APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

An Agreement Requiring Departing Lawyers to Forfeit Monetary Contribution to Law Firm is Permissible if Reasonable. The Arizona Supreme Court, following California's lead, held that lawyers may enter into reasonable withdrawal agreements that require departing lawyers to tender stock or other capital contribution for no compensation. The Court reversed the Court of Appeals' determination that such agreements constitute a *per se* violation of ER 5.6, which prohibits agreements that restrict the right to practice law. Justice Bales dissented. He would have struck down the financial disincentive provision under ER 5.6. *Fearnow, et ux. v. Ridenour, et al.*, CV-05-0217-PR, 7/18/06.

The Five-Day Window to Appeal a Nomination Challenge Under A.R.S. § 16 351 (A) Does Not Exclude Weekends or Holidays. A.R.S. § 16-351(A) requires that an appeal from a decision concerning a nomination challenge be filed "within five days." The five-day period does not exclude weekends or holidays. *Bohart v. Hanna, et al.*, CV-06-0225-AP/EL, 7/26/06.

SUPREME COURT CRIMINAL MATTERS

Although under the U.S. Supreme Court's decision in *Miranda v. Arizona* a criminal defendant generally has the right against self-incrimination, which includes the right to counsel during a custodial interrogation such that once the right is invoked all "interrogation must cease until an attorney is present," if a suspect merely makes reference to an attorney or their invocation is "equivocal" whereby a reasonable officer under the circumstances would have understood that the suspect "might" be invoking the right, police are not constitutionally required under later precedents in *Davis* and *Eastland* to either clarify the statement or to stop questioning. However, for a criminal defendant's statement to be admissible at trial, police must not merely comply with *Miranda* requirements, the statement itself must be voluntary and not obtained by coercion or improper inducement such as "[p]romises of benefits or leniency, whether direct or implied, even if only slight in value." Although in Arizona a suspect's statement is presumptively involuntary, a prima facie case for admission of a confession is made when the interrogating officer testifies that the confession was obtained without threat, coercion or promises of immunity or lesser penalty. In situations involving factual disputes regarding a question of voluntariness in a given case, the trial court is responsible for resolving factual conflicts, and its findings are given deference absent an abuse of discretion.

In cases involving a question of judicial bias or prejudice, trial counsel are required under Rule 10.1, ARIZ.R.CRIM.P., to file a written motion under Rule 10.1(b) within 10 days of discovering grounds for removal or the issue may be waived on appeal despite the fact that a defendant's constitutional right to a fair trial includes the right to a fair and impartial judge. Judges are presumed to be impartial, and a party who fails to actually move for a change of judge may be unable to provide a factual record for review on appeal of the judge's alleged bias or prejudice, which must be proven by a preponderance of the evidence under the rule. Moreover, opinions formed by a judge on the basis of facts introduced or events occurring in the course of trial or pretrial proceedings do not constitute a basis for a bias or partiality motion before sentencing unless they display "a deep seated favoritism or antagonism that would make a fair judgment impossible. … [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" without also showing either an extrajudicial source of bias or deep seated favoritism.

With regard to whether it is unconstitutional under the U.S. Supreme Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), for an earlier jury that was not death qualified to provide the factual determination of guilt for a later-empaneled jury to impose the death sentence, there is no error in cases in which at the time the earlier jury was selected, juries were not responsible for deciding the appropriateness of the death sentence in Arizona because *Ring v. Arizona*, 536 U.S. 584 (2002), had not yet been decided. For a defendant to admit a co-defendant's statements against interest as exculpating evidence, that party must establish particularized guarantees of trustworthiness as to the statements. However, such statements are not admissible to prove a "duress" defense, which is not available in Arizona for offenses involving homicide, including premeditated and felony murder.

The cumulative error doctrine is usually not applicable in capital cases despite argument that the severity and finality of the death penalty warrant its application, unless the error results from prosecutorial misconduct. In addition, absent fundamental error, a defendant cannot complain on appeal that the trial court failed to order *sua sponte* a mistrial or give a limiting instruction concerning non-confronted hearsay testimony if the defendant fails at trial to request a mistrial, or that the testimony be either stricken or a limiting instruction given.

Although the Eighth Amendment does not allow the death penalty to be imposed on a defendant unless they either themselves "kill or intend that a killing take place," "that lethal force be employed" "or [they are] a major participant in the crime and act[ ] with reckless indifference" to human life, a reasonable fact finder could conclude requisite reckless indifference necessary for the imposition of the death penalty from the fact that a defendant was present at the time of murder and participated or contributed in both binding the victims and attempting to smother a particular victim. Moreover, in *State v. Anderson* (*Anderson II*), 111 P.3d 369 (2005), the Arizona Supreme Court held that aggravating factors need not be included in the original indictment, nor proven to the original jury, as long as appropriate advance notice is given to a defendant prior to sentencing such that they are not prejudiced by the timing of the formal notice itself. Although a death sentence cannot be upheld if the jury was selected by striking for cause all prospective jurors who "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" in violation of the U.S. Supreme Court's holding in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), a judge may strike for cause potential jurors whose expressed views as to personal biases regarding the death penalty

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"would prevent or substantially impair the performance of their duties as a juror," despite their sincere promises to uphold the law. Instructions given pursuant to A.R.S. § 13-703.01(H) requiring jury unanimity as to leniency or in imposing a life sentence as opposed to the death penalty are not erroneous unless they require jurors to unanimously find the existence of any individual mitigating factor or circumstance before it may be considered. Disparate sentences as between co-defendants are constitutionally relevant and may be a mitigating circumstance only if no reasonable explanation exists as to the disparity.

Under A.R.S. § 13-703.01(R) and applicable law, a "victim may present information about the murdered person and the impact the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact," which may include "in-life" family photos. Though the Arizona Supreme Court has recognized the danger that photos of the victims may "be used to generate sympathy for the victim and his or her family," the Court has refused to adopt a per se rule barring same. There is no error in allowing jurors to take into their sentencing deliberations an in-life photo that may be benign as compared to the victim's post-death photos. *State v. Ellison*, CR-04-0073-AP, 8/8/06.

COURT OF APPEALS CIVIL MATTERS

AIDS Walk Participant Is a "Recreational User" Under Immunity Statute. A.R.S. § 33-1551 limits property owners' liability to "recreational users" injured on their property to situations involving willful, malicious, or grossly negligent conduct. The definition of "recreational user" under the statute includes a "person to whom permission has been granted or implied without the payment of an admission fee or any other consideration" to engage in certain activities on particular property. *Andresano v. Pima County*, 2 CA-CV 05-0151, 6/30/06.

Workers' Compensation Act's "Lent Employee Doctrine" Applies to an Employee Who Was Injured While Attempting to Leave Her Place of Employment After Completing Her Shift. The "lent employee doctrine" applicable to workers' compensation cases applies when a general employer lends an employee to a special employer and requires the special employer to provide workers' compensation coverage to the lent employee. The doctrine also affords the special employer immunity from suit by the lent employee for work-related injuries (whether or not the employee seeks to recover benefits from the special employer). A.R.S. § 23-1022(A) prevents employees who are provided with coverage under the workers' compensation act from suing their co-employees for accidents arising from their employment. *Schwager v. VHS Acquisition*, 1 CV 05-0677, 7/3/06.

Superior Court Is Not Divested of Jurisdiction Over Grandparent Visitation Matter By Marriage of Child's Parents. A.R.S. § 25-409(A)(3) provides that the superior court may grant the grandparents of the child reasonable visitation rights to the child during the child's minority on a finding that the visitation rights would be in the best interests of the child and upon certain other enumerated findings, including that the child was born out of wedlock. Jurisdiction is determined when the action is filed. Accordingly, if the parents of a child born out of wedlock subsequently marry, that event does not divest the superior court of jurisdiction over a grandparent visitation issue. *Fry v. Garcia*, 1 CV 05-0663, 7/3/06.

A Contractor May Appeal the Registrar of Contractors' Final Decision Revoking a License Even if the Contractor Failed to Appeal the Underlying Orders Resulting in Revocation. The registrar of contractors revoked a residential contractor's license after the latter failed to adequately perform repair work permitted by prior orders to avoid revocation. The revocation order constitutes a "final order" subject to review under the Administrative Review Act. The superior court thus has subject matter jurisdiction to review registrar of contractors' final decision even if the contractor failed to seek review of the earlier revocation orders. *Bolser v. Arizona Registrar of Contractors*, 1 CV 05-0355, 7/25/06.

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A trial court does not err in admitting evidence of other acts showing "a character trait giving rise to an aberrant sexual propensity to commit the offense(s) charged under Rule 404(c), ARIZ.R.EVID.**, by failing to also instruct the jury that it may consider the other act evidence only if it finds beyond a reasonable doubt that the defendant committed the other acts themselves.** Such evidence may be proven by clear and convincing evidence at the pretrial and trial levels based solely upon victim testimony, despite the fact that no expert testimony is offered to support it. The present codification of the rule permits admission of such evidence either on the basis of similarity or closeness in time, supporting expert testimony, *or other reasonable basis that will support such an inference* of aberrant sexual propensity. There is no error if a trial court properly finds that evidence presented provided a reasonable basis to infer that a defendant had a character trait giving rise to such a propensity to commit the crimes charged, as long as the court also complies with or performs the required Rule 403 probative value/prejudice balancing test prior to admission. Sexual acts against children traditionally have been characterized as abnormal or aberrant behavior, and as long as there is sufficient evidence in the record establishing similar acts, an accused's propensity to commit such acts is properly admitted. **Correction of error in an indictment as to the date an offense occurred that does not change the nature of the offense itself may be remedied by amendment of the indictment.** A defendant has the burden of showing that he suffered actual prejudice from the amendment of their indictment, which may include an inability to properly prepare a defense. A trial court does not err by failing to strike an entire jury pool unless the record affirmatively shows that that a fair and impartial jury was not secured through objective indications of the jurors' prejudice. A prospective juror's statements may be found to have tainted the jury pool in a particular case if they are "expert like" or go to the fundamental issues of guilt and credibility. *State v. Ploof*, 2 CA-CR 05-0137, 7/31/06.

* indicates a dissent

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