APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

A Typed Signature of a Judge in the "/s/ Name" Format on an Electronically Filed Judgment Counts as a "Signed" Judgment. A judgment is appealable under A.R.S. § 12-2101 only if it complies with the requirements of Arizona Rule of Civil Procedure 58(a). A typed signature of a judge in the "*/s/ Name*" format on an electronically filed judgment satisfies Rule 58(a)'s requirement that judgments be "signed." *Haywood Securities, Inc. v. Hons. Ehrlich/Barker, et al.*, CV-06-0280-SA, 1/10/07.

Proposition 107 (Defining Marriage) Constitutes a Single Amendment Under the "Separate Amendment" Test. Proposition 107 ("Prop. 107"), which Arizona voters rejected in November 2006, had proposed to define marriage as a union between one man and one woman, and to prohibit granting legal status similar to marriage to any unmarried persons. The separate components of Prop. 107 did not constitute separate constitutional amendments because, under the "common purpose or principle" test first articulated by *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (1934), the separate provisions were topically related and sufficiently interrelated that they logically should "stand or fall as a whole." The inquiry from previous cases asking whether a voter supporting part of the proposition would reasonably be expected to support the other parts sheds little light on the issue and should not be used. *Arizona Together v. Brewer*, CV-06-0277-AP/EL, 1/12/07.

Co-worker Owed Duty of Care to Those Harmed by Providing Prescription Medication to Others. Foreseeability is not a factor to be considered by courts when determining the presence or absence of a duty. Although Arizona's common law recognizes certain relationships that give rise to a duty, such a relationship is a sufficient but not a necessary condition for a duty to arise. Public policy considerations alone may support recognizing a duty of care. Due to the public policy reflected in statutes criminalizing the distribution of prescription drugs to others lacking a valid prescription, an individual who gave his prescription oxycodone pills to another owed a duty to a third individual who suffered injury from taking the pills. Justice Hurwitz separately concurred to urge that Arizona adopt the Restatement (Third) of Torts rule, under which every actor owes a duty of reasonable care whenever his conduct creates a risk of harm. *Gipson v. Kasey*, CV-06-0100-PR, 1/23/07.

A Late-Appointed Personal Representative May Bring an Elder Abuse Claim on Behalf of a Deceased Victim's Estate. Probate code provision A.R.S. § 14-3108(4), which precludes a personal representative appointed more than two years after the death of the decedent from prosecuting claims on behalf of the estate, did not bar a late-appointed personal representative from bringing an Adult Protective Services Act ("APSA") claim under A.R.S. § 46-455(B) on behalf of a deceased victim's estate. *George Winn v. Plaza Healthcare*, CV-06-0076-PR, 1/23/07.

SUPREME COURT CRIMINAL MATTERS

A trial court errs in enhancing a sentence based upon the admission by a defendant that a foreign conviction exists that temporally qualifies as a prior conviction under A.R.S. § 13-604 even though the conduct itself would have been a felony under Arizona law if the elements of the foreign statute upon which the defendant was convicted would not constitute a felony offense under Arizona law. As a preliminary matter, though such an admission by a defendant at trial dispenses with the necessity of proof of the prior conviction, it does not constitute proof that the foreign conviction would have been a felony under Arizona law. It is the statutory definition of the foreign crime itself, and not its specific factual basis that is the determining factor because rather than limiting the inquiry for the sentencing court to the purely legal issue focusing solely on the elements of the foreign statute, a factual determination about a defendant's underlying conduct would in effect become a second trial on the defendant's prior conviction and waste judicial resources. *State v. Crawford*, CR-06-0205, 1/18/07.

The recent amendments to Arizona's affirmative defense and justification laws apply only to offenses that were committed on or after the effective date of the amendments or April 24, 2006, and do not apply to already pending trials for which the alleged criminal conduct occurred before the effective date. Among other things, the recent amendments changed A.R.S. §§ 13-103(B) and 13-205(A) to provide the following: (1) that justification defenses are not affirmative defenses, (2) that justification defenses actually describe conduct that, if not justified constitutes an offense, yet if justified, does not constitute criminal or wrongful conduct, and (3) that if evidence of justification pursuant to A.R.S. §§ 13-401 to 13-402 is presented by the defendant, the state itself must prove beyond a reasonable doubt that the defendant did not act with justification. Although the Arizona Court of Appeals had recently held that the amendments were retroactive and could be applied to cases pending for trial in which the subject conduct occurred prior to the amendments becoming law, the Arizona Supreme Court reversed this holding, finding that under A.R.S. § 1-244, for a law to have retroactive application, the legislature must have expressly declared that it shall be retroactive rather than merely prospective. Moreover, because the application of the amendments to events that occurred before their effective date (i.e., applying the amendments to pending criminal trials) would attach new legal consequences to those events, any retroactive application would violate A.R.S. § 1-244. Though the amending legislation contained an emergency enactment provision, such is not the equivalent of expressly stating in plain language that the legislation was meant to be retroactive, notwithstanding the fact that the legislative history may have supported such a view. When legislation contains an emergency enactment or "operative immediately" provision, rather than a retroactive application provision, the plain language of the emergency enactment provision controls, and the subject legislation goes into effect immediately on the date it is signed by the Governor, instead of the usual 90 days after the end of the legislative session. *Garcia v. Hon. C. Browning & State of Arizona*, CV-06-0320-PR, 2/9/07.

COURT OF APPEALS CIVIL MATTERS

"Mode of Operation Rule" Could Not Be Used to Prove Negligence in Slip and Fall Case Where Evidence Showed Only That a Couple of Spills Per Week Occurred in a Store. Under the "mode of operation" rule, a plaintiff may prove negligence by showing that a business could reasonably anticipate that a hazardous condition causing an accident (such as a spill) would regularly arise. Testimony from a store manager that "a couple of spills" a week occurred that were not "repetitive in nature" in a store open twenty-four hours per day was "insufficient" because there was no evidence that the liquid from the spills occurring twice a week necessarily reached the floor or occurred in the area of the store accessible to cus-

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tomers. *Contreras v. Walgreens Drug Store #3837*, 2 CA-CV 06-0147, 12/27/06.

City Cannot Condemn Land for Park Purposes Outside Its Territorial Limits. Strict principles of statutory construction apply to exercises of eminent domain power by local governments apply in particular to extraterritorial condemnations. Section 9-511 only allows a city to condemn land outside its boundaries for park purposes when that land is also used simultaneously for public utility purposes. *City of Phoenix v. Harnish*, 1 CA-CV 05-0023, 12/28/06.

Hearing Aids Are Not Subject to "Assistive Device" Warranty Statutes. A hearing aid is not an "assistive device" as defined in A.R.S. § 44-1351(1). The legislature purposely deleted hearing aids from the assistive device warranty statutes and did not intend that hearing aids be included. *Stein v. Sonus USA, Inc*, 2 CA-CV 06-0065, 1/9/07.

Attorney General Is Not Entitled to Absolute Immunity From Claim of Defamation in Connection With Press Release. The Arizona Attorney General does not enjoy absolute immunity in connection with statements made in press conferences concerning cases being prosecuted. Absolute immunity is unavailable unless the official demonstrates that it is "essential to conducting public business," which is not true in connection with press conferences. The Court's holding did not address situations in which "the Attorney General is the policy maker," such as criminal prosecutions and consumer protection. In a separate dissent, Judge Hall argued that the case fit within a recognized exception to qualified immunity, and that "[t]he harm to the public would be substantial if an attorney general hesitated in explaining the activities of his office for fear of otherwise incurring tort liability." *Goddard v. Fields*, 1 CA-SA 06-0114, 1/16/07.

Jury Trial Appropriate in Parental Severance Action Where Request for Jury Trial Made Before Law Changed. Before January 1, 2007, a parent had the choice of a trial to a court or a trial to a jury in a severance action. Due to the statute's delayed repeal clause, after that date a parent may not request a jury trial. A parent who asked for a jury trial before December 31, 2006, has the right to a jury trial. *ADES v. Reinstein*, 1 CA-SA 06-0274, 1/18/07.

Claims of Damage to Home Caused by Allegedly Faulty Workmanship Constitute an "Occurrence" Under Homebuilder's Insurance Policies. In the context of a developer's insurance policy, where an insurance policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," accidental property damage that occurs as a natural result of faulty workmanship may constitute an "occurrence." However, an agreement to obtain insurance is not the same as an agreement to add a general contractor to the policy as an additional insured and thus a subcontractor who had not agreed to provide the developer with liability insurance would not be an "additional insured" under the policy. *Lennar Corp. v. Auto-Owners Insurance Co.*, 1 CA-CV 03-0451, 1/23/07.

County Sheriff's Refusal to Transport Inmate Seeking Abortion Without a Court Order Is Not Reasonably Related to County's Stated Penological Interests. Certain constitutional rights of prison inmates may be curtailed to satisfy legitimate penological interests. Requiring a court order to transport an inmate to receive a first-trimester abortion at her own expense (including any security and transportation costs) does not serve any legitimate penological interest. *Doe v. Arpaio*, 1 CA-CV 05-0835, 1/23/07.

COURT OF APPEALS CRIMINAL MATTERS

A trial court does not violate the Sixth Amendment Confrontation Clause as interpreted by *Crawford v. Washington* by permitting a testifying police officer who has no independent memory of their involvement or conduct in a criminal investigation pertinent to a case on trial to read from their police report. Although the Sixth Amendment to the U.S. Constitution protects a defendant's "right … to be confronted with the witnesses against him," in *Crawford* the U.S. Supreme Court explicitly held that the Confrontation Clause prohibits the use of only testimonial out-of-court statements *if the declarant does not testify at trial*, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine them. Although it is arguable that an officer with no memory of their part in a police investigation is unavailable under Rule 804 (a)(3) Arizona Rules of Evidence, in *Crawford* the U.S. Supreme Court had separated a states' hearsay rules and analysis from the constitutional Confrontation Clause analysis, and allowing an officer to refresh their recollection by reviewing their report, or to read from their report may be permitted as long as the officer is subject to cross examination. *State v. Rafael Real*, 2 CA-CR 06-0024, 1/31/07.

A criminal defendant charged with weapon misconduct for being a prohibited possessor under A.R.S. §§ 13-3102(A)(4) and 13-3101(A)(6)(d), by which it is unlawful for an individual placed on probation for a misdemeanor domestic violence offense to possess a weapon while on probation, is not entitled to dismissal of the prohibited possession charge when the underlying misdemeanor domestic violence related offense is later dismissed on constitutional grounds because the State's burden under the statute is merely to prove the defendant's status on probation for a domestic-violence offense *at the time of the weapons misconduct*, not to prove the validity of the underlying conviction as required in the standard prohibited possession case involving a prior felon and defined by A.R.S. § 13-3101(A)(6)(b). It is noteworthy that the U.S. Supreme Court in *Lewis v. United States* has found *no federal due process violation* in "allow[ing] a felon in possession [of a weapon] charge to be based upon a later found constitutionally infirm prior conviction (i.e., the underlying felony conviction was overturned after possession of the weapon), which the Court of Appeals found analogous to the defendant's status on probation in this case and persuasive authority for its decision. *State v. Mangum*, 2 CA-CR 05-0384, 1/12/07.

The corpus delecti rule does not apply in the context of a constitutionally valid, in-court change of plea to any statements or admissions made by a criminal defendant in entering the plea in order to provide a factual basis for the plea. The corpus delecti rule prohibits conviction of a defendant based upon an uncorroborated confession without independent proof of the "body of the crime" itself. It developed historically to prevent the conviction of an individual based solely on an uncorroborated confession, with the concern being that a confession could be unreliable due to a defendant's mental state, and/or that it may have been unfairly obtained leading to a conviction lacking in fundamental fairness. In other words, before a defendant's confession or incriminating statements may be admitted at trial as evidence of a crime, the state must first establish that a crime occurred, and that someone is responsible for it. However, the corpus delecti rule does not apply to infrajudicial confessions because statements made in a court setting are made generally after the advice of an attorney, and under the supervision and protection of a trial judge who must ensure under the U.S. Supreme Court's mandate in *Boykin v. Alabama* that a defendant's plea and admission of guilt are made with a knowing, voluntary and intelligent waiver of their constitutional rights. *State v. Rubiano*, 2 CA-CR 06-0050 PR, 1/18/07.

Under both the U.S. Supreme Court's decision in *Illinois v. McArthur*, as well as the Arizona Supreme Court's decision in *State v. Ault*, exigent circumstances may justify a temporary seizure of a criminal suspect's abode in which a third party resides who may destroy evidence of a crime until a valid search warrant may be secured. Although under both the U.S. and Arizona Constitutions police generally may not search a home or seize evidence without a warrant supported by probable cause with evidence seized as the result of a Fourth Amendment violation being usually suppressed, there are exceptions to the warrant requirement, including the exigent circumstance exception. Under the *McArthur* exigent circumstances exception the following four (4) circumstances must be present for a legal seizure without a warrant: (1)

the police must have probable cause to believe a residence contains contraband, (2) the police must have good reason to fear that unless a form of restraint or seizure takes place, the contraband would be destroyed prior to obtaining a warrant, (3) the police must make reasonable efforts to reconcile law enforcement needs with the demands of personal privacy (i.e., neither searching the residence nor arresting a suspect in their home whose home is subject to seizure without obtaining a warrant from a neutral magistrate finding probable cause, and (4) that the seizure or imposed restraint is for a limited period of time. While the Arizona Supreme Court's decision in *Ault* disallows such a seizure (i.e., entering a home to secure it out of concern a defendant or other person may destroy evidence) when the police themselves create the exigency by not arresting a defendant while outside their home when they have probable cause to do so, **if the *McArthur* exigency criteria are met, police are not restricted to remaining outside until the warrant is obtained, yet may proceed into the interior of a residence for the sole purpose of securing the subject area of the search warrant being obtained and properly assuring, with deference to individual privacy interests, that a suspect and/or third party does not destroy evidence.** In a criminal trial if the defense establishes the prima facie case of racial discrimination in jury selection, **a trial court does not err in denying *Batson* challenges to the state's peremptory strikes of prospective jurors if the party making the strike offers a race-nuetral explanation that is not merely pretextual. In determining the credibility of the of the state's proffered explanation(s), under the U.S. Supreme Court's recent decision in *Miller-El v. Cockrell (Miller-El I)* a trial court may consider the following factors: (1) the prosecutor's demeanor, (2) how reasonable or improbable the explanations actually are, (3) whether the proffered rationale has some basis in accepted trial strategy, and (4) any statistical disparity and/or side by side comparisons of voir dire questioning of different racial or gender groups (i.e., if a prosecutor's reason for striking a particular panelist applies equally well to other group(s) permitted to serve, such is evidence of purposeful discrimination).** However, a trial court's credibility finding is "due much deference" because the trial court is in a better position to make such a determination which may include assessing a prosecutor's facial expression, tone, and/or demeanor. Facially race neutral strikes may include antipathy toward police, the prospective juror's contradictory responses about their ability to impose the death penalty, as well as the venireperson's manner or mode in answering voir dire questions. It is also noteworthy while statistical presence (or non-presence) on particular juries and in trials in a particular jurisdiction may be evidence of discrimination under *Miller-El I*, the fact that members of the alleged discriminated group served on a particular jury may also indicate a nondiscriminatory motive under the circumstances of a given case. *State v. Gay*, 2 CA-CR 04-0306, 1/23/07.

A county assessor does not violate A.R.S. § 38-504(C) (the conflict of interest statute) by taking or obtaining non-confidential or publicly available property taxpayer information from their own office for use in a private business venture because such conduct cannot be considered using their elected position to secure any valuable thing or valuable benefit that is of such character as to manifest a substantial and improper influence *with respect to their public or official duties* which is the actual purpose of the statute. *State v. Ross*, 1 CA-CR 05-0200, 1/30/07.

A criminal defendant may liable under A.R.S. §§ 13-301 and 13-303 as an accomplice to negligent homicide despite the fact that they may have had no actual intention for the death of the victim to have taken place. A.R.S. § 13-303(B) provides that "[i]f causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense if" "[t]he person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging *in the conduct causing the result*." While § 13-301 states the general rule that one may be an accomplice only if one acts with intent to promote or facilitate the commission of an offense, subsection 13-303(B) sets out a different culpable mental state requirement for an accomplice to a crime that has as one of its elements "causing a particular result." In other words, one may be liable under A.R.S. § 13-303(B) if one commands or aids another in the underlying conduct that leads to the ultimate or statutorily required result. *State v. Nelson*, 1 CA-CR 05-0951, 1/9/07.

The Arizona legislature's amendment to the enabling statute for the Victims' Bill of Rights which lessened or modified the class of individuals protected in misdemeanor cases to victims in cases involving physical injury, the threat of physical injury, or a sexual offense, is unconstitutional. In 1990 Arizona citizens enacted the Victims' Bill of Rights as an amendment to the State Constitution. Under Article 2, Sec. 2.1(A), it confers a broad range of rights to victims of crime, including the right to "refuse an interview, deposition, or other discovery request by" [a criminal] defendant, the defendant's attorney, or other person acting on behalf of the defendant. Although under Article 2, Sec. 2.1(D) the legislature could pass enabling legislation or "enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims," the legislature's power to enact such enabling statutes is subject to any limitations imposed by the text of the constitutional provision itself, and may not eliminate or reduce the rights otherwise guaranteed. As the definition of "criminal offense" that existed at the time the Victims' Bill of Rights protected all victims of felony and misdemeanor offenses, the legislature may not constitutionally limit or diminish the protected class of victims originally defined. *Robbins v. Darrow/State of Arizona*, 1 CA-SA 06-0173, 1/11/07.

COURT OF APPEALS JUVENILE MATTERS

An individual whose parenting rights to their child(ren) are the subject of ADES termination proceedings, and who had asked for a jury trial before the effective date for repealing the jury trial provision previously contained in A.R.S. § 8-223, actually retains their right to jury trial despite the fact that the right was repealed effective Dec. 31, 2006, and their trial could not occur prior to the repeal. Pursuant to the U.S. Supreme Court's holding in *Hawkins v. Bleakly*, whether there is a trial by jury in a state civil action is determined by the individual states. The Arizona legislature had established a substantive right to jury trial in termination proceedings. Although statutory changes in procedure or remedies may generally be applied to proceedings already pending, the recognized exception to this rule exists in cases where the amended statute affects or impairs accrued and vested rights. Moreover, under the general savings statute (A.R.S. § 1-249) "[n]o action or proceeding commenced before a repealing act takes effect, and no right accrued, is affected by the repealing act" though the proceedings "shall conform to the new act so far as applicable." *ADES v. Reinstein,* 2 CA-SA 06-0274, 1/18/07.

Molestation of a child may be a lesser-included offense of sexual conduct with a minor under the "charging documents" test. Although molestation of a child is not a lesser-included offense of sexual conduct with a minor under the "elements test" due to differences in the age of the victim elements, it may be a lesser-included offense under the alternate "charging documents" test where the charging document actually describes the lesser offense, thereby giving appropriate constitutional notice to the alleged perpetrator. *In re Jerry C.*, 1 CA-JV 06-0104, 1/25/07.

***** indicates a dissent

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