# ARKANSAS REPORTS
# VOLUME 321

# ARKANSAS
# APPELLATE REPORTS
# VOLUME 50

THIS BOOK CONTAINS THE OFFICIAL

# ARKANSAS REPORTS
# Volume 321

CASES DETERMINED
IN THE

# Supreme Court
# of Arkansas

FROM
June 12, 1995 – October 2, 1995
INCLUSIVE[1]

AND

# ARKANSAS
# APPELLATE REPORTS
# Volume 50

CASES DETERMINED
IN THE

# Court of Appeals
# of Arkansas

FROM
June 7, 1995 – September 27, 1995
INCLUSIVE[2]

PUBLISHED BY THE
STATE OF ARKANSAS
1995

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[1]Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 661. Cite as 321 Ark. ___ (1995).
[2]Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 through 273. Cite as 50 Ark. App. ___ (1995).

## ERRATUM

270 Ark. at 274; first paragraph, line one:

The word "sufficient" should be "insufficient."

Set in Times Roman

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1995

# ARKANSAS REPORTS

## Volume 321

CASES DETERMINED
IN THE

# Supreme Court of Arkansas

FROM
June 12, 1995 – October 2, 1995
INCLUSIVE

WILLIAM B. JONES, JR.
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
(June 12, 1995 –
October 2, 1995, inclusive)

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## JUSTICES

| | |
|---|---|
| JACK HOLT, JR. | Chief Justice[1] |
| BRADLEY D. JESSON | Chief Justice[2] |
| ROBERT H. DUDLEY | Justice |
| DAVID NEWBERN | Justice |
| TOM GLAZE | Justice |
| DONALD L. CORBIN | Justice |
| ROBERT L. BROWN | Justice |
| ANDREE LAYTON ROAF | Justice |

## OFFICERS

| | |
|---|---|
| WINSTON BRYANT | Attorney General |
| LESLIE W. STEEN | Clerk |
| JACQUELINE S. WRIGHT | Librarian |
| WILLIAM B. JONES, JR. | Reporter of Decisions |

[1]Retired August 31, 1995.

[2]Appointed August 24, 1995, by Governor Jim Guy Tucker and sworn in September 5, 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.

# OPINIONS NOT DESIGNATED FOR PUBLICATION

Aaron *v.* Storey, 95-517 (Per Curiam), Pro Se Petition for Writ of Mandamus moot June 19, 1995.

Adams *v.* State, CR 95-496 (Per Curiam), Pro Se Motion for Belated Appeal denied and Motion of Frank E. Shaw to be Relieved as Counsel moot June 26, 1995.

Boyd, Horachel *v.* State, CR 95-622 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied July 17, 1995.

Boyd, Stanley Frank *v.* State, CR 94-321 (Per Curiam), Pro Se Motion for Transcript at Public Expense denied October 2, 1995.

Bradford *v.* State, CR 95-449 (Per Curiam), Pro Se Motion for Appointment of Counsel to Assist in Preparation of Motion for Belated Appeal remanded June 26, 1995.

Brown *v.* Storey, CR 95-836 (Per Curiam), Pro Se Petition for Writ of Mandamus moot September 25, 1995.

Campbell *v.* State, CR 95-422 (Per Curiam), Pro Se Motion for Duplication of Appellant's Brief at Public Expense denied and appeal dismissed July 10, 1995.

Cotton *v.* State, CR 95-513 (Per Curiam), Pro Se Motion for Transcript denied and appeal dismissed October 2, 1995.

Dix *v.* State, CR 95-133 (Per Curiam), affirmed June 26, 1995.

Douglas *v.* State, CR 95-115 (Per Curiam), affirmed July 3, 1995.

Edmondson *v.* State, CR 95-263 (Per Curiam), Pro Se Motion for Appointment of Counsel Treated as Motion for Belated Appeal remanded June 19, 1995.

Ellis *v.* State, CR 95-98 (Per Curiam), Pro Se Motion for Access to Record and Pro Se Motion for Extension of Time denied and appeal dismissed June 19, 1995.

Ford *v.* Davis, 95-342 (Per Curiam), Pro Se Petition for Writ of Mandamus granted July 17, 1995.

Fox *v.* State, CR 95-91 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted July 17, 1995.

Frazier *v.* State, CR 94-995 (Per Curiam), Pro Se Motion for Reconsideration of Motion for Stay of Proceedings and for Appointment of Counsel denied June 26, 1995.

Gaffney *v.* State, CR 95-196 (Per Curiam), affirmed July 3, 1995.

Givens *v.* State, CR 95-136 (Per Curiam), Pro Se Motion to File a Belated Brief denied and appeal dismissed July 10, 1995.

Goins *v.* State, CR 95-653 (Per Curiam), Pro Se Motion for Appointment of Counsel denied and appeal dismissed July 3, 1995.

Gomez *v.* State, CR 95-388 (Per Curiam), Pro Se Motion to File Belated Brief denied and appeal dismissed July 10, 1995.

Griswold *v.* State, CR 94-1459 (Per Curiam), affirmed June 19, 1995.

Hall *v.* State, CR 95-166 (Per Curiam), Pro Se Motion to File Enlarged Brief denied and Pro Se Motion for Extension of Time granted September 25, 1995.

Harris *v.* State, CR 95-464 (Per Curiam), Appellee's Motion to Dismiss Appeal granted; appeal dismissed October 2, 1995.

Harvey *v.* May, CR 95-321 (Per Curiam), Pro Se Motion for Extension of Time denied and appeal dismissed July 17, 1995.

Haynes *v.* Glover, CR 95- 465 (Per Curiam), Pro Se Petition for Writ of Mandamus granted July 17, 1995.

Holloway *v.* Slayden, 94-569 (Per Curiam), rehearing denied July 17, 1995.

Hunes *v.* State, CR 95-329 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief denied and appeal dismissed July 10, 1995.

Jackson *v.* State, CR 95-520 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted October 2, 1995.

Johnson *v.* State, CR 95-497 (Per Curiam), Appellee's Motion to Dismiss Appeal granted; appeal dismissed October 2, 1995.

Jones, Howard Wayne *v.* State, 95-633 (Per Curiam), affirmed September 25, 1995.

Jones, Willie B. *v.* State, CR 94-75 (Per Curiam), Pro Se

Motion for Transcript and Other Material at Public Expense denied July 3, 1995.

Lanford *v.* State, CR 95-585 (Per Curiam), affirmed October 2, 1995.

McLemore *v.* Davis, CR 95-648 (Per Curiam), Pro Se Petition for Writ of Mandamus moot July 17, 1995.

Minor *v.* Yates, CR 95-745 (Per Curiam), Pro Se Petition for Writ of Mandamus moot October 2, 1995.

Mitchell *v.* State, CR 95-834 (Per Curiam), Pro Se Motion for Belated Appeal of Order granted and Pro Se Motion to Supplement Record denied October 2, 1995.

Nooner *v.* State, CR 94-358 (Per Curiam), Pro Se Motion for Retrial or Dismissal denied July 3, 1995.

Nooner *v.* State, CR 94-358 (Per Curiam), Pro Se Petition for Writ of Mandamus and Declaratory Judgment denied September 18, 1995.

Nooner *v.* State, CR 94-358 (Per Curiam), Pro Se Petition for Writ of Certiorari denied October 2, 1995.

Oliver *v.* State, CR 95-30 (Per Curiam), affirmed July 3, 1995.

Oliver *v.* State, CR 95-30 (Per Curiam), appeal reinstated July 17, 1995.

Partin *v.* State, CR 93-682 (Per Curiam), Pro Se Motion for Photocopy at Public Expense denied June 26, 1995.

Petree *v.* State, CR 94-987 (Per Curiam), reversed and remanded July 10, 1995.

Ridgell *v.* State, CR 95-665 (Per Curiam), Pro Se Motion to Withdraw Appeal granted; appeal dismissed with prejudice to reinstating appeal October 2, 1995.

Santana *v.* State, CR 94-1257 (Per Curiam), affirmed June 19, 1995.

Talley *v.* State, CR 94-556 (Per Curiam), Appellee's Motion to Dismiss Appeal granted June 12, 1995.

Verdict *v.* State, CR 95-319 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied June 12, 1995.

Williams, Michael *v.* State, CR 95-120 (Per Curiam), Appellee's Motion to Dismiss Appeal granted; appeal dismissed October 2, 1995.

Woods *v.* State, CR 94-1372 (Per Curiam), In Re: Appellant's Failure to File Brief on Appeal dismissed July 10, 1995.

# APPENDIX
# Rules Adopted or Amended by Per Curiam Orders

## IN THE MATTER OF THE CLIENT SECURITY FUND

Supreme Court of Arkansas
Delivered June 19, 1995

PER CURIAM. The per curiam order of July 12, 1993, 314 Ark. 639, which adopted Rules of the Client Security Fund Committee, provides in Rule 10 that "Four dollars of the annual license fee paid by each attorney to the Clerk of this Court shall be credited to the Client Security Fund, until further Order of this Court." Beginning with the year 1995, that sentence is amended to read: "Ten dollars of the annual license fee paid by each attorney to the Clerk of this Court shall be credited to the Client Security Fund, until further Order of this Court."

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## IN RE: JOHN LLOYD JOHNSON, JR. ARKANSAS BAR ID #79230

899 S.W.2d 479

Supreme Court of Arkansas
Delivered June 26, 1995

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

# IN RE: IN THE MATTER OF THE ADOPTION OF REVISED RULES OF APPELLATE PROCEDURE

900 S.W.2d 560

Supreme Court of Arkansas
Delivered July 10, 1995

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. 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. On February 13, 1995, we published a second per curiam order extending the time for comment from the bench and bar to May 1, 1995.

We hereby adopt the Revised Rules of Appellate Procedure, to be effective on January 1, 1996.

## 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 (1995):** 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 in a case tried by a jury, or a finding of guilty in a case 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 (1995):** This rule is former A.R.Cr.P. 36.4, with grammatical changes.

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**Reporter's Note:* Deleted from Revised Rules of Appellate Procedure—Criminal and added to Arkansas Rules of Criminal Procedure as Rule 33.2. *See* per curiam order *In Re: Revised Arkansas Rules of Appellate Procedure—Criminal and A.R.Cr.P. 33* (December 4, 1995).

**Rule 3. TIME AND METHOD OF TAKING APPEAL**

(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 filed at any time prior to the day that the judgment or order appealed from is entered or prior to the day that a post-trial motion is deemed denied except as provided herein. If a notice of appeal is filed on the same day that the judgment or order appealed from is entered or on the day that a post-trial motion is deemed denied, the notice of appeal shall be effective. 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 postconviction 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.]

**Court's Comment to Rule 3(b) (1995):** Rule 3(b) makes clear that a notice of appeal filed on the same day as the judgment or order is effective, even though filed on that day before the judgment or order appealed from.

**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 [now Rule 3] 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 (1995):** 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 (1995):** 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 costs as a prerequisite for the appeal of either a felony or misdemeanor conviction.

**Reporter's Notes to Rule 6 (1995):** This rule is former A.R.Cr.P. 36.17. In the title, "cost" has been changed to "costs."

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**Reporter's Note: See* per curiam order *In Re: Revised Rules of Appellate Procedure—Criminal* (November 20, 1995).

## 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) When a defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to an offense other than one specified in subsection (b)(2) or (b)(3) of this section, and he is sentenced to serve a term of imprisonment, and he has filed a notice of appeal, the trial court shall not release the defendant on bail or otherwise pending appeal unless it finds:

(A) By clear and convincing evidence that the defendant is not likely to flee or that there is no 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 the defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to capital murder, the trial court shall not release the defendant on bail or otherwise, pending appeal or for any reason.

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

(c)(1) If an appeal bond is granted by the trial court, it shall be conditioned on the defendant's surrendering 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 as provided by law in any place in which the sureties may be found, and the service of the summons on the defendant or defendants 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. [Amended by Per Curiam March 27, 1995.]

**Reporter's Notes to Rule 7 (1995):** This rule is former A.R.Cr.P. 36.5. 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, 884 S.W.2d 593 (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 the Supreme Court. If the trial court or a Justice or Justices of the Supreme Court admit the defendant to bail pending appeal, the commitment by which the sentence was carried into execution may be recalled. 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 by Per Curiam December 18, 1978.]

**Reporter's Notes to Rule 8 (1995):** This rule is former A.R.Cr.P. 36.13, with grammatical changes.

## Rule 9. EXCEPTIONS AND MOTION FOR NEW TRIAL UNNECESSARY

**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.

**Reporter's Notes to Rule 9 (1995):** This rule is former A.R.Cr.P. 36.21(a).

## 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 (1995):** 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 (1995):** 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.

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**Reporter's Note:* Deleted from Revised Rules of Appellate Procedure—Criminal and added to Arkansas Rules of Criminal Procedure as Rule 33.3. *See* per curiam order *In Re: Revised Arkansas Rules of Appellate Procedure—Criminal and A.R.Cr.P. 33* (December 4, 1995).

### Rule 12. AFFIRMANCE OF DEATH SENTENCE; PROCEDURE

When a judgment of death has been affirmed, a petition under A.R.Cr.P. 37 has been denied, or a 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 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 (1995):** This rule is former A.R.Cr.P. 36.12, with grammatical changes and amended only by the addition of the last sentence to make it clear that stays are dissolved automatically when either the Arkansas Supreme Court or 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 (1995):** This rule is former A.R.Cr.P. 36.14, with grammatical changes.

### 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 (1995):** 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 (1995):** 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 has been imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant.

**Reporter's Notes to Rule 16 (1995):** This rule is former A.R.Cr.P. 36.24 altered only by grammatical changes.

**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 or 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 (1995):** 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 (1995):** 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 (1995):** 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 (1995):** 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 (1995):** 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.

*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 (1995):** 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 stipulation, 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.

(f) **Notice of Appeal Filed on Same Day.** A notice of appeal filed on the same day as the judgment, decree, or order appealed from shall be effective.

**Court's Comment to Rule 4(f) (1995):** Rule 4(f) makes clear that a notice of appeal filed on the same day as the judgment, decree, or order is effective, even though filed on that day *before* the judgment, decree or order appealed from. The new rule overrules the holdings in *Lawrence Bros., Inc.* v. *R.J. "Bob" Jones Excavating Contractor, Inc.*, 318 Ark. 328, 884 S.W.2d 620 (1994) (per curiam) and *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992) (per curiam), to the extent those holdings invalidate notices of appeal filed on the same day but before the judgment, decree, or order appealed from.

**Reporter's Notes to Rule 4 (1995):** 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 30-day 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 provided. 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 (1995):** 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 amendments 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 (1995):** 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. § 27-2127.3 (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 (1995):** 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 transmit 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 (1995):** This rule tracks former Appellate Rule 8 without change. The Reporter's Notes prepared 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 (1995):** 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 DIRECTED VERDICT IN CRIMINAL CASES

Supreme Court of Arkansas
Delivered July 10, 1995

The title to Rule 33 of the Arkansas Rules of Criminal Procedure shall be renamed "Motions for Directed Verdict and Special Procedures During Jury Trial," effective immediately.

The following rule regarding motions for directed verdict in criminal cases is hereby adopted and is effective immediately as Rule 33.1 of the Rules of Criminal Procedure, with the current sections of Rule 33 renumbered successively:

> **Motions for Directed Verdict.** 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 the respect in which the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal of a previous motion for a directed verdict at the close of all of the evidence preserves the issue of insufficient evidence for appeal.
>
> **Court's Comment to Rule 33.1 (1995):** This rule is former A.R.Cr.P. 36.21(b). The word "again" has been added to the first sentence to emphasize the requirement that an appropriate motion be made after the State's case and at the close of the case. The next to the last sentence was added to codify the holding in *Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (1994), in which the Supreme Court expressed the standard as follows: "We draw a bright line and hold that a motion for a directed verdict in a criminal case must state the specific ground of the motion." *Walker* at 109. For example, in *Walker* a motion simply

stating that the evidence was insufficient for a conviction of first or second degree murder or manslaughter did not preserve for appeal issues relating to whether the state proved that the defendant had the requisite culpable mental state for any of those offenses. The last sentence was added to reflect the holding in *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995), which did not require a party to repeat the specific deficiencies in the evidence when the motion is renewed.

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## IN RE: NOTICES OF APPEAL FILED BEFORE JUDGMENTS

900 S.W.2d 560

Supreme Court of Arkansas
Delivered July 10, 1995

The issue to be addressed by these proposed rule changes is the effect of filing a notice of appeal on the same day as the judgment, decree, or order appealed from but prior to the entry of that judgment, decree, or order. We have also included the rule changes in the Revised Rules of Appellate Procedure, adopted this date and effective January 1, 1996. The rule changes set out in this per curiam order, however, are effective immediately. The rule changes would permit a notice of appeal filed on the same day as a judgment, although prior in time, to be effective. Under the rules as they existed before these changes, a notice filed before entry of judgment is ineffective. *See Lawrence Bros., Inc.* v. *R.J. "Bob" Jones Excavating Contractor, Inc.*, 318 Ark. 328, 884 S.W.2d 620 (1994) (per curiam); *Kelly* v. *Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); *see also* Ark. R. Crim. P. 36.9(b).

We adopt the following rule changes, effective immediately.

Rule 4 of the Rules of Appellate Procedure is amended by the addition of the following subparagraph (f):

> (f) A notice of appeal filed on the same day as the judgment, decree, or order appealed from shall be effective.

Rule 36.9(b) of the Rules of Criminal Procedure is amended to read as follows:

> (b) A notice of appeal is invalid if filed at any time prior to the day that the judgment or order appealed from is entered or prior to the day that a post-trial motion is deemed denied. If a notice of appeal is filed on the same day that the judgment or order appealed from is entered or on the day that a post-trial motion is deemed denied, the notice of appeal shall be effective.

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## IN RE: REVISED RULE I OF THE RULES GOVERNING ADMISSION TO THE BAR

Supreme Court of Arkansas
Delivered July 17, 1995

Rule I of the Rules Governing Admission to the Bar is revised to include an immunity provision for the members of the State Board of Law Examiners, the Executive Secretary, and agents and employees of the Board. It has also been revised so that it is gender neutral.

The revised Rule I is adopted this date and is effective immediately.

### RULE I.

### COMPOSITION OF BOARD OF LAW EXAMINERS

The State Board of Law Examiners, hereafter Board, is hereby constituted, before whom all applicants for license must appear.

Said Board shall consist of eleven members: Two from each Congressional District (as now or hereafter constituted), and the remainder from the State at large. Each appointment shall be for a term of three years, unless otherwise designated by the Supreme

Court. Vacancies occurring from causes other than the expiration of term of office will be filled by the Supreme Court as they occur, and the person so appointed shall serve the remainder of the term of his or her predecessor. The Board, from its members, shall annually select its own chair. Absent exigent circumstances, a Board member may serve no more than two (2) consecutive full three year terms. A replacement where a vacancy occurs shall not be considered a full three year term. Members shall continue to serve beyond their designated term until such time as their successor is qualified and appointed by the Court.

The Board, its individual members, Executive Secretary and employees and agents of the Board are absolutely immune from suit or action for their activities in discharge of their duties hereunder to the full extent of judicial immunity in Arkansas. (Per Curiam Order, February 10, 1969; Amended by Per Curiam Order, May 18, 1992.)

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## IN RE: REVISED RULE XV GOVERNING STUDENT PRACTICE

Supreme Court of Arkansas
Delivered July 17, 1995

We hereby adopt Revised Rule XV governing student practice, effective immediately. Revised Rule XV adopted this date will replace current Rule XV of the Rules Governing Admission to the Bar.

### Rule XV.

### STUDENT PRACTICE

A. Purpose

The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing

assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds, this rule is adopted by the Arkansas Supreme Court (hereinafter this Court).

B. Activities

1. An eligible law student (hereinafter student) may appear in any court or before any administrative tribunal in this State on behalf of any person if the person on whose behalf the student is appearing has indicated in writing consent to that appearance and the supervising lawyer (hereinafter lawyer) has also indicated in writing approval of that appearance.

2. A student may also appear in any criminal matter on behalf of the State or prosecuting authority with the written approval of the prosecuting attorney (lawyer) or his or her authorized representative.

3. When a student appears pursuant to paragraphs B(1) or (2) above the lawyer must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

4. In civil cases and cases in which the student represents a defendant in a criminal case, the written consent of the person on whose behalf an appearance is being made and the approval of the lawyer shall be filed in the record of the case. In courts or administrative tribunals in which the student represents the State or prosecuting authority, the approval of the lawyer shall be filed of record with the clerk of the court or administrative tribunal.

C. Requirements of Eligibility

In order to make an appearance pursuant to this rule, the law student shall:

1. Be duly enrolled in a law school approved by the American Bar Association;

2. Have completed legal studies amounting to at least forty-eight (48) credit hours, or the equivalent if the school is on some basis other than a semester basis, including courses in civil procedure, evidence, criminal procedure, and professional responsibility, or the equivalent of such courses;

3. File with the Clerk of this Court the law school dean certification described in paragraph E of this rule;

4. File with the Clerk of this Court the supervising lawyer certification described in paragraph F of this rule;

5. Neither ask for nor receive any compensation or remuneration of any kind directly from the person on whose behalf services are rendered, but this shall not prevent an attorney, law firm, legal aid bureau, public defender agency, or the state, county, or municipality from paying compensation not otherwise prohibited by these rules to the student.

6. Certify in writing that he or she has read and will comply with this rule and with the Model Rules of Professional Conduct adopted by this Court. This certification shall be incorporated in the law school dean certification described in paragraph E of this rule.

D. Limitations

1. A student is authorized to practice under this rule only under the supervision of:

(a) The lawyer who signs the supervising lawyer certification described in paragraph F of this rule; or,

(b) A lawyer who is admitted to practice in this State and who otherwise meets the requirements of Section H of this rule and is a member of the same law firm as the supervising lawyer; or, a lawyer who is admitted to practice in this State and is employed by the same law school or public office as the supervising lawyer; or,

(c) A lawyer employed as a full time supervising attorney in a program of clinical legal education in an Arkansas Law School accredited by the American Bar Association, may engage in supervision under this section for no more than one year without being admitted to practice in this State, providing the lawyer:

(1) is admitted to practice and is in good standing in another state; and,

(2) has had at least five years of practice in another state or states.

(3) it shall be the responsibility of the Arkansas law school which employs a full time supervising attorney pursuant to this section to secure and maintain documentation confirming that the supervising attorney meets the requirements of this section, and, the law school dean certification shall contain an affirmation by the dean to that effect.

2. The authority of a law student to practice under this rule may be terminated by this Court at any time without notice or hearing and without any showing of cause. Notice of the termination shall be filed with the Clerk of this Court.

3. After a law student has appeared in a court or administrative tribunal on one or more occasions, a judge of the trial court or tribunal may terminate, for good cause, the authority of any such student to appear subsequently in the court or division thereof, or the administrative tribunal, over which the Judge presides.

E. Law School Dean Certification

The certification of a law student by the law school dean shall:

1. Unless sooner withdrawn, remain in effect until: the expiration of eighteen (18) months after it is filed; or, the student graduates; or, the student officially withdraws from law school.

2. Certify that the law student is of good moral character and competent legal ability and is adequately trained to perform as an eligible law student under this rule;

3. Be subject to withdrawal by the dean at any time by mailing a notice to that effect to the Clerk of this Court and it is not necessary that the notice state the cause for withdrawal; and

4. The law school dean certification required by this section shall contain an affirmation that the dean of the certifying institution will promptly notify the Clerk of this Court in the event the student's eligibility ceases pursuant to this section.

F. Supervising Lawyer Certification

The certification of a law student by a lawyer shall:

1. Be signed by a lawyer admitted to practice in this State

who agrees to act as a supervising lawyer with respect to practice by a law student under this rule;

2. Unless sooner withdrawn, remain in effect until: the expiration of six (6) months after it is filed; or, the student graduates; or, the student officially withdraws from law school.

3. Be subject to renewal by filing a new certification;

4. Certify that the lawyer has read and will comply with this rule and with the Model Rules of Professional Conduct adopted by this Court;

5. Be subject to withdrawal by the lawyer at any time by mailing a notice to that effect to the Clerk of this Court and it is not necessary that the notice state the cause for withdrawal.

G. Other Activities

1. In addition, a student may engage in other activities, but outside the personal presence of the lawyer, including:

(a) Preparation of pleadings and other documents to be filed in any matter in which the student is eligible to appear, but such pleadings or documents must be signed by the lawyer;

(b) Preparation of briefs, abstracts, and other documents to be filed in appellate courts of this State, but such documents must be signed by the lawyer.

2. The taking of a deposition shall be considered a court appearance subject to the provisions and requirements of paragraph B of this rule.

H. Supervision

The lawyer under whose supervision a student does any of the things permitted by this rule shall:

1. Be a lawyer who is licensed in this State (except as may be otherwise provided by this rule) and who has been actively engaged in the practice of law in this State or any other jurisdiction for a period of at least two years and is in good standing with the Supreme Court of Arkansas;

2. Assume personal professional responsibility for the stu-

dent's guidance in any work undertaken and for supervising the quality of the student's work;

3. Assist the student in preparation to the extent the lawyer considers it necessary; and,

4. The lawyer may not charge the client for services of a student practitioner pursuant to activities under section B of this rule.

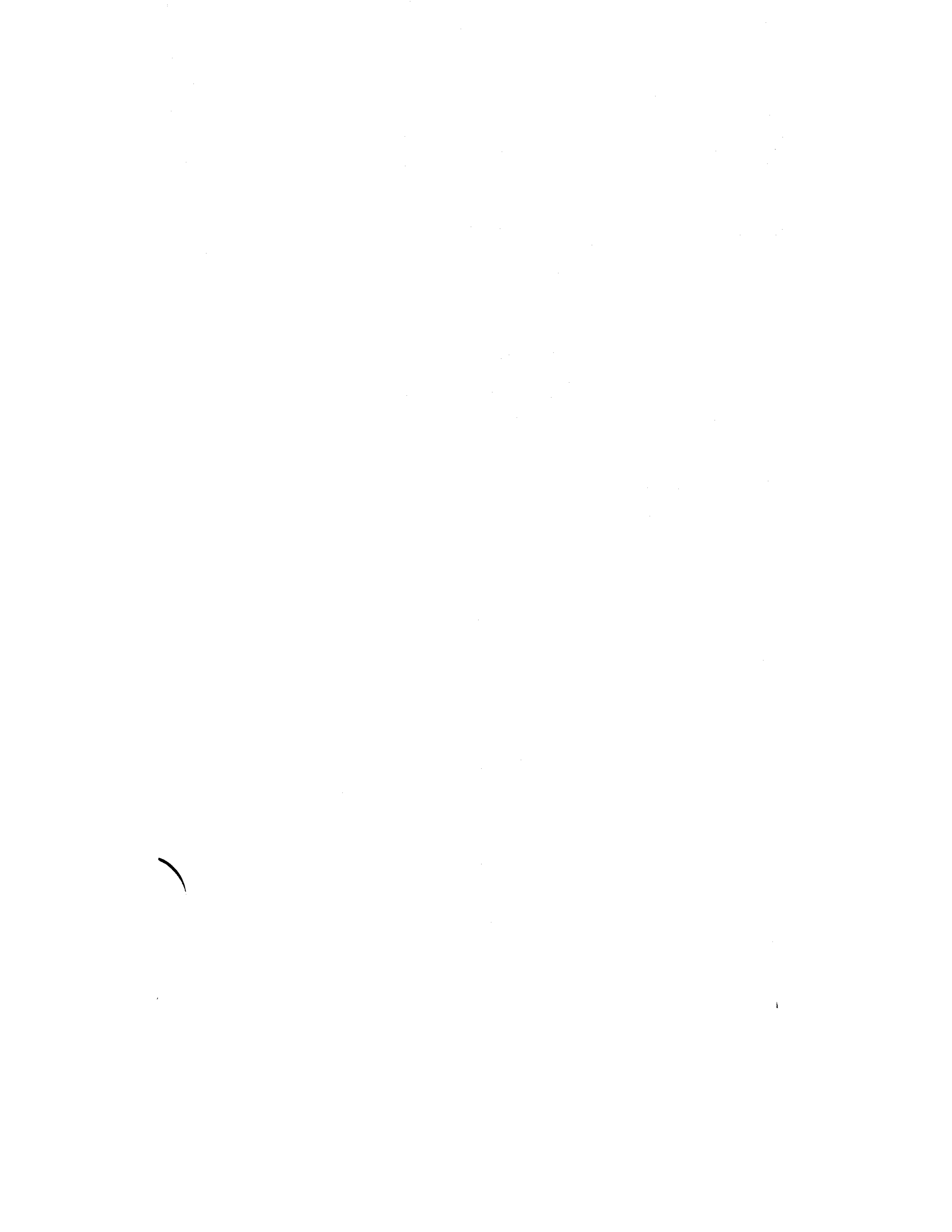
I. Duties of the Clerk of this Court

The Clerk shall establish such records as are appropriate to administer and enforce the provisions of this rule.

J. Miscellaneous

Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of this rule.

# Appointments to Committees



## IN RE: BOARD OF CERTIFIED COURT REPORTER EXAMINERS

Supreme Court of Arkansas

Delivered July 3, 1995

The Honorable Tom Hilburn of Walnut Ridge; and Ms. Fern Nicholson, CCR, of Harrison, are reappointed to our Board of Certified Court Reporter Examiners.

Each term of reappointment is for a three-year period expiring July 1, 1998.

The Court thanks Judge Hilburn and Ms. Nicholson for accepting reappointment to this most important Board.

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## IN RE: COMMITTEE ON AUTOMATION

Supreme Court of Arkansas

Delivered July 3, 1995

The Honorable Harry Foltz of Fort Smith is appointed to our Committee on Automation to serve the remainder of the unexpired term of the late Honorable Watson Villines. This term will end on October 31, 1996.

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

The Court posthumously recognizes the dedicated and faithful service of Judge Villines to the Committee.

## IN RE: ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION

Supreme Court of Arkansas
Delivered July 17, 1995

In accordance with Amendment 66 of the Constitution of Arkansas, and Act 637 of 1989, the Court appoints the Honorable Van A. Gearhart, Municipal Judge, of Mountain Home, to the Arkansas Judicial Discipline and Disability Commission for a six-year term to expire on June 30, 2001. Judge Gearhart replaces the Honorable Andy Fulkerson, whose term has expired.

The Court reappoints the Honorable Annabelle Imber, Chancellor, of Little Rock, to an Alternate position on the Commission for a six-year term to expire on June 30, 2001.

The Court thanks Judge Gearhart and Judge Imber for accepting appointment and reappointment respectively to this most important Commission. Judge Gearhart is hereby excused from further service on the Committee on the Unauthorized Practice of Law, and the Court thanks him for his faithful and dedicated service to that Committee.

The Court expresses its gratitude to Judge Fulkerson for his faithful and dedicated service as a member of the Commission.

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## IN RE: COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Supreme Court of Arkansas
Delivered July 17, 1995

Noyl Houston, Esq., of Jonesboro, First Congressional District, is hereby appointed to our Committee on the Unauthorized Practice of Law for a three-year term to expire on May 31, 1998. Mr. Houston replaces Hoyt Thomas, Esq., of Heber Springs who has retired from the Committee.

Alex G. Streett, Esq., of Russellville, Third Congressional District, is hereby appointed to serve the remainder of the unexpired term of the Honorable Van A. Gearhart of Mountain Home who has accepted appointment to the Arkansas Judicial Discipline and Disability Commission and is thus excused from further service on this Committee. This term will expire on May 31, 1996.

William R. Russell of North Little Rock is hereby appointed to an At-Large position on the Committee to serve the remainder of the unexpired term of Mel Orender of North Little Rock. This term will expire on May 31, 1997.

The Court thanks Messrs. Houston, Streett, and Russell for accepting appointment to this most important Committee.

The Court expresses its gratitude to Mr. Thomas and Judge Gearhart for their faithful and dedicated service as members of the Committee.

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## IN RE: SUPREME COURT COMMITTEE ON CIVIL PRACTICE

Supreme Court of Arkansas
Delivered July 17, 1995

Comer Boyett, Jr., Esq., of Searcy; Stephen A. Matthews, Esq., of Pine Bluff; and David Manley, Esq., of Little Rock are hereby reappointed to our Committee on Civil Practice for three-year terms to expire on July 5, 1998.

The Court thanks Messrs. Boyett, Matthews, and Manley for accepting reappointment to this most important Committee.

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

Supreme Court of Arkansas
Delivered September 11, 1995

On January 23, 1995, and in agreement with a Court Improvement Grant from the U. S. Department of Health and Human Services, we appointed a committee to study foster care and adoption practice and procedures in our state courts. We hereby appoint David Manley, Attorney with Legal Services of Arkansas, to be an additional member of that committee.

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## IN RE: APPOINTMENT OF COUNSEL IN CRIMINAL CASES

Supreme Court of Arkansas
Delivered September 25, 1995

PER CURIAM: Because appellants in criminal cases are entitled to counsel on direct appeal from a judgment of conviction, this Court on occasion must appoint attorneys to represent indigent appellants. Attorneys who are desirous of such appointments should register with Sue Newbery, Criminal Justice Coordinator, Arkansas Supreme Court, Justice Building, 625 Marshall St., Little Rock, AR 72201. Counsel will be paid a fee after determination of the case, upon a proper motion.

## IN RE: BOARD OF LAW EXAMINERS

Supreme Court of Arkansas
Delivered September 25, 1995

Sheila Campbell, Attorney-at-Law, of Little Rock, At-Large; James R. Van Dover, Esq., of Marianna, At-Large; and James A. Ross, Jr., Esq., of Monticello, Fourth Congressional District, are reappointed to the Board of Law Examiners for three-year terms ending September 30, 1998.

The Court thanks Ms. Campbell, Mr. Van Dover, and Mr. Ross for accepting reappointment to this most important Board.

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## IN RE: COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Supreme Court of Arkansas
Delivered September 25, 1995

Mary Bennett, of Little Rock, is hereby appointed to an At-Large Position on our Committee on the Unauthorized Practice of Law for a three-year term to expire on May 31, 1998. Ms. Bennett replaces Mr. Felton Rhodes, of Little Rock, whose term has expired.

The Court thanks Ms. Bennett for accepting appointment to this most important Committee.

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

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Motion for rule on the clerk, good cause for granting. *Taylor v. State*, 291.
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Explanatory testimony concerning a videotape not allowed, testimony properly excluded at trial. *Id.*
Trial court erred in refusing to direct a verdict on issue of underinsured motorist coverage. *State Farm Mut. Auto. Ins. Co. v. Beavers*, 292.
Neither authority cited nor argument made, decision affirmed. *Id.*
Issue not presented to or determined by trial court, supreme court will not give advisory opinion. *Cordell v. Nadeau*, 300.
Evidence viewed in light most favorable to appellee. *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 303.
Assignments of error unsupported by convincing argument or authority not considered. *Id.*
Judgment notwithstanding the verdict, when judgment affirmed in favor of the party having the burden of proof. *Potlatch Corp. v. Missouri Pac. R.R. Co.*, 314.
Request to remand case to another division, such action inappropriate. *Whetstone v. Chadduck*, 327.
Appellant failed to request that a limiting instruction be given below, appellant cannot now raise the objection. *Gooden v. State*, 340.
Motion for belated brief, granted. *Miller v. State*, 358.
Argument depended upon favorable resolution of previous argument, argument not addressed. *Callahan v. Clark*, 376.
Contemporaneous objection necessary to preserve issue for appellate review. *Id.*
Matter must be objected to at trial to be addressed on appeal. *Id.*
Motion to dismiss treated as one for summary judgment. *Masterson v. Stambuck*, 391.
Review of summary judgment, factors considered. *Id.*
Subject-matter jurisdiction in circuit court, remanded for transfer to circuit court. *Villines v. Lee*, 405.
Conditional stipulations designed to obtain interlocutory appeals not countenanced. *Martin v. Black & White Cab Co.*, 432.
Stipulation entered into for the sole purpose of entering a final appealable order, factual issue remained, appeal interlocutory and advisory, appeal dismissed. *Id.*
Cautionary instruction, failure to request precludes consideration of issue on appeal. *Sasser v. State*, 438.
Appeal by state in criminal case, acquittal does not preclude review of asserted legal error. *State v. Jones*, 451.
Appeal by state in criminal case, no right beyond constitution or rules of criminal procedure. *Id.*
Error declared, judgment not reversed, acquittal prevents retrial. *Id.*
Mootness, issues raised on appeal concerned general election on a constitutional amendment referred by the General Assembly, issues should be decided even though election has already been held. *McCuen v. Harris*, 458.
Chancery court's finding that appellee would be irreparably harmed without the injunction and that he had no adequate remedy at law correct, no error found. *Id.*
Secretary of State merely attempting to comply with statutes passed by the General assembly, hypothetical argument that Secretary of State would willfully interfere with legislative amendments not reached. *Id.*
Failure to include proffered jury instructions in abstract or record, issue not addressed. *Wade v. Grace*, 482.
Supreme court erred in dismissing appeal, appeal ordered reinstated. *Clayton v. State*, 496.

Motion for rule on clerk, treated as motion for belated appeal, granted. *Hadley v. State*, 499.
Motion to dismiss appeal, remanded for determination of voluntariness. *Johnson v. State*, 500.
Argument not raised at trial, issue not addressed on appeal. *Spears v. State*, 504.
Motion for rule on the clerk, granted as motion for belated appeal. *Henry v. State*, 512.
Motion for rule on the clerk, good cause for granting. *West v. State*, 513.
Motion for rule on the clerk, good cause for granting. *Zucco v. State*, 514.
No reversal absent error at trial. *Vinson Elec. Supply, Inc. v. Poteete*, 516.
Substantial evidence supported the verdict, no error in trial court's denial of appellant's motion for a directed verdict. *Young v. State*, 541.
Basis of evidence argument changed on appeal, argument not addressed. *Jenkins v. State*, 551.
Arguments not ruled on below, arguments not reached on appeal. *Porter v. State*, 555.
Filing of record on appeal, trial court erred in granting seven-month extension. *Jacobs v. State*, 561.
Filing of record on appeal, purpose of Ark. R. App. P. 5(a). *Id.*
Motion for writ of certiorari to complete record denied. *Id.*
Certiorari directed to court reporter would only cause more delay. *Id.*
Motion for belated appeal granted, counsel admitted fault, good cause shown. *Kennedy v. State*, 564.
Motion to stay and to remand to settle record granted. *McPeek v. White River Lodge Enter.*, 565.
Motion for Rule on the Clerk, attorney's duty to file record on time. *Mayo v State*, 566.
Motion for Rule on the Clerk, attorney directed to file new motion and affidavit accepting responsibility. *Id.*
Motion for writ of certiorari to complete record denied. *Perry v. State*, 568.
Motion to dismiss appeal granted. *Watanabe v. Webb*, 569.
Motion to suppress, standard of review. *Mitchell v. State*, 570.
Argument may not be raised for the first time on appeal. *Clayton v. State*, 602.
No objection raised below, argument not considered on appeal, counsel cannot object to that for which he was partially responsible. *Id.*
Preserving error for appeal, objection must be timely. *Edwards v. State*, 610.
Party cannot agree with trial court's ruling and then attack it on appeal. *Id.*
Failure to abstract critical issue precludes review. *Id.*
Informing trial court of appellant's displeasure did not amount to an objection. *Id.*
Motion for belated appeal granted, counsel admitted fault, good cause shown. *King v. State*, 617.
Timely objection not made at trial, issue could not be raised on appeal. *Mills v. State*, 621.
No reversal absent error at trial. *Id.*
Appeals by State, when authorized. *State v. Beall*, 624.
Appeals by State, attempted appeal from dismissed case is not an interlocutory appeal. *Id.*
Interlocutory appeals, subsequent final disposition contemplated. *Id.*
Interlocutory appeals by State, rationale, State may not ask for opinion on issue that is purely abstract in character. *Id.*
Error will not be considered for the first time on appeal. *O'Neal v. State*, 626.
Argument not presented below not considered on appeal. *Jones v. State*, 649.
Motion to file belated brief granted. *McGhee v. State*, 658.
Reversal required where trial record is insufficient to permit full review. *Ward v. State*, 659.

ARREST:

Reasonable cause to arrest without a warrant, degree of proof necessary. *Williams v. State*, 344.

Reasonable suspicion to arrest defined. *Id.*

Reasonable cause existed to arrest and search appellant without a warrant, no error found. *Id.*

Warrantless arrest and search proper, appellant's suppression argument without merit. *Id.*

Killing to eliminate a potential witness is the same as avoiding or preventing lawful arrest, submission of second aggravating circumstance proper. *Porter v. State*, 555.

ATTORNEY & CLIENT:

Charge of ineffective assistance, when charge will be considered. *Hillard v. State*, 39.

Ineffective counsel issue not properly raised, argument rejected. *Id.*

Effectiveness of counsel, counsel must use own best judgment in calling witnesses. *Wicoff v. State*, 97.

Conflict of interest, when prejudice will be presumed. *Johnson v. State*, 117.

Conflict of interest argument made by appellant, appellant failed to prove any conflict existed. *Id.*

Attorneys are presumed to be competent, factors considered for an argument of ineffective assistance. *Id.*

Ineffective assistance of counsel argument based on attorney's failure to interview witness, trial court's finding not against the preponderance of the evidence. *Id.*

Ineffective assistance argued, trial court's ruling not clearly against the preponderance of the evidence, no showing appellant's allegations, if true, would have made any difference. *Id.*

Ineffective assistance argued, trial court weighted credibility issue, no error found. *Id.*

Allegations of ineffective assistance of counsel, when postconviction relief is justified. *Id.*

Postconviction relief for ineffective assistance sought, relief denied, petitioner failed to substantiate allegations. *Id.*

Postconviction relief for ineffective assistance due to failure to secure testimony, showing required. *Id.*

Ineffective assistance at pretrial proceedings alleged, argument summarily dismissed. *Id.*

Ineffective assistance at pretrial proceedings alleged, no prejudice shown by omission. *Id.*

Counsel will not be labeled ineffective merely because of possible bad strategy, ineffective assistance not found. *Id.*

Ineffective assistance alleged, trial court's ruling not against the preponderance of the evidence. *Id.*

Ineffective assistance alleged, argument over strategy not entertained in Rule 37 petitions. *Id.*

Ineffective assistance argued, differences over trial strategy not sufficient for finding of ineffective assistance. *Id.*

Ineffective assistance alleged, no prejudice found. *Id.*

Appellant's argument without merit, communication by prosecutors with a party on matters outside the representation is permissible. *Id.*

Appellant attempting to reargue evidentiary issue through the guise of ineffective assistance argument, trial court's ruling was correct. *Id.*

Ineffective assistance of counsel argued, issues could not be raised for the first time on appeal. *Id.*

Fees, trial court's decision concerning entitlement required separate inquiry from decision on merits. *Marsh & McLennan of Ark. v. Herget*, 180.

Fees, motion for attorney's fee is collateral or supplemental matter, left within

trial court's jurisdiction even though appeal has been docketed, absence of appeal did not alter collateral nature of fee motion, trial court retained jurisdiction. *Id.*
Fees, Ark. Code Ann. § 16-22-308 authorizes award of attorney's fee in discretion of trial court, no abuse of trial court's discretion in ordering fee award. *Id.*
Fees, no statute or local court rule prescribes time limit on motion for attorney's fee, attorney did not waive right to request fee award by filing motion more than thirty days after judgment was rendered. *Id.*
Decision to call certain witnesses and reject others is largely matter of trial strategy, counsel must use own best judgment to determine which witnesses will be beneficial to client. *Farmer v. State*, 283.
Penalty & attorney's fees, remanded for recalculation. *State Farm Mut. Auto. Ins. Co. v. Beavers*, 292.
Award of fee discretionary, erroneous interpretation or application of law or rule constitutes abuse of discretion. *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 303.
Factors for determining the appropriateness for Rule 11 sanctions not considered, matter remanded for such consideration. *Whetstone v. Chadduck*, 327.
Attorneys failed to file brief despite repeated extensions, contempt order issued. *Stone v. State*, 501.
Ineffective assistance of counsel, failure to preserve issue. *Pipkin v. State*, 511.
When claim of ineffective assistance of counsel may be raised as a point of direct appeal, rationale behind the rule. *Kanig v. State*, 515.
Conflict of interest, firm's representation of hospital and insurance company not directly adverse. *Saline Memorial Hosp. v. Berry*, 588.
Disqualification of counsel could not be justified on basis that law firm's representation might be "materially limited," hospital had given its consent after consultation. *Id.*
Conflict of interest, not all of the law of disqualification is found in Model Rules of Professional Conduct. *Id.*
Conflict of interest, public perception, client's interest in retaining chosen counsel. *Id.*
Disqualification, factors to be considered, role of court in balancing clients' rights. *Id.*
Plaintiffs' choice of counsel entitled to substantial deference, motions to disqualify counsel not generally favored. *Id.*
Disqualification not warranted. *Id.*
Ineffective assistance of counsel, when such a point may be raised on appeal. *Edwards v. State*, 610.
Ineffective assistance of counsel, issue not preserved. *Id.*
Ineffective assistance of counsel, facts not fully developed, Rule 37 petition not precluded by trial court's pretrial findings. *Id.*
Change of counsel, denial of request, considerations on review. *Id.*
Change of counsel, right to counsel of one's choice is not absolute, factors trial court may consider in deciding whether to order change of counsel. *Id.*
Change of counsel, no abuse of discretion in denial of continuance and request for new counsel. *Id.*

ATTORNEY'S FEES:
Not allowed unless expressly authorized by statute, absence of justiciable issue of law or fact raised by losing party or attorney, court may award fee in amount not to exceed $5,000 or ten percent of amount in controversy. *Wynn v. Remet*, 227.
Evidence showed counterclaims were baseless, counterclaim lacking justiciable issue of law or fact is one commenced or used in bad faith for harassing or maliciously injuring another or delaying adjudication without just cause, fees justified when party or attorney knew or should have known counterclaim was without reasonable basis in law or in equity. *Id.*

Appellee knew or should have known he could not prove elements of torts alleged in counterclaims, no justification in taking counterclaims to trial, Trial Court erroneously declined to award attorney's fees to appellant. *Id.*

AUTOMOBILES:

DWI, person who calibrates breathalyzer must be made available for cross examination. *Peters v. State*, 276.

DWI, person calibrating the machine clearly refers to the person who tests the calibration. *Id.*

CERTIORARI:

Certiorari cannot generally be used as a substitute for appeal, actions of trial courts are subject to review. *Neal v. Wilson*, 70.

No convincing argument or citation of authority, argument not reached. *Id.*

CHARITIES:

Charitable immunity, narrow construction, factors adopted. *Masterson v. Stambuck*, 391.

Charitable immunity, Conway Corporation cannot be characterized as "charitable." *Id.*

Charitable immunity, entity must perform as its articles of incorporation state. *Id.*

Charitable immunity, receipts held in trust for furtherance of charitable purposes. *Id.*

Charitable immunity, Conway Corporation not entitled to. *Id.*

CIVIL PROCEDURE:

Appealable orders, Rule 54(b) jurisdictional matter must be raised by appellate court. *Reeves v. Hinkle*, 28.

Appealable orders, trial court must make finding that likelihood of hardship or injustice will occur unless there is immediate appeal. *Id.*

Judgment notwithstanding the verdict discussed. *Potlatch Corp. v. Missouri Pac. R.R. Co.*, 314.

Claim barred by finality, request for findings of fact filed after order becomes final cannot be used as a means of resurrecting the claim. *Tucker v. Lake View Sch. Dist.*, 618.

Motion to modify findings of fact not timely filed, Ark. R. Civ. P. 40(c) inapplicable. *Id.*

Stay of proceedings for legislators fixed by Rule 40(c), counsel chose to file a motion during stay which was ruled untimely, counsel could not later argue stay was effective in order to obtain yet another ruling on the same issue. *Id.*

Appellant's appeal found timely, no reason to remand for lack of finality. *Id.*

CONSTITUTIONAL LAW:

Right to jury trial, no entitlement to jury trial in municipal court, case tried *de novo* on appeal from municipal to circuit court, appellant entitled to trial by jury in circuit court. *State v. Roberts*, 31.

Burden placed upon right to jury trial by requirement of proceeding in municipal court is not impermissible, inviolability of right to jury trial protected by right to take case to circuit court. *Id.*

Persons summoned before municipal court have adequate remedy to protect right to trial by jury, mandamus does not lie. *Id.*

Interpretation of, when the meaning is certain, that meaning will be applied. *Foster v. Jefferson County Quorum Court*, 105.

Interpretation of, extrinsic facts will not be used to alter the plain meaning of a constitutional provision. *Id.*

Equal protection provisions challenged, appellant lacked standing to warrant the issue's consideration on appeal. *Garrigus v. State*, 222.

Federal due process analysis, lien laws, private use of state-sanctioned private

remedies or procedures not state action, use of state procedures with overt, significant assistance of state officials may constitute state action. *Leonards v. E.A. Martin Machinery Co.*, 239.
Federal due process analysis, no state action occurred, ownership is property interest that Fourteenth Amendment protects only from deprivations by state action, trial court erred in holding repairmen's lien laws unconstitutional under United States Constitution. *Id.*
State due process analysis, deprivation of property must be caused by exercise of right or privilege created by state or by rule of conduct imposed by state or by person for whom state is responsible, party charged with deprivation must be state actor, second requirement not met in present case, trial court erred in holding repairmen's lien laws unconstitutional under Arkansas Constitution. *Id.*
Double jeopardy analysis, first step a determination as to the intent of legislature. *Moore v. State*, 249.
Double jeopardy clause does not bar cumulative punishments, legislature clearly intended to authorize separate punishments. *Id.*
Interpretation and construction of constitutional provision, language given its plain and ordinary meaning, constitution must be considered as a whole. *Foster v. Jefferson County Quorum Court*, 116-A.
Mischief to be remedied in 1874 related solely to property taxes, Article 16 consistently treated as limiting only county levies on property taxes. *Id.*
Interpretation of provisions should be consistent and uniform, interpretation followed over the years should not be changed. *Id.*
When pre-trial identification violates Due Process Clause. *Chenowith v. State*, 522.

CONTEMPT:
Summary punishment an inherent power, specifically reserved to courts by constitution. *Hodges v. Gray*, 7.
Criminal contempt explained, standard of review. *Id.*
Contemptuous act defined. *Id.*
When inherent power to punish should be exercised, purpose of contempt proceedings. *Id.*
Attorney should not engage in conduct that offends dignity of court, attorney may make proper objection but should abide by ruling. *Id.*
Sufficient evidence to support holding of contempt. *Id.*
Substantial evidence to support holding of contempt, attorney's contumacious statement. *Id.*
Attempt by counsel to have record reflect that trial judge said something to bailiff did not constitute contempt. *Id.*
No substantial evidence to support finding of contempt, counsel's words not used as expletives. *Id.*
Court order must be in definite terms and command must be express rather than implied before person may be held in contempt for violation. *Id.*
Earlier order of chancellor did not constitute notice that a word sometimes used as an expletive could not be used in another context, even use of street language or vernacular cannot support criminal contempt conviction when not directed at judge or court officer. *Id.*
First Amendment right to criticize judge, even protected speech not equally permissible in all places at all times, State may place reasonable restrictions on speech in public forum. *Id.*
Powers of contempt are reasonable as applied to time, place, and manner restrictions on freedom of speech. *Id.*

CONTRACTS:
Law implies agreement to pay what labor or material is worth, standard of reasonableness, fair value of services recoverable. *Leonards v. E.A. Martin Machinery Co.*, 239.

Evidence showed appellee satisfied burden of proving reasonableness of value of its parts and labor, trial court's findings not clearly erroneous. *Id.*
Parties to agreement, presumption regarding third parties. *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 303.
Third-party beneficiaries, clear intention to benefit. *Id.*
Third-party beneficiaries, contractual retainage provision not necessary for third-party beneficiary. *Id.*
Third-party beneficiaries, party that did actual work intended to benefit. *Id.*
"No damage" clauses, restrained approval —strict construction. *Id.*
"No damage" clauses, provision not included in appellant's contract, intended for benefit of Highway & Transportation Department only. *Id.*
Lost profits, proof required. *Id.*
Third-party beneficiaries, may recover for breach of contract. *Id.*
Third-party beneficiaries, may recover attorney's fees, cross-appeal remanded for reconsideration. *Id.*
Agreements to indemnify an indemnitee against its own negligence generally strictly construed, when strict construction not applied. *Potlatch Corp. v. Missouri Pac. R.R. Co.*, 314.
Complete indemnity ordered at trial in error, substantial evidence existed showing that appellant was not negligent. *Id.*

COURTS:
Judgment cannot be modified after the close of term. *Johnson v. State*, 117.
Retrospective application of decisions, no justifiable reliance on old rule of law, no reason to engage in selective prospective application. *Baker v. Milam*, 234.
Trial court correctly applied decisional law of supreme court, no error in granting summary judgment to appellee. *Id.*
New trial not granted, verdict reinstated, trial court should not substitute its judgment for that of the jury and set aside a verdict. *Potlatch Corp. v. Missouri Pac. R.R. Co.*, 314.
Subject-matter jurisdiction, determined from pleadings, may be raised by appellate court. *Villines v. Lee*, 405.
Jurisdiction, chancery court generally without jurisdiction to review discretionary functions of executive branch. *Id.*
Jurisdiction, exceptions to general rule barring chancery review of discretionary executive functions. *Id.*
Jurisdiction, chancery court not empowered to issue injunction under circumstances. *Id.*
Appeal from county court, taken to circuit court. *Id.*
Jurisdiction, mandamus, will not lie in chancery court, exclusively within subject-matter jurisdiction of circuit court. *Id.*
Failure to establish abuse of discretion. *Wade v. Grace*, 482.
Transfer of a case to juvenile court, factors considered by the circuit court, when a decision on a motion will be reversed. *McGaughy v. State*, 537.
Transfer of case to juvenile court, criminal information may provide sufficient basis for trial court's decision on transfer motion. *Id.*
Denial of transfer to juvenile court, circuit court did not err in retaining jurisdiction. *Id.*
Denial of transfer to juvenile court, defendant's demeanor at transfer hearing relevant to the factor of character traits indicating a juvenile's prospects for rehabilitation. *Id.*
Jurisdiction of supreme court, limited control of actions of municipal court, petition for certiorari to municipal court and motion to stay proceedings denied. *Hogrobrooks v. Routon*, 654.

CRIMINAL LAW:
Affirmative defense defined, lack of capacity as affirmative defense. *Catlett v. State*, 1.

Spontaneous statement by declarant, statement not inadmissible because *Miranda* warning not given. *Stone v. State*, 46.
Review of admissibility of confession, review of trial court's denial of suppression motion. *Id.*
In-custody statments, determining spontaneity of. *Id.*
Trial court found that appellant's confession was spontaneous, finding supported by a preponderance of the evidence. *Id.*
Appellant's argument meritless, roadside confession was admissible as a spontaneous utterance. *Id.*
Entrapment an affirmative defense, when established. *Elders v. State*, 60.
Determination as to whether entrapment has occurred, defendant's conduct and predisposition to commit the crime are relevant. *Id.*
Trial court held that entrapment did not occur as a matter of law, no error found. *Id.*
Sentencing, no retroactive application of Act. *Id.*
Retroactive effectiveness not provided for in the Act, mere fact that Act was approved before the commission of the crime and effective after the crime does not affect its application. *Id.*
In-custodial statements presumed involuntary, state has the burden of proving their voluntariness. *Foreman v. State*, 167.
Appellant's suppression motion raised the issue of the voluntariness of his statement to the police, trial court committed reversible error in denying the suppression motion. *Id.*
Appellant's assertion that statute violated double jeopardy right not reached. appellant had no standing to raise the issue. *Garrigus v. State*, 222.
Sentencing guidelines, statutory minimum and maximum ranges always override presumptive sentences. *Pickett v. State*, 224.
Voluntariness of custodial statement, factors on review. *Moore v. State*, 249.
Assertion custodial statement coerced presented an issue of credibility, no error found in trial court's rejection of appellant's claim. *Id.*
Appellant claimed he was denied use of telephone, trial court's determination in the state's favor not in error. *Id.*
Equivocal request for counsel does not obligate the police to cease questioning, interrogation may continue until suspect clearly asks for counsel. *Id.*
Testimony was that appellant never specifically requested an attorney, no error shown in trial court's determination that appellant failed to invoke his right to counsel and in denial of motion to suppress. *Id.*
Statute's intention clear, separate criminal offense punishable in addition to, not as a substitute for, the predicate felony offenses. *Id.*
Trial court reversed, jury verdict and sentence reinstated. *Id.*
Proportionality review unnecessary, no mitigating circumstances found. *Williams v. State*, 344.
Refusal or failure to instruct on a lesser offense, no error in such refusal where the evidence clearly shows that the defendant is guilty of the greater offense or innocent. *Brown v. State*, 413.
No proportionality review, no erroneous finding of aggravating circumstances. *Sasser v. State*, 438.
Instruction on lesser included offense, rational basis standard. *State v. Jones*, 451.
Instruction on lesser included offense, error not to give, determination of existence of rational basis required. *Id.*
Instruction on lesser included offense, no rational basis for acquitting on greater offense and convicting on lesser where defense premised on complete denial. *Id.*
Instruction on lesser included offense,appellee did not deny shooting victim, *Doby* rule not applicable. *Id.*
Ark. R. Crim. P. 37, motion for a new trial based on newly discovered evidence not a proper basis for relief under Rule 37. *Cigainero v. State*, 533.

Rule 37 does not provide the means to challenge the constitutionality of a judgment where the issue could have been raised in the trial court, remedy provided for jury misconduct. *Id.*
No proper grounds for postconviction relief shown, trial court's denial of Rule 37 motion affirmed. *Id.*
Death cases, proportionality review no longer performed, no error in jury's finding that two aggravating and no mitigating circumstances existed. *Porter v. State*, 555.
Simultaneous possession of drugs and firearms. *Mitchell v. State*, 570.
Evidence, admissibility of luminol tests generally. *Houston v. State*, 598.
Admission of novel scientific evidence, process trial court must follow in the admission of. *Id.*
Relevancy approach to the admission of novel scientific evidence, proponent of the evidence carries the burden of proof. *Id.*
Luminol test results not allowed at trial, no abuse of discretion found. *Id.*
Felony murder, proof necessary for a conviction. *O'Neal v. State*, 626.
Affirmative defenses, when established as a matter of law. *Id.*
State met its burden of proof for first degree murder, no affirmative defense proven. *Id.*
First degree murder, reference to a felony not meant to exclude the seven felonies specified in the capital murder statute. *Id.*
Guilt of first degree murder found where the associated crime committed was one of the felonies named in the capital murder statute, first degree murder verdict sustained. *Id.*
First-degree murder defined, State's burden at trial. *Williams v. State*, 635.
Murder, intent or state of mind, inferred from circumstances. *Id.*

CRIMINAL PROCEDURE:
Postconviction relief, ineffective assistance of counsel, standard of review. *Wicoff v. State*, 97.
Postconviction relief, strong presumption counsel's performance reasonable, burden on appellant to overcome presumption. *Id.*
Postconviction relief, conduct fell below objective standard of competence, acts of omission resulted in prejudice. *Id.*
Postconviction relief, trial strategy not basis for relief, strategic decisions must be supported by reasonable professional judgment, appellate court must determine whether counsel's assistance was reasonable considering all the circumstances. *Id.*
Burden of proving voluntariness of confession, factors on review. *Phillips v. State*, 160.
Determination of mental capacity to waive rights, intoxication alone insufficient to invalidate statement. *Id.*
Intoxication claimed at time statement made, test for intelligent waiver. *Id.*
Totality of the circumstances, no indication from testimony that appellant was not rational and not able to exercise free will at time of statement, no testimony that medication rendered appellant incompetent to waive rights, trial court correct in refusing to suppress statement. *Id.*
Bifurcated trial procedure, defendant cannot appeal from guilty plea, appeal not precluded from sentencing or penalty phase on nonjurisdictional issues, rules of evidence apply to sentencing phase, evidence allowed under bifrcated sentencing act does not conflict with rules of evidence. *Id.*
Bifurcated trial procedure, prosecutor must disclose names and addresses of witnesses to be called at any hearing or at trial, nothing in statutory language prevents rules of discovery from applying, trial court erred in holding rules of discovery inapplicable to sentencing phase. *Id.*
Time limits imposed by Rule 37 are jurisdictional, the circuit court may not grant relief on an untimely petition for post-conviction relief. *Smith v. State*, 195.

Petition for post-conviction relief not timely filed, motion for belated appeal denied. *Id.*
Time for taking an appeal, when trial judge's decision denying appellant's motion becomes effective. *Clayton v. State*, 217.
Postconviction relief, showing required to prove ineffective assistance of counsel. *Farmer v. State*, 283.
Postconviction relief, presumption that counsel's conduct falls within wide range of reasonable professional assistance, petitioner must show reasonable probability that decision reached would have been different absent errors. *Id.*
Postconviction relief, totality of evidence must be considered on ineffectiveness claim. *Id.*
Postconviction relief, denial affirmed unless clearly against preponderance of evidence, credibility of witness is question of fact for trier of fact in Rule 37 proceedings. *Id.*
Postconviction relief, counsel failed to seek continuance when crucial witness failed to appear, counsel held ineffective. *Id.*
Written reservation of right to appeal conditional guilty plea. *Burress v. State*, 329.
Effect of failure to meet express terms of Ark. R. Crim. P. 24.3(b). *Id.*
Rights-form reasonably conveyed to appellant his rights as required by *Miranda*, custodial statements were admissible. *Williams v. State*, 344.
Appellant's argument that his statements did not accurately reflect what was really said without merit, appellant could have refused to sign. *Id.*
Death penalty, motion to limit appeal, remanded for findings by trial court. *Echols v. State*, 497.
Death penalty, when abandonment of appeal of death sentence permitted. *Id.*
Death penalty, mandatory review of competency hearing, standard of review. *Id.*
Suggestive pre-trial identification technique, identification may still be reliable. *Chenowith v. State*, 522.
Reliability of pre-trial identification, factors to consider. *Id.*
Identification reliable. *Id.*
Speedy trial, mental examination, period required for examination is excluded. *Mack v. State*, 547.
Speedy trial, effect of failure to raise issue of tolling of speedy-trial time limitation. *Id.*
Speedy trial, State Hospital's independence, delays caused by its operations not subject to same scrutiny as criminal justice system. *Id.*
Speedy trial, no error in denial of motion to dismiss on speedy-trial grounds. *Id.*
Illegal seizure argued, no such seizure found. *Smith v. State*, 580.

DAMAGES:
Jury verdict will ordinarily not be disturbed on appeal, factors considered. *St. Louis S.W. Ry. Co. v. Grider*, 84.
Determination of propriety of award, little reliance placed on prior decisions. *Id.*
Remittitur, when proper. *Id.*
Review of evidence of injuries, compensatory damages not shocking, no proof of prejudice or influence to justify disturbing jury award. *Id.*
Speculative damages in attorney malpractice cases, general rule discussed. *Callahan v. Clark*, 376.
Damages clearly identifiable, no error in trial court's refusal to direct verdict in appellants' favor. *Id.*

DISCOVERY:
Broad discretion in trial judge. *Wade v. Grace*, 482.
No requirement of finding of concealment under Ark. R. Civ. P. 26(e)(1). *Id.*

ELECTIONS:
Election Commission not the proper party defendant in an election contest, Election Commission should remain neutral. *Phillips v. Earngey*, 476.

Election Commission has no power to call or hold a new election, it is the legislature's function to provide relief when a means of redress has not been designated. *Id.*
Circuit court directed commission to hold a special election, error found. *Id.*
Presumption all votes cast are lawful, authenticity of votes must be impeached by affirmative evidence. *Id.*
Appellee failed to offer proof sufficient to set aside the election, circuit court was in error in setting it aside. *Id.*

ESTOPPEL:

Latches argued, doctrine does not apply where plaintiff seeks to enforce his constitutional right to be fully informed on a proposed constitutional amendment. *McCuen v. Harris*, 458.

EVIDENCE:

Reopening of case-in-chief for the taking of additional evidence, trial court may call and interrogate witnesses. *Hillard v. State*, 39.
Trial court properly called and questioned witnesses, no abuse of discretion found. *Id.*
Appellant's admission clear, no error in Commission's finding that appellant had admitted rebating. *Wacaser v. Insurance Comm'r*, 143.
Residual hearsay exception, when such hearsay is admissible. *Foreman v. State*, 167.
Unsworn statement did not contain the equivalent circumstantial guarantees of trustworthiness, the admission of the statement under the residual hearsay exception was error. *Id.*
Substantial evidence to support trial court's findings. *Leonards v. E.A. Martin Machinery Co.*, 239.
Directed verdict, third-party beneficiary issue correctly submitted to jury. *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 303.
Substantial evidence to support jury's award of damages. *Id.*
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# ARKANSAS APPELLATE REPORTS

## Volume 50

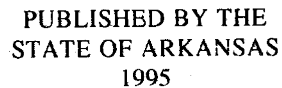
CASES DETERMINED
IN THE

# Court of Appeals of Arkansas

FROM
June 7, 1995 – September 27, 1995
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS



PUBLISHED BY THE
STATE OF ARKANSAS
1995

## ERRATUM

48 Ark. App. at xiv:

Heading should be "OPINIONS NOT DESIGNATED FOR PUBLICATION."

Set in Times Roman

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1995

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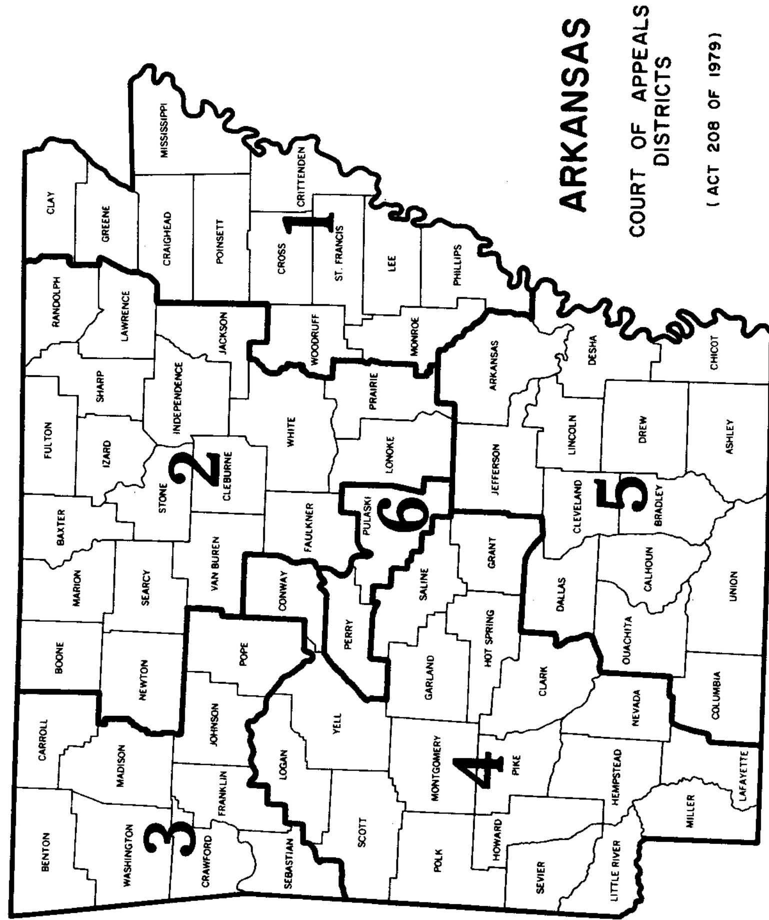
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WASHINGTON
FRANKLIN
CRAWFORD
SEBASTIAN
SCOTT
POLK
HOWARD
SEVIER
LITTLE RIVER
MILLER

# JUDGES AND OFFICERS
OF THE
# COURT OF APPEALS OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(June 7, 1995 –
September 27, 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 |
| WILLIAM B. JONES, JR. | Reporter of Decisions |

---

[1]District 3.
[2]District 1.
[3]District 2.
[4]District 4.
[5]District 5.
[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.

# OPINIONS NOT DESIGNATED FOR PUBLICATION

Alexander *v.* State, CA CR 94-652 (Pittman, J.), Motion of Counsel to Withdraw denied; Rebriefing ordered July 5, 1995.

Allen *v.* Allen, CA 94-844 (Cooper, J.), affirmed August 30, 1995.

Allen *v.* Mansfield, CA 94-653 (Jennings, C.J.), affirmed June 7, 1995.

Allen *v.* State, CA CR 95-440 (Per Curiam), Appellant's Motion to File a Supplemental Brief granted August 23, 1995.

AMI Nat'l Park Medical Ctr. *v.* Magboy, CA 94-941 (Cooper, J.), affirmed June 21, 1995.

Anderson, Michael *v.* State, CA 94-1386 (Rogers, J.), affirmed September 6, 1995.

Anderson, Theodis *v.* State, CA CR 94-1015 (Robbins, J.), affirmed August 23, 1995.

Andrews *v.* E.I.S. Brake Shoe Factory, CA 94-1027 (Robbins, J.), affirmed June 28, 1995.

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Argo *v.* State, CA CR 94-1269 (Robbins, J.), affirmed September 27, 1995.

Arkansas Rural Endowment Fund, Inc. *v.* Brittain, CA 94-847 (Mayfield, J.), dismissed August 30, 1995.

Arnolt *v.* State, CA CR 94-1038 (Rogers, J.), affirmed September 13, 1995.

Arter *v.* State, CA CR 94-832 (Jennings, C.J.), affirmed June 14, 1995.

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Binns *v.* Binns, CA 94-1150 (Cooper, J.), affirmed June 28, 1995.

Binns *v.* Director, E 95-177 (Per Curiam), Motion for Rule on the Clerk to Lodge Petition for Review denied September 6, 1995.

Brasuell *v.* Southwestern Glass, CA 94-1120 (Rogers, J.), affirmed September 20, 1995.

Browder *v.* Riceland Foods, CA 94-1075 (Mayfield, J.), affirmed September 20, 1995.

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Bryant *v.* Arkansas Pub. Serv. Comm'n, CA 95-109 (Per Curiam), Joint Motion to Supplement the Record granted July 5, 1995.

Bryant *v.* Arkansas Pub. Serv. Comm'n, CA 95-448 (Per Curiam), Appellant's Motion to Review Portions of Record Filed Under Seal granted July 5, 1995.

Bryant *v.* Arkansas Pub. Serv. Comm'n, CA 95-109 (Per Curiam), Appellant's Motion to Consolidate Appeals and to Stay Brief Time granted July 5, 1995.

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Butts *v.* Butts, CA 94-994 (Cooper, J.), affirmed August 30, 1995.

Campbell *v.* Campbell Soup, CA 94-948 (Robbins, J.), affirmed June 21, 1995.

Campbell *v.* K & K Oil Co., CA 94-780 (Robbins, J.), affirmed August 23, 1995.

Campbell *v.* State, CA CR 94-514 (Robbins, J.), affirmed June 7, 1995.

Carter *v.* State, CA CR 94-1161 (Mayfield, J.), reversed August 23, 1995.

Charlie's Auto Air *v.* Ramsey, CA 94-935 (Cooper, J.), affirmed June 14, 1995.

Chatten *v.* State, CA CR 94-1175 (Per Curiam), Appellant's Pro Se Motions denied June 21, 1995.

Christesson *v.* Thruston, CA 94-1041 (Mayfield, J.), affirmed September 27, 1995.

Cogbill *v.* State, CA CR 94-231 (Jennings, C.J.), reversed and remanded June 21, 1995.

Cooper *v.* Director, E 94-159 (Mayfield, J.), affirmed June 21, 1995.

Crabtree *v.* Alcoholic Beverage Control Div., CA 94-495 (Bullion, S.J.), affirmed June 14, 1995.

Craker *v.* State, CA CR 94-1201 (Robbins, J.), affirmed September 13, 1995.

Cullum *v.* Richards, CA 94-888 (Mayfield, J.), dismissed August 23, 1995.

Dancy *v.* Child Support Enforcement Unit, CA 94-688 (Pittman, J.), affirmed June 14, 1995.

Darnell *v.* Darnell, CA 94-1291 (Jennings, C.J.), affirmed August 30, 1995.

Davis *v.* Compton, CA 94-791 (Robbins, J.), affirmed June 28, 1995.

Dean *v.* City of Stamps, CA 94-918 (Pittman, J.), affirmed August 30, 1995.

DeLeon *v.* State, CA CR 94-523 (Mayfield, J.), affirmed June 7, 1995.

Diamondhead Property Owners Ass'n, Inc. *v.* Hinz, CA 94-967 (Cooper, J.), affirmed September 13, 1995.

Douglas *v.* City of North Little Rock, CA 94-1104 (Rogers, J.), affirmed August 23, 1995.

Dunigan *v.* Mississippi County Nursing Home, CA 94-1004 (Jennings, C.J.), affirmed June 21, 1995. Rehearing denied July 26, 1995.

Duty *v.* State, CA CR 94-1153 (Per Curiam), Appellant's Pro Se Motion to Relieve Counsel and to Stay Brief Time granted June 14, 1995.

Ellison *v.* State, CA CR 94-974 (Mayfield, J.), Additional Briefing for Appellant allowed September 13, 1995.

Felker *v.* Felker, CA 94-697 (Jennings, C.J.), affirmed June 21, 1995.

Fenton *v.* Pilgrim's Pride Corp., CA 94-715 (Pittman, J.), affirmed June 14, 1995.

Fewell *v.* Pulaski Bank & Trust Co., CA 94-673 (Mayfield, J.), reversed and remanded July 5, 1995.

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Foreman *v.* State, CA CR 94-925 (Cooper, J.), affirmed August 23, 1995.

Fureigh *v.* Fureigh, CA 94-522 (Bullion, S.J.), affirmed June 28, 1995.

Gant *v.* State, CA CR 94-876 (Jennings, C.J.), affirmed June 14, 1995.

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Getz *v.* State, CA CR 94-851 (Mayfield, J.), affirmed June 14, 1995.

Gill *v.* Lasley, CA 95-178 (Per Curiam), Appellee's Motion to Dismiss Appeal passed September 20, 1995.

Graham Hearing Aid Ctr. *v.* Davis, CA 94-714 (Rogers, J.), affirmed June 7, 1995.

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Hardin *v.* State, CA CR 94-619 (Cooper, J.), affirmed September 20, 1995.

Harper *v.* Post, CA 94-309 (Jennings, C.J.), affirmed June 21, 1995. Rehearing denied July 26, 1995.

Hartmann *v.* E.C. Rowlett Constr. Co., CA 94-1157 (Per Curiam), Motion for Appointment of Special Administrator and to Revive denied June 21, 1995.

Hartmann *v.* E.C. Rowlett Constr. Co., CA 94-1157 (Jennings, C.J.), affirmed September 20, 1995.

Harwood *v.* State, CA CR 94-886 (Rogers, J.), affirmed June 7, 1995.

Healthcorp, Inc. *v.* Davis, CA 94-866 (Robbins, J.), reversed and remanded September 20, 1995.

Henderson *v.* Gaylord Container Corp., CA 94-1274 (Pittman, J.), affirmed September 27, 1995.

Hendrix *v.* Darling Store Fixtures, CA 94-1003 (Rogers, J.), affirmed June 7, 1995.

Hutchinson *v.* State, CA CR 94-430 (Robbins, J.), affirmed June 21, 1995.

Hutto *v.* State, CA CR 94-1107 (Rogers, J.), affirmed August 30, 1995.

Ivy *v.* State, CA CR 95-135 (Per Curiam) Appellant's Motion for Release of Copies of Record granted August 30, 1995.

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Johnson *v.* Andrews, CA 94-788 (Jennings, C.J.), affirmed July 5, 1995. Rehearing denied August 16, 1995.

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Jones *v.* State, CA CR 94-857 (Pittman, J.), affirmed June 14, 1995.

Jones *v.* Taylor, CA 94-1098 (Rogers, J.), affirmed September 27, 1995.

Jordan *v.* Tyson Foods, Inc., CA 94-705 (Mayfield, J.), reversed and remanded June 7, 1995.

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King *v.* City of Hoxie, CA 94-1025 (Jennings, C.J.), affirmed August 30, 1995.

Knighten *v.* Knighten, CA 94-1431 (Rogers, J.), dismissed August 30, 1995.

Krein *v.* State, CA CR 94-963 (Mayfield, J.), affirmed September 20, 1995.

LaCotts *v.* State, CA CR 94-819 (Jennings, C.J.), affirmed September 13, 1995. Rehearing denied Octobert 18, 1995.

M.J.T. *v.* State, CA 94-917 (Pittman, J.), affirmed August 23, 1995.

Mack *v.* State, CA CR 94-726 (Rogers, J.), affirmed August 23, 1995.

Magoon *v.* Thrasher, CA 94-970 (Rogers, J.), affirmed September 20, 1995.

Marsh *v.* State, CA CR 94-1101 (Jennings, C.J.), affirmed September 20, 1995.

Mathis *v.* Mathis, CA 94-1154 (Per Curiam), Appellee's Motion to Withdraw Cross-Appeal moot, motion to substitute parties granted June 7, 1995.

McDonald *v.* McDonald, CA 94-674 (Pittman, J.), affirmed July 5, 1995.

McElhaney *v.* Brasfield, CA 94-484 (Cooper, J.), reversed and remanded July 5, 1995.

McNair *v.* McNair, CA 94-1047 (Jennings, C.J.), affirmed September 20, 1995.

Medical & Dental Credit Bureau *v.* Powell, CA 94-716 (Pittman, J.), affirmed as modified June 7, 1995.
Michael *v.* State, CA CR 94-1074 (Robbins, J.), affirmed August 30, 1995.
Miller *v.* Miller, CA 94-858 (Mayfield, J.), affirmed June 28, 1995.
Mizell *v.* State, CA CR 94-914 (Robbins, J.), affirmed September 20, 1995.
Moore *v.* Moore, CA 94-904 (Jennings, C.J.), affirmed August 23, 1995.
Murie *v.* Industrial Refrigeration, CA 94-972 (Mayfield, J.), affirmed June 28, 1995.
Murie *v.* Industrial Refrigeration, CA 94-972 (Per Curiam), Supplemental opinion issued September 20, 1995. Rehearing denied September 20, 1995.
Myers *v.* State, CA CR 93-587 (Robbins, J.), affirmed June 14, 1995.
Nash *v.* Farm Fresh Catfish, CA 94-938 (Robbins, J.), affirmed September 27, 1995.
Nelson *v.* Fort Biscuit Co., CA 94-1056 (Cooper, J.), affirmed August 30, 1995.
Noles *v.* State, CA CR 94-889 (Jennings, C.J.), affirmed June 28, 1995.
Owens *v.* State, CA CR 94-566 (Pittman, J.), affirmed June 14, 1995.
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Parker *v.* State, CA CR 94-740 (Jennings, C.J.), affirmed July 5, 1995.
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Pate *v.* Pate, CA 94-890 (Mayfield, J.), affirmed September 13, 1995.
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Proctor *v.* State, CA CR 94-1173 (Cooper, J.), affirmed September 20, 1995.
Profit *v.* State, CA CR 94-924 (Cooper, J.), affirmed as modified and remanded June 14, 1995.

Reeves *v.* State, CA CR 94-707 (Cooper, J.), affirmed July 5, 1995.

Rose *v.* Deltic Farm & Timber, CA 94-1086 (Mayfield, J.), affirmed August 30, 1995; Jennings, C.J., and Cooper, J., agree.

Ross *v.* D & M Consulting, Inc., CA 94-993 (Cooper, J.), affirmed September 27, 1995. Rehearing denied November 1, 1995.

Russell *v.* State, CA CR 94-950 (Cooper, J.), affirmed July 5, 1995.

Schalchlin *v.* State, CA CR 93-270 (Cooper, J.), affirmed June 21, 1995.

Schwartz *v.* Moody, CA 94-695 (Per Curiam), Appellant's Motion to Supplement the Record and to Consolidate CA 95-708 with this Appeal denied; Appellant's Motion for Brief Time granted September 27, 1995.

Simpson *v.* State, CA CR 94-883 (Rogers, J.), Motion of Counsel to Withdraw denied; Rebriefing ordered July 5, 1995.

Smith, DeWayne A. *v.* State, CA CR 94-842 (Mayfield, J.), affirmed July 5, 1995.

Smith, Leon Larry *v.* State, CA CR 94-1023 (Bullion, S.J.), affirmed June 28, 1995.

Smith, Ricky *v.* State, CA CR 94-962 (Jennings, C.J.), affirmed June 14, 1995.

Speaks *v.* Affiliated Foods SW Inc., CA 94-385 (Per Curiam), Petition for Rehearing granted and supplemental opinion issued July 5, 1995.

Stamps Pub. Schs. *v.* Colvert, CA 95-318 (Per Curiam), Appellant's Motion to Supplement Abstract denied June 21, 1995.

Stamps Pub. Schs. *v.* Colvert, CA 95-318 (Per Curiam), Appellee's Motion to Supplement the Record and for Brief Time remanded June 21, 1995.

Stephens *v.* Director, E 95-79 (Per Curiam), Appellant's Motion to Remand passed June 21, 1995.

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Strickland *v.* Central Arkansas Area Agency on Aging, CA 94-1135 (Cooper, J.), affirmed September 6, 1995.

Sullins *v.* State, CA CR 95-404 (Per Curiam), Appellant's Motion for Brief Time granted June 21, 1995.
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Thomas, Louis *v.* State, CA 94-985 (Robbins, J.), affirmed as modified June 28, 1995.
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Van Cleve *v.* Van Cleve, CA 94-811 (Pittman, J.), affirmed September 13, 1995. Rehearing denied Octobert 18, 1995.
Vaught *v.* Vaught, CA 94-799 (Bullion, S.J.), reversed and remanded June 21, 1995.
Virgil *v.* State, CA CR 94-1125 (Cooper, J.), affirmed September 6, 1995.
W & L Enterprises *v.* American Family Home Ins. Co., CA 94-380 (Robbins, J.), dismissed September 6, 1995.
Wade *v.* State, CA CR 94-856 (Jennings, C.J.), affirmed June 21, 1995.
Wallace *v.* State, CA CR 94-937 (Mayfield, J.), affirmed June 21, 1995.
Watson *v.* State, CA CR 94-1040 (Jennings, C.J.), affirmed September 27, 1995.
Weaver *v.* Darling Store Fixtures, CA 94-1005 (Bullion S.J.), affirmed June 21, 1995. Rehearing denied July 26, 1995.
Weitzel *v.* Cooper Tire & Rubber Co., CA 94-1020 (Pittman, J.), affirmed September 13, 1995.

West *v.* State, CA CR 94-956 (Robbins, J.), affirmed July 5, 1995.

Whitley *v.* State, CA CR 94-823 (Pittman, J.), affirmed June 28, 1995.

Willett *v.* P.A.M. Transp., CA 94-899 (Bullion, S.J.), affirmed June 14, 1995. Rehearing denied July 26, 1995.

Williams, Ray *v.* State, CA CR 94-1236 (Jennings, C.J.), affirmed September 27, 1995.

Woods *v.* State, CA CR 94-1033 (Jennings, C.J.), affirmed July 5, 1995.

Wright, Lindsey & Jennings *v.* Griffin, CA 94-986 (Pittman, J.), affirmed June 28, 1995.

York *v.* State, CA 94-482 (Per Curiam), Appellant's Motion for Attorney's Fees remanded June 21, 1995.

Zentner *v.* Garden City Nursery, CA 94-1018 (Robbins, J.), affirmed in part; reversed and remanded in part September 13, 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

Alexander *v.* Director of Labor, E 94-200, August 30, 1995.
Allen *v.* Director of Labor, E 94-187, June 14, 1995.
Anderson *v.* Director of Labor, E 94-236, September 13, 1995.
Benrock, Inc. *v.* Director of Labor, E 94-185, June 7, 1995.
Biggs *v.* Director of Labor, E 94-177, June 7, 1995.
Brannon *v.* Director of Labor, E 94-186, June 7, 1995.
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Charros, Inc. *v.* Director of Labor, E 94-180, September 6, 1995.
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Pope *v.* Director of Labor, E 94-281, June 28, 1995.
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Smith, Shannon *v.* Director of Labor, E 94-195, June 14, 1995.
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Freedom to make pragmatic adjustments called for by particular circumstances, result reached, not method used, that primarily controls. *Id.*
Test-year data, known and measurable adjustments proper if they can be determined with certainty. *Id.*
Utility ratemaking is an inexact art, analytical studies, historical data, and expert projections often must provide basis. *Id.*
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Adjustment for incentive award payments supported by substantial evidence. *Id.*
Adjustment for mobile dispatching systems expenses supported by substantial evidence. *Id.*
Adjustment in utility's insurance costs reasonably known and measurable. *Id.*
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Allocation of cost of distribution mains, record supported Commission's determination of appropriate methodology. *Id.*
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Unreasonable rate differences prohibited. *Id.*
Determination of weight to accord various factors in ratemaking process. *Id.*
Allocation of increase in revenues, decision not in excess of statutory authority, did not result in unjust, unreasonable, or discriminatory rates. *Id.*
Shareholders of local distribution company, rather than ratepayers, may be made to bear consequences of company's imprudent business judgment. *Id.*
Substantial evidence in record, orders affirmed. *Id.*

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Federal statute will preempt a state one. *Smith v. Cotton*, 100.

TRIAL:
Statutory and due process requirements met, appellant's attorney clearly aware of pending trial date. *Whitmire v. State*, 34.
Request by appellant that trial be held in absentia, granting of request not mandatory. *Id.*
Mistrial, when appropriate. *Black v. State*, 42.
Mistrial, denial of motion not error, no intent on trial court's part to ridicule or demean counsel. *Id.*
Trial court has wide discretion in controlling arguments of counsel, no abuse of discretion found. *Samples v. State*, 163.

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Failure to appeal in time to Appeal Tribunal or Board of Review may be excused if due to circumstances beyond appellant's control. *Id.*
Appellant must be afforded opportunity to have hearing on whether untimely appeal was due to circumstances beyond appellant's control. *Id.*
Appeal Tribunal's removal of untimely filing issue to Board's jurisdiction did not eliminate need to consider apppellant's request for new hearing date, request for new hearing, received before Board's decision became final, allowed Board to grant appellant new hearing. *Id.*

Whether new hearing should granted is for Board of Review to determine on remand, due process requires more than simple finding that appellant failed to appear at hearing. *Id.*

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