

for The Defense

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Crawford v. Washington

Expanding Confrontation Rights over Hearsay

By Donna Elm, Assistant Federal Public Defender

An increasingly constitutionalistic Supreme Court put meaningful bite back into the Sixth Amendment in early March when it handed down its opinion in *Crawford v.*

Washington, slip op. no. 02-9410, 2004 WL 413301 (U.S. Supreme Court March 8, 2004). Prosecutors and defenders had been watching this precedent-altering case with intense interest. *Crawford* overruled a long line of cases (notably, *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980)) that would admit declarant-unavailable hearsay (regardless of what purpose it was produced for) as long as it met "reliability" tests.

The holding is nothing short of remarkable. With years of established evidence rules and mountains of *stare decisis* against *Crawford*, his lawyers simply asserted that *Ohio v. Roberts* had been *wrong*. Seldom do we witness a David versus Goliath challenge like this and see David win.

A bit of history: *Ohio v. Roberts* expanded opportunities to impeach an accused with hearsay, curtailing Confrontation Clause domain. Roberts was charged with forging a

check he had gotten from his girlfriend; she testified, inculpatting him, at his preliminary hearing. When she could not be found for trial, and when Roberts testified contrary to her earlier statement, the prosecution introduced her prior testimony. Roberts objected that this violated his confrontation rights. The Supreme Court held that Confrontation would be satisfied in hearsay admissions when (a) the declarant is unavailable, and (b) the statement bears adequate "indicia of reliability." Further, reliability could be inferred where the statement fell within a "firmly rooted hearsay exception," or otherwise made a showing of "particularized guarantees of trustworthiness." Because Roberts's counsel had been allowed to cross-examine the girlfriend at the preliminary hearing, that satisfied the Confrontation Clause.

Changes in the evidence rules as a hearsay exception occurred six years before the Supreme Court came out with *Ohio v. Roberts*. Based on case law that presaged *Ohio v. Roberts*, the Federal Rules of

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■ James J. Haas, Maricopa County Public Defender ■

Evidence were revised to include a hearsay “catch-all” exception in Rule 807,¹ and states across the country followed suit with their evidence rules. Tracking the language of *Ohio v. Roberts*, Arizona Rules of Evidence 804(b)(5) provides for the admissibility of:

Statements not specifically covered by any of the foregoing exceptions² but having equivalent circumstantial guarantees of trustworthiness, if the court determines that: (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. ...

A quarter-century of law has stood firmly behind *Ohio v. Roberts*. It was so entrenched in lawyer education and practice and “so seemingly unassailable” that it became the very fabric of evidence law. Happily, some defenders think outside the box.

In 1999, Michael Crawford and his wife Sylvia went in search of Kenneth Lee to confront him about his attempt to rape Sylvia. A fight ensued during which Crawford stabbed Lee. The issue was self-defense. Both Sylvia and

Crawford gave virtually identical statements to police, with one noteworthy exception: he indicated that the victim had “gone for something” prior to the stabbing, while she indicated that the victim had nothing in his hands at the time of the stabbing. At trial, Crawford invoked the marital privilege, thus rendering his wife “unavailable.” Nonetheless, the prosecution introduced Sylvia’s recorded statement to police under the theory that, because she was Crawford’s accomplice, it constituted a “statement against penal interest.” Some debate followed in the Washington appellate courts whether it fit that exception or instead bore other guarantees of trustworthiness (*i.e.*, was corroborated by Crawford’s account), but its admissibility was finally endorsed under the residual hearsay exception. Despite *Roberts v. Ohio*, the defenders claimed that permitting this *type* of evidence under the residual exception violated Crawford’s confrontation rights.

Announcing at the outset that Confrontation was one of the “bedrock procedural guarantees,” Justice Scalia provided a studied, detailed analysis of this right’s history. This led to identification of two principles underlying American Confrontation rights. First, the principal evil it sought to address was the use of *ex parte* examinations of a witness against an accused. Hence, the Court “once again reject[s] the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon [what Wigmore called] ‘the law of Evidence for the time being.’”³ Police interrogations, then, fall squarely within the class of statements subject to confrontation. Second, hearsay could not be admitted unless a witness was in fact unavailable and the defendant had previously had an opportunity to cross-examine that witness. The Court noted that historical sources of the Confrontation Clause found that the best way to get to truth was through cross-examination, and not by alternatives that were “otherwise” considered trustworthy.

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This does not, of course, rid us of all witness-unavailable hearsay. *Crawford* was limited to criminal cases where the government sought to introduce “testimonial” statements.

“Testimonial” statements are those *meant to* prove a crime, “a solemn declaration or affirmation made for the purpose of establishing some fact.” Hence an accuser who makes a formal statement to government officials “bears testimony” against the accused in a way that casual

remarks to acquaintances do not. Most hearsay exceptions (*e.g.*, business records, medical records, family history, statements in furtherance of a conspiracy, often even excited utterances⁴) are normally not “testimonial.” Why “testimonial”

statements are problematic is that the declarants would reasonably expect these statements to be used for prosecution. Statements taken by police investigating crimes are thus “testimonial.” Moreover, even prior testimony (for example of a co-defendant), would not satisfy Confrontation. In one of the Court’s telling footnotes (fn.7), the majority wrote:

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse - a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception.

The Court “left for another day” any more comprehensive definition of “testimonial” evidence, but made very clear that it included at a minimum testimony at a preliminary hearing, before a grand jury, or at a former trial (not cross-examined by the instant defendant), as well as statements during police questioning.

Crawford is an extraordinary decision. Returning unapologetically to original intent, its beauty lies in simplicity... No amount of piling on of “indicia of reliability” could get around Confrontation if the statement was “testimonial.”

The holding is: “testimonial” statements of witnesses absent from trial are admissible only where the declarant is unavailable and the defendant has had an opportunity to cross-examine those statements. The Confrontation Clause demands that reliability be tested in the crucible of cross-examination. The Court noted that much of its case law (although not all of its rationales) have been faithful to this distinction. Hence the test in

Ohio v. Roberts (admitting *ex parte* testimony as long as *other* indicia of reliability supported it) departed from this principle. The “unpardonable vice” of the *Ohio v. Roberts* test was that it admitted “testimonial” statements that the Constitution only intended if subject to cross-examination.

Crawford made clear that a judicial determination of reliability could not supplant the constitutionally prescribed means of assessing reliability of “testimonial” statements. So where a hearsay statement is “testimonial,” no amount of “reliability” can get around the Confrontation right.

Crawford is an extraordinary decision. Returning unapologetically to original intent, its beauty lies in simplicity: drawing a very bright line in the sand. No amount of piling on of “indicia of reliability” could get around Confrontation if the statement was “testimonial.”

As practitioners, whenever the State seeks to admit hearsay from a non-testifying witness, we should immediately think: *Crawford*. The starting point of our analysis no longer is “Does it fit a hearsay exception?” or “Does it otherwise have ‘indicia of reliability?’”, but rather, “Is it a ‘testimonial’ statement?” If so, that entire class of statements is barred unless the declarant takes the stand and subjects herself to the “crucible” of cross-

examination - end of discussion. *Crawford* left much unsaid, and future case law will clarify what else might fall under the rubric of “testimonial” statements. But that gives us great opportunity to make law. It is therefore imperative that trial lawyers raise *Crawford* claims in the gray areas as well as the obvious ones, to preserve the issue for appeal in this Brave New Revitalized Constitutional World.

(Endnotes)

¹ Until 1997, this was numbered Rule 804(b)(5). Federal Rules of Evidence 807 has virtually the same language as its Arizona counterpart. Note that when Congress was debating adding the residual exceptions in Rules 803 and 804, the House turned it down because it injected “too much uncertainty” into principles of evidence. The Supreme Court’s version, the Senate Committee proposing the bill noted, was too expansive. Further there is language in the legislative history that “it is intended that the residual hearsay exceptions will be used very rarely.” Concerned about the breadth of the proposed residual exception “emasculating the hearsay rules,” the Senate narrowed the test significantly to essentially what we have now. S.Rep. Pub. Law 93-595, Senate Report 93-1277 (October 11, 1974).

² The exceptions referred to are those above this “residual” exception, i.e., former testimony, dying declaration, statement against interests, and statement of personal/family history. Arizona Rules of Evidence 804(b)(1-4).

³ What is interesting about this choice of quotes is that the Supreme Court continues to signal its (unanimous) inclination to return to basic principles of the American founders, as opposed to the vagaries of politics, social development, or national mood. See also *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)(expanding the right to jury decisions under the Sixth Amendment); *Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527 (2003)(returning to the basics and breath of *Strickland* in ineffective assistance of counsel Six Amendment claims); and *Lawrence v. Texas*, ___ U.S. ___, 123 S.Ct. 2472 (2003)(striking down Texas sodomy statute as violating Due Process).

⁴ The one hearsay exception that is clearly “testimonial,” and that the Court expressly did not decide yet, was dying declarations.

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Passenger Restitution

Is a passenger in a stolen vehicle liable for economic damage?

By Suzanne Sanchez, Defender Attorney, and Christina Phillis, Group Supervisor

A person who does not steal or drive a vehicle, but who accepts a ride in the vehicle and knows, or has reason to know, that the vehicle was stolen, commits unlawful use of a means of transportation. A.R.S. § 13-1803(A)(2). However, is this passenger liable for restitution? The answer varies, and depends upon considerations set forth below.

First, beware of any plea agreement provision that the client will pay restitution for all economic loss arising out of a specified law-enforcement report. Appellate courts generally construe such an agreement as a waiver of any argument that the client should not have to pay because he or she did not cause the damage. *See, e.g., Maricopa County Juv. Action No. JV-128676*, 177 Ariz. 352, 355, 868 P.2d 365, 368 (App. 1994).

Restitution is not limited to the adjudicated offense. *In re Stephanie B.*, 204 Ariz. 466, 469-70 ¶¶ 14-17, 65 P.3d 114, 118-19 (App. 2003). Thus, restitution properly can extend to offenses for which the client prevails at trial. *Id.* Restitution also properly can extend to uncharged offenses. *See Maricopa County Juv. Action No. JV-128676*, 177 Ariz. at 354, 868 P.2d at 368. Furthermore, restitution can extend to unlawful conduct that is not an element of the adjudicated offense. *In re Andrew A.*, 203 Ariz. 585, 586 ¶ 7, 58 P.3d 527, 528 (App. 2002).

However, the State must prove by a preponderance of the evidence that the economic loss would not have occurred but for the client's unlawful conduct. *Stephanie B.*, 204 Ariz. at 466, 467 ¶ 1, 469 ¶ 10, 65 P.3d at 115, 117; *see also State v. Wilkinson*, 202 Ariz. 27, 39 P.3d 1131, 1133 (2002). Such evidence may be entirely circumstantial. *Andrew A.*,

203 Ariz. at 587 §§ 8, 10, 58 P.3d at 529. However, such evidence must "reasonably lead to the inference" that the client's conduct caused the loss. *Id.* at 586 ¶ 7, 58 P.3d at 528 (citing *Maricopa County Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996); *State v. Lindsley*, 191 Ariz. 195, 198, 953 P.3d 1248, 1251 (App. 1997)).

Evidence likely will not establish a reasonable inference that the client damaged a vehicle that he did not drive. *See, e.g., Maricopa County Juv. Action No. JV-132905*, 186 Ariz. at 609, 925 P.2d at 750 (citing *Maricopa County Juv. Action No. JV-128676*, 177 Ariz. at 352, 868 P.2d at 365). For example, in *Maricopa County Juv. Action No. JV-128676*, a youth accepted a ride in a car that he knew had been stolen by another youth. 177 Ariz. at 352, 355, 868 P.2d at 365, 368. There was no evidence that such passenger participated in the original taking of the vehicle or drove the vehicle at any time. *Id.* Hence, the passenger was not liable for restitution. *Id.* at 369, 868 P.2d at 356. Courts should not order restitution based upon conspiracy or accomplice-liability theories, absent an adjudication based upon one of these theories. *Id.* at 356, 868 P.2d at 369.

However, if the court concludes, based upon evidence reasonably leading to such an inference, that the client either participated in the unlawful taking of the vehicle or drove the vehicle at some time prior to the arrest, and that such conduct caused damage, then the court may order restitution. *Andrew A.*, 203 Ariz. at 587 ¶ 10, 58 P.3d at 529; *Maricopa County Juv. Action No. JV-132905*, 186 Ariz. at 609, 925 P.2d at 750. A passenger may also cause economic loss to the owner of a stolen vehicle if such passenger takes or damages personal property that the owner left in the

vehicle, or if such passenger inscribes graffiti in or otherwise damages the vehicle. Furthermore, courts can properly order restitution against a person who abandons a stolen vehicle, thereby allowing others to come upon and damage the vehicle. *Id.* at 355, 868 P.2d at 368.

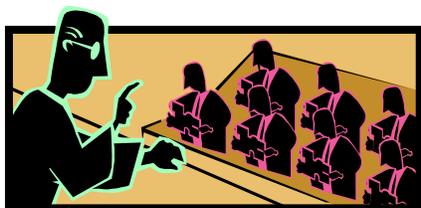
If your client is prosecuted in juvenile court and must pay restitution, the court, pursuant to A.R.S. § 8-344(A), may order that the client pay partial restitution. The statute indicates that in exercising its discretion, the court must consider, *inter alia*, “the nature of the

offense[.]” A.R.S. § 8-344(A). The nature of the offense may be that your client, as a passenger, did not cause most of the damage.

In sum, restitution is a significant part of our clients’ sentences – the ability to pay it in full can oftentimes make the difference in our clients being able to successfully complete probation and move forward with productive lives. Use these standards to limit the amount they are ordered to pay to the economic losses caused by their actions.



Capital Jury Selection Seminar



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Participation is limited exclusively to individuals who currently represent or who intend to represent a defendant in a capital case. The seminar is not open to those who are engaged in the prosecution or adjudication of criminal offenses. The seminar is free of charge to attorneys who are appointed by courts to represent indigent criminal defendants in Arizona. Participants will obtain approximately 6 hours of training in capital defense.

Space is limited. To register for this event, please RSVP by FRIDAY, APRIL 16, at azcaprep@hotmail.com. You also may RSVP by phone at (520) 229-8550 or fax at (520) 229-6150.

Immigration Consequences

Selected Practice Pointers Relating to Juveniles

By Dan Kesselbrenner, Director of the National Immigration Project

Editors' Note: The following article was originally published in the National Immigration Project's March 2004 Newsletter and is being reprinted with their permission.

This article raises selected pointers to eliminate adverse immigration consequences from crimes a noncitizen committed before her or his eighteenth birthday.

Pointer 1: Admissions

An adjudication of delinquency is not a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). However, a noncitizen can be inadmissible from the United States if she or he admits the essential elements of a crime involving moral turpitude or a controlled substance offense. In order for a noncitizen's statements to constitute a valid admission:

- the conduct must be for something that is a crime,
- the government must provide a plain language description of the crime, and
- the admission must be voluntary.

The Board of Immigration Appeals (BIA) has held that an adult cannot admit essential elements of controlled substance or moral turpitude offense if the conduct required mandatory delinquency treatment. *Matter of M-U*, 2 I&N Dec. 92 (BIA 1944).

Example: AV, a 25 year-old noncitizen admitted setting a fire in a national forest when she was 11. Under the Federal Juvenile Delinquency Act (FJDA) no one under the age of 12 can be tried as adult. Even if AV voluntarily

provides the information, the statements are not an admission since she could only face delinquency charges under FJDA standards.

The several states have different standards to determine when a child can be charged as an adult. By examining the rules for when a child can be charged as an adult in a particular jurisdiction, a practitioner can determine whether her or his client's statements could be treated as an admission of a crime.

Pointer 2: Adult Court Convictions May Have Juvenile Dispositions

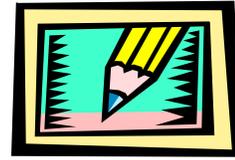
There is a provision in the FJDA that may create a defense for certain under-18 defendants to argue that the disposition is a delinquency adjudication even if they plead guilty to an offense as an adult. Section 5032 of Title 18 provides:

Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter.

For those practitioners assisting minor clients with pending charges in the federal criminal justice system that the Attorney General transferred from juvenile proceedings, try to get a plea that would not have warranted a

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Writers' Corner



Buried Verbs: What They Are and What's Wrong with Them?

Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including A Dictionary of Modern Legal Usage, The Winning Brief, A Dictionary of Modern American Usage, and Legal Writing in Plain English. He is also editor in chief of Black's Law Dictionary in all its current editions. The ABA Appellate Practice Journal has hailed him as "the preeminent expert in America on good legal writing." The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at www.us.oup.com/us/apps/totd/usage. Garner's Modern American Usage can be purchased at bookstores or by calling Oxford University Press at: 800-451-7556.

Jargonmongers call them “nominalizations,” i.e., verbs that have been changed into nouns. Without the jargon, one might say that a verb has been buried in a longer noun — usually a noun ending in one of the following suffixes:

-tion (e.g., implementation)	-ence (e.g., dependence)
-sion (e.g., preclusion)	-ance (e.g., reliance)
-ment (e.g., establishment)	-ity (e.g., deformity)

It is hardly an exaggeration (make that “one hardly exaggerates”) to say that when the verb will work in context, the better choice is almost always to use it instead of a buried verb. Thus, the following examples of buried verbs and the verb uncovered:

arbitration—arbitrate	knowledge—know
compulsion—compel	obligation—obligate or oblige
conformity or conformance—conform	opposition—oppose
enforcement—enforce	reduction—reduce
hospitalization—hospitalize	utilization—utilize or use
incorporation—incorporate	violation—violate

Naturally, you will sometimes need to refer to competition or litigation or regulation as a procedure, and when that is so you must say “competition” or “litigation” or “regulation.” But if a first draft says “the insurance industry’s attempts at regulation of doctors,” you would be well advised to change that to “the insurance industry’s attempts to regulate doctors.”

Why uncover buried verbs?

Three reasons are detectable to the naked eye: first, you generally eliminate prepositions in the process (“perform an analysis of” becomes “analyze”); second, you often eliminate weak be-verbs by replacing them with so-called action verbs (“is in violation of” becomes “violates”); and third, you humanize the text by saying who does what — something often obscured by buried verbs (“upon inspection of the letters” might become “when I inspected the letters”).

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transfer in the first instance. In so doing, the resulting plea is a juvenile disposition under 18 USC § 5032 by operation of law.

The law is less clear for analogous transfers in the state system. Nevertheless, a practitioner may still argue that a plea that would not have warranted a transfer in the first instance should not be a conviction because Congress did not intend for such a disposition to be a conviction in light of 18 USC § 5032. The First Circuit has rejected this argument. *Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001).

In the Ninth Circuit there is case law that requires comparable treatment for noncitizens in federal and state criminal justice systems that would support by analogy this argument. See, e.g., *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that a state rehabilitative disposition is not a conviction for immigration law purposes if it is a counterpart to the Federal First Offender Act (FFOA)). A practitioner within the Ninth Circuit could argue that a noncitizen defendant in state court should get the treatment she or he could have received under the FJDA just as a noncitizen defendant under *Lujan* now gets the benefit of the treatment she or he could receive under the FFOA.

Example: KAM, a noncitizen living in California, does not face juvenile proceedings because he is facing aggravated assault charges. He pleads guilty to disorderly conduct in adult court. There is no provision under California law that a defendant under 18 be treated as a juvenile if he pleads to an offense that would not have justified transfer to adult court in the first instance. Mr. M can argue that he is entitled to the treatment he would have received had he faced federal charges, which would mean that he would be treated as a juvenile.



Practice Pointer: Motion to Strike State's Allegation of Priors in "Third Strike" Misdemeanor Cases

By Karen Boehmer, Defender Attorney

We are all familiar with the "three strike" rule that increases punishment for misdemeanors such as DUI, shoplifting, Proposition 200 drug offenses, and domestic violence. The first and second offenses remain misdemeanors, but cross that magic number of three offenses within 60 months and your client automatically enters felony land. For crimes involving domestic violence, the third misdemeanor offense within 60 months is bumped up to Aggravated Domestic Violence, a class 5 felony.

This is why it is imperative to double check the misdemeanor priors that the State alleges for purpose of sentence enhancement. If the first two misdemeanors occur out of "the same series of acts," I recommend filing a Motion to Strike Allegation of Priors, thereby asking the Court to dismiss the felony charge of Aggravated Domestic Violence. A sample motion is provided on pages 10-11.

Practice Pointer: Sample Motion

Motion to Strike State's Allegation of Priors in "Third Strike" Misdemeanor Cases

The Arizona State Legislature has decided that for certain crimes, a third conviction for an offense should be treated more seriously than the first two. *State ex rel. Romley v. Martin*, 205 Ariz. 279, 284, 69 P.3d 1000, 1005 (2003) (en banc). The legislature punishes repeat offenders who commit the magic number of three offenses. "The legislature can constitutionally treat the third occurrence of criminal conduct in a more serious fashion than the first and second occurrences of precisely the same conduct." *Id.*; See *State v. Renteria*, 126 Ariz. 591, 594, 617 P.2d 543, 546 (App.1979) (upholding against an equal protection attack a prior version of the drunk driving statutes which prescribed a mandatory sixty-day sentence for those with two prior convictions in the past twenty four months, and concluding that classifying repeat offenders more harshly than first or second time offenders is rational).

The "three strike rule" affects certain misdemeanor crimes including shoplifting under A.R.S. §13-1805(I); Proposition 200 drug offenses under A.R.S. §13-901.01(H)(1); driving under the influence of alcohol (DUI) under A.R.S. §28-1381(C); and domestic violence (DV) offenses under A.R.S. §13-3601.02(A). The first or second offenses may be misdemeanors, but a third offense within sixty months can amount to a felony charge with harsh prison time.

The timing of these three strikes is crucial. The legislature in the DV and DUI statutes was careful to distinguish between three or more offenses that occur on the same day and three or more offenses that occur over different times and dates. Both statutes contain language stating that the third or subsequent misdemeanor conviction arising out of the same series of acts would not be enhanced to the felony level. A.R.S. §28-1383(B); A.R.S. §13-3601.02(D).

In particular, the domestic violence statute reads, "The dates of the commission of the offenses are the determining factor in applying the sixty month provision in subsection A of this section regardless of the sequence in which the offenses were committed. *For purposes of this section, a third or subsequent violation for which a conviction occurs does not include a conviction for an offense arising out of the same series of acts.*" A.R.S. §13-3601.02(D) (emphasis added). When including this subsection, the legislature ensured that if, for example, someone committed three misdemeanor domestic violence acts all in the same day and same time (same series of acts), then that third act would not rise to the level of a felony, because that would go against the whole point of the statute, which is to punish *repeat offenders*. According to the misdemeanor statutes, repeat offenders are not those who commit crimes on one occasion, or two occasions, but on three or more occasions. Subsection D makes clear that that the number of offenses can *not* be used to aggravate a misdemeanor to the felony level, as long as the offense arose out of the same series of acts.

The Defendant has been charged with Aggravated Domestic Violence, a class 5 felony. The State improperly alleged the two prior misdemeanors as two separate convictions, when for sentencing enhancements, they should be considered as only one prior because they occurred out of the same act. The two prior misdemeanor offenses occurred on the same day, same place, same time, same incident, and with the same victim. Therefore, there is no question that these two offenses arose out of the "same series of acts." Because subsection D shows that the number of offenses in the same act can not be used to aggravate a misdemeanor to the felony level, that supports the presumption that the Defendant's two closely related misdemeanor convictions count as only one conviction for sentencing enhancement purposes.

Misdemeanor Arizona case law is limited. But, felony case law helps to understand the logic behind why the Defendant's two convictions should count as one. "Offenses committed on the same occasion cannot be historical prior felony convictions, because the offenses that are the subject of the prior conviction must have been committed before the present offense." *State v. Thompson*, 200 Ariz. 439, 441, 27 P.3d 796, 798 (2001) (en banc). Because the Defendant's two misdemeanors occurred together, one is not a prior for the other. If the convictions can not be priors for each other, then they can not be two separate priors for purposes of this case.

Moreover, the general felony sentencing statute, A.R.S. §13-604(M), also supports the fact that the two prior closely related misdemeanor convictions cannot be used to aggravate the subsequent misdemeanor to a felony. This sentencing statute provides that "convictions for two or more offenses committed on the same occasion shall be counted as only one conviction for purposes of this section." A.R.S. §13-604(M). No "all encompassing test" exists to determine whether different crimes occur on the "same occasion." *State v. Derello*, 199 Ariz. 435, 437, 18 P.3d 1234, 1236 (Ariz. App. 2001) citing *State v. Henry*, 152 Ariz. 608, 612, 734 P.2d 93, 97 (1987). Rather, a court must consider the spatial and temporal relationship between the two crimes, whether the crimes involved the same or different victims, whether the crimes were continuous, and whether they were directed to the accomplishment of a single criminal objective. See *State v. Kelly*, 190 Ariz. 532, 534, 950 P.2d 1153, 1155 (1997).

For example, when different crimes, even though unrelated in nature, are committed at the same place, on the same victim or group of victims, and at the same time or as part of a continuous series of criminal acts, they should be considered as having been committed on the "same occasion" for purposes of sentence enhancement. See *id.* (citing *Henry*, 152 Ariz. at 612, 734 P.2d at 97 (1987); *State v. Derello*, 199 Ariz. 435, 18 P.3d 1234 (Ariz. App. 2001) (unlawful flight from a law enforcement vehicle and prohibited possession of a deadly weapon offenses occurred on the same occasion so that the offenses were not separate historical prior felony convictions for purposes of sentence enhancement); *State v. Kelly*, 190 Ariz. 532, 950 P.2d 1153 (1997) (en banc) (defendant sold marijuana and methamphetamine to single officer in single transaction and offenses were uninterrupted and were committed at the same time and place with single criminal objective; these two prior convictions were properly treated as single transaction committed on the same occasion for purpose of sentence enhancement); *State v. Noble*, 152 Ariz. 284, 286, 731 P.2d 1228, 1230 (1987) (defendant's kidnapping and child molestation offenses were committed on the same occasion because "1) appellant's criminal conduct was continuous and interrupted, 2) appellant's conduct was directed to the accomplishment of a single criminal objective..., 3) only one person was victimized, and 4) the time period involved was very brief.")

In our case, the Defendant was convicted of two prior misdemeanor domestic violence counts that occurred on the same day, same place, same time, same incident, with the same victim. The fact that there were two separate convictions, does not change the fact that they were committed on the same occasion. Therefore, there is no question that these two acts fall under the "same occasion" prerequisite and should be counted as only one conviction for purposes of sentencing enhancement.

Defendant requests the court strike the allegation of priors because the two predicate misdemeanor domestic violence convictions arose out of the same series of acts and were committed on the same occasion, and thus should be considered one prior for purposes of aggravating the current misdemeanor into a felony. For this reason, Defendant moves the Court to dismiss the current charge of Aggravated Domestic Violence, a class 5 felony.

Arizona Advance Reports

By Terry Adams, Defender Attorney



Editors' Note: This will be our last Arizona Advance Reports column. In an effort to disseminate information in a more timely fashion, staff will receive case summaries of recent appellate decisions via e-mail. Starting May 1, 2004, Kathleen Carey, Public Defender Legislative Relations Coordinator, will distribute regular e-mail summaries prepared by Randy Callender, a private attorney and current Website Administrator for the Arizona Public Defender Association. Randy's summaries should normally be distributed within a day or two of a decision. Kathleen will forward the summaries to all of our office's attorneys, law clerks and paralegals. The editors would like to extend their sincere appreciation and thanks to Steve Collins and Terry Adams for preparing the Arizona Advance Reports column these many years.

State v. Dean, 418 Ariz. Adv. Rep. 70 (SC, 9/15/03)

The defendant was lawfully stopped while driving. He fled the scene, was apprehended two and one half hours later, and arrested for outstanding warrants. After his arrest, the police searched his vehicle and found methamphetamine. He filed a motion to suppress arguing that the search was not "incident" to his arrest because it was conducted long after he drove the vehicle. The superior court granted the motion, the court of appeals reversed. Here the Supreme Court granted review and affirmed the trial court holding that the search was not incident to the arrest and a warrant was required.

State v. Long 418 Ariz. Adv. Rep. 5 (CA 1, 2/0/04)

The defendant was convicted of two counts of sexual conduct with a minor and one count of sexual exploitation of a minor. He was sentenced to 24 years for one count of sexual conduct and 20 years for exploitation to be served consecutively. On appeal he contends that the sentence was cruel and unusual. The exploitation charged consisted of possessing a CD depicting his sexual activity with the minor. The court found that under the circumstances of this case the sentence was appropriate.

State v. Rivera, 418 Ariz. Adv. Rep. 3 (CA2, 1/30/04)

The defendant was convicted of aggravated DUI. At trial the state proceeded on alternate theories that he was either driving or in actual physical control by grabbing the steering wheel while his girlfriend drove. The court held that procedure was proper and that grabbing the steering wheel while someone else is driving is sufficient to establish actual physical control.

State v. Brown, 419 Ariz. Adv. Rep. (CA 2, 2/17/04)

The defendant was convicted of aggravated harassment for stalking his ex-girlfriend after a magistrate issued an injunction against him. On appeal, he argued that Arizona's harassment statute is unconstitutionally vague and overbroad. The court denied relief and affirmed his conviction and sentence.

State v. Devolt, 419 Ariz. Adv. Rep. 3 (SC, 2/17/04)

The defendant was convicted of two counts of first degree murder and sentenced to death. He was a juvenile at the time of the murders. The Supreme Court remanded for resentencing. Regarding the death sentence for juveniles, the court found that consideration of age alone as a statutory mitigating factor is insufficient in the context of the capital sentencing scheme to provide juvenile defendants with the individualized consideration mandated by the eighth Amendment. Therefore, the state may not seek the death penalty against a juvenile without an individual assessment of the juvenile's moral responsibility at the time of the offense. The trial court was ordered to make this assessment before resentencing.

Jury and Bench Trial Results

February 2004

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of *for The Defense*, please contact the Public Defender Training Division.



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A fourth reason is not detectable to the naked eye, though. It is the sum of the three reasons already mentioned. For example, I might write this: "After the transformation of nominalizations, the text has fewer abstractions, so readers' visualization of the discussion finds enhancement." Or I could make the readers' job far more pleasant by writing this: "Uncovering buried verbs makes writing more concrete, so readers can more easily see what you're talking about."

Though long neglected in books about writing, buried verbs ought to be a sworn enemy of every serious writer. In technical writing, they often constitute an even more serious problem than passive voice.

Look for more from Bryan Garner in future columns of Writers' Corner.



The Maricopa County 5th Annual Employee
Picnic

Sunday, April 25, 11:30 am - 3:30 pm.

The Pera Club, 1 East Continental Drive, Tempe



Softball - Volleyball - Tennis - Wall-climbing - Craft fair - Free door prizes -
Music - Midway games -
Live entertainment

Lunch included! Employees & friends all invited!

Tickets now on sale at First Choice, 101 W. Jefferson, (inside the
Change of Venue)

\$13 family up to 4; \$4 each additional; \$5 Individuals;
FREE, Children 2 and younger.

For information: [http://
ebc.maricopa.gov/pio/](http://ebc.maricopa.gov/pio/)



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for The Defense

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