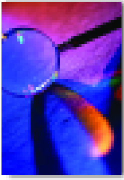

APPELLATE HIGHLIGHTS

by Hon. Donn Kessler, Arizona Court of Appeals, Div. One, and Patrick C. Coppen, Esq., Tucson

SUPREME COURT CIVIL MATTERS

An applicant to the State Bar who was convicted of first-degree murder has an extraordinary burden to show that he was rehabilitated and has current good moral character to be admitted. The record showed he failed to accept full responsibility for his crimes, he showed some lack of candor to the State Bar about being questioned by the police in a later matter and he had failed to comply with his child support obligations over a long duration. *In re Hamm*, SB-04-0079-M, 12/7/05.

SUPREME COURT CRIMINAL MATTERS

In a capital case, **an instruction stating that the defendant has the affirmative duty to prove mitigating circumstances "sufficiently substantial to call for leniency" is improper. No party has the burden of proof on whether such mitigating circumstances are sufficiently substantial.** Rather, the sufficiency of such evidence is not a fact question, but a sentencing decision that each juror must determine in the weighing process. **An instruction providing that the jury must sentence the defendant to life if it has a doubt as to whether a death sentence is appropriate is also erroneous.** *State v. Granville (Baldwin),* CV 05-0155-PR, 12/08/05 … In affirming convictions but remanding sentencing on the capital and kidnapping charges, the Arizona Supreme Court held: (1) **A jury instruction that solely provides that proof of actual reflection is not required to prove premeditation does not amount to fundamental error when the defendant fails to object and rests his entire defense on total innocence;** (2) The trial court did not err in refusing to give a manslaughter instruction as a lesser-included offense to first-degree murder when there was no evidence that any sudden quarrel or heat of passion was the result of adequate provocation by the victim; (3) An aggravated sentence for kidnapping had to be remanded for resentencing under *Blakely v. Washington* because the aggravated sentence was based on the defendant using more force than was necessary and that issue was not presented to the jury and could not be inherent in the jury verdict; and (4) **The capital sentence also had to be vacated and remanded because the defendant was required to appear in visible shackles during the penalty phase of the trial when there were no good reasons for such requirement in the record. A mere conviction of a capital crime is insufficient to justify such shackles, and the record did not show any security concerns. Rather, the shackles were used because jail policy required them when the defendant appeared in jail garb or represented himself.** *State v. Gomez*, CR 03-0199-AP, 12/06/05.

COURT OF APPEALS CIVIL MATTERS

Section 509 of the Communications Decency Act of 1996, 47 U.S.C. § 230, provides immunity for Internet service providers for distributing allegedly defamatory material on the World Wide Web. Arizona lacked personal jurisdiction over an individual defendant who allegedly published the defamatory material but contracted with an Internet service provider located in Arizona to place the material on the Web. Assuming the defendant purposefully availed himself of Arizona laws by contracting with the ISP and sending the article to him for publication, it would be unreasonable to assert personal jurisdiction over him because both the plaintiff and defendant lived in Indonesia and neither were Arizona citizens, Arizona had no real interest in the dispute and the dispute was governed by Indonesian law. *Austin v. Crystaltech Web Hosting*, 1 CA-CV 04-0023, 12/22/05 … **In reversing summary judgment of a dispute over the validity of a condominium declaration amendment limiting the right to rent units, the Court of Appeals held: (1) The amendment could be approved by a majority of the members under statutes that existed prior to the Condominium Act of 1985, A.R.S. § 33-1201 *et seq.* (the Act) because the Act, requiring a higher percentage of approval expressly, did not apply to preexisting association declarations, which provided for a mere majority approval**; (2) **The one-year statute of limitations provided by the Act did not apply because that provision was limited to amendments adopted under the Act. In this case, the amendment was adopted under the prior law. Thus, the contract and tort statutes of limitations applied to the complaint for declaratory relief and the claim was not time-barred;** (3) The amendment was invalid to the extent it was changed after the draft amendment was approved by a majority of the association members; and (4) The restriction could not be retroactively applied because it was approved April 2, 2000, but prevented rentals as of March 26, 2000. After striking the date restriction, the court concluded that the association members would have approved the rest of the amendment; however, summary judgment was reversed unless the Association could show the rental was in violation of the amendment without the stricken language. *Vales v. Kings Hill Condominium Ass'n*, 1 CA-CV 04-0816, 12/22/05 … **Municipal ordinances setting rates for city-owned utility services are administrative acts not subject to referendum**. *Stop Exploiting Taxpayers v. Jones*, 1 CA-CV 04-0819, 12/22/05 … **Under Ariz.R.Civ.P. 4(i),** a trial court must extend time for service of process beyond the rule's 120-day limit for good cause shown, and also may extend time on a discretionary basis by directing that service be effected within a specified period of time with or without a predicate showing of good cause. Although the good cause basis for an extension under the rule is a question of fact for the trial court and requires a showing of due diligence in trying to serve the defendant, the discretionary prong of the rule must be based on a reasonable explanation as to why service cannot be accomplished within the required period. **The trial court did not err in failing to find good cause when the movant failed to request an extension within the 120-day period, relied on the court clerk's courtesy notice of dismissal, and where the plaintiff was unrepresented by counsel.** Ariz.R.Civ.P. 60(c) relief was not appropriate when the decision not to serve the party within the required period was intentional or out of ignorance of a rule's requirements, rather than merely inadvertent or based upon a clerical error. The trial court's failure to employ A.R.S. §. 12-504 was not erroneous when the plaintiffs failed to show that despite diligent efforts they were unable to effect service, even in cases where without relief under the statute the action would be time-barred. *Maher v. Urman*, 2 CA-CV 05-0039, 12/20/05.

COURT OF APPEALS CRIMINAL MATTERS

A criminal defendant is subject to multiple punishments for a single act of disorderly conduct by recklessly handling, displaying or discharging a firearm when the act constitutes disorderly conduct committed against multiple victims in a prosecution involving alleged aggravated assault with a deadly weapon involving multiple victims. In such situations, the imposition of multiple consecutive sentences does not violate the Double Jeopardy Clauses of either the United States or Arizona Constitutions because Arizona courts have repeatedly found that a separate societal interest is invaded as to each victim that must be protected. *State v. Burdick*, 2 CA-CR 04-0043, 12/21/05 … **Under A.R.S. § 13-3554, the offense of luring a minor for sexual**

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), the Court of Appeals, Div. 1 (www.cofad1.state.az.us) and Div. 2 (www.apltwo.ct.state.az.us).

exploitation is not limited to conduct that involves producing pornographic material. The plain and unambiguous language of the statute specifically prohibits merely requesting sexual conduct with a minor, and does not incorporate or make reference to the provisions of A.R.S. § 13-3553, which include elements of production and distribution of pornographic material resulting from the sexual exploitation of a minor. *State v. Hollenback*, 2 CA-CR 04-0139, 12/09/05.

COURT OF APPEALS JUVENILE MATTERS

A juvenile court erred in finding a minor guilty of assault pursuant to A.R.S. § 13-1203(A)(3) as a lesser-included offense of the actual charged offense of assault pursuant to A.R.S. § 13-1203(A)(2). The offense of assault by knowingly touching another person with intent to injure, insult or provoke as defined by A.R.S. § 13-1203(A)(3) is not a lesser-included offense of assault by intentionally, knowingly or recklessly causing physical injury to another as proscribed by A.R.S. § 13-1203(A)(1). In such cases involving A.R.S. § 13-1203, a delinquency petition is not automatically amended to conform to evidence produced at trial without a formal request by the State for such amendment, or an express ruling by the court, because the nature of either referenced assault charge is not the same, whereby they may not be construed as a single, unified offense subject to automatic amendment. *In re Jeremiah T.*, 2 CA-JV 05-0021, 1/9/06 … **A juvenile court may hold multiple permanency hearings under A.R.S. §§ 8-861 and 8-862(A).** *Veronica T. v. Arizona Dep't of Econ. Sec.*, 1 CA-JV 05-0038, 12/27/05.

* indicates a dissent