

# for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

James J. Haas, Maricopa County Public Defender

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*Delivering America's  
Promise of Justice for All*

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for The Defense

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## Concurrent Sentences

Serving Jail and DOC Time at DOC- The Curse of Dicta

By Robert L. Gottsfield, Maricopa County Superior Court Judge, and Diane Alessi, Maricopa County Superior Court Staff Attorney

A concurrent sentence is one which runs simultaneously with another, as distinct from sentences which run only after prior sentences have been completed. *Washington v. State*, 10 Ariz. App. 95, 97, 456 P.2d 415, 417 (1969). Concurrent sentences may run simultaneously but they are not necessarily coterminous, meaning they need not begin and end at the same time (*Id.*).

A sentence of imprisonment begins when the sentence is imposed if defendant is in custody or surrenders into custody at that time. §13-709 A. Otherwise it begins when defendant is actually taken into custody (*Id.*). The time the sentence begins, as well as all time credited against the sentence, must be stated in any sentencing or commitment order. §13-709 E.

Where defendant is going to prison, a trial court has no power to date the sentence to begin before imprisonment commences or to date a sentence before the date the crime was committed. *Washington v. State*, supra. The day a sentence begins does not have to be a full 24 hours. *State v. Carnegie*, 174 Ariz. 452, 850 P.2d 690 (App. 1993).

Pursuant to §13-708, if multiple sentences are imposed by the court on a person at the same time (or the person is subject to any undischarged term of imprisonment imposed previously), the "sentence imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence." (Interestingly, the statute had previously read "shall run concurrently," see *Milburn* decision hereafter referred to.)

This section does not create a presumption in favor of consecutive sentences and the same is solely a default statute applying only when the judge has not specified whether the sentences are consecutive or concurrent. *State v. Garza*, 192 Ariz. 171, 174 962 P.2d 898, 901 (1998); *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 13003, 1313 (App. 1996) (no “statutory preference” is created one way or another).

Section 13-708, furthermore, does not impose any restriction on a trial court’s discretion in choosing between consecutive or concurrent sentences, assuming the crimes are separate and distinct. *State v. Garza, Id.*; *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983), *cert. denied*, 467 U.S. 1244 (1984); *State v. Ward*, 200 Ariz. 387, 388 26 P. 3d 1158, 1159 (App. 2001), *rev. denied*, Feb. 12, 2002. Thus, concurrent sentences may be mandated by the prohibition

against double punishment for a single act. *State v. Gordon*, 161 Ariz. 308, 778 P. 2d 1204(1989) (identical elements test as modified is used to determine whether facts constitute a single act requiring concurrent sentences or multiple acts permitting consecutive sentences); *State v. Williams*, 182 Ariz. 548, 898 P. 2d 497, 511 (App. 1995) (convictions under the same statute for the same crime committed multiple times, such as sex offenses, can be made consecutive); §13-116 (acts or omissions made punishable by different sections may be punished under both but must be concurrent). Concurrent



sentences may also be permitted when multiple offenses are committed against the same victim. §13-604.01(K) (certain dangerous crimes against children involving child molestation or sexual abuse may be served concurrently with other sentences if the offense involved only one victim).

A recent topic in some trial courts has been whether a defendant can serve a misdemeanor conviction concurrently with a felony conviction with both being served in DOC. Two cases cited as against this proposition are *State v. Harris*, 134 Ariz. 287, 655 P. 2d 1339 (App. 1982) and *State v. Garcia*, 165 Ariz. 547, 799 P. 2d 888 (App. 1990) which cites *Harris*. Both cases rely on the wording of §13-707 which then and now provides that a misdemeanor sentence must be “served other than a place within custody of the state department of corrections.”

Both cases remark in footnotes, that a trial court’s order that a misdemeanor jail sentence run concurrently with felony DOC time is “unlawful” or “improper”. Neither statement was on an issue for which the case was appealed and thus can be considered classic dicta. As we remember, a dictum (or obiter dictum) is that part of a court’s opinion on an issue not necessarily involved in the case, without the force of an adjudication and thus nonbinding on a future court, including trial courts. *Garvey v. Trew*, 64 Ariz. 342, 170 P. 2d 845 (1946), *cert. denied*, 329 U.S. 784 (1946).

Actually, however, the *Harris* and *Garcia* cases are no longer law. The Arizona Supreme Court, in a case decided four months after *Harris*, held that §13-707 did not preclude concurrent sentences of six months on a misdemeanor unlawful imprisonment conviction and of three years on a felony

assault conviction, with both being served at the same time in the custody of DOC. *State v. Milburn*, 135 Ariz. 3, 658 P. 2d 803 (1983). This accords with the common practice in Maricopa County.

While the Supreme Court in *Milburn* mentioned this was especially true where the convictions arose from the same event, the Court, in our view, did not limit the application of its holding to that fact situation. This is because the Court determined that §13-707 applies exclusively to the situation where only a misdemeanor sentence is to be imposed and that the legislature never intended to thwart concurrent sentencing when there are misdemeanor as well as felony convictions. The true controlling statute was said to be §13-708, which concerns multiple sentences and was discussed above.

The *Garcia* court, writing in 1990, obviously missed the *Milburn* decision which can happen when a matter is raised *sua sponte* by the court as dicta and not fully briefed and argued to the court.

The *Milburn* decision is in line with those cases permitting a sentence to be concurrent with a sentence imposed in another jurisdiction (*State v. Rhodes*, 104 Ariz. 451, 454 P.2d 993 (1969)), including a federal sentence (*State v. Prevost*, 118 Ariz. 100, 574 P.2d 1319 (App. 1977)), or where defendant is sentenced in the Superior Court of the same county in two different actions involving separate indictments and separate sentencings (*Washington v. State, supra*).

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## Immigration Update

By Alex E. Navidad, Criminal Defense/Immigration Laywer, formerly with MCPD, the Federal Public Defender and currently with Navidad, Leal & Silva

On December 6, 2006, the U.S. Supreme Court in *Lopez v. Gonzales*, 127 S.Ct. 625, ruled that a conviction for a drug crime that is a felony under state law but only a misdemeanor under federal law is not the kind of offense that triggers deportation. The ruling cleared up a conflict among federal courts regarding this issue. Federal immigration law provides for deportation for anyone convicted of a crime that is a “felony punishable under the Controlled Substances Act.” This case established that a state offense comes within this phrase only if it proscribes conduct punishable as a felony under the Act.

### How to use in your cases:

Comparing the state offense to federal offenses, to determine whether they are deportable offenses, may seem out of the scope of your representation as a county PD. One way to handle this issue is to have the client consult with an immigration lawyer. However, as you begin to learn more about immigration consequences, this should be part of the analysis in drug cases.

### NEW RESOURCE FOR IMMIGRATION INFORMATION

**We are pleased to announce that Kara Hartzler has joined the Florence Immigration and Refugee Rights Project as a full time attorney whose sole position is to be a consultant to criminal defense attorneys on the immigration consequences of Arizona convictions. Please take advantage of this extremely valuable resource by contacting Kara at [khartzler@firrp.org](mailto:khartzler@firrp.org) or 520-868-0191 ext 103 with any immigration-related questions that arise in your criminal matters.**

Editor's note: *For the second year in a row, a number of volunteers from the MCPD assisted the City of Phoenix in its homeless street count. This year's count occurred on Tuesday, January 30th, 2007. This HUD mandated point-in-time survey of homeless individuals provides valuable data regarding the number and characteristics of people living on the streets in Maricopa County. This count is critical in assisting the City of Phoenix in acquiring funding for the valley, justifying the need for additional housing and services, confirming the widespread nature of homelessness, and developing strategies to end homelessness throughout the valley. The editors extend our thanks to Fredrica Strumpf, Vonda Wilkins, Wendy Reasons, Victoria Washington, Kellie Sanford, Melody Harmon, Tammy Wray, Cathryn Whalen, Catherine Parker-Williams, and Alicia Dominguez for taking part in this year's count.*

## Homeless Street Count Project

By Vonda Wilkins, Defender Attorney

I signed up for the Homeless Street Count project this year because Fred Strumpf made it sound like they had a lot of fun last year. I hate to be left out when people are having fun.

A few days before the project, Jeremy Mussman sends out an email saying there were lots of volunteers, and we may not need everyone. By then, my initial enthusiasm has waned, I have a cold, a trial starting, and it didn't sound like nearly as much fun as it had when I signed up. I think I probably should just beg off, but I am a procrastinator and didn't get around to it, so I am on the hook.

The day of the big event, Tuesday. It is raining. It is cold. The sky is dark. It is miserable. I think to myself, "great! If it rains, of course they will reschedule!" I throw a pair of jeans and some tennis shoes into a bag to take with me to work, but don't worry much about it. I don't worry that I don't have a raincoat, didn't bring a flashlight, no gloves, no hat, no cough drops (I *do* still have a cold, remember?). No worries at all, it will be rescheduled.

At work. Jeremy sends out a final reminder. Victoria Washington (very promptly) responds, "what if it rains?" "We get wet", Jeremy replies. **Not** what I was wanting, **not** what I was expecting, to hear! "We get wet"?! What kind of flippin' response is that? What about rescheduling???



Resigned to the inevitable, I decide to go have a bite with my "teammate" Cathy Whalen before we have to be at the Burton Barr library at 6:30. I wasn't hungry, but Cathy says "well, do ya think ya might get hungry before MIDNIGHT, huh??" Good point, it is going to be a long night. We load up on carbs and caffeine. (Caffeine to keep us awake. We realize it is a Catch 22 -- if we drink this we are going to have to go to the bathroom; BUT if we don't, we are not going to be able to stay awake!)

We head off for the library (we are now late) and promptly get lost, with no place to turn around on the quagmire that is Central Avenue/light rail construction. And apparently everyone in the office knows The Rule except me: if you are going somewhere, do NOT follow Cathy Whalen!

Get to the library. 6:50, supposed to be there at 6:30, not bad, although we miss the speech by the police which contain all the safety pointers. Jeremy (who is also on my “team”) asks me if I speak Spanish. “Un poquito solamente” I reply, joking. I don’t speak Spanish at all.

Cathy, Jeremy and I head out, our team of three. I am a little freaked out now, because it is dark, rainy, no flashlight and we are searching for homeless people. The more we find and count, the more money the City will be able to get from federal grants for programs that will benefit the homeless. We are told the best places to look are in the alleys, behind Circle Ks and 7-11s, under bushes and trees. In other words, in dark places.

The first place we stop is at a Circle K. One of the clerks takes us out back. Sure enough, there are two guys back there, drinking beer. Uh, they only speak Spanish. “Vonda, wanna try it out?” I was just *joking*!! I don’t speak Spanish! But I gave it a try, “tiena una casa? Tiena un apartamento?” (Dang it, what is the word for “live”? Vivir?) “Vive in la calle?” I think one of them tells me he has been homeless since August and the other claims to have a home but we don’t really believe him.

One of our tasks is to determine if the homeless we encounter are “chronic” or not, defined as someone who has been homeless for one year or at least four times in the preceding three years, *and* has a mental or physical disability. One would think most homeless people, especially those who have been homeless for some time, would have some sort of disability. But, surprisingly, we meet some who seem to be without disabilities.

We meet “G”, “as in Gee Whiz”, she tells us. She sleeps on a sidewalk outside a shop in a strip mall. She came from Cleveland, and had never been on the streets before in her life until June, when the money she had finally dwindled out. She has been homeless since then, except for three months she spent in the Estrella jail. She had “trespass problems” she says. She tells us she has now found a shop owner who doesn’t care if she sleeps there as long as she is gone by the time they arrive in the morning and doesn’t come around until they are gone at night. Apparently in this way she has solved her trespass problems.

G tells us there are many homeless in the area, and rattles off several she knows, by their “street” names. “Freeway, Rascal, Snake, Tiny, JJ . . . .” She tells us some live in the bushes in the vacant field behind (another) Circle K, and Freeway lives by the IHOP. We check out the bushes, and don’t see any people, but see cardboard boxes where people have made a sleeping mat, some rocks that indicate a campfire, and other evidence that this is someone’s home.

At the IHOP, we see someone get up from the bushes with a sign and walk out into the street median where it intersects I-10. Jeremy approaches him, having Cathy and me stand back until he determines it is safe. (Jeremy is the only male from our office who is participating in the event. I like to think of myself as a women’s-libber, but I have to admit, it is nice to have a man in the group.) Sure enough, it is Freeway. His belongings are near some oleanders on the corner of the “freeway”: a Styrofoam cooler, a tiny grill, possibly some clothes. We are surprised that his things are so out in the open. Maybe people just see “trash” if they aren’t looking for homes of the homeless.

Behind yet another convenience store we see two more people, a woman dragging a suitcase, a man drinking out of a brown paper bag. Jeremy waves and we approach them. The woman is quick to let Cathy and I know that they are not together. She is young and attractive, although obviously down on her luck. I am sure all of her possessions in the world are in her bag she drags with her everywhere. Cathy asks her if she has ever contacted Value Options (if she is mentally disabled, she may be “chronic”.) The woman says she does not participate in Value Options, as all they offer is counseling, and she needs shelter services. She can’t stay in many of the shelters, she told us, because she had made a lot of “enemies” on the streets. We think it might be because she is pretty, and may have had to fight people off. We wish we had the cards that Jeremy told us Linda Shaw, mitigation specialist, has made up which lists services for homeless people. Although the organizers had told us we were not there to “save anyone” or provide any services for anyone, our job was simply to count, we still wish we had that card to give that woman. She really looks like she could use, and wants, the help.

As Cathy and I speak with this young woman, Jeremy is speaking to the man, rough, unkempt, obviously, stereotypically, *homeless*. They seem to be having a cordial conversation, until we hear the man getting agitated. He begins screaming, and starts approaching Jeremy aggressively. “Why do you come in here and wave your hands at me, telling me to get out of here, to leave, waving me out of here? What gives you the right to do that?” He seems suddenly menacing. I scoot around to the other side of the car and want to get in, but Cathy is standing her ground, as is Jeremy. Apparently I am the only chicken. Jeremy says “I was just being friendly, just waving to say hello. I don’t mean you any harm. Have a good night.” Jeremy stays calm as he gets in the car. Later Cathy tells Jeremy she is impressed with the way he handled this man, saying that when a mentally ill person gets out of control, if you react to it, it makes them feel out of control, and they consequently get more out of control. Jeremy says the man switched in a flash, from calm and cordial to threatening and angry. Jeremy says “I could see he didn’t have any sharp objects. I figured the most he could do is punch me.”

We are surprised when the young woman stays in that location with the out-of-control man, although she does pick up her stick (her protection I guess.) She tells the man, “stay away from me” but sits down. Later we circle around the block to check on her. There is another man there as well this time, but she seems fine. She seems to have learned how to take care of herself.

About 10:45, we decide that we have sufficiently canvassed and counted our area and head for home. I am glad I got assigned to a team with people who knew what they were doing, and were calm and unafraid. We are grateful that it hasn’t rained, except for a few drops, and that it hasn’t gotten as cold as we thought it would. I am especially grateful the next day, when it pours.

I drive home close to midnight, crank up the heat, get into my bed and grab a few hours’ sleep, before I head off for court the next morning.



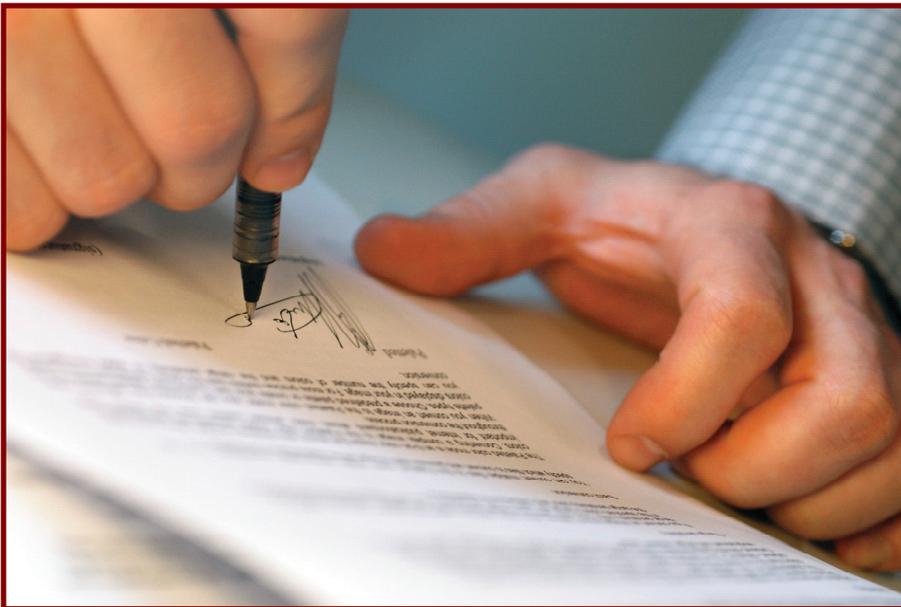
# H.R. 4472, the Adam Walsh Child Protection Act of 2006

By Elizabeth Kehoe, National Juvenile Defender Center

Several months ago, President Bush signed H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006, into law. You can view the legislation online at <http://thomas.loc.gov/> by searching by bill number (HR 4472) or by Public Law Number (109-248). Not only does this legislation create a national sex offender registry list, but it requires states and other jurisdictions (including the District of Columbia, Puerto Rico, etc.) to create and/or amend their own registries to be in compliance with the requirements in the legislation. Every person who is on a state's list will also be included on the national list. All of these lists shall be made available on the Internet. Each jurisdiction must comply with the requirements of this legislation within three years, but states may apply for up to two one-year extensions. If a state does not comply with the Act, it will lose 10% of funds under the Omnibus Crime Control and Safe Streets Act of 1968 each year it is not in compliance. If the registry requirements in the Act are found by a jurisdiction's highest court to conflict with its constitution, then the Attorney General can find the jurisdiction to be in compliance if it has made reasonable alternative procedures consistent with the purposes of the Act.

## Who Must Register

In addition to youth transferred into the criminal justice system, certain juveniles adjudicated delinquent in juvenile court will be included on the state and national sex offender registries including those who are "14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18, United States Code), or was an attempt or conspiracy to commit such an offense." The U.S. Code's definition of aggravated sexual abuse includes offenders who engage in a sexual act by using force or by threatening force against the victim or if the offender renders the victim unconscious or administers an intoxicant without the person's knowledge to impair the victim's ability to control conduct and then engages in a sexual act with the person. Thus, if a juvenile is adjudicated delinquent of a crime comparable or more severe to these crimes, he or she will be subject to the Act's registration requirements as a Tier III offender. However, "if the victim was at least 13 years old and the offender was not more than 4 years older than the victim" and the sexual conduct was consensual, the conduct is not a sex offense for the purposes of this Act, and the offender is not included in the registration requirements. (Sec. 111)



## **Retroactivity**

The legislation gives the Attorney General authority to decide whether the registry requirements will be applicable to sex offenders convicted before the Act was signed into law or before it is implemented in a jurisdiction. (Sec. 113).

## **Registry Requirements**

A sex offender required to register under this Act must register and keep the registration current in the jurisdiction where he or she resides, where he or she may be an employee and where he or she may be a student. Registration is required before release or not later than 3 business days following sentencing if the offender is imprisoned for the offense. For initial registration and for updating the registry, offenders must provide their name, Social Security number, address of residence, address where he or she is an employee, address where he or she is a student, license plate number and description of vehicle and any other information required by the Attorney General. Jurisdictions' registries must include a physical description of the offender; the text of the law for violation of which they are required to register; the offender's criminal history, including the date of all arrests and convictions (the legislation is silent as to whether juvenile adjudications will also be included); the status of parole, probation, or supervised release; registration status and the existence of any outstanding warrants; a current photograph; a set of finger and palm prints; a DNA sample; a photocopy of an identification card; and any other information required by the Attorney General. (Secs. 113 and 114).

The legislation creates three levels of sex offenders which dictate the duration of the registry obligations. (Sec. 111). Tier I sex offenders are required to register for 15 years. Tier II sex offenders have been convicted of offenses punishable by imprisonment for more than one year and which are comparable to or more severe than certain offenses listed in the Act including sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, and abusive sexual contact. Tier II sex offenders are required to register for 25 years. Tier III sex offenders have also been convicted of offenses punishable by imprisonment for more than one year and are comparable to or more severe than those committed by Tier II offenders, including aggravated sexual abuse or sexual abuse, abusive sexual contact, and kidnapping of a minor. Tier III sex offenders are required to register for life. Offenders are able to reduce their time on the registry by maintaining a clean record for a specified amount of time depending on their offender level. Those who are Tier I sex offenders can reduce registration requirements by 5 years if they maintain a clean record for 10 years. Juveniles who are adjudicated delinquent for what would be a Tier III offense may be exempted from the registry after 25 years, but only so long as they maintain a clean record for that time and beyond. (Sec. 115).

Offenders must appear in person at different times to verify and update their registries. Tier I sex offenders must do so every year; Tier II offenders must do so every 6 months; and Tier III offenders must do so every three months. When an offender updates his or her registry, a number of entities must be informed, including law enforcement, schools, public housing agencies, and certain volunteer organizations, among others. (Secs. 116 and 121)

## **Failure to Register**

If a sex offender fails to comply with the requirements in the legislation, jurisdictions must provide a penalty that includes a maximum term of imprisonment greater than one year. If an offender

required to register under this Act because of a conviction under federal law, DC law, tribal law or the laws of any US territory or an offender who travels in interstate commerce fails to register, he or she can be fined and/or imprisoned for not more than 10 years. (Sec. 141). A person who violates a sex offender registration requirement shall be deemed a fugitive, and federal and jurisdiction resources will be available to locate and apprehend such offenders. (Sec.142). Furthermore, failure to register is a deportable offense for aliens (Sec. 401).

### **Additional Crimes and Punishments**

If a sex offender required to register under this Act commits a crime of violence under federal law, the law of the district of Columbia, Indian tribal law, or the law of any territory or possession of the US, he or she may be imprisoned for not less than 5 years and not more than 30 years (this is in addition to the punishment imposed by the jurisdiction for the original crime). (Sec. 141). Additionally, if a person required to register under this Act, commits certain criminal offenses which allow for imprisonment longer than one year, the court shall revoke the person's supervised release and require the person to serve a term of imprisonment for not less than 5 years.

The legislation imposes mandatory minimums for federal offenses that are violent crimes against children, including life sentences, and increases penalties for certain crimes including coercion and enticement by sex offenders, child prostitution, sexual abuse and offenses, child pornography, and sex trafficking of children. (Secs. 202-209). It also creates a new crime for internet sales of date rape drugs. (sec. 201).

### **SMART Office**

An Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART Office) will be created within the Department of Justice to administer the registration requirements in the Act and to provide technical assistance. (Sec. 146).

### **Warrantless Searches**

Persons required to register under this Act who are under probation may be ordered to submit their person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion of a violation of probation. Additionally, for someone on supervised release, the judge may order such person to submit all of these things, with or without a warrant. (Sec. 210).

### **Civil Commitment Programs**

The Act authorizes the Attorney General to make grants to jurisdictions to create secure civil commitment programs for "sexually dangerous persons" who are deemed to be a high risk for recommitting a sexual offense against a minor or who have been convicted of a sexually violent offense. According to this section of the legislation, a sexually dangerous person is "a person suffering from a serious mental illness, abnormality, or disorder, as a result of which the individual would have serious difficulty in refraining from sexually violent conduct or child molestation." (Sec. 301)

For persons in the custody of the federal Bureau of Prisons or for people against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General (or someone authorized by the AG or Director of Bureau of Prisons) may certify that the person is a sexually dangerous person and require a hearing to confirm such certification. A psychiatric or psychological report may be conducted for the hearing, and if after the hearing, the court finds by clear and convincing evidence that the person is sexually dangerous, the court shall commit the person to the custody of the AG. The AG will ensure the person's custody either in the relevant state or a federal facility until the person is no longer sexually dangerous to others. (Sec. 302).

### **Grant Programs**

The legislation creates grants and extends other grants for a number of programs including Big Brothers Big Sisters, National Police Athletic League, a pilot program for electronic monitoring of sex offenders, residential and non residential treatment programs through the Bureau of Prisons, funding for treatment of juvenile sex offenders (those who were under the age of 18 at the time of the offense), fingerprinting programs for children, awareness campaigns, etc. (Title VI).

The previous information highlights sections of the legislation particularly relevant to defenders; however, we urge defenders to read the legislation in its entirety. If you have any questions, please contact Elizabeth Kehoe at 202.452.0010 x103 or [ekehoe@njdc.info](mailto:ekehoe@njdc.info).

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# Helping Your Appellate Lawyer

Tips from the MCPD Appellate Division



- **Voir Dire**

Many prosecutors have added a standard question to their voir dire comparing the state's burden of proof to cop shows—SVU, CSI, etc. The judges or prosecutors always seem to want the jurors to know that's TV, and the poor state can't be held to that standard. That type of inquiry is arguably objectionable. It is irrelevant and diminishes the burden of proof. It is an unnecessary inclusion. The jurors know it's TV, the judge will instruct them on the state's burden of proof, and no one ever makes the Perry Mason comparison for defense counsel. "Do you understand I can't be held to that level of competence? I won't be able to have someone in the audience jump up at the last minute and confess to the crime. Does everyone understand that?" Make the objections!

- **Special Statutory Sentencing Conditions**

Pursuant to Ariz. R. Crim. Pro. 17.2(b), before a defendant accepts a plea agreement, or enters a no contest plea, the court must inform the defendant of "any special conditions regarding sentence." One such condition is any offense that statutorily requires "flat time" (meaning a defendant is ineligible for early release on any basis, including community supervision). Also, the language should be included in the plea agreement and discussed with the client.

If a defendant is not aware of special statutory sentencing conditions, then it may be a basis for a claim of ineffective assistance of counsel on Rule 32 and the plea can be set aside. A.R.S. § 41-1604.07 - Community Supervision a.k.a "parole" presumptively provides that ". . . the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted." A.R.S. § 41-1604.07 is the statutory provision that allows an inmate to be eligible to receive an *earned release credit eligibility classification, which in turns, allows an inmate to receive early release credits*. Consequently, it is essential to specify when those provisions do not apply due to "flat time," such as:

**§ 13-1405. Sexual conduct with a minor.**

" . . . the convicted person is **not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed has been served or commuted.**" A.R.S. § 13-1405(B).

**§ 13-1406. Sexual assault.**

" . . . the person is **not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.**" A.R.S. § 13-1406(B).

**§ 13-3409. Involving or using minors in drug offenses.**

"A person who violates a provision of this section is guilty of a class 2 felony and is **not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the court has been served or commuted, and if the minor is under fifteen years of age it is punishable pursuant to § 13-604.01, subsection C.**" A.R.S. § 13-1409(B).

**§ 13-3410. Serious drug offender.**

**A. A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a serious drug offense and who committed the offense as part of a pattern of engaging in conduct prohibited by this chapter, which constituted a significant source of the person's income, shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served not less than twenty-five years or the sentence is commuted. A.R.S. § 13-3410(A).**

**B. A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a serious drug offense and who committed the offense as part of the person's association with and participation in the conduct of an enterprise as defined in § 13-2301, subsection D, paragraph 2, which is engaged in dealing in substances controlled by this chapter, and who organized, managed, directed, supervised or financed the enterprise with the intent to promote or further its criminal objectives shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served not less than twenty-five years or the sentence is commuted. A.R.S. § 13-3410(B).**

**§ 13-3411. Possession, use, sale or transfer of marijuana, peyote, prescription drugs, dangerous drugs or narcotic drugs or manufacture of dangerous drugs in a drug free school zone.**

**B. A person who violates subsection A of this section is guilty of the same class of felony that the person would otherwise be guilty of had the violation not occurred within a drug free school zone, but the minimum, maximum and presumptive sentence for that violation shall be increased by one year. A person convicted of violating subsection A of this section is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except pursuant to § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted. The additional sentence imposed under this subsection is in addition to any enhanced punishment that may be applicable under § 13-604 or other provisions of this chapter. A.R.S. § 13-3411(B).**

# Capital Unit Sweeps Annual Awards

By James Haas, Public Defender

At the office holiday party on December 8, the Benita “Bingle” Dizon Commitment to Excellence Award was presented to Capital Paralegal Supervisor Christine Oliver, and the Joe Shaw Award was presented to Capital Attorney Joe Stazzone.

The Dizon Award was created in 2001 to honor Bingle, who was a longtime and beloved secretary with our office known for her extraordinary commitment to high quality work and her dedication to our office. The recipient of this award is selected by a committee composed of attorneys and support staff representing all parts of our office. The award was given to Christine Oliver in recognition of her outstanding work and long standing devotion to our office.

Christine joined our office in 1987 as a legal secretary. She transitioned to paralegal and later was promoted to paralegal supervisor. Christine is known as a highly skilled and professional paralegal and an effective and supportive supervisor. The attorneys with whom she works are unanimous in their praise of Christine’s organizational skills, efficiency and professionalism. She consistently anticipates the needs of the attorneys in cases to which she is assigned and goes above and beyond to meet those needs.

The nomination of Christine for the award said it best: “It has been said that Christine sets the bar for outstanding performance and that we often judge the work of others against her exemplary work.”

The Joe Shaw Award was created in 1995 to honor Joe, a remarkable attorney who spent 20 years in our office, starting at the age of 65. Joe was known as a true gentleman and a skilled and dedicated attorney. The Shaw Award is given each year to an attorney, selected by the same committee that chooses the Dizon Award, who best demonstrates Joe Shaw’s many qualities.

Joe Stazzone has been with our office since 1990. He has excelled as a trial lawyer in Group D and the Capital Unit. Joe was recognized because of his consummate legal skills, professionalism and easygoing nature that is consistently present even as he handles the most stressful cases in the profession. Like Joe Shaw, Joe Stazzone is a true gentleman, a consummate professional, and a pleasure to work with.

Congratulations, Christine and Joe!



# Jury and Bench Trial Results

## November / December 2006

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group 1</b>						
11/01 - 11/02	<b>Sloan</b>	Nothwehr	Cotter	CR05-118565-001DT 2 cts. Agg. DUI, F4 (w/1 prior untimely alleged)	Mistrial - Case dismissed with prejudice on 11/17/06.	Jury
11/8	<b>Rosell</b>	Rayes	Flynn	CR06-123344-001DT Forgery, F4	Guilty	Jury
11/13 - 11/14	<b>Farney D. De La Torre Carson</b>	Porter	Low	CR05-014158-001DT Child Abuse, F4	Not Guilty	Jury
11/14 - 11/20	<b>Jakobe Davis Ralston</b>	Aceto	Novitsky Parecki	CR06-136686-004DT Conspiracy to Commit Human Smuggling, F4	Guilty	Jury
11/16 - 11/22	<b>Reece Ralston</b>	Blakey	Davidon	CR06-134418-002DT POM f/s, F2 Sale or Transportation of Marijuana, F2	Not Guilty	Jury
11/16 - 11/27	<b>Ventrella</b>	Holt	Alegre	CR05-134729-001DT Threatening or Intimidating, F6 (DV)	Mistrial	Jury
11/27 - 11/29	<b>Sloan</b>	Holding	Adel	CR05-034926-001 SE 2 cts. Agg. DUI, F4	Not Guilty; Guilty of lesser included Misdemeanor DUI	Jury
11/30	<b>Guyton Carson</b>	Burke	Goebel	CR06-120570-001DT Theft, F6	Not Guilty	Jury
11/27 - 11/29	<b>Shelley McDonald</b>	French	Warrick	CR05-009056-001DT POM, F6	Guilty	Jury
12/4 - 12/6	<b>Reece Sain</b>	Johnson	Squier	CR06-108797-001DT Agg. Assault, F6 Resisting Arrest, F6	Mistrial	Jury
12/18 - 12/21	<b>Farrell</b>	Udall	Vaitkus	CR06-129801-001DT Agg. Assault, F3 Agg. Assault, F5 Resisting Arrest, F6	Not Guilty, Agg. Assault, F5; Guilty Agg. Assault, F3 and Resisting Arrest	Jury
12/20 - 12/22	<b>Sloan</b>	Holding	Rothblum	CR05-135252-001DT 2 Cts. Agg. DUI, F4 3 Cts. Agg. DUI Pass/U 15 F6	Guilty	Jury

# Jury and Bench Trial Results

## November / December 2006

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group 2</b>						
11/6 - 11/14	<b>Taradash R. Kirchler</b> Robinson <i>Del Rio</i>	O'Toole	Doering	CR06-007830-001DT Murder 2nd Degree, F1	Not Guilty	Jury
11/13 - 11/16	<b>Nelson</b> Romani <i>MacDonald</i>	Rayes	Buesing	CR05-014504-001DT Forgery, F4	Not Guilty	Jury
11/16 - 11/21	<b>Mays</b>	Anderson	Goebel	CR05-134987-001DT Resisting Arrest, F6 Assault, M1	Guilty Resisting Arrest Assault dismissed with prejudice day of trial	Jury
11/7	<b>Smiley</b>	Cunanan	Anderson	CR06-007101-002 DT 2 cts. Fraud Schemes, F2 2 cts. Theft, F2 Attempted Theft, F3	Dismissed on 2nd day of trial	Jury
12/4 - 12/6	<b>Leonard Kephart</b>	Gordon	O'Brien	CR06-107628-001DT PODD, F4 Marij. Viol. F6	Directed Verdict	Bench
12/13 - 12/14	<b>Tomlinson</b> Souther <i>Burns</i>	Gama	Rubalcava	CR06-143741-001DT Agg. Assault, F6 Criminal Damage, F6	Guilty of Assault, M1 Not Guilty Criminal Damage	Jury
12/19 - 12/21	<b>Davis</b> <i>Renning</i>	Notwehr	Adel	CR04-024479-001DT 2 cts. Agg. DUI, F4	Not guilty on Agg. DUI Hung on lesser offense for Count 1 Guilty on lesser offense for Count 2	Jury
12/18 - 12/19	<b>Taradash</b> Spizer	Akers	Church	CR06-138646-002DT Agg. Assault on Police Officer, F2D Crim. Tresp. 1st Deg. Res- Struct. F6	Mistrial	Jury

# Jury and Bench Trial Results

## November / December 2006

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group 3</b>						
11/8 - 11/14	<b>Grashel</b> Ryon <i>Renning</i>	Nothwehr	McDermott	CR06-104850-001SE 2 cts. Agg. DUI, F4	Guilty	Jury
11/28 - 11/29	<b>Baird</b> Schuster <i>Kunz</i>	Cunanan	Whitney	CR06-130314-001DT Agg. Assault, F6	Not Guilty	Jury
11/28 - 11/29	<b>Clemency</b> Schuster	Gama	Church	CR06-136881-001DT Agg. Assault, F3D MIW, . F4	Guilty	Jury
12/5 - 12/7	<b>J. Kirchler</b> O'Farrell <i>Curtis</i>	Burke	Church	CR06-007339-002DT Sale of Narc. Drugs, F2 Transp. Of Narc. Drugs, F2	Mistrial	Jury
12/6	<b>Baird</b> Bradley	Mahoney	Duvall	CR06-103618-003 DT Resisting Arrest, F6	Not Guilty	Bench
12/13	<b>Wilkins</b>	Ditsworth	Church	CR03-019304-001DT 2 cts. Cruelty to Animals, F6 Interfer w/Judicial Proceedings M1	Not Guilty	Jury
12/12 - 12/13	<b>J. Kirchler</b> <b>Cooper</b> <i>Curtis</i>	Trujillo	Markle	CR04-020466-001 DT PODD, F4	Guilty	Jury
12/18 - 12/20	<b>Stewart</b> Bradley <i>Kunz</i>	Anderson	Bonaguidi	CR06-110031-001DT POND, F4	Guilty	Jury
<b>Group 4</b>						
10/30 - 10/31	<b>Jolley</b>	Stephens	Little	CR04-039886-001SE Forgery, F4	Guilty	Jury
10/31 - 11/1	<b>Engineer</b>	Udall	Easterday	CR06-108823-001SE Forgery, F4	Not Guilty	Jury
11/2 - 11/6	<b>Whitney</b>	Stephens	Brenneman	CR05-143036-001SE Forgery, F4	Guilty	Jury

# Jury and Bench Trial Results

## November / December 2006

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group 4 (Continued)</b>						
11/2 - 11/28	<b>Fisher Lockard</b>	Talamante	Stalzer Galindo	CR06-131784-003SE Armed Robbery, F2D Agg. Assault, F3D MIW, F4	Guilty	Jury
11/6 - 11/7	<b>Sheperd</b>	Udall	Borges	CR05-032127-001SE Agg. Assault, F3 Unlawful Imprisonment, F6	Mistrial	Jury
11/28 - 11/30	<b>Gaziano</b>	Arellano	Little	CR06-130352-001SE Armed Robbery, F2D False Report to Law Enforcement, M1	Armed Robbery - Hung False Report - Guilty	Jury
11/15 - 12/5	<b>Ziemba Salvato Lenz</b>	Ditsworth	Valenzuela	CR04-010513-001SE 5 cts. Agg Asslt, F2D Miscon. E1 Inv. Weapons, F4	5 cts. Agg. Assault, F2D - Hung Jury Miscon. Inv. Wpns. - Guilty	Jury
11/28 - 12/1	<b>Quesada Salvato Cewart</b>	Udall	Easterday	CR05-031800-001SE Theft, F4	Not Guilty	Jury
12/4 - 12/6	<b>Sitver</b>	Stephens	Alegre	CR05-140336-001SE Child/Vul Adult Physical Abuse, F4	Guilty	Jury
12/5 - 12/11	<b>Fluharty</b>	Arellano	Smith	CR06-149554-001SE Burglary 3rd Deg. F5 Burglary Tools Possession, F6	Not Guilty	Jury
12/13 - 12/14	<b>Whitney Vincent</b>	Talamante	Brenneman	CR06-005611-001DT Shoplifting, F6	Guilty	Jury
12/18 - 12/19	<b>Klopp</b>	Arellano	Bennett	CR06-030792-001SE Agg. Assault, F3D	Guilty	Jury

# Jury and Bench Trial Results

## November / December 2006

### Legal Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
11/1 - 11/6	<b>Rothschild</b>	Rayes	Yuva	CR05-015068-001 Poss. for Sale of Narcotic Drugs, F2 Poss. of Narcotic Drugs, F6	Not Guilty	Jury
11/2 - 11/8	<b>Jolly</b>	Steinle	Valenzuela	CR06-119605-002 Agg. Assault, F2 Dang., 4Cts; Drive by Shooting, F2 Dang.; Unlawful Flight, F5	Guilty: Unlawful Flight Hung Jury: 2 Cts. Agg. Assault and Drive by Shooting (10NG/2G) 2 Cts Agg. Assault (1NG/11G)	Jury
11/6	<b>Bushor</b>	Gaylord	AG	JD506368 Dependency Trial	Dependency Found: Client consented on 1st day of trial.	Bench
11/15 - 11/16	<b>Ivy</b>	Arellano	Brenneman	CR06-118871-001 Theft of Means of Transportation, F3	Not Guilty	Jury
11/28 - 11/30	<b>Allen Hill</b>	Stephens	Rodriguez	CR04-125105-001 Agg. Assault, F4	Guilty	Jury
10/31 - 12/8	<b>Rosenberg</b>	McVey	Vescio	JD12626 Guardianship Trial	Guardianship Dissolved	Bench
12/1 - 12/6	<b>Jolly</b>	Cunanan	Bonaguidi	CR06-007923-002 Theft, C4	Not Guilty	Jury
12/4	<b>Kolbe</b>	Rees	Siegel	JD506394 Dependency Trial	Dependency Found	Bench
12/7	<b>Kolbe</b>	Gaylord	Siegel	JD505156 Dependency Trial	Dependency Found	Bench
12/11	<b>Ripa</b>	Woodburn	Ottosen	JD15115 Dependency Trial	Dependency Found	Bench
12/15 - 12/21	<b>Garfinkel</b>	McVey	AG	JD13214 Dependency Trial	Dependency Found	Jury

# Jury and Bench Trial Results

## November / December 2006

### Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
11-2 to 11-8	<b>Craig</b> Prieto	Steinle	CR06-119605-001-DT Agg. Assault (4 Counts) - F2; Drive By Shooting - F2	Hung Jury	Trial
11/6 to 11/7	<b>LeMoine</b> Mullavey	Duncan	CR05-142326-001-DT MIW - F4	Guilty	Jury
11/13 to 11/15	<b>Centeno-Fequiere</b> Mullavey Brauer Prieto Stovall	Burke	CR06-120753-002-DT POM-Sale - F4; PODP - F6	Guilty	Jury
11/14 to 11/16	<b>Agan</b>	Cunanan	CR06-008085-001 Agg. Assault (2 Cts) - F3 - Dang; MIW - F4	Guilty	Jury
11/14 to 11/22	<b>Schmich</b> Brauer Sinsabaugh Prieto Stovall	Hicks	CR05-130551-001-DT Sex Conduct w/Minor - F2; Kidnap - F2	Not Guilty	Jury
11/14 to 11/27	<b>Craig</b> Mullavey Prieto	Gama	CR05-135281-001-DT Att. Murder - F2	Guilty	Jury
11/20 to 11/21	<b>LeMoine</b> Brauer	Johnson	CR06-127608-001-DT POND - F4; Drug Para. Viol - F6	Guilty	Jury
11/27 - 12/18	<b>Gray</b> Brauer Sinsabaugh	Cole	CR04-130421-001-DT PODD-F2; Poss. Equip & Chem Mfg- F3; POM-F6	Guilty	Jury
11/29 - 12/5	<b>Garcia</b>	Aceto	CR05-011655-001-DT Cts. 1 and 2-Agg. Ass. (Dang)- F3; Ct. 3-Leaving Scene of Ser. Inj. Acc.-F4	Ct. 1-Guilty; Ct. 2-NG; Ct. 3-Guilty of Lesser - Leaving Scene of Inj. Acc.-F6	Jury
12/7 - 12/8	<b>Tucker</b>	Steinle	CR05-015542-001-DT Armed Rob (Dang)-F2; Kidnap- F2; Theft-MOT-F3	Plead on 12/8 to Armed Robb (Non-Dang)-F2 and Theft MOT-F3; Kidnap-F2-Dismised	Jury
12/14 - 12/19	<b>Glow</b> <b>Reinhardt</b> Mullavey	Mahoney	CR05-126078-001-DT Agg. Assault (Dang) - F3	Dis. W/Prej 2nd Day of Trial	Jury

**MARCH 2007**

**NEW ATTORNEY CLASS**



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*for The Defense*

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