

for The Defense

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Discretionary Prosecution of Juveniles in Adult Court

A Way to Get Juveniles Back to Where They Once Belonged?

Helene F. Abrams, Juvenile Division Chief

Can a child who is being prosecuted in the adult court ever get back to the juvenile court? The answer is yes, no and maybe.

After numerous failed efforts in the legislature, the voters, through the initiative process, passed a proposition that changed the Arizona Constitution. This constitutional change allowed, for the first time, a child to be directly prosecuted in the adult court without a judge first deciding that adult criminal prosecution was appropriate. (See *Kent v. United States*, 86 S.Ct. 1045 (1966)).

Proposition 102, passed in the November 1996 election, changed the Arizona Constitution in numerous ways, but two changes are most important. First, the previously required judicial determination about the appropriateness of adult criminal court prosecution was replaced with a different standard. The new requirement allowed a child aged 15 years or older to be directly prosecuted in the adult criminal court if he or she was accused of murder, armed robbery,

forcible sexual assault, "other violent felony offenses" or if the child was a "chronic felony offender". Art. IV, Part 2. Section 22. The legislative implementation provisions contained in Senate Bill 1446, effective July 21, 1997, defined the terms that were undefined in the constitutional changes, See, e.g. A.R.S. § 13-501(G). Second, the constitutional change stated: "All other juveniles accused of unlawful conduct shall be prosecuted as provided by law". This seemingly innocuous sentence opened the door for what is now called "discretionary direct file" by the prosecution. A.R.S. § 13-501 (B) is the codification of "as provided by law". This subsection includes a laundry list of offenses, which the prosecutor may, if he so chooses, "direct file". A.R.S. § 13-501 (B) provides: "Except as provided in subsection A of this section, the county attorney may bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is at least fourteen years of age and is accused of any of the following offenses:



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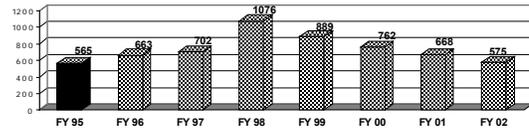
1. A class 1 felony.
2. A class 2 felony.
3. A class 3 felony in violation of any offense in chapters 10 through 17 or chapter 19 or 23 of this title.
4. A class 3, 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.
5. Any felony offense committed by a chronic felony offender.
6. Any offense that is properly joined to an offense listed in this subsection.”

The statute reduced the age of the child from the constitutional provision of 15 or older to “at least fourteen years of age”. The list of offenses subject to “direct file” at the prosecutor’s discretion was increased, and the age of children subject to “discretionary direct file” was decreased. I think I can fairly say that most of the voters did not realize that one seemingly throwaway sentence in the proposition would result in so many changes. The transfer process remained in place for any child left who could not be direct filed against under the mandatory or the discretionary provisions.

As one might expect, the number of children prosecuted in adult court skyrocketed from 663 in 1996 to 1076 in 1998. (F. Mullaney, The Summit on Juvenile Transfers. September

2001). The following chart shows the number of juveniles referred for adult prosecution over the past seven years.

Juveniles Referred for Adult Prosecution in Arizona (FY 1995 - 2002)



The chart includes mandatory direct file cases, discretionary direct file cases and cases transferred by the court after hearing. In Maricopa County from January 1997-June 2001, the percentage of kids prosecuted in adult court by way of discretionary direct file was almost 30% of the total number of kids in adult court. (Prosecuting Juveniles in the Adult Criminal Justice System, A Summary of Key Issues and Recommendations For Arizona, Children’s Action Alliance, Juvenile Justice Advisory Committee report, March 2003). Consistent with national trends, the number of children in adult criminal court has decreased since the 1998 high. In FY 2002, 575 children in Arizona were prosecuted in adult court; 280 were mandatory direct filed, 197 were discretionary direct filed, and 98 were transferred by the court. The percentage of the total number of kids in adult court who were discretionarily direct filed statewide was over 34%.

Interestingly, during the January 1997-June 2001 time frame, in Maricopa County, of the 2,976 referrals to the court that would have been eligible for discretionary direct filing, the Maricopa County Attorney’s Office only filed on 797, or about 27%.

Despite some grumblings, it thus appears that the county attorneys exercised some discretion when making the “discretionary” decisions. There is, however, an argument that the numbers do not tell the whole story. There is a certain comfort factor in a transfer situation, when the decision whether to allow prosecution of a child as an adult is made by a Superior Court Judge based on statutory and

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rule criteria, the helpful information provided by the juvenile probation department and a psychological evaluation (if ordered) (A.R.S. § 8-327, Rule 34, Rules of Procedure for the Juvenile Court), as well as the knowledge and wisdom accumulated during his or her judicial tenure. Many of the “mandatory” and “discretionary” adult filing decisions might have been the same. The judicial transfer decision, though, is reviewable (See Rule 88-93, RPJC). The prosecutor’s decision is not. Or is it?

Some obviously are not. A mandatory direct file case cannot be sent back to the juvenile court unless the court does not have jurisdiction. For example, the case where, after hearing, the court determines the state cannot prove the requisite prior juvenile felony offenses (See A.R.S. § 13-501 (D) and (E)).

So where are we going with all this? There is a way back for the discretionary direct file case. Hidden in A.R.S. § 8-302 (B) is a provision that says: “If during the pendency of a criminal charge in any court of this state the court determines that the defendant is a juvenile who is subject to prosecution as an adult pursuant to § 13-501, subsection B, **on motion of the prosecutor** the court shall transfer the case to the juvenile court...” How might one go about getting a prosecutor to agree to do this? Look at the factors listed in A.R.S. § 8-327 and Rule 34, Rules of Procedure for the Juvenile Court. Gather school records, medical records, psychological and psychiatric records, juvenile court records (if available but remember some are confidential under Rule 19, Rules of Procedure for the Juvenile Court). Maybe talking to the child’s parents, teachers, coaches, religious leaders? Obtaining a psychological evaluation with recommendations for treatment options. Don’t forget to consider whether your client is even competent to stand trial in adult court. While the *Dusky* standard is the same, juveniles do not need to have a mental illness or defect to be incompetent to stand trial. *Dusky v. United States*, 362 U.S. 402, 402 (1960). A.R.S. § 8-291 defines juvenile competency and A.R.S. sec. 8-291.01 (A) states that a juvenile shall not participate in a delinquency, incorrigibility or criminal proceeding if the court determines

that the juvenile is incompetent to proceed. Nationally recognized juvenile expert, Dr. Thomas Grisso, in his recent study, encourages some rethinking on juveniles’ competency to stand trial in adult court by strongly suggesting immaturity be a factor in the competency decision. *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, Law and Human Behavior.

The current circumstances of our adult probation department might also factor into your discussion. Remember the juvenile court and its probation officers have specialized training and a multitude of services for children compared to the dearth of services specifically for kids in the adult court.

The decision by the prosecution to direct file on a child in custody is usually made within 24 hours. They may not, and probably do not, have all the information they would like to make a good decision. By gathering this information, you may be able to give the prosecutor what is needed to send the child back to juvenile court. If not, you’ve still got some great mitigation. Finally, remember to look at A.R.S. § 13-921(A), as it provides a possible means for dismissal of the charges for the juvenile convicted of his first adult felony if he successfully completes probation.

Managing the Chaos

Time Management Tips for the Busy Lawyer

Edie Lucero, Defender Attorney - Trial Group A

No good deed goes unpunished.

I don't know who said that, but it is a good saying, so the person who coined it was, no doubt, punished severely. I fear it may apply to me, as I have somehow gained a reputation for having good time management skills, and have therefore been asked by the "tenth floor" to write an article on the techniques that I use. My disclaimer to this article is that I am not trying to tell others how to manage their cases. In fact, much of my "system" is derived from advice I received from others.

The following is a brief description of the basic system that I use to maximize my time:

Video-conferences (VC): When I receive a case, I usually have client contact within a few days through a video-conference, usually followed by weekly VC contact. Explaining to them that I will likely meet them once a week through VC and to please save their questions until the next VC seems to really reduce my phone calls. I also tell them they can call my secretary to find out when our next VC is scheduled. The client seems relieved to at least have met me right away and to know when we will speak next.

VC are a great way to stay in regular contact with the client, ease their concerns about our communication, and keep me constantly refreshing myself with the case and the client. So by the time the case reaches sentencing, I feel I have a pretty good idea of who this person is and what has happened in their life, in order to relay this to the sentencing judge, trying to advocate for the best possible resolution. Now, I know some may cringe at such infrequent live contact versus virtual, but from a time management perspective, more clients can be reached through an hour and a half of VC, than

a lengthy afternoon at Estrella waiting for one client to be pulled.

Jail visit: Jail visits mostly occur to go over a plea or with clients in trial status.

Client Letters: Individual letters written to the client that covers plea consequences versus trial exposure also doubles as my case log, documenting discussions with the client.

Also, a general form-sentencing letter has proven really beneficial. First, it informs the client how to take an active role in their sentencing. Surprisingly, several clients implement the suggestions from the sentencing letter by writing their own sentencing letter to the judge. If they have done this, then I ask Initial Services to go out to the jail and pick it up. I review it, and then send it to the respective sentencing parties. This letter is included in this newsletter if you are interested in using it.

Settlement Conference (SC) Memos: When a SC occurs, a one-page memo briefly describing the facts, procedural history and the defense SC goals (e.g., what I am working towards in a plea agreement) has been a good way to quickly inform the court about the case and purpose of the SC beforehand.

Notice of Intent: To avoid a form motion being denied because it lacks specifics facts, etc., label the motion as a 'notice of intent.' This way, the motion has not technically been filed. But, it puts the parties on notice of the issues to be addressed prior to trial. It also reminds you to follow up with the motion as you head toward trial.

Case Log (active and closed): Keeping an active case log of all the cases through a word processing program is a nice way to see all the

cases at-a-glance. For example, listing the following information in different columns: clients name, prosecutor, judge, priors, case number, charges, court dates, in custody or out of custody, booking numbers, jail location, when client contact occurs, etc. This gives you a comprehensive overview of all of your cases.

Creating a closed folder also keeps track of all the cases you have worked on. Listing plea agreement versus the ultimate resolution is a good way to know when mitigation or aggravation occurred, under what circumstances and with which prosecutor or judge.

In closing, this approach has been quite beneficial to me in managing my time. Please contact me directly if you want to talk further about any of the techniques described.

Sample Language for Sentencing Letter

Re: State of Arizona v. , CR
Your Sentencing Scheduled for , at 8:30 AM before Judge ,
Central Court Building, Courtroom , th Floor, 201 West Jefferson,
Phoenix, Arizona

At your next court date it is likely that you will be sentenced. At sentencing, it is undersigned counsel's experience that several factors tend to lessen a defendant's sentence:

1. Accepting responsibility for your conduct.
2. Not blaming your conduct on another.
3. Not arguing you are innocent.
4. Apologizing to the court and the police.
5. Personal appearances and/or letters from friends, family, and employer showing specific incidences of unselfish or good conduct on your part.
6. Getting a substance abuse evaluation to determine if and to what extent you need treatment.
7. If the aforesaid evaluation indicates you need treatment, you should start said treatment.
8. If treatment is necessary, explaining that you plan on continuing treatment until your treatment issues are resolved.
9. If you have a drug problem, having a drug counselor testify on your behalf indicating that you can be successfully treated.
10. Explaining what your plan is to do with the rest of your life: if you have a drug problem, quitting drugs; running a business; getting married; being a father; being a better parent, etc.
11. Explaining that you plan on staying away from bad influences.

Enclosed is an article by The Honorable Judge Wilkinson. It explains what to do and what not to do at sentencing. Call your friends, family, and employer so they may send letters of support to undersigned counsel's office. Undersigned counsel needs to review these letters at least two (2) weeks prior to submitting them to see if said letters are appropriate. If said letters are appropriate, undersigned counsel will send them to the judge. At sentencing, undersigned counsel wants you to read a prepared statement to the judge and look him in the eye as much as possible so that he knows you are serious. In undersigned counsel's experience at sentencing, what the defendant says has more weight than what the lawyer does. If the judge acknowledges that you are serious and truly believe in what you say, the judge will probably give you less time.

Undersigned counsel needs to meet you and anyone who will address the judge on your behalf at least two (2) times prior to your sentencing.

When you are finished writing a letter to the Judge, please contact my office and we will have someone pick it up from you.

If you have any questions, please call me.

Sincerely yours,

Prepare to Attack

Don't Let PowerPoint Presentations Blindside You at Trial

Russ Born, Training Director

Relying upon computer-generated data and conclusions has become part of our culture. The everyday interaction and reliance by individuals, corporations, and governments on computer-generated data reinforces the mystique that computers provide accurate and indisputable information. Consequently, computer-generated evidence can have an inordinate impact upon a jury. The jurors' natural tendency is to accept computer-generated evidence as fact. This predisposition is further reinforced where the jurors are receiving the information in a visual format. Hearing the presentation and participating visually in the presentation reinforces a juror's comprehension and retention. In light of this, guarding against the prosecution's visual presentation of improper, inadmissible or prejudicial material must be a priority for defense counsel.

Openings

In the context of opening statements, defense counsel must be especially vigilant for "*visual arguments*" hidden in computer-generated text and diagrams. "*Visual arguments*" can be as subtle as the coloring of particular letters and words, the size of particular words in contrast to others, font type, shading, and word choice. They can be as blunt as the enlarging of a few selected photographs or portions of photographs, rendering a once admissible exhibit inadmissible. Combining the auditory impact of an opening statement with the visual impact of "Power Point" heightens the impact and influence the materials have on the jury's decision-making process.

Viewing the state's "Power Point" presentation for the first time as it is simultaneously presented to the jury puts defense counsel at a distinct disadvantage. Objecting to possible inadmissible material that is both visual and auditory, and flowing at a frightening pace, may be impossible. If defense counsel fails to object or perhaps even detect words, colors, and symbols that are quickly flashing before the jurors, those issues are lost on appeal. *State v. Sucharew*, 397 Ariz. Adv. Rep. 30 (2003).

If the opening presentation taints the jury, no curative instruction can alleviate the harm. Declaring a mistrial becomes a necessity. Obtaining discovery in the form of a duplicate copy of the "Power Point" or other computer presentation program lessens the chances that a mistrial will occur and preserves the record for appeal.

Admissibility of Computer Animation and Enhanced Evidence

Computer-generated demonstrative evidence is subject to the same evidentiary requirements as other evidence. It first must be authenticated under Arizona Rules of Evidence 901(a) and 901(b)(9). Authentication is a condition precedent to admissibility. Under 901(b)(9), the state must provide evidence that the process or system used to generate the evidence produces an accurate result. It must show the reliability and accuracy of the computer and software used as well as the reliability of the data input and used to produce the program or animation. Additionally, the state must establish through testimony the reliability and accuracy of the resulting demonstrative evidence. In the case of computer-enhanced evidence or computer animation, an expert or witness must testify that the evidence or animation fairly and accurately reflects their opinions. If animation is used, then additional testimony must show that the evidence utilized to produce it is of the type

reasonably relied upon by experts in forensic animation. *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000).

Authentication, however, is not the final hurdle. The authenticated evidence is still subject to the requirement of relevancy under Arizona Rule of Evidence 401 and whether or not its probative value is substantially outweighed by the danger of unfair prejudice under Arizona Rule of Evidence 403. Additionally, the content of computer-generated text must be scrutinized for inadmissible hearsay so as to avoid a mistrial.

Prepare to Attack

Because of the potential impact of computer-generated evidence on the jury, the defense should submit a written discovery request tailored to cover potential Power Point presentations.¹ The information requested should include:

1. Duplicate originals of any photographs utilized;
2. The source of the originals and the name of the person who processed them;
3. The name and qualification of the person that input the photos;
4. The type of hardware and software used to input the photos;
5. Any changes made by the software to the photos, including, but not limited to: color, contrast, focus, tone, compression (lossy or nonlossy), cropping, rotating, etc.;
6. Whether the state intends to enlarge any particular area of a photo during the presentation; and/or
7. Whether any image editing application was part of, connected to or available to the person who input the photos.

Additionally, if it is anticipated that the state may seek to present computer-enhanced evidence, animation or a computer-generated re-enactment, defense counsel, pursuant to Rule 15.1(a)(3) should also request the following:

1. All data including the notes, drawings, sketches, reports, witness statements, photographs, expert analyses and calculations used in preparing the computer animation or re-enactment.
2. The type of hardware and software used to produce the evidence along with the computer(s) involved.

Finally, defense counsel should request a pretrial evidentiary hearing to ensure that any issues related to this area are fleshed out before the trial. In order for the defense to properly prepare for the hearing, the court should be asked to order disclosure of the requested discovery and set a compliance date that allows the defense adequate time for preparation. The defense should further request that the state supply the court with a complete copy of its "Power Point" presentation to provide, where necessary, an adequate record on appeal.

Endnote

¹ A form motion for discovery concerning this area is available to public defender attorneys on the S drive under PD-Forms/Motions/Limine-Discovery of Powerpoint Presentations. Others may contact one of our newsletters editors to obtain a copy.

Personal Possession Over the Threshold?

Kirk Nurmi, Defender Attorney - Trial Group D

Recently, I had a trial in which the client, who had one strike under Proposition 200, was accused of Possession of Dangerous Drugs for Sale (methamphetamine). Pursuant to A.R.S. 13-3408, the State also alleged that the amount of methamphetamine was in excess of the 9-gram statutory threshold. When the jury returned their verdict, I was stunned. The jury found my client guilty, not of sale, but of the lesser-included offense of Possession of Dangerous Drugs *over the threshold*.

I was stunned for two reasons. The first bit of confusion centered on how the jury arrived at such a verdict. The second and more important reason for my bewilderment was the time I spent contemplating the consequences of such a verdict. I was shaken out of my haze when the State requested that my client be taken into custody. The basis for the State's request was that Proposition 200 did not protect my client because the amount of drugs involved was over the threshold.

My gut reaction to all of this was that the threshold finding as it relates to personal possession was meaningless. In a strange coincidence, I was right – the law actually supported my hunch. What follows is a much more artful rendition of my hasty argument to the Court.

The State's threshold allegation was made pursuant to A.R.S. 13-3408(D). This provision, in relevant part, dictates that when the aggregate amount of drugs involved in one offense or all of the offenses consolidated for trial equals or exceeds the statutory threshold amount, a person who is convicted of a violation of subsection A, paragraph 2, 5, or 7 of this section is not eligible for suspension of sentence, probation or release from confinement. In contrast, my client was convicted under A.R.S. 13-3408(A)(1), simple possession. Thus, the threshold allegation did not apply to her conviction.

Furthermore, Proposition 200 does apply to my client. Proposition 200 specifically lists those offenses that do not qualify for mandatory probation. Those offenses relate to the sale, production, manufacturing or transportation for sale of a controlled substance. These are the *only* exceptions enumerated within the text of Proposition 200 and, since the text of Proposition 200 stands mute on threshold issues, the State bears the burden of proving that such a conviction is outside the scope of Proposition 200.

What I did not know at the time and what you should know if you ever encounter this situation is that this argument actually has some basis in case law. That basis is found in *State v. Christain*, 202 Ariz. 462, 463, FN2, 47 P.3d 666, 667 FN2, (Ariz. App Div 1, 2002). In footnote 2 of that decision, the *Christain* court held that convictions under Proposition 200 could “involve drugs in excess of the threshold amount.”

Fortunately, my failure to cite the aforementioned footnote did not harm my client, who went home happy.

Sex Crimes Sentencing Simplified

Gerald Schreck, Defender Attorney - Sex Crimes

Chapter 14 of the criminal code has always confused the hell out of me. There seems to be so many fine lines between ramifications for convictions, and elements of offenses, that a simpleton like myself cannot keep things straight. In the past, when dealing with sex offenses I have often found my self wearing out the binding on the good old rule book. For these reasons, I have devised a handy, dandy, reference chart that I use when dealing with sex offenses. I use the following chart in my everyday practice like most of you use your sentencing charts, and I call it "Sex Crimes Sentencing Simplified."

OFFENSE	CLASSIFICATION	IS A FELONY	IS A MANDATORY	IS A LIFE	IS A DEATH	IS A DEATH
CRIMINAL SEXUAL ABUSE OF A CHILD	CLASS 1 14-02-01	Yes	Yes (Mandatory Life Imprisonment)	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (1)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (2)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (3)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (4)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (5)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (6)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (7)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (8)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (9)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (10)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (11)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (12)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (13)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (14)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (15)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (16)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (17)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (18)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (19)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)
CRIMINAL SEXUAL ABUSE OF A CHILD (20)	CLASS 1 14-02-01	Yes	Yes	Yes	Yes (Death)	Yes (Death)

Arizona Advance Reports

Stephen Collins, Defender Attorney - Appeals



Demarce v. Willrich (State of AZ) **385 Ariz. Adv. Rep. 37 (CA 1, 10/29/02)**

Demarce was charged with sexual assault, a class 2 felony and sexual abuse, a class 5 felony. Pursuant to a plea agreement, he pled guilty to the sexual abuse charge that carried a presumptive sentence of one and one-half years imprisonment and a maximum term of two years imprisonment. The prosecution dismissed the sexual assault charge.

The plea agreement contained a stipulation of “lifetime probation” and a notation that allowed for re-examination or modification after seven years. Five years later, Demarce moved to have the probation revoked and be sentenced to prison. The Court of Appeals held he had no right to reject probation and be sentenced to prison. It held he was “subject to the contract interpretation” of the plea agreement.

Glaze v. Larsen **385 Ariz. Adv. Rep. 46 (CA 2, 9/24/02)**

A jury found Glaze guilty of sexual abuse. Pursuant to a post-conviction relief petition, the verdict was reversed because of ineffective assistance of counsel. The charges were then dismissed. Glaze then sued his trial attorney for malpractice. The trial attorney argued that the suit was barred by the statute of limitations. The malpractice suit was filed over two years after the trial court had found there was a colorable claim of ineffective assistance of counsel in the post-conviction relief proceeding. The Court of Appeals held the suit was not barred because the two-year limitations period did not begin until the day the criminal proceedings were dismissed.

State v. Juarez **385 Ariz. Adv. Rep. 4 (CA 1, 10/25/02)**

Juarez was driving a commercial truck hauling a refrigerated trailer when the police stopped him. He told the police he was being paid \$500 by the vehicle’s owner to drive it to Chicago and that he did not know what was in the trailer. After he consented to a search of the trailer, the police found 108 pounds of cocaine in hidden compartments in the walls.

Juarez filed a motion to suppress alleging the search was illegal under the Fourth Amendment to the United States Constitution and Article 2, Section 8 of the Arizona Constitution. The trial judge ruled Juarez did not have standing to allege a Fourth Amendment violation because Juarez lacked a legitimate expectation of privacy in the cargo area and interior walls of the trailer. However, the trial judge ruled there was automatic standing under Article 2, Section 8 of the Arizona Constitution. The trial judge then found that, although Juarez had voluntarily consented, the search was illegal because the dismantling of the trailer’s interior exceeded the scope of consent.

The Court of Appeals acknowledged that the Arizona Supreme Court had found Article 2, Section 8 grants broader protection than the Fourth Amendment when dealing with searches of a home. However, the Court of Appeals held that Article 2, Section 8 does not grant broader protection in any other situation.

With minor exceptions, the entirety of Article 2 of the Arizona Constitution was adopted verbatim from the bill of rights contained in the Washington Constitution. Article 2, Section 8 is worded identically to Article 1, Section 7 of the Washington Constitution. The Washington Supreme Court has held that this section grants automatic standing in a case involving the search of a commercial truck. The

Arizona Court of Appeals declined to follow the Washington Supreme Court's logic.

State v. Morrison
385 Ariz. Adv. Rep. 3 (CA 1, 10/22/02)

When G was fourteen years old, her mother read passages in her diary containing sexual language and descriptions with references to Morrison, who was thirty-five years old. G's mother then surreptitiously recorded a telephone conversation between G and Morrison. Before his trial for sexual abuse and child molestation, Morrison moved to suppress the audiotape of the telephone conversation. He argued the taping was illegal under A.R.S. Section 13-3005 and 18 U.S.C. Section 2511 because neither he nor G consented to the taping.

The Court of Appeals held A.R.S. Section 13-3005 criminalizes the interception of the conversation, but does not provide for the exclusion of evidence obtained unlawfully. The federal law provides for exclusion. However, the Court of Appeals found that exclusion was not required because parents have "vicarious consent" when a parent "has a good faith, objectively reasonable basis for believing the recording of a child's telephone conversations is necessary and in the best interest of the minor."

State v. Old West Bonding Company
385 Ariz. Adv. Rep. 20 (CA 1, 9/26/02)

A defendant out on bond failed to make his court appearances. However, before the entry of a bail bond forfeiture judgment, the surety's agents arrested the defendant and surrendered him to the sheriff's office. The Court of Appeals held that the trial judge still had discretion to forfeit all, part or none of the bond.

Cherry v. Araneta (Romley)
386 Ariz. Adv. Rep. 17 (CA 1, 11/07/02)

Cherry was convicted of possession of narcotic drugs, a class 4 felony. A.R.S. Section 13-901.01 (Proposition 200) required that she be placed on probation unless she had a prior violent crime. Cherry had a prior conviction

for aggravated assault resulting in a serious physical injury. She argued that under *Apprendi v. New Jersey* and *Ring v. Arizona*, there had to be a jury finding of a prior violent crime before she would be ineligible for probation under Proposition 200. The Court of Appeals disagreed, holding that the trial judge could make the finding of a prior violent crime in the absence of a jury.

State v. Moore
386 Ariz. Adv. Rep. 4 (CA 1, 11/12/02)

Moore was charged with aggravated DUI. The prosecution alleged his driver's license was suspended. At his jury trial, Moore admitted that he had previously been arrested in 1998 for DUI and as a result, his driver's license had been suspended. He testified that approximately one month after the 1998 arrest, he appeared in justice court and had a private meeting with the justice of the peace. Moore testified that the justice of the peace agreed to issue a temporary driving permit and effectively void the prior notice of suspension. Moore indicated he thought his driver's license would automatically be reinstated once the temporary driving permit expired.

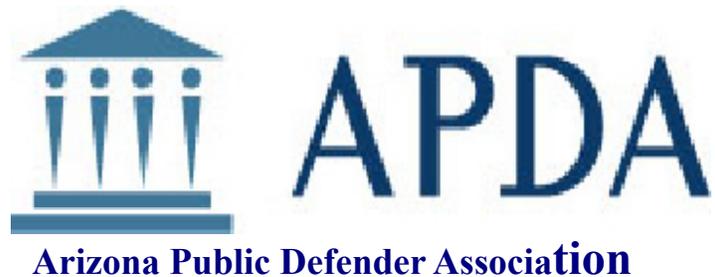
The prosecution asked to take testimony from the justice of peace to rebut Moore's testimony. The superior court judge allowed the prosecution to take this testimony by telephone because the justice of the peace had a busy schedule.

The Court of Appeals reversed, holding the telephonic testimony violated the Sixth Amendment Confrontation Clause. "Telephonic testimony thwarts the purposes of the Confrontation Clause in that the jury cannot 'observe the demeanor, nervousness, expressions, and other body language of the witness.'"

State v. Patterson
386 Ariz. Adv. Rep. 3 (CA 1, 11/07/02)

Patterson was tried by a jury on charges of murder and drive-by shooting. The crimes took place on a residential street and the course of

the car from which the shots were fired, the location of the victims and the location of the witnesses all bore upon the issues before the jury. After jury deliberations began, the jury requested a map of the area where the shooting occurred. Defense counsel objected because the evidence was closed. The trial judge gave the jury a map. The Court of Appeals held there was no error in the trial judge reopening the case during deliberations and admitting the map.



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Jury and Bench Trial Results

April 2003

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