CHARGING: *State v. Benak* — State must provide pretrial notice to defendant that the State intends to preclude probation under Proposition 200 because defendant has a violent prior conviction .....Revised 11/2009

In 1996, the Arizona voters enacted "Proposition 200," the "Drug Medicalization Prevention and Control Act of 1996." See *Stubblefield v. Trombino ex rel. County of Maricopa*, 197 Ariz. 382, 383, 4 P.3d 437, 438 (App. 2000). The Arizona Court of Appeals explained Proposition 200's effect in *State v. Thomas*, 196 Ariz. 312, 314, 996 P.2d 113, 115 (App. 1999):

> The Act significantly changed this state's treatment of defendants convicted of nonviolent, first-time drug offenses. Included among the changes was § 13-901.01, which requires courts to suspend sentencing for such defendants, place them on probation, and order them to participate in an appropriate drug treatment or education program as a condition of probation.

A.R.S. § 13-901.01(A) provides:

> Notwithstanding any law to the contrary, any person who is convicted of the personal possession or use of a controlled substance as defined in § 36-2501 is eligible for probation. The court shall suspend the imposition or execution of sentence and place such person on probation.

Subsection B, however, provides that defendants who have a history of violent crime are not eligible for probation under Proposition 200:

> Any person who has been convicted of or indicted for[1] a

[1]The actual language of subsection B provides that a defendant who has merely been **indicted** for a violent crime is ineligible for probation even though he has never been convicted of such an offense. In *State v. Gomez*, the Court stated that, despite the seemingly clear language of Prop 200, a defendant cannot be excluded from Prop 200's mandatory probation clause because of a previously dismissed indictment for a violent crime. *State v. Gomez*, 212 Ariz. 55, 61, 127 P.3d 873, 879 (2006). In each of the cases discussed herein, the defendant had prior convictions, not just indictments.

> violent crime as defined in § 13-901.03[2] is not eligible for probation as provided for in this section but instead shall be sentenced pursuant to chapter 34 of this title.

The question arose whether the State needed to allege and prove the existence of a defendant's prior convictions to take the defendant out of Proposition 200's protection. In *Bolton v. Superior Court*, 190 Ariz. 201, 945 P.2d 1332 (App. 1997), Bolton pleaded guilty to possession of marijuana. Although it was her third drug conviction, the State and the defense stipulated in the plea agreement that "probation is mandatory," thus agreeing that the defendant was to be placed on probation under Proposition 200 as though it were her first conviction. The trial court refused to ignore Bolton's prior convictions as the parties had agreed. Instead, the trial court rejected the mandatory probation provision of the plea agreement, stating that "the existence of prior convictions was a matter for determination by the court at the time of sentencing." *Bolton*, 190 Ariz. at 202, 945 P.2d 1333. Bolton challenged the trial court's decision, arguing that "a prior conviction exists for purposes of section 13-901.01 only if it is properly alleged by the State." Bolton based her argument on A.R.S. § 13-604(P), which provides for enhanced sentencing if prior convictions are "charged in the indictment or information and admitted or found by the court." *Bolton*, 190 Ariz. at 202-02, 945 P.2d at 1333-34. The Court of Appeals denied relief, holding that A.R.S. § 13-901.01 does not require the State to allege prior convictions:

> Unlike section 13-604, section 13-901.01 does not require that the State allege prior convictions before they are deemed to

[2]A.R.S. § 13-901.03(A) requires: "The allegation that the defendant committed a violent crime shall be charged in the indictment or information and admitted or found by the court." A.R.S. § 13-901.03(B) defines "violent crime" for purposes of that statute as including "any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument."

> exist. Therefore, we hold that whether a defendant is entitled to be sentenced pursuant to section 13-901.01 is a matter of law to be decided by the court; it is not a matter of pleading or plea bargaining to be decided by the state.

The Court in *Bolton* thus held that the State could not put an ineligible defendant back into Proposition 200's mandatory probation provisions even by stipulation in a plea agreement, because the court, not the State, determines whether the defendant was eligible for Proposition 200 treatment.

Nevertheless, despite the holding in *Bolton*, in *State v. Benak*, 199 Ariz. 333, 18 P.3d 127 (App. 2001), the Arizona Court of Appeals held that in drug prosecutions, "the State must provide notice pursuant to section 13-604.04 if it intends to preclude a sentence of probation on the grounds that a defendant has been convicted of a violent crime." Benak was charged with aggravated assault, resisting arrest, drug possession, and possession of drug paraphernalia. *Benak* at ¶ 2. The jury acquitted Benak of the aggravated assault charges but convicted him of resisting arrest and the drug and paraphernalia charges. *Id*.

Before trial, the State alleged that Benak had four nondangerous historical prior felony convictions. *Benak* at ¶ 3. After trial, the trial court found that Benak had two historical prior felony convictions, one of which was for a class 3 aggravated assault. Accordingly, the trial court found that Benak was ineligible for probation under A.R.S. § 13-901.01 because of his prior conviction for aggravated assault and accordingly sentenced him to concurrent prison terms for the drug possession and other charges. *Id*.

Benak appealed and argued that probation was mandatory on his drug possession conviction because the State had failed to allege before trial that he had previously been convicted of a violent crime. *Benak* at ¶ 5. The State argued that A.R.S. § 13-901.01 does

not require the State to give the defendant any notice. *Benak* at ¶ 9. The Court of Appeals noted that the State had not alleged that Benak had any "dangerous" prior convictions and stated, "Although 'dangerous' and 'violent' are separate concepts, they share a similar definition." *Benak* at ¶ 7. The Court then stated, "The State's allegation of nondangerous prior felonies certainly does not provide notice that the State intended to allege a violent crime." *Id*.

The *Benak* Court then reasoned that when the State wishes to enhance a defendant's sentence based on the defendant's historical prior conviction for a violent offense, A.R.S. § 13-604.04 [now § 13-901.03] requires the State to charge that fact in the indictment or information. *Benak* at ¶ 10. The Court then noted that the language of A.R.S. § 13-604.04 did not specifically exclude it from applying to Proposition 200 cases, and held, "The notice requirement of section 13-604.04 therefore applies to the statutes enacted to codify Proposition 200." *Benak* at ¶ 12.

The State argued that if the State is required to give the defendant notice that it will seek to have the defendant declared ineligible for mandatory probation, Benak received sufficient notice when the State made its disclosure of the defendant's prior felony convictions, along with the disclosure of the police report and minute entry concerning Benak's prior aggravated assault conviction. The Court of Appeals disagreed:

> We do not agree that Defendant was fairly forewarned of the State's intent to allege a violent prior offense.
>
> The allegation of prior nondangerous felonies and the disclosure of discovery materials, although appropriate notice that the State sought to enhance Defendant's sentence pursuant to section 13-604, did not clearly inform Defendant that the State would seek to render him ineligible for probation

> as one who had previously committed a violent crime. While the allegation referred to specific subsections of section 13-604, it neither specifically referred to section 13-604.04 nor mentioned "violent crime." The State elected to allege the prior offenses, including the aggravated assault, as nondangerous offenses.

Benak at ¶¶ 16-17. The *Benak* Court then held that the State was "statutorily required to provide Defendant with the additional disclosure if it wished to further enhance Defendant's sentence," and found that "The disclosures were not sufficient to put him on notice that the State intended to use the information to prove that the prior offense was a violent crime." *Benak* at ¶ 18. The Court concluded:

> To exclude Defendant from mandatory probation under section 13-901.01(B), the State was required to provide him with notice by alleging before trial that he had previously committed a violent crime. Because the State failed to make the required allegation, Defendant remained eligible for probation on the drug charge. Accordingly, we remand for resentencing on the dangerous drug conviction.

Benak at ¶ 19. The *Benak* Court noted in a footnote that neither the defense nor the State had cited *Bolton*, *supra*, but said that *Bolton* was correctly decided because it involved the trial court's authority to reject a plea agreement. The Court went on to question the language of *Bolton* in cases not involving plea agreements:

> [*Bolton* does] "hold that whether a defendant is entitled to be sentenced pursuant to section 13-901.01 is a matter of law to be decided by the court; it is not a matter of pleading or plea bargaining to be decided by the State." *Id*. at 203, 945 P.2d 1332, 945 P.2d at 1334. We believe that this statement, if taken out of the plea bargaining context, is overbroad. See *State ex rel. Bowers v. Superior Court*, 173 Ariz. 34, 40, 839 P.2d 454, 460 (prosecution has sole discretion to file allegations of prior convictions for purposes of enhancing sentence).

Benak at ¶ 12 n. 3. Thus, in light of *Benak*, it appears that in drug possession cases, the State is now going to be required to allege and prove both the existence of the defendant's prior convictions and the violent nature of any conviction to remove the defendant from the mandatory probation provisions of A.R.S. § 13-901.01.

The Court of Appeals again followed *Benak*'s reasoning in *State v. Hensley*, 201 Ariz. 74, 31 P.3d 848 (App. 2001). In *Hensley*, the defendant had two prior convictions for armed robbery, but the State had not alleged or proven those prior convictions before the defendant pleaded no contest to possession of dangerous drugs and drug paraphernalia. The presentence report noted the prior violent-nature convictions and recommended prison, but the trial court imposed probation. The State appealed, arguing that A.R.S. § 13-901.01(B) says that a defendant with a violent prior conviction "is not eligible for probation as provided for in this section," relying on *Bolton v. Superior Court*, 190 Ariz. 201, 945 P.2d 1332 (App. 1997). The Court of Appeals disagreed, following *Benak*.

The *Hensley* Court then held that A.R.S. § 13-901.01(E) requires the trial court to impose new conditions of probation on defendants who violate their Proposition 200 probation. The Court noted that no statute allows the court to "unsuccessfully terminate" a defendant's probation and held, "The plain language of A.R.S. § 13-901.01(E) states that the court 'shall' impose additional conditions on one who violates the terms of probation. The word 'shall' is a mandatory term." *Hensley* at ¶ 22. The Court concluded:

> We appreciate the obstacles faced by the trial court in dealing with persons who repeatedly violate probation in Proposition 200 cases. However, as set forth in A.R.S. § 13-901.01(E), the solution to this problem cannot be to reward a violator by releasing him from probation. Instead, the court should employ all legally available means to penalize an offending probationer.

The Court of Appeals followed *Hensley* with *Raney v. Lindberg*, 206 Ariz 193, 76 P.3d 867 (App. 2003). The *Raney* court rejected the Defendant's assertion that "as a matter of constitutional due process, he is entitled to pretrial notice of any prior drug convictions before he may be incarcerated in jail as a condition of probation under § 13-901.01(F)." *Id.* at 197, 76 P.3d at 871. The court limited *Benak* and *Hensley* to cases involving § 13-901.01(B), prior "violent crime" convictions. *Id*.

Raney differentiated "violent crime" convictions from prior drug convictions, explaining that prior drug convictions are not sentencing enhancers, rather they merely disqualify the defendant from an alternative sentencing system. *Id*. at 198, 76 P.3d at 872. Finally, *Raney* reaffirmed *Bolton*, stating that "the existence of prior convictions is a matter for determination by the court at the time of sentencing." *Id*.