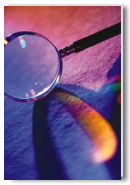

APPELLATE HIGHLIGHTS

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

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).

SUPREME COURT CRIMINAL MATTERS

A defendant is not entitled to reversal of his conviction for alleged prosecutorial misconduct when: (1) The prosecutor entered into a plea agreement with a codefendant on the eve of trial in return for testimony, but the trial court held that the agreement was not entered into in bad faith and there were objective factors in the record which supported that finding. Such an agreement did not constitute a discovery violation when the prosecutor took reasonable steps to notify the defendant quickly of the witness and the defendant could not successfully claim surprise or prejudice; (2) The prosecutor offered letters written from the defendant to the co-defendant that had not been disclosed previously because the State was not aware of the exact nature of the contents of the letters until the codefendant told the State about the letters at trial; (3) The prosecutor may have engaged in personal attacks on defense counsel, but such attacks occurred outside the presence of the jury; and (4) **The prosecutor informed the defendant's mother, who was a victim, that she could write a letter to the judge criticizing an evaluation of the defendant. Such conduct was not improper.** However, imposition of the death penalty after the trial judge found aggravating and mitigating factors required remanding for resentencing because the court could not say that a finding that the defendant had a pecuniary motive to kill the victim was harmless error nor that the jury would have made the same findings that the trial court made on mitigating factors. *State v. Armstrong*, CR-00-0595-AP, 7/15/04* … **Appointed appellate counsel who receive a threatening letter from their client where there is evidence that the threats were credible should be permitted to withdraw from further representation of the defendant.** The defendant may effectively waive the right to appellate counsel if, after appropriate warnings from the court, the defendant continues such conduct. The court left open the question of whether certain serious misconduct by a defendant can result in forfeiture of the right to counsel without prior warning. *State v. Hampton*, CR-03-0033-PR, 7/02/04 … **A trial court's failure to conduct an inquiry into an indigent defendant's request to change appointed counsel does not mandate an automatic reversal of the defendant's conviction. Rather, the matter must be remanded for a hearing on the defendant's request when the defendant has made sufficiently specific, factually based allegations in support of his request for new counsel.** The mere possibility that the defendant had a fractured relationship with counsel does not amount to structural error. *State v. Torres*, CR-03-0326-PR, 7/01/04.

SUPREME COURT CIVIL MATTERS

An insurance company raising a policy defense of concealment or misrepresentation has the burden to prove such defense under a preponderance of the evidence standard, not a clear and convincing evidence standard. *American Pepper Supply Co. v. Federal Ins. Co.*, CV-03-0290-PR, 7/15/05 … **All arbitration agreements between employers and employees are exempted from Arizona's arbitration act, A.R.S. §§ 12-1501 to -1518.** However, the issue whether such agreements may be enforceable at common law was left undecided. *North Valley Emergency Specialists, LLC v. Superior Court*, CV 03-0279-PR, 7/14/04 … **To prove a discriminatory tax valuation, a taxpayer must establish (1) that the taxing officials engaged in deliberate and systematic conduct and (2) that such conduct resulted in great inequality, a finding that requires the court to define the appropriate class of property for evaluating the claim and then to find greatly disproportionate tax treatment within the defined class. As to that latter element, the plaintiff must show tax treatment greatly unequal to that afforded others in the same class and must do so by reference to full cash value.** The plaintiff's burden of proof is under the preponderance of the evidence standard. The appropriate remedy in such a case is to refund the difference between the amount the taxpayer paid as property taxes and the amount it would have paid had it been treated in the same manner without the discrimination. *Aileen H. Char Life Interest v. Maricopa County*, CV-03-0348-PR, 7/13/04 … **A prosecutor who appealed to fear by the jury if the defendant was not convicted, was disrespectful for and prejudiced against mental health experts that led to harassment and insults during cross-examination and made improper arguments to the jury when combined with the prosecutor's refusal to cooperate in the disciplinary proceedings should be suspended for six months plus one day followed by a one year probationary period** under Bar supervision with continuing education and referral to the Member Assistance Program. *In re Zawada*, SB-02-0103-D, 7/01/04 … **Life insurance proceeds paid to a decedent's spouse are exempt from claims of creditors of the estate, pursuant to A.R.S. § 20-1131.** *May v. Superior Court*, CV-04-0025-PR, 7/01/04.

COURT OF APPEALS CIVIL MATTERS

A trial court that imposes a sanction of attorneys' fees pursuant to Rule 11 ARIZ.R.CIV.P. against the State in a special action arising from a criminal matter that is subsequently withdrawn by the State erred as a matter of law because Rule 11 applies only to civil proceedings, and does not apply per se to criminal or appellate matters. Although Arizona Rule of Procedure for Special Actions 4(g) provides that a party in a special action proceeding "may claim costs and attorney's fees as in other civil actions," the rule is merely procedural in nature. Because A.R.S. §§ 12-348 (H)(2) & (7) expressly exclude criminal cases from its provisions authorizing fees against the State, Rule 4(g) was not intended to authorize Rule 11 sanctions nor may it enlarge the legal or substantive scope of a court's authority enabling it to apply a civil sanction in a criminal setting. *State v. Shipman/Sweeney*, 2 CA-CV 02-0158, 8/03/04 … **A trial court erred in refusing to apply the doctrine of equitable subrogation to subrogate a permanent financing lender to the first lien position of the construction lender where there is no material prejudice to the intervening mechanics lienholders and the permanent financing or loan discharged the original construction loan.** The lienholders remain in the same position occupied before subrogation and would receive a windfall if elevated to a higher priority status. *Lamb Excavation v. Torrejon*, 2 CA-CV 02-0139, 7/29/04 … **An insurer who had issued a homeowners' policy on the insured's home was not entitled to equitable contribution from another insurer who had issued a renters' policy to the roommate of the insureds' daughter on another location for a claim arising from the roommate's dog biting the claimant while the parents were caring for the dog at their home.** The rental insurance policy excluded claims arising from conduct occurring off the insured premises or which conduct was not in connection with the insured premises. *California Cas. Ins. Co. v. American Family Mut. Ins. Co.*, 1 CA-CV 03-0645, 7/27/04 … **Where the bid documents contained all of the contract terms, a school district's decision that a contractor was the lowest and most responsible bidder and approving an award of a contract to the bidder constituted an enforceable contract without the need for the parties to sign the formal agreement.** In a later dispute between the parties, the contractor did not have to file a claim pursuant to A.R.S. § 12-821.01 where the contract required the contractor to follow exclusively the claims procedures of the Procurement Code. The court also refused to apply the constructive termination for convenience doctrine where there was no unexpected event or changed circumstances that might justify retroactive application of the contract termination provision. *Ry-Tan Constr. Inc. v. Washington Elementary Sch. Dist. No. 6*, 1 CA-CV 03-0248, 7/08/04 … **A trial court can award *in loco parentis* visitation to a widowed stepmother pursuant**

to A.R.S. § 25-415 when the stepchild enjoyed a good relationship with both legal parents before the father's death and the child is currently parented by his legal mother. The stepmother need not show that the child's relationship to her is equal or superior to the relationship he shared with his legal parents. Rather, the person petitioning for visitation need only show that the child has treated that person as a parent and formed a meaningful relationship with that person for a substantial period of time along with the other statutory factors and that the visitation would be in the child's best interests. *Riepe v. Riepe*, 1 CA-CV 03-0184, 6/29/04*.

COURT OF APPEALS CRIMINAL MATTERS

Under A.R.S. § 13-4032, the State has no right of appeal from the imposition of a life sentence in a first-degree murder case that is within the permissible statutory range or 25-year minimum sentence authorized by A.R.S. § 13-703.01. Generally, statutes allowing the State the right to appeal from a sentence imposed in criminal cases are strictly construed, and appeals by the State in such matters are only entertained when the right is clearly given by statute. A.R.S. § 13-4032 grants the State the right to appeal a sentence that is illegal or if the sentence imposed is other than the presumptive sentence authorized by A.R.S. §§ 13-604 and 13-701. An illegal sentence by definition is "a sentence not authorized by law or … based upon an unlawful order of the court which strikes or modifies the effect of an enhancement or prior conviction." Because A.R.S. § 13-703.01 authorizes a defendant to be sentenced to either life in prison with a 25-year minimum or to a natural life sentence, a 25-year sentence is not "unlawful." *State v. Viramontes*, 2 CA-CR 03-0265, 7/27/04 … **If a defendant pleads guilty to multiple offenses in the same proceeding, one or more of the offenses admitted may not then be used as historical prior felonies for sentence enhancement purposes under A.R.S. § 13-604.** An historical prior conviction as referenced in A.R.S. § 13-604(V) means a "conviction on the prior offense must precede the conviction on the present offense" for which the prior is offered to enhance. As there is "no meaningful distinction between convictions based on jury verdicts rendered at a single trial for multiple felonies and convictions resulting from [a] trial court's acceptance of guilty pleas to multiple felonies at the same hearing," contemporaneous felony convictions based upon plea agreements may not be used for sentence enhancement purposes under § 13-604. **If a plea agreement contains a provision permitting some of the resulting convictions rendered to be used as "historical" prior convictions for enhancement purposes, there is no factual basis for the plea itself, and the plea must be vacated.** *State v. Ofstedahl*, 2 CA-CR 03-0080-PR, 7/27/04 …

The State may amend existing allegations or prior convictions for sentence enhancement purposes under A.R.S. § 13-604 after trial, but before sentencing, to change dates of conviction or specify the class of felony if the defendant had sufficient constitutional notice through the original allegations specifying precisely what prior offenses upon which the State relied. Notice for due process purposes must be such that the defendant is not misled, surprised or deceived in any way by the prior conviction allegation, giving the defendant notice of their potential range of sentence before trial. **The State is not required to prove a prior historical conviction for sentence enhancement purposes beyond a reasonable doubt and is only required to prove prior convictions for such purposes by clear and convincing evidence.** The clear and convincing evidence required must properly establish both the particular defendant's positive identification as the person previously convicted, as well as the fact of the conviction itself. *State v. Cons*, 2 CA-CR 02-0333, 7/22/04 … **A person carrying a concealed weapon in a fanny pack can be guilty of misconduct involving weapons by knowingly carrying a deadly weapon without a permit pursuant to A.R.S. § 13-3102(A)(1).** A fanny pack is not luggage for purposes of the luggage exemption. The luggage exemption is also not unconstitutionally vague. *State v. McDermott*, 1 CA-CR 03-0683, 7/08/04.

** indicates a dissent*