

for The Defense

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for The Defense

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Confrontation at Sentencing

Looking Beyond Capital Cases

By Mikel Steinfeld, Law Clerk

A recent series of cases has arisen in federal and state courts where a defendant's sentence has been enhanced as a result of testimonial evidence which the defendant was unable to cross-examine.¹ Appellate courts have typically denied relief, largely relying on precedent predating *Crawford* and *Apprendi*, which held that the Confrontation Clause did not apply to non-capital sentencing.²

On August 14, 2006 the Arizona Supreme Court clarified its position regarding the application of confrontation rights to capital sentencing in *State v. McGill*.³ The Court held that the Confrontation Clause applies to the first stage of capital sentencing, where the state presents evidence to make a defendant death eligible.⁴ However, the Court also held that the Confrontation Clause does not extend further; the defendant has no right to confront evidence which is used to rebut mitigation.⁵ Justice Hurwitz dissented on a single issue, arguing that the Confrontation Clause applies to the entirety of capital sentencing.⁶ *McGill* did not address whether confrontation rights extend to non-capital cases.⁷ In fact, Justice Hurwitz seems to indicate that the application of confrontation rights to non-capital sentencing is a more difficult question.⁸ Nonetheless, this case provides insight into the status of the Confrontation Clause as applied to sentencing in Arizona. A review of *McGill*, in conjunction with other cases and academic literature, indicates that confrontation rights should apply to non-capital sentencing in Arizona.

1. *McGill*: Extending Confrontation Rights to the Eligibility Phase of Capital Sentencing

Initially, a review of *McGill* is helpful to understand the extent of confrontation rights in capital sentencing so that comparison can be made. In *McGill*, the Court began by analyzing the

Confrontation Clause from a historical perspective.⁹ Specifically, the Court focused on the United States Supreme Court's decision in *Williams v. New York*.¹⁰ In *Williams* the sentencing judge relied on testimonial evidence in a presentence report and imposed the death penalty despite the jury's recommendation of a life sentence.¹¹ The defendant argued that this violated his due process rights under the Fourteenth Amendment because he was deprived of the opportunity to confront and cross-examine the witnesses providing the information.¹² The Court dismissed the defendant's argument, noting that in England and colonial America judges traditionally had wide discretion in sentencing and were able to use evidence typically inadmissible at trial, including out-of-court affidavits and personal knowledge, when making sentencing determinations.¹³

Justice Hurwitz disputed the majority's reliance on *Williams* in two respects. First, Hurwitz noted that *Williams* dealt with Due Process.¹⁴ This distinction was important to Hurwitz because the Due Process Clause requires only "minimal substantive reliability," whereas the Confrontation Clause requires the "procedural" reliability provided by cross-examination.¹⁵ Second, Hurwitz argued that the historical analysis in *Williams* is incorrect. In 1791, the death penalty was a mandatory sentence that jurors were aware of.¹⁶ Thus, because the death penalty was mandatory, a defendant's sentence was never dependent upon evidence which they did not have the opportunity to cross-examine.¹⁷ Accordingly, Hurwitz concluded that confrontation rights should extend to the entirety of capital sentencing.¹⁸

The majority next opined that Arizona jurisprudence supports the conclusion that the Confrontation Clause does not apply to sentencing procedures.¹⁹ To support this proposition, the Court relied on two cases: *State v. Ortiz*²⁰ and *State v. Greenway*.²¹ *Ortiz* dealt with a defendant who was convicted of conspiracy and testified at sentencing "that he was of good character, had been a good father, and had no prior criminal record."²² To rebut this testimony, the state introduced a transcript of the defendant's wife's testimony at her own trial, where she stated that the defendant had beaten her, pointed a gun at her and had an affair with another woman.²³ The Court held that Ortiz did not have the right to "rebut rebuttal evidence" presented at sentencing through cross examination.²⁴ The Court based its decision on the grounds that the Confrontation Clause applies only to trials, not to sentencing proceedings.²⁵



In *Greenway*, the defendant offered, for mitigation purposes, evidence of non-violence and a diminished mental capacity.²⁶ As rebuttal, the prosecution introduced statements admitted at the trial of Greenway's codefendant.²⁷ In a footnote, the Court drew a distinction between evidence introduced to establish an aggravating factor, which requires recognition of a defendant's confrontation rights, and evidence introduced to rebut mitigation evidence, which need not conform to the Confrontation Clause.²⁸

Justice Hurwitz interpreted Arizona jurisprudence differently, stating that Arizona courts have, at various points, both extended and limited the role of the Confrontation Clause in sentencing procedures.²⁹ Justice Hurwitz also noted that the foundation underlying the cases cited by the

majority has since changed in favor of *Crawford*.³⁰ Thus, Hurwitz urged for a reexamination of Arizona jurisprudence in light of *Crawford*.³¹

The essence of *McGill* is that confrontation rights extend to the eligibility phase³² of capital sentencing.³³ When this rationale is joined with decisions of the United States Supreme Court, the result is an extension of confrontation rights to the enhancement stage of non-capital sentencing.

2. Confronting Confrontation: How the Confrontation Clause Applies to Non-Capital Sentencing

Professor Michael S. Pardo, in his article *Confrontation Clause Implications of Constitutional Sentencing Options*, argued that the Confrontation Clause applies to sentencing due to the interplay between *Crawford* and the Supreme Court's sentencing decisions.³⁴ Professor Pardo presented a syllogism: first, additional findings which are necessary to increase or decrease a defendant's sentence are trial issues; second, the Confrontation Clause applies to all trial issues; and third, the Confrontation Clause therefore necessarily applies to sentencing procedures where the fact-finder makes additional findings to either increase or decrease the defendant's sentence.³⁵ Pardo initially analyzed United States Supreme Court precedent to conclude that some factual issues decided during sentencing are actually leftover trial issues.³⁶ Pardo summarized the Supreme Court's holdings as standing "for the proposition that any additional findings that increase a defendant's sentence beyond what state or federal law authorizes based solely on the jury's verdict are . . . trial issue[s]."³⁷ Thus, a factual finding which is necessary to increase a sentence beyond what is statutorily authorized for the commission of the crime alone is a "trial issue."³⁸

Pardo next analyzed the Confrontation Clause, noting that it is more than just a constitutionally recognized rule of evidence.³⁹ The Confrontation Clause "applies only to a subset of hearsay statements, but it does so categorically."⁴⁰ Per Pardo, the application of the Confrontation Clause to sentencing becomes apparent once sentencing procedures are defined as trial issues:

"Because some sentencing issues really are "elements" or trial issues, and because the Confrontation Clause provides a constitutionally mandated right independent from extant evidence rules, the confrontation right should apply to any sentencing issues that function as "elements" or trial issues."⁴¹

Professor Pardo next applied his rationale to find the anticipated result of five hypotheticals.⁴² The first example supposed a crime punishable by a sentence of up to 10 years.⁴³ However, if the prosecutor is able to prove fact Y, the maximum sentence would increase to 15 years.⁴⁴ Pardo concluded, "[t]he Confrontation Clause would thus apply with regard to fact Y and the government would be precluded from using any out-of-court 'testimonial' statements to prove Y unless the declarant testifies or the defendant had a prior opportunity to cross-examine the declarant."⁴⁵ Thus, according to Professor Pardo, the interrelation between Confrontation Clause jurisprudence and recent sentencing jurisprudence results in the extension of confrontation rights to sentencing. An analysis of Supreme Court precedent relating to confrontation supports this conclusion.

Many of the recent cases which have not extended confrontation rights to sentencing⁴⁶ have ignored the United States Supreme Court's decision in *Specht v. Patterson*,⁴⁷ which extended confrontation rights to the enhancement stage of the non-capital sentencing before it. *Specht* had been convicted of a sex offense and was sentenced under a separate statute for sex offenders.⁴⁸ Upon conviction, a sex offender was subject to an additional sentence of one day to life if the judge found that the defendant "constitute[d] a threat of bodily harm to members of the public, or [was] an habitual offender and mentally ill."⁴⁹ The United States Supreme Court held that this statute required a

new finding of fact and thus required the defendant “be present with counsel, have an opportunity to be heard, *be confronted with witnesses against him, have the right to cross-examine*, and to offer evidence of his own.”⁵⁰ It is important to note *Specht* for two reasons: first, *Specht* dealt with non-capital sentencing, and second, *Specht* explicitly considered *Williams*.⁵¹ To fully understand the implications of *Specht*, it is important to briefly reflect upon *Williams*.

In *Williams*, the Supreme Court quoted the sentencing statute which governed first degree murder: “Murder in the first degree is punishable by death, unless the jury recommends life imprisonment.”⁵² If the jury recommended life, “the court *may* sentence the defendant to imprisonment for the term of his natural life.”⁵³ The language made clear that when the jury recommended life, the judge was not required to impose life. Rather, the trial court still had the discretion to sentence the defendant to death. Thus, the death penalty was within the range of sentences the judge could impose in *Williams*.

However, in *Specht*, the Court dealt with a situation where the sentence imposed was not within the judge’s discretion upon conviction. Rather, the judge needed to make further findings in order to enhance the defendant’s sentence. Thus, the Court concluded that the fact-finding which would subject the defendant to an additional sentence was, in effect, a new crime and necessitated the procedural protections mentioned. The difference between these two cases represents the difference between the enhancement of a sentence and the selection of a sentence. Where a sentence is enhanced—the maximum penalty is increased—the defendant does have confrontation rights. This is *Specht*. However, the defendant does not have confrontation rights where the judge selects what sentence, within a prescribed range, is appropriate for the defendant. This is the holding of *Williams*.

This result is reflected in the United States Supreme Court’s decision in *Apprendi*, decided twenty-four years later:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.⁵⁴

While *Apprendi* dealt with the right to a jury trial, the Court’s conclusion was that when evidence is presented for the purpose of enhancing a defendant’s sentence, a defendant’s right to jury trial is not abandoned. Rather, the defendant maintains his right to a jury determination because the facts which must be proved are “elements” of the crime. Similarly, when evidence is presented to enhance a defendant’s sentence, the defendant’s confrontation rights are also extended.

The Arizona Supreme Court’s decision in *McGill* is consistent with this conclusion. The Court specifically indicated that confrontation rights extend to the capital eligibility phase.⁵⁵ The capital eligibility statutes and the non-capital enhancement statutes are similar in the protections they provide; both require the state to prove the element (1) to a jury (2) beyond a reasonable doubt.⁵⁶ Accordingly, the rationale in *McGill*, applying confrontation rights to the sentencing eligibility phase is equally persuasive to extend confrontation rights to non-capital enhancement sentencing phases. Using A.R.S. § 13-604 as an example, proof that a felony was committed (1) in a dangerous manner;⁵⁷ (2) while the defendant was released or escaped from pre-conviction custody; or (3) “with the intent to promote, further or assist any criminal conduct by a criminal street gang”⁵⁹ requires an extension of the defendant’s confrontation rights. The capital eligibility phase is also similar to the non-capital aggravation phase. In Arizona, the presumptive sentence is the maximum sentence a judge can impose for the commission of a crime alone; a defendant does not become eligible for a sentence greater than the presumptive until the state proves an aggravating factor to the trier of

fact.⁶⁰ Accordingly, because the first aggravating factor must be found by the trier of fact to make the defendant eligible for a sentence greater than the presumptive, the defendant is entitled to confrontation rights.

3. Implications

As a public policy matter, enforcing the defendant's confrontation rights is necessary to prevent a jury from hearing unreliable evidence at the enhancement stage. In the wake of *Apprendi*, any fact, aside from prior convictions, which may raise a defendant's maximum sentence must be presented to a jury.⁶¹ Preventing a defendant from confronting witnesses and evidence presented for enhancement would deny the jury access to all of the information relevant and necessary to render a verdict. The jury would be unable to make determinations including, but not limited to, whether a witness holds particular biases against the defendant, how much credibility to give a witness's testimony, and whether the witness is even competent to provide their testimony. Instead, the jury would be relegated to making enhancement decisions based on the untested proclamations of one party. Whereas a judge might be able to assess the weight and reliability of evidence absent cross-examination, jurors lack the experience and training of judges and would be hampered in making such demanding evaluations without full information. Thus, in the absence of cross-examination, there is a substantial risk that a jury's findings regarding enhancement would deviate from the truth, thereby leading to potentially excessive and extreme sentences.

While confrontation rights should apply to non-capital enhancement stages, a defendant is not likely entitled to confront evidence used by the court to select a sentence within a prescribed range.⁶² Thus, once an aggravating factor has been found by the trier of fact and the defendant is eligible for the upper range of sentences, the court may consider further aggravating factors without affording the defendant cross-examination. Moreover, the defendant likely does not get a second chance to confront evidence which was presented at trial and is presented a second time for enhancement. For example, a defendant would be unable to use confrontation rights to prevent the prosecutor from using, at sentencing, testimony elicited during the guilt phase that the defendant exhibited a dangerous weapon. The application of confrontation rights to sentencing is likely limited to the enhancement or eligibility phase.⁶³

4. Conclusion

The Arizona Supreme Court has recognized that a capital defendant has a constitutional right to cross-examine evidence presented at the eligibility phase of sentencing. This is consistent with the bulk of jurisprudence in Arizona and nationally. However, the Court's rationale also applies to non-capital sentencing at the enhancement stage. Because the enhancement stage requires proof of additional "elements" in order to make the defendant eligible for a greater maximum sentence, the defendant's right to confront witnesses extends to this stage of the criminal prosecution. A trial court's refusal to recognize the defendant's confrontation rights at the enhancement stage could be reversible error that would entitle the defendant to a second sentencing where the Confrontation Clause is recognized and the defendant is given the opportunity to cross-examine.⁶⁴ Thus, if a trial court improperly denies a non-capital defendant's confrontation rights at a stage of sentencing which would make the defendant eligible for a greater maximum penalty, or if the state attempts to introduce evidence which would deny a defendant their confrontation rights, attorneys should preserve the record by objecting to the use of testimonial evidence on Sixth Amendment and *Crawford* grounds.

(Endnotes)

1. See e.g. *United States v. Bustamante*, 454 F.3d 1200 (10th Cir. 2006), *United States v. Stone*, 432 F.3d 651 (6th Cir. 2005), *United States v. Brown*, 430 F.3d 942 (8th Cir. 2005), *United States v. Luciano*, 414 F.3d 174 (1st Cir. 2005).
2. E.g. *Luciano*, 414 F.3d at 178-79 (relying on *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999), *United States v. Francis*, 39 F.3d 803 (7th Cir. 1994) and others).
3. 213 Ariz. 147, ¶¶ 45-52, 140 P.3d 930, ¶¶ 45-52.
4. *Id.* at ¶ 51.
5. *Id.*
6. See generally *id.* at ¶ 85-105 (Hurwitz, J., dissenting).
7. *Id.* at ¶ 104 fn. 11 (Hurwitz, J., dissenting).
8. *Id.*
9. *Id.* at ¶ 47-48.
10. See *id.* (analyzing *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079 (1949)).
11. 337 U.S. at 242-43, 69 S.Ct. at 1080-81.
12. *Id.* at 243, 1081.
13. *Id.* at 246, 1082 (footnotes omitted). *Williams* is discussed in more detail *infra* section 2.
14. 213 Ariz. at ¶ 93, 140 P.3d at ¶ 93.
15. *Id.* at ¶ 94.
16. *Id.* at ¶ 103 (citing *Woodson v. North Carolina*, 428 U.S. 280, 289, 96 S.Ct. 2978 (1976)).
17. *Id.* at ¶ 104. For a more in depth discussion of the history of capital cases and how the Confrontation Clause relates to capital sentencing, see John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967 (2005).
18. 213 Ariz. at ¶ 104, 140 P.3d at ¶ 104. However, Hurwitz noted that, historically, the question of whether confrontation rights should extend to non-capital sentencing is different because the discretion discussed by the majority likely was exercised by sentencing judges in 1791 non-capital cases. *Id.* at fn. 11.
19. *Id.* at ¶¶ 49-51.
20. 131 Ariz. 195, 639 P.2d 1020 (1981).
21. 170 Ariz. 155, 823 P.2d 22 (1991).
22. 131 Ariz. at 208, 639 P.2d at 1033.
23. *Id.*
24. *Id.* at 209, 1034.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at fn. 1.
29. 213 Ariz. at ¶¶ 96-97, 140 P.3d at ¶¶ 96-97.
30. *Id.* at ¶ 98.
31. *Id.*
32. Before the death penalty can be imposed the jury must find, beyond a reasonable doubt, that one or more aggravating circumstances exist. A.R.S. § 13-703(E).
33. The Mississippi Supreme Court analyzed an analogous question and concluded, contrary to the Arizona Supreme Court, that the defendant's confrontation rights extended to evidence presented to rebut mitigation. *Lanier v. State*, 533 So.2d 473, 486-90 (Miss. 1988).
34. 18 Fed.Sent.R. 230 (April, 2006).

- 35.*Id.* See also Nigel Hugh Holder, Student Author, *Confrontation at Sentencing: The Logical Connection Between Crawford and Blakely*, 49 How. L.J. 179 (arguing that confrontation rights should apply to sentencing because (1) the Supreme Court expanded the scope of the Sixth Amendment to define certain sentencing determinations as elements of a crime and (2) confrontation rights apply to the determination of elements).
36. 18 Fed.Sent.R. 230.
- 37.*Id.* Pardo also opined that mitigating factors are “trial issues” because they are analogous to affirmative defenses; thus, Pardo recommended the extension of confrontation rights to mitigation and rebuttal of mitigation. *Id.*
- 38.*Id.*
- 39.*Id.*
- 40.*Id.*
- 41.*Id.*
- 42.*Id.*
- 43.*Id.*
- 44.*Id.*
- 45.*Id.* As an interesting side note, Pardo addresses a hypothetical similar to Arizona’s capital scheme in example number 5 and concludes that the Confrontation Clause should apply to all phases of capital sentencing. *Id.*
46. See cases listed *supra* notes 1-2.
47. 386 U.S. 605, 87 S.Ct. 1209 (1976).
- 48.*Id.* at 607.
- 49.*Id.*
- 50.*Id.* at 610 (emphasis added).
51. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079 (1949).
- 52.*Id.* at 243 fn. 2, 1081 fn. 2 (quoting New York Penal Law, § 1045).
- 53.*Id.* at 243, 1081 (quoting New York Penal Law, § 1045-a) (emphasis added).
54. *Apprendi v. New Jersey*, 530 U.S. 466, 489, 120 S.Ct. 2348, 2362-63 (2000).
55. *State v. McGill*, 213 Ariz. 147, ¶ 51, 140 P.3d 930, ¶ 51 (2006).
56. Compare *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63 and A.R.S. § 13-604 (P) with A.R.S. § 13-702(C).
57. A.R.S. § 13-604(F)-(K), (P) (increasing maximum sentence).
58. A.R.S. § 13-604(R) (increasing maximum sentence by 2 years).
59. A.R.S. § 13-604(T) (increasing maximum sentence by 3 years).
60. A.R.S. § 13-702(B), *State v. Price*, ___ Ariz. ___, ¶ 9, ___ P.3d ___, ¶ 9, 2006 WL 3071380 (App. Div. 1 2006) (“The statutory maximum sentence authorized by a jury’s verdict in Arizona is the presumptive term.”).
61. *Apprendi v. New Jersey*, 530 U.S. 466, 489, 120 S.Ct. 2348, 2362-63 (2000).
62. See *id.* (noting the important constitutional difference between a judge’s imposition of a sentencing *within* a statutory range and a sentence which *exceeds* the statutory maximum).
63. But see *United States v. Mills*, ___ F.Supp.2d ___, 2006 WL 2381329 (C.D. Cal. 2006) (extending confrontation rights to all stages of capital sentencing), *Lanier v. State*, 533 So.2d 473 (Miss. 1988) (same), Michael S. Pardo, *Confrontation Clause Implications of Constitutional Sentencing Options*, 18 Fed.Sent.R. 230 (April, 2006) (arguing that confrontation rights should apply to all stages of sentencing).
64. See *Lanier*, 533 So.2d at 492 (Miss. 1988).

Practice Pointer

When to Prove Priors

By Kathryn Petroff, Defender Attorney

My client was recently found guilty of a class 3 felony, after a jury trial in which he did not testify. The State had alleged an historical prior in its discovery and had produced a certified copy of the minute entry on the prior. After the verdict was read, there remained the issue of the State “proving up” the client’s alleged prior.

The existence of a prior felony conviction for sentence enhancement purposes must be proved by clear and convincing evidence, and documentary evidence is usually a part of that requirement (*See generally, State v. Robles*, 213 Ariz 268, 2006; *State v. Cons*, 208 Ariz 409, 2004; *State v. Hauss*, 140 Ariz. 230, 1984). But in my case, the thumbprint used at the sentencing in the prior was “illegible,” and the county attorney advised me that he had not been able to locate the client’s probation officer on the prior. Thus, there was a (slim) hope that the county attorney would not be able to meet its burden, and my client could be sentenced without a prior.

This was, after all, not the case, but I requested the “priors” hearing immediately, hoping the county attorney would remain unprepared. I had hoped there was some rule, or rule of thumb, limiting the State to a certain amount of time after the verdict in which to prove its allegation. In the end, over my objections (preserved for appeal), the probation officer appeared and convinced the judge that she knew my client and that he had a prior.

All of this provoked the inquiry, “How long, after all, does the State have to gather their evidence in this regard?” A blanket email to my sistren and brethren¹ gleaned the following (paraphrased) pointers, where the client 1) has not taken the stand, 2) has not otherwise admitted to the prior(s), 3) the prior is not an element of the crime charged, and 4) the case is non-capital:

- 1) The first thing to keep in mind (and, for me, this has been tricky) is that there are two different uses for priors. They can be used to **enhance** a sentence by changing the range of statutory sentence possible – e.g., pushing the range into the next sentencing “box” on the Sentencing Provisions charts (A.R.S. § 13-604). Or they can be used as an **aggravating** factor, to increase a sentence within the allowable sentencing range (A.R.S. § 13-702).
- 2) If the prior is being used to **enhance**, and there is nothing else at issue, it does not strictly matter when the priors hearing takes place, as the judge will make the determination. So the hearing can, theoretically, be held as late as just prior to sentencing, if that is convenient for you.
- 3) If, however, the prior is being used to **aggravate** within the statutory sentencing range, or to **aggravate and enhance**, the priors hearing *must* be held straightaway, before the jury is dismissed. (*See Blakely v. Washington*, 542 U.S. 296, 2004; Rule 19.1(b), Arizona Rules of Criminal Procedure.) Pursuant to A.R.S. § 13-702 (B) (H), the aggravating prior must be proved to the jury beyond a reasonable doubt.
- 4) But, if you are anxious to have an **enhancement** hearing take place as soon as possible (as was I in the above scenario), language in Rule 19.1(b) (2), which sets out the procedure for **aggravation** determinations, can *arguably* be interpreted to contemplate that determinations on **enhancement**

priors are meant to take place at the same time, i.e., right after the verdict, before the jury is dismissed. Thus, an argument could be made to the judge that **enhancement** hearings are meant to be made immediately following the verdict, even where there are no **aggravating** factors to determine and even where the judge, not the jury, will be the finder of fact.

(Endnotes)

1. Janis Williams, Ed McGee, Dan Lowrance, et al.



Career-Day Fairs at Schools

By Norma Munoz, Training Facilitator

The Public Defender's Office proudly encourages lawyers to give back to the community by speaking at career-day fairs at schools. This service maximizes students' individual potentials and goals by expanding their knowledge of all careers available to them.

On Tuesday November 28, 2006, at 10:50 AM Elisa Donnadiu, our own Public Defender from Juvenile (Durango,) volunteered to speak at a career day to senior students at the Mesquite High School in Gilbert.

Elisa presented on topics such as:

- Interests that led to your desire to pursue law as a career
- Education required to enter the profession
- Bar exam and licensing requirements
- On-going education required to maintain license
- The daily tasks of a public defender
- Appropriate experiences in court/with clients

The students loved having Elisa over and the teacher writes:

"I just wanted to express my appreciation for coordinating Elisa as a guest speaker in my classroom this past Tuesday. She was fantastic!! My students were also impressed with her and her delivery style and information. I don't often receive much feedback from my students for my guest speakers, but for Elisa, many came to me to express their appreciation for having her in class.

Please extend my appreciation to her and to the Public Defender's Office."

John Sachs
Mesquite High School



Elisa Donnadiu, Defender Attorney

The Courthouse Experience

By Norma Munoz, Training Facilitator

The Courthouse Experience is a unique school field trip program sponsored by the Judicial Branch of Maricopa County and has been successful for over 16 years because of area attorneys who volunteer their time to give to students a firsthand look at the justice system.

This program provides attorneys the opportunity to introduce young people to the courts and compare the reality of the courtroom with what they might see on television or on the street.

The Maricopa County Public Defender's Office has been very active in this participation. This past year several of our attorneys made it possible for children to experience a court tour with a real attorney to explain procedures and hearings.

On the afternoon of December 14, 2006, John Sullivan, a public defender from our office, escorted the children of Bernard Black school from the Roosevelt School District on their first Court Experience tour.



John Sullivan

Mr. Sullivan shared the general functions of the court system and the many people who participate in making the process run smooth. He talked about *Gideon v. Wainwright* and the importance of being represented by a trained and skilled lawyer when going to court.

John led them to Commissioner Richard Nothwehr's court where Commissioner Northwehr spent around 25 minutes talking to the students and answering questions. Afterward, the students observed part of an actual jury selection process in the courtroom.

Needless to say, John Sullivan served his community well by being a positive role model from the Maricopa County Public Defender's Office. But most importantly, he demonstrated the efforts of this office to express a positive impact for the support of our nation's future leaders, our children.

Thank you John!



Southern Juvenile Defender Center
at the Southern Poverty Law Center

Children Who Engage In Inappropriate Sexual Behavior Are Not Sexual Predators

Children charged with sexual offenses are different from adult sex offenders.

Sexually inappropriate behavior by children is wrong – but wrong in a different way. Adolescent brains and psychological makeup are in a state of constant change and development, which makes children dependent on adults to grow, learn, and understand this complicated world. This is also why children are receptive to rehabilitation and treatment.

When talking about juvenile sexual offending, people often oversimplify the issue by analogizing children to adult sex offenders. These comparisons are based on a number of commonly held myths about “juvenile sex offenders.” In fact, inappropriate sexual behavior by youth derives from a fundamentally different set of causes.

Here are the FACTS:

- **CHILDREN WHO COMMIT SEXUAL OFFENSES RESPOND WELL TO TREATMENT AND EXHIBIT EXTREMELY LOW RATES OF RECIDIVISM.**

Children who engage in sexually inappropriate behavior are not chronic sexual predators. Over 90% of arrests of children for sex offenses represent a **one-time event** that will never recur.¹

Studies show that sexually abusive youth are responsive to and benefit from treatment.²

Specialized treatment that helps children develop healthy understandings of sexuality and programs are proven to reduce recidivism rates for sexual offenses. Such programs

¹ FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING* 66 (2004).

² Center for Sex Offender Management, *Understanding Juvenile Sexual Offending Behavior: Emerging Research, Treatment Approaches and Management Practices* (Dec. 1999), available at <http://www.csom.org/pubs/juvbrf10.html>.

include cognitive-behavioral and relapse-prevention treatment, as well as multi-systemic therapy (MST).³

➤ **YOUTH WHO ENGAGE IN SEXUALLY INAPPROPRIATE BEHAVIOR DO NOT BECOME ADULT SEX OFFENDERS.**

Psychiatrists and other experts agree: sexually inappropriate behavior by children does not indicate a permanent problem. Because youth are in a transitional and developmental stage in their lives, their sexual offending behavior is **not fixed**.⁴

Patterns of sexual behavior by youth differ significantly from those of adult sex offenders. Unlike adult sex offenders, children who act out sexually do not find aggression erotic. Children who engage in sexual behavior with other young people are not motivated by an abnormal sexual obsession with children.⁵

➤ **CHILDREN WHO ENGAGE IN INAPPROPRIATE SEXUAL BEHAVIOR GENERALLY HAVE CHILD-SPECIFIC RISK FACTORS SIMILAR TO JUVENILE DELINQUENTS. THESE ISSUES ARE BEST UNDERSTOOD AND ADDRESSED BY THE JUVENILE JUSTICE SYSTEM.**

80% of issues identified as important for treating sexually abusive children are standard concerns for all youth.⁶

Regardless of whether a charge involves sexual behavior, all young offenders suffer from similar problems of social isolation, chaotic family environments, difficulties with anger management, mental illness, and histories of physical and/or sexual abuse.

Unlike adult sex offenders, whose behavior cannot be explained by looking to the general criminal population, youth offenders exhibit child-specific problems that require child-specific treatment in the juvenile justice system.

“Juvenile Sex Offender” is a label loaded with serious consequences for all youth, but especially for youth tried as adults. Placed in a category separate from other youth offenders, children who commit sexual offenses are subject to stigmatizing sex offender registration and notification requirements that foreclose opportunities for employment, housing, rehabilitation and a normal life.

➤ **MANDATORY MINIMUMS AND OTHER ADULT SENTENCING PRACTICES ONLY EXACERBATE UNDERLYING PROBLEMS OF MENTAL ILLNESS, VIOLENCE, AND ISOLATION.**

³ Center for Sex Offender Management, *Recidivism of Sex Offenders* (May 2001), <http://www.csom.org/pubs/recidsexof.html>; *Understanding Juvenile Sexual Offending Behavior*, *supra* note 2.

⁴ In *Roper v. Simmons*, 125 S.Ct. 1883 (2005), the U.S. Supreme Court explained that “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” *Id.* at 1195.

⁵ ZIMRING, *supra* note 1 at 139-40 (explaining that the overwhelming majority of sexually abusive children are not diagnosable sex deviants at any point before they age out of the juvenile system. Zimring similarly noted that it was unlikely juvenile offenders could be diagnosed with any confidence for pedophilia).

⁶ *Id.* at 170.

Up to 80% of sexually abusive youth have a diagnosable psychiatric disorder, 40% - 80% have histories of sexual abuse, and 20% - 50% have histories of physical abuse.⁷

In comparison with youth committed to a juvenile facility, a child sentenced to serve time in the adult system spends his/her formative years in a prison environment where he or she is:

- five times more likely to be sexually assaulted,
- twice as likely to be beaten by staff,
- fifty percent more likely to be attacked with a weapon, and
- nearly eight times more likely to commit suicide.⁸

If they survive the adult prison system, youth return to their communities scarred by the trauma of incarceration and may be more likely to commit crimes.

There is another way. With appropriate treatment in the juvenile justice system, research shows that children who engage in sexually inappropriate behavior will become healthy, responsible adults.⁹

➤ **KEEPING AND TREATING CHILDREN IN THE JUVENILE SYSTEM REHABILITATES, REDUCES RECIDIVISM, AND SAVES TAXPAYER MONEY.**

Whereas intensive supervision and treatment for sex offenders is estimated to cost \$5,000 per year, incarceration in an adult facility costs more than \$20,000 per year.¹⁰

⁷ *Understanding Juvenile Sexual Offending Behavior*, supra note 2.

⁸ Jason Ziedenberg and Vincent Schiraldi, *The Risks Juveniles Face When They Are Incarcerated With Adults*, July 19, 1997, available at <http://www.justicepolicy.org/reports/report-j-risk.html> (citing to Michael Flaherty, *An Assessment of the National Incidences of Juvenile Suicides in Adult Jails, Lockups, and Juvenile Detention Centers*, The University of Illinois, Urbana-Champaign, 1980).

⁹ *Understanding Juvenile Sexual Offending Behavior*, supra note 2.

¹⁰ The Association for the Treatment of Sexual Abusers, *Facts About Adult Sex Offenders*, available at <http://www.atsa.com/ppOffenderFacts.html> (last visited Feb. 8, 2006).

Ensuring excellence in juvenile defense and promoting justice for all children

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Jury and Bench Trial Results

October 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
10/3 - 10/4	Shelley McDonald	Davis	Warrick	CR05-009056-001DT POM, F6	Hung - (7-1 Guilty)	Jury
10/3 - 10/11	Farney	Heilman	Church	CR05-007426-001DT Sale or Transportation of Narcotic Drugs, F2	Guilty	Jury
10/4 - 11/11	Barraza	Anderson	Whitney	CR05-121122-001DT Aggravated Assault, F4 Assault, M3	Not Guilty	Jury
10/6	Taylor Willmott	Akers	Sponsel	CR06-005641-001DT POM, M1	Not Guilty	Bench
10/11 - 10/12	Iacob Blieden	Burke	Shipman	CR05-014471-001DT 2 cts. PODD For Sale, F2 PODP, F6 POM, F6	Ct. 2 PODD F/S dismissed; Guilty on all other charges. Trial held in absentia.	Jury
10/11 - 10/17	Taylor Davis <i>Ralston</i>	Hicks	Plicht	CR06-143096-001DT Forgery, F4	Guilty	Jury
10/16 - 10/18	Sloan	Nothwehr	Foster	CR06-115252-001DT Aggravated DUI, F4	Guilty	Jury
10/16 - 10/19	DeWitt Flanagan <i>Ralston</i>	Klein	Green	CR06-112307-001DT Armed Robbery, F2D Aggravated Assault, F3D	Guilty	Jury
10/17 - 10/25	Farney Guyton Sain	Hicks		CR06-008063-001DT Armed Robbery, F2 2 cts. TOMOT, F3 Poss. of Burg. Tools, F6	Poss. of Burg. Tools dismissed the day of trial; Guilty on all other charges.	Jury
10/19 - 10/25	Whitehead Force Ryon <i>Renning</i>	Nothwehr	Adel	CR05-034182-001DT 2 cts. Aggravated DUI, F4	Guilty	Jury
10/23 - 10/27	Dominguez Flanagan <i>Curtis</i>	Steinle	DuVall	CR06-117533-001DT Aggravated Assault, F3D	Guilty	Jury
10/24 -10/27	Farrell Sikora Carson	Burke	Reckart	CR06-112155-001DT Aggravated Assault, F2D Resisting Arrest, F6 Assault, M1	Guilty	Jury

Jury and Bench Trial Results

October 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 2						
10/30 -10/31	Jakobe Davis	Cole	Gard	CR05-015546-001DT Forgery, F4	Guilty	Jury
10/30 - 10/31	Barraza	Cunanan	Plicht	CR04-022423-001DT Unlawful Flight, F5	Guilty	Jury
10/5 - 10/12	Budge Ryon	Nothwehr	Foster	CR06-116924-001DT 2 cts. Agg. DUI, F4 2 cts. Agg. DUI, F6	Hung jury all counts	Jury
10/5 -10/13	Taradash	Steinle	Imbordino	CR03-019327-001DT Murder 1, F1	Guilty 2nd Degree Murder	Jury
10/16	Mays Reilly	Gordon	Rassas	CR06-122708-001DT Disorderly Conduct, M1 Resisting Arrest, M1	Guilty	Bench
10/16 - 10/25	Roskosz Reilly	French	Okano	CR05-124249-001DT 3 cts. Sexual Assault, F2	Ct. 1 Not guilty Ct. 2 & 3 Dismissed by directed verdict	Jury
10/17 -10/19	Colon Burns	O'Toole	Novitsky / Basta	CR06-124913-001DT Conspiracy to Commit Human Smuggling, F4	Guilty	Jury
10/26 -10/30	Greene Davison	Duncan	Church / Rassas / Hazard	CR06-126518-001DT Robbery, F4	Not Guilty -Robbery Guilty of Lesser Offense, Theft, F6	Jury
10/30 - 10/31	Colon	Nothwehr	Kelley	CR06-103903-001DT PODD, F4	Guilty	Jury
Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 3						
10/2 - 10/4	Cain	Trujillo	Rassas	CR06-106524-001DT 3 cts. Agg. Assault, F6 Resisting Arrest, F6	Ct. 1 Agg. Assault - Guilty Ct. 2 Agg. Assault - Dismissed Ct. 3 Agg. Assault - Not Guilty Resisting Arrest - Guilty	Jury
10/5 - 10/6	Leong Bradley Brown	Cunanan	Valadez	CR06-119613-001DT Crim. Damage F6 3 cts. Forgery, F4	ct. 1 Dism. Ct. 2-3-4 Guilty	Jury

Jury and Bench Trial Results

October 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 3 (Continued)						
10/11 - 10/12	Randall Schreck O'Farrell	Cunanan	Beaver	CR04-014825-001DT Agg. Assault, F3	Not Guilty	Jury
10/23 - 10/24	Conter	Anderson	Rothblum	CR05-128000-001SE 4 Cts. Agg. DUI, F4	Guilty	Jury
10/24 - 10/25	Sitton	Rayes	Dahl	CR06-127641-001DT 2 cts. Burglary F4 Burglary Tools, F6	1 ct. Burg, - Dism. 1 ct. Burg, & Poss. Burg. Tools - Guilty	Jury
10/24 - 10/26	Harmon Schreck O'Farrell Kunz	Mahoney	Sponsel	CR04-0111155-001DT TOMT, F3 Poss. Of Burglary Tools, F6	Guilty	Jury
Group 4						
10/4 - 10/6	Peterson Ditsworth	Udall	Blum	CR06-115767-001SE 1 ct. Misconduct Inv. Weapons, F3D	Directed Verdict	Jury
10/16 - 10/19	Engineer		Little	CR05-140608-001SE 1 ct. PODD, F4	Guilty	Jury
10/19 - 10/26	Brink Vincent	Sanders	Easterday	CR05-034054-001SE PODD, F4 PODP, F6	Guilty	Jury
10/23 - 10/24	Lewis	Arellano	Smith	CR05-033117-001SE PODD, F4	Guilty	Jury
10/25 - 10/30	Petroff Vincent Thomas Lenz	Stephens		CR06-109659-001SE Theft Means of Transportation, F3	Guilty	Jury
Capital						
8/16 - 10/26	Bevilacqua Stazzone Reilly Erwin/Oliver	Blakely	Levy	CR02-011656B 2 cts. Murder 1, F1D 5 cts. Kidnap, F2D	Hung jury 2 cts. Murder Hung Jury 2 cts. Kidnap Guilty 3 cts. Kidnap	Jury
9/18 - 10/3	Stein Brown Unterberger Brazinskas- Pangburn	Gottsfeld	Kalish / Grimsmann	CR03-017983-001DT Murder 1, F1 Child Abuse, F2 7 cts. Child Abuse, F4	Mistrial	Jury

Jury and Bench Trial Results

October 2006

Legal Defender's Office

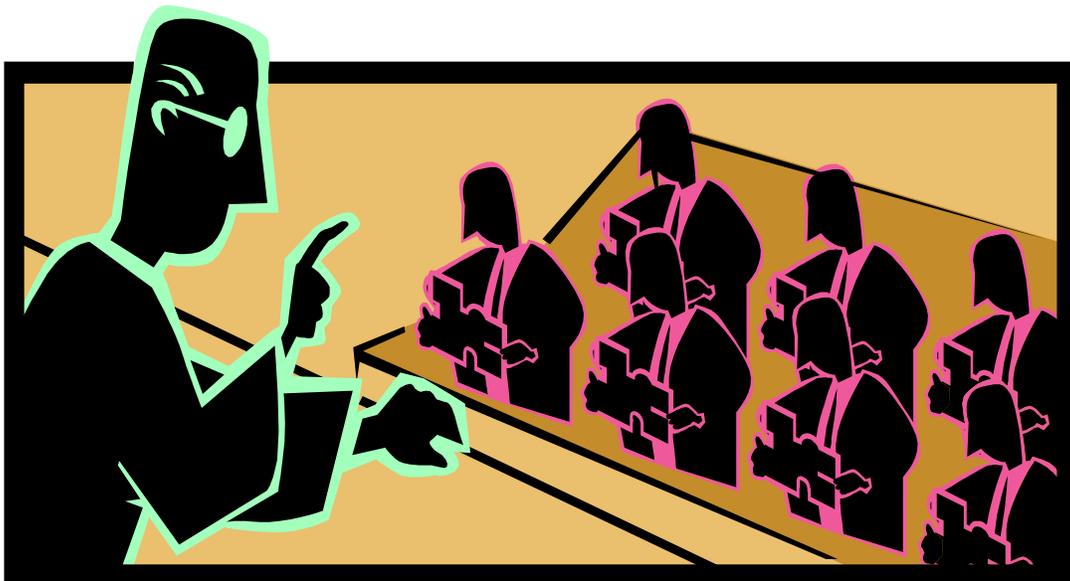
Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
8/31 - 10/3	Lawson	Burke	Goebel	CR2006-113608-001 Resisting Arrest, F6	Not Guilty	Jury
10/2	McGuire	Verdin	AG	JD506102 Dependency Trial	Dependency Found	Bench
10/2 - 10/3	Shaler	Nothwehr	Wicht	CR2006-109866-001 Burglary 3rd Degree, F4	Guilty	Jury
10/3	Bushor	Gaylord	AG	JD506310 Dependency Trial	Dependency Found	Bench
10/4 - 10/10	Ivy Hill	Cunanan	Smith	CR2006-123117-001 Forgery, F4	Not Guilty	Jury
10/5	Hozier	Kemp	AG	JD13407 Dependency Trial	Limited Guardianship Granted, Dependency Dismissed	Bench
10/5	Bushor	Gaylord	AG	JD506011 Severance Trial	Severance Granted	Bench
10/10	Lawson	Burke	Goebel	CR2006-129170-001 Theft Means of Transportation, F3 Agg. Assault, F6	Not Guilty: Theft Means of Transportation Guilty: Agg. Assault	Jury
10/17	Sanders	Lewis	AG	JD11897 Severance Trial	Severance Granted	Bench
10/18	Kolbe	Rees	AG	JD504601 Dependency Trial	Dependency Found	Bench
10/19	Jolly	Gordon	Holmberg	CR2006-134090-001 Possession of Marijuana, F6	Not Guilty	Bench
10/26	Bushor	Gaylord	AG	JD505524 Severance Trial	Severance Granted	Bench
10/26	Gaunt	Franks	AG	JD13232 Guardianship Trial	Guardianship Granted	Bench
10/30	Kolbe	Araneta	AG	JD505704 Severance Trial	Severance Granted	Bench
10/30	Bushor	Gaylord	AG	JD506355 Dependency Trial	Dependency Dismissed	Bench
10/31	Bushor	Owens	AG	JD504667 Severance Trial	Severance Granted	Bench

Jury and Bench Trial Results

October 2006

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
9/27 - 10/10	Everett Mullavey Brauer Prieto, Sinsabaugh Stovall Joseph	Cole	CR06-048100-001-DT Ct.1 Sex. Cond. w/Minor-F2 Ct. 2 Child Pros.-F2 Ct. 3 Child Pros.-F2	Ct. 1-NG; Ct. 2-Guilty; Ct. 3- Mistrial	Jury
10/4 - 10/11	Glow Mullavey Brauer Prieto Stovall	Porter	CR05-013178-001-DT Ct. 1 Theft/MOT-F3 Ct. 2 Proh. Poss-F4 Ct. 3 Theft-F6	Ct. 1-NG; Ct.2-Guilty; Ct. 3- Guilty	Jury
10/16 - 11/1	Glow Prieto	Holt	CR04-130005-001-DT Ct. 1 Burg.-1st Deg-F2 Ct. 2 Agg. Ass.; F3	Guilty	Jury
10/23 - 10/25	Peterson	Duncan	CR06-131441-001-DT CT. 1 Sex. Ass.-F2 Ct. 2 Kidnapping-F2 Ct. 3 Sex. Abuse-F5	Ct. 1 NG, but Guilty of lesser of Sex. Abuse-F5 Ct. 2 NG, but Guilty of Unlaw. Imprison.-F6 Ct 3 Sex. Abuse Guilty-F5	Jury
10/26 - 10/30	Craig Brauer Prieto	Comm. French	CR05-139552-001-DT Ct. 1 POM-F6 Ct. 2 Theft-F6 Ct. 3 MIW-F4	Ct. 1 NG; Ct. 2 NG; Ct. 3 Guilty	Jury



New Attorney Class - January 2007



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