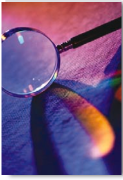

# APPELLATE HIGHLIGHTS

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

### SUPREME COURT CRIMINAL MATTERS

**Imposition of a super-aggravated sentence based upon a trial judge finding aggravating factors under A.R.S. § 13-702(C) violates *Blakely v. Washington*, 124 S. Ct. 2531 (2004).** With exceptions not applicable to this case, a jury must find such aggravating factors if the defendant is to be sentenced beyond the presumptive sentence. *State v. Brown*, CV-03-0255-PR, 10/28/04.

### SUPREME COURT CIVIL MATTERS

**An initiative petition to prohibit public funding of candidates violated the "separate amendment rule" of the Arizona Constitution. Article 21, § 1 of the Arizona Constitution provides that if more than one proposed constitutional amendment shall be submitted at any election, the amendments must be submitted in such a manner that the electors may vote for or against such proposed amendments separately. As such, simply showing that several sections of a proposed amendment relate to the same general subject as that expressed in the title of the proposed amendment is insufficient to conform to Article 21.** Moreover, a court may not sever an offending provision from a multiple-proposal constitutional amendment. When a proposed amendment consists of multiple provisions, it is one amendment under Article 21 if the provisions are sufficiently related to a common purpose or principle so that it can be said to constitute a consistent and workable whole on the general topic embraced. The proposed amendments did not meet this test because one section prohibited taxpayer money to fund any political candidate or campaign and another section provided that all money in the Clean Elections Fund would be deposited in the general fund of the state. *Clean Elections Institute, Inc. v. Brewer*, CV-04-0263-PR, 10/07/04.

### COURT OF APPEALS CIVIL MATTERS

**The Tucson Symphony Musicians' employment contracts, under which annual salaries were paid over a 12-month period, did not violate A.R.S. § 23-351(C), which requires that employers pay "on each of the regular paydays ... all wages due the employees up to such date," even though their symphony performance obligations lasted less than 12 months.** A trial court does not abuse its discretion in awarding attorney's fees pursuant to A.R.S. § 12-341.01 if there is any reasonable basis in the record for such an award. When such a reasonable basis exists, although reasonable minds may balance the Associated Indemnity factors differently, an appellate court may not substitute its discretion for that of the trial court. As long as the requesting counsel succinctly indicates in its billing the type of legal service provided, the date, the service provided, the attorney providing the service, and the time spent in providing the service, the fee application requirements of *Schweiger v. China Doll* and *Associated Indemnity* are met. The fact that a trial court initially rules on a fee request before it received and considered an opposing party's objections thereto does not necessarily invalidate the awards ultimately made. **Finally the fact that some portion of an attorney fee expense was covered by insurance of the successful party does not preclude the fee award or establish an abuse of discretion.** *Orfaly, George v. TSS*, 2 CA-CV 2003-0153, 10/29/04 … **A trial court errs in failing to dismiss a case brought under Arizona's Lemon Law, A.R.S. §§ 44-1261, *et seq.*, when the consumer sells the vehicle to a third party, rather than return it to the manufacturer.** Though the statute may not require a consumer seeking relief to return the nonconforming vehicle to the manufacturer before being entitled to remedies under the statute, a consumer may not sell the vehicle to another party rather than ultimately return the vehicle to the manufacturer. A court may not engraft common law remedies onto statutory schemes, as the extension of a present statutory remedy is for the legislature alone. *Hull v. Daimler-Chrysler*, 2 CA-CV 2004-0016, 10/26/04 … **Disagreeing with another panel's decision in *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, 90 P.3d 211 (App. 2004), the Arizona Court of Appeals held that A.R.S. §§ 23-1021(C) and (H)(2), providing that a claim is not compensable if the worker's alcohol or substance abuse is a substantial contributing cause of the injury, does not violate Article 18, § 8 of the Arizona Constitution** by depriving workers of compensation for injuries caused in whole or in part or contributed to by necessary employment risks or dangers. *Komalestewa v. Indus. Comm'n,* 1 CA-IC 03-0041, 10/20/04 … **The Court of Appeals lacks jurisdiction over an appeal from the Corporation Commission's decision imposing conditions on a proposed merger between a water company and a foreign corporation.** The order did not relate to rate-making or rate-design and the court lacked jurisdiction over any order simply because it might affect rates. *Arizona-American Water Co. v. Arizona Corp. Comm'n,* 1 CA-CC 03-0001, 10/05/04 … **An insurer my not avoid coverage by litigating in a declaratory relief action issues relating solely to their insured's liability, causation and a claimant's damages.** The trial court did not err in finding insurance coverage under the insurer's comprehensive general liability "accident" policy" based on the plaintiffs having sustained cellular damage from toxic substance exposure during the period of coverage despite the lack of proof of fully manifested disease at that time. Nor did the trial court err in finding the *Morris* agreement and resulting consent judgment reasonable when the insured evaluated and settled claims of approximately 1,600 plaintiffs on a "global" basis, without having individualized proof of either the nature and extent of their sustained injuries or damages. *Assoc. Aviation Underwriters v. Wood*, 2 CA-CV 2003-0091, 9/29/04.

### COURT OF APPEALS CRIMINAL MATTERS

**Although A.R.S. § 28-1388(E) allows a law enforcement officer to obtain a sample of a person's blood drawn for medical purposes by medical personnel for DUI-related investigative purposes, it does not apply when a person's blood has been drawn without a warrant solely as a result of having received medical treatment involuntarily or against the person's will.** Whether a private citizen has acted as a state agent is determined on a case-by-case basis, with a court's inquiry focusing on: (1) the degree of government knowledge and the acquiescence in the search or seizure and (2) the intent of the party performing the search. Police involvement in transporting an unwilling suspect who suffered non-life-threatening or serious injuries may meet the degree of governmental participation and encouragement necessary to meet the first part of the test. The second part may be met if the intent of the medical personnel is motivated by a desire to assist the police in obtaining the blood evidence, rather than a desire to obtain medical assistance for the suspect. *State v. Estrada*, 2 CA-CR 2003-0302, 11/04/04 … **In determining whether a defendant had committed a crime in another jurisdiction that, if committed in Arizona, would require him to register as a sex offender, a trial court may consider only the judgment of a foreign conviction and compare the elements of that offense with the corresponding Arizona offense existing at the time of the foreign conviction.** *State v. Kuntz*, 1 CA-CR 03-0180, 10/28/04 … **The offenses of public sexual indecency and public sexual indecency to a minor are sexual offenses for purposes of Arizona Rule of Evidence 404(c) despite the fact that such offenses are not included in the list of sexual**

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).

**offenses under A.R.S. § 13-1420(C).** Admission of statements made by the defendant to a probation officer in a presentence interview are inadmissible in any proceeding bearing on the issue of guilt. However, the admission of such evidence was not fundamental error when other evidence relating to prior crimes addressed by the probation officer was admitted. *State v. Williams*, 1 CA-CR 03-0640, 10/26/04 … **A crime can be a dangerous crime against children under A.R.S. § 13-604.01 even if it is committed recklessly and the crime focused on, was directed against, aimed at or targeted a victim under 15 years of age. This is true even if the conduct was directed only at adults when the victim turns out to be a child and even if the defendant reasonably believed the child was an adult. The trial court's enhancement of the sentence under the above statute, if erroneous because it was not found by a jury, was harmless because the defendant's own testimony that he led the child and his family into the desert and left them there was sufficient to apply sentencing enhancement.** The trial court's balancing of aggravating and mitigating factors to impose a mitigated sentence did not violate *Blakely v. Washington*, 124 S. Ct. 2531 (2004). *State v. Miranda-Cabrera*, 1 CA-CR 01-0926, 10/21/04 … **A.R.S. § 13-610(O)(1) authorizes DNA testing of juveniles adjudicated delinquent for attempted sexual offenses as well as sexual offenses. The statute doe not violate a juvenile's right to privacy or amount to an unreasonable search. The test is not the type of generalized crime control that falls outside special-needs exceptions to the Fourth Amendment because it serves the government's special needs to identify perpetrators of past and future crimes and to deter a know class of offenders from re-offending.** *In re Leopoldo L.,* 1 CA-JV 04-0074, 10/21/04 … **A trial court abused its discretion in denying the state's motion to amend the indictment to allege aggravating factors to give the defendant notice of the maximum sentence he might receive and to allow the jury to consider those factors so the trial court can impose an aggravated sentence if the defendant is convicted. A trial court can submit such aggravating factors to the jury without a statutory amendment to A.R.S. § 13-702.** *State v. Conn,* 1 CA-SA 04-0180, 10/14/04 … **A defendant petitioning for post-conviction relief fails to raise either a colorable claim for ineffective assistance of counsel or the required prejudice in asserting that their trial counsel had been ineffective for failing to reinstate plea negotiations with the prosecutor just before trial began absent proof that a specific beneficial plea agreement would have been extended had the attorney so inquired.** Though the power to offer a plea agreement rests exclusively with the prosecution, under *State v. Donald* a trial court may order reinstatement of a plea that was once offered by the state as a remedy for a constitutional violation based upon ineffective assistance in plea bargaining. *State v. Jackson*, 2 CA-CR 2003-0021, 9/22/04 … **A trial court is not required to expressly invoke A.R.S. § 13-921 at the time it places a juvenile defendant tried as an adult on probation in order for the defendant to later be able receive relief under § 13-921(B) providing for expunging the defendant's criminal conviction record following the successful completion of probation.** *State v. Sanchez,* 2 CA-CR 2003-0092, 9/21/04.

* indicates a dissent

## SUPREME COURT PETITIONS

**compiled by Barbara McCoy Burke, Staff Attorney, Arizona Supreme Court**

**The Arizona Supreme Court accepted review or jurisdiction of the following issues on October 26, 2004*:**

***Kent K. and Sherry K. v. Bobby M. And Leeh M.,*** CV 04-0209-PR, 2 CA-JV 2003-005 (Mem.)
"The court of appeals applied an erroneous standard by requiring that appellants prove that severance was in the best interests of the child by clear and convincing evidence."

**Unless otherwise noted, the issues are taken verbatim from either the petition for review or the certified question.*