

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-156830-001 DT

12/06/2007

THE HONORABLE ANNA M. BACA

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

COUNTY ATTORNEY CRIMINAL -
CCC

v.

OZIE WASHINGTON (001)

JAMES P LEONARD
MICHELE M IAFRATE
JAMES LEO LOGAN
MARY JANE GREGORY

JUDGE FIELDS
JUDGE MROZ
JUDGE MUNDELL
VICTIM SERVICES DIV-CA-CCC

RULING

The Court has considered the defense motions¹ regarding jail hours for privileged visitation at Maricopa County Jails and the Maricopa County Adult Probation Department's ("APD") motion to expand access to in-custody defendants. Additionally, the Court has considered the related issues of jail visits by experts to conduct mental health evaluations and Court Interpretation and Translation Services ("CITS") interpreters to interpret meetings with attorneys, APD officers or mental health evaluators. The Court has considered the responses of

¹ Upon agreement and stipulation of the parties, because of the similarity of issues, the parties presented evidence on a limited number of motions that provided a representative sample of the issues raised. The cases in which the parties presented evidence are: State v. Clarence Dixon, CR2002-019595-001; State v. Dionicio Vargas, CR2006-175092-001; State v. Robert Hernandez CR2007-119475-001 and CR2007-155927-001; State v. Irma Garcia, CR2005-129847-001; State v. Juan Manual Godinez-Morales, CR2007-146854-001; State v. Shawn King, CR2005-014314-001, CR2005-111076, CR2006-012775-001; State v. Miciah Sumpter, CR2006-008209-001, CR2006-134110-001, CR2006-156634-001, CR2007-155510-001, CR2007-143417-001; State v. Casey Romero, CR2007-148305-001; State v. Roberto Vega, CR2006-048861-001; State v. Raymond Musgrove CR2007-148283-001, CR2003-021314-001; State v. Natalie Rose Herrera Engler, CR2006-166117-001; State v. Ronnie Guilford, CR2006-162702-001; and APD Motion (filed in State v. Ozie Washington, CR2007-156830-001).

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the Maricopa County Sheriff's Office ("MCSO"), evidence presented at the evidentiary hearing, the credibility and demeanor of the witnesses, counsels' statements to the Court and the relevant law. As stated in footnote one, the Court heard evidence on a limited number of motions. However, this ruling regarding changes in privileged visitation hours applies to all cases because the issues and impact are the same in all cases. In addition, defense counsel stated that similar motions would be filed in all criminal cases raising this issue. Privileged visits are jail visits to inmates by attorneys, CITS interpreters, APD employees and mental health evaluators. Visits by family members and other members of the public are not privileged visits. The defense motions do not request that the MCSO expand visitation times for families and the public, and the Court's findings and rulings are limited to privileged visits. The Court now finds and rules as follows.

The defense motions request that this Court restore the privileged visitation schedule and remote videoconferencing visitation schedule that existed prior to November 12, 2007 as to all five jail facilities. These motions request alternative relief of emergency orders pending full evidentiary hearing or dismissal of certain cases with prejudice. The APD requests expanded weekday privileged visitation hours.

On November 12, 2007, the MCSO changed the visitation hours at all Maricopa County Jails to 6:30 a.m. to 2:30 p.m. daily. This change reduced the hours previously available for privileged visits. The change in hours affected attorneys, the court-appointed doctors who conduct mental health evaluations, the APD which prepares pre-sentencing reports for the court, and CITS interpreters. Defendants essentially contend that the change in visitation hours violates their constitutional rights and A.R.S. § 13-3901.

This Court has the inherent authority to issue orders necessary for the ordinary and efficient exercise of its jurisdiction. *Fenton v. Howard*, 118 Ariz. 119, 121, 575 P.2d 318, 320 (1978); *Schavey v. Royston*, 8 Ariz.App. 574, 575, 448 P.2d 418, 419 (1968). *See also Holaway v. Realty Associates*, 90 Ariz. 289, 293, 367 P.2d 643, 646-47 (1961) (the rule that the grant of jurisdiction implies necessary and usual incidental powers essential to effectuate it applies even though court may be called upon to decide matters which would not be within the original cause of action). In addition, "the absence of an express grant of authority will not preclude the court from entering orders 'essential to the due administration of justice.'" *Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 240, 871 P.2d 1172, 1177 (App. 1994). This Court also has an obligation to protect constitutional rights, including a criminal defendant's right to counsel. *See Bristor v. Cheatham*, 75 Ariz. 227, 234, 255 P.2d 173, 177 (1953) ("It is the court's duty to protect constitutional rights."). This order is entered in furtherance of the Court's efficient exercise of its jurisdiction, the administration of justice, and the Court's obligation to protect each criminal defendant's constitutional rights, including the right to counsel and access to the courts.

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The MCSO contends that defendant's claims of constitutional violations are controlled by the test set forth in *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, the United States Supreme Court held that if a court finds that a prison regulation or condition "impinges on inmates' constitutional rights," the condition is valid if it is "reasonably related to legitimate penological interests." *Id.* at 89. *Turner* involved post-conviction, restrictions on liberty, rather than, as claimed here, regulations on pretrial detainees. As such, the "legitimate penological interests" of rehabilitation or punishment are not present here. See *Demery v. Arpaio*, 378 F.3d 1020, 1028-29 (9th Cir. 2004) (noting that *Turner* is inapposite to cases dealing with conditions of pretrial confinement); *Benjamin v. Fraser*, 264 F.3d 175, 187 (2d Cir. 2001) (doubting that the *Turner* standard applies to pretrial detainees but not deciding the issue because policy at issue would not survive scrutiny under either standard). But see *Hause v. Vaught*, 993 F.2d 1079, 1082 (4th Cir. 1993) (applying *Turner* to pretrial inmates "with due regard for the particular circumstances of pretrial detainment"). Thus, *Turner* does not provide the standard to be used for evaluation of the alleged constitutional violations in this case.

All criminal defendants, including pretrial detainees, have a right to counsel throughout the pendency of criminal proceedings against them. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24; *Gideon v. Wainwright*, 372 U.S. 335 (1963). Effective representation by counsel, as required by the constitution, is not possible without the right of a defendant to confer with counsel. See, e.g., *State v. Moody*, 208 Ariz. 424, 448, ¶ 76, 94 P.3d 1119, 1143 (2004). "[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery v. Alabama*, 308 U.S. 444, 446 (1940). In addition, all criminal defendants have a right of access to the courts. See *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts" and that such access must be adequate, effective and meaningful.).

In addition to the constitutional rights at issue, Arizona law provides that an attorney "shall, at the request of the person arrested or of someone acting in his behalf, be permitted, under reasonable regulations, to visit the person arrested." A.R.S. § 13-3901 (emphasis added). In *Procunier v. Martinez*, 416 U.S. 396 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the court stated "inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Id.* at 419, citing *Ex parte Hull*, 312 U.S. 546 (1941). See also *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir.1989) ("Pre-trial detainees have a substantial due process interest in effective communication with their counsel . . . When this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised.").

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In evaluating whether a pretrial detainee's right to counsel or access to the courts is impaired, the court determines whether the restrictions imposed unjustifiably obstructed the right of access to counsel or to the courts "in the light of the central objective of prison administration, safeguarding institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Benjamin*, 264 F.3d at 187. "Any jail policy that limits or regulates a detained defendant's access to his attorney or persons designated by the attorney must be related to the sheriff's need for the secure maintenance of his facility and must be justified by him in these terms." *Kennedy v. Omodt*, 264 N.W.2d 809 (Minn. 1978). Conditions of confinement, apart from the fact of confinement itself, that impede a defendant's ability to prepare a defense or damage his mental alertness at trial must be justified by a compelling necessity. *Campbell v. McGruder*, 580 F.2d 521, 531-32 (D.C. Cir. 1978). A lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration and inadequate resources can never be adequate justification for state's depriving any person of his constitutional rights. See *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 399 (2nd Cir. 1975) ("Inadequate resources of finances can never be an excuse for depriving detainees of their constitutional rights."); *Miller v. Carson*, 401 F.Supp. 835, 842 (D.C.Fla. 1975) (same).

Based on the evidence presented, the Court makes the following findings of fact:

1. Effective November 12, 2007, the MCSO changed its privileged visitation hours to 6:30 a.m. to 2:30 p.m. This change applied to five MCSO inmate facilities: 4th Avenue, Lower Buckeye, Towers, Estrella and Durango. The MCSO also shortened the hours for visitation by (video) remote access, also referred to as videoconferencing, for the indigent defense attorneys and the APD. Previous visiting hours for in-person visits by attorneys had been unrestricted but, as a practical matter, generally did not extend beyond 9:00 p.m. weekdays.

2. After this change in hours, a number of instances occurred in which defense attorneys attempted to visit their in-custody clients after 2:30 and were turned away at various jail locations. In other instances privileged visits were cut short around 2:30 p.m. before the visit could be completed. In other cases requests for video conferences were affected because of the reduced number of time slots available for defense counsel and APD.

3. Defense attorneys are generally in court each morning for morning calendars until about 10:30 or 11:00. (See testimony of Gretchen Cooper on 11/20/2007). In addition, comprehensive mental health ("Rule 11") calendars are held two mornings each week, and can stretch into the afternoon both days. (See testimony of Fredrica Strumpf on 11/26/2007.) Thus, defense attorneys are usually unable to conduct in-person jail visitation during the morning hours. Attorneys who are in trial all day are unable to confer with their clients after trial each day under the new jail visitation hours. (See testimony of Kenneth Countryman on 11/21/2007; Nathaniel Carr on 11/21/2007; Raymond Kimball on 11/28/2007).

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4. All three indigent defense agencies share videoconferencing (remote access) time, along with the APD officers. The remote accessing hours were reduced to both defense counsel and APD officers with the November 12, 2007 changes. For example, the indigent defense agencies formerly could conduct remote videoconferences with inmates at the 4th Avenue and Lower Buckeye jails from 8:00 a.m. to 8:00 p.m. Those hours have been reduced, and the indigent defense agencies now only have until 1:30 p.m. In addition, Estrella, Towers, and Durango each have one videoconferencing machine to share among users. (See testimony of Norma Munoz on 11/26/2007.) Moreover, remote videoconferences with defendants must be scheduled 24 hours in advance. (See testimony of Gretchen Cooper on 11/20/2007.) Thus, the facilities and hours for remote videoconferencing are insufficient to meet the needs of counsel to videoconference with the in-custody defendants.

5. Videoconferencing is impractical for non-English speaking defendants. (See testimony of Raul Ramon on 11/20/2007.) Furthermore, remote videoconferencing cannot be used to review a plea agreement with a defendant. In sex offender charges, the plea agreements cannot be faxed. (See testimony of Bethanne Klopp on 11/20/2007.) Videoconferencing is not appropriate for conferring with defendants with mental health issues because counsel must be able to clearly see defendant's affect and make sure defendant understands. (See testimony of Fredrica Strumpf on 11/26/2007.) Therefore, remote videoconferencing is not a substitute for in-person visitation

6. Defense attorneys utilize CITS interpreters when conferring with non-English speaking defendants at the jails. Additionally APO employees and some mental health examiners use CITS interpreters. CITS interpreters are in court each morning covering morning calendars. CITS interpreters are not available to translate at the jail before the 8:30 morning calendars because of the need to attend the CITS daily coordination meeting held early each morning. Accordingly, based on the court morning calendar schedules, for the most part, CITS interpreters are only available to translate at the jails from 1:30 p.m. to 5:00 p.m. weekdays. With the changed hours, CITS interpreters can realistically only interpret at the jail from 1:30 p.m. to 2:30 p.m. (about one visit). Under the prior visitation schedule, CITS interpreters were able to translate up to four jail visitations per day. (See testimony of Raul Ramon on 11/20/2007.)

7. The mental health experts who must evaluate in-custody defendants have been affected by the changed hours and alternative space offered by the MCSO to conduct their testing and interviews. These court-appointed experts are ordered to submit reports within a stated deadline. Depending on the evaluation required, the expert may need up to four hours with the defendant. Some experts are not available during morning hours to conduct the evaluations because of other professional appointments such as hospital staffing meetings and private patient appointments. (See testimony of Dr. Catherine O'Connell on 12/3/2007.) The changes by the MCSO have made it increasingly difficult for these court-appointed experts to

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conduct the evaluations within the new visitation schedule. Furthermore, the noisy, non-private setting offered as an alternative after hours is inadequate to conduct a reliable examination and testing. (See testimony of Dr. Catherine O'Connell on 12/3/2007). If the changed schedule continues, some doctors may no longer be able to conduct the evaluations. (See testimony of Dr. Debra Joy Lewis on 11/27/2007; Dr. Catherine O'Connell on 12/3/2007.)

8. APD employees have been adversely affected by the reduced visitation hours in their ability to interview in-custody defendants. Presentence report writers interact with defendants through remote videoconferencing. However, those hours have been reduced, and previously scheduled videoconferences have been cancelled as a result of the reduced hours. (See testimony of Sandy Lewis on 11/27/2007; Jerry Pieczynski on 11/27/2007.) In addition, pre-sentence jail screeners from the APD interview defendants at the jails. At least one presentence jail screener has had to adjust work hours to 5:30 a.m. to 2:30 p.m. to complete the person-to-person interviews in the jails as a result of the reduced visits hours. (See testimony of Jessie Davila on 11/27/2007.)

9. The MSCO reduced the visitation hours for budgetary reasons. (See testimony of Chief Gerard Sheridan on 12/3/2007; Capt. Michael Gordon Olson on 11/29/2007.) The reduction in hours was not prompted by any concerns about the security at the jails. (See testimony of Capt. Nick Larkin on 11/29/2007 and 11/30/2007.) The MCSO in looking for budget savings decided to eliminate 18 detention officer assignments on the second shift (2:30 p.m. to 10:30 p.m.) which included those handling the privileged jail visits. The new visitation hours are convenient for the MCSO and match the MCSO's first shift (6:30 a.m. and 2:30 p.m.). MCSO witnesses testified that most legal visits occur between 10 a.m. and 2:00 p.m. However, cross examination of these witnesses revealed that their testimony about peak hours for visits combined both privileged and family/public visits. Thus, MCSO did not study and identify the peak hours for privileged visits before deciding on the new visitation schedule. (See testimony of Capt. Michael Gordon Olson on 11/29/2007; Lt. Stacey Nowicki on 11/30/2007 and 12/03/2007.) The MCSO's chart (Exhibit 5) shows peak visiting hours for all visitors, but does not differentiate privileged visits. (See testimony of Capt. Nick Larkin on 11/29/2007 and 11/30/2007.)

10. After November 12, 2007, the MCSO has occasionally made "special accommodations" for after-hours visits (after 2:30 p.m.) under special circumstances and if there was sufficient staff. However, there is no MCSO policy or directive regarding special accommodations. Whether to grant a special accommodation for an after-hours visit is discretionary (see testimony of Sgt. Jeffrey Potter on 12/3/2007) and based on available personnel (see testimony of Lt. Donna Hudson on 12/3/2007). If any special accommodations are offered, it is only on a case-by-case basis and depend on the particular detention officer on duty to make a determination of whether the request constitutes a special circumstance and whether sufficient staff is available to allow a privileged visit. In addition, some of the special

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accommodations that have been offered are inadequate and inappropriate for privileged visits. (See testimony of Gretchen Cooper on 11/20/2007.) A Rule 11 expert was offered the area near the Durango Security Control Room, which is noisy and not private, to conduct a mental health evaluation. Any data from the evaluation would have been unreliable as a result. (See testimony of Dr. Catherine O'Connell on 12/3/2007.)

11. The reduced visitation hours have impinged and obstructed the right to counsel and access to the courts at Towers, Estrella, Durango, 4th Avenue and Lower Buckeye jails. (See, e.g., testimony of Bethanne Klopp on 11/20/2007 [Towers and Durango]; William T. Fischer on 11/20/2007 [Lower Buckeye]; Kenneth Countryman on 11/21/2007 [4th Avenue]; Fredrica Strumpf on 11/26/2007 [4th Avenue]; Frances Gray on 11/28/2007 [Estrella].) For example, an attorney visit to review a plea offer from the Maricopa County Attorney (MCA) with an in-custody defendant whose charges involved attempted murder was interrupted about 23 minutes into the conference by a detention officer at 2:17 p.m. and not completed because of the new schedule which ends visits at 2:30 p.m. The attorney had been waiting about one hour before the attorney could begin that visit with the in-custody defendant. (See testimony of Frances Gray.) Additionally, as a result of defense attorneys' inability to confer with their clients because of the new hours, MCA plea agreement deadlines have expired prior to counsel having an opportunity to review the plea agreement with the defendant. (See, e.g., testimony of Bethanne Klopp on 11/20/2007.)

12. In any case involving victims, resetting or otherwise delaying the sentencing adversely impacts the victims, who are often present at sentence. The court has had to reschedule sentencing defendants because of the reduced visitation schedule. (See, e.g., testimony of Fredrica Strumpf on 11/26/2007 [sentencing in *State v. King* had to be rescheduled from 11/20/2007 to 12/13/2007 because she was unable to review presentence report, which was first available to her on the afternoon of 11/19/2007, with defendant prior to sentencing under new jail visitation hours].) In addition, in some cases the APD has not been able to complete presentence reports prior to scheduled sentencings because of the reduced visitation hours. When this occurs, sentencings have to be re-set for a later date or the judicial officer would have to sentence with limited information. (See testimony of Sandy Lewis on 11/27/2007; Jessie Davila on 11/27/2007; Angela Morris on 11/27/2007.)

13. The change in visitation hours has also affected members of the community who are serving on juries. For example, in *State v. Guilford*, counsel attempted to visit the defendant at 4th Avenue Jail after the trial day at 4:30 p.m. but was denied access. As a result, the trial judge delayed the start of trial the following day so that counsel could first meet with defendant. Members of the community who were serving on that jury were unnecessarily made to wait for the trial to resume while the attorney met with the defendant in preparation for matters that would be raised during trial that day. (See testimony of Raymond Kimball on 11/28/2007.)

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The court finds that the new schedule for privileged visits at the MCSO facilities impairs the in-custody defendants' constitutional right to counsel. The new schedule was not implemented because of any MCSO need to safeguard jail security, but because of its budget problems, resulting in eliminating detention officer assignments on shift 2 privileged visits. Further, the new schedule's negative impact on the ability of CITS interpreters, APD employees and mental health examiners to meet with the defendants results in delays and impairs the right of access to the courts. The MCSO changes in privileged visit hours, taken to resolve its budget issues, are not an allowable basis for the result which impairs in-custody defendants' constitutional right to counsel and access to the courts. Therefore,

The Court will enter temporary orders to provide an opportunity for the parties to mediate a reasonable privileged visitation schedule that will not impinge on in-custody defendants' constitutional right to counsel and access to the courts, and will also give due consideration to the MCSO's budget concerns.

IT IS ORDERED that representatives from the Public Defender, the Legal Defender, the Legal Advocate, the Office of Public Defense Services, and the MCSO shall participate in mediation. The Court appoints retired Judge Kenneth Fields as the mediator. Counsel for each side shall contact Judge Fields within three business days of this order to schedule the mediation. The parties shall mediate in good faith. In addition, each party shall have a representative with actual authority to bind its agency attend the mediation. *See* Ariz. R. Civ. P. 16.1(d). Mediation is to be completed within 30 days of the date of this order or report significant progress towards completion of mediation.

IT IS FURTHER ORDERED that representatives from the APD and the court attend the mediation, if so ordered by Judge Fields, to articulate the court's perspective related to APD, CITS, and Rule 11 scheduling.

IT IS FURTHER ORDERED setting a status conference on January 10, 2008 at 11:00 a.m. in this division.

IT IS FURTHER ORDERED that the parties submit a written memorandum advising the Court as to the status of mediation no later than close of business January 7, 2008. If the parties cannot agree to submission of a joint memorandum, the parties may submit separate memoranda.

IT IS FURTHER ORDERED entering the following temporary orders.

IT IS ORDERED that the MCSO extend the hours of privileged visitation at the Towers, Estrella, Durango, 4th Avenue and Lower Buckeye jails. The MCSO is ordered to extend the hours of privileged visitation at all five locations to at least until 9:00 p.m. daily. The rooms or areas provided shall allow for confidentiality at the same level as previously provided.

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IT IS FURTHER ORDERED that the MCSO reinstate the remote access visitation schedule that existed prior to the November 12, 2007 changes.

IT IS FURTHER ORDERED that the MCSO reinstate its prior schedule and facilities for examination/testing for mental health examiners.

IT IS FURTHER ORDERED that the MCSO must extend the hours for in-person privileged visitation, remote access visitation and mental health examinations, as ordered, no later than Thursday, December 13, 2007.

These interim orders will endure until the parties agree to a schedule for privileged visitation, or until this Court enters other orders to the contrary. This ruling applies to both those cases in which the Court heard testimony, listed in footnote one, as well as those cases in which the Court did not hear testimony,² because the issues and impact are the same in all cases.

IT IS FURTHER ORDERED denying the defense motions for the alternative relief of either temporary orders pending evidentiary hearing or dismissal with prejudice. To the extent that any motions filed with this division requested relief beyond that addressed in this minute entry order, counsel is directed to file a separate motion with the trial judge re-asserting the request for relief.

Copies: Chief Barbara Broderick, Adult Probation Department
Raul Roman, Court Translation and Interpretation Services

² State v. Ozie Washington CR2007-156830-001; State v. Jose Martinez Cisneros, CR2006-127391-001, CR2007-164695-001; State v. Louis Griego, CR2007-157260-001; State v. Carolyn Huffman, CR2007-146793-001, CR2007-129848-001, CR2007-048068-001; State v. Kevin Miracle, CR2007-166898-001; State v. Eldon Wickey CR2007-157725-001; State v. Jimmy Phillips, CR2007-165659-001; State v. Martin Lopez Perez, CR2007-163828-001; State v. Edgar Ixtabalan Lucas, CR2007-162065-001; State v. Rodolfo Acosta Garcia CR2007-167121-001; State v. Larry Varvel, CR2007-006430-001; State v. Raymond Harvey, CR2007-168867-001; State v. James Davis, CR2007-166307-001, CR2007-159792-001; State v. David Soto, CR2007-157265-001; State v. David Rene Espinosa, CR2007-162231-001, CR2007-115098-001; State v. Victor Lopez-Gonzales, CR2006-008034-001; State v. Sanja Buzanic, CR2007-166358-001; State v. Angel Durazo, CR2007-106122-001, CR2007-152690-001; State v. Royce Gibbons, CR2006-030947-001; State v. Jesus Esquivel, CR2007-164010-001; State v. Victor Estes, CR2007-120998-001; State v. Kandiece Shiree Geeslin, CR2006-135942-001, CR2007-141222; State v. Eliasar Vallero, CR2007-134768-001.