

## APPELLATE UPDATE

*Appellate Update* is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (<http://courts.state.ar.us/opinions/opinions.html>).

PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS  
JANUARY, 2007 VOLUME 14, NO. 5

### ANNOUNCEMENTS

In *Simes v. Jud. Discipline and Disability Commission* (Jan. 25, 2007), supreme court upheld constitutionality of Canon 5C (2) by distinguishing *Republican Party of Minnesota v. White*.

#### **Administrative Plans. Deadline July 1, 2007.**

ADMINISTRATIVE ORDER NUMBER 14 provides that the administrative plan for the judicial circuit shall be submitted by the administrative judge to the Supreme Court by **July 1** of each year following the year in which the general election of circuit judges is held. The effective date of the plan will be the following January 1.

### CRIMINAL

*Brown v. State* [**sufficiency of the evidence; sexual assault in the first-degree**] Because the appellant did not identify the element of the crime that the State failed to prove in his motion for directed verdict, a challenge to the sufficiency of the evidence was not properly preserved for appellate review. [**evidence; failure to comply with discovery obligations**] Without a ruling on an alleged discovery violation, the Supreme Court could not consider the matter on appeal.

[**evidence; work product**] The appellate court was precluded from determining whether certain evidence was properly excluded because the appellant failed to proffer the challenged evidence.

[**public access to trial**] When the appellant agreed to an exclusion of family members from the courtroom during the trial proceedings, he waived his ability to later challenge the exclusion of the family members in an appeal. [**prosecutorial misconduct; cumulative-error argument**]

The Supreme Court declined to consider appellant's cumulative-error argument because the appellant failed to raise objections to the errors individually and failed to object to the prosecutor's actions as cumulative error. (Phillips, G.; SCCR 06-737; 1-4-07; Hannah)

*Davis v. State* [**sufficiency of the evidence; kidnapping**] There was substantial evidence to support the appellant's conviction for kidnapping. [**sufficiency of the evidence; criminal-**

**attempt-to-commit-residential burglary**] From the appellant's actions, the jury could infer that the appellant intended to enter the victim's apartment and to cause harm to the victim. Thus, the trial court properly denied appellant's directed-verdict motion. **[revocation of probation]** The trial court did not err in revoking appellant's probation when he failed to report to his probation officer, failed to pay supervision fees, and was convicted of three criminal offenses. (Fox, T.; SCCR 06-766; 1-4-07; Glaze)

*Callaway v. State* **[Sixth Amendment right to public trial]** Because the appellant failed to raise his constitutional argument at the trial court level, the issue was not preserved for review by the appellate court. (Fox, T.; SCCR 06-675; 1-11-07; Gunter)

*State v. Rapp* **[State's interlocutory appeal pursuant to Rape-Shield Statute]** The trial court's order, which excluded evidence of the victim's prior sexual conduct, was not subject to an interlocutory appeal by the State. (Wilkerson, N.; SCCR 06-813; 1-11-07; Glaze)

*Davis v. State* **[sufficiency of the evidence; affirmative defense of insanity]** Where the jury considered the conflicting testimony from expert witnesses on appellant's mental state and concluded that appellant had the requisite *mens rea* for first-degree murder, the trial court correctly denied appellant's motion for a directed verdict. **[sufficiency of the evidence; kidnapping]** Although the appellant "released" his victim in her home, she was physically restrained. Thus, the trial court properly denied appellant's request to reduce the kidnapping charge from a Class Y felony to a Class B felony. **[evidence; Rule 403]** Photographs, which were offered to establish the appellant's intent and to assist the jury in its understanding of the testimony, were properly admitted by the trial court. The trial court did not err when it admitted a 911 recording because the evidence was relevant, and because the appellant failed to provide authority to exclude the recording based upon the tone of the caller's voice. **[jury instruction; lesser-included offense]** The Supreme Court did not consider appellant's contention that the trial court erred when it refused to give a jury instruction on a lesser-included offense because the appellant failed to proffer the instruction to the trial court. (Medlock, M.; SCCR 06-669; 1-11-07; Imber)

*Holsombach v. State* **[sufficiency of the evidence; kidnapping]** There was substantial evidence to support the appellant's conviction for kidnapping. **[suppression; confession; right to counsel]** The trial court did not err in denying appellant's motion to suppress his confession because the appellant's alleged request for an attorney was ambiguous and equivocal, and because the appellant signed a *Miranda* form. **[joinder of offenses]** Where the alleged criminal activities occurred as a series of connected acts, the trial court properly allowed the State to join all offenses against the appellant in a single information. **[mistrial; juror misconduct]** The trial court, which excused all jurors, who heard potentially prejudicial comments, did not err when it denied appellant's motion for a mistrial. **[jury instructions]** The allegations in the criminal information were sufficient to apprise the appellant of the crimes with which he was charged. Thus, the trial court correctly instructed the jury on accomplice liability. (Reynolds, D.; SCCR 06-550; 1-11-07; Gunter)

*Craig v. State* **[motion to withdraw]** After reviewing the motion and no-merit brief filed by the

appellant's attorney, the Court of Appeals concluded that the appeal was wholly without merit and granted appellant's attorney's motion to withdraw. **[sufficiency of the evidence; aggravated assault; criminal mischief; terroristic act]** The evidence established that the appellant fired a shotgun at a vehicle, which was occupied by two individuals, and caused the vehicle to sustain extensive damages. Thus, there was substantial evidence to support the appellant's convictions for aggravated assault, criminal mischief, and committing a terroristic act. **[sentencing]** The trial court, who has broad discretion, did not err in denying appellant's request to run his sentences concurrently. The trial court correctly concluded that aggravated assault, criminal mischief, and committing a terroristic act are separate offenses and properly allowed convictions on all offenses. **[evidence]** Issues of witness credibility are for the jury to resolve. (Wyatt, R.; CACR 06-170; 1-17-07; Griffen)

*Powell v. State* **[jurisdiction]** The trial court properly concluded that it had jurisdiction over this matter because the appellant's actions, as well as the result of his conduct, occurred in Arkansas. (Pope, S.; CACR 06-370; 1-17-07; Gladwin)

*Blanchett v. State* **[suppression of evidence; arrest warrant]** The trial court correctly denied appellant's motion to suppress evidence that was obtained during the execution of an arrest warrant because the warrant was properly issued based upon the sworn testimony of an investigating officer. (Maggio, M.; SCCR 06-879; 1-18-07; Corbin)

*Sheridan v. State* **[suppression of evidence; roadblocks]** It is not necessary for an elected official to approve a roadblock before one may be established. Thus, the trial court did not err when it denied appellant's motion to suppress evidence that was collected during a roadblock. (Clinger, D.; SCCR 06-695; 1-18-07; Danielson)

*Arkansas Department of Correction v. Bailey* **[constitutional challenge; due process; Sex Offender Registration Act]** The trial court erroneously concluded that the Sex Offender Registration Act violated federal and state constitutional guarantees of procedural due process as applied to the criminal defendant. The criminal defendant, who pleaded not guilty by reason of mental disease or defect, conceded that he engaged in the conduct charged. Requiring persons acquitted of a sex offense by reason of mental disease or defect to submit to a risk assessment is rationally related to the State's interest in protecting society from repeat sex offenders. Thus, the trial court erred when it reversed the criminal defendant's assessment. (Proctor, W.; SCCR 06-674; 1-25-07; Glaze)

*Miller v. State* **[sentencing]** The trial court abused its discretion when it applied an "unwavering court policy" of refusing to instruct the jury on alternative sentences for certain offenses. However, the appellant, who received the maximum sentence for the offense of sexual assault in the first degree, failed to establish that he was prejudiced by the trial court's actions. (Pope, S.; CACR 06-387; 1-31-07; Glover)

*Ward v. State* **[criminal information; amendments]** After the parties had presented their cases, but before the matter was submitted to the jury, the trial court erroneously permitted the

prosecutor to amend the criminal information to increase the degree of the offense charged from a Class C felony to a Class B felony. However, the appellant's conviction was upheld because he failed to establish that the error was prejudicial. **[sentencing]** The trial court lacked authority to sentence the appellant to fifteen years for a Class D felony under the habitual-offender statute because the maximum sentence permitted is twelve years. Thus, the Court of Appeals reduced the appellant's sentence for possession of a firearm from fifteen years to twelve years. (Humphrey, M.; CACR 06-444; 1-31-07; Vaught)

## CIVIL

*Nationwide Ins. v. Ibanez*: **[foreign judgment]** Motion to set aside a foreign default judgment which was registered in Arkansas is a direct attack rather than a collateral attack and is permissible under the uniform act. The purpose of the motion was to correct the amount that could be lawfully garnished. Court properly reduced the judgment to the correct amount. (Scott, J.; 06-765; 1-11-07; Gunter)

*Marlar v. Daniel*: **[appraiser negligence]** Wife's appraiser, who was hired in a divorce proceeding, owed no duty to husband (opposing party) to sustain a negligence action against the appraiser. (Landers, M.; SC 06-386; 1-18-07; Imber)

*Sowers v. St. Joseph's Mercy Health Center*: **[charitable immunity]** Hospital's liability pool did not constitute insurance for purposes of the direct-action statute. The pool does not meet the statutory definition of insurance. (Shirron, P.; SC 06-414; 1-18-07; Hannah)

*Drummond v. Shepherd*: **[justiciable issue/attorneys fees]** Plaintiff fell far short of proving his prescriptive easement claim, but defendant was not entitled to an award of attorneys fees based upon the suit lacking a justiciable issue. (Medlock, M.; CA 06-438; 1-24-07; Vaught)

*Get Rid of It Arkansas v. Hughes*: **[workers comp]** Commission has exclusive jurisdiction to determine whether an employer-employee relationship existed and court was without jurisdiction. (Guthrie, D.; SC 06-1255; 1-25-07; Glaze)

*JB Wayne, Inc. v. Hot Springs Village Assoc.* **[venue]** Venue for suit involving a lease was in county where defendants were located at the time of suit and where they were served. (Williams, L.; CA 06-453; 1-31-07; Marshall)

## DOMESTIC RELATIONS

*Office of Child Support Enforcement, et al. v. Anthony L. Parker*: **[disestablishment of paternity; past-due child support]** A default judgment of paternity was entered against the appellee in 2002, child support was set, and retroactive support of \$4,446 was ordered. Appellee paid no child support, and he failed to appear at a subsequent show cause hearing, which resulted in a pick-up order being issued in May of 2003. About a year later, OCSE found appellee's

employer and income withholding was instituted against his paycheck. In 2005, appellee was arrested under the pick-up order, a hearing was held, and he requested a paternity test, which resulted in a finding that he was not the biological father of the child. A hearing was held, after which the trial court ordered the weekly child-support payments abated; the court also found that he was not responsible for past-due child support. In reversing, the Supreme Court interpreted Ark. Code Ann. 9-10-115(f)(1), holding that the statute provides that after the disestablishment of paternity, a man shall be relieved of any future obligation of support, but he cannot be relieved under that provision of past-due child support, absent some special circumstances such as an equitable defense or where a mother deprives a father of temporary custody or visitation under a valid decree. Remanded for a determination of proper arrearages. (McGowan, M.; No. SC06-415; 1-11-07; Corbin)

*Randy Tucker v. Office of Child Support Enforcement, et al.*: **[child support; retroactive modification; net-worth approach]** Petition of review granted for a case that was heard by the Court of Appeals. Appellant father's child support was increased from \$45/week to \$1,809.92/month, based on a net-worth approach. He appealed. The appellee mother and OCSE cross-appealed from the trial court's denial of their request to make the modification retroactive to the date of filing the petition for modification. The Supreme Court affirmed the trial court's use of the net-worth approach to determining the amount of child support, but reversed concerning the effective date of the modification and remanded with instructions to make the modification retroactive to the date the motion for retroactive modification was filed. (McCain, G.; No. SC06-1143; 1-18-07; Hannah)

*Stevie Christine Wilson Boyd v. Sharp Co. Circuit Court*: **[writ of certiorari; Ark.R.Civ.P 4(i)]** Plaintiff below failed to perfect service on the defendant within 120 days. Therefore, subsequent orders in the case were void ab initio and the trial court's failure to dismiss under 4(i) was an abuse of discretion. In light of contempt proceedings against her, the defendant had no other adequate remedy except a writ of certiorari. (Smith, P.; No. SC06-553; 1-25-07; Imber)

*Louanne Parker v. John Matthew Parker*: **[child support; alimony]** The Court of Appeals affirmed the trial court's calculation of the parties' incomes for child-support purposes. The Court also affirmed the modification of alimony, which included a decrease for a period and then a complete cessation. (Honeycutt, P.; No. CA06-111; 1-31-07; Vaught)

## **PROBATE**

*In the Matter of the Adoption of A.M.C., A Minor*: **[adoption; consent; Indian Child Welfare Act; ]** A case of first impression involving the Indian Child Welfare Act (ICWA), which the Supreme Court found did not apply to the child in question. The Georgia tribe to which the child belonged is not federally recognized as eligible to receive services from the U.S. Bureau of Indian Affairs. Therefore, he is not an "Indian child" under the ICWA, so the Act does not apply to this adoption, as the circuit court had found. Secondly, the circuit court was also correct in finding that consent of the natural father was not required because he had failed significantly without justifiable cause for at least one year to provide support for the child as required by the

parents' divorce decree, or that he had abandoned the child without justifiable cause for a period of one year. Finally, the adoption by the stepfather was in the best interest of the child. The adoption was affirmed. (Sullivan, T.; No. SC06-820; 1-7-07; Imber)

## JUVENILE

*Arkansas Dep't of Human Servs. v. Jones* [PC Custody] Circuit Court affirmed for placing the custody of a child with his paternal grandparents who lived in another state at the probable cause hearing and closing the case. DHHS appealed on five grounds. The case arose when the police were contacted when a two year-old was left locked in a car at the mall. The mother appeared and DHHS took a 72 hold and filed an emergency petition for custody. Prior to the probable cause hearing the child's father filed a paternity petition to establish paternity and to request the child be placed in the custody of his parents.

At the probable cause hearing, both parents and the maternal and paternal grandmother testified they all lived in Sallisaw, Oklahoma. They also testified that the child had lived with the paternal grandparents since April 2005 and they all wanted custody to remain with the paternal grandparents. The paternal grandmother testified that the child was covered on their health insurance policy. Evidence also included an approved home study from a licensed social worker for Arkansas without objection, a background check, testimony that the grandparents had provided excellent care for the child, and several letters from community members stating that the paternal grandparents were qualified and financially able to care for the child. The AAL recommended placement with the paternal grandparents. OCC objected and requested a home study pursuant to ICPC, but stated when asked by the judge that the only services DCFS would offer the mother would be parenting classes. The circuit court found that probable cause existed at the time of removal; the father was the legal father; an approved home study was performed and custody should be placed with the grandparents. Since no further services were found to be necessary, the court closed the case.

First, DHHS argued that the court could not close the case prior to adjudication. The Court held that the statute does not require the court to hold an adjudication. Second, DHHS argued that the home study was not performed by a licensed "certified" social worker; however, DHHS did not object to the social worker's qualification or the home study at the hearing. DHHS' third argument was that a court may not grant permanent custody at a probable cause hearing. Ark. Code. Ann. §9-27-315(a)(1)(B) specifically provides that the courts may enter orders as to "issues to custody and delivery of services" at probable cause hearings.

Finally, DHHS argued that the court abused its discretion by not complying with ICPC. The Court stated that the Arkansas Supreme Court made it clear in *Huff* that ICPC is limited to placement of a child in foster care or dispositions preliminary to adoption. DHHS argued that amendments to ICPC post *Huff* to the definition of foster care to include a child parent(s) or relative had remedied *Huff*. The Court stated that the new definition makes it clear that whether a situation is considered foster care depends not upon the relationship of the care giver, but upon the reason for the placement. The circuit court did not place the child in foster care with anyone,

it restored custody and ICPC does not apply. (Hewett, M.; 06-630; 1-31-2007; Bird)

*Albright v. Arkansas Dep't of Human Servs.* [TPR] TPR affirmed. Appellant argued that the circuit court erred in basing the TPR finding upon an issue unrelated to the original adjudication order and that there was insufficient evidence to support the finding that he sexually abused his child. The child was originally adjudicated dependent-neglected for educational neglect; however, during the case the child disclosed sexual abuse and testified to such at a hearing, along with other witnesses including the investigator. DHHS filed for TPR on three grounds, including aggravated circumstances subjecting a child to sexual abuse.

The circuit court made explicit findings that the child's statements were credible along with other testimony at the TPR hearing sufficient to establish that the appellant perpetrated sexual abuse. (Collier, L.; CA06-270; 1-31-07; Griffin)

*Judkins r. Arkansas Dep't of Human Servs.* Circuit Court affirmed. [Removal of AAL]. This case began as a FINS case and the court later ordered the child in DHHS custody in order to protect the child. The court appointed an AAL for the child. Appellant filed a motion to remove the AAL on the basis that he was biased and adverse, since he represented her former husband in a divorce proceeding. The court conducted a pre-trial hearing on the issue and the AAL stated that he could perform his duties as an AAL without be influenced by previous litigation experience with the appellant. The court denied appellant's motion. Appellant offered no evidence in fact that the AAL was biased against her.

[Permanency Planning] At the permanency planning hearing the court determined that it was in the juvenile's best interest for the goal to be changed and he authorized plan for permanent placement with the juvenile's father. The court further made specific findings as to the permanency plan alternatives and why this plan was in the child's best interest. Appellant failed to demonstrate that the court erred.

Appellant argued that the trial court erred because the father failed to show a material change of circumstances to warrant the change in custody. Had this been a domestic relations case the burden would be on the father to show such a change; however, it is a FINS case and the dispositions are governed solely by the juvenile code.

Finally, appellant argues that it was not in the juvenile's best interest to be placed with his father and that her mental evaluation was faulty and there were variations of opinion about alleged sexual abuse. Due deference to assess creditably of the witness is left the trial judge and the Court found that it was not left with a distinct and firm conviction that a mistake had been made. The trial court was affirmed on all points. (Coker, K.; CA06-258; 1-31-07; Robbins)

*C.C.B. r. Arkansas Dep't of Human Servs.* [Child Maltreatment Central Registry] Appellant appeals the Circuit Court order affirming his placement on the Child Maltreatment Central Registry and argued that it is unconstitutional and the Administrative Law Judge erred in refusing

a statutory defense and allowing hearsay evidence.

Appellant challenges the constitutionality of the statutes and procedures operating the central registry, specifically that there is a conflict of interest that the administrative law judge is part of the Office of Chief Counsel and subordinate to the chief counsel, thus the prosecutor and judge come from the same agency therefore it violates appellate's due process rights. The Court noted that the only allegation regarding the appearance of impropriety was based on the fact that the ALJ and OCC are seeking to keep appellant's name on the registry. Appellant has the burden to demonstrate that he was denied due process based on the statutory scheme, the scheme itself does not automatically result in such a violation.

Appellant also argued that the standard of proof by preponderance of evidence is too low and it should be clear and convincing evidence. The traditional standard of administrative hearings is proof by preponderance of evidence. Further, appellant has not shown how he has been prejudiced by the standard of proof

Appellant argued that the administrative judge erred in failing to sustain his objection to hearsay testimony and to consider a statutory defense. The evidence is clear that the appellant had sex that constitutes placement on the registry. It is within the administrative judge's prerogative to consider or reject the defense proffered. Further, administrative proceedings are civil in nature and the rules of evidence need not be strictly adhered to. (Fox, T.; 06-554; 1-25-07; Corbin)

## **EIGHTH CIRCUIT**

*Lee v. Pine Bluff School*: **[school trip/civil rights]** District court did not err in dismissing school district from Section 1983 action arising out of a student's death as the complaint failed to allege any policy or custom of the district which caused an alleged constitutional violation. With respect to the band leader defendant who was in charge of the school trip, the district court did not err in dismissing the action as the student was not within the limited class of persons to whom the state owes a constitutional duty to provide some degree of medical care. Voluntary participation in an out-of-town extracurricular activity does not impose a constitutional duty on state actors to care for individuals who participate in the event. (E.D. Ark.; # 05-2011; 1-8-07)