APPELLATE HIGHLIGHTS

by Thomas L. Hudson, Osborn Maledon PA, and Patrick C. Coppen, Esq., Tucson

SUPREME COURT CRIMINAL MATTERS

A court errs by ordering a trial to proceed on the same day a criminal defendant actually learns or receives notice of a supervening indictment when the prosecution obtained the supervening indictment months before trial, failed to attempt to serve it upon the defendant or their attorney, and such failure prejudices the defendant in their defense because the indictment includes an additional charge with different elements than those required by the original charge. Rule 14.1, ARIZ.R.CRIM.P., requires that an out-of-custody defendant be arraigned "within 30 days after the filing of an indictment" or "as soon as possible thereafter." The purpose of an arraignment under Rule 14 "is formally to advise the defendant of [their] legal rights and of the charges against [them] and to begin the proceedings by assuring counsel is provided and the date of trial set." Prejudice exists for the purposes of Rule 14.1 if the failure to arraign a defendant deprives a defendant of notice of the charges and thereby deprives the defendant of a full and fair opportunity to defend against the charges. *State v. Leenhouts*, CR 07-0319, 6/17/08.

Although the right to counsel attaches at all critical states of the criminal justice process where the results of the process might well settle an accused defendant's fate reducing a trial to being a mere formality, **an accused can waive the right to counsel previously invoked even without counsel present if the accused himself initiates contact with police.** As such, a trial court does not err when it allows at a capital trial the admission of a confession made by a defendant after initially invoking their 6th Amendment upon finding that the police did not use coercive tactics, and that the defendant made a subsequent voluntary, knowing and intelligent waiver of such rights by initiating contact with police for the purposes of making the confession, and being properly *Mirandized* prior to the confession in which he volunteers to answer additional police questions. **Although the State/police have an affirmative obligation to respect and preserve a defendant's rights upon invocation by refraining from engaging in further interrogation, interrogation may resume without the presence of defense counsel if an accused subsequently initiates the communication with police and then makes a voluntary, knowing and intelligent waiver of their *Miranda* rights.** Despite the fact that the Sixth Amendment Confrontation Clause applies to all testimonial statements, **a defendant's right to confrontation does not apply to out of court statements admitted at trial for context purposes attributed to a co-conspirator as part of a police interrogation technique in which the police accuse a particular defendant of lying about his degree of involvement in a case based on statements alleged to have been made to police by others involved in the crime(s).** Moreover, although a criminal defendant's Sixth Amendment rights are not violated by the admission of such unconfronted statements, **in these situations a trial court, upon request, should provide the jury with an appropriate limiting instruction explaining that the statements were contextual in nature, and not for the purpose of proving the truth of the matter asserted** in order to ensure a fair trial. While a criminal defendant has the constitutional right to proceed pro per, **once the right to self representation is waived, and defense counsel is both appointed and serves throughout the guilt phase of a capital trial, a trial court may deny a subsequent motion for self representation prior to the penalty phase** because the right must be balanced against the government's right to a fair trial conducted in a judicious and orderly manner. **A court does not err by admitting during the penalty phase of a capital case threatening letters written to both prosecutor and prosecution witnesses by a defendant who is the proclaimed leader of hate group militia when the evidence is relevant** to whether mitigation presented that the defendant's alleged militia involvement was benign and the result of mental health delusions sufficiently substantial to call for leniency (or a life rather than death sentence). Moreover, **although a capital case may be dismissed in some situations in which law enforcement seize papers and trial preparation materials prior to trial in an effort to prove such threats came from the Defendant, if the evidence seized by the State is not actually reviewed by the prosecution, yet only by a court-appointed special master, there is no Sixth Amendment violation of the right to counsel** that would encompass the seizure of trial preparation materials. In such a situation the determination of whether a Sixth Amendment violation exists depends on whether the intrusions were purposeful and whether the prosecution, either directly or indirectly, obtained evidence learned of defense strategy from the seizure. *State v. Boggs,* CR-05-0174-AP, 6/16/08 (amended).

COURT OF APPEALS CIVIL MATTERS

A.R.S. § 25-214(C)(2) Protects the Substantive Rights of the Non-signing Spouse to a Guaranty and Bars Collection of a Guaranteed Debt From a Community's Property. A.R.S. § 25-214(C)(2) requires both spouses to sign a guaranty in order to bind their community. The statute is substantive, rather than procedural, and bars collection of the guaranteed debt from community property. A judgment obtained against one spouse in another state and domesticated in Arizona does not allow the judgment creditor to collect from community assets. *Rackmaster Sys., Inc. v. Patrick Maderia*, 1 CA-CV 07-0646, 6/24/08.

Settlement Payments Are Not Reimbursable Costs in a Successful Indemnity Action Brought Pursuant to A.R.S. § 12-684(A). Under A.R.S. § 12-684(A), when a manufacturer in a product liability action rejects a tender of defense, the seller is entitled to reimbursement of its reasonable attorneys' fees and costs. The word "costs" is typically a specific term of art with a limited meaning. Although A.R.S. § 12-684(A) does not define the term, A.R.S. § 12-332(A) defines taxable costs in civil actions. Settlement payments are not among the "limited" enumerated expenses that may be taxed against the losing party pursuant to A.R.S. § 12-332(A). A party may not recover amounts paid to settle a claim as costs in an indemnification action under A.R.S. § 12-684(A). *Heatec, Inc. v. R. W. Beckett Corp.*, 1 CA-CV 07-0156, 6/24/08.

Employee Benefits That Reduce Personal Living Expenses Can Qualify as Income in Calculating Child Support. Arizona's child support guidelines were designed to establish a stan-

Thomas L. Hudson is a member at Osborn Maledon PA, where his practice focuses on civil appeals and appellate consulting with trial lawyers. He can be reached at thudson@omlaw.com, and is ably assisted with this column by Osborn Maledon PA's appellate group, which maintains AzAPP. AzAPP contributors include **Jean-Jacques Cabou, Michael S. Catlett, Sharad Desai, Ronda R. Fisk, Sara Greene, Mark P. Hummels, Jason J. Romero, Keith Swisher, Robert T. Weeks** and **Kristin L. Wright.**

Patrick Coppen is a sole practitioner in Tucson.

dard of support for children consistent with the reasonable needs of children and the ability of parents to pay. In determining a parent's annual income for the purpose of calculating child support, employment benefits may count as income if the benefits reduce the parent's living expenses. *Hetherington v. Hetherington*, 1 CA-CV 07-0518, 6/19/08.

A.R.S. § 12-2604(A), Which Governs Experts in Medical Malpractice Cases, Violates the Separation of Powers Provision of the Arizona Constitution. A.R.S. § 12-2604, which governs the qualifications of expert witnesses in medical malpractice cases, conflicts with Arizona Rule of Evidence 702, and violates the doctrine of separation of powers included in the Arizona Constitution. Under the Arizona Constitution, only the Arizona Supreme Court is authorized to make rules relative to all procedural matters in any court. *Seisinger v. Siebel*, 1 CA-CV 07-0266, 6/17/08.

An Insurer Who Unequivocally Defended an Insured for 10 Months May Waive Its Right to Deny Coverage. Where an insurer defended an action for ten months without any reservation of rights and only raised the defense after the close of discovery which potentially prejudiced the insured, questions of fact exist on whether the insurer waived its right to deny coverage. *Penn-America Ins. Co. v. Sanchez*, 1 CA-CV 06-0792, 6/17/08.

A Prior Court Order Is a Necessary Prerequisite to an Award of Double Damages Under A.R.S. § 14-3709(D); An Individual Who Violates Arizona's Vulnerable Adults Statute Automatically Forfeits All Benefits in the Decedent's Estate; There Is No Jury Trial Right for a Breach of Fiduciary Duty Claim Made in Connection With Probate Proceedings. A prior order with regard to the decedent's property is required in order for double damages to be assessed under A.R.S. § 14-3709(D). However, a violation of an order is not required before a double damages award; the issuance of an order itself is sufficient. An individual who occupies a position of trust and confidence with regard to a vulnerable adult and breaches a duty of trust to that adult thereby automatically forfeits any benefits from the decedent's estate. There is no jury trial right with regard to a breach of fiduciary duty claim in the probate context because such a claim is equitable in nature and no jury trial right existed for equitable claims at the time of the adoption of Arizona's Constitution. *In re Newman*, 1 CA-CV 07-0373, 6/12/08.

A Claimant Who Has Filed a Notice of Claim Alleging Wrongdoing by a Public Entity Must Amend His Notice or File a New Notice to Preserve Claims for Subsequent Related but Different Wrongdoing by the Same Entity or Employee. A notice of claim under A.R.S. § 12-821.01 that alleges one set of wrongs by a public entity or employee does not provide adequate notice of subsequent or related wrongs by the same entity or employee. A claimant must amend his notice or file a new notice to preserve claims based on a second set of acts by the same public entity or employee. *Haab v. Maricopa County*, 1 CA-CV 07-0562, 6/5/08.

A Husband Who Admits He Is the Father of a Child During Divorce Proceedings Is Precluded from Contesting His Paternity in a Later Proceeding. Where a father's paternity is established by a dissolution decree, the father is precluded from contesting that fact in a subsequent proceeding. Claim preclusion applies regardless of whether an issue was actually litigated as long as the issue could have been litigated in the first action. *In re Pettit v. Pettit*, 1 CA-CV 07-0275, 6/3/08.

Expert Disclosure Requirements of A.R.S. §§ 12-2603 & 2604 Apply to *Res Ipsa Loquitur* Medical Malpractice Cases; But Dismissal With Prejudice Is Not an Appropriate Sanction. A.R.S. § 12-2603, which requires a preliminary expert opinion before an action is filed, applies to "claim[s] against a health care professional… asserted in a civil action" without an exclusion for *res ipsa loquitur* cases. But a court should not dismiss a claim with prejudice for failing to provide a proper expert affidavit with the complaint. *Sanchez v. Old Pueblo Anesthesia, P.C.*, 2 CA-CV 2007-0131, 5/30/08.

Statute Requiring Service on the Attorney General and Others Whenever a State Law Is Alleged to Be Unconstitutional Applies to Lawsuits Filed Before Its Effective Date and Facial Constitutional Challenges First Pressed on Appeal. In 2006, the Arizona Legislature amended A.R.S. § 12-1841(A) to require service upon the Speaker of the House of Representatives and the President of the Senate (in addition to the Attorney General) when a state law is challenged on constitutional grounds. Because requiring service upon the Speaker of the House and the President of the Senate does not affect the underlying right to raise a constitutional challenge or any other right, the 2006 amendment is merely procedural and thus applies to actions filed before its effective date. Section 12-1841's broad language applies to assertions of unconstitutionality made during appellate proceedings. The service requirement contained within § 12-1841(A) is not limited to actions where "[d]eclaratory relief is sought." An allegation of unconstitutionality triggers the service requirement, not the relief sought. *Devries v. State*, 1 CA-CV 07-0399/CV 07-0424, 5/22/08.

COURT OF APPEALS CRIMINAL MATTERS

A criminal defendant may not challenge the legality of a search on Fourth Amendment grounds based on a personal property interest in an item seized when he has no legitimate expectation of privacy in the premises searched. In order to challenge a search, a person must first show they possess a legitimate expectation of privacy in the area searched. Although a properly interest in an item seized is a factor in determining whether there is a legitimate expectation of privacy, such interest is not sufficient in itself to permit a Fourth Amendment challenge. *State v. Tarkington*, 2 CA-CR 2007-0192, 6/27/08.

While felony murder occurs pursuant to A.R.S. § 13-1105(A)(2) when a victim is killed without intention during the course and in the furtherance of certain enumerated felonies or flight therefrom, the crime of **attempted felony murder is not a cognizable offense in Arizona because without the death of a victim, the doctrine has no application because the offense of felony murder focuses on the result of criminal conduct rather than on an offender's state of mind**. Felony murder differs from murder under A.R.S. § 13-1105(A)(1) because the defendant may be found guilty of felony murder even when the killing is unintended as there is no required culpable mental state for the murder itself in such situation as it is actually supplied by law from the accompanying felony during the course of which the death of a victim occurs. Moreover, although an attempt requires the actual intent to commit the target offense, there can be no criminal offense that requires an attempt to accomplish an unintended result. Arizona Appellate Courts have reached similar conclusions as to attempted second degree murder, attempted reckless manslaughter, and attempted negligent homicide. **However, when there is an actual intent to murder in the course of any of the felonies expressly listed in A.R.S. § 13-1105(A)(2) but no death occurs, attempted murder may still be charged in accordance with §§ 13-1105(A)(1) or 13-1104(A)(1).** *State v. Moore*, 1 CA-CR 07-0475, 6/24/08.

A trial court does not abuse its discretion by admitting into evidence at a criminal trial for burglary/theft a video recording made by a retail store's automated surveillance equipment even though no witness who was present during the events recorded actually testified at trial, as long as the proponent of the evidence provides some evidence from which a jury could conclude the recording in fact accurately depicts the event or criminal act recorded. Under the "silent witness" theory of authentication the only question in a criminal prosecution is whether there is sufficient evidence to support a jury finding that the offered evidence depicts with reasonable accuracy what the State purports it to be—a video recording of the crime(s) alleged to have been perpetrated by the defendant(s). In Arizona cases, a flexible approach is appropriate by which a trial Judge must merely consider the unique facts and circumstances of a particular case, and the purpose for which the evidence is offered in the case, before deciding whether the evidence has been properly authenticated under Rule 901(a), ARIZ.R.EVID. *State v. Haight-Gyuro*, 2 CA-CR 2007-0218, 6/18/08.

A trial court does not err in denying a defendant's motion to suppress incriminating statements to police following *Miranda* warnings in a case in which the police determine that a defendant understands their rights, yet fail to obtain an explicit waiver thereof because both the Arizona Supreme Court in *Trostle* and the U.S. Supreme Court in *North Carolina v. Butler* have found that the answering of questions after police properly give *Miranda* warnings constitutes a waiver of such rights by a defendant's overt conduct. **A trial court does not commit fundamental error by imposing attorney's fees pursuant to A.R.S. § 11-584 and Rule 6.7(d) without making required financial asset/ability findings** because a defendant's right to counsel (*i.e.,* the appointment of court-appointed counsel in indigent cases) is not contingent on such findings, and such failure does not go to the foundation of a defendant's case, nor take from them any other right essential to their defense or constitute error of such magnitude as to undermine their right to a fair trial. **The premature reduction of indigent defense fees to a criminal restitution order at sentencing in violation of A.R.S. § 13-805(C) is not fundamental error for the same reasons. Although an appellate court will presume that a lower court did not consider a defendant's insistence on their own innocence at sentencing** following conviction in keeping with applicable Arizona law forbidding such consideration, if evidence in the record contradicts such a presumption, sentencing error may be properly established. *State v. Moreno-Medrano*, 2 CA-CR 2007-0202, 6/17/08.

Convictions for both aggravated assault and armed robbery arising out of the same conduct does not violate the principles of double jeopardy because the underlying elements of each crime are different, and neither crime is a lesser included offense of the other. Under the *Blockburger test* two offenses are not the same for double jeopardy purposes if "each [offense] requires proof of an additional fact which the other does not" require. Unlike aggravated assault, the crime of armed robbery can be committed without intending to place or actually place a victim in fear, and requires as the additional element of the taking of property. **Although under Art. 2, Sec. 23 of the Arizona Constitution a criminal defendant is entitled to a 12-person jury if their potential sentence is 30 years or more, a trial court does not commit fundamental error by presenting a case to an 8-person jury when the application of A.R.S. § 13-116 (prohibiting the imposition of consecutive sentences for multiple offenses constituting a single act) would limit a defendant's potential imprisonment to less than 30 years**. In determining whether a single act has occurred for sentencing analysis purposes under § 13-116, a sentencing court employing the factors outlined in *State v. Gordon* must subtract the evidence of the greater or ultimate crime from the subject factual transaction to determine if what remains constitutes of evidence as to all required elements of the secondary crime(s) for which a defendant is to be sentenced. A court also must determine whether the victims were exposed to a greater risk as the result of the additional crime(s) in issue. *State v. Price*, 2 CA-CR 2007-0210, 5/30/08.

COURT OF APPEALS JUVENILE MATTERS

Neither the federal Indian Child Welfare Act nor Arizona's statutory scheme require in a case involving Native American dependent children that the State prove beyond a reasonable doubt both statutory grounds for termination and that the termination is in the child's best interests. The U.S. Congress enacted the Indian Child Welfare Act ("ICWA") to establish minimum standards "for the removal of Indian children from their families, and requires that no termination of parental rights may be ordered absent a determination supported by evidence beyond a reasonable doubt (including testimony by a qualified expert) that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The ICWA does not establish the appropriate standard of proof to be applied in evaluating state-law termination grounds or making state-mandated best interests determinations. As such, while the ICWA does establish additional criteria that must be met by a higher burden of proof before termination of rights may occur in cases involving Native American children in Arizona, it does not take precedence over Arizona law that requires that the State prove by clear and convincing evidence appropriate statutory grounds for termination (in addition to the ICWA requirements which must be proven beyond a reasonable doubt), and that the termination is in the child's best interests by a preponderance of the evidence. *Valerie M. v. ADES*, 1 CA-JV 07-0033, 6/17/08.

COURT OF APPEALS MENTAL HEALTH MATTERS

A Patient May Be Removed From Commitment Hearing for Disruptive Behavior Without Advance Warning. Due process does not require that a specific warning be given that further disruptive behavior will result in removal before a patient may be removed from a commitment hearing held under A.R.S. § 36-539. Although such a warning is "desirable" and "the best practice," it is within the trial judge's discretion whether to issue a warning where the court-issued warning may not be recognized or understood by a patient. *In Re MH 2007-000629*, 1 CA-MH 07-0010, 6/3/08.

COURT OF APPEALS TAX MATTERS

A Qualified Non-Profit, Charitable Organization Is Entitled to an Exemption from Property Taxes on Those Portions of Its Property Used to Operate a Gift Shop, Exhibit Art for Sale, and Rent to Various Third Parties. Where a taxpayer's primary use of its property is for a designated exempt charitable purpose, the taxpayer is entitled to the exemption notwithstanding its occasional or incidental use of its property for other purposes. A taxpayer that presented uncontroverted evidence that it primarily uses its gift shop and meeting areas for its own charitable, exempt purposes, is entitled to the tax exemption on all of its property notwithstanding some non-exempt commercial use. *Tucson Botanical Gardens, Inc. v. Pima County*, 1 CA-TX 07-0007, 5/20/08.

* indicates a dissent

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