

for The Defense

■ Training Newsletter of the Maricopa County Public Defender's Office ■

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Damage Control Update

Sentencing Advocacy in Maricopa County

By Shelley Davis, Group Supervisor

Editors' note: This article originally appeared in for The Defense several years ago. Since that time, a number of new approaches have been implemented that can further enhance your sentencing practice – the italicized portions of the article are updates prepared by Shelley Davis and Linda Shaw, Mitigation Specialist.

We love trying cases, arguing to a jury, objecting, and cross-examination. It's all good. That is, until the clerk reads that guilty verdict. Too often, that's when we start thinking about sentencing. In many of our cases, particularly in those where our client enters a plea, the most important work we do is preparing for sentencing.

Here are ten things you can do to help obtain the most effective sentence for your clients regardless of whether they go to jail or prison or are given probation. You probably won't do every one of them in every case, but any little extra effort can make a big impact.

Gather Information Early and Often

You know that old Chicago phrase, "Vote early, vote often?" Well it applies in a modified form, to sentencing. There are many opportunities to gather information to help your client. Here are just a few:

- Ask for your client's address and all relevant phone numbers when you first meet in justice court or at your first contact. This will save you considerable time down the road.
- If friends or family members come to court with the client, ask for their names, addresses and phone numbers. You might want a letter from them later.
- Obtain releases from your client for his records. You can get school records, medical records, jail records and employment records. You can also obtain previous presentence reports if your client has prior felony convictions. These reports can be very helpful as the present presentence reports are



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often very brief and provide minimal social history or analysis. You may not need these kinds of records in every case but it is useful to think about how the records can help you explain the client’s background and behavior.

The Public Defender’s Office now has a new Initial Assessment Form to identify in-custody clients with medical, psychological, cognitive, and substance abuse problems early in the case. The client completes the form shortly after the initial appearance with the assistance of Initial Services staff. If the client has a mental illness, was in special education in school, or has had a head injury, the client can simply check off that question on the form. Attorneys are alerted early so they can start gathering records, retaining experts and enlisting appropriate support staff when appropriate. For out-of-custody clients, attorneys should send the form with their initial contact letter.

Take Calls From Family Members

I know you are thinking, “I just don’t have the time!” But family members can provide insight into your client’s upbringing and issues. Even if they are upset, insulting or abusive, you can use this to demonstrate the difficulties the client is facing and perhaps explain his or her behavior.

As a supervisor, I regularly take calls from family members calling about their relative’s case. Often, they are upset because the attorney has not returned their calls. Once you have gotten permission from your client to talk to their family, you can accomplish a great deal by developing a relationship with

family members. Having a good rapport with them can be the key to convincing a client to take a beneficial plea. It can also be critical at sentencing if the judge can see that the client has strong family support.

Send Sentencing Memoranda to the Presentence Writer as well as the Court and Opposing Counsel

You may not be able to persuade the APO to adopt your sentencing recommendation, but your memorandum and any attachments such as character letters, psychological reports and client services reports will become part of the presentence report. This information can help the Adult Probation Department determine what services your client needs. If your client goes to prison, this information can assist DOC in properly classifying your client.

You can now e-mail your comments to the presentence report writer shortly after the trial or change of plea, when the facts of the case and the circumstances of your client are fresh in your mind. The name and phone number of the assigned presentence report writer are posted on iCIS within 24 hours of the plea or verdict. If you don’t know what iCIS is, don’t worry, your secretary does and can retrieve the information you need. You can provide your comments directly to the PSR writer in an e-mail, or attach a memorandum to an e-mail setting forth your position.

It is valuable to get your comments in early, before the writer gets the County Attorney packet. That way, when they read the prosecutor’s recommendation it will be after they have read and considered what you have to say.

Talk to Your Mitigation Specialists

Even though you are not referring your client for a report because the plea agreement stipulates to probation, Mitigation Specialists have a wealth of information about drug treatment programs, shelters, halfway houses, jail programs and other services.

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Project Restore

Helping Our Clients and Our Community

By Helene Abrams, Juvenile Division Chief

Editors' note: this article discusses one of several projects that the MCPD has initiated as part of its involvement in the Brennan Center for Justice's Community Oriented Defender Network ("COD"). For more information regarding COD, please see Volume 13, Issue 3 of for The Defense.

Did you know that juvenile adjudications do not magically disappear at age 18? As a result, obstacles may exist to educational or employment opportunities for our juvenile clients who have successfully completed probation or been discharged from the Department of Juvenile Corrections. Did you know that an adjudication for any offense results in a loss of a juvenile's right to carry a firearm until his or her right is restored? As a result, many kids are charged with being a prohibited possessor, a class four felony, in criminal court.

The Public Defender's office, the Supreme Court Commission on Minorities-Collaboration Workgroup, Arizona Building Blocks-Youth and Families Workgroup, the Clerk of the Superior Court, the County Attorney's office, the Office of the Court Interpreter and others recognized these issues and decided to work together to provide an opportunity for people who have completed all of the juvenile court imposed consequences to apply for restoration of civil rights, for setting aside adjudications and for destruction of records. (See ARS 13-912.01, 8-348, 8-349)

On July 28, 2004, from 9 am to 6 pm, at the Family Resource Center, Cartwright School District's Open House, representatives from our office and our partners will be available to provide information about the process and to

assist in filling out the application forms. Bilingual attorneys will be present to assist, too.

The clerk's office has updated the forms and provided training for us. The interpreter's office translated the instructions into Spanish. The application form is available on the Clerk's website and is in Spanish, too. The county attorney's office agreed that all completed forms would be reviewed within 45 days.

We still need a few volunteers to help on the 28th, especially Spanish speaking attorneys. Training will be available on July 20 at lunchtime at the AOC to anyone, including support staff, who is willing to commit a few hours of their time. If it goes well, we hope to offer this opportunity to our adult clients, too. Please contact me at 506-4261 or Abrams@mail.maricopa.gov if you would like to help out — we are grateful for any support you can give to this very worthwhile endeavor.



Ooh, ooh That Smell

Keeping the Nose of Law Enforcement Out of Your Living Room

By Curtis Rau, Defender Law Clerk

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344 (1914).

The Fourth Amendment of the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The Fourth Amendment was the colonists’ reaction to the evils of the use of the general warrants in England and the writs of assistance in the Colonies – a writ of assistance was generally granted to British customs officers by English authority, and would allow the customs officers to search any person or place, anytime or for any reason, or no reason, and the officers were not responsible for any damage caused by their conduct in the pursuit of their duties. Their duty was to raise money, through customs, for the crown.

Indeed, the very principles at the center of the Fourth Amendment, and related to public outrage over the writs of assistance, caused James Otis to resign his (royal) position as the Chief Justice of the Massachusetts colony Superior Court in 1761 to defend the Boston merchants against the renewal of authority for the writs of assistance. The historical significance? Though James Otis lost his

case, a young attorney by the name of John Adams was present in court that day, and he later said, with the benefit of hindsight, “then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.” Adams noted that Otis even made reference to “my country” when discussing the colonies, marking one of the first recorded instances of anyone publicly declaring and conceiving of a nation separate and independent from the crown.

“The maxim that ‘every man’s house is his castle’ is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen. Accordingly, in speaking of the English law in this respect, no man’s house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon.” *Weeks*, 232 U. S. at 343. Lofty ideals, indeed.

So, how is it that a police officer walking by a private residence can claim to detect the smell of marijuana, thereby allowing him to approach the private residence, and perhaps even enter the residence and conduct a search? In Arizona, it is well established law that an officer can, based on the burning odor of marijuana alone, have sufficient probable cause to kick in a door (hopefully knocking first) and search the premises. In *State v. Decker*, 119 Ariz. 195, 197-98, 580 P.2d 333, 335-36 (1978), the Arizona Supreme Court held that the smell of marijuana emanating from a residence could provide officers with probable cause and also was an exigent

circumstance justifying entry into the residence without a warrant. “[T]he odor of burned marijuana alone is sufficient to provide probable cause to believe that someone is smoking marijuana,” and a warrantless entry is justified due to the exigent circumstances that contraband would be destroyed before the officer could get a warrant. *State v. Kosman*, 181 Ariz. 487, 491, 892 P.2d 207, 211 (App.Div.1 1995) (citing *Decker*).

Two possible defenses exist to this condition of the law, depending on the facts of the case. A “curtilage” analysis would be helpful if the officer was not legitimately on the private property when he alerted to the scent. Since Arizona case law is a stranger to a modern constitutional curtilage analysis, the issue of where the officer was located when he smelled the odor of marijuana has not been litigated. A second argument would be that under *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 (1984), the nature of the crime was not sufficiently serious to justify a warrantless entry, search and seizure, even if the suspected contraband marijuana may be destroyed by someone smoking it.

Curtilage. Not only are we guaranteed security and reasonable privacy within the four walls of our homes, but we also are protected in an area immediately around our home, which is the “curtilage.” Black’s Law Dictionary, 389 (7th ed.1999) defines “curtilage” as “[t]he land or yard adjoining a house, usu. within an enclosure.” Under the Fourth Amendment, the curtilage is an area usually protected from warrantless searches. In overly simplified terms, the protected curtilage area is the area around your private residence such that, finding a stranger skulking around in that proximity, would cause a reasonable person to believe that the stranger had no legal business or right to be there – based generally on the physical

arrangement and seclusion of your property, as well as the purposes to which the property is put.

The word “curtilage” has ancient roots in Middle English, from Old French (“courtilage”), from the word “courtil,” which is the diminutive of “court.” Tracing the origins back even further in the French language, we see “cort,” drawn from the Latin “cohors” and similar roots such as cors, chors, cohortis, cortis, chortis. These words sound familiar to a word we know today – “cohorts,” which actually has quite a humble contemporary usage compared to its original meaning, roughly meant the king’s retinue; his court; his lands and domain over which he

Not only are we guaranteed security and reasonable privacy within the four walls of our homes, but we also are protected in an area immediately around our home, which is the “curtilage.”

had absolute control and privacy as he chose. Further references to curtilage and its origins include Court Lands, which at English Common Law were lands kept in demesne – that is, lands for the use of

the lord and his family. In the Bible, it is also the enclosure of the tabernacle (Ex. 27:9-19; 40:8), of the temple (1 Kings 6:36), of a private house (2 Sam. 17:18), and of a king’s palace (2 Kings 20:4).

Curtilage Analysis. The central consideration of a curtilage inquiry is “whether the area harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.” *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 (1987). In determining the dimensions of the “curtilage” afforded the search protections of the Fourth Amendment, the four *Dunn* factors to be considered include: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding home; (3) the nature of uses to which area is put; and (4) the steps taken by the resident to protect the area from people passing by. *Id.* These

four factors are not dispositive, nor are they to be mechanically applied. The Supreme Court in *Dunn* instructed that these are merely useful analytical tools to the extent that they bear on resolving the issue as to whether or not the area in question is so intimately tied to the home itself that it should be placed under the umbrella of Fourth Amendment protection.

Well over a thousand state and federal cases cite *Dunn*, and each part of the fact-driven scrutiny has been discussed and applied. In the eleven published Arizona state cases that contain the word “curtilage,” the courts have not yet applied the *Dunn* analysis, nor thoroughly analyzed the principles which define curtilage. Conversely, the Ninth Circuit Federal Courts have cited *Dunn* in fifty-five instances, and California state courts have cited *Dunn* on twenty occasions. This area is ripe for the development of state case law jurisprudence.

We should briefly consider the *Dunn* factors in our hypothetical situation. If the officer was within the curtilage of the home when he alerted to the scent of the marijuana, that in and of itself would not provide probable cause, either for a warrant or for a warrantless search, seizure or arrest (if inside the curtilage, then it is an illegal search, unless there are exigent circumstances for being within the curtilage, which is not considered in this analysis).

(1) Proximity. Where was the officer located in relation to the front door when he smelled the marijuana? Distance from the primary residence is a consideration, though no particular distance is dispositive.

(2) Enclosure. Are there any fences between the private residence and adjacent public and private property? If in a rural area, external fences usually carry little weight, while interior fences often will readily identify the area to which the activity of home life extends.

(3) Use. The “nature of the use to which the property is put” is of particular significance. For example, a grow shed for marijuana 50 feet from the primary residence is an illegal use, and a private citizen could not have a reasonable expectation of privacy in the grow shed. However, “[o]ften, law enforcement officers will obtain additional information as they approach the property or structure in question. Good examples are a strengthening odor of marijuana, an absence of human activity, or an absence of lighting. As the level of objective data indicating that a particular piece of property is being used for illegitimate purposes increases, the curtilage recedes before the advancing officers. This produces the notion that curtilage is never fixed, rather it has elastic properties, and may stretch or contract based on the amount of objective information possessed by the law enforcement officers. In fact, the third factor in the *Dunn* test is the only elastic factor, and accordingly should come under great scrutiny to ensure Fourth Amendment freedoms.” *U.S. v. Shates*, 915 F.Supp. 1483, 1498 (N.D.Cal.,1995). See, e.g., *United States v. Depew*, 8 F.3d 1424 (9th Cir. 1993), *overruled on different grounds by U.S. v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (police officers had no objective information that marijuana was being grown on property in question, so all evidence was suppressed when law enforcement entered on to premises that clearly marked owner’s intentions of maintaining privacy).

(4) Visibility. Anything that the owner does to protect his premises from visibility and/or access can only work in his favor.

Curtilage not considered. Unfortunately, if law enforcement has a legitimate purpose to be on private property, and happens to smell marijuana, then the private owner has little recourse. The law of trespass has “little or no relevance to the applicability of the Fourth Amendment.” *Oliver v. United States*, 466 U.S. 170, 184, 104 S.Ct. 1735 (1984). Perfect congruence does not exist between trespassers and those who violate the Fourth Amendment – an officer who trespasses is not necessarily conducting an illegal search. The

police may approach a front door, even if they have to cross curtilage to get to the front door, if they have “the honest intent of asking questions of the occupant thereof.” *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964).

This brings the analysis to the second line of defense.

Warrantless Entry and Search – Exigency.

Unlawful entry of homes was the chief evil the Fourth Amendment was designed to prevent. *Welsh*, 466 U.S. at 748; *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134 (1972). The Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens. *State v. Martin*, 139 Ariz. 466, 473, 679 P.2d 489, 496 (1984). As a matter of Arizona law, officers may not make a warrantless entry into a home in the absence of exigent circumstances or other necessity. *State v. Bolt*, 142 Ariz. 260, 265, 689 P.2d 519, 524 (1984); *State v. Martin*, 139 Ariz. at 474, 679 P.2d at 497. The United States Supreme Court has recently been even more specific in saying “[t]hus, absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional **even when a felony has been committed** and there is probable cause to believe that incriminating evidence will be found within.” *Groh v. Ramirez*, 124 S.Ct. 1284, 1291 (2004). “Evidence that is recovered following an illegal entry into a home is inadmissible and must be suppressed.” *United States v. Shaibu*, 920 F.2d 1423, 1425 (9th Cir.1990).

Under A.R.S. § 13-3883, an officer may make an arrest without warrant if the officer has probable cause to believe that a felony has been committed and probable cause to believe the person to be arrested has committed the felony. Arizona state case law has stated that, when an officer smells marijuana emanating from a house, it is reasonable for him to believe that a felony is being committed in his presence, and there are exigent circumstances insofar the burning smell of marijuana indicates that evidence is being

destroyed. *See Decker, supra*. Under these conditions, he may knock on the door of the residence and gain entry to conduct a search and/or make an arrest, with or without the owner’s consent. *Welsh, infra*, is the key United States Supreme Court case which may be applied to give us direction – even though Arizona state courts have not applied *Welsh* in this situation, they have cited *Welsh* favorably in other contexts. *See, e.g., State v. Boudette*, 164 Ariz. 180, 184, 791 P.2d 1063, 1067, (Ariz.App.Div 1. 1990); *State v. Greene*, 162 Ariz. 431, 433, 784 P.2d 257, 259 (1989), *en banc*; *Baker v. Clover*, 177 Ariz. 37, 39, 864 P.2d 1069, 1071 (Ariz.App.Div.2, 1993).

It is accepted that the smell of burning marijuana, by a properly qualified law enforcement officer, will generally support probable cause to obtain a warrant. The smell of burning marijuana is sufficiently distinctive as to be readily identifiable to a trained police officer. *See, e.g., United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir.1993); *United States v. DeLeon*, 979 F.2d 761, 764-65 (9th Cir.1992). However, even though the issue of probable cause must, as a result, often be conceded, *Welsh* still provides us with another key issue — whether the smell of burning marijuana alone supports further inquiry, search, seizure and arrest of a private citizen in an individual’s home absent a warrant, under the exigency exception.

The question presented in *Welsh* was whether a warrantless, nighttime entry into a home to arrest an individual for driving while under the influence of an intoxicant was prohibited by the Fourth Amendment – the Court answered that it was prohibited. *Welsh*, 466 U.S. at 749. In *Welsh*, the United States Supreme Court identified four situations that form the appropriate standard for determining the existence of exigent circumstances: (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent escape, and (4) the risk of danger to police or others. In addition, the United States Supreme Court held that “an important factor to be considered when determining

whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. . . . [H]ome entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.” *Welsh*, 466 U.S. at 753. The Supreme Court even suggested that “the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses.” *Welsh*, 466 U.S. at 750 n. 11. *Welsh* has been cited in 836 published state and federal cases, and it is well accepted case law.

Consider as background *Johnson v. U.S.*, 333 U.S. 10, 68 S.Ct. 367 (1948). In *Johnson*, the Supreme Court held that the smell of opium fumes alone was not sufficient for officers to gain warrantless entry. The court reasoned, *inter alia*, that the only evidence or contraband that was threatened with removal or destruction was the opium fumes themselves, and they couldn’t be “reduced to possession for presentation to court.” *Johnson*, 333 U.S. at 369. “No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement.” *Id.* “If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.” *Id.* The Supreme Court has not changed their position in subsequent decisions. The Ninth Circuit has cited this case with approval. (“[A] confidential informant’s tip, plus the smell of opium in the hallway and scuffling noises heard in response to knocking by the police, did not justify a warrantless arrest” *Satchell v. Cardwell*, 653 F.2d 408, 411-12 (9th Cir. 1981), *cert. denied*, 454 U.S. 1154, 102 S.Ct. 1026 (1982).)

Moreover, Arizona residents do not consider possession of marijuana to be a dangerous or violent crime (Arizona state laws have changed since *Decker* and *Kosman*). Under

A.R.S. § 13-3405, possession or use of marijuana is classified as a Class Six Felony. However, as we know, in 1996, the voters passed Proposition 200 (codified at A.R.S. § 13-901.01) – this law reflected the evolution in thought that the people needed to medicalize Arizona’s drug control policy by recognizing that drug abuse is a public health problem and treating abuse as a disease (at least for the first two offenses). The legislative council’s analysis evaluating Proposition 200 stated that “[t]he drug problems of non-violent persons who are convicted of personal possession or use of drugs are best handled through court-supervised drug treatment and education programs.) *Cited in Calik v. Kongable*, 195 Ariz. 496, 501, 990 P.2d 1055, 1060 (1999). In short, personal possession or use of marijuana just isn’t the sort of crime for which Arizonans want the police to run around kicking in doors at the slightest whiff of burning hemp.

Jurisdictions that cite *Welsh* hold that the smell of burning marijuana does not evidence an offense sufficiently grave to justify entering a residence without a warrant. *See State v. Curl*, 125 Idaho 224, 869 P.2d 224 (1993), *cert. denied*, 510 U.S. 1191, 114 S.Ct. 1293 (1994); *Haley v. State*, 696 N.E.2d 98 (Ind.Ct.App.1998); *State v. Beeken*, 7 Neb.App. 438, 585 N.W.2d 865, 872 (1998) (dictum); *State v. Wagoner*, 126 N.M. 9, 966 P.2d 176 (Ct.App.), *cert. denied*, 125 N.M. 654, 964 P.2d 818 (1998); *State v. Ackerman*, 499 N.W.2d 882 (N.D.1993); *State v. Robinson*, 103 Ohio App.3d 490, 659 N.E.2d 1292 (1995); *State v. Ramirez*, 49 Wash.App. 814, 746 P.2d 344 (1987).

In conclusion, the mere smell of marijuana does not give the police carte blanche authority to invade the privacy of a residence. Even if the police did not violate your client’s curtilage when they detected the odor, a warrantless inquiry, search, seizure and arrest based on smell alone should still be prohibited due to the lack of seriousness of the offense of possession of marijuana versus the Fourth Amendment privacy protections at stake.

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They are a valuable resource for sentencing alternatives--take advantage of their knowledge and skills.

At the other end of the sentencing spectrum, many of our clients have multiple felony convictions, are not eligible for probation even with a plea agreement, and may not fall within the guidelines to have a mitigation specialist assigned to the case. At the same time, it is often those clients who have underlying mental health and substance abuse issues that have never been properly treated. The mitigation specialists can assist the attorneys in identifying those clients who could benefit from a psychological or other specialized evaluation that can greatly benefit the client at sentencing. If the judge knows that the client has been properly diagnosed and is taking medication that effectively treats his underlying condition, he may be willing to impose a shorter term of incarceration. It is important to ask the judge to order the Probation Department to screen probation-bound defendant's for the proper caseload, such as S.M.I., Sex Offender, and/or Learning Disabled. It is also important to familiarize yourself with current programs being offered at D.O.C. so that you can request the Court to RECOMMEND (it cannot order) that the defendant be considered for the most appropriate programs. A list of current D.O.C. programs is available from any of the office's Mitigation Specialists. In addition, representatives from DOC's Inmate Services Programs will be presenting a session at the upcoming APDA Conference. Remember, if any type of evaluation is conducted on your client, it is important that it follow him or her to jail, prison or the Probation Department. A simple way to do that is to ask the judge to include it in the Final Minute Entry.

Send a Letter To Your Client Outlining What He/She Can Do To Assist With Sentencing

Many attorneys have a form "to-do" list for clients, giving direction to them regarding

crucial areas, including writing letters to the court, getting in substance abuse programs, obtaining work furlough paperwork, preparing for the presentence interview, and making a positive impression on the court at sentencing. A sample form is provided on pages 4 and 5 of this issue of *for The Defense*. Something like this can be invaluable in getting the client and their family members actively involved in sentencing.

No letter, however eloquent, will have much of a chance to reduce your client's sentence if it is handed to the judge on the morning of sentencing. Please stress with your client and his or her family members that the letters must be to you at least a week before the sentencing so the court can properly consider them. If you do get a pile of letters on the day of sentencing, you may want to summarize the letters for the court, particularly if

If the judge knows that the client has been properly diagnosed and is taking medication that effectively treats his underlying condition, he may be willing to impose a shorter term of incarceration.

*they are difficult to read because of penmanship or language. A sample sentencing preparation letter to a client, prepared by Defender Attorney Stephanie Conlon, is provided on pages 12 and 13 of this issue of *for The Defense*.*

Review A.R.S. §13-702(C) and (D)

This statute sets forth statutory aggravating and mitigating circumstances. Look for ways to fit the facts and circumstances of the case and particular attributes of your client into these categories in order to argue for probation or a mitigated prison sentence. It is also useful to review the aggravating circumstances so you can explain why your client's case does not fit within those factors. Sometimes, referencing a specific 13-702 factor impacts the judge's decision.

Advise Your Client About the Presentence Investigation

We have all read presentence reports where things are going fine until we get to the

defendant's statement. Your client is convicted of simple possession of narcotic drugs. He proceeds to tell the presentence report writer that he came to the United States illegally two weeks ago and has been selling crack out of a motel room. To avoid this situation, prepare your client. Tell him that the PSR writer will ask him about the offense. He should be truthful and not minimize his conduct. This does not mean he should talk about any other offenses he might have committed.

If your client is out of custody, review the basics, if necessary (it is often necessary): Be on time to the interview. Dress conservatively. (I have found this works better than "dress appropriately." You would be amazed at what some people think is appropriate.) Accept responsibility for the offense (unless, of course, your client has gone to trial maintaining innocence).

If you spend just five minutes reviewing these helpful hints, it will help give your client a fair shot with the PSR writer. Additionally, if there is a particular area that your client should avoid discussing with the probation officer instruct him to politely inform the officer that his attorney advised him not to talk about certain things without counsel present. Finally, while it is not realistic for attorneys to accompany all clients to their interviews, there are, however, certain particularly sensitive matters that would warrant the attorney being present. For example, if you have a scared, impressionable client or one with a complicated criminal history, contacting the presentence writer and arranging to be present at the interview may be appropriate.

This is another example of a situation where early contact with the PSR writer can be helpful. If your client behaves in inappropriate ways because of a

mental illness, a brain injury or a learning disability, you can let the PSR writer know what to expect when they meet with the client, so the behavior is not used against your client.

Suggest That Your Client Write a Narrative Including Goals for the Future

It can be a very frustrating experience to passionately argue for probation for your client, giving all the reasons and the impact of the offense, only to hear, when the judge asks your client if he has anything to say, "No, nothing." It is easy to think that he doesn't care. It is more likely that your client is scared to death to be standing in open court talking about himself.

One way to deal with this problem is to have your client put his thoughts down on paper. His history, what led to this offense, how it has affected him, his plans and goals for the future. A well-thought-out letter explaining a realistic plan

for the future can go a long way toward demonstrating that your client is showing the type of maturity needed to "turn the corner." Just be sure the client shows you the letter first.

You might ask your client to do this at the very beginning of the case rather than waiting until the sentencing phase – it can be of great help in formulating a defense or writing a memo for a settlement conference.

Acknowledge to the Court the Seriousness of the Charge, Your Client's Record, and the Victim's Position

Generally speaking, the court is much more receptive to your arguments for leniency if you acknowledge the "warts" on your case/client first. If he did lousy on probation, admit it. Then talk about the changes he has made, or the support that he now has, which justify

If you have a scared, impressionable client or one with a complicated criminal history, contacting the presentence writer and arranging to be present at the interview may be appropriate.

giving him another opportunity. Recognize and acknowledge the impact of the offense on the victim, if there is one. Don't paint your client as an angel if the horns and tail are clearly visible. By recognizing the problems, you gain credibility and become a more effective advocate for your client.

Before sentencing, look at your case and ask yourself, "How will the judge see my client? What can I say to allow the judge to see him from a more positive perspective?" Anticipate the court's objections to the sentence you are proposing and address them upfront. If the case is serious enough to warrant jail time, propose a reasonable amount, rather than losing your credibility by arguing for no jail time. If a jail sentence is being imposed, don't forget to request that the defendant be screened for any appropriate jail programs, including Work Furlough, Work Release and ALPHA, M.C.S.O.'s substance abuse program.

Be an Inspired and Passionate Advocate

Don't be afraid to be passionate at sentencing and don't be afraid to coach your client in addressing the Court regarding his particular situation. Everyone has at least one positive quality or attribute that you and the defendant can emphasize. Take the time to find that in your client. This is one of the most important moments of your client's life. Treat it that way.



Practice Pointer

Calculating Presentence Credit

By John DeWitt, Defender Attorney



Are you mathematically challenged when it comes to figuring out things like presentence credit? This link <http://www.calendarhome.com/cgi-bin/date2.pl> will take you to a calculator and automatically calculate the number of days between two dates. I've found it exceptionally useful for figuring out how long clients have been in custody for purposes of their backtime credit.

SAMPLE SENTENCING PREPARATION LETTER TO CLIENT

Dear _____,

The sentencing on your case will take place on _____, before Judge _____, located in the _____ Court Building, room _____, 201 W. Jefferson Street, in Phoenix. As you know, the judge may sentence you to a term within a range. The judge will consider whether there are any aggravating circumstances that could raise the penalty higher than the presumptive term. You should be aware that the prosecutor will probably emphasize these aggravators at sentencing, if they apply to your case. Some aggravating circumstances are:

- infliction of serious physical injury
- use of a deadly weapon or dangerous instrument
- high value of loss or damage to property,
- presence of an accomplice
- cruelty
- offense committed for money
- money paid to another to commit an offense
- defendant was working as a public servant
- physical, emotional, financial harm done to victim
- victim is elderly
- a child was present during the offense
- defendant was responsible to victim
- hate crimes
- prior convictions within the last 10 years
- poor past performance on probation or parole
- unacceptance of responsibility or remorse for the offense
- any other factors the court deems appropriate

The judge will also consider whether there are any mitigating circumstances that could lower the penalty below the presumptive term. These are factors that we should emphasize, if they apply to your case.

defendant's age, if under 21 or over 60

defendant's capacity to appreciate wrongfulness of his conduct was significantly impaired

defendant was under substantial duress

defendant's participation in offense was minor

any other factor the court deems appropriate, such as:

abusive childhood with evidence that abuse contributed to cause of defendant's behavior,
cooperation with law enforcement,

financial support and love for defendant's children,

defendant's lack of a prior felony record,

defendant's low IQ or mental impairment if it impaired his judgment at the time of offense,

military service with honorable discharge,

achievements in education and career

defendant's substance abuse problem if he has not had an opportunity for rehabilitation

participation in drug/alcohol rehabilitation programs or other counseling

There are several things you can do in order to help your case (see attached). If you have any further questions, or if you would like me to contact people who might write letters on your behalf, call me.

Deputy Public Defender

MARICOPA COUNTY PUBLIC DEFENDER

1. Write a letter to the Judge. (Dear Honorable Judge _____).
Send the letter to me, not to the Judge directly. If possible, send it 2 weeks before sentencing.
 Your letter should be honest, direct and in your own words. Areas to consider addressing, if they are applicable, include:
 - a. Accept responsibility and apologize for the crime and to the victim. Do not make excuses. Just explain that you are sorry for what you did.
 - b. Discuss your background, including any obstacles you have had to overcome. Try to explain what problems caused you to commit the offense. Do not blame others, just explain how you got yourself in this situation. Please include any of the mitigating circumstances listed above in, if they truthfully apply to you.
 - c. Discuss what is good about you and your potential for success. Tell the judge specifically how you are going to change your life so you don't get into another situation like this. Outline your plan for the future.
2. If you have an alcohol or drug-use problem, go to alcohol or drug rehab.
 Get signatures every time you go or get a letter from the center.
Bring the signature list or letters with you at sentencing.
3. Go to GED, parenting, anger management classes or any other classes.
 Get signatures every time.
Bring the signature list or letters with you at sentencing.
4. If you are out of custody and have a job — keep it.
 If you are unemployed, get a job, any job.
5. If you are out of custody, you will make an appointment to see a probation officer for an interview. Be on time for your appointment, dress conservatively, and dress the same way for your sentencing. If you are in custody, a probation officer will come to see you. Be polite and helpful to the officer. In the interview, do not attack any aspect of the criminal justice system, unfairness in the law or the court system. Explain what you did and why you did it. This is your chance to tell your story, but do not make excuses.

The Probation Department will give you forms to fill out completely and honestly. Please provide the pre-sentence probation officer with all the requested information that you can. However, DO NOT admit to any other crime(s) other than what is noted in the plea agreement, or for which you have been found guilty at trial. Tell the Probation Officer about your education, military background, employment verification, marital status, social security number, professional licenses, driver's license, and your correct address, as well as past contacts with the criminal justice system.

6. Send letter requests (enclosed) to people who might write to the judge on your behalf (family, friends, employer, church, sponsor, counselor, teacher). I am including 2 copies of the letter request for you to send to people you think will write a letter for you. Fill in the date, their name, Judge, courtroom and time of sentencing, sign your name, and send them out right away.

They should send their letters to me, NOT to the judge or the prosecutor.
They should send their letters 2 weeks before sentencing, if possible.

Jury and Bench Trial Results

April 2004

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



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