

APPELLATE UPDATE

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ANNOUNCEMENTS

On March 2, 2006, the Supreme Court published proposed changes to rules affecting civil practice for comment. The comment period ended March 31, 2006. A copy of the *per curiam* order was included in the weekly mailout.

CRIMINAL

Barnes v. State: [**aggravated assault on corrections facility employee; felony information**] While the trial judge could have allowed the State to amend the information as requested, or explicitly stated that he was relying on the amended version of the statute (aggravated assault on corrections facility employee) in making his bench trial ruling, the appellant failed to meet his burden of proving that the trial court's failure to do so was reversible error. (Langston, J.; CACR 05-959; 3-1-06; Gladwin)

Deshazer v. State: [**sufficiency of the evidence; theft; forgery**] Because the lack of any reasonable explanation of the manner in which the appellant acquired the forged \$9,900 cashier's check warranted an inference that the possessor committed the forgery or was an accessory to its commission, the trial court did not err in inferring the appellant's intent. (Sims, B.; CACR 05-903; 3-1-06; Baker)

Higgins v. State: [**failure to disclose State's agreement with testifying co-defendant**] Where no deal had been offered by the State to a co-defendant at the time he testified against the appellant on aggravated robbery and theft charges, there was no violation of *Brady* by the State for failure to disclose such an agreement. (Langston, J.; CACR 05-779; 3-1-06; Gladwin)

Osborne v. State: [**A.C.A. §5-4-403; constitutionality**] The trial court did not err in determining that the subdivisions of A.C.A. §5-64-403 relating to the possession of drug paraphernalia with the intent to manufacture methamphetamine are not unconstitutional. [**jury instructions; lesser included offenses**] Because the appellant claimed innocence, there was no rational basis for

issuing jury instructions on any lesser-included offenses. (Erwin, H.; CACR 05-267; 3-1-06; Griffen)

Carey v. State: **[sufficiency of the evidence; rape; issue preservation]** The appellant's motion for directed verdict was clearly general and lacked any mention of the specific element or elements which the State may have failed to establish, and the directed verdict motion was not preserved for appeal. (Humphrey, M.; SCCR 05-782; 3-2-06; Brown)

Thessing v. State: The appellant was convicted of capital murder and other charges and sentenced to death. **[competency to stand trial]** Although the opinions of the medical experts conflicted as to whether the appellant was competent to stand trial, there was substantial evidence to support the circuit court's finding that the appellant was competent to stand trial. **[voir dire; death penalty; death qualification; A.R.Cr.P. Rule 32.2]** The circuit court did not abuse its discretion in refusing to allow defense counsel to ask rehabilitative questions to certain prospective jurors that the State chose to strike for cause. **[mistrial; crack cocaine use; A.R.E. Rule 404(b); res gestae]** Evidence that the appellant smoked crack cocaine (purchased with money taken from the victim) with his friends subsequent to the murder was admissible under A.R.E. Rule 404(b) as *res gestae* evidence. **[mistrial; closing argument]** Although the appellant did not formally raise mental illness and defect as a defense, he put his mental competency at issue by his direct testimony. The prosecutor's statement during closing argument of the guilt phase that the appellant "has been judged competent for trial" did not require a mistrial. Whatever the impact of the prosecutor's argument that the appellant had been judged competent, the jury unanimously found mental illness as a mitigating circumstance, and any prejudice resulting from the prosecutor's comment was minimal. **[aggravating circumstance; pecuniary gain]** There was substantial evidence that the appellant committed the murder for pecuniary gain. **[aggravating circumstance; vulnerable victim]** Substantial evidence supported the jury's finding that the victim was especially vulnerable to attack due to physical disability. **[closing argument; attempt to diminish jury's sense of responsibility]** The prosecutor did not make an inaccurate statement about the jury's role in sentencing the appellant to death, and the circuit court did not abuse his discretion in denying the appellant's motion for mistrial or by not admonishing the jury on this point. **[mitigating circumstances; jury instructions]** Any discrepancy in the wording of the model instruction (which stated that a "mitigating circumstance is shown if you believe from the evidence that it probably existed") and the statute actually benefitted the appellant, and there was no reversible error in giving the model instruction which included the word "probably." **[jury verdict forms; mitigating circumstances as of "the time of the murder"]** The discrepancy in the verdict forms argued by the appellant did not rise to the level of serious error or a matter essential for the jury's consideration, and the case was affirmed. (Proctor, W.; SCCR 05-420; 3-2-06; Brown)

Robbins & Steenblock v. State: **[search and seizure; warrantless home entry; exigent circumstances]** Although there was a nine year old child present in the home where there were methamphetamine manufacturing supplies present, ample opportunity existed for the police to obtain a search warrant, and there were no exigent circumstances to justify the warrantless entry into the home. **[search warrant; fruit of illegal seizure]** Although no evidence was seized during the initial illegal warrantless entry, the subsequent finding of evidence (pursuant to a search

warrant) was the result of the exploitation of the initial illegal seizure. The fruits of the illegal seizure were poisoned by the officers' unlawful warrantless entry, and the trial court erred in denying the appellants' motion to suppress. (Keith, T.; CACR 05-717; 3-8-06; Neal)

Bryant v. State: **[request for mental evaluation; denial]** The appellant put forth no evidence (independent of his former counsel's allegations) to suggest that he lacked an appreciation for the seriousness of the charges against him or an ability to assist his attorney in his defense. Based on the trial court's two in-court interviews of the appellant, the trial court found that the appellant was fit to proceed, and nothing in the record, outside of comments by former counsel, indicated otherwise. The trial court did not err in denying the request for mental evaluation. (Anthony, C.; CACR 05-405; 3-8-06; Griffen)

Collins v. State: The appellant was convicted of capital murder and sentenced to death in 1997. **[Rule 37.5; postconviction petitions; counsel]** The circuit court's denial of the appellant's Rule 37.5 petition was reversed and remanded for the appointment of a Rule 37.5 qualified attorney and for the appellant to file a verified petition for postconviction relief that complies with Rule 37.5. (Yates, H.; SCCR 05-71; 3-9-06; Hannah)

MacKool v. State: **[sufficiency of the evidence; accomplice testimony; corroboration]** There was sufficient evidence to support the appellant's convictions for first degree murder and theft of property. **[confession; suppression; invocation of right to attorney]** The circuit court did not err in denying the appellant's motion to suppress statements made to the police, where the State showed that the statements were voluntary, and where the appellant failed to prove that any statements he gave were coerced. Although it was clear that the appellant initially invoked his rights, it was equally clear that when the appellant did speak to police, the appellant initiated the further communication. Where the appellant did not offer testimony that his confession was induced in any way, there was no specific evidence to refute, and the State's burden to produce all material witnesses at the suppression hearing did not arise. **[refusal to redact statement]** The trial court did not err in refusing to redact the appellant's statement with regard to references in the statement to appellant's "record" and the appellant's invocation of his right to remain silent. **[marital privilege]** The appellant's communication to his wife (an accomplice in the murder) about how she should act and what she should not disclose to the police was exempt from the marital privilege, and the trial court did not err in allowing the wife to testify about the communications. In making several conflicting statements to the police, the appellant waived the marital privilege because he disclosed a significant part of the privileged matter in his statements. **[hearsay; state of mind]** The trial court did not err in allowing the State's witnesses to repeat out of court statements made by the victim, in which she expressed her fear of the appellant. **[medical examiner's testimony; emotional nature of the crime]** The victim had been stabbed over seventy times by her daughter (the appellant's wife), and her throat had been slit in an attempted decapitation. The trial court did not err in preventing questioning of the medical examiner as to the "emotional nature" of the crime. The trial court did not err in finding that the medical examiner was not qualified to testify about the "psychology" of the crime. **[questions posed to witnesses by jurors]** During the trial, jurors submitted fifty-nine questions to be asked of witnesses; six questions were disallowed by the circuit court, and the remaining questions were asked of the witnesses. It was within the trial court's discretion to allow jurors to ask questions

of witnesses. The appellant failed to demonstrate prejudice, and the circuit court did not err; however, the Supreme Court expressed “that we have concerns about the practice of permitting jurors to question witnesses.” The issue was referred to the Supreme Court Committees on Criminal Practice and Civil Practice for study. **[evidence; financial documents]** The trial court did not err in admitting financial documents found in the appellant’s possession (including a quitclaim deed, collection letters, account statements, a default judgment, and bankruptcy documents) as evidence of the appellant’s lifestyle to show that the appellant and his wife were having financial trouble and that financial gain was a motive for the murder. **[sentencing; evidence; prior bad acts]** The trial court did not abuse its discretion during the penalty phase in admitting evidence of the appellant’s prior bad acts (including a thirty two year old murder investigation and a ten year old expunged conviction). **[mistrial; statement by juror during voir dire]** The circuit court did not abuse its discretion in refusing to declare a mistrial after a potential juror testified that she was acquainted with the appellant and had a “negative perception” of him. **[mistrial; statement by witness]** The trial court did not abuse its discretion in allowing a witness to testify that he had told police that he thought the appellant was involved in the murder, where the trial court admonished the jury to consider the statement only for purposes of whether the witness had made a prior inconsistent statement and not as evidence of guilt or innocence. (Proctor, W.; SCCR 05-609; 3-9-06; Hannah)

Green v. State: The appellant was convicted of four counts of capital murder and one count of kidnapping, and sentenced to death on each capital murder count and to life imprisonment on the kidnapping count. **[sufficiency of the evidence]** The testimony presented at trial, without the use of the accomplice testimony, established that the crimes were committed and connected the appellant to the crimes. The trial court did not err in denying the appellant’s directed verdict motion. **[marital privilege]** The trial court did not err in allowing the appellant’s wife to testify about statements made by the appellant where the statements were made in the presence of third parties. The trial court did not err in allowing the appellant’s wife to testify about statements made by the appellant to her that were intended to establish an alibi. **[evidence; prior bad acts]** The trial court abused its discretion in allowing a witness to allude to her belief that the appellant played a role in her nephew’s (not a murder victim in the case at bar) murder and disappearance. The trial court abused its discretion in refusing to grant a mistrial. The trial court abused its discretion in allowing one of the appellant’s sons to testify that the appellant had always been on the outside of the law and had physically abused him from the time he was a child. The trial court improperly allowed the appellant’s daughter to testify that the appellant was abusive to her brother and her mother; there was no relevance or basis for allowing continual testimony that the appellant was abusive and controlling. The trial court abused its discretion in allowing the appellant’s son to testify that he frequently smoked methamphetamine with the appellant, and that he stole under the appellant’s direction. The trial court abused its discretion in allowing the appellant’s wife to testify that the appellant mentally and physically abused his family, that she knew more about the appellant than she could tell the jury, and that she felt safer since the appellant’s arrest. **[mistrial; admonishment]** The trial court’s admonishment to the jury was sufficient to overcome any prejudice that may have resulted from a statement of a witness that “[i]f I was on the jury, I’d convict him,” and a mistrial was not necessary. **[chain of custody; DNA evidence]** The trial court did not abuse its discretion by admitting the DNA results (taken from blood in the carpet in the victims’ family car) and allowing a crime lab serologist to testify

about the results. The appellant failed to expose any actual tampering, planting of evidence, or significant gap in the chain of custody. **[closing argument; comment on failure to testify]** The prosecutor's comment (regarding the whereabouts of the appellant on the night of the murder) did not refer to the appellant's failure to testify, and as such was not improper. (Erwin, H.; SCCR 04-1379; 3-9-06; Corbin)

Williams v. State: **[sufficiency of the evidence; possession of firearm; joint occupancy]** The State failed to prove that the appellant possessed the gun (which was found in an apartment jointly occupied by the appellant and his girlfriend) because it failed to show that the appellant exercised care, control, and management over it, and the appellant's felon in possession of a firearm conviction was reversed and dismissed. **[marijuana possession; subsequent offense]** Although the appellant had previously been convicted of possession of cocaine, the appellant had not previously been convicted of possession of marijuana, and it was error for the trial court to allow the appellant to be charged as a second-time offender (for possession of marijuana). The marijuana conviction was reduced from a class D felony to a class A misdemeanor and remanded for resentencing. (Proctor, W.; CACR 05-1064; 3-15-06; Glover)

Scissom v. State: **[probation; revocation; additional period of confinement]** Because the statute in effect at the time the underlying offense was committed only allowed for a period of confinement not to exceed 120 days, the trial court, at the revocation hearing, apparently operated under the amended statute, which became effective after the date of the offense, and clearly erred in imposing an additional period of confinement (in a regional correctional unit) of 365 days. (Patterson, J.; CACR 05-725; 3-15-06; Roaf)

Davis v. State: The appellant was convicted of capital murder and kidnapping, and was sentenced to life imprisonment plus twenty years' imprisonment. **[sufficiency of the evidence]** There was sufficient evidence of premeditation and deliberation to support the capital murder conviction. **[voir dire]** The trial court did not abuse its discretion during jury selection by treating each side leniently and allowing the prosecution to touch on intent, while allowing the defense to educate the jury on justification. **[mistrial; outburst of family member of victim]** The trial court did not abuse its discretion in denying the appellant's motion for mistrial after the victim's mother cried out (in the presence of the jury) after seeing a post-mortem picture of the victim. **[lesser included offenses; kidnapping]** Because first and second degree false imprisonment are not lesser included offenses of kidnapping, the trial court did not err by not instructing the jury as such. (Proctor, W.; SCCR 05-849; 3-16-06; Dickey)

Whitt v. State: The appellant was convicted of capital murder and aggravated robbery and sentenced to two consecutive life terms. **[sufficiency of the evidence]** There was substantial evidence to support the appellant's convictions for aggravated robbery and capital murder. (Singleton, H.; SCCR 05-1181; 3-16-06; Hannah)

Wilson v. State: The appellant was convicted of capital murder and sentenced to life imprisonment. **[sufficiency of the evidence]** Although the appellant's presence at the crime scene did not make him an accomplice as a matter of law, the appellant's conduct to which he confessed amounted to more than mere presence at the murder scene. (Langston, J.; SCCR 05-870; 3-16-

06; Gunter)

Hamm v. State: **[directed verdict motion; renewal after rebuttal evidence]** Where the appellant did not renew his motion for a directed verdict after the presentation of his sur-rebuttal evidence, which was the last evidence, the appellant's directed verdict claims were procedurally barred on appeal. **[A.R.E. Rule 404(b); pedophile exception]** It was not a manifest abuse of discretion for the trial judge to admit a different minor victim's testimony under the pedophile exception because of the numerous similarities between the two incidents. **[evidence of exoneration in previous trial involving different alleged minor victim]** The trial court did not err in excluding evidence that the appellant had been acquitted of charges involving the different minor victim. **[pedophile exception]** The trial court did not abuse its discretion in admitting testimony by a witness (that during a church lock-in the appellant held a little girl of unspecified age in an inappropriate manner, straddling his pelvic area) to show that the appellant was possessed of a depraved sexual instinct and had a proclivity for molesting young girls. The testimony was also relevant to show preparation or a plan on the part of the appellant. **[arraignment on amended charge]** Because the appellant waived formal arraignment (on a charge of second degree sexual assault which was amended to rape) by appearing and announcing ready for trial, and because he suffered no prejudice by not being arraigned, there was no reversible error. **[evidence; transcripts of police interviews]** While attempting to show that the investigator coaxed or cajoled the minor victim into giving incriminating testimony, the appellant expressly referred to selective portions of the police interviews. Thus, the entire transcript of the two interviews was properly admitted to refute a charge of improper influence and to provide context. (Reynolds, D.; SCCR 05-676; 3-16-06; Dickey)

Steward v. State: **[restraint of defendant during trial]** Under the circumstances, the trial court did not abuse its discretion in ordering that the appellant be restrained (by leg chains) during the jury trial. Moreover, the trial court properly instructed the jury to disregard the fact that the appellant had on leg chains. Furthermore, the appellant could not show prejudice where the jury convicted him of lesser included offenses, found him not guilty of one offense, and could not agree on a sentence. **[additional mental evaluation]** Although the appellant was hearing voices during his trial, the trial court did not err in refusing to order an additional mental evaluation. Prior to trial, the appellant had been evaluated and found not fit to proceed, but had his fitness restored after a stay in the state hospital. Any further mental health evaluations were purely discretionary with the trial court. (Erwin, H.; CACR 05-221; 3-22-06; Gladwin)

Yankaway v. State: The appellant was convicted of capital murder and sentenced to life imprisonment without parole. **[lesser included offenses; skip rule]** Where the jury was instructed on capital murder and the lesser included offense of first degree murder, and convicted the appellant of the greater charge, the "skip rule" barred the appellant's argument that the trial court erred in failing to give a second degree murder instruction. **[impeachment; prior inconsistent statement; extrinsic evidence]** The trial court did not err in denying the admission of testimony from an impeachment witness (extrinsic evidence), where the witness to be impeached had not been given an opportunity to explain or deny the inconsistent statement. (Hill, V.; SCCR 05-1071; 3-23-06; Corbin)

Johnson v. State: The appellant was convicted of capital murder and aggravated robbery, and was sentenced to life imprisonment plus twenty years' imprisonment. [**sufficiency of the evidence**] There was sufficient evidence to support the appellant's convictions. [**mistrial; mention of polygraph**] Where the State did not elicit the witness's comment about a polygraph test, and nothing in the witness's testimony indicated how she had performed on the test, there was no inference as to the result of the test, and the trial court did not abuse its discretion in denying the appellant's motion for mistrial. [**confession; cocaine intoxication**] Based on a review of the evidence, the trial court's decision to deny the appellant's suppression motion (which was based on the appellant's allegation that she was under the influence of cocaine at the time of her statement) was not clearly against the preponderance of the evidence. (Goodson, D.; SCCR 05-1030; 3-23-06; Glaze)

CIVIL

Guerrero v. OK Foods: [**workers comp**] Court refused to expand the intentional-tort exception to the exclusive-remedy doctrine. (Wilkinson, N.; CA 05-865; 3-1-06; Bird)

Yu v. Metropolitan Fire Extinguisher Co.: [**comparative fault**] A plaintiff who is free of fault can recover damages if her fault is less than the fault of the defendant. The fault of each individual plaintiff must be compared with the fault of all the defendants without regard to the fault of other plaintiffs. (Sims, B.; CA 05-856; 3-1-06; Hart)

Roberts v. Boyd: [**adverse possession**] The contiguous requirement of the adverse possession statute is satisfied in this case. There was no physical boundaries (such as a street) to disrupt the contiguous nature of the properties but merely a "gap" between the two competing properties. Each piece of property was contiguous to the gap property. The land claimed by adverse possession included the gap property. (Lindsay, M.; CA 05-568; 3-1-06; Griffen)

American Underwriters Ins. Co. v. Drummond: [**insurance**] Insurer had no duty to defend under terms of the policy when insured intentionally shot a gun out of car window and person was injured from the shot. This incident was not an "auto accident." (Simes, L.; CA 05-847; 3-1-06; Hart)

Tri-County Solid Waste District v. Ark. Pollution Control and Ecology Comm.: [**landfill permit**] There was substantial evidence to support the Commission's decision that the Waste Management Board was wrong in denying a landfill permit. (Mashburn, M.; SC 05-589; 302006; Glaze)

Deaver v. Falcon Properties: [**revivor**] The lawsuit was properly revived by the entry of an order substituting the son as a party for his mother who died during the pendency of the action. Although the term "revive" was not used in the pleading and order, it was implicit that the suit was to continue. (Clawson, C.; CA 05-1019; 3-8-06; Hart)

Dodson v. Allstate Ins.: [**summary judgment**] Summary judgment is improper when there are

questions of material fact with regard to a party's intent. (Sims, B.; SC 05-731; 3-9-06; Glaze)

Brewer v. Carter: **[illegal exaction]** Plaintiff did not have standing to bring illegal exaction claim because funds were paid by an insurance company and not with tax dollars. (Cole, J.; SC 05-738; 3-9-06; Imber)

Beebe v. Fountain Lake Sch. Dist.: **[res judicata]** Claim was not res judicata. Prior claims involved litigation of Amendment 59. This action involved Amendment 74 and was not litigated in prior action. (Erwin, H.; SC 05-508; 3-9-06; Gunter)

Harvest Rice v. Fritz Lehman Elevator and Dryer: **[statute of frauds]** Buyer report constituted a writing in confirmation of oral contract – not merely negotiations. The merchant's execution was satisfied. (Gibson, B.; SC 05-716; 3-9-06; Gunter)

Daniel v. City of Ashdown: **[inverse condemnation]** The limitations period in which to bring an inverse condemnation case is 7 years. (Yeagan, C.; CA 05-424; 3-15-06; Roaf)

Van Buren Sch. Dist. v. Jones: **[class certification]** Court did not abuse its discretion in certifying action by teachers against the district as a class action. (Medlock, M.; SC 05-861; 3-16-06; Brown)

Crawford County v. Jones: **[counties]** The county assessor's actions, acting in her capacity as an elected official, can be imputed to the county itself to impose liability on the county. **[whistle blowers act]** Fired employee's claim under the Whistle Blowers Act should have been submitted to the jury. (Cottrell, G.; SC 05-680; 3-16-06; Corbin)

Heinemann v. Hallum: **[contribution]** Attempt to recover monies paid out as a result of a lawsuit, which stemmed from claims for fraud and breach of fiduciary duty constituted contribution even though facts had their derivation in the distribution from an estate. Claim for contribution does not accrue until one pays more than his share. (Burnett, D.; SC 05-876; 3-16-06; Brown)

Van Carr Enterprises v. Hamco: **[contract]** Contract could be enforced even if it contained an illegal rate of interest. It was only void as to the usurious rate, but the remaining provisions were enforceable. A borrower cannot waive a usury defense by requesting specific performance. (Sutterfield, D.; SC 05-954; 3-16-06; Imber)

Concrete Wall Systems v. Master Paint: **[personal jurisdiction]** Court had personal jurisdiction over Kansas corporation because corporation had one significant contact with the State of Arkansas. It filed a lien on real property in the state, and by doing so, it invoked the jurisdiction of the state for its own benefit and sought the protection of our courts. (Cook, V.; CA 05-1046; 3-22-06; Gladwin)

Ken's Discount v. Meeks: **[premises-liability/duty]** Property owner did not violate any duty owed to bicycle rider who was injured when he struck the horizontal crossbar of a sign on the

premises. Owner was not guilty of willful or wanton misconduct. Furthermore, crossbar was an obvious danger. (Guthrie, D.; CA 05-208; 3-22-06; Crabtree)

Hardy v. USAA: **[declaratory judgment act]** Plaintiff sought to bring a declaratory judgment action against insurer testing whether a claim for a tort heretofore not recognized in Arkansas would be recognized. This was an improper use of declaratory judgment, and the case was properly dismissed for lack of a justiciable controversy. Suing an insurer to determine whether the plaintiff had a claim against a third party is improper because the relationship between the insurer and its insured has no bearing on the existence of the claim. The plaintiff should bring the action directly against the third party. (Anthony, C.; CA 05-918; 3-22-06; Roaf)

Mack v. Sutter: **[legal malpractice]** To prevail in an attorney malpractice claim, plaintiff must show but for the alleged malpractice, the result of the underlying action would have been different. In this case, the plaintiff must prove that he would have prevailed in his underlying discrimination case. Here, the evidence is clear that it cannot be shown that but for the alleged misconduct he would have prevailed on his discrimination claim. (Fox, T.; SC 05-748; 3-23-06; Hannah)

Combs v. City of Springdale: **[appeal city council/Inferior Rule 9]** Thirty-day time to file appeal from city council's zoning decision begins to run from date of council's action and not from date that council approved the minutes of the earlier meeting. Approval of the minutes is not equivalent to the entry of a judgment. The council's final action was at the meeting where the vote was taken. (Smith, K.; SC 05-1-32; 3-23-06; Dickey)

First National Bank of Lewisville v. Mayberry: **[appealable order/rule 60--correct erroneous documents]** Trial court did not rule on the motion to vacate. Motion cannot be deemed denied because a clerical error can be raised at any time under Rule 60. There was no final appealable order; therefore, the appellate court lacks jurisdiction. (Anthony, C.; SC 04-1381; 3-23-06; Dickey)

Windsong Enterprises v. Upton: **[bill of assurance/amendment/ interference with business expectancy]** Summary judgment on business expectancy claim was proper. Basis of claim was related to amendment to bill of assurance which restricted plaintiff's ability to build multi-family residences although such structure were permitted in original bill of assurance. Plaintiff knew or should have known that restrictions in bill of assurance could be amended. It could not have an expectancy in restriction that was always amendable. (Harkey, J.; SC 05-616; 3-23-06; Imber)

DOMESTIC RELATIONS

Jerome Mark Shipp v. Toni P. Shipp: **[child support--retroactive modification]** Child support can be modified retroactively only to the date of the petition to modify child support, not to the date of the last child-support order. (Thomas, J.; No. CA 05-469; 3-1-06; Neal)

Eugene Newton v. Catherine D. Tidd: **[domestic abuse--order of protection]** The evidence was

insufficient to establish that the appellant committed domestic abuse. (Looney, J.; No. CA 05-982; 3-8-06; Pittman)

James E. Morehouse v. Lori Morehouse Lawson: **[child support–deviation from the chart]**

The appellant sought a modification in child support based upon his alleged reduction in income resulting in a material change in circumstances. The court reduced his monthly obligation from \$8,333 to \$7,608, and relieved him from some additional obligations, such as payment of school tuition and expenses for extracurricular activities. The appellant appealed, arguing that he was entitled to further reductions and contending that the court should have deviated from the support chart to correspond with the reasonable needs of the children. The appellee cross-appealed, arguing that the original award should be reinstated because the modified amount was inconsistent with the chart amount. The Court of Appeals found that the trial court had erred in reducing the monthly child support because the amount awarded is inconsistent with the support chart and the trial court made no written findings to support a deviation from the chart. (Lineberger, J.; No. CA 05-581; 3-8-06; Robbins)

Thomas John Farrell v. Olivia Farrell: **[divorce; property–marital]** The disputed property was stock in the Arkansas Writer’s Project, Inc., now known as the ARC Project, Inc. (ARC), a holding company that includes subsidiaries which publish the *Arkansas Times* and *Arkansas Business*. Appellee purchased the stock before the parties married with money she borrowed from her grandparents. The loan was repaid over several-years, mostly after the marriage. The trial court found that the stock was non-marital property but that the increase in the value of the stock was marital property because the appellee spent a substantial amount of time during the marriage working to increase the value of the company and of the stock. The trial court found that the stock had increased from a value of zero to \$832,639.50. The court also found that an unequal division was equitable based upon the factors in Ark. Code Ann. 9-12-315, and he set out his reasons why. (Smith, V.; No. SC 05-433; 3-9-06; Corbin)

Tori Romeo Benedix v. Richard Randall Romeo: **[custody; relocation]** The trial court denied the appellant custodial mother’s relocation request, finding that the appellee father overcame the presumption in favor of a custodial parent’s relocation with the child. In reversing, the Court of Appeals found that, under *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), the mother had no burden to show that the move was advantageous to herself or her child. Nor under *Hollandsworth* is there a burden to prove that the move will provide an equally or more stable situation for the child. (Maggio, M.; No. CA 05-418; 3-15-06; Bird)

Kenneth Connally v. Catherine Connally: **[post-decree motion; service]** Parties divorced in 1997, and before entry of the decree, the parties executed an agreement regarding two business entities. Catherine was to retain them, but was to pay Kenneth 49% of the sale proceeds if she sold them within five years. The agreement was incorporated but not merged into the divorce decree. Kenneth filed a motion to enforce the decree, using the caption and docket number of the parties’ divorce case, alleging that Catherine had sold the businesses and owed him money. The issue was whether he had properly served Catherine, who has moved to Canada, by his three attempted means of service: (1) mail; (2) commercial courier; and (3) personal service. The trial court found that he had not. (Gray, A.; No. CA 05-897; 3-22-06; Baker)

PROBATE

Shirley Bailey v. Emile Maxwell, et al.: **[guardianship–qualification to serve as guardian]** The trial court found that the appellant was not qualified to serve as guardian of her grandchildren because she offered no testimony stating that she was not a convicted and unpardoned felon, a statutory prerequisite to one's serving as a guardian. In affirming, the Court of Appeals found no error in the trial court's not considering the best interest of the child because, without a showing that she was not a convicted and unpardoned felon, appellant was not qualified to be appointed. (Whiteaker, P.; No. CA 05-700; 3-1-06; Crabtree)

Rusty Wayne Escobedo v. Mark Nickita, et al.: **[adoption; notice; consent]** The trial court granted a petition for adoption, finding that neither notice to nor consent from the appellant putative father was required. The court also dismissed as moot the putative father's petition for paternity. The putative father appealed, claiming the court had erred in granting the adoption without notice or consent. The court looked at the meaning of "otherwise legitimated" found in Ark. Code Ann. 9-9-206(a)(2)(Repl. 2002), and at whether the appellant has "otherwise legitimated" the child in this case. (Mashburn, M.; No. SC 05-315; 3-9-06; Gunter)

JUVENILE

Knight v. v. Arkansas Dep't of Human Servs., **[TPR]** In *Knight I*, 87 Ark. App. 230 (2004), the trial court was reversed for terminating appellant's parental rights. DHHS sought review with the Supreme Court, which was denied, and then later filed a second petition for TPR, which was affirmed. Appellant did not challenge the sufficiency of the evidence or that the TPR was in the child's best interest, appellant only argued that the trial court erred by not following the Court of Appeal's order to provide reunification services which violated her due process rights.

The appellate court noted DHHS' meager attempts at providing reunification services, but stated that the children had been out of the mother's home for over three years and neither child had seen their mother in two years. At the advise of counsel she refused subsequent drug screens after she tested positive, when she denied using drugs. As a result, she was denied visitation with her children. Appellant also did not maintain stable housing or employment. (Collier, L.; No. 04-752, 3-8-2006; Roaf).

Moiser v. Arkansas Dep't of Human Servs., **[Dependency Adjudication]** Dependency adjudication reversed where parent was arrested and there were appropriate relatives to care for the child. Ark. Code Ann. 9-27-303(17)(B) provides that a child is dependent when a parent is incarcerated and there is no appropriate relative or friend to care for the child. In this case when the father was arrested his father and an aunt and uncle were available to take custody of his child.

Parent counsel also presented evidence at the adjudication that DCFS had reviewed their respective homes and found them appropriate. No evidence was presented at the hearing that the relatives were inappropriate to care for the child. (Choate, S.; 05-366; 3-22-2009; Vaught)

EIGHTH CIRCUIT

Miller v. Baker Implement Co.: **[products liability]** District court did not abuse its discretion in excluding the testimony of plaintiff's experts, as expert had not shown that an alternative fire suppression system was feasible or possible for the cotton picking machine involved in the accident at issue. (E.D. Ark.; # 04-3419; 3-1-06)

Servewell Plumbing v. Federal Ins. Co.: **[forum selection clause]** District court did not err in dismissing action based on a forum selection clause in the applicable contract which required any claim to be brought in Florida. Forum selection was neither unreasonable nor unjust, and enforcement of the clause would not violate Arkansas's public policy. (E.D. Ark.; # 05-1548; 3-2-06)

Skokos v. Rhoades: **[immunity]** Prosecutor was entitled to qualified immunity on claim he violated plaintiff's rights when he advised the Fort Smith police that the tabletop games in plaintiff's business establishment were illegal gaming devices. Police had probable cause to believe the games were contraband and did not need to have a warrant in order to seize them. (W.D. Ark.; # 05-2374; 3-10-06)

Wilson v. City of Malvern: **[qualified immunity]** Defendants were entitled to qualified immunity on claim they violated plaintiff's civil rights by constructing a drainage ditch to flood her property, as there was no evidence in the record from which a jury could find defendants' actions constituted purposeful race discrimination. Defendants were not entitled to qualified immunity on plaintiff's claim that their failure to maintain the ditch was racially motivated.. Claim that city officials harassed plaintiff's sister in retaliation for plaintiff's complaints was not supported by the record, and defendants were entitled to qualified immunity on that claim. (W.D. Ark.; #05-1231; 3-21-06)

U.S. SUPREME COURT

Georgia v. Randolph: **[search]** Respondent's estranged wife gave police permission to search the marital residence for items of drug use after respondent, who was also present, had unequivocally refused to give consent. Respondent was indicted for possession of cocaine, and the trial court denied his motion to suppress the evidence as products of a warrantless search unauthorized by consent.

Held: In the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry renders warrantless entry and search unreasonable and invalid as to him.

The Fourth Amendment recognizes a valid warrantless entry and search of a premises

when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, and no present co-tenant objects. A disputed invitation, without more, gives an officer no better claim to reasonableness in entering than the officer would have absent any consent. Disputed permission is no match for the Fourth Amendment central value of respect for the privacy of the home.

A co-tenant who has an interest in bringing criminal activity to light or in deflecting suspicion from himself can tell the police what he knows for use in getting a warrant. This case, which recognizes limits on evidentiary searches, has no bearing on the capacity of the police, at the invitation of one tenant, to enter a dwelling over another tenant's objection in order to protect a resident from domestic violence. Though alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside, nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. Here, respondent's refusal is clear, and nothing in the record justifies the search on grounds independent of his wife's consent. ((No. 04-1067; March 22, 2006)

U.S. v. Grubbs: **[search]** A Magistrate Judge issued an anticipatory search warrant for respondent Grubbs' house based on a federal officer's affidavit. The affidavit explained that the warrant would not be executed until a parcel containing a videotape of child pornography, which Grubbs had ordered from an undercover postal inspector, was received at, and physically taken into, the residence. The affidavit also referred to two attachments describing the residence and the items to be seized. After the package was delivered and the search commenced, Grubbs was given a copy of the warrant, which included the attachments but not the supporting affidavit. When he admitted ordering the videotape, he was arrested, and the videotape and other items were seized. Following his indictment for receiving child pornography, Grubbs moved to suppress the seized evidence, arguing, that the warrant was invalid because it failed to list the triggering condition. The Ninth Circuit reversed, concluding that the warrant ran afoul of the Fourth Amendment's particularity requirement, which, under Circuit precedent, applied to the conditions precedent to an anticipatory warrant.

Held: The warrant at issue did not violate the Fourth Amendment's particularity requirement. The Amendment specifies only two matters that the warrant must particularly describe: "the place to be searched and the persons or things to be seized." That language is decisive here. The particularity requirement does not include the conditions precedent to execution of the warrant. Respondent's two policy rationales-that setting forth the triggering condition in the warrant itself is necessary (1) to delineate the limits of the executing officer's power and (2) to allow the individual whose property is searched or seized to police the officer's conduct find no basis in either the Fourth Amendment or Federal Rule of Criminal Procedure 41. (No. 04-1414; 3-21-06)

Merrill Lynch v. Dabit: **[securities/preemption]** Dabit filed a private securities fraud class action in federal court, invoking diversity jurisdiction to advance his state-law claims that petitioner, his former employer, fraudulently manipulated stock prices, causing him and other brokers and their

clients to keep their overvalued securities. The District Court dismissed his amended complaint, finding his claims pre-empted by title I of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which provides that no covered class action based on state law and alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security may be maintained in any State or Federal court by any private party.

Held: The background, text, and purpose of SLUSA's pre-emption provision demonstrate that SLUSA pre-empts state law holder class-action claims of the kind Dabit alleges.

(No. 04-1371; March 21, 2006)