APPELLATE HIGHLIGHTS

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

SUPREME COURT CIVIL MATTERS

Governor Exceeded Constitutional Authority in Exercising the Item Veto. The Arizona Legislature's challenge to the Governor's item veto raised legal, not political issues, which the Legislature had standing to raise. The Governor's item veto of a section of legislation exempting certain employees from the State merit system exceeded her constitutional authority, which is limited to "items of appropriation"—"the setting aside from public revenue of a certain sum of money for a specified object." *The Forty-seventh Legislature of the State of Arizona v. Janet Napolitano*, CV 06-0079-SA, 9/12/06.

COURT OF APPEALS CIVIL MATTERS

Principles of Comparative Fault Established in A.R.S. § 12-2506 Are Applicable to the Participants in the Chain of Distribution of a Defective Product in a Strict Products Liability Case. A.R.S. § 12-2506 requires the fault of all members of the distribution chain to be compared and allocated. All entities in the chain of distribution in a strict products liability action are not jointly and severally liable. *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 1 CA-CV 04-0465, 8/29/06.

Vehicle Lessee May Not Recover Under Arizona's "Lemon Law" But May, Under Some Circumstances, Recover Under the Magnuson–Moss Warranty Act. The remedies available under Arizona's Lemon Law require that a claimant be able to transfer title back to the manufacturer. Thus a new car lessee (who, by definition, does not hold title to the vehicle) may not assert such claims. Under the Magnuson–Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (the "Warranty Act"), a claim may be asserted by a consumer if there is a "qualifying sale," which need "only occur sometime within the sequence of events that ultimately places the consumer product with the consumer." When, in the context of a lease transaction, the car dealer simultaneously sells the vehicle and assigns the lease to a lessor (such as a financing company), a "qualifying sale" has occurred. When a qualifying sale occurs during the applicability of the written warranty, a consumer may seek relief under the Warranty Act. *Mago v. Mercedes–Benz*, 1 CA-CV 04-0144, 9/7/06.

Superior Court Lacks Jurisdiction Over Claims That Indirectly Challenge a Prior Federal Energy Regulatory Commission Decision. Section 19(b) of the Natural Gas Act grants the United States Courts of Appeals exclusive jurisdiction "to affirm, modify, or set aside [a Federal Energy Regulatory Commission ("FERC")] order in whole or in part." 15 U.S.C. § 717r(b). Collateral attacks on the agency's decision, even when packaged as state law claims, are prohibited. The rule applies to both direct and "indirect" challenges to prior FERC orders. The Superior Court thus lacked subject matter jurisdiction over a lawsuit that indirectly challenges a prior FERC order, even though it alleges purely state-law based claims. *Phelps Dodge v. El Paso Corp.*, 1 CA-CV 05-0683, 9/7/06.

Lawyer's Service as Judge Pro Tem Created Appearance of Impropriety in Client's Matter Pending in Same Division in Which Lawyer Served. The impartiality of a trial judge overseeing a case involving an attorney who had served as a pro tem judge for the judge's court, a specialized division, on repeated occasions (but without regularity) "might reasonably be questioned" under Canon 3(E)(1)(a) of the Arizona Code of Judicial Conduct. Whether the judgment in issue would need to be vacated depends on whether the challenged decisions would have been made by a judge whose partiality was not reasonably subject to question. *Kay S. v. Mark S.*, 1 CA-CV 04-0343, 9/7/06.

Nonprofit Wholesale Rural Electric Transmission Cooperative Is a Public Service Corporation. A nonprofit wholesale electric transmission cooperative engaged in furnishing gas, oil or electricity for light, fuel or power is a public service corporation (other than municipal) for purposes of the Arizona Constitution. Although a co-op does not claim monopoly rights, does not accept all requests for service, and provides service by contracts, its rate-making, charges, and methods of operations are a matter of public concern under the eight factors articulated in *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 219 P.2d 324 (Ariz. 1950). This is true even though it is one step removed from providing electricity to the consumer directly. *SW Transmission Coop. v. Ariz. Corp. Comm'n*, 1 CA-CV 05-0369, 9/12/06.

COURT OF APPEALS CRIMINAL MATTERS

Although a trial court errs by imposing an aggravated sentence when no *Blakely*-compliant factors (found by jury explicitly or implicitly) or prior convictions exist, when the issue is not properly raised and preserved at sentencing, fundamental error review applies by which the defendant bears the burden of showing that a reasonable jury applying appropriate standard of proof could have reached a different result than the trial judge. In cases involving the imposition of a super-aggravated sentence, pursuant to the Arizona Supreme Court's holdings in *Martinez* and *Henderson*, should the reviewing court find that a reasonable jury applying the correct standard could have reached a different conclusion than the trial judge, it must still consider whether at least two aggravators not subject to such a conclusion remain to sustain the sentence. If not, the defendant has made an adequate showing of prejudice for fundamental error purposes requiring reversal and remand for resentencing. In cases involving only an aggravated sentence if prejudicial error is found, only one valid aggravator is required to sustain the original sentence. In such cases it is not fundamental error for the trial court to have considered other aggravating circumstances that are not *Blakely*-compliant in determining a sentence. If harmless error is found in reviewing either a super-aggravated or aggravated sentence, the sentencing court may have properly considered other aggravators not found by the jury. *Lemke v. Rayes*, 1 CA-SA 06-0130, 8/15/06 … **Under Rule 10.4 (b) ARIZ.R.CRIM.P., a party who has previously exercised a preemptory change of judge before appeal and remand is not entitled after appeal and remand to request an additional change of judge as a matter of right.** Although Rule 10.2 ARIZ.R.CRIM.P. permits both the State and defense to request a change of judge without cause in a non-captial case within 10 days of notice of judicial assignment or issuance of mandate to Superior Court following appeal and remand for a new trial, the right to change of judge, while renewed pursuant to Rule 10.4

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. He is ably assisted by Osborn Maledon PA's appellate group, which maintains AzAPP. AzAPP contributors include **Jean-Jacques Cabou, Ronda R. Fisk, Sara Greene, Mark P. Hummels, Daniel L. Kaplan, Diane M. Meyers,** and **Jason J. Romero.**

Patrick Coppen is a sole practitioner in Tucson.

ARIZ.R.CRIM.P. for a party who had never previously exercised their right under Rule 10.2, is not renewed for a party who had previously exercised their right. While the origins of the present Rule 10.4 may be traced to the Arizona Supreme Court's Ruling in *State v. King*, in which it was explained that the policy reason behind allowing a change of judge following appeal was that following reversal and remand for new trial it was always possible that a trial judge may subconsciously resent the lawyer or defendant who obtained the reversal, the statutory history of the rule itself (i.e., Rule 10.2 was originally codified by § 999 of the Arizona Penal Code of 1913, and subsequently under A.R.S. § 44-1203 of the 1939 Code), Arizona appellate interpretation of the civil change of judge counterpart, the plain language of the rule and present policy concerns actually support an interpretation of Rule 10.2 and 10.4 allowing only one change of judge per party in one cause of action. *State v. Gordan*, 1 CA-SA 06-0116, 10/3/06 … **Following remand by the Arizona Supreme Court for resentencing of a capital case pursuant to ARS §§ 13-703 and 13-703.01** (where remand was based upon harmless error review following the U.S. Supreme Court's holding in *Ring II,* finding Arizona's previous judge-based sentencing scheme unconstitutional), **a criminal defendant is entitled to a full sentencing hearing in accordance with those statutes in which the jury itself must now determine both the existence of aggravators, as well as whether the death sentence should be imposed**. The scope of a resentencing hearing in such a case is neither limited by the post-*Ring II* harmless error review of the Arizona Supreme Court, nor any prior concessions by a defendant during the earlier trial or appellate process, yet solely upon the subsequently enacted language of the new sentencing scheme. No language contained in ARS § 13-703 or § 13-703.01 would permit a trial judge to direct a verdict against a defendant on alleged aggravating circumstances based upon evidence presented at an earlier trial. The new language of § 13-703.01(P) actually requires that a jury make any "factual determinations required by" [the new sentencing scheme] "or the Constitution of the United States or this state to impose a death sentence." *Nordstram v. State of Arizona*, 2 CA-SA 06-0056, 9/14/06 … **An assault victim's excited utterance at the scene of an initial police encounter and in response to the police officer's question as to "what happened" to the victim was not testimonial, and therefore not subject to the Sixth Amendment's Confrontation Clause as defined by the U.S. Supreme Court in either *Davis v. Washington* or *Crawford v. Washington*, because the statement was not the product of police interrogation whose primary purpose was to establish or prove past events potentially relevant to later criminal prosecution.** It appears that the U.S. Supreme Court in *Davis* may have shifted its focus of inquiry regarding a particular statement for Sixth Amendment analysis from the motivations or reasonable expectations of the accuser, to the primary purpose of the interrogation. In any case, the question of whether a statement is testimonial in a given case is factually driven and must be determined on a case by case basis, taking into account the totality of the circumstances surrounding the statement itself. In cases in which there is nothing in the record to suggest that the declarant would have either reasonably expected that their statement would be used to prosecute a particular defendant (e.g., that the declarant knew they were actually making statements to police, identified their attacker, or even actually intended to implicate an accused), and police motivation in questioning was merely to enable police assistance in an ongoing emergency, the protections of the Sixth Amendment Confrontation Clause are not implicated. While an investigating officer's interrogation of a victim at the scene about what happened might often lead to testimonial answers, it cannot be said that such a line of questioning always seeks and results in a testimonial response subject to the protections of confrontation. **Under the U.S. Supreme Court's recent holding in *Davis*, the Sixth Amendment Confrontation Clause does not prohibit non-confronted police questioning when its purpose is to either ascertain if there is an ongoing emergency or to enable police assistance to meet that emergency.** *State v. Alvarez*, 2CA-CR 02-0084, 9/29/06 … In contrast to Division II's holding in *Alvarez*, Division I of the Arizona Court of Appeals held that **the Sixth Amendment Confrontation Clause applies to all police officer interrogations of possible witnesses to a crime at the crime scene that produce testimonial statements where questioning eliciting statements is meant to obtain information regarding a potential crime** and includes separation of witnesses by police at the time of the interrogation in order to ensure witness recollection would have prosecutorial force and is not meant to ascertain what was happening under emergency circumstances, yet to establish "what happened" at time of alleged crime. *State v. Parks*, 1 CA-CR 03-0573, 9/14/06 … **Pursuant to the Arizona Supreme Court's recent decision in *State v. Dean*, which established a distance/time related totality of the circumstances test governing searches of automobiles incident to arrest** similar to the spatio-temporal test later promulgated by the U.S. Supreme Court in *Thornton v. United States*, **the validity of a particular automobile search incident to arrest is not necessarily controlled by the bright-line rule of *New York v. Belton* and its "recent occupancy test," yet may be limited in a particular case to an inquiry regarding its underlying rationale concerning both officer safety and preservation of evidence** as originally established by the U.S. Supreme Court in *Chimel v. California*, and whether the actual circumstances of the case at the time of the automobile search itself (i.e., ongoing concerns for officer safety and preservation of evidence) actually overcame the Fourth Amendment prohibition against unreasonable searches and seizures without a lawful warrant. *State v. Gant*, 2 CA-CR 00-0430, 9/20/06.

COURT OF APPEALS MENTAL HEALTH MATTERS

Court May Give Notice of Subject's Release From Involuntary Mental Health Treatment Even When Subject Has Not Been Declared a "Danger to Others." Family members who had been threatened by a relative could be given notice of the relative's release from a mental health facility without violating the relative's due process rights. Although A.R.S. § 36-541.01(B) provides for notice only when the person receiving treatment has been declared a "danger to others"—factor not present in this case—A.R.S. § 36-509(A)(3) affords the court the discretion to provide for such notice. *In Re: MH, 05-001290*, MH 05-0022, 9/14/06.

***** indicates a dissent

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).

Detailed summaries of selected cases and other court news may be found at **www.azapp.com**