemia. A family history of hyperlipidemia or onset of cardiovascular disease before age 60 is further reason to look for premature atherosclerosis

Prevention

The most effective way to prevent the cardiovascular and cerebrovascular complications of atherosclerosis and the associated arterial thrombosis is to prevent atherosclerosis itself. Reversible risk factors for atherosclerosis are abnormal serum lipid levels, hypertension, cigarette smoking, diabetes mellitus, obesity, physical inactivity, hyperhomocysteinemia, and possibly *C. pneumoniae* infection. Increased understanding of these risk factors and their role in the etiology, pathogenesis, and course of atherosclerosis will lead to more focused intervention for preclinical or overt atherosclerotic disease and will thereby contribute to further declines in morbidity and mortality.

Abnormal serum lipid levels: At least 20 randomized trials show that lowering serum LDL cholesterol levels slows progression or induces regression of CAD and reduces coronary events. The benefits are greatest in patients at greater risk of CAD (ie, those with other risk factors, eg, hypertension, cigarette smoking) and in those with the most elevated cholesterol levels. Lowering serum LDL is also beneficial in those with preexisting CAD, even if their LDL levels are not elevated. Recent trials have shown a significant decrease in cardiovascular and total mortality when the statins are used to lower cholesterol. Statins also slow the progression of CAD (shown by angiography) in patients with arterial bypass grafts and elevated LDL cholesterol levels. Guidelines for screening and treatment of mild, moderate, and severe hypercholesterolemia are discussed in [Ch. 15](#).

Hypertension: Treatment of patients with elevated BP reduces stroke and overall mortality, but the effect on coronary event reduction is less striking. Pooled analysis of all studies of BP lowering shows a risk reduction of 40% in stroke, 8% in MI, and 10% in cardiovascular mortality.

Cigarette smoking: Smoking cessation should be encouraged whenever possible. The risk in persons who quit, regardless of how long they smoked, is half of that in those who continue to smoke. Smoking cessation also decreases morbidity and mortality in patients with peripheral vascular disease and decreases mortality after coronary bypass surgery and in post-MI patients.

Diabetes mellitus: Although tight glycemic control reduces the risk of microvascular complications of diabetes, the effects on macrovascular disease and atherosclerosis are less clear. Hyperlipidemia and hypertension are more common in diabetics, and these risk factors together with hyperinsulinemia may contribute to the increased CAD risk.

Obesity: Weight loss raises HDL levels and should be encouraged when possible.

Physical inactivity: Several randomized trials have demonstrated that moderate exercise performed consistently reduces the clinical manifestations and mortality of CAD in high-risk patients. Regular exercise has also been reported to lower the incidence of MI and death, but it is uncertain whether the association is causal or merely indicates that healthier persons are more likely to exercise regularly. Regular exercise increases HDL levels and can lower BP.

Hyperhomocysteinemia: Hyperhomocysteinemia in the presence or absence of low plasma concentrations of vitamin B can be corrected by folate administration with or without vitamin B supplementation. However, it is unclear whether this treatment is beneficial.

***Chlamydia pneumoniae* infection:** Understanding of the role of infection and inflammation in atherosclerosis and its complications is improving. Trials are underway to assess whether antibiotic treatment will impact the infection's clinical manifestations.

Treatment

Treatment of established atherosclerosis is directed at its complications (eg, angina pectoris; MI, arrhythmias, heart failure, kidney failure, ischemic stroke, and peripheral arterial occlusion). These subjects are covered elsewhere in *The Manual*.

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[General]

Arteriosclerosis: A generic term for several diseases in which the arterial wall becomes thickened and loses elasticity.

Vascular disease, which affects the brain, heart, kidneys, other vital organs, and extremities, is the leading cause of morbidity and mortality in the USA and in most Western countries. There were almost 1 million deaths due to vascular disease in the USA in 1994 (twice as many as from cancer and 10 times as many as from accidents). Although prevention and treatment of coronary artery disease (CAD) resulted in a 28.6% reduction in age-adjusted death rates between 1984 and 1994, CAD and ischemic stroke combined are the number one killer in industrialized Western countries and are of increasing prevalence in the rest of the world.

The death rate from CAD among white men aged 25 to 34 is about 1/10,000; at age 55 to 64, it is nearly 1/100. This age relationship may be due to the time required for lesions to develop or to the duration of exposure to risk factors. The death rate from CAD among white men aged 35 to 44 is 6.1 times that among age-matched white women. For unknown reasons, the sex difference is less apparent in nonwhites.

Atherosclerosis is the most common and serious vascular disease. Nonatheromatous forms include arteriolosclerosis and Mönckeberg's arteriosclerosis.

The Merck Manual of Diagnosis and Therapy ▲

Section 16. Cardiovascular Disorders ▲

Chapter 201. Arteriosclerosis

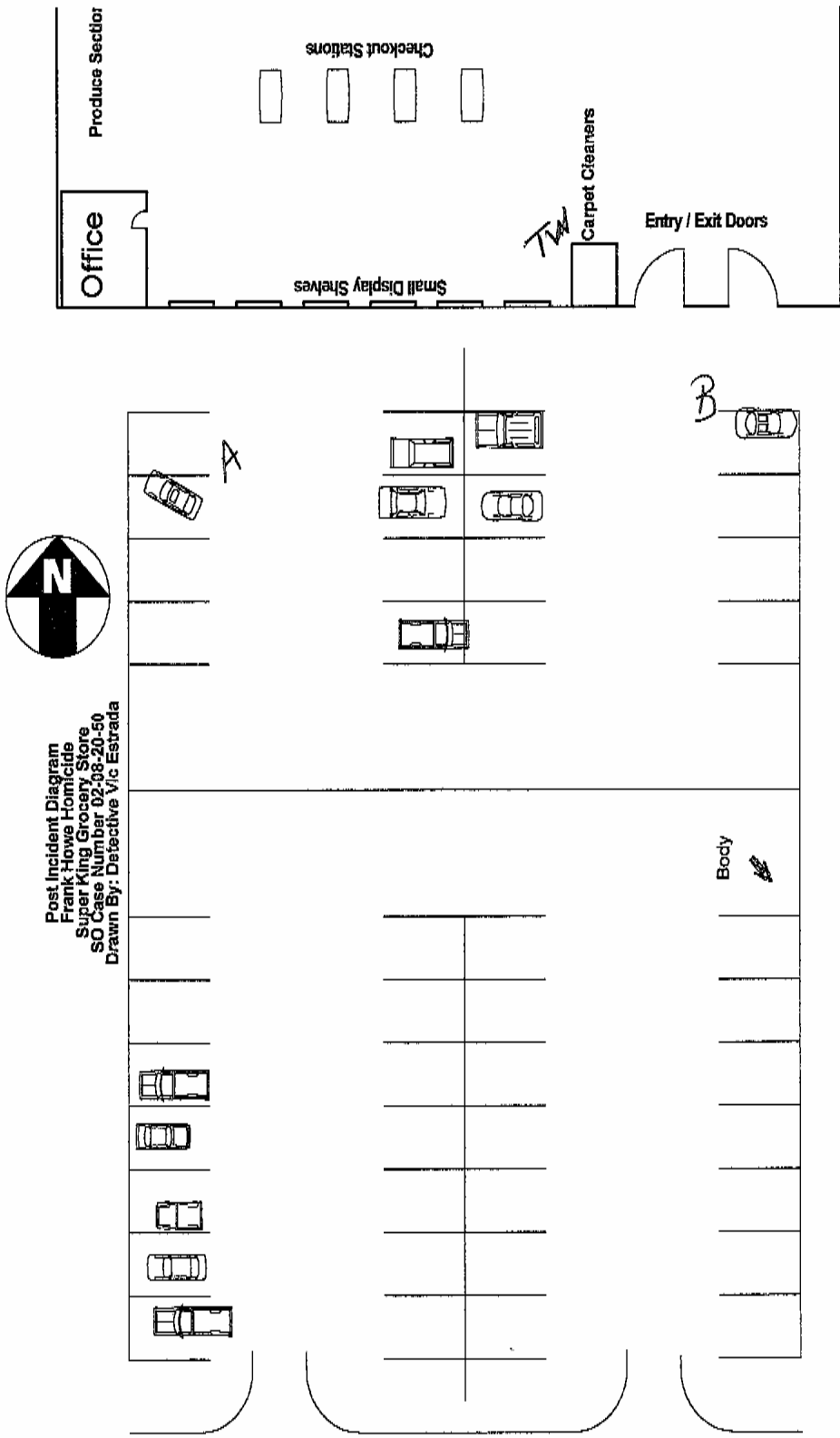
Topics

[General]

Atherosclerosis

Nonatheromatous Arteriosclerosis

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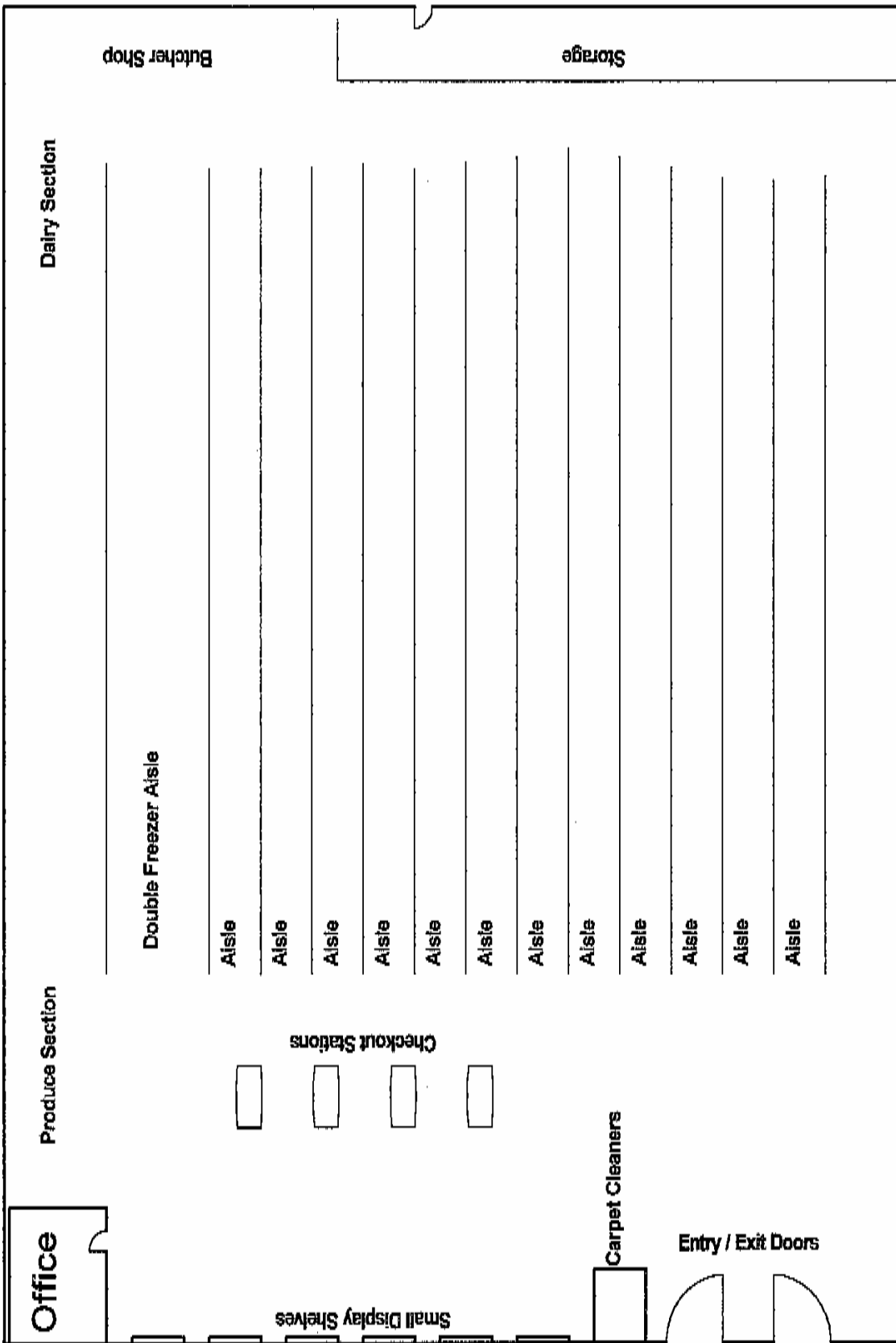
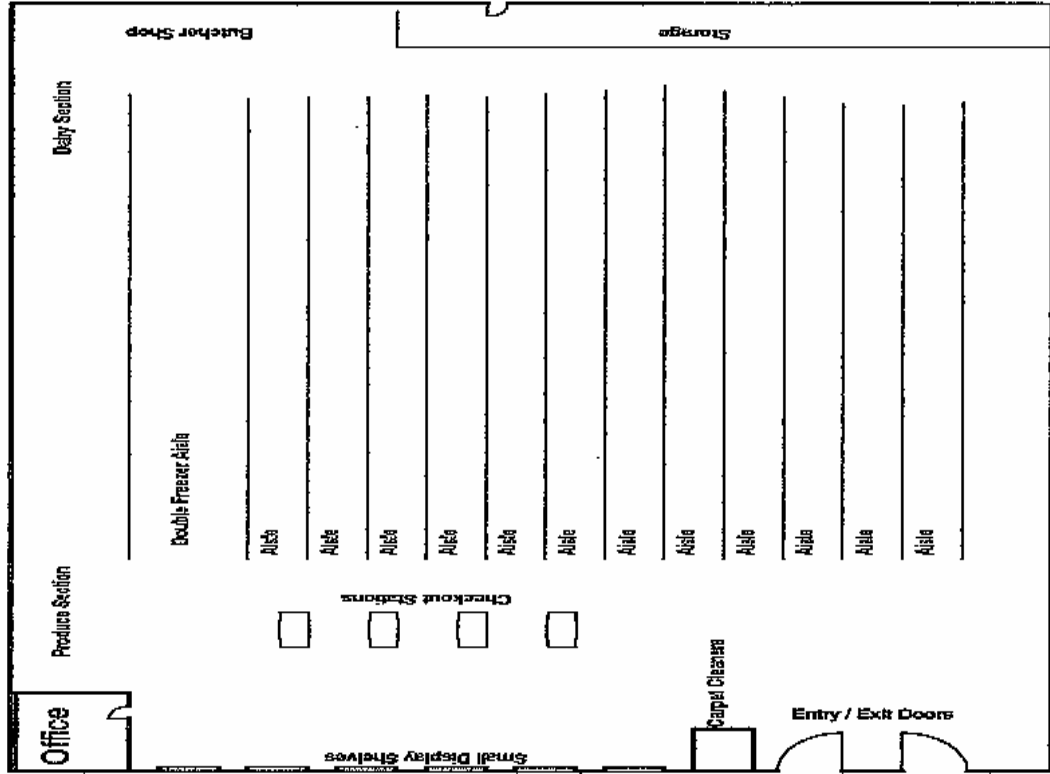
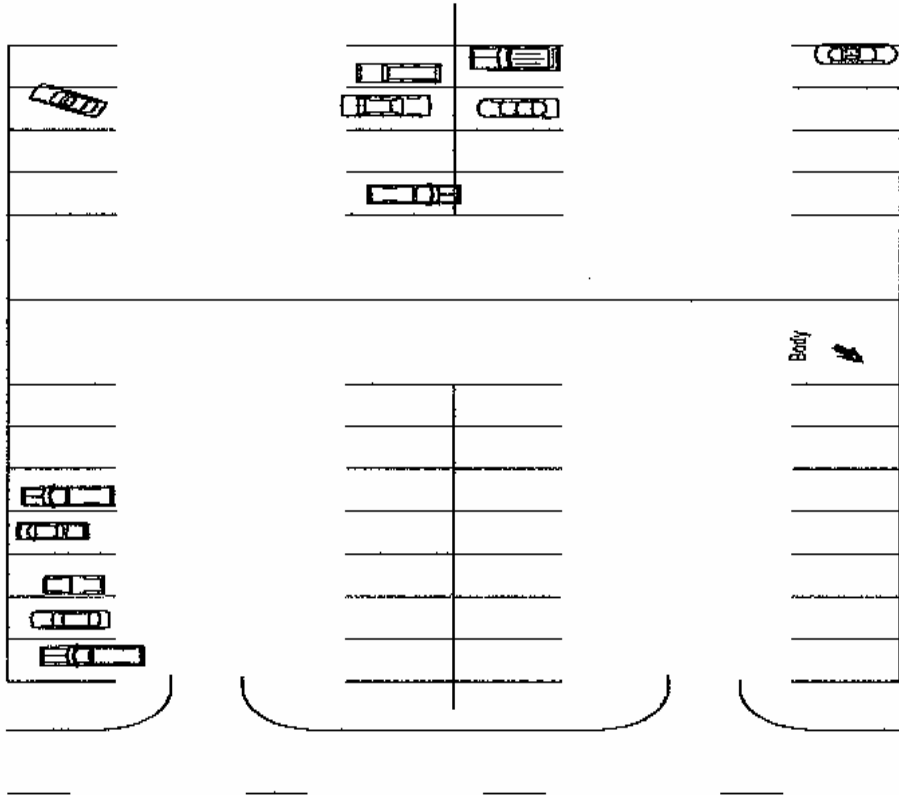


EXHIBIT 5



Post Incident Diagram
Frank House homicide
Sugar King Grocery Store
SO Case Number 02-06-205-60
Drawn By: Detective Vito Estrella



State of Arizona vs FRANK HOWE	Plaintiff Defendant	Docket # _____ _____ _____ 200215	Agency # _____ _____ _____	SENTENCING MINUTE ENTRY <input type="checkbox"/> PLEA <input type="checkbox"/> TRIAL
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INTERPRETER VICTIM NOTIFIED PRESENT PAGE 1 OF _____

PLEA	CITATION NO.	CV	CR	OFFENSE/VIOLATION	OFF DATE	JUDGMENT	DISPOSITION	DISM	W	W/O
	0672002		X	SHOPLIFTING	06-01-02	GUILTY				
				DIAPERS FROM						
				SUPER KING						
	0672002		X	CARRYING A	06-01-02	NOT GUILTY				
				CONCEALED						
				WEAPON						

PROBATION TOTAL MONTHS 18 MONTHS OF UNSUPERVISED AND _____ MONTHS OF MONITORED PROBATION

CONDITIONS: REPORT TO PROBATION OFFICE TODAY WITHIN _____ HOURS OF JAIL RELEASE

VIOLATE NO LAWS HAVE NO CONTACT WITH VICTIM

STAY AWAY FROM SUPER KING STORES OBTAIN PROOF OF _____

OTHER: _____

PROOFS: DRIVERS LICENSE VEHICLE REGISTRATION 6 MONTHS PAID INSURANCE REPAIR DOG LICENSE

OTHER _____ BY _____ OR _____

FINE _____ TODAY, OR THROUGH SENTENCE ENFORCEMENT OFFICE TIME PAYMENT FEE OF _____

INSTALLMENTS COMMUNITY SERVICE _____ HOURS, PROOF BY _____

ADMINISTRATIVE FEES WAIVED FOR COST OF APPOINTED COUNSEL \$200.00

DUI PROCESSING FEES = _____ JAIL FEE _____ X _____ = \$0.00 TOTAL \$200.00

RESTITUTION IN AMOUNT OF _____ TO _____

INSTALLMENTS _____

JAIL TIME SERVED _____ DAYS WITH CREDIT FOR _____ DAY ALREADY SERVED

(REFERENCED COMMITMENT ORDER ATTACHED) SUSPEND _____ DAYS

BOND CONVERT TO FINE REFUND EXONERATE TO SURETY

I AGREE TO THE CONDITIONS OF PROBATION
 I have received a copy of this Minute Entry and Notice of Appeal

Defendant _____ DOB _____

Address _____ ZIP _____

QUASH WARRANT
 SET ASIDE CIVIL DEFAULT

I certify that the defendant's finger print was affixed on the reverse side of this document upon acceptance of this plea.

CHAYET _____ 07-10-02
 JUDGE DATE

State of Arizona vs FRANK HOWE Plaintiff Defendant	Docket # _____ _____ _____ 200214	Agency # _____ _____ _____ TPD	SENTENCING MINUTE ENTRY <input type="checkbox"/> PLEA <input checked="" type="checkbox"/> TRIAL
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INTERPRETER VICTIM NOTIFIED PRESENT PAGE 1 OF 1

PLEA	CITATION NO.	CV	CR	OFFENSE/VIOLATION	OFF DATE	JUDGMENT	DISPOSITION	DISM	W	W/O
	0812000		X	SHOPLIFTING	08-20-00	GUILTY	PROB			
				CLOTHING AND CAMPING SUPPLIES FROM TARGET						
	0812000		X	ASSAULT	08-20-00	NOT GUILTY			X	
				A CLASS 3 MISDEMEANOR						

PROBATION TOTAL MONTHS 18 MONTHS OF UNSUPERVISED AND 18 MONTHS OF MONITORED PROBATION

CONDITIONS: REPORT TO PROBATION OFFICE TODAY WITHIN _____ HOURS OF JAIL RELEASE

VIOLATE NO LAWS HAVE NO CONTACT WITH VICTIM - SALLY HUGHES

STAY AWAY FROM TARGET STORES OBTAIN PROOF OF _____

OTHER: ATTEND AA MEETINGS TWICE A MONTH

PROOFS: DRIVERS LICENSE VEHICLE REGISTRATION 6 MONTHS PAID INSURANCE REPAIR DOG LICENSE

OTHER _____ BY _____ OR _____

FINE _____ TODAY, OR THROUGH SENTENCE ENFORCEMENT OFFICE TIME PAYMENT FEE OF _____

INSTALLMENTS COMMUNITY SERVICE 20 HOURS, PROOF BY 11-20-00

ADMINISTRATIVE FEES WAIVED FOR COST OF APPOINTED COUNSEL \$20.00

DUI PROCESSING FEES = _____ JAIL FEE _____ X _____ = \$0.00 TOTAL \$20.00

RESTITUTION IN AMOUNT OF _____ TO _____

INSTALLMENTS _____

JAIL TIME SERVED _____ DAYS WITH CREDIT FOR _____ DAY ALREADY SERVED

(REFERENCED COMMITMENT ORDER ATTACHED) SUSPEND _____ DAYS

BOND CONVERT TO FINE REFUND EXONERATE TO SURETY

I AGREE TO THE CONDITIONS OF PROBATION
 I have received a copy of this Minute Entry and Notice of Appeal

Defendant _____ DOB _____

Address _____ ZIP _____

QUASH WARRANT
 SET ASIDE CIVIL DEFAULT

I certify that the defendant's finger print was affixed on the reverse side of this document upon acceptance of this plea.

CHAYET _____ 09-15-00
 JUDGE DATE

ARIZONA SUPERIOR COURT

PIMA COUNTY

HON. DANELLE LIWSKI

COURT REPORTER: Barbara Jones

IN THE MATTER OF
SMITH, Pat

A PERSON UNDER THE AGE
OF EIGHTEEN YEARS
DOB: 04-07-72

CASE NUMBER: 12347601
DATE: 10-5-1989

Serra Kimmins
Deputy County Attorney
Lynnette Tsethlikai
Assistant Public Defender

DISPOSITION MINUTE ENTRY

Hearing began at 2:25 p.m.

PRESENT: MINOR; MOTHER; FATHER
PROBATION OFFICER: Anthony Enos

The minor is adjudicated on the:

- Delinquent Petition dated 09-03-89 Count 01
Possession/Use of marijuana a Class 1 Misdemeanor
- * in violation of A.R.S. 13-3405 A

Statements were made to the Court by the minor's mother, Counsel and Probation Officer.

The Court having considered the Risk/Needs Assessment and Commitment Guidelines,

IT IS ORDERED that the minor;

As a consequence for the offense and for not being truthful to the Court with regard to his/her drug use, the minor is to serve four (4) consecutive weekends in the detention facility. Is placed on Probation under conditions of Probation for a term of six (6) months, unless extended by the Court, pursuant to A.R.S. 8-341, not to exceed the minor's eighteenth birthday.

IT IS ORDERED, Pursuant to A.R.S. 8-241 A, that the minor's parents pay \$50.00 per month probation fee commencing on 11-03-89.

Kenny Wagner
Deputy Clerk

Any fee assessed may be appealed by contacting the Assessment Office at 740-5028 or 740-5061.

Minor is advised of the right to appeal and appeal procedures.

The minor's right thumbprint is affixed to the thumbprint form in open court this date and is permanently attached to the original of this Minute Entry Order.

FILED IN COURT: Order of Probation

Hearing ended at 2:41 p.m.

Dated this 5th day of October, 1989

HON. DANIELLE LIWSKI

Kenny Wagner
Deputy Clerk

Distribution for 12347601.001
Calendar Office
Assessment Office
Probation Officer: Anthony Enos
County Attorney: Serra Kimmins, Esq.
Public Defender: Lynnette Tsethlikai, Esq.
Parents:
Mary and Harold Smith
2436 S. Campbell Ave.
Tucson, AZ 85706

**PIMA COUNTY MEDICAL EXAMINER'S OFFICE
AUTOPSY REPORT**

Re: FRANK HOWE

DATE AND TIME: August 21, 2002 @ 10:00 a.m.

PRESENT: Dr. Willie Williams, Deputy Vic (Victoria) Estrada, intern Michael Strom and assistant Brooke Bennett

Weight: 140 lbs. Height: 5' 6"

External examination: The deceased is a young adult, Caucasian male. The hair is sparse, brown and short. The teeth are natural and in poor repair. The torso and extremities are somewhat underdeveloped. There is a tattoo of a tiger on the left shoulder and needle marks in the left forearm. It is not possible to tell if the needle marks are fresh or not.

Injuries, external and internal: There is major, blunt trauma injury to the center front torso. There is a roughly 3 x 4 inch contusion over the upper front chest. The underlying anterior chest wall contains soft tissue hemorrhage with fractures of the fifth and sixth ribs. The cardiovascular system reveals severe internal heart damage. There is some evidence of narrowing and hardening of the arteries.

Drug screen results (source - autopsy blood taken from the deceased):

Ethanol - undetected
Cocaine - undetected
Cannabis - trace metabolites detected
Opiates - undetected

Pathologic Diagnosis: Blunt impact to torso with: 1) Abrasions and contusions; 2) Anterior chest wall soft tissue damage; 3) Rib fractures; 4) Cardiac contusion, and 5) Rule out natural heart failure.

Opinion: Death of this adult male is due to blunt impact to the torso causing fracture of the 5th and 6th ribs and further resulting in severe heart damage that caused heart failure. The manner of death is certified as homicide.

Willie Williams, MD
Chief Forensic Pathologist

**FORENSIC REVIEW OF THE MEDICAL EXAMINER'S
AUTOPSY OF FRANK HOWE**

Background: This review is being conducted at the request of Pat Smith's legal counsel. The sources of material used to prepare this report include: 1) Dr. Williams' Autopsy Report; 2) photographs of the autopsy; 3) a sample of Mr. Howe's blood; 4) the heart removed and preserved by Dr. Williams during Mr. Howe's autopsy; 5) the police report and diagrams of the scene of the death; and 6) the Merck Manual.

Toxicological Blood Sample Results:

Cannabis - high level of metabolites
Barbiturates - metabolites noted
Nicotine - present in high quantities
Cholesterol - extremely high

These results were obtained from the blood sample received from Dr. Williams. I personally broke the seal initialed by Dr. Williams and conducted the blood test.

Heart Analysis: Coronary vessels indicate advanced atherosclerosis.

These results were obtained after a visual inspection of Mr. Howe's heart. The heart was obtained from Dr. Williams and I personally broke his initialed seal prior to inspecting the heart.

Conclusions: Mr. Howe was a heavy smoker of both tobacco and marijuana. His diet was poor and consisted of primarily of heavily saturated fats. Photographs of the broken ribs are consistent with fractures that commonly occur when the sternum is cracked open during an autopsy suggesting that the ribs were broken post mortem. The bruising to the chest appears slight and superficial.

Opinion: The cause of Mr. Howe's death was cardiac arrest precipitated by advanced atherosclerosis, which was the result of Mr. Howe's regular drug and tobacco use and poor diet. It is my opinion that Mr. Howe would have died of a heart attack on or about August 20, 2002 whether he had been punched in the chest or not, and that the blow to the chest was not the cause of death.

Taylor Shea, MD, PhD, BA, BS
Chairperson of the Forensic Pathology Department
University of Texas, Austin

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTY OF PIMA
 JUVENILE COURT

IN THE MATTER OF)	
)	
PAT SMITH)	JUVENILE NO. 12347601
DOB: 04-07-72)	
)	DELINQUENCY PETITION
A Person under the age of eighteen)	
(18) years.)	
)	
_____)	

Personally appeared before me this 03 day of September, 1989, Serra Kimmins, who being duly sworn upon information and belief, complains and says:

1. That PAT SMITH, is a 17 year old male/female, who resides at 2436 S. Campbell, Tucson, Pima County, Arizona 85706.
2. That the father of said child is Harold Smith, who resides at same as minor.
3. That the mother of said child is Mary Jane Smith, who resides at same as minor.
4. That the person(s) having guardianship, custody, or control of said child is/are parents.
5. That PAT SMITH, is presently detained at the Pima County Juvenile Court Center, located at 2225 E. Ajo Way, Tucson Arizona, being taken into custody by Tucson Police Dept. on the 2nd day of September, 1989 at 11:15 AM
6. That PAT SMITH, is an alleged delinquent child within the purview of Arizona Revised Statutes, Section 8-201, as amended, in that said child committed a violation of the law as follows:

[C1] [LEA #8706130413] COUNT ONE: (POSSESSION/USE OF MARIJUANA, A CLASS ONE MISDEMEANOR)

On or about the 2nd day of September, 1989, PAT SMITH unlawfully possessed/used marijuana, having a weight of less than two pounds, in violation of A.R.S. §§ 13-3405 (A) (1), 13-702 (G), 13-707, 13-802, 13-804 and 13-902. [Field 1220] [13-3405A1]

 Serra Kimmins
 Deputy County Attorney

SUBSCRIBED AND SWORN to before me this 03 day of September, 1989.

 KC\vm

 Notary Public

GUIDELINES FOR STANDARDIZED SCORING

The judge/scorer is scoring student performance in each category and not scoring legal merits of the case. It is recommended that scorers use the "5-6" range as an indication of an average performance, and adjust higher or lower for stronger or weaker performances. Scoring must be on a whole number basis (partial points not allowed). Points will be awarded based upon the criteria set forth below.

<u>Points</u>	<u>Performance</u>	<u>Criteria for Evaluating Students' Performance</u>
1-2	Not effective (Poor)	Disorganized, unsure of self, illogical, uninformed, demonstrates lack of preparation, and understanding of task, simply ineffective in communications.
3-4	Fair	Minimal performance and preparation; performance is passable but lacks depth in terms of knowledge of task and materials; communication lack clarity and conviction.
5-6	Good (Average)	Good, but less than spectacular performance; fundamental understanding of task and can perform outside the script but with less confidence than when using the script; grasps major aspects of the case but does not convey a mastery of the case; communications are clear and understandable but could be more persuasive; acceptable but uninspired performance.
7-8	Excellent	Presentation is fluent, persuasive, clear and understandable; organizes materials and thoughts well and exhibits a mastery of the case and of the materials provided; presentation was both believable and skillful.
9-10	Outstanding	Thinks well on feet, is logical, keeps poise under duress; performance was resourceful, original, and innovative; can sort out the essential from the non-essential and uses time effectively, to accomplish major objectives; knows how to emphasize vital points of trial and emphasizes them.

Judge _____

Round (circle one) 1 2 3 4

Courtroom _____

Arizona High School Mock Trial Competition Region _____

Competition: Regional State

Score Sheet

P=Prosecution/Plaintiff _____

D=Defendant/Defense _____

Using a scale of 1 to 10, rate the P and D in the categories below.
DO NOT USE FRACTIONAL POINTS.

	Not Effective	Fair	Good	Excellent	
Outstanding					
1	2	3	4	5	6
	7	8	9	10	

Score Sheet		P	D
Opening Statement		()	()
Prosecution/Plaintiff First Witness	Direct Examination	()	Cross-Examination ()
	Witness Presentation	()	
Prosecution/Plaintiff Second Witness	Direct Examination	()	Cross-Examination ()
	Witness Presentation	()	
Prosecution/Plaintiff Third Witness	Direct Examination	()	Cross-Examination ()
	Witness Presentation	()	
Defendant/Defense First Witness	Cross Examination	()	Direct Examination () Witness Presentation ()
Defendant/Defense Second Witness	Cross Examination	()	Direct Examination () Witness Presentation ()
Defendant/Defense Third Witness	Cross Examination	()	Direct Examination () Witness Presentation ()
Closing Argument		()	()
Subtotal		()	()
Penalty Points		()	()
Total Points (Absolutely no ties)		()	()

Please deliver ballot and student roster to timekeeper before debriefing the team

Overall Best Performance:

(School Name)

Outstanding Individual Performer:

(Student's Name)

STUDENT ROSTER

This form is to be completed prior to the beginning of each Round and handed to the judge when the delegated student introduces the team members.

**SCHOOL AND/OR
TEAM NAME** _____

ROUND I II III IV SEMI FINALS FINALS

(circle one)

PLAINTIFF/PROSECUTION DEFENDANT

(circle one)

Please print student names and indicate alternates where applicable.

ATTORNEY _____

ATTORNEY _____

ATTORNEY _____

WITNESS _____

WITNESS _____

WITNESS _____