



for *The Defense*

▶ ◀ James J. Haas, Maricopa County Public Defender ▶ ◀

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Bad Dough Risin' A Baker's Dozen of Sentencing Boo Boos

**By Anna Unterberger
Defender Attorney, Appeals**

There are some Maricopa County trial judges who are serving up some very unappetizing recipes when it comes to criminal sentencings. These unpalatable creations tend to be cooked up by two categories of "judicial bakers." The first category consists of the "old-timer" judges who were appointed to the bench prior to 1994. Being familiar and

comfortable with the "old" (pre-1994) sentencing code, these judges will mix old code ingredients with new code ingredients and apply the recipe to offenses committed after 1993. And the second category consists of those newer judges who did not practice criminal law before being appointed to the bench and are overwhelmed when they begin dealing with our criminal sentencing laws.

This article presents 13 of the

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Relief from Mandatory Excesses Executive Clemency

**By Carol Carrigan
Defender Attorney, Appeals**

How many times have you, the judge (and perhaps even the prosecutor) been frustrated by the Arizona Mandatory Sentencing Scheme? As you are painfully aware, this scheme often results in sentences unjustified by the crime or the circumstances of the

defendant.

There is something you can (and should) do for your client, but your actions (and the client's) must fit within the statutory scheme. Unfortunately, I have learned that too few defendants are taking advantage of the expeditious method of reaching the Board of

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sentencing boo-boos that have come up in my appellate and/or PCR cases. And all of them could have been avoided if the judge or attorneys slowed down and spent a little more time reading the applicable law prior to sentencing. So preheat your ovens and read on!

I'll start with some issues that seem to continually re-occur. Knowledge of these issues can have a dramatic impact on the client's decision regarding a trial or plea, the advice you give them and ultimately on the amount of time the client will serve if sentenced to prison.

BOO-BOO #1: THE JUDGE IMPROPERLY USES A FOREIGN FELONY CONVICTION TO ENHANCE YOUR CLIENT'S SENTENCE

A.R.S. § 13-604(N) states in part that, "[a] person who has been convicted in any court outside the jurisdiction of this state of an offense which if committed within this state would be punishable as a felony . . . is subject to the provisions of this section." When a defendant refuses to admit that he has a prior felony conviction for purposes of sentence enhancement, he essentially pleads "not guilty to the commission of a previous offense." *State v. Song*, 176 Ariz. 215, 217, 860 P.2d 482, 484 (1993). "Although an admission by a defendant at trial dispenses with the necessity of proof of prior convictions, such an admission does not constitute proof that the foreign conviction would have been a felony under Arizona law. A defendant's testimony is immaterial and incompetent whether a foreign conviction constitutes a felony in Arizona, because that question raises an issue of law. Therefore, the trial judge must make that determination." *State v. Heath*, 198 Ariz. 83, 84, 7 P.3d 92, 93 (2000).

"[T]he *essence* or nature of the conviction as it relates to Arizona law is an issue of law, which like other legal issues is precluded unless raised. If raised by objection or

otherwise, the judge decides the issue by comparison of the relevant statutes and cases as he or she would any other purely legal issue." *Song*, 176 Ariz. at 218, 860 P.2d at 485 (emphasis in the original). In *Song*, the State provided a copy of the foreign statute to the trial court. 176 Ariz. at 218 n.8, 860 P.2d at 485 n.8. The defense then waived the issue because it failed "to contend that such a crime would not be a felony in Arizona[.]" 176 Ariz. at 218, 860 P.2d at 485.

The crux of this issue is not whether the prior convictions are felonies under the foreign criminal code, but whether *they would necessarily be felonies* under the Arizona criminal code. In *State v. Clough*, 171 Ariz. 217, 829 P.2d 1263 (App. 1992), the Court addressed this issue under former A.R.S. § 13-604(I), now A.R.S. § 13-604(N). Clough's Arizona jury convicted him of third-degree burglary and a class 3 felony theft. The State's allegations included a prior felony conviction for issuing a bad check in Montana. Clough admitted the prior felony at trial.

In an amended opinion, the Court reversed and remanded Clough's enhanced sentences. The Court first addressed what test to use when deciding whether enhancement with a foreign felony as a prior conviction is appropriate:

[Defense counsel] emphasized that there must be strict conformity between the elements of the Montana felony and the elements of some Arizona felony before A.R.S. § 13-604 (I) can apply. He is correct. In *State v. Ault*, 157 Ariz. 516, 521, 759 P.2d 1320, 1325 (1988), our supreme court ruled that in order for an out-of-state conviction to constitute one of the felonies enumerated in A.R.S. § 13-604(O) [now A.R.S. § 13-604(V)(d)(3)] relating to eligibility for release from prison, a court must be sure that the fact finder in the prior case

actually found beyond a reasonable doubt that the defendant had committed every element that would be required to prove the Arizona offense. While *Ault* dealt with a different statute, we believe its reasoning applies to A.R.S. § 13-604 (I). See also *State v. Schaaf*, 169 Ariz. 323, 333, 819 P.2d 909, 919 (1991) (foreign statutory definition must involve violence or threat of violence if foreign conviction for felony involving violence or the use of violence is used to enhance under [former] A.R.S. § 13-703(F)(2)).

Next, the Court compared the Montana bad check statute with the Arizona statutes for theft, and for fraudulent schemes and artifices, and found that the Montana statute did not equate with either Arizona statute. 171 Ariz. at 221-22, 829 P.2d at 1267-68. Thus, a remand for re-sentencing without the prior-conviction enhancement was necessary.

Additionally, if an offense would have been a felony if committed in Arizona, but was a misdemeanor in the state where the conviction occurred, it may not be used as a felony sentence-enhancer in Arizona. *State v. Decker*, 172 Ariz. 33, 35, 833 P.2d 704, 706 (1992) (holding that an Iowa misdemeanor conviction could not be used to enhance the defendant's sentence under A.R.S. § 13-604, even though the offense would have been a felony if committed in Arizona).

Finally, these issues should also be kept in mind regarding sentence-aggravation under A.R.S. § 13-702(C)(11), which states that it is an aggravating factor if: "The defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense. A conviction outside the jurisdiction of this state for an offense which if committed in this state would be punishable as a felony is a felony conviction for the purposes of this paragraph." If you don't raise this issue at the trial level, it will be waived. See, *State v.*

Fagnant, 176 Ariz. 218, 220, 860 P.2d 485, 487 (1993) (holding that where the defense did not raise the legal issue of whether the foreign felonies were necessarily felonies in Arizona, the issue was waived on appeal and the trial court could properly consider any reliable information presented to it concerning aggravating factors).

**BOO-BOO #2: THE JUDGE ENHANCES
YOUR CLIENT'S SENTENCE WITH A
HISTORICAL PRIOR CONVICTION UNDER
A.R.S. § 13-604 (V) (1) (b) or (c) WITHOUT
FINDING THAT THE PRIOR WAS
COMMITTED WITHIN THE APPLICABLE
TIME PERIOD**

Historical prior conviction boo-boos are probably the most frequent sentencing boo-boos that I see in my cases. And they occur regardless of whether the defendant admits the conviction, or whether the issue is tried to the court or, as in older cases, to a jury.

As we all know, the government must prove every element of a charge beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). And that includes the punishment-enhancement charge that the defendant has a prior conviction, assuming that the defendant does not admit the conviction. *State v. Gilbert*, 119 Ariz. 384, 385, 581 P.2d 229, 230 (1978); Rule 19.1(b)(2), ARCP.

But once the *fact* of a prior conviction is established, the court must still determine whether the conviction qualifies for sentence enhancement *as a matter of law*. *State v. Graves*, 188 Ariz. 24, 26, 932 P.2d 289, 291 (App. 1996). And under certain sections of the historical-priors statute, this includes whether the *commission* date of the prior falls within a certain time period. Under these sections, any time spent incarcerated is excluded in calculating whether the prior was committed within this time period. See, A.R.S. § 13-604(V)(1)(b) & (c).

An appellant may challenge on direct appeal whether the court's use of priors for enhancement purposes conforms with the enhancement statute. *See, State v. Johnson*, 142 Ariz. 223, 224-25, 689 P.2d 166, 167-68 (1984). If the evidence is insufficient to meet the requirements of the statute, but the court nevertheless imposes an enhanced sentence, the appellate court must remand the case for re-sentencing. *State v. Hickman*, 194 Ariz. 248, 249-50, 980 P.2d 501, 502-03 (App. 1999). A sentence that is enhanced based on prior convictions that do not meet the statutory definition is an illegal sentence, and imposing it is fundamental error. 194 Ariz. at 249, 980 P.2d at 502.

This boo-boo continues to crop up in cases where the State presents evidence that the defendant has prior convictions, but fails to present evidence that those convictions fall within the statutory time limits of § 13-604(V) (1) (b) or (c). Most recently, I had a jury-trial case where the commission dates, on their face, were too old, the State failed to present any evidence of incarceration time that would bring the commission dates within the statutory time periods, and the court used the convictions as historical priors, without objection from defense counsel.

When the court commits this boo-boo, make sure to object and hold the State to its burden. Also be on the lookout for the court trying to take judicial notice of a prior conviction when that conviction is used for sentence enhancement, which is another boo-boo. *See, State v. Lee*, 114 Ariz. 101, 105, 559 P.2d 657, 661 (1976) (capital case) ("We do not approve the procedure of asking the court to take judicial notice of a conviction for the purpose of establishing such a conviction as an aggravating circumstance."). Such improper judicial notice includes relying on the allegation of a prior conviction that has been added to the charge in another court file, and/or relying on a presentence report as

a source of proof. *Id.*

BOO-BOO #3: THE JUDGE SENTENCES YOUR CLIENT UNDER A.R.S. § 13-702.02 (THE MULTIPLE-CONVICTIONS STATUTE) WITHOUT FIRST READING THE STATUTE

A.R.S. 13-702.02, by its language, only requires a term of imprisonment for "a second or subsequent offense," *not* a first offense. In one of my jury-trial appeals, it was obvious that neither the judge nor defense counsel (who was retained) read this statute before sentencing. Because of that, the defendant was sentenced to prison on *both* counts of her indictment, even though the judge said that he would have given her probation if he could. At the re-sentencing after her appeal, she received probation for Count 1, what amounted to a time-served prison sentence at that point on Count 2 and was released after she was transported back to DOC.

BOO-BOO #4: THE JUDGE GETS CONFUSED REGARDING WHETHER SUBSECTION (A) OR (B) OF A.R.S. § 13-604.02 APPLIES

In one case where this type of problem came up, the defendant was on probation, and then was convicted of Misconduct Involving Weapons for "possessing" a weapon found in the apartment where he was staying; he wasn't holding the weapon at the time he was arrested. This offense occurred after January 1, 1994; thus, the "new" sentencing code applied. The court sentenced him to flat time under A.R.S. § 13-604.02(A). But because he was *not* convicted of an offense that involved "the discharge, use or threatening exhibition of a deadly weapon[,]" as required under A.R.S. § 13-604.02(A), his case was remanded for re-sentencing under § 13-604.02(B). Thus, he became eligible to earn release after serving 85% of his sentence, rather than having to serve it flat time.

There are also problems using this statute

due to the changes made between the “old” and “new” sentencing codes. See Boo-Boo #5.

BOO-BOO #5: THE JUDGE USES A SENTENCING LAW THAT BECAME EFFECTIVE AFTER THE COMMISSION DATE OF YOUR CLIENT’S OFFENSE

Some judges don’t understand that the applicable sentencing law is the one that existed at the time of the offense, *not* the one existing at the time of sentencing, assuming that the two are different. “When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed.” A.R.S. § 1-246; *accord, State v. Murray*, 194 Ariz. 373, 374-75, 982 P.2d 1287, 1288-89 (1999) (holding that the applicable law is that “in effect at the time of the event”); *State v. Stine*, 184 Ariz. 1, 3, 906 P.2d 58, 60 (App. 1995) (same).

For example, in 1993 the presumptive term of imprisonment for a first-time offender, class 2 felony was 7 years, with a minimum term of 5.25 years, and a maximum term of 14 years. A.R.S. §§ 13-701(C) & -702(B) (Supp. 1993). An inmate was eligible for parole after serving half of his sentence. A.R.S. § 41-1604.07(A) (1) (Supp. 1993). In addition to this parole eligibility, the inmate could be released on “earned release credit” after serving two-thirds of his sentence. A.R.S. § 41-1604.07(A) (2) (Supp. 1993). The inmate could also participate in a work furlough program. A.R.S. § 31-333 (Supp. 1993).

These conditions changed when the current sentencing code became effective on January 1, 1994. At that point, the presumptive term of imprisonment for a class 2 felony became 5 years, with a minimum term of 4 years, and a maximum term of 10 years. A.R.S. §§ 13-701 (C) & -702(A) (Supp. 1994). These outer

ranges may be reduced down to 3 years, or increased up to 12.5 years if the court finds that “exceptional circumstances” existed. A.R.S. § 13-702.01(A) & (B) (Supp. 1994). A consecutive term of “community supervision” must be imposed, and it begins when the inmate is released from prison. A.R.S. §§ 13-603(I) & 41-1604.07(D) (Supp. 1994). The inmate is eligible for release after serving approximately 85% of his sentence. A.R.S. § 41-1604.07(A) (Supp. 1994).

The 1994 code recognizes that those inmates who were under the parole system, *i.e.*, those who committed felonies before January 1, 1994, continue to be eligible for release under that system. In the case of someone convicted of a class 2 felony as a first-time offender, parole eligibility occurs after the inmate serves 50% of his sentence, and “earned release” occurs after the inmate serves two-thirds of his sentence. A.R.S. § 41-1604.10(A)(1), (2) & (E) (Supp. 1994).

Furthermore, our Supreme Court has held that, “[w]hen the state seeks the enhanced penalties for repeat offenders, former A.R.S. § 13-604 provides an exclusive sentencing scheme.” *State v. Tarango*, 185 Ariz. 208, 209-10, 914 P.2d 1300, 1301-02 (1996). This includes the situation where the defendant was sentenced for sexual assault under A.R.S. § 13-1406(B), which required a flat time sentence. 185 Ariz. at 210-11, 914 P.2d at 1302-03 (rejecting the contrary analysis of *State v. Behl*, 160 Ariz. 527, 530, 774 P.2d 831, 834 (App. 1989)).

Regarding the sexual assault case that was consolidated with *Tarango*, the Court noted that, “[t]he state did not have to invoke former § 13-604(D), but when it did it subjected the defendant to the possibility of far more incarceration time than a defendant sentenced to flat time as a first-time offender.” 185 Ariz. at 211, 914 P.2d at 1303. The Court rejected the State’s argument that flat-time sentencing statutes should be combined with § 13-604(D) to create flat-time

sentencing under that latter statute. Instead, the defendant would be parole eligible after serving two-thirds of the sentence imposed, and the Court supplemented the trial court's sentencing order accordingly. 185 Ariz. at 212, 914 P.2d at 1304.

Then, and in response to *Tarango*, the legislature amended A.R.S. § 13-1406(B) to provide for a repetitive, flat time sentencing scheme. See, 1997 Ariz. Sess. Laws, Ch. 217, § 2. But the legislature may *not* "retrospectively overrule court decisions." *Murray*, 194 Ariz. at 374, 982 P.2d at 1288. "Parole eligibility on sentencing is, of course, a substantive right rather than a procedural matter." 194 Ariz. at 375, 982 P.2d at 1289. "[T]he separation of powers doctrine prevents the legislature from changing the rule of decision in completed cases." *Id.* Thus, "[t]he substantive legal consequence of past events is determined by the law in effect at the time of the event, and the determination of that law is for the courts to decide." *Id.* Consequently, and despite the legislature's 1997 statutory enactment to the contrary, it "cannot overrule and change *Tarango's* interpretation of the statute and apply it on a retroactive basis." *Id.*

I also see this problem coming up with sentencings under A.R.S. § 13-604.02. Since January 1, 1994, A.R.S. § 13-604.02(A) states in part: "[A] person convicted of any felony offense involving the discharge, use or threatening exhibition of a deadly weapon . . . if committed while the person is on probation for a conviction of a felony offense . . . shall be sentenced to imprisonment for not less than the presumptive sentence . . . and is not eligible for suspension or commutation or release on any basis until the sentence imposed is served." If the person was already on some kind of release for a dangerous offense, the person must be sentenced to at least the maximum sentence, which may be increased up to 25%. But prior to 1994, subsection (A) required a 25-year to life

sentence.

Also since January 1, 1994, A.R.S. § 13-604.02(B) states in part: "[A] person convicted of any felony offense not included in subsection A of this section if committed while the person is on probation for a conviction of a felony offense . . . shall be sentenced to a term of not less than the presumptive sentence . . . and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed . . . has been served, *the person is eligible for release pursuant to § 41-1604.07* or the sentence is commuted." (emphasis added). And A.R.S. § 41-1604.07(A) allows prisoners to earn release credits of 1 day for every 6 days served. Thus, a defendant who is sentenced under A.R.S. § 13-604.02(B) for a crime that occurred during 1994 and later is eligible for earned release credits. But prior to 1994, subsection (B) required a flat-time sentence.

The applicable sentencing code can make a big difference in your client's term of imprisonment, as well as his release-eligibility conditions. When your client is sentenced, make sure that the judge is using the correct version of the sentencing code.

BOO-BOO #6: THE JUDGE USES TOO MANY HISTORICAL PRIOR FELONY CONVICTIONS FOR SENTENCE-ENHANCEMENT BECAUSE THOSE PRIORS WERE "COMMITTED ON THE SAME OCCASION"

In *State v. Sheppard*, 179 Ariz. 83, 876 P.2d 579 (1994), our Supreme Court recognized the unfairness of counting two convictions "committed on the same occasion" as two convictions for sentence-enhancement purposes under A.R.S. § 13-604:

Because defendant committed the theft and trafficking offenses to accomplish a single objective, we find that the offenses occurred on the "same occasion" for purposes of [former] § 13-604(H). Although theft and trafficking in stolen property will not always constitute the "same occasion," they do under these facts. We therefore reverse defendant's sentence, vacate that portion of the court of appeals' opinion addressing the imposition of an enhanced sentence, and remand for resentencing with instructions that the trial court consider defendant's prior offenses as one conviction for purposes of sentence enhancement under A.R.S. § 13-604(B).

179 Ariz. at 85, 876 P.2d at 581. Factors relevant to the "same occasion" determination include: (1) the time period over which the offenses occurred; (2) the location where the offenses occurred; and (3) the number of victims involved. 179 Ariz. at 84, 876 P.2d at 580. Of paramount importance is whether the offenses "were aimed at achieving a single criminal objective." *Id.* If so, then the offenses generally will have been committed on the "same occasion." *Id.*

When the State alleges historical priors, always check the minute entries for the priors (make the State produce them *at the beginning* of the case) and see if you have a *Sheppard* issue. This may not only make a difference regarding your client's sentence after a conviction-- it may also result in a more favorable plea offer.

BOO-BOO #7: THE JUDGE IMPOSES TOO MANY TIME-PAYMENT FEES

Many of the mistakes made are double-punishment boo-boos that involve money. Our double punishment statute, A.R.S. § 13-

116, states in part: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Our caselaw applies this concept to monetary assessments, as well as terms of imprisonment.

In *State v. Pennington*, 178 Ariz. 301, 873 P.2d 639 (1994), the defendant was convicted of 2 separate charges after two separate jury trials with two different cause numbers. The sentencings took place on the same date. The defendant was sentenced to prison, his fines and fees were ordered to be paid in monthly installments after his release, and a time payment fee was ordered for each cause number. The Court upheld the 2 fees:

The court incurs administrative costs for each time payment plan imposed against a defendant, regardless of whether the plans are implemented for separate counts in the same case or for separate cases.

Thus, we hold that A.R.S. § 12-116 [the time payment fee statute] requires a separate time payment fee for each time payment plan approved and ordered by the court. We emphasize that the fee is for each *plan*, not for each *component* of each plan. Thus, one time payment fee should be imposed on each count or case in which a time payment plan is approved[.]

178 Ariz. at 303, 873 P.2d at 641 (emphasis in the original).

An example of just 1 payment plan would be when your client is convicted for multiple counts committed on the same occasion (see Boo-Boo #4), and is ordered to pay a fine on 1 count, restitution on another count, and an

attorney-services assessment. In that case, and although there are 3 monetary components, there should only be 1 time-payment fee.

BOO-BOO #8: THE JUDGE IMPOSES TOO MANY FINES

In *State v. Alexander*, 175 Ariz. 535, 858 P.2d 680 (App. 1993), the defendant was convicted of aggravated robbery, residential burglary, theft, and aggravated assault. The Court held the trial court erred when it imposed fines for both aggravated robbery and assault, and then imposed another fine for burglary. The Court reduced Alexander's fines from \$400.00 to \$200.00. The Court recognized that between aggravated robbery and theft only 1 fine was proper because "[t]aking the victim's property was also an element of the aggravated robbery, so theft involves the same act as the ultimate crime." 175 Ariz. at 537, 858 P.2d at 262. Thus, it was error to impose a fine for the burglary because there was no additional risk or harm to the victim beyond the robbery; they were a "single act." 175 Ariz. at 538, 858 P.2d at 263.

In addition to the robbery/burglary/theft situation, also watch out for this one in the sexual assault/kidnap situation. See generally, *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989) (discussing the double-punishment problems inherent in sexual assault/kidnap cases).

BOO-BOO #9: THE DUI VERSION

In the context of DUI cases in Arizona where the defendant is convicted of both driving under the influence and driving with a BAC of .10 [.08 under our newer law] or greater arising out of the same act of driving, "the clear legislative intent is not to cumulate punishment for one act. A.R.S. § 13-116. Therefore the court may only sentence concurrently, and the Motor Vehicle Department may assess 'points' for only one offense." *Anderjeski v. City Court of City of*

Mesa, 135 Ariz. 549, 551, 663 P.2d 233, 235 (1983).

This reasoning also applies to assessments imposed for such convictions. "[A]ny fine imposed upon an individual by a sentencing court constitutes a 'sentence' within the meaning of the double punishment statute, § 13-116, and is subject to its mandate requiring the imposition of concurrent sentences upon an individual convicted of multiple offenses arising out of one act." *State v. Sheaves*, 155 Ariz. 538, 541, 747 P.2d 1237, 1240 (App. 1987). Thus, "a court may only impose one felony penalty assessment for two felony convictions arising from one act of driving" that violates the statutes prohibiting driving under the influence and driving with a BAC of .10 or more. 155 Ariz. at 542, 747 P.2d at 1241; see also, *State v. Bedoni*, 161 Ariz. 480, 486-87, 779 P.2d 355, 361-62 (App. 1989) (holding the same regarding both fines and assessments).

BOO-BOO #10: THE JUDGE AGGRAVATES YOUR CLIENT'S SENTENCE BECAUSE YOUR CLIENT REFUSES TO ADMIT THAT HE'S GUILTY

Probation officers keep listing this as an aggravating factor in presentence reports, and judges keep adopting that factor. Doing so is simply wrong. "As contrition or remorse necessarily imply guilt, it would be irrational or disingenuous to expect or require one who maintains his innocence to express contrition or remorse." *State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995). "A convicted defendant's decision not to publicly admit guilt is irrelevant to a sentencing determination, and the trial court's use of this decision to aggravate a Defendant's sentence offends the Fifth Amendment privilege against self-incrimination." *Id.*

BOO-BOO #11: THE JUDGE USES A PRESENTENCE REPORT THAT LISTS THE FACT OF AN ARREST, BUT NOT MUCH

ELSE, TO IMPOSE AN AGGRAVATED SENTENCE

State v. Shuler, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989), held that a trial court should not aggravate a sentence, "based on the mere report of an arrest, with no evidence of the underlying facts to demonstrate that a crime or some bad act was probably committed by the defendant[.]" The Court cited to *Brothers v. Dowdle*, 817 F.2d 1388, 1390 (9th Cir. 1987), where the Ninth Circuit recognized that, "[t]he court may not impose a more severe punishment simply because the defendant was in some way entangled with the police."

The Ninth Circuit has also recognized that a sentence imposed for a criminal offense must reflect an individualized assessment of a particular defendant's culpability, rather than just a mechanistic application of a certain sentence to a given category of crime:

[P]unishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. The sentencing judge is required to consider all mitigating and aggravating circumstances involved. There is a strong public interest in the imposition of a sentence based upon an accurate evaluation of the particular offender and designed to aid in his personal rehabilitation. Thus, appellate courts have vacated sentences reflecting a preconceived policy always to impose the maximum penalty for a certain crime.

United States v. Barker, 771 F.2d 1362, 1365 (9th Cir. 1985).

It's the State's burden to go beyond the mere fact of an arrest and provide the court with the specifics. If the State fails to do this, then object to the court aggravating your client's sentence based upon his arrest record.

BOO-BOO #12: THE JUDGE FAILS TO GIVE YOUR CLIENT PRESENTENCE INCARCERATION CREDIT AGAINST HIS ARIZONA SENTENCE BECAUSE YOUR CLIENT IS ALSO SERVING A SENTENCE IN A "FOREIGN JURISDICTION."

This came up in one of my PCR cases, and the defendant was awarded an additional 11 months in backtime because the State knew that he was in federal custody, but waited 11 months to bring him to Arizona. "Foreign jurisdiction" may also mean other states.

"All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment[.]" A.R.S. § 13-709(B). A clear case of "in custody" is when the defendant is in jail in Arizona to stand trial for the crimes he committed in Arizona. The fact that the defendant is *also* receiving credit against a federal sentence during this time period does *not* change his entitlement to credit against his Arizona sentence. *State v. De Passquallo*, 140 Ariz. 228, 229, 681 P.2d 380, 381 (1984).

The Due Process Argument

An accused has a right to timely proceedings under the due process clauses of the Federal and Arizona Constitutions. U.S. Const., Amends. V & XIV; Ariz. Const., Art. 2, § 4; *State v. Adler*, 189 Ariz. 280, 282, 942 P.2d 439, 441 (1997) (probation revocation proceedings). Even in cases where the Interstate Agreement on Detainers Act does *not* apply, the State may always seek a defendant's presence through a writ of habeas corpus ad prosequendum. *Id.* When a

defendant is in federal custody, the fact that the federal warden has the discretion as to whether he will honor the writ does not excuse the State's failure to make the request, especially when the defendant has made a request for a timely disposition of his case. 189 Ariz. at 282-83, 942 P.2d at 441-42. When the State fails to make good faith efforts to obtain the defendant's presence through the writ, the court reviews the resulting delay to determine whether it was unreasonable. 189 Ariz. at 284, 942 P.2d at 443.

If the court finds unreasonable delay, it then determines whether the delay prejudiced the defendant. Prejudice is clear when the defendant shows that he lost his opportunity to have his Arizona prison sentence run concurrently with his federal prison sentence. *Id.*

The Speedy Sentencing Argument

An accused also has a right to a speedy sentencing. See, U.S. Const., Amends. VI & XIV; Ariz. Const., Art. 2, § 24; *State v. Burkett*, 179 Ariz. 109, 114, 876 P.2d 1144, 1149 (App. 1993). To analyze speedy-sentencing delay, the Arizona courts use the four-pronged test of *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). *Burkett*, 179 Ariz. at 114, 876 P.2d at 1149. The four prongs are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. The length of the delay is the least important, and prejudice is the most important. The defendant's deprivation of his right under Arizona law to seek a sentence concurrent with his foreign sentence may be a sufficient showing of prejudice under the Sixth Amendment. 179 Ariz. at 115, 876 P.2d at 1150. When an inmate detainer is lodged in a foreign jurisdiction, it puts those prison officials on notice that the inmate is wanted for trial in another jurisdiction. But further action by the issuing state is necessary to actually obtain custody of the prisoner. *State*

v. Olson, 146 Ariz. 336, 338, 705 P.2d 1387, 1389 (App. 1985). The State may use a writ of habeas corpus ad prosequendum to return the accused to the charging county, and to ensure that his speedy-trial rights under the Sixth Amendment are satisfied. *State v. Loera*, 165 Ariz. 543, 545, 799 P.2d 884, 886 (App. 1990). The writ is the equivalent of a request for temporary custody. 165 Ariz. at 546, 799 P.2d at 887. Under Arizona's Rule 8.3(a), Arizona Rules of Criminal Procedure ("ARCP"), a prisoner in a foreign jurisdiction becomes available for transportation to Arizona once the prisoner begins to serve his foreign sentence. 165 Ariz. at 338-39, 705 P.2d at 1389-90.

You may need to do some digging to come up with the paperwork regarding your client's foreign-jurisdiction sentences, but it can result in a significant increase in his backtime.

BOO-BOO #13: THE JUDGE IMPOSES A SENTENCE THAT PENALIZES YOUR CLIENT FOR CHALLENGING HIS ORIGINAL SENTENCE

And last but definitely not least, something to be on the lookout for when you get a case back for a re-sentencing.

When you get a case back for resentencing after a remand, make sure that the judge doesn't penalize your client by increasing the term of imprisonment. Doing so would penalize the defendant for bringing the sentencing errors to the attention of the judicial system. And that would violate the reasoning of the United States and Arizona Supreme Courts, as well as the Arizona Rules of Criminal Procedure. See, *North Carolina v. Pearce*, 395 U.S. 711, 724-26, 89 S.Ct. 2072, 2080-81 (1969) (holding that imposing a more severe sentence upon a defendant after he has successfully pursued an appeal or collateral remedy violates due process under the Fourteenth Amendment, unless there is objective information concerning the

defendant's conduct occurring after the time of the original sentencing proceeding that supports a more severe sentence); *State v. Jackson*, 107 Ariz. 371, 373-74, 489 P.2d 8, 10-11 (1971) (following *Pearce*); Rule 26.14, ARCP (embodying *Pearce*).

CONCLUSION

As I said toward the beginning of this article, all of the errors discussed here could have been avoided if the judge or attorneys had read the applicable law prior to sentencing. The law, like a recipe, needs to be reviewed carefully before using it. Even if you've read it before you need to read it again, because you never know what you may notice while rereading. For example, a couple of months ago one distracted holiday baker misread a previously-used recipe as calling for baking soda rather than baking powder. And no, the two are *not* interchangeable. The resulting inedible slop is now laying somewhere in an Arizona landfill. I mention no names.



(Continued from page 1)

Executive Clemency. For this reason, a second, but more lengthy, avenue has been created. The two avenues are the 90-day process and the 2-year rule.

A. The 90-day process.

Arizona Revised Statutes Section 13-603(L) provides that if the sentencing court enters a special order explaining that the mandated sentence is clearly excessive, the person committed to DOC has ninety days in which to petition the Board of Executive Clemency for commutation of sentence. The defendant must petition for clemency within ninety days or waive the privilege.

Therefore, if you feel your client is eligible for clemency:

- 1) Before the day of sentencing, move the sentencing judge for a special order pursuant to A.R.S. § 13-603(L) and, in this written motion, list the reasons justifying clemency.
- 2) Ask the judge to issue a special order at the time of sentencing pursuant to A.R.S. § 13-603(L) setting forth the reasons that the sentence the law requires is excessive (the judge can use your list).
- 3) If the court grants the motion, ask that a copy of the special order (with reasons listed) accompanied by any statements of the State and the victim be sent to the Board of Executive Clemency. (**Note:** Experience tells us that the clerk does not do this automatically—be sure that the Board is listed in the minute entry.)
- 4) Send a notice advising the client of the court's special order and the ninety-day time limit. A form letter should probably be maintained by the lead secretary in each trial group which reads approximately as follows:

Dear Mr./Ms.:

At the time of your sentencing, the court entered a special order permitting you to petition the Board of Executive Clemency for a commutation of sentence. You must, however, do this within ninety days from the date of your sentencing. In order to assist you, I am enclosing with this letter a copy of the court's special order setting forth the specific reasons for concluding that your sentence is excessive along with a copy of my motion for the special order, and copies of the statements of the State and the victim. Your petition can be in your own words and you should attach the documents I have mentioned. Address the petition to the Board of Executive Clemency at 1645 West Jefferson, #326, Phoenix, Arizona 85007.

B. The 2-year rule.

The second, more lengthy avenue of relief is available after two years have been served but the application must be filed within one year of release. Unfortunately, there will be prisoners who cannot meet these requirements, which makes it all the more important to attempt the 90-day procedure set forth above in section A.

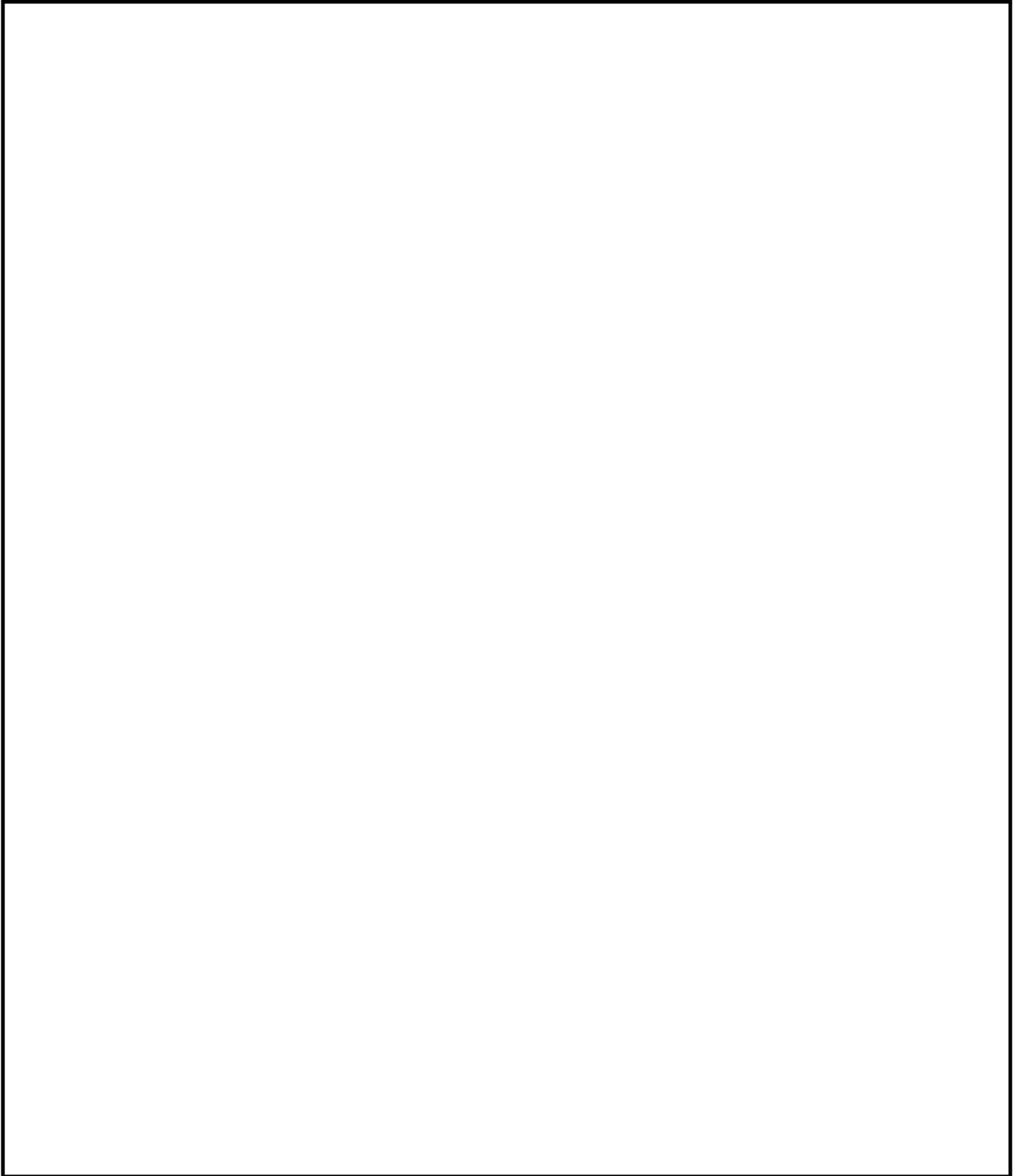
All of the prisons now maintain commutation of sentence application forms. A copy of this three-page application is appended to this article.

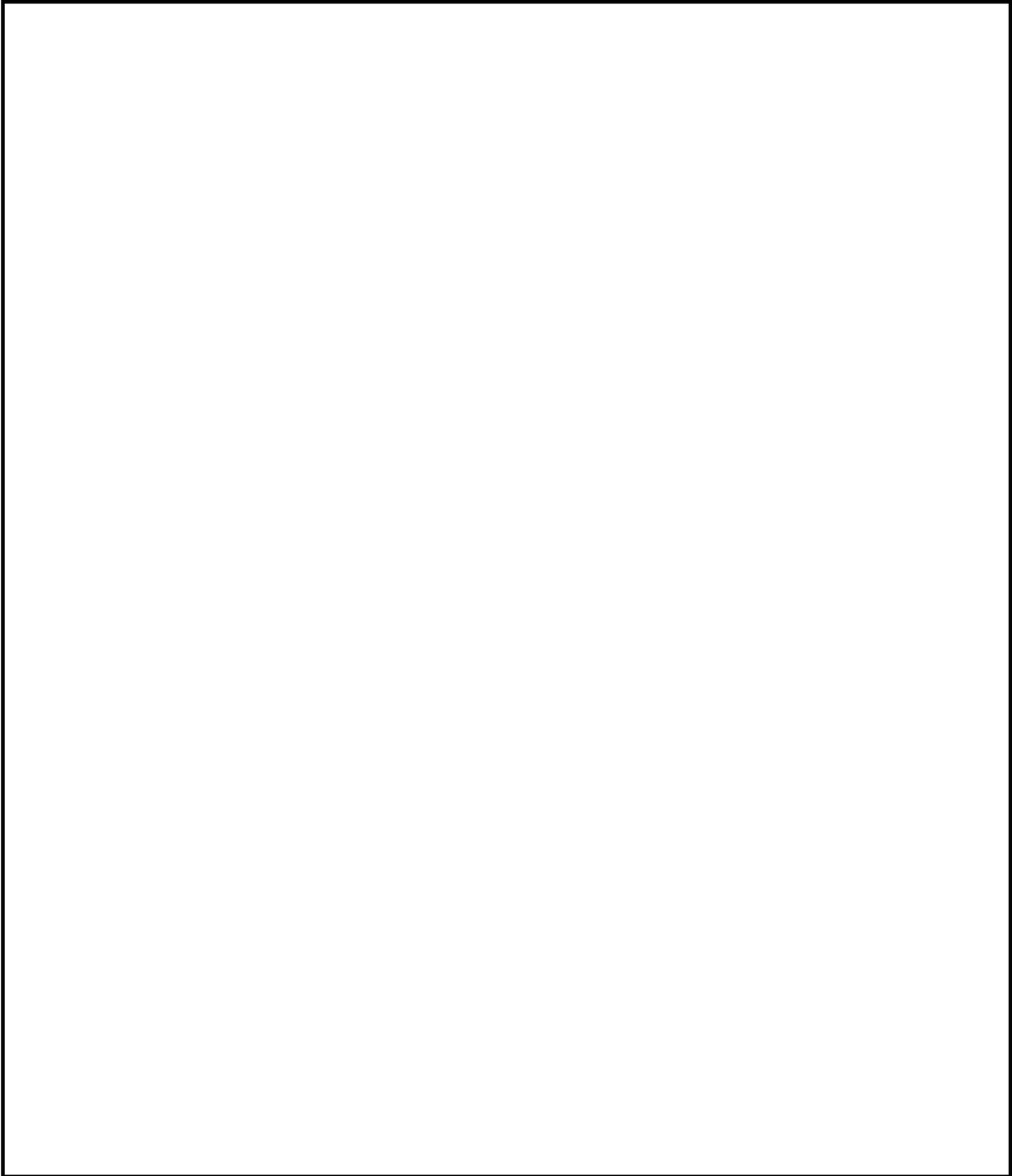
Of course, using this procedure means that the prisoner must serve two years in the prison before he or she can even apply. In addition, if within one year of release, the application will not be accepted. What this means is that the least culpable or recidivist offenders will not be able to obtain relief.

Please be aware that you can be of untold assistance to your clients even though the sentencing news is grim. The reason I

suggest a written motion be submitted to the judge prior to sentencing is that it makes it much easier for the judge in composing the sentencing minute entry.







ARIZONA ADVANCE REPORTS

By Terry Adams

Defender Attorney – Appeals Division



Adam P, In re, 361 Ariz. Adv. Rep. 12, (CA 1, 11/20/01)

After having stolen a golf cart the juvenile was adjudicated delinquent for theft of means of transportation. The question on appeal was whether a golf cart is a vehicle under A.R.S. sections 13-1801 and 105. The court answers in the affirmative, adjudication upheld.

State v. Estrada, 361 Ariz. Adv. Rep. 20 (SC, 11/15/01)

The Arizona Supreme Court here clears up the question that was answered differently by the two divisions of the court of appeals: Does A.R.S. 13-901.01 (Prop. 200) apply to possession of drug paraphernalia? Of course the answer is yes. The court determined that a prison sentence couldn't be given in a paraphernalia case and set aside the sentence.

State v. Fields (Medina), 361 Ariz. Adv. Rep. 14 (CA 1, 11/20/01)

This was a special action taken by the state from the trial court's decision to conduct a *Frye* hearing to determine the admissibility of actuarial data relied upon by experts in rendering opinions on recidivism in Sexually Violent Persons Act commitment proceedings. After a lengthy discussion the appellate court found that the use of actuarial models by mental health experts to help predict a person's likelihood of recidivism is not the kind of novel scientific evidence or process to which *Frye* applies. Therefore a *Frye* hearing was not necessary. The court did not rule on the admissibility of the evidence.

Van Herrewegne v. Burke (State of AZ), 362 Ariz. Adv. Rep. 12 (CA 1, 12/11/01)

Defendant was arrested for aggravated D.U.I. He was advised of his right to obtain an independent blood sample. However he was booked into jail and was not permitted immediate release pursuant to the misdemeanor bail schedule because he was charged with a felony. He was not released until the following day. He moved for dismissal or suppression of the breath sample because he was denied immediate release, which prevented him from obtaining a blood sample. He took a special action from the trial court's denial of the motion. He argued that the bail schedule statute, by omitting felony offenses, unreasonably interferes with a defendant's right to gather exculpatory evidence. The court ruled that an incarcerated defendant has reasonable means to obtain a sample without being released. He can arrange for a technician to come to the jail. Therefore the statute does not violate due process.

Defender Attorneys and Law Clerk Honored

On April 9, 2002, ASU Law School's Homeless Legal Assistance Project held its annual awards ceremony. Many of our attorneys were present, including Terry Hill, Rodney Mitchell, and Aldon Terpstra, longtime contributors to this extremely worthwhile project. Special congratulations, however, go out to Defender Attorneys Fredrica Strumpf and Cory Engle, and our newest Law Clerk, Danielle Rosetti -- Justice Rebecca Berch, the newest member of the Arizona Supreme Court, presented them with awards for devoting substantial time to area homeless shelters during the past year.

MARCH 2002 JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER

Dates: Start - Finish	Attorney Investigator Legal Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
2/05 - 2/07	Enos <i>Curtis</i>	Gottsfeld	Bernstein	CR01-016362 Agg Assault, F6	Not Guilty	Jury
2/6 - 2/7	Harris <i>Curtis</i>	Martin	Naber	CR01-16305 2 Cts. Agg assault, F3 Shoplifting, M1	Not Guilty - 1ct. of Agg. Assault Guilty - 1ct Agg. Assault, Shoplifting	Jury
2/12 - 2/13	Harris <i>Curtis</i>	Foreman	Hanlon	CR01-017616 POND for sale, F2	Guilty	Jury
2/13	Reid <i>Curtis</i>	Gaines	Naber	CR01-013991 Agg Assault, F3	Guilty	Jury
2/19 - 2/20	Rempe <i>Francis</i>	Reinstein	Toftoy	CR01-14529 Agg. Assault, F3D	Not Guilty	Jury
2/21 - 3/6	Peterson / Roskosz <i>Reilly Bowman</i>	Padish	Levy	CR00-18098 Murder 1°, F1D Armed Robbery, F2D Kidnapping, F2D	Guilty - Murder, Armed Robbery Not Guilty - Kidnapping (but guilty of lesser offense of Unlawful Imprisonment) F6D	Jury
2/25 - 3/1	Walker	Anderson	Kay	CR01-17479 Armed Robbery, F2D Agg. Assault, F3D	Hung Jury - Armed Robbery Not Guilty - Agg. Assault	Jury
2/26 - 3/4	Ellig <i>Ames</i>	Holt	Simpson	CR01-06391 2 cts. Agg. Assault, F3D Endangerment, F6	Guilty	Jury
2/28 - 3/5	Colon <i>Muñoz Oliver</i>	Gerst	Petrowski	CR01-12646 3 cts. Kidnapping, F2; 3 cts. Sexual Conduct w/ Minor, F2	Not Guilty-2 cts. Kidnapping; Not Guilty-2 cts. Sexual Conduct w/ Minor Guilty - 1 ct. Kidnapping; Guilty - 1 ct. Sexual Conduct w/ Minor	Jury
2/28 - 3/6	Farney <i>Elzy Jaichner</i>	Willett	Beougher	CR 2001-17707B Theft Of Means Of Transportation, F3 Possession Of Burglary Tools, F6	Guilty	Jury
3/1	Lucero <i>Jones Guyton</i>	Gutierrez	Suzuki	CR01-01716 Assault/M1	Not Guilty	Bench
3/4 - 3/6	Dennis / Klopp-Bryant <i>Arvanitas</i>	Jarrett	Pierce	CR01-97197 Arson Unoccup Struc/ F4N Criminal Damage / F6N Interf w/Jud Proc / M1N	Directed Verdict for Acquittal	Jury
3/4 - 3/7	Tavassoli	Heilman	Mayer	CR01-17889 Burglary 3 rd., F4	Guilty	Jury

MARCH 2002 JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER – CONTINUED

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
3/5 - 3/6	Carey <i>Moncada</i>	Gaylord	Mauger	CR 01-96749 PODD, F4D	Guilty	Jury
3/5 - 3/6	Hall Barwick	Reinstein	Musto	CR01-12561 Agg. DUI, F4	Hung Jury	Jury
3/5 - 3/7	Cain	Hotham	Shreve	CR01-016712 3cts. Endang. F6 2cts. Resist, F6 Trespass, F6	Guilty of 3 cts. Guilty of lesser on remaining 3 cts.	Jury
3/6 - 3/7	Lawson	Donahoe	Simpson	CR01-17831 PODD, F4 PODP, F6	Hung jury	Jury
3/11 - 3/12	Buckallew Moeller <i>Moncada</i>	Oberbillig	Denney	CR 00-94517 6 cts. Agg. DUI, F4N 2 cts. Agg. Assault, F6N	Guilty - 4 cts. Agg. DUI, 2 cts. Agg. Assault, 2 cts. Agg. DUI, dismissed w/ prejudice	Jury
3/12 - 3/14	Evans Ames <i>Del Rio</i>	Padish	Brnovich	CR01-15145 2 cts Kidnapping, F4 Agg. Assault, F3D Burglary 2 nd , F3 Assault, M1	Not Guilty - Kidnapping, Agg. Assault, Burg 2 nd Guilty - Assault	Jury
3/13 - 3/22	Patterson Thomas <i>Southern</i>	Jarrett	Martinez	CR00-94933 Murder 1°, F1D	Guilty	Jury
3/18 - 3/19	Grant	Gaylord	Mercer	CR01-94039 PODD / F4N PODP / F6N	Guilty	Jury
3/18 - 3/20	Hall Barwick	Cates	Shreve	CR01-12136 Theft of Identification, F4 2 cts. Theft of Credit Card, F5 2 cts. Assault, M1	Guilty - Theft of ID, credit card Not Guilty - Misd. Assault	Jury
3/20 - 3/21	Cain	Schwartz	Coolidge	CR01-018724 Agg. DUI, F4	Guilty	Jury
3/20 - 3/21	Gaxiola Robinson <i>Valentine</i>	Gottsfield	Clarke	CR01-18409 Felony Flight, F5	Mistrial	Jury
3/25 - 3/26	Hamilton / Moore	Jarrett	Anderson	CR 01-97663 Agg. DUI, F4N	Guilty	Jury
3/26 - 3/27	Lawson	Schwartz	Clarke	CR01-17836 POM, F6	Guilty	Jury
3/26 - 3/29	Scanlan	Cates	Washington	CR01-18534 Burglary 2 nd Degree, F3 Burglary, 3 rd Degree, F4	Not Guilty	Jury
3/27 - 3/29	Clemency	Foreman	Charnell	CR01-017622 Attempt Theft Means Trnsprt, F4; Assault, CI 3 Misd; Agg Asslt-Peace Officer, F6; Agg Asslt-Peace Officer, F6	Guilty - Lesser Included Offense Attempt Unlawful Use Means Trnsprt Guilty - Agg. Assault, Hung - Agg. Assault, Guilty - Misd. Assault	Jury

MARCH 2002 JURY AND BENCH TRIALS

OFFICE OF THE LEGAL DEFENDER

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
3/18-3/28	de la Vara deSantiago	Araneta	Sorrentino Wisdom	CR2001-007665 2 Cts. Kidnaping, C2F 4 Cts. Sexual Assault, C2F 1 Ct. Sexual Assault, C2F 1 Ct. Kidnaping, C2F Agg. Assault, C4F 1 Ct. Sexual Abuse, C5F 1 Ct. Sexual Abuse, C5F 2 Cts. Sexual Abuse, C5F 1 Ct. Armed Robbery, C2F	Guilty 3 Guilty, 1 NG Guilty, Non-Dang Guilty, Non-Dang Not Guilty Directed Verdict Guilty, Non-Dang 1 Guilty, 1 NG Not Guilty	Jury
3/26-3/28	Vogel deSantiago	Davis	Charbel	CR2001-015797 POND, C PODP, C6F	Not Guilty	Jury
2/25-2/26	Shaler	McVey	DeBrigida	CR2001-017205 (C) Poss. MJ for Sale, C2F Sale or Trans. Of MJ, C2F	Guilty	Jury

OFFICE OF THE LEGAL ADVOCATE

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
3/6-3/14	F. Gray Cano	Wilkinson	CR2001-13918 Agg Asslt 2F DCAC Agg Asslt 3FD Endangerment	Hung	Jury
3/14—3/19	S. Koestner	P. Reinstein	1 st degree murder	Guilty—1 st degree murder	Jury
3/26-3/28	S. Storrs Cano	Martin	CR2000-018194 Theft of Motor Vehicle Cl. 3	Mistrial	Jury

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