

# appellate highlights

by Donn Kessler and Patrick Coppen

## SUPREME COURT CRIMINAL MATTERS

In affirming a capital murder conviction, the Arizona Supreme Court held that the State need not meet the due process reliability standards for eyewitness identification applicable where the State taints the identification if the tainting was caused by the media and not the State. In such a case, due process can be met where the defendant is fully able to cross-examine and impeach the eyewitness and the witness' testimony was sufficiently reliable to meet threshold reliability requirements. *State v. Nordstrom*, CR 98-0278-AP, 6/21/01 ... In affirming the death penalty of another defendant, the Supreme Court held, among other things: (a) evidence obtained by a wiretap was properly admitted where the State had shown traditional methods of investigation had failed or were unlikely to succeed and a wiretap need not be used only as a last resort; and (b) evidence a third party might have committed the crime was not admissible if it did not exculpate the defendant. *State v. Ring*, CR-97-0428-AP, 6/20/01 ... The superior court erred in expediting sentencing of a capital defendant where the court had previously refused or delayed funding for a mitigation investigation, leading the defendant to waive further efforts in such an investigation in the absence of counsel and where there was a record of possible mitigation evidence. The trial court also erred in considering the sentencing recommendation of a victim's family member in a capital case because such evidence is not relevant except to rebut mitigating evidence. *State v. Bocharski*, CR-97-0306-AP, 5/3/01\*.

## SUPREME COURT CIVIL MATTERS

The Supreme Court held that censure, rather than suspension of 90 days from the practice of law, was appropriate where the attorney had no prior disciplinary complaints, had not committed the violation in this case for his own gain or without the client's consent, there was no evidence the conflict would have resulted in incompetently representing the client, and there was no evidence the attorney would repeat the misconduct. *In re Walker*, SB-00-0096-D, 6/19/01 ... In certifying teachers, the State is only entitled to A.R.S. § 12-820.02 qualified immunity when issuing a certificate rather than A.R.S. § 12-820.01 absolute immunity. *Doe v. State of Arizona*, CV-00-0252-PR, 5/30/01 ... Arizona courts lack in personam jurisdiction over a California resident and an Oregon attorney representing him in a California probate dispute where the only contact with Arizona was mailing pleadings to an Arizona resident. *Bils v. Bils*, CV-99-0463-PR, 5/2/01\*.

## COURT OF APPEALS CIVIL MATTERS

An employee who was exposed to flour dust causing baker's asthma was not precluded from seeking workers' compensation. A.R.S. § 23-901.04(A) only precludes compensation for disability and not medical benefits for willful self-exposure to a risk. *Bernhart v. Industrial Commn*, 1 CA-IC 99-0136, App. 6/28/01 ... Under A.R.S. § 25-327(B), the death of a former

spouse terminates the obligation to pay spousal maintenance unless the parties have executed a written agreement containing "direct or unmistakable" language. *Diefenbach v. Holmberg*, 2CA-CV 00-0174, 6/28/01 ... Under the Fair Labor Standards Act, government employees are not entitled to overtime for lunch periods unless the time spent during the period is predominantly for the employer's benefit. *Hahn v. Pima County*, 2 CA-CV 00-0200, 6/13/01 ... A city's failure to distribute publicity pamphlets relating to a charter amendment prior to the distribution of early ballots violated A.R.S. §§ 19-123, 19-141(A) and 19-143 despite the fact that the ballot change was not a referendum. The court set aside the election result because the number of ballots cast before the pamphlets were distributed could have affected the outcome of the vote. *Sherman v. City of Tempe*, 1 CA-CV 00-0348, 6/5/01 ... A.R.S. § 45-173 authorizes a water company to make beneficial use of an existing natural watercourse to move appropriated water and for water storage purposes without obtaining the consent of the property owner. *West Maricopa Combine, Inc. v. Arizona Department of Water Resources*, 1 CA-CV 00-0086, 6/5/01 ... A plaintiff may show wrongful termination of employment based on a request to violate federal law applicable in Arizona but also must show the requested act would have in fact violated the law and not that the employee merely had a good faith belief the requested action (possible copyright infringement) was illegal. Claims for wrongful termination based on whistle-blowing or illegal discrimination only require a good-faith belief because they are based on a public policy to report unsafe or illegal activities harmful to the public good. *Cummins v. Mold-In Graphic Systems*, 1 CA-CV 99-0559, 6/5/01 ... Where the plaintiffs and a non-party at fault's employer stipulate the employee proximately caused the accident and the jury later allocates no fault to the employee, the employer is not entitled to a judgment as a matter of law on a theory of negligent entrustment because the only theory before the jury was negligent entrustment and not the employee's liability. *Ogden v. J.M. Steel Erecting, Inc.*, 1 CA-CV 00-0260, 5/31/01 ... The superior court has no authority to remove a trustee as the personal representative of the estate and approve a family settlement agreement disregarding the decedent's will where the heirs do not present any basis to attack the validity of the will. *In re Estate of Ward*, 1 CA-CV 00-0403, 5/29/01 ... Owners of land used by nursing home operators were subject to a tax as a business activity in the business of leasing and were not entitled to a residential exclusion because the operators themselves were not residing on the premises. *Citadel Care Center v. Arizona Dept. of Revenue*, 1 CA-TX 00-0006, 5/29/01 ... Arizona residents earning income in Mexico as employees of a maquiladora and paying tax to Mexico on that income are entitled to an Arizona tax credit for those taxes because the Mexico taxes are a net income tax subject to a credit under A.R.S. § 43-1071(A). *Rangel v. Arizona Dept. of Revenue*, 1 CA-TX 00-0014, 5/29/01 ... Arizona's June 14 deadline for independent presidential

candidates to submit their petitions to the Secretary of State is unconstitutional. The deadline impermissibly discriminates against independent candidates. *Browne v. Bayless*, 1 CA-CV 00-0546, 5/29/01 ... The Successive Injury Doctrine by which an employer takes a worker as he is applies when there has been organic change in a prior condition making the new injury carrier liable for subsequent treatment. *SW Gas Corp. v. ICA*, 2 CA-IC 00-0012, 5/29/01 ... The victim of a hit-and-run driver who died on impact or shortly thereafter is not entitled to punitive damages based upon the driver's leaving the scene of the accident because such conduct, while egregious, did not cause any harm to the victim. *Saucedo v. Salvation Army*, 1 CA-CV 00-0272, 5/24/01 ... The Arizona Department of Revenue cannot refuse to refund transaction taxes collected from a taxpayer or condition such refund on the taxpayer refunding such taxes to its customers once the activity has been determined to be nontaxable. *Arizona Dept. of Revenue v. Canyoners, Inc.*, 1 CA-TX 00-0016-0019, 5/24/01 ... Under A.R.S. § 41-1604.07, earned release credits may be applied only to outright release from confinement. Furthermore, there is no liberty interest in earned release credits under the statute because application by DOC under the statute is solely discretionary. *Crumrine v. Stewart*, 2 CA-CV 00-0221, 5/24/01 ... The reversal of a license suspension was erroneous when it was based on the improper findings of an administrative law judge regarding the legality of the stop because such findings exceed the statutory scope of the hearing under A.R.S. § 28-1385. *Pinedo v. Arizona Dept. of Transportation*, 2 CA-CV 00-0016, 5/23/01 ... A landlord is not entitled to attorneys' fees in a commercial forcible detainer action under A.R.S. § 12-1178 even if the lease provides for an award of such fees in an action under the lease. Such fees are not back rent nor are they "charges stated in the rental agreement" under the statute. *Camelback Plaza Development, L.C. v. Hard Rock Caf *, 1 CA-CV 00-0516, 5/22/01 ... A general liability policy provided to a business as the exclusive coverage for a piece of mobile equipment used on roads to deliver products is a motor vehicle liability policy for purposes of A.R.S. § 20-259.01 so that the insurer's failure to offer UIM coverage for the equipment resulted in UIM being imputed into the general coverage. *Castillo v. Miller's Mut. Fire Ins.*, 1 CA-CV 00-0271, 5/22/01... The National Labor Relations Act does not preempt a state cause of action after the employee leaves his employment and the former employer retaliates against him by tortiously interfering with the person's new employment or business expectancy. *Hill v. Peterson*, 2 CA-CV 98-0153, 5/22/01 ... The City of Tucson's restaurant smoking ordinance (TCC § 11-19) is facially valid because: (1) The city charter gives authority for regulation of health matters; (2) The ordinance is not preempted by existing state law; and (3) The ordinance does not infringe upon freedom of association nor does it violate equal protection. *City of Tucson v. Grezaffi*, 2 CA-CV 00-0172, 5/15/01 ... The Interstate Compact on the Placement of Children, A.R.S. §§ 8-548 through 8-548.07, applies to a court-ordered placement of children with a non-custodial, out-of-state parent. Under the compact, DES can investigate the home of the children's mother before placement of the children in that out-of-state home where in a divorce proceeding

the biological father had obtained sole custody. *Arizona Dept. of Economic Security v. Superior Court*, 2 CA-SA-0023, 5/3/01.

## COURT OF APPEALS CRIMINAL MATTERS

The special sentencing procedures of A.R.S. § 13-703 apply only when the death penalty is requested, so trial court's use of aggravating/mitigating circumstances in A.R.S. § 13-702 was not error; a trial court is not required to find existence of aggravating factors beyond a reasonable doubt in non-death penalty cases; a natural life term is not a presumptive sentence under A.R.S. § 13-703. *State v. Viramontes*, 2 CA-CR 00-0227, 6/19/01 ... A police search of a hotel room after hotel employees entered the room in response to a sign requesting housekeeping and found drugs was not a search under the Fourth Amendment. Later searches after the hotel terminated the rental did not violate the Fourth Amendment because the defendants then no longer had any expectation of privacy in the hotel room. *State v. Weekley*, 1 CA-CR-99-0897, 6/5/01 ... There is no crime-fraud exception to the medical treatment privilege under A.R.S. § 13-4062(4) when a criminal defendant asserts the privilege and there has been no waiver. *State v. Wilson*, 2 CA-CR 00-0054, 5/31/01 ... The State may not withdraw from a plea agreement once a trial court accepts it because jeopardy attaches unless the defendant breaches his obligations under the agreement; the State bears the risk as to mistake of law in negotiating, drafting and entering a plea unless the defendant negotiates or enters a plea in bad faith or knows the term thereof impossible/illegal under applicable law. *Coy v. Fields*, 2 CA-SA 01-0018, 5/31/01 ... The superior court has jurisdiction to commit a defendant to consecutive terms in the Arizona State Hospital when the defendant is found guilty except insane despite the fact that A.R.S. § 13-502(D) does not contain any specific authority for such consecutive sentences. *State v. Ward*, 1 CA-CR 00-0497, 5/24/01 ... A dismissal for prosecutorial misconduct based upon double jeopardy grounds is improper unless the prosecutor deliberately (i.e., intentional conduct with known error and prejudice) injects error into the first trial to force a mistrial. *State v. Trani*, 2 CA-CR00-0091, 5/16/01.

## COURT OF APPEALS JUVENILE MATTERS

In telling a classmate he would kill her if she told others about a prior conversation, a juvenile was delinquent for threatening or intimidating another without a finding of wrongful intent under A.R.S. § 13-1202(A)(1). Despite that fact, the court held that violation of the statute is not a strict liability crime because the statute only criminalizes "true" threats, meaning that a reasonable person would foresee that the words would be taken as a serious expression of an intent to inflict bodily harm and the words were not the result of mistake, duress or coercion. However, the State need not prove the defendant had the ability to carry out the threat or he actually intended to do so. *In re Kyle M.*, 1 CA-JV 00-0179, 6/7/01.

\* indicates a dissent

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The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continually. Readers may visit the sites for the Supreme Court ([www.supreme.state.az.us/opin](http://www.supreme.state.az.us/opin)) and the Court of Appeals ([www.state.az.us/co](http://www.state.az.us/co)).