

# for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

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## Immigration Law Update

By Beth Houck, Defender Attorney

### *Rule 17.2 Change Going Into Effect*

A criminal conviction may have a devastating impact on many of our clients, whether here legally or illegally. Removal (the current term for deportation) can mean the loss of home and business, and separation from family and friends forever, far worse consequences than a United States citizen receives for the same criminal act. Over the past decade, changes in immigration law have increased the number and types of criminal offenses which have immigration consequences, and have also reduced or completely removed the channels available for seeking a waiver from deportation. Since many crimes now render a person ineligible for any sort of relief in immigration court, the focus has shifted to the criminal courts, where a person can attempt to negotiate a plea for a conviction that doesn't put him in the removable-and-ineligible-for-relief category.

A change to Arizona Rule of Criminal Procedure 17.2 goes into effect on December 1, 2004, joining at least twenty-one other states which already require judges to give a warning about immigration consequences. Judges in Arizona will now be required to advise defendants, prior to entering a plea of guilty or no contest, the following:

That if he or she is not a citizen of the United States, the plea may have immigration consequences. Specifically, the court shall state, "If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen." The court shall also give the advisement in this section prior to any admission of facts sufficient to warrant finding of guilt, or prior to any submission on the record. The defendant shall not be required to disclose his or her legal status in the United States to the court. Ariz. R. Cr. P. Rule 17.2(f).<sup>1</sup>

In the past, Arizona and many other states' courts have not found it the duty of defense counsel to advise clients of immigration consequences, nor considered them ineffective



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for The Defense

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James J. Haas, Maricopa County Public Defender

for failing to do so. See *State v. Rosas*, 183 Ariz. 421, 423, 904 P.2d 1245, 1247 (Ct. App. 1995). That is changing, as amendments to the immigration laws over the past decade have made some collateral consequences now a virtual certainty rather than a mere possibility. Some defendants have been allowed to have their convictions reconsidered based on a showing of either no advice or affirmatively wrong advice from their defense attorney regarding immigration consequences. See, e.g. *People v. Bautista*, 8 Cal. Rptr. 3d 862, 868 (Cal. Ct. App. 2004) trial counsel's representation fell below the standards for effective assistance of counsel because he failed to advise client that deportation and exclusion from readmission was mandatory for possession of marijuana for sale, an "aggravated felony" under federal law, and did not attempt to negotiate a plea bargain to a non-aggravated felony such as offering to sell marijuana); *Gonzalez v. Oregon*, 83 P.3d 921 (Or. App. 2004) (notwithstanding general applicability of the collateral consequences rule, for attorneys to provide constitutionally adequate representation to clients who are considering whether to accept a guilty plea, attorneys must tell their clients about the risk of deportation); *People v. McKenzie*, 771 N.Y.S.2d 551 (N.Y.App. Div. 2004) (allegations that defendant would not have pleaded guilty to charge of first-degree sexual abuse had he understood he would be deported as a result of the plea, or had he understood that deportation would even be a possibility,

and that avoiding deportation was important to defendant because of his job, new wife, and children, were sufficient to warrant a hearing to determine whether defendant was prejudiced by counsel's incorrect advice regarding the deportation consequences of the plea.)

Advisement as to the collateral consequences of a criminal conviction has long been the standard to which defense attorneys should aspire, according to the American Bar Association. "To the extent possible, defense counsel should warn clients in advance of entering a guilty plea as to any possible collateral consequences." ABA Standards for Criminal Justice, Standard 14-3.2(f). Now it is becoming a requirement, not just an aspiration.

The United States Supreme Court has recognized the overarching importance of immigration consequences to the non-citizen defendant. "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *I.N.S. v. St. Cyr* 533 U.S. 289, 322, 121 S.Ct. 2271, 2291 (2001). However, the Ninth Circuit still will not find counsel ineffective despite the above statement, because immigration consequences remain collateral. See *U.S. v. Fry*, 332 F.3d 1198, 1201 (9<sup>th</sup> Cir. 2003).

The statement made by the Supreme Court in *St. Cyr* is unfortunately not true; aliens do enter pleas without being aware of the consequences. It can be assumed, at least, that an alien would not knowingly enter into a plea agreement if he knew for certain it would have certain direct and undesirable immigration consequences. It is the defense attorney's job to make him acutely aware.

### ***General Strategy for Avoiding Immigration Consequences***

For a more detailed discussion of this topic, see the May 2003 issue of *for The Defense*, Volume

*continued on p. 6*

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# A Second Chance

## Expungement (or Not) of Juvenile Records

By Helene Abrams, Juvenile Division Chief

*Editor's Note: Increasingly the collateral consequences of criminal convictions exceed those imposed by the judge at sentencing. Helene Abrams' article "A Second Chance" addresses a critical issue for many of our clients—presently in Arizona there is no true expungement statute.*

*Currently, an arrest is not cleared or erased from a person's criminal record. If a conviction is set aside through the judicial process, it is noted on an arrest record as "set aside." Even when a conviction is set aside under Arizona law, many employment applications ask whether a person has "ever" been arrested for or convicted of a felony. This does not pose a problem for clients whose cases are handled in the juvenile system since they have not been convicted of felonies. In addition, this article discusses a unique approach applicable to some juveniles whose cases are direct filed in adult court.*

*The overwhelming majority of clients in the adult system, however, have a more difficult path. Upon successful completion of probation or upon absolute discharge from the Department of Corrections an adult offender may apply, through the clerk of the superior court, for an order vacating the judgment of guilt, dismissing charges, and restoration of rights. If granted, this does not operate to entitle a client to say he or she has not been convicted of a felony. Despite this, it still has value; in addition to restoring rights, it may serve as the functional equivalent of showing that a person has been rehabilitated or convince an employer that a person should be given a chance to succeed.*

Expungement in the State of Arizona? Doesn't exist, right? We have set asides and restoration of civil rights. For juveniles, we also have destruction of the record. But expungement? There is one circumstance where this exists and

it can be used more often now.

In September 2004, the Court of Appeals, Division Two, decided the case of Rene A. Sanchez (435 Ariz. Adv. Rep. 17). The question presented to the court was whether A.R.S. §13-921(B) is available for a person who met the A.R.S. §13-921(A) requirements but for whom the sentencing judge did not mention A.R.S. §13-921 provision in the original sentencing minute entry. The answer, thankfully, is yes.

In 1996, two thirds of the voters approved Proposition 102, the Juvenile Justice Initiative. The following year, implementation legislation was passed in the form of Senate Bill 1446. Many of the provisions explained the constitutional changes. Others created new procedures to prosecute children in the adult criminal court. One of the provisions of this bill seemed to recognize that a child who is direct-filed into the adult court on a felony charge may still be salvageable. There was an understanding that a child may make a mistake, learn from that mistake and be able to become a productive citizen. A felony conviction might jeopardize that chance for the child to move forward. Maricopa County Superior Court Judge John Foreman was instrumental in arguing that a child with a first time felony conviction who completes all of the court-ordered consequences should be able to have the slate wiped clean.<sup>1</sup> A.R.S. §13-921(A) and (B) are the codifications of this belief. (See side bar on p. 4 for full text).

There were some attorneys who believed that a judge must place the statute in the minute entry before the client would be entitled to a dismissal, set aside or expungement, etc. Many judges also believed this and some refused to afford this opportunity to a child. There were prosecutors

*continued on p. 5*

## A.R.S. §13-921 Probation for defendants under eighteen years of age; dual adult juvenile probation

A. The court may enter a judgment of guilt and place the defendant on probation pursuant to this section if all of the following apply:

1. The defendant is under eighteen years of age at the time the offense is committed.
2. The defendant is convicted of a felony offense.
3. The defendant is not sentenced to a term of imprisonment.
4. The defendant does not have a historical prior felony conviction as defined in section 13-604.

B. If the court places a defendant on probation pursuant to this section, all of the following apply:

1. Except as provided in paragraphs 2, 3 and 4 of this subsection, if the defendant successfully completes the terms and conditions of probation, the court may set aside the judgment of guilt, dismiss the information or indictment, expunge the defendant's record and order the person to be released from all penalties and disabilities resulting from the conviction. The clerk of the court in which the conviction occurred shall notify each agency to which the original conviction was reported that all penalties and disabilities have been discharged and that the defendant's record has been expunged.
2. The conviction may be used as a conviction if it would be admissible pursuant to section 13-604 as if it had not been set aside and the conviction may be pleaded and proved as a prior conviction in any subsequent prosecution of the defendant.
3. The conviction is deemed to be a conviction for the purposes of sections 28-3304, 28-3305, 28-3306 and 28-3320.
4. The defendant shall comply with sections 13-3821 and 13-3822.

C. A defendant who is placed on probation pursuant to this section is deemed to be on adult probation.

D. If a defendant is placed on probation pursuant to this section, the court as a condition of probation may order the defendant to participate in services that are available to the juvenile court.

E. The court may order that a defendant who is placed on probation pursuant to this section be incarcerated in a county jail at whatever time or intervals, consecutive or nonconsecutive, that the court determines. The incarceration shall not extend beyond the period of court ordered probation, and the length of time the defendant actually spends in a county jail shall not exceed one year.

F. In addition to the provisions of this section, the court may apply any of the provisions of section 13-901.

*Continued from A Second Chance, p.3*

who objected to this statute being included, so the minute entry was silent on this issue. Whatever gamble it was, the only one who lost was the client as nothing happened unless the client successfully completed all the terms and conditions of probation.

So the question has now been answered, at least by Division Two. No mention of the statute needs to be made in the sentencing minute entry for the provisions of A.R.S. §13-921(B) to apply. But this is not the end of the inquiry – now we need to define the scope of the “expungement” that is available.

There are parallel provisions in the statutes for set aside, dismissal and orders that the person be released from all penalties and disabilities resulting from the conviction. See A.R.S. §§13-904 to 912. But expungement is not defined. If one reads the set aside statute, while a person may be released from disabilities, etc., the record is still available. In fact, the Arizona Supreme Court’s web site notes “conviction set aside” on the same line as the offense for which the person was convicted.

To have any meaning, an expungement should treat the offense as if it never existed. That is what a number of other states do with juvenile records. (See, Kansas, K.S.A. §38-1610, Kentucky, K.R.S. §610.330, Utah, U.C.A. 1953 §78-3a-905, Oklahoma, 10 Okl. St. Ann. §7307-1.8, Colorado, C.R.S.A. §19-1-306 Wyoming, W.S. 1977 §14-6-241, Oregon, O.R.S. §419A.262).

I am aware of only one circumstance in Maricopa County where expungement was requested and granted. The attorney requested it after the child completed probation and met all of the section A requirements. The judge granted the motion and ordered the clerk of the court to expunge the record. The problem was that the clerk has no procedure to do this. The other unresolved area concerns when and who triggers the request. Even if the statute is

referenced in the minute entry, does the attorney request expungement years later? Does the probation officer? Does the court set a hearing at the end of the probation term? Does the defendant have to do it?

In short, we need to do some work on defining “expungement” and discussing a procedure for requesting it now that the opportunity exists for many of our juvenile clients convicted of their first felony in criminal court. I am currently drafting some possible changes to the statute. Please contact me if you are interested in being involved in this effort.

### **(Endnotes)**

<sup>1</sup> Exceptions, of course, were allowed but only if the child got in trouble again.



*Continued from Immigration Law Update, p.2*

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The easy answer is to avoid any conviction that makes a person inadmissible, removable, or an aggravated felon. Easier said than done. If the person is undocumented, and has no aspirations of ever becoming legal, the main thing to avoid is an aggravated felony, because he will probably be deported no matter what. It is helpful to ask these clients what relatives they have in this country, what relatives they have in their home country, and how close they are to them. It gives a pretty good idea whether the person is likely to return illegally. Being found in the United States illegally after being deported is a federal crime, and doing so while having a criminal conviction subjects the person to harsher sentencing under 8 U.S.C. 1326(b) and U.S.S.G. 2L12. Even a person who says she never expects to reside here legally might become eligible through some future amnesty or guest worker program that she never anticipated. A conviction that makes her inadmissible would probably preclude that.

For persons here legally, who frequently have more at stake, it would be wise to consult an immigration attorney (see side bar). The person may fit into an exception category that saves him from being inadmissible or deportable, or the person may be eligible to apply for cancellation of removal under 8 U.S.C. 1226(b). The particular offense to which he pleads guilty may have bearing on his eligibility.

### ***Recent Developments in the Law Regarding Immigration Consequences***

There have been some changes in the law since the article on immigration consequences was first published in *for The Defense* in May, 2003. A few are discussed here.

In the previous article, a plea to solicitation was recommended to avoid immigration

## Immigration Attorneys

The following immigration attorneys have consented to answer questions from Maricopa County public defenders in plea negotiations with non-citizen clients. Their preferred method of contact is given.

Michael Franquinha  
(602) 294-0200

Lynn Marcus  
(520) 626-5232  
marcus@law.arizona.edu

Margarita Silva  
fax (602) 251-3170  
margarita.silva@azbar.org

Monika Sud-Devaraj  
(602) 234-0782  
monika@whiteheadlaw.com

Dori Zavala  
(602) 230-2056  
dzavala@zavalalaw.com

Some of these attorneys have their own intake forms which they would like you and the client to fill out before they attempt to answer any questions. They can fax you their form.

One of them also pointed out that, just as clients are not always correct about their criminal history, some may not know their immigration history. It is possible to get the client's file from the immigration service, usually at no charge; however, it may take six weeks or so. The form to use for this request may be found at <http://uscis.gov/graphics/formsfee/forms/g-639.htm>.

consequences. That holds true for drug offenses; there is case law that says solicitation to commit a crime relating to a controlled substance is not itself a crime relating to a controlled substance. However, there is no case law as to whether solicitation to commit a crime involving moral turpitude is itself a CIMT.

### Drug Offenses as Aggravated Felonies

When the previous article was printed, felony drug convictions under Arizona state law were considered aggravated felonies in the immigration courts. A recent Ninth Circuit opinion has changed that. There is a “strong interest in national uniformity in the administration of immigration laws,” rooted in the Constitution. See *Cazarez-Gutierrez v. Ashcroft*, — F.3d —, 2004 WL 1879240, \*5 (9<sup>th</sup> Cir. 2004); U.S. Const. Art. I § 8. When a statute is interpreted in an immigration court proceeding (such as removal or cancellation of removal), the vagaries of state laws should matter little. However, when a state statute is analyzed as a predicate offense in federal criminal court (for illegal reentry), there is no pressing need for national uniformity, and variations are permissible from state to state. See *Cazarez-Gutierrez* at \*6. In other words, a felony “for immigration purposes” may differ from a felony “for sentencing purposes.” The court held that, in the interest of keeping immigration law uniform throughout the country, a felony “for immigration purposes” must be a felony under federal law. See *id.* Persons seeking benefits or being proceeded against in immigration courts should be treated the same, regardless of state law. For sentencing purposes, it is acceptable to vary by state and circuit.<sup>2</sup> An example:

Drug possession under federal law is a misdemeanor. For example, “[p]ossession of methamphetamine is punishable under the federal Controlled Substances Act (“CSA”) with imprisonment of not more than one year, see 21 U.S.C. § 844(a), and thus is not a felony under federal law.” *United States v. Arellano-Torres*, 303 F.3d 1173, 1177-78 (9<sup>th</sup> Cir.2002). An alien with an Arizona conviction for methamphetamine has a felony conviction

under Arizona law. See A.R.S. § 13-3407. He is deportable because he has a conviction relating to a controlled substance. To be an aggravated felony, a drug conviction must be “illicit trafficking in a controlled substance, including a drug trafficking crime.” 8 U.S.C. § 101(a)(43)(B). A drug trafficking crime is “any felony punishable by the Controlled Substances Act. . . .” 18 U.S.C. § 924(c)(2)(emphasis added). For “immigration purposes” the alien does not have an aggravated felony and can apply for cancellation of removal if he meets the other requirements. See 8 U.S.C. §1229b. For “sentencing purposes,” however, felony means “any federal, state or local offense punishable by imprisonment for a term exceeding one year.” U.S.S.G. 2L1.2, 18 U.S.C., App. Note 2. Should he return illegally, he is subject to the enhanced penalty for aggravated felons because his conviction is a felony, and punishable by the CSA.

### Firearm Offenses

The definition of prohibited possessor under Arizona law was changed in the last year to incorporate anyone who is a prohibited possessor under federal law because of alienage. See A.R.S. § 13-3101; 18 U.S.C. 922(g)(5). The federal statute makes undocumented and non-immigrant aliens (aliens here on a work, student, or tourist visa, e.g.) prohibited possessors, so now Arizona law does, too. A conviction for this felony is grounds for deportation and an aggravated felony.

### Aggravated DUI

The Board of Immigration Appeals formerly held that a DUI with a suspended license was a crime involving moral turpitude (CIMT), because the person knew he was not supposed to be driving at all. See *In re Lopez-Meza*, 22 I. & N. 1188 (BIA 1999). The Ninth Circuit has since decided that Arizona’s statute is divisible – it includes some behavior which is a CIMT and some which is not. Actual physical control of a vehicle, while parked in one’s driveway and legally intoxicated, does not involve moral turpitude. See *Hernandez-Martinez v. Ashcroft*, 2003 WL 21212623 (9<sup>th</sup> Cir. 2003). On the other hand,

“Drunken driving is despicable.” *Id.* A plea entry that uses the phrase “defendant was in actual physical control of a vehicle in Maricopa County” for the factual basis, for example, *even if* the person was actually driving on the freeway, escapes being a CIMT because of insufficient facts in the record of conviction.

### **Class Six Felonies Post-*Blakely***

In immigration law, a felony is an offense punishable by more than one year. *See U.S. v. Robles-Rodriguez*, 281 F.3d 900, 904 (9<sup>th</sup> Cir. 2002). It is the punishment, not the label, that controls. Since *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531 (2004), and *State v. Brown and McMullen*, 2004 WL 2390005 (Ariz. 2004), the maximum sentence for a class six felony, without a finding of additional facts (other than prior convictions) is the presumptive one year. That makes it a misdemeanor under immigration law. Whether it becomes a felony by waiving one’s *Blakely* rights in the plea agreement or does not become a felony unless an aggravator is actually found, it is too soon to tell. However, it might be a reason for a person charged with a class six to go to trial.

(Endnotes)

<sup>1</sup> Defendants should not be asked, and can refuse to answer, whether they are here legally or illegally, because that is an element of many offenses.

<sup>2</sup> The Second, Third, and Ninth Circuits are in accord. The Fifth Circuit felt that a uniform definition of the term ‘felony’ for both purposes in the Fifth Circuit was more important than a uniform definition across all circuits for immigration purposes. And the BIA currently follows the law of the circuit. *See Cazarez-Gutierrez v. Ashcroft*, 2004 WL 1879240, \*3-6 (9<sup>th</sup> Cir. 2004).

## **El Salvador Capital Assistance Project**

Dear Colleagues:

We are pleased to announce that the Republic of El Salvador has recently created the El Salvador Capital Assistance Project. The Project will assist nationals of El Salvador who are facing the death penalty at trial and in post conviction. We will be providing litigation support and amicus briefs to attorneys handling these cases. It is important that we learn of pending trials as soon as possible. We are aware of four Salvadorens who are currently on death row (Ortiz in LA, Amaya Ruiz in AZ, Guevara in TX, and Arevalo in GA), and one who is facing trial in Los Angeles (Centeno). Please contact us as soon as you learn of any murder charge filed against a citizen of El Salvador. Thank you very much for your help and support.

Nick Trenticosta and Susana Herrero  
7100 St. Charles Avenue  
New Orleans, LA 70118  
504-864-0700  
504-864-0780 fax

# Practice Pointer

## Definition of Charge with Historical Prior

By Jennifer Manzi, Pima County Public Defender's Office

A.R.S. §13-604 (V)(2)(c) has recently been revised to add that, in order to determine whether a class 4,5,or 6 is a valid prior, “any time spent on absconder status while on probation is excluded in calculating if the offense was committed within the preceding five years.” “Absconder” is now defined in A.R.S. §13-604(V)(1) as someone whose whereabouts are unknown and such is alleged in the petition to revoke, and cannot be contacted by the P.O. within 90 days of the last contact. Thus, my client’s class 5 from 1997 is valid since she absconded from probation in 1998 and didn’t get picked up until this past September (and the allegations in the petition conform to §13-604(V)(1).)



## Got the Writer's Bug?

Then, consider submitting an article for publication in  
for The Defense.

Articles, practice pointers and other training related  
information are welcome at anytime...So, submit  
next article to one of our editors soon!



# Practice Pointer: New Rule 15.1 (j)

The Arizona Supreme Court recently promulgated a new rule governing many aspects of the production of allegedly pornographic materials in child pornography cases. Curtis Rau, Defender Attorney in Group D, wrote MCPD's comment on proposed Rule 15.1(j), which was submitted to the Supreme Court for review. He has now prepared the following motion and proposed order to comply with the criteria of the new rule. The Supreme Court has invited comments concerning the implementation of the new rule to be filed on or before April 30, 2005. Curtis Rau is the contact person for our office if you have any information regarding the manner in which this new rule effects your ability to obtain *necessaru discoveru* in a *timelu* manner. *whether positivelu* or *neativelu*.

## IN THE SUPERIOR COURT OF THE STATE OF ARIZONA FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	}	Case No. CRXXXXXXXX
	}	
Plaintiff,	}	<b>MOTION FOR REPRODUCTION OF</b>
	}	<b>DIGITAL MEDIA EVIDENCE</b>
v.	}	<b>ALLEGEDLY CONTAINING</b>
	}	<b>ILLEGAL CONTRABAND</b>
XXXXXXXX	}	
Defendant	}	<b>PURSUANT TO NEWLY</b>
	}	<b>PROMULGATED RULE 15.1(j)</b>
	}	
	}	(Assigned to the Honorable XXXXXX)

Pursuant to newly promulgated Rule 15.1(j), the Defendant, \*\*\*, moves the court to order the state to provide an EnCase forensically duplicate image of any and all digital media, hardware, or software seized by law enforcement on DATE.

Rule 15.1(j) specifically states as follows:

Upon a substantial showing by a defendant that reproduction or release for examination or testing of any particular item is required for the effective investigation or presentation of a defense, such as for expert analysis, the court may require reproduction or release for examination or testing of that item, subject to such terms and conditions as are necessary to protect the rights of victims, to document the chain of custody, and to protect physical evidence. (See Rule 15.1(j), attached hereto as Exhibit A for six enumerated conditions).

Moreover, the Connecticut Rule 15.1(j) specifically states:

Reproduction of evidence is allowed only upon court order. A court should order reproduction of evidence of such nature only in those cases in which it is necessary for the prosecution of a defense, such as when the evidence could be examined by an expert in order to determine whether actual copying or a deposit in the case file or when a computer hard drive or other digital storage medium must be examined by an expert to determine whether the defendant was responsible for downloading the materials or had actual knowledge of the existence of the materials on the computer hard drive or digital storage medium. (Emphasis added)

Such an order is not given for the reasons set forth in the following reasons:

(Substantial basis or grounds, e.g. other individuals had access to computer. Defendant did not have actual or constructive knowledge about the presence of non-abstract digital media, non-abstract digital media could have been downloaded by someone else, a batch downloading program, involuntary peer-to-peer downloading, or maliciousware computer virus such as one of the CWS viruses, or alleged digital non-abstract is involuntarily downloaded through.)

Please refer to the attached curriculum vitae and scholarly piece written by XXX, designed for some computer expert for the Defendant in this matter for a more technical explanation of the need for production of an Exact copy of the requested evidence (Attached hereto as Exhibits B and C respectively)

Also included is Meritop County Office of the Public Defenders Procedure and Procedure B-13, Handling of Allegedly Illegal Forensic Discovers, and a proposed Court Order (Attached hereto as Exhibits D and E respectively)

WHEREFORE, the Defendant requests that, pursuant to an appropriate protective order, the court order the various discover the above-described discovery by XXX, XXX 2004

Respectfully Submitted:

03.22.04, 2004

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XXXXXXXXXX  
Deputy Public Defender

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	) Case No. XXXXXXXX
	)
Plaintiff,	) ORDER TO INTRODUCE DIGITAL
v	) MICHAELEMBENCE ALL BIRTHLY
	) COASTAL HUNG ILLEGAL COASTERS AND
XXXXXX,	) (Assigned to the Honorable XXXXXXX)
	)
Defendant.	)

GOOD CAUSE HAULING BEHEM SHOULD, IT IS HEREBY ORDERED:

- 1) The court shall provide defendant's counsel (the Maricopa County Public Defenda) a copy of the hard drive images (collectively referred to as "the retained computer evidence") currently in the custody of the Phoenix Police Department, necessarily including any and all actual or alleged child pornography and/or associated materials. Defense counsel shall maintain copies of the retained computer evidence as follows:
  - a) Copies of the retained computer evidence shall be maintained by defense counsel in accordance with this Order, and shall be used by counsel and employees of the Maricopa County Public Defenda designated by defense counsel solely and exclusively in connection with this case (including trial preparation, trial and appeal)
  - b) Copies of the retained computer evidence shall be maintained by defense counsel consistent with Maricopa County Office of the Public Defenda Process and Procedure 8-18, Handling of Allegedly Illegal Pornographic Discovery
  - c) A copy of this Order shall be kept with the copies of the retained computer evidence at all times
  - d) Copies of the retained computer evidence shall be accessed and viewed only by defense counsel and staff employed by defense counsel, including the designated expert in this matter, XXXXXXXX of XXXXXX
  - e) Defense counsel shall not be permitted to access or view any graphic image file containing actual or alleged child pornography, or copies of the retained evidence or its EOLC evidence files, without direct observation of defense counsel, adversary counsel, or defense expert
  - f) Any computer raw which copies of the retained evidence may be used for access and operations shall not be connected to a network while a copy of the retained evidence is used for any computer
  - g) The computer raw which copies of the retained evidence are received may be connected to a network only under the following conditions: the network utilized is a local network, the network may be connected only when and as necessary to process non-graphic image files, and that defense counsel or staff or experts employed by defense counsel shall be personally present at all times a network is connected

- b) In no event shall any graphic image concerning actual or alleged child pornography be copied, duplicated, or replicated, in whole or in part, including duplications onto any external media, other than a single copy which shall be retained by defense counsel for examination so as to remain compliant with standard digital forensic analysis procedures commonly accepted within the community of forensic computer experts.
- 2) If not already provided, the court shall provide defendant's counsel, XXXX, a copy of all of the Evidentiary files relevant to this case, which includes evidence files for all media seized by the police in this matter, necessarily including any and all actual or alleged child pornography and/or associated materials between Mr. XXXX of XXXX shall maintain and secure the Evidentiary files in the following manner:
- Copies of the Evidentiary files shall be maintained by Mr. XXXX in accordance with this Order, and shall be used by Mr. XXXX solely and exclusively in connection with this case.
  - Copies of the Evidentiary files shall be maintained by Mr. XXXX in a locked safe in his office at all times, except while being securely utilized as provided for in this Order.
  - A copy of this Order shall be kept with the copies of the Evidentiary files at all times.
  - Copies of the Evidentiary files shall be accessed and viewed only by Mr. XXXX and staff employed by Mr. XXXX in whom he has given this Order who agree to be bound by the requirements of this protective order.
  - Mr. XXXX shall maintain custody over the Evidentiary files and shall maintain a list of all XXXX employees granted access to the Evidentiary files.
  - Any computer now which copies of the Evidentiary files may be retrieved for access and review shall not be connected to a network while a copy of the Evidentiary files is retrieved from any computer.
  - The computer now which copies of the Evidentiary files are retrieved may be connected to a printer only under the following conditions: that any printer utilized is a local printer, that the printer may be connected only when and as necessary to print non-graphic image files, and that XXXX or staff employed by XXXX who are subject to this Order shall be personally present at all times a printer is connected.
  - In no event shall any graphic image concerning actual or alleged child pornography be copied, duplicated, or replicated, in whole or in part, including duplications onto any external media.
- 3) Within 30 days of termination of this matter (including the termination of any appeal), defense counsel shall return (or cause the return of) copies of the returned computer evidence and the Evidentiary files to the Police Department, the County Auditor, or a designated agent. Mr. XXXX is cautioned to forensically "cleanse" any media prior to return for the purposes of not disclosing privileged attorney work product information. Upon the return of the copies of returned evidence and the Evidentiary files, defense counsel shall file a brief report to the Court specifying that the terms of this Order have been complied with and requesting the return of the copies of evidence.

XXXXXX \_\_\_\_, 2004

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 HON. XXXXXXX

# Jury and Bench Trial Results

## September 2004

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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### *for The Defense*

*for The Defense* is the monthly training newsletter published by the Maricopa County Public Defender's Office, James J. Haas, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.