



APAAC's website has new features!

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Our website now has a Research Section and a Forums Section.

The Maricopa County Attorney's Office has graciously allowed us to place their brief bank on our website. It is located in the Research Section. In addition, a Forum Section provides the opportunity to ask your fellow-prosecutors questions on a variety of topics.

Prosecutors will need to create a username and password to access these areas of our website. Please feel free to contact us with any suggestions or questions that you may have regarding the changes to our website. Also if you have ideas for different Forum topics, please don't hesitate to let us know!

HOT TOPIC!!!

APAAC was recently notified that some prosecutors' personal contact information appears on spokeo.com, which is a white pages-like website that searches the web for personal information. Upon searching other similar websites like whitepages.com, it appears likely that prosecutors' personal contact information is available to the public. APAAC has not yet been able to identify an avenue to remove such information from public view. Please contact APAAC if you have information on ways to resolve this issue.

2010 LEGISLATIVE SUMMARY

(Effective date is July 29, 2010 unless otherwise noted)

Provided by Rebecca Baker, MCAO

Laws 2010, Chapter 24 (HB 2020): restoration order; juveniles commitment

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2020h.pdf>

A.R.S. § 8-291.08 is amended to provide that the court may appoint a guardian ad litem for a juvenile who is ordered to participate in an inpatient or outpatient program pursuant to this section.

Laws 2010, Chapter 54 (SB 1093): prisoners; transition program

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1093s.pdf>

Permits all inmates, except those who have been convicted of a Title 13, chapter 14 or 17 and Title 28, chapter 4, to be eligible to participate in the Transition Program, so long as they meet the other necessary qualifications. This program was previously only available to inmates convicted of drug offenses. Requires 5% of inmate's gross wages to be deposited into the Transition Fund.

Laws 2010, Chapter 56 (SB 1122): prison contraband; wireless communication device

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1122s.pdf>

Adds wireless communication devices and multimedia storage devices to the list of contraband items not permitted in a correctional facility or juvenile secure care facility; punishable as a class 5 felony.

Laws 2010, Chapter 59 (SB 1108): concealed weapons; permit; justification

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1108s.pdf>

Changes the classification of misconduct involving weapons by removing as a violation subject to a class 1 misdemeanor the carrying or transporting of a concealed deadly weapon without a CCW permit unless:

- a) It occurs during the commission or attempted commission of a serious offense, violent offense or any felony offense that is a class 4 or above, in which case it is a class 6 felony.
- b) The person, when contacted by a law enforcement officer, fails to answer an inquiry by the law enforcement officer as to whether the person is carrying a concealed deadly weapon, in which case it is a class 3 misdemeanor.
- c) The person is under 21 years of age, with specified exceptions, in which case it is a class 3 misdemeanor.

Allows a CCW permit holder to enter a public establishment or attend any public event carrying a deadly weapon, except as prohibited by law, unless the establishment is a secured facility.

Exempts from misconduct involving weapons violations related to the possession of a deadly weapon on school grounds by a person who possesses a certificate of firearms proficiency and who is authorized under the Law Enforcement Officers Safety Act to carry a concealed firearm.

Prohibits a law enforcement officer from confiscating or forfeiting a weapon that is lawfully possessed by a permittee whose permit is suspended, except temporarily during an investigatory stop.

Expands the ways in which CCW permit applicants can receive firearms safety training that demonstrates competency with firearms.

Requires a deadly weapon, dangerous instrument or explosive forfeited under court order be sold to any business authorized to receive and dispose of the article. Unless otherwise prohibited by federal, state or local law, the authorized business must then sell the article to the public.

Laws 2010, Chapter 76 (SB 1059): human trafficking

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1059s.pdf>

Modifies the statutory definitions of sex trafficking and trafficking of persons for forced labor or services by removing the requirement that a person obtain another person specifically for transport.

Laws 2010, Chapter 97 (HB 2062): aggravated assault; peace officer

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2062h.pdf>

A.R.S. § 13-1204(A)(8) is amended to increase the penalty for assaulting a police officer to a class 5 felony, if the assault does not result in injury to the officer. If the assault results in an injury to the officer, it is now a class 4 felony.

Laws 2010, Chapter 103 (HB 2493): sexually violent person; commitment

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2493h.pdf>

In cases where an inmate has a detainer pending for an outstanding sentence for imprisonment in another jurisdiction, the Director of the Department of Corrections may enter into a written agreement with the prosecuting authority by which a defendant was prosecuted, was found incompetent or will be released to have the person retrieved by the other state or federal jurisdiction in lieu of seeking commitment as a sexually violent person.

Laws 2010, Chapter 109 (SB 1204): capital post-conviction public defender

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1204s.pdf>

While the State Capitol Post-conviction Public Defender may not represent a person not assigned to their office, their powers and duties are amended to allow them to provide general training to attorneys outside the office.

Laws 2010, Chapter 111 (SB 1304): abortion; reporting requirements

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1304s.pdf>

SB 1304 requires a hospital or facility that performs abortions and health professionals that treat women with complications due to an abortion to submit a report to the Department of Health Services (DHS) detailing non patient identifiable information so that DHS can prepare an annual statistical report based on the data gathered in the reports.

Provides that an employee, agent or contractor of the department who willfully discloses any information obtained from reports filed pursuant to this article, other than disclosure as otherwise authorized by law, is guilty of a class 3 misdemeanor.

Specifies a person who willfully delivers or discloses to DHS any report, record or information known by that person to be false commits a class 1 misdemeanor.

Laws 2010, Chapter 112 (SB 1071): involuntary commitment; privileged communications

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1071s.pdf>

Amends the antimarital privilege to allow a husband or wife to testify about physical acts and behaviors made by one to the other in a civil commitment hearing without the consent of the other. In a civil commitment hearing, a husband or wife, during the marriage or afterward, without the consent of the other, may be examined as to any communications, physical acts or behaviors made by one to the other during the marriage that relate to the matters at issue in the hearing. END_STATUTE

Laws 2010, Chapter 113 (SB 1070): immigration; law enforcement; safe neighborhoods

As amended by Laws 2010, Chapter 211 (HB 2162): immigration; border security

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf>

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2162c.pdf>

Establishes A.R.S. § 11-1051 which prohibits any governmental entity from adopting a policy that limits or restricts the enforcement of federal immigration law.

A reasonable attempt to determine the immigration status of a person shall be made by law enforcement (except when it may hinder or obstruct an investigation) only during a lawful stop, detention or arrest during the enforcement of any other law or ordinance.

An alien's immigration status may be determined by a law enforcement officer authorized by the federal

government to ascertain an alien's status or by ICE/Border Patrol pursuant to 8 USC 1373(c).

A law enforcement official or agency may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the US or Arizona Constitution.

Allows any person to bring a civil action against any agency that violates this provision and provides a penalty of not less than \$500 or more than \$5000 for every day that the agency had the policy in place after the filing of the action.

Establishes the crime of willful failure to complete or carry an alien registration card if a person is in violation of 8 U.S.C. Section 1304(e) or 1306(a).

8 U.S.C. Section 1304(e) or 1306(a) requires aliens to complete an application for and carry at all times a certificate or card of alien registration.

A law enforcement official or agency may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the US or Arizona Constitution.

The offense is a class 1 misdemeanor.

The Court shall not sentence a person to more than 20 days in jail for a first violation or more than 30 days in jail for second or subsequent violation of this section.

Establishes the new offenses of Unlawful Stopping to Hire and Pickup Passengers for Work (13-2928) and Unlawful Transporting of Unlawful Aliens (13-2929).

It is a class one misdemeanor to impede traffic on a street or highway while attempting to pick up passengers for hire.

It is a class one misdemeanor to do any of the following while in violation of a criminal offense to:

- 1) transport or move a person in a motor vehicle, in furtherance of the illegal presence in the US, if you know or have reason to know that the person is an illegal alien;
- 2) conceal, harbor or shield an illegal alien from detection in any building or means of transportation; or
- 3) encourage or induce an alien to come to this state in violation of the law.

A law enforcement official or agency may not consider race, color or national origin in the enforcement of these sections except to the extent permitted by the US or Arizona Constitution.

An alien's immigration status may be determined by a law enforcement officer authorized by the federal government to ascertain an alien's status or by ICE/Border Patrol pursuant to 8 USC 1373(c).

Includes entrapment as an affirmative defense to the Legal Arizona Workers Act. It is not entrapment for law enforcement to merely provide an employer with an opportunity to commit a violation of ARS 23-212 or to conceal their identity or use a ruse. However, the employer may claim and has the burden of proving by C&C evidence that they were entrapped.

Requires employers to maintain E-Verify records for the duration of the employee's employment or at least 3 years, whichever is longer.

Requires law enforcement to impound any motor vehicle if the person driving is transporting, moving, concealing, harboring or shielding an illegal alien in the vehicle.

Additional Provisions of HB 2162 include:

Amends the statutes which prohibit providing to federal and state benefits to individuals not lawfully present in the US, to allow a court to award court costs and reasonable attorney fees to anyone that prevails in a civil action brought pursuant to those sections.

Establishes, in session law, the Joint Border Security Advisory Committee which shall analyze border crossing and crime statistics and make recommendations to the Legislature and Governor regarding increased border security. The committee may go in executive session to take testimony or evidence in a confidential manner if the information is of a sensitive nature.

States the Attorney General shall act at the direction of the Governor and appear on behalf of the State to defend any challenges to SB 1070 or amendments to the law.

Laws 2010, Chapter 155 (HB 2534): traffic complaints; social security numbers

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2534h.pdf>

A.R.S. § 28-1557 is amended to prohibit traffic complaints from containing a person's social security number. The Law Enforcement and Court copy of the citation may contain an individual's social security number.END_STATUTE

Laws 2010, Chapter 180 (HB 2463): auto glass repair; fraudulent practices

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2463s.pdf>

Establishes a series of unlawful practices for persons providing auto glass services and makes it a class 6 felony for a person to violate these provisions with the intent to injure, defraud or deceive an insurer. Specifically, it is unlawful for persons selling or repairing auto glass to knowingly:

- Submit a false claim to an insurer for auto glass repair, replacement or related services;
 - Advise a policyholder to falsify the date of damage that results in a change of insurance coverage;
 - Sign falsely a work order, insurance assignment form or other related form in order to submit a claim.
 - Misrepresent the price of the proposed repairs or replacement being billed to the insurer or that the insurer has approved the repair(s) or replacement unless the facility has verified coverage or obtained authorization confirmed by a written and recorded communication.
 - Represent to a person that the work will be paid for by the insurer at no cost to the policyholder, unless the insurance coverage has been verified by a person who is employed by or is a producer contracted by the insurer or is a third-party administrator contracted with the insurer.
 - Add to the damage done in order to increase the repairs or replacement or encourage someone else to add to the damage prior to repair.
- Perform work clearly and substantially beyond the level necessary to put the vehicle back into a safe pre-damaged condition.

Laws 2010, Chapter 183 (SB 1009): juvenile prosecutions; adult court; age

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1009s.pdf>

A.R.S. § 8-501 is amended to require the county attorney to consider the age of the juvenile at the time the offense was committed when determining if the juvenile shall or may be charged in adult court.

Laws 2010, Chapter 184 (SB 1025): criminal justice commission; rules

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1025s.pdf>

A.R.S. § 41-2405 is amended to allow ACJC to adopt rules for the purpose of allocating CJEF fund monies in a manner that will promote effective and efficient use of the monies.

Laws 2010, Chapter 185 (SB 1030): driver license violations; suspensions

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1030s.pdf>

Establishes a restricted driver's license for individuals with a suspended license that allows the individual to drive to specific locations (such as work or a doctor's appointment).

Eliminates some of the mandatory penalties for driving with suspended, cancelled or revoked license.

This bill contains a delayed effective date of after December 31, 2010.

Laws 2010, Chapter 194 (HB 2435): repetitive offenders; probation; marijuana offenses

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2435h.pdf>

This was a general criminal code "clean up" bill which made the following changes:

Clarifies that the 2009 increase of the monthly probation fee (from \$50 to \$65) is retroactive to July 13, 2009 and is not subject to a surcharge.

The Arizona criminal sentencing code was reorganized in Laws 2008, Chapter 301. It was subsequently discovered that in the process of combining the statutes relating to historical prior convictions and multiple offenses not committed on the same occasion, a substantive change was made to A.R.S. § 13-703. That change only allowed out of state priors, which were utilized as a multiple offenses not committed on the same occasion, to be used if the offense would constitute a felony offense in Arizona. This provision clarifies that requirement only applies to those out of state convictions being used as historical prior convictions.

Clarifies that A.R.S. § 13-902 relating to GPS monitoring of offenders convicted of dangerous crimes against children applies to those convicted on or after November 1, 2006.
Amends 13-3405 to provide that the production of more than four pounds of marijuana is a class 3 felony.

Laws 2010, Chapter 195 (HB 2470): public defender; duties; reimbursement

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2470h.pdf>

Modifies the duties of the Public Defender to allow the court to appoint a Public Defender as counsel to an indigent person in guardianship, conservatorship and involuntary quarantine proceedings

Laws 2010, Chapter 203 (SB 1144): drug offenses

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1144h.pdf>

Amends A.R.S. § 13-3401 to include Trifluoromethylphenylpiperazine (TFMPP), Benzylpiperazine (BZP) and Cathinone in the definition of Dangerous Drugs.

Make numerous changes to the definition of vapor releasing substances in A.R.S. §§ 13-3401 and 13-3403.

Laws 2010, Chapter 226 (HB 2236): theft by extortion; tax liens

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2236s.pdf>

A person commits the class 4 felony offense of Theft by Extortion if they take or withhold action regarding an alleged claim of easement or other right of access to an adjoining property if both of the following occur:

The claimant's property interest is the result of a tax lien purchase or foreclosure pursuant to title 42, chapter 18.

The fair market value of the claimant's property is equal to or less than the amount paid by the claimant for the purchase of the tax lien or foreclosure, including taxes paid after the lien purchase and any costs and attorney fees paid in connection with the lien foreclosure.

Laws 2010, Chapter 233 (SB 1055): victim's rights; disclosure of information

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1055s.pdf>

A.R.S. § 13-4430 is amended to allow a victim advocate, with the written or verbal permission of the victim, to disclose information provided by the victim to the Court in furtherance of any Victim's Right.

Laws 2010, Chapter 234 (SB 1056): sentencing; guilty except insane

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1056s.pdf>

Amends A.R.S. § 13-3821 to require a defendant adjudicated guilty except insane, or not guilty by reason of insanity in another jurisdiction, of specific offenses to register as a sex offender.

Amends A.R.S. § 13-3994 to provide that defendants found guilty except insane and sentenced pursuant to 13-710 and 13-751(A) who are determined to no longer need treatment but are dangerous or have a propensity to reoffend shall be transferred to DOC for the remainder of their sentence.

Laws 2010, Chapter 241 (SB 1135): aggravated assault; code enforcement officers

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1135h.pdf>

Amends A.R.S. § 13-1204 to provide that assaulting a code enforcement officer or a state or municipal park ranger is a class 6 felony.

Laws 2010, Chapter 255 (HB 2238): sexual offenses; probation; sentencing

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2238c.pdf>

Establishes a special sentencing provision for persons convicted of a third or subsequent violations of indecent exposure or public sexual indecency involving a minor under the age of 15.

Allows a defendant who is sentenced to lifetime probation and who has served one year in jail as a term of probation, to serve additional jail time as a result of a probation violation. The actual period of time spent in jail as a result of probation violations may not exceed one year. The total amount of time spent in jail as a term of probation (both initially and as a result of probation violations) may not exceed the maximum period of imprisonment allowed by law.

Makes numerous changes to the child prostitution statute relating to penalties for persons engaging in prostitution with a minor; including reducing the amount of jail time required for those who engage in

prostitution with a minor who is 15, 16 or 17 years of age and eliminating the affirmative defense that a person could not have reasonably known the minor was 15, 16 or 17 years of age.

Amends the sex offender registration statute to no longer require registration for offenders who in engage in prostitution with a minor 15, 16 or 17 years of age, unless the offender knew the age of the minor.

Adds Indecent Exposure to a person under 15 years of age and Public Sexual Indecency to a Minor to the definition of sexually violent offenses in A.R.S. § 36-3701.

Laws 2010, Chapter 259 (HB 2471): appointed mental health experts; requirements

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2471s.pdf>

Eliminates the requirement that the court appoint a licensed psychiatrist as one of the mental health experts to evaluate the defendant for the purpose of making a competency determination. The court may on its own motion or the motion of one of the parties appoint a psychiatrist to evaluate the defendant.

Laws 2010, Chapter 276 (SB 1266): sexting; domestic violence; protections orders

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1266h.pdf>

Establishes the offense of Unlawful Use of a Communication Device by a Minor.

- It is a petty offense for a juvenile to transmit or display a visual depiction of a minor that depicts explicit sexual material to one other minor.
- It is a class 3 misdemeanor for a juvenile to transmit or display a visual depiction of a minor that depicts explicit sexual material to more than one other minor.
- It is a petty offense for a juvenile to intentionally or knowingly possess a visual depiction of a minor that depicts explicit sexual material.

It is a class 2 misdemeanor for a juvenile to commit a second or subsequent violation of any of these provisions; including a violation which occurs after completing a diversion program.

Establishes the class 4 felony domestic violence offense of aggravated assault by intentionally impeding the breathing or circulation of blood of another person while assaulting the person.

Amends A.R.S. § 13-3601 by adding additional criminal offenses to the definition of “domestic violence” and eliminating the requirement that a defendant receive written notice that subsequent violations of the domestic violence statute will result in enhanced sentences.

Allows a court issuing an order of protection to grant the petitioner the exclusive care, custody or control of an animal that is owned, possessed, leased, kept or held by the petitioner, the respondent or a minor child residing in the residence or household of the petitioner or the respondent, order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, committing an act of cruelty or neglect in violation of section 13-2910 or otherwise disposing of the animal.

Laws 2010, Chapter 302 (SB 1189): admissibility of opinion testimony

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1189h.pdf>

Applies the *Daubert* standard for the admissibility of expert testimony to civil and criminal actions. Accordingly, only a qualified witness may offer expert opinion testimony regarding scientific, technical or other specialized knowledge.

The expert’s testimony is admissible if the court determines that *all of the following apply*:

1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.
2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.
3. The opinion is based on sufficient facts and data.
4. The opinion is the product of reliable principles and methods.
5. The witness reliably applies the principles and methods to the facts of the case.

The statute enumerates additional factors the court shall consider, *if applicable*, in determining whether the expert testimony is admissible:

1. Whether the expert opinion and its basis have been or can be tested.
2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.
3. The known or potential rate of error of the expert opinion and its basis.
4. The degree to which the expert opinion and its basis are generally accepted in the scientific community. END_STATUTE

Laws 2010, Chapter 307 (SB 1309) parents; rights

<http://www.azleg.gov/legtext/49leg/2r/bills/sb1309h.pdf>

Establishes numerous statutory rights of parents relating to decisions about the education, upbringing, moral and religious training and healthcare treatment of their children.

This statute contains a general exception for law enforcement which provides: "This section does not prohibit courts, law enforcement officers or employees of a government agency responsible for child welfare from acting in their official capacity within the scope of their authority."

Some notable exceptions to specific rights which pertain to prosecutors and law enforcement are:

o A parent's right to access and review of all medical records of a child can be limited if the parent is the subject of an investigation of a crime committed against the child and law enforcement requests that the information not be released.

A parent's right to consent in writing before DNA or blood is taken from a child is limited by A.R.S. § 13-610 and any court order.

Laws 2010, Chapter 327 (HB 2629): firearms; self defense; registration

<http://www.azleg.gov/legtext/49leg/2r/bills/hb2629s.pdf>

Amends the justification statute in A.R.S. § 13-405 to include a provision that a person has no duty to retreat before threatening or using deadly physical force pursuant to this section if the person is in a place where the person may legally be and is not engaged in an unlawful act. END_STATUTE

Prohibits a political subdivision of the state from requiring or maintaining a record of the following:

1. Identifying information regarding a person who temporarily stores a weapon at any public establishment or event.
2. Identifying information of a person who sells or transfers firearms, unless in the course of a law enforcement investigation or if the transactions involves a federally licensed firearms dealer.

The description of weapons temporarily stored at any public establishment or event.

The operator of the establishment or the sponsor of the event may require that a person provide a government issued identification or a reasonable copy of a government issued identification for the purpose of establishing ownership of the weapon placed into temporary storage.

Case Summary Highlights

All case Summaries were prepared by Diane Gunnels Rowley, APAAC Staff Attorney

To view the full case summaries please visit our website at: <http://apaac.az.gov>
You will need to register for a username and password. Once APAAC approves your request, you will be able to click on the Research tab and then scroll down to “Case Summaries”.

Graham v. Florida, __ S.Ct. __, 2010 WL1946731 (United States Supreme Court, May 17, 2010)

Juvenile Law; Eighth Amendment; Sentence of Life Imprisonment Without Possibility of Parole

- ◆ The Eighth Amendment’s bar on cruel and unusual punishment prohibits imposing life sentences without possibility of parole on nonhomicide juvenile offenders.
- ◆ The State must give juvenile nonhomicide offenders sentenced to life terms “some meaningful opportunity to obtain release,” although they need not guarantee eventual release.

Jefferson v. Upton, __ U.S. __, 2010 WL 2025209 (United States Supreme Court, May 24, 2010)

Capital Punishment: Mitigating factors: Brain injury; Due Process: Federal Habeas Corpus; Ineffective Assistance of Counsel

- ◆ In federal habeas proceedings, reviewing courts must ordinarily defer to state courts’ factual findings, presuming them to be correct. However, there are exceptions if the state court proceeding failed to develop the facts or was otherwise deficient.

United States v. O’Brien, 2010 WL 2025204, __ S.Ct. __ (United States Supreme Court, May 24, 2010)

Charging: Elements of offense to be charged in indictment and found by jury; Apprendi v. New Jersey; Federal Sentencing: 18 U.S.C. § 934(c), increasing penalties for crimes using weapons

- ◆ Under federal statute prohibiting using or carrying a firearm in a crime of violence or drug trafficking crime, and increasing the sentencing range if the firearm is a machinegun, whether a particular gun was a machinegun is a question of fact for the jury to find beyond a reasonable doubt, not a sentencing factor to be found by the court based on a preponderance of the evidence.

United States v. Stevens, 130 S.Ct. 1577 (United States Supreme Court, April 20, 2010)

First Amendment: Overbreadth; Animal Cruelty

- ◆ Content-based regulations of speech are presumptively invalid, and the Government bears the burden of rebutting that presumption.
- ◆ A federal statute, 18 U.S.C. § 48, criminalizing the commercial creation, sale, or possession of “depictions of animal cruelty,” was substantially overbroad and therefore facially invalid under the First Amendment.
- ◆ Depictions of animal cruelty are not categorically outside the protection of the First Amendment.

State v. Machado, __ Ariz. __, 2010 WL 1713953 (Court of Appeals, Div. 2, April 20, 2010)

Criminal Law; Rules of Evidence: Third-Party Culpability Evidence; Rule 404(b) “Other Acts” Evidence; Hearsay; Third-Party Hearsay Admissions

Summarizer’s note: This summary is unusually long because this case deals with many issues. Please note that this summary does not fully cover every issue addressed in this case.

- ◆ Third-party culpability evidence offered by the defense – that is, evidence suggesting that someone other than the defendant is guilty of a crime – is not subject to the exclusionary provisions of Rule 404(b), Ariz. R. Evid.
- ◆ Third-party culpability evidence is admissible if (1) it is relevant, in that it tends to cast doubt on the defendant’s guilt, and (2) its probative value is not substantially outweighed by the danger of undue prejudice, confusion, or delay.
- ◆ When determining whether to admit or preclude evidence, courts must consider the purposes of the Rules of Evidence, which are designed to ensure relevance and reliability of evidence.

State v. Windsor, 224 Ariz. 103, 227 P.3d 864 (Court of Appeals, Div. 2, March 30, 2010)

Sex Crimes: A.R.S. § 13-3553(A)(1) and (2): Child Pornography: “Duplicating” and “Receiving”

- ◆ Downloading child pornography images to a computer from an Internet source constitutes “duplicating” those images rather than “receiving” them under A.R.S. § 13-3553(A)(1).

State v. Weiss, __ Ariz. __, 2010 WL 2121964 (Court of Appeals, Div. 1, May 27, 2010)

DUI: Sixth Amendment Right to Counsel: “Critical Stage”

- ◆ A defendant’s initial appearance is not a “critical stage” at which a defendant has a Sixth Amendment right to the assistance counsel. A main purpose of the initial appearance is to advise the defendant of that right.
- ◆ Because the sheriff’s office has statutory responsibility for bringing defendants to court, sheriff’s deputies have the power to regulate jail visits, even visits from counsel, and to prohibit counsel from talking with the defendant while deputies are readying the defendant for his initial appearance.

State v. Eazy Bail Bonds, __ Ariz. __, 2010 WL 1636891 (Court of Appeals, Div. 1, April 22, 2010)

Bond Forfeiture; Appearance of company representative

- ◆ A corporation may not use a non-attorney agent to represent the company’s interests in court. A corporation may only appear in court through counsel.

Stoddard v. Donahoe, __ Ariz. __, 228 P.3d 144 (Court of Appeals, Div. 1, April 6, 2010)

Contempt of Court: Civil or Criminal Contempt

- ◆ Whether a contempt is civil or criminal turns on both the nature of the act and the sanction imposed for the contempt.

State v. Ochoa, __ Ariz. __, 228 P.3d 950 (Court of Appeals, Div. 1, April 20, 2010)

Forfeiture: Time Limits; Filing: “Prison Mailbox Rule”

- ◆ After a defendant is personally served with a forfeiture notice, A.R.S. § 13-4311 imposes a maximum 30-

day time limit to file a challenge to that claim. This time limit is substantive and jurisdictional and the court has no discretion to extend it.

- ◆ The “prison mailbox rule” does not apply to imprisoned defendants who are represented by counsel.

State v. Munoz, 234 Ariz. 146, 228 P.3d 138 (Court of Appeals, Div. 1, April 1, 2010)

Juvenile Law: Criminal Law: Aggravated Assault: Age of victim

Statutory Construction: “Rule of Lenity”

- ◆ The phrase “fifteen years of age or under” includes children who have reached their 15th birthday but not their 16th.
- ◆ The “rule of lenity” applies only when a statute remains ambiguous after analysis under the recognized rules of statutory construction.

PROSECUTOR PROFILE

Kelly Neal Deputy Pinal County Attorney

Kelly Neal has been the Bureau Chief of the Pinal County Attorney's Office Drug Prosecution and Auto Theft Unit since January 2008. He also is the legal advisor to the Pinal County Sheriff's Office Special Weapons and Tactics team (S.W.A.T.)

Before he assumed all these titles, however, he was a line prosecutor, working in the drug unit and representing the office at the Florence Justice Court.

The Tucson native came to Pinal County from the Maricopa County Attorney's Office in November 2002. Pinal County presented greater opportunity for professional growth and financial compensation.

"The office here offered more latitude to prosecutors in the management of their cases," Neal said. "It is important to have room to be creative and grow."

Before Neal came to Pinal County, and before he became a prosecutor, he was a student of history, earning a BA degree from the University of Arizona in 1991. He graduated from the University of Wyoming Law School in 1996.

Public service beckoned, and after a short time in private practice he joined the Maricopa County Attorney's Office in 1997.

"I truly like being a minister of justice," Neal said, adding "Prosecutors are the good guys in the criminal justice system. Our responsibility is to protect the victims, the public, even the rights of defendants."

He began as a preliminary hearing attorney, advanced to trial attorney, and worked in charging. He also trained new prosecutors.

"Prosecutors are the only attorneys that get to truly be intellectually consistent every time they are in court," he said. "I get to say exactly what I think every time."

Serving the state also appealed to him because his family has had a long history of serving the state and the country. His father was a captain in the U.S. Army and an Arizona Game Ranger, and his mother is a nurse and was also a captain in the U.S. Army.

When asked "why drug prosecution?" Neal said that illegal drugs fuel most other crimes. Burglaries, ID theft, domestic violence and gang violence often intersect with drug abuse.

A significant case took Neal's unit to Casa Grande about two years ago for "Operation Enough is Enough," which led to the successful prosecution and conviction of about a dozen gang members for drug related offenses.

In a more recent case, Neal and the Drug Unit became involved in “Operation Fertile Ground,” again targeting drug dealing in Casa Grande and Coolidge. This time two dozen individuals are being prosecuted for drug offenses.

Both cases had another common element: the use of the Pinal County SWAT team, which Neal advises. Neal’s expertise in firearms and shooting competitions made him the natural choice for the position.

“I am a native Arizonan. I grew up with guns and hunting,” Neal said. “My father and grandfather taught me self-discipline and mental-physical focus that way.”

Neal is a sponsored professional competitive shooter and has participated in matches throughout the world. He has competed in Norway, England, Denmark and, of course, all over the United States.



APAAC PAGE

“What’s New at APAAC”

Elizabeth Ortiz has her Bachelor’s degree in Economics, Master of Art’s degree in Political Science, and law degree. After clerking with the Arizona Court of Appeals, Elizabeth joined the Maricopa County Attorney’s Office in 1993. While at MCAO, Elizabeth held a number of positions, including Bureau Chief of Juvenile, Pretrial, and Appeals. In October of 2009, Elizabeth became the Senior Staff Attorney at APAAC. Elizabeth is currently the Interim Executive Director of APAAC.



Elizabeth Ortiz
Interim Executive Director

Diane graduated from ASU College of Law in 1980. Her first legal job was clerking for Judge Sandra Day O'Connor at the Arizona Court of Appeals. She also clerked for Chief Justice William A. Hohanan at the Arizona Supreme Court. She worked at the Maricopa County Attorney's Office from 1985 through 2008, most of that time in the Appeals Bureau. She retired in 2008 and APAAC honored her with a Lifetime Achievement Award. She now works part-time for APAAC summarizing cases and doing research. She and her husband Bob enjoy movies, playing trivia games, and Mensa events.



Diane & Bob

So far this has been a great year for me! I had the pleasure of marrying my best friend on April 10th of this year! In May my son graduated from high school and is enrolled in college, and my daughter graduated from 8th grade. I am so very blessed!



Mr. & Mrs. Reyna

I was born and raised in Sugar Land, Texas, just southwest of Houston. In high school I participated in track and field and in the choir, but my true loves were always politics and baseball. I grew up as a fan of the Houston Astros and the Houston Rockets and attended the games



Daniel Woolston
APAAC Intern

whenever I could. I graduated from Brigham Young University in 2009 in Political Science and Communications. Since elementary school, I've wanted to be an attorney, so making the decision to attend law school was not difficult to make. I just completed my first year at the Sandra Day O'Connor College of Law at Arizona State University and I'm excited to be here at APAAC.

As some of you may know, **Denise Helm**, our Executive Assistant, has been with APAAC for 31 1/2 years! I personally am hoping she stays for another 30 years! She is an avid gardener and has the cutest little Shih Tzu named Buster.



Buster

APAAC

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We're on the web!
<http://apaac.az.gov>

APAAC's Upcoming Seminars

["Ethics the Movie" Part I](#) - June 25, 2010

[How to Meet the Daubert Standard](#) - June 25, 2010

[2010 Summer Training Conference](#) - August 4-6, 2010

All Upcoming NDAA Seminars

<http://ndaa.org>

July

NDAA 2010 Summer Conference - July 11-14, Napa, CA
 Trial Advocacy - July 12-16, 2010 NAC, Columbia, SC
 Trial Advocacy for Civil Child Protection Attorneys - July 19-23, 2010 National Child Protection Training Center (NCPTC), Winona, MN
 Prosecutor and the Jury - July 19-23, 2010, NAC, Columbia, SC
 Trial Advocacy I - July 26-30, 2010, NAC, Columbia, SC

August

Cross Examination Summary - August 3-6, 2010 NAC, Columbia, SC
 Prosecutor Bootcamp - August 9-13, 2010 NAC, Columbia, SC
 Trial Advocacy I - August 16-20, 2010 NAC, Columbia, SC
 Strategies for Justice: Adv. Investigation & Pros. of Child Abuse & Exploitation - August 23-27, 2010 National Harbor, Maryland
 Lethal Weapon - August 23-27, 2010 NAC, Columbia, SC

September

Prosecuting Drug Cases - September 12-16, 2010 Las Vegas, Nevada
 Courtroom Tech. - September 13-16, 2010 NAC, Columbia, SC
 Abusive Head Trauma: Trial Techniques for Prosecutors - September 15, 2010 Atlanta, GA
 NDAA Fall Conference - September 20-24, 2010 NAC, Columbia, SC
 Experienced Prosecutor Course - September 26-30 Marco Island, FL
 Trial Advocacy I - September 27-October 1, 2010 NAC, Columbia, SC
 SafetyNet: Multidisciplinary Investigation & Pros. of Tech.-Facilitated Child Sexual Exploitation
 September 27-October 1, 2010 Easton, Massachusetts