

for The Defense

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James J. Haas, Maricopa County Public Defender

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*Delivering America's
Promise of Justice for All*

for The Defense

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Representation of the Juvenile Charged in Adult Court Post - *Roper v. Simmons*

By Paul J. Prato, Attorney Manager, Adult Trial Division

Defense counsel representing a juvenile in adult court must remain mindful that adolescents are not merely small adults. Legal recognition of this scientific fact finds support in the United States Supreme Court. In 2002, the Court held in *Atkins v. Virginia* that executing mentally retarded persons violated the Eighth and Fourteenth Amendments.¹ The Court reasoned:

[They] frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.²

Although the Court was speaking of the mentally retarded, it could have been speaking of teenagers or adolescents. Three years later, in *Roper v. Simmons*, Justice Kennedy, writing for the majority and using same reasoning—"diminished culpability"—held that executing 16 and 17 years olds who commit a capital offense violates the Eighth and Fourteenth Amendments.³ Previously, a plurality of the Court in *Thompson v. Oklahoma* banned executing any offender who was under the age of 16 at the time of the capital offense for the reason that it violates the Eighth and Fourteenth Amendments.⁴ *Thompson, Atkins, and Roper* are capital cases, however, their reasoning—diminished capacity and diminished culpability—is equally applicable to non-capital cases in which an adolescent is the defendant. Their rationale "should be applied to any situation in which juveniles are subjected to harsh punishments that are disproportionate to the juveniles' level of culpability."⁵

ROPER V. SIMMONS

Justice Kennedy's opinion in *Roper* relies heavily upon scientific research findings about the adolescent brain development to support the majority's "evolving standards of decency" rationale for banning the death penalty for 16 and 17

year olds. Justice Kennedy identified three general differences between the developing adolescent brain and the adult brain that “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”⁶

The first area of difference is a lack of maturity and an underdeveloped sense of responsibility in the adolescent brain which “often result in impetuous and ill-considered actions and decisions.”⁷ The Court also noted that “[e]ven the normal 16-year-old customarily lacks the maturity of an adult[.]”⁸ The second area of difference is that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure” than adults.⁹ Adolescence is not only a “chronological fact” but also a “time and condition of life when a person may be most susceptible to influence and to psychological damage.”¹⁰ The third area of difference is “that the character of a juvenile is not as well formed as that of an adult” and “personality traits of juveniles are more transitory, less fixed.”¹¹

The significance of these “differences,” between the adolescent brain and the adult brain, is summarized by Justice Kennedy:

The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” (Internal citation omitted). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. (Internal citation omitted). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult for a greater possibility exists that a minor’s character deficiencies will be reformed. Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” (Internal citation omitted). (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risk or illegal activities develop entrenched patterns of problem behavior that persist into adulthood”).¹²

To borrow a phrase from Justice Kennedy, “from a moral standpoint it would be misguided” to limit the consideration of these “differences” between older adolescent offenders and adult offenders to capital cases.

COMMON EXPERIENCE SUPPORTS ROPER

The Supreme Court’s recognition in *Thompson* and *Roper* that juveniles are not merely small adults has long been recognized through the existence of the various juvenile justice systems found among the states. They were founded in the belief that society’s duty to children is not confined by the concept of justice alone; instead, it is to ascertain what can best be done in the interest of the child and interest of the state to save the child from a “downward career.”¹³ Implicit in the concept that the juvenile is “to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive[.]”¹⁴ is the recognition that the irresponsible behavior of adolescents does not make them “adults.”

As a society we do not require scientific research to inform us of the limitations of adolescence since, in recognition of these limitations, we already “restrict their privileges to vote, serve on a jury, consume alcohol, marry, enter into contracts, and even watch movies with mature content.”¹⁵ An advertisement sponsored by the Allstate Insurance Company, in support of graduated driver licensing laws, effectively makes the point. It begins

with the tag line: “Why do most 16-year-olds drive like they’re *missing a part of their brain*? Because they are.”¹⁶ The advertisement continues:

Even bright, mature teenagers sometimes do things that are “stupid.”

But when that happens, it’s not really their fault. It’s because their brain hasn’t finished developing. The underdeveloped area is called the dorsal lateral prefrontal cortex. It plays a critical role in decision making, problem solving and understanding future consequences of today’s actions. Problem is, it won’t be fully mature until they’re in their 20s.¹⁷

The scientific research findings have added the weight of science in support of what society has always known, and what the Supreme Court in *Thompson* and *Roper* has recognized: adolescents are not adults even if they commit adult crimes and are charged in adult court.

APPLYING ROPER IN DEFENSE OF YOUR CLIENTS

The Supreme Court’s recognition that juveniles are not small adults creates significant opportunities for improving the representation of adolescents. Defense counsel may mount adolescent based challenges to the validity on “consent” searches and “voluntary” *Miranda* rights waivers; craft jury instructions that speak in terms of a reasonable adolescent standard, in contrast to a reasonable person standard; and craft sentencing memoranda arguing for a mitigated sentence based upon proportional culpability arising from the scientifically demonstrated diminished culpability of the juvenile offender when compared to an adult offender.¹⁸ In probation violation matters involving technical violations, the fact that the personality traits of adolescents “are still transitory and they tend to act before thinking” can be used to argue for reinstatement to probation because the violation is a result “of normal adolescent behavior.”¹⁹

In Arizona, defense counsel may present an “adolescent brain” based argument, supported by neurological, psychiatric, and psychological research to support a request that the juvenile’s case be transferred out of the adult court and to the juvenile court.²⁰ Defense counsel is able to present a scientifically based argument, on behalf of a youthful sex offender in support of modifying or terminating probation, suspending or terminating sex offender registration, or deferring or terminating community notification requirements, based upon the scientific evidence that the juvenile offender is likely to be rehabilitated upon reaching adulthood.²¹

The fact that the Arizona legislature has provided for “reverse” transfer of juveniles is legislative recognition that crimes committed as adolescents are not necessarily best addressed in the adult criminal courts. The fact that the Arizona legislature has provided for modification, including termination, of youthful sex offender probation requirements for adolescent offenders in adult court is legislative recognition that adolescent sex offenders may outgrow their irresponsible sexual behavior.

RESOURCES

The scientific research findings regarding the adolescent brain are as complex as they are fascinating. To incorporate this scientific information into defense counsel’s practice requires “reading about neuroscience and learning about the fundamentals of the human brain.”²² As good a starting point as any is to review the *amicus* science briefs submitted in *Roper* by the American Medical Association, *et. al.*²³ and the American Psychological Association, *et. al.*²⁴ These briefs are illustrative of a successful marriage of science and the law. Time Magazine’s *The Secrets of the Teen Brain* contains a graphic of brain imaging at ages 5, 8, 12, 16 and 20 depicting the maturation of the frontal lobe (self-control, judgment, emotional regulation).²⁵ As part of this site, there is also a graphic describing the functions of each part of the adolescent brain.

Other sources of information pertaining to developments in juvenile law and adolescent brain development are the *National Juvenile Defender Center*,²⁶ the *Juvenile Defense Network*²⁷ and the *National Institute of Mental Health*.²⁸ The Juvenile Division of the Maricopa County Public Defender Office is another valuable, and readily available, resource. The attorneys in the division are light-years ahead of their colleagues in the adult trial division when it comes to understanding the juvenile defendant and the science of the adolescent brain. They possess a wealth of information regarding consulting and testifying experts, treatment options and programs available for the juvenile defendant.

CONCLUSION

Roper v. Simmons, the Arizona Legislature, and the medical, psychiatric and psychological research community have provided defense counsel with the legal and scientific tools necessary to insure that an adolescent's culpability is a proportional culpability consistent with the limitations of adolescence. While adolescents' "deficiencies do not warrant an exemption from criminal sanctions . . . they do diminish their personal culpability."

(Endnotes)

1. 536 U.S. 304, 122 S.Ct. 2242 (2002).
2. *Id.*, at 318, 122 S.Ct. at 2250.
3. 543 U.S. 551, 571, 125 S.Ct. 1183, 1196 (2005).
4. 487 U.S. 815, 108 S.Ct. 2687 (1988).
5. McNaughton, Lisa. "Extending Roper's Reasoning to Minnesota's Juvenile System." 32 Wm. Mitchell L. Rev. 1063, 1067-1068 (2006).
6. *Supra* at 569, 125 S.Ct. at 1195.
7. *Id.* at 569, 125 S.Ct. at 1195.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*, at 570, 125 S.Ct. at 1195.
12. *Id.*, 125 S.Ct. at 1195-96.
13. *In re Gault*, 387 U.S. 1, 15, 87 S.Ct. 1428, 1437 (1967).
14. *Id.*, at 16, 87 S.Ct. at 1437.
15. American Bar Association, Juvenile Justice Center. "Adolescence, Brain Development and Legal Culpability." (January 2004)(available at <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>).
16. Available at <http://www.allstate.com/content/refresh-attachments/Brain-Ad.pdf>.
17. *Id.*
18. Wolf, Wendy. "Roper v. Simmons and Ways To Incorporate It Into Your Practice." *Juvenile Defense Network/YAP/CPCS*. 4 (Available at <http://www.youthadvocacyproject.org/pdfs/Roper%20fact%20sheet.pdf>).
19. *Id.*
20. See A.R.S. § 13-504.
21. See A.R.S. § 13-923.
22. See, Haider, Aliya. "Roper v. Simmons: The Role of the Science Brief." 3 *Ohio State Journal of Criminal Law* 369, 371 (available at http://moritzlaw.osu.edu/osjcl/Articles/Volume3_2/Symposium/Haider-PDF-04-04-06.pdf).
23. Available at <http://www.abanet.org/crimjust/juvjus/simmons/ama.pdf>.
24. Available at <http://www.abanet.org/crimjust/juvjus/simmons/apa.pdf>.
25. Time, May 10, 2003. Available at <http://www.time.com/covers/1101040510/neurons/2.html>.
26. http://www.njdc.info/about_us.php.
27. <http://www.youthadvocacyproject.org/jdn.htm>.
28. <http://www.nimh.nih.gov>.

*The Office of the Maricopa County
Public Defender
invites you to attend our ...*

HOLIDAY HAPPY HOUR

Date: Friday, December 7, 2007
Time: 5:00pm



AUNT CHILADA'S
at the Pointe Hilton Squaw Peak

7330 N. Dreamy Draw Dr.
Phoenix, Arizona 85020

Happy Hour Food
Live Music Starting at 7:30 PM

The Return of Youthful Sex Offenders to Juvenile Court

By Chris Phillis, Attorney Manager



On May 1, 2007, Governor Napolitano signed Senate Bill 1628 into law, thus allowing the wave of juveniles forced into the criminal system through direct files the possibility of having their cases returned to the juvenile system. The new law, A.R.S. 13-501.01, allows non-violent juvenile sex offenders the hope of escaping the punitive criminal system for the rehabilitative juvenile system. The burden is upon the child to show by clear and convincing evidence that public safety and rehabilitation of the juvenile would best be served by transferring prosecution to juvenile court.

To ensure quality representation of our clients in this challenging and rapidly-developing area, the Maricopa County Public Defender's Office will assign two attorneys to each case - an attorney in the Adult Trial Division who specializes in these cases, and an attorney in the Juvenile Division. All juvenile sex offender files will be color coded blue. Once trial group counsel has received a blue file the manager of the juvenile division should be contacted to assign an attorney in the juvenile division to assist with the preparation and presentation of the transfer hearing. In consultation, the attorneys will determine, taking into consideration the time remaining before the child's eighteenth birthday, if the child is eligible to have the case transferred to the juvenile system.

Request for a transfer hearing may be initiated by the juvenile or upon the court's own motion. In cases where the charges were filed more than twelve months after the alleged act, the court must hold a transfer hearing. This automatic right to a transfer hearing resulted from legislative concern about delay in filing charges until a child is old enough for criminal prosecution.

According to the interim rules, the motion requesting a transfer hearing must be filed within forty days of the date of the arraignment and contain the sexual offenses that are subject to transfer. Time is of the essence: every week that passes makes it more likely that the child will remain in the criminal system. Once the criminal bench receives a request from the juvenile, or upon its own motion, the transfer hearing must be held within forty-five days. During those forty-five days the defense team will amass information regarding the juvenile's history, education, criminal background, prior therapeutic services, psychological or mental disorders, amenability to treatment, plans for the future and family history to assist the judge in determining whether the child's case should be transferred to the juvenile system. The gathering of the information will require the expertise of a mitigation specialist.

The mitigation specialist has the expertise to gather the relevant information from various sources and condense it into a compelling report to the court. The goal of the investigation is to determine whether information can be found to show that the juvenile is a teenager who had a lapse of judgment based on immaturity rather than, as the charges may suggest, a sexual deviant lurking in the bushes waiting to prey on pre-schoolers. The mitigation specialist will illustrate to the court the vast array of residential and out-patient programs available to the client in juvenile court, as well as the lack of programs in the criminal system.

Also, the mitigation specialist will be able to provide the child's history to the psychologist, who has been hired by the defense, to form an opinion regarding amenability to treatment. Without the assistance of a mitigation specialist, the psychologist will very likely receive a very limited history from the all too often confused and frightened juvenile. A psychologist's recommendation that the child is amenable to services in the juvenile system is essential to meeting the clear and convincing standard for transfer of the case to juvenile court.

The reports prepared by the psychologist and the mitigation specialist will allow the court a glimpse into the child's history, setting the stage for the transfer proceedings. At the transfer proceeding the mitigation specialist will be an essential witness for the client. After gathering the child's history, reviewing the psychological evaluation and speaking with family members, the mitigation specialist can educate the court on the particular services available in juvenile court that will rehabilitate the juvenile and protect the community. It is not likely that the county attorney will be able to produce a contrary expert who possesses the equivalent degree of expertise and knowledge about the client.

The testimony from the psychologist and mitigation specialist will lay the foundation upon which the juvenile will structure a case to have his charges transferred to juvenile court, where needed services are available should he be adjudicated. Children fortunate enough to escape the perils of criminal court will have their future vastly altered from lifetime probation scrutiny to rehabilitative services until eighteen, a future worth fighting for.

Writers' Corner

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

Hobson's Choice

This ever-growing cliché has loosened its etymological tether. Tradition has it that Thomas Hobson (1549-1631), a hostler in Cambridge, England, always gave his customers only one choice among his horses: whichever one was closest to the door. Hence, in literary usage, a "Hobson's choice" came to denote no choice at all -- either taking what is offered or taking nothing.

Though purists resist the change, the prevailing sense in American English is not that of having no choice, but of having two bad choices -- e.g.: "Meanwhile, the women -- if we can believe them -- had a Hobson's choice: Either lie and ruin men's careers and lives; or tell it like it was and learn to live with hell in this man's Army." Deborah Mathis, "Race Becomes Issue in Aberdeen Rape Cases," *Fla. Today*, 15 Mar. 1997, at A11.

In a sense, this usage isn't much of a slipshod extension. After all, the choice of either taking what is offered or taking nothing must often be two poor options.

Traditionally -- and still in British English -- the phrase takes no article; that is, you are faced not with "a Hobson's choice" but with "Hobson's choice." In American English, though, the phrase usually takes either "a" or "the."

Amazingly, some writers have confused the obscure Thomas Hobson with his famous contemporary, the philosopher Thomas Hobbes (1588-1679). The resulting malapropism, while increasingly common, is still beautifully grotesque -- e.g.: "If you have to shoot yourself in the foot, should it be the right or the left? Italian Prime Minister Silvio Berlusconi faced that Hobbesian choice [read 'Hobson's choice'] last week." Malcolm Beith, "Decisions," *Newsweek*, 24 Dec. 2001, at 8.



The Importance of Mitigation for Youthful Offenders

By Mike Scanlan, Senior Attorney

I have represented many clients between 18 and 25 years of age who have been considered “youthful offenders.” To my knowledge, there is no clear definition of such a segment of society, but perhaps there should be. It’s important that these individuals, not juveniles, be identified as soon as possible so that proper services can be delivered in time to prevent the destruction of another potentially productive life.

Often, young people will have several active cases proceeding at the same time. Many times I have been assigned to represent someone under 25 who had four to six open cases; apparently unrelated offenses committed on different occasions, and not charged in the same indictment where A.R.S. § 13-702.02 could be applied resulting in a mandatory prison term. They are assigned to the same prosecutor, often from some special or “repeat offender” unit, and defended by the same counsel. This is an opportunity for counsel to break the offense cycle and effect a profound, life-changing improvement for the client. These cases are not unrelated in terms of ultimate cause.

The common salient factors that I have noticed include: origin in a broken or dysfunctional family, poverty, history of behavioral problems, history of psychological disorder(s) such as ADHD, developmental or learning disorders, failure to graduate high school, lack of supervision and stable residence in early life continuing into early adulthood with under or unemployment, early introduction to alcohol, tobacco, marijuana, or prescription medication abuse, early introduction to narcotic or dangerous drugs, and finally, early introduction to sexual activity resulting in unplanned pregnancy. Usually, this results in a young person living for years an unsupervised, often wild, lifestyle involving the daily use of alcohol and drugs and the attending criminal conduct. Criminal conduct is resorted to for the funding of the addiction and the party lifestyle.

Typically, by the time I receive these cases, the damage is done and the inevitable consequences have finally caught up with the individual. The client is in custody on a string of cases after a two year “meth binge” and crime spree where ID theft, forgery, burglary, and vehicle theft were regularly committed and are provable. Whether or not prison is avoidable is the first concern but not the last. Prison may be avoidable if a realistic treatment plan can be presented to the court and the prosecutor as an alternative to incarceration. Regardless, if effective intervention is not applied, this youthful offender will likely quickly return to the criminal justice system shortly after release from custody only to face more charges with numerous allegeable, historical prior convictions. It may then be too late to prevent an unreasonably long period of incarceration and the resulting institutionalization.

The key is to enlist the assistance of a competent and diligent mitigation specialist to assist with a complete investigation of the client’s history, a psychological and/or neurological evaluation, a thorough analysis and a comprehensive disposition proposal that would incorporate the needs of the client while serving the interests of society. Facts stemming from complications with pregnancy and birth, developmental or learning disorders, physical or sexual abuse resulting in undiagnosed and untreated psychological disorders, or physical handicaps are predictably discovered in virtually all of these cases.

Ideally, if these factors are pronounced enough to constitute causes of the client’s antisocial behavior and can be remedied through education, counseling, treatment, therapy and medication, then strong arguments can be made for the mitigation of punitive sanctions in favor of rehabilitation which will have the laudable effect of achieving the highest goals of the criminal justice system including the prevention of further crime by this individual and the creation of another good and productive citizen.

These “youthful offenders” will reenter society eventually, marry, have children, and try to find work. Whether they fail or succeed in the community, will depend on the court’s judgment rendered in the client’s early adulthood. If the work is done, the court will see the cost-effective and risk-minimizing benefits and act accordingly. If this is a life-changing event for the better, the rewards are obvious and plentiful. On the other hand, if the client fails, then important mitigation groundwork has been done at a time when records are still available and witnesses’ recollections are fresh.

Too often these youthful offenders are overlooked for mitigation as a result of plea agreement offers that make probation possible in cases that would result in substantial prison terms. This is a mistake. The background investigation and disposition planning is even more important at this stage of their development than later when they are facing serious or violent charges. If handled properly, chances are, we will not see them again. If only routinely processed through our current “system,” then the probability that they will recidivate is unacceptably high.

If you are handling a “youthful offender” case, first enlist the services of a professional mitigation specialist. They can gather relevant information on the client’s social, medical, and educational history. The mitigation specialists of the Maricopa County Public Defender’s Office have a comprehensive client background information form that can be used as a starting point for learning about your client. They also have lists of local agencies that may be able to help your client with specific problems related to housing, education, and substance abuse treatment. They often work closely with psychologists and psychiatrists to whom your client can be referred for evaluation.

Finally, there are nongovernmental agencies charged with the responsibility of providing treatment, counseling, and other services to the indigent mentally ill. Two examples are TERROS, a non-profit, community-based organization that has provided substance abuse and behavioral health services in Maricopa County since 1969, and Magellan Health Services of Arizona, the company that was just awarded a \$1.4 billion, three-year contract to provide mental–health services for Maricopa County residents under the auspices of the Maricopa County Regional Behavioral Health Authority. Magellan replaced ValueOptions in providing behavioral-health services to low-income and seriously mentally ill county residents.

Medication is available even for those without employer provided insurance though the Arizona Health Care Cost Containment System (AHCCCS) the state level administrator for the Medicaid program. Magellan case managers can supervise and assist clients in navigating the bureaucracies to obtain these benefits and services. TERROS.org and Magellanofaz.com are comprehensive web based resources for leads of those available to provide services to your young offender. There is an alternative to prison for these young people if we can navigate the appropriate path.



December 6 & 7, 2007

Death Penalty 2007

PRESENTED BY

**Federal Public Defender Habeas Unit
Maricopa County Public Defender
Legal Defender and Legal Advocate**

**PHOENIX CONVENTION CENTER
2ND FLOOR—LECTURE HALL
100 N. 3RD. STREET
PHOENIX, AZ**

This seminar is designed to meet the Arizona Supreme Court C.L.E. requirements for criminal defense attorneys engaged in death penalty litigation under Rule 6.8, AZ Revised Criminal Procedures. It will provide valuable information to any lawyer who anticipates involvement in the defense of homicide cases.

Death Penalty 101

Pre-Conference

December 6, 2007

Registration: 8:30-9:00am

Sessions: 9:00-11:30am

Death Penalty Conference

December 6, 2007

Registration: 12:00-1:00pm

Sessions: 1:00-5:00pm

Conference

December 7, 2007

Registration: 8:30-9:00am

Sessions: 9:00-4:30pm

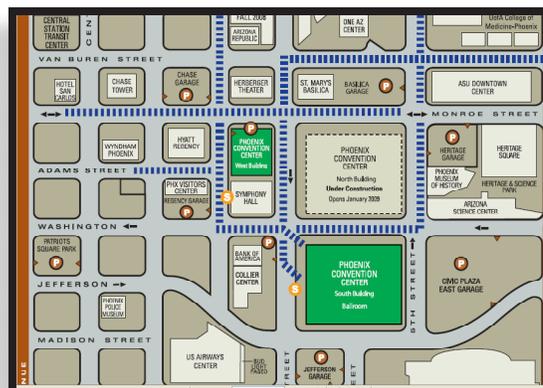
Pay Parking Areas

Chase Garage

2nd St/Monroe St

Regency Garage

Washington/2nd St



REGISTRATION IS LIMITED!

Conference Fees

- Federal/County Public & Legal Defenders: **No Fee**
- Court Appointed/Contract Counsel; City Public Defenders: **\$75**
- Other/Private: **\$150**
- Late Fee (After November 29): **\$15**

Pre-Conference Fees

- Federal/County Public & Legal Defenders: **No Fee**
- Court Appointed/Contract Counsel; City Public Defenders: **\$25**
- Other/Private: **\$50**

Form IV - What is it and What is it Good For?

By Carlos Daniel Carrion, Attorney Manager

BOOKING

When an individual is booked into jail, the arresting officer must submit a two-page release questionnaire commonly known as the Form IV. In Maricopa County as part of the ever increasing need to streamline processes, the arresting officer prepares an Electronic Form IV at the booking facility which will immediately feed the information into a database for distribution to various criminal justice agencies.

The Form IV has a probable cause statement section and a certification section which reads: "I certify that the information presented is true to the best of my knowledge." The arresting officer types his name, badge number, and date of the submission as part of the electronic affidavit.

INITIAL APPEARANCE

The Initial Appearance Commissioner will review a hard copy of the Form IV for setting release conditions and probable cause determination. This procedure was ordered by the then presiding criminal judge of Maricopa County in response to the Supreme Court ruling in *Riverside County v. McLaughlin*, 500 US 44 (1991). In an [August 30, 1991 letter to the IA Court Commissioners and Justices of the Peace](#), the judge wrote of the importance of the Form IV:

In its *Riverside County v. McLaughlin* (5-13-91) decision, the Supreme Court held that an individual arrested and placed in custody following a warrantless arrest is entitled to a judicial determination of probable cause for the arrest within 48 hours.

After consulting with the County Attorney and Public Defender, I have decided to combine this probable determination with our initial appearance. Remember that this determination is only required in cases where an arrest is made without a warrant. Also, keep in mind that this determination pertains to the circumstances of the arrest only, and not to the facts of the case. This determination is more in scope than the probable cause determination at the preliminary hearing. It should be realistic, non-technical, and garnered from the Form 4 as a whole.

What a police officer believes to be the charge and what the County Attorney's Office thinks is the appropriate charge may be miles apart. For example, the police officer might write that the offense was a disorderly conduct whereas the charging attorney may think the offense should be aggravated assault dangerous. A disconnect like that becomes apparent at a subsequent court setting when the client sees the charging document for the first time.

COMPLAINT

Within 48 hours of the initial appearance of the in-custody individual, the County Attorney must file a complaint with the Form IV attached. Otherwise, the case is scratched and the person is released. [Supreme Court No. R-07-0003 \(Adopted Rules\)](#). Prior to the use of the electronic filing, the arresting officer would appear before a magistrate such as the local justice of the peace and swear to the truthfulness of his probable cause statements to the magistrate. The rules and the statute were changed to eliminate this. § 13-4261(A) states:

If a prosecutor charges a criminal offense by complaint, the prosecutor may attach an affidavit of a law enforcement officer or employee that swears on information and belief to the accuracy of the complaint in lieu of making an oath before a magistrate.

The electronic Form IV, the Form IV attached with the initial appearance paperwork, and the Form IV attached with the complaint vary from each other. The electronic Form IV will have a pre-filing number on the case number section. In most cases, it will look like the common cause number identifiers. The essential difference will be that it will have a PF instead of a CR. When PF and CR do not correspond, the attorney must check to see what happened to the other CR number.

The initial appearance Form IV will not have the PF number and will be marked DRAFT instead of FINAL. Once in awhile, the facts are so lacking in the arresting officer's probable cause statement that the initial appearance commissioner will release the individual or request additional information. If there is additional information, it will be handwritten somewhere on the form and usually below the probable cause statement section. It may have the badge number of the officer who wrote the additional information.

Finally, the Form IV attached with the complaint should have two stamped sections: (1) AO 2003-046 oath avowal and (2) judicial officer review of probable cause. The first one indicates that officer was sworn by a clerk of the court pursuant to the [Maricopa County Superior Court Administrative Order 2003-046](#), *In the Matter of Direct Complaint Action as a Ministerial Act by the Clerk of the Court*. The second section provides five boxes for the judicial officer to check off: (1) complaint review, (2) witness sworn, (3) reviewed Form IV, (4) other sources, and (5) PC determined. Often the checklist is left incomplete.

WHY IS IT IMPORTANT?

Rule 3.1 of the Arizona Rules of Criminal Procedure clearly states: "Upon presentment of a complaint signed by a prosecutor, the magistrate shall issue a summons, or, after a finding of probable cause, issue a warrant." The magistrate has the responsibility to review the attached Form IV for probable cause determination of the alleged offenses in the complaint. If the evidence is lacking, the magistrate should dismiss the complaint and order the immediate release of the in-custody individual.

The Form IV serves many functions. It documents the initial impression of the arresting officer and can provide a good synopsis of key issues early on in a case. In addition, it impacts release issues. On an emergency basis as of July 3, 2007, the Supreme Court of Arizona included instructions for the arresting officer to follow when the police officer believes that the person is not eligible for bond pursuant to [Rule 4.2\(a\)](#), which now incorporates Proposition 100 allegations. The Form IV that accompanies the new rule states in part: "Certain felonies may be non-bondable and require facts which establish proof evident or presumption great for the crime(s) charged". The new form was written so the judicial officer can focus on whether the officer has presented sufficient evidence to meet the greater standard. For the moment, however, the electronic Form IV does not include that language. The attorney will need to look at the initial appearance paperwork for an addendum of statement of facts. If there is no addendum or the facts are insufficient, the attorney may have a basis for challenging the finding of non-bondability.

[CLICK HERE TO LEARN HOW TO VIEW THE FORM IV IN ICIS](#)

Jury and Bench Trial Results

September 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
8/28 - 8/31	Friddle <i>Ralston</i>	Lynch	Reed Godbehere	CR06-174851-001DT Resisting Arrest, F6	Guilty	Jury
9/4 - 9/6	Andrade Davis	Gaines	Voyles	CR07-103869-001 DT Disorderly Conduct, F6D	Guilty - Non Dangerous	Jury
9/4 - 9/7	Guyton Smith <i>Armstrong</i>	Grant	Corasiniti	CR07-105036-001DT Theft, F3 Trafficking in Stolen Property, F3	Not Guilty	Jury
9/13 - 9/18	Farney Brazinskas <i>Armstrong</i>	Foster	Whitney	CR06-150125-001DT Child Abuse, F4 (DV)	Guilty	Jury
9/19	Williams Sain	Swann	Felcyn	CR07-110689-001DT Agg. Assault, M1	Guilty	Bench
9/19 - 9/26	Farney Carter	Klein	Mendoza	CR04-023870-001DT Shoplifting, F6 Agg. Assault on Police Officer, F2 Unlawful Flight, F5	Not Guilty of Agg. Assault; Guilty of Shoplifting and Unlawful Flight - Tried in Absentia	Jury
9/20 - 9/25	Taylor	Harrison	Felcyn	CR06-008514-001DT POND, F4	Guilty	Jury
9/25 - 9/27	Fischer Sain	Arellano	Rubalcaba	CR07-120665-001DT Aggravated Assault, F3D (DV)	Guilty	Jury
Group 2						
9/5 - 9/7	Teel Taradash Thompson	Ditsworth	Sammons	CR07-119845-001DT Disorderly Conduct, F6D False Reporting to Law Enf. Agency M1	Guilty on lesser-included misdemeanor. Guilty of False Reporting M1	Jury
9/5 - 9/11	Roskosz	Trujillo	Church	CR07-122538-001DT Burglary 1, F2D 2 cts. Attempted Armed Robbery, F3D POND, F4	Hung Jury on Burglary and Att. Armed Robbery Guilty of POND	Jury
9/13-9/14	Teel	Hall	Halstenrud	CR07-129589-001DT PODD, F4	Not Guilty	Jury
9/5 - 9/13	Salter Evans Thompson	Granville	Baker	CR06-165013-001DT Burglary 2 F3	Guilty	Jury

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Group 3						
9/6 - 9/7	Mata Nair Curtis	Foster	Lee	CR07-115573-001DT Resisting Arrest, F6	Guilty	Jury
9/25 - 9/26	Clemency Burgess Browne	Heilman	Low	CR06-011428-001DT 2 cts. Child Abuse, F4	Ct. 1 Not Guilty Ct. 2 Guilty	Bench
9/25 - 9/27	Harmon Godinez Kunz	Steinle	Harris	CR07-103448-002 DT PODD, F4	Hung	Jury
Group 4						
8/14 - 8/29	Nurmi	Contes	Baker	CR05-110548-001SE Violent Sexual Assault, F2D Kidnap, F2 Agg. Assault, F3D Fail Register as Sex Of- fender, F4	Violent Sexual Assault - Not guilty but Guilty of Sexual Assault; Kidnap - Guilty; Agg. Assault-Not Guilty; Fail Register - Guilty	Jury
8/27 - 9/4	Peterson	Arellano	Kerchenko	CR07-104146-001SE Agg. Assault, F3D Disorderly Conduct, F6D Disorderly Conduct, F6 2 cts. Assault/Intent, M1 Assault-touched to in- jure, M3	Agg. Assault-Not Guilty; Disorderly Conduct, F6D-Not Guilty; Disorderly Conduct, F6-Guilty; Assault/Intent-Guilty; Assault/Intent-Not Guilty; Assault-Touch Injure- Dismissed w/preju- dice at trial.	Jury
8/29 - 9/5	Barnes Petroff	Udall	Schneider	CR06-174099-001SE 2 cts. Agg. Assault, F3D	Not Guilty	Jury
9/4 - 9/6	Corbitt	Sanders	Giordano	CR06-163506-001SE 3 cts. Sexual Abuse, F5 Threat/Intimidating, M1 Harassment, M1	Sexual Abuse, Not Guilty; Threat/Intim.-Not Guilty; Harassment - Guilty	Jury
9/5 - 9/13	Fluharty	Arellano	Lucca	CR06-130484-001SE PODD, F2 POM, F6 Misconduct Inv. Weapon, F4	PODD-Guilty POM-Guilty Misconduct Inv. Weapon-Not Guilty	Jury

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9/6 - 9/7	Ditsworth Salvato <i>Baker</i>	Burke	Kelly	CR06-170009-001SE Theft, F3	Not Guilty	Jury
9/13 - 9/18	Houck	Contes	Rodriguez	CR07-030315-001SE PODD, F4 POM, F6 PODP, F6	Mistrial	Jury
9/18 - 9/21	Dehner	Sanders	Kerchenko	CR06-167856-001SE Child/Adult Vulnerable Physical Abuse, F4	Mistrial	Jury
9/18 - 9/21	Gaziano Quesada Salvato <i>Baker</i>	Abrams	Baker	CR06-163793-001SE Sexual Assault, F2 Sexual Abuse, F4	Guilty	Jury
9/20 - 9/25	Houck Beatty	Udall	Blum	CR07-125202-001SE Burglary 3rd Degree, F4	Not Guilty	Jury
9/26 - 9/27	Braaksma Arvanitas	Contes	Harbulot	CR06-032322-001SE Burglary 2nd Degree, F3	Not Guilty	Jury
Vehicular						
9/17 - 9/19	Sloan	Holding	McGregor	CR06-132991-001DT 2 cts. Agg. DUI, F4	Guilty	Jury
9/25 - 9/28	Timmer	McMurdie	Murphy	CR06-011370-001DT Murder 2, F1 Leaving Scene of Fatal Accident, F3	Guilty	Jury
Capital						
6/19 - 8/28	Matthew	Gottsfield	Grimsman/ Stevens	CR04-037319-001DT Murder 1, F1 Child Abuse, F2	Guilty	Jury

Jury and Bench Trial Results

September 2007

Legal Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
8/9 - 9/27	Jones Napper	Duncan	Lynch Jorgensen	CR98-004885DT Murder 1, F1 Re-sentencing	Mistrial	Jury
9/11	Bushor	Keppel	AG	JD506424 Severance Trial	Severance Granted	Bench
9/11	Steltenpohl	Brain	AG	JD14341 Guardianship Trial	Guardianship Granted	Bench
9/12	Kolbe	Rees	AG	JD506764 Dependency Trial	Dependency Found	Bench
9/12 - 9/13	S. Anderson	Cunanan	Harames	CR07-105038-002DT Shoplifting w/Device to Facilitate, F4	Guilty	Jury
9/14	Bushor	Keppel	AG	JD506310 Severance Trial	Severance Granted	Bench
9/24	Kolbe	Araneta	AG	JD506220 Severance Trial	Severance Granted	Bench
9/26 - 9/28	S. Anderson	Newell	Reed	CR07-006282-001DT PODD, F4; PODP, F6	Guilty	Jury

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
6/15 & 9/7	Owsley Marrero	Dairman	AG Thiss	JD-14450; Severance	Severance Granted	Bench
9/4 - 9/6	Romberg Mullavey	Steinle	Okano	CR2007-104656-001-DT Ct 1 Agg. Assault-F3 Dang. Ct 2 False Rep. To Law Enfor-M1 Ct 3 Assault-M1	Not Guilty on Ct. 1 Guilty on Cts. 2 & 3	Jury
9/20 & 9/25	Todd	Ober- bilig	Villareal	JD-506056 - Severance	Severance Granted	Bench

SAVE THE DATES...

Objections and Sentencing Advocacy

Presented by Ira Mickenberg

January 25, 2008
Holiday Inn Hotel & Suites - Mesa
Conference Room
1600 South Country Club Drive
Mesa, AZ 85210

"CRASH COURSE 101"

January 24, 2008
Wells Fargo Conference Center
100 W. Washington Street
Phoenix, AZ 85003



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for The Defense

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