

# for The Defense

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

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## Blakely Update

Some Issues and Motions to Consider in this Rapidly Evolving Area

By Jill Evans, Mohave County Public Defender's Office

*Editors' note: the Blakely decision has sparked a flurry of activity among defense attorneys and prosecutors across the country. Mohave County Deputy Public Defender Jill Evans has been at the forefront of filing motions on a myriad of issues, all of which remain unresolved as of the date of publication of this newsletter. The following is a collection of key issues that Jill has culled from pending motions, some of which were contributed to by the legendary David Goldberg, a private attorney in Flagstaff and former Maricopa County Deputy Public Defender. If you need full copies of any of the motions referenced in this article, please contact Jill at [jill.evans@co.mohave.az.us](mailto:jill.evans@co.mohave.az.us). Additional Blakely resources, including motions on other pertinent issues, are available at [www.pubdef.maricopa.gov](http://www.pubdef.maricopa.gov), the Maricopa County Public Defender's website.*

### 1. Does *Blakely* apply in Arizona?

On June 26, 2000, the United States Supreme Court held that, other than a prior conviction, any fact used to increase a sentence beyond the maximum allowed by statute must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Since then, the Arizona courts have

applied the *Apprendi* rule to various sentencing provisions, requiring that they be proven beyond a reasonable doubt to a jury. *State v. Gross*, 201 Ariz. 41, 31 P.3d 815 (App. 2001) (pre-trial release status pursuant to A.R.S. 13-604(R)); *State v. Dewakuku*, 2004 Ariz. App. Lexis 96 (App. June 29, 2004); (release status pursuant to 13-604.02(A)); *State v. Benenati*, 203 Ariz. 235, 241, 52 P.3d 804, 810 (App. 2002) (pre-trial release pursuant to A.R.S. 13-604(P)).

However, the Arizona courts had not yet extended the rule to aggravating factors found by a judge in non-capital cases pursuant to A.R.S. §13-701 et. seq. See e.g. *State v. Dewakuku*, 2004 Ariz. App. LEXIS 96 (App. June 29, 2004) ("a finding of aggravating circumstances under §13-702 (C) does not allow a court to increase a defendant's sentence beyond the statutory maximum" and therefore does not violate *Apprendi* rule.)

Now, the United States Supreme Court has *rejected* the argument that the statutory maximum in Washington and Arizona is the



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statutory *maximum of the sentencing range*. *Blakely v. Washington*, 2004 U.S. LEXIS 4573 (June 24, 2004). In *Blakely*, the Supreme Court struck down a Washington sentencing statute finding that the statutory scheme violated the Sixth and Fourteenth Amendments under *Apprendi*. The Washington Sentencing Reform Act of 1981 established sentencing guidelines that set forth a *standard* sentence range based on the seriousness of the crime and what is referred to as an “offender score.” Wash. Rev. Code Ann. §§ 9.94A.510-9.94A.530 (West 2004) (formerly §§ 9.94A.310-9.94A.330). The Washington court is obligated to impose a sentence within this *standard range*, unless it finds compelling reasons justifying a departure from this range. *Id.* at § 9.94A.535 (formerly § 9.94A.390). Compelling reasons include any mitigating or aggravating factors that the court may find. *Id.* The relevant sections read,

Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range . . . The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

*Id.* at §§ 9.94A.505 and 9.94A.535 (formerly §§ 9.94A.120 and 9.94A.390, respectively). In *Blakely*, the lower court found the compelling

circumstance that the defendant acted with “deliberate cruelty,” which increased the sentence from the standard sentencing range to the exceptional sentencing range.

The Supreme Court reexamined the *Apprendi* rule in light of the Washington statute, struck down this judicial fact-finding allowed by the statute, and held that the “statutory maximum” pursuant to *Apprendi* is “**the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.**” *Blakely*, 2004 U.S. LEXIS 4573 at 13-14 (emphasis added).

In Arizona, the maximum sentence that a judge may impose without finding additional, specific aggravating factors is the presumptive sentence. See e.g. *State v. Harrison*, 195 Ariz. 1, 985 P.2d 486 (1999); *State v. Thurlow*, 148 Ariz. 16, 19, 712 P.2d 929, 932 (1986); *State v. Germain*, 150 Ariz. 287, 289, 723 P.2d 105, 107 (App. 1986). The code sets forth a presumptive sentence for each of 6 classified felonies. A.R.S. §13-701. (“Except as provided in 13-604, the term of imprisonment for a felony **shall** be determined as follows for a first offense...”). A first time felony conviction may be reduced or increased within a specified range by the judge “on any evidence or information introduced or submitted to the court before sentencing or any evidence previously heard by the judge at the trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.” A.R.S. §13-702(A)(B).

Thus, in both states, an initial sentence is established based on the statutory classification of the crime, then departures or enhancements are allowed, but only upon the finding of certain facts by the court, rather than a jury. If these findings are not made in Arizona, or if the court is silent about any findings, then the sentence “shall” be the presumptive.

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# Turning the Corner

## Harlem group helps ex-felons win rights and jobs

By Arlene McKanic, Amsterdam News

*Editor's note: The February 2004, issue of for The Defense featured an article on the collateral consequences of convictions. Collateral consequences in the criminal justice system include far more than just immigration consequences. A criminal conviction impacts employment, federal and state benefits, as well as issues as fundamental as child custody.*

*With permission, we're reprinting an excellent article that shows how one public defender office has met client needs in a "holistic" model by developing a "Reentry Advocacy Project." For the last year, our own office has been involved in developing a series of projects, in conjunction with the Brennan Center and the National Legal Aid and Defender Association with similar goals.*

WHEN someone is released from prison, he's not finished serving time for his conviction. The consequences of incarceration are felt long after the inmate is released, and can even affect innocent members of their families.

This is where the Neighborhood Defender Service (NDS) and Harlem Reentry Advocacy Project (Harlem RAP) come in. Neighborhood is a community-based public defender that represents indigent residents of upper Manhattan in criminal proceedings. Its offices are located on fifth Avenue right off 125th Street in Harlem, in the same building as The National Black Theatre. The organization is unique among public defenders in that it provides holistic representation to its clients by providing social service referrals as well as legal representation in related civil proceedings.

Neighborhood Defender Service launched Harlem RAP in September 2003 to reach out to

those who were formerly incarcerated and are returning to upper Manhattan communities.

Harlem RAP provides legal representation and social services to individuals returning from prison who are faced with a number of obstacles that prevent them from building productive lives.

One of the top priorities for people returning home is finding a job. But Michele Davila, a law graduate of Harlem RAP who was funded by an Equal Justice Works Fellowship to work on employment issues, describes how difficult it is for people who have been incarcerated to get a job.

In fact, the state makes it more difficult by denying state-issued employment licenses to people with criminal records. One of her clients, for example, was trained and worked as a barber while incarcerated in a state prison. He applied for a state barbers license in preparation for his release, but although his crime was unrelated to barbering, the state denied his application. "Essentially," Ms. Davila explains, "the state that trained him barred others from hiring him."

Another perverse catch-22 is that New York City public housing, the most affordable in the city, automatically denies those with criminal records. One repercussion is that many clients can't return to their spouses and children living in subsidized housing without jeopardizing their tenancies. Joy Radice, a Harlem RAP attorney who is funded by a Skadden Fellowship through a foundation set up by the law firm Skadden, Arps, Slate, Meagher and Flom, summed it up best: "With a record, ex-offenders cannot get housing, but

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without housing, rehabilitation is at best an elusive possibility.”

Many people returning from prison encounter even more fundamental hurdles. They're released without any form of identification – birth certificates, social security cards or driver's licenses – and are therefore unable to apply for jobs or any benefits programs. This is particularly problematic for people with chronic health problems who are released and have no access to medical care. Without identification, they're unable to apply for Medicaid and are left stranded without necessary medications and treatment.

Senior Social worker Johanna Elumn points out, “These individuals are desperately in need of a range of basic services including housing, mental health services, drug treatment, and medical care.”

Harlem RAP helps individuals overcome these barriers through an interdisciplinary approach combining social work and legal advocacy. For example, in the area of employment, the social work staff assists individuals in drafting resumes and preparing for interviews. They advise clients on how to answer questions regarding their criminal histories in job applications and interviews. The legal team will step in when an individual is illegally denied a job opportunity solely because of his or her criminal record.

The staff of Harlem RAP also conducts community education workshops for people who are formerly incarcerated so that they can advocate for themselves. The project has reached out to neighborhood organizations that also work with this population.

“We have partnered with community organizations to train staff and program participants on the rights of the formerly incarcerated,” explains Radice, who works on housing and family housing and family law cases. “Specifically, we have developed a workshop to assist people in building what we call ‘rehabilitation portfolios.’ These are

packets of materials that each person could gather to show how they've changed since their incarceration.” The portfolios highlight completed job training programs, drug rehabilitation programs, paid or volunteer work or any other efforts that they've made to rebuild their lives. These packets can help someone describe rehabilitation in a job interview or with an appeal of a job license or public housing denial.

The combination of partnering with community-based organizations and conducting education complements Harlem RAP's direct legal representation and social services. It enables Harlem RAP to reach a broad segment of the population returning home. For example, a family member of a former NDS client called Harlem RAP when the prison failed to send his son home on his parole date. Harlem RAP staff was able to get him released in the next few days and then sent him to Exodus Transitional Community, Inc., one of Harlem RAP's neighborhood partners that works with the formerly incarcerated population. The Harlem RAP client became actively involved in Exodus' program and was hired as a case manager to help others who return home from prison. He's now referring his own clients to Harlem RAP.

“We believe that our work can have a ripple effect on this population,” says Radice.

Davila, Elumn and Radice hope that Harlem RAP will be a model for how lawyers and social workers can work together to fight for the rights of the formerly incarcerated. This project hits home for Davila, who was born, raised and continues to live in Harlem.

“It was my goal to go to law school and come back to Harlem to help those in my community,” she said.

*This article appeared in Edition 125 of Voices That Must Be Heard. Included by permission of Amsterdam News. Voices © 2004, IPA, all rights reserved.*



## Practice Pointer

Ascertaining Immigration Status: Advisement Rule Effective December 1, 2004.

Although Supreme Court Order No. R-03-0025, amending Rule 17.2, Ariz. R. Crim. P., does not “officially” take effect until December 1, 2004, many practitioners agree that criminal defense lawyers should already be taking steps to determine the immigration status of clients and advise them that a guilty plea (or no contest) or conviction may cause the client’s removal from the United States. *See, e.g.,* ER 1.1, Ariz. Rules of Professional Conduct (competent representation includes legal knowledge, skill, and thoroughness of preparation); *See State v. Paredes*, No. 28270 (Filed August 31, 2004, New Mexico Supreme Court) (“We hold that criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise the client of the immigration consequences of pleading guilty, including whether deportation would be virtually certain.”).

An accused’s lawyer has an affirmative duty to determine a client’s immigration status that is independent of the trial court’s advisement. *Paredes, supra.*

Beginning December 1, 2004, before the trial court may accept a plea of guilty or no contest, it must address an accused personally in open court and determine whether the client understands that if she is a not a citizen of the United States that a plea may have immigration consequences. Specifically, the trial court must advise an accused that:

If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the

United States, or could prevent you from becoming a United States citizen.

Practitioners should know that their client is *not*, however, required to disclose her legal status to the court. *See also*, ER 1.6 (confidentiality of information).

Not only should criminal practitioners address the immigration status with the client before a change of plea, they should also ensure that the court properly advises the client as well. The court’s failure to advise the client could go to the voluntariness of the plea. *See* Rule 17.1(b), Ariz. R. Crim. P. (a plea of no contest or guilty may be accepted only if knowingly and voluntarily made). A lawyer’s failure to make a good faith effort to determine his client’s immigration status may provide a prima facie case of ineffective assistance of counsel. *Paredes, supra.*

Federal law provides that “[a] ny alien . . . in and admitted to the United States shall, upon order of the Attorney General, be removed” if the alien is with a statutorily defined class of deportable aliens. 8 U.S.C. § 1227 (a) (2000). One class of deportable aliens includes those who are convicted of an “aggravated felony.” The definitions of what constitutes an aggravated felony may be found in 8 U.S.C. § 1101.

### Office Forges Ties with Mexican Consulate

Even before the adoption of the modifications to Rule 17, the Office began on working on developing a professional working relationship the Mexican General Consulate in Phoenix.

Norma Munoz, MCPD's Training Facilitator, ERU Chief Dan Carrion, and several members

of our initial services staff, were instrumental in forging ties with the newly appointed Phoenix Mexican Consul General.

The efforts culminated in the Office hosting a meeting with Carlos Flores Vizcarra, the Consul General and his legal assistant, Jorge Solchaga. Jim Haas, Jeremy Mussman, Norma Munoz and Christopher Johns attended. During the meeting ideas were exchanged for creating a working relationship.

The Consul General's office, for example, has supplied the office with forms that give our office permission (from the client) to discuss their case with the Consulate. There is also a notification of arrest form. Forms are available in English and Spanish on our website under

"Legal Resources" and on our shared drive under "Mexican Consulate Forms."

The Consulate may be able to help practitioners obtain documents or contact relatives who may be able to provide information critical to the defense. You can reach the Consulate at:

1990 West Camelback Road, Suite 110  
Phoenix, Arizona 85015  
Tel. 602-242-7398 ext. 241  
602-242-3649  
Fax: 602-995-7496

Email: [clofress@consulmexphoenix.phxcoxmail.com](mailto:clofress@consulmexphoenix.phxcoxmail.com)

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## COD (Community Oriented Defender) Update

By Helene Abrams, Juvenile Division Chief

On July 28, 2004, MCPD participated in our first Project Restore event. Project Restore is a collaborative re-entry effort involving the Arizona Supreme Court Commission on Minorities, the Arizona Building Blocks Initiative, the Office of the Maricopa County Public Defender, the Maricopa County Attorney, the Clerk of the Maricopa County Superior Court, the Office of the Court Interpreter, and the Juvenile Law Section of the State Bar. We were invited to the Cartwright School District's Family Resource Center for their back to school Open House. We were stationed at a table where we had the applications for restoration of civil rights, setting aside adjudications and destruction of records available in English and Spanish along with Spanish speaking attorneys and staff available to assist in the filling out of the forms. We also had a JOLIS hook up to check or verify records as needed. We handed out many forms but didn't take any applications back with us. Most of the families had very young kids and they didn't need the applications for those kids although some people took applications for other family or friends. We also had Voter Registration applications available. We provided lots of information about the application process.

Our next event will be on September 11, 2004. We were invited by Chicanos por la Causa to attend their "Law Day" event at their office on Central, south of downtown. They will have a number of attorneys available to provide free legal advice on criminal, family, juvenile, immigration, and personal injury law. Project Restore will provide the application forms and information at this event too. The applications for juveniles are available in English and Spanish from the Clerk of the Court's web site. Applications for adults are available there too although I don't think they are in Spanish.

Special thanks to those in the office who participated in Project Restore's first event, including Mara Siegel, Jose Montano, Eleanor Terpstra, and Annabell Gonzalez. Also thanks to Kathleen Carey and Christopher Johns for assisting in the preparation and to Tony Colon for volunteering to help. We also appreciate the assistance of Patti Cordova, chair of the Collaboration Committee of the Commission on Minorities, Lynn Wiletsky and Maria Dennis from the Arizona Building Blocks Initiative and Margarita Silva, private practice attorney and Commission on Minorities member.

# Exonerations in the United States

## Study Suggests Thousands in Prison May Be Innocent

*Editor's Note: This article first appeared in THE SPANGENBERG REPORT, Vol. VIII, Issue 4 (August 2004) and is reprinted with permission from The Spangenberg Group.*

According to a study conducted by the University of Michigan, based on the fact that nearly all of the 328 exonerations in the United States over the past 15 years occurred in murder and rape cases, it can be implied that a large number of innocent people have been convicted of less serious offenses. The study, *Exonerations in the United States, 1989 Through 2003*, cited two reasons why wrongful convictions in less serious cases may have gone unnoticed. First, the study suggested that murder cases, particularly capital cases, attract more attention and are thus more rigorously scrutinized. Death row inmates are .25 percent of the total prison population, but comprise of 22 percent of those exonerated. Second, the study also suggests that mistakes are more likely to occur when prosecuting murder cases, particularly where the death penalty is imposed. Likely, the study claims, it is a combination of both reasons.

Sponsored by a grant from The Gideon Project of the Open Society Institute, law professor Samuel R. Gross examined all United States exonerations over the past 15 years, the point from which the first DNA exoneration occurred. During that time there were 328 exonerations: 199 in murder cases, 73 in capital cases, 120 in rape cases and nine cases involving other crimes. Of these cases, 145 involved DNA evidence, and DNA analysis was the decisive factor in 88 percent of rape cases but only 20 percent of murder cases, of which most were rape-murder cases. According to the Innocence Project, there have been 143 exonerations based on post-conviction DNA testing. For more information see The Innocence Project website at [www.innocenceproject.org](http://www.innocenceproject.org).

In most rape cases, the wrongful conviction was based on misidentification by witnesses, often across races. In murder cases there were a number of factors leading to wrongful convictions, however, most common were false confessions and perjury by co-defendants, informants, police officers or forensic scientists. The Michigan study also raised serious concerns about the juvenile justice system, finding that 90 percent of all juvenile exonerees were African American or Hispanic and that 44 percent of all juveniles exonerated falsely confessed, compared to 13 percent of adults. Seventy-five percent of juveniles exonerated between the ages of 12-15 were convicted based on false confessions. A second study, recently published in the North Carolina Law Review, found that false confessions were most common among the mentally ill, mentally retarded and juveniles; groups that are prone to intimidation and suggestion. The Innocence Project found that 33 of the first 123 post-conviction DNA exonerations involved false confessions, while 61 the first 70 of those wrongful convictions were based on mistaken identity.

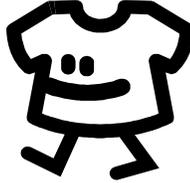
The methodology of the Michigan study has been questioned. Critics claim that the number of actual innocent people is inflated because the study includes every case in which a governor, court or prosecutor has nullified a conviction and thus declared a person not guilty of a crime as an exoneration. The study claims that its estimates were conservative and a number of defendants freed in "mass exonerations" have been excluded, including at least 135 innocent

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## 2004 Maricopa County Combined Charitable Campaign

### Upcoming Events

**MCPD T-shirts on sale until September 17<sup>th</sup>.** T-shirts are \$10.00 each or 2 for \$15.00. Available in White or Maroon. Adult sizes-Small to XXL.



**Pie Baking Contest on September 21, 2004 at 10:30 in the MCPD Training Room.** 2 categories-Fruit or Cream. Store bought or homemade may be entered. After the contest, slices of the winning pie will be sold for \$1.50. All other slices of pie will be sold for \$1.00.



**A-Day-At-The-Races will be held October 20<sup>th</sup> in the MCPD Training Room.** Race times are 10:30 and 12:30. There will be food for purchase, an auction and a lot of entertainment. Don't miss out on all the fun and excitement!!



Please click on the County's EBC link to make your pledge on line and for further information regarding many of the other County-wide events, such as the upcoming craft fair and softball tournament.

*Continued from Blakely Update, p.2*

The *Blakely* decision applies to Arizona as it does to Washington. Any sentence imposed by the court above that allowed by A.R.S. § 13-701(C) must be supported by facts found by a jury beyond a reasonable doubt. That means, for *Apprendi* purposes, assuming that aggravating factors are not reflected in the jury verdict, the statutory maximum sentence in Arizona is the presumptive sentence because that is the maximum sentence that may be imposed without any additional judicial fact-finding. Under *Apprendi*, and clarified by *Blakely*, pursuant to the Sixth and Fourteenth Amendments, any aggravating factor sought to be used to increase a sentence above the presumptive pursuant to A.R.S. § 13-702 must be submitted to a jury and proved beyond a reasonable doubt.

## **2. Does *Blakely* apply to cases not yet final on direct review, where there was a jury trial, and the time has not yet expired for filing a petition for cert. with the US supreme court?**

The *Blakely* decision applies to all cases which were not yet final when *Blakely* was decided, even if not retroactive pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) and *Schriro v. Summerlin*, 2004 U.S. LEXIS 4574 (June 24, 2004). Even if *Blakely* imposed a “new rule,” which might preclude retroactive application pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), this analysis is not applicable to cases not yet final on direct review. *Griffith v. Kentucky*, 479 U.S. 314 (1987). A state court conviction is not final on direct review until after the time expires for filing a discretionary petition for certiorari to the United States Supreme Court. *State v. Darglish*, 183 Ariz. 188, 901 P.2d 1218 (App. 1995) (post-conviction matter); *Clay v. United States*, 537 U.S. 522, 527-528, n.3 (2003) (direct review encompasses review of a state conviction by the United States Supreme Court). Because the defendant’s case is not yet final on direct review, the non-retroactivity analysis of

*Schriro v. Summerlin*, 2004 U.S. LEXIS 4574 (June 24, 2004) does not apply.

## **3. Does *Blakely* apply to cases which were not yet final on direct review after a jury trial at the time *Apprendi* was decided in June of 2000?**

The *Blakely* decision applies to all cases which were not yet final when *Apprendi* was decided, even if not retroactive pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) and *Schriro v. Summerlin*, 2004 U.S. LEXIS 4574 (June 24, 2004). In *Blakely*, justice Scalia clearly states, “This case requires us to *apply the rule we expressed in Apprendi v. New Jersey.*” *Blakely*, 2004 U.S. LEXIS 4573 at 10. When established rules have merely been applied to new factual situations, then no new rule has been announced, and the rule applies retrospectively. *Yates v. Aiken*, 484 U.S. 211, 217 (1988), n.3 (“[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way,” quoting *United States v. Johnson*, 457 U.S. 537, 549 (1982)).

Because *Blakely* does not pass the threshold test for retroactivity analysis, conducting such an analysis is improper for post-*Apprendi* cases. In *Yates*, the Court examined whether the ruling in *Francis v. Franklin*, 471 U.S. 307 (1985), that invalidated burden-shifting jury instructions under the Fourteenth Amendment, was retroactive for cases on habeas review. The Court held that a retroactivity analysis was unnecessary because *Francis* did not announce a new constitutional rule. The Court applied the reasoning in *Johnson*, finding that *Francis* was simply an application of the rule already expressed in *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that burden-shifting jury

instructions violated the Due Process clause of the Fourteenth Amendment). Because *Francis* did not announce any rule beyond what was held in *Sandstrom*, and *Sandstrom* was decided before petitioner's trial, petitioner was entitled to relief under *Francis* and *Sandstrom*. *Yates*, 471 U.S. at 216-17. *Blakely* involves the same situation. Under *Yates* and *Johnson*, *Blakely* did not announce a new constitutional rule, but instead applied the earlier rule of *Apprendi* to a new factual situation, and any defendants sentenced since *Apprendi* should be able to benefit from it.

The *Blakely* decision did not announce a "new rule," but rather interpreted the *Apprendi* rule from four years earlier. Thus, the *Blakely* decision applies to all cases not yet final when *Apprendi* was decided (June 26, 2000) without any further retroactivity analysis.

#### **4. Can the trial court modify the sentence pursuant to Rule 24.3 to correct the sentence after jury trial but prior to appeal?**

Ariz.R.Crim.P. Rule 24.3 authorizes the trial court to "correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant's appeal, if any, is filed." Even absent an objection, a sentence that is improperly imposed can be reversed on appeal or post-conviction. *State v. Dewakuku*, 2004 Ariz. App. Lexis 96 (June 29, 2004) (*Apprendi* violation); *State v. Canion*, 199 Ariz. 227, 230, 16 P.3d 788, 791 (2000). Thus, this court should order a re-sentencing hearing to correct the Defendant's unlawful sentence imposed in violation of the Defendant's Sixth and Fourteenth Amendment rights. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Blakely v. Washington*, 2004 U.S. LEXIS 4573 (June 24, 2004).

This Court retains jurisdiction for sixty days to correct an unlawful sentence pursuant to

Ariz.R.Crim.P. Rule 24.3. See *State v. Bever*, 152 Ariz. 364, 732 P.2d 594 (App. 1987) (Where § 13-702(c) has not been complied with, it would be the trial court's duty to grant a motion brought under this rule and to re-sentence the defendant); *State v. Suniga*, 145 Ariz. 389, 701 P.2d 1197 (App. 1985) (A sentence imposed in an unlawful manner is one imposed without due regard to the procedures required by statute).

The Defendant was sentenced under an unconstitutional statute. The court found aggravating factors which were not proven beyond a reasonable doubt to a jury. Further, the Defendant did not knowingly, voluntarily and intelligently waive his right to a jury determination of these factors. See e.g. *State v. Dewakuku*, 2004 Ariz. App. LEXIS 96 (App. June 29, 2004) (plea to offense committed while on release pursuant to A.R.S. 13-604.02(A) without understanding his right to a jury trial on that factor pursuant to *Apprendi* was not a knowing, intelligent or voluntary waiver). Thus, the Defendant's sentence cannot be greater than the presumptive in this case. This court should order a re-sentencing hearing to correct the Defendant's unlawful sentence imposed in violation of the Defendant's Sixth and Fourteenth Amendment rights. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Blakely v. Washington*, 2004 U.S. LEXIS 4573 (June 24, 2004).

#### **5. Are aggravating factors necessarily included in a verdict?**

When aggravating factors are not necessary elements of the offense, they should not be considered to have been found beyond a reasonable doubt by the jury as required by *Apprendi* and *Blakely*. See e.g. *State v. Smith*, 146 Ariz. 491, 707 P.2d 289 (1985) (armed robbery jury verdict necessarily included finding of dangerousness); *State v. Miller*, 135 Ariz. 8, 658 P.2d 808 (1983) (verdict did not necessarily support dangerousness finding where jury could have found verdict based on

recklessness); *State v. Towns*, 136 Ariz. 541, 667 P.2d 241 (App. 1983) (jury verdict could have supported verdict for reckless aggravated assault and therefore knowing or intentional use of a weapon not necessarily included in verdict); *State v. Purcell*, 199 Ariz. 319, 18 P.3d 113 (App. 2001) (court's finding of dangerousness based upon verdict vacated).

## 6. Is proof of only one aggravating factor sufficient to affirm the sentence based upon multiple aggravating factors?

The State argues that only one of these aggravating factors must be found by a jury to justify any aggravated sentence beyond the presumptive. The State contends that once *any* aggravating factor is either admitted by defendant, found by a jury or is implicit in the jury verdict, the remaining aggravating factors can be found by the trial judge or are irrelevant since now the defendant is exposed to the maximum punishment available under law. This argument is directly contrary to *Blakely*. See, Slip Op. at 15 (“**Every** new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt.”) Slip Op. at 17 (“As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury **all facts** legally essential to the punishment.”)(bold added.) This argument was also expressly rejected by the Arizona Supreme Court in the context of capital sentencing after *Ring v. Arizona*. *State v. Ring*, 205 Ariz. 534, ¶¶87-90, 65 P.3d 915 (2004)(*Ring III*).

Additionally, the cases relied upon by the State for this proposition were decided **before** *Blakely* and could not have reached the issue here on the merits since prior to *Blakely* no Supreme Court decision expressly held that aggravating facts had to be proven beyond a reasonable doubt or by a jury (absent a valid waiver of that right.) For example, *State v. Long*, 207 Ariz. 140, ¶ 39, 83 P.3d 618 (App. 2004) the Court was faced only with

defendant's contention that the aggravating factors utilized by the judge (abuse of position of trust, multiple sex acts, extreme mental trauma) were authorized by law, not whether the judge could find them or a jury needed to find them. Neither *Apprendi* nor *Blakely* were at issue. Similarly, *Harris v. United States*, 536 U.S. 545 (2002)<sup>1</sup> and *State v. Tschilar*, 200 Ariz. 427, ¶ 18, 27 P.3d 331 (App. 2001) (cited by State at p. 4) were not facing sentencing factors in light of *Blakely*'s requirement that the facts be proven beyond a reasonable doubt by a jury so should have no application to post *Blakely* issues. Those decisions, in the correct light, merely applied *Apprendi* as it was then understood.

## 7. On direct appeal, does it matter if nobody objected at the sentencing hearing?

The *Blakely* decision is contrary to existing Arizona case law, which previously held that a defendant did not have a constitutional right to a jury determination of facts used to aggravate a sentence. See *State v. Brown*, 205 Ariz. 325, 70 P.3d 454 (App. 2003), *pet. rev. pending*. Although there was no objection below, a sentence that is improperly imposed is fundamental error and may be reversed on appeal or post-conviction even absent objection below. *State v. Dewakuku*, 2004 Ariz. App. Lexis 96 (June 29, 2004) (*Apprendi* violation); *State v. Canon*, 199 Ariz. 227, 230, 16 P.3d 788, 791 (2000). *State v. Kelly*, 190 Ariz. 532, 950 P.2d 1153 (1997) citing, *State v. Graves*, 188 Ariz. 24, 27, 932 P.2d 289, 292 (App. 1996).

## 8. Is the standard from *Blakely* subject to a harmless error analysis in light of *State v. Ring*, 206 Ariz. 150, 76 P.3d 421 (2003)?

A defendant is entitled pursuant to the Sixth Amendment to a jury trial on the aggravating factors. As repeatedly argued first by Justice Feldman, and since by Justice Jones, the failure to provide for a jury determination of an aggravating factor in a bifurcated proceeding is akin to the denial of a jury trial

altogether, and therefore structural error not subject to harmless error review. See *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003) (J. Feldman and J. Jones, dissenting) (Ring III); *State v. Ring*, 206 Ariz. 150, 76 P.3d 421 (2003) (J. Jones, dissenting); *State v. Sansing*, 206 Ariz. 232, 77 P.3d 30 (2003) (J. Jones, dissenting). Further, unlike capital cases, the courts in these cases have not made any of the factual findings beyond a reasonable doubt. See A.R.S. 13-702(C). The error is structural requiring reversal.

Even if harmless error analysis applies, the error was not harmless in this case. The Arizona Supreme Court has applied the harmless error analysis to all death cases which were not yet final on direct review when Ring II was decided. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). In every case but one known to Appellant, the Court rejected harmless error, and remanded for jury re-sentencing. Just recently, the Court set forth the standard for reviewing factually intensive aggravating factors: “We will not deem harmless the finding of an (F)(5) aggravating factor (pecuniary gain) if circumstantial evidence and witness credibility could be weighed differently by a reasonable jury than they were by the sentencing judge.” *State v. Moody*, 94 P.3d 1119 (2004)(citations omitted). The court applied the same standard to the factually intensive aggravating (F)(6) factor, that the murder was “especially heinous, cruel or depraved.” Based on the facts of this case, the evidence could have been weighed differently by a jury.....

## **9. Is the presumptive term for non-capital first degree murder 25 years to life?**

The first degree murder sentencing statute, A.R.S. 13-703, as interpreted by *State v. Viramontes*, 204 Ariz. 360, 64 P.3d 188 (2003) requires that the court find an aggravating factor to impose a natural life sentence; thus, the presumptive sentence is 25-to-life, and any aggravating factor must be proven beyond a reasonable doubt to a jury pursuant to *Blakely*.

In *State v. Viramontes*, 204 Ariz. 360, 64 P.3d 188 (2003), the court held that the aggravating factors in §13 703 are the only factors which may be considered in a first degree murder prosecution when the trial court must choose between natural life and life with the possibility of parole after 25 years, even where the state has not sought the death penalty. See *Viramontes*, 64 P.2d at 190. As the Court stated, “nothing in the statutes expresses or implies that the procedure and aggravators of section 13-703 apply only to cases in which the state has sought the death penalty. Rather, it is clearly the nature and classification of the crime that determines the appropriate sentencing statute,” (the nature of the crime being first degree murder). *Viramontes*, 204 Ariz. at 362, 64 P.3d at 190. Logically, since the court had to consider 703 aggravating factors in making its decision, the fall back sentence or presumptive sentence absent an aggravating factors was 25 years to life. Similarly, the revised statute after *Viramontes* states that the court “shall consider the aggravating and mitigating circumstances listed in 13-702.” See A.R.S. 13-703(Q)(1) (2003). Thus, without the finding of aggravating circumstances, the lesser sentence of 25-to-life is imposed.

That was exactly the position that the Court took in *State v. Ovind*, 186 Ariz. 475, 478, 924 P.2d 479 (App. 1996) (“[U]nder the sentencing statute for first degree murder, the sentence that the Court will presumably apply unless it finds a reason to do otherwise is twenty-five years without commutation or parole.”) In *Ovind*, the court held that the 25 year sentence, with possibility of parole, was defined as the “fall back” position, after the court noted the ambiguity of the statute, and applied the rule of lenity. If the court finds an ambiguity, either within A.R.S. §13 703 or within the broader sentencing structure, such ambiguity must be resolved in Appellant’s favor pursuant to the rule of Lenity. See *State v. Ossana*, 199 Ariz. 459, 462, 18 P.3d 1258, 1261 (App. 2001). Thus, the functional equivalent of the “presumptive” sentence is a 25-to-life sentence, since it is the sentence allowed by the verdict alone without any additional

judicial fact-finding. *Blakely* provides that aggravators must be determined by a jury or admitted by the defendant. The “statutory maximum” for murder under *Blakely* must be 25-to-life, because some fact in addition to the facts reflected in the jury verdict must be found before a greater sentence can be imposed.

Although the Court has upheld a natural life decision in the past where no aggravating factors were found and no reasons were stated, the circumstances were readily distinguishable. See e.g. *State v. Sproule*, 188 Ariz. 439, 937 P.2d 361 (App. 1996). In *Sproule*, the state alleged the death penalty. Thus, the case involved an “extensive hearing” regarding the sentencing options where the trial court issued a detailed minute entry specifically listing all of its findings and listing its reasons why the death penalty was not warranted. Thus, the court’s failure to say why it imposed natural life rather than life was not an abuse of discretion based on an arbitrary decision. Other decisions have been either impliedly overruled, or are distinguishable from the case at bar. *State v. Viramontes*, 200 Ariz. 452, 27 P.3d 809 (App. 2001) (full aggravation hearing pursuant to §13 703 was held); *State vs. Guytan*, 192 Ariz. 514, 968 P.2d 587 (App. 1998) (trial court found one aggravating factor pursuant to A.R.S. §13 703, and engaged in a proper balancing test). The Arizona Supreme Court did not rely on these cases, noting that the lower court decisions were not binding on it. See *State v. Viramontes*, 64 P.3d at 190. Finally, in *State v. Wagner*, the Court rejected a due process challenge to 13-703 (1993), holding that there was no due process constitutional right to guidelines in non-capital proceedings. However, the Court in *Wagner* was presented with a different question; whether or not the administrative procedure due process test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) could be applied to 13-703 challenges. *Wagner* assumed without discussion that there were no guidelines, and *Wagner* was decided prior to *Viramontes*. Thus, *Wagner* does not control.

Further, the finding and weighing of aggravation and mitigation is the only thing

that narrows the broad discretion given to the court, and protects against arbitrary or capricious decisions. *State v. Gordon*, 125 Ariz. 425, 428, 610 P.2d 59, 62 (1980). Here, the court, rather than the jury, made the highly factually intensive finding that the murder was cruel, heinous and depraved, elevating the sentence from 25-to-life to natural life. As previously argued in Appellant’s opening brief, the court acted arbitrarily when it found that the natural life sentence was necessary to “protect society” from all murderers. The court’s reasoning implied that a natural life sentence was justified in all murder cases to protect society “from the types of individuals that have demonstrated that they are able to do this to other human beings.” The court failed to distinguish this case from any other first degree murder case, since there was insufficient evidence to support its finding of cruel, heinous and depraved. The court apparently created this “rule” and applied it to this case, without considering the alternative sentence of life with the possibility of parole based on the individual circumstances in this case. The sentence was unconstitutional, both in violation of the *Blakely* rule, and based upon an arbitrary decision in violation of a defendant’s right to due process pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, and the corresponding provision to the Arizona Constitution, Article 2, Section 4. See also *State v. Fillmore*, 187 Ariz. 174, 927 P.2d 1303 (1996); *United States v. Brown*, 723 F.2d 826 (11<sup>th</sup> Cir. 1984); *United States v. Wardlaw*, 576 F.2d 932 (1<sup>st</sup> Cir. 1978).

## **10. When is there a knowing, voluntary or intelligent waiver of *Blakely* rights in a plea agreement?**

The court has discretion to “allow withdrawal of a plea of guilty or no contest when necessary to correct a manifest injustice.” Rule 17.5, *Arizona Rules of Criminal Procedure*. This discretion “should be liberally exercised in favor of permitting withdrawal where there is any showing that justice will be served thereby.” *State v. Gibbs*, 6 Ariz. App. 600, 602,

435 P.2d 729 (1967). Any doubts should be resolved in favor of withdrawing the plea. *State v. Dockery*, 169 Ariz. 527, 821 P.2d 188 (App. 1991). This court has authority to allow withdrawal even after the plea has been accepted and the defendant has been sentenced to prison with the range of penalties if necessary to serve the ends of justice. *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990).

Due process requires that a valid guilty plea be intelligently, voluntarily and knowingly made. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Obviously a defendant cannot knowingly and intelligently waive a constitutional right that he is not aware of at the time he pleads guilty. In this case Petitioner pled guilty after this court advised him of the possible ranges of sentences and his constitutional rights. However, this court did not advise Petitioner (nor did the written plea agreement) that he was waiving his constitutional right to have a jury determine which aggravating factors would be found and would result in a sentence greater than the presumptive term. *See, Blakely*, Slip Op. at 14 (“If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.”) Petitioner’s guilty pleas are therefore unknowing and involuntary and should be vacated.

At a minimum, Petitioner is entitled to a new sentencing hearing where the State must prove the existence of the aggravating factors to a jury since under *Blakely* this court could not sentence Petitioner to greater than the presumptive term as supported by the facts admitted by Petitioner at his change of plea. None of the “facts” presented in the presentence report or otherwise at the sentencing hearing may result in an aggravated term absent a valid waiver. Since no valid waiver occurred in this case Petitioner’s aggravated sentences are in violation of the Sixth Amendment and should now be vacated.

## **11. Can a defendant’s admissions during a pre-*Blakely* change of plea or sentencing proceeding be used to establish the court’s finding of aggravating factors?**

The State argues that even if *Blakely* applies to this case there is no need for re-sentencing or other relief since Petitioner admitted the facts that support the aggravating factors during either his change of plea or at sentencing when Petitioner acknowledged the accuracy of the presentence report and/or its attachments. The problem with this assumption is that Petitioner was never advised by anyone that his admissions would be used against him to increase his punishment beyond the presumptive term. During the change of plea litany this court merely advised Petitioner of the sentencing range, it did not advise Petitioner that he had a right to contest the facts that would be used to increase the sentence nor that his admissions could be used against him to prove these facts. To accept the State’s argument would be identical to admitting a defendant’s statements in the State’s case in chief that were obtained without *Miranda* warnings, a result clearly prohibited by the law. The same logic prevails on this issue. Petitioner cannot be punished based upon facts that he never knew would be used against him to increase his punishment. *See, State v. Dewakuku*, \_\_\_ Ariz. \_\_\_, ¶17, \_\_\_ P.3d \_\_\_ (App. 2004) (“Without knowing of his right to a trial by a jury, the defendant could not have intentionally relinquished that right. Thus, his admission to his release status was not knowing and voluntary.”) Petitioner is entitled to either withdraw his plea, be sentenced to the presumptive terms or have a new sentencing hearing before a jury

## **12. Is a plea case not yet final on direct review?**

The only way to obtain appellate review of a *Blakely* issue for a pleading defendant is pursuant to Rule 32.1(c). A pleading defendant

has a right to file a post-conviction relief proceeding challenging an unlawful conviction or sentence, pursuant to Rule 32, known as an “of-right” proceeding. *Ariz.R.Crim.P.*, Rule 32.1. *State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996). The of-right post-conviction proceeding is the only avenue of appellate review of a *Blakely* error for a pleading defendant. See Rule 32.9, 31.19. For a pleading defendant, post-conviction relief satisfies a defendant’s constitutional right to appeal. Thus, in Arizona, a conviction after a plea is not yet final until the time limits expire for filing a petition for post-conviction relief and any subsequent petitions for review. As the Court noted in *Smith*, 184 Ariz. at 458-9, in making its required review and disposition of the petition, the trial court provides the pleading defendant a form of post-conviction appellate review via motion under Rule 32. *Wilson*, 176 Ariz. at 123, 859 P.2d at 746. In this respect, a Rule 32 petition for post-conviction relief in the trial court is “analogous to a direct appeal for a pleading defendant.” *Montgomery I*, 181 Ariz. at 260, n.5, 889 P.2d at 618, n.5. Therefore, because review and disposition of the petition is the only constitutionally guaranteed appeal, an indigent pleading defendant is entitled to appointed counsel for the trial court proceedings, as provided in Rule 32.4(c), and is also entitled to a transcript of the plea proceedings. *Wilson*, 176 Ariz. at 124, 859 P.2d at 474. If, after conscientiously searching the record for error, appointed counsel in a post-conviction proceeding finds no tenable issue and cannot proceed, the defendant is entitled to file a pro per petition. *Montgomery I*, 181 Ariz. at 260, 889 P.2d at 618. As in constitutionally guaranteed to direct appeals by non-pleading defendants, should counsel be unable to proceed, he or she must so notify the court and the client. See *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 156 (1984). In Arizona at least, a post-conviction relief proceeding is the only available means for Defendant to exercise his constitutionally protected right to appellate review.

Thus, regardless of any retroactivity analysis, a pleading defendant’s case is not final until

the time limits have expired for the filing of a petition for post-conviction relief of-right and for any subsequent levels of discretionary review by the appellate courts. See Rule 32.9(g); Rule 31.19. As a result, *Blakely* applies to defendant’s case, since it is not yet final on direct review.

### 13. Is relief available on collateral review pursuant to a significant change of law?

*Blakely* applies to all post-*Apprendi* cases where the relief requested under Rule 32.1(g) is based upon a significant change of law even if relief would otherwise be precluded. A pleading defendant’s constitutional rights to appellate review are set forth in Rule 32. *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616 (1995); *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995). A pleading defendant’s case that is pending a first petition for post-conviction relief as a matter of right and/or Petition for Review from denial of Petitioner’s PCR is not “final” in the sense that other convicted defendant’s cases are final, because at that point his case has not been subject to *any* judicial review.

A pleading defendant sentenced post-*Apprendi* may raise an issue pursuant to Rule 32.1(g) without facing preclusion pursuant to Rule 32.2 when “there has been a significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence.” *State v. Bonnell*, 171 Ariz. 435, 831 P.2d 434 (App. 1992).

Whether relief may be obtained under Rule 32.1(g) then depends on the question of retroactive application of the new principle of law. If the principle is not a new rule pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), but merely an extension of existing law, then defendants may apply for state court relief pursuant to Rule 32.1(g). See *State v. Slemmer*, 170 Ariz. 174, 184, 823 P.2d 41 (1991); See also *State v. Garcia*, 152 Ariz. 245, 247, 731 P.2d 610 (App. 1986).

Thus, although the *Blakely* decision did not decide a new constitutional rule for retroactivity analysis, it did significantly change the law for post-conviction analysis. Through no fault of their own, the defendant failed to challenge improper aggravating factors found by a court rather than a jury beyond a reasonable doubt based on then existing case law interpreting *Apprendi* and Arizona sentencing provision.

Finally, the defendant must present the claim to state court for review before proceeding to federal court. *Briggs v. Raines*, 652 F.2d 862, 864-865 (9<sup>th</sup> Cir. 1981) (a federal habeas claim for a change of law which occurs after a defendant's state appeal but before his federal habeas petition is not exhausted for purposes of federal habeas review until it is presented to the state courts pursuant to the change of law provision of Rule 32.1(g)). Thus, *Blakely* applies to all cases post-*Apprendi* raising the *Blakely* issue for the first time on post-trial motion, direct appeal, or on post-conviction relief, regardless of their procedural posture.

#### **14. Were all of us (except Bob Hooker, the defense attorney in *State v. Brown*) ineffective for not anticipating this whole mess?**

If this court somehow finds that *Blakely* was not a significant change in law as argued by the state, then either trial and/or appellate counsel was necessarily ineffective for not raising the issue after *Apprendi* was decided, but before the direct appeal was final, despite the Arizona court's prior holdings. See *State v. Brown*, 205 Ariz. 325, 70 P.2d 454 (App. 2003); *State v. Dawakuku*. The matter should have been remanded then for a jury re-sentencing hearing on the aggravating factors as required by *Apprendi*, or a reduction to the presumptive sentence. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Defendant had a right to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United

States Constitution and Art. II, §§ 4 and 24 of the Arizona Constitution; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Because it affects the voluntariness of the plea, an accused that has not received reasonably effective advice cannot be bound by his plea. *State v. Anderson*, 147 Ariz. 346, 350, 710 P.2d 456, 460 (1985). To show prejudice, the defendant must be able to demonstrate a "reasonable probability" that but for the counsel's errors, the result of the proceeding would have been different. *Ysea*, 191 Ariz. at 377, 956 P.2d at 504 (quoting *Nash*, 143 Ariz. at 398, 694 P.2d at 228).

Here, the Defendant had a right to a jury trial and a burden of proof that required a finding beyond a reasonable doubt that aggravating facts existed to justify an increased sentence. If this the State argues and this Court agrees that *Blakely* did not announce a change in the law, the Defendant's attorney was clearly ineffective by failing to assert these rights at sentencing. Prejudice exists because the Court was permitted to both find and weigh aggravating factors that should have never been before the Court.

#### **15. Additional practical considerations applicable to post-*Blakely* sentencings:**

- ❖ No blanket waivers of a jury finding of any aggravator.
- ❖ If the Prosecutor seeks a waiver of a jury finding, make the prosecutor list each and every aggravator to which he seeks a waiver, and only waive with respect to specifically detailed aggravators. If you do a more blanket waiver, your judge could consider almost anything, even if neither you, nor the client, (nor the prosecutor for that matter) had thought of it.
- ❖ If you go to trial, you should not waive the jury findings on aggravation.
- ❖ If you go to trial, there is a very strong argument that the prosecution cannot seek aggravators which they have not previously

identified in a charging document, or at a minimum specified at least twenty days prior to trial.

- ❖ The right to waive the jury finding, remains your client's right. You must have permission to enter a waiver. The waiver must be knowing, intelligent and voluntary, since it is a waiver of a constitutional right.
- ❖ Since the court cannot consider factors in determining sentence, pre-sentence reports should not contain any reference to any aggravating factor. You should object to any aggravating factor reference, and ask that it be stricken from the report as entered on the record. (this may avoid bad facts being before an appellate judge, who then reviews them and rules against your client because of them, although a different legal justification will inevitably be given).
- ❖ If you have a sentencing before new legislation is passed, and the court attempts to aggravate a sentence absent a jury's verdict on the aggravators, object based on *Apprendi*, *Blakely*, the 6th and 14th Amendments, and the Arizona constitution.
- ❖ If you have a defendant who presents mitigation, but no aggravation is presented and the court attempts to impose the presumptive sentence, have the court state on the record its basis for not imposing a mitigated term. Object to any consideration of factors which move the sentence from a mitigated term to the presumptive. Also, if the court rejects all mitigation, and then imposes an aggravated sentence based upon the aggravating factor, have the court state why it rejected the mitigation.
- ❖ For cases which are post change of plea, but pending sentencing, attempt to contact the pre-sentence report writer so he/she is aware that you are familiar with *Blakely* and does not include any inappropriate language in the PSR.
- ❖ Also in some cases, the state may try to withdraw from the plea agreement based upon

the *Blakely* decision. Scrutinize the language in the plea agreement to see whether the state has a valid basis to withdraw and is not punishing your client for exercising his/her constitutional right to a jury determination of any aggravator.

- ❖ All of these arguments apply to probation revocation proceedings.
- ❖ If you have a screaming good deal, and your client wants to waive it all, here is some controversial language you may (or may not) agree to....

I also waive any right I may have to a jury determination of the following aggravating sentencing factors:

Factors listed in A.R.S. 13-702(C)(1-19)

Factors limited to the following pursuant to A.R.S. 13-702(C)(20), \_\_\_\_\_

Additional factors based solely on conduct occurring after entry of this plea agreement, and I agree the judge may find any mitigating and these aggravating factors based upon any information presented to the court the judge deems appropriate under Arizona law and sentence me to the full range of sentences specified in paragraph 1, either at the time of sentencing or after any probation violation, unless otherwise limited by this plea agreement or Arizona law.

(Endnote)

The continued validity of Harris is in doubt given recent developments. The majority of federal circuits currently hold that *Blakely* invalidates that portion of the Federal Sentencing Guidelines that previously allowed the judge to determine and utilize any sentencing factors not alleged in the indictment nor alleged and proven to a jury as elements of the charged offense in upward departures. E.g., U.S. v. Ameline, \_\_\_ F.3d \_\_\_ (02-30326) (9th Cir. July 21, 2004); U.S. Pirani, \_\_\_ F.3d \_\_\_ (03-2871)(8th Cir. August 5, 2004); U.S. v. Curtis, \_\_\_ F.3d \_\_\_, fn. 2, (02-16224)(11th Cir. August 10, 2004)(citing cases and split.) The Supreme Court has granted certiorari in two cases that will resolve the split on this issue. Oral argument is scheduled for October 4, 2004. U.S. v. Booker, No. 04-104 \_\_\_ S.Ct. \_\_\_, (mem)(August 2, 2004); U.S. Fanfan, No. 04-105 \_\_\_ S.Ct. \_\_\_ (mem)(August 2, 2004.)

## Father Knows Best?

When the verdict was read in Blaire Griffin's first jury trial on July 21, 2004, it was an acquittal. Blaire's second chair was her father, Steve Rempe, who has been with the Office for over 22 years, and for a period of time in 1987 was even the "Acting Public Defender." Blaire and Steve may be the first father-daughter public defender team to ever get an acquittal—at least in Maricopa County.

Blaire's client was charged with forgery, a class 4 felony. She made arrangements for a second-chair, but through a series of events, no second chair from Group A was available the day before the trial. Blaire called her father who said he would be glad to help out. During the trial Blaire had counted on rebutting the state's "intent" argument by putting her client on the stand. But, at the close of the State's case, Steve advised Blaire that the State hadn't proved its case and that it would be best to argue it in closing.

Father knew best and the jury acquitted on the grounds that the State just hadn't met its burden of proof. That's part of what second-chairing is all about—having an experienced voice to suggest strategies. It worked in his case.



*Continued from Exonerations in the United States on p. 7*

defendants who were framed by police in two mass exonerations, one in 1999-2000 in Los Angeles in the Rampart area and the other in 2003 in Tulia, Texas. Additionally, there have been over 70 defendants exonerated in childcare sex abuse cases that were not included in the study's numbers.

The authors of the study caution that there are a number of "categories of cases with false convictions that have not been detected: rape convictions that have not been reexamined with DNA evidence; robberies, for which DNA identification is useless; murder cases that are ignored because the defendants were not sentenced to death; assault and drug convictions that are forgotten entirely." The authors suggest it is possible that in the past fifteen years thousands, even tens of thousands, of defendants may have been falsely convicted.

The study can be found at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>.



# Jury and Bench Trial Results

## June / July 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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P

D

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### *for The Defense*

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