

# for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

James J. Haas, Maricopa County Public Defender

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*Delivering America's  
Promise of Justice for All*

for The Defense

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## Hands-Off Social Security

By John Sullivan, Defender Attorney, Vehicular Crimes Unit

I recently inherited a case from an attorney who had departed our office shortly before the sentencing. I had read the file and knew what to expect.



My client arrived to court in a joy-stick-driven, electric wheel chair and presented with obvious physical disabilities. Her crimes? Aggravated DUI on two different occasions, two years earlier.

So, did her incapacity result from some drunken collision? Of sorts, yes.

She did not drive her car into a collision, she drove herself into a collision with alcohol. Prior to her DUI's and prior to becoming disabled, she had suffered a number of personal set-backs, including a failed marriage. Like so many people who have personal difficulties and lack supportive surroundings, she turned to alcohol to, more or less, self-medicate her problems. This self abuse escalated, and DUI's followed, until her body revolted and she suffered a series of strokes that devastated and debilitated her body. The result was a wheelchair for the remainder of her life.

Social Security is her sole source of income and nothing more. To my knowledge, this is my first client, in the Grand Canyon state,<sup>1</sup> that has Social Security as the sole source of income.

The strokes wracked her body with pain and disabilities, diminished her eye-sight, and robbed her of any memory of the events surrounding the DUI's. She also requires out-patient medical attention 3 to 4 days a week. A Nolo plea was entered and accepted under an agreement where she would be confined at home rather than DOC.

When my wheelchair-burdened client was being sentenced, I brought the Court's attention to the (nearly obvious) fact that my client's only

source of income was Social Security and asked that the Court address that circumstance in the sentencing disposition so that it would not become an issue with the Probation Department. Suddenly, my full focus on the matter was drawn to a silence in the courtroom. In response to my alert about Social Security income, the Court said and did nothing, absolutely nothing, except proceed with sentencing. The Social Security issue was, in no way, addressed.

From my prior experience in other state courts, I had envisioned that the Court would instruct the Probation Department on the issue, e.g.: "*defendant is on Social Security and does not, at present, have ability to pay, but the matter should be reviewed periodically for any change in circumstances.*" After all, the monies are owed, but, for now, the probationer has no means to pay.

The Judge did nothing to address the Social Security circumstances. I was surprised because this judge had always demonstrated an excellent grasp of the law in the past and, even though this judge sometimes *mistakenly* disagrees with me on legal issues, I greatly appreciate the work of this judge. I immediately surmised that this was a systemic problem, not an isolated one. In retrospect, I presumed too much; the Court, apparently, did not understand the implications of the Social Security issue.<sup>2</sup>

Before my client left the courtroom to be interviewed by Probation, I instructed her that, because her sole source of income was Social Security, she had no obligation to pay **anything** to the Probation Department. Not a single penny, unless she obtained another source of money or income, like the Lottery. She laughed and said she didn't have enough money to buy lottery tickets, so it shouldn't be a problem. In addition, I told her that she should not be intimidated by the Probation Department and, if they insisted that she pay anything at all, to tell them that I said, because Social Security is her sole source of income, she lacks the ability to pay. I also told her to call me immediately if there were problems. Off she went.

I had not been back to the office long when the phone rang with my client's call from home. As I suspected, the Probation Department was demanding payment, despite the fact that my client repeated my informative words. There was no direct threat, but, she was told that failure to comply with probation terms (failure to pay) would result in a violation of probation; clearly an intended and implied threat. I re-assured and re-instructed my client. I also immediately sent her a letter explaining why she was not required to pay; reminding her not to be coerced into paying; to call me if any attempt was made to bring her in front of a judge; and, telling her to keep a copy of my letter.

A little explanation of the law; **the well settled law**.<sup>3</sup>

I must admit, I didn't learn about this in law school, but in private practice. Anyone who has engaged in Social Security claims, Auto PI, Bankruptcy or Debt Collection, would know the applicable law. It's commonly called the "Anti-Attachment Statute," and is found in the Social Security Act, 42 U.S.C.A. § 407. The relevant portion reads as follows:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

But wait, now that you're enthralled, there's more.

[U]nder the established interpretative canons of *noscitur a sociis*<sup>4</sup> and *eiusdem generis*,<sup>5</sup> where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words.

\* \* \*

“Thus, ‘other legal process’ should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.” *Washington State Dept. of Social and Health Svcs. v. Keffeler*, 537 U.S. 371, 384 (2003) (clarifying anti-attachment statute and allowing State to receive reimbursement by a representative payee of foster child receiving both SSI and State care).

This interpretation is important on several levels, but most apropos in the present application. I sent an email to the Chief of Maricopa County’s Adult Probation Department, alerting her to my client’s circumstances and asking her to initiate appropriate corrective action. A few days later, I received a reply from the Probation Department’s Division Director for the Collections Unit who also supervised the Standard Field Office where my client’s case was assigned. Here is a substantial part of that response:

As with all clients, we will assess their ability to pay if there is limited income. At this time Ms. [Client] indicates an income of \$813.00 per month and rent payment of \$640.00 per month. Leaving sufficient income to pay the \$35.00 fees.<sup>6</sup> The probation officer will also assist [Ms. Client] with finding other sources of assistance if needed, such as food bank assistance, utility assistance, or other state/federal resources that she might be entitled to.<sup>7</sup>

We have not ‘attached’ ‘garnished’ or otherwise ‘levied’ her SSI benefits, nor do we routinely take that type of action on these cases, so I do not believe that the “anti-attachment” statute applies.

By a strict **lay** interpretation, the Division Director is correct, they have not “attached garnished or otherwise levied” with a direct judicial praecipe or Order of Execution. But, it’s not that simple. If it were, we could close all the law schools and do away with judges and pesky lawyers like me.

"As a preliminary matter, we note that § 407(a) applies to any creditor, including the state. Moreover, by virtue of the Supremacy Clause, the protection of § 407(a) must prevail over any conflicting actions authorized by state law. See, e.g., *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973).

\* \* \*

[T]he term ‘other legal process’ in § 407(a) includes the threat of legal process . . . . What the state cannot do, it cannot threaten to do. *King v. Schafer*, 940 F.2d 1182, 1185 (8th Cir. 1991) (To offset state care, Missouri Dept. of Mental Health was coercing Social Security recipients to surrender benefits under threat of law suit.).

I cannot imagine that any lawyer could (or would) seriously argue that a Probation Order or a Petition to Violate Probation is not a legal process, or that such is not State and/or judicial action?! Although, the Probation Department’s position suggests an excursion on that slippery slope.

“Congress intended the words ‘or other legal process’ to embrace not only the use of formal legal machinery but also resort to express or implied threats and sanctions. See, e.g., *Moore v. Colautti*, 483 F.Supp. 357, 368 (E.D.Pa.1979), *aff’d*, 633 F.2d 210 (3d Cir.1980). Thus, section 407(a) is

violated **when the state places itself in the position of a preferred creditor or coerces payment from protected benefits.**" *Fetterusso v. State of N.Y.*, 898 F.2d 322, 328 (2nd Cir. [N.Y.] 1990) (emphasis added).

In the mid-1980's, the State of Arkansas adopted the State Prison Inmate Care and Custody Reimbursement Act,<sup>8</sup> a statute that authorized the State to seize a prisoner's property or **estate** to help defray the cost of maintaining the state prison system. The statute had included, in its definition of **estate**, a prisoner's social security benefits. In *Bennett v. Arkansas*, 485 U.S. 395 (1988), the Supreme Court held the Supremacy Clause precluded Arkansas from attaching a prisoner's social security benefits. The Arkansas statute permitting seizure of prisoner's benefits was in direct conflict with the social security statute exempting benefits from execution, levy, attachment, garnishment, or other legal process. *Id.* Arkansas had argued that there was an implied exception that would allow attachment of otherwise exempted federal payments simply because the State had provided the prisoner with care and maintenance. The Supreme Court specifically rejected that argument. *Id.*

There's more.

The Social Security Administration's Program Operations Manual System (POMS), the publicly available operating instructions for processing Social Security claims, defines 'legal process' as used in § 407(a) as "the means by which a court (or agency or official authorized by law) compels compliance with its demand; generally, it is a court order."

\* \* \*

Elsewhere in the POMS, the Commissioner defines 'legal process' similarly as "any writ, order, summons or other similar process *in the nature of garnishment*. It may include, but is not limited to, an attachment, writ of execution, income execution order or wage assignment that is issued by ... [a] court of competent jurisdiction ... [or a]n authorized official pursuant to an order of a court of competent jurisdiction or pursuant to State or local law ... [a]nd is directed to a governmental entity." *Keffeler* at 385.

True, is it not, that the terms and conditions of probation are a Court Order? And what is the Probation Department? Isn't the Probation Department an arm of the judiciary? I believe so. Look at the statute.

The presiding judge of the superior court in each county shall appoint a chief adult probation officer who shall serve at the pleasure of the presiding judge. Such chief adult probation officer, with the approval of the presiding judge of the superior court, shall appoint such deputy adult probation officers and support staff as are necessary to provide presentence investigations and supervision services to the court.

ARS 12-251 (2007).

The "Social Security Act" is codified in Chapter 7 of Title 42 of the United States Code and consists of 21 subchapters; a very extensive writing. The SSDI<sup>9</sup> and SSI<sup>10</sup> benefits at issue here are identified in Subchapter II, "Federal Old-Age, Survivors and Disability Insurance Benefits" and Subchapter XVI, "Supplemental Security Income for Aged, Blind, and Disabled." In succinct terms, Congress created Social Security so that elderly, blind and/or disabled persons (and their qualifying dependents or survivors) would have money to procure the necessities of life. See 42 USCA 401, et seq. and 42 USCA 1381. I doubt that anyone could, or would, say that such is not the intent of Congress.

Now enter, **PREEMPTION**, under the Supremacy Clause, U.S.C.A. Const. Art. 6, Cl. 2. Just in case you've forgotten, here it is:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.C.A. Const. Art. 6, Cl. 2.

Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in a statute's language or **implicitly contained in its structure and purpose**; the court looks to congressional intent. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). A state does not possess the power to interfere with, or to condition, operation of federal policies constitutionally mandated by Congress. *Iowa Public Svc. Co. v. Iowa State Commerce Comm.*, 407 F.2d 916 (8th Cir. [Iowa] 1969), certiorari denied 396 U.S. 826 (1969).

The aforesaid precedents are well known (or should be) in Arizona. Any state legislation which frustrates full effectiveness of federal law is rendered invalid by the supremacy clause. *Perez v. Campbell*, 402 U.S. 637 (1971)(Arizona's Motor Vehicle Safety Responsibility Act conflicted with Federal Bankruptcy laws where Arizona statute attempted to exclude certain tort claim judgments from discharge in bankruptcy).

The following case arose in Massachusetts and was decided by the U.S. Supreme Court in 1905:

The mode or manner in which the police power may be exercised to safeguard the public health and the public safety is within the discretion of the state, subject, so far as the federal power is concerned, only to the condition that no rules prescribed by a state, nor any regulation adopted by a local governmental agent acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument; therefore a local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).<sup>11</sup>

There is one caveat. You have read, herein, that the SSDI and SSI benefits are identified in Subchapter II, "Federal Old-Age, Survivors and Disability Insurance Benefits" and Subchapter XVI, "Supplemental Security Income for Aged, Blind, and Disabled." The "anti-attachment" statute (42 U.S.C.A. § 407) only applies to Subchapter II benefits (SSDI). But, this is where the Supremacy Clause moves in. Remember, the Supremacy Clause prevents a state from interfering-with, defeating or frustrating a federal law or program.<sup>12</sup> So, Subchapter XVI benefits (SSI) enjoy the same protection.

If confronted with this situation where probation is demanding payment from a person whose sole source of income is SSDI or SSI, here is my recommended to-do list:

1. Do your best to assure yourself, by documentation or otherwise, that the client's only source of income is SSDI or SSI;
2. Attempt to resolve the problem with the Probation Department;
3. Draft a Sentencing Memorandum that addresses the issue and provide supporting documentation;<sup>13</sup>

4. Explain the law to the client in sufficient terms so the client can speak with some intelligence on the subject to probation or other involved parties;
5. Coach the client on standing firm in the face of demands and threats by probation;
6. Make sure the client knows to call you if anyone makes any attempt to bring them in front of a judge for failing to pay;
7. Make sure they understand that, if they acquire other sources of money (not like-kind items such as food stamps), they may be required to make payments IF the other money exceeds their unpaid necessary living expenses;
8. Put the above #4, 5, 6 & 7 into a letter sent to the client; and,
9. Tell the client to keep the letter and tell them why.

So, why keep the letter? The letter is evidence that the client is following the reasonable advice of their attorney and serves as a defense to summary contempt.

If such circumstance arises, you are at a crossroads: wait to see if the Probation Department takes action against your client OR initiate your own preemptory action by Motion to Modify Terms and Conditions of Probation. The former may be more prudent and more efficient with your time.

Now, if you must go to the mat for your client, and you're in front of a judge that won't listen, be prepared to intelligently fight your battle by Special Action or otherwise; get a Stay. If you can't get a Stay, don't be too worried, whatever money your client is forced to pay, is recoverable and, to my knowledge, there is no statute of limitation on recovery by either the individual or the Commissioner of the Social Security Administration. The issue is well-settled law; relief is not too remote in time. If a judge orders payment and there's no Stay, tell your client to pay until the matter is resolved. Don't be afraid to write letters to call in the cavalry: the Social Security Administration ("SSA") Regional Chief Counsel, the SSA Office of Investigations, the client's Congressman or Congresswoman, Legal Aide, the U.S. Solicitor General and the ACLU. Get your client to take the lead on making contact and writing letters.

The bottom line: Neither the Court nor the Probation Department may punish (nor threaten to punish) any probationer for failure to pay any **finer, fees, or restitution** under any circumstances when that person's sole source of income is Social Security benefits.

One last thought. Recall that the Presiding Judge of the Superior Court appoints the Chief Probation Officer (and virtually everyone else in the Probation Department). So, "Who's the Boss" of the Probation Department? In my opinion, it is not a horizontal appeal to complain to the *Boss* of the Probation Department that the Probation Department is violating federal law and to ask the *Boss* for corrective action. Complain not by Motion, but by letter.

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(Endnotes)

1. For those who don't know, I'm a recent migrant from the Bay State and also practiced in the Granite State.
2. This article addresses Social Security in the criminal court context and is not intended to address other circumstances such as health care law, family law, workers' compensation, bankruptcy law and federal issues where some differences exist.
3. For similar principles applicable to Veterans' Benefits, see 38 U.S.C.A. § 5301.
4. The rule of *noscitur a sociis* states that words of a statute are to be construed in the light of their context.
5. Latin for "of the same kind." Where a statute lists specific classes of persons or things and then refers to them in general, the general reference only applies to the same type of persons or things specifically listed.

6.  $\$813 - \$640 = \$173 - \$35 = \$138/\text{month}$ .  $\$138 \times 12 \text{ months} = \$1656$ .  $\$1656 \div 52 \text{ weeks} = \$31.85$  per week (rounded-up).
7. Think about this for a moment: they're taking SSDI and potentially replacing it with some other source of federal or state public assistance. This is also illegal discrimination against a federal government program under the Supremacy Clause, but I won't address the issue in this article.
8. Ark.Stat.Ann. § 46-1701 *et seq.* (Supp.1985).
9. SSDI is financed with Social Security taxes paid by workers, employers and self-employed persons. To be eligible, the worker must earn sufficient credits based on taxable work. Disability benefits are payable to disabled workers, disabled widow(er)'s or adults disabled since childhood, who are otherwise eligible. Auxiliary benefits may be payable to a worker's dependents.
10. SSI is financed through general tax revenues. SSI disability benefits are payable to persons age 65 and other adults or children who are disabled or blind, who have limited income and resources, who meet the living arrangement requirements, and are otherwise eligible.
11. A statute of the Commonwealth required all citizens to be vaccinated against Small Pox. One of its inhabitants claimed the statute violated the Supremacy Clause, and that part of the U.S. Constitution which reads, in relevant part, "no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Held: No conflict with Supremacy Clause – Commonwealth's Statute is not unconstitutional.
12. A state statute becomes unconstitutional when applied so as to impede or condition the operation of federal programs. City of Los Angeles v. U.S., 355 F.Supp. 461 (C.D.Cal. 1972).
13. A sample sentencing memo follows at the end of this article. Remember to redact any sensitive personal information from supporting documents: they are becoming public records.



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 Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
 IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

vs.

DON RONGLY,

Defendant.

CR 2007-1X30X2-001 DT

**SENTENCING MOTION &  
 MEMORANDUM  
 (Social Security Benefits)**

Assigned to the Honorable Bea Fare

**DEFENDANT**, through counsel, in the above-entitled matter, moves this Court to address in its Sentencing Order and/or in the Terms and Conditions of Probation, the Defendant's inability to pay fines, fees, or restitution for matters arising under this cause.

In support hereof, defense counsel asserts:

1. Mr. Rongly is a recipient of Social Security benefits and, on information and belief, such funds are Mr. Rongly's sole source of income. See Exhibit 'A' attached hereto.
2. Social Security benefits are protected by federal law and, therefore, no state court has the authority to compel a recipient of Social Security benefits to use those benefits to pay fines, fees, restitution or any other monies-owed arising out of this criminal matter.
3. The federal benefits paid to recipients under Social Security Disability Income ("SSDI") and Supplemental Security Income ("SSI") are protected by the doctrine of **preemption** under the Supremacy Clause of the United States Constitution, U.S.C.A. Const. Art. 6, Cl. 2, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. SSDI is a federal insurance program intended to provide workers with replacement income when a qualifying medical disability prevents them from working for a year or more. See 42 USCA 401, et seq. **SSI** is a federal social welfare program designed to assure that the recipient's income is maintained at a level viewed by Congress as the minimum necessary for the subsistence of that individual. *Metz v. Metz*, 101 P.3d 779 (9th Cir. 2004). See also, Social Security Act, § 1601, as amended, 42 U.S.C.A. § 1381. Preemption may be either

express or implied, and is compelled whether Congress' command is explicitly stated in a statute's language or **implicitly contained in its structure and purpose**; the court looks to congressional intent. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). A state does not possess the power to interfere with or to condition operation of federal policies constitutionally mandated by Congress. *Iowa Public Svc. Co. v. Iowa State Commerce Comm.*, 407 F.2d 916 (8th Cir. [Iowa] 1969), certiorari denied 396 U.S. 826 (1969).

5. Any state legislation which frustrates full effectiveness of federal law is rendered invalid by the Supremacy Clause. *Perez v. Campbell*, 402 U.S. 637 (1971)(Arizona's Motor Vehicle Safety Responsibility Act conflicted with Federal Bankruptcy laws where Arizona statute attempted to exclude certain tort claim judgments from discharge in bankruptcy).
6. In addition to **preemption**, SSDI benefits are protected by federal statute:

“(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.” Social Security Act, 42 U.S.C.A. § 407.

7. In *King v. Schafer*, the United States Court of Appeals for the 8th Circuit held:

As a preliminary matter, we note that § 407(a) applies to any creditor, including the state. Moreover, by virtue of the Supremacy Clause, the protection of § 407(a) must prevail over any conflicting actions authorized by state law. See, e.g., *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973).

\* \* \*

[T]he term "other legal process" in § 407(a) includes the threat of legal process . . . What the state cannot do, it cannot threaten to do.

*King v. Schafer*, 940 F.2d 1182, 1185 (8th Cir. 1991) (To offset state care, Missouri Dept. of Mental Health was coercing Social Security recipients to surrender benefits under threat of law suit.).

8. “Congress intended the words 'or other legal process' to embrace not only the use of formal legal machinery but also resort to express or implied threats and sanctions. See, e.g., *Moore v. Colautti*, 483 F.Supp. 357, 368 (E.D.Pa.1979), *aff'd*, 633 F.2d 210 (3d Cir.1980). Thus, section 407(a) is violated **when the state places itself in the position of a preferred creditor or coerces payment from protected benefits.**” *Fetterusso v. State of N.Y.*, 898 F.2d 322, 328 (2nd Cir. [N.Y.] 1990) (emphasis added).
9. In *Bennett v. Arkansas*, 485 U.S. 395 (1988), the Supreme Court held the Supremacy Clause precluded Arkansas from attaching a prisoner's social security benefits. The Arkansas statute permitting seizure of prisoner's benefits was in direct conflict with the social security statute exempting benefits from execution, levy, attachment, garnishment, or other legal process. *Id.* Arkansas had argued that there was an implied exception that would allow attachment of otherwise exempted federal payments simply because the State had provided the prisoner with care and maintenance. The Supreme Court specifically rejected that argument. *Id.*

10. Likewise, in *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. [Ca.] 1995), the Court rejected an argument by the State of California that it did not use "legal process" when it took Social Security benefits from institutionalized patients' hospital accounts to pay for the cost of their care and treatment, even considering whether the patients had signed a form authorizing such deductions. The Court observed that, Section 407(a) was designed "to protect social security beneficiaries and their dependents from the claims of creditors." *Citing with approval, Fetterusso v. State of N.Y.*, 898 F.2d 322, 328 (2nd Cir. [N.Y.] 1990).
11. Because a recipient of Social Security is granted those monies by the federal government, to accomplish a Congressional purpose, the State may not directly or indirectly interfere with the use of those monies, nor may a State punish a recipient for receiving, holding or making use of those monies. Consequently, for purposes of fines, fees, restitution, and the like, the probationer lacks the ability to pay. A probationer who lacks the ability to pay cannot be punished for such inability. *Bearden v. Georgia*, 461 U.S. 660 (1983), *followed and adopted by State v. Robinson*, 142 Ariz. 296 (Div. 1, 1984)(reconsideration and review denied).

**WHEREFORE**, the Defendant requests this Court to issue Orders and instruct the Probation Department to exclude the consideration of SSDI or SSI when calculating the Defendant's ability to pay fines, fees or restitution. More specifically, the Defendant requests that the Probation Department be instructed that, if the Probation Department finds that Social Security benefits are the sole source of income for the Defendant, the Defendant does not have the ability to pay fines, fees or restitution and that Probation Department employees are not to make any effort to compel the Defendant to make any such payments so long as Social Security benefits remain the Defendant's sole source of income. The Probation Department may conduct periodic reviews of the Defendant's financial status to assure unchanged circumstances.

The Defendant requests such other and further relief as justice requires.

RESPECTFULLY SUBMITTED this 30th day of March, 2008.

MARICOPA COUNTY PUBLIC DEFENDER

By \_\_\_\_\_  
 Kent B. Denyde  
 Deputy Public Defender

Copy of the foregoing motion e-filed this 30th day  
 of March, 2008, to:

HON. Bea Fare  
 Judge Pro Tempore of the Superior Court  
 1 W. Madison St., DUI Court  
 Phoenix, Arizona 85003

# OBJECTIONS SEMINAR

**Friday, April  
18, 2008**



*This seminar will follow up on the Ira Mickenberg Objection and Sentencing Advocacy Seminar. It will be a hands-on, small group, highly interactive seminar for new attorneys who want to sharpen their objection skills.*

## Highlights

- Helpful Exercises on Using Objections as Sword and Shield
- Review Evidentiary Rules
- Put Evidentiary Rules into Practice
- Interactive Lectures and Small Group Workshops

**Downtown Justice Center**

**620 W. Jackson, 2nd Floor Training Room**

**May qualify for up to 5.5 hrs CLE, including 1 hr Ethics**

**9:00am — 4:00pm (Check in 8:30am)**

**Registration is limited!!! No charge for Federal, Public & Legal Defenders or Legal Advocate**

Contact Celeste Cogley at [cogleyc@mail.maricopa.gov](mailto:cogleyc@mail.maricopa.gov) or  
602-506-7711 X37569

Sponsored by MCPD and Arizona Federal Public Defender

# Sentencing Advocacy

## Presentence Report Concerns

By Rose Weston, Pima County Defender Attorney

The current rules regarding PSRs violate Due Process in several ways, and the burden falls on defense counsel to devise ways to protect a client's constitutional rights in the face of some pretty discouraging case law. Here is my list of observations, suggestions, and concerns:

### **DEFENSE COUNSEL MUST MAKE TIMELY AND PROPER OBJECTIONS TO THE PSR**

Prior to the day of the presentencing hearing, counsel must notify the court and all other parties of any objections to the PSR. See Rule 26.8(a).

Failure to properly object to erroneous, inaccurate, or prejudicial information in the presentence report waives any argument on appeal absent fundamental error and legal prejudice. See *e.g.*, *State v. Amaya-Ruiz*, 166 Ariz. 152, 179, 800 P.2d 1260, 1287 (1990).

In objecting to the use of a problematic presentence report, defense counsel should cite constitutional Due Process concerns and emphasize the need for courts to view skeptically and redact any information that has not been subjected to the "traditional adversarial and evidentiary safeguards for ensuring fairness and accuracy." *State v. Watton*, 164 Ariz. 323, 327, 793 P.2d 80, 84 (1990).

Counsel may insist upon a full, on-the-record presentence hearing conference under Rule 26.7(b) in order to introduce reliable, relevant evidence to "correct or amplify the pre-sentence, diagnostic or mental health reports." And if the PSR is received less than two business days before sentencing, defense counsel should request a pre-hearing conference under Rules 26.6(b) and 26.7(c), at which counsel can move the court to "postpone the date of sentencing for up to 10 days" in order to allow investigation of the information contained in the report.

### **PSRs ARE WIDELY DISSEMINATED AND NEVER GO AWAY**

Under Rule 26.6(e), Ariz. R. Crim. P., PSRs are presumed to be "matters of public record."

After any subsequent conviction, all previous PSRs are provided to all future sentencing judges. Ariz. R. Crim. P. 26.6(d)(1).

The presentence report follows the defendant long after sentencing. The PSR is provided to DOC under Rule 26.6(d)(1) (report "shall be furnished to persons having direct responsibility for the custody, rehabilitation, treatment and release of the defendant") and Rule 26.10(b)(5). The information contained in the report is taken into account by DOC in making decisions about classification, placement, privileges, and release.

### **INACCURATE OR INAPPROPRIATE INFO CAN BE CORRECTED . . . PROBABLY**

Although under Rule 26.6(c), the court can excise some information and withhold it from the parties, the information that can be withheld pertains only to information that is (1) disruptive to rehabilitation, (2) obtained on promise of confidentiality, or (3) disruptive to an existing police investigation.

However, even properly withheld information may still be available to DOC and later sentencing judges. Although the trial court can correct the PSR under Rule 26.8(c) by (1) excising objectionable

language, (2) ordering a new report, (3) ordering a new report to be prepared by a different probation officer, and/or (4) ordering the objectionable report sealed, it is unclear whether future courts have access to excised material or sealed reports. *See State v. Stokley*, 182 Ariz. 505, 519, 898 P.2d 454, 468 (1995) (even though trial court had sealed and not read the PSR, Supreme Court reviewed and considered it).

### **PSRs PERPETRATE HEARSAY**

PSRs routinely perpetrate unreliable hearsay. Unsubstantiated and uncorroborated statements made to police by witnesses (or even assertions made by a neighbor, friend, victim, officer, or bystander who saw nothing but has an impression or heard a rumor) are often included in the Statement of Offense portion of the PSR. It is not unusual to find that the PSR includes a variety of statements made by officers, witnesses, relatives, or victims about what supposedly happened or about what someone else heard, thought, remembered, or believed happened. These statements can be included even if the person making the statement did not testify or the statements were precluded at trial.

### **PSR WRITERS OFTEN MAKE UNSUBSTANTIATED AND UNSUPPORTABLE ASSERTIONS**

PSR writers frequently make global statements and predictions about the defendant, including psychological assessments, guesses at a possible diagnosis, and predictions about future behavior. Most, if not all, PSR writers are unqualified to reach such conclusions.

PSR writers include their impressions of the defendant's personality, history, tendencies, childhood, family, attitude, as well as personal opinions about anything and everything related to the defendant. Such personal thoughts, impressions, and statements are irrelevant and prejudicial to the defendant's ability to receive a fair sentencing process.

In many cases, assertions made by PSR writers could not or would not be made by even the most highly qualified mental health professional (e.g., "this defendant is not likely to benefit from treatment;" "the defendant is likely to reoffend;" "there is no reason for the defendant's outbursts.")

### **PSRs ALLOW COURTS TO USE POLICE REPORTS IN SENTENCING**

PSRs typically include impressions, descriptions, statements, and accounts taken directly from police reports. By exposing the trial court to unsubstantiated allegations in the police reports, the PSR provides the state with an end-run around the prohibition on getting police reports admitted into evidence. The inclusion of unsubstantiated or inadmissible information from any source violates the defendant's Due Process rights.

### **PSRs UNDERMINE THE PRESUMPTION OF INNOCENCE**

Even when a defendant has actually been acquitted of one or more of the charges, the Statement of Offense in the PSR will typically include details about the alleged offense. Thus, despite the acquittal, prejudicial information about the alleged crime will still be made available to later sentencing courts and the Department of Corrections.

### **PSRs ENCOURAGE COURTS TO USE MERE ARRESTS TO AGGRAVATE SENTENCE**

The Criminal History portion of the PSR typically includes arrests and dismissed charges that did not result in a conviction or even an indictment. By including this information in the PSR, trial courts are encouraged to sentence more harshly based simply on an alleged contact with police regardless of whether the defendant was involved in criminal activity.

Although judges are permitted to use a prior incident that did not result in a conviction for purposes of sentencing, the trial court errs if it “aggravates the sentence based on the mere report of an arrest, with no evidence of the underlying facts to demonstrate that a crime or some bad act was probably committed by the defendant.” *State v. Shuler*, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989); *see also Brothers v. Dowdle*, 817 F.2d 1388, 1390 (9th Cir. 1987) (“The court may not impose a more severe punishment simply because the defendant was in some way entangled with the police. Of course, an arrest or detention that does not result in a conviction may nevertheless reflect wrongful conduct that the sentencing court may consider. What the court may not do, however, is to infer wrongful conduct from the arrest or detention alone; it must look at the underlying facts.”).

### **INACCURATE BOOKING INFORMATION CAN APPEAR IN THE PSR**

In two of my recent cases, the defendants were booked on first degree murder charges when, in both cases, the ultimate charge was attempted aggravated assault. In neither case was the victim even hurt, much less killed. But whether the defendant is eventually (a) acquitted of all charges, (b) convicted of aggravated assault, or (c) pleads guilty to something else, later PSRs will typically contain the arrest for first degree murder.

### **A PSR ALONE CANNOT PROVE PRIORS**

Division One of the Arizona Court of Appeals recently held that an allegation of a prior felony conviction in a presentence report, standing alone, cannot prove the existence of the prior. *See State v. Sojka*, ¶ 12, No. 1 CA-CR 06-0413 (memorandum decision filed Dec. 11, 2007) (declining to take judicial notice of prior conviction listed in presentence report – an unsworn document – to establish prior conviction for sentencing enhancement purposes). The *Sojka* decision can be found at:

<http://www.cofad1.state.az.us/memod/CR/CR060413.pdf>

However, because Rule 31.24, Ariz. R. Crim. P., 17A A.R.S., specifically precludes citation of Memorandum Decisions as controlling law, this memo decision can only assist you in fashioning your argument on the issue. For purposes of citation, see *State v. Lee*, 114 Ariz. 101, 559 P.2d 657 (1976), in which the Arizona Supreme Court reversed the trial court’s decision to take judicial notice of a prior conviction documented in the presentence report and disapproved of the procedure in which the state asks the court to take judicial notice of a conviction for the purpose of establishing the conviction as an aggravating factor. The *Lee* court specified that the “proper procedure to establish the prior conviction is for the state to offer in evidence a certified copy of the conviction pursuant to Rule 19.3(a), [Ariz. R. Crim. P.], 17 A.R.S. and Rule 44(g)(1), [Ariz. R. Civ. P.], 16 A.R.S. and establish the defendant as the person to whom the document refers.”

### **THE PSR MAY CONTAIN INCOMPLETE OR INACCURATE FINANCIAL INFORMATION**

In order to attack excessive or unaffordable fees, surcharges, and assessments, it is crucial that the PSR contain accurate and complete information about the defendant’s current financial circumstances, including debts such as unpaid child support and outstanding costs from previous convictions. It is up to defense counsel to ensure that the financial information available to the sentencing court is updated, complete, and accurate.

If your client has been incarcerated awaiting trial, it is even likely that he or she will have had changes in his or her own or the family’s financial circumstances. When circumstances have changed, object to the use of the questionnaire the defendant filled out shortly after arrest and request admission of an updated questionnaire. If the PSR contains inaccurate, distorted, outdated, unsubstantiated, or incomplete information, object and request additions or corrections.

# Helping our Veterans

The following two articles focus on sentencing advocacy for clients who are veterans of the armed forces. The MCPD's Adult Division is currently exploring additional ways to better meet the unique needs of many veterans who are being charged with criminal offenses. We are in the process of forming a workgroup comprised of providers and public defenders focused on a number of areas, including:

- Expedited access to military records and medical information.
- Access to VA services.
- Diversion programs or heightened recognition of veterans' issues, such as Traumatic Brain Injury and Post Traumatic Stress Disorder, for favorable case dispositions.
- Information about potential grant proposals.

Billy Little, a defender attorney who is also a full Colonel in the reserves, is heading up this effort and, at no expense to the County, will be traveling to Washington D.C. in April to obtain additional information and seek support for potential programs. Please contact Billy at [little@mail.maricopa.gov](mailto:little@mail.maricopa.gov) if you would like to be a part of this effort .



# The Domiciliary

## Northern Arizona Veterans Rehab Facility Prescott, AZ

By Linda Shaw, Mitigation Specialist

About 60 miles north of Phoenix, The Northern AZ VA Health Care System operates a 120 bed premier drug/alcohol residential rehabilitation facility known as “The Domiciliary.” It is part of the Bob Stump VA Medical Center complex.

Any defendant who is honorably discharged (or has a general discharge under honorable conditions) from the U.S. Armed Forces is eligible to apply for admission into the Domiciliary Program.

The 90-day program is designed to tackle all of the complicated, residual damage done to our clients who have struggled with their addictions and/or mental illness and wound up (many times, repeatedly) in jail/prison.

For defendants who are due to be released to the community after sentencing, the application process for the “Dom” begins by contacting the Admissions Coordinator, Gail Ferguson, Tel: (928) 445-4860 X6315. She will fax an application to you for the defendant to fill out. The application should be filed about 30-45 days prior to release so a bed may be secured for the sentenced veteran. This procedure also applies to defendants who are within 90 days of release from ADC (Arizona Department of Corrections).

As “The Dom” is in Yavapai County, an Interstate Compact arrangement must be made between Maricopa County Probation and Yavapai County probation. If there is any resistance between the Maricopa probation team to this plan, action should be taken to try to address their concerns prior to sentencing.

There are certain steps in planning for a smooth, seamless transition for the sentenced veteran from the moment he leaves the county jail to his arrival at the facility in Prescott.

For example, it is imperative that prior arrangements be made with the Maricopa County Probation Department Interstate Compact team to have the discharged vet’s paperwork ready for his signature immediately upon his release. This responsibility must be discharged in a timely manner so he may then catch the shuttle bus up to Prescott (unless he has private transportation to get up there) at about 11 a.m. Coordination of seemingly simple details, like making sure your veteran defendant has bus fare between the jail and the probation office, and coordinating his release with MCSO command staffs so he may be released from jail by 7 A.M. are essential in implementing the successful discharge plan in its entirety.

Our former client, Jimmy Varner, whose story recently appeared in the January-March, 2008, “USVets Magazine” (and is reprinted below) exemplifies the epitome of what we strive to achieve for our defendants in the Mitigation Unit of the Public Defender’s Office.

Mr. Varner’s odyssey from homelessness and constant contact with the criminal justice system to full-time employment with the Federal Government complete with benefits, including a retirement plan and a furnished apartment of his own is a testament to the effectiveness of designing an effective discharge plan for our veteran defendants. It is also a testament to the exceptional services offered to appropriate veteran candidates by the Domiciliary Program.



# Jury and Bench Trial Results

## January 2008

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group 1</b>						
12/4 - 1/8	<b>Reece Rankin Armstrong</b>	Foster	Cohen	CR06-012831-001DT 16 cts. Sexual Conduct with a Minor, F2 (DCAC) 12 cts. Sexual Conduct with a Minor, F6 Attempted Sexual Conduct with a Minor, F3 (DCAC) Assault, M3 Sexual Assault, F2	Guilty - 28 Counts; Not Guilty - 1 Count Sexual Conduct with a Minor, F2, Sexual Assault; Directed Verdict on Assault, M3	Jury
1/9 - 1/25	<b>Dominguez Rankin Curtis</b>	Foster	Sorrentino	CR06-176663-001DT Sexual Assault, F2 Burg. 2nd Deg., F3 Kidnapping, F2 Agg. Assault, F4	Guilty on all counts.	Jury
1/16 - 1/23	<b>Baker Stewart</b>	Harrison	Kuwata Steinberg	CR07-117248-001DT POM, F6 PODP, F6	Guilty	Jury
1/23 - 1/25	<b>Barraza Rankin Carter</b>	O'Connor	Plicht	CR07-145873-001DT Agg. Assault, F3D Assault, M3	Guilty	Jury
1/24 - 1/30	<b>Turner Stewart Rankin Armstrong</b>	Gottsfield	Sponsel	CR07-048315-001DT MIW, F4	Guilty	Jury
<b>Group 2</b>						
1/29	<b>Scott Davison</b>	Hoffman	Horn	CR07-147667-001DT Agg. Assault, F6 IJP, M1	Not Guilty Agg. Assault IJP dismissed	Jury
<b>Group 3</b>						
12/17 - 1/16	<b>Harrison Burgess Browne</b>	Heilman	Muñoz	CR07-132468-001DT Agg. Assault, F3D Discharge Firearm in City Limit, F6D	Guilty on both counts	Jury
1/14 - 1/15	<b>Lane Spizer Kunz</b>	Lynch	White	CR06-115188-001DT Criminal Damage, F5	Direct Verdict of Acquittal	Jury
1/15 - 1/22	<b>Cooper Mata O'Farrell Williams</b>	Lee	Gilla	CR06-142708-001DT Disorderly Conduct, F6D	Guilty non-dangerous	Jury
1/28 - 1/30	<b>Cooper O'Farrell Williams</b>	Johnson	Munoz	CR07-048334-001DT Agg. Assault, F3D	Guilty	Jury

# Jury and Bench Trial Results

## January 2008

### Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
<b>Group 4</b>						
1/11 - 1/14	<b>Klopp</b>	Rogers	Seeger	TR07-102057-001WT 2 Cts. DUI, M1	Guilty	Jury
1/14 - 1/17	<b>Sheperd</b>	Newell	Murphy	CR06-170290-001SE Trafficking in Stolen Prop., F3 Shoplifting, M1	Guilty	Jury
1/16 - 1/23	<b>Gaziano</b> Quesada Houser	Contes	Luder	CR07-150685-001SE Burg. 3rd Deg., F4	Not Guilty	Jury
1/24 - 1/30	<b>Jolley</b>	Contes	Pollak	CR07-143771-001SE Burg. 3rd Deg., F4 Burg. Tools Poss., F6	Guilty	Jury
<b>Vehicular</b>						
1/3 - 1/9	<b>Taylor</b> Renning	Harrison	Letellier	CR07-006561-001 DT Agg. Domestic Violence, F5	Guilty	Jury
1/9 - 1/23	<b>Budge</b> Ryon	McMurdie	Harder	CR06-119146-001 DT 2 cts. Neg Homicide, F2D	Guilty	Jury
1/22 - 1/24	<b>Sloan</b>	Holding	Collins	CR04-041679-001 DT 2 cts. Agg DUI, F4	Guilty	Jury



## Save The Date...

2008 APDA Annual Conference  
June 16-18, 2008

# Jury and Bench Trial Results

## January 2008

### Legal Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
1/22 - 1/23	<b>S. Anderson</b>	Dunevant	Telles	CR06-178916-001DT Theft Means Trans, F3	Guilty	Jury
1/22 - 1/31	<b>Fortner</b>	Del Mar Verdin	Hoffmeyer	CR06-011463-001DT Murder 2nd Degree, F1D Theft Means Trans, F3 Arson Occupied Structure, F2	Guilty: Murder 2nd Degree Theft Means Trans  Not Guilty: Arson Occupied Structure	Jury
1/24	<b>Dorr</b>	Whitten	Horn	CR06-178343-001DT PODD, F4	Guilty	Jury
1/24	<b>Wilhite</b>	Mahoney	Matsuno	CR07-132650-001DT POM, M1	Guilty	Bench
1/24	<b>Gaunt</b>	Holt	AG	JD12919 Dependency Trial	Dependency Found	Bench
1/28	<b>Bushor</b>	Keppel	AG	JD506876 Guardianship Trial	Guardianship granted	Bench
1/28 - 1/30	<b>Abernethy</b>	Foster	Bonaguidi	CR07-159880-001DT Unlawful Flight from Law Enf Veh	Guilty	Jury

### Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
1/7	<b>Christian Christensen</b>	Keppel	AG Antosz Vierling Owley	JD-15713 - Dependency Trial	Dependency Found	Trial
1/24	<b>Christian Christensen</b>	Hoag	AG Welch-Rowland Pola-Pulver	JD-506474 - Severance; AG removed 1 child from severance; 2 children were severed	Severance Granted	Bench
1/3	<b>Timmes Gill</b>	Keppel	AG Welch-Rowland	JD-506130 - Severance Granted	Severance Granted	Bench

# SPRING PROFESSIONALISM COURSE

## SAVE THE DATE

### FRIDAY, MAY 16TH, 2008

### 11:00 AM - 3:15 PM



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*for The Defense*

**for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, James J. Haas, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.**

