

**IN THE ARIZONA SUPREME COURT**

STATE OF ARIZONA,  
Appellee,

v.

DAVID LEE GREEN  
Appellant.

No. CR-18-0537-PR

Arizona Court of Appeals, Div. 2  
No. 2 CA-CR 2017-0208

Pima County Superior Court  
No. CR-20163874-001

**BRIEF OF *AMICI CURIAE***

**THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AND  
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE  
IN SUPPORT OF PETITIONER**

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## INTRODUCTION

In 1996, the voters of Arizona passed Proposition 200, or the “Drug Medicalization, Prevention, and Control Act of 1996,” which includes the mandatory probation provisions codified at A.R.S. § 13-901.01. In passing Proposition 200, the voters of Arizona wanted to “medicalize Arizona’s drug control policy” by greatly increasing the use of mandatory drug treatment instead of prison for people convicted of “personal possession” of drugs. While the voters also intended to “incarcerate violent offenders and drug dealers,” they chose to base disqualification of mandatory probation not upon one’s status as an alleged “violent offender” or “drug dealer” nor upon the seriousness of a prior offense, but upon the specific *charge* for which someone is convicted. Thus, the government ignores the plain language of A.R.S. § 13-901.01 and misstates voter intent when it claims voters mandated treatment for “low-level drug offenders”—a term not found in the statute—and argues that Mr. Green’s status as an alleged “drug dealer”—based on a prior solicitation conviction—counts as a “strike” under the statute.

Likewise, the trial court erred when it ignored the plain language of A.R.S. § 13-901.01 and ruled that a prior conviction for solicitation to sell a narcotic drug was a disqualifying strike against Mr. Green barring him from the mandatory probation provisions of that statute. Because A.R.S. § 13-901.01 explicitly limits “strikes” to charges related to the “personal possession” of drugs, Mr. Green’s prior conviction

for solicitation is not a “strike” and he is still eligible for mandatory probation and treatment.

Such a ruling by the trial court, however, is not surprising. Despite voter clarity that Proposition 200 was intended to greatly expand the use of drug treatment to deal with the problem of drug abuse in Arizona, our Court of Appeals has continued to limit who may receive treatment instead of prison by expanding exclusions from the mandatory probation protections of A.R.S. § 13-901.01. Worse, these decisions ignore the plain language of A.R.S. § 13-901.01 and undermine the will of Arizona voters.

As the voters declared, “the drug problems of non-violent persons who are convicted of personal possession or use of drugs are best handled through court-supervised drug treatment and education.” Since the passage of Proposition 200, this declaration has found support in a mountain of research and evidence, yet Arizona continues to incarcerate non-violent people for their drug problems, failing to heed to demands of the voters that drug abuse should be treated as a disease. As such, Amici respectfully ask this Court to uphold the will of the voters and find that only the crime of “personal possession or use” of controlled substances can count as a “strike” for purposes of A.R.S. § 13-901.01.

## **IDENTITY AND INTERESTS OF AMICI**

The American Civil Liberties Union of Arizona (ACLU of Arizona) is a state-wide nonpartisan organization with over 20,000 members and the state affiliate of the national American Civil Liberties Union. ACLU-AZ is dedicated to protecting the constitutional and statutory rights of everyone, including criminal defendants. The ACLU of Arizona's Smart Justice Campaign is part of a nationwide effort to dramatically reform our criminal legal system by reducing Arizona's prison population by fifty percent while fighting racism in the system to achieve a fairer criminal justice system for all. The ACLU of Arizona therefore defends individual rights through litigation, legislation, and public education. The ACLU of Arizona also frequently files amicus curiae briefs in Arizona courts on a wide range of civil liberties and civil rights issues.<sup>1</sup>

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in

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<sup>1</sup> The ACLU of Arizona wishes to recognize the contributions of its summer legal intern, Paul Davis, a third-year law student at Arizona State University's Sandra Day O'Connor School of Law, for his help researching and drafting this brief.

the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

## ARGUMENT

### **I. Arizona Revised Statutes § 13-901.01 Disqualifies Defendants from Mandatory Probation Based on Prior Convictions for Specific Offenses not Seriousness of Offense or Alleged Status as a “Drug Dealer.”**

When the voters of Arizona passed Proposition 200 in 1996, they did so with the stated goal of handling “the drug problems of non-violent persons who are convicted of personal possession or use of drugs ... through court-supervised drug treatment and education programs.” Ariz. Sec’y of State, 1996 Ballot Propositions (1996) (“1996 Ballot Propositions”), *available at*: <https://azsos.gov/sites/default/files/1996-ballot-propositions.pdf>. The voters also intended to “free up space in our prisons” by creating “room to incarcerate violent offenders and drug dealers.” *Id.* To accomplish the first goal, Proposition 200, as codified in A.R.S. § 13-901.01, mandates courts to “suspend imposition or execution of sentence and place the person on probation” while requiring “participation in an appropriate drug treatment or education program.” A.R.S. § 13-901.01(A), (D).

To accomplish the second goal, A.R.S. § 13-901.01 permanently bars “[a]ny person who has been convicted of or indicted for a violent crime as defined in section 13-901.03” from being eligible for mandatory probation. A.R.S. § 13-901.01(B).

Yet the statute treats prior convictions related to drug sales or distribution differently by simply removing those crimes from its ambit, allowing courts to continue to sentence people charged with the “possession for sale, production, manufacturing, or transportation for sale of any controlled substance” as they had prior to the voter’s approval of Proposition 200. *See* A.R.S. § 13-901.01(C).

In this way, the voters chose a specific procedure to accomplish the goals of Proposition 200:

(1) mandate probation of those charged with “personal possession or use” under A.R.S. §§ 13-3405(A)(1), 13-3406(A)(1) and (8), 13-3407(A)(1), and 13-3408(A)(1);

(2) permanently bar those convicted of “a violent crime” from the mandatory probation protections of A.R.S. § 13-901.01; and

(3) make no changes to how courts would sentence someone charged with “possession for sale, production, manufacturing, or transportation for sale of any controlled substance.”

The plain language of A.R.S. § 13-901.01 supports this reading of the statute and is the “most reliable indicator” of voter intent. *State v. Jones*, 246 Ariz. 452, ¶ 5 (citing *State v. Burbey*, 243 Ariz. 145, 147 ¶ 7 (2017)). From this statutory language, we know the seriousness of a conviction is not tied to provisions related

to disqualification from mandatory probation.<sup>2</sup> Instead, the statute references specific crimes from the criminal code and defines them as something other than “personal possession or use.” A.R.S. § 13-901.01(C). Indeed, in the unlikely event the Legislature decided to increase the severity of personal possession crimes while decreasing the severity of crimes related to drug sales and distribution, the public policy behind Proposition 200 would not change. Nor would the mechanism it creates to accomplish its goals. “[A]ny person who is convicted of personal possession or use” would still receive mandatory probation and treatment regardless of the severity of that crime. A.R.S. § 13-901.01(A). While someone charged with “possession for sale,”<sup>3</sup> “production,”<sup>4</sup> “manufacturing,”<sup>5</sup> or “transportation for sale”<sup>6</sup> of any controlled substance would be sentenced outside the provisions of A.R.S. § 13-901.01 entirely.

Such a reading of the language in A.R.S. § 13-901.01 is the most logical interpretation of the intention of voters who approved Proposition 200 in 1996 and,

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<sup>2</sup> In fact, A.R.S. § 13-901.01 never references the severity of crimes including several drug-related crimes more severe than “personal possession or use.” For example, A.R.S. § 13-3408(A)(5) makes it a class 2 felony to “administer a narcotic drug to another person,” yet this crime is not referenced in A.R.S. § 13-901.01(C), which is only concerned with differentiating between “personal possession” crimes and crimes related to the sale or distribution of controlled substances.

<sup>3</sup> A.R.S. §§ 13-3405(A)(2), 13-3406(A)(2), 13-3407(A)(2), and 13-3408(A)(2).

<sup>4</sup> A.R.S. § 13-3405(A)(3).

<sup>5</sup> A.R.S. §§ 13-3406(A)(4), 13-3407(A)(4), and 13-3408(A)(4).

<sup>6</sup> A.R.S. §§ 13-3405(A)(4), 13-3406(A)(7), 13-3407(A)(7), and 13-3408(A)(7).

more importantly, does not require this Court to ignore the proposition's plain language as the government and prior court decisions have done. *See* Appellee's Supplemental Brief at 2 (inserting the term "low-level drug offenders" to interpret the actual language of A.R.S. § 13-901.01 which does not use that phrase); *see e.g. Goddard v. Superior Court*, 191 Ariz. 402, 404, ¶ 8 (App. 1998) (acknowledging that the plain language of A.R.S. § 13-901.01 is "susceptible" to one interpretation, yet declining to interpret the statute that way).

**II. The Plain Language of A.R.S. § 13-901.01 and Its Intent Demonstrate That Prior "Personal Possession" Convictions are the Only Prior Convictions That Count as "Strikes" Against Mandatory Probation.**

Again, one of the primary goals of Proposition 200 was to handle "the drug problems of non-violent persons who are convicted of personal possession or use of drugs ... through court-supervised drug treatment and education programs." 1996 Ballot Propositions. But, although voters mandated probation for "any person who is convicted of the personal possession or use of a controlled substance or drug paraphernalia," A.R.S. § 13-901.01(A), they limited that mandate based upon whether an offender had been provided with prior opportunities for treatment and whether an offender took advantage of those opportunities. *See* A.R.S. § 13-901.01(F)-(H). As such, only crimes related to the *personal* possession or use of controlled substances count as "strikes," allowing "additional conditions of probation" when "a person is convicted a second time of *personal* possession or

use,” A.R.S. § 13-901.01(F) (emphasis added), and deeming someone “not eligible for probation” under A.R.S. § 13-901.01 if the court finds the person either:

1. Had been convicted three times of *personal possession* of a controlled substance or drug paraphernalia.
2. Refused drug treatment as a term of probation.
3. Rejected probation.

A.R.S. § 13-901.01(H) (emphasis added).

Because the plain language of A.R.S. § 13-901.01 and the purpose behind it expands treatment options for those convicted of the “*personal possession* or use of a controlled substance”—notwithstanding any prior convictions unless those prior convictions include “a violent offense” as defined by A.R.S. § 13-901.03—Court of Appeals decisions limiting who is subject to the mandatory probation protections of A.R.S. § 13-901.01 are flawed and should be overruled. *See e.g. Goddard v. Superior Court*, 191 Ariz. 402 (App. 1998).<sup>7</sup> A ruling from this Court clarifying that only the crime of “personal possession of a controlled substance” counts as a “strike” for purposes of the mandatory probation provisions of A.R.S. §13-901.01 would

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<sup>7</sup> Following *Goddard*, the Court of Appeals repeatedly failed to adhere to the plain language of Proposition 200 and instead substituted its view of what voters intended untethered from the actual language approved by the voters in 1996. These cases are: *State v. Estrada (Estrada I)*, 197 Ariz. 383 (App. 2000) (holding that a non-personal possession conviction counts as a “strike” for purposes of A.R.S. § 13-901.01); *State v. Guillory*, 199 Ariz. 462 (App. 2001) (holding that a non-personal possession conviction counts as a “strike” by relying on the seriousness of crime charged); and *Raney v. Lindberg*, 206 Ariz. 193 (App. 2003) (again holding that a non-personal possession conviction counts as a “strike” for purposes of A.R.S. § 13-901.01).

finally fulfill the “primary objective in construing statutes adopted by initiative” by giving “effect to the intent of the electorate.” *State v. Gomez*, 212 Ariz. 55, 57 ¶ 11 (2006).

In *Goddard*, the Court of Appeals held that “as a consequence of Petitioner’s two prior felony convictions for possession of narcotic drugs for sale, he is not entitled to mandatory probation pursuant to Proposition 200.” *Id.* at ¶ 14. This holding ignores the plain language of A.R.S. § 13-901.01 and the voters’ intent when approving Proposition 200 and instead relies on the Court’s mistaken belief that voters did not intend “to require mandatory probation for virtually all prior felons who commit a current possession or use offense.” *Id.* at ¶ 13. But that is precisely what voters intended because imposing a prison sentence on “prior felons” is already required under Arizona law and, therefore, the *Goddard* Court’s reasoning would render parts of A.R.S. § 13-901.01 superfluous in violation of basic canons of statutory construction. *Bilke v. State*, 206 Ariz. 462, ¶ 11 (2003) (explaining that all portions of a statute must be given meaning so “no clause, sentence or word is rendered superfluous, void, contradictory or insignificant”).

As noted above, the plain language of A.R.S. § 13-901.01 disqualifies someone from its mandatory probation provisions based on either (1) a prior conviction for “a violent crime” and *no other crime*, A.R.S. § 13-901.01(B); or (2) whether the person has “been convicted three times of “*personal possession* of a

controlled substance or drug paraphernalia.” A.R.S. § 13-901.01(H)(1) (emphasis added). And the statute further explicitly declares “[p]ersonal possession or use of a controlled substance pursuant to this section *shall not include possession for sale, production, manufacturing or transportation for sale of any controlled substance.*” A.R.S. § 13-901.01(C) (emphasis added). Thus, the plain language of this statute supports overturning the holding in *Goddard*.

Similarly, the decisions in *Estrada I* and *Guillory* are flawed because they base disqualification of mandatory probation on the severity of prior “drug-related” convictions. Such reasoning again fails to adhere to the plain language of A.R.S. § 13-901.01, which, as discussed above, is not concerned with the severity of prior convictions.<sup>8</sup>

Moreover, in approving Proposition 200, the voters of Arizona identified the non-violent crime of personal possession or use of a controlled substance as symptomatic of disease deserving of treatment rather than punishment. As the voters declared, “we need to medicalize Arizona’s drug control policy: Recognizing that drug abuse is a public health problem and treating abuse as a disease. Thus, drug

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<sup>8</sup> Although the decision in *State v. Ossana*, decided on the same day as *Guillory*, relies in part on the severity of an offense when discussing how prior convictions for attempted possession of a controlled substance affect the “three strikes” rule, that decision ultimately furthers the voters’ intent to expand the use of drug treatment because the Court declined to “expand the language of subsection (G) [now subsection (H)] beyond its plain meaning to include preparatory offenses to the detriment of a defendant.” 199 Ariz. 459, 461-62 ¶ 11 (2001).

treatment and prevention must be expanded.” 1996 Ballot Propositions. Voters were highly concerned about escalating drug use despite Arizona’s attempts to contain it, declaring that nonviolent drug offenders “are best handled through court-supervised drug treatment and education programs,” which are “more effective than locking nonviolent offenders up in a costly prison.” *Id.* As such, voters understood punitive measures do little to eliminate addiction-based crimes and that such measures should be replaced with medical approaches. This belief is reflected in the structure of the measure’s “three strikes” scheme.

Under this scheme, should drug use continue after repeated opportunities at probation and treatment, the person is no longer eligible for mandatory probation. A.R.S. § 13-901.01(H)(1). That “strikes” only accumulate for personal possession convictions makes sense because one’s previous convictions for crimes unrelated to the personal possession of drugs would never have triggered mandatory drug treatment in the first place. A.R.S. § 13-901.01(A). Thus, someone with prior convictions—including prior convictions for crimes related to drug sales—would not have been provided an opportunity at probation and mandatory treatment. *Id.* The Court of Appeals decision in *Goddard* and its progeny notwithstanding, it would therefore follow that prior convictions for any crime other than “a violent offense” would not work to exclude someone from the mandatory probation provisions of A.R.S. § 13-901.01.

### **III. The Voters of Arizona Declared that Sending Those Convicted of Personal Possession Crimes to Prison is Ineffective and That Treatment Should be Provided Instead, A Public Policy Supported by Research.**

As recognized by Arizona voters, imprisoning drug users has proven ineffective in controlling drug abuse. The drafters of Proposition 200 cited findings from the Arizona Criminal Justice Commission that marijuana use had doubled among elementary school students between 1991-1993 and quadrupled among middle school students between 1990 and 1993. 1996 Ballot Propositions. Yet at the time voters approved Proposition 200, sixty-one percent of federal inmates were imprisoned for drug offenses, and thirty-eight percent of state inmates were imprisoned for simple possession. *Id.* While many states have decreased their reliance on prison since 1996 without a rise in crime rates, Arizona has not, becoming “a national outlier with high imprisonment rates and rising corrections spending.” *Arizona’s Imprisonment Crisis: Part 1, The High Price of Prison Growth* (“Arizona’s Imprisonment Crisis”), FWD.us, 1 (Sep. 2018), available at: <https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/The-High-Price-of-Prison-Growth.pdf>.

Despite the voters’ declaration twenty-two years ago that drug treatment is “more effective than locking non-violent offenders up in a costly prison,” 1996 Ballot Propositions, “since 2000, Arizona has increasingly used prison sentences—instead of probation, drug treatment, or other alternatives—to sanction people who

commit non-violent and first-time offenses.” Arizona’s Imprisonment Crisis at 9. Currently, seventy percent of all new prison admissions are for non-violent crime with simple drug possession making up a large proportion of those sent to prison. *Id.* at 9-10. Indeed, “[m]ore people are now sent to prison for drug crimes in Arizona than all violent offenses combined.” *Id.* at 11.

Such reliance on prison for drug offenses not only runs contrary to the voters’ mandate, it also runs contrary to the research about what works to treat addiction. Sentencing policy experts find that increasingly lengthy sentences for drug crimes do not promote public safety. Marc Mauer, *Long-term Sentences: Time to Reconsider the Scale of Punishment*, UMKC L. Rev. 87, 113 (2018), available at: <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/>. In fact, a 2018 study by the Pew Charitable Trusts found no relationship between a state’s drug imprisonment rate and its rates of drug abuse. The Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems*, 5-6 (2018), available at: [http://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_more\\_imprisonment\\_does\\_not\\_reduce\\_state\\_drug\\_problems.pdf](http://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf). Worse, “[r]esearch also shows that for many people convicted of drug offenses, prison makes them more likely to commit crimes in the future.” Arizona’s Imprisonment Crisis at 11 (citing Cassia Spohn and David Holleran, “The Effect of

Imprisonment on Recidivism Rates for Felony Offenders: A Focus on Drug Offenders,” *Criminology* 40, 329-358 (2002)).

These conclusions are echoed within the medical community. A 2009 medical study concluded, “Punishment alone is a futile and ineffective response to drug abuse, failing offenders whose criminal behavior is directly related to drug use.” Redonna Chandler, PhD, et. al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301(2) *J. Am. Med. Ass’n* 183, 189 (2009). This finding relates to how addiction compromises the very mental processes that govern a user’s response to punishment as a deterrent. The “non-rational actor” model of addiction is further supported by studies describing addiction as a disease with deep and lasting “effects on brain-circuitry” causing involuntary conditioned responses and relapses. Thomas McLellan, PhD, et. al., *Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation*, 284 *J. Am. Med. Ass’n* 1691 (2000); see also Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 *Fla. St. U. L. Rev.* (2014) (concluding that because of the effects drug use has on mental processes, it is “nonsensical to attempt to deter this group through severe mandatory sentences”). Voters in 1996 would not be surprised by these findings, but they would be disappointed that Arizona continues to ignore their demand that non-violent persons who are convicted of personal

possession or use of drugs are best handled through court-supervised drug treatment and education programs. It is time to respect the demands of the voters and expand the mandatory probation protections explicitly found in A.R.S. § 13-901.01.

## **CONCLUSION**

In 1996, the voters of Arizona understood that treating drug addiction as a disease requiring treatment and education was a more effective way of dealing with this public health emergency than warehousing people in prison. To expand the use of drug treatment, the voters approved Proposition 200 which mandates probation and drug treatment of those convicted of the “personal possession” of controlled substances. To accomplish this goal, voters chose to base disqualification of mandatory probation upon the specific crime for which someone was previously convicted and to only disqualify someone currently convicted of personal possession from mandatory probation and treatment after three prior convictions for “personal possession” of drugs or drug paraphernalia or for a prior conviction for “a violent offense.” Despite the clear language to this effect in A.R.S. § 13-901.01, prosecutors in Arizona continue to imprison those struggling with substance abuse disorder; and the interpretations of the law by the lower courts serve to weaken the mandatory probation protections of that statute. Amici therefore urge this Court to adhere to the actual language the voters approved in 1996, affirm the decision of the Court of Appeals as it relates to Mr. Green’s prior solicitation conviction, and overturn

*Goddard* and its progeny, which found that crimes other than the personal possession of controlled substances can count as “strikes” under A.R.S. § 13-901.01.

Respectfully submitted, this 29th day of July, 2019.

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