

for The Defense

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for The Defense

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Beyond Brady v. Maryland

The Prosecutor's Duty to Disclose Under Arizona's Procedural and Ethical Rules

By Anna Unterberger, Defender Attorney

INTRODUCTION

In Arizona, prosecutors are obligated to, “make available to the defendant for examination and reproduction the following material and information within [their] possession or control: All material or information which tends to mitigate or negate the defendant’s guilt as to the offense charged or which would reduce his punishment therefore.” See Rule 15.1(b)(8), Arizona Rules of Criminal Procedure (“ARCP”). The language in this Rule is very similar to some of the language found in Arizona’s Rules Of Professional Conduct, Ethical Rule (“ER”) 3.8(d), which states that the prosecutor in a criminal case shall, “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]” These Rules go beyond the holding of *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), which held that the prosecution must disclose to the Defense material, exculpatory evidence regarding the defendant’s guilt and/or punishment.

When dealing with discovery issues, please keep in mind the “beyond *Brady*” requirements of these Rules. You may need to educate the prosecutor, and maybe even the court, regarding the procedural and ethical requirements that bind the prosecution when it comes to discovery disclosure.

ARIZONA’S ETHICS COMMITTEE WEIGHS IN WITH A FORMAL ETHICS OPINION

A good place to start is with Arizona’s **Formal Ethics Opinion 94-07**, which was authored by the State Bar of Arizona’s Committee on Professional Conduct (“Ethics Committee”) in 1994 in response to an inquiry from a prosecutor with the Maricopa County Attorney’s Office regarding three factual scenarios. The scenarios all involved what were “problems of proof” for the prosecution, and whether the prosecution must disclose those “problems” to the Defense.

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The Ethics Committee began its analysis by reviewing *Brady* and its progeny. The Committee next recognized that Rule 15.1(a)(7) [now 15.1(b)(8)], ARCP, “essentially tracks the language of ER 3.8(d).” The Committee then addressed the **three scenarios** presented by the inquiring prosecutor.

Scenario #1 involved a felony DUI case where the arresting officer testified at the preliminary hearing, and his testimony was recorded. Soon after the hearing, the officer died. Before the officer’s death, the prosecutor extended a plea offer to the defendant. The defendant had not yet decided whether to take the offer. The inquiry: Must the prosecutor disclose that the officer had died, and if so, then when?

The Committee found that it was unnecessary to analyze the issue under ER 3.8(d), because disclosure of the officer’s death would be required under what is now Rule 15.1(b)(1), ARCP, which Rule requires that the prosecution disclose the names and addresses of the witnesses it intends to call at trial. The prosecution’s disclosure obligation under this Rule would include correcting any pleading that had already been filed and listed the officer as a witness. And the relevant ethical rules would be ER 3.4(c), which, “prohibits a lawyer from ‘knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists,’” and Rule 8.4(c) and (d), which prohibit conduct that is deceiving, misleading, and/or prejudicial to the administration of justice. “This disclosure should be made as soon as the prosecutor learns of the unavailability of this witness, and certainly before the defendant is asked to respond to the plea offer.” *Opinion 94-07*, at 6.

Scenario #2 involved a felony drug possession case. After the prosecutor extended a plea offer, but before the defendant had made a decision, the prosecutor learned that the drugs had been destroyed. The inquiry: Must the prosecutor disclose the destruction of evidence, and if so, then when?

The Committee again found that it was unnecessary to analyze the issue under ER 3.8(d), because disclosure was required under ER 3.4, if the drugs were listed as evidence under what is now Rule 15.1(b)(5), ARCP. “Now that the prosecutor has learned that this evidence has been destroyed, he is under an obligation to correct the Rule 15.1 disclosure. This correction must be accomplished as soon as possible after the prosecutor learns of the destruction. Certainly, it must be done before any response is made by the defendant to the plea offer, as otherwise the defendant would be misled as to the strength of the State’s case. ER 8.4(c) and (d).” *Id.*, at 7.

Scenario #3 involved a misdemeanor driving while under the influence of drugs case. A key piece of evidence was a urine sample given by the defendant that tested positive for methamphetamine, although the State might have sufficient evidence to proceed to trial without the sample. All of the sample was consumed in testing, thereby precluding independent testing by the Defense. The Defense had not made a motion for discovery. The inquiry: Must the prosecution disclose that all of the sample was consumed in testing, and if so, then when?

The Committee concluded that if the prosecutor had filed Rule 15.1 discovery listing the urine sample as potential evidence, then the same type of analysis for the preceding scenarios would apply. But if the prosecutor had simply disclosed a report of the urine test that did not reveal the destruction of the sample, the analysis would be somewhat different. After reviewing relevant caselaw, including DUI caselaw, the Committee recognized that the, “laws governing DUI prosecutions are extremely complex and changing. ... Whether those laws themselves may require disclosure of the unavailability of a urine sample for retesting is beyond the scope of this opinion. If they do, then ER 3.4 clearly requires that the prosecutor disclose that fact. Nevertheless, it appears to the committee that the lack of such evidence is sufficiently exculpatory ... to call for disclosure under ER 3.8(d). Again, disclosure must be made in a timely manner so that the defendant may use it in the preparation of the case and in responding to any plea offers.” *Id.*, at 8-9.

THE AMERICAN BAR ASSOCIATION'S RECENT OPINION ON MODEL RULE 3.8(d)

In 2009, the American Bar Association (“ABA”) construed its Model Rule 3.8(d), whose language is identical to that of Arizona’s ER 3.8(d). The ABA concluded in **Formal Opinion 09-454** that, “Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.” *Opinion 09-454*, at 2. The Opinion presented its analysis in six sections:

- The Scope of the Pretrial Disclosure Obligation
- The Knowledge Requirement
- The Requirement of Timely Disclosure
- Defendant’s Acceptance of Prosecutor’s Nondisclosure
- The Disclosure Obligation in Connection with Sentencing
- The Obligation of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Beginning with **The Scope of the Pretrial Disclosure Obligation**, the ABA recognized that, “[u]nder Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution’s proof. Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.” *Opinion 09-454*, at 5 (footnote omitted).

“Further, this ethical duty of disclosure is not limited to admissible ‘evidence,’ such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable ‘information.’ Though possibly inadmissible itself, favorable information may lead a defendant’s lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in this rule suggests a de minimis exception to the prosecutor’s disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant’s guilt, or that the favorable evidence is highly unreliable.” *Id.* (footnote omitted).

In **The Knowledge Requirement** section, the ABA discussed that, “Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.” *Id.* But neither is the prosecution allowed to turn a blind eye if the inference of favorable evidence is present. If prior to the defendant deciding whether to accept a plea offer, the prosecutor has not yet reviewed voluminous files or obtained all police files, Rule 3.8 does not require that the prosecutor do so, “unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence of information. ... Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.” *Id.*, at 6 (footnote omitted).

The Requirement of Timely Disclosure section reviewed that generally, disclosure, “must be made early enough that the information can be used effectively” and “as soon as reasonably practical.” The evidence and information disclosed includes information that could be used for investigation by the Defense, deciding whether to raise an affirmative defense, general defense strategy, or the defendant’s deciding whether to accept a plea offer. *Id.* (footnotes omitted).

The Defendant’s Acceptance of Prosecutor’s Nondisclosure section makes it clear that a, “defendant’s consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant’s consent” to nondisclosure.

Id., at 7. And that is because, “Rule 3.8(d) is designed not only for the defendant’s protection, but also to promote the public’s interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant’s consent might undermine a defense lawyer’s ability to advise the defendant on whether to plead guilty, with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions.” *Id.* (footnote omitted).

The Disclosure Obligation in Connection with Sentencing section centered on how sentencing disclosure requirements differed from those regarding disclosures that must be made before a guilty plea or trial. First, and because guilt has already been determined, the nature of the information to be disclosed is different. Here, there is a duty to disclose information that might lead to a more lenient sentence. Second, “the rule requires disclosure to the tribunal as well as the defense[.]” although the disclosure “to the tribunal” may be made to a relevant agency. Third, the disclosure, “must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.” And fourth, although the prosecutor may withhold privileged information in connection with sentencing, that exception does not apply, “when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. ... Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.” *Id.*, at 7-8 & n. 38.

The last section in the Opinion covered **The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution**. “Any supervisory lawyer in the prosecutor’s office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations. Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations. To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.” This includes having a policy that ensures that a prosecutor working on a case toward the beginning of the case transfers information to a prosecutor handling later proceedings in the case. “Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation of the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed.” The internal procedures must also ensure that there is a policy in place that provides for disclosure of evidence from the prosecutor of one case to be made to the prosecutor of another case, where that evidence would negate the defendant’s guilt in the other case. “In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d).” *Id.*, at 8 & n. 42.

AND A NOTE FROM THE UNITED STATES SUPREME COURT

Finally, it may be a foreshadowing of things to come that, also in 2009, the United States Supreme Court took note of ABA Model Rule 3.8(d). The Court recognized that: “Although the Due Process clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations. ... As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.” *Cone v. Bell*, 129 S.Ct. 1769, 1783 n.15 (2009) (including citation to ABA Model Rule 3.8(d)).

CONCLUSION

While the prosecution must disclose material, exculpatory evidence pursuant to *Brady v. Maryland*, that isn’t the end of the “discovery saga.” “[E]ven if courts were to hold that the right to favorable

evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure[.]” *ABA Formal Opinion 09-454*, at 7 n. 33. Instead, the prosecution's duty to disclose under procedural and ethical rules “go beyond *Brady*.” It is in your clients' best interests for you to keep this in mind when investigating your cases and holding the prosecution to its disclosure duties.



Save the Dates...

EIGHTH ANNUAL APDA CONFERENCE

**TEMPE MISSION PALMS RESORT
& CONFERENCE CENTER
60 EAST FIFTH STREET, TEMPE, 85281**

WEDNESDAY, JUNE 9, 2010

through

FRIDAY, JUNE 11, 2010

Corpus Delicti: A Powerful Rule that can Kill the State's Case

By John F. Sullivan, Defender Attorney

A (citations omitted) police officer is walking his beat (unusual in Arizona) at 11:00 p.m. As he walks on the public sidewalk, he observes a man lying on the sidewalk. The police officer investigates and finds the man unresponsive. The man appears asleep; there are no signs of violence. Upon closer examination, the officer opines that the man is not breathing and appears dead.

An ambulance is called and they transport to the JC Lincoln Hospital. At the hospital, the ER physician declares the man dead. The manner and cause of death are not apparent.

The decedent is transported to the medical examiner and an autopsy is performed. The manner of death is natural and the cause is cerebrovascular accident secondary to brain tumor.

Two days later, 17-year-old Don Wrongly, under threat by detectives to confess or else, tells police, "I killed that guy you found on the sidewalk."

The county prosecutor brings Don Wrongly to trial for murder. The medical examiner's finding of manner and cause of death remains unchanged.

During trial, the prosecutor discovers that the defense attorney has the audacity to object when the prosecutor asks the officer to tell the jury about Don's confession. The Court sustains the objection and calls the prosecutor to the bench. The judge explains to the prosecutor that, **before** the prosecutor can present Don's confession, the prosecutor must present evidence that a crime has been committed. This very nice judge has just told the prosecutor about the corpus delicti rule. The judge continues to explain to the prosecutor that the manner and cause of death exclude the existence of a criminal homicide. The very, very wise judge suggests that the prosecutor read *State v. Rubiano*, 214 Ariz. 184 (Div. 2, 2007) and *Smith v. U.S.*, 348 U.S. 147 (1954).

To help the prosecutor along, the truly insightful judge gives him a written summary of the relevant parts of *Rubiano* and *Smith*. As stated in *Rubiano*: "The corpus delicti rule prohibits conviction of a defendant 'based upon an uncorroborated confession without **independent proof** of the corpus delicti, or the body of the crime.'" (Id. at 185, emphasis added).

Stated another way, the rule requires that, **before** a defendant's confession or incriminating statements may be admitted at trial as evidence of a crime, the state must establish with independent evidence that a crime occurred and that someone is responsible for that offense. The corpus delicti rule was invented by courts, and although some states have codified the principle by statute, in most jurisdictions, including Arizona, it is entirely a creature of the common law.

The purpose of the rule is to prevent a conviction based solely on an individual's uncorroborated confession, the concern being that such a confession could be false and the conviction thereby lack fundamental fairness.

The rationale for the corpus delicti doctrine was the realization that a defendant's confession might be untrustworthy due to mental instability or improper police procedures. The historical purpose of the corpus delicti rule is for protection of defendants with limited mental capacity, avoidance of involuntary confessions, and promotion of better law enforcement.

As stated by the United States Supreme Court in *Smith*:

There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime

charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is **substantial independent evidence that the offense has been committed**, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely on two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone, and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged. We answer both in the affirmative. **All elements of the offense must be established by independent evidence or corroborated admissions**, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense ‘through’ the statements of the accused.

348 U.S. at 199 (emphasis added) (citations omitted).

The prosecutor asks for a recess. He has never litigated corpus delicti, so he does some quick research and proudly announces to himself that he is right. He figures the judge just cannot ever admit he is wrong and, before the recess is over, he files a Special Action.

The moral of the story is that a dead body lying on the sidewalk, however suspicious it may be, is not “some evidence” of a crime and, until there is independent evidence of a crime, persons with limited mental capacity (like a 17-year-old boy), who are being threatened by police, cannot confess to a crime where the elements of that crime have not been established without the confession.

“The State must establish the *corpus delicti* of a homicide by showing that the alleged injury to the victim--death, in this case--occurred and that the injury was caused by criminal conduct rather than by suicide or accident.” *State v. Hall*, 204 Ariz. 442, 453 (2003). The same is true for any other crime.

The prosecutor is still spitting and sputtering about the judge’s confession ruling, but presumes the Special Action shall vindicate him. So, he moves on to the next case.

In the next case, Diddin Duit is charged with the very dangerous crime of Possession of Marijuana, a capital offense (well, it really isn’t, but the prosecutor thinks it should be and that’s all that matters).

The facts presented in court in the Diddin Duit case are: police stop three 17-year-old boys on a public street, including Diddin Duit; during the contact, police find marijuana lying on the street nearby; police tell boys that unless someone fesses-up to owning the pot, everyone gets arrested. Diddin Duit, 17 yrs. old, tells police it is his. (No evidence of knowing, voluntary and intelligent waiver of *Miranda*. In fact, no evidence of *Miranda* Warning.)

Now, the prosecutor (and, apparently, some other people) cannot understand that Arizona does not have a crime called, “Being Present When Marijuana is Found in the Street.” What Arizona does have, is a law that prohibits persons (*except authorized persons*) from knowingly possessing marijuana. To survive the corpus doctrine, the prosecutor must establish that the marijuana was *knowingly transported* to the street by an *unauthorized person*¹ who also knew the illicit nature of the substance. While its presence in the street is suspicious, there is no evidence that it arrived there in violation of the law.

Marijuana lying on the street is not, by itself, evidence of a crime. Ergo, unless there is “some evidence” that a crime has been committed and that “someone is responsible for that offense” (see *Rubiano*), Diddin Duit’s confession is not evidence of a crime.² Especially so, where, as here, the purpose of the corpus delicti rule is: (1) to protect defendants with limited mental capacity; (2)

to avoid involuntary confessions; and, (3) to counter-act improper police procedures (such as not giving *Miranda* Warnings and threatening teenagers with arrest unless they confess).

Under *Smith*, the prosecutor cannot get the confession into evidence because there is no other evidence, *independent of the confession*, that an unauthorized person (perhaps Diddin Duit) “knowingly possessed” marijuana. Sufficient independent evidence could be, if it existed, that: Duit identified it as marijuana; a witness saw Duit possess the marijuana; Duit had paraphernalia (or other marijuana) on his person; Duit has a prior conviction for possessing marijuana; or, if packaged, Duit describes a characteristic of the packaging (i.e., inside a cigarette box). Consequently, in this case, where the marijuana fell out of some authorized person’s pocket onto a public street,³ no crime has been established without including Diddin Duit’s confession in the factual analysis.

“The purpose of the corpus delicti rule is to prevent a defendant from being convicted based on a coerced or otherwise untrue confession. But the rule has been the subject of criticism claiming that other safeguards exist to prevent convictions based on coerced confessions and that the rule can impede the truth-finding process. The corpus delicti rule has been applied in numerous ways. The traditional, and majority, approach requires there be corroborative evidence, independent of the defendant’s confession, which tends to prove the commission of the crime charged. Another variation, abandoned by many courts, requires that independent proof support each and every element of the crime. And yet another approach requires independent proof that the confession be trustworthy, rather than requiring proof of the corpus delicti. Arizona cases have indicated that a corroborated confession may be used to establish proof of an element of the crime.”

State v. Morgan, 204 Ariz. 166, 170-71 (Div. 2, 2002) (citations omitted). *Cf.*, *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, 22-23 (Div. 1, 2000). (As long as the State ultimately submits adequate proof of the *corpus delicti* before it rests, the defendant’s statements may be admitted, without prejudice. It is only if the State altogether fails to make this showing that the court should direct an acquittal.)

The bottom line: If the confession is removed from consideration as part of the evidence, and consideration of the remaining facts establish that a crime has been committed, the confession comes into evidence. If, however, the remaining facts (without the confession) do not establish that a crime has been committed, the confession is excluded from evidence.

(Endnotes)

1. To prove a prima facie case of the corpus delicti, all that was necessary was to show a **reasonable probability** of the **unlawful possession** of marijuana **by a person**. *People v. Cuellar*, 110 Cal.App.2d 273, 276 (1952). If Arizona ever addresses corpus delicti in specific reference to possession of Marijuana, it may adopt the California view.
2. See, *Matter of Appeal in Pima County Juvenile Delinquency Action*, 187 Ariz. 100 (Div. 2, 1996) (defendant cannot be convicted of marijuana for sale without independent evidence that corroborates confession of sale).
3. Or, a police officer dropped it during a prior arrest. Or, it was thrown in household trash by a protective parent and it fell out of the trash truck en route to the dump. Or, it fell out of the truck taking it to the Marinol factory. Or, it fell out of the truck on the way to the medical research laboratory. Or, it fell out of the truck on the way to the police academy. Or, it fell off the tire treads of a vehicle that had driven over a marijuana plant growing in the wild. Or, a bird, collecting nesting materials, dropped it in the street. Or,

April Brown Bags

Interstate Compact Updates

*Presented by
Dori Ege,
Interstate Compact
Commissioner*

**Friday-4/16/2010
1:30 pm—2:30 pm**

May qualify for up to
1 hour CLE

Firearms Familiarization

*Presented by MCPD
Investigators
Mick Charlton &
Bill Meginnis*

**Friday-4/23/2010
Noon—1:00 pm**

May qualify for up to
1 hour CLE

Current Gang Trends in the Phoenix Area

*Presented by
Chuck Schoville,
Rocky Mountain
Information Network*

**Wednesday-4/28/2010
Noon—1:30 pm**

May qualify for up to
1.5 hours CLE

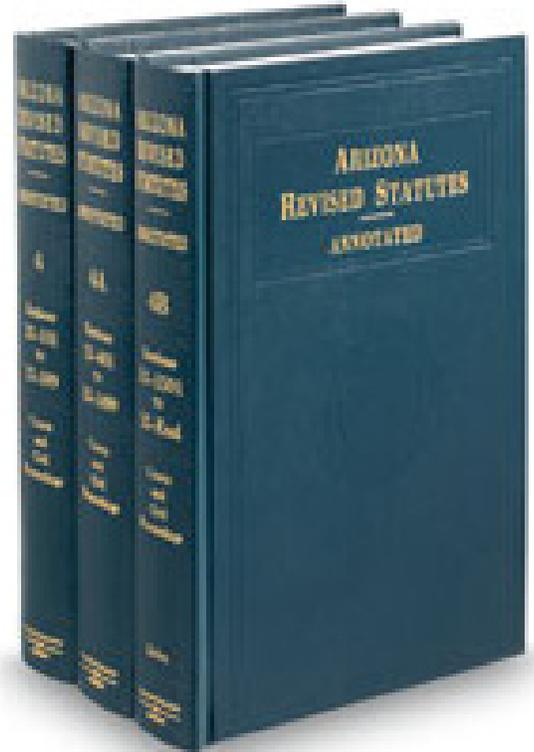
**All of the above Brown Bags will be held at the
Downtown Justice Center
620 W. Jackson, 5th Floor Training Room**

**If you have questions, please contact Celeste Cogley at 602-506-7711
X37569 or email at cogleyc@mail.maricopa.gov**

Mitigation Litigation

By Derek Koltunovich, Law Clerk, Pima County Public Defender's Office

In Arizona, the court is required to consider mitigating factors in determining the sentence of a convicted defendant. A.R.S. § 13-701(E) states: “For the purpose of determining the sentence pursuant to subsection C of this section, the court shall consider the following mitigating circumstances...” Ariz. Rev. Stat. § 13-701(E). The mitigating circumstances that the court shall consider are: “1. The age of the defendant; 2. The defendant’s capacity to appreciate the wrongfulness of the defendant’s conduct or to conform the defendant’s conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; 3. The defendant was under unusual or substantial duress, although not to a degree that would constitute a defense to prosecution; 4. The degree of the defendant’s participation in the crime was minor, although not so minor as to constitute a defense to prosecution; 5.) During or immediately following the commission of the offense, the defendant complied with all duties imposed under §§ 28-661, 28-662 and 28-663; 6.) Any other factor that is relevant to the defendant’s character or background or to the nature or circumstances of the crime and that the court finds to be mitigating.” Id.



Included in this article is a list of recognized mitigating factors in Arizona. Each factor is accompanied by supporting case law and any applicable exceptions. This is not a complete list of mitigating factors, it is merely a list of mitigating factors that have been recognized in Arizona case law.

I. Statutory Mitigators

A. Age (A.R.S. 13-701(E)(1))

“Arizona law requires that the trial court ‘consider the age of the defendant’ as a statutory mitigating circumstance when determining sentences imposed for non-capital offenses.” *State v. Davolt*, 207 Ariz. 191, 216, 84 P.3d 456, 481 (2004). Extreme youth or old age only becomes a mitigating factor when, because of immaturity or senility, the defendant lacks substantial judgment in committing the crime. *State v. Johnson*, 131 Ariz. 299, 640 P.2d 861 (1982). “When addressing the issue of young age, we look at the defendant’s level of maturity, judgment, past experience, and involvement in the crime.” *State v. Bolton*, 182 Ariz. 290, 314, 896 P.2d 830, 854 (1995); *see also State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997) (held that defendant “was immature and easily influenced”, that his “emotional development was at a child-like level” and that he “never has had the experience of living as an independent functioning adult).

“Age is entitled to great weight as a mitigating circumstance, especially if the defendant is a minor.” *State v. Gerlaugh*, 144 Ariz. 449, 461, 698 P.2d 694, 706 (1985). However, the court may find that the age of the defendant is not a mitigating factor if the defendant has a history of crime or violence. *See State v. Gerlaugh*, 144 Ariz. at 461; *see also State v. Cazares* 205, Ariz. 425, 72 P.3d 355, (Ariz. App. Div. 2,2003). Furthermore, where the defendant is not of a young age, even if he doesn’t have

a criminal record, it will not be considered a mitigating factor. *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062, (1996) (held that 33 years of age is too old to use age as a mitigating factor).

B. Mental Illness or Impairment (A.R.S. § 13-701(E)(2))

Mental illness or disorder is a statutory mitigating circumstance if “[t]he defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.” *State v. Roque*, 213 Ariz. 193, 230, 141 P.3d 368, 405 (2006). In *Roque*, the defendant’s IQ was found to be 80, which was “not, by itself, low enough for him to be considered to have mental retardation, [but] his overall score ...[was] below average.” *Id.* at 231. The court gave “substantial weight” to the evidence of mental illness and “consider[ed] the mitigating evidence of Roque’s low IQ and its likely impact on Roque’s ability to seek help or reason his way out of committing the crimes.” *Id.* at 230-231. The defendant has the burden of proof by a preponderance of the evidence to prove that he/she is mentally impaired and his/her capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired. *State v. Thornton*, 187 Ariz. 325, 929 P.2d 676 (1996).

Generally, personality or character disorders and addiction issues are not sufficient to meet the statutory standard of A.R.S. § 13-701(E)(2). *State v. Velazquez* 216 Ariz. 300, 166 P.3d 91 (2007). They can be used as a non-statutory mitigating factor if they are a significant impairment. *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997). For example, where the defendant had organic brain damage, dementia, a low IQ bordering on retarded, and a serious personality disorder at the time of the killings the court found that the impairment was significant and considered it a substantial factor for mitigation. *State v. Stuard*, 176 Ariz. 589, 610, 863 P.2d 881, 902 (1993). On the other hand where the defendant was remorseless and had a sociopathic personality, the disorder did not constitute a mitigating circumstance. *State v. Gerlaugh*, 144 Ariz. 449, 459-60, 698 P.2d 694, 704-05 (1985). In that case, the defendant had been raised in a relatively stable home environment, and there was no evidence he had been abused as a child and the defense expert was simply unable to explain why the defendant displayed violent and destructive tendencies. *Id.*

Intoxication and Substance Abuse

Voluntary intoxication is a statutory mitigating circumstance if it “significantly impairs a defendant’s capacity to conform his conduct to the requirements of the law.” *State v. Kiles*, 175 Ariz. 358, 374, 857 P.2d 1212, 1228 (1993). Intoxication at the time of offense which does not meet the standard of a statutory mitigating circumstance may still be given consideration as a non-statutory mitigator. *Id.* at 1229. “But [w]e have frequently found that a defendant’s claim of alcohol or drug impairment fails when there is evidence that the defendant took steps to avoid prosecution shortly after the murder, or when it appears that intoxication did not overwhelm the defendant’s ability to control his physical behavior.” *State v. Kiles*, 213 P.3d 174, 190 (Ariz.,2009) (quoting *State v. Rienhardt*, 190 Ariz. 579, 591-92, 951 P.2d 454, 466-67 (1997)). Proving that intoxication overwhelmed the defendant’s capacity to conform his conduct to the requirements of the law is done by a preponderance of the evidence. *State v. Moore*, 213 P.3d 150, 170 (Ariz.,2009). A defendant must show a causal link between the alcohol abuse, substance abuse, or mental illness and the crime itself in order to meet the preponderance standard. *State v. Kayer*, 194 Ariz. 423, 984 P.2d 31 (1999).

Evidence of substance abuse may be relevant to determining whether an individual is intoxicated at the time of committing a crime. *State v. Carreon*, 210 Ariz. 54, 70, 107 P.3d 900, 916 (Ariz.,2005). This claim presents a few pitfalls that must be avoided, though. First, if the individual has attempted rehabilitation and failed, or not attempted rehabilitation, that court may look upon them unfavorably. *State v. de la Garza*, 138 Ariz. 408, 675 P.2d 295 (App. Div.2 1983). Furthermore, courts have held that addicts have a higher tolerance and therefore are less likely to be intoxicated to a degree necessary for it to be mitigating. *State v. Dann*, 220 Ariz. 351, 207 P.3d 604 (2009).

C. Duress (A.R.S. § 13-701(E)(3))

Duress may be considered a statutory mitigating circumstance if “[t]he defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.” Evidence of duress is not limited to danger of physical harm. *State v. Carlson*, 202 Ariz. 570, 585, 48 P.3d 1180, 1195 (2002). The “[d]efendant’s money, house, and child custody worries created stress that rose to the level of a mitigating circumstance.” *Id.* Similarly, in *State v. Herrera*, the defendant was considered to have been under duress when his father ordered him to shoot the victim because “the father’s directions to shoot the deputy were substantial and immediate” and the “[d]efendant had little opportunity to consider the consequences of his actions.” *State v. Herrera*, 174 Ariz. 387, 400, 850 P.2d 100, 113 (1993). Duress must be proven by a preponderance of the evidence. *State v. Carlson*, 202 Ariz. at 585. To prove that a defendant was “under unusual and substantial duress,” the defendant must show that he was coerced or induced to commit the offense against his own free will. *State v. Castaneda*, 150 Ariz. 382, 394, 724 P.2d 1, 13 (1986).

D. Participation in Crime was Minor (A.R.S. 13-701(E)(4))

It is a mitigating circumstance if participation in a crime was relatively minor, although not so minor as to constitute a defense to prosecution. *State v. Garza*, 216 Ariz. 56, 70, 163 P.3d 1006, 1020 (Ariz). This is generally used in accomplice liability cases. *See State v. Hoskins*, 199 Ariz. 127, 150, 14 P.3d 997, 1020 (2000). Generally where a defendant is an active participant in the crime, either by perpetrating the crime itself or masterminding the crime, this mitigating factor is unavailable. *See State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002); *see also State v. Hyde*, 186 Ariz. 252, 921 P.2d 655 (1996) & *State v. Murray*, 184 Ariz. 9, 906 P.2d 542 (1995).

II. Character Evidence and Non-Statutory Mitigators

A. Employment

“While the court had the discretion to find that [defendant’s] employment... constituted mitigating factors, it was under no duty to do so.” *State v. Olmstead*, 213 Ariz. 534, 535, 145 P.3d 631, 632 (Ariz.App. Div. 1,2006). It is not necessary that the defendant be gainfully employed at all times leading up to the offense for employment to be a mitigating factor, but the defendant must have a history of some periods of gainful employment. *See State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454 (1997) (held that where the defendant had a history of employment as a mason, it may be viewed as a mitigating factor). On the other hand, where the defendant cannot hold down a job and has had long periods of unemployment, even if employed at a time, no mitigating factor will be found. *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996).

Military Service

“We have on rare occasions found that a defendant’s military record warranted consideration as a mitigating circumstance.” *State v. Kayer*, 194 Ariz. 423, 438, 984 P.2d 31, 47 (1999). For the court to consider the individuals military service it must be exemplary. *See State v. Spears*, 184 Ariz. 277, 293, 908 P.2d 1062, 1078 (1996). Where the defendant’s military record is less than exemplary, the court will likely not find it a mitigating factor. *State v. Kayer*, 194 Ariz. 423 at 438.

B. Education

It is possible to use either the defendant’s lack of education or pursuit of education as a mitigating factor. When claiming a lack of education, the court looks at whether the defendant’s lack of education made it so they did not understand the difference between right and wrong or could not conform their conduct to the dictates of the law, otherwise the court has found that lack of an education is not on its own a mitigating factor. *State v. West*, 176 Ariz. 432, 450-451, 862 P.2d

192, 210 - 211 (1993). Where a defendant participates in education programs while incarcerated, the court will generally view this favorably and factor it into the sentencing as a mitigator. See *State v. Lopez*, 175 Ariz. 407, 416, 857 P.2d 1261, 1270 (1993) & *State v. Watson*, 129 Ariz. 60, 63-64, 628 P.2d 943, 946 - 947 (1981). For younger defendants, a good high school record has been viewed as a mitigating circumstance. *State v. Schackart*, 190 Ariz. 238, 947 P.2d 315 (1997). Where a defendant is highly educated, and intelligent, the court may not view education as a mitigating factor, especially if they used their education and intelligence to perpetrate the crime. *State v. Henry*, 189 Ariz. 542, 552, 944 P.2d 57, 67 (1997).

C. Family and Community Ties

“The existence of family ties is a mitigating factor.” *State v. McGill*, 213 Ariz. 147, 162, 140 P.3d 930, 945 (2006). In *State v. Moore*, 213 P.3d 150, 171 -172 (2009), the court found that the negative impact that the defendant’s execution would have on his family was a mitigating factor, but the court only gave it minimal weight. In another case, the court found that the defendant’s family’s desire to have a relationship with him was a mitigating factor. *State v. Bocharski*, 218 Ariz. 476, 498, 189 P.3d 403, 425 (2008). The defendant must show by a preponderance of the evidence that close family ties exist, “although close family ties may be mitigating...general statements of support carry little weight.” *State v. Jones*, 197 Ariz. 290, 313, 4 P.3d 345, 368 (2000). Furthermore, where a defendant has had minimal contact with his children or family the court will not find a mitigating factor. *State v. Greene*, 192 Ariz. 431, 443, 967 P.2d 106, 118 (1998).

Charity Work and Good Deeds

“[A] long record of significant good deeds for others and the community as a whole is entitled to substantial weight even if not entirely engendered by virtuous motives.” *State v. Willoughby*, 181 Ariz. 530, 549, 892 P.2d 1319, 1338 (1995).

D. Childhood

Evidence of an abusive childhood or dysfunctional family background may be introduced as non-statutory mitigation. *State v. Velazquez*, 166 P.3d 91, 105 (2007). The Velazquez court found that a “toxic environment” at home including drug abuse by both parents, physical abuse by the father, and neglect by the mother were mitigating circumstances. *Id.* “Although a difficult family background, in and of itself, is not a mitigating circumstance sufficient to mandate leniency in every capital case, we can consider both the degree to which a defendant suffered as a child and the strength of a causal connection between the mitigating factors and the crime in assessing the quality and strength of the mitigation evidence.” *State v. Bocharski*, 218 Ariz. 476, 189 P.3d 403 (2008) (held that the severity of the defendant’s emotional, physical, and sexual abuse called for leniency). A causal connection is not necessary to find a mitigating factor but it is relevant in determining the weight to give the mitigating factor. *State v. Pandeli*, 215 Ariz. 514, 161 P.3d 557 (2007). Domestic violence may also be a mitigating factor, either in the same way childhood abuse is a mitigating factor, or because there is a causal connection between the domestic violence and the crime. See *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007).

E. Remorse

“Remorse may be a mitigating factor if found to exist.” *State v. Brewer*, 170 Ariz. 486, 507, 826 P.2d 783, 804 (1992). In certain cases, the court may find that the defendant was remorseful even if his or her initial actions after the crime “showed little remorse”. See *State v. Gallegos*, 178 Ariz. 1, 19, 870 P.2d 1097, 1115 (1994). For instance, in *Gallegos*, the defendant was convicted of first-degree murder and sexual conduct with a minor. *Id.* at 8. The defendant’s initial actions after the crime included lying about the victim’s fate and location as well as denying responsibility for the victim’s death even after confessing to his involvement in the murder. *Id.* at 19. However, the defendant’s subsequent co-operation in the investigation and “verbal expression of remorse

at sentencing” justified a finding of remorse. *Id.* Remorse will not be found as a mitigating factor, though, where the defendant committed subsequent similar crimes. *State v. Finch*, 202 Ariz. 410, 46 P.3d 421 (2002).

F. Cooperation with Authorities

The defendant’s co-operation in the investigation may be considered a non-statutory mitigating circumstance. See *State v. Murdaugh*, 209 Ariz. 19,36, 97 P.3d 844, 861 (2004). However, such co-operation will be given little weight if the defendant co-operates only after learning that the State has substantial evidence for a conviction. *Id.* Evidence of co-operation may also be used to show remorse, even if the defendant initially refuses to aid in the investigation. *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097 (1994).

G. Criminal History

The lack of a significant prior criminal record is a well-established non-statutory mitigating circumstance. *State v. Trostle*, 191 Ariz. 4, 22 951 P.2d 869, 887 (1997). In *Trostle*, the defendant had “one previous adult felony conviction for car theft (nondangerous), which occurred just two weeks before this incident, and his juvenile record consist[ed] mainly of sexual “acting out” episodes.” *Id.* The Supreme Court of Arizona decided that the lack of a significant prior criminal record was one of the relevant mitigating circumstances in the case and included it in the independent reweighing. *Id.* In making its decision, the court noted that although the defendant was convicted of a violent crime, “nothing in his criminal record reveals a tendency toward the kind of violent crime for which he has been convicted.” *Id.* Lack of a felony record may be overcome by the existence of multiple misdemeanors for the purposes of mitigation. *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999).

H. Participation in, or Potential for, Rehabilitation

Potential for rehabilitation may be treated as a mitigating factor. *State v. Dann*, 220 Ariz. 351, 207 P.3d 604 (2009). Furthermore, it is mitigating where the defendant actually seeks treatment for a psychological or a substance abuse problem, but it can be viewed as an aggravating circumstance if they refused to attend further rehabilitation for those problems. *In re Carpenter*, 199 Ariz. 246, 249, 17 P.3d 91, 94 (2001).

I. Recommendation of Leniency

A recommendation of leniency from authorities who are intimately involved in a case carries significant weight and may constitute a mitigating circumstance. Prosecutors, detectives, and probation officers may all be considered “authorities” for the purposes of establishing this circumstance. *State v. White*, 194 Ariz. 344, 350 982 P.2d 819, 825 (1999); citing *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097 (1994) (recommendation given by a detective), *State v. Lee*, 185 Ariz. 549, 556, 917 P.2d 692, 699 (1996) (recommendation given by a prosecutor), and *State v. Rockwell*, 161 Ariz. 5, 15-16, 775 P.2d 1069, 1079-80 (1989) (recommendation given by probation officer in the presentence report).

J. Good Behavior during Presentence Incarceration

“Good conduct during pretrial and presentence incarceration may be, but is not always, mitigating.” *State v. Pandeli*, 200 Ariz. 365, 380, 26 P.3d 1136, 1151 (2001) (“Defendant presented evidence at the sentencing hearing that he has been a model prisoner. He has not been involved in difficulties or altercations while in prison and has adjusted to his incarceration. This evidence was found to be minimally mitigating.”). Other cases, though, have held that good behavior during presentence incarceration is not mitigating since “a defendant is expected to behave himself in jail while awaiting sentencing.” *State v. Finch*, 202 Ariz. 410, 418, 46 P.3d 421, 429 (2002).

K. Disparity in Relation to Co-Defendant's Sentence

“A disparity in sentences between codefendants and/or accomplices can be a mitigating circumstance if no reasonable explanation exists for the disparity.” *State v. Kayer*, 194 Ariz. 423, 439, ¶ 57, 984 P.2d 31, 47 (1999). “Only the unexplained disparity is significant.” *State v. Ellison*, 213 Ariz. 116, 140, 140 P.3d 899, 923 (2006). Though, even where there is an unexplained disparity it may not be mitigating if the crime is serious enough. *State v. Bearup*, 211 P.3d 684, 695 (2009)

L. Voluntary Admission of a Crime

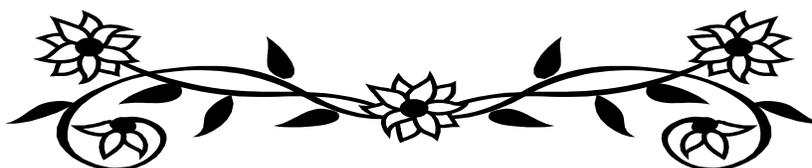
Where the defendant voluntarily admits the crime, it may create a mitigating factor. Though no case specifically holds this factor as a mitigating one, a case did consider it but did not find it as mitigating because of other factors. *State v. Schackart*, 190 Ariz. 238, 253, 947 P.2d 315, 330 (1997). The court in *Schackart* found that because the defendant later retracted the admission, that he could not use it to mitigate his sentence. *Id.* The court did imply that if the defendant had not retracted his admission they may have considered it as a mitigating circumstance. *Id.* This factor has been held as mitigating in multiple federal cases. See Michael R. Levine, *128 Easy Mitigating Factors* (2006).

M. Physical Disability

“Physical disability is a mitigating factor only if there is a direct causal connection between the physical disability and the misconduct.” *In re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). “The stronger the connection between the disability and the misconduct, the greater the weight it must be given.” *Id.* This is limited to a defendant’s pre-arrest health, post-arrest health problems are afforded no weight for mitigation; “defendant’s [post-arrest] physical health does not address his pre-murder character, nor does it address his propensities, his record, or the circumstances of the offense...” *State v. Kayer*, 194 Ariz. 423, 440, 984 P.2d 31, 48 (1999); see also *State v. Pandeli*, 200 Ariz. 365, 380, 26 P.3d 1136, 1151 (2001) & *State v. Spencer*, 176 Ariz. 36, 45, 859 P.2d 146, 155 (1993).

III. Factors Not Recognized In Arizona

Numerous factors not recognized in Arizona are recognized in other jurisdictions. For instance voluntary cessation of criminal activity has been recognized in the 10th Circuit, but no Arizona cases exist. *U.S. v. Numemacher*, 362 F.3d 682 (10th Cir. 2004) (defendant destroyed child pornography prior to investigation and cooperated with the FBI). Also, where defendants have paid large amounts of restitution, leniency has been afforded. See *U.S. v. Kim*, 364 F.3d 1235 (11th Cir. 2004) & *U.S. v. Miller*, 991 F.2d 552, 553-54 (9th Cir. 1993). A great resource for novel or unrecognized factors in Arizona is *128 Easy Mitigating Factors* by Michael R. Levine. It is a list of mitigating factors that have been recognized in Federal Court, it contains things like abuse at the hands of law enforcement, gender or cultural discrimination, punishment for acquitted conduct, and even things as novel as being a holocaust survivor. Michael R. Levine, *128 Easy Mitigating Factors* (2006).



Trial Tips

By Terry Lovett Bublik, Attorney Supervisor

Tip # 1: Jury Instructions

How often have you found yourself in the situation where your case has just been placed in a court for trial, you meet with the Judge, and the first thing he asks for is a copy of your jury instructions? Trial has not even started, no evidence has been presented, yet the Judge expects you to have a complete set of “final instructions.” The question then becomes, what do you do if new or specific issues are raised in trial and you want to supplement your instructions? Can you do so? Absolutely.

Generally, the latest time counsel may add to or object to the final instructions to the jury is immediately before the jury retires. A.R.C.P, Rule 21.3; *State v. Canady*, 26 Ariz. App. 1, 545 P. 2d 963 (1976). However, after the jury has retired, A.R.C.P., Rule 22.3 permits additional instructions if they or any party requests them. Counsel may use this rule for additional instruction after the prosecutor’s arguments if, for instance, he has misstated the law and the final instructions do not controvert his argument. In such case, counsel should timely and specifically request corrective instructions. Such instructions may be necessary where the prosecutor has misstated facts, misstated the law, or given his personal opinion concerning the evidence. If this happens, make sure you supplement your instructions and that there is a clear record of your request.



Jury and Bench Trial Results

December 2009 / January & February 2010

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
12/1 - 12/9	Barnes <i>Cowart</i>	Mroz	Chapman	CR08-154731-001SE Agg. Assault, F3D 2 cts. Assault, M1	Guilty of Agg. Assault, 1 ct. Assault; Not Guilty 1 ct. Assault Guilty	Jury
12/15 - 12/18	Smith <i>Ames</i> <i>Ralston</i>	Kemp	Viatkus	CR09-143302-001 DT POND f/s, F2	Hung	Jury
1/12 - 1/15	Houck <i>Thompson</i> <i>Falle</i>	Lynch	Bhatia	CR09-121663-001 Agg. Assault, F5	Guilty	Jury
Group 2						
11/16 - 12/3	Fischer	Pineda	Telles	CR08-165837-001DT 2 cts. Child Molest, F2 DCAC Sex. Cond. w/Minor, F2 DCAC	Guilty	Jury
1/19 - 1/21	Covil	Garcia	Arif	CR08-007701-001 Forgery, F4	Guilty	Jury
1/26 - 2/24	Farney <i>Pangburn</i> <i>Ralston</i>	Jones	Lish	CR09-112436-001 Kidnap, F2 3 cts. Sexual Assault, F2	Kidnap - Guilty of lesser included offense of Unlawful Imprisonment ct. 1 & 3 Sex. Assault - Guilty Sex. Assault - Not Guilty	Jury
2/1 - 2/2	Fischer	Burke	Arino	CR09-107838-001 Agg. Domestic Viol., F5	Not Guilty	Jury
2/11 - 2/17	Traher <i>Munoz</i> <i>Brown</i>	McMurdie	White	CR09-150583-001 Burg. 3rd Deg., F4	Not Guilty	Jury
Group 3						
12/1 - 12/2	Crawford	Lynch	Jenscok	CR08-137411-001DT TOMOT, F3	Not Guilty	Jury
12/3 - 12/4	Whitney	Contes	Kohler	CR08-153736-001SE 2 cts. Theft of Crdt. Crd. Obt. By Fraud Means, F5	Guilty	Jury
1/4 - 1/6	Abramson	Blomo	Eicker	CR09-124605-001 PODD, F4 PODP, F6	Not Guilty PODD Guilty PODP	Jury
1/13 - 1/21	Corbit	Contes	Kelly	CR09-124801-001 Burg. 3rd Deg., F4 Traffic. Stln. Prop., F2	Guilty	Jury

Jury and Bench Trial Results

December 2009 / January & February 2010

Public Defender's Office (Continued)

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 3 (Continued)						
01/26 - 02/04	Salter Bob Urista Ray Del Rio	Davis	White	CR09-133319-001 Armed Robbery, F2 Kidnap, F2 Burglary 1st Degree, F2	Hung Jury	Jury
2/8 - 2/19	Crawford	Lynch	Pollack	CR09-135506-001 Crim. Trespass, F6 3 cts. Agg. Assault, F3D Agg. Assault, F6D	Guilty Crim. Trespass, Not Guilty 2 cts. Agg. Assault (F3D) Guilty, Disorderly Conduct, Guilty Agg. Assault, F6D	Jury
2/9-2/10	Banihashemi	Brnovich	Fauth	CR09-151026-001 TOMOT, F3 Theft Crdt. Crd. Obt. by , F5 PODP F6	Guilty ct. 1 and 2, PODP Dismissed w/o prejudice	Jury
2/16 - 2/19	Corbitt	Vandenberg	Grabowski	CR08-135748-001 2 cts. Agg. Assault, F3D	Not Guilty	Jury
2/24-2/25	Banihashemi Bublik	Burke	Walker	CR09-160939-001 Forgery, F4	Guilty	Jury
Group 4						
11/17 - 11-19	Tivorsak	Harrison	Ogus	CR09-131532-001 DT MIW F4 POM F6	Guilty	Jury
11/19 - 12/1	Becker Conlon Flannigan Curtis	Myers	Keer	CR08-009332-001 Agg. Assault, F3D	Hung Split Not Given	Jury
11/30 - 12/3	Naegle (Advisory Counsel)	Rayes	Ogus	CR08-009345-001 MIW, F4	Not Guilty	Jury
12/14 - 12/17	Kalman Munoz Browne	Hoffman	Carper	CR09-129914-001 Agg. Assault, F3D	Guilty	Jury
12/14 - 12/17	Naegle Meginnis Kunz	Lynch	Jared Allen	CR09-152507-001 Disorderly Conduct, M1 Resist Arrest, F6 Agg. Assault, F5	Disorderly Cond - Directed Verdict Resist Arrest-Guilty Agg. Assault-Not Guilty	Jury
1/4 - 1/6	Stanford Schreck Rock Hagler Curtis	Martin	Ensign	CR09-143427-001 Resist Arrest, F6 Crim. Trespass, M3 False Report, M1	Resist Arrest - Guilty, Crim. Trespass - Guilty, False Report - Client pled Guilty	Jury

Jury and Bench Trial Results

December 2009 / January & February 2010

Public Defender's Office (Continued)

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 4 (Continued)						
1/5 - 1/15	Roach Schreck Meginnis Kunz	Hoffman	Dixon	CR09-129906-001 3 cts. Sexual Abuse, F3	Ct. 2 dismissed on Rule 20 motion, Hung Jury on cts. 1 and 3	Jury
1/12	L. Engle Conlon	Whitten	Keer	CR09-149067-001 Assault-Intent/Reck., M1 Disorderly Conduct, M1 POM, F6	Ct. 1 & 2 Dismissed w/ out prejudice day of trial Ct. 3 guilty, M1	Bench
2/17 - 2/23	Naegle Meginnes	Passamonte	Pokrass	CR09-152519-001 Unlawful Flight, F5	Guilty	Jury
Group 5						
1/11 - 1/19	Dehner	Martin	Humm	CR07-171343 Poss of Chem./Equip Mfg. Dang. Drugs, F2 PODP, F6 PODD, F4 Theft, M1	Guilty on all counts	Jury
1/20 - 1/25	Dehner	Lynch	Rademacher	CR09-048579 2 cts. Agg. Domestic Viol., F5 Agg. Assault, F6 Assault, M1	Not Guilty on all counts	Jury
1/29	Dehner	Hamblen Mesa JC	Diedrich	TR2008-179094 DUI, M1 DUI-BAC > .08, M1 Extreme DUI-BAC > .15, M1	Guilty on all counts	Jury
2/23 - 2/24	Garcia Ralston	Davis	Kennelly	CR09-129301-001DT PODD, F4 PODP, F6	Guilty in absentia	Jury
2/11	Alagha Thompson	Trujillo	Eicker	CR09-148769-001 POM, F6 PODP, F6	Not Guilty	Bench
2/23 - 2/25	Alagha Falle	Welty	Green Grabowski	CR09-108239-002SE Unlawful Flight from LE Veh., F5	Guilty	Jury
Group 6						
12/3	Steinfeld	Brnovich	Eicker	CR08-133478-001DT POM, M1 PODP, M1	Guilty	Bench
12/6	Steinfeld	Brnovich	Eicker	CR08-129389-001DT POM, M1 PODP, M1	Guilty	Bench
12/7 - 12/10	Fritz Taradash Springer	Lynch	Rassas	CR09-141681-001DT MIW, F4	Guilty	Jury

Jury and Bench Trial Results

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Public Defender's Office (Continued)

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 6 (Continued)						
1/6 - 1/11	Tomlinson <i>Springer</i>	Harrison	Heiner	CR07-169942-001 MIW, F4	Guilty	Jury
1/6 - 1/12	Teel Reilly	McMurdie	Ogus	CR09-147396-001 Unlawful Flight, F5 Agg. Assault, F6 Resisting Arrest, F6	Ct.1 Guilty Lesser Included, Failure to Stop Ct. 2 Dismissed Ct. 3. Guilty	Jury
1/11 - 1/20	Sheperd	Newell	Seager	CR09-048332-001 2 cts. Agg. Assault, F3D	Guilty	Jury
2/2 - 2/11	Steinfeld Taradash Reilly <i>Springer</i>	Barton	Telles	CR09-118155-001 Molest. of Child., F2 DCAC Sex Abuse, F3 DCAC	Guilty both counts	Jury
2/09 - 2/11	De La Torre Romani <i>Farrell</i>	Whitten	Reed	CR-2009-146056-001 Agg. Assault, F3D	Guilty of Lesser Included, Disorderly Cond. Class 6D	Jury
Vehicular						
11/30 - 12/2	Black Ryon	Passamonte	Hagerman	CR08-134795-001DT 2 cts. Agg. DUI, F4	Not Guilty	Jury
12/2 - 12/3	Whitehead	Vandenberg	Collins	CR07-179147-001DT 2 cts. Agg. DUI, F4	Guilty	Jury
12/16 - 12/17	Taylor	Svoboda	Caputo	CR07-146555-001DT 2 cts. Agg. DUI, F4 2 cts. Agg. 3rd DUI, F4	Guilty all counts	Jury
1/12 - 1/14	Black	Passamonte	McDermott	CR08-169145-001 2 cts. Agg. DUI, F4	Guilty	Jury
1/14 - 1/19	Iniguez	Svoboda	Caputo	CR09-138951-001 2 cts. Agg. DUI, F4	Guilty both counts	Jury
2/2 - 2/5	Sloan	Svoboda	Caputo	CR07-135502-001 2 cts. Agg. DUI, F4	Guilty	Jury
Juveniles in Adult court						
11/9 - 12/21	DeWitt Brazinskas <i>Curtis</i>	Brnovich	Eidemanis	CR07-007505-001DT Murder 1st Deg., F1 DCAC Child Abuse, F2 DCAC	Not Guilty	Jury
Capital						
10/5 - 12/1	Little Stein Carson <i>Perry-Johnson</i>	Granville	Stevens Weinberg	CR08-133101-001DT Murder 1st Deg., F1 (Death Notice Filed) 2 cts. MIW	Not Guilty - 1st Deg. Murder; Guilty of lesser included 2nd Deg. Murder, 1 ct. MIW (other ct. was severed)	Jury
11/16 - 1/12	Patterson Tavassoli Spizer <i>Resop</i>	Whitten	Valenzuela	CR93-008378 Murder 1 Deg., F1D	Sentence Retrial - Death	Jury

Jury and Bench Trial Results

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Public Defender's Office (Continued)

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Capital (Continued)						
11/5/09 - 2/2/10	Blieden Brown James Southern	Welty	Shutts Imbordino	CR04-007442-001 3 cts. Murder 1st Deg., F1D Att. to Commit Murder 1st Deg., F2D Att. to Commit Murder 2nd Deg., F2D	Guilty (Death on each of the first deg. murders, 22 years one att. murder and 15.75 years on the other att. murder to be served consecutively)	Jury
RCC						
12/3 - 12/10	Peterson	Gottsfeld	Sponsel	CR08-147550-001 Att. to Commit Murder 1st Deg., F2D Agg. Assault, F3D MIW, F4 Unlawful Flight, F5	Att. Commit Murder - NOT GUILTY Guilty on all other counts	Jury
12/4	Braaksma	Ore	Harris	TR09-125404-001TP DUI, M1 DUI w/BAC .08 or more, M1 Extreme DUI/BAC, M1	Guilty on all counts	Jury
12/18	Braaksma	Goodman	Davis	JC09-121351-001SM Prostitution, M1	Guilty	Jury
12/15 - 1/4	Peterson Ditsworth Coward	Spencer	Voyles	CR08-137801-001 Att. Commit Murder 2nd Deg., F2 Agg. Assault, F3D	Guilty	Jury
1/21 - 1/27	Antonson	Kreamer	Arino	CR08-149376-001 Child Abuse, F5	Mistrial Split 4/4	Jury
1/22 - 1/25	Vincent	Jarvis	Millington	TR09-050855-001 HL DUI Liquor/Impaired, M1 DUI Liquor/ > .08, M1 DUI Liquor/ > .15, M1 DUI Liquor/ > .20, M1	Guilty	Jury
2/2 - 2/5	Peterson	Hoffman	Vaitkus	CR09-144101-001 POM, F3 POM, F4 PODD, F5	Guilty POM, F3 Guilty POM, F4 Not Guilty PODD F5	Jury
2/10 - 2/18	Peterson	Blomo	Goddard	CR09-139769-001 Agg. Assault, F3D	Hung Jury (split not given)	Jury
2/22 - 2/24	Peterson	Blomo	Blum	CR09-100127-001 Agg. Assault, F3	Guilty	Jury

Jury and Bench Trial Results

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Legal Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
11/18 - 12/14	Tallan McWhirter	Kemp	Jorgensen	CR06-164744-001 Murder 1st Degree, F1D	Not Guilty	Jury
12/4	Sanders	Bergin	AG	JD17249 Severance Trial	Severance Granted	Bench
12/8 - 12/10	Garner	Vandenberg	Reamer	CR08-176223-001DT Theft-Means Trans, F3	Not Guilty	Jury
12/9 - 12/10	Pulver	Thompson	AG	JD508159 Dependency Trial	Dependency Found	Bench
12/10	Pulver	Aceto	AG	JD506871 Severance Trial	Severance Granted	Bench
12/17	Bushor	Ishikawa	AG	JD5507001 Severance Trial	Severance Granted	Bench
1/5 -1/7	Garner	French	Kennelly	CR09-1504455-001DT Armed Robbery, F2D Agg. Robbery, F3D	Guilty	Jury
1/5 -1/7	Ivy	Lynch	Sherman	CR08-147289-001DT Crim. Tresp. 1st Degree-Res. Struct., F6	Guilty	Jury
1/27	Ross	Smith	AG	JD10911 Dependency Trial	Dependency Found	Bench
1/27 - 1/29	Gaunt	Ballinger	AG	JD16945 Severance Trial	Severance Granted	Bench
12/16 - 2/24	Shriver Jolly	Granville	Kalish	CR08-144114-001DT 2 cts, Murder 1st Degree, F1D Agg. Assault, F3D	Plead Guilty Eve of Trial Penalty Phase: Ct 1, Murder - Life Ct 2, Murder - Death Agg. Assault - 6 years	Jury
1/24 - 2/1	Beck	Passamonte	Covault	CR09-144112-001DT POND, F4 PODP, F6	Guilty	Jury
1/25 - 2/2	Ivy	Martin	Lauer	CR07-168607-001SE Theft, F3	Not Guilty	Jury
1/25 - 2/24	Phillips Lane	Gama	Kay	CR08-159515-001DT Murder 1st Degree, F1D Dschg Firearm at Structure, F3D Agg. Assault, F3D	Not Guilty: Murder 1st Degree Guilty: Manslaughter, lessor included and Dschg Firearm at Structure Hung Jury: Agg. Assault	Jury

Jury and Bench Trial Results

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Legal Defender's Office (Continued)

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
1/26 - 2/1	Navazo	Vandenberg	Heung	CR07-155843-001DT Burglary 3rd Degree, F4	Not Guilty	Jury
1/26 - 2/2	Allen	Lynch	Church	CR09-136239-002SE Armed Robbery, F2D Agg. Robbery, F3D	Guilty	Jury
1/27 - 2/1	Bogart	Roberts	Humm	CR09-110586-002DT 2 cts, Sale or Transport of Narcotic Drug, F2	Guilty	Jury
2/8 - 2/11	Rothschild	Flores	Kittredge	CR08-139060-001DT 2nd Degree Murder, F1	Guilty of Lesser, Manslaughter	Jury
2/8 - 2/12	Ivy	Roberts	Chapman	CR08-177450-001SE Agg. Assault, F3D	Mistrial / Hung Jury	Jury
2/17	Ripa	Bergin	AG	JD18635 Dependency Trial	Dependency Dismissed	Bench
2/19	Pulver	Aceto	Welch- Rowland	JD507728 Severance Trial	Severance Granted	Bench
2/19	Ross	Smith	AG	JD18311 Dependency Trial & Severance Trial	Dependency Found Severance Granted	Bench
2/22 - 2/23	Ivy	Burke	Arif	CR09-030347-001DT Taking Identity of Another, F4 Forgery, F4	Guilty	Jury
2/23	Ross	Smith	AG	JD17306 Severance Trial	Severance Granted	Bench
2/24	Lincoln	Foster	Carper	CR09-103107-001DT POM, F6 PODP, F6 Rx-only drug Viol., M1	Not Guilty	Bench



Jury and Bench Trial Results

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Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
11/23 to 12/1	Tucker Hayes Rood Stapley	Gottsfield	CR09-125209-001-DT Armed Robbery, F2 Dangerous	Guilty	Jury
12/10	Owsley Marrero	Brain	JD14172 Severance Trial	Severance Granted	Bench
11/30 to 12/10	Koestner	McMurdie	CR08-007523-001-DT Consp. To Sell Marij, F2 Transp. Of Marij, F2 2 Cts. Poss of Marij for Sale, F2 PODP, F6 MIW, F4	MIW dismissed during trial; Not Guilty on 2 Cts of Marij For Sale; Not Guilty of PODP; Guilty of Consp. to Sell Marij. and Transp. Of Marij.	Jury
1/19-1/22	Owsley Marrero	Sinclair	9646; Severance	Severance Granted	Bench
11/16 - 1/19	Burns Glow Susoreny Brauer Hayes Rood	Mahoney	CR07-135527-001 Capital Murder, F1 Kidnap, F2D Armed Robbery, F2D Burglary, F3D TMOT, F3	Guilty - 3 Aggravators proven; Hung Jury in Penalty Phase (4 for Life)	Jury
10/19 - 1/12	Garcia, Centeno- Fequiere Joseph Hayes Brauer	Jones	CR96-011714 Capital Murder/Ring Remand	3 Aggravators (no pecuniary gain) Hung Jury (5 for Life)	Jury
1/21 & 2/4	Youngblood Armburst	Norris	JD15210 Severance	Parent Rights Severed	Bench
1/11 - 2/1	Tucker Mullavey Rood	Hannah	CR08-007764-001-DT 3 Cts. Fraudulent Schemes & Artifices, F2	Not Guilty All Counts	Jury
1/28 - 2/8	Garcia Brauer	Jones	CR09-112436-002-DT 1 Ct. Kidnapping, F2 3 Cts. Sexual Assault, F2	2/2/10 Client entered Plea; Plead to 1 Ct. Sex. Assault; 2 Cts. Att. Sex. Assault	Jury
1/25 - 2/2	Buck	Trujillo	CR09-005503-001-DT 2nd Deg. Murder, F1 Agg. Assault, F3D	Guilty On Both Counts	Jury
2/3 - 2/5	Owsley Marrero	Thumma	JS11119 Termination of Parental Rights	Granted	Bench
2/14	Owsley Marrero	Smith	JD17473 Termination	Granted	Bench

Jury and Bench Trial Results

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Legal Advocate's Office (Continued)

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
2/4	Smith Contreras	Blakey	JD18419 Dependency	Granted	Bench
2/10 - 2/12	Smith Contreras	Brodman	JD14601 Severance	Granted	Bench
2/16	Youngblood Armbrust	Gentry- Lewis	JD18423 Dependency	Dependency Found	Bench
2/17 & 2/18	Youngblood Armbrust	Thumma	JD17506 Termination of Parental Rights	Severed	Bench



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for The Defense

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