

for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

Volume 14, Issue 7/8

July/August 2004



Blakely v. Washington

Illuminating Apprendi's Scope

By Dana Hlavac, Mohave County Public Defender / APDA Vice President

*Editors' Note: The United States Supreme Court's recent decision in *Blakely v. Washington*, 124 S.Ct. 2531, 2004 WL 1402697 (U.S. June 24, 2004), dramatically alters the manner in which many sentences will be handled in criminal cases. The precise impact has yet to be determined. The following articles reflect the current views of several practitioners. Additional information including motions and analysis from other states are available on the Public Defender website under Legal Resources at <http://www.pubdef.maricopa.gov/>*

At the end of its last term, the United States Supreme Court revisited the Sixth Amendment jurisprudence it started in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* was the landmark case that held that a jury, not a judge, must find any facts used to increase a sentence above the statutory maximum. It eventually led to the Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), that held Arizona's capital-sentencing statute unconstitutional because judges were finding the aggravating factors that were necessary for a defendant to be death-eligible. In *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004), the Court took *Apprendi's* rule to the next logical step.

Ralph Howard Blakely, Jr. pled guilty to kidnapping his wife. Under the relevant Washington statutes, the facts admitted in the plea allowed a sentence within a range of 49 to 53 months, which the state recommended as a term of the plea agreement. However, at the sentencing hearing, pursuant to Washington sentencing procedures, the trial judge found that Blakely had executed the crime with "deliberate cruelty" and imposed an exceptional sentence of 90 months. Blakely appealed his sentence on the ground that Washington's sentencing procedure violated *Apprendi*. Washington's Court of Appeals affirmed the sentence and the Washington Supreme Court denied review. The U.S. Supreme Court granted certiorari.

The state argued that Blakely's sentence did not violate *Apprendi* because the statutory maximum sentence under Washington law for a class B felony was ten years. However, the Court rejected this reasoning. Although Washington statutes state that no sentence for a class B felony will exceed ten years, Washington also employs a complex



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system of sentencing guidelines that determine the “standard range” for a given offense. The statutes state that the court must impose a sentence within this range unless the court finds compelling reasons to depart from the range. The statutes enumerate an illustrative list of aggravating and mitigating factors that the court may consider, but the judge was essentially free to take anything into account (similar to the discretion allowed Arizona judges under the catch-all provision of A.R.S. §13-702(C)(20)). It was this portion of Washington’s sentencing procedure that the Court found objectionable.

The Court specifically pointed out that, absent the judicially-determined aggravating factors; the maximum sentence for Blakely’s offense was the standard range as determined by the statutory guidelines. This, the Court said, was Blakely’s statutory maximum sentence for the purposes of *Apprendi*. Citing precedent that apparently most of the rest of the country failed to notice, the Court explicitly stated that the maximum sentence a judge may impose is the maximum sentence allowed by statute *based solely on the facts reflected in the jury verdict or admitted by the defendant*. This means that the statutory maximum exceptional (or aggravated) sentence is not the statutory maximum for *Apprendi* purposes.

The holding of *Blakely* essentially means that the Sixth Amendment disallows any judicial fact-finding used to increase a defendant’s sentence. But wasn’t this the holding of

Apprendi? Yes and no. Because of the phrase “statutory maximum sentence”, judges around the country (and here in Arizona) interpreted the holding of *Apprendi* to mean that a sentence could not be increased above the maximum aggravated sentence allowable by statute without submitting the facts used to increase the sentence to a jury. This was a specious interpretation because, under most statutory schemes, a sentence can *never* exceed the maximum aggravated sentence. This essentially rendered *Apprendi* a noteworthy piece of Supreme Court memorabilia, except in a few specific circumstances (such as capital cases due to *Ring v. Arizona*).

In Arizona, the above interpretation led to an interesting, perhaps inconsistent, application of *Apprendi*. Prior to *Blakely*, Arizona courts recognized that *Apprendi* applied to some of the enhanced sentence ranges under Title 13, Chapter 6, but rejected the argument that the aggravating factors used to increase sentences pursuant to §13-702 needed to be submitted to a jury. How did *Blakely* affect Arizona’s interpretation?

In order to answer this question, it must first be determined if *Blakely* applies to Arizona. It goes without saying that there will be arguments presented that it does not. These arguments rely on distinguishing Washington’s sentencing procedures from Arizona’s. If the holding in *Blakely* can be shown to be an idiosyncrasy unique to jurisdictions that use sentencing guidelines similar to Washington’s, then it would follow that it does not apply to jurisdictions that use alternative methods, like Arizona’s presumptive sentence method.

This article suggests that *Blakely* applies to all jurisdictions. This seems to be the consensus across the state (at least among defense attorneys). The holding in *Blakely* is not dependent on the fact that Washington employs sentencing guidelines. The Court makes no reference to Washington’s sentencing procedure in its holding that, for the purposes of *Apprendi*, the statutory maximum sentence is

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Blakely and Apprendi

Burdens of Proof, Double Jeopardy, and Separation of Powers

By Paul Prato, Chief Trial Deputy

Apprendi, in addition to requiring that any fact that increases the penalty for a crime beyond the prescribed statutory maximum be submitted to a jury, “other than the fact of prior conviction,” also requires that the fact be “proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000). The majority in *Apprendi* explains in detail the historical constitutional importance of the applicability of the reasonable doubt burden of proof to both the question of guilt or innocence and the question of the length of sentence. 530 U.S. at 477-490. The majority’s adherence to the constitutional principle that the reasonable doubt standard applies not only to the issue of guilt or innocence, but also to the determination of aggravating factors that increase the penalty for a crime beyond the prescribed statutory maximum is unequivocally set forth in the following language:

“[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” *Id.*, at 490.

Arguably, if the legislature cannot legislate away the reasonable doubt standard, then prosecutors and courts cannot constitutionally require an accused to waive this fundamental constitutional right that has been zealously protected by the Court since *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970).

Even the question whether the existence of prior convictions should be submitted to a jury for determination beyond a reasonable doubt is now open for debate. The Court noted in *Apprendi*, “it is arguable that *Almendarez-Torres*, [*v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998)] [no

right to jury trial on issue of recidivism] was incorrectly decided.”

The constitutional importance of the reasonable doubt burden of proof was reaffirmed by the *Blakely* majority, which held that a “[w]hen a defendant pleads guilty, the state is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.” 124 S.Ct. at 2542. The Court does not state that the defendant can waive the burden of proof.

A practice issue raised by *Apprendi/Blakely* occurs when the state seeks to withdraw from a plea that has been accepted by the trial court because the defendant refuses to waive the *Apprendi/Blakely* rights. *Jackson v. Schneider*, 207 Ariz. 325, 86 P.3d 381 (App. 2004) and *Campas v. Superior Court*, 159 Ariz. 343, 344, 767 P.2d 230 (Ariz. App. 1989) provides support for the argument that double jeopardy attached the moment the trial court accepted the plea, and the trial court may not reject the plea or permit the state to withdraw from the plea because it would violate the prohibition against double jeopardy. Although the trial court can reject the agreed-upon sentence after the plea has been accepted, it can only sentence the defendant within the legal limits of the charges pled to, and then only if the defendant agrees, or, in the alternative, the defendant may withdraw from the plea. Arguably, post-*Apprendi/Blakely*, the only legal sentence is the presumptive sentence or less in the absence of a prior jury finding of aggravating factors.

Finally, it is well established that “[c]ourts have power to impose sentences only as authorized by statute and within the limits set down by the legislature.” *State v. Harris*, 133 Ariz. 30, 31,

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Second APDA Conference Surpasses the First

By Jim Haas, Maricopa County Public Defender / APDA President

The Second Annual Arizona Public Defender Association Statewide Conference held June 23 - 25 boasted some pretty impressive numbers: 93 training sessions; 130 presenters; 800 attendees registered (and another 100 that had to be turned away); and billions and billions of Rice Krispy Treats and ice cream bars consumed.

Once again it was great fun to have so many people dedicated to indigent representation in one place. The attendees included attorneys and all types of support staff from every corner of the state, including county, city, federal and tribal public defense offices and programs. This year we welcomed a new member, the Pascua Yaqui Tribe Public Defender Office, to the conference and our organization.

The conference showcased the incredible wealth of talent enjoyed by Arizona's public defense offices and programs. In addition, APDA was blessed with amazing cooperation from top-notch speakers from around the country, who traveled at their own expense to do presentations at the conference. They included nationally-known trial attorney Steve Rench from Denver; renowned clinical psychologist Xavier Amador from New York City; Cynthia Works, Director of Training and Education for the National Legal Aid & Defender Association, from Washington D.C.; Maya Grosz, Supervising Attorney at the Neighborhood Defender Service of Harlem; Michael Pinard, Assistant Professor at the University Of Maryland School Of Law; McGregor Smyth, Supervising Attorney at The Bronx Defenders; and Gerry Spence, world-famous attorney and author from Jackson, Wyoming.

Gerry Spence gave a rousing and inspiring speech at the awards luncheon. He expressed

admiration for public defenders as "attorneys who escaped those ungodly hell-holes (law schools) with [their] humanity intact." He exhorted public defenders to refuse to become "cogs" in the wheels of the criminal justice system, and to be "warriors", even when it makes judges or (gulp) bosses angry.

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

Outstanding Rural Administrative Professional – **Maria Flores**, Cochise County Public Defender's Office

Outstanding Urban Administrative Professional – **Maria Poyner**, Maricopa County Legal Defender's Office

Outstanding Rural Paraprofessional – **Pete Eggers**, Investigator, Yavapai County Public Defender's Office

Outstanding Urban Paraprofessional – **Melissa Kupferberg**, Capital Mitigation Specialist, Maricopa County Legal Defender's Office

Outstanding Rural Performance/Contribution – **Reynold Harrison**, Tribal Court Advocate, Navajo Nation Public Defender's Office

Outstanding Urban Performance/Contribution – **Armand Casanova**, Lead Investigator/Accident Reconstructionist, Maricopa County Public Defender's Office

"Rising Star" Award – **Steve Hauser**, Mohave County Public Defender's Office

Outstanding Rural Attorney – **Brad Bransky**,
Coconino County Public Defender’s Office

Outstanding Urban Attorney – **Ken Huls**,
Maricopa County Public Defender’s Office

Lifetime Achievement Award – **Don Klein**, Pima
County Public Defender’s Office

Gideon Award – **Tom Karas**, former Federal
Public Defender for Arizona

The Gideon Award was presented to Tom Karas’ daughter, Teresa, by current Arizona Federal Public Defender Fred Kay. Tom was the first Federal Public Defender in the United States, and created the model office for the rest of the country. Tom passed away earlier this year.

The presentation of the Gideon Award by Fred Kay, who was hired by Tom Karas in 1971, was especially touching because Fred is retiring this year after over 30 years with the Federal Public Defender's Office. Fred was recognized by his office at the luncheon for his humanity, humor and undying commitment to indigent representation. He was also presented with a (somewhat kitschy) “Lady Justice” fringed lamp by the APDA Board of Directors.

Another touching moment occurred when the Pima County Public Defender’s Office recognized its director, Susan Kettlewell, who is also retiring this year after 25 years with the office. Susan was presented with a plaque by her office. She also received a “Lady Justice” lamp at the Board meeting earlier that day. To illustrate how many lives and careers Susan had touched over the years, PCPD attorney Carol Wittels asked all those who had worked with Susan at the office to stand. It seemed like more than half of the room was on its feet. A memorable moment.

The awards presentation was punctuated several times by energetic standing ovations as the recipients’ accomplishments were described. The ceremony was ably and humorously emceed by La Paz County Public Defender Craig

Williams, who had a successful career as an entertainer before becoming an attorney. Craig was visibly upset with the APDA officers who would not let him use certain words that were readily uttered by Gerry Spence.

The APDA conference has become something of a phenomenon - the variety and quality of the training sessions; the energy of hundreds of people who share a passion for challenging work that only they really understand; the presence and recognition of support staff as essential members of our team; the long-overdue recognition of outstanding accomplishment and dedication; the tote bags, portfolios, t-shirts, and pens sporting OUR logo; the comfortable environment of the Tempe Mission Palms; and, yes, those wonderful snack stations - all combine to make the conference a unique experience that we hope to repeat and improve each year.



Misdemeanor DUI Sentencing Chart

The following chart was created to assist those who have to go to misdemeanor court with all the questions defendants always have about DUIs. It is a quick resource for those unfamiliar with the myriad of ramifications DUIs carry these days. Of particular note is the new “prison fund” fine that was put into effect for arrests after March 13. This fine will go to pay stipends of up to \$100 per paycheck for prison guards, build new prisons and establish prison drug rehabilitation programs.

	Jail	Mandatory Minimum Fine	Driver License Action
1st DUI .08-.14 (eff. 4/4/01)	Min – 10 days 9 days may be suspended; at least 24 consecutive hours. Max – 6 months	\$250 fine \$200 surcharge \$500 prison fund fine (eff. 3/14/04) \$20 time pymt. fee \$5 probation fee =\$975	Unless already suspended for Admin per se, MVD Suspension 30 days + 60 days restricted (work/ school only) \$75 reinstatement fee SR22 insurance
1st DUI Slightest Degree (no test)	Same.	Same.	Same.
2nd DUI within 60 months of date of 1st DUI offense	Min – 90 days 30 days consecutive, 60 may be suspended. At least 48 consecutive hours. Max – 6 months	\$500 fine \$400 surcharge \$1,250 prison fund fine \$20 time pymt. Fee \$5 probation fee =\$2,175	Revocation 1 year. Notation on license after revocation that, for applicable period, every car driven by person to be equipped with Ignition Interlock.
2nd within 60 mos. Slightest Degree	Same.	Same.	Same.
1st Extreme DUI >.15 (eff. 4/4/01)	Min – 30 consecutive days, 20 may be suspended. At least 48 consecutive hours. Max – 6 months.	\$250 fine \$200 surcharge \$250 DUI fund \$1,000 prison fund fine \$20 time pymt fee. \$5 probation fee = \$1,725	Unless already suspended for Admin per se, MVD Suspension 30 days + 60 restricted (work/ school only). \$75 reinstatement fee SR22 insurance Notation on license after suspension that, for applicable period, every car driven equipped w/ Interlock.

Feel free to contact Defender Law Clerk Kristina Matthews if you need specific citations to statutes or have any other questions or comments regarding this chart.



	Other Terms	Ignition Interlock	Court's Discretion
1st DUI .08-.14 (eff. 4/4/01)	Alcohol screening/ education mandatory. Prob. up to 5 years.	No.	Community service, jail costs (up to \$101/ day), work release or home arrest available after 1st 24 hours.
1st DUI Slightest Degree (no test)	Same.	No.	Same.
2nd DUI within 60 months of date of 1st DUI offense	Alcohol screening/ education mandatory. Prob. up to 5 years.	Yes – for at least 1 year after MVD revocation lifted. Installation and maintenance costs. Certificate of compli- ance every 90 days.	Community service, jail costs (up to \$101/ day), work release available after 48 consecutive hours; home arrest available after 15 days.
2nd within 60 mos. Slightest Degree	Same.	Same.	Same.

Practice Pointer

Adult Probation for Juvenile Offenders

By Elmer Parker, Defender Attorney

This month's Juvenile in Adult Court Practice Pointer is A.R.S. §13-921, which deals with placing clients under 18 years of age on adult probation. It allows the court to enter a judgment of guilt and place a client under age 18 on probation pursuant to this section if all of the following apply:

- ~ The client is under eighteen years of age at the time the offense is committed.
- ~ The client is convicted of a felony.
- ~ The client is not sentenced to prison.
- ~ The client does not have a historical prior felony conviction as defined in A.R.S. §13-604.

If the court places your client on probation pursuant to this section, all of the following apply:

- ~ It allows a client, if he or she successfully completes the terms and conditions of probation, to ask the court to set aside the judgment of guilt, dismiss the information or indictment, expunge the client's record and order the person to be released from all penalties and disabilities resulting from the conviction.
- ~ It also satisfies all the concerns the state would have to having any conviction set aside or record expunged, as:
 - The expungement is discretionary with the court, so they may object to it if and when it is requested.
 - The conviction may still be used as a prior conviction even after it has been set aside in the event of any subsequent prosecution of the defendant.
 - The conviction is deemed to be a conviction for the purposes of driver's license revocations and suspensions.
 - The client must still comply with any applicable sex offender registration laws.
 - A client who is placed on probation pursuant to this section is deemed to be on adult probation.
 - It does not restrict the court in ordering jail time as a condition of probation.
- ~ It also allows the court to order a client to participate in services that are available to the juvenile court, so that if there were a particular program or service offered by the juvenile division, the court could order the client's participation in that program.

Note that the statute does not exclude any particular offenses from the use of this statute, such as violent offenses or sex offenses (except for the requirement that there is no prison sentence

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that allowed by the facts reflected in the verdict or admitted by the defendant. Furthermore, for the purposes of *Blakely*, Arizona's and Washington's sentencing procedures are virtually indistinguishable. In both states, crimes are categorized into classes and these classes determine the basic sentence for a given crime. In both states, the basic sentence must be imposed unless other facts are found that allow for an adjustment to the sentence. The only differences between the two systems are that Washington calls this basic sentence a "standard range," while Arizona refers to it as the "presumptive sentence," and Washington employs a more complex procedure for classifying a crime to determine its basic sentence.

It should be clear then that *Blakely* applies to any jurisdiction that uses some method of factual sentence enhancing such as Washington and Arizona.

Turning now to the original question of how *Blakely* affects Arizona's application of *Apprendi*, Arizona's interpretation has very likely been overruled. *Blakely* clearly forbids the judicial fact-finding required by A.R.S. §13-702. Unless the court finds aggravating factors, it must impose the presumptive sentence or less. This means that the statutory maximum sentence is the presumptive sentence, because it is the maximum sentence that can be imposed based solely on the jury verdict (assuming of course that the verdict does not contain any aggravating factors or the defendant has not admitted to any). Because of this, all of the 702 aggravators should now be submitted to the jury.

So, what does all this mean for day-to-day practice? First of all, consider advising clients not to enter a blanket waiver of their *Apprendi-Blakely* rights. Prosecutors have already begun adding this as a standard rider on plea agreements. Do not stipulate to this. Either admit only to specific aggravators or add a disclaimer to the waiver specifying that it does not include any aggravators that may be

potentially found under the catch-all provision of §702(B)(20). There are two reasons for this. First, a blanket waiver exposes the client to anything under the sun that the judge decides to use to enhance the sentence. Second, it may invalidate the plea. It is questionable whether such a broad waiver could be knowing, voluntary, and intelligent, and this may taint the entire agreement. The choice, of course, to waive these rights belongs to the client.

Second, any aggravators that the prosecutor wishes to allege will probably have to be noticed at least twenty days prior to the trial. This is similar to being provided adequate notice of the crime being charged. It is likewise fundamentally necessary for a fair trial; for without notice, a proper defense to alleged aggravators cannot be prepared.

Third, although it is a near certainty that the legislature will amend Arizona's sentencing statutes, a client's *Apprendi-Blakely* rights must be protected prior to that. This means that anytime a court begins to consider aggravating factors at the sentencing stage, an objection is in order. An objection should also be made whenever the court attempts to impose a sentence above the presumptive without citing any aggravating factors. Likewise, if mitigating factors have been successfully submitted to the court, and no aggravating factors have been found, object if the court does not reduce the sentence below the presumptive.

Fourth and last, carefully monitor pre-sentencing reports to preclude reference to any aggravating factors. If judges cannot find them, then neither should a probation officer.

As a practical matter, the following general guidelines should be considered when dealing with all post-*Blakely* sentencings:

1. You should object to all sentences imposed beyond the presumptive, unless the client admitted to the aggravator which supports the sentence, or the fact was an essential element of the offense of conviction, or the client waived his right to a jury finding of aggravators (BEWARE

OF WAIVERS SEE BELOW).

2. You should object to a court's attempted use of elements such as serious physical injury or use of weapon or dangerous instrument (702(c)(1) and (c)(2)) because the law already excludes them as aggravating factors since they are essential elements or 604 enhancers.

3. Continue to argue mitigating circumstances, *Blakely* does not apply to mitigating circumstances and the judge can still find facts to reduce the sentence from the presumptive.

4. Remember there is great language in the decision about not allowing judges to punish for behavior greater than that which supported the offense of the plea or conviction, like our judges do here all the time (ie: aggravating factor for pleading to a lesser included [oh yeah, we aggravate for the crime actually being completed, not for getting a reduced plea!])

5. DO NOT advise a client to enter into a blanket waiver of a jury finding of ANY aggravator! (Of course, the ultimate decision about signing the waiver remains with your client.)

6. If the prosecutor seeks a waiver of a jury finding, request the prosecutor list each and every aggravator to which he seeks a waiver, and only waive with respect to specifically detailed aggravators. If you do a more blanket waiver, your judge could consider almost ANYTHING, even if neither you or the client (or the prosecutor for that matter) had thought of it!

7. If you go to trial, you should not waive the jury findings on aggravation unless you have some clearly articulable strategic basis.

8. If you go to trial, there is a very strong argument that the prosecution cannot seek aggravators which have not been previously identified in a charging document or noticed at least twenty days prior to trial.

9. The right to waive the jury finding remains

your client's. You must have permission to enter a waiver. The waiver must be knowing, intelligent and voluntary, since it is a waiver of a constitutional right. If your client decides to enter into a blanket waiver, despite your concerns, make a record regarding the over broad nature of the waiver.

10. Since the court cannot consider aggravating factors in determining sentence, pre-sentence reports should not contain any reference to any aggravating factor. You should object to any aggravating factor reference, and ask that it be stricken from the report as entered on the record. This may avoid bad facts being before an appellate judge, who then reviews them and rules against your client because of them, although a different legal justification will inevitably be given.

11. If you have a sentencing before new legislation is passed, and the court attempts to aggravate a sentence, on the aggravators, object based on *Apprendi*, *Blakely*, the 6th and 14th Amendments, the Arizona constitution, and separation of powers (no law currently provides for jurors finding aggravators in non-capital cases).

12. If you present mitigation, but no aggravation is presented, and the court attempts to impose the presumptive sentence, have the court state on the record its basis for not imposing a mitigated term. Object to any consideration of factors which move the sentence from a mitigated term to the presumptive.

13. For cases that are pending sentencing, contact the pre-sentence report writer to make sure that the writer is familiar with *Blakely* and to put the writer on notice that the PSR should not include any inappropriate aggravating information.

14. If the state tries to withdraw from the plea agreement, scrutinize the language in the plea agreement to see whether the state has a valid basis to withdraw and is not punishing your client for exercising the constitutional right to a jury determination of any aggravator.

15. DO NOT FORGET THAT THESE ARGUMENTS APPLY TO PROBATION REVOCATION SENTENCINGS AS WELL!

Blakely also has a bearing on clients who have been recently sentenced to an aggravated term based upon judicial fact-finding. There is a very strong argument that these sentencing were illegal and need to be modified down to the presumptive. If you are concerned about such a case, consider the appropriateness of filing a motion to modify the sentence pursuant to Rule 24.3, Arizona Rules of Criminal Procedure, consult with your appellate attorneys, or feel free to call Jill Evans at the Law Offices of the Mohave County Public Defender at (928) 753-0734.

it the difficulty of going through life with a felony conviction on one's record, and anticipating the increased number of juveniles being placed on adult probation after the laws were amended making adult prosecution of juveniles more widespread, intended to allow an opportunity to expunge a first adult conviction.

Very few of the prosecutors and judges seem to be aware of this statute, so its something we should raise in every case where a juvenile is being placed on adult probation.

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648 P.2d 145, 146 (App. 1982). *See, also, State v. Reed*, 120 Ariz. 58, 583 P.2d 1378 (App 1978) (legislature has responsibility of defining crimes and prescribing allowable penalties). Currently, there is no statutory authority for jurors making aggravating factor findings in non-capital cases. It is arguably beyond the scope of the courts' authority to create a vehicle for doing so, absent statutory authority. Consequently, until such time as the legislature makes a "legislative fix", a good faith argument can be made that courts cannot address the requirements of *Blakely* on their own. Simply stated, absent a waiver from a defendant, no aggravated sentences should be imposed against any defendants until such time as the legislature changes the criteria pertaining to ARS §13-702.

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imposed) and the statute anticipates that sex offender registration would continue after the expungement, so that indicates that even a sex offender should be placed on probation under this statute.

All of this also makes common sense because the legislature apparently recognized in enacting

Practice Pointer

Intake and Time Computation

At a recent seminar provided by our appellate division, representatives from the Arizona Department of Corrections spoke about Intake and Time Computation. Here is some of the important info they shared and their phone numbers (they welcomed all to call with questions).

For Intake and Inmate Classification

Donna H. Clement
Bureau Administrator: 542-3896
Herb Haley
Deputy Administrator: 542-3896

For Records

Cecelia Salas
Supervisor: 542-9166

For Time Computation

Cindy L. Aydlett
Administrator: 542-1880
Kathleen O'Hare
Manager, Time Computation Unit: 542-1881
Nancy Sargent
Program Specialist: 542-1856

Processing

Once an MCSO inmate is sentenced (do your best to make sure all the info the judge includes correct credit calculations) DOC will pick up defendant within 10 days and if not they want to know about it. All adult males (except death) go to Alhambra (on ASH grounds) for processing, all women go to Perryville (in Good-year), and all juveniles tried as adults go to Tucson. You need to call and notify them of very short timers (0 to 60 days DOC time), and those who may need to go to Protective Custody.

Classification

Inmates are classified based on all info contained in PSR, including current conviction, previous convictions, and charged offenses with no disposition, but not arrests. This is all by Arizona Statute, according to DOC.

Sex Offenders - Classification for sex offenders is currently changing and now will include only those whose current conviction is for a Chapter 14 offense. Those in need of serious and intensive treatment will now go to Winchester Unit in Tucson, others will go to two separate yards in Florence.

DUI Offenders - Housed in DUI only facilities in cities of Phoenix, Florence, and Kingman. Includes inmates sentenced to 6 years or less (or if longer, when sentence reaches six years).

Substance Abusers - DOC will take into consideration a judge's recommendation for Marana, but defendant also has to meet several other criteria that DOC evaluates including requirement of one year of actual incarceration time.

Time Computation

When you calculate your client's actual DOC time you can start from the actual sentence date to figure the credit since DOC will also do this. First, subtract the presentence custody time, then subtract the earned release credit, approx. 85% (It is actually 1 day for every 6 days served, while Community Supervision is actually 1 day for every 7 days served). Almost everyone, except violent offenders (to be determined by DOC) is eligible for a 90 day early release, BUT whether it is actually given is to be determined by DOC. Nobody automatically gets this early Temporary Release (some get none, some get 20, 30, 45 days). There is no way to determine at Sentencing whether your client will receive this.

If Community Supervision is waived, then inmate will NOT be eligible for TR (Temporary Release).

Inmates with INS holds have discretionary deportation once 50% of their sentence is served, even though it is discretionary it almost always occurs.

ADOC has a literacy requirement per ARS §31-229, if inmate cannot pass an 8th grade literacy test (after education classes and assistance), then they will have to serve their ENTIRE sentence! The Education Department can choose to waive the requirement for individuals with mental or learning disabilities.

Writers' Corner

Chronology

Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including A Dictionary of Modern Legal Usage, The Winning Brief, A Dictionary of Modern American Usage, and Legal Writing in Plain English. The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at www.us.oup.com/us/apps/totd/usage. Garner's Modern American Usage can be purchased at bookstores or by calling Oxford University Press at: 800-451-7556.

Many writing problems — though described in various other ways — result primarily from disruptions in chronological order. In narrative presentations, of course, chronology is the essential organizer. The brain can more easily process the information when it's presented in that order. So generally, the writer should try to work out the sequence of events and use sentences and paragraphs to let the story unfold.

Even at the sentence level, disruptions can occur. The following example comes from a handbook for band directors: "Improved intonation often results when students take up their instruments after singing their parts aloud once the director realizes that there are intonation problems." This is in reverse chronological order. But the sentence can easily be recast: "A director who detects intonation problems should try having the students put their instruments down and sing their parts aloud. Often, when they play again, their intonation will be improved."

Consider the more subtle problem presented by a legal issue phrased (as lawyers generally do it) in one sentence. To illustrate the problem, we'll date the items as they appear in the original statement:

"Is an employee [hired in Oct. 1997] who makes a contract claim [in Sept. 1998] on the basis that her demotion and reduction in salary [in June 1998] violate her alleged employment contract [dated Sept. 1997], and who makes a timely demand [in Aug. 1998] under the Attorney's Fees in Wage Actions Act, disqualified from pursuing attorney's fees under this statute without the court's addressing [in May 1999] the merits of her claim?"

The dates (which no one would ever actually want in the sentence) show that the sentence is hopelessly out of order. We improve the story line by highlighting the chronology — and we make the issue instantly more understandable:

"Lora Blanchard was hired by Kendall Co. as a senior analyst in October 1997. She worked in that position for eight months, but in June 1998 Kendall demoted her to the position of researcher. Two months later, she sued for breach of her employment contract and sought attorney's fees. Is she entitled to those fees under the Attorney's Fees in Wage Actions Act?"

Of course, part of the improved story line comes from the enhanced concreteness that results from naming the parties. But the main improvement is finding the story line.

Remember: chronology is the basis of all narrative.

Jury and Bench Trial Results May 2004

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of for The Defense, please contact the Public Defender Training Division.

Latest Reentry News

ABA Justice Kennedy Commission Recommendations

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Resolution 121D Regarding Prison Conditions and Reentry

On August 9, 2003, Supreme Court Justice Anthony M. Kennedy addressed the American Bar Association with questions about the fairness, wisdom and efficacy of criminal punishment throughout the United States. The inauguration of the ABA Justice Kennedy Commission soon followed, aiming to make recommendations for improving public knowledge of and confidence in the sentencing and correctional process, make punishment more effective in preventing crime and enable people convicted to crimes to reenter society at the completion of their sentences. The Justice Kennedy Commission recently published its recommendations. Of particular interest is its Resolution Regarding Prison Conditions and Prisoner Reentry which among other things:

*addresses the need for programs and policies geared toward preparing incarcerated people for release and reentry into the community and encouraging community acceptance of those returning

*urges jurisdictions to identify and remove unwarranted legal barriers to reentry

*urges law schools to establish clinics to assist convicted persons with legal issues to their reentry into the community.

Access the Resolution at: <http://www.abanews.org/nosearch/kencomm/rep121d.pdf>

For information about all recommendations: <http://www.manningmedia.net/Clients/ABA/ABA288/index.htm#>

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