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Senate Bill 1070

Preliminary Thoughts for Criminal Defense as of July 9, 2010

By Amy Kalman and Mikel Steinfeld, Defender Attorneys

On April 23, 2010, Governor Jan Brewer signed SB 1070¹ into law. One week later, Brewer signed HB 2162,² which modified portions of SB 1070.³ Unless an injunction is granted, the law will take effect on July 29, 2010. The legislation creates several new crimes, amends other criminal provisions, and creates new obligations for police to verify residency status. The goal of this article is to provide some preliminary insights and thoughts about how to approach the crimes codified by SB 1070 and to encourage more discussion about how to best represent clients who may be affected by SB 1070. This article will proceed by first, outlining SB 1070; next addressing the constitutional issues incumbent with SB 1070; third, directing the reader to additional challenges to SB 1070; and finally, proposing topics for further discussion of how SB 1070 might impact indigent defendants.



I. SB 1070

SB 1070 modifies several existing statutes and creates three new criminal offenses: §13-1509,⁴ which criminalizes failure to carry documents; §13-2928,⁵ which addresses those who stop for day laborers; and § 13-2929,⁶ which criminalizes non-smuggling transportation of illegal immigrants. SB 1070 also establishes laws intended to mandate the cooperation and assistance of law enforcement officers and agencies.⁷ Included in the provisions of this section is a restriction against any official or agency limiting or restricting enforcement of immigration laws,⁸ a requirement that immigration status be investigated when there is "reasonable suspicion" the person is an undocumented alien,⁹ and a provision permitting residents to file a lawsuit against any officer or agency that is not enforcing immigration laws to the fullest extent.¹⁰ The bill also extends an officer's authority to make an arrest without a warrant to include situations where the person arrested "has committed any public offense that makes the person removable from the United States."¹¹ SB 1070 also expands on a number of laws related to employment¹² and vehicle impound,¹³ creates

a “gang and immigration intelligence team enforcement mission fund,”¹⁴ and set forth a severability of implementation section so that if any portion of the bill is determined to be unconstitutional the remainder of the bill may still be enforced.¹⁵ The focus of this article will be primarily upon the sections that deal with the creation, modification, and enforcement of the criminal code.

II. Constitutional Issues

a. SB 1070 and the Supremacy Clause

Congress was vested with the power “To establish a uniform Rule of Naturalization” in the United States Constitution.¹⁶ This power has been interpreted to include the power to enact statutes to deport aliens.¹⁷ The United States Supreme Court has also held, “[The p]ower to regulate immigration is unquestionably exclusively a federal power.”¹⁸ However, a state statute that affects immigration is not unconstitutional simply because the statute deals with immigrants.¹⁹

The Supreme Court set forth a three-pronged test in *De Canas v. Bica* to determine whether a state law is preempted by federal law:

1. Whether state legislation is a “regulation of immigration,” which is “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”²⁰
2. Whether it was “the clear and manifest purpose of Congress” to completely oust state power.²¹
3. Legislation which “burdens or conflicts” with federal laws may be preempted even if Congress did not provide a clear intent to preempt state laws.²²

Analyzing the proposed legislation under each of these prongs, §13-1509 is unconstitutional because it is preempted by Federal legislation.

SB 1070 first fails because the stated goals of SB 1070 establish it as an immigration policy and the criminal enactments of SB 1070 operate as a “determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” Section 1 provides:

The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.²³

Because the enactment is specifically designed “to discourage and deter the unlawful entry and presence of aliens,” SB 1070 was clearly intended to impact who should or should not come into the country. Moreover, by establishing criminal offenses focused on punishing undocumented aliens, SB 1070 creates a comprehensive system focused on addressing the conditions upon which a person may remain in the United States. Even presuming an alien enters unlawfully, there are a plethora of reasons that person may be permitted to remain in the United States.²⁴ Moreover, in the federal system, illegal presence is not a criminal offense but would subject a person to deportation,²⁵ which is a civil, not criminal, proceeding.²⁶ By establishing criminal offenses that are premised upon alien status, SB 1070 usurps the federal government’s discretion because it supplants the judgment of the federal government with that of Arizona, securing criminal convictions for undocumented persons within the United States before the federal government has an opportunity to decide whether it would like to grant the alien protected status or deport the alien through a civil proceeding. Accordingly, SB 1070 as a whole, and each of the sections creating criminal offenses

individually, is focused on setting immigration policy and determining the circumstances by which aliens should be permitted to enter or remain in the United States.

The second prong, whether Congress has clearly and manifestly intended to oust states, may be more difficult to prove for SB 1070. Case law establishes that enforcement of federal immigration law is permitted to the states. In *Gonzales v. City of Peoria*²⁷ the Ninth Circuit Court of Appeals held that state law enforcement agencies could enforce federal immigration laws.²⁸ The Court noted that the position of the city was very limited: the city's position was only that it had the ability to enforce the criminal provisions of the federal immigration laws.²⁹ The Court assumed that the civil provisions were so broad and complete as to indicate the federal government had exclusive power.³⁰ However, because there are relatively few criminal provisions and these laws are simple in nature, the Court found that the laws did not indicate that the federal government had exclusive province over criminal immigration enforcement.³¹ Thus, local police enforcement agencies are able to enforce federal immigration laws. Additionally, in *State v. Barragan-Sierra*, a challenge to Arizona's smuggling statutes failed under a *De Canas* evaluation on the grounds that Congress did not demonstrate an intent to exclude states from enacting harmonious legislation.³²

SB 1070, however, establishes a marked departure from the actions taken in *Gonzales*. Rather than simply enforce federal criminal laws, SB 1070 creates new criminal laws related to immigration and grants Arizona law enforcement officials the authority to enforce these new state laws. Additionally, these criminal laws are not limited to the "harmonious" enforcement seen in *Gonzales* and *Barragan-Sierra*. In *Gonzales* the city merely wanted to enforce federal laws. The Arizona smuggling statutes could be interpreted as a harmonious enforcement of unlawful entry into the United States, which is a crime.³³ SB 1070 goes further; SB 1070 aims to punish undocumented aliens for mere presence, contravening the federal government's exercise of discretion when deciding how to deal with undocumented aliens.³⁴ Because SB 1070 goes beyond the harmonious enforcement of criminal immigration law, it fails the second prong of the *De Canas* analysis.

Finally, SB 1070 fails under the third prong of the *De Canas* analysis. An in-depth discussion of how SB 1070 burdens the federal government's immigration enforcement policies can be found in the Complaint, Motion for Preliminary Injunction and Declarations that were filed by the United States on July 6, 2010.³⁵ In short, SB 1070 interferes with the federal government's policy of pursuing the worst illegal aliens with its monolithic "attrition through enforcement" policy focused on applying to all undocumented aliens, interferes with the government's ability to grant discretionary legal status to undocumented aliens, interferes with foreign policy and diplomacy efforts, and improperly diverts federal immigration enforcement resources to the enforcement of Arizona laws.

Under the *De Canas* analysis, a law is unconstitutionally preempted if it fails under any of the three prongs. SB 1070 fails under each prong. Any single reason is sufficient to establish a clear conflict with federal law. Accordingly, SB 1070 is unconstitutional because it is preempted by federal law.

b. SB 1070 and Vagueness

"A legislative enactment is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit standards for those who will apply it."³⁶ Explicit standards are particularly important in criminal law because "where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.'"³⁷

Section 13-1509 is inherently contradictory in its application. Subsection A states, "a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)." Subsection 1304(e) states:

(e) Personal possession of registration or receipt card; penalties
Every alien, eighteen years of age and over, shall at all times carry

with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both.³⁸

Thus, to be held accountable under 8 U.S.C. § 1304(e) a card must have already been issued to an alien. This necessarily indicates that the alien has registered with the United States government and has authorization to be present. However, A.R.S. §13-1509 also states, “This section does not apply to a person who maintains authorization from the Federal Government to remain in the United States.”³⁹

The United States Code regulation in section 1304(e) can only apply to immigrants who have received a certificate of alien registration or alien registration receipt card. A.R.S. §13-1509, on the other hand, blurs the clarity of the United States Code by attempting to apply the Code to immigrants who have not received this paperwork.⁴⁰

The second Federal Immigration statute that is applied in A.R.S. §13-1509 is 8 U.S.C § 1306(a), which reads:

(a) Willful failure to register

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both.⁴¹

In order to accurately assess who this must apply to, we must answer the question of who must register. The registration of aliens is set forth in 8 U.S.C § 1302:

(a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.⁴²

Thus, if a person has been in the country for less than thirty days, there is no requirement to register. However, such a person who is in the country for less than thirty days may still not have authorization from the Federal Government to remain in the country.

A.R.S. §13-1509 leaves a number of questions unanswered. If an illegal immigrant has not registered, and therefore has not been issued registration paperwork, are they guilty under section 13-1509? If an illegal immigrant has not registered but has been in the country for less than thirty days, are they guilty under section 13-1509? If a person is a legal immigrant but does not have their registration papers on their person, are they guilty of 13-1509? If a person has not registered, but would have been granted (or has been granted) a waiver by the federal government, are they guilty under section 13-1509?⁴³ Based upon a reading of the statute, the answer to each of these questions could certainly be yes. By the terms of the state statute, a person who has not registered or does not have their registration papers on their person for any reason would appear to be guilty.

Other concerns arise in a read of §13-2928. When looking to whether actions “block or impede the flow of traffic” there is an inevitable amount of guesswork. Certainly there are already traffic regulations against blocking traffic but there is no indication as to whether the

same standards apply to the conditions set forth under this statute. Is a slowing of traffic enough? What about a full stop? How long of a full stop? Does it matter if traffic would have stopped for another reason such as a pedestrian or traffic signal? Another troubling term is “solicit work”, which is defined as “verbal or nonverbal communication by a gesture or a nod that would indicate to a reasonable person that a person is willing to be employed.” When attempting to determine what a sufficient “gesture” is, it is clear that it is extremely difficult to determine the line between standing completely still and violating the statute. This is further complicated by the fact that solicitation of work is protected First Amendment speech under the US Constitution.⁴⁴

Finally, §13-2928 presents one of the most vague sections of the legislation. It states in part that it is unlawful to “[e]ncourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering or residing in this state is or will be in violation of law.” There is no definition, and little guidance, as to the meaning of “encourage” or “induce.” Section 13-2901, which lists definitions for the chapter, does not define either term, and nor does § 13-105. It is conceivable that accusations could be made against advocates for “open border” policies, or anyone who provides any type of friendly word to a potential illegal migrant.

The imprecise wording of the new criminal provisions brings to light the risks warned of because it “may permit ‘a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.’”⁴⁵ The lack of clarity permits the State law enforcement and prosecutorial agencies to apply this law to whatever persons they see appropriate. SB 1070 has repeatedly been criticized on the grounds that it will be applied in a racist fashion. In light of the imprecise language, these criticisms are rational and will be discussed in further sections.

c. SB 1070 and Equal Protections

Challenges on the basis of equal protection will be difficult. The Fourteenth Amendment provides, “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁶ In *Plyler v. Doe*⁴⁷ the United States Supreme Court held that illegal immigrants are considered persons within the jurisdiction of a state for the purposes of the Fourteenth Amendment.⁴⁸ However, the Supreme Court also stated that illegal immigrants were not a suspect class.⁴⁹ One of the primary reasons for the Court’s decision to deny illegal immigrants suspect classification was that illegal immigrants voluntarily enter the United States.⁵⁰ Accordingly, the Court stated that an illegal immigrant’s status is not immutable.⁵¹ Nonetheless, the Supreme Court’s decision to deny suspect class status to illegal immigrants has been called into question. Articles have specifically drawn analogy between immigrants and racial minorities as a justification.⁵²

SB 1070 actually supports the conclusion that illegal immigrants should be a suspect class. The legislation attempts to segregate and isolate illegal immigrants by creating a new crime that will apply only to this class of persons. A.R.S. § 13-1509(F) explicitly excludes any citizen or person legally authorized to be in the United States. Further, in Arizona the illegal immigrants who would most commonly and immediately suffer from such a law, Mexican immigrants, are members of a racial minority and would often be determinable by language or accent. Accordingly, the particular set of circumstances relevant to the passage of Senate Bill 1070, supports the position that illegal immigrants should be considered members of a suspect class.

If illegal immigrants in Arizona are considered members of a suspect class, SB 1070 would likely violate principles of equal protection. Race, national origin, alienage⁵³ and ancestry⁵⁴ are all suspect classifications that warrant a strict scrutiny review. Speaking specifically of alienage, the Supreme Court defined the test that legislation must pass as follows:

In undertaking this scrutiny, “the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are

necessary and precisely drawn.” Alienage classifications by a State that do not withstand this stringent examination cannot stand.⁵⁵

The government interests claimed include “discourage[ing] and deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”⁵⁶ These may be considered legitimate and substantial interests. The question will be whether the means are necessary and precisely drawn. This will be measured and analyzed with the potential public policy impacts of the legislation.

The Equal Protections analysis is further impacted by the realities how the laws will be enforced and the anticipated profiling based upon race and national origin. To address the initial criticisms of racism, the legislature added language to section 2 that is purported to resolve any concerns.⁵⁷ This language reads:

A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.⁵⁸

The problem with this language is twofold: first, the United States and Arizona Constitutions have been interpreted as to permit consideration of race and national origin, and second, the factors created for consideration by the Arizona Peace Officer Standards and Training Board (AZ POST) directly consider national origin.

In *U.S. v. Brignoni-Ponce*⁵⁹ the United States Supreme Court dealt with a situation where an immigration officer’s decision to stop a car was supported by only one factor: race (phrased as “the apparent Mexican ancestry of the occupants”).⁶⁰ The Court ruled that this one factor alone was not sufficient to support the stop.⁶¹ However, the Court held, “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”⁶² Race and national origin is a permissible consideration under the United States Constitution. The Arizona Supreme Court, in *State v. Graciano*,⁶³ similarly noted, “We do not hold today, however, that race or ethnic background can never be part of the totality of circumstances used to justify a stop.... Similarly, enforcement of immigration laws often involves a relevant consideration of ethnic factors.”⁶⁴ Accordingly, SB 1070 permits racial profiling. SB 1070 may actually require racial profiling. Section 2 of SB 1070 prohibits the “limit[ation] or restrict[ion of] the enforcement of federal immigration laws to less than the full extent permitted by federal law.”⁶⁵ The same section also gives legal residents the ability to enforce this mandate by suing any “official or agency ... that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws ... to less than the full extent permitted by federal law.”⁶⁶

The second concern is that AZ POST has specifically articulated the following factors may contribute to “reasonable suspicion”: possession of a foreign identification, a foreign vehicle registration, or a poor command of the English language.⁶⁷ These factors are simply indications of national origin. The fact that a person has a foreign identification or a foreign vehicle registration is not objective indicia that the person is present illegally. These factors are merely proof that the person is likely from a different country. Birth in or citizenship of a different country is not a crime and is not an objective indication that the person is unlawfully present. Similarly, a poor command of the English language—or an outright inability to speak English—is not an indication of undocumented status. By including these “factors,” AZ POST has advocated for the consideration of national origin when deciding whether a person may be undocumented.

The reality of SB 1070 is that it does not stop profiling on the basis of race or national origin. Instead, section 1 of the bill may require profiling in order to enforce the immigration statutes to the fullest extent possible. Moreover, the training program that was developed to prevent profiling actually recommends profiling on the grounds of national origin and alienage.

d. SB 1070 and Due Process

From a preliminary review, the Due Process questions raised by SB 1070 are: 1) concerns over secret evidence that have already been seen in *Simpson* hearings after Proposition 100; 2) the codification of new and novel methods of proof; 3) the impacts to a defendant's rights to a speedy trial and reasonable bail; and 4) the extended power to require identification created by SB 1070. These will each be addressed in turn.

1. "Secret Evidence"—already used at *Simpson* hearings—may become part of trials

Often at bond review hearings⁶⁸ where immigration status is at issue, the State will call 287(g) officers who bring evidence to court that is not disclosed to the defense and use it to testify that the person is in the United States illegally. This has included copies of interviews conducted with the defendant, notes regarding a search of the FBI number conducted on certain databases,⁶⁹ and a checklist of actions taken to determine the defendant's status in the United States. The practice of those officers has been to use this evidence to refresh their recollection and to enter hearsay into evidence, without permitting examination of any of the source material.⁷⁰

The defendant has the right to see and confront the witnesses and evidence against him.⁷¹ The United States Supreme Court reviewed the minimum requirements of due process in the context of parole revocation proceedings in *Morrissey v. Brewer*.⁷² The Court stated that "the minimum requirements of due process" includes "disclosure to the parolee of evidence against him."⁷³

To satisfy the Confrontation Clause, the defense must be "given a full and fair opportunity to probe and expose ... infirmities through cross-examination" and to call "to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."⁷⁴ To give effect to a Defendant's right to cross-examination, the government must disclose the evidence that will be used to prove its case.⁷⁵

Arizona Rule of Evidence 612 likewise mandates:

If a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) before testifying, if the court in its discretion determines it is necessary in the interests of justice, or

(2) while testifying, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the action, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

While a court may conclude that a bail hearing is not subject to the same due process protections as criminal proceedings, *Morrissey* and Rule 612 clearly demonstrate that the practices of testifying 287(g) witnesses in bondability hearings will not be acceptable in trial.

By establishing illegal status as an element to a number of new offenses, prosecutors will likely attempt to prove illegal status by bringing 287(g) officers into court. These officers will need to rely on the same resources they rely upon in *Simpson* hearings to argue illegal status. However, the

officers—and, in turn, the State—will attempt to argue that the Defense is not entitled to review these documents because of their confidential and protected status. Absent the ability to review the documents relied upon by the officer, it is impossible to adequately confront the 287(g) officers. These rights are even more important in a trial setting than a bail hearing. This also sets up a system in which the fact-finder must simply defer to the judgment of an officer who testifies, which is addressed next.

2. SB 1070 infringes on the role of the fact-finder

A criminal defendant has a right to a jury trial on any felony count and a bench or jury trial on a misdemeanor.⁷⁶ The ultimate fact-finder, thus, is the jury or judge. SB 1070, however, sets up a situation in which the element of illegal status will often be testified to by 287(g) officers who will attempt to refuse access to the documents they rely upon, as discussed above. Thus, SB 1070 creates a situation in which the judgment of officers who, in effect, go unchallenged make the decision regarding one of the elements of an offense, not the fact-finder. Section 3 is perhaps the most concerning. Section 3 creates the offense of Willful failure to complete or carry an alien registration document. The language of the statute establishes an impermissible shift of the determination of an element of the offense to law enforcement officials or agencies.

A previous version of the bill mandated that the immigrations status “shall” be determined by either the law enforcement officer or the agency. The bill was amended in the House by the Biggs floor amendment on April 13, 2010.⁷⁷ Section 13-1509 now encodes its own subsection as to the level of proof regarding the defendant’s status or lack thereof in the United States. It states:

B. In the enforcement of this section, an alien’s immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien’s immigration status.
2. A law enforcement officer or agency communicating with the United States Immigration and Customs Enforcement or the United States Border Protection pursuant to 8 United States Code Section 1373(c).⁷⁸

While the final version shifted away from a mandate that status be determined by a non-jury person or agency, which is a move in the right direction, the section still states that a determination that is properly left to a jury (or judge in certain circumstances) may be made by an officer or agency that is neither. Even if that is not the intent or ultimate application by the statute, it also unreasonably infringes on the role of the fact-finder, who should be free to determine that testimony of such officials is inadequate to establish this element of the offense.

3. SB 1070 raises Speedy Trial and Release concerns

The Offense of Willful failure to carry a registration document is punishable by no more than 20 days in jail for a first offense and 30 days in jail for a second or subsequent offense.⁷⁹ Arizona courts have applied the United States Supreme Court’s holding in *Williams v. Illinois* to hold that there is a liberty interest involved in presentence incarceration and that when presentence incarceration combined with punishment exceeds the statutory maximum, civil rights are violated.⁸⁰

In *State v. Fuentes*, the Arizona Appellate court cited *Williams v. Illinois*, holding that “. . . once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”⁸¹

Ordinarily, a Defendant’s speedy trial would be set 150 days from arraignment if held in custody. Ariz. R. Crim. P., 8.2 (a)(1). The exception is for complex cases, which are granted longer timelines. However, when a rule is in conflict with a defendant’s constitutional rights, the rule must give

way to the constitutional rights. Specifically, the rights to due process and equal protection are violated if a trial is set for a time past the statutory maximum punishment for this offense. Neither the United States nor the Arizona Constitution requires that a trial be held within a specified time period.⁸² However, the speedy trial right is both constitutional and statutory, and the Defendant must have a prompt trial to alleviate the constitutional violations incumbent with prolonged incarceration. In the case of violations of § 13-1509, if that trial is set or conducted later than twenty or thirty days from the date of incarceration, Defendant's equal rights and due process rights are violated.

When pretrial incarceration drastically exceeds the maximum term of imprisonment, it renders the maximum sentence a fiction. To prevent the abuses at risk, the speedy trial must be held within the maximum possible sentence for a defendant. The Arizona Rules of Criminal Procedure have not been amended to adapt to this offense and its unique circumstances. Defense attorneys will need to file motions to preserve the defendant's rights.

e. SB 1070 and the Fourth Amendment

The Fourth Amendment protects persons against unreasonable seizures.⁸³ This protection applies to even brief detentions or investigatory stops.⁸⁴ However, section 2 of SB 1070 establishes a mandate that officers must investigate a person's immigration status where "reasonable suspicion" exists:

For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance or a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released.⁸⁵

The most glaring problem with this law is that it mandates (through the use of the word shall) that officers investigate a person's legal status when there is a reasonable suspicion that the person may be illegally present, a "crime" that is only subject to civil penalties on the federal level.⁸⁶ What constitutes "reasonable suspicion" is also of concern. AZ POST was tasked with developing a training program to educate officers on what constitutes "reasonable suspicion."⁸⁷

The AZ POST handout for the training provides the following:⁸⁸

FACTORS WHICH MAY BE CONSIDERED, AMONG OTHERS, IN DEVELOPING REASONABLE SUSPICION OF UNLAWFUL PRESENCE

- Lack of identification (if otherwise required by law)
- Possession of foreign identification
- Flight and/or preparation for flight
- Engaging in evasive maneuvers, in vehicle, on foot, etc.
- Voluntary statements by the person regarding his or her citizenship or unlawful presence
 - Note that if the person is in custody for purposes of *Miranda*, he or she may not be questioned about immigration status until after the reading and waiver of *Miranda* rights.
- Foreign vehicle registration
- Counter-surveillance or lookout activity

- In company of other unlawfully present aliens
- Location, including for example:
 - A place where unlawfully present aliens are known to congregate looking for work
 - A location known for human smuggling or known smuggling routes
- Traveling in tandem
- Vehicle is overcrowded or rides heavily
- Passengers in vehicle attempt to hide or avoid detection
- Prior information about the person
- Inability to provide his or her residential address
- Claim of not knowing others in same vehicle or at same location
- Providing inconsistent or illogical information
- Dress
- Demeanor – for example, unusual or unexplained nervousness, erratic behavior, refusal to make eye contact
- Significant difficulty communicating in English

Many of these factors do not clarify the initial critical question: what does an illegal immigrant look like? Instead, “reasonable suspicion” is met by a plethora of legal and acceptable activities: possession of a valid foreign license, a valid foreign vehicle registration, travelling with a companion, riding in a car that is crowded, not knowing everyone in an immediate vicinity, giving answers that do not satisfy the “logical” expectations of a police officer, certain clothing (what does an illegal immigrant dress like?), being uncomfortable when questioned by a police officer, or speaking a language other than English. These overly broad factors do not legitimately point to illegal status. Rather, these factors, many of which will likely exist in any contact, merely operate to provide justifications where none exist. The result will be the detention of a number of individuals for whom there is no truly objective evidence of undocumented status. This is further borne out by the issues of racial profiling incumbent with SB 1070. Seizure will be discussed a bit further at the end of the next section.

f. SB 1070 and *Miranda*

SB 1070 also creates substantial *Miranda*⁸⁹ concerns in light of the requirement that officers determine whether persons are undocumented aliens once “reasonable suspicion” is believed to exist.⁹⁰ To make a *Miranda* claim two issues must be demonstrated adequately: that the defendant was in custody and that the defendant was interrogated.

Regarding custody, the *Miranda* decision articulated its intent as follows:

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.⁹¹

The Arizona Supreme Court posited the following test:

Whether a suspect is “in custody” is determined by an objective test: Would a reasonable man feel that he was deprived of his freedom in a significant way?⁹²

The first assessment of custody issues comes from the language of SB 1070 itself. SB 1070 states that an officer must investigate immigration status pursuant to “any lawful stop, detention or arrest.”⁹³ Two of these, detention and arrest, would automatically indicate a custody status as a person who is arrested or legally detained is not going to feel free to leave. A lawful stop that is envisioned as temporary may create more of a question. In *State v. Perea*,⁹⁴ the Arizona Supreme Court set forth the factors that are indicative of custody:

1) the site of the interrogation, 2) whether the investigation has focused on the accused, 3) whether the objective indicia of arrest are present, and 4) the length and form of the interrogation.⁹⁵

On its face, SB 1070 does not appear to implicate the first, third and fourth factors any differently than a standard case. However, the mandate of section 2 clearly implicates the second factor. By the time any officer develops “reasonable suspicion” that a person is in the country without permission, “the investigation has focused on the accused.” Additionally, as discussed below, the development of this suspicion may establish custody simply because of the mandates of section 2.

The next question is whether Defendant was interrogated. In *Rhode Island v. Innis*,⁹⁶ the United States Supreme Court set out a definition for what constitutes an interrogation:

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.⁹⁷

With this in mind, the Arizona Supreme Court indicated:

The focus in ascertaining whether particular police conduct amounts to interrogation, then, is not on the form of words used, but the intent of the police officers and the perceptions of the suspect.⁹⁸

SB 1070 requires officers to determine legal status any time “reasonable suspicion” exists. One of the ways a person can prove their status is to present a valid Arizona driver license, a valid Arizona non-operating identification license, a valid tribal enrollment card or other tribal identification, or any valid federal, state or local identification so long as the entity requires proof of legal presence prior to issuance.⁹⁹ Suspects will likely be requested for these identifications once an officer develops “reasonable suspicion.”

There is an interesting interplay between the two issues of custody and interrogation insofar as SB 1070 is concerned. The general rule is that a person is not required to carry identification, subject of course to a number of exceptions.¹⁰⁰ Under SB 1070, once the officer has decided reasonable suspicion exists, the officer “shall ... determine the immigration status of the person.”¹⁰¹ By requiring investigation, the person being investigated is no longer free to leave for the duration of that investigation. Accordingly, the moment reasonable suspicion exists, the person being investigated is in custody insofar as a *Miranda* analysis is concerned and has been seized insofar as a Fourth Amendment analysis is concerned. Thus, if the investigation consists of requesting a license or identification, the request is being made while the person is necessarily in custody. In effect, SB 1070 creates a situation in which custody is established very quickly. The result of this, however, is that if a request to see identification is preceded by “reasonable suspicion,” the request is inherently conduct that is “reasonably likely to elicit an incriminating response from the suspect.” In such a case, the presentation of identification could be challenged under *Miranda*.

g. SB 1070 and Charging Considerations in Maricopa County

The Maricopa County Attorney’s Office has produced a new policy referencing the SB 1070 misdemeanor offenses and their policy on charging.¹⁰² It includes comprehensive requirements for law enforcement agencies in submitting the charges, and specifies that it will not charge the offenses if the requirements are not met.

The most important requirement is that “[t]o sustain prosecution, a submittal must recite sufficient evidence, independent of the suspect’s statements, to sustain each and every element of the offense,

including the elements of applicable federal law.” This requirement matches the state’s requirement to use more than defendant’s statements to present their evidence.¹⁰³ Review any charges carefully to ensure that all elements are supported.

The MCAO policy also states that “[a]ny submittal will not be filed if there is any indicia of racial profiling.” As mentioned in other sections, the danger of racial profiling is significant due to provisions of the law that explicitly except profiling “permitted by the Arizona and US Constitution.” Additionally, the training of officers has centered around factors that are not race- or origin-neutral and do not focus on circumstances of entry or remaining. It is important to look to these issues in evaluating any case in Maricopa County. If cases are being accepted for prosecution that involve racial profiling, the policy indicates that this should be turned down for prosecution and this issue should be brought to the attention of the assigned DCA.

Finally, the policy also states that prosecution of a misdemeanor offense will be declined if a felony charge is also filed. This will likely reduce the filings by the County Attorney’s Office and the majority of SB 1070 prosecutions will be in justice and municipal courts. However, it should be noted that this will not prevent police abuses from providing pretexts for stops, seizures, and arrests. If officers use procedures that are inadequate to ensure prosecution under MCAO policies for SB 1070 misdemeanors and submit the felonies instead, that would be informative to demonstrate pretext.

III. Lawsuits Filed Against Arizona

a. Federal Lawsuit

On July 6, 2010, the United States filed suit against the State of Arizona along with a Motion for Preliminary Injunction.¹⁰⁴ The focus of the Complaint and Motion for Preliminary Injunction is that SB 1070 is preempted by federal law. The Motion for Preliminary Injunction provides an extensive argument why SB 1070 is preempted by federal law as well as an insightful background of immigration law and the number of decisions that have been made by Congress and the Executive Branch as to how to deal with aliens. Of particular import is the discretion that has been granted to the agencies in charge of immigration enforcement.¹⁰⁵

The Motion for Preliminary Injunction argues that the overall scheme of SB 1070 is preempted because SB 1070 is a comprehensive immigration policy.¹⁰⁶ To draw support for this argument, the Motion focuses on the stated policy goal of SB 1070 to obtain “attrition through enforcement,”¹⁰⁷ the fact that SB 1070 explicitly refers to itself as a policy, SB 1070’s establishment of interlocking regulations, and how SB 1070 effectuates the policy.¹⁰⁸ The United States next points to three reasons SB 1070 conflicts with federal immigration policy: 1) The SB 1070 policy interferes with federal enforcement priorities because it requires law enforcement “to target any and all suspected aliens without regard to dangerousness,” in contravention with the federal system’s allowance for significant discretion and focus on the most dangerous aliens, and diverts federal resources;¹⁰⁹ 2) SB 1070 “interferes with the federal government’s ability to administer and enforce the immigration laws in a manner consistent with congressional objectives” such as humanitarian relief;¹¹⁰ and 3) “Arizona’s focus on criminal sanctions is at odds with the federal policy of channeling certain unlawfully present aliens into civil removal proceedings or permitting them to leave the country without criminal penalty or incarceration.”¹¹¹ The United States also argues that SB 1070 improperly interferes with foreign policy, affairs and diplomacy.¹¹² The Motion then reviews every section to demonstrate how each section is independently preempted by federal law.¹¹³

The Motion next addresses the three harms that the United States will suffer absent a preliminary injunction.¹¹⁴ First, SB 1070 “undermines the federal government’s control over the regulation of immigration and immigration policy and thereby interferes with the federal government’s ability to achieve the purposes and objectives of federal law and to pursue its chosen enforcement priorities.”¹¹⁵ Second, SB 1070 interferes with foreign policy.¹¹⁶ Third, SB 1070 will burden the Department of Homeland Security “and force DHS to react to Arizona’s enforcement of SB 1070 at

the expense of its own policy priorities”¹¹⁷ Finally, the United States argues that injunctive relief is necessary for public interest reasons.¹¹⁸

Attached to the Complaint and Motion for Preliminary Injunction are a number of Declarations from government officials detailing the policy and enforcement issues advanced in the Complaint and Motion. Many of these Declarations should be considered as attachments to any motions filed challenging SB 1070 provisions.

b. Additional Suits

Other suits have been filed by Arizona citizens. Martin Escobar,¹¹⁹ a Tucson Police Officer, and David Salgado,¹²⁰ a Phoenix Police Officer, have sued claiming that the provisions of SB 1070 place them in an untenable position by forcing him to engage in due process violations against Hispanics or face disciplinary action and/or lawsuits. Escobar also charges that the law is the product of racial bias.

A coalition of documented and undocumented individuals, religious clergy, and business owners have also filed suit,¹²¹ alleging multiple causes of action. Hispanic individuals have charged that they fear harassment, arrest, and deportation. Those who were documented feared that being charged with a crime under 13-1509 would harm their chances at becoming citizens. Business owners have charged that they have lost business due to an anti-Hispanic atmosphere. Churches charge that their rights to free speech and exercise of religion are threatened. The American Civil Liberties Union also filed suit, arguing that SB 1070 is preempted by federal law, violates equal protections, violates the First Amendment, Fourth Amendment, Article 2, § 8 of the Arizona Constitution, violates due process, and infringes upon the right to travel.¹²² The Arizona Attorneys for Criminal Justice filed an *amicus* brief to this suit.¹²³

IV. Topics for Further Discussion

As the legislation awaits enactment, discussion in the legal community and national media has already brought about many questions, doubts, and concerns.¹²⁴ The goal of this article is to foster dialogue within indigent defense offices about the best ways to defend clients charged under SB 1070. Topics for further thought and discussion may include:

- Is there an impact of an unfunded mandate as related to criminal defense?
- This section permits lawsuits –will these extend to prosecution agencies? What about individual prosecutors? Can “adopting or implementing a policy or practice that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law” be defined as dismissal of charges with no reasonable likelihood of conviction? What about as part of a plea deal? Or amending charges?
- Will this legislation lead to decreased reporting of crime and exploitation of victims and witnesses?

(Endnotes)

1. <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf>.
2. <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2162o.asp>.
3. Throughout this article, “SB 1070” will be used to reference the Senate Bill, as modified by HB 2162.
4. §13-1509: Willful failure to complete or carry an alien registration document
 - A. In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code Section 1304(e) or 1306(a).

B. In the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.
2. The United States Immigration and Customs Enforcement or the United States Customs and Border Protection pursuant to 8 United States Code Section 34 1373(c).

C. A Law Enforcement Official or Agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

D. A person who is sentenced pursuant to this section is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement on any basis except as authorized by Section 31-233, subsection A or B until the sentence imposed by the court has been served or the person is eligible for release pursuant to Section 41-1604.07.

E. In addition to any other penalty prescribed by law, the court shall order the person to pay jail costs.

F. This section does not apply to a person who maintains authorization from the federal government to remain in the United States.

G. Any record that relates to the immigration status of a person is admissible in any court without further foundation or testimony from a custodian of records if the record is certified as authentic by the government agency that is responsible for maintaining the record.

H. A violation of this section is a class 1 misdemeanor, except that the maximum fine is one hundred dollars and for a first violation of this section the court shall not sentence the person to more than twenty days in jail and for a second or subsequent violation the court shall not sentence the person to more than thirty days in jail.

5. §13-2928. Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definitions

A. It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

B. It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

C. It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.

D. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona constitution.

E. IN the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.
2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

F. A violation of this section is a class 1 misdemeanor.

G. For the purposes of this section:

1. "Solicit" means verbal or nonverbal communication by a gesture or a nod that would indicate to a reasonable person that a person is willing to be employed.
2. "Unauthorized alien" means an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code section

1324a(h)(3). END_STATUTE

6. § 13-2929. Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens; vehicle impoundment; exception; classification
- A. It is unlawful for a person who is in violation of a criminal offense to:
1. Transport or move or attempt to transport or move an alien in this state, in furtherance of the illegal presence of the alien in the United States, in a means of transportation if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
 2. Conceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
 3. Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering or residing in this state is or will be in violation of law.
- B. A means of transportation that is used in the commission of a violation of this section is subject to mandatory vehicle immobilization or impoundment pursuant to section 28-3511.
- C. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona constitution.
- D. In the enforcement of this section, an alien's immigration status may be determined by:
1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.
 2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).
- E. This section does not apply to a child protective services worker acting in the worker's official capacity or a person who is acting in the capacity of a first responder, an ambulance attendant or an emergency medical technician and who is transporting or moving an alien in this state pursuant to title 36, chapter 21.1.
- F. A person who violates this section is guilty of a class 1 misdemeanor and is subject to a fine of at least one thousand dollars, except that a violation of this section that involves ten or more illegal aliens is a class 6 felony and the person is subject to a fine of at least one thousand dollars for each alien who is involved.
7. SB 1070, § 2 (A.R.S. § 11-1051).
 8. *Id.* at (A).
 9. *Id.* at (B).
 10. *Id.* at (C).
 11. SB 1070, § 6 (A.R.S. § 13-3883(A)(5)).
 12. SB 1070, §§ 7-9.
 13. SB 1070, § 10.
 14. SB 1070, § 11.
 15. SB 1070, § 12.
 16. U.S. Const. art. I, § 8, cl. 4.
 17. *U.S. v. Shaughnessy*, 338 U.S. 521, 529, 70 S.Ct. 329, 333 (1950) ("There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct.") (citing *Mahler v. Eby*, 264 U.S. 32, 44 S.Ct. 283; *Ng Fung Ho v. White*, 259 U.S. 276, 280, 42 S.Ct. 492, 493; *Bugajewitz v. Adams*, 228 U.S. 585, 33 S.Ct. 607; *Fong Yue Ting v. U.S.*, 149 U.S. 698, 730, 13 S.Ct. 1016, 1028).

18. *De Canas v. Bica*, 424 U.S. 351, 354, 96 S.Ct. 933, 936 (1976).
19. *Id.* at 355, 936 (“But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”).
20. *Id.* at 355, 935-36.
21. *Id.* at 357, 937.
22. *Id.* at 358, 938 (“[E]ven absent such a manifestation of congressional intent to ‘occupy the field,’ the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties.”).
23. SB 1070, § 1.
24. *E.g.* 8 U.S.C. § 1158 (provision for granting asylum); 8 U.S.C. § 1182(a)(6)(A)(ii) (precluding from inadmissibility certain battered women and children); 8 U.S.C. § 1182(d)(5)(A) (permitting aliens to stay for humanitarian reasons); 8 U.S.C. § 1227(a)(1)(E)(iii) (permitting the Attorney General to waive deportation for humanitarian purposes, family unity or public interest reasons); 8 U.S.C. § 1229b (permitting cancellation of removal for a number of reasons); 8 U.S.C. § 1254a (provision for granting temporary protected status).
25. 8 U.S.C. § 1227(a)(1)(B) & (C).
26. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483 (1984).
27. 722 F.2d 468 (9th Cir. 1983).
28. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (“The general rule is that local police are not precluded from enforcing federal statutes.”). Specifically, the City of Peoria was arresting and detaining illegal immigrants and holding them for INS. Eleven immigrants brought suit against the police department on the grounds that the police officers were making arrests without sufficient probable cause and solely on the grounds of race.
29. *Id.*
30. *Id.*
31. *Id.* at 475-77. The Court further bolstered its conclusion with a legislative analysis of 8 U.S.C. 1324(c). Section 1324(c) went through an amendment procedure that clearly intended to give local authorities the ability to enforce the criminal provisions of the federal immigration legislation.
32. *State v. Barragan-Sierra*, 219 Ariz. 276, 287, 196 P.3d 879, 890 (App. 2008).
33. 8 U.S.C. § 1325.
34. *See supra* note 25-27.
35. *See* discussion of the federal suit *infra* notes 104-118.
36. *State v. Takacs*, 169 Ariz. 392, 394, 819 P.2d 978, 980 (App. 1991) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972)).
37. *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858 (1983)). “Penal statutes also require more precision than civil statutes because ‘the consequences of imprecision are qualitatively less severe’ where civil statutes are concerned.” *Id.* at 394-95, 980-81 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193 (1982)).
38. 8 U.S.C. § 1304(e).
39. SB 1070, § 3 (A.R.S. §13-1509(F)).
40. This has also been noted as simply a defect in the workability of SB 1070, rather than a vagueness challenge. *See* Chin, Gabriel, Carissa Hessick, Toni Massaro, Marc Miller, [Arizona Senate Bill 1070: A Preliminary Report on Legal Issues Raised By Arizona’s New Statute Regulating Immigration](#), Preliminary Comment Draft (Version 1.2), June 7, 2010 (accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440 on July 8, 2010).
41. 8 U.S.C. § 1306(a).

42. 8 U.S.C § 1302(a).
43. For example, 8 U.S.C § 1201(b) provides that registration requirements may be waived for immigrants with ties to foreign governments.
44. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (2006) (“It is beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech.”) (citing *Vill. Of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 628-32, 100 S.Ct. 826 (1980); *Int’s Soc’y for Krishna Consiousness, Inc. v. Lee*, 505 U.S. 672, 677, 112 S.Ct. 2701 (1992)).
45. *Takacs*, 169 Ariz. at 394, 819 P.2d at 980.
46. U.S. Const. Amend. 14, § 1.
47. 457 U.S. 202, 102 S.Ct. 2382 (1982).
48. Specifically, the Court stated:

Appellants argue at the outset that undocumented aliens, because of their immigration status, are not “persons within the jurisdiction” of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments.

Id. at 210, 2391.

49. *Id.* at 223, 2398 (“Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”).
50. *Id.* at 220, 2396.
51. *Id.* (“Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.”).
52. “Similar to African Americans and many other racial minorities, undocumented immigrants are a ‘discrete and insular’ minority. They, like racial minorities, have been historically segregated and isolated. In times of economic depression, immigrants have been targeted by laws aiming to separate them from United States citizens by way of deportation or strict quotas. Furthermore, strict quotas make a change of status from illegal to legal almost impossible for most immigrants, much like racial minorities are unable to change their color.
“Additionally, both racial minorities and immigrants are visibly distinct, and thus ‘discrete.’ They are also often readily determinable by their language or accent, and thus easily fall victim to deliberate and unequal treatment as a result of stereotypes not truly reflecting their individual capabilities. Because illegal immigrants are a class of individuals sharing many characteristics with racial minorities, a suspect class, they too should be afforded strict scrutiny.”
Catherine Halliday, Student Author, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States’ Northern and Southern Borders*, 36 Val. U. L. Rev. 181, 213-14 (2001) (citations omitted).
53. *City of Cleburne, Tex. V. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254 (1985) (race, national origin, alienage); see also *McLaughlin v. Florida*, 379 U.S. 184, 191-92, 85 S.Ct. 283, 288 (1971) (race).
54. *Oyama v. California*, 332 U.S. 633, 646, 68 S.Ct. 269, 275 (1948).
55. *Nyquist v. Mauclet*, 432 U.S. 1, 7, 97 S.Ct. 2120, 2124 (1977) (citations omitted).
56. <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf>.
57. SB 1070, § 2 (A.R.S. § 13-1509(C)).
58. *Id.* (emphasis added).

59. 422 U.S. 873, 95 S.Ct. 2574 (1975).
60. *Id.* at 885-86, 2582.
61. *Id.* at 886, 2582-83.
62. *Id.* at 886-87, 2583.
63. 134 Ariz. 35, 653 P.2d 683 (1982).
64. *Id.* at 39, 687 fn.7 (citations omitted).
65. SB 1070, § 2 (A.R.S. § 11-1051(A)).
66. *Id.* at A.R.S. § 11-1051(H).
67. "Implementation of the 2010 Arizona Immigration Laws Statutory Provisions for Peace Officers," accessed at http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf; see note 88 *infra*.
68. Pursuant to *Simpson v. Owens*, 207 Ariz. 261, 85 P.3d 478 (App, 2004) and *Segura v. Cunanan*, 219 Ariz. 228, 196 P.3d 831 (App, 2008).
69. IDENT--Automated Biometric Identification System; CIS-Current Index to Statistics; DASC Deportable Alien Control System. None of these databases are accessible to defense counsel.
70. This has occurred in numerous cases since the *Segura* decision granted the right to a hearing on non-bondability issues. Challenges have been frequently filed and summarily denied by the court. A special action was filed in CR 2009-111331-001 DT, and the Arizona Court of Appeals denied jurisdiction.
71. The Sixth Amendment applies to the States through the due process clause of the Fourteenth Amendment. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110 (1974); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965); *State v. Dunlap*, 125 Ariz. 104, 105, 608 P.2d 41, 42 (1980). The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. 6. Similarly, the Arizona Constitution provides:
In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, [and] to meet the witnesses against him face to face

Ariz. Const. Art. 2, § 24.
72. 408 U.S. 471, 92 S.Ct. 2593 (1972).
73. *Id.* at 488-89, 2604. The Court emphasized, however, that parole revocation proceedings were not the equivalent of criminal proceedings. *Id.* at 489, 2604. The same requirements set forth in *Morrissey* were extended to probation violation proceedings in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973).
74. *Delaware v. Fensterer*, 474 U.S. 15, 22, 106 S.Ct. 292, 295 (1985).
75. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413 – 1414 (1959).
76. U.S. Const. amendment 6, 14, Arizona Const. Article 2, §23.
77. <http://www.azleg.gov/legtext/49leg/2r/adopted/h.1070ab.pdf>.
78. SB 1070, § 3.
79. ARS § 13-1509.
80. [W]hile presentence incarceration may not qualify as 'punishment' under A.R.S. § 13-1652, it amounts to an infringement of freedom and deprivation of liberty and when added to the maximum deprivation of liberty allowed by law results in a denial of equal protection guaranteed by the 14th Amendment of the United States Constitution.

State v. Sutton, 21 Ariz.App. 550, 552, 521 P.2d 1008, 1010 (App. 1974), *relying on Williams v. Illinois*, 399 U.S. 235, 242, 90 S.Ct. 2018, 2023 (1970).
81. 26 Ariz.App. 444, 447, 549 P.2d 224, 228 (App. 1976) (citing *Williams* at 241, 2022 (internal

- citations omitted)).
82. *State v. Wassenaar*, 215 Ariz. 565, 571, 161 P.3d 608, 614 (App. 2007).
 83. U.S. Const. Amend. 4; *see also* Ariz. Const. Art. 2, § 8.
 84. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877 (1968).
 85. SB 1070, § 2 (A.R.S. § 11-1051(B)).
 86. *See* discussion *supra* regarding Supremacy Clause, notes 26 and 27.
 87. The materials for this training program, including the video, are available at <http://www.azpost.state.az.us/SB1070infocenter.htm>.
 88. “Implementation of the 2010 Arizona Immigration Laws Statutory Provisions for Peace Officers,” accessed at http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf.
 89. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).
 90. *See* SB 1070, § 2 (A.R.S. § 11-1051(B)).
 91. *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612 (1966).
 92. *State v. Morse*, 127 Ariz. 25, 28, 617 P.2d 1141, 1144 (1980).
 93. SB 1070, § 2 (A.R.S. § 11-1051).
 94. 142 Ariz. 352, 690 P.2d 71 (1984).
 95. *Id.* at 354-55, 73-74.
 96. 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-90 (1980).
 97. *Id.* at 300-01, 1689-90 (footnote omitted).
 98. *State v. Finehout*, 136 Ariz. 226, 230, 665 P.2d 570, 574 (1983).
 99. SB 1070, § 2 (A.R.S. § 11-1051(B)(1)-(4)).
 100. *E.g.* A.R.S. §§ 13-3821(J) (sex offender registration), 28-3169 (driver license when driving).
 101. SB 1070, § 2 (A.R.S. § 11-1051(B)).
 102. *See* Michael Kiefer, “Arizona immigration law: Rick Romley spells out the rules to handle cases,” The Arizona Republic, 7/9/2010 (accessed at: <http://www.azcentral.com/news/election/azelections/articles/2010/07/09/20100709arizona-immigration-law-rick-romley-cases.html#reply20580210>). The policy is not yet available online but will be made available upon request.
 103. “The purpose of the corpus-delicti rule is to prevent a conviction based solely on an individual’s uncorroborated confession, the concern being that such a confession could be false and the conviction thereby lack fundamental fairness.” *State v. Flores*, 202 Ariz. 221, 222, ¶5, 42 P.3d 1186, 1187 (App. 2002), citing *State v. Jones*, 198 Ariz. 18, 21 ¶ 10, 6 P.3d 323, 326 (App. 2000)). *See also In re Winship*, 397 U.S. 358, 365, 90 S.Ct. 1068, 1073, (1970), cited by *State v. Jensen*, 153 Ariz 171, 176, 735, P.2d 781, 786 (1987)(“The due process clause places the burden on the prosecution to prove beyond a reasonable doubt every element of a criminal offense.”)).
 104. Complaint, Motion for Preliminary Injunction and Declarations accessed at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html>.
 106. Motion for Preliminary Injunction, 5 (noting that the Department of Homeland Security “has the authority to permit aliens ... to temporarily enter and remain in the United States for ‘urgent humanitarian reasons’ or ‘significant public benefit[,]’ family unity, domestic abuse, persecution, or a national of a country experiencing ongoing extraordinary circumstances).
 107. *Id.* at 12-13.
 108. *Id.*
 109. *Id.* at 14.
 110. *Id.* at 19-20.
 111. *Id.* at 20-21.

112. Id. at 21.
113. Id. at 22-25.
114. Id. at 25-46.
115. Id. at 46.
116. Id. at 46-47.
117. Id. at 47-50.
118. Id. at 50.
119. Id. at 52-53.
120. Accessed at <http://www.azcentral.com/ic/pdf/0429immigration-lawsuit-tucson.pdf>.
121. Accessed at <http://www.azcentral.com/ic/pdf/0429immigration-lawsuit-salgado.pdf>.
122. Accessed at <http://www.azcentral.com/ic/pdf/0429immigration-lawsuit-clergy.pdf>.
123. Accessed at http://www.aclu.org/files/assets/az_sb1070_complaint_20100517.pdf.
124. Accessed at http://www.aclu.org/files/assets/amicus_Arizona_Association_for_Criminal_Justice_0.pdf.
125. “Indeed, our failure to act responsibly at the federal level will only open the door to irresponsibility by others. And that includes, for example. . . the recent efforts in Arizona, which threatened to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and their communities that is so crucial to keeping us safe.” President Barack Obama, “Remarks by the President at Naturalization Ceremony for Active-Duty Service Members,” 4/23/2010, accessed at <http://www.whitehouse.gov/the-press-office/remarks-president-naturalization-ceremony-active-duty-service-members>; Dan Nowicki, “Court fight looms on new immigration law,” *The Arizona Republic*, 4/25/2010, accessed at <http://www.azcentral.com/news/articles/2010/04/25/20100425immigration-bill-jan-brewer-arizona.html> quoting Annie Lai, Arizona ACLU:

The immigration-enforcement provisions do not have adequate safeguards that United States citizens, legal residents, Native Americans and other minorities will not be detained and arrested.

and Secretary of Homeland Security Janet Napolitano:

The Arizona immigration law will likely hinder federal law enforcement from carrying out its priorities of detaining and removing dangerous criminal aliens,” she said. “With the strong support of state and local law enforcement, I vetoed several similar pieces of legislation as governor of Arizona because they would have diverted critical law-enforcement resources from the most serious threats to public safety and undermined the vital trust between local jurisdictions and the communities they serve.



Understanding the Lack of Mental Health Treatment in Hispanic Populations

By Patricia Lopez, Mitigation Specialist

According to NAMI, the National Alliance on Mental Illness, “Latinos are over-represented in the criminal and juvenile justice system.” Latino men are nearly four times as likely to be arrested during their lifetimes. Among these two Latino groups, **many have an undiagnosed or misdiagnosed mental illness**. Latino Juveniles are often misdiagnosed as having anger problems or conduct disorders when in reality findings show they suffer disproportionately more from anxiety-related symptoms, depression and substance abuse issues.

There are numerous reasons given for the lack of mental health treatment among the Hispanic communities. Statistics and other studies show that Hispanics do not access the mental health system due to lack of knowledge regarding signs and symptoms of mental illness, finances, and their strong spiritual, cultural and religious beliefs.

The U. S. Department of Health and Human services described “Cultural-bound syndromes seen in Hispanic Americans to include **susto** (fright), **nervios** (nerves), **mal de ojo** (evil eye), and **ataque de nervios**. Symptoms of an **ataque** may include screaming uncontrollably, crying, trembling, verbal or physical aggression, dissociative experiences, seizure-like or fainting episodes and suicidal gestures.” Also known in our culture is “**un mal**” meaning that someone has placed “**a curse**” on an individual or a family and that is why bad things have happened to them.

I have worked with the Hispanic population in a professional capacity for the past eighteen years. The last seven years I worked for Correctional Health Services as a Psychiatric Counselor throughout the Maricopa County jail system. While working for CHS I found that addressing mental illness was a huge challenge. Often, Hispanic –Americans and those who have migrated to the United States deny any knowledge of mental illness being present in the family or with themselves. Over the years I have occasionally heard the aforementioned expressions while interviewing clients. When receiving responses referring to *nervios*, *males*, and *sustos*, etc. meant I had something to work with and that there was some awareness with family members regarding mental health symptomology that could be helpful to my assessment and the information I was able to present to the provider. Of course, often, I was able to revert to my own childhood experiences in an attempt to gather such information. As a child I grew up in the housing projects of Phoenix and it was not uncommon to find an adult or a child who suffered from a mental disorder or perhaps mental retardation or Down’s syndrome, etc. I recall as a child when someone in our community had “issues” they were not discussed openly. Of course as children our curiosity got the best of us and we inquired for information. The response was different according to the condition or behavior of the individual being discussed. If the person was “fragile, vulnerable, or suffered with cognitive deficits,” we were told to be watchful of that person in case anyone else bullied them or tried to harm them. If the person was “aggressive, belligerent, or sexually inappropriate,” we were warned to stay away from that person for they may harm us.

Over the years, living and working with the Hispanic community I have found that family members and the community tend to be genuinely empathetic and more understanding of individuals suffering from mental illness, thus making them less blameworthy.

Hispanics often rely on extended family, community, traditional healers, and/or churches during a health crisis. In fact, they are twice more likely to seek help from any of the aforementioned resources than from a mental health provider.

The Hispanic culture is known to place value on the elders in the family due to their extensive life experience. Often when someone in the family takes ill they turn to the elders for advice, support and comfort. The elders may offer a safe, simple, home remedy such as herbal teas, or other herbs which may be used for various medical complaints.

Many Hispanics are of the Catholic faith and believe that health is a gift from God. The prevention of an illness or overall good health is accomplished with prayer, wearing religious medals, lighting candles and offering prayer.

There is also the use of a Curandero, who is considered a holistic healer with a spiritual component. They may offer “massages or special cleansings, prayer and the use of herbs and potions.”

While these various options may be utilized for healing, comfort, and support, it is extremely important to help educate families and individuals who suffer with mental illness. At times it is difficult for these individuals to believe that something is wrong and that they may be experiencing symptoms related to a psychiatric disorder. While it is important to respect the cultural beliefs of this population it is equally important to gain their trust and confidence so they may be open to the education process and are able to openly discuss “triggers,” symptomology, and medications that may be helpful in stabilizing their symptoms and may offer them a more productive and healthy lifestyle.

My experience has been that while individuals and family members may be concerned about what they are experiencing they do not know who to contact. Often, by the time family members become involved their loved one is in a crisis situation. Many do not know that there are crisis centers and mobile teams that can be called out to the home to assess such an emergency.

The Mobile Crisis Teams along with the Urgent Care Centers can be utilized to assist families with a petition process. Many times the client may be a Danger to Self (suicidal thoughts) or a Danger to Others (homicidal thoughts) and in need of immediate intervention or hospitalization as their judgment and insight may be grossly impaired.

Urgent Care Centers available are:

Crisis Recovery Unit (CRU) – (602) 257-1558

1420 S. 7th Ave. Phoenix, AZ

Urgent Psychiatric Center (UPC) – (602) 416-7600

903 N. 2nd Street Phoenix, AZ

Psychiatric Recovery Center (West Phx) (PRC) – (623) 972-8888

11361 N. 99th Ave #402 Peoria, AZ

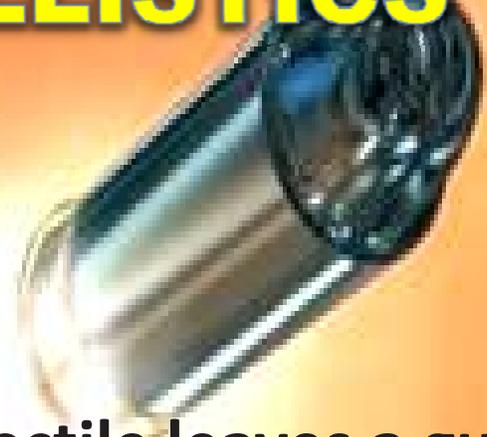
Magellan Help Line (General Information) 1-800-564-5465

Crisis Mobile Team (This team can assess on-sight and help with petitioning process
1-800-631-1314.

August Brown Bag

FIREARMS / BALLISTICS

Presented by: Bill Meginnis
Investigator MCPD



- ◆ What happens once a projectile leaves a gun?
- ◆ Stopping power of ammunition.
- ◆ What is Velocity?
- ◆ Ammunition Characteristics.
- ◆ Wounds (Caution: Graphic).

If you have questions or would like to register, contact Celeste Cogley by phone at 602-506-7711 X37569 or by email at cogleyc@mail.maricopa.gov

Thursday, August 19, 2010

12:00 pm – 1:30 pm

Downtown Justice Center, Maricopa County Public Defender
620 West Jackson, 5th Floor Training Room, Phoenix, AZ 85003

Practice Pointer

Rule 15.8 and Fast Track Discovery

By Jeremy Mussman, Deputy Director

Here's an approach that may be of assistance to those of you dealing with problems with discovery and cut-off dates in Fast Track cases. Unlike other RCC plea offers, Fast Track cases involve plea deadlines in cases in which an Information has been filed in Superior Court. Consequently, relief under Rule 15.8 may be available for some of these cases. Specifically, if material information required under 15.1(b) is not provided by the prosecution **at least 30 days prior to the plea deadline** and your client doesn't take the plea before the deadline, Rule 15.8 should apply if the client decides at a later date that he wants the plea back based upon material information provided by the prosecution under Rule 15.1(b). Here's the full text of Rule 15.8, along with the comment to the rule:

→Rule 15.8. Disclosure prior to a plea deadline; sanctions

If the prosecution has imposed a plea deadline in a case in which an indictment or information has been filed in Superior Court, but does not provide the defense with material disclosure listed in [Rule 15.1\(b\)](#) at least 30 days prior to the plea deadline, the court, upon motion of the defendant, shall consider the impact of the failure to provide such disclosure on the defendant's decision to accept or reject a plea offer. If the court determines that the prosecutor's failure to provide such disclosure materially impacted the defendant's decision and the prosecutor declines to reinstate the lapsed plea offer, the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed at least 30 days prior to the deadline.

CREDIT(S)

Added Oct. 16, 2003, effective Dec. 1, 2003.

COMMITTEE COMMENT TO 2003 ADDITION OF THE NEW RULE 15.8

Although there is no constitutional right to a plea bargain, see [United States v. Osif, 789 F.2d 1404, 1405 \(9th Cir. 1986\)](#); [State v. McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 \(1996\)](#), once the State engages in plea negotiations, certain constitutional protections attach that allow the Court to ensure the process is fair. See [State v. Donald, 198 Ariz. 406, 413, 10 P.3d 1193, 1200 \(App. 2000\)](#).

It has become common, especially in high-volume jurisdictions, for a prosecutor to impose a deadline by which a defendant must accept a plea offer. Such deadlines are imposed in order to optimize scarce criminal justice resources and minimize impact to victims. However, when the plea deadline occurs before material discovery is provided to the defense, such deadlines may impact a defendant's constitutional rights. Defense counsel may not have adequate information about the prosecution's case to provide effective assistance to the defendant in making the decision whether to accept a plea offer or proceed to trial, resulting in a plea not knowingly and intelligently made.

New Rule 15.8 balances these interests by requiring that all material discovery listed in Rule 15.1(b) be provided to the defense well enough in advance of any plea deadline to enable the defendant to make an informed decision on the plea offer with the effective assistance of counsel.

Rule 15.8 is not triggered by a failure to comply with Rule 15.1(b), but by the failure to provide the materials or information listed under Rule 15.1(b) at least 30 days prior to the plea deadline. For example, a lab result may be material to the defendant's decision whether to accept or reject a plea offer. Under Rule 15.1(b), the prosecution does not have to provide the result to the defendant until it is "then existing" and may not even order the report until after the plea deadline. This would not violate Rule 15.1(b). However, under Rule 15.8, the court, upon motion by the defendant, would consider the impact of the

failure to provide the lab report on the defendant's decision to reject the plea offer, and impose a sanction, if appropriate.

Rule 15.8 does not automatically preclude evidence that is disclosed within thirty days of the plea deadline. It applies only to discovery that the court finds material to the defendant's decision whether to accept or reject a plea offer. Whether discovery is material or not must be determined by the court after considering all of the circumstances of the case.

APPLICATION

<The October 16, 2003 amendment is applicable to all criminal cases in which the indictment, information or complaint is filed on or after December 1, 2003, or in which service of the mandate of an appellate court ordering a new trial upon the reversal of a judgment occurs on or after December 1, 2003.>

HISTORICAL NOTES

The former rule, relating to non-severability, was repealed as obsolete.

Trial Tips

Tip # 2: Is the Officer Lying?

By Terry Lovett Bublik, Attorney Supervisor

You are in trial and your client is on the stand. You just conducted a spectacular direct examination of him and now it is time for the prosecutor to conduct his cross-examination. Next, comes the question that seems to be the favorite of prosecutors: "Mr. Defendant, you just heard Officer Jones testify that.... Is he lying?"

Sound familiar? The more important question is, did you object? If not, you need to start doing so. It is black letter law that a prosecutor may not ask a Defendant to comment on the truthfulness of another witness. *U.S. v. Combs*, 379 F. 3d 564, 572 (9th Cir. 2004), *U. S. v. Geston*, 299 F. 3d 1130, 1136 (9th Cir. 2002). Questioning a witness about whether or not another witness is lying is improper and should be objected to. For example, object to the form of the question, or object that it is an improper question. It is up to the jury to decide who is telling the truth. This type of questioning may also be a form of vouching. *State v. Morales*, 198 Ariz. 372, 375, 10 P.3d 630, 633 (App. 2000). See also, memo decision *State v. James Montella*, 1 CA-CR 05-1041 App. Div. 1 (2007), *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). The next time the prosecutor asks any witness this question, be ready to object and cite your case law.



Eighth Annual APDA Conference

By Jim Haas, Maricopa County Public Defender

The Eighth Annual Arizona Public Defender Association Statewide Conference was held June 9 to 11 at the Tempe Mission Palms Hotel.

Once again, over 1200 people attended. The three-day conference offered 141 classes taught by over 200 presenters. The conference offered a total of 18 CLE hours, including more than 16 ethics hours. APDA again took over the entire Mission Palms hotel, and most of the nearby Courtyard Marriott hotel.

At the awards luncheon, staff and attorneys from public defender offices and programs around the state were recognized for their accomplishments and dedication to indigent representation over the past year. The honorees were:

Outstanding Rural Administrative Professional – Dorothy Fenech,
Legal Administrative Assistant, La Paz County Public Defender

Outstanding Urban Administrative Professional – Karen Long,
Administrative Assistant, Pima County Public Defender

Outstanding Rural Paraprofessional – Susan Lerma, Legal Assistant,
La Paz County Public Defender

Outstanding Urban Paraprofessional – Michael Jones, Legal Support Specialist, Maricopa County
Legal Defender

**Outstanding Performance– Ny Lopez, Laura Ortiz, Tammy Velting, John Sikora, Mike Traher
and Jerry Schreck**, Maricopa County Public Defender

Outstanding Rural Attorney – Roberta McVickers, Coconino County Public Defender

Outstanding Urban Attorney – (tie) Mark Tallan, Maricopa County Legal Defender and **Michael
Rosenbluth**, Pima County Public Defender

“Rising Star” - Katherine Badrick, Maricopa County Juvenile Public Defender

“Rising Star” – Ryan Bleau, Tucson Public Defender

Lifetime Achievement – Stephen Collins, Maricopa County Public Defender

Gideon – Susan Kettlewell, Pima County Public Defender

Robert J. Hooker – Kara Hartzler, Florence Immigrant and Refugee Rights Project

In addition to the awards, third year ASU law student **Jason Swenson** was recognized as the
Gideon Fellow for 2010-11.

The Ninth Annual APDA Statewide Conference is already scheduled for June 22 – 24, 2011. Mark
your calendars!



Sponsored by Maricopa County Public Defender

New Attorney Training: Trial Skills

.....

Trial Skills - August 2—6, 2010

This week-long training will help develop key aspects, including Batson Challenge, Voir Dire, Objections, Structuring Cross-Examination and more...



For a complete agenda or to register, please contact Celeste Cogley by phone at 602-506-7711 x37569 or via email at cogleyc@mail.maricopga.gov
Please register by July 23rd for the Trial Skills training.

There is no fee for Public Defenders, Legal Defenders or Legal Advocate attorneys. Please inquire for registration fees for Private or Contract Counsel.

Training will be held:
Downtown Justice Center
Maricopa County Public Defender
620 W. Jackson, 5th Floor Training Room
Phoenix, Arizona 85003



Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
3/1/2010	Dapkus <i>Reilly</i>	Whitten	2009151551 Theft, F5 Utility Serv/Unautho, F6	1 1	Court Trial-Not Guilty-Directed Verdict	Bench
3/4/2010	Little Peterson <i>Carson</i> <i>Perry</i> <i>Gonzalez</i>	Granville	2008133101 Misconduct Involving Weapons, F3 Murder 1st Degree, F1	2 1	Jury Trial- Guilty Lesser/Fewer	Jury
3/4/2010	Vincent	Dodge	2009050855 Extreme DUI-Bac > .20, M1 DUI w/Bac Of .08 or More, M1 DUI-Liquor/Drugs/Vapors/ Combo, M1 Extreme DUI-Bac .15 -.20, M1	1 1 1 1	Jury Trial- Guilty As Charged	Jury
3/5/2010	Peterson Ditsworth <i>Cowart</i> <i>Austin</i>	Spencer	2008137801 Murder 2nd Degree, F2, Attempt To Commit Aggravated Assault, F3	1 1	Jury Trial- Guilty As Charged	Jury
3/5/2010	Griffin	McMurry	2009153055 Extreme DUI-Bac .15 or More, M1 DUI-Liquor/Drugs/Vapors/ Combo, M1 DUI w/Bac of .08 or More, M1	1 1 1	Jury Trial-Not Guilty	Jury
3/8/2010	Cain <i>Kunz</i>	Gottsfeld	2008173371 Aggravated Assault, F3	1	Court Trial- Guilty But Insane	Bench
3/11/2010	Farney <i>Carter</i> <i>Hales</i>	Gaines	2004023870 Aggravated Assault, F2 Shoplifting, F6 Unlaw Flight From Law Enf Veh, F5	1 1 1	Jury Trial- Guilty Lesser/Fewer	Jury
3/12/2010	Tomlinson <i>Springer</i>	Harrison	2007169942 Misconduct Involving Weapons, F4	1	Jury Trial- Guilty As Charged	Jury
3/22/2010	Hann <i>Rankin</i>	Spencer	2009005872 Aggravated Assault, F3	1	Jury Trial- Guilty As Charged	Jury

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
3/22/2010	Crawford <i>O'Farrell Jarrell</i>	Roberts	2009166133 Theft-Means of Transportation, F3	1	Jury Trial-Not Guilty	Jury
3/23/2010	Sheperd <i>Thompson Johnson</i>	Newell	2009048332 Aggravated Assault, F3	2	Jury Trial- Guilty As Charged	Jury
3/24/2010	Peterson	Blomo	2009100127 Aggravated Assault, F3	1	Jury Trial- Guilty As Charged	Jury
3/26/2010	Houck <i>Lopez</i>	Roberts	2008009355 Forgery, F4 Taking Identity of Another, F4 Fraudulent Schemes/Artifices, F2 Agg Taking ID-Person/Entity, F3	6 1 1 1	Jury Trial- Guilty As Charged	Jury
3/26/2010	Whitney	Flores	2007130970 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial- Guilty As Charged	Jury
3/26/2010	Blackwell	Burke	2009137268 Narcotic Drug Violation, F4	1	Jury Trial- Guilty As Charged	Jury
3/29/2010	Farney <i>Brazinskas Springer</i>	Jones	2009112436 Sexual Assault, F2	4	Jury Trial- Guilty Lesser/Fewer	Jury
3/30/2010	Smith <i>Thompson</i>	Newell	2009165077 Burglary 3rd Degree, F4	1	Jury Trial- Guilty As Charged	Jury
3/31/2010	Hann <i>Sain</i>	Lynch	2009124860 Theft-Means of Transportation, F3	1	Jury Trial-Not Guilty	Jury
3/31/2010	Banihashemi <i>Salvato</i>	Burke	2009160939 Forgery, F4	1	Jury Trial- Guilty As Charged	Jury
3/31/2010	Alagha	Welty	2009108239 Unlaw Flight From Law Enf Veh, F5	1	Jury Trial- Guilty As Charged	Jury

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
3/31/2010	Delatorre Romani Farrell Johnson	Whitten	2009146056 Aggravated Assault, F3 Assault-Touched To Injure, M3	1 1	Jury Trial- Guilty Lesser/Fewer	Jury
4/1/2010	Peterson	Hoffman	2009144101 Marijuana-Possess For Sale, F4 Marij-Transport And/Or Sell, F3 Dangerous Drug-Poss/Use, F5, Attempt To Commit	1 1 1	Jury Trial- Guilty Lesser/Fewer	Jury
4/2/2010	Stanford	Burke	2009159852 Unlaw Flight From Law Enf Veh, F5	1	Jury Trial- Guilty As Charged	Jury
4/5/2010	Blackwell Flannagan Shaw	Blomo	2009006832 Aggravated Assault, F5	1	Jury Trial- Guilty As Charged	Jury
4/6/2010	Gaziano Arvanitas Clesceri	Spencer	2009124846 Forgery, F4 Drive w/Lic Susp/Revoke/Canc, M1 Taking Identity of Another, F4	1 1 1	Jury Trial- Guilty As Charged	Jury
4/7/2010	Steinfeld Souther Springer	Svoboda	2008151639 Aggravated Assault, F6 Disorderly Conduct, M1 Resisting Arrest, F6	1 1 1	Jury Trial-Not Guilty	Jury
4/8/2010	Farney Brazinskas	Flores	2009152622 Unlaw Flight From Law Enf Veh, F5	1	Jury Trial- Guilty As Charged	Jury
4/9/2010	Corbitt Shaw	Hoffman	2008180044 Aggravated Assault, F3	1	Jury Trial- Guilty As Charged	Jury
4/9/2010	Akins Stein Godinez Hagler Perry Gonzalez	Mcmurdie	2009118151 Kidnap-Death/Inj/Sex/Aid Fel, F2 Burglary 2nd Degree, F3 Murder 1st Deg-During Crime, F1	1 1 1	Jury Trial- Guilty As Charged	Jury

Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
4/13/2010	Whitney	Granville	2009149745 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer	Bench
4/13/2010	Dapkus Reilly	Gottsfeld	2009156299 Crim Tresp 1st Deg-Res Struct, F6 Armed Robbery, F3	1 1	Court Trial-Not Guilty	Bench
4/15/2010	Alexander Munoz	Vandenberg	2009107197 Marijuana Violation, F6	1	Jury Trial-Guilty As Charged	Jury
4/15/2010	Teel Reilly	Hegy	2009130954 Taking Identity of Another, F4	1	Jury Trial-Not Guilty	Jury
4/15/2010	Califano Hagler Renning	Passamonte	2009150544 Agg DUI-Lic Susp/Rev For DUI, F4	2	Jury Trial-Guilty Lesser/Fewer	Jury
4/16/2010	Hann	French	2009159213 Resisting Arrest, F6	1	Jury Trial-Guilty As Charged	Jury
4/19/2010	Garcia Romani	Davis	2009129301 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial-Guilty As Charged	Jury
4/20/2010	Becker Flannagan Curtis	Mahoney	2008009332 Aggravated Assault, F3	1	Jury Trial-Not Guilty	Jury
4/22/2010	Conter	Lynch	2008119685 Agg DUI-Lic Susp/Rev For DUI, F4	2	Jury Trial-Guilty As Charged	Jury
4/23/2010	Fischer Rankin Lopez	Duncan	2009030267 Misconduct Involving Weapons, F4 Murder 2nd Degree, F1	1 1	Jury Trial-Guilty Lesser/Fewer	Jury
4/27/2010	Banihashemi Yalden	Brnovich	2009151026 Theft Crdt Crd Obt Fraud Means, F5 Theft-Means Of Transportation, F3 Drug Paraphernalia Violation, F6	1 1 1	Jury Trial-Guilty As Charged	Jury

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
4/28/2010	Roth Brunansky Beatty	Duncan	2008008244 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial- Guilty As Charged	Jury
4/29/2010	Whalin Schreck Hagler Hales Baker	Gottsfeld	2009136153 Molestation Of Child, F2 Sexual Conduct With Minor, F2	1 1	Jury Trial-Not Guilty	Jury
4/29/2010	Agnick Sain Baker	Myers	2009166816 Street Gang, F3 Threat-Intimidate, F3	1 3	Jury Trial- Guilty Lesser/Fewer	Jury
4/29/2010	Dehner	Vandenberg	2009148708 Dangerous Drug Violation, F4	1	Jury Trial- Guilty As Charged	Jury
4/29/2010	Potter	Passamonte	2009006718 Agg DUI-Lic Susp/Rev For DUI, F4	2	Jury Trial- Guilty As Charged	Jury
4/30/2010	Walker	Welty	2008007518 Molestation Of Child, F2 Sexual Abuse, F3 Sexual Conduct With Minor, F2 Obscene Matl-Furnish To Minors, F4	7 1 4 1	Jury Trial- Guilty Lesser/Fewer	Jury
5/5/2010	Abramson Salvato	Blomo	2009124605 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial- Guilty Lesser/Fewer	Jury
5/5/2010	Corbitt	Contes	2009124801 Burglary 3rd Degree, F4 Trafficking In Stolen Property, F2	1 1	Jury Trial- Guilty As Charged	Jury
5/6/2010	Braaksma	Ore	2009136802 DUI-Liquor/Drugs/Vapors/ Combo, M1 DUI w/Bac Of .08 Or More, M1 Extreme DUI-Bac .15 -.20, M1	1 1 1	Jury Trial- Guilty Lesser/Fewer	Jury
5/6/2010	Roth	Newell	2009129678 Drug Paraphernalia Violation, F6 Dangerous Drug Violation, F4	1 1	Jury Trial- Guilty As Charged	Jury

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
5/6/2010	Crawford	Steinle	2009005695 Aggravated Assault, F6 Child/Vulnerable Adult Abuse, F4	1 1	Jury Trial-Not Guilty	Jury
5/6/2010	Black <i>Casanova Hagler</i>	Passamonte	2009138287 Agg DUI-Lic Susp/Rev For DUI, F4	2	Jury Trial- Guilty As Charged	Jury
5/10/2010	Naegle <i>Meginnis</i>	Passamonte	2009152519 Narcotic Drug Violation, F4 Unlaw Flight From Law Enf Veh, F5	1 1	Jury Trial- Guilty Lesser/Fewer	Jury
5/11/2010	Colon <i>Salvato Springer</i>	Mroz	2009120677 Aggravated Assault, F3 Agg Aslt-Serious Phy Injury, F3	1 3	Jury Trial- Guilty As Charged	Jury
5/11/2010	Iniguez <i>Renning</i>	Passamonte	2008112418 Agg DUI-Lic Susp/Rev For DUI, F4	2	Jury Trial- Guilty As Charged	Jury
5/12/2010	Sheperd	Welty	2009112299 Drug Paraphernalia-Possess/Use, F6 Marijuana-Possess For Sale, F4 Dangerous Drug-Poss For Sale, F2	2 1 2	Jury Trial- Guilty As Charged	Jury
5/12/2010	Dapkus <i>Reilly</i>	Martin	2009153101 Unlaw Use of Means of Transp, F5	1	Jury Trial-Not Guilty	Jury
5/13/2010	Turner <i>Ralston</i>	Martin	2008162984 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6 Marijuana Violation, F6	1 1 1	Jury Trial- Guilty As Charged	Jury
5/13/2010	Dapkus	Kreamer	2009173392 Drug Paraphernalia Violation, F6 Marijuana Violation, F6	1 1	Court Trial- Guilty Lesser/Fewer	Bench
5/14/2010	Whitney	Kreamer	2009163504 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Jury Trial- Guilty As Charged	Jury
5/14/2010	Engle	Flores	2009112287 Drug Paraphernalia Violation, F6 Narcotic Drug Violation, F4	1 1	Jury Trial- Guilty As Charged	Jury

*Defined as the date the defendant was sentenced or case was dismissed.

Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
5/14/2010	Dehner <i>Shaw</i>	Martin	2007171343 Theft, M1 Drug Paraphernalia-Possess/Use, F6 Dangerous Drug-Poss/Use, F4 Dangerous Drug Violation, F3	1 1 1 1	Jury Trial- Guilty As Charged	Jury
5/14/2010	Steinfeld <i>Reilly Springer Johnson</i>	Barton	2009118155 Sexual Abuse, F3 Molestation Of Child, F2	1 1	Jury Trial- Guilty As Charged	Jury
5/17/2010	Baker	Garcia	2009132034 Impersonating a Peace Officer, F6	2	Jury Trial- Guilty Lesser/Fewer	Jury
5/18/2010	Sheperd	Contes	2008120915 Trafficking In Stolen Property, F3	1	Jury Trial-Not Guilty	Jury
5/19/2010	Llewellyn <i>Thompson Farrell</i>	Blomo	2009143243 Drug Paraphernalia Violation, F6 Marijuana Violation, F6	1 1	Jury Trial- Guilty As Charged	Jury
5/19/2010	Crawford	Flores	2009158032 Aggravated Assault, F6 Threat-Intimidate, M1	2 1	Jury Trial-Not Guilty	Jury
5/20/2010	Stanford <i>Curtis</i>	Vandenberg	2009006704 Theft-Means Of Transportation, F3 Burglary 3rd Degree, F4	1 1	Jury Trial- Guilty As Charged	Jury
5/20/2010	Braaksma	Ore	2009116135 DUI w/Bac of .08 or More, M1 DUI- Liquor/Drugs/Vapors/ Combo, M1	1 1	Jury Trial- Guilty Lesser/Fewer	Jury
5/21/2010	Reece <i>Brazinskas Ralston</i>	Hoffman	2007138328 Molestation of Child, F2 Indecent Exposure, F6 Public Sexual Indecency, F5	4 4 1	Jury Trial- Guilty Lesser/Fewer	Jury
5/21/2010	Klopp	Ronan	2008152304 Unlawful Imprisonment, F6 Sexual Conduct With Minor, F2 Resisting Arrest, F6 Aggravated Assault, F6	1 3 1 1	Jury Trial- Guilty Lesser/Fewer	Jury

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Jury and Bench Trial Results

March 2010 – May 2010

Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
5/25/2010	Stanford <i>Curtis Austin</i>	Newell	2009165152 Pandering, F5	1	Jury Trial- Guilty As Charged	Jury
5/26/2010	Chiang	McMurdie	2009167289 Drug Paraphernalia Violation, F6 Marijuana Violation, F6	1 1	Court Trial-Not Guilty	Bench
5/27/2010	Rolstead <i>Rankin Leigh</i>	Brnovich	2006031379 Theft, F3	1	Jury Trial- Guilty As Charged	Jury
5/28/2010	Rosell	McMurdie	2008133258 Murder 1st Degree, F1, Conspiracy To Commit	1	Jury Trial- Guilty As Charged	Jury



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Jury and Bench Trial Results

March 2010 – May 2010

Legal Defender's Office – Trial Division

Closed Date	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
3/4/2010	Tate	Passamonte	2009152739 Armed Robbery, F3, Attempt to Commit	1	Jury Trial-Not Guilty	Jury
3/12/2010	Allen	Lynch	2009136239 Aggravated Robbery, F3 Armed Robbery, F2	1 1	Jury Trial-Guilty As Charged	Jury
3/18/2010	Bogart McReynolds	Roberts	2009110586 Narcotic Drug Violation, F2	2	Jury Trial-Guilty As Charged	Jury
4/2/2010	Ivy	Burke	2009030347 Taking Identity of Another, F4 Forgery, F4	1 1	Jury Trial-Guilty As Charged	Jury
4/6/2010	Phillips Haimovitz	McMurdie	2009153052 Murder 1st Degree, F2, Attempt to Commit Aggravated Assault, F3 Misconduct Involving Weapons, F4 Street Gang, F3 False Report to Law Enforce, M1	1 1 1 1	Jury Trial-Guilty Lesser/Fewer	Jury
4/8/2010	Garner	Vandenberg	2007005750 Narcotic Drug Violation, F2	2	Jury Trial-Guilty As Charged	Jury
4/8/2010	Lee	Hannah	2009160608 Agg Taking ID-Person/Entity, F3	1	Jury Trial-Not Guilty	Jury
4/9/2010	Lee	Martin	2009144164 Aggravated Assault, F3 Misconduct Involving Weapons, F4	1 1	Jury Trial-Guilty Lesser/Fewer	Jury
4/12/2010	Cleary Lawson Horrall Hill Bowen Simpson Macturk	Anderson	2005014235 Murder 1st Degree, F1 Murder 1st Degree, F2, Attempt to Commit Burglary 1st Degree, F2	2 1 1	Jury Trial-Guilty Lesser/Fewer	Jury

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Jury and Bench Trial Results

March 2010 – May 2010

Legal Defender's Office – Trial Division

Closed Date	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
4/15/2010	Bogart	Lynch	2009006156 Aggravated Assault, F3 Hindering Prosecution 1st Deg, F5	2 1	Jury Trial-Not Guilty	Jury
4/23/2010	Rothschild Haimovitz Bowen	Flores	2008139060 Murder 2nd Degree, F1 Dschrng Firearm in City Limit, F6	1 3	Jury Trial- Guilty As Charged	Jury
4/30/2010	Jolly Horrall McReynolds Carrillo Woodrick Brewer	Martin	2009118151 Murder 1st Degree, F1 Burglary 2nd Degree, F3 Kidnap, F2 Misconduct Involving Weapons, F4	1 1 1 1	Jury Trial- Guilty As Charged	Jury
4/30/2010	Phillips Lane Otero Williams Woodrick	Gama	2008159515 Murder 1st Degree, F1 Dschrng Firearm at a Structure, F3 Aggravated Assault, F3	1 1 1	Jury Trial- Guilty Lesser/Fewer	Jury
5/24/2010	Schaffer Sinclair McReynolds Otero Williams Baker Fehnel	Steinle	2006129786 Murder 1st Degree, F1 Burglary 1st Degree, F2 Kidnap, F2	2 1 1	Jury Trial- Guilty As Charged	Jury

Legal Defender's Office – Dependency

Last Day of Trial	Attorney Case Manager	Judge	Case Number and Type	Result	Bench Or Jury Trial
4/20	Ross	Sinclair	JD17708 Severance Trial	Severance Granted	Jury

Jury and Bench Trial Results

March 2010 – May 2010

Legal Advocate's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result	Bench Or Jury Trial
3/3/2010	Buck	Trujillo	2009005503 Murder 2nd Degree, F1 Aggravated Assault, F3	1 1	Jury Trial- Guilty As Charged	Jury
3/29/2010	Zabor		2010005362 Organized Retail Theft, F4	1	Jury Trial- Guilty As Charged	Jury
4/16/2010	Miller	Burke	2009160842 Dangerous Drug Violation, F2 Misconduct Involving Weapons, F4 Drug Paraphernalia Violation, F6	1 1 1	Court Trial- Guilty As Charged	Bench



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Jury and Bench Trial Results

March 2010 – May 2010

Legal Advocate's Office – Dependency

Last Day of Trial	Attorney <i>CWS</i>	Judge	Case Number and Type	Result	Bench Or Jury Trial
3/4/2010	Owsley <i>Marrero</i>	Blakey	JD17665 Severance	Granted	Bench
3/31/2010	Russell <i>Miller</i>	Brain	JD17756 Severance for Father	Granted	Bench
4/9/2010	Christian <i>Christensen</i>	Aceto	JD504030R Severance Trial	Severance Granted	Bench
4/13/2010	Owsley <i>Marrero</i>	Gentry- Lewis	JD11850 Termination of Parental Rights	Termination Granted	Bench
4/29/2010	Russell <i>Miller</i>	Brain	JD17756 Termination	Termination	Bench
5/5/2010	Owsley <i>Marrero</i>	Bergin	JD14450 Severance	Granted	Bench
5/5/2010	Stubbs <i>Holmes</i>	Udall	JD507751 Severance	Granted	Bench
5/18/2010	Valdez <i>Williams</i>	Gentry- Lewis	JD17392 Severance	Granted	Bench
5/24/2010	Valdez <i>Williams</i>	Sullivan	JD1760 Severance	Granted	Bench
5/21/2010	Christian <i>Christensen</i>	Aceto	JD504030R Severance	Severance Not Granted	Bench
5/27/2010	Kenyon <i>Indovino</i>	Coury	JD15550 Dependency	Dependency Found	Bench
5-27/2010	Kenyon <i>Indovino</i>	Coury	JS11478 Termination	Termination	Bench
5/28/2010	Kenyon <i>Indovino</i>	Thumma	JD13671 Termination	Termination	Bench
5/17/2010	Stubbs <i>Holmes</i>	Akers	JD507780 Dependency	Under Advisement	Bench

SAVE THE DATES...

Death Penalty 2010

December 1, 2 & 3, 2010

Advanced Trial College with Ira Mickenberg

December 9 & 10, 2010



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for The Defense

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