

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
SEPTEMBER, 2008 VOLUME 16, NO. 1

ANNOUNCEMENTS

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

On September 18th, the Supreme Court adopted amendments to Rule 4 of the Rules of Appellate Procedure – Criminal, Rule 4-3 of the Rules of the Supreme Court, and adopted a Conditional Plea Form to be use with Rule 24.3 of the Rules of Criminal Procedure. The *per curiam* order was included in the mailout. **In addition, a copy of the Conditional Plea Form is appended to the *Appellate Update*.**

On September 25th, the Supreme Court adopted amendments to Rules 6-9 and 6-10 of the Rules of the Supreme Court and Court of Appeals. The *per curiam* order was included in the mailout.

CRIMINAL

Duncan v. State: **[warrants]** A warrant issued by a circuit clerk without the authorization of a judge is defective and invalid. The appellate court will not “assume” that a judge authorized a warrant to be issued. **[jurisdiction]** Because a valid arrest warrant was not issued during appellant’s probationary period, the circuit court was without jurisdiction to revoke appellant’s probation. (Jones, B.; CACR 08-141; 9-3-08; Vaught).

Kelley v. State: **[sufficiency of the evidence; computer child pornography; internet stalking of a child]** There was substantial evidence to support appellant’s convictions for computer child pornography and internet stalking of a child. **[constitutionality of statute; Arkansas Computer Pornography Statute]** The Arkansas Computer Pornography Statute is not overly broad or unconstitutional on its face or as applied to appellant. Additionally, the statute does not criminalize a substantial amount of lawful speech without a compelling State interest in doing so. **[appellate procedure]** The appellate court will not address an argument on appeal when a contemporaneous objection was not made to the trial court. (William, S.; CACR 07-633; 9-3-08;

Baker).

Drake v. State: [**guilty pleas**] A defendant may not withdraw his plea of guilty or *nolo contendere* as a matter of right after it has been accepted by the court. Rule 26.1 of the Arkansas Rules of Criminal Procedure does not require that the court accept a guilty or *nolo contendere* plea by express words. (Gibson, R.; CACR 07-1338; 9-3-08; Bird).

Warren v. State: [**sufficiency of the evidence; commission of a terroristic act; first-degree battery**] There was substantial evidence to support appellant's convictions for commission of a terroristic act and first-degree battery. Appellant's convictions for commission of a terroristic act and first-degree battery do not violate principles of double jeopardy because he was not punished twice for the same crime. (Erwin, H.; CACR 07-942; 9-10-08; Robbins).

Anderson and Givens v. State: [**motion to suppress**] Following a tip from a confidential informant, law enforcement officials discovered appellants in a motel room napping during the middle of the day. The motel room was not registered to appellants and they had not paid for the room. Appellants consented to a search of the room. Appellants did not have any personal belongings in the motel room. After contraband was discovered, during the search of the room, appellants filed motions to suppress the evidence. Appellants' motions were denied. On review, the Court of Appeals concluded that the appellants' physical presence in the motel room, without additional evidence, did not establish that they possessed a legitimate expectation of privacy in the motel room. Accordingly, the trial court correctly denied appellants' motions to suppress. (Sims, B.; CACR 07-1333; 9-10-08; Heffley).

Wertz v. State: [**corroboration of accomplice testimony**] Appellant was convicted of two counts of capital murder. During his trial, appellant's accomplice testified about the facts surrounding the murders. A felony conviction cannot be based upon the testimony of an accomplice unless the testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. Corroborating evidence must be evidence of a substantive nature because it must be directed toward proving the connection of the accused with a crime and not directed toward corroborating the accomplice's testimony. The test for corroborating evidence is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence would independently establish the crime and would tend to connect the accused with its commission. On review, the Supreme Court concluded that there was sufficient corroborating evidence to support the testimony of appellant's accomplice and affirmed appellant's convictions. [**aggravating circumstance**] There was substantial evidence whereby the jury could have found the existence of an aggravating circumstance during the penalty phase of appellant's trial. [**mitigating circumstance**] The jury did not err in finding that a mitigating circumstance did not exist during the penalty phase of appellant's trial. (Erwin, H.; CR 07-1155; 9-18-08; Danielson).

Sales v. State: [**sufficiency of the evidence; capital murder; aggravated robbery**] There was substantial evidence to support appellant's convictions for capital murder and aggravated robbery. [**mistrial**] Potential jurors were present when law enforcement officials showed crime-scene photographs to the victim's family. Based upon these facts, appellant requested a mistrial. The trial court denied his request and the Supreme Court, holding that appellant failed to show

how he was prejudiced by the foregoing facts, affirmed the trial court. **[aggravating circumstance]** There was substantial evidence whereby the jury could have found the existence of an aggravating circumstance during the penalty phase of appellant's trial. (Gibson, R.; CR 07-1308; 9-18-08; Hannah).

Bienemy v. State: **[sufficiency of the evidence; capital murder]** Because appellant failed to make a specific motion for a directed verdict at trial, as is required by Rule 33.1 of the Arkansas Rules of Criminal Procedure, the Supreme Court was precluded from reviewing appellant's challenge to the sufficiency of the evidence on appeal. (Edwards, R.; CR 08-514; 9-18-08; Corbin).

*Costes v. State:***[revocation of probation]** Law enforcement officials discovered 4.3 milligrams of methamphetamine in appellant's purse. The appellate court concluded that this was a "usable" amount of a controlled substance. Accordingly, the trial court did not err in finding that there was sufficient evidence upon which to base the revocation of appellant's probation. (Cox, J.; CACR 08-55; 9-24-08; Robbins).

Weaver v. State: **[motion to dismiss]** Appellant was arrested and convicted of driving while intoxicated and driving left of center. Prior to trial, appellant filed a motion to dismiss the charges against him based upon an illegal arrest. Appellant's motion was denied by the trial court. On appeal, the Court of Appeals affirmed the lower court's actions and explained that a motion to dismiss is not the proper mechanism for challenging an illegal arrest. The appeals court noted that an invalid arrest may call for the suppression of a confession or other evidence, but it does not entitle the defendant to be discharged from the responsibility for the offense. (Arey, F.; CACR 07-1278; 9-24-08; Vaught).

Clark v. State: **[standard of review; voluntariness of confession]** The appellate courts in Arkansas are not constitutionally bound to apply the standard of review that is outlined in *Ornelas v. U.S.*, 517 U.S. 690 (1996) when considering a trial court's determination of the voluntariness of a confession. However, the standard of review that is applied by the appellate courts in Arkansas is consistent with *Ornelas*. In cases involving a ruling on the voluntariness of a confession, the appellate court makes an independent determination based upon the totality of the circumstances. The appellate court reviews the trial court's findings of fact for clear error, and the ultimate question of whether the confession was voluntary is subject to an independent, or *de novo*, determination by the appellate court. **[constitutional right to record entire police interview]** There is not an Arkansas statute that requires law enforcement officials to record an interrogation in its totality. The Supreme Court declined to recognize a constitutional right to a recording of all phases of a police interrogation leading to a confession in appellant's case. **[jury instructions]** AMI Criminal 2d 110 correctly conveys the concept of reasonable doubt to a jury. (Wyatt, R.; CR 07-1276; 9-25-08; Imber).

Williams v. State: **[sufficiency of the evidence; engaging children in sexually explicit conduct for use in visual or print medium]** There was substantial evidence to support appellant's conviction of engaging children in sexually explicit conduct for use in visual or print medium. **[admission of evidence; DVD]** Video evidence is admissible if it is relevant, helpful to the jury, and not prejudicial. A defendant cannot prevent the admission of evidence simply by conceding

to the facts of the crime. The trial court properly admitted a DVD depicting the appellant engaging in sexual acts with children because the footage established the elements of the crimes for which appellant was charged and the video served a valid purpose other than inflaming the passions of the jury.

(Pope, S.; CR 07-1266; 9-25-08; Brown).

Allen v. State: [**rape-shield statute**] Because appellant failed to comply with the requirements of the rape-shield statute by filing a written motion and obtaining a written record of an *in camera* hearing on his motion, the appellate court was precluded from reviewing appellant's challenge on appeal. [**404(b); pedophile exception**] The trial court properly allowed a witness, who was sexually abused by the appellant, to testify pursuant to the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. (Hanshaw, L.; CR 08-47; 9-25-08; Imber).

Rohrbach v. State: [**sufficiency of the evidence; rape; sexual assault in the second degree; terroristic threatening in the first degree**] There was substantial evidence to support appellant's convictions of rape, sexual assault in the second degree, and terroristic threatening in the first degree. [**404(b); pedophile exception**] The trial court properly allowed a witness, who was sexually abused by the appellant, to testify pursuant to the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. [**admission of evidence**] Appellant requested that the trial court exclude evidence of a witness, who planned to testify that appellant threatened to harm and kill her. The trial court denied appellant's request and determined that the testimony was relevant to show appellant's intent, plan, and motive. The Supreme Court affirmed the trial court's decision and noted that the evidence was independently relevant to prove that appellant attempted to silence a witness. [**motion to set aside the guilty verdict**] After the jury found appellant guilty, he moved for a judgment notwithstanding the verdict. The trial court denied his motion. Rule 50 of the Arkansas Rules of Civil Procedure allows a party to ask that the circuit court set aside the verdict in civil cases, there is no such procedure available in criminal cases. (Smith, P.; CR 08-132; 9-25-08; Hannah).

Brown v. State: [**sufficiency of the evidence; first-degree murder**] Because appellant failed to make a specific motion for a directed verdict at trial, as is required by Rule 33.1 of the Arkansas Rules of Criminal Procedure, the Supreme Court was precluded from reviewing appellant's challenge to the sufficiency of the evidence on appeal. [**sentence**] On appeal, appellant asserted that his sentence was unconstitutional. However, he failed to present an objection to his sentence to the circuit court. A defendant, who makes no objection at the time the sentence is imposed, has no standing to complain of it on appeal. Accordingly, the Supreme Court declined to consider appellant's challenge on appeal. (Arnold, G.; CR 08-127; 9-25-08; Danielson).

CIVIL

Muldoon v. Martin: [**jurisdiction/tax assessment**] County courts have exclusive jurisdiction over a claim alleging a flaw in assessment or erroneous collection. Circuit court lacked subject matter jurisdiction to hear the claim. (Kennedy, J.; CA07-1337; 8-27-08; Robbins)

Lackey v. Mays: [**duty/invitee**] Plaintiff knew of and appreciated the danger related to traffic

flow on the parking lot; consequentially, the landlord had no duty to warn the plaintiff. **[damages]** Plaintiff suffered damages in two separate wrecks. Evidence supported court's division of damages. (Maggio, M.; CA06-521; 8-27-08; Marshall)

Discover Bank v. Pommell: **[evidence]** Ark. Code Ann. Section 16-46-108 (allowing introduction of business record via affidavit) is a valid hearsay exception even though it is not set out in the Rules of Evidence but in a statute. (Halsey, B.; CA08-54; 9-3-08; Bird)

Knox v. Regions Bank: **[contract]** Borrower presented submissible breach of contract claims because although contract allowed lender to pay directly to contractor, bank could not do so unilaterally but the borrower had to apply for any payment. **[fiduciary duty]** Contract created a fiduciary duty between lender and borrower because agreement appointed lender attorney in fact with respect to payments. (Clawson, C.; CA08-60; 9-3-08; Glover)

Follett v. Fitzsimmons: **[adverse possession]** Adverse possession by an adjoining landowner was not established. Use was not hostile nor exclusive. (Scott, J.; CA08-275; 9-3-08; Pittman)

Warren Wholesale, Inc. v. McLane Co.: **[Tobacco Control Board]** Appeal is moot because rules and regulations under review were repealed while appeal was pending. (Kilgore, C.; SC 07-1034; 9-11-08; Corbin)

Health Resources v. Flener: **[employment benefits]** Employee died while still working for the company; therefore, under the policies he was not entitled to be paid vacation/retirement benefits. Death was not equivalent to retirement. (Kemp, J.; SC 08-177; 9-11-08; Danielson)

Ark. Comprehensive Health Ins. Pool v. Denton: **[CHIP/subrogation]** Under Ark. Code Ann. Section 23-79-510, CHIP has a right to subrogation only after the insured is made whole. (Clawson, C.; SC 08-334; 9-11-08; Hannah)

Knott v. Carr: **[contempt]** For a party to be held in contempt for violating a court order, the order must be clear and definite as to the duties imposed upon the party. In this case the order was not clear and definite. (Wyatt, R.; CA 07-883; 9-17-08; Heffley)

Stilley v. UAFS: **[contempt]** Trial court properly found attorney in contempt. The attorney was on notice that he faced contempt if he took certain actions in a case, so he should not have been surprised that consequences followed based upon his conduct. (Tabor, S.; SC 07-981; 9-18-08; Gunter)

Southern Farm Bureau v. Easter: **[insurance exclusion/public policy]** Eluding lawful arrest exclusion in insurance policy was not void as against public policy under the compulsory insurance law. Insurer was also permitted to exclude payment of benefits under no-fault law. (Keith, T.; SC 08-358; 9-18-08; Brown)

Dachs v. Hendrix: **[wrongful death/limitations]** Action was not brought by personal representative; therefore, complaint was a nullity and amended complaint was barred by limitations. Tolling periods for minors do not apply when a personal representative can bring a

wrongful death or survival action. (Burnett, D.; CA 08-106; 9-24-08; Bird)

DOMESTIC RELATIONS

Brandt v. Brandt: [**divorce—decree; child support**] The Court of Appeals found that the divorce decree, in part the parties' agreement and in part the trial court's decision on the issue of child support, did not provide for automatic increases in child support beyond the year 2000. The Court also found it clear in the decree that appellant's 1999 and 2000 bonuses were to be included in child-support calculations, but found it unclear from the parties' calculations whether it was done. The Court ordered the child-support arrearages, based upon salary and bonuses, to be recalculated upon remand. (Pierce, M.; No. CA 07-1346; 8-27-08; Glover)

Czupil v. Jernigan: [**jurisdiction; UCCJA/UCCJEA**] Although the Arkansas trial court had jurisdiction over the divorce of the child's parents, the court never acquired jurisdiction over the child under the uniform law in effect at the time—the Uniform Child Custody Jurisdiction Act (UCCJA). The child's home state was Georgia. She was born in Georgia, lived with her mother in Georgia, and had never been to Arkansas. Home state jurisdiction was in Georgia, which had never declined to exercise that jurisdiction. An order entered by a court that acts without subject-matter jurisdiction is void and cannot be enforced. The court did not have continuing, exclusive jurisdiction over the subject matter because its continuing jurisdiction was based on a child-custody determination that was void. (Cottrell, G.; No. CA07-1253; 9-10-08; Bird)

Harrison v. Harrison: [**child custody—change in custody**] In this substituted opinion on grant of rehearing, the Court of Appeals affirmed the trial court's original decision to leave custody of the parties' child with the appellee father. In its first opinion, the Court of Appeals had reversed the trial court and had changed custody from the father to the mother. In this opinion, the majority agreed with the appellant who contended in his petition for review that the Court in its original opinion (1) had failed to adhere to the well-settled standard of review and (2) had speculated about what the testimony at trial might have been, assuming that custody was denied or awarded on a single issue. The Court affirmed the trial court's finding that no material change in circumstances was shown and that the best interests of the child supported that she remain in her father's home. (Van Ausdall, R.; No. CA07-587; 9-17-08; Glover)

Erwin v. Pace: [**temporary custody order—appealability**] The appealability of a temporary custody order is limited—it is not appealable if further presentation of proof on the issue of custody is contemplated. The Court of Appeals said it has no authority to overrule the Supreme Court on this issue and, until the Supreme Court rules otherwise, the Court of Appeals must adhere to its rule of nonappealability. (Kilgore, C.; No. CA07-1261; 9-24-08; Baker)

Robinson v. Robinson: [**divorce; default judgment; damages**] After entry of a default judgment of divorce after defendant filed an untimely answer, the defendant, who was present at the hearing, should have been permitted to present evidence and cross-examine the plaintiff-appellee on the issues of marital property and debt. The Court of Appeals said, "In Arkansas, a default judgment establishes the liability, but not the amount of damages. A hearing is required to determine the amount of damages, and the plaintiff is required to introduce evidence of the

damages....Except in cases where the claim is for a sum certain, where the party against whom judgment by default is sought has appeared in the action, default judgment may be entered by the court only after the defaulting party is given notice of a hearing on the issue of damages.... An ‘appearance’ under this rule is any action on the part of a defendant, except to object to jurisdiction, that recognizes the case as in court....” (Citations omitted) The Court concluded, “We hold that the trial judge abused her discretion by refusing to allow appellant, who had appeared, to present a defense to the property division and debt claims, and we reverse and remand for retrial of those issues.” (McGowan, M.; No. CA07-1250; 9-24-08; Pittman)

PROBATE

Scroggin, et al. v. Scroggin, et al.: **[trust–distribution of property; statute of limitations; summary judgment]** Upon the death of their father, six sons created a trust in 1959 for the support of their mother. The mother died in 1999 at the age of 102. The appellants are the three sons who survived her; the appellees are the surviving spouses and children of her three deceased sons. The Court of Appeals affirmed the trial court in all respects, resolving four issues the appellants raised: (1) The appellees’ claims were not barred by the statutes of limitations (the statute begins to run when an issue of pecuniary consequence arises, here, well within the statute). (2) The trial court did not err in considering appellees’ motion for summary judgment even though it was filed less than forty-five days before the scheduled trial date (that timetable is not a jurisdictional bar to considering the motion). (3) The trial court correctly found that the original trust agreement was valid, the appointment of a successor trustee was invalid (absent authority in the trust instrument, a trustee has no power to appoint his successor), and the lease of mineral interests by the successor trustee was invalid (without authority to appoint a successor trustee, the designation of the successor trustee was void, so his subsequent actions as trustee were void). (4) Wilhelmina Scroggin, widow of one of the sons, was entitled to an interest in the estate as an heir of her husband, not as a dower right which she had undisputedly waived in 1959. (McCormick, D.; No. CA07-1011; 9-10-08; Hunt)

JUVENILE

Porter v. Arkansas Dept. of Human Servs., **[D-N Adjudication]** DHS’ original petition for emergency custody and dependency-neglect alleged that appellant’s children were at risk due to the parents inability to provide supervision and to make decisions that protect and keep them safe. DHS alleged that the parents’ consent for D.P. to marry a stranger from the internet posed a threat to all children under their supervision. Appellant argued that the decision to remove his children from custody was based on his lawful consent and that the court violated his 14th Amendment due process rights to make child care decisions.

The evidence before the trial judge included that the appellant allowed D.P., at the age of 15, to date a 34-year-old man without appropriate supervision. D.P. had inappropriate sexual contact before the marriage, including the posting of sexually exploitative pictures on the internet. The parents consented to marriage without appropriate inquiry into man’s background. The Court found that “this easily qualifies as evidence of appellant’s failure to properly supervise D.P., which resulted in her being left alone, creating a dangerous situation.”

Further, the therapist testified that she believed that D.P. had been neglected as a result of the parents' inability to provide a stable and nurturing environment. The therapist testified that the long history of neglect and trauma, multiple school and home placements, and the parents' substance abuse and mental illness had resulted in D.P.'s lack of trust in most adults and institutions. There was additional evidence of educational and medical neglect. As to the other children, there was evidence of sexual contact between siblings and failure of appellant to notice or prevent repeated sexual contact between the siblings.

The Court held there was sufficient evidence for the trial court to find that appellant failed to provide for the essential and necessary mental and emotional needs of his children. There was also sufficient evidence to finding that this behavior constituted abuse as it caused direct injury to D.P.'s emotional and psychological development.

[Marriage Valid] Prior to the dependency-neglect adjudication, the attorney ad litem filed a motion to void the marriage of D.P. due to the parents disregard to D.P.'s health and safety. The trial judge was correct in finding that the Arkansas Code Revision Commission lacked the authority to Amend Act 441 2007 in its codification that resulted in changing the meaning and substance of the Act.

However, the Supreme Court held that the trial court erred in voiding the marriage. The Court held that the trial court did not meet the burden of clear and convincing evidence of misrepresentation of age, but rather there was extreme carelessness on the part of the parents in supervising D.P. The trial court's finding that the marriage was void based on the best interest of the child and that the marriage was incompatible with the goal of reunification had not statutory basis. The Court also found that there was no evidence to void the marriage based on D.P.'s lack of mental capacity to enter the marriage. Immaturity is not enough and no inquiry was made by the trial court as to D.P.'s capacity at the time of the marriage.

Finally, the Court held that the validity of the marriage had no effect on the state's ability to assume custody of D.P. and for the court to order the same. DHS custody of D.P. will not change. (Wood, R., ; 08-359; 9-11-2008; Brown)

Arkansas Dept. of Human Servs. v. A.B., **[Child Maltreatment Registry]** Circuit Court reversed and administrative judge affirmed. DHS appealed the Circuit Court reversing an administrative law judge's decision that a minor, A.B., must remain on the registry. The trial court ruled that A.B. was denied a meaningful opportunity to be heard, to cross-examine witnesses, and to confront his accuser. The trial court declared the DHS administrative procedure unconstitutional. The state's only witness was a police officer, who never interviewed the alleged victim and whose conclusion on forcible compulsion was based on hearsay. The alleged victim, his interviewer, and the officer who observed the interview were all available to testify, but DHS did not call them as witnesses.

The U.S. Supreme Court has identified three factors that must be considered to determine whether administrative procedures are constitutional:

- (1) the private interest that will be affected by official action,

(2) the risk of an erroneous deprivation of such interest through the procedures used, (3) the probable value, if any, of substitute procedural safeguards, and the governmental interest, including the function involved and the fiscal and administrative burdens that the additional and substitute procedural requirement would entail. *Matthew v. Eldridge*, 424 U.S. 319 (1976)

Under this analysis and review of the Child Maltreatment Act, the Court found that the statutorily recognized due-process rights were not violated in this case. The Court noted that the Act acknowledges the rights of confrontation and cross-examination and provides a process to issue subpoenas at the request of the alleged offender. The Court held that DHS was not and should not be required to call the victim to testify. The record reflected that *A.B.* subpoenaed the victim and other adverse witnesses, but chose not to call them because he was under the impression that DHS was required to do so. *A.B.* was afforded the opportunity to subpoena, confront, and cross-examine witnesses, but waived his right by failing to present their testimony.

As to the issue of substantial evidence as to forcible compulsion, the Court held that there was substantial evidence that *A.B.* engaged in both deviate sexual activity and forcible compulsion. In addition to the evidence, the relative age and relationship between the boys support such a finding.

A.B.'s argument that the "adverse interference rule," citing that a presumption is always open to explanation by circumstance which make some other hypothesis a more natural one than the fear of exposure, was without merit. (Scott, J. ; 07-897; 9-11-2008; Imber)

Garcia Strickland v. Dept. of Human Servs., [TPR] TPR reversed. Appellant argued insufficiency of evidence. Children were adjudicated dependent-neglected in March 2006, and among many orders, the court ordered the appellant to obtain stable housing. The appellant moved eight times during the course of the case, and the vast majority of the moves occurred after the first year of the case. The Court found that "although the trial court ordered the appellant to maintain stable housing, nothing in the court order required the appellant to stay in a fixed location in order to meet that requirement." Appellant always had some type of housing, and DHS did not present clear and convincing evidence that any of these residences were unsafe or inappropriate. (French, T ; CA08-441; 9-24-2008; Griffin)

Per Curiam (D-N Appellate Rules 6-9 and 6-10) The Supreme Court adopted amendments to *Rules 6-9 and 6-10 of the Rules of the Supreme Court and Court of Appeals*. Effective immediately. (*Arkansas Supreme Court Per Curiam*; 9-25-2008)

EIGHTH CIRCUIT

Rose v. City of Mulberry: [arrest] While the city police officer did not have authority under Arkansas law to make traffic stops and arrests on the interstate highway, he had probable cause to arrest Rose and so the arrest did not violate Rose's civil rights. (W.D. Ark.; No.07-1645; 7-9-08)

Warren v. State Farm Fire & Casualty: **[insurance/misrepresentation]** The district court did not err in directing a verdict for plaintiff on defendant's material misrepresentation defense as the statements upon which the defense relied were either not material misrepresentations or were not made intentionally. Court's statement to the jury that it had directed a verdict on the material misrepresentation affirmative defense did not prejudice the jury's consideration of the defendant's arson defense. (E. D. Ark; No: 07-2010; 07/10/2008)

Johnson v. Norris: **[habeas/effective assistance]** Given the absence of Supreme Court guidance on the issue of whether the right to confront a witness should trump the state's psychotherapist-patient privilege, the decisions of the Arkansas courts to enforce the privilege and prevent Johnson from obtaining the treatment notes of his victim's minor daughter were within the range of reasonableness allowed by the Antiterrorism and Effective Death Penalty Act. Arkansas courts did not err in finding counsel acted within the wide range of professionally competent assistance when he advised Johnson not to testify at a pretrial hearing. Counsel's failure to raise a constitutional challenge to the trial court's refusal, on a state law ground, to allow one of his witnesses to testify was not ineffective assistance of counsel as there was no basis for a constitutional challenge to the decision. Arkansas courts did not err in rejecting Johnson's vagueness argument with respect to the aggravating circumstance that the murder was committed in an "especially cruel manner." Arkansas courts did not err in finding admission of victim impact testimony did not violate Johnson's constitutional rights. Arkansas courts correctly applied established federal precedent in determining a change of venue did not deprive Johnson of his constitutional right to trial by a fair cross-section of the community. (E. D. Ark.; No: 07-3058; 8-8-08)

Thornton Drilling Company v. National Union Fire Insurance: **[insurance]** District court did not err in construing a sequence of written agreements to determine that a subsequent contract that applies more specifically to the drilling work in question was controlling on the issue of indemnification. (W. D. Ark.; No: 07-2950 and No: 07-3079; 8-12-08)

Northland Casualty Company v. Meeks: **[insurance]** District court did not err in finding deceased was insured's employee and thus excluded from insured's business auto policy coverage. Court did not err in determining that the deceased was not a temporary worker as defined in the policy. (E. D. Ark.; No: 07-3057 and No: 07-3199; 8-28-08)

Lowry v. Watson Chapel School District **[Civil Rights]** The district court did not err in finding that defendant School District violated plaintiffs' First Amendment rights when it disciplined them for wearing black arm bands to protest the school's dress code. District court did not err in holding that nominal damages must be awarded when the jury finds a violation of plaintiffs' constitutional rights, and it did not abuse its discretion in amending the judgment to reflect a nominal damage award as a matter of law. District court did not err in permanently enjoining defendants from disciplining any student who wears a band substantially like the ones plaintiffs wore around their wrists. (E.D. Ark.; No: 07-3437 and No: 08-1139; 9-2-08)

Koch v. Compucredit Corporation: **[Consumer law]** Validity of assignment was matter for the

court, rather than an arbitrator, to decide. Plaintiff's obligation to arbitrate a dispute over her credit card debt was not terminated when she settled the debt. This continuing obligation to arbitrate gave the credit card company a present interest in the contract, and its assignment of that interest to defendant was valid. (E.D. Ark.; # 07-1948; 9-23-08)

CONDITIONAL PLEA FORM

[For use with Rule 24.3(b), Arkansas Rules of Criminal Procedure]

IN THE CIRCUIT COURT OF _____, ARKANSAS

_____ Division

No. _____

STATE OF ARKANSAS

v.

_____, Defendant

CONDITIONAL PLEA

I, _____ (*name of defendant*), with the approval of the court, and the consent of the Prosecuting Attorney am entering a plea of [guilty] [no contest] to Count 1. _____

Count 2. _____

Count 3. _____

I understand my plea is conditioned upon the filing of an appeal on the issue of _____ (*describe pretrial motion [to suppress seized evidence] [to suppress custodial statement] upon which appeal will be based*).

I understand that, if the judge approves my plea of [guilty] [no contest], a judgment and sentence will be entered, and that I may appeal on the issue specified above in the manner provided by the rules of court.

I understand that if I win my appeal on the issue specified above, that I may withdraw my plea of [guilty] [no contest].

I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading [guilty] [no contest], if my plea is not later withdrawn, I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

Date

Defendant

DEFENSE COUNSEL REVIEW

I have reviewed this conditional plea with my client, and I have discussed with my client its consequences.

Defense counsel

Date

PROSECUTOR APPROVAL

I have reviewed this conditional plea and consent to it.

Prosecutor Attorney

Date

COURT APPROVAL

This Conditional Plea Agreement is approved, and I direct that it be entered of record in this case.

Circuit Judge

Date

This Conditional Plea Form shall accompany the Judgment and Commitment Order Form or Judgment and Disposition Order Form and be made a part of the record in the case.

I certify this is a true and correct record of this Court.

Date: _____ Circuit Clerk/Deputy: _____