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2013 APPELLATE CASES FROM THE DEFENSE PERSPECTIVE

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2013 APPELLATE COURT CASES – FROM A DEFENSE PERSPECTIVE

By James P. Cleary, Deputy Legal Defender, Maricopa County

I. SUBSTANTIVE

State v. Grell, 231 Ariz. 153, 291 P.3d 350 (2013)

The court reviewed defendant's death sentence for the murder of his two-year-old daughter following a jury verdict for death. The defendant's mental retardation/intellectual disability was the focus of the court's decision. The court set aside the jury's death verdict and found that the evidence showed by a preponderance of the evidence that he was ineligible for a death sentence due to his mental retardation/intellectual disability.

The court reviewed the evidence as it bore on the three prongs necessary for a finding of mental retardation/intellectual disability. His IQ scores were clearly in the range consistent with intellectual disability. The court found the expert testimony as to his adaptive behavior credible and overcame the state claims of a personality disorder. In sum, the court found his eligibility for a death sentence wanting as his moral culpability was significantly reduced due to his diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses and to understand the reactions of others.

In Re Lisa Aubuchon, 233 Ariz. 62, 309 P.3d 886 (2013)

The court reviewed a disciplinary hearing conclusion that respondent Aubuchon had violated numerous attorney ethical rules. The court found the hearing board properly adjudicated the charges leveled against the respondent and upheld the order for disbarment. It found that disbarment was the presumptive sanction in view of the quality and quantity of the violations and the absence of any significant mitigating circumstances.

The court viewed the respondent's most egregious conduct to be that of filing baseless criminal charges against a sitting judge, ER 3.8(a), and behavior in several instances that was detrimental to the administration of justice, ER 8.4(d). (E.g. attempts

to interview or depose judges concerning their rulings; filing criminal charges beyond the statute of limitations; and participation in a civil suit filed in retaliation against various individuals). It determined that the respondent's arguments that the hearing board actions were evidence of abuse of discretion were without merit.

State v. Kendrick, 232 Ariz. 428, 306 P.3d 85 (CA 1 2013)

The court reviewed defendant's conviction for escape in the second degree in violation of A.R.S. 13- 2503 (A) (2), (B). The factual allegation of escape was premised upon the defendant's removal of a GPS monitoring device he was required to wear as a condition of a previously imposed probation for another felony. His conviction for escape premised upon his removal of the GPS tracing device was vacated by the court.

The court held that the defendant's electronic monitoring device did not constitute the constructive restraint necessary to satisfy the definition of custody under the statute he was charged. While he was required to wear the device at all times he was not required to stay at one particular venue while being monitored. Consequently, he could not escape where there was no confinement condition aligned with the electronic monitoring requirement.

State v. Yazzie, 232 Ariz. 615, 307 P.3d 1042 (CA 1 2013)

The court reviewed defendant's conviction for driving on a suspended license in violation of A.R.S. 28-3473. At trial, the state's proposed jury instructions for driving on a suspended license only required the jury to find the defendant drove and that his license was suspended at the time he drove. There was no ***mens rea*** requirement for the charge. The trial court agreed with the state. On review the court reversed the defendant's conviction holding that a ***mens rea*** requirement was required. It found that precedent established the offense was not deemed a strict liability offense and knowledge of suspension or revocation need to be found to find guilt.

State v. Pena, 233 Ariz. 112, 309 P.3d 936 (CA 2 2013)

Defendant was convicted of kidnapping and aggravated assault with a deadly weapon as well as three counts of aggravated assault causing temporary and substantial disfigurement. On review the court found evidence as to one of the temporary and substantial disfigurement aggravated assaults to be insufficient. This was a puncture wound on an area above the victim's left hip.

The court reviewed the definitions of temporary and substantial disfigurement. It concluded that the injury inflicted on the upper left hip did not qualify as a substantial disfigurement. The wound was a diminutive teardrop-shaped puncture wound. The wound was not bandaged by paramedics and was described as a superficial wound. It normally was covered by clothing and there was no evidence as to the length or brevity of the healing of the wound. Further the victim minimized the impact of that injury. The aggravated assault was reduced to a lesser-included assault (physical injury).

II. PROCEDURAL

State v. Salazar, 231 Ariz. 535, 298 P.3d 224 (CA 1 2013)

The state appealed a trial court's order suppressing evidence obtained through a wiretap authorized pursuant to A.R.S. 13-3010. The request for the wiretap was in relation to an ongoing drug investigation. The application presented by a deputy county attorney contained a one paragraph summary request for a wiretap signed by the county attorney and attached an affidavit from a deputy sheriff relating the investigation facts. The trial court suppressed the fruits of the wiretap as it found that the application was deficient as it did not include an oath attested to by the applicant/deputy county attorney.

On appeal, the court upheld the trial court's suppression order. It reasoned that the statute was specific and demanded an application be signed under oath. The vouching requirement in the statute was not a mere form requirement. It indicated a more substantial role than that of a mere courier for law enforcement investigators.

State v. Becerra, 231 Ariz. 200, 291 P.3d 994 (CA 2 2013)

Defendant appealed his trial to the court convictions for aggravated driving with a prohibited drug in his body and driving with a prohibited drug in his body. He challenged his convictions on the basis of invalid waiver of a jury trial and that conviction of both offenses was a violation of double punishment prohibitions under A.R. S. 13-116.

On review the court of appeals reversed and remanded for a new trial. It agreed that the record from the trial court was inadequate to sustain defendant's waiver, through counsel's representations, that he knowingly, voluntarily and intelligently waived his right to a jury trial. Further, it concluded that upon remand for a new trial he

could not be convicted and sentenced for both aggravated driving with a prohibited drug in his body and driving with a prohibited drug in his body as the latter was a lesser included offense of the former.

Whillock v. Bee, 232 Ariz. 139, 302 P.3d 664 (CA 2 2013)

Defendant was convicted of animal cruelty in a justice court. He filed a notice of appeal and request for trial **de novo** with the superior court. His request for a trial **de novo** was premised on his claim that the trial transcript from the justice court trial was incomplete. The superior court denied his request for a trial **de novo**. A subsequent request for a briefing schedule was denied as untimely.

On special action review the court concluded that the request for a briefing schedule was proper and the trial court improperly conflated the trial **de novo** request and notice of appeal as the same. It ruled that the trial court was required to set a briefing schedule on the merits despite the fact it had denied a trial **de novo.**

State v. Denz, 232 Ariz. 441, 306 P.3d 98 (CA 2 2013)

Defendant was convicted of child abuse and aggravated assault charges relating to injuries to his infant son. His conviction was affirmed an appeal. He sought postconviction relief. He claimed his trial counsel was ineffective in failing to present testimony from an independent medical expert that the infant son's injuries were accidental. Following an evidentiary hearing the trial court concluded that the trial counsel made a reasoned tactical decision not to consult with or present testimony from an independent medical expert.

On review of the postconviction denial the court vacated the convictions and remanded for a new trial. It reviewed the defense counsel's reasoning as to his choice not to consult with an independent expert i.e. the state experts were uncertain as to the cause and timing of the injuries and his fear of a trial with "hired gun" experts for the defense, and concluded that the defense counsel's tactical decisions were not reasoned decisions where the evidence showed that the attorney made a full investigation and made decisions based on all possible options considered. It concluded that in view of the state's evidence of abuse the defendant was prejudiced by the counsel's failure to adequately explore and investigate expert opinions.

State v. Vasquez, 233 Ariz. 302, 311 P.3d 1115 (CA 2 2013)

Defendant was convicted by a trial jury of first degree murder and other felony offenses stemming from a home invasion. Defendant was charged with the crimes along with his two brothers. One brother pled guilty and testified against him at trial. Defendant was tried at a joint trial, over defendant's objection, with the other brother. At the trial the prosecution played a video-tape of a news interview of statements of the jointly tried brother made after his arrest and while in custody. The statements implicated the defendant in the crimes charged. The defendant objection to the video-tape testimony was overruled.

On appeal the court reversed defendant's convictions and sentences and remanded for a new trial. The court concluded that the trials should have been severed due to the introduction of the incriminating statements of the non-testifying co-defendant. The court saw this as a violation of defendant's confrontation rights necessitating a new separate trial.

Fuller v. Olson, 233 Ariz. 468, 314 P.3d 814 (CA 2 2013)

Petitioner was alleged to be a sexually violent person (SVP) by the state in January, 2012. The court found probable cause to believe petitioner was a SVP and ordered him detained under the provisions of A.R.S. 36-3701. Over a year later, primarily through neglect and oversight, the state filed a motion to set a hearing on petitioner's case and that counsel be appointed. Petitioner's appointed counsel filed a motion to dismiss the petition and a petition for habeas corpus based upon the trial court's failure to appoint counsel and schedule a timely hearing after the January, 2012 order for detention. The trial court denied the motions.

On special action review the court held that the motions to dismiss and for habeas corpus should have been sustained. It found that the failure of the court to comply with the provisions of A.R.S. 36-3704, 3705 and 3706 requiring a probable cause hearing and a trial within 120 days of the original SVP detention mandated dismissal of the petition and defendant's release from custody. It found that the purposes of the SVP statute mandated treatment in the event of a finding of a person's status as a SVP. Since the purposes of the statute were thwarted by the state's failure to proceed with a timely hearing and trial the only appropriate remedy was dismissal and release.

<u>Milke v. Ryan</u>, 711 F.3d 998 (9th Cir. 2013)

The court of appeals reviewed the district court's denial of habeas corpus relief. Defendant challenged her 1990 state court conviction and death sentence from Maricopa County for the murder of her 4 year old son. She had claimed violation of her due process rights by the state's failure to disclose impeachment evidence relevant to the detective who claimed defendant had confessed to him her involvement with others in her son's death. The district court found the non-disclosures did not amount to a constitutional violation.

The court of appeals reversed. It concluded that there were at least nine instances of ***Brady*** impeachment material that were not disclosed to defendant or her attorney's prior to her trial in 1990. The court found that the state court's denial of relief was premised upon the wrong issue of whether the evidence was discoverable rather than whether it was material to the issues of defendant guilt or sentence. The court held that the instances of misconduct of the detective were relevant to his credibility where the defendant had denied confessing and the detective testified otherwise. Defendant was ordered released from custody unless the state was to retry her.

<u>Hurles v. Ryan</u>, 706 F.3d 1021 (9th Cir. 2013)

Defendant challenged his conviction from Maricopa County for the murder of a librarian at a public library in Buckeye, Arizona in 1992. He claimed he was entitled to relief from his conviction and death sentence due to the trial court judge's bias as revealed in her statements and actions in pretrial proceedings before his conviction. The district court denied relief. The court of appeals reversed the district court's conclusion and remanded for an evidentiary hearing in the district court.

The court found that the state court's determination that the trial court was not biased against the defendant was not entitled to any deference. It reasoned that the claims of judicial bias were not fanciful and struck at the heart of the judge's required impartiality as required by federal constitutional principles. The trial court's denial of the bias claim in state court at pre-trial proceedings, on special action review and in subsequent postconviction proceedings resulted in a one sided view of the facts, the judge's, with no opportunity for the defendant to establish the facts due to the judge's denials and rulings against the defendant. The only remedy was an evidentiary hearing in the district court where the defendant could develop and present the facts to support his claim to be decided by an impartial arbiter.

Vega v. Ryan, 735 F.3d 1093 (9th Cir. 2013)

Defendant challenged his state court convictions for child molestation and sexual abuse of his stepdaughter. He claimed his trial counsel, his third attorney to represent him on several failed prosecutions in state and federal court, was ineffective due to the failure to call a priest who had heard the victim recant her accusations against the defendant. The state courts, as well as the federal district court, denied relief concluding that the failure to call the priest was not prejudicial as there was other evidence of recantations. Additionally, the defendant was aware of the testimony from the priest in his first two aborted trials in federal and state court.

The court of appeals reversed the district court and concluded that the attorney was ineffective in failing to present the testimony of recantation at his final trial. The court reasoned that the failure to call the priest as a witness was due to a failure to investigate. The third trial counsel could have learned of the existence of the priest's testimony from a review of prior counsel files where the priest's existence and testimony was documented. Further, though there was evidence of recantation through the victim's mother's testimony, the added testimony of the victim's priest could have been the difference in a case with a history of failed prosecutions and dismissals. A new trial was ordered.

Trevino v. Thaler, 133 S.Ct. 1911 (2013)

The Supreme Court reviewed a capital conviction from Texas where the lower state and federal courts had denied relief on a claim of ineffective assistance of counsel. At issue was whether the Court's holding in **Martinez v. Ryan**, 132 S.Ct. 1309 (2012), applied to a defaulted ineffective assistance of counsel claim in Texas state court proceedings. A Texas procedural requirement allowed a defendant to raise an ineffective assistance of counsel claim on a direct appeal from a state court conviction. The lower courts all concluded that the **Martinez** ruling did not apply as that case dealt only with defaulted claims in a first state collateral attack proceeding, not a defaulted claim from a direct appeal.

The Court reversed. The Court held that Texas' allowance for an ineffective assistance of counsel claim to be presented on a direct appeal of a conviction in Texas state court was not a meaningful opportunity to raise an ineffective assistance of counsel claim. The time constraints for appeal and the lack of a meaningful opportunity to investigate and present a claim of ineffective assistance in a hearing made the opportunity a nullity in most respects. Consequently, the failure to present a claim on

direct appeal from a criminal conviction could not be grounds for default. The case was remanded to the federal district court for hearings and proceedings on his claims of ineffective assistance.

III. EVIDENTIARY

State v. Cooperman, 232 Ariz. 347, 306 P.3d 4 (2013)

The state sought review of lower court rulings allowing the admission of partition ratio evidence to rebut claims of impairment in a driving while impaired prosecution. The partition ratio evidence was deemed relevant to the jury determination of impairment as it tends to dispute the equation of breath alcohol content findings to blood alcohol content findings. The supreme court granted review of the lower court rulings.

The court upheld the lower court rulings. It found that the evidence was admissible with a proper evidentiary foundation. It was relevant to the question of impairment though the state was not arguing that breath alcohol content was evidence of impairment. The admissibility did not rely upon the state's purposes. It was solely relevant to the charge of impairment and could not be restricted by the state's limitation of its use of breath alcohol evidence secured from the defendant.

State v. James, 231 Ariz. 490, 297 P.3d 182 (CA 1 2013)

Defendant was charged with aggravated assault by intentionally placing a victim in reasonable apprehension of physical injury by pulling and waving a knife at store security during a confrontation in a store parking lot. Defendant claimed he pulled the knife and waved it at people as he was in fear of injury from others confronting him. He was convicted at trial of the aggravated assault.

On appeal the court found fundamental error in the trial court's instruction on the elements of the crime. The court included in the instructions to the jury that the defendant could be found guilty if his actions were intentional, knowing or reckless. The statute did not allow for the mental states of knowing or reckless. The sole ***mens rea*** element was intentional state of mind. The court found the instruction to be fundamental error and remanded for a new trial.

Wells v. Fell, 231 Ariz. 525, 297 P.3d 931 (CA 2 2013)

Defendant interviewed police officer witnesses in an aggravated assault case. The state was not present when the interviews occurred as it had not been notified that the interviews would occur. The state requested copy of the recordings or transcripts. The defense objected claiming the interviews were intended only for impeachment purposes and thus not subject to pretrial disclosure under the holdings in **Osborne v. Superior Court**, 157 Ariz. 2, 754 P.2d 331 (CA 2 1988). The trial court ordered disclosure citing the state's need to be prepared at trial should the witnesses not remember exactly what they said.

On special action review the court revisited its holdings in **Osborne**. There it held that prior statements used for impeachment was governed by Ariz. R. Evid. 613 (a) and the possibility of their use did not require disclosure under Rule 15.2, Ariz. R. Crim. Pro. However, the court concluded that its holding in **Osborne** was too broad and the reasons for departing from the **Osborne** precedent were compelling. The court found that the discovery rules promoted full disclosure and settlement and a fair trial and the "trial by ambush" and "hiding the pea" approaches to litigation were inconsistent with such principles. Hence, it held that the disclosure of witness statements intended for impeachment advances the purposes of the discovery rules and that such statements, when obtained in the absence of a prosecutor or their representative, are subject to disclosure under Rule 15.2 (g), Ariz. R. Crim. Pro., if a proper showing of substantial need and undue hardship is made.

State v. Glissendorf, 233 Ariz. 222, 311 P.3d 244 (CA 2 2013)

Defendant was charged in 2011 with two counts of child molestation. The charges arose out of claimed acts against two different victims. One charge was from 1997-1999; the other from 2009-1010. Additionally, the court pursuant to Rule 404 (c), Ariz. R. Evid., allowed evidence from a 1976 incident of molestation in Nevada where the defendant was charged but the case was later dismissed. At trial, the defendant requested a **Willits** instruction due to the destruction and loss of a videotaped interview of the victim from the 97-99 incident that was made in 2001. The trial court denied the requested instruction. Defendant was convicted and appealed.

The court of appeals reversed the convictions and remanded for a new trial. It concluded that the trial court erred when it failed to give the jury a **Willits** instruction. It found that the instruction was proper given the inconsistency between the victim's trial testimony, the police reports used for impeachment and the victim's claim the police reports were in error. The defense request for the instruction would have left the final

determination for the jury whether the statements were fabricated in view of the loss of a videotape of the victim's statements. The court concluded the trial jury should determine whether the destroyed evidence ***might*** be exculpatory or potentially helpful to the defendant.

Additionally, the court held that the trial court erred in admitting the 1976 testimony. However, it concluded that on remand the trial court should clarify what it believed the similarities between the acts were because on the surface the acts seemed dissimilar i.e. predatory vs. opportunistic.

Evans v. Michigan, 133 S.Ct. 1069 (2013)

Defendant was charged in a Michigan state court with arson. At the close of the state's evidence, the defense request for a directed verdict was granted. The trial court was persuaded, erroneously, that the state had not provided sufficient evidence that the object of the arson was not a dwelling. On appeal the state courts found that the directed verdict was in error and thus retrial was not barred by the Double Jeopardy Clause of the federal constitution. The Supreme Court granted ***certiorari*** review.

On review the Court held that even an erroneous grant of a directed verdict is a final determination of the merits of a criminal case and a retrial is precluded by the Double Jeopardy Cause. The Court found that the policies of repose and the fact of the government's vast resources that could wear down a criminal defendant militated against resurrection of charges after a final trial determination of insufficiency of the evidence.

Florida v. Jardines, 133 S.Ct. 1409 (2013)

Defendant was charged in Florida state court with trafficking in marijuana. The charges resulted after a search warrant was granted for search of his residence where marijuana plants were found. The probable cause for the warrant was established after a drug-sniffing dog was brought to the defendant's home to assist in surveillance of the home. While at the home the dog reacted in a manner consistent with detecting narcotics and was allowed onto the defendant's property and on the front porch area where it ultimately alerted to the smell of narcotics and sat at the front door – a trained response for the detection of narcotics. At the trial court the evidence was suppressed due to the claimed Fourth Amendment violation. The intermediate appellate court reversed the trial court but the Florida Supreme Court upheld the trial court's suppression order. The state sought ***certiorari*** review in the United States Supreme Court.

The Court upheld the suppression order. It found that the drug-sniffing dog's actions were within the curtilage of the home. This was a privacy area protected by the Fourth Amendment. The home owner had an expectation of privacy in this protected area and the police and dog's entry onto the protected area constituted a trespass in violation of the Fourth Amendment.

Missouri v. McNeely, 133 S. Ct. 1552 (2013)

Defendant was stopped by police at 2:08 a.m. while speeding and driving erratically on a Missouri highway. Initial investigation revealed signs of impairment. The defendant refused to comply with a request to provide a breath sample in a portable breath test device. He was arrested and subsequently alerted police he would not provide any breath sample at the police station. He was then transported to a hospital where after further refusal to provide a blood sample or otherwise cooperate with the police investigation a blood sample was drawn by hospital personnel at 2:35 a.m. Test results revealed a BAC of .154 – well above the legal limit. The state courts suppressed the nonconsensual blood test results concluding that the natural dissipation of blood-alcohol in an unquestionably routine DWI was not an exigency which justified a nonconsensual warrantless blood draw. The state sought ***certiorari*** review in the United States Supreme Court.

The sole issue before the Court was whether the natural dissipation of alcohol in the blood stream establishes a ***per se*** exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations. The court reaffirmed its holding in **Schmerber v.California**, 384 U.S. 757, 86 S.Ct. 1826 (1966) where it applied a totality of circumstances approach in determining whether an alleged exigency justified an exception to the warrant required for a blood draw in a DWI investigation. It concluded in the case before it that the routineness of the stop and investigation, with no intervening incidents or factors, diminished the alleged exigency and thus a warrant was required for the blood draw.

McQuiggin v. Perkins, 133 S.Ct. 1924 (2013)

Defendant was charged in Michigan state court with murder in 1993. He testified at trial and denied involvement in the homicide. His testimony was controverted by witnesses who testified that they either saw defendant commit the murder or confess to them that he committed the murder. He was convicted and his conviction became final in 1997 after state appellate review. He sought federal habeas relief in 2008 claiming ineffective assistance of counsel and evidence of actual innocence. The district

court dismissed the habeas petition as untimely. The court of appeals reversed and concluded a claim of innocence could overcome a statute of limitations bar to his claim. The Supreme Court granted ***certiorari*** review to address the relevance of claims of innocence to the one year statute of limitations for habeas claims.

The Court agreed with the court of appeals and concluded that a claim of innocence could overcome a procedural or limitations default on a federal habeas corpus claim for relief. However, the Court further held that the timing of the actual innocence claim may have a bearing on whether the claim of innocence is so strong that a court cannot have confidence in the outcome of the underlying trial and conviction. The case was remanded to the district court for its evaluation of the strength of the actual innocence claim.

IV. SENTENCING

State v. Loney, 231 Ariz. 474, 296 P.3d 1010 (CA 1 2013)

Defendant was granted relief from a sentence on appeal. However, the court determined that remand was appropriate for consideration of a probation grant. A petition for reconsideration was filed by the state. While the motion was pending at the court of appeals the defendant completed the prison term on the sentence that was to be reconsidered. The court found his release from prison on the sentence at issue made any re-sentencing issue moot. Consequently the defendant need not be resentenced.

State v. Braidick, 231 Ariz. 357, 295 P.3d 455 (CA 1 2013)

Defendant was charged with several crimes arising out of domestic violence incident with his girlfriend. Following trial, he was convicted of two counts of unlawful imprisonment which were lesser included offenses of the kidnapping charges for which he was tried. At sentencing he requested to be sentenced for only one count as sentences for both counts would violate double jeopardy principles as the restraint for bot counts was one continuous act. The trial court denied the request.

On appeal the court of appeals agreed with defendant. It found that the entire incident constituted one episode which allowed for only one sentence following the holding in **State v. Herrera**, 176 Ariz. 9, 859 P.2d 119 (1993). Accordingly, one count was vacated with one sentence remaining.

State v. Burns, 231 Ariz. 563, 298 P.3d 911 (CA 1 2013)

Defendant was on lifetime probation for a class 6 felony of indecent exposure. He was convicted of a burglary while on probation. He was sentenced to imprisonment for the burglary but the trial court reinstated him on lifetime probation for the class six offense. The trial court reasoned that reinstatement was proper for lifetime probation as it was an unstated exception to the rule of termination and imposition of imprisonment pursuant to A. R. S. 13-708 (C). Defendant appealed.

The court of appeals vacated the lifetime probation reinstatement and remanded for resentencing and imposition of a term of imprisonment. The court found no unstated exception to justify the trial court's sentence of reinstatement to lifetime probation.

State v. McDonagh, 232 Ariz. 247, 304 P.3d 212 (CA 1 2013)

Defendant was convicted of four counts of aggravated DUI. The charges arose out of one incident and the four charges were allegation of various permutations of aggravated DUI. At sentencing the court imposed probation with a four month term of imprisonment for each count to be served concurrently. However, as to fines and surcharges, the court imposed a total of $4,630 for each count with a total fine of $18,520. Defendant appealed the imposition of the fines.

On review the court held that imposition of fines for each count was double punishment under A.R.S. 13-116 as the crimes all arose out of one incident. It held that payment on one count would be applied to the other counts. Consecutive fines were impermissible.

State v. Reyes, 232 Ariz. 468, 307 P.3d 35 (CA 1 2013)

Defendant was convicted of possession of marijuana. At sentencing the court ordered him to pay the cost of statutorily mandated DNA testing. He appealed.

On review the court vacated the order to pay the cost of the DNA testing required by statute. It found that the applicable statute, A.R.S. 13-610, did not authorize an assessment for the cost of DNA testing. Further, the cost could not be characterized as a fine or surcharge to otherwise allow it to be imposed.

State v. Jones, 232 Ariz. 448, 306 P.3d 105 (CA 1 2013) rev. granted 11/26/13

Defendant was convicted of two counts of child abuse and one count of felony murder. One count of child abuse was found to be a dangerous crime against children and the court ordered the sentence for that count to be served consecutive to the sentence for the felony murder. There was no dispute that the child abuse dangerous against children was the underlying felony for the felony murder count. Defendant appealed the sentence and convictions.

The court found that the consecutive child abuse count should be served concurrently with the felony murder sentence. It reasoned that since the child abuse and murder arose from the same act or conduct then A.R.S. 13-116 required the sentences be served concurrently. It followed the precedent in **State v. Arnoldi**, 176 Ariz. 236, 860 P.2d 503 (CA 1 1993), where it concluded that A.R.S. 13-116 was "paramount" in Arizona sentencing statutes and controlled over sentencing provisions found in A.R.S. 13-705 (M) which normally mandated consecutive sentences for dangerous crimes against children.

State v. Lopez, 231 Ariz. 561, 298 P.3d 909 (CA 2 2013)

Defendant was convicted of possession of narcotic drugs and drug paraphernalia. He was sentenced to imprisonment and the various fines, fees and assessments associated with his crime were reduced to a Criminal Restitution Order (CRO). Further, the court ordered that no interest or collection charges could accrue while defendant was incarcerated in prison for the offenses. Defendant appealed.

The court held there was no authority for the trial court to reduce the fines, fees and assessments to a CRO. CRO's are only appropriate at the expiration of a defendant's sentence or probation. Such an order is an illegal sentence. The CRO was vacated

State v. Whitman, 232 Ariz. 60, 301 P.3d 226 (CA 2 2013) rev. granted 1/7/14

Defendant was convicted of aggravated DUI. He was sentenced on December 7, 2011. The minute entry documenting the sentencing event was filed December 9, 2011. A notice of appeal was filed December 28, 2011, 21 days after the actual sentencing but 19 days after the filing of the minute entry. Dismissal of the appeal was sought as the notice of appeal was untimely.

The court held that the time for filing a notice of appeal commences when the minute entry containing the judgment and sentence is filed not from the time of the oral pronouncement of the sentence and judgment.

State v. Seay, 232 Ariz. 146, 302 P.3d 671 (CA 2 2013)

Defendant was charged with burglary. At the time he was charged he was incarcerated in the department of corrections on an unrelated charge. The trial court ordered that he be transferred from prison to the court for proceedings. Ultimately he was sentenced to imprisonment pursuant to a plea agreement. However, he was not given any credit for the time spent in custody after his transfer from the department of corrections to the court. The court concluded he was not entitled to any credit as no conditions of release had been set upon his transfer and he was only in custody due to the previously imposed prison sentence. Defendant sought relief in postconviction proceedings but relief was denied. He petitioned for review.

On review the court concluded that though no conditions for release had been set upon his transfer from prison to court for the new proceedings, he was effectively in custody on an arrest warrant authorized by the court. Thus he was entitled to credit for the time in custody pursuant to A.R.S. 13-712 (B).

State v. Moran, 232 Ariz. 528, 307 P.3d 95 (CA 2 2013)

Defendant was convicted of four counts of aggravated DUI. Two of the four counts were premised upon DUI convictions from Nevada state courts within 84 months of the Arizona offense. Defendant moved to dismiss the two counts alleging the Nevada DUI's on the basis that the Nevada convictions did not necessarily amount to a DUI conviction under Arizona law. The trial court denied the motion concluding there was strict conformity between the subsection of the Nevada statute under which defendant was convicted and the Arizona statute. Defendant appealed.

On appeal the court reviewed the various ways under which defendant could have been convicted of DUI in Nevada to determine whether he could have been similarly convicted in Arizona. Narrowing its inquiry to the particular subsection of the Nevada law alleged to be similar to Arizona's law the court found differences that compelled a conclusion that the Nevada convictions did not necessarily amount to a conviction for DUI under Arizona law. Specifically, the court found that under the Nevada law there was not always a requirement of proof when a person consumed alcohol to convict that person of DUI. Additionally, under Nevada law actual physical control did not include the element of danger to the public, unlike Arizona law. Given

these differences and the lack of a record to detail the actual facts and events of the Nevada convictions the motion to dismiss the counts based on the Nevada charges should have been granted.

State v. John, 233 Ariz. 57, 308 P.3d 1208 (CA 2 2013)

Defendant was charged with failure to register as a sex offender under A.R.S. 13-3821. Defendant was convicted of sexual assault in 1989 which occurred on Navajo Nation land. In 2010 he was arrested outside the Navajo Nation boundaries for failing to register as a sex offender. He pled guilty but subsequently claimed the court was without subject matter jurisdiction to charge him with failure to register as a sex offender because he was a member of the Navajo Nation living on tribal lands and had not worked, resided or attended school outside the reservation boundaries. The trial court denied relief.

On review the court found that the federal Sex Offender Registration and Notification Act (SORNA) preempted the state sex offender registration requirement. That act required registration only for federal registration and, absent a waiver of the requirement by the Attorney General of the U.S., the states could not impose a registration requirement on defendant whose crime prompting any registration duty occurred on sovereign tribal land.

State v. Snider, 233 Ariz. 243, 311 P.3d 656 (CA 2 2013)

Defendant was charged and convicted of 9 counts of first degree burglary, 10 counts of armed robbery, 1 count of aggravated assault and 1 count of attempted robbery. He received prison terms on three of the counts and life sentences on the remaining 18 counts pursuant to A.R.S. 13-706(A). Defendant appealed.

The court determined that the life sentences were illegal sentences. Defendant had no prior convictions for serious offenses which is a requirement for imposition of life sentences pursuant to A.R.S. 13-706(A). His charges had been consolidated for trial pursuant to A.R.S. 13-704 (F) and that section provided the appropriate sentencing ranges. The life sentences were vacated and the case remanded for resentencing.

State v. Bernini/Copeland, 233 Ariz. 170, 310 P.3d 46 (CA 2 2013)

Defendant pled guilty to attempted aggravated assault as a non-dangerous offense. She was placed on probation which she successfully completed. She requested that her conviction be set aside and her civil rights restored pursuant to A.R.S. 13-907

and 908. The state objected to setting aside the conviction arguing that under A.R.S. 13-907 (D)(1) the conviction could not be set aside as the offense she pled guilty to was necessarily a dangerous offense, i.e. domestic violence with a knife, notwithstanding the offenses designation as non-dangerous at sentencing. The trial court set aside the conviction. The state sought special action relief.

The court affirmed the trial court's action. It held that a trial court may rely on a conviction's designation of an offense as non-dangerous to find a defendant eligible to apply for relief pursuant to A.R.S. 13-907. It concluded that the definitions of "dangerous offense" in A.R.S. 13-105(13), 13-704 and 13-907(D) were all consistent so as to allow the possibility of setting aside a conviction under 13-907 without initial consideration of the underlying facts of the offense.

Murdaugh v. Ryan, 724 F.3d 1104 (9th Cir. 2013)

Defendant pled guilty in Maricopa County state court to two counts of first degree murder. His plea and sentencing were to the court as his cases preceded the United States Supreme Court decision in **Ring v. Arizona**, 536 U.S. 584 (2002), which required a jury determination of the aggravating factors alleged to make a defendant eligible for a death sentence in Arizona. Defendant's case was pending at the Arizona Supreme Court when the **Ring** decision was handed down. The state court affirmed his convictions and death sentence for one of the murders. He ultimately sought federal habeas relief.

The Ninth Circuit Court of Appeals reviewed the proceedings in defendant's state court proceedings. It concluded that the **Ring** decision required jury consideration of his mitigating circumstances as they bore on the issue of leniency and the quality of the alleged aggravating factors that made him eligible for a death sentence. It found that a rational juror could find that his mitigation evidence was relevant to his state of mind at the time of the crime and may persuade them to choose life rather than death as the appropriate sentence. It granted habeas relief and directed that the defendant be resentenced in state court before a jury.