

APPELLATE UPDATE

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ANNOUNCEMENTS

This issue is the first issue of *Appellate Update* for this term of court.

On September 27th, the Supreme Court issued the following noteworthy *per curiam* orders:

- All administrative plans submitted by the various circuits were approved.
- Administrative Order Number 18 was amended to add a new section 6 to address the jurisdiction for the new pilot state district court judgeships. Circuits with these new courts should carefully review this amendment and consider whether they want to amend their administrative plans.
- Administrative Order Number 3 was amended to clarify when a matter is deemed “under submission.”

CRIMINAL

Bob Cole Bonds, Inc., v. State [**bonds**] Pursuant to Rule 9.2 of the Arkansas Rules of Criminal Procedure, an appearance bond guarantees all subsequent appearances of the defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand. Thus, the trial court erred when it found that a written confirmation was needed from the bonding company for a defendant’s bond to continue while he was pursuing an appeal following the entry of a conditional guilty plea. (Sutterfield, D.; CACR 06-1371; 08-29-07; Bird).

Hickman v. State [**jury instructions; disputed-accomplice liability status**] Because there was evidence whereby a jury could have concluded that a witness was a joint participant in the crime for which appellant was charged, the trial court erred by failing to issue the disputed-accomplice liability instruction to the jury. (Glover, D.; CACR 06-841; 8-29-07; Griffen).

Thompson v. State [**sufficiency of the evidence; rape**] Appellant's rape conviction required proof that he engaged in sexual intercourse or deviate sexual activity with another person, who was less than eighteen years of age, and that he was the victim's guardian. Appellant argued that there was insufficient evidence to establish that he was the victim's "guardian." The appeals court rejected appellant's argument and concluded that appellant, who: (1) had lived in the same home as his victim for the majority of her life; (2) was the father of his victim's half-siblings, (3) "played the 'father role' in the home;" (4) paid the household bills; (5) took care of his victim's health-care needs; (6) took the children in the home on outings; and (7) exhibited his power and authority over his victim by threatening to kill her, was his victim's "guardian." Accordingly, there was substantial evidence to support appellant's conviction of rape. (Pope, S.; CACR 06-1014; 9-12-07; Hart).

Omar v. State [**motion to suppress; Rule 3.1 of the Arkansas Rules of Criminal Procedure**] Appellant sought to suppress certain evidence that was obtained during a traffic stop. Appellant argued that the evidence should be suppressed because he was detained for thirty-seven minutes, which he asserted exceeded the scope and duration of a detention permitted by state and federal law. The court of appeals, reviewed the totality of the circumstances and concluded that the law enforcement official had specific, particular, and articulable reasons to extend the appellant's detention beyond the initial traffic stop, which in turn gave the law enforcement official reasonable suspicion to believe that criminal activity was present. The appeals court also concluded that the officer's reasonable suspicion of criminal activity allowed further detention of the appellant so that a canine sniff of his car could be conducted. The drug dog arrived at the scene without undue delay. Thus, the court of appeals held that the thirty-seven minute detention was not unreasonable. [**motion to suppress; illegal search**] A drug dog's entry into appellant's car through an open window was not an illegal search. (Cottrell, G.; CACR 06-1321; 9-12-07; Bird).

Wilson v. State [**evidence; sentencing phase**] The trial court did not err when it admitted appellant's prior convictions into evidence during the sentencing phase of appellant's trial. A trial court is permitted to admit proof of the defendant's prior convictions for felonies and misdemeanors during the sentencing phase of the trial even when the defendant's habitual-offender status is not an issue. (Wright, J.; CACR 07-106; 9-19-07; Vaught).

Herrod v. State [**disqualification of prosecuting attorney**] The trial court did not err when it denied the appellant's request to disqualify a prosecuting attorney, who had shown a photo spread to a witness prior to trial, and who had testified at a suppression hearing, because the prosecuting attorney was merely participating in a "routine investigation," when he showed the witness the photo spread, and because the appellant failed to establish that the prosecuting attorney was a "material witness" during his trial. (Langston, J.; CR 07-219; 9-20-07; Brown).

Reese v. State [**sufficiency of the evidence; capital murder**] Testimony, which established that appellant shot his victim four times in the head and then admitted his actions to two witnesses, was sufficient to support appellant's capital-murder conviction. [**suppression of statement; impairment based on drugs and alcohol use**] Where the trial court was able to listen to the appellant's taped statement and to consider the testimony of two law enforcement officials on the

issue, it was not error for the trial court to admit the appellant's in-custody statement in which the appellant claimed to be intoxicated and unable to voluntarily waive his *Miranda* rights. Evaluations of witness credibility at suppression hearings are left to the trial court and the appeals court will defer to the trial court's determination. (Glover, D.; CR 07-112; 9-20-07; Corbin).

Seely v. State [**Confrontation Clause; hearsay testimony**] The trial court erred when it permitted a social worker to testify about out-of-court "testimonial" statements made by a child victim to the social worker during a sexual-abuse evaluation because such hearsay testimony violated the Confrontation Clauses of the United States and Arkansas Constitutions. The appeals court explained that "when the context of the questioning is for the purpose of establishing past events potentially relevant to later criminal prosecution, then the questioning is inherently testimonial." (Langston, J.; CACR 06-1318; 9-26-07; Robbins).

Jarrett v. State [**Right to proceed pro se**] Where the appellant did not make an unequivocal request to proceed *pro se*, the trial court did not err in denying appellant's motion to dismiss his defense counsel. (Pope, S.; CR 07-56; 9-27-07; Danielson).

State v. Barrett [**Rule 37**] The State is not required to satisfy Rule 3 of the Arkansas Rules of Appellate Procedure-Criminal when it is appealing from an order granting a Rule 37 petition. The circuit court found that appellant's trial attorney failed to develop a trial strategy and that his performance was deficient. The circuit court further concluded that there was a reasonable probability that but for the appellant's attorney's deficiencies, the jury would have had reasonable doubt as to the appellant's guilt. The supreme court held that the circuit court's findings were not clearly erroneous. (Keith, T.; CR 06-1490; 9-27-07; Gunter).

Keller v. State [**Rape-shield statute**] The trial court did not abuse its discretion when it denied appellant's request to admit evidence of a victim's prior allegations of sexual abuse by a third party during the sentencing phase of appellant's trial. (Piazza, C.; CR 06-1418; 9-27-07; Imber).

Stone v. State [**Preservation of appellate issues**] The supreme court declined to consider appellant's challenge to the sufficiency of the evidence because appellant's attorney failed to make a specific directed-verdict motion. The appellant's evidentiary arguments were not preserved for appellate review because his attorney failed to make specific objections during trial. The supreme court did not consider appellant's argument, which was not supported by citation to legal authority or convincing arguments. The appellant may not raise arguments for the first time on appeal. (Cottrell, G.; CR 06-1129; 9-27-07; Brown).

Terry v. State [**Sufficiency of the evidence; capital murder**] The evidence established that appellant shot her husband, while he was asleep, and fled the scene of the crime after stealing his cash, credit card, and car. Appellant confessed to the murder, taking her husband's property, and obtaining additional cash from her husband's credit card. She further admitted that she had wanted to leave the marriage prior to murdering her husband because he abused her, but did not do so because her husband would not permit her to leave. Based upon the foregoing evidence, the jury returned a general guilty verdict. The supreme court concluded that the evidence was substantial enough to support appellant's conviction for capital murder under either "the felony-

murder provision” or “the premeditated and deliberated provision” of the capital murder statute. **[Admission of evidence; photos]** The trial court did not abuse its discretion when it admitted photographs illustrating the state of the body at the crime scene because they were helpful to the jury in its consideration of the evidence. (Maggio, M.; CR 06-688; 9-27-07; Glaze).

Tryon v. State **[Sufficiency of the evidence; possession of a controlled substance]** The supreme court concluded that where methamphetamines were found in appellant’s truck, and appellant was the only person at the home when the drugs were found in the vehicle, there was substantial evidence to support the appellant’s convictions for possession of a controlled substance. **[Sufficiency of the evidence; drug paraphernalia]** The supreme court concluded that there was substantial evidence to support appellant’s conviction for drug paraphernalia because the evidence established that the paraphernalia was found in plain view in appellant’s home and he was the only person at the residence when law enforcement officials conducted the search. **[Sufficiency of the evidence; theft by receiving]** Appellant testified that he knew that the items he purchased from an individual were “likely obtained in illegal ways.” He also testified that he knew he was getting a “heck of a buy” when he gave the individual \$275 to purchase items valued at \$1615. Based upon the foregoing testimony, there was substantial evidence to support appellant’s conviction for theft by receiving. **[Suppression of evidence]** A law enforcement official saw certain stolen items in appellant’s shed as he drove up to appellant’s home. The appellant sought to exclude the stolen items from evidence based upon an alleged unlawful search. The trial court concluded that the law enforcement official saw the items in plain view from the street, a location in which the appellant had no reasonable expectation of privacy. Thus, the trial court correctly concluded that a search had not been conducted and the evidence was properly admitted. **[Closing arguments]** The trial court, who is given broad discretion to control counsel during closing arguments, did not err when it denied appellant’s request to grant a mistrial or to give an admonishment to the jury after the prosecutor stated, during closing arguments, that she had never seen a defendant with more disregard for the law than the appellant and she argued that appellant “deserved the maximum sentence available under the law.” (Wilkinson, N.; CR 06-801; 9-27-07; Hannah).

CIVIL

Pulaski County v. Democrat-Gazette: **[foi]** Personal emails of county employee are to be reviewed by judge in camera to determine whether they constitute a record of the performance or lack of performance of official duties of the public employee. The content of the record rather than its location determines whether it must be disclosed. (McGowan, M.; SC 07-669; 7-20-07)

Bristow v. Mourot: **[securities]** Defendant was not liable under the Arkansas Securities Act as an agent who materially aided in the sale of the investments. Defendant’s actions could be viewed as an attempt to help his employees and investors rather than “representation.” (Moody, J.; CA 06-1419; 8-29-07; Glover)

Prock v. Southern Farm Bureau: **[ins.]** A “cousin-in-law” is a family member under the terms of the policy providing coverage for a family member residing in the household. (Lindsay, M.; CA 06-1391; 8-29-07; Griffen)

McAlmont Sewer Dist. V. McCain: **[sewer services]** Plaintiff had standing as a third party beneficiary and under the Declarative Judgment Act. Sewer District's agreement with the North Little Rock Sewer Committee gave the committee a veto over connection fees for non-residents. (Piazza, C.; CA 06-1445; 9-12-07; Marshall)

Richard Harp Homes v. Van Wyk: **[arbitration]** Arbitration provision was illusory when the contract is considered as a whole because one party's remedies under the contract are not limited to arbitration. (Fox, T.; CA 06-1446; 9-12-07; Baker)

Arkansas Oklahoma Gas v. MacSteel Division of Quanex: **[easement/public lands]** County granted easement in land that had been conveyed to it for use as public park or for recreational purposes. County was authorized to grant an easement in such property pursuant to Ark. Code Ann. Section 14-164-205, which gives county the power to alienate land to secure or develop industry. (Wilkinson, N.; SC 07-148; 9-13-07; Hannah)

Sluyter v. Hale Fireworks: **[easement termination]** The reciprocal written easement ran with the land and could not be terminated by the court when only one of the parties agreed to the termination. In the absence of agreement, abandonment, prescription, or merger, there is no basis for the court to terminate the easement. (Duncan, X.; SC 06-1442; 9-13-07; Danielson)

MBNA America Bank v. Blanks: **[arbitration]** Court properly denied application to confirm arbitration award because bank failed to present evidence that its customer agreed in writing to arbitrate disputes. (Sims, B.; CA 06-1396; 9-19-07; Glover)

Helms v. Martin: **[malpractice/expert]** Plaintiff was required to produce expert testimony to prosecute medical malpractice claim because issue was not within jury's comprehension. *Res ipsa loquitur* doctrine did not apply. (Gibson, R.; CA 06-1380; 9-26-07; Gladwin)

Burgess v. French: **[fraud]** In suit for fraud arising out of real estate transaction, plaintiff failed to show that he had the right to rely on defendant's "seller property disclosure form." (Clawson, C.; CA 06-1394; 9-26-07; Miller)

Ryan v. Weiss: **[foi]** Legal opinions relating to Rule GR-75 issued by the Department of Finance and Administration are not exempt from disclosure under the Freedom of Information Act. (Fox, T.; SC 06-1266; 9-27-07; Hannah)

Gallas v. Alexander: **[Act 1151]** Act 1151 of 2005 permitting the public authorization of wagering on electronic games of skill at horse and greyhound racing parks is constitutional. (Lineberger, J.; SC 06-956; 9-27-07; Danielson)

DOMESTIC RELATIONS

Dawn Michelle Singleton v. Michael Larue Singleton: **[divorce-marital property]** Appellant claimed on appeal that she should have been awarded a greater share of the marital assets because all assets were purchased with funds from her personal injury settlement. The Court of

Appeals said that application of the proper factors for dividing property is a factual determination that will not be reversed unless the division of marital property is clearly against the preponderance of the evidence. The decision was affirmed. (Landers, M.; No. CA06-1070; 8-29-07; Griffen)

Kathy D. Stuart v. Loren Stuart: **[child support]** Because the proceeds from a class-action settlement had not yet been received by the appellant at the time of the hearing, it was not known when the proceeds would be received or the amount that would be received. Therefore, the court acted prematurely in setting child support based upon that settlement. However, under the Supreme Court's broad definition of "income" in the Child Support Guidelines, the appellant's class-action settlement will fall within the definition of "income" because it is a "payment" from "any source." The court did not err in finding that the proceeds, when paid, would constitute "income" for child-support purposes. (Weaver, T.; No. CA06-1331; 8-29-07; Bird)

Tommy L. Gullahorn v. Gail A. Gullahorn: **[UCCJEA]** The trial court determined that Arkansas had continuing jurisdiction over this child-custody case because the appellee mother remained in Arkansas even though the appellant father and child had moved to Texas. In the majority opinion, the Court of Appeals said the trial court should have made a factual determination of the propriety of the Arkansas court's continued jurisdiction. The trial court has the discretion to exercise, or to decline to exercise, jurisdiction over the case, and it was remanded for findings regarding the extent or significance of the appellant's and the child's connections with Arkansas. (Pierce, M.; No. CA06-1258; 8-29-07; Baker)

Phillip Linn v. Brenda Linn Miller: **[jurisdiction–modification of divorce decree]** At the time of the parties' divorce in 2004, their property settlement agreement provided for each to receive a specified number of acres of their 192-acre tract of land. After a survey, the boundaries of their acreage were established. The decree also allocated the mortgage balance, pro rata, based upon acreage. Because they disagreed over the enforcement of the decree, the court ordered them to mediation, resulting in a Memorandum of Understanding that did not change the division of the land or the obligations on the mortgage. The Memorandum was adopted in an amended decree, which provided that the court retained jurisdiction for further orders necessary to enforce the amended decree. The appellee decided to sell a portion of her tract and, in order to do so, she paid off the mortgage on both the appellant's and her parcels. She also discovered that part of her property did not extend all the way to the road. She filed a motion for the trial court to clarify the decree, for an easement of ingress and egress, and for reimbursement of appellant's share of the mortgage she had paid. After a hearing, the trial court (1) ordered the appellant to pay his share of the mortgage, (2) declared that the division of the acreage was in error and ordered the appellant to deed her .9 acres, and (3) awarded her fees and costs. The Court of Appeals found that neither Ark. R. Civ. P. 60 nor the court's reservation of jurisdiction in the original decree empowered the court to modify the decree. The Court noted that the appellee had other recourse for recovering the appellant's share of the mortgage and for gaining access to the public road. The Court also reversed the award of fees and costs to appellee. The original decree was reinstated. (Reynolds, D.; No. CA06-1479; 9-5-07; Griffen)

Jon G. Morse v. Teri Morse Chapman: **[alimony–modification]** The Court of Appeals found that under the circumstances of this case—that the appellant's income had decreased by more than

50% since his initial agreement to pay alimony, that the appellee earned more than the appellant and had no dependents, and that the trial court's award of alimony was over one-half of appellant's take-home pay—that the court abused its discretion in imputing income to support an award of alimony and in finding that the appellant had the ability to pay. The Court held that alimony should have been terminated. (Medlock, M.; No CA06-1238; 9-12-07; Bird)

Arkansas Department of Health and Human Services v. Hon. Vann Smith: **[writ of prohibition]** The Supreme Court granted a writ of prohibition, finding that the circuit court was without jurisdiction to grant Karen Blaylock's request for an increase in her Medicaid Community Spouse Monthly Income Allowance (CSMIA) and Medicaid Community Spouse Resource Allowance (CSRA). DHHS, Intervenor, is the entity responsible for administering the Arkansas Medicaid program. DHS claimed that Mr. Blaylock had not applied for Medicaid and that DHHS had made no determination of his eligibility for benefits. Therefore, the Blaylocks had failed to exhaust their administrative remedies and the court lacked jurisdiction over the matter. In granting the writ, the Court found that in enacting the Medicare Catastrophic Coverage Act (MCCA), Congress did not create an independent, original cause of action in state courts whereby potential Medicaid applicants can get a preemptive court order attributing and allocating assets in anticipation of a future application for Medicaid. The Blaylocks had not applied for Medicaid, so their attempt to pursue relief in state court was without a jurisdictional foundation. In Arkansas, DHHS is the agency with the authority to determine Medicaid eligibility, as well as any deductions or allowances permitted under the MCCA. (Smith, V.; No. SC06-6; 9-13-07; Glaze)

Johnnie Russell McGee v. Teresa Lynn McGee: **[paternity; child support—modification]** The parties' 1994 divorce decree provided that two children were born of the marriage, awarded custody to the appellee mother, and provided that the appellant father would pay no support. The appellee filed for a modification in 2005, seeking child support, insurance, and medical expenses for the children. She also asked for restitution from the date of the divorce decree. Appellant responded with allegations of estoppel and fraud because of the parties' agreement at divorce regarding child support and medical bills, claiming that appellant agreed she would seek neither if he agreed not to contest paternity. Appellant also filed a motion for paternity testing. After a hearing, the trial court held that res judicata barred relitigation of the finding of paternity in the divorce decree, and that appellant had a full and fair opportunity to litigate that issue but chose not to do so. The court also held that the appellant had mandated the terms of the agreement the parties' entered into and that he could not now assert fraud as a basis for challenging paternity. The court also rejected the defense of estoppel, finding that appellant was aware at the time of the facts regarding the paternity of the children and did not meet his burden of ignorance of the facts. The court also held that any agreement between the parties regarding child support was not binding on the children, who were not represented at the divorce. The court ordered appellant to pay child support from the date the appellee filed the petition for support. The Court of Appeals affirmed the trial court in all respects. (Singleton, H.; No. CA06-1342; 9-19-07; Bird)

John David Rawe, Jr. v. Christa S. Rawe: **[child custody; relocation; visitation; child support]** After the parties' divorce, the appellee relocated to her native Australia with the parties' son, with the trial court's permission to move. The court set out a detailed visitation schedule,

ordered child support at a reduced rate, and denied the appellee's request for child support retroactive to the date of the divorce. The appellant appealed and appellee cross-appealed. The Court of Appeals did not consider appellant's argument that the trial court erred in awarding the child to the mother because of procedural deficiencies. Appellant also argued that the trial court erred in allowing appellant to relocate to Australia with the child, but the Court affirmed on that point. The appellant also argued that the trial court erred in granting him limited visitation. The Court of Appeals found, however, that the trial court did the best possible in an unfortunate situation—the parties live on different continents. The Court said the schedule gives the appellant substantial periods of visitation, both in Australia and in Arkansas. The court had even supplemented face-to-face visitation with telephone and internet visitation, and the Court affirmed the trial court on this point, as well. Last, the appellee cross-appealed the trial court's refusal to order child support to be paid retroactively from the date the divorce complaint was filed. The appellee's cross-appeal was dismissed as untimely filed. (Hannah, C.; No. CA06-1063; 10-3-07; Glover)

PROBATE

Adawna Devine v. Linda R. Martens, et al.: **[guardianship; UCCJEA]** The appellee grandparents failed to return the child in question to his mother, the appellant, in Texas, after the child had visited them with the mother's permission. The Supreme Court affirmed the trial court's assuming jurisdiction of the case under the UCCJEA and its granting an emergency temporary guardianship to the appellees, but reversed the trial court's granting a permanent guardianship to the grandparents. The Court found that the appellant mother did not abandon her child, and that the court had clearly erred in making that finding and using it as a basis to remove the child from his mother's care and to grant permanent custody in the appellees. The Court compared this to a dependency-neglect case and said that the mother herein had made significant changes to alleviate the circuit court's concerns so that she could retain custody of her son. In a footnote, the Court said that it "has made it clear that the state cannot interfere with a natural parents' right to custody simply to better the moral and temporal welfare of the child as against an unoffending parent." (Mashburn, M.; No. SC06-859; 9-27-07; Corbin)

JUVENILE

Arkansas Dept. of Human Servs. v. Mitchell **[D-N Adjudication]** Circuit court affirmed for dismissing dependency-neglect petition for failure to meet its burden of proof. DHS failed to call any witness or present any evidence and rested solely on its pleadings that the father was a convicted sex offender and that the mother failed to properly supervise the children by allowing unsupervised custody. The appellant testified that she believed her children were safe and had complied with the safety plan in order to keep her children. A caseworker testified that appellants were complying with the safety plan and that she believed that the mother would protect the children (Choate, S.; CA 07-427; 9-26-2007; Baker)

Posey v. Arkansas Dept. of Human Servs. **[No Merit Briefs & Ark. Sup. Ct. R. 6-9]** The Court of Appeals certified the case to the Supreme Court to decide if DHS is required to submit a reply

brief as required under Ark. Supr. Ct R. 4-3(j)(3) and (6-9). The current rule for no-merit briefs in termination of parental rights cases does not expressly require DHS to file a reply brief.

[TPR] TPR affirmed based on clear and convincing evidence that the circuit court found that the termination was in the best interest of the children. Evidence included a strong likelihood that the children would be adopted and that there was potential harm to the children if they remained in their father's custody. Further, the trial court found that the children were not in the father's custody for over 12 months and he willfully failed to maintain meaningful contact during that time. Appellant was in prison for six months and only visited his children two times when he was not in prison. Appellant argued that he was unable to visit his children because he had to move out of state for work. The Court stated it is for the circuit court to determine the credibility of the appellant for reasons in not complying with court ordered visitation

[Counsel Withdrawal] Although appellant argued ineffective assistance of counsel, he failed to show prejudice resulted from counsel's actions. The failure to complete services was due to appellant's lack of cooperation. Counsel continually assert appellant's goal of reunification even asking for more time. Review of the transcript indicates that counsel repeatedly questioned witnesses and appellant in such a way to bolster his case. Counsel's motion to withdraw was granted. (Warren, J.; 06-1274; 9-12-2007; Imber)

Sturdivant v. Arkansas Dept. of Human Servs. **[Child Maltreatment Registry]** Circuit court affirmed. Appellant unable to raise affirmative defense at the Administrative Hearing to remove his name from the Child Maltreatment Registry. Act 1705 of 2005 amended Ark. Code Ann. §12-12-512 to recognize affirmative defenses a Administrative Hearings was not effective at the time of his alleged act or the time of his Administrative Hearing. Further, even if appellant used the affirmative defense available in the criminal proceeding, substantial evidence remains to support the finding that his name should remain on the registry. (Clawson, E.; 07-38; 7-29-2007; Vaught)

EIGHTH CIRCUIT

Smith v. Insley's Inc. **[towing/civil rights]** Arkansas abandoned car statute does not apply to vehicle seized by the police in a criminal investigation, and the lien provisions of the law did not operate to give the tow company a right to sell the car for accumulated tow and storage charges. Even if the statute did apply, the notice the tow company sent was premature and deficient because it was sent well before the plaintiff had any right to claim the truck. District court erred in granting defendant summary judgment on plaintiff's claim that sale of his truck without proper notice and a meaningful opportunity to oppose the action violated his civil rights. State law claims for conversion and violation of the Arkansas Civil Rights Act are also remanded for trial; however, the district court did not err in granting defendant's motion for summary judgment on plaintiff's claim for the tort of outrage, as the conduct did not rise to the level necessary to state a successful claim under Arkansas law. (E.D. Ark.; No. 06-3333; 8-22-07)

