



APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

Title Insurance Policy Exclusion for Risks “Created” by the Insured Applies When an Insured Pays a Grossly Inadequate Price for Property Purchased at a Sheriff’s Sale and Thereby Creates a Risk That the Sale Will Be Set Aside. A title insurance policy’s exclusion of coverage for losses resulting from the insured’s “failure to pay value” does not apply if a purchaser pays some “valuable consideration,” and thus the exclusion does not apply in the context of a Sheriff’s sale where the sale is set aside because the price paid was grossly inadequate. However, a title insurance policy’s exclusion of coverage for losses resulting from the risks “created” by the insured does apply. That exception applies whenever the insured intended the act causing the defect, not only when the insured intended the defect or when the insured engaged in misconduct, and thus when a purchaser bids such a low amount so as to create the risk that resulted in the loss (*i.e.*, the setting aside of the sale) the exclusion applies. *First Am. Title Ins. Co. v. Action Acquisitions, LLC.*, CV 07-0412-PR, 7/25/08.

Arizona’s Pleading Standard as Previously Interpreted Applies to Arizona Actions Rather Than the Pleading Standard Adopted by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*. An Arizona procedural rule such as Rule 8, ARIZ.R.CIV.P., may only be changed or re-interpreted in one of two ways: (1) by the Arizona Supreme Court through its rulemaking powers or through interpretation in the context of the case; (2) by a member of the public via a petition to the

Arizona Supreme Court pursuant to ARIZ.R.S.Ct. 28(A)(1) to adopt, amend or repeal a rule of procedure. Because the Supreme Court has not changed its interpretation of Rule 8 and no Rule 28 petition has been filed, the notice pleading standard previously set forth by the Court continues to apply to Rule 8 rather than the United States Supreme Court’s interpretation of the comparable federal rule in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Justice Hurwitz dissented in part. *Cullen v. Auto-Owners Ins. Co.*, CV 07-0402-PR, 7/25/08.*

SUPREME COURT CRIMINAL MATTERS

In reversing a decision of the Arizona Court of Appeals, the Arizona Supreme Court held that **possession of a dangerous drug under A.R.S. § 13-3407(A)(1) is a lesser-included offense of transportation for sale of a dangerous drug under A.R.S. § 13-3407(A)(7)** because one cannot transport dangerous drugs without possessing them. To constitute a lesser-included offense, the offense must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one. The Court reasoned that both offenses contain the same elements, with the transportation for sale offense merely containing the additional “for sale” element. Although argued on appeal, “useable quantity” is not an element of the possession offense. Rather, a “useable quantity” is merely evidence from which a fact-finder may infer intent. *State v. Cheramie*, CR 08-0001-PR, 7/29/08.

In a capital murder case remanded for re-sentencing by a jury under

Ring v. Arizona, no fundamental error occurs when the judge assigned to the re-sentencing jury trial fails to order required pretrial evaluations under A.R.S. § 13-702.02 (to determine whether the defendant is mentally retarded) or under § 13-702.03 (to determine whether the defendant is competent to stand trial) when the defendant is unable to show prejudice and there is no evidence raising any doubt as to either issue. Although for the purposes of re-sentencing under *Ring* it is improper under § 13-703(D) and Arizona case law to automatically admit evidence related to the nature of the homicides at the second trial merely because it was heard at the first trial, under § 13-703(B), admission of relevant evidence pertaining to aggravation is governed by the rules of evidence whereby evidence admitted at the first trial is admissible at the *Ring* re-sentencing jury trial if it is relevant to proving any aggravating circumstance. Though the Sixth Amendment Confrontation Clause may prohibit the admission of a trial transcript from an earlier trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, such error need not be reviewed where its admission was harmless beyond a reasonable doubt because substantial evidence existed without the admission of the transcript to prove the sole aggravating factor providing the basis for the imposition of a death sentence, and it is clear that such error did not contribute to or affect the sentence. A.R.S. § 13-703.01(R), **providing for victim impact statements during the penalty phase of a capital trial, is not unconstitutional** because their consideration is relevant to the issue of harm caused by the defendant and do not violate the Eighth Amendment. Moreover, the U.S. Constitution places due process limits on a victim impact statement when it is “so unduly prejudicial that it renders the [sentencing phase of a capital] trial fundamen-

tally unfair.” Furthermore, the placement or timing of the victim impact statement following the presentation of mitigation is not erroneous because the Arizona Supreme Court recently held in *State v. Garza*, “Victim impact statements ... are generally relevant to rebut mitigation.” Finally, there is no unconstitutional restriction upon a defendant’s right to allocation, when the defendant refrains from expressing remorse when the State has given notice that it shall rebut such mitigation with appropriate evidence. *State v. Armstrong*, CR 06-0443-AP, 7/29/08.

In a multiple homicide case in which the State alleges that the murder of one of the victims was to cover up their molestation by the defendant, reversible error occurs when a trial court improperly admits other-acts evidence under Rule 404(b), ARIZ.R.EVID., related to the molestation when it fails to properly apply the clear and convincing evidence standard necessary to prove that the molestation actually occurred prior to admitting evidence related thereto, and the error is not harmless because the prosecution used the molestation as a centerpiece of its overall prosecution (making repeated references to the molestation in closing argument), and the reviewing court is unable to determine beyond a reasonable doubt that the error did not contribute to the verdicts. *State v. Anthony*, CR 04-0098-AP, 7/28/08.

In a case involving alleged prosecutorial misconduct regarding improper statements to the jury in closing argument that may warrant a new trial, the failure of a defendant to contemporaneously object to such statements waives all but fundamental error, must not only go the foundation of the defense case and take from a defendant a right essential thereto, yet be of such magnitude that the defendant could not have possibly received a fair trial. When felony murder is an alternate theory of first-degree murder, an appellate court need not consider a challenge

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to the sufficiency of the evidence of felony murder when the jury also returned a separate verdict of guilt for premeditated murder, which is itself based upon sufficient evidence. However, an instruction for felony murder is erroneous if it merely requires that a felony and killing were part of the same series of events. A defendant's Fifth Amendment right against self-incrimination survives pending both direct and collateral appeal. Although a criminal defendant has the right under the Sixth Amendment to compel witness testimony, this right is not absolute and will give way when the witness' preservation of their own Fifth Amendment rights would prevent him from answering relevant questions. The state's refusal to grant a particular witness immunity is not violative of due process absent a showing the witness would present exculpatory evidence, and the state has no strong interest in withholding immunity. *Caldwell* error may occur in a death penalty case in which comments are made to the jury by either a judge or the prosecution (such as the fact that a defendant has the right to appellate review) that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Although error occurs when the trial court answers questions posed by a jury without notice to the defendant or defense counsel, the Arizona Supreme Court will defer to the lower court belated factual findings on the issue when supported by the record and the court's responses

were neither erroneous or prejudicial. However, the better practice is to make a contemporaneous record with counsel about any jury questions and proposed responses. A victim impact statement is not subject to mandatory disclosure by the State of its contents prior to the sentencing phase of a capital trial, nor is it subject to cross examination by the defense. Moreover, even if a mother gave up the murder victim for adoption, she is still a victim based upon consanguinity. Although the U.S. Supreme Court described capital sentencing by a jury as a "reasoned moral response" in *Penry v. Lynaugh*, a trial court's failure to include the word "moral" in its final instructions does not render the instructions (which included that the jury should consider all possible mitigating evidence) as a whole incorrect or misleading. A trial court does not abuse its discretion in allowing further deliberations by a jury resulting in a guilty verdict after the court initially intended to enter a mistrial, yet allowed the jury to continue deliberating after first questioning the jury as to whether further deliberations may be helpful and receiving an affirmative response. *State v. Martinez*, CR 05-0507, 7/25/08.

COURT OF APPEALS CIVIL MATTERS

A County Board of Supervisors May Require a County Officer to Post a Bond, but the County Must Pay the Bond Premiums. Pursuant to A.R.S. § 11-253(A), the Apache County Board of Supervisors may require a county sheriff indicted on crimes regarding

the misuse of public funds and property to post a bond to cover any losses caused by the sheriff's dishonest or fraudulent acts after his indictment. The board may also remove the sheriff for failure to post such a bond. However, under A.R.S. § 38-254, the county is responsible for paying the premiums on the bond. *Hounshell v. White*, 1 CA-CV 06-0728, 7/22/08.

Arizona's Notice of Claim Statute, A.R.S. § 12-821.01, Requires that a Plaintiff's Claim Letter Provide Some Facts Supporting a Proposed Settlement Amount. Arizona's notice of claim statute requires that "[t]he claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount." A notice of claim letter contains enough facts to comply with the statute when the letter provides some facts to support the proposed settlement amount. If a governmental entity desires additional factual information, it may ask for it. *Backus v. State*, 1 CA-CV 07-0640/07-0671, 7/17/08.

Good Cause and Excusable Neglect Not Applicable to ARCAP Rules 9(a) and 6(b). Arizona Rule of Civil Appellate Procedure 9(a) permits a court to expand the time to appeal a jury verdict under certain circumstances; Arizona Rule of Civil Procedure 6(b) permits a court to enlarge the time for various matters in superior court including the filing of post-trial motions. Neither of these rules, however, requires a showing of "good cause" or "excusable neglect." *Haroutunian v. ValueOptions, Inc.*, 2 CA-CV 2007-0090, 7/10/08.

Constable Is Entitled to Reasonable Process Before the Presiding Judge May Reduce the Constable's Duties. A.R.S. § 22-131(A) gives the superior court presiding judge supervisory authority over constables. The presiding judge's supervisory authority over the justice courts gives the presiding judge the right and the responsibility to exercise supervisory authority over a constable who has been reprimanded by the Constable Ethics Committee. The supervisory authority, however, must be exercised reasonably. Thus, although a

constable is not entitled to due process to protect the right to hold elected office, reasonable process (notice, an opportunity to be heard, and an explanation of why disciplinary action is required) must be followed before the presiding judge implements disciplinary action. *Clark v. Campbell*, 1 CA-CV 07-0529, 7/10/08.

A.R.S. § 49-497 Confers Standing on an Organization Acting in a Representative Capacity Seeking Declaratory Relief Concerning the Validity or Construction of a County Rule. In connection with claims against the Maricopa County Air Quality Control Department and other defendants related to the issuance of permits for dust-generating operations, an association comprised of businesses involved in the home building industry does not have standing to assert its members' claims for damages where the damages suffered were neither common to the entire membership nor shared by the all members in an equal degree. Such an association also lacks standing for injunctive and declaratory relief claims when there is no demonstration of a present and continuing injury sufficient to confer standing. However, such an association has standing to assert a claim for declaratory claim pursuant to A.R.S. § 49-497 as the association counts for purposes of that statute as a "person" who "may be" affected by a county rule. *Home Builders Ass'n v. Kard*, 1 CA-CV 07-0629, 7/8/08.

Landlocked Parcel Owner Does Not Have Absolute Right to Enforce Right-of-Way Granted Under Federal Law. A landlocked parcel owner may enforce a right-of-way reserved for roadway purposes under land patents issued by the United States pursuant to the Small Tract Act, 43 U.S.C. § 682a (which was repealed in October 1976). But a parcel owner does not possess an absolute right to enforce a right-of-way reserved under federal land patents issued pursuant to the Act, and may do so only when such use is consistent with the purposes of the Act. When an existing roadway provides the landowner full access to and use of their property, they are not entitled to enforce the right-of-way reserved for roadway purposes under the Act over

another's property. Judge Snow dissented. *Neal et al. v. Brown*, 1 CA-CV 06-0756, 7/8/08.*

The Rule Against Perpetuities Does Not Render Void a Commercial Real Estate Sales Agreement That Fails to Include a Specific Time Period for Performance if the Parties Intended Performance Within a Reasonable Time. The common law rule against perpetuities holds that no interest in real property is valid unless it must vest no later than twenty-one years after some life in being at the creation of the interest. Where a contract does not include an express time for performance, the rule against perpetuities nevertheless does not apply if the circumstances indicate that the parties intended to fulfill their contractual obligations within a reasonable time. *Malad Inc. v. Miller*, 1 CA-CV 07-0680, 7/3/08.

Arizona Courts Have Jurisdiction to Issue Pre-Forfeiture Seizure Warrants for Wire Transfers. In the context of forfeiture of wire transfers sent to and from 28 states, not including Arizona, and 26 locations in Sonora, Mexico, the superior court lacks *in personam* jurisdiction over the wired funds, but may exercise *in rem* jurisdiction over the wire transfers because they constitute "property" as defined by the criminal code and the *res*—the "electronic credits" reflected in the wire transfer company's computer—is located in Arizona. Those credits constitute intangible property "of value" under A.R.S. § 13-105(32) and constitute proceeds from human smuggling and narcotics trafficking activities that predominantly occur in Arizona. *State of Arizona v. Western Union Fin. Servs., Inc.*, 1 CA-CV 07-0178, 7/1/08.

Settlement Amount in Notice of Claim Statute Should Be Determined by Reading the Notice as a Whole; Governmental Entity May Waive Defense to Defective Notice of Claim. Read in context and as a whole, a notice of claim pursuant to A.R.S. § 12-821.01 that indicated the attorney would recommend settlement of claims for certain dollar amounts and that the offers would expire in 60 days complied with the statutory requirement that

a specific amount be provided for which the claim could be settled. A governmental entity may waive its defense that a notice of claim does not meet the statutory requirements by taking substantial action to litigate the merits of the claims, such as participating in discovery that would have been unnecessary if the defense had been promptly asserted. *Jones v. Cochise County*, 2 CA-CV 2007-0132, 6/30/08.

COURT OF APPEALS CRIMINAL MATTERS

A trial court errs by failing to dismiss felony charges against an incompetent individual after efforts to restore their competency to stand trial prove unsuccessful over a 21 month period because A.R.S. § 13-4501 through 45017 and Rules 11.1 through 11.6, ARIZ.R.CRIM.P., actually limit restoration efforts to 21 months after a criminal defendant is first found legally incompetent to stand trial, rather than to a combined 21-month period of treatment for restoration to competency. Once a criminal defendant is found incompetent, a trial court must determine whether treatment should be ordered, with restoration to competency being the preferred course under the statute. The only exception is when "there is clear and convincing evidence that the defendant will not be restored to competency within 15 months under both A.R.S. § 13-4510(c), and Rule 11.5(b)(3), ARIZ.R.CRIM.P. This 15-month period may be extended for an additional six months under A.R.S. § 13-4510(c) "if the court determines that the defendant is making progress toward the goal of restoration. It is noteworthy that a **prior adjudication of incompetency actually gives rise to a presumption of continued incompetence** in such cases under applicable Arizona law. *Nowell v. Hon. B. Rees/State of Arizona*, 1 CA-SA 08-0102, 7/31/08.

A trial court acts in excess of its legal authority by reinstating a defendant on probation, after finding that the particular defendant committed another felony while on intensive probation because A.R.S. § 13-917(B) requires in such situations both the revocation of probation and imposition of a prison sentence for the

conviction(s) for which the imposition of sentence was suspended. While for less serious probation violations a trial court possesses discretion to reinstate on probation, a court may not reinstate a probationer who is convicted of committing a felony while on intensive probation, nor may it **reinstate the defendant on regular probation prior to finding a violation of intensive probation** by the commitment of the new felony following an extended jail term on the new felony **avoiding the mandatory requirements of the statute** even in cases in which revocation and sentencing to prison may seem unduly harsh given the nature and circumstances of the new felony offense. A dissent noted that given the specific language of § 13-917(B) a sentencing court retains the discretion to reinstate an individual on probation for both less serious violations not constituting felonies nor serious threats or dangers to the community, as well as in those situations in which the defendant is no longer on intensive probation at the time they are found guilty of the new felony. *State v. Boykin*, 1 CA-CR 07-0083, 7/31/08.*

Arizona has subject matter jurisdiction over a defendant who commits the crime of solicitation to commit human smuggling within the State even when all the elements of the offense take place outside of the United States because A.R.S. § 13-108 provides for jurisdiction over an offense when the "result of such conduct occurs within this state," and Arizona's jurisdiction is not subject to constitutional limitations such as federalism or preemption, and applicable international law would not preclude its application. The U.S. Supreme Court has never held that every state enactment that in any way deals with aliens is a regulation of immigration and thus per se pre-empted by federal constitutional power, whether latent or exercised. Federal preemption exists only in those cases in which the state statute actually regulates immigration itself, there is a clear and manifest purpose of Congress to preclude even harmonious state regulation touching on aliens in general, and the state law stands as an obstacle to the accomplishment

and execution of the full purpose and objectives of Congress. Moreover, international law allows a state to prescribe law with respect to conduct outside of its territory that has or is intended to have substantial effect within its territory. For obvious reasons, human smuggling having an origin outside of the United States has a substantial affect within its territory. *State v. Flores*, 1 CA-CR 07-0800, 7/31/08.

A defendant's possession and proposed use of marijuana is not permitted by the Arizona Free Exercise of Religion Act or the Free Exercise Clause of the U.S. Constitution. The free exercise of religion encompasses two concepts: (1) "the right to believe and profess whatever religious doctrine one desires", and (2) the right to perform or abstain from physical acts for religious reasons. Though the government cannot regulate the right to believe and profess whatever religious doctrine one desires, nor may it penalize or discriminate against individuals or groups because of their religious views, actions or conduct prompted by religious beliefs or principles are not totally free from government regulation or proscription. When the government has a compelling state interest in enforcing valid and religion neutral laws, it may proscribe religious conduct in violation of such law including the use of marijuana in religious ceremonies, even though the individual(s) affected sincerely hold(s) the religious belief requiring the proscribed conduct. Moreover, Arizona's Free Exercise of Religion Act allows restriction of such conduct if the State demonstrates that such restriction furthers a compelling state interest, and that it uses the least restrictive means of furthering the state interest. As such, Arizona's laws regulating the possession and use of marijuana are meant to fulfill the State's interest in regulating the possession and use of marijuana which use is judicially noticed as being harmful. However, this decision does not mean that a defendant can never pursue a religious freedom defense against marijuana-type possession laws because even in circumstances in which the case law and legislative history show the existence of a well-established

compelling governmental interest and the government has chosen the least restrictive means to achieve its interest, a defendant may successfully assert a religious freedom defense if they can present independent evidence negating existing authority on the issue. *State v. Hardesty*, 1 CA-CR 06-0966, 7/31/08.

An individual convicted of disorderly conduct based upon the reckless discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, which is a Class 6 felony, is not eligible to have their offense designated as a misdemeanor pursuant to A.R.S. § 13-702(G). Under § 13-702(G) the Arizona Legislature has granted that trial judges in their discretion may designate a class 6 felony offense as a class 1 misdemeanor under certain circumstances in which the court understands both the nature and circumstances of the crime, as well as the history and character of the defendant such that in the court's opinion the imposition of a felony would seem to be unduly harsh. However, the statute specifically precludes its application to two distinct categories of offenses involving both "the intentional or knowing infliction of serious physical injury," and those involving "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." Both statutory construction analysis, as well as the study of other similar statutory provisions, confirm this interpretation. *State v. Garcia*, 1 CA-CR 07-0314, 7/24/08.

A trial court errs by instructing the jury in an aggravated DUI case that it could find the defendant was in actual physical control of the vehicle if based upon the totality of the circumstances, which included evidence that the defendant maintained that he entered his vehicle while intoxicated solely for the purpose of sleeping in it, the defendant's "potential use" of the vehicle presented a real danger to himself or others at the time the offense was alleged. A.R.S. § 28-1383(A)(1) prohibits a person with a suspended or revoked license from "driving or [being in] actual physical control [of a vehicle] while under the influence of intoxicating

liquor." Although the legislature has not defined "actual physical control," and Arizona courts have repeatedly addressed its application in various factual scenarios, the Arizona Supreme Court has declined to set forth any bright-line rule for defining the term based on the impaired person's specific actions, choosing instead a totality of the circumstances approach. By the plain terms of the statute the legislature meant to criminalize actually physically controlling a vehicle while impaired, yet did not mean to punish the many impaired drivers who may have ready access to drive, yet retain the sound judgment not to, and merely intend to use their vehicle as a stationary shelter until they are no longer impaired. To this end, the Arizona Supreme Court in *State v. Love* recognized that A.R.S. § 28-1383(A)(1) had "the obvious ... aim of enabling the drunken driver to be apprehended before he maims or kills himself or someone else," yet was not designed to criminalize an impaired persons' mere use of a vehicle as a "stationary shelter." In future cases involving an actual physical control issue, any instruction given must properly account for both the statute's clear intent to criminalize an impaired person's actual control of a vehicle under the circumstances that could not yet be characterized as driving (or the legislature's prohibition of "actual physical control" would have little meaning), yet also avoid terms such as "potential use" that may require a jury to find the defendant guilty even if they accept the defendant's claim that they intended to use the vehicle exclusively as a stationary shelter in order to sleep until sober (a circumstance that would not support a guilty verdict under the Arizona Supreme Court's holding in *State v. Love*). *State v. Zaragoza*, 2 CA-CR 2007-0017, 7/23/08.

A trial court does not abuse its discretion by finding that circumstantial evidence that a defendant had joined in a conspiracy to smuggle himself into the United States was sufficient to give rise to a reasonable inference of the crime independent of the defendant's own statements necessary to satisfy the *corpus delicti* rule. The *corpus delicti* doc-

trine ensures that defendant's conviction is not merely based upon an uncorroborated confession or incriminating statement which could be false and/or coerced such that the conviction would lack fundamental fairness, requiring as a condition of the admissibility of the self-incriminating statements that the State present independent evidence sufficient to raise a reasonable inference that the crime charged was actually committed by some person. Federal preemption does not apply to Arizona's anti-smuggling statutes because: (1) the statutes do not regulate immigration by determining the legal status of an individual accused of their violation, (2) there is no clear and manifest purpose of Congress to preclude even harmonious state regulation affecting aliens in general, and (3) Arizona anti-smuggling laws do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress regarding the same subject in the federal realm. Moreover, a review of the plain language of the statutes in issue supports the conclusion that the Arizona Legislature intended that both state conspiracy and anti-smuggling statutes may be applied to charge and convict *adult* illegal aliens of conspiracy to smuggle themselves into the United States. *State v. Barragan-Sierra*, 1 CA-CR 07-0048, 7/17/08.

COURT OF APPEALS MENTAL HEALTH MATTERS

A Court May Not Continue the Hearing on a Petition for Involuntary Treatment Absent a Request by the Patient. Once an

individual is detained and a petition for court-ordered treatment is filed, the trial court must either release the patient or order a hearing to be held within six days after the petition is filed pursuant to A.R.S. § 36-535(B). Although A.R.S. § 36-539(C) allows the court to conduct the hearing in the patient's absence if the patient is unable to attend for medical reasons, the statute does not grant the court discretion to continue the hearing. Instead, the court may continue the hearing only at the patient's request. *In re MH 2003-000240*, 78 P.3d 1088, 1090 (Ariz. Ct. App. 2003). If the patient does not request a continuance, the trial court may either conduct the hearing in the patient's absence or order the patient's release. *In re MH 2007-001264*, 1 CA-MH 07-0028, 6/26/08.

COURT OF APPEALS TAX MATTERS

Table for Tax Valuation of Electric Generation Facilities Is a Guideline Exempt from Requirements of the Administrative Procedures Act. A Department of Revenue table for determining tax valuation of electric generation facilities authorized under A.R.S. § 42-14156(A)(3) is not invalid for failure to comply with the rulemaking requirements of the Arizona Administrative Procedure Act, A.R.S. § 41-1001 *et seq.* The tax table is merely a guideline, not a rule, and thus is exempt from the Act's rulemaking requirements. *Duke Energy Arlington Valley, LLC v. Arizona Dep't of Rev.*, 1 CA-TX 07-0009, 7/15/08. ¶14

* indicates a dissent

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