

ANNOUNCEMENTS

Reminder: Submission deadline for administrative plans is July 1, 2007.

The Arkansas Bar Association's recommendations to the Supreme Court to revise the procedural rules of the Judicial Discipline and Disability Commission were published for comment on May 24th, and a copy of the *per curiam* order was included in the weekly mailout. **Comment period ends on September 1, 2007.**

The Arkansas Bar Association petitioned the Supreme Court to revise Ark. R. Evid. 502 dealing with inadvertent disclosure of privileged material and selected waiver of such material. The proposal was published for comment on May 24th. A copy of the *per curiam* order was included in the weekly mailout, and the **comment period ends on July 1, 2007.**

On May 25th, the Supreme Court published for comment the recommendations of the Civil Practice Committee for changes to rules affecting civil practice. A copy of the *per curiam* order was included in the weekly mailout, and the **comment period ends on August 1, 2007.**

CRIMINAL

Rhoden v. State [**speedy trial**] Where appellant was not brought to trial within twelve months of his arrest and the prosecution was unable to attribute the delay to the appellant or to other legally justifiable reasons, the trial court erred in denying appellant's motion to dismiss based on a violation of his right to a speedy trial. (Phillips, G.; CACR 06-860; 5-2-07; Gladwin).

Trotter v. State [**suppression of evidence**] The Monticello police officers, who were commissioned to act as deputy sheriffs in Drew County, had authority to stop the appellant's vehicle in Drew County. Thus, the trial court correctly denied appellant's motion to suppress the evidence, which was obtained during the traffic stop. (Pope, S.; CACR 06-863; 5-9-07; Glover).

Laxton v. State [**sentencing**] The appellant entered into a plea agreement, which permitted his case to be transferred to Crittenden County Drug Court. Pursuant to the agreement, appellant was advised that if he did not successfully complete the requirements of drug court, he would be incarcerated. When appellant failed to complete the requirements of drug court, he was sentenced in accordance with the plea agreement. On appeal, the appellant sought jail-time credit for time in which he was incarcerated due to drug-court sanctions while his case was assigned to drug court. The Court of Appeals concluded that appellant was not entitled to the credit and explained that by sentencing him in accordance with the plea agreement, appellant was receiving the sentence for which he bargained. (Burnett, C.; CACR 06-1228; 5-9-07; Hart).

Tubbs v. State [**sufficiency of the evidence; possession of a controlled substance with intent to deliver**] Crack cocaine was found in a vehicle that was operated by the appellant. The vehicle was registered in the appellant's name and was covered by appellant's insurance. Appellant was the sole occupant in the vehicle. The drugs were found under the driver's seat and in the back seat, areas which the appellant could easily access. During a canine sweep of the vehicle, the appellant began to exhibit suspicious behavior as the

officer approached the contraband. Based upon the foregoing evidence, the trial court properly denied the appellant's directed-verdict motion. (Singleton, H.; SCCR 06-945; 5-10-07; Danielson).

Yarbrough v. State [**speedy trial**] The appellant failed to appear at an arraignment, thereby, causing the hearing to be rescheduled. The delay from the originally scheduled hearing until the rescheduled hearing was due to the appellant's conduct. Thus, the time-period should not have been counted against the State for speedy-trial purposes. Once this period was excluded, the appellant's trial was scheduled within 365 days from the date of his arrest. Accordingly, the trial court correctly denied appellant's motion to dismiss based on an alleged violation of the speedy-trial rules. [**suppression of evidence**] The trial court properly denied appellant's motion to exclude evidence, which was obtained during a valid traffic stop, after receiving appellant's consent, and prior to the time upon which the legitimate purpose of the stop was completed. (Cottrell, G.; SCCR 07-07; 5-10-07; Imber).

State v. Blandin [**rape-shield statute**] The trial court erred when it granted the defendant's motion to introduce evidence of the child victim's allegations of prior sexual abuse. The Supreme Court, applying the five-factor test, which was articulated in *State v. Townsend*, concluded that the evidence of the victim's allegations of prior abuse was not relevant to the current rape charge against the defendant. (Sims, B.; SCCR 06-1117; 5-10-07; Imber).

Eastin v. State [**sufficiency of the evidence**] The Supreme Court could not review appellant's challenge to the sufficiency of the evidence because his directed-verdict motion was not specific. [**motion to suppress**] Because appellant's attorney abandoned his motion to suppress without receiving a ruling from the trial court, the Supreme Court declined to consider this matter on appeal. [**identity of confidential informant**] Where appellant failed to establish that the confidential informant witnessed or participated in the crime for which appellant was charged, the trial court did not err in refusing to order the State to disclose the identity of the confidential informant. [**best-evidence rule**] Appellant gave a statement to law enforcement officials, which was recorded on a tape and then transcribed. The tape was destroyed in a fire and the trial court allowed the State to admit the transcript into evidence to establish the content of the taped statement. The Supreme Court held that admission of the transcript was erroneous because the tape, rather than the transcript, was the "best evidence." However, the Court concluded that such an error was "harmless" because the evidence of appellant's guilt was overwhelming and the error was slight. (Thomas, J.; SCCR 06-1474; 5-10-07; Brown).

Donaldson v. State [**sentencing**] Because the jury imposed a sentence that complied with the applicable sentencing statute, the trial court erred when it rejected the jury's verdict and imposed a different sentence upon appellant. The jury recommended a verdict of "zero years' imprisonment and a fine of zero dollars." The Supreme Court held that zero years' imprisonment was the "lower limit of the sentencing range for a Class D felony." (Gibson, R.; SCCR 06-607; 5-10-07; Corbin).

State v. Grisby [**preservation of argument on appeal**] The Supreme Court declined to consider the State's argument on appeal because it was not presented to the trial court. (Dennis, J.; SCCR 06-1269; 5-17-07; Glaze).

Thomas v. State [**jury selection**] Because appellant failed to establish the systematic exclusion of members of his racial group from the venire, the trial court did not err in denying appellant's motion to expand the jury pool. [**constitutionality of the capital-sentencing scheme**] The capital-sentencing statutes are not unconstitutionally vague because the phrase "mitigating circumstance" is not defined therein. [**victim-impact evidence**] The trial court correctly admitted victim-impact evidence. The appellant's assertion that victim-impact evidence is admissible only when it is relevant to the aggravators or mitigators advanced at trial is misplaced. Victim-impact evidence is relevant evidence, which informs the jury of the toll that the murder has taken on the victim's family and society. [**continuance of trial**] Because the appellant did not establish that he was prejudiced by the trial court's denial of his motion for continuance, the Supreme Court concluded that the trial court's actions were not an abuse of discretion. [**jury instructions**] Appellant alleged that the model-jury instruction on the issue of mitigating circumstances imposed a non-statutory burden on him to establish that the mitigating circumstances "probably" existed. The Supreme Court, relying on previous case law, rejected this argument and held that the addition of the word "probably" did not affect which party had the burden of proof nor did it suggest to a jury that the appellant had the burden of proof. Thus, the trial court did not err when it refused to give the jury instruction proffered by the

appellant and instructed the jury pursuant to the model-jury instructions. (Yeargan, C.; SCCR 06-439; 5-17-07; Gunter).

Ford v. State [**sentencing**] The appellate courts of Arkansas have not adopted the federal court doctrine of “sentence manipulation,” which occurs when an individual, who is predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment. Appellant was convicted of four counts of delivery of a controlled substance, four counts of possession of a controlled substance, and possession of drug paraphernalia. The jury recommended that the appellant be sentenced to a total of one hundred fifty-three years in the Arkansas Department of Correction. The trial court accepted the jury’s sentencing recommendations and noted that the sentences, which were recommended, were less than the maximum amount that could have been imposed. The trial court also noted that the recommended sentences were consistent with other sentences imposed in the county. The trial court did not abuse its discretion in accepting the jury’s sentencing recommendations and having appellant’s sentences run consecutively rather than concurrently. (Anthony, C.; CACR 06-1030; 5-23-07; Baker).

Hill v. State [**amendment to information**] The State is entitled to amend an information at any time prior to the case being submitted to the jury so long as the amendment does not change the nature or degree of the offense charged or create unfair surprise. The trial court did not err when it permitted the State to amend the information filed against appellant at the conclusion of its case because the amendment did not change the offense charge but rather amended the manner in which the crime took place. Additionally, permitting the information to be amended was not error because the appellant was not surprised by the amendments and he was permitted the opportunity to conduct additional cross-examination of the State’s witnesses after the amendment, which he declined to do. [**discovery violations**] During the discovery process, the State failed to disclose an oral statement to the appellant in violation of Rule 17.1 of the Arkansas Rules of Criminal Procedure. The trial court permitted the State to introduce this statement into evidence at appellant’s trial. The Supreme Court explained that a prosecutorial discovery violation does not automatically result in the reversal of a conviction. The Court further explained that an appellant must establish that he suffered prejudice by the prosecutor’s failure to disclose information before the discovery violation will result in a reversible conviction. The statement, which the State failed to disclose, did not establish that appellant committed the crimes for which he was charged. Additionally, testimony from other witnesses established the content of the undisclosed statement. Thus, the trial court did not err when it admitted the statement. (Henry, D.; SCCR 06-686; 5-24-07; Corbin).

Benitez v. State [**sufficiency of the evidence; possession of a controlled substance with intent to deliver**] During a two-hour traffic stop, the appellant exhibited suspicious behavior, which included fleeing the scene of the stop at the time the law enforcement official located the contraband. Thus, the Court of Appeals concluded that there was substantial evidence to support appellant’s conviction for possession of a controlled substance with intent to deliver. [**suppression of evidence**] Appellant, who was a passenger in his sister-in-law’s vehicle, lacked standing to contest the search of the vehicle. (Hudson, J.; CACR 05-1293; 5-30-07; Vaught).

McBride v. State [**sufficiency of the evidence; second degree unlawful discharge of a firearm from a vehicle**] Several witnesses testified that they saw appellant shooting a gun from his vehicle towards a gas station. Appellant was identified as the only person in the vehicle. When appellant was stopped by law enforcement officials, a gun casing, which matched the gun that a witness saw appellant discard prior to the stop, fell from his lap. The foregoing evidence was sufficient to support appellant’s conviction for second degree unlawful discharge of a firearm from a vehicle. [**Rule 606 of the Arkansas Rules of Evidence**] Rule 606(b) of the Arkansas Rules of Evidence prohibits a juror from testifying about jury deliberations. (Fox, T.; CACR 06-1158; 5-30-07; Vaught).

Porter v. State [**sufficiency of the evidence; possession of methamphetamine**] Because the State failed to offer evidence that established that appellant possessed a usable or measurable amount of contraband, the Court of Appeals concluded that the trial court erred when it denied appellant’s directed-verdict motion. In so holding, the Court noted that “possession of a container with a trace amount or residue of contraband that is neither measurable nor usable is not possession of a controlled substance under Ark. Code Ann. § 5-64-401.” (Medlock, M.; CACR 06-1114; 5-30-07; Marshall).

Young v. State [**sufficiency of the evidence; capital murder**] There was substantial evidence to support appellant’s capital-murder conviction. [**motion to suppress**] In her motion to suppress, appellant alleged

that her custodial statements were involuntarily given. Because material witnesses were connected with appellant's controverted statements, it was the State's burden to produce those witnesses at the suppression hearing or to explain their absence. The State failed to meet this burden. Thus, the Supreme Court remanded the matter to the trial court for a new suppression hearing. (Erwin, H.; SCCR 06-1263; 5-31-07; Danielson).

CIVIL

Searcy Farm Supply v. Merchants Bank: [**lien priority**] Bank's lien on crops and crop proceeds had priority over a purchase money security interest of supplier who furnished seeds, fertilizer, and chemicals. Court rejected supplier's claim that its lien followed the seeds to the "identifiable proceeds" of the seeds -- being the crops. **Damages** awarded calculated on the acreage planted and the average yield were supported by the evidence. (Smith, P.; SC06-892; 5-3-07; Gunter)

Arkansas Beverage Retailers Assoc. v. ABC Board: [**standing**] Retailers had standing to challenge Board's decision to transfer permits affecting Sam's Club. The financial impact on liquor stores supports standing and alleged injury from inability to compete with Sam's Club. (Brantley, E.; SC 06-794; 5-3-07; Danielson)

Youree v. Eshaghoff: [**specific performance**] Specific performance could not be ordered to enforce a contract provision, added subsequent to the time of the original contract, because the amendatory addition was not supported by consideration. (Duncan, X.; CA 06-883; 5-9-07; Hart)

Riddle v. Udouj: [**limitations/breach of warranty**] Cause of action for breach of warranty in a deed accrued when property was conveyed at which time property conveyed included property that the grantor did not have title to convey. (Marschewski, J.; CA 06-865; 5-9-07; Robbins)

Royal Oaks Vista v. Maddox: [**laches**] Laches was not a proper defense because laches requires detrimental reliance, and in the case, there is no evidence that the defendant incurred any expenses or otherwise relied to its detriment because of plaintiff's delay in asserting rights under a bill of assurance. (Harkey, J.; CA 06-738; 5-9-07; Baker)

Danner v. Discover Bank: [**burden of proof**] Court shifted burden to defendant to prove credit card charges were not hers, but plaintiff creditor had the burden to prove the charges were authorized. (Thomas, J.; CA 06-1052; 5-16-07; Pittman)

Wilkins v. Food Plus, Inc. [**service**] Court properly dismissed complaint because attorney misled the court in attempting to get an order to extend time to serve a summons. (Marschewski, J.; CA 06-552; 5-16-07; Pittman)

Alvarado v. St. Mary Hospital: [**dismissal**] Complaint failed to state claims for conversion and interference with business expectancy. (Scott, J.; CA 06-1061; 5-23-07; Hart)

Hamilton v. Ford Motor Credit: [**arbitration**] Creditor was not required to arbitrate its attempt to replevin the vehicle. Contract provided that creditor could enforce its security interest. (Piazza, C.; CA 06-0838; 5-23-07; Miller)

Norton v. Luttrell: [**conflicts of law**] Arkansas law applied to malpractice action involving estate of deceased Texas resident where surgery occurred in Arkansas and doctor was an Arkansas resident. (Piazza, C.; CA 06-1093; 5-23-07; Bird)

Arkansas Diagnostic Center v. Tahiri: [**arbitration**] Arbitration agreement is not enforceable under the FAA because it did not involve interstate commerce. (Brantley, E.; SC 06-667; 5-31-07; Danielson)

Yeakley v. Doss: [**evidence of prior DWI convictions**] Court granted motion in limine excluding evidence of defendant's prior DWI convictions because the defendant admitted fault and to being DWI at the time of the accident which was the subject of the trial. Prior convictions were relevant to claim for punitive damages, and it was error to grant motion in limine. (Clinger, D.; SC 06- 851; 5-31-07; Corbin)

DOMESTIC RELATIONS

Gerald Wayne Lyons v. Teresa Lyons McInvale: [**child custody; visitation; child support**] At the time of divorce, custody of two daughters was divided between the parties and no child support was ordered so long as custody was divided. Two years later, an order was entered changing custody of one daughter from appellant father to appellee mother and appellant was ordered to pay child support for both daughters. Specific visitation was ordered for the father. When one daughter refused to visit her father, the trial court reduced child support to one child contingent upon the child's continued refusal to visit. The trial court also found that if the other daughter refused to visit her father, his child-support obligation would cease. After a show cause hearing, the trial court found that the appellant father owed an arrearage of \$9,140. The father contended on appeal that he had no visitation and therefore owed nothing under the court's previous order. In affirming, the Court of Appeals said that, although it was clear that he did not receive visitation on a regular basis, he did not return to court to attempt to terminate his child-support obligation, which remained in force, which became vested when due, and which was a debt due the payee. The Court noted that it was troubled that the father's child-support obligation was tied to his receiving visitation. The Court pointed out a line of adoption cases holding that the duty to pay child support is independent of the duty of the custodial parent to allow visitation, because both may be enforced by the courts. "This reasoning should not be limited solely to adoption cases, and it is squarely on point in this case. If Gerald was not receiving his visitation, the answer was not to cut off child support, but to return to court." [**marital debt**] The Court affirmed the trial court's denial of appellant's claim for reimbursement for interest on credit card debt resulting from his having to pay the entire debt because the appellee ignored the order to pay her share. He admitted that he had made other charges on the account and he failed to establish that he had paid any interest charges. The Court said the trial court would have had to resort to speculation and conjecture to determine what charges were attributable to appellee, given the evidence before it. (Landers, M.; No. CA06-1146; 5-2-07; Glover)

Cyndall Sharp v. M. J. Keeler: [**child custody; visitation**] The trial court ordered a change of custody of an 18-month-old boy from the appellant mother to the appellee father based upon parental alienation, which the trial court found was a material change of circumstances warranting modification. In addition, the trial court ordered supervised visitation for the mother for two hours each day, two days a week. The Court of Appeals affirmed the change of custody, but directed that the mother should have the same unsupervised visitation as the father enjoyed before the change in custody. (Zimmerman, S.; No. 06-714; 5-9-07; Glover)

Kevin Martin v. Melissa Martin Pierce: [**divorce; paternity; domestic relations attorneys ad litem**] The parties' divorce decree in 1997 found that two children were born of the marriage and a property settlement agreement incorporated into the decree included child support for both children. In 2004, appellee mother filed a petition for contempt for the appellant father's alleged failure to pay child support. He counterclaimed alleging fraud and requesting a paternity test regarding one child, C.M. The paternity test found that he could not be the biological father of C.M. At appellee's request and over appellant's objection, the court appointed an attorney ad litem for C.M. The attorney ad litem filed a motion for declaratory judgment, which was granted, thus declaring appellant to be C.M.'s father. The trial court found that Ark. Code Ann. § 9-10-115, a part of the Paternity Code, was inapplicable to this divorce decree. The appellant alleged on appeal that the trial court erred: (1) in appointing an attorney ad litem for a person not a party to the action and in granting affirmative relief to that person; (2) in holding that res judicata foreclosed the appellant's challenge to paternity and his duty to pay child support for C.M.; and (3) in finding that § 9-10-115 did not operate to allow appellant's challenge to paternity and to his duty to pay child support for C.M. In affirming, the Supreme Court found no error in the appointment of an attorney ad litem for C.M. Even though the exact issue of custody may not have been in question, the corresponding issue of support made it proper for the court to appoint an attorney ad litem to guard the individual interests of a minor child. The Court noted that the circuit court has inherent authority to appoint an attorney ad litem to represent a child's interests in disputes between divorcing parents. The attorney ad litem should be permitted to represent his child client as he would any client in preparation for and at trial, which C.M.'s attorney ad litem did by filing a pleading on behalf of C.M. The Court also found that res judicata applied to his challenge to paternity and his duty to pay child support. The Court found that § 9-10-115 is a part of the Paternity Code and applies only to judicial findings of paternity or to acknowledgments of paternity by both parents, not to divorce decrees. The Court cited *Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999), in which the Court made a distinction between adjudicated fathers under the paternity code and those under divorce decrees. The legislature has done nothing to change that. The

Court held that the amendment to the law in 2001 (Act 1736 of 2001) did nothing to abrogate the Court's decision in *Williams*, and that § 9-10-115 does not apply to a paternity determination arising as a matter of presumption under a divorce decree. (Vittitow, R.; No. SC06-950; 5-17-07; Hannah)

Lade Thomas Conlee Jr. v. Jennifer Conlee: **[divorce; contempt]** Contempt proceedings stemmed from a divorce case. The opinion includes a good discussion of civil versus criminal contempt. The court said the appellant had repeatedly and consistently refused to abide by the court's orders both before and after the divorce decree was entered. The appellant did not dispute that the court's orders were valid, definite, and clear, but he simply maintained that the punishment was too severe. Substantial evidence existed to support the trial court's decision to hold him in contempt and to warrant the punishments that the court imposed. (Gray, A.; No. SC06-586; 5-24-07; Glaze)

Paul L. Artman v. Vickie D. Artman Hoy: **[alimony; costs and attorney's fees]** When the parties divorced, their Agreement was incorporated into the decree. The Agreement provided for appellant to pay weekly alimony for ten years. When appellee remarried about two years later, appellant filed a motion to terminate his alimony obligation pursuant to the automatic termination provisions in Ark. Code Ann. section 9-12-312, relying upon that provision and a Court of Appeals case. He also asserted that he should not be held in contempt for refusing to pay the alimony. The trial court found that section 9-12-312 did not apply to the contract between the parties, relying upon *Rockefeller v. Rockefeller*, 335 Ark. 145 (1998). The court reasoned that the parties and their attorneys had the responsibility not to enter into an improvident agreement. The court dismissed the petition to terminate alimony and found that, because the parties had agreed that appellant would pay alimony into the registry of the court, the appellee had waived any claim for contempt. Finally, the court ordered payment of \$2,500 as an attorney's fee for the action. In affirming, the Supreme Court found that it was undisputed that the Agreement was unambiguous and that the parties agreed to a term of ten years for alimony. Thus, the automatic termination provision regarding remarriage is inapplicable. The Court also affirmed the award of fees, finding that appellant failed to cite any legal authority as to why the award was unwarranted. (Lindsay, M.; No. SC06-1428; 5-31-07; Corbin)

PROBATE

In Re Adoption of H.L.M., Wade L. McNew: **[step-parent adoption]** Appellant McNew attempted a step-parent adoption of his wife's child, whom she had adopted as a single parent before their marriage. When the wife adopted her daughter, the child's biological mother and biological father had executed consents. The trial court dismissed Appellant McNew's petition for adoption, finding that he was required either to obtain the consent of the child's biological father or to produce an order that showed the biological father's rights had been terminated. In reversing, the Court of Appeals noted that Ark. Code Ann. section 9-9-215 addresses the effect of an adoption decree which, in part, terminates all legal relationships between an adopted individual and biological relatives, including his or her biological parents. Therefore, the Court said, the appellant was not required to obtain the consent of the biological father or to have an order specifically terminating his parental rights. By operation of law, the first "adoption decree forever severed and held for naught the biological father's rights, responsibilities, and legal relationship with the child." (Gray, A.; No. CA07-11; 5-23-07; Heffley)

JUVENILE

Latham v. Arkansas Dept. of Human Servs. **[TPR]** TPR sought as to the youngest child of three was upheld. Appellant argued that the trial court erred because there was no evidence that he was an unfit parent, that termination was in the child's best interests, and that the trial court ignored his efforts to comply with the court's orders.

The trial court made specific findings of fact as to the child's best interest, that return home to the parent would be harmful to the juvenile, and that the juvenile was very adoptable and had stability and was thriving in his current foster home. The court found noted court involvement with the family for the last six years. At the time of the termination hearing the juvenile was 11 and did not want contact or to be returned to his father.

The trial court acknowledged that appellant had completed anger-management and substance abuse courses in prison. The court also noted that the appellant was employed and had filed for divorce which the court

referred to as a “chaotic and volatile relationship.” However at the time of the Permanency Planning Hearing and TPR Hearing, although appellant had the means still did not have a home for his child.

Williams v. Arkansas Dept. of Human Servs. [**Pro Se**] Appellants argued that they properly waived their right to counsel and that they should have been allowed to proceed pro se at the termination hearing. The Court noted that the trial court extensively questioned the parents about the motions to proceed pro se. The Court found that the trial court erred in finding that the appellants did not make a knowing and intelligent waiver of counsel. However, appellants must show prejudice or harm as a result of appointed counsel. Based on appellants’ own admission no prejudice was suffered. In fact, the father stated on direct examination that since he was appointed an attorney, “you have been better than my private attorney. I mean you have really been there... You have been responsive to what I have asked [and] have represented me appropriately.”

[**TPR**] Appellant argued that the trial court lacked sufficient evidence to terminate parental rights. TPR upheld based on aggravated circumstances as a result of multiple bone fractures. neglect. Appellant’s reliance on the fact that they complied with reunification services is misplaced because the trial court had previously found that aggravated circumstances existed and that no reunification services would be provided to the family. (Warren, J.; CA 06-1492; 5-23-2007; Gladwin)