

for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

James J. Haas, Maricopa County Public Defender

Volume 17, Issue 3

May 2007



*Delivering America's
Promise of Justice for All*

for The Defense

Editor: Dan Lowrance

Assistant Editors:
Jeremy Mussman
Susie Graham

Office:
620 West Jackson, Ste. 4015
Phoenix, AZ 85003
(602) 506-7711

Copyright © 2007

Contents

Prosecutorial Misconduct: The Top 10 list.....	1
Writers' Corner.....	7
Immigration Law Update Strategies for Drug Offenses	8
Fifth Annual APDA Conference.....	18
Jury and Bench Trial Results.....	20
11th Annual Trial Skills College.....	26

Prosecutorial Misconduct: The Top 10 list

By Anna Unterberger, Defender Attorney

INTRODUCTION

A couple of years ago at the Arizona Public Defenders Association Convention, I did a seminar segment on prosecutorial misconduct; my written materials included the following Top Ten List, which placed an emphasis on capital cases. I was recently asked to submit "The List" to our Newsletter, so with a little bit of updating, here it is.

#10: EXCESSIVE LEADING QUESTIONS

Too many leading questions may justify a new trial. *Locken v. United States*, 383 F.2d 340, 341 (9th Cir. 1967) (holding that repeatedly asking leading questions constituted a "prejudicial irregularity" that was one of the factors leading to the reversal and remand of the defendant's conviction); *State v. Cardenas*, 146 Ariz. 193, 197, 704 P.2d 834, 838 (App. 1985) (recognizing that abuse of leading questions may justify reversal). See also Rule 611(c), ARE ("Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.")

#9: PRETENDING TO REPRESENT THE VICTIM OR BE THE VICTIM'S CRUSADER

This is improper because it misleads the jury and is designed to encourage the jury to decide the case on emotion and ignore the court's instructions. *State v. Bible*, 175 Ariz. 549, 603, 858 P.2d 1152, 1206 (1993) (capital); *State v. Superior Court (Flores)*, 181 Ariz. 378, 383, 891 P.2d 246, 250 (App. 1995). See also Rule 39(c)(4), ARCP ("In asserting any of the rights enumerated in this rule or provided for in any other provision of the law, the victim shall also have the right to engage and be represented by personal counsel of his or her choice.")

#8: INCITING PASSION, PREJUDICE OR FEAR IN THE JURY REGARDING THE DEFENDANT

- The "sticks and stones" version: the prosecutor calls your client names, like "monster," "filth," "the reincarnation of the

devil” or “psychopath,” or likens him or her to Saddam Hussein. References such as these improperly appeal to the passions and fears of the jury. *State v. Henry*, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993) (capital; remanded for resentencing after (F)(2) factor invalidated; “psychopath” comment); *State v. Comer*, 165 Ariz. 413, 426-27, 799 P.2d 333, 346-47 (1990) (capital) (“monster,” “filth” and “the reincarnation of the devil” comments); *People v. Harris*, 888 P.2d 259, 265-66 (Colo. 1995) (remanding for a new trial; “Saddam Hussein” comment).

- **The “gruesome photographs” version.** “If the offered exhibit is of a nature to incite passion or inflame the jury, the court, keeping in mind the purpose of the offer, must go beyond relevance and consider whether the probative value of the exhibit outweighs the danger of unfair prejudice created by admission of the exhibit.” *State v. Moorman*, 154 Ariz. 578, 586, 744 P.2d 679, 687 (1987) (capital); *see also* Rules 401, 402 & 403, ARE. If photographs, “have no tendency to prove or disprove a *contested issue* in the case, they have little use or purpose except to inflame and ordinarily are inadmissible.” *Moorman*, 154 Ariz. at 586, 744 P.3d at 687 (emphasis added); *accord State v. Bocharski*, 200 Ariz. 50, 55-57, 22 P.3d 43, 48-50 (2001) (capital). This is especially true for “gruesome” photographs. *Compare, State v. Powers*, 117 Ariz. 220, 223-24, 571 P.2d 1016, 1019-20 (1977) (reversing defendant’s conviction for involuntary manslaughter where gruesome photographs of the deceased victim were erroneously admitted, because they were not probative of the only issue in the case, which was whether the defendant pushed the victim into the path of the oncoming car that killed him) *and State v. Chapple*, 135 Ariz. 281, 287-90, 297-98, 660 P.2d 1208, 1214-17, 1224-25 (1983) (first-degree murder, non-capital) (reversing due to improperly admitted inflammatory photographs coupled with improperly excluded expert witness testimony re identification), *with State v. Montes*, 136 Ariz. 491, 499, 667 P.2d 191, 199 (1983) (first-degree murder, non-capital) (holding photographs of the victim admissible where they were taken at a distance, showed minimal blood, and were not graphic).
- **The “scaring the jurors” version.** It is improper to appeal to the fear of the jurors. Examples include arguing that if the defendant is acquitted by reason of insanity he will be able to commit future murders, or imploring the jury to reject the insanity defense and not arrive at a verdict that will allow the defendant to kill again. *See respectively State v. Hughes*, 193 Ariz. 72, 88, 969 P.2d 1184, 1200 (1998) (first-degree murder, non-capital); *State v. Makal*, 104 Ariz. 476, 478, 455 P.2d 450, 452 (1969) (capital, 3 victims, remanded for new trial).

#7: VOUCHING

- **It is improper for the prosecutor to give a personal opinion on the defendant’s guilt.** *Dunn v. United States*, 307 F.2d 883, 885-86 (5th Cir. 1962); *State v. Abney*, 103 Ariz. 294, 295, 440 P.2d 914, 915 (1968). For a somewhat different twist, see *State v. Roque*, 213 Ariz. 193, 229, 141 P.3d 368, 404 (2006) (capital) (holding that it was improper for the prosecutor to state, while cross-examining an expert witness, that she thought that a psychiatric test had been improperly administered; the test results and corresponding expert opinion were favorable for the defendant).
- **It is improper for the prosecutor to comment on, and/or elicit a witness’s opinion about, a person’s truthfulness, even if it is done indirectly.** *Bible*, 175 Ariz. at 601, 858 P.2d at 1204; *State v. Martinez*, 175 Ariz. 114, 119, 854 P.2d 147, 152 (1993) (commenting on defendant’s credibility as a witness). This includes eliciting the testimony through expert witnesses. *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986); Rules 701 & 704 (see comment), ARE.

- **It is improper for the prosecutor to suggest that information not presented to the jury supports a witness's testimony.** *Bible*, 175 Ariz. at 601, 858 P.2d at 1204. “[E]ven where the invited error doctrine is applicable to make an otherwise improper or irrelevant subject a proper area of comment, nothing justifies vouching by going outside the record and assuring the jury that there are facts, known to counsel, not admissible in evidence, which will rebut the comments made by the opponent.” *State v. Woods*, 141 Ariz. 446, 455, 687 P.2d 1202, 1210 (1984) (first-degree murder, non-capital). Telling the jurors that they would not get to see evidence, “which the Judge makes various rulings on[,]” was misconduct. *State v. Leon*, 190 Ariz. 159, 162, 945 P.2d 1290, 1293 (1997) (remanded for new trial).

#6: MISSTATING THE FACTS OR THE LAW

- **Misstatements of facts are improper.** “We cannot conceive of a more serious injury, not just to the defendants but to the criminal justice system, than a prosecutor’s presentation of false testimony in a capital murder case.” *In re Peasley*, 208 Ariz. 27, 36, 90 P.3d 764, 773 (2004) (disbarring Mr. Peasley); *State v. Minnitt*, 203 Ariz. 431, 439-40, 55 P.3d 774, 782-83 (2002) (capital, 3 victims; reversing convictions and dismissing charges with prejudice; Peasley was the prosecutor); Ethical Rules (“ERs”) 3.3(a)(1) & 4.1(a), Rule 42, Arizona Rules of Professional Conduct.
- **Misstatements of law are improper.** *State v. Serna*, 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990) (capital) (prosecutor’s argument that State’s witness could not have been prosecuted for murder belied by evidence showing that witness fit legal definition of accomplice, but defense counsel did not object and conviction affirmed on direct appeal; retrial later granted based on a different issue after a PCR hearing); ERs 3.3(a)(1) & 4.1(a). An example of this is the prosecutor telling the jurors that he or she doesn’t have to prove the State’s case beyond “any” reasonable doubt or beyond “all” reasonable doubt – just beyond “a” reasonable doubt. See “*The Diagnosis and Treatment of the Prosecutorial Misconduct Virus*,” For The Defense (MCPD Newsletter), Vol. 15, Issue 5, May 2005.

#5: COMMENTING ON THE DEFENDANT’S EXERCISING OF CONSTITUTIONAL RIGHTS

- **It is improper for the prosecutor to comment on the defendant’s silence, invocation of the right to remain silent or desire to remain silent until after speaking to an attorney once the defendant has been *Mirandized*, or the fact that the defendant refused to consent to a search.** *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976); *Henry*, 176 Ariz. at 579-60, 863 P.2d at 871-72 (“The state cannot impeach a testifying defendant with his post-arrest silence if it was or could have been in response to *Miranda* warnings.”); *State v. Mauro*, 159 Ariz. 186, 197, 766 P.2d 59, 70 (1988) (capital sentence reduced to life) (“It is . . . unfair to use a defendant’s post-arrest, post-*Miranda* warnings silence as evidence of sanity at the time of arrest.”), citing *Wainwright v. Greenfield* 474 U.S. 284, 292 (1986) (same); *State v. Palenkas*, 188 Ariz. 201, 212, 933 P.2d 1269, 1281 (App. 1996) (refusal to consent to search issue); U.S. Const., Amends. V & XIV (right to remain silent and to due process); Ariz. Const., Art. 2, §§ 4 & 10 (right to due process and to not be compelled to give evidence against oneself). Use by the prosecutor of the defendant’s silence is a due-process violation because it, “can have but one objective: to induce the jury to infer guilt.” Thus, it impermissibly allows the prosecutor to, “argue that if the defendant had nothing to hide, he would not keep silent.” *Palenkas*, 188 Ariz. at 212, 933 P.2d at 1280, quoting *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978).
- **It is improper for the prosecutor to comment on the defendant’s seeking, contacting or retaining counsel.** Prosecutorial comment on a defendant’s retaining counsel is error

that justifies a new trial. *United States v. Kallin*, 50 F.3d 689, 693-94 (9th Cir. 1995). Because the right to counsel is included in *Miranda* warnings, it, “is covered by the implicit assurance that invocation of the right will carry no penalty.” *Id.*, quoting *United States v. Daoud*, 741 F.2d 478, 480 (1st Cir. 1984). Reference to a defendant’s contacting counsel prior to his arrest violates the defendant’s rights to a fair trial because it, “creat[es] an inference that defendant’s invocation of constitutional rights was evidence of his guilt.” *Palenkas*, 188 Ariz. at 212, 933 P.2d at 1281. See also U.S. Const., Amends. V (due process clause), VI & XIV; Ariz. Const., Art. 2, §§ 4 & 24.

- **It is improper for the prosecutor to comment on the defendant’s choosing not to testify at trial, or to make a comment that puts pressure on the defendant to testify.** The prosecutor can’t even indirectly comment about the fact that the defendant did not testify at trial. *Griffin v. California*, 380 U.S. 609, 612-15 (1965) (capital conviction reversed); *State v. Arredondo*, 111 Ariz. 141, 143, 526 P.2d 163, 165 (1974) (second degree murder). The test for judging whether an impermissible comment occurred is: was the language manifestly intended, or was it of such character, so that the jury would naturally and necessarily take it to be a comment on the failure to testify. *State v. Fuller*, 143 Ariz. 571, 574-75, 694 P.2d 1185, 1188-89 (1985). The prosecutor’s arguing that the defendant was telling lies, and that an expert witness was the defendant’s “mouthpiece” in presenting these lies, was an improper comment on the defendant’s right not to testify under Ariz. Const., Art. 2, § 10, and A.R.S. § 13-117(B). *Hughes*, 193 Ariz. at 78-80, 969 P.2d at 1190-92. Making a comment before the jury that puts pressure on the defendant to testify is also improper. *State v. Ikirt*, 160 Ariz. 113, 119, 770 P.2d 1159, 1165 (1987). See also U.S. Const., Amends. V & XIV.

#4: FAILING TO DISCLOSE EXCULPATORY EVIDENCE

- **It is improper for the prosecutor to fail to disclose exculpatory evidence.** An accused has a, “constitutionally guaranteed access to evidence.” *California v. Trombetta*, 467 U.S. 479, 485 (1984); U.S. Const., Amends. V, VI & XIV; Ariz. Const., Art. 2, §§ 4 & 24. The purpose of this guarantee is to deliver, “exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.” 467 U.S. at 485. The guarantee includes evidence that is material to the accused’s guilt. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (capital). The question of materiality, “is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (capital). A *Brady* violation exists where the defendant shows, “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* The reviewing court must consider the omitted evidence collectively, not item-by-item. 514 U.S. at 436-37. A *Brady* violation is constitutional error that cannot be harmless. 514 U.S. at 435-36.
- **The prosecution has a constitutional duty to disclose exculpatory evidence to the defense, even without a defense request.** *United States v. Agurs*, 427 U.S. 97, 107-13 (1976) (second-degree murder); accord *State v. Fowler*, 101 Ariz. 561, 564, 422 P.2d 125, 128 (1967) (first-degree murder, non-capital). Failing to disclose this type of evidence is a constitutional violation, even in the absence of bad faith. *Agurs*, 427 U.S. at 110; see also, Rule 15.1, ARCP.
- **Exculpatory evidence includes impeachment evidence.** *United States v. Bagley*, 473 U.S. 667, 682 (1985). It includes **whether a witness had, “any understanding or agreement [with the government] as to future prosecution[.]”** *Giglio v. United States*,

405 U.S. 150, 155 (1972). It also includes **prior convictions of the State's witnesses**. Rule 15.1(d)(1), ARCP.

- **A conviction must be reversed and remanded when**, “disclosure of the suppressed [Brady] evidence to competent counsel would have made a different result reasonably probable.” *Kyles*, 514 U.S. at 441. This includes the situation where the evidence would have, “substantially reduced or destroyed” the credibility of a State’s witness. *Id.* It also includes the situation where the evidence could have “attacked the reliability of the investigation.” 514 U.S. at 446, citing *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) (capital, 3 victims) (remanding for a new trial and holding that when assessing a possible *Brady* violation, a court may consider whether the defense presented involved discrediting the police investigation) and *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (capital) (remanding for a new trial where withheld *Brady* evidence had the potential to discredit the police officers’ investigatory methods).

#3: DISCLOSING EVIDENCE IN AN UNTIMELY AND PREJUDICIAL MANNER

- **The prosecution is obligated to obtain information from persons who have investigated the case and are under the prosecution’s control.** Rule 15.1(f), ARCP; *State v. Krone*, 182 Ariz. 319, 321 n.3, 897 P.2d 621, 623 n.3 (1995) (capital conviction reversed, life sentence imposed at retrial, defendant eventually exonerated and released). The prosecution has a duty to keep itself apprized of the evidence relating to its case, and it may be held accountable for the negligence of its investigators. *State v. Towery*, 186 Ariz. 168, 186-87, 920 P.2d 290, 308-09 (1996) (capital); accord *Kyles*, 514 U.S. at 437.
- **The defense is unable to properly investigate a case when it is surprised by the State’s untimely discovery disclosure.** *State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984). Disclosing key physical evidence in a capital case the last business day before trial began was untimely, prejudicial and required a new trial. *Krone*, 182 Ariz. at 322, 897 P.2d at 624. “[T]he defense should not have been required to meet the force of the crucial, tardily disclosed [evidence] and at the same time try a capital case.” *Id.* See also *Roque*, 213 Ariz. at 229-30, 141 P.3d at 404-05 (capital) (finding improper the prosecution’s failure to **fully** disclose the extent of a witness’s testimony); *Phillips v. Araneta*, 208 Ariz. 280, 284, 93 P.3d 480, 484 (2004) (capital) (recognizing that defense counsel needs time to prepare to meet the opinions advanced by the other party’s expert witness, and that defense counsel generally requires substantial time to follow up on questions raised during a mental health examination).

#2: DISRESPECTING THE DEFENSE TEAM

- **It is improper for the prosecutor to disrespect defense counsel in front of the jury.** Referring to defense counsel in front of the jury as a liar, verbally and/or in writing, is “grossly inappropriate.” *State v. Smith*, 182 Ariz. 113, 116, 893 P.2d 764, 767 (App. 1995). It is improper for the prosecutor to imply, “duplicity on the part of defense counsel.” *State v. Stambaugh*, 121 Ariz. 226, 228, 589 P.2d 469, 470 (App. 1978) (involuntary manslaughter). Asking a witness if the defense had talked witnesses into supporting an insanity defense is improper because it impugns the integrity or honesty of defense counsel. *Hughes*, 193 Ariz. at 86, 969 P.2d at 1188. And insinuating that advisory counsel coached the defendant to feign symptoms of mental illness is also improper. *State v. Cornell*, 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994) (capital sentence reduced to life).
- **It is improper for the prosecutor to disrespect defense witnesses, especially experts, in front of the jury.** It is improper for the prosecutor to attack the expert witness with

“non-evidence,” or to use, “irrelevant, insulting cross-examination and baseless argument designed to mislead the jury[.]” *In re Zawada*, 208 Ariz. 232, 237, 92 P.3d 862, 867 (2004) (suspending Mr. Zawada for 6 months and 1 day). It is improper to argue that an expert is a “fool” or a “fraud.” *Hughes*, 193 Ariz. at 84-86, 969 P.2d at 1196-98 (prosecutor was Zawada). It is improper to argue that, “psychiatrists create excuses for criminals.” 193 Ariz. at 84, 969 P.2d at 1196. It is also improper to insinuate, “that an expert is unethical or incompetent without properly admitted evidence to support it. Unfair attacks on the veracity of a witness are of particular concern when the target is a key witness.” *State v. Bailey*, 132 Ariz. 472, 479 647 P.2d 170, 177 (1982) (first-degree murder, non-capital); *accord, Roque*, 213 Ariz. at 229, 141 P.3d at 404 (capital).

#1: INTENTIONALLY ENGAGING IN MISCONDUCT AND NOT CARING WHETHER IT CAUSES A MISTRIAL OR A REVERSAL

This is the one that occurs when the State’s case is heading for the sewer system at Mach 2 speed. It also is the one that may give you **double jeopardy grounds** for a **dismissal with prejudice**. While the argument may be made under both the Federal and Arizona Constitutions, you have the better shot under the Arizona Constitution, as interpreted by the Arizona Supreme Court.

- **The Federal Argument.** U.S. Const., Amends. V & XIV; *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (“[W]here the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial,” the defendant may then, “raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.”)
- **The Arizona Argument.** Ariz. Const., Art. 2, § 10; *Pool v. Superior Court*, 139 Ariz. 98, 109, 677 P.2d 261, 272 (1984) (barring retrial on double jeopardy grounds where the record disclosed that the prosecutor (Zawada) intentionally engaged in conduct during trial, “with indifference to a significant resulting danger of mistrial or reversal[.]”)

See also “*The Diagnosis and Treatment of the Prosecutorial Misconduct Virus*” (discussing *Kennedy* and *Pool*).

Other cases to consider:

- *State v. Minnitt*, 203 Ariz. at 439-40, 55 P.3d 774 at 782-83 (reversing 3 capital convictions and dismissing charges with prejudice because prosecutor Peasley essentially presented perjured testimony of a police detective; Peasley disbarred 2 years later).
- *State v. Jorgenson*, 198 Ariz. 390, 10 P.3d 1177 (2000) (dismissing the *Hughes* case with prejudice due to Zawada’s prosecutorial misconduct, because that misconduct resulted in a violation of Hughes’s right to be free from double jeopardy).
- *In re Zawada*, 208 Ariz. at 237, 92 P.3d at 867 (suspending prosecutor Zawada for 6 months and 1 day in light of *Hughes* misconduct) (“The distinction between Peasley and Zawada is that Peasley concealed acts amounting to subornation of perjury, while Zawada misled the jury openly, appealing to fear and emotion.”)

CONCLUSION

Although I borrowed the “top ten” idea from a late-night comedy show, there is nothing funny about this topic. And prosecutorial misconduct is one of the few areas of the law where the doctrine of “cumulative error” is recognized. In other words, the more misconduct that the prosecutor commits, the higher the likelihood that your client will receive a new trial, or even a dismissal with

prejudice. When misconduct occurs, object each time, make a contemporaneous record and cite to the applicable law, especially the relevant Federal and Arizona constitutional provisions. Because you never know when your client may end up like Mr. Pool, Mr. Minnitt or Mr. Hughes.

Writers' Corner

Garner's Usage Tip of the Day:



Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including *A Dictionary of Modern Legal Usage*, *The Winning Brief*, *A Dictionary of Modern American Usage*, and *Legal Writing in Plain English*. The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at www.us.oup.com/us/apps/totd/usage. Garner's *Modern American Usage* can be purchased at bookstores or by calling the Oxford University Press at: 800-451-7556.

Formal Words

The English language has several levels of diction, and often synonyms exist on different levels. For example, "residence" is a formal word, "house" is an ordinary word, and "digs" is slang. Stylists worry that well-known formal words crowd out ordinary words. It's a perpetual concern as each generation becomes enamored of its own brands of linguistic inflation: doublespeak, officialese, and the like.

The sad trend shows up everywhere: "accommodation" displaces "room"; "approximately" displaces "about"; "commencement" displaces "start"; "individual" displaces "person"; "necessitate" displaces "require"; "obtain" displaces "get"; "prior to" displaces "before"; "proceed" displaces "go"; "purchase" displaces "buy"; "request" displaces "ask"; "subsequently" displaces "later"; "sufficient" displaces "enough"; "utilize" displaces "use."

One way or another, formal words lead to stuffiness -- the great fault in modern writing: "For most people . . . in most situations, in the writing of everyday serious expository prose, it is the Stuffy voice that gets in the way. The reason it gets in the way, I submit, is that the writer is scared. If this is an age of anxiety, one way we react to our anxiety is to withdraw into omniscient and multisyllabic detachment where nobody can get us." Walker Gibson, *Tough, Sweet & Stuffy* 107 (1966).

Quotation of the Day: "Despite the technically correct grammar, the writing is heavy and opaque. It reminds me of a soggy biscuit. If we analyze the passage we find an overabundance of words and an overabundance of syllables. The reader gets tired after a single paragraph, and if he had to go on for page after page, he would get very tired. If we wanted to make the style simpler and more appealing, what could we do? We cannot merely cut a word here and there. We would need to go over the passage with minute care, to find a short word for a long one, to cut out unnecessary words -- to put the biscuit in the oven and dry it out." Lester S. King, *Why Not Say It Clearly* 89-90 (1978).

New York State Defenders Association Immigrant Defense Project

25 Chapel Street, Suite 703, Brooklyn, NY 11201 • Phone 718-858-9658 ext. 201 • Fax 800-391-5713 • www.immigrantdefenseproject.org

PRACTICE ADVISORY: CRIMINAL DEFENSE OF IMMIGRANTS IN STATE DRUG CASES — THE IMPACT OF *LOPEZ V. GONZALES** December 14, 2006

This advisory is IDP's third in a series of practice advisories on the impact of the Supreme Court's decision in *Lopez v. Gonzales* (No. 05-547) (Dec. 5, 2006). The Court's decision answers an important question for criminal lawyers representing immigrants: What state drug offenses are "aggravated felonies" and thereby trigger mandatory deportation without the possibility of a waiver?

What the Supreme Court decided in *Lopez*

The Supreme Court held that the federal government may not apply the aggravated felony label to state felony drug possession offenses that would be misdemeanors under federal law. This means that **state first-time drug simple possession offenses**—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—are **NOT aggravated felonies**, even if classified as a felony by the state. Thus, while noncitizen clients convicted of such offenses will generally still face regular drug offense deportability or inadmissibility, some may be eligible to seek discretionary relief from removal in later immigration proceedings, e.g., cancellation of removal, asylum or naturalization.

What *Lopez* means for state criminal defense practice

1. Conviction of, or mere guilty plea to, **virtually any drug offense still generally triggers deportability and/or inadmissibility**. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver.
2. *Lopez*, however, makes clear that **most first-time drug possession offenses will not trigger the more certain mandatory deportation consequences** attached to the "aggravated felony" label.
3. **Whether a second possession offense may be deemed an aggravated felony remains uncertain** and may depend on the law of the federal circuit in which your client's removal case later arises.
4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal felony "*trafficking*" offense continues to trigger aggravated felony mandatory deportation consequences.

For background on *Lopez*, see pages 2 - 3.

For details on the impact of *Lopez* on state defense practice, see pages 4 - 6.

For post-*Lopez* practice tips for state defense practice, see pages 7 - 9. *Cont'd* ►

* By IDP's Manuel D. Vargas and Marianne C. Yang. IDP acknowledges the helpful input by Dan Kesselbrenner of the National Immigration Project and Nancy Morawetz of the NYU School of Law.

Background; More on Lopez

Pre-Lopez case law conflict. Before *Lopez*, the Board of Immigration Appeals (BIA) had reversed position and federal courts had been split on what state drug offenses constitute a “drug trafficking” aggravated felony for immigration purposes.

The immigration statute defines “aggravated felony” to include “illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).” See INA 101(a)(43)(B). The BIA had initially interpreted INA 101(a)(43)(B) and 18 U.S.C. 924(c) to hold that a state drug offense qualifies as an aggravated felony only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered “illicit trafficking” as commonly defined or (2) regardless of state classification as a felony or misdemeanor, it is analogous to a felony under the federal Controlled Substances Act (the so-called **federal felony approach**). *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), *reaffirmed by Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999).

In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including possession with intent to distribute), but simple possession drug offenses are generally misdemeanors. See 21 U.S.C. 801 et seq. and 21 U.S.C. 844 (penalizing possession offenses as misdemeanors unless the prosecution has charged and proven a prior final drug conviction, or possession of more than five grams of cocaine base or any amount of flunitrazepam).

Before and after *Matter of L-G-*, however, several federal circuit courts concluded, in the context of the prior aggravated felony sentence enhancement for the federal crime of illegal reentry after removal, that a state simple possession drug offense is an aggravated felony if it is classified as a felony under state law, even if it is not punishable as a felony under federal law (the so-called **state felony approach**). See *U.S. v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996); *U.S. v. Polanco*, 29 F.3d 35 (2d Cir. 1994); *U.S. v. Wilson*, 316 F.3d 506 (4th Cir. 2003); *U.S. v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 2001); *U.S. v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997); *U.S. v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000); *U.S. v. Cabrera-Sosa*, 81 F.3d 998 (10th Cir. 1996); *U.S. v. Simon*, 168 F.3d 1271 (11th Cir. 1999).

In 2002, in response to the trend in sentencing cases, the BIA, in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), reversed course and adopted the reasoning of the federal courts in the sentencing context and found that a state simple possession drug offense is an aggravated felony for immigration purposes if it is classified as a felony under state law, unless the case arises in a federal circuit with a contrary rule.

After *Matter of Yanez-Garcia*, conflict in the case law only increased. Some federal circuit courts applied the state felony approach in both the immigration and sentencing contexts, see, e.g., the lower court decision in the case before the Supreme Court—*Lopez v. Gonzales*, 413 F.3d 934 (8th Cir. 2005). At the same time, several other courts lined up in support of the federal felony approach, at least in the immigration context. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002)(immigration context), *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004)(immigration context), *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)(sentencing context, but applicable also in the immigration context), and

Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006)(immigration context). Two Circuits – the Second and Ninth -- adopted different rules for sentencing and immigration cases. Compare *U.S. v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999) and *U.S. v. Ibarra-Galindo*, *supra* (sentencing cases following state felony approach), with *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996) and *Cazarez-Gutierrez v. Ashcroft*, *supra* (immigration cases following federal felony approach). Yet other courts went so far as to find or suggest that a state drug offense is an aggravated felony if it is a felony under either state or federal law (the so-called “**either or**” approach). See, e.g., *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992)(immigration context); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(sentencing context); *U.S. v. Sanchez-Villalobos*, 413 F.3d 575 (5th Cir. 2005)(sentencing context, but Fifth Circuit followed same rule in immigration and sentencing contexts).

Lopez resolves case law conflict. With *Lopez*, the Supreme Court resolved this conflict, ruling in favor of the federal felony approach to interpreting the meaning of the 18 U.S.C. 924(c) “drug trafficking crime” term referenced in the aggravated felony definition. Thus, the government may no longer deem a state felony possession offense to be an aggravated felony unless it would be a felony under federal law.

The Court relied in part on the ordinary meaning of “trafficking,” noting that “[t]he everyday understanding of ‘trafficking’ should count for a lot here, for the statutes in play do not define the term” *Lopez*, slip op. at 5. Noting that “ordinarily ‘trafficking’ means some sort of commercial dealing,” it stated that reading 924(c) the government’s way would nevertheless turn simple possession into trafficking, “just what the English language tells us not to expect.” *Lopez* at 3. Although there are exceptions, the Court found that typically federal law treats non-trafficking offenses as misdemeanors, and therefore such offenses generally should not be deemed “drug trafficking crimes” in the absence of express Congressional command. The “inclusion of a few possession offenses in the definition of ‘illicit trafficking’ does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning.” *Lopez* at n.6. Moreover, the Court made clear that it did not matter what quantity of the controlled substance was possessed, since federal law punishes virtually all simple possession offenses as misdemeanors without, in general, designating such offenses as felonies based on the quantity involved. See *Lopez* at 11-12.

The only exceptions to the general rule that simple possession offenses are misdemeanors under federal law, the Court noted, are offenses involving possession of two specific controlled substances—crack cocaine and flunitrazepam—as well as “recidivist possession,” citing 21 U.S.C. 844(a) (providing sentence enhancements for possession of more than five grams of cocaine base, known as “crack cocaine,” possession of any amount of flunitrazepam, and possession of a controlled substance after a prior drug conviction has become final). See *Lopez* at n.4 & n.6. The Court indicated that state counterparts may be deemed aggravated felonies if the state offense “corresponds” to the analogous federal offense. See *Lopez* at n. 6.

What *Lopez* means for state criminal defense practice

We distill the import of *Lopez* for state criminal defenders into the following four general principles:

1. **Conviction of, or mere guilty plea to, virtually any drug offense still generally triggers deportability and/or inadmissibility, even if later vacated or expunged based on rehabilitation or participation in drug treatment. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver.** If your noncitizen client is convicted of virtually any drug offense relating to a controlled substance, he or she will become removable despite the Supreme Court decision in *Lopez*. Your client's conviction will trigger regular controlled substance offense deportability for lawfully admitted immigrants,¹ or inadmissibility for others who now or in the future may be seeking lawful admission.² The only exception is for deportability purposes and applies only to lawfully admitted immigrants convicted of a single offense involving possession for one's own use of thirty grams or less of marijuana.³

Even a drug conviction later expunged via a rehabilitative statute--or even a mere guilty plea to a drug offense later vacated, e.g., due to successful completion of a drug treatment program--may be sufficient for your client to be deemed convicted for immigration purposes and rendered removable (unless the disposition involves a first-time possession offense and the removal case later arises in the Ninth Circuit).⁴

Moreover, if your client is a lawful permanent resident immigrant ("green card" holder) who was admitted to the United States less than seven years before the alleged commission of the drug offense, conviction or plea to a drug offense may trigger *mandatory deportation*.⁵ And, if your client is a noncitizen who does not have lawful permanent resident status, conviction or plea to virtually any drug offense will trigger *inadmissibility without a waiver* if the client is now applying, or in the future plans to apply, for permanent resident status.⁶

¹ See INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i).

² See INA 212(a)(2)(A)(i)(II), 8 U.S.C. 1182(a)(2)(A)(i)(II).

³ See INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i).

⁴ See INA 101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A) (guilty plea combined with some penalty or restraint ordered by a court sufficient to be deemed conviction for immigration purposes); see also *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute); but see *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act).

⁵ The relief of cancellation of removal for lawful permanent resident immigrants is barred not only if the individual is convicted of an aggravated felony, but also if the individual commits any drug offense before the person has continuously resided in the United States for seven years. See INA 240A(a) & (d), 8 U.S.C. 1229b(a) & (d).

⁶ The waiver of inadmissibility available for persons seeking lawful permanent resident status who have been convicted of, or who have admitted, crimes is not available for any drug offense other than a single offense of simple possession of 30 grams or less of marijuana. See INA 212(h), 8 U.S.C. 1182(h).

2. **Lopez, however, dictates that most first-time drug possession convictions will no longer trigger the more certain mandatory deportation consequences attached to the “aggravated felony” label.** Your client convicted of a first-time possession offense – even if deemed a felony under state law – will no longer be deemed convicted of an aggravated felony. The only exceptions would be if your client was convicted of possession of more than five grams of crack cocaine or any amount of flunitrazepam since such offenses would be felonies under federal law.⁷

This is important: If your client is convicted of a first-time drug possession offense, he or she may avoid the statutory aggravated felony bars for eligibility for removal relief such as cancellation of removal for certain lawful permanent residents,⁸ asylum,⁹ withholding of removal,¹⁰ and termination of removal proceedings in order to pursue naturalization.¹¹ Whether your client may be able to obtain such relief will depend on whether he or she is otherwise eligible and the strength of the claim.

For example, if your client is a lawful permanent resident and is convicted of a drug offense that triggers removability but is not an aggravated felony, your client may later be eligible for the relief of cancellation of removal as long as s/he has resided continuously in the United States for at least seven years prior to commission of the offense.¹² To be granted such relief, your client will have to show favorable factors such as family ties within the United States, residency of long duration in the country, evidence of hardship to the individual and family if deportation were to occur, service in the armed forces, history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation, and evidence attesting to good moral character.¹³ It is estimated that about one-half of applicants whose applications for the similar “212(c) waiver” cancellation predecessor form of relief were decided between 1989 and 1995 were granted such relief.¹⁴

Finally, it should be noted that avoiding the aggravated felony label also avoids other negative immigration consequences under the immigration laws, such as the stiff sentence enhancements that exist for the federal crime of illegal reentry after deportation subsequent to an aggravated felony conviction.¹⁵

3. **Whether a conviction of a second possession offense may be deemed an aggravated felony remains uncertain, and may depend on the law of the federal court circuit in which your client’s removal case later arises.** The only drug offense plea that is currently safe from aggravated felony consequences is a first-time possession offense. If preceded by a prior drug conviction, even a

⁷ See 21 U.S.C. 844(a).

⁸ Barred by aggravated felony—see INA 240A(a)(3)).

⁹ Barred by aggravated felony—see INA 208(b)(2)(B)(i)).

¹⁰ Barred by aggravated felony or felonies for which the person has been sentenced to an aggregate term of imprisonment of at least 5 years—see INA 241(b)(3)(B)).

¹¹ Barred by post-November 29, 1990 aggravated felony—see INA 101(f).

¹² See INA 240A(a) & (d), 8 U.S.C. 1229b(a) & (d).

¹³ See *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).

¹⁴ See *INS v. St. Cyr*, 533 U.S. 289 at 296, n.5 (2001).

¹⁵ See INA 276(b)(2), 8 U.S.C. 1326(b)(2).

misdemeanor possession offense might be deemed an aggravated felony. This is because the government may continue to argue, as it has in the past, that under the federal felony approach adopted by the Supreme Court in *Lopez*, a misdemeanor possession offense preceded by a prior drug conviction must be deemed an aggravated felony because of the authority under federal law to penalize a second or subsequent possession conviction as a felony.¹⁶ Some federal circuits have adopted this position.¹⁷ However, other circuits have applied the federal felony approach to find that the later conviction does not correspond to a federal “recidivism possession” 21 U.S.C. 844(a) felony offense if the state conviction did not involve notice and proof of the prior conviction as required for a federal possession recidivism conviction under 21 U.S.C. 851.¹⁸ In addition, even if a circuit has stated that a second or subsequent possession offense may be deemed an aggravated felony, it may not so find if the prior conviction was not yet final at the time of commission of the later offense. This is because a second or subsequent state drug possession conviction is subject to an 844(a) recidivism sentence enhancement only if the prior conviction was final at the time of commission of the later offense.¹⁹ It should be noted that the Ninth Circuit Court of Appeals has ruled that a second or subsequent state drug possession conviction should not be treated as punishable by more than one year’s imprisonment and therefore a “felony” punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement;²⁰ however, be aware that the *Lopez* decision contains language characterizing federal convictions of misdemeanor possession offenses with a recidivist enhancement to a potential sentence in excess of one year as “felonies” falling within the 18 U.S.C. 924(c)(2) “drug trafficking crime” definition. See *Lopez* at n.6.

- 4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal “trafficking” offense continues to trigger aggravated felony mandatory deportation consequences.** Any state drug offense that corresponds to a federal felony drug offense listed at 18 U.S.C. 841 *et seq.* -- generally true trafficking-type offenses such as drug distribution or intent to distribute offenses -- is an aggravated felony. However, conviction of a state offense that covers conduct that may not be a federal felony (e.g., possession, transfer of marijuana without remuneration, or maybe offer to sell – see practice tips below), as well as conduct that would be a federal felony, may not necessarily be deemed an aggravated felony unless the federal government is able to establish, through the state record of conviction, that your client was convicted of that portion of the statute relating to the covered conduct that would be a federal felony.

¹⁶ See 21 U.S.C. 844(a) (subjecting individuals convicted of possession of a controlled substance after a prior drug conviction has become final to a maximum sentence in excess of one year).

¹⁷ See *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005) (finding second misdemeanor possession offense constituted an aggravated felony); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002) (finding second misdemeanor possession offense to be an aggravated felony in illegal reentry sentencing context but declining to comment on whether such offense would be an aggravated felony in the immigration context).

¹⁸ See *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006) (“Because Berhe’s 1996 conviction is not a part of the record of the 2003 conviction, the government did not establish that Berhe was convicted of a hypothetical federal felony”); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001).

¹⁹ See 21 U.S.C. 844(a) (providing for sentence enhancement based on a prior conviction only if the offense at issue is committed after such prior conviction “has become final”); see also *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005) (later offense committed while prior drug case still pending in criminal court); *Smith v. Gonzales*, 468 F.3d 272 (5th Cir. 2006) (later offense committed while individual still within time to seek leave to appeal prior conviction).

²⁰ See *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004);

Practice Tips

In light of *Lopez*, state criminal defense practitioners representing noncitizen clients facing state drug charges may wish to consider the following tips:

► **Avoid drug conviction or plea, if possible.** As explained above, virtually any drug offense – other than a single offense involving possession for one’s own use of thirty grams or less of marijuana -- triggers controlled substance deportability for a lawfully admitted noncitizen client. Moreover, any drug offense triggers inadmissibility for a noncitizen client who is not yet lawfully admitted. Therefore, if possible, you should avoid conviction of a drug offense for a noncitizen client. This includes a guilty plea to a drug offense combined with some penalty or restraint ordered by a court (e.g., court-ordered commitment to a drug treatment program) since such a disposition may be deemed a conviction for immigration purposes even if the plea is later vacated. See, *supra*, note 4. If possible, when there is a possibility of placement in a drug treatment or other alternative-to-incarceration program, try to negotiate a disposition that does not involve an up-front guilty plea to a drug offense.

► **If this is your client’s first drug offense charge, plead to possession rather than sale.** As discussed above, *Lopez* makes clear that any first-time drug possession offense – although it will still trigger removability -- may not be deemed an aggravated felony triggering mandatory removal of a lawful permanent resident immigrant. Thus, if your permanent resident client will plead guilty, you should negotiate a plea to a simple possession offense rather than a sale or possession with intent-to-sell or other trafficking-type offense in order to preserve the possibility of relief from removal. Moreover, since the Court made clear that it did not matter what quantity of the controlled substance was possessed as long as the possession offense does not contain a distribution, intent to distribute, or other federal “trafficking” element, your client may in some states be able to offer a plea to a simple possession offense that is of a comparable or even higher level than the “trafficking” offense charged. Even if your client is not a permanent resident, avoiding the aggravated felony label may enable your client to apply for asylum if otherwise eligible or, if your client is deported, may avoid the stiff federal prior aggravated felony sentence enhancement if your client is charged and convicted in the future of the crime of illegal reentry after deportation.

► **If your client has a prior drug conviction(s), file an appeal of the prior conviction(s), or seek leave to appeal the prior conviction(s), if possible.** *Lopez* leaves open the question of whether a second state drug possession conviction may be deemed an aggravated felony. However, a second state possession offense should not be deemed to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the prior conviction was not final at the time of commission of the later offense. Thus, if your client is still within the time to file an appeal of the prior conviction as of right, you might advise your client that he or she may avoid aggravated felony consequences for the current case if he or she appeals the prior conviction. If the time for an appeal of right has passed but there is still time to seek discretionary leave to appeal the prior conviction, you might advise your client to seek such leave. See *Smith v. Gonzales*, 468 F.3d 272 (5th Cir. 2006)(later offense committed while individual still within the time to seek leave to appeal the prior conviction).

► **If your client has a prior drug conviction(s), avoid plea to offense that involves charge and proof of the prior conviction(s).** As discussed above, a second state drug possession conviction might be deemed not to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the conviction does not include charging and proof of the prior drug conviction. Thus, if your state has separate offenses for those convicted of possession depending on whether the prosecution chooses to charge and prove a prior conviction of a drug offense, you should seek to avoid the offense involving proof of the prior conviction. This strategy should work in particular if your client's later removal case is likely to fall within the jurisdiction of the U.S. Courts of Appeals for the First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island) or the Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands). See *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001). Be aware, however, that this strategy may not work if your client's later removal case falls within the jurisdiction of the Second Circuit (Connecticut, New York, Vermont) or the Fifth Circuit (Canal Zone, Louisiana, Mississippi, Texas). See *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002); *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005).

► **If possible, plead to a preparatory or accessory-after-the-fact offense.** For removal cases arising in the Ninth Circuit, a state conviction of a free-standing preparatory or accessory offense such as solicitation, even if the underlying offense is a drug offense, should not be deemed an aggravated felony. See *Levy-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999). Therefore, if your noncitizen client is charged with a drug offense, you might offer an alternate plea to such a preparatory or accessory offense. At present, this strategy may work only if your client's later removal case falls within the jurisdiction of the Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington); however, even for clients whose cases will probably not fall within Ninth Circuit jurisdiction, such a disposition may offer your client an argument to avoid removal or mandatory removal.

► **If your client will plead guilty to a state drug offense that covers conduct that would be an aggravated felony but also conduct that would not, keep out of the record of conviction any information that would help establish that the conduct is an aggravated felony.** Under immigration case law, an offense that covers some conduct that is an aggravated felony and some that is not may not categorically be determined to be an aggravated felony. For example, the Third Circuit has found that a state marijuana "sale" offense that might cover transfer of a small amount of marijuana for no compensation should not categorically be considered a "drug trafficking crime" or an "illicit trafficking" aggravated felony since such a transfer would be treated as a misdemeanor under federal law. See 21 U.S.C. 841(b)(4) ("distributing a small amount of marijuana for no remuneration" treated as simple possession misdemeanor under 21 U.S.C. 844); *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2004); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001). Similarly, the Ninth Circuit has found that a state drug offense that includes "offers" to transport, import, sell, furnish, administer, or give away marijuana thus includes solicitation conduct and, therefore, could not categorically be determined to be an aggravated felony. See *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001). However, be aware that the immigration authorities may look to the record of conviction to determine whether your client was

convicted of that portion of the statute relating to conduct that would be an aggravated felony. Therefore you may help your noncitizen client avoid removal if you either make sure the record of conviction establishes conduct that would not be considered an aggravated felony, or keep out of the record of conviction any information that would help the federal government establish conduct that would be an aggravated felony.

► **If your client will plead guilty to a state drug offense whose elements do not establish the controlled substance involved, keep out of the record of conviction any information that would help establish that the substance involved is one listed in the federal controlled substance schedules.** The aggravated felony definition at INA 101(a)(43)(B) covers only drug offenses that relate to a substance included in the federal definition of “controlled substance” in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules published at 21 U.S.C. 812). However, many states define “controlled substance” to include some substances that do not appear in the federal controlled substance schedules. Therefore, if you are able to avoid the record of conviction in your client’s state criminal case establishing the particular controlled substance involved, this may offer your client an argument in later immigration proceedings that his or her particular offense is not necessarily an aggravated felony.

► **If your client will plead guilty based on an understanding that the plea will not trigger removal, or at least mandatory removal, advise your client to allocute to his or her understanding.** You might advise your client to include such a statement of his or her understanding in the plea allocution in order to provide some basis for a later withdrawal of the plea should this understanding be upset by later legal developments.

Contact Us

For the latest legal developments or litigation support on any of the issues discussed in this advisory, contact IDP’s Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208, or for support on issues involving drug possible alternative-to-incarceration (ATI) disposition cases, contact IDP’s Alina Das at (718) 858-9658 ext. 203. They may also be contacted by email at bjain@nysda.org, mvargas@nysda.org and adas@nysda.org.



The Defending Immigrants Partnership

Mission

For a noncitizen facing criminal charges today, the right to defense counsel who understands the immigration consequences of criminal dispositions may be all that stands between continued permanent, temporary or potential residence as a member of our community and the other side of the border. The Defending Immigrants Partnership, a joint initiative comprised of the National Legal Aid and Defender Association (NLADA), the New York State Defenders Association's Immigrant Defense Project, the Immigrant Legal Resource Center (ILRC), and the National Immigration Project, represents an unprecedented collaboration among the foremost immigration advocacy and defense organizations with expertise in the immigration consequences of crime and the one national legal organization devoted exclusively to ensuring high-quality legal representation for indigent clients in criminal and civil matters. Since its inception in October 2002, the Partnership has coordinated on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent noncitizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions. To that end, the Partnership offers defender programs and individual defense counsel critical resources and training about the immigration consequences of crimes, actively encourages and supports development of in-house immigration specialists in defender programs, forges connections between local criminal defenders and immigration advocates, and provides defenders technical assistance in criminal cases.

http://www.nlada.org/Defender/Defender_Immigrants

About the Defending Immigrants Partnership ~ Who we are, what we do and why

Immigration Consequences ~ Analyses of selected state & federal offenses and related consequences

Practice Tips & Alerts ~ Current "best practices" suggestions & law change alerts

Cutting Edge Precedents ~ Circuit specific updates & federal, state and Board Immigration Appeals decisions

Training Resources ~ Download an immigration consequences client screening form, our National Manual on representing noncitizens, PowerPoint slides for your next training and sample curriculum

Pleading and Resources ~ Selected amicus briefs, model pleadings and background materials





5th Annual Conference

FIFTH ANNUAL ARIZONA PUBLIC DEFENDER ASSOCIATION CONFERENCE

at the....



Tempe Mission Palms Resort & Conference Center

60 East Fifth Street, Tempe, 85281
(480) 894-1400

▶ *RESERVE NOW, ROOMS SELL OUT QUICKLY*

▶ Ask for reduced APDA rate

www.missionpalms.com

Pre-Conference Schedule

Wednesday, June 20, 2007

9:00 a.m. – 12:00 noon

Conference Schedule

Wednesday, June 20, 2007

1:00 p.m. – 5:00 p.m.

Thursday, June 21, 2007

9:00 a.m. – 5:00 p.m.

Friday, June 22, 2007

9:00 a.m. – 12:15 p.m.



Welcome to the Fifth Annual Statewide APDA Conference. Break out your Hawaiian shirts and shorts, and join the professionals from across Arizona who will gather at the beautiful Tempe Mission Palms for this criminal defense program unlike any other in the country. See you there!

What's new?

Conference Changes for Return Attendees

- Conference starts earlier (1:00 p.m.) on Wednesday
- Hotel check-out is 1:00 p.m. on Friday
- \$50 registration late fee after May 31
- \$100 walk-up registration fee

▼▲▶▼◀▲ Nuts and Bolts ▶▼◀▲▼▶

This year's conference will feature a series of *Nuts and Bolts* courses designed to provide a primer on basic topics to benefit both newer attorneys and experienced attorneys looking for a refresher course. ▲▶▼◀▲▶▼◀▲▶▼

Pre-order your APDA Polo Shirts now!

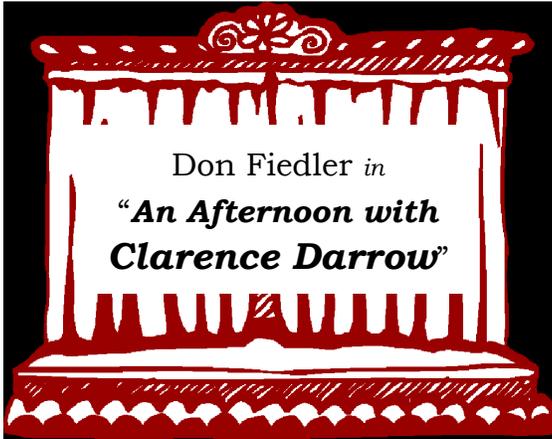
Available in men's and ladies' styles – 5 colors. Eight sizes to fit everyone from Tattoo to Shaq. Pre-order form is on last page of brochure. Order deadline is May 31. Pick up at conference.

Registration Deadline
May 31, 2007
Register Early - Space is Limited

MCPD Employees: Register through Celeste Cogley. All Others: Click on this link for Registration Information: [APDA Website](#)

Conference Highlights

APDA proudly presents, as a Special CLE Event for Wednesday’s opening plenary session, a one-man play brought to you straight from the National Criminal Defense College in Macon, Georgia:



The performance of “An Afternoon with Clarence Darrow” will start promptly at 1:15 on Wednesday. **To minimize disruption of the play, please be seated by 1:00.** Registration tables will open at 7:30 a.m. on Wednesday morning and will remain open throughout Wednesday afternoon.



FRIDAY MORNING

Annie Loyd has changed the lives of countless women with her message of inner strength and empowerment. Join her for a 3-hour presentation that will change the way you look at yourself and your role in life.

(Courses 86 and 110)



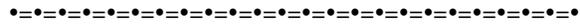
Course Highlights

Pre-Conference Featured Programs:

Death Penalty – the Colorado Jury Selection Method in Arizona

Eyewitness Testimony – the facts, fallacies, and how to deal with this inaccurate, yet powerful, aspect of a case

DNA – a guide to understanding and learning how to challenge the one-in-a-million odds of this forensic analysis



Conference Featured Programs:

Traumatic Brain Injury and its Effect on Your Client

Introduction to Ballistics and Firearm Injuries

Cute is Good, But Not a Reason to Keep a Juror: Effective Voir Dire and Jury Selection

Advanced Cross-Examination

Zen and the Art of Criminal Defense

Challenging Criminal Intent Based on the Child’s Age

An Insight into the Workings of Street and Prison Gangs

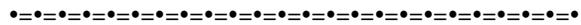
Clarence Darrow’s Ethics in the 21st Century

Mitigation and Making Movies to Use at Sentencing

DOC Classification and Time Comp

Immigration Consequences: The Most Severe Sanction

Beyond the Dust: A New Life for Arizona’s Historically Significant Cases, Records, and Archives



Over 200 Faculty Members

including our colleagues from Public Defenders Offices in:

Brooklyn, New York..... Andrew Eibel
Supervising Attorney, Legal Aid Society

Duluth, Minnesota.....Fred Friedman
Chief Public Defender, 6th District, Minnesota

Chicago, Illinois.....Dorene Kuffer
Chief, Juvenile Div., Cook County Public Defender



Those sensitive to air conditioning may wish to bring an additional layer to keep warm.

Jury and Bench Trial Results

March 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
2/26 - 3/6	Dominguez <i>Armstrong</i>	Trujillo	Goddard	CR05-011607-001DT POM f/s, F3 2 cts. Misc Inv Wpn, F4 2 cts. Agg Assault, F3D	Guilty - POM f/s and Misc Inv Wpn; Not Guilty Agg Assault, F3D - Guilty of Lesser Included Att Agg Assault, F4D	Jury
3/6 - 3/7	Guyton <i>Ralston</i>	Whitten	Rubalcaba	CR06-008094-001DT Agg Assault, F4 DV Assault, M1 DV	Guilty	Jury
3/8 - 3/19	Taylor <i>Ralston</i>	Akers	Sponsel	CR06-104896-001DT PODD, F4	Guilty	Jury
3/19 - 3/21	Fischer	Johnson	Susser	CR06-005617-001DT Theft, F3	Guilty	Jury
3/19 - 3/22	Farney <i>Armstrong</i>	Porter	Steinberg	CR06-007302-001DT 2 cts. Theft, F4	Directed Verdict, Ct. 2; Guilty, Ct. 1	Jury
3/20 - 3/22	Guyton Hales <i>Armstrong</i>	Ishikawa	Sammons	CR05-106927-001DT Possession for Sale of Narcotic Drugs Over the Threshold, F2	Guilty of Lesser Included Possession of Narcotic Drugs	Jury
3/26 - 3/27	Baker Rosales	Gottsfeld	Steinberg Stines	CR06-005758-002DT POND, F4 PODP, F6	Not Guilty	Jury
Group 2						
2/22	Kephart	Ditsworth	Telles	CR06-160583-001DT Agg. Assault, F6	Guilty Agg. Assault, M1	Bench
2/27 - 2/28	Kephart Bublik Reilly <i>Burns</i>	Cunanan	Sammons	CR06-156619-001DT Criminal Trespass, F6	Guilty	Jury
2/27 - 3/5	Taradash Spizer	Akers	Church	CR06-138646-002DT Agg. Assault Against Police Officer, F2D Criminal Trespass, F6	Guilty	Jury
2/27 - 3/1	Guenther Reilly	Blakey	Susser	CR06-107499-001DT Forgery, F4	Not Guilty	Jury
3/1 - 3/6	Houston Leonard Romani	Anderson	Gilbert	CR06-159547-001DT Burg 2nd Deg, F3	Not Guilty	Jury
3/8 - 3/30	Evans	Davis	Scott Church	CR06-129852-001DT Misc Inv Wpns Prohibited Possessor, F4	Hung Jury (6-2 Guilty)	Jury

Jury and Bench Trial Results

March 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 2 (Continued)						
3/21 - 3/23	Greene	Dunevant	Scott	CR06-138670-001DT Misconduct Inv. Wpns., F4 Unlawful Discharge of Firearm, F6D	Dismissed With Prejudice	Jury
3/21 - 3/27	Kephart Kozelka Clesceri	Sanders	Willison	CR06-160691-002DT Agg. Assault, F6 Resisting Arrest, F6	Not Guilty Count 1, lesser of Disorderly Conduct Guilty Count 2	Jury
3/29	Kephart Burns	Ditsworth	Sammons	CR06-153502-001DT Resisting Arrest, F6	Not Guilty	Bench
Group 3						
3/20 - 3/21	Cain	Gaines	Bonaquidi	CR06-144102-001DT Burglary 2nd Deg., F3	Guilty in absentia	Jury
3/15 - 3/16	Parker	Burke	Lee	CR06-150171-001DT 2 Cts. POND for Sale, F2	Guilty	Jury
3/21 - 3/23	Parker Randall	Heilman	Green	CR04-024215-001DT 2 cts. Agg. Assault, F2 Drive by Shooting, F2 Burglary 1st Deg, F2 Agg. Assault, F3 Kidnap, F2 Misconduct Inv. Wpns., F4 Burglary 3rd Deg, F4 Unlaw Flight from Law Enf. Veh., F5 Theft, F6	Mistrial	Jury
Group 4						
2/27 - 3/6	Little Arvanitas Lenz	Ditsworth	Schultz	CR06-150275-001SE 4 cts. Armed Robbery, F2 4 cts. Burg 1st Deg F2 Theft, F5	Not Guilty (on all charges)	Jury
2/28 - 3/12	Ziemba	Stephens	Harrison	CR06-134886-001SE Armed Robbery, F2D Burg 1st Deg F2D Kidnap, F2D	Armed Robbery. - Guilty Burglary - Guilty Kidnap - Not Guilty	Jury
3/5 - 3/6	Gaziano Ditsworth	Talamante	Kelly	CR06-030589-001SE Theft, F2	Not Guilty	Jury

Jury and Bench Trial Results

March 2007

Public Defender's Office

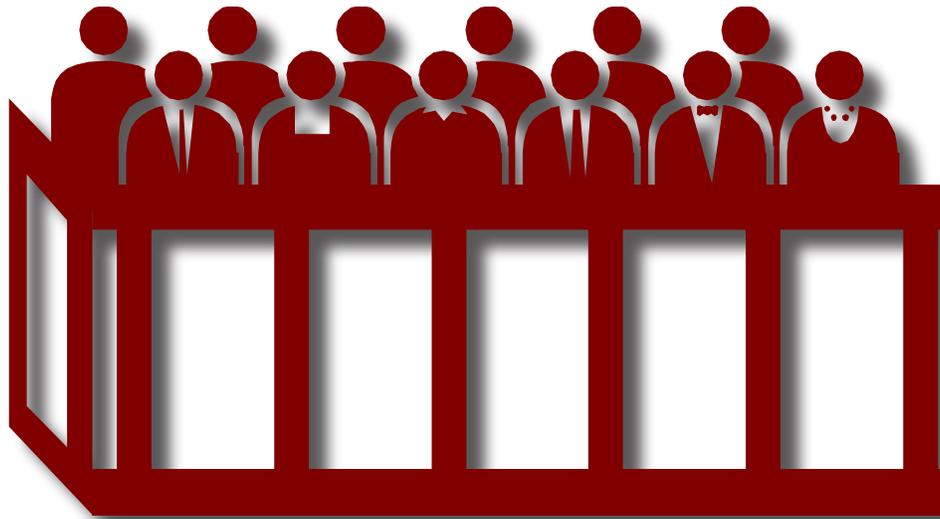
Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 4 (Continued)						
3/5 - 3/9	Corbitt Thomas	Udall	Fowler	CR06-127780-001SE 3 cts. Agg. Assault, F3D Disorderly Conduct, F6D Agg. Domestic Viol, F5D	3 cts. Agg. Assault - Guilty Disorderly Conduct - Guilty Agg Dom. Violence - Dismissed by Prosecution	Jury
3/6 - 3/7	Dehner	Sanders	Starkovich	CR06-129568-001SE Misconduct Inv. Wpns., F4	Not Guilty	Jury
3/6 - 3/8	Houck	Rayes	Melton	CR06-164824-001SE Burg 2nd Deg F3 Misconduct Inv. Wpns., M1	Burglary - Guilty of Lesser Included Criminal Trespass, M1 Misconduct Inv. Wpns. - Not Guilty	Jury
3/13 - 3/14	Dehner	Duncan	Harbulot	CR05-033466-001DT PODD, F4	Guilty	Jury
3/20 - 3/21	Gaziano	Stephens	Murphy	CR06-144167-001SE Burg 2nd Deg F3 Burg Tools Poss, F6 PODP, F6	(in absentia) Burgl 2nd - Guilty Burg Tools - Not Guilty PODP - Not Guilty	Jury
3/20 - 3/27	Sitver	Arellano	Baker	CR06-132849-001SE Armed Robbery, F2D False Report to Law Enforce - M1	Guilty	Jury
3/22 - 3/27	Akins	Talamante	Brooks	CR06-145690-001SE Theft, F3	Guilty	Jury
3/28 - 3/30	Corbitt	Talamante	Rodriguez	CR04-133020-001SE Robbery, F5 Burg 3rd Deg F4	Not Guilty	Jury
Vehicular						
3/1 - 3/6	Souccar	Nothwehr	Smith	CR06-008288-001 DT 2 cts. Agg. DUI, F4	Dismissed on Rule 20 Motion	Jury
3/7 - 3/9	Davis	Holding	Harder	CR03-025119-001 DT 2 cts. Agg. DUI, F4	Hung (7 not guilty)	Jury
3/12 - 3/14	Conter	Holding	Smith	CR06-008194-001 DT 2 cts. Agg. DUI, F4, Hit and Run, M3	Guilty	Jury
3/21 - 3/23	Sloan	Holding	Hammond	CR06-136303-001 DT 2 cts. Agg. DUI, F4	Guilty	Jury

Jury and Bench Trial Results

March 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Vehicular (Continued)						
3/26 - 3/28	Iniguez	Akers	Cottor	CR06-011323-001 DT Agg. Assault, F3, Drive w/ Susp. License, M1	Guilty	Jury
3/27 - 3/29	Sloan	Anderson	Rothblum	CR03-022201-001 DT 2 cts. Agg. DUI, F4	Guilty	Jury
3/27	Souccar	Burke	Salcido	CR06-141032-001 DT 2 cts. Agg. DUI, F4	Mistrial	Jury
3/29 - 3/30	Souccar	Burke	Salcido	CR06-141032-001 DT 2 cts. Agg. DUI, F4	Guilty	Jury



Jury and Bench Trial Results

March 2007

Legal Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
2/5 - 2/12	Fee	Reinstein	Parson	JD14142 Severance Trial	Severance Denied	Bench
3/1	Bushor	Gaylord	AG	JD506092 Guardianship Trial	Guardianship Granted	Bench
3/5 - 3/13	Rothschild	Granville	Valenzuela	CR05-015501-001 Armed Robbery, F2 Dang.; Burglary 1st Degree, F2 Dang.; Agg. Assault, F2 Dang.; Misconduct Involving Weapons, F4; Kidnapping, F2 Dang., 5 Cts.	Guilty	Jury
3/5 - 3/15	Dorr	O'Connor	Warrick	CR06-007334-002 PODD, F4	Not Guilty	Jury
3/7	Kolbe	Rees	AG	JD505996 Severance Trial	Severance Granted	Bench
3/7 - 3/12	Allen De Santiago	Stephens	Harrison Krabbe	CR06-134886-002 Armed Robbery, F2 Dang.; Burglary 1st Degree, F2 Dang.; Kidnapping, F2 Dang.	Guilty: Armed Robbery & Burglary 1st Degree; Not Guilty: Kidnapping	Jury
3/12	Bushor	Gaylord	AG	JD506479 Guardianship Trial	Guardianship Dismissed	Bench
3/12	Kolbe	Rees	AG	JD506553 Dependency Trial	Guardianship Granted	Bench
3/14	Kolbe	Rees	AG	JD506358 Dependency Trial	Dependency Found	Bench
3/15	Gaunt	Franks	AG	JD13330 Severance Trial	Severance Dismissed	Bench
3/22 - 3/29	Fortner	Anderson	Voyles	CR06-166614-002 Kidnapping, F2 Dang.	Not Guilty	Jury
3/23	S. Anderson	Lee	Munoz	CR06-159304-001 POM, Misdemeanor	Guilty	Bench

Jury and Bench Trial Results

March 2007

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
3/27 - 3/29	Gray Mullavey	Ditsworth	CR06-155922-001-DT Agg. Assault-F3; Resist Arrest-F6	Guilty on both counts	Trial
3-9 - 3-15	Eaton	McVey	JD 14022 - Severance	Severance Granted	Trial
3/8 - 3/14	Koestner	Porter	CR06-125197-001-DT Theft-MOT-F3; State alleged two (2) prior felony convictions	Not Guilty	Trial
3/14	Klass	Reinstein	JD 15358 - Dependency	Dependency Granted	Bench
3/1, 3/13 & 3/15	Miller	Hoag	JD 505617 - Dependency	Under Advisement	Bench



11th Annual Trial Skills College

We wish to express our thanks to all the faculty and attendees who made the 11th Annual Trial Skills College a great success. Over 60 people representing 7 public defenders offices and the private bar participated in the 3 day college which featured nationally recognized speakers Terry MacCarthy, Josh Karton and Diane Wyzga.



**Terry MacCarthy
on Cross-
Examination**



**Diane Wyzga Teaches
Voir Dire Skills**



**Josh Karton Expounds on Communicating
With the Jury**





Maricopa County
Public Defender's Office
11 West Jefferson, Suite 5
Phoenix, AZ 85003
Tel: 602 506 7711
Fax: 602 506 8377
pdinfo@mail.maricopa.gov

for The Defense

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

