

# for The Defense

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for The Defense

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## 708 Factors Need A Jury

By The Honorable Robert L. Gottsfield, Maricopa County

### What They Are

Since January 1, 2009, when the Criminal Code was renumbered but not substantively changed, and the enhancements found in A.R.S. §§ 13-604<sup>1</sup> and 13-604.02 were moved to A.R.S. § 13-708, the latter have become known as 708 factors. Section 708 sets forth the punishment for defendants convicted of felony offenses while on felony probation, parole, community supervision or release, including those who have escaped from confinement for a felony conviction.

Section 13-708 specifically covers those committing a dangerous offense,<sup>2</sup> while any listed 708 factor is present (§ 13-708A); those convicted of a dangerous offense while on release or escape from confinement for a conviction of (1) a serious offense [meaning a listed three strikes offense found in § 13-706(A)], or (2) an offense resulting in serious physical injury, or (3) an offense involving the use or exhibition of a deadly weapon or dangerous instrument [§ 13-708(B)].<sup>3</sup>

Section 13-708(C), the most often cited subparagraph, sets forth the penalty for defendants convicted of a non-dangerous felony, while on felony probation, parole, work furlough, community supervision<sup>4</sup> or any other release or escape.

Finally, § 13-708(D) concerns those convicted of a felony committed while defendant is released on bond, or on the person's own recognizance on a separate felony offense, or escaped from preconviction custody for a separate felony offense.

### Conviction Defined

A person is convicted of a crime when there has been a determination of guilt by verdict, finding, or the acceptance of a plea.<sup>5</sup> Sentencing is not required.

### Enhancers

As sentencing aggravators elevate a sentence within a previously defined range of punishment and sentencing enhancers raise the permissible

range of punishment, 708 factors are properly considered as enhancement provisions. To be sure the same factor, such as a prior conviction, can be considered both as an enhancer and aggravator.<sup>6</sup>

### **The 708 Penalties**

For a violation of § 13-708(A) the statute requires no less than the presumptive and flat.<sup>7</sup>

Under § 13-708(B) the defendant must receive the maximum sentence and flat and be consecutive to any Arizona sentence from which the defendant was on release or escaped.

Section 13-708(C) prescribes a mandatory 85% sentence<sup>8</sup> of not less than the presumptive and consecutive to the offense for which defendant was on probation, parole or other listed element.

Finally, a violation of § 13-708(D) requires an extra two year 85% sentence in addition to what would normally be imposed.

### **Arizona's Recidivist Statutes / Election by State of Higher Penalty**

Section 13-708 is to be distinguished from Arizona's recidivist or repetitive offender statutes providing for enhanced sentences for non-dangerous (§13-703) and dangerous (§13-704) second and third felony offenders. Moreover, penalties for crimes committed on separate occasions which are either consolidated for trial purposes or are not historical prior felony convictions are sentenced pursuant to § 13-703(A) and (B) for non-dangerous offenses and § 13-704(F) (G) and (H) for dangerous offenses.<sup>9</sup>

Of course in Arizona the state has discretion to request that a defendant be sentenced for a non-dangerous offense where he has priors, even if the state alleged and the jury concluded there was a dangerous offense.<sup>10</sup>

### **708 Factors Must Be Alleged / Jury Not To Know**

Section 708 factors must be separately alleged by the state<sup>11</sup> and are not to be disclosed to the jury on the trial of the main counts.<sup>12</sup> Once the jury has convicted a defendant on any main count, a second immediate trial on the enhancers set forth in 708 which have been alleged, then occurs.

### **Apprendi / Blakely / Martinez**

By way of review, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), both 5-4 decisions, are restraints on the sentencing conducted by a court. *State v. Martinez*, 210 Ariz. 578, 115 P. 3d 618, *cert. denied*, 546 U.S. 1044 (2005), helps define trial judges' sentencing discretion in light of the United States Supreme Court's rulings.

*Apprendi* held that a jury had to determine beyond a reasonable doubt any factor (specifically in that case that the crime was racially motivated) which increased the penalty beyond the "prescribed statutory maximum". The one exception was a prior felony conviction which for years had been and could continue to be found by the trial court by clear and convincing evidence (and which after *Blakely* came to be called a *Blakely*-exempt factor).

*Blakely*, another Sixth Amendment violation case (the trial judge imposed a sentence of 90 months for a defendant who kidnapped his wife or three years longer than the maximum sentence) held that "statutory maximum" means the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by defendant, not the maximum sentence a judge may impose after finding additional facts.

In Arizona this is the presumptive sentence established for defendant's crime.<sup>13</sup> Just as the determination defendant has one or more prior felony convictions became known as a *Blakely*-exempt factor (because judges may properly decide the issue), those factors which must be decided by a jury beyond a reasonable doubt (i.e. all other factors used by the prosecutor to argue for a sentence beyond the presumptive) are called *Blakely*-compliant factors. *Apprendi/Blakely* rights, of course, can be waived.<sup>14</sup>

The Arizona Supreme Court in *Martinez*, a capital case, decided a year after *Blakely*, was faced with the argument that a sentencing judge can only consider aggravating factors found by a jury beyond a reasonable doubt and cannot impose a sentence beyond the presumptive on any other basis. A unanimous court held that once a jury finds one single aggravating factor or the aggravator is inherent in the jury's verdict, or has been admitted by the defendant (all *Blakely*-compliant factors) or there is a prior conviction found by the judge (the one and only *Blakely*-exempt factor) the court can then find more aggravators by a preponderance of the evidence standard.<sup>15</sup>

### **Jury to Find**

As the above cases provide, any determination exposing a defendant to a penalty exceeding the presumptive sentence must be submitted to a jury. As each 708 enhancement factor permits a sentence beyond the presumptive, it is clear that a jury must determine whether the defendant has violated any of them.<sup>16</sup>

Recent decisions also confirm that the same rule pertains to three strikes enhancement statutes such as Arizona's found in §§ 13-706 A and B.<sup>17</sup>

### **The Case of the Disappearing Underlying Enhancer**

It is irrelevant under Arizona law that a 708 factor, once present and found by the jury beyond a reasonable doubt to have existed at the time a defendant committed the main charge, for some reason at a later time no longer exists. It is the defendant's status at the time he commits a new offense which is determinative as to whether his sentence can be enhanced.<sup>18</sup>

### **Saving Grace**

If a trial judge has improperly found, without a jury, a violation of a 708 enhancer, it is not necessarily reversible error. Arizona appellate courts apply a harmless error analysis to such violations.<sup>19</sup> Like *Blakely* error,<sup>20</sup> it is not structural error which requires a reversal. The test applied by the appellate court is whether a reasonable jury applying the standard of proof beyond a reasonable doubt could not have reached a different conclusion than did the trial court. If the trial court's 708 error satisfies this test it will be a harmless Sixth Amendment (trial by jury required) error and violation and the decision of the trial court will be affirmed.

It may not be often, it appears, that a 708 error will require a new trial. That is not to say this type of error should not be raised in the trial court and then on appeal by the defense bar whenever it appears, as the particular violation in your case may not pass the saving grace test.

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### (Endnotes)

1. Former § 13-604, which now concerns class 6 felonies, was a hodgepodge containing, inter alia, such pertinent definitions as dangerous offense [now 13-105 (13)], serious offense [13-706 (A)], historical prior felony conviction [13-105 (22)]; substantive sentencing provisions, repetitive offenders (13-703), dangerous offenders (13-704), promoting or assisting a criminal street gang [13-709.02 (C)], aggravated

assault on a peace officer [13-709.01 (A)], as well as what are now 13-708 factors discussed herein [formerly 13-604 (P) and (R)].

2. A dangerous offense means an offense involving the discharge, use or threatening exhibition of a *deadly weapon* or *dangerous instrument* or the intentional or knowing infliction of *serious physical injury* A.R.S. § 13-105(13). The foregoing italicized terms are found at §§ 13-105 (15) and (12) and (38) respectively. Former § 13-708 concerning consecutive sentences is now found in 13-711.
3. A.R.S. § 13-708 (B) also provides for an additional “maximum sentence” of up to twenty-five percent if the court finds at least two substantial aggravating circumstances.
4. Still defined at A.R.S. § 13-105 (5).
5. *State v. Thompson*, 200 Ariz. 439, 441, 27 P. 3d 796, 798 (2001). Although a defendant may waive his appearance at trial, *State v. Tamplin*, 126 Ariz. 175, 177, 613 P. 2d. 839, 841 (App. 1980), the sentencing generally cannot occur in his absence. Ariz. R. Crim. P. 26.9: *State v. Fettis*, 136 Ariz. 58, 59, 664 P. 2d 208, 209 (1983).
6. *State v. Ritacca*, 169 Ariz. 401, 403, 819 P. 2d 987, 989 (App. 1991), *rev. denied*; *State v. Le Master*, 137 Ariz. 159, 166, 669 P. 2d 592, 599 (App. 1983), *rev. denied*. But this is not true of all factors. Thus the infliction or threatened infliction of serious physical injury as well as the use, threatened use or possession of a deadly weapon or dangerous instrument cannot be used as an aggravator (unless an essential element of the offense) if already used to enhance a sentence. § 13-701(D)(1) and (2).
7. A flat sentence is characterized in the Criminal Code usually as “not eligible for suspension or commutation or release on any basis until the sentence imposed is served.” See e.g. § 13-708 (B). Sometimes language will be added “except as specifically authorized by § 31-233, subsection A or B” [e.g. § 13-706(A)]. This provides for temporary removal under custody for inmate work, voluntary medical research, participating in juvenile delinquency programs and the like, as well as medical treatment not obtainable in prison and compassionate leave.
8. A typical sentence calling for 85% imprisonment will usually provide for eligibility “for release pursuant to § 41-1604.07” which provides for an earned release credit of one day for every six days served. See e.g. 13-708(C).
9. These sections were formerly found in §§ 13-604 and 702.02. See n. 1 supra for the new section defining historical prior felony conviction. To be an historical prior felony both the prior offense and the prior conviction must precede the present offense. See *State v. Thompson*, n. 5 supra, at 200 Ariz. 441, 27 P. 3d 798. If offenses are consolidated for trial, the conviction on the prior offense cannot, of course, precede the conviction for the subsequent offense, *Id*.
10. *State v. Knorr*, 186 Ariz. 300, 306, 921 P. 2d 703, 709 (App. 1996); *State v. Laughter*, 128 Ariz. 264, 269, 625 P. 2d 327, 332 (App. 1980); And see *State v. Diaz*, 224 Ariz. 322, 230 P.3d 705 (2010) (defendant convicted of possessing methamphetamine for sale with two non-methamphetamine-related historical prior felony convictions may be sentenced under 13-703, the general repetitive sentencing statute, rather than the meth sentencing statute 13-709.03, citing the *Laughter* case).
11. *State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990); *State v. Waggoner*, 144 Ariz. 237, 697 P. 2d 320 (1985); *State v. La Bar*, 148 Ariz. 522, 715 P. 2d 775 (App. 1985). See Criminal Rules 13.5 (a) and 16.1 (b). Section 13-708 (D) dealing with release or escape refers specifically to the state’s obligation to separately allege 708 factors. Cf. §§ 13-703 (N); 704 (L).
12. *State v. Tucker*, 157 Ariz. 433, 759 P. 2d 579 (1988) (questioning defendant on case in chief concerning his parole status improper impeachment; also applies to probation, on release, and all 708 factors under reasoning of case, until the second trial on such factors commences). And see specific prohibition against doing so in § 13-708 (D).

13. *State v. Brown (McMullen)*, 209 Ariz. 200, 203, 99 P. 3d 15, 18 (2004).
14. Significantly, the Supreme Court added in *Blakely* that a defendant can waive his *Apprendi/Blakely* rights by pleading guilty and agree in the plea agreement that factors which increase his or her sentence beyond the presumptive can be determined by the court, rather than a jury, and by a lesser standard than beyond a reasonable doubt. Thus in Maricopa County plea agreements contain paragraph 7 which advises that a judge may determine aggravators by a preponderance of the evidence (more probably true than untrue) and defendants are waiving a jury trial on the issue. When taking a plea, judges must advise defendants of paragraph 7 (called the *Blakely* advisement).
15. *Martinez*, at 210 Ariz. 585, 115 P. 3d 625.
16. *State v. Molina*, 211 Ariz. 130, 118 P. 3d 1094 (App. 2005), *rev. denied* (on probation at time of crime); *State v. Benenati*, 203 Ariz. 235, 241, 52 P. 3d 804, 810 (App. 2002), *rev. denied* (on release; decided under *Apprendi*); *State v. Gross*, 201 Ariz. 41, 31 P. 3d 815 (App 2001), *rev. denied* (on release; decided after *Apprendi* but before *Blakely*; jury required to make finding if on release status under § 13-604 (R) the predecessor statute to § 13-708 (D); which remanded for a new trial on the enhancement issue before the harmless error saving grace *Blakely* violation determination was decided in later cases); *State v. Mount*, 149 Ariz. 394, 719 P. 2d 280 (App. 1986) (on release; decided before *Apprendi* and *Blakely*). The Ninth Circuit strongly agrees that § 13-708 factors go to a jury. *Butler v. Curry*, 528 F. 3d 624 (9th Cir.), *cert. denied*, 129 S. Ct. 767 (2008). Raji 3rd has an instruction for the situation where it is charged a defendant is on release or on probation when the crime occurs. *Contra: State v. Cox*, 201 Ariz. 464, 37 P. 3d 437 (App. 2002) an on release case which was decided before *Blakely* and that part of the decision is believed no longer law. Still properly cited for the rule an illegal sentence constitutes fundamental error and will be reversed even if not objected to.
17. These statutes provide for life sentences of 25 years for committing at different times a third “serious” felony and 35 years for committing a third “violent or aggravated” felony. Five cases requiring a jury determination on the issue of whether the two prior convictions are listed three strikes offenses and whether the third qualifies, were consolidated and are considered in *Besser v. Walsh*, 601 F. 3d 163 (2nd Cir.), *cert. denied*, 113 S. Ct. 342 (2010).
18. *State v. Mangum*, 214 Ariz. 165, 150 P. 3d 252 (App. 2007), *rev. denied* (prior conviction or probation status invalidated or set aside); *State v. Mount*, 149 Ariz. 394, 719 P. 2d 280 (App. 1986), *rev. denied* (subsequent dismissal of underlying charge on which release status was based). But cf. *State v. Szpyrka*, 223 Ariz. 390, 224 P. 3d 206 (App. 2010), *rev. denied* (pleading to conspiracy with a prior and prior conviction vacated on appeal entitles defendant to withdraw from plea because agreement materially altered by nullification of one of its provisions).
19. See cases notes 16 supra. and 20 infra. Error committed by a trial court can be structural error, requiring reversal, or trial error. Trial error to which an objection is made is subject to a harmless error analysis. Trial error to which no objection is made below is subject to an appellate review for fundamental error. Fundamental error requires the defendant to establish (1) error exists; (2) the error is fundamental (of such magnitude defendant could not possibly have received a fair trial); and (3) the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 564, 115 P. 3d 601, 604 (2005).
20. The United States Supreme Court in *Washington v. Recuenco*, 548 U.S. 212 (2006) held that *Apprendi/Blakely* error is not structural error but is subject to a harmless error analysis. See also *State v. Molina*, 211 Ariz. 130, 118 P. 3d 1094 (App. 2005), *rev. denied* and the Second Circuit decision in *Besser v. Walsh*, 601 F. 3d 163 (2nd Cir. 2010); *State v. Cleere*, 213 Ariz. 54, 138 P. 3d 1181 (App. 2006), *rev. denied*.

# Trial on the Priors: A Practical Guide

By Peg Green, Defender Attorney - Appeals Division

**State's Burden of Proof:** clear and convincing evidence that: (1) the prior conviction exists and (2) the defendant committed that prior offense. *State v. Cons*, 208 Ariz. 409, 415, 94 P.3d 609, 615 (App. 2004). It can also be argued that the proper burden of proof should be beyond a reasonable doubt, citing to *Jones v. United States*, 119 S.Ct. 1215(1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

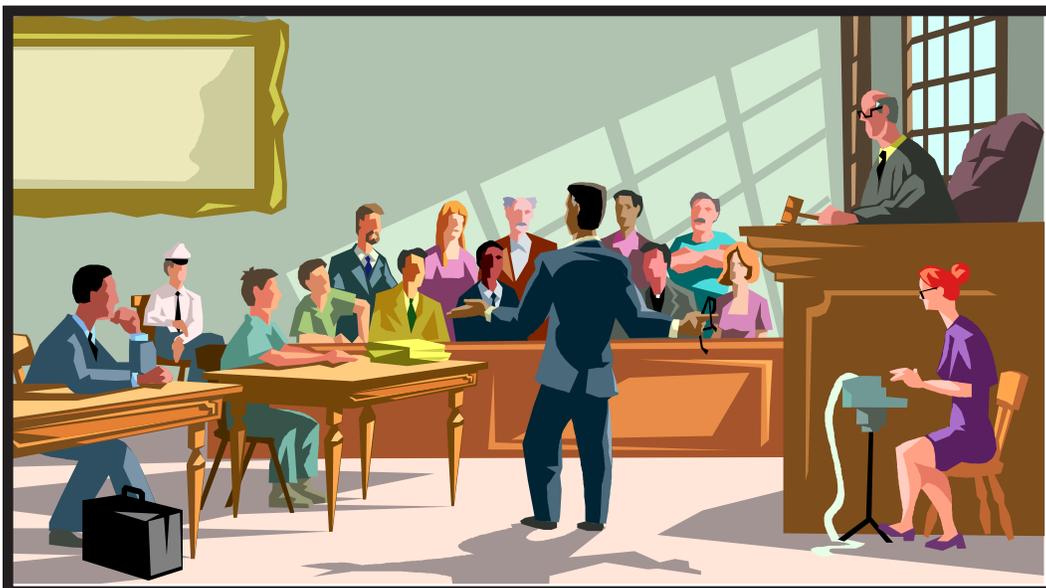
**Rule 19.1(b):** The Arizona Rules of Criminal Procedure require the Court to make a finding regarding alleged priors after the jury returns a guilty verdict.

## What must the State do to prove priors?

- 1) A prior is proven if the defendant admits to it on the stand. Arizona Rules of Criminal procedure, Rule 17.6.
- 2) The State can prove the priors by offering into evidence:
  - a. A certified copy of the conviction; AND
  - b. Establishing the defendant as the person to whom the document refers. *State v. Hauss*, 140 Ariz. 230, 231, 681 P.2d 382, 383 (1984). The preferred method of proving priors for sentence enhancement purposes is the submission of certified conviction documents bearing the defendant's fingerprints. *State v. Robles*, 213 Ariz. 268, 273, 141 P.3d 748, 754 (App. 2006).

## What if the fingerprints on the documents are of poor quality and cannot be used for comparison?

The State must link the documents to the defendant using other means, such as a certified DOC record or live testimony from someone like a probation officer or parole officer. *State v. Robles*, 213 Ariz. 268, 273, 141 P.3d 748, 754 (App. 2006).



# Practice Pointer

## Issuing Blank Subpoenas for Compelling Production of Testimony or Records in Preparation for Trial

By Peter Rosales, Attorney Supervisor

Prior to 2006, a defendant seeking exculpatory or otherwise favorable information or records from third parties could compel production of these things by making application to the Clerk of the Court for blank subpoenas that would order such production. This was arguably authorized under the old A.R.S. § 13-4071(D), which also allowed the issuance of as many blank subpoenas for witnesses as the defendant required, all without charge. The ability to use subpoenas to compel the attendance of witnesses at hearings or trials continues to be allowed, however, subsection D of this statute was rewritten in 2006 to specifically prohibit using blank subpoenas to procure discovery in a criminal case, including access to the records of a victim. Moreover, it provided for notice to the victim and the victim's right to be heard at any proceeding involving a subpoena for records of the victim from a third party. ***Given this, obtaining and serving a blank subpoena is no longer an appropriate discovery device in a criminal matter. Its use is now limited to compelling attendance of witnesses at hearings or trials.***

However, another kind of subpoena can be used to require a reluctant witness to turn over information. Under Rule 15.3 of the Arizona Rules of Criminal Procedure, a party can file a motion with the court for an order compelling a witness to submit to an oral deposition when (1) a party shows that the person's testimony is material to the case and there is a substantial likelihood that the person will not be available for trial; (2) a party shows that the person's testimony is material to the case or necessary to adequately prepare a defense or investigate the offense, that the person will not cooperate in granting a personal interview, and that the person was not a witness at the probable cause phase, or if he was, that his testimony was limited under Rule 5.3 to only such evidence as was material to the question of whether probable cause existed to hold the defendant to answer; or (3) a witness is incarcerated for failure to give satisfactory security that the witness will appear to testify at a trial or hearing.

Under Rule 15.3(c), the motion for deposition shall specify the time and place for taking the deposition and the name and address of each person to be examined, together with designated papers, documents, photographs, or other tangible objects, not privileged, to be produced at the same time and place. The rule further provides that the moving party shall notice the deposition in the manner provided for in civil actions (See Rules 28 and 30 of the Arizona Rules of Civil Procedure) and "serve a *subpoena* upon the deponent", specifying the terms and conditions set forth in the court's order granting the deposition, and give notice of the deposition in writing to every other party to the action. Thus, after the requisite steps provided for in Rule 15.3 are followed, a subpoena of a more specific stripe is an appropriate mechanism for dealing with uncooperative or reluctant third party witnesses.

Also, remember Rule 15.1(g), Arizona Rules of Criminal Procedure, provides a process for seeking a court order to obtain disclosure that is not within the possession or control of the State.<sup>1</sup>

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(Endnote)

1. Pursuant to this Rule: "Upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain that substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive."

# Options for Juvenile Sex Offenders Transferred to Adult Court

By Tammy Velting, MCPD Mitigation Specialist, and Mike Traher, Private Attorney and former Deputy Public Defender

News on the sentencing front is usually dismal for defendants. One positive development in sentencing law over recent years, however, concerns juvenile sex offenders. This article addresses several options now available for juveniles who are transferred to adult court for sex offenses that are not available to adult sex offenders.

## I. MODIFICATION OF PROBATION TERMS

The opportunity to have lifetime supervised probation, sex offender registration, and/or community notification modified or terminated at age 22 is addressed by the following statute:

A.R.S. § 13-923. Persons convicted of sexual offenses; annual probation review hearing; report; notification.

- A. If requested by the probationer, the court shall conduct a probation hearing at least once a year for a probationer who is under twenty-two years of age and who was convicted of an offense that occurred when the person was under eighteen years of age and that requires the probationer to register pursuant to §13-3821.
- B. This section does not preclude the court from conducting more than one probation review hearing each year.
- C. The probation department that is supervising the probationer shall prepare a probation report and submit the report to the court prior to the hearing.
- D. The following individuals shall be notified of the hearing:
  1. A prosecutor.
  2. An attorney for the probationer.
  3. Any victim or victim's attorney who has a right to be present and heard pursuant to the victims' bill of rights, Article II, § 2.1 of the constitution of this state, title 13, chapter 40 or court rule.
  4. The probation officer supervising the probationer.
- E. At the hearing, after hearing from those present pursuant to subsection D of this section, the court shall consider the following:
  1. Whether to continue, modify, or terminate probation.
  2. Whether to continue to require, to suspend or to terminate the probationer's registration pursuant to § 13-3821.
  3. Whether to continue, defer or terminate community notification pursuant to § 13-3825.

- F. The court may hold a prehearing involving the persons listed in subsection D of this section to discuss and advise the court concerning the issues listed in subsection E of this section.

A.R.S. § 13-923 (2007).

If the juvenile is given an opportunity to be placed on probation, they will be supervised by the youthful sex offender unit of the adult probation department. If their probation is not terminated at age 22, they will continue to be supervised by the youthful sex offender unit until age 25. Once a probationer turns 25, they will be transferred to a regular sex offender unit.

## II. REVERSE TRANSFER

Since the reverse transfer law of A.R.S. § 13-504<sup>1</sup> went into effect a few years ago, very few juveniles are actually being transferred to adult court for sex offenses. Specifically, the State filed forty-four discretionary sex offense cases in 2006 that would have been 13-504 eligible.<sup>2</sup> In 2010, only six discretionary cases were filed. Currently, there is only one probationer under age 18 being supervised by adult probation for a sex offense.

Only juveniles charged with sex offenses in title 13, chapter 14 or 35.1 are eligible to be considered for transfer back to juvenile court. No other type of offense is eligible for transfer. However, this may soon be changing with SB #1191, authorizing a reverse transfer hearing for all 13-504(B) offenses.<sup>3</sup> Pursuant to Rule 401(d)(1), Arizona Rules of Criminal Procedure, the attorney must file the motion for reverse transfer within forty-five days of the arraignment. If the state will not agree to the transfer, a hearing will be held. This Rule further requires that the transfer hearing shall be held within forty-five days of the filing of the motion for transfer. During the hearing, the court evaluates the public safety and the juvenile's chance for rehabilitation by considering ten factors.

1. The seriousness of the offense involved.
2. The record and previous history of the juvenile, including previous contacts with the court and law enforcement, previous periods of any court ordered probation and the results of that probation.
3. Any previous commitments of the juvenile to juvenile residential placements or other secure institutions.
4. Whether the juvenile was previously committed to the department of juvenile corrections for a felony offense.
5. Whether the juvenile committed another felony offense while the juvenile was a ward of the department of juvenile corrections.
6. Whether the juvenile committed the alleged offense while participating in, assisting, promoting, or furthering the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise.
7. The views of the victim of the offense.
8. The degree of the juvenile's participation in the offense was relatively minor but not so minor as to constitute a defense to prosecution.
9. The juvenile's mental and emotional condition.

10. The likelihood of the juvenile's reasonable rehabilitation through the use of services and facilities that are currently available to the juvenile court.

### III. FUNDING FOR TREATMENT

There are several treatment options available to youthful sex offenders through the Administrative Office of the Courts (AOC). Probationers are eligible for this funding as long as their offense occurred prior to age 18. It is important to note that a person who is sentenced to adult sex offender probation for an offense committed as a minor, even if not indicted or sentenced until after age 18, is still eligible for this funding. Residential treatment is covered 100% by the AOC contract. Probationers are assessed a modest co-pay for outpatient counseling services. However, once a probationer earns their high school diploma or GED, they are only eligible to receive AOC funds for outpatient counseling (residential services are no longer covered). After turning 21, a probationer is not eligible for any AOC funding. Maricopa County has the following contracts for youthful sex offender services:

#### Level 1 Locked Residential Treatment

- Youth Development Institute (YDI)  
1830 E Roosevelt St, Phoenix, AZ, 85006, (602) 254-0884

#### Level 2 Residential Treatment

- YDI

#### Therapeutic Day: Half day (up to 3 hours)

- YDI

#### Individual and Group Counseling

- Arizona Center for Change  
4205 N 7th Ave, Suite 311, Phoenix, AZ, 85013, (602) 253-8488
- Grossman & Grossman  
Phoenix office: 2345 E Thomas Rd, Suite 360, Phoenix, AZ, 85016  
Peoria office: 9635 W Peoria Ave, Suite 107, Peoria, AZ, 85345  
(602) 468-2077
- The Resolution Group  
460 N Mesa Drive, Suite 201, Mesa, AZ, 85201, (480) 962-9288
- YDI

#### Home-based Counseling

- Arizona Center for Change
- Grossman & Grossman
- YDI

#### Family Counseling and Multi-Family Group Counseling

- Arizona Center for Change
- Grossman & Grossman (family counseling only)
- The Resolution Group
- YDI

These contracts are valid through June 2012. Although not listed, there are AOC contracts for three additional residential treatment agencies in Maricopa County which are available to juvenile sex offenders supervised on juvenile probation.

It is important to keep in mind when considering plea options that there is only residential sex offender treatment for those under age 18. Most residential sex offender treatment facilities want at least one year to complete treatment so age 16 and under is best to increase the likelihood of acceptance. Unless the client is just turning 17 when they are sentenced, residential treatment will likely not be available to them. Since most probation eligible plea agreements for sex offenses require upfront jail time, a stipulation that a client may be released from jail upon acceptance to a residential treatment facility is extremely beneficial.

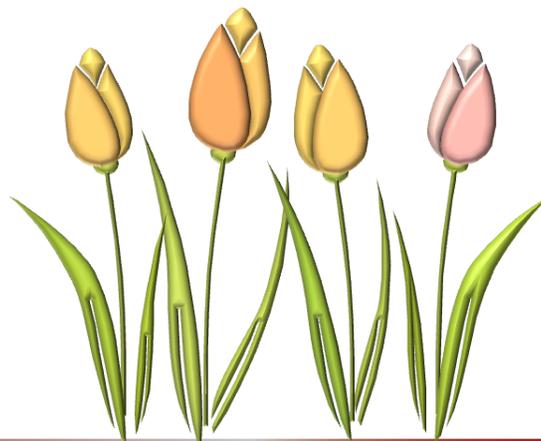
The timeframe it takes to get accepted to residential treatment depends on several factors. First, there must be available bed space. In addition, the client will need to have had a psychosexual evaluation and/or risk assessment prior to sentencing. No residential treatment facility will consider accepting a client who has not been evaluated. If an attorney has their client assessed prior to sentencing, adult probation will be able to make the referral to the treatment agency shortly after sentencing and a client may be admitted within weeks. Adult probation will need a copy of the assessment or evaluation. The evaluation does not need to be provided to the presentence report writer; it may be sent to the assigned probation officer or the supervisor of the youthful sex offender unit once the client is sentenced. The current supervisor is Manuel Barron and his office is located at 2445 W Indianola Ave., Phoenix. The main office number is (602) 372-2310.

If the client does not have a psychosexual evaluation and/or risk assessment prior to sentencing, the adult probation department has to make arrangements for the client to be evaluated before they will be able to make a referral for residential treatment. That process may take several months. Therefore, if your client is close to their 17th birthday, getting them evaluated prior to sentencing will save significant time and increase the likelihood they will still be accepted into residential treatment.

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(Endnotes)

1. A.R.S. § 13-504 (2007) (“[p]ersons under eighteen years of age; juvenile transfer”).
2. Statistics provided by Beth Rosenberg of Children’s Action Alliance.
3. This bill passed the Senate, passed in House Judiciary Committee on March 17, 2011, and is now headed to the House floor.



# Trial Tips

By Terry Lovett Bublik, Attorney Supervisor

## Tip # 3: Contemporaneous Record of Bench Conferences

Over the years, Arizona courts have continued to stress the importance of and need for a complete and contemporaneous record in criminal cases. Consequently, they strongly disapprove of the practice of conducting bench conferences off the record and causing a record to be made at a later time, such as the next recess. See *State v. Bay*, 150 Ariz. 112, 722 P.2d 280 (1986), *State v. Fletcher*, 149 Ariz. 187, 189, 717 P.2d 866, 868 (1986). In *State v. Babineaux*, the court stated, "While at times it may be expedient and avoid some delay, it more often leads to confusion and inefficiency, frequently defeating the goal of preserving for appellate review an accurate record of what actually transpired in the trial proceedings." 22 Ariz. 322, 526 P.2d 1277, 1279 (App. 1974). Unfortunately, although this procedure has been expressly disapproved, it is not reversible error in the absence of demonstrable prejudice to the defendant. *State v. Sanchez*, 130 Ariz. 295, 635 P.2d 1217 (App. 1981).

*So what should you do if you are prevented from making a contemporaneous record of your bench conferences?*

You should make a detailed oral record at your first opportunity. Make sure to include any evidence of prejudice to the defendant. If necessary, you can also file a written motion to augment the record, nunc pro tunc. In the written motion you can cite the failure of the record to reflect the making and denial of your motion or objection, as well as your supporting argument. In essence, you are reconstructing the record. This is especially important to do when the judge has prevented you from making any record.

In the area of jury instructions, it is a common practice for counsel and the court to informally discuss proposed jury instructions. These informal discussions may continue for an extended period and result in a core of instructions that the parties have agreed upon or the judge has indicated that he is inclined to give. If possible, try to have all discussions regarding jury instructions on the record. If you are not able to do so, make sure a full record is made at your next opportunity. Include your position on each instruction that you have requested or have objected to. Also, make sure the judge has made a clear record specifying the instructions he is denying or those he intends to give. See *Gosewisch v. American Honda Motor Co., Inc.*, 153 Ariz. 400, 737 P.2d 376 (1987).



# Jury and Bench Trial Results

## December 2010 – February 2011

### Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
<b>Group 1</b>					
12/15/2010	<b>Hann</b> <i>Sain</i>	Gottsfeld	2010-139208-001 Aggravated Assault, F3 Shoplifting, M1	1 1	Jury Trial-Guilty As Charged
1/10/2011	<b>Agnick</b>	Holguin	2008-006821-001 Paraphernalia Violation, F6 Dangerous Drug Violation, F2	1 1	Jury Trial-Guilty As Charged
1/31/2011	<b>Reece</b> <i>Trimble</i> <i>Yalden</i>	Rummage	2010-105803-001 Forgery, F4	1	Jury Trial-Guilty As Charged
2/18/2011	<b>Hann</b>	Svoboda	2010-123808-002 Marijuana Violation, F6	1	Court Trial-Guilty Lesser/Fewer
2/23/2011	<b>Turner</b>	Vandenberg	2010-136113-001 Paraphernalia Violation, F6 Marijuana Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer
<b>Group 2</b>					
12/9/2010	<b>Traher</b> <i>Browne</i>	Vandenberg	2010-109517-001 Disorderly Conduct, F6	2	Court Trial-Guilty Lesser/Fewer
12/9/2010	<b>Friddle</b> <b>Godley</b> <i>Munoz</i> <i>Menendez</i>	Kemp	2010-123518-001 Aggravated Assault, F3	1	Jury Trial-Not Guilty
12/9/2010	<b>Godley</b>	French	2010-124729-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer
1/3/2011	<b>Alagha</b> <i>Salvato</i> <i>Munoz</i> <i>Browne</i>	French	2010-127120-001 Tresp 1st Deg-Res Struct, F6	1	Jury Trial-Guilty As Charged

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

# Jury and Bench Trial Results

## December 2010 – February 2011

### Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
2/7/2011	<b>Califano</b>	Svoboda	2007-146555-002 DUI-Lic Susp/Rev for DUI, F4 Aggravated DUI-Third DUI, F4	2 2	Jury Trial-Guilty As Charged
2/11/2011	<b>Baker</b>	Stephens	2010-143624-001 Aggravated Assault, F3	2	Jury Trial-Not Guilty
2/15/2011	<b>Fridde Munoz</b>	Warner	2010-143831-001 Burglary 2nd Degree, F3	1	Jury Trial-Not Guilty
<b>Group 3</b>					
12/9/2010	<b>Colon Farley</b>	Thumma	2010-103035-001 Elec Commun Drug Transact, F4 Drug Paraphernalia Violation, F6 Dang Drug-Transp and/or Sell, F2	5 1 5	Jury Trial-Guilty Lesser/Fewer
12/15/2010	<b>Gronski Bublik Salvato</b>	Granville	2010-124433-001 Aggravated Assault, F3	1	Jury Trial-Not Guilty
1/7/2011	<b>Banihashemi Salvato</b>	Gottsfeld	2010-100544-001 Aggravated Robbery, F3	1	Jury Trial-Guilty As Charged
1/28/2011	<b>Robinson Yalden</b>	Verdin	2010-101342-001 Misconduct Involving Weapons, F4	1	Jury Trial-Guilty As Charged
2/25/2011	<b>Parker Farley</b>	Lynch	2010-128838-001 Interfere w/Education Inst, M1 Resisting Arrest, F6 Aggravated Assault, F6	1 1 1	Jury Trial-Guilty Lesser/Fewer
<b>Group 4</b>					
12/8/2010	<b>Sturgell Kunz</b>	Warner	2010-130961-001 Aggravated Assault, F3	1	Jury Trial-Guilty As Charged
12/15/2010	<b>Becker Flannagan</b>	Smith	2009-174658-001 Theft, F5 Burglary 3rd Degree, F4	1 1	Jury Trial-Guilty As Charged

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

# Jury and Bench Trial Results

## December 2010 – February 2011

### Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
12/15/2010	<b>Tivorsak</b> <i>Flannagan</i>	Hoffman	2010-124757-001 Theft, F3	1	Jury Trial-Not Guilty
12/17/2010	<b>Tivorsak</b> <i>Flannagan</i> <i>Curtis</i>	Warner	2010-005976-001 Misconduct Involving Weapons, F4 Drug Paraphernalia Violation, F6 Agg Taking ID-Person/Entity, F3	2 1 1	Jury Trial-Guilty Lesser/Fewer
1/7/2011	<b>Cooper</b>	Martin	2010-030549-001 Resisting Arrest, F6	1	Jury Trial-Guilty As Charged
1/18/2011	<b>Becker</b> <i>Flannagan</i> <i>Curtis</i> <i>Austin</i>	Anderson	2010-048155-001 Theft-Means of Transportation, F3 Drive w/Lic Susp/Revoke/Canc, M1	1 1	Jury Trial-Guilty Lesser/Fewer
1/21/2011	<b>Kalman</b> <b>Sloan</b> <i>Flannagan</i> <i>Curtis</i>	Svoboda	2009-166857-001 DUI-Lic Susp/Rev for DUI, F4 Aggravated Assault, F3	2 1	Jury Trial-Guilty Lesser/Fewer
1/24/2011	<b>Jolley</b> <i>Kunz</i>	Kemp	2009-120107-001 Aggravated Assault, F3	2	Jury Trial-Guilty As Charged
2/1/2011	<b>Finsterwalder</b>	Brodman	2010-135359-001 Aggravated Assault, F6	1	Court Trial-Guilty Lesser/Fewer
2/23/2011	<b>Warner</b> <i>Meginnis</i>	Welty	2009-138955-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer
2/24/2011	<b>Stanford</b> <i>Thompson</i>	Flores	2010-130563-001 Burglary 3rd Degree, F4 Trafficking In Stolen Property, F2	1 1	Jury Trial-Guilty Lesser/Fewer
<b>Group 5</b>					
1/7/2011	<b>Ditsworth</b> <i>Thompson</i> <i>Falle</i>	Brodman	2010-005359-001 Burglary 3rd Degree, F4	1	Jury Trial-Guilty As Charged

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

# Jury and Bench Trial Results

## December 2010 – February 2011

### Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
1/14/2011	<b>Alagha Thompson</b>	Gottsfeld	2008-158069-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Not Guilty
1/19/2011	<b>Glass-Hess Thompson</b>	Stephens	2010-143476-001 Aggravated Assault, F5	1	Jury Trial-Not Guilty
1/21/2011	<b>Rosell Delrio</b>	Hannah	2010-006222-003 Aggravated Assault, F3 Murder 2nd Degree, F2, Attempt to Commit Armed Robbery, F2, Conspiracy to Commit Misconduct Involving Weapons, F4	2 1 3 1	Jury Trial-Guilty As Charged
1/27/2011	<b>Glass-Hess</b>	Lynch	2010-129876-001 Marijuana-Possess/Use, F6	1	Court Trial-Guilty Lesser/Fewer
2/18/2011	<b>Glass-Hess Thompson Ralston</b>	Lynch	2010-140672-001 Forgery, F4	1	Jury Trial-Not Guilty
<b>Group 6</b>					
1/18/2011	<b>Llewellyn</b>	Brodman	2009-143775-002 Marijuana Violation, F2 Drug Paraphernalia Violation, F6	1 1	Jury Trial-Not Guilty
1/21/2011	<b>Steinfeld Springer</b>	Smith	2009-141705-001 Burglary 3rd Degree, F4	1	Jury Trial-Guilty As Charged
1/21/2011	<b>Kirchler O'Farrell Springer</b>	Contes	2010-119295-001 Molestation of Child, F2 Sexual Conduct with Minor, F2 Sexual Abuse, F3 Kidnap, F2	7 2 3 2	Jury Trial-Guilty Lesser/Fewer
2/2/2011	<b>Steinfeld Godinez</b>	Blomo	2010-120194-002 Resisting Arrest, F6 Disorderly Conduct, M1	1 1	Court Trial-Not Guilty

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# Jury and Bench Trial Results

## December 2010 – February 2011

### Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
2/16/2011	<b>McCarthy</b> Souther Farrell	Lynch	2010-141491-001 Misconduct Involving Weapons, F4	1	Jury Trial-Guilty As Charged
<b>Capital</b>					
12/17/2010	<b>Matthew Dominguez</b> Page Sandberg Daniels-Rojas	McMurdie	2009-105844-001 Aggravated Assault, F3 Murder 1st Degree, F1	1 1	Court Trial-Guilty But Insane
12/21/2010	<b>Johnson Cooper</b> Flannagan Kunz	Brnovich	2009-007752-001 Molestation of Child, F2 Obscene Matl-Furnish to Minor, F4 Sexual Conduct with Minor, F2	3 2 1	Jury Trial-Guilty Lesser/Fewer
2/28/2011	<b>Stazzone Peterson</b> Page Ericksen Sims	O'Connor	2007-106833-001 Murder 1st Degree, F1 Misconduct Involving Weapons, F4 Sexual Assault, F2 Kidnap, F2	1 1 1 1	Jury Trial-Guilty As Charged  Sentenced to Death
<b>RCC</b>					
12/1/2010	<b>Braaksma</b>	Goodman	2010-113906-001 Assault-Intent/Reckless/Injure, M1	1	Court Trial-Guilty As Charged
12/1/2010	<b>Primack</b>	Jayne	2010-131705-001 Fail to Comply-Court Order, Mi	1	Court Trial-Not Guilty
12/15/2010	<b>Primack</b>	Jayne	2010-065337-001 Fail to Comply-Court Order, Mi	1	Court Trial-Not Guilty
1/5/2011	<b>Antonson</b>	Granville	2009-113485-001 Molestation of Child, F2	1	Jury Trial-Guilty As Charged
1/14/2011	<b>Vincent Jarrell</b>	Seyer	2010-128712-001 Prostitution, M1	1	Court Trial-Not Guilty-Directed Verdict

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

# Jury and Bench Trial Results

## December 2010 – February 2011

### Public Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(s)	Counts	Result
2/18/2011	<b>Braaksma</b>	Cahill	2010-142311-001 DUI-Liquor/Drugs/Vapors/Combo, M1 DUI w/Bac of .08 or More, M1	1 1	Jury Trial-Guilty Lesser/Fewer
2/22/2011	<b>Braaksma</b> <i>Trimble</i>	Frankel	2010-111580-001 DUI w/Bac of .08 or More, M1 DUI-Liquor/Drugs/Vapors/Combo, M1	1 1	Jury Trial-Guilty As Charged
<b>Vehicular</b>					
12/20/2010	<b>Tomlinson</b>	Passamonte	2005-141996-001 Aggravated Domestic Violence, F5	1	Jury Trial-Guilty As Charged
1/12/2011	<b>Conter</b>	Passamonte	2009-167027-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial-Guilty As Charged
1/28/2011	<b>Black</b>	Svoboda	2010-104734-001 Agg DUI-Lic Susp/Rev for DUI, F4	2	Jury Trial-Guilty Lesser/Fewer
2/15/2011	<b>Rodak</b>	Flores	2010-119926-001 Marijuana Violation, F6 Drug Paraphernalia Violation, F6	1 1	Court Trial-Guilty Lesser/Fewer



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# Jury and Bench Trial Results

## December 2010 – February 2011

### Legal Defender's Office – Trial Division

Closed Date*	Attorney Investigator Paralegal Mitigation	Judge	CR Number and Charge(S)	Counts	Result
1/5/2011	<b>Beck</b>	Svoboda	2009-123408-002 Agg Dui-Lic Susp/Rev For Dui, F4	2	Jury Trial-Guilty Lesser/Fewer
12/21/2010	<b>Jolly</b> <i>Rangel</i> <i>Marino</i> <i>Rubio Gaytan</i>	Welty	2009-135836-001 Murder 1st Degree, F1	1	Jury Trial-Not Guilty
1/11/2011	<b>Navazo</b> <i>Rangel</i>	Pineda	2009-113981-002 Theft By Extortion, F2 Aggravated Assault, F3 Theft-Means Of Transportation, F3 Misconduct Involving Weapons, F4 Kidnap, F2	5 3 1 1 3	Jury Trial-Guilty Lesser/Fewer
2/2/2011	<b>Navazo</b>	Kemp	2009-123131-002 Theft By Extortion, F2 Kidnap, F2, Conspiracy To Commit Misconduct Involving Weapons, F4	1 2 1	Jury Trial-Not Guilty
2/23/2011	<b>Rothschild</b> <i>Warner</i>	Verdin	2010-121493-001 Armed Robbery, F2 Kidnap, F2	2 2	Jury Trial-Not Guilty
12/16/2010	<b>Tate</b>	Davis	2008-007494-002 Armed Robbery, F2 Kidnap, F2	1 1	Jury Trial-Guilty As Charged
12/17/2010	<b>Tate</b>	Warner	2010-124145-002 Armed Robbery, F2	1	Jury Trial-Guilty As Charged
1/7/2011	<b>Collins</b>	Brodman	2009-144771-001 Dangerous Drug Violation, F4 Drug Paraphernalia Violation, F6	1 1	Jury Trial-Guilty Lesser/Fewer
1/7/2011	<b>Collins</b>	Brodman	2009-178890-002 Burglary 3rd Degree, F4	1	Jury Trial-Guilty As Charged
1/20/2011	<b>Babbitt</b>	French	2009-163164-003 Kidnap, F2 Theft By Extortion, F2 Aggravated Assault, F3 Aggravated Assault, F6 Misconduct Involving Weapons, F4	2 1 1 1 1	Jury Trial-Guilty Lesser/Fewer

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

# Jury and Bench Trial Results

## December 2010 – February 2011

### Legal Defender's Office – Trial Division

Closed Date*	Attorney <i>Investigator</i> <i>Paralegal</i> <i>Mitigation</i>	Judge	CR Number and Charge(S)	Counts	Result
1/20/2011	<b>Abernethy</b>	Harrison	2010-006903-002 Theft-Means Of Transportation, F3	1	Jury Trial-Not Guilty
1/24/2011	<b>Abernethy</b>	Gottsfeld	2010-123144-001 Aggravated Assault, F3	2	Jury Trial-Guilty Lesser/Fewer
1/27/2011	<b>Lee</b>	Gottsfeld	2010-133732-001 Armed Robbery, F2	1	Jury Trial-Guilty Lesser/Fewer
2/2/2011	<b>Storrs</b> <i>Rangel</i>	McMurdie	2010-006139-001 Theft, F6 Aggravated Assault, F3 Assault-Intent/Reckless/Injure, M1	1 1 1	Jury Trial-Guilty Lesser/Fewer

### Legal Defender's Office – Dependency

Last Day of Trial	Attorney <i>Case Manager</i>	Judge	Case Number and Type	Result	Bench Or Jury Trial
12/14/2010	<b>Ross</b>	Hicks	JD18116 Severance Trial	Severance Granted	Bench
1/18/2011	<b>Sandler</b>	Gentry-Lewis	JD17958 Severance Trial	Severance Granted	Bench
2/10/2011	<b>Sanders</b>	Blakey	JD17860 Severance Trial	Severance Granted	Bench

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

# Jury and Bench Trial Results

## December 2010 – February 2011

### Legal Advocate's Office – Trial Division

Closed Date*	Attorney <i>Investigator</i> <i>Paralegal</i> <i>Mitigation</i>	Judge	CR Number and Charge(S)	Counts	Result
12/10/2010	<b>Corey Sherwin</b> <i>Susorney</i>	Barth	2007-009026-001 Murder 1st Degree, F1	1	Jury Trial-Guilty As Charged Sentenced to Life
12/27/2010	<b>Reinhardt</b>	Gottsfeld	2010-005546-001 Forgery, F4 Taking Identity Of Another, F4	1 1	Court Trial-Guilty Lesser/Fewer
1/21/2011	<b>Roskosz</b>	Hannah	2010-006222-002 Armed Robbery, F2 Aggravated Assault, F3	3 2	Court Trial-Guilty As Charged

### Legal Advocate's Office – Dependency

Last Day of Trial	Attorney <i>CWS</i>	Judge	Case Number and Type	Result	Bench Or Jury Trial
12/9/2010	<b>Russell, Miller</b>	Anderson	JD15456 Termination of Parental Rights	Termination	Bench



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

# SAVE THE DATES...

## 9TH ANNUAL APDA CONFERENCE

June 22, 23 & 24, 2011  
Tempe Mission Palms

## ADVANCED TRIAL COLLEGE

November 16 & 17, 2011  
Presented by  
Ira Mickenberg

## DEATH PENALTY 2011

December 7, 8 & 9, 2011  
Phoenix, AZ



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*for The Defense*

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