CASE NOTE:

DRUG PARAPHERNALIA CHARGES AND PROPOSITION 200: *STATE V. ESTRADA*

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I. INTRODUCTION

Over five years ago, Arizona voters passed Proposition 200, the "Drug Medicalization, Prevention, and Control Act of 1996."[1] In part, the Act sets forth sentencing guidelines for persons convicted of drug use and possession, specifying that first- and second-time nonviolent offenders receive probation and treatment rather than incarceration.[2] The Act, however, does not specify whether these guidelines apply to convictions for possession of drug paraphernalia, leaving this question unanswered for Arizona prosecutors and judges.[3] Prior to the review and decision of the Arizona Supreme Court in *State v. Estrada*,[4] the two divisions of the Arizona Court of Appeals were divided as to whether Proposition 200 affected sentencing of convictions for drug paraphernalia possession.[5] With its decision in *State v. Estrada*,[6] the Arizona Supreme Court has significantly clarified the application of the statute for the Arizona state courts.[7]

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1. Codified as ARIZ. REV. STAT. § 13-901.01 (West 2000).

2. *See id.*; *see also* Sandra Norman-Eady, Update on Arizona's Proposition 200, *at* http://www.druglibrary.org/schaffer/MISC/ct/prop200.html (last visited Apr. 1, 2002). There are exceptions to this, however. Defendants with a prior violent crime conviction are ineligible for mandatory probation. *See* § 13-901.01(B). Defendants with two or more prior convictions for personal possession or use of a controlled substance are also ineligible for mandatory probation. *See* § 13-901.01(G).

3. *See* ARIZ. REV. STAT. § 13-901.01(G).

4. 34 P.3d 356 (Ariz. 2001).

5. *See* State v. Estrada, 4 P.3d 438 (Ariz. Ct. App. 2000); State v. Hatton, No. 1 CA-CR 99-0448 (mem. decision) (Ariz. Ct. App. 2000) (Division One). *Cf.* State v. Holm, 985 P.2d 527 (Ariz. Ct. App. 1998) (Division Two).

6. 34 P.3d 356 (Ariz. 2001).

7. *See id.* at 359 ¶ 15 – 362 ¶ 25.

II. PROPOSITION 200

In 1996, Arizona voters approved a ballot initiative entitled "Drug Medicalization, Prevention, and Control Act of 1996"[8] (the Act), substantially altering statutory sentencing guidelines for first- and second-time drug offenders.[9] In essence, "the purpose [of the Act] was to change Arizona's drug control policy by treating drug abuse as a medical problem best handled by drug treatment and education, not by incarceration."[10] To this end, the Act mandates treatment and probation for most people convicted of drug use and possession.[11] A person sentenced to probation does not serve any jail or prison time, is under a probation officer's supervision, and is not detained for as long as he abides by the conditions of probation.[12] Additionally, the sentence includes required participation in a drug treatment or education program.[13]

Despite an attempt by the Arizona legislature to change the Act's probation guidelines,[14] the voters rejected the legislative changes in 1998 and endorsed Proposition 200 as originally enacted.[15] Thus, the Act remains virtually the same as it was when passed over five years ago.[16]

III. DIVISION TWO OF THE ARIZONA COURT OF APPEALS

In the first of the three cases[17] considered by the Arizona Supreme Court in deciding *State v. Estrada*,[18] Division Two of the Arizona Court of Appeals ("Division Two") concluded that all drug paraphernalia convictions fall beyond the language of Proposition 200.[19] Under this interpretation, defendants convicted

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8. Sixty-five percent of the voters in the 1996 Arizona General Election approved the ballot initiative. *See* Arizona Secretary of State, Election Summary, *available at* http://www.sosaz.com/results/1996general/eresults.csv (last visited Apr. 1, 2002).

9. *See* ARIZ. REV. STAT. § 13-901.01; *see also* State v. Estrada, 4 P.3d 438 (Ariz. Ct. App. 2000).

10. Foster v. Irwin, 995 P.2d 272, 273 ¶ 3 (Ariz. 2000).

11. *See* ARIZ. REV. STAT. § 13-901.01.

12. *See id.*; *see also* Sandra Norman-Eady, Update on Arizona's Proposition 200, *at* http://www.druglibrary.org/schaffer/MISC/ct/prop200.html (last visited Apr. 1, 2002).

13. *See* ARIZ. REV. STAT. § 13-901.01; *see also* Sandra Norman-Eady, Update on Arizona's Proposition 200, *at* http://www.druglibrary.org/schaffer/MISC/ct/prop200. html (last visited Apr. 1, 2002).

14. *See* Arizona Secretary of State, 1998 Ballot Propositions, *available at* http://www.sosaz.com/election/1998/Info/PubPamphlet/prop301.html (last visited Apr. 1, 2002) (explaining proposed changes to statute).

15. Fifty-two percent of the voters in the 1998 Arizona General Election rejected the attempted changes to the probation guidelines. *See* Arizona Secretary of State, State of Arizona Official Canvas, *available at* http://www.sosaz.com/election/1998/General/ Canvass1998GE.pdf (Nov. 1998); *see also* Calik v. Kongable, 990 P.2d 1055 (Ariz. 1999) (examining history of ARIZ. REV. STAT. § 13-901.01 (West 1996)).

16. *See Calik*, 990 P.2d at 1060.

17. *Estrada*, 4 P.3d 438 (Ariz. Ct. App. 2000) (Division One); *Hatton*, No. 1 CA-CR 99-0448 (mem. decision) (Ariz. Ct. App. 2000) (Division One); *Holm*, 985 P.2d 527 (Ariz. Ct. App. 1998) (Division Two).

18. 34 P.3d 356 (Ariz. 2001).

19. *See Holm*, 985 P.2d at 529 ¶ 10.

merely of paraphernalia possession would be more likely to receive jail time than those persons convicted of actual drug possession, as they would not be entitled to the probation and treatment programs provided under the Proposition 200 sentencing guidelines.[20] In *State v. Holm*,[21] the defendant was convicted not of actual possession or use of drugs, but merely of possession of drug paraphernalia.[22] Holm was sentenced to a presumptive one and three-quarter year term of imprisonment.[23] Before Division Two, Holm argued that this sentence was improper, because possession of paraphernalia should have been considered a lesser-included offense subject to sentencing under Proposition 200 guidelines.[24]

In rejecting the defendant's argument that "possession of drug paraphernalia is a lesser or 'necessarily' included offense,"[25] Division Two held that for purposes of Proposition 200,[26] possession of paraphernalia is not a lesser-included offense of personal possession.[27] According to Division Two, possession of paraphernalia is not a lesser-included offense of drug possession because one need not actually possess a drug in order to possess paraphernalia.[28]

Division Two concluded its discussion of the issue by stating that the legislature, not the courts, was the appropriate body to determine whether its interpretation would lead to illogical or unfair results.[29] Holm did not seek review of his sentence by the Supreme Court of the State of Arizona.[30]

IV. DIVISION ONE OF THE ARIZONA COURT OF APPEALS

Despite Division Two's apparent certainty that Proposition 200 was intended to exclude all drug paraphernalia charges,[31] Division One of the Arizona Court of Appeals (Division One) reached the opposite conclusion, deciding in two separate cases that convictions for possession of drug paraphernalia were subject to the provisions of Proposition 200.[32] In both cases, the defendants had been convicted of possession of drug paraphernalia and Division One ultimately held that Proposition 200 required that the defendants be sentenced to probation, not prison.[33]

Angelita Estrada was convicted of possession of a dangerous drug, a class four felony, and possession of drug paraphernalia, a class six felony.[34] The charges

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20. *See id.*
21. 985 P.2d 527 (Ariz. Ct. App. 1998).
22. *See id.* at 529 ¶ 9.
23. *See id.* at 528 ¶ 1.
24. *See id.* at 529 ¶ 9.
25. *Id.*
26. Codified as ARIZ. REV. STAT. § 13-901.01.
27. *See Holm*, 985 P.2d at 529 ¶ 10.
28. *See id.*
29. *See id.*
30. *See Estrada*, 34 P.3d at 359 ¶ 13.
31. *See Holm*, 985 P.2d at 529 ¶ 10.
32. *See Estrada*, 4 P.3d 438; *Hatton*, No. 1 CA-CR 99-0448 (mem. decision).
33. *See Estrada*, 4 P.3d at 443 ¶ 23; *Hatton*, No. 1 CA-CR 99-0448 (mem. decision).
34. *See Estrada*, 4 P.3d at 439 ¶ 3.

arose from a police search of a car in which Estrada was a passenger.[35] During the search, the officers found methamphetamine in two plastic "baggies" and a single glass tube commonly used for smoking the drug in a purse containing Estrada's driver's license and social security card.[36]

Estrada was initially sentenced to a three-year term of probation for the drug possession conviction, pursuant to Proposition 200.[37] The trial court, however, later concluded that a prior conviction rendered her ineligible for probation, sentencing her instead to two and one-quarter years in prison.[38] The trial court also sentenced Estrada to three-quarters of a year on the paraphernalia conviction after finding the mandatory probation provision inapplicable there.[39]

Estrada argued before Division One that imprisonment for her paraphernalia possession conviction was prohibited under Proposition 200.[40] Division One agreed, noting that the statute did not explicitly apply to paraphernalia convictions, but concluding that the voters of the State of Arizona did not intend for paraphernalia convictions to fall outside Proposition 200's mandatory probation and treatment.[41] Division One found that the "voters who sought to reserve prison space for violent offenders could not have intended, when a defendant is caught with a joint of marijuana, to require probation for the drug, yet permit prison for the rolling paper wrapped around it."[42] Ultimately, Division One held that, where paraphernalia is associated solely with personal possession or use, the mandatory probation provisions of Proposition 200 apply.[43] Therefore, Division One vacated Estrada's prison sentence.[44]

Similarly, in *State v. Hatton*,[45] Terry Lee Hatton was stopped by the police while carrying several bags on his bicycle early in the morning.[46] After the police conducted a routine name check and found he had an outstanding warrant, he was subjected to a search that produced "methamphetamine, marijuana, scales, baggies, a ledger, and some glass pipes used for smoking methamphetamine."[47] He was ultimately convicted of the probation-eligible offenses of simple possession of methamphetamine and possession of marijuana, and the felony conviction of possessing drug paraphernalia.[48] For the drug convictions, the trial court imposed

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35. *See id.* at 439 ¶ 2.
36. *See id.*
37. *See id.* at 440 ¶ 5.
38. *See id.*
39. *See id.*
40. *See Estrada*, 4 P.3d at 440 ¶ 6. Division One also vacated the prison sentence on the drug count for independent reasons not addressed by the Supreme Court upon review. *See Estrada*, 34 P.3d at 358 ¶ 6.
41. *See Estrada*, 4 P.3d at 442–43 ¶ 21.
42. *Id.* at 443 ¶ 21.
43. *See id.* at 443 ¶ 23.
44. *See id.* at 443 ¶ 24.
45. No. 1 CA-CR 99-0448 (mem. decision).
46. *See id.* at ¶ 2.
47. *Id.*
48. *See id.* at ¶ 3.

concurrent three-year sentences of probation.[49] In addition, however, the trial court gave Hatton a prison sentence after finding Proposition 200 inapplicable to his conviction for paraphernalia possession.[50]

On appeal, Division One applied *Estrada*[51] to *Hatton*[52] and found improper the prison sentence imposed for the paraphernalia conviction.[53] Division One therefore vacated Hatton's paraphernalia sentence and remanded his case for sentencing pursuant to Proposition 200.[54]

V. THE ARIZONA SUPREME COURT MAJORITY OPINION

The Supreme Court of Arizona granted the State's petition for review on the basis of the apparent conflict between *Holm*[55] and the Division One cases,[56] in order to determine whether the mandatory probation provision of Proposition 200 applies to convictions for drug paraphernalia.[57] Reviewing *de novo*, the Supreme Court examined the statutory language and compared the statute as enacted with the voters' intent in passing Proposition 200.[58]

Writing for the majority, Vice Chief Justice Jones[59] first looked to the statute itself.[60] The statute provides:

> A. 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.
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> ....
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> C. Personal possession or use of a controlled substance pursuant to this section shall not include possession for sale, production,

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49. *See id.* at ¶ 6.
50. *See id.*
51. 4 P.3d 438.
52. No. 1 CA-CR 99-0448 (mem. decision).
53. *See id.* at ¶ 9.
54. *See id.* at ¶ 13.
55. 985 P.2d 527.
56. *Estrada*, 4 P.3d 438 (Ariz. Ct. App. 2000); *Hatton*, No. 1 CA-CR 99-0448 (mem. decision) (Ariz. Ct. App. 2000).
57. *See Estrada*, 34 P.3d at 359 ¶ 15. The Supreme Court had jurisdiction over the case pursuant to Article VI, section 5(3) and (4) of the Arizona Constitution. *See id.* at 359 ¶ 14.
58. *See id.* at 359 ¶ 15.
59. Following the expiration of his term as Chief Justice of the Supreme Court of the State of Arizona, Justice Zlaket remains a member of the court and Justice Jones now serves as the Chief Justice.
60. *See Estrada*, 34 P.3d at 359 ¶ 16.

> manufacturing or transportation for sale of any controlled substance.[61]

Finding both Proposition 200 and ARIZ. REV. STAT. § 36-2501 silent as to paraphernalia,[62] the Supreme Court was left to address the question of inclusion of paraphernalia in Proposition 200 by considering the result of the different possible interpretations and applications.[63] To do so, the Court looked to the language of the statute itself, beginning its examination with a textual approach to statutory interpretation.[64]

Division One had previously found it irrational, and therefore contrary to principles of statutory interpretation, to read the statute as allowing incarceration for a conviction for paraphernalia possession, while mandating probation for drug possession or use.[65] On appeal, the State argued that the statutory language was clear and unambiguous and does not produce an absurd result.[66] The Supreme Court rejected this argument and agreed with Division One, finding the most important aspect of the case[67] to be that the State's argument would produce an absurd and illogical result.[68] As drug possession routinely requires some sort of a container, the statute creates the "practical impossibility" of drug use occurring without the presence of paraphernalia.[69]

Broadly construing "drug paraphernalia" could include not only devices and objects used or intended to be used in connection with the possession, use, production, or sale of illegal drugs,[70] but also otherwise innocuous items that are regularly associated with drugs.[71] The statute is, however, notably silent as to

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61. ARIZ. REV. STAT. § 13-901.01; *see also* ARIZ. REV. STAT. § 36-2501 (West 2000) (referring to lists of drugs, compounds, and chemical precursors to define "controlled substance").

62. *See Estrada*, 34 P.3d at 360 ¶ 16.

63. *See id.*

64. *See* Rector, Holy Trinity Church v. United States, 143 U.S. 457 (1892) (providing example of application of textualism, whereby court interprets statute without consideration beyond statutory language used).

65. *See Estrada*, 4 P.3d at 442–43 ¶ 21.

66. *See Estrada*, 34 P.3d at 360 ¶ 17.

67. *See id.* at 361 ¶ 22. The Court had seen similar phenomena previously. *See* City of Scottsdale v. McDowell Mountain Irrigation & Drainage Dist., 483 P.2d 532, 537–38 (Ariz. 1971) (declining to read the statutory phrase "resident owners of real property" as requiring owners to physically reside on the property, because doing so would be a "practical impossibility" due to a lack of water and would therefore "defeat" the statutory objective).

68. *See* Perini Land Dev. Co. v. Pima County, 825 P.2d 1, 4 (Ariz. 1992) (quoting Bussanich v. Douglas, 733 P.2d 644, 646–47 (Ariz. Ct. App. 1986)) (describing a result as "absurd 'if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of [persons] with ordinary intelligence and discretion.'").

69. *See Estrada*, 34 P.3d at 361 ¶ 22; *see also City of Scottsdale*, 483 P.2d at 537–38.

70. *See Estrada*, 34 P.3d at 361 ¶ 22; ARIZ. REV. STAT. § 13-3415(F–2) (West 2000).

71. *See Estrada*, 34 P.3d at 361 ¶ 22; ARIZ. REV. STAT. § 13-3415(F)(2)(h) (West 2000) (suggesting inclusion of such items as blenders, bowls, and spoons).

paraphernalia,[72] because a person will almost never actually possess or use a drug without also possessing the associated paraphernalia for use with the drug itself.[73] As such, the majority found that there would be a patently absurd result if it interpreted Proposition 200 as mandating probation for the crime of using a drug, but permitting incarceration if the State charged the user for possession of paraphernalia because he had wrapped the drug in paper.[74]

The Court further broadened its approach, going beyond a textualist approach to interpret Proposition 200, implying that the result would likely, if not certainly, have been the same even if the language been clear regarding paraphernalia.[75] Based upon an examination of the intent provisions of Proposition 200, the Court determined that it would be inappropriate to mandate probation for serious drug use and possession convictions, but to incarcerate for the lesser crime of paraphernalia possession.[76] These provisions explicitly reject incarceration of first-time drug offenders in favor of treatment, in the hopes of reducing the use of drugs in Arizona.[77] Another benefit expressed in the intent provisions is that such a guideline reduces prison crowding, making room for persons convicted of more serious crimes.[78]

Based on the intent provisions, the Court held "that the probation eligibility provisions of Proposition 200 apply to convictions for the possession of items of drug paraphernalia associated solely with personal use by persons also charged or who could have been charged with simple use or possession of a controlled substance under the statute."[79] The Court noted that for it to find otherwise would render Proposition 200 a practical nullity, and allow the State to circumvent the manifest purpose of the statute.[80] The Court emphasized, however, that even under Proposition 200, all drug paraphernalia convictions are not

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72. *See Estrada*, 34 P.3d at 361 ¶ 22.

73. *See id.*

74. *See id.* at 361 ¶ 23.

75. *See id.* at 360 ¶ 19. To support this proposition, the majority relied on a number of previous cases, all of which suggested that the Court take a textualist approach to statutory interpretation. *See* Resolution Trust Corp. v. Western Techs, Inc., 877 P.2d 294, 300 (Ariz. Ct. App. 1994) (employing a "plain meaning interpretation [that] would lead to ... a result at odds with the legislature's intent, even where statutory language is 'clear and unambiguous'") (McGregor, J.); *Calik*, 990 P.2d at 1060 ¶ 20 ("Courts should avoid hypertechnical constructions that frustrate legislative intent.") (internal quotations omitted); Mail Boxes, Etc., U.S.A. v. Industrial Comm'n, 888 P.2d 777, 779 (Ariz. 1995) ("Where language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary."); Corbin v. Pickrell, 667 P.2d 1304, 1307 (Ariz. 1983) ("[I]t is a basic tenet of statutory interpretation that where the statutory language is unambiguous, that language must ordinarily be regarded as conclusive, absent a clearly expressed legislative intent to the contrary.").

76. *See* Text of Proposed Amendment – Proposition 200 §§ 3(C), (E), (F), 1996 Ballot Propositions, *available at* http://www.sosaz.com/election/1996/General/1996 BallotPropsText.htm. (as of Apr. 1, 2002).

77. *See id.*

78. *See id.*

79. *See Estrada*, 34 P.3d at 361 ¶ 24.

80. *See id.*

probation-eligible, as it was the Court's opinion that the statutory protections clearly apply to only clearly defined individuals engaged in "personal possession or use of a controlled substance," but not to individuals engaged in the "sale, production, manufacturing or transportation for sale of any controlled substance" or to paraphernalia associated with those activities.[81]

The Supreme Court ultimately affirmed Division One's decisions in *Estrada*[82] and *Hatton*,[83] concluding that their sentences of incarceration for possession of paraphernalia were properly vacated.[84] It also expressly disapproved of both the analysis and the result in *Holm*.[85]

VI. JUSTICE FELDMAN'S SPECIAL CONCURRENCE

In his special concurrence, Justice Feldman suggests that perhaps the majority opinion does not go far enough to ensure that the will of the electorate, which adopted Proposition 200 by sixty-five percent,[86] is fully carried out.[87] As a result, Justice Feldman wrote a separate concurrence, which former Chief Justice Zlaket joined, to identify his concerns regarding the majority's opinion.[88] Justice Feldman's opinion goes farther than that of the majority to identify those categories of charges to which Proposition 200's statutory probation requirements should apply.[89]

Justice Feldman argued that the majority of the Court made its decision without considering the "stand-alone" case in which a defendant's possession of paraphernalia, and not the drug itself, is for the purpose of personal use of the drug.[90] Justice Feldman believed that the Court's analysis is equally applicable, if not more applicable, to such stand-alone situations—the very category the majority failed to address.[91]

The majority presented two reasons for not addressing the stand-alone problem, neither of which convinced Justice Feldman.[92] First, because both Estrada

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81. *See id.* at 361–62 ¶ 25 (citing ARIZ. REV. STAT. § 13-901.01(C); also citing *Foster*, 995 P.2d at 275 ¶ 7 ("Proposition 200 differentiates non-commercial possession or use from the commercial or potentially commercial trafficking in controlled substances.")).

82. 4 P.3d 438.

83. No. 1 CA-CR 99-0448 (mem. decision).

84. *See Estrada*, 34 P.3d at 362 ¶ 26.

85. *See id.*

86. *See* Arizona Secretary of State, Election Summary, *available at* http://www.sosaz.com/results/1996general/eresults.csv (last visited Apr. 1, 2002).

87. *See Estrada*, 34 P.3d at 362–64 ¶¶ 27–36 (Feldman, J., concurring).

88. *See id.* at 362 ¶ 27 (Feldman, J., concurring).

89. *See id.* at 362–64 ¶¶ 27–36 (Feldman, J., concurring).

90. *See id.* at 362 ¶ 28 (Feldman, J., concurring) (giving two examples of these situations: (1) a person who, having smoked marijuana, now is in possession of only the pipe, the wrapper, or whatever container he used for the purpose of smoking the drug; (2) a person who has stopped using drugs, but has yet to dispose of the paraphernalia she used in conjunction with the drugs).

91. *See id.* at 362 ¶ 28 (Feldman, J., concurring).

92. *See id.* at 362 ¶ 29 (Feldman, J., concurring); *see also Estrada*, 34 P.3d at 361 ¶ 24.

and Hatton actually possessed drugs, the majority determined that their cases did not present the stand-alone problem.[93] Justice Feldman, however, found that this category of cases is included within the issues the Court considered and accepted.[94] He noted that the State framed the issues in its petitions for review in both *Estrada*[95] and *Hatton*[96] as to address whether Proposition 200 mandates probation for possession of drug paraphernalia, despite the absence of any statutory reference to drug paraphernalia.[97] Second, the majority decided that, because Proposition 200 "depends on the actual presence of drugs," it need not consider stand-alone cases.[98] Justice Feldman, however, would have preferred that the Court clarify for Arizona's prosecutors and judges that the Court will—in all Proposition 200 cases, including stand-alone cases of possession of paraphernalia for personal use—follow the intent of the electorate.[99] By doing so, Justice Feldman argued, the Court could have clarified the limitation of its holding for judges and prosecutors who may still feel justified in continuing to treat stand-alone defendants as prison-eligible, despite the fact that the majority held the electorate's intent should not be ignored by the state, and that the courts should not countenance such attempts to ignore the intent of the electorate.[100]

Although Justice Feldman ultimately agreed with the majority's holding,[101] he found Estrada's and Hatton's victories "pyrrhic."[102] Estrada and Hatton both served full prison terms, and with the Court's holding, learned too late that they should have received treatment and probation instead.[103] Not only would subjecting others convicted of mere paraphernalia possession for personal use to prison result in unnecessary expense and waste of judicial and prison resources, Justice Feldman noted that it would frustrate the aims of Proposition 200.[104] Therefore, Justice Feldman "[saw] no sense in failing to take the last step required by logic, common sense, and Proposition 200."[105]

VII. CONCLUSION

The lingering question from the holding in this case is whether *Estrada*[106] explains the extent to which Proposition 200 applies to cases where the defendant is charged with mere possession of paraphernalia without any charges of possession or use of actual drugs. As Justice Feldman addressed in his concurrence, it is still unclear whether stand-alone defendants are prison-

93. *See Estrada*, 34 P.3d at 361 ¶ 24, n. 2.
94. *See id.* at 362 ¶ 29 (Feldman, J., concurring).
95. 4 P.3d 438.
96. No. 1 CA-CR 99-0448 (mem. decision).
97. *See Estrada*, 34 P.3d 356 ¶29 (Feldman, J., concurring).
98. *See id.* at 363 ¶ 24 n.2.
99. *See id.* at 363–64 ¶ 35 (Feldman, J., concurring).
100. *See id.*
101. *See id.* at 363 ¶ 32 (Feldman, J., concurring).
102. *See id.* at 364 ¶ 36 (Feldman, J., concurring).
103. *See Estrada*, 34 P.3d at 364 ¶ 36 (Feldman, J., concurring).
104. *See id.* at 364 ¶ 36.
105. *See id.*
106. 34 P.3d 356 (Ariz. 2001).

eligible.[107] Whether the voters, the Legislature, or the courts will address this question remains to be seen.

107. *See id.* at 362–64 ¶¶ 27–36 (Feldman, J., concurring).