



APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

Fire District's "Facilities Benefit Assessment" Exceeds District's Authority Under A.R.S. § 48-805(B)(14). The statute permits fire districts to "[a]dopt resolutions establishing fee schedules for providing fire protection services," including "facilities benefit assessments." The Northwest Fire District authorized a "facilities benefit assessment" on new construction. That assessment was not a valid exercise of its statutory authority because Northwest did not demonstrate, *inter alia*, that the funds collected under this assessment will be spent on facilities that uniquely benefit the assessed property, as required for a special assessment. *Northwest Fire Dist. v. U.S. Home of Arizona Constr. Co.*, CV-06-0377-PR, 6/29/07.

SUPREME COURT CRIMINAL MATTERS

The *Belton* search incident to arrest exception to the Fourth Amendment's warrant requirement does not permit the warrantless search of an arrestee's car when the scene is secure and the arrestee is handcuffed, seated in the back of a patrol car, and under the supervision of a police officer because the rationales permitting such an exception, officer safety and preservation of evidence, do not exist once the scene has been secured and the police have no reason to believe that anyone could gain access to the vehicle or that officer safety is in issue. The U.S. Supreme Court recently held in *Thornton* that the *Belton* rule still applies when an officer does not initiate contact with a vehicle's occupant until after the occupant has left the vehicle. In this case, the Arizona Supreme Court agreed with Justice Scalia's concurring opinion in *Thornton* that applying the *Belton* doctrine to justify a search of the car of a person handcuffed and con-

finied in a police car "stretches [the doctrine] beyond its breaking point." *State v. Gant*, CR-06-0385, 7/25/07.

A trial court does not commit error in a capital case involving an alleged serial killer by deferring its ruling on the State's proposed rebuttal case (which includes evidence of a prior murder) to a defendant's mitigation evidence for leniency until after the mitigation evidence is presented at the penalty phase, especially when the judge's delay does not deprive the defense of adequate *voir dire*, which should include questions about the venire's thoughts about the appropriateness of the death penalty for serial murderers, as well as follow-up questions regarding expressed beliefs on the issue. Following remand for re-sentencing pursuant to the U.S. Supreme Court's holding in *Ring*, a trial court does not err by allowing the jury in a capital case to determine the existence of a prior serious felony conviction or (F)(2) aggravator (even though it may have been previously lawfully found by a judge before both the prior sentence and its aggravation findings were vacated), because earlier Sixth Amendment decisions allowing a judge to find prior convictions do not affect Arizona's statutory mandate requiring that the jury find all aggravators in consideration of the death sentence pursuant to A.R.S. § 13-703.01(P). Moreover, there is no double jeopardy violation in using a prior murder conviction as a prior serious felony or (F)(2) aggravator in such a case because such use is actually under a recidivist statute meant to enhance a sentence in the new and separate charge. Furthermore, Arizona's capital sentencing scheme does not create an unconstitutional presump-

tion for the imposition of the death penalty or improperly place the burden of proof upon a criminal defendant because applicable instructions make it clear that the sentencing decision is not a "fact question." Finally, "[a] judge's analysis in determining the relevance of rebuttal evidence [in the penalty phase of death penalty cases] involves fundamentally the same considerations as relevance and prejudice determinations under Arizona Rules of Evidence 401 and 403." *State v. Pandeli*, CR-06-0143-AP, 7/12/07.

Although other-act evidence such as the perpetrator attempting to procure life insurance for a future murder victim spouse or extramarital affairs may be properly admitted in a capital murder case when they are intrinsic to the crime itself (such as when the other act evidence is inextricably intertwined with the underlying offense, part of a single criminal episode or a necessary preliminary to the underlying offense), even if the evidence is improperly admitted at trial because it was not intrinsic to the crime charged (e.g., no insurance was ever obtained), the evidence may have been nonetheless properly admitted under Rule 404(b), ARIZ.R.EVID., to prove motive, plan, knowledge or intent to kill the victim or in rebuttal to a defense theory. Moreover, there is no statutory or constitutional requirement that a jury consider "mercy" among the statutorily enumerated mitigators; mercy or leniency are only appropriate when based upon mitigation evidence actually presented. *State v. Andriano*, CR-05-0005-AP, 7/9/07.

Imposing a time limit for jury *voir dire* in a capital case may be erroneous, yet is subject to harmless error review. Although suppression by the prosecution of evidence favorable to an accused violates the due process clause where the evidence is material to either guilt or punishment pursuant to *Brady* and its progeny, a trial court does not err in failing to compel discovery or disclosure of government records showing that a murder victim was an informant

for law enforcement when the victim had concluded his services as an informant long before he was murdered. While a failure by the State to disclose specific aggravating factors within 60 days of indictment may violate a criminal defendant's due process rights under current Rule 15.1, ARIZ.R.CRIMP., no violation occurs in cases in which the charging document was filed before Dec. 1, 2003, as long as a criminal defendant received adequate notice of aggravators or no later than 10 days after a guilty verdict prior to sentencing as previously required by former Rule 15.1(g)(2)(a). A capital defendant's young age or prior good deeds, while mitigating, are entitled to less weight when a crime was planned in advance. Pursuant to Rule 10.11(L) of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases death penalty counsel must "at every stage" of a capital appeal "take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client", and should not merely rely upon the Arizona Supreme Court's statutory duty to review the record. *State v. Garza*, CR-04-0343-AP, 6/29/07.

COURT OF APPEALS CIVIL MATTERS

An Arizona Court May Not Modify an Out-of-State Child Custody Order Unless the Out-of-State Court First Relinquishes Its Exclusive Continuing Jurisdiction. Under the Uniform Child Custody Jurisdiction and Enforcement Act, an Arizona court generally may not modify another state's custody order. The primary purpose of the UCCJEA is to avoid jurisdictional competition among state courts in child custody matters. The UCCJEA establishes exclusive, continuing jurisdiction in the court that enters the first child custody determination concerning a particular child unless: (a) both parents and the child move out of the forum state, or (b) the original court relinquishes its jurisdiction. *Melgar v. Campo*, 1 CA-CV 06-0408, 7/26/07.

The Prompt Pay Act Prohibits Owners From Withholding Payment on an Invoice for Allegedly Defective Work That Does Not Actually Appear on

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Such Invoice. The primary purpose of the Prompt Pay Act is to establish a framework for ensuring timely payments from the owner to the contractor and down the line to the subcontractors and suppliers whose work has been approved. The statute links progress payments from the owner to work done by subcontractors and suppliers, whose particular work or supplies are billed in the contractor's application for that progress payment. An owner may not wait until a later billing statement to disapprove and withhold payment for work already completed and deemed approved. *Stonecreek Bldg. Co., Inc. v. Shure*, 1 CA-CV 06-0372, 7/26/07.

A Wife May Bind Her Husband to an Arbitration Agreement Even Without a Power of Attorney, Legal Guardianship or His Express Authorization. Where sufficient evidence supports the determination that a wife has an implied actual agency relationship with her husband, wife's execution of a binding arbitration agreement binds the husband. *Ruesga v. Kindred Nursing Ctrs. West*, 2 CA-CV 2006-0114, 7/18/07.

County Not Liable to Buyer of Tax Liens That Were Found to Be Invalid. Tax liens purchased from the Maricopa County treasurer were invalid because the property was in receivership when the liens would have attached to the property. However, the county treasurer has no duty to determine the validity of a tax lien offered for sale. Under A.R.S. § 42-18125, a purchaser may seek to recover the purchase price only in a case in which the tax lien is sold on property for which no tax is due. The risk that a tax lien is invalid for any other reason falls on the purchaser. *PLM Tax Certificate Program 1991-92 L.P. v. Schweikert*, 1 CA-CV 06-0467, 7/17/07.

County Funding Mechanisms Adopted Under A.R.S. § 11-821 Must Satisfy the Statute's "Reasonable Relationship" Requirement. Where a county adopts a funding mechanism identified under A.R.S. § 11-821(D)(4), that mechanism must bear a reasonable relationship to the burden imposed on the county to provide the additional public facilities to the development. Whether Pima County's sewer connection fee ordinance violated the reasonable relationship requirement of A.R.S. § 11-821, *i.e.*, whether the fee reasonably relates to the burden imposed on Pima County by the development, involved a question of fact precluding summary judgment. *Robson Ranch Quail Creek v. Pima County*, 2 CA-CV 2006-0206, 7/13/07.

Under the Terms of the Contract Between a Resident and Her Retirement Care Facility, the Resident Is Entitled to a Full Refund of Her Entrance Fee After Giving Timely Written Notice and Vacating the Facility. An estate sought reimbursement for the entrance fee that the decedent had paid to a retirement care facility because the decedent gave timely written notice to the facility and vacated her room. After the facility denied its requests, the estate filed an action for breach of the refund provisions of the residency contract. Under the terms of the

addendum to the residency contract, the estate was entitled to a refund of the entrance fee and was not responsible for monthly fees after the decedent had vacated the premises. *Hanson v. Tempe Life Care Village, Inc.*, 1 CA-CV 06-0274, 7/12/07.

Notice of Claim Rules Require Delivery, Not Just Mailing, of Claim. Arizona's Notice of Claim statute, A.R.S. § 12-821.01, requires a claimant to "file" their claim within 180 days. The filing requirement obliges tort claimants in Arizona to actually deliver or ensure the actual delivery of the notice of claim to the proper person within the statutory period. Where the state offered evidence that no claim was delivered (and the plaintiff had no proof of delivery), the plaintiff's suit was barred. *Lee v. State of Arizona*, 1 CA-CV 06-0145, 7/12/07.

Declaratory Judgment Action Challenging the State's Implementation of Proposition 200, the Arizona Taxpayer and Citizen Protection Act, Allowed to Proceed. The Arizona Taxpayer and Citizen Prevention Act (Proposition 200) requires, *inter alia*, state agencies and local governments that administer "state and local public benefits that are not federally mandated" to verify applicants' immigration status for benefits and report any discovered violations to federal immigration authorities. In an action challenging the State's implementation of Proposition 200, claims against Arizona's Attorney General, Secretary of State, and Governor seeking mandamus relief were properly dismissed. However, a claim for declaratory relief against the Governor could proceed as the Governor has the ability to control the implementation of that proposition, making the Governor an appropriate official. Declaratory relief could also be pursued against various agency officials in their official capacity. *Yes on Prop*

200 v. Napolitano, 1 CA-CV 05-0235, 6/28/07.

Communications Between Two Agents of the Same Principal Constitute Publications for Purposes of Defamation Claim. Under Arizona law a communication may be a publication for purposes of a defamation claim even though the communication is only between two agents of the same principal. A privilege, however, prevents recovery when statements are made in good faith. States have split on this issue, but this rule accords with the "modern" view. *Dube v. Likins*, 2 CA-CV 2006-0176, 6/28/07.

COURT OF APPEALS CRIMINAL MATTERS

A defendant inmate who is found guilty of promoting prison contraband under A.R.S. § 13-2505 by possessing methamphetamine for personal use is not eligible for mandatory probation pursuant to A.R.S. § 13-901.01 because promoting prison contraband involves knowingly possessing contraband while confined in a correctional facility, and is among the "Escape and Related Offenses", rather than the drug offenses listed under A.R.S. § 13-3400 *et seq.* The plain language of A.R.S. § 13-901.01, along with the existing statutory scheme at the time of its enactment, suggests the "crimes of personal possession or use" identified by A.R.S. § 13-901.01 are those crimes specifically found in Chapter 34 of Title 13, the chapter of the criminal code governing "drug offenses." Although "prison contraband" certainly includes a dangerous drug, such use or possession would "endanger the safety, security or preservation of order in a correctional facility" as proscribed by § 13-2505. *State v. Romero*, 2 CA-CR 2007-0075-PR, 7/30/07.

A trial court does not commit reversible error when it fails to hold an evidentiary hearing to determine whether it was necessary for a capital defendant to wear a stun or electronic shock

belt (an alternative method of securing a prisoner at trial as opposed to shackles) during trial or sentencing when the defendant fails to make a timely legal objection. Under Arizona law a criminal defendant is generally entitled to appear free from all manner of shackles or bonds at trial and sentencing, whether visible or hidden from the view of the jury, unless there is an evident danger of possible escape, whereby a trial court may exercise its discretion to shackle or secure a defendant throughout proceedings. *State v. Bassett*, 1 CA-CR 06-0088, 7/24/07.

A trial court is not required to instruct a jury in a trial for the charge of first-degree felony murder based upon accomplice liability that a defendant must be "both an accomplice and a participant" in the underlying felony. To obtain a conviction for felony murder on the theory of accomplice liability, the state need only prove that the defendant, either as a principal or as an accomplice, committed or attempted to commit an underlying felony, such as robbery, and that someone was killed in the course of and in furtherance of the underlying offense. *State v. Rios*, 1 CA-CR 05-1091, 7/17/07.

A criminal defendant is not entitled as a matter of due process to obtain a victim's medical records through a pretrial motion to compel discovery in an attempt to establish a justification defense for deadly force based upon a defense "theory" that the victim was violent when the defendant had no pre-existing knowledge whether the victim had any reputation for violence. When a defendant raises a justification defense, he is entitled to offer at least some proof of the victim's reputation for violence. Yet he may do so only in limited ways including: 1) offering into evidence either reputation or opinion evidence that the victim had a violent or aggressive character trait, or 2) offering specific instances of violence committed by the victim but "only if

the defendant *knew* of them" or if they were directed to third persons relating to or growing out of the same transaction, or so proximate in time and place and circumstances as would legitimately reflect upon the conduct or motives of the parties at the time of the alleged fight resulting in the victim's death. *State v. Connor*, 1 CA-CR 05-0153, 7/17/07.

A trial court does not abuse its discretion by designating a case "complex," and thus extending the time before a defendant must be tried, when such is necessary by virtue of the case's nature (i.e., its unique circumstances and necessary discovery) or because of the evidence required (i.e., the number of trial witnesses and exhibits as well as the presence of scientific evidence) in order to afford more time to prepare so that the case may be fairly and fully presented. Pursuant to Rule 8.2(a)(1), ARIZ.R.CRIM.P., an in-custody defendant must generally be tried within 150 days of their arraignment or their prosecution is subject to dismissal. However, Rule 8.2 (a)(3) previously provided that if a case (which indictment was filed between Dec. 1, 2002, and Dec. 1, 2005) was designated complex it shall be tried within one year from arraignment. Moreover, a defendant is not denied his right to a speedy trial pursuant to Rule 8, ARIZ.R.CRIM.P., the Sixth Amendment and the Arizona Constitution and requiring reversal of his conviction when a trial in a complex case is continued beyond the one-year period unless a defendant is able to establish that his defense was prejudiced or that he was deprived of a fair trial. Furthermore, a defendant's waiver of trial counsel is not rendered unknown or unintelligent merely because the trial court failed to warn the defendant that should he choose to testify at trial he would have to do so by responding to questions asked by advisory counsel, rather than through narrative testimony or by asking himself questions. *State v. Wassenaar*, 1 CA-CR 05-0765/1 CA-CR 05-0975 (Consolidated), 7/17/07.

The State may not lawfully retain property seized from a criminal defendant in a case that is later dismissed without prejudice sim-

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ply because the statute of limitations for filing the underlying criminal charges for which the property was originally seized has not yet expired because by retaining such property the State has effected a *de facto* forfeiture without allowing due process. *State v. Salerno*, 1 CA-CR 06-0661, 7/12/07.

Actual evidence of accidental loss or inadvertence by a property owner is not required to instruct a jury on the elements of theft of lost or misdelivered property pursuant to A.R.S. § 13-1814(A)(4), nor is it necessary to support a conviction, especially in a case in which the defendant claims that he “found” the property in issue, and believed that it had been abandoned, such that the property was “lost” as to its true owner. Theft of lost or misdelivered property requires proof that a criminal defendant knowingly and without lawful authority came “into control of another person’s property that was lost or misdelivered under circumstances providing means of inquiry as to the true owner, and the defendant misappropriates the property to their own or another’s use without reasonable efforts to notify the true owner. *State v. Dixon*, 2 CA-CR 2006-0203, 7/11/07.

The admission of records of prior DUI convictions at an aggravated DUI trial without testimony from the person who had prepared the records and signed the attached authenticating affidavit does not violate a defendant’s rights under the Confrontation Clause of the Sixth Amendment as re-defined in the U.S. Supreme Court’s decision in *Crawford v. Washington*. In order to prove a prior conviction as a required element under A.R.S. § 28-1383 (the aggravated DUI statute) the state must submit appropriate evidence establishing both positive identification that the accused is the same person who previously was convicted, as well as evidence of the past convictions. *State v. Bennett*, 2 CA-CR 2006-0324, 6/29/07.

COURT OF APPEALS TAX MATTERS

The Public’s *De Minimis* Actual Use of Property Does Not Preclude “Common Area” Property Tax Valuation. Under A.R.S. § 42-13404, the public’s relatively *de minimis* actual use of property does not preclude a property from receiving a common area tax valuation, rather than the “commercial property” valuation that is subject to a higher tax rate. *Sun City v. Maricopa County*, 1 CA-TX 06-0018, 7/26/07.

Court Upholds Decision to Exclude Consideration of Obsolescence From Tax Valuation of Pipeline Under Statutory Formula. The Arizona Department of Revenue correctly declined to factor in alleged obsolescence in applying the statutory valuation set forth at A.R.S. § 42-14204. The statute provides the exclusive method of valuation and does not include obsolescence as a factor. *Arizona Department of Revenue v. Questar Southern Trails Pipeline Co.*, 1 CA-TX 06-0015, 7/19/07. ¶

* indicates a dissent