Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-013289-001 DT 03/11/2010

COMMISSIONER JAMES R. MORROW

CLERK OF THE COURT
S. Haynes
Deputy

STATE OF ARIZONA

v.

ISRAEL TORRES (001)

LOUIS FRANK CAPUTO III

DAVID R WROBLEWSKI

DISPOSITION CLERK-CSC

MINUTE ENTRY

1:40 p.m.

Courtroom 812

State's Attorney:	Louis Caputo
Defendant's Attorney:	David Wroblewski
Defendant:	Present

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

This is the time set for Oral Argument.

Oral arguments are heard.

IT IS ORDERED taking this matter under advisement.

1:57 p.m. Matter concludes.

LATER:

This matter having been taken under advisement this date,

Defendant filed a Motion Designate Misdemeanor ("Motion") pursuant to A.R.S. § 13-702(G) (now renumbered A.R.S. § 13-604). The State filed an opposition, and Defendant submitted a Reply. In addition, the Court heard oral argument on March 11, 2010.

A.R.S. § 13-702(G), in pertinent part, provided:

> If a person is convicted of any class 6 felony . . . and if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a class 1 misdemeanor. . . .

1. Nature and Circumstances of the Crime

The circumstances of the crime are described in the presentence report filed July 9, 2004.

> On October 19, 2003, at approximately 12:30 a.m., police initiated a traffic stop after observing the defendant squeal his tires and make a lane change without signaling. Upon contact, the defendant emitted an odor of an alcoholic beverage from his breath. Police observed an unrestrained infant in the front seat alongside a female subject. The defendant identified himself with his driver license. A blood sample was obtained and analysis showed it to contain .164% ethyl alcohol.

Defendant entered a guilty plea to aggravated driving under the influence of intoxicating liquor or drugs with a person under the age of 15 in the vehicle, a class 6 undesignated felony. Defendant reported to the presentence report writer that he was accepting responsibility for his actions. He admitted to consuming six beers prior to operating his vehicle with his young child in the vehicle.

On July 15, 2004, Defendant was found guilty in accordance with the plea and placed on probation for a period of 18 months. The original expiration date was January 15, 2006. As a condition of probation, Defendant was ordered to pay fine and a monthly probation service fee. He was also ordered to serve nine days in jail beginning January 3, 2005.

2. History and Character of the Defendant

Defendant was 20 years old at the time of the offense. This matter was his first criminal conviction.

Prior to sentencing, Defendant was released under the supervision of pretrial services. On July 8, 2004, pretrial services reported that Defendant had tested positive for "THC (marijuana) on June 25, 2004." This information contradicted Defendant's statement to the presentence report writer that he had not used marijuana since December of 2003—six months before the positive test.

Defendant had difficulty in complying with the conditions of his probation. Approximately six months after the start of the probation grant, the probation officer reported that "defendant has demonstrated a marginal level of compliance so far." Petition to Modify Terms of Probation filed December 30, 2004. Although the probation officer asked that the deferred jail be deleted, the Court further deferred the jail to begin on April 3, 2005. *Id.* Defendant ultimately served this deferred jail term.

A Petition to Revoke Probation was submitted to the Court in the fall of 2005 alleging a series of instances of illicit drug possession and a series of missed drug tests. In addition, the petition included allegations that Defendant had not paid the fine which had been ordered at sentencing and that he had failed to complete community service hours as ordered. On December 7, 2005, Defendant admitted to violating condition 9A of his probation, specifically that he had failed to submit to drug testing as directed. In the probation violation report prepared for disposition, the probation officer stated that defendant tested positive for THC a total of 12 times, failed to submit to drug testing 10 times, and gave 3 diluted tests. He only completed 5 hours of community service. On a positive note, Defendant had completed 36 hours of substance abuse treatment. Defendant was reinstated to probation but for a period of three years. He was again ordered to pay fines and a monthly probation service fee as well as to complete community work service. In addition, Defendant was required to abide by the special conditions of probation concerning Drug Court.

Even after reinstatement, Defendant continued to have difficulties in complying with probation. On November 13, 2006, the Court excluded one year from the running of the grant of probation and established a new revised expiration date of July 8, 2008. Defendant agreed to this exclusion of time in lieu of a filing of a petition to revoke probation. On March 3, 2008, Defendant was ordered to serve 24 hours in jail as a Drug Court sanction for his noncompliance with probation. Then again on June 9, 2008, Defendant was ordered to serve 48 hours in jail as a Drug Court sanction for his noncompliance with probation. Defendant's probation grant was allowed to expire on July 9, 2008, without an additional petition to revoke. In the expiration summary, however, the probation officer noted that Defendant failed to complete his community

service and had failed to pay off his fines and monthly probation service fees. A Criminal Restitution Order was filed on June 17, 2008, calculating the total unpaid balance at $600.

The Court inquired at the oral argument on March 11, 2010, as to whether Defendant had yet paid off the fine and monthly probation service fees included in the Criminal Restitution Order. Defendant acknowledged that he had not done so by expressing his willingness to pay off these amounts now—18 months after the Criminal Restitution Order was filed. Defendant's failure to address the unpaid Restitution Order reflects poorly upon him. The Court is cognizant, however, that probation has expired and that it may be improper to delay designation to assess future behavior. *See State v. Soriano,* 217 Ariz. 476, 481, 176 P.3d 44, 49 n.4 (App. 2008) (dicta).

Defendant provided the Court with a number of documents in support of his good character as a family man and student. The Court considered the letters from Lizeth Torres (Defendant's wife), Anna Torres (Defendant's mother), Victor Torres, Jr. (Defendant's brother), and Darrell Wroten. The Court also considered the letters concerning Defendant's status as a student at the Arizona Automotive Institute.

Both Defendant and the State alerted the Court that Defendant is currently facing new criminal charges. The State correctly acknowledged in its Response that the mere fact that charges are pending does not equate to a finding of guilt on the new charges. Therefore, the Court did not explore the underlying allegations surrounding the new charges and neither party presented the Court with any significant information about the allegations. The Court has not considered the mere pendency of new charges in analyzing Defendant's Motion. Defendant, through his attorney, did suggest that the advent of the new charges heightens the importance of the designation issue in this case. While that may be true from Defendant's perspective, the Court would have considered Defendant's Motion of importance even had he not been facing new charges.

3. Not Unduly Harsh to Sentence the Defendant for a Felony

Having due regard to the nature and circumstances of the crime and to the history and character of Defendant based on the arguments of the parties, their memoranda, and a review of the Court's file in this matter, the Court is not of the opinion that it would be unduly harsh to sentence the defendant for a felony.

IT IS ORDERED designating the offense a class 6 felony.