

for The Defense

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Eggs Ain't Poultry

When A Conviction Can't Be Used for Impeachment

By Christopher Johns, Training Director

Blues aficionados know that Little Milton crafted some of the best lyrics to ever blast from a jukebox on a Saturday night in Mississippi. Lyrics like:

*If I don't love you baby,
Grits ain't grocery,
Eggs ain't poultry
And Mona Lisa was a man.*

These are clever and reflective earthy analogies gleaned from hard living.¹ Little Milton probably couldn't have envisioned the best selling book *The Da Vinci Code*. I won't give away the plot, but suffice it to say that things aren't always what they seem--even with the Mona Lisa and the Last Supper--and so it is with Proposition 200 (A.R.S. § 13-901.01 (Supp 2000) (Drug Medicalization, Prevention, and Control Act of 1996, subsequently codified as A.R.S. § 13-901.01).

Unlike Mona Lisa's gender being a settled question, convictions aren't always convictions, at least for impeachment purposes under Arizona law after our supreme court's decision in *State v. Martin (Landeros)*, 205 Ariz. 279, 69 P.3d 1000, 402 Ariz. Adv. Rep. 28 (June 5, 2003). In

fact, *Landeros* reasons unflinchingly that a Prop 200 "conviction" cannot be used to impeach in an accused's trial. Period?

One question is--if it can't be used for impeachment--why can it be used for enhancement? The reason appears to be because the Arizona Supreme Court says so.

Appellate Courts Struggle to Interpret Prop 200

There are now over twenty appellate decisions dealing with Prop 200 issues.² One of the most recent Arizona Supreme Court cases interpreting Prop 200 is an example of just how quirky Prop 200 law has become. You need but read *Landeros* to get a feel for the complications in Arizona law spawned by Prop 200.

A little background is helpful. Remember *State v. Christian*, 202 Ariz. 462, 66 P.3d 1241 (2002)? In *Christian*, Danny Evans of our office argued that a Prop 200 conviction wasn't a historical prior felony for enhancement purposes because of



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the language of A.R.S. § 13-604(V) (1) (2001). Despite what appeared to be sound logic on Danny’s part, based in part on former Arizona Court of Appeal’s Judge Noel Fidel’s dissent, our supreme court rejected the argument presented in *Christian* as to enhancement. The court left intact the lower court’s ruling on impeachment. The Arizona Supreme Court reasoned that a first or second conviction under Prop 200 did constitute a prior felony conviction and that its lack of listing in A.R.S. § 13-604(V) (1) was inconsequential for enhancement purposes.

Another argument focused on A.R.S. § 13-105(16). It provides that a felony is “an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.” The Court of Appeals for the Ninth Circuit, for example, in *United States v. Robles-Rodriguez*, 281 F.3d 900 (2002) observed, in a case involving the determination of an aggravated felony for purposes of federal sentencing guidelines, that it was “unclear whether, notwithstanding Proposition 200, first- and second-time drug offenses were still considered felonies under Arizona law.” The *Robles* court further wrote, in a footnote, that a Prop 200 offense did not meet the definition of a felony under Arizona law (citing to A.R.S. § 13-105(16)).

In an appeal filed by Chuck Krull of our appellate division, the court of appeals rejected this definitional argument in *State v. Thues*, 203 Ariz. 339, 54 P.3d 368 (2002) (*Reviewed Denied* April 22, 2003).³ In *Thues*, the court of appeals wrote, “It is clear to us that the legislature did not intend to change the felony designation . . . under Proposition 200.” According to division one, an alternative reading of Prop 200 offenses is unnecessary. The court further addressed *U.S. v. Robles-Rodriguez* by noting that it turned on the definition of an aggravated felony for federal sentencing guidelines purposes, and consequently the ninth circuit’s reasoning was not “instructive in the deciding the issue of state law.”

Meanwhile, the *Landeros* special action was snaking its way through the courts. *Landeros* stemmed from Judge Gregory Martin’s ruling that our client (*Landeros*) could not be impeached with a prior Proposition 200 adjudication--nor his sentence enhanced for purposes of A.R.S. § 13-604. Following Martin’s ruling, the state filed a special action and division one stayed the case.

The court of appeals held that the trial court did not abuse its discretion by finding that a Prop 200 conviction could not be used for impeachment purposes. It further held, however, that *Christian* and *Thues* did not substantively alter the status of various drug offenses as convictions for enhancement purposes. See *State ex rel. Romley v. Martin*, 203 Ariz. 46, 49 P.3d 1142 (App. 2002).

The state then filed a petition for review and our office filed a cross petition on the issue of enhancement. Before oral argument, the Arizona Supreme Court dismissed our office’s cross-petition (trying to get review on the issue denied in *Thues*). Consequently, the sole issue for the court to decide was whether a Prop 200 offense conviction could be used for impeachment purposes under Rule 609, Ariz. R. Evid. Not unlike the definition of a felony in Arizona under A.R.S. § 13-105(16), Rule 609 requires the prerequisite that, for a felony to

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Sometimes A Superior Can Be Inferior

Understanding the Distinction Between the Role of a Magistrate and a Judge

By C. Daniel Carrion, Chief Trial Deputy Early Representation

A judicial officer in either the Regional Court Center (RCC) or the Expedited Disposition Court (EDC) makes a ruling that you feel should be reviewed by an appellate court--before seeking relief, you must first determine whether a judge or a magistrate made the ruling.

The distinction between a judge and a magistrate in EDC and RCC is not always clear because a judicial officer often wears “two robes” in those courts. Generally, preliminary hearings are presided over by a magistrate. If the proceeding is an arraignment or sentencing, the judicial officer serves as a superior court judge.

But it is important to understand the distinction because it is the judicial officer’s function that determines the method of judicial review. This discussion is limited to the jurisdiction to review a magistrate’s decision.

Role of Magistrate

In Arizona, a prosecution must be initiated by either information or indictment. ARIZ. CONST. ART. II, § 30. If initiated by information, an accused has the right to a preliminary hearing before a magistrate. *Id.* See also ARIZ. R. CRIM. P. 2.2 THROUGH 5.4. Arizona authority therefore provides that a magistrate conducts preliminary hearings.

A magistrate is defined by A.R.S. § 1-215(18) as “an officer having power to issue a warrant for the arrest of a person charged with a public offense.” *Id.* The definition includes the chief justice, supreme court justices, superior court judges, justices of the peace and police magistrates in cities and towns. *Id.* Thus, a superior court judge can sit as a magistrate conducting a preliminary hearing and as a superior court judge at the same time.

Until recently, it was easy to determine whether

the judicial officer was acting as a judge or a magistrate. The reason is that, until 2002, a criminal complaint was filed in the justice court precinct where the offense allegedly occurred. The precinct’s justice of the peace conducted the preliminary hearing, making it easy to maintain the distinction between a lower court and a superior court. Under A.R.S. § 22-301(A)(2), a justice of the peace has jurisdiction over felonies, “but only” to commence the action, to conduct a preliminary hearing, and to determine whether probable cause exists to hold the defendant to answer in superior court.

Under this procedure, it was clear that the justice of the peace acted as a magistrate. Pursuant to Article 6, Section 16 of the Arizona Constitution, the superior court has appellate jurisdiction over cases handled by lower courts.

How Preliminary Hearings are Conducted Now

During the 1990s, the Maricopa County Superior Court started to streamline criminal procedures for felony offenses that began in justice courts and concluded in superior courts. The concept was that in “simple” cases an accused should appear for an initial appearance, preliminary hearing, change of plea, and sentencing before one judicial officer all on the same day.

Beginning in November 1997, the superior court transferred some of the proceedings handled by the justice courts to the superior court commissioner’s calendar. Pursuant to Administrative Order 97-058, Rule 2.2 of the Arizona Rules of Criminal Procedure, and Rule 4.2 of the Local Rules of Practices of the Superior Court in Maricopa County, felony complaints on simple drug charges arising of Phoenix Police Department investigations could be filed in EDC. Each case was then

assigned a superior court case number by the clerk's office. Building on this, the court then established the regional court centers for all other felonies in addition to drug cases. The result is that, by May 2003, all felony complaints are to be directly filed in superior court. See Administrative Orders 2002-029 and 2002-030.

Under the administrative order, all preliminary hearings now are heard in one of the three regional court centers. (Homicides are assigned to special assignment judges to conduct the preliminary hearing.) Significant to determining appellate review, the transfer from the justice courts to the regional court centers has not changed which *office* (i.e. whether a magistrate or judge) handles the preliminary hearing.

Although a superior court judge is authorized to handle the preliminary hearing, the judge does so sitting as a magistrate. *Wilson v. Garrett*, 104 Ariz. 57, 58, 448 P.2d 857, 858 (1969). If an appealable question arises, it is necessary to determine whether to appeal to the superior court or to the court of appeals. Under A.R.S. § 12-124, decisions made by a magistrate should be reviewed by superior court. But if it is a superior court judge sitting as a magistrate, an appeal to superior court is improper under Rule 16.1 (d) of the Arizona Rules of Criminal Procedure. Rule 16.1(d) provides that "except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered." Additionally, the comment to this rule explains that "issues once determined by a court ought not, without a showing of good cause, be reconsidered by the same court or another of equal jurisdiction."

Relevant Caselaw

This issue arose and was addressed in *Dunlap v. Superior Court*, 169 Ariz. 82, 817 P.2d 27 (App. 1991). There, the state charged Mr. Dunlap with murder by complaint, and he was summoned to appear at an initial appearance before a superior court judge sitting as magistrate. *Id.* at 83-84, 817 P.2d at 28-29. At this proceeding, the judge released Dunlap on his own recognizance. *Id.* at 84, 817 P.2d at 29. A preliminary hearing was

scheduled before another superior court judge also sitting as a magistrate. *Id.*

The state then moved to revoke Dunlap's release and the superior court judge presiding over the preliminary hearing agreed to reconsider the release. *Id.* Dunlap objected and ultimately took a special action in the superior court challenging this ruling. *Id.* The superior court judge assigned to hear the special action *sua sponte* raised the superior court's jurisdiction to review the decision of another superior court judge. *Id.* The judge, relying on Rule 16.1 (d), determined that he had no jurisdiction and dismissed the special action. *Id.*

The court of appeals disagreed and stated that "when exercising the functions of a magistrate, a superior court judge takes on a role separate and apart from his superior court duties. He is an *ex officio* magistrate with narrowly restricted power and jurisdiction." *Id.* at 84, 817 P.2d at 30. This role, however, does not preclude the judge from, in addition to the magistrate duties, holding "any of the positions or offices enumerated in A.R.S. § 1-215 (13)."

Thus, when the judge reconsidered Dunlap's release, he did so in role of a magistrate. Since this is not a function within the jurisdiction of the superior court, but is restricted to magistrates, the judge did not act as a member of superior court. Because the special action challenged the ruling of magistrate, as opposed to the ruling of another superior court judge, relief was appropriately sought in superior court. *Id.* at 86-87, 817 P.2d 31-32.

Request for Relief

In conclusion, when the decision of a judicial officer in RCC or EDC falls within the scope of duties belonging to a magistrate, the party seeking relief should file the special action before the presiding criminal judge of the Maricopa County Superior Court. But, if the judicial officer is acting as a member of the superior court, then it is not appropriate to seek relief from another judge of that court. ARIZ. R. CRIM. P. 16.1 (D). See also *Green v. Thompson*, 17

Ariz. App. 587, 499 P.2d 715 (1972) (holding that a superior court judge may not review, by special action, the decision made by a superior court commissioner).

The Dark Side of Innocence

By David Feige

David Feige is a public defender in the Bronx. His article "The Dark Side of Innocence" was previously published in The New York Times Magazine on June 15, 2003 and is reprinted here with his permission. Mr. Feige can be reached at DavidF@Bronxdefenders.org.

Michael Mercer was released in May after serving more than a decade in prison for a rape he did not commit. He is the most recent of at least 128 people to be set free by DNA evidence.

A steady stream of exonerations is shedding new light on just how fallible the criminal justice system is. From eyewitness identifications to false confessions, criminal convictions are being re-examined with an ever more sophisticated eye. There is more talk, too, about what we can do to protect the innocent. The issue comes up not only among the criminal defense bar but also at cocktail parties and in Congress. Innocence projects are springing up all over the country, and two states (Illinois and Maryland) have experimented with a moratorium on the death penalty for fear of executing the innocent. An entire innocence movement is afoot.

There is something a little scary about this, though, especially for those most interested in protecting and defending the rights of the accused. The obsessive focus on innocence runs the risk of eclipsing what should be the central issue of the criminal justice system--protecting the rights of everyone. The more that we highlight the rare cases in which innocence can actually be proved, the less we focus on the right of all to the presumption of innocence. So while criminal-defense attorneys may be gleefully reaping the rewards of DNA exonerations now,

the long-term impact may be more pernicious than they anticipate.

The reason everyone is talking about protecting the innocent is simple. It is one of the only things in the criminal justice system that everyone can agree on--Republicans and Democrats, prosecutors and public defenders. And it is because everyone can finally agree on something that the rhetoric of innocence has become the dominant discourse within and about the criminal justice system.

The media has also jumped in. Month after month, newspapers and magazines run stories featuring the faces of the falsely accused. Movie stars like Richard Dreyfuss, Mia Farrow and Jeff Goldblum have lined up to perform in "The Exonerated," a play that recounts the tragic stories of wrongly convicted death-row inmates. Several groups are already lobbying legislatures in an attempt to compensate the exonerated for the lost years of their lives.

All this attention has had some wonderful effects. Not only are the innocent exonerated, but a healthy skepticism has also begun to take hold in the criminal justice system. Jurors are learning that despite prosecutors' claims to the contrary, a confession or eyewitness identification may not be a perfect predictor of guilt.

But while DNA evidence has given us a definitive look at a certain segment of criminal cases in which biological evidence is deposited, recovered and preserved, these clear cases are few and far between. The reality is that most criminal cases are muddled, confusing affairs, rife with

conflicting testimony, jumbled loyalties, complex motivations and equivocal evidence. In the vast majority of cases, proof of innocence simply can't be established. Because of this reality, the criminal justice system has developed an arcane but workable system for approximating a truth that is, in all but the most exceptional cases, unknowable. It is a system that relies on fundamental rights afforded anyone accused of a crime: proof beyond a reasonable doubt, conviction by 12 unanimous jurors and, perhaps most important, the presumption of innocence.

As anyone who has served on a jury or watched a legal TV show knows, our standard of proof does not even contemplate innocence. Juries across the country render a verdict of guilty or not guilty (short for "not guilty beyond a reasonable doubt"). Innocent isn't a choice. The danger is that the rhetoric of innocence will function like a Trojan horse, an easy way for conservatives to hijack criminal justice legislation and decision-making, rolling back what they view as the reviled rights of criminals, in favor of protecting a tiny number of demonstrably innocent citizens.

Last month, a coalition of advocates for the exonerated initiated a program to help wrongly convicted inmates recently released from prison deal with the stresses of re-entry to the world. The group offered psychological evaluations and an assessment of needs related to housing, health care and jobs. It sounds fantastic. But it is limited to the exonerated. Prison is a brutal, dehumanizing place. And guilty or innocent, ex-inmates emerge into a world ill suited to receive them, generally without the skills they need to adapt and prosper. More than two million people are currently behind bars. Almost all of them will re-enter society, and almost all of them could benefit from the kinds of resources the program currently seeks only for those like Michael Mercer.

Eager for public support that has long been denied, even defenders of the criminally accused are beginning to fall for the widespread embrace of innocence. Some public-defender offices have even begun creating their own in-house

innocence projects. Each of these moves could fundamentally alter the way the legal system conceives of rights, upending notions that we all take for granted now, like the burden of proof--which does and should lie with the prosecution, rather than with the defense--and the presumption of innocence, rather than the proof of it.

The best way to ensure the integrity of the system is to insist ever more stridently on protecting these notions and ensuring the rights of all. There is, in this, a good lesson for all those riding the wave of innocence: Beware the hubris of certainty.

Honoring Our Veterans

By Mike Fusselman, Lead Investigator

In 1918, on the eleventh hour of the eleventh day in the eleventh month, the world rejoiced. After four years of war, the Allied powers signed an armistice with Germany in Rethondes, France. November 11, 1918 marked the end of World War I. Exactly one year later, that date was set aside to remember the sacrifices that men and women had made in the war.

It wasn't until 1926, however, that Armistice Day officially received its name through a Congressional resolution. Twelve years later, in 1938, Congress voted to make the day a national holiday. World War II began the following year. After World War II, Armistice Day continued to be observed on November 11th.

In 1953, the townspeople of Emporia, Kansas called the holiday Veterans Day in gratitude to the veterans in their town. Subsequently, Congress passed legislation creating Veterans Day. Beginning in 1954, the United States designated November 11th as Veterans Day to honor veterans of all U.S. wars.

Did you know that we have many veterans in the Public Defender's Office? Do you know who they are, where they have been or what they have done? The service of our Office's veterans spans nearly a half-century, from 1954 to the present. Yes, we have employees who are currently serving. Our veterans have fought in the air and on the ground in Vietnam. They have been deployed to Bosnia, Germany, Japan, and Korea--literally every corner of the globe. They have served in reserve, National Guard and on active duty. They have searched for Soviet submarines aboard a destroyer during the "Cold War." They have fought in the deserts of Iraq. They have survived rocket attacks, machine guns, surface to air missiles and mess hall food. They have experienced separation from loved ones and homesickness. They have served at home and abroad. Veterans include clerks, electronic technicians, infantrymen, physician's

assistants, policemen, firemen, paralegals, aviation ordnance men, scout-snipers, dog handlers and many, many more. You may be surprised to learn that your law clerk is a 20 year Army veteran or that the attorney down the hall was awarded the Distinguished Flying Cross.

This year will be a special one for the veterans of our Office. On October 29th, we will honor the veterans of the Public Defender's Office with a special day of recognition. That day, from 9:00 a.m. until 4:00 p.m., the training room will be open and will feature a display honoring these special individuals. As of this writing, 40 veterans have come forward and have agreed to participate in our recognition effort. Most have done so very reluctantly, maintaining that they "didn't do anything special." The fact of the matter is, that when they were in uniform, they went where they were told and did whatever was asked of them without question or hesitation. They were separated from loved ones and put their own personal interests aside while they served our country. This is what makes each of our veterans, no matter when, where or how they served, special.

The display will feature items of militaria generously donated from the collection of Bob Bohach. Bob is something of a "super veteran" having served in the Army, Air Force and Marines and still somehow finding the time to put in 22 years as a deputy sheriff with MCSO. He is a member of the First Marine Division Association and produces displays for various functions and organizations. His display will feature unique and interesting items representing each branch of service. There will also be continuous showings of home movies and military related videos throughout the day.

A brief military history of each of the veterans with our Office will be on display for your review

as well as personal items that the veterans have generously agreed to share such as photographs, documents, uniforms and decorations. The histories come from the veterans themselves. These first hand accounts contain information and personal insights into their service to our country. You will learn who these people are, what branch of service they served in, and when and where they served. There are some truly remarkable stories contained in these autobiographical accounts. The histories are diverse, interesting and thought provoking. The veterans share their thoughts on Veterans Day as well as some very humorous accounts of their time in service. For example, do you know who stole the duty officer's jeep, rolled it and then quietly returned it where he found it? Who was fired as the bodyguard to the Secretary of Defense (after the Secretary's wife complained in a direct call to the White House)? Who went into labor while aboard a submarine? Who parachuted from an airplane (while holding a sentry dog)?

Please mark October 29th on your calendars and plan on spending a few minutes getting to know more about some of the truly remarkable people that you work with every day. I promise you, you will come away with a greater understanding and appreciation not only of the veterans of our Office, but for the sacrifices and contributions of veterans everywhere.

Calling all Public Defender's Office Veterans!

To produce an interesting and honorable presentation of the sacrifices and contributions that our employees have made, we would like to hear from you about your service experiences. We want your stories, remembrances, humorous anecdotes and, yes, even a war story or two.

If you have not yet responded with your branch and dates of service, please email Mike Fusselman.

We don't want to miss anyone!

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have impeachment value, it must be “punishable by death or imprisonment in excess of one year under the law which the witness was convicted . . .” Rule 609(a)(1), Ariz. R. Evid.

Rulings involving the interpretation of a court rule are *de novo*. See *State v. ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, 998 P.2d 1055 (2000). Hence, the court essentially focused on an issue of law and addressed an issue with little precedent.

In the first opinion authored by newly appointed Justice Andrew Hurwitz, the supreme court reasoned that the “most logical interpretation of Rule 609(a)(1) is that the defendants’ previous Proposition 200 convictions cannot be used for impeachment at trial because their crimes were not, in the words of the Rule, ‘punishable by death or imprisonment in excess of one year.’” The court rejected the state’s contention that the classification of the prior conviction should control. In other words, the mere fact that the Proposition 200 offense constituted a class 4 felony and carried the possibility of punishment in excess of one year under A.R.S. § 13-604, did not define its punishment. The definition of the crime is instead found in Chapter 34 and does not inherently specify a punishment. Punishment, in this case, is controlled by the parameters of A.R.S. § 13-901.01.

Justice Hurwitz further wrote that the court was constrained by *State v. Malloy*, 131 Ariz. 125, 639 P.2d 315 (1981). In *Malloy*, the defendant could not be impeached because the court exercised its discretion by designating a class 6 felony a class 1 misdemeanor. See A.R.S. §13-702 (G). By the same token, the supreme court appeared to ignore that the converse is not true. While a superior court judge can change a felony into a misdemeanor, a judge can’t convert misdemeanors into felonies.

Justice Hurwitz also observed that the state’s position “suffered from a serious internal inconsistency.” The court noted that the length of a sentence is often controlled by a

separate statute other than the one defining the conviction. Put differently, A.R.S. § 13-901.01, in the court’s language, supersedes all other statutes when it comes to interpreting Proposition 200 offenses. The court did not note, however, that A.R.S. § 13-901.01 specifically uses the term “offense” and not felony. See A.R.S. § 13-105(23) (defining offense to encompass felony, misdemeanor, and petty offenses).

And there is the rub. The supreme court rejected the contention that the mere possibility of a prison sentence by the terms of the offense’s classification altered the fact that a prison sentence could not be given for a Proposition 200 offense. By dismissing the *Landeros* cross-petition, the supreme court did not have to address the definition of a felony for enhancement purposes. Arguably, the supreme court simply did not want to tackle head-on the enhancement issue (remember it denied review in *Thues*), which it may have reasoned would create a windfall for drug offenders. Both the supreme court and court of appeals are stuck with a law created by initiative that was drafted by an out-of-state law firm unfamiliar with Arizona’s statutory scheme. Moreover, Prop 200’s policy goals are not universally shared by some officials and are an anathema to Arizona’s bevy of drug war laws and policies.

Consequently, *Christian*, *Thues* and *Landeros* seem logically inconsistent, notwithstanding construing a rule of evidence in one case and a statutory sentencing scheme in another. Aren’t grits always grocery?

Further, neither *Christian*, *Thues* nor *Landeros* address a due process analysis. Does Prop 200 give a person of average intelligence notice of the statutory consequences? See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). This issue seems, for now, to have also escaped review.

The *Landeros* decision may create further ripples. Can the accused ever open the door to impeachment or is a Prop 200 offense treated as a complete nullity? What does the accused have to say, if he takes the stand, that might alter the holding in *Landeros*? The supreme court did

not address whether it created a bright line rule or a ruling on Prop 200 Rule 609 priors that is open to exceptions. Probably, a simple denial by the accused should not “open the door” to impeachment since it will almost always be the case that the accused is claiming the drugs in question are not his.

The only thing that seems unambiguous is that Prop 200 will continue to spawn litigation and that no stone should be left unturned in crafting pretrial motions. You might be surprised what opportunities are hiding there. After all, who knows why Mona Lisa is smiling or why the blues is forever?

Or maybe, as Little Milton’s growls out a blues song, “When you’re cheating on a love that’s true, who’s cheating who?”

Endnotes

¹ “Little Milton’s” real name was Peter Carmichael and he was from Chicago. Other Little Milton hits included “I Stand Accused” and “Pouring Water on a Drowning Man.”

² *State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001) (Prop 200 applies to paraphernalia convictions when associated with personal drug use); *State v. Roman*, 200 Ariz. 594, 30 P.3d 661 (App. 2001) (Prop 200 does not include promoting prison contraband); *State v. Gallagher*, 205 Ariz. 267, 69 P.3d 38 (App. 2003) (drug paraphernalia and possession arise out of same occasion); *State v. Tousignant*, 202 Ariz. 270, 43 P.3d 218 (App. 2002) (Prop 200 offender may not choose to reject probation); *State v. Guillory*, 199 Ariz. 462, 18 P.3d 1261 (App. 2001); *O’Brien v. Escher*, 204 Ariz. 459, 65 P.3d 107 (2003); *State v. Thues*, 203 Ariz. 339, 54 P.3d 368 (App. 2002); *State v. Christian*, 202 Ariz. 462, 47 P.3d 666 (App. 2002); *State v. Rodriguez*, 200 Ariz. 105, 23 P.3d 100 (2001); *Montero v. Foreman*, 204 Ariz. 378, 64 P.3d 206 (App. 2003) (prior disorderly conduct made accused ineligible for Prop 200); *State v. Hylton*, 202 Ariz. 325, 44 P.3d 1005 (App. 2002) (non-Prop 200 violations need not force court to impose additional condition); *State v. Hensley*, 201 Ariz. 74, 31 P.3d 848 (App. 2001); *State v.*

Ossana, 199 Ariz. 459, 18 P.3d 1258 (2001); *State v. Pereyra*, 199 Ariz. 352, 18 P.3d 146 (App. 2001); *State v. Benak*, 199 Ariz. 333, 18 P.3d 127 (App. 2001) (state must allege violent crime denying Prop 200 protection); *Cherry v. Araneta*, 203 Ariz. 532, 57 P.3d 391 (App. 2002).

³The *Thues* and *Landeros* arguments focus on the fact that by altering the punishment (notwithstanding any law to the contrary) the Arizona people effectively rendered first- and second-time drug possession offenses non-felonies. See A.R.S. § 13-901.01 (A).

Arizona Advance Reports

By Stephen Collins, Defender Attorney - Appeals



State v. Johnson **402 Ariz. Adv. Rep. 3 (CA 1, 6/17/03)**

Johnson was found guilty of aggravated assault for intentionally shooting a police officer. The trial judge instructed the jury that the intent to shoot the police officer could be transferred to establish the intent to place bystanders in reasonable apprehension of physical injury. The jury found Johnson guilty of aggravated assault upon five bystanders. The Court of Appeals reversed the convictions involving the bystanders because the intent to cause physical injury to one person cannot be transferred to provide the intent to place others in reasonable apprehension of imminent physical injury. The case contains a detailed discussion of the transferred intent doctrine.

State v. Padilla **402 Ariz. Adv. Rep. 7 (CA 1, 6/19/03)**

The Court of Appeals held that unlawful use of a means of transportation is a lesser-included offense of theft of a means of transportation.

Goy v. Jones (State) **402 Ariz. Adv. Rep. 11 (CA 1, 6/17/03)**

Goy was arrested for DUI in 1996. Trial was not set until 2002. The Court of Appeals held the arresting officer could read his police report to the jury because it came under the recorded recollection exception to the hearsay rule.

State v. Casey **402 Ariz. Adv. Rep. 13 (SC, 6/25/03)**

In *Martin v. Ohio*, the United States Supreme Court held that a statute shifting the burden of proof on self-defense to a defendant does not violate the federal due process mandate. In the present case, the Arizona Supreme Court held that A.R.S. Section 13-205(A), which shifts the burden of proof on self-defense to a defendant, does not violate the due process clause in the Arizona Constitution.

In re Arnulfo G. **403 Ariz. Adv. Rep. 3 (CA 1, 5/6/03)**

The State moved to dismiss a misdemeanor DUI charge against Arnulfo so it could be filed as a felony in adult court. A juvenile court judge dismissed the DUI charge with prejudice. The Court of Appeals held it was error to dismiss the matter *with prejudice* because the delay caused by the dismissal did not sufficiently harm Arnulfo. "The type of harm that will justify dismissal with prejudice is a harm that would actually impair the accused's ability to defend against the charges."

State v. Brown (McMullen) **402 Ariz. Adv. Rep. 22 (CA 2, 5/23/03)**

The Court of Appeals held that *Apprendi v. New Jersey* and *Ring v. Arizona* do not require a jury trial for determining aggravating circumstances in a noncapital case under A.R.S. Section 13-702.

State v. Martin (Landeros)
402 Ariz. Adv. Rep. 28 (SC, 6/5/03)

Arizona Evidence Rule 609 allows evidence of a prior conviction to be used for impeachment of a witness only if the crime was punishable by death or imprisonment in excess of one year. Landeros had previously been convicted of a drug offense. However, under A.R.S. Section 13-901.01 (Proposition 200) he could not be sentenced to a term of imprisonment for the offense. Therefore, the Arizona Supreme Court held the prior conviction could not be used to impeach Landeros if he testified in his trial on a new charge.

State v. Soltero
403 Ariz. Adv. Rep. 8 (CA 1, 7/3/03)

Soltero was convicted of “extreme DUI” and challenged the constitutionality of the 2001 amendment to A.R.S. Section 28-1382(A) that reduced the alcohol concentration limit for extreme DUI from 0.18 to 0.15. He contended that because the amendment was enacted with an emergency clause and thereby became immediately effective on the date it was signed by the governor, it violated the due process clause by failing to provide adequate notice regarding the prohibited conduct. The Court of Appeals held that the absence of any grace period or specific notice to the public regarding the enactment of the amendment does not present any constitutional bar to the immediate enforcement of the amended statute.

State v. Esser
403 Ariz. Adv. Rep. 12 (CA 2, 5/23/03)

Esser was convicted of driving with an alcohol concentration of 0.10 or greater. He filed a motion to suppress the breath test results based on his pulmonary physiology expert’s testimony that the Intoxilyzer 5000 does not and cannot measure alveolar or “deep lung” air. A Department of Health Services regulation requires that breath specimens be “alveolar in

composition.” The Court of Appeals affirmed the trial judge’s denial of the motion to suppress.

State v. Cazares
403 Ariz. Adv. Rep. 15 (CA 2, 7/11/03)

Cazares was convicted of aggravated assault with a deadly weapon and sentenced to an aggravated five-year prison term. He claims the trial judge failed to consider the “significant mitigating circumstance of the age of the defendant,” a statutory mitigating factor under A.R.S. Section 13-702(D)(1). The Court of Appeals “presumed” the trial judge properly weighed the fact Cazares was only eighteen years old in light of the fact he had an extensive criminal history.

State v. Lehr
403 Ariz. Adv. Rep. 16 (SC, 4/30/03)

State v. Jones
404 Ariz. Adv. Rep. 13 (SC, 7/7/03)
State v. Canez
403 Ariz. Adv. Rep. 24 (SC, 6/30/03)

In these death penalty cases, aggravating factors were vacated pursuant to *Ring v. Arizona*. Even though other aggravating factors were upheld, the Arizona Supreme Court could not conclude that the sentencing procedure resulted in harmless error and the cases were remanded for resentencing.

State v. Rodriguez
403 Ariz. Adv. Rep. 18 (CA 2, 6/27/03)

Rodriguez argued that the trial court lacked personal jurisdiction to try him as an adult because the state failed to file a notice of his “chronic felony offender” status under A.R.S. Section 13-501(D) and failed to prove he was such an offender. The Court of Appeals disagreed.

State v. Darelli

404 Ariz. Adv. Rep. 9 (CA 1, 7/22/03)

On the first day of trial while the jury was assembled and awaiting voir dire, the prosecutor made a plea offer subject to approval by her supervisor. The trial judge became aware of the plea negotiation and told both counsel that, because the prospective jurors had already been assembled, he would only accept a plea to the indictment or a dismissal of all charges. Otherwise, the case would go to trial that same day. As a result, the matter went to trial and Darelli was convicted.

The Court of Appeals held that the trial judge may not effectively implement a plea cut-off date by rejecting all potential pleas except a plea to the charges, based solely on the procedural posture of a case. Arizona Criminal Procedure Rule 17.4 guarantees the parties the right to have a trial judge consider any plea agreement on the merits.

State v. Lamar

404 Ariz. Adv. Rep. 3 (SC, 7/17/03)

Lamar was convicted of first-degree murder and sentenced to death. The Arizona Supreme Court held that although Lamar was entitled to self-representation at trial, he was not entitled to a continuance to prepare his pro se defense. A witness testified that one of Lamar's accomplices had threatened to kill her. This was held to be harmless error. In closing argument, the prosecutor discussed a witness' testimony and stated, "well, that sounds like a truthful statement." It was held that the statement constituted inappropriate vouching, but was harmless error. Lamar's conviction for first-degree murder was upheld.

Announcing... Defender System Talk

Forty years ago last March, the Supreme Court issued its opinion in *Gideon v. Wainwright*, ruling that anyone accused of a felony has a fundamental right to counsel. Whether government has met Clarence Gideon's challenge is an ongoing discussion.

Beginning next month, Defender System Talk will be a periodic column intended to be an eclectic gathering of news about developments in our office and the criminal justice system.

It is a "conversation" with for The Defense readers about Gideon's mandate in the broadest sense. We welcome your input.

Information for future Defender System Talk columns can be sent to the attention of johns@mail.maricopa.gov.

Jury and Bench Trial Results July 2003

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of for The Defense, please contact the Public Defender Training Division.



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