



for The Defense

▶ ◀ James J. Haas, Maricopa County Public Defender ▶ ◀

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Apprendi Update: A Judicial Perspective

**By Hon. Robert Gottsfeld
Maricopa County Superior Court**

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) advises that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt.” We also know that *Apprendi* expressly excluded prior convictions used to enhance a sentence from this mandate.

Arizona Applications

Recent cases have explained what *Apprendi* does and does not do with respect to Arizona’s statutory sentencing scheme. While *Apprendi* is not applied retroactively to defendants whose convictions have become final, it does apply to cases pending before trial courts and cases on direct review before appellate courts. *State v. Tschilar*, 200 Ariz. 427, 27 P.3d 331 (Ct.App. 2001); rev.granted.

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Argument for a New Interpretation of ARS § 13-107 Statute of Limitations for Felonies

**By Beth Houck
Law Clerk – Trial Group F**

THE PROBLEM

Have you ever been faced with this scenario? The state files a complaint against a person for a class two to six felony, fails to serve the summons, and then

issues an arrest warrant. Little or no attempt is made to arrest the person, who is in state and easily found through standard procedures. Nine years pass. The person then comes to the state’s attention for some other reason; the outstanding warrant is discovered; and the

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Jan 8, 2002. *State v. Sepulveda*, 201 Ariz. 158, 32 P.3d 1085 (Ct.App. 2001) (*Apprendi* does not apply on a Rule 32 where decision final). This is in keeping with the U.S. Supreme Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987) which holds that new federal constitutional rules are retroactively applied in all cases, state or federal, that are not yet final.

13-604

A jury must determine beyond a reasonable doubt whether a defendant committed a new felony offense while released from a felony offense on his own recognizance or on bail under A.R.S. §13-604(R). Consequently §13-604(P) which requires a judge determination of §13-604 (R) status is unconstitutional because such a determination adds two years to the maximum sentence. *State v. Gross*, 201 Ariz. 41, 31 P.3d 815 (2001).

A.R.S. §13-604.02(A) enhances a sentence where a judge finds that defendant was on probation and §13-604.02(B) enhances a sentence where the judge finds an offense was committed while defendant was on parole or community supervision. Two recent decisions from panels of Division One and Division Two permit the trial judge to continue to make these determinations because such a finding only requires there be a presumptive sentence. Thus the statutory minimum is enhanced but the statutory maximum penalty is not and this does not violate *Apprendi*. *State v. Flores*, 363 Ariz. Adv. Rep. 3 (CA2, 11/1/01) [§13-604.02(A)]; *State v. Cox*, 364 Ariz. Adv. Rep. 3 (CA1, 1/10/02) [§13-604.02(B)].

Drug Cases

Well, should *Apprendi* apply to a determination of Proposition 200 eligibility or status? No, according to *State v. Rodriguez*, 200 Ariz. 105, 23 P.3d 100 (Ct.App. 2001). The reason is that such a determination does not increase the statutory maximum prison sentence but only determines whether or not a defendant is entitled to mandatory probation.

We even have a ruling under the serious drug offense statute §13-3410(A) (significant source of income exceeding \$25,000 during a calendar year from drug transactions). According to *State v. Nichols (Motley)*, 359 Ariz. Adv. Rep. 25 (CA1, 10/30/01) because this finding mandates life imprisonment a jury verdict beyond a reasonable doubt is required as well as a bifurcated trial. *Motley* also holds, what has been an open question in Arizona, that the state need not include sentence enhancement allegations in the charging document or present them to the grand jury in order to satisfy *Apprendi*, as long as adequate notice is otherwise provided to the defense. But see on this last point Justice Thomas' concurring opinion in *Apprendi* set forth below.

In *Tschilar*, supra, the court also explained (consistent with *State v. Eagle*, 196 Ariz. 188, 994 P.2d 395, cert. denied, ___ U.S. ___, 121 S.Ct. 102 (2000) and decided before *Apprendi*) that the issue of a victim's safe release [§13-1304(B)] need not be resolved by the jury under *Apprendi*. The reason is that a victim's safe release is not an element of the offense and does not in any way increase

the statutory maximum. It is solely a mitigating factor relevant strictly for sentencing purposes. If the judge finds that the victim was released safely, then the trial court may reduce the crime from a class 2 to a class 4 felony. Remember, however, that a kidnapping involves a knowing restraint of another person with the intent to commit one of six enumerated offenses set forth in A.R.S. §13-1304(A). The kidnapper does not have to complete the enumerated offense in order to complete the kidnapping. *Eagle*, 196 Ariz. at 190, ¶7, 994 P.2d at 397. Thus if a defendant at the time of kidnapping places a victim in reasonable apprehension of imminent physical injury [§13-1304(A)(4)] it cannot be a class 4 but will be a class 2.

A panel of Division One in *State v. Garcia*, 200 Ariz. 471, 28 P.3d 327 (Ct.App. 2001) holds that even if *Apprendi* requires any element of an offense that increases the penalty to be charged in the indictment (as well as in final instructions) and proven beyond a reasonable doubt by a jury verdict, the rule is subject to a harmless error review. Assuming the age of the child in a felony indecent exposure case should have been in jury instructions, it was harmless error where all the evidence pointed to the child being eight years of age. *Neder v. United States*, 527 U.S. 1 (1999) is cited for this ruling.

Apprendi is a 5 to 4 decision and reflects a deeply divided court. Justice Stevens, wrote for the majority, joined by Justices Scalia, Souter, Thomas and Ginsburg. A

majority limits *Apprendi* to that noted in the first paragraph of this article, namely: a jury determination is needed beyond a reasonable doubt only where any fact increases the statutory maximum sentence. The finding that the defendant has one or more prior convictions which are used to enhance a sentence are specifically excluded from this ruling. Justices O'Connor, Rehnquist, Kennedy and Breyer dissented, believing the majority's holding was contrary to a number of the Court's prior decisions. Those decisions allowed a trial judge to impose an increased sentence based on the existence of a particular fact where it was often impractical to submit such issues to a jury.

For our purposes, and as argued in these pages (Bob Ellig, *All Facts Are Equal But Some Facts Are More Equal Than Others*, Dec. 2001, at 6-7), lawyers should argue and make a record based on the concurring opinion of Justice Thomas,

Lawyers should argue and make a record based on the concurring opinion of Justice Thomas, joined by Justice Scalia, which broadens the majority decision in a significant way.

joined by Justice Scalia, which broadens the majority decision in a significant way. Under the Thomas-Scalia approach any fact resulting in an increase in punishment, including recidivism, should be proven to a jury beyond a reasonable doubt. Moreover, the majority's holding should apply where there is a statutory minimum sentence which is enhanced even if the statutory maximum is not. Additionally, Justices Thomas and Scalia would have all facts resulting in an increase in punishment be charged in the indictment.

Arizona courts have limited *Apprendi* to its facts and applied a narrow reading of the decision. Several other circuits have done the same (see e.g. *United States v. Garcia-Sanchez*, 238 F.3d 1200 (9th Cir. 2001); *United States v. Shepard*, 235 F.3d 1295 (11th Cir. 2000) (both cases hold that a trial judge may increase a sentence based on drug quantity that was not proven by a jury where the increased sentence is within, rather than beyond, the statutory maximum range).

Also, stay tuned, for on January 11, 2002, the United States Supreme Court granted *certiori* of the decision in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001) with oral argument set for April 22, 2002. Specifically, the issue in *Ring* is whether it is any longer constitutional for a judge, not a jury, to decide if a convicted murderer receives a death sentence in light of *Apprendi*. This is the third death penalty case the court has accepted for the current term, and the second in which the court will reconsider its own earlier rulings. Arizona presently has 128 people awaiting execution.

Ring, 25 P.3d 1139, 1150 holds that the Arizona Supreme Court is bound by the Supremacy Clause to follow the determination of the United States Supreme Court in *Walton v. Arizona*, 497 U.S. 639 (1990), which approved Arizona's present judge-sentencing procedure in capital cases. Justice Feldman writing for the court notes that subsequent decisions of the Supreme Court in *Jones v. United States*, 526 U.S.

227 (1999) and *Apprendi* "raise some question about the continued validity of *Walton*" although they expressly declined to overrule *Walton*. Justice Martone in his lone dissent takes the view that

There is a real possibility that Apprendi will...end determinations by judges whether defendants should receive the death penalty.

Walton was not cast in doubt by *Apprendi*. He makes the same argument in the subsequent case of *State v. Harrod*, 200 Ariz. 309, 26 P.3d 492, 501 (2001) where he wrote the opinion for the court. Justice McGregor also relies on the continued viability of *Walton* in two

capital cases in which she wrote the opinions decided on the same day. *State v. Sansing*, 2000 Ariz. 347, 26 P.3d 1118, 1131 (2001); *State v. Pandeli*, 200 Ariz. 365, 26 P.3d 1136, 1153 (2001).

There is a real possibility, and to some a probability, that given the present make up of the court, *Apprendi* will be used to overrule *Walton* and end determinations by judges whether defendants should receive the death penalty in capital cases in Arizona and in other states with similar procedures.



Argument for a New Interpretation of A.R.S. § 13-107

Continued from page 1

person is arrested for the nine year old crime. A preliminary hearing is held or waived, an information filed, and the case proceeds.

Surely one of the several mechanisms in place to protect an accused from having to answer for events that occurred so long ago must apply, one would think. But, the way the law is currently interpreted, none of them do. There is a good argument to be made for a different interpretation of the statute of limitations law, that if accepted by the court will remedy the above scenario. Your client does not have to forego a plea agreement to raise this argument, because it is jurisdictional and therefore non-waivable and can be raised at any time. *See State v. Escobar-Mendez* 195 Ariz. 194, 197, 986 P.2d 227, 230 (Ct. App. 1999); *State v. Emerson*, 171 Ariz. 569, 570, 832 P.2d 222, 223 (Ct. App. 1992).

The Statute of Limitations Doesn't Apply, As Interpreted Today

A.R.S. § 13-107 is the statute of limitations. It says that the prosecution of a class two to six felony must be commenced within seven years, and that a prosecution is commenced when an indictment, information, or complaint is filed. By a plain reading, the state met the statute of limitations for the above scenario by filing the complaint at the time the crime was discovered. The next nine years don't count. The literal interpretation has been upheld without examination in court. *See State v.*

Lemming, 188 Ariz. 459, 461-62, 937 P.2d 381, 383-84 (App. Div. 1, 1997). This article challenges it based on the Arizona Constitution, which states:

No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination. Ariz. Const., Art. 2 § 30.

The argument is that a felony prosecution is not commenced upon filing a complaint, but only upon filing an information or indictment.

The Sixth Amendment Speedy Trial Right Doesn't Apply

The Sixth Amendment, applied to the states through the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. Amend. 6; *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). The right is activated when a prosecution is commenced and extends to persons who have been accused. *See U.S. v. Marion*, 404 U.S. 307, 313-314 (1971). “It is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.” *Id.* at 321.

In Arizona, the federal right to a speedy trial attaches at the same time as in *Marion*. *See State v. Torres*, 116 Ariz. 377,

378, 569 P.2d 807, 808 (Ariz. 1977), quoting *U.S. v. Marion*, 404 U.S. 307 (1971) (the right to a speedy trial attaches when the person becomes an accused, which occurs only after arrest, indictment, or filing of an information).

In a more recent Arizona case, the court held that a person's Sixth Amendment right to a speedy trial attaches when an indictment is returned or a complaint has been filed *and* a magistrate has found probable cause to hold the person to answer in the superior court. See *State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. Div. 1, 1997). The probable cause must be that which is found at the preliminary hearing, not merely that which is sufficient to file a complaint and issue a warrant, because of the word "and." Further support for this interpretation is the fact that when *Medina* waived his preliminary hearing, the court said his speedy trial right attached at that time, because it was then that he was held to answer before the superior court. See *id.* at 419, 508. The complaint had been filed almost two years earlier. See *id.*

In a state supreme court case raising the Sixth Amendment issue, the procedural history was as follows: complaint filed in Justice Court; felony warrant issued; warrant not served; defendant charged for same offense via indictment; another warrant issued. See *McCutcheon v. Superior Court*, 150 Ariz. 312, 314, 723 P.2d 661, 663 (Ariz. 1986 *en banc*). The court held that his constitutional speedy trial right attached when he was charged by indictment. See *id.* at 316, 665.

The Arizona Constitution's Right To a

Speedy Trial Does Not Apply

The Arizona Constitution, like the federal, guarantees an accused the right to a speedy trial. See Ariz. Const. Art. 2 § 24. It has been interpreted as coterminous with the federal right. See *State v. Spreitz*, 190 Ariz. 129, 945 P.2d 1260, Ariz., 1997) (analyzing both federal and state guarantee under same federal test). Thus, it has not attached yet.

The Rule 8 Speedy Trial Rule Probably Does Not Apply

Every person against whom an indictment, information, or complaint is filed shall be tried by the court having jurisdiction of the offense within 150 days of the arrest or service of the summons under Rule 3.1 except for those excluded periods set forth in Rule 8.4 below. Ariz. R.Crim.P 8.2.(a).

On plain reading, this rule applies to persons against whom a complaint has been filed, as in my scenario. However, the time limitation does not begin until they are actually arrested or served with a summons. At least three cases have interpreted Rule 8.2 this way. See *State v. Acinelli*, 191 Ariz. 66, 952 P.2d 304 (Ct. App. 1997); *Hennessey v. Superior Court*, 190 Ariz. 298, 947 P.2d 872 (Ct. App. 1997); *State v. Lemming*, 188 Ariz. 459, 461, 937 P.2d 381, 383 (Ct. App. 1997).

One case found that the Rule 8.2 clock began on the date when the person should have been arrested, but the clock was tolled under Rule 8.4(a) as long as the state used due diligence in attempting to serve the indictment pursuant to warrant or summons. See *Humble v. Superior Court*, 179 Ariz. 409, 880 P.2d 629 (Ct. App. 1993). This may be a better

argument to make than statute of limitations if you can get the court to accept it, because it gives the state only 150 days, not seven years, to do nothing. The charge may be dismissed with or without prejudice; the *Humble* court found five years between warrant and arrest to be presumptively prejudicial. See *id.* at 416, 636. Although *Humble* concerned the State's failure to serve an indictment, the same argument may be used when the State fails to serve a complaint.

Rule 8.2(a) was amended in 1975. See *State v. Roberson*, 118 Ariz. 343, 344, 576 P.2d 531, 532 (Ct. App. 1978). It used to read "within 150 days of the issuance of a warrant or summons under Rule 3.1" rather than the *service* of it. *Id.* (emphasis added). This amendment appears to be the cause of the giant loophole. The intent was probably to allow more than 150 days total for service of the warrant and getting to trial. But the intent was probably not to remove any time limit whatsoever between the issuance and the service of the warrant, which is in effect what the amendment, as interpreted by the more recent cases, did.

Given that the warrant or summons is issued at the same time as the complaint or indictment ("immediately" per Rule 3.1), the *Humble* interpretation makes the amendment have no effect. Under *Humble* the clock still begins at issuance rather than service, but allows for tolling while the state uses due diligence. Although the *Humble* interpretation is favorable to the defense, it runs clearly counter to the wording of the rule, which states a trial shall begin "within 150 days of the arrest or service of the summons." Ariz.

R.Crim.P 8.2.(a).

If a person is arrested and released with no charges filed, that arrest does not count for starting the clock. See *State v. Lemming*, 188 Ariz. 459, 461, 937 P.2d 381, 383 (App. Div. 1, 1997) citing *State v. Hall*, 129 Ariz. 589, 592, 633 P.2d 398, 401 (1981) ("our supreme court has rejected the argument that Rule 8.2(a) measures the period from the date of the initial arrest prior to the filing of a complaint, indictment, or information"). It did for a period of time in DUI cases under the *Hinson* rule, which was overruled in 1992. See *State v. Mendoza*, 170 Ariz. 184, 823 P.2d 51 (Ariz. 1992); *Hinson v. Coulter*, 150 Ariz. 306, 723 P.2d 655 (Ariz. 1986). *Snow*, which appears to support the *Humble* interpretation, is actually inapposite because it was decided under the *Hinson* rule. See *State v. Snow*, 157 Ariz. 597, 760 P.2d 597 (Ct. App. 1988).

Rule 8, with the exception of the *Humble* interpretation, provides no protection in my hypothetical. Its protection does not kick in until the person is actually arrested pursuant to the nine year old complaint.

The Time Limit for a Preliminary Hearing Does Not Apply

Rule 5.1 guarantees a person against whom a complaint has been filed the right to a preliminary hearing, and the state constitution requires it for felonies. Ariz. Const. Art. 2 § 30; Ariz.R.Crim.P. 5.1(a). The hearing must occur within 10 days of the defendant's initial appearance if the defendant is in custody, and within 20 days of initial appearance if not in

custody. *See id.* The information must be filed within 10 days of the finding of probable cause or waiver of the preliminary hearing. Ariz.R.Crim.P. 13.1(c). The person in my scenario does not make his initial appearance till nine years after the offense. This rule does not help him.

The Test for Pre-indictment Delay Fails

The proper test for cases in which there is some delay between the commission of the offense and holding the person to answer for it is pre-indictment delay, as a violation of due process under the Fifth and Fourteenth Amendments. *See State v. Torres*, 116 Ariz. 377, 378, 569 P.2d 807, 808 (Ariz. 1977) (quoting *U.S. v. Marion*, *supra*). The test for whether pre-indictment delay violates due process has two prongs. *See Marion*, *supra* at 324. The defendant must show that the delay substantially prejudiced his right to a fair trial, and that the delay was deliberate on the part of the government, for the purpose of gaining tactical advantage over the defendant. *See id.* In my hypothetical, the delay is caused by negligence or a lack of due diligence on the part of the government; it is not deliberate. Hence, the pre-indictment delay test will not protect the person in that situation.

In the cases that have been analyzed for pre-indictment delay, the prosecutions were begun within the applicable statute of limitations. *See, e.g. State v. Lemming*, 188 Ariz. 459, 937 P.2d 381, (App. Div. 1, 1997) (delay of twenty months between initial arrest and indictment); *State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. Div. 1, 1997) (delay of two years and two months between initial arrest and initial appearance); *State v.*

Broughton, 156 Ariz. 394, 752 P.2d 483 (Ariz., 1988) (delay of one year between assault in prison yard and indictment of prisoner); *State v. Torres*, 116 Ariz. 377, 569 P.2d 807 (Ariz. 1977) (seven month delay between sale of heroin and indictment). The pre-indictment delay test provided *additional* protection *within* the statute of limitations.

A SOLUTION

The Statute of Limitations is the Appropriate Vehicle to Remedy the Situation in the Hypothetical

In *Marion*, the Court stated that a statute of limitations is “the primary guarantee against bringing overly stale criminal charges.” *Id.* at 322. Such statutes are based on legislative judgment about the relative interests of the state in bringing criminals to justice, and of the defendant who may over time lose his means of defense. *See id.* The relationship is apparent in that the more serious the crime, generally the longer the period in which it can be prosecuted. Beyond the time specified by the statute of limitations there is an irrebuttable presumption that the accused’s right to a fair trial has been prejudiced. *See id.*

In Arizona, statutes of limitations serve the same purpose as in the federal system. The state supreme court in *Broughton* said, “The due process clause plays only a limited role in evaluating pre-indictment delay. The primary guarantee against a stale prosecution is the statute of limitations.” 156 Ariz. 394, 397, 752 P.2d 483, 486 (Ariz., 1988). “Statutes of limitations in criminal cases are designed primarily to protect the accused from the

burden of defending himself against charges of long completed misconduct.” *State v. Fogel*, 16 Ariz. App. 246, 248, 492 P.2d 742, 744 (App. Div. 1, 1972). Furthermore, unlike their civil counterpart, a criminal statute of limitations is jurisdictional; it limits the authority of the sovereign to act against the accused. *See id.* Such statutes are to be “construed liberally in favor of the accused and against the prosecution.” *State v. Escobar-Mendez*, 195 Ariz. 194, 197, 986 P.2d 227, 230 (App. Div. 1, 1999) (citing *Fogel*).

In creating a limit of seven years for a class two to six felony, the Arizona legislature has decreed that after seven years, absent any tolling, the importance of prosecuting a class two to six felony is outweighed by the prejudice to the defendant.

The state’s interests are amply protected by the tolling provisions in the statute. The clock does not begin to run until the state has actually discovered or should have discovered the offense. ARS § 13-107(B); *see State v. Escobar-Mendez*, 195 Ariz. 194, 197, 986 P.2d 227, 230 (Ct. App. 1999). If the charge were a “serious offense” as defined in ARS § 13-604, the clock would not run until the suspect had been identified. ARS § 13-107(E). The clock is tolled when the accused is absent from the state or has no reasonably ascertainable place of abode within the state. ARS § 13-107(D). Finally, if a timely filed complaint, information, or indictment is dismissed without prejudice for any reason, the state can refile it within six months even if the statute of limitations has run in the meantime. ARS § 13-107(G).

Requiring an Indictment or Information, Not Just a Complaint, is the Correct Interpretation of A.R.S. § 13-107 for a Class Two to Six Felony

As stated above, the Arizona Constitution requires that felonies be prosecuted by means of indictment or information. When proceeding by indictment, the grand jury makes a finding of probable cause that an offense has been committed and that the accused committed it. A.R.S. § 21-413, Ariz.R.Crim.P 12.1(d)(4). When proceeding by information, the accused is entitled to a preliminary hearing before being prosecuted. Ariz. Const. Art. 2 § 30, Ariz.R.Crim.P. 5.1(a). The purpose of the preliminary hearing is for a magistrate to decide whether probable cause exists that an offense has been committed and that the accused committed it. Ariz.R.Crim.P 5.4(a). The indictment and the information are parallel documents. Ariz.R.Crim.P. 13.2. The purpose of a preliminary hearing is the same as a grand jury proceeding - they are both to determine whether there is probable cause to officially charge a person with a crime. *See State v. Neese*, 126 Ariz. 499, 502, 616 P.2d 959, 962 (App. Div. 1, 1980). It is the state’s choice as to which official charging document to use. *See State v. Sisneros*, 137 Ariz. 323, 670 P.2d 721 (Ariz., 1983).

Although Rule 2.2 says a felony action may be commenced by the filing of a complaint before a magistrate, the decision to prosecute in superior court is not made until the preliminary hearing, when the person is brought in. Ariz.R.Crim.P. 2.2(b), 5.4. *See State v. Hutton*, 143 Ariz. 386, 388, 694 P.2d 216,

218 (Ariz. 1985) (“Pursuant to . . . rule 2.2(b), the state elected to commence prosecution by way of a complaint and preliminary hearing.”). Charging by information is a two-step process, with the complaint justifying an arrest, and the preliminary hearing justifying a felony prosecution. The arrest is necessary to bring the person in for the hearing. When an indictment is returned, there is both cause to arrest and to justify prosecution. It is the decision to prosecute that is relevant to the statute of limitations, not whether there is probable cause to arrest; therefore it is the information and not the complaint that matters.

Since the indictment and information are parallel vehicles, they should have the same effect. A person charged by indictment must be charged within the statute of limitations. A person charged by information should have to be charged within the statute of limitations, too. A person charged by indictment has a Sixth Amendment right to a speedy trial from that point on; thus their right to a speedy trial attaches within the statute of limitations period. When the statute of limitations protection ends, the speedy trial protection begins. A person charged by complaint and information should have the same protection. Instead, with today’s interpretation, he loses the protection of the statute of limitations when the complaint is filed, and is completely unprotected from the passage of time until he is arrested any number of years later.

No change to the wording of the statute is required in order to make this change in

interpretation. The applicable sections of the statute read:

B. Except as otherwise provided in this section, prosecutions for other offenses must be commenced within the following periods after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or the political subdivision that should have occurred with the exercise of reasonable diligence, whichever first occurs:

1. For a class 2 through a class 6 felony, seven years.
2. For a misdemeanor, one year.
3. For a petty offense, six months.

C. For the purposes of subsection B of this section, a prosecution is commenced when an indictment, information or complaint is filed.

A.R.S. § 13-107.

Section B deals with all three categories of crimes – felonies, misdemeanors, and petty offenses. Section C lists the charging documents but does not specify which type of document is to be used for each category. Petty offenses are chargeable via complaint only. Therefore, the word complaint must be listed. Yet, no one would go to a grand jury for an indictment for a petty offense. Clearly, the three types of documents are not each freely used with any type of offense. So, while the word complaint needs to be listed, it does not need to apply to a felony. An information or indictment is required to prosecute a felony.

CONCLUSION

The argument that the statute of limitations for a felony continues to run until an information is filed is not far-fetched. It is a fair, consistent and logical application of the law that seals up a loophole that deserves to be closed.



Early Disposition Court – Is There Something Scary in the Basement????

By Karen Kaplan, EDC Supervisor and Paul Klapper, Defender Attorney

EDC began over four years ago to, among other things, address a growing backlog of cases, which slow the system and increase the average time that it takes to dispose of a case. Has it helped us and our clients?

Consider the following: EDC currently handles 25% of all criminal cases in Superior Court. In 2000/2001, EDC saved 17,064 jail days, getting our clients out of jail and into programs more quickly and resulting in a savings of \$702,354.24 in incarceration costs.

Early Disposition Court provides an effective method of processing drug possession cases and works to improve the overall efficiency of criminal case processing in the County's justice system. In addition to providing a speedy means of resolving drug cases, EDC makes treatment available to defendants at an early stage—often the same day the case is resolved. Addiction problems are best addressed if treatment begins very soon after arrest. EDC provides a direct route from plea to treatment, thereby increasing defendants' chances for maintaining a drug free lifestyle.

The Early Disposition Court began operating in November 1997. It is located in the basement of the East Court Building at 101 W. Jefferson. It has two functioning courtrooms and numerous offices containing attorneys, probation

officers and TASC representatives. Cases come into EDC one of three ways:

1. The county attorney files a complaint on a defendant who remains in custody after the initial appearance.
2. The court issues a warrant for a defendant whose whereabouts are unknown.
3. The court issues a summons for a defendant to appear. The court will conduct the initial appearance only in cases where a summons was issued.

EDC was established based on four goals:

1. To seek new ways of processing cases and expediting time to case disposition on minor felony drug and welfare fraud offenses.
2. To respond to the community's desire to provide drug offenders the opportunity for treatment expressed in Proposition 200, expediting entry into treatment and impacting the potential to reoffend.
3. To alleviate jail overcrowding, saving jail space and costs.
4. To reduce the potential for bench warrants due to fewer court appearances.

Defendants receive many benefits by having their cases processed through EDC. Under the standard court processing timelines, it is estimated that a case takes between one hundred to one hundred and thirty days to resolve. The EDC process reduces the disposition timeline for these types of cases to between twelve and thirty-eight days.

Other benefits provided to defendants:

- the opportunity to proceed from initial appearance to sentencing in one day
- reduced number of court appearances and reduced time lost at work
- reduced need for traveling to and from court
- reduced number of jail days required
- the availability for early treatment

An average day at EDC has 80-100 cases set on the calendar. The vast majority of cases involve drug possession and attempted possession. In addition, welfare fraud cases prosecuted by the Attorney General's Office of Arizona are processed on Fridays. EDC does not handle victim cases or possession for sale cases.

The EDC is staffed with Public Defenders, Legal Defenders, County Attorneys, the Adult Probation Office and TASC. There are two commissioners, one for in-custody matters and one for out-of-custody matters. The success of EDC is due in large part to the different departments sharing office space in close proximity and working closely together to resolve cases.

A TYPICAL DAY AT EDC

The first step when the defendant arrives at EDC is to sign in. In the morning, all in- and out-of-custody defendants hear the Commissioner give the group advisement, which lets them know of their constitutional rights, possible penalties, etc. After this, each defendant meets with an attorney. The defendants generally have 4 options:

Option 1: Have a Preliminary Hearing

Where the client maintains their innocence or in situations where the police violated the Fourth Amendment, a preliminary hearing is usually held. If the case is bound over, an Initial Pretrial Conference is set and the client is arraigned. The case will likely be assigned to a special EDC trial attorney rather than to a regular trial group. Currently, Rickey Watson (Mesa) and Michele Lawson handle trial cases transferred out of EDC. Both Rickey and Michele are excellent resources for any issues concerning Proposition 200 and EDC matters.

Option 2: Plead Guilty and Waive the Preliminary Hearing

In cases where a defendant wants to accept a plea, they can sign a plea, waive the preparation of a presentence report and be sentenced all in one proceeding. The defendant, however, does have a right to have a full presentence report prepared. If a party or the court requests a full presentence report, sentencing will be continued for 30 days. If the defendant can be sentenced on the same day, the defendant will meet with an assigned EDC probation officer and a short form probation report will be prepared. If the defendant is on probation or parole, has a violent or extensive criminal history, has out of state priors, prior sex offenses or arrests, offenses against minors, or does not meet Proposition 200 guidelines, the EDC probation department will advise the judge that it is requesting a full presentence report. Normally, if the defendant is pleading guilty to a misdemeanor, the defendant does not

need to be screened by the EDC Adult Probation Department for sentencing. The majority of defendants sentenced for first and second time drug offenses who are Proposition 200 eligible are sentenced to Drug Court. Drug Court is divided into Track 1 and Track 2.

Track 1 Drug Court applies to defendants who have no more than one prior felony conviction and have a low to moderate substance abuse problem. Sanctions include deferred jail, lapse/relapse counseling, budget classes, additional community service hours, all-day court, written reports, and more frequent court appearances. Rewards include reduction of deferred jail time, reduction of probation term, promotion to next path of treatment, graduation from the program and discharge from probation.

Track 2 Drug Court is for the first time Proposition 200 offender where jail is not available as punishment. The same sanctions are available to these defendants with the exception of deferred jail. Recently, there has been discussion of using the court's contempt powers to impose jail on Track 2 participants and circumvent the statute. This issue has not yet been decided by the courts and should be vigorously contested. The same rewards are also available with the exception of reduction of jail term. An additional reward is that upon promotion, defendants may get tickets for the Science Center, Phoenix Zoo and Harkin's Theatres. If a defendant does everything required in the Drug Court program, he/she could graduate early and be discharged from probation after 10 months.

Option 3: Diversion to TASC

TASC is an excellent program with a reported 71% success rate. A defendant can enter the TASC diversion program before any charges are filed; this is referred to as pre-file TASC. If the individual is presented with this option and successfully completes the program, no charges will ever be filed. A TASC pre-file is not seen in EDC. If the defendant enters the TASC program as a post-file, meaning that the defendant is given the option to waive the preliminary hearing and be screened for TASC diversion, the defendant can meet with the TASC representative the day of the preliminary hearing. If the defendant waives the preliminary hearing for TASC, the court will enter a not guilty plea and suspend prosecution for 1-2 years. If the defendant successfully completes the TASC diversion program, the charges are dismissed. If the defendant is unsuccessful, the County Attorney's Office can file a motion to vacate suspended prosecution. The case is then set for a status conference in EDC, where the defendant is given the choice to either plead guilty and sign a plea agreement, or plead not guilty and have the case transferred to a criminal division for an Initial Pretrial Conference.

Option 4: Waiver of Preliminary Hearing

A not guilty plea is entered, an Initial Pretrial Conference is set and the client is arraigned.

PROPOSITION 200

Proposition 200 provides for mandatory probation for a person's first and second

drug or paraphernalia convictions. The first time offender theoretically is not facing jail as a term of probation, while the second time offender may be sentenced to jail time as a term of probation.

The word “theoretically” is used because a first time offender might be jailed pending preliminary hearings, or probation violation proceedings.

Who Is Prop 200? Who Is Not?

You’re eligible for Prop 200 treatment if: 1) it is your first or second conviction (no distinction is made between misdemeanors or felonies); and 2) You have never been convicted for a “violent offense.” A “violent offense” is one in which the defendant used a weapon or dangerous instrument or caused an injury or death.

The general state of the law appears to be that prior offenses are defined by the conviction, rather than the actual facts of the case. However, be prepared to argue whichever side of this issue favors your client.

If not admitted by your client, the State is required to prove convictions that strike Defendants out of Proposition 200. In the real world, where plea agreements require avowals and pre-sentence reports include rap sheets, and excerpts from prior pre-sentence reports, this issue is often resolved short of an evidentiary hearing.

“Open Cases”

If your client has a case pending in another court, your hands are tied in

EDC. The State probably will not make a plea offer, but if it does, it could stand as a prior conviction against the “open” case.

What to Do?

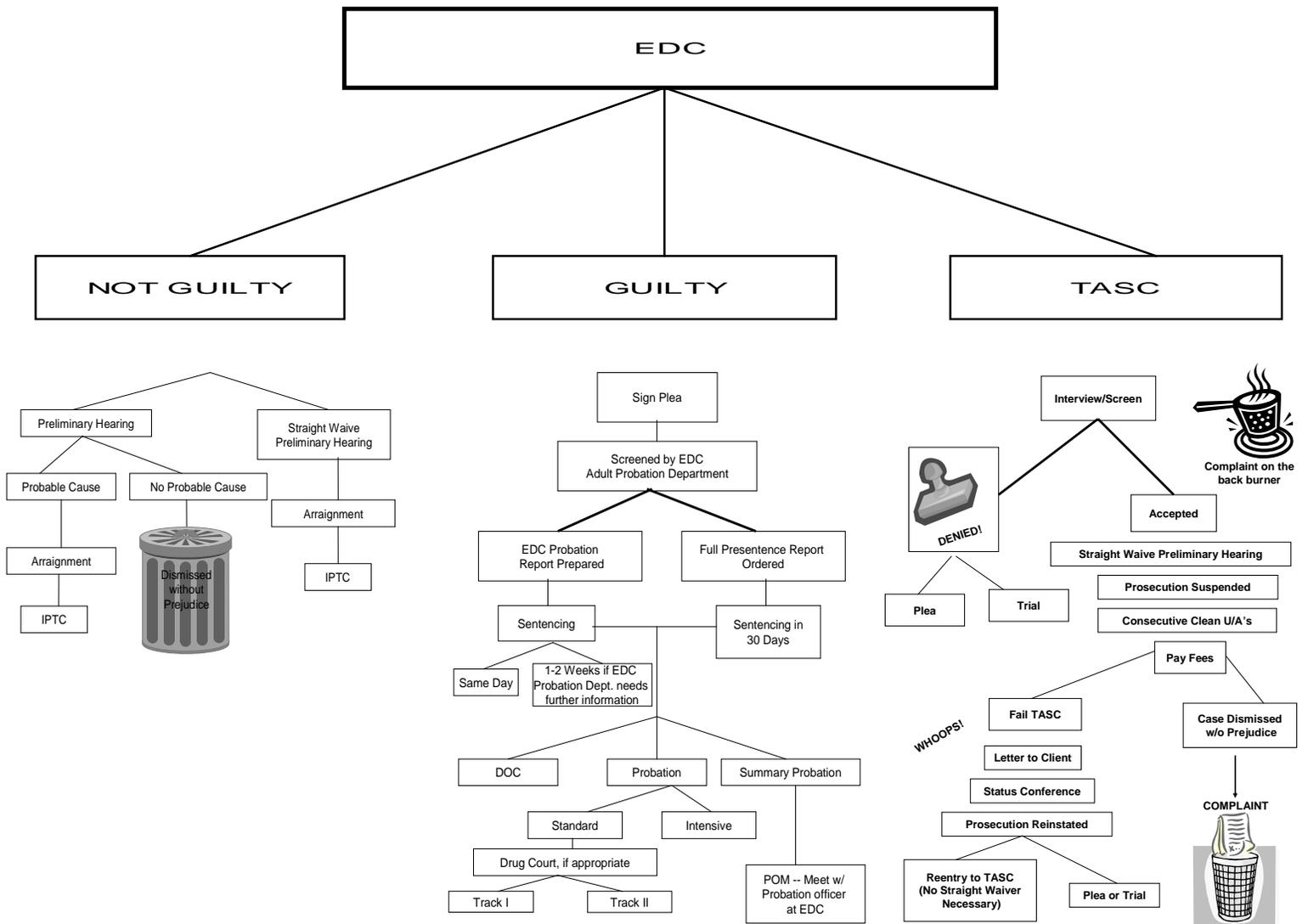
First, keep in mind the fact that only drug cases land in EDC. Therefore, if the “open case” is not a drug case, get your drug case out of EDC so that it may be consolidated with the “open case” in another court. Thus, either put on the preliminary hearing or under appropriate circumstances (a plea in the case has been offered and accepted) waive it.

If the open case is probably going to be plead to a misdemeanor, it may be in your client’s best interest to continue the EDC case until after the next court date on the open case.

If the open case is in RCC, it may be possible to arrange for the EDC case to be handled in RCC. This may seem a confusing proposition, but since EDC is considered Superior Court and RCC is both Justice Court and Superior Court, it can be done. Each “open case” problem is unique and will have its own solution. You just have to find it. Do not be afraid to ask someone.

FAVORABLE DISPOSITIONS

Sometimes the State fails in its efforts to prove probable cause, and while many of our victories are re-filed, some cases do go away forever. Some Defendants spend little if no time in jail, in circumstances where, without EDC, they might have remained locked up for weeks or months. Some Defendants are acquitted based in part on preliminary hearing testimony.



EDC Chart prepared by Marcia Wells, Legal Assistant Supervisor

Some Defendants strike out of Proposition 200 due to extensive criminal histories. Still others are able to enter TASC, receive treatment and ultimately have their charges dismissed.

realized the location of E.D.C court belies its importance and impact on the criminal justice system in Maricopa County.



When you have an opportunity you should venture down into the basement and take a look. As you by now have

ARIZONA ADVANCE REPORTS

By Stephen Collins

Defender Attorney – Appeals Division



State v. Carrasco, 359 Ariz. Adv. Rep. 3 (CA 2, 10/30/01)

Carrasco was an attorney who was representing his cousin who had been charged with sexually abusing his two minor stepdaughters. The girls were staying in a shelter that had a policy that defense attorneys would not be allowed to talk to them. Carrasco told shelter workers he represented the victims and was allowed to see the girls. He then informed the girls that they did not have to talk to the police.

As a result of this conduct, Carrasco was found guilty of obstructing a criminal investigation. A.R.S. Section 13-2409 provides that one is guilty of this offense if he or she knowingly attempts by means of bribery, misrepresentation, intimidation or force or threats of force, to obstruct, delay or prevent the communication of information or testimony relating to a violation of any criminal statute to a peace officer.

On appeal, Carrasco argued that he did not violate the statute because he did not make any misrepresentations to the girls. His statement to them that they did not have to talk to the police was entirely accurate. The Court of Appeals held he was guilty of the offense because he misrepresented his role to the shelter workers in order to gain access to the girls.

State v. Thompson, 359 Ariz. Adv. Rep. 5 (CA 1, 10/25/01)

Premeditation is the concept that distinguishes first-degree murder from second-degree murder. A.R.S. Section 1101(1). The Court of Appeals held that the statutory definition of premeditation lacks sufficient specificity to provide an adequate standard by which a fact-finder can differentiate the two degrees of murder. Therefore, the statute is void for

vagueness.

In 1997, in *State v. Ramirez*, the Court of Appeals held that premeditation required that not only must a period of time to permit reflection elapse, but also that actual reflection must occur during this period. The Arizona Supreme Court granted review, but after oral argument held that review had been improvidently granted. In 1998, in response to *State v. Ramirez*, the Arizona Legislature changed the definition of premeditation in the statute. The change provides that the prosecution need not prove actual reflection.

In the present case, the Court of Appeals found this amendment caused the distinction between first and second-degree murder to become so vague that a fact-finder could decide between the two only by making a completely arbitrary selection, a method of fact-finding prohibited by Fourteenth Amendment due process principles. However, as applied to Thompson it was held to be harmless error.

State v. Navarro, 360 Ariz. Adv. Rep. 3 (CA 2, 11/13/01)

Navarro received a 10.5 year prison sentence for attempted second-degree murder, the presumptive term for a nonrepetitive, dangerous, class two felony under A.R.S. Section 13-604(I). On appeal, he argued the sentencing range provided is an arbitrary violation of the Fourteenth Amendment equal protection clause because the same sentencing range applies to defendants convicted of attempted first-degree murder.

The Court of Appeals denied relief because the legislature has the sole authority to prescribe punishment for criminal acts. "The legislature has authority to determine that all attempts to take human life may be punished equally,

regardless of the underlying mens rea relating to the attempt.”

State v. Garcia Bail Bonds, 359 Ariz. Adv. Rep. 18 (CA 1, 10/30/01)

Theodore Pineda was arrested in Arizona for theft and bond was set in the amount of \$20,000. The judge specifically granted permission for Pineda to self-surrender in Colorado on charges pending there. He was taken into custody in Colorado and therefore, missed a court appearance in Arizona. The judge issued an order forfeiting the appearance bond. The Court of Appeals reversed, holding the circumstances constitute reasonable cause excusing Pineda’s non-appearance.

State v. Nichols, 359 Ariz. Adv. Rep. 25 (CA 2, 10/30/01)

Jack Motley was charged by indictment with possessing a dangerous drug for sale and possessing marijuana for sale. The prosecution filed an allegation of serious drug offense pursuant to A.R.S. Section 13-3410(A). That statute provides that a person convicted of one or both of these substantive offenses who receives more than \$25,000 income in a calendar year through a pattern of illegal drug sales shall be sentenced to life imprisonment with no possibility of parole for twenty-five years.

On appeal it was argued that under *Apprendi v. New Jersey*, there could be no finding that it was a “serious drug offense” unless the grand jury returned an indictment on this charge. The Court of Appeals held this was just an enhancement provision and did not require a grand jury finding. However, it was held that there must be a bifurcated jury trial regarding the underlying charges and the enhancement provision.

State v. Evenson, 359 Ariz. Adv. Rep. 12 (CA 1, 10/30/01)

A.R.S. Section 13-3513 prohibits the selling of materials harmful to minors from vending machines. The statute was held to be

constitutional.

Norgord v. State of Arizona, 360 Ariz. Adv. Rep. 7 (CA 2, 9/11/01)

Norgord was charged with indecent exposure. A superior court judge ruled that under the Victim’s Bill of Rights a witness did not have to submit to an interview. On appeal, Norgord argued the Victim’s Bill of Rights did not apply because indecent exposure was not a sexual offense and was a victimless crime. The Court of Appeals upheld the superior court ruling.

State v. Dawley (Barraza), 360 Ariz. Adv. Rep. 15 (CA 2, 11/15/01)

In Barraza’s DUI jury trial, the only issue was whether he was in “actual physical control” of the vehicle. He was found asleep at 2:00 a.m. with the car’s hood up and the headlights on. He presented evidence that the car was incapable of being driven due to a mechanical problem. The trial ended with a hung jury. The prosecution filed a special action challenging an instruction given to the jury.

The Court of Appeals held it was improper to instruct the jury that “actual physical control means that a person has the *apparent ability* to start and move a vehicle.” Instead, the jury should be instructed that Barraza was in “actual physical control of the vehicle if, based on the totality of the circumstances shown by the evidence, his potential use of the vehicle presented a real danger to himself or others.”



JANUARY 2002 JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
12/3 - 12/10	Force	Galati	Morton	CR01-012062 Murder 2 Endanger	Not Guilty - Murder 2, Guilty - Man & Endanger	Jury
12/17 - 12/18	Healy	Gaines	Coolidge	CR01-011323 Agg DUI	Not Guilty	Jury
1/3 - 1/8	Lopez	Schwartz	Lindquist	CR01-13197 Flt. Frm. Purs. Law Veh., F5 2 Cts Endangerment, F6	Hung Jury	Jury
1/7	Silva	Foreman	Larish	CR01-015690 POND, F4	Guilty	Jury
1/7 - 1/9	Scanlan	Cates	Newell	CR01-12907 Perjury, F4 Theft, F4	Guilty	Jury
1/7 - 1/10	Healy Casanova	Gerst	White	CR01-011685 Manslaughter, Leaving the scene of a Fatal Accident	Not Guilty - Manslaughter, Guilty-Neg. Homicide, Leaving Scene of a Fatal Accident.	Jury
1/7 - 1/15	Fisher Kresicki	Willrich	Doane	CR01-93468 Armed Robbery, F2D Burglary First Deg., F3D Misconduct w/ Weapon, F4N	Not Guilty - Armed Robbery Guilty - Burglary First Degree Directed Verdict - Misconduct w/ Weapon	Jury
1/8 - 1/10	Billar	Martin	Naber	CR01-013783 Agg. Asslt. w/ deadly weapon- dangerous instrument, F3	Hung	Jury
1/8 - 1/10	Gaxiola Valentine	Yarnell	Mueller	CR01-12414 Agg. DUI, F4	Guilty	Jury
1/9	Walker	Oberbillig	Bernstein	CR01-92603 POM, F6N 2 cts. PODP, F6N	Guilty	Jury
1/14	Woodfork	Padish	Lemke	CR01-14590 Agg. DUI, F4	Guilty	Jury
1/14 - 1/16	Gaxiola	McClennen	Clarke	CR01-13798 Theft of Means of Transportation, F3	Hung	Jury
1/14 - 1/18	Blieden Kasieta Oliver	Gerst	Sorrentino	CR01-10418 4 cts. of Child Molestation, F2	Not Guilty on 3 cts. Guilty on 1 ct.	Jury
1/14 - 1/18	Logsdon / Schmich Kresicki Rivera	Oberbillig	Wilson	CR01-93501 Child Abuse, F4N	Guilty	Jury
1/14 - 1/23	Lopez Castro	Padish	Kay	CR01-11655 Armed Robbery, F2	Not Guilty	Jury
1/15	Healy	Cates	White	CR01-013551 Agg assault Lv Scen Endag	Guilty	Jury
1/15	Enos	Padish	Kalish	CR01-012987 Criminal Trespass, F6	Not Guilty	Jury

JANUARY 2002
JURY AND BENCH TRIALS

OFFICE OF THE PUBLIC DEFENDER – CONTINUED

Dates: Start - Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
1/15 - 1/24	Klopp-Bryant / Kavanagh Arvanitas Geary	Willrich	O'Neill	CR00-94954 Armed Kidnapping, F2D Burglary First Deg, F2D Armed Robbery, F2D	Guilty	Jury
1/22	Aeed Jones	Tolby	Ballos	CR01-01543 Criminal Damage, M2	Not Guilty	Bench
1/22	Enos	Hotham	Ruiz	CR01-010986 Attpt. Homicide, F1	Guilty	Jury
1/22 - 1/23	Primack Souther	Gottsfeld	Coolidge	CR01-09032 2 Cts. Agg. DUI, F4	Guilty	Jury
1/22 - 2/4	Valverde	Schwartz	Sorrentino	CR01-12122 8 cts. Sex Conduct with Minor, F2DCAC 3 cts. Sex Abuse, F3DCAC Child Molest, F3DCAC 4 cts. Public Sexual Indecency, F5DCAC	Not Guilty 1 ct. Sexual Conduct, 1 ct. Sex Abuse, 1 ct. Public Sexual Indecency Guilty remaining 13 counts	Jury
1/23	Castillo	Davis	Corcoran	CR01-001085 Aggravated Assault, F6	Hung	Jury
1/23	Hill	Foreman	Clarke	CR01-15650 Agg. Assault, F6	Guilty	Jury
1/23 - 1/28	Sheperd	Willrich	Krabbe	CR01-94846 Attmpt. Comm. Burg, F5N	Guilty	Jury
1/24 - 1/31	Ackerley	Gottsfeld	Wisdom	CR01-10975 4 Cts. Sex. Con. w/ Mnr, F2 Kidnap, F2	2 Cts. Not Guilty Sex. Con. w/ Mnr, Guilty - Lesser (Attmpt. Sex. Con. w/ Mnr), Kidnap, F2, Sex. Con. w/ Mnr	Jury
1/28 - 1/31	Hanson	Donahoe	Raymond	CR01-00179 Agg. Asslt., F5	Guilty	Jury
1/29 - 1/30	Scanlan	Cates	Adleman	CR01-13336 Promoting Prison Contraband, F2	Guilty	Jury
1/29 - 1/31	Fox Thomas Rivera	Akers	Harrison	CR01-96711 Marijuana Violation, F6N	Guilty	Jury
1/29 - 2/5	Looney	McClennen	Sherman / MacRae	CR01-07856 Trafficking in Stolen Property 2 nd Degree, F3 with 2 priors	Not Guilty	Jury
1/30	Kratter	McClennen	Charnell	CR01-16055 Agg. Assault, F6	Guilty	Jury
1/30	Leonard	Oberbillig	Duggan	CR01-92521 Theft, F3N	Guilty	Jury
1/30 - 1/31	Clemency	Hotham	Reddy	CR01-012805 Aggravated Assault, F6 Assault, M1	Guilty on Aggravated Assault, F6 Misdemeanor Dismissed	Jury

JANUARY 2002 JURY AND BENCH TRIALS

OFFICE OF THE LEGAL DEFENDER

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
1/7	Curry	McVey	Agra	CR01-011541, C4F POND	Guilty	Jury
1/3-1/7	Granda	Gottsfeld	Koplow	CR01-013981	Guilty	Jury
1/14-1/15	Funckes	Martin	Boyle	CR01-012623, C4F Misconduct Involving Weapons	Guilty	Jury
1/23-1/24	Granda	Pillinger	Hanlon	CR01-013526 Forgery	Guilty	Jury
1/14	Shaler	Gottsfeld	Lindquist	CR01-014189 PODDS; PODP	Mistrial Pled to Lesser – PODD	Jury
1/16	Tallan	Franks	Sherman	CR01-013704 PODD; PODP	Tried in Absentia Guilty	Jury

OFFICE OF THE LEGAL ADVOCATE

Dates: Start–Finish	Attorney Investigator <i>Legal Assistant</i>	Judge	CR# and Charge(s)	Result	Bench or Jury Trial
1/28-2/4	Schaffer	Willet	CR2001-010378 Armed Robbery, F2	Mistrial	Jury
1/22-2/7	Everett	Gerst	CR2001-013600 4 cts child sex crimes	Guilty	Jury

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 5th of each month.