



# for *The Defense*

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

## Arizona Appellate Highlights – 2001 Cases from the Defense Perspective

### INSIDE THIS ISSUE:

#### Articles:

Arizona Appellate Highlights 2001 1

Does Proposition 200 Protect Paint Huffers 9

#### Regular Columns:

Calendar of Jury and Bench Trials 13

**By James Cleary**  
**Attorney – Legal Defender’s Office**

*Editor’s Note: This article is based on Jim Cleary’s presentation at the recent CLE West seminar “Criminal Year in Review” and is being provided here in an effort to ensure that these important materials reach a wider audience of practitioners.*

### **SUBSTANTIVE LAW DECISIONS**

**A. State v. Powers, 200 Ariz. 363, 26 P.3d 1134, 352 Ariz. Adv. Rep. 10 (SC July 12, 2001)**

The Supreme Court approved the opinion of the Court of Appeals, Division Two, construing A.R.S. 28-661. It held that the number of victims affected by the accident does not define the number of accident scenes under 28-661. It found that the purpose of 28-661 was to prohibit drivers from evading civil or criminal liability by escaping before their identity could be established. The purpose is scene-related, not victim related. It reversed one of defendant's convictions under 28-661.

**B. In Re: Robert A., 199 Ariz. 485, 19 P.3d 626, 342 Ariz. Adv. Rep. 38 (Ariz. App. Div. 1 March 8, 2001)**

The Court of Appeals, Division One, vacated juvenile adjudications for disorderly conduct and misconduct with a weapon. It held that a flare gun, as a matter of law, is not a deadly weapon, under A.R.S. 13-3101(7). Further, in reviewing the evidence from the adjudication hearing, it found insufficient

#### *for The Defense*

Editor: Russ Born

Assistant Editors:

Jeremy Mussman  
Keely Reynolds

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

Copyright © 2002

evidence to conclude that the juvenile's use of the flare gun was under such circumstances as to cause death or serious injury. The circumstances were that the juvenile had discharged the flare gun into the sky to celebrate a touchdown scored by his high school football team.

**C. *State v. Gross*, 201 Ariz. 41, 31 P.3d 815, 355 Ariz. Adv. Rep. 3 (Ariz. App. Div. 1 Sept. 4, 2001)**

The Court of Appeals, Division One, vacated a sentence enhancement under A.R.S. 13-604(R) (on pretrial release at time of offense). It held that the United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), dictated that a jury must determine the factual question of whether a defendant was on pretrial release at the time the alleged offense was committed. This was so because the finding increased the punishment by two years. A.R.S. 13-604(P) was found to be unconstitutional as it removed from the jury the assessment of the facts which increased the punishment to which the defendant was exposed. It remanded for a new trial on the sentence enhancement issue, as the state was not at fault for the need of a retrial.

**D. *State v. Boyd*, 201 Ariz. 27, 31 P.3d 140, 357 Ariz. Adv. Rep. 5 (Ariz. App. Div. 1 Sept. 25, 2001)**

The Court of Appeals, Division One, reversed a defendant's conviction for driving with a suspended license while having a dangerous drug or its metabolite in his body. It concluded that A.R.S. 28-1381(A)(3) was void for vagueness, as applied to the defendant, in violation of his right to due process of law. Defendant had consumed "Renewtrient" and "Thunder" prior to his driving. The products contained "GBL". "GBL" turns into "GHB" when exposed to water. "GHB" is listed as a dangerous drug, but "GBL" is not. The court concluded that defendant did not have adequate notice that his ingestion of "Renewtrient" and "Thunder", which contained "GBL", would result in illegal actions due to their transformation into "GHB" when combined with water.

**E. *State v. Seyrafi*, 201 Ariz. 147, 32 P.3d 430, 358 Ariz. Adv. Rep. 3 (Ariz. App. Div. 1 Oct. 16, 2001)**

The Court of Appeals, Division One, reversed defendant's convictions and sentences for nine misdemeanor violations of various property maintenance provisions. It concluded that a City of Scottsdale ordinance, which contained a mandatory presumption, unconstitutionally shifted the burden of persuasion on an element of the offense and violated due process. In this particular case, the ordinance presumed that an owner of record was the person having lawful control over a structure or parcel of land. The court found that such a statute would impose strict liability upon an owner of record without any showing of lawful control. Having lawful control was an element of the offense that could not be presumed.

**F. *State v. Thompson*, 201 Ariz. 273, 34 P.3d 382, 359 Ariz. Adv. Rep. 5 (Ariz. App. Div. 1 October 25, 2001)**

The Court of Appeals, Division One, concluded that the statute defining premeditation, A.R.S. 13-1101(1), the concept that distinguishes first-degree murder from second-degree murder, was void for vagueness. It found that the statutory definition, which declared that proof of actual reflection was not required, coupled with judicial interpretations finding the length of time to permit reflection could be as "instantaneous as successive thoughts" resulted in a situation where a sufficiently ascertainable standard of guilt did not exist. Under such a standard, degrees of guilt could only be decided arbitrarily. In this particular case the court found the defendant was not entitled to a new trial as the offensive language, i.e. "instantaneous as successive thoughts", was not used in the jury instructions.

**PROCEDURAL LAW DECISIONS**

**A. *State v. Lucas*, 199 Ariz. 366, 18 P.3d 160, 341 Ariz. Adv. Rep. 12 (Ariz. App. Div. 1 Feb. 13, 2001) cert. denied, *Arizona v. Lucas*, U.S. , 122 S.Ct. 506, 151 L.Ed.2d 415 (Oct. 29, 2001)**

The Court of Appeals, Division One, reversed defendant's convictions for attempted sexual assault, sexual abuse and kidnapping. During jury selection the prosecution peremptorily struck the only African American male juror. The prosecutor stated the reasons for striking the juror were because: 1.) he was a lawyer, and 2.) he was a southern male who might take offense to pregnant women who work. The court found the first reason race and gender neutral. The second was an unacceptable anecdotal generalization without basis in fact. It was a non-neutral reason that tainted the entire jury selection procedures necessitating reversal.

**B. *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799, 348 Ariz. Adv. Rep. 55 (Ariz. App. Div. 2 May 31, 2001)**

The Court of Appeals, Division Two, vacated a trial court's setting aside of a plea agreement. The defendant had pled guilty to unlawful imprisonment, a class six felony. The plea agreement had stipulated that if defendant was granted probation he faced the possibility of lifetime probation. Defendant's plea was accepted and judgment was entered. He was placed on fifteen years probation. Subsequently, the defendant sought modification of the length of probation pursuant to Rule 24.3, Ariz. R. Crim. Pro. The state then sought to withdraw from the plea pursuant to Rule 17.5, Ariz. R. Crim. Pro. The Court of Appeals found no basis for the state to withdraw since the plea had been accepted and judgment entered. Further, it held that since a fifteen-year probation grant was not permissible, the defendant had not breached any part of the plea agreement by merely requesting the court to impose a legal sentence.

**C. *State v. Ibanez*, 201 Ariz. 56, 31 P.3d 830, 356 Ariz. Adv. Rep. 12 (Ariz. App. Div. 1 Sept. 18, 2001)**

The Court of Appeals, Division One, reversed defendant's convictions for aggravated D.U.I. A juror had expressed during voir dire that it would be hard for her to be fair and impartial due to her personal and family experiences. The juror also opined that she didn't think anybody had any business having a drink and driving. The request to strike her for cause was denied and she was removed with a peremptory strike. The Court of Appeals found that, in total, the juror's responses and answers supported the challenge for cause. Rule 18.4(b), Ariz. R. Crim. Pro. The fact the defendant used a peremptory challenge to the juror did not preclude reversal. *State v. Huerta*, 175 Ariz. 262, 855 P.2d 776 (1993), required automatic reversal whenever a trial court erroneously denied a defendant's challenge for cause.

**D. *State v. Bonds*, 201 Ariz. 203, 33 P.3d 537, 359 Ariz. Adv. Rep. 18 (Ariz. App. Div. 1 Oct. 30, 2001)**

The Court of Appeals, Division One, reversed the trial court's order of forfeiture of a \$3,500 bond. It held that, under the facts and circumstances, the court abused its discretion in ordering forfeiture. The state had consented to allowing defendant to return to Colorado to take care of an outstanding warrant in that jurisdiction. Once in Colorado, the defendant was incarcerated and unable to make his Arizona court appearance. Under such circumstances, the court found the state acquiesced in defendant's departure from Arizona, knowing that incarceration in Colorado may result. Further, Rule 7.6(d), Ariz. R. Crim. Pro., authorized exoneration of the bond due to defendant's incarceration in Colorado on a fugitive warrant there.

**TRIAL EVIDENTIARY DECISIONS**

**A. *State v. Carlos*, 199 Ariz. 273, 17 P.3d 118, 339 Ariz. Adv. Rep. 10 (Ariz. App. Div. 2 Jan 25, 2001)**

The Court of Appeals, Division Two, reversed defendant's convictions for deadly assault by a prisoner and promoting prison contraband with a "shank." Defendant was charged with attacking another inmate, F. At a first trial on the charges defendant called F as a witness. F refused to be sworn and stated he would not cooperate at all in the courtroom. He was excused as a witness by the court. The trial ended in hung jury. At the retrial the defendant again asked that F be called as a witness. The trial court refused to allow F to be called as a witness absent assurances he would testify and not repeat his prior courtroom performance. This procedure violated defendant's right to compulsory process. At a minimum, the court should have held a hearing, in the absence of the jury, to inquire of F whether he intended to testify, invoke the Fifth Amendment privilege or otherwise cooperate. The error was not harmless.

**B. *State v. Wilson*, 200 Ariz. 390, 26 P.3d 1161, 348 Ariz. Adv. Rep. 40 (Ariz. App. Div. 2 May 31, 2001)**

The Court of Appeals, Division Two, affirmed a trial court's ruling precluding testimony from a physician who had examined defendant as part of a Worker's Compensation claim. The state had charged the defendant with fraudulent schemes and artifices by misrepresentations in the course of a Worker's Compensation claim. The court found the fact that pecuniary gain may have been part of the motivation for the Worker's Compensation claim did not render the physician-patient privilege inapplicable. Further, the filing of a claim did not operate as a waiver of the privilege. Finally, the court could not find from the evidence that the defendant's visit with the doctor was for a purpose other than for treatment.

**C. *State v. Garcia*, 200 Ariz. 471, 28 P.3d 327, 351 Ariz. Adv. Rep. 10 (Ariz. App. Div. 1 July 10, 2001)**

The Court of Appeals, Division One, reversed defendant's conviction for one count of indecent exposure. He was found guilty at trial of two counts of molestation of a child as well as the indecent exposure. He had been acquitted of eight other charges. The court found that the trial court had failed to conduct hearings and make findings consistent with Rules 404(c) and 403, Ariz. R. Evid. The court, at length, reviewed a trial court's obligation to consider the effect of admission of uncharged bad acts. While the court found the court's failure to conduct hearings and make findings was error as to all three convictions, it was harmless as to two of the convictions.

**D. *State v. Green*, 200 Ariz. 496, 29 P.3d 271, 354 Ariz. Adv. Rep. 5 (SC Aug. 17, 2001)**

The Supreme Court vacated the Court of Appeals, Division One, Memorandum Decision and reversed defendant's conviction for sexual abuse. It concluded that the trial court erred in allowing the state to impeach the defendant, who testified, with prior felony convictions that were more than ten years old. The trial court's ruling that credibility was a central issue in the case was insufficient to overcome the intent of Rule 609, Ariz. R. Evid., that remote convictions should be admitted "very rarely and only in exceptional circumstances."

**SENTENCING DECISIONS**

**A. *State v. Purcell*, 199 Ariz. 319, 18 P.3d 113, 338 Ariz. Adv. Rep. 3 (Ariz. App. Div. 1 Jan 4, 2001)**

The Court of Appeals, Division One, remanded for resentencing defendant's conviction for misconduct involving weapons. The trial court designated the offense as a

dangerous offense and sentenced defendant to a maximum term. The state had not alleged dangerousness nor had the jury determined dangerousness. Remand was the proper remedy and not just substitution of the maximum sentence for a non-dangerous conviction.

**B. *State v. Decenzo*, 199 Ariz. 355, 18 P.3d 149 (Ariz. App. Div. 2 Feb. 6, 2001)**

The Court of Appeals, Division Two, found the trial court erred in determining defendant had two historical prior felonies. His 1996 conviction was a prior for purposes of subsection (c) of A.R.S. 13-604 (V)(1). It could not be counted again with his two 1988 prior convictions to qualify as a third or more prior felony conviction under subsection (d) of A.R.S. 13-604 (V)(1). The court agreed with the opinion of Division One in ***State v. Garcia***, 189 Ariz. 510, 943 P.2d 870 (App. 1997), that one could not count backward chronologically to determine whether a defendant had a third prior conviction under subsection (d).

**C. *State v. Pereyra*, 199 Ariz. 352, 18 P.3d 146, 340 Ariz. Adv. Rep. 5 (Ariz. App. Div. 1 Feb. 6, 2001)**

The Court of Appeals, Division One, concluded that Prop. 200 applies to possession of a narcotic drug for personal use within a drug free school zone. The intent of Prop. 200 was to treat users. The fact that a user possesses a drug for personal use within a drug free school zone makes them no less worthy of Prop. 200's benefits.

**D. *State v. Ossana*, 199 Ariz. 459, 18 P.3d 1258, 342 Ariz. Adv. Rep. 11 (Ariz. App. Div. 2 Feb. 28, 2001)**

The Court of Appeals, Division Two, concluded that defendant's two prior convictions for attempted possession of narcotic drugs did not preclude him from mandatory probation, guaranteed by Prop. 200, for his instant conviction of possession of narcotic drugs. It declined to extend the holding of Division One in ***Stubblefield v. Trombino***, 197 Ariz. 382, 4 P.3d 437 (App. 2000) (attempted possession of drugs falls within Prop. 200) to the detriment of the defendant.

**E. *State v. Newton*, 200 Ariz. 1, 21 P. 3d 387, 344 Ariz. Adv. Rep. 33 (SC Apr. 3, 2001)**

The Supreme Court vacated a memorandum decision of the Court of Appeals, Division One, and remanded defendant's case for resentencing. It held that defendant could not be sentenced under the version of A.R.S. 13-604.02 that was in existence at the

time of his 1993 conviction for a subsequent offense committed in 1998 while on earned credit release status from the Department of Corrections. The 1994 amendment to A.R.S. 13-604.02 did not apply to offenders on early release. He was to be sentenced according to the version of A.R.S. 13-604.02 in effect in 1998, the 1994 amendment.

**F. *State v. Rodriguez*, 200 Ariz. 105, 23 P.3d 100, 345 Ariz. Adv. Rep. 12 (Ariz. App. Div. 2 Apr. 19, 2001)**

The Court of Appeals, Division Two, remanded defendant's case for resentencing. Defendant had been sentenced to imprisonment for possession of narcotic drugs and drug paraphernalia. The record was barren of any findings that his prior felony convictions precluded him from Prop. 200 considerations. Remand to determine the nature of the prior felonies was necessary to clarify his Prop. 200 eligibility.

**G. *State v. Benak*, 199 Ariz. 333, 18 P.3d 127, 346 Ariz. Adv. Rep. 14 (Ariz. App. Div. 1 Jan. 23, 2001)**

The Court of Appeals, Division One, vacated defendant's sentence of imprisonment for a possession of dangerous drugs conviction. The trial court had imposed a sentence of imprisonment by finding defendant ineligible for probation, pursuant to Prop. 200, due to a prior violent felony. The court found the state had not alleged the prior felony to be violent and defendant had no notice he would be Prop. 200 ineligible. The court held that the state must allege the prior felonies and their nature if they seek to have a defendant ineligible under Prop. 200.

**H. *State v. Bocharski*, 200 Ariz. 50, 22 P.3d 43, 346 Ariz. Adv. Rep. 27 (SC May 3, 2001)**

The Supreme Court vacated the sentence of death imposed on the defendant. It found that the defendant's sentencing was flawed due to trial court administrative procedures that effectively denied defendant of mitigation investigation and experts. Though defendant requested that the sentencing proceed, the court concluded that it could not uphold the sentence of death. The record and proceedings in the trial court indicated that the lack of expert/mitigation assistance might have resulted from improper intervention/oversight by the court administration at the expense of the trial judge's obligations.

**I. *State v. Viramontes*, 200 Ariz. 452, 27 P.3d 809, 350 Ariz. Adv. Rep. 3 (Ariz. App. Div. 2 June 19, 2001)**

The Court of Appeals, Division Two, remanded defendant's case for clarification/resentencing. Defendant was convicted of first-degree murder. The death penalty was not alleged. He was sentenced to natural life imprisonment as the trial court found natural life

to be the presumptive sentence under A.R.S. 13-703. The court disagreed that natural life was the presumptive sentence under A.R.S. 13-703. The legislature made no such distinctions under 13-703 as it had under other sentencing schemes.

**J. *State v. Hensley*, 201 Ariz. 74, 31 P.3d 848, 356 Ariz. Adv. Rep. 5 (Ariz. App. Div. 1 Sept. 20, 2001)**

The Court of Appeals, Division One, upheld the trial court's refusal to declare defendant Prop. 200 ineligible. Following its decision in *Benak*, the court concluded the state had failed to allege the violent nature of defendant's prior convictions so as to preclude him from Prop. 200. Further, the court held that defendant's probation could not be terminated due to his repeated violations. The trial court was bound to reinstate defendant on probation with additional terms pursuant to the language and intent of Prop. 200.

**K. *State v. Bass*, 201 Ariz. 83, 31 P.3d 857, 357 Ariz. Adv. Rep. 3 (Ariz. App. Div. 2 Sept. 26, 2001)**

The Court of Appeals, Division Two, vacated imposition of lifetime probation on defendant after he was convicted of conspiracy to commit sexual conduct with a minor. It concluded that by the terms of A.R.S. 13-902(E) lifetime probation was not a sanction for a preparatory offense. It remanded for resentencing.

**L. *In Re Kevin A.*, 201 Ariz. 161, 32 P.3d 1088, 358 Ariz. Adv. Rep. 19 (Ariz. App. Div. 1 Oct. 9, 2001)**

The Court of Appeals, Division One, vacated a restitution order in a juvenile delinquency proceeding. The order was entered after the time had expired for filing a restitution claim. The trial court had no jurisdiction to order restitution under that circumstance.

**M. *State v. Estrada*, 201 Ariz. 247, 34 P.3d 356, 361 Ariz. Adv. Rep. 20 (SC Nov. 15, 2001)**

The Supreme Court concluded that Prop. 200 applies to convictions for possession of drug paraphernalia. The convictions, however, must relate to personal use or possession of a controlled substance.



## Does Proposition 200 Protect Paint Huffers?

By Nicholas Merrill  
Defender Law Clerk

Bob Stein and I recently submitted a memorandum of law to a Maricopa County Superior Court judge. The issue presented was whether the illicit personal possession or use of vapor-releasing substances containing toxic substances (commonly known as “inhalants”)<sup>1</sup> is a Proposition 200-protected offense. We argued that, in passing Proposition 200,<sup>2</sup> the people of Arizona intended personal possessors or users of inhalants to receive the same judicial treatment as personal possessors or users of controlled substances.<sup>3</sup>

The problem is that Proposition 200<sup>4</sup> refers only to “personal possession or use of a *controlled substance as defined in § 36-2501*.”<sup>5</sup> The definition of “controlled substance” at § 36-2501 does not include inhalants of any kind.<sup>6</sup> Instead, the legislature has defined “vapor-releasing substance containing a toxic substance” elsewhere,<sup>7</sup> and codified the prohibition of using such a substance in a separate statute.<sup>8</sup> Violating that statute is a class 5 felony, and incarceration is discretionary with the court.<sup>9</sup> Yet, as demonstrated by the overwhelming passage of Proposition 200<sup>10</sup> and speedy defeat of the legislature’s attempt to disable it,<sup>11</sup> the will of the people was to provide for the treatment and education of all first- or second-offense non-violent drug users as an alternative to incarcerating them. By passing Proposition 200, we argued, the people of

Arizona did not intend to mandate probation for a user of heroin, cocaine, marijuana or any other “controlled substance” and at the same time allow courts to incarcerate people for “huffing.”<sup>12</sup>

Arizona voters must have intended to afford the same protection from incarceration to all non-violent users of illicit drugs, whether or not the drug illicitly used is on the government’s arcane list of “controlled substances.” This is apparent upon review of the publicity pamphlet distributed to all voters in the summer of 1996.<sup>13</sup>

The “Findings and Declarations” section of the pamphlet stated:

(A) [W]e need to medicalize Arizona’s *drug* control policy: recognizing that *drug abuse* is a public health problem and treating abuse as a disease.

\*\*\*

(D) The *drug* problems of non-violent persons who are convicted of personal possession or use of *drugs* are best handled through court-supervised *drug* treatment and education programs. These programs are more effective than locking non-violent offenders up in a costly prison. (Emphasis supplied.)<sup>14</sup>

The language quoted above comes from the part of the publicity pamphlet relied on by voters to understand the initiative measure they were asked to approve. The common term “drug” is used presumably because the average voter clearly

understands what it means. On the other hand, the phrase “controlled substance” only appears in the section of the pamphlet where the proposed language of the law is stated. Hence, a narrow technical reading of A.R.S. § 13-901.01 gives only controlled substances Proposition 200-status. This reading ignores unlisted mind-altering substances, the possession of which may be criminally prosecuted, and, we submit, is not aligned with the demonstrated will of the people.

The memorandum of law is reprinted on page 11, modified only in that the names of the parties and the officer involved have been changed. Although our judge ruled against us, we believe this is still a viable issue.

#### Endnotes

- 1) Inhalants include paint, paint thinner, glue, rubber cement, air freshener, glass cleaner, nail polish, gasoline, brake fluid, nitrous oxide, alkyl nitrites, typewriter correction fluid, air-conditioning refrigerant, felt tip markers, butane and many other household and industrial products that can be inhaled to alter one’s consciousness. See the National Inhalant Prevention Coalition’s website at <http://www.inhalants.org/>. The family of inhalants is much larger than the statutory definition of “vapor-releasing substance containing a toxic substance” at A.R.S. § 13-3401(38). See note 6, *infra*.
- 2) The “Drug Medicalization, Prevention, and Control Act of 1996.”
- 3) The statutory manifestation of Proposition 200 provides that “any person who is convicted of the personal possession or use of a *controlled substance as defined in § 36-2501* is eligible for probation” and requires that the court “suspend the imposition or execution of sentence and place such person on probation.” (Emphasis supplied.)
- 4) Codified at A.R.S. § 13-901.01.
- 5) A.R.S. § 13-901.01(A) (emphasis supplied).
- 6) A.R.S. § 36-2501 defines “controlled substance” as “a drug, substance or immediate precursor in schedules I through V of [A.R.S. § 36-2511 et seq.]” The schedules, which list all of the controlled substances, do not include any inhalants or ingredients thereof.
- 7) A.R.S. § 13-3401(38) provides the following definition: “Vapor-releasing substance containing a toxic substance” means paint or varnish dispensed by the use of aerosol spray, or any glue, which releases vapors or fumes containing acetone, volatile acetates, benzene, butyl alcohol, ethyl alcohol, ethylene dichloride, isopropyl alcohol, methyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, toluene, volatile ketones, isophorone, chloroform, methylene chloride, mesityl oxide, xylene, cumene, ethylbenzene, trichloroethylene, mibk, miak, mek or diacetone alcohol or isobutyl nitrite.
- 8) A.R.S. § 13-3403.
- 9) A.R.S. § 13-3403(G) reads, in pertinent part: [a] person who violates any provision of this section is guilty of a class 5 felony, but the court may, having regard to the nature and circumstances of the offense, enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation . . . and refrain from designating the offense as a felony or misdemeanor until the probation is terminated.
- 10) Arizona voters passed Proposition 200 by a ratio of nearly two-to-one in November of 1996.
- 11) In April of 1997, the 43<sup>rd</sup> legislature and then-governor Fife Symington attempted to override key elements of Proposition 200. The electorate responded by passing the Voter Protection Act in 1998, requiring that legislative changes to any voter-approved initiative or referendum both further its purposes and receive a three-fourths vote.
- 12) “Huffing” is the street term for using inhalants to get high. It is also called sniffing, snorting, glading (because of the common illicit inhalation of Glade® air fresheners), and bagging (because of the common method of inhaling the inhalant of choice from a saturated paper bag (saturated socks are often used in the same way)).
- 13) In a recent case construing Proposition 200, the Arizona Supreme Court concluded that the “popular intent” (i.e., intent of the electorate) could be determined by reference to the proposition’s publicity pamphlet. See *Calik v. Kongable*, 990 P.2d 1055, 1059 (2001).
- 14) The complete text of Proposition 200 as printed in the publicity pamphlet may be found at <<http://www.sosaz.com/election/1996/General/1996BallotPropsText.htm>>.



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

MEMORANDUM OF LAW

**THE ISSUE:**

The issue presented is whether the illicit personal possession or use of a vapor-releasing substance containing a toxic substance is a Proposition 200-protected offense.

**THE FACTS:**

On October 15, 1998 Officer Q. Draw, of the Chandler Police Department observed Defendant Joe Public huffing paint (holding a paint-saturated sock up to his nose and mouth) in the parking lot of Sherwin Williams Lanes at 2732 S. Huffington Blvd. The officer then arrested the defendant for illicit possession of a vapor-releasing substance in violation of A.R.S. § 13-3403(A)(1).

**THE LAW:**

A.R.S. § 13-3403(A)(1) proscribes knowingly breathing, inhaling, or drinking a vapor-releasing substance containing a toxic substance.

A.R.S. § 13-3403(G) states that a person who knowingly breathes, inhales, or drinks a vapor-releasing substance containing a toxic substance is guilty of a class 5 felony. However, subsection (G) specifically allows the sentencing court, "having regard to the nature and circumstances of the offense," to "enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly," or "place the defendant on probation in accordance with [A.R.S. § 13-901 et seq.] and refrain from designating the offense as a felony or misdemeanor until the probation is terminated."

A.R.S. § 13-3401(38) defines "vapor-releasing substance containing a toxic substance" as follows:

Vapor-releasing substance containing a toxic substance" means paint or varnish dispensed by the use of aerosol spray, or any glue, which releases vapors or fumes containing acetone, volatile acetates, benzene, butyl alcohol, ethyl alcohol, ethylene dichloride, isopropyl alcohol, methyl alcohol, methyl ethyl ketone, pentachlorophenol, petroleum ether, toluene, volatile ketones, isophorone, chloroform, methylene chloride, mesityl oxide, xylene, cumene, ethylbenzene, trichloroethylene, mibk, miak, mek or diacetone alcohol or isobutyl nitrite.

A.R.S. § 13-901.01, commonly known and hereinafter referred to as Proposition 200, is the codified result of the “Drug Medicalization, Prevention, and Control Act of 1996.” A.R.S. § 13-901.01(A) provides that “any person who is convicted of the personal possession or use of a *controlled substance as defined in § 36-2501* is eligible for probation” and requires that the court “suspend the imposition or execution of sentence and place such person on probation.” (Emphasis supplied.) A.R.S. § 36-2501(A)(3), in turn, defines “controlled substance” as “a drug, substance or immediate precursor in schedules I through V of [A.R.S. § 36-2511 et seq.]”

Schedules I through V, the comprehensive lists of controlled substances, do not include vapor-releasing substances as described in the statute proscribing their illicit use, A.R.S. § 13-3403(A). Likewise, schedules I through V do not list the toxic constituents of such substances as statutorily defined at A.R.S. § 13-3401(38). So it cannot be said that vapor-releasing substances containing toxic substances are in part or whole “controlled substances.” Therefore, since Proposition 200 only refers to “controlled substances,” it does not technically apply to vapor-releasing substances containing toxic substances. Counsel argues, however, that these facts are not determinative of the issue.

### **THE ARGUMENT:**

The Arizona Supreme Court analyzed the content and purpose of Proposition 200, and interpreted the popular intent that resulted in its enactment, in holding that incarceration may not be imposed as a condition of probation for a person convicted of first-offense personal possession or use of a controlled substance. *See Calik v. Kongable*, 990 P.2d 1055 (1999). The court first determined that the legislative intent of the enacting group controls the interpretation of any statutory ambiguity, and that the publicity pamphlet for Proposition 200 may be relied upon to assist the court in divining that group’s intent. *Id.* at 1059. The court then pointed to the statute’s underlying purposes and goals:

The Findings and Declarations in the publicity pamphlet for Proposition 200 delineated the changes in Arizona’s approach to drug control: (A) [W]e need to medicalize Arizona’s drug control policy: recognizing that drug abuse is a public health problem and treating abuse as a disease.

\*\*\*

(D) The drug problems of non-violent persons who are convicted of personal possession or use of drugs are best handled through court-supervised drug treatment and education programs. The [sic] programs are more effective than locking non-violent offenders up in a costly prison.

*Id.* at 1060 (quoting Text of Proposed Amendment § 2(A), (D), Proposition 200, 1996 Ballot Propositions).

The Purpose and Intent stated in the publicity pamphlet for Proposition 200 further illuminates the will of the people as to law enforcement policy with respect to substance abusers: “The people of the state of Arizona declare their purposes to be as follows: B. To require that non-violent persons convicted of personal possession or use of drugs successfully undergo court-supervised mandatory drug treatment programs and probation.” Text of Proposed Amendment § 3(B), Proposition 200, 1996 Ballot Propositions.

The term “controlled substance” is not used at all in either the Findings and Declarations or the Purpose and Intent sections of the publicity pamphlet. The drafters chose instead to use the more common and inclusive term “drugs” to illustrate their point that substance abusers ought to be treated as sick individuals rather than criminals. Therefore, since the terms “controlled substance” and “drugs” were used interchangeably in the publicity pamphlet, the fact that “controlled substance” has a technically limited statutory definition is not determinative of the issue.

The Arizona Supreme Court further discussed its interpretation of Proposition 200 in *Foster v. Irwin*: “In construing [a] statute, [a court’s] ‘primary purpose is to effectuate the intent of those who framed the provision and, in the case of an [initiative], the intent of the electorate that adopted it.’” 995 P.2d 272, 273 (2000) (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994)). The court went on to conclude that “possess” or “use,” as those terms are criminalized by the statute proscribing the illicit use of dangerous drugs, A.R.S. § 13-3407(A)(1), are the same as “personal possession or use” under Proposition 200.

Subsequently, the Arizona Supreme Court performed an analysis of Proposition 200 that is determinative of the issue in the case at bench. It stated that Proposition 200 applies to the possession of drug paraphernalia even though the statute itself only mentions “controlled substances.” See *State v. Estrada*, 34 P.3d 356 (2001). The court noted that “[a] [statutory] result is absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intentions of persons with ordinary intelligence and discretion.” The court found that it would be irrational and absurd to permit incarceration for personal possession of drug paraphernalia while prohibiting incarceration “for the more serious crime of actual drug possession or use.” *Id.* at 360.

The court additionally found that “Proposition 200’s intent provisions, which explicitly call for treatment rather than incarceration . . . to . . . preserve prison space for more dangerous criminals, make it clear that the electorate, acting in the role of the legislature, did not intend to incarcerate for the lesser offense and yet mandate probation for the more serious.” *Id.* at 360-61 (citing Text of Proposed Amendment § 3(C), (E), (F), Proposition 200, 1996 Ballot Propositions).

The relevance of these findings is that the court interpreted “controlled substance” expansively to include “drug paraphernalia” in order to accurately reflect the will of the electorate and to avoid an irrational and absurd result. A similarly expansive interpretation should be applied here such that “controlled substance” includes “vapor-releasing substance containing a toxic substance.”

Finally, it should be noted here that abuse of vapor-releasing substances is a national (if not global) health problem. According to the National Inhalant Prevention Coalition (NIPC) of Austin, Texas, huffing paints, glues, deodorizers, correction fluids, markers, and other easily accessible products can lead to permanent brain damage, “sudden sniffing death syndrome” (heart failure), hearing and vision problems, fetal effects similar to fetal alcohol syndrome, and liver or kidney damage. See NIPC website at <http://www.inhalants.org>. The probationary treatment and education afforded by Proposition 200 will perhaps be most effective in addressing the inhalant epidemic.

### **THE CONCLUSION:**

Counsel concludes with a vignette. Four citizens of Arizona (each with no prior drug arrests or convictions or violent crime convictions etc.) sit on the same park bench. Citizen Number One lights up a marijuana cigarette to avoid the pain of everyday reality. Citizen Number Two snorts a line of cocaine to enliven his afternoon. Citizen Number Three shoots up heroin to distance himself from responsibility. Citizen Number Four huffs a vapor-releasing substance containing a toxic substance for all of the above reasons.

Police officers observe all of the above and arrest all four citizens and retrieve the drugs and drug paraphernalia.

All four citizens appear in front of the same jurist in the Arizona court system. That jurist is particularly disturbed by the brazenness of the crimes committed by the four defendants. Hypothetically the following results occur: Citizens One through Three obtain the benefit of Proposition 200 and receive sentences which include no incarceration. Citizen Number Four is sentenced to jail because he is not shielded by Proposition 200.

Does this result make any sense? May counsel answer that question as follows: “Of course not.”

Is this Court to be bound by the failure to include vapor-releasing substances containing toxic substances in the legislative lists of controlled substances and in Proposition 200 itself? Does the failed inclusion take precedence over fairness, common sense, and justice?

Counsel suggests that the Arizona Supreme Court has already answered this question in the case of *State v. Estrada*. The voters of this state wished to include all illicit drug use and possession, including drug paraphernalia, within the ambit of the Drug

Medicalization, Prevention, and Control Act of 1996. Is it not clear that, considering the popular intent underlying Proposition 200, the illicit possession and use of a vapor-releasing substance containing a toxic substance is precisely the type of drug offense Arizona voters desired to address via that Act?

Therefore, Counsel argues to this Court in the affirmative, that the illicit personal possession or use of a vapor-releasing substance containing a toxic substance is a Proposition 200-protected offense.



## FEBRUARY 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
10/9 - 2/8	<b>Bevilacqua Stazzone Fusselman</b>	Davis	Stevens	CR99-14411 Murder 1°, F1 Child Abuse, F2, DCAC Burglary 3°, F4	Guilty Except Insane	Bench
12/10 - 12/17	<b>Schreck O'Farrell Reidy</b>	Padish	Gadow	CR01-10586 Child Molesting, F2 3 Cts. Sex Abuse under 15, F3 5 Cts. Agg Assault, F6	Not Guilty	Jury
1/10 - 1/17	<b>Schreck Salvato</b>	Foreman	Adleman	CR01-13628 Kidnap, F2 Agg Assault, F6 Criminal Damage, F6	Not Guilty Kidnap & Agg Assault; Guilty Criminal Damage M2	Jury
1/22 - 2/11	<b>Patterson / Shell</b>	Jarrett	Shutts & Martinez	CR99-91746(B) 2 Cts. Murder 1°, F1D Armed Robbery, F2D Burglary 1°; F2D	Guilty	Bench
1/28 - 1/31	<b>Hall Elzy Jaichner / Francis</b>	Daughton	Gallagher	CR01-12140 2 cts. Agg. Assault, F3D	Guilty	Jury
1/31 - 2/5	<b>Blieden King Oliver</b>	Wilkinson	Brnovich	CR01-07166 Agg. Assault, FD3 Kidnapping, F2	Guilty	Jury
1/31 - 2/5	<b>Knowles</b>	Gaylord	Johannes	CR01-96171 Burglary, 2 <sup>nd</sup> degree, F3N	Guilty	Jury
2/1	<b>Felmy Arvanitas</b>	Johnson	Montgomery	TR01-04942 DWI Liq/Drq/Intox. Sub, M1 DWI .10 or Grtr., M1	Not Guilty	Jury
2/4 - 2/6	<b>Kratter</b>	Schwartz	Blumenreich	CR01-16875 Agg. Assault, F3	Not Guilty	Jury
2/4 - 2/22	<b>Elm / Houston Bradley Reidy</b>	Hotham	Bennink	CR99-012905 Agg. Assault Endangerment Armed burglary 2cts Police Shooting	Hung Jury on Police Shooting; Not Guilty, Agg. Assault and Endangerment; Guilty, Trespass	Jury
2/5 - 2/7	<b>Walton</b>	Heilman	Coolidge	CR01-07275 Agg. DUI, F4	Guilty	Jury
2/5 - 2/7	<b>Moore</b>	Keppel	Brenneman	CR01-92749 2 cts. Agg. DUI, F4N	1 Ct. - Guilty 1 Ct. - Not Guilty	Jury
2/5 - 2/11	<b>Giancola Robinson Valentine</b>	Araneta	Charnell	CR01-14978 Agg. Assault, FD3	Guilty	Jury
2/6 - 2/8	<b>Pajerski</b>	Santana	Mayer	CR01-15136 Misc. Inv. Weapons, F4	Guilty	Jury
2/6 - 2/11	<b>Silva / Cuccia Curtis</b>	McVey	Petrowski	CR01-13002 4 Cts. Sex Asslt, F2 Burglary 3 <sup>rd</sup> degree, F3 2 Cts. Sex Abuse over 15, F4	Not Guilty	Jury

FEBRUARY 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
2/6 - 2/19	<b>Burns / Felmy</b> Thomas	Gaylord	Evans	CR01-93525 3 cts. Sexual Abuse (DCAC), F3D Molestation of a Child (DCAC), F2D 5 cts. Sexual Conduct w/Minor (DCAC), F2D	Directed Verdict 1 ct. Sexual Abuse, 1 ct. Sexual Conduct w/Minor Guilty 2 cts. Sexual Abuse, 1 ct. Molestation of a Child, 4 cts. Sexual Conduct w/Minor	Jury
2/11 - 2/12	<b>Blair</b> Robinson	Gerst	Williams	CR01-16873 Unlawful Flight, F5	Guilty	Jury
2/11 - 2/12	<b>Rock</b> <i>Francis</i>	Willet	MacRae	CR01-14977 Forgery, F4	Guilty	Jury
2/11 - 2/14	<b>B. Peterson</b> Elzy <i>Francis</i>	Hutt	Sorrentino	CR01-010387(A) 3 Cts. Child Molestation, F2, DCAC Sexual Abuse, F3, DCAC Kidnapping, F2, DCAC Attempt Sex Conduct w/Minor, F3, DCAC Child Prostitution, F2, DCAC	Hung Jury	Jury
2/12	<b>Clemency</b>	Davis	Reddy	CR01-015898 Armed Robbery, F2 Burglary in the Third Degree, F4 Shoplifting, F6	Guilty	Jury
2/12 - 2/13	<b>Walton</b>	Araneta	Wisdom	CR01-11424 Sexual Abuse, F5	Not Guilty	Jury
2/13 - 2/14	<b>Kavanagh</b> <i>Rivera</i>	Akers	Pierce	CR01-93166 Agg Assault/ F4N Agg Assault/ F6N Unlawful Imprisonmt./ F4N Disorderly Conduct/ M1N	Not Guilty	Jury
2/13 - 2/15	<b>Silva</b>	Fields	Pittman	CR01-16351 2cts. Indec. Expo., F6 2cts. Indec. Expo., M1	Not Guilty	Jury
2/14	<b>Lawson</b>	Hall	Schlittner	CR01-14281 P.O.D.D, F4 P.O.D.P., F6	Not Guilty	Jury
2/14 - 2/19	<b>Looney</b>	Cates	Musto	CR01-16340 Leaving Scene of Injury Accident, F6	Hung Jury	Jury
2/19	<b>Wallace</b>	Keppel	Doane	CR01-94670 POM/ M1N	Guilty	Bench
2/19 - 2/21	<b>Valverde</b>	McNally	Donaldson	CR01-16586 Aggravated Assault, F3D	Guilty	Jury
2/19 - 2/21	<b>Schreck</b> Fusselman	Davis	Eliason / Sharbell	CR01-013487 Agg Assault, F6	Guilty	Jury

FEBRUARY 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
2/20 - 2/22	<b>Benson</b>	Granville	Adelman	CR01-13611 Agg. Asslt., F3	Guilty	Jury
2/22 - 2/25	<b>Hall</b> Barwick <i>Jaichner</i>	Gaines	Coolidge	CR01-15359 2 cts. Agg. DUI, F4	Guilty	Jury
2/25 - 2/28	<b>Morris / Rosales</b> Klosinski	Willrich	Gordwin	CR01-95337 Agg. Assault, F3D Disorderly Conduct, F6N	Not Guilty	Jury
2/25 - 3/1	<b>Walker</b>	Anderson	Kay	CR01-17479 Armed Robbery, F2 Agg. Asslt. w/Ddly. Wpn., F3	Not Guilty Armed Robbery Hung Jury Agg. Asslt. w/ Ddly. Wpn.	Jury
2/26	<b>Kratter</b>	Gottsfeld	Flannigan	CR01-14006 Shoplifting, F4	Mistrial	Jury
2/26	<b>Knowles</b>	Oberbillig	Thompson	CR01-93673 Theft of Means of Transportation, F3N	Guilty	Jury
2/27 - 2/28	<b>Valverde</b>	P. Reinstein	Robinson	CR01-16606 2 cts. Agg. Assault, F3D	Guilty	Jury
2/27 - 2/28	<b>Noland / Willmott</b> Brazinkas <i>Jaichner</i>	Buttrick	Sampson	CR01-017240 Indecent Exposure, F6	Guilty	Jury
2/27 - 2/28	<b>Ackerley</b>	Hoag	Musto	CR01-12345 2 cts. Agg. DUI, F4	Guilty	Jury
2/28 - 2/29	<b>Woodfork</b> <i>Schneider</i>	Doughton	Raymond	CR01-17438 Theft of Means of Transportation, F3	Guilty	Jury

## FEBRUARY 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
2/19 – 2/20	<b>Shaler</b>	Gerst	Hanlon	CR2001-007494 Ct. 1: POND, Ct. 2; POM, Ct.3; PODP, Ct. 4; PODP	Ct. 2&3: Guilty Ct. 1&4: Hung (11-1 in favor of acquittal)	Jury
2/21 – 2/21	<b>Sawyer</b> Otero	Gerst	Beougher	CR2001-007333 APND by Fraud	Guilty	Jury
2/25 – 2/27	<b>Funckes</b>	Hotham	Reckart	CR2001-014578 Ct.1: Mfg.DD, Cl.2 Ct. 2:PODD, Cl.4	Guilty of Lesser Incl. Poss. of Equip. to Mfg.DD, Cl.3 & PODD	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
2/11—2/13	<b>Koestner</b>	Anderson	CR2001-014631 Misconduct Weapon/ Prohibited Possessor	Not Guilty	Jury
2/25/02	<b>Everett</b>	Gottsfield	CR2001-016656 Agg Assault	Dismissed w/ prejudice	Jury

The Maricopa County Public Defender's Office

*Presents*



# Name That Movie...



This 2002 ethics seminar will be premiering at a location near you  
Friday, June 21, 2002...

and



...Will be narrated by Larry Cohen  
from the Cohen Law Firm

Look for further information on a future preview...

*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.