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APPELLATE REPORTS
VOLUME 48

THIS BOOK CONTAINS

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Volume 319

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
December 12, 1994 – March 13, 1995
INCLUSIVE[1]

AND

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IN THE

Court of Appeals of Arkansas

FROM
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1995

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[1]Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 790. Cite as 319 Ark. ___ (1994) or 319 Ark. ___ (1995).
[2]Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 through 240. Cite as 48 Ark. App. ___ (1994) or 48 Ark. App. ___ (1995).

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ARKANSAS REPORTS

Volume 319

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
December 12, 1994 – March 13, 1995
INCLUSIVE

MARLO MAY BUSH
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1995

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JUSTICES AND OFFICERS
OF THE
SUPREME COURT OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(December 12, 1994 –
March 13, 1995, inclusive)

JUSTICES

JACK HOLT, JR.	Chief Justice
ROBERT H. DUDLEY	Justice
STEELE HAYS	Justice[1]
DAVID NEWBERN	Justice
TOM GLAZE	Justice
DONALD L. CORBIN	Justice
ROBERT L. BROWN	Justice
ANDREE LAYTON ROAF	Justice[2]

OFFICERS

WINSTON BRYANT	Attorney General
LESLIE W. STEEN	Clerk
JACQUELINE S. WRIGHT	Librarian
MARLO M. BUSH	Reporter of Decisions

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[1]Resigned December 31, 1994.

[2]Appointed December 25, 1994, by Governor Jim Guy Tucker and sworn in January 17, 1995.

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STANDARDS FOR PUBLICATION OF OPINIONS

Rule 5-2

Rules of the Arkansas Supreme Court and Court of Appeals

OPINIONS

(a) SUPREME COURT — SIGNED OPINIONS. All signed opinions of the Supreme Court shall be designated for publication.

(b) COURT OF APPEALS — OPINION FORM. Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

(c) COURT OF APPEALS — PUBLISHED OPINIONS. Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked "Not Designated for Publication."

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case).

Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.

(e) COPIES OF ALL OPINIONS. In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.

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Acklin *v.* State, CR 94-1054 (Per Curiam), Supplemental Opinion on Denial of Rehearing April 10, 1995.

Akbar *v.* State, CR 94-728 (Per Curiam), affirmed December 12, 1994.

Andrews *v.* State, CR 94-1184 (Per Curiam), Pro Se Motion for Rule on the Clerk denied December 19, 1994.

Ayers *v.* Norris, 94-1219 (Per Curiam), Pro Se Motion for Rule on the Clerk denied December 19, 1994.

Ayers *v.* State, CR 94-1221 (Per Curiam), Pro Se Motion for Rule on the Clerk denied December 19, 1994.

Bell v. State, CR 94-1422 (Per Curiam) Pro Se Motion for Belated Appeal and Appointment of Counsel Granted January 30, 1995.

Bradley *v.* State, CR 94-871 (Per Curiam), Pro Se Motion to Amend Appellant's Brief and Pro Se Motion for Transcript Denied March 6, 1995.

Brown *v.* State, CR 94-1182 (Per Curiam), Pro Se Motion for Access to Transcript denied and appeal dismissed January 17, 1995.

Buchanan *v.* State, CR 94-518 (Per Curiam), Pro Se Motion for Access to Trial Transcript; Pro Se Motion for Extension of Time to File Brief; and Pro Se Motion to File a Belated Brief denied March 13, 1995.

Burrell *v.* State, CR 94-781 (Per Curiam), affirmed February 13, 1995.

Campbell *v.* State, CA CR 93-1187 (Per Curiam), Pro Se Motion for Transcript and for Extension of Time to File a Petition Pursuant to Criminal Procedure Rule 37 denied January 23, 1995.

Carroll *v.* State, CR 94-830 (Per Curiam) affirmed March 13, 1995.

Chelette *v.* Davis, CR 94-1253 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 30, 1995.

Cloird *v.* State, CR 95-7 (Per Curiam), Pro Se Motion for Appointment of Counsel and Extension of Time to File Brief denied and appeal dismissed February 27, 1995.

Davis *v.* State, CR 94-555 (Per Curiam), Pro Se Motion for Extension of Time to File Reply Brief granted January 30, 1995.

Davis *v.* State, CR 94-555 (Per Curiam), affirmed March 13, 1995.

Douglas *v.* State, 94-1174 (Per Curiam), Pro Se Motion for Extension of Time denied and appeal dismissed January 23, 1995.

Edgemon *v.* Norris, 94-1331 (Per Curiam), Pro Se Motion to Dismiss Appeal Without Prejudice denied and appeal dismissed with prejudice February 20, 1995.

Embry *v.* State, CR 94-1127 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted February 13, 1995.

Franklin *v.* State, CR 94-686 (Per Curiam), Pro Se Motion to Exhaust State Remedies denied January 23, 1995.

Gaines *v.* State, CR 94-531 (Per Curiam), affirmed February 27, 1995.

Gardner *v.* State, CR 94-559 (Per Curiam), affirmed February 27, 1995.

Gilbert *v.* State, CR 94-1124 (Per Curiam), Pro Se Motion for Belated Appeal denied December 12, 1994.

Gilmer *v.* State, 94-1166 (Per Curiam), Pro Se Motion for Appointment of Counsel denied and appeal dismissed December 19, 1994.

Goodwin *v.* May, CR 94-1350 (Per Curiam), Pro Se Motion to File a Handwritten Brief denied and appeal dismissed February 27, 1995.

Graham *v.* State, CR 94-1265 (Per Curiam), Pro Se Motions for Extension of Time, for Transcript, and for Appointment of Counsel denied and appeal dismissed January 30, 1995.

Hagen *v.* State, CR 94-996 (Per Curiam), Pro Se Motion to Amend Brief denied and appeal dismissed January 23, 1995.

Harris *v.* State, CR 94-634 (Per Curiam), Pro Se Motion for Reconsideration denied January 17, 1995.

Hill *v.* State, CR 94-840 (Per Curiam), Pro Se Motion for Reconsideration denied December 19, 1994.

Holloway *v.* Slayden, 94-569 (Per Curiam), Pro Se Motion to Renew Motion to File a Handwritten Appellant's Brief and to Renew Motion for State to Duplicate Brief granted February 13, 1995.

Ingram *v.* State, CR 94-701 (Per Curiam), affirmed February 13, 1995.

Ivery *v.* Hudson, CR 95-46 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 13, 1995.

Jones *v.* Pearson, CR 94-1407 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 20, 1995.

Jones *v.* State, CR 94-794 (Per Curiam), affirmed December 12, 1994.

Kimbrough *v.* State, CR 94-834 (Per Curiam), affirmed February 27, 1995.

Lambert *v.* State, CR 94-875 (Per Curiam), affirmed March 13, 1995.

Langford *v.* State, CR 93-795 (Per Curiam), affirmed March 6, 1995.

McCullough *v.* State, CR 94-1192 (Per Curiam), Pro Se Motion for Belated Appeal denied December 19, 1994.

Martinez *v.* State, CR 94-729 (Per Curiam), affirmed January 30, 1995.

Morgan *v.* Tucker, 94-1439 (Per Curiam), Pro Se Motion for Record and for Extension of Time to File Appellant's Brief granted February 13, 1995.

Riddle *v.* State, CR 94-588 (Per Curiam), Pro Se Motion to File a Belated Brief denied March 6, 1995.

Scherrer *v.* State, CR 87-71 (Per Curiam), Pro Se Motion for Photocopy at Public Expense denied January 23, 1995.

Sesley *v.* State, CR 94-736 (Per Curiam), affirmed February 6, 1995.

Shelton *v.* State, CR 94-700 (Per Curiam), affirmed January 17, 1995.

Slack *v.* State, CR 94-753 (Per Curiam), affirmed March 6, 1995.

Stipes *v.* State, CR 94-792 (Per Curiam), affirmed February 6, 1995.

Tennison *v.* Crabtree, CR 94-990 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 20, 1995.

Thompson *v.* State, CR 94-755 (Per Curiam), Appellee's Motion to Dismiss Appeal granted and appeal dismissed February 27, 1995.

Thorne *v.* Davis, 94-1057 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 27, 1995.

Verdict *v.* State, CR 94-1102 (Per Curiam), Pro Se Motion for

Permission to Use Record in CR 94-1102 as Record with Respect to Motion for Belated Appeal denied February 20, 1995.

Walker *v.* Reynolds, CR 95-66 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 27, 1995.

Walters *v.* State, CR 94-741 (Per Curiam), Pro Se Motion for Extension of Time to File Pro Se Brief denied February 6, 1995.

Walters *v.* State, CR 94-741 (Per Curiam), affirmed March 6, 1995.

Ware *v.* State, CR 95-47 (Per Curiam), Pro Se Motion for Belated Appeal remanded March 13, 1995.

Washington *v.* State, CR 94-471 (Per Curiam), Pro Se Motion to Reinstate Appeal denied December 12, 1994.

Wilson, Charles Isaac *v.* State, CA CR 83-57 (Per Curiam), Pro Se Motion for Transcript and Other Material at Public Expense denied December 12, 1994.

Wilson, Charles Isaac *v.* State, CR 83-129 (Per Curiam), Pro Se Motion for Transcript and Other Material at Public Expense denied December 12, 1994.

APPENDIX
Rules Adopted or Amended by Per Curiam Orders

IN RE: Ezra Earl MAGLOTHIN, Jr.,
Arkansas Bar ID #78103

894 S.W.2d 136

Supreme Court of Arkansas
Delivered December 12, 1994

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we grant the committee's petition and order that Ezra Earl Maglothin, Jr., of Fayetteville, Arkansas, is hereby barred from the practice of law in the State of Arkansas and direct that Mr. Maglothin's name be removed from the list of attorneys authorized to practice law in this state.

NEWBERN, J., not participating.

IN THE MATTER OF RECOMMENDATIONS OF THE ARKANSAS SUPREME COURT COMMITTEES ON CIVIL PRACTICE AND CRIMINAL PRACTICE TO ADOPT REVISED RULES OF APPELLATE PROCEDURE

Supreme Court of Arkansas
Delivered December 12, 1994

PER CURIAM. The Arkansas Supreme Court Committees on Criminal and Civil Practice have submitted proposals to divide the Arkansas Rules of Appellate Procedure into Civil and Criminal sections as part of a plan to remove from the Arkansas Rules of Criminal Procedure those rules pertaining to appeals and place them, as revised, in the Arkansas Rules of Appellate Procedure. The Committees have studied their respective areas and have approved the proposed appellate rules for civil and criminal cases.

We publish the proposed Appellate Rules of Procedure and the Reporter's Notes for comment from the bench and bar. Unless withdrawn or altered by further order, the changes will become

effective January 15, 1995.

Rule 3 of the criminal appeals rules and Rule 4 of the civil appeals rules deal with the time for filing a notice of appeal. The two rules pose different requirements. We would like them to be as compatible as possible, given the distinctions, such as the right to cross-appeal generally available in civil but not in criminal cases, between the two areas of the law. We ask our Civil Practice Committee to study the matter further with a view to solving the difficult problem of retaining the "deemed denied" and other features of the rule designed to prevent delay but disallowing multiple appeals in a single case. For now, we simply call attention to the difference between the civil and criminal rules.

We express our gratitude to Chairs of the respective Committees, Judge Gerald Pearson for Criminal Practice and Judge Henry Wilkinson for Civil Practice, their Reporters, the Honorable Frank Newell for Criminal Practice and Professor John J. Watkins for Civil Practice, and the membership of both Committees for their faithful and helpful work with respect to the Rules.

Comments and suggestions on these prospective rules changes may be made in writing addressed to:

Clerk, Arkansas Supreme Court
Attn: Rules of Appellate Procedure
Justice Building
625 Marshall
Little Rock, Arkansas 72201

ARKANSAS RULES OF APPELLATE PROCEDURE — CRIMINAL

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RULES OF APPELLATE PROCEDURE — CRIMINAL

Rule 1. RIGHT OF APPEAL

(a) **Right of Appeal.** Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas. An appeal may be taken jointly by co-defendants or by any defendant jointly charged and convicted with another defendant, and only one (1) appeal need be taken where a defendant has been found guilty of one (1) or more charges at a single trial. Except as provided by A.R.Cr.P. 24.3(b) there shall be no appeal from a plea of guilty or nolo contendere. [Amended by Per Curiam July 13, 1987, effective October 1, 1987.]

(b) **Precedence.** Appeals in criminal cases shall take precedence over all other business of the Supreme Court. Appeals under R.A.P.Civ. 2(a)(6), (7), and (9) shall take next precedence in the Supreme Court.

(c) **Death of Defendant.** No appeal shall be taken after defendant's death, and upon his death an appeal taken during his life shall abate and shall not be revived.

Reporter's Notes to Rule 1 (1994): Subsection (a) is former A.R.Cr.P. 36.1 modified only by substituting "A.R.Cr.P. 24.3" for "Rule 24.3." The first sentence of subsection (b) is former A.R.Cr.P. 36.2. The second sentence is former R.A.P. 2(c) slightly modified. Subsection (c) is former A.R.Cr.P. 36.3.

Rule 2. SENTENCING AND ENTRY OF JUDGMENT

Upon the return of a verdict of guilty, if tried by a jury, or the finding of guilty if tried by a circuit court without a jury, sentence may be pronounced and the judgment of the court may be then and there entered, or sentencing and the entry of the judgment may be postponed to a date certain then fixed by the court, not more than thirty (30) days thereafter, at which time probation reports may be submitted, matters of mitigation presented or any other matter heard that the court or the defendant might deem appropriate to consider before the pronouncement of sentence and entry of the formal judgment. The defendant may file a written demand for immediate sentencing, whereupon the trial judge may cause formal sentence and judgment to be made of record. At the time sentence is pronounced and judgment entered, the trial judge must advise the defendant of his right to appeal, the period of time prescribed for perfecting the appeal, and either fix or deny bond. [Amended by Per Curiam May 30, 1989, effective July 1, 1989; Amended by Per Curiam dated Oct. 29, 1990, effective Jan. 1, 1991.]

Reporter's Notes to Rule 2 (1994): This rule is former A.R.Cr.P. 36.4.

Rule 3. TIME AND METHOD OF TAKING

(a) Notice of Appeal. Within thirty (30) days from

(1) the date of entry of a judgment; or

(2) the date of entry of an order denying a post-trial motion under R.A.P.Crim. 10; or

(3) the date a post-trial motion under R.A.P.Crim. 10 is deemed denied pursuant to R.A.P.Civ. 4(c); or

(4) the date of entry of an order denying a petition for postconviction relief under A.R.Cr.P. 37,

the person desiring to appeal the judgment or order *or both* shall file with the trial court a notice of appeal identifying the parties taking the appeal and the judgment or order *or both* appealed.

(b) **Time for Filing.** A notice of appeal is invalid if it is filed prior to the entry of the judgment of conviction or order appealed from except as provided herein. A notice of appeal filed within thirty (30) days of entry of the judgment of conviction shall be effective to appeal the judgment, even if a post-trial motion is subsequently filed. If a post-trial motion is filed after the notice of appeal, it shall not be necessary, to preserve the appeal of the judgment of conviction, to file another notice of appeal of the judgment. If an appellant wishes to appeal an adverse ruling on a post-trial motion and the appellant has previously filed a notice of appeal of the judgment, the appellant must file a notice of appeal regarding the ruling on the motion within the time provided in subpart (a)(2) or (3) hereof.

(c) **Certificate That Transcript Ordered.** The notice of appeal shall include either a certificate by the appealing party or his attorney that a transcript of the trial record has been ordered from the court reporter or a petition to obtain the record as a pauper if, for the purposes of the appeal, a transcript is deemed essential to resolve the issues on appeal. It shall not be necessary to file with either the notice of appeal or the designation of contents of record any portion of the reporter's transcript of the evidence of proceedings.

(d) **Notification of Parties.** Notification of the filing of the notice of appeal shall be given to all other parties or their representatives involved in the cause by mailing a copy of the notice of appeal to the parties or their representatives and to the Attorney General, but failure to give such notification shall not affect the validity of the appeal.

(e) **Failure to Pursue Appeal.** Failure of the appellant to take any further steps to secure the review of the appealed conviction shall not affect the validity of the appeal but shall be ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit. However, no motion for belated appeal shall be entertained by the Supreme Court unless application has been made to the Supreme Court within eighteen (18) months of the date of entry of judgment or entry of the order denying post-conviction relief from which the appeal is taken. If no judgment of conviction was entered of record within ten (10) days of the date sentence was pronounced, application for belated appeal must be made within eighteen (18) months of the date sentence was pronounced.

(f) **Dismissal of Appeal.** If an appeal has not been docketed in the Supreme Court, the parties, with the approval of the trial court, may dismiss the appeal by stipulation filed in that court or that court may dismiss the appeal upon a motion and notice by the appellant. [Amended by per curiam October 25, 1976; amended December 18, 1978; amended by per curiam January 25, 1988, effective March 1, 1988; amended by per curiam January 31, 1994.]

Reporter's Notes to Rule 3 (November, 1994): Rule 3 is former A.R.Cr.P. 36.9. Subsection (b) has been modified to address cases where both a notice of appeal and a post-trial motion are filed. The subsection changes present law, under which a notice of appeal is invalid if filed before the entry of an order denying a post-trial motion or before the motion is "deemed denied" under R.A.P.Civ. 4(c). See *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); *Kimble* v. *Gray*, 313 Ark. 373, 853 S.W.2d 890 (1993) (per curiam), *affirming Kimble* v. *Gray*, 40 Ark. App. 196, 842 S.W.2d 473 (1992). See, also, *Giacona* v. *State*, 311 Ark. 664, 846 S.W.2d 185 (1993)(per curiam).

The second sentence of subsection (c) of this rule is former A.R.Cr.P. 36.18.

This rule applies in A.R.Cr.P. 37 cases only as to appeals

from an actual denial of the Rule 37 petition: the "deemed denied" provision of R.A.P.Civ. 4(c) does not apply to Rule 37 petitions.

Court's Comment to January 1994 Amendment: The 1993 amendment was adopted to clarify that if a post-trial motion in the nature of a motion for a new trial or amendment of judgment is not resolved by the trial court within 30 days from the date of its filing, it is deemed denied under A.R.A.P. 4(c), and an appeal must be taken within 30 days from the date the motion is deemed denied. The amended rule also provides that the "deemed denied" principle does not apply to A.R.Cr.P. 37 petitions. Appeals may be taken within 30 days after a Rule 37 petition is actually denied by the trial court irrespective of whether that denial occurs more than 30 days after the petition is filed.

Reporter's Notes, 1988 Amendment: The phrase "or order denying postconviction relief" has been added to make it clear that the Supreme Court will accept a belated appeal of the denial of a petition for postconviction relief. *See Garner* v. *State*, 293 Ark. 309, 737 S.W.2d 637 (1987).

Note that the reference to filing a motion for belated appeal in the trial court has been deleted because the Supreme Court has held that such a motion must be filed directly in the Supreme Court because only the Supreme Court has the authority to grant a belated appeal. *Gray* v. *State*, 277 Ark. 442, 642 S.W.2d 306 (1982); *Hamman* v. *State*, 270 Ark. 307, 605 S.W.2d 6 (1980). The reference to the trial court in the current rule has resulted in confusion for both attorneys and *pro se* movants as to the court in which to file a motion for belated appeal.

The word "commitment" in Rule 36.9 also creates confusion since it is open to several interpretations and has not been defined by the Supreme Court. Some circuit judges, attorneys and *pro se* movants treat "commitment" as meaning the date judgment was entered of record in the circuit clerk's office. Others assume it to be the date sentence was pronounced by the circuit judge or the date the judge signed the judgment, regardless of when, or if, the judgment was ever filed. Still others interpret "commitment" to mean the date the convicted defendant was physically taken into custody by an officer of the Arkansas Department of Correction. (Under this interpretation, a defendant who was released on appeal bond without a notice of appeal having been filed has

an advantage since this defendant's time for filing a belated appeal would not begin to run until he was taken into custody, giving him longer to proceed under the rule than the defendant who went straight to prison. This situation, while infrequent, has occurred and can be prevented by changing the rule to read "entry of judgment" rather than "commitment.")

The phrase "or entry of the order denying postconviction relief from which the appeal is taken" has been added because, as stated, Rule 36.9 does not currently indicate that there may be a belated appeal from a petition for postconviction relief.

"If no judgment of conviction was entered of record within ten (10) days of the date sentence was pronounced, application for belated appeal must be made within eighteen (18) months of the date sentence was pronounced" has been added to cover those instances where there is either no filemarked judgment from which to calculate or there was a delay of more than ten days in filing the judgment.

Rule 4. APPEAL BY STATE

(a) An interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under A.R.Cr.P. 16.2 to suppress seized evidence or (2) suppresses a defendant's confession. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.

(b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either a misdemeanor or felony prosecution, the prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge.

(c) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney

general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that the correct and uniform administration of the criminal law requires review by the Supreme Court, he may take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

(d) A decision by the Arkansas Supreme Court sustaining in its entirety an order appealed under subsection (a) hereof shall bar further proceedings against the defendant on the charge. [Amended June 7, 1976, effective July 7, 1976; amended by Per Curiam February 14, 1983.]

Reporter's Notes to Rule 4 (1994): This rule is former A.R.Cr.P. 36.10.

Court's Comment to February 1983 Amendment: Paragraph (a) of this Rule, as amended, in conjunction with paragraph (d), limits interlocutory appeals by the state to the two specified situations and contemplates that the suppressed evidence or confession must be essential to the prosecution of the case.

Rule 5. TIME FOR FILING RECORD, CONTENTS OF RECORD

(a) **Generally.** Matters pertaining to several appeals, the docketing, designation, abbreviation, stipulation, preparation, and correction or modification of the record on appeal, as well as appeals where no stenographic record was made, shall be governed by the Rules of Appellate Procedure—Civil and any statutes presently in force which apply to civil cases on appeal to the Supreme Court.

(b) **Exhibits.** All exhibits in the trial of any criminal case shall be a part of the record on appeal unless specifically omitted by the appealing party without objection by the adverse party.

(c) **Record For Preliminary Hearing in Supreme Court.** Prior to the time the complete record on appeal is settled and certified as herein provided, any appealing party may docket the appeal in order to make in the Supreme Court a motion for dismissal, for a stay pending appeal, for fixing or reduction of bail, to proceed in forma pauperis, or for any intermediate order. The

clerk of the trial court at the request of the appealing party shall certify and transmit to the Supreme Court a copy of such portion of the record of proceedings as may be available or needed for the purpose.

Reporter's Notes to Rule 5 (1994): Subsection (a) of this rule is former A.R.Cr.P. 36.23 slightly modified by adding a reference to the Rules of Appellate Procedure–Civil. Most of the statutes once applying to civil appeals have been superseded. See Ark. Code Ann. §§ 16-67-301 *et seq.* (Michie 1987 and Michie Supp. 1993); *In the Matter of Statutes Deemed Superseded by the Arkansas Rules of Appellate Procedure*, 290 Ark. 616, 719 S.W.2d 436 (1986) (per curiam).

Subsection (b) of this rule is former A.R.Cr.P. 36.19.

Subsection (c) of this rule is former A.R.Cr.P. 36.20.

Rule 6. NO BOND FOR COSTS

There shall be no bond for cost as a prerequisite for the appeal of either a felony or misdemeanor conviction.

Reporter's Notes to Rule 6 (1994): This rule is former A.R.Cr.P. 36.17. In the title, "cost" has been changed to "costs."

Rule 7. BAIL ON APPEAL

(a) The appeal bond provided for in this rule shall be filed in the office of the clerk of the court in which the conviction is had, and a copy thereof shall be attached to the bill of exceptions and shall be made a part of the transcript to be filed in the Supreme Court.

(b)(1) Except those offenses provided for in subdivisions (b)(2) and (b)(3) of this section, when a criminal defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to a criminal offense and is sentenced to serve a term of imprisonment, and the criminal defendant has filed a notice of appeal, the court shall not release the defendant on bail or otherwise pending appeal unless the court finds:

(A) By clear and convincing evidence that the person is not likely to flee or that there is not a substantial risk that the defendant will commit a serious crime, intimidate witnesses,

harass or take retaliatory action against any juror, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and

(B) That the appeal is not for the purpose of delay and that it raises a substantial question of law or fact.

(2) When a criminal defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to a criminal offense of capital murder, the court shall not release the defendant on bail or otherwise pending appeal or for any reason.

(3) When a criminal defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to a criminal offense of murder in the first degree, rape, aggravated robbery, or causing a catastrophe, or the criminal offenses of kidnapping or arson when classified as a Class Y felony and is sentenced to death or a term of imprisonment, the court shall not release the defendant on bail or otherwise pending appeal or for any reason.

(c)(1) If an appeal bond is granted by the circuit court, the appeal bond shall be conditioned that the defendant surrender himself to the sheriff of the county in which the trial was held upon the dismissal of the appeal or upon the rendition of final judgment upon the appeal. The trial court may also condition release by imposing restrictions specified in A.R.Cr.P. 9.3 or other restrictions found reasonably necessary.

(2) Following the affirmance or reversal of a conviction, the Clerk of the Supreme Court shall immediately make and forward to the clerk of the circuit court of the county in which the defendant was convicted a certified copy of the mandate of the Supreme Court.

(3) The circuit clerk, upon receipt of a mandate affirming the conviction, shall immediately file the mandate and notify the sheriff and the bail bondsman or, in appropriate cases, other sureties on the bail bond that the defendant should be surrendered to the sheriff as required by the terms of the bail bond.

(4) If the defendant fails to surrender himself to the sheriff in compliance with the conditions of his bond, the sheriff shall notify the clerk of the circuit court, and the circuit court shall direct that fact to be entered on its records and shall adjudge

the bail bond of the defendant, or the money deposited in lieu thereof, to be forfeited.

(5) The defendant having failed to surrender, the circuit clerk shall immediately issue a summons against the sureties on the bail bond requiring them to appear and show cause why judgment should not be rendered against them for the sum specified in the bail bond on account of the forfeiture thereof, which summons shall be made returnable and shall be executed as in civil actions, and the action shall be docketed and shall proceed as an ordinary civil action.

(6) The summons may be served in any county in the state, and the service of the summons on the defendant or defendants in any county in the state shall give the court complete jurisdiction of the defendant and cause.

(7) No pleadings on the part of the state shall be required in such cases.

(d) The circuit court in which the defendant was convicted shall retain jurisdiction to hear and decide any motion to revoke the bail of a defendant set at liberty pursuant to this rule, even if the record on appeal has been lodged with the Supreme Court or the Court of Appeals.

(e) If the court in which the defendant was convicted refuses to grant an appeal bond and an appeal bond shall thereafter be granted by any Justice or Justices of the Supreme Court, the bond shall be conditioned that, upon the dismissal of the appeal or the rendition of the final judgment therein by the Supreme Court, the defendant shall surrender himself as provided in this rule in execution of the judgment.

Reporter's Notes to Rule 7 (1994): In March 1994, the General Assembly enacted 1994 Ark. Acts 3, First Extraordinary Session. The act, which governed bail on appeal after conviction, was struck down by the Arkansas Supreme Court in *Casement* v. *State*, 318 Ark. 225 (October 10, 1994), the Court having found that the act conflicted with post-conviction appeal procedures established by rules of the Court.

Rule 7 is, in essence, Act 3, modified to eliminate the requirement that a defendant free on bail pending appeal surrender to

the Arkansas Supreme Court upon the affirmance of his conviction. Under this rule the defendant is to surrender to the sheriff of the county in which the defendant was convicted.

The term "bail bond" in subsection (a) of the act has been replaced by "appeal bond" in subpart(a) of the rule. In addition, subpart (b)(1) of the rule, restating subsection (b)(1) of Act 3, has been modified to speak of filing "a notice of appeal" rather than "an appeal," it being reasonably clear that this was the intent of the Act 3's drafters.

Subpart (c)(1) of the rule, restating subsection (c)(1) of Act 3, has been amended to speak of the circuit court's granting an "appeal bond" rather than "the appeal." Guidelines for imposing conditions of release have been included.

Subpart (d) vests jurisdiction to hear revocation motions in the circuit court.

Subpart (e), restating subsection (d)(1) of Act 3, has been amended to speak of the trial court's granting "an appeal bond," not "an appeal." The rule contains no counterpart of subsection (d)(2) of the act, which was viewed as surplusage.

Finally, language clarifying the procedure to be followed by the Clerk of the Supreme Court and circuit clerks has been added.

Rule 7 will supersede A.R.Cr.P. 36.5 through 36.8.

Rule 8. APPEAL AFTER CONFINEMENT

If a judgment of confinement in a detentional facility operated by the state has been executed before notice of appeal is given, the defendant shall remain in the detentional facility during the pendency of the appeal, unless discharged by the expiration of his term of confinement or by pardon or parole, or admitted to bail by the trial court prior to the docketing of the appeal in this court. If the trial court admits the defendant to bail pending appeal, the court may recall the commitment by which the sentence was carried into execution. Upon a reversal, if a new trial is ordered, the defendant shall be removed from the detentional facility and returned to the custody of the sheriff of the county in which the sentence was imposed. [Amended Per Curiam December 18, 1978.]

Reporter's Notes to Rule 8 (1994): This rule is former A.R.Cr.P. 36.13.

Rule 9. EXCEPTIONS AND MOTION FOR NEW TRIAL UNNECESSARY

(a) **Motions for New Trial.** It shall not be necessary to file a motion for new trial to obtain review of any matter on appeal. If a motion for new trial is submitted to the trial court, on appeal the appellant shall not be restricted to a consideration of matters assigned therein. Formal exceptions to rulings or orders of the trial court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

(b) **Failure to Question the Sufficiency of the Evidence.** When there has been a trial by jury, the failure of a defendant to move for a directed verdict at the conclusion of the evidence presented by the prosecution and *again* at the close of the case because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. A motion for a directed verdict based on insufficiency of the evidence must specify in what respect the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to whether sufficient proof on each of the elements of the offense was adduced. [Amended by Per Curiam January 25, 1988, effective March 1, 1988.]

Reporter's Notes to Rule 9 (1994): This rule is former A.R.Cr.P. 36.21. Subsection (b) has been amended to incorporate into the rule the standards announced in *Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (October 3, 1994) with respect to motions for directed verdicts.

The word "again" has been added to the first sentence of subsection (b) to emphasize the requirement that an appropriate motion be made after the state's case and at the close of the case.

Reporter's Notes, 1988 Amendment: It is the feeling of the committee that this change would bring the criminal rules and the civil rules into alignment by requiring a motion challenging the sufficiency of the evidence as an essential step to raising the issue on appeal.

Rule 10. OTHER REMEDIES NOT ABOLISHED

A person convicted of either a felony or misdemeanor may file a motion for new trial, a motion in arrest of judgment, or any other application for relief, but all motions or applications must be filed prior to the time fixed to file a notice of appeal. Such pleadings should include a statement that the movant believes the action to be meritorious and is not offered for the purpose of delay. A copy of any such motion shall be served on the representative of the prosecuting party. The trial court shall designate a date certain, if a hearing is requested or found to be necessary, to take evidence, hear, and determine all of the matters presented within ten (10) days of the filing of any motion or application unless circumstances justify that the hearing or determination be delayed. Upon the filing of any motion or other application for relief in the trial court, the time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications.

Reporter's Notes to Rule 10 (1994): This rule is former A.R.Cr.P. 36.22.

Rule 11. ACQUITTAL BARRING PROSECUTION

A judgment in favor of the defendant that operates as a bar to future prosecution of the offense shall not be reversed by the Supreme Court.

Reporter's Notes to Rule 11 (1994): This rule is former A.R.Cr.P. 36.11. This rule does not bar an appeal by the State of a trial court's granting of a defendant's motion for judgment notwithstanding a jury's verdict of guilty. See *State* v. *Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992), where the Arkansas Supreme Court, without citing this rule, held that the State can appeal a trial court's grant of a defendant's motion for a judgment notwithstanding the jury's verdict of guilty because such an appeal by the State, if successful, results in reinstatement of the verdict of

guilty and does not subject the defendant to a second trial.

Rule 12. AFFIRMANCE OF DEATH SENTENCE; PROCEDURE

When a judgment of death has been affirmed, petition under A.R.Cr.P. 37 has been denied or mandate has been returned from the United States Supreme Court, and the day of execution has passed, the Clerk of the Supreme Court shall transmit to the Governor a certificate of the affirmance, denial or return of mandate and the judgment, to the end that a warrant for the execution of the judgment may be issued by the Governor. Such certificate shall operate to dissolve any stay of execution previously entered by the Supreme Court. [Amended by Per Curiam July 6, 1981.]

Reporter's Notes to Rule 12 (1994): This rule is former A.R.Cr.P. 36.12, amended only by the addition of the last sentence to make it clear that stays are dissolved automatically when the United States Supreme Court affirms a judgment of death.

Rule 13. PROCEEDINGS ON REVERSAL

Upon a mandate of reversal, ordering a new trial, being filed in the clerk's office of the circuit court in which the judgment of confinement in the penitentiary was rendered and executed, the clerk shall deliver to the sheriff a copy of the mandate and precept, authorizing and commanding him to bring the defendant from the penitentiary to the county jail, which shall be obeyed by the sheriff and keeper of the penitentiary.

Reporter's Notes to Rule 13 (1994): This rule is former A.R.Cr.P. 36.14.

Rule 14. DEDUCTION OF CONFINEMENT UNDER PRIOR CONVICTION

If the defendant upon the new trial is again convicted, the period of his former confinement in the penitentiary shall be deducted by the court from the period of confinement fixed in the last verdict of conviction.

Reporter's Notes to Rule 14 (1994): This rule is former A.R.Cr.P. 36.15.

Rule 15. JUDGMENT FOR COSTS

On the affirmance of a judgment, where the appeal is taken by the defendant, and on the reversal of an appealable order where the appeal is taken by the state, a judgment for costs shall be rendered against the defendant.

Reporter's Notes to Rule 15 (1994): This rule is former A.R.Cr.P. 36.16.

Rule 16. MATTERS TO BE CONSIDERED ON APPEAL

The Supreme Court need only review those matters briefed and argued by the appellant, provided that where either a sentence for life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant.

Reporter's Notes to Rule 16 (1994): This rule is former A.R.Cr.P. 36.24 altered only by the addition of a comma after "appellant."

Rule 17. ACTION TO BE TAKEN ON APPEAL

A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution, the laws of Arkansas or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed or affirmed as modified.

Reporter's Notes to Rule 17 (1994): This rule is former A.R.Cr.P. 36.25. The last sentence has been amended to explicitly recognize the Supreme Court's authority to affirm a conviction as modified.

Rule 18. TRIAL COUNSEL'S DUTIES WITH REGARD TO APPEAL

Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause. After the notice of

appeal of a judgment of conviction has been filed, the Supreme Court shall have exclusive jurisdiction to relieve counsel and appoint new counsel.

Reporter's Notes to Rule 18 (1994): This rule is former A.R.Cr.P. 36.26, amended to specify when the Supreme Court's authority to relieve counsel begins.

Rule 19. TIME EXTENSION WHEN LAST DAY FOR ACTION ON SATURDAY, SUNDAY OR HOLIDAY

Whenever the last day for taking any action under these rules or under the Rules of the Supreme Court and Court of Appeals falls on a Saturday, Sunday, or legal holiday, the time for such action shall be extended to the next business day. [Adopted May 5, 1980].

Reporter's Notes to Rule 19 (1994): This rule is former R.A.P. 9.

Rule 20. UNIFORM PAPER SIZE

All notices of appeal, motions, orders, records, transcripts, and other papers required or authorized by these rules shall be on an 8-1/2" x 11" paper. [Adopted by Per Curiam May 15, 1989.]

Reporter's Notes to Rule 20 (1994): This rule is former R.A.P. 10.

Arkansas Rules of Appellate Procedure

1. The Arkansas Rules of Appellate Procedure are hereby repealed and replaced with two sets of rules: the Arkansas Rules of Appellate Procedure–Civil and the Arkansas Rules of Appellate Procedure–Criminal.

2. The Arkansas Rules of Appellate Procedure — Civil and accompanying Reporter's Notes are as follows:

ARKANSAS RULES OF APPELLATE PROCEDURE — CIVIL

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Rule 1. SCOPE OF RULES

These rules shall govern the procedure in civil appeals to the Arkansas Supreme Court or Court of Appeals. Whenever the words Supreme Court appear in these rules, the words Court of Appeals shall be substituted in applying the rules in a case in which jurisdiction of the appeal is in the Court of Appeals under Rule 1-2 of the Rules of the Supreme Court and Court of Appeals.

Reporter's Notes to Rule 1 (1994): This rule is a slightly modified version of former Appellate Rule 1. The word "civil" has been added to the first sentence to make clear that these rules apply only to appeals in civil cases. The Reporter's Notes prepared in connection with former Appellate Rule 1 are set out below.

Reporter's Notes to Rule 1: 1. This rule makes it clear that

these rules apply only to appeals to the Arkansas Supreme Court. They have no applicability to appeals from municipal, county, small claims courts, etc.

2. The Committee did not deem it necessary to draft comprehensive rules dealing with the procedure after the Arkansas Supreme Court has acquired jurisdiction of a particular case. The Supreme Court has periodically revised its own rules with the result that little or no change is necessary at that level. These appellate rules are basically a revision and condensation of prior Arkansas statutory law as it affected procedures prior to the time the Supreme Court acquired jurisdiction. Thus, these rules are much less comprehensive than the federal appellate rules.

Rule 2. APPEALABLE MATTERS; PRIORITY

(a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:

1. A final judgment or decree entered by the trial court;

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;

3. An order which grants or refuses a new trial;

4. An order which strikes out an answer, or any part of an answer, or any pleading in an action;

5. An order which vacates or sustains an attachment or garnishment;

6. An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused;

7. An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder;

8. An order which disqualifies an attorney from further participation in the case;

9. An order granting or denying a motion to certify a case

as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure.

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

(c) Appeals in criminal cases have priority over all other business of the Supreme Court. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), and (a)(9) of this rule take precedence.

Reporter's Notes to Rule 2 (1994): This rule is virtually identical to former Appellate Rule 2, although the title has been changed to more accurately reflect its content. Subdivision (c) has been modified to expressly include the statement that criminal appeals take precedence in the Supreme Court, as was the case under former Rule 36.2 of the Rules of Criminal Procedure. The Reporter's Notes prepared in connection with former Appellate Rule 2 are set out below.

Reporter's Notes to Rule 2: 1. Act 38 of 1973, authorizing the Supreme Court to prescribe rules of civil procedure, provides that rights of appeal shall continue as authorized by law. Accordingly, in this rule the Court has preserved rights of appeal as conferred by superseded Ark. Stat. Ann. § 27-2101 (Supp. 1971), superseded § 27-2102 (Repl. 1962), and superseded § 31-165 (Repl. 1962). If, at the effective date of these rules, there are other statutes conferring rights of appeal from trial courts, they are not intended to be superseded.

2. An order dismissing a writ of garnishment is appealable. *Bank of Eudora* v. *Ross*, 168 Ark. 754, 271 S.W. 703 (1925).

Addition to Reporter's Notes, 1985 Amendment: Subsection (9) is added to Rule 2(a) to permit appeal to the Supreme Court of an order certifying a case as a class action under Rule 23, Ark. R. Civ. P. *See Ford Motor Credit Co.* v. *Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985). The Supreme Court has previously held that an order denying class certification is appealable under Rule 2. *Drew* v. *First Federal Savings & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981). In contrast, neither type of order is immediately appealable in the federal courts. *See Coopers & Lybrand* v. *Livesay*, 437 U.S. 473 (1978); *Gardner* v.

Westinghouse Broadcasting Co., 437 U.S. 478 (1978).

Addition to Reporter's Notes, 1991 Amendment: Rule 2(a)(9) is amended to expressly permit an immediate appeal from any order denying a motion to certify a case as a class action, as well as from an order granting such certification. The Supreme Court has held that both types of orders may be immediately appealed. *See Ford Motor Credit Co.* v. *Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985); *Drew* v. *First Federal Savings & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981). However, Rule 2(a)(9) has heretofore specifically dealt only with orders granting class certification. Rule 2(c) is amended to add appeals under Rule 2(a)(9) to the list of those that "take precedence," since appeals of orders granting or denying class certification are interlocutory in nature.

Rule 3. APPEAL — HOW TAKEN

(a) **Mode of Obtaining Review.** The mode of bringing a judgment, decree or order to the Arkansas Supreme Court for review shall be by appeal.

(b) **How Taken.** An appeal shall be taken by filing a notice of appeal with the clerk of the court which entered the judgment, decree, or order from which the appeal is taken. Failure of the appellant or cross-appellant to take any further steps to secure review of the judgment or decree appealed from shall not affect the validity of the appeal or cross-appeal, but shall be ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal or cross-appeal. If, however, the record on appeal has not been filed pursuant to Rule 5 of these rules, the trial court in which the notice of appeal was filed may dismiss the appeal or cross-appeal upon petition of all parties to the appeal or cross-appeal accompanied by a joint stipulation that the appeal or cross-appeal is to be dismissed.

(c) **Joint or Consolidated Appeals.** If two or more persons are entitled to appeal and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in the appeal after filing separate, timely notices of appeal and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court

upon its own motion or upon motion of a party.

(d) **Cross-Appeals.** A cross-appeal may be taken by filing a notice of cross-appeal with the clerk of the court which entered the judgment, decree or order being appealed.

(e) **Content of Notice of Appeal or Cross-Appeal.** A notice of appeal or cross-appeal shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been ordered by the appellant.

(f) **Service of Notice of Appeal or Cross-Appeal.** A copy of the notice of appeal or cross-appeal shall be served by counsel for appellant or cross-appellant upon counsel for all other parties by any form of mail which requires a signed receipt. If a party is not represented by counsel, notice shall be mailed to such party at his last known address. Failure to serve notice shall not affect the validity of the appeal.

(g) **Abbreviated Record; Statement of Points.** If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his notice of appeal and designation a concise statement of the points on which he intends to rely on the appeal.

Reporter's Notes to Rule 3 (1994): With the exception of one minor revision for purposes of clarity, this rule is identical to former Appellate Rule 3. The single change is the addition of the phrase "of these rules" in subdivision (b). The Reporter's Notes prepared in connection with former Appellate Rule 3 are set out below.

Reporter's Notes (as revised by the Court) to Rule 3: 1. Rule 3 establishes the procedures for initiating an appeal to the Arkansas Supreme Court. This rule makes certain changes in prior Arkansas procedures, but these should have little effect on the overall appellate process. The significant changes are found in Sections (e) and (f). In Section (e), it is provided that the notice of appeal shall contain a designation of the record, as opposed to prior practice which required a separate instrument, and shall contain a statement that the transcript has been ordered.

The latter statement is intended to expedite appeals. In Section (f), the responsibility for serving notice of filing a notice of appeal or cross-appeal is placed upon counsel for appellant or cross-appellant as opposed to the clerk. The notice must be by a form of mail which requires a signed receipt.

2. For the appellee's procedure for designating additional parts of the record when the appellant does not designate the entire record, see Rule 6(b).

3. Rule 3 makes no attempt to define or affect the Arkansas Supreme Court's power in matters of original jurisdiction under Ark. Stat. Ann. § 22-200(e) (Repl. 1977). The Court's authority in this area is not in any way abridged or enlarged by this or any other rule adopted herein.

4. Rule 3 supersedes Ark. Stat. Ann. §§ 27-2103, 27-2106.1, 27-2106.2, and 27-2110.1 (Repl. 1962).

Addition to Reporter's Note, 1986 Amendment: Rule 3(b) is amended to incorporate provisions of statutes superseded when the rules of appellate procedure were adopted. The revised rule makes plain that the appellate court may, in its discretion, dismiss an appeal if the appellant has not taken the appropriate steps to secure review after filing the notice of appeal. However, if the record has not yet been filed in the appellate court, the trial court may dismiss the appeal upon stipulation of the parties or upon motion of either party. With respect to the latter provision, the rule represents a slight change in prior practice, under which dismissal in the trial court was by stipulation only and an appellee was required to file a partial record in the appellate court in order to move for dismissal there. *See Norfleet* v. *Norfleet*, 223 Ark. 751, 268 S.W.2d 387 (1954). Leaving the matter to the trial court when no record on appeal has been filed is consistent with Rule 5, which permits the trial court to extend the time for filing the record, and is perceived as less expensive and cumbersome than the prior practice.

Addition to Reporter's Notes, 1988 Amendment: Under the amendment, which revises the last sentence of Rule 3(b), the trial court has authority to dismiss an appeal before the record is docketed in the appellate court only if all parties so stipulate and petition the trial court for dismissal. Absent such a stipula-

tion, a party wishing to dismiss an appeal must file a partial record in the appellate court and move for dismissal there. *See Norfleet* v. *Norfleet*, 223 Ark. 751, 268 S.W.2d 387 (1954). The amendment works a significant change in the rule, which, as amended in 1986, permitted the trial court to dismiss an appeal, prior to the docketing of the record, upon motion of a party.

Rule 4. APPEAL — WHEN TAKEN

(a) **Time for Filing Notice.** Except as otherwise provided in subsequent sections of this rule, a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from. A notice of cross-appeal shall be filed within ten (10) days after receipt of the notice of appeal, except that in no event shall a cross-appellant have less than (30) days from the entry of the judgment, decree or order within which to file a notice of cross-appeal. Upon a showing of failure to receive notice of the judgment, decree or order from which appeal is sought, the trial court may extend the time for filing the notice of appeal by any party for a period not to exceed sixty (60) days from the expiration of the time otherwise prescribed by these rules. Such an extension may be granted before or after the time otherwise prescribed by these rules has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) **Time for Notice of Appeal Extended by Timely Motion.** Upon timely filing in the trial court of a motion for judgment notwithstanding the verdict under Rule 50(b), of a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), or of a motion for a new trial under Rule 59(b), the time for filing of notice of appeal shall be extended as provided in this rule.

(c) **Disposition of Posttrial Motion.** If a timely motion listed in section (b) of this rule is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any other such motion. Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. A notice of appeal filed before the disposition of any such motion

or, if no order is entered, prior to the expiration of the 30-day period shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period. No additional fees shall be required for such filing.

(d) **Time for Appeal from Disposition of Motion.** Upon disposition of a motion listed in section (b) of this rule, any party desiring to appeal from the judgment, decree or order originally entered shall have (30) days from the entry of the order disposing of the motion or the expiration of the 30-day period provided in section (c) of this rule within which to give notice of appeal.

(e) **When Judgment Is Entered.** A judgment, decree or order is entered within the meaning of this rule when it is filed with the clerk of the court in which the claim was tried.

Reporter's Notes to Rule 4 (1994): This rule tracks former Appellate Rule 4 without change. The Reporter's Notes prepared in connection with former Appellate Rule 4 are set out below.

Reporter's Notes (as revised by the Court) to Rule 4: 1. Rule 4 consolidates various superseded Arkansas statutes concerning the time for taking an appeal into one rule. Section (a) follows superseded Ark. Stat. Ann. § 21-2106.1 (Repl. 1962) insofar as a notice of appeal is concerned. A notice of cross-appeal must be filed within ten days after receipt of the notice of appeal, but in no event shall the cross-appellant have less than thirty days from entry of judgment within which to file his notice.

2. Section (b) does not follow the second paragraph of Rule 4 of the Federal Rules of Appellate Procedure. It was believed that the federal rule permits excessive delay with respect to post-judgment motions that might be filed but not acted upon promptly. Consequently, Sections (b), (c) and (d) preserve the procedure that was prescribed by Act 123 of 1963. *See* superseded Ark. Stat. Ann. § 27-2106.3 et seq. (Supp. 1977); *St. Louis S.W. Ry.* v. *Farrell*, 241 Ark. 707, 409 S.W.2d 341 (1966).

3. Under Federal Rule 4, the trial court is empowered to extend the time for filing a notice of appeal upon a showing of excusable neglect. No such provision is included in Rule 4 for the reason that Arkansas has long considered the filing of a notice

of appeal as jurisdictional and unless timely filed, there can be no appeal. *White* v. *Avery*, 226 Ark. 951, 295 S.W.2d 364 (1956). The Committee saw no need to change this settled rule of law.

4. Section (e) incorporates in the rule the definition of the "entry" of a judgment that has been followed under superseded Ark. Stat. Ann. § 27-2106.1 (Repl. 1962); *Norfleet* v. *Norfleet*, 223 Ark. 751, 268 S.W.2d 387 (1954).

Addition to Reporter's Note, 1986 Amendment: Rule 4(a) is amended to empower the trial court to extend the time for filing a notice of appeal when the party has not received notice of the entry of the judgment or order from which he seeks to appeal. The amendment represents a narrow exception to the rule that the filing of a notice of appeal is jurisdictional and, unless timely filed, there can be no appeal. *White* v. *Avery*, 226 Ark. 951, 291 S.W.2d 364 (1956). The change was deemed necessary to ensure fairness when counsel has not received notice of the entry of the judgment or other appealable order. *Cf. Karam* v. *Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976). Although under longstanding Arkansas custom counsel have been given an opportunity to approve a judgment or order prepared by opposing counsel, circumstances have arisen where counsel did not receive that opportunity and did not otherwise receive notice that a judgment had been entered.

The reference in Rule 4(b) to Rule 59(f), Ark. R. Civ. P., was rendered obsolete when Rule 59(f) was deleted in 1983. *See* Reporter's Note, Rule 59(f). Moreover, a new Rule 59(f) was added in 1984, making the reference in Rule 4(b) even more confusing. This amendment deletes the language referring to Rule 59(f).

Addition to Reporter's Notes, 1988 Amendment: Sections (c) and (d) of Rule 4 are amended significantly in an effort to simplify Arkansas appellate practice. The amended provisions are modeled on Rule 4 of the Federal Rules of Appellate Procedure, though the federal practice has not been followed in all particulars. When the Arkansas Rules of Civil Procedure were promulgated in 1979, the federal approach with respect to judicial action on posttrial motions was not adopted for fear of excessive delay. It is now apparent, however, that precisely the same sort of delay occurs regularly under the more complex Arkansas rule, which also has become a trap for the unwary. The Arkansas practice has been

further complicated by decisions construing Rule 4 in such a manner as to impose additional requirements not found on the face of the rule. *E.g., Brittenum & Assocs.* v. *Mayall*, 286 Ark. 427, 692 S.W.2d 248 (1985). Thus, the 1988 amendment follows the more simplified procedure established in the federal rule, but adds a 30-day "window" for judicial action on posttrial motions to prevent problems with excessive delay. Under Rule 4(c), a motion is deemed denied if the trial court neither grants nor denies the motion within 30 days of its filing, and, under Rule 4(d), the time for filing the notice of appeal begins to run at the end of that 30-day period. If, however, an order granting or denying the motion is acted upon within the 30-day period, the time for filing the notice of appeal begins to run upon entry of the order.

Further, the 1988 amendment expands from 10 to 30 days the time period in Rule 4(d) for filing the notice of appeal when a posttrial motion has been made. This change, which makes consistent the time periods found in Rule 4(a) and 4(d), should eliminate confusion as to the time for filing the notice of appeal. Moreover, the amendment works an important change in prior Arkansas law. Because of the shorter time period contained previously in Rule 4(d), it was possible for an appellant to miss the 10-day deadline but still file a notice of appeal from the order denying the posttrial motion by complying with the 30day period provided in Rule 4(a). *E.g., Cornett* v. *Prather*, 290 Ark. 262, 718 S.W.2d 433 (1986). In that event, the appellant could challenge only the trial court's action with respect to the posttrial motion and could not attack other errors underlying the judgment. *Id.* By establishing a uniform 30-day period for filing the notice of appeal, amended Rule 4(d) eliminates this possibility and is thus consistent with Rule 5(b), which provides that an appeal from an order disposing of a posttrial motion under Rule 4 "brings up for review the judgment, decree and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from."

Rule 5. RECORD — TIME FOR FILING

(a) **When Filed.** The record on appeal shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal, unless the time is extended by order of the trial court as hereinafter pro-

vided. When, however, an appeal is taken from an interlocutory order under Rule 2(a)(6) or (7), the record must be filed with the clerk of the Supreme Court within thirty (30) days from the entry of such order.

(b) **Extension of Time.** In cases where there has been designated for inclusion any evidence or proceeding at the trial or hearing which was stenographically reported, the trial court, upon finding that a reporter's transcript of such evidence or proceeding has been ordered by appellant, and upon a further finding that an extension is necessary for the inclusion in the record of evidence or proceedings stenographically reported, may extend the time for filing the record on appeal, but the order of extension must be entered before the expiration of the period for filing as originally prescribed or extended by a previous order. In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment, decree or order, or from the date on which a timely postjudgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c), whichever is later. An appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment, decree and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from. Counsel seeking an extension shall give to opposing counsel notice of the application for an extension of time.

Reporter's Notes to Rule 5 (1994): This rule tracks former Appellate Rule 5 without change. The Reporter's Notes prepared in connection with former Appellate Rule 5 are set out below.

Reporter's Notes (as revised by the Court) to Rule 5: 1. Rule 5 is a slightly revised version of superseded Ark. Stat. Ann. § 27-2127.1 (Supp. 1975) and superseded Rule 26A of the Arkansas Supreme Court Rules. Only minor wording changes are made and the substance of prior Arkansas law remains unchanged. Under Section (b), the order extending the time must actually be filed prior to the expiration of the time for filing the record, whereas under prior Arkansas law, the order of extension needed only to have been made within the time allowed and not necessarily filed.

2. The 30-day limitation for the filing of the record in appeals is taken from superseded Ark. Stat. Ann. § 27-1202 (Repl. 1962).

Addition to Reporter's Notes, 1985 Amendment: 1. The next to last sentence of Rule 5(b) is amended to eliminate confusion that had existed regarding the interplay between Rule 4, which governs the filing of the notice of appeal, and Rule 5, which governs the time for filing the record with the clerk of the Supreme Court. As amended, Rule 5(b) provides that the time for filing the record may not be extended more than seven months from either (a) the date of entry of judgment or order, or (2) the date on which a timely postjudgment motion under Rule 4(b) has been deemed disposed of under Rule 4(c), whichever is later. *See Pentron Corp.* v. *Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985).

Addition to Reporter's Note, 1986 Amendment: The new language is designed to address a problem stemming from the relationship between Appellate Rules 4 and 5. Under prior practice and under certain circumstances, Rule 5 required that the record on appeal be filed before Rule 4(c) required the filing of a notice of appeal in the trial court. *See Yent* v. *State*, 279 Ark. 268, 650 S.W.2d 577 (1983) (concurring opinion). While the most recent amendment to Rule 5(b) was aimed at this anomaly, difficulties persist when the postjudgment motion is (1) limited to a single issue, although other errors are to be presented on appeal, and (2) the trial court properly takes under advisement such a motion. In such a situation, counsel for the appellant must lodge the record on appeal within seven months from the date of the original judgment in order to preserve an error not raised in the motion for new trial, even though the time for filing the notice of appeal would not begin to run until disposition of the motion, which under Rule 4(c) could occur more than seven months after entry of judgment. Under the amended rule, however, an appeal from the order disposing of the motion raises not only the issue presented by the motion, but also other issues properly preserved at trial. The time for filing the record on appeal would run from disposition of the motion.

Rule 6. RECORD ON APPEAL

(a) **Composition of Record.** The record shall be compiled in accordance with the rules of the Arkansas Supreme Court and Court of Appeals.

(b) **Transcript of Proceedings.** On or before filing the

notice of appeal, the appellant shall order from the reporter a transcript of such parts of the proceedings as he has designated in the notice of appeal. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary thereto, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. If the appellant has designated less than the entire record or proceeding, the appellee, if he deems a transcript of other parts of the proceedings to be necessary, shall, within ten (10) days after the filing of the notice of appeal, file and serve upon the appellant (and upon the court reporter if additional testimony is designated) a designation of the additional parts to be included. The appellant shall then direct the reporter to include in the transcript all testimony designated by appellee.

(c) **Record to be Abbreviated.** All matters not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties. Where parties in good faith abbreviate the record by agreement or without objection from opposing parties, the appellate court shall not affirm or dismiss the appeal on account of any deficiency in the record without notice to appellant and reasonable opportunity to supply the deficiency. Where the record has been abbreviated by agreement or without objection from opposing parties, no presumption shall be indulged that the findings of the trial court are supported by any matter omitted from the record.

(d) **Statement of the Evidence or Proceedings When No Report Was Made or the Transcript Is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best means available, including his recollection. The statement shall be served on the appellee, who may serve objections or proposed amend-

ments thereto within ten (10) days after service upon him. Thereupon the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal.

(e) **Correction or Modification of the Record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court on proper suggestion, or on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to form and content of the record shall be presented to the appellate court.

Reporter's Notes to Rule 6 (1994): This rule tracks former Appellate Rule 6 without change. The Reporter's Notes prepared in connection with former Appellate Rule 6 are set out below.

Reporter's Notes (as modified by the Court) to Rule 6: 1. Rule 6 combines and condenses a number of superseded Arkansas statutes, but makes no drastic changes in prior practice and procedure. Section (a) recognizes that the Arkansas Supreme Court has adopted extensive rules governing the contents and order of the record and defers such matter to the Supreme Court rules. Ark. Stat. Ann. § 27-2137.8 (Repl. 1962) is superseded in part by Section (a) of this rule.

2. Section (b) represents a combination of Rule 10(b) of the Federal Rules of Appellate Procedure and superseded Ark. Stat. Ann. § 2127.3 (Repl. 1962). It requires the appellant to order the transcript at or before the filing of the notice of appeal (which under Rule 3 must contain a statement that such action has been taken). It also gives the appellee the right to require appellant to complete the transcript by filing a designation within ten days after the filing of the notice of appeal. This is in accord with superseded Ark. Stat. Ann. § 27-2127.2 (Repl. 1962). As

noted in Rule 3, appellant's notice of appeal must also contain a designation of the record; therefore, appellee's designation must be filed within ten days after the notice of appeal is filed. Section (b) makes no provision for adjustment of costs where the record is supplemented at the request of appellee. Normally, appellant bears the initial expense and the Supreme Court can thereafter make the proper adjustment of costs upon request of one of the parties.

3. Section (c) is copied from superseded Ark. Stat. Ann. § 27-2127.6 (Repl. 1962).

4. Section (d) is lifted from Rule 10(c) of the Federal Rules of Appellate Procedure and is substantially the same as superseded Ark. Stat. Ann. § 27-2127.11 (Repl. 1962). This section expressly provides that it applies not only where no record is made, but also where the record is unavailable. The superseded Arkansas statute did not contain this express language, although it was so construed. *Arkansas State Hwy. Comm'n* v. *Clay*, 241 Ark. 501, 408 S.W.2d 600 (1966).

5. Section (e) tracks superseded Ark. Stat. Ann. § 27-2129.1 (Repl. 1962) and Rule 10 (e) of the Federal Rules. It works no changes in Arkansas practice or procedure.

Rule 7. CERTIFICATION AND TRANSMISSION OF RECORD

(a) **Certification.** The clerk of the trial court shall certify the record as being a true and correct copy of the record as designated by the parties.

(b) **Transmission.** After the record has been duly certified by the clerk of the trial court, it shall be the responsibility of the appellant to transmit such record to the clerk of the appellate court for filing and docketing.

Reporter's Notes to Rule 7 (1994): This rule tracks former Appellate Rule 7 without change. The Reporter's Notes prepared in connection with former Appellate Rule 7 are set out below.

Reporter's Notes to Rule 7: Rule 7 defines the duties of the clerk of the trial court and the appellant. It is the clerk's duty to certify the record and it is the duty of the appellant to trans-

mit the record to the Arkansas Supreme Court. Superseded Ark. Stat. Ann. § 27-2127.8 (Repl. 1962) required the court clerk to transmit the record to the Supreme Court, although the clerk seldom performed such duty. Generally, counsel for appellant assumed this responsibility under prior Arkansas law and this rule should have little effect on actual practice in Arkansas.

Rule 8. STAY PENDING APPEAL

(a) **Supersedeas Defined; Necessity.** A supersedeas is a written order commanding appellee to stay proceedings on the judgment, decree or order being appealed from and is necessary to stay such proceedings.

(b) **Supersedeas; By Whom Issued.** A supersedeas shall be issued by the clerk of the court which rendered the judgment, decree or order being appealed from unless the record has been lodged with the appellate court in which event the supersedeas shall be issued by the clerk of the appellate court.

(c) **Supersedeas Bond.** Whenever an appellant entitled thereto desires a stay on appeal, he shall present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree or order of the trial court.

(d) **Proceedings Against Sureties.** If security is given in the form of a bond or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the trial court and irrevocably appoints the clerk of the trial court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and such notice of the motion as the trial court prescribes shall be filed with the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

Reporter's Notes to Rule 8 (1994): This rule tracks former Appellate Rule 8 without change. The Reporter's Notes pre-

pared in connection with former Appellate Rule 8 are set out below.

Reporter's Notes to Rule 8: 1. Rule 8 revises and consolidates prior Arkansas law concerning stays during appeal. Section (a) is a consolidation of superseded Ark. Stat. Ann. §§ 27-2119 and 27-2120 (Repl. 1962). It continues the requirement that a supersedeas be obtained in order to stay an appeal.

2. Section (b) permits the trial court clerk to issue a supersedeas up until the time the appeal has been docketed with the Arkansas Supreme Court. After such date, the supersedeas must be issued by the clerk of the Arkansas Supreme Court. Under superseded Ark. Stat. Ann. §§ 27-2122 and 27-2123 (Repl. 1962), a trial court clerk was limited to a period of thirty days following the entry of judgment within which to issue a supersedeas. Under Rule 8, the trial court clerk may issue a supersedeas until such time as the record is filed with the Arkansas Supreme Court.

3. Section (c) largely follows superseded Ark. Stat. Ann. § 27-2121 (Repl. 1962) which was largely repealed by superseded Ark. Stat. Ann. § 27-2121.1 (Repl. 1962). No appreciable change in prior Arkansas law is effected by this section.

4. Section (d) is taken from Rule 8 (b) of the Federal Rules of Appellate Procedure and is generally in accord with prior Arkansas law.

Rule 9. TIME EXTENSION WHEN LAST DAY FOR ACTION FALLS ON SATURDAY, SUNDAY, OR HOLIDAY

Whenever the last day for taking any action under these rules or under the Rules of the Supreme Court and Court of Appeals falls on a Saturday, Sunday, or legal holiday, the time for such action shall be extended to the next business day.

Reporter's Notes to Rule 9 (1994): This rule is identical to former Appellate Rule 9.

Rule 10. UNIFORM PAPER SIZE

All notices of appeal, motions, orders, records, transcripts,

and other papers required or authorized by these rules shall be on 8-1/2" x 11" paper.

Reporter's Notes to Rule 10 (1994): This rule is identical to former Appellate Rule 10.

IN RE: MOTIONS FOR RECONSIDERATION IN POST-CONVICTION MATTERS

Supreme Court of Arkansas
Delivered December 19, 1994

PER CURIAM. This court frequently acts on motions filed in the course of appeals of orders denying post-conviction relief pursuant to Arkansas Criminal Procedure Rule 37, Ark. Code Ann. § 16-90-111 (Supp. 1991), statutes which govern the issuance of writs of habeas corpus and mandamus as well as legal remedies such as error coram nobis proceedings and others. As there is no provision in the prevailing rules of procedure for a motion for reconsideration to be filed after this court has denied a motion which stems from a post-conviction matter, such motions will no longer be filed.

IN RE: Robert J. JOHNSON
Arkansas Bar ID #72138

Supreme Court of Arkansas
Delivered January 17, 1995

PER CURIAM: On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the license of Robert J. Johnson of Crossett, Arkansas, to practice law in the State of Arkansas and direct that Mr. John-

son's name be removed from the list of attorneys authorized to practice law in this state.

IN RE: Guy Hamilton JONES, Jr.
Arkansas Bar ID #72138

Supreme Court of Arkansas
Delivered February 13, 1995

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the license of Guy Hamilton Jones, Jr., of Conway, Arkansas, to practice law in the State of Arkansas and direct that Mr. Jones's name be removed from the list of attorneys authorized to practice law in this state.

IN THE MATTER OF RECOMMENDATIONS OF THE ARKANSAS SUPREME COURT COMMITTEES ON CIVIL PRACTICE AND CRIMINAL PRACTICE TO ADOPT REVISED RULES OF APPELLATE PROCEDURE

Supreme Court of Arkansas
Delivered February 13, 1995

PER CURIAM. On December 12, 1994, we submitted by per curiam order proposals prepared by the Arkansas Supreme Court Committees on Civil and Criminal Practice to divide the Arkansas Rules of Appellate Procedure into Civil and Criminal sections. *See In the Matter of Recommendations of the Arkansas Supreme Court Committees on Civil Practice and Criminal Practice to Adopt Revised Rules of Appellate Procedure*, 319 Ark. 791 (1994). This was part of a plan to remove from the Arkansas Rules of Criminal Procedure those rules pertaining to appeals and place

them, as revised, in the Arkansas Rules of Appellate Procedure. We asked for comment from the bench and bar and stated that the Rules would become effective January 15, 1995, unless altered by further order. Because of the significance of these changes, we have determined to extend the time for comment from the bench and bar to May 1, 1995.

Rule 3 of the criminal appeals rules and Rule 4 of the civil appeals rules deal with the time for filing a notice of appeal. The two rules pose different requirements. We would like them to be as compatible as possible, given the distinctions, such as the right to cross-appeal generally available in civil but not in criminal cases, between the two areas of the law. For now, we simply call attention to the difference between the proposed civil and criminal rules.

We alter our December 12, 1994 per curiam order and state that the Appellate Rules of Procedure will not become effective January 15, 1995, in light of this extension for additional comment.

Comments and suggestions on these prospective rules changes may be made in writing addressed to:

Clerk, Arkansas Supreme Court
Attn: Rules of Appellate Procedure
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

Appointments to Committees

IN RE: BOARD OF LAW EXAMINERS

893 S.W.2d 318

Supreme Court of Arkansas
Delivered December 12, 1994

PER CURIAM. Edwin B. Alderson, Jr., Esq., of El Dorado, Fourth Congressional District, is appointed to the Board of Law Examiners for a term of three years ending September 30, 1997. Mr. Alderson replaces Dennis L. Shackleford, Esq., of El Dorado, whose term has expired.

William C. Bridgforth, Esq., of Pine Bluff is appointed to an At-Large position on the Board for a term of three years ending September 30, 1997. Mr. Bridgforth replaces A. Watson Bell, Esq., of Searcy, whose term has expired.

The Court thanks Mr. Alderson and Mr. Bridgforth for accepting appointment to this most important Board.

The Court expresses its appreciation to Mr. Shackleford and Mr. Bell for their dedicated and faithful service to the Board.

IN RE: ARKANSAS CONTINUING LEGAL EDUCATION BOARD

Supreme Court of Arkansas
Delivered December 19, 1994

PER CURIAM. Philip D. Hout, Esq., of Newport, Second Court of Appeals District, and Robert R. Ross, Esq., of Little Rock, Sixth Court of Appeals District, are hereby reappointed to our Board of Continuing Legal Education for three-year terms to expire on December 5, 1997.

The Court thanks Mr. Hout and Mr. Ross for accepting reappointment to this most important Board.

Pamela S. Osment, Attorney-at-Law of Conway, is hereby appointed to the Board, At-Large, for a three-year term to expire December 5, 1997. Ms. Osment replaces Donna Gay, Attorney-at-Law of Little Rock, whose term has expired.

The Court thanks Ms. Osment for accepting appointment to this most important Board.

The Court expresses its gratitude to Ms. Gay for her faithful and dedicated service as a member and Chair of the Board.

IN RE: BOARD OF LAW EXAMINERS

Supreme Court of Arkansas
Delivered December 19, 1994

PER CURIAM. Randy E. Philhours, Esq., of Paragould, First Congressional District, is appointed to the Board of Law Examiners for a term of three years ending September 30, 1997. Mr. Philhours replaces W. Frank Morledge, Esq., of Forrest City, whose term has expired.

The Court thanks Mr. Philhours for accepting appointment to this most important Board.

The Court expresses its appreciation to Mr. Morledge for his dedicated and faithful service as a member and Chair of the Board.

IN RE: SUPREME COURT COMMITTEE ON CHILD SUPPORT

Supreme Court of Arkansas
Delivered December 19, 1994

PER CURIAM. The Honorable Warren Kimbrough, Chancellor, of Fort Smith is hereby reappointed to our Committee on Child Support. This is a four-year term which will expire on November 30, 1998.

Cathleen V. Compton, Attorney-at-Law, of El Dorado is hereby appointed to the Committee replacing Harry Truman Moore, Esq., of Paragould whose term has expired. This is also a four-year term which will end on November 30, 1998.

The Court thanks Judge Kimbrough for accepting reappointment and Ms. Compton for accepting appointment to this most important Committee.

The Court expresses its gratitude to Mr. Moore for his dedicated and faithful service as a member of the Child Support Committee.

IN RE: SUPREME COURT COMMITTEE ON CIVIL PRACTICE

Supreme Court of Arkansas
Delivered December 19, 1994

PER CURIAM. The Honorable John Ward, North Little Rock, is appointed to the Supreme Court Committee on Civil Practice effective January 1, 1995. Judge Ward will replace the Honorable Henry Wilkinson of Forrest City whose term will expire on that date. This appointment will end on July 30, 1997.

The Court thanks Judge Ward for accepting appointment to this most important Committee.

The Court expresses its gratitude to Judge Wilkinson for his faithful and dedicated service as a member and Chair of this Committee.

IN RE: SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE

Supreme Court of Arkansas
Delivered December 19, 1994

PER CURIAM. The Honorable Gerald Pearson of Jonesboro and Stevan E. Vowell, Esq., of Berryville are reappointed to our Committee on Criminal Practice for three-year terms to expire on January 31, 1998.

In our Per Curiam of December 13, 1993, we stated that this Committee by attrition would shrink from 18 to 15 members. The terms of the Honorable John A. Fogleman of Little Rock, Ray Guzman, Esq., of Fayetteville, and Ray Hartenstein, Esq. of Little Rock will expire on January 31, 1995. Due to our earlier Per Curiam, their appointments will not be renewed.

Further, we designate the Honorable Robert Edwards of Searcy to serve as Chair of the Committee as the current Chair, Judge Pearson, will retire from the bench on December 31, 1994. The Court thanks Judge Edwards for accepting the position as Chair of the Committee.

The Court thanks Judge Pearson and Mr. Vowell for accepting reappointment to this most important Committee and expresses its gratitude to Judge Pearson for his dedicated and faithful service as Chair of the Committee.

In anticipation of the expiration of their term and their retirement on January 31, 1995, the Court thanks Justice Fogleman, Professor Guzman, and Mr. Hartenstein for their years of service and commitment to the Committee.

IN RE: BOARD OF LAW EXAMINERS

Supreme Court of Arkansas
Delivered January 17, 1995

PER CURIAM. For the purpose of grading and certifying the results of the February, 1995 Bar Examination, Jim Pilkinton is appointed to replace Edwin Alderson as a Fourth District member of the Arkansas Board of Law Examiners.

IN RE: COMMITTEE ON AUTOMATION

Supreme Court of Arkansas
Delivered January 17, 1995

PER CURIAM. The Honorable David Bogard and Stanley D. Rauls, Esq., both of Little Rock, are reappointed to our Committee on Automation for three-year terms to end on October 31, 1997.

The Court thanks Judge Bogard and Mr. Rauls for accepting reappointment to this most important Committee.

IN RE: SUPREME COURT COMMITTEE ON CIVIL PRACTICE

Supreme Court of Arkansas
Delivered January 17, 1995

PER CURIAM. The Honorable John Ward of North Little Rock is appointed as a member and Chair of the Supreme Court Committee on Civil Practice effective January 1, 1995. Judge Ward replaces the Honorable Henry Wilkinson of Forrest City whose

term expired on that date. This appointment will end on July 30, 1997.

The Court thanks Judge Ward for accepting appointment as Chair of this most important Committee.

The Court expresses its gratitude to Judge Wilkinson for his faithful and dedicated service as a member and Chair of this Committee.

IN RE: AD HOC COMMITTEE ON RULE XV OF THE RULES GOVERNING ADMISSION TO THE BAR

893 S.W.2d 318

Supreme Court of Arkansas
Delivered January 23, 1995

PER CURIAM. Kaye McLeod, Attorney-at-Law of Little Rock and Chair of the Board of Law Examiners, is hereby appointed to our Ad Hoc Committee on Rule XV of the Rules Governing Admission to the Bar established by Per Curiam Order on March 14, 1994.

The Court thanks Ms. McLeod for accepting appointment to this ad hoc committee.

IN RE: ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION

893 S.W.2d 318

Supreme Court of Arkansas
Delivered January 23, 1995

PER CURIAM. In accordance with Amendment 66 of the Constitution of Arkansas and Act 637 of 1989, the Court appoints the Honorable Kim Smith of Fayetteville to the Arkansas Judicial Discipline and Disability Commission to fill the unexpired term of Stark Ligon, Esq., of Warren. This term will expire on June 30, 1999.

The Court thanks Judge Smith for accepting appointment to this most important Commission.

The Court expresses its gratitude to Mr. Ligon for his dedicated and faithful service as a member and Chair of the Commission.

IN RE: ARKANSAS SUPREME COURT AD HOC COMMITTEE ON FOSTER CARE AND ADOPTION ASSESSMENT

Supreme Court of Arkansas
Delivered January 23, 1995

PER CURIAM. Our State has received a Court Improvement Grant from the U.S. Department of Health and Human Services to be administered by the Supreme Court. The purpose of the grant is to conduct a study of foster care and adoption practice and procedure in our state courts, to determine where improvements can be made, and to implement those improvements.

Pursuant to the provisions of the grant we appoint an ad hoc ,committee to assist in the evaluation and implementation of the

Court Improvement Grant. The committee will study the practices and procedures utilized in foster care and adoption cases and based upon its evaluation, the committee will make recommendations to the Court regarding its findings and the implementation of improvements.

The following persons are hereby appointed to the Arkansas Supreme Court Ad Hoc Committee on Foster Care and Adoption Assessment.

Honorable Joyce Williams Warren
Juvenile Division Judge

Honorable Gayle Ford
Circuit/Chancery Judge

Jan Chaparro, Assistant Director for Family Preservation
Arkansas Department of Human Services

Lisa McGee, Assistant Chief Counsel
Arkansas Department of Human Services

Kay West Forrest, Managing Attorney
Arkansas Department of Human Services

Amy Rossi, Executive Director
Arkansas Advocates for Children and Families

Consevellá James, Executive Director
Treatment Homes, Inc.

Gerald Glenn, Director
UALR School of Law Legal Clinic

Mary Alice Hesselbein
Guardian Ad Litem

Jim Miles, Esq.
Adoptive Parent and former Foster Parent

Judieth Balentine
Attorney-at-Law

IN RE: ARKANSAS BOARD OF LEGAL SPECIALIZATION

893 S.W.2d 757

Supreme Court of Arkansas
Delivered January 30, 1995

PER CURIAM. Terry Poynter, Esq., of Mountain Home, Second Court of Appeals District, Bobby L. Odom, Esq., of Fayetteville, Third Court of Appeals District, and Richard N. Moore, Jr., Esq., of Little Rock, Sixth Court of Appeals District, are hereby reappointed to the Arkansas Board of Legal Specialization for three-year terms to expire on December 5, 1997.

The Court thanks Mr. Poynter, Mr. Odom and Mr. Moore for accepting reappointment to this most important Board.

IN RE: SUPREME COURT COMMITTEE ON MODEL JURY INSTRUCTIONS — CRIMINAL

892 S.W.2d 512

Supreme Court of Arkansas
Delivered February 27, 1995

PER CURIAM. The Honorable Henry Wilkinson, Forrest City; Scott Stafford, Esq., Professor of Law, Little Rock; the Honorable Tom Wynne III, Prosecuting Attorney for the Thirteenth Judicial Circuit, Fordyce; and Leslie Powell, Attorney-at-Law and Director of the Arkansas Sentencing Commission, North Little Rock, the Honorable John S. Patterson, Judge, Fifth Judicial Circuit, Clarksville are hereby appointed to our Supreme Court Committee on Model Jury Instructions - Criminal.

Judge Wilkinson replaces the Honorable John Dan Kemp and will serve the remainder of Judge Kemp's term which will expire on February 28, 1997. Professor Stafford, Mr. Wynne, Ms. Powell and Judge Patterson are appointed to three-year terms which will expire on February 28, 1998.

The Court thanks Judge Wilkinson, Professor Stafford, Mr. Wynne, Ms. Powell and Judge Patterson for accepting appointment to this most important Committee.

The Honorable William Enfield, Bentonville; the Honorable Jack Lessenberry, Little Rock; Wayne Matthews, Esq., Pine Bluff; Frederick S. Ursery, Esq., Little Rock; and the Honorable John Dan Kemp, Mountain View, now retire from the Committee. The Court expresses its gratitude to each of them for their dedicated and longstanding service to the Committee.

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Chancery cases reviewed de novo, even if chancellor refused to make any finding reversal inappropriate. *Id.*
Decree modified, defendant must place mailbox in a reasonable location in the servient right-of-way, such placement subject to the plaintiff's right to delimit. *Id.*
Appellant may not change the basis for her objection on appeal. *Nicholson v. State*, 566.
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Failure to abstract ruling or file notice of appeal, merits not addressed. *Id.*
Notice of appeal filed prematurely, appeal not perfected, appeal dismissed. *Id.*
Sufficiency of evidence issue not preserved, motion to renew made too late. *Claiborne v. State*, 602.
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Error harmless, similar opinion testimony admitted without objection. *Williams v. Southwestern Bell Tel. Co.*, 626.
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Argument not supported by convincing argument or authority, argument not considered on appeal. *Thomson v. Littlefield*, 648.
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Failure to preserve issue for appeal, record did not show ruling obtained below, no objection to testimony in record. *Garrett v. Brown*, 662.
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Specific grounds raised on appeal to support motion for directed verdict not raised at trial, argument not available on appeal. *Id.*
Motion for directed verdict not renewed at the close of the evidence, earlier motion treated as waived. *Id.*
Issue preserved for appeal, motion in limine, objection at first opportunity, ruling of trial court admitted evidence. *Massengale v. State*, 743.
Issue not moot, order continues to hamper appellant in performance of statutory duty to evaluate and move youth. *Arkansas Dep't of Human Servs. v. State*, 749.
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Matters that may be submitted to arbitration. *Lancaster v. West*, 293.
Contract giving rise to cause of action was executed after appellant quit appellee's agency, issue properly submitted to arbitration. *Id.*
At time sale consummated, parties not members of same firm, mandatory arbitration agreement applied. *Id.*
Public policy favors, party challenging award bears burden of proof. *Id.*
Appearance waives irregularities in notice. *Id.*
Partiality of the board, burden of proof. *Id.*
Partiality, proof must be certain and direct. *Id.*
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Officials had ample cause to arrest appellant. *Rhoades v. State*, 45.
Probable cause sufficient. *Milholland v. State*, 604.

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New attorney appointed to represent appellant on appeal, extension of time granted for the filing of appellant's brief. *Stone v. State*, 180.
Existing counsel failed to timely file brief, even after final extension, show cause hearing set. *Id.*
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Attorney held in contempt, fine imposed. *Pipkin v. State*, 237.
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Award of fees not specifically covered by statute. *Id.*
Ineffective assistance of counsel, when such a point may be raised. *Sumlin v. State*, 312.
Fees not awarded unless expressly authorized by statute, breach of contract. *Gill v. Transcriptions, Inc.*, 485.
Award of fees is within the trial court's discretion. *Id.*
Appellate court usually defers to trial court to award fees, reversal only for abuse of discretion. *Id.*
Award of fees, prevailing party. *Id.*
Appellee was the prevailing party and thus entitled to attorney's fees. *Id.*
Failure to file abstract and brief, contempt filed, additional counsel appointed to speed appeal. *Pipkin v. State*, 505.
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DWI, physical control of a vehicle may be proved by circumstantial evidence. *Wetherington v. State*, 37.
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Public safety one of the purposes of the DWI act, prosecutor's remark went to the issue of public safety, objection properly overruled. *Id.*
Parent not liable for negligence of child absent agency or employment relationship. *McMahan v. Berry*, 88.
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Operation is privilege not right. *Stevens v. State*, 640.
Substantial evidence appellants at fault, no error to deny directed verdict in appellants' favor. *Garrett v. Brown*, 662.
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Change to account, law in effect at the time of the change governs. *Stevens v. Billings*, 265.
Account could be changed by direction of any one of the persons named as a joint tenant, wife's act valid. *Id.*
In cases relied upon account owners did not make a designation in writing, cases inapplicable here. *Id.*

BONDS:
Written notification of failure of defendant (bond principal) to appear at court hearing received by appellant (bondsman) within 120 days of defendant's appre-

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Statutes presumed constitutional, general principles of construction. *Reed v. Glover*, 16.
Equal protection challenge to a statute, factors considered on appeal. *Id.*
Appellant asserted due process violation, appellant had no right or interest protected by the Constitution. *Id.*
Fourth amendment, investigative stop. *Johnson v. State*, 78.
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Right to counsel, when right attaches. *Milholland v. State*, 604.
Right to counsel claim too speculative. *Id.*
Police power permits regulation of operation of motor vehicle for safety and in other areas. *Stevens v. State*, 640.
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New bifurcated sentencing law does not violate Ex Post Facto clause. *Diffee v. State*, 669.
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Indemnity agreements, doctrine of acquiescence defined. *Id.*
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Original action, costs to be shared equally by real parties in interest. *Bailey v. McCuen*, 369.

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Issue moot, appellate court does not render advisory opinions. *Id.*
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Dispute over location of a mailbox, Congressional intent not to supplant the authority of state courts in such a dispute. *Lawson v. Sipple*, 543.
When state court jurisdiction is barred by federal law, doctrine of preemption does not apply to a dispute involving the location of a mailbox. *Id.*
Jurisdiction, criminal case, no positive proof offense occurred outside court's jurisdiction. *Nicholson v. State*, 566.
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Juvenile transfer cases, burden of proof. *Id.*
Juvenile transfer case, factors considered. *Id.*
Determination as to whether juvenile should be tried as an adult, facts sufficient to deny transfer to juvenile court, information sufficient to establish serious nature of the crime. *Id.*
Motion to transfer to juvenile court denied, evidence sufficient to support circuit court's refusal to transfer the case. *Id.*
Opinions and findings of court do not constitute a judgment or decree, judgment or decree must be subsequently rendered. *Mason v. Mason*, 722.
Chancellor has discretion to reopen a case before entry of a final decree, both parties must be given an opportunity to be heard. *Id.*
Both parties briefed the issue, no error for chancellor to reopen case prior to entry of final decree. *Id.*
Juvenile court, jurisdiction, misdemeanor juvenile possession of handgun. *Lucas v. State*, 752.
Argument for reversal jurisdictional, court will raise such argument on its own if necessary. *Jones v. State*, 762.
Jurisdictional argument rejected, Arkansas Juvenile Code will not be construed to achieve absurd results. *Id.*
Juvenile court, jurisdiction, possession of a handgun a misdemeanor offense for a minor. *Rosario v. State*, 764.
Probate court, no jurisdiction to interpret trust. *Thomas v. Arkansas Dep't of Human Servs.*, 782.

CRIMINAL LAW:
Inclusion of *contra pacem* clause in indictment not a condition precedent to circuit court's obtaining subject matter jurisdiction, failure to include a *contra pacem* clause in an indictment goes to the sufficiency of the charging instrument and must be raised prior to trial. *Wetherington v. State*, 37.
Evidence insufficient to sustain conviction for one crime but sufficient for a lesser included offense, the court may reduce the punishment, remand the case or grant a new trial. *Tigue v. State*, 147.
Judgment of conviction modified to the lesser included offense, case affirmed as modified. *Id.*
When writ of prohibition will issue, adequate remedies for review of the issuance of a criminal contempt citation. *Davis v. State*, 171.
Circumstantial evidence, when sufficient to support a conviction. *Nesdahl v. State*, 277.
Circumstantial evidence, factfinder may draw reasonable inferences. *Id.*
Carrying a weapon, sufficient evidence. *Id.*

When amendment to an information may be made, amendment here not in error. *Witherspoon v. State*, 313.
Appellants never had witness declared an accomplice, requirement of corroborative evidence must be brought into play. *Rockett v. State*, 335.
Defendant's burden to prove a witness is an accomplice, issue of corroborative evidence could not be raised for the first time on appeal. *Id.*
Capital murder, requirements for a conviction. *Dixon v. State*, 347.
Capital murder charge proper, evidence clear that appellant was an accomplice to the underlying aggravated robbery. *Id.*
Appellant convicted of capital felony murder, no error found. *Id.*
A defendant in a criminal case is entitled to effective assistance of counsel, standards for measuring ineffective assistance. *Noble v. State*, 407.
How an allegation of ineffective assistance of counsel is judged by the court, when a conviction will be set aside. *Id.*
Custodial statements presumed involuntary, Miranda standard imposed. *Id.*
Custodial statements must be proven to be voluntary, state has burden of proof. *Id.*
Determining voluntariness of custodial statement, factors on review. *Id.*
Components of totality of the circumstances, factors to be evaluated. *Id.*
Totality of the circumstances on review, evidence viewed in the light most favorable to the state, trial court resolves credibility questions. *Id.*
Custodial statement, persistent questioning will not necessarily render a confession involuntary. *Id.*
Custodial statements, police may use some psychological tactics in eliciting confession, including appeals to an accused's religious sympathies. *Id.*
Appellant's free will not overborne, conflicts in testimony for the trial court. *Id.*
Custodial statements, photographs of the victim or other psychological pressure permissible so long as they do not overbear appellant's free will, showing murder suspect photos of the victim was not inherently coercive. *Id.*
Invocation of right to silence must be scrupulously honored. *Id.*
Denial of right to remain silent in issue, trial court resolved conflicting testimony. *Id.*
Custodial statements, telling the accused he would not pass a polygraph if he did not tell the truth was not a threat. *Id.*
Post-conviction relief denied, no error found. *Id.*
When *Miranda* warning is required, determination of custody depends upon the objective circumstances of the interrogation. *State v. Spencer*, 454.
Noncustodial situation not converted to *Miranda* situation simply because questioning took place in a coercive environment, police officers are not required to *Mirandize* everyone whom they question. *Id.*
Suspect not "in custody," conversation not subject to *Miranda* safeguards. *Id.*
Intent to commit murder may be inferred. *Dansby v. State*, 506.
Capital murder, sufficient evidence. *Id.*
Sentencing, sentence not illegal. *Claiborne v. State*, 537.
Jury instruction, no rational basis for, no error to refuse to give proffered instruction. *Washington v. State*, 583.
Principal and accomplice, no distinction between them as to criminal responsibility. *Garrison v. State*, 617.
Juvenile possession of a handgun, affirmative defense applied, juvenile on mother's property. *Lucas v. State*, 752.
Juvenile in possession of handgun, affirmative defense, "possessory interest" in property defined. *Id.*
Juvenile in possession of handgun, affirmative defense applies to all persons, including juveniles. *Id.*

CRIMINAL PROCEDURE:
Severance of endangerment charge not conclusive as to whether doctor could describe the girl's physical condition, her trench foot condition was relevant proof of the crimes charged. *Lindsey v. State*, 132.

Speedy trial issue raised, writ denied due to lack of necessary information. *Davis v. State*, 171.
Rule 37 petitions, petition must be filed after the mandate is issued. *Doyle v. State*, 175.
Petition filed prior to issuance of mandate, once court made this determination it properly denied the petition. *Id.*
Sentencing, discretion to impose consecutive sentences. *Aaron v. State*, 320.
Prosecution attempted to try appellant as habitual offender at first trial, procedural objection prevented it, no error to correct oversight on retrial. *Id.*
Retrial, when permitted. *Rowlins v. State*, 323.
Mistrial declared, proof appellant agreed with the decision. *Id.*
Severance motion not properly renewed at trial, issue not preserved for appeal. *Rockett v. State*, 335.
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Severance motion, factors to be considered. *Id.*
Motion to sever denied, no abuse of discretion found. *Id.*
Identification testimony. *Halbrook v. State*, 350.
Sentencing, which law applies. *State v. Kinard*, 360.
Sentencing, habitual offenders, when amendment to reduce minimum sentences took effect. *Id.*
Sentencing, error to apply new law when crime occurred prior to acts' effective date. *Id.*
Sentencing, which law applies. *State v. Rodriques*, 366.
Sentencing, old law applied, error made in sentencing. *Id.*
No error to allow amendment of information to charge appellant as habitual offender. *Davis v. State*, 460.
Jury free to show mercy, death penalty not mandatory. *Dansby v. State*, 506.
As long as statutes certain, mere overlap does not render statute unconstitutional. *Id.*
Degree of proof required for aggravating or mitigating circumstances. *Id.*
Proof of aggravating circumstances. *Id.*
Mitigating factors, jury properly instructed to consider all mitigating evidence. *Id.*
Mitigating factors, no error to use standard form instead of proffered form where jurors told list of factors not only ones to consider. *Id.*
Aggravating circumstances, only one must be present to impose death penalty. *Id.*
More than one killed, no error to consider death penalty. *Id.*
Discovery, disclosing reports of expert witnesses to the defense. *Nicholson v. State*, 566.
Identification reliability for trial court to determine, jury then weighs testimony. *Milholland v. State*, 604.
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60-day requirement of Ark. Code Ann. § 5-4-310 not applicable when appellant serving time for another crime. *Bilderback v. State*, 643.
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Reserving right to appeal conditional guilty plea, effect of failure to "reserve in writing." *Id.*
Illegal sentence not raised by appellant, issue not addressed, must now be raised in post-conviction proceeding. *Id.*
Speedy trial rule, violation of rule an absolute bar to further prosecution. *Caulkins v. Crabtree*, 686.
Prima facie case of violation of the right to a speedy trial made, burden shifted to the State to show the delay was justified. *Id.*
Speedy trial, unavailability of petitioner not proven. *Id.*
Nolle prosequi used in attempt to bypass speedy trial provisions, *nolle prosequi* has no such effect absent a showing of good cause for the period of delay. *Id.*

Speedy trial, contemplation of a federal charge did not make it necessary for the state to drop its charge against the petitioner, speedy trial rule violated. *Id.*

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Punitive damages, when justified, even gross negligence not sufficient. *Carroll Elec. Coop. Corp. v. Carlton*, 555.
Inadequacy of jury award alleged, standard on review is abuse of discretion. *Garrett v. Brown*, 662.
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Wage loss, gross amount, error invited, no reversal. *Id.*

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Continuance, no error to deny, appellant given two months to review information. *Dansby v. State*, 506.
Failure to properly disclose, no undermining prejudice. *Nicholson v. State*, 566.

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Voidable decree, delay of twenty-four years in getting it set aside, error not to apply laches to preserve effect of decree. *Id.*
Retirement and disability benefits as marital property, both should be treated as such. *Mason v. Mason*, 722.
Exemption from marital property, when a personal injury claim is so exempt.
Personal injury defined. *Id.*
Appellee's long-term physical condition more consistent with bodily injury than personal injury, disability benefits were marital property and should have been divided as such. *Id.*
Appellee's benefits found to have been for a permanent disability, court did not err. *Id.*
Social security benefits not divided by chancellor, chancellor did not err. *Id.*
Distribution of property, chancellor given wide discretion. *Id.*
Equitable distribution of marital property, chancellor directed to extend the period considered and to resolve all questions as to marital property. *Id.*
Division of marital property, decision should not have been limited to a review of only a limited period of income and expenditures. *Id.*
Property received through inheritance not marital property. *Id.*
Trust found to be appellee's personal property, no error found. *Id.*

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Testimony concerning other crimes, wrongs, or acts admissible if independently relevant to the main issue. *Id.*
Appellant failed to ask for a limiting instruction, such failure foreclosed a claim of error on appeal. *Id.*
Circumstances connected with a particular crime may be shown, even when those circumstances would constitute another crime. *Id.*
Jury entitled to know the full extent of the child's physical condition at the time of the appellant's arrest, proof of child's total physical condition relevant to the charge of rape. *Id.*
Probative value of proof not outweighed by prejudicial effect, proof of trench foot properly allowed. *Id.*
Appellant opened the door to testimony concerning his fitness as a parent, proof of bad character becomes admissible when a party opens the door by eliciting proof of good character. *Id.*
Test for determining whether there was sufficient proof to support the verdict, factors on review. *Tigue v. State*, 147.
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Sufficient proof introduced to support convictions. *Id.*
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Chain of custody objected to, testimony had sufficient foundation. *Id.*
Hearsay evidence improperly admitted, such evidence properly admitted through another source, no reversible error. *Id.*
Even relevant testimony may be excluded if it would only confuse the issues. *Id.*
Substantial evidence defined. *St. Paul Fire & Marine Ins. Co. v. Brady*, 301.
Substantial evidence. *Witherspoon v. State*, 313.
Serious physical injury required, evidence sufficient to show such injury occurred. *Id.*
Mention of prior arrest was harmless error. *Aaron v. State*, 320.
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Evidence admitted without an objection was cumulative, could not later be claimed to be prejudicial. *Id.*
Neither appellant sufficiently objected to all in-court identifications, assertion of prejudice could not be made. *Id.*
Sufficiency of the evidence, challenge on appeal requires motion for directed verdict at close of all the evidence. *Adams v. State*, 381.
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Evidence of final judgment of wife's conviction was admissible, appellant failed to offer any other proof. *Noland v. Farmers Ins. Co.*, 449.
Exclusion, failure to make proffer, issue not preserved for appeal. *Davis v. State*, 460.

Exclusion not prejudice, witness told jury of bias despite sustained objection. *Id.*
Hearsay objection sustained, question not rephrased, no error. *Id.*
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Limited leading questions proper here. *Id.*
Exclusion of police officer opinion testimony about test not error where expert testified who actually performed test. *Id.*
Test to determine sufficiency, evidence reviewed in light most favorable to appellee. *Dansby v. State*, 506.
Substantial evidence defined. *Id.*
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Bias, no denial of connection with police, proffered evidence all postdated the witness's relating appellant's statement to police, evidence not relevant. *Id.*
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Judicial notice, no need to distinguish bench trial from jury trial. *Id.*
Judicial notice, no error to take judicial notice of schedules of controlled substances. *Id.*
Credibility of and conflicts in testimony are for trial court, decision not disturbed on appeal. *Milholland v. State*, 604.
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Cash admitted into evidence, no error to so admit. *Garrison v. State*, 617.
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Knife admitted as demonstrative evidence, trial court did not abuse its discretion. *Id.*
A specific ground of objection need not be stated when the error is obvious from the context, yet, some objection must be made. *Thomson v. Littlefield*, 648.
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Evidence determined to be prejudicial, no abuse of discretion found. *Id.*
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Lay opinion admissible here, rationally based on perception of witness. *Id.*
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Whether innocent coinsured may recover under policy, language of the policy controls. *Id.*
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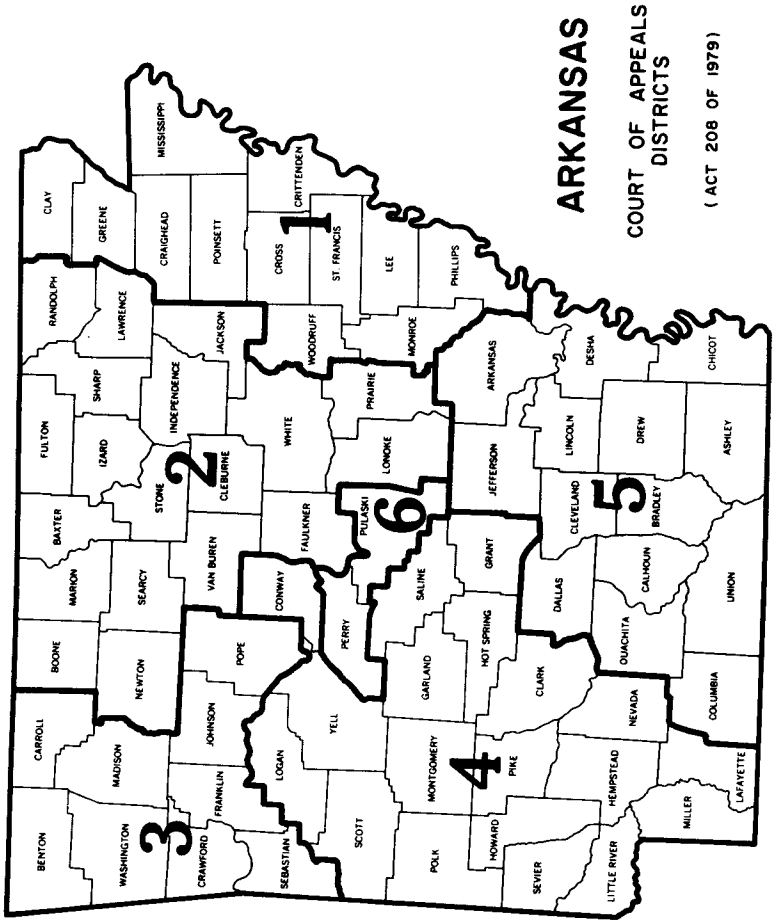
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LITTLE RIVER
MILLER

JUDGES AND OFFICERS
OF THE
COURT OF APPEALS
OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(December 7, 1994 –
March 8, 1995, inclusive)

JUDGES

JOHN E. JENNINGS	Chief Judge[1]
JOHN MAUZY PITTMAN	Judge[2]
JAMES R. COOPER	Judge[3]
JOHN B. ROBBINS	Judge[4]
MELVIN MAYFIELD	Judge[5]
JUDITH ROGERS	Judge[6]

OFFICERS

WINSTON BRYANT	Attorney General
LESLIE W. STEEN	Clerk
JACQUELINE S. WRIGHT	Librarian
MARLO M. BUSH	Reporter of Decisions

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[1]District 3.
[2]District 1.
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[6]District 6.

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STANDARDS FOR PUBLICATION OF OPINIONS

Rule 5-2

Rules of the Arkansas Supreme Court and Court of Appeals

OPINIONS

(a) SUPREME COURT — SIGNED OPINIONS. All signed opinions of the Supreme Court shall be designated for publication.

(b) COURT OF APPEALS — OPINION FORM. Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

(c) COURT OF APPEALS — PUBLISHED OPINIONS. Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked "Not Designated for Publication."

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the

Arkansas Reports by case number, style, date, and disposition.

(e) COPIES OF ALL OPINIONS. In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.

CASES AFFIRMED BY THE ARKANSAS COURT OF APPEALS WITHOUT WRITTEN OPINION PURSUANT TO TULE 5-2(b), RULES OF THE ARKANSAS SUPREME COURT AND COURT OF APPEALS

Allen, Roderick *v.* State, CA CR 94-258 (Pittman, J.), affirmed December 28, 1994.

Allen, Virginia F. *v.* State, CA CR 94-333 (Cooper, J.), affirmed December 28, 1994.

Aitken *v.* Sloop, CA 93-1264 (Cooper, J.), affirmed December 14, 1994.

Anderson *v.* State, CA CR 94-56 (Pittman, J.), affirmed December 7, 1994.

Andrews *v.* Environmental Sys. Co., CA 93-1114 (Robbins, J.), affirmed December 28, 1994.

Arkansas Delivery Servs., Inc. *v.* Director, E 93-256 (Cooper, J.), affirmed February 8, 1995.

Arnold *v.* TCR Corp., CA 94-251 (Jennings, C.J.), affirmed March 8, 1995.

Baglio *v.* State, CA CR 93-1226 (Jennings, C.J.), affirmed January 4, 1994.

Bain *v.* State, CA 93-1347 (Pittman, J.), dismissed December 28, 1994.

Baker *v.* State, CA CR 93-1331 (Rogers, J.), affirmed December 14, 1994.

Beard *v.* Regional Healthcare Nursing Home, CA 94-477 (Cooper, J.), affirmed March 8, 1995.

Blytheville Holiday Inn *v.* Besharse, CA 94-171 (Jennings, C.J.), affirmed February 1, 1995.

Bohanan *v.* State, CA CR 94-227 (Mayfield, J.), affirmed January 18, 1995.

Boothby *v.* Boothby, CA 94-152 (Rogers, J.), affirmed in part; reversed and remanded in part March 8, 1995.

Bradley *v.* State, CA CR 94-349 (Robbins, J.), affirmed January 25, 1995.

Brown *v.* Brown, CA 94-756 (Per Curiam), Appellant's Motion for Stay of Time to Settle the Record and to File Brief and Motion to Supplement the Record granted December 7, 1994.

Burgener *v.* Briggler, CA 93-1044 (Jennings, C.J.), reversed December 28, 1994.

Burlington Indus. *v.* Forrest, CA 94-505 (Cooper, J.), affirmed March 1, 1995.

Cairns *v.* Arkansas Dep't of Health, CA 94-206 (Rogers, J.), dismissed January 4, 1995.

Carder Buick-Olds Co. *v.* Wilson, CA 93-1128 (Jennings, C.J.), affirmed December 7, 1994.

Carpenter *v.* State, CA CR 94-264 (Rogers, J.), affirmed January 25, 1995.

C.C. *v.* State, CA 94-67 (Jennings, C.J.), affirmed February 8, 1995.

Chambers *v.* State, CA CR 94-246 (Rogers, J.), affirmed January 18, 1995.

Chambers *v.* Wayne Poultry, CA 94-200 (Cooper, J.), affirmed January 4, 1995.

Chesser *v.* State, CA CR 94-196 (Pittman, J.), affirmed December 28, 1994.

Circle C Enter. *v.* Brammer, CA 94-400 (Jennings, C.J.), affirmed February 8, 1995.

Cooper *v.* State, CA CR 94-428 (Pittman, J.), affirmed March 8, 1995.

Cunningham *v.* State, CA CR 94-90 (Robbins, J.), affirmed February 22, 1995.

D.C. *v.* State, CA 94-316 (Mayfield, J.), affirmed March 8, 1995.

Eagle *v.* Beaver Lake Concrete, CA 94-436 (Rogers, J.), affirmed February 15, 1995.

Ebey *v.* Director, E 95-24 (Per Curiam), Motion for Rule on Clerk to Lodge Petition for Review remanded March 8, 1995.

Evans *v.* Arkansas Dep't of Human Servs., CA 94-424 (Cooper, J.), affirmed January 25, 1995.

Evans *v.* Evans, CA 93-985 (Jennings, C.J.), affirmed December 7, 1994.

Eveland *v.* State, CA CR 93-242 (Pittman, J.), remanded December 7, 1994.

Farm Bureau Mut. Ins. Co. *v.* Sherrod, CA 93-1189 (Pittman, J.), affirmed February 22, 1995.

Forehand *v.* State, CA CR 93-692 (Robbins, J.), affirmed February 22, 1995.

Foster *v.* State, CA CR 94-229 (Cooper, J.), affirmed January 4, 1995.
Gatewood *v.* State, CA CR 94-259 (Jennings, C.J.), affirmed March 1, 1995.
Gaylord Container Corp. *v.* Director, E 93-279 (Cooper, J.), affirmed February 15, 1995.
General Agents Ins. Co. of Am., Inc. *v.* Tri-Eagle Enter., CA 93-1358 (Rogers, J.), reversed and dismissed December 7, 1994.
Hall *v.* Hall, CA 93-1387 (Robbins, J.), affirmed January 11, 1995.
Hampton *v.* Barnett, CA 94-130 (Mayfield, J.), affirmed February 15, 1995.
Harris *v.* Cruce, CA 93-1120 (Jennings, C.J.), affirmed December 7, 1994.
Harris *v.* Harris, CA 93-889 (Per Curiam), dismissed February 15, 1995.
Hefley *v.* State, CA CR 94-236 (Mayfield, J.), affirmed January 25, 1995.
Heien *v.* State, CA CR 94-315 (Robbins, J.), affirmed January 4, 1994.
Highfill *v.* ADM Milling Co., CA 94-270 (Mayfield, J.), affirmed January 25, 1995.
Hignite *v.* State, CA CR 93-1368 (Mayfield, J.), affirmed March 1, 1995.
Hilton *v.* Little Rock School Dist., CA 94-291 (Rogers, J.), affirmed February 8, 1995.
Holbrook *v.* Summerford, CA 94-99 (Cooper, J.), affirmed January 11, 1995.
Ivory *v.* State, CA CR 94-285 (Jennings, C.J.), affirmed January 18, 1995.
Jackson *v.* State, CA CR 94-146 (Rogers, J.), affirmed January 4, 1995.
Jenkins *v.* State, CA CR 91-286 (Mayfield, J.), affirmed January 11, 1995.
Johnson *v.* State, CA CR 94-230 (Pittman, J.), affirmed December 14, 1994.
Jones, Christopher *v.* State, CA CR 93-1232 (Jennings, C.J.), dismissed as moot December 14, 1994.
Jones, Eric *v.* State, CA CR 94-665 (Jennings, C.J.), affirmed March 8, 1995.

Jones *v.* United Parcel Serv., CA 94-174 (Pittman, J.), affirmed January 25, 1995.

Julian *v.* Story, CA 93-1142 (Mayfield, J.), reversed and remanded December 14, 1994.

Keel *v.* First Nat'l Bank, CA 94-331 (Cooper, J.), affirmed February 15, 1995.

Keel *v.* State, CA CR 93-311 (Pittman, J.), affirmed December 21, 1994.

Kelly *v.* State, CA CR 94-97 (Robbins, J.), affirmed December 14, 1994.

Kendrick *v.* Baddour, Inc., CA 94-365 (Cooper, J.), affirmed February 1, 1995.

King *v.* State, CA CR 93-1362 (Mayfield, J.), affirmed December 14, 1994.

Lambert *v.* State, CA CR 94-25 (Rogers, J.), affirmed March 1, 1995.

Lasley *v.* State, CA CR 93-1204 (Mayfield, J.), affirmed December 21, 1994.

Lawrence *v.* State, CA CR 94-244 (Rogers, J.), affirmed February 22, 1995.

Laws *v.* Director, E 93-31 (Pittman, J.), dismissed February 8, 1995.

Lyons *v.* State, CA CR 94-211 (Rogers, J.), affirmed January 4, 1995.

Maples *v.* State, CA CR 93-1318 (Pittman, J.), affirmed December 21, 1994.

Martin *v.* State, CA CR 94-226 (Robbins, J.), affirmed December 21, 1994.

Mason *v.* Ashley County Convalescent Cntr., CA 93-1330 (Mayfield, J.), reversed and remanded December 21, 1994.

McCandless *v.* State, CA CR 94-501 (Pittman, J.), affirmed March 1, 1995.

McClinton *v.* State, CA CR 94-443 (Cooper, J.), affirmed February 15, 1995.

McDougal *v.* McDougal, CA 93-873 (Robbins, J.), affirmed in part; reversed and remanded in part December 21, 1994.

McGuire *v.* Watson, CA 94-297 (Pittman, J.), dismissed February 22, 1995.

McMurtrey *v.* Director, E 93-253 (Jennings, C.J.), affirmed March 1, 1995.

Mid-South Reclamation Indus. *v.* Director, E 93-268 (Jennings, C.J.), reversed and remanded February 8, 1995.
Mitchell, Bennie *v.* State, CA CR 93-945 (Pittman, J.), affirmed December 21, 1994.
Mitchell, David *v.* State, CA CR 94-1401 (Per Curiam), Appellant's Pro Se Motion for Appointment of Counsel denied February 22, 1995.
Mobley *v.* Cunningham, CA 94-170 (Robbins, J.), affirmed February 8, 1995.
Moore *v.* Estate of Moore, CA 94-346 (Pittman, J.), affirmed February 22, 1995.
Morgan *v.* State, CA CR 94-512 (Rogers, J.), affirmed March 1, 1995.
Morris *v.* Skaggs, CA 94-286 (Jennings, C.J.), affirmed February 8, 1995.
Morris *v.* State, CA CR 94-106 (Mayfield, J.), affirmed January 25, 1995.
Nail *v.* State, CA CR 94-11 (Robbins, J.), affirmed March 8, 1995.
Overby Law Firm, P.A. *v.* Wyse, CA 92-1483 (Rogers, J.), affirmed January 4, 1995.
Parker *v.* State, CA CR 94-43 (Pittman, J.), affirmed December 14, 1994.
Parrish *v.* State, CA CR 93-458 (Jennings, C.J.), affirmed December 14, 1994.
Pierce *v.* State, CA CR 94-329 (Robbins, J.), affirmed January 18, 1995.
Pogue *v.* State, CA CR 94-337 (Mayfield, J.), affirmed January 4, 1995.
Polletta *v.* State, CA CR 94-299 (Robbins, J.), affirmed February 8, 1995.
Powell *v.* Brooks, CA 94-76 (Mayfield, J.), affirmed in part and reversed in part February 8, 1995.
Pullie *v.* State, CA CR 94-520 (Mayfield, J.), affirmed February 8, 1995.
Quick *v.* State, CA CR 93-1397 (Rogers, J.), affirmed December 7, 1994.
Rash *v.* Arkansas Aerospace, CA 94-458 (Robbins, J.), affirmed March 1, 1995.
Ricks *v.* State, CA CR 94-69 (Jennings, C.J.), affirmed February 22, 1995.

Rosser *v.* State, CA CR 94-579 (Per Curiam) issued December 14, 1994.

Saubers *v.* Director, E 93-227 (Cooper, J.), affirmed February 8, 1995.

Schulze *v.* Director, E 93-283 (Jennings, C.J.), affirmed March 8, 1995.

Schwarz *v.* Moody, CA 94-695 (Per Curiam), Appellee's Motion to Extend Stay of Appeal granted February 8, 1995.

Schwarz *v.* Moody, CA 94-695 (Per Curiam), Appellant's Motion to Set Supersedeas Bond granted February 8, 1995.

Scoggin *v.* Poulan/Weedeater, CA 94-82 (Pittman, J.), affirmed January 25, 1995.

Scott *v.* State, CA CR 93-1207 (Pittman, J.), affirmed December 21, 1994.

Scott *v.* Universal Mfg. Co., CA 94-243 (Mayfield, J.), affirmed February 15, 1995.

Shaw *v.* State, CA CR 94-42 (Cooper, J.), affirmed December 21, 1994.

Shepherd *v.* Foundation Life Ins. Co. of Ark., CA 93-809 (Pittman, J.), affirmed December 14, 1994.

Sims *v.* Rostker, CA 94-268 (Robbins, J.), affirmed February 8, 1995.

Sinclair *v.* Hickory Springs Mfg. Co., CA 94-497 (Robbins, J.), affirmed March 8, 1995.

Spencer *v.* Ramey, CA 94-187 (Jennings, C.J.), affirmed February 8, 1995.

Sphere Drake Ins. Co. *v.* Gaston, CA 93-1394 (Cooper, J.), affirmed March 8, 1995.

Spikes *v.* State, CA CR 94-479 (Jennings, C.J.), affirmed February 15, 1995.

Spurling *v.* State, CA CR 94-324 (Jennings, C.J.), affirmed March 8, 1995.

State *v.* Wetherington, CA CR 94-221 (Pittman, J.), reversed and remanded January 25, 1995.

Surveyor *v.* State, CA CR 94-38 (Cooper, J.), affirmed December 14, 1994.

The Liquor Outlet, Inc. *v.* Guardtronic, Inc., CA 94-22 (Mayfield, J.), affirmed January 11, 1995.

Thomas *v.* Simpson, CA 93-1321 (Robbins, J.), affirmed January 25, 1995.

Thornton *v.* Washington Regional Medical Ctr., CA 94-382 (Robbins, J.), reversed and remanded February 15, 1995.

Thurman *v.* State, CA CR 93-1268 (Robbins, J.), affirmed in part; reversed and remanded in part January 18, 1995.

Tims *v.* Tolson, CA 93-1218 (Pittman, J.), affirmed December 28, 1994.

Tuberville *v.* Tuberville, CA 94-147 (Robbins, J.), affirmed February 22, 1995.

United Parcel Serv. *v.* Hooks, CA 94-361 (Rogers, J.), affirmed February 1, 1995.

USA Truck, Inc. *v.* Williams, CA 94-359 (Robbins, J.), affirmed February 1, 1995.

Walton *v.* State, CA CR 94-51 (Jennings, C.J.), affirmed December 21, 1994.

Weathers *v.* First Nat'l Bank, CA 94-228 (Cooper, J.), affirmed March 8, 1995.

Welcher *v.* State, CA 94-204 (Pittman, J.), affirmed March 8, 1995.

West *v.* Estate of West, CA 93-1344 (Mayfield, J.), affirmed February 1, 1995.

West *v.* Guardianship of Woodard, CA 93-1126 (Robbins, J.), affirmed March 1, 1995.

West *v.* State, CA CR 94-195 (Pittman, J.), affirmed March 1, 1995.

Whitehead *v.* State, CA CR 94-165 (Cooper, J.), affirmed January 25, 1995.

Whitman *v.* Whitman, CA 94-252 (Jennings, C.J.), affirmed December 14, 1994.

Wickliffe *v.* State, CA CR 94-319 (Cooper, J.), affirmed March 1, 1995.

Williams *v.* State, CA CR 94-50 (Cooper, J.), affirmed January 4, 1995.

Wilson *v.* State, CA CR 94-269 (Cooper, J.), affirmed January 18, 1995.

Zetty *v.* Zetty, CA 94-449 (Rogers, J.), affirmed in part; reversed and remanded in part March 8, 1995.

CASES AFFIRMED BY THE ARKANSAS COURT OF APPEALS WITHOUT WRITTEN OPINION PURSUANT TO RULE 5-2(b), RULES OF THE ARKANSAS SUPREME COURT AND COURT OF APPEALS

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Blevins *v.* Director of Labor, E 94-88, December 14, 1994.
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England *v.* Director of Labor, E 94-111, December 21, 1994.
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Hubbard *v.* Director of Labor, E 94-121, December 21, 1994.
Jackson *v.* Director of Labor, E 94-109, December 14, 1994.
Johnson *v.* Director of Labor, E 94-87, December 14, 1994.
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Lane *v.* Director of Labor, E 94-103, December 14, 1994.
Loggins *v.* Director of Labor, E 94-134, February 22, 1995.
McBroom *v.* Director of Labor, E 94-77, January 18, 1995.
Morris *v.* Director of Labor, E 94-126, January 25, 1995.
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Power *v.* Director of Labor, E 94-101, December 14, 1994.
Rankins *v.* Director of Labor, E 94-129, January 25, 1995.
Roberts *v.* Director of Labor, E 94-114, December 21, 1994.
Service Finance Corp. *v.* Director of Labor, E 94-37, February 15, 1995.
Walker *v.* Director of Labor, E 94-107, December 14, 1994.
Ward *v.* Director of Labor, E 94-122, December 21, 1994.
Wells *v.* Director of Labor, E 94-124, December 21, 1994.
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Wimbley *v.* Director of Labor, E 94-70, December 21, 1994.
Zeiler *v.* Director of Labor, E 94-151, February 22, 1995.

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Generally, appellee had the burden of proof. *Boone v. Armistead*, 187.
Chancellor's finding that there were two agreements supported by the evidence, no error found. *Id.*
Generally part performance will not constitute satisfaction, some actions may make it impossible for a party to abandon the compromise. *Id.*
Chancellor ordered satisfaction of judgments, no error found. *Id.*

ADVERSE POSSESSION:
Factors necessary to establish, how a permissive use can become adverse. *Tolson v. Dunn*, 219.
Appellants had permission to remain on the property, chancellor's finding that there was no adverse possession not against the preponderance of the evidence. *Id.*

APPEAL & ERROR:
Review of denial of motion to suppress. *Mounts v. State*, 1.
No timely objection, issue not preserved for appeal. *Massengale v. State*, 19.
Preserving argument for appeal. *Id.*
When motion in limine preserves issue absent further objection. *Id.*
Order appealed is not final, appealable order, appeal dismissed. *Lester v. Lester*, 40.
Subject-matter jurisdiction essential, but ruling by trial court that it has jurisdiction does not render such order appealable. *Id.*
Lack of jurisdictional requirements should be raised by court on its own motion. *Id.*
Issue not addressed but left for determination on remand. *Deal v. Farm Bureau Mut. Ins. Co. of Ark, Inc.*, 48.
Assignment of error unsupported by convincing argument, such assignment, generally, not considered on appeal. *Morrell v. Morrell*, 54.
Arguments not supported by argument or citation of authority are not considered. *Kelleher v. City of Russellville*, 58.
Prejudice must be shown, no reversal for harmless error. *Id.*
Failure to abstract arguments, review precluded. *Id.*
Appropriateness of directed verdict, standard of review. *Forrest v. General Ins. Co. of Am.*, 88.
Issue integral part of guilty plea, issue not appealable. *Hampton v. State*, 93.
Standard of review, clearly erroneous standard. *Davis v. Davis*, 95.
Clearly erroneous standard explained. *Id.*
Deference given to chancery court on review. *Id.*
Standard of review, chancery cases. *Keesee v. Keesee*, 113.
Issues not raised below, not considered on appeal. *Id.*
Review of denial of entitlement to Workers' Compensation benefits. *Russell v. Georgia-Pacific Corp.*, 131.
Review of sufficiency of the evidence on appeal in a workers' compensation case. *Maxwell v. Carl Bierbaum*, Inc., 159.
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Review of chancery cases, when appellate court will reverse a chancery case. *Boone v. Armistead*, 187.
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Review of chancery cases, chancellor has superior opportunity to assess credibility. *Tolson v. Dunn*, 219.

Chancery cases reviewed *de novo*, no reversal unless chancellor's decision clearly against the preponderance of the evidence. *Id.*
Standard of review in workers' compensation cases. *Morelock v. Kearney Co.*, 227.

ARREST:
Warrantless arrest, probable cause required, more than mere suspicion, probable cause determination based on officer's knowledge at time of arrest. *Mounts v. State*, 1.
Warrantless arrest, probable cause requirement strictly enforced. *Id.*
Arrest without probable cause is illegal. *Id.*

ASSIGNMENTS:
All contracts in writing for the payment of money are assignable, construction of assignments. *Watkins v. Hadamek*, 78.
Assignment valid, no error found. *Id.*

ATTORNEY & CLIENT:
Calculation of attorney's fees. *State Farm Mut. Auto Ins. Co. v. Brown*, 136.
Award of fees not an abuse of discretion. *Id.*
Fees for counsel for indigent parent, termination of parental rights, case remanded to trial court for fee determination. *Evans v. Arkansas Dep't of Human Servs.*, 157.

AUTOMOBILE:
Driver's license, no automatic revocation. *Mounts v. State*, 1.

BANKRUPTCY:
Abandoning an asset, when estate remains open, when estate is closed. *King v. Knox*, 85.
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CONSTITUTIONAL LAW:
Fourth Amendment protection, rights personal, standing to challenge established by showing possessory interest. *Bernal v. State*, 175.
Fourth Amendment rights, no standing found, abandoned article, abandoned rights. *Id.*

CONTRACTS:
Chancellor's finding that there was no proof that an oral contract existed was not against the preponderance of the evidence, appellants were not entitled to specific performance. *Tolson v. Dunn*, 219.

COURTS:
Jurisdiction, bankruptcy court or state court, abandoned asset. *King v. Knox*, 85.

CRIMINAL PROCEDURE:
Warrantless search of vehicle. *Mounts v. State*, 1.
Sentencing, bifurcated trial for DWI and two misdemeanors, no prejudice. *Kelleher v. City of Russellville*, 58.
DWI, bifurcated procedure protects defendant. *Id.*
No right to appeal from guilty plea, exceptions. *Hampton v. State*, 93.
Objection to form of information must be raised prior to trial, failure to do so, issue not preserved for appeal. *Ingram v. State*, 105.
Right of appeal limited to persons actually convicted, no appeal may be taken from an order of nolle prosequi. *Webb v. State*, 216.

DEEDS:
Proof that deed absolute on its face is in fact a mortgage, burden, requirements. *Davis v. Davis*, 95.

Proof deed that is absolute on its face is in fact a mortgage, standard of evidence required. *Id.*
Finding that deed was equitable mortgage was not clearly erroneous. *Id.*

DIVORCE:
Contract incorporated into decree is not modifiable, child support agreements modifiable. *Keesee v. Keesee*, 113.
Proof of residence must be corroborated, it may not be waived. *Araneda v. Araneda*, 236.
Residence for the required period a jurisdictional issue, question of residence may be raised at any stage of the proceedings. *Id.*

EMINENT DOMAIN:
Measure of damages. *City of Fort Smith v. Findlay*, 197.
Damages that necessarily flow from easement distinguished from damages caused by negligent contractor. *Id.*
Error to allow damage testimony in condemnation proceeding where damage not shown to have resulted from construction on condemned easement. *Id.*
Jury instruction not supported by evidence. *Id.*
Jury instruction not a correct statement of law. *Id.*
Temporary easement, value of. *Id.*
Fair rental value, photographs of construction and blockage of driveway were not relevant. *Id.*
Difference in market value before and after the taking, evidence that developers were permitted to build without improving drainage was irrelevant but not prejudicial. *Id.*

EQUITY:
Laches, delay of eleven years will not defeat claim for child support arrearages. *Laroe v. Laroe*, 192.
Clean hands doctrine, chancellor in better position to judge equities than appellate court, no abuse of discretion shown. *Id.*
Clean hands doctrine, application discretionary with chancellor. *Id.*

ESTOPPEL:
Doctrine and elements. *State Farm Mut. Auto Ins. Co. v. Brown*, 136.
Party who benefits from a transaction may be estopped from questioning transaction's validity, doctrine of estoppel founded on a party's own act. *Araneda v. Araneda*, 236.
No evidence corroborating appellee's residence in the state for the statutory period, proof of residence may not be supplied by indirect action through application of estoppel. *Id.*

EVIDENCE:
Admissibility of specific instances of conduct, admissibility of specific acts of violence or threats. *Simpkins v. State*, 14.
Right to introduce specific instances of the victim's violent character essential to appellant's defense. *Id.*
Testimony relevant to appellant's theory of self-defense, trial court erred in excluding it. *Id.*
What qualifies as a dying declaration, trial court's determination reversed only if an abuse of discretion found. *Id.*
Testimony admitted as a dying declaration, no abuse of discretion found. *Id.*
Trial court has broad discretion to weigh probative value against danger of unfair prejudice, no abuse of discretion here. *Massengale v. State*, 19.
Exhibit was a self-authenticating document, exhibit was properly admitted at trial. *Price v. State*, 37.
Other crimes, independent relevance required, trait of character, reputation or

opinion testimony, cross-examination, inquiry into relevant specific conduct. *Value v. State*, 70.
Purpose of cross-examination of a character witness. *Id.*
Prior conviction raised on cross-examination of character witness, question did not impeach but supported witness's testimony, prosecutor's question improper. *Id.*
Hearsay, no error or prejudice demonstrated from officer's testimony. *Ingram v. State*, 105.
Admission of facsimile copy of crime lab report proper where no real question about authenticity, accuracy, or continuing effectiveness. *Id.*
Sufficiency of the evidence challenged as to robbery conviction, evidence found sufficient to support conviction. *Baldwin v. State*, 181.
Substantial evidence defined. *City of Fort Smith v. Findlay*, 197.
Photographs irrelevant and prejudicial in eminent domain case. *Id.*
Expert testimony may be based on hearsay. *Id.*
Expert testimony properly permitted, though based on hearsay. *Id.*
Video tape should have been excluded as irrelevant and prejudicial, tape showed conditions only after construction, not before, tape focused on culvert across the street that was not part of this project. *Id.*
Trial court has discretion in determining the relevance of evidence, when trial court will be reversed. *Service Fin. Corp. v. Evans*, 225.
Ability to pay debt not in issue, evidence erroneously admitted. *Id.*
Amount paid by collection agency for the claim irrelevant, evidence should not have been admitted. *Id.*

GARNISHMENT:
Garnishment a species of attachment, statute applicable thereto. *Watkins v. Hadamek*, 78.
Appellee had an interest in the garnishment, appellee had standing to challenge the writ. *Id.*

GUARDIAN & WARD:
Person found incapacitated, error not to appoint guardian. *Deffenbaugh v. Estate of Claphan*, 208.
Capacity, standard, "sound mind." *Id.*
Mental soundness, weakness of understanding. *Id.*
Mental capacity, no high standard. *Id.*
Unsound mind more than poor memory. *Id.*
Possibility of future incompetence not sufficient, question is competence at time of proceeding. *Id.*
Finding of competency not clearly erroneous. *Id.*
Presumption of mental competency. *Id.*

HUSBAND & WIFE:
Control of property owned in an entirety estate. *Morris v. Solesbee*, 123.
Entirety estates, not subject to partition. *Id.*
Tenancy by the entirety, execution is allowed against one spouse's interest, but the other spouse cannot be ousted from possession. *Id.*
Execution may occur without partition in estates held by the entirety, writs of execution and garnishment erroneously quashed. *Id.*

INSURANCE:
Ambiguous language, construction favoring insured adopted. *Deal v. Farm Bureau Mut. Ins. Co. of Ark, Inc.*, 48.
Ambiguity determined by court, meaning for fact-finder to determine. *Id.*
Fire policy, application asked about prior "fire loss," "loss" ambiguous. *Id.*
Evidence disputed reliability and reasonableness of company's estimate, fact question for jury to resolve. *Forrest v. General Ins. Co. of Am.*, 88.
Time it takes to make repair is factor in estimate's reasonableness. *Id.*

Award not limited to lowest estimate. *Id.*
Reasonable proof of benefits provided by amended complaint and response to interrogatories. *State Farm Mut. Auto Ins. Co. v. Brown*, 136.
Reasonable proof of benefits, informal demand sufficient. *Id.*
Penalty and attorney's fees, failure to recover eighty percent of claim, estoppel applied against insurer. *Id.*
Estoppel properly applied to keep insurer from claiming the benefits of insured's failure to recover eighty percent of claim. *Id.*
Attorney & client, no abuse of discretion in calculation of attorney's fee. *Id.*
Award of prejudgment interest on overdue benefits. *Id.*
Test for prejudgment interest. *Id.*
Penalty and attorney's fees, error to award of prejudgment interest on. *Id.*

JUDGMENT:
Summary judgment, when proper. *Deal v. Farm Bureau Mut. Ins. Co. of Ark, Inc.*, 48.
Summary judgment, extreme remedy, when summary judgment not proper. *Id.*
Judgment or decree ineffective until "entered" as provided by law, decree announced from the bench ineffective until the date of filing. *Morrell v. Morrell*, 54.
Judge's ruling from the bench not reduced to writing, judge free to alter decision upon further consideration of the matter. *Id.*

MASTER & SERVANT:
Determination as to whether employee left work for good cause connected with the work, factors on review. *Khan v. Director*, 64.
"Good cause" to terminate employment defined, claimant has the burden of proof. *Id.*
No good cause for termination found, decision affirmed. *Id.*

MOTIONS:
Directed verdict, when proper. *Forrest v. General Ins. Co. of Am.*, 88.
Directed verdict, when motion should be granted. *City of Fort Smith v. Findlay*, 197.

MUNICIPAL CORPORATIONS:
Sovereign immunity. *City of Fort Smith v. Findlay*, 197.

NEW TRIAL:
Party requesting new trial due to juror misconduct must demonstrate that a reasonable possibility of prejudice resulted, appellate court will reverse only for manifest abuse of discretion. *Arkansas Power & Light v. Bolls*, 23.
"Abuse of discretion" in granting a new trial defined. *Id.*
No abuse of discretion found, order granting new trial affirmed. *Id.*

NOTICE:
Bankruptcy, debtor not entitled to notice of abandonment of asset. *King v. Knox*, 85.

PARENT & CHILD:
No error to find house payment was made on behalf of child. *Keesee v. Keesee*, 113.
Support beyond eighteenth birthday if conditioned on child remaining in school. *Id.*
Custody cases, factors on review. *Ideker v. Short*, 118.
Considerations in award of custody, between parent and grandparent, parent is favored. *Id.*
Primary custody should have been awarded to the father, case remanded. *Id.*
Termination of parental rights, indigent parent, right to counsel. *Evans v. Arkansas Dep't of Human Servs.*, 157.

Statute not effective until after petition filed, statute not applicable to case. *Laroe v. Laroe*, 192.
Modification of child support orders cannot be retroactive. *Id.*

PROPERTY:
Restrictive covenants strictly construed, intention of the parties governs. *Dossey v. Hanover, Inc.*, 108.
Recovery for improvements to property under color of title, factors necessary for recovery. *Tolson v. Dunn*, 219.
Appellants had nothing evidencing color of title, appellants were not entitled to damages for their improvements. *Id.*

SEARCH & SEIZURE:
Vehicle impounded and inventoried, permitted only following legal arrest. *Mounts v. State*, 1.
Evidence resulting from illegal arrest is excluded. *Id.*
Warrantless search of vehicle. *Id.*
No probable cause to search vehicle. *Id.*
Warrantless search presumptively unconstitutional. *Id.*
Exclusionary rule. *Id.*
Arrest invalid, no probable cause for warrantless search, evidence that was seized during search was excluded. *Id.*
No detention, no seizure. *Bernal v. State*, 175.
No seizure supported by facts. *Id.*
When *Miranda* warnings required. *Id.*
When *Miranda* rights attach, reasonable-man standard applied. *Id.*
Reasonable-man standard applied, statement not product of custodial interrogation. *Id.*

SPECIFIC PERFORMANCE:
Defined, factors considered in awarding. *Dossey v. Hanover, Inc.*, 108.
When it should be ordered. *Id.*
Deviation from the approved plan had no substantial effect on the home's value, specific performance should not have been granted. *Id.*
Specific performance awarded solely on the basis that the covenants had been breached, interests the covenants were intended to protect were not substantially breached. *Id.*

STATUTES:
Specific statute governs over general statute. *State Farm Mut. Auto Ins. Co. v. Brown*, 136.

TENANCY IN COMMON:
Adverse possession, actual ouster must be shown. *Davis v. Davis*, 95.

TRIAL:
Error not to declare mistrial, specific wrongful act improperly raised in cross-examination of character witness. *Value v. State*, 70.
Stipulation amended by testimony, no objection abstracted. *Laroe v. Laroe*, 192.

UNEMPLOYMENT COMPENSATION:
Motion for remand denied, no error, motion made too late. *Wagner v. Director*, 92.
Factors considered on appeal from the Board of Review, scope of judicial review. *Perry v. Gaddy*, 128.
Misconduct discussed, what actions constitute. *Id.*
Appellant had the ability to perform her job, Board correct in finding that appellant's recurring negligence established misconduct. *Id.*

WILLS:
Proof of undue influence, burden of proof and burden of going forward with evidence. *Higgs v. Higgs*, 148.
Finding of no undue influence supported by the evidence. *Id.*

WITNESSES:
Expert witness fee not authorized by statute. *State Farm Mut. Auto Ins. Co. v. Brown*, 136.
Award of expert witness fee not supported as a sanction was error. *Id.*
Conflicts in testimony, judge not required to believe defendants. *Bernal v. State*, 175.

WORKERS' COMPENSATION:
Objective and measurable findings necessary to support a determination of physical impairment. *Brantley v. Tyson Foods. Inc.*, 27.
Self-serving testimony, such testimony, for that reason alone, was not insufficient to support a finding in appellant's favor. *Id.*
Review of Commission's decision, standard on review.
Evidence supported Commission's decision, Commission affirmed. *Id.*
No compensable injury found, employer not required to furnish employee with medical treatment. *Id.*
Review on appeal, factors considered. *Marcoe v. Bell Int'l*, 33.
Accidental injury may result from a continuation of irritation on some part of the body as well as from a specific incident, only a reasonably definite time is required. *Id.*
Commission's opinion failed to display a substantial basis for denial of relief, Commission reversed and remanded. *Id.*
Written notice to employer, excuses for not doing so. *Weyerhaeuser Co. v. Johnson*, 100.
Error to find injury not result of safety violation. *Russell v. Georgia-Pacific Corp.*, 131.
Second Injury Fund liability, one requirement. *Id.*
No error to determine second injury alone was sufficient to produce permanent and total disability, no Second Injury Fund liability. *Id.*
Claimant's burden of proof, occupational disease. *Maxwell v. Carl Bierbaum*, Inc., 159.
Commission found claimant failed to prove either requirement, if evidence supports finding that either requirement was not met, the case is affirmed. *Id.*
Clear and convincing evidence standard explained. *Id.*
Credibility of witnesses. *Id.*
Substantial evidence standard of review. *Id.*
Substantial evidence to support denial of relief. *Id.*
Responsibility for timely filing of the record on appeal discussed, filing of the record on appeal is jurisdictional. *Novak v. J.B. Hunt Transp.*, 165.
Filing fee not mailed in a timely manner, motion for rule on the clerk denied. *Id.*
Review of denial of relief based on claimant's failure to prove entitlement. *Morelock v. Kearney Co.*, 227.
Commission's function regarding credibility and weight given testimony. *Id.*
Record supports Commission's denial of benefits. *Id.*