



for *The Defense*

▶ ◀ Dean Trebesch, Maricopa County Public Defender ▶ ◀

DOWN THE RABBIT HOLE SPECIAL PROPOSITION 200 ISSUE

INSIDE THIS ISSUE:

Articles:

Proposition 200's Third Visit to the Electorate	4
Opening the Umbrella: Interpreting Prop 200 from <i>Goddard to Estrada</i>	6
Overcoming the Insanity Concerning Proposition 200 and Prior Violent Crimes	11

Regular Columns:

Arizona Advance Reports	10,18
Bulletin Board	5, 10, 16
Calendar of Jury and Bench Trials	20

By Russ Born
Training Director

Stimulating the fertile minds of defense attorneys, evoking the wrath of prosecutors, confounding elected officials, angering many judges, that is the legacy of the Drug Medicalization Prevention and Control Act of 1996, AKA Prop 200. Trying to recall an issue which has generated as much controversy and resulted in so many divergent views is difficult. But there are several explanations emerging from the current dialogue that help explain the cause or genesis of the controver-

sies.

The Initiative

Obviously a good deal of the blame lies squarely with the initiative itself. Stating clearly its purpose and intent, Prop 200 went on to use "criminal terms of art" without really analyzing their interplay with other areas of criminal procedure. A perfect example was the use of the phrase "*convicted of or indicted for*" found in §13-901.01(B). Use of the term "indicted for" provides enough discussion for an entire article. Another example of where more precise language would have saved time, money and wasted hours of incarceration was the issue of jail for first time possessors. Although this writer thought the intent was there all along,¹ it took almost three

(Continued on page 2)

IF A GRAND JURY WOULD INDICT A HAM SANDWICH, SOMETHING'S NOT KOSHER ABOUT A.R.S. § 13-901.01(B)

By Doug Passon and Ron Van Wert
Defender Attorneys Group E

A.R.S. §13-901.01(B) disqualifies a person from Proposition 200 if they have been convicted of, *or indicted for*, a violent crime as defined in §13-604.04. The reality of the "indicted for" language of §13-901.01(B) is that your 45-year-old defendant can face a prison term on a simple drug case based on a 20 year old indictment for a crime he did not commit.

So, how, in a system where everyone is innocent until proven guilty, can an indictment be taken as gospel for purposes of excluding defendants from Prop 200? It can't. The "indicted for" language of §13-901.01(B) has disturbing constitutional ramifications. The following is meant to provide some constitutional muster against this little gem if and when it rears its ugly head.

(Continued on page 8)

for The Defense

Editor: Russ Born

Assistant Editors:

Jim Haas

Keely Reynolds

Office: 11 West Jefferson
Suite 5
Phoenix, AZ 85003
(602)506-8200

Copyright © 2000

years to get a definitive answer from the Arizona Supreme Court.² But not all of the blame lies with the drafters.

The Power Brokers

Some of the blame for the misapplication or misdirection of Prop 200 lies at the feet of others. It belongs to prosecutors, some probation officers and a few Superior Court judges. Specifically, it belongs to those who refused to acknowledge that their power to incarcerate through charging decisions, probation violations and sentencing decisions had been curtailed by the voters. Refusing to accept a limitation on their power to incarcerate, prosecutors, probation officers and some judges fostered the belief that the voters could not possibly have intended the results which a common sense interpretation of Prop 200 demanded. Because of these prejudices against it, lower court rulings on probation violation issues, motions and sentencing issues involving Prop 200 were skewed against its common sense application. So all-encompassing was the brouhaha surrounding Prop 200, that even West Publishing and the Court of Appeals were drawn in. Failing to grasp the subtleties affecting Prop 200 and its legislative amendments led to some confusing situations.

The remainder of this article points out some of the more strange, bizarre and quirky circumstances that have surrounded Prop 200.

Becoming law on December 6, 1996, Prop 200 was not retroactive and applied only to crimes committed on or after its effective date.³ Its existence in its initial form, however, was short lived due to a tremendous outcry from certain players in the system. It has been this writer's experience that there are some judges, a few probation officers and very few prosecutors who will speak out publicly against mandatory prison where a defendant should have an opportunity for probation. But curtail their ability to incarcerate and the chorus becomes deafening. Listening to that chorus and responding in kind, the 1996-97 Arizona State Legislature immediately passed legislation amending Prop 200. That session produced three noteworthy pieces of legislation, one of which is still impacting Prop 200 eligibility. They were House Bill 2518 (medical use of marijuana) Senate Bill 1373 (13-901.01) and Senate Bill 2475 (allegation of violent crimes, 13-604.04) (hereinafter H.B & S.B.)

Senate Bill 2475 AKA - Allegation of Violent Priors

Reacting quickly to the perceived threat that Prop 200 would free hundreds of prisoners from DOC, the legislature passed S.B. 2475, codified as § 13-604.04. Significantly, it passed as an emergency piece of legislation. This meant that it became law on March 6, 1997, the day the governor signed it. Addi-

tionally, due to its emergency status, it was immune from a referendum.⁴ The real significance of that fact is explained in Doug Passon's article beginning on page 11 of this newsletter. For purposes of this article, it is important only to note that § 13-604.04 (allegation of violent priors) has been alive and well since March of 1997.

House Bill 2518 (medical use) Senate Bill 2475 (13-901.01)

Differing from their aforementioned cousin, H.B. 2518 and S.B. 2475 were not emergency pieces of legislation. Although passed by the legislature, they never became law. Both pieces of legislation were subjects of proper referenda which tolled their enactment.⁵

The only way they could have become law was through voter approval at the general election in November of 1998. Needless to say, the voters, who were not very happy with the legislature, voted to keep the original Prop 200. Apparently angry over the legislature's cavalier attitude toward voter initiatives, the electorate also approved Proposition 105. That Proposition severely limits the legislature's ability to amend initiatives. But it was the little nuance regarding the effective date of H.B. 2518 and S.B. 2475, which was overlooked by almost everyone. This included West Publishing, Superior Court judges, probation officers and even the Court of Appeals. Although most defense attorneys had been made aware of this issue,⁶ it apparently took awhile for others to catch on. This led to some bizarre pronouncements and quirky opinions which further confused the Prop 200 situation.

West Publishing

Contributing to the confusion about which law was the real Prop 200 was West Publishing. In their West's Arizona Criminal law and Rule Book, 1997-1998 Edition (brown cover) the text of § 13-901.01 (Prop 200) is the amended text passed by the legislature. Thus, the 1997-1998 Edition contains the wrong law!

In their 1998-1999 Edition (purple cover) they apparently tried to remedy the situation. But the remedy just further added to the confusion. This time they published two different texts of § 13-901.01. The first text, starting on page 168 and containing the language about "historical priors," never became law! The second text, starting on page 169, is the original text of Prop 200 (except for some cleanup language). Since Prop 200 was never effectively amended, this text remained the law from December 6, 1996 to the present. But publishing the text of the legislative amendments and inferring that at one time they were the law, really confused a lot of people. It led to a lot of phone calls and e-mails trying to convince people that the book was wrong. But it wasn't just West Publishing that was confused.

Court of Appeals

As stated earlier, the nuances of voter initiatives, legislative amendments and voter referenda were not widely discussed topics. So it should not come as a surprise that some of the first opinions out of the Court of Appeals on Prop 200 failed to recognize these nuances and their impact on Prop 200. The result was that a few of the earlier opinions relied on law that was never in effect.

In *Bolton v. Superior Court*,⁷ an October 1997 decision, the Court of Appeals tackled the issue of prior convictions and what should be considered as disqualifying priors under Prop 200. The problem was that, in footnote 1, the court referred to the legislative amendment which never became law. Additionally, in deciding that a judge should determine whether or not a defendant is entitled to be sentenced under Prop 200, the Court of Appeals held that, unlike § 13-604, § 13-901.01 does not require that the state allege the prior.⁸ The court ruled that it was the judge who should make the priors determination. Once again because of some of the subtle nuances surrounding Prop 200, the Court of Appeals apparently was not aware that § 13-604.04 (allegation of violent priors) had been in effect since March of 1997.

In *Calik v. Superior Court*⁹ (*Calik I*) another October 1997 decision, the Court of Appeals, tackling the issue of incarceration in jail under Prop 200, rendered another decision based upon the legislative amendments that were never the law. That part of the opinion wasn't corrected until the Court issued a second opinion on a motion to reconsider some nine months later.¹⁰

The result of all this early confusion surrounding Prop 200 was that it wasn't until *Mejia v. Irwin*¹¹ and *Gray v. Irwin*,¹² early 1999 cases, that a little light started to shine through the fog.

Conclusion

Even though the fog surrounding Prop 200 is starting to lift, there are still several issues that have not yet been definitively decided by the courts. Some of these issues (What is a violent prior? How is it proved? How to treat inchoate offenses? What does "indicted for" mean? How are the courts of review analyzing Prop 200 issues? What is in the new initiative?) are addressed in this newsletter. Other issues will have to wait for another day. I hope that this newsletter issue will shed some light on those still undecided issues surrounding Prop 200.

Editor's Note: As editor, I want to thank all those who have contributed to the discussion, especially our Prop 200 Com-

mittee. The committee is made up of trial lawyers who have met on several occasions over the last six months. Framing issues for special actions, answering lawyers' questions and developing arguments for motion practice has taken a good deal of their time. Thanks to Jason Goldstein, Vicki Lopez, Doug Passon, Ron Van Wert and Jennifer Willmott.

Endnotes

1. "I'm Baaack! Proposition 200 Revisited," *for the Defense*, Vol. 7, Issue 9, September, 1997.
2. *Calik v. Kongable*, 195 Ariz. 496, 900 P.2d 1055 (1999).
3. *Baker v. Superior Court*, 190 Ariz. 336, 947 P.2d 910 (1997).
4. A.R.S. Const. Art. 4, Pt. 1 § 1(3)
5. *Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 814 P.2d 767 (1991).
6. "I'm Baaack! Proposition 200 Revisited," *for the Defense*, Vol. 7, Issue 9, September, 1997.
7. 190 Ariz. 201, 945 P.2d 1332 (1997).
8. *Ibid.* at p. 202.
9. *Calik I* (Motion for Reconsideration granted, opinion withdrawn).
10. *Calik II*, 194 Ariz. 188, 979 P.2d 1, 1997 (overruled by *Calik v. Kongable*).
11. 195 Ariz. 270, 987 P.2d 756 (1999).
12. 195 Ariz. 273, 987 P.2d 759 (1999).



PROPOSITION 200'S THIRD VISIT TO THE ELECTORATE

By Vicki Lopez
Defender Attorney Group B

The Drug Medicalization and Control Act of 1996, fondly known as Proposition 200, was an initiative measure backed by the people. It was clear from the outset that the various branches of government felt that the electorate could not possibly have known what they were doing when they enacted it. This governmental bias resulted in certain "interpretations" by the judiciary, along with out and out alterations and interference by the legislature. As a result, "Proposition 200" again appeared on the ballot in November, 1998. Labeled as Proposition 301, it contained all the legislative changes. Thus a vote for 301 was a vote against the original Prop 200. A vote against 301 would be a vote in favor of the original Prop 200. The public soundly defeated 301, sending a message to the government that the people knew precisely what they were doing when they voted in Proposition 200.

Now, four years after its original enactment, a new "Proposition 200" is being presented to the electorate in November of this year. This time, however, it is an attempt by the proponents of the original Proposition 200 to refine it and address some of the questions created by the language of the original initiative. The purpose of this article is not to address every element of the new initiative, but to illustrate some of the relevant portions.

The new initiative deals with an issue that has long been a source of aggravation for those involved in the criminal justice system – the fact that possession of a single joint can land a person in prison for up to two years. It would add §13-3405.01 to the Arizona Revised Statutes. This new section requires that a person found in possession of up to two ounces of marijuana or the associated paraphernalia must be given a written citation and released, after showing proof of identity to the officer. The penalty would be a fine of up to \$500.00 and the sentencing court would have the additional option of requiring attendance at a drug education program.

Furthermore, the new section states that the provisions of §13-901.01 shall not apply to any person who violates this new section and such person shall be subject only to the penalties imposed by the section. This language sets up a rather interesting argument regarding the future use of convictions falling under this section. If §13-901.01 does not apply to these cases, then these cases should not constitute prior possessions or "strikes" against a person to prevent them from being sentenced under §13-901.01 for any possession charges they may incur in the future. There is little doubt that this will be the subject of a future special action.

Another interesting point about the new marijuana section is that it does not define the offense as either a misdemeanor or a petty offense. Comparing the definitions of a petty offense with that of a misdemeanor, however, indicates that the offense should be considered petty. Under §13-105(21), a misdemeanor is defined as:

...an offense for which a sentence to a term of imprisonment other than to the custody of the state department of corrections is authorized by any law of this state.

Under §13-105(27), a petty offense is defined as:

... an offense for which a sentence of a fine only is authorized by law. Since there can be no incarceration for possession of two ounces or less of marijuana under this section, it will have to be treated as a petty offense.

The new initiative also codifies the recent decisions in *Calik v. Kongable*, 195 Ariz. 496, 990 P.2d 1055 (1999) and *State v. Estrada*, 316 Ariz. Adv. Rep. 9 (Div. 1 Mar. 7, 2000). The *Calik* decision held that there can be no incarceration imposed on a first offense personal possession or use of drugs conviction. The initiative amends §13-901.01 to specifically state that there will be no jail or prison for first time offenders, or *second time offenders*. This will make the issue of jail as a condition of probation very easy to determine. If the case comes under the new "Proposition 200," then no jail can ever be imposed, regardless of whether it is a first possession offense or a second possession offense.

The new initiative also amends §13-901.01 to include "[p]ossession or use of paraphernalia associated with possession or use of a controlled substance." Although actually drafted prior to the *Estrada* decision, this amendment to the statute effectively codifies that decision, which held that possession of drug paraphernalia is included under Proposition 200. The *Estrada* decision is currently at the Arizona Supreme Court on a Petition for Review. However, should this initiative be passed by the voters, it will make any decision on the Petition for Review a moot point. Therefore, it's possible that the presence of this initiative on the ballot will delay the Court in rendering its decision.

Another interesting item in the new initiative is the language set forth in the "Purpose and Intent" section of the initiative itself, which is used to justify the proposed statutory amendments. Section E under "Purpose and Intent" states that the

sentencing provisions of the Drug Medicalization, Prevention and Control Act of 1996 [i.e., Proposition 200] will be clarified. It goes on to state:

Currently, the courts have not understood that the original Act clearly stated that first and second time offenders should not be incarcerated in jail or prison. In addition, some prosecutors have been trying to circumvent the mandatory treatment provisions of the original Act by invoking paraphernalia laws. The new Act remedies both these situations and will restore the parole provisions repealed by the 1997 Legislature.

It is clear that the message being sent by this initiative is one of "hands off" and stop trying to circumvent the intent of the people. While this initiative clarifies certain issues that have arisen as a result of the enactment of Proposition 200, other issues remain unaddressed. Among those issues are the legal ramifications of the language "*indicted for a violent crime*" when setting forth the group of people who will not be covered by Proposition 200. That language invites a host of constitutional problems. Another unaddressed issue is that of preparatory offenses and whether or not they should be included under Proposition 200. *Stubblefield v. Trombino*, 313 Ariz. Adv. Rep. 29 (Ariz. App. Div. 1, Jan. 27, 2000) held that "attempted possessions" come under Proposition 200, but the issues of conspiracy to possess, solicitation to possess and facilitation to possess are still undecided.

This new initiative is progress and in this case, progress is good, but not complete. There will always be new issues arising in the interpretation and implementation of the laws involved in "Proposition 200."



BULLETIN BOARD

ATTORNEYS

Attorney Moves/Changes

Mike Hruby, a Defender Attorney assigned to Group A, resigned his position with the office effective Friday, March 31, 2000. Mike and his family relocated to Northern Arizona.

Michael Burkhart, a Defender Attorney assigned to Group C, resigned his position with the office effective Tuesday, April 18, 2000. Michael will be joining the Law Office of David Michael Cantor.

Michael S. Ryan, a Defender Attorney in Group E, resigned his position with the office effective Friday, April 21, 2000. Michael will be joining the commercial litigation firm of Grant, Williams, Lake & Dangerfield.

Stacy Hinkel, a Defender Attorney assigned to Group A, resigned her position with the office effective Friday, April 21, 2000.

Monique Kirtley, a Defender Attorney assigned to the Juvenile Division at SEF, has resigned her position with the office effective Friday, April 28, 2000. Monique is returning to San Diego to be closer to her family.

OPENING THE UMBRELLA: INTERPRETING PROP 200 FROM GODDARD TO ESTRADA

By Ron Van Wert and Jason Goldstein
Defender Attorneys Group E

The rationale and decision making in a string of Proposition 200 decisions has paved the way for additional drug-related offenses, such as preparatory offenses, to be brought in under the protection of the expanding umbrella of Proposition 200. The courts, for the most part, have employed a common sense approach in making decisions clarifying Proposition 200's ambiguity and its silence, based on the electorate's intent and the spirit of the law.

In *Goddard v. Superior Court*, 191 Ariz. 402, 956 P.2d 529 (App. 1998), Division One of the Arizona Court of Appeals looked beyond the plain language of A.R.S. 13-901.01, the statutory enactment of Proposition 200, and found that possession of drugs for sale was a "strike" against a defendant convicted of a subsequent drug-related offense. *Goddard* was a double whammy for the defense, because possession for sale was already expressly excluded from Proposition 200 protection, and could now be used as a strike, hurting the defendant's chances for Prop 200 application in the future. However, *Goddard* also opened the Prop 200 umbrella a bit.

The *Goddard* court reasoned that the electorate could not have intended that a defendant with two or more priors for the more severe crime of possession for sale would receive mandatory probation, whereas the defendant with two or more priors for the lesser crime of possession could receive jail or prison time. 956 P.2d at 532. Because Proposition 200 does not expressly include possession for sale as a "strike," the court made its findings based on a common sense approach to statutory interpretation. This common sense approach to interpreting Proposition 200 also provides the courts with the means to include additional drug-related offenses within the protection of Proposition 200.

However, before the courts had the opportunity to open the umbrella any further, Division Two of the Court of Appeals decided *State v. Holm*, 195 Ariz. 42, 985 P.2d 527 (App. 1998). In *Holm*, the court took a strict construction approach to Proposition 200 and found that, since paraphernalia was not expressly included within the statute as a protected offense, the electorate could not have intended to mandate probation for those convicted of possession of paraphernalia. 985 P.2d at 529. Yet, despite its strict construction approach in relation to paraphernalia, the court went on to suggest that Proposition 200 might be extended outside of its express terms to "encompass any lesser-included offenses of personal possession or use." *Id.* Therefore, although *Holm* appeared

to close the umbrella a bit, it also gave it a little nudge open.

Division One's subsequent decision in *Gray v. Irwin*, 195 Ariz. 273, 987 P.2d 759 (App. 1999), indicated that the court was not deterred by *Holm*'s strict construction approach. In *Gray*, the court found that a prior conviction for forgery, a non-violent, non-drug related offense, could not be "converted" to a drug-related offense to be used as a Prop 200 strike against the defendant. The court affirmed the common sense approach it had taken in *Goddard*.

The Arizona Supreme Court's decision in *Calik v. Kongable*, 195 Ariz. 496, 990 P.2d 1055 (Ariz. 1999), made it clear that a strict construction approach to Proposition 200 was not warranted. The court found that Proposition 200's lack of express language was not an indication of the electorate's intent, but it did cause the statute to be ambiguous. *Id.* at 1058-59. The court stated that the statute's ambiguity would have to be clarified by determining the electorate's intent through consideration of the statute's "context, subject matter, historical background, effects and consequences, and spirit and purpose." *Id.* at 1059. The *Calik* decision arguably opened the Prop 200 umbrella further by providing a green light from the top court to extend Proposition 200 outside of its express language, when common sense indicates that this was the intent of the electorate.

In *Stubblefield v. Trombino*, 313 Ariz. Adv. Rep. 29, 2000 WL 64270 (Ariz. App. Div. 1, Jan. 27, 2000), Division One of the Court of Appeals followed the common sense approach of *Goddard* and its progeny in finding that attempted possession is protected by Proposition 200. The *Stubblefield* court concluded that it would be "illogical to hold that Proposition 200 applies to possession of narcotic drugs but that it does not apply to the less serious offense of attempted possession of narcotic drugs." *Id.* at ¶ 6.

Stubblefield was restricted to attempted offenses and, therefore, did not extend to all preparatory offenses. As the decision points out, attempt—unlike solicitation, facilitation or conspiracy—is a lesser-included offense of possession. Therefore, the same "paradoxical result" argument could be made that was made in *Goddard* and expressed in *Gray*. The *Stubblefield* court also stayed in line with *Holm*, which, as noted earlier, suggested that Proposition 200 might be extended to include lesser-included offenses of possession. In addition, the Court of Appeals maintained its position relating to attempted offenses that was established in prior decisions relating to sex offender registration and DNA statutes, which is that attempted offenses are more than preparatory and are

part of the completed offense. See *In re Sean M.*, 189 Ariz. 323, 942 P.2d 482 (App. 1997); *State v. Lammie*, 164 Ariz. 377, 793 P.2d 134 (App. 1990).

Although *Gray*, *Calik* and *Stubblefield* began reopening the umbrella partially closed by *Goddard* and *Holm*, the recent Court of Appeals decision in *State v. Estrada*, 316 Ariz. Adv. Rep. 9, 2000 WL 248978 (Div. 1, March 7, 2000), reopened it to 99% capacity. In *Estrada*, the court took the common sense approach and based both holdings in the case on following the electorate's intent and purpose in enacting Proposition 200.

The opinion in *Estrada* made clear the basis on which the court's decision was made, by relating how the common sense approach has been effectively and consistently used in the line of prior decisions, regardless of whether the outcome of those decisions either widened or narrowed the eligible offenses and strikes under Proposition 200. The court also articulated the fact that the basis for its holdings was the relationship of the offense to the statutory intent and purpose. The court in *Estrada* bolstered its choice of taking the common sense approach by declaring that, "our case law has long cautioned that the courts must reject a literal statutory construction that would result in an absurdity and defeat the purpose of the statute to be construed." *Id.* at ¶ 20.

In its first holding, the *Estrada* court added the preparatory offense of conspiracy to possess narcotic drugs for sale to the list of offenses which could be considered as strikes against a defendant's eligibility for Proposition 200. Next, the court extended Proposition 200 protection to the offense of possession of drug paraphernalia, thus notably extending protection, for the first time, to a drug-related offense which lay outside the expressly stated statutory area of personal possession.

The *Estrada* court made conspiracy a strike because the actual charge was conspiracy to possess narcotic drugs for sale. This was directly in line with *Goddard* and its findings that the electorate's intent was to exclude all commercially related controlled substance offenses. At the same time, in extending Proposition 200 to include the preparatory offense of conspiracy "for sale" as a strike, the court cannot now reasonably deny Proposition 200 protection to those convicted of conspiracy related to possession and use only. This protection should also logically apply to the additional preparatory offenses of solicitation and facilitation, so long as they are related to personal possession or use.

By adding possession of drug paraphernalia to the list of protected offenses, the court in *Estrada* has both decisively departed from the *Holm* court's strict statutory construction view and accomplished Proposition 200's objective of probation for non-violent drug offenders whose offenses are related to possession for personal use. The court addressed the personal possession and use issue by specifically stating that the

drug paraphernalia in this case was intended for use only in connection with the consumption of a controlled substance.

The courts' common sense approach of making decisions clarifying Proposition 200's ambiguity and its silence, based on the electorate's intent and the spirit of the law, provides insight into the Arizona Supreme Court's Proposition 200 position. The umbrella is now open...but the question is, will the Supreme Court leave it that way?





Do you have an idea for an article? Would you be interested in writing an article for publication in *for The Defense*?

If so, give us a call with your ideas.

If a Grand Jury Would Indict a Ham Sandwich, Something's Not Kosher About A.R.S. §13-901.01(B)

Continued from page 1

Battling the Grand Jury Indictment

The old saying is that a good prosecutor could get a grand jury to indict a ham sandwich. The opportunity for the prosecution to abuse the grand jury process has not gone unnoticed by the Arizona Supreme Court. In *Herrell v. Sargeant*, 189 Ariz. 627, 631, 944 P.2d 1241, 1245 (1997) (citations omitted), the Court stated:

This court has previously expressed its concerns surrounding the grand jury process... [w]e must bear in mind the potential for abuse and the "devastating personal and professional impact that a later dismissal or acquittal can never undo," when the prosecutor is allowed to exercise control "over a cooperative grand jury."

Because a prior indictment could exclude a defendant from Proposition 200 protection and thereby lead to a prison term, the prosecution's ability to control the grand jury process is a particular problem for Proposition 200 defendants.

First, there is little or no "quality control" of the "evidence" prosecutors can bring to the grand jury to secure an indictment. Evidence presented to the grand jury need not be admissible at trial. See *State ex rel. Berger v. Myers*, 108 Ariz. 248, 250, 495 P.2d 844, 846 (1972). Thus, the reality is, if 901.01(B) went unchallenged, a defendant could be sentenced to a lengthy prison term based on an indictment procured by irrelevant, misleading or inflammatory testimony, suppressible evidence, hearsay, or the withholding of exculpatory evidence.

In addition, a defendant has no opportunity to confront the validity or veracity of the "evidence" presented against him in grand jury proceedings. Cross-examination is "[t]he principle means by which the believability of a witness and the truth of his or her testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). In grand jury proceedings, the defendant is, in no uncertain terms, denied the right to confront the evidence against him. To add insult to injury, prosecutors can repeatedly submit a case to the grand jury until they get an indictment. How do we know that, although one grand jury finally indicted your little ham sandwich, ten others refused to do so? We don't! Unfortunately, after the indictment is issued, a defendant can never challenge the sufficiency or the competency of the evidence presented—he can only chal-

lenge a denial of a constitutional procedural right. See *Crimmins v. Superior Court*, 137 Ariz. 39, 668 P.2d 882 (1983).

In some instances, the prosecution obtains a grand jury indictment not only by exercising control over a cooperative grand jury, but also by withholding exculpatory evidence or presenting false or misleading evidence to the grand jury. This, of course, is a direct violation of your client's fundamental constitutional rights. A constitutionally infirm indictment cannot be used to enhance a sentence for a subsequent crime. See *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, cert. denied, 101 S. Ct. 287, 449 U.S. 913 (1980) (constitutionally infirm convictions may not be used to enhance punishment under this section nor weighed by court in sentencing defendant for subsequent crime); *State v. Miller*, 108 Ariz. 303, 497 P.2d 516 (1972) (prior conviction which is constitutionally infirm may not be used to enhance punishment in second trial). However, many cases are settled (some by dismissal) before a defendant has the opportunity to challenge the validity of the grand jury proceeding. Moreover, trying to fight the constitutionality of a grand jury process many years down the road for purposes of Proposition 200 would be a substantive and procedural nightmare.

Winning with Due Process

Even if the prosecution obtains a *lawful* indictment against a client, it is still fundamentally unfair to use that indictment to exclude a client from the protection of Proposition 200. Everybody in the United States—including Arizona—is guaranteed the right to protection of life, liberty and property without violation of due process of law guaranteed by the 14th Amendment to the United States Constitution and by Art. 2, Sec. 4 of the Arizona Constitution.

Due process means that the actions of the state cannot be arbitrary, nor can they be without proper procedure. The procedure must include notice of time and place of hearing, a reasonable definite statement of the charges, the *right to produce witnesses* and to have a *full consideration and determination according to evidence* before the body with whom the hearing is held. *Sulger v. Arizona Corp. Commission*, 5 Ariz. App. 69, 73, 423 P.2d 145, 149 (App. 1967) (citations omitted) (emphasis added).

If someone is found ineligible for Proposition 200 because of a prior violent crime indictment, they can be—and in some cases, must be—sentenced to prison. Guarantees of due process, therefore, demand that the prosecution prove more than just the existence of a prior indictment when attempting to enhance a person's sentence. As the court concluded in *Sulger* 5 Ariz. App. at 74, 423 P.2d at 150:

It is, of course, much easier to prove violations if the accused is not informed of the charges, *testimony is taken broadly on any conceivably relevant subject*, and finally, *the decision is only 'you have violated'*. Such conduct we find to be in *violation of due process*, both substantive and procedural. (emphasis added)

This is exactly the kind of unconstitutional conduct that would necessarily result if the courts ruled on one's Proposition 200 eligibility based on nothing more than a prior indictment.

Using a prior indictment to condemn someone to prison without that person ever having a hearing on the charges underlying the indictment shocks the conscience. This is especially true where the charges are dismissed or the person pleads to a lesser, non-violent charge. As set forth in *Phoenix Metals Corp. v. Roth*, 79 Ariz. 106, 110, 284 P.2d 645, 648 (1955), imprisoning someone based on a crime that they did not have an opportunity to dispute in a court of law:

...lacks all the attributes of a judicial determination; *it is judicial usurpation and oppression and can never be upheld where justice is fairly administered*. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to *convert the court exercising such an authority into an instrument of wrong and oppression*, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. (emphasis added).

If one is convicted of possession of drugs, he has been found guilty beyond a reasonable doubt on each element of the crime. If the court wants to enhance the person's sentence based on prior criminal conduct, the elements of that criminal conduct must also be proven beyond a reasonable doubt. *State v. Powers*, 154 Ariz. 291, 294, 742 P.2d 792, 795 (1987). The Proposition 200 electorate has made a prior, violent crime indictment a "predicate for applying the enhancement factor," i.e., making someone prison eligible. *Id.* Therefore, if the court wants to use prior criminal conduct to take a person out of Proposition 200 and thereby enhance their sentence by making them prison eligible, the court must find that the prior conduct and the elements thereof were proven beyond a reasonable doubt. Even the prosecution must recognize that the probable cause burden needed to obtain an indictment falls far below the beyond a reasonable doubt burden necessary to use prior criminal conduct as a sentencing

factor.

Sixth Amendment Attack

In addition, courts are clearly prohibited by the Sixth Amendment of the United States Constitution and Art. 2, Sec. 24 of the Arizona Constitution from using prior *uncounseled* convictions to enhance a sentence on a current charge. *State v. Anderson*, 185 Ariz. 454, 455-56, 916 P.2d 1170, 1171-72 (Ariz. App. Div. 1 1996), citing *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (Ariz. 1968). It defies justice and logic to suggest uncounseled prior indictments can be used against the defendant when uncounseled prior convictions cannot. Because a defendant is never represented by counsel during a grand jury proceeding, the "indicted for" language of Proposition 200 is a blatant violation of the client's right to counsel.

Furthermore, allowing the court to use a prior indictment as a sentencing factor without finding that the underlying crime was proven beyond a reasonable doubt violates one's right to a trial by jury guaranteed by both the Sixth Amendment of the United States Constitution, and Art. 2, Sec. 4 of the Arizona Constitution. *Powers*, 154 Ariz. at 294-95, 742 P.2d at 795-96. "The right to a jury trial prevents a sentencing judge from increasing the classification of an offense based on a finding not explicitly adopted by the jury." *State v. Virgo*, 190 Ariz. 349, 947 P.2d 923, 928 (App. 1997). "[T]he legislature's ability to denominate factual findings as sentencing factors, rather than *elements* of the crime, must be restricted by the jury trial and due process guarantees or they would be meaningless." *Powers*, 154 Ariz. at 294, 742 P.2d at 795. If the courts were to find a person ineligible for Proposition 200 based entirely upon a prior indictment, the courts would be deeming both the United States and Arizona Constitutions exactly that . . . meaningless.

Conclusion

On a final note, let's not forget about our clients who are charged with violent crimes through complaint and information (i.e. preliminary hearings) rather than indictment. Under the plain language of §13-901.01(B), they are immune from the "indicted for" clause, are they not? That is an arbitrary distinction that will lead to absurd results.

It does not yet appear that the prosecution is utilizing the "indictment" clause of §901.01(B) with any vigor or frequency to exempt clients from Prop 200. Maybe the unconstitutionality of that provision is so clear on its face that they are shying away from this engraved invitation to trample the rights of the defendant. In any event, the only logical course of action to take concerning this language is to strike it pursuant to the severance clause of Proposition 200 and *State v. Brown*, 982 P.2d. 815, 819 (1999) (invalid portions of a statute may be severed without declaring the statute unconstitutional as a whole).

ARIZONA ADVANCE REPORTS

By Stephen Collins
 Defender Attorney – Appeals



BULLETIN BOARD (continued)

SUPPORT STAFF

Support Staff Move/Changes

Stephanie McMillen, a legal secretary in Group A, has been given a special duty assignment as our new Training Coordinator. She will begin her duties on May 1, 2000.

Barbara Jordan in the Appeals Division departed the office effective Thursday, March 16, 2000.

Ronald Lopez, Office Aide in Group B, departed the office effective Friday, March 17, 2000.

Andrea Fries, Client Services Coordinator in Dependency at SEF, departed the office effective Friday, March 17, 2000.

Brandi L. Schlosser, Designated File Manager in Group E, departed the office effective Friday, April 14, 2000.

Linda F. Arbizu, Office Aide/Trainee in Group C, departed the office effective Friday, March 24, 2000.

Salina Godinez, Training Coordinator in Administration, departed the office effective Friday, April 14, 2000 for employment with the City of Phoenix.

Jennifer Steel, Legal Secretary in Group B, will be departing the office effective Wednesday, May 3, 2000.

In Re: Alton D., 316 Ariz. Adv. Rep. 43 (SC, 2/28/00)

The juvenile court judge set a reasonable deadline for victims to claim restitution. The Arizona Supreme Court held victims who failed to comply with the deadline were barred from recovery.

Calik v. Kongable, 316 Ariz. Adv. Rep. 26 (SC, 12/20/99)

A.R.S. Section 13-901.01 (Proposition 200) requires courts to grant probation on first time convictions for personal possession of drugs. The Arizona Supreme Court held jail may not be imposed as a condition of probation in such cases. The opinion of the Court of Appeals was vacated because courts should avoid ‘hypertechnical constructions that frustrate legislative intent.’

Foster v. Irwin, 316 Ariz. Adv. Rep. 46 (SC, 2/29/00)

Defendant was charged with possession of dangerous drugs for sale. He pleaded guilty pursuant to a plea agreement to simple possession of dangerous drugs. The trial judge accepted the plea.

Under A.R.S. Section 13-901.01 (Proposition 200), Defendant had to be placed on probation for mere possession. However, the judge ruled Section 13-901.01 did not apply because the judge believed Defendant actually possessed the drugs for sale. The judge also ruled Defendant was ineligible for probation because he had a prior non-violent, non-drug-related felony conviction.

The Arizona Supreme Court reversed, holding a “judge may not accept and enter judgment on a guilty plea and then substitute his or her personal view of the facts to sentence the defendant for a crime for which he was not convicted.”

It was also held that a prior felony conviction for a non-violent, non-drug-related crime does not preclude probation under Section 13-901.01. However, because Defendant had a prior misdemeanor drug conviction, under 13-901.01(F), a jail term may be imposed as a condition of probation.

Louis A. v. Bayham-Lesselyong, 316 Ariz. Adv. Rep. 65 (CA 1, 3/7/00)

(Continued on page 18)

OVERCOMING THE INSANITY CONCERNING PROPOSITION 200 AND PRIOR VIOLENT CRIMES

By Douglas A. Passon¹
Defender Attorney Group E

Introduction-- Presumption of Prop 200 Protection

If your client pled to or was convicted of simple drug possession (and now paraphernalia and attempts), he is presumed to fall under the mandatory probation and drug treatment provisions of A.R.S. § 13-901.01.² However, Proposition 200 ("Prop 200") protection, i.e., mandatory probation with drug treatment, is unavailable to anyone who was previously "convicted of or indicted for a violent crime as defined under § 13-604.04."³

A.R.S. § 13-604.04 was added as part of a bill addressing practical applications of the voter approved Prop. 200.⁴ This provision became law on March 6, 1997.⁵ This provision sets forth the process by which the state must allege and prove that your client has a "violent" prior that would take him or her out of Prop 200. Section 13-604.04 requires that:

A. The allegation that the defendant committed a violent crime shall be charged in the indictment or information and admitted or found by the court. The court shall allow the allegation that the defendant committed a violent crime at any time before the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings.

B. For the purpose of this section, "violent crime" includes any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument.⁶

This is one of the most important issues under Prop 200, because if a court decides your client has a prior "violent crime", his sentence can be significantly enhanced to allow for incarceration in jail or prison. This article is a step by step analysis of how the "violent prior" issue must be handled, before, during or after sentencing.

The Process

In order to determine if your client can be precluded from Prop 200 mandatory probation and drug treatment, you must

address the following issues:

- Who is saying your client is not Prop 200? The prosecutor, not the judge, is responsible for alleging and proving your client has a violent prior as defined under § 13-604.04.
- When are they saying it? The prosecutor must *timely* file the 604.04 allegation before trial or acceptance of the plea.
- How does the state intend to prove that allegation? The prosecutor must make a sufficient showing that (1) your client was indicted or convicted of an act; (2) he was represented by counsel; and (3) the act necessarily included an element of "violence". The court is not allowed to look beyond the elements of the offense to the alleged underlying facts of the prior conviction.

Who is saying your client is not Prop 200?

Unfortunately, judges are taking it upon themselves at all stages of criminal proceedings to make Prop 200/violent prior determinations *sua sponte*. This should *not* be happening. The prosecutor, not the judge, is responsible for alleging and proving your client has a violent prior under § 13-604.04. For better or for worse, the law is clear that the state has the sole discretion to file sentencing enhancing allegations.⁷ The plain language of § 13-604.04 mirrors the language in § 13-604 (P). Under both statutes, the state must formally allege the relevant sentence enhancer.⁸ There is no legal, logical or just reason to treat § 13-604.04 allegations different than any of its statutory counterparts.

There is no authority that allows judges to make these determinations in the absence of the proper allegation and proof by the state. The plain language of § 13-604.04 requires the state to initiate the "exclusion" process. Cases interpreting identical language in other sentence enhancing statutes clearly hold that judges cannot make enhancement findings in the absence of a timely allegation by the state. Consequently, judges should not be addressing the violent prior issue unless and until the state files a timely and proper allegation under § 13-604.04.⁹

When are they saying your client is not Prop 200?

The prosecutor must file the 604.04 allegation before jeopardy attaches.

*Trial: 20 Days Before Trial.
Jeopardy Attaches When Jury is Sworn.*

Like most other sentence enhancement allegations, the plain language of § 13-604.04 only allows the state to allege a prior violent conviction 20 days before trial, and possibly later, but still before trial, provided there is no prejudice to the defendant.¹⁰ Division One aptly points out that:

[t]he requirement that sentence-enhancement allegations be filed prior to trial is intended to ensure that a defendant has sufficient notice of the full extent of potential punishment before his trial begins.¹¹

In *State v. Guytan*, the court interpreted the “prior to trial” language to mean “before the jury is sworn.” This, of course, is when jeopardy attaches.¹³

Again, allegations under § 13-604.04 must be treated exactly like any other similar sentence enhancement statute. A defendant going to trial on a drug possession case could be facing mandatory probation or an extremely large amount of prison time, depending on the allegations the state files and is able to prove. A client cannot make an informed choice about how to proceed with his case unless he has sufficient notice of the full extent of his potential punishment. Thus, under the plain language of the statute, which is bolstered by cases dealing with the exact language in other sentence enhancement provisions, the state is clearly prohibited from alleging violent priors under § 13-604.04 after the jury is sworn.

Plea: Jeopardy Attaches When Plea Is Accepted

So, what happens if, as in most cases, your client does not go to trial, but instead enters a guilty plea? When the parties enter a plea agreement, “jeopardy” attaches when the court accepts that plea agreement.¹⁴ In *State v. Nunez*, the Arizona Supreme Court, En Banc, held that “the allegation of a prior conviction may not be filed after a plea of guilty has been entered on the principal charge.”¹⁵ The court based its decision on a sentence enhancement statute that, like § 13-604.04, stated “the court may allow the allegation of a prior conviction at any time prior to trial.”¹⁶ Again, the statute and cases dealing with the exact language plainly preclude the state from alleging violent priors after the court accepts the plea.

Recent Prop 200 cases provide strong support for the argu-

ment that if the state never alleges a violent offense prior to acceptance of the plea, your client stands convicted as a non-violent drug offender and must be sentenced accordingly. To sentence the defendant as if he did in fact have a prior violent offense would be the equivalent of sentencing him for a crime for which he has never been convicted.

In *Foster v. Irwin*, the Arizona Supreme Court, En Banc, held that, “the trial judge may not accept and enter judgment on a guilty plea and then substitute his or her personal view of the facts to sentence the defendant for a crime for which he was not convicted.”¹⁷ In that case, the defendant pled guilty to simple possession. The court accepted that plea and entered judgment. The underlying facts, including the original charges, suggested that the case really involved drug sales. The judge sentenced Foster to prison, in part because he believed Foster’s instant conviction involved drug sales. However, because the defendant pleaded guilty only to simple possession, the court held that:

[a] judgment or sentence must conform to the offense for which an accused has been charged and convicted, or to which he has entered his plea of guilty. The court cannot render judgment or pronounce sentence for another or different offense.¹⁸

In an almost identical factual situation, Division One held that, “once having accepted the plea agreement, the trial court may not use the underlying facts to sentence [a defendant] for a crime for which he has never been convicted. To do so would be analogous to sentencing [him] for crimes that were dismissed as part of the plea agreement.”¹⁹ The court further stated that:

[i]f the state believed that [the defendant] should not be entitled to mandatory probation, it should not have offered a plea agreement to mere possession of dangerous drugs. Similarly, if the trial court thought [defendant’s] offense too serious to warrant mandatory probation, it could have rejected the plea agreement.²⁰

Likewise, in the “violent crime” context, if the defendant was not charged with and did not plead guilty to having a prior “violent crime”, he stands convicted as a non-violent drug offender. As such, the legal parameters of that plea require the court to place the defendant on probation with mandatory drug treatment. The court cannot instead pronounce sentence upon the defendant as if he did in fact have a prior violent offense. To do so would be the equivalent of sentencing the client for a crime for which he has never been convicted. If the state felt the defendant was not entitled to mandatory probation under Prop 200, it could have filed the proper allega-

tion under A.R.S. § 13-604.04, or offered a different plea. The court has an opportunity to review the facts of the case and your client's record and decide whether to accept your client's plea. Once the agreement is entered and accepted, all parties are bound by it.

What if your client entered a plea to simple possession and the court accepted it but, at sentencing time, the court wishes to reject the plea?²¹ Clearly, if at the time of sentencing, the court does not agree with the sentencing stipulations contained in the plea, the court may reject that part of the plea.²² At that point, the defendant may withdraw from the plea or agree to proceed with the sentencing knowing the judge can sentence him to anything within the legal limits of the charge to which he pled.²³ However, if the defendant does not withdraw, the court cannot sua sponte reject the plea entirely and set the case for trial. This would put the defendant twice in jeopardy for the same offense.²⁴ Therefore, even though the court is not bound by the stipulated sentence, the court is bound to sentence the defendant within the legal limit of the charge.²⁵

If your client pled guilty to a simple possession case and the state did not file a timely 604.04 allegation, the "legal limit" of the charge to which he pled is *probation only*. This is because jeopardy has attached and, more important, because everyone who pleads to or is convicted of simple possession is presumed to fall under the mandatory probation provisions of § 13-901.01.²⁶ To sentence the defendant to a prison term when § 13-604.04 was not alleged or negotiated within the plea is to sentence him outside the legal limits of the charge.

An untimely allegation in the plea process is just as troublesome, if not more so, than an untimely allegation in the trial context. It would be fundamentally unfair for a client to plead guilty to a drug possession case without sufficient notice of the full extent of potential punishment he faces as a consequence of the plea. The state had the option of alleging violent priors. The court had the option of rejecting the plea. If neither of those circumstances occur, it is imperative that after jeopardy attaches all parties must be bound by the legal parameters of the plea.

After sentencing-- Probation Violations

The "violent felony" issue has also been pervasive in probation violation court when the prosecution is attempting to revoke a client's probation on a simple drug case. At some point, the state will probably waltz into court with a shoddily prepared police report from five years ago suggesting your client got medieval on some slack-jawed yokel. This is too little and way too late!

Again, the plain language of § 13-604.04 forecloses any discussion of violent priors where the state failed to file a timely allegation. There is zero support for the position some judges

are now taking that § 13-604.04 allows the state to make the allegation at any time in the proceedings, including at probation violation proceedings. It would be extremely prejudicial to allow such untimely allegations. The defendant gave up his right to trial and pled guilty, presumably under the assumption that he was protected under Prop 200. If the state can allege § 604.04 at a probation violation proceeding, why not let them allege any other sentence enhancer while they're at it?

How does the state intend to prove that allegation?

All too often, we see a crime listed in the criminal history section of the presentence report and, based on the name of the offense, we simply assume the client has a violent prior. It sounds bad enough, so we don't question. We must question! As stated above, if the state didn't allege it, the prior should not even be an issue. However, if either the state filed its timely allegation under § 13-604.04, or the judge allows a late allegation, then apply the following analysis.

If necessary, you should request an evidentiary hearing on this issue. It should be treated just like a hearing on allegeable prior felonies. Of course, there are no cases dealing directly with the state's burden in Prop 200/§ 604.04 cases. However, the burden and the proof requirement should be the same because the stakes are the same: the potential for a significantly enhanced sentence of incarceration. The prosecutor must therefore make a sufficient showing that (1) your client was indicted or convicted of some act; (2) your client was represented by counsel; and (3) that act necessarily included an element of "violence", as defined under § 604.04 (B).

Are you sure it was your client?

The state should be made to establish beyond a reasonable doubt that the defendant in the present case is the same person who was convicted (or indicted) in the prior case.²⁷ Arizona cases discussing the sufficiency of evidence needed to prove a prior conviction all note that the state must produce a certified copy of the conviction, along with independent evidence that establishes that the person in the prior case is the same person in the present case.²⁸ Mere identity by comparing the name on the prior conviction with the name of the person on trial in the present case is insufficient.²⁹

Was he represented by counsel?

In order to use prior convictions³⁰ to enhance an instant charge, the record of that prior conviction must show that the defendant was represented by counsel or that he was advised of his right to counsel and waived that right.³¹ Moreover, it is not permissible to presume a waiver of counsel where the record is silent.³²

*Was the prior really "violent"?
No "going behind the priors"*

The state must also prove that the offense at issue was "any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument."³³ Generally, the state (or judge) seeks to rely on extremely subjective, hearsay-laden documents such as police reports and presentence reports as "evidence" that the defendant committed a "violent" crime. In other words, they attempt to "go behind" the prior conviction by looking at the alleged facts of the crime to determine whether the crime was "violent". This practice violates due process. Moreover, this practice will inevitably lead to "ad hoc mini-trials" concerning prior offenses that have long since gone stale.

In virtually all cases dealing with sentence enhancing allegations like § 13-604.04, courts have held that, in order to prove the fact of a prior felony conviction, due process requires that a court can only look to the statutory elements of the offense to which the defendant pled guilty or was convicted, not to the underlying facts of the offense.³⁴ In an analogous situation, the United States Supreme Court described the "daunting practical difficulties and potential unfairness" of going behind a conviction for purposes of proving prior convictions under a federal repeat offender statute.³⁵ The Court noted that:

[I]n cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser [] offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [the greater offense].³⁶

Moreover, if the court was permitted to look beyond the statutory elements of the prior offense, the inevitable result would be that the parties would seek to contest each other's versions of the "real" facts of the prior offense. The Ninth Circuit warned against that practice, and pointed out the evident problems with conducting such "ad-hoc mini-trials" regarding an individual's prior criminal conduct, stating:

Witnesses would often be describing events years past. Such testimony is highly unreliable. As in [defendant's] case, the witnesses might be persons who did not even testify at the earlier criminal proceeding. In many cases, witnesses to the events in question might be unavailable altogether. Additionally, there would likely be substantial problems with court records and transcripts relating to earlier convictions. These problems become especially difficult in a case

like [defendant's] where, because the conviction was based on a guilty plea, there is little or no contemporaneous record developed.³⁷

The practice of "going behind the priors" violates due process and is forbidden under § 13-604 and other analogous provisions. Thus, the relevant inquiry must be limited only to the elements of the prior offense, not the alleged underlying facts of the offense.

Example

Let's say there is proof your client has a prior conviction for the crime of aggravated assault. That has to be a "violent crime," right? Not necessarily.

1. Figure out exactly what statute (down to the subsection your client was convicted of violating. If the prior involved a plea, start by looking at the specific statutory provisions referenced in the plea agreement. If you can't tell from that, try looking at the minute entries. You might even have to pull a transcript of the plea proceedings. If the prior involved a trial, you may have to examine the jury instructions, the form of verdict, the minute entries or all of the above. Remember, your only concern is the offense to which the client pled or was convicted.

Let's say, in our example, the client plead guilty to aggravated assault under A.R.S. § 13-1204(A)(5) and § 13-1203(A)(2), a class six felony.

2. List the Elements. In this example, we know from examining A.R.S. § 13-1204(A)(5) and § 13-1203(A)(2), that the defendant (a) intentionally placed another person in reasonable apprehension of imminent physical injury; (b) knowing or having reason to know that the person was a peace officer engaged in the execution of official duties. We also know that in order to satisfy § 13-604.04, the aggravated assault must either (a) result in death or physical injury; or (b) involve the criminal use of a deadly weapon or dangerous instrument.

3. Compare the Elements. Did the above listed aggravated assault necessarily require physical injury to the victim or involve weapons? Absolutely not. The elements of § 13-1203(A)(2) require only that your client placed another person in fear of injury, not that he actually caused physical injury, which is clearly a requirement under § 13-604.04(B).³⁸ Thus, because the elements in A.R.S. §§ 13-1204(A)(5) and 13-1203(A)(2) do not strictly conform to the elements in § 13-604.04(B), the crime is not "violent" under § 13-604.04.

Again, only the elements of the prior crime are at issue, not the supposed underlying facts of the offense. Here, the state

might have a police report that states the defendant waived a baseball bat (i.e. dangerous instrument) at the officer, or actually caused the officer some physical injury. To introduce such "evidence" would be to "go behind the prior." As stated above, this practice violates the defendant's right to due process and is clearly prohibited under Arizona law. Therefore, in this example, the defendant's prior would not exclude him from Prop 200.

Conclusion

If your client pled guilty to or was convicted of a first or second simple drug offense, he automatically falls under the mandatory probation provisions of A.R.S. § 13-901.01. In order to exclude your client from Prop 200, the state must first file a timely allegation that your client has a prior "violent crime" under A.R.S. § 13-604.04. If the state does not file that allegation before jeopardy attaches to his case, he stands convicted as a non-violent drug offender, and the issue cannot be revisited, particularly in probation proceedings. Finally, when it comes to proving the violent prior, the court may not look behind the elements of the prior conviction to the alleged underlying facts and circumstances of the prior offense.

Endnotes

1. Special thanks to Jennifer Willmott for her substantial assistance with this article.
2. Foster v. Irwin, 316 Ariz. Adv. Rep. 46, 995 P.2d 272 (February 29, 2000)(conviction for personal possession or use "automatically brings one within the [Prop 200] statute")(emphasis added).
3. A.R.S. § 13-901.01 (B). This article only deals with the issue of when a defendant is precluded from Prop 200 because of prior convictions for violent acts. Your client can arguably be excluded if he was indicted for a violent act. A.R.S. § 13-901.01 (B). But See, "If the Grand Jury Will Indict a Ham Sandwich, Something is not Kosher About A.R.S. § 901.01(B)", *for The Defense*, (Vol. 10, Issue 4, April 2000). Your client can also be excluded if he has two or more drug convictions. A.R.S. § 13-901.01 (G). There are many issues that can arise when determining what counts as a prior drug conviction, who makes and decides the claim of drug priors and what levels of proof should accompany those allegations. Those issues are not addressed in this article.
4. See, Fact Sheet for H.B. 2475, Arizona State Senate.
5. See, House Bill 2475, approved by the Governor March 6, 1997.
6. A.R.S. § 13-604.04, Violent crimes; allegation; definition.
7. See, State v. Olsen, 157 Ariz. 603, 607, 760 P.2d 603, 607 (App. 1988) (finding that accused's right to due process or equal protection is not violated when "prosecutor alone can decide whether to invoke the mandatory sentencing provision of A.R.S. § 13-604."); State v. Buchholz, 139 Ariz. 303, 678 P.2d 488 (App. 1983); See also State v. Brydges, 134 Ariz. 59, 653 P.2d 707 (Ariz. App. Div. 1 1982)(where state failed to allege that the defendant had a "dangerous prior" pursuant to §13-604, trial court's independent determination that prior conviction was "dangerous" is of no force and effect.)
8. A.R.S. §§ 13-604.04 (A), 13-604 (P)("[t]he allegation that the defendant committed a violent crime shall be charged in the indictment or information").
9. See, Foster v. Irwin, *supra* ("The state did not brief or argue the issue of whether [defendant's] conviction [] was a violent crime. Thus, his only prior felony conviction does not remove [him] from the mandatory probation requirement of § 901.01")(emphasis added).
10. Keep in mind that if the state files the allegation fewer than 20 days before trial, the judge must preclude the late allegation if the defense can show that the client was prejudiced by this untimely filing. This article does not address the ways in which untimely allegations can cause prejudice to a defendant.
11. State v. Guytan, 192 Ariz. 514, 522, 968 P.2d 587, 596 (Ariz. App. Div. 1 1998), citing, State v. Rodgers, 134 Ariz. 296, 306-07, 655 P.2d 1348, 1358-59 (App. 1982)(holding that all allegations of prior convictions must be made prior to trial.).
12. 192 Ariz. at 523, 968 P.2d at 597.
13. Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).
14. State v. DeNistor, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985) (finding that once a guilty plea is accepted by the court, the accused is put in jeopardy).
15. 108 Ariz. 484, 502 P.2d 361 (1972).
16. Id. (emphasis added).
17. Foster v. Irwin, *supra*.
18. Id. citing Haney v. Eyman, 97 Ariz. 289, 291, 399 P.2d 905, 906 (1965).
19. Mejia v. Irwin, 1999 WL 68910, 3 (Ariz. App. Div. 1, 1999).
20. Id., cited with approval in Foster v. Irwin, *supra*.
21. The court has wide discretion to accept or reject a plea. State v. Cooper, 166 Ariz. 126, 131, 800 P.2d 992, 997 (App. 1990).
22. DeNistor, 143 Ariz. at 411, 694 P.2d at 241.
23. Id.
24. 143 Ariz. at 407, 694 P.2d at 242.
25. Cooper, 166 Ariz. at 131, 800 P.2d at 997.
26. Foster v. Irwin, *supra* (conviction for personal possession or use "automatically brings one within the [Prop 200] statute")(emphasis added).
27. See State v. Norgard, 6 Ariz.App. 36, 429 P.2d 670 (1967).
28. State v. Penny, 102 Ariz. 207, 427 P.2d 525 (1967).
29. Id.
30. See, "If the Grand Jury Will Indict a Ham Sandwich, Something is not Kosher About A.R.S. § 901.01(B)", *for The Defense*, (Vol. 10, Issue 4, April 2000), for a discussion of why prior indictments must not be used to exclude a client from Prop 200.
31. State v. Anderson, 185 Ariz. 454, 455-56, 916 P.2d 1170, 1171-72 (Ariz. App. Div. 1 1996), citing State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (Ariz. 1968).
32. Id. at 1173.
33. A.R.S. § 604.04(B).
34. See, inter alia, State v. Thompson, 924 P.2d 1048, 1051, 186 Ariz. 529, 532 (Ariz. App. Div. 1 1996)(When court considers foreign prior for enhancement purposes, it must confine itself to comparative statutory analysis and may not consider testimonial evidence concerning the actual conduct the defendant was proven to commit); State v. Morrison, 889 P.2d 637,638, 81 Ariz. 279, 281 (Ariz. App. Div. 1 1995) (sentencing court must be sure that fact finder in the prior case actually found beyond a reasonable doubt that defendant committed every element that would be required to prove the Arizona offense.); State v. Clough, 829 P.2d 1263, 1265, 171 Ariz. 217, 219 (Ariz. App. Div. 1 1992)("there must be strict conformity between the elements of the [foreign conviction] and the elements of some Arizona felony before [a sentence enhancement under § 13-604] can apply); State v. Ault, 759 P.2d 1320, 1324, 157 Ariz. 516, 520 (Ariz. 1988)(Whether a prior conviction is "serious" under § 13-604 is a "purely legal question; it does not depend on the merits of alternative versions of the facts."); State v. Schaaf, 819 P.2d 909, 919-20, 169 Ariz. 323, 333-34 (Ariz. 1991)(In order to "guarantee" that a criminal defendant's due process rights will not be violated," the court can only look to the statutory definition of the prior offense and may not consider other evidence or witnesses"); State v. Hinchey, 799 P.2d 352, 165 Ariz. 432, 437 (Ariz. 1990)(using extrinsic evidence of the circumstances surrounding the previous conviction to establish prior violent felony was improper and violates defendant's due process rights); State v. Gillies, 662 P.2d 1007, 1018, 135 Ariz. 500, 511 (Ariz. 1983)(allowing witness to testify as to a

necessary element of prior conviction long after a crime has been committed “violates the basic tenets of due process.”); State v. Fagnant 839 P.2d 430, 433, 173 Ariz. 10, 13, (Ariz. App. Div. 1 1992)(Judge abused discretion by considering out of state conviction as aggravating factor where state failed to provide proof that out of state offense would be a felony in Arizona), overruled on other grounds, 176 Ariz. 218, 860 P.2d 485 (Ariz. 1993).

35. Taylor v. United States, 110 S.Ct. 2143, 2159-60, 495 U.S. 575, 601-02 (1990).
36. 110 S.Ct. 2143, 2159-60, 495 U.S. 575, 601-02.
37. United States v. Sherbondy, 865 F.2d 996, 1008 (9th Cir. 1988) (addressing proving prior crimes in the context of a federal repeat offender statute).
38. Note that, unlike the assault in our example, if the client committed an assault under A.R.S. § 13-1203 (A)(1) there would exist an element of physical injury. However, there is strong support for the argument that the element of “physical injury” under A.R.S. § 13-1203 (A)(1) does not correspond to the element of “physical injury” under A.R.S. § 13-604.04(B). The argument is based on the language of § 13-604.04 (B), the interpretation of Prop 200 as a whole, and the policy behind Prop 200. This argument is set forth in a sample brief which is currently located on the S: Drive.



BULLETIN BOARD (continued)

SUPPORT STAFF

New Support Staff

Carlene C. Jung is the new Juvenile Division Records Processor at Durango effective Monday, March 27, 2000.

Allen C. Johnson is the new Client/Server Programmer Analyst in the Information Technology Division effective Monday, March 27, 2000.

Julien Jones is the new Law Clerk assigned to Group E effective Monday April 3, 2000. Julian graduated from Cal Western Law School last December.

Debbie Finley is the new Juvenile Division Legal Secretary at SEF effective Monday, April 3, 2000.

Richard B. Klosinski is the new Defender Investigator assigned to Group C effective Tuesday, April 18, 2000.

Sammye L. Collins is the new Trainee in Group A effective Wednesday, April 19, 2000.

Dana Y. McMullen will be the new Litigation Assistant assigned to Group C effective Monday, May 1, 2000.

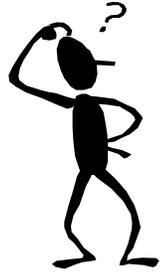
Connie Barrick will be a new Records Processor in the Records Division Downtown effective Monday, May 1, 2000.

Frances Dairman will be returning to the office after a six month absence. Frances will be the new Operations Coordinator in Administration effective May 1, 2000.

Patty Lopez will be a new Records Processor in the Records Division effective Monday, May 8, 2000.



Is your client PROP 200?

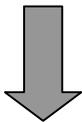


By Shannon Slattery and Jennifer Willmott

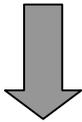
Personal possession of drugs or paraphernalia*

YES

1. 2 or more prior drug related offenses (the question of whether possession of paraphernalia constitutes a strike is still up for debate)*
2. Present offense occurred prior to December 6, 1996
3. Possession for sale
4. Violent Prior

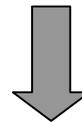


1. 13-604.04 not alleged**
2. If defendant is prejudiced by untimely filing of 13-604.04 allegation



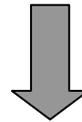
SENTENCING

1. First Offense: Probation with no jail either up front or deferred as a condition of probation or probation violation; cannot be sentenced to prison.
2. Second Offense: Probation with up to 12 months jail as a condition of probation or probation violation if a felony; 6 months jail if a misdemeanor – no prison.
3. PROBATION VIOLATION: At time of PV disposition, 13-604.04 CANNOT be alleged if allegation of violent prior was not part of original sentence.



13-604.04 Alleged:

1. within 20 days of conviction; or
2. if not within 20 days of conviction but before date of conviction (by COP or trial);
3. does not cause prejudice to defendant; and
4. is proven by the State.



NO

SENTENCING

Sentence according to General Crimes Sentencing Ranges based on offense and priors, if any.

* State v.

Holm, 195 Ariz. 42, 985 P.2d 527 (App. 1998); State v. Estrada, 316 Ariz. Adv. Rep. 9, 2000 WL 248978 (Div. 1, March 7, 2000)

** See REEFER MADNESS – OVERCOMING THE INSANITY CONCERNING PROPOSITION 200 AND PRIOR VIOLENT CRIMES by Doug Passon, page 11 this issue.

Arizona Advance Reports

Continued from page 10

Delinquency proceedings were commenced by filing traffic citations. It was held the citations could substitute for delinquency petitions. The speedy justice requirements of the juvenile system begin to run from the date of filing, as opposed to the date of issuance, of a citation.

State v. Eagle, 316 Ariz. Adv. Rep. 3 (SC, 2/23/00)

Defendant was given consecutive sentences for kidnapping and sexual assault. He argued this was a violation of the double jeopardy clause because the sexual assault was an element of "a class 2 kidnapping." The Arizona Supreme Court held there was no violation because kidnapping only requires the intent to commit a sexual assault, not the completion of a sexual assault.

A.R.S. Section 13-1304(B) states, "Kidnapping is a class 2 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest and prior to accomplishing any of the further enumerated offenses in subsection A of this section in which case it is a class 4 felony."

The Arizona Supreme Court held the "release" of the kidnapping victim was not an element distinguishing a class 2 from a class 4 kidnapping. It held there is only one kidnapping crime in Arizona and the "release" is only a "mitigator." Thus, the burden was not on the prosecution to prove the victim was not released prior to the accomplishing of the sexual assault.

A.R.S. Section 13-1304 is entitled, "Kidnapping; classification; consecutive sentence." The Arizona Supreme Court stated that although statute "headings are not part of the law itself, where an ambiguity exists the title may be used to aid in the interpretation of the statute."

In dissent, Justice Feldman states the issue should not be answered solely by looking to see whether the statute labels the facts to be found as aggravators or mitigators. He notes guidance may come from the United States Supreme Court in the pending case of *New Jersey v. Appendi*. The issue in this case is whether a hate crime motive is an element of the charge of unlawful possession of a firearm or is just a sentencing factor.

State v. Estrada, 316 Ariz. Adv. Rep. 9 (CA 1, 3/7/00)

Defendant was convicted of possession of dangerous drugs and possession with intent to use drug paraphernalia. Defendant had a prior felony conviction of conspiracy to possess narcotic drugs for sale.

Even though the prior involved intent to sell drugs, A.R.S. Section 13-901.01 (Proposition 200) still mandates that Defendant be placed on probation. However, under Section 13-901.01(F) the prior felony allows for jail to be im-

posed as a condition of probation.

Proposition 200 was silent as to whether it applied to possession of drug paraphernalia. The Court of Appeals held Proposition 200 applies because "pragmatic construction is required if technical construction would lead to absurdity."

State v. Gaffney, 316 Ariz. Adv. Rep. 24 (CA 2, 2/24/00)

Defendant was arrested after being involved in a traffic accident. A police officer requested a blood sample and Defendant consented.

Defendant moved to suppress the results of the blood test because the officer failed to tell Defendant of the consequences of his decision to provide the blood sample. It was argued this was required by A.R.S. Section 28-1321, the implied consent law.

The Court of Appeals held the police only have to tell a suspect the consequences of a refusal. The statute's warnings do not have to be given when a driver gives express consent to a test of their blood, breath or urine.

State v. Gilfillan, 316 Ariz. Adv. Rep. 17 (CA 1, 3/2/00)

Defendant contended A.R.S. Section 13-1421(A), the Arizona Rape Shield Law was unconstitutional on its face and deprived him of his rights to due process, to present a defense and to confront witnesses according to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Court of Appeals denied these arguments.

The Arizona Rape Shield Law contains five exceptions in which evidence of an alleged victim's past is allowed into evidence. One of the exceptions is evidence of a victim's previous false accusations against others.

Such evidence is admissible only if the trial judge determines the relevant and probative value outweigh the prejudicial effect and if a defendant is able to prove the existence of the accusations by clear and convincing evidence.

Defendant contended these provisions of the statute violated the separation of powers doctrine because the Arizona Constitution vests the power to make procedural rules with the Arizona Supreme Court. The Court of Appeals held the statute was valid because a statutory evidentiary rule may supplement the rules promulgated by the courts. Also, it was held the burden of proof is substantive, not procedural.

The Court of Appeals noted that although Defendant did not raise any constitutional issues at trial, constitutional arguments may be considered for the first time on appeal.

State v. Heartfield, 316 Ariz. Adv. Rep. 22 (CA 2, 3/7/00)

Pursuant to a plea agreement, Defendant was found guilty except insane on the charge of attempted arson. He was ordered to pay restitution in the amount of \$15,000.

The Court of Appeals held that a finding of guilty except insane is not a "conviction" for purposes of restitution. Therefore, it was improper for the trial judge to impose restitution.

State v. Mach, 316 Ariz. Adv. Rep. 7 (CA 2, 1/11/00)

Defendant was charged with sexual conduct with a minor. A psychiatrist on the jury panel was an expert on child molestation. The Court of Appeals held the trial judge was not required to strike this panelist for cause.

Defendant's first conviction was reversed on appeal because the trial judge had improperly allowed a jury panelist to make prejudicial comments to the rest of the panel. Retrial did not violate Defendant's double jeopardy rights because there was no showing the judge in the first trial had intentionally engaged in improper conduct in order to provoke Defendant into requesting a mistrial. Thus, the United States Supreme Court case of *Oregon v. Kennedy* and the Arizona Supreme Court case of *Pool v. Superior Court* did not apply.

Defendant filed a pro se motion for substitution of counsel, alleging that trial counsel had failed to take actions Defendant deemed necessary for a proper defense. Defense counsel responded, defending and explaining his conduct. The Court of Appeals rejected Defendant's claim that counsel's response disputing Defendant's claims created a conflict of interest.

The Court of Appeals stated that on a motion for substitution of counsel, a trial judge should examine various factors, such as whether new counsel would be confronted with the same alleged conflict, the time between the alleged offense and the trial, the timing of the motion, the quality of current counsel, and the proclivity of the defendant to change counsel. Whether there is some conflict not rising to the level of irreconcilable conflict between a defendant and counsel is a factor that may also be considered.

State v. Valle, 316 Ariz. Adv. Rep. 12 (CA 1, 2/29/00)

Gang Task Force officers stopped a vehicle because it had a cracked windshield and the license plate was not illuminated. Defendant was a passenger. A police officer conducted a pat-down search pursuant to *Terry v. Ohio*.

The officer felt "an object" in the pocket of Defendant's pants. The officer reached in and removed Zig Zag rolling papers. The officer testified at the suppression hearing that the object did not feel like a weapon. There was no evidence the officer knew the object was contraband until he removed the object from the pocket.

A *Terry* search is limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. A "plain feel" exception allows an officer to seize an item if by its feel, the officer knew the item was contraband. The Court of Appeal held the officer could not justify the seizure here.

After removing the rolling papers, the officer had Defendant remove his shoes. Marijuana was found in the shoes.

The officer testified he had Defendant remove his shoes because weapons could be hidden there and it was stan-

dard D.P.S. police. The Court of Appeals held this was insufficient grounds for the search because the "uniform policy cannot substitute for the reasonable, articulable individualized suspicion that *Terry* requires."

The State also argued the officer had probable cause to believe Defendant had either used or possessed marijuana because (1) he smelled of marijuana, (2) his passenger had marijuana on his person, (3) he had a "bulge in his pocket," and (4) he was wearing gang insignia. The Court of Appeals rejected this claim and specifically stated a defendant's "gang affiliation" is irrelevant in determining if there was probable cause.

State v. Preston, 317 Ariz. Adv. Rep. 3 (CA 2, 3/14/00)

A.R.S. Section 13-206 provides that a person who asserts an entrapment defense has the burden of proving the defense by clear and convincing evidence. Defendant argued this violated due process because it placed too high of a burden on him. The Court of Appeals rejected this argument.

In order to assert an entrapment defense, a defendant must admit committing the offense. Here, Defendant admitted committing the offense. Pursuant to Section 13-206(D), the trial judge did not instruct the jury on the presumption of innocence and the prosecution's burden of proof. The jury was merely instructed to determine if Defendant had proved entrapment by clear and convincing evidence.

The Court of Appeals reversed holding 13-206(D) to be unconstitutional. The prosecution still has to prove Defendant guilty beyond a reasonable doubt.

State v. Woodruff, 317 Ariz. Adv. Rep. 7 (CA 1, 3/14/00)

State v. Brooks (App. 1988) held a defendant may only be placed on intensive probation if recommended by the probation officer. A.R.S. Section 12-292(C) was amended to eliminate the probation office's recommendation as a prerequisite to intensive probation placement.



MARCH 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
2/9-2/14	Farney	McVey	Gidh	CR 99-13700 PODD/F4 PODP/F6	Guilty	Jury
2/24-3/2	Farney	Padish	Godbehere	CR 99-14308 Charge amended from Thft of Means of Transportation/F3 with 2 priors to Unlawful Use of a Means of Transportation with 2 priors/F6	Guilty	Jury
3/6-3/7	Carr Clesceri	O'Toole	Brinker Beresky	CR 99-10694 Theft/F3	Not Guilty of Theft Guilty of Lesser In- cluded Unlawful Use of Means of Transportation	Jury
3/6-3/9	Davis Hall	Akers	Cohen	CR 95-09163 2 cts. Agg. Assault/F3D Misconduct Involving Weapons/ M1	Guilty on all counts	Jury
3/21-3/22	Hernandez	Dougherty	Brinker	CR 99-18434 Agg. Assault/F5 with 2 priors	Judge dismissed allega- tion of priors prior to jury selection as a discovery violation sanction; Hung 5 to 3 in favor of ac- quittal	Jury
3/23-3/27	Valverde	P. Reinstein	Hunt	CR 99-17647 Trafficking in Stolen Property/F3	Guilty	Jury

GROUP B

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
2/28 - 3/1	McCullough	Jones	Frick	CR99-08235 POM For Sale, cl 2 PDP, cl 6	Guilty	Jury
2/17 - 3/7	Gray King Linden	Gottsfeld	Nothwehr	CR99-07869 Aggravated Assault, Dang cl 2 w/ 2 Dang Priors	Not Guilty	Jury
3/8	Lopez / Mitchell Munoz Linden	Hilliard	Novak	CR99-11577 Armed Robbery, cl 3 Dang	Dismissed day before trial	Jury
3/14	Walton	Hilliard	Bernstein	CR99-15442 Aggravated Assault, F3	Def accepted plea dur- ing jury selection	Jury
3/16 - 3/21	Peterson Erb	O'Toole	Sampson	CR99-17685 Armed Robbery, cl 2 Dang w/ 2 priors	Guilty	Jury
3/20 - 3/21	Primack Munoz Linden	Hilliard	Cottita	CR99-13740 Misconduct Involving Weapons, cl 4	Guilty	Jury
3/27 - 3/28	Healey King	O'Toole	Brnovich	CR99-15765 2 cnts Custodial Interference, cl 4	Not Guilty on both counts	Jury
3/29	Owens / Bublik	Gottsfeld	Rahi-Loo	CR2000-000328 Robbery, cl 4	Dismissed	Jury

MARCH 2000 JURY AND BENCH TRIALS

GROUP C

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
3/1 – 3/3	Zazueta	Dairman	Brenneman	CR1999-094018 Ct. 1 Burglary 3 rd , F4N Ct. 2 Poss. Burg. Tools, F6N Ct. 3 Theft, M1	Not Guilty – Cts 1 & 2 Guilty – Ct. 3	Jury
3/6 – 3/6	Antonson Rivera	Dairman	Click	CR1998-095350 Ct. 1 Child Molest, F2N	Pled out day of trial	
3/6 – 3/8	Bond	Barker	Andersen	CR1998-093423 Ct. 1 Theft, F3N w/a prior felony	Not Guilty	Jury
3/6 – 3/9	Moore	Jarrett	Arnwine	CR1999-094911 Ct. 1 Agg Assault, F6N Ct. 2 Resist Arrest, F6N	Hung Jury (4 guilty/4 not guilty)	Jury
3/7 – 3/9	Dunlap-Green & Klopp-Bryant	Dairman	Sampanes	CR1999-095099 Ct. 1 Agg Assault, F6N	Not Guilty	Jury
3/7 – 3/13	Leonard / Hamilton	Keppel	Boode	CR1999-094024 Ct. 1 Agg Assault, F6N Ct. 2 Crim. Trespass 1 st Degree, F6N	Guilty on both counts.	Jury
3/8 – 3/9	Silva Beatty	Gerst	Bennink	CR1999-091146 1 Ct. Resid. Burglary, F3N 2 Cts. Trafficking in Stolen Prop- erty, F3N	Not Guilty on all counts	Jury
3/14 – 3/14	Zazueta	Ishikawa	Andersen	CR1999-095664 Ct. 1 Agg Assault, F6N Ct. 2 Burglary 2 nd , F3N	Guilty on Ct. 1 Dismiss Ct. 2 w/ preju- dice	Bench
3/14 – 3/15	Moore / Little Thomas	Jarrett	Weinberg	CR1999-095222 2 Cts. Agg DUI, F4N 2 Cts. Dr-Lq/Drug w/ minor pre- sent, F6N	Mistrial	Jury
3/16 – 3/22	Moore / Little Thomas	Jarrett	Weinberg	CR1999-095222 2 Cts. Agg DUI, F4N 2 Cts. Dr-Lq/Drug w/ Minor Pre- sent, F6N	Guilty	Jury
3/17 – 3/17	Alcock	Hamblen	Reddy	TR99-08957 Ct. 1 Misd. DUI	Hung Jury (3 guilty/3 not guilty)	Jury
3/20 – 3/20	Antonson	Dairman	Weinberg	CR1999-095382 2 Cts. Agg DUI, F4N	Pled out day of trial	
3/23 – 3/27	Gaziano	Ishikawa	Griblin	CR1999-095240 Ct. 1 PODD, F4N Ct. 2 PODP, F6N Cts. 4, 5, 6, misd. DUI	Jury picked, but re- solved by plea	Jury
3/27 – 3/31	Moore Thomas	Dairman	Sampanes	CR1999-093281 4 Cts. Forgery, F4N	Guilty Cts. 1. 2. 4 Not Guilty Ct. 3	Jury

MARCH 2000 JURY AND BENCH TRIALS

GROUP D

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
2/24 - 3/2	Kibler	Dougherty	Bailey	CR 99-14811 1 Kidnap, F2 1 Sex Assault, F2	Hung on the Kidnap Guilty on Sex Assault	Jury
3/1	Zelms	Dougherty	Clark	CR 99-10338A 5 Armed Robbery, F2 Dangerous	Dismissed	Jury
3/6 -3/16	Schaffer Bradley <i>Kay</i>	Dougherty	Brnovich	CR99-07823 1 Murder 1, F1	Guilty	Jury
3/6-3/9	Willmott / Wallace Barwick <i>Fairchild</i>	D'Angelo	Blake	CR99-09550 2 Agg. Asslt F2,D, MIW, F4 1 Endangerment F6,D	Guilty	Jury
3/7-3/9	Varcoe Barwick	Katz	Simpson	CR99-16403 1 Theft-TK-OBT-Credit Card, F5	Guilty	Jury
3/15-3/21	Silva	Galati Barwick	Amato	CR99-03547 1 Murder 1, F1 1 Agg. Assault, F3	Guilty (Manslaughter) Not Guilty Agg Assault	Jury
3/16 -3/22	Schreck	Gerst	Lamm	CR97-09566 2 Traffic stolen property 1 Burglary 1 Theft	Not Guilty	Jury
3/20-3/24	Enos Barwick	Ballinger	Cottor	CR99-008482 1 Pos. Cocaine F4 1 Pos. Drug Par. F6	Guilty	Jury
3/23/00	Adams	Dougherty	Alexov	CR 99-14656 1 Attmp BURLARY, F5	Dismissed day of trial	Jury
3/27-3/31	Mehrens	Gerst	Lemke	CR 99-14194 2 Agg. Assault-DUI, F4	Guilty	Jury
3/29-3/31	Varcoe Fusselman	Ballinger	Alexov	CR99-16606 1 Theft, F5	Guilty	Jury
3/30/00	Martin	Ballinger	Brnovich	CR99-12577 1 Ct. Agg. Assault-Dangerous	Dismissal	

MARCH 2000 JURY AND BENCH TRIALS

GRUPE

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
3/29 - 3/31	Brown Souther	Ellis	Novak	CR99-01226 Agg. Asslt./F3d	Guilty of Assault/F4ND	Jury
3/9 - 3/10	Flynn	Sheldon	Blumenreich	CR99-17496 Agg Asslt. on Police Officer/F6 Resisting Arrest/F6	Guilty on both counts	Jury
3/28 - 3/30	Palmisano	Wotruba	Horn	CR00-04878 Sexual Abuse	Guilty	Jury
3/16 - 3/22	Ryan Gotsch	Reinstein	Newell	CR99-13779 2 Cts. Agg. Asslt./F3	Guilty on both counts	Jury
3/23 - 3/31	Walker O'Farrell	Gottsfeld	Kerchansky	CR99-04819 2 Cts. Agg. Asslt./F2D 2 Cts. Agg. Asslt./F6	Guilty on all four counts Agg.Asslt. (all Non-Dang.)	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start–Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
2/24 – 3/01	Keilen De Santiago	Bacam	C. Lynch	CR99-01385 Murder 2 / F1, Dangerous	Hung Jury (3 NG; 3 G, 2 undecided)	Jury
3/02 – 3/07	Canby	Gerst	Lindstedt	CR99-10652 Theft of Means of Transportation / F3	Not Guilty	Jury
3/16 – 3/20	Babbitt De Santiago	Dougherty	Clarke	CR99-08861A POND / F4, PODP / F6	Guilty	Jury
3/20 – 3/21	Funckes	Gottsfeld	Reid-Moore	CR99-16438 POND / F4	Not Guilty	Jury
3/20 – 3/22	Dupont Otero	McVey	Pittman	CR99-12253B Agg. Assault / F6 Resisting Ofc/Arrest / F6	Judgment of Acquittal on Agg. Assault; Guilty of Resisting Arrest	Jury
3/21 – 3/29	Keilen De Santiago	Baca	C. Lynch	CR99-01385 Murder 2 / F1, Dangerous	Not Guilty	Jury
3/22 – 3/23	Canby De Santiago	Gerst	Frick	CR99-11542B Unauth. Use of Veh. / F6	Judgment of Acquittal	Jury
3/23 – 3/29	Cleary Abernethy	Wilkinson	Myers	CR98-07238 Murder 1 / F1, Dangerous	Guilty	Jury
3/28 – 3/28	Canby Apple Abernethy	Dunevant	Pierce	CR99-18022 Burglary, 2 nd Degree / F3	Mistrial, Motion to Dis- miss	Jury
3/28 – 3/29	Steinle Horral Parker	Bolton	Martinez	CR97-12653B Murder 1 / F1, Dangerous Conspiracy to Commit Murder 1 / F1, Dangerous	Guilty of Murder 1	Jury



The Northern Arizona Public Defenders Association



Proudly Presents

CLE in the Picturesque Pines of Prescott

(Featuring the State Bar Required Professional Course – Optional)

June 9 & 10, 2000

**Prescott Resort
Conference Center and Casino
1500 Highway 69
Prescott, Arizona**

Agenda

June 9

1:00 – 2:45:

Title 36 Proceedings

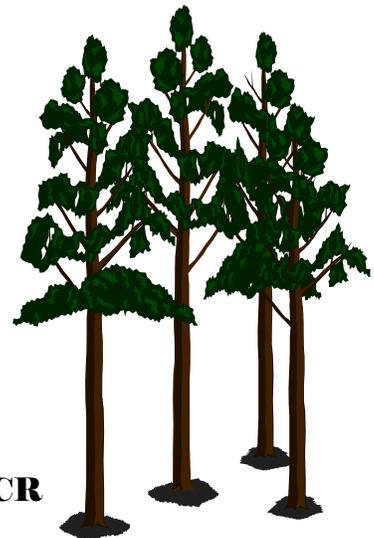
3:00 – 5:00:

Your Choice of DUI or Appeal/PCR

June 10

8:00 – 12:30:

**Your Choice of Forensic Document Analysis or
the Professionalism Course**



For Further Information Contact Dan DeRienzo at (520)771-3588 by May 26, 2000.

for The Defense

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, 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 5th of each month.