



Administrative Order Number 8 proposal, comments regarding the Judgment and Disposition Order Form are in order. The comment period ends December 31, 2010. A copy of the per curiam was included in the weekly mailout.

## **CRIMINAL**

*Purdie v. State:* [**expert testimony**] The trial court abused its discretion when it permitted an expert witness to testify about the credibility of a victim's accusations. (Wyrick, K.; CACR 10-186; 10-6-10; Gladwin).

*Cheater v. State:* [**revocation; sentencing**] Upon revocation of appellant's concurrent suspended sentences, the trial court was authorized by statute to modify the original order and impose any sentence that appellant originally could have been given and to order that those sentences run consecutively. (Fitzhugh, M.; CACR 10-115; 10-6-10; Vaught).

*Collins v. State:* [**continuance**] The trial court did not err in granting the State a continuance. (Jones, B.; CACR 10-315; 10-6-10; Pittman).

*Porter v. State:* [**sufficiency of the evidence; first-degree battery**] There was substantial evidence to support appellant's conviction. [**motion to suppress**] Because appellant's custodial statements were voluntary, the circuit court's refusal to suppress them was not clearly against a preponderance of the evidence. (Yeagan, C.; CACR 10-86; 10-6-10; Gladwin).

*Bond v. State:* [**bail**] The trial court acted within its discretion when it increased appellant's bail as a condition of a continuance. (Clinger, D.; CACR 09-549; 10-6-10; Kinard).

*Mathis v. State:* [**sufficiency of the evidence; possession of a controlled substance with intent to deliver; possession of drug paraphernalia; simultaneous possession of drugs and firearms; maintaining a drug premises**] There was substantial evidence to support appellant's convictions. [**admission of evidence**] Although appellant was only charged with possession of marijuana, the trial court did not abuse its discretion in admitting into evidence drugs other than marijuana, which were discovered in appellant's home, because the evidence was relevant to the charge of maintaining a drug premises. (Singleton, H.; CACR 09-1296; 10-6-10; Kinard).

*Childs v. State:* [**jurors**] The trial court did not abuse its discretion in denying appellant's request to remove a juror and replace her with an alternate. (Wright, H.; CACR 10-31; 10-6-10; Baker).

*Taylor v. State:* [**sufficiency of the evidence; capital murder; kidnapping**] There was substantial evidence to support appellant's convictions. [**accomplice liability**] The circuit court did not abuse its discretion in refusing to find that appellant's former girlfriend was an accomplice and in refusing to instruct the jury that it could make such a finding. (Arnold, G.; CR 10-50; 10-7-10; Gunter).

*McCoy v. State*: [**rape-shield statute**] The trial court did not abuse its discretion when it denied appellant's motion to admit evidence regarding alleged prior sexual conduct between the victim and the appellant. [**Rule 403 of the Arkansas Rules of Evidence**] The trial court did abuse its discretion when it permitted the State to cross-examine a witness about her prior relationship with a man convicted of murdering one of her children because the evidence was probative of the witness's credibility and it was not unfairly prejudicial. (Vittitow, R.; CR 10-472; 10-7-10; Gunter).

*Forrest v. State*: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court did not abuse its discretion when it prohibited the admission of improper lay-opinion testimony from appellant's wife or when it admitted certain testimony from an expert witness regarding her qualifications. (Williams, C.; CACR 10-232; 10-20-10; Robbins).

*Sweet v. State*: [**admission of evidence**] The trial court did not abuse its discretion during appellant's trial on the charge of failing to register as a sex offender when it permitted the State to introduce evidence regarding appellant's previous conviction, which required him to register as a sex offender. (Cottrell, G.; CACR 09-1323; 10-20-10; Gruber).

*Cannon v. State*: [**revocation hearing**] The rules of evidence do not apply in a revocation hearing. [**harmless error**] Appellant's confrontation right was violated by the court's admission of certain hearsay testimony. Although the trial court erred in its admission of the hearsay evidence, the Court of Appeals concluded that the error was harmless. (Erwin, H.; CACR 09-1158; 10-20-10; Baker).

*Johnson v. State*: [**Batson challenge**] The trial court did not err when it denied appellant's *Batson* challenge to the State's use of a peremptory strike to exclude a potential juror, who was an African-American woman, because the State was able to provide a race-neutral explanation for the strike. (Cox, J.; CACR 09-1050; 10-20-10; Brown).

*McCormick and Carter v. State*: [**Rule 1.8**] Rule 1.8 of the Arkansas Rules of Criminal Procedure permits a district court judge to issue a search warrant. [**search warrants**] Arkansas Code Annotated § 16-17-929 is silent with respect to which judicial officers may issue search warrants. However, Ark. Code Ann. § 16-82-201 (a) specifically authorizes "any judicial officer" in this state to issue a search warrant. (Thyer, C.; CR 10-339; 10-21-10; Hannah).

*Wagner v. State*: [**search warrant; affidavit**] The trial court did not err when it denied appellant's motion to suppress, which was based upon several challenges to the affidavit that accompanied the search warrant that was issued to search appellant's home, because the information provided in the affidavit established that probable cause existed for the circuit court to conclude that contraband would be found in appellant's residence. [**search warrant; authority to issue**] Statutes setting forth a court's territorial jurisdiction to adjudicate controversies between litigants do not control the question of when the court may issue a search warrant. A district judge is a "judicial officer" and may issue search warrants. It is not necessary for a district judge to be designated as a "criminal magistrate" pursuant to Rule 1.8 of the Rules of Criminal Procedure before he can issue a search warrant. (Hill, V.; CR 10-372; 10-21-10; Gunter).

*Lacy v. State*: [**sufficiency of the evidence; capital murder; aggravated robbery**] There was substantial evidence to support appellant's convictions. [**evidentiary rulings**] The trial court did not abuse its discretion when it excluded various testimony which consisted of hearsay, was cumulative to other testimony admitted, and was irrelevant. [**Brady violations**] In his various alleged discovery violations, appellant failed to establish that he suffered prejudice to such an extent that the outcome of the trial would have been different. [**prosecutorial abuse**] Where the prosecutor issued a subpoena, placed the witness under oath, and was present during the entire interview, which may have been led entirely by law enforcement, the Supreme Court was "reluctant" to strike the witness's testimony based upon an alleged abuse of the prosecutor's subpoena power. (Green, R.; CR 09-1340; 10-21-10; Brown).

*Arnett v. State*: [**admission of evidence**] The trial court did not abuse its discretion when it refused to admit evidence of the victim's toxicology report, which was irrelevant to the charges pending against appellant. (McCallum, R.; CACR 09-1231; 10-27-10; Vaught).

*Holliday v. State*: [**indigency**] Because appellant failed to disclose an interest in one home or to secure an equity loan on another home to finance his appeal, the trial court was not required to find appellant indigent. (Green, R.; CACR 09-764; 10-27-10; Pittman).

*Wallace v. State*: [**confrontation clause**] *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_ (2009), does not expand the holding in *Crawford v. Washington*, 541 U.S. 36 (2004), as it relates to the confrontation clause, by applying it to the sentencing phase of a trial. [**admission of photographs**] The trial court did not abuse its discretion when it admitted certain photographs into evidence because they were relevant to corroborate the victim's testimony as to the manner and violence with which she was attacked, and because they were relevant to the treating physician's testimony regarding the amount of blood loss the victim suffered. (Sims, B.; CACR 10-128; 10-27-10; Gladwin).

*Ellis v. State*: [**sufficiency of the evidence; first-degree domestic battery**] There was substantial evidence to support appellant's conviction. [**admission of photographs**] The trial court did not abuse its discretion when it admitted into evidence certain photographs, which were more probative than prejudicial. (Sims, B.; CACR 10-175; 10-27-10; Kinard).

*Branning v. State*: [**Rule 37**] Appellant was not incarcerated at either the time that he filed his Rule 37 petition or the time that a hearing was held on his petition. Based on these facts, the trial court dismissed appellant's petition. When the trial court's order was entered, appellant was incarcerated. Because appellant was in custody when the trial court's order was entered, the trial court erred in dismissing the Rule 37 petition. (Webb, G.; CR 09-15; 10-28-10; Danielson).

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

*Ridgell v. State*: (possession of a controlled substance with intent to deliver) CACR 10-343; 10-6-10; Brown.

*Beckmann v. State*: (second-degree forgery; third-degree domestic battering; resisting arrest) CACR 10-18; 10-6-10; Henry.

*Gray v. State*: (aggravated residential burglary; aggravated robbery; first-degree false imprisonment; aggravated assault; third-degree battery) CACR 10-296; 10-6-10; Robbins.

*Woods v. State*: (possession of a controlled substance with intent to deliver; maintaining a drug premises; possession of drug paraphernalia; simultaneous possession of drugs and firearms) CACR 10-287; 10-6-10; Hart.

*Snider v. State*: (aggravated robbery; kidnapping) CACR 10-385; 10-20-10; Abramson.

*Burrow v. State*: (possession of drug paraphernalia) CACR 10-35; 10-20-10; Glover.

*Walker v. State*: (rape) CACR 09-934; 10-20-10; Kinard.

*Gormley v. State*: (theft by receiving property valued in excess of \$2,500); CACR 10-109; 10-27-10; Brown.

*Hall v. State*: (delivery of methamphetamine) CACR 10-91; 10-27-10; Baker.

## CIVIL

*Mitchell v. Fells*: [**deed reformation**] There was not substantial evidence for the jury to conclude anything other than that a mutual mistake was made and that both parties intended for the sale to pertain only to a portion of the lot containing one house as opposed to the whole lot and two houses. (Gray, A.; CA 09-1193; 10-6-10; Robbins)

*Bradshaw v. Alpha Packaging, Inc.*: [**trade secrets**] Evidence supported verdict that trade secrets were misappropriated. Customer lists and account information may constitute trade secrets. [**trial exhibits**] Information on trial exhibits regarding damages was properly admitted. (Tabor, S.; CA 09-1141; Gladwin)

*Karman, Inc. v. Elliot*: [**garnishment**] Court properly set aside a writ of garnishment for failure to strictly comply with the notice requirements.. Although party had actual knowledge of the garnishment, errors regarding names and addresses require that writ be set aside. (Yates, H.; CA 10-248; 10-06-10; Pittman)

*Minor v. Chaw Auto Finance*: [**repossession**] Secured party did not breach the peace in repossessing the vehicle. (Pearson, W.; CA 09-801; 10-06-10; Glover)

*Velazquez v. Riddle*: [**non-model jury instruction**] While the proffered instruction might be a correct statement of the law, there was no evidence to support giving it. [**jury misconduct**] Party failed to support her contention that there was juror misconduct. (Tabor, S.; CA 09- 1121; 10-06-10; Robbins)

*Parker v. Crow*: [**Carroll County**] Writ of certiorari granted to quash order dissolving Eastern and Western Districts of Carroll County. Court was without jurisdiction. (10-7-10; Brown)

*State of Louisiana v. Joint Pipeline Group*: [**Pollution Control and Ecology Commission**] Appellants failed in their burden to rebut the presumption that the Pollution Control and Ecology Commission's decision was reasonable, valid, and complied with the law. (Guthrie, D.; SC 09-1093; 10-7-10; Wills)

*Jackson v. Smith*: [**warranty of title**] Five-year limitations period for breach of warranty of title begins to run when the grantee is evicted from the property. [**estoppel by deed**] Person who signs a deed in a representational capacity purporting to convey the entire interest is estopped to claim any interest in the property in his individual capacity. (Crow, G.; CA 09-1374; 10-20-10; Vaught)

*Bank of Ozarks v. Jim Wood Co.* [**contract**] Contract required contractor to make bank a joint payee, which it did. There was no requirement that the bank be the only joint payee; therefor, inclusion of other subcontractors was permitted by the parties' agreement. (Humphrey, M.; CA 10-19; 10-20-10; Glover)

*Edwards v. Campbell*: [**candidate/elections**] Candidate for mayor was ineligible to run as a result of a conviction for misdemeanor theft of property (stealing three campaign signs). This crime constitutes an "infamous crime." An "infamous crime" is one that includes elements of deceit or dishonesty. (Fitzhugh, M.; SC 10-1020; 10-26-27; Brown)

*Allen v. Murphy* [**setoff**] Court properly set off two judgments. Because one defendant was entitled to contribution against another defendant for any sums paid on the judgment. When the latter defendant purchased the judgment, the judgments were extinguished. (Story, B.; CA10-22; 10-27-10; Brown)

*Le v. Nguyen*: [**constructive trust**] Evidence supported court's imposition of a constructive trust. (Fitzhugh, M.; CA 10-264; 10-27-10; Glover)

*Weaver v. Collins*: [**declaratory judgment**] City settled dispute with a former employee but then failed to tender payment under the settlement agreement. Court declared that the employee was entitled to payment. (Simes, L.; CA09-846; Gladwin)

*Matsukis v. Joy*: [**sua sponte summary judgment**] Court erred in sua sponte granting summary judgment without a party requesting such relief. (Crow, K.; SC 10-356; 10-28-10; Wills)

## DOMESTIC RELATIONS

*Ross v. Bugaj*: [**contempt; visitation**] The trial court found the appellant in willful contempt for both her failure to allow visitation and for her continued cohabitation. On appeal, she challenged only the ruling involving visitation. The Court of Appeals summarily affirmed the decision, noting that the Supreme Court has held that, when a court makes independent, alternative rulings that are each dispositive of an appellant's claim, and when the appellant attacks only one of those rulings on appeal, the case will be affirmed summarily without addressing either ruling. (Cook, V.; No. CA 10-66; 10-6-10; Hart).

*Office of Child Support Enforcement v. Gaddie*: [**child support—statute of limitations**] The correct statute of limitations to apply to this case was California's, not Arkansas's. The support order issued by the California court was registered in Arkansas for enforcement. As a result, Arkansas law provides that in a proceeding for arrearages, the statute of limitation under the laws of this state or the issuing state, whichever is longer, applies. In Arkansas, the statute of limitations is five years, so recovery of an arrearage is cut off when the child reaches age twenty-three. Under California law since 1993, a judgment for child support is enforceable until paid in full, so there is no limitation in time. Therefore, California law governed the limitation period in this case, and it was error for the trial court to grant the appellee's motion to dismiss. (Jamison, L.; No. CA 10-258; 10-6-10; Baker).

*Brand v. Mourot*: [**child custody—change in custody**] The Court of Appeals held that the excessive absences of the child from school and the appellant's history of thwarting visitation efforts were sufficient proof of a material change in circumstances. Those, combined with evidence that the appellee could provide the child with a good home, were enough to support the trial court's award of custody to the appellee father. (Brantley, E.; No. CA 10-42; 10-20-10; Brown).

*Craig v. Craig*: [**alimony**] The trial court abused its discretion in doubling the appellant's income for the purpose of computing alimony. The appellant's income was added to his roommate/girlfriend's income (their respective salaries were the same amount). The Court of Appeals said that the commingling of their funds in a joint-checking account did not cause her money to be imputable to the appellant so as to double his income. Nothing indicated that the appellant had control over her money. (Martin, W.; No. CA 10-344; 10-27-10; Baker).

*Vigneault v. Vigneault*: [**alimony**] The appellant alleged on appeal that the trial court abused its discretion in both the amount and the duration of alimony awarded to the appellee. The court found no merit in any of the appellant's arguments and found no abuse of discretion in the amount or the duration. The court noted that the appellant can seek modification of the award if the circumstances change. (Duncan, X.; No. CA 09-1217; 10-27-10; Henry).

*Hickman v. Hickman*: [**divorce—grounds; alimony**] The Court of Appeals found the evidence of general indignities shown in this case to be ample to support the trial court's granting a divorce. The court also found that the trial court did not abuse its discretion in awarding rehabilitative alimony or in its calculation of the amount awarded. (Pearson, W.; No. CA 10-171; 10-27-10; Vaught).

## JUVENILE

*Worell v. Arkansas Dept. of Human Servs.* [**Dependency-Neglect Adjudication**] Affirmed. Appellant challenged the sufficiency of the evidence of the d-n adjudication based on educational neglect, physical abuse by the father, and failure to protect by the mother. Appellants argued that the juvenile's testimony was not completely credible. However, the trial court credited the juvenile's testimony, which was more than sufficient to support the finding of physical abuse. The court's finding of neglect due to the mother's failure to protect was affirmed because she rejected the investigator's offer to take the juvenile to a safe place until the situation calmed down and the father could be interviewed. The appellate court noted that the juvenile was troubled but that the parents could not control her, keep her safe, or meet her needs. The court stated that since an adjudication is "centered on the child, not assigning blame to parents....we hold the adjudication was supported by the evidence." (Cook, V.;10-563; 10-6-2010; Abramson)

*Rose v. Arkansas Dept. of Human Servs.* [**Permanent Custody**] Affirmed. Appellant first argued that the trial court erred in granting custody of his daughters (8 years and 14 months) without review of a home study prior to granting custody as required by law. The appellate court cited A.C.A. 9-27-355 (c)(1) requiring a written home study to be presented to the court prior to an award of custody, but found that appellant failed to preserve this issue for appeal. Appellant then argued that the custodial placement with the maternal grandparents was not in his children's best interest, particularly when the court did not order visitation to appellant's sister or considering her as a back up placement. The court considered testimony from the child's counselor and family members and did not err in finding that placement with the grandparents was in the children's best interest and necessary for their protection. (Jamison, L.; 10-550; Gruber)

*Ross v. Arkansas Dept. of Human Servs.* [**TPR - Best Interest**] Affirmed. Appellant argued that the statute did not authorize termination where parents were still married and the rights of one of the parents is terminated. The Court of Appeals found that the circuit court has the authority to terminate on one parent upon finding that it is in the child's best interest. (McCallum, R; 10-605, 10-6-2010;Gladwin)

*Williams v. Arkansas Dept. of Human Servs.* [**TPR - Final Order**] Dismissed and no merit brief to withdraw denied. This is not a final appealable order because the trial court reserved the right to change or modify its ruling at a later date if the father's rights were not terminated. (Clark, D.;10-615, 10-6-2010; Abramson)

*Smith v. Arkansas Dept. of Human Servs.* [**TPR - no contact**] Affirmed. Trial court was not clearly erroneous where appellant failed to support or maintain meaningful contact with his children. The evidence showed that appellant made no effort to contact his children for 18 months, including letters or phone calls, while he was incarcerated or when he was released. (Arnold, G.; 10-499; 10-6-2010; Kinard)

*Porter v. Arkansas Dept. of Human Servs.* [**TPR - Best Interest & Subsequent Issues**] Affirmed. There was sufficient evidence that termination was in the child's best interest, including the potential harm of being kept in the "limbo land of foster care." The appellate court noted that although the trial court did not quote the statutory language exactly, the circuit court's intent was clear that it

terminated appellant's parental right based on the ground concerning subsequent issues. At issue here was domestic abuse. The trial court also made findings that although the parents had extra time to work toward reunification, they failed after 17 months to get their act together to be in a position to parent their child. (Branton, W.;10-595; 10-6-2010)

*Aday v. Arkansas Dept. of Human Servs.* [**No Merit TPR & No Reunification Services**] The appellate court consolidated an appeal for termination of reunification services and termination of parental rights noting that the trial court's orders were supported by almost identical testimony and documentary evidence. Evidence revealed a longstanding history with DHS, concerns over appellants ability to care for the safety of her children, refusal of most services offered by DHS, and failure to comply with case plan and court orders. (Arnold, G.; 10-33; 10-6-2010; Baker)

*C.M. v. State* [**Juvenile Sex Offender Registration**] Affirmed. Appellant at the age of 13 was charged with the rape of his two year old brother. The trial court made extensive findings: The offense was a brutal rape of a two year old and a serious felony which appellant did not dispute. Appellant was still a risk to society, had no family support, and was likely to re-offend. With regard to the level of planning the court described the physical force used in the rape and that appellate admitted to sexually abusing two other brothers and threatening them with harm if they told. As to previous history the court found that he had multiple victims, including founding a male peer while in treatment where he was discharged as a treatment failure. With regard to rehabilitation programs the court found that he had been discharged as a treatment failure in one program, but had successfully completed another program The court also found that the Community Notification Risk Assessment rating was moderate risk to re-offend, but the court found the witness that performed the assessment not credible and instead relied on a prior assessment and current safety plan that warned against allowing him to be alone with younger children. The appellate court noted that there was evidence in appellants favor including timing from his past sexual abuse, his current progress in treatment and that the Risk Assessment was the most recent assessment. The appellate court found that no one factor is determinative and due deference if given to the circuit court's credibility and evidence determinations. (Wood, R; 09-1299; 10-20-2010; Abramson)

*R.R. v. State* [**No Merit Juvenile Sex Offender Registration**] Affirmed and motion to withdraw granted pursuant to *Anders*. Appellant at the age of 15 was found delinquent for raping his younger cousin and ordered to register upon the prosecutor's motion at age 20. Appellant failed to move for a directed verdict at the close of all the evidence. As a result appellant failed to preserve the sufficiency of the evidence for review. The appellate court went further to review the trial court's findings and held that if the issue was preserved for review the trial court would be affirmed. (Wood, R; 09-1297; 10-20-2010; Kinard)

*N.J. v. State* [**No Merit Juvenile Sex Offender Registration**] Affirmed pursuant to subsection (b) *In re Memorandum Opinions*, 16 Ark 301 (1985). (Wood, R; 09-1298; 10-20-2010; Baker)

## **EIGHTH CIRCUIT**

*John Doe v. Wilcher*: **[civil rights]** The district court erred in denying school principal's and school district's motions for summary judgment on claim they violated plaintiff's civil rights when they failed to investigate and take remedial action on claims that a teacher sexually abused their minor daughter. The information the principal had before her did not provide her with actual notice of sexual abuse and her reasonable investigation did not uncover any evidence to substantiate suspicions that such conduct was occurring. As a result, she was not deliberately indifferent to violations of the student's constitutional rights, and she was entitled to qualified immunity. Under Title IX, a school district cannot be liable unless the appropriate person with authority to rectify the violation had actual notice of the alleged contact and since neither party disputes that the principal was the appropriate person for purposes of this analysis, the Title IX claim against the district must fail. (W.D. Ark.; # 09-2535; 10-19-10)