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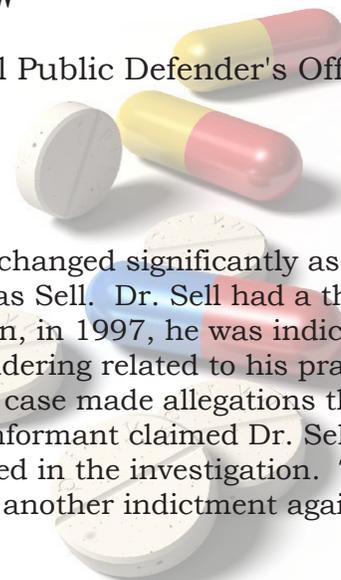
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Forced Medication after *U.S. v. Sell*

Fighting Your Client's "War on Drugs"

By Donna Elm & Doug Passon, Federal Public Defender's Office

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I. What happened in *Sell*?

The landscape of forced medication cases changed significantly as the result of the struggle of Dr. Charles Thomas Sell. Dr. Sell had a thriving dental practice in suburban St. Louis when, in 1997, he was indicted on over sixty counts of fraud and money laundering related to his practice.¹ After the first indictment, a witness in the case made allegations that Dr. Sell had threatened her life; another informant claimed Dr. Sell was making plans to kill an F.B.I. agent involved in the investigation. Thus, in April of 1998, the government obtained another indictment against Dr. Sell, adding those serious charges.

Dr. Sell had a history of mental illness dating back to 1982. Questions regarding competency were inevitably raised, and in early 1999, the magistrate entered an order sending Dr. Sell to the United States Medical Center for Federal Prisoners in Springfield, Missouri ("Springfield"). The doctors at Springfield believed he was suffering from Delusional Disorder and determined he was not competent to stand trial. The federal magistrate then ordered that Dr. Sell be "hospitalized for medical treatment" at Springfield for up to four months to determine if he could be restored to competency.

The staff at Springfield quickly decided that the only way to restore Dr. Sell to competency would be through the use of powerful anti-psychotic medications. However, he did not believe he had a problem that needed medicating. Moreover, given his medical background, he well knew that these drugs could have serious, permanent, even life-threatening side-effects. Therefore, he adamantly refused the drugs. Consequently, Springfield staff took steps to force the drugs upon him.²

In Dr. Sell's words, they did everything they could to make his life "a living hell" until he agreed to take the drugs.³ They determined he was "dangerous" when he took a liking to a staff nurse and addressed her by her first name. Moving him from an "open" ward where he had many privileges and virtually unrestricted movement, he was placed in solitary

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confinement. Dr. Sell complained he suffered serious physical abuse at the hands of the Springfield guards. For example, he alleged that the guards stripped him, sprayed him with scalding water, and dragged him, nearly naked, in handcuffs, through the corridors of the institution. Some dismissed these allegations as the fantasy of a delusional mental patient; however, his lawyers eventually uncovered institutional video recordings that captured the abuse and substantiated his claims.⁴

Dr. Sell never backed down from his staunch refusal to take antipsychotics, and neither did his lawyers.⁵ After much litigation in lower courts, the Supreme Court agreed to hear his case, to answer the question “whether the Constitution permits the Government to administer antipsychotic drugs voluntarily to a mentally ill criminally defendant– in order to render that defendant competent to stand trial for serious, but nonviolent crimes.”⁶ The result was a landmark decision that required the government to make a substantial showing before it could proceed with forced medication of an incompetent defendant.

The Court remanded the case to the District Court for further proceedings under the tests set forth in the *Sell* decision, but no further attempts were made to force medicate him. In 2005, after nearly seven years of fighting off forced medication, he was finally deemed competent to enter into a plea agreement. He plead no contest to the charges and was sentenced to time served and supervised release. He received (non-drug) therapeutic treatment from Dr. Robert Cloninger, the defense expert in his case.⁷ As of this writing, his Delusional Disorder is in remission, and he is living a quiet, normal life in Missouri .

A. What is the *Sell* holding?

The Supreme Court framed the issue as a conflict between individual autonomy rights and the Government’s right to intrude on those in criminal competency restoration. It framed the issue as: “[h]as the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual’s protected interest in refusing it?”⁸ The Court answered that the Constitution would allow forced medication under the following, limited circumstances:

- (1) There must be “*important governmental interests*” at stake. This means that the charges must be “serious,” and that “special circumstances” may lessen the importance of that interest.
- (2) Involuntary medication must “*significantly further*” the important governmental interest. This means that:
 - (A) the “administration of the drugs must be *substantially likely* to render a defendant competent to stand trial;” and,
 - (B) the administration of drugs must be “*substantially unlikely*” to have side effects that will undermine the trial’s fairness or significantly interfere with the defendant’s ability to assist counsel in conducting a defense. This is the issue raised by Justice Kennedy in his *Riggins v. Nevada* concurrence that becomes a central part of the majority holding in *Sell*.
- (3) Involuntary medication must be “*necessary* to further those interests.” This means there are no likely *alternative, less intrusive* means to achieve substantially same results.
- (4) Finally, the involuntary medication must be “*medically appropriate*.” It must be “in the patient’s best medical interest in light of his medical condition.” This prong examines

issues such as side-effects, efficacy of using specific drugs to treat specific conditions, and available medical research.⁹

Because the Court views these standards as rigorous protections, it notes that instances of involuntary medication “may be rare.”¹⁰

B. What was the *Riggins* concurrence that was relied on in *Sell*?

Riggins preceded *Sell* by eleven years. In *Riggins*, the pre-trial defendant was medicated with an antipsychotic drug, Mellaril, to render him competent for trial. He moved to suspend that treatment for trial, arguing that it interfered with his Due Process rights to show the jury his present demeanor as well as his mental state when unmedicated. His motion was summarily denied, and he went to trial on capital charges with an insanity defense; having testifying at trial while medicated, he was convicted and sentenced to death.¹¹ The Supreme Court held that this violated his Sixth and Fourteenth Amendment rights. He was entitled to a hearing regarding forced administration of the drugs.¹² However, the more intriguing Eighth Amendment question, that is the right to show the jury what he looked like when unmedicated, had not been preserved. So the *Riggins* majority did not address it.¹³ In his concurrence, Justice Kennedy seized on that issue, considering it an important trial right.¹⁴ The *Riggins* Kennedy concurrence became a central pillar of the *Sell* holding.¹⁵

C. What constitutional protections are implicated by *Sell*?

1. Substantive Due Process:

The Supreme Court found that *substantive* Due Process may prevent the government from interfering with a defendant’s medical decision about how to treat his mental illness.¹⁶ This right is also referred to as a right to personal autonomy, privacy, and freedom from bodily intrusions.¹⁷ For federal prosecutions, it is embodied in the Fifth Amendment to the United States Constitution; for state prosecutions, that federal protection is imposed through the Fourteenth Amendment. This right was also, incidentally, the constitutional basis for the related *Riggins* decision.¹⁸

2. Procedural Due Process:

Aside from personal liberty interests, the criminal defendant’s right to a fundamentally fair trial (also guaranteed under the Fifth and Fourteenth Amendment Due Process clauses) is implicated if forced medication interferes with his trial. This is *procedural*, as opposed to *substantive*, Due Process. This right was a major concern of Justice Kennedy in his *Riggins* concurrence where he recognized that “elementary protections against state intrusion require the State ... to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant’s capacity or willingness to react to the testimony at trial or to assist his counsel.”¹⁹ That issue was subsequently embraced by the majority as a key concern in *Sell*.²⁰

3. Right to Counsel:

When the medication’s side-effects interfere with the defendant’s assistance of counsel or even talking to counsel (*i.e.*, when it renders them a “zombie,” sedates them, or makes them withdraw), then it impacts his Sixth Amendment (applied to state cases through the Fourteenth) right to assistance of counsel.²¹

4. Free Speech:

In addition, and for the same reasons, if it prevents him from communicating, the First Amendment guarantee of “free speech” is implicated.²²

5. State Constitutional Rights:

Another vast and normally underused source of constitutional protections lies in state constitutions. For example, Washington (and many other states) actually have express constitutional Privacy clauses that have been interpreted to provide individual autonomy over medical treatment.²³ The Arizona Constitution guarantees criminal defendants the right to “Appear and Defend.”²⁴ Appear connotes that not only can the defendant see the trial, but also the jury can see him. When the government tinkers with how he appears in a way that prejudices his defense, then that constitutional guarantee could be violated as well.

II. What triggers Sell litigation?

The seeds of a *Sell* hearing are sewn when the medical staff concludes that: 1) medication is necessary to restore to competency; 2) the patient has refused to take medication voluntarily; and 3) no alternative means of forcing the client to take medication exist.

A. When is medication necessary?

The central mandate of *Sell* is that intrusive medical intervention is a course of last resort. Competency restoration programs should consider lesser alternatives *before* asking to force-medicate. See § XIII.A, below, for greater discussion of alternative treatments.

B. What constitutes a refusal of treatment?

Because defendants are constitutionally entitled to refuse medication, it is not their *refusal*, but a *waiver* of that right of refusal, that must be clear and express. Even apparent agreement to medication may not constitute a knowing, voluntary waiver.

1. Is a defendant entitled to informed consent?

Yes. Whether a defendant waived his right to refuse medication involves “informed consent.” All medical patients are entitled to informed consent (information about potential negative side effects or outcomes) before making treatment decisions. If the defendant is not adequately informed about the possible negative consequences of medical treatment, then any consent is flawed. This principle should apply when medicating prisoners and pre-trial detainees as well.²⁵

2. Does acquiescence to treatment waive the Sell issue?

Probably not. There is little case law on this issue. Acquiescence to medication has been held to mean consent in California.²⁶ However, that position may be challenged because waiver of *constitutional* rights must be by clear and express language.²⁷ Moreover, catatonic, terrified, retarded, or speech-impaired defendants may not be realistically capable of overt refusals. If the defendant is that impaired, mere acquiescence to treatment should not be equated with consent.²⁸

3. Can someone else refuse medication for the defendant?

Yes. Some mentally ill clients are so incompetent that they accept medication when they should reject it. However, the criminal defense attorney should be wary of the potential ethical quandary of deciding what is in his client’s best medical interests. Instead, an attorney should consider having a guardian or guardian *ad litem* appointed to make medical decisions for the defendant to avoid that dilemma. When the defendant is a juvenile, his parents retain the right to make medical decisions for him, and they can decide whether he should be medicated.

4. How do you discuss this decision with your client?

Defendants, especially when impaired, may not have the will or backbone to stand up to their doctors. Counsel can be helpful in asserting the refusal of medication for their clients. Furthermore, the defendant is entitled to legal advice when making this decision. However, restoration programs may not make communications with the attorney a priority. Indeed at Springfield, all inmate calls are tape-recorded, and doctors insisted on overseeing calls with counsel;²⁹ lawyers' demands for non-recorded and unobserved communications with clients were turned down. However, competency restoration is a critical stage in a criminal prosecution where counsel is guaranteed.³⁰ Suggesting that doctors check with their counsel before denying a defendant confidential attorney calls usually corrects the situation; but if not, the court will provide an appropriate order.

5. Can a defendant discontinue medication he has agreed to take?

Yes. Deciding not to accept treatment, whether before it is given or after, is treated the same. Indeed, *Riggins* arose from a motion to *discontinue* antipsychotics.³¹ If your client decides to stop treatment, you should send a firm letter invoking his right to cease treatment as soon as medically safe to the warden and chief psychiatrist at the restoration program.³² You should also be entitled to an expert for a second opinion if your client is experiencing problematic effects from his treatment. In a case where a defendant was gaining a great deal of weight on second generation antipsychotics, his lawyer asked for an independent expert to evaluate whether the weight gain was drug-related, and if so, whether the defendant should demand to stop the medicine.

C. Can the government force-medicate your client without a *Sell* hearing?

Yes, but not if the medication is necessary solely to restore to competency. In *Sell*, the Supreme Court strongly suggested that the institution should pursue alternative grounds to forced medication before requesting a court to sanction forced medication solely for competency restoration.³³ Most commonly, the institution determines that the defendant poses an immediate danger to himself or others within that setting, and initiates so-called "*Harper*" hearings.³⁴

In *Harper*, the defendant was incarcerated for a parole violation in a correctional facility designed to hold and treat seriously mentally ill offenders.³⁵ After he refused medication, the facility sought to medicate him involuntarily pursuant to their internal policy allowing it when the inmate suffers from a mental disorder *and* is either "gravely disabled"³⁶ or "poses a 'likelihood of serious harm' to himself, others, or their property."³⁷ Their regulations provided the inmate with some administrative and judicial process, including the rights to an administrative hearing in the facility, notice of the hearing and the reasons forced medication is being sought, call and confront witnesses, assistance from a "lay advisor", and appeal the decision internally and to the state court.³⁸ The Supreme Court condoned force medicating Harper, holding that those internal administrative regulations comported with substantive and procedural due process.³⁹

As a result, the federal government enacted C.F.R. 549.43, providing substantially similar procedures for administrative forced medication hearings in federal institutions.⁴⁰ Interestingly, however, the regulation appears more expansive, allowing the administrative officer (*i.e.*, psychiatrist) conducting that hearing to determine "whether treatment or psychotropic medication is necessary in order *to attempt to make the inmate competent for trial* or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison."⁴¹ Courts have been confused by seemingly different directives from the *Sell* Court (preference for exhausting alternative grounds for forced medication), and C.F.R. 549.43.

1. Administrative Hearing for Danger/Gravely Disabled:

The government probably does not need to pursue a *Harper* hearing before initiating *Sell* litigation. Some federal courts have found that C.F.R. § 549.43 must be exhausted first;⁴² however, different federal courts have held otherwise.⁴³ Although courts are divided, it should not be necessary to exhaust administrative remedies, particularly when treating clinicians have concluded that the defendant is neither dangerous nor gravely disabled.

Where courts have remanded a case seeking a *Sell* hearing for a *Harper* administrative hearing instead, they lament that the government had not followed the *Sell* Court's directive to pursue alternate grounds first.⁴⁴ However, *Sell* does not require that *Harper* hearings necessarily or automatically precede a *Sell* determination. To the contrary, it merely stated that, "a court asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not."⁴⁵ To avoid a remand for an administrative hearing, ensure that the record clearly indicates that treating clinicians do not believe circumstances warrant a *Harper* hearing (*i.e.*, the defendant is not gravely disabled and does not present a danger to himself, others, or property). Doctors often include such information in their competency reports to the court. Enlist your client's treating clinicians' help in making the record clear on this issue.⁴⁶

2. Administrative Hearing for Competency:

Sell issues should not be addressed in the administrative context, notwithstanding the language of the C.F.R. referring to involuntary medication for competency restoration. That provision was created in response to *Harper* (that pre-dated *Sell* by more than a decade), and dealt solely with force medicating a defendant because he was presently dangerous or gravely disabled.⁴⁷ Relying on that language and the "doctrine of exhaustion," the Fifth Circuit stated in *dicta* that an administrative hearing as to force-medicating the defendant for competency must precede a judicial *Sell* hearing for the same purpose.⁴⁸ However, it is unlikely elsewhere that restoration programs will have to conduct redundant administrative hearings before resorting to *Sell*. Moreover, *Sell* clearly contemplated *judicial* determinations of its factors, and distinguished legal questions about competency restoration from *Harper's* purely medical question.⁴⁹ Hence, "[i]t is inappropriate for [clinicians at an institution] to determine whether or not prosecutorial interests are so significant that a medication order issued pursuant to *Sell* should be pursued."⁵⁰

Even if the C.F.R. did require that administrative hearings precede judicial *Sell* hearings, the "doctrine of exhaustion" allows courts to bypass administrative procedures under "extraordinary circumstances."⁵¹ Such conditions "typically arise when the administrative process would be inadequate or futile, the claimant challenges the legality of the administrative process itself, or the claimant has advanced a constitutional challenge that would remain after the completion of the administrative process."⁵² *Sell* made it quite clear that, unlike *Harper* concerns, *Sell* addresses legal questions that cannot be resolved by medical professionals. Thus, administrative procedures do not come close to satisfying *Sell* requirements, nor provide the defendant with adequate procedural or substantive due process.⁵³

3. Treatment Differences between *Harper* and *Sell*:

In fact, the Supreme Court's suggestion that administrative *Harper* hearings would obviate the need for judicial *Sell* hearings may be overly simplistic. Medicating for competency and medicating for danger may be entirely different. According to respected forensic psychiatrist Dr. Jack Potts of Phoenix, a doctor in a clinical setting may prescribe far less psychiatric drugs (to reduce the risks of side-effects) to help a floridly psychotic individual feel better than a doctor in a competency program to restore his competency. In the latter, exposure to more dangerous drugs may be

justified due to the theory that competency only has to be maintained through trial and sentencing; once past that, the high dosage may be reduced or less problematic drugs substituted. Dr. Potts also pointed out that forced medication under *Harper* is short-term, usually only for a few days, and once the defendant's dangerousness passes, drugs are discontinued. Because restoring and maintaining competency requires long-term drug administration, *Harper* hearings cannot supplant *Sell* litigation. You may therefore be able to forego a *Harper* hearing by showing that the means and goals of administrative involuntary treatment significantly differ from those of *Sell*.

III. How is *Sell* litigation initiated?

Restoration doctors tell the prosecution that they believe the defendant should be medicated in order to restore him, but that he rejects that treatment. They will ask him to move for a court order allowing forced medication. Because it is the prosecution's burden of proof, they must initiate the litigation.

A. What court conducts the *Sell* hearing?

Sell litigation, at least in federal practice, is conducted in the jurisdiction where the case lies. It is part and parcel of the criminal case – as opposed to civil commitment procedures that generally occur in the jurisdiction where the defendant presently resides. In federal and many state jurisdictions, restoration programs are situated in another venue.⁵⁴ In federal cases, it is not clear whether the court will physically conduct the hearing in its own venue or go to the location where the defendant is for the *Sell* hearing. In some cases, the court and lawyers have traveled to the jurisdiction of the medical facility, borrowed a local federal courtroom, and held the hearing there.

B. Can commissioners or magistrate judges conduct *Sell* hearings?

Probably not, though they may take evidence and make recommendations for a higher judge to use to rule. Whether a *Sell* hearing is conducted by a junior judicial officer (like a magistrate judge or commissioner who is an employee, as opposed to an appointed or elected judge) has been debated. In the Ninth Circuit, for instance, magistrate judges are not permitted to make *Sell* rulings.⁵⁵ Nonetheless, they may conduct hearings to establish facts, and then make recommendations to the assigned district court judge who would render the decision. In some state jurisdictions, similar lower judicial officers have conducted these hearings. Practitioners should nonetheless request that judges both hear the evidence and make the rulings: the findings of law and fact are complex, and most courts will want their independent judiciary to handle such complicated undertakings.

1. Was the judge tainted by judicial training?

On July 8, 2004, federal magistrate judges were provided with a training session called *Competency and Dangerousness Issues Presented to Magistrate Judges*, at the National Workshop for U.S. Magistrate Judges in Chicago. Springfield's Dr. Wolfson provided written materials and a lecture that he expressly hoped would be used later as a resource when the judges had to conduct *Sell* hearings.⁵⁶ His teachings unmistakably advocate the government's position favoring medicating incompetent defendants. You may want to consider asking judges whether they received any training on *Sell* hearings from persons representing restoration programs, as it could taint the judge.

C. Does *Sell* only apply pre-trial?

Yes, by its plain language, *Sell* applies pre-trial. The first prong of *Sell* refers to "the government's interests in bringing to trial."⁵⁷ The second prong balances that against the defendant's interests in avoiding drug side-effects that interfere with his ability "to assist counsel in conducting a trial defense."⁵⁸ Nonetheless, nothing in *Sell* excluded it from applying to post-trial litigation. Thus,

the Fourth Circuit applied it to defendants pre-sentence.⁵⁹ Jurisdictions are split over whether it applies post-sentencing. *Sell* has been used in federal probation or supervised release violations in Delaware and West Virginia.⁶⁰ On the other hand, the Eighth Circuit held that the government may force medication on a defendant who was incompetent to be executed without resort to a *Sell* hearing; *certiorari* was denied by the Supreme Court in that case.⁶¹

IV. How do I prepare for the *Sell* hearing?

A. What discovery should I seek?

You should consider the treating clinicians as government “experts” and proceed accordingly. Obviously, it is important to secure their resumes, reports, transcripts of prior testimony, case law summarizing their testimony, and their publications. Make efforts to verify their stated credentials. Beyond that, you should demand a complete copy of your client’s medical records at the restoration facility. In one case, a Springfield psychiatrist sought to administer drugs known to trigger diabetes. He testified at length about the care they took to ensure the defendant would not be at risk with these drugs, including checking family history. Because counsel had gotten their client’s Springfield medical records, they could confront the doctor with his own intake forms reflecting a pervasive family history of diabetes – establishing instead Springfield’s cavalier approach to treatment: prescribe now, ask questions later!



B. Do their doctors have to specify the drug regimen they recommend?

Yes. We have additionally seen government doctors refuse to commit on the medication they would use because they “wanted to involve the patient in all treatment decisions.” In fact, the patient had made his treatment decision (no drugs), and they wanted to override it! Their purpose instead was to hinder the defense from preparing to challenge the drug choice in the *Sell* hearing. There is little law on point, but the Ninth Circuit recently required drug specification.⁶² It reasoned that, otherwise, how else can the Court decide whether that treatment is efficacious and offers the least serious side-effects? In addition, a Nebraska District Court Judge recently remanded a *Sell* hearing to the magistrate judge for gathering more facts, specifying that the lower court needed to ascertain the type of medication being contemplated before a decision can be made on the *Sell* issue.⁶³

C. What investigation should I do?

You should gather as much of your client’s medical and psychological records as possible. Bear in mind that if he has been medicated with the proposed drug before, and it did not work, you should be able to foreclose using it again. You may also uncover a medical condition or family history that counterindicates using a given drug.

D. Do I need to have an expert?

Most likely, yes. You probably will not need an expert if the only issue in your case is the legal determination whether important governmental interests are at stake. However, the other three prongs of *Sell* call for involved medical evidence that depends on expert testimony. Government doctors can become highly “invested” in their opinions, so they cannot be relied upon to testify favorably for the defense.

You can also bolster your doctor’s expertise with similar expert opinions from other cases. Through resources like NACDL (or its mental health committee), its state affiliates, or the Federal Defender

Organization, you may locate testimony or affidavits from other doctors backing your expert's conclusions.⁶⁴ These sworn opinions do not supplant having your own expert, but they do support him, and are less expensive than having a bevy of doctors testify.

E. Do I need to learn the science?



Yes. You *do* need to develop a fundamental understanding of the science. Government doctors may skirt it in their opinions, and you have to be ready to discredit glib theories with hard science. The authors have reviewed a number of failed *Sell* hearings where doctors just stood on their expertise that certain medications would be effective, and were not challenged with controverting research.

By understanding the neurochemistry of how the brain and certain drugs function, you can impeach their experts, showing that the proposed medicine does not correct the biological problem causing incompetency. For instance, antipsychotics are a misnomer, as they do not correct all types of psychoses. They block some of the brain chemical, dopamine, so are usually effective on psychoses caused by excess dopamine (*e.g.*, Schizophrenia, Dementia, and Mania).⁶⁵ But, psychoses that do not have excess dopamine (such as Delusional

Disorder, severe Depression, or those caused by brain damage) may not improve with dopamine-blocking drugs. Moreover, a healthy amount of dopamine is necessary for proper brain functioning; so reducing it in someone with a normal amount of it, interferes with normal brain chemistry.

Government doctors with an agenda will tend to paint with an overly broad brush, repeating the mantra of “because he is psychotic, we treat him with antipsychotics.”⁶⁶ When you can counter such generalities with the neurochemistry of both the disease and the drug, then the judge can appreciate why the recommended drug is inappropriate for this defendant. To further challenge doctors' opinions, you should understand how they come up with treatment recommendations. The “medical model” is a set of procedures physicians are trained to follow.

(Endnotes)

1. *See United States v. Sell*, 539 U.S. 166, 169-70 (2003).
2. *Id.*
3. The authors recently gave a presentation on litigating forced medication cases at the 2007 NACDL Annual Conference in San Francisco. In preparation for that presentation, Doug Passon interviewed Dr. Sell.
4. *See, e.g.*, Carolyn Tuft, *Judge Rules No Sell Trial Next Week*, St. Louis Post Dispatch, Nov. 23, 2004, at C1. Although the tapes have never been made public, the expert in Dr. Sell's case (Dr. Robert Cloninger) was allowed to view them in connection with a subsequent competency evaluation. He filed a report with the court declaring that the inhumane treatment by Springfield staff had exacerbated competency issues. The newspaper reported the following excerpts from an affidavit submitted by Dr. Cloninger which contained harrowing descriptions of the abuse he witnessed on the video tapes:

On Nov. 9, 1999, a team of seven guards – some wearing riot gear of heavily padded vests and black helmets with tinted face shields – pulled Sell from his jail cell. Sell cooperated “fully and is [sic] peacefully” in the move to an isolation cell “where his clothes are cut from his body, he is injected seemingly unnecessarily with a sedative and he is handcuffed to an item referred to as a ‘black box.’” Sell was left on the concrete slab for 19 hours, Cloninger noted.

On Feb. 19, 2000, a guard is seen preparing a shower and taking Sell into it. Sell is in the shower, while a female staff member is seen “peering into the shower cell.” “Abruptly, Dr. Sell is seen forcibly falling forward out of the shower cell room.” The guard then pulls Sell, who is handcuffed behind his back, forward and onto the floor, Cloninger said. “As Dr. Sell lies [sic] in the floor naked except for his scanty underpants,” the guard continues to “push or pull” Sell by his handcuffed wrists down the hall and back to his cell.

An internal investigation, Cloninger wrote, shows that the guard had been spraying Sell with scalding hot water while calling the female staffer to watch. Sell suffered cuts on his left hand, marks from the dragging on his back and first-degree burns on his legs, chest and back, Cloninger wrote.

“The water was sprayed forcefully onto Dr. Sell by a hose that had been pre-arranged by the (guard) even before escorting Dr. Sell to the shower,” Cloninger wrote, noting that the water temperature was 120 degrees Fahrenheit.

Id.

5. Dr. Sell was represented by Lee Lawless (Federal Public Defender for the Eastern District of Missouri) and Barry Short (Lewis, Rice & Fingersh in St. Louis).
6. *Sell*, 539 U.S. at 169.
7. Dr. Cloninger is a professor of Psychiatry and Genetics at the Washington University School of Medicine in St. Louis. He is also the director of the Sansone Family Center for Well-Being.
8. *Sell*, 539 U.S. at 183 (citing *Washington v. Harper*, 494 U.S. 210, 221-23 (1990) and *Riggins v. Nevada*, 504 U.S. 127, 134-35 (1992)).
9. *Sell*, 539 U.S. at 180-81.
10. *Id.*, 539 U.S. at 180.
11. *Riggins*, 504 U.S. at 130-31.
12. *Id.*, 504 U.S. at 135.
13. *Id.*, 504 U.S. at 133.
14. *Id.*, 504 U.S. at 138 *et seq.* Justice Kennedy acknowledged that:

... the defendant’s behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of trial. If the defendant takes the stand ... his demeanor can have a great bearing on his credibility, persuasiveness, and on the degree to which he evokes sympathy. The defendant’s demeanor may also be relevant to his confrontation rights.

The side-effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulates the evidence in this way.
- Id.*, 504 U.S. at 142.
15. *Sell*, 539 U.S. at 179, 181-82.
16. *Id.*, 539 U.S. at 178-80 (recognizing the “liberty interest” in avoiding unwanted administration of drugs).

17. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992); *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Harper*, 494 U.S. at 221; *Albright v. Oliver*, 510 U.S. 266, 272 (1994).
18. *Riggins*, 504 U.S. at 133-34.
19. *Id.*, 504 U.S. at 141.
20. *Sell*, 539 U.S. at 179.
21. *Riggins*, 504 U.S. at 143; *Geders v. United States*, 425 U.S. 80, 88 (1976).
22. *Bee v. Greaves*, 744 F.2d 1387, 1393 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).
23. Wash. Const., Art. 1, §7.
24. Ariz. Const., Art. 2, §24.
25. *Benson v. Terhune*, 304 F.3d 874 (9th Cir. 2002). Observing that the right to refuse treatment is useless without knowledge of the treatment, the Third Circuit held that convicted federal prisoners have the constitutional right to information about the proposed treatment to make a rational decision on medical options. *White v. Napoleon*, 897 F.2d 103, 113 (3rd Cir. 1990).
26. See *People v. Bradford*, 15 Cal.4th 1229, 65 Cal.Rptr.2d 145, 939 P.2d 259, 336-37 (1997), *cert. denied*, 523 U.S. 1118 (1998).
27. *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972).
28. Note that in *People v. Clouse*, 859 P.2d 228, 234 (Colo.App. 1992), *cert. denied*, 2003 WL 21688713 (Co. 2003), the defendant acquiesced to police entry and questioning. The Court found that that constituted a valid Fourth Amendment waiver – because nothing indicated that he was uneducated, had failing memory, or was in “an impaired state.”
29. *Accord, United States v. Thompson*, 2007 WL 2480066 at *3 (M.D.Fla. 2007).
30. *Sturgis v. Goldsmith*, 796 F.2d 1103, 1109 (9th Cir. 1986); *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir. 2005); *Appel v. Horn*, 250 F.3d 203, 215 (3rd Cir.2001); *United States v. Klat*, 156 F.3d 1258, 1262 (D.C. Cir. 1998), *aff'd*, 213 F.3d 697 (D.C. Cir. 2000); *United States v. Barfield*, 969 F.2d 1554, 1556 (4th Cir. 1992).
31. *Riggins*, 504 U.S. at 130-31.
32. A number of psychiatric drugs require a period of decreased usage in order to safely wean the patient from treatment. For instance, a class of antidepressants called SSRI’s should be tapered down; abrupt cessation of medication results in “SSRI Withdrawal Syndrome,” including dizziness, shock-like sensations, anxiety, fatigue, headache, irritability, nausea, and tremors. K. Black, *et al.*, *Selective Serotonin Reuptake Inhibitor Discontinuation Syndrome: Proposed Diagnostic Criteria*, 25 J. PSYCHIAT. NEUROSCI. 355-61 (2000).
33. *Sell*, 539 U.S. at 181-182; see also *United States v. Rivera-Guerrero (“Rivera-Guerrero II”)*, 426 F.3d 1130, 1137 (9th Cir. 2005) (“The Supreme Court clearly intends courts to explore other procedures, such as *Harper* hearings for dangerousness before considering involuntary medication orders under *Sell*.”).
34. See *Harper*.
35. *Id.*, 494 U.S. at 215.
36. The involuntary commitment statute at issue in *Harper* defined “gravely disabled” as “a condition in which a person, as a result of a mental disorder: (a) [i]s in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.” *Id.*, 494 U.S. at 215 n. 3.
37. *Id.*

38. *Id.* at 216.
39. *Id.* at 236.
40. 28 C.F.R. § 549.43.
41. 28 C.F.R. § 549.43 (a)(5)(emphasis supplied).
42. *United States v. White*, 431 F.3d 431 (5th Cir. 2005); *United States v. Milliken* (“*Milliken I*”), 2006 WL 2945950 (M.D.Fla., 2007); *United States v. Gonzalez-Aguilar*, 446 F.Supp.2d 1099 (D.Ariz. 2006).
43. *United States v. Valenzuela-Puentes*, 479 F.3d 1220 (10th Cir. 2007); *United States v. Bradley*, 417 F.3d 1107, 1114 n. 13. (10th Cir. 2005); *United States v. McKnight*, 2007 WL 2021848 (W.D.N.C. 2007).
44. In *White*, the government pursued involuntary medication in the district court on both *Harper* and *Sell* grounds, without offering any reasons for failing to exhaust administrative procedures. The Court was concerned that the government did not first seek medication on “alternative grounds” as *Sell* suggests. *White*, 431 F.3d at 435.

In *Gonzales-Aguilar*, the judge criticized the Bureau of Prisons for not conducting a *Harper* hearing, despite “overwhelming evidence” that defendant met at least two of the *Harper* criteria (“gravely disabled and unable to live in an open population”). *Gonzales-Aguilar*, 446 F.Supp.2d at 1105-06. The judge was concerned that the Bureau felt it no longer had the authority to conduct *Harper* hearings in the wake of *Sell*. *Id.*, 446 F.Supp.2d at 1105-07.

In the authors’ experience, the Bureau routinely conducts *Harper* hearings when it believes they are warranted. However, it is not in favor of court-ordered administrative hearings when its clinicians have already determined an inmate is neither a danger nor gravely disabled.

45. *Sell*, 539 U.S. at 183.
46. In at least one case, it was the defendant who complained that he had not first been afforded a *Harper* hearing. *Milliken I*. However, it is difficult to imagine circumstances where it would be advantageous to the defendant to force the government to pursue such a hearing where he would have less legal protection, and the outcome may foreclose any chance of a judicial *Sell* determination. *But see* § II.C.3, below, arguing that the nature and amount of medication necessary to address dangerousness might be different than that needed to address competency.
47. *Harper*, 494 U.S. at 215; 57 Fed.Reg. 53820 (Nov. 12, 1992) (codified at 28 C.F.R. § 549.43)(legislative history explicitly stating that implementation of this regulation was a direct result of the *Harper* decision).
48. *White*, 431 F.3d at 434.
49. *See, e.g., Gonzalez-Aguilar*, 446 F.Supp.2d at 1105 ([i]t is inappropriate for BOP to determine whether or not prosecutorial interests are so significant that a medication order issued pursuant to *Sell* should be pursued.)
50. *See id.*, 446 F.Supp.2d at 1105.
51. *See, e.g., White*, 431 F.3d at 434.
52. *Id.*
53. It is also the authors’ experience that the Bureau of prisons does *not* believe it is authorized to conduct administrative *Sell* determinations, notwithstanding the language of the C.F.R. However, you may be hard-pressed to find a Bureau representative to state that on record.

54. In federal cases, an incompetent defendant is committed to the custody of the U.S. Attorney General for restoration. The Attorney General will transfer that defendant to prison medical centers at either Butner, North Carolina, Springfield, Missouri, or several other sites. State jurisdictions often have a central facility (perhaps a state hospital or county facility) used for restoration.
55. *United States v. Rivera-Guerrero* (“*Rivera-Guerrero I*”), 377 F.3d 1064 (9th Cir. 2004).
56. The authors, Federal Public Defenders in Phoenix, were able to secure a copy of the handout and could share it with fellow practitioners upon request.
57. *Sell*, 539 U.S. at 180.
58. *Id.*, 539 U.S. at 181.
59. *United States v. Baldovinos*, 434 F.3d 233 (4th Cir.), *cert. denied*, 546 U.S. 1203 (2006).
60. *See United States v. Morris*, 2005 WL 348306 (D.Del. 2005)(unpublished); *United States v. Kourey*, 276 F.Supp.2d 580 (S.D.W.Va. 2003).
61. *Singleton v. Norris*, 319 F.3d 1018 (8th Cir.), *cert. denied*, 540 U.S. 832 (2003).
62. *Rivera-Guerrero II*. Springfield’s Dr. Sarrazin played games by refusing to forecast his drug choices, even though he must have had them in mind. The Ninth Circuit was frustrated by his testimony:

When counsel asked the FMC doctors at the February 6th hearing which specific drugs would be used in the course of treatment, Dr. Sarrazin simply offered a list of the available drugs – including Alanzapin, Risperidone, Perazidone, Haloperidol and Phuphesedene – instead of identifying the specific drug or drugs that the FMC intended to administer. Dr. Sarrazin went on to confirm that he would not be able to say “at this point ... exactly what medication” would be used and that often, many medications may be attempted before finding one that is effective.

Id., 426 F.3d at 1139 n.5. The Ninth Circuit criticized his obfuscation as “a non-specific and unhelpful general listing of available medications by the FMC doctors.” *Id.*, 426 F.3d at 1140.
63. *United States v. Dallas*, 461 F.Supp.2d 1093, 1100(D.Neb. 2006).
64. For instance, we found a transcript where a Butner doctor testified that antipsychotic drugs are usually ineffective on persons with Delusional Disorder, which was helpful in a *Sell* hearing on a Delusional defendant.
65. Notably, however, highly reliable scientific research has shown that they only work in about 75% of the Schizophrenia cases. J. Lieberman, *et al.*, *Effectiveness of Antipsychotic Drugs in Patients with Chronic Schizophrenia*, 353 N. ENG. J. MED. 1209-1223 (2005)(referred to as the Clinical Antipsychotic Trials of Intervention Effectiveness, or CATIE Study).
66. *See, e.g., Bradley*, 417 F.3d at 1111.

Is Identity the Wild Card in 404(b) Other Acts Evidence Cases?

By Robert L. Gottsfield, Maricopa County Superior Court Judge

A truism which Arizona criminal law and evidence professors like to repeat is “show me a criminal case which has been reversed on evidence grounds and I’ll show you a case where there has been improper admission of other acts evidence or a flight instruction was improperly given.”

The question posed is whether Evidence Rule 404(b) is to be more broadly construed where “identity” is an issue than is the case with intent, plan, knowledge, motive or any other exception listed in the Rule? It is submitted the answer is NO!

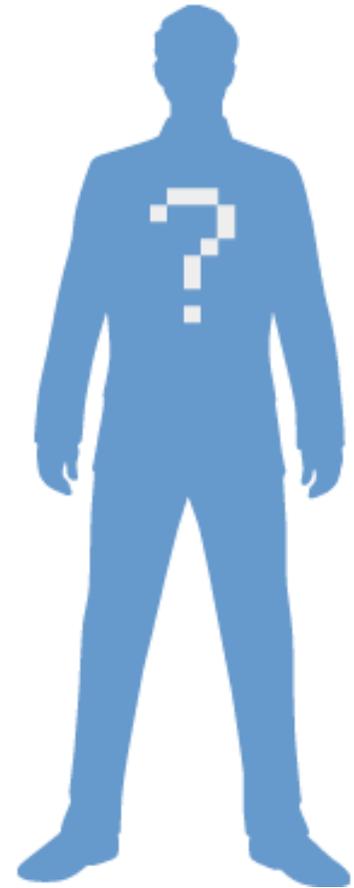
The identity exception is subject to the same narrow construction as the other named reasons for permitting evidence of other acts or wrongs to be admissible in a criminal case, where they normally would be excluded. Evidence Rule 404(b) provides:

(b) Other crimes, wrongs, or acts. Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(c) concerns character evidence in sexual misconduct cases and has its own set of rules, not here under discussion.

In 1996 two seminal cases decided by the Arizona Supreme Court clarified other acts evidence law and gave us a framework for analysis of such issues. *State v. Dickens*, 187 Ariz. 1, 926 P.2d 468 (1996), *cert. denied*, 522 U.S. 920 (1997) and *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). See also McClennen and Gottsfield, Rule 404(b) and 404(c): New Definitions, New Tests and New Rules, 34 Ariz. Atty. 31 (June, 1998).

Dickens, (which interestingly deals with the admission of other act evidence against a witness), citing federal cases, advised there is a difference between intrinsic and extrinsic evidence and that Rule 404(b) only applies to the latter. Evidence is intrinsic in the other acts context where the other act evidence and the evidence of the crime charged are “inextricably intertwined” or both acts are part of a “single criminal episode” or the other acts were “necessary preliminaries” to the crime charged. *Id.* at 187 Ariz. 18-19, 926 P.2d 485-86. And see *State v. Baldenegro*, 188 Ariz. 10, 932 P.2d 275 (App. 1996), *rev. denied*, decided a few weeks prior to both *Dickens* and *Ives* where a panel of Division Two used the same intrinsic/ extrinsic dichotomy citing the Fed. R. Evid. 404 Advisory Committee’s Note. While the court need not engage in a Rule 404(b) analysis where evidence is intrinsic, a Rule 403 finding on the record is presumably required just as it would be in an extrinsic evidence 404(b) case. *Ives*, at 187 Ariz. 111, 927 P.2d 771; *Dickens*, at 188 Ariz. 19, 926 P.2d 486.



Ives, the foundation 404(b) case, adopted the most narrow definition of “common scheme or plan” as used in Criminal Rule 13.3(a)(3) concerning joinder of offenses and thus applicable to Rule 404(b), and followed the intrinsic/ extrinsic distinction made in *Dickens*. Rule 13.3(a)(3) permits joinder where two or more offenses “(a)re alleged to have been part of a common scheme or plan.” Similar language appears in Rule 13.3(b) with respect to joining two or more defendants who are part of a “scheme or plan.”

Ives cautioned that prior definitions of “common scheme or plan” were out the window and that the language could no longer be equated with “similar and related conduct” or “substantial similarities” or a “visual connection” between the events, which was when “similarities exist where one would normally expect to find differences.” From now on a narrower definition was to prevail and joinder of separate offenses would be allowed under “common scheme or plan” only when the other offense was part of “a particular plan of which the charged crime is a part.”

Note that Rule 13.3(a)(2) permits joinder of offenses if they “(a)re based on the same conduct or are otherwise connected together in their commission”. In *State v. Prion*, 203 Ariz. 157, 162, 52 P.3d 189, 194 (2002) the language “otherwise connected together in their commission” is said to refer to a situation in which “evidence of the two crimes (i)s so intertwined and related that much the same evidence (i)s relevant to and would prove both, and the crimes themselves arose out of a series of connected acts”.

Rule 13.3 joinder of separate offenses must also be read with Rule 13.4 concerning severance, again because of its Rule 404(b) implications. Rule 13.4(a) gives the court authority to sever counts or cases (or defendants) when it “is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense.” Rule 13.4(b) severance as of right was amended after *Ives* to provide there is no right to severance where “evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately.”

It is submitted that neither the joinder or severance rules nor the aforesaid amendment to Rule 13.4(b), mean that the narrow definitions given to other acts evidence exceptions under Rule 404(b) do not apply in joinder or severance cases. The same definitions apply. Remember *Ives* was construing a joinder issue when it defined “common scheme or plan” and it is still controlling.

As noted in *Ives*, even if defendant is entitled to severance as a matter of right, the denial of severance is reversible error only if the evidence of other crimes would not have been admitted at trial for any evidentiary purpose. *Ives*, at 187 Ariz. 106, 927 P.2d 766. That is why joinder and severance issues often implicate any Rule 404(b) analysis. It was this language in *Ives* which apparently prompted the additional Rule 13.4(b) severance language amendment and it was not used by *Ives* to water down any narrowly construed definitions, it or presumably its progeny, offered then or in the future.

The issue presented at the beginning of this piece now becomes pertinent. Can the prosecutor use identity as a way to get other acts in evidence because identity is not construed as narrowly as the other exceptions in 404(b)? As noted the answer is no because identity is also subject to a narrow definition according to the Arizona Supreme Court. *State v. Hughes*, 189 Ariz. 62, 68, 938 P.2d 457 (1997). According to *Hughes*, the admission of other acts identity evidence is limited to “signature” crimes, meaning “the modus operandi of and the circumstances surrounding the two crimes must be sufficiently similar,” quoting a prior decision.

Five years later, the Court reiterated this view in *State v. Prion*, supra, at 203 Ariz. 163, 52 P.3d 195 using the language “that the pattern and characteristics of the crimes...are so unusual and distinctive as to be like a signature” quoting from and citing prior decisions.

As noted, neither *Hughes* nor *Prion* were breaking new ground as each relied on prior decisions on the issue of identity. *State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996), *cert. denied*, 519 U.S. 1015; *State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993); See also *State v. Garland*, 191 Ariz. 213, 953 P.2d 1266 (App. 1998). *Ives* also relied on the narrow view of “common scheme or plan” adopted by previous cases. *State v. Torres*, 162 Ariz. 70, 781 P.2d 47 (App. 1989); *State v. Ramirez_Enriquez*, 153 Ariz. 431, 737 P.2d 407 (App. 1987).

With respect to *Ramirez Enriquez* no wiser words in the 404(b) context have been written than by Judge, law professor and evidence guru, Joe Livermore:

The question under Rule 404(b) is not whether evidence tends to establish guilt but how it tends to establish it. If it tends to show a disposition toward criminality from which guilt on this occasion is to be inferred, it is inadmissible. If it establishes guilt in some other way, it is admissible. The common plan or scheme exception does not permit proof that the defendant is a long time drug dealer or burglar. Instead it permits proof of his commitment to a particular plan of which the charged crime is a part. It is a matter of the particularity of the plan and thus of the probative force of the connection between one crime and another. (emphasis supplied) (*Id.* at 153 Ariz. 432-3, 737 P.2d 408-9).

Under the reasoning of *Dickens*, *Ives*, *Hughes* and *Prion*, where there are contrary decisions they no longer apply. See e.g. *Ives*, at 187 Ariz. 106, 927 P.2d 766.

Rule 404(b) exceptions such as “intent” and “motive” do not fare any better under the modern restricted construction given 404(b) exceptions by the Arizona Supreme Court. *Ives* and *Hughes* also limit the use of other evidence on the issue of intent. The Court in *Ives* held that “where defendant steadfastly maintains that he simply did not commit any of the criminal acts in question, there is no issue as to intent and no danger of shifting defense theories to justify the admission of the prior bad acts.” *Ives*, at 187 Ariz. 111, 927 P.2d. 771. *Hughes* reiterates that a denial by the defendant is not a proper basis for injecting prior misconduct into a case and this means there must be some discernable issue as to the defendant’s intent beyond the fact the crime charged requires a specific intent. *Hughes*, at 189 Ariz. 69, 938 P.2d 457.

And, where the issue is whether defendant did the acts at all, there is no issue presented of a lack of “mistake” or “accident” by which to back door other acts evidence. The same is true of motive and knowledge. *Ives*, at 187 Ariz. 111, 927 P.2d 771 discussing *Torres*, supra. *Prion*, in addition to its discussion of the identity exception as requiring a signature crime, advises that “motive” as a 404(b) exception is similarly restricted in its use. Even general threats to do harm to others, as ostensibly permitting the admission of other act evidence, will not be countenanced where such threats are not specifically directed at a particular victim. *Prion*, at 203 Ariz. 164, 52 P.3d 196.

Prion also warns against trying to admit what is essentially aberrant sexual propensity evidence (Rule 404(c) material) under the 404(b) exception where the specific findings of Rule 404(c) have not been made by the judge. *Id.*

To be sure, if defendant (foolishly perhaps?) raises any of the 404(b) exceptions as defenses, this will open the door to relevant other act evidence. *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002) (evidence of three apparently disparate robberies admissible where defendant raised the issue of misidentification); *State v. Van Adams*, 194 Ariz. 408, 984 P.2d 16 (1999), *cert. denied*, 528 U.S. 1172 (admission of similar events in case of sexual assault of a saleswoman at a model home because, inter alia, defense was mistaken identity); *State v. Lee*, 189 Ariz. 590, 944 P.2d 1204 (1997), *cert. denied*, 523 U.S. 1007 (1998) (where defendant testified he did not intend to kill victims he put his intent in issue and separate murders of pizza delivery person and cab driver admissible on issue of intent while they would not be on issue of common scheme or plan); *State v. Hines*, 130

Ariz. 68, 633 P.2d 1384 (1981) (defendant in testifying and by the substance of his defense put his intent in issue).

Because of the tendency to cause error when 404(b) other acts evidence is admitted under an exception, *Lee*, supra, reiterates the “four protective provisions” controlling its admission: (1) there must be a true admissible exception under 404(b); (2) the evidence must be relevant under Rule 402; (3) the great gatekeeper Rule 403 must be employed arduously; and (4) if requested, the court must give an appropriate limiting instruction. *Id.* at 189 Ariz. 599, 944 P.2d 1213. This is the *Huddleston* test [*Huddleston v. United States*, 485 U.S. 681 (1998)] adopted by Arizona in criminal cases [*State v. Atwood*, 171 Ariz. 576, 832 P.2d 592 (1992). *cert. denied*, 506 U.S. 1084 (1993)] and in civil cases [*Lee v. Hodge*, 180 Ariz. 97, 882 P.2d 408 (1994)] for admission of other acts evidence.

Finally, always keep in mind that for other act evidence to be admissible in a criminal case, the state must show by clear and convincing evidence that the act was committed and that the defendant committed it. *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997). Moreover, even where other acts are presumably admissible under an exception listed in Rule 404(b), and thus relevant, there will be, as noted in *Ives*, situations where the probative value is substantially outweighed by the danger of unfair prejudice. *Ives*, at 187 Ariz. 111, 927 P.3d 771. Our Supreme Court has advised that “unfair prejudice” with respect to Rule 403 means an “undue tendency to suggest decision on an improper basis... such as emotion, sympathy or horror.” *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162, *cert. denied*, 510 U.S. 1026 (1993) (citing Fed. R. Evid. 403, Advisory Committee Note).

That is when the following mandate set forth in *Livermore, et al.* becomes paramount and tests the abilities and instincts of trial lawyers and judges alike: “The discretion of the trial judge under Rule 403 to exclude otherwise relevant evidence because of the risk of prejudice should find its most frequent application in this [404(b)] area.” *Livermore, Bartels, Hammeroff*, Arizona Practice: Law of Evidence, §404.2 at 95 (Fourth Edition).



Fighting 609 Impeachment

Maybe Your Client *Can* Testify

By Mikel Steinfeld, Defender Attorney

I. Introduction

In almost every case where a defendant has prior convictions, the state is fast to file its Request for 609 Hearing. The state's position is quite simplistic: defendant has a prior conviction, prior conviction is pertinent to defendant's credibility, if the defendant testifies the state should get to impeach defendant with prior conviction. However, 609 jurisprudence is not this simple. Each step of analysis made by the state can be called into question and is subject to certain exceptions. Some of the following arguments are relatively straight-forward, while others are nuanced arguments that may gain some traction. This article is not meant to be an exhaustive review of 609 jurisprudence but a mechanism to promote further review and examination of 609 issues, and to encourage more objections to the state's 609 motion. At its root, every 609 issue is a balancing between the probative value of the prior conviction as it relates to impeachment and the prejudicial impact the impeachment would have on your client. Thus, this article progresses by analyzing each in turn.



II. Threshold Determination of Probative Value

The initial burden rests with the state to establish the admissibility of prior convictions for impeachment purposes. *State v. Williams*, 144 Ariz. 433, 437, 698 P.2d 678, 682 (1985). “The state must further show that the prior conviction is somehow probative of the veracity of the witness.” *Id.* at 437-38, 682-83. However, this threshold burden is minimal, “the state need only come forward with the date, place, and nature of the prior conviction in order to satisfy its initial burden of showing probative value.” *Id.* at 438, 683. The threshold burden is minimal because all “felonies have some probative value in determining a witness’ credibility” *Id.* (citing *State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317 (1981)). When filing their Request for 609 Hearing, the state always presents a list of felonies they intend to use to impeach the defendant. Presuming the state can present evidence to support these prior convictions, this showing is likely sufficient. However, there are some circumstances to keep in mind.

a. Offenses Under Proposition 200 Cannot be Used for Impeachment

A prior conviction for a drug offense which falls under the protections of Proposition 200 (codified under A.R.S. § 901.01) cannot be used for impeachment purposes under Rule 609. *State ex rel.*

Romley v. Martin, 205 Ariz. 279, ¶ 11, 69 P.3d 1000, ¶ 11 (2003). The rationale of the Supreme Court was that Proposition 200 prevents punishment exceeding one year. *Id.* at ¶ 12. Thus, if the state alleges a prior drug offense protected by Proposition 200, object to its use.

b. Class 6 Felonies May Not be Sufficient for Impeachment

While this does not appear to have been squarely addressed by an Arizona appellate court, a prior conviction for a class 6 felony may not meet the threshold established by Rule 609. Rule 609 specifically requires that the crime be punishable by death or “imprisonment in excess of one year.” Ariz.R.Evid. Rule 609(a) (emphasis added). In Arizona a class six felony carries a presumptive term of one year in prison. A.R.S. § 13-701. The presumptive sentence is the maximum sentence permitted by the facts of a crime. A.R.S. § 13-702(b); *State v. Price*, 217 Ariz. 182, ¶¶ 8-9, 171 P.3d 1223, ¶¶ 8-9 (2007). Based on the jury verdict, a person convicted of a class 6 felony is subject to a maximum term of imprisonment of one year. See A.R.S. § 13-702(b); *Price*, 217 Ariz. 182, ¶¶ 8-9, 171 P.3d 1223, ¶¶ 8-9. It is not until the state meets a further burden that a person becomes eligible for imprisonment in excess of one year. See A.R.S. § 13-702(b); *Price*, 217 Ariz. 182, ¶¶ 8-9, 171 P.3d 1223, ¶¶ 8-9. Thus, the crime of any class 6 felony is not punishable by death or “imprisonment in excess of one year.” Accordingly, impeachment under Rule 609 would be improper. See *e.g. Martin*, 205 Ariz. 279, ¶ 11, 69 P.3d 1000, ¶ 11 (holding that criminal convictions falling under protection of Proposition 200 cannot be used for impeachment under Rule 609 because they cannot impose a term of imprisonment exceeding one year); *U.S. v. Snead*, 447 F.Supp. 1321, 1324 -1325 (D.C.Pa. 1978) (holding impeachment improper when the maximum penalty is one year imprisonment).

III. Prejudicial Effect

Once the state has met its minimal burden, a defendant is permitted to rebut the state’s showing. *Williams*, 144 Ariz. at 438, 698 P.2d at 683. This is typically done by arguing the defendant is prejudiced by the introduction of the prior conviction. *Id.* If the defendant is able to counter the state’s showing, the burden shifts back to the state:

If the defendant’s evidence of unfair prejudice successfully counters the probativeness of veracity inherent in any felony conviction, the state will need to present additional evidence of probative value to sustain its burden of proof under Rule 609.

Id. Prejudice against a criminal defendant has been regarded as the most severe and most obvious form of prejudice resulting from impeachment with prior convictions. McCormick on Evidence, § 42 (6th ed. 2006).¹ The determination of whether prior convictions should be used for impeachment is a function of numerous non-exclusive factors, including: “the impeachment value of the prior, the length of time since the prior conviction, the witness’ history since the prior conviction, the similarity between the past and present crimes, the importance of the defendant’s testimony, and the centrality of the credibility issue.” *State v. Rendon*, 148 Ariz. 524, 528, 715 P.2d 777, 781 (App. 1986).

a. Impeachment Value of the Prior

The impeachment value of a prior conviction is another way of determining just how probative a prior conviction is to the defendant’s tendency for truthfulness. The simple assertion that all felonies have *some* probative value is incomplete. Rather, the circumstances of the prior conviction are relevant to determine how much probative weight to assign a prior conviction. *Williams*, 144 Ariz. at 438, 698 P.2d at 683; *Rendon*, 148 Ariz. at 528, 715 P.2d at 781.

Because “[t]he Arizona Rules of Evidence are patterned on the Federal Rules of Evidence,” a review of the Federal Rule can assist. *State v. Malloy*, 131 Ariz. 125, 126, 639 P.2d 316 (1981). The Federal Rule is worded in a slightly different manner such that a prior conviction cannot be excluded, “if it involved dishonesty or false statement, regardless of the punishment.” Fed. R.Evid. Rule 609(a)(2); see *U.S. v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). This class of crimes was narrowly construed to include only crimes, “the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.” *Hayes*, 553 F.2d at 827 (citation omitted). As guidance, the note to the Federal Rule includes a short list of which crimes involve dishonesty or false statement.² Clearly, because the admission of this class of crimes was mandated, this class of crimes is deemed to be more probative to truthfulness than other crimes. For all other felonies the Federal Rule permits the judge to engage in a balancing test paralleling the Arizona Rule.

Like Federal Courts, Arizona employs a narrow view of which crimes involve dishonesty or false statement. *Malloy*, 131 Ariz. at 127, 639 P.2d at 317. The Arizona Rule, however, provides a defendant even more protection because it permits the trial judge to exclude any prior convictions—even those involving dishonesty or false statement—when the prejudice outweighs the probative value. Ariz.R.Evid. Rule 609; *Malloy*, 131 Ariz. at 127, 639 P.2d at 317. The reasoning employed by federal rulemakers is still pertinent though. Prior convictions which involve dishonesty or false statement would still carry more probative weight in a court’s balancing than the typical felony conviction. The state rarely engages in an actual analysis of the impeachment value of a prior conviction. Thus, presenting this analysis to the court can be very useful when objecting to 609 impeachment.

b. Length of Time Since the Prior Conviction

As time passes, the probative value of a prior conviction decreases. *State v. Lucas*, 146 Ariz. 597, 606, 708 P.2d 81, 90 (1985) (citing M. Udall & J. Livermore, *Arizona Practice, Laws of Evidence*, § 47 at 90 (2d ed. 1982)) (rejected on other grounds). Rule 609 sets forth a presumptive ten year limit, beyond which prior felony convictions can no longer be used for impeachment purposes unless the probative value “substantially outweighs” the prejudice caused to the Defendant. Ariz.R.Evid. Rule 609(b). This is because a prior felony conviction can become so remote “that it cannot reasonably cast a reflection upon the witness’ credibility.” *Sibley v. Jeffreys*, 76 Ariz. 340, 345, 264 P.2d 831, 833 (1953). As *Sibley* noted, “[t]here is no exact yardstick to measure the time that must elapse to blot out the relevancy of such former conviction.” *Id.* at 345, 833-34. Even in cases where the ten year time-limit has not yet run, the length of time is still a relevant consideration in determining the probative value of the prior.

c. The Similarity Between the Past and Present Crimes

It is not per se prejudicial to use a prior conviction of the same crime for impeachment purposes. *Williams*, 144 Ariz. at 438-39, 698 P.2d at 683-84. However, to the extent that the prior conviction is akin to the charged offense, the potential for prejudice is stronger because the “similarity to the charged offense may lead to the unfair inference that if defendant ‘did it before he probably did so this time.’” *State v. Bolton*, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995) (quoting *Gordon v. U.S.*, 383 F.2d 936, 940 (D.C.Cir. 1967)). Therefore, “a trial court should sparingly admit evidence of prior convictions when the prior convictions are similar to the charged offense” *Id.* Often courts will chose to sanitize, and this may be acceptable. However, consider that in this computer age people can easily access information online, including information regarding charges and minute entries regarding the entry of a plea. A judge’s instructions not to engage in independent investigation could easily be thwarted, especially when the curiosity of a juror leads them to take the very small step of a public access check through the Arizona Supreme Court website.

d. The Importance of the Defendant's Testimony

Arizona jurisprudence has determined that impeachment under Rule 609 does not unreasonably impinge on a defendant's right to testify. *State v. Harding*, 141 Ariz. 492, 498-99, 687 P.2d 1247, 1253-54 (1984); *State v. Waratzeck*, 130 Ariz. 499, 502, 637 P.2d 301, 304 (App. 1981). This does not lead to the conclusion that impeachment is automatically permissible. As then District Court Judge Burger wrote:

One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.

Gordon v. U.S., 383 F.2d 936, 940 (D.C. Cir. 1967). When a defendant's testimony is important the goal should be to give the jury access to all versions of an event. If you anticipate a defendant is going to testify, this may be a valuable policy argument to bring to the judge, particularly where a juror could easily obtain proof of the defendant's prior conviction. The court must still engage in a balancing of interests even if there is no presumed infringement on the right to testify. Whether the defendant's testimony is important is included in this balancing.

e. The Centrality of the Credibility Issue

The state usually posits that if a defendant testifies, her credibility is automatically of paramount importance. However, the case law cited by the state focuses on circumstances where there were no witnesses to a crime, *State v. Harding*, 141 Ariz. 492, 687 P.2d 1247 (1984), or where the defendant's testimony was in direct conflict with testimony of an officer and that conflict was of "paramount importance," *State v. Dixon*, 126 Ariz. 613, 618, 617 P.2d 779, 784 (App. 1980). The logical conclusion is that a defendant's credibility may not be a central issue. Sometimes this factor may be inconsistent with the previous section, in which case a selection should be made as to which is more important. However, suppose a defendant is the only person who can testify to the entire version of events but has witnesses who can independently corroborate different aspects of the defendant's version. The defendant's testimony is important so the jury can understand the entire story, but the defendant's credibility is far less central an issue thanks to corroboration. Alternatively, suppose a defendant agrees with the version of events presented by other witnesses, and will testify consistently with that version of events, but wants to testify that she lacked a culpable mental state. The defendant's testimony would be important but is not in direct conflict with the testimony of other witnesses. In such cases, the defendant's testimony is important and the defendant's credibility is not a central issue.

f. Shifting of the State's Burden

One final prejudice to consider is that the defendant's decision to testify is also motivated by a determination of whether it is appropriate to make the State's case for them. In order to obtain an enhanced or aggravated sentence the State must prove to the appropriate fact-finder that aggravating circumstances, such as priors, exist beyond a reasonable doubt. A.R.S. § 13-702(B); see *Apprendi v. New Jersey*, 530 U.S. 466, 489, 120 S.Ct. 2348, 2362-63 (2000). When the court permits impeachment under Rule 609 the obvious result is that any defendant who chooses to testify must inexorably admit to the prior or face possible perjury charges. Thus, when a defendant has a defense they can testify to, the burden to prove aggravating circumstances shifts away from the State. This is often the pragmatic concern that leads an attorney to advise a defendant not to take the stand, linking this factor with the importance of a defendant's testimony. While case law

does not expressly contemplate this factor, the factors listed by appellate courts are not exclusive, meaning courts may also consider this issue.

IV. Conclusion

Rule 609 is not a stagnant, hardened rule that always means a defendant cannot testify without being impeached with a prior felony. Admittedly, responding to the state's Request will frequently be fruitless as courts will often side with the state and find that the probative value of a prior conviction outweighs the prejudice to a defendant. However, cases will come along where a prior conviction provides minimal insight into a defendant's tendency for truthfulness, will legitimately harm a defendant, and sanitization will not be enough.

(Endnotes)

1. "The most prejudicial impact of impeachment by conviction is on one particular type of witness, namely, the criminal accused who elects to take the stand. Suppose that the accused is forced to admit that he has a 'record' of past convictions, particularly convictions that are for crimes similar to the one on trial. In this situation, despite any limiting instructions, there is an obvious danger of misuse of the evidence. The jurors might give more weight to the past convictions as evidence that the accused is the kind of man who would commit the crime charged, or even that he ought to be imprisoned without much concern for present guilt, than they will to the convictions' legitimate bearing on credibility. The accused, who has a 'record' but who thinks he has a defense to the present charge, thus faces a harsh dilemma. One horn of the dilemma is that if he stays off the stand, his silence alone might prompt the jury to believe him guilty. The other horn is that if he elects to testify, his 'record' becomes provable to impeach him, and this again could doom his defense." McCormick on Evidence, § 42 (6th ed. 2006) (footnote omitted).
2. "By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." Fed.R.Evid. Rule 609, Comment.



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11:00am — 3:15pm

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620 W. Jackson,
2nd Floor Training Room**



Presenters include:

Russ Born,
Deputy Maricopa County Public Defender
Bruce Bowers, APAAC Chief Counsel
Sylvia Lafferty, Deputy Pinal County Attorney
Kevin Maricle,
Deputy Maricopa County Attorney
Art Merchant,
Deputy Maricopa County Public Defender
Jim Rizer, Retired Maricopa County Attorney

This course is designed for newly admitted attorneys and will satisfy the State Bar of Arizona requirement.

May qualify for up to 4 hours CLE, including 1 hour Ethics.
*Feel free to bring your lunch

To register or for questions, please contact
Celeste Cogley (MCPD)
602-506-7711 X37569 or email
cogleyc@mail.maricopa.gov

Work Furlough Information Guide for Clients

By Brian Sloan, Defender Attorney

WORK FURLOUGH INFORMATION GUIDE – GIVE TO CLIENTS

For defendants sentenced with jail stipulations, there are four factors to consider when planning for Work Furlough.

1. Legal Status – only citizens and legal residents may participate in Work Furlough

2. History of Violence – department policy excludes defendants with a history of violence from participation in the Work Furlough program. This can include any domestic violence incident, Endangerment conviction, Assault conviction, and “Dangerous” offense. However, even if you have “violence” in your past, or have just been convicted of a “violent” offense, the judge can order you into Work Furlough. The order of confinement and the minute entry must both state that you are ordered into the Work Furlough program. In addition, the judge must check box # 21 of the written terms of probation, indicating that you shall participate in the Work Furlough program.

3. Medical Screening – you should be medically screened prior to sentencing. The form to be filled out is attached, or can be provided by the Pre-Sentence Officer, the defense attorney, or the court bailiff. This form must be signed by a doctor, indicating that you are medically fit to participate in the program. You are responsible for bringing the completed form to court when appearing for sentencing. The judge can order you into Work Furlough immediately or, if you have not had your medical clearance form filled out, the jail can do the medical screening process while you are in-custody, which can take several days or weeks.

4. Ability to work – you are expected to either have a job or be able to get a job somewhere in Maricopa County. The maximum time to work in the community is five days a week for DUI convictions and six days a week for non-DUI convictions. In all cases, the maximum amount of time out of custody is 12 hours a day, which accounts for travel and work time. Transportation is your responsibility, but you must have written permission from Work Furlough before you are permitted to drive yourself. There is a parking lot for those on Work Furlough to park. Below are issues that have come up with Work Furlough:

- Job outside Maricopa County – normally a defendant is expected to work within Maricopa County when on Work Furlough. If you are employed outside of Maricopa County, the judge can order that you be allowed to continue working outside the county if all other requirements are met. The judge should be asked to order this at sentencing. However, the requirement to be back in jail on time remains the same and no additional time will be given for travel – the maximum out of custody is still 12 hours a day.
- Job involves multiple locations – normally Work Furlough requires a defendant to work in one location so that they may be checked upon by Surveillance Officers. Those jobs that require multiple job sites require the defendant to page the Surveillance Officer for every location change. The defendant is required to have a cell phone, but cannot keep this cell phone with them when they check back into the jail. Some professions that sometimes have issues:
 - Construction workers, although often working at different work sites, this usually won’t pose a problem
 - Exotic dancers – can pose problems – should ask judge to allow continued work
 - People convicted of alcohol-related offenses, but work in places that serve alcohol – usually dealt with on a case-by-case basis, but the judge can order that these defendants be allowed to work at their jobs

Other Information:

Clothes – people on Work Furlough can go home one time, after orientation, to get a limited number of clothes for their job (see below). There are laundry facilities at the jail.

Items that can be brought in the jail (anything additional is considered “contraband”):

- Five sets of clothes
- Two pairs of shoes
- Two towels
- Classified ads from newspapers
- One wristwatch / wedding ring
- Battery operated alarm clock
- Plastic, battery operated standard-sized (or smaller) flashlight
- Maximum of \$40 cash
- *Note: All hygiene items must be purchased from the vending machines*

Hours of work – your boss will be provided a “Letter of Understanding” in order to fill out the hours you normally work. This will determine what hours you are allowed out of custody

Getting to work – you are responsible for everything on Work Furlough. You must wake yourself up and make arrangement to get to and from work

Transportation – transportation is your responsibility. To drive to and from work yourself, you must show the Work Furlough Officer proof of a valid Arizona Driver’s License, proof of insurance, current registration, and give a complete vehicle description

Don’t have a job – if you do not currently have a job or you are not allowed to work at your normal place of employment for some reason, you may be given five days to attempt to find a job.

Self-employed – a defendant who is self-employed may participate in Work Furlough. The defendant must provide a business license, tax ID, and the last two years income tax returns. If the business is out of the home, the judge must order the defendant to be allowed to work out of the home

Medical services – medical services are not available in Work Furlough.

Long hair – despite how well kept their hair is, men on Work Furlough will be required to cut their hair short.

Rules of Work Furlough:

- Follow all laws, Work Furlough rules, and jail rules to remain in the program
- No physical contact among inmates (fighting, pushing, spitting, etc.)
- No smoking, no cigarettes, no lighters, no jewelry, no tank tops, no cameras, no cell phones, no recorders
- You must submit to an Intoxilyzer or urinalysis test if asked by any probation or detention officer. This is a one strike policy. If you refuse to test or test positive, you are done with Work Furlough.

Surveillance Officer (S.O.) – everyone in Work Furlough has an S.O. Defendants on Work Furlough are required to:

- Page their S.O. each day when they arrive to work, break for lunch, return from lunch, and leave the job site to go back to jail.
- Page their S.O. anytime they are not on the jobsite, when the job finishes early, when they are laid off, terminated, or any other reason. If you are laid off, terminated, or done from work early, you must return immediately to jail
- A job that moves sites must be pre-approved and requires a cell phone. The cell phone cannot be brought into the jail. The defendant must page their S.O. at each site and answer the cell phone

Trust Accounting and Work Furlough Fees:

- The defendant must pay an advance of \$125 (money order or cashier's check only) before starting their job
- The defendant will turn in all earnings (payroll checks with pay stubs, tips, commissions, bonuses, etc.) to the Work Furlough program on the date they are paid

Fees will be deducted, but the defendant will receive at least \$25 per week back from the check

- Work Furlough will take 'one hour of pay plus \$3' a day in fees, starting the first day they work
- Failure to turn over checks and stubs will result in removal from Work Furlough

Tips on Surviving Work Furlough:

- Mind your own business – don't be concerned with what other inmates are doing or not doing. Assaulting, threatening, or intimidating other inmates will get you kicked out of Work Furlough
- Don't take advice from other inmates – if you have questions, ask the probation officer
- Inmates are not roommates – do not lend out your car, money, etc., and do not borrow from other inmates. Stealing is a crime, even if it is done within the jail, and you can be prosecuted or punished
- Wake up – it is your responsibility to wake yourself up and be ready to leave for work at the appropriate time
- Always come back to jail – if you don't return to jail, you will be charged with a new felony, a warrant will issue for your arrest, and a petition will be filed to revoke your probation. No matter what is going on in your life, not coming back to jail will definitely make things worse
- Come back on time – you must be at the gate ready to check in at your scheduled time. Being in the parking lot, or on the property, is not good enough. Excuses are not tolerated
- Physical health – practice good hygiene, and if you need medical attention, seek it out immediately
- Respect your living areas – what you do affects everyone on the yard. Don't feed any creatures, don't keep food under your mattress or in your locker, and don't abuse the vending or washing machines (even if they take your money)
- Work Furlough is for Work – this is not time to be social, to hang out around your home, to sleep, smoke, do drugs, have sex, etc.

MCSO Jail Rules:

- You are allowed to have a short list of items in the jail. If it is not on that list, then it is contraband
- No drugs, alcohol, or tobacco are allowed in the jail
- Don't throw things over the fence or bring contraband into the jail
- Don't pick up packages found in the yard that come over the fence – if you touch it, it is yours
- Keep your drawer locked, and check your bed before you leave and when you return to make sure you aren't "holding" someone else's contraband
- Always treat the Detention Officers with respect – follow their instructions
- Stay away from the fence and do not talk to inmates of the opposite sex
- Stay off "The Hill" unless you have a reason to be there
- No smoking, gambling, fighting, wrestling, or football
- Wear appropriate clothing – no sleeveless shirts, see-through clothing, bare midriffs, short shorts, high heels, bare feet, or inappropriate symbols / advertisements
- Do not cover your head with any hat, hood, beanie, do-rags, towels, etc.
- Do not set anything on fire or damage the jail property (including vending and washing machines)
- Leave the horses alone

Top Ten Reasons for getting kicked out of Work Furlough:

1. Returning to jail late
2. Too many clothes in the jail
3. Having medication/pills in the jail yard
4. Not paging your Surveillance Officer
5. Having a cell phone in the jail
6. Attempting to bring in or throw contraband into the jail
7. Having contraband in jail or smoking cigarettes
8. Refusing a drug/alcohol test or using drugs/alcohol
9. Being at an unauthorized location in the community
10. Going home without prior approval

If you have any other questions, talk to your attorney,
or contact Adult Probation Officer Donna Trudel at 602-372-5581

BRING THIS COMPLETED FORM WITH YOU TO JAIL
OR YOU WILL BE KEPT IN FULL CUSTODY AND NOT BE ALLOWED
TO PARTICIPATE IN WORK RELEASE OR WORK FURLOUGH

These are instructions for determining your medical fitness for work release or work furlough. If you have been sentenced to 15 or more days in jail, you must be examined by a health care provider to be eligible for work release or work furlough. If you appear for booking at the Maricopa County Jail without the bottom portion of this form filled out by a health care provider, **YOU WILL BE KEPT IN FULL CUSTODY AND NOT BE ALLOWED TO PARTICIPATE IN WORK RELEASE OR WORK FURLOUGH.**

Within two business days of when you are sentenced, you must call to make an appointment with:

1. Your own health care provider and have them complete the form below

OR

2. A provider listed in the Yellow Pages under "Urgent Care Centers" or "Medical Clinics" and have them complete the form below;

OR

3. A provider listed on the back of this form and have them complete the form

Any medications that you require during your jail stay must be in the original, pharmacy labeled containers, must be administered by yourself, and must be brought with you to the jail. Do not change or add anything to the original contents - that would be considered contraband and would cancel your eligibility for work furlough or work release.

Regardless of your medical status, you will be eligible for work release or work furlough as ordered by the sentencing judge, as long as a health care provider completes this form.

HEALTH CARE PROVIDER'S CERTIFICATION

A health care provider is to complete a history and examination that assesses whether the person is medically fit to live in the Maricopa County Sheriff's Office Con-Tents. The living conditions involve outdoor military- type tent dormitory style living space. Inmates have access to an indoor area for rest rooms, showers, and meals. Fans are provided in the summer months and space heaters in the winter. Inmates may leave the facility for part of a day or for several consecutive days depending on the terms of their release.

In determining medical fitness, the following types of conditions are examples of what could render a person not suitable to be housed in the Con-Tents: extreme cardiopulmonary conditions; severe heart or lung disease; severe vascular disorders; active tuberculosis (TB); lack of physical ability to perform usual life skills such as eating, dressing, or transferring out of bed (wheelchair use is possible if the person is able to perform daily living skills independently). When evaluating the effects of climate, please consider the time of year when the jail time will be served. The person must be able to self-administer any medications.

If you have any questions regarding the exclusion of active contagious TB or other communicable disease, please call 506-5101.

I certify that *(person's name)* _____ *(date of birth)* _____

_____ Is free of active contagious TB and meets medical fitness criteria for placement in the Con-Tents facility;

OR

_____ Does not meet medical fitness criteria for placement in the Con-Tents facility.

*If your case is being handled by the Superior Court, fax this form, when completed, to the Work Furlough Office at (602) 506-6335 prior to self-surrender/sentencing date of _____.

Signature of Health Care Provider

Date

(Please print or stamp)

Health Care Provider Name:

Address/City:

Telephone:

**FOR WORK FURLOUGH AND WORK RELEASE DEFENDANTS REQUIRING
MEDICAL CLEARANCE FOR HOUSING IN CONTENTS**

Low-Cost Medical Services

Policlinica San Xavier
809 E. Washington Street
Phoenix, AZ 85034
Phone: 602-254-9695
Fax: 602-254-8120

Mountain Park
635 E. Baseline Road
Phoenix, AZ 85042
Phone: 602-243-7277
Fax: 602-276-4427

Clinica Latina
3243 W. Thomas Road
Phoenix, AZ 85017
Phone: 602-415-1900

Mountain Park West (Oeste)
4616 N. 51st Avenue, Suite 203
Phoenix, AZ 85031
Phone: 602-243-7277
Fax: 623-247-9742

St. Vincent de Paul
420 W. Watkins
Phoenix, AZ 85003
Phone: 602-254-3338
Fax: 602-261-6829

Clinica Familiar Mexicana
1514 W. Thomas Road
Phoenix, AZ 85015
Phone: 602-264-9900
Fax: 602-231-1217

Maricopa Integrated Health Systems Locations

Avondale Family Health Center
950 E. Van Buren
Avondale, AZ 85323
623-344-6800

Guadalupe Family Health Center
5825 E. Calle Guadalupe
Guadalupe, AZ 85283
480-344-6000

7th Avenue Family Health Center
1407 S, 9th Avenue
Phoenix, AZ 85007
602-344-6600

Chandler Family Health Center
811 S. Hamilton
Chandler, AZ 85225
480-344-6100

Maryvale Family Health Center
4011 N. 51st Avenue
Phoenix, AZ 85031
623-344-6900

South Central Family Health
Center
33 W. Tamarisk
Phoenix, AZ 85041
602-344-6400

El Mirage Family Health Center
12428 W. Thunderbird
El Mirage, AZ 85335
623-344-6500

McDowell Healthcare Center
1144 E. McDowell Road
Phoenix, AZ 85006
480-344-6550

Sunnyslope Family Health Center
934 W. Hatcher
Phoenix, AZ 85021
602-344-6300

Glendale Family Health Center
5141 W. Lamar
Glendale, AZ 85301
623-344-6000

Mesa Family Health Center
59 S. Hibbert
Mesa, AZ 85210
480-344-6200

New Attorney Training: Case Management & Trial Skills

Case Management May 27-30, 2008

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**Downtown Justice Center Building
Maricopa County Public Defender
620 W. Jackson, 5th Floor Training Room
Phoenix, AZ 85003**

The training topics include:

Professionalism	DUI: Everything you need to know
Overview of Criminal Code	Search & Seizure
Prior Convictions	Inside View of Adult Probation
Sentencing Advocacy	Drugs: The Good/The Bad/The Ugly

**To register please contact Celeste Cogley by May 16, 2008
cogleyc@mail.maricopa.gov or call 602-506-7711 X37569**

There is no fee for Public/Legal Defenders.
Contact Celeste for registration fees for Private/Contract Counsel.

Presented by Maricopa County Public Defender

Jury and Bench Trial Results

February 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
12/4 - 2/1	DeWitt Raynak (Knapp) Hales Curtis	Granville	Weinberg Linn	CR05-007734-001DT Murder 2nd, F1D	Guilty of Lesser Included Manslaughter, Non-Dangerous	Jury
1/30 - 2/5	Barraza Ralston	Eidmanis	Garcia	CR07-132629-001DT 3 cts. Agg. Assault, F2D Endangerment, F6	Not Guilty	Jury
1/31 - 2/5	Turner Davis Rankin Armstrong	Gottsfeld	Sponsel	CR07-134181-001DT MIW, F4	Guilty (Held in Absentia)	Jury
2/4 - 2/6	Dominguez Rankin Curtis	Davis	Pollak	CR07-006336-001DT Armed Robbery, F2D	Not Guilty	Jury
2/4 - 2/7	Fridde Whalin	Newell	Telles	CR07-140049-001DT TOMOT, F3	Guilty	Jury
2/12 - 2/20	Fischer Brazinskas	O'Toole	Shipman	CR07-123039-001DT PODD f/s, F2 2 cts. POND f/s, F2 PODP, F6 MIW, F4	Guilty on all counts.	Jury
Group 2						
1/29 - 1/31	Mestaz Leonard Romani	Gordon	Golomb	CR07-151969-001DT Burg. 3rd Deg., F4 Voyeurism, F5	Mistrial (State violated order <i>in limine</i>)	Jury
2/5 - 2/6	Scott Lee Arvanitas	Blomo	Torgoley	CR07-156299-001DT 2 cts. Forgery, F4	Guilty	Jury
2/7 - 2/21	Taradash Steinfeld Souther Del Rio	Ditsworth	Buesing	CR06-005484-001DT Agg. Assault, F3 Att. Agg. Assault, F4	Not Guilty 2 cts. Agg. Assault Dangerous, Guilty of Misdemeanor Assault	Jury
2/11 - 2/13	Teel Reilly	Akers	Thomas	CR07-142577-001DT 2 cts. Agg. Assault, F6	Dismissed w/prejudice on 3rd day of trial	Jury
2/25 - 2/28	Kozelka Mealy Souther	Kemp	Thomas	CR07-157727-001 Forgery, F4	Not Guilty	Jury

Jury and Bench Trial Results

February 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 3						
2/7 - 2/15	Harrison Burgess <i>Browne</i>	Gottsfield	Sponsel	CR07-105355-001DT 2 cts. Agg. Assault, F2 Agg. Assault, F2D Drug Paraphernalia, F6 Resisting Arrest, F6	Guilty	Jury
2/21 - 2/25	Sanford DeLatorre <i>Browne</i>	Spencer	Lish	CR07-137171-001DT MIW, F4	Not Guilty	Jury
2/26	Harrison	Hoffman	White	CR07-130797-001DT Criminal Trespass, F6 Agg. Assault, F6 Criminal Damage, M2	Not Guilty Not Guilty Guilty	Jury
2/27 - 2/28	Traher DeLatorre <i>Browne</i>	Myers	White	CR07-160720-001DT Burg. 3rd Deg., F4 Poss. of Burg. Tools (3 tools), F6	Not Guilty DV for 2 tools NG on remaining tool	Jury
2/27	Tivorsak DeLatorre <i>Browne</i>	Verdin	Arino	CR07-143661-001DT Criminal Trepass 1st Deg., F6 Criminal Damage, M2	Not Guilty Guilty	Bench
Group 4						
1/31 - 2/6	Lockard Beatty	Contes	Maroney	CR07-111581-001SE Agg. Assault, F5 Agg. Assault, F6 MIW, M1 Criminal Trespass, F6	(Both) Agg. Assault - Guilty MIW-Not Guilty Criminal Trespass - Not Guilty	Jury
2/4 - 2/7	Dehner	Udall	Harbulot	CR07-048395-001SE Agg. Assault, F3D 4 cts. Assault Intent/Reckless/ Injure, M1	Agg. Assault-Guilty 4 cts. Assault Intent/ Reckless/Injury - Not Guilty	Jury
2/5 - 2/7	Brink <i>Baker</i>	Sanders	Maroney	CR06-120653-001SE PODD, F4	Guilty	Jury
2/6 - 2/20	Nurmi (Advisory Counsel)	Contes	McCowan	CR05-104441-001SE Sexual Exploitation of Minor, F2	Guilty	Jury
2/11 - 2/12	Brink	Holding	Brenneman	CR05-031571-001SE PODD, F4 PODP, F6	Mistrial	Jury
2/11 - 2/12	Petroff Arvanitas <i>Baker</i>	Rayes	Judge	CR07-110468-001SE Burg. 3rd Deg., F4	Pled Guilty during trial to reduce charge of Poss. Burg. Tools, F6	Jury
2/11 - 2/22	Akins Ryon <i>Houser</i>	Udall	Smith	CR06-148092-001SE Manslaughter, F2D Agg. Assault, F3D 2 cts. Endangerment, F6D	Guilty	Jury

Jury and Bench Trial Results

February 2008

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 4 (Continued)						
2/12	Jolley	McMurdie	Pollak	CR07-157342-001SE Burg. 3rd Deg., F4 Burg. Tools Poss., F6	Guilty	Jury
2/12 - 2/14	Gaziano <i>Houser</i>	Buttrick	Clark	CR07-142594-001SE 2 cts. Agg. Assault, F3D Unlawful Use of Means of Transportation, F5	Not Guilty	Jury
2/15	Klopp	Rogers	Seeger	TR06-172096-001WT 2 Cts. DUI, M1	Guilty	Jury
2/19 - 2/21	Crocker	Udall	Doering	CR07-160492-001SE 4 cts. Rec. Earnings of Prostitution, F5 Pandering, F5	Not Guilty	Jury
Vehicular						
2/6 - 2/11	Taylor	Dunevant	Humm	CR06-158148-001 DT Burg., 3rd Deg., F4 Burg. Tools Poss., F6	Hung	Jury
2/20 - 2/22	Conter	Passmonte	Foster	CR07-103097-001 DT 2 cts. Agg. DUI, F4	Guilty	Jury
Capital						
6/19- 11/14	Matthews Simpson Burns Ames Page <i>Berry</i> <i>Davis</i>	Gottsfeld	Stevens Grimsman	CR04-037319-001 DT Murder, 1st Deg., F1D Child Abuse, F2N	Guilty - Death	Jury
10/22 - 12/10	Bevilacqua Stazzone Ames <i>Shah</i> <i>Hoban</i>	Donahoe	Clayton Sorrento	CR96-004691 Murder, 1st Deg. F1D Kidnap, F2N 3 cts. Sexual Assault, F2N	Guilty - Life	Jury

Jury and Bench Trial Results

February 2008

Legal Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
1/23 - 2/27	Garfinkel	Thumma	Florio	JD14587 Severance Trial	Severance Granted	Bench
1/29 - 2/5	Bogart	Verdin	Lynas	CR07-150638-001DT Theft Means Trans, F3	Guilty	Jury

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
1/24 to 2/14	Gray Rood	Donahoe	Green	CR06-166549-001-DT 1 ct. Burglary, F2 9 cts. Agg. Assault, F3 5 cts. Armed Robbery, F2 1 ct. Criminal Syndicate, F3 1 ct. Impers. Police Officer, F4 1 ct. Criminal Syndicate, F2 2 cts. Threaten/Intimidate, F4 1 ct. Conspiracy to Threaten, F4 1 1 ct. Conspiracy to Threaten, F5 1 ct. Influence Witness, F5 6 priors on parole	Guilty All Counts	Trial
12/10; 1/25; 2/14	Timmes Gill	Talamante	AG Barons	JD-506858 - Dependency	Dependency Found	Trial
1/11; 1/23; 2/8	Timmes Gill	Talamante	AG Haran	JD-504651 - Severance	Severance Granted	Trial
2/12	Timmes Gill	Oberbillig	AG Villareal	JD-501772 - Severance	Severance Granted	Trial
2/6 to 2/8	Klass Sherry	Bergin	AG O'Donnell- Smith	JD-15358 - Severance	Under Advisement	Bench

**SAVE THE
DATES...**



SIXTH ANNUAL APDA CONFERENCE



**TEMPE MISSION PALMS RESORT
& CONFERENCE CENTER
60 EAST FIFTH STREET, TEMPE, 85281**

MONDAY, JUNE 16, 2008

Pre-Conference: 8:45 am - Noon

Conference: 1:30 pm - 5:00 pm

Social Hour: 5:00 pm - 6:00 pm

TUESDAY, JUNE 17, 2008

Conference: 9:00 am - 5:00 pm

Awards Luncheon: Noon - 1:15 pm

Social Hour: 5:00 pm - 6:00 pm

WEDNESDAY, JUNE 18, 2008

Conference: 9:00 am - 12:15 pm

Post-Conference: 1:30 pm - 4:45 pm



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for The Defense

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