

# for The Defense



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The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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some relief. The courts have ruled repeatedly on the subjective nature of the *Miranda* warnings and their relation to children. A review of the law with regard to *Miranda* warnings to juveniles may prove valuable to the attorneys now forced to defend them.

The seminal case in juvenile law is *In Re Gault*, 387 U.S.1, 87 S.Ct.1428, 18 L.Ed. 2d 527 (1967). Ironically, (yet not surprisingly,) young Mr. Gault was an Arizona resident who had been arrested, found delinquent, and sentenced to the industrial school for boys. All of this occurred without a modicum of due process. Gault received no notice of the charges, right to counsel, right to confrontation, or privilege against self-incrimination. The Arizona Supreme Court affirmed the lower courts and the Gaults filed a Writ of Habeas Corpus to the United States Supreme Court. The high court granted certiorari and, in their decision, gave to juveniles almost all of the due process rights that had been afforded adults under the U.S. Constitution. The focus of this article is the rulings and comments this and other courts have made regarding to the unique nature of juveniles in the criminal justice system in light of the *Miranda* decision.

In *Gault*, the court not only found that all of the protections afforded by *Miranda* were applicable to juveniles, but also found that since the potential for error was much greater in juveniles, greater care must be taken. The court stated "... the greatest care must be taken to assure that the admission was voluntary, in the sense that it was not only coerced or suggested, but it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.* at 34. It is this difference, and higher level of scrutiny, which may afford juveniles some additional protection in the adult courts. The following is a review of the issues that can be raised and the supporting case law.

The United States Supreme Court and the Arizona high court have, through a series of rulings, established the factors that must be considered in evaluating whether  
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## YOU HAVE THE RIGHT TO REMAIN A CHILD

By Jason R. Leonard  
Deputy Public Defender - Juvenile Division

With enactment of Senate Bill 1446, the Arizona legislature created an entirely new battlefield. Attorneys who have been defending adults are now forced to defend children and deal with all of their accompanying issues. Although we in the juvenile section have been fighting this battle for some time, with little success, this new "adult" arena may provide children with

a juvenile's confession is voluntary and trustworthy. The United States Supreme Court has adopted a *totality of the circumstances* test to ascertain whether a juvenile's waiver of rights and subsequent statements were voluntary and not in violation of due process. See *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). In *Fare*, the Court held that:

The totality approach permits--indeed, it mandates--inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. *Id.*

Other factors that have been enumerated in case law include the juvenile's sophistication, the level of coercive force exerted, and any other applicable indicia of trustworthiness or coerciveness.

The court in *Gault* stated that "...juvenile proceedings to determine 'delinquency' which may lead to commitment to a state institution must be regarded as 'criminal' for purposes of the privilege against self-

incrimination." *Gault*, 387 U.S. at 32, 87 S.Ct. at 1455 (1967). Although the case law is clearly to the contrary, it is this writer's opinion that the civil label that has erroneously been affixed to juvenile proceedings, has created an atmosphere amongst juvenile judicial officers that due process does not *actually* apply to juveniles in juvenile court. While most of the case law addressing juvenile voluntariness was intended for use in the juvenile court, it has been established that it also applies to juveniles who are transferred to the adult court. *State v.*

*Hardy*, 107 Ariz.583, 491 P.2d 17 (1971). Directly filed cases fall under the existing case law for juveniles as well. The presiding judicial officers in superior court may be more receptive to arguments based on the existing case law.

**"The United States Supreme Court has adopted a *totality of the circumstances* test to ascertain whether a juvenile's waiver of rights and subsequent statements were voluntary and not in violation of due process."**

Any voluntariness analysis must begin with the legal presumption that all statements made are involuntary, and the state must show by a preponderance of the evidence that the statements were voluntary. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d. 1260, 1272 (1990). This presumption is arguably much stronger given the special nature of juveniles, and their current involvement in the adult criminal justice system. Under Rule 7 of Arizona Rules of Procedure for the Juvenile Court, a juvenile is afforded more protection than what is provided for by *Miranda v Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Rule 7 (a) provides that:

No extra-judicial statement to a peace officer or court officer by the child shall be admitted into evidence in juvenile court over objection unless the person offering the statement demonstrates to the court that: The statement was voluntary and before making the statement the child was informed and intelligently comprehended that he need not make a statement, that any statement made might be used in a court proceeding, and that he had a right to consult with counsel prior to making a statement, and that, if he or his parents, guardians or custodian could not afford an attorney, the court would appoint one for him prior to any questioning.

The courts have incorporated Rule 7 into the *totality of the circumstances* test. See *State v. Jackson*, 118 Ariz. 270, 576 P.2d. 129 (1978); *State v. Toney*, 113 Ariz. 404, 555 P.2d. 650(1976); *State v. Rodriguez*, 113 Ariz. at 584, (cont. on pg.3) <sup>438</sup>

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Editor: Russ Born

Assistant Editors: Jim Haas  
Lisa Kula

Office: 11 West Jefferson, Suite 5  
Phoenix, Arizona 85003  
(602) 506-8200

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491 P.2d. at 18 (1976). Therefore the voluntariness analysis must include an examination of all the factors surrounding a juvenile and his or her statements. *See Pima County Juvenile Action No. 97036-02*, 164 Ariz. 306, 311, 792 P.2d 769, 774 (App.1990). While many of these factors are mirrored in adults, the several that are unique to juveniles must be considered with extra scrutiny.

Two of the most important factors that must be examined are the juvenile's age and lack of sophistication. A.R.S. § 13-501 provides that juveniles as young as 14 years of age can be directly prosecuted in the adult court. Prior to the enactment of this law, the only vehicle available to the state to try juveniles in the adult court was by way of the transfer hearing. In the transfer hearing, many factors were addressed. However, the most important or deciding factors were generally the age of the juvenile in relation to his juvenile record. The practical effect was that by the time a juvenile had compiled enough of record to be considered for transfer, the juvenile was often within sight of his eighteenth birthday. The new law has created the reality of 14- or 15-year-olds finding themselves in adult court with little or no experience in life let alone, the criminal justice system. The courts have repeatedly acknowledged that youth and lack of sophistication are of paramount importance when evaluating voluntariness of confessions and the propriety of the police conduct surrounding these confessions.

It is well established that an objective test is used to evaluate police interrogation. *See Colorado v Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L. Ed.2d 473 (1986). However, the Arizona high court has added a subjective component that may help juveniles escape police coercive conduct. The court, commenting on *Connelly*, held that the evaluation should be made in light of what the police should perceive from the suspect's physical or mental condition. *State v. Carrillo*, 156 Ariz. 125, \_\_\_, 750 P.2d 883,895 (Ariz. 1988). The court elaborated on the conditions that must be considered. Among these are poverty, the mental deficiency, youth, or inexperience. To those who have dealt with juveniles for any length of time, these factors sound quite familiar and it would be safe to say that this describes a great deal of our clients.

In *Carrillo*, the court held that while police are permitted to outsmart, they are not permitted to compel. Compulsion is explained by the courts as gaining, through artifices or techniques, confessions from suspects as a result of their particular diminished capacities. *Id.* Therefore, acceptable methods of police work for adults may not be acceptable for juveniles. Of particular

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importance to juveniles are the use of promises and threats in securing confessions. Juveniles have been found to be more susceptible to promises and threats and therefore must be afforded specific protections. "A confession is rendered involuntary as the result of a promise if two requirements are met: first there must be an express or implied promise, and second the defendant must rely on the promise in making the confession." *Amaya-Ruiz*, 166 Ariz. at 165, 800 P.2d. at 1273. With juveniles, these promises can be as "innocuous" as promising not to tell their parents or as "insidious" as a promise of no prosecution if the truth is told. Given the naivete and inexperience of many juveniles, these sorts of promises can be devastatingly effective. For the same reasons,

threats can also produce untrustworthy statements. As a result, the courts have held, "a confession must not be extracted by any sorts of threats or violence, nor obtained by any direct or indirect or implied promises, however slight, nor by the exertion of any improper influence... ." *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 1493, 12 L.Ed.2d

**"In *Carrillo*, the court held that while police are permitted to outsmart, they are not permitted to compel. Compulsion is explained by the courts as gaining, through artifices or techniques, confessions from suspects as a result of their particular diminished capacities."**

653 (1964).

Confessions can also be extracted by other police conduct. Standard practices such as transporting the defendant to the police station, making the defendant the focus of the investigation, placing him in the interrogation room, have been found to be potentially overly coercive. *See State v. Carrillo*, 750 P.2d 883, 156 Ariz. 125, (Ariz. 1988). The Supreme Court in, *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct.302, L.Ed. 224 (1962), put it quite succinctly in stating that "Age 15 is a tender and difficult age for a boy... . He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."

While the legislature and prosecutors can change the laws and public perception, they cannot change reality. The reality is that children are different from adults. The courts have gone to great lengths to protect children from the overbearing nature of the criminal justice system. With the aforementioned cases and principles as a starting point from which to begin the battle, we may be able to use the arena of the adult court to protect juveniles from the superstition and fear that political posturing and media sensationalism has created. ■

## EXECUTIVE CLEMENCY OR YES, VIRGINIA, THERE IS A SANTA CLAUS

By Carol Carrigan  
Deputy Public Defender - Appeals

Your client is led away in chains to begin serving the minimum (but mandatory) sentence. You know that the punishment well exceeds the crime. Is there anything you can do?

As you well know, the Arizona sentencing scheme leaves little or no discretion for sentencing judges and, all too often, results in the imposition of a term unwarranted by the defendant's actions or dangerousness to the community. Judges often lament the fact that prosecutors have more power in sentencing than they do. As the law now stands, a judge who refuses to impose the mandatory (but excessive) sentence is guilty of malfeasance. A.R.S. 13-604(Q). Although sentencing is a judicial function, our courts have shown no inclination to wrest back that function from prosecutors or legislators who delight in enacting ever more punitive sentencing provisions in order to obtain or retain office. But there may be something you can do for the client whose crime and circumstances do not and should not warrant the term imposed.

Arizona Revised Statutes Section 13-603(L) provides that if the sentencing court enters a special order explaining that the mandated sentence is clearly excessive, the person committed to DOC has ninety days in which to petition the Board of Executive Clemency for commutation of sentence. Unfortunately, the Superior Court Clerk's Office has little knowledge or appreciation of the importance of this provision and, in the past, little information was available to the defendant who must petition for clemency within ninety days or waive the privilege.

If you have been anguishing over the amount of time your client must serve and you feel that it is appropriate for your client to petition for clemency, you should proceed as follows:

- 1) If the circumstances warrant, move the sentencing judge for a special order pursuant to A.R.S. § 13-603(L) setting forth all the reasons the sentence is excessive. Make it easy for the trial judge by listing every reason which you want to appear in the minute entry

including, if appropriate, the number of years which would be proper, given the circumstances of the crime and the defendant.

- 2) If the court grants the motion, ask that a copy of the special order (with reasons listed), accompanied by any statements of the state and the victim, be sent to the Board of Executive Clemency. Ask that the Board of Executive Clemency be noticed on the minute entry.

- 3) Get a copy of the minute entry to send to your client.

- 4) Send a notice advising the client of the court's special order and the ninety-day time limit. A form letter should be maintained by the lead secretary in each trial group which reads approximately as follows:

Dear Mr./Ms. \_\_\_\_\_:

At the time of your sentencing, the court entered a special order permitting you to petition the Board of Executive Clemency for a commutation of sentence. You must, however, do this within ninety days from the date of your sentencing. In order to assist you, I am enclosing with this letter a copy of the court's minute entry setting forth the specific reasons for concluding that your

sentence is excessive, along with a copy of my motion for the special order, and copies of the statements of the state and the victim. Your petition should be written on the "Commutation of Sentence" application

which I am also enclosing and you should attach the documents I have mentioned. (You may wish to help your client with the application.) Address the petition to the Board of Executive Clemency at 1645 West Jefferson, Suite 326, Phoenix, Arizona 85007.

Following this article is a copy of the Commutation of Sentence application (Note: these can also be obtained from the prison counselors) and the Board's policy and procedure directive. Good luck! ■

## DUI ALERT

By Russ Born  
Training Director

Anyone who has defended an aggravated DUI case where the felony status is based on the defendant's prior DUI convictions, knows the drill. The current case against your client was very weak. But the trial is over! You walk back to talk to the jurors about why they convicted. If they talk to you, it all boils down to one thing; "Well, I did not think the state had a really strong case" or "I really had some questions about *this charge*" but . . . "Those prior DUIs really bothered me."

Whether you're a judge, prosecutor or defense attorney there is one thing that we can all agree upon. It is that jurors pay attention to prior convictions. This is especially true in the case of aggravated DUI trials. In those cases, the overwhelming prejudicial effect of prior DUI convictions cascades over the jurors. The real facts of the trial are swept away as the jurors are driven toward a conviction. They cannot ignore nor put into proper perspective the prior DUI's. The reason for that is fairly simple. Jurors are normal everyday people. In the real world, prior experiences form the basis for making current or future decisions. Naturally, a lot of weight is given to a persons past behavior as a predictor of future performance. That is why jurors will ignore the evidence and convict. It amazes me every time someone argues that admitting a prior DUI conviction in a DUI trial is not overly prejudicial. Common sense tells you otherwise.

Recently the Court of Appeals relied on some of that good common sense and decided *State v. Root*, 1 CA-CR 97-0737, slip op., 1998 WL 849790 (Ariz. App. Div. 1 1998). The Court of Appeals in *Root* recognized the prejudicial effect of allowing jurors to hear about prior DUI convictions in aggravated DUI cases. In *Root* the court held that when a defendant is willing to stipulate to the aggravating elements the stipulation must be accepted and the convictions kept from the jury. *Root* is important because it was decided after another Division One opinion *State v. Galati (Petersen)*, 282 Ariz. Adv. Rep. 8 (CA App. Nov. 10, 1998). In *Petersen*, a different panel of Division One, ruling on a similar aggravated DUI case, reversed a trial court's decision that kept the priors from being disclosed to the jury. But even in *Petersen* the majority opinion found that the trial court's order was well

reasoned. They simply felt that it was contrary to controlling Arizona authority. Essentially, the Court of Appeals in *Petersen* found that it was irrelevant whether they agreed with the trial judge; only the Arizona Supreme Court could modify its case precedent and court rules. Judge Kleinschmidt, however, wrote an excellent dissent in *Petersen* and came to the conclusion that the trial court's procedure was proper and not an abuse of discretion.

### Which case rules?

The question is, what do you do with current aggravated DUI cases, where prior DUI convictions or suspended licenses are the aggravating elements? A petition for review to the Arizona Supreme Court has been filed in *Petersen* and a companion case, *Bradshaw*. But what do you do in the meantime? You could try and continue those aggravated DUI cases until a decision

comes down from the Arizona Supreme Court. If that is not practical there is another solution. You should argue that *Root* is the better analysis and it came out after *Petersen*. Additionally, it should be pointed out that if the procedures in *Root* are followed

(stipulation kept from the jury) but *Root* is overruled, no reversible error has occurred. If *Petersen* is overruled and the priors were allowed before the jury, there may be reversible error built into the case. It is better to err on the safe side and keep the prior convictions from the jury.

### Procedure

How do you go about accomplishing your goal? This is done by a modified plea proceeding. John Rock, from our office, was the trial attorney in *Petersen* and also did the special action and petition for review. Along with Dan Carrion, who heads our DUI Unit, they came up with the four short forms necessary to ensure that both the state and defendant are treated fairly. One form is a modified copy of the indictment which will be read to the jury. This one has been sanitized to exclude the element of prior DUI convictions or suspended license. On that same form is an offer of agreement that the defendant signs. It acknowledges that if the defendant is found guilty of a DUI by the jury, then he will be guilty of aggravated DUI. The second form, consist of two separate stipulations, one for the prior misdemeanor DUI's and another for the suspended licenses. (See attached stipulations at the end of the newsletter).

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## Conclusion

The suggested stipulation or guilty pleas conclusively establish the aggravating elements. This obviates the need for a court to conduct a bifurcated mini-trial or for the state to prove aggravating elements. It benefits judicial economy and simplifies the state's burden of proof. More importantly, the tension created between the need for the state to prove the DUI priors, versus the defendant's right to a trial free from unfair prejudice, is eliminated. In other words, this is a good common sense solution. ■

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## A WORKING INMATE IS A HAPPY INMATE

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By Michael Rossi  
Deputy Public Defender - Group C

Is your client capable of working? Does your client have access to transportation to and from work? Does your client have a history of violent convictions or a pattern of violent behavior within the last five years? Depending on the answers to these questions and several others, your client may be eligible for Work Furlough and/or Work Release.

### Sponsors

The Work Furlough Program is operated by the Adult Probation Office and the Work Release program is run by the Maricopa County Sheriff's Office.

### Employment

Employment is necessary in order to be eligible for the Work Furlough Program. If an individual is self-employed or is a business owner, he/she must provide the APO with any of the following: business records, verifiable business address, client list, or any other supporting documentation as proof of their independent business status. If your client is not employed prior to being sentenced, tell that person to acquire a job or they can get involved with the Job Search Program after being in custody for one week. This program allows clients five half days to find a job while in custody. If they cannot find a job within that time, they lose their only chance. On the other hand, a job is not necessary to be eligible for Work Release.

**“An individual is charged \$125.00 up front, payable by money order, for participation in the program. In addition, a participant must also be willing to part with one hour's gross pay + \$2.00/day that they work (\$7.00 minimum).”**

## Eligibility/Screening

Work Furlough is an option after either the plea is accepted or there is a deferred sentence. If there is a stipulated jail term, an individual is automatically eligible for Work Furlough. An individual can become eligible for the Work Furlough program in several ways.

The APO can screen the individual and determine that they are a candidate for the program. In doing so, the main factor that the APO considers is if the individual is before the court because of some violent activity, and if so, the APO will automatically determine that the individual is not a candidate for the program. For all intents and purposes, violent activity includes any offense where there is a weapon, the discharge of a gun, or some form of assault. However, there is still hope for that violent offender. The judge can either override the APO's determination or just outright place that individual in the program.

On the other hand, there is but one way to become eligible for work release: a judge's order. Unfortunately, I cannot quantify what the judges look for in making their determinations. My advice is to get out the brush and paint the best picture possible.

### Screening Locations

Individuals are screened by the probation department at either their Central Court or Southeast Facility offices. Further, a request can be made by the defense attorney or jailed client to be screened while awaiting sentencing.

### Costs

Simple premise: work furlough does not come cheap. An individual is charged \$125.00 up front, payable by money order, for participation in the program. In addition, a participant must also be willing to part with one hour's gross pay + \$2.00/day that they work (\$7.00 minimum). The additional \$2.00/day is assessed as an administrative fee. Example: person is paid \$7.00/hr., he has to pay the Work Furlough Program \$9.00 per day of work. And as a final nail in the proverbial coffin, the judge may also order that a work furlough participant pay monthly probation fees. Naturally, one will want to argue against this, as it inherently appears to be double-dipping.

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Work release, however, is a freebie. There are no additional costs incurred by a participant in this program. Chalk another one up for work release.

### Work

Participants in either program must agree to go only to their place of employment. If they get fired or finish early one day, they must immediately report back to the In-Tents. Under the Work Furlough Program, the hours of release are set by the Work Furlough Officer and will be based on the actual hours reported by the employer and appropriate travel time. Changes in hours/days can only be made by the Work Furlough Officer. With the Work Release program, the judge orders the hours of release, and only the sentencing judge can alter work hours/days. With both programs, release hours cannot exceed twelve hours per day, up to six days per week. DUI cases are limited to five days of work per week.

### Earnings

Under the Work Furlough Rules and Regulations, a participant must turn over all earnings to the Work Furlough Program. ( See Costs.) Work Furlough fees will be deducted from these earnings. On the flip side, earnings of a work release participant will continue to be allocated as they were prior to entrance in the program.

### Clothes and Personal Items

Common to both programs is the fact that a participant can bring a jacket or sweater, two towels (which must stay in the facility), one non-electric clock, a plastic flashlight (no larger than typical 2 D-cell), and is allowed to carry up to \$20.00/day. Personal hygiene items are not allowed, except for those purchased through the inmate vending machines. Additionally, if an individual is entered into the work furlough program, he/she can bring five sets of clothing (shirts, pants, socks, and underwear) and two pairs of shoes.

### Additional Concerns

Before a client is permitted to be furloughed, he or she will need to have a Letter of Understanding (standard form provided by the program) completed by his/her employer. This letter states the offense committed and may raise some red flags with employers. Further, another letter must also be provided by the employer on company letterhead acknowledging the employer's understanding of the charge. In addition, participants have to provide a driver's license, auto insurance, vehicle description,

license plate numbers, and current registrations for all vehicles that they drive or may drive. Once all the paperwork is submitted, it will take 48 hours from their intake to be furloughed. If they are found eligible while in custody, it will take 5-7 days before they will be furloughed.

Lastly, the probation terms are still in effect when a client participates in Work Furlough. The Work Furlough Officer may randomly screen clients for drugs and/or alcohol. If the Officer makes the determination that your client is not doing well on the program, he will have to serve the remaining time without the furlough opportunity.

### Best Chances

In my short tenure, I have come to the realization that it is best to have "Work Furlough and/or Work Release" language stipulated to in the plea offer, especially those coming from justice court. I would rather have the option stated in the plea, as the judge is obviously more inclined to grant it. In addition, if the PSI states that they feel your client is a candidate for work furlough, jump at the chance. "A working inmate is a happy inmate," this is my motto, or did I hear that somewhere else? ■

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## UNITED WAY THANKS

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By Dean Trebesch  
Public Defender

It is with great pleasure that I thank Judi Wheeler, her committee members Tim Bein, Jeanne Hyler, Ellen Hudak, and all the volunteers and donors in the office who gave to the United Way during our recently concluded campaign.

It was a major success! In fact, although our goal this year rose from \$10,000 to \$13,000, our undaunted workers ended the campaign with \$17,456.02. This incredible record was reached with the help of 41 first time givers, 20 givers who increased their donation from last year by at least 10 percent, and 8 givers who contributed \$500 or more.

I especially want to thank our coordinator, Judi Wheeler, for her innovative and enthusiastic efforts, and for her many hours of dedication to the project. Beyond

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normal pledges, she engineered our successful raffle tickets, candy grams, tee shirt sales, and casual day sticker sales promotions.

At this holiday season, it is heart-warming to see the tremendous outpouring of human kindness exhibited by our employees. Not only do we conscientiously render legal assistance to our indigent clients every day, but numerous organizations have found our willing employees ready to help those less fortunate in our community.

Other than the United Way, I am personally aware of several charitable efforts underway in the office. As just one example, Terri Zimmerman indicates that 67 individuals from our office have signed up to work on the Legal Community Builds Habitat for Humanities House.

We truly have an amazing group of dedicated, caring people working here. Thanks for your help. ■

## ADDRESSING HARASSMENT RELATED ISSUES

*Editors Note: The following is printed for staff information. Please contact your supervisor if you need additional information.*

### INTRODUCTION

This practice and procedure defines and outlines the procedures for reporting, investigating, and resolving harassment-related complaints. Requests for assistance and advice in preventing or eliminating sexual harassment or in correcting apparent sexual harassment may be obtained from the Employment Relations Division of the Human Resources Department.

### PRACTICE

1. Maricopa County prohibits sexual, gender, racial, and ethnic harassment by all employees at all levels.
2. Harassment is any conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Harassment includes, but is not limited to:
  - A. Explicitly or implicitly ridiculing, mocking, deriding, or belittling any person.
  - B. Making offensive or derogatory comments based on race, color, sex, religion, or national origin to another person, either directly or indirectly. Such harassment is a prohibited form of discrimination under both state and federal employment laws.
3. Sexual Harassment is defined as any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
  - A. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
  - B. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
  - C. Such conduct has the purpose or effect of reasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment. Retaliation against an employee or applicant for filing a sexual harassment complaint may be considered to be grounds for a new sexual harassment complaint.
4. Sexually Harassing behaviors include unwanted sexual advances and physical contact with someone who considers that behavior unacceptable, requests or demands for sexual favors, and verbal abuse or kidding considered unacceptable by another individual to include jokes or comments that offend others.
5. It is the responsibility of all County employees, supervisors and appointing authorities and department heads to actively pursue the elimination of discrimination in County employment. All incidents of alleged harassment involving County employees which cannot be resolved within the department should be called to the attention of the Human Resources Department, Employee Relations Division. County employees should raise sexual harassment questions promptly so that an immediate investigation may be conducted and appropriate steps taken.
6. After a through investigation has been conducted by either the department or the Human Resources Department, employees who are determined to have been involved in the harassment of another person while on duty or while representing Maricopa

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County will be disciplined according to Maricopa County Employee Merit Rules. This discipline may include dismissal from County Employment.

#### PROCEDURE

1. Any employee who believes that he or she is being harassed by a supervisor, co-worker, customer or client should promptly take the following action:

A. The person felt to be involved in the harassing should be confronted in a polite, but firm, manner. This person should be told how the harassing is perceived and to cease it immediately. Feelings of intimidation, offense or discomfort should be expressed to the harasser. If practical, a witness should be present for this discussion. If a confrontation is not possible, a memorandum should be written describing the incident(s) of harassment, the date(s), a summary of any conversations with the harasser and the harasser's reactions. This should be retained for future use.

B. If the harassment continues or if it is felt that some employment consequences may result from the confrontation with the harasser, the employee may, either orally or in writing, bring the complaint to a higher level supervisor, the department head, other appropriate person within the office or the Employee Relations Division of the Human Resources Department. This should be done as soon as possible so the problem may be resolved. Employees in our department with questions or concerns may follow one of two approaches, (1) discuss the matter with a supervisor, progressing through the normal "chain of command" and skipping the immediate supervisor if that individual is the offending party, or (2) discuss the matter with one of our office's designated harassment contact people: Rena Glitsos, Jim Haas, or Diane Terribile.

C. If the employee is dissatisfied with the actions of the supervisor or departmental staff, the complaint may be brought to the Employee Relations

Division of the Human Resources Department in accordance with the Procedure detailed herein.

D. The Employee Relations Division of the Human Resources Department is available to provide advice to any employee who feels that he or she may be a victim of sexual harassment or has any questions on the issue. All inquiries and complaints directed to Employee Relations will be treated in a confidential manner unless directed otherwise by the employee.

2. It is the responsibility of the Department to:

A. Make employees, including supervisors, aware of the County policy regarding sexual harassment. A department may even wish to issue its own internal policy emphasizing the importance of eliminating sexual harassment in the department.

B. Formally make supervisors aware of sexual harassment problems and express employer disapproval of sexually harassing conduct.

C. Encourage open communication so that employees will not feel uncomfortable in bringing forth complaints.

D. Investigate all complaints impartially and promptly, keeping the complaint as confidential as possible.

E. Upon learning of harassment, take prompt corrective actions.

3. It is the responsibility of the Supervisor:

A. Set a good example. Do not participate.

B. Do not condone even seemingly innocent acts of discrimination or harassment.

C. Remember that you are management's representative.

4. It is the responsibility of the Employee Relations Division of Human Resources:

A. To thoroughly investigating employment discrimination allegations brought to its attention by County employees or job applicants, including all complaints of sexual harassment. The Employee Relations Division will notify the department

(cont. on pg.10)

when a complaint is received and work closely with the department throughout its investigation in a spirit of cooperation to reach a resolution. All complaints are handled in a manner which is confidential and will help preclude retaliation against the employee.

5. Complaint procedures:

A. The Public Defender must be notified of all incidents involving sexually harassing behavior which occur while an employee is on duty or representing the Public Defender's Office.

B. Any office supervisor who receives a complaint of discrimination or sexual harassment, observes behavior which meets the definitions as outlined in this guideline, or otherwise learns of behavior which meets that definition is expected to immediately notify the appointed harassment contact people. An immediate and thorough investigation will be conducted. Upon conclusion of the investigation, the Public Defender will determine the appropriate course of action.

i The immediate supervisor of an employee involved in a harassment complaint shall treat the complaint as confidential and be responsible for taking the following actions:

a. Meeting with the employee to discuss allegations.

b. Document the alleged incidents, the persons performing or participating in the alleged harassment, and the dates on which the alleged incidents occurred.

c. Reporting the claim in a timely manner to the appointed harassment contact people.

6. An employee or job applicant who believes he or she has been harassed as defined in the definition section, and whose complaint has not been resolved with the department, may file a complaint with the Maricopa County Human Resources Director, 301 West Jefferson Street, 2nd Floor. Such complaints must be filed timely so that the investigation and corrective action can be effective. The employee

filing the complaint may contact the Employee Relations Division at 506-3895 for assistance.

A. Department supervisors who wish to discuss situations which may be harassment are also urged to contact the Employee Relations Division. The Employee Relations Division's investigative findings and recommendations will be reviewed with the appointing authority. ■

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## ARIZONA ADVANCE REPORTS

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By Steve Collins  
Deputy Public Defender - Appeals

*Benitez v. Dunevant*, 281 Ariz. Adv. Rep. 14 (CA 1, 10/27/98)

Defendant was convicted under A.R.S. Section 28-3473(B) for driving on a suspended license. The license was suspended because of a DUI conviction. The Court of Appeals held Defendant was entitled to a jury trial because of the potential "grave consequences" of six months in jail, a \$2,500 fine and a one-year suspension of his driver's license.

A.R.S. Section 22-320 provides that a jury trial is waived in municipal court unless it is requested at least five days before trial. The Court of Appeals held this provision is not unconstitutional. Although defendant failed to request a jury trial, it was held he did not waive this right because neither he nor his attorney had reason to believe there was a right to a jury.

*In re Frank H.*, 281 Ariz. Adv. Rep. 28 (CA 1, 11/3/98)

In this consolidated case of eight juveniles, judges set deadlines for victims to assert claims for restitution. The deadlines ranged from seven to forty-five days after the disposition hearing. The Court of Appeals held the deadlines were appropriate.

The State argued the juvenile court has jurisdiction under A.R.S. Section 8-344(A) to modify restitution until a juvenile's eighteenth birthday. The Court of Appeals disagreed, stating the statute only allows modification of the manner in which restitution payments are made.

*State v. Flannigan*, 281 Ariz. Adv. Rep. 30 (CA 1,

(cont. on pg.11) ☞

11/3/98)

Defendant was convicted of negligent homicide and aggravated assault. Police suspected Defendant had ingested either cocaine or methamphetamine prior to a traffic accident. Pursuant to a Mesa Police Department procedure in all traffic cases involving serious injury, officers did not attempt to obtain a warrant before having blood drawn from Defendant.

At the suppression hearing, police conceded that it was usually possible to obtain a telephonic search warrant in fifteen to forty-five minutes. A police criminalist testified a delay of forty-five minutes in obtaining a blood sample probably would not preclude detection of a stimulant in the blood.

Reviewing the case *de novo*, the Court of Appeals held the prosecution failed to prove exigent circumstances justifying a warrantless blood draw. Further, the prosecution failed in its burden of proof in establishing consent to the draw by Defendant. "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."

Defendant was convicted under A.R.S. Section 13-1204(B) which provides aggravated assault is a class 2 felony if the victim is under the age of fifteen. Otherwise, it is a class 3 felony. Defendant argued this imposed an arbitrary enhancement because he was convicted for reckless rather than intentional or knowing conduct. It was merely fortuitous that a passenger was under the age of fifteen.

*State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (1993), also involved a traffic accident in which a child under the age of fifteen was injured. The Arizona Supreme Court held reckless aggravated assault was not a "dangerous crime against children" under A.R.S. Section 13-604.01. That section applies only if a defendant's conduct specifically targets a child under the age of fifteen. The Court of Appeals held *Williams* did not apply in the present case because Defendant was not charged under Section 13-604.01.

***State v. Lujan*, 281 Ariz. Adv. Rep. 6 (SC, 10/22/98)**

Defendant was convicted of one count of child molestation for touching a child in a swimming pool. Defendant admitted to touching the child but not in the genital area.

The child was molested by two other men. Defendant moved to introduce this evidence. At the hearing on the motion an expert testified a child who had been molested might develop "hypersensitivity" and thus

misperceive the nature of any physical touch by another adult male. The trial judge precluded this testimony.

The Arizona Supreme Court reversed stating opinion testimony describing behavioral characteristics outside jurors' common experience is permitted as long as it meets other admissibility requirements. The Arizona rape shield law did not apply because the evidence was not offered to impugn the alleged victim's moral character, but was intended solely to help explain the subconscious mental processes that might have affected the child's perception.

***In re Charles B.*, 282 Ariz. Adv. Rep. 24 (CA 1, 11/19/98)**

The juvenile was a normal eleven-year-old boy but was found mentally incompetent to understand the delinquency process. It was proper to dismiss the case "without" prejudice.

***State v. Doerr*, 282 Ariz. Adv. Rep. 14 (SC, 11/12/98)**

During jury selection, a panelist who once directed the Phoenix Crime Lab stated he could not be impartial because he knew several of the police officers and felt they had high integrity. Another panelist was a prison guard and he stated he had only encountered three inmates who were not guilty. It was held these statements did not taint the jury. Further, it was held it was not vouching because the witnesses were not prosecutors. Admission of an "in-life" photograph of the victim was harmless error.

The trial judge excused five teachers from the jury panel because it would impose a hardship on them and their students to be gone for a week. This was held to be proper. Defendant was sentenced to death. The opinion has a discussion of aggravating and mitigating factors.

***State v. Galati*, 282 Ariz. Adv. Rep. 8 (CA 1, 11/10/98)**

Defendant was charged with aggravated DUI because his driver's license had been suspended. He offered to stipulate that his license was suspended so the jury would not be told of this fact. The majority of the court held this was an element of the crime and must be told to the jury.

The dissenting judge disagreed with the majority's finding that *State v. Geschwind*, 136 Ariz. 360, 666 P.2d 460 (1983) was controlling. He found that especially in light of *Old Chief v. United States*, 117 S. Ct. 644 (1997), the prior bad act of a suspended driver's license should have been kept from the jury. Under Arizona Evidence Rule 403, the prejudicial effect outweighed the probative value.

***State v. Hughes*, 282 Ariz. Adv. Rep. 31 (SC, 11/19/98)**  
(cont. on pg.12) ☞

Generally the doctrine of cumulative error is not recognized in Arizona absent related errors. Multiple instances of prosecutorial misconduct are "related errors" when they are so pronounced and persistent that they permeate the entire atmosphere of the trial.

The Arizona Supreme Court noted the prosecutor was the same one who intentionally engaged in misconduct in *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984). In the present case he committed misconduct by commenting on Defendant's failure to testify and insinuated that defense counsel and mental health experts conspired to fabricate an insanity defense. The prosecutor improperly told the jury Defendant had been found mentally competent to stand trial.

The prosecutor insinuated that if the jury acquitted Defendant by reason of insanity, they would be responsible when he later kills someone else. This was an improper appeal to fear and improperly discussed potential punishment. The case was reversed and remanded for a new trial.

***State v. Moody*, 282 Ariz. Adv. Rep. 11 (SC, 11/12/98)**

Defendant was charged with two counts of first degree murder and was sentenced to death. He wished to proceed with a defense that space aliens were in control of his body, and he was merely an unconscious observer of the murders.

The assigned public defender refused to present this evidence. Defendant expressed frustration at his attorney's failure to interview witnesses and threatened to file ethical complaints with the Arizona State Bar. Confidence in counsel was also undermined when a detention officer told Defendant that with his assigned counsel, Defendant might as well plead guilty, because his lawyer "keeps his files in his shirt pocket."

Defense counsel had called Defendant "crazy" both to his face and to the press and told Defendant he did not care about his case. Defense counsel allegedly had a party to celebrate when Defendant was originally found incompetent to stand trial.

Defense counsel claimed his "unfair and oppressive trial schedule" left him unprepared and exhausted. He told the trial judge, "it would be the happiest day in my life if you took me off the case." He stated he believed Defendant would cooperate with another attorney.

The Arizona Supreme Court found the trial judge's refusal to assign a new attorney left Defendant with the choice of representation by a lawyer with whom he had an "irreconcilable conflict," or self-representation. This was an abuse of discretion and rendered Defendant's waiver of  
*for The Defense*

counsel involuntary. The case required automatic reversal because "the deprivation of a defendant's Sixth Amendment right to counsel infects the entire trial process." ■

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## BULLETIN BOARD

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### *Attorney Moves/Changes*

**Gary Bevilacqua** will transfer from Group D to the Major Felony Unit on January 11. Due to the expansion of this Unit, **Emmet Ronan** will assume supervisory duties for the Unit. He will remain in Mesa.

### *New Support Staff*

**Lisa Araiza** returned to Group B as a legal secretary on December 7. Welcome back!

**Carmen Black** will become the new Administrative Assistant for Appeals on January 11. Carmen's most recent experience was providing administrative support at Maverick Investigations.

**Andrea Fries** will join our Dependency Division on December 28, as our new Client Services Coordinator. She comes to us from Child Protective Services.

**Jodi Shuptrine** became the Office Aide for Group D on December 7. She was previously employed doing general office work for a temporary agency.

### *Support Staff Moves/Changes*

**Carol Hickman** left the Records division on November 24.

**Marc Hodge**, Law Clerk, left Group D effective December 8, and is returning to Colorado.

**Alicia Miner**, Office Aide in Group D, left the office on November 30.

**Jason Swetnam**, was promoted to DFM for Group A on November 30. ■

## November 1998 Jury and Bench Trials

### Group A

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/14-10/16	Lehner & Wuebbels Clesceri	Dougherty	Manning	CR 98-03670 Robbery/ F4	Not Guilty	Jury
11/2-11/3	Rossi & Wall	Baca	Lockhart	CR 98-06818 Unauth Use of Motor Vehicle/ F6	Not Guilty	Jury
11/2-11/4	Reece	Cole	Freeman	CR 98-01666 Armed Robbery/ F2 Agg. Assault-Dang./ F3	Guilty	Jury
11/3-11/3	Reece	Baca	Hudson	CR 98-08311 Agg. Assault/ F2 Burg 1/ F 2 Crim. Damage/ F6	Dismissed with prejudice	Jury
11/3-11/3	Klepper	Jarrett	Kramer	CR 98-09972 POM/ F6 PODP/ F6	Not Guilty on PODP Guilty on POM	Jury
11/4-11/6	Klepper	Baca	Poster	CR 98-07289 2 cts Agg. DUI/ F4	Hung on Count 2-Agg. DUI (.10 or above) Guilty -Agg. DUI (impairment), Guilty of lesser included Driving on a Susp. License	Jury
11/10-11/10	Leal	Dunevant	Bernstein	CR 98-09976 Res. Arr./F6 I.J.P./ M1	Not Guilty-Resist. Arrest Guilty-I.J.P.	Bench
11/12-11/16	Parsons & Flores Jones	Schneider	Clarke	CR 96-12997 Agg. Assault/ F3	Hung jury 7 to 1	Jury
11/17-11/17	Lehner & Howe	Dairman	Bustamonte	CR98-04012 Resisting Arrest/ F6	Guilty of Lesser Included	Bench
11/18-11/18	Hernandez	Reinstein	Lockhardt	CR 98-09469 POM/ F6 PODP/ F6	Not Guilty of PODP Reduced POM to M1 in exchg for a bench trial Guilty of POM	Bench
11/18-11/23	Lawson & Green Clesari	Hilliard	Hernandez	CR 98-04898 2 cts Agg. Assault ./ F3D Drive by shooting / F2D	Not Guilty Hung 8 - 4	Jury
11/30-12/1	Farney	McVey	Sigmund	CR 98-03672 2° Burg./ F3 Agg. Assault/ F6	Mistrial	Jury

## Group B

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
10/26-11/3	<b>Blieden &amp; Agan</b>	Dougherty	Mitchell	CR 96-11821 Sexual Assault/ F2 Agg. Assault/ F2D Kidnapping/ F2D 4 cts. Sexual Asslt/ F2D 4 cts. Sexual Abuse/ F5D	Guilty	Jury
10/29-11/2	<b>Noble Erb &amp; Lopez</b>	Arellano	Lemense	CR 98-04022 Sale of Nar. Drugs/ F2	Guilty	Jury
11/2-11/5	<b>Lemoine &amp; Washington Castro Brink</b>	Hotham	Frick & Lemense	CR 98-04405 2 cts. Aggravated Assault/ F3	Guilty	Jury
11/2-11/5	<b>Agan</b>	Hutt	Kuffner	CR 98-08763 Armed Robbery/ F2	Guilty	Jury
11/3-11/4	<b>Peterson</b>	Magnum	Kerchansky	CR 98-09554 2° Burglary/ F3	Guilty	Jury
11/09-11/10	<b>Blieden</b>	Hutt	Merchant	CR 98-01620 Aggravated Assault/ F6 Resisting Arrest/ F6	Not Guilty Guilty	Jury
11/10-11/17	<b>Park Ames</b>	Bolton	Rahi-Loo	CR 98-01570 Resisting Arrest/ F6 Trespassing/ F6	Guilty	Jury
11/12-11/17	<b>Burns Ames Kasieta</b>	Gerst	Merchant	CR 98-09879 1 ct. Aggravated Robbery/ F3	Guilty	Jury
11/12-11/20	<b>L. Brown Erb</b>	Wilkinson	Proudfit	CR 98-07424 Poss. of Narcotic Drugs for sale/ F2	Hung Jury/ Mistrial 5-3	Jury
11/12-11/25	<b>Bublik &amp; Bransky Castro Brink</b>	Dunevant	McIlroy	CR 98-03590 1° Murder/ F1	Not Guilty	Jury
11/20-11/24	<b>Gray</b>	Hutt	Boyle, J	CR 98-04789 2 cts. Agg. DUI/ F4	Guilty	Jury
11/23-11/23	<b>Noble</b>	O'Toole	Clarke	CR 98-07344 2 cts. Custodial Interference/ F6 (reduced to misdemeanor)	Dismissed	Bench
11/23-11/24	<b>Goodman &amp; Peterson</b>	Dougherty	Ainley	CR 98-12097 1 ct. Aggravated Assault/ F6	Guilty	Jury
11/24-11/24	<b>Taradash Castro</b>	Kaufman	Frick	CR 96-13556 2 cts. Agg. Assault/ F3D	Dismissed	Jury

## Group C

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
11/3-11/5	Antonson Beatty	Dougherty	Fuller	CR98-92607 2 Ct. Agg Assault/ F3D	Not Guilty Both Counts	Jury
11/5-11/5	Gaziano	Barker	Stewart	CR98-91752 1 Ct. Sale of Marij./ F3	Guilty	Jury
11/6-11/6	Bingham	Ore	Sampanes	TR98-00322CR 1 Ct. DUI/ M1	Guilty	Jury
11/10-11/12	Klobas Corbett	Oberbillig	Craig	CR98-93248 1 Ct. Theft/ F5 1 prior alleged	Guilty (in Abstentia)	Jury
11/16-11/18	DuBiel Moller	Ellis	Perrin	CR98-93200 1 Ct. PODD/ F4 1 Ct. PODP/ F6	Not Guilty Both Counts	Jury
11/18-11/19	Silva & Nermyr	Aceto	Fuller	CR98-93466 1 Ct. Agg Assault/ F3D 1 prior alleged	Not Guilty	Jury
11/18-11/23	Klopp-Bryant & Walker	Keppel	Smyer	CR98-91110 1 Ct. Agg Assault/ F3	Guilty	Jury
11/19-11/20	Burkhardt & Ramos	Ellis	Carter	CR98-94095 1 Ct. Burglary/ F4	Not Guilty	Jury
11/23-11/24	Gavin Beatty	Barker	Stewart	CR97-91239 1 Ct. Offer to Sell Dang. Drug (Meth)/ F2	Guilty	Jury
11/23-11/24	Dunlap-Green & Klobas Thomas	Ellis	Carter	CR98-92756 1 Ct. PODD/ F4 1 Ct. PODP/ F6	Not Guilty of PODP Guilty of PODD	Jury
11/24-11/24	Shoemaker & Ramos	Aceto	Lundin	CR98-94200 1 Ct. POM/ F6 (Designated misdemeanor prior to trial in exchange for waiver of jury.)	Not Guilty	Bench

## Group D

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
11/4-11/4	Crews & Carrion O'Farrell	P. Reinstein	Kane	CR 97-13617 Agg. DUI/ F4	Pled to class 6 open Endangerment and misd. DUI	
11/12- 11/19	Mussman & Ferragut Barwick	Katz	Maasen	CR 97-10775 1Ct. Residential Burglary 2° / F3 1Ct. Theft/ F3 (With 2 Priors While on Probation)	Guilty	Jury

(cont. on pg.16) ☞

11/16-11/18	<b>Willmott</b>	Gottsfeld	Worth	CR 98-07922 1Ct. Agg DUI/ F4 1Ct. Agg DUI/ F4	Guilty	Jury
10/28-11/04	<b>Billar</b>	Galati	Tucker	CR 98-07682 1 Ct. Armd Robry/ F2	Guilty	Jury
10/28-11/13	<b>Schaffer &amp; Berko</b> Barwick <i>Fairchild</i>	Akers	Armijo	CR 97-07057B 1° Murder/ F1 1° Burglary/ F2	Guilty on all counts	Jury
11/19-11/24	<b>Stazzone</b> Ames	Kamin	Amato	CR 98-36618 Mscndct Inv. Wpns/ F4	Guilty	Bench

## DUI Unit

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
11/5-11/12	Timmer	Hilliard	Eckhardt	CR98-08355 1Ct. Manslaughter	Guilty	Jury

## Office of the Legal Defender

Dates: Start/Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
10/21-11/2	<b>Babbitt</b> Soto	Arellano	Inciong	CR 94-03630 4 cts. Agg. Asslt./ F3	Hung Jury 7 Not Guilty, 2 Guilty, 3 Undecided * Case pled later in month to time served with terminal disposition which saved client 19 yrs. Of original 24 yr. Sentence.	Jury
11/6-11/9	<b>Canby</b>	Gerst	Schesnol	CR 98-07689 PV 97-02314 ; 98-12970 Unlawful Use of Transportation/ F6	Not Guilty	Jury
10/22-11/4	<b>Taylor</b>	Gottsfeld	Davidon	CR 98- 09717 consolidated under CR 97-05555(B) 2 cts. Armed Rob/ F2D 1° Murder/ F1D Arson Unoccupied Prop/ F4 Attpt/Com. 1° Murder/ F2	Not Guilty - Arson Guilty - all other counts	

\*, Bar #\*  
Deputy Public Defender  
11 West Jefferson, Suite #5  
Phoenix, Arizona 85003  
(602) 506-\*

Attorney for Defendant

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

STATE OF ARIZONA, )  
 ) No. CR \*  
 Plaintiff, )  
 ) MOTION IN LIMINE  
 v. )  
 )  
 \* ) (Assigned to the Honorable  
 ) \*)  
 Defendant. )  
 \_\_\_\_\_ )

Defendant asks this Court to accept his knowing, intelligent, and voluntary admission to the aggravating element(s) of the aggravated DUI so that the jury will not be informed of his prior convictions for DUI. Defendant also requests that the indictment/information that is read to the jury omit any reference to the aggravating element(s). This motion is made pursuant to the holding of the Arizona Court of Appeals in *State v. Root*, 1 CA-CR 97-0737 (Ct.App. filed Dec. 10, 1998). See also *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644 (1997); *State v. Leonard*, 151 Ariz. 1, 725 P.2d 493 (App. 1986); contra *State v. Galati (Petersen)*, 1 CA-SA 98-0143 (Ct.App. filed Nov. 10, 1998).

Defendant offers the admissions for the following reasons:

(cont. on pg.18) 

1. The prejudicial potential of the evidence substantially outweighs any legitimate need of the state to prove, before a jury, the facts to which the defendant offers to make an admission;

2. The court's refusal to accept the admissions will encumber the trial on uncontested matters;

3. The proposed admissions and the modified guilty plea fully satisfy the state's requirement to prove the prior DUI's and the suspended license;

4. The state's sole motive in refusing the admissions and then presenting the evidence is to prejudice the jury.

5. The admissions will avoid unnecessary juror confusion.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of \*, 199\*.  
MARICOPA COUNTY PUBLIC DEFENDER

By \_\_\_\_\_

\*

Deputy Public Defender

**AGGRAVATED DUI STIPULATIONS**

Proposed Indictment to be read to the jury in lieu of listed counts in CR \_\_\_\_\_.

\_\_\_\_\_, on or about the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, drove or was in actual physical control of a vehicle while under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substance.

Defendant's offer of agreement:

\_\_\_\_\_ hereby agrees that in CR \_\_\_\_\_, if he is found guilty of:  
on \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, driving or being in actual physical control of a vehicle while his ability to do so is impaired in the slightest degree due to his consumption of alcohol,

then it will be as two counts of Class 4 Felony, AGGRAVATED DRIVING OR ACTUAL PHYSICAL CONTROL WHILE UNDER THE INFLUENCE OF INTOXICATION LIQUOR OR DRUGS, one count in violation of A.R.S. § 28-697(A)(2), both counts committed on that day and subject to all criminal penalties associated with those charges.

\_\_\_\_\_  
Deputy Public Defender

\_\_\_\_\_  
Defendant in CR \_\_\_\_\_

(cont. on pg.20) 

**AGGRAVATED DUI STIPULATIONS**

Stipulation re: Defendant's Prior Misdemeanor DUI convictions - *State v.* \_\_\_\_\_, CR \_\_\_\_\_

The parties hereby stipulate that \_\_\_\_\_ had two prior DUI convictions in violation of A.R.S. 28-692. The first occurring on \_\_\_\_\_, with a conviction date of \_\_\_\_\_. The second occurring on \_\_\_\_\_ with a conviction date of \_\_\_\_\_. Both of these convictions are within 60 months of \_\_\_\_\_.

For the Defendant:

For the State:

\_\_\_\_\_  
Deputy Public Defender

\_\_\_\_\_  
Deputy County Attorney

Approved:

\_\_\_\_\_  
Superior Court Judge

Stipulation re: Defendant's Suspended License - *State v.* \_\_\_\_\_, CR \_\_\_\_\_

The parties hereby stipulate that \_\_\_\_\_'s drivers license was suspended, canceled or revoked on \_\_\_\_\_.

For the Defendant:

For the State:

\_\_\_\_\_  
Deputy Public Defender

\_\_\_\_\_  
Deputy County Attorney

Approved:

\_\_\_\_\_  
Superior Court Judge



ARIZONA  
BOARD OF EXECUTIVE CLEMENCY

1645 WEST JEFFERSON  
SUITE 326  
PHOENIX, ARIZONA 85007  
(602) 542-5656  
FAX (602) 542-5680

EDWARD M. LEYVA  
CHAIRMAN

MEMBERS  
DUANE BELCHER, SR.  
KATHRYN D. BROWN  
DONNA FLANIGAN  
HOWARD JARRETT

COMMUTATION OF SENTENCE APPLICATION

DATE: \_\_\_\_\_

APPLICANT'S NAME: \_\_\_\_\_

ADOC# \_\_\_\_\_

DOB: \_\_\_\_\_

AGE: \_\_\_\_\_

ARE YOU APPLYING UNDER A SPECIAL ORDER BY THE COURT YES  NO   
(A.R.S. 13-603 (L))

COMMITTING COUNTY

COMMITTING OFFENSE(S)  
(Do Not Use A.R.S. Statute)

SENTENCE(S)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DETAINEES: YES  NO  IF SO, WHAT JURISDICTION \_\_\_\_\_

ARE YOU APPLYING UNDER IMMINENT DANGER OF DEATH: YES  NO

"IMMINENT DANGER OF DEATH" means that a prisoner has been examined by a medical doctor and that doctor has diagnosed the prisoner as suffering from a medical condition which, in the doctor's professional medical opinion, will to a reasonable medical certainty result in the prisoner's death within three (3) months.

STATE THE EXACT AMOUNT OF SENTENCE REDUCTION YOU ARE ASKING THE BOARD OF EXECUTIVE CLEMENCY TO RECOMMEND TO THE GOVERNOR:

---

1. INSTITUTIONAL RECORD/DISCIPLINARIES:

---

2. WHAT POSITIVE ACCOMPLISHMENTS HAVE YOU ACHIEVED SINCE IMPRISONMENT? (I.E. PARTICIPATION IN AVAILABLE EDUCATIONAL, VOCATIONAL AND THERAPEUTIC PROGRAMS? INCLUDE A DESCRIPTION OF YOUR WORK RECORD SINCE INCARCERATION.)

---

3. WHY DO YOU BELIEVE YOU ARE ENTITLED TO A CHANGE OF SENTENCE?

---

4. DESCRIBE YOUR INVOLVEMENT IN THE CRIME(S) FOR WHICH YOU WERE SENTENCED.

---

5. WHAT ARE YOUR PLANS UPON RETURNING TO SOCIETY?

---

6. GIVE ANY OTHER INFORMATION YOU BELIEVE THE BOARD OF EXECUTIVE CLEMENCY SHOULD CONSIDER.

---

---

---

APPLICANT'S SIGNATURE

---

ADOC#

---

DATE

**FORWARD THIS APPLICATION DIRECTLY TO:**

ARIZONA DEPARTMENT OF CORRECTIONS  
TIME COMPUTATION UNIT  
1601 WEST JEFFERSON  
PHOENIX, ARIZONA 85007

**ATTN TIME COMPUTATION UNIT: IF APPLYING UNDER IMMINENT DANGER OF DEATH AND APPLICANT HAS BEEN DEEMED STATUTORILY ELIGIBLE, PLEASE FORWARD THIS APPLICATION TO ADOC HEALTH SERVICES.**

COMMUTATION OF SENTENCE APPLICATION  
PAGE 3

(cont. on pg.24) 

**ARIZONA BOARD OF EXECUTIVE CLEMENCY  
BOARD POLICY**

<b>Policy Title:</b>	<b>Effective Date:</b>	<b>Policy No</b>
<i>Commutation of Sentence</i>	04/29/97	400.13
	<b>Supercedes</b>	<b>Pages:</b>
	N/A	1 of 2

**PURPOSE**

*The purpose of this policy and procedure is to establish guidelines for processing an application for commutation of sentence.*

**POLICY**

*It is the policy of the Arizona Board of Executive Clemency, to conduct a hearing for all eligible applicants to determine whether to recommend to the Governor that a Commutation of Sentence be granted. If granted, the action changes the penalty imposed by a court on a convicted felon to one that is less severe, but does not restore the inmate's civil rights.*

**AUTHORITY**

ARS § 13-603 (k)  
ARS § 31-402  
ARS § 31 411 (H)(1)(1)  
ARS § 38-431.01

**PROCEDURE**

- A. *Individuals must complete and sign the application for commutation form adopted by the Board.*
- B. *All applications made to the Governor for a commutation of sentence are transmitted to the Chairperson of the board of Executive Clemency for review. Only those applicants deemed eligible after review by the Department of Corrections, will be scheduled for a hearing.*
- C. *Only those applicants who have served two (2) years from their sentence-begin date and are not within 1 year of parole eligibility or mandatory release will be considered.*
- D. *If at the time of sentencing for an offense committed on or after 1/1/94, the court is of the opinion that the sentence that the law requires the court to impose is clearly excessive, the court may enter a special order allowing the person sentenced to petition the Board for a commutation of sentence within 90 days*

*(cont. on pg.25)*

after the person is committed to the custody of the state department of corrections.

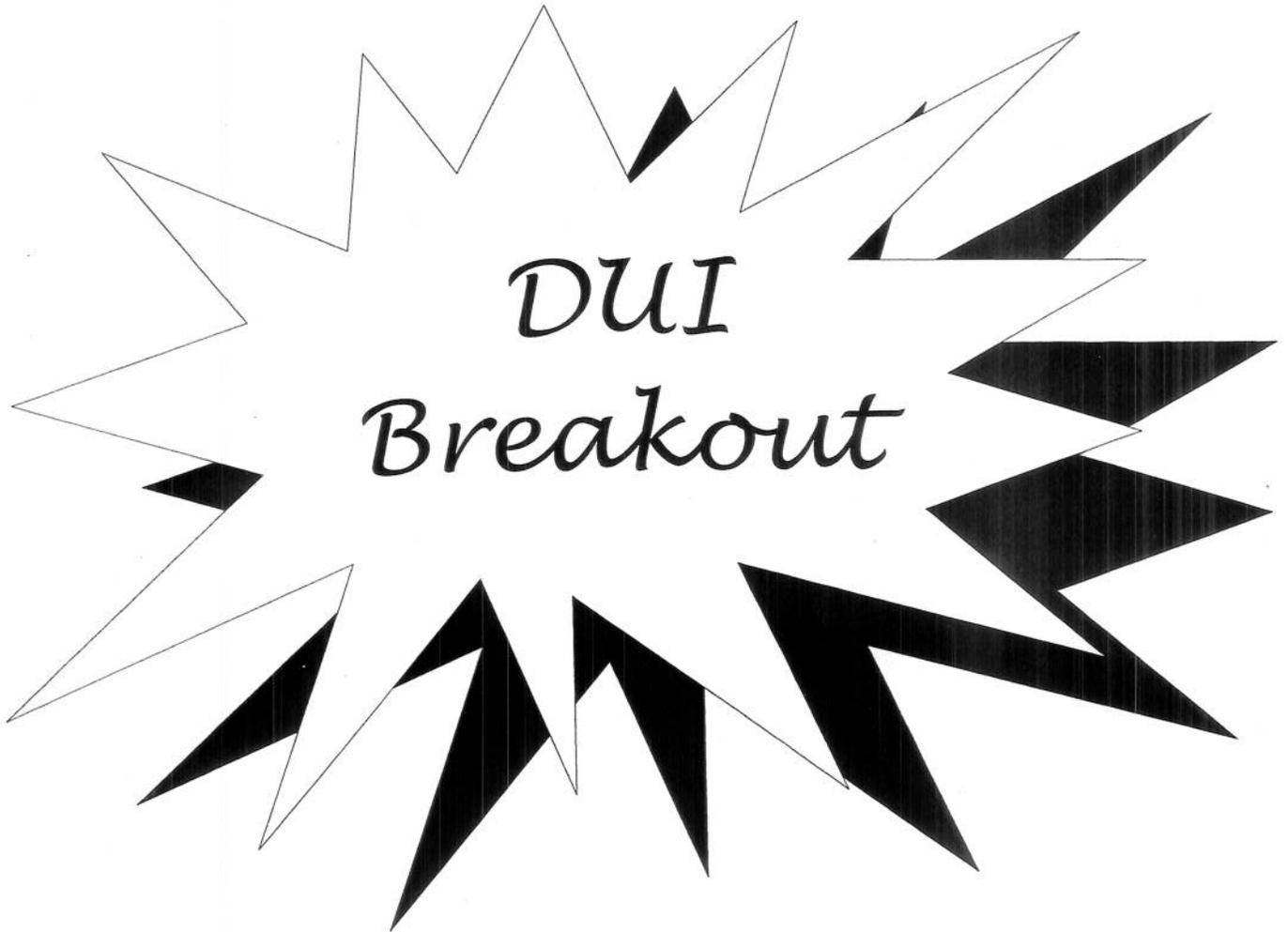
- E. When the applicant is in imminent danger of death, and the medical status has been verified by the Department of Corrections, the Board may waive the above eligibility criteria and schedule a personal hearing. In order for the Board to consider the application, however, the applicant must meet the statutory eligibility criteria.
- F. Commutation hearings will be conducted in two phases:
1. On the date set by the Chairperson for the Phase I hearing, the Board will review the applications, applicants' files, letters and all relevant information. The Phase I hearing is an in absentia hearing; however, family, friends, victims, other witnesses and legal counsel may submit written information concerning the matter or may provide oral testimony. At the conclusion of the hearing, the Board may take one of the following actions:
    - a. Find by a majority vote of the Board members that there is no basis for further consideration on the application.
    - b. Find by a majority vote of the Board members that sufficient reasons exist to warrant further investigation, and pass the matter to a Phase II hearing.
  2. At the Phase II hearing, the Board will interview the applicant, review all relevant information including the comprehensive report prepared by Board staff, and take testimony from family, friends, victims, other witnesses and/or legal counsel. At the conclusion of the hearing, a final decision is made to either recommend this action to the Governor or not to recommend this action to the Governor.
- G. When a majority of the Board vote to recommend a commutation of sentence to the Governor, a letter of recommendation is prepared that includes the reasons for the affirmative vote. Letters of dissent may also be prepared and forwarded.
- H. Letters of recommendation and if applicable dissent, along with the case materials considered by the Board at the Phase II hearing, are transmitted to the Governor by the Chairman.
- I. Subsequent applications are not considered until a period of 2 years has elapsed from the final action by the Board on the matter.

This policy was adopted by the Arizona Board of Executive Clemency in accordance with law.

  
Edward Leyva, Chairman

4/29/97  
Date

Mark Your Calenders  
for



Friday, February 26, 1999

A CLE Seminar sponsored by  
The Maricopa County Public Defender's Office  
and

The City of Phoenix Public Defender Contract Administrator's Office

# INSIDE ADDITION

The Insider's Monthly

December 1998

## TRAINING NEWS

By Lisa Kula  
Training Administrator

As 1998 comes to a close, I would like to take this opportunity to thank all of the people who have helped with support staff training and the publication of "Inside Addition" this past year. It would not be possible to provide quality training programs for the staff without the generous contributions of the following individuals:

Russ Born	Dan Carrion
Mike Fusselman	Sylvia Gomez
Bob Guzik	Christopher Johns
Norma Munoz	Rose Salamone
Louise Stark	Dean Trebesch
Jim Wilson	Michelle Wood

The knowledge and expertise these individuals share with the new staff are a priceless resource.

Additionally, "Inside Addition" would have ceased publication long ago were it not for the following contributing authors:

Martha Lugo	Gene Parker
Susie Tapia	Michelle Wood

. . . and all the good sports who submitted to the "Personnel Profile."

All of your extra work and thoughtfulness are very much appreciated. Here's looking to an even better year in 1999! ■

## COMMUNITY BOARD

Congratulations to all the 1998 award winners!

### *The Joseph P. Shaw Award*

**Emmet Ronan**  
*Major Felonies*

### *Commitment to Excellence*

**Lucia Herrera**  
*Lead Secretary - Appeals*

**Elia Hubrich**  
*Secretary - Mental Health*

*Information Technology*  
**Chuck Brokschmidt**  
**Gene Parker**  
**Julie Roberg**  
**Mike Schwarz**  
**Susie Tapia**



*December 1998 Do you see what I see?...*

K	T	N	L	O	J	O	Y	T	O	T	H	E	W	O	R	L	D
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P	C	T	A	T	E	R	E	S	A	S	S	Y	X	E	N	J	C
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I	O	E	A	H	W	A	D	O	N	Z	O	R	P	A	U	P	A
N	L	N	W	U	B	O	O	K	R	D	E	I	T	N	I	P	T
S	D	O	S	E	G	G	N	O	G	D	E	N	R	C	T	Y	I
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S	N	A	A	Z	N	A	W	K	I	R	F	I	G	K	K	L	S
T	G	E	N	E	P	R	S	H	J	R	F	L	K	I	E	I	Z
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E	R	Z	N	A	S	H	T	C	Z	A	S	I	H	L	M	Y	E
P	V	I	Y	I	G	Y	T	C	H	U	C	K	B	X	I	S	V
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