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SUPREME COURT PETITIONS

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The Arizona Supreme Court accepted review or jurisdiction of the following issues on September 25, 2007*:

***Donald W. Sr. v. ADES, et al.*,** CV-07-0221-PR, 1 CA-JV 06-0088 (Opinion), 159 P.3d 65 (Ariz. Ct. App. 2007)

1. In determining whether Appellant's ineffective assistance of counsel claim was clearly meritless, did the court of appeals err in creating a new standard for ineffective assistance of counsel claims in parental termination cases rather than applying the established standard based on *Strickland*?
2. After determining that Appellant's claim was not clearly meritless, did the court of appeals err in determining that counsel was ineffective rather than remanding the case to the juvenile court for an evidentiary hearing?

Jean Cundiff, on her own behalf and a class of similarly situated persons v. State Farm Mutual Automobile Ins., CV-07-0057-PR, 2 CA-CV 05-0209 (Opinion), 145 P.3d 638 (Ariz. Ct. App. 2006)

1. Does the Arizona UM/UIM Act, § 20-259.01, permit an underinsured insurer to enforce a policy's offset provision that is not authorized by the statute to prevent the insured from obtaining the full amount of damages she would have obtained if the tortfeasor had sufficient liability coverage?
2. If so, can the insurer apply an offset provision even when there has been no duplication of payment in the arbitration award and application of the offset provision prevents the insured from obtaining payment of damages for which she had never received compensation from a collateral source?
3. Does Arizona's collateral source rule apply to UIM claims?

D. Jere' Webb et al. v. Victoria Gittlen, et al., CV-07-0127-PR, 1 CA-CV 06-0300 (MD)

1. Whether professional negligence claims against insurance agents may be assigned to third parties.
2. Whether *Premium Cigars International, Ltd v. Farmer-Butler-Leavitt Ins. Agency*, 208 Ariz. 557, 96 P.3d 555 (App. 2004), should be overturned, thus validating the assignment by the owners of the Liquor Vault to Mr. Webb of their claim for professional negligence against their insurance agent.

State of Arizona v. Gary Edward Cox, CR 07-0127-PR, 2 CA CR 2005-0272 (Opinion), 214 Ariz. 518, 155 P.3d 357 (Ct. App. 2007)

1. The court of appeals' holding on Cox's insufficiency of evidence claim contradicts the holding in *State v. Miramon,* 27 Ariz. App. 451, 745 P.2d 991 (1987), that a persons' presence in a car with others together with his knowledge that drugs are under his seat are insufficient to establish constructive possession. Thus, this Court should accept review to clarify the law on constructive possession.
2. The court of appeals held that language in *State v. Tyler,* 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986), supporting Cox's jury instructions request was dicta. The court's statement is unsupported, and by its holding it has overruled another appellate court decision, which it has no authority to do. Thus, this Court should accept review to decide whether Tyler or Cox correctly states the law on possession.

Juan Picaso et al. v. Tucson Unified School District, 2 CA-CV 2005-0174 (Opinion), 154 P.3d 364 (Ariz. Ct. App. 2007)

Does the Court of Appeals' published Opinion in this case wrongfully conclude that Plaintiffs are entitled to a new trial because the trial court precluded Maribel Picaso from denying or explaining her guilty plea?

**Unless otherwise noted, the issues are taken verbatim from either the petition for review or the certified question.*

tencing court states on the record that it does not intend to rely on incorrect or inappropriate information in sentencing, it is not required to correct the presentence report, even though it may be used in the future for classification purposes by the Arizona Department of Corrections or at future sentencings. *State v. McCurdy*, 2 CA-CR 2006-0049, 10/24/07.

In a first-degree murder prosecution, the trial court does not err by ordering supplemental closing argument in response to a jury question regarding the meaning of "premeditation" rather than giving the jury an additional "impasse" instruction where the record indicates that a jury was merely confused and does not reflect that an impasse was reached by the jury. Jury coercion may exist when a trial court's actions or remarks, viewed in the totality of circumstances, displaces the independent judgment of the jurors, or when a trial court encourages a deadlocked jury to reach a verdict. **Whether a jury is at an impasse is an important determination to be made by the trial court because prematurely giving an impasse instruction may also be a form of coercion.** Under Rule 22.4, ARIZ.R.CRIM.P., **a trial court may use supplemental closing argument on a particular issue to fully and fairly respond to the questions asked by deliberating jurors concerning the instructions given as long as additional argument is done fairly, without prejudicing the rights of either party** by giving equal time to each party for presentation of supplemental argument. Although a trial court does not have free reign in attempting to get the jury to reach a verdict, and thus displacing the independent judgment of the jury, trial courts have "inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them," as long as such procedures are not inconsistent with statutory or constitutional provisions or other rules of the court. **A trial court does not err by allowing the jury to determine whether a defendant's conduct sufficiently focused on or targeted children to satisfy the dangerous crimes against children sentencing enhancement provision** under A.R.S. § 13-604.01 **when sufficient evidence is presented showing that the defendant targeted the individual victims themselves, rather than supporting that the children were "the unintended and unknown victims of" "unfocused conduct."** It is noteworthy that in such cases that the knowledge of a victim's age is unnecessary because when a defendant "targets a particular person [or group of persons]," the defendant assumes the risk that the victim(s) will turn out to be within a protected age group. *State v. Fernandez*, 1 CA-CR 05-1136, 10/18/07.

A criminal defendant may, by his own improper and/or egregious conduct, actually forfeit his Sixth Amendment right to the assistance of counsel at trial. Although the Sixth Amendment guarantees criminal defendants the right to representation of counsel at all criminal proceedings, such a defendant may effectively forgo that assistance through his own improper actions, even though they do not expressly waive their right to counsel. While waiver by improper conduct requires that a trial court both warn a defendant that further disruptive conduct may result in the loss of the right to counsel, and explain the implications of such waiver, **forfeiture resulting from "severe misconduct or a course of disruption aimed at thwarting judicial proceedings" does not require a prior warning**. Improper conduct which may be considered by a trial Judge for the purposes of forfeiting the right to counsel may include death or violent threats made by a defendant against the defendant's attorney(s), ongoing verbal abuse or frivolous bar complaints made against defense counsel, repeated refusals to cooperate with counsel, as well as repeated demands for the appointment of different counsel for the purpose of manipulating the criminal justice system for delay or some other advantage. However, as noted

by the Arizona Supreme Court's recent decision in *State v. Hampton*, **forfeiture should result only when less restrictive measures are inappropriate**, such as appointing additional counsel, or advisory counsel to serve at trial in cases where a defendant refuses to cooperate with all counsel appointed on their behalf. **A sentencing court commits fundamental error pursuant to A.R.S. § 13-604(M) by improperly using two prior convictions rather than one for purposes of sentence enhancement.** Under the plain language of § 13-604(M), "Convictions for two or more offenses committed on the same occasion shall be counted as only one conviction for the purposes of [sentence enhancement]." Although the common meaning of the phrase 'same occasion' is the same time and place, when offenses committed close in time are meant to further a single criminal objective or ultimate criminal act, the offenses will generally constitute one offense for the purpose of sentence enhancement. *State v. Rasul*, 2 CA-CR 1995-0014, 10/10/07.

Proposition 100, which disallows bail to individuals charged with serious crimes (Class 4 felonies or greater) who entered or remain in the United States illegally, does not apply to those persons who are now legal resident aliens or United States Citizens. Moreover, Proposition 100 is not facially unconstitutional under the principles of equal protection or substantive due process because there is a legitimate state interest in denying bail in those circumstances necessary to ensure that a defendant will remain in the United States to "stand trial and submit to sentence if found guilty", and such initial detention is not indefinite nor potentially permanent due to speedy trial constraints. *Hernandez v. Lynch/State*, 1 CA-SA 07-0092, 10/2/07.

A trial court does not err in admitting positive results of a urine test for drugs at a defendant's probation revocation proceeding even though there may be significant chain of custody-related questions because under Rule 27.8, ARIZ.R.CRIM.P., a court during a probation violation hearing may receive and consider "any reliable evidence not legally privileged, including hearsay" establishing that the tested sample came from the probationer, how the sample was obtained and that there was nothing in the record to indicate that the report itself was inaccurate such as whether the testing procedures of the sample were unreliable. When a probation officer testifies at such hearings that a urine sample was taken by a second officer and submitted for laboratory testing, a trial court does not abuse its discretion by admitting the urinalysis report. **The admission of written urinalysis results at a probation revocation proceeding without a laboratory employee to testify and be cross–examined does not violate a probationer's Sixth Amendment confrontation rights under *Crawford v. Washington* because a probation violation hearing is not a stage of criminal prosecution, and the right to confrontation at such a hearing is not "of the same scope as**

afforded in the trial stage of a criminal prosecution." Under applicable Arizona law, "The judicial process in revocation hearings need not mirror the judicial process guaranteed to defendants in criminal trials" and a court possesses greater flexibility and is not bound by the same strict rules of evidence and procedure. *State v. Carr*, 2 CA-CR 2006-1079, 9/20/07.

In a defendant's second Rule 32 proceeding a claim that the trial court improperly and erroneously answered a note from jurors during deliberations without defendant's personal presence or appropriate waiver thereof is not an issue of sufficient constitutional magnitude to avoid preclusion of the claim under Rule 32.2(a)(3), ARIZ.R.CRIM.P., because while a defendant's right to be present at trial is based upon both the Sixth Amendment confrontation right and principles of due process, if there is no confrontation necessary (such as in post evidentiary situations in which a jury may ask a trial judge a question during deliberations), the principles of due process do not require the presence of the defendant unless a fair and just hearing would be thwarted by the Defendant's absence. Under both Arizona and federal law, "The right to be personally present applies only to those proceedings in *open* court 'whenever [a defendant's] presence has a relation, reasonably substantial, to the fullness of [their] opportunity to defend against the charge.'" When "a personal confrontation occur[s] between the court and the jury potentially touching upon the fundamental relationship between an accused, the court, and the people who judge him," "[f]airness requires that the defendant be given the chance to attend, and possibly participate in the proceedings against him before the jury." Moreover, even if alleged error in a second Rule 32 petition may be fundamental in nature, unless the error itself is of sufficient constitutional magnitude to avoid preclusion (*i.e.,* those errors involving a criminal defendant's constitutional rights requiring a knowing, intelligent and voluntary waiver by the defendant herself/himself), the error is waived because it should have been raised on appeal or in the prior Rule 32 collateral appeal. *State v. Swoopes*, 2 CA-CR 2006-0174PR, 9/19/07.

During a routine traffic stop, an officer may not conduct a pat-down search of a potentially armed and dangerous passenger when the officer has no grounds to investigate the passenger for any crime, and the pat-down search is conducted solely to assure the officer's safety during a consensual investigation of the passenger unrelated to the original stop of the vehicle. Although under the U.S. Supreme Court's decision in *Brendlin v. California* a passenger is legally "seized" when the vehicle in which she or he is riding is lawfully stopped by police, Arizona case law supports the proposition that a valid *Terry* stop may evolve into a consensual encounter whereby under principles previously announced by the Arizona Court of Appeals in *In re Ilono H.* police must have both a reasonable suspicion of criminal activity and reasonably believe that a detained indi-

vidual is armed before a valid pat-down search may be conducted. *State v. Johnson*, 2 CA-CR 2006-0079, 9/10/07.

A trial court abuses its discretion by entertaining a defendant's untimely challenge to a grand jury proceeding, and by remanding the case for a new probable cause finding more than two years after the grand jury transcript and minutes were filed. Under Rule 12.9, ARIZ.R.CRIM.P., a criminal defendant must request a remand within 25 days of the filing of the grand jury transcript and minutes or 25 days after the arraignment has taken place, whichever is less. Although under *Maule v. Superior Court* a criminal defendant in Arizona may request an extension of time for filing a motion to remand if such request is made within the 25-day time limit of Rule 12.9, a defense motion to dismiss based upon alleged prosecutorial misconduct in grand jury proceedings related to inaccurate or untruthful testimony by law enforcement should actually be treated as a motion to remand and is appropriately preserved beyond the Rule 12.9 time limit by filing a timely motion for extension prior to expiration of the 25-day period, especially in a case in which such discovery may be anticipated. *State v. Frye*, 2 CA-SA 2007-0067, 9/7/07.

COURT OF INDUSTRIAL COMMISSION MATTERS

The Higher Causation Showing Required to Reopen a Worker's Compensation Claim Based on a Subsequent Injury Does Not Apply Where the Subsequent Injury Is a Deterioration Linked to the Initial Injury. The "compensable consequences" doctrine requires more stringent proof of causation when a subsequent injury manifests after a distinct event, accident or disease after the original injury. The higher showing of causation required under the "compensable consequences" cases is not required where an employee's subsequent injury is the result of a gradual deterioration of the condition that caused the original injury. An employee may reopen a prior worker's compensation claim upon establishing a new, additional, or previously undiscovered condition with a causal link to the initial injury. *See* A.R.S. § 23-1061(H). *Sun Valley Masonry, Inc. v. Industrial Commission of Arizona*, 1 CA-IC 06-0092, 10/4/07.

** indicates a dissent*

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